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FOREWORD

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Welcome to the 2010 edition of the **Martindale-Hubbell Law Digest.**
The Law Digest continues to evolve and access to this valuable content is now available in 2 media:
CD ROM; and online via subscription to *lexis.com.* Each service offers vastly different features to best suit the need of the user.

CD ROM

Law firms that subscribe to the Martindale-Hubbell Law Directory automatically receive a copy of the Law Digest on CD, which was launched with the 2006 edition. If you are not a subscriber and wish to order the CD, a powerful research tool, you may call our Customer Relations Team at 800-526-4902, extension 8001. Single use and network versions are also available.

Lexis Online

The Law Digest has long been available online to Lexis research subscribers. If you are interested in becoming a subscriber, please contact customer support at 800-356-6548.

Content of Law Digest

This invaluable compendium, now in its 141st year, provides summaries or ``digests'' of the laws of 151 jurisdictions. In sum, the 2008 edition contains: 57 digests of U.S. States, Territories, and Federal Codes; eleven digests of Canadian Provinces and the Canadian Federal Code; 81 leading trading nations outside of the U.S. Canada (this figure includes the European Union). The Selected International Conventions set forth the texts of those conventions to which the U.S. is a party. Annotations are included.

The Law Digest is the first place to look to find the law on the most important topics in jurisdictions world- wide. The Law Digest summarizes the breadth of statutory law that applies to significant areas of legal practice, for example business regulation, tax, and law related to cross border transactions and matters. General background information is provided to help understand the structure of the different governmental and legal systems in various jurisdictions. The Law Digest is updated annually by pre-eminent law firms, leading legal scholars and other content experts. Web sites are listed to provide further information and access to legal resources to make certain that users get to the next step in their search for relevant information. Further practical information is presented such as normal office hours and national holidays.

Arrangement of Law Digest

The digests are arranged by a standard taxonomy of Categories, Topics, and Sub-headings. This uniform arrangement of the material, supported by abundant citations, presents the laws in a predictable and accessible manner. To obtain the maximum benefit from the digests, the user should become familiar with the Topical Index included in the prefatory material. This index, which interfiles thousands of legal subjects and cross references, is a powerful research and reference aid. Attention is directed to the numerous forms of instruments preferred by local usage which appear throughout the digests under the appropriate topics, e.g., forms of acknowledgment under the topic ``Acknowledgments,'' sub-head ``Forms.''

Notice

Changes to law may occur after production which can only be reflected in subsequent editions. Accordingly, it is suggested that local counsel be consulted as to the current law applicable to a particular situation.

LEGAL ADVISORY BOARD

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The Advisory Board's mission is to ensure that LexisNexis and Martindale-Hubbell are responsive to the constantly changing needs of the legal profession. In response to these needs, the Board entertains new strategies and concepts developed by the company, and provides impartial and candid points of view. The following lawyers selected from the private, corporate, academic and international sectors of the profession comprise the 2008-2009 Board.

DENNIS W. ARCHER of Dickinson Wright PLLC; Detroit, Michigan. Mr. Archer is the former Mayor of the City of Detroit, (1994-2001) and a former Associate Justice of the Michigan

Supreme Court (1986-1990). He is the past President of the Wolverine Bar Association, the National Bar Association and the State Bar of Michigan. Mr. Archer is the past President of the National League of Cities, past President of the National Conference of Democratic Mayors and a past member of the Board of Trustees of the United States Conference of Mayors and Board of Directors of the National Conference of Black Mayors. He currently serves on the American Bar Association's Board of Governors. He was President of the American Bar Association-August 2002 to August 2003, the first person of color to be so honored. He also serves as Chairman of Dickinson Wright PLLC.

ROBERT H. BERNSTEIN joined Reed Smith in January 2005. Mr. Bernstein heads the Firm's Labor & Employment Global Marketing Team, strengthening the Firm's offering to its national and international corporate clients. During the past 23 years, Mr. Bernstein has developed an extensive labor and employment practice, exclusively representing multinational and domestic corporations nationwide, with an emphasis in employment litigation. Mr. Bernstein lectures and writes extensively throughout the United States and overseas concerning a wide array of employment law issues. In 1982, Mr. Bernstein earned his J.D. from Georgetown University Law Center; in 1979, he received his B.S.F.S., with distinction, from the Georgetown University School of Foreign Service. Mr. Bernstein is admitted to the New Jersey Bar, the U.S. Court of Appeals for the Third Circuit, and the U.S. District Court for the District of New Jersey. He is a member of the Labor Law Section and Litigation Section of the American Bar Association.

THOMAS R. CURTIN of Graham Curtin, A Professional Association, Morristown, New Jersey. Mr. Curtin is a Life Fellow of the American Bar Foundation. He is a past President of the Morris County Bar Association (1978-1979), the New Jersey State Bar Foundation (1986-1988), the New Jersey State Bar Association (1993-1994), and the Notre Dame Law Association (2000-2001). He is a former Chairman of the New Jersey Commission on Professionalism in the Law (1996-1998). He is a member of the American Bar Association House of Delegates, serving as the New Jersey State Delegate, and the Sports Lawyers Association. He is currently a member of the Notre Dame Law School Advisory Council and has been on the Board of Directors for the National Football Foundation and College Hall of Fame since 2002.

THOMAS G. HEINTZMAN, O.C., Q.C., is a trial and appellate counsel practicing with the law firm of McCarthy Tétrault, Toronto, Ontario. He is a Bencher of the Law Society of Upper Canada, an Officer of the Order of Canada and a past President of the Canadian Bar Association. Mr. Heintzman is a Fellow of the International Academy of Trial Lawyers, and the American College of Trial Lawyers and the Co-Chair of its Special Problems in the Administration of Justice (Canada) Committee.

DOUGLAS B. HENDERSON is the Founding and Senior Partner of Finnegan, Henderson, Farabow, Garrett & Dunner, LLP, Washington, D.C. Mr. Henderson was the Founder of the Federal Circuit Bar Association, a co-founder of the U.S. Court of Federal Claims Bar Association, and a co-founder of the ITC Trial Lawyers Association. He has been a Member of the Advisory Council of the United States Court of Federal Claims. He was formerly a member of the House of Delegates of the American Bar Association, and Chairman of the Patent Division and Member of Council of the Section of Intellectual Property Law of the American Bar Association.

PATRICK E. HOBBS, Dean of Seton Hall University School of Law, first joined the faculty of Seton Hall in 1990. He teaches in the area of taxation and has taught Federal Income Taxation, Corporate Taxation and Business Planning, and Law and Literature. In 1995, he became the Associate Dean for Finance. In 1999, he became the Law School's seventh Dean. Dean Hobbs graduated magna cum laude from Seton Hall University with a B.S. in Accounting. He received his J.D. from the University of North Carolina at Chapel Hill, and earned his LL.M. from New York University. Dean Hobbs was recently appointed a Commissioner on the New Jersey State Commission of Investigation by former Governor James McGreevy. He has chaired the American Bar Association, Section of Legal Education and Admissions to the Bar, Law School Development Committee since 2002, and was also recently appointed to serve on the American Bar Association Standards Review Committee. He also serves as a member of the boards of the Newark Alliance, LexisNexis, Newark Beth Israel Medical Center, the New Jersey Commission of Professionalism, and the New Jersey Institute for Continuing Legal Education. In 2004, he served as Chair of the Newark, New Jersey Mayor's Blue Ribbon Commission on the Downtown Core Redevelopment

THOMAS J. KLITGAARD of Dillingham & Murphy, L.L.P., in San Francisco, California, teaches Asian Legal Systems at the University of San Francisco School of Law. He is a Director of the San Francisco-Shanghai Sister City Committee which has had nearly 200 business, cultural, and public works projects with the Shanghai Municipal Government over the past 25 years. Tom is also the current Chair of the Institute for Law and Technology at the Center for American and International Law in Plano, Texas. He is currently a member of the international arbitration panels of the American Arbitration Association and the Hong Kong International Arbitration Centre and is on the mediation panel of the American Arbitration Association. Tom is a former Senior Vice President and General Counsel of Tandem Computers Incorporated and Sega of America, Inc., and a former law clerk of Supreme Court Justice William O. Douglas. He is a graduate of the Monterey Institute of International Studies Training for Service Abroad Program in the Chinese language. He practices in the areas of patent litigation, intellectual property, and Asian and American corporate law.

J. ALLEN MAINES of Paul Hastings Janofsky & Walker LLP concentrates on domestic and international corporate counseling, cross-border corporate governance issues and internal investigations, and securities and intellectual property litigation. He has served as Chairman of his firm's Securities Litigation Practice and Litigation Department, and has published and spoken extensively on securities, corporate governance and intellectual property issues. Mr. Maines is a faculty member for both the National Institute for Trial Advocacy and the National Association of Corporate Directors. He began his law career as the law clerk for James Wm. Moore, Sterling Professor of Law at Yale University, author of *Moore's Federal Practice* and editor-in-chief of *Collier on Bankruptcy.* He received his J.D. degree, with honors, in 1976 from the University of Florida, where he was executive editor of the *Florida Law Review,* and graduated *magna cum laude* from Taylor University in 1973. Mr. Maines serves on the Board of Directors for the March of Dimes, Earth Share, The Animal Health Trust, the Socionomics Foundation, several for profit entities, and a state university's Center for Corporate Governance.

KAREN J. MATHIS, a partner in the Denver office of McElroy, Deutsch, Mulvaney & Carpenter, LLP, is the president of the American Bar Association. She will serve as president for a one-year term, which begins in August 2006 at the adjournment of the association's Annual Meeting in Honolulu. Mathis is a business, commercial and estate planning lawyer with more than 30 years' experience. An active member of the ABA for almost 30 years, Mathis served as the association's second highest elected officer, chair of its House of Delegates, from August 2000 until August 2002. She is the third woman to serve as an ABA president, and the first president from Colorado. She has served as a member of the House of Delegates since 1982. Mathis is also a member of the ABA Board of Governors, and has served on its Executive Committee, Operations Committee and Program and Planning Committee. Mathis's extensive ABA involvement includes leadership of numerous ABA entities. She served as chair of the 30,000-member General Practice, Solo and Small Firm Section (now a Division) in 2002 to 2003; as chair of the Commission on Women in the Profession from 1997 to 2000; and as chair of the Standing Committee on Membership from 1994 to 1997. Mathis has also been active in the Denver Bar Association and Colorado Bar Association for many years. She has held offices in the Young Lawyers Section of both bar associations, and served as vice president of the CBA from 1992-1993.

JERALYN E. MERRITT is a criminal defense lawyer in private practice in Colorado. Her practice is limited to criminal defense and related forfeitures, with an emphasis on complex federal drug and white collar crimes. Ms. Merritt served as Treasurer and Secretary and on the Board of Directors of the National Association of Criminal Defense Lawyers, from 1996 through 2004. She was a member of the governing council of the American Bar Association's Criminal Justice Section from 2000 through 2004. She is an elected fellow of the American Board of Criminal Lawyers and a past member of its Board of Governors. Ms. Merritt has testified before both Congress and the United States Sentencing Commission on drug sentencing laws. She is the co-author of a text on the Patriot Act, published by Lexis Publishing. She lectures nationally on a variety of criminal defense topics, and since 1996, has provided insightful legal analysis for

MSNBC, Fox News, CNN, Court TV and other television and radio networks. From 2000 to 2003, she was a Lecturer-In-Law at Denver University's College of Law teaching ``Wrongful Convictions'' and ``Criminal Defense.'' In 1996 and 1997, she served as one of the principal trial lawyers for Timothy McVeigh in the Oklahoma City Bombing Case. She is the founder and creator of two award winning websites, CrimeLynx.com, and TalkLeft: The Politics of Crime (TalkLeft.com), a weblog for legal professionals, journalists and the public.

HARRIET MIERS serves as Counsel to the President. Most recently, she served as Assistant to the President and Deputy Chief of Staff, and prior to that she was Assistant to the President and Staff Secretary. Before joining the President's staff, she was Co-Managing Partner at Locke Liddell & Sapp, LLP from 1998-2000. She had worked at the Locke Purnell Rain & Harrell firm, or its predecessor, from 1972 until its merger with the Liddell Sapp firm. From 1995 until 2000, she was chair of the Texas Lottery Commission. In 1992, Harriet became the first woman president of the Texas State Bar, and in 1985 she became the first woman president of the Dallas Bar Association. She also served as Member-At-Large on the Dallas City Council. Ms. Miers had a distinguished career as a trial litigator, representing such clients as Microsoft, Walt Disney Co. and SunGard Data Systems Inc. Moreover, when she left her law firm of Locke Liddell & Sapp, Ms. Miers was serving as Co-Managing Partner of the firm which had more than 400 lawyers. In 1972, Ms. Miers became the first woman hired at Dallas's Locke Purnell Rain Harrell. In March 1996, her colleagues elected her the first female president of Locke Purnell Rain & Harrell, at that time a firm of about 200 lawyers. She was the first woman to lead a Texas firm of that size. In 1985, Ms. Miers was selected as the first woman to become President of the Dallas Bar Association. In 1992, she became the first woman elected President of the State Bar of Texas. Ms. Miers served as the President of the State Bar of Texas from 1992 to 1993. Ms. Miers has served as Counsel to the President since February 2005. In this role, she has served as the top lawyer to the President and the White House, and in particular has been the principal advisor of judicial nominations. Ms. Miers' professional accomplishments have been recognized time and time again.

FERNANDO POMBO, Founder and Senior Partner of Gomez-Acebo & Pombo, Madrid, Spain, has contributed to and authored several publications in the field of international business law. Currently, he is President of the International Bar Association (2007-2009). Mr. Pombo has been a visiting professor at the Institute on International Legal Studies in Salzburg, Austria since 1985. He is also a former President of LES International and a member of the Spanish Arbitration Court. He is fluent in Spanish, English, French and German.

LAURA STEIN, has been Senior Vice President, General Counsel for The Clorox Company since January 2005. In this position she is responsible for Clorox's global legal, ethics and compliance, corporate security, corporate communications, crisis management, risk management and internal audit matters. She deals with corporate governance and chairs both the Clorox women's employee resource group and the Clorox Crisis Management Team. She is also the company's chief security officer. Before joining the Clorox Company in 2005, Stein was Senior Vice President, General Counsel of the H.J. Heinz Company. She earned her J.D. from Harvard Law School and her undergraduate and master's degrees from Dartmouth College.

TOMASZ WARDYNSKI, Polish adwokat and Founding Partner and President of Wardynski & Partners is a member of the Polish Business Council, the European Circuit of England and Wales, and the Garrick Club. He is a specialist in international project financing, privatization and restructuring of state- owned enterprises. He is a member of the Polish Bar Association and a former chairman of its Foreign Committee (1988-92). In 1991-96 he was a member of the Advisory Council on Privatisation to the Prime Minister of Poland. He is a former member of the Supervisory Board of the Polish Development Bank. Since 1986 Tomasz Wardynski has been an honorary legal advisor to her Britannic Majesty's Ambassador in Poland. He is a visiting scholar at the American Bar Foundation as well as an Honorary Commander of the Civil Division of the Most Excellent Order of the British Empire. Tomasz Wardynski is a member of the Polish-British Legal Association, a member of the International Bar Association, a member of the European Circuit of England and Wales, and a member of the Garrick Club.

WALTER H. WHITE, JR. is a Partner in Grundberg Mocatta Rakison LLP (GMR), where his practice concentrates on cross-border securities law and emerging markets investment activities.

He was the Founding Partner of White and Jones LLP, London, England, which merged with GMR in 2006. Mr. White previously has served as a Partner and Managing Director of Steptoe & Johnson International. Mr. White is a former Commissioner of Securities for the State of Wisconsin 1988-1991. He currently serves on the boards of the ABA Center for Human Rights and the Center for Rule of Law Initiatives, he has previously served as a member of the executive committee of the ABA Board of Governors in the House of Delegates, as the Chair of ABA Africa, as the Chair of the Section of Individual Rights and Responsibilities, and also as Chair of the Young Lawyers Division. Mr. White has also been a member of the State Bar of Wisconsin Board of Governors, on the board of the Milwaukee Foundation and as a board member of the Central-Asian-American Enterprise Fund by appointment of former President Clinton. He also currently serves as a Trustee of Hampshire College and a Director of Church Mutual Insurance Company.

Topical Index

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The body of law suitable for presentation in the Martindale-Hubbell Law Digests of the states of the United States, the District of Columbia, Puerto Rico and the Virgin Islands has been classified under a system of categories and topics, that are uniform in these Digests. The same classification system is followed, as closely as cultural conditions permit, in the International Section of the Law Digests.

The components of this classification system follow a hierarchy of: Category; Topic; Sub-heading; Catchline. Please note that the Categories are arranged alphabetically in each digest except for the `Introduction' Category which always comes first.

Here is an example of the classification hierarchy showing all components noted above:

DOCUMENTS AND RECORDS	(Category: bold, all caps)
ACKNOWLEDGMENTS	(Topic:, bold, all caps)
What Persons May Take.—	(Sub-heading: roman)
Within State.— *Outside State But Within United States.—* *Outside United States.—*	(Catchlines: italics)

The digests often make cross references to another Topic within the instant Category, or to another Category and Topic entirely. Here is an example of two such cross references that may be found under the Category **ESTATES AND TRUSTS:**

ALLOWANCES:

See topic Descent and Distribution.

In this first example, the Topic `Descent and Distribution' is also under the Category **ESTATES AND TRUSTS.**

CLAIMS:

See topic Executors and Administrators; category Civil Actions and Procedure, topic

```
                        Pleading; and category Dispute
                        Resolution, topic Arbitration
                        and Award.
```

In this second example, the Topic `Executors and Administrators' is also under the Category `Estates & Trusts'. The subsequent references however are to differenct Categories entirely. This Topical Index inter-files all the Categories and Topics used in the Law Digests, and the more commonly used Sub-headings into a unified index. The user may then identify all major classification entities, and how they reference one another. Forms of many instruments will be found under the appropriate topics. For example, forms of acknowledgment under Category `Documents and Records', Topic `Acknowledgments', Sub-head `Forms'.

FEATURE

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Abandonment, see category Family, topics Divorce, Husband and Wife.
Abatement, see category Civil Actions and Procedure, topic Actions.
Absconding debtors, see category Debtor and Creditor, topic Attachment.
Absent defendants, see category Civil Actions and Procedure, topic Process.
ABSENTEES.—See category Property; see also categories Business Organizations, topic Corporations; Civil Actions and Procedure, topics Costs, Limitation of Actions, Process, Venue; Debtor and Creditor, topic Attachment; Estates and Trusts, topics Death, Executors and Administrators; Family, topic Guardian and Ward.
Accidents, see category Transportation, topic Motor Vehicles.
ACCORD AND SATISFACTION.—See category Civil Actions and Procedure.
Accounts, see categories Business Regulation and Commerce, topic Banks and Banking; Estates and Trusts, topic Executors and Administrators; Family, topic Guardian and Ward.
Accounts Receivable, see category Debtor and Creditor, topic Assignments.
Accumulations, see categories Estates and Trusts, topic Trusts; Property, topic Perpetuities.
ACKNOWLEDGMENTS.—See category Documents and Records, see also topics Affidavits, Notaries Public; categories Business Regulation and Commerce, topic Sales; Debtor and Creditor, topic Assignments; Mortgages, topics Chattel Mortgages, Mortgages of Real Property, Property, topics Deeds, Landlord and Tenant.
ACTIONS.—See category Civil Actions and Procedure; see also topics Appeal and Error, Certiorari, Judgments, Limitation of Actions, Submission of Controversy, Pleading, Practice, Process, Venue; Courts and Legislature, topic Courts; Debtor and Creditor, topics Attachment, Receivers; Employment, topic Labor Relations; Estates and Trusts, topics Death, Executors and Administrators; Family, topics Divorce, Guardian and Ward, Infants, Marriage. For Declaratory Judgments, see category Civil Actions and Procedure, topic Judgments.
Adjudication, see category Civil Actions and Procedure, topic Judgments.
ADMINISTRATION.—See categories Estates and Trusts, topic Executors and Administrators, Taxation.
Administration, when unnecessary, see category Estates and Trusts, topic Executors and Administrators.
Admission, demand for, see category Civil Actions and Procedure, topic Practice.
Admission to bar, see category Legal Profession, topic Attorneys and Counselors.
ADOPTION.—See category Family.
Adultery, see category Family, topic Divorce.
Advancements, see category Estates and Trusts, topic Descent and Distribution.
ADVERSE POSSESSION.—See category Property; see also category Civil Actions and

Procedure, topic Limitation of Actions.
Affidavit of defense, see category Civil Actions and Procedure, topic Pleading.
AFFIDAVITS.—See category Documents and Records; see also topic Acknowledgments; categories Civil Actions and Procedure, topics Depositions and Discovery, Evidence, Pleading; Estates and Trusts, topic Executors and Administrators.
Affirmation as substitute for acknowledgment, see category Documents and Records, topic Acknowledgments.
Affirmation as substitute for affidavit, see category Documents and Records, topic Affidavits.
Afterborn children, see category Estates and Trusts, topics Descent and Distribution, Wills.
Age, see category Family, topics Adoption, Infants, Marriage.
AGENCY.—See categories Business Organizations; see also topics Corporations, Partnerships; categories Business Regulation and Commerce, topic Factors; Civil Actions and Procedure, topic Brokers; Employment, topic Labor Relations; Property, topic Powers of Attorney.
Agent for service of process, see categories Business Organizations, topic Corporations; Civil Actions and Procedure, topic Process; Estates and Trusts, topic Executors and Administrators; Insurance, topic Insurance Companies; Property, topic Absentees; Transportation, topic Motor Vehicles.
AIRCRAFT.—International Digests only. See category Transportation.
Air pollution, see category Environment, topic Environmental Regulation.
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Alienation of property, restrictions on, see category Property, topic Perpetuities.
ALIENS.—See category Immigration in International Digests.
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Allowances, see category Estates and Trusts, topic Executors and Administrators.
ALTERNATIVE DISPUTE RESOLUTION.—See category Dispute Resolution.
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Alternative to affidavit, see category Documents and Records, topic Affidavits.
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Ancestors, see category Estates and Trusts, topic Descent and Distribution.
Ancillary administration, see category Estates and Trusts, topic Executors and Administrators.
Annulment of marriage, see category Family, topic Marriage; see also category Family, topic Divorce.
Answer, see category Civil Actions and Procedure, topic Pleading.
Antenuptial contracts, see category Family, topic Husband and Wife.
Antitrust, see category Business Regulation and Commerce, topic Monopolies, Restraint of Trade and Competition.
APPEAL AND ERROR.—See category Civil Actions and Procedure; see also topics Certiorari; categories Courts and Legislature, topic Courts; Taxation, topic Taxes.
Appearance, see category Civil Actions and Procedure, topic Actions, Pleading, Process.
Applicable law, see categories Business Regulation and Commerce, topics Contracts and Sales in certain International Digests.
Apportionment, see category Taxation, topic Taxes.
Appraisal of dissenting shareholder's stock, see category Business Organizations, topic Corporations, subhead Appraisal.
ARBITRATION AND AWARD.—See category Dispute Resolution; see also category Civil Actions and Procedure, topic Submission of Controversy.
Arbitration of death taxes, see category Taxation, topic Taxes, subhead Interstate Cooperation.
Armed Forces, acknowledgments of persons in, see category Documents and Records, topic Acknowledgments.
Armed Forces, members of, exemptions, see categories Taxation, topic Taxes; Transportation, topic Motor Vehicles.
Armed Forces, notarial powers of officers, see category Documents and Records, topics

Notaries Public, Acknowledgments.

Articles of association or incorporation, see category Business Organizations, topic Corporations.

ASSIGNMENTS.—See category Debtor and Creditor; see also categories Business Regulation and Commerce, topics Commercial Code, Sales; Civil Actions and Procedure, topic Judgments; Employment, topic Labor Relations; Intellectual Property, topic Trademarks and Tradenames; Mortgages, topics Chattel Mortgages, Mortgages of Real Property; Property, topic Deeds.

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Attestation, see category Estates and Trusts, topic Wills.

Attorney ethics, see category Legal Profession, topic Attorneys and Counselors.

Attorney fee clauses, see category Business Regulation and Commerce, topic Bills and Notes.

ATTORNEYS AND COUNSELORS.—See category Legal Profession; see also category Civil Actions and Procedure, topics Costs, Evidence, subhead Witnesses.

Attorneys in fact, see category Property, topic Powers of Attorney.

Attorneys, professional association or corporation, see category Legal Profession, topic Attorneys and Counselors; also category Business Organizations, topics Associations, Corporations.

Authentication, see categories Civil Actions and Procedure, topic Depositions and Discovery; Documents and Records, topics Acknowledgments, Affidavits.

Automobiles, see category Transportation, topic Motor Vehicles.

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Bailments, see category Business Regulation and Commerce, topics Carriers, Warehousemen.

Bank collections, see category Business Regulation and Commerce, topics Banks and Banking, Commercial Code.

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Bankruptcy, see category Debtor and Creditor, topic Receivers; and category Debtor and Creditor, topic Bankruptcy in International Digests.

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Beer, see categories Business Regulation and Commerce, topic Licenses, Business and Professional; Taxation, topic Taxes.

Beneficiaries, see categories Estates and Trusts, topics Descent and Distribution, Executors and Administrators, Trusts, Wills; Taxation, topic Taxes, subhead Inheritance Tax.

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BILLS AND NOTES.—See category Business Regulation and Commerce, see also topic Commercial Code.

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Bills of lading, see category Business Regulation and Commerce, topic Carriers; also category Business Regulation and Commerce, topic Commercial Code.

Bills of sale, see category Business Regulation and Commerce, topic Sales; also category Business Regulation and Commerce, topic Commercial Code.

Birth certificates, see category Documents and Records, topic Records.

Blue Sky Laws, see category Business Regulation and Commerce, topic Securities.

BONDS.—See category Civil Actions and Procedure; see also topics Appeal and Error, Costs, Injunctions, Replevin; see also categories Business Regulation and Commerce, topics Brokers, Commercial Code, Securities, Warehousemen; topics Debtor and Creditor, topics Attachment, Executions, Garnishment, Receivers; Documents and Records, topic Notaries Public; Estates and Trusts, topic Executors and Administrators; Family, topic Guardian and Ward; Insurance, topic Surety and Guaranty Companies; Legal Profession, topic Attorneys and Counselors; Mortgages, topic Mortgages of Real Property.

BROKERS.—See also category Business Regulation and Commerce, topics Factors, Licenses, Business and Professional, Securities.

Bulk sales, see categories Business Regulation and Commerce, topic Commercial Code; Debtor and Creditor, topic Fraudulent Sales and Conveyances.

Business names, see category Intellectual Property, topic Trademarks and Tradenames; also category Business Organizations, topics Corporations, Partnerships.

BUSINESS ORGANIZATIONS [category]

BUSINESS REGULATION AND COMMERCE [category]

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Business trusts, see categories Business Organizations, topic Joint Stock Companies; Business Regulation and Commerce, topic Monopolies, Restraint of Trade and Competition.

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CARRIERS.—See category Business Regulation and Commerce; see also category Transportation, topic Motor Vehicles.

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Certificate of birth, see category Documents and Records, topic Records.

Certificate of death, see category Estates and Trusts, topic Death; also category Documents and Records, topic Records.

Certificate of incorporation, see category Business Organizations, topic Corporations.

Certificate of Marriage, see categories Documents and Records, topic Records; Family, topic Marriage.

Certificate of Stock, see category Business Organizations, topic Corporations.

CERTIFICATION.—See category Health, topic Licensure and Certification.

CERTIORARI.—See category Civil Actions and Procedure; see also topic Appeal and Error.

Chain Stores, see categories Business Regulation and Commerce, topic Licenses, Business and Professional; Taxation, topic Taxes.

Change of Venue, see category Civil Actions and Procedure, topic Venue.

Charitable immunity, see category Civil Actions and Procedure, topic Damages.

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CHATTEL MORTGAGES.—See category Mortgages; see also categories Business Regulation and Commerce, topics Commercial Code, Sales; Debtor and Creditor, topics Fraudulent Sales and Conveyances, Pledges; Documents and Records, topic Records.

Chattel paper, see category Business Regulation and Commerce, topic Commercial Code.

Checks, see category Business Regulation and Commerce, topics Banks and Banking, Bills and Notes.

Children, see categories Civil Actions and Procedure, topics Limitation of Actions, Evidence, subhead Witnesses, Process; Employment, topic Labor Relations; Estates and Trusts, topics Descent and Distribution, Wills; Family, topics Adoption, Divorce, Guardian and Ward, Infants, Marriage.

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Claim and delivery, see category Civil Actions and Procedure, topic Replevin.

Claims, see categories Civil Actions and Procedure, topic Pleading; Estates and Trusts, topic Executors and Administrators.

Class actions, see category Civil Actions and Procedure, topic Actions.

Close corporations, see category Business Organizations, topic Corporations.

Codes, see category Courts and Legislature, topic Statutes, also category Civil Actions and Procedure, topic Practice; category Courts and Legislature, topic Law Reports, Codes, in International Digests.

Collateral inheritance tax, see category Taxation, topic Taxes.

Collateral security, see category Debtor and Creditor, topic Pledges; see also category Business Regulation and Commerce, topic Commercial Code.

Collection agencies, see category Business Regulation and Commerce, topic Licenses, Business and Professional.

Color of title, see category Property, topic Adverse Possession.

Combinations, see category Business Regulation and Commerce, topic Monopolies, Restraint of Trade and Competition.

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COMMERCIAL REGISTER (International Digests only).—See category Business Regulation and Commerce; see also category Business Organizations, topics Corporations, Joint Stock Companies; Immigration, topic Aliens.

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Commission merchants, see category Business Regulation and Commerce, topic Factors.

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Common law marriage, see category Family, topic Marriage.

Common trust funds, see category Business Regulation and Commerce, topic Banks and Banking.

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Competency, see categories Civil Actions and Procedure, topics Evidence, subhead Witnesses, Limitation of Actions; Estates and Trusts, topics Executors and Administrators, Wills; Family, topics Guardian and Ward, Husband and Wife, Infants, Marriage.

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Compromise of death taxes, see category Taxation, topic Taxes, subhead Interstate Co-operation.

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Compulsory continuing legal education, see category Legal Profession, topic Attorneys and Counselors.

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Conflicts of laws, see category Business Regulation and Commerce, topics Contracts and Sales in certain International Digests.
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Conventions, in certain International Digests see category Treaties and Conventions, topic Treaties; see also category Taxation, topic Treaties and Agreements. See European Union Digest. See also Part VI, for Selected International Conventions to which U.S. is a party.
Conveyances, see category Property, topic Deeds. See also categories Business Regulation and Commerce, topic Frauds, Statute of; Debtor and Creditor, topic Fraudulent Sales and Conveyances, Mortgages, topic Mortgages of Real Property.
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Filing fees, see categories Business Organization, topic Corporations; Business Regulation and Commerce, topic Commercial Code; Documents and Records, topic Records; Estates and

Trusts, topic Executors and Administrators; Mortgages, topics Chattel Mortgages, Mortgages of Real Property; Property, topic Deeds.

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Financing statement, see categories Business Regulation and Commerce, topic Commercial Code; Mortgages, topic Chattel Mortgages.

Fishing zone, see category Mineral, Water and Fishing Rights.

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Foreign conveyances of incumbrances, see categories Documents and Records, topic Records; Property, topic Real Property.

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Foreign depositions, see category Civil Actions and Procedure, topic Depositions and Discovery.

Foreign distribution, see category Estates and Trusts, topic Executors and Administrators.

Foreign divorce, see category Family, topic Divorce.

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Foreign executors and administrators, see category Estates and Trusts, topic Executors and Administrators.

Foreign guardians, see category Family, topic Guardian and Ward.

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Foreign marriages, see category Family, topic Marriage.

Foreign operators of motor vehicles, see category Transportation, topic Motor Vehicles.

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Foreign wills, see category Estates and Trusts, topic Wills.

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Forms, see categories Civil Actions and Procedure, topics Depositions and Discovery, Judgements; Documents and Records, topics Acknowledgments, Affidavits; Estates and Trusts, topics Executors and Administrators, Wills; Mortgages, topics Chattel Mortgages, Mortgages of Real Property; Property, topic Deeds.

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GOVERNMENT AND LEGAL SYSTEM.—See category Introduction; see also category Courts and Legislature.
Government contracts, see category Business Regulation and Commerce, topic Contracts in certain International Digests.
Government, suit against, see category Civil Actions and Procedure, topic Damages.
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HOMESTEADS.—See category Debtor and Creditor; see also topic Exemptions.
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Inheritance, see categories Citizenship, topic Aliens; Estates and Trusts, topics Descent and Distribution, Wills; Family, topic Adoption; Property, topics Curtesy, Dower.
INHERITANCE TAX.—See category Taxation; see also topics Estate Tax, Gift Tax,
Initiative, see category Courts and Legislature, topic Legislature.

INJUNCTIONS.—See category Civil Actions and Procedure, see also category Courts and Legislature, topic Courts.
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Justices of the Peace, see category Courts and Legislature, topic Courts.
Justification, see category Civil Actions and Procedure, topic Bonds.
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topic Consumer Protection.
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Lawyers, see category Legal Profession, topic Attorneys and Counselors.
Leases, see category Property, topic Landlord and Tenant; see also category Business Regulation and Commerce, topic Frauds, Statute of.
Legacies, see category Estates and Trusts, topic Wills.
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Levy, see categories Debtor and Creditor, topics Attachment Executions, Garnishment; Taxation, topic Taxes.
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Employment, topic Labor Relations.
MINES, MINERALS AND FISHERIES TAXES.—See category Taxation; see also category Mineral, Water and Fishing Rights.
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Moratorium, see categories Introduction, topic Holidays; Mortgages, topic Mortgages of Real Property.
MORTGAGES [category]
MORTGAGES OF PERSONAL PROPERTY.—See category Mortgages, topic Chattel Mortgages.
MORTGAGES OF REAL PROPERTY.—See category Mortgages; see also topic Chattel Mortgages; categories Business Regulation and Commerce, topic Frauds, Statute of; Debtor and Creditor, topic Fraudulent Sales and Conveyances; Documents and Records, topics Acknowledgments, Records; Property, topic Deeds.
Motion for Judgment, see category Civil Actions and Procedure, topic Judgments.
MOTOR VEHICLES.—See category Transportation.
Names, see categories Business Organizations, topics Corporations, Partnerships; Intellectual Property, topic Trademarks and Tradenames.
Negligence, see categories Business Regulation and Commerce, topic Sales; Civil Actions and Procedure, topics Damages, Limitation of Actions; Estates and Trusts, topic Death; Family, topic Infants; Transportation, topic Motor Vehicles.
Negotiable instruments, see category Business Regulation and Commerce, topics Bills and Notes, Commercial Code.
New Media, see category Business Regulation and Commerce, topic Information Technology, Internet and New Media.
New promise, see category Civil Actions and Procedure, topic Limitation of Actions.
Next of kin, see category Estates and Trusts, topic Descent and Distribution.
No-fault insurance, see category Transportation, topic Motor Vehicles, subhead No- Fault Insurance.
Noise, see category Environment, topic Environmental Regulation.
Nominees, Securities in name of, see category Estates and Trusts, topic Trusts.
Nonprofit Corporations, see category Business Organizations, topics Associations, Corporations.
Nonresidents, see categories Business Organizations, topic Corporations; Civil Actions and Procedure, topics Costs, Limitation of Actions, Process, Venue; Debtor and Creditor, topic Attachment; Estates and Trusts, topic Executors and Administrators; Family, topic Guardian and Ward; Property, topic Absentees; Transportation, topic Motor Vehicles.
Nonsupport, see category Family, topics Divorce, Husband and Wife.
NOTARIES PUBLIC.—See category Documents and Records; see also topics Acknowledgments, Affidavits; categories Civil Actions and Procedure, topic Depositions and Discovery.
Notes, see category Business Regulation and Commerce, topics Bills and Notes, Commercial Code.
Notice of sale, see categories Debtor and Creditor, topics Attachment, Executions, Liens; Mortgages, topics Chattel Mortgages, Mortgages of Real Property; Taxation, topic Taxes.
Notice to creditors, see categories Business Organizations, topic Corporations; Debtor and Creditor, topic Fraudulent Sales and Conveyances; Estates and Trusts, topic Executors and Administrators.
Notices, see category Business Regulation and Commerce, topic Sales in certain International Digests.
Nuncupative wills, see category Estates and Trusts, topic Wills.

Oaths, see categories Civil Actions and Procedure, topic Depositions and Discovery; Documents and Records, topics Affidavits, Notaries Public.
Occupational diseases, see category Employment, topic Labor Relations.
OFFICE HOURS AND TIME ZONE.—See category Introduction.
Oil and gas, see category Mineral, Water and Fishing Rights, topic Mines and
Minerals, see also category Taxation, topic Taxes.
Oleographic wills, see category Estates and Trusts, topic Wills.
Parent, see categories Estates and Trusts, topic Descent and Distribution; Family, topics Adoption, Divorce, Guardian and Ward, Infants.
Parental liability, see category Family, topic Infants.
Part payment, see category Civil Actions and Procedure, topic Limitation of Actions.
Partial release, see categories Business Regulation and Commerce, topic Commercial Code; Mortgages, topics Chattel Mortgages, Mortgages of Real Property.
Parties, see category Civil Actions and Procedure, topic Actions.
PARTITION.—See category Civil Actions and Procedures.
PARTNERSHIP.—See category Business Organizations; see also topics Associations, Joint Stock Companies; category Intellectual Property, topic Trademarks and Tradenames.
Patents, see United States Patent Law Digest; see category Intellectual Property, topic Patents in Dominion of Canada and International Digests.
Pawnbrokers, see categories Business Regulation and Commerce, topic Interest, Debtor and Creditor, topic Pledges.
Penalties, see categories Environment, topic Environmental Regulation; Taxation, topic Taxes.
Permits, see category Environment, topic Environmental Regulation.
Perpetuating testimony, see category Civil Actions and Procedure, topic Depositions and Discovery.
PERPETUITIES.— See category Property.
PERSONAL PROPERTY.—See category Property; see also categories Business Regulation and Commerce, topics Commercial Code, Frauds, Statute of, Sales; Debtor and Creditor, topics Exemptions, Fraudulent Sales and Conveyances, Liens, Pledges; Estates and Trusts, topic Descent and Distribution; Mortgages, topic Chattel Mortgages; Taxation, topic Taxes.
Petroleum, see categories Mineral, Water and Fishing Rights, topic Mines and Minerals; Taxation, topic Taxes.
``Plain language" statutes, see category Business Regulation and Commerce, topic Consumer Protection,
PLEADING.—See category Civil Actions and Procedure; see also topics Accord and Satisfaction, Actions, Limitation of Actions, Practice, Process, Submission of Controversy; category Courts and Legislature, topic Courts.
PLEDGES.—See category Debtor and Creditor.
Pollution, see category Environment, topic Environmental Regulation.
Posthumous children, see category Estates and Trusts, topics Descent and Distribution, Wills.
Pour over trusts, see category Estates and Trusts, topic Wills, subhead Bequests and Devises to Inter Vivos Trusts.
POWERS OF ATTORNEY.—See category Property, topic Powers of Attorney.
PRACTICE.—See category Civil Actions and Procedure; see also topics Actions, Appeal and Error, Depositions and Discovery, Injunctions, Judgments, Pleading, Process, Submission of Controversy; categories Courts and Legislature, topic Courts; Debtor and Creditor, topics Creditors' Suits, Executions.
Preliminary injunction, see category Civil Actions and Procedure, topic Injunctions.
Premium tax, see category Insurance, topic Insurance Companies.
Prescription, see categories Civil Actions and Procedure, topic Limitation of Actions; Property, topic Adverse Possession; in certain International Digests, category Civil Actions and Procedure, topic Prescription.
Presumption of death or survivorship, see category Estates and Trusts, topic Death.
Pretermitted children, see category Estates and Trusts, topic Wills.
Price fixing contracts, see category Business Regulation and Commerce, topic Monopolies,

Restraint of Trade and Competition.
PRINCIPAL AND AGENT.—See also categories Business Organizations, topic Partnerships; Business Regulation and Commerce, topics Brokers, Factors; Employment, topic Labor Relations.
Privileged communications, see category Civil Actions and Procedure, topic Evidence, subhead Witnesses.
Probate, see category Estates and Trusts, topic Wills.
Probate Code, see category Estates and Trusts, topic Wills.
Probate courts, see category Courts and Legislature, topic Courts.
Procedure, see categories Civil Actions and Procedure, topics Actions, Pleading, Practice; Courts and Legislature, topic Courts.
PROCESS.—See category Civil Actions and Procedure, see also category Transportation, topic Motor Vehicles.
Process agent, see categories Business Organizations, topic Corporations; Business Regulation and Commerce, topic Securities; Civil Actions and Procedure, topic Process, Insurance, topic Insurance Companies; Property, topic Absentees.
Product liability, see category Business Regulation and Commerce, topic Sales.
Professional associations, see category Business Organizations, topic Associations.
Professional corporations, see category Business Organizations, topic Corporations.
Prohibited marriages, see category Family, topic Marriage.
Promissory notes, see category Business Regulation and Commerce, topics Bills and Notes, Commercial Code.
Proof of claims, see categories Civil Actions and Procedure, topic Pleading; Estates and Trusts, topic Executors and Administrators.
Proof of deeds, see category Documents and Records, topic Acknowledgments.
PROPERTY [category]
PROPERTY TAXES.—See category Taxation.
Proxies, see category Business Organizations, topic Corporations.
Public administrators, see category Estates and Trusts, topic Executors and Administrators.
PUBLIC HEALTH.—See category Health.
Public works, see category Debtor and Creditor, topic Liens, subhead Mechanics' Liens.
Publication, see category Civil Actions and Procedure, topic Process.
Pyramid sales, see category Business Regulation and Commerce, topic Securities.
Qualification of foreign corporation, see category Business Organizations, topic Corporations.
Quitclaim deeds, see category Property, topic Deeds.
Railroads, see category Business Regulation and Commerce, topic Carriers.
Real estate brokers, see category Business Regulation and Commerce, topic Brokers.
Real estate conveyance tax, see category Taxation, topic Taxes.
Real estate subdivides, see Model Land Sales Practices Act, reproduced in Part III, and category Courts and Legislature, topic Statutes, subhead Uniform Acts, for states adopting.
REAL PROPERTY.—See category Property; see also topics Adverse Possession, Curtesy, Deeds, Dower, Landlord and Tenant; categories Business Organizations, topic Corporations; Business Regulation and Commerce, topic Frauds, Statute of; Civil Actions and Procedure, topic Partition; Debtor and Creditor, topics Fraudulent Sales and Conveyances, Homesteads, Liens; Documents and Records, topic Records; Estates and Trusts, topic Descent and Distribution; Family, topic Husband and Wife; Mortgages, topic Mortgages of Real Property; Taxation, topic Taxes.
RECEIVERS.—See category Debtor and Creditor; see also topic Executions; categories Business Organizations, topic Corporations.
Recognition of foreign acknowledgments, see category Documents and Records, topic Acknowledgments.
RECORDS.—See category Documents and Records; see also categories Business Regulation and Commerce, topics Commercial Code, Sales; Civil Actions and Procedure, topic Judgments; Debtor and Creditor, topics Assignments, Liens; Mortgages, topics Chattel Mortgages, Mortgages of Real Property; Property, topic Deeds.

Redemption, see categories Debtor and Creditor, topics Executions, Liens; Mortgages, topics Chattel Mortgages, Mortgages of Real Property; Taxation, topic Taxes.
Referendum, see category Courts and Legislature, topic Legislature.
Registration, see categories Business Regulation and Commerce, topic Securities; Documents and Records, topic Records; Intellectual Property, topic Trademarks and Tradenames.
Registration as law student, see category Legal Profession, topic Attorneys and Counselors.
Release, see categories Business Regulation and Commerce, topic Commercial Code; Civil Actions and Procedure, topic Judgments; Debtor and Creditor, topics Attachment, Liens; Mortgages, topics Chattel Mortgages, Mortgages of Real Property; Property, topic Dower.
Rent, see category Property, topic Landlord and Tenant.
Renunciation, see category Estates and Trusts, topics Descent and Distribution, Trusts, Wills.
REPLEVIN.—See category Civil Actions and Procedure.
Reply, see category Civil Actions and Procedure, topic Pleading.
REPORTS.—See category Courts and Legislature, see also categories Business Organizations, topic Corporations; Business Regulation and Commerce, topic Banks and Banking, Insurance, topic Insurance Companies; Transportation, topic Motor Vehicles.
Reservation of name, see category Business Organizations, topic Corporations.
Residency requirements, see category Family, topic Divorce.
Restraint of Trade, see category Business Regulation and Commerce, topic Monopolies, Restraint of Trade and Competition.
Restrictions on alienation, see category Property, topic Perpetuities.
Retail Credit Sales, see category Business Regulation and Commerce, topics Consumer Protection, Sales.
Retaliatory laws, see category Insurance, topic Insurance Companies.
Review, see category Civil Actions and Procedure, topics Appeal and Error, Certiorari, Taxation, topic Taxes.
Revival, see category Civil Actions and Procedure, topics Actions, Judgments, Limitation of Actions.
Revocation of will, see category Estates and Trusts, topic Wills.
Right to work laws, see category Employment, topic Labor Relations.
Rule in Shelley's case, see category Property, topic Real Property.
SALES.—See category Business Regulation and Commerce; see also topics Commercial Code, Consumer Protection, Contracts, Frauds, Statute of, Securities; categories Debtor and Creditor, topics Assignments, Executions, Fraudulent Sales and Conveyances, Pledges; Documents and Records, topic Acknowledgments; Estates and Trusts, topic Executors and Administrators; Family, topic Guardian and Ward; Mortgages, topics Chattel Mortgages, Mortgages of Real Property; Property, topic Deeds; Taxation, topic Taxes; Transportation, topic Motor Vehicles.
Sales of accounts, see category Business Regulation and Commerce, topic Commercial Code.
SALES AND USE TAXES.—See category Taxation.
Satisfaction, see categories Civil Actions and Procedure, topics Accord and Satisfaction, Judgments; Debtor and Creditor, topics Executions, Liens; Mortgages, topics Chattel Mortgages, Mortgages of Real Property.
Savings Banks, see category Business Regulation and Commerce, topic Banks and Banking.
Scroll, see category Documents and Records, topic Seals.
SEALS.—See category Documents and Records; see also topics Acknowledgments, Affidavits, Notaries Public; categories Business Regulation and Commerce, topics Commercial Code, Sales; Civil Actions and Procedure, topic Depositions and Discovery; Mortgages, topics Chattel Mortgages, Mortgages of Real Property; Property, topic Deeds.
Secured transactions, see categories Business Regulation and Commerce, topics Commercial Code, Sales; Mortgages, topic Chattel Mortgages; Taxation, topic Stamp and Seal Taxes.
SECURITIES.—See category Business Regulation and Commerce; see also topic Commercial Code; categories Business Organizations, topic Corporations; Civil Actions and Procedure, topic Bonds; Debtor and Creditor, topic Pledges; Family, topics Guardian and Ward, Infants; Estates and Trusts, topic Trusts; Mortgages, topics Chattel Mortgages, Mortgages of Real Property.
Security agreement, see categories Business Regulation and Commerce, topic Commercial

Code; Mortgages, topic Chattel Mortgages.

Security deposits, see category Property, topic Landlord and Tenant.

Security devices, see categories Business Regulation and Commerce, topics Commercial Code, Sales; Debtor and Creditor, topic Pledges; Mortgages, topic Chattel Mortgages.

Security for costs, see category Civil Actions and Procedure, topic Costs.

Self-proved wills, see category Estates and Trusts, topic Wills.

Separate estate, see category Family, topic Husband and Wife.

Separate examination, see category Documents and Records, topic Acknowledgments.

Separation, see category Family, topics Dissolution of Marriage, Divorce, Husband and Wife.

SEQUESTRATION.—See category Civil Actions and Procedure; see also category Debtor and Creditor, topics Attachment, Executions, Garnishment, Receivers.

Servants, see category Employment, topic Labor Relations.

Service, see category Civil Actions and Procedure, topic Process.

Set-off, see category Civil Actions and Procedure, topic Pleading.

Settlement, see category Civil Actions and Procedure, topic Accord and Satisfaction.

Severance, see category Civil Actions and Procedure, topic Actions.

Shares, see Stock, this index.

SHIPPING.—See category Transportation, topic Shipping in International Digests only.

Simultaneous death, see category Estates and Trusts, topic Death.

Small claims, see category Courts and Legislature, topic Courts.

Small estates, see category Estates and Trusts, topic Executors and Administrators.

Small loans, see category Business Regulation and Commerce, topic Interest.

SMOKING REGULATIONS.—See category Health.

Societies, see category Business Organizations, topic Associations.

Sovereign immunity, see category Civil Actions and Procedure, topic Damages.

Specialty certification, see category Legal Profession, topic Attorneys and Counselors.

Special fuels taxes, see category Taxation, topic Gasoline and Special Fuels Taxes.

Splitting of actions, see category Civil Actions and Procedure, topic Actions.

Spouses, division of property, see category Family, topics Dissolution of Marriage, Divorce.

STAMP AND SEAL TAXES.—See category Taxation.

Statute of frauds, see category Business Regulation and Commerce, topic Frauds, Statute of.

Statute of limitations, see category Civil Actions and Procedure, topic Limitation of Actions.

STATUTES.—See category Courts and Legislature; in certain International Digests, see category Introduction, topic Government and Legal System; category Foreign Trade and Commerce.

Stay, see categories Civil Actions and Procedure, topics Actions, Appeal and Error, Judgments; Courts and Legislature, topic Courts; Debtor and Creditor, topic Executions.

Stock, see categories Business Organizations, topic Corporations; Business Regulation and Commerce, topic Securities; also category Business Regulation and Commerce, topic Commercial Code.

Stockholders, see categories Business Organizations, topic Corporations; Business Regulation and Commerce, topic Banks and Banking.

Stock transfer, see categories Business Organizations, topic Corporations; Taxation, topic Taxes; also category Business Regulation and Commerce, topic Commercial Code.

Storage, see category Business Regulation and Commerce, topic Warehousemen.

Subdividers, registration of, see Model Land Sales Practices Act, reproduced in Part III, and category Courts and Legislature, topic Statutes, subhead Uniform Acts, for states enacting.

SUBMISSION OF CONTROVERSY.—See category Civil Actions and Procedure; see also topic Actions; category Dispute Resolution, topic Arbitration and Award.

Subpoenas, see category Civil Actions and Procedure, topic Evidence, subhead Witnesses.

Subscribing witnesses, see categories Documents and Records, topic Acknowledgments; Estates and Trusts, topic Wills; Property, topic Deeds.

Substituted service, see category Civil Actions and Procedure, topic Process.

Succession, see category Estates and Trusts, topic Descent and Distribution.

Succession tax, see category Taxation, topic Taxes.

Suits, see category Civil Actions and Procedure, topic Actions.

Summary judgment, see category Civil Actions and Procedure, topic Judgments.
Summary proceedings, see category Property, topic Landlord and Tenant.
Sunday, see category Introduction, topic Holidays.
Supersedeas, see category Civil Actions and Procedure, topic Appeal and Error.
Supplementary proceedings, see category Debtor and Creditor, topic Executions.
Support, enforcement of, see category Family, topic Husband and Wife, subhead Desertion and Nonsupport.
SURETY AND GUARANTY COMPANIES.—See category Insurance; see also topics Insurance Companies; categories Business Organizations, topic Corporations; Civil Actions and Procedure, topic Bonds.
Surety bonds, see categories Civil Actions and Procedure, topic Bonds; Insurance, topic Surety and Guaranty Companies.
Surrogates' courts, see category Courts and Legislature, topic Courts.
Survivorship, see category Estates and Trusts, topic Death.
Suspension of power of alienation, see category Property, topic Perpetuities.
Takeover Bids, see categories Business Organizations, topic Corporations; Business Regulation and Commerce, topic Securities.
Tax apportionment, see category Taxation, topic Taxes.
TAXATION [category]
TAXATION.—See also categories Business Organizations, topic Corporations; Business Regulation and Commerce, topic Licenses, Business and Professional; Insurance, topic Insurance Companies; Mineral, Water and Fishing Rights, topic Mines and Minerals; Transportation, topic Motor Vehicles; in certain International
Digests, see also category Foreign Trade and Commerce, topics Trade Zones, Investment Incentives.
Tax sales, see category Taxation, topic Taxes.
Technology, see this index under ``Industrial property".
Tenancy, see category Property, topic Landlord and Tenant.
Tenancy by entirety in personality, see category Property, topic Personal Property.
Tenancy by entirety in realty, see category Property, topic Real Property.
Tenancy in common, see category Property, topic Real Property.
Tender Offers, see categories Business Organizations, topic Corporations; Business Regulation and Commerce, topic Securities.
Termination of parental rights, see category Family, topic Infants.
Termination statement, see categories Business Regulation and Commerce, topic Commercial Code; Mortgages, topic Chattel Mortgages.
Testamentary capacity, see category Estates and Trusts, topic Wills.
Testamentary trusts, see category Estates and Trusts, topic Trusts.
Testaments, see category Estates and Trusts, topic Wills.
Testimony, see categories Civil Actions and Procedure, topics Depositions and Discovery, Evidence, subhead Witnesses; Documents and Records, topic Affidavits.
Third party claims, see category Debtor and Creditor, topics Attachment, Executions.
Third party practice, see category Civil Actions and Procedure, topics Actions, Pleading.
Title, see category Property, topics Adverse Possession, Real Property.
Tobacco taxes, see category Taxation, topic Alcohol, Beverages and Tobacco Taxes.
Torrens Act, see category Documents and Records, topic Records.
TORTS.—In certain International Digests, see category Civil Actions and Procedure; see also categories Business Regulation and Commerce, topic Sales; Civil Actions and Procedure, topics Damages, Limitation of Actions; Estates and Trusts, topic Death; Family, topic Infants; Transportation, topic Motor Vehicles.
Trade, restraint of, see category Business Regulation and Commerce, topic Monopolies, Restraint of Trade and Competition.
TRADE SECRETS.— See category Intellectual Property.
TRADE ZONES (Certain International Digests Only).—See category Foreign Trade and Commerce; see also categories Business Organizations, topic Corporations; Business Regulation

and Commerce; Taxation.
TRADEMARKS AND TRADENAMES.—See category Intellectual Property. For federal trademark law, see United States Trademark Law Digest.
Transfer of decedent's title, see category Documents and Records, topic Records,
Transfer of stock, see categories Business Organizations, topic Corporations; Taxation, topic Taxes; also Business Regulation and Commerce, topic Commercial Code.
Transfer tax, see category Taxation, topic Taxes.
TRANSPORTATION [category]
Treaties, in certain International Digests see category Treaties and Conventions, topic Treaties; see also category Taxation, topic Treaties and Agreements, See European Union Digest. See also Part VI, for Selected International Conventions to which U.S. is a party.
TREATIES AND CONVENTIONS [category, International Digests only]
Trust companies, see categories Business Organizations, topic Corporations; Business Regulation and Commerce, topic Banks and Banking.
TRUSTS.—See category Estates and Trusts; see also topic Executors and Administrators; categories Business Regulation and Commerce, topic Monopolies, Restraint of Trade and Competition; Family, topic Guardian and Ward; Mortgages, topic Mortgages of Real Property, Property, topic Perpetuities.
Trust deeds, see category Mortgages, topic Mortgages of Real Property,
Trustee process, see category Debtor and Creditor, topic Garnishment.
Trust receipt security, see categories Business Regulation and Commerce, topic Commercial Code; Debtor and Creditor, topic Pledges.
Tutors, see category Family, topic Guardian and Ward.
Unclaimed deposits, see category Business Regulation and Commerce, topic Banks and Banking; also category Property, topic Absentees.
Unclaimed dividends, see category Business Organizations, topic Corporations.
Unclaimed legacies, see category Estates and Trusts, topic Wills.
Unclaimed property, see Escheat, this index.
Undertakings, see category Civil Actions and Procedure, topic Bonds.
Unemployment compensation, see category Employment, topic Labor Relations.
Unemployment compensation taxes, see category Taxation, topic Taxes.
Unfair competition, see category Business Regulation and Commerce, topic Monopolies, Restraint of Trade and Competition.
Uniform Commercial Code, see Commercial Code, this index.
UNIFORM LAWS.—See Courts and Legislature; see also topic Statutes. For Uniform Acts promulgated by the National Conference of Commissioners on Uniform State Laws (NCCUSL) in force in each state, see specific topics, e.g., category Business Organizations, topic Partnerships, etc., also category Courts and Legislature, topic Statutes in each state Digest. For text of selected Uniform Acts of the NCCUSL within the scope of the Martindale-Hubbell Law Digests, see table of contents. It should be noted that where local differences from a Uniform Act are very significant they may be omitted from the list of Uniform Acts for a particular state in order to avoid misleading readers. Furthermore, Uniform Acts that are not promulgated by NCCUSL are covered under the relevant topics.
Unincorporated associations, see category Business Organizations, topic Associations.
Unsolicited merchandise, see category Business Regulation and Commerce, topics Consumer Protection, Sales.
Use tax, see category Taxation, topic Sales and Use Taxes.
UTILITIES TAX.—See category Taxation.
Usury, see category Business Regulation and Commerce, topic Interest.
Valuation, see categories Debtor and Creditor, topic Executions; Taxation, topic Taxes.
VALUE ADDED TAX.—International Digests only. See category Taxation. See European Union Digest, category Taxation, topic Value Added Tax for member nations.
VENUE.—See category Civil Actions and Procedure, see also categories Estates and Trusts, topics Executors and Administrators, Wills; Family, topic Divorce.
Vital Statistics, see category Documents and Records, topic Records.

Wages, see categories Debtor and Creditor, topics Assignments, Exemptions, Garnishment; Employment, topic Labor Relations.
Wards, see category Family, topic Guardian and Ward.
Warehouse receipts, see category Business Regulation and Commerce, topic Commercial Code.
WAREHOUSEMEN.—See category Business Regulation and Commerce; see also topic Commercial Code.
Warranties, see category Business Regulation and Commerce, topics Commercial Code, Sales.
Warranty deed, see category Property, topic Deeds.
Water pollution, see category Environment, topic Environmental Regulation.
Widow, see categories Debtor and Creditor, topic Homesteads; Estates and Trusts, Topics Descent and Distribution, Executors and Administrators, Wills; Property, topic Dower.
Wife, see categories Civil Actions and Procedure, topic Evidence, subhead Witnesses; Debtor and Creditor, topics Exemptions, Homesteads; Documents and Records, topic Acknowledgments; Estates and Trusts, topics Descent and Distribution, Executors and Administrators, Wills; Family, topics Divorce, Husband and Wife, Marriage; Property, topics Deeds, Dower.
WILLS.—See category Estates and Trusts, see also topics Descent and Distribution, Executors and Administrators; category Taxation, topic Taxes.
Wine, see categories Business Regulation and Commerce, topic Licenses, Business and Professional; Taxation, topic Taxes.
WITNESSES.—See also categories Civil Actions and Procedure, topic Depositions and Discovery; Documents and Records, topics Acknowledgments, Affidavits; Estates and Trusts, topic Wills.
Workers, see category Employment, topic Labor Relations.
Workmen's Compensation, see category Employment, topic Labor Relations.
Wrongful death, see category Estates and Trusts, topic Death.

1

ALABAMA LAW DIGEST

—Scope —

Revised for 2010 edition by

BRADLEY ARANT BOULT CUMMINGS LLP of Birmingham.

(Citations, unless otherwise noted, are to Code of 1975. Citations are to title, chapter, and section. Session laws are cited by year, type session if other than regular session, and act number. Alabama Rules of Civil Procedure cited as “ARCP.” Alabama Rules of Appellate Procedure cited as “ARAP.” Alabama Rules of Juvenile Procedure cited as “ARJP.” Alabama Civil Court Mediation Rules cited as “ACCMR.” Parallel Citations to the Southern Reporter begin with 81 Ala. and 1 Ala. App. Citations to Ala. end at 295 Ala., and citations to Ala. App. end at 57 Ala. App. All subsequent citations are to So.2d only, beginning with 331 So.2d. See also category 6 Courts and Legislature, topic 6.03 Reports.)

NOTE: This Revision covers all Acts of Alabama Legislature through 2009 Regular Session. Legislature meets annually.

1 INTRODUCTION

1.01 GOVERNMENT AND LEGAL SYSTEM:

The State of Alabama is a constituent state of the United States of America. For further discussion of the U.S. federal system, see Introduction to the Federal Government of the United States at the beginning of this volume. A great many laws are promulgated by the federal government of the United States and are not reflected in the topics below. See the Introduction to this volume for references to the federal law topics covered.

Like all but one of the United States, Alabama has a common law legal system, with roots in English common law. For information on the courts and legislature of Alabama, see category 6 Courts and Legislature.

1.02 [RESERVED]

1.03 HOLIDAYS:

Holidays are: Sundays, Christmas Day, New Year's Day, Martin Luther King, Jr.'s birthday (3d Mon. in Jan.), Robert E. Lee's birthday (3d Mon. in Jan.), George Washington's birthday (3d Mon. in Feb.), Thomas Jefferson's birthday (3d Mon. in Feb.), Confederate Memorial Day (4th Mon. in Apr.), National Memorial Day (last Mon. in May), Jefferson Davis' birthday (1st Mon. in June), 4th of July, Labor Day, Columbus Day, Fraternal Day and American Indian Heritage Day (2d Mon. in Oct.), Veteran's Day (11th day of Nov.), and Thanksgiving (4th Thurs. in Nov.). Mardi Gras is legal holiday in Mobile and Baldwin Counties.

Holiday Falling on Sun.

Observed following Mon.

Holiday Falling on Sat.

Observed preceding Fri.

Legality of Transactions on Sat., Sun. or Holiday.

Banks may do business on any legal holiday except Sun. and may use automated teller machine on any day. (Ala. Code § 5-5A-30-31). 1975 Code repealed Tit. 9, § 21 of 1958 Code which declared void all contracts made on Sun.

1.04 OFFICE HOURS AND TIME ZONE:

Alabama is in the Central (GMT -06:00) time zone. Office hours are generally from 9 a.m. to 5 p.m.

2 BUSINESS ORGANIZATIONS

2.01 AGENCY:

Generally, principles of agency governed by common law. See category Property, topic Powers of Attorney.

Formalities.

Determination of agency based on whether alleged principal has retained right of control over actions of alleged agent. (640 So.2d 940). Relationship of principal and agent created by express or implied contract or operation of law. (676 F. Supp. 1134).

Revocation.

Agency without interest may be revoked orally. Sufficiency or effectiveness of revocation depends on facts of case. Courts consider whether principal gave notice of revocation to agent and parties likely to deal with agent.

Common law rules apply.

Authority.

Agent has authority to: (1) Do everything necessary or proper and usual in ordinary course of business for effecting purpose of his agency; (2) make representation respecting any matter of fact, not including terms of his authority, but upon which his right to use his authority depends, and truth of which cannot be determined by use of reasonable diligence on part of person to whom representation is made. (Ala. Code § 8-2-4).

Agent to Sell.

Entrusted by principal with possession of thing sold, has authority to receive price. (Ala. Code § 8-2-2). Special agent to sell has authority to receive price on delivery of thing sold, but not afterwards. (Ala. Code § 8-2-3).

Notice.

As against principal, both principal and agent deemed to have notice of whatever either has notice of, and ought, in good faith and exercise of ordinary care and diligence, to communicate to the other. (Ala. Code § 8-2-8).

Binding the Principal.

Apparent authority binding when third party in good faith and exercising due care incurs liability or gives value on reliance. (Ala. Code § 8-2-6).

Set Offs.

Third party may set off, against any claim of principal arising out of same, all claims which he might have set off against agent before notice of agency. (Ala. Code § 8-2-9).

Negligence.

Unless required by or under authority of law to employ that particular agent, principal is responsible to third parties for negligence of his agent in transaction of business of agency, including wrongful acts committed by such agent in and as part of transaction of such business, and for agent's willful omission to fulfill obligations of principal. (Ala. Code § 8-2-7).

Liability.

Corporation liable for slanderous utterance made within line and scope of agent's employment; requirement of prior authorization or subsequent ratification overruled. (385 So.2d 630).

Members of Armed Forces.

No statutory provision.

Warranty.

Person acting as agent thereby warrants, to all who deal with him in that capacity, that he has authority. (Ala. Code § 8-2-5).

See category 21 Property, topic 21.15 Powers of Attorney.

2.02 ASSOCIATIONS:

Generally, no statutory or common law definition of unincorporated association; common law definition presumptively in effect. Specific forms of unincorporated associations regulated by statute. (Ala. Code § 10-4-1 to -323). Uniform Unincorporated Nonprofit Association Act adopted with modifications. (Ala. Code § 10-3B-1, et seq.).

Formation.

No general statutory provisions governing formation of unincorporated associations; common law methods presumptively in effect. (894 F.Supp. 1538). Organization of certain specific associations governed by statute. (Ala. Code § 10-4-1 to -323).

Rights and Powers.

Unincorporated association has power to adopt constitution and enact bylaws, rules and regulations that are not illegal or contrary to public policy. (387 So.2d 140). Constitution, bylaws, rules and regulations constitute contract between members, which is binding upon each member. (387 So.2d 140).

Generally, absent statute, unincorporated association without capacity to acquire and hold legal title to real property. (281 Ala. 297, 202 So.2d 83). Statutory provisions expressly authorize certain unincorporated associations to take, hold, convey and defend interest in real property. (Ala. Code § 10-4-4; Ala. Code § 10-4-21; Ala. Code § 10-4-41; Ala. Code § 10-4-60; Ala. Code § 10-4-133; Ala. Code § 10-4-192; Ala. Code § 10-4-320).

Liabilities.

Unincorporated association may be liable in tort for wrongful acts of members acting collectively in business for which association organized, and responsible for torts of members or employees which association encourages or ratifies. (599 So.2d 9).

Actions.

Actions may be maintained by and in name of unincorporated association and against and in name of any such association for any cause of action upon which members of such organization may be sued. (Ala. Code §§ 6-7-80 to -81). Property of unincorporated association may be liable for satisfaction of judgment. (Ala. Code § 6-7-81).

Dissolution.

No specific statutory or common law provision.

Professional Associations.

Note: Following discussion applies only to professional associations organized prior to Jan. 1, 1984. New professional associations may not be formed in Alabama after that date. (Ala. Code § 10-10-2[b]). Professional corporations may still be formed. See topic 2.03 Corporations, subhead Professional Corporations.

Formation by any one or more persons duly licensed to practice profession who desire to associate for purpose of rendering one particular type of professional service. (Ala. Code § 10-10-4).

Professional association means an unincorporated association as distinguished from partnership; professional service means any type of professional service which requires license from state court or regulatory licensing board or other like agency. (Ala. Code § 10-10-1).

Articles of association must be executed and recorded in office of probate court in county in which association's principal office located. Recording fee $2.50 plus 15¢ per 100 words. (Ala.

Code § 10-10-5). Within 30 days after organization and within 30 days after Nov. 1 of each year statement must be filed with Secretary of State showing names and addresses of all members or shareholders certifying that all duly licensed to practice in Ala. $50 penalty for failure to file. (Ala. Code § 10-10-10).

Name for association at discretion of associators but must have suffix "Professional Association" or "P.A." (Ala. Code § 10-10-5).

Rights and Powers.

Association may render only one specific kind of professional service and cannot engage in any other business. (Ala. Code § 10-10-6). May own real or personal property appropriate for rendering professional service. (Ala. Code § 10-10-6). May invest its funds in real estate, mortgages, stocks, bonds, or any other type of investment. (Ala. Code § 10-10-6). May render services only through officers, employees and agents duly licensed or otherwise legally authorized to render professional service within state. (Ala. Code § 10-10-12). May contract in own name, take, hold and sell real and personal property in name and likewise sue and be sued. (Ala. Code § 10-10-9). Conveyance in name of association executed by president and attested by secretary is conclusive against association, board of governors and members. (Ala. Code § 10-10-9).

Ownership.

Articles of association may provide for stock-type or nonstock organization. Membership if nonstock, or stock or certificate of membership if stock-type, is freely transferrable absent limitations in articles of association. Stock purchase or membership limited to persons duly licensed to render same professional services. (Ala. Code § 10-10-7).

Governing body is board of governors elected by members or shareholders and represented by officers elected by board. Bylaws may be promulgated by members or authority to promulgate may be delegated to board of governors in articles. (Ala. Code § 10-10-8).

Existence continued as separate entity independent of members or shareholders for period of time provided in articles or until dissolved by two-thirds vote. Partnership dissolution laws not applicable. (Ala. Code § 10-10-15).

Liabilities.

Members or shareholders not individually liable for debts or claims against association unless such individual personally participated in transaction giving rise to debt or claim. (Ala. Code § 10-10-11). Assets of professional association not liable to attachment for individual debt of member or shareholder. (Ala. Code § 10-10-9).

Laws applicable to relationship between person furnishing professional service and person receiving such service, including liability arising out of such professional service and laws governing confidential relationships, not modified. (Ala. Code § 10-10-11).

Dissolution.

In stock-type associations, board of governors as trustees apply assets first to payment of debts of association and then to holders of stock as per articles. (Ala. Code § 10-10-16). In nonstock-type associations, assets distributed or sold and net proceeds applied first to payment of association's debts and remainder distributed to members as per articles. (Ala. Code § 10-10-16).

See topic 2.03 Corporations, subhead Professional Corporations.

2.03 CORPORATIONS:

For unincorporated associations, see topic 2.02 Associations.

Alabama Business Corporation Act (Ala. Code § 10-2B-1.01, et seq.) is based on Revised Model Business Corporation Act (1984), which is reprinted in Part III of this publication. Certain material deviations from Revised Model Business Corporation Act set out below.

General Supervision.

Secretary of State, Corporate Division, 11 South Union Street, Suite 207, Montgomery 36104.

Purposes.

May be organized under chapter for any lawful purpose or purposes. (Ala. Code § 10-2B-3.01).

Name.

For any corporation organized after Jan. 1, 1981 or that amends articles after that date to change name, corporate name must contain word "corporation", or "incorporated", or abbreviation of those words, or if banking corporation words "bank", "banking", or "bankers". (Ala. Code § 10-2B-4.01). Corporate name may not be same as or deceptively similar to: (1) Name of corporation incorporated or authorized to transact business in state; (2) name reserved or registered under § 4.02 or § 4.03; or (3) fictitious name adopted by foreign corporation authorized to transact business in state because its real name unavailable. (Ala. Code § 10-2B-4.01).

Term of Corporate Existence.

Unless delayed effective date specified, corporate existence begins when articles of incorporation filed. (Ala. Code § 10-2B-2.03). Unless articles of incorporation provide otherwise, corporation has perpetual duration. (Ala. Code § 10-2B-3.02).

Incorporators.

One or more persons may act as incorporator(s). (Ala. Code § 10-2B-2.01). "Person" means "individual" or "entity." (Ala. Code § 10-2B-1.40[17]).

Articles of Incorporation.

Names and addresses of initial directors and purposes of corporation must be stated. (Ala. Code § 10-2B-2.02). In addition to items stated in Model Act, articles of incorporation may state that right to adopt initial bylaws of incorporation is reserved to shareholders. (Ala. Code § 10-2B-2.02). Unlike Model Act, Act does not permit articles of incorporation to specify that personal liability may be imposed against shareholders for debts of corporation or to eliminate or limit liability of director for breach of director's duty of loyalty to corporation or shareholders. (Ala. Code § 10-2B-2.02). Two copies of articles of incorporation must be filed. (Ala. Code § 10-2B-1.25).

Filing of Articles.

Articles of incorporation must be filed with probate judge of county of corporation's initial registered office. (Ala. Code § 10-2B-2.01).

Incorporation Tax or Fee.

Fees for filing of articles of incorporation: $40 to Alabama Secretary of State; and $35 to probate judge in county of incorporation. (Ala. Code § 10-2B-1.22).

License to Do Business.

Unless delayed effective date specified, corporate existence begins when articles of incorporation filed. (Ala. Code § 10-2B-2.03). For authority to transact business for foreign corporations, see subhead Foreign Corporations, infra.

Organization.

Initial directors named in articles of incorporation conduct organizational meeting. (Ala. Code § 10-2B-2.05).

Paid in Capital Requirements.

No statutory provision.

Amendment of Articles.

Corporation may amend articles of incorporation at any time to add or change provision required or permitted in articles, or to delete provision not required in articles. (Ala. Code § 10-2B-10.01). Board of directors may amend articles without shareholder action in certain circumstances. (Ala. Code § 10-2B-10.02). Generally, board of directors submits proposed amendments to shareholders for vote. (Ala. Code § 10-2B-10.03).

Increase or Decrease of Authorized Capital Stock.

If authorized capital stock to be increased to accommodate stock split and corporation has only that class of outstanding stock, increase in authorized shares may be accomplished by amendment of articles by board of directors. (Ala. Code § 10-2B-10.02[4]). Other amendments to articles of incorporation regarding stock must be approved by shareholders. (Ala. Code § 10-2B-10.03).

Bylaws.

Unless right to adopt initial bylaws reserved to shareholders in articles of incorporation, board of directors adopts initial bylaws. (Ala. Code § 10-2B-2.06). Bylaws may contain any provision regulating affairs of corporation not inconsistent with law or articles of incorporation. (Ala. Code § 10-2B-2.06).

Stock.

Articles of incorporation must prescribe classes of shares and number of shares in each class corporation is authorized to issue. (Ala. Code § 10-2B-6.01[a]). If more than one class authorized, articles must prescribe distinguishing designation for each class and preferences, limitations, and relative rights of each class. (Ala. Code § 10-2B-6.01[a]). Articles must authorize at least one class with unlimited voting rights, and at least one class entitled to receive net assets of corporation upon dissolution which may be same as those shares with voting rights. (Ala. Code § 10-2B-6.01[b]).

Share Certificates.

Unless articles or bylaws provide otherwise, board of directors may authorize issue of some or all of shares of any or all of corporation’s classes or series without certificates. (Ala. Code § 10-2B-6.26[a]). After issue or transfer of shares without certificates, corporation must send shareholder written statement of certain information. (Ala. Code § 10-2B-6.26[b]).

Issuance of Shares.

Shares may be issued for money, labor done or property actually received. (Ala. Code § 10-2B-6.21).

Transfer of Stock.

Articles of incorporation, bylaws, agreement among shareholders, or agreement between shareholders and corporation may restrict right to transfer stock. (Ala. Code § 10-2B-6.27). Restriction must be noted conspicuously on front or back of stock certificate or be contained in information statement required by Ala. Code § 10-2B-6.26(b). (Ala. Code § 10-2B-6.27). Even if not so noted, restriction enforceable against person with actual knowledge of restriction. (Ala. Code § 10-2B-6.27).

Uniform Simplification of Fiduciary Security Transfers Act repealed eff. Jan. 1, 1997.

Uniform Commercial Code adopted. (Ala. Code § 7-1-101, et seq.). See category 3 Business Regulation and Commerce, topic 3.09 Commercial Code.

Stock Transfer Tax.

None.

Shareholders.

Based on "opt-in" § 6.30(b) of Model Act. Shareholder has preemptive rights except as limited in articles of incorporation. No preemptive rights as to shares issued as, or in connection with, compensation or shares sold for consideration other than money. (Ala. Code § 10-2B-6.30).

Shareholders' Actions.

Common law rules regarding such actions apply. Shareholders may commence judicial proceeding to remove director for fraud, dishonesty, gross abuse of authority or if removal is in best interest of corporation. (Ala. Code § 10-2B-8.09). Minority shareholders may commence proceeding against majority shareholders and directors for oppression, particularly in close corporation. (621 So.2d 1235; Ala. Code § 10-2B-14.30[2][ii]). See also subhead Appraisal, infra.

Shareholders' Liabilities.

Shareholders not personally liable for acts or debts of corporation. (Ala. Code § 10-2B-6.22).

Shareholders' Meetings.

Once holders of at least 10% of votes entitled to be cast at special meeting properly request such meeting, then corporation must, within 21 days of receipt of such demand, cause notice to be given of meeting. (Ala. Code § 10-2B-7.02). If notice not delivered, or if special meeting not held, holders of at least 10% of votes entitled to be cast may call special meeting. (Ala. Code § 10-2B-7.02). Court may order meeting if annual meeting not held within earlier of 12 months after end of fiscal year or 15 months after last annual meeting. (Ala. Code § 10-2B-7.03).

Notice of special meeting must include statement of purpose for which meeting is called. (Ala. Code § 10-2B-7.05).

Stock or bonded indebtedness of corporation may not be increased at meeting unless notice of such meeting given under § 234 of Constitution of Alabama. (Ala. Code § 10-2B-7.05).

Corporation may accept authority of revoked proxy, unless notice of such revocation received by corporation before proxy exercised. (Ala. Code § 10-2B-7.22).

Except as provided in articles, action required or permitted to be taken at shareholders meeting may be taken without meeting if action taken by all shareholders entitled to vote and evidenced by written consent signed by all shareholders entitled to vote. (Ala. Code § 10-2B-

7.04[a]).

Voting Trusts.

One or more shareholders may create voting trust by signing agreement setting out provisions of trust and transferring shares to trustee. (Ala. Code § 10-2B-7.30).

Directors.

Director must be natural person at least 19 years old. (Ala. Code § 10-2B-8.02). Number of directors within variable range may be fixed by board of directors only if authorized by articles. (Ala. Code § 10-2B-8.03[c]).

Classes.

If articles authorize dividing shares into classes, articles may authorize elections of all or specified number of directors by holders of one or more authorized classes of shares. (Ala. Code § 10-2B-8.04).

Directors’ Meetings.

May be held in or out of state. (Ala. Code § 10-2B-8.20). Director deemed present in person at meeting if using means of communication whereby he and other persons participating in meeting may simultaneously hear each other during meeting. (Ala. Code § 10-2B-8.20). Regular meetings of board of directors may be held with or without notice as prescribed by bylaws. (Ala. Code § 10-2B-8.22). Unless articles of incorporation or bylaws provide otherwise, special meetings require at least two days’ notice of date, time, and place of meeting and notice need not describe purpose of special meeting. (Ala. Code § 10-2B-8.22). Unless articles of incorporation or bylaws require greater number, quorum consists of majority of fixed number of directors if corporation has fixed board size, or majority of fixed number of directors prescribed, or if no number prescribed number in office immediately before meeting begins, if corporation has variable-range size board. (Ala. Code § 10-2B-8.24). Unless articles of incorporation or bylaws provide otherwise, action required or permitted to be taken at board of directors’ meeting may be taken without meeting if taken by all members of board and evidenced by one or more written consents describing action taken and signed by each director. (Ala. Code § 10-2B-8.21).

Powers and Duties of Directors.

Corporate powers exercised by or under authority of, and business and affairs of corporation managed under direction of, board of directors, subject to articles or shareholder agreement authorized under § 10-2B-7.32. (Ala. Code § 10-2B-8.01[b]).

Liabilities of Directors.

Fiduciary obligations of directors, officers, employees and controlling shareholders not abrogated or limited by Alabama Business Corporation Act. (Ala. Code § 10-2B-8.31). Director or officer must not act with intent to depreciate stocks or bonds with further intent to buy depreciated stocks or bonds. (Ala. Code § 10-2B-8.32). Director must discharge duties in good faith, with care ordinarily prudent person in like position would exercise under similar circumstances, and in manner director reasonably believes to be in best interests of corporation. (Ala. Code § 10-2B-8.30[a]).

Officers.

Corporation has officers described in bylaws or appointed by board of directors; no requirement for specific officers in Act. (Ala. Code § 10-2B-8.40). Unless bylaws provide otherwise, same person may hold more than one office. (Ala. Code § 10-2B-8.40[d]).

Liabilities of Officers.

Officer must discharge duties in good faith, with care ordinarily prudent person in like position would exercise under similar circumstances, and in manner officer reasonably believes to be in best interests of corporation. (Ala. Code § 10-2B-8.42[a]). See also subhead Liabilities of Directors, supra.

Indemnification of Directors and Officers.

Generally permissive, but mandatory under certain circumstances. (Ala. Code §§ 10-2B-8.51; 10-2B-8.52; 10-2B-8.56). In addition to purchasing indemnification insurance on behalf of directors, officers, employees, and agents, corporation may furnish similar protection, including but not limited to trust funds and self-insurance reserves. (Ala. Code § 10-2B-8.57).

Principal Office.

No statutory provision. Corporation must continuously maintain registered office in state, which may be same as any of its places of business. (Ala. Code § 10-2B-5.01; Ala. Code § 10-2B-15.07).

Resident Agent.

Corporation must continuously maintain registered agent in state. (Ala. Code § 10-2B-5.01). If none, or agent cannot with reasonable diligence be served, corporation may be served as provided by ARCP. (Ala. Code § 10-2B-5.04).

General Powers of Corporations.

Unless articles of incorporation provide otherwise, corporation has same powers as individual to do all things necessary or convenient to conduct business. (Ala. Code § 10-2B-3.02). Ultra vires defense eliminated by Ala. Code § 10-2B-3.04, except for specific instances cited therein. (407 F. Supp. 1270, 479 So.2d 720).

Dividends.

Right to declare dividends limited by articles of incorporation and Ala. Code § 10-2B-6.40(c). (Ala. Code § 10-2B-6.40[a]). Distributions to shareholders prohibited where, following distribution, corporation would be unable to pay debts as due in ordinary course or corporation's total assets would be less than sum of total liabilities plus amount required upon dissolution to satisfy preferential rights of shareholders whose preferential rights are superior to those receiving distribution. (Ala. Code § 10-2B-6.40[c]). Directors can be held personally liable for unlawful declarations of dividends. (Ala. Code § 10-2B-8.33).

Unclaimed Dividends.

See category 21 Property, topic 21.01 Absentees, subhead Escheat.

Sale or Transfer of Corporate Assets.

Statutory authority limited by Constitution of Alabama. (Ala. Code § 10-2B-12.02). Sale or transfer, otherwise than in usual and regular course of business, generally must be recommended by board to shareholders and approved by each voting group entitled to vote, by two-thirds of all votes of such group entitled to be cast. (Ala. Code § 10-2B-12.02).

Books and Records.

Foreign corporations having principal offices in Alabama subject to same recordkeeping requirements imposed upon domestic corporations. (Ala. Code § 10-2B-16.01). Any shareholder of domestic corporation or foreign corporation may inspect and copy any records of corporation set forth in Ala. Code § 10-2B-16.01 by giving corporation written notice of demand at least five business days before date on which he or she wishes to inspect and copy. (Ala. Code § 10-2B-

16.02). Any shareholder of domestic corporation or of foreign corporation who has been shareholder of record for 180 days immediately preceding his or her demand or who is holder of record of at least 5% of all outstanding shares (or voting trust certificates) of corporation has right to examine, at any reasonable time or times, for any proper purpose, all books and records of account, minutes, and record of shareholders by giving corporation written notice of demand, stating purpose thereof, at least five business days before date on which he or she wishes to inspect and copy such records. (Ala. Code § 10-2B-16.02). If corporation engaged in banking, records of borrowers and depositors who are neither officers, directors or employees nor related to or engaged in business with officers, directors or employees are not subject to examination without court order after in camera inspection; records of bank corporation do not include reports of examination by state or federal supervisory agencies. (Ala. Code § 10-2B-16.02). Any officer, agent, or corporation refusing to allow examination without reasonable cause liable to shareholder making demand for penalty of amount not to exceed 10% of value of shares owned by shareholder. (Ala. Code § 10-2B-16.02).

Reports.

Domestic and foreign corporations doing business in Alabama must, between Jan. 1 and Mar. 15 of each year, file with Secretary of State annual report setting forth: (1) Name of corporation and state of incorporation; (2) address of registered office and name of registered agent; (3) address of principal office including, in case of foreign corporation, address of principal office in Alabama or state of incorporation; (4) names and addresses of president and secretary; and (5) brief statement of character of business in Alabama. (Ala. Code § 10-2B-16.22). Filing of public record information filed with Department of Revenue may serve as annual report, provided $10 fee to State of Alabama accompanies filing. (Ala. Code § 10-2B-16.22).

Corporate Bonds or Mortgages.

Subject to limitations of Constitution of Alabama, corporation may mortgage or otherwise encumber any or all of its property, whether or not in usual and regular course of business. (Ala. Code § 10-2B-12.01).

Merger and Consolidation.

Statutory authority limited by Constitution of Alabama. (Ala. Code § 10-2B-11.01). Board of directors of each corporation must adopt, and shareholders of each corporation (if required by Ala. Code § 10-2B-11.03) must approve, plan of merger. (Ala. Code § 10-2B-11.01). If shareholder approval is required, transaction must be approved by each voting group entitled to vote by two-thirds of all votes of such group entitled to be cast. (Ala. Code § 10-2B-11.03). Parent corporation must own at least 80% of outstanding shares of each class of subsidiary corporation to merge subsidiary into parent without approval of shareholders of parent or subsidiary. (Ala. Code § 10-2B-11.04). Claims existing against corporation party to merger may be prosecuted as if merger had not taken place, or surviving corporation may be substituted in action for corporation whose existence ceased. (Ala. Code § 10-2B-11.06).

Corporations may merge with any other business entity, including limited liability companies, general partnerships, limited partnerships, registered limited liability partnerships and real estate investment trusts. (Ala. Code § 10-15-4). Merger must be approved in accordance with procedure and by shareholder vote required by § 10-2B-11.03 unless articles of incorporation provide otherwise. (Ala. Code § 10-15-4[c][1]). If articles of incorporation provide for approval by less than all of corporation’s shareholders, approval of merger subject to dissenters’ rights. (Ala. Code § 10-15-4[c][1]). No merger of corporation into general or limited partnership may be effected without consent in writing of each shareholder who is to be general partner in surviving entity. (Ala. Code § 10-15-4[c][1]). Merger with foreign business entity permitted if allowed under law of foreign jurisdiction. (Ala. Code § 10-15-6).

Corporations may convert to or from any other business entity including, limited liability companies, general partnerships, limited partnerships, registered limited liability partnerships and real estate investment trusts. (Ala. Code § 10-15-3). Conversion must be approved by all shareholders unless articles of incorporation provide otherwise. (Ala. Code § 10-15-3[a][1]). Dissenters' rights arise if articles allow for less than unanimous approval of conversion. (Ala. Code § 10-15-3[a][1]). No conversion of corporation to general or limited partnership may be effected without consent in writing of each shareholder who is to be general partner in resulting business entity. (Ala. Code § 10-15-3[a][1]). Conversion to or from foreign business entity permitted if allowed under law of foreign jurisdiction. (Ala. Code § 10-15-6).

Share Exchanges or Acquisitions.

Subject to limitations of Constitution of Alabama, corporation may acquire all outstanding shares of another corporation if board of directors of each corporation adopts plan of exchange and, if required by Ala. Code § 10-2B-11.03, shareholders approve plan of exchange. (Ala. Code § 10-2B-11.02[a]). Plan of exchange must set forth name of corporation whose shares will be acquired, name of acquiring corporation, terms and conditions of exchange, and manner and basis of exchange. (Ala. Code § 10-2B-11.02[b]).

Tender Offers.

No specific statutory provision, but see subhead Share Exchanges or Acquisitions, supra, and subhead Merger and Consolidation, supra.

Dissolution.

Voluntary dissolution may be effected by: (1) Unanimous written consent of shareholders; or (2) resolution of board of directors followed by recommendation of board to shareholders that corporation be dissolved. (Ala. Code § 10-2B-14.02). Unless articles of incorporation provide for greater or lesser vote, but in no event less than majority vote, proposal to dissolve must be approved by each voting group entitled to vote by two-thirds of all votes entitled to be cast by that voting group. (Ala. Code § 10-2B-14.02). If corporation dissolved by written consent of shareholders, must be stated in articles of dissolution and copy of written consents of shareholders must be attached thereto. (Ala. Code § 10-2B-14.03). Articles of dissolution, and articles of revocation if corporation elects to revoke its dissolution, filed with probate judge of county in which corporation's articles of incorporation filed. (Ala. Code §§ 10-2B-14.03 to -14.04). Dissolution does not affect limited liability of shareholders, except with respect to value of assets distributed to shareholders in liquidation of corporation. (Ala. Code § 10-2B-14.05). Dissolved corporation that publishes notice of dissolution in newspaper of general circulation in county in which principal office located is not subject to unknown claims and certain other claims unless claimant commences proceeding to enforce claim within two years of publication of such notice. (Ala. Code § 10-2B-14.07). Secretary of State may seek to administratively dissolve corporation if corporation has not filed annual report within six months after due, or upon certain other conditions. (Ala. Code §§ 10-2B-14.20 to -14.21).

Insolvency and Receivers.

Creditor may institute dissolution proceeding against corporation if creditor has obtained judgment against corporation, execution on judgment returned unsatisfied, and corporation insolvent, or if corporation admits in writing creditor's claim owing and corporation insolvent. (Ala. Code § 10-2B-14.30). Court may appoint receiver to wind up business of and liquidate corporation. (Ala. Code § 10-2B-14.32). Individual, domestic corporation, foreign corporation authorized to do business in state, or other entity may serve as receiver. (Ala. Code § 10-2B-14.32). Court may require receiver to post bond. (Ala. Code § 10-2B-14.32).

Close Corporations.

If formed before Jan. 1, 1995 governed by Ala. Code. §§ 10-2A-300 to -313.

Appraisal.

Shareholder entitled to dissent from, and obtain payment of fair value of shares in event of, certain corporate actions set forth in Ala. Code § 10-2B-13.02. To assert dissenters' rights, shareholder must deliver to corporation, prior to shareholder vote on proposed action, written notice of intent to demand payment if proposed action is taken, and must not vote shares in favor of proposed action. (Ala. Code § 10-2B-13.21). Upon receipt of payment demand from dissenter or as soon as proposed action taken, corporation must offer to pay dissenter amount corporation estimates to be fair value of dissenter's shares, plus accrued interest. (Ala. Code § 10-2B-13.25). If dissenter dissatisfied with corporation's offer of payment, dissenter must within 30 days of corporation's offer of payment notify corporation in writing of dissenter's estimate of fair value of shares and interest due, and demand payment of dissenter's estimate. (Ala. Code § 10-2B-13.28). Corporation may then, within 60 days after receiving payment demand, petition court to determine fair value of shares and accrued interest. (Ala. Code § 10-2B-13.30[a]). All dissenters, whether or not residents of state, whose demands remain unsettled are parties to appraisal proceeding and must be served with copy of appraisal petition. (Ala. Code § 10-2B-13.30[c]). Costs of appraisal proceeding generally assessed against corporation, unless dissenters acted arbitrarily, vexatiously, or not in good faith. (Ala. Code § 10-2B-13.31).

Foreign Corporation.

May not maintain action without certificate of authority. (Ala. Code § 10-2B-15.02). All contracts made in state by foreign corporations prior to obtaining certificate of authority void at action of foreign corporation or any person claiming through or under foreign corporation by virtue of contract. (Ala. Code § 10-2B-15.02[a]). Service of process upon foreign corporation is made upon registered agent of foreign corporation or in accordance with ARCP. (Ala. Code § 10-2B-15.10).

Any corporation or bank of another state or national bank or corporation organized under laws of U.S. located in another state may act as fiduciary in Alabama without qualification if: (1) Files verified statement with commissioner of revenue and appoints commissioner to receive service of process, (2) it is authorized by laws of own state to act as fiduciary, and (3) laws of own state extend same privileges to Alabama banks and corporations on same terms. (Ala. Code §§ 10-2B-15.40 to -15.45).

Taxation of Corporate Property.

See category 22 Taxation, topics 22.10 Income Tax, subhead Income-Taxed Corporations; 22.15 Property Taxes; 22.05 Employment Taxes, subhead Unemployment Compensation Tax.

Corporate Shares Tax.

Annual tax on shares of corporations organized under laws of Alabama or doing business in state. (Ala. Code § 40-14A-31). Financial institutions, insurance companies, certain public utilities, real estate investment trusts and certain not-for-profit corporations, including property-owners associations, are exempted. (Ala. Code § 40-14A-32). For taxable year beginning Jan. 1, 2000, tax levied at rate of $5.30 per $1,000 of taxable shares base, total not to exceed $500,000. (Ala. Code § 40-14A-31). For taxable year beginning Jan. 1, 2001, levied at rate of $1.33 per $1,000 of taxable shares base, total not to exceed $125,000. (Ala. Code § 40-14A-31). Corporate shares tax was repealed for all tax years beginning on or after Jan. 1, 2002. (Act 99-650; Const. Amend. 662). Taxable shares base equals sum of capital stock, additional paid-in capital (without reduction for treasury stock) and retained earnings, less certain deductions (including book value of inventory, equity investments in other Alabama corporations and federal obligations). (Ala. Code § 40-14A-33). This amount is then apportioned to Alabama and potentially reduced according to certain factors. (Ala. Code § 40-14A-34). Tax accrues as of Jan. 1 of each year and is due not later than Mar. 15 of each year. (Ala. Code § 40-14A-35). Repealed for all tax years beginning after Jan. 1, 2002. (Act 2000-705).

Business Privilege Tax.

Annual privilege tax imposed on every corporation, limited liability entity and disregarded entity doing business in Alabama or organized under laws of Alabama. (Ala. Code § 40-14A-22). Tax accrues as of first day of fiscal year and payable not later than two and one-half months after beginning of fiscal year for corporations; not later than three and one-half months after beginning of fiscal year for limited liability entities; and not later than time owner of disregarded entity is required to file its return. (Ala. Code § 40-14A-25-26). Amount of tax determined by multiplying net worth by rate based on taxable income, ranging from 25¢ per $1,000 for income less than $1 to $1.75 per $1,000 for income greater than $2,500,000. (Ala. Code § 40-14A-22). Minimum tax is $100 (Ala. Code § 40-14A-22[c]), except for financial institutions (Ala. Code § 40-14A-22[f]). For most corporations, maximum tax for full year is $15,000. (Ala. Code § 40-14A-22[d]). Maximum tax is $3,000,000 for financial institutions, insurance companies and public utilities, and $500,000 for real estate investment trusts and $100 for certain not-for-profit corporations, including property-owners associations. (Ala. Code § 40-14A-22[d]). Net worth of corporations, determined as of first day of corporation's taxable year, equals sum of capital stock and additional paid-in capital (without reduction for treasury stock), retained earnings (including amounts designated for payment of dividends not yet paid), excessive related-party debt and compensation or distributions to 5% owners to extent in excess of $500,000. (Ala. Code § 40-14A-23). Deducted from net worth is book value of equity investment in other taxpayers doing business in Alabama (unless corporation is dealer in securities), book value of financial institutions' equity interest in entity not doing business in Alabama so long as financial institution owns more than 50%, unamortized portion of goodwill and core deposit intangibles due to purchase of another entity, balance of any amount amortized over period of years pursuant to pronouncement 106 of Financial Accounting Standards Board, and amount that financial institutions' net worth pursuant to section exceeds 6% of assets. (Ala. Code § 40-14A-23). Deduction limited only to taxpayers doing business in Alabama held unconstitutional in violation of Commerce Clause. (953 So.2d 1240). Separate rules for determining net worth of limited liability entities. (Ala. Code § 40-14A-23). Net worth is then apportioned to Alabama and potentially reduced according to certain factors (including 30% reduction for Alabama S corporations). (Ala. Code § 40-14A-24). Initial return due within two and one-half months after incorporation, qualification or registration. (Ala. Code § 40-14A-29).

Professional Corporations.

Governed by Revised Alabama Professional Corporation Act. (Ala. Code §§ 10-4-380 to -406). May be formed only for purpose of rendering service that may be lawfully performed only pursuant to license issued by state.

Purposes.

Professional corporation may be formed only for purpose of rendering single professional service; provided, that medical and dental services may be rendered by same professional corporation. (Ala. Code § 10-4-383).

Applicability.

To corporation whose articles of incorporation include as stated purpose performance of professional services and state that incorporated under Act. (Ala. Code § 10-4-384).

Name.

Professional corporation governed by rules of regulating board of profession. Name must contain words "professional corporation" or abbreviation "P.C."; must not suggest purpose other than purpose contained in articles; and must not be deceptively similar to reserved name or name of existing corporation. (Ala. Code § 10-4-387).

Death or Disqualification of Shareholder.

Act contains extensive rules governing transfer of shares by operation of law upon death or disqualification. (Ala. Code § 10-4-389).

Issuance and Transfer of Stock.

Domestic professional corporation may issue shares of capital stock only to qualified persons (Ala. Code § 10-4-388) defined as: (1) Individuals authorized to render professional services permitted by professional corporation's articles; (2) general partnerships in which all partners are qualified as above; and (3) professional corporations (domestic or foreign) in which all shareholders are qualified as above (Ala. Code § 10-4-382). Shareholders may transfer shares only to qualified persons. Any shares issued in violation of this section void. (Ala. Code § 10-4-388).

Liability.

Employee of domestic professional corporation liable for negligent or wrongful act or omission in which he personally participates as if he rendered such services as sole practitioner. Personal liability of shareholder, employee, director or officer of domestic professional corporation no greater than that of shareholder, employee, director or officer of corporation organized under Alabama Business Corporation Act. Personal liability of shareholder, member, employee, director or officer of foreign professional corporation is determined under law of jurisdiction in which organized. (Ala. Code § 10-4-390).

Voting Trusts.

Voting trust with respect to shares of domestic professional corporation not valid unless all trustees and beneficiaries thereof are qualified persons, except that voting trust may validly continue for period of 12 months after death of deceased beneficiary or after beneficiary becomes disqualified person. (Ala. Code § 10-4-392).

Directors.

At least one director of domestic professional corporation and president of domestic professional corporation must be qualified persons; restriction does not apply during 12 month period following death of sole shareholder of domestic professional corporation. (Ala. Code § 10-4-393).

Amendments to Articles of Incorporation.

Legal representatives of estates of shareholders of domestic professional corporations who hold all outstanding shares of corporation may amend articles by signing written consent to such amendment. Articles of amendment must be executed in duplicate, verified and filed with probate judge of county in which articles filed. Such articles must set forth name of corporation, amendments adopted, date of adoption, and statement that legal representative owns all outstanding shares. (Ala. Code § 10-4-394).

Merger and Consolidation.

Domestic professional corporation may merge or consolidate with another corporation, or professional corporation, domestic or foreign. Upon such merger or consolidation surviving corporation must comply with Revised Alabama Professional Corporation Act if it renders professional services. Professional corporation may also merge with unincorporated professional association organized under provisions of Ala. Code § 10-10-1-16 provided that surviving corporation is domestic professional corporation. (Ala. Code § 10-4-395).

See topic 2.02 Associations, subhead Professional Associations.

Deeds.

See category 21 Property, topic 21.06 Deeds.

Nonprofit Corporations.

Alabama Nonprofit Corporation Act §§ 10-3A-1 to -225 based on 1964 ABA Model Act, with variations. Provisions omitted from Model Act: §§ 81 (Annual Report of Domestic and Foreign Corporations); 82 (Filling of Annual Report of Domestic and Foreign Corporations); 85 (Penalties Imposed Upon Corporation); 87 (Interrogatories by Secretary of State); and 88 (Information Disclosed by Interrogatories). Act provides for authorization and regulation of foreign nonprofit corporations. (Ala. Code § 10-3A-170 to -186). Labor unions, cooperative organizations, and organizations subject to insurance laws may not be organized under these provisions. (Ala. Code § 10-3A-4).

Infant Shareholders.

See category 14 Family, topic 14.10 Infants, subhead Corporations.

Limited Liability Companies.

See topic 2.06 Limited Liability Companies.

2.04 [RESERVED]

2.05 JOINT STOCK COMPANIES:

No statutory provisions. Term “corporation” wherever used in Constitution of Alabama includes joint stock companies and provisions as to corporations apply thereto. (Const. Art. XII § 241).

Purposes.

See topic 2.03 Corporations, subhead Purposes.

Formation.

No statutory provision.

Rights, Powers, and Liabilities.

See topic 2.03 Corporations.

Actions.

No statutory provision.

Dissolution.

See topic 2.03 Corporations, subhead Dissolution.

Massachusetts Trusts.

Term “business trust” includes Massachusetts Trusts. (Ala. Code § 10-13-15).

Professional Associations (or Corporations).

See topics 2.02 Associations and 2.03 Corporations.

2.06 LIMITED LIABILITY COMPANIES:

Alabama Limited Liability Company Act adopted. (Ala. Code § 10-12-1, et seq.).

Purpose.

May be organized for any lawful purpose. (Ala. Code § 10-12-3).

Name.

Limited liability company name shall contain words “Limited Liability Company” or abbreviation “L.L.C.” or “LLC” as last words of company name. Limited liability company name may not contain word or phrase which indicates or implies organization for purpose other than one or more of purposes contained in Articles. (Ala. Code § 10-12-5).

Formation.

May be formed by one or more persons by filing Articles with probate judge of county in which initial registered office of limited liability company located. (Ala. Code § 10-12-9).

Articles of Organization.

Must contain following: (1) Name of limited liability company; (2) period of duration, if not perpetual; (3) purpose(s) for which organized; (4) location and mailing address of initial registered office, and name of initial registered agent at that address; (5) name and mailing addresses of initial member or members and, if any, organizer; (6) right, if given, of member or members to admit additional members, and terms and conditions of admission; (7) circumstances, if any, under which cessation of membership of one or more members will result in dissolution; (8) if limited liability company to be managed by one or more managers, Articles must so state and must set out names and mailing addresses of manager or managers who are to serve as managers until their successors are elected and begin serving; and (9) any other provision, not inconsistent with law for regulation of limited liability company’s internal affairs. (Ala. Code § 10-12-10).

Property.

May be acquired, held and conveyed. (Ala. Code § 10-12-23).

Property Interest.

Membership interest is personal property. (Ala. Code § 10-12-6).

Admission of Additional Members.

Unless otherwise provided in operating agreement, additional members may be admitted upon written consent of all members. Effective time of admission of members is later of date of formation or date provided in operating agreement (or date of admission records if no operating agreement). (Ala. Code § 10-12-31).

Transferability of Member’s Interest.

Unless otherwise provided in operating agreement, membership interest in limited liability company assignable in whole or in part. Assignment entitles assignee only to financial rights of assignor to extent assigned; it does not dissolve limited liability company or entitle assignee to exercise management rights. (Ala. Code § 10-12-32). Unless otherwise provided in operating agreement, assignee may become member only upon unanimous consent of members. (Ala. Code § 10-12-33).

Liability to Third Parties.

Unless otherwise provided in Act, member of limited liability company not liable under judgment, decree or order of court, for debt, obligation or liability of limited liability company whether arising in contract, tort or otherwise, or for acts or omissions of any other member, manager, agent, or employee of limited liability company. Member may become liable by reason of member's own acts or conduct. Member may be liable to creditors for written agreement to make contributions to limited liability company. (Ala. Code § 10-12-20).

Form of Contributions.

Contributions of member may be in cash, property, services previously rendered, or promissory note, or other binding obligation to pay cash, convey property, or to render services. (Ala. Code § 10-12-26).

Dissolution.

Dissolution occurs upon occurrence of first of following events: (1) Events specified in Articles or operating agreement; (2) written consent of all members to dissolve; (3) when no remaining member, unless holders of all financial rights agree in writing within 90 days of cessation of membership of last member to continue legal existence and business and appoint one or more new members, or legal existence and business are continued and new member or members appointed in manner stated in articles or operating agreement; (4) when limited liability company not successor in merger or consolidation with one or more limited liability companies or other entities; or (5) upon entry of judicial dissolution. (Ala. Code § 10-12-37). Cessation of membership occurs upon occurrence of one or more of events specified in § 10-12-36.

Management.

Unless otherwise stated in Articles, management of limited liability company vested in members. If Articles vest management in one or more managers, managers have power to manage business or affairs of limited liability company as provided in operating agreement. Unless otherwise provided in operating agreement, manager(s): (1) Must be designated, appointed, elected, removed or replaced by vote, approval, or consent of more than one-half of number of members; (2) need not be members or natural persons; and (3) unless they have been earlier removed or have earlier resigned, hold office until successors elected and qualified. Articles of organization may provide for classes or groups of members or managers with certain rights, powers and duties, and may provide for future creation of additional classes or groups having such rights as may be created in manner provided in Articles, including rights, duties and powers senior to existing class or group. Articles may also grant right to vote on certain matters to specified classes or groups of members or managers based on per capita, number, financial interest, class, group or any other basis. Articles or operating agreement may also specify provisions with respect to any rights to vote including notice, waiver of notice, action by consent without meeting, record date, quorum, proxy or any other matter. (Ala. Code § 10-12-22).

Profits and Losses, income, deductions, and credits, and items of income, deduction, and credits of limited liability company allocated among members in manner provided in operating agreement. If operating agreement does not so provide, profits and losses, income, deductions, and credits, and items of income, deductions, and credits allocated on basis of pro rata value of contributions made by each member to extent contributions have been made and not returned. (Ala. Code § 10-12-28).

Filing Fees.

Fees for filing and issuance of certificates collected by judge of probate ("Probate") and Secretary of State ("State"): (1) Filing of Articles, $40 to State and $35 to Probate; (2) filing of articles of amendment and issuing certificate of amendment, $10 to Probate; (3) filing restated Articles, $25 to Probate and $10 to State; (4) filing report of name and address of registered agent or statement of change of address of registered agent or change of registered agent or both, $5 to State; (5) filing articles of dissolution, $5 to Probate and $10 to State; (6) filing application for foreign limited liability company for amended certificate of authority to transact business in Ala. and issuing amended certificate of authority, $25 to State; (7) filing certificate of cancellation of foreign limited liability company and issuing certificate, $20 to State; (8) filing copy of articles of merger, $5 plus 50¢ per page in excess of five pages to Probate; (9) filing application for registration as foreign limited liability company and issuing certificate of registration to transact business in Ala., $75 to State; and (10) filing any other statement or report of domestic or foreign limited liability company, $10 to State. (Ala. Code § 10-12-60). When appropriate, two checks must accompany document: one payable to Probate for all charges of Probate and one payable to State of Ala. for all charges of State. Check for State will be forwarded by Probate to State. (Ala. Code § 10-12-60).

Derivative Action.

Members may sue on behalf of limited liability company if members or managers with authority to do so have refused to bring action or if effort to cause members or managers to bring action unlikely to succeed. If member receives anything as result of action, court may award member reasonable expenses, including reasonable attorney's fees, with remainder of proceeds remitted to limited liability company. (Ala. Code § 10-12-25).

Duties of Care and Loyalty.

Only fiduciary duties owed by members and managers are duties of care and loyalty to limited liability companies and their members. (Ala. Code § 10-12-21).

Member-Managed.

Members owe duty to limited liability company and its members: (1) To account for and hold as trustee property, profit or benefit derived from conduct or winding up of business, or derived from use of limited liability company property, including appropriation of opportunity; (2) to refrain from dealing on behalf of party with interests adverse to limited liability company; (3) to refrain from competition prior to dissolution; (4) to refrain from grossly negligent or reckless conduct, intentional misconduct, or knowing violation of law; and (5) to discharge duties and exercise rights to limited liability company and its members consistent with obligation of good faith and fair dealing. (Ala. Code § 10-12-21).

Manager-Managed.

Member not manager must not disclose or use information from books and records of limited liability company to detriment of limited liability company or other members. Managers and members who, pursuant to operating agreement, exercise some or all managers' rights, to extent member exercises managerial authority, owe duty: (1) To account for and to hold as trustee property, profit or benefit derived from conduct or winding up of business, or derived from use of limited liability company property, including appropriation of opportunities; (2) to refrain from dealing on behalf of party with interests adverse to limited liability company; (3) to refrain from competition prior to dissolution; (4) to refrain from grossly negligent or reckless conduct, intentional misconduct, or knowing violation of law; and (5) to discharge duties and exercise rights consistent with obligation of good faith and fair dealing. (Ala. Code § 10-12-21).

Articles or operating agreement may not: (1) Unreasonably restrict right to information or access to records; (2) eliminate duty of loyalty; (3) unreasonably reduce duty of care; or (4) eliminate obligation of good faith and fair dealing. Articles or operating agreement may: (1) Modify duties of members; (2) identify types or categories of activities that do not violate duty of loyalty; (3) specify number or percentage of members or disinterested managers that may authorize or ratify, after full disclosure of material facts, specific act or transaction that would otherwise violate duty of loyalty; and (4) determine standards by which performance of obligation of good faith and fair dealing to be measured (provided, standards not manifestly unreasonable). (Ala. Code § 10-

12-21).

Merger and Consolidation.

Provisions for merger or consolidation contained in §§ 10-12-54 to -58. Effective Oct. 1, 2000, Act 2000-211 also governs merger of limited liability companies and exclusively governs conversion of limited liability companies. Limited liability companies may merge with or convert to any other business entity, including corporations, general partnerships, limited partnerships, registered limited liability partnerships and real estate investment trusts. (Ala. Code § 10-15-3, -4). Merger or conversion must be approved by all members unless articles of organization or operating agreement provide otherwise. (Ala. Code § 10-15-3, -4). No merger of limited liability company with or conversion to general or limited partnership may be effected without consent of each member who is to be general partner in surviving or resulting entity. (Ala. Code § 10-15-3, -4). Merger with or conversion to foreign business entity permitted if allowed under law of foreign jurisdiction. (Ala. Code § 10-15-6).

Foreign Limited Liability Companies.

Provisions for admission contained in §§ 10-12-46 to -53.

Professional Services.

Certain special rules for limited liability companies performing professional services contained in § 10-12-45, including provisions governing liability of members rendering professional services.

2.07 [RESERVED]

2.08 PARTNERSHIPS:

Alabama Uniform Partnership Act effective Jan. 1, 1997. (Ala. Code § 10-8A-101, et seq.; Ala. Code § 10-8A-1104). Alabama Uniform Partnership Act governs all partnerships formed after Jan. 1, 1997, unless partnership continuing business of dissolved partnership under Ala. Code § 10-8-102. Effective for all Alabama partnerships after Dec. 31, 2000. In interim, partnership formed prior to Jan. 1, 1997 may elect whether to be governed by these provisions in partnership agreement. (Ala. Code § 10-8A-1106).

Formation.

Association of two or more persons to carry on as co-owners business for profit. (Ala. Code § 10-8A-101[5]). Association formed under statute other than this Act, predecessor statute, comparable statute of another jurisdiction or any association existing in Ala. prior to Jan. 1, 1972 not partnership. (Ala. Code § 10-8A-202).

Partnership Property.

Property acquired is property of partnership not individual partners. (Ala. Code § 10-8A-203). Property is partnership property when (1) Acquired in name of partnership; (2) transferring interest indicates transfer to partnership. Presumed partnership property if purchased with partnership assets. (Ala. Code § 10-8A-204).

Rights and Liabilities of Partners Inter Se.

Partner credited with amount equal to partner's contributions and partner's share of partnership profits minus liabilities. Each partner entitled to equal share of profits and chargeable with share of losses in proportion to share of profits. Partnership must reimburse partner for payments made in ordinary course of partnership business. Partner has equal rights to manage partnership business, but may use or possess partnership property only on behalf of partnership. Partner not entitled to payment for services performed for partnership and may only become partner with consent of all partners. (Ala. Code § 10-8A-401). Partner has right to access partnership books and records. (Ala. Code § 10-8A-403).

Rights and Liabilities of Partners as to Third Persons.

Partners agents of partnership for purpose of its business. (Ala. Code § 10-8A-301[1]). Partnership liable for loss or injury resulting from wrongful act or omission of partner in ordinary course of business or with authority of partnership. (Ala. Code § 10-8A-305). Partners jointly and severally liable. (Ala. Code § 10-8A-306).

Dissolution.

Upon occurrence of: (1) Withdrawal in partnership at will, except under dissociation provision § 10-8A-601(2) to -(10); (2) end of term within 90 days of partner’s wrongful dissociation or death or by express will of all partners to dissociate in partnership for definite term or particular undertaking; (3) event agreed to in agreement; (4) event making partnership business unlawful; (5) economic purposes of partnership likely to be unreasonably frustrated; (6) upon application by partner or for transfer of partner’s transferrable interest, judicial determination that equitable to wind up partnership. (Ala. Code § 10-8A-801).

Administration of Partnership Property.

Partnership continues after dissolution only for purpose of winding up business. (Ala. Code § 10-8A-802; -803).

Liability After Dissolution.

Subject to provisions regarding statement of dissolution, partnership bound by partner’s acts after dissolution if appropriate for winding up partnership business or if would have bound partnership before dissolution if other party to transaction did not have notice of dissolution. (Ala. Code § 10-8A-804).

Dissociation.

Upon occurrence of: (1) Partnership notice of will to withdraw; (2) event agreed in partnership agreement to cause dissociation; (3) expulsion under agreement; (4) expulsion on unanimous vote of partnership under specified conditions; (5) expulsion by judicial determination on application by partnership or other parties under specified conditions; (6) becoming debtor in bankruptcy or related actions; (7) death or incapacity of partner; (8) other miscellaneous provision for trusts, estates and other entities not corporations or partnerships. (Ala. Code § 10-8A-601-705).

Authority of Partners.

Partnership may file statement of partnership authority which must include: (1) Name of partnership; (2) street address of chief executive officer and one office in state (if there is one); (3) names and mailing addresses of all partners or of agent appointed and maintained by partnership; (4) names of partners authorized to execute instrument transferring real property held in partnership name; and (5) may state general authority of partners to enter into other transactions on behalf of partnership. (Ala. Code § 10-8A-303). Subject to statement of authority in § 10-8A-303, partner agent of partnership for purposes of its business. Act of partner apparently carrying on partnership business binds partnership. (Ala. Code § 10-8A-301).

Out-of-State Partnerships.

No provisions.

Limited Partnership.

Alabama Limited Partnership Act of 1983, repealed Sept. 30, 1998. Alabama Limited Partnership Act ("LPA") adopted Oct. 1, 1998, effective until Dec. 31, 2011. (Ala. Code § 10-9B-101, et seq.).

Alabama Uniform Limited Partnership Act of 2010 ("ULPA") adopted Jan. 1, 2010, applies only to limited partnerships formed after Jan. 1, 2010 until Dec. 31, 2011, applies to all limited partnerships as of Jan. 1, 2012. (Ala. Code § 10-9C-1206).

Under LPA, limited partnership can be formed for lawful business which a partnership without limited partners may carry on, except insurance and banking. (Ala. Code § 10-9B-106).

Under ULPA, limited partnership can be formed for any lawful purpose except banking or insurance business and has perpetual duration. (Ala. Code § 10-9C-104). ULPA recognizes domestic and foreign limited liability limited partnerships. (Ala. Code § 10-9C-101).

Formation.

Under LPA, certificate of limited partnership must be filed with judge of probate in county in which registered office maintained. Must include name of limited partnership, registered office address and name and address of registered agent for service of process, name and mailing address of each general partner, and date of dissolution. (Ala. Code § 10-9B-201). All general partners shall sign. (Ala. Code § 10-9B-204).

Continuance of partnership beyond time originally fixed for duration thereof and addition or withdrawal of general partners effected by amendment to certificate in similar manner. (Ala. Code § 10-9B-202).

Under ULPA, certificate of limited partnership must be filed with judge of probate in county in which designated office maintained. Must include name of limited partnership, initial designated office address and name and address of initial agent for service of process, name and mailing address of each general partner, and whether limited partnership is limited liability limited partnership and, if so, purpose(s) for which organized. (Ala. Code § 10-9C-204).

Amendment or reinstatement of certificate under ULPA governed by Ala. Code § 10-9C-202. Amendment required for admission or dissociation of general partner, appointment of person to wind up limited partnership's activities, or if general partner knows of information in certificate of limited partnership to be false. (Ala. Code § 10-9C-202).

Name.

Under LPA, name of limited partnership must be put in certificate and must be followed by word "Limited," or abbreviations "L.P.", "LP" or "Ltd." (Ala. Code § 10-9B-102[1]). Name may not contain name of limited partner unless it is also name of general partner or business of limited partnership had been carried on under that name before admission of that limited partner. (Ala. Code § 10-9B-102[2]). Name may not contain words: "bank," "banking," "banker," "trust," "insurance," "insurer," "corporation," "incorporated," or any abbreviation of such words. (Ala. Code § 10-9B-102[3]).

Under ULPA, name of limited partnership that is not limited liability limited partnership must contain phrase "limited partnership" or "Limited", or abbreviations "L.P.", "LP" or "Ltd." and must not contain phrase "limited liability limited partnership" or abbreviation "LLLP" or "L.L.L.P.". (Ala. Code § 10-9C-108[b]). Name of limited liability limited partnership must contain phrase "limited liability limited partnership" or abbreviation "LLLP" or "L.L.L.P." and must not contain phrase "limited partnership" or "Limited", or abbreviations "L.P.", "LP" or "Ltd.". (Ala. Code § 10-9C-108[c]). Name may contain name of any partner. (Ala. Code § 10-9C-108[a]). Name may not contain words: “bank”, “banking”, “banker”, “trust”, “insurance”, “insurer”, “corporation”, “incorporated”, or any abbreviations of such words. (Ala. Code § 10-9C-108[g]).

Powers.

Under LPA, general partners have all powers of partner in partnership without limited partners. (Ala. Code § 10-9B-403). Limited partners may not participate in control of partnership for any purpose, or they will be liable as general partners to third parties transacting business with partnership who reasonably believe that limited partner is general partner. (Ala. Code § 10-9B-303).

Under ULPA, activities of limited partnership may be exclusively decided by general partner, or if more than one, by majority thereof, with certain enumerated exceptions. (Ala. Code § 10-9C-406). Limited partners may not participate in control of business for any purpose, or they will be liable as general partners to third parties transacting business with partnership who reasonably believe that limited partner is general partner. (Ala. Code § 10-9C-303).

Liabilities.

Under LPA, general partners have same liabilities as partners in partnerships without limited partners to partnership and other partners. (Ala. Code § 10-9B-403). Limited partner is not liable to third parties for obligations of limited partnership unless he is also general partner or, in addition to exercise of his rights and powers as limited partner, he participates in control of business. (Ala. Code § 10-9B-303).

In bankruptcy or insolvency of partnership no limited partner can claim to be creditor until claims of all other creditors are satisfied, except when limited partner has loaned money or transacted other business with partnership and gained status as general creditor. (Ala. Code § 10-9B-805).

Under ULPA, all general partners are liable jointly and severally for all obligations of limited partnership unless obligations incurred before person became general partner or while limited partnership is limited liability limited partnership, or if agreed by claimant or provided by law. (Ala. Code § 10-9C-404). Limited partner is not liable to third parties for obligations of limited partnership unless limited partner also general partner or, in addition to exercise of rights and powers as limited partner, limited partner participates in control of business. (Ala. Code § 10-9C-303).

No limited partner can claim to be creditor until claims of all other creditors are satisfied, except when limited partner has loaned money or transacted other business with partnership and gained status as general creditor. (Ala. Code § 10-9C-812).

Dissolution.

Under LPA, limited partnership dissolved and affairs to be wound up upon: (1) Event specified in certificate of limited partnership; (2) events specified in partnership agreement; (3) written consent of all partners; (4) event of withdrawal of general partner (as defined in § 10-9B-402), unless at time there is at least one other general partner with authority to carry on business of limited partnership, or within 90 days after withdrawal,all remaining partners agree in writing to continue business of limited partnership; or (5) entry of judicial dissolution under § 10-9B-802. (Ala. Code § 10-9B-801).

Under ULPA, limited partnership dissolved and affairs to be wound up upon: (1) Happening of event specified in partnership agreement; (2) written consent of all partners; (3) after dissociation of general partner (as defined in Ala. Code § 10-9C-603), if at least one general partner remains and consent to dissolve given within 90 days of dissociation by all remaining partners; (4) passage of 90 days after dissociation of last general partner unless new general partner admitted; (5) passage of 90 days after dissociation of last limited partner unless new limited partner admitted; or (6) entry of judicial dissolution under Ala. Code § 10-9C-802. (Ala. Code § 10-9C-801-802).

Foreign Limited Partnership.

Under LPA, foreign limited partnership must register before doing business in state. (Ala. Code § 10-9B-902). If there is failure to register, entity may not maintain lawsuit until it registers, but failure to register does not impair validity of prior contracts nor prevent defending lawsuits. (Ala. Code § 10-9B-907). Attorney general may sue to enjoin unqualified entities from conducting business in state. (Ala. Code § 10-9B-908).

Under ULPA, foreign limited partnership must register before doing business in state. (Ala. Code § 10-9C-902). If there is failure to register, entity may not maintain lawsuit until it registers, but failure to register does not impair validity of prior contracts nor prevent defending lawsuits. (Ala. Code § 10-9C-907). Partner of foreign limited partnership not liable for obligations of partnership solely by reason of lack of registration. (Ala. Code § 10-9C-907[d]). Attorney General may sue to enjoin unqualified entities from conducting business in state. (Ala. Code § 10-9C-908).

Actions.

When partnership sues, complaint must give individual names of partners. (190 Ala. 241, 67 So. 707). Partners may be sued in name of partnership alone, in which case judgment runs against partnership property only. (Ala. Code § 6-7-70). Any one or more of partners may be sued for damages for obligation of all. (Ala. Code § 6-7-70).

When suit is brought by or against a partnership, plaintiff not required to prove existence of partnership unless issue raised by specific negative averment. (ARCP 9).

Limited Liability Partnerships.

Alabama Limited Liability Partnership Act, as revised, governs effective Jan. 1, 1997.

Formation.

Registered limited liability partnership must file with judge of probate in county of partnership principal office and with Secretary of State registration stating name of partnership; address of principal office; brief statement of business of partnership. Fee of $35 to judge of probate and $40 to Secretary of State required. Annual fee of $70 to Secretary of State required. Registration effective immediately and partnership is for all purposes same entity existing prior to registration. (Ala. Code § 10-8A-1001).

Name.

Must contain words “Registered Limited Liability Partnership” or “L.L.P.” or “LLP” as last words or letters of name. Failure to disclose status as LLP upon entering contract may subject party to personal liability on contract or undertaking. (Ala. Code § 10-8A-1002).

Rights and Liabilities of Partners.

Partner not personally liable for debts or liabilities of registered LLP or other partners unless all partners agree otherwise. (Ala. Code § 10-8A-306).

Cancellation.

Registration cancelled by filing statement with judge of probate in county of registration setting forth name of partnership; date and place of registration; reason for cancellation; and effective date of cancellation. (Ala. Code § 10-8A-1005).

Taxation.

Limited liability partnership taxed as partnership in accordance with Ala. Code § 40-18-24. (Ala. Code § 10-8A-1109).

Professional Limited Liability Partnership.

Partners rendering professional services liable for own negligence, wrongful act or omission to same extent individual would be liable if sole practitioner. (Ala. Code § 10-8A-1010).

Foreign Registered Limited Liability Partnership.

Must register with Secretary of State before transacting business in State. (Ala. Code § 10-8A-1006). Failure to register or appoint and maintain registered agent prevents partnership from maintaining action in courts of State until registered. (Ala. Code § 10-8A-1008).

Merger and Conversions.

Merger and conversion of general partnerships and registered limited liability partnerships governed by § 10-8A-901, et seq. Mergers and conversions of limited partnerships governed by § 10-9B-1101, et seq. Effective Oct. 1, 2000 (Ala. Code § 10-15-1, et seq.), merger and conversion of general, limited and registered limited liability partnerships also governed by Act 2000-211. General, limited and registered limited liability partnerships may merge with or convert to any other business entity, including corporations, limited liability companies and real estate investment trusts. (Ala. Code § 10-15-3, -4). Merger or conversion must be approved by all partners unless partnership agreement provides otherwise. (Ala. Code § 10-15-3, -4). No merger of limited partnership or registered limited liability partnership with or conversion to general or limited partnership may be effected without consent in writing of each limited partner (in case of limited partnership) or partner (in case of registered limited liability partnership) who is to be general partner in resulting or surviving entity. (Ala. Code § 10-15-3, -4). Merger with or conversion to foreign business entity permitted if allowed under law of foreign jurisdiction. (Ala. Code § 10-15-6).

2.08A REAL ESTATE INVESTMENT TRUSTS:

Alabama Real Estate Investment Trust Act adopted. (Ala. Code § 10-13-1, et seq.).

Formation.

May be formed by filing declaration of trust with probate judge of county in which initial registered office of real estate investment trust is located. (Ala. Code § 10-13-6).

Declaration of Trust.

Must contain following: (1) Indicate that trust is real estate investment trust; (2) name of trust; (3) total number of shares of beneficial interest real estate investment trust authorized to issue; (4) annual meeting of shareholders after delivery of annual report; (5) election of trustees at least every three years; (6) number and names of initial trustees; (7) name and address of resident agent; and (8) if shares are divided in classes, description of each class including preferences, conversion, other rights, voting powers, and others. Must be signed and acknowledged by each trustee. (Ala. Code § 10-13-6).

Restrictions.

At least 75% of value of real estate investment trust’s assets must be held in real estate assets, mortgages or mortgage related securities, governmental securities, cash and cash equivalents. Real estate investment trust may not use or apply land for farming, agriculture, horticulture or similar purposes. (Ala. Code § 10-13-10).

Amendment of declaration of trust requires affirmative vote of two-thirds of shares entitled to vote. Declaration of trust may allow trustees to amend by two-thirds vote in order to qualify as real estate investment trust under Internal Revenue Code or under Alabama Real Estate Investment Trust Act. (Ala. Code § 10-13-14).

Merger and Conversion.

Merger of real estate investment trusts governed by § 10-13-15. Effective Oct. 1, 2000, merger of real estate investment trusts also governed by, and conversion of real estate investment trusts exclusively governed by, Act 2000-211. Real estate investment trusts may merge with or convert to any other business entity, including corporations, limited liability companies, limited partnerships, general partnerships and registered limited liability partnerships. (Ala. Code § 10-15-3, -4). Merger or conversion must be approved by all shareholders unless otherwise provided in declaration of trust, but in no case less than two-thirds of all votes entitled to be cast. (Ala. Code § 10-15-3, -4). No merger of real estate investment trust with or conversion to general or limited partnership may be effected without consent in writing of each shareholder who is to be general partner in resulting or surviving entity. (Ala. Code § 10-15-3, -4). Merger with or conversion to foreign business entity permitted if allowed under law of foreign jurisdiction. (Ala. Code § 10-15-6).

Liability of Shareholders.

Shareholders not personally liable for liabilities, duties or obligations of, or claims against, real estate investment trust. (Ala. Code § 10-13-18).

Liability of Trustees.

Trustees not personally liable for obligations of real estate investment trust. Trustee not relieved of liability to trust or shareholders for acts constituting bad faith, willful misfeasance, gross negligence or reckless disregard of duties. Declaration of trust may not limit liability of trustees to extent: (1) It is proven that trustee actually received improper benefit or profit in money, property or services, or (2) adverse judgment or final adjudication is entered finding trustee's act or failure to act was result of active or deliberate dishonesty and was material to cause of action asserted. (Ala. Code § 10-13-19).

Termination.

Real estate investment trust may terminate existence by voluntary dissolution under Alabama Business Corporation Act, § 10-2B-14.02. May curtail or cease trust activities by partially or completely distributing trust assets. Attorney General may institute dissolution proceedings for real estate investment trust which has abused, misused or failed to use powers. (Ala. Code § 10-13-16).

3 BUSINESS REGULATION AND COMMERCE

3.01 BANKS AND BANKING:

"Bank" means any banking corporation or trust company organized under laws of this state under jurisdiction of Superintendent of Banks of this state or organized under laws of U.S. having principal place of business in this state. (Ala. Code § 5-1A-2, Ala. Code § 5-3A-1). Words "Bank," "Banker" or "Banking", or foreign language equivalent, may be used only in name of banking corporations organized under laws of Ala., other states, U.S. or foreign countries. Directors or officers that knowingly and willfully violate this provision liable in their individual capacity for all damages caused by violation. (Ala. Code § 5-1A-3).

Regulated by.

Uniform Commercial Code.

Adopted. (Ala. Code § 7-4-101, et seq.). See topic 3.09 Commercial Code.

Regional Reciprocal Banking.

Alabama Regional Reciprocal Savings Institutions Act allows acquisition of savings and loan associations, savings banks and savings and loan holding companies in following states if state has reciprocal law: Ark., Fla., Ga., Ky., La., Md., Miss., N.C., S.C., Tenn., Va., W.Va., and D.C. (Ala. Code § 5-14A-1, et seq.).

Interstate and International Banking Act.

Alabama Interstate and International Banking Act of 1995 authorizes any bank holding company whose principal place of business is located in U.S. to acquire banks and bank holding companies located in Ala. under certain conditions. (Ala. Code § 5-13B-1, et seq.).

Stockholders.

No statutory provision for stockholder liability for assessment. See subhead Taxes, infra.

Deposits.

In Trust for Another.

Whenever deposit made by person in trust for another, and no further written notice given bank concerning legal trust, then, in event of death of trustee, bank may release itself from all liability by paying deposit to person for whom deposit was made. (Ala. Code § 5-5A-40). Deposits held in trust in savings and loan associations may be similarly treated. (Ala. Code § 5-16-47). Deposits of trust funds by trust department of bank included in list of deposits for which bank authorized to pledge assets as security therefor. (Ala. Code § 5-5A-28).

Joint Deposit.

Deposit made in names of two persons payable to either of such persons, upon death of either may be paid by bank to survivor irrespective of whether provision for survivorship made, funds were property of only one depositor, person making deposit evidenced any intent to vest other with present interest in account, only one depositor had right to withdraw such deposit, or there was any delivery of any bank book, account book, savings account book, certificate of deposit or other writing made by person making such deposit to other person. (Ala. Code § 5-5A-41). Provision applies to savings accounts, checking accounts, certificates of deposit, and to deposits made in names of more than two persons where there is express written provision for survivorship in deposit contract. (Ala. Code § 5-5A-41). § 5-5A-41 exempts bank from liability, but title to account determined by intent of parties. (Ala. Code § 35-4-7; 463 So.2d 129). Deposit made in any savings and loan association in names of two persons, payable to either, or payable to either or survivor, may be paid to either of said persons whether other is living or not and by so paying savings and loan association released from further liability. (Ala. Code § 5-16-44). Upon death of one of two persons, deposit becomes property of and payable according to its terms to survivor, irrespective of whether funds deposited were property of only one of persons, of whether at time of such deposit there was any intention on part of person making deposit to vest other with present interest, of whether only one of said persons had right to withdraw deposit, and of whether there was any delivery of any account book or savings account book by person making deposit to other person. (Ala. Code § 5-16-45). Uniform Multiple-Person Accounts Act adopted, effective Mar. 1, 1998. (Ala. Code § 5-24-1, et seq.).

Fiduciaries.

Uniform Fiduciaries Act in effect. (Ala. Code § 19-1-1 to -13).

Uniform Commercial Code superseded all special provisions on stop payment orders, forged and altered instruments, delay in presentment, etc. (Ala. Code § 7-1-101, et seq.).

Unclaimed Deposits.

In case of bank's insolvency, receivership court may make proper provisions for unproven or unclaimed deposits. (Ala. Code § 5-8A-42). Unclaimed funds in hands of receiver at time of final settlement must be transmitted by him to state treasurer to be held as unclaimed property under Uniform Disposition of Unclaimed Property Act of 2004. (Ala. Code § 35-12-70 to -96). See category 21 Property, topic 21.01 Absentees, subhead Escheat.

Collections.

Uniform Commercial Code adopted. (Ala. Code § 7-4-101 to -504). See topic 3.02 Bills and Notes.

Trust Companies.

Amenable to general banking laws if laws applicable to trust companies and do not conflict with provisions of this chapter. (Ala. Code § 5-11A-1). Unless prohibited by instrument governing fiduciary relationship, trust company may purchase securities underwritten or distributed by it. (Ala. Code § 5-11A-12).

Uniform Common Trust Fund Act.

See category 13 Estates and Trusts, topic 13.15 Trusts.

Foreign Banks.

See category 2 Business Organizations, topic 2.03 Corporations, subhead Foreign Corporations.

Securities.

Absent contrary provision in governing instrument or court order, fiduciary may deposit securities held in fiduciary capacity in clearing corporation. Securities so deposited may be merged and held in bulk in name of nominee of clearing corporation with other securities of same class. Ownership and other interests of said securities may be transferred by entries on books of clearing house without physical transfer of certificates. (Ala. Code § 19-4-2, -21).

Savings and Loan Associations provided for and regulated by State Banking Department. (Ala. Code § 5-2A-61).

Small Loans.

Persons, associations, and corporations organized to make loans in amounts less than $1,000, other than banks, trust companies, credit unions and savings or billing and loan associations, provided for and regulated by State Banking Department. (Ala. Code § 5-18-3, -4). Annual license fee paid by licensees is $500, and there shall be account maintenance fee of $3 for each month of scheduled period of repayment of loan when monthly repayment amount equals or exceeds $30. (Ala. Code § 5-18-5, -15). Such account maintenance fee shall be determined at date of loan, but may not be prepaid. (Ala. Code § 5-18-15). Such fee as so determined shall not bear interest and shall constitute part of finance charge. (Ala. Code § 5-18-15). As alternative to interest rates and charges permitted to be charged by licensee pursuant to above of this paragraph, on loans of less than $1,000, licensee may charge acquisition charge for making loan in amount not in excess of 10% of amount of principal. (Ala. Code § 5-18-15). See topic 3.17 Interest.

Taxes.

On call of Superintendent of Banks, each bank must pay to State Banking Department, assessment fee based on total resources of bank as shown by its last report to State Banking Department. Rate of such assessment fee must be in amount fixed by Superintendent and approved by Banking Board and may be made more frequently than annually. No other assessment or license may be levied against any bank, except ordinary taxes assessed against property in general. (Ala. Code § 5-2A-20). Failure to make such payments within 30 days after receiving notice from Superintendent of amount of assessment renders bank liable to pay state $100 for each day after such 30 day period. (Ala. Code § 5-2A-21). Excise tax of 6.5% of net income levied on financial institutions (Ala. Code § 40-16-4) (including banks, trust companies, loan companies, building and loan associations and other businesses employing moneyed capital in competition with national banks) (Ala. Code § 40-16-1), returns for preceding taxable year must be filed annually within first 15 days of Apr., and tax, which may be computed on calendar or fiscal year basis, payable Apr. 15 (Ala. Code § 40-16-3, -5).

No state tax may be levied upon or made applicable to bank chartered by banking authorities of Ala. unless such tax levied upon and made applicable to all banks and banking institutions, including national banks, doing business in Alabama. (Ala. Code § 40-1-9).

Credit Cards.

Alabama Credit Card Act authorizes bank holding company to establish credit card bank. (Ala. Code § 5-20-2, -4). Act provides that lender and debtor may agree to terms and conditions. (Ala. Code § 5-20-5). Credit card bank not considered “bank” for purpose of certain banking laws. (Ala. Code § 5-20-8). Notwithstanding anything to contrary contained in certain banking laws, Alabama bank may subscribe for and own stock in credit card bank. (Ala. Code § 5-20-8).

Loans on or purchases of bank’s own stock prohibited. (Ala. Code § 5-5A-27).

Ownership of stocks of other banks prohibited, with limited exceptions. (Ala. Code § 5-5A-27).

Exchange.

Banks must remit or pay at par all checks drawn on them and transmitted in cash letter and may not charge exchange on such checks first time presented to them for payment. (Ala. Code § 5-5A-33).

Public Deposits.

Effective Jan. 1, 2001, under SAFE (Security for Alabama Fund’s Enhancement program), deposits made by state entities must be with “qualified public depositories” approved by administrative board and must be secured according to Ala. Code § 41-14A-1, et seq. Financial institutions accepting payments must comply with filing and collateral pledging requirements. (Ala. Code § 41-14A-3[a][3]). Board has review and oversight powers regarding collateral policies. (Ala. Code § 41-14A-6).

3.02 BILLS AND NOTES:

Uniform Commercial Code adopted. (Ala. Code § 7-3-101, et seq.). See topic 3.09 Commercial Code.

Special Requirements.

When extending credit with respect to consumer credit transaction other than open-end credit, creditor must furnish duplicate copies of all instruments executed by debtor in connection with transaction. Consumer credit transaction contract or note must contain following statement in eight point type immediately above space for debtor's signature: "CAUTION - - IT IS IMPORTANT THAT YOU THOROUGHLY READ THE CONTRACT BEFORE YOU SIGN IT." (Ala. Code § 5-19-6).

Judgment Notes.

Provision in note for confession of judgment thereon void, but does not invalidate note itself. (Ala. Code § 8-9-11; 193 Ala. 166, 69 So. 527).

Attorney Fees.

Have been held enforceable if reasonable (205 Ala. 269, 87 So. 552) and not cover for usury (123 Ala. 439, 26 So. 290). Fee is part of plaintiff's total judgment and will not be allowed if defendant succeeds in counterclaim greater than amount of note. If defendant's counterclaim partially successful, fee reduced pro rata. (213 Ala. 551, 106 So. 136). Such clauses in instruments evidencing loan under $300 invalid; for larger amounts, fee limited to 15% of unpaid debt after default. (Ala. Code § 5-19-10). See topic 3.11A Consumer Credit.

Special Defenses.

See topic 3.12 Consumer Protection; category 8 Debtor and Creditor, topic Consumer Credit.

Promissory Notes Payable Out of Specific Fund.

Contingency for payment out of particular fund must be contained in instrument to prevent payment out of funds from maker's general personal credit. (460 So.2d 861).

Postdated Check.

Bank may charge account of drawer for postdated check, even if payment before date, unless drawer gives notice of postdating, and notice received in such time to allow bank reasonable opportunity to act. Bank liable for damages if account charged prior to date specified in notice. (Ala. Code § 7-4-401).

Writing Required.

Agreement or commitment to lend money, delay or forbear repayment of money or modify provisions of existing agreement void unless in writing except consumer loans with principal amount financed less than $25,000. (Ala. Code § 8-9-2).

Sale of Checks.

No person, as service for fee or other consideration, may engage in business of selling, issuing, or otherwise dispensing checks or receiving money as agent for obligors for purpose of paying such obligors' bills, invoices or accounts without obtaining license. (Ala. Code § 8-7-3). Violation of § 8-7-3 is misdemeanor. (Ala. Code § 8-7-15). Banks, trust companies, savings and loan associations and U.S. and Ala. governments (and all subdivisions thereof) exempted. (Ala. Code § 8-7-4).

Bad Checks.

Upon receipt of bad check, lender of money, extender of credit, merchant or assignee who receives check may charge payor bad check charge of not more than greater of $25 or amount equal to actual charge by bank or similar institution. (Ala. Code § 8-8-15). As of Jan. 1, 1999, maximum amount increases to $26; thereafter maximum charge shall increase by $1 per year through Jan. 1, 2003. (Ala. Code § 8-8-15). §§ 13A-9-13.1, 13.2 provide for establishment of prima facie intent to defraud thereby criminal prosecution if drawer does not pay returned check within ten days of statutorily prescribed notice plus service charge.

Consumer Credit Sale or Consumer Lease.

Seller or lessor may not take negotiable instrument other than check or promissory note as evidence of obligation. (Ala. Code § 5-19-1, -5).

3.03 BILLS OF LADING:

See topic 3.08 Carriers.

3.04 BILLS OF SALE:

See topic 3.23 Sales.

3.05 BLUE SKY LAW:

See topic 3.24 Securities.

3.06 BROKERS:

Uniform Commercial Code adopted. (Ala. Code § 7-1-101). See topic 3.09 Commercial Code.

Licenses.

Certain brokers must be specifically licensed: e.g., real estate brokers by Real Estate Commission (Ala. Code § 34-27-1 to -11); stock brokers by Securities Commissioner (Ala. Code § 8-6-3); insurance brokers by Commissioner of Insurance (Ala. Code § 27-7-4); and air carrier brokers by Alabama Public Service Commission (Ala. Code § 37-9-24). In addition, various types of brokers must pay state and county license or privilege tax in varying amounts and may be required to pay municipal license tax. See topic 3.24 Securities; category 16 Insurance, topic 16.01 Insurance Companies.

Bond.

Air carrier brokers must furnish bond or other security approved by Alabama Public Service Commission. (Ala. Code § 37-9-24).

Real Estate Brokers.

Regulated by Alabama Real Estate Commission. (Ala. Code § 34-27-2, -8). Must be licensed (Ala. Code § 34-27-30, am'd 2008, Act 2008-141), pass written examination (Ala. Code § 34-27-33, am'd 2008, Act 2008-141), and meet statutory fitness requirements (Ala. Code § 34-27-32, am'd 2009, Act 2009-617). Persons who have been convicted of or pleaded guilty or nolo contendere to felony or to crime involving moral turpitude may be rejected by Commission. (Ala. Code § 34-27-32, am'd 2009, Act 2009-617). Obligations and duties of brokers set out in Real Estate Consumer's Agency And Disclosure Act, §§ 34-27-80 to -88, supersedes any duties of brokers at common law which are inconsistent with duties specified therein. (Ala. Code § 34-27-87). No agency relationship between broker and consumer without written bilateral agreement establishing terms of relationship. (Ala. Code § 34-27-82). No specific statutory provision governing real estate commissions. Interference with real estate broker relationship by demanding referral fee in absence of reasonable cause for payment of fee punishable by civil action with damages of up to maximum of three times actual damages, plus attorney fees and expenses. (Ala. Code § 34-27-100, -101).

3.07 BULK SALES:

See topic 3.09 Commercial Code; also category 8 Debtor and Creditor, topic 8.08 Fraudulent Sales and Conveyances.

3.08 CARRIERS:

Carriers by rail and other transportation companies doing business in Ala. and not engaged solely in interstate commerce subject to supervision, regulation and control of Alabama Public Service Commission in all matters relating to performance of their public duties, and their charges therefor. (Ala. Code § 37-2-1,-3). Such carriers required to pay quarterly fees to Commission for inspection and supervision. (Ala. Code § 37-2-41).

Uniform Commercial Code adopted. (Ala. Code § 7-1-101). See topic 3.09 Commercial Code. Art. 7 on documents of title does not modify or repeal any laws prescribing form of documents of title or services to be provided by carriers; but fact that such laws violated does not affect status of document otherwise complying with definition of document under Uniform Commercial Code. (Ala. Code § 7-7-103).

Licenses.

Permits and certificates of convenience and necessity required by Commission. (Ala. Code § 37-2-4, -5).

Rates.

Commission charged with duty of prescribing and enforcing rates, charges, classifications of freight, storage, demurrage, and car service charges, rules and regulations and of requiring establishment and maintenance of public service facilities and conveniences. All rates, charges, classifications, rules and regulations adopted or acted upon by any transportation company inconsistent with those prescribed by Commission within scope of its authority, or inconsistent with those prescribed by any statute, unlawful and void. (Ala. Code § 37-2-3).

Filing of Records.

Each carrier subject to supervision of Public Service Commission must print and file with the Commission and keep open to public inspection tariffs or schedules of rates. (Ala. Code § 37-2-10). Charges must be in accordance with such tariffs or schedules. (Ala. Code § 37-2-13).

Discrimination unlawful. (Ala. Code § 37-2-16).

Limiting Liability.

Every carrier liable to holder of bill of lading for any loss, damage or injury to property covered thereby which was negligently caused by carrier. (Ala. Code § 37-2-21; Ala. Code § 37-2-60 to -62). No contract, stipulation, receipt, rule or regulation contained in bill of lading shall exempt carrier from liability. (Ala. Code § 37-2-21). Damages may be limited by provision that carrier's liability shall not exceed value stated in document if carrier's rates dependent upon value and consignor is afforded opportunity to declare higher value and is advised of opportunity. (Ala. Code § 7-7-309).

Bills of Lading.

Receipts or bills of lading must be issued according to statutory form. (Ala. Code § 37-2-21).

Liens.

No statutory provisions other than as contained in Uniform Commercial Code. (Ala. Code § 7-7-301 to -309).

Unclaimed Freight.

Ordinary nonperishable freight remaining unclaimed for 40 days, may be sold at public auction on 15 days written notice to consignor or consignee or two weeks publication in newspaper published at point of destination, at any point where best prices may be obtained. (Ala. Code § 37-2-28). Unclaimed perishable goods may be sold as soon as deemed necessary and notice must be given to consignor and consignee when practicable. (Ala. Code § 37-2-29).

Claims and Damages.

Measure of damages for loss of, destruction of, injury to, or delay in delivery of or failure to deliver goods prescribed by statute. (Ala. Code § 37-2-60). Where itemized and verified claim presented to officer or agent of carrier within 60 days after injury or loss, if proper claim, claimant may recover penalty for failure to pay claim within 60 days after presentation. (Ala. Code § 37-2-61, -62). Suit for such penalty must be brought within one year after presentation of claim. (Ala. Code § 37-2-62). Failure to make such claim does not forfeit right to recover for loss or injury, but unless timely claim made only actual value of goods or injury may be recovered. (Ala. Code § 37-2-61).

Storage of Freight.

If destination of freight is city or town having daily mail, carrier not relieved from liability as such by reason of deposit or storage of freight in depot or warehouse, unless within 24 hours after arrival of such freight, notice given to consignee, personally or by mail. (Ala. Code § 37-2-27).

Where only part of consignment arrives, carrier may not demand charges on part not received. (Ala. Code § 37-2-32).

Connecting Carriers.

On intrastate shipments over connecting carriers, both may be sued jointly for injury to goods or failure to deliver. (Ala. Code § 37-2-34).

Motor Vehicle Carriers.

See category 23 Transportation, topic 23.01 Motor Vehicles.

See also topic 3.19 Licenses, Business and Professional.

Interstate Commerce.

All authority, powers and jurisdiction given by law to Commission over carriers engaged in intrastate commerce also given with respect to carriers engaged in interstate commerce not regulated by federal legislation to extent that exercise by Commission of such authority, powers and jurisdiction over such carriers engaged in interstate commerce is permissible. (Ala. Code § 37-1-43).

3.09 COMMERCIAL CODE:

Uniform Commercial Code adopted. (Ala. Code § 7-1-101, et seq.). (See Uniform and Model Acts section.)

Peculiar Local Interpretations.

Phrase “Uniform Commercial Code” and word “Act” are replaced by “title” throughout.

Timber and cutting rights with respect thereto treated as chattels. Corresponding amendments made to Art. 2 and Rev. Art. 9. All standing timber and trees, and cutting rights with respect thereto, while owned by or mortgaged to anyone other than owner of land upon which such timber located, considered chattels and not real property when cutting rights limited to ten years from date of conveyance or mortgage. (Ala. Code § 35-4-363). All such timber and trees which are considered chattels are considered to be goods for Rev. Art. 9 purposes. (Ala. Code § 7-9A-102[a][44][ii]).

Landlord's Lien.

Priority conflicts between landlord's lien for rent arising by operation of law, other than agricultural lien, and security interest in goods brought on leased premises determined by whether security interest attaches before or after goods brought on premises. (Ala. Code § 7-9A-333[c]). If security interest attaches after goods brought onto leased premises, landlord's lien has priority. (Ala. Code § 7-9A-333[c][1]). If security interest attaches before goods brought onto leased premises, it has priority over landlord's lien from time security interest is perfected or landlord has notice of it, whichever occurs first, except that, if secured party files with respect to purchase money security interest before or within 20 days after debtor receives possession of goods, security interest takes priority over landlord's lien. (Ala. Code § 7-9A-333[c][2]).

Seller's Warranty.

Amendments to Art. 2 abolished requirement of privity in personal injury cases for breach of warranty. Any person sustaining personal injury may sue for breach of warranty if reasonable to expect that such person would use, consume or be affected by the defective goods. (Ala. Code § 7-2-318). Vertical privity requirement eliminated in personal injury actions based on breach of warranty. (336 So.2d 1340). With respect to certain livestock, no implied warranty that such livestock free from disease, provided compliance with all federal and state statutes and regulations concerning inspection, disease prevention and control. (Ala. Code § 2-15-4).

Deviations.

Rev. § 1-101 et seq. Revised Art. 1 adopted, effective Jan. 1, 2005. (Ala. Code § 7-1-101 et seq.).

Rev. § 1-201(a) Subsection (a) not adopted, but instead reserved. (Ala. Code § 7-1-201[a]).

Rev. § 1-201(b) Text amended to read "Subject to additional definitions contained in the subsequent articles of this title which are applicable to specific articles or parts thereof, and unless the context otherwise requires, in this title:" (Ala. Code § 7-1-201[b]).

Rev. § 1-201(b)(9) Word "minehead" replaced with "mine". (Ala. Code § 7-1-201[b][9]).

Rev. § 1-201(b)(20) Text amended to read " 'Good faith' means honesty in fact in the conduct of the transaction concerned." (Ala. Code § 7-1-201[b][9]).

Rev. § 1-201(b)(35) Text amended to read " 'Security interest' means an interest in personal property or fixtures which secures payment or performance of an obligation. 'Security interest' includes any interest of a consignor and a buyer of accounts, chattel paper, a payment intangible, or a promissory note in a transaction that is subject to Article 9A. 'Security interest' does not include the special property interest of a buyer of goods on identification of those goods to a contract for sale under Section Ala. Code § 7-2-401, but a buyer may also acquire a 'security interest' by complying with Article 9A. Except as otherwise provided in Section Ala. Code § 7-2-505, the right of a seller or lessor of goods under Article 2 or 2A to retain or acquire possession of the goods is not a 'security interest,' but a seller or lessor may also acquire a 'security interest' by complying with Article 9A. The retention or reservation of title by a seller of goods notwithstanding shipment or delivery to the buyer under Section Ala. Code § 7-2-401 is limited in effect to a reservation of a 'security interest.' Whether a transaction in the form of a lease creates a 'security interest' is determined pursuant to Section Ala. Code § 7-1-203." (7-201[b][35]).

§ 1-301 Text for subsections (a) through (f) replaced by subsections (a), which reads: "Except as otherwise provided in this section, when a transaction bears a reasonable relation to this state and also to another state or nation the parties may agree that the law either of this state or of other such state or nation shall govern their rights and duties," and (b), which reads: "In the absence of an agreement effective under subsection (a), and except as provided in subsection (c), this act applies to transactions bearing an appropriate relation to this state." Subsection (g) adopted as subsection (c). (Ala. Code § 7-1-301).

§ 2-103 Amendments promulgated as conforming amendments to Revised Article 1 were not adopted.

§ 2-107(2) words "or of timber to be cut" omitted following words "described in subsection (1)." (Ala. Code § 7-2-107[2]).

§ 2-202(a) Text amended to read "By course of dealing or usage of trade (Section Ala. Code § 7-1-303); and" (Ala. Code § 7-2-202[a]).

§ 2-314 adds subsection (4) which reads: "Procuring, furnishing, donating, processing, distributing, or using human whole blood, plasma, blood products, blood derivatives, and other human tissues such as corneas, bones or organs for the purpose of injecting, transfusing, or transplanting any of them in the human body is declared for all purposes to be the rendition of a service by every person participating therein and whether any remuneration is paid therefor is declared not to be a sale of such whole blood, plasma, blood products, blood derivatives, or other human tissues." (Ala. Code § 7-2-314[4]).

§ 2-316 adds subsection (5) which reads: "Nothing in subsection (2) or subsection (3)(a) or in Section Ala. Code § 7-2-317 shall be construed so as to limit or exclude the seller's liability for damages for injury to the person in the case of consumer goods." (Ala. Code § 7-2-316[5]).

§ 2-318 Alternative B adopted, except first sentence reads: "A seller's warranty, whether express or implied, extends to any natural person if it is reasonable to expect that such person may use, consume or be affected by the goods and who is injured in person by breach of the warranty." Official Comment 3 amended to read "This section is designed for states where the case law has already developed and for those that desire to expand the class of beneficiaries." (Ala. Code § 7-2-318).

§ 2-503(5)(b) Text amended to read "Tender through customary banking channels is sufficient and dishonor of a draft accompanying the documents constitutes nonacceptance or rejection." (Ala. Code § 7-2-503[5][b]).

§ 2-705(2)(c) Word "warehouse" replaced with "warehouseman". (Ala. Code § 7-2-705[2][c]).

§ 2-714(2) adds following after "amount": ", and nothing in this section shall be construed so as to limit the seller's liability for damages for injury to the person in the case of consumer goods. Damages in an action for injury to the person include those damages ordinarily allowable in such actions at law." (Ala. Code § 7-2-714[2]).

§ 2-719 adds subsection (4) which reads: "Nothing in this section or in Section Ala. Code § 7-2-718 shall be construed so as to limit the seller's liability for damages for injury to the person in the case of consumer goods." (Ala. Code § 7-2-719[4]).

§ 2-725(2) adds at end of second sentence "; however, a cause of action for damages for injury to the person in the case of consumer goods shall accrue when the injury occurs.” (Ala. Code § 7-2-725[2]).

§ 2A-101, et seq. Art. 2A adopted with variations as noted below. Gender neutral language adopted. (Ala. Code § 7-2A-101, et seq.).

§ 2A-102 Words, “as defined in Section Ala. Code § 7-2A-103(1)(j)” added at end. (Ala. Code § 7-2A-102).

§ 2A-103(1)(a) Second sentence amended to read “ ‘Buying’ may be for cash or by exchange of other property or on secured or unsecured credit and includes receiving goods or documents of title under a pre-existing contract for sale but does not include a transfer in bulk or as security for or in total or partial satisfaction of a money debt.” (Ala. Code § 7-2A-103[1][a]).

§ 2A-103(1)(e) Optional language adopted; figure $100,000 inserted. (Ala. Code § 7-2A-103[1][e]).

§ 2A-103(1)(g)(iii)(C) Text amended to read “the lease contract or a separate accurate and complete statement delivered to the lessee discloses in writing (a) all express warranties and other rights provided to the lessee by the lessor and the supplier in connection with the lease contract (b) that there are no other express warranties or rights provided to the lessee by the lessor or the supplier in connection with the lease contract, and (c) in a consumer lease, any waiver, disclaimer or other negation of express or implied warranties and any limitation or modification of remedy or liquidation of damages for breach of those warranties or other rights of the lessee in a manner as provided in this article or in Article 2, as applicable; or”. (Ala. Code § 7-2A-103[1][g][iii][C]).

§ 2A-103(1)(g)(iii)(D) Text amended to read “the lessor, before the lessee signs the lease contract, informs the lessee in writing (a) of the identity of the supplier, unless the lessee has selected the supplier and directed the lessor to purchase the goods from the supplier, (b) that the lessee is entitled under this article to all warranties and other rights provided to the lessee by the supplier in connection with the lease contract, and (c) to contact the supplier to receive an accurate and complete statement from the supplier of any such express warranties and other rights and any disclaimers or limitations of them or of remedies.” (Ala. Code § 7-2A-103[1] [g][iii][D]).

§ 2A-103(1)(u) Words “the court as a matter of law as” inserted after “the discount is determined by” and before “a commercially reasonable rate”. (Ala. Code § 7-2A-103[1][u]).

§ 2A-103(3) Cross reference to definition of “good faith” not deleted in Alabama version. (Ala. Code § 7-2A-103[3]).

§ 2A-104(1)(a) No specific statutes listed. (Ala. Code § 7-2A-104[1] [a]).

§ 2A-104(1)(c) Words “, or final consumer protection decision of a court of this state existing on the effective date of this Article” omitted at end. (Ala. Code § 7-2A-104[1][c]).

§ 2A-104(2) Words at end read “, and any statute referred to in subsection (1), the provisions of that statute control.” (Ala. Code § 7-2A-104[2]).

§ 2A-106(1) Text after “other than a jurisdiction in which” amended to read “(a) the lessee resides at the time the lease agreement becomes enforceable or within 30 days thereafter, (b) the goods are to be used, or (c) the lease is executed by the lessee, the choice is not enforceable.” (Ala. Code § 7-2A-106[1]).

§ 2A-108 Subsections (2) and (4) omitted. Subsection (3) redesignated as subsection (2) with cross-reference to subsection (1) only. (Ala. Code § 7-2A-108).

§ 2A-208 Non-Code subsection (3) added. Text reads “The requirements of the statute of frauds section of this article (Section Ala. Code § 7-2A-201) must be satisfied if the contract as modified is within its provisions.” Code subsections (3) and (4) redesignated as subsections (4) and (5) respectively. (Ala. Code § 7-2A-208).

§ 2A-214(2) Text amended to read “Subject to subsection (3): (a) to exclude or modify the implied warranty of ‘merchantability,’ or any part of it the language must mention merchantability, be by a writing, and be conspicuous. Language to exclude the implied warranty of merchantability is sufficient if it is in writing, is conspicuous and states, for example, ‘There is no warranty that the goods will be merchantable.’ (b) to exclude or modify any implied warranty of fitness the exclusion must be by a writing and be conspicuous. Language to exclude all implied warranties of fitness is sufficient if it is in writing, is conspicuous and states, for example, ‘There is no warranty that the goods will be fit for a particular purpose.’ .” (Ala. Code § 7-2A-214[2]).

§ 2A-214 Non-Code subsection (5) added to read “Nothing in subsection (2) or subsection (3)(a) or in Section Ala. Code § 7-2A-215 shall be construed so as to limit or expand the lessor’s liability for damages for injury to the person in the case of consumer goods.” (Ala. Code § 7-2A-214).

§ 2A-216 Alternative B adopted. Three sentences of section designated (1), (2) and (3). Last words of subsection (3) read “against any person referred to in subsections (1) and (2) of this section”. (Ala. Code § 7-2A-216).

§ 2A-218(2) Words “the lessor’s” inserted after “until” and before “default.” (Ala. Code § 7-2A-218[2]).

§ 2A-218(3) Second sentence added to read “For this purpose the option to buy shall be deemed to have been exercised by the lessee when the resulting sale is closed, not when the lessee gives notice to the lessor of the lessee’s intention to exercise the option.” (Ala. Code § 7-2A-218[3]).

§ 2A-221(a) Word “avoided” replaced with “voided.” (Ala. Code § 7-2A-221[a]).

§ 2A-221(b) Word “avoided” replaced with “voided.” Words “that is not a consumer lease” after “finance lease” omitted. (Ala. Code § 7-2A-221[b]).

§ 2A-303 In subsection (1), “Section Ala. Code § 7-9A-109(a)(3)” substituted for “Section Ala. Code § 7-9A-102(1)(b)”. In subsection (2), “subsection (3) and Section Ala. Code § 7-9A-407” substituted for “subsections (3) and (4)”. Official subsection (3) deleted; official subsection (4) redesignated as subsection (3) and internal cross-references throughout section revised accordingly. Reference at end of subsection (3) is to “purview of subsection (4)” rather than “purview of subsection (b)”. In subsection (4), “subsection (3) and Section Ala. Code § 7-9A-407” substituted for “subsections (3) and (4)”. (Ala. Code § 7-2A-303).

§ 2A-308(2) Words “(a) becomes enforceable, not in current course of trade but in satisfaction of or as security for a pre-existing claim for money, security, or the like, and (b)” omitted. (Ala. Code § 7-2A-308[2]).

§ 2A-309(4)(a) Number of days changed from “ten” to “twenty”. (Ala. Code § 7-2A-309[4][a]).

§ 2A-406(b) Words “that is not a consumer lease” after “finance lease” omitted. (Ala.

Code § 7-2A-406[b]).

§ 2A-503 Non-Code subsection (5) added to read “Nothing in this section or in Section Ala. Code § 7-2A-504 shall be construed so as to limit or expand the lessor’s liability for damages for injury to the person in the case of consumer goods.” (Ala. Code § 7-2A-503).

§ 2A-506(2) First sentence unchanged; rest reads “A cause of action for indemnity accrues (a) in the case of an indemnity against liability, when the act or omission on which the claim for indemnity is based is or should have been discovered by the indemnified party, or when the default occurs, whichever is later, (b) in the case of an indemnity against loss or damage, when the person indemnified makes payment thereof. A cause of action for damages for injury to the person in the case of consumer goods accrues when the injury occurs.” (Ala. Code § 7-2A-506[2]).

§ 2A-513(1) Words “it is” inserted after “because” and before “nonconforming.” (Ala. Code § 7-2A-513[1]).

§ 2A-516(2) After “finance lease,” and before “if made with,” following inserted: “other than a consumer lease in which the supplier assisted in the preparation of the lease contract or participated in negotiating the terms of the lease contract with the lessor.” (Ala. Code § 7-2A-516[2]).

§ 2A-516(3)(b) Words at beginning “except in the case of a consumer lease,” omitted. (Ala. Code § 7-2A-516[3][b]).

§ 2A-516 Non-Code subsection (6) added to read “Subsection (3) shall not apply to a consumer lease.” (Ala. Code § 7-2A-516[6]).

§ 2A-524(1) Words at beginning “After default by the lessee under the lease contract of the type described in Section 2A-523(1) or Section 2A-523(3)(a) or, if agreed, after one default by the lessee, the lessor may” replaced with “A lessor aggrieved under Section Ala. Code § 7-2A-523(1) may:.” (Ala. Code § 7-2A-524[1]).

§ 2A-529(5) Text reads “After a lessee has wrongfully rejected or revoked acceptance of goods, has failed to pay rent then due, or has repudiated (Section Ala. Code § 7-2A-402), a lessor who is held not entitled to rent under this section must nevertheless be awarded damages for nonacceptance under Sections Ala. Code § 7-2A-527 and Ala. Code § 7-2A-528.” (Ala. Code § 7-2A-529[5]).

Rev. § 3-101, et seq. 1990 Revision of Art. 3 adopted with variations as noted below. Old section numbers repealed and reused as needed. (Ala. Code § 7-3-101, et seq.).

Rev. § 3-103(a)(4) Words after “honesty in fact” replaced with words “in the conduct or transaction concerned.” (Ala. Code § 7-3-103[a][4]).

Rev. § 3-112(a)(i) Words “until dishonor” inserted after “interest” and before “, and.” (Ala. Code § 7-3-112[a][i]).

Rev. § 3-118 Captions added for each subsection as follows: “(a) Note payable at a definite time.;” “(b) Note payable on demand.;” “(c) Unaccepted draft.;” “(d) Certified check, teller’s check, cashier’s check and traveler’s check.;” “(e) Certificate of Deposit.;” “(f) Accepted draft.;” and “(g) Conversion, breach of warranty and other Article 3 actions.” (Ala. Code § 7-3-118).

Rev. § 3-307(b)(2) Subsection (iii) omitted. Word “or” inserted before “(ii).” (Ala. Code § 7-3-307[b][2]).

Rev. § 3-307(b)(4) Subsection (iii) omitted. Word “or” inserted before “(ii).” (Ala. Code § 7-3-307[b][4]).

Rev. § 3-404 Non-Code subsection added at end to read “(e) The adoption of a comparative fault approach in subsection (d) and in Sections Ala. Code § 7-3-405 and Ala. Code § 7-3-406 is limited to transactions treated under this article and Section Ala. Code § 7-4-406 of Article 4 of the Uniform Commercial Code-Bank Deposits and Collections.” (Ala. Code § 7-3-404).

Rev. § 3-405(a) Introductory language “(a) In this section:” replaced with “This section applies to fraudulent indorsements of instruments with respect to which an employer has entrusted an employee with responsibility as part of the employee’s duties. The following definitions apply to this Section:.” (Ala. Code § 7-3-405[a]).

Rev. § 3-415(a) 1993 Amendment adding subsection (e) to list of subsections to which subsection (a) is subject not adopted. (Ala. Code § 7-3-415[a]).

Rev. § 3-420(a) First sentence replaced with “(a) An instrument is converted under circumstances which would constitute conversion under personal property law.” (Ala. Code § 7-3-420[a]).

Rev. § 3-603(a) Words “obligation to pay” replaced with “amount due on.” Words “and by subsections (b), (c) and (d)” added at end of sentence after “contract.” (Ala. Code § 7-3-603[a]).

Rev. § 3-603(b) Words “obligation to pay” replaced with “amount due on.” (Ala. Code § 7-3-603[b]).

Rev. § 3-603 Non-Code subsection added at end to read “(d) Acceptance of partial payment by a person entitled to enforce an instrument does not prejudice such person’s rights or remedies with respect to the remaining amount due on the instrument or otherwise.” (Ala. Code § 7-3-603).

Rev. § 4-101, et seq. 1990 Conforming Amendments to Art. 4 adopted with variations as noted below. (Ala. Code § 7-4-101, et seq.).

Rev. § 4-106 Alternative B adopted. (Ala. Code § 7-4-106).

Rev. § 4-401(b) Words “, except that a bank may charge the amount of the overdraft, interest thereon, and any applicable fee against deposits or other credits to the account, regardless of the source of the deposits or credits.” inserted at end. (Ala. Code § 7-4-401[b]).

Rev. § 4-406(f) First sentence rewritten and non-Code second sentence added. Both read as follows: “Without regard to care or lack of care of either the customer or the bank, a customer who does not within 180 days after the statement and the items or a legible copy or image of the items are sent to the customer, or within one year after the statement or items are otherwise made available to the customer (subsection (a)) discover and report the customer’s unauthorized signature on or any alteration on the item is precluded from asserting against the bank the unauthorized signature or alteration. Without regard to care or lack of care of either the customer or the bank, a customer who does not within one year after the statement or items are sent or made available to the customer, discover and report any alteration on the back of the item or any unauthorized endorsement is precluded from asserting against the bank any such alteration or unauthorized endorsement.” Second sentence of Official Text retained as third sentence. (Ala. Code § 7-4-406[f]).

§ 4A-101, et seq. Art. 4A adopted. (Ala. Code § 7-4A-101, et seq.). Part 6, Uniformity, and new section added, reading: “This article shall be applied and construed so as to effectuate its general purpose to make uniform the law with respect to the subject of this article among states enacting it.” (Ala. Code § 7-4A-601).

§ 4A-105(a)(6) Text amended to read “ ‘Good faith’ means honesty in fact and the observance of reasonable commercial standards of fair dealing.” (Ala. Code § 7-4A-105[a][6]).

§ 5-101, et seq. Repealed effective Jan. 1, 1998. (Act 97-702).

Rev. § 5-101, et seq. Revised Art. 5 adopted with variations as noted below. (Ala. Code § 7-5-101, et seq.).

Rev. § 5-103(c) Words “5-106(d)” omitted following words “Sections Ala. Code § 7-5-102(a)(9) and (10).” Following text added after phrase “A Term in;” “a letter of credit, confirmation, advice, transfer, amendment, or cancellation” replacing words “an agreement or undertaking.” (Ala. Code § 7-5-103[c]).

Rev. § 5-106(d) Omitted.

Rev. § 5-108(e). Second and third sentences omitted. (Ala. Code § 7-5-108[e]).

Rev. § 5-111(e) Word “must” following phrase “expenses of litigation” replaced with “may.” (Ala. Code § 7-5-111[e]).

§ 6-101, et seq. Repealed effective May 17, 1996. (Act 96-523). Official repealer of Art. 6 not adopted.

Rev. § 7-101 et seq. Revision to Art. 7 adopted, effective Jan. 1, 2005, with variations noted below. (Ala. Code § 7-7-101 et seq.).

Rev. § 7-102(a)(2) Word “carrier” replaced by “A carrier.” (Ala. Code § 7-7-102[a][2]).

Rev. § 7-102(a)(6) Text amended to read “ ‘Good faith’ means honesty in fact in the conduct or transaction concerned.” (Ala. Code § 7-7-102[a][6]).

Rev. § 7-102(b)(2) Reads “Lessee in ordinary course.” (Ala. Code § 7-7-102[b][2]).

Rev. § 7-103(d) Text amended to read “To the extent there is a conflict between the Alabama Uniform Electronic Transactions Act and this article, this article governs.” (Ala. Code § 7-7-103[d]).

Rev. § 7-204(d) Omitted.

Rev. § 8-101, et seq. Revised Art. 8 (1994 Amendments) adopted with variations as noted below. (Ala. Code § 7-8-101, et seq.).

Rev. § 8-102(a)(10) Conforming amendment deleting definition of “good faith” not adopted. (Ala. Code § 7-8-102[a][10]).

Revised definitions section adopted for Art. 8. (Ala. Code § 7-8-103).

Rev. § 8-601 Effective date stated as “January 1, 1996” but § 7 of enacting legislation was revised to provide that effective date was Jan. 1, 1997. (Act 96-742; § 7).

Rev. § 9-101, et seq. 2000 Revision of Art. 9 adopted with variations as noted below, effective Jan. 1, 2002, except that Rev. § 9-525 became effective July 1, 2001. (Ala. Code § 7-9A-101 et seq.).

Rev. § 9-102(a)(6)(B) Word “mine” substituted for “minehead.” (Ala. Code § 7-9A-102[6][B]).

Rev. § 9-102(a)(43) Subsection reads “‘Good faith’ means honesty in fact in the conduct or transaction concerned.” (Ala. Code § 7-9A-102[43]).

Rev. § 9-102(a)(44) Words “to the extent such standing timber and cutting rights with respect thereto are considered as chattels under Section Ala. Code § 35-4-363” added to end of subsection (ii). (Ala. Code § 7-9A-102[44]).

Rev. § 9-102(a)(53) Subsection reads “‘Manufactured home’ means a structure defined as a ‘manufactured home’ in Section Ala. Code § 32-8-2.” (Ala. Code § 7-9A-102[53]).

Rev. § 9-102(a)(67) Section is omitted.

Rev. § 9-102(a)(80) Official Text of clause (D) amended, and nonuniform clause (E) added, as follows: “(D) transmitting or producing or distributing electricity, steam, gas, or water; or (E) owning, operating, leasing or controlling a ‘utility’ as defined in Section Ala. Code § 37-1-30.” (Ala. Code § 7-9A-102[a][80]).

Rev. § 9-102(b) Amended to read “ ‘Control’ as provided in Section Ala. Code § 7-7-106 and the following definitions in other articles of this title apply to this article:” (Ala. Code § 7-9A-102[b]).

Rev. § 9-109(c) Subsection (2) omitted, and subsections (3) and (4) renumbered accordingly. (Ala. Code § 7-9A-109[c]).

Rev. § 9-109(d) Words “except as provided in Section Ala. Code § 7-9A-333,” added to beginning of subsection (1). Nonuniform subsection (14) added as follows: “to a security interest created in connection with any of its securities by this state, any municipal corporation, county, public authority, public corporation or other similar public or governmental agency or unit in this state, or any political subdivision of any thereof, or by any educational institution or educational corporation organized under the laws of this state, whether such institution or corporation is public or private.” (Ala. Code § 7-9A-109[d]).

Rev. § 9-201(b) Words “insert reference to” deleted from official text. (Ala. Code § 7-9A-201[b]).

Rev. § 9-208 Nonuniform subsection (b)(6) dealing with electronic documents as security. (Ala. Code § 7-9A-208[b][6]).

Rev. § 9-208 Nonuniform subsection (c) added as follows: “Authenticated demand. In this section, ‘authenticated demand’ means a record authenticated by the debtor demanding that the secured party take one or more of the specific actions described in subsection (b) and reasonably identifying the collateral that is the subject of the demand. The secured party may designate in a record sent to the debtor or as to which the debtor has notice an address to which such demands must be sent. A demand sent to another address of the secured party will be effective, but the 10-day period of action by the secured party does not begin until the person or department at the address specified by the secured party has notice of the demand.” (Ala. Code § 7-9A-208[c]).

Rev. § 9-209 Nonuniform subsection (d) added as follows: “Authenticated demand. In this section, ‘authenticated demand’ means a record authenticated by the debtor demanding that the secured party take the action described in subsection (b). The secured party may designate in a record sent to the debtor or as to which the debtor has notice an address to which such demand must be sent. A demand sent to another address of the secured party will be effective, but the 10-day period for action by the secured party does not begin until the person or department at the address specified by the secured party has notice of the demand.” (Ala. Code § 7-9A-209[d]).

Rev. § 9-301(4) Word “mine” substituted for “minehead.” (Ala. Code § 7-9A-301[4]).

Rev. § 9-307 Nonuniform subsection (1) added as follows: “Information as to debtor’s location. Within 10 days after receipt of the secured party’s authenticated request, the debtor shall provide to the secured party the information reasonably necessary to enable the secured party to determine the debtor’s location under this section.” (Ala. Code § 7-9A-307[1]).

Rev. § 9-311(a)(2) Words “list any” are deleted, and “a” is inserted at beginning of subsection. Words “manufactured homes” substituted for “mobile homes.” (Ala. Code § 7-9A-311[a][2]).

Rev. § 9-320(d) Word “mine” substituted for “minehead.” (Ala. Code § 7-9A-320[d]).

Rev. § 9-320 Nonuniform subsection (f) added as follows: “A secured party may enforce a security interest in farm products against a buyer who, in the ordinary course of business, purchases farm products from, or a commission merchant or selling agent who, in the ordinary course of business, sells farm products for a person engaged in farming operations only where the secured party has filed with the Secretary of State an original, reproduced copy, or electronically reproduced copy of an effective financing statement containing such information and in such form as may be required for an effective financing statement by Section 1324 of the Food Security Act of 1985, P.L. 99-198, 7 U.S.C. § 1631, as now enacted or hereafter amended.” (Ala. Code § 7-9A-320[f]).

Rev. § 9-320 Nonuniform subsection (g) added as follows: “The fee for filing and indexing and for stamping a copy furnished by the secured party to show the date and place of filing for the form described in subsection (f) or any amendment to such form shall be twenty dollars ($20) for the first one or two pages and two dollars ($2) per page for each additional page if the statement or amendment is in the standard form prescribed by the Secretary of State, fifteen dollars ($15) if the information in the form is communicated by a medium other than the filing of a paper form that is authorized by filing-office rule, and an additional five dollars ($5) for each statement or amendment if not in the standard form. The number of names required to be indexed or the presence of a trade name, or both, does not affect the amount of the fee. The form described in subsection (f) must be amended in writing within three months, and similarly signed and filed, to reflect material changes. The effectiveness and continuation of the form is to be treated as if it were a financing statement.” (Ala. Code § 7-9A-320[g]).

Rev. § 9-320 Nonuniform subsection (h) added as follows: “There is hereby created in the State Treasury a fund to be known and designated as the Alabama Farmers Credit Protection Fund. All funds, fees, charges, costs, and collections accruing to or collected by the office of the Secretary of State pursuant to the provisions of subsection (g) or subsections (g), (h), (i), or (j) of Section Ala. Code § 7-9A-523, or any fees collected in relation to filing the form described in subsection (f) shall be deposited into the State Treasury to the credit of the Alabama Farmers Credit Protection Fund.” (Ala. Code § 7-9A-320[h]).

Rev. § 9-320 Nonuniform subsection (i) added as follows: “All funds now or hereafter deposited in the State Treasury to the credit of the Alabama Farmers Credit Protection Fund shall be expended for the purpose of administering the provisions of law authorizing the collection of such funds and shall be payable from the fund on the requisition of the Secretary of State. Such funds shall be exempt from the provisions of subsection (g) of Section Ala. Code § 7-9A-525. The fees collected from August 1, 2002 until September 30, 2003, that are deposited into the Alabama Farmers Credit Protection Fund are hereby appropriated for the fiscal year in which the fees are deposited into the Alabama Farmers Credit Protection Fund. Any of the appropriations that are unexpended at the end of the fiscal years beginning on October 1, 2001, or on October 1, 2002, are hereby reappropriated for the following fiscal year. Commencing October 1, 2003, no funds shall be withdrawn nor expended for any purpose whatsoever unless the same shall have been allotted and budgeted in accordance with Article 4 of Chapter 4 of Title 41, and only in the amounts and for the purposes provided by the Legislature in the general appropriations act." (Ala. Code § 7-9A-320[i]).

Rev. § 9-320 Nonuniform subsection (j) added as follows: "The Secretary of State is authorized to promulgate rules and regulations and set reasonable fees which have not been delineated in this section or Section Ala. Code § 7-9A-523 in order to implement a central filing system which conforms with the requirements of the Federal Food Security Act of 1985, P.L. 99-198, 7 U.S.C. § 1631, as now enacted or as hereafter amended. Except where prescribing forms to administer this central filing system, such regulations and fees shall be adopted in accordance with the Administrative Procedure Act." (Ala. Code § 7-9A-320[j]).

Rev. § 9-320 Nonuniform subsection (k) added as follows: "The Secretary of State may contract with one or more public or private parties to perform some or all of its duties under this section and subsections (g), (h), (i), or (j) of Section Ala. Code § 7-9A-523; except that the Secretary of State may not delegate the power to make rules or regulations, conduct public hearings, prescribe forms, and establish services and fees therefor." (Ala. Code § 7-9A-320[k]).

Rev. § 9-333 Nonuniform subsection (c) added as follows: "Priority of landlord's lien. Priority conflicts between a landlord's lien for rent arising by operation of law, other than an agricultural lien, and a security interest in goods brought on leased premises shall be determined as follows: (1) If the security interest attaches after the goods are brought on the premises, the landlord's lien has priority over the security interest; (2) If the security interest attaches before the goods are brought on the premises, the security interest has priority over the landlord's lien from the time the security interest is perfected or the landlord has notice of the security interest, whichever first occurs; except that if the secured party files with respect to a purchase-money security interest before or within 20 days after the debtor receives possession of the goods, the security interest takes priority over the landlord's lien." (Ala. Code § 7-9A-333[c]).

Rev. § 9-334(j) Subsection reads "Subsection (i) prevails over any inconsistent provision of an existing or future statute, rule or regulation of this State unless the provision is contained in a statute of this State, refers expressly to subsection (i) and states that the provision prevails over subsection (i)." (Ala. Code § 7-9A-334[j]).

Rev. § 9-404(d) Word "if" is added after second comma and after "and" following third comma. (Ala. Code § 7-9A-404[d]).

Rev. § 9-405(a) Words "and in accordance with reasonable commercial standards" added at end of first sentence. (Ala. Code § 7-9A-405[a]).

Rev. § 9-406(j) Subsection reads "Section prevails over inconsistent law. This section prevails over any inconsistent provision of an existing or future statute, rule or regulation of this State unless the provision is contained in a statute of this State, refers expressly to this section and states that the provision prevails over this section." (Ala. Code § 7-9A-406[j]).

Rev. § 9-408(e) Subsection reads "Section prevails over inconsistent law. This section prevails over any inconsistent provision of an existing or future statute, rule or regulation of this State unless the provision is contained in a statute of this State, refers expressly to this section and states that the provision prevails over this section." (Ala. Code § 7-9A-408[e]).

Rev. § 9-501(a)(2) "[T]he Secretary of State" added after "the office of." (Ala. Code § 7-9A-501[a][2]).

Rev. § 9-501(b) "[T]he Secretary of State" inserted at end of first sentence. (Ala. Code § 7-9A-501[b]).

Rev. § 9-502(b)(2) Words "for record" are omitted. (Ala. Code § 7-9A-502[b][2]).

Rev. § 9-502(b)(3) Optional language "sufficient to give constructive notice of a mortgage under the law of this State if the description were contained in a record of the mortgage of the real property" adopted. (Ala. Code § 7-9A-502[b][3]).

Rev. § 9-502(c)(4) Word "duly" is omitted. (Ala. Code § 7-9A-502[c][4]).

Rev. § 9-512(a) Alternative A adopted. Optional language "or recorded" adopted. (Ala. Code § 7-9A-512[a]).

Rev. § 9-515(a) Words "and (h)" added following "(g)," and before "a filed financing statement." (Ala. Code § 7-9A-515[a]).

Rev. § 9-515(b) Words "Public finance or" are omitted from subsection heading. Phrase "public-finance transaction or" is omitted throughout subsection. (Ala. Code § 7-9A-515[b]).

Rev. § 9-515(h) Nonuniform subsection (h) added as follows: "Obligations made pursuant to the provisions of the Alabama Small Loan Act. If the secured obligation is made pursuant to the provisions of the Alabama Small Loan Act, the effectiveness of a filed financing statement lapses upon the earlier of repayment of the loan in full or the expiration of five years after the date of filing." (Ala. Code § 7-9A-515[h]).

Rev. § 9-516(b)(3)(D) Optional language "or recorded" adopted. (Ala. Code § 7-9A-516[b][3][D]).

Rev. § 9-518(b) Alternative A adopted. (Ala. Code § 7-9A-518[b]).

Rev. § 9-519(b) Words "By July 1, 2002, a file number" substituted for words "A file number assigned after January 1, 2002." (Ala. Code § 7-9A-519[b]).

Rev. § 9-519(d) Words "it must be filed for record and" omitted. (Ala. Code § 7-9A-519[d]).

Rev. § 9-519(f) Alternative A adopted. (Ala. Code § 7-9A-519[f]).

Rev. § 9-520(b) Optional language "in the case of a filing office described in Section Ala. Code § 7-9A-501(a)(2)" adopted. (Ala. Code § 7-9A-520[b]).

Rev. § 9-522(a) Alternative A adopted. (Ala. Code § 7-9A-522[a]).

Rev. § 9-523(c)(1)(A) Optional language "or, if the request so states, designates a particular debtor at the address specified in the request" adopted. (Ala. Code § 7-9A-523[c][1][A]).

Rev. § 9-523(d) Second sentence ends after "certificate"; remaining language omitted. (Ala. Code § 7-9A-523[d]).

Rev. § 9-523(e) Subsection reads "Timeliness of filing office performance. The filing office shall perform the acts required by subsections (a) through (d) at the time and in the manner prescribed by filing-office rule. The filing office should perform the required acts within a reasonable period of time, and after January 1, 2003, not later than two business days after the filing office receives the request." (Ala. Code § 7-9A-523[e]).

Rev. § 9-523(f) Subsection reads "Public availability of records. The Secretary of State shall adopt a rule pursuant to the Alabama Administrative Procedure Act which provides a procedure and reasonable fees for the sale or licensing to the public on a nonexclusive basis, in bulk, of copies of all records filed in the office of the Secretary of State under this part. There is hereby created in the State Treasury a fund to be known as the Secretary of State's Information Bulk Sales Fund. Section Ala. Code § 7-9A-525 or any other law to the contrary notwithstanding, all funds, fees, charges, costs and collections accruing to or collected by the office of the Secretary of State under the provisions of this section shall be deposited into the State Treasury to the credit of this fund and shall not be expended for any purpose whatsoever unless the same shall have been allotted and budgeted in accordance with the provisions of Article 4 of Chapter 4 of Title 41, and only in the amounts and for the purposes provided by the Legislature in the general appropriation bill or this section." (Ala. Code § 7-9A-523[f]).

Rev. § 9-525(a) Introductory language reads as follows: "Except as otherwise provided in subsection (e), and except that no filing fee is required for the filing of a termination statement pursuant to Section Ala. Code § 7-9A-513, the fee for filing and indexing a record under this Part is". In subsection (2), words "plus $2.00 for each page more than two" are added after "$20.00." (Ala. Code § 7-9A-525[a]).

Rev. § 9-525(b) Words "public finance and" are omitted from subsection heading. Following language is omitted: "the amount specified in subsection (c), if applicable, plus: (1) $___ if the financing statement indicates that it is filed in connection with a public-finance transaction; (2)". (Ala. Code § 7-9A-525[b]).

Rev. § 9-525(c) Alternative A adopted. Reference is changed to "subsections (a) or (b) of this section." (Ala. Code § 7-9A-525[c]).

Rev. § 9-525(d) Words "issuing a certificate showing" are substituted for "communication." Following language is added to subsection (d), following end of subdivision (2): "The fees described in subdivisions (1) and (2) of this subsection shall apply to each debtor name submitted in the request where the request seeks information on more than one debtor. An additional fee of $100.00 shall be required where the request for information requests expedited response by the Secretary of State." (Ala. Code § 7-9A-525[d]).

Rev. § 9-525 Nonuniform subsection (f) added as follows: "Use of non-standard form. A fee of $5.00 shall be required in addition to the fees set forth in subsections (a), (b) and (d) where the filing or request is submitted in a non-standard form." (Ala. Code § 7-9A-525[f]).

Rev. § 9-525 Nonuniform subsection (g) added as follows: "Proration of fees: (1) If the first mailing address of the debtor or debtors on the initial financing statement is located in a county in Alabama, $5.00 of the filing fee associated with the filing of the financing statement in the office of the Secretary of State shall be rebated to the probate judge of the county where the address is located. This rebate shall begin January 1, 2002 and lapse after December 31, 2011. (2) The balance of the fee shall be paid to the general fund of the State of Alabama, a portion to be allocated to the office of the Secretary of State as provided in subjection (j)." (Ala. Code § 7-9A-525[g]).

Rev. § 9-525 Nonuniform subsection (h) added as follows: "Uniform Commercial Code Fund. There is hereby created in the State Treasury a fund to be known and designated as the Uniform Commercial Code Fund. All funds, fees, charges, costs and collections accruing to or collected by the office of the Secretary of State under the provisions of this section, except fees rebated to probate judges pursuant to subsection (g), shall be deposited into the State Treasury to the credit of the Uniform Commercial Code Fund except as provided in subsection (j).” (Ala. Code § 7-9A-525[h]).

Rev. § 9-525 Nonuniform subsection (i) added as follows: “Use of funds. All funds now or hereafter deposited in the State Treasury to the credit of the Uniform Commercial Code Fund shall be expended for the purpose of carrying out the provisions of the law authorizing the collection of such funds and shall be payable from said fund on the requisition of the Secretary of State; provided, however, commencing in the fiscal year beginning October 1, 2003 and in subsequent fiscal years, no funds shall be withdrawn nor expended for any purpose whatsoever unless the same shall have been allotted and budgeted in accordance with the provisions of Article 4 of Chapter 4 of Title 41, and only in the amounts and for the purposes provided by the Legislature in the general appropriation bill.” (Ala. Code § 7-9A-525[i]).

Rev. § 9-525 Nonuniform subsection (j) added as follows: “Allocation of fees. From July 1, 2001 through December 31, 2001, 81.0 percent of all fees collected in accordance with this section by the Secretary of State shall be deposited to the credit of the state general fund for the credit of the Secretary of State to use for the implementation of this Act. There shall be no change in fees collected by the Office of the Judge of Probate from July 1, 2001 through December 31, 2001.

From January 1, 2002 through September 30, 2002, and in subsequent fiscal years, 81.0 percent of total funds collected in accordance with this section or any fees collected in direct relation to the Uniform Commercial Code during that period shall be deposited to the credit of the state general fund.” (Ala. Code § 7-9A-525[j]).

Rev. § 9-526(a) Words “Secretary of State” inserted in blank in first sentence. Words “Alabama Administrative Procedure Act” inserted in blank in clause (2). (Ala. Code § 7-9A-526[a]).

Rev. § 9-526(b) Words “Secretary of State” inserted in blank. (Ala. Code § 7-9A-526[b]).

Rev. § 9-527 Section was not enacted.

Rev. § 9-604(d) Words “or obligor” added after words “the debtor” in first sentence. (Ala. Code § 7-9A-604[d]).

Rev. § 9-617(a)(3) Text described in parentheses was not adopted; subsection ends after “or other subordinate lien.” (Ala. Code § 7-9A-617[a][3]).

Rev. § 9-701 Section reads as follows: “This article is effective January 1, 2002, except Section Ala. Code § 7-9A-525 is effective July 1, 2001.” (Ala. Code § 7-9A-701).

Rev. § 9-705(c)(2) Date “December 31, 2006” is substituted for “June 30, 2006.” (Ala. Code § 7-9A-705[c][2]).

Rev. § 9-710 Section was not enacted.

Appendix II to Official Text of Rev. Art. 9 (§ 9-103A, § 9-324A, certain definitions in § 9-102) these sections, setting forth provisions for production-money priority, were not enacted.

§ 10-101 Phrase “December 31st following its enactment” replaced with “December 31, 1966.” (Ala. Code § 7-10-101).

§ 10-102(1) Repeals various Alabama Acts instead of uniform acts listed in Official Text. (Ala. Code § 7-10-102[1]).

§ 10-104 Repealed effective Jan. 1, 2005. (Act 2004-315).

§ 11-106 Subsections (2) and (3) omitted; (4) redesignated (2). (Ala. Code § 7-11-106).

Official Options, Alternatives and Amendments.

§ 1-209: 1966 Official Optional Amendment not adopted. Section not adopted.

§ 2-318: Alternative B adopted, with variations.

§ 2-702: 1996 Official Amendment not adopted.

§ 2A-101, et seq.: Adopted, with variations. (See subhead Deviations, supra.)

§ 2A-103(1)(e): Optional language adopted.

§ 2A-216: Alternative B adopted.

Rev. § 3-101, et seq.: Adopted, with variations. (See subhead Deviations, supra.)

Rev. § 3-415(a): 1993 Amendment not adopted.

Rev. § 4-101, et seq.: 1990 Conforming Amendments adopted, with variations. (See subhead Deviations, supra.)

Rev. § 4-106: Alternative B adopted.

§ 4A-101 et seq.: Adopted, with addition of new § 7A-4A-601.

§ 6-101, et seq.: Repealed. Official Repealer of Art. 6 not adopted.

§ 7-204: Optional subsection (4) not adopted.

§ 7-209: 1966 Official amendment not adopted.

§ 7-403(1)(b): Optional language not adopted.

Rev. § 8-101, et seq.: Revised Art. 8 (1994 Amendments) adopted, with variations. (See subhead Deviations, supra.)

Rev. § 9-101, et seq.: 1999 Revision and Conforming Amendments adopted with variations. (See subhead Deviations, supra.)

Rev. § 9-502(b)(2): Optional language omitted. (Ala. Code § 7-9A-502[b][2]).

Rev. § 9-502(c)(4): Optional language omitted. (Ala. Code § 7-9A-502[c][4]).

Rev. § 9-512(a): Alternative A adopted. (Ala. Code § 7-9A-512[a]).

Rev. § 9-518(b): Alternative A adopted. (Ala. Code § 7-9A-518[b]).

Rev. § 9-519(f): Alternative A adopted. (Ala. Code § 7-9A-519[f]).

Rev. § 9-522(a): Alternative A adopted. (Ala. Code § 7-9A-522[a]).

Rev. § 9-525(a): Optional language omitted, and other variations adopted. (See subhead Deviations, supra.) (Ala. Code § 7-9A-525[a]).

Rev. § 9-525(c): Alternative A adopted. (Ala. Code § 7-9A-525[c]).

Permanent Editorial Board's Recommendations for Optional Amendments.

1966 Official Optional Amendments to §§ 1-209, 2-318, 9-105, 9-106 not enacted. As to § 2-318, however, see text under subhead Deviations, supra.

1972 Official Amendments adopted, with certain exceptions. (Ala. Code § 7-11-101).

1973 Official Amendment adopted.

1977 Official Amendments not adopted.

1987 Official Amendments adopted, with certain exceptions. (Ala. Code § 7-2A-101, et seq.).

1989 Official Amendments adopted. (Ala. Code § 7-4A-101 et seq. and repeal of Ala. Code § 7-6-101 et seq.).

1990 Official Amendments adopted. (Affecting certain provisions of Article 2A).

1991 Official Amendment adopted. (Ala. Code § 7-3-101 et seq. and Ala. Code § 7-4-101 et seq.).

1994 Official Amendment adopted. (Ala. Code § 7-8-101 et seq.).

1995 Official Amendment adopted. (Ala. Code § 7-5-101 et seq.).

1999 Official Amendment adopted. (Ala. Code § 7-9A-101 et seq.).

2001 Official Amendment adopted.

2003 Official Amendment adopted.

Filing Fees.

See category 10 Documents and Records, topic 10.04 Records, subhead Filing Under Commercial Code.

Forms.

For forms of financing statement, financing statement addendum, financing statement amendment and financing statement amendment addendum, see Official Text of Rev. § 9-521. (See Part III, Uniform and Model Acts section, Commercial Code Amendments.) Other forms complying with requirements of § 7-9A-516 may be used; filing office will charge additional fee of $5 for use of nonstandard form. (§ 7-9A-525[f]).

See also topics: Banks and Banking, Bills and Notes, Brokers, Carriers, Contracts, Factors, Frauds, Statute of, Sales, Securities, Warehousemen; categories Business Organizations, topic Corporations; Civil Actions and Procedure, topic Limitation of Actions; Debtor and Creditor, topics Assignments, Fraudulent Sales and Conveyances, Liens, Pledges; Documents and Records, topics Records, Seals; Mortgages, topic Chattel Mortgages.

3.10 CONDITIONAL SALES:

See topic 3.23 Sales.

3.11 CONSIGNMENTS:

See topic 3.14 Factors.

3.11A CONSUMER CREDIT:

Uniform Consumer Credit Code (UCCC) not adopted. Alabama Consumer Credit Act of 1971 (Ala. Code § 5-19-1, et seq.), as amended May 20, 1996 (Mini-Code), contains some provisions similar to those in UCCC.

Maximum finance charge for credit transactions (excluding sales made under open-end credit plans) under $2,000 may equal but not exceed total of: $15 per $100 per year for first $750 of original amount financed; and $10 per $100 per year for portion of original amount financed exceeding $750 and less than $2,000. (Ala. Code § 5-19-3). Maximum finance charge under open-end credit plan 1.75% per month on first $750 or less, and 1.5% per month on unpaid balance in excess of $750. (Ala. Code § 8-8-14). Debtor and creditor can agree to greater rate of interest, subject to common law limits on unconscionability, if original principal balance not less than $2,000. (Ala. Code § 8-8-5).

Other Charges.

Creditor permitted to charge fees for pest inspection and flood inspection for loans secured by real property; appraisal fee payable to employee of creditor if employee licensed appraiser. (Ala. Code § 5-19-4). Creditor permitted to charge debtor attorneys' fees prior to default in connection with closing or amending credit transaction in excess of $10,000 or secured by real property regardless of amount of credit, provided attorney not salaried employee of creditor. (Ala. Code § 5-19-10). Certain licensed lenders permitted to charge monthly account maintenance fee of up to three dollars during repayment of credit transaction, if fees were stipulated in contract. (Ala. Code § 5-19-33).

Penalties for Excess Finance Charge.

Creditor liable only for debtor's "actual economic damages" resulting from excess finance charge. (Ala. Code § 5-19-19[a]). If creditor's excess finance charge violation "deliberate" or "reckless," borrower entitled to recover greater of: (1) Five times actual economic damages or (2) finance charge itself, but not less than $100. (Ala. Code § 5-19-19[a][2]).

Penalties for Other Mini-Code Violations.

Creditor's violation renders transaction unenforceable only to extent of violation, and debtor's remedies limited to "actual economic damages." (Ala. Code § 5-19-19[c]). Creditor has no fiduciary duty to debtor. (Ala. Code § 5-19-19[f]).

Credit Life Insurance.

Amended Mini-Code allows creditor to offer, and if accepted, provide credit life, accident and health, and involuntary unemployment insurance. (Ala. Code § 5-19-20[b]). If credit scheduled to be paid in equal installments, credit life coverage limited to unpaid principal balance plus amount of one scheduled payment. (Ala. Code § 5-19-20[b]). Credit life coverage, if single payment transaction, accident and health insurance and involuntary unemployment insurance may not exceed total amount of payments. (Ala. Code § 5-19-20[b]).

Licensing Requirements.

No creditor with place of business or resident employee in Alabama may make consumer loans or take assignments of consumer credit contracts without obtaining license from Ala. superintendent of banks. (Ala. Code § 5-19-22). Sellers engaging in consumer credit sale transactions not required to be licensed. (Ala. Code § 5-19-22).

Disclosures.

When extending credit to consumer, other than under open-end credit plan, creditor must provide debtor copy of each instrument executed by debtor. (Ala. Code § 5-19-6). Note or consumer credit contract must contain following statement in eight point or larger type immediately above space for debtor's signature: "CAUTION—IT IS IMPORTANT THAT YOU THOROUGHLY READ THE CONTRACT BEFORE YOU SIGN IT." (Ala. Code § 5-19-6).

Loans not covered include loans to individuals, corporations, trusts, partnerships, or associations of not less than $2,000 (Ala. Code § 8-8-5), loans involving interest in real property where creditor is approved mortgagee under National Housing Act (Ala. Code § 5-19-31), and pawnbroking business (Ala. Code § 5-19-31).

3.12 CONSUMER PROTECTION:

Deceptive Trade Practices Act (Ala. Code § 8-19-1 to -15) similar to Uniform Deceptive Trade Practices Act. In addition to activities proscribed by Uniform Act, Act proscribes following: Falsely representing going out of business; altering motor vehicle odometer with intent to deceive; failing to ship purchased goods within time advertised, or if no time advertised, within 30 days; using chain referral sales plan; selling or offering to sell right to participation in pyramid sales structure; misrepresenting either amount of earnings or extent of market of goods in connection with seller-assisted marketing plan; intentionally misrepresenting warranty rights; failing to disclose material damage to motor vehicles; affix Alabama revenue stamp to cigarettes for deceptive purposes; engaging in scheme or artiface to defraud by telephone communications; contacting party by telephone to offer gift, award or prize, where communicating party had knowledge at that time that statements were materially false and intended to deprive other of property. (Ala. Code § 8-19-5).

Act does not apply to acts by publisher or employee of newspaper, radio station, television station, or telephone company in dissemination of advertisement that such person did not know to be false or misleading; or to any seller who: (1) Disseminates advertisements from manufacturer or other seller without knowledge that advertisements are false or misleading; (2) provides name and address of such manufacturer or other seller upon request of Attorney General or District Attorney; and (3) on request of Attorney General or District Attorney, agrees in writing to discontinue such dissemination. (Ala. Code § 8-19-7).

Enforcement.

Restraining orders may be sought by Attorney General or District Attorney to prevent violations. (Ala. Code § 8-19-8). When consumer monetarily damaged, he may sue under Act to recover actual damages or $100, whichever greater, or in court's discretion up to three times actual damages. (Ala. Code § 8-19-10). Willful violation of Act Class A misdemeanor (Ala. Code § 8-19-12).

State of Emergency.

1996 Alabama Unconscionable Pricing Act prohibits charging of unconscionable prices for sale or rental of any commodity or rental facility during periods of declared state of emergency. (Ala. Code § 8-31-3). Price equal to or in excess of 25% of average price of commodity or facility during last 30 days immediately prior to declared state of emergency prima facie unconscionable. (Ala. Code § 8-31-4).

Alabama Telemarketing Act.

(Ala. Code § 8-19A-1, et seq.). Applies to commercial telephone solicitation, defined as unsolicited telephone call for purpose of inducing consumer to purchase or invest in consumer goods or services, or other communication where gift, award or prize offered, consumer invited to call, and salesperson intends to complete sale or enter into purchase agreement in course of telephone call. (Ala. Code § 8-19A-3). "Other communication" means written or oral notification or advertisement transmitted through any means. (Ala. Code § 8-19A-3).

Does not apply to isolated transactions, calls for religious, charitable, political, educational or other noncommercial purposes or person soliciting for nonprofit corporation if corporation properly registered with Secretary of State as § 501(c)(3) organization under Internal Revenue Code. (Ala. Code § 8-19A-4). Other specific exemptions listed in statute.

Requires commercial telephone seller to obtain license from Consumer Division of Office of Attorney General. (Ala. Code § 8-19A-5). Requirements of application for license explicitly set forth in §§ 8-19A-5 to Ala. Code § 8-19A-7. Act requires: (1) Commercial telephone seller to identify himself within first 30 seconds of call and to inform purchaser of cancellation rights if sale or agreement to purchase is completed (Ala. Code § 8-19A-12); (2) seller to submit to Consumer Division of Office of Attorney General statement setting forth each prize and gift discussed along with value, terms and conditions of offer, and odds of receiving item (Ala. Code § 8-19A-13); and (3) signed written contract for purchase to be final explaining purchaser's rights and procedure for cancellation. (Ala. Code § 8-19A-14). Prohibits telephone solicitations to residential subscribers who give notice of objection to telephone solicitations to Public Service Commission. (Ala. Code § 8-19C-2).

Provides that person violating Act may be liable for civil penalty of up to $10,000 for each violation. (Ala. Code § 8-19A-18). In civil action or investigation, Consumer Division recoups reasonable attorneys' fees and costs from non-prevailing party. (Ala. Code § 8-19A-19). In any civil litigation initiated by Consumer Division, court may award to prevailing party reasonable attorneys' fees and costs if court finds complete absence of justiciable issue or bad faith on part of losing party. (Ala. Code § 8-19A-19). Soliciting in violation of Act Class C felony punishable under §§ 13A-5-6 and Ala. Code § 13A-5-11. (Ala. Code § 8-19A-21). Provides for database operated by Consumer Division of objectors and provides charges for those on list. (Ala. Code § 8-19C-2 to -3).

Door to Door Sales.

Consumer right to cancel home solicitation sale until midnight of third business day following execution of agreement or offer to purchase. Seller must obtain buyer's signature to written agreement or offer to purchase, designating as date of transaction date on which buyer actually signs and containing following under conspicuous caption:

Form

BUYERS RIGHT TO CANCEL:

If this agreement was solicited at your residence and you do not want the goods or services, you may cancel this agreement by delivering or mailing a notice to the seller. The notice must say that you are cancelling the agreement and must be delivered or mailed before midnight of the third business day after you sign this agreement. The notice must be delivered or mailed to:

. . . .

(insert name and mailing address of seller)

Within ten days of cancellation seller must tender to buyer any payments made or goods traded. Within a reasonable time thereafter buyer, upon demand, must tender at his residence to seller any goods delivered by seller. If seller fails to demand possession within 20 days after receipt of notice of cancellation, goods become property of buyer without obligation to pay for them. (Ala. Code § 5-19-12). Seller using FTC forms (16 C.F.R. 429) presumed in compliance.

Lemon Law.

If consumer returns new motor vehicle that does not conform to express warranties, and gives notice of nonconforming condition during specified time period, manufacturer must make repairs required to remedy nonconforming condition. (Ala. Code § 8-20A-2). Manufacturer's obligation ends after earlier of 24 months following delivery or 24,000 miles. (Ala. Code § 8-20A-2).

Plain Language Law.

No "Plain Language" statute.

Social Security Numbers.

No state department, licensing or regulatory board, or agency may reveal Social Security Number of person on any document available for public inspection, without consent. (Ala. Code § 41-13-6).

3.13 CONTRACTS:

Common law rules govern except for Tit. 8 of Ala. Code which provides certain interpretative standards and makes particular kinds of contracts invalid or illegal.

Uniform Commercial Code adopted. See topic 3.09 Commercial Code.

Seal on contract does not foreclose defense based on failure of consideration. (Ala. Code § 6-5-287). See category 10 Documents and Records, topic 10.05 Seals.

Franchise Contract.

Wholesaler, manufacturer, or distributor who enters into franchise agreement with retailer of farm, lawn and garden, or light industrial equipment, which agreement requires retailer to maintain inventory, obligated to repurchase inventory when franchise agreement terminated. (Ala. Code § 8-21A-6). Termination of franchise without good cause renders wholesaler, etc. liable for actual and consequential damages. (Ala. Code § 8-21A-4; -8). Warranty claims must be approved or disapproved in writing within 60 days after receipt of claim from retailer and paid within 30 days of approval. (Ala. Code § 8-21A-10). Wholesaler, etc. must compensate retailer for performance of warranty work. (Ala. Code § 8-21A-10).

Infant's Contracts.

See category 14 Family, topic 14.10 Infants, subhead Ratification of Contracts.

Consumer Contracts.

See topic 3.11A Consumer Credit.

Consumer Protection.

See topic 3.12 Consumer Protection.

Lottery.

§ 41-26-1, et seq. not effective.

Partial Restraints on Trade.

No-hire provisions, as partial restraint on trade, not rendered void by statute governing contracts in restraint of business if individual bound by provision not prevented from practicing his or her profession. (981 So.2d 413).

3.14 FACTORS:

Uniform Commercial Code adopted (1965). (§ 7-1-101, et seq.). See topic 3.09 Commercial Code.

License Requirements.

Commission merchant, as defined in the statute (Ala. Code § 2-29-1), must obtain annual permit from Commissioner of Agriculture and Industries (fee $10) and supply surety bond in penal sum of $1,000 (Ala. Code § 2-29-4), or bond equivalent, being either trust fund agreement based on cash, fully negotiable bonds of U.S. Government or of State of Alabama, or irrevocable letter of credit (Ala. Code § 2-2-71). All forms for issuance of bond or bond equivalent furnished by Commissioner of Agriculture and Industries. (Ala. Code § 2-2-71). Commission merchant or merchandise broker must also obtain, from judge of probate, state license (fee $25) and county license (fee $12.50). (Ala. Code § 40-12-40,-81). City license may also be necessary.

Consignment Agreements.

If delivered goods may be returned by buyer even though goods conform to contract, transaction is sale on approval if goods for use, or sale or return if goods for resale. (Ala. Code § 7-2-326).

Liens.

See topic 3.09 Commercial Code.

Records.

Commission merchant must keep detailed records subject to inspection by commissioner of agriculture and industries and must mail copy of such record to consignor within 48 hours and remit within seven days or such period as stipulated by written contract. (Ala. Code § 2-29-7).

Penalties.

Factor, commission merchant, attorney, auctioneer, architect, agent or broker punishable upon conviction for overcharging customers or accepting rebates, gratuities, etc. as if he had stolen. (Ala. Code § 8-11-5).

Reports.

Commission merchants and all persons trading and dealing on commission, assignees and consignees authorized to sell and persons having in their possession goods owned by nonresident must assess such goods for taxation, and must attach last inventory thereof to tax list. (Ala. Code § 40-7-13). Agent or factor, when legally called on by assessor, is required to list all real and personal property held by him. (Ala. Code § 40-7-20).

3.15 FRANCHISES:

No special legislation, but see The Motor Vehicle Franchise Act. (Ala. Code § 8-20-1, et seq.). For franchisee suits against franchisor, see 540 So.2d 648.

3.16 FRAUDS, STATUTE OF:

Following agreements are void unless agreement or some note or memorandum thereof, expressing consideration, is in writing and signed by party to be charged: (1) Every agreement by its terms not to be performed within one year; (2) every special promise by executor or administrator to answer damages out of his own estate; (3) every special promise to pay for debt, default or miscarriage of another; (4) every agreement, promise or undertaking made on consideration of marriage, except mutual promises to marry; (5) every contract for sale of real estate, except leases for not longer than one year, unless purchase money, or portion thereof paid, and purchaser put in possession by seller; (6) every agreement, contract or promise to make will or to devise or bequeath any real or personal property or right therein; (7) every agreement or commitment, except for consumer loans with principal amount financed less than $25,000; (8) notwithstanding § 7-8-113, every agreement for sale or purchase of securities other than through national stock exchange or over-the-counter securities market. (Ala. Code § 8-9-2). Auctioneer's memorandum made at public auction of real estate (Ala. Code § 8-9-3), or return or report of officer making judicial, execution or attachment sale (Ala. Code § 8-9-4; Ala. Code § 6-9-141) is sufficient. Representation or assurance concerning character, conduct, ability, trade or dealings not actionable by person to whom made, unless in writing and signed by person sought to be charged. (Ala. Code § 8-9-5).

Uniform Commercial Code adopted. (Ala. Code § 7-1-101, et seq.). See topic 3.09 Commercial Code.

Contract of sale governed by § 7-2-201.

Option Contracts.

Option contract between mortgagor and mortgagee contemplating sale of goods valued at more than $500 must satisfy statute of frauds.

Part Performance.

Contracts for sale of real estate exempt only if portion of purchase money paid and purchaser put into possession by seller (Ala. Code § 8-9-2), and Supreme Court has uniformly held that both requisites must be met in order to take contract out of statute (476 So.2d 75). Contract void under statute of frauds cannot be exempted from effect of statute by partial performance so as to permit recovery under contract for any part thereof remaining executory. (18 Ala. App. 350, 92 So. 236).

3.17 INTEREST:

Legal rate in absence of written contract fixing rate 6% per annum. (Ala. Code § 8-8-1).

Maximum Rate.

Interest up to 8% per annum may be contracted for. (Ala. Code § 8-8-1). Interest that is prima facie usurious under § 8-8-1 may be lawful under Consumer Credit Act, § 5-19-3. (See topic 3.11A Consumer Credit.) Interest up to 6% per annum for entire period of loan may be computed in advance and added to principal even though loan is to be repaid in monthly or other installments. (Ala. Code § 8-8-2). Lender may charge if provided in contract: (a) Interest surcharge of not more than 6% of part of amount financed, which is not in excess of $2,000; (b) as alternative to other applicable interest limits, prime rate plus 2% ("prime rate" defined as average of prime rate charged by three largest banks in New York City at close of business three days prior to loan); and (c) on open-end credit, 1¾% per month on amounts under $750, and 1½ % per month on excess of any unpaid balance. (Ala. Code § 8-8-14). Any person, corporation, trust, partnership, or association may agree to pay any rate of interest on loans of $2,000 or more, provided that no law relating to unconscionability in consumer transactions is violated. (Ala. Code § 8-8-5). State board of education and State institution where education part of program permitted to pay interest not exceeding 15% per annum on loans of $100,000 or more. (Ala. Code § 8-8-4). Debts under National Housing Act and acts providing veteran's benefits exempt from usury and interest restrictions. (Ala. Code § 8-8-6). Industrial development boards organized under §§ 11-54-80, et seq. and medical clinic boards organized under §§ 11-58-1, et seq. exempt from usury laws and interest regulations. (Ala. Code §§ 11-54-97; 11-58-15). Bonds issued by public entity or nonprofit corporation exempt from usury and interest restrictions. (Ala. Code § 8-8-7). Public housing bonds and state board of education securities may bear interest as determined by issuing authority. (Ala. Code §§ 24-1-32; 16-3-28[b]). Bonds, notes, and other securities issued by public hospital corporations exempt from state laws governing usury or limiting interest rates. (Ala. Code § 22-21-6).

Judgments for payment of money, other than costs, bear interest from day of entry, at rate of 12% per annum; provided, that fees allowed trustee, executor, administrator, or attorney and taxed as part of cost of proceeding bear interest at same rate from day of entry. Judgment based upon contract action bears interest at rate provided in contract. (Ala. Code § 8-8-10). Prejudgment interest accrues at legal rate of 6% per annum unless statute or written contract otherwise provides. (440 So.2d 321).

Open Accounts.

Do not bear interest until closed, in absence of contract or usage. (220 Ala. 332, 124 So. 884).

Small loans governed by §§ 5-18-1, et seq. Licensed lender may charge, on loans up to $1,000, 3% per month on unpaid principal balance up to $200 and 2% per month on unpaid principal balance between $200 and $1,000, but may not divide loan contracts, and may not contract for or receive any charges, including insurance premiums, other than those specifically authorized. (Ala. Code § 5-18-15). Refunds on prepayment or renewal of loan must be calculated under rule of 78ths. (Ala. Code § 5-18-15). Bookkeeping and advertising of licensed lender regulated. (Ala. Code § 5-18-11 to -13). Exaction of usurious interest or failure to comply with statutory requirements that borrower receive clear statement of terms of contract, etc., may result in criminal penalties, revocation of license, and borrower's actual economic damages. (Ala. Code § 5-18-15; -16; -18; -21). (See topic 3.11A Consumer Credit.) Mini-Code did not repeal Small Loan Act, but should be read in conjunction with Small Loan Act.

Usury results in forfeiture of all interest, and all interest paid is deducted from principal. Cannot be pleaded against holder in due course of negotiable instrument. (Ala. Code § 8-8-12). Lender violating Small Loan Act forfeits borrower's actual economic damages. (Ala. Code § 5-18-16; -21). Creditor charging excessive finance charge forfeits debtor's actual economic damages not to exceed finance charge. If violation deliberate or reckless, creditor forfeits greater of entire finance charge imposed or five times debtor's economic damages, but not less than $100. (Ala. Code § 5-19-19).

Credit Cards.

Alabama Credit Card Act (Ala. Code § 5-20-2, et seq.) does not limit amount or rate of interest and other financing charges, cash advance charges, charges for extension of credit in excess of preestablished limits, late fees, annual fees, or insurance premiums, which may be provided for in credit card agreement. (Ala. Code § 5-20-5).

Equalization.

Any person or entity may charge interest at maximum rate permitted under any other federal or state chartered or licensed lender having principal place of business in Alabama and will be subject to same penalties for excessive interest or finance charges. (Ala. Code § 8-8-1.1).

Collection of Attorney Fee Clauses.

See topic 3.02 Bills and Notes.

Savings and Loan Associations.

May charge, on loans secured by savings accounts, rate of interest not exceeding 2% per annum above rate payable on such savings accounts. (Ala. Code § 8-8-1.2).

Credit unions may charge rates of interest and finance charges as authorized for other financial institutions pursuant to Consumer Credit Act. (Ala. Code § 5-17-18).

Partial payments applied first to interest due, except payments for spouse or child support. (Ala. Code § 8-8-11).

3.18 INFORMATION TECHNOLOGY, INTERNET AND NEW MEDIA:

Uniform Electronic Transactions Act.

Adopted. (Ala. Code § 8-1A-1 et seq.).

Modifications.

Government agency party also subject to state and local records retention requirements.

Personal Jurisdiction.

Alabama court does not have personal jurisdiction over nonresident seller solely as result of sale made to Alabama resident over Internet. (83 F.Supp.2d 1261).

Investment Securities Registration.

Demand to not register transfer of security can be communicated electronically. (Ala. Code § 7-8-403[a]; Ala. Code § 7-8-102[a][6]).

Commercial Law and Consumer Protection.

Written notices required under Ala. Code § 8-21A-1 et seq. can be accomplished via email. (Ala. Code § 8-21A-2[13]).

Municipal Telecommunication Services.

Public providers may provide Internet services. Municipality may be public provider of Internet services. Public provider required to make available communications equipment not needed for public municipal or self purposes to others on unbundled basis. Municipality service provider approves own rates. Customers must receive 30 days notice of rate change. Power of eminent domain applies. (Ala. Code § 11-50B-1 et seq.).

Criminal.

Community Notification of Sex Offenders.

Electronic notification permitted. (Ala. Code § 15-20-25).

Child Pornography.

Possession or dissemination of obscene material containing visual depiction of persons under age 17 by any means including computers, computer diskettes, other electronic devices or Internet prohibited. (Ala. Code § 13A-12-192; 745 So.2d 912).

Cigarettes.

Retail cigarette sales where order is placed by phone, facsimile or Internet prohibited. (Ala. Code § 13A-12-3.1 to -3.7).

3.19 LICENSES, BUSINESS AND PROFESSIONAL:

State license and county license must be procured annually for substantially all businesses and many occupations. (Ala. Code § 40-12-40, et seq.). In absence of special provision, payment for state and county licenses is due Oct. 1 of each year (delinquent Nov. 1), and licenses are for term of one year ending Sept. 30. (Ala. Code § 40-12-26). Except as otherwise provided, licenses procured from judge of probate for county in which business to be carried out. (Ala. Code § 40-12-2).

Municipalities have power to require licenses for any trade, business, occupation, etc., engaged in or carried on in such municipalities or within police jurisdictions, except as prohibited by constitution or laws of state. (Ala. Code §§ 11-51-90 to -91). License application forms must be standardized in conformity with form set out in Ala. Code § 11-51-90(d). Maximum municipal license tax on public utilities, other than telephone, telegraph, railroad, sleeping car and express companies, is 3% of gross receipts. (Ala. Code § 11-51-129). State imposes additional 2.2% license tax on gross receipts of public utility companies. (Ala. Code § 40-21-50).

Utilities furnishing electricity, domestic water or natural gas also subject to following gross receipts tax: Not over $40,000, 4%; $40,001 to $60,000, $1,600 plus 3% of excess over $40,000; over $60,000, $2,200 plus 2% excess over $60,000. (Ala. Code § 40-21-82). Gross receipts tax on utilities furnishing telegraph or telephone services is as follows: Not over $60,000, 6.7%; over $60,000, $4,020 plus 3.7% of excess over $60,000. (Ala. Code § 40-21-82).

Architects.

Must be licensed by State Board of Registration. Must qualify through test from independent testing agency authority. (Ala. Code § 34-2-33). Unlicensed practice is Class A misdemeanor. (Ala. Code § 34-2-36).

Commercial Travelers.

Person carrying goods from place to place to sell them. Itinerant peddler of drugs, ointments and medical preparations pays annual license tax of $250 to State and $125 to each county in which he does business. Other peddlers or vendors subject to special provisions. (Ala. Code § 40-12-139).

Collection Agencies.

No general provisions regulating same. Collection agency must pay license tax. (Ala. Code § 40-12-80). Use of unreasonable collection tactics by licensed Small Loan Act lender or his agent is ground for revocation of license (Ala. Code § 5-18-9); such tactics are defined in part by Regulation No. Ala. Code § 155-2-3-.06 of Bureau of Loans (promulgated Feb. 15, 1960, last am'd Aug. 1, 2002). Collection agency may be liable to debtor for damages where agency's conduct "exceeds bounds of reasonableness." (272 Ala. 174, 132 So.2d 321). No one save regularly licensed attorney may practice law, and one is said to be practicing law who as vocation enforces, secures, settles, adjusts, or compromises defaulted, controverted or disputed accounts, claims or demands between persons with neither of whom he is in privity or in relation of employer and employee in ordinary sense. (Ala. Code §§ 34-3-6 to -7). One acting as collection agent may be subject to prosecution for unauthorized practice of law. (Ala. Code §§ 34-3-6 to -7).

Professional Counselors.

Any persons holding themselves out to be "Licensed" professional counselor who offers to render professional counseling services in private practice must be licensed by Alabama Board of Examiners in Counseling. (Ala. Code § 34-8A-1, et seq.). To qualify, applicant must be at least

19 years of age, of good moral character, have received masters degree, submit documentation of completion of 3,000 hours of supervised counseling experience and pass examination, and citizen of U.S. or, if not citizen of U.S., person legally present in U.S. with appropriate documentation from federal government. (Ala. Code § 34-8A-7, am'd 2008, c. 175).

Chain Stores.

Annual license fees exacted at following rates, graduated according to number of stores operated in this state: One store, $1; second to fifth stores, $15 each; sixth to tenth stores, $22.50 each; 11th to 20th stores, $37.50 each; stores in excess of 20, $112.50 each. (Ala. Code § 40-12-315). Licenses must be obtained from probate judge or license commissioner. Filing fee of 50¢ for each store must accompany application for original issuance or renewal of license. (Ala. Code § 40-12-312).

"Store" means any store or mercantile establishment owned, operated, maintained, controlled, or for which buying done, by same person, firm, corporation, copartnership or association, either foreign or domestic in which goods, wares or merchandise of any kind are sold, at retail or wholesale but excludes places of business at which principal business conducted is sale or distribution of petroleum products, or ice (when less than 4,000 pounds kept in establishment at one time). (Ala. Code § 40-12-310).

Railroads.

Freight and equipment companies subject to annual license tax of 3½% of 30% value of average number of cars within state for 12-month period preceding Oct. 1. (Ala. Code § 40-21-52).

Alarm System Installers.

All alarm system installers shall be licensed by Alabama Electronic Security Board of Licensure except parties exempted under Ala. Code § 34-1A-6. License fees shall not exceed $150 per individual and $750 per business. (Ala. Code § 34-1A-5).

Distress Sales and Going-Out-of-Business Sales.

Unlawful to hold distress merchandise sale or going-out-of-business sale without license issued by probate judge. (Ala. Code § 8-13-2). License must be applied for 30 days in advance of sale, and unless renewed, license authorizes sale of only 30 days duration. (Ala. Code § 8-13-3 to -12). License requires payment of $10 investigation fee and license fees ranging from $50 to $500, depending on amount of inventory. (Ala. Code § 8-13-6 to -8). Renewal of license for 30 days or less is $100, issuance fee is $25. (Ala. Code § 8-13-8). Bond of $2,500 or 5% of amount of inventory, whichever is greater, must be posted to indemnify plaintiffs who suffer loss by misrepresentation. (Ala. Code § 8-13-4). Bond forfeited to state by noncompliance with licensing act. (Ala. Code § 8-13-4). Willful violation of act is punishable by fine and imprisonment. (Ala. Code § 8-13-22).

Auctioneers governed by Auctioneers License Act. (Ala. Code § 34-4-1, et seq.). Privilege license fees for auctioneers are not to exceed $250 state license and $25 county license for each county worked. No license required for apprentice auctioneer. (Ala. Code § 34-4-27).

Small Loan Act licensees required to pay annual license fee of $500 for each office, branch or place of business to Bureau of Loans of Banking Department. (Ala. Code § 5-18-5). Fee due Oct. 1 (delinquent Nov. 1). (Ala. Code § 5-18-5).

Real estate brokers, real estate salespersons, and corporations must be licensed to engage in business of selling, renting or listing real estate situated within Alabama. (Ala. Code § 34-27-30, am'd 2008, c. 141). Applicants for licenses must be U.S. citizens or legally present in

U.S. with appropriate documentation from federal government or is alien with permanent resident status and at least 19 years old, must submit to written examination by Commission, and, if nonresident, must: (1) Sign affidavit submitting to jurisdiction; and (2) complete course in real estate approved by Commission. (Ala. Code § 34-27-32 to -33, am'd 2008, c. 141). Real estate brokers and sales persons must complete 15 hours of continuing education to renew license and certification. Conviction of criminal offense involving moral turpitude may disqualify applicant for license as broker or salesperson. Original license fees are $150 for individual brokers, $65 for individual salesperson, and $65 for corporations or partnerships. Beginning Oct. 1, 2004, original license fees for individual salesperson and corporations and partnerships is $85. (Ala. Code § 34-27-35). Applicant for original license must also deposit $30 in state real estate recovery fund. (Ala. Code § 34-27-31). Criminal penalties provided for violation. (Ala. Code § 34-27-36).

General Contractor.

License fee of $300 originally, $200 renewal. (Ala. Code § 34-8-2, am'd 2008, c. 134). Failure to secure general contractor's license under § 34-8-2 renders construction contract null and void. (417 So.2d 574). Every contractor, whether general or not, must also obtain license. (Ala. Code § 40-12-84).

Landscape Architects.

Unlicensed practice prohibited as Class A misdemeanor. (Ala. Code § 34-17-7).

Mussel Catchers.

Before taking any type of mollusk from fresh waters of state, must purchase mussel catcher's license. (Ala. Code § 9-11-372).

Commercial fishing equipment must be affixed with tag stating name, address, and social security or tax identification number of owner. (Ala. Code § 9-11-22).

Optometrists must be licensed by Alabama Board of Optometry. (Ala. Code § 34-22-6). License not required for sale of eyeglasses in store on prescription of licensed physician. (Ala. Code § 34-22-4). $160 license renewal fee. (Ala. Code § 34-22-22).

Onsite Waste Water Systems.

Must be licensed by Alabama Onsite Wastewater Board to manufacture, install, or service onsite waste water systems. (Ala. Code § 34-21A-1, et seq.).

Veterinarians.

Must pass all portions of Alabama state board examination, acquire veterinary facility license and score at least 70% on American Veterinary Medical Association National Licensing Exam. (Ala. Code § 34-29-60, et seq.).

Heating and air conditioning contractors shall be licensed by Board of Heating and Air Conditioning Contractors. (Ala. Code § 34-31-18, et seq.). License fees shall not exceed $200 and shall be renewed annually. (Ala. Code § 34-31-25). Prospective contractors found to have performed substandard work shall be required to submit $10,000 performance bond. (Ala. Code § 34-31-28).

Massage Therapists.

Alabama Board of Massage Therapy must license applicants who have completed 650 hours of supervised instruction as specified in Ala. Code § 34-43-9 and passed National Certification Exam for Therapeutic Massage; or who are licensed in another state. (Ala. Code § 34-43-1, et seq.). Licenses will be renewed biannually and all licensees must complete 16 hours of continuing education. (Ala. Code § 34-43-21).

Alcoholic Beverages.

Alabama Alcoholic Beverage Control Board may not issue license in Class IV municipality for retail sale of alcoholic beverage without approval of municipality. (Ala. Code § 28-1-7).

Insurance agents must complete at least 24 hours biannually of continuing education. (Ala. Code § 27-8A-1).

Exemptions.

Certain charitable, religious and civic organizations exempt from licensing requirements. (Ala. Code § 40-9-1, et seq.).

3.20 MONOPOLIES, RESTRAINT OF TRADE AND COMPETITION:

Monopolies or pools or combinations to fix or regulate quantity price or production of commodities prohibited under penalty of $500 to $2,000 fine. (Ala. Code § 8-10-1 to -3). Person injured by unlawful trust, combination or monopoly may recover actual damages and $500 penalty. (Ala. Code § 6-5-60). Injunction lies where legal remedy inadequate. (200 Ala. 492, 76 So. 434).

Unfair Trade Practices.

Officer, agent, or servant of railroad, manufacturing, or mining corporation, or factor, commission merchant, broker, attorney, auctioneer, architect, or agent who takes rebates, discounts, drawbacks, return commissions, gifts or gratuities punishable as if he had stolen amount. (Ala. Code § 8-11-4,-5).

3.21 NEGOTIABLE INSTRUMENTS:

See topic 3.02 Bills and Notes.

3.22 RESTRAINT OF TRADE:

See topic 3.20 Monopolies, 3.22 Restraint of Trade and Competition.

3.23 SALES:

Sales of personal property governed by Art. 2 of Uniform Commercial Code Jan. 1, 1967. (Ala. Code § 7-2-101; Ala. Code § 7-10-101). See topic 3.09 Commercial Code. Implied warranty of fitness contained in Uniform Commercial Code extended to newly constructed homes. See subhead Conditions or Warranties, infra.

Contracts of Sale.

Formalities and validity in general, see topics 3.09 Commercial Code; 3.16 Frauds, Statute of. No statutory requirement as to type size, except as to certain consumer credit sales, loans, leases. See topic 3.11A Consumer Credit.

Bills of Sale.

Bill of sale not necessary to pass title. (30 Ala. 432; Ala. Code § 7-2-401). If seller to deliver document of title, title passes at time when and place where he delivers document. (Ala. Code § 7-2-401[3][a]). Bill of sale not analogous to chattel mortgage and not required to be recorded. (223 Ala. 677, 138 So. 263). Dealers in livestock for resale or slaughter required to obtain bill of sale from seller of livestock. (Ala. Code § 2-15-43).

Product Liability.

Modified version of § 402A, Restatement 2nd of Torts, applicable both in personal injury and in wrongful death actions, retaining negligence per se concept. (335 So.2d 128; 335 So.2d 134). Defenses available under modified version of § 402A include lack of causal relation, product misuse and assumption of risk. (585 So.2d 1336). Uniform Commercial Code abolished defense of privity in suits for personal injury based on breach of either express or implied warranties applicable to sale of goods. (Ala. Code § 7-2-318; 336 So.2d 1340). No cause of action in tort when commercial product malfunctions or defective and malfunction or defect results in damage only to product itself. (543 So.2d 671). See topic 3.09 Commercial Code.

Retail Credit Sales.

See topic 3.11A Consumer Credit.

Consumer Protection.

See topic 3.11A Consumer Credit.

Bulk Sales.

See topic 3.09 Commercial Code; category 8 Debtor and Creditor, topic 8.08 Fraudulent Sales and Conveyances.

Sales of Motor Vehicles.

See category 23 Transportation, topic 23.01 Motor Vehicles.

International Sales of Goods.

See Part V this Volume, Selected International Conventions.

Conditions or Warranties.

Governed by Uniform Commercial Code. (Ala. Code § 7-2-312 to -318). See topic 3.09 Commercial Code. By analogy to Code, implied warranty of “fitness and habitability” in sales of newly constructed homes (47 Ala. App. 194, 252 So.2d 307, aff’d 287 Ala. 439, 252 So.2d 313), but privity of contract required (477 So.2d 296).

Conditional Sales.

Governed by Uniform Commercial Code. (Ala. Code § 7-2-401).

3.24 SECURITIES:

Ala. Securities Act (Ala. Code § 8-6-1 et seq.) based upon Uniform Securities Act with material variations.

Uniform Commercial Code adopted. (Ala. Code § 7-1-101 et seq.). 1990 Revisions of Art. 3 (Ala. Code § 7-3-101 et seq.) and 1990 Amendments to Art. 4 (Ala. Code § 7-4-101 et seq.) adopted. See topic 3.09 Commercial Code.

Supervision.

Director of Securities Commission under direction and supervision of five-man Securities Commission. (Ala. Code §§ 8-6-50 to -60). Address is Suite 570, 770 Washington Street, Montgomery, AL 36104.

Regulatory Powers of Supervising Authority.

May issue order revoking registration of securities if finds such order in public interest, and: (1) Registration statement incomplete, false or misleading as to material facts; (2) parties to issuance of security willfully violated Act; (3) party to issuing of security convicted of felony or misdemeanor involving moral turpitude, security or aspect of securities business; (4) security subject of injunction; (5) issuer's business illegal; (6) offering would constitute fraud on purchasers; (7) offering made on terms unfair, unjust or inequitable; (8) security not eligible for registration in manner attempted; (9) excessive underwriter's and seller's profit; (10) failure to pay registration fee. (Ala. Code § 8-6-9).

Registration of Dealers, Salesmen and Investment Advisors.

Registration is effected by filing application together with consent to service of process and payment of fee. Initial registration fee, and annual renewal registration fee, $200 for dealer, $50 for agent, $200 for investment advisor and $50 for investment advisor representative. Commissioner must require that: (1) All applicants (and, in case of corporation or partnership, officers, or partners) pass written examination as evidence of knowledge of securities business; and (2) dealer have minimum net worth as set by Commissioner. Commission will require by rule or order all or any applicants to post bonds or cash of not less than $50,000, and will determine conditions. (Ala. Code § 8-6-3).

Securities to Which Act Applicable.

Definition of "securities" includes annuity contract (unless issued by insurance company), bankers' shares, trustees' shares, investment participating bonds, investment trust debentures, units, shares, bonds, and certificates in, for, respecting or based upon any form of securities or collateral, subscriptions and contracts covering or pertaining to sale or purchase on installment plan of any security as therein defined; or subscriptions or contracts covering or pertaining to sale or purchase of beneficial interest in title to property, profits or earnings; or any right to subscribe to any of foregoing. (Ala. Code § 8-6-2).

Exempt securities include securities: (1) Issued or guaranteed by U.S., any state, or political subdivision thereof; (2) issued or guaranteed by Canada, Canadian province, or political subdivision thereof, or any other government with which U.S. maintains diplomatic relations; (3) issued by and representing interest in or debt of, or guaranteed by, any bank organized under laws of U.S. or any bank, savings institution or trust company organized and supervised under laws of Ala.; (4) issued by and representing interest in, debt of, or guaranteed by any federal savings and loan association or similar association organized under laws of Ala.; (5) issued or guaranteed by any federal credit union or any credit union, industrial loan association, or similar association organized and supervised under laws of Ala.; (6) issued or guaranteed by any railroad, other common carrier, public utility or holding company; (7) national market system security under § 11A of Securities Exchange Act of 1934; (8) issued by nonprofit person exclusively for religious, educational, or charitable purpose after notice to commission specifying terms of offer; (9) commercial paper which evidences obligation to pay cash within nine months of date of issuance; (10) investment contract issued in connection with employee's stock purchase, pension, profit sharing, or similar benefit plan; (11) issued by issuer registered as open-end management investment company or investment trust under § 8 of Investment Company Act of 1940. (Ala. Code § 8-6-10).

Exempt transactions include: (1) Isolated non-issuer transaction, whether effected through dealer or not; (2) non-issuer transaction in outstanding security by registered dealer subject to reporting requirements or if fixed maturity or yield and no default by issuer; (3) non-issuer transaction effected by or through registered dealer pursuant to unsolicited order or offer to buy; (4) transaction between issuer and underwriter or among underwriters; (5) transaction in bond or other evidence of indebtedness secured by mortgage or deed of trust if offered and sold as unit; (6) offering at judicial, executors, administrators, guardian, or conservators sale, or at any sale by receiver or trustee in insolvency or bankruptcy; (7) transaction executed by bona fide pledge without purpose of evading Blue Sky law; (8) offer or sale to financial institution or institutional buyer or to dealer, whether purchaser is acting for itself or in some fiduciary capacity; (9) ULOE transaction not part of issue with no more than ten purchasers in 12 months when issuer reasonably believes all buyers are purchasing for investment and not with view to distribution; (10) offer to existing security holders of issuer if no commission paid and after five days notice to Commission; (11) offer, but not sale of security for which registration statements have been filed; (12) issuance of stock dividend; (13) transaction incident to reclassification, recapitalization, reorganization, stock split, merger, consolidation, or sale of assets; or (14) “small offering” exemption limited to $500,000 in 12 months with maximum purchase per investor of $15,000 unless accredited, adequate disclosure is made, purchased for investment, without commission, issuer and proceeds must be of “intra-state” character, securities not sold on credit terms, after five business days notice to Commission and filing fee of $150. (Ala. Code § 8-6-11). Filing fee of $250 for application submitted with application claiming exception for limited offering exemption with no more than ten purchasers in 12 month period. (Ala. Code § 8-6-11[c]).

Registration of Securities.

Filing fee of $40, plus registration fee of 1/10 of 1% of aggregate offering price of securities offered in Ala., but not to exceed $1,000, must be paid to Commission. (Ala. Code § 8-6-8).

Registration by notification permissible if: (1) Issuer and any predecessors have been in continuous operation for at least five years without default and with average net earnings in preceding three fiscal years of 5% of amount of securities to be offered; (2) registered for non-issuer distribution and any security of same class has ever been registered or issued pursuant to exemption; and (3) national market system security under § 11A of Securities Exchange Act of 1934. (Ala. Code § 8-6-5).

Registration by coordination permissible when registration statement in connection with same offering has been filed under Securities Act of 1933. (Ala. Code § 8-6-6).

Registration by qualification for all securities; less extensive information required in registration statement than Uniform Act, but issuers must file verified quarterly reports of financial condition. (Ala. Code § 8-6-7).

Issuer desiring to be discharged from further supervision must file notice with Commissioner. (Ala. Code § 8-6-8).

Consent to Service.

Every applicant for registration as dealer or salesman, and every issuer proposing to issue securities in Ala. through person acting on agency basis in common-law sense (other than issuers whose securities registered by coordination) must file irrevocable consent appointing Secretary of State as attorney for receipt of service of process in any noncriminal action. (Ala. Code § 8-6-12).

Bonds.

Dealers, agents, investment advisers and investment adviser representatives must post $50,000 surety bond or cash. (Ala. Code § 8-6-3[e]).

Advertisements and all sales literature used in connection with offering must be authorized in writing by Commission before use, unless within requirements of NASD. (Sec. Reg. 830-X-2-.06).

Liabilities.

Criminal.

Willful violation of statute is Class C felony with five year limitation period. Willful violation of any rule or order of Commission is Class A misdemeanor. (Ala. Code § 8-6-18).

Civil.

Purchaser may bring action to recover consideration paid, together with 6% interest, and attorneys' fees, less any income received. If purchaser no longer owns security, damages equal amount that would be recoverable upon tender less value of security when buyer disposed of, plus 6% interest from date of disposition. Damages for fraud or deceit against person who receives direct or indirect consideration for advice as to value of securities are recovery of consideration paid for such advice and any loss due to such advice with 6% interest and reasonable attorneys' fees less amount of any income received from such advice. Every person who directly or indirectly controls liable person or materially aids in conduct giving rise to liability is jointly and severally liable. (Ala. Code § 8-6-19).

Uniform Securities Ownership by Minors Act adopted with significant modifications. (Ala. Code §§ 8-6-90 to -95).

Uniform TOD (Transfer on Death) Security Registration Act adopted. (Ala. Code §§ 8-6-140 to -150).

3.25 STATUTE OF FRAUDS:

See topic 3.16 Frauds, Statute of.

3.26 TRUST RECEIPT SECURITY:

See category 8 Debtor and Creditor, topic 8.15 Pledges.

3.27 WAREHOUSEMEN:

Warehouses regulated as to standards by inspection and investigation of complaints, and by licensing requirements. (Ala. Code § 8-15-1; -18). Commissioner of Agriculture and Industries enforces provisions of Act (Ala. Code § 8-15-1; Ala. Code § 8-15-11), and may take over operation of any warehouse, if he finds operated in violation of law or in jeopardy of public interest (Ala. Code § 8-15-14).

Uniform Commercial Code adopted.

See topic 3.09 Commercial Code.

Bonds.

Bond of no more than $5,000 is required to operate warehouse (Ala. Code § 8-15-7); amount determined by Commissioner (Ala. Code § 8-15-7). Bond must be filed and recorded in probate office of county where warehouse located. (Ala. Code § 8-15-8[a]).

Licenses.

Warehousemen, before engaging in business, must procure permit from Commissioner, and no probate judge may issue license to person not having such permit. (Ala. Code § 8-15-3). Person operating public warehouse without license subject to penalty not over $1,000. (Ala. Code § 8-15-10[a]).

Warehouse Receipts.

Warehousemen must give receipts for goods actually delivered to them. (Ala. Code § 8-

15-15). By retaining receipt depositor does not necessarily agree to all its terms. (292 Ala. 147, 290 So.2d 636).

Lien.

Governed by Uniform Commercial Code. (Ala. Code §§ 7-7-209 to -210).

4 CITIZENSHIP

4.01 ALIENS:

Property.

Resident or nonresident alien may take, hold, dispose of and transmit real and personal property to same extent as native citizen. (Const. Art. I § 34; Ala. Code § 35-1-1).

5 CIVIL ACTIONS AND PROCEDURE

5.01 ACCORD AND SATISFACTION:

Accord is agreement to accept, in extinction of obligation, something different from or less than that which person agreeing to accept is claiming or entitled to. (Ala. Code § 8-1-20). Satisfaction is acceptance of consideration of accord and extinguishes obligation. (Ala. Code § 8-1-22). Seal, or new consideration, not necessary to validate written composition or release of existing obligation. (Ala. Code § 12-21-31; Ala. Code § 8-1-23). Until fully executed, accord does not extinguish existing obligation. (Ala. Code § 8-1-21). Receipt or release in writing given such effect as parties intended. (Ala. Code § 12-21-109).

Compromise.

Following are sufficient legal consideration to support agreement to settle: bona fide claim based on colorable right, such as conflicting or indeterminate testimony from which inferences can be drawn; result of proceeding on claim is doubtful; some reasonable ground for controversy exists. Existence of mere controversy will not suffice to support agreement to settle. (263 Ala. 557, 83 So.2d 201).

Pleading.

Accord and satisfaction must be set forth as affirmative defense. (ARCP 8[c]).

See category 3 Business Regulation and Commerce, topic 3.09 Commercial Code.

5.02 ACTIONS:

See topic 5.19 Practice.

Pursuant to rule-making authority given it by legislature (Const. Amend. 328, § 6.11), Supreme Court of Alabama has adopted and promulgated Alabama Rules of Civil Procedure (cited ARCP) governing procedure in civil actions in circuit courts, in courts of full, like jurisdiction, in district courts as provided in subparagraph “(dc)” of each rule, in small claims courts as provided in Rule N of Small Claims Rules, and in all other courts where appeals lie directly to Supreme Court or Court of Civil Appeals except probate courts not exercising statutory equitable jurisdiction and proceedings enumerated in ARCP 81. (ARCP 1). These rules in general conform to Federal Rules of Civil Procedure (cited FRCP) but contain modifications required for adaptation to state practice and existing state court system.

Equity.

ARCP 2 provides for merger of law and equity. (436 So.2d 873). Office of clerk and office of register in chancery preserved for administrative purposes only. (ARCP 81[d]). Cases must be filed with clerk or register as prior to adoption of ARCP, unless court orders otherwise. (ARCP 79[f]).

Form of Action.

Only one form of action known as "civil action." (ARCP 2).

Conditions Precedent.

Action must not be commenced against county until claim has been presented to county commission, disallowed or reduced by commission, and reduction refused by claimant. (Ala. Code § 6-5-20[a]). Claimant can recover punitive damages in action for libel on account of publication only if, five days or more before commencement of action, claimant makes written demand on defendant for public retraction of charge or matter published. (Ala. Code § 6-5-186). In pleading performance or occurrence of conditions precedent, sufficient to aver generally all conditions precedent have been performed or have occurred. Denial of performance or occurrence shall be made specifically and with particularity. (ARCP 9[c]).

Commencement.

See topics 5.20 Process; 5.17 Pleading.

Parties.

Capacity.

FRCP 17(a) effective except for deletions of matters not relevant to state practice. (ARCP 17[a]). Alabama law determinative of capacity of party to sue or be sued. (ARCP 17[b]). Suits by and against minors and incompetents conform to Alabama practice. (ARCP 17[c], [d]). See category 14 Family, topic 14.10 Infants, subhead Actions. Party whose name unknown may be fictitiously designated in original complaint and true name may be later substituted, provided that substitution not used to change parties where plaintiff originally sued wrong party. (ARCP 9[h], 15[c][3]). See topic 5.17 Pleading.

Joinder of Parties.

FRCP 19 and 20 effective except for deletions of matters not relevant to state practice. (ARCP 19, 20). FRCP 21 effective. (ARCP 21). Necessary party plaintiff who refuses to join can be joined as involuntary plaintiff if active plaintiffs provide bond to protect him from costs and judgment. (Ala. Code § 6-7-50). Requirement that bond be filed with clerk of court not jurisdictional and may be waived. (228 Ala. 59, 152 So. 31).

Class Actions.

FRCP 23 effective except as inconsistent with Ala. Code § 6-5-640. (ARCP 23). Ala. Code § 6-5-640 applies to all class actions in state court and supersedes all inconsistent rules of civil procedure. (Ala. Code § 6-5-640). Court must hold discovery conference contemplated by ARCP 16 for discovery allowed by ARCP 26-37 and for discovery related to certification issues. (Ala. Code § 6-5-641[b]). Upon motion of any party, court must, except for good cause, stay all discovery directed solely to merits of claims or defenses until class certification decision. (Ala. Code § 6-5-641[c]). Upon motion of any party, court must hold full evidentiary hearing on class certification, to be held on record. (Ala. Code § 6-5-641[d]). Court's class certification order shall be appealable in same manner as final order; appeal within 42 days. Action in trial court stayed during pendency of appeal. (Ala. Code § 6-5-642). Until final adjudication on merits, trial court retains jurisdiction to revisit certification. (Ala. Code § 6-5-642). In connection with shareholder's derivative actions, see ARCP 23.1. In connection with actions relating to unincorporated associations, see ARCP 23.2. Uniform Class Actions Act has not been adopted.

Intervention.

FRCP 24 effective except for deletions of matters not relevant to state practice. (ARCP 24).

Interpleader.

FRCP 22(1) effective. (ARCP 22[a]). Party seeking interpleader may deposit with court amount of property claimed and court may thereupon order such party discharged from liability. (ARCP 22[b]). Court may allow attorneys' fees to one or more parties if claimed in pleading. (ARCP 22[c]).

Third Party Practice.

FRCP 14 effective except for deletions of matters not relevant to state practice, except that plaintiff must assert claims against third-party defendant arising out of subject matter of original suit (ARCP 14[a]); failure to assert such claims estops plaintiff from asserting said claims in subsequent proceeding (359 So.2d 414). Severance of third-party claims for trial is authorized. (ARCP 14[a]).

Joinder of Causes of Action.

FRCP 18 effective. (ARCP 18). Jury trial of liability insurance coverage question jointly with trial of related damage question against insured not permitted. (ARCP 18[c]).

Splitting of Causes of Action.

Where contract is entire, only one action maintainable for breach. If severable or breaches occur at successive periods in entire contract (as money to be paid in installments), action lies for each breach. All breaches up to time of action must be included therein. (Ala. Code § 6-5-280).

Consolidation of Actions.

FRCP 42 effective except preservation of right to trial by jury referenced solely to Art. 1, § 11, Constitution of Alabama. (ARCP 42[b]).

Severance of Actions.

FRCP 42(b) effective except for elimination of reference to jury trial rights under Seventh Amendment to U.S. Constitution. (ARCP 42[b]).

Stay of Proceedings.

FRCP 62 effective except for deletions of matters not relevant to state practice and except for certain clarifications of time limits. (ARCP 62). Automatic stay of 30 days. (ARCP 62[a]).

Abatement and Revival.

Action by or against unmarried woman not abated by her marriage but continues under her married name after suggestion of marriage made on record. Judgment can be satisfied out of her estate. (Ala. Code § 6-5-460).

In proceedings not of equitable nature, claims upon which action has been filed, claims upon which no action has been filed on contract, and personal claims upon which action has been filed except for injury to reputation, survive in favor of and against personal representative; personal claim upon which no action has been filed survives against personal representative of deceased tortfeasor. (Ala. Code § 6-5-462). Equitable claims survive in favor of and against heir, successor or personal representative regardless of whether action filed. (Ala. Code § 6-5-464). Tort causes of action do not survive death of injured party when no action is pending at time of death (437 So.2d 1230); where death is caused by tortfeasor, claim actionable under wrongful death statute (Ala. Code § 6-5-410[a]). Real property claims with respect to which actions have been filed survive in favor of heirs, devisees or personal representatives and against heirs, devisees, tenants, or personal representatives according to their respective rights; court must direct record and judgment to be framed to secure their rights and declare their respective interests. (Ala. Code § 6-5-463).

If claim survives, civil action based thereon does not abate by death of party but may be revived by motion to substitute by any party or by successors or representatives of deceased party not later than six months after death is suggested upon record by service of statement of fact of death. (ARCP 25[a][1]; see also Ala. Code § 6-5-465 which directs that final judgment against personal representative may not be entered over his objection until six months after grant of letters testamentary or of administration). If claim survives only to surviving plaintiffs or only against surviving defendants, action does not abate by death of one or more plaintiffs or defendants and action shall proceed in favor of or against surviving parties. (ARCP 25[a][2]). In any such pending action, failure of any party to present claim within six months after grant of letters testamentary or of administration or five months from date of first publication of notice, whichever is later (Ala. Code § 43-2-350), does not bar claim against estate to extent estate is entitled to assert any right under any contract providing for payment of judgment in said action (ARCP 25[a][3]). See also category 13 Estates and Trusts, topic 13.09 Executors and Administrators.

Statutory abatement under § 6-5-440 applies to competing individual actions; common-law abatement to competing class actions; and “myriad” equitable factors to hybrid situations. (715 So.2d 207).

Limitation of.

See topic 5.16 Limitation of Actions.

Small Claims.

See category 6 Courts and Legislature, topic 6.01 Courts.

Termination of Actions.

FRCP 41 effective except that counterclaim interposed prior to dismissal of action remains pending despite dismissal. (ARCP 41[a][2]). Actions, counterclaims, cross claims or third party claims may be dismissed voluntarily or by order of court upon defendant’s motion for failure to prosecute or failure to comply with Rules or court order. Involuntary dismissal operates as adjudication upon merits unless court specifies otherwise, except that dismissals for lack of jurisdiction, improper venue or failure to join party under ARCP 19 are deemed without prejudice. (ARCP 41). Joint stipulation of dismissal terminates action and does not require judicial approval. (991 So.2d 697).

Prohibited Actions.

§§ 6-5-330 to Ala. Code § 6-5-342 exempt certain classes of persons from liability under certain circumstances. Volunteer coaches, managers, and officials participating in nonprofit, county or municipal athletic leagues have civil immunity. (Act 2006-605, HB634).

Administration.

See category 13 Estates and Trusts, topic 13.09 Executors and Administrators.

Direct Actions Against Insurer.

See category 23 Transportation, topic 23.01 Motor Vehicles, subhead Direct Actions.

Direct Actions Against Tax Preparer.

§ 40-2A-11.1 establishes civil penalties for unethical tax preparation conduct that is subject to penalties under federal law and authorizes State, at request of Commissioner of Revenue, to commence civil action against unethical tax return preparer and to seek injunctive relief against tax return preparers and tax refund preparers who engage in unethical tax preparation conduct. (Act 2006-589, SB153).

Counterclaims and Cross-Claims.

FRCP 13(b, e-i) effective. (ARCP 13[b, e-i]). FRCP 13(a) effective; in addition, compulsory counterclaim not required if opposing party's claim for damage covered by liability insurance policy under which insurer has right or obligation to conduct defense. (ARCP 13[a][3]). If otherwise compulsory claim not asserted in reliance upon ARCP 13(a) exceptions, relitigation of claim may be barred by res judicata or collateral estoppel by judgment. (ARCP 13[a]). Compulsory counterclaim is action for purposes of § 6-5-440, which bars plaintiff from prosecuting two actions in courts of Alabama at same time for same cause and against same party. (628 So.2d 598). FRCP 13(c) effective except that counterclaims maturing or acquired after pleading do not relate back to time original plaintiff's claim arose. (ARCP 13[c]). Right to assert counterclaims or claim credits against State of Alabama or officer or agency thereof governed by Constitution of Alabama. (ARCP 13[d]; see also 259 Ala. 177, 66 So.2d 141). Counterclaim cannot be directed solely against new parties to action. (998 So.2d 1042).

Appealed Actions.

Where action commenced in court from which appeal lies to circuit court for trial de novo, ARCP 13(a) compulsory counterclaim must be stated as amendment to pleadings within 30 days after appeal perfected or within such further time as court allows. (ARCP 13[j]). When plaintiff appeals lower court decision to circuit court, he is limited to jurisdictional amount of lower court except when defendant asserts counterclaim in excess of said jurisdictional amount; when defendant appeals lower court decision to circuit court, plaintiff can claim full amount of his claim without regard to jurisdictional limit of lower court. (ARCP 13[j]). Claims that are mutually exclusive or that reflect alternative claims for recovery of damages should not be split for appellate review by way of ARCP 54(b). (7 So.3d 342).

Settlement.

Structured Settlement Protection Act provides for, on approval of court or responsible administrative authority, transfer of payment rights pursuant to structured settlement or arrangement for periodic payment of damages for personal injuries or sickness established by settlement or judgment in resolution of tort claim, excluding workers' compensation settlements. (Act 2006-628, HB288).

5.03 APPEAL AND ERROR:

Appellate jurisdiction in Supreme Court, Court of Civil Appeals and Court of Criminal Appeals. (Const. Amend. 328 §§ 6.02, 6.03). Review by Supreme Court of decisions of Courts of Appeal by certiorari. (See topic 5.05 Certiorari.) Supreme Court authorized to make rules governing administration of and procedure in all courts. (Const. Amend. 328 § 6.11; Ala. Code § 12-2-7[4]). ARCP and Alabama Rules of Appellate Procedure (cited ARAP) in effect.

Appeal Bond.

Unless appellant exempted by law or rule, or has filed supersedeas bond or other undertaking that includes security for payment of costs on appeal, security for costs on appeal must be filed by appellant with notice of appeal in trial court. Security for costs must be approved by clerk of trial court. (ARAP 7). § 6-12-4 limits total amount of supersedeas bond to stay execution of judgment during appellate review to $125,000,000 for all Tobacco Master Settlement Agreement appellants collectively, except limit would be total amount of judgment for any appellant found to be dissipating assets outside ordinary course of business to avoid payment of judgment. (2006 Act 20069-94, HB220).

Stay of Proceedings.

Appellant in civil case not entitled to stay of execution of judgment pending appeal (except as provided in ARCP 62[e]) unless he executes supersedeas bond, approved by trial court, payable to appellee. (ARAP 8). Stay must ordinarily be sought first in trial court; if stay not granted, motion to stay in appellate court permitted. (ARAP 8[b]). Execution of judgment in criminal cases stayed pending appeal. (Ala. Code §§ 12-22-170; 12-22-171; 12-22-172).

Extent of Review.

Circuit Court.

Law and facts decided de novo on appeal of final district court judgments. (Ala. Code §§ 12-11-30[3]; 12-12-71).

Court of Civil Appeals.

Ordinarily limited to questions of law. Where evidence presented ore tenus, judgment of trial court on evidence presumed correct and not to be reversed on appeal unless plainly and palpably wrong. (659 So.2d 675). Where facts undisputed, ore tenus rule inapplicable and inquiry is whether relevant law has been correctly applied. (587 So.2d 349). Review of entry of summary judgment de novo. (631 So.2d 1023). Divorce judgment in which trial court expressly retained jurisdiction to modify property division upon occurrence of certain contingencies is not final judgment reviewable on appeal. (935 So.2d 1191). Finding of contempt final, separately appealable judgment. (963 So.2d 125). Appellate review of merits of trial court's order granting motion for extension to file notice of appeal under Rule 77(d) is foreclosed only, when no party opposed motion for extension before trial court. (988 So.2d 555). Court reviews de novo adjudications under Fair Dismissal Act (Alabama Code § 36-26-100 et seq.), where issue is application of law to undisputed facts. (2009 Ala. LEXIS 102).

Court of Criminal Appeals.

Questions of law and fact may be reviewed. (Ala. Code §§ 12-22-240; 12-22-241).

Character of Hearing.

Circuit Court.

Trial is de novo in civil and criminal appeals. (Ala. Code §§ 12-11-30[3]; 12-12-71; 12-22-113). In civil cases, appellant not entitled to jury trial unless demanded in notice of appeal. Appellee not entitled to jury trial unless written demand filed in circuit court within 14 days of service of appellant's notice of appeal. (Ala. Code § 12-12-71).

Court of Civil Appeals.

Court reviews proceeding of lower court. (Ala. Code §§ 12-12-70[a]; 12-12-72).

Court of Criminal Appeals.

Court reviews proceeding of lower court. (Ala. Code §§ 12-12-70[b]; 12-12-72; 12-22-131; 12-22-240; 12-22-241; ARAP 45A, 45B).

Supreme Court.

Court reviews proceedings of lower court. (Ala. Code § 12-12-72; ARAP 39[k]).

To Court of Civil Appeals.

Court of Civil Appeals has exclusive appellate jurisdiction of all civil cases where amount involved, exclusive of interest and costs, does not exceed $50,000, all appeals from administrative agencies other than Alabama Public Service Commission, all appeals in workers' compensation cases, domestic relations cases, and all extraordinary writs arising from appeals in said cases. When recovery in court below of any amount other than costs, amount of such recovery deemed to be amount involved; otherwise amount claimed is deemed to be amount involved. In actions of detinue, alternate value of property found by court or jury deemed to be amount involved. (Ala. Code § 12-3-10).

To Supreme Court.

Appeal to Supreme Court as a matter of right available only where not reserved to Courts of Appeal. (Ala. Code §§ 12-2-7; 12-22-2; 12-1-4). In general, review of decisions of courts of appeals by writ of certiorari. (ARAP 39). Supreme Court may deflect appealed civil cases to Court of Civil Appeals except where case (1) presents substantial question of federal or state constitutional law; (2) involves novel legal question; (3) is utility rate case appealed directly to Supreme Court under § 37-1-40; (4) is bond validation proceeding appealed to Supreme Court under § 6-6-754, or (5) is bar disciplinary proceeding. (Ala. Code § 12-2-7).

To Court of Criminal Appeals.

Court of Criminal Appeals has exclusive appellate jurisdiction of all misdemeanors, including violation of town and city ordinances, habeas corpus, all felonies, and all post-conviction writs in criminal cases. (Ala. Code § 12-3-9). Automatic appeals from cases in which death penalty imposed. (Ala. Code § 12-22-150).

To Circuit Court.

Circuit courts have appellate jurisdiction of all civil, criminal and juvenile cases before district courts and prosecutions for ordinance violations in municipal courts, except in cases in which direct appeal to courts of civil or criminal appeals is provided by law or rule. (Ala. Code § 12-11-30[3]).

Administrative Rulings.

Under provisions of Ala. Administrative Procedure Act, persons aggrieved by rulings of most administrative agencies may seek judicial review in Circuit Court of Montgomery County, in circuit court of county in which agency maintains headquarters or in county where party resides. Corporation may seek review in county of registered office or principal place of business within state. (Ala. Code § 41-22-20).

Supreme Court.

Ordinarily limited to questions of law. Where evidence presented ore tenus to trial court, presumption of correctness exists as to conclusions on issues of fact and determination will not be disturbed unless clearly erroneous, without supporting evidence, manifestly unjust, or against great weight of evidence. (608 So.2d 391). Where facts undisputed, ore tenus rule inapplicable and inquiry is whether relevant law has been correctly applied. (568 So.2d 752). No weight given to decision of trial judge upon facts when evidence not taken orally before judge, but in such cases Court will weigh evidence and give judgment as it deems just. (Ala. Code § 12-2-7[1]). Review of entry of summary judgment de novo. (665 So.2d 190). In reviewing decisions of courts of appeals, scope is that generally employed by certiorari and ordinarily limited to review of facts stated in opinion of appellate court. Application of law to stated facts included in scope of review. (ARAP 39[k]).

Judgment or Order on Appeal.

Circuit Court.

Law and facts decided de novo on appeal of final district court judgments. (Ala. Code §§ 12-11-30[3]; 12-12-71).

Supreme Court and Court of Civil Appeals.

Upon reversal of judgment or decree, appellate court may remand for further proceedings or may enter such judgment or decree as lower court should have rendered, when record enables it to do so. (Ala. Code § 12-22-70). When appellate court is of opinion that case should be reversed solely on basis of excessive lower court judgment, appellate court will require appellee to file remittitur of excessive amount. Failure to file such remittitur will result in reversal and remand of case. If appellee files such remittitur appellate court will affirm case and enter judgment for reduced amount. (Ala. Code § 12-22-71). When appeal is dismissed or judgment affirmed, execution may issue and other proceedings be had thereon in all respects as if no appeal had been prosecuted. (Ala. Code § 12-22-75).

Court of Criminal Appeals.

Upon reversal, appellate court may order new trial or that defendant be discharged or that he be held in custody until discharged by due course of law or make such other order as case may require. (Ala. Code §§ 12-22-242; 12-22-245). Upon affirmation of judgment carrying death penalty, appellate court must direct sentence to be executed. If day appointed for execution of sentence has passed, appellate court must specify new date. (Ala. Code § 12-22-243; ARAP 8[d][1]). Court of Criminal Appeals has jurisdiction over common law petition for writ of certiorari challenging decision of Department of Corrections. (12 So.3d 58).

Time for Taking Appeal.

Appeals permitted by law as of right to Supreme Court or Courts of Appeal must be taken within 42 days of entry date of judgment or order appealed from, except time of appeal is 14 days from interlocutory order on injunction, interlocutory order appointing or refusing to appoint receiver, interlocutory order determining right to public office or any judgment in action for validation of public obligation. (ARAP 4[a][1]). Post-trial motion filed pursuant to ARCP 50, 52, 55, or 59 suspends running of time for appeal; 42 days run from grant or denial of motion. (ARAP 4[a][3]). Post-trial motion pending more than 90 days without disposal deemed denied. (ARCP 59.1). Filing of notice of appeal by facsimile not accepted. (622 So.2d 929).

In civil and criminal cases, appeals from district to circuit court must be taken within 14 days of judgment or denial of post-trial motion. (Ala. Code § 12-12-70).

Time of appeal from judgments or decrees of probate court to circuit court varies from seven days to 42 days, according to subject matter. (Ala. Code § 12-22-21).

Mode of Taking Appeal.

Appeals in civil cases taken by: (a) Filing notice of appeal with clerk of trial court specifying party taking appeal, judgment, order or part thereof appealed from, and court to which appeal is taken (ARAP 3[a], [c]); (b) paying $100 docket fee (ARAP 12, 35A); (c) giving security for costs of appeal to be approved by clerk or register (ARAP 7), or giving supersedeas bond approved by court (ARAP 8).

Notice of Appeal.

Appeal must be dismissed if notice of appeal not timely filed. (ARAP 2). Appellant must provide sufficient copies of notice of appeal marked filed and certified by trial court clerk as true copy for service by clerk or register of trial court on clerk of appellate court, court reporter, counsel of record or party. (ARAP 3[d]).

Interlocutory Decrees.

Appeals of interlocutory orders permissive and limited to civil cases within original appellate jurisdiction of Supreme Court involving controlling question of law. (ARAP 5).

5.04 BONDS:

Bonds in legal proceedings generally payable to the party entitled to benefit thereof, and generally approved by the court, board or officer before whom taken. Statute requiring bond indicates to whom bond should be payable, amount of same, etc. See Ala. Code § 39-1-1 regarding bond requirements for public works.

Additional bonds may be required from personal representatives (Ala. Code § 43-2-292), conservators (Ala. Code § 26-3-7), and certain officials (Ala. Code § 36-5-40).

Sureties.

See 16.02 Insurance, topic Surety and Guaranty Companies.

Enforcement.

For breach of official bond or undertaking of state officer, executor, administrator, or guardian, or of bond or undertaking given in official capacity to state or any officer thereof, person aggrieved may sue in his own name, assigning appropriate breach. (Ala. Code § 6-5-30). In other cases, where bond returned forfeited by sheriff, constable, or deputy, execution issues thereon without further proceedings.

New Bond.

Upon application of surety, new bond may be required, effect of which is to discharge surety on old bond as to breaches subsequent to execution and approval of new bond. Execution of additional bond does not affect liability on old bond. (Ala. Code § 36-5-60-68).

5.05 CERTIORARI:

Jurisdiction.

Supreme Court may grant writs of certiorari to all inferior courts as at common law. (Const. Amend. No. 328, § 6.02; Ala. Code § 12-2-2). Judges of Courts of Appeals may issue writs of certiorari and supersedeas to all inferior courts. (Ala. Code §§ 12-22-6; 12-3-8). Circuit court judges may grant writs of certiorari as permitted by common law (Ala. Code § 12-17-26), and to grant such writs directed to judges of district and municipal courts in all cases in which appeals lie from such courts to circuit court (Ala. Code § 12-17-28).

Grounds.

Writ of certiorari, when directed to courts other than Supreme Court, available only when relief cannot be had by appeal or writ of error; it is, however, sole method of obtaining Supreme

Court review of decisions of Courts of Appeals. (Const. Amend. No. 328, 6.02; ARAP 39; Ala. Code § 12-2-2; 243 Ala. 130, 8 So.2d 824). Certiorari to Supreme Court in criminal cases in which death penalty imposed considered as matter of right. (ARAP 39[a][2]). In all other cases, civil or criminal, petitions for writs of certiorari to Supreme Court granted only from: (1) Decisions initially holding valid or invalid city ordinance, state statute or federal statute or treaty, or initially construing controlling provision of Alabama or Federal Constitution; (2) decisions that affect class of constitutional, state or county officers; (3) decisions where material question requiring decision is one of first impression in Alabama; (4) decisions in conflict with prior decisions of Supreme Court or Courts of Appeals; and (5) where petitioner seeks to have controlling Supreme Court cases overruled which were followed in decision of Court of Appeals. (ARAP 39[a]; 285 Ala. 72, 229 So.2d 27).

Proceedings.

Application commenced by petition verified by affidavit. Defendant may plead or answer as to all matters necessary for defense. (Ala. Code § 6-6-640; see also ARCP 81[a][19]). Application must be made to Supreme Court for writ of certiorari to Courts of Appeals within 14 days after decision of court of appeals on application for rehearing. (ARAP 39[b]).

Review.

Limited to review of questions of law and does not extend to review of weight and preponderance of evidence. (642 So.2d 437).

5.06 CHARITABLE IMMUNITY:

See topic 5.09 Damages.

5.07 COMMISSIONS TO TAKE TESTIMONY:

See topic 5.11 Depositions and Discovery.

5.08 COSTS:

Costs allowed as matter of course to prevailing party unless court otherwise directs or unless expressly provided otherwise in statute. (ARCP 54[d]). FRCP 41(d) effective as to costs of previously dismissed action when subsequent action based upon or including same claim against same defendant. (ARCP 41[d]). FRCP 68 effective as to costs incurred after making offer of judgment, except that offer of judgment must be made 15 days before trial. (ARCP 68). Costs and attorneys' fees imposed against any attorney or party who brings civil action, asserts claim, or interposes defense that court determines to be without substantial justification. (Ala. Code § 12-19-272).

Security for Costs.

Probate judge must take and approve security for costs in suits within jurisdiction of his court commenced by or for use of nonresident. (Ala. Code § 12-19-48). Security required for temporary restraining order and preliminary injunction. (ARCP 65[c]).

Liability of Attorney.

Attorney may be liable for filing action or asserting claim that is groundless in law or without substantial justification. (Ala. Code § 12-19-272; 614 So.2d 409).

5.09 DAMAGES:

Common law generally prevails as to compensatory damages. Procedure for determining future damages in § 6-11-3 held to violate Constitution of Alabama. (589 So.2d 184). In general, punitive damages for civil actions are capped at three times compensatory damages, or

$500,000, whichever is greater. (Ala. Code § 6-11-21[a]). For business with net worth of $2 million or less, no award of punitive damages shall exceed $50,000 or 10% of business's net worth, whichever is greater. (Ala. Code § 6-11-21[b]-[c]). In civil actions for physical injury, no award of punitive damages shall exceed three times compensatory damages or $1.5 million, whichever is greater. (Ala. Code § 6-11-21[d]). Limitations on punitive damages in Ala. Code § 6-11-21 do not apply to actions for wrongful death or for intentional infliction of physical injury (Ala. Code § 6-11-21[j]) or to class actions (Ala. Code § 6-11-21[h]). Jury may not be informed of provisions of Ala. Code § 6-11-21. (Ala. Code § 6-11-21[g]). Recovery of damages against governmental entity limited to $100,000 for bodily injury or death per person, to $300,000 aggregate on account of bodily injury or death arising out of any single occurrence, and to $100,000 for damage to property arising out of any single occurrence. (Ala. Code § 11-93-2). But, $100,000 cap does not apply to amount of damages recoverable in lawsuit filed to recover damages for wrongful termination. (613 So.2d 318). Compensatory and punitive damages for indivisible injury may not be apportioned among joint tortfeasors. (523 So.2d 1042). Where jury verdict challenged as excessive, trial court will review damage award and determine whether evidence warrants remittitur based on several factors. If punitive damage award appealed, appellate court will conduct its own review. (701 So.2d 524). Punitive damages may not be recovered in libel actions unless publication was made with knowledge of falsity or with reckless disregard as to falsity and written demand for retraction made at least five days before bringing suit and defendant shall have refused to retreat. (Ala. Code § 6-5-186). Punitive damages allowed by statute in some ejectment actions. (Ala. Code § 6-6-296). Profits of unestablished business recoverable if proved with reasonable certainty. (506 So.2d 317). Diminution in value, not cost of remediation, is proper measure of compensatory damages for injury to real property. (972 So.2d 792). Punitive damages award cannot be supported by discovery aimed at generic out-of-state conduct of defendant. (992 So.2d 1252).

Comparative Negligence Rule.

Not adopted.

Charitable Immunity.

Charity liable for torts of servants. (226 Ala. 109, 145 So. 443; 191 Ala. 572, 68 So. 4).

Sovereign Immunity.

Not abrogated by statute. However, Board of Adjustment has power to hear and determine claims for injuries to person or property or for death occasioned by State of Alabama or any of its agencies, commissions, boards, institutions or departments where in law, justice or good morals same should be paid. (Ala. Code § 41-9-60,-62). Mayor and City Council, in their individual capacities, entitled to absolute immunity from personal liability in performance of their legislative duties. (418 So.2d 102). Action against Department of Human Resources to compel agency to perform its legal duties is barred by doctrine of sovereign immunity. (999 So.2d 891).

No-Fault Insurance.

See category 23 Transportation, topic 23.01 Motor Vehicles, subhead Insurance.

Uniform Contribution Among Tortfeasors Act (Revised).

Not adopted.

Guest Statute bars recovery by guest from owner of motor vehicle unless caused by willful or wanton misconduct. (Ala. Code § 32-1-2). Car owner does not become guest within meaning of statute by moving to passenger seat. (948 So.2d 544).

See also categories 3 Business Regulation and Commerce, topic Sales, subhead Product Liability; Estates and Trusts, topic Death, subhead 13.05 Actions for Death.

5.10 DECLARATORY JUDGMENTS:

Uniform Act adopted. (Ala. Code § 6-6-220, et seq.). See also ARCP 57.

5.11 DEPOSITIONS AND DISCOVERY:

Taking and use of depositions are regulated by ARCP, based on FRCP (except recently enacted mandatory disclosures) with modifications to conform to state court practice. (See topic 5.19 Practice.) In certain proceedings not governed by ARCP manner of taking and use of depositions specially provided for by statute: Proceedings before arbitrators (Ala. Code § 6-6-7); election contests (Ala. Code § 17-15-24,-25,-29,-55 to 62); proceedings before Public Service Commission (Ala. Code § 37-1-92); proceedings for contest of will (Ala. Code § 43-8-194) and proving will (Ala. Code § 43-8-168); proceedings for sale of land belonging to estate (Ala. Code § 43-2-452); proceedings for settlement of account of executor or administrator (Ala. Code § 43-2-513); proceedings before Board of Dental Examiners (Ala. Code § 34-9-47); proceedings before Board of Hearing Instrument Dealers (Ala. Code § 34-14-9); proceedings before Board of Medical Examiners to revoke certification to practice medicine or osteopathy (Ala. Code § 34-24-365); criminal proceedings (Ala. Code § 15-7-2).

Parties may obtain discovery of any matter not privileged and relevant to subject matter involved in pending action, by one or more of following: Deposition upon oral examination or written questions; written interrogatories; production of documents or things or permission to enter upon land or other property, for inspection and other purposes; physical and mental examinations; and requests for admission. (ARCP 26). See subhead Insurance Agreements, infra.

Within State for Use Within State.

See subhead Before Whom Taken, infra.

Within State for Use Elsewhere.

Person desiring to take depositions may produce to judge of circuit court where witness resides commission authorizing taking of such depositions or proof of notice duly served, whereupon judge must issue necessary subpoenas. (ARCP 28[c]; 45).

Outside of State for Use within State.

See subhead Before Whom Taken, infra. Party, upon notice to other parties and persons affected, may apply for order compelling party to submit to discovery in court in which action pending or to any court having general civil jurisdiction in place where deposition taken. Application for such order against nonparty shall be made to court having general civil jurisdiction in place where deposition taken. (ARCP 37[a][1]). Failure to comply with such order may be considered contempt of court. (ARCP 37[b]). State circuit judge may not grant order authorizing party to take deposition before federal magistrate in another state. (460 So.2d 855).

De Bene Esse.

See subhead Perpetuating Testimony, infra.

Perpetuating Testimony.

FRCP 27 substantially adopted, with appropriate changes in wording applicable to state practice. Discovery limited to production of documents and things and entry upon land for inspection and other purposes (ARCP 34) and physical and mental examination of persons (ARCP 35) may be obtained before action or pending appeal (ARCP 27[a], [b]). Notice must be served at least 30 days before date of hearing on application to perpetuate testimony before action, as opposed to 20 days under FRCP 27(a)(2). (ARCP 27[a][2]).

Before Whom Taken.

Based generally on FRCP 28. Depositions taken within U.S. for use in state must be taken before officer authorized to administer oaths by laws of U.S., or of State of Ala., or of state or other place where examination held, or before person appointed by court in which action pending. (ARCP 28[a]). Person seeking to take deposition in state for use out of state must produce commission authorizing taking of deposition or proof of notice to judge of circuit where witness resides; judge will issue necessary subpoenas. (ARCP 28[c]). Depositions must not be taken before relative or employee or attorney or counsel of any party, or relative or employee of such attorney or counsel, or person financially interested in action. (ARCP 28[d]). Unless court orders otherwise, parties may by written stipulation provide that depositions may be taken before any person. (ARCP 29).

Commissions.

See subhead Before Whom Taken, supra. Additional provisions: Governor may appoint commissioners in other states and territories of U.S. to take and certify depositions in actions pending in courts of Alabama; commissioners so appointed hold office for four years. (Ala. Code § 36-1-1).

Compelling Attendance of Witness.

Attendance of witnesses may be compelled by subpoena in accordance with ARCP 45. (ARCP 30[a]). Residents may be required to attend deposition only within 100 miles from residence, place of employment, or regular situs for transacting business. Nonresidents may be required to attend deposition only within 100 miles from place of service. (ARCP 45[c]). Failure without adequate excuse to obey subpoena served may be deemed contempt of court. (ARCP 45[e]).

Examination of Witnesses.

See subhead Discovery, infra.

Interrogatories.

Answerable within 30 days after service of interrogatories or, if responding party is defendant, within 45 days of service of summons and complaint. Limit of 40 interrogatories to any other party without leave of court. (ARCP 33[a]).

Discovery.

Parties may obtain discovery of any matter not privileged and relevant to subject matter involved in pending action. Similar to FRCP 26, except initial disclosures not required, limitation on frequency of use of discovery methods not express, and discovery conference and scheduling order at direction of court. (ARCP 26). See subhead Insurance Agreements, infra.

Demand for Admission of Facts.

Party may serve upon another party written request for admission of truth of discoverable matters, including genuineness of documents. Matter admitted unless response by later of 30 days after service of request, or, if responding party defendant, 45 days after service of summons and complaint. (ARCP 36[a]). If party fails to admit matter under ARCP 36 and requesting party thereafter proves genuineness of matter, requesting party may apply for reasonable expenses, including attorneys' fees, necessary to prove matter. (ARCP 37[c]).

Return.

FRCP 30(f); 31(b), (c) apply. (ARCP 30[f]; 31[b], [c]).

Form.

Deposition may be in substantially following form:

Forms

IN THE CIRCUIT COURT OF THE . . . .

JUDICIAL CIRCUIT IN AND FOR . . . .

COUNTY, ALABAMA

A. B., plaintiff

vs.

C. D., defendant }

Case No.

. . . . . .

[city]

[date]

BEFORE: [name], Commissioner

APPEARANCES:

[name], for Plaintiff.

[name], for Defendant.

I, [name], a Court Reporter of [city and state], acting as Commissioner, certify that on this date, as provided by Rule 30 of the Alabama Rules of Civil Procedure, there came before me at [address], [city and state], beginning at [time], [witness' name], witness in the above cause, for oral examination, whereupon the following proceedings were had:

[witness' name]

being first duly sworn, was examined and testified as follows:

EXAMINATION BY [attorney's name]:

Q:

A:

. . .

FURTHER DEPONENT SAITH NOT

Certificate of Commissioner should be in substantially the following form:

STATE OF . . . .

. . . . .COUNTY }

I hereby certify that the above and foregoing deposition was taken down by me in stenotype, and the questions and answers thereto were reduced to typewriting under my supervision, and that the foregoing represents a true and correct transcript of the deposition given by said witness upon said hearing.

I further certify that I am neither of counsel nor of kin to the parties to the action, nor am I in any wise interested in the result of said cause.

. . . .

COMMISSIONER

Note.

Above form should be modified by insertion in preamble or by attachment of appropriate stipulations of counsel as permitted under ARCP 29. Should such stipulations include a waiver of any of matters covered in commissioner’s certificate, certificate should be modified only to that extent.

When Depositions May Be Taken.

FRCP 30(a) applies in substantial part. (ARCP 30[a]). Leave of court required for deposition within 30 days of service of summons and complaint. (ARCP 30[a]). Exception to 30 days rule if defendant has sought discovery or deponent may become unavailable. (ARCP 30[a], [b]).

Notice of Examination; Time and Place.

FRCP 30(b) and 31(a) apply in substantial part. Under ARCP 30(b)(5), notice to party deponent may be accompanied by request that he produce books and other tangible things needed as basis for examining party. Party deponent may, within 14 days after service of notice, serve upon deposing party written objection to inspection or copying of any or all of designated materials. (ARCP 30[b][5]). Thereafter, deposing party may not inspect materials except pursuant to order compelling discovery under ARCP 37(a). (ARCP 30[b][5]). ARCP 34, rather than ARCP 30, must be used where primary purpose is inspection of documents rather than examination of witnesses. ARCP 31(a) differs from FRCP 31 in that party receiving notice of deposition on written questions, after making demand upon deposing party of time and place of taking of testimony, may attend deposition in person and cross-examine witness orally. (ARCP 31[a]). In such case, deposing party also has right to attend deposition in person and examine witness orally in rebuttal. (ARCP 31[a]). ARCP 31(a) further differs from FRCP 31 in that cross questions must be served within 15 days after notice and written questions are served, redirect questions must be served within ten days after cross questions, and recross questions must be served within five days after service of redirect questions. (ARCP 31[a]).

Use in Court Proceedings.

FRCP 32 applies in substantial part. (ARCP 32). In addition to those witnesses whose deposition may be used for any purpose, ARCP adds witness who is out of state or licensed physician or dentist. (ARCP 32[a][3]).

Requests for Production.

FRCP 34 applies. (ARCP 34). Requests for production of documents and things and entry upon land for inspection and other purposes may be served on parties. (ARCP 34). Nonparty must be personally served with production subpoena in accordance with ARCP 45 and prior notice of intent to serve subpoena must be served on each party in accordance with ARCP 5(b) at least 15 days prior to service on nonparty. (ARCP 45[b]). Party upon whom request served must serve written response within 30 days, except that defendant may serve response within 45 days after service of discovery with summons and complaint. (ARCP 34[b]).

Insurance Agreements.

Existence and contents of any insurance agreement under which person carrying on insurance business may be liable to satisfy part or all of judgment which may be entered in action or to indemnify or reimburse for payments made to satisfy judgment discoverable. (ARCP 26[b] [2]). Limits of insurance coverage discoverable. (717 So.2d 818).

5.12 EQUITY:

See topic 5.02 Actions.

5.13 EVIDENCE:

See topic 5.11 Depositions and Discovery.

Witnesses.

Presumption of competency attends every witness. (ARE 601; 659 So.2d 1039).

See also topic 5.11 Depositions and Discovery.

Privileged Communications.

Privileges recognized: (1) Attorney and client (ARE 502); (2) communications to clergymen (ARE 505); (3) counselor and client (ARE 503A); (4) husband and wife (ARE 504); and (5) psychotherapist and patient (ARE 503).

Husband and wife are competent witnesses in civil actions for or against each other. (184 Ala. 188;63 So. 546). In civil or criminal proceeding, spouse has privilege to refuse to testify, or to prevent any person from testifying, as to any confidential communication made by one spouse to other during marriage. (ARE 504[b]). In criminal prosecution, neither spouse may be compelled to testify against other. (Ala. Code § 12-21-227). Wife's testimony from first criminal trial may be used in retrial if they were not married during first trial. (52 Ala. App. 702, 296 So.2d 796). Inter-spousal privilege protects any act performed with confidence of marriage in mind. (ARE 504[b]). Privilege belongs to both spouses. (ARE 504[c]).

Experts.

FRE 702 substantially adopted. (ARE 702).

Communications or Transactions with Persons Since Deceased or Incompetent.

Survivors allowed to testify, and unavailability of deceased person merely factor for jury to consider in determining weight to give to testimony. (ARE 601).

Self-Incrimination.

Criminal defendant cannot be compelled to give evidence against himself. (Const. Art. I § 6).

Compelling Attendance.

See topic 5.11 Depositions and Discovery.

Interest.

No person is incompetent by reason of interest in subject matter of suit. (ARE 601).

Conviction of Crime.

Conviction of perjury, subornation of perjury, or crime involving moral turpitude does not disqualify witness. (ARE 601). (Ala. Code § 12-21-162). Prosecution witness's juvenile records have been held admissible under certain facts to impeach in criminal case. (477 So.2d 1385). General rule is exclusion of evidence of juvenile conviction. (580 So.2d 1370).

Attorney.

Client has privilege to prevent any person from disclosing confidential communication made for purpose of facilitating rendition of professional legal services to client. (ARE 502[b]).

Clergyman or person whom he counsels in professional capacity and confidential manner may refuse to disclose and may prevent other party from disclosing that confidential communication. (ARE 505).

Disabled Persons.

Interpreter shall be provided if due process concerns warrant. (Ala. Code § 15-1-3). Reasonable accommodations shall be made to comply with Americans with Disabilities Act. (Ala. Code § 12-1-23).

Psychotherapists' communications with clients treated same way as those between attorney and client. (Ala. Code § 34-26-2).

Collateral Source Rule abrogated in limited instances. (Ala. Code §§ 12-21-45, 6-5-222).

Authentication.

Presence of person's or company's letterhead on document is important characteristic suggesting authenticity. (ARE 901; 903 So.2d 802).

5.14 INJUNCTIONS:

Injunctions not issued unless plaintiff's injury is immediate, irreparable, and no adequate remedy at law exists. (503 So.2d 1211).

Federal Rules of Civil Procedure (FRCP) substantially adopted. See topic 5.19 Practice.

Jurisdiction.

Supreme Court (Const. Art. VI § 140; Ala. Code § 12-2-2), Circuit Court (Const. Art. VI § 142; Ala. Code § 12-2-2), Court of Civil Appeals (Ala. Code § 6-6-500) or Court of Criminal Appeals (Ala. Code § 6-6-500) may grant injunction (Ala. Code § 6-6-500).

Prerequisites.

No application made to justice of Supreme Court or judge of Court of Civil Appeals for temporary restraining order or other equitable process which may be granted by any other judge or officer unless same made to such other judge or officer and refused. (Ala. Code § 12-22-8; ARCP 65).

Procedure.

FRCP 65 substantially adopted. (ARCP 65).

Bond.

FRCP 65 substantially adopted. No security need be provided by State of Alabama or officer or agency thereof or, in discretion of court, in domestic relations cases. (ARCP 65). Security must include reasonable attorneys' fees. (ARCP 65[c]).

Temporary Injunction.

FRCP 65 substantially adopted. (ARCP 65). If application made to circuit court judge for temporary restraining order and refused, no other circuit judge can act on application. Application may be made to judge of Court of Civil Appeals or Supreme Court, and if refused by judge of Court of Civil Appeals, may be renewed to judge of Supreme Court, but no other officer. If refused by judge of Supreme Court, cannot be renewed. Application to appellate judge must be made and acted upon in accordance with ARCP 65. (Ala. Code § 12-22-7).

Appeal.

Losing party may appeal to Supreme Court within 14 days; such appeal may be given preferred standing on docket in that court. (ARAP 4[a][1][A]; ARAP 2[b]). Trial court's issuance of injunction reviewed for abuse of discretion. (12 So.3d 1173).

Dissolution.

FRCP 65 substantially adopted. Motion to dissolve will lie to granting of preliminary injunction only for matters subsequently occurring. (Ala. Code § 6-6-501).

5.15 JUDGMENTS:

Judgments may be interlocutory or final.

ARCP based on FRCP. "Judgment" used in procedural rules includes decree and any order from which appeal lies. (ARCP 54). See topic 5.19 Practice.

Judgment of court of record of this state, or of U.S. court held in this state, when properly authenticated, may be registered in office of judge of probate of any county in this state. (Ala. Code § 6-9-210).

Judgments by Confession.

In law constitute release of errors. (Ala. Code § 12-22-1). No surety, when sued, may confess judgment if principal debtor willing to defend at own cost, and gives security to surety, to be approved by court. (Ala. Code § 8-3-12).

Judgments by Consent.

Recital in judgment or decree rendered by court of competent jurisdiction that parties interested are sui juris and consented or agreed to entry is, in absence of vitiating fraud in premises, conclusive of facts recited and imports absolute verity. (277 Ala. 471, 172 So.2d 35).

Judgments on Pleadings.

FRCP 12(c) adopted. (ARCP 12[c]).

Summary Judgments.

FRCP 56 adopted with requirement of 30 day waiting period from commencement of action before moving for summary judgment and requirement of specific materials that must accompany motion. (ARCP 56).

Declaratory Judgments.

Uniform Act adopted; §§ 14-17 omitted. (ARCP 57; Ala. Code § 6-6-220, et seq.).

Default Judgments.

FRCP 55 substantially adopted. Court may set aside entry of default any time before judgment. Default judgment may be set aside by court's own motion or on motion by party within 30 days of entry. (ARCP 55[c]).

Default judgment may be entered without notice when it arises from failure to appear on day case is set for trial. (ARCP 55[b][2]). Jury demand is now deemed waived upon default for failure to appear. (ARCP 55[b][2]; ARCP 38). In ejectment, judgment by default is admission of title in plaintiff, but to recover costs plaintiff must prove defendant's possession of premises at commencement of suit. (Ala. Code § 6-6-290). Default judgment against trade name is judgment against individual doing business under trade name if individual served with complaint. (601 So.2d 465).

Offer of Judgment.

FRCP 68 substantially adopted with requirement that offer of judgment be made at least 15 days before trial. (ARCP 68).

Docketing.

Judgments entered upon minutes of court are parts of record of causes to which they pertain, and need not be copied into final record. (Ala. Code § 12-20-21). Minute entry showing judgment constitutes final record of judgment. (16 Ala. App. 51, 74 So. 864). See also ARCP 58.

Vacation or Modification.

FRCP 59 and 60 substantially adopted. (ARCP 59, 60). On motion within 30 days of entry of judgment, judgment may be set aside and new trial granted. (ARCP 59[b]). In criminal trials, judgment may be set aside and new trial ordered. (Ala. Code § 15-17-5). Statute cumulative with common law power of court to set aside judgment and grant new trial. (251 Ala. 163). Within 30 days of entry of judgment, court of its own initiative may order new trial for any reason it might have granted new trial on motion of party. (ARCP 59[d]). Unlike practice under FRCP, if case is tried before jury, new trial must be granted as to all issues or denied as to all. (ARCP 59[a]). Motion to alter, amend, or vacate judgment must be filed not later than 30 days after entry of judgment. (ARCP 59[e]). Court may require remittitur as condition to overruling of motion for new trial, but plaintiff's acceptance of such remittitur does not prejudice right to have verdict reinstated in full amount upon appeal by defendant. (ARCP 59[f]).

Unless time limit extended by consent of parties or by appellate court to which appeal from judgment would lie, failure of trial court to rule on motion under ARCP 59 within 90 days deemed denial of motion. (ARCP 59.1). When judgment invalid on face of record because of lack of jurisdiction, court must, upon application of interested party, vacate such judgment without regard to time limits. (270 Ala. 715, 121 So.2d 885; 151 Ala. 242, 44 So. 184). Same principle applies where judgment based upon complaint which fails completely to state substantial claim. (244 Ala. 667, 15 So.2d 462).

Lien.

Judgment is not lien (89 Ala. 538, 7 So. 637) but registration of judgment of court of record creates lien on all property of defendant in county where registered, which continues for ten years. (Ala. Code § 6-9-211). For judgment creditor to have priority over prior executed deed, judgment creditor must show that its rights accrued before prior executed deed recorded, and it did not, at time of judgment, have notice of deed. (477 So.2d 328).

Revival.

No execution shall issue on judgment or decree of district or circuit court on which execution has not been sued out within ten years of its entry, until same has been revived by appropriate motion or action under ARCP. (Ala. Code § 6-9-192). Assignee of judgment or decree, if assignment written, may have same revived in assignee's name by appropriate motion or action under ARCP. (Ala. Code § 6-9-196[d]). Judgment or decree cannot be revived after 20 years from entry. (Ala. Code § 6-9-190).

Assignment.

If assignment endorsed on execution docket or margin of record of judgment and attested by clerk, register or judge of probate, assignee may have execution thereon in name of plaintiff for use of assignee (Ala. Code § 6-9-196[b]), and may maintain any action thereon in own name (Ala. Code § 6-9-196[c]).

Satisfaction.

No statutory form of satisfaction; marginal notation on judgment record "Received payment in full.", signed by judgment creditor, sufficient.

Actions.

Independent action may be maintained on judgment. (234 Ala. 654, 176 So. 363). Conversely, action can be maintained to subject property to lien of judgment despite availability of statutory means of enforcement. (226 Ala. 313, 146 So. 807). See also category 8 Debtor and Creditor, topic 8.08 Fraudulent Sales and Conveyances, subhead Remedies.

Foreign Judgments.

Foreign judgment is not enforceable unless final or not subject to modification of any liability thereunder. (275 Ala. 305, 154 So.2d 661). Proper form of action to enforce foreign judgment is action of debt or statutory equivalent. (36 Ala. App. 360, 58 So.2d 129). To enforce foreign judgment, certified, exemplified, or otherwise properly authenticated copy of judgment must be before Alabama court as part of trial record. (477 So.2d 396).

Revised Uniform Enforcement of Foreign Judgments Act adopted. (Ala. Code § 6-9-230, et seq.).

Nonsuit.

FRCP 41(b) adopted. (ARCP 41[b]).

Amendment.

FRCP 60 substantially adopted. (ARCP 60). Motion for relief from final judgment, order, or proceedings should be made not more than four months after judgment, order, or proceeding entered or taken. (ARCP 60[b]). Leave to make motion need not be obtained from any appellate court unless judgment is pending before court. (ARCP 60[b]).

5.16 LIMITATION OF ACTIONS:

Actions must be brought within following periods after respective causes of action accrue:

Twenty Years.

Actions on judgments of courts of record. (Ala. Code § 6-2-32).

Ten Years.

Actions on sealed instruments; for recovery of lands; brought on behalf of state or political subdivision against public officers for nonfeasance, misfeasance or malfeasance in office. (Ala. Code § 6-2-33).

Seven Years.

All claims, whether in tort or contract, against all persons who performed or furnished design, planning, supervision or construction of improvements on real property (Ala. Code § 6-5-218), held unconstitutional (435 So.2d 725).

Six Years.

Actions for trespass to persons or to personal or real property; for conversion; on unsealed instruments; for recovery of money on loan on stated or liquidated account; for recovery of rent due upon parol demise (oral rental); for use and occupation of land; motions and actions against sureties of public officers and personal representatives; against attorneys at law for failure to pay over money to clients, or for neglect of duty (but see category 18 Legal Profession, topic 18.01 Attorneys and Counselors, subhead Legal Services Liability, concerning two year limitation on actions under Alabama Legal Services Liability Act); for recovery upon simple contract not otherwise enumerated. (Ala. Code § 6-2-34).

Five Years.

Actions founded on equities of redemption; by state or any subdivision thereof for taxes and licenses other than business licenses. (Ala. Code § 6-2-35, am'd 2006, Act 2006-586).

Four Years.

Actions or motions against surety on bond executed in cause in any of federal courts or of any other state or country. (Ala. Code § 6-2-36). Breach of contracts of sale under Uniform Commercial Code, unless reduced by agreement of parties. (Ala. Code § 7-2-725).

Three Years.

Actions to recover money due on open or unliquidated account; proceedings to disbar attorneys. (Ala. Code § 6-2-37).

Two Years.

Actions by representatives to recover damages for wrongful act, omission, or negligence causing death of decedent. Actions for malicious prosecution; seduction; penalty prescribed by statute; libel or slander; any tort not specifically provided for; actions seeking to hold master liable for actions of agent; actions for injury to property of decedent; actions for recovery of wages. (Ala. Code § 6-2-38[a], [h]-[o]).

Certain civil actions under Securities Act of Alabama. (Ala. Code § 8-6-19[f]).

Actions for malpractice against physicians, surgeons, dentists, medical institutions, or other health care providers for liability, error, mistake, or failure to cure, whether based on tort or contract, except that if cause was not and could not have reasonably been discovered, then six months after it was or should have been discovered, but in no event more than four years, except minor under four years old shall have until his eighth birthday. (Ala. Code § 6-5-482).

Actions by and against common carrier to recover charges or overcharges. (Ala. Code § 6-2-38[b]-[f]).

Actions to charge real estate with debts and obligations of decedents. (Ala. Code § 6-2-41[a]).

Action based on intentional blasting proximately causing damage by concussion is action of trespass on case, not of trespass, and is governed by two-year limitations period of § 6-2-38 rather than six-year period of § 6-2-34. (472 So.2d 1044).

Actions arising under 42 U.S.C. § 1983. (576 So.2d 210).

Contract actions against architects, engineers, and certain licensed general contractors, whether written express warranty, contract, or indemnity regarding construction of real property; all actions occurring more than 13 years after substantial completion of construction are barred unless contrary contractual provision. (Ala. Code §§ 6-5-221; 6-5-227).

Product liability actions against original seller. (Ala. Code § 6-2-38).

One Year.

Actions against creditor for charging excessive finance charges in violation of Consumer Credit Act. (Ala. Code § 5-19-19[a][2]).

Six Months.

Actions to test validity of bond elections or issuance of bonds or levying of taxes pursuant to such elections must be commenced within six months from declaration of election results. (Ala. Code § 6-2-40).

Actions Not Specifically Provided For.

All actions for injury to person or rights of another not arising from contract and not otherwise provided for must be brought within two years of accrual. (Ala. Code § 6-2-38[l]).

New Actions.

On arrest or reversal of judgment for plaintiff, suit may be brought again within one year. (Ala. Code § 6-2-38[p]).

Foreign Cause of Action.

When statute of limitations of another state or foreign country bars action upon contract made or act done in such state or country, bar effective in this state against any action brought thereon in same manner. (Ala. Code § 6-2-17).

Disabilities of Plaintiff.

Infants and insane persons have three years or such lesser applicable statutory period after removal of disabilities to bring action; provided that disabilities shall not extend for more than 20 years from time cause of action accrued. (Ala. Code § 6-2-8[a]).

Imprisoned persons have right to commence action and to make any proper appearances on their behalf in such actions. (Ala. Code § 6-2-8[a]). Rule operates only in favor of disabled and not to one succeeding to disabled person's rights. (416 So.2d 743). Disability not existing when cause of action accrued does not suspend statute, unless otherwise provided. (Ala. Code § 6-2-8[c]). When two or more disabilities coexist at time cause of action accrued, limitation does not attach until all removed. (Ala. Code § 6-2-8[b]). Savings provision applies even though guardian appointed for infant, insane person. (404 So.2d 576).

Absence or Concealment of Defendant.

Time does not run during absence of defendant from state (Ala. Code § 6-2-10), but special statutory methods for service of process on nonresidents create presence within state sufficient to prevent this section from tolling statute of limitations. (299 F.2d 173).

Interruption of Statutory Period.

Statute does not run while action stayed by injunction or statutory prohibition. (Ala. Code § 6-2-12).

Public Rights.

No time limitation within which state may bring action for recovery of lands of state and of state educational and governmental institutions, nor within which counties or municipal corporations may bring actions for recovery of lands. (Ala. Code § 6-2-31).

Revival of Barred Claims.

Partial payment, or interest payment by party sought to be charged, made before bar in effect, sets new date from which full period must run. (161 So. 486). After bar in effect, debt or obligation cannot be revived except by unconditional promise in writing signed by party to be charged. (Ala. Code § 6-2-16).

Contractual Limitations.

Except as otherwise provided by Uniform Commercial Code, agreement limiting time for bringing action to less than that prescribed by law is void. (Ala. Code § 6-2-15).

Pleading.

Limitation must be specially pleaded. (ARCP 8[c]).

Uniform Commercial Code adopted. (Ala. Code § 7-10-101). See category 3 Business Regulation and Commerce, topic 3.09 Commercial Code.

Computation of Time.

In motions or actions against sureties for public officers and representatives for misfeasance or nonfeasance, time computed from act done or omitted by principal, which fixes liability of surety. (Ala. Code § 6-2-34[7]).

In actions to recover money due by open or unliquidated account time computed from date of last item of account, or from time when by contract or usage account due. (Ala. Code § 6-2-37[1]).

When right of entry on lands accrues, entry must be considered as having been made and cause of action as having then accrued. (Ala. Code § 6-2-4).

When there are mutual accounts between persons who are not merchants, time computed from date of last item, unless account liquidated, and balance struck. (Ala. Code § 6-2-11).

When right exists, but demand necessary to entitle party to action against any officer, agent, or attorney, limitation commences from commission or omission of act giving right of action, and not from date of demand. (Ala. Code § 6-2-7).

In actions seeking relief on ground of fraud, including actions otherwise barred by statute, aggrieved party has two years after discovery of facts constituting fraud within which to prosecute. (Ala. Code § 6-2-3; see also Ala. Code § 43-8-5 with respect to intestate succession and wills).

Civil action for injury resulting from exposure to asbestos accrues on first date injured party should have reason to discover injury giving rise to such action. (Ala Code § 6-2-30; previous version found at Ala. Code § 6-5-502 and held unconstitutional by 416 So.2d 996).

Time for limitation of action by principal against deputy or agent for latter's act or omission does not commence until liability of the principal ascertained by suit against him. (Ala. Code § 6-2-6).

When either party to a contract is subject or citizen of country with which U.S. is at war, time of continuance of war not included. (Ala. Code § 6-2-13).

Time between death and grant of letters testamentary or of administration, not exceeding six months, not part of time limit for actions by or against estate. (Ala. Code § 6-2-14).

Personal injury action based on exposure to hazardous chemicals accrues on date injury manifests, not on date of last exposure. (990 So.2d 291).

Contest of Wills.

See category 13 Estates and Trusts, topic 13.16 Wills, subhead Contest.

5.16A PARTITION:

Jurisdiction and Venue.

Jurisdiction proper in circuit (Ala. Code § 35-6-20) or probate (Ala. Code § 35-6-40) court of county where property located. Original jurisdiction of circuit court unaffected by jurisdiction statutorily conferred on probate court. (74 Ala. 198).

Proceedings.

Circuit Court Proceeding.

If proceeding is in circuit court, ARCP apply (ARCP 1; see also Ala. Code § 35-6-20) and all questions pertaining to controverted title or equity of party may be disposed of in action (Ala. Code § 35-6-23). Concerning nonresident, unknown, or absent parties, see category 21 Property, topic 21.01 Absentees, subhead Partition.

Probate Court Proceeding.

In probate court proceeding one or more of joint owners or tenants in common must make petition to court (Ala. Code § 35-6-40), stating names of all parties and names of guardians of infant parties; their residence if known and whether they are over or under 19 years old and description of property; number of shares into which it is to be divided; and interest of various parties therein (Ala. Code § 35-6-42). There must be hearing. (Ala. Code § 35-6-43). Commissioners must be appointed (Ala. Code § 35-6-45); property divided or sold; and papers filed and registered as conveyances (Ala. Code § 35-6-49). If any defendants are unknown, petitioner must state in petition, or submit affidavit stating, that names of such persons are unknown, that he has made diligent inquiry to ascertain same, and that proceedings may be had against them without naming them, and judge of probate must make publication. (Ala. Code § 35-6-44). If, after reasonable diligence, petitioner cannot locate defendant or ascertain whether defendant is alive at time of filing of petition, petitioner must specify facts of his diligence in petition, and defendant may become party by publication. (Ala. Code § 35-6-44). If, after service by publication, any such defendant does not appear before expiration of time for filing pleadings, court will appoint guardian ad litem. (Ala. Code § 35-6-44).

Partition in Kind or Sale.

Any property, real, personal or mixed, held by joint owners or tenants in common, may be divided among them, or sold for division, on written application of one or more of them to circuit (Ala. Code § 35-6-20) or probate (Ala. Code § 35-6-40) court of county in which property situated. Such application to probate court may be made by executor or administrator of deceased person in interest, or by guardian of minor or person of unsound mind. (Ala. Code § 35-6-40).

Partnership Property.

Whenever partner retires or dies, and if business continues without settlement of accounts between him or estate and partnership, he or his legal representative may have value of interest at date of dissolution ascertained and shall receive, as ordinary creditor, value of partnership interest or profits attributable to partnership interest since dissolution. (Ala. Code § 10-8-103; repealed effective Jan. 1, 2001).

5.17 [RESERVED]

5.18 PLEADING:

Governed by ARCP, derived in large part from FRCP. See topic 5.19 Practice.

Pleadings Permitted.

FRCP 7 adopted. (ARCP 7).

Complaint.

FRCP 8(a, e, f) adopted except jurisdiction need not be pleaded. While there are not many technical requirements of pleadings, intent and effect of pleading rules is to permit claim to be stated in general terms, and thus ARCP 8 envisages statement of circumstances, occurrences, and events in support of claim presented. (ARCP 8).

Answer.

FRCP 8(b, c, d, e, f) adopted. (ARCP 8). FRCP effective except parties allowed 30 days for responsive pleading. (ARCP 12[a]). Parties allowed 14 days for responsive pleading in district court. (ARCP 12[dc]).

Counterclaim or Set-Off.

Substantially same as FRCP 13 except compulsory counterclaims not mandatory if claim of defendant whose defense will be managed by liability insurer. (ARCP 13[a]). See category 5 Civil Actions and Procedure, topic 5.02 Actions, subhead Counterclaims and Cross-Claims.

Reply.

FRCP 7(a) adopted. (ARCP 7[a]).

Demurrer.

Not permitted (ARCP 7[c]), but use of word “demurrer” shall be understood to mean “motion to dismiss for failure to state a claim” or “motion to strike an insufficient defense” as set out in ARCP 12 (ARCP 81[e]).

Amended or Supplemental Pleadings.

FRCP 15 adopted with modifications. Party can amend pleading without leave of court any time within 42 days before first trial setting. (ARCP 15[a]). Thereafter, party can only amend pleading for good cause and upon court approval. (ARCP 15[a]). Party can respond to amended pleading within time remaining to respond to original pleading or within ten days after service of amended pleading, whichever is longer. (ARCP 15[a]). Also, amendment shall not be refused under ARCP 15(a) or (b) solely because it adds claim or defense, changes claim or defense, or works complete change in parties. (ARCP 15[b]). When party ignorant of name of opposite party and uses fictitious name in pleadings, and subsequently learns real name of opposing party, amendment substituting real name not amendment changing party against whom claim is asserted. (ARCP 9[h]; see also ARCP 15[c]).

Affidavits of Merits.

FRCP 56(e) applies to affidavits supporting motion for summary judgment. (ARCP 56[e]).

Affidavits of Defense.

FRCP 56(e) applies to affidavits opposing motion for summary judgment. (ARCP 56[e]).

Bills of Particulars.

No provisions.

Verification.

FRCP 11 substantially adopted, but ARCP 11 applies to motions and other papers as well as pleadings. (ARCP 11).

Service.

FRCP 5(a,b,c) adopted. (ARCP 5).

Filing.

FRCP 5(d,e) adopted, except if court determines discovery papers need not be filed. (ARCP 5).

Time.

Answer, answer to cross-complaint, and reply, if ordered by court, must be served within 30 days after service. (ARCP 12[a]). If motion permitted under ARCP 12 is made, period of time for answer, answer to cross-complaint or reply, shall be ten days after notice of court's denial or postponement of motion or after service of more definite statement if court grants a motion for more definite statement. (ARCP 12[a]). All counterclaims other than those maturing or acquired after pleading shall relate back to time original plaintiff's claim arose. (ARCP 13[c]). Time computed and may be extended as under FRCP 6. (ARCP 6).

Frivolous Claims.

Court may award attorney's fees and costs against attorney or party who has brought civil action or asserted claim or defense that court determines to be without substantial justification. (Ala. Code § 12-19-272[a]). Court may assess attorney's fees and costs against any attorney or party if court finds that claim or defense interposed for abuse of discovery, delay, or harassment. (Ala. Code § 12-19-272[c]).

Small Claims.

See category 6 Courts and Legislature, topic 6.01 Courts.

See also topic 5.19 Practice.

5.19 PRACTICE:

Pursuant to rule making authority given it by legislature (Ala. Code § 12-1-1), Supreme Court has adopted and promulgated Alabama Rules of Civil Procedure (ARCP) governing procedure in civil actions in circuit courts, in courts of full, like jurisdiction, and in all other courts where appeals lie directly to Supreme Court or Court of Civil Appeals, except proceedings enumerated in ARCP 81. ARCP conform to FRCP but contain modifications required for adaptation to state practice and existing state court system.

Small Claims.

See category 6 Courts and Legislature, topic 6.01 Courts.

Discovery.

Except for mandatory initial disclosure of core information required under recent amendments to FRCP 26(a), ARCP 26 through 37 are substantially same as FRCP, providing for following methods of discovery: depositions upon oral examination (ARCP 30) or written questions (ARCP 31); written interrogatories limited to 40 interrogatories, including subparts (ARCP 33[a]); production of documents or things or permission to enter upon land or other property for inspection or other purposes (ARCP 34); physical and mental examinations (ARCP 35); and requests for admission (ARCP 36). See topic 5.11 Depositions and Discovery, subhead Insurance Agreements.

Demand for Admission of Facts.

FRCP 36 adopted, with minor modifications. (ARCP 36).

Direct actions against insurer not allowed.

Dismissal.

FRCP 41 adopted with minor modifications. (ARCP 41; see also ARCP 52[c] dealing with dismissal by court in nonjury case).

Pre-Trial Conference.

With exception of allowing any party to request pre-trial conference, ARCP 16 providing for pre-trial conferences is similar to FRCP 16. Under ARCP 16, however, trial court is not instructed to enter scheduling order. (ARCP 16[b]).

Setting of Cases.

Trial of actions shall be set by entry on trial docket at least 60 days before date set for trial unless shorter period of time is agreed by all parties, interests of justice so require, or case involves default, injunction, domestic relations, habeas corpus, or action appealed to circuit court for de novo review. (ARCP 40[a]). Clerk must notify all out-of-county attorneys of record by personal service or mail within three days of placing case on trial docket. (ARCP 40[b]).

Trial.

Civil cases are tried without jury unless demand for jury trial is made by any party not later than 30 days after service of last pleading directed to issue for which jury trial is sought. (ARCP 38[b]). Trial of all issues so demanded shall be by jury unless right of jury trial is found not to exist under Constitution of Alabama or statutes, or unless parties or their attorneys subsequently file written stipulation or make oral stipulation with court, consenting to trial by court sitting without jury. (ARCP 39[a]). Notwithstanding failure of party to demand jury trial in action in which such demand might have been made as matter of right, court in its discretion upon motion may order trial by jury of any or all issues. (ARCP 39[b]).

See also topics 5.02 Actions, Appeal and Error, Depositions and Discovery, Injunctions, Judgments, Pleading, Process; category 8 Debtor and Creditor, topics 8.02 Attachment, 8.05 Executions, 8.09 Garnishment.

5.20 PROCESS:

Civil action commenced by filing complaint with court. (ARCP 3[a]). Service of process, unless otherwise provided by law, shall be made as provided in ARCP. (Ala. Code § 6-4-20).

FRCP form basis of ARCP. See topic 5.19 Practice.

General Requisites.

Complaint and summons follow pattern of FRCP. (ARCP 3, 7, am’d effective Aug. 1, 2004 to be identical to corresponding Federal Rule).

By Whom Issued.

Upon filing of complaint, clerk of court shall issue summons or other process for service on each defendant, clerk of court can issue additional summons upon request. (ARCP 4[a][1]).

Who May Serve.

Summons and complaint served together with complaint by sheriff or other officer of county in which party to be served resides or may be found, or by someone, not less than 18 years old, especially appointed by court, or by certified mail. (ARCP 4.1, 4[i][1]).

Multiple Defendants.

In case involving multiple defendants, clerk must issue separate summons directed to each defendant. (ARCP 4[a][2]).

Limits of Effective Service.

All process may be served anywhere within territorial limits of state and, when authorized by law or ARCP, may be served outside state. (ARCP 4.1).

Execution and Return of Service.

Summons must be executed promptly; when person serving process unable to serve copy of process within 30 days, he must endorse that fact and reason therefor on process and return process and copies to clerk who must make appropriate entry on docket sheet of action. (ARCP 4[i][1][D]). Failure to make service within 30 day period and failure to make proof of service do not affect validity of service. (ARCP 4[i][1][D]). However, failure of plaintiff to attempt to obtain service within reasonable time may amount to failure to prosecute warranting dismissal of case. (474 So.2d 642).

Execution and Return of Service in Proceedings Not Governed by ARCP.

All original and mesne process and notices must be immediately executed and returned by officer executing same, unless otherwise provided by law; all executions and venditioni exponas must be made returnable 90 days after issue. (Ala. Code § 6-4-1).

All executions and other process issuing from court of probate may be made returnable, if no other day provided by law, not less than three nor more than six months after such issue. (Ala. Code § 12-13-6).

In actions for forcible entry and unlawful detainer notice must be served on defendant at least six days before return day of process, and may be served on him anywhere within state. (Ala. Code § 6-6-332[b]). If service cannot be made personally, service may be had by giving notice to any person residing on premises. (Ala. Code § 6-6-332[b]). If no one residing on premises, service may be had by posting notice on premises and mailing complaint to mailing address of premises. (Ala. Code § 6-6-332[b]).

In attachment proceedings, when defendant nonresident of state, notice must be advertised once a week for three successive weeks in newspaper of general circulation in county in which property found, and copy mailed to defendant if residence known or ascertainable. (Ala. Code § 6-6-81). When defendant resident of county notice may be given in writing, in person, or by leaving writing at defendant's residence. (Ala. Code § 6-6-82). If defendant resident of state but not of county, notice must be posted at courthouse door and copy mailed to defendant. (Ala. Code § 6-6-82).

Detinue begun as other actions and writ of seizure issued pending action if plaintiff executes affidavit and bond; but defendant may retain property upon giving bond with surety in double value of property. (Ala. Code § 6-6-250; see also topic 5.21 Replevin).

Garnishment may issue on summons, pending writ, when affidavit and bond given. (Ala. Code § 6-6-393).

When garnishment issued on judgment in which appearance has not been entered for defendant, notice of garnishment must be served on him contemporaneously with service of process of garnishment on garnishee. (Ala. Code § 6-6-457). Notice must be accompanied by statement of rights of exemption, as set forth in ARCP 64A. See category 8 Debtor and Creditor, topic 8.09 Garnishment.

In actions against foreign or domestic receivers holding, owning, claiming or operating property in state, service may be had by delivery of copy of summons and complaint to receiver if he is found within state, or, if outside state, by leaving copy of summons and complaint with receiver's agent (Ala. Code § 6-6-627).

Service on Absentee.

See subheads Service by Publication and Long Arm Statute, infra. See also ARCP 4.2 through 4.4 (am'd effective Aug. 1, 2004).

Personal Service on Individual.

By serving individual or by leaving copy of summons and complaint at individual's dwelling house or usual place of abode with person of suitable age and discretion residing therein or by delivering copy of summons and complaint to agent authorized by law to receive service. (ARCP 4[c][1]).

Personal Service on Partnership.

Service on partnership may be made by delivering summons and complaint in person or by certified mail to partner other than limited partner, managing or general agent, or any agent authorized by appointment or by law. (ARCP 4[c][6]).

Personal Service on Unincorporated Association or Organization.

Service may be made in person or by certified mail to officer, managing or general agent, or any agent authorized by appointment or by law. (ARCP 4[c][6]).

Personal Service on Domestic Corporation.

Upon corporation, by serving, in person or by certified mail, officer, managing or general agent, or any agent authorized by appointment or by law. (ARCP 4[c][6]).

Personal Service on Professional Association, Professional Corporation or Limited Liability Company.

By serving in person or by certified mail, officer, managing or general agent, or any agent authorized by appointment or by law. (ARCP 4[c][6]).

Personal Service on Infant.

By serving any one of following: father, mother, guardian, or individual having care of such person or with whom he lives, or spouse, if infant is married and, if infant is more than 12 years old, by also serving infant personally. (ARCP 4[c][2]).

Personal Service on Joint Stock Company.

No statutory provision.

Personal Service on Foreign Corporation.

Same as domestic corporation. (ARCP 4[c][6]).

Personal Service on Incompetent Person.

Upon incompetent person not confined, by serving incompetent and his guardian but, if no guardian has been appointed, by serving incompetent and person with whom he lives or person who cares for him. (ARCP 4[c][3]).

Upon incompetent person not having guardian and confined in any institution for mentally ill or mentally deficient, by serving superintendent of institution or similar official or person having responsibility for custody of incompetent person. (ARCP 4[c][4]).

Personal Service on Incarcerated Person.

By serving individual, except when individual infant. (ARCP 4[c][5]).

Personal Service on Public Bodies.

State.

Upon this state or any one of its departments, offices and institutions by serving officer responsible for administration of department, office or institution, and by serving attorney general of this state. (ARCP 4[c][7]).

County.

Upon county or upon any of its offices, agencies, districts, departments, institutions or administrative units, by serving chief executive officer or clerk, or other person designated by appointment or by statute. (ARCP 4[c][8]).

Municipal Corporation.

Upon municipal corporation or upon any of its offices, departments, agencies, authorities, institutions or administrative units by serving chief executive officer or clerk, or other person designated by appointment or by statute. (ARCP 4[c][8]).

Other Governmental Entity.

Upon any governmental entity not mentioned above by serving chief executive officer or clerk, or other person designated by appointment or by statute. (ARCP 4[c][8]).

Service by Publication.

Service by publication available for claims historically equitable involving property under control of court or marital status where identity or residence of defendant unknown or where resident defendant has been absent from his residence for more than 30 days since filing of complaint and method of service by publication in such instances not specifically provided by statute and for claims against defendant who avoids service of process. (ARCP 4.3[a]). Affidavit is required reciting reason for need to serve by publication. (ARCP 4.3[d][1]). Publication must be made once a week for four consecutive weeks (ARCP 4.3[d][3]) in newspaper of general circulation in county where action is pending, if any, or, if none, in newspaper of general circulation in adjoining county (ARCP 4.3[d][2]). When name of defendant unknown and cannot be ascertained, upon presentation of complaint to clerk with affidavit stating that plaintiff does not know defendant's name after diligent inquiry, and that he believes defendant's residence not in state, clerk must make publication. (ARCP 4.3). Appropriate basis exists for service of process outside state when person nonresident or resident absent from state with sufficient contacts with state as set forth in ARCP 4.2(b) so that prosecution of action not inconsistent with constitution of this State or U.S.

Service By Mail.

Service may be made by certified mail when plaintiff files written request with clerk requesting such service. (ARCP 4[i][2]).

Personal Service Outside State.

Plaintiffs may file request with clerk for order designating service by nonparty process server not less than 18 years old. (ARCP 4[i][1][B]).

Long Arm Statute.

Jurisdiction extends to limits of due process. (ARCP 4.2[b]).

Nonresident Motorist.

See category 23 Transportation, topic 23.01 Motor Vehicles, subhead Action Against Nonresident.

Proof of Service.

When personal service is made by delivery, person serving process shall endorse that fact on process and return it to clerk who must make appropriate entry on docket sheet of action. (ARCP 4[i][1][C]). When service made by certified mail, return receipt requested, clerk must enter fact of mailing and receipt of return receipt on docket sheet of action. (ARCP 4[i][2][B]).

Substitute Service.

For various transactions provided by statute in addition to above provisions. Service may be had by certified mail, or in certain cases by publication, on nonresident or resident. (ARCP 4, 4.1, 4.2). When defendant in any action involving real or personal property or effects situated in this state secretes himself, on affidavit being filed, service may be had by publication. (ARCP 4.3). Unknown heirs or defendants may also be served by publication after affidavit filed. (ARCP 4.3[d][1]). Service may be had by publication on domestic or foreign corporation whenever shown by affidavit that corporation has failed to elect officers or appoint agents or that officers or agents have been absent from state for 30 days since complaint filed. (ARCP 4.3[c]).

Service on nonresident executors and administrators may be made by filing copy of summons in probate court granting letters and by mailing copy thereof to such nonresident executor or administrator and serving copy thereof upon resident surety if any. (Ala. Code § 43-2-198).

Where no post office address of nonresident executor is given and there is no resident surety, service may be made by publication in newspaper published in county where proceeding is pending for two consecutive weeks, or, if none, by posting on door of courthouse for 15 days. (Ala. Code § 43-2-199).

Acknowledgment or Waiver.

Defendant may make acknowledgment or waiver of service. (ARCP 4[h]).

See topic 5.19 Practice.

5.21 REPLEVIN:

Statutory detinue used instead of replevin. (Ala. Code § 6-6-250, et seq.). Detinue statute held facially unconstitutional to extent it permits attachment without prior notice and hearing. (362 F.Supp. 520). Rules of practice, effective subsequent to decision, require notice and hearing before issuance of writ of seizure prior to judgment, unless plaintiff shows that defendant about to remove, conceal or dispose of personalty sought. (ARCP 64).

Proceedings.

After action commenced for recovery, plaintiff, his agent, or his attorney makes affidavit that property belongs to plaintiff and submits bond in amount approved by clerk. Sheriff required to take possession unless defendant gives bond double value of property. If defendant neglects to post bond, sheriff delivers property to plaintiff, and plaintiff must post bond double value of property within five days. (Ala. Code § 6-6-250).

Repossession.

Successful party may obtain writ of attachment or execution when practicable, if losing party does not deliver property. (Ala. Code § 6-6-263). Repossession prior to judgment requires defendant to serve written request for hearing on plaintiff within five days from seizure date. (ARCP 64).

Claims of Third Persons.

Any person not party claiming interest may intervene by order of court as of right. Within five days of order authorizing intervention, third person may obtain possession by submitting affidavit that he is entitled to possession of property and by giving bond for double value of property in favor of party otherwise entitled to possession, unless party in possession gives similar bond to retain possession. (Ala. Code § 6-6-252).

Judgment or Order.

Against either party must be for property sued for, or its value, with damages for detention to time of trial. (Ala. Code § 6-6-256).

5.22 SEQUESTRATION:

Where judgment directs party to do any specific act and party fails to comply, court may direct act to be done at disobedient party’s expense; includes land conveyance, document delivery, or any specific act. (ARCP 70).

5.23 SERVICE:

See topic 5.20 Process.

5.24 STAY OF EXECUTION:

See topic 5.03 Appeal and Error; category 8 Debtor and Creditor, topic 8.05 Executions.

5.25 SUBMISSION OF CONTROVERSY:

No statutory provisions.

5.26 VENUE:

Legal Actions Against Individuals.

(1) Recovery of, possession of, and trespass to land, in county in which land (or material part of) located; (2) contracts, in county in which any permanent Alabama defendant resides; (3) other personal actions (if there is any permanent Alabama resident defendant), in county in which defendant resides or in county in which act or omission may have been done or occurred. (Ala. Code § 6-3-2).

Equitable Actions Against Individuals.

(1) Real estate subject of matter, in county in which land (or material part of) located; (2) to enjoin proceedings on judgments in other courts, in county in which proceedings pending or judgment entered; (3) (with some exceptions) must be commenced in county in which defendant or material defendant resides; (4) where nonresident, in county subject of (or portion of) action was when claim arose or act on which action founded was to be performed. (Ala. Code § 6-3-2).

Executors or administrators, in county where letters granted. (Ala. Code § 43-2-130).

Actions for work and labor done or breaches of contracts or covenants as to easements or rights-of-way, in county in which work done or land situated (as to which easement or right-of-way granted). (Ala. Code § 6-3-3).

Unincorporated organizations or associations that issue policies or certificates of insurance to members, in county where they do business or issue such policies or certificates. (Ala. Code § 6-3-4).

Actions against unincorporated organization or association, in county where it does business or has branch or local organization. (Ala. Code § 6-3-6).

Corporations, in county: (1) Where substantial part of events or omissions occurred, or substantial part of real property is located; (2) of corporation's principal Alabama office; (3) of plaintiff's residence if plaintiff is individual; or (4) of plaintiff's principal Alabama office at time action accrues if plaintiff not individual if corporation does business by agent in county of plaintiff's residence. (Ala. Code § 6-3-7[a][1]-[3]). If none of above apply, in county where corporation did business by agent at time action accrues. (Ala. Code § 6-3-7[a][4]).

Civil actions for damages for personal injury, death, or property damage against county or municipality, in county or in county in which municipality is located or in county where act or omission complained of occurred. (Ala. Code § 6-3-11).

Other specific venue rules apply to breach of official bonds (Ala. Code § 6-3-8) and action involving prison system (Ala. Code § 6-3-9).

Actions Arising in Other States.

Whenever, either at common law or under statutes of another state, contract or tort cause of action has arisen in such other state against any person or corporation, such cause of action enforceable in courts of this state, in any county in which jurisdiction of defendant may legally be obtained, in same manner in which jurisdiction could have been obtained if cause of action had arisen in this state. Forum non conveniens applies, but dismissal may be subject to defendant's consent to other jurisdiction. (Ala. Code § 6-5-430).

If venue improperly laid, court shall on timely motion transfer action to court in which action might have been properly filed and case must proceed as though originally filed therein. If venue might have been proper in more than one court, defendant shall have right to select court to which case shall be transferred. (Ala. Code § 6-3-21; ARCP 82[d]). Ruling on transfer of venue may be raised either on appeal from judgment or by petition for writ of mandamus. (540 So.2d 720).

Change of Venue.

Venue may be changed if either party, by affidavit, shows that he cannot have fair trial in county where suit pending (Ala. Code § 6-3-20), or for convenience of parties and witnesses (Ala. Code § 6-3-21.1).

Contract provisions changing or altering venue void. (Ala. Code § 6-3-1).

See also category 16 Insurance, topic 16.02 Surety and Guaranty Companies.

5.27 WITNESSES:

See topic 5.13 Evidence, subhead Witnesses.

6 COURTS AND LEGISLATURE

6.01 COURTS:

United States District Courts.

Northern District.

Clerk's office: 140 Hugo L. Black U.S. Courthouse, 1729 Fifth Avenue N., Birmingham 35203; or 101 Holmes Avenue, N.E., Huntsville, 35801.

Filing fee, to be paid when suit is filed, is $350.

Northeastern Division.

Counties of Cullman, Jackson, Lawrence, Limestone, Madison and Morgan.

Court sits at Huntsville and Decatur.

Eastern Division.

Counties of Calhoun, Clay, Cleburne and Talladega.

Court sits at Anniston.

Southern Division.

Counties of Blount, Jefferson and Shelby.

Court sits at Birmingham.

Western Division.

Counties of Bibb, Greene, Pickens, Sumter and Tuscaloosa.

Court sits at Tuscaloosa.

Northwestern Division.

Counties of Colbert, Franklin and Lauderdale.

Court sits at Florence.

Middle Division.

Counties of Cherokee, DeKalb, Etowah, Marshall and St. Clair.

Court sits at Gadsden.

Jasper Division.

Counties of Fayette, Lamar, Marion, Walker and Winston.

Court sits at Tuscaloosa.

Southern District.

Clerk's office: 113 St. Joseph Street, Mobile 36602.

Filing fee, to be paid when suit is filed, is $350.

Northern Division.

Counties of Dallas, Hale, Marengo, Perry and Wilcox.

Court sits at Selma for Northern Division.

Southern Division.

Counties of Baldwin, Choctaw, Clarke, Conecuh, Escambia, Mobile, Monroe and Washington.

Court sits at Mobile.

Middle District.

Clerk's office: One Church Street, Montgomery 36104.

Filing fee, to be paid when suit is filed, is $350.

Northern Division.

Counties of Autauga, Barbour, Bullock, Butler, Chilton, Coosa, Covington, Crenshaw, Elmore, Lowndes, Montgomery and Pike.

Court sits at Montgomery.

Eastern Division.

Counties of Chambers, Lee, Macon, Randolph, Russell and Tallapoosa.

Court sits at Opelika.

Southern Division.

Counties of Coffee, Dale, Geneva, Henry and Houston.

Court sits at Dothan.

Supreme Court.

Jurisdiction.

Supreme Court has original jurisdiction of cases and controversies as provided by constitution, to issue such remedial writs or orders as may be necessary to give it general supervision and control of courts of inferior jurisdiction, and to answer questions of state law certified by court of U.S. (Const. Amend. 328, § 6.02; Ala. Code § 12-2-7); to issue writ of quo warranto and mandamus in matter where no other court has jurisdiction (Ala. Code § 12-2-7).

Supreme Court has appellate jurisdiction coextensive with state, under restrictions and regulations prescribed by law. (Ala. Code § 12-2-7).

Filing of application for rehearing in Court of Civil Appeals is not prerequisite to review by certiorari in Supreme Court. (ARAP 39[b]).

Transfer.

Supreme Court may transfer to Court of Civil Appeals, for determination, any civil case appealed to Supreme Court and within appellate jurisdiction of Supreme Court, except following: (1) Case that Supreme Court determines presents substantial question of federal or state constitutional law; (2) case that Supreme Court determines involves novel legal question, resolution of which will have significant statewide impact; (3) utility rate case appealed directly to Supreme Court under provisions of § 37-1-140; (4) bond validation proceeding appealed to Supreme Court under provisions of § 6-6-754; or (5) bar disciplinary proceeding. (Ala. Code § 12-2-7).

Place Where Court Sits.

Supreme Court sits in Montgomery.

Clerk’s Office.

300 Dexter Avenue, Montgomery 36104.

Courts of Appeals have no original jurisdiction except to issue all writs necessary or appropriate in aid of appellate jurisdiction of courts of appeals. (Const. Amend. 328, § 6.03). Each court of appeals has original jurisdiction in issuance and determination of writs of quo warranto and mandamus in relation to matters in which it has appellate jurisdiction. Each court has authority to issue writs of injunction, habeas corpus and such other remedial and original writs as necessary to give it general superintendence and control of jurisdictions inferior to it and in matters over which it has exclusive appellate jurisdiction and to punish for contempts. (Ala. Code § 12-3-11).

Court of Criminal Appeals.

Court of Criminal Appeals has exclusive appellate jurisdiction of all misdemeanors, including violation of town and city ordinances, habeas corpus and all felonies, including all post conviction writs in criminal cases. (Ala. Code § 12-3-9).

Court of Civil Appeals.

Court of Civil Appeals has exclusive appellate jurisdiction of all civil cases where amount involved, exclusive of interest and costs, does not exceed $50,000, all appeals from administrative agencies other than Alabama Public Service Commission, all appeals in workers' compensation cases, all appeals in domestic relations cases, including annulment, divorce, adoption and child custody cases, and all extraordinary writs arising from appeals in said cases. When there is recovery in court below of any amount other than costs, amount of such recovery shall be deemed to be amount involved, otherwise amount claimed shall be deemed to be amount involved, except that in actions of detinue alternate value of property as found by court or jury shall be deemed to be amount involved. (Ala. Code § 12-3-10).

When case is improperly submitted to Supreme Court or court of appeals, it will be transferred to proper court. (Ala. Code § 12-1-4).

Place Where Court Sits.

Courts of Appeals sit in Montgomery.

Clerks' Office.

300 Dexter Avenue, Montgomery 36104.

Circuit Courts.

Jurisdiction.

General jurisdiction. (Const. Amend. 328, § 6.04). Circuit courts have exclusive original jurisdiction of all civil actions in which matter in controversy exceeds $10,000 exclusive of interest and costs and concurrent jurisdiction with district courts in all civil actions in which matter in controversy exceeds $3,000 exclusive of interest and costs. (Ala. Code § 12-11-30[1]).

Circuit courts have exclusive original jurisdiction of all criminal prosecutions for felonies and misdemeanor or ordinance violations which are lesser included offenses or which arise from same incident as felony charge, except district courts have concurrent jurisdiction with circuit courts to receive pleas of guilty in non-capital felony cases. (Ala. Code § 12-11-30[2]).

Circuit courts have appellate jurisdiction of civil, criminal and juvenile cases in district court and prosecutions for ordinance violations in municipal courts, except in cases in which direct appeal to courts of civil or criminal appeals is provided by law or rule. Appeals to circuit courts are tried de novo with or without jury as provided by law. (Ala. Code § 12-11-30[3]).

Circuit courts have original jurisdiction over matters in equity. (Ala. Code § 12-11-31).

Involuntary juvenile commitment proceedings may be transferred from probate court to circuit court upon motion of party to proceeding. (Ala. Code § 12-11-10).

Cases within exclusive jurisdiction of circuit courts filed in district courts, and cases within exclusive jurisdiction of district courts filed in circuit courts, will be transferred to appropriate court by judge or clerk. (Ala. Code § 12-11-9).

Venue.

See ARCP 82. (See also category 5 Civil Actions and Procedure, topic 5.26 Venue.) Venue has no effect on circuit court's subject matter jurisdiction. (978 So.2d 33).

Rules of Practice.

ARCP apply. (See also category 5 Civil Actions and Procedure, topic 5.19 Practice.)

Appeals.

See ARAP. (See also category 5 Civil Actions and Procedure, topic 5.03 Appeal and Error.)

There are 41 circuits. (Ala. Code § 12-11-2).

Place Where Court Sits.

Circuit court provided in every county. (Ala. Code § 12-11-1). Circuit courts of several counties required to be open at all times for transaction of any and all business or judicial proceedings of every kind. (Ala. Code § 12-11-4).

Ala. counties, circuit to which each county belongs, and places where each circuit court sits are as follows:

(Place named is county seat; where two places are named, first is county seat.)

Autauga County: Nineteenth Circuit; court sits at Prattville.

Baldwin County: Twenty-eighth Circuit; court sits at Bay Minette.

Barbour County: Third Circuit; court sits at Clayton and Eufaula.

Bibb County: Fourth Circuit; court sits at Centreville.

Blount County: Forty-first Circuit; court sits at Oneonta.

Bullock County: Third Circuit; court sits at Union Springs.

Butler County: Second Circuit; court sits at Greenville.

Calhoun County: Seventh Circuit; court sits at Anniston.

Chambers County: Fifth Circuit; court sits at Lafayette.

Cherokee County: Ninth Circuit; court sits at Centre.

Chilton County: Nineteenth Circuit; court sits at Clanton.

Choctaw County: First Circuit; court sits at Butler.

Clarke County: First Circuit; court sits at Grove Hill.

Clay County: Fortieth Circuit; court sits at Ashland.

Cleburne County: Seventh Circuit; court sits at Heflin.

Coffee County: Twelfth Circuit; court sits at Elba and Enterprise.

Colbert County: Thirty-first Circuit; court sits at Tuscumbia.

Conecuh County: Thirty-fifth Circuit; court sits at Evergreen.

Coosa County: Fortieth Circuit; court sits at Rockford.

Covington County: Twenty-second Circuit; court sits at Andalusia.

Crenshaw County: Second Circuit; court sits at Luverne.

Cullman County: Thirty-second Circuit; court sits at Cullman.

Dale County: Thirty-third Circuit; court sits at Ozark.

Dallas County: Fourth Circuit; court sits at Selma.

DeKalb County: Ninth Circuit; court sits at Fort Payne.

Elmore County: Nineteenth Circuit; court sits at Wetumpka.

Escambia County: Twenty-first Circuit; court sits at Brewton.

Etowah County: Sixteenth Circuit; court sits at Gadsden.

Fayette County: Twenty-fourth Circuit; court sits at Fayette.

Franklin County: Thirty-fourth Circuit; court sits at Russellville.

Geneva County: Thirty-third Circuit; court sits at Geneva.

Greene County: Seventeenth Circuit; court sits at Eutaw.

Hale County: Fourth Circuit; court sits at Greensboro.

Henry County: Twentieth Circuit; court sits at Abbeville.

Houston County. Twentieth Circuit; court sits at Dothan.

Jackson County: Thirty-eighth Circuit; court sits at Scottsboro.

Jefferson County: Tenth Circuit; court sits at Birmingham and Bessemer.

Lamar County: Twenty-fourth Circuit; court sits at Vernon.

Lauderdale County: Eleventh Circuit; court sits at Florence.

Lawrence County: Thirty-sixth Circuit; court sits at Moulton.

Lee County: Thirty-seventh Circuit; court sits at Opelika.

Limestone County: Thirty-ninth Circuit; court sits at Athens.

Lowndes County: Second Circuit; court sits at Hayneville.

Macon County: Fifth Circuit; court sits at Tuskegee.

Madison County: Twenty-third Circuit; court sits at Huntsville.

Marengo County: Seventeenth Circuit; court sits at Linden.

Marion County: Twenty-fifth Circuit; court sits at Hamilton.

Marshall County: Twenty-seventh Circuit; court sits at Guntersville and Albertville.

Mobile County: Thirteenth Circuit; court sits at Mobile.

Monroe County: Thirty-fifth Circuit; court sits at Monroeville.

Montgomery County: Fifteenth Circuit; court sits at Montgomery.

Morgan County: Eighth Circuit; court sits at Decatur.

Perry County: Fourth Circuit; court sits at Marion.

Pickens County: Twenty-fourth Circuit; court sits at Carrollton.

Pike County: Twelfth Circuit; court sits at Troy.

Randolph County: Fifth Circuit; court sits at Wedowee.

Russell County: Twenty-sixth Circuit; court sits at Phenix City.

Shelby County: Eighteenth Circuit; court sits at Columbiana.

St. Clair County: Thirtieth Circuit; court sits at Ashville and Pell City.

Sumter County: Seventeenth Circuit; court sits at Livingston.

Talladega County: Twenty-ninth Circuit; court sits at Talladega and Sylacauga.

Tallapoosa County: Fifth Circuit; court sits at Dadeville and Alexander City.

Tuscaloosa County: Sixth Circuit; court sits at Tuscaloosa.

Walker County: Fourteenth Circuit; court sits at Jasper.

Washington County: First Circuit; court sits at Chatom.

Wilcox County: Fourth Circuit; court sits at Camden.

Winston County: Twenty-fifth Circuit; court sits at Double Springs.

District Courts.

Jurisdiction.

District courts are courts of limited jurisdiction. (Ala. Code § 12-12-1).

Original civil jurisdiction of district courts is concurrent with circuit courts, except as noted below, and includes all civil actions in which matter in controversy does not exceed $10,000, exclusive of interest and costs and civil actions based on unlawful detainer. (Ala. Code § 12-12-30). District courts have exclusive jurisdiction over civil actions in which matter in controversy, exclusive of interest and costs, does not exceed $3,000. (Ala. Code § 12-12-31[a]; 533 So.2d 617). District courts do not have jurisdiction over: (a) Actions seeking equitable relief other than equitable questions in juvenile cases within jurisdiction of district courts and equitable defenses asserted or compulsory counterclaims filed by party in action within jurisdiction of district courts; (b) actions enumerated in ARCP 81 other than actions based in negligence against municipalities, actions seeking substitution of lost or destroyed records or instruments, summary motion proceedings, or relieving disabilities of nonage; (c) actions seeking declaratory judgments; and (d) appeals from probate or municipal courts. (Ala. Code § 12-12-30).

Concurrent juvenile jurisdiction with circuit courts. (Ala. Code § 12-12-34).

Adoption proceedings may be transferred from probate court to district court upon motion of party to proceeding. (Ala. Code § 12-12-35).

Exclusive original trial jurisdiction over prosecutions of all misdemeanors except: (a) Prosecutions by municipalities having municipal courts; (b) any prosecution which also involves felony offense within exclusive jurisdiction of circuit courts; and (c) any misdemeanor for which indictment has been returned by grand jury. However, district courts may exercise original jurisdiction concurrent with circuit courts to receive pleas of guilty in prosecutions of noncapital felony cases. (Ala. Code § 12-12-32).

Exclusive original jurisdiction of misdemeanor prosecutions for traffic infractions, except ordinance infractions prosecuted in municipal courts. (Ala. Code § 12-12-51).

May exercise jurisdiction over proceedings relating to demands for extradition made by another jurisdiction pursuant to Alabama laws governing extradition. (Ala. Code § 12-12-33).

May issue all writs necessary to preserve and enforce their jurisdiction and authority. (Ala. Code § 12-12-7).

Exercise exclusive jurisdiction to hold preliminary hearings in prosecutions for felonies. Finding by district court of no probable cause is not res judicata as to that issue and state is not barred from proceeding further (Ala. Code § 15-11-2).

Place Where Court Sits.

In each county seat, in each municipality containing population of 1,000 or more where no municipal court exists, to be restricted to municipal cases, and at other locations within counties where geographical venue lies in more than one place. (Const. Amend. 328, § 6.05; Ala. Code § 12-12-1[b]).

Venue lies in county where venue would lie for civil or criminal actions brought in circuit court except: (a) In counties where venue for inferior court has lain in area of lesser geographic extent than county, venue lies in such lesser geographic area; (b) venue of prosecutions for violations of municipal ordinances lies in district court sitting in municipality, or if none, district court within county and nearest to municipality. If action filed where venue does not lie, any party may move to transfer action to location where venue proper. (Ala. Code § 12-12-36).

Rules of Procedure and Trials.

ARCP apply to all civil actions brought in district courts except as otherwise provided by law or rule. (Ala. Code § 12-12-11). ARCP specifies special rules for district courts, identified under specific rule as (dc). All issues of law and fact tried by judges of district courts without jury. (Ala. Code § 12-12-3). Where district court sits as municipal court it takes judicial notice of ordinance of municipality for which it sits. (Ala. Code § 12-14-7; see also category 5 Civil Actions and Procedure, topic 5.19 Practice).

Appeals.

Any party may appeal from final judgment of district court in civil case by notice filed in district court within 14 days from later of date of judgment or date of denial of post-trial motion, together with security for costs required by law or rule. Defendant may appeal from final judgment in criminal case by filing notice, together with any bond required by law or rule, within 14 days from later of date of judgment or date of denial of post-trial motion. If appeal in civil or criminal case to appellate court, time governed by ARAP or ARJP. State or municipality may appeal only from judgment holding statute or ordinance invalid. (Ala. Code § 12-12-70). Appeals to circuit court for trial de novo (Ala. Code § 12-12-71), except that appeals in both civil and criminal cases may be direct to appropriate appellate court if: (a) Adequate record or stipulation of facts is available and right to trial by jury is waived by all parties entitled thereto; or (b) parties stipulate that only questions of law are involved and district court certifies questions. (Ala. Code § 12-12-72). Supersedeas bond in twice amount of judgment required by appellant in civil appeals to circuit court. (Ala. Code § 12-12-73).

Juvenile Courts.

Jurisdiction.

Circuit court and district court exercise original concurrent jurisdiction sitting as juvenile court. (Ala. Code § 12-15-103). Juvenile court has exclusive original jurisdiction in proceedings in which child alleged to be delinquent, dependent, or in need of supervision; proceedings involving delinquent acts committed before age of 18 and filed before age of 21, except not over offenses in Ala. Code § 15-3-5; proceedings arising out of these proceedings, including, but not limited to, proceedings pursuant to Interstate Compact on Juveniles and Interstate Compact on Placement of Children and proceedings for termination of parental rights. (Ala. Code § 12-15-114). Juvenile court has exclusive jurisdiction over civil actions involving proceedings for removal of nonage; proceedings when judicial consent is required to marry, be employed, withdraw from school, or enlist in military; proceedings for commitment of minor with mental illness or retardation; proceedings for adoption removed from probate court on motion of party; proceedings for waiver of parental consent for abortion; proceedings to establish paternity or maternity of child under Alabama Uniform Parentage Act; proceedings to establish child or spousal benefits when equivalent court of other state has issued order; proceedings to establish grandparent visitation when part of juvenile case involving same child; proceedings involving emergency medical treatment of child; proceedings involving school suspension, expulsion, or exclusion. (Ala. Code § 12-15-115). Juvenile court has exclusive original jurisdiction: (a) To try any minor or adult charged with: aiding, encouraging, or causing any child to become or remain delinquent, in need of supervision or dependent; opposing juvenile probation officer or representative of Department of Human Resources; violating certain juvenile confidentiality provisions; nonsupport; violating certain juvenile criminal sex offender positions; violating compulsory school attendance laws; (b) all criminal cases before juvenile court governed by juvenile laws and initiated by complaint made according to criminal procedure rule and made to judge or magistrate. (Ala. Code § 12-15-116).

Juvenile court may, upon motion by prosecution, transfer for criminal prosecution minor of 14 or more years of age if charges would constitute crime if committed by adult. Conviction following such transfer of minor shall terminate juvenile court’s jurisdiction with respect to pending and future allegations of delinquency and to pending and future criminal charges. (Ala. Code § 12-15-203).

Venue.

If delinquency or need of supervision alleged, venue lies in district where acts constituting allegation occurred. If dependency alleged, venue lies in district where child resides or in district where child is present when proceedings commenced. (Ala. Code § 12-15-203).

Appeals.

Appeals from final orders arising out of jurisdiction of juvenile court taken directly to appropriate appellate court if adequate record or stipulation of facts available and right to jury trial granted or waived, or if parties stipulate that only questions of law are involved and juvenile court certifies questions. In all cases involving minors and adults, appeals to circuit court which tries case de novo. (ARJP 28). In cases arising out of jurisdiction of court over child, appeals to: (1) Court of Criminal Appeals in proceedings in which child is adjudicated delinquent and proceedings in which motion seeking order to transfer child to adult court for criminal prosecution is either granted or denied; or (2) to Court of Civil Appeals in any other case. (ARJP 28).

Municipal Courts.

Jurisdiction of all prosecutions for breach of ordinances of municipality within its police jurisdiction. (Ala. Code § 12-14-1[b]). Concurrent jurisdiction with district court of all acts constituting violations of state law committed within police jurisdiction of municipality which may be prosecuted as breaches of municipal ordinances. (Ala. Code § 12-14-1[c]). Cases tried by judge without jury. (Ala. Code § 12-14-6). All appeals from judgments of municipal court to circuit court of circuit in which violation occurred for trial de novo. (Ala. Code § 12-14-70[a]). Municipality may appeal within 60 days without bond from judgment holding ordinance invalid. (Ala. Code § 12-14-70[b]). Defendant may appeal in any case within 14 days from entry of judgment by filing notice of appeal and giving bond conditioned upon defendant’s appearance in circuit court (unless bond waived due to indigency). (Ala. Code § 12-14-70[c]).

Probate Courts.

Jurisdiction.

General jurisdiction of orphans’ business, adoptions, and power to grant letters testamentary, of administration, and guardianship, such further jurisdiction as provided by law, provided that whenever circuit court has taken jurisdiction of settlement of estate, it has power to do all things necessary for settlement of estate, including appointment and removal of administrators, executors, guardians and trustees. (Const. Amend. 364). Original and general jurisdiction as to probate of wills, granting and revoking of letters testamentary and of administration, controversies in relation to right of executorship or of administration, settlement of accounts of executors and administrators, sale and disposition of real and personal property belonging to and distribution of intestate’s estate, appointment and removal of guardians for minors and persons of unsound mind, controversies as to right of guardianship and settlement of guardians’ accounts, allotment of dower, partition of lands within their counties, change of name, and in other cases as jurisdiction may be given by law. (Ala. Code § 12-13-1). Jurisdiction extends to proceedings for costs in probate matters. (13 So.3d 989). Involuntary juvenile commitment proceedings may be transferred to circuit court on motion of any party to proceeding. (Ala. Code § 12-11-10). Proceedings for adoption of child may be transferred to district court on motion of any party to proceeding. (Ala. Code § 12-12-35).

Place and Terms of Court.

Probate courts open at all times except Sat., Sun., holiday. (Ala. Code § 12-13-3).

Probate court sits at county seat. In following counties court sits also at places named: Barbour County, at Eufaula; Coffee County, at Enterprise.

6.02 LEGISLATURE:

Legislature.

Annual sessions limited to 30 legislative days and 105 calendar days of Alabama legislature, commence on first Tues. in Mar. of first year of term of office of legislators, on first Tues. of Feb. of second and third year of term and on second Tues. in Jan. of fourth year of term. (Ala. Code § 29-1-4).

Special or Extraordinary Sessions.

Governor may call special sessions (Const. Art. V § 122), which must be limited to 12 legislative days and 30 calendar days (Ala. Code § 29-1-5).

Initiative and Referendum.

No statutory provision.

Lobbyists.

Registration of lobbyists and payment of $100 annual fee required by Jan. 31 each year or within ten days after first undertaking requiring such registration. (Ala. Code § 36-25-18[a]).

State Ethics Commission composed of five members created in 1973. (Ala. Code § 36-25-3).

Statement of economic interests must be filed with Commission no later than Apr. 30 each year by all: (1) Elected public officials; (2) appointed public officials; (3) candidates (defined in Ala. Code § 17-22A-22); (4) members of Alabama Ethics Commission and appointed members of boards and commissions with statewide jurisdiction; (5) all full-time nonmerit employees; (6) chief clerks and chief managers; (7) chief county clerks and chief county managers; (8) chief administrators; (9) chief county administrators; (10) public officials or employees whose primary duty is to invest public funds; (11) chief administrative officers of political subdivisions; (12) chief and assistant county building inspectors; (13) county or municipal administrators with power to grant or deny land development permits; (14) chief municipal clerks; (15) chiefs of police; (16) fire chiefs; (17) city and county school superintendents and school board members; (18) city and county school principals or administrators; (19) purchasing or procurement agents; (20) directors and assistant directors of state agencies; (21) chief financial and accounting directors; (22) chief grant coordinators; (23) employees of Legislature or agencies; and (24) employees of judicial branch. (Ala. Code § 36-25-14[a][1]-[24]). No requirement to file statement if occupying position earns less than $50,000 annually. (Ala. Code § 36-25-14[b]). Statements must contain (1) names and addresses of family members and business; (2) occupations; (3) total combined household income; (4) if party engaged in business providing certain services, number of clients and income; (5) if retainer exists for certain client categories, list of categories and anticipated income; (6) list of real estate held for investment; (7) list of indebtedness to businesses operating in Ala. (Ala. Code § 36-25-14[b][1]-[7]).

Penalties.

Intentional violation of Ala. Code § 36-25-1, et seq. Class B felony. (Ala. Code § 36-25-27[a][1]). Other violations Class A misdemeanor. (Ala. Code § 36-25-27[a][2]).

Administrative Procedure Act.

Promulgation of rules and regulations by administrative agencies governed by Administrative Procedure Act (Ala. Code § 41-22-1, et seq.), which provides for public notice of adopted agency rules, for declaratory ruling by agency on petition of persons substantially affected by rule, for notice and hearing in contested cases, and for judicial review of contested cases.

6.03 REPORTS:

Official Reports.

Minor Reports, one volume; Stewart's Reports, 3 volumes; Stewart & Porter's Reports, 5 volumes; Porter's Reports, 9 volumes; Alabama Reports, 295 volumes; Court of Appeals Reports, 57 volumes; Alabama Edition of Southern Reporter, current series, beginning with 331-333 So. 2d.

Unofficial Reports.

Opinions of Supreme Court and Court of Appeals reported unofficially in Southern Reporter, 1887 to 1941, and Southern Reporter, Second Series, 1941 to date.

Digests.

Philip's, Minor to 13 Alabama; Brickell's, Minor to 76 Alabama; Clark's (Criminal), 44 to 63 Alabama; Lomax's (Criminal), 64 to 100 Alabama; Mayfield's, Minor to 180 Alabama; Michie's, complete; Alabama and Southern Reporter Digest (West Publishing Company); Alabama Digest (West Publishing Company); Alabama Digest (2d) (West Publishing Company).

6.04 STATUTES:

Contained in Code of 1975. ARCP contained in "Alabama Rules of Court" (West Publishing Company) and in Code of 1975.

Uniform Acts of National Conference of Commissioners on Uniform State Laws adopted are: 1968 and 1987 Anatomical Gift (1969, am'd 1987, 2004); Act to Secure Attendance of Witnesses From Without a State in Criminal Proceedings (1977); Athlete Agents (2001); †Business Corporation (1959, am'd 1980, 1994); †Certification of Questions of Law (ARAP 18) (1975); 1968 and 1997 Child Custody Jurisdiction (1980, am'd 1999); Commercial Code (1965, am'd 1982, 1996, 2002, 2004); †Common Trust Fund (1943, am'd 1949, 1967, 1980); Condominium (effective Jan. 1, 1991); Conservation Easement (1997); 1970 Controlled Substances (1971); Declaratory Judgments (1935, am'd 1947); Determination of Death (1979, am'd 2000); 1978 †Disclaimer of Property Interests (1981); †Division of Income for Tax Purposes (1967, am'd 1997); Durable Power of Attorney (1981, am'd 1997); Electronic Transactions (2001); Eminent Domain Code (Model) (1985); Enforcement of Foreign Judgments (1986); Federal Lien Registration (1989); Fiduciaries (1943, am'd 1961); Fraudulent Transfer (1989, am'd 1999); Gifts to Minors, Revised (1957, am'd 1965, am'd 1967) (repealed 1986 and replaced by Transfers To Minors Act); 1982 Guardianship and Protective Proceedings (1987); †Health-Care Decisions (1997); Insurers Liquidation (1943); Interstate Enforcement of Domestic Violence Protection Orders (2003); 1996 Interstate Family Support (1997); Limited Liability Company (1997); 1985 †Revised Limited Partnership (1997); Management of Institutional Funds (1993); Mandatory Disposition of Detainers (1978); Motor Vehicle Certificate of Title and Anti-Theft (1973); Multiple-Person Accounts (1997); †Non-Profit Corporation (1955, am'd 1984); †Nonprobate Transfers on Death (1997); 1973 †Parentage (1984); 1994 †Partnership (1996); †Photographic Copies of Business and Public Records as Evidence (1951); 1997 Principal and Income (2000); Prudent Investor (2007); Prudent Management of Institutional Funds (2008); Residential Landlord and Tenant (2007); †Securities (1959, am'd 1990); †Securities Ownership by Minors (1961); 1940 Simultaneous Death (1949); †State Administrative Procedure (1961) (Model) (1981); 1960 †Testamentary Additions to Trusts (1961, am'd 1982); TOD (Transfer on Death) Security Registration (1997); Trade Secrets (1987); Transfers To Minors (1986); Trust Code (2007); 1995 Unclaimed Property (2004); Unincorporated Nonprofit Association (1995); Veterans' Guardianship (1931, am'd 1936).

Uniform Probate Code used as guide for Alabama Law of Intestate Succession and Wills, but many material differences exist between Uniform Probate Code and Alabama law.

Uniform Commercial Code adopted Jan. 1, 1967. 1972 Official Amendments adopted Feb. 1, 1982, with some Alabama differences. Adopted 1990 Revision of Art. 3 and 1990 Amendments to Art. 4. Repealed Art. 6 "Bulk Transfers". (Act No. 96-523). Adopted 2001 Revision of Art. 9. See category 3 Business Regulation and Commerce, topic 3.09 Commercial Code. Ala. Code § 7-1-101 amended effective Jan. 1, 2005 to make structure of Art. 1 parallel with that of other Arts. of Uniform Commercial Code.

†Adopted with significant modifications.

For text of Uniform Acts falling within the scope of the Martindale-Hubbell Law Digests see Uniform and Model Acts section.

Other Uniform Acts adopted are: Commercial Driver License; Motor Vehicle Safety Responsibility (1951, am'd 1965).

6.05 UNIFORM LAWS:

See topic 6.04 Statutes.

7 CRIMINAL LAW

7.01 CRIMINAL LAW:

Criminal Code and Code of Criminal Procedure contained in Tit. 13A and Tit. 15. Alabama Rules of Criminal Procedure effective Jan. 1, 1991.

Indictment or Information.

All felonies and all misdemeanors originally prosecuted in district court or circuit court are indictable offenses. (Ala. Code § 15-8-2). Indictable offenses must be prosecuted by indictment, unless otherwise provided by Constitution of Alabama or Legislature. (Const. Art. I § 8). Indictments presented by grand jury. (Ala. Code § 15-8-70). Validity of indictment does not affect court's subject matter jurisdiction; therefore, challenge to indictment not jurisdictional claim and subject to procedural bars in Rule 32.2. (959 So.2d 1157). Alleged omission from indictment of essential element not jurisdictional defect that could be raised for first time on post-conviction review. (989 So.2d 607). Because defendant may only be convicted on charges found in indictment or information, instructions to jury which, in fact, change offense charged constitute plain error, warranting reversal of conviction based on said jury charge. (973 So.2d 380).

Pretrial Procedure.

Trial court abuses its discretion when it dismisses suit based on inmate's failure to appear at pretrial conference. (896 So.2d 573).

Waiver of Right to Counsel.

Requirement that police receive unequivocal assertion from defendant of right to counsel in order for police to discontinue questioning of defendant pertains to situation where defendant has previously waived such right and then, during interrogation, makes equivocal statement regarding exercise of right, rather than to situation where defendant makes ambiguous invocation of right to counsel prior to waiving right. (937 So.2d 86). Defendant retains right to counsel even where she withdraws waiver on eve of trial; regardless of defendant's tactics, courts must ensure that right respected by either appointing attorney or granting continuance. (985 So.2d 495).

Defendant does not have Sixth Amendment right to have counsel present when blood sample is obtained pursuant to search warrant. (11 So.3d 866). When petitioner raises claim of ineffective assistance of counsel in post-conviction proceeding he waives attorney-client privilege only with respect to matters relevant to his allegations of ineffective assistance of counsel. (2008 Ala. Crim. App. LEXIS 123).

Bail.

All offenses bailable as of right except in capital offenses where court of opinion that defendant guilty of offense (Ala. Code § 15-13-2; -3) and in offenses involving abuse, assault, harassment, or attempt or threat thereof, of family, household, dating or engagement relationship, or for violation of protective order, except after appearance before judge or magistrate. (Ala. Code § 15-13-190). Capital offenses bailable as matter of right where continuance had twice by state, without consent of accused, for testimony of absent witnesses. (Ala. Code § 15-13-3).

Homicide.

Determination whether offense may serve as predicate felony under Ala. Code § 13A-6-2(a)(3) must be based on facts and circumstances of particular case. (936 So.2d 1094). Under Ala. Code § 13A-6-2(b), only legal provocation may reduce murder to heat-of-passion manslaughter. (907 So.2d 470). Trial court may, either sua sponte or at request of State, instruct jury on lesser included offense that is supported by evidence, even over objection of one or both of parties. (14 So.3d 898).

Sentencing and Punishment.

Following U.S. Supreme Court's decision holding it is cruel and unusual to inflict death penalty on offenders under age of 18, retroactive application of collateral review in death penalty case is required where offender was under age 18 when crime was committed. (925 So.2d 245). Trial court has authority to split defendant's sentence following revocation of probation by adding another period of confinement and suspending remaining portion of sentence. (912 So.2d 292). If trial court splits sentence upon revocation, total length of confinement portion shall not exceed maximum allowed by § 15-18-8. (939 So.2d 962). Trial court lacks jurisdiction to impose enhanced sentence if State fails to invoke habitual offender law prior to sentencing. (912 So.2d 539). Trial court has jurisdiction to consider defendant's second motion for reconsideration of sentence under habitual offender statute because only legislature has authority to alter jurisdiction of circuit courts. (993 So.2d 433). Trial court is not required to issue written order stating its reasons for revoking probation and evidence it relied upon; rather, it is task of Court of Criminal Appeals to examine record to determine whether: (1) Due process requirements have been met; and (2) requirements of rule that judge make written statement or state for record evidence he relied upon and his reasons for revoking probation have been met. (921 So.2d 450). State's failure to present sufficient evidence to prove defendant's guilt beyond reasonable doubt is nonjurisdictional defect that may be raised on direct appeal, despite guilty plea. (992 So.2d 686).

Post-conviction Relief Petition.

Petitioner seeking to amend petition for post-conviction relief does not have initial burden of showing diligence in filing amendment or that facts underlying amendment were unknown to him before filing of original petition. (900 So.2d 455). Petitioner may amend petition for post-conviction relief if amendment does not give rise to actual prejudice to State or cause undue delay. (957 So.2d 533). Petitioner seeking relief from sentences for offenses that have separate case numbers but were resolved in same proceedings may file single petition with single filing fee. (945 So.2d 448). Rule 32 petition, when accompanied by request to proceed in forma pauperis, deemed filed for purposes of limitations period on date both are submitted to circuit court. (950 So.2d 344). Court's failure to serve defendant or his attorney with order denying motion for post-conviction relief under Rule 32 violates due process as it precludes defendant from timely filing motion for reconsideration. (945 So.2d 448). Rule 32 petition, when accompanied by request to proceed in forma pauperis, deemed filed for purposes of limitations period on date both are submitted to circuit court. (950 So.2d 344). Court's failure to serve defendant or his attorney with order denying motion for post-conviction relief under Rule 32 violates due process as it precludes defendant from timely filing motion for reconsideration. (988 So.2d 608). Preclusive provisions of Rule 32.2(a) cannot be read as jurisdictional and, as procedural bar, may be waived; only in extraordinary circumstances may such waiver be overcome by appellate court acting sua sponte. (2007 Ala. LEXIS 78). Criminal Court of Appeals is proper forum for resolution of dispute that is subject to mandamus proceeding when there is pending criminal proceeding. (985 So.2d 446). Court of Criminal Appeals, rather than Court of Civil Appeals, has jurisdiction over inmate's petition for writ of certiorari challenging his heinous offender status. (982 So.2d 1078).

Interstate Compact for Supervision of Parolees and Probationers not in effect; replaced Interstate Compact for Adult Offender Supervision. (Ala. Code § 15-22-l.1; 1.2).

Uniform Criminal Extradition Act in effect. (Ala. Code § 15-9-20; -30 to -49; -60 to -65).

8 DEBTOR AND CREDITOR

8.01 ASSIGNMENTS:

All bonds, contracts, and writings for payment of money, or other things, or performance of any act assignable by endorsement. (Ala. Code § 8-5-20). Personal service contracts generally not assignable. (286 Ala. 72, 237 So.2d 463). Verbal assignment of chose in action effective in equity. (218 Ala. 221, 118 So. 404). Claims against railroad companies for injuries to property may be assigned in writing. (Ala. Code § 8-5-23).

Uniform Commercial Code adopted. (Ala. Code § 7-9A-101 to -709). See category 3 Business Regulation and Commerce, topic 3.09 Commercial Code.

Instrument Transferring Title.

No special requirements.

Filing.

See category 3 Business Regulation and Commerce, topic 3.09 Commercial Code.

Recording.

See categories 3 Business Regulation and Commerce, topic Commercial Code; Documents and Records, topic Records.

Notice.

See category 3 Business Regulation and Commerce, topic 3.09 Commercial Code.

Effect.

Assignment by endorsement authorizes action thereon by each successive endorsee. (Ala. Code § 8-5-20).

Credits Against Assigned Claims.

All contracts and writings, except those governed by Uniform Commercial Code and paper issued to circulate as money, subject to all payments, setoffs, and discounts had or possessed against same, prior to notice of assignment or transfer. (Ala. Code § 8-5-25).

Actions on Assigned Claims.

On all contracts assigned by writing not governed by Uniform Commercial Code, in order to charge endorser or assignor, suit must be brought against maker within 30 days after suit can properly be brought, and if judgment obtained, execution must be issued as authorized by law, and inability of maker to pay such judgment proved by return of “no property.” (Ala. Code § 8-5-26). Time for bringing suit against maker may be extended or waived by consent of indorser or assignor in writing (Ala. Code § 8-5-27), and holder is excused from bringing suit, obtaining judgment and issuing execution under certain specified circumstances (Ala. Code § 8-5-28). Assignee may enforce promissory note that was lost, destroyed, or stolen while in possession of assignor. (Ala. Code § 7-3-309). Costs in suit against maker on such assigned or indorsed contract recoverable in suit against assignor or indorser. (Ala. Code § 8-5-30).

Assignment of wages void. (Ala. Code § 8-5-21).

Assignment of Life Insurance Policies.

See category 16 Insurance, topic 16.01 Insurance Companies.

8.02 ATTACHMENT:

Actions in Which Allowed.

May issue in actions founded on contract or tort. (58 Ala. 139).

Courts Which May Issue Writ.

Attachment to enforce collection of debt or liquidated money demand may be issued by judge or clerk of circuit court, returnable to any county, or by judge of probate or district judge within their respective counties. Attachment to recover unliquidated damages for breach of contract or on claim sounding in damages merely can be issued only by judge of circuit court or judge of probate, returnable to any county. (Ala. Code § 6-6-43).

In Whose Favor Writ May Issue.

No limitation imposed on issuance of writ on account of residence or citizenship of plaintiff, whether natural person or corporation. (Ala. Code § 6-6-30; Ala. Code § 6-6-48; Ala. Code § 6-6-49). Executors and administrators may commence suit by attachment in their representative characters. (Ala. Code § 6-6-47).

Against Whom Writ May Issue.

No limitation on imposition of writ on account of residence or citizenship of defendant, whether natural person or corporation. (Ala. Code § 6-6-30; Ala. Code § 6-6-48; Ala. Code § 6-6-51). Executors and administrators subject to writ; no judgments may be rendered against executors and administrators on answer in attachment until six months after grant of letters testamentary or of administration. (Ala. Code § 6-6-144).

Claims on Which Writ May Issue.

May issue in following kinds of actions: (1) To enforce collection of debt, whether due or not; (2) for liquidated money demand; (3) to recover unliquidated damages for breach of contract; and (4) when action sounds in damages only. (Ala. Code § 6-6-41). Attachment may issue in action by state for recovery from public officer of public money (Ala. Code § 6-5-4); on arbitration awards, whether for delivery of property or particular act or omission (Ala. Code § 6-6-13); and on judgments in detinue for recovery of specific property (Ala. Code § 6-6-263).

Grounds.

May issue in cases where defendant: (1) Resides outside state; (2) absconds; (3) secretes himself to avoid service of process; (4) about to leave state; (5) about to remove his property from state; (6) about to fraudulently dispose of his property; (7) fraudulently disposed of his property; or (8) has money, property or effects liable to satisfaction of debts which he fraudulently withholds. (Ala. Code § 6-6-42). When summons to defendant resident of county returned "not found", plaintiff may sue out attachment on making affidavit that defendant evaded service of process. (Ala. Code § 6-6-121). Plaintiff may also sue out attachment in aid of pending suit under same conditions as if in original attachment proceeding. (Ala. Code § 6-6-120). Similar rules prevail in respect to attachments to enforce certain specific liens (Ala. Code § 35-9-34; -37; -60 to -65; Ala. Code § 35-11-5; -431), and in suits to collect municipal taxes (Ala. Code § 11-51-26).

Proceedings to Obtain.

Complaint must be filed within 15 days after suing out attachment if demand was then due; otherwise within 15 days after claim or demand becomes due. (Ala. Code § 6-6-140). Summons must issue on complaint so filed, but has no effect on levy, lien or enforcement of attachment. (Ala. Code § 6-6-141). If defendant appears and pleads, case proceeds as in actions commenced by complaint; if defendant fails to appear or to plead within time required by law, plaintiff may take judgment by default and if necessary, court may determine amount of damages pursuant to ARCP. (Ala. Code § 6-6-141; see also ARCP 55).

Action for recovery of or possession of specific personal property under detinue statutes (Ala. Code § 6-6-250 to -264) or other provision whereby owner of security interest in personal property seeks possession prior to judgment must follow procedure set forth in ARCP 64.

Notice of attachment must be given nonresident defendant by publication and by mail if residence can be ascertained. (Ala. Code § 6-6-81). Personal notice or notice left at his residence must be given defendant who is resident of county; notice by posting at court house door and by mail must be given defendant who is resident of some other county. (Ala. Code § 6-6-82).

Notice necessary for attachment for enforcement of arbitration award (Ala. Code § 6-6-13) and where hereinabove expressly stated; see also ARCP 70.

Affidavit.

In order to obtain attachment to enforce collection of debt or liquidated money demand, plaintiff, his agent or attorney must make written oath of amount of debt, that debt or demand is justly due or to become due, that one of grounds for attachment exists, and that attachment not sued out to harass defendant. (Ala. Code § 6-6-44).

Special Affidavits.

In order to obtain attachment to recover unliquidated damages for breach of contract or to enforce claim sounding in damages merely, plaintiff, his agent or attorney must, in addition, make affidavit as to special facts and circumstances enabling judge to determine amount for which levy must be made. (Ala. Code § 6-6-46). Nonresident seeking attachment against another nonresident, in addition to other requirements, must make affidavit that defendant has not sufficient property within state of his residence wherefrom to satisfy debt and must also give bond with surety resident in this state. (Ala. Code § 6-6-48).

Attachment Bond.

Except where attachment sued out on ground that defendant is nonresident, plaintiff must supply bond in double amount claimed with sufficient surety. (Ala. Code § 6-6-45). Defendant may bring action on attachment bond within three years for actual damages if attachment wrongfully sued out and may recover vindictive damages if attachment was sued out maliciously.

(Ala. Code § 6-6-148).

Alias writ of attachment may be issued without renewal of bond or affidavit required in original proceeding in cases where insufficient property has been found or, pending action, plaintiff wishes to garnish other persons. (Ala. Code § 6-6-75).

Levy.

Attachment may be levied on real estate, personalty (whether or not in possession of defendant) or choses in action (Ala. Code § 6-6-70), and also on joint and separate estate of joint obligors, promisors or partners. (Ala. Code § 6-6-72).

Levy on Investment Securities.

No attachment or levy upon outstanding security valid until security actually seized by officer making levy, but security surrendered to issuer may be levied on at source. Creditor whose debtor owns security, whether certificated, uncertificated, or security entitlement, entitled to injunctive relief in reaching security. Interest of debtor in uncertificated security reached by legal process on issuer or on secured party if registered in name of secured party. Interest in security entitlement reached by legal process on securities intermediary where securities account maintained. (Ala. Code § 7-8-112).

Levy on Goods Covered by Negotiable Document.

Except where document was issued upon unauthorized bailment, there can be no valid attachment of goods in possession of bailee for which negotiable document is outstanding unless document be surrendered to bailee or its negotiation enjoined. (Ala. Code § 7-7-602).

Where Levy Made.

Attachment may be executed by sheriff of county in which property located. (Ala. Code § 6-6-73; -74).

Indemnity.

Sheriff may demand indemnity when doubt exists as to defendant's title to personal property on which levy required. (Ala. Code § 6-6-80). Such demand may be made either before or after levy. (98 Ala. 503, 12 So. 789).

Lien.

Levy or service of garnishment creates lien in favor of plaintiff. (Ala. Code § 6-6-76).

Priorities.

Liens of attaching creditors given priority according to dates of levies. (99 Ala. 292, 13 So. 305).

Release of Property.

Defendant or, in his absence, stranger, may on execution of approved bond in amount double value of property, replevy attached property. Value determined by levying officer. (Ala. Code § 6-6-100 to -102).

Third Party Claims.

Third party claiming title, legal or equitable, or lien paramount to right, title or interest in property of defendant in writ, may try right to such property before sale thereof upon making affidavit by himself, his agent, or attorney, that he holds title to, or such lien upon, property claimed and by executing bond, with sufficient sureties, payable to plaintiff in amount double value of property levied on and claimed, with condition that property will be forthcoming for satisfaction of judgment or claim of plaintiff if it shall be found liable therefor and also for payment of costs and damages as may be recovered for interposing claim for delay. (Ala. Code § 6-6-160). Entry of judgment against defendant in writ suspended pending determination of third party claim. (Ala. Code § 6-6-145).

Vacation or Modification.

Attachment issued without required affidavit and bond may be dismissed on motion of defendant filed within 30 days after service of complaint (Ala. Code § 6-6-142), but plaintiff allowed liberal right to cure defects in affidavit or bond and to supply bond after such plea made (Ala. Code § 6-6-143).

Witnesses.

Attachment may issue against subpoenaed witness absent from civil trial. (556 So.2d 390).

Sale.

Plaintiff, after judgment, may obtain sale of property levied on. Court, on motion of either party, must before judgment order sale of property if perishable or if expense of keeping great; sheriff retains proceeds to await final disposition of cause. (Ala. Code § 6-6-77). Sheriff must sell at public auction goods so perishable that they will deteriorate greatly in value before meeting of court, and if charge of keeping very great; proceeds of such sales must be paid into court. (Ala. Code § 6-6-77).

Proceeds of Sale.

Plaintiff, on notice to defendant and execution of proper bond, in absence of adverse third person's claim and of sworn denial by defendant of plaintiff's claim, may before judgment obtain proceeds of sale. (Ala. Code § 6-6-78).

Judgment.

Where contest arises concerning title to or right in attached property, no judgment can be entered against defendant in attachment until trial of such collateral issues. (Ala. Code § 6-6-145). When plaintiff fails to obtain judgment against defendant in attachment because claim for trial of right to property has been interposed, attached property must be restored to claimant at cost of plaintiff. (Ala. Code § 6-6-146). If judgment for plaintiff not satisfied by property attached, execution may issue thereon against any property of defendant (Ala. Code § 6-6-147), but this does not apply to nonresident who fails to appear (109 Ala. 270, 19 So. 814).

Forms of attachment and other proceedings provided in Code. (Ala. Code § 6-6-40; ARCP 64).

8.03 [RESERVED]

8.04 CREDITORS' SUITS:

Creditors in certain cases may file complaints to compel discovery and to subject property of debtors to payment of debts except where it is held in trust. (Ala. Code § 6-6-180 to -187). Code authorizes complaints of discovery as to collusive judgments and attachments (Ala. Code § 6-6-181), and also authorizes creditor, without judgment or lien, to file such complaint. (Ala. Code § 6-6-182). Two or more creditors may join in such suit. (Ala. Code § 6-6-184).

Judgment creditors of corporation, where execution is returned “no property found,” may file complaint to subject unpaid subscriptions of one or more stockholders in such corporation to Execution. (Ala. Code § 6-6-187). (See also topics 8.05 Executions, subhead Supplementary Proceedings; Fraudulent Sales and Conveyances; category 13 Estates and Trusts, topic 13.09 Executors and Administrators.)

8.05 EXECUTIONS:

Kinds of Execution.

In general, execution may issue on judgment or decree, whether for payment of money or return of specific property or land. (Ala. Code § 6-9-1). Execution cannot issue for amount of negotiable instrument lost or destroyed by theft or otherwise before maturity until judgment creditor executes bond to indemnify judgment debtor. (Ala. Code § 6-5-284). Execution may also issue in following special cases: On judgment in action of detinue, for specific property involved or for value thereof (Ala. Code § 6-6-259; -261 to -263); for costs against parties obtaining division in suit for partition of real estate (Ala. Code § 35-6-54; cf. Ala. Code § 35-7-4); on judgment establishing materialman’s or mechanic’s lien (Ala. Code § 35-11-226); for certain taxes, assessments and penalties (Ala. Code § 28-3-14; Ala. Code § 11-51-7. See also Ala. Code § 40-1-15).

Forms of Writ of Execution provided in Code. (Ala. Code § 6-9-1).

Issuance in Favor of Representatives.

Provision made for issuance of execution in favor of personal representative of deceased judgment creditor or in favor of successor executor, administrator, guardian or trustee, without revival (Ala. Code § 6-9-193), and for revival of judgment in favor of personal representative of judgment creditor (Ala. Code § 6-9-194).

Exemptions.

See topic 8.06 Exemptions.

Time for Issuance.

Execution must issue within 90 days from entry of judgment or decree unless otherwise directed by trial judge or by written direction of judgment creditor. (Ala. Code § 6-9-21). Execution may issue after expiration of 30 days but may be issued before expiration of 30 day period on showing of sufficient cause supported by affidavit of judgment creditor (Ala. Code § 6-9-22; ARCP App. III), and must be issued before such expiration on affidavit that judgment debtor is about fraudulently to dispose of or to remove his property (Ala. Code § 6-9-23).

Revival.

No execution may issue on judgment or decree of district or circuit court on which execution has not been sued out within ten years of its entry, until same revived by appropriate motion or action under ARCP. (Ala. Code § 6-9-192; cf. ARCP App. III). Judgment or decree cannot be revived after lapse of 20 years from its entry. (Ala. Code § 6-9-190). Revival of judgment does not constitute new judgment for limitations purposes. (886 F.Supp. 1261).

Writ of execution issued and received by sheriff during life of judgment debtor may be levied after latter’s death, or alias writ may be issued and levied within ten years from date of judgment if at time of judgment debtor’s death certificate of judgment filed for record in county in which property is located. (Ala. Code § 6-9-62). Revival may be had in any case after six months from grant of letters testamentary or of administration, and revival unnecessary if judgment for recovery of real or personal property. (Ala. Code § 6-9-63).

Stay.

Except as otherwise provided by ARCP 62, statute or order of court for good cause shown, no execution can issue upon judgment nor may proceedings be taken for its enforcement until expiration of 30 days after entry. (ARCP 62).

Lien.

Execution is lien only: On lands of judgment debtor within county in which it is received by officer authorized to execute writ from time of receipt, provided judgment properly filed and recorded (Ala. Code § 6-9-60; Ala. Code § 35-4-132); on personal property subject to levy and sale, from time of levy thereon, whether or not judgment has been registered (Ala. Code § 6-9-60).

Destruction of Lien.

Lien destroyed by execution of supersedeas bond or by issuance of injunction or restraining order against enforcement of judgment. (Ala. Code § 6-9-61). Notice of claim by filing lis pendens nullified before judgment entered enforcing lien by executing bond in double amount of fair market value of land described in lis pendens. (Ala. Code § 35-4-137).

Levy.

Executions may be levied on: Real property to which debtor has legal title, perfect equity or vested legal interest in possession, reversion or remainder; personal property (except choses in action); equity of redemption in either land or personal property. (Ala. Code § 6-9-40). Undivided interest of debtor in any property may be levied on and sold without taking property into actual possession. (Ala. Code § 6-9-85).

Growing crops exempt from levy. (Ala. Code § 6-9-41). Right of redemption is not subject to levy and sale under execution, attachment, or alienation; but if right or privilege perfected by redemption, subject to levy, sale, alienation or other disposition. (Ala. Code § 6-5-250).

Except when negotiable document issued upon unauthorized bailment, no lien attaches by virtue of any judicial process to goods in possession of bailee for which negotiable document outstanding unless document first surrendered to bailee or negotiation enjoined, and bailee must not be compelled to deliver goods pursuant to process until document surrendered to him or impounded by court. (Ala. Code § 7-7-602).

Indemnity Bond.

Sheriff may require indemnity bond from judgment creditor when reasonable doubt exists as to ownership of personal property, or as to whether property subject to levy and sale. (Ala. Code § 6-9-81; cf. Ala. Code § 6-6-80). If party having prior lien refuses to give such bond, party having next lien in order may give it and have property sold for his benefit. (Ala. Code § 6-9-81).

Surety may, on application supported by affidavit, secure levy first on property of principal. (Ala. Code § 6-9-83).

Return.

All executions must be made returnable within 90 days after issuance thereof. (Ala. Code § 6-4-1; Ala. Code § 6-9-80).

Claims of Third Persons.

Third person claiming paramount interest in personal property levied on may, on giving affidavit respecting title and execution of approved bond with sureties, obtain possession of such property and trial of title thereto. (Ala. Code § 6-6-160-166). Such contest does not prevent judgment creditor from levying on other property of judgment debtor. (Ala. Code § 6-6-167). Third party claimant, on other hand, by proceeding under these sections, releases any claim against sheriff for seizing property levied upon. (Ala. Code § 6-6-168).

Satisfaction presumed ten years after rendition of judgment or decree on which no execution has been issued or ten years after date of last execution issued (Ala. Code § 6-9-191), and presumption conclusive after lapse of 20 years (Ala. Code § 6-9-190).

Marshaling of Debtor's Assets.

Marshaling of judgment debtor's assets for benefit of vendees required when debtor sells part of property subject to lien. (Ala. Code § 6-9-84).

Judgment Creditor's Death Prior to Sale.

Duty of officer making levy to proceed to sale not affected by death of judgment creditor or judgment debtor after issuance or levy of execution. (Ala. Code § 6-9-94).

Sale of Perishables.

Officer levying on perishable goods must sell them at such time, on such notice and at such place as sound discretion may warrant. (Ala. Code § 6-9-88; Ala. Code § 6-6-77).

Substitution of Property to be Sold.

Judgment debtor has right, on day of sale to substitute equally valuable property in lieu of that levied upon (Ala. Code § 6-9-91) and may at time of levy point out to officer property to levy upon and sell first (Ala. Code § 6-9-90).

Notice of Collection.

Officer making sale must notify judgment creditor of collection. (Ala. Code § 6-9-92).

Repossession.

Judgment debtor may repossess personal property on execution of forthcoming bond except in cases of executions based upon judgments against officers of court for failure to pay over money collected in official capacities. (Ala. Code § 6-9-160).

Execution of Deeds.

Officer making sale, on tender of purchase price plus all fees due, must, within five days after sale, execute deed to real estate or interest therein sold (Ala. Code § 6-9-149); and purchaser at such sale of any stock, share, interest, judgment or decree of judgment debtor becomes owner thereof as if it had been regularly assigned to him by judgment debtor (Ala. Code § 6-9-144). Similarly, any sale made under judicial process conveys title as effectually as if made by person against whom process issued. (Ala. Code § 6-9-140).

Sale Under Void Process.

Judgment debtor bound by sale held under void process if proceeds thereof applied to valid liens against him and if present at sale and did not object. (Ala. Code § 6-9-148).

Warranties.

Purchaser of lands at sale under execution takes covenants of warranty running with land incorporated in previous title deeds (Ala. Code § 6-9-145), but covenant of warranty contained in sheriff's deed binds officer only if made with that intention for valuable consideration and in writing. (Ala. Code § 6-9-142).

Redemption.

Certain enumerated persons may redeem real estate or any interest therein sold under execution, or by virtue of any judgment in court of competent jurisdiction, or under any deed of trust or power of sale in mortgage, from purchaser or his vendee, within one year after sale. (Ala. Code § 6-5-248, -249). Statutory enumeration of persons entitled to redeem exclusive (206 Ala. 310, 89 So. 719), and statutory right of redemption is personal and not property right (Ala. Code § 6-5-250). Statutory right to redeem property sold at foreclosure is insurable interest. (962 So.2d 855).

Provision made respecting priority of right of various persons enumerated to redeem. (Ala. Code § 6-5-248).

Failure of debtor, or anyone holding under him, to deliver possession within ten days after purchaser makes written demand therefor forfeits right to redeem. (Ala. Code § 6-5-251). Conversely, person entitled to redeem may in writing demand from purchaser or his vendee written statement of debt and of all lawful charges; failure to furnish such statement within ten days forfeits right to compensation for improvements. (Ala. Code § 6-5-252).

Tender of amount of purchase money, with interest at 12% and all other lawful charges, necessary to redeem. (Ala. Code § 6-5-253). Permanent improvements constitute lawful charge which must be valued, in event of disagreement, by referees appointed by parties. (Ala. Code § 6-5-254). If purchaser or his vendee fails or refuses to reconvey on proper tender of purchase price plus all lawful charges, one entitled to redeem who made such tender may file complaint to force redemption in circuit court. (Ala. Code § 6-5-255; -256).

Supplementary Proceedings.

In aid of judgment or execution, judgment creditor, or his successor in interest when that appears of record, may obtain discovery from any person, including judgment debtor, in accordance with ARCP. (ARCP 69[g]). Judgment creditor may file complaint for discovery and subjection of legal and equitable assets against judgment debtor where execution for money issued and not satisfied. (Ala. Code § 6-6-180; -183 to -184). Similar complaint may be filed by judgment creditor of corporation when execution returned “no property found” against shareholders for unpaid stock subscriptions. (Ala. Code § 6-6-187). Complaint for discovery may also be filed against defendant charged with having confessed and paid wholly or in part judgment with intent to hinder, delay or defraud creditors. (Ala. Code § 6-6-181). Where execution has been returned “no property found,” judgment creditor may file complaint for discovery, to which judgment debtor must answer under oath listing all property in which he has any legal or equitable interest, including choses in action; provision made for examination of debtor and court must make such orders or decrees, including appointment of receiver, as necessary and proper to reach assets so disclosed. (Ala. Code § 6-6-183 to -186. Compare Ala. Code § 6-6-620 to -628 which provide for appointment of receiver in aid of pending suit).

Judgment creditor, where execution returned “no property found”, may alternatively, on written request to clerk or register, require judgment debtor to file in court within 30 days sworn statement of all his assets, whether legal or equitable, including choses in action. (Ala. Code § 6-6-200; cf. ARCP App. II). If necessary, and on affidavit filed by such judgment creditor, oral examination of judgment debtor may be had in such proceedings. (Ala. Code § 6-6-200-204; cf. ARCP App. II).

Priorities.

When any judgment creditor redeems, all recorded judgments, recorded mortgages and recorded liens with existing higher priority revived against redeemed real estate and redeeming party. (Ala. Code § 6-5-248). When any debtor, mortgagor, or transferees of such, redeem, all existing recorded judgments, recorded mortgages and recorded liens revived and further redemption by other parties precluded. (Ala. Code § 6-5-248).

Body Execution.

None.

Assignees.

Assignment of judgment or decree endorsed and properly attested on execution docket or on margin of record of judgment or decree, gives assignee substantially all rights and remedies of original judgment creditor. (Ala. Code § 6-9-196). Similarly, surety paying judgment or decree against principal entitled to rights and remedies of judgment creditor. (Ala. Code § 8-3-41).

Death of one or more of several judgment creditors does not prevent the issuance of an execution in favor of survivors. (Ala. Code § 6-9-195).

8.06 EXEMPTIONS:

In addition to homestead following exempt to resident: Burial place and church pew (Ala. Code § 6-10-3 to -9); personal property, except for wages, salaries or other compensation, to $3,000, selected by resident, all necessary wearing apparel, family portraits or pictures, and all books used in family (Ala. Code § 6-10-6); wages, salaries and other compensation for personal services exempt from levy under writs of garnishment or other process for collection of debts or judgments rendered in tort in amount equal to 75% of such wages, salaries, or other compensation (Ala. Code § 6-10-7; Ala. Code § 5-19-15); worker compensation benefits (Ala. Code § 25-5-86[2]); and certain personal property (Ala. Code § 6-10-126).

See also 15 U.S.C. § 1673(a).

Exemptions granted by 11 U.S.C. § 522(d) not available.

Growing or Ungathered Crops.

Exempt from levy and sale except for enforcing liens for rent, advances or labor. (Ala. Code § 6-9-41).

Proceeds of Insurance.

See category 16 Insurance, topic 16.01 Insurance Companies.

Wages and Salaries.

See introductory paragraph.

Debts Against Which Exemptions Not Allowed.

Except as otherwise specifically stated above, exemption may not be claimed against judgment for tort (158 Ala. 65, 48 So. 341) or execution for costs taxed in actions ex delicto (201 Ala. 344, 78 So. 200). No partnership property exempt against co-partners or partnership creditors. (Ala. Code § 6-10-9).

Waiver of Exemption.

May waive his right to exemption by instrument in writing (Const. Art. I § 210; Ala. Code § 6-10-120); as to personal property, waiver may be made by separate instrument in writing or by stipulation incorporated in any bond, bill or note (Ala. Code § 6-10-121), but such waiver may not be implied (25 Ala. App. 117, 141 So. 723); as to homestead, waiver must be by separate instrument in writing and attested by one witness (Ala. Code § 6-10-122). Waiver of exemption ineffectual as to certain cooking utensils, furniture and other items described in statute. (Ala. Code § 6-10-126). Rights of surviving spouse to homestead allowance, exempt property and family allowance may be waived in writing before or after marriage or in complete property settlement entered into after, or in anticipation of, separation or divorce. (Ala. Code § 43-8-72).

Necessity of Claiming Exemption.

Claims of exemption filed in office of judge of probate of county in which property lies if homestead, or, if personal property, in which judgment debtor resides. (Ala. Code § 6-10-20). After claim filed, exempt property not subject to levy unless waiver endorsed on process or claim contested. (Ala. Code § 6-10-24). Defendant may claim exemption after levy and prior to sale with officer making levy. (Ala. Code § 6-10-26).

Contest of Claim.

Plaintiff, on giving bond with sureties, may contest claim filed in office of judge of probate and secure levy of execution (Ala. Code § 6-10-25); or, in event claim filed with officer making levy, may contest without execution of bond (Ala. Code § 6-10-26). If defendant gives bond within five days after notice of contest, may take property; if he does not give bond, plaintiff, within five days thereafter, may give bond and take property; if no bond given within ten days after notice of contest, property delivered to defendant without bond. (Ala. Code § 6-10-27).

Earnings.

See topic 8.09 Garnishment.

8.07 FORECLOSURE:

See topic 8.13 Liens; category 20 Mortgages, topics 20.01 Chattel Mortgages, 20.04 Mortgages of Real Property.

8.08 FRAUDULENT SALES AND CONVEYANCES:

Transfer of all or substantially all debtor’s property subject to execution by which preference on priority of payment to one or more creditors is given over remaining creditors to pay for prior debt will inure to benefit all creditors. (Ala. Code § 8-9-8). Grantor of realty may invalidate transfer where material part of consideration is grantee’s agreement to support grantor. (Ala. Code § 8-9-12). Defrauding secured creditors misdemeanor. (Ala. Code § 13A-9-46).

Uniform Fraudulent Transfer Act adopted. (Ala. Code § 8-9A-1, et seq.). Language in uniform act dealing with obligations omitted. UFTA entitles good-faith transferee to keep property, to extent of value given to another person as consequence of debtor’s making transfer to value given to any other person, without qualification or exception, as consequence of debtor’s transfer. (Ala. Code § 8-9A-8[d]; 977 So.2d 462).

Uniform Fraudulent Conveyance Act not adopted. See supra subhead Uniform Fraudulent Transfer Act.

Remedies.

When execution has been returned unsatisfied (Ala. Code § 6-6-180) or defendant has confessed or suffered judgment (Ala. Code § 6-6-181) or property has been, or attempted to be, fraudulently transferred or conveyed (Ala. Code § 6-6-182), creditor may file complaint against debtor or others (Ala. Code § 6-6-183) to compel discovery of debtor’s assets. Court must enter orders and may appoint receiver to allow creditor to recover discovered property. (Ala. Code § 6-6-185).

Bulk Sales.

Former Uniform Commercial Code sections (Ala. Code § 7-6-101, et seq.) repealed (Acts 96-523), May 17, 1996.

8.09 GARNISHMENT:

Plaintiff in pending action for recovery of money or owner of judgment may reach and subject to attachment money or property of defendant in possession of third person or debts or liabilities owed to defendant. (Ala. Code § 6-6-370). No garnishment can issue prior to final judgment absent extraordinary circumstances. (Ala. Code § 6-6-390). Prior to entry of judgment, creditor may not attach unpaid earnings of debtor by garnishment; after judgment, with respect to consumer loans, sales or leases, amount of earnings subject to garnishment limited. (Ala. Code § 5-19-15). Executor or administrator may obtain process of garnishment and may be garnished for debts of decedent. (Ala. Code § 6-6-411).

Caveat.

See 395 U.S. 337 (1969).

Property Which May Be Reached.

Debts due defendant from testator or intestate held by executors and administrators (Ala. Code § 6-6-411), money in hands of attorney, sheriff or other officer of court (Ala. Code § 6-6-412), corporate stockholders who have not fully paid subscriptions (Ala. Code § 6-6-414), trustees (Ala. Code § 6-6-413) and salaries of state, county or city officials (Ala. Code § 6-6-481; -483) may be garnished.

Jurisdiction.

Court where action pending or where judgment entered. (Ala. Code § 6-6-391).

Proceedings to Obtain.

Plaintiff or attorney, to obtain garnishment writ, must file with clerk of court affidavit stating amount due from defendant, and that process of garnishment believed to be necessary. (Ala. Code § 6-6-391). Bond required where garnishment issued in pending action. (Ala. Code § 6-6-392).

Answer of Garnishee.

Garnishee must answer under oath within 30 days under penalty of judgment. (Ala. Code § 6-6-393; -450 to -457).

Garnishee may suggest adverse claimant. (Ala. Code § 6-6-463).

Practice.

Officer issuing garnishment must issue notice to defendant. (Ala. Code § 6-6-394). Defendant may post bond in amount approved by judge or clerk payable to plaintiff and money or property held by garnishee will be discharged from garnishment, and if garnishee liable to defendant for money or property, judgment will be entered against defendant and sureties on bond. (Ala. Code § 6-6-430). If garnishee admits possession of money belonging to defendant, he must pay money in amount of plaintiff's claim into court. (Ala. Code § 6-6-452). If garnishee admits indebtedness to defendant, judgment thereon must be entered for amount admitted. (Ala. Code § 6-6-454). Execution suspended until debt's maturity. (Ala. Code § 6-6-454).

Adverse Claims.

Garnishee must allege adverse claimants in answer. (Ala. Code § 6-6-463). Claimant must appear and propound claim in writing to clerk of court. (Ala. Code § 6-6-463).

Judgment.

Entered against garnishee for indebtedness to defendant (Ala. Code § 6-6-454) or for delivery for personal property (Ala. Code § 6-6-455) or for effects of defendant (Ala. Code § 6-6-456). Conditional judgment entered against garnishee if fails to answer. (Ala. Code § 6-6-457).

Earnings.

See topic 8.06 Exemptions.

Claims on Which Writ May Issue.

Garnishment may be issued on unpaid ad valorem assessments. (Ala. Code § 11-51-8; Ala. Code § 40-5-20). Creditors of losing party in gambling transaction may garnish winner. (Ala. Code § 8-1-151).

Exemptions.

75% of wages exempt from garnishment (Ala. Code § 6-10-7), except that exemption does not apply to withholding orders for child support, which are governed by separate statutory provisions (Ala. Code § 30-3-60, 71). Employee cannot waive exemption. (143 Ala. 243, 39 So. 368). With respect to consumer debts, see topic Consumer Credit.

Code.

See also 15 U.S.C. § 1673(a).

Examination of Garnishee.

Garnishee may, if required by plaintiff, be examined orally in presence of court. (Ala. Code § 6-6-450).

Lien.

Service of garnishment creates lien in favor of plaintiff. (Ala. Code § 6-6-76).

Delivery of Property.

Where garnishee liable to debtor for delivery of personal property, court must ascertain value thereof, and order garnishee to deliver said property to sheriff by stipulated day, or be liable for such value. (Ala. Code § 6-6-455).

Rights of Defendant Giving Bond.

Defendant may give bond and collect from garnishee; or may give bond in double amount of plaintiff's claim and dissolve garnishment. (Ala. Code § 6-6-430,-431).

8.10 HOMESTEADS:

Homestead of resident of state exempt from levy and sale under execution or other process for collection of debts during life and occupancy of such resident. (Ala. Code § 6-10-2).

Interest of Owner.

Homestead right attaches irrespective of whether resident owns fee simple interest or lesser estate in land and whether held in common or severalty. (Ala. Code § 6-10-2). Leasehold interest giving debtor present right to possession as of date of bankruptcy satisfies ownership requirement. (318 B.R. 588). Pre-paid rents attributable to leasehold may be claimed as exempt. (318 B.R. 588).

Limitation of Value.

Of exempt homestead, with improvements and appurtenances to owner, is $5,000. (Ala. Code § 6-10-2). See subhead Rights of Surviving Spouse and Family, infra.

Limitation of Area.

That may be held exempt is 160 acres; such area may not be enlarged by reason of any encumbrance on property or character of estate or interest owned therein. (Ala. Code § 6-10-2).

Debts or Liabilities Against Which Exemption Not Available.

Liens of laborer, merchant or materialman for work, labor, or materials furnished; or any vendor for unpaid purchase money; or validity of any deed, mortgage or lien relating to homestead, which has been lawfully executed or created. (Ala. Code § 6-10-4). Homestead not exempt from judgment for tort. (103 Ala. 539, 15 So. 852).

Designation of Homestead.

Resident of state entitled to claim homestead may, at any time, file in office of probate judge of county where such property located sworn declaration describing property claimed as homestead. (Ala. Code § 6-10-20). After declaration filed, homestead property exempt from levy, unless fact of waiver of exemption endorsed on process under which levy attempted. (Ala. Code § 6-10-24).

Claim of Exemption.

Right of homestead not lost by failure, before levy of process, to file declaration claiming homestead. (Ala. Code § 6-10-26). Any time after levy and prior to sale, defendant may file with officer making levy claim in writing. (Ala. Code § 6-10-26). Plaintiff must then contest claim in manner provided for claims which have been filed prior to levy (Ala. Code § 6-10-25), except that no bond required. Levy discharged if plaintiff does not institute contest within ten days after notice of claim. (Ala. Code § 6-10-26).

Waiver of Exemption.

Must be by separate written instrument subscribed by party making same and attested by one witness and if such party is married man, waiver not valid without voluntary signature and assent of wife and acknowledgment by her. (Ala. Code § 6-10-122). See category 10 Documents and Records, topic 10.01 Acknowledgments, subhead Married Persons. If owner is married woman, waiver generally must be joined by husband. (Ala. Code § 6-10-122; Ala. Code § 30-4-12).

Loss of Exemption.

Homestead exemption may be lost by failure to file proper claim before actual sale of property. (Ala. Code § 6-10-26). Right of homestead forfeited through abandonment without intent to return. (Ala. Code § 6-10-41; 231 Ala. 493, 165 So. 593).

Alienation or Encumbrance.

No mortgage, deed or other conveyance of homestead by married person valid unless made with voluntary signature and assent of husband or wife evidenced by his or her general acknowledgment in statutorily required form. (Ala. Code § 6-10-3). See category 10 Documents and Records, topic 10.01 Acknowledgments, subhead Married Persons.

Proceeds of Sale.

Proceeds of voluntary sale of properties exempt from levy under homestead right are not exempt. (65 Ala. 439).

Rights of Surviving Spouse and Family.

Surviving spouse of decedent who was domiciled in state entitled to homestead allowance of $6,000 from property of estate, other than property specifically devised, selected by surviving spouse, but value of any constitutional right of homestead in family home charged against homestead allowance. If no surviving spouse, each minor and each dependent child of decedent has same right to homestead allowance of $6,000, divided by number of such children. (Ala. Code § 43-8-110). Homestead allowance in addition to any share passing to surviving spouse or minor or dependent children by intestate succession. (Ala. Code § 43-8-110). Homestead allowance has priority over payment of family allowance. (Ala. Code § 43-8-112). See category 13 Estates and Trusts, topic 13.09 Executors and Administrators, subhead Allowances.

Proceeds of insurance on homestead exempt. (194 Ala. 477, 69 So. 916).

8.11 JUDGMENT NOTES:

See category 3 Business Regulation and Commerce, topic 3.02 Bills and Notes.

8.12 LEVY:

See topics 8.02 Attachment, 8.05 Executions.

8.13 LIENS:

Common Law Liens.

Common law lien is right to retain possession of personal property until debt due on or secured by property paid. (208 Ala. 334, 94 So. 354). Continuous possession essential to creation and preservation of common law lien. (Id).

Statutory liens as follows: Cleaners, pressing establishments, launderers and menders of household linens and articles of wearing apparel, including hats and shoes (Ala. Code § 35-11-170); jewelers, watchmakers or silversmiths, for repairs or work done to personal property (Ala. Code § 35-11-150); materialmen, laborers, etc., on watercraft for furnishings, repairs, wages (including master), etc. (Ala. Code § 35-11-60); owner of self-service storage facility on personal property located therein for rent labor and other charges (Ala. Code § 8-15-33); lessors of equipment for use in construction of or improvements to land or in clearing or improving land (Ala. Code § 35-11-430); riparian owners, on vessels for use of booms and bulkheads, and piles (Ala. Code § 35-11-310); tenants in common of crops, on such crops, for services and supplies (Ala. Code § 35-11-350); railroad laborers and employees, except officers, for work and labor done (Ala. Code § 35-11-90); agricultural laborers and superintendents on crops, subordinate to landlord's lien for rent and advances and to any other lien for supplies furnished (Ala. Code § 35-11-91); livery stable keepers and agisters, on stock (Ala. Code § 35-11-70; Ala. Code § 35-11-190); owners of bulls, stallions, jacks, rams, he-goats or boars, on the young and on the female (Ala. Code § 35-11-330); sawmill laborers and employees, for wages (Ala. Code § 35-11-270); owners of land, on timber sold therefrom for stumpage (Ala. Code § 35-11-20); owner of cotton gin, peanut machine or picker, hay baling machine or press, or plant for drying or processing planting seeds, on commodity processed thereby (Ala. Code § 35-11-290); sawmill owners or operators, for lumber sawed (Ala. Code § 35-11-250); hotel, inn, boardinghouse and restaurant keepers, on personal baggage and goods of guests and boarders (Ala. Code § 35-11-130); hospitals, on judgments from any causes of action which patients may have arising out of cause of hospitalization (Ala. Code § 35-11-370), not limited solely to tort claims or money recovered in tort settlements or actions, but also applies to money due to patient under contract, such as insurance policy (953 So.2d 413); duly licensed veterinarians, on animal treated (Ala. Code § 35-11-390); persons furnishing by contract with landowner labor or materials for improvements in or on public streets, or abutting land for work and labor done, if work exceeds $100.00 (Ala. Code § 35-11-410); real estate brokers on commercial real estate subject to compensation agreement between broker and broker's client (Ala. Code § 35-11-451).

Uniform Commercial Code adopted. (Ala. Code § 7-10-101). See category 3 Business Regulation and Commerce, topic 3.09 Commercial Code.

Vendor's Lien.

No implied vendor's lien exists for purchase money on property, except realty when delivered to purchaser under contract. (231 Ala. 27, 163 So. 334).

Waiver, Loss, or Extinguishment.

Unless otherwise provided, proceedings to enforce statutory liens must be commenced within six months after demand becomes due; or lien lost. (Ala. Code § 35-11-6).

Enforcement.

In most instances statutory liens are enforceable by writ of attachment. (Ala. Code § 35-11-1). Plaintiff must execute affidavit and bond payable to defendant, with sufficient sureties, to protect defendant in event of wrongful attachment. (Ala. Code § 35-11-5). In addition to method of enforcement based on attachment, Code provides for sales in satisfaction of liens in certain instances. Notices and other requirements vary with statutory liens involved. (See generally c. 11, Tit. 35.) Statutory methods for enforcement by attachment, etc., cumulative and not exclusive, and enforcement may be had by any other common law or equitable remedy available. (Ala. Code § 35-11-1). Person regularly engaged in performing services upon articles left in custody for that purpose may dispose of articles in any manner, subject to statutory waiting periods and notice to owner. (Ala. Code § 35-12-6).

Mechanics' and Materialmen's Liens.

Every mechanic or other person, firm or corporation, that performs any work, labor or furnishes any materials, fixtures, engines, boilers, waste disposal services and equipment, or machinery for building or improvement on land, or repair, alteration or beautification thereto, under or by virtue of contract with owner or proprietor, or owner's agent, architect, trustee, contractor or subcontractor, has lien therefor on building, improvements and land for such work and improvements upon complying with statutory requirements. (Ala. Code § 35-11-210). Foreign corporation not qualified to do business generally prohibited from filing mechanic's lien statement. Mechanic's lien for repair of vehicle, implement, machine or article of any kind is subordinate to any security interest under Uniform Commercial Code which was perfected prior to time work was done, unless secured party authorized work. (Ala. Code § 35-11-110). Constructive notice supplied by materialman's lien statute defeats lenders' equitable-subrogation claim. (6 So.3d 7).

Subcontractor's lien extends only to amount of unpaid balance due from owner to original contractor, unless before material furnished subcontractor gives owner statutory notice that he will claim lien for all such work and materials. (Ala. Code § 35-11-210). Laborers and materialmen under contract with prime contractor and subcontractors also have lien on buildings and improvements, but only (unless statutory notice given) to extent of unpaid balance due prime contractor by owner. (Ala. Code § 35-11-210; 257 Ala. 332, 58 So.2d 614).

Notice of Lien Claim.

Every person, except original contractor, claiming lien, must, before filing statement in probate office, give written notice of such claim to owner or proprietor unless owner notified in advance. (Ala. Code § 35-11-218; 529 So.2d 201).

Lien Statement.

Verified statement by mechanic or contractor, claiming benefit of this law, setting out demand, description of property and name of owner, must be filed in court of probate, within six months by original contractor, within 30 days if by journeymen or day laborers, and by every other person within four months after last item of work or labor performed, or material furnished. (Ala. Code § 35-11-213; Ala. Code § 35-11-215).

Building or Improvement on Leased Property.

When building or improvement erected on leased land at tenant's behest, and improvement not in violation of lease, lien attaches to building or improvement and to unexpired term of lease, and lienor or purchaser at foreclosure sale may avoid forfeiture of lease by fulfilling obligations of lease, and may remove improvement from such leased property within reasonable time after expiration of term of lease. (Ala. Code § 35-11-212[a]). But lessor may prevent removal of such improvement by discharging lien prior to sale of property. (Ala. Code § 35-11-212[b]).

List of Employees of Contractor.

Original contractor must, when required, furnish list of employees, laborers, and materialmen to owner or proprietor or forfeit lien. (Ala. Code § 35-11-219).

Priorities.

All liens, except in favor of original contractor, entitled to equal priority. (Ala. Code § 35-11-228).

Lien as to land and buildings or improvements thereon, has priority over all other liens, mortgages or incumbrances created subsequent to commencement of work. Enforcement will not affect any prior mortgage or lien. With respect to prior mortgage, date of recording such mortgage determines priority. (613 So.2d 339). As to liens, mortgages or incumbrances created prior to commencement of work, lien for such work has priority only against product of such work which is an entirety, separable from land, building or improvement subject to prior lien, and which can be removed therefrom without impairing value or security of any prior lien, and persons entitled to such lien may have it enforced by sale of building or improvement and purchaser may, within reasonable time thereafter, remove same. (Ala. Code § 35-11-211). Under doctrine of equitable subrogation, purchase-money mortgages have priority over materialman's liens. (6 So.3d 1).

Assignment.

Mechanics' and materialmen's liens may be assigned or transferred to other security. (Ala. Code § 35-11-233).

Satisfaction of liens must be acknowledged on the margin of record in probate office. (Ala. Code § 35-11-231).

Enforcement.

When amount involved exceeds $50, actions may be brought in circuit court in county where property is situated. In all other cases, district courts have jurisdiction. (Ala. Code § 35-11-220). Action for enforcement of mechanics' or materialmen's lien must be commenced within six months after maturity of entire indebtedness. (Ala. Code § 35-11-221). No special pleadings, other than allegation of lien and entitlement to enforce needed to invoke equity jurisdiction. (Ala. Code § 35-11-222).

If suit by employee or materialman of contractor, contractor is necessary defendant. (Ala.

Code § 35-11-227).

Filing materialman's lien against property subject to dispute does not waive contractor's right to enforce arbitration clause in contract between contractor and homeowner. (987 So.2d 561).

Public Works.

Person contracting with state, county or municipal corporation for construction of public work or building must furnish bond with surety, conditioned to pay mechanics and materialmen. (Ala. Code § 39-1-1).

Attachment Lien.

See topic 8.02 Attachment.

Attorney's Lien.

See category 18 Legal Profession, topic 18.01 Attorneys and Counselors.

Collateral Security.

See topic 8.15 Pledges.

Execution Lien.

See topic 8.05 Executions.

Judgment Lien.

See category 5 Civil Actions and Procedure, topic 5.15 Judgments.

Landlord's Lien.

See category 21 Property, topic 21.10 Landlord and Tenant.

Liens on Exempt Property.

See topic 8.06 Exemptions.

Liens on Homestead.

See topic 8.10 Homesteads.

Real Estate Mortgage Lien.

See category 20 Mortgages, topic 20.04 Mortgages of Real Property.

Tax Lien.

See category 22 Taxation, topic 22.15 Property Taxes, subhead Lien.

8.14 MECHANICS' LIENS:

See topic 8.13 Liens.

8.15 PLEDGES:

Pledges are governed generally by the rules of common law, except where supplanted or supplemented by Uniform Commercial Code. (Tit. 7). Essential elements of pledge are that possession of pledged property pass from pledgor to pledgee, that legal title remain in pledgor, and that pledgee have lien on property for payment of debt due him by pledgor or some other party. (8 Ala. App. 487, 62 So. 537).

Uniform Commercial Code adopted. (Ala. Code § 7-1-101, et seq.). See category 3 Business Regulation and Commerce, topic 3.09 Commercial Code.

Remedies of Pledgee.

Governed by Uniform Commercial Code. (Ala. Code § 7-9A-607; -610).

Rights and Duties When Pledge is in Pledgee's Hands.

Governed by Uniform Commercial Code. (Ala. Code § 7-9A-207).

Receipt for Collateral.

All persons engaged in making discounts, lending money, or taking collateral for loan or discount must, if demanded, give receipt in writing, designating or describing collateral, stating character of debt, time of maturity and amount. Where collateral consists of negotiable bonds, series numbers, if any, must be given. (Ala. Code § 8-1-3).

8.16 RECEIVERS:

Appointed at discretion of court only when suit is pending, except in cases affecting infants and mental incompetents. (227 Ala. 173, 149 So. 216).

Jurisdiction.

May be appointed by circuit judge, or by register or clerk in absence of circuit judge, on application in writing. (Ala. Code § 6-6-620).

Proceedings.

Applicant must post bond in amount prescribed by judge, register, or clerk when appointment in advance of final hearing on merits. (Ala. Code § 6-6-622[a], 271 Ala. 249, 123 So.2d 109). Reasonable notice of application for appointment of receiver must be given to necessary or interested parties unless notice would jeopardize property or party would sustain irrevocable injury. (291 Ala. 39, 277 So.2d 343). Order appointing receiver by register or clerk may be appealed to circuit judge and must be suspended upon appellant entering sufficient bond prescribed by register or clerk. (Ala. Code § 6-6-621). Any person damaged by appointment, if appointment vacated or discharged, may bring action on applicant's bond. (Ala. Code § 6-6-622[b]).

Eligibility and Competency.

Subject to judicial discretion. (Ala. Code § 6-6-622).

Qualification.

Must obtain state and county license. (Ala. Code § 40-12-40).

Powers and Duties.

Receiver stands in place of and has no greater power than party whose property is being subjected to receivership. (220 Ala. 529, 126 So. 102). Duty to act as arm of court to care for and preserve property pending litigation. (159 Ala. 570, 48 So. 870).

Compensation.

Amount within sound discretion of court after consideration of responsibility, business experience, time spent, but not necessarily what receiver would have earned in some other business. (202 Ala. 609, 81 So. 551).

Discharge.

Shall not be dismissed except by order of court. (ARCP 66).

Attachments and Levies.

Commencement of proceedings for appointment of receiver of partnership or corporation dissolves all attachments and levies of execution not completed, made within 60 days next preceding, but attachments and executions revive if property taken from receiver so as no longer to be subject to order of court or on termination of receivership pending settlement. (Ala. Code § 6-6-624).

Suability.

Receiver or manager of property may be sued with respect to any act or transaction of his in carrying on business connected with such property in state, without previous leave of appointing court. (Ala. Code § 6-6-626).

8.17 REDEMPTION:

See topic 8.05 Executions; categories 20 Mortgages, topics Chattel Mortgages, Mortgages of Real Property; Taxation, topic Real Estate Conveyance Tax.

8.18 SUPPLEMENTARY PROCEEDINGS:

See topic 8.05 Executions.

8.19 TRUSTEE PROCESS:

See topic 8.09 Garnishment.

8.20 USURY:

See category 3 Business Regulation and Commerce, topic 3.17 Interest.

9 DISPUTE RESOLUTION

9.01 ALTERNATIVE DISPUTE RESOLUTION:

Mandatory Dispute Resolution.

Arbitration.

In determining applicability of Federal Arbitration Act, United States Supreme Court rejected “contemplation of substantial interstate activity” test used by Alabama Supreme Court, holding that relevant inquiry is whether contract in fact involved interstate commerce, not whether parties contemplated such commerce. (115 S.Ct. 834).

Voluntary Dispute Resolution.

Mediation is mandatory: (1) Where all parties agree, (2) upon motion by any party and (3) upon court order. (Ala. Code § 6-6-20). Mediation is conducted pursuant to Alabama Civil Court Mediation Rules (ACCMR). Upon entry of order for mediation, court proceedings may be stayed. (ACCMR 2). Mediator does not have authority to impose settlement upon parties. (ACCMR 9). Any party can terminate mediation process at any time. (ACCMR 13).

See also topic 9.02 Arbitration and Award.

9.02 ARBITRATION AND AWARD:

Uniform Arbitration Act not adopted. Arbitration agreements enforceable under both common law and statutory rules. (Ala. Code §§ 6-6-1; 6-6-2; 6-6-16). But see subhead Contract to Arbitrate Future Disputes, infra. Courts under duty to encourage arbitration of pending actions. (Ala. Code § 6-6-1).

Form and Requisites of Submission.

At common law, agreement of submission may be oral and terms general. (135 Ala. 522, 33 So. 179). By statute, parties must concisely state in signed writing matter in dispute and desire to leave determination with arbitrator. (Ala. Code § 6-6-3). Such signed writing must be delivered to arbitrator together with list of witnesses either party may desire to examine. (Ala. Code § 6-6-3). Written submission not required when arbitration ordered in pending action. (90 Ala. 493, 7 So. 840).

Common law arbitration is also recognized. (Ala. Code § 6-6-16).

Contract to Arbitrate Future Disputes.

General provision in contract for arbitration of any dispute that may arise thereunder not ordinarily enforceable (Ala. Code § 8-1-41), and does not displace jurisdiction of courts (202 Ala. 384, 80 So. 466). Predispute arbitration agreement in contract evidencing transaction that involves interstate commerce enforceable under Federal Arbitration Act, 9 U.S.C. §§ 1-14 which pre-empts Ala. Code § 8-1-41 (3). Contract within scope of Federal Arbitration Act if contract does, in fact, involve interstate commerce. (115 S.Ct. 834). Arbitration provision that incorporates rules which provide for arbitrator to decide issues of arbitrability evidences parties' intent to arbitrate scope of arbitration provision. (973 So.2d 332). See also topic 9.01 Alternative Dispute Resolution.

Rescission.

Arbitration itself is matter of contract, not of law, and parties can be required to arbitrate only if they have agreed to do so. (655 F.2d 607). Arbitration agreements designed to defeat jurisdiction of courts as to subject matter void as against public policy. (202 Ala. 384, 80 So. 466).

Powers of Arbitrators.

May administer oaths, subpoena witnesses at request of either party and, on application of either party, issue commission to take depositions of witnesses residing outside of county. (Ala. Code § 6-6-7). Power of arbitrator ceases when award made. (108 Ala. 118, 19 So. 367).

Award and Enforcement Thereof.

Award must be made in writing, signed and dated by arbitrator and delivered to parties or their agents or attorneys. (Ala. Code § 6-6-4). Award conclusive and final between parties under statute and at common law unless arbitrator is guilty of fraud, partiality or corruption in making award (Ala. Code § 6-6-14; 208 Ala. 595, 94 So. 745); however, manifest disregard of law not ground for vacating or modifying award under Federal Arbitration Act (13 So.3d 375). If award not performed within ten days after notice and delivery thereof, successful party may, if action pending, cause submission and award to be returned to court in which action pending. If no action pending, submission and award may be returned to clerk of circuit court of county in which award was made. Such award has force and effect of judgment, upon which execution may issue as in other cases. (Ala. Code § 6-6-12). Either party may appeal award to appropriate court within ten days after receipt of notice of award. (Ala. Code § 6-6-15). Statutory time period for taking appeal of award expanded from ten days from date of notice to 42 days from that date. (999 So.2d 462; ARAP 4). Arbitration award is not final judgment subject to appellate review merely upon filing of award and notice of appeal. (12 So.3d 1197). Award may be pleaded in bar to subsequent suit on same claim or demand. (229 Ala. 39, 155 So. 533).

Mandatory Arbitration.

No specific statutory provisions. See topic 9.01 Alternative Dispute Resolution.

Services.

In disputes arising out of rendering or failure to render services, parties may enter into written agreement, signed by both parties, to settle such disputes by arbitration. (Ala. Code § 6-5-485 [medical liability actions]; Ala. Code § 6-5-575 [legal services liability actions]).

10 DOCUMENTS AND RECORDS

10.01 ACKNOWLEDGMENTS:

Uniform Law on Notarial Acts has not been adopted.

Acknowledgment may be taken on any day, including Sunday (230 Ala. 423, 161 So. 806) by following officers:

Within State.

Judge of Supreme Court, Court of Civil Appeals, Court of Criminal Appeals, circuit court, district court; clerk of any of above courts; register of circuit court; judge of probate court; notary public. (Ala. Code § 35-4-24).

Outside State but within United States.

Judge or clerk of federal court or state court of record; notary public; commissioner appointed by Governor of Ala.; commissioner of deeds in state wherein taken; commissioned officer of U.S. Armed Forces. (Ala. Code § 35-4-26).

Outside United States.

Judge of court of record; mayor or chief magistrate of city, town, borough or county; notary public; diplomatic, consular or commercial agent of U.S.; or commissioned officer of U.S. Armed Forces. (Ala. Code § 35-4-26).

Persons in or with U.S. Armed Forces.

Commissioned officer may take acknowledgment anywhere outside Alabama, signature of such officer being prima facie proof of authority without seal. (Ala. Code § 35-4-26).

General Requirements as to Taking.

Notary public must ascertain identity of person whose signature is attested. (380 So.2d 301).

General Requirements of Certificate.

Seal of officer (except of U.S. Armed Forces, see subhead Persons in or with U.S. Armed Forces, supra) taking acknowledgment outside state must be affixed (106 Ala. 663, 18 So. 74), and purpose of notary to affix official seal should appear in certificate (203 Ala. 446, 83 So. 338). This appearing, court will presume officer’s commission had not then expired. (212 Ala. 280, 102 So. 221). Electronic signature valid for acknowledgments. (Ala. Code § 8-1A-11).

Married Persons.

Voluntary signature and assent of husband or wife to alienation of homestead must be shown by certificate of officer authorized to take acknowledgment of deeds. (Ala. Code § 6-10-3). Single certificate may include acknowledgments of both husband and wife in conveyance of homestead or in waiver of homestead exemption. (212 Ala. 481, 103 So. 452).

Attorneys in Fact.

Powers of attorney or other instruments conferring authority to convey property or to enter satisfaction of mortgages or other liens may be proved by two witnesses or acknowledged and recorded in same manner and must be received as evidence to same extent as conveyances. (Ala. Code § 35-4-28).

Corporations.

Any deed, mortgage, or other conveyance of property which purports on its face to have been executed in name of corporation by person as its president, vice-president, or secretary, when attested by one or more witnesses or acknowledged by such person before any officer authorized to take and certify acknowledgments, prima facie evidence that conveyance was executed in name of corporation by person as officer and that person was officer of corporation and duly authorized by corporation to execute conveyance. (Ala. Code § 35-4-67[a]). Once such deed, mortgage, or other conveyance is recorded, it will be received in evidence in any court of Alabama without further proof. (Ala. Code § 35-4-67[b]). Transcript of conveyance, duly certified, may be received in evidence on proof that original has been lost, destroyed, or is beyond control of party offering same. (Ala. Code § 35-4-67[c]).

Foreign Acknowledgments.

See subhead Outside United States, supra.

Effect of Acknowledgment.

Conveyance of real or personal property which has been acknowledged as required by law or proven by two attesting witnesses and recorded, may be received in evidence without further proof, and transcript of record, duly certified, may be received in evidence on proof that original has been lost, destroyed, or is beyond control of party proffering same. (Ala. Code § 35-4-65).

All instruments of conveyance, affidavits or contracts purporting to be acknowledged, proved or verified as prescribed by law, and which are recorded in office of probate judge of proper county, and all transcripts of such documents taken from record, are prima facie evidence that seal of officer acknowledging or attesting such instrument was his official seal and was affixed in his official capacity, whether he be officer of Alabama or any other state, territory or district of U.S. (Ala. Code § 35-4-27).

Proof by Subscribing Witness.

All conveyances (other than those properly acknowledged [156 Ala. 432, 47 So. 205]) admitted to record on proof must be attested by two witnesses. (Ala. Code § 35-4-68).

Authentication.

Conveyances of property, real or personal, or any interest therein, whether absolute or on condition, which are acknowledged or proved according to law and recorded may be received into evidence in any court without further proof. If court determines that original conveyance lost or destroyed or party offering transcript does not have custody or control thereof, court must receive transcript, duly certified, in place of original, unless reputed maker is in bona fide possession of property and makes and files affidavit that conveyance is forgery. (Ala. Code § 35-4-65).

Forms

Acknowledgment for individual must be substantially in following statutory form:

The State of . . . . . ., ... County. I, ... (name and style of officer) hereby certify that . . . . . . whose name is signed to the foregoing conveyance, and who is known to me, acknowledged before me on this day that, being informed of the contents of the conveyance, he executed the same voluntarily on the day the same bears date. Given under my hand this . . . . . . day of . . . . . ., A. D. 20. . . (signature and title of officer). (Ala. Code § 35-4-29).

Homestead Acknowledgment. (See category 8 Debtor and Creditor, topic 8.10 Homesteads.) No form prescribed by statute. Form in general use recites separate examination of wife, although such is not required, as follows:

The State of . . . . . ., ... County. I, ... (name and style of officer), hereby certify that on the . . . . . . day of . . . . . . 20. . . ., came before me the within named . . . . . ., known to me to be the wife of the within named . . . . . ., who, being examined separate and apart from the husband touching her signature to the within named . . . . . ., acknowledged that she signed the same of her own free will and accord, and without fear, constraints, or threats on the part of the husband. Given, etc. (as in form above).

Probate of conveyance, or proof by subscribing witness, must be in following form:

The State of . . . . . ., ... County. I, ... (name and style of officer), hereby certify that . . . . . ., a subscribing witness to the foregoing conveyance, known to me, appeared before me on this day, and being sworn, stated that . . . . . ., the grantor, voluntarily executed the same in his presence, and in the presence of the other subscribing witness, on the day the same bears date; that he attested the same in the presence of the grantor, and of the other witness, and that such other witness subscribed his name as a witness in his presence. Given, etc. (as in form above). (Ala. Code § 35-4-30).

Form for official or other person in representative capacity must be substantially as follows:

The State of . . . . . ., ... County. I, ..., a . . . . . ., in and for said County in said State, hereby certify that . . . . . ., whose name as . . . . . . (here state representative capacity) is signed to the foregoing conveyance and who is known to me, acknowledged before me on this day that, being informed of the contents of the conveyance, he, in his capacity as such . . . . . ., executed the same voluntarily on the day the same bears date. Given, etc. (as in form above). (Ala. Code § 35-4-29).

Form for corporation must be substantially as follows:

The State of . . . . . ., ... County. I, ..., a . . . . . . in and for said County in said State, hereby certify that . . . . . . whose name as . . . . . . of . . . . . ., a corporation, is signed to the foregoing conveyance and who is known to me, acknowledged before me on this day that, being informed of the contents of the conveyance, he, as such officer and with full authority, executed the same voluntarily for and as the act of said corporation. Given, etc. (as in form above). (Ala. Code § 35-4-29).

Form for corporation in representative capacity must be substantially as follows:

The State of . . . . . ., ... County. I, ..., a . . . . . . in and for said County in said

State, hereby certify that . . . . . . whose name as . . . . . . of . . . . . ., a corporation as . . . . . . of the estate of . . . . . . (or as the case may be) is signed to the foregoing . . . . . ., and who is known to me, acknowledged before me on this day, that being informed of the contents of said . . . . . ., he, as such officer, and with full authority, executed the same voluntarily for and as the act of said corporation, acting in its capacity as . . . . . . as aforesaid. Given, etc. (as in form above). (Ala. Code § 35-4-29).

No form specified for acknowledgment by attorney or for authentication of officer's certificates.

Validating Acts.

When validly executed instrument, not properly acknowledged and recorded, has for ten years been of record in office of judge of probate, original or duly certified transcript shall have same force and effect as evidence as original or transcript would have had if instrument had been duly acknowledged and recorded. (Ala. Code § 35-4-72).

Alternative to Acknowledgment or Proof.

No statutory provision.

10.02 AFFIDAVITS:

By Whom Taken.

Within state affidavits may be taken by judges of supreme court, court of civil appeals, court of criminal appeals, circuit courts, and district courts, and clerks of such courts, registers of circuit courts, judges of probate and notaries public. (Ala. Code § 35-4-24). Notaries may charge fee of 50¢ for acknowledging affidavit. (Ala. Code § 36-20-6).

Outside state but within United States they may be taken by judges or clerks of any federal court or any state court of record, notaries public, commissioners appointed by Governor of Ala., commissioner of deeds for state wherein acknowledgment taken or commissioned officers of U.S. Armed Forces. (Ala. Code § 35-4-26).

Outside of United States they may be taken by judge of any court of record, mayor or chief magistrate of any city, town, borough or county, notary public, or any diplomatic, consular or commercial agent of the United States or commissioned officers of U.S. Armed Forces. (Ala. Code § 35-4-26).

Limitation.

Foregoing provisions appear in connection with provision relating to acknowledgments and proofs of conveyances under general heading of conveyances and are perhaps limited to affidavits relating to conveyances.

In Judicial Proceedings.

Affidavits required in commencement or progress of suit or judicial proceeding may be taken outside Ala. before any commissioner appointed by Governor of Ala., any judge or clerk of federal court or any court of record, or notary public, who must certify under his hand and seal of office, if any. (Ala. Code § 12-21-4).

Authentication.

Extrinsic evidence of authenticity as condition precedent to admissibility not required with respect to documents accompanied by certificate of acknowledgment executed in manner provided by law by notary public or other officer authorized by law to take acknowledgments. (Alabama Rule of Evidence 902[8]).

General Requirements as to Administration.

Duty is imposed on notary public to ascertain identity of person whose signature is attested. (380 So.2d 301).

General Requirements of Jurat.

Seal of officer (except of U.S. Armed Forces, see topic 10.01 Acknowledgments) taking acknowledgment outside state must be affixed (106 Ala. 663, 18 So. 74), and purpose of notary to affix official seal should appear in certificate (203 Ala. 446, 83 So. 338). This appearing, court will presume officer's commission had not then expired. (212 Ala. 280, 102 So. 221).

Use of Affidavit.

Ex parte affidavits not generally received as evidence. (259 Ala. 306, 66 So.2d 836). However, ex parte affidavits may be received in certain proceedings. Affidavits to show relationship of parties to real estate conveyances as well as certain other information relative thereto may be recorded (Ala. Code § 35-4-69) and when recorded are admissible in evidence under specified circumstances (Ala. Code § 35-4-70). Affidavits of jurors inadmissible to impeach verdicts, but admissible to sustain them. (285 Ala. 477, 233 So.2d 484; Ala. R. Evid. 606[b]).

Form

No statutory form, following sufficient:

The State of . . . . . ., County of . . . . Before me (name and style of officer) personally appeared . . . . . ., who is known to me and who being duly sworn, deposes and says . . . . (Signature of affiant). Subscribed and sworn to before me this . . . . . . day of . . . . . ., 20. . . ., as witness my hand and seal of office. (Signature and title of officer). (Official seal). My commission expires . . . . . .

Alternative to Affidavit.

No statutory provision.

10.03 NOTARIES PUBLIC:

Notaries public for each county are appointed by judges of probate for counties (Ala. Code § 36-20-1) ("county notaries") as are notaries public for state at large (Ala. Code § 36-20-30) ("state notaries"), and commissions are for four years (Ala. Code §§ 36-20-1; 36-20-30). Alabama international notaries may be appointed by Alabama Secretary of State. (Ala. Code § 36-20-51).

Qualification.

Must give bond with sureties in amount of $10,000, approved by judge of probate of county for which appointed. (Ala. Code §§ 36-20-3; 36-20-31). Alabama international notary must be attorney admitted to practice law in State of Alabama who has practiced law for at least five years. (Ala. Code § 36-20-50).

Authentication.

See topic 10.01 Acknowledgments, subhead Authentication.

Seal.

County notaries authenticating official acts must provide seal which states name, office, state and county for which appointed. (Ala. Code § 36-20-4). State notaries authenticating official acts must provide seal which states name, office and state for which appointed. (Ala. Code § 36-20-32).

Powers and Duties.

(1) To administer oaths in all matters incident to exercise of office; (2) to take acknowledgment or proof of instruments relating to commerce or navigation; (3) to demand acceptance and payment of bills of exchange, promissory notes and all other writings governed by commercial law as to days of grace, demand and notice of nonpayment; to protest same for nonacceptance or nonpayment and to give notice thereof as required by law; and (4) to exercise such other powers as, according to commercial usage or the laws of Ala., belong to notaries public. (Ala. Code § 36-20-5).

Territorial Extent of Powers.

For state notaries, jurisdiction extends to any county of state. (Ala. Code § 36-20-30). For county notaries, jurisdiction unclear but may be limited to county in which appointed. (Ala. Code § 36-20-1).

Expiration of Commission.

Statement on certificate of date of expiration of commission not required, but often included where certificate to be used in another state.

Fees.

Entitled to following fees: $1.50 plus necessary postage for services rendered in connection with protest of bill of exchange for acceptance, or of any bill of exchange, promissory note, check, or other writing for payment; 50¢ for oath, certificate and seal taken; 20¢ for each 100 words for giving copies from register; 25¢ for certificate and seal to copy; 50¢ for giving other certificate and affixing seal of office. (Ala. Code § 36-20-6).

Commissioners of Deeds.

None.

Officers of U.S. Armed Forces.

No specific provision.

10.04 RECORDS:

Probate judge in county where property located has charge of records, except when Uniform Commercial Code has designated office of Secretary of State as place of filing. (Ala. Code § 12-13-1, et seq.). Uniform Commercial Code adopted. (Ala. Code § 7-1-101, et seq.). 1990 Revision of Art. 3 (Ala. Code § 7-3-101, et seq.) and 1990 Amendments to Art. 4 (Ala. Code § 7-4-101, et seq.) adopted.

Recordable Instruments.

Recording Necessary for Full Effect.

Except as otherwise provided for by Uniform Commercial Code (See subhead Filing Under Commercial Code, infra), all deeds, mortgages, deeds of trust, bills of sale, contracts or other documents conveying any right, title, easement, or interest in any real estate or personal property, and all assignments and extensions thereto, recordable in office of probate judge of any county. (Ala. Code § 35-4-51). All conveyances or mortgages of real property void as to purchasers for valuable consideration, mortgagees, and judgment creditors without notice, unless recorded before accrual of right of such purchasers, mortgagees, and judgment creditors. (Ala. Code § 35-4-90[a]). Also required to be recorded for full effect are following: Deeds of assignment for benefit of creditors (Ala. Code § 35-4-57); final condemnation orders or applications therefor (476 So.2d 1224); defeasance of absolute conveyances of real property (Ala. Code § 35-4-90[b]); wills and conveyances creating estates in lands in remainder or reversion upon condition after estate for life (Ala. Code § 35-4-91); all loans in writing, wills, or conveyances creating estates in personal property, on condition, in reversion or remainder, or in which use separated from right and under which possession remains for three years with party entitled to estate or use but excluding any lease, or any security interest under Uniform Commercial Code (Ala. Code § 35-4-94); conveyances of personal property to minors, except by will, when parents have control and possession (Ala. Code § 35-4-96); conveyances of personal property in consideration of marriage when possession remains with husband solely or with husband and wife jointly (Ala. Code § 35-4-93); remainder estates in personal property created in another state when personal property brought by life tenant into state but excluding any leases (Ala. Code § 35-4-54); transfers of standing timber, trees, and cutting rights therein (Ala. Code § 35-4-92).

Memorandum summarizing lease, rather than lease itself, may be recorded if certain information contained in memorandum. (Ala. Code § 35-4-51.1).

Permissive Recording.

Following instruments may be recorded and recording thereof constitutes legal notice of contents of such instruments: Petition in bankruptcy (Ala. Code § 35-4-52); bond for title or other written contracts for sale of land (Ala. Code § 35-4-53); federal or state patents to land in Ala. (Ala. Code § 35-4-56); affidavits showing relationship of parties to conveyances of land (Ala. Code § 35-4-69).

Place of Recording.

Conveyances of real property must be recorded in office of probate judge in county where such property located. (Ala. Code § 35-4-50). Record offices are maintained at various county seats. *For list of Counties and County Seats, see first page for this state in volume containing Practice Profiles Section.* In following counties, record offices maintained at places named and instruments must be recorded in office in division where properties located: Coffee County, at Elba and Enterprise; Jefferson County, at Birmingham and Bessemer; St. Clair County, at Ashville and Pell City; Barbour County, at Clayton and Eufaula.

Recording in Several Counties.

After deed, mortgage, map, or other paper affecting title to property filed in any probate office in Ala., certified copy of same may be filed in any other probate office in Ala. with same effect as filing of original. (Ala. Code § 35-4-66).

Requisites for Recording.

Probate judge may refuse to indorse “filed” on any instrument, or to record same, until registration fees paid and unless instrument witnessed, probated, or acknowledged as required by Code. (Ala. Code § 35-4-58). Attestation or acknowledgment not required to admit instrument to record. (39 Ala. App. 72, 96 So.2d 432). Instrument must: Show name and address of individual who prepared it (Ala. Code § 35-4-110); marital status of grantor or vendor (Ala. Code § 35-4-73); and have plat attached to instrument if land described by reference to plat (Ala. Code § 35-4-74).

Recording Fees.

Specified in Ala. Code § 12-19-90.

Documents Filed For Record (Ala. Code § 12-19-90[b][22]) $3/page

Oil, gas, mineral and/or coal leases (Ala. Code § 12-19-90[b][23]) $3/page

Certificate of Incorporation for Profit (Ala. Code § 12-19-90[b][28]) $50

Certificate of Incorporation Non-Profit (Ala. Code § 12-19-90[b][29]) $15

Satisfaction of a Mortgage (Ala. Code § 12-19-90[b][31]) $3

Certificate of Judgment (Ala. Code § 12-19-90[b][35]) $3

Plats (per map) (Ala. Code § 12-19-90[b][45]) . . . . $1 for each lot, but not less than $15 nor more than $200 for one map.

Initial financing statement or other records such as amendments, except as otherwise provided: $20 if record communicated in writing and two pages or less; additional $2 for each page over two; $15 if record communicated by another medium authorized by filing-office rule. (Ala. Code § 7-9A-525[a]). Initial financing statements for manufactured housing transactions $10. (Ala. Code § 7-9A-525[b]). Additional $5 fee for use of nonstandard form. (Ala. Code § 7-9A-525[f]).

No fees charged under Ala. Code § 7-9A-101 et seq.: For mortgage effective as financing statement (Ala. Code § 7-9A-525[e]); or termination statement filed pursuant to Ala. Code § 7-9A-513 (Ala. Code § 7-9A-525[a]).

Recording Taxes.

See category 22 Taxation, topic 22.15 Property Taxes, subhead Real Estate Conveyance Tax.

Foreign Conveyances or Encumbrances.

No statute authorizing recording of instrument executed and acknowledged in conformity with law of state where executed but not in conformity with law of this state. If effective under laws of this state to pass equitable interest, can be recorded even though not acknowledged, attested or proven in accordance with laws of this state. See subhead Requisites for Recording, supra.

Effect of Record.

Recording in proper office of any instrument which may be legally admitted to record operates as notice of contents even if not acknowledged or proved. (Ala. Code § 35-4-63). Instrument considered recorded from day of delivery to probate judge. (Ala. Code § 35-4-59). Instruments acknowledged or proved according to law and recorded may be received in evidence without further proof, and certified transcript of record may be received in evidence when original lost or destroyed, unless reputed maker in bona fide possession of property and makes and files affidavit that instrument is forged. (Ala. Code § 35-4-65). See topic 10.01 Acknowledgments. Proof for record requires instrument be attested by two witnesses. (Ala. Code § 35-4-68).

Torrens Act.

Not adopted.

Transfer of Decedent's Title to real estate to devisees is shown by recordation of will, duly probated, in office of probate judge of county in which real estate lies. In case of intestacy, record of administration proceedings will usually show that title has passed to heirs, but if not shown, or if no administration, affidavits of heirship must be recorded in office of probate judge. (Ala. Code § 43-8-40, et seq.).

Filing Under Commercial Code.

Place of Filing Generally.

Office to file financing statement to perfect security interest or agricultural lien is office designated for filing or recording record mortgage on related real property if: (1) Collateral is as-extracted collateral or timber to be cut or (2) financing statement is filed as fixture filing and collateral is goods that are/are to become fixtures. (Ala. Code § 7-9A-501[a]). In all other cases, Secretary of State. (Ala. Code § 7-9A-501[a]).

Transmitting Utilities.

For collateral of transmitting utility, file with Secretary of State. (Ala. Code § 7-9A-501[b]).

See category 3 Business Regulation and Commerce, topic 3.09 Commercial Code.

Filing Fees.

See subhead Recording Fees, supra.

Vital Statistics.

Births, deaths and marriages registered with Office of Vital Statistics, Ala. Dept. of Public Health, RSA Tower, Suite 1150, 201 Monroe St., Montgomery, AL 36104. (Ala. Code § 22-9A-1, et seq.). See also category 14 Family, topic 14.11 Marriage.

Establishing Birth Record.

Statute requires certificate to be filed within five days after birth. (Ala. Code § 22-9A-7[a]).

Delayed registration may be filed for child under one year old on regular form in manner set forth in Ala. Code § 22-9A-9(1). For persons aged one to five years old must be signed by attending physician, or parent with notarized statement attached if no physician available. (Ala. Code § 22-9A-9[2]). If person is 18 years old and competent, may be sworn to by individual whose birth being registered. Otherwise, must be sworn to by parent, guardian, next of kin, or other person having knowledge of birth. All certificates for persons more than five years old must be accompanied by at least three pieces of supporting documentary evidence. (Ala. Code § 22-9A-9[3]).

Court procedure for establishing birth provided for persons unable to meet aforesaid requirements. (Ala. Code § 22-9A-10).

Lis Pendens.

In suit in any court to enforce lien upon, right to, or interest in or to recover land or where application made to county probate judge for order of condemnation, or any interest therein, notice containing names of all parties to suit or persons named in application for condemnation order, description of real estate and statement of nature of lien, writ, application or suit must be filed in office of probate judge of county where land is situated. (Ala. Code § 35-4-131). Unless notice of suit or application recorded, such suit or application shall not affect rights of bona fide purchaser, lessee, mortgagee or other lienee. (Ala. Code § 35-4-135). (Ala. Code § 35-4-130, et seq.).

Fees.

Specified in Ala. Code § 22-9A-23:

Search and one certified copy, if found	$15
Additional fee for same day expedited service	$15
Each additional copy	$6
Authenticated copy	$25
Amendment to original record and one certified copy	$20
New birth certificate after adoption and one certified copy	$25
Delayed certificate and one certified copy	$20

10.05 SEALS:

Not necessary for conveyance of land to enable grantee to bring civil action (Ala. Code § 35-4-21) or execution of bonds (Ala. Code § 1-3-2). Writings which import on face under seal deemed sealed instruments. (Ala. Code § 35-4-22). Word “seal” alone insufficient. (378 So.2d 721). Affixing seal to writing evidencing contract for sale or offer to buy or sell goods does not constitute writing sealed instrument. (Ala. Code § 7-2-203). Consideration of sealed instruments may be inquired into by plea. (Ala. Code § 6-5-287). Notary public taking acknowledgment outside state should affix seal. (106 Ala. 663, 18 So. 74).

Uniform Commercial Code adopted. (Ala. Code § 7-1-101, et seq.). See category 3 Business Regulation and Commerce, topic 3.09 Commercial Code.

Personal Seal.

Scroll or letters L. S. insufficient, unless purpose to seal declared in body of instrument. (123 Ala. 222, 26 So. 203).

Corporate Seal.

Deed, mortgage or other conveyance of property can be validly executed without using corporate seal. (Implied by Ala. Code § 35-4-67.) Presence of corporate seal establishes prima facie that instrument to which affixed act of corporation, and dispenses with necessity of proof executed by proper officers, or that they have authority to execute or that all proceedings to legalize execution were had unless corporation rebuts such presumption. (232 Ala. 471, 168 So. 693). Instrument must declare in body that corporate seal affixed to make seal effectual; when such declaration made use of word “seal” sufficient. (250 Ala. 229, 33 So.2d 904).

Effect of Seal.

All deeds, powers of attorney, instruments of conveyance, affidavits or contracts purporting to be verified by law recorded in probate judge’s office and transcripts thereof are prima facie evidence that seal acknowledging such instrument is official seal affixed in official capacity. All such instruments and certified copies thereof must be received in court without further proof of due execution or seal. (Ala. Code § 35-4-27). See also category 5 Civil Actions and Procedure, topics 5.16 Limitation of Actions, subhead Ten Years, 5.01 Accord and Satisfaction.

10.06 TORRENS ACT:

See topic 10.04 Records, subhead Torrens Act.

10.07 VITAL STATISTICS:

See topic 10.04 Records, subhead Vital Statistics.

10A EDUCATION

10A.01 PUBLIC SCHOOL COURSES:

State Board of Education shall establish rigorous and meaningful core curriculum including, but not limited to, all of following courses for grades nine through twelve in public schools: (1) Four years (equivalent of four credit units) of English; (2) four years (equivalent of four credit units) of Mathematics; (3) four years (equivalent of four credit units) of Science; and (4) four years (equivalent of four credit units) of Social Studies with emphasis on History, Music History, Fine Arts History, Geography, Economics, and Political Science. (Ala. Code § 16-6B-2[b]).

In addition to required courses, elective courses including, but not limited to, Foreign Languages, Fine Arts, Physical Education, Wellness Education, and Vocational and Technical Preparation are intended available to all students as determined by Local Board of Education. For purposes of this section, American Sign Language is foreign language. (Ala. Code § 16-6B-2[d]).

11 EMPLOYMENT

11.01 EMPLOYER AND EMPLOYEE:

See topic 11.02 Labor Relations.

11.02 LABOR RELATIONS:

State Department of Labor has jurisdiction over labor matters.

Hours of Labor.

No statutory provision, with exception of child labor (see subhead Child Labor, infra).

Wages.

No statutory provision regarding minimum wage. Child Support withholding order takes priority over other writs of garnishment, irrespective of when withholding order served on employer. (Ala. Code § 30-3-67). Wages may be ordered withheld by court to pay criminal restitution. (Ala. Code § 15-18-140, et seq.).

Assignment of Wages.

See category 8 Debtor and Creditor, topic 8.01 Assignments.

Child Labor.

Employment of minors regulated in detail, and under general supervision of Department of Labor. (Ala. Code § 25-8-32, et seq.; Ala. Code § 25-3-3[e]).

Child under 16 years old may not be employed, except in agricultural services or otherwise provided by child labor laws of Ala. (Ala. Code § 25-8-33). Children 14 or 15 may work outside school hours and during school vacation, except in certain occupations. (Ala. Code § 25-8-33). Work hours for children under 16 and for children 16, 17, or 18 enrolled in secondary school system are expressly limited. (Ala. Code § 25-8-36). Persons under 18 employed as actors, performers, or models subject to time and hour restrictions under authority of Department, and employed under specified conditions. (Ala. Code §§ 25-8-60; 25-8-61). Certain specified occupations and places of work prohibited for children under 16. (Ala. Code § 25-8-35). Employment of child under 18 in or about certain specified occupations, positions or places prohibited. (Ala. Code § 25-8-43). Special regulations governing employment of minors in or about places where alcoholic beverages sold. (Ala. Code § 25-8-44). Employment of child in violation of child labor act is negligence per se, and employer liable for injury which is proximate result of such violation. (204 Ala. 649, 87 So. 168).

Permits must be obtained by minors or their employers in certain cases. (Ala. Code § 25-8-45, et seq.).

Penalties.

Violation of any provision of child labor act or of any lawful order issued thereunder punishable by civil penalty of $300 for violation of specified statutory provisions, $5,000 for violation of prohibited occupations for minors, and other specified penalties. (Ala. Code § 25-8-59).

Female Labor.

Employers of women in stores or shops as clerks or saleswomen must provide accommodations for sitting or resting when not actively at work and separate sanitary facilities. (Ala. Code § 25-1-2).

Penalties.

Violation punishable by fine of $50 to $500. (Ala. Code § 25-1-2).

Discrimination in employment against employee 40 years and over on basis of age prohibited under Alabama Age Discrimination Act. (Ala. Code § 25-1-20, et seq.). Same evidentiary framework applied to federal age discrimination claims should be applied to Alabama Age Discrimination Act claims. (964 So.2d 1225). No statutory provision regarding discrimination on basis of disability, race, color, religion, sex, or national origin.

Labor Unions.

Must file copies of constitution, bylaws and amendments thereto with State Department of Labor and make annual financial reports to Department. (Ala. Code § 25-7-5).

Labor Disputes.

Prohibited: (1) Interference by force, coercion, or intimidation with person’s freedom to join or refrain from joining labor organization (Ala. Code § 25-7-6); (2) use of force or threats of violence to prevent any person from doing or contracting to do work or furnish materials (Ala. Code § 25-7-9); (3) seeking by force or threat of force to secure or prevent attendance at any meeting or place where strike vote taken (Ala. Code § 25-7-11); (4) collection or demand of money for privilege of working (Ala. Code § 25-7-12); (5) membership by professional, executive, administrative or supervisory employees in union which permits membership by others than such employees. (Ala. Code § 25-7-13).

State Agencies.

State agency required to timely inform state employee in writing when document pertaining to disciplinary action placed in personnel file of employee. (Ala. Code § 36-26-27.1).

Workers’ Compensation Law.

(Ala. Code § 25-5-1, et seq.).

When employer subject to Workers' Compensation Act, compensation according to schedules contained therein must be paid for injury to or death of employee caused by accident arising out of and in course of his employment without regard to negligence, except under specified circumstances. (Ala. Code § 25-5-51). Employee may not waive benefits provided by Act. (475 So.2d 872). Injury which occurs subsequent to original compensable injury is itself compensable if direct and natural result of original injury. (474 So.2d 1125); 742 So.2d 1264).

All other rights and remedies of employee against employer and officer, director, agent, servant, employee and workers' compensation carrier of such employer and officer, director, agent, servant or employee of such workers' compensation carrier, and also against any labor union or any official or representative thereof, making safety inspection for benefit of employer or employees limited to willful conduct. Employer immunity does not extend to third party suits by tortfeasor to enforce contractual indemnity for claim arising out of injury to employee of same employer. (629 So.2d 633). Prohibits discharge in retaliation for filing workers' compensation claim or for filing notice of safety rule violations. (Ala. Code § 25-5-11.1).

Presumption as to Applicability of Act.

Every employer and employee presumed to have accepted, and thus subject to, provisions relating to payment and acceptance of compensation. (Ala. Code § 25-5-54). Terms of Workers' Compensation Act read into employment contract. (981 So.2d 434).

Exception of Certain Employments.

Act does not apply to domestic employees, farm laborers, persons whose employment at time of injury is casual and not in usual course of business, or to any employer who regularly employs less than five employees in any one business, or to any municipality of less than 2,000 persons according to most recent federal decennial census, unless such employer or such municipality or school district accepts provisions thereof by filing written notice with Department of Industrial Relations and by posting copies of such notice in employer's place of business. Withdrawal may be accomplished by giving like notice. (Ala. Code § 25-5-50).

Written notice of accident must be given to employer within five days unless prevented by physical or mental incapacity (other than infancy), fraud, deceit or other good reason (Ala. Code § 25-5-78, 656 So.2d 897). In any event notice must be given within 90 days after accident or death. (Ala. Code § 25-5-78). Actual knowledge of employer dispenses with 90-day notice requirement. (213 Ala. 399, 104 So. 756).

To Whom Compensation Payable.

Compensation payable only to employee or certain dependents. (Ala. Code § 25-5-60,-66). Partner not employee of partnership. (53 Ala. App. 102, 298 So.2d 34).

Amount of Compensation.

Minimum and maximum weekly compensation is 27½% and 100%, respectively, of average weekly wage of state as determined by Director of Industrial Relations pursuant to statutory formula. (Ala. Code §§ 25-5-68; 25-5-57). No compensation allowed for first three days of disability unless disability lasts 21 days (Ala. Code § 25-5-59), but medical, surgical and hospital expenses allowed from date of injury less benefits otherwise payable for such expenses without loss of benefit to employee (Ala. Code § 25-5-77). Normally, employer not liable for costs of medical or surgical treatment obtained by employee without justification or notice to employer. (355 So.2d 1133). If installment not paid without good cause within 30 days after payment due, 15% of installment added to amount. (Ala. Code § 25-5-59[b]).

Rehabilitation.

Employee's refusal to accept rehabilitation at employer's request and expense results in loss of compensation for each week of refusal. (Ala. Code § 25-5-77[c]-[d]). (Note: As to standards for determining whether employee has right to vocational rehabilitation at employer expense, see Ala. Code § 25-5-77[c]; 477 So.2d 408.)

In case of injury to a minor who, at the time thereof, is employed in violation of child labor law, compensation is double what it would have been had employment been legal. (Ala. Code § 25-5-34).

Lump Sum Settlements.

With circuit court approval, parties may make lump sum settlements on basis of present value of payments to be made calculated using 6% basis. (Ala. Code § 25-5-83). All matters of compensation may be settled by parties between themselves, but settlement must be in amount same as benefits stipulated by Act unless circuit court approves settlement for lesser amount. Settlement may be vacated within six months for fraud, undue influence or coercion. (Ala. Code § 25-5-56). After any settlement other than one approved by circuit court, employer must, within ten days, make report to Department of Industrial Relations. (Ala. Code § 25-5-5). In cases of employer's default on installment payments for permanent total disability, court can order payments to be reduced to lump sum award without consent of employer. (957 So.2d 484).

Parties may enter settlement agreement at benefit review conference as part of statutory Ombudsman Program. Settlement agreement effective on date signed, unless party requests court approval, and binding unless court relieves parties of agreement within 60 days after agreement signed or approved. (Ala. Code § 25-5-292; 782 So.2d 185).

Recovery is barred when: (1) Injury caused by employee's willful misconduct; (2) employee intended to injure himself or another employee; (3) injury due to employee's willful failure to use safety appliances provided by employer; (4) accident due to injured employee being intoxicated from use of alcohol or being impaired by illegal drugs (positive drug test creates conclusive presumption of impairment from use of illegal drugs); (5) employee refused to cooperate in blood or urine test after accident after being warned in writing that such refusal would forfeit right to recovery; (6) employee knowingly and falsely misrepresented in writing physical or mental condition and condition aggravated by work-related accident. Burden of proof on employer. (Ala. Code § 25-5-51).

Limitations Period.

Claims barred two years after accident or death. Time extended in case of incapacity of claimant other than infancy. Partial payments toll limitations. (Ala. Code § 25-5-80). Statute may be tolled by fraud or estoppel. (504 So.2d 1217). Payments under another state's laws do not toll statute under certain circumstances. (999 So.2d 932).

Actions.

In case of dispute, either party may file verified complaint in circuit court, of county which would have jurisdiction over tort action. (Ala. Code § 25-5-81[a]). Case tried summarily by court unless jury demanded to try issue of employee's willful misconduct. (Ala. Code § 25-5-81[a]). Party aggrieved by decree may obtain review in Court of Civil Appeals. (Ala. Code § 25-5-81[e]). Substantial evidence standard of appellate review prescribed by Ala. Code § 25-5-81(e) makes no distinction between preponderance of evidence and clear and convincing evidence level of proof, and applies to findings of fact pursuant to each, albeit in varying degrees due to heightened level of evidence necessary to satisfy latter. (2008 Ala. LEXIS 192). Court's power to fashion remedies limited to those explicitly granted by Act or necessarily implied by its terms. (963 So.2d 654). No cause of action for retaliatory discharge in anticipation of workers' compensation claim. (7 So.3d 986).

Subrogation.

If employee or dependents elect to receive compensation from employer, employer (or employer's insurer) subrogated to all rights of employee or dependents against third persons for injury or death of employee. (Ala. Code § 25-5-11).

Self-Insurers.

Employer can be authorized to self insure upon satisfactory proof to Director of Industrial Relations of employer's ability to pay compensation. (Ala. Code § 25-5-8[b]). Director of Industrial Relations also empowered to issue regulations under which two or more employers can agree to pool liabilities for purpose of qualifying as self-insurers (Ala. Code § 25-5-9) or for purpose of providing excess coverage above self-insured retention levels maintained by individual employee groups (Ala. Code § 25-5-9).

False Statement.

Felony offense to make false statement for purpose of obtaining workers' compensation benefits. (Ala. Code § 13A-11-124).

Jones Act (48 USC § 688 [1982]) not exclusive remedy for seaman seeking to recover worker's compensation under Alabama law; Jones Act is fault-based system for recovery; double recovery precluded. (668 So.2d 775).

Occupational Diseases.

Disablement or death of employee caused by contraction of occupational disease arising out of and in course of employment and resulting from nature of employment, treated as injury by accident and employee or dependents (in case of death) entitled to compensation as provided in Workers' Compensation Act. (Ala. Code § 25-5-111).

Employers' Liability Act abrogates fellow servant rule and defenses of assumption of risk and contributory negligence in certain specified cases. (Ala. Code § 25-6-1). Damages recovered by employee not subject to payment of debts or legal liabilities, except judgments in favor of dependents. (Ala. Code § 25-6-2). Personal representative may sue when employee's injury results in death. (Ala. Code § 25-6-3). Insurance benefit or contract of employment no bar to recovery. (Ala. Code § 25-6-4). Superseded by Workers' Compensation Act, but still applicable in cases which cannot be brought under Workers' Compensation Act. (See 237 Ala. 387, 187 So. 468.)

Unemployment Compensation.

Unemployed individual may receive benefits if director finds employee: (1) Has made claim; (2) has registered for work and reported to employment office; (3) is capable of doing work and available for work; (4) has been totally or partially unemployed in such week; (5) has made reasonable and active effort to secure work which he is qualified to perform; (6) has during base period been paid wages for insured work equal to or exceeding 1½ times total of wages for insured work paid to him in that quarter of such base period in which such total wages were highest; provided, however, that no otherwise eligible individual who shall have received benefits in preceding benefit year shall be eligible to receive benefits in succeeding benefit year unless and until such otherwise eligible individual, subsequent to beginning date of preceding benefit year, worked in insured employment for which work he earned wages equal to at least eight times weekly benefit amount established for such individual in preceding benefit year; and (7) has been selected and referred to reemployment services and participates in same. (*Note*: individual may also be required to participate in reemployment services in certain circumstances.) (Ala. Code § 25-4-77).

Right to Work.

Right of person to work may not be denied or abridged on account of membership or nonmembership in any labor union or labor organization. Agreements requiring membership in labor union or organization as condition of employment or continuation of employment prohibited. No employer may require employee to pay union dues as condition or continuation of employment. Any person denied employment or deprived of continuation of employment in violation of statute may recover damages. (Ala. Code § 25-7-30 to -36).

Individuals Disqualified for Benefits.

(1) For any week in which his unemployment is directly due to labor dispute in active progress in establishment in which he is or was last employed; (2) if he has left his employment voluntarily without good cause connected with such work (with possible exceptions connected to sickness or disability); (3) if he was discharged for dishonest or criminal act committed in connection with his work, for sabotage, act endangering safety of others, or use of illegal drugs or refusal to submit to drug test after previous warning; (4) for any week of unemployment because of revocation or suspension of required license, certificate, permit, insurability, bond, or surety; (5) if he fails without good cause either to apply for or to accept available suitable work; (6) for any week with respect to which he is receiving or has received remuneration in form of back pay; (7) for any week with respect to which he has received or is seeking unemployment benefits under law of another state or U.S.; (8) for any week with respect to which he has received, or has been determined eligible to receive, any pension, annuity or similar periodic payment based on previous work; (9) for any week with respect to which he has received or is seeking compensation for temporary disability under any workmen's compensation law; (10) for any week that individual is employed in federal or state public works or work relief; (11) for any week he is self-employed; (12) for any week with respect to which he has applied for or received training allowance; (13) for any week which commences between sports seasons to any individual for which benefits claimed are on basis of participation in sports events; and (14) for any week for which benefits claimed on basis of services of alien, unless alien lawfully admitted to U.S. and lawfully present for such services, residing under color of law, or admitted for temporary residence. (Ala. Code § 25-4-78).

11.03 WORKERS' COMPENSATION LAW:

See topic 11.02 Labor Relations.

12 ENVIRONMENT

12.01 ENVIRONMENTAL REGULATION:

General Supervision.

Air, water and hazardous waste pollution control monitored by Department of Environmental Management. (Ala. Code § 22-22A-1, et seq.). Coal surface mining and reclamation monitored by Surface Mining Commission, Surface Mining Reclamation Commission, by Surface Mining Control and Reclamation Act of 1981. (Ala. Code § 9-16-70, et seq.). Soil and water resources monitored by Alabama Agricultural and Conservation Development Commission. (Ala. Code § 9-8A-1, et seq.). Underground storage tanks and protection of wellhead areas of public water supply systems monitored by Alabama Environmental Management Commission and Department of Environmental Management. (Ala. Code § 22-36-1, et seq.). Public wastewater collection systems monitored by Department of Environmental Management (ADEM). (Ala. Code § 22-25-1, et seq.). Privately owned wastewater systems regulated by Alabama Public Service Commission and either ADEM or Alabama Department of Public Health. (Ala. Code § 22-25B-1, et seq.). Utilities purchasing electricity from distributed generation facilities monitored by Alabama Public Service Commission. (Ala. Code § 37-4-140, et seq.).

Prohibited Acts of Pollution.

Air pollution standards governed by Air Pollution Control Act. (Ala. Code § 22-28-1, et seq.). Water pollution standards governed by Water Pollution Control Act. (Ala. Code § 22-22-1, et seq.). Hazardous waste standards governed by Hazardous Wastes Management and Minimization Act. (Ala. Code § 22-30-1, et seq.). No specific acts prohibited by above Acts; however, broad powers are conferred on ADEM to adopt regulations for control, abatement, prevention of air and water pollution, on Mining Commission to control and regulate reclamation of surface mined lands, and on Agricultural Commission to provide funds for encouragement of soil conservation, water quality improvement and improved forestry practices.

Enforcement.

ADEM may conduct hearings; develop environmental policy; enter into agreements and contracts; issue, modify, suspend or revoke orders, citations, notices of violations, licenses, certifications and permits; subpoena witnesses; require owner or operator of any air contaminant source to establish and maintain equipment and records for monitoring and reporting. (Ala. Code §§ 22-22A-5; 22-28-21). ADEM empowered by emergency procedures to order persons causing or contributing to air pollution to reduce or immediately discontinue emission of air contaminants and hold hearing within 24 hours. (Ala. Code § 22-28-21).

ADEM also empowered to order to cease violations of water pollution statutes, regulation, order or permit and may require violator to file full report outlining steps implemented to control discharge. (Ala. Code § 22-22-9). ADEM, Attorney General, or any district attorney may file civil action for violation of water pollution act. (Ala. Code § 22-22-9). Actions for pollution of air also authorized. (Ala. Code §§ 22-22-9,-14; 22-28-22). Certain municipal governing bodies and each county board of health authorized to establish and administer local air pollution control program. (Ala. Code § 22-28-23).

Surface Mining Commission, enforces Alabama Surface Mining Control and Reclamation Act of 1981 and may promulgate rules and regulations, hold hearings, subpoena witnesses, issue orders to cease violations, issue and revoke permits, and initiate civil or criminal actions. (Ala. Code § 9-16-74, et seq.). Private citizens may bring actions requiring Commission to perform enforcement duties. (Ala. Code § 9-16-95, et seq.).

Penalties.

Knowingly violating, failing or refusing to obey or comply with Alabama Air Pollution Control Act or knowingly submitting false information may lead to maximum $10,000 fine, and additional maximum $10,000 penalty for each day of continuing violation and sentence of hard labor for county for maximum of one year. (Ala. Code § 22-28-22).

Willful or grossly negligent violations of Water Pollution Control Act punishable by fines of $2,500 to $25,000 per day and/or imprisonment for maximum of one year, with harsher penalties for subsequent convictions. Knowingly falsifying any information reportable or required maintained under Act is punishable by maximum fine of $10,000 and/or maximum of six months imprisonment. (Ala. Code § 22-22-14).

Surface Mining Commission may impose maximum civil penalty of $5,000 per violation at administrative hearing on violation of Act. (Ala. Code § 9-16-94). Each day of continuing violation may be separate violation. Commission may also cite violations and issue cessation orders. (Ala. Code § 9-16-93). For failure to correct violation for which citation has been issued, minimum penalty of $750 for each day violation continues for maximum of 30 days, may be imposed. (Ala. Code § 9-16-94). Willful misrepresentation of any fact, willful violation of any permit or order issued by Commission or willful interference with Commission punishable by maximum fine of $10,000, and/or by maximum imprisonment of one year. (Ala. Code § 9-16-94).

Alabama Hazardous Substance Cleanup Fund provides for penalties and recovery costs related to clean up of hazardous wastes. (Ala. Code § 22-30A-1, et seq.).

Exemptions.

None; however, ADEM may grant individual variances beyond limitations prescribed by Air Pollution Control Act, if it finds that compliance imposes serious hardship without equal or greater benefits to public, and emissions occurring or proposed to occur do not endanger human health or safety, comfort, and aesthetic values. In granting variance, ADEM may impose certain conditions and policies, but variance period cannot exceed one year. Variance may be extended from year to year. (Ala. Code § 22-28-13).

Fees For Waste Disposal.

Base fee of $41.60 per ton on all hazardous waste from any commercial facility except commercial facility located in Emelle, Alabama; and base fee of $21.60 per ton of hazardous waste on all hazardous waste from commercial facility located at Emelle, Alabama, identified or listed under § 3001 of Resource Conservation and Recovery Act of 1976 and on PCB wastes required to be disposed in chemical waste landfill approved under Federal Toxic Substance Control Act; and additional fee of $62 per ton on certain waste listed in 40 C.F.R. 261.33(e), or additional fee of $25 per ton on certain waste listed in 40 C.F.R. 261.33(f), or fee of $11.60 per ton on all other hazardous waste not subject to taxation; emission control dust/sludge from primary steel production in electric arc furnaces and hazardous waste de-characterized is exempt from base fee. (Ala. Code § 22-30B-2).

Hazardous Materials.

Pipelines and other facilities used in state for transporting hazardous liquids required to be constructed and maintained in accordance with specific safety standards. Alabama Public Service Commission empowered to regulate such activities, conduct inspections and otherwise enforce safety standards. (Ala. Code § 37-4-90, et seq.).

Permits required for construction, installation, modification or use of equipment or other device causing or contributing to air pollution. ADEM may require that applications for permits be accompanied by plans, specifications and other information. (Ala. Code § 22-28-16,-17). Permits required for discharge of sewage, industrial waste, or other waste into waters of state. ADEM examines all applications and grants permits, stipulating conditions under which such discharge may be permitted. (Ala. Code § 22-22-9).

License must be obtained from Surface Mining Commission before coal surface mining or exploration; permit for particular location of mining is required. (Ala. Code § 9-16-81, et seq.).

No license to collect, haul and/or dispose of solid waste may be issued by county commission or municipality without first obtaining permit and posting performance bond. (Ala. Code § 22-27-5).

Permit required from Department of Conservation and Natural Resources, acting through Lands Division, for construction and maintenance of beach project by coastal municipality. (Ala. Code § 9-15-56).

Recycling.

Land Recycling and Economic Redevelopment Commission and Finance Authority administered by ADEM. (Ala. Code § 22-30E-1, et seq.; Ala. Code § 22-30F-1, et seq.). Reuse and Redevelopment of contaminated properties. Secondary metal recyclers must maintain records of all purchase transactions. (Ala. Code § 13A-8-30, et seq.).

Alternative Fuel.

Center for Alternative Fuels is authorized to act as information center for alternative fuels and available federal grant funds, to set standards for alternative fuels and to promulgate rules relating to alternative fuels. (Ala. Code § 2-2-90, et seq.).

Scrap Tires.

Scrap tire disposal and recycling governed by Scrap Tire Environmental Quality Act. Scrap Tire Commission, ADEM, Department of Economic and Community Affairs, and Department of Revenue enforce Act. (Ala. Code § 22-40A-1 et seq.). Scrap tire environmental fee on purchase of replacement tires. Scrap Tire Fund to receive proceeds. Violation of Act to transport scrap tires without permit, noncompliance with department regulations, or unpermitted storage or disposal of tire material. Minimum fines of $300 for each violation. Fine of $5 per tire for unlawful transport of scrap tires. (Ala. Code § 22-40A-19).

Waste Cooking Grease.

Disposal of waste cooking grease and animal by-products; various approved methods of disposal. Violations include permit denial and misdemeanor. (Ala. Code § 22-27-70, et seq.; Ala. Code § 22-27-90, et seq.).

Underground Storage Tanks.

Regulation of storage of motor fuels in underground storage tanks. Rehabilitation of contamination sites. Establish Underground and Aboveground Storage Tank Trust Fund. (Ala. Code § 22-35-1, et seq.).

13 ESTATES AND TRUSTS

13.01 ADMINISTRATION:

See topic 13.09 Executors and Administrators.

13.02 ADVANCEMENTS:

See topic 13.07 Descent and Distribution.

13.03 ALLOWANCES:

See topic 13.09 Executors and Administrators.

13.04 CLAIMS:

See topic 13.09 Executors and Administrators.

13.05 DEATH:

Person absent from domicile and unheard from for five years presumed dead and estate may be administered as decedent’s estate. (Ala. Code § 43-2-231).

Survivorship.

Uniform Simultaneous Death Act adopted. (Ala. Code § 43-7-1, et seq.).

Actions for Death.

When death of minor child caused by wrongful act, omission or negligence, father or mother may, in certain instances named in statute, commence action. (Ala. Code § 6-5-391). If suit not brought within six months from death of minor, personal representative of such minor may, within two years, bring suit. (Ala. Code § 6-2-38[a], Ala. Code § 6-5-391). Any damages recovered to be distributed according to intestate succession laws. (Ala. Code § 6-5-391; Ala.

Code § 43-8-40, et seq.). Cause of action for wrongful death at any time after viability of fetus caused by tort to mother. (293 Ala. 95, 300 So.2d 354). No cause of action for wrongful death of nonviable fetus, meaning fetus not capable of living outside uterus. (613 So.2d 1241). Cause of action for wrongful birth if birth was result of negligent failure of physician to discover and inform parents of existence of fetal defects. (624 So.2d 1022).

Personal representative may sue in Ala., and not elsewhere, and recover such damages as jury may assess, for wrongful act, omission or negligence causing death of decedent, if decedent could have sued for such wrongful act, omission, or negligence if it had not caused death to decedent. Such action must be brought within two years after death, and amount recovered is not subject to decedent's debts or liabilities. (Ala. Code § 6-5-410). Alabama Wrongful Death Act provides only for punitive damages, not for compensatory or actual damages. (444 So.2d 373). No statutory limitation of amount recoverable. Failure of automobile accident victim to file action prior to death prevents estate from recovering uninsured motorist benefits. (926 So.2d 1033).

Death Certificate.

See category 10 Documents and Records, topic 10.04 Records, subhead Vital Statistics.

Uniform Anatomical Gift Act.

Uniform Anatomical Gift Act of 1969 applies to gifts made prior to Jan. 1, 2004. (Ala. Code § 22-19-40, et seq.). Alabama Uniform Anatomical Gift Act governs gifts made after Jan. 1, 2004. (Ala. Code § 22-19-50, et seq.). Revised Uniform Anatomical Gift Act repeals and replaces Alabama Uniform Anatomical Gift Act effective Nov. 1, 2008. (Ala. Code § 22-19-160, et seq.).

See also topic 13.16 Wills.

Living Wills.

See topic 13.16 Wills.

13.06 DECEDENTS' ESTATES:

See topics 13.09 Executors and Administrators, 13.07 Descent and Distribution, and 13.16 Wills.

13.07 DESCENT AND DISTRIBUTION:

Alabama Probate Code (Ala. Code § 43-8-1, et seq.) based on Uniform Probate Code 1974 edit., with many and material variances from Uniform Probate Code.

Distinction between real and personal property abolished. (Ala. Code § 43-8-1[25]).

Estate of decedent not effectively disposed of by will in excess of share of surviving spouse, or all such property if no surviving spouse, passes as follows, each class of which member is living taking to exclusion of subsequent classes: (1) Issue of decedent in equal shares if all issue of same degree of kinship to decedent, but by representation (see infra) if of unequal degree; (2) parent or parents equally; (3) issue of parents or either of them by representation; (4) in equal shares to more remote paternal and maternal kindred in following manner: (a) grandparent or grandparents equally, (b) issue of grandparents in equal shares if all issue of same degree of kinship to decedent, but by representation if of unequal degree; (5) if no paternal or maternal kindred on one side, entire estate to relatives on other side; (6) to state. (Ala. Code § 43-8-42, -44). Except where estate could pass to state, heir must survive decedent five days. (Ala. Code § 43-8-43). Issue of person means all lineal descendants of all generations. (Ala. Code § 43-8-1[15]).

For representation, estate divided into as many shares as surviving heirs in nearest degree of kinship and deceased persons in same degree who left issue surviving decedent, each surviving heir in nearest degree receiving one share and share of each deceased person in same degree being divided among issue of such deceased heir in same manner. (Ala. Code § 43-8-45).

Surviving Spouse.

Takes intestate share as follows: All if no surviving issue or parent of decedent; first $100,000 plus one-half of balance if decedent survived by parent or parents and no surviving issue; first $50,000 plus one-half of balance if decedent survived by issue all of whom are also issue of surviving spouse; one-half if decedent survived by issue one or more of whom are not issue of surviving spouse. If estate located in two or more states, surviving spouse's share may not exceed in aggregate amounts allowable under Ala. law. (Ala. Code § 43-8-41). Person divorced from decedent or whose marriage has been annulled not surviving spouse. (Ala. Code § 43-8-252). Surviving spouse who feloniously and intentionally kills decedent not entitled to any intestate share. (Ala. Code § 43-8-253).

Half Blood.

Relatives of half blood inherit same share as if they were of whole blood; no distinction between ancestral and general estate property. (Ala. Code § 43-8-46).

Posthumous Children or Other Issue.

Relatives of decedent conceived before decedent's death but born thereafter inherit as if born in lifetime of decedent. (Ala. Code § 43-8-47).

Illegitimates.

Heir of mother, and mother and kindred of illegitimate child on part of mother may inherit estate of such child. Illegitimate child is also heir of his father if: (1) Natural parents participated in marriage ceremony before or after birth of such child, even though marriage void, or (2) paternity established by adjudication before death of father, or by clear and convincing proof thereafter. Established paternity ineffective to entitle father or his kindred to inherit from or through child unless father openly treated child as his and has not refused to support child. (Ala. Code § 43-8-48). See also category 14 Family, topic 14.10 Infants, subhead Legitimation.

Adopted Children.

See category 14 Family, topic 14.01 Adoption.

Determination of Heirship.

Person related to decedent through two lines of relationship only entitled to single share, which is based on relationship that results in larger share. (Ala. Code § 43-8-58).

Advancements.

If person dies intestate as to all his estate, property he gave in lifetime to heir is advancement against heir's share of estate only if declared in contemporaneous writing by decedent or acknowledged in writing by heir to be advancement. If recipient predeceases decedent, advancement not charged against intestate share of recipient's issue unless declaration or acknowledgment provides otherwise. Property valued at time heir came into possession or enjoyment of property or death of decedent, whichever first occurs. (Ala. Code § 43-8-49). Debt owed decedent not charged against intestate share of any person except debtor, and if debtor predeceases decedent, debt not charged against intestate share of debtor's issue. (Ala. Code § 43-8-55).

Election.

Surviving spouse has right to elective share equal to lesser of all of estate of deceased reduced by value of surviving spouse's separate estate or one-third of estate of deceased. (Ala. Code § 43-8-70).

See also topic 13.09 Executors and Administrators.

Renunciation.

Person, or representative of deceased, incapacitated person, protected person, incompetent or ward, who is heir may disclaim in whole or in part right of succession to any property by delivering or filing written disclaimer (Ala. Code § 43-8-291) in probate court where administration of decedent's estate is, or could be, administered, or in case of real property in office of probate judge of county in which property located. Filing must be within nine months after death of decedent; qualified disclaimer of transfer of interest must be delivered not later than nine months after later of date of transfer or day on which disclaimant attains age 21. Copy of disclaimer must be delivered or mailed by registered or certified mail to personal representative of decedent. (Ala. Code § 43-8-292). Disclaimed property devolves as if disclaimant had predeceased decedent. (Ala. Code § 43-8-294). Uniform Disclaimer of Property Interests Act adopted with significant modifications. (Ala. Code § 43-8-290, et seq.).

Escheat.

Upon failure of heirs, decedent's intestate estate passes to state. (Ala. Code § 43-8-44).

13.08 ELECTION:

See topic 13.16 Wills.

13.08A ESTATES: (in property)

See category 21 Property, topic 21.16 Real Property.

13.09 [RESERVED]

13.10 EXECUTORS AND ADMINISTRATORS:

Jurisdiction.

Probate court has jurisdiction over probate of wills and administration of estates. (Ala. Code § 12-13-1).

Before final settlement, heir, devisee, legatee, distributee, executor or administrator may have administration of estate removed from probate court to circuit court without assigning any special equity. (Ala. Code § 12-11-41).

Venue.

Probate courts within their respective counties, may grant letters of administration on estate of intestate: (1) Where intestate was inhabitant of county at time of death; (2) where intestate, though not inhabitant of state, dies in or out of county, leaving assets therein; (3) where intestate, though not inhabitant of state, dies leaving no assets therein, but assets are subsequently brought into county; (4) where intestate who is inhabitant of state dies leaving no assets in county of residence and no letters of administration granted in county of residence within three months after death. (Ala. Code § 43-2-40).

Preferences in Right to Administer.

Named executor, if fit to serve, must be appointed when will has been admitted to probate. (Ala. Code § 43-2-20; 210 Ala. 502, 98 So. 474; 265 Ala. 236, 90 So.2d 262). Named executor can renounce his appointment. (Ala. Code § 43-2-25). Letters of administration in intestate's estate granted to competent and willing persons in following order: (1) Husband or widow; (2) next of kin entitled to share in distribution of estate; (3) resident creditor with largest claim; (4) county or general administrator, in counties having population of 400,000 or more or having elected county or general administrator; (5) such other person as judge of probate appoints. (Ala. Code § 43-2-42). Whole blood preferred to half blood, and when several persons equally entitled, court may grant letters to one or more. Letters to which married woman entitled may be granted to husband in her right. (Ala. Code § 43-2-44). Preference may be relinquished in same manner as executors renounce appointment (see topic 13.07 Descent and Distribution, subhead Renunciation) or lost if letters not applied for within 40 days after death known. (Ala. Code § 43-2-43).

No regular letters granted until five days have elapsed after death of intestate known. (Ala. Code § 43-2-45).

Eligibility and Competency.

No person under 19 years of age or convicted of infamous crime or deemed unfit by court, may serve as administrator. Nonresident cannot be appointed administrator except when duly qualified and acting executor or administrator of same estate under appointment of some other state or territory. (Ala. Code § 43-2-22).

Letters may be issued to married woman without consent of husband, and husband not responsible for her acts. (Ala. Code § 43-2-23).

Minor named as executor in will may join in administration with persons previously appointed when his disabilities removed. (Ala. Code § 43-2-24).

Nonresident may be granted letters testamentary under will of resident or nonresident decedent. (Ala. Code § 43-2-191). When probated in foreign state or territory, nonresident executor must file in office of judge of probate copy of will, together with certificate of judge of court in which will probated, stating that will regularly proved, established and admitted to probate, and that letters testamentary were issued thereon, before local letters testamentary will be issued. (Ala. Code § 43-2-192). Nonresident may be appointed administrator of deceased nonresident leaving assets in state if no application made by resident relative or creditor, in preference to any other person, on production and recordation of duly certified copy of letters issued by state of decedent's domicile. (Ala. Code § 43-2-193). Nonresidents seeking issuance of letters testamentary, or appointment as administrator, subject to same terms, conditions and requirements as residents, all subject to approval of judge of probate. (Ala. Code § 43-2-190 to -198).

Corporations with requisite corporate authority may act as executors or administrators. See category 2 Business Organizations, topic 2.03 Corporations, subhead Foreign Corporations.

Qualification.

Personal Representative or Special Administrator must post bond in amount equal to value of estate (exclusive of real estate) plus one year's income, unless court otherwise directs. (Ala. Code § 43-2-851).

Exemption from Bond.

Testator may by will exempt personal representative from giving bond, except where person interested in estate makes affidavit, showing affiant's interest and alleging that interest will be endangered by lack of security or where, in opinion of court, estate likely to be wasted to prejudice of any interested person. Personal representative may overcome exceptions by showing cause against application to give bond. (Ala. Code § 43-2-851).

Issuance of Letters.

See subheads Preferences in Right to Administer and Eligibility and Competency, supra.

Removal.

Administrator may be removed from office on account of his removal from state (Ala. Code § 43-2-290), but executor's removal from state not necessarily cause for removal from office (Ala. Code § 43-2-275). Either administrator or executor may be removed for: (1) Imbecility, intemperance, continued sickness rendering him incapable to discharge duties, or when reason to believe he is not suitable person to have control of estate; (2) failure to make and return inventories or accounts of sales, failure to make settlements as required by law or failure to do any act as such executor or administrator, when lawfully required by judge of probate; (3) waste, embezzlement or other maladministration; (4) using funds of estate for own benefit; (5) sentence of imprisonment or for hard labor for county for 12 months or more. (Ala. Code § 43-2-290).

Special Kinds of Administration.

Administrator ad colligendum may be appointed wherever necessary. Authority of such administrator ceases upon grant of letters testamentary or of administration, and he must render account of his proceeding, under oath, to probate court. (Ala. Code § 43-2-47).

Administrators D. B. N. and C. T. A.

If sole executor, or all executors die, resign, or are removed, probate court must grant letters of administration, with will annexed, to persons entitled under Ala. Code § 43-2-27, or if all administrators die, resign, or are removed to person entitled thereto, as in cases of intestacy. (Ala. Code § 43-2-272).

Administrator ad litem without bond may be appointed where estate of deceased person must be represented in probate or circuit court and when no executor or administrator of such estate, or such executor or administrator is adversely interested. (Ala. Code § 43-2-250).

Ancillary Administration.

See subhead Foreign Executors or Administrators, infra.

Public Administrators.

Judge of probate must appoint general administrator for county, to take charge of cases when no one else will take charge, and none other appointed by court. (Ala. Code § 43-2-170). General administrator has right to serve when no person applies for letters within 40 days of decedent's death. (Ala. Code §§ 43-2-43; 43-2-42).

Inventory and Appraisal.

Within two months after appointment, personal representative must file inventory of property owned by decedent at time of death, indicating fair market value of each item at time of death. Testator may exempt personal representative from filing inventory through express provision in will, but court may still require inventory if in its absence estate likely to be wasted to detriment of interested person. (Ala. Code § 43-2-835; see also Ala. Code § 43-2-311 to -313). Supplemental inventory also may be required. (Ala. Code § 43-2-836).

General Powers and Duties.

Personal representative has broad powers to handle assets of estate without prior court approval if acting prudently for benefit of interested persons. (Ala. Code § 43-2-843). Under broad powers granted by Ala. Code (Ala. Code § 43-2-839), personal representative of estate has power to consent to annexation of estate property without prior court approval. (957 So.2d 1096). Unless expressly authorized by will, court approval required for some actions, most notably selling or purchasing assets and mortgaging or leasing real or personal property. (Ala. Code § 43-2-844). Any fiduciary may deposit securities held in fiduciary capacity in clearing corporation. Securities so deposited may be merged and held in bulk in name of nominee of clearing corporation with other securities of same class. Ownership and other interests of securities may be transferred by entries on books of clearing house without physical transfer of certificates. (Ala. Code § 19-4-1, et seq.). Personal representative duties as fiduciary and other specific duties. (Ala. Code § 43-2-833, et seq.).

Notice of Appointment.

Personal representative must give actual notice as soon as practicable to known creditors and must give publication notice within 30 days from grant of letters. (Ala. Code § 43-2-60).

Notice to Creditors.

Personal representatives must give notice of appointment to creditors. Actual notice must be given as soon as practicable after creditor's identification known, to all creditors known or reasonably ascertainable within six months from grant of letters. Personal representatives must exercise reasonably diligent efforts to uncover reasonably ascertainable creditors. (2007 Ala. Civ. App. LEXIS 368). Publication notice when required must be given within 30 days from grant of letters. Actual notice when required must be given by first-class mail addressed to creditor's last known address or by other mechanism reasonably calculated to provide actual notice. Publication notice must be given by publishing notice once a week for three consecutive weeks in newspaper published in county in which letters were granted, or if none published there, in one published nearest to courthouse thereof or in adjoining county. (Ala. Code § 43-2-60; -61).

Presentation of Claims.

Made by filing verified claim or verified statement in office of judge of probate by whom letters granted, and must be docketed with note of date of presentation; and, if required, statement must be given by judge, showing date of presentation. (Ala. Code § 43-2-352).

All claims not presented as above provided, within six months after grant of letters, or within five months from date of first publication of notice, whichever later to occur, barred and payment prohibited, provided that creditor entitled to actual notice pursuant to Ala. Code § 43-2-61 must be allowed 30 days after notice within which to present claim. (Ala. Code § 43-2-350 to -352).

Minors and persons of unsound mind, who have no legal guardian at time of grant of letters testamentary or of administration, allowed six months after appointment of guardian or, if none appointed, six months after removal of respective disabilities, in which to present claims. (Ala. Code § 43-2-351).

Unmatured claims must be presented in same manner as matured claims. (Ala. Code § 43-2-350 to -375).

Contingent claims, including future rentals, excepted. (282 Ala. 492, 213 So.2d 225).

Debts secured by mortgage or other security can be enforced without filing claims to extent of security, but claims must be filed in order to charge general estate. (1 Ala. 708; 226 Ala. 52, 145 So. 318).

Revival of an action pending against any person at time of death, which by law survives against personal representative, by notice served on executor or administrator, within six months after grant of letters, considered as presentation of claim on which action founded. (Ala. Code § 43-2-353).

Claims of personal representative of decedent or by assignee, or transferee, or in which he has an interest, whether due or to become due, must be presented within six months after grant of letters, or within five months from date of first publication of notice, whichever later to occur, provided however, that creditor entitled to actual notice as prescribed in § 43-2-61 must be allowed 30 days after notice to present claim, by filing claims, or statement thereof verified by affidavit, in office of judge of probate. Such claims not so presented and filed barred, and payment or allowance thereof prohibited. Does not apply to claim for compensation or to sums properly disbursed in course of administration. (Ala. Code § 43-2-350).

Claims for waste and conversion against decedent as executor or administrator of any other estate enforceable against his personal representative. (Ala. Code § 43-2-112).

Proof of Claims.

Every claim or statement presented must be verified by oath of claimant or some person having knowledge of correctness thereof, that amount claimed justly due or to become due, after allowing all proper credits. Defect or insufficiency in affidavit may be supplied by amendment at any time. (Ala. Code § 43-2-352).

Form.

Following is suggested:

Form

In the Probate Court of . . . . . . County.

In the matter of

the Estate of

. . . .

No. . . . .

To the Honorable . . . .

Judge of Probate in Said County.

Statement of Claim

. . . .

Signature.

State of . . . .

. . . . County }

Before me . . . . . ., a Notary Public in and for said County in said State, personally appeared . . . . . ., who is known to me and who, being by me first duly sworn, deposes and says that he is . . . . . . of . . . . . ., the claimant, and that he has full and complete knowledge of the correctness of the above claim against the Estate of . . . . . ., deceased, and that the amount claimed is justly due (or to become due) after allowance of all proper credits.

. . . .

Affiant.

Sworn to and subscribed before me,

this . . . . . . day of . . . . . ., 20. . . . . . As

witness my hand and official seal.

. . . .

Notary Public, ... County,

State of . . . .

Approval or Rejection of Claims.

Claims filed after six months of grant of letters or after five months of first notice publication barred and payment or allowance thereof prohibited. (Ala. Code § 43-2-350). Can only pay claims against estate which are barred by statute of limitations at decedent's death if testator expressly directs in will. (Ala. Code § 43-2-373). Any claim not presented by filing verified claim or verified statement in office of judge of probate within six months after grant of letters, or within five months from date of first publication of notice, whichever later to occur, barred and payment prohibited, provided that creditor entitled to actual notice pursuant to § 43-2-61 must be allowed 30 days after notice within which to present claim. (Ala. Code § 43-2-350 to -352). Executor or administrator must render sworn list of claims six months after appointment and when thereafter required by court or by person interested in estate. (Ala. Code § 43-2-318).

Personal Representative to Give Claimant Written Notice that Claim Disputed.

Judge of court having jurisdiction of administration of estate must, on written application by either party, hear and pass on validity of claim, first giving ten days notice to interested parties; either party may appeal to circuit court for trial de novo. (Ala. Code § 43-2-354).

Presentation of claim suspends running of limitations until written notice from representative, heir or devisee disputing validity. (Ala. Code § 6-2-9).

Payment of Claims.

Claims may be paid after six months from grant of letters. (Ala. Code § 43-2-374).

Unmatured claims may be paid at any time after six months from grant of letters, provided creditor accepts, in discharge of debt, such amount as, with interest to date of maturity, equals amount of debt. (Ala. Code § 43-2-375).

Priorities.

Debts of solvent (Ala. Code § 43-2-371) and insolvent (Ala. Code § 43-2-700) estates are paid in following order: (1) Funeral expenses; (2) expenses of administration; (3) expenses during last sickness; (4) taxes prior to death; (5) debts due employees during year of decedent's death; (6) other debts. (Ala. Code § 43-2-371). No preference as to debts in same class. (Ala. Code § 43-2-372). In insolvent estates, claims of creditors of same class paid ratably. (Ala. Code § 43-2-

700).

Sales.

Unless expressly authorized by will, personal representative must obtain prior approval of court before selling asset. (Ala. Code § 43-2-844). When will does not specifically authorize personal representative to sell land, he may do so after court approval (i) to pay debts (Ala. Code § 43-2-441), (ii) to divide among heirs or devisees when adult heir or devisee consents and land cannot be equally divided (Ala. Code § 43-2-443), and (iii) for payment of pecuniary legacies when they are made charge on land (Ala. Code § 43-2-480). All property of decedent, except as otherwise provided, charged with payment of his debts, and, if necessary, may be sold for that purpose. (Ala. Code § 43-2-370).

Personal property of decedent may be sold only by order of court, on written and verified application of executor or administrator, unless power to sell conferred by will, in following cases: (1) For payment of debts; (2) to make distribution among distributees or legatees; (3) to prevent waste or destruction of property liable to waste or perish. Notice of application to sell and notice of sale must be given. (Ala. Code § 43-2-410; -417). Crops, farm products and stocks of goods may be sold at public or private sale. (Ala. Code § 43-2-418; -419; Ala. Code § 43-2-421). Return of accounts of sale must be made on oath within 30 days and must be recorded. (Ala. Code § 43-2-422).

Actions by Representative.

Civil actions commenced by special administrator not abated by appointment of executor or administrator. (Ala. Code § 43-2-132). Succeeding executor or administrator may prosecute any civil action commenced by personal representative. (Ala. Code § 43-2-133).

Actions against Representative.

No suit can be commenced against executor or administrator until six months after grant of letters unless executor or administrator has given notice of disallowance of claim. (Ala. Code § 43-2-131). Presentation of claim is condition precedent to action thereon. (24 Ala. App. 344, 135 So. 412).

Time between death and grant of letters testamentary or of administration, not exceeding six months, not to be taken as part of time limited for commencement of actions by or against executors or administrators. (Ala. Code § 6-2-14).

Allowances.

Surviving spouse and minor and dependent children entitled to reasonable family allowance for maintenance during administration. Allowance may not continue for more than one year if estate inadequate to discharge allowed claims. Allowance payable as follows: To surviving spouse, if living, for use of surviving spouse and minor children living with surviving spouse; otherwise, to children or persons having their care and custody; partially to spouse and partially to children or their guardians or persons having their care if child living apart from surviving spouse. Family allowance not chargeable against intestate share of surviving spouse or minor and dependent children. (Ala. Code § 43-8-112). Personal representative may determine allowance not to exceed $500 a month or $6,000 for one year, but personal representative or any interested person may petition court for larger or smaller allowance. (Ala. Code § 43-8-113). Homestead allowance (see category 8 Debtor and Creditor, topic 8.10 Homesteads) has priority over family allowance. (Ala. Code § 43-8-112). In addition to homestead allowance and family allowance, surviving spouse (or children if no surviving spouse) is entitled to property not exceeding $3,500 in furniture, autos, furnishings, appliances, and other personal effects (Ala. Code § 43-8-111); following exempt to resident: burial place and church pew (Ala. Code § 6-10-5); wages, salaries and other compensation for personal services exempt from levy under writs of garnishment or other process for collection of debts or judgments rendered in tort in amount equal to 75% of such wages, salaries, or other compensation (Ala. Code § 6-10-7; Ala. Code § 5-19-15); worker compensation benefits (Ala. Code § 25-5-86[2]); partner's right in property (Ala. Code § 10-8-72[b]) (repealed effective Jan. 1, 2001 and replaced by Ala. Code § 10-8A-101, et al.); and certain personal property (Ala. Code § 6-10-126). See also 15 U.S.C. § 1673(a). Exemptions granted by 11 U.S.C. § 522(d) not available.

Widow's Quarantine.

Surviving spouse may retain possession of dwelling house where surviving spouse resided with decedent, with offices and buildings appurtenant thereto and plantation connected therewith until homestead is assigned. Decedent's estate retains obligation to pay any rent due. (Ala. Code § 43-8-114).

Intermediate Accountings.

Executor or administrator must make annual settlement of administration, and may be required to make settlement at any time. (Ala. Code § 43-2-500). When executor or administrator dies, resigns, or is removed, accounting must be made within one month; when moves from state, sureties must make accounting within six months after grant of letters. (Ala. Code § 43-2-550).

Final Accounting and Settlement.

May be made at any time after six months from grant of letters if debts paid and condition of estate permits (Ala. Code § 43-2-501), on notice by publication and notice by mail to resident distributees (Ala. Code § 43-2-505). In case of intestacy, order of distribution may be made, on application of any distributee, after six months from grant of letters. (Ala. Code § 43-2-641). Representative may be compelled to settle by citation and attachment from court having jurisdiction of estate. (Ala. Code § 43-2-530).

In making settlement, executor or administrator must file sworn statement of account, together with all affidavits or other legal evidence relied upon to sustain credit side of account. (Ala. Code § 43-2-502). After notice and on day appointed, court must audit account, hear contestants and render decree. (Ala. Code § 43-2-507; Ala. Code § 43-2-511; Ala. Code § 43-2-516). When estate free from debt, and court deems best, settlement may be referred to arbitration if parties consent thereto. (Ala. Code § 43-2-600).

If administration of estate completely inactive for 20 years, and 20 years have elapsed since six months after issuance of letters testamentary or of administration, and all bequests and legacies have been payable or demandable for such time, conclusive presumption arises that final settlement made and decree to that effect may be obtained. (Ala. Code § 43-2-660 to -664).

Consent Settlement.

If all debts of estate paid and all distributees and legatees (or, in case of intestacy, all heirs and next of kin) are of age (or, if not, represented by guardian not adversely interested to ward), order of final settlement can be entered without notice or publication upon filing of verified petition of executor or administrator consented to by such distributees and legatees, or heirs and next of kin. (Ala. Code § 43-2-506).

Distribution.

Executor or administrator may, if satisfied estate solvent, make distribution, with or without order, after six months of grant of letters. (Ala. Code § 43-2-640). When under terms of will or trust indenture fiduciary to satisfy pecuniary gift by distribution of properties from corpus or estate, absent contrary instructions in governing document, fiduciary must select properties which fairly reflect net appreciation or depreciation of corpus or estate in satisfaction of such gift. (Ala.

Code § 19-3-9).

Distribution If Abroad.

Whenever upon settlement of an estate it is shown that any persons entitled to share in estate are residents and subjects of foreign country, and not represented by counsel of own employment, custodian of funds must pay over such person's share to accredited consular officer of foreign country, in whose jurisdiction court situated. (Ala. Code § 6-8-20).

Liabilities.

Except where executor or administrator fails to give notice of his appointment to creditors in order that they may present their claims, not liable beyond amount of assets which have come to his hands or which have been lost by his negligence. (Ala. Code § 43-2-62, 110). Personal representative and sureties liable to parties in interest for distribution of damages recovered on account of death of decedent. (Ala. Code § 43-2-111). If exercise of power concerning estate is improper, personal representative liable to interested persons for damage or loss resulting from breach of personal representative's fiduciary duty to same extent as trustee of express trust. (Ala. Code § 43-2-840).

Compensation of Representatives.

Personal representative entitled to reasonable compensation as may appear to court to be fair, not to exceed 2.5% of receipts and 2.5% of disbursements. Court may consider ten enumerated factors. (Ala. Code § 43-2-848). Representative entitled to expenses and attorneys' fees for any proceeding defended or prosecuted in good faith regardless of outcome. (Ala. Code § 43-2-849). Compensation paid to attorneys, accountants, investment advisors and other agents will be reviewed by court upon petition by interested person. (Ala. Code § 43-2-850). Unless expressly authorized in will, personal representative must have prior court approval before paying compensation to personal representative. (Ala. Code § 43-2-844[7]).

When Administration Unnecessary.

If value of entire estate does not exceed $25,000, or other figure set by State Finance Director, surviving spouse or, if none, distributees of estate of personal property only, may initiate proceeding for summary distribution of personal property provided certain conditions met. (Ala. Code § 43-2-690 to -696).

Small Estates.

See subhead When Administration Unnecessary, infra.

Foreign Executors or Administrators.

Letters testamentary may be issued to nonresident persons who are named as executors in wills upon same terms and requirements as required by citizens of this state. (Ala. Code § 43-2-191). Nonresident cannot be named as administrator unless he is also executor or administrator of same estate in another state. (Ala. Code § 43-2-22[a]). When nonresident dies, leaving assets in state, letters of administration granted to representative appointed by foreign court on written application with exemplified copy of will and foreign letters attached. (Ala. Code § 43-2-192; -193).

Foreign and Ancillary Administration.

After 60 days from date of death, personal representative appointed by foreign court may collect and execute release for indebtedness or bank deposit owing to deceased in Alabama, first filing in probate office exemplified copy of letters. No collection may be made, however, if grant of letters in Ala. made or pending. (Ala. Code § 43-2-195).

Foreign executor or administrator of decedent not inhabitant of this state at time of death, and who has not taken out letters in this state in accordance with above, may maintain suits and recover or receive property in this state by recording, before judgment or receipt of property, duly authenticated copy of his letters in probate office of county where suit brought or property received or by giving bond. (Ala. Code § 43-2-211). Grant of letters in this state does not bar suit by foreign administrators, but local administrator or executor may intervene. (Ala. Code § 43-2-212). See also topic 13.16 Wills, subhead Foreign Probated Wills.

Uniform Fiduciaries Act adopted with modifications. (Ala. Code § 19-1-1, et seq.).

Uniform Principal and Income Act adopted with modifications effective Jan. 1, 2001 (Ala. Code § 19-3A-101, et seq.) repealing former Act (Ala. Code § 19-3-270 to -282). See topic 13.15 Trusts.

Uniform Anatomical Gift Act.

Uniform Anatomical Gift Act of 1969 applies to gifts made prior to Jan. 1, 2004. (Ala. Code § 22-19-40, et seq.). Alabama Uniform Anatomical Gift Act governs gifts made after Jan. 1, 2004. (Ala. Code § 22-19-50, et seq.). Revised Uniform Anatomical Gift Act repeals and replaces Alabama Uniform Anatomical Gift Act effective Nov. 1, 2008. (Ala. Code § 22-19-160, et seq.).See also topic 13.16 Wills.

Beneficiaries.

Legatees and distributees, if more than sufficient assets to pay debts, after six months may apply for payment of legacies and for distribution. Legatee or distributee must give refunding bond, on which liable also for interest, before receiving payment. (Ala. Code § 43-2-580 to -586).

Insolvent Estates.

When executor or administrator satisfied that estate insolvent, must file with probate judge report to that effect, together with statements listing property, claims, heirs, and distributees, which must be verified by affidavit. (Ala. Code § 43-2-701; -703). After notice, hearing, and decree of insolvency, executor or administrator must make final settlement. Creditors, present or represented on day designated for settlement of administration of estate may nominate administrator. (Ala. Code § 43-2-720; -721). Verified claims must be filed within six months after declaration of insolvency or after accrual thereof and settlement must be made from six to 12 months from declaration of insolvency. (Ala. Code § 43-2-740). If no opposition made to claim within six months after declaration of insolvency, it must be allowed without further proof. When, prior to declaration of insolvency, claim filed in office of judge of probate, such claim considered as filed under insolvency provision. Objection to any claim within six months after declaration of insolvency. (Ala. Code § 43-2-704 to -720; Ala. Code § 43-2-740 to -747; Ala. Code § 43-2-770).

As to priorities among claims against insolvent estates, see supra, subhead Priorities.

Substitution.

No statutory provision.

13.11 FIDUCIARIES:

See topics 13.09 Executors and Administrators, Trusts; category 14 Family, topic 14.07 Guardian and Ward.

13.12 INTESTACY:

See topic 13.07 Descent and Distribution.

13.13 LIVING WILLS:

See topic 13.16 Wills.

13.14 PROOF OF CLAIMS:

See topic 13.09 Executors and Administrators; also category 5 Civil Actions and Procedure, topic 5.17 Pleading.

13.15 TRUSTS:

Alabama Uniform Trust Code adopted with modifications (Ala. Code § 19-3B-101, et seq.), operative Jan. 1, 2007.

Alabama Probate Code (Ala. Code § 43-8-1, et seq.) based on Uniform Probate Code 1974, with many and material variances from Uniform Probate Code.

Kinds.

Alabama Uniform Trust Code applies to express trusts but not constructive trusts, resulting trusts or business trusts. (Ala. Code § 19-3B-102). As to latter, see category 2 Business Organizations, topic 2.04 Joint Stock Companies.

Creation.

Uniform Trust Code provisions adopted. (Ala. Code § 19-3B-401 to -402). Trust in real property must be in writing. (Ala. Code § 19-3B-1301). Trust in personalty need not be established in writing. (Ala. Code § 19-3B-407).

Appointment of Trustee.

Uniform Trust Code provisions adopted. (Ala. Code § 19-3B-704).

Eligibility and Competency.

No specific restrictions in state version of Uniform Trust Code. Nonresident permitted to act as trustee of Alabama trust. (263 Ala. 106, 81 So.2d 610). Corporate trustees permitted to act if they meet requirements of Ala. Code § 5-11A-1, et seq.

Qualification.

Uniform Trust Code provisions adopted with modifications. (Ala. Code § 19-3B-701 to -702). Alabama bank which deposits sufficient securities with Alabama State Treasurer generally exempt from bond. (Ala. Code § 5-11A-5 and Ala. Code § 5-11A-9). When express trust created for payment or security of debts, and terms do not require trustee's bond, any interested creditor may apply to circuit court for order requiring trustee to give bond. (Ala. Code § 19-3-20).

Removal of Trustee.

Uniform Trust Code provisions adopted. (Ala. Code § 19-3B-706).

General Powers and Duties of Trustees.

Uniform Trust Code provisions adopted. (Ala. Code § 19-3B-801 to -1101).

Sales.

Unless limited by trust instrument, trustee may buy and sell property held by trust. (Ala.

Code § 19-3B-816[a][2]). Court may authorize sale to highest bidder of doubtful debts or choses in action belonging to trust estate. (Ala. Code § 19-3-39). Notice to creditors must be given before sale of real property belonging to express trust for payment or security of debts. (Ala. Code § 19-3-40).

Investments by fiduciaries regulated by Const. Art. IV § 74, as am'd by Const. Amend. 40, §§ 19-3-120 to -128, §§ 19-3B-816, -901 to -906, and §§ 19-4A-1 to -7.

Securities in Name of Nominee.

Statute explicitly provides that fiduciary may hold securities in name of nominee subject to certain conditions. (Ala. Code § 19-3B-816). Any fiduciary, absent specific provision to contrary in governing instrument or court order, may deposit securities held in fiduciary capacity in clearing corporation. (Ala. Code § 19-4-2[a]). Securities so deposited may be merged and held in bulk in name of nominee of clearing corporation with other securities of same class. (Ala. Code § 19-4-2[b]). Ownership and other interests of said securities may be transferred by entries on books of clearing house without physical transfer of certificates. (Ala. Code § 19-4-2[c]).

Bequests and Devises to Inter Vivos Trusts.

See topic 13.16 Wills, subhead Testamentary Additions to Trusts.

Accounting.

Uniform Trust Code provisions adopted. (Ala. Code § 19-3B-205 and Ala. Code § 19-3B-813[c]).

Compensation.

Uniform Trust Code provisions adopted. (Ala. Code § 19-3B-708 to -709).

Discharge.

Uniform Trust Code provisions adopted. (Ala. Code § 19-3B-705 to -707).

Uniform Common Trust Fund Act adopted with modifications. (Ala. Code § 5-12A-1 to -15).

Revised Uniform Principal and Income Act adopted with modifications. (Ala. Code § 19-3A-101 to -605). Effective Jan. 1, 2001, applicable to every trust and decedent's estate then in existence, and created thereafter. At any time prior to Jan. 1, 2003, preexisting trust or decedent's estate had right to elect to continue operating under prior law. (Ala. Code § 19-3A-604). Significant modifications: Settlor must expressly provide power for trustee to elect to adjust between principal and income. (Ala. Code § 19-3A-104). Inventory values, not market values, to determine income distributions to residuary beneficiaries after termination of prior income interest. (Ala. Code § 19-3A-202). Timber rules modified significantly. (Ala. Code § 19-3A-412).

Gifts to Minors.

See category 14 Family, topic 14.10 Infants.

Uniform Fiduciaries Act adopted with modifications. (Ala. Code § 19-1-1 to -13).

Uniform Simplification of Fiduciary Security Transfers Act repealed effective Jan. 1, 1997 by Act 1996, No. 96-742.

Accumulations.

See category 21 Property, topic 21.13 Perpetuities, subhead Accumulations.

Perpetuities.

See category 21 Property, topic 21.13 Perpetuities.

Pour Over Trusts.

See topic 13.16 Wills, subhead Bequests and Devises to Inter Vivos Trusts.

Renunciation.

Uniform Disclaimer of Property Interests Act adopted with significant modifications and applies to beneficial interests in testamentary and nontestamentary trusts. (Ala. Code § 43-8-290, et seq.). Disclaimer shall be: (1) In writing, (2) describe interest being disclaimed, (3) declare disclaimer and extent thereof, and (4) signed by disclaimant. (Ala. Code § 43-8-293). Disclaimer must be filed in probate court within nine months from when interest vests. (Ala. Code § 43-8-292).

Trust with Spendthrift Provisions.

Uniform Trust Code provisions adopted. (Ala. Code § 19-3B-502 to -506).

Business trusts provided for in §§ 19-3-60 to -67. See category 2 Business Organizations, topic 2.04 Joint Stock Companies.

Cy Pres.

Uniform Trust Code provisions adopted. (Ala. Code § 19-3B-413).

Uniform Cy Pres Act repealed effective Jan. 1, 2007 by Act 2006-216, HB49.

Trust Instruments.

All trusts concerning lands, unless implied or constructive, must be created by instrument in writing signed by creator or authorized agent or attorney (provided authorization written). (Ala. Code § 19-3B-1301).

Recordation.

Such trust instrument, when recorded in county in which lands lie, equivalent to actual notice to all persons claiming under subsequently created lien or subsequent conveyance. (Ala. Code § 35-4-257). Neither express nor implied trusts defeat title of creditor or purchaser for value without notice. (Ala. Code § 19-3B-1302).

Legal title vested in beneficiary of dry or passive trust by operation of law. (266 Ala. 471, 97 So.2d 537).

Extinguishment.

Uniform Trust Code provisions adopted. (Ala. Code § 19-3B-410 to -414).

Misapplication of Funds.

Persons making payments to trustees not responsible for application of such moneys in absence of collusion with trustee or knowledge of intended misapplication. (Ala. Code § 19-3B-1012).

Antilapse Statute applies to trusts. (Ala. Code § 19-3B-112, adopting rules of construction under Tit. 43, c. 8, Art. 8, including Ala. Code § 43-8-224).

13.16 WILLS:

Law of Intestate Succession and Wills (Ala. Code § 43-8-1 to -298), effective Jan. 1, 1983, repealed in large part prior law of wills found in tit. 43, c. 1 of Code of Alabama 1975 as amended. Uniform Probate Code 1974 edit., was used as guide for new law, but there are many material variances from Uniform Probate Code.

Person 18 years old or more who is of sound mind may make will. (Ala. Code § 43-8-130). Competency standard for making will lower than standard for appointment of conservator. To make valid will, testator need only know his estate and to whom he wishes to give property and understand he is executing will. (886 So.2d 76).

Testamentary Disposition.

No limitations as to amount or recipient of testamentary dispositions.

Execution.

Will must be in writing signed by testator or in testator’s name by some other person in testator’s presence and by his direction, and must be signed by at least two persons each of whom witnessed either signing or testator’s acknowledgment of signature or of will. (Ala. Code § 43-8-131). Person generally competent to be witness may witness will. (Ala. Code § 43-8-134[a]). Witness’s subsequent incompetency will not prevent probate of such will, if otherwise satisfactorily proved. (Ala. Code § 43-8-163). Will not invalid if signed by interested witness. (Ala. Code § 43-8-134[b]).

Attestation Clause.

No prescribed form.

Following form complies with statutory execution requirements:

Form

The foregoing instrument was signed by . . . . (or signed in the name of . . . . in the testator’s presence and at his direction) as and for his last will and we, having witnessed the signing (or the testator’s acknowledgment of the signature) (or the testator’s acknowledgment of the will), have by our signatures hereunto subscribed our names and addresses as attesting witnesses on the date last above written.

Signed (name) . . . . (address) . . . .

Signed (name) . . . . (address) . . . .

For attestation form for self-proved wills, see subhead Self-proved Wills, infra.

Holographic Wills not recognized because of statutory requirement that every will must be witnessed and attested by at least two persons. (474 So.2d 696). Will written in handwriting of testator and attested by at least two witnesses is not holographic will. See also subhead Foreign Executed Wills, infra.

Nuncupative Wills not recognized.

Revocation by subsequent will which revokes prior will or part expressly or by inconsistency. (Ala. Code § 43-8-136[a]). Entire will revoked by being burned, torn, canceled, obliterated or destroyed, with intent and for purpose of revoking same by testator or by another person in his presence by his consent and direction, and if physical act by someone other than testator, consent and direction of testator must be proved by at least two witnesses. (Ala. Code § 43-8-136[b]). Divorce or annulment after execution of will revokes any disposition or appointment of property made by will to former spouse, any provision conferring general or special power of appointment on former spouse and any nomination of former spouse as executor, trustee or guardian, unless will expressly provides otherwise; property so devised to former spouse passes, and other provisions conferring power or office on former spouse are interpreted as if spouse failed to survive decedent. (Ala. Code § 43-8-137).

Revival.

If second will which, had it remained effective at death, would have revoked first will in whole or in part, is thereafter revoked by being burned, torn, canceled, obliterated or destroyed, first will is revoked in whole or in part unless evident from circumstances of revocation of second will or from testator's contemporary or subsequent declarations in writing that testator intended first will to take effect as executed. If second will which, had it remained effective at death, would have revoked first will in whole or in part, is thereafter revoked by third will, first will is revoked in whole or in part, except to extent it appears from terms of third will that testator intended first will to take effect. (Ala. Code § 43-8-138). Provisions revoked by divorce or annulment revived by testator's remarriage to former spouse. (Ala. Code § 43-8-137).

Testamentary Gifts to Subscribing Witnesses.

Will or any provision thereof not invalid because signed by interested witness. (Ala. Code § 43-8-134[b]).

Bequests and Devises to Inter Vivos Trusts.

Pour-over trusts valid if trust identified in will, terms of trust written (other than in will) and executed before or concurrently with execution of testator's will or in last valid will of person who predeceased testator. (Ala. Code § 43-8-140). Section 1 of Uniform Testamentary Additions to Trust Act adopted; other sections not adopted. (Ala. Code § 43-8-140). Trust may be amended subsequent to date of testator's will. (Ala. Code § 43-8-140).

Testamentary Guardians.

See category 14 Family, topic 14.07 Guardian and Ward.

Probate.

Jurisdiction.

Probate court has jurisdiction to probate wills. (Ala. Code § 12-13-1[b][1]).

Venue.

Wills must be proved in probate court of county of which testator was inhabitant at time of death (Ala. Code § 43-8-162[1]) or in county designated by testator in will if testator owns property therein at time of death (Ala. Code § 43-8-162[5]). When testator not inhabitant of state, will must be proved in probate court of county in which testator died leaving assets therein (Ala. Code § 43-8-162[2]), in county in which testator left assets even though testator died in another place (Ala. Code § 43-8-162[3]), or in county into which assets of testator are brought (Ala. Code § 43-8-162[4]).

Time for Probate.

Will must be filed for probate within five years after testator's death. If testator not inhabitant of state at time of death, will may be admitted to probate in this state provided will admitted to probate in state, territory or country where testator resided within five years after testator's death, however, probate in this state not effective against persons purchasing from heirs of nonresident testator if purchase made more than five years after testator's death and prior to Feb. 24, 1959. (Ala. Code § 43-8-161).

Any will not propounded for probate within 12 months after testator's death inoperative and void as to bona fide purchasers and mortgagees, provided acquisition occurs prior to propounding of will for probate and provided purchaser lacked actual notice of will. (Ala. Code § 43-8-172).

"File for probate" language of § 43-8-161 (formerly Ala. Code § 43-1-37) denotes action beyond turning will over to clerk for recordation and involves further action evidencing intent to probate. (387 So.2d 156).

Statute of Limitations.

Statute imposing time limit for probating will considered statute of limitations; must be affirmatively pleaded. (459 So.2d 868).

Who May Apply for Probate.

Any executor, devisee or legatee named in will, or any person interested in estate, or who has custody of will may have will proved before probate court. (Ala. Code § 43-8-160). Upon request of interested person, any person having custody of will must deliver it to person able to secure probate of same or, if none known, to appropriate court. (Ala. Code § 43-8-270).

Notice.

If all next-of-kin are competent adults, notice may be waived. Surviving spouse and next of kin residents of state must be given ten days notice before application for probate heard (Ala. Code § 43-8-164), and if nonresidents or outside state, must be notified by publication or posting of application (Ala. Code § 43-8-166) or as provided in ARCP (by registered mail). Minor served by giving notice in manner required by ARCP and guardian ad litem must be appointed to represent minor in proof and probate of will. (Ala. Code § 43-8-165; ARCP 4[c]). See category 5 Civil Actions and Procedure, topic 5.20 Process.

Proof.

One or more subscribing witnesses must prove will or, if satisfactorily shown all are dead, insane or absent from state or have become incompetent since attestation, proof of handwriting of testator and at least one witness may be received. Testimony of one witness sufficient if no contest filed. (Ala. Code § 43-8-167[a]). See also subhead Self-proved Wills, infra.

Self-proved Wills.

Any will may be simultaneously executed, attested and made self-proved by acknowledgment by testator and affidavits of witnesses before authorized officer in substantially following form (Ala. Code § 43-8-132[a]):

Form

I, ..., the testator, sign my name to this instrument this . . . . day of . . . ., 20. . . ., and being first duly sworn, do hereby declare to the undersigned authority that I sign and execute this instrument as my last will and that I sign it willingly (or willingly direct another to sign for me), that I execute it as my free and voluntary act for the purposes therein expressed, and that I am 18 years of age or older, of sound mind, and under no constraint or undue influence.

. . . .

Testator

We, ... and . . . ., the witnesses, sign our names to this instrument, being first duly sworn, and do hereby declare to the undersigned authority that the testator signs and executes this instrument as his last will and that he signs it willingly (or willingly directs another to sign for him), and that each of us, in the presence and hearing of the testator, hereby signs this will as witness to the testator's signing, and that to the best of our knowledge the testator is 18 years of age or older, of sound mind and under no constraint or undue influence.

. . . .

Witness

. . . .

Witness

State of . . . .

County of . . . .

Subscribed, sworn to and acknowledged before me by . . . ., the testator, and subscribed and sworn to before me by . . . . and . . . ., witnesses, this . . . . . day of . . . ., 20. . . . . .

[SEAL]

(Signed) . . . .

. . . .

(Official Capacity of Officer)

Attested will may at any time subsequent to its execution be made self-proved by acknowledgment by testator and affidavits of witnesses before authorized officer in substantially following form (Ala. Code § 43-8-132[b]):

Form

State of . . . .

County of . . . .

We, ..., ... and . . . ., the testator and the witnesses, respectively, whose names are signed to the attached or foregoing instrument, being first duly sworn, do hereby declare to the undersigned authority that the testator signed and executed the instrument as his last will and that he had signed willingly (or willingly directed another to sign for him), and that he executed it as his free and voluntary act for the purposes therein expressed, and that each of the witnesses, in the presence and hearing of the testator, signed the will as witness and that to the best of his knowledge the testator was at that time 18 years of age or older, of sound mind and under no constraint or undue influence.

. . . .

Testator

. . . .

Witness

. . . .

Witness

Subscribed, sworn to and acknowledged before me by . . . ., the testator, and subscribed and sworn to before me by . . . . and . . . ., witnesses, this . . . . . day of . . . ., 20. . . . . .

[SEAL]

(Signed) . . . .

. . . .

(Official Capacity of Officer)

Self-proved will shall be admitted to probate without further proof of compliance with requirements for execution, unless proof of fraud or forgery affecting acknowledgment or affidavit. (Ala. Code § 43-8-132[c]).

Living Wills.

Governed by Alabama Natural Death Act. (Ala. Code § 22-8A-1; -4; -13).

Contest.

Before probate, will may be contested by interested person, or by person who would have been heir or distributee of testator if testator had died intestate, by filing written allegations that will not duly executed, testator of unsound mind or other valid objections, and such issue must be tried by jury on demand of either party. (Ala. Code § 43-8-190). Contest must be transferred to circuit court on written demand of either party made at time of filing initial pleading; appeal may be taken to supreme court within 42 days after entry of judgment in circuit court. (Ala. Code § 43-8-198). After final determination of contest, transcript and papers must be returned to probate court to be recorded. (Ala. Code § 43-8-198).

Within six months after admission of will to probate, person who has not contested will as outlined above may contest same by filing complaint in circuit court. (Ala. Code § 43-8-199). Under limited conditions, infants and persons of unsound mind granted additional time to contest will, but in no case to exceed 20 years after admission of will to probate. (Ala. Code § 43-8-201).

Legacies.

If assets of estate sufficient to pay debts of decedent, legatee may compel payment of legacy six months after grant of letters. (Ala. Code § 43-2-580 to -586).

Abatement.

Absent express order of abatement in will, shares of distributees abate, without preference as between real and personal property, as follows: (1) Property not disposed of by will; (2) residuary devises; (3) general devises; (4) specific devises. (Ala. Code § 43-8-76[a]).

Ademption.

Specific devise of securities, rather than equivalent value, entitles specific devisee to: (1) As much of devised securities as is part of estate at death; (2) additional securities of same entity derived from specifically devised securities owned by testator through action initiated by entity; (3) securities of another entity derived from specifically devised securities owned by testator as result of merger, consolidation, etc.; and (4) additional securities of entity owned by testator as result of plan of reinvestment of regulated investment company. (Ala. Code § 43-8-226). Specific devisee has right to remaining specifically devised property and: (1) Any balance of purchase price (and security interest) owing from purchaser to testator at death from sale of property; (2) any amount of condemnation award for taking of property unpaid at death; (3) any proceeds unpaid at death on fire or casualty insurance on property; and (4) property owned by testator at death as result of foreclosure, or obtained in lieu of foreclosure, of security for specifically devised obligation. (Ala. Code § 43-8-227). Specific devise passes subject to mortgage interest, regardless of general directive in will to pay debts. (Ala. Code § 43-8-228).

Satisfaction.

Property which testator gave in lifetime to person is treated as satisfaction of devise, only if: (1) Will provides for such deduction; (2) testator declares in contemporaneous writing that gift to be deducted; or (3) devisee acknowledges in writing that gift in satisfaction. (Ala. Code § 43-8-231).

All of foregoing applies unless contrary intent of testator indicated in will. (Ala. Code § 43-8-222).

Unclaimed Legacies.

Uniform Disposition of Unclaimed Property Act repealed by Act 2004-440 § 2, effective May 12, 2004. (formerly Ala. Code § 35-12-20, -50).

Lapse.

Any person who fails to survive decedent five days deemed to have predeceased decedent for purposes of homestead allowance, exempt property and intestate succession. (Ala. Code § 43-8-43). Devisee who fails to survive testator five days treated as if predeceased decedent, unless will contains language dealing explicitly with simultaneous deaths, deaths in common disaster or requirement that devisee survive testator or survive for stated period. (Ala. Code § 43-8-220).

If devisee grandparent or lineal descendant of grandparent of testator is dead at time of execution of will, fails to survive testator or is treated as if predeceased testator, issue of deceased devisee who survive testator five days take in place of deceased devisee; such issue take in equal shares if of same degree of kinship to devisee, but by representation if of unequal degree. One who would have been devisee under class gift had he survived testator treated as devisee whether he died before or after execution of will. (Ala. Code § 43-8-224).

Except as provided in § 43-8-224, if devise, other than residuary devise, fails, it becomes part of residue. (Ala. Code § 43-8-225[a]). Except as provided in § 43-8-224, if residue devised to two or more persons and share of one residuary devisee fails, his share passes to other residuary devisees ratably. (Ala. Code § 43-8-225[b]).

Children.

Any surviving child born or adopted after execution of will and not provided for in will takes intestate share unless: (1) Omission intentional; (2) estate devised substantially to other parent of omitted child and at time will executed testator had other children; or (3) testator provided for omitted child outside will with intent transfer be in lieu of testamentary provision. (Ala. Code § 43-8-91[a]). Living child omitted because believed dead takes intestate share. (Ala. Code § 43-8-91[b]).

Election.

Surviving spouse of resident decedent has right to take elective share which is lesser of: (1) All of decedent's estate reduced by value of separate estate of surviving spouse; or (2) one-third of decedent's estate. (Ala. Code § 43-8-70[a]). "Separate estate" of surviving spouse defined to include all property owned by spouse after death of decedent, all legal and equitable interests spouse acquired by surviving decedent and all income and beneficial interests under trust, proceeds of insurance and under any employee pension, stock bonus, etc. plans. (Ala. Code § 43-8-70[b]). Election must be filed within later of six months after decedent's death or probate of decedent's will. (Ala. Code § 43-8-73[a]). Election personal to surviving spouse, but guardian, custodian, curator or conservator appointed for surviving spouse may exercise such election upon order of court if exercise is necessary to provide adequate support for spouse during probable life expectancy. (Ala. Code § 43-8-71). Election presumed to be in lieu of dower or curtesy. (758 So.2d 533). Values of property included in estate which pass, have passed or would have passed to surviving spouse but renounced first applied to satisfy elective share, and liability for balance of elective share equitably apportioned ratably among recipients of estate. (Ala. Code § 43-8-75).

Surviving spouse entitled to homestead allowance, exempt property and family allowance, whether or not right of election exercised. (Ala. Code § 43-8-74). Spouse may waive right of election and rights to homestead allowance, exempt property and family allowance. (Ala. Code § 43-8-72).

Contribution.

Share of pretermitted child satisfied in same order as shares of distributees abate (Ala. Code § 43-8-91[c]), and share of omitted spouse satisfied in same manner (Ala. Code § 43-8-90[b]). Liability for any balance of elective share not satisfied by values of property otherwise passing to spouse, as determined under § 43-8-75(a), equitably apportioned ratably among recipients of estate. (Ala. Code § 43-8-75[b]). See subhead Election, supra.

Renunciation.

Renunciation of succession must comply with Ala. Uniform Disclaimer of Property Interests Act (Ala. Code § 43-8-290 to -298) or as otherwise provided by law (Ala. Code § 43-8-251).

Foreign Executed Wills.

Written will valid if executed in compliance with Ala. law, with law at time of execution of place where will executed, with law of place where at time of execution or at time of death testator is domiciled, has place of abode or is national. (Ala. Code § 43-8-135). Not condition precedent to probate of will of nonresident that such will first be probated in state of testator's domicile. (Ala. Code § 43-8-162; 198 Ala. 137, 73 So. 442).

Foreign Probated Wills.

If testator nonresident and will duly proved in other U.S. jurisdiction, it may be admitted to probate in proper court of Ala. upon presentation of exemplified copy of will and probate thereof to probate judge. If will admitted to probate outside of U.S. and undertakes to dispose of real or personal property situated in Ala., such will must be probated in same manner as will of resident and is subject to contest. (Ala. Code § 43-8-175). Letters testamentary must be issued to nonresident executor of will probated in another state or territory if there is to be administration of assets in Ala. (Ala. Code § 43-2-192). See also topic 13.09 Executors and Administrators, subhead Foreign and Ancillary Administration.

Simultaneous Death.

See topic 13.05 Death, subhead Survivorship.

Testamentary Trusts.

See topic 13.15 Trusts.

Uniform Anatomical Gift Act of 1969 and 1987 adopted. (Ala. Code § 22-19-40 to -47; Ala. Code § 22-19-50 to -59.7). Such gift may be made by filing affidavit and so indicating specific gift on drivers' license. (Ala. Code § 22-19-60; Ala. Code § 22-19-52[c]).

Incorporation by Reference and Events of Independent Significance.

Testator may incorporate by reference any writing in existence when will executed if writing identified and intent manifested in language of will. (Ala. Code § 43-8-139). Will may dispose of property by reference to acts and events which have significance apart from effect upon dispositions made by will, whether they occur before or after execution of will or testator's death. (Ala. Code § 43-8-141).

Testamentary Additions to Trusts.

§ 1 of Uniform Testamentary Additions to Trusts Act adopted. (Ala. Code § 43-8-140).

Record.

If it appears on proof taken that will was duly executed, testimony of witnesses must be reduced to writing, signed by witnesses and recorded with will. (Ala. Code § 43-8-169). Every will so proved must have certificate endorsed thereon, and every will so proved or endorsed, or copy thereof transcribed from record and certified by probate judge, may be read in evidence in any court of state without further proof. (Ala. Code § 43-8-170; -171).

Omitted Spouse.

Surviving spouse not provided for in will who married testator after execution of will, takes intestate share unless: (1) Omission intentional; or (2) testator provided for omitted spouse outside will with intent transfer be in lieu of testamentary provision. (Ala. Code § 43-8-90[a]). See also subhead Election, infra.

Contracts Concerning Succession.

Contract to make will or devise, not to revoke will or devise or to die intestate, executed after Jan. 1, 1983, effective only if: (1) Will sets forth material provisions of contract; (2) express reference in will to contract and extrinsic evidence proving terms of contract; or (3) writing signed by decedent evidences such contract. Execution of joint or mutual wills does not create presumption of contract not to revoke will. (Ala. Code § 43-8-250).

14 FAMILY

14.01 ADOPTION:

Any adult person or husband and wife jointly who are adults may petition to adopt. (Ala. Code § 26-10A-5). Any minor may be adopted. (Ala. Code § 26-10A-6). Adult may be adopted if adoptee: (1) Is totally and permanently disabled; (2) is mentally retarded; (3) consents in writing to adoption and related in any degree of kinship or is stepchild by marriage; or (4) consents in writing to adoption by adult man and woman who are husband and wife. (Ala. Code § 26-10A-6). No uniform act adopted.

Consent Required.

Following persons must consent to adoption or relinquishment for adoption: (a) Adoptee if 14 or older, except where court finds adoptee lacks mental capacity to give consent; (b) adoptee's mother; (c) adoptee's presumed father, regardless of paternity, if certain conditions are met; (d) agency to which adoptee has been relinquished or which holds permanent custody, unless court finds adoption is in best interest of child and agency has unreasonably withheld consent; (e) putative father if made known by mother or otherwise, provided he complies with Ala. Code § 26-10C-1 and responds within 30 days of notice. (Ala. Code § 26-10A-7). Written consent is required to adopt adult. (Ala. Code § 26-10A-7[b]). Consent may be implied by actions or by failing to comply with Ala. Code § 26-10C-1. (Ala. Code § 26-10A-9). Minor parent cannot consent unless guardian ad litem appointed. (Ala. Code § 26-10A-8). Consent not required of person whose parental rights have been terminated by Alabama Child Protection Act. (Ala. Code § 26-10A-10; Ala. Code § 26-18-1 to -10). Consent not required from parent adjudged incompetent, parent who has relinquished minor child to department of human resources or licensed child placing agency, parent presumed deceased, alleged father who has signed written statement denying paternity, natural father when natural mother indicates natural father is unknown, unless he is otherwise known to court. (Ala. Code § 26-10A-10). Statute specifies form to be used for consent or relinquishment of minor for adoption. (Ala. Code § 26-10A-11; -12). Consents must be filed with court in which petition for adoption pending before final decree of adoption entered. (Ala. Code § 26-10A-13). Consent may be withdrawn for any reason within five days after latter of filing or birth of child. (Ala. Code § 26-10A-13). Consent may be withdrawn if reasonable and in best interest of child, within 14 days after latter of filing or birth of child (Ala. Code § 26-10A-13), or any time before final decree if consent obtained by fraud, duress, mistake, or undue influence (Ala. Code § 26-10A-14). Consent not challengeable on any ground after one year from final decree, except in cases of kidnapping. (Ala. Code § 26-10A-14; -25[d]). Statute specifies form to be used for withdrawal of consent. (Ala. Code § 26-10A-14).

Conditions Precedent.

Except as specifically provided by statute, court may not grant final decree of adoption unless it finds by clear and convincing evidence that: (a) Adoptee has been in actual physical custody of petitioners for 60 days; (b) all necessary consents, relinquishments, terminations have been obtained; (c) service has been made or dispensed with as to all persons entitled to notice under Ala. Code § 26-10A-17; (d) petitioners have prevailed in all contests brought under Ala. Code § 26-10A-24; (e) petitioners would make suitable parents; (f) adoption in best interests of adoptee; (g) statute complied with in all respects. (Ala. Code § 26-10A-25[b]).

Jurisdiction.

Probate court has original jurisdiction over proceedings brought under statute. (Ala. Code § 26-10A-3). If party whose consent required does not consent, case should be transferred to juvenile court for limited purpose of termination of parental rights. (Ala. Code § 26-10A-3). Statute provides for appeals to Ala. Ct. of Civ. App. (Ala. Code § 26-10A-26).

Venue.

Petitions may be filed in probate court of county in which minor or adult resides, petitioner resides or agency or institution having guardianship or custody is located. (Ala. Code § 26-10A-4).

Petition.

Must be filed within 30 days after minor placed with prospective adoptive parents unless minor in custody of Department of Human Resources or licensed child placing agency, unless good cause shown. (Ala. Code § 26-10A-16). Petition must be signed and verified by each petitioner and must state: (1) Full name, age, and place of residence of each petitioner, and place and date of marriage; (2) date and birth place of adoptee; (3) birth name and adoptee's proposed new name; (4) place of residence of adoptee now and after adoption; (5) statement of petitioner's fitness to adopt; (6) disclosure of prior court orders which affect custody, visitation, or access to adoptee; (7) relationship of each petitioner to adoptee; (8) name and address of placing agency; (9) name and address of all persons who are required to give consent. (Ala. Code § 26-10A-16).

Preplacement investigation of petitioners must occur before adoption decreed. (Ala. Code § 26-10A-19).

Proceedings.

Upon filing of motion contesting adoption, hearing must be held. (Ala. Code § 26-10A-24). Dispositional hearing no later than 90 days after filing of petition. (Ala. Code § 26-10A-25).

Decree.

Final decree of adoption may not be attacked collaterally, except in cases of fraud or where adoptee has been kidnapped, after expiration of one year from entry of final decree and after all appeals. (Ala. Code § 26-10A-25[d]).

Name.

Petitioner designates adoptee's name. (Ala. Code § 26-10A-29[a]). Court's final decree of adoption shall include new name of adoptee and shall not include any other name by which adoptee has been known or names of natural or presumed parents. (Ala. Code § 26-10A-25[c]). Petitioner shall receive new birth certificate in new name with names of adopting parents. (Ala. Code § 26-10A-32). After issuance of new birth certificate, original certificate not subject to inspection except for good cause shown. (Ala. Code § 26-10A-31; -32).

Effect of Adoption.

Upon final decree of adoption, natural parents, except for natural parent who is spouse of adopting parent, are relieved of all parental duties and rights. (Ala. Code § 26-10A-29[b]). After adoption, adoptee treated as natural child of adopting parents and has all rights of, and subject to all duties, arising from that relationship, including right of inheritance. (Ala. Code § 26-10A-29[a]; Ala. Code § 43-8-48). Person related to decedent through two lines of relationship entitled only to single share based on relationship entitling him to larger share. (Ala. Code § 43-8-58). Decree of adoption must be final for adopted person to have same rights as natural child inter sese under descent and distribution statutes. (283 Ala. 257, 215 So.2d 585).

Setting Aside Adoption.

Final decree of adoption may not be collaterally attacked, except in cases of fraud or where adoptee has been kidnapped, after expiration of one year from entry of final decree and after all appeals. (Ala. Code § 26-10A-25[d]). Action to set aside final decree of adoption must be commenced within one year from entry of final decree and after any appeal. (Ala. Code § 26-10A-25[d]).

Confidentiality of Records.

Upon entry of final decree, records are sealed and open to inspection only upon order of court for good cause shown. (Ala. Code § 26-10A-31). Natural parents or adoptee 19 or older may obtain nonidentifying information. (Ala. Code § 26-10A-31[g], [i]). Adoptee 19 or older may petition for identifying information. (Ala. Code § 26-10A-31[j]).

Putative Father Registry.

Department of Human Resources must establish putative father registry which must record information of certain persons under certain conditions. (Ala. Code § 26-10C-1[a]). If clerk of court determines man to be father of child born out of wedlock, clerk must immediately notify Department of Human Resources. (Ala. Code § 26-10C-1[b]). Statute specifies what must be contained in notice of intent or acknowledgment of paternity. (Ala. Code § 26-10C-1[c]; Ala. Code § 26-10C-1[g]). Person may revoke his notice of intent to claim paternity. (Ala. Code § 26-10C-1[d]). Department of Human Resources must provide registry information to any court that requests such information. No other person may receive information unless court orders it for good cause. Under certain circumstances, Department of Human Resources shall forward notice of intent to claim paternity to courts in which adoption proceedings pending. Court in which proceeding pending must then notify putative father of such proceeding and biological mother of putative father's registry. (Ala. Code § 26-10C-1[f]). Ala. Code § 26-10C-1(g) is exclusive procedure available for any person who claims to be natural father of child born out of wedlock on or after Jan. 1, 1997, to entitle that person to notice of, and opportunity to contest, any adoption proceeding filed and pending on or after Jan. 1, 1997. (Ala. Code § 26-10C-1[i]). Other than those exceptions, registry shall be kept confidential. (Ala. Code § 26-10C-1[h]). If person claiming to be natural father of child fails to file notice of intent to claim paternity prior to within 30 days of birth of child born out of wedlock, he is deemed to have given irrevocable implied consent in any adoption proceeding. (Ala. Code § 26-10C-1[i]). Knowingly or intentionally registering false information is Class A misdemeanor. Knowingly or intentionally releasing confidential information in violation of Section Class A misdemeanor unless Department of Human Resources acting in good faith with reasonable diligence. (Ala. Code § 26-10C-1[j]). This chapter became effective Jan. 1, 1997. (Ala. Code § 26-10C-2).

Adoption by Relatives.

Statute provides for adoption by relative or stepparent in certain circumstances. (Ala. Code § 26-10A-27; -28). In case of adoption by relative or stepparent, natural grandparents may obtain visitation. (Ala. Code § 26-10A-30).

Fees and Charges.

No person or legal entity may accept any fee whatsoever for bringing adopting parent or parents together with adoptee or natural parents. (Ala. Code § 26-10A-23[a]). Violation punishable under § 26-10A-33. Court will approve all reasonable expense incurred by petitioners or persons acting in their behalf. (Ala. Code § 26-10A-23[b]). Request for reimbursement must be in writing and filed with court. (Ala. Code § 26-10A-23[b]). In addition, petitioners must file statement that is full accounting of all disbursements paid in adoption. (Ala. Code § 26-10A-23[d]). Paying or offering money or anything of value to natural parents in violation of Ala. Code § 26-10A-34 prohibited; offering money is Class A Misdemeanor; paying or receiving money is Class C felony. (Ala. Code § 26-10A-34). Section not intended to apply to surrogate motherhood. (Ala. Code § 26-10A-34[c]).

Advertisement for offering adoption and placement services prohibited. Violation is Class A Misdemeanor. (Ala. Code § 26-10A-36).

14.02 ALIMONY:

See topic 14.06 Divorce.

14.03 COMMUNITY PROPERTY:

See topics 14.06 Divorce; 14.09 Husband and Wife.

14.04 DESERTION:

See topics 14.06 Divorce; 14.09 Husband and Wife.

14.05 DISSOLUTION OF MARRIAGE:

See topic 14.06 Divorce.

14.06 DIVORCE:

This subject is governed by Ala. Code § 30-2-1 to -12, -40, -50, -51, -52, -54, -55; Ala. Code § 30-3-1.

Grounds for Absolute Divorce.

For either party, incapacity at time of marriage, adultery, physical violence, abandonment for one year, imprisonment in penitentiary for two years under sentence of seven years or more, crime against nature before or after marriage, for becoming addicted after marriage to habitual drunkenness or to habitual use of certain drugs, five successive years in mental hospital after marriage, spouse so confined being hopelessly and incurably insane when bill filed, irretrievable breakdown of marriage so that further attempts at reconciliation impractical or futile and not in best interest of parties or family, or final decree of divorce from bed and board or final decree of separate maintenance in effect for more than two years, or complete incompatibility of temperament of such nature that parties can no longer live together. (Ala. Code § 30-2-1,-2). Husband may obtain divorce on ground of wife's pregnancy at time of marriage without his knowledge or agency. (Ala. Code § 30-2-1). Wife may obtain divorce for nonsupport for two years. (Ala. Code § 30-2-1).

Grounds for Legal Separation.

Legal separation may be decreed if certain conditions met, including jurisdictional requirements, finding that marriage irretrievably broken or complete incompatibility of temperament exists or one or both parties desires to live separate, and child custody taken into consideration. (Ala. Code § 30-2-40).

Residence Requirements.

Alabama courts do not have jurisdiction to grant divorce if neither party domiciled in Alabama; personal appearance by both parties does not confer jurisdiction to grant divorce. (251 Ala. 73, 36 So.2d 236; 252 Ala. 103, 39 So.2d 406). Domicile defined as usual. (258 Ala. 423, 63 So.2d 364). Plaintiff must have resided in state at least six months if defendant is nonresident. (Ala. Code § 30-2-5). Jurisdiction over marriage res is conferred upon court by proof of domicile of plaintiff where defendant is nonresident (256 Ala. 629, 56 So.2d 344) or by proof of domicile of defendant where plaintiff is nonresident (252 Ala. 103, 39 So.2d 406). Wife seeking divorce on ground of nonsupport must have resided in state for two years and husband and wife must have been separated during such time. (Ala. Code § 30-2-1).

Complaint must allege that necessary residence existed immediately prior to filing of complaint and such allegation must be proved, failing in which renders court without jurisdiction and decree of divorce void even on collateral attack. (Ala. Code § 30-2-5; 173 Ala. 106, 55 So. 632; 191 Ala. 305, 68 So. 143). Court can sua sponte declare divorce invalid on ground it was obtained by fraud on court, if complaint falsely alleged necessary residence and both parties are physically present before court. (272 Ala. 67, 128 So.2d 725; noted 75 Har. L. Rev. 568). Where nonresident procured divorce by fraud and later sought bill of review to set aside divorce, bill was not subject to demurrer on grounds of laches, "clean hands" or estoppel. (276 Ala. 303, 161 So.2d 588).

Jurisdiction.

Circuit court has jurisdiction of divorce actions. (Ala. Code § 30-2-1).

Venue.

County of defendant's residence; county where parties resided at time of separation; or county of plaintiff's residence if nonresident defendant. (Ala. Code § 30-2-4). Venue for all proceedings to modify child custody, visitation rights or child support will lie in: (1) Original circuit court; or (2) county wherein custodial parent and child or children have resided for three consecutive years prior to institution of action to modify prior circuit court decree. Current custodial parent shall choose venue regardless of who commences action. (Ala. Code § 30-3-5).

Process.

Personal service required, but service by publication may be had on resident defendant who avoids service. (Ala. Code § 30-2-8; ARCP 4 to 4.3). Publication must be made both in forum and at defendant's last known county of residence when avoidance is basis for publication. (ARCP 4 to 4.3[d][2]).

Pleading.

Cause for which divorce sought must be alleged in complaint. (Ala. Code § 30-2-8).

Practice.

As in other actions formerly cognizable in equity, but answer of defendant cannot be considered as evidence. (Ala. Code § 30-2-7).

Judgment or Decree.

Court must not enter final judgment of divorce until after expiration of 30 days from date of filing of summons and complaint. (Ala. Code § 30-2-8.1).

Temporary Alimony.

Pending action for divorce, court may make allowance for support of either spouse, suitable to spouse's estate and condition in life of parties, for period of time not longer than necessary for prosecution of complaint for divorce. (Ala. Code § 30-2-50).

Allowance for Prosecution of Suit.

Pending suit for divorce, court may make allowance for support of either spouse from estate of other spouse, suitable to spouse's estate and condition in life of parties, for period of time not longer than necessary for prosecution of suit. (Ala. Code § 30-2-50).

Permanent Alimony.

If either spouse has no separate estate, or if it be insufficient for maintenance, upon granting divorce, court may, at its discretion, decree either spouse allowance out of estate of other spouse. (Ala. Code § 30-2-51). Property acquired before marriage or by gift or inheritance may not be considered, unless such property or income therefrom has been used regularly for common benefit of both parties during marriage. (Ala. Code § 30-2-51). Present value of any future or current retirement benefits may be considered at court's discretion and under certain circumstances. (Ala. Code § 30-2-51[b]). If retirement benefits are distributed as alimony, amount is not payable until covered spouse begins to receive benefits. (Ala. Code § 30-2-51[c]). Alimony may be terminated upon proof that spouse receiving alimony has remarried or is living openly or cohabiting with member of opposite sex. (Ala. Code § 30-2-55; Const. Amend. 390). Factors considered in determining amount of alimony (and in making equitable division of property) include earning ability of parties, future prospects, age, health, duration of marriage, accustomed standard of living, source, value and type of property, and conduct of parties as related to marriage. (473 So.2d 1091).

If divorce granted at suit of either spouse for misconduct of other court may, in its discretion, enter order for allowance to either spouse from estate of other spouse, and such misconduct may be considered in determining amount. In such cases, any property acquired prior to marriage or by gift or inheritance may not be considered in determining amount. (Ala. Code § 30-2-52).

Foregoing rules apply only when suit for divorce a vinculo (214 Ala. 219, 106 So. 866), but similar results reached on equity principles in suits for divorce a mensa (115 Ala. 474, 22 So. 448; 214 Ala. 219, 106 So. 866).

Wife may sue for alimony without divorce. (190 Ala. 527, 67 So. 400).

Alimony must be allowed, if at all, at time of or before final decree. (98 Ala. 373, 13 So. 412). Court may adjudge spouse failing to pay alimony, in accordance with decree, guilty of contempt. (ARCP 70).

Division of Property of Spouses.

In court's discretion, separate property of one spouse may be ordered paid for support of other spouse provided that such separate property not acquired prior to marriage or by inheritance or gift. (Ala. Code § 30-2-51). Divorce decree silent on property held jointly with right of survivorship does not automatically destroy existing survivorship provisions. (472 So.2d 630). Any property used regularly for common benefit of parties during marriage may be awarded in property settlement. (Ala. Code § 30-2-51; 377 So.2d 141). Divorced parents of minor child share equally in insurance proceeds owing to deceased child in wrongful death action. (952 So.2d 1107).

Change of Wife's Name.

Court may in its discretion, enjoin divorced wife from use of given name or initials of divorced husband. (Ala. Code § 30-2-11).

Custody of Children.

Court may, in its discretion, award custody of children to either parent. (Ala. Code § 30-3-1). Court may also award joint custody if it is in best interests of child. (Ala. Code § 30-3-150 to -157). Courts may resolve educational disputes among divorced custodial parents. (964 So.2d 24). In case of abandonment of husband by wife, husband, if suitable, entitled to custody of children after they reach seven years of age. (Ala. Code § 30-3-1). Spouse may be awarded custody of children even though he or she is neither natural nor adoptive parent. (52 Ala. App. 539, 295 So.2d 260). Decree awarding custody of children may be modified at any time. (176 Ala. 299, 58 So. 195). Noncustodial parent need not prove overwhelming necessity to support change in child custody order. (19 So.3d 886).

Rebuttable presumption that child should not be in custody of parent who perpetrates domestic violence. (Ala. Code § 30-3-131 to -133). Visitation by parent committing domestic violence only if adequate provision for safety of child or parent-victim. (Ala. Code § 30-3-135).

In custody case, court may in its discretion, award visitation rights to grandparents of such children. (Ala. Code § 30-3-4.1). Statute deemed unconstitutional. (812 So.2d 361; 841 So.2d 1252). Great-grandparents not entitled to visitation rights under Ala. Code § 30-3-41. (962 So.2d 864).

Uniform Child Custody Jurisdiction and Enforcement Act adopted. (Ala. Code § 30-3B-101, et seq.). Rebuttable presumption that change of principal residence of child is not in best interest of child, contained in such Act, is not applicable to initial custody determination. (18 So.3d 393).

Child of parties to divorce case may testify. (461 So.2d 1332).

Alabama Parent-Child Relationship Protection Act. (Ala. Code § 30-3-160 to 169.1).

Allowance for Support of Children.

Court may make orders respecting support of children upon granting divorce and pending action. (Ala. Code § 30-3-1). Parents cannot modify previous child support judgment by mutual agreement without approval of trial court. (588 So.2d 476). In determining child support, court must apply Rule 32 of Alabama Rules of Judicial Administration. (Ala. Code § 30-3-155). Parent may seek withholding order to collect support. (Ala. Code § 30-3-60).

Remarriage.

Neither party may remarry (except each other) within 60 days after decree or pending appeal. (Ala. Code § 30-2-10). Then, either party may remarry unless decree expressly disallows right of guilty party, in which case guilty party may not remarry without permission of court. (Ala. Code § 30-2-8,-10).

Separation Agreements.

Enforced when sufficient consideration, fairness, and absence of coercion. (435 So.2d 1292).

Annulment of Marriage.

See topic 14.11 Marriage.

Antenuptial Contracts.

Enforced in divorce proceeding when sufficient evidence to establish adequate consideration and entire transaction fair, just and equitable from point of view of party seeking to avoid operation. (519 So.2d 1347). See topic 14.09 Husband and Wife.

Uniform Interstate Family Support Act adopted. (Ala. Code § 30-3A-101, et seq.).

Defenses.

Condonation or husband’s knowledge or connivance is defense in bar, when divorce is sought on ground of adultery. (Ala. Code § 30-2-3).

Appeal from decree of divorce must be taken within 42 days (ARAP 4[a]) and decree is suspended pending appeal.

14.07 [RESERVED]

14.08 GUARDIAN AND WARD:

Uniform Guardianship and Protective Proceedings Act adopted. (Ala. Code § 26-2A-1 et seq.). Probate court has jurisdiction over guardianship and conservatorship proceedings (Ala. Code § 26-2A-31; Ala. Code § 26-2A-20[3]), but administration may be removed to circuit court (Ala. Code § 26-2-2). Venue lies where minor or incapacitated person resides or is present at time proceedings commence (Ala. Code § 26-2A-74); and for incapacitated person, where person resides or is present or institutionalized at time proceedings commence (Ala. Code § 26-2A-101).

Selection of Guardian.

If two or more appointments for guardianship of minor, last in time has priority. (Ala. Code § 26-2A-71). Court appointing guardian for minor 14 years or older must choose minor's nominee unless court finds appointment contrary to child's best interest. (Ala. Code § 26-2A-76). For incapacitated person, court must appoint person designated in most recent durable power of attorney unless good cause dictates otherwise. (Ala. Code § 26-2A-104). If no durable power of attorney, court follows statutory priorities, where spouse has highest priority. (Ala. Code § 26-2A-104).

Eligibility and Competency.

Court has discretion to appoint suitable person, such as spouse, adult child, parent, relative, with whom incapacitated person resided six months prior to petition, or person nominated by one caring for incapacitated person. (Ala. Code § 26-2A-104).

Appointment of Guardian.

Guardian may be appointed by parent in will or by other acknowledged or witnessed writing, by court. (Ala. Code § 26-2A-71, -73). Minor 14 years or older may block parental appointment. (Ala. Code § 26-2A-72). Guardian for incompetent person may be appointed by parents, spouse or court. (Ala. Code § 26-2A-100).

Qualification.

Court must appoint as guardian person it determines in best interest of child. (Ala. Code § 26-2A-76). Conservator of estate must post bond in amount of value of estate plus one year's expected income. (Ala. Code § 26-2A-139). Parent may nominate conservator in will and waive bond. (Id.).

Inventory.

Conservator must file inventory of entire estate subject to control within 90 days following appointment. (Ala. Code § 26-2A-146).

Powers and Duties.

Guardian generally has powers and responsibilities of parent regarding health, support, education and maintenance. (Ala. Code § 26-2A-78).

Investments.

Conservator held to standard of care applicable to trustees (i.e., standards observed by prudent person dealing with property of another). (Ala. Code § 26-2A-145).

Securities in Name of Nominee.

See category 13 Estates and Trusts, topic 13.15 Trusts, subheads Securities in Name of Nominee, and Securities.

Real Estate.

With prior court approval, conservator may dispose of real property for cash or credit at private or public sale and manage, develop, improve, partition or change character of estate real property. (Ala. Code § 26-2A-152[d]).

Liabilities of Guardian.

Not liable to third parties for acts of ward. (Ala. Code § 26-2A-78[a], -108).

Accounts.

Conservator must give accounting to court at least once every three years and upon termination. (Ala. Code § 26-2A-147).

Termination of Guardianships.

Upon minor's death, adoption, marriage, or attainment of majority by ward, or by resignation or by removal of guardian. (Ala. Code § 26-2A-79). Resignation not effective until approved by court. (Ala. Code § 26-2A-79).

Insane Persons.

Guardian ad litem must be appointed to defend person alleged to be of unsound mind. (Ala. Code § 26-2-46).

Foreign Guardians.

Upon proof of appointment and delivery of affidavit, fiduciary appointed by state of residence of protected person may receive debts, property, stock or chose in action belonging to protected person if no proceeding pending in this state. (Ala. Code § 26-2A-159). Foreign conservator may file copies of letters of appointment and bond in county where property of protected person located and thereafter exercise powers of conservator appointed. (Ala. Code § 26-2A-160).

Gifts to Minors.

See topic 14.10 Infants.

Uniform Fiduciaries Act adopted. (Ala. Code § 19-1-1, et seq.).

Uniform Simplification of Fiduciary Security Transfers Act.

(Ala. Code § 8-6-70 to -80, repealed 1996, Act 96-742).

Foreign Conservators.

Must file letters of appointment and bond and has same powers as domestic conservator. (Ala. Code § 26-2A-160).

Removal of Property.

If property of nonresident minor to be removed from state, application for removal must be: (1) In writing; (2) signed by person having legal custody; (3) verified by affidavit; and (4) accompanied by transcript, duly certified, of appointment of conservator by court of competent jurisdiction in state of person having legal custody, and of bond of such conservator with sureties approved by such court. (Ala. Code § 26-8-41). If such conservator corporate fiduciary, not required by laws of state wherein appointed to give bond, certificate from appointing authority may be filed in lieu of bond. (Ala. Code § 26-8-41).

Veterans' Guardianship.

Uniform Veterans' Guardianship Act adopted. (Ala. Code § 26-9-1, et seq.).

Developmentally Disabled Persons.

Subject to certain specified limitations, probate court has authority and duty to appoint suitable person or agency as guardian for person whose general intellectual functioning or adaptive behavior impaired and expected to continue to be impaired indefinitely by reason of mental retardation, cerebral palsy, epilepsy, autism, or any similar condition, where condition constitutes substantial burden to impaired person's ability to perform normally in society. (Ala.

Code § 12-13-21). Petition for appointment of such guardian may be filed by any interested person. (Ala. Code § 12-13-21).

Curators.

§§ 26-7A-1 to -17, repealed 1995, Act 95-751.

14.09 HUSBAND AND WIFE:

Husband not liable for his wife's torts, debts or contracts, whether antenuptial or postnuptial. (Ala. Code § 30-4-6,-7). Doctrine of necessaries held unconstitutional when applied to husband as gender-based classification. (596 So.2d 578).

Disabilities of Married Women.

No disabilities of married women in disposition of property, except as set forth in subheads Contracts and Conveyance or Encumbrance of Property, infra.

Separate Property.

Property acquired by wife before or after marriage (Const. Art. X § 209; Ala. Code § 30-4-1), earnings received by her from third persons (Ala. Code § 30-4-2), and damages which she may recover for injuries to person or reputation (Ala. Code § 30-4-4) are wife's separate property and not subject to husband's debts.

Distinction between equitable and statutory separate estates, except in case of active trusts for benefit of wife, abolished. (Ala. Code § 30-4-5; 84 Ala. 585, 4 So. 421).

Contracts.

Wife has full legal power to contract, except as otherwise provided by law. (Ala. Code § 30-4-8). Husband and wife may contract with each other, but all such contracts subject to rules of law as to contracts between persons standing in confidential relations. (Ala. Code § 30-4-9).

Antenuptial Contracts.

Valid, but scrutinized for informed consent and equity to spouse. (386 So.2d 749; 550 So.2d 999). Agreement must be signed by parties. (Ala. Code § 8-9-2). Spouse may waive statutory right to share of spouse's estate to allow assets of successive marriage to go to prior marriage's children. (Ala. Code § 43-8-72).

Wife as Surety for Husband.

Prior to June 21, 1957, statute governing contracts between husband and wife (Ala. Code § 30-4-9) contained provision that wife must not, directly or indirectly, become surety for husband, and holdings prohibiting wife from being surety of her husband explicitly based on such statutory provision (203 Ala. 97, 82 So. 111). Effective June 21, 1957, provision deleted. Deletion noted by Supreme Court in manner indicating recognition of legislative intent to change prior rule, but no decision has yet affirmatively declared right of wife to act as surety for her husband's debts. (279 Ala. 303, 184 So.2d 815; 267 Ala. 491, 102 So.2d 904).

Actions.

Wife must sue or be sued alone, whether action concerns her separate property, her contracts or torts committed by or against her. (Ala. Code § 30-4-11). Husband and wife may join in one action as plaintiffs if they assert any right to relief jointly, severally or in alternative and such right arises out of same transaction or occurrence and question of law or fact common to all parties; they may be joined as defendants, if any such joint right to relief asserted against them. (ARCP 20[a]). Either spouse may sue other. (201 Ala. 41, 77 So. 335). Action by or against woman not abated by her marriage. (Ala. Code § 6-5-460). Wife may sue or defend any action in her husband's name where he deserted family, confined in insane asylum or imprisoned for term of two years or more. (Ala. Code § 6-7-1).

Agency.

No statutory provision.

Conveyances or Encumbrance of Property.

Conveyance of homestead by married person invalid without assent of spouse. (Ala. Code § 6-10-3). See also categories 21 Property, topic Deeds, subhead Covenants; Documents and Records, topic Acknowledgments, subhead Forms, catchline Homestead Acknowledgment. Except as stated below, conveyance by husband of his lands does not affect homestead rights of wife unless she joins in deed or otherwise releases said rights. (Ala. Code § 6-10-3). See category 8 Debtor and Creditor, topic 8.10 Homesteads. Husband may convey his land (except homestead) without joinder of wife, where she has been judicially declared insane, or confined in Alabama state hospital for insane, and superintendent thereof certifies in writing to probate judge of county of husband's residence that wife's insanity is permanent. Certificate must be recorded in office of probate judge, and copy of judgment or certificate, as case may be, must be attached to husband's deed, which itself must recite that husband married and wife insane. (Ala. Code § 30-4-30,-31). Spouse of insane person, by proceedings of equitable nature in circuit court, may obtain decree conferring authority on him or her to make conveyance as if single. (Ala. Code § 30-4-32 to -37).

Desertion and Nonsupport.

Intentionally failing to provide support when able and legally obligated constitutes misdemeanor crime of nonsupport. (Ala. Code § 13A-13-4). Desertion of child with intent to wholly abandon constitutes misdemeanor crime of abandonment. (Ala. Code § 13A-13-5).

Revised Uniform Reciprocal Enforcement of Support Act.

Earlier version adopted. (Ala. Code § 30-4-80 to -98, repealed, Act 97-245, effective Jan. 1, 2000).

Community Property.

System does not exist.

Protection from Abuse.

Protection from Abuse Act adopted. (Ala. Code § 30-5-1, et seq.). Boyfriend can qualify as "household member" under Ala. Code § 30-5-1. (961 So.2d 148). Family Violence Protection Order Enforcement Act adopted. (Ala. Code § 30-5A-1, et seq.).

14.10 INFANTS:

Infants attain majority at age 19. All laws in conflict herewith are repealed, with exception of §§ 15-19-1, -7. (Ala. Code § 26-1-1). Minimum age for purchase of alcoholic beverages is 21. (Ala. Code § 28-1-5).

Emancipation.

Juvenile court, on proper proceedings, may relieve minor over 18 years old of disabilities. (Ala. Code § 26-13-1). Duly certified copy of decree of court of competent jurisdiction in another state relieving minor nonresident of this state of disabilities may be recorded in any county in which such minor owns property and when so recorded decree has same force in this state as in state where rendered. (Ala. Code § 26-13-8).

Disabilities.

Infants incompetent to become parties to express contract. (See 215 Ala. 31, 109 So. 574.) Person under 16 years of age incapable of contracting for marriage. (Ala. Code § 30-1-4, am'd 2003, Act 2003-150). See Child Labor Laws. (Ala. Code § 25-8-33, -61, am'd 2000, Act 2000-706). Written consent of parent or legal guardian necessary before unemancipated woman has abortion, except under special circumstances. (Ala. Code § 26-21-3).

Ratification of Contracts.

Infant liable for reasonable price of necessaries, but otherwise contract voidable and infant may either affirm or avoid after coming of age. (16 Ala. 186; 75 Ala. 555; 101 Ala. 658, 14 So. 399). Minor of 15 years old or more at nearest birthday may contract for life, health and accident insurance, endowment and annuity contracts on himself or on another, except that minor not bound by unperformed agreement to pay premium thereon. With respect to policy or annuity for which contracted, minor may give discharge for payments received. Policy or annuity procured by or for minor as above to be made payable either to minor or his estate or to person having insurable interest in life of minor. (Ala. Code § 27-14-5).

Actions.

Infant representative, such as general guardian or like fiduciary, may sue in name of infant. If no representative, he may sue by next friend. Court must appoint guardian ad litem for infant defendant not otherwise represented in action. Such guardian must be qualified to represent infant in capacity of attorney and must not be related to plaintiff or attorney or clerk or judge of court. Infant 14 years old has 30 days after perfection of service to nominate choice of guardian ad litem. If failure to nominate within 30 days or before first hearing in action, whichever is first, court must appoint guardian ad litem. (ARCP 17, am'd effective Aug. 1, 2004).

Support of Minor.

See topic 14.09 Husband and Wife, subhead Desertion and Nonsupport. There is also post-minority educational support obligation in which parent must provide support to child pursuing higher education. This obligation includes provision of health insurance. (904 So.2d 1275).

Parental Responsibility.

Parents of unemancipated minor under age of 19 years old liable in civil action for minor's theft of property. (Ala. Code § 6-5-271). Parents of minor under 18 with whom minor living and who have custody of minor liable for minor's intentional, willful or malicious destruction of property up to $1,000. (Ala. Code § 6-5-380). State not required to present evidence that juvenile's parent could not control juvenile prior to proceeding with adjudication as child in need of supervision on grounds of habitual truancy. (945 So.2d 463).

Adoption.

See topic 14.01 Adoption.

Uniform Transfers to Minors Act.

Adopted. (Ala. Code § 35-5A-1 to -24). Age of majority under new act is 21. (Ala. Code § 35-5A-2[1]).

Legitimation.

Marriage of mother and reputed father of illegitimate child renders child legitimate, if recognized by father as his child. (Ala. Code § 26-11-1). Father of illegitimate child may seek to legitimate it and render it capable of inheriting his estate by filing notice of declaration of legitimation attested by two witnesses, stating name, sex, and supposed age of child, name of child's mother and stating that he recognizes child as his, capable of inheriting his estate as if born in wedlock. Declaration must be acknowledged and filed in office of judge of probate of father's residence or child's residence. Upon notice to child's mother and to child, probate judge must conduct informal hearing to determine whether legitimation in best interest of child. Order granting or denying legitimation issued by probate judge of father's or child's residence. (Ala. Code § 26-11-2). Statutory scheme declared unconstitutional in part insofar as it precluded children, who did not have opportunity to be legitimized during life of father, from later achieving such status. (697 F.2d 999).

Termination of Parental Rights.

If court finds clear and convincing evidence that parents unable or unwilling to discharge parental duties. (Ala. Code § 26-18-7). Department of Human Resources must file termination of parental rights petitions in cases in which child has been in foster care for 15 of most recent 22 months, child has been abandoned, or court has determined that parent of child has assaulted child or assaulted or killed another child of parent or has aided in such action. (Ala. Code § 26-18-5 and Ala. Code § 26-18-7, am'd 1998, Act 98-370). Petition may be filed by state, licensed child-placing agency, parent or any interested party. (Ala. Code § 26-18-5; 474 So.2d 715). Complaint must set forth, and petitioner must prove, petitioner's ability and willingness to assume custody of child. (Ala. Code § 26-18-4, repealed 2008, Act 2008-277). Proceedings are governed by statutory juvenile court procedure (Ala. Code § 12-15-1 to -156), and court's order terminates all parental rights absolutely (Ala. Code § 26-18-7). It is required that foster parents, pre-adoptive parents, and relatives providing care to child be given notice and opportunity to be heard at any hearing on any child in care in their home. (Ala. Code § 12-15-65).

Medical Treatment.

Department of Human Resources may pursue any legal remedy and discovery to provide medical care to prevent serious harm to child or to prevent withholding of medically indicated treatment to disabled infants with life-threatening conditions; statute provides for disclosure of records, public disclosure of child fatality or near fatality, prohibits disclosure of non-indicated reports for purposes of employment or other background checks, provides good faith immunity for disclosure. (Ala. Code § 26-14-7.2; Ala. Code § 26-14-8, and Ala. Code § 26-14-9, am'd 1998, Act 98-371).

Veterans.

Disabilities of minor veterans and minor wives of veterans removed with respect to contracts made under servicemen's readjustment or rehabilitation acts. (Ala. Code § 31-1-2).

Oversight Committee of Children in State Care.

Establishes Permanent Joint Legislative Oversight Committee of Children in State Care; creates Interdepartmental Council of Children in State Care; establishes State case registry; provides for confidentiality of information; provides penalties. (Ala. Code § 29-2-100 to -107).

Corporations may treat infant holders of securities as adults, and infants may not disaffirm actions with respect to such securities, provided corporation has no written notice of infancy. (Ala. Code § 10-6-1,-2). Infant shareholder may also receive dividends from such securities, such receipt discharging corporation for dividends, whether or not corporation has actual or written notice of infancy. (Ala. Code § 10-6-3). Rules also apply to banks, brokers, issuers (as defined), third parties or transfer agents. (Ala. Code § 8-6-90 to -95).

Uniform Securities Ownership by Minors Act adopted with significant modifications. (Ala. Code § 8-6-90 to -95).

Uniform Child Custody Jurisdiction and Enforcement Act adopted. (Ala. Code § 30-3B-101, et seq.).

14.11 MARRIAGE:

Age of consent is 16. (Ala. Code § 30-1-4, am'd 2003, Act 2003-150).

Consent Required.

Personal or proved written consent of parents and bond for $200 required where person under 18, unless minor has previously been married. (Ala. Code § 30-1-5). Failure to obtain consent of parent not ground for annulling marriage. (205 Ala. 502, 88 So. 577). Section addresses solemnized marriages, not common law marriages. (559 So.2d 1084). See subhead Common Law Marriages, infra.

Medical Examination.

None.

License.

No marriage may be solemnized without license, issued by judge of probate. Any license issued invalid if marriage for which issued has not been solemnized within 30 days from date of issuance, and every license must so state. (Ala. Code § 30-1-9). License must be issued by judge or his duly qualified clerk; authority cannot be otherwise delegated. (109 Ala. 48, 19 So. 917). Penalty imposed on person solemnizing marriage for which license not issued. (Ala. Code § 30-1-11). No license issued to parties of same sex. (Ala. Code § 30-1-19).

Waiting Period.

60 days following divorce. No marriage during pendency of appeal. (Ala. Code § 30-2-10).

Ceremonial Marriage.

Marriage may be solemnized by licensed minister of gospel in regular communion with Christian church or society of which he is member, or by judge or retired judge of supreme, appellate, circuit or district court anywhere within state, or by judge or retired judge of probate within his county. (Ala. Code § 30-1-7[a], am'd 2004, Act 2004-485).

May be solemnized by pastor of religious society according to rules ordained or custom established by such society. (Ala. Code § 30-1-7[b], am'd 2003, Act 2003-303). Mennonites, or Quakers, or any other Christian society having similar rules or regulations, may solemnize marriages according to their forms by consent of parties, published and declared before congregation assembled for public worship. (Ala. Code § 30-1-7[c]).

Judge or licensed minister of gospel celebrating rites of matrimony is entitled to $2. (Ala. Code § 30-1-8).

Reports of Marriages.

Judge of probate must keep register of licenses issued by him. (Ala. Code § 30-1-12).

Clerk or keeper of minutes of each religious society must keep register, and enter thereon particular account of all marriages solemnized by society; register, or sworn copy thereof, is presumptive evidence. (Ala. Code § 30-1-7[b], am'd 2003, Act 2003-303).

Persons or religious societies solemnizing marriage must notify judge of probate;

certificate must be recorded in book kept for registry of licenses. (Ala. Code § 30-1-13).

Record.

See category 10 Documents and Records, topic 10.04 Records, subhead Vital Statistics.

Common Law Marriages.

Recognized. (194 Ala. 613, 69 So. 885). Capacity to marry, present agreement or consent, public recognition of marriage, and consummation must exist. (567 So.2d 869). Mere cohabitation insufficient to establish common law marriage; must also have mutual intent to be married. (404 So.2d 82). Common law marriage cannot exist if spouse previously married and has not obtained valid divorce. (477 So.2d 316).

Proxy Marriages.

Not authorized.

Marriages by Written Contract.

Not authorized.

Prohibited Marriages.

Marriage during life of former spouse is crime, unless former spouse absent for last five years preceding second marriage, and not known to be living, or unless valid divorce from former spouse obtained prior to second marriage and said divorce did not prohibit person from marrying again. (Ala. Code § 13A-13-1; Ala. Code § 30-2-9). Same sex marriages invalid and not recognized. (Ala. Code § 30-1-19).

Issue of incestuous marriage, before annulment, not illegitimate. (Ala. Code § 30-1-3).

Foreign Marriages.

Valid except when marriage from other states contrary to positive statute or pronounced public policy. (235 Ala. 564, 180 So. 577). Generally, validity of marriage determined by law of place where contracted. (223 Ala. 155, 134 So. 651).

Annulment.

Annulment not statutory remedy, but within general equity powers of courts with respect to contracts. (249 Ala. 419, 31 So.2d 579). Grounds for annulment include insanity of one party at time of marriage (28 Ala. 565), fraudulent intent not to perform marriage vows, (241 Ala. 223, 2 So.2d 443), bigamy (245 Ala. 145, 16 So.2d 401), incest (235 Ala. 564, 180 So. 577), and fraudulent inducement (984 So.2d 434). Bona fide domicile of one party sufficient to confer jurisdiction on Alabama court. (242 Ala. 70, 4 So.2d 901). Where person under age of consent, marriage voidable while under that age. (201 Ala. 531, 78 So. 885). Certified copies of marriage certificate may be obtained by persons having proper interest from state registrar of vital statistics, upon payment of statutory fees. (Ala. Code § 22-9A-22, -23).

Antenuptial Contracts.

See topic 14.09 Husband and Wife.

14.12 MARRIED WOMEN:

See topics 14.09 Husband and Wife, Marriage; categories 5 Civil Actions and Procedure, topic Evidence, subhead Witnesses; Debtor and Creditor, topic Homesteads; Documents and Records, topic Acknowledgments; Estates and Trusts, topics Executors and Administrators, Wills;

Property, topic Dower.

15 HEALTH

15.0115.04 [RESERVED]

15.05 FOOD, DRUGS, DEVICES AND COSMETICS:

Manufacture, sale, and distribution of food, drug, and cosmetic products are regulated. (Ala. Code § 20-1-20 et seq.). Board of Agriculture and Industries promulgates regulations concerning adulteration and misbranding of products (Ala. Code § 20-1-2), and Commissioner of Agriculture and Industries enforces provisions (Ala. Code § 20-1-1). Board of Health adopts rules and regulations concerning labeling of drugs. (Ala. Code § 20-1-152). Violations may result in suspension of sales, seizure, or condemnation of products (Ala. Code § 20-1-4), as well as fines and six months' imprisonment (Ala. Code § 20-1-5).

15.05A HOSPICES:

Licensure of new hospices prohibited after July 7, 2006 until all hospices inspected within previous 12 months (hospices with letter of nonreviewability from SHPDA and filed application for licensure within 12 months of letter exempted). (Ala. Code § 22-21-29, am'd 2006, Act 2006-617). Hospice services included within definition of healthcare facility for certificate of need purposes. (Ala. Code § 22-4-2, am'd 2009, Act 2009-492).

15.05B HOSPITALS:

Alabama Public Health Financing Authority authorized to provide for acquisition, construction, and improvement of public health facilities. (Ala. Code § 22-3A-1 et seq.). State Health Planning and Development Act of 1975 also provides for acquisition and construction of health facilities, including hospitals. (Ala. Code § 22-4-1 et seq.). Hospitals are regulated under Ala. Code § 22-21-1 et seq.

15.05C MENTAL HEALTH:

Regulated generally by Ala. Code § 22-50-1 et seq. Department of Mental Health and Mental Retardation is authorized to provide for mental health services throughout state. (Ala. Code § 22-50-2). Commitment, discharge, and transfer of persons in mental health institutions are governed by Ala. Code § 22-52-1.1 et seq.

Mental Health Consumer's Rights Act.

Regulated by Ala. Code § 22-56-1 et seq. Consumers of mental health services have same general rights as other citizens of Alabama. (Ala. Code § 22-56-4).

15.0615.11 [RESERVED]

15.12 PUBLIC HEALTH:

Requirements regarding consent for health care services are set forth in Ala. Code § 22-8-1 et seq. Rights to control decisions relating to rendering of one's own medical care and termination of life-support procedures are governed by Ala. Code § 22-8A-2 et seq. Any competent adult may execute living will that includes written health care proxy designation appointing another competent adult to make decisions. (Ala. Code § 22-8A-4 et seq.). These statutes do not permit physician-assisted suicide. (Ala. Code § 22-8A-10).

Uniform Anatomical Gift Act.

Regulated by Ala. Code § 22-19-40, et seq., am'd 2003, Act 2003-347 (applies to anatomical gifts made prior to Jan. 1, 2004). Act permits any individual of sound mind and 18 years of age or older to give all, or any part of, his body for any purposes specified in Ala. Code § 22-19-43, gift to take effect upon death.

Revised Uniform Anatomical Gift Act.

Regulated by Ala. Code § 22-19-160, et seq.

Lifesaving Organ Procurement Act.

Regulated by Ala. Code § 22-19-140, et seq. Sets forth governing law on requests for consent to anatomical gift when no gift has been made.

Alabama Clean Indoor Air Act.

Regulated by Ala. Code § 22-15A-1 to -10.

16 INSURANCE

16.01 INSURANCE COMPANIES:

Regulated by §§ 27-1-1 et seq.

Supervision by Commissioner of Insurance, 201 Monroe Street, Suite 1700, Montgomery, Ala. 36104.

Department of Insurance charged with administration of all laws relating to insurance, insurance producers, and service representatives. Commissioner of Insurance is chief officer of Department of Insurance with power to perform all duties required by law in relation to supervision, regulation and control of insurance companies and title insurance companies. (Ala. Code § 27-2-1 et seq.). Title must be complied with to transact business of insurance in Alabama. (Ala. Code § 27-1-5).

Rates.

§§ 27-13-1, et seq.

Annual statements must be filed with Commissioner on or before Mar. 1 (Commissioner may grant 30 day extension for good cause shown), verified statement of financial condition, transactions, and affairs during preceding calendar year (Ala. Code § 27-3-26); verified statement showing total amount of premiums and annuity considerations received during preceding calendar year must be filed on or before such date. (Ala. Code § 27-4A-3). Every property or casualty insurer required to file annual statement with commissioner must include statement by qualified independent loss reserve specialist. (Ala. Code § 27-3-26.1, am'd 1994, Act 94-789). Application for original certificate of authority, fee $500. Annual continuation or renewal fee $500. Other fees as set forth in § 27-4-2, am'd 2006, Act 2006-299.

Policies.

Express entire contract between parties when life insurance or annuities (Ala. Code § 27-15-5), industrial life insurance (Ala. Code § 27-16-5), or disability insurance (Ala. Code § 27-19-4) involved; hence application, or summary of application, if to be considered part of policy, must be endorsed thereon or attached to policy when issued. In event of discrepancies between original application and summary of application, contents of original govern. When summary of application attached to policy, insurer must keep and maintain original application for insurance or copy for three years after date policy issued. (Ala. Code § 27-15-5). Each policy must specify on face its character, names of parties to contract, risks insured against, subject of insurance, period during which policy in effect, premium, and conditions pertaining to insurance. (Ala. Code § 27-14-11). Section does not apply to surety contracts or to group insurance policies. (Ala. Code § 27-14-11). Policyholder's application for group life insurance must be attached to policy when issued. (Ala. Code § 27-18-5). Policy must be mailed or delivered to insured within reasonable period of time after issuance, except where condition required by insurer has not been met by insured, and insurer may be estopped from asserting coverage conditions or otherwise valid exclusions for failure to do so. (Ala. Code § 27-14-19).

Insurers providing health, accident, or dental coverage must provide written description of terms and conditions. (Ala. Code § 27-1-20). Health benefit plan must provide coverage for mental illness on same basis as physical illness. (Ala. Code § 27-54-3).

Discrimination.

Prohibition against discrimination between insured of same class (Ala. Code § 27-12-11) and against discriminatory acts against victims of abuse (Ala. Code § 27-55-3).

Rebates.

Prohibited unless expressly provided for in insurance contract. (Ala. Code § 27-12-12).

Liens.

No statutory provision.

Agents and Brokers.

§ 27-4-2, am'd 2006, Act 2006-299 outlines license fees and other charges. Provision made for examination and control of all insurance producers by Commissioner. (Ala. Code § 27-7-1 to -40, am'd 2006, Act 2006-294, -299). No insurer may accept applications for insurance, issue any policy or assume direct liability as to subject of insurance resident, located or to be performed in state unless through licensed agents, solicitors, or brokers. Section does not apply to title insurance or insurance of rolling stock, vessels or aircraft of common carriers in interstate commerce, life or disability insurance not delivered or issued for delivery in Ala., and lawfully solicited outside Ala. (Ala. Code § 27-3-27). Commissioner may issue motor vehicle rental companies limited license to sell insurance in connection with vehicle rental. (Ala. Code § 27-7-5.1).

Process Agent.

Insurer must appoint Commissioner. (Ala. Code § 27-3-24).

Investments.

§§ 27-1-8; -9 and Ala. Code § 27-41-1 to -41.

Foreign Insurance Companies.

Foreign insurer may become domestic insurer. (Ala. Code § 27-3-30). Foreign company may obtain certificate authorizing it to do business in this state by filing with Commissioner certified copy of charter, articles of incorporation, or other charter documents with all amendments thereto, sworn statement of financial condition in "convention" form as of next preceding Dec. 31, certified copy of report of last examination, appointment of Commissioner as agent for service of process, certificate of public official supervising insurance in its state showing that it is legally organized and authorized to transact kinds of insurance proposed to be transacted in this state, and showing of required deposit (see subhead Deposit Requirements, infra). (Ala. Code § 27-3-17). Commissioner must be satisfied that such insurance company meets requirements before issuing certificate of authority specifying kinds of insurance authorized to transact in this state. (Ala. Code § 27-3-18).

Retaliatory Laws.

If any other state imposes taxes, penalties, or other obligations or penalties on insurance companies of this state doing business in such other state in excess of those imposed by this state upon insurance companies of such other states, like taxes, penalties, or other obligations or prohibitions will be imposed on all similar insurance companies of such state doing business in this state. (Ala. Code § 27-3-29).

Premium Tax.

Every insurer (Ala. Code § 27-1-2) must pay Commissioner premium tax as established by § 27-4A-3 for premiums received by insurer for business done in Ala. whether same was actually received by insurer in Ala. or elsewhere. Premium tax exclusive and in lieu of all other taxes and licenses of state or any county imposed on or measured by premiums received by insurer for business done in Ala. (Ala. Code § 27-4A-5). Every insurer failing to pay this tax subject to penalty of between $1,000 and $10,000. Upon any violation, Commissioner may suspend or revoke insurer’s certificate of authority. (Ala. Code § 27-4A-4). Insurers paying premium tax pursuant to § 27-4A-3 exempt from income taxes under Title 40, c. 18 or similar laws. (Ala. Code § 27-4A-6, am’d 2000, Act 2000-705).

Privilege Tax.

None.

Uniform Insurers Liquidation Act adopted. (Ala. Code § 27-32-1 to -41).

No-Fault Insurance.

See category 23 Transportation, topic 23.01 Motor Vehicles, subhead No-Fault Insurance.

Plain Language.

See category 3 Business Regulation and Commerce, topic 3.12 Consumer Protection.

Capital Requirements for Companies Authorized to Do Business.

All insurance companies applying for original certificate of authority to transact insurance in Ala. must possess and maintain unimpaired paid-in-capital stock (if stock insurer) or unimpaired surplus (if foreign mutual or foreign reciprocal insurer) in amount not less than applicable for amount of particular kind of insurance required by § 27-3-7, plus, in either case, insurers must possess additional funds as special surplus, at time of application, in amount required by § 27-3-8. Insurance company previously authorized to transact business in state may continue as before enactment of capital requirements, but no such insurer can be authorized to transact any other or additional kinds of insurance until capital requirements met. (Ala. Code § 27-3-7[b]).

Beneficiaries.

Insured may take out policy on own life for any beneficiary; but insurable interest necessary where beneficiary procures policy on life of insured. (Ala. Code § 27-14-3, am’d 1994, Act 94-576). Beneficiary has standing to challenge change in life insurance policy beneficiary. (982 So.2d 1086).

Assignment of Life Insurance Policies.

Life insurance policy taken out by insured or by person having insurable interest in life of insured, in good faith, may be lawfully assigned without regard to whether assignee has insurable interest, unless policy provides otherwise. (Ala. Code § 27-14-21).

Loans.

Maximum interest that can be charged on policy loans provided by statutory formula. (Ala. Code § 27-15-8.1).

Reinstatement.

With some exceptions, at any time within three years after date of premium default, lapsed life insurance policies may be reinstated by application of insured. Application must include evidence of insurability, payment of overdue premiums, and payment of other debts to insurer, including interest at rate not to exceed policy loan rate. (Ala. Code § 27-15-11).

Defenses Available to Company.

Misrepresentation in application by insured will not prevent recovery under policy or contract unless fraudulent, or material to acceptance of risk or to hazard assumed by insurer, or insurer, in good faith, either would not have issued policy or would not have issued policy at premium rate applied for if true facts had been known by insurer. Plea of misrepresentation in connection with life insurance policy or annuity contract must be accompanied by payment into court of all premiums paid on policy. (Ala. Code § 27-14-7). Insurer's defense of misrepresentation is affirmative defense that is lost if not properly pleaded. (903 So.2d 769). Validity of life insurance policy incontestable, except for nonpayment of premiums, after in force for two years during lifetime of insured from date of issue. (Ala. Code § 27-15-4). If age or sex misstated in policy, then any amount payable under policy will be such as premium would have purchased at correct age or sex. (Ala. Code § 27-15-6). Alabama has adopted Standard Nonforfeiture Law for life insurance policies. (Ala. Code § 27-15-28).

Proceeds.

If effected by any person on his own life or on another life in favor of person other than himself or assigned to any such person (except in cases of transfer with intent to defraud creditors) other than insured, exempt from liability for insured's (or person effecting such insurance) debts or engagements. If person effecting such insurance, or assignee of such insurance, is wife of insured, proceeds exempt from liability for wife's debts or engagements. (Ala. Code § 27-14-29). If contract so provides, proceeds of annuity contract or life insurance policy retained by issuing company for purpose of making installment payment to beneficiaries cannot be reached by judicial process for payment of debts, contracts, or engagements of such beneficiaries. (Ala. Code § 27-14-30; -32).

Surplus Line Brokers.

See generally §§ 27-10-20; -38. Provision made for examination of officers and records of surplus line brokers (Ala. Code § 27-2-21, am'd 1993, Act 93-675), and annual taxation of such brokers (Ala. Code § 27-10-31, am'd 1993, Act 93-679). Duty of determining financial soundness of surplus line insurance carrier on surplus line broker. (475 So.2d 545).

Claims on health and accident policies are payable within 45 days of receipt of written claim or 30 days of electronic claim. If claim not denied for proper reason by end of 45 or 30 day period, insurer must pay insured 1½% interest per month on amount of claim until finally settled or adjudicated. (Ala. Code § 27-1-17). Tort of bad faith refusal to pay insurance proceeds is recognized. (405 So.2d 1; 461 So.2d 1320).

Deposit Requirements.

All insurers (other than alien insurers) must deposit and maintain deposited in trust with treasurer of this state cash or securities eligible under § 27-6-3 of minimum value of $100,000 as continuing prerequisite for certificate of authority. (Ala. Code § 27-3-11). Special additional deposits required of surety and title insurers. (Ala. Code § 27-3-12; -13). Deposit requirements for alien insurers governed by § 27-3-14; -15. Commissioner shall make annual valuation of reserves for life insurance policies and annuity and endowment contracts. (Ala. Code § 27-36-7, am'd 1996, Act 96-784).

Examinations.

Commissioner may examine affairs of authorized insurer, domestic or foreign, including attorney-in-fact of reciprocal insurer insofar as insurer transactions involved, as often as he deems advisable and at least every five years for each domestic insurer; all examinations made at expense of company. (Ala. Code § 27-2-21, am'd 1993, Act 93-675; -25). Commissioner has discretion to accept as true and correct certified full report of last recent examination of foreign or alien insurer made by insurance supervisory official of another state. (Ala. Code § 27-2-21[c], am'd 1993, Act 93-675).

Sale of Stock.

Stock and mutual insurers which desire to sell stock in this state must obtain solicitation permit from Commissioner. (Ala. Code § 27-27-4; -14).

Ownership and sale of insurance securities by insiders are governed by statute similar to § 16 of Securities Exchange Act. (Ala. Code § 27-27-52; -60). See category 3 Business Regulation and Commerce, topic 3.24 Securities.

16.02 SURETY AND GUARANTY COMPANIES:

Subject to regulation by Commissioner of Insurance as "insurers" under Insurance Code, Tit. 27, Code of Alabama of 1975. (Ala. Code § 27-1-1). See topic 16.01 Insurance Companies. Surety Insurance Contracts are governed specifically by §§ 27-24-1 to -8.

Venue.

Any official bond or undertaking executed by such a company may be sued on in county of residence of principal, or in which he resided at time of execution of bond or undertaking; suit by state must be brought in Montgomery County. (Ala. Code § 27-24-6).

Insurer Estopped.

No such company having signed any official bond or undertaking may deny its corporate or other power to execute such instrument or to incur liability in any proceeding to enforce liability of such company thereunder. (Ala. Code § 27-24-7).

Rights of Insurer.

Such a company as surety on an official bond, undertaking, or obligation entitled to all rights and remedies of other sureties on such instruments. (Ala. Code § 27-24-8).

17 INTELLECTUAL PROPERTY

17.01 TRADEMARKS AND TRADENAMES:

Trademark may be acquired by anyone who produces or deals in particular thing or conducts particular business. (Ala. Code § 8-12-1).

What May Be Used.

Any form, symbol or name which has not been appropriated by another may be used as trademark to designate origin or ownership. May not use designation which relates only to name, quality, or description of thing or business, or place where thing produced, or business carried on. (Ala. Code § 8-12-1).

Registration.

Secretary of State has since about 1927, maintained trademark register and kept trademark applications filed in office and other documents, such as assignments and surrenders, filed in this connection.

Tradenames, trademarks and service marks, may be registered by filing application with Secretary of State on form furnished by Secretary, setting forth following: (1) Name and business address of person applying for registration and, if corporation, state of incorporation; (2) description of goods, services or business with which mark is used and mode or manner in which mark is used, and class (as statutorily defined) in which such goods, services or business fall; (3) date when mark first used anywhere and date when first used in state by applicant or his predecessor in business; and (4) statement that applicant is owner of mark and that no other person has right to use such mark in state either in identical form or in such near resemblance as might be calculated to deceive or be mistaken therefor. Application must be signed and verified by applicant or by member of firm or officer of corporation or association applying for it. Every application must be accompanied by specimen or facsimile of mark in triplicate. Every application must be accompanied by filing fee of $30, payable to Secretary of State. (Ala. Code § 8-12-8).

Registration effective for ten years and may be renewed for successive periods of ten years in like manner, during six-month period prior to expiration. Renewal fee is $30. (Ala. Code § 8-12-10).

Assignment.

Trademarks and attendant registrations assignable with good will of business with which connected. Assignment must be in writing, duly executed, and may be recorded with Secretary of State, for fee of $30. Assignment void against subsequent purchaser for value without notice, unless recorded within three months after date of purchase or prior to subsequent purchase. (Ala. Code § 8-12-11).

Protection Afforded.

Ownership of marks flows from use, not from registration, so registration will not presumptively prove ownership. (Ala. Code §§ 8-12-7; 8-12-9, see Comment in both sections). Registration will make assignment of mark easier as common law did not provide for assignment separately from business with which mark was used. (Ala. Code § 8-12-11).

Infringement.

Anyone using trademark without consent of registrant subject to civil equitable penalties and damages. (Ala. Code §§ 8-12-16; 8-12-18).

Tradenames included in definition of mark and registrable under Alabama Trademark Act. (Ala. Code § 8-12-6, et seq.; see subhead Registration, supra).

Containers.

Marks or devices used on bottles, boxes, kegs, etc., may be registered (Ala. Code § 8-12-20), and it is a crime for anyone to refill, deal in, or remove marks upon same, without owner's consent (Ala. Code § 8-12-21).

17.02 TRADE SECRETS:

Uniform Trade Secrets Act.

Not adopted.

Trade secrets governed by Alabama Trade Secrets Act. (Ala. Code § 8-27-1 to -6). Alabama Trade Secrets Act draws primarily on common law of trade secrets as reflected in first Restatement of Torts (1939) (Ala. Code § 8-27-2, see Comment); where policy considerations make deviation from Restatement advisable, Alabama Trade Secrets Act draws first from Uniform Trade Secrets Act and case law that has developed since Restatement. (Ala. Code § 8-27-6, see Comment).

Alabama Trade Secrets Act contains definitions of trade secrets (Ala. Code § 8-27-2), describes elements of tort of trade secret misappropriations (Ala. Code § 8-27-3), sets out remedies (Ala. Code § 8-27-4), and prescribes statute of limitations (Ala. Code § 8-27-5).

18 LEGAL PROFESSION

18.01 ATTORNEYS AND COUNSELORS:

Integrated bar; admission to practice automatically results in membership in State Bar Association.

Jurisdiction over Admissions.

Vested in Supreme Court.

Eligibility.

Applicants must be at least 19 years old. No citizenship or residency requirements. All applicants must be approved by State Bar Association's Committee on Character and Fitness. Applicant not approved by this Committee may appeal to Board of Commissioners of State Bar. (Rule IV.A., 2007 Rules Governing Admission to Ala. State Bar).

Registration as Law Student.

Students entering law school with intention of applying for admission to Alabama Bar must register with Secretary of the Alabama State Bar within 60 days following commencement of study. If registration not filed within 390 days, must submit affidavit to Committee on Character and Fitness showing reasonable cause for having failed to file timely registration. (Rule I.A., 2007 Rules Governing Admission to Ala. State Bar).

Educational Requirements.

Prelegal.

Applicant who did not graduate from law school on approved list of American Bar Association or American Association of Law Schools at time of applicant's graduation must give proof that applicant has received baccalaureate degree from college or university which, at time of applicant's graduation, appeared on approved list of any standard accrediting agency or association in various states, or accepted by accrediting agency as meeting substantially same standards required for appearing on approved list of agency and that degree received before entering law school. Proof must be had by filing certified copy of diploma or certificate with Secretary of Board of Commissioners of Alabama State Bar. Proof of prelegal education by applicants who did graduate from law school on approved list of American Bar Association or American Association of Law Schools at time of applicant's graduation may be required by Committee on Character and Fitness. (Rule IV.B.[1], 2007 Rules Governing Admission to Ala. State Bar).

Legal.

Applicant must file proof of completion of legal study with Secretary of Board of Commissioners of Alabama State Bar. (Rule IV.B.[2], 2007 Rules Governing Admission to Ala. State Bar).

Graduation after course of law study of at least three years of at least 30 weeks each from law school which, at time of graduation, has been approved by American Bar Association or Association of American Law Schools, or graduation after course of study of four years of at least 30 weeks each from Birmingham School of Law, Jones School of Law of Faulkner University, or Miles College of Law. (Ala. Code § 34-3-2.1; Rule IV.B.[2], 2007 Rules Governing Admission to Ala. State Bar).

Petition for Admission.

Admission governed by 2007 Rules Governing Admission To Alabama State Bar, as adopted by Board of Commissioners of Alabama State Bar and approved by Supreme Court. Admitted attorneys must take prescribed oath or affirmation prior to commencing practice. (Ala. Code §§ 34-3-2; 34-3-15).

Examination.

Board of Commissioners of State Bar may prescribe subjects upon which candidates examined, conduct of examinations, time and place of examinations, and certification of persons found qualified. (Ala. Code § 34-3-2). Except as hereinafter stated, all applicants for admission must stand written examinations held at Montgomery on Mon., Tues., and Wed. of week in July and Feb. when Multi-State Bar Examination administered. Bar exam comprised of Alabama Essay Examination which may test state law and federal taxation, Multi-State Bar Examination, Multi-State Essay Examination and Multi-State Performance Test as well as Multi-State Professional Responsibility Examination. (Rule VI[B], 2007 Rules Governing Admission to Ala. State Bar). Multi-State Bar Examination score from another jurisdiction accepted for transfer within 20 months from time taken provided MBE scaled score of 140 or above. (Rule VI[B], 2007 Rules Governing Admission to Ala. State Bar). Examination fee set by board of commissioners but may not exceed $1,500 for applicants not required to take examination and not to exceed $400 for residents required to take examination; nonresidents required to be examined must pay additional sum set by Board of Commissioners not to exceed $1,000. (Ala. Code § 34-3-3).

Clerkship.

No requirement prior to admission.

Admission Without Examination.

Certain teachers who have taught full-time for three years at accredited Alabama law schools and who have been admitted to bar of another state may apply for admission to bar without taking examination. (Rule III, 2007 Rules Governing Admission to Ala. State Bar). Foreign attorneys no longer admitted to Alabama Bar without examination.

Admission Pro Hac Vice.

Attorney licensed to practice in other jurisdictions permitted to appear in particular case before any court or administrative agency in Alabama, provided such attorney associates himself with Alabama attorney. (Rule VII, 2007 Rules Governing Admission to Ala. State Bar).

Licenses.

$300 per year. (Ala. Code § 40-12-49). In addition, municipality may levy license tax.

Privileges.

No specific provisions.

Disabilities.

When client's ability to make adequately considered decisions in connection with representation is impaired, attorney must maintain normal attorney-client relationship with client. Attorney may seek appointment of guardian or take other protective action with respect to client only when attorney reasonably believes client cannot adequately act in own interest. (Rule 1.14, Ala. Rules of Pro. Conduct).

Liabilities.

See category 5 Civil Actions and Procedure, topic 5.08 Costs.

Compensation.

Governed by §§ 34-3-60 to -62 and Rule 1.5, Ala. Rules of Pro. Conduct. Contingent fee agreements permitted except in domestic relations and criminal cases. (Rule 1.5, Ala. Rules of Pro. Conduct). No requirement regarding filing of contingent fee agreements. No specific limitations on contingent fee amounts. See subhead Lien, infra.

Lien.

Attorney shall have lien for fees for services rendered: (1) On all papers and money of their clients in their possession; (2) on actions and judgments for money; and (3) on actions for real or personal property, on judgment therefor, and property recovered by action. (Ala. Code § 34-3-61).

Disbarment or Suspension.

Certain enumerated causes grounds for disbarment, suspension, public censure, private reprimand, or private informal admonition pursuant to Rules of Disciplinary Procedure (Interim) promulgated by Supreme Court and administered by Disciplinary Board of Ala. State Bar. §§ 34-3-80 to -89 set forth procedural rules for disciplinary proceedings. Attorney who has not been convicted of serious crime may be subject to interim suspension only after notice and opportunity to be heard, in all but emergency circumstances. (925 So.2d 956).

Unauthorized Practice.

Attorney must not practice law in jurisdiction where doing so violates regulation of legal profession or assist person not member of bar in unauthorized practice of law. (Rule 5.5, Ala. Rules of Pro. Conduct). Unlicensed person, or those whose licenses expired, or those who fail to pay license fee within 30 days of due date, who acts or holds himself out to public as attorney, guilty of misdemeanor and can be fined up to $500 or imprisoned for up to six months or both. (Ala. Code § 34-3-1). Any person, firm or corporation who is not regularly licensed and who engages in unauthorized practice of law guilty of misdemeanor. Any person, firm or corporation who conspires with, aids and abets in unauthorized practice of law guilty of misdemeanor. (Ala. Code § 34-3-7). Restrictions on practice of law by specific categories of individuals set by statute. (Ala. Code § 34-3-8 to -14).

Mandatory Continuing Legal Education.

Governed by Alabama State Bar Mandatory Continuing Legal Education Rules and Regulations.

Specialty Certification Requirements.

Governed by Alabama State Bar Rules of Specialization.

Professional Association.

See category 2 Business Organizations, topic 2.02 Associations, subhead Professional Associations.

Attorney Ethics.

American Bar Association Rules of Professional Conduct adopted with modifications.

Powers.

Attorney may bind client in action or proceeding by agreement in writing relating thereto or entry made on minutes of court. (Ala. Code § 34-3-21). Attorney may advance or guarantee emergency financial aid if client ultimately liable. (Rule 1.8[e][3], Ala. Rules of Pro. Conduct).

Legal Services Liability.

Anyone licensed to practice law by State of Alabama or engaged in practice of law in State of Alabama subject to provisions of “The Alabama Legal Services Liability Act” (Ala. Code § 6-5-570, et seq.), which provides that legal service providers must exercise reasonable care, skill and diligence as other similarly situated providers in same general line of practice and locality, or, if certified specialist, reasonable care, skill and diligence as other providers practicing as specialist in same area of law (Ala. Code § 6-5-572; -580). Action must be commenced within two years after act or omission giving rise to claim, provided that action may be commenced within six months from date act or omission was discovered but not more than four years after act or omission occurred. (Ala. Code § 6-5-574). Parties to action may agree to settle dispute by arbitration. (Ala. Code § 6-5-575). Plaintiff has burden of proving that legal service provider breached applicable standard of care. (Ala. Code § 6-5-580). Alabama Legal Services Liability Act applies only to claims against legal service providers arising out of provision of legal services. (2009 Ala. LEXIS 100).

19 MINERAL, WATER AND FISHING RIGHTS

19.01 MINES AND MINERALS:

Director of Department of Industrial Relations must appoint sufficient number of mining inspectors and employees, including at least one mining engineer. (Ala. Code § 25-9-3).

Operation of Mines.

Alabama Coal Mine Safety Law (Ala. Code § 25-9-1, et seq.) provides laws to promote safety and health of those engaged in coal mining and protection and preservation of property. Alabama Surface Mining Act (Ala. Code § 9-16-1, et seq.) provides for safe and reasonable reclamation of lands on which surface mining has occurred, preservation of natural resources within state and protection and promotion of health and safety of people of state.

Safeguarding of Employees.

Special provisions regarding clothing, checking systems, training, dust, gases, machines, cages, working places, openings, ventilation, props, pipes, doors, lamps, explosives, electrical equipment, etc., and methods of work; penalties provided. (Ala. Code § 25-9-40 to -284). Some statutory confusion, but it would appear that operators of other underground mines and of all surface mines subject to safety regulation by Department of Industrial Relations. (Ala. Code §§ 25-9-270; 9-16-106).

Inspection of Mines.

Mine inspector, who must be qualified elector, possess mine foreman certificate of competency of State, have eight or more years practical experience, and be at least 28 years old, vested with power to examine mines as to safety, health, compliance with mining laws, etc. (Ala. Code § 25-9-6; -7). Inspector may order suspension of activities if violations imminently hazardous to workmen. (Ala. Code § 25-9-365). Coal mines inspected every 45 days. (Ala. Code § 25-9-20). Representative of miners at mines may accompany inspector. (Ala. Code § 25-9-7). Inspector's decisions take effect as specified in written notice to superintendent of mine and not subject to review, unless within ten days after giving such notice, owner or operator appeals to chief for review, who must render decision within ten days of notice of appeal. (Ala. Code § 25-9-366). Board of examiners issues certificates of competency to mine foremen and fire bosses (Ala. Code § 25-9-9; -10), who have duties under Coal Mine Safety Act (Ala. Code § 25-9-16; -19).

Oil and Gas.

Drilling and production of oil and gas regulated by State Oil and Gas Board (Ala. Code § 9-17-3), which has broad powers, including limiting and prorating production (subject to provisions of Ala. Code § 9-17-12, -13), requiring pooling of separately owned tracts, and making regulations and orders for purpose of efficient operation, prevention of waste, etc. (Ala. Code § 9-17-6). Validity of such regulations and orders may be tested in circuit court. (Ala. Code § 9-17-15). Administrative fine limit of Oil and Gas Board for violations of this chapter $10,000 per day per act. (Ala. Code § 9-17-32).

Upon termination of any recorded lease, tenant who fails after 30 days written notice from lessor to cancel lease on record or furnish lessor with cancellation instrument, liable for damages and attorney's fee. (Ala. Code § 9-17-50). Commissioner of Conservation and Natural Resources may lease land under its jurisdiction (Ala. Code § 9-17-60) upon basis of competitive bid (Ala. Code § 9-17-65).

Taxes.

On oil and gas, 8% of gross value at point of production. (Ala. Code § 40-20-2[a][1]). Incremental oil or gas production produced during year resulting from qualified enhanced recovery project taxed at 4% of gross value at point of production, as approved by State Oil and Gas Board. (Ala. Code § 40-20-2[a][2]). All wells producing 25 barrels or less of oil per day or 200,000 cubic feet or less of gas per day taxed at 4% of gross value of oil or gas at point of production. (Ala. Code § 40-20-2[a][3]). Oil and gas produced from on-shore discovery wells, oil and gas produced from on-shore development oils on which drilling commenced within four years of completion date of discovery of well and producing from depth of 6,000 feet or greater, and oil and gas produced from on-shore development wells on which drilling commenced within two years of completion date of discovering of well and producing depth less than 6,000 feet taxed at 6% of gross value of oil and gas at point of production for five years from date production begins from discovery in development wells; certain qualifications to such tax rates exist. (40-20-[a][4]). Oil or gas produced by offshore production greater than 8,000 feet below sea level taxed at 8% of gross proceeds. (Ala. Code § 40-20-2[a][1]). For any well for which initial permit issued by State Oil and Gas Board dated on or after July 1, 1988, except for replacement well for which initial permit issued dated before July 1, 1988, rates provided in Ala. Code § 40-20-2(a)(1) and (5) reduced by 2%. (Ala. Code § 40-20-2[a][7]). Applicable rate reduced by 50% for five year period for well permitted on or after July 1, 1996 and before July 1, 2002, except for replacement well for well initially permitted before July 1, 1996 (in addition to tax, reduction pursuant to § 40-20-2[a][8]). Tax levied upon basis of entire production in State including royalty interest. (Ala. Code § 40-20-2[b]). Under certain circumstances, Department of Revenue determines "value" of gas (Ala. Code § 40-20-1[3]), which may be challenged by taxpayer if other than actual sale price (638 So.2d 886). Tax on iron ore, 3¢ per ton, but Department of Revenue, with approval of Governor, may fix lower rates. (Ala. Code § 40-12-128). On coal or lignite, 20¢ per ton. (Ala. Code § 40-13-31).

Production Tax and Permit Fee.

In addition to severance tax, tax of 2% of gross value, at point of production, of all oil and gas produced imposed for defraying expenses of Oil and Gas Board (Ala. Code § 9-17-25), and permit fee of $300 per well required prior to drilling (Ala. Code § 9-17-24).

Transfer Tax.

Tax on recording of instruments involving severed interests and nonproducing oil, gas or minerals. (Ala. Code § 40-20-31 to -32).

Tax credits allowed based upon annual tonnage of coal mined. (Ala. Code § 40-18-220).

Surface Mining.

Operators engaged in surface mining must obtain license and permit for each location mined from Surface Mining Commission by filing application with Commission, together with license fee of $1,000. (Ala. Code § 9-16-81). See also category 12 Environment, topic 12.01 Environmental Regulation.

20 MORTGAGES

20.01 CHATTEL MORTGAGES:

Uniform Commercial Code adopted. (Ala. Code § 7-1-101; -108). See category 3 Business Regulation and Commerce, topic 3.09 Commercial Code.

Filing.

Uniform Commercial Code governs. Official text—1990 adopted with some variations. See category 3 Business Regulation and Commerce, topic Commercial Code for specific variations from official texts. Except as provided in Uniform Commercial Code, general recording statute still applies. See category 10 Documents and Records, topic 10.04 Records, subhead Recordable Instruments.

Place of Filing.

Uniform Commercial Code governs. (Ala. Code § 7-9A-501). See category 10 Documents and Records, topic 10.04 Records, subhead Filing Under Commercial Code for details of place of filing.

Filing Fees.

Uniform Commercial Code governs. (Ala. Code § 7-9A-525). See category 10 Documents and Records, topic 10.04 Records, subhead Filing Under Commercial Code for specific fee details.

Taxation.

See category 22 Taxation, topic 22.15 Property Taxes, subhead Real Estate Conveyance Tax.

Forms.

No forms prescribed by statute. Secretary of State has approved following standard forms: (a) UCC-1 financing statement; (b) UCC-3 statements of continuation, partial release, assignment, etc. (also used for termination, amendment and both full and partial assignment); (c) UCC-1F farm products financing statement; (d) UCC-3F farm products financing statement—continuation, termination, assignment and amendment; (e) UCC-E additional page; and (f) UCC-11 request for information or copies.

Alabama standard forms printed by various printers will be accepted by Secretary of State. List of approved printers can be obtained from Secretary of State.

UCC-1 and UCC-3 forms at end of this Digest have been approved by Secretary of State. Additional filing fee of $2 imposed when nonstandard form (i.e. not prescribed by Alabama Secretary of State) used. Secretary of State strongly urges that standard prescribed forms be used, that information recorded thereon be typed, not handwritten, and, if nonstandard form used, unsigned but otherwise completed standard form also be submitted to assist with indexing filing.

Security Agreement.

No prescribed, official or approved forms of security agreement.

20.02 COLLATERAL SECURITY:

See category 8 Debtor and Creditor, topic 8.15 Pledges.

20.03 MORTGAGES OF PERSONAL PROPERTY:

See topic 20.01 Chattel Mortgages; category 3 Business Regulation and Commerce, topic 3.09 Commercial Code.

20.04 MORTGAGES OF REAL PROPERTY:

Mortgages must be executed and acknowledged or witnessed in same manner as deeds. (Ala. Code § 35-4-57). In law, mortgages treated as defeasible conveyances; in equity, as security for debt. Trust deeds are in general use, but more frequent practice is to use defeasible conveyance containing power of sale.

Execution.

Mortgages must be executed and acknowledged or witnessed as deeds. (Ala. Code § 35-4-57).

Recording.

Except as otherwise provided by Uniform Commercial Code, all deeds, mortgages, deeds of trust or other documents conveying any right, title, or interest in real property to be recorded in office of probate judge of county where property situated. (Ala. Code § 35-4-51; -62). Recording operates as notice. (Ala. Code § 35-4-63). All deeds, mortgages, deeds of trust or other conveyances void as to purchasers, mortgagees and judgment creditors without notice, unless such instruments are recorded before accrual of right of such third parties. (Ala. Code § 35-4-90).

Recording Fees.

See category 10 Documents and Records, topic 10.04 Records.

Taxes.

See category 22 Taxation, topic 22.15 Property Taxes, subhead Real Estate Conveyance Tax.

Trust Deeds.

Recognized. (Ala. Code § 35-4-51; -90; 142 Ala. 422, 38 So. 244). Also, when deed absolute on its face given to secure debt, treated in equity as mortgage. (256 Ala. 73, 53 So.2d 613).

Future Advances.

Mortgage not satisfied until all agreements for future advances satisfied. (Ala. Code § 35-10-26).

Priorities.

Mortgage void as to other bona fide purchasers without notice unless mortgage recorded before accrual of right. (Ala. Code § 35-4-90).

Subordination Agreements.

No statutory provisions. Generally considered valid.

Assignment.

Transfer of mortgage by mere delivery is equitable assignment, but passes no rights at law. (59 Ala. 183). Transfer by mere delivery of note secured by mortgage, if for valuable consideration, operates as equitable assignment of mortgage to transferee. (190 Ala. 530, 67 So. 426). Power to sell lands, given in mortgage, is part of security, and may be executed by person or personal representative who by assignment or otherwise becomes entitled to money secured; and conveyance to purchaser of lands sold under such power of sale executed by mortgagee, any assignee or other person entitled to money secured, his agent or attorney, or auctioneer making sale, vests legal title in purchaser. (Ala. Code § 35-10-1). Purchaser of property against which there are recorded mortgages or liens is protected when assuming that record owner of such liens is holder of indebtedness. (Ala. Code § 35-4-64).

Release.

Mortgagee must upon written request release property from lien of mortgage by appropriate instrument duly recorded, or by entry on margin of record of mortgage when fully paid. (Ala. Code § 35-10-27).

Satisfaction.

Mortgagee, at written request of mortgagor, must enter on margin of record of mortgage date and amount of full or partial payments (Ala. Code § 35-10-21 to -23) or file separate written instrument so stating (Ala. Code § 35-10-24). If after 30 days request not complied with, mortgagor may recover $200 from mortgagee, unless action pending or instituted contesting payment or satisfaction. (Ala. Code § 35-10-30). Judge of Probate or clerk must attest full satisfaction, or full satisfaction may be made by attorney in fact authorized by instrument executed and acknowledged as conveyance, and filed for record. (Ala. Code § 35-10-27; -28).

Properly attested satisfaction in full by any one of several joint mortgagees which is noted on margin of record, or properly notarized and recorded release by any one of several joint mortgagees acknowledging full satisfaction of any mortgage in names of joint mortgagees, sufficient to extinguish lien of mortgage. (Ala. Code § 35-10-28).

Duly appointed executor or administrator of deceased mortgagee may enter satisfaction on margin of record of mortgage paid during lifetime of decedent. (Ala. Code § 35-10-25).

Discharge.

See subheads Satisfaction and Release, supra.

Foreclosure.

For Mortgages Executed On or Before Dec. 31, 1988.

If deed of trust or mortgage, with power of sale, silent as to place or terms of sale, or as to notice, sale may be made at courthouse door of county where land situated for cash to highest bidder, after 30 days' notice of time, place and terms of sale by notice once a week for four consecutive weeks in newspaper published in county where property situated. (Ala. Code § 35-10-2). If no power of sale in mortgage or deed of trust, grantee may foreclose in court having jurisdiction of subject matter, or by selling for cash at courthouse door of county where property situated, to highest bidder, after notice of time, place, terms, purpose of sale given by four consecutive weekly insertions of notice in newspaper published in county where lands situated. (Ala. Code § 35-10-3). Where lands situated in two or more counties and no provision made in mortgage for sale, then lands may be sold at courthouse door of county wherein any portion of lands situated, after 30 days' notice of time, place, terms and purpose of such sale, by publishing notice once a week for four consecutive weeks in newspaper in each county in which said lands or portion thereof situated. (Ala. Code § 35-10-4). In foreclosure under § 35-10-2 to -4, foreclosure deed executed by mortgagee conveys legal title. (Ala. Code § 35-10-5). Sale of part of property conveyed by mortgage operates as foreclosure of mortgage only as to property sold, other property continues as security for mortgage debt. (Ala. Code § 35-10-6). All sales of real estate under powers of sale contained in mortgages and deeds of trust must be held in county where all or part of said real estate situated. (Ala. Code § 35-10-7). Notice of sale must be given in manner provided in mortgage or deed of trust or in county where mortgagor resides and land, or part thereof, located; but if mortgagor does not reside in county where land or part thereof located, then notice must be published in county where land, or part thereof is located; but notice of sale under powers of sale contained in mortgages and deeds of trust executed after July 1, 1936, where amount secured $500 or more, must be given by publication once a week for three successive weeks in newspaper published in county in which land or portion thereof situated, and notice must give time, place and terms of sale, with description of property. (Ala. Code § 35-10-8). Sales under powers contained in mortgages or deeds of trust contrary to provisions of article void, notwithstanding agreement to contrary. (Ala. Code § 35-10-9).

For Mortgages Executed After Dec. 31, 1988.

Notice of sale must be given in county where land located. (Ala. Code § 35-10-13). Notice must be given by publication once a week for three successive weeks in newspaper published in county or counties in which land located. If land in more than one county publication to be made in all counties where land located. Notice must give time, place and terms of sale, together with description of property. (Ala. Code § 35-10-13). Power to sell must be exercised at front or main door to courthouse of county where land or material part located. Sale must be held between 11:00 A.M. and 4:00 P.M. on day designated. (Ala. Code § 35-10-14). Sale of part of property conveyed by mortgage or similar instrument operates as foreclosure only as to property sold, if debt not satisfied in full, other property in mortgage continues as security. (Ala. Code § 35-10-15).

Sales.

See subhead Foreclosure, supra.

Deficiency Judgments.

Mortgagee may sue on mortgage indebtedness without first foreclosing mortgage, or may foreclose mortgage and sue for deficiency judgment on any resulting deficiency. (228 Ala. 281, 153 So. 412).

Moratorium.

None.

Redemption.

See category 8 Debtor and Creditor, topic 8.05 Executions, subhead Redemption.

Form.

No prescribed form. Following is in general use:

Form

The State of Alabama . . . County. Know all men by these presents: That whereas, the undersigned . . . (hereinafter "Mortgagor") has become justly indebted to . . . (hereinafter "Mortgagee") in the sum of . . . Dollars due by promissory note and whereas, the said Mortgagee is desirous of securing the prompt payment of said note when the same shall fall due, now, therefore, in consideration of said indebtedness, and to secure the prompt payment of the same at maturity, the Mortgagor has bargained and sold, and does hereby grant, bargain, sell and convey unto the Mortgagee the following described real estate situated in . . . County and State of Alabama, to-wit: (description) warranted free from all encumbrances and against any adverse claims.

To have and to hold the above granted premises unto the Mortgagee, its heirs, executors, successors and assigns forever, and for the purpose of further securing the payment of said promissory note, Mortgagor does hereby agree to pay all taxes and assessments when imposed legally upon said premises, and should Mortgagor make default in the payment of same, the said Mortgagee may, at Mortgagee's option, pay off the same; and to further secure said indebtedness Mortgagor agrees to keep said property insured for at least . . . Dollars, loss, if any, payable to said Mortgagee as interest may appear, and if Mortgagor shall fail to keep said property insured as above specified, then the said Mortgagee may, at Mortgagee's option, insure said property for said sum for Mortgagee's own benefit, the policy, if collected, to be credited on said indebtedness, less cost of collecting same; all amounts so expended by said Mortgagee shall become a debt to said Mortgagee additional to the indebtedness hereby specifically secured, and shall be covered by this Mortgage and bear interest from date of payment by said Mortgagee and be due and payable at the maturity of any of the principal or any interest thereon.

Upon condition, however, that if the Mortgagor shall pay said note and reimburse said Mortgagee for any amounts Mortgagee may have expended as taxes, assessments or other charges and insurance and interest thereon, then this conveyance to be null and void; but should default be made in the payment of any sum so expended by the said Mortgagee, or should said note or any part thereof, or interest thereon, remain unpaid at maturity, or should the interest of said Mortgagee or of its heirs, executors, successors and assigns in said property become endangered by reason of the enforcement of any prior lien or encumbrance thereon, so as to endanger the debt hereby secured, then in any one of said events the whole of the said indebtedness shall at once become due and payable, and this mortgage shall be subject to foreclosure as now provided by law in case of past due mortgages, and the said Mortgagee and its agents, heirs, executors, successors and assigns, shall be authorized to take possession of the premises hereby conveyed, and after notice by publication once a week for three consecutive weeks of the time, place and terms of sale, together with a description of the premises by publication in some newspaper published in the county in which the premises are located, to sell the same, as a whole or in parcels, in front of the main or front courthouse door, of said last named county, at public outcry, to the highest bidder for cash, and apply the proceeds of said sale: first, to the expense of advertising, selling and conveying, including a reasonable attorney's fee; and, second, to the payment of any amounts that may have been expended or that may then be necessary to expend, in paying insurance, taxes, assessments, or other encumbrances, with interest thereon; and, third, to the payment of said note in full, whether the same shall or shall not have fully matured at the date of said sale; but no interest shall be collected beyond the day of sale; and, fourth, the balance, if any, to be turned over to the Mortgagor; and Mortgagor further agrees that said Mortgagee, its agents, heirs, executors, successors and assigns, may bid at said sale, and purchase said property, if the highest bidder therefor; and Mortgagor further agrees to pay a reasonable attorney's fee to Mortgagee or its assigns, for the foreclosure of this mortgage. Should the same be foreclosed, said fee to be a part of the debt hereby secured.

Witness the undersigned's hand and seal this . . . day of . . . ., 20 . . .

WITNESSES:

. . . .

. . . .

. . . .(Seal)

. . . .(Seal)

(Acknowledgments)

Defeasance.

Title passing by mortgage will not divest until all secured obligations paid and there is no commitment or agreement by mortgagee to make advances, incur obligations or otherwise give value under any agreement. (Ala. Code § 35-10-26).

Presumption of Payment.

As to third persons without notice or knowledge, indebtedness secured by recorded mortgage or reservation of vendor's lien covering real estate is, on becoming 20 years past due, conclusively presumed paid, unless recorded record of such mortgage or lien shows credit by owner of debt of one or more payments on such indebtedness within last 20 years. (Ala. Code § 35-10-20). Presumption does not apply to mortgages executed by corporations and political subdivisions securing bonds where maturity dates of bonds are not fixed in mortgage or deed of trust. (Ala. Code § 35-10-20).

21 PROPERTY

21.01 ABSENTEES:

Care of Property.

In sale of lands of decedent for payment of debts or for division, nonresident heirs or devisees may be brought into court by publication. (Ala. Code § 43-2-446). Unknown heirs and devisees may likewise be proceeded against by publication on proper averments. (Ala. Code § 43-2-447). Funds to which such parties are entitled are paid into court and there retained until ascertainment of persons entitled thereto. (Ala. Code § 43-2-447).

Process Agent.

See topic 21.15 Powers of Attorney.

Escheat.

Uniform Disposition of Unclaimed Property Act adopted. (Ala. Code § 35-12-70 to -96).

Partition.

In probate court, nonresident is made defendant in partition proceedings through publication carried out in same manner as when property in hands of executor is distributed. (Ala. Code § 35-6-43). Partition proceedings against unknown defendant without naming him are authorized upon averment that diligent inquiry has not disclosed his identity and after publication of character in which he is being sued and with reference to his title or interest in property. (Ala. Code § 35-6-44). When known party cannot be located, or when it cannot be ascertained whether he is alive, he can be made defendant in his name by publication, provided that petitioner specifically alleges facts showing diligence of his search for absent defendant. (Ala. Code § 35-6-44). Court shall appoint guardian ad litem to represent interest of absent defendant. (Ala. Code § 35-6-44).

In circuit court, nonresident in partition proceedings (Ala. Code § 35-6-20 to -25) can be made defendant through publication (ARCP 4.3). Unknown party can be made defendant without naming him upon averment of diligent inquiry concerning his identity and after publication. (ARCP 4.3). Known party who cannot be located, or about whom it cannot be ascertained whether he is alive, can be made defendant in his own name through publication, provided specific facts are alleged by petitioner showing diligence of search for absent defendant's whereabouts. (Ala. Code § 35-6-25). Court must appoint guardian ad litem for absent defendant and decree is binding on both him and his heirs. (Ala. Code § 35-6-25).

Nonresident parent or guardian having legal custody of minor may, by application showing that said parent or guardian has legal custody in state of residence, obtain order from court having jurisdiction of estate of such minor authorizing removal of property of minor from state to conservator and authorizing such conservator to receive it. (Ala. Code § 26-8-40, -43). Property belonging to nonresident ward, either minor or ward, may on petition by nonresident guardian to judge of probate of county in which property is situated be removed to state of residence of minor or ward. (Ala. Code § 26-8-44 to -52; 235 Ala. 314, 179 So. 215).

21.02 ADVERSE POSSESSION:

Adverse possession, to bar entry on, or recovery of, real estate must be open, actual, exclusive, notorious, hostile and continuous. (255 Ala. 569, 52 So.2d 207).

Character of Possession.

Adverse possession cannot confer or defeat title to land unless: (1) Deed or other color of title has been recorded in office of judge of probate of county in which lands lie, for at least ten years before action has been commenced; (2) claimant or predecessor in title has annually listed land for taxation for ten years prior to action; or (3) claimant has acquired title by descent cast or devise from predecessor in title who was in possession. (Ala. Code § 6-5-200[a]). To complete time required under color of title, time of any predecessor in title may be added. Accident, oversight or misdescription of tax assessment will not defeat claim based on adverse possession. (Ala. Code § 6-5-200[b]). Coterminous owner may acquire title by adverse possession for ten years without any of above three alternative requirements. (Ala. Code § 6-5-200[c]; 294 Ala. 189, 314 So.2d 65).

In cases where none of above requirements are met, common law prescriptive period of 20 years applies. (230 Ala. 197, 160 So. 336; 264 Ala. 492, 88 So.2d 868).

Action for recovery of land, or possession thereof, must be commenced within ten years, except as otherwise provided by law. (Ala. Code § 6-2-33). See category 5 Civil Actions and Procedure, topic 5.16 Limitation of Actions, subhead Ten Years.

No statute of limitations exists on actions for recovery of lands belonging to State of Alabama or any of its public, educational, or governmental institutions, counties or municipal corporations (Ala. Code §§ 6-2-31, 6-6-281), except for "sixteenth section lands" held under color of title and which had been in possession for more than 20 years prior to May 1, 1908 (Ala. Code § 16-20-6).

Duration of Possession.

Where purchaser to whom land was sold for payment of taxes in actual adverse possession under claim of right, action to recover land must be brought within three years from date purchaser became entitled to demand deed therefor, but if owner was at time of sale minor or insane, he, his heirs or legal representatives must be allowed one year after disability is removed to bring suit; otherwise suit is barred. Rule does not apply to any action brought by State, nor to cases in which owner of land sold had paid taxes prior to sale, nor to cases in which land sold was not at time of assessment or sale subject to taxation. (Ala. Code § 40-10-82, am'd 2009, Act 2009-508).

Easements.

Established by use and enjoyment for 20 years adverse to owner of servient estate, under claim of right, exclusive, continuous, and uninterrupted, with actual or presumptive knowledge of owner. (252 Ala. 296, 40 So.2d 873).

Disabilities.

Person entitled to make entry on land or enter defense founded on title to land who is, at time such right accrues, less than 19 years old or insane has three years after termination of such disability (or shorter period if provided by law) to commence action or enter defense to action. Period may not extend beyond 20 years. (Ala. Code § 6-2-8[a]). When both disabilities coexist at time claim accrues, limitation does not attach until both disabilities removed. (Ala. Code § 6-2-8[b]). Disability not existing at time claim accrues does not suspend operation of limitation. (Ala. Code § 6-2-8[c]). This § 6-2-8 is inapplicable to wrongful death actions. (278 Ala. 497, 179 So.2d 76; 473 So.2d 984).

21.03 CONDOMINIUMS:

See topic 21.16 Real Property.

21.04 CONVEYANCES:

See topic 21.06 Deeds.

21.05 CURTESY:

Estate of curtesy abolished. (Ala. Code § 43-8-57).

21.06 DEEDS:

Person of legal capacity and 19 years of age may alienate any present, future or contingent interest in land by will or by executing and delivering deed. (Ala. Code § 35-4-1). See topic Real Property for types of estates.

Execution.

Valid deed must be signed at foot by grantor, or duly authorized agent, and must be duly acknowledged by grantor, or its execution must be attested by subscribing witness. (Ala. Code § 35-4-20). If grantor signs by making mark or through amanuensis, instrument must be duly acknowledged or attested by two witnesses in writing. (Ala. Code § 35-4-20). Acknowledgments for conveyances and other recorded instruments in other states and foreign countries are valid if executed in compliance with law of place where executed. (Ala. Code § 35-4-26).

For circumstances in which spouse must join, see categories 8 Debtor and Creditor, topic Homesteads, subhead Alienation or Encumbrance; Family, topic Husband and Wife, subhead Conveyance or Encumbrance of Property.

Seal not necessary to convey legal title (Ala. Code § 35-4-21), and writing importing on face to be under seal has same effect as if seal of parties were affixed thereto (Ala. Code § 35-4-22).

While seal not essential to validity of deed of corporation (Ala. Code § 35-4-67), general practice to affix corporate seal, which constitutes prima facie evidence that deed was duly executed by proper officer acting with full authority (232 Ala. 471, 168 So. 693; 285 Ala. 371, 232 So.2d 616).

Recording.

Recordation in office of judge of probate in county in which property situated necessary to constitute notice to subsequent purchasers, mortgagees, etc., who do not have actual notice of deed. (Ala. Code § 35-4-50; -62; -63). **Alabama Uniform Real Property Electronic Recording Act** adopted. (Act 2009-510, SB90). See also category 10 Documents and Records, topic 10.04 Records.

Recording Fees.

See category 10 Documents and Records, topic 10.04 Records.

Operation and Effect.

Recorded deed, properly acknowledged or probated, is self-proving in court, unless reputed maker has bona fide possession and files affidavit of forgery. (Ala. Code § 35-4-65).

Taxes.

Deed tax imposed at rate of 50¢ for first $500 or less of value, and 50¢ for each $500 or fraction thereof of excess. Tax applies only to value in excess of any mortgage or vendor's lien on property on which mortgage tax is paid. (Ala. Code § 40-22-1). See also category 22 Taxation, topic 22.15 Property Taxes, subhead Real Estate Conveyance Tax.

Form.

No prescribed form of warranty deed. Following is effective:

Form

Know All Men By These Presents, That we (Tom Brown) and (Sarah Brown), his wife, for and in consideration of the sum of (one thousand dollars) to us in hand paid by (John Doe) the receipt whereof we hereby acknowledge, do grant, bargain, sell and convey unto the said (John Doe), the following described real estate, all situated in (Jefferson County, State of Alabama) to-wit: (Description).

To Have and to Hold the aforegranted premises to the said (John Doe), his heirs and assigns, forever.

And we, for ourselves and our heirs and assigns, do hereby covenant with the said (John Doe), his heirs and assigns, that we are lawfully seized in fee of the aforegranted premises; that they are free from all incumbrances; that we have good right to sell and convey the same, and that we will warrant and defend the said premises to the said (John Doe), his heirs and assigns, forever against the lawful claims and demands of all persons.

In Witness Whereof, we (Tom Brown) and (Sarah Brown), his wife, have hereunto set our hands and seals this . . . day of . . . ., 20. . . . .

Witnesses:

. . . . Tom Brown (L. S.)

. . . . Sarah Brown (L. S.)

(Acknowledgment.)

Quitclaim deed may be in like form, except "do hereby remise, release, quitclaim and convey" should be substituted for "do grant, bargain, sell and convey" and paragraph containing covenants should be omitted.

21.07 DEEDS OF TRUST:

See category 20 Mortgages, topic 20.04 Mortgages of Real Property.

21.08 DOWER:

Estate of dower has been abolished. (Ala. Code § 43-8-57).

21.09 ESCHEAT:

See topic 21.01 Absentees, subhead Escheat; categories 3 Business Regulation and Commerce, topic Banks and Banking, subhead Unclaimed Deposits; Estates and Trusts, topic Descent and Distribution, subhead Escheat, and Wills, subhead Unclaimed Legacies.

21.10 LANDLORD AND TENANT:

Uniform Commercial Code Art. 2A adopted. (Ala. Code § 7-2A-101 to -532).

Kinds of Tenancy.

Tenancy for life, years, month to month, at will, and at sufferance recognized.

Leases for over one year must be in writing. (Ala. Code § 8-9-2). Leasehold estate cannot be created for longer term than 99 years. (Ala. Code § 35-4-6). Leases for more than 20 years void for excess over said period unless acknowledged as conveyances and recorded within one year in office of judge of probate in county in which leased property situated. (Ala. Code § 35-4-6).

Security Deposits.

For tenancies governed by Alabama Uniform Residential Landlord and Tenant Act, landlord may not demand or receive deposit in excess of one month's rent, except for pets, changes to premises, and increased liability risks to landlord or premises. (Ala. Code § 35-9A-201[a]). Upon termination, landlord may apply deposit to payment of accrued rent and damages caused by tenant's failure to maintain dwelling unit, but only if landlord itemizes charges and delivers written notice of same to tenant within 35 days after termination. (Ala. Code § 35-9A-201[b], [c]). If landlord fails to mail refund or notice of charges within 35-day period, landlord must pay tenant double amount of deposit. (Ala. Code § 35-9A-201[f]). Tenant forfeits deposit if tenant fails to provide forwarding address and deposit not claimed within 180 days. (Ala. Code § 35-9A-201[d]).

Recording.

See subhead Leases, supra.

Rent.

When one party furnishes land and other party labor with stipulation to divide crop, relationship of landlord and tenant exists and portion of crop to which party furnishing land is entitled is rent thereof. (Ala. Code § 35-9-37). Reasonable satisfaction may be recovered for use and occupation of land: (1) When demise by deed or parol and no specific sum agreed on as rent; (2) when defendant in possession under sale not consummated; (3) when tenant remains on land by sufferance; (4) when tenant obtains possession of land unlawfully; (5) when defendant estopped from disputing plaintiff's title. (Ala. Code § 35-9-100).

In ejectment proceedings tenant in possession under license or lease from another liable only for rent in arrears at commencement of action and that which may accrue during possession. (Ala. Code § 6-6-288). Rent accruing after judgment but before delivery of possession may be recovered on motion. (Ala. Code § 6-6-293).

For tenancies governed by Alabama Uniform Residential Landlord and Tenant Act, in absence of written agreement tenant shall pay fair rental value for use and occupancy of dwelling unit. (Ala. Code § 35-9A-161).

Lien.

Common law methods of distress for rent abolished and replaced by giving lien on tenant's goods enforceable by attachment in certain cases. (Ala. Code § 35-9-34; Ala. Code § 35-9-61; Ala. Code § 35-9A-425). For rents and advances on lands, landlord has lien on crops for rent for current year and for advances. (Ala. Code § 35-9-30). Unless otherwise agreed, such rent due Nov. 1 of year in which crop grown. (Ala. Code § 35-9-31). Lien continues and attaches to crops of succeeding year. (Ala. Code § 35-9-32). Landlord may assign rights and remedies for rents and advances. (Ala. Code § 35-9-33). May be enforced by attachment when rent or advances due and tenant fails to pay, and in following cases, even if rent or advances not due: (1) Tenant has removed, or good cause to believe tenant will remove, crops from premises; and (2) tenant has disposed, or good cause to believe tenant will dispose, of articles advanced or obtained with money advanced. (Ala. Code § 35-9-34). Landlord has lien on livestock raised or grazed upon land rented from him for rent of said land for current year. (Ala. Code § 35-11-72).

For tenancies not governed by Alabama Uniform Residential Landlord and Tenant Act, landlords of storehouses or other buildings have lien for rent on goods, furniture, and effects of tenants. (Ala. Code § 35-9-60). Such lien has precedence over all other liens, except those for taxes and perfected security interest in collateral that attaches before collateral brought on leased premises. (Ala. Code § 7-9A-333; Ala. Code § 35-9-60). May be enforced by attachment when rent due, and in following cases, even if rent not due: (1) Fraudulent or near fraudulent disposal of goods; (2) assignment for benefit of creditors; (3) or transfer of substantially all of his goods without payment of rent. (Ala. Code § 35-9-61). Assignee of rent has all rights and remedies of assignor. (Ala. Code § 35-9-65).

For tenancies governed by Alabama Uniform Residential Landlord and Tenant Act, landlord's lien or security interest in tenant's household goods not enforceable unless perfected before Jan. 1, 2007. (Ala. Code § 35-9A-425).

Termination of Tenancy.

Where no time is specified for termination of tenancy, the law construes it to be from Dec. 1 to Dec. 1, but if expressly tenancy at will, then either party may terminate it at will, by ten days notice in writing. (Ala. Code § 35-9-3).

For tenancies governed by Alabama Uniform Residential Landlord and Tenant Act, unless rental agreement fixes definite term, tenancy is week-to-week in case of tenant who pays weekly rent, and in all other cases month-to-month. (Ala. Code § 35-9A-161). Landlord or tenant may terminate week-to-week tenancy by seven days' written notice and month-to-month tenancy by 30 days' written notice. (Ala. Code § 35-9A-441[a], [b]).

Holding Over.

When tenant by month or for any term less than one year holds over without special agreement, landlord may terminate tenancy by giving tenant ten days notice in writing. (Ala. Code § 35-9-5). If tenant forcibly or unlawfully retains possession after termination or refuses to surrender same upon written demand of landlord, tenant liable for double amount of annual rent and for special damages sustained by party unlawfully kept out of possession. (Ala. Code § 6-6-314). For tenancies governed by Alabama Uniform Residential Landlord and Tenant Act, if tenant remains in possession without landlord's consent after expiration of term, landlord may bring action for possession and, if holdover is willful and not in good faith, recover three months' rent or actual damages, whichever is greater, and attorneys' fees. (Ala. Code § 35-9A-441[c]).

Uniform Residential Landlord and Tenant Act adopted with some modifications and additions. (Ala. Code § 35-9A-101, et seq.). Applies to certain residential rental agreements entered into or extended or renewed on or after Jan. 1, 2007. (Ala. Code § 35-9A-101, -122, and -601).

Distress.

See subhead Lien, supra.

Dispossession.

Two statutory methods for removing holdover tenants. (Ala. Code § 6-6-310 to -353; Ala. Code § 35-9A-461, am'd 2009, Act 2009-633). Under first method, where tenant fails or refuses to deliver possession after termination of possessory interest complaint must be filed with district court for county in which lands or tenements are situated. (Ala. Code § 6-6-330, -331). Such court has exclusive jurisdiction and venue over such action. (Ala. Code § 6-6-330, -331). Trial may not be postponed longer than 15 days after defendant answers complaint. (Ala. Code § 6-6-335).

Under second method, which applies to tenancies governed by Alabama Uniform Residential Landlord and Tenant Act, action governed by ARCP and ARAP except where modified by statute. (Ala. Code § 35-9A-461[a], am'd 2009, Act 2009-633). District courts and circuit courts, according to respective jurisdictions, have jurisdiction over actions. (Ala. Code § 35-9A-461[b], am'd 2009, Act 2009-633). Venue lies in county where property located. (Ala. Code § 35-9A-461[b], am'd 2009, Act 2009-633). Appeal by tenant to circuit or appellate court does not prevent issuance of writ of restitution or possession unless tenant pays to clerk all rents properly payable since date of filing of action and continues to pay rent that becomes properly payable during pendency of appeal. (Ala. Code § 35-9A-461[d], am'd 2009, Act 2009-633). If eviction judgment entered in favor of landlord, writ of possession shall issue. (Ala. Code § 35-9A-461[e], am'd 2009, Act 2009-633). If tenant without just cause re-enters premises, tenant can be held in contempt and successive writ may issue. (Ala. Code § 35-9A-461[e], am'd 2009, Act 2009-633).

Default.

When default made in any term of lease, ten days notice to quit may be written and served. (Ala. Code § 35-9-6). For tenancies governed by Alabama Uniform Residential Landlord and Tenant Act, §§ 35-9A-401 to -427 address remedies for default.

21.11 LEASES:

See topic 21.10 Landlord and Tenant.

21.12 PARTITION:

See category 5 Civil Actions and Procedure, topic 5.16A Partition.

21.13 PERPETUITIES:

Common law rules are applicable to both real and personal property (Ala. Code § 35-4-

4), but do not apply to pension, profit-sharing and stock bonus plans created by employers for benefit of their employees or trusts consisting solely of policies of life, health, accident or disability insurance, or proceeds thereof (Ala. Code § 19-3B-1304, -1305). Rule against perpetuities does not apply to business trusts. (Ala. Code § 19-3-65); see category 2 Business Organizations, topic 2.04 Joint Stock Companies.

Accumulations.

See Alabama Uniform Trust Code.

Alienation of Proceeds of Annuities, etc., Retained by Insurance Company.

Where, under annuity contract or life insurance policy (or agreement in writing supplemental to either) issued by any life insurance company, proceeds are to be retained by company at maturity, no person entitled to such proceeds may alienate, anticipate, or encumber any part of interest or principal due therefrom, if such contract, policy or supplemental agreement expressly withholds such permission. (Ala. Code § 27-14-30).

21.14 PERSONAL PROPERTY:

Tenancy by the entirety not recognized. (212 Ala. 45, 101 So. 663). Attempt to create tenancy by entirety may indicate sufficient intent to create survivorship estate under § 35-4-7 and may result in tenancy with right of survivorship. (447 So.2d 185).

21.15 POWERS OF ATTORNEY:

Attorneys In Fact.

Power of attorney may confer authority to convey property or to enter satisfaction of mortgage or other lien. (Ala. Code § 35-4-28).

Formalities.

Same as requirements for passing any other real estate interest. (Ala. Code § 35-4-28).

Revocation not required to be formally executed, acknowledged and recorded. (206 Ala. 519, 91 So. 82).

Uniform Durable Power of Attorney Act adopted, with modifications. (Ala. Code § 26-1-2).

Members of Armed Forces.

No special provision.

21.16 REAL PROPERTY:

Common law estates generally recognized. No leasehold estate for term longer than 99 years may be created. Leases for more than 20 years void for excess over said period unless lease or memorandum thereof acknowledged or approved as required by law for conveyances of real estate and recorded within one year from date of execution in office of judge of probate in county in which property is located. (Ala. Code § 35-4-6).

Rule in Shelley's Case abolished. (Ala. Code § 35-4-230).

Condominiums created on or after Jan. 1, 1991 governed by Alabama Uniform Condominium Act of 1991. (Ala. Code § 35-8A-101 to -417). Condominiums created prior to Jan. 1, 1991 governed by Condominium Ownership Act (Ala. Code § 35-8-1 to -22), provided, however, that certain sections of 1991 Act apply to all condominiums created prior to Jan. 1, 1991. (Ala. Code § 35-8A-102).

Eminent Domain.

Alabama Eminent Domain Code provides standards for property acquisition, conduct of actions, and determination of just compensation. (Ala. Code § 18-1A-1, et seq.). Pursuant to Ala. Code § 18-1A-283, landowner has 30 days from date probate court signs condemnation order for property to appeal order, rather than 30 days from date order is recorded. (988 So.2d 1015). Condemnee's recovery of prejudgment interest was limited, by statute, to pro rata share of Circuit Court's judgment of interest actually earned on funds deposited by State with Probate Court, thus overruling *Williams v. Alabama Power Co.*, 730 So.2d 172 (Ala. 1999). (989 So.2d 1065)

Foreign Conveyances or Encumbrances.

Ala. law governs manner of execution of and competency of parties to conveyance of land situated in Ala. (243 Ala. 651, 11 So.2d 374). See category 10 Documents and Records, topic 10.04 Records, subhead Foreign Conveyances or Encumbrances.

Presumption of Tenancy in Common.

Real property held jointly presumed held in equivalent of tenancy in common, unless instrument creating tenancy shows intent to create joint tenancy with use of words "right of survivorship" or similar words to that effect. (Ala. Code § 35-4-7).

Forfeitures.

No estate or interest can be defeated, discontinued or extinguished by act of any third party having possessory or ulterior interest, except in cases specially provided for by statute. (Ala. Code § 35-4-170). Conveyance by tenant for life or years, purporting to convey greater interest than he possesses or can lawfully convey, passes to grantee all estate which tenant could lawfully convey, rather than forfeit estate. (Ala. Code § 35-4-232).

Survivorship, as incident of joint tenancy, abolished, except when instrument creating joint tenancy states that there shall be survivorship. (Ala. Code § 35-4-7). Tenancy by entirety not recognized. (212 Ala. 45, 101 So. 663).

Livery of seisin and attornment of tenant not recognized. (Ala. Code § 35-4-31,-32).

See also topics 21.05 Curtesy, Deeds, Dower, Landlord and Tenant; categories 8 Debtor and Creditor, topic Homesteads; Family, topic Husband and Wife; Mortgages, topic Mortgages of Real Property.

21.17 TRUST DEEDS:

See category 20 Mortgages, topic 20.04 Mortgages of Real Property.

22 TAXATION

22.01 ADMINISTRATION:

Alabama Department of Revenue supervises administration of tax laws. (Ala. Code § 40-2-11). Commissioner of Revenue is Chief Executive Officer of Department of Revenue and all powers, authority, and duties vested in Department of Revenue exercised by Commissioner. (Ala. Code § 40-2-40).

State Taxes.

Alabama Department of Revenue exercises general supervision and control of valuation, equalization, and assessment of property, privilege, or franchise taxes and collection of property, privilege, license, excise, intangible, franchise, or other taxes for state and counties. (Ala. Code § 40-2-11). Alabama Department of Revenue subject to uniform revenue procedures for assessment and refund claims related to taxes administered by Department. (Ala. Code § 40-2A-7). Taxpayers may appeal final assessment or denial of refund to Department's Administrative Law Division or certain circuit courts. (Ala. Code § 40-2A-7). Information, forms, and waivers, etc., may be obtained by contacting Alabama Department of Revenue, 50 N. Ripley St., Montgomery, AL 36132, (334) 242-1170.

County and Municipal Taxes.

County Commission administers and collects local county taxes, including ad valorem taxes. (Ala. Code § 11-3-11.2; § 40-1-3). County Commission has authority to levy tax for general county purposes or special purposes. (Ala. Code § 11-3-11). Municipal corporations may levy tax to purchase school property or land to erect school buildings thereon. (Ala. Code § 11-47-13). Governing body of incorporated towns and cities authorized to levy property tax (Ala. Code § 11-51-1), sales and use tax, lodgings tax, excise tax (Ala. Code § 11-51-200, -202), business license and rental tax (Ala. Code § 11-51-90). Counties and municipalities may appoint Alabama Department of Revenue to collect and administer certain local taxes. (Ala. Code § 11-51-207; § 11-3-11.3).

Exemptions.

Generally.

Certain organizations exempt from all state, county and municipal taxes, licenses and fees. (Ala. Code § 40-9-9 to -34).

Penalties - Income Tax.

Income Tax.

Failure to file return on time is misdemeanor punishable by fine not less than $10 and no more than $1,000. (Ala. Code § 40-18-50). Failure to timely file return carries penalty of 10% of any additional tax required to be paid with such return or $50, whichever greater. (Ala. Code § 40-2A-11). In addition to other penalties, willful failure to pay tax, file return or supply information misdemeanor punishable by fine of not more than $25,000, or $100,000 for corporation, or imprisonment for not more than one year, or both, plus costs of prosecution. (Ala. Code § 40-29-112). If any underpayment due to negligence, penalty of 5% of tax attributable to negligence assessed. (Ala. Code § 40-2A-11). If underpayment due to fraud, penalty of 50% of underpayment attributable to fraud assessed. (Ala. Code § 40-2A-11). If fraud penalty asserted, no other penalty may be asserted. (Ala. Code § 40-2A-11).

Penalties - Sales Tax.

Penalty for failure to keep records or make reports is misdemeanor and fine of $25 to $500 (Ala. Code § 40-23-11), or $50 to $500 and/or up to six months imprisonment for willful refusal to keep records or make reports (Ala. Code § 40-23-12). In addition to other penalties, willful failure to pay tax, file return or supply information is misdemeanor punishable by fine of not more than $25,000, or $100,000 for corporation, or imprisonment for not more than one year, or both, plus costs of prosecution. (Ala. Code § 40-29-112).

Penalties - Contractors Tax.

Penalty for failure to file returns and make payments same as those applicable to state sales tax. (Ala. Code § 40-23-50).

Penalties - Use Tax.

Penalty up to $500 for failure to make payment, and fine of $300 to $5,000 and/or imprisonment up to one year for fraudulent evasion which shall be misdemeanor. (Ala. Code § 40-23-88).

Penalties - Hotel and Motel Tax.

Fine from $25 to $500 for failure to make reports and keep records (Ala. Code § 40-26-8), and $50 to $500 fine and/or imprisonment for up to six months for willful refusal to make reports or permit examination of records. (Ala. Code § 40-26-9).

Interstate Cooperation.

Multistate Tax Compact adopted. (Ala. Code § 40-27-1).

Taxpayer Bill of Rights.

Alabama Taxpayers' Bill of Rights and Uniform Revenue Procedures Act adopted. (Ala. Code § 40-2A-1 to -18).

22.02 ALCOHOL, BEVERAGES AND TOBACCO TAXES:

Alcoholic beverage taxes governed by §§ 28-3-183 to -207; Ala. Code § 28-7-16; Ala. Code § 28-7A-1 to -6.

Cigarette Taxes.

Sales and use tax and excise tax governed by §§ 40-25-1 to -47.

22.03 BUSINESS TAXES:

Business Privilege Tax.

See category 2 Business Organizations, topic 2.03 Corporations, subhead Business Privilege Tax.

Privilege License.

Certain enumerated businesses, vocations, occupations, and professions must purchase state and county (if required) privilege license. (Ala. Code § 40-12-40, et seq.).

Provider Tax.

Privilege tax imposed on business activities of every provider of pharmaceutical services to Alabama citizens, except for pharmacy serving hospital in-patient or owned and operated by State of Alabama, at rate of 10¢ for each prescription. (Ala. Code § 40-26B-2). Tax due on or before 20th day of following month after tax accrues. (Ala. Code § 40-26B-3). Every pharmaceutical provider should also file statement showing total number of prescriptions filled for previous month and taxes due along with payment of tax. (Ala. Code § 40-26B-4[a]). When tax due does not exceed $10 for any month, quarterly return and remittance allowed. (Ala. Code § 40-26B-4[a]). Penalty for nonpayment 10% of amount of tax due, together with interest in addition to tax amount. (Ala. Code § 40-26B-4[b]).

Privilege or license tax levied against every provider of cellular radio telecommunication services doing business in State of Alabama. (Ala. Code § 40-21-121[a]). Rate is 6% against gross sales or receipts from monthly charges for cellular services. Tax added to charge for services and collected from purchaser. (Ala. Code § 40-21-121[b]). Following excluded from gross sales or receipts of cellular provider: (1) Furnishing of cellular services which State of Alabama prohibited from taxing; (2) furnishing of cellular services which are otherwise taxed under §§ 40-23-1 through Ala. Code § 40-23-36; (3) wholesale sales; and (4) furnishing of cellular services through prepaid telephone calling card or prepaid authorization number. (Ala. Code § 40-21-122).

22.03A CONTROLLED DANGEROUS SUBSTANCES TAX:

Marijuana and Controlled Substances Tax.

No dealer allowed to possess, distribute, sell, transport, import, transfer or otherwise use any marijuana or controlled substance upon which tax imposed unless tax paid as evidenced by stamp or other official indicia. (Ala. Code § 40-17A-4). Nothing in §§ 40-17A-1, et seq., provides immunity for dealer from criminal prosecution. (Ala. Code § 40-17A-5). Tax imposed at following rates: (1) $3.50 on each gram or portion of gram of marijuana; and (2) $200 on each gram or portion of gram of controlled substance; or (3) $2,000 on each 50 dosage units of controlled substance not sold by weight, or portion thereof. (Ala. Code § 40-17A-8).

Penalty of 100% of tax in addition to amount of tax. In addition to penalty, dealer who fails to affix appropriate stamp, labels, or other indicia guilty of Class C felony. (Ala. Code § 40-17A-9).

22.04 CORPORATE TAXES:

Taxation of Corporate Shares.

Repealed for tax years beginning after Jan. 1, 2002. (Act 2000-705). See category 2 Business Organizations, topic 2.03 Corporations, subhead Corporate Shares Tax.

Business Privilege Tax.

See category 2 Business Organizations, topic 2.03 Corporations, subhead Business Privilege Tax.

Income Tax.

See topic 22.10 Income Tax, subhead Income Taxed - Corporations.

22.05 EMPLOYMENT TAXES:

Unemployment Compensation Tax.

For purposes of providing unemployment benefits, employers (except those engaged in certain specified employments) who employ one or more persons in 20 or more weeks in year must pay tax on first $8,000 of annual wages payable to any individual. (Ala. Code § 25-4-8, -16, -54). Contribution rate determined according to experience of employer. (Ala. Code § 25-4-51). Employer with sufficient experience to determine contribution rate under provisions of § 25-4-54 subject to maximum rate ranging from 5.4% to 6.8%, depending on financial condition of unemployment trust fund. (Ala. Code § 25-4-54). Employer with insufficient experience subject to 2.7% contribution rate. (Ala. Code § 25-4-51).

Delinquent payments bear 1% interest per month (Ala. Code § 25-4-132), plus penalty of 10% of tax due if failure to pay without good cause. If failure to pay due to fraud, additional penalty of 15% charged. (Ala. Code § 25-4-133).

22.06 ENVIRONMENTAL TAXES:

Coal Severance Tax.

Covered generally in § 40-13-1, et seq. Every producer who severs coal within state subject to tax of 13½¢ per ton of coal severed. (Ala. Code § 40-13-2). "Producer" defined as person who ultimately owns right to extract coal. (464 So.2d 95). Additional tax levied by Department of Revenue on persons severing coal or lignite within state of 20¢ per ton of coal or lignite severed. (Ala. Code § 40-13-31).

Hazardous Waste.

Operators of commercial sites for hazardous waste disposal generally subject to $1 per ton state disposal fee. (Ala. Code § 22-30-4). Certain types of waste subject to greater levy. (Ala. Code § 22-30B-2[c][1]). Operators subject to county fee equal to $2.40 per ton of hazardous waste disposed. (Ala. Code § 22-30B-4).

Dry-cleaning registration fee. Owners or operators of dry-cleaning facility subject to yearly registration fee equal to 2% of Alabama gross receipts during previous calendar years, not to exceed $25,000 per year. (Ala. Code § 22-30D-6[a]).

Solid Waste Disposal Fees.

Beginning Oct. 1, 2008, generators of solid waste subject to $1 per ton or $0.25 per cubic yard for waste disposed at certain landfills, composting facilities, and waste management facilities. (Ala. Code § 22-27-17[a]). Fees levied on private waste facilities capped at $1,000 per year. (Ala. Code § 22-27-17[a][3]). Certain persons and entities are exempt. (Ala. Code § 22-27-17[f]). Solid waste fees administered and enforced by Alabama Department of Revenue. (Ala. Code § 22-27-17[g]).

22.06A ESTATE AND INHERITANCE TAX:

Taxable Property.

There is imposed upon all net estates passing by will, devise or under intestate laws of State of Alabama, or otherwise, which are lawfully subject to imposition of estate tax by State of Alabama, tax equal to full amount of state tax permissible when levied by and paid to State of Alabama as credit or deduction in computing any federal estate tax payable by such estate according to act of Congress in effect, on date of death of decedent, taxing such estate with respect to items subject to taxation in Alabama. (Ala. Code § 40-15-2). Federal credit for state death taxes repealed for decedents dying after Dec. 31, 2004. (I.R.C. § 2011[f]). Thus, no Alabama estate and inheritance taxes are due and no return must be filed for decedents dying after Dec. 31, 2004. However, federal credit for state death taxes currently set to reinstate for decedents dying after Dec. 31, 2010. (P.L. 107-16, § 901).

Rates of Tax and Exemptions.

Estate and inheritance tax is equivalent to full credit or deduction permissible in computing Federal estate tax under Federal Act in effect at date of decedent's death on account of any estate or inheritance tax payable to state. (Const. Art. XI § 219; Ala. Code § 40-15-2). Uniform Estate Tax Apportionment Act adopted. (Ala. Code § 40-15-18).

Exempt Transfers.

Money, credits, securities and other intangibles within state but not employed in any business within state exempt from tax, if owned by nonresident domiciled in another state which imposes tax (Ala. Code § 40-15-8) and which grants similar exemption to Alabama resident (Ala. Code § 40-15-9).

Administration and Enforcement.

Administration of estate and inheritance tax vested in Alabama Department of Revenue. (Ala. Code § 40-15-19).

Deductions.

Use applicable federal statutes. (Ala. Code § 40-15-2).

Valuation Date.

Use applicable federal statutes. (Ala. Code § 40-15-2). Because state estate tax is calculated with reference to federal estate tax, no express provision concerning alternate valuation date. However, use of alternate valuation date allowed under federal law might be reflected in state tax.

Valuation of Particular Transfers.

Not applicable.

Returns and Reports.

Executor must file with State Department of Revenue, duplicates of all returns required to be filed with federal authorities. (Ala. Code § 40-15-3).

When Due; Interest.

Tax due must be paid to Department of Revenue and return required by § 40-15-3 must be filed within nine months after death. Extension of time may be granted in cases of hardship, such extension not to exceed ten years. (Ala. Code § 40-15-4). In cases of extension, interest charged at legal rate from original due date. (Ala. Code § 40-15-4). Taxes not paid before delinquent date bear interest at same rate established by Secretary of Treasury pursuant to 26 U.S.C. § 6621 until paid. (Ala. Code § 40-1-44).

Foreign Representatives.

See category 13 Estates and Trusts, topics 13.09 Executors and Administrators, 13.16 Wills and 13.15 Trusts.

Taxable Transfers.

Not applicable.

Reciprocal Agreements.

Reciprocity is effective only as to property of residents of states which grant to property of residents of Ala. similar exemption from death taxation. (Ala. Code § 40-15-9).

Waivers.

Not applicable.

Access to Safety Deposit Boxes.

See category 13 Estates and Trusts, topics 13.09 Executors and Administrators, 13.16 Wills and 13.15 Trusts.

22.07 ESTATE TAX:

See topic 22.06A Estate and 22.12 Inheritance Tax.

22.07A GAMBLING AND ENTERTAINMENT TAXES:

Race Tracks.

Privilege tax of 1% of pari-mutuel pool on all pari-mutuel races imposed upon all dog race track operators in Alabama. (Ala. Code § 40-26A-2[a]). In addition, privilege tax of 1% of pari-mutuel pool on all pari-mutuel races requiring selection of three or more racers imposed on every dog race track operator. (Ala. Code § 40-26A-2[b]). Statement showing pari-mutuel pool gross receipts of race track operation for next preceding month, must be submitted, in addition to amount of taxes due, to Department of Revenue on or before 20th of each month. (Ala. Code § 40-26A-3). Any person who fails to make any report shall be guilty of Class B misdemeanor. Each month of such failure shall constitute separate offense. (Ala. Code § 40-26A-5).

22.08 GASOLINE AND SPECIAL FUELS TAXES:

Gasoline tax imposed on selling, distributing, storing or withdrawing from storage in this state for any use at following rates: Gasoline 16¢ per gallon (Ala. Code §§ 40-17-31; 40-17-220), with refund of 11¢ per gallon used on farm for agricultural purposes (Ala. Code § 40-17-302); diesel fuels 19¢ per gallon (Ala. Code §§ 40-17-2; 40-17-220); lubricating oil 6¢ per gallon (Ala. Code §§ 40-17-171; 40-17-220); aviation fuel 2.7¢ per gallon for fuel to power reciprocating engines and 0.9¢ per gallon for fuel to power jet or turbine engines with exception of certain fuel sold and used in international commerce, both rates subject to changes according to fixed schedule based upon total revenues derived from tax on aviation fuel and according to exceptions for “hub” operations (Ala. Code § 40-17-31[d]). Cities and towns may not levy any new or additional tax, excise, or license on sale, distribution, storage, consumption, or use of aviation fuel. (Ala. Code § 40-17-50). Wholesale dealers in illuminating, lubricating or fuel oils pay additional ½ of 1% of gross sales. (Ala. Code § 40-17-174). All motor carriers must pay excise tax on motor fuels used in their operations within this state at same rate imposed on fuels sold within state (Ala. Code § 40-17-140 to -155), except liquefied petroleum gas used as fuel (Ala. Code § 40-17-160). Requirements as to licensing of distributors of motor fuels (Ala. Code § 40-12-190 to -206) and reports required of carriers and warehousemen handling motor fuels (Ala. Code § 40-17-200 to -203). Privilege taxes are imposed on producers of oil and gas. (Ala. Code § 40-20-2). International Fuel Tax Agreement applies. (Ala. Code § 40-17-270 to -275).

Liquefied Petroleum Gas Tax.

In lieu of excise tax on liquefied petroleum gas used to propel motor vehicles, annual fee levied on following using liquefied petroleum gas as fuel: (1) Passenger automobiles, pickup trucks under one ton, $75; (2) recreational vehicles and vans and trucks one ton or over but with rear axle carrying capacity less than 14,000 pounds, $85; (3) bobtail trucks, $150; (4) tractor/trailer units, $175. (Ala. Code § 40-17-160).

Motor Carriers Fuel Tax.

Motor carriers subject to tax in effect for fuels (Ala. Code § 40-17-141), allowing for setoff of fuel tax paid (Ala. Code § 40-17-142).

22.08A GENERATION SKIPPING TAX:

Tax on transfer of intangible personal property of transferor domiciled in state and tangible personal and real property which is located in state. (Ala. Code § 40-15A-3). Tax equal to full amount of state tax permissible as credit in computing federal generation skipping tax. (Ala. Code § 40-15A-1 to -14).

22.09 GIFT TAX:

None.

22.10 HOTEL AND RESTAURANT TAX:

Lodgings tax imposed on persons renting or furnishing rooms or accommodations to “transients” (i.e., less than 180 continuous days) in any hotel, motel, inn, or any other place in which rooms or accommodations are regularly furnished for consideration. (Ala. Code § 40-26-1). Charges for rooms or accommodations to U.S. Government (and agencies) and certain nonprofit organizations are exempt. (Ala. Code § 40-26-1[b]; Ala. Admin. Code r. 810-6-5-.13[11][c]). Municipalities and Counties may levy lodgings tax, parallel to state levy except for rate. (Ala. Code § 11-51-202[b]; 40-12-4[a]).

22.11 INCOME TAX:

Income tax imposed on net income, in excess of exemptions, of every: (a) Resident individual, (b) nonresident individual receiving income from property located or business transacted in state, (c) corporation, association or joint stock company domiciled in Alabama or licensed or qualified to transact business in Alabama, (d) corporation, association or joint stock company doing business in Alabama or deriving income from sources located within Alabama, (e) resident fiduciaries, estates and trusts, and (f) nonresident estate or trust receiving income from property owned or business transacted in Alabama. Natural persons domiciled, maintaining permanent abode within state, or spending more than seven months of tax year within state presumed to be residents. (Ala. Code § 40-18-2).

Except for unrelated business taxable income, tax imposed by § 40-18-31 shall not apply to organizations listed under 26 U.S.C. § 501(a) and certain other organizations, such as national banks, farmers banks, municipalities, farmers, civic organizations, agricultural and horticultural organizations and building and loan associations (Ala. Code § 40-18-32), and certain charitable trusts and trusts under pension or profit sharing plans for benefit of employees, etc. (Ala. Code § 40-18-25.1).

Interest on, or other income from, obligations of U.S. or its agencies or instrumentalities or of corporations organized under U.S. laws (Ala. Code § 40-18-4) and income of officers or agents of U.S. or its agencies or instrumentalities or its contractees (Ala. Code § 40-18-3) included in gross income for income tax purposes insofar as state may lawfully tax such income.

Returns.

Individuals and fiduciaries must file returns Apr. 15 if on calendar year basis, or on 15th day of fourth month following close of fiscal year (Ala. Code § 40-18-27, -29). Corporations must file returns Mar. 15 if on calendar year basis, or on 15th day of third month following close of fiscal year. (Ala. Code § 40-18-39). Department of Revenue may grant reasonable extension, generally not to exceed six months. (Ala. Code § 40-18-27, -29, and -39). State returns may be inspected by federal or foreign state agents. (Ala. Code § 40-18-53).

Taxes Are Payable.

Individual’s tax must be paid in full on filing return. (Ala. Code § 40-18-42). Debts to specified state agencies may be set off against refunds due. (Ala. Code § 40-18-102).

Individuals in Military and Public Health Services of U.S.

Income of officers or agents of U.S. or its agencies from U.S. or its agencies is subject to income tax levied by state as other income is taxed, except that compensation for act of service in combat zone is not subject to state taxation. (Ala. Code § 40-18-3).

Income Taxed—Individuals.

Income computed on basis of taxable year and in accordance with same method of accounting used for federal income tax purposes. (Ala. Code § 40-18-13). Deductions for individuals include all taxes imposed by U.S. (Ala. Code § 40-18-15[a][3][a]), state, local and foreign occupational license taxes and real property taxes, state and local personal property taxes, and generation-skipping transfer taxes (Ala. Code § 40-18-15[a][3][b], [c], [d], [e]). Deductibility of certain taxes limited to extent to which taxes deductible for federal income tax purposes. (Ala. Code § 40-18-15[a][3][f]). Right of individual to deduct from gross income amount of federal income tax protected by state constitution. (Const. Amend. 225). In lieu of itemized deductions allowed, taxpayers may elect one of two optional standard deductions. (Ala. Code § 40-18-15[b]). Deduction also allowed for federal income tax paid or accrued during year. (Ala. Code § 40-18-15[c]). Consumer interest limitations and limitations on travel, entertainment and business meal expenses of Tax Reform Act of 1986 incorporated by reference. (Ala. Code § 40-18-15[a]). (See also Ala. Admin. Code, Revenue §§ 810-3-1.1-.01, et seq. conforming Alabama's income tax regulations to Tax Reform Act of 1986 without corresponding statutory amendments.)

Rate.

Rates for single individuals, and heads of family and married persons filing separate returns, on net income in excess of exemptions, are 2% on first $500 or part thereof, 4% on next $2,500 or part thereof (excess over $500 up to $3,000), 5% on all excess over $3,000. (Ala. Code § 40-18-5). (See also Const. Art. XI § 211.01.) Rates for married persons filing joint return, on net income in excess of exemptions, are: 2% on first $1,000 or part thereof, 4% on next $5,000 or part thereof (excess over $1,000 up to $6,000), 5% on all excess over $6,000. (Ala. Code § 40-18-5). (See also Const. Art. XI § 211.01.)

Exemptions allowed are: (a) Retirement allowances, pension, and annuities or optional allowances approved by Board of Control of Teachers' Retirement System of Alabama or Employees' Retirement System of Alabama; (b) retirement compensation, retirement allowances, pensions and annuities, or optional allowances paid to eligible fire fighter or police officer by firefighting agency or police retirement system; (c) annuities from U.S. government civil service retirement and disability fund; (d) payments to retiree under "defined benefit plan" to extent such payments taxable for federal tax purposes; (e) net income to individuals and partnerships conducting financial business employing moneyed capital in competition with national banks, but only if individual or partnership subject to excise tax in Alabama with respect to such net income; (f) beginning Jan. 1, 1998, all income, interest, dividends, gains or benefits received from education accounts administered under c. 33C, Tit. 16 under certain conditions; (g) $1,500 for single individual or married person not living with spouse; (h) $3,000 for head of family (husband and wife living together have single exemption of $3,000 which may be taken by either or divided between them); (i) additional amounts for each dependent, other than spouse, receiving over half of support from taxpayer ("dependent" defined as person within certain degrees of kinship or affinity). (Ala. Code § 40-18-19). By statute (Ala. Code § 40-18-19) validity of which has not been tested (Const. Art. XI § 211.01) nonresident is only allowed such proportion of latter three exemptions as adjusted gross income from sources within state bears to entire adjusted gross income. (Ala. Code § 40-18-19[b]). Other exemptions include compensation for active service as member of Armed Forces of U.S. in combat zone designated by Executive Order of President (Ala. Code § 40-18-3); effective Jan. 1, 1989, all payments made under any military retirement program (Ala. Code § 40-18-20[d]).

Tax Credits.

(1) Credit for Taxes Paid to Other States: Individual resident taxpayers, including corporations, allowed credit for taxes paid to other states, which cannot exceed amount due at Alabama rate on income with respect to which tax was levied by such other state (Ala. Code § 40-18-21); (2) Credit for Certain Development Projects: Credits allowed for certain development projects of predominately industrial, warehousing or research business activity (Ala. Code § 40-18-190 to -203, am'd 2009, Act 2009-722); (3) Credit for Coal Production: Credits allowed based upon annual tonnage of coal production (Ala. Code § 40-18-220); (4) Credit for Rural Physicians: Credits allowed for certain physicians recruited to practice and actually practicing in small or rural

community (Ala. Code § 40-18-132).

Optional Tax Table.

Not applicable.

Nonresidents.

Every nonresident individual is taxed on income from property owned or business transacted in state. (Ala. Code § 40-18-2[6]).

Income Taxed—Corporations.

For corporations, taxable income defined as federal taxable income as allocated and apportioned to state (Ala. Code § 40-18-33) less allowable deductions (Ala. Code § 40-18-35). Deductions for corporations include refunds of state and local income taxes, federal income tax accrued and paid during taxable year and interest income on obligations of U.S. and Alabama. (Ala. Code § 40-18-35). Certain intangible and interest expenses paid to related members not deductible. (Ala. Code § 40-18-35[b]). Corporation taxable income subject to 6.5% rate of tax. (Ala. Code § 40-18-31). Certain affiliated groups of corporation may elect to file consolidated return; unitary combined reporting not permitted. (Ala. Code § 40-18-39). Financial institutions not subject to tax imposed by § 40-18-31. (Ala. Code § 40-18-32). Financial institutions subject to excise tax of 6.5% of net income as allocated and apportioned to state. (Ala. Code § 40-16-4).

Withholding and Declarations.

Comprehensive withholding statute requires employers to withhold income tax on employees' wages (Ala. Code § 40-18-71), to remit such tax to state (Ala. Code § 40-18-74), and to furnish withholding statements to employees (Ala. Code § 40-18-75). Declarations of estimated tax, together with prescribed payments to complement any tax withheld from wages, must be made (i) by any single person, or married person filing separate return, whose net income from sources other than wages reasonably expected to exceed $1,875; and (ii) by any married couple filing jointly whose net income from sources other than wages reasonably expected to exceed $3,750. (Ala. Code § 40-18-82, Ala. Code § 40-18-83). Corporations must file and pay declaration of estimated tax in accordance with §§ 40-18-82, -83. (Ala. Code § 40-18-83.1).

22.12 INHERITANCE TAX:

See topic 22.06A Estate and 22.12 Inheritance Tax.

22.12A LOCAL TAXES—MUNICIPAL BUSINESS LICENSE:

Municipalities may levy business license on taxpayers engaging in lawful business within corporate limits. (Ala. Code § 11-51-90). Business activity subject to uniform classification system. (Ala. Code § 11-51-90.2). Unless state regulated, all business may be subject to either flat fee or gross receipts license base, according to municipalities' discretion, for each line of business conducted within corporate limits. (Ala. Code. § 11-51-90.2[b]). Procedures for assessment and appealing business license dispute similar to procedure applicable to state administered taxes. (Ala. Code § 11-51-181, et seq.).

22.12B MOTOR CARRIER FUEL TAX:

See topic 22.08 Gasoline and Special Fuels Taxes.

22.13 [RESERVED]

22.14 MOTOR VEHICLE TAXES:

Motor Vehicle Usage Taxes.

Excise tax imposed on storage, use or other consumption in this state of automotive vehicle or truck trailer, semitrailer or house trailer, and mobile home set-up materials and supplies, purchased at retail on or after Oct. 1, 1965, for storage, use or other consumption in this state at rate of 2% of sales price or amount of tax collected by seller, whichever greater. (Ala. Code § 40-23-61[c]). Excise or use tax levied upon every person, firm or corporation purchasing outside state, other than at wholesale, any automotive vehicle, motor boat, truck trailer, trailers, semitrailer or travel trailer, required to be registered or licensed with judge of probate of any county in this state for use, storage, or other consumption within this state equal to 2% of purchase price. (Ala. Code § 40-23-102[a]).

22.15 [RESERVED]

22.16 PROPERTY TAXES:

Assessing official in each county has authority to assess all real estate, with improvements thereon, and all personal property taxable to party last assessing same or to owner of record. (Ala. Code § 40-7-1[a]). However, assessing official in each county shall not have authority to assess aforementioned real and personal property that is centrally assessed by Department of Revenue. (Ala. Code § 40-7-1[a]).

Taxable Situs.

Subjects of ad valorem taxation: (1) Every piece, parcel, tract, or lot of land in this state, including therein all things pertaining to such land; (2) all docks, wharves, wharf boats, landings, warehouses, toll bridges, ferries, canals, passes, channels, turnpikes, all street railroads, printing presses, and materials; (3) all steamboats, barges, vessels, and watercraft, however propelled, plying waters of this state, and owner must return same for taxation to assessors in county wherein owner thereof resides; and if such vessel is owned by corporation, then in that county where its principal office is located; or if owner is individual not residing in this state or being corporation with no principal office in this state, then in county or counties where used; and all such steamboats, barges, vessels, or watercraft which have acquired permanent situs in this state; (4) all stocks of goods, wares and merchandise; (5) all household and kitchen furniture, ornaments and articles of taste, vehicles, trailers, outboard motors, aircraft and equipment, tools and implements, tanks, sporting goods, livestock except as exempted, and machines or devices needed for professional work; (6) all money hoarded, whether in custody of owner in this state or in another state or in any safety deposit box, safe, vault or elsewhere, except money on deposit in banks; (7) all investments in bonds which are taxable by law; (8) all roadbed, track, engines, cars, derricks, cranes, signals, crossties and other property of railroads, of mining and manufacturing plants; (9) on gross amount of sales of goods by nonresidents at auction; (10) on gross amount of commissions received by auctioneer; (11) all real and personal property of water companies, power companies, gas companies, manufacturing establishments, and certain agricultural enterprises; (12) all property of all cement, lime, plaster plants, or quarries; (13) all property, including heavy duty equipment, used for construction purposes brought into this state after Oct. 1 of any tax year but before assessor has completed his assessment shall be subject to taxation same as if it had been held or owned in this state on Oct. 1. Heavy duty equipment brought into this state after Oct. 1 and after assessor has completed his assessment shall be subject to taxation as if it had been held or owned in this state on Oct. 1; except that such tax shall be prorated with respect to number of months remaining in year; (14) all manufactured homes located on land owned by manufactured home owners, except those rented or leased for business purposes, other than those in inventory of manufacturer of dealer; and (15) all other property not hereinbefore specified, except as specifically exempted. (Ala. Code § 40-11-1).

Exemptions from ad valorem taxation granted with respect to public property, property of religious, educational, charitable, etc., institutions used for such purposes and certain property of residents of state, frequently limited as to value. Lease for profit to entity using land for religious, educational, or charitable purposes does not entitle owner to ad valorem tax exemption. (601 So.2d 474). Following exemptions should be noted: U.S., Alabama, and Alabama county and municipal bonds; all cemeteries, school and religious property; mortgages on property within state on which privilege tax has been paid; all security agreements and security interests under Commercial Code; money on deposit in any banking institution and other solvent credits (Ala. Code § 40-9-1[1]); materials, including coke when stocked at any plant for manufacturing purposes in Alabama (Ala. Code § 40-9-1[13]); all articles manufactured in Alabama, including pig iron, in hands of producer or manufacturer for 12 months after production or manufacture (Ala. Code § 40-9-1[14]); cotton, livestock, or agricultural products raised or grown in Alabama in hands of producer, his landlord or cooperative association, or in hands of purchaser or manufacturer (exempt for one year) (Ala. Code § 40-9-1[9]); cotton, wherever grown, stored in any licensed warehouse in Alabama for period not exceeding 12 months (Ala. Code § 40-9-1[10]); warrants issued by city and county board of education for school purposes (Ala. Code § 40-9-1[1]); property owned by certain veterans organizations (Ala. Code § 40-9-1[4]); property of deaf mutes and insane persons ($3,000) and blind persons ($12,000) (Ala. Code § 40-9-1[7]); religious books kept for sale by ministers and colporteurs (Ala. Code § 40-9-1[6]); pollution control devices (Ala. Code § 40-9-1[20]); tobacco leaf stored in hogsheads (Ala. Code § 40-9-1[21]); various items of personal property owned by individuals usually kept in home (Ala. Code § 40-9-1[18]); aircraft and parts, components, ground support equipment used by air carrier operating hub within state (Ala. Code § 40-9-1[24]); all vessels and equipment thereon, used predominantly in business of commercial shrimping by owners thereof (Ala. Code § 40-9-1[26]); personal property in transit through state or kept in storage, for period not to exceed 36 months, in public or private warehouse or other storage facility for shipment outside state (Ala. Code § 40-9-6); personal property manufactured, compounded or processed remaining property of manufacturer, compounder or processor and held by licensed public warehouse for distribution (Ala. Code § 40-9-7); property used exclusively in hospitals providing specific amounts of charitable treatment, or stock in corporation owning such hospital, but not to exceed $75,000 in either case (Ala. Code § 40-9-1[2], [3]); all property described in 12 U.S.C. § 1701 (Q) (Ala. Code § 40-9-1[25]); property of literary and scientific institutions and societies (Ala. Code § 40-9-1[5]); family portraits (Ala. Code § 40-9-1[8]); farming provisions and supplies for use of family and making of crops (Ala. Code § 40-9-1[11]); athletic stadiums owned by and used exclusively for schools (Ala. Code § 40-9-1[12]); property owned by National Guard (Ala. Code § 40-9-1[15]); all poultry (Ala. Code § 40-9-1[16]); property of incompetent veterans ($3,000) (Ala. Code § 40-9-1[17]). Home of any veteran acquired pursuant to provisions of P.L. 702, 80th Congress, as am’d, exempt if owned and occupied by veteran or his unremarried widow. (Ala. Code § 40-9-20).

Homestead of resident of state, to extent of $4,000 in assessed value and 160 acres in area for owner not over age 65, and without limit for owner over age 65, retired due to total and permanent disability, without regard to age, or who is blind without regard to age or whether such person retired, is exempt from state ad valorem taxation. (Ala. Code § 40-9-19[a]). For tax years beginning on and after Oct. 1, 1981, homesteads of residents of state, to extent of $2,000 or 160 acres for owner not over age of 65, are exempt from all ad valorem property taxes, except countywide and school district ad valorem taxes levied for school purposes. (Ala. Code § 40-9-19[b]). In addition, homesteads of residents, to extent of $5,000 if owner over age 65 with annual adjusted gross income less than $12,000 in previous year, or retired due to total and permanent disability or blind without regard to age or whether person retired, in assessed value and 160 acres in area, are exempt from county ad valorem taxation (Ala. Code § 40-9-19[d]), provided claim for exemption is filed with tax assessor. Such claim need be made only once and may be verified each year thereafter by mail on form affidavit to be provided by tax assessor. (Ala. Code § 40-9-21.1).

Principal residence, and 160 acres adjacent thereto, of individuals totally disabled, or age 65 or older having net taxable income of $7,500 or less, exempt from ad valorem taxation. (Ala.

Code § 40-9-21). Once made, claimant may verify qualification yearly by mail under Ala. Code § 40-9-21.1.

Factories manufacturing calcium cyanamide (lime nitrogen), aluminum or aluminum products exempt from state, county and municipal taxation, except taxes on land, for ten years after beginning construction of manufacturing plant. (Ala. Code § 40-9-5).

Exempt Organizations.

Certain organizations exempt from all state, county and municipal taxes, licenses and fees. (Ala. Code § 40-9-9, et seq.).

State Tax Rates.

Property assessed for purpose of ad valorem taxation according to following classifications: (I) Utilities, 30%; (II) all other property, 20%; (III) agricultural, forest, residential property, and historic buildings, 10%; and (IV) private automobiles and motor trucks (“pickups”) not used for hire, 15%. (Const. Art. XI § 217, as am’d by Const. Amends. 325 and 373; Ala. Code § 40-8-1[a]). Maximum rate of taxation on assessed value of taxable property within state, 65/100 of 1%. (Const. Art. XI § 214; Ala. Code § 40-8-2). Property and activities of U.S. and its agencies taxable as other property and activities to extent of state’s constitutional power. (Ala. Code § 40-11-2).

Local Tax Rates.

Maximum rates of taxation on assessed value of taxable property for counties 75/100 of 1% plus special levy for school purposes of 9/10 of 1%, if voted, all of which totaling 1.65%, currently levied by every county. (Const. Art. XI § 215, 3d, 111th and 202d Amendments). Certain counties given power to levy additional taxes for specified purposes. (See Const., e.g., 30th, 34th and 36th Amendments.) Municipalities may levy ad valorem tax of ½ of 1%, proceeds to be used for any purpose (Const. Art. XI § 216), and, if voted, additional ad valorem tax of 3/10 of 1% for school purposes (Const. Amend. 3). Other constitutional provisions empower specified municipalities to levy other taxes for various purposes at rates varying up to additional 1%, so that in some municipalities, e.g., Birmingham, total rate for state, county and city taxes is 3.6%.

Assessment.

Listing of property for taxation by tax assessor must commence on Oct. 1 and must finish on Jan. 1. (Ala. Code § 40-7-2). Owner must make tax return between Oct. 1 and Jan. 1 covering changes in value in real estate or purchase of real estate. (Ala. Code § 40-7-1). Assessor must assess all property not claimed on tax return by owner for which varying service fee and 10% penalty added to tax. (Ala. Code § 40-7-22, -25).

Omitted Property.

Notice of assessment of property not assessed within preceding five years must be given owner or his agent by registered or certified mail. (Ala. Code § 40-7-23[a], [d]). Notice must contain list of escaped property, its value, years during which property escaped taxation, and amount of 10% penalty on taxes imposed thereon for each year. (Ala. Code § 40-7-23[a]).

Nonresident taxpayer, resident taxpayer subject to disabling infirmity or woman taxpayer may send in duly sworn list, or such list may be rendered by agent having knowledge of his or her taxable property. (Ala. Code § 40-7-7). Final assessment of ad valorem tax may be appealed to circuit court by taxpayer. (Ala. Code § 40-7-45). Conditions precedent to exercise of right and procedure to be followed depend on official or body making assessment (Ala. Code §§ 40-7-45; 40-3-25). Assessment on common areas must take into account value of all encumbrances on common areas. (659 So.2d 607). Initial assessment has no preclusive effect in future tax years. (668 So.2d 768).

Special rules govern and special procedure obtains in reference to assessment of taxes on tangible and intangible property of public utilities. (Ala. Code § 40-21-1, et seq.).

Municipal ad valorem taxes become due on Dec. 1 and delinquent on Jan. 1, and if assessment has been made in month of May, taxes become due Oct. 1 and delinquent Jan. 1. In either case they bear legal rate of interest after delinquency. (Ala. Code § 11-51-2).

Review of Assessment.

Taxpayer may file written objections to assessment to Board of Equalization within 30 calendar days from "date of the statement". (Ala. Code § 40-7-25). Taxpayer's objection must be postmarked within 30 calendar days from when assessment was issued, *i.e.*, date provided on statement, and not date taxpayer actually receives assessment. (Atty. Gen. Op. 2008-108). If taxpayer has made objection to preliminary assessment with Board of Equalization and such objection is overruled, he may appeal to circuit court of county in which property is located. (Ala. Code § 40-3-24).

Real Property and Personal Property.

Taxpayer may appeal final assessment of ad valorem taxes on real or personal property by filing notice in writing with officer, board or commission of intent to appeal and bond of $100 (Ala. Code § 40-7-46) and by appealing to appropriate Circuit Court (Ala. Code § 40-7-45).

Payment.

All taxes due must be remitted to Department of Revenue, with any checks made payable to Treasurer. (Ala. Code § 40-1-5). Payment deemed made as of date of U.S. Postmark if delivered by U.S. Mail. (Ala. Code § 40-1-45). Commissioner may enter into written agreements with taxpayers for installment payments. (Ala. Code § 40-2A-4[b][6]).

Collection.

Collected by tax collector and authorized deputies. (Ala. Code § 40-5-2). State and county taxes are due and payable Oct. 1 of each year and become delinquent on Jan. 1 following (Ala. Code § 40-11-4) except that taxes become due and payable at once when taxpayer about to move from county or to dispose of all assets (Ala. Code §§ 40-11-4, 40-7-43, 40-5-17, 40-5-31, 40-5-32). All delinquent ad valorem taxes bear interest at 12% per annum (Ala. Code § 40-5-9), and delinquent taxpayer must, in addition, pay certain demand fees (Ala. Code § 40-5-6).

Lien.

Arises in favor of state if any person liable to pay any tax, other than ad valorem taxes, neglects or refuses to pay tax. (Ala. Code § 40-1-2). Lien arises when property becomes assessable and continues until taxes paid. (Ala. Code § 40-1-3).

Sale.

No property exempt from levy and sale for payment of taxes, fees and charges lawfully incurred in making assessment and collection against owner thereof. (Ala. Code § 40-5-18). Tax collector must give ten days' notice of time and place of sale, accompanied by description of property, by placing same at three or more public places. Sale made at public outcry to highest bidder for cash. Collector allowed $5 fee. (Ala. Code § 40-5-14).

Tax collector required to sell personal property of delinquent taxpayers (Ala. Code § 40-5-14), and may garnish money, property, and choses in action (Ala. Code § 40-5-20, -22), before selling delinquent taxpayer's realty (Ala. Code § 40-5-19).

Probate court of each county may order sale of lands therein for default in payment of taxes when tax collector holding tax lien is unable to collect taxes assessed against land. (Ala. Code § 40-10-1).

Tax collector must enter, in book provided for that purpose, each parcel of real estate, or interest therein, assessed to any person against whom taxes have been assessed which are not paid; and all real estate or interest therein which has been assessed against unknown owner. (Ala. Code § 40-10-2). Book must be delivered to judge of probate by Mar. 1 (Ala. Code § 40-10-3), and he must issue notice to each person against whom unpaid taxes are assessed; notice may be given by publication in certain instances (Ala. Code §§ 40-10-4; 40-10-5). Hearing thereupon held in which said tax book is prima facie evidence of amount of taxes and fees due. (Ala. Code § 40-10-9). Court, after such hearing, may proceed to decree sale of land in satisfaction of taxes due. (Ala. Code §§ 40-10-8; 40-10-11, et seq.). Tax collector, on 30 days notice by publication, must proceed to sell real estate ordered to be sold immediately at end of term of court in which such decree was rendered. (Ala. Code § 40-10-12).

Redemption.

Real estate sold for taxes or purchased by state may be redeemed at any time before title passes out of state, or if purchased by any other purchaser, may be redeemed at any time within three years from date of sale by owner, his heirs, or personal representatives, or by any mortgagee or purchaser of such lands, or any part thereof, or by any person having interest therein, or in any part thereof, legal or equitable, in severalty or as tenant in common, including judgment creditor, or other creditor having lien thereon, or on any part thereof. Infant or insane person entitled to redeem at any time before expiration of three years from sale, may redeem at any time within one year after removal of disability. (Ala. Code § 40-10-120). However, there is no time limit for redemption if owner retains possession of real estate after tax sale. (Ala. Code § 40-10-82). If mortgage is duly recorded after tax sale, one who seeks to redeem under mortgage or other instrument creating lien which was duly recorded at time of tax sale may redeem at any time within one year from date of written notice from purchaser of his purchase of said land at tax sale served on either original mortgagee or lien holder or his transferee of record or his heirs, personal representatives or assigns. (Ala. Code §§ 40-10-73, 40-10-74). To redeem land sold to state, redemptioner must deposit with judge of probate of county in which land situated amount for which land was sold with interest at 12% per annum, together with amount of all taxes due on such land from date of sale, including any municipal taxes not assessed during period of state ownership, with interest thereon at 12% per annum and all costs and fees due to officers. (Ala. Code § 40-10-121). To redeem land sold to one other than state, redemptioner must deposit with probate judge of county where land lies amount for which land was sold, together with amount of taxes theretofore paid upon such land by purchaser with interest at rate of 12% per annum from date of sale on all such amounts, plus taxes then due on property, including those taxes accrued but unpaid by purchaser, and all costs and fees due to officers because of sale and redemption. (Ala. Code § 40-10-122).

When distinct parcels of land have been included in one assessment and sold for taxes under one decree, any person, including owner, whose interest in one or more of such parcels is such as to entitle him to redeem, may redeem parcels of land in which he has such interest without redeeming remainder; owner must, however, first pay all personal property assessments together with court costs and advertising fees. (Ala. Code § 40-10-123; cf. Ala. Code § 40-10-120).

Public Service Corporation Property Tax.

Department of Revenue has duty to assess for taxation property of all public service or public utilities corporations and owner, president, general manager, agent, trustee, receiver or other person or persons having control of company's affairs in this state must make returns of all property of company located in state with Department of Revenue. (Ala. Code § 40-21-1).

Valuation and Assessment.

No specific statutory provision. Various statutory methods provide for valuation of Public Service Corporation property; however, there is no statutory guidance as to which method state will use. (Ala. Code § 40-21-18 to Ala. Code § 40-21-30). Department of Revenue shall examine returns made by all persons, firms and corporations required by law to file return, and shall determine valuation of different items of property and assess such property at 30% of its reasonable value. (Ala. Code § 40-21-17). Department of Revenue shall send to owner of assessed property copy of its notification to tax assessor regarding assessment. (Ala. Code § 40-21-34[c]). Each person, firm or corporation must file return with Department of Revenue by Mar. 1 in each year, and Department of Revenue may add to assessment penalty not exceeding 10% if no return has been filed by such date. (Ala. Code § 40-21-17).

Review of Assessment (by Revenue Cabinet).

No specific statutory provision.

Reports.

No specific statutory provision. Every person, firm or corporation whose property is required to be assessed under Ala. Code § 40-21-1 by Department of Revenue must report by Mar. 1 of each year its property of every nature and character whatsoever and any other information required by Department of Revenue. (Ala. Code § 40-21-3).

Local Taxes.

No specific statutory provision.

Real Estate Conveyance Tax.

License tax is imposed on every deed, bill of sale, or other instrument conveying real or personal property, or interest in such property, at rate of 50¢ for first $500 or less of value, and 50¢ for each $500 or fraction thereof of excess. Tax applies only to value in excess of any mortgage or vendor’s lien on property on which mortgage tax paid. (Ala. Code § 40-22-1).

All mortgages, deeds of trust, contracts of conditional sale and like instruments to secure payment of debt, including security agreements and financing statements under Uniform Commercial Code, subject to license tax of 15¢ for first $100 or less of indebtedness and 15¢ for each additional $100 or fraction thereof. Tax does not apply to security agreements or financing statements relating solely to accounts, contract rights or general intangibles, as defined in Uniform Commercial Code. Tax imposed only on initial indebtedness at time of filing, and no tax imposed upon any instrument providing additional security for indebtedness secured by instrument previously filed and for which taxes have been paid, provided secured indebtedness remains unchanged in amount and time of maturity. Alternatively, instruments securing open end or revolving indebtedness with any interest in property may be taxed based upon maximum principal indebtedness as stated in instrument or any amendment thereto, irrespective of cumulative amount advanced from time to time. Optionally, with respect to real property, tax at time of filing payable only on amount of initial indebtedness, but owner of instrument must execute bond to secure payment to state of tax which may become due upon indebtedness to be incurred thereafter. If any part of property described in mortgage or like instrument located outside Ala., indebtedness upon which tax must be paid is that proportion of indebtedness secured by instrument which value of property located in this state bears to whole property in instrument. (Ala. Code § 40-22-2).

Corporations and associations created under Federal Farm Loan Act as amended by Farm Credit Act of 1933, or corporations or associations engaged exclusively in making farm or crop loans are not subject to tax with respect to instrument to secure loan to one of its stockholders or members for agricultural purposes. (Ala. Code § 40-22-5). Conveyances for purpose of division or merger of religious organizations exempt from recording taxes. (Ala. Code § 40-22-5.1).

In any sale or transfer of real property and related tangible personal property located in Alabama by nonresident of Alabama, buyer must remit to Commissioner of Revenue withholding tax, with certain exceptions. Withholding tax for individual buyers is 3% of purchase price or net gain recognized by seller, and for corporate, partnership, or unincorporated association, buyer's tax is 4% of purchase price or net gain recognized by seller. (Ala. Code § 40-18-86).

22.17 SALES AND USE TAXES:

Sales Tax.

In addition to all other taxes and licenses, imposed as follows: (1) 4% of gross proceeds of all retail sales made by any person, firm or corporation in business of selling at retail any tangible personal property, except stocks and bonds, and sales of materials for painting, repairing or reconditioning water-going crafts of over five tons load displacement. (Ala. Code § 40-23-2[1]). Municipal privilege license taxes, that are levied and collected by applying flat percentage to gross sales or gross receipts from sales, which are passed on to consumer, shall be excluded from gross proceeds. (Ala. Code § 40-23-3). When both retail and wholesale business conducted, tax must be paid at retail rate on all gross proceeds unless segregated accounts of each type of transaction are kept. (Ala. Code § 40-23-2[1]). (2) 4% of gross receipts received by any person, firm or corporation in business of conducting any amusement places, billiard and pool rooms, bowling alleys, amusement and musical devices, theaters, opera houses, moving picture shows, vaudevilles, amusement parks, athletic contests, including wrestling and prize fights, boxing and wrestling exhibitions, football and baseball games, skating rinks, race tracks, golf courses, public bathing, and public dancing halls. (Ala. Code § 40-23-2[2]). (3) 1½% of gross proceeds of all sales of machines used in mining, quarrying, compounding, processing and manufacturing of tangible personal property and attachments, parts and replacements therefor necessary to operation of such machines and customarily so used, upon every person, firm or corporation engaged in business of selling at retail such machines and attachments, parts and replacements therefor. (Ala. Code § 40-23-2[3]). (4) 2% of gross proceeds of all sales of automotive vehicles, truck trailers, semitrailers, or house trailers, or mobile home set-up materials and supplies, upon every person, firm or corporation in state engaged in business of selling at retail such vehicles. Where used vehicles taken in trade as part payment on sale of new or used vehicles, tax paid on net difference. (Ala. Code § 40-23-2[4]). 2% of purchase price of sale of any automotive vehicles, motorboats, truck trailers, semitrailers, and travel trailers required to be registered or licensed with judge of probate of any county and purchased other than at wholesale from any person, firm, or corporation not licensed dealer engaged in selling same. (Ala. Code § 40-23-101[a]). (5) 1½% of gross proceeds of all sales of agricultural machines or equipment and parts and attachments necessary to operation of such equipment, upon every person, firm or corporation engaged in business of selling at retail such equipment. When any used agricultural equipment taken in trade as part payment on sale of new or used equipment, tax paid only on net difference. (Ala. Code § 40-23-37). (6) 3% of gross proceeds of all sales through coin operated dispensing machines of food and food products for human consumption, not including beverages other than coffee, milk, milk products and substitutes therefor. (Ala. Code § 40-23-2[5]).

4% tax added to sales price as follows: 4¢ for each whole dollar or sales price, and on that part of sales price which is fractional part of dollar, in addition to whole dollar, and on sales of less than dollar no tax collected on 1¢ to and including 10¢ of sales price, 1¢ on sales from 11¢ to and including 30¢ 2¢ on sales from 31¢ to and including 54¢; 3¢ on sales from 55¢ to and including 73¢; and 4¢ on sales from 74¢ to and including 99¢. Taxes levied at rate of less than 4% are added to sale price in amount equal to prescribed percentage of such sales price. (Ala. Code § 40-23-26[a]).

Use Tax.

Imposes excise tax, at same rates provided in sales tax act. Generally, Alabama use tax levied on personal property purchased outside state and later brought into state for storage, use, or consumption. (Ala. Code § 40-23-61). Credit on use tax allowed for sales and use taxes paid to other states on property brought into Alabama, provided credit allowed by other states for taxes paid on similar property in Alabama. (Ala. Code § 40-23-65).

Utilities Gross Receipts.

Privilege or license tax levied against every utility furnishing electricity, domestic water or natural gas in State of Alabama. (Ala. Code § 40-21-82[a]). Amount of tax based upon application of rates against amount of monthly gross sales or receipts from furnishing of such services. (Ala. Code § 40-21-82[a]). Separate tax rate structure applies to every utility furnishing telegraph or telephone services in state. (Ala. Code § 40-21-82[b]). Certain entities exempt from tax (Ala. Code § 40-21-82.1); and also certain revenues excluded from gross receipts or sales of utility (Ala. Code § 40-21-83).

Exemptions from Sales and Use Taxes.

Certain specified transactions, products, businesses, and organizations exempt from sales tax. (Ala. Code § 40-23-2, Ala. Code § 40-23-4, Ala. Code § 40-23-4.1, Ala. Code § 40-23-4.2, Ala. Code § 40-23-5). Storage, use or consumption of certain tangible personal property exempt from use tax. (Ala. Code § 40-23-62; see also Ala. Code § 40-23-5).

Returns.

Taxes levied payable on 20th of each succeeding month in which accrued (Ala. Code § 40-23-7[a]), but taxes payable on account of credit sales may be deferred until collections made (Ala. Code § 40-23-8). Taxpayer whose average monthly sales tax liability was $1,000 or greater during the preceding year must make estimated tax payments on 20th day of month in which liability incurred, equal to lesser of 662/3 of tax payable for same month in prior year or 662/3 of current month’s estimated liability. When total tax does not exceed $200 per month, quarterly return and payment may be made. Returns must be made, and tax paid, to Department of Revenue. (Ala. Code § 40-23-7). State use tax must be collected before vehicle can be registered or licensed. (Ala. Code § 40-23-104). For use tax, returns must be made and tax paid monthly to Department of Revenue on 20th day of each month succeeding month for which tax accrues. (Ala. Code § 40-23-68).

Penalty for failure to keep records or make reports is fine of $25 to $500 (Ala. Code § 40-23-11), or $50 to $500 and/or up to six months imprisonment for willful refusal to keep records or make reports (Ala. Code § 40-23-12). In addition to other penalties, willful failure to pay tax, file return or supply information is misdemeanor punishable by fine of not more than $25,000, or $100,000 for corporation, or imprisonment for not more than one year, or both, plus costs of prosecution. (Ala. Code § 40-29-112). For use tax, fine up to $500 for failure to make payment, and fine of $300 to $5,000 and/or imprisonment up to one year for fraudulent evasion. (Ala. Code § 40-23-88).

22.17A SPECIAL FUELS TAX:

See topic Gasoline and 22.17A Special Fuels Tax.

22.18 STAMP AND SEAL TAXES:

Stamp Tax.

None except for stamps on tobacco. (Ala. Code § 40-25-3; -6).

22.18A TAX LIENS:

Uniform Federal Lien Registration Act Amended.

Not adopted. Adopted Alabama Uniform Federal Lien Registration Act at §§ 35-11-42 through Ala. Code § 35-11-48.

22.19 USE TAXES:

See topic 22.17 Sales and 22.19 Use Taxes.

23 TRANSPORTATION

23.01 MOTOR VEHICLES:

Director of Department of Public Safety, responsible for administering and enforcing all laws relating to operation or movement of vehicles on public highways. (Ala. Code § 32-2-5). Motor Vehicle Safety-Responsibility Act. (Ala. Code § 32-7-1, et seq.). Uniform Certificate of Title and Anti-Theft Act. (Ala. Code § 32-8-1, et seq.). Department of Revenue responsible for issuing titles and maintaining registration. (Ala. Code § 40-12-240, et seq.).

Vehicle license required annually (Ala. Code § 40-12-240, et seq.); license taxes and registration fees collected at same time ad valorem taxes assessed. (Ala. Code § 40-12-253). 20-day grace period to purchase license plate may be granted. (Ala. Code § 40-12-264). License tags must be displayed on rear. (Ala. Code § 32-6-51). Individual reregistering motor vehicle that has been stored in Alabama and not used must pay annual license taxes and registration fees. Taxes and fees must not be prorated. (Ala. Code § 40-12-258[a]). Person registering commercial vehicle must state under oath name, address and whether vehicle owned by resident or nonresident. (Ala. Code § 40-12-263). Commercial drivers subject to Alabama Uniform Commercial Driver License Act. (Ala. Code § 32-6-49.1, et seq.). One passenger vehicle owned and operated by active members of Ala. National Guard, active members of state guard when organized in lieu of national guard, service-connected disabled veterans, and officer, warrant officer, or enlisted person serving as active member of U.S. armed forces reserve organization or service-connected disabled veteran who were residents of Alabama at time of entering service and still Alabama residents, civil air patrol, member of volunteer rescue squad, or retired member of Ala. National Guard with 20 years or more of service exempt from license tax and registration fee. (Ala. Code §§ 31-2-12; 40-12-244).

Any person whose driver's license issued in this or another state or whose driving privilege as nonresident has been canceled, denied, suspended or revoked as provided in this article and who drives any motor vehicle upon highways of this state while his or her license or privilege is canceled, denied, suspended or revoked shall be guilty of misdemeanor and upon conviction shall be punished by fine of not less than $100 nor more than $500, and may be imprisoned for not more than 180 days. In addition to all fines, fees, costs, and punishments prescribed by law, there shall be imposed or assessed additional penalty of $50. (Ala. Code § 32-6-19[a]).

Operator's license required every four years (Ala. Code § 32-6-1[b]); not issued to person under 16 years old or any person whose driving privilege suspended or revoked or to habitual abuser of alcohol or drugs or any person considered physically or mentally unable to exercise reasonable and ordinary control over motor vehicle. (Ala. Code § 32-6-7). Also not issued to person under 19 not in school, or not graduated from high school, who does not present acceptable documentation for not being in school or has accumulated sufficient disciplinary points that would extend age of eligibility. (Ala. Code § 16-28-40[a]). Person shall apply to Department of Public Safety, Driver's License Division for initial driver's license, and to judge of probate or license commissioner for renewal of license. (Ala. Code § 32-6-4[a]). Males between ages of 18 and 26 will automatically be registered with selective service system, if not already registered, when they apply for driver's license or learner's license. (Ala. Code § 32-6-4[c]).

Exemptions from needing license include: employee of federal government while driving official government vehicle on official business; persons driving any road machine, farm tractor or other farm or agricultural equipment; and nonresident if they are at least 16 years old and has on his person valid driver's license issued in his home state or country. (Ala. Code § 32-6-2). Persons under 18 may not apply for license unless they have held Alabama learner's license (or comparable license issued by another state) for at least six months. (Ala. Code § 32-6-7.2[a]).

Titles.

Owner of motor vehicle designated 1975 year model or later or mobile home or travel trailer designated 1990 year model or later required to be registered under motor vehicle laws and for which no certificate of title has been issued by Department of Revenue must make application for certificate of title to judge of probate, Commissioner of Licenses, Director of Revenue or other county official authorized and required by law to issue motor vehicle license tags. (Ala. Code §§ 32-8-30; 32-8-34). If mobile home affixed to parcel of real property and ownership of mobile home and property identical, owner may obtain cancellation of title. (Ala. Code § 32-8-30[c]). Dealer of vehicles required to be titled who does not comply with requirements guilty of misdemeanor and, upon conviction, fined sum not exceeding $500. (Ala. Code § 32-8-30[e]). No certificate of title required for: Vehicle owned by U.S. or any agency thereof; vehicle owned by manufacturer or dealer and held for sale; vehicle owned by nonresident and not required by law to be registered; vehicle with current owner or operator recorded as such on currently effective certificate of title issued in another state and title held by record lienholder; vehicle moved solely by animal power; implement of husbandry; special mobile equipment; pole trailer; manufactured homes; travel trailers; and mobile trailers designated 1989 year models and prior year models; new manufactured home placed on owner's land when classified real property through surrender of manufacturer's certificate of origin and real property deed issued; utility trailers, other than moving collapsible and folding campers designated 1990 and subsequent year models; vehicle designated 1974 year model or prior year model. (Ala. Code § 32-8-31).

Sales.

Dealer in used motor vehicles who is nonresident, or who does not have permanent place of business in state, and person who brings used motor vehicle into state for purposes of sale or resale, except as trade-in, must, within ten days from date of bringing used motor vehicle into state, register motor vehicle with probate judge of county in which used motor vehicle is brought, and must execute bond payable to probate judge for use or benefit of purchaser for losses due to fraud. Bond must be in full amount of sales price of used vehicle, not to exceed $1,000. (Ala. Code § 32-16-2). Motor vehicle manufacturers, distributors, dealers, and their representatives, and dealings between manufacturers and distributors and wholesalers and dealers, extensively regulated. (Ala. Code § 8-20-1 et seq.).

Handicapped drivers may have distinctive license plates, fee for which shall not be greater than regular license tags prescribed by law. (Ala. Code § 40-12-300[a]). They will be issued one removable windshield placard displaying International Symbol of Access; two placards if handicapped driver does not have distinctive license plate. (Ala. Code § 32-6-231[a]).

Liens.

Security interest in vehicle perfected by delivery to Department of Revenue of existing certificate of title, if any, application for certificate of title containing name and address of lienholder and date of security agreement and required fee. Perfected as of time of creation if delivery completed within 30 days thereafter, otherwise, as of time of delivery. (Ala. Code § 32-8-61).

If owner creates security interest in vehicle, owner must immediately execute application in space provided on certificate of title, or on separate form prescribed by Department of Revenue to name lienholder on certificate showing name and address of lienholder and date of security agreement, and cause certificate, application and required fee to be delivered to lienholder. Lienholder must immediately cause certificate, application and required fee to be mailed or delivered to Department of Revenue. (Ala. Code § 32-8-62).

Above procedures for security interests do not apply to or affect: Lien given by statute or rule of law to supplier of services or materials for vehicle; lien given by statute to U.S., state or political subdivision of state; security interests in vehicle created by manufacturer or dealer who holds vehicle for sale, but buyer in ordinary course of trade from manufacturer or dealer takes title free of security interest. (Ala. Code § 32-8-60).

Operation prohibited by person under influence of alcohol or controlled substances (Ala. Code § 32-5A-191), or by person without license (Ala. Code § 32-6-1). Every new resident of state of Alabama shall procure Alabama driver's license within 30 days after establishing residence in this state. (Ala. Code § 32-6-1[a]).

Size and Weight Limits.

Regulated by Ala. Code § 32-9-20.

Permits for Overweight and Oversize Vehicles.

Director of Department of Transportation may, at his discretion, upon application and for good cause being shown therefore, issue permits for operation and movement of overweight or oversize vehicle or combination of no more than two vehicles over public highways. (Ala. Code § 32-9-29[a]). Director of Department of Transportation may issue annual permit to operate vehicle which exceeds maximum limits otherwise provided for in article for rubber-tired equipment used solely in scope and operation of mining refractory grade bauxite. (Ala. Code § 32-9-29[b]).

Equipment Required.

Regulated by Ala. Code § 32-5-210, et seq. Seat belts must be worn by each front seat occupant of passenger car. (Ala. Code § 32-5B-4). Use of child passenger restraints required for children with infant only seats in rear facing position until at least one year or 20 pounds, convertible seats in forward position until child is at least five years or 40 pounds, booster seat for children under six years, and safety belts for children under 15 years, except in taxis and vehicles seating 11 or more. (Ala. Code § 32-5-222). Failure to wear seat belt not considered evidence of contributory negligence and shall not limit liability of insurer, nor shall conviction be entered on driving record of any individual charged. (Ala. Code § 32-5B-7).

Lights Required.

Regulated by Ala. Code § 32-5-240. Permissible other lighting is specified (Ala. Code § 32-5-241), and Highway Director may set up standard specifications and approve lighting. (Ala. Code § 32-5-252).

Abandoned vehicles are governed by Ala. Code § 32-13-1, et seq. Person who has abandoned motor vehicle on his or her property, under certain conditions, must provide notice to persons with lawful interest in abandoned motor vehicle. (Ala. Code § 32-13-3). Class 1 municipalities may establish procedure for abatement and removal of inoperable motor vehicles from private property as public nuisances. (Ala. Code § 11-67A-1, et seq.).

Accidents.

Driver of vehicle involved in accident must stop, make himself known, render assistance to any person injured, and report injury or death to local police. (Ala. Code § 32-10-1, et seq.).

Liability of Owner.

Generally not liable for negligence of bailee or borrower while operating car, unless owner knew or should have known of incompetence. (220 Ala. 101, 123 So. 897; 470 So.2d 1141).

Guests.

Owner or operator of vehicle not liable for injury to or death of gratuitous guest unless guilty of willful or wanton misconduct. (Ala. Code § 32-1-2).

Proof of Financial Responsibility.

Uniform Motor Vehicle Safety-Responsibility Act adopted. (Ala. Code § 32-7-1, et seq.).

Insurance.

No person shall operate, register or maintain registration of, and no owner shall permit another person to operate, register or maintain registration of, motor vehicle designed to be used on public highway unless motor vehicle is covered by liability insurance policy, motor vehicle liability bond or deposit of cash. (Ala. Code § 32-7A-4[a]). Insurance policy shall be issued in amounts not less than minimum amounts set for bodily injury or death and for destruction of property under Ala. Code § 32-7-6(c). Motor vehicle bond shall be in amount of not less than $50,000. Deposit of cash with State Treasurer shall be sum of not less than $50,000. (Ala. Code § 32-7A-4). Exemptions to insurance requirement are found in Ala. Code § 32-7A-5. Department of Transportation shall suspend vehicle registration of any motor vehicle determined to be in violation of Ala. Code § 32-7A-4. (Ala. Code § 32-7A-9[a]). In case of first violation of Ala. Code § 32-7A-4, Department of Transportation shall terminate suspension upon submission of proof of insurance of vehicle and payment by owner of reinstatement fee of $100. (Ala. Code § 32-7A-9[c]). In case of second or subsequent violation by person having ownership interest in motor vehicle or vehicles within preceding four years, or violation of Ala. Code § 32-7A-16(3), Department of Transportation shall terminate suspension four months after its effective date upon payment by owner of reinstatement fee of $200 and submission of proof of insurance. (Ala. Code § 32-7A-9[d]). Liability insurance issued must provide for payment to insured of damages which he may be legally entitled to recover from owner or operator of uninsured motor vehicle. Insured can reject such coverage. (Ala. Code § 32-7-23). Coverage for uninsured motorist must be rejected in writing by named insured personally. (292 Ala. 103, 289 So.2d 606).

Clauses reducing insured's recovery where other uninsured motorist coverage available to cover portion of damages void. (286 Ala. 606, 243 So.2d 736). Insurer not permitted to setoff workmen's compensation payments against recovery on uninsured motorist coverage so long as total recovery of insured does not exceed his damages. (287 Ala. 462, 252 So.2d 619).

No-Fault Insurance not adopted.

Foreign Vehicles.

Private car of nonresident, duly registered in home state and displaying license plates required by law of home state, may operate without license or registration for 30 days from date of entering state; provided that nonresident owner shall have complied with provisions of law of foreign country, state, territory, or federal district of his residence relative to registration of motor vehicles. Department of Revenue may make reciprocal agreements with other states for exchange of rights and privileges. (Ala. Code § 40-12-262[a]).

Vehicles registered under International Registration Plan governed by Ala. Code §§ 40-12-262[b]-[g].

Nonresident Operators.

Nonresident at least 16 years old, who has immediate possession of driver's license issued in home state or country is exempt from license requirements; nonresident of like age whose home state or country does not require driver's license exempt for not more than 90 days in calendar year, if vehicle duly registered in home state or country. (Ala. Code § 32-6-2).

Actions Against Nonresidents.

Action against nonresident, except foreign corporation licensed to do business in state having designated agent residing in state to receive process, arising out of operation of vehicle in state or against resident driver or resident owner of motor vehicle involved in highway accident, who is absent from state at time process issues (ARCP 4.2[b]), may be commenced by effecting service via certified mail or through delivery by process server. (ARCP 4[i]). Under certain circumstances, service may also be made by publication. (ARCP 4.3).

Direct Actions.

Judgment creditor who recovers from insured in personal injury action, however, may proceed against insurance company to recover judgment. (Ala. Code § 27-23-2).

Motor Vehicle Carriers.

Intrastate operation of common and contract carriers by motor vehicles is regulated in detail by Alabama Motor Carrier Act of 1939 (Ala. Code § 37-3-1, et seq.), and commerce by air carriers is regulated by Alabama Air Commerce Act of 1945 (Ala. Code § 37-9-1, et seq.) and under general supervision and control of Alabama Public Service Commission (Ala. Code § 37-9-7). Common carriers must obtain certificates of convenience and necessity, and contract carriers must obtain permits. (Ala. Code §§ 37-9-16; 37-3-10, et seq.).

No person may operate commercial motor vehicle in this state, or fail to maintain required records or reports, in violation of Federal Motor Carrier Safety Regulations as prescribed by U.S. Department of Transportation. Certain Federal Motor Carrier Regulations are applicable to certain commercial motor vehicles engaged solely in intrastate commerce. (Ala. Code § 32-9A-2).

Mileage tax levied on every motor carrier of persons for hire within state. (Ala. Code § 40-19-3).

Rates vary according to rated carrying capacity as follows: 9 to 16 passengers, ¼¢ per mile; 17 to 21 passengers, ½¢ per mile; 22 to 25 passengers, ¾¢ per mile; over 25 passengers, 1¢ per mile. (Ala. Code § 40-19-3). Tax increased by 50% for carriers not paying Alabama annual license tax. (Ala. Code § 40-19-3).

Every motor carrier must file statements with Department of Revenue by 15th day of each month, and payment of tax must accompany return. (Ala. Code § 40-19-4).

Fee on Vehicles Using Liquefied Petroleum Gas as Fuel.

In lieu of excise tax on liquefied petroleum gas used to propel motor vehicles, annual fee levied on following using liquefied petroleum gas as fuel: (1) Passenger automobiles, vans, pickup trucks under one ton, $75; (2) recreational vehicles and vans and trucks one ton or over but with rear axle carrying capacity less than 14,000 pounds, $85; (3) bobtail trucks, $150; (4) tractor/trailer units, $175. (Ala. Code § 40-17-160).

Privilege License Tax on Vehicles for Hire Transporting Property.

Based on "gross vehicle weight," which means empty weight of truck or truck-tractor, plus heaviest load to be carried, and, in case of combinations, empty weight of heaviest trailer with which power unit can be placed in combination plus heaviest load to be carried. Rates vary according to “base amount” and “additional amount” weight schedules. (Ala. Code § 40-12-248). Trucks operated to transport farm products, to transport forest products from point of severance to sawmill, papermill, or concentration yard, or operated exclusively within state and also within 15 miles of corporate limits of municipality where customarily domiciled, taxed at special rates. (Ala. Code § 40-12-248).

Gasoline Tax.

See category 22 Taxation, topic 22.08 Gasoline and Special Fuels Taxes.

Odometer alteration prohibited.

Inspection.

None of personal vehicles.

Traffic Regulations.

Set out in Ala. Code § 32-5A-1 et seq.

Lemon Law.

See category 3 Business Regulation and Commerce, topic 3.12 Consumer Protection.

23.02 RAILROADS:

See category 3 Business Regulation and Commerce, topic 3.08 Carriers.

1

ALASKA LAW DIGEST

—Scope —

Revised for 2010 edition by

HOFFMAN, SILVER, GILMAN & BLASCO, P.C.

(Citations unless otherwise noted are to Alaska Statutes [AS], with 2009 revisions. Rules of Civil Procedure are cited: Civ. R.P., Rule of Criminal Procedure: Crim. R.P.)

Note: This revision covers 2008 Session Laws through July 2009. Legislature convenes annually in Jan.

For free access to public legal resources: State administrative departments: http://www.state.ak.us/ Court System: http://www.state.ak.us/courts/ Legislature: http://www.legis.state.ak.us/home.htm See also: The Alaska Legal Resource Center: http://www.touchngo.com/

1 INTRODUCTION

1.01 GOVERNMENT AND LEGAL SYSTEM:

The State of Alaska is a constituent state of the United States of America. For further discussion of the U.S. federal system, see Introduction to the Federal Government of the United

States at the beginning of this volume. A great many laws are promulgated by the federal government of the United States and are not reflected in the topics below. See the Introduction to this volume for references to the federal law topics covered.

Like all but one of the United States, Alaska has a common law legal system, with roots in English common law. For information on the courts and legislature of Alaska, see category 6 Courts and Legislature.

1.02 [RESERVED]

1.03 HOLIDAYS:

Legal holidays, in addition to Sundays, are: Jan. 1 (New Year's Day); 3d Mon. in Jan. (Martin Luther King, Jr.'s Birthday); 3d Mon. in Feb. (Presidents' Day); last Mon. in Mar. (Seward's Day); last Mon. in May (Memorial Day); July 4 (Independence Day); 1st Mon. in Sept. (Labor Day); Oct. 18 (Alaska Day); Nov. 11 (Veteran's Day); 4th Thurs. in Nov. (Thanksgiving Day); Dec. 25 (Christmas Day); every Sun.; any day designated by President or Governor as legal holiday. (Alaska Stat. § 44.12.010). When holiday falls on Sat., preceding Fri. is also holiday for officers and employees of State. (Alaska Stat. § 44.12.025). When holiday falls on Sun., following Mon. is also holiday. (Alaska Stat. § 44.12.020).

1.04 OFFICE HOURS AND TIME ZONE:

Alaska is in the Alaska (GMT -09:00) time zone. Office hours are generally from 8 a.m. to 5 p.m. State office hours are generally from 8 a.m. to 4:30 p.m.

2 BUSINESS ORGANIZATIONS

2.01 AGENCY:

No statute. Common law rules apply.

Husband and Wife.

Husband or wife may appoint other as his or her attorney in fact, to control or dispose of his or her property, and may revoke same to same extent and manner as other persons. (Alaska Stat. § 25.15.040).

2.02 ASSOCIATIONS:

Cooperatives may be organized as corporations. See topic 2.03 Corporations.

Cemetery association authorized. (Alaska Stat. § 10.30.010-.155). Association may be formed by not less than five persons or more persons who are residents of same recording district. At least three members must serve as trustees and one as clerk. Records of organizational meetings must be filed with recorder and clerk of superior court. Trustees have perpetual succession and power to contract and prosecute and defend actions. Alternatively, cemetery associate can incorporate subject to AS 10.20. Cemetery associate or nonprofit can hold land not exceeding 80 acres. Cemeteries are exempt from execution and appropriation to public purposes if used for burial purposes only. Exempt from taxation if nonprofit.

Professional Corporations.

See topic 2.03 Corporations, subhead Professional Corporations.

2.03 CORPORATIONS:

Alaska Corporations Code effective July 1, 1989. (10.06).

Purposes.

Corporations may be organized for any lawful purpose. (Alaska Stat. § 10.06.005).

Name.

Must contain word “corporation”, “company”, “incorporated”, or “limited” or abbreviation of above. Must not be deceptively similar to another corporation name. Must not contain word “city”, “borough” or “village” or otherwise imply it is municipality. (Alaska Stat. § 10.06.105). Corporate name may be reserved for 120 days by filing application with commissioner if it is available. (Alaska Stat. § 10.06.110-115). Reserved name can be transferred by filing notice of transfer with commissioner, signed by holder of name and specifying name and address of transferee. (Alaska Stat. § 10.06.120).

Terms of Existence.

Perpetual unless limited by Articles of Incorporation. (Alaska Stat. § 10.06.010).

Incorporators.

One or more natural persons at least 18 years of age. (Alaska Stat. § 10.06.205).

Articles of Incorporation.

Shall set out: (1) Name of corporation; (2) purpose(s); (3) address of initial registered office and name of initial registered agent; (4) name and address of each alien affiliate or statement that there are not alien affiliates; (5) if authorized to issue only one class of shares, total number of shares authorized to issue; (6) if corporation authorized to issue more than one class of shares, or if class of shares is to have two or more series, (a) total number of shares of each class authorized to issue, and total number of shares of each series that corporation is authorized to issue or of which board is authorized to fix number of shares, (b) designation of each class or series or that board may determine designation of any series, (c) privileges, rights, preferences and restrictions imposed on respective classes or series, or that board may determine same, (d) if board authorized to fix number of shares of series, whether board may increase or decrease those shares. (Alaska Stat. § 10.06.208). May set out: (1) power to levy assessments upon shares or class of shares, (2) removing shareholders preemptive rights to subscribe to any or all issues of shares or securities; (3) special qualifications of shareholders; (4) limit on duration of corporations existence to specified date; (5) restriction or elimination of power to adopt, amend, or repeal provisions of bylaws; (6) requirement of larger percentage of vote; (7) limit or restrict business of corporations or powers of corporation; (8) to allow holder of evidence of indebtedness right to vote; (9) right of shareholders to determine consideration for which shares shall be issued; (10) requirements of approval of shareholders of outstanding shares for corporate action; (11) that one or more classes or series are redeemable; (12) confer or impose powers of directors upon delegates; (13) elimination or limitation of personal liability of director for breach of fiduciary duty, but not (a) breach of loyalty, (b) acts not in good faith or intentional misconduct or knowing violation, (c) willful or negligent conduct in payment of dividends or repurchase of stock, (d) transaction resulting in improper personal benefit; (14) reasonable restrictions on transfer; (15) names and addresses of persons appointed to act as initial directors; (16) any other provision not in conflict for management of business and conduct of its affairs (Alaska Stat. § 10.06.210). Articles must be signed by incorporators. (Alaska Stat. § 10.06.205).

Filing of Articles.

Original and exact copy of articles of incorporation shall be delivered to commissioner. (Alaska Stat. § 10.06.213). Also include separate statement of codes under Alaska Stat. § 10.06.870 which most closely describe activities in which corporation will initially engage. (Alaska

Stat. § 10.06.215).

Incorporation and Filing Fee.

Filing fee is fixed by regulation without reference to amount of authorized shares and paid to Commissioner of Commerce, Community and Economic Development. (Alaska Stat. § 10.06.828).

License to do Business.

Corporate existence begins on issuance of certificate of incorporation. Certificate is conclusive evidence that corporation has been incorporated. Doctrines of de jure compliance, de facto corporations and corporations by estoppel are abolished. (Alaska Stat. § 10.06.218).

Organizational Meeting.

After issuance of certificate, either incorporators or board shall meet at call of majority of incorporators or directors for purpose of electing directors, officers and/or other business with 20 days notice by mail to each incorporator or director. (Alaska Stat. § 10.06.223). If directors are not named in articles, then incorporators may do whatever necessary to perfect organization. (Alaska Stat. § 10.06.225).

Paid in Capital Requirements.

None.

Amendment of Articles.

Permitted amendments: Corporation may amend provisions that would be lawful to file originally including, but not limited to (1) change its corporate name; (2) duration; (3) change limitation upon its corporate purpose; (4) increase or decrease number of shares it is authorized to issue; (5) exchange, classify, reclassify or cancel all or part of its shares whether issued or not; (6) change designation; preferences, limitations, and relative rights of shares; (7) create new classes or shares; (8) otherwise change shares and shares' rights. (Alaska Stat. § 10.06.502). For prohibited amendments, see Alaska Stat. § 10.06.502(c). Certain amendments may be made without shareholder action. (Alaska Stat. § 10.06.504). Required to be included in articles of amendment, see Alaska Stat. § 10.06.510.

Procedure to Amend Articles.

(1) If shares have not been issued, board shall adopt resolution or board and shareholders shall approve amendment if shares have been issued. Board may delete names and addresses of initial directors and/or registered agent, enlarge whole shares of only class outstanding, without approval by shares. (Alaska Stat. § 10.06.504).

Bylaws.

Unless in Articles, bylaws shall state number of directors. Number of directors cannot be amended or changed to less than five if more than 162/3% of outstanding shares vote against it. (Alaska Stat. § 10.06.230). Bylaws may contain any lawful provision for management not in conflict with Articles including but not limited to: (1) provision referred to in 10.06. 210(2), (3), or (4); (2) proxies; (3) qualifications, duties, compensation, election of directors and requirements of quorum; (4) appointment, duties, compensation, tenure of officers; (5) appointment, duties, compensation of committees of board. (Alaska Stat. § 10.06.230). Bylaws required to be available for inspection by shareholders at principal executive office in this state or principal business office if executive office is out of state. (Alaska Stat. § 10.06.233).

Stock.

If authorized by Articles, corporation may issue one or more classes or series of stock or both (Alaska Stat. § 10.06.305), preferred or special classes of stock (Alaska Stat. § 10.06.308), shares in series (Alaska Stat. § 10.16.310).

Stock Certificates.

Shall state corporation is organized under laws of state, name of person to whom issued, number and class of shares, designation of series that certificate represents. If corporation authorized to issue shares of more than one class, then shall state that upon request and without charge corporation will furnish statement of designations, preferences, limitations and relative rights of each class and series, if applicable. (Alaska Stat. § 10.06.350). Shares may be issued without certificate if information required on certificates sent to shareholder in writing. (Alaska Stat. § 10.06.349).

Issuance of Stock.

Board shall set dollar price for shares unless Articles reserve that right to shareholders. (Alaska Stat. § 10.06.335). Share may not be issued until fully paid. (Alaska Stat. § 10.06.353). Payment may be made in money, property, tangible or intangible, or in labor or services actually performed by corporation. Promissory note or future service does not constitute payment. (Alaska Stat. § 10.06.338).

Transfer of Stock.

To fix records for determining shareholders entitled to notice or vote at meeting of shareholders or adjournment of meetings or shareholders entitled to receive dividend or any other proper purpose, transfer books closed for no more than 70 days. If books closed to determine shareholders entitled to notice of or vote at meeting of shareholders, closed for at least 20 days immediately preceding meeting. Bylaws or board may fix date as record date no more than 60 days, and in case of meeting of shareholders, not less than 20 days before date. (Alaska Stat. § 10.06.408).

Uniform Simplification of Fiduciary Security Transfers Act.

Not adopted.

Uniform Commercial Code.

Adopted. (45.01-45.08, 45.12, 45.14, and 45.29).

See category 3 Business Regulation and Commerce, topic 3.09 Commercial Code.

Stockholders.

Unless provided otherwise in Articles, majority of shares entitled to vote constitutes quorum; however, quorum may never be less than one-third of shares entitled to vote. Once quorum established business may be transacted even if thereafter quorum not present. (Alaska Stat. § 10.06.415).

Stockholders Actions.

Shareholder may bring action in right of corporation. Costs may be awarded if derivative action plaintiff successful. (Alaska Stat. § 10.06.435).

Liability of Shareholders.

No liability other than payment of full consideration for shares. (Alaska Stat. § 10.06.438).

Shareholders’ Meetings.

Written notice stating place, day and hour of meeting (if special meeting, purpose must be given) shall be delivered not less than 20 or more than 60 days before meeting to each record shareholder. Notice by electronic transmission allowed if authorized by shareholder. (Alaska Stat. § 10.06.410). Proxies allowed but expires after 11 months unless irrevocable proxy. Proxy revoked by writing delivered to corporation, by subsequent proxy, or by attending and voting in person. Dates contained on proxy forms determinative of order of execution. Proxy not revoked by death or incapacity unless written notice received by corporation prior to count of votes. Proxy that states irrevocable is irrevocable for time specified if certain conditions met. (Alaska Stat. § 10.06.418). Cumulative voting allowed. (Alaska Stat. § 10.06.420). Action may be taken without meeting upon written consent of all shareholders entitled to vote unless prohibited by articles or bylaws. (Alaska Stat. § 10.06.423).

Voting Trusts.

Allowed by entering into written agreement specifying terms and agreements, depositing copy of agreement at corporation’s registered office and transferring shares to trustee(s). (Alaska Stat. § 10.06.425).

Directors.

Board shall consist of one or more members. If number of directors not set by bylaws or articles, number is three. (Alaska Stat. § 10.06.453). If board consists of three or more members, articles may provide that directors be elected as two or three classes with terms staggered. (Alaska Stat. § 10.06.455). Vacancies filled by majority of directors unless otherwise provided. (Alaska Stat. § 10.06.465). Need not be resident of state or shareholder. (Alaska Stat. § 10.06.450).

Director’s Meetings.

Chairman, president, vice-president, secretary or director may call meeting inside or outside of state. No notice needed for regular meeting set in bylaws, special meeting required notice is ten days for written notice, 72 hours for person to person communication and disclosure of business and purpose. Director waives notice by signing waiver before or after meeting or attends meeting without protesting before meeting or at its commencement. (Alaska Stat. § 10.06.470). Majority of directors fixed by corporation is quorum unless larger number fixed. (Alaska Stat. § 10.06.473). Meeting may be conducted by conference telephones or similar communications. No meeting necessary upon identical written consents by all directors. (Alaska Stat. § 10.06.475).

Powers and Duties of Directors.

Set forth in Alaska Stat. § 10.06.450.

Liabilities of Directors.

Set forth in Alaska Stat. § 10.06.480.

Indemnification of Directors and Officers.

May be indemnified by corporation if acted in good faith and in manner person reasonably believed to be in or not opposed to best interests of corporation and with criminal proceeding, had no reasonable cause to believe conduct unlawful. (Alaska Stat. § 10.06.490).

Officers.

Shall have president, secretary, treasurer chosen by board and who serve at pleasure of board. Any two or more offices may be held by same person except offices of president and secretary. (Alaska Stat. § 10.06.483). Corporation may maintain insurance on behalf of officers.

(Alaska Stat. § 10.06.490).

Principal Office and Resident Agent.

Corporation shall continuously maintain in this state registered agent and registered office. Registered agent may either be individual resident of state or domestic or foreign corporation authorized to transact business in state who has as their business office same as registered office. (Alaska Stat. § 10.06.150). To change registered office or agent corporation must file verified statement. Explained in detail in Alaska Stat. § 10.06.165.

General Powers of Corporations.

10.06.015 discards defense of ultra vires with certain exceptions. General power described in Alaska Stat. § 10.06.010.

Dividend.

Distribution conditions in general. (Alaska Stat. § 10.06.358). Distribution of dividends to corporation shareholders is not allowed if as result of distribution corporation would be likely to be unable to meet its liabilities as they mature. (Alaska Stat. § 10.06.360). See generally Alaska Stat. § 10.06.360-10.06.385.

Unclaimed Dividends.

See category 21 Property, topic 21.01 Absentees, subhead Escheat.

Sale or Transfer of Corporate Assets.

In order to sell financially most or all of property and assets of corporation sale shall be recommended to shareholders by resolution approved by board and submitted to vote of shareholders. (Alaska Stat. § 10.06.568).

Books and Records.

Corporation organized under this chapter shall keep correct and complete books and records of account, minutes of proceedings of its shareholders, board and committees of board, and record of its shareholders, containing names and addresses of all shareholders and number and class of shares held by each. These books and records shall be written or capable of being converted into written form within reasonable time. (Alaska Stat. § 10.06.430). These records shall be reasonably available for inspection and copying at registered office or principal place of business in state by shareholder of corporation. Shareholder inspection shall be upon written demand, stating with reasonable particularity purpose of inspection. (Alaska Stat. § 10.06.430).

Reports.

Domestic corporation and foreign corporation authorized to transact business in state shall file biennial report. (Alaska Stat. § 10.06.805). Biennial report is due by Jan. 2 of filing year. (Alaska Stat. § 10.06.811). Contents of biennial report are set out in Alaska Stat. § 10.06.808. In event of change in officer, director or alien affiliate of corporation during first year of biennial reporting period or change in a 5% of shareholder before Sept. 30th of first year of biennial reporting period, corporation shall file notice of change amending biennial report of corporation before following Jan. 2nd. (Alaska Stat. § 10.06.813). Penalty for failure to file biennial report is penalty of 10% of amount of corporation tax assessed against it for period beginning Jan. 1st of year for which report should have been filed. (Alaska Stat. § 10.06.815).

Merger and Consolidation.

Two or more domestic corporations may merge into one of such corporations under plan of merger approved in manner provided in Alaska Stat. § 10.06.530–10.06.582. Merger or consolidation between domestic and foreign corporation. (Alaska Stat. § 10.06.562). Resolution of board of each corporation shall be proposed setting out names of corporations and name of surviving corporation into which they propose to merge; terms and conditions of proposed merger; manner and basis of converting shares of each merging corporation into shares or other securities or obligations of surviving corporation; statement of changes in articles of incorporation of surviving corporation caused by merger; and other provisions of merger considered necessary or desirable. (Alaska Stat. § 10.06.532). Same procedure should be carried out for consolidation of corporations. (Alaska Stat. § 10.06.534 and Alaska Stat. § 10.06.536). Plan is approved if it receives affirmative vote of at least two-thirds of outstanding shares of each corporation. Each outstanding share of each corporation may vote on proposed plan whether or not share has voting rights under articles of corporation. (Alaska Stat. § 10.06.546). Alaska Stat. § 10.06.574 to Alaska Stat. § 10.06.582 set out rights and procedures for dissenting shareholders. Two or more cooperatives may merge or consolidate pursuant to plan of merger or consolidation adopted in manner provided in Alaska Stat. § 10.15.405 to Alaska Stat. § 10.15.415. These four filing articles of incorporation, application for certificate of authority, amendatory articles, or other application with department are set forth in regulations.

Share Exchanges or Acquisitions.

All of issued or outstanding shares of one or more classes of domestic corporation may be acquired through exchange of all of issued or outstanding shares of class or classes by another domestic or foreign corporation under plan of exchange approved in manner provided in Alaska Stat. § 10.06.530 to Alaska Stat. § 10.06.582. (Alaska Stat. § 10.06.538).

Dissolution.

See Alaska Stat. § 10.06.605 through Alaska Stat. § 10.06.678. Dissolution may be voluntary or involuntary. If corporation has been completely wound up without court proceedings majority of directors in office shall sign articles of dissolution as set out in Alaska Stat. § 10.06.620. Original and exact copy of articles of dissolution shall be delivered to commissioner and for issuance of certificate of dissolution. (Alaska Stat. § 10.06.623). Upon issuance of certificate of dissolution existence of corporation ceases. (Alaska Stat. § 10.06.625). Grounds for involuntary dissolution by commissioner are set out in Alaska Stat. § 10.06.633. After all of known debts and liabilities of corporation has been paid or adequately provided for, board shall distribute all remaining corporate assets among shareholders according to their respective rights and preferences and, if there are no shareholders, to persons entitled to assets. (Alaska Stat. § 10.06.665). Alaska Stat. § 10.06.673 provides for plan of distribution.

Foreign Corporations.

To transact business in state foreign corporation must be issued certificate of authority by commissioner. (Alaska Stat. § 10.06.705). Foreign corporation that transacts business in state without certificate of authority is liable to state for years or portions of years during which it transacts business in state without certificate of authority and in amount equal to all fees and corporation taxes that would have been imposed if it had received certificate of authority. Additionally, all penalties imposed by this chapter for failing to pay fees and corporation taxes plus penalty of up to $10,000 per calendar year would also be imposed. (Alaska Stat. § 10.06.710). Foreign corporation transacting business in this state without certificate of authority may not maintain action suit or proceeding in court of this state until it obtains certificate of authority. (Alaska Stat. § 10.06.713). However, failure of foreign corporation to obtain certificate of authority to transact business in this state does not impair validity of contract or act of corporation and does not prevent corporation from defending action suit or proceeding in court of this state. (Alaska Stat. § 10.06.715). Alaska Stat. § 10.06.718 sets forth activities not constituting transacting business in this state. Application for certificate of authority must set out name of corporation and assumed name if any, and state or country under whose laws it is incorporated; date of incorporation and period of duration of corporation; address of principal office of corporation in state or country under whose laws it is incorporated; address of proposed registered office of corporation in this state and name of its proposed registered agent in this state at that address; purpose corporation proposes to pursue and transaction of business in this state; names and addresses of directors and officers of corporation; statement of aggregate number of shares that corporation may issue, itemized by classes, par value of shares, shares without par value, and series, if any, within class; statement of aggregate number of issued shares itemized by classes, par value of shares, shares without par value, and series, if any, within class; statement expressed in dollars of amount of stated capital of corporation; estimate expressed in dollars of (a) value of all property to be owned by corporation for following year; (b) value of property of corporation to be located in state during following year; (c) gross amount of all business that will be transacted by corporation during following year; (d) gross amount of business that will be transacted by corporation at or from places of business in state during following year; additional information necessary or appropriate to enable commissioner to determine whether corporation is entitled to certificate of authority and to determine and assess fees and taxes that are payable; names and address of each alien affiliate, percentage of outstanding shares controlled by each alien affiliate and specific description of nature of relationship between foreign corporation and its alien affiliate. Or statement that there are no alien affiliates; name and address of each person owning at least 5% of shares or 5% of any class of shares and percentage of shares or class of shares owned by that person. (Alaska Stat. § 10.06.730). Alaska Stat. § 10.06.740 provides that foreign corporation that has received certificate of authority enjoys same but no greater rights and privileges as domestic corporation organized for purposes set out in application under which security of authority is issued and is subject to duties, restrictions, penalties and liabilities now or hereafter imposed up domestic corporation of like character.

Taxation of Corporate Property.

See category 22 Taxation, topic 22.03 Corporate Taxes, subhead Corporate Property Tax.

Professional Corporations.

10.45.240 provides that professional corporations enjoy powers and privileges and are subject to duties, restrictions and liabilities of other corporations. Professional corporation means corporation organized under this chapter to render professional service. Professional person means person licensed to render professional service. Professional service means type of highly skilled, technical and specialized personal service rendered to public by persons licensed by state. (Alaska Stat. § 10.45.500). 10.45 is Alaska Professional Corporation Act.

Deeds.

See category 21 Property, topic 21.06 Deeds.

Model Nonprofit Corporation Act.

Alaska has not adopted. Alaska Nonprofit Corporation Act is contained in 10.20.

2.04 [RESERVED]

2.05 JOINT STOCK COMPANIES:

No statute. See topics 2.02 Associations, 2.03 Corporations.

2.06 LIMITED LIABILITY COMPANIES:

Purpose.

Limited liability companies may be organized for any lawful purpose, including rendering of professional service. (Alaska Stat. § 10.50.010).

Name.

Must contain words “limited liability company”, “Ltd. Liability Co.”, or abbreviation “LLC”, or “L.L.C.” Must not contain “city”, “borough”, or “village” or otherwise imply that company is municipality. (Alaska Stat. § 10.50.020). Must be distinguishable from other organized entity or reserved or registered name. (Alaska Stat. § 10.50.25). Name may be reserved for 120 days if available upon application to Commissioner. (Alaska Stat. § 10.50.030-.035).

Articles of Organization.

Shall set out: (1) name of company; (2) purpose; (3) mailing address of registered office and registered agent; and (4) if applicable, whether company will be managed by manager. (Alaska Stat. § 10.50.075).

Filing of Articles.

Signed articles must be delivered to Department for filing. (Alaska Stat. § 10.50.070).

Registered Office and Registered Agent.

Company shall continuously maintain registered agent and office in this state. Registered agent may either be individual resident of state or domestic or foreign corporation authorized to transact business in state who has as their business office same as registered office. (Alaska Stat. § 10.50.055).

Management.

Company may be managed by its members or manager. If managed by manager, manager has exclusive power to manage to extent of operating agreement. (Alaska Stat. § 10.50.110).

Dissolution.

Company dissolved if (1) event occurs which operating agreement identifies as causing dissolution; (2) written consent of all members; or (3) court enters decree for judicial dissolution pursuant to Alaska Stat. § 10.50.405. (Alaska Stat. § 10.50.400).

2.07 [RESERVED]

2.08 PARTNERSHIPS:

Uniform Partnership Act (adopted 1949, repealed effective Jan. 1, 2004; see notes for continuing applicability). (Alaska Stat. § 32.05.010-.995). Replaced with Uniform Partnership Act (1997, adopted 2000, effective Jan. 1, 2001). (Alaska Stat. § 32.06.201-.997).

Uniform Limited Partnership Act (1976 with 1985 amendments, adopted 1992, subsequent amendment). (Alaska Stat. § 32.11.010-.990).

3 BUSINESS REGULATION AND COMMERCE

3.01 BANKS AND BANKING:

Regulated by Department of Commerce, Community and Economic Development, Division of Banking and Securities. http://www.dced.state.ak.us/bsc/. Title 6. Alaska Statutes.

Banking Code (Alaska Stat. § 06.05.005) and subsequent amendments covers definitions, effect on existing banks, establishment and duties of Department of Community and Economic Development, banking practices, trust business, reserves, loans, investments, etc., bank collections, organization and corporate functions of banks, liquidation, dissolution and reorganization, prohibited practices, sanctions. Alaska Savings Association Act repealed. (06.30). Mutual Savings Bank Act. (Alaska Stat. § 06.15.010-.380).

Liability of Directors and Officers.

Issuing officer, director, executive or managing officer of state bank who knowingly or with gross negligence permits loans or overdrafts in unsound manner or in violation of law or policies is personally liable for all such loans or overdrafts. (Alaska Stat. § 06.05.215).

Uniform Commercial Code (adopted 1962). (45.01-45.08, 45.12, 45.14, and 45.29). Uniform Commercial Code—Bank Deposits and Collections Alaska Stat. § 45.04.101; collections Alaska Stat. § 45.04.301—.303. See topic 3.09 Commercial Code.

Deposits.

Deposits made on behalf of minor or person with disability when paid to such minor on check or order, such payment is valid in all respects. (Alaska Stat. § 06.05.100). Joint deposits and deposits in trust allowed. Express right of survivorship cannot be changed by will. Sums on deposit at death of party to joint account belong to surviving party. (Alaska Stat. § 13.33.101-.310).

Foreign Banks.

Model Foreign Banks Loan Act (adopted 1960). (Alaska Stat. § 06.10.010-.050).

Unclaimed Deposits.

See category 21 Property, topic 21.01 Absentees, subhead Escheat.

Uniform Common Trust Fund Act (adopted 1964). (Alaska Stat. § 06.35.010-.050).

3.02 BILLS AND NOTES:

Uniform Commercial Code in effect. (Alaska Stat. § 45.01.101). Criminal and civil penalties are provided for issuing insufficient funds checks. (Alaska Stat. § 11.46.280 and Alaska Stat. § 09.68.115).

See topic 3.09 Commercial Code.

Judgment Notes.

Not in use.

Attorney Fees.

Reasonable provisions for costs of collection and attorney fee clauses enforceable, otherwise determined by court under Rules of Civil Procedure. Civ. R.P. 79 and 82. (See also Civ. R. P. 68.)

Negotiable Instruments.

Uniform Commercial Code Alaska Stat. § 45.03.101-.605.

See also topic 3.12 Consumer Protection.

3.03 BILLS OF LADING:

See topic 3.07 Carriers.

3.04 BILLS OF SALE:

See topic 3.23 Sales.

3.05 BLUE SKY LAW:

See topic 3.24 Securities.

3.06 BROKERS:

Uniform Commercial Code adopted. (Alaska Stat. § 45.01.101). See topic 3.09 Commercial Code.

Money, bill, note and stock brokers must have annual Alaska Business License, yearly fee $50, except fee is $25 if business is sole proprietorship and sole proprietor is 65 years or older when license is applied for or at any time during year for which license is issued. (Alaska Stat. § 43.70.030). Insurance agents and brokers must have annual license.

See also topics 3.24 Securities, Commercial Code; category 16 Insurance, topic 16.01 Insurance Companies.

Real Estate Brokers.

License required. (Alaska Stat. § 08.88.161). Licenses granted by Real Estate Commission. (Alaska Stat. § 08.88.071). Licensing requirements. (Alaska Stat. § 08.88.171).

3.07 [RESERVED]

3.08 CARRIERS:

Liens allowed upon personal property for just and reasonable charges. (Alaska Stat. § 34.35.220). May sell property to cover charges three months after performance. (Alaska Stat. § 34.35.225).

Pipelines regulated by Regulatory Commission of Alaska. (42.06).

Uniform Commercial Code adopted. (Alaska Stat. § 45.01.101).

See topics 3.18 Licenses, Business and Professional, Commercial Code; category 8 Debtor and Creditor, topic 8.13 Liens.

3.09 COMMERCIAL CODE:

Uniform Commercial Code 1958 Official Text adopted, effective midnight, Dec. 31, 1962. (Alaska Stat. § 45.01.101). Recommended amendments included in 1962 Official Text not adopted. Local variations from 1962 Official Text, in addition to those noted above are found in § 2-201(1)—sales of boats and vessels included, 2-316—section added excluding sale of human blood, blood plasma, or other human tissue from implied warranties of merchantability and fitness, 2-318—alternative A adopted, 2-326—art works on exhibit or consignment sale not subject to claims of art dealer's creditors, 2-329—additional section relating to door-to-door sales (Alaska Stat. § 45.02.350), 2.502 modified, c. 3—Negotiable Instruments 1991 Official Text of Revised Art. 3 adopted, effective Jan. 1, 1994 (Alaska Stat. § 45.03.101-45.03.605), c. 4—Bank Deposits and Collections 1991 Amendments adopted effective Jan. 1, 1994 (Alaska Stat. §

45.04.101-45.04.504), c. 5—Letters of Credit, 1995 Official Text of Revised Art. 5 adopted, effective Jan. 1, 2000 (Alaska Stat. § 45.05.101-45.05.118), c. 6—Bulk Transfers, repealed 1993, 7-204—subsection (4) omitted, 7-210—subsection (2)(f), "three conspicuous places" substituted for "six conspicuous places", 7-403—subsection (1)(b) optional language omitted, c. 8—Investment Securities, 1994 Official Text of Revised Art. 8 adopted (Alaska Stat. § 45.08.101-45.08.511). Effective July 1, 2001, 45.09 is repealed in its entirety and recodified with modifications at Alaska Stat. § 45.29.101-.709, which is based on comprehensive 1998 revision of Uniform Commercial Code's Article 9 on Secured Transactions. § 34, c. 113 SLA 2000 provides that provisions of 45.29 do not apply to action, case, or proceeding commenced before July 1, 2001.

Permanent Editorial Board's Recommendations for Amendments.

1966 Official Amendments to §§ 2-702, 3-501 and 7-209 not enacted.

Permanent Editorial Board's Recommendations for Optional Amendments.

1966 Official Optional Amendments to §§ 1-209, 2-318, 9-105 and 9-106 not enacted.

1972 Official Amendments.

Not adopted.

1973 Official Amendment adopted.

1977 Official Amendments.

Not adopted.

See also topics: Banks and Banking, Bills and Notes, Carriers, Factors, Frauds, Statute of, Sales, Securities, Warehousemen; categories Business Organizations, topic Corporations; Civil Actions and Procedure, topic Limitation of Actions; Debtor and Creditor, topics Assignments, Fraudulent Sales and Conveyances, Liens, Pledges; Documents and Records, topics Records, Seals; Mortgages, topic Chattel Mortgages.

3.10 CONDITIONAL SALES:

See topic 3.23 Sales.

3.11 CONSIGNMENTS:

See topic 3.14 Factors.

3.12 CONSUMER PROTECTION:

Uniform Deceptive Trade Practices Act not adopted.

Unfair competition and deceptive conduct of trade or commerce are unlawful. Included are: fraudulent conveyance of goods or services, false representation of origin, nature, standard etc. of goods or services; false or misleading advertising of goods or services or their price; falsely representing frozen meat, fish or poultry as fresh; failure to deliver written contract for installment sales; using chain referral sales plan, engages in prohibited telephonic solicitations, violations of mortgage lending regulations, etc. (Alaska Stat. § 45.50.471). Contact Alaska Department of Law, Commercial and Fair Business Section, 1031 W. 4th Ave., Suite 200, Anchorage, AK 99501 for information.

Damages.

Private and class actions allowed. (Alaska Stat. § 45.50.531). Person may recover greater of three times actual damages or $500, whichever is greater. (Alaska Stat. § 45.50.531). Person may not commence action more than two years after discovery of loss from act or practice declared unlawful under Alaska Stat. § 45.50.531.

"Unsolicited goods" statute adopted. (Alaska Stat. § 45.45.105). Free trial periods, opt-out marketing plans regulated. (Alaska Stat. § 45.45.920; Alaska Stat. § 45.45.930).

Consumer paper nonnegotiable. (Alaska Stat. § 45.50.541).

"Lemon Laws".

(Alaska Stat. § 45.45.300-.360).

Plain Language.

No plain language statute adopted.

3.13 CONTRACTS:

Uniform Commercial Code adopted. (Alaska Stat. § 45.01.101). See topic 3.09 Commercial Code.

3.14 FACTORS:

Uniform Commercial Code adopted. (Alaska Stat. § 45.01.101). See topic 3.09 Commercial Code.

3.15 FRANCHISES:

Uniform Franchise and Business Opportunities Act not adopted. See topics 3.20 Monopolies, 3.22 Restraint of Trade and Competition, 3.24 Securities.

3.16 FRAUDS, STATUTE OF:

Uniform Commercial Code adopted. (Alaska Stat. § 45.01.101). See topic 3.09 Commercial Code.

a. In the following cases and under the following conditions an agreement, promise, or undertaking is unenforceable unless it or some note or memorandum of it is in writing and subscribed by the party charged or by his agent:

(1) an agreement that by its terms is not to be performed within a year from the making of it;

(2) an agreement the performance of which is not to be completed by the end of a lifetime. This provision includes a contract to bequeath property or make a testamentary disposition of any kind, a contract to assign or an assignment, with or without consideration to the promisor, of a life or health or accident insurance policy, or a promise, with or without consideration to promisor, to name a beneficiary of that type of policy. But this provision does not include an insurer's promise to issue a policy of insurance, or any promise or assignment with respect to a policy of industrial life or health or accident insurance;

(3) a special promise to answer for the debt of another;

(4) an agreement by an executor or administrator to pay the debts of his testator or intestate out of his own estate;

(5) an agreement made upon consideration of marriage other than mutual promises to

marry;

(6) an agreement for leasing for a longer period than one year, or for sale of real property, or of any interest in real property, or to charge or encumber real property;

(7) an agreement concerning real property made by an agent of the party sought to be charged unless authority of the agent is in writing;

(8) an agreement authorizing or employing an agent or broker to sell or purchase real estate for compensation or commission; however, if the note or memorandum of the agreement is in writing, subscribed by party to be charged or by his lawfully authorized agent, contains a description of the property sufficient for identification, authorizes or employs the agent or broker named in it to sell the property, and expresses with reasonable certainty amount of commission or compensation to be paid the agent or broker, the agreement of authorization or employment is not unenforceable for failure to state a consideration;

(9) an agreement to establish a trust;

(10) a subsequent or new promise to pay a debt discharged in bankruptcy;

(11) a conveyance or assignment of a trust in personal property;

(12) an agreement to pay compensation for services rendered in negotiating a loan, effecting procurement of a business opportunity, or purchase and sale of a business, its good will, inventory, fixtures, or an interest in it, including a majority of the voting stock interest in a corporation and including the creating of a partnership interest, other than an agreement to pay compensation to an auctioneer or an attorney at law.

(13) Agreement to lend more than $50,000 or to grant or extend credit of more than $50,000, if loan or grant or extension of credit is not primarily for personal, family, or household purposes and if person who agrees to loan or grant or extend credit is engaged in business of lending or arranging for lending of money or granting or extension of credit and this paragraph alone secured solely by residential property consisting of one to four dwelling units is considered to be loan primarily for personal, family, or household purposes.

b. No estate or interest in real property, other than a lease for a term not exceeding one year, nor any trust or power concerning the property may be created, transferred, or declared, otherwise than by operation of law, or by a conveyance or other instrument in writing subscribed by party creating, transferring, or declaring it or by his agent under written authority and executed with the formalities that are required by law. If interest is created, transferred or declared to, or for benefit of, nonresident alien, instrument shall so state and shall contain alien’s name and address. This does not affect power of testator in disposition of his real property by will, nor prevent trust’s arising or being extinguished by implication or operation of law, nor affect power of court to compel specific performance of agreement in relation to property. (Alaska Stat. § 09.25.010).

Exceptions to Statute of Frauds.

A contract, promise, or agreement which is subject to § 09.25.010, which does not satisfy requirements of that section, but which is otherwise valid is enforceable if either

(1) There has been full performance on one side accepted by the other in accordance with the contract; or

(2) there is a memorandum which would satisfy requirements except for error or omission in recital of past events; or

(3) there is a memorandum which would satisfy the requirements except for error or omission which could be corrected by reformation if it occurred in formal contract; or

(4) party against whom enforcement is sought admits, voluntarily or involuntarily, in his pleadings or at any other stage of this or any other action or proceeding the making of an agreement; or

(5) it is a contract of employment for a period not exceeding one year from the commencement of work under its terms. (Alaska Stat. § 09.25.020).

Part performance also can remove bar of statute. (519 P.2d 814).

Representations as to Credit, Skill, or Character of a Third Person.

Evidence is not admissible to charge person upon representation as to credit, skill, or character of third person unless representation or some memorandum of it is in writing, and either subscribed by or in handwriting of party to be charged. (Alaska Stat. § 09.25.030).

Sale of Goods.

Except as otherwise provided a contract for sale of goods, including sale or transfer of a boat or vessel, for price of $500 or more is not enforceable by way of action or defense unless there is some writing sufficient to indicate that a contract for sale has been made between the parties and signed by party against whom enforcement is sought or by his authorized agent or broker. A writing is not insufficient because it omits or incorrectly states a term agreed upon but the contract is not enforceable under this paragraph beyond the quantity of goods shown in such writing. (Alaska Stat. § 45.02.201).

Between merchants if within a reasonable time a writing in confirmation of the contract and sufficient against sender is received and party receiving it has reason to know its contents, it satisfies the requirements unless written notice of objection to its contents is given within ten days after it is received. (Alaska Stat. § 45.02.201).

Exceptions: Sale of Goods.

A contract which does not satisfy requirements of the statute but which is valid in other respects is enforceable

(a) if the goods are to be specially manufactured for buyer and are not suitable for sale to others in ordinary course of seller’s business and seller, before notice of repudiation is received and under circumstances which reasonably indicate that the goods are for buyer, has made either a substantial beginning of their manufacture or commitments for their procurement; or

(b) if party against whom enforcement is sought admits in his pleading, testimony, or otherwise in court that a contract for sale was made, but the contract is not enforceable under this provision beyond the quantity of goods admitted; or

(c) with respect to goods for which payment has been made and accepted or which have been received and accepted. (Alaska Stat. § 45.02.201).

3.17 INTEREST:

Legal rate in absence of contract fixing rate, 10.5%, interest charged by express agreement in contract or loan commitment dated after June 4, 1976 may not exceed 5% above annual rate which is charged member banks for advances by 12th Federal Reserve District on day which contract or loan commitment is made; but commitment exceeding $25,000 in principal amount is exempt. (Alaska Stat. § 45.45.010).

Judgment.

Interest rate on judgments, including prejudgment interest, is three percentage points above 12th Federal Reserve discount rate in effect on Jan. 2 of year in which judgment is entered unless based on written contract providing for specified rate, in which case judgment bears interest at contract rate provided such rate is set forth in judgment. (Alaska Stat. § 09.30.070). Prejudgment interest accrues from day process is served on defendant or day defendant receives written notification that injury has occurred and that claim may be brought against that defendant, whichever is earlier. Prejudgment interest may not be awarded for future economic damages, future noneconomic damages, or punitive damages. (Alaska Stat. § 09.30.070).

Small Loans.

Rates applicable to unpaid balance equal to or less than indicated amount. Loan maximum $25,000. $850 or less, 3% per month; $850 to $10,000, 2% per month; $10,000 to $25,000, at rate agreed by contract. (Alaska Stat. § 06.20.230). Option available for open-ended small loans or contracted loans between $10,000 to $25,000: Three percent per month on that part of unpaid principal of loan not exceeding $850, 2% on unpaid principal between $850 and $10,000, and at rate agreed by contract for remaining unpaid principal exceeding $10,000 but less than $25,000. (Alaska Stat. § 06.20.230).

Usury results in forfeiture of all interest (Alaska Stat. § 45.45.040) and person paying usurious interest may recover double amount thereof by action brought within two years (Alaska Stat. § 45.45.030). Interest on loans under $10,000, payable in installments in seven years or less may be collected in advance. (Alaska Stat. § 45.45.080).

See also topic 3.23 Sales, subhead Retail Credit Sales.

3.18 INFORMATION TECHNOLOGY, INTERNET AND NEW MEDIA:

Digital Signatures - Uniform Electronics Transactions Act (adopted 2004) (Alaska Stat. § 09.80.010-.195). Applies to transactions between parties who agree to transactions by electronic means; recognizes electronic records, signatures and contracts.

3.19 LICENSES, BUSINESS AND PROFESSIONAL:

Alaska General Business License levied upon all businesses, Alaska Stat. § 43.70.020-120, but numerous businesses and professions are covered by special acts. See category, Taxation, topic Taxes, subhead Business License Tax. Unless exempted, license fee for all Alaska businesses is $150, except $25 if sole proprietorship and sole proprietor is age 65 or older. (Alaska Stat. § 43.70.030).

A centralized occupational and professional licensing section is established in Department of Community and Economic Development. (08.01).

Collection Agencies.

License required from and biennial fee set by Department of Commerce, Community and Economic Development. (Alaska Stat. § 08.01.065). License not required of attorneys, banks, fiduciaries, financing institutions, common carriers, title insurers doing escrow business, real estate brokers, substation payment offices of public utilities when engaged in regular course of their business. (Alaska Stat. § 08.24.090-08.24.100).

3.20 MONOPOLIES, RESTRAINT OF TRADE AND COMPETITION:

All statutory provisions found in Alaska Stat. § 45.50.

Prohibited Restraints of Trade and Competition.

Every contract, combination and monopoly in restraint of trade or which lessens competition is unlawful. (Alaska Stat. § 45.50.562-.566). Contracts restraining trade are voidable. (Alaska Stat. § 45.50.574). Acquisitions and mergers of stock, share capital or assets of corporation which substantially lessen competition are unlawful and court may order divestiture. (Alaska Stat. § 45.50.568). Interlocking directorates and relationships between competitive business entities which substantially lessen competition likewise unlawful and court may terminate interlocking relationship. (Alaska Stat. § 45.50.570). Violations constitute misdemeanor. (Alaska Stat. § 45.50.578). Other violations may result in imposition of civil penalty, treble damages, reasonable attorney's fees and costs to any person injured (Alaska Stat. § 45.50.576). Enforcement by Attorney General for monetary relief. (Alaska Stat. § 45.50.577).

Exemptions to Act found enumerated in Alaska Stat. § 45.50.572. For example, Act does not apply to labor, agricultural, horticultural, or marine pilot organizations created for purpose of mutual help, and not conducted for profit; fishing industry; long distance telecommunications services provided by public utilities; public utilities certified for public convenience; some activities of Alaska Housing Finance Corporation; and actions or arrangements necessary to carry out Alaska Native Claims Settlement Act, etc. (Alaska Stat. § 45.50.572).

3.21 NEGOTIABLE INSTRUMENTS:

See topic 3.02 Bills and Notes.

3.22 RESTRAINT OF TRADE:

See topic 3.20 Monopolies, 3.22 Restraint of Trade and Competition.

3.23 SALES:

Uniform Commercial Code adopted. (Alaska Stat. § 45.01.101). See topic 3.09 Commercial Code.

Contracts of Sale.

See Uniform Commercial Code, § 2-106. (Alaska Stat. § 45.02.106). See topics 3.16 Frauds, Statute of; 3.12 Consumer Protection.

Bills of Sale.

No statutory requirements.

Conditions or Warranties.

See Uniform Commercial Code, §§ 2-313-2-317. (Alaska Stat. § 45.02.312-.318).

Consumer Protection.

See topic 3.12 Consumer Protection.

Product Liability.

See Uniform Commercial Code, §§ 2-313-2-317. (Alaska Stat. § 45.02.313-.317). Privity not required of family household or guest in home, U.C.C. § 2-318. (Alaska Stat. § 45.02.318).

Transfer of Title.

See Uniform Commercial Code, Art. 2, § 2-401. (Alaska Stat. § 45.02.401).

Delivery.

See Uniform Commercial Code. (Alaska Stat. § 45.02.319 – 323).

Stoppage in Transitu.

See Uniform Commercial Code.

Remedies of Seller.

See Uniform Commercial Code. (Alaska Stat. § 45.02.701 –725).

Remedies of Buyer.

See Uniform Commercial Code (Alaska Stat. § 45.02.701 –725).

Conditional Sales.

See Uniform Commercial Code.

Retail Credit Sales.

Alaska Retail Installment Sales Act (Alaska Stat. § 45.10.010-230) provides comprehensive statutory provisions regulating installment sales and covering documents, prepayment, charges of all kinds, insurance, actions by Attorney General, penalties, etc.

Seller must notify buyer of inclusion of any service charge included in retail installment contract, retail charge or revolving account at or before time retail charge agreement is made. Rate must be agreed upon by buyer and seller. Alaska Stat. § 45.10.010 – 020.

Sales of Vehicles.

See category 23 Transportation, topic 23.01 Motor Vehicles.

3.24 SECURITIES:

Uniform Securities Act adopted with some changes in 1959 as Alaska Securities Act of 1959. Current Alaska Securities Act found at Alaska Stat. § 45.55.010-45.55.995. Substantial deviation from Uniform Act.

Uniform Commercial Code. – Investment Securities enacted. (45.08). See topic 3.09 Commercial Code.

Supervision.

By Department of Community and Economic Development, Division of Banking and Securities; http://www.dced.state.ak.us/bsc/. (Alaska Stat. § 45.55.905).

Fees.

Established by Department by regulation. (Alaska Stat. § 45.55.040). Fees for security registration are nonrefundable filing fee of $100 and refundable registration fee of $500 for one year, or $100 and $1,000 if automatic extension of one year desired. (Alaska Stat. § 45.55.110; 3 AAC 08.920[a][5]).

Minimum Capital Required.

Administrator must require minimum capital and bond for broker-dealers and investment advisors, and may require bond in amount prescribed by administrator for broker-dealers, agents and investment advisors. (Alaska Stat. § 45.55.040).

Takeover Bid Disclosure Act may subject violators to fine of $5,000 or imprisonment for three years or both, and civil liability. (Alaska Stat. § 45.57.070-.080).

Uniform Simplification of Fiduciary Security Transfers Act not adopted.

Uniform Securities Ownership by Minors Act not adopted.

Viatical Settlement Transactions regulated. (Alaska Stat. § 21.89.110).

3.25 STATUTE OF FRAUDS:

See topic 3.16 Frauds, Statute of.

3.26 TRUST RECEIPT SECURITY:

See category 8 Debtor and Creditor, topic 8.15 Pledges.

3.27 WAREHOUSEMEN:

Uniform Commercial Code adopted. (45.07). See topic 3.09 Commercial Code.

4 CITIZENSHIP

4.01 ALIENS:

Native born citizens of Canada are accorded the same mining rights and privileges as are accorded to citizens of the United States in British Columbia, and the Northwest Territory, under dominion or provincial laws, but no greater rights are thus accorded than citizens of the United States, or those who have declared intention of becoming such may enjoy. (formerly codified in 48 U.S.C.A. § 392). Aliens not lawfully admitted to U.S. prohibited from commercial fishing activities or taking marine mammals in waters of state. (Alaska Stat. § 16.05.905). Alien convicted of violation of AS Alaska Stat. § 16.05.905 is guilty of misdemeanor. Aliens are not disqualified from intestate succession. (Alaska Stat. § 13.12.111).

5 CIVIL ACTIONS AND PROCEDURE

5.01 ACCORD AND SATISFACTION:

In General.

In absence of statute, common law applies. (Alaska Stat. § 01.10.010). See category 3 Business Regulation and Commerce, topic 3.09 Commercial Code.

Pleading.

General requirements. (Rule 8 Civ. R.P.).

By Use of Instruments.

If good faith tender of instrument in full payment of unliquidated disputed claim with conspicuous statements offered in full satisfaction is accepted, claim discharged. (Alaska Stat. § 45.03.311).

5.02 ACTIONS:

Generally.

Rules of Civil Procedure (Civ. R.P.) based upon Federal Rules, control in Superior and district courts. See topic 5.19 Practice.

Civil actions against state authorized. (Alaska Stat. § 09.50.250).

Equity.

Distinction between actions at law and suits in equity is abolished. There is but one form of action, which is denominated civil action. (Rule 1 Civ. R.P.).

Forms of Action.

There is but one form of action, which is denominated civil action. (Rule 1 Civ. R.P.).

Commencement.

By filing a complaint with court. (Rule 3 Civ. R.P.).

Parties.

Every action must be prosecuted in the name of the real party in interest, except that an administrator, guardian, executor, trustee of express trust, or person expressly authorized by statute, may sue without joining with him person for whose benefit action is prosecuted. Parties needed for complete relief or claiming interest must be joined unless doing so deprives court of subject matter jurisdiction. (Rule 17[a] Civ. R.P.).

Heirs of decedent, whose names and addresses are unknown, may be proceeded against as “the unknown heirs of” such decedent in any action or suit relating to real property in Alaska. (Alaska Stat. § 09.45.900).

Class Actions.

One or more members of class may sue or be sued as representative parties on behalf of all only if (1) class is so numerous that joinder is impracticable; (2) common questions of law and fact; (3) claims are typical of entire class; (4) representative class will fairly and adequately protect class. (Rule 23 Civ. R.P.).

Intervention.

As matter of right or by permission depending on whether applicant is so situated that disposition would impede ability to protect interest, unless interest is adequately protected by parties. (Rule 24 Civ. R.P.).

Interpleader.

Persons having claims against plaintiff may be joined as defendants and required to interplead when their claims expose plaintiff to double or multiple liability. (Rule 22 Civ. R.P.).

Third Party Practice.

Defendant as third party plaintiff may serve complaint on person not a party who may be liable to defendant on plaintiff’s claim. (Rule 14 Civ. R.P.). Defendant may serve complaint on person not party who may be at fault for purposes of apportioning fault. (Alaska Stat. § 09.17.080; Rule 14[c] Civ. R.P.; Rule 82[e] Civ. R.P.).

Joinder of Causes of Action.

Party may join, either as independent or alternate claims, as many claims either legal or equitable or both as party has against opposing party. (Rule 18 Civ. R.P.).

Splitting Causes of Action.

Common law rules govern.

Consolidation of Actions.

Actions involving common issues of law or fact, court may join any matters in issue. (Rule 42 Civ. R.P.).

Severance of Actions.

Any claim against a party may be severed and proceeded with separately. (Rule 21 Civ. R.P.).

Abatement.

No action abates by reason of death or disability of a party or transfer of interest, if cause of action survives, but in case of death or disability of a party the court may, at any time within two years thereafter, on notice, allow action to be continued by or against personal representative or successor in interest of such party. (Alaska Stat. § 09.15.040).

Upon Death.

Uniform Probate Code adopted with no substantial variations. (Alaska Stat. § 13.16.460, Alaska Stat. § 13.16.640, Alaska Stat. § 13.16.645).

Limitation of.

See topic 5.16 Limitation of Actions.

Small Claims.

See category 6 Courts and Legislature, topic 6.01 Courts.

Prohibited Actions.

Certain claims against state authorized but many forms of tort claims prohibited including discretionary acts of state employees. (Alaska Stat. § 09.50.250). Actions may be brought against municipalities subject to exceptions. (Alaska Stat. § 09.65.070). Peace officers, firefighters precluded from bringing certain actions (Alaska Stat. § 09.65.295); limits on claims involving inherent risks of sports and recreational activities (Alaska Stat. § 09.65.290); limits on claims against users of defibrillator (Alaska Stat. § 09.65.087).

Direct Actions Against Insurer.

See category 23 Transportation, topic 23.01 Motor Vehicles, subhead Direct Actions.

Limitation on Damages.

Recovery of certain noneconomic damages limited to $400,000 or injured person's life expectancy multiplied by $8,000, whichever is greater, except in cases of severe disfigurement or severe physical impairment wherein recovery limited to $1,000,000 or injured person's life expectancy multiplied by $25,000, whichever is greater. (Alaska Stat. § 09.17.010). (See topic 5.09 Damages.)

5.03 APPEAL AND ERROR:

Federal Rules of Civil Procedure form basis for rules of procedure in all courts. Time allowed for taking appeal is 30 days after entry of judgment. (204[a][1], Appellate Rules). Time allowed for taking appeal is 15 days after clerk's distribution in child custody cases. (218[d], Appellate Rules).

From Municipal Magistrates.

No specific provision, but appeal lies to superior court from subordinate court. (Alaska Stat. § 22.10.020).

From Administrative Agency.

Appeal lies to superior court. (Alaska Stat. § 22.10.020). Appeal to be heard without jury. Court may admit new evidence. (Alaska Stat. § 44.62.570; 609b).

From District Courts.

Appeal lies to superior court in civil action and to court of appeals in most criminal matters (see category 6 Courts and Legislature, topic 6.01 Courts). No appeal after plea of guilty in criminal case except for excessive sentence. State has no right of appeal in criminal actions except to test sufficiency of information. (Alaska Stat. § 22.10.020). Notice of Appeal to Court of Appeals must be filed within 15 days after date shown in clerk's certificate of distribution on judgment being appealed. (217, Appellate Rules).

From Superior Court.

Appeal lies to supreme court for most civil matters and to court of appeals for most criminal matters (see category 6 Courts and Legislature, topic 6.01 Courts). State's right of appeal is limited by prohibitions against double jeopardy.(Alaska Stat. § 22.07.020).

Appeal Bonds.

Cost bond on appeal required. (204[c] Appellate Rules). Indigents, municipalities, and State are exempt from bond provisions on appeal. (Alaska Stat. § 09.68.040).

Stay of Proceedings.

Giving of supersedeas bond may result in a stay of proceedings. (Rule 62, Civ. R.P.).

Time.

Generally, Notice of Appeal must be filed within 30 days from date shown in clerk's certificate of distribution on judgment being appealed. (204, Appellate Rules). Within 15 days in child custody cases. (218, Appellate Rules).

See topic 5.19 Practice.

5.04 BONDS:

Individual surety must be resident within state; attorney at law, peace officer, clerk of any court or other officer of any court may not be surety in any action. (Rule 80[b] Civ. R.P.).

Corporation in compliance with laws of Alaska relative to surety companies, may be surety upon any bail. (Rule 80[b] Civ. R.P.).

New surety may be substituted on application of principal, surety or obligee and presentation of bond of new qualified surety conditioned as in former bond and accepting all liability theretofore or thereafter accruing under either former bond or new bond. (Alaska Stat. § 45.70.010).

Official Bonds.

Official undertaking or other security of a public officer to any city, town or other municipal or public corporation of like character is deemed security to the state or to such city, town, etc., and also to all persons severally. (Alaska Stat. § 09.55.470). Any person injured by official misconduct or neglect of officer or entitled to benefit of his security may maintain action in his own name against the officer and his sureties (Alaska Stat. § 09.55.470). Judgment may not be rendered against surety for more than excess of penalty of undertaking over any judgments previously recovered against him otherwise than by confession. (Alaska Stat. § 09.55.490).

Official bond must be joint and several, be payable to the State and cover faithful discharge of all duties required by any law in force at time of execution or subsequently enacted. Surety may be released from further liability by filing written application with Commissioner of Administration, serving it on principal and publishing notice for 30 days in newspaper published in Juneau. (Alaska Stat. § 39.15.010-100).

Performance and payment bonds required on any contract exceeding $100,000 for construction, alteration or repair of any State or political subdivision public building or work, and procedure established for suit on such bonds. (Alaska Stat. § 36.25.010). Municipality may exempt contractors from bond under listed circumstances. (Alaska Stat. § 36.25.025).

5.05 CERTIORARI:

Appeal from final judgment of Superior Court is matter of right, as specified in Alaska Stat. § 22.05.010. (Rule 202, App. R.). Party may petition for review of other orders or decisions. (Rule 402, App. R.).

Jurisdiction.

Supreme Court may issue injunctions, writs of certiorari, and all other process necessary or proper to complete exercise of its jurisdiction. (Alaska Stat. § 22.05.010).

5.06 CHARITABLE IMMUNITY:

See topic 5.09 Damages.

5.07 COMMISSIONS TO TAKE TESTIMONY:

See topic 5.10 Depositions and Discovery.

5.08 COSTS:

Prevailing party is entitled to costs allowed by court rule. (Alaska Stat. § 09.60.010, Rule 54[d] and Rule 79 Civ. R.P.).

Attorney’s Fees.

Prevailing party entitled to attorney’s fees. Fees set by rule unless modified by Court. (Rule 82, Civ. R.P.: Alaska Stat. § 09.60.015). For costs covered see Rule 79, Civ. R. P.

Offer of Judgment as Affecting Costs.

If defendant offers in writing to allow entry of judgment for a specific sum, or for specific property, together with costs and disbursements to date of offer, plaintiff is not entitled to costs, if he recovers no more than the sum or property offered, but defendant is entitled to costs accruing after offer. (Rule 68 Civ. R.P.).

For all actions filed on or after Aug. 7, 1997, if judgment is at least 5% less favorable to offeree than offer, or if multiple defendants, at least 10% less favorable to offeree than offer, offeree shall pay costs and attorney fees incurred by offeror as follows: (1) if offer is made 60 days or less after C.R. 26 disclosures, offeree shall pay 75% of offeror's attorney fees; or (2) if offer made more than 60 days after disclosures but more than 90 days before trial, offeree shall pay 50% of offeror's attorney fees; or (3) if offer made 90 days or less but more than ten days before trial begins, offeree shall pay 30% of offeror's attorney fees. (Alaska Stat. § 09.30.065; 68 Civ. R.P.).

5.09 DAMAGES:

Common law generally prevails as to compensatory damages. Damages are awarded on basis of several liability only for causes of action accruing after Mar. 5, 1989. (Alaska Stat. § 09.17.080[d]). Statutory limitation on non-economic damages of $400,000 or injured's life expectancy multiplied by $8,000, whichever is greater, except in cases of severe disfigurement or severe physical impairment wherein statutory limitation is $1,000,000 or injured person's life expectancy multiplied by $25,000, whichever is greater. (Alaska Stat. § 09.17.010).

Statutory limitation on punitive damages: award not to exceed greater of three times compensatory damages or $500,000, unless conduct motivated by financial gain and adverse consequences actually known and then not to exceed greatest of four times compensatory damages, four times aggregate amount of financial gain or $7,000,000. Exceptions for employer in action by employee. 50% of award paid to state general fund. (Alaska Stat. § 09.17.020).

Comparative negligence rule pure form adopted. (540 P.2d 1037; Alaska Stat. § 09.17.060). Uniform Comparative Fault Act not adopted. Several liability established for causes of action accruing after Mar. 5, 1989. Allocation of fault required. After Mar. 5, 1989, fault allocated to all parties to action and only to parties to action. (Alaska Stat. § 09.17.080; 874 P.2d 949). After Aug. 7, 1997, fault also may be allocated to nonparty depending upon whether person is protected by statute of repose, is not precluded from joinder by law or court rules, is within court's jurisdiction, and is reasonably locatable. (Alaska Stat. § 09.17.080). Contribution abolished; joint liability abolished. Defendant may use third-party defendant procedures to bring in others for purposes of establishing proportion of fault. (Id., Rules 14[c], 82[e], 79[e] Civ. R.P.)

Charitable immunity doctrine not recognized. (14 Alaska 546, 118 F. Supp. 399).

Torts of Minors.

Parents or legal guardian liable for malicious or willful destruction of real or personal property by minors under 18 up to $10,000 for each tort. (Alaska Stat. § 34.50.020).

Sovereign Immunity.

Claims against State may be pursued in state court pursuant to Alaska Stat. § 09.50.250 et seq., which is patterned after Federal Tort Claims Act.

Statutory Provisions.

Various statutes provided for penalties and recovery of compensatory, double or treble damage in civil actions based on trespass to trees and shrubs (Alaska Stat. § 09.45.730), waste by guardian or tenant (Alaska Stat. § 09.45.740), allowing fire to escape (Alaska Stat. § 41.15.160), failing to discharge satisfied lien, mortgage or deed of trust (Alaska Stat. § 34.35.215, Alaska Stat. § 34.35.900).

Uniform Contribution Among Tortfeasors Act (Revised) abolished.

Alaska Medical Injury Compensation Reform Act.

Enacted in 2005. Noneconomic damages caused by health care provider limited to $250,000 when single injury, $400,000 for wrongful death or severe permanent physical impairment. (Alaska Stat. § 09.55.549).

See category 13 Estates and Trusts, topic 13.05 Death, subhead Action for Wrongful Death.

5.10 [RESERVED]

5.11 DEPOSITIONS AND DISCOVERY:

Governed by Civ. R.P. based on Federal Rules of Civil Procedure.

Uniform Foreign Depositions Act not adopted. State rules similar to federal rules. (Civ. R.P. 1-98).

Within the State.

Depositions may be taken in state before officer authorized to administer oaths in any action at any time after jurisdiction of defendant acquired, and in any special proceeding after question of fact has arisen, if the witness is a party adverse or an officer of a corporation which is a party adverse to the party seeking the deposition, resides or is about to remove more than one hundred miles from place of trial, or is too infirm to attend trial; or if testimony is to be used on motion or other proceeding where oral examination not required. (Rule 28 [a] Civ. R.P.).

Outside of the State.

Depositions may be taken outside of the state, but within United States, before an officer authorized to administer oaths by laws of U.S. or state where taken. (Rule 28 [b], Civ. R.P.).

Commissions to take deposition out of the state may be issued when necessary or convenient on such terms as are just and appropriate.

The commission must authorize the person taking the deposition, to administer oaths to witnesses and take testimony.

Compelling Attendance of Witnesses.

Attendance of witnesses may be compelled by use of subpoena as provided in Rule 45, Civ. R.P. Superior court clerk shall issue subpoena upon proof of service of notice to take deposition (Civ. R.P. 45[d]), and may direct production of designated books, records, papers, documents, or tangible things constituting or containing evidence, subject to Civ. R.P. 30. Resident of judicial district in which deposition is to be taken may be required to attend an examination at any place within district; nonresident of judicial district in which deposition is to be taken, and nonresident of state subpoenaed in state, may be required to attend at any place within district wherein he is served with subpoena, unless otherwise ordered by court. (Civ. R.P. 45[d] [2]). Failure to obey without adequate excuse may be deemed contempt. (Civ. R.P. 45[f]). If party willfully fails to appear before officer who is to take his deposition, court on motion and notice may strike all or any part of any pleading of that party, or dismiss action or proceeding or any part thereof, or enter a judgment by default against that party. (Civ. R.P. 37[d]).

Return.

Officer taking deposition must certify it, enclose it in sealed envelope indorsed with title of action and send it to party requesting deposition. Notice of filing must be given by party taking deposition to other parties. (Rule 30 [f], Civ. R.P.).

5.12 EQUITY:

See topic 5.02 Actions.

5.13 EVIDENCE:

See topic 5.10 Depositions and Discovery.

Witnesses.

Questions regarding the competence, creditability or privileges of witnesses are governed by Supreme Court rule. (Crim. R.P., Civ. R.P.).

Competency and Creditability.

A person is disqualified to be a witness if court finds that he is incapable of expressing himself concerning the matter so as to be understood by court and jury either directly or through interpretation by one who can understand him or if he is incapable of understanding duty of a witness to tell the truth. Parties or other persons who have an interest in the action, persons who have been convicted of crime and persons on account of their opinions on matters of religious belief are not disqualified to be witnesses.

Privileges.

The following privileges are found in the rules: husband-wife; attorney-client; confessor-confessant; physician-patient; and against self-incrimination.

5.14 INJUNCTIONS:

Jurisdiction.

Supreme and superior courts have jurisdiction of injunctions. (Alaska Stat. § 22.05.010; Alaska Stat. § 22.10.020). Injunction may be allowed by court or judge at any time after commencement of action and before judgment.

Bond.

No injunction shall issue except upon giving of security by applicant in such sum as court deems proper. (Civ. R.P. Rule 65[c]).

Prerequisites.

Injunction may issue when it appears by complaint that plaintiff entitled to relief demanded, and such relief consists in restraining commission or continuance of some act commission or continuance of which during litigation would produce injury to plaintiff; or when it appears by affidavit that defendant is doing, or threatens, or is about to do, or is procuring or suffering to be done, some act in violation of plaintiff’s rights concerning subject of action, and tending to render judgment ineffectual; or when it appears by affidavit that defendant threatens or is about to remove or dispose of his property, with intent to delay or defraud his creditors. (Alaska Stat. § 09.40.230).

An injunction is only allowed as a provisional remedy, and when a judgment is given enjoining a defendant, it is effectual and binding on him without other proceeding or process, and may be enforced, if necessary, by punishing disobedience or neglect thereof as for contempt.

5.15 JUDGMENTS:

Federal Rules of Civil Procedure form basis of statutory and civil rule provisions. (AS Title 9; Rules 54-63, Civ. R.P.). See topic 5.19 Practice.

Offer of Judgment.

See topic 5.08 Costs, subhead Offer of Judgment as Affecting Costs.

Judgment as Lien.

A certified copy of judgment or decree of a court of this state or a court of record of the United States upon which execution may issue, enforcement of which has not been stayed, may be recorded with recorder of a recording district. From the recording, the judgment or decree becomes lien upon real property of defendant which is in the recording district, which is not exempt from execution, and which is owned by him at the time or acquired by him afterward but before lien expires. Lien continues during time execution may issue on the judgment or decree but for not more than ten years from date of entry of the judgment or decree. After expiration of lien, court may grant leave for issuance of execution upon the judgment or decree. From date of recording the judgment or decree, together with order allowing issuance of execution, the judgment or decree becomes a lien as above. (Alaska Stat. § 09.30.010).

A conveyance of real property or interest in real property is void against a judgment lien that is recorded before conveyance is recorded. (Alaska Stat. § 09.30.020).

Declaratory judgments may be obtained in case of an actual controversy. (Alaska Stat. § 22.10.020[g]).

Foreign Judgments.

Uniform Enforcement of Foreign Judgments Act (Alaska Stat. § 09.30.200) and Uniform Foreign Money Judgments Recognition Act (Alaska Stat. § 09.30.100) adopted. See also subhead Judgment as Lien, supra.

Judgments for Custody.

See category 14 Family, topic 14.07 Guardian and Ward.

Satisfaction.

Forms

For use when judgment recorded:

[Caption]

ACKNOWLEDGMENT OF SATISFACTION UNDER AS Alaska Stat. § 09.30.300

This is to certify that the judgment rendered in the above-entitled action on the ____ day of ______, 20__, has been fully satisfied, and that the recordation thereof in Book ___, at Page ___, in the office of the District Recorder, _______ Recording District, _____ Judicial District, State of Alaska, having been made, the same should now be noted as satisfied and of no further force or effect.

DATED this ____ day of _______, 20__.

[Signature Block]

For use when judgment not recorded:

[Caption]

SATISFACTION OF JUDGMENT

WHEREAS, on ______, 20__, a judgment in the above-entitled action was recovered by (plaintiff/defendant and name) against (plaintiff/defendant and name), in the amount of ________ DOLLARS ($______), with interest thereon at the rate of ___% per annum from date of judgment until paid in full; and

WHEREAS said judgment has been fully paid to the (plaintiff/defendant),

NOW, THEREFORE, satisfaction of the said judgment is hereby acknowledged and the Clerk of the Court is hereby directed to cancel and discharge the same.

DATED this ____ day of _______, 20__.

[Signature of Judgment Creditor or Attorney]

5.16 LIMITATION OF ACTIONS:

Uniform Commercial Code adopted. (Alaska Stat. § 45.01.101). See category 3 Business Regulation and Commerce, topic 3.09 Commercial Code.

Actions must be brought within following periods after respective causes of action accrue:

Ten years: actions for recovery of real property, or for recovery of possession; except no limit if recorded (Alaska Stat. § 09.10.030); upon judgment or decree of any court of U.S., or of any state or territory within U.S.; upon sealed instrument. (Alaska Stat. § 09.10.040). Ten-year period governs with respect to any action not otherwise provided for. (Alaska Stat. § 09.10.100).

Six years: action for waste or trespass on real property. (Alaska Stat. § 09.10.050).

Four years: an action for breach of any contract for sale must be commenced within four years after cause of action has accrued. By original agreement parties may reduce period of limitation to not less than one year but may not extend it. (Alaska Stat. § 45.02.725, U.C.C. § 2-725). Also action for restraint of trade, and action by Attorney General suspends running of statute against private parties. (Alaska Stat. § 45.50.588).

Three years: action upon contract or liability except as provided by law or waived by contract (Alaska Stat. § 09.10.053); action upon statute for penalty or forfeiture, where action is given to party aggrieved, or to such party and U.S., except where statute prescribes different limitation (Alaska Stat. § 09.10.060); on mutual, open, and current account, but if more than one year has elapsed between any of series of items, they are deemed not to constitute such account (Alaska Stat. § 09.10.110).

Two years: action for libel, slander, assault, battery, seduction, false imprisonment, or for any injury to person or rights of another not arising on contract and not herein especially enumerated, or for taking, detaining, or injuring personal property and for recovery thereof; upon statute for forfeiture or penalty to State of Alaska, upon statutory liability, other than penalty or forfeiture. (Alaska Stat. § 09.10.070). See also category 13 Estates and Trusts, topic 13.05 Death, subhead Action for Wrongful Death.

One year: action against a peace officer for the escape of a person arrested or imprisoned on civil process (Alaska Stat. § 09.10.080); statute for penalty given in whole or part to person prosecuting for same, unless not commenced within such time by private party, when same may be commenced within two years by State (Alaska Stat. § 09.10.090). Action against construction professionals for certain design, construction and remodeling defects. (Alaska Stat. §

09.10.054).

Six months: no action may be brought under Art. VI of Uniform Commercial Code relating to Bulk Transfers more than six months after date on which transferee took possession of goods unless transfer has been concealed, in which case actions may be brought within six months of discovery.

Upon Death.

Uniform Probate Code adopted with no substantial variations. (Alaska Stat. § 13.16.460, Alaska Stat. § 13.16.640, Alaska Stat. § 13.16.645).

Relating to Sexual Offenses.

See Alaska Stat. § 09.10.065.

Absence or Concealment.

Time does not run during period person against whom cause of action exists, is out of district or concealed therein. (Alaska Stat. § 09.10.130).

Disabilities.

Minors, persons incompetent by reason of mental illness, and persons imprisoned on criminal charge or in execution under sentence for term less than life, at time cause of action accrues, may commence action within two years after such disability ceases; for personal injury action to person under eight years of age, period before person's eighth birthday is not included within time limit for commencing civil action. (Alaska Stat. § 09.10.140).

Acknowledgment or promise is not sufficient evidence of a new or continuing contract, whereby to take the case out of the operation of the statute, unless same is contained in some writing, signed by the party to be charged and, as to instruments affecting real estate, acknowledged and recorded in the office of the recorder wherein the original contract shall have been filed or recorded; but this does not alter the effect of any payment of principal or interest. (Alaska Stat. § 09.10.200).

Payment on Account.

When a past due payment of principal or interest is made upon any evidence of indebtedness, running of time within which an action may be commenced starts from time last payment was made. (Alaska Stat. § 09.10.210).

Part Payment.

Where an indebtedness is secured by lien on real estate, no payment thereon can extend the lien beyond its original or extended period, as against subsequent purchasers, optionees, mortgagees, creditors or persons acquiring a lien upon the real estate, unless prior to expiration of the statutory time for bringing action upon the contract and extensions as exhibited by terms of the recorded instrument, a memorandum of such payment, signed and acknowledged by the owner of the contract of indebtedness, or someone for him, is recorded in office of recorder of the district wherein the real estate is situated. Unless period of instrument disclosed therein, maturity date deemed ten years from date thereof. As to existing recorded lien instruments not disclosing period of instrument, an instrument extending period may be recorded prior to Jan. 1, 1956. (Alaska Stat. § 34.20.140-150).

Foreign Causes of Action.

No action may be maintained in Alaska on a cause of action arising in any state, territory, or country between nonresidents of this district, which by the laws of such state, territory, or country cannot be maintained by reason of lapse of time. (Alaska Stat. § 09.10.220).

Limited Liability Act adopted. (10.50).

5.16A PARTITION:

Tenants in common may maintain an action against each other for a partition of their property. (Alaska Stat. § 09.45.260).

Plaintiff must make lien creditors defendants. (Alaska Stat. § 09.45.280).

5.17 [RESERVED]

5.18 PLEADING:

In General.

Rules of Civil Procedure are in effect, based on Federal Rules. See also topic 5.19 Practice.

Amended or Supplemental Pleadings.

Additional subsection to Rule 15, as follows:

"*(e) Form.*—Unless otherwise permitted by the court, every pleading to which an amendment is permitted as a matter of right or has been allowed by order of the court, must be retyped or reprinted and filed so that it will be complete in itself, including the exhibits, without reference to the superseded pleading. No pleading will be deemed to be amended until this subdivision of this rule has been complied with. All amended pleadings shall contain copies of all exhibits referred to in such amended pleadings. Permission may be obtained from the court, if desired, for the removal of any exhibit or exhibits attached to prior pleadings, in order that the same may be attached to the amended pleading." (Rule 15[e], Civ. R.P.).

Filing.—As in federal rule, except that following papers, unless ordered by court on motion of party or its own motion, may not be filed with court unless or until they are actually used in proceedings: (a) Notices of taking depositions, (b) interrogatories and request for admissions and answers thereto, (c) request for production and responses thereto, (d) subpoenas, including subpoenas duces tecum, (e) offers of judgment, (f) proof of service of any of above, (g) copies of correspondence between counsel, and (h) exhibits and (i) Rule 26[a] disclosures. (Rule 15[d][2] Civ. R.P.).

Claims for Collection.

If a claim sent to this state for collection is on an open account, the account should be itemized in detail and sworn to be correct by the creditor or an officer of the creditor company. If the claim is on a written instrument or a negotiable instrument, the original instrument should be forwarded. The letter forwarding the claim should give a full, complete and comprehensive statement of the facts upon which the claim is founded. It should also give the full name and address of each party. If a partnership is claimant, the full names and residences of the individuals composing it should be given. If a corporation is to be a party or is claimant the exact corporate name and state of incorporation should be given. If the claimant operates under a tradename, the name of claimant and his or their tradename should be given. If the action is contested, the claim must be proven by witnesses or deposition or both.

An assignment in blank of the account should be forwarded with the account, as action on an assigned account can be brought in the name of the assignee.

Proof of Claims.

In forwarding claims from another state sufficient information should be given to enable local attorneys to prepare complaint. If defendant contests, proof of issues must be made by deposition if witnesses cannot appear to testify in court.

See also topic 5.19 Practice.

Small Claims.

See category 6 Courts and Legislature, topic 6.01 Courts.

Frivolous Claims.

Alaska Civ. R.P. 11 parallels FRCP 11.

5.19 PRACTICE:

In General.

Rules of Civil Procedure govern civil procedures in all courts. Rules are adapted from Federal Rules, without current Federal amendments. Probate and certain statutory matters are excepted.

Demand for Admission of Facts.

If facts in request not denied within 30 days of service, they are deemed admitted, except that defendant need not answer until 45 days after service of complaint. Court may shorten time. (36 Civ. R.P.).

Disclosures.

26 Civ. R.P.

Discovery.

Local rules based on Federal Rules. Interrogatories limited to 30 questions. (33 Civ. R.P.). Requests for Production. (34 Civ. R.P.).

Direct actions against insurer not allowed.

Liability in tort actions is several for causes of action accruing after Mar. 5, 1989. (Alaska Stat. § 09.17.080).

Small Claims.

See category 6 Courts and Legislature, topic 6.01 Courts.

See also topics 5.02 Actions, Appeal and Error, Depositions and Discovery, Injunctions, Judgments, Pleading, Process; category 8 Debtor and Creditor, topics 8.02 Attachment, 8.05 Executions, 8.09 Garnishment.

5.20 PROCESS:

Generally, as provided in Federal Rule 4, with deviations as noted below. Summons is issued by the court or its clerk and is served together with complaint by peace officer, by person specially appointed by Commissioner of Public Safety for that purpose or, where rule so provides by registered or certified mail. (Rule 4, Civ. R.P.). Subpoena may be served by peace officer, or by any person not less than age 18 who is not party to action.

Copies of summons and complaint served must be certified by plaintiff, his agent or attorney, or by clerk of court. (Rule 4 Civ. R.P.).

Who May Serve.

See introductory paragraph, supra.

Personal Service on Infant.

By personally delivering copy of summons and complaint to infant, and also to infant's father, mother or guardian, or if no parent or guardian within state, then to any person having care or control of infant, or with whom infant resides, or in whose service infant is employed, or if service cannot be made on any of them, then as provided by order of court. (Rule 4, Civ. R.P.).

Personal Service on Incompetent Persons.

By personally delivering copy of summons and complaint to guardian of person or competent adult member of his family with whom he resides, or if he is living in institution, then to director or chief executive officer of institution, or if service cannot be made upon any of them, then as provided by order of court; and unless court otherwise orders also to incompetent. (Rule 4, Civ. R.P.).

Personal Service on Corporation.

Upon domestic or foreign corporation, by delivering copy of summons and complaint to officer, managing or general agent, or to any other agent authorized by appointment or by law to receive service of process. (Rule 4, Civ. R.P.).

Personal Service on Partnership.

By delivering copy of summons and complaint personally to member of such partnership, or to managing or general agent of partnership, or to any other agent authorized by appointment or by law to receive service of process, or to person having control of business of partnership; or if service cannot be made upon any of them, then as provided by order of court. (Rule 4, Civ. R.P.).

Personal Service on Unincorporated Associations.

By delivering copy of summons and complaint personally to officer, managing or general agent, or to any other person authorized by appointment or by law to receive service of process, or if service cannot be made upon any of them, then as provided by order of court. (Rule 4, Civ. R.P.).

Personal Service on State of Alaska.

By delivering copy of summons and complaint personally to Attorney General and to person in judicial district designated by him in writing filed with clerk of court, and when service is made upon such person so designated by also sending copy of summons and of complaint by registered or certified mail to attorney general of Alaska at Juneau, Alaska. (Rule 4, Civ. R.P.).

Personal Service on Officer or Agency of State.

By serving State of Alaska as provided in preceding paragraph, and by delivering copy of summons and complaint to such officer or agency. If agency is corporation copies shall be delivered as provided in rule for personal service on corporation. (Rule 4, Civ. R.P.).

Personal Service on Public Corporation.

Upon borough or incorporated city, town, school district, public utility district, or other public corporation in state, by delivering copy of summons and complaint to chief executive officer or chief clerk or secretary thereof. (Rule 4, Civ. R.P.).

Personal Service Outside State.

By procedure provided for under subhead Service by Mail, infra. (Rule 4, Civ. R.P.).

Service by Mail.

Process may be served within state or U.S. or any of its possessions by registered or certified mail upon individual other than infant or incompetent person and upon corporation, partnership, and unincorporated association. Process shall be mailed by clerk for restricted delivery only to party to whom summons or other process is directed or to person authorized under federal regulation to receive his restricted delivery mail. All receipts shall be so addressed that they are returned to party requesting summons or process or his attorney. Proof of service shall be made by affidavit forthwith. (Rule 4, Civ. R.P.).

Substituted Service.

When it appears by affidavit by person having knowledge of facts filed with clerk that after diligent inquiry party cannot be personally served, service may be made by publication or as otherwise directed by court. Court, in its discretion may allow service in any manner reasonably calculated to give absent party actual notice of proceedings and opportunity to be heard, so long as order permitting such service is entered before service of process is made. (Rule 4, Civ. R.P.).

Service by Publication.

Absent defendants may be served with summons by publication if affidavit filed with clerk stating that diligent inquiry, as defined in Civil Rule 4, made and service within state not possible. (Rule 4 Civ. R.P.).

Notice shall be published once a week for four consecutive calendar weeks in newspaper published in district in which action is pending. If no newspaper is published in district, then in newspaper published in state which circulates in that district. Prior to last publication copy of notice and complaint or pleading shall be sent by registered mail, postage prepaid, to absent parties’ residence or place where party receives mail addressed in care of party, unless it appears by affidavit that absent parties’ residence or place is unknown and cannot be ascertained after inquiry. Notice shall be in form of summons, stating briefly nature of action, relief demanded, and why party named in notice has been made party. If action involves real property, notice shall include property’s legal description. Notice shall state time within which party is to appear or answer or plead, and effect of failure to do so. In case of published notice, absent parties shall respond not more than 30 days after last date of publication, and court may proceed after that time as if absent party had been served. Proof of publication made by affidavit of newspaper’s publisher, printer, manager, foreman, or principal clerk, or by attorney for party at whose instance service was made. Affidavits shall be accompanied by copy of printed notice marked with name of newspaper and dates published. (Rule 4, Civ. R.P.).

Long Arm Statute in Effect.

State court having jurisdiction over subject matter has jurisdiction over a person served in an action according to rules of civil procedure when: (1) Defendant is present in state, domiciled, domestic corporation or engaged in substantial activity; (2) statute specifically confers personal jurisdiction; (3) in action claiming injury arising out of act or omission in this state; (4) where injury in state was caused by act or omission outside state if solicitation was carried on in state or products used in this state; (5) in contract situations where activity is centered in this state; (6)

actions involving real property and tangible property in state; (7) in action for annulment, divorce or separate maintenance when personal claim asserted and parties in state six consecutive months during preceding six years, plaintiff still in state and defendant receives notice; (8) in various other areas of deficiency judgment, domestic corporation, its officers and directors, taxes, insurance, actions against personal representatives on claim against deceased person; (9) action for collection of taxes; (10) action which arose out of promise which occurred in this state or promisee was resident; (11) action against personal representative to enforce claim against deceased if grounds in (2)-(10) would have conferred jurisdiction. (Alaska Stat. § 09.05.015).

Proof of Service.

Made by affidavit, if not made by peace officer; must be in writing, stating manner, place, date and papers served. Proof of mailing and publication by affidavit, with copy of notice and dates attached. (Rule 4, Civ. R.P.).

Miscellaneous.

Process may be served on Commissioner of Community and Economic Development if foreign corporation fails to appoint registered agent or whenever registered agent cannot with reasonable diligence be found or whenever certificate of authority of foreign corporation is suspended or revoked. (Alaska Stat. § 10.06.765).

Process may be served on Commissioner of Community and Economic Development if electric or telephone co-operative fails to appoint registered agent or whenever registered agent cannot with reasonable diligence be found. (Alaska Stat. § 10.25.500).

Every applicant for registration under Blue Sky Law (see category 3 Business Regulation and Commerce, topic 3.24 Securities) and every issuer which proposes to offer a security in state through person acting on agency basis in common-law sense must file irrevocable consent with Commissioner of Community and Economic Development appointing Commissioner to be attorney to receive process in any noncriminal action. When any person, including nonresident, engages in conduct prohibited by act, and he has not filed consent to service of process, such conduct is considered equivalent to appointment of Commissioner as attorney to receive process. (Alaska Stat. § 45.55.980[g]).

Domestic or foreign insurance companies must file with Director of Insurance resolution of board of directors consenting that service of process on Director of Insurance in suits or actions against it in Alaska is valid service on company, which consent is irrevocable so long as any policy remains in force in the state or any loss remains unpaid thereon. (Alaska Stat. § 21.09.180).

Service may be made on Lieutenant Governor for unauthorized doing of insurance business. (Alaska Stat. § 21.33.025).

Nonresident Motorist.

See category 23 Transportation, topic 23.01 Motor Vehicles.

See also topic 5.19 Practice.

5.21 REPLEVIN:

In pending action for recovery of possession of personal property, plaintiff, at any time, may claim immediate delivery thereof, by filing an affidavit required by the court with an undertaking executed by sufficient sureties to effect that they are bound in double value of the property for prosecution of the action and return of the property to defendant.

Defendant may except to sufficiency of sureties or he may require return of the property by giving an undertaking approved by Clerk of Court and executed by sufficient sureties to effect that they are bound in double value of the property for delivery of the property to plaintiff if so adjudged.

Peace Officer taking the property into custody is responsible for it until it is delivered to party entitled to it.

If third person makes an affidavit claiming ownership or right to possess property, property may be released to him unless plaintiff indemnifies Peace Officer against the third party claim by an undertaking approved by Clerk of Court. (Alaska Stat. § 09.40.260-310).

5.22 SEQUESTRATION:

No statute.

Provisional remedy available. (Rule 64, Civ. R.P.).

Writ available. (Rule 70, Civ. R.P.).

5.23 SERVICE:

See topic 5.20 Process.

5.24 STAY OF EXECUTION:

See category 8 Debtor and Creditor, topic 8.05 Executions.

5.25 SUBMISSION OF CONTROVERSY:

Unnecessary under Civil Rules of Procedure.

5.26 VENUE:

Venue for all actions shall be set under rules established by supreme court. (Alaska Stat. § 22.10.030, Rule 3 Civ. R.P.).

6 COURTS AND LEGISLATURE

6.01 COURTS:

United States District Court.

Clerk's office: Federal Building, Anchorage 99513.

Court headquarters are located at Anchorage. Court also sits in cities of Nome, Fairbanks, Juneau, and Ketchikan.

For other information: http://www.akd.uscourts.gov/.

Filing Fees.

Plaintiff, $350; defendant, none. For filing fees in bankruptcy cases, see 28 U.S.C. § 1930.

Supreme Court.

Supreme Court is composed of a Chief Justice and four Associate Justices.

Jurisdiction.

Supreme Court has appellate jurisdiction in all matters. Court may issue injunctions and other writs. Any Justice may issue writ of habeas corpus. Chief Justice is administrative head of all State courts, and Supreme Court promulgates all rules of procedure for all courts. (Alaska Stat. § 22.05.010).

Court of Appeals.

Court of Appeals is composed of three judges.

Jurisdiction.

Court of Appeals has appellate jurisdiction in all criminal matters involving criminal prosecution and sentencing (including matters involving criminal law violations by minors), post-conviction relief, extradition, habeas corpus, probation and parole, bail, and children's court matters. (Alaska Stat. § 22.07.020).

Superior Court.

Jurisdiction.

Superior Court has statewide jurisdiction. Original jurisdiction in all civil and criminal matters, exclusive jurisdiction of probate, guardianship, adoption, juveniles and title to real property. Court has appellate jurisdiction from subordinate courts and administrative agencies. (Alaska Stat. § 22.10.020). When jurisdiction concurrent between superior and district courts, action may not be filed in superior court, except for petitions for injunctive relief in cases involving domestic violence or except as provided by supreme court rules.

Filing Fees.

Plaintiff, $150.

Districts.

First Judicial District: Southeastern Alaska Court sits at Ketchikan, Juneau, Craig, Petersburg, Wrangell, and Sitka.

Second Judicial District: Ambler, Barrow, Gambell, Kiana, Kotzebue and Nome.

Third Judicial District: Anchorage, Cordova, Dillingham, Glennallen, Homer, Kenai, Kodiak, Naknek, Seward, Unalaska, Valdez, and Palmer.

Fourth Judicial District: Fairbanks, Healy, and Bethel.

District and Magistrate Courts.

District courts have statewide civil and criminal jurisdiction. They have original civil jurisdiction in matters when amount claimed exclusive of costs, interest and attorney fees does not exceed $100,000. District court's civil jurisdiction does not extend to actions involving questions of title to real property nor to actions for false imprisonment, libel, slander, malicious prosecution, equitable actions nor actions in which state is defendant. (Alaska Stat. § 22.15.030; Alaska Stat. § 22.15.050).

Filing Fees.

Plaintiff, $90.

Magistrates' jurisdiction is same as that of District Judges except that in civil actions jurisdiction is limited to $10,000. (Alaska Stat. § 22.15.120). District court judges and magistrates sit in same jurisdictions as superior court, above. In addition, magistrates only sit in following towns:

First Judicial District: Magistrates only located in following towns: Angoon, Haines, Hoonah, Kake, Skagway, and Yakutat.

Second Judicial District: Magistrate only located in Unalakleet.

Fourth Judicial District: Magistrates in Aniak, Chevak, Delta Junction, Emmonak, Ft. Yukon, Galena, McGrath, Nenana, St. Mary's, Tanana, and Tok.

Small Claims Courts.

See subhead District and Magistrate Courts, supra. Matters involving amounts of $10,000 or less exclusive of interest and costs are handled as small claims; procedure is same basically as set forth in Civil Rules for all other cases except formal pleadings are not required and potential litigants are required to be advised that mediation, conciliation, and arbitration services are available as alternatives to litigation. (Alaska Stat. § 22.15.040). Satisfaction of judgment obtained by same procedure as all other judgments. No jurisdiction over actions for specific relief, declaratory judgments, injunctions. (District Court Civil Rule 1).

Small claims courts are specially authorized to hear wage claims brought by AK Department of Labor so long as amount at issue is less than $20,000.

Filing Fees.

Plaintiff, $40-$75.

For other information, including court rules and forms: http://www.state.ak.us/courts/.

6.02 LEGISLATURE:

Legislature convenes annually in Jan. (Alaska Stat. § 24.05.090).

For other information: http://www.legis.state.ak.us.

Special Sessions.

Governor may call special session, at locations throughout state, and legislature may call itself into session if two-thirds of membership responds in affirmative to poll conducted by presiding officers of respective houses. (Alaska Stat. § 24.05.100).

Initiative and Referendum.

May be exercised by people of every political subdivision of state (Alaska Stat. § 29.26.100), and by people of state (Constitution, Art XI).

Ethics.

Conflict of interest and other conduct standards for state legislators and legislative employees. (Alaska Stat. § 24.60.010-24.60.105).

Lobbyists.

Provisions administered by Alaska Public Offices Commission. (24.45). For other information: http://www.state.ak.us/apoc/

6.03 REPORTS:

Decisions of supreme court are reported in Pacific Reporter (West. Pub. Co.). (1960—). Territorial cases reported in Alaska Reports.

Digests.

Alaska Digest (West Pub. Co.) covers all Alaska Supreme Court and Alaska Federal District Court cases.

6.04 STATUTES:

Alaska Statutes (AS), officially adopted 1963 (Alaska Stat. § 1.05.006), is only official compilation. As supplemented with replacement pages after each legislative session. There are also session laws containing legislation of each session of legislature. For reference: http://www.touchngo.com, Alaska Court System's website (www.state.ak.us/courts/home/htm) or web site of Alaska legislature.

Uniform Acts adopted are: Air Licensing (1929); Alcoholism and Intoxication Treatment (1972); Arbitration (1968; revised 2004); Attendance of Witnesses From Without the State in Criminal Proceedings (1962); Child Custody Jurisdiction and Enforcement (1977); Commercial Code (1962); Common Interest Ownership Act (1986); Common Trust Fund (1964); Conservation Easement Act (1981); Controlled Substances (1982); Crime Prevention and Privacy Compact (2001); Criminal Extradition (1962); Custodial Trust Act (1994); Determination of Death (1980); Disposition of Community Property Rights at Death (1984); Electronic Transactions (2004); Enforcement of Foreign Judgments (1972); Estate Tax Apportionment (1958 Act) (1973); Extradition of Persons of Unsound Mind (1923); Federal Tax Lien Registration (1933); Foreign Acknowledgments (1915); Foreign Bank Loan (1960); Foreign Money-Judgments Recognition (1972); Gifts to Minors, Revised (1967); Health Care Decision Act (2004); Insurers Liquidation (1966); Interstate Compact on Juveniles (1960); Interstate Corrections Compact (1961); Interstate Family Support Act (1995); Interstate Multi Offender Supervision Compact (1957); Interstate Placement of Children Compact (1976); Land Sales Practices (1968); Limited Partnership (1917); Multi-State Tax Compact (1970); Narcotic Drug (1943); Partnership (2001); Principal and Income (2003); ‡Probate Code (1972); Reciprocal Transfer Tax (1933); Recognition of Acknowledgments (1981); Residential Landlord and Tenant (1974); ‡Securities (1959); Simultaneous Death (1987); ‡Statutory Rule Against Perpetuities (2000); Testamentary Additions to Trusts (1967); Trade Secrets (1988); Transfers to Minors (1986); Unclaimed Property Act (1986).

‡Adopted with significant variations or modifications. See appropriate topics as to Acts within scope of Digests volume.

For text of Uniform Acts falling within the scope of the Martindale-Hubbell Law Digests see Uniform and Model Acts section.

7 CRIMINAL LAW

7.00A BAIL:

See topic 7.01 Criminal Law.

7.01 CRIMINAL LAW:

Crimes are defined by AS Title 11. Criminal procedure is regulated by Rules of Criminal Procedure (Crim. R.P.) based on Federal Rules of Criminal Procedure and by Code of Criminal Procedure. (AS Title 12).

No person can be held to answer for an infamous crime unless on presentment or indictment of a grand jury, except in cases arising in armed forces in time of war or public danger. Indictment may be waived by accused, however, in which case prosecution may be by information. (Alaska Stat. § 12.80.020; Crim. R.P. Rule 7).

Death penalty abolished.

Victims' Rights.

Victim impact statement is part of presentence and sentencing reports of each felony offender. (Alaska Stat. § 12.55.022 and Alaska Stat. § 12.55.025). Victims' rights include: To be informed of dates of trial and sentencing, to be informed of victim compensation procedures, to obtain immediate medical assistance (Alaska Stat. § 12.61.010), to comment on parole of prisoner (Alaska Stat. § 33.16.087), to participate in sentencing (Alaska Stat. § 12.55.023), and to receive protection from harm arising out of cooperation with police (Alaska Stat. § 12.61.010). Victims' Compensation. (Alaska Stat. § 18.67.080). Prosecutor may introduce victim to jury at trial. (Alaska Stat. § 12.45.015).

Failure to ensure these rights does not give rise to separate cause of action. (Alaska Stat. § 12.61.010).

Bail.

Defendant is entitled to be admitted to bail before conviction, or after conviction (as permitted by Alaska Stat. § 12.30.040), as matter of right if alleged victim can be reasonably protected through imposition of bail and conditions of release. (Alaska Stat. § 12.30.010).

Sentencing Procedures.

12.55.025.

Interstate Compact for Supervision of Parolees and Probationers (adopted 1957). (Alaska Stat. § 33.36.110).

Uniform Criminal Extradition Act (adopted 1962). (Alaska Stat. § 12.70.010-.290).

National Crime Prevention and Privacy Compact (adopted 2001). (Alaska Stat. § 12.64.010).

Interstate Corrections Compact (adopted 1961). (Alaska Stat. § 33.36.010).

8 DEBTOR AND CREDITOR

8.01 ASSIGNMENTS:

Uniform Commercial Code adopted. (Alaska Stat. § 45.01.101). See category 3 Business Regulation and Commerce, topic 3.09 Commercial Code.

Common law rules apply. Assignee of chose in action may sue in his own name.

Any assignment, pledge or other transaction, irrespective of form, intended to create a security interest in personal property, including goods, documents, instruments, chattel paper, accounts receivable or contract rights, is governed by Uniform Commercial Code, Art. 9, effective Jan. 1, 1963. (Alaska Stat. § 45.01.101).

Note: Secured transactions governed by Alaska Stat. § 45.29.101-.709 effective July 1, 2001.

Recording.

Assignments of choses in action relating to real property should be recorded in office of the recorder for the district in which the real property is situated.

See also category 3 Business Regulation and Commerce, topic 3.09 Commercial Code.

Assignment of Wages.

To Department of Labor for prosecution up to $20,000 allowed. (Alaska Stat. § 23.05.220-260).

8.02 ATTACHMENT:

Actions in Which Allowed—Grounds.

At any time after complaint is filed, writ of attachment may be secured by plaintiff: (1) In any action on contract, for payment of money which is not secured by a lien on property, or if so secured, when security is insufficient to satisfy a judgment for amount justly due plaintiff; (2) in any action on contract against a defendant not residing in state; (3) in any action for collection of any state tax or license fee. (Alaska Stat. § 09.40.010).

Courts Which May Issue Writ.

Superior, district and magistrate courts.

In Whose Favor Writ May Issue.

No distinctions made between residents and nonresidents as to right to secure attachment.

Property Subject.

All property not exempt from execution is liable to attachment. (Alaska Stat. § 09.40.010).

Proceedings to Obtain.

File affidavit showing grounds for attachment, amount of debt with allowance for setoff and counterclaim, no intent to hinder action or defraud creditors, and that defendant not in bankruptcy proceedings or that debt not extinguished by such proceedings. Notice and hearing within three to seven days required unless: (1) Defendant nonresident and ex parte writ needed for jurisdiction or (2) plaintiff establishes probable validity of claim and fact that defendant about to flee, dispose or conceal himself or possessions. (Rule 89, Civ. R.P.). Generally, hearing required before seizure. (502 P.2d 146).

Undertaking.

Before the writ issues, an undertaking with one or more sureties, for not less than $100, and at least equal to the amount for which judgment is claimed, must be filed by the plaintiff. With the undertaking must also be filed affidavits showing that the sureties are qualified and that, taken together, they are worth penalty of undertaking. (Alaska Stat. § 09.40.020).

Provisional Levy.

Property may be attached and held during pendency of motion for issuance of execution reviving judgment and until final ruling.

Release of Property.

Upon giving redelivery bond. (Alaska Stat. § 09.40.110).

It is a good defense to an action on a redelivery bond that the property did not, at the time of the execution of the writ of attachment, belong to the defendant against whom it was issued.

Discharge of Attachment.

Provided where perishable goods have been sold. (Rule 89, Civ. R.P.).

Lien on Real Estate.

Certificate shall be made by peace officer containing title of cause, names of parties, description of property attached, date of attachment, statement that writ issued, date of issuance, and within ten days deliver certificate to recorder of recording district in which real property is situated. (A.S. Alaska Stat. § 09.40.050).

Third Party Liability.

All persons having in their possession personal property belonging to defendant or owing debt to defendant at time of service upon them of writ and notice shall deliver, transfer or pay property or debts to peace officer or be liable to plaintiff until plaintiff satisfied. (Alaska Stat. § 09.40.040).

Levy on Mortgaged Personalty.

See category 20 Mortgages, topic 20.01 Chattel Mortgages.

Third Party Claims.

See topic 8.05 Executions.

8.03 [RESERVED]

8.04 CREDITORS' SUITS:

Creditors may file bill to set aside conveyances or assignments, in writing or otherwise, made with intent to hinder, delay, or defraud creditors. See topics 8.05 Executions, 8.08 Fraudulent Sales and Conveyances.

8.05 EXECUTIONS:

Time for Issuance.

Ten days must elapse after entry of judgment except default, consent, or confession. (Civ. R.P. 62[a]).

Writ and Return.

The writ is issued by the clerk and directed to the officer serving writ. It contains the name of the court, the names of the parties to the action, and the title thereof, and such other matters as are required by law, depending upon the kind of execution, including in all cases a substantial description of the judgment. It is returnable within 60 days, if issued from the superior court; within 30, if issued from a district magistrate's court. Until levy, property is unaffected by execution. (Alaska Stat. § 9.35.110).

Exemptions.

See topic 8.06 Exemptions.

Stay of Execution.

Stay may be granted upon cause shown. (Rule 62 Civ. R.P.).

Third Party Claims.

If a third party by affidavit claims title to and states value of property levied on under execution or attachment, officer may release levy if plaintiff, on demand, indemnifies officer by bond of two sureties qualifying in double amount of value of property. (Alaska Stat. § 9.35.130).

Levy on Mortgaged Personalty.

See category 20 Mortgages, topic 20.01 Chattel Mortgages.

Sales.

All auction sales in the state, when made by order of court, must be held between the hours of 9 A.M. and 4 P.M. (Alaska Stat. § 09.35.150).

Notice must be given (1) in case of personal property, by posting written or printed notice of time and place of sale in three public places within five miles of place where sale is to take place, not less than ten days prior to sale, one of such notices to be posted at the post-office nearest place of sale (Alaska Stat. § 9.35.140). (2) in case of real property, by posting similar notice particularly describing property for 30 days prior to sale in three public places as above provided, and publishing copy thereof once a week for four weeks in newspaper published nearest place of sale.

Officer holding the execution or his deputy cannot be a purchaser. Personalty, capable of manual delivery and not in possession of a third person, must be within view of persons attending sale, unless otherwise ordered by court. Property must be sold in such parcels as are likely to bring highest price. Realty, when consisting of several known parcels, may be lumped or sold separately whichever is likely to bring highest price; and, when portion of realty is claimed by a third person, it must be sold separately if he so requires. (Alaska Stat. § 9.35.150).

Redemption.

Judgment-debtor or his successor in interest may, prior to confirmation of sale redeem real property sold under execution, and the judgment-debtor within 12 months from such order of confirmation, may redeem by paying amount of purchase money, with interest at 8% per annum from date of sale, together with any taxes and authorized expenses paid by purchaser after purchase. (Alaska Stat. § 9.35.250).

Lien-creditor may redeem like property within 60 days from date or order confirming sale, by paying purchase money, interest, and amount of taxes and authorized expenses as aforesaid, together with amount of prior lien, if any. (Alaska Stat. § 9.35.230).

In case of unpatented mining claims, taxes include annual assessment work required by law to be performed. (Alaska Stat. § 9.35.230).

Leasehold with less than two years unexpired term not subject to redemption. (Alaska Stat. § 9.35.210).

Form.

Notice to debtor shall include instructions substantially as follows. (See Alaska Stat. § 09.38.085.)

Form

NOTICE

The . . . . Court of the State of Alaska, ... Judicial District, has issued a judgment that you must pay to . . . . the sum of $ . . . . . A writ of execution has been issued against you, a copy of which is attached to this form. This writ is an order of the court by which your property can be taken from you and sold to pay the judgment and any court costs which have been assessed against you.

The following property, believed to be yours, has been seized and is now being held by the court:

	Person in Possession	
Description	at Time of Levy	Date of Levy

Both federal and state law provide that certain types of property (up to specified dollar evaluations) and certain percentages and types of wages are exempt from execution. Details of legal exemptions to which you may be entitled are available to you at . . . . [name and address of court issuing judgment], or you may contact any attorney of your choice, or other available legal service, for an explanation of your rights.

After having determined whether or not you are entitled to an exemption on the property described above, please complete and sign the following form and deliver or mail it to the court WITHIN 15 DAYS of the receipt of this notice:*

TO BE COMPLETED BY DEBTOR:

I have investigated my rights as to exemption from execution on the property described above, now in possession of the court, and find that (1) I AM . . . . (2) AM NOT . . . . entitled to an exemption. (Complete the following ONLY if you have checked block #1, indicating that you claim an exemption.) Therefore, I claim an exemption up to the amount (or evaluation) of $ . . . . . . on property or money presently in custody of the court.

Signature of Debtor . . . .

* IF YOU HAVE CLAIMED NO EXEMPTIONS, OR IF YOU FAIL TO RETURN THE ABOVE FORM TO THE COURT WITHIN 15 DAYS OF THE RECEIPT OF THIS NOTICE, THE PROPERTY DESCRIBED ABOVE WILL BE SOLD TO SATISFY THE JUDGMENT AGAINST YOU IN THIS CASE. Any money in possession of the court which was seized to satisfy this judgment will be turned over to the judgment creditor. If you claim an exemption, and that exemption is disputed by the judgment creditor, a hearing on your claim will be held within three days after the claim for exemption is filed or as soon thereafter as practicable.

Please retain one copy of this form for your records and submit the other to the court as requested above.

Supplementary Proceedings.

Court may order a peace officer to arrest judgment debtor and bring him before the court upon satisfactory proof that he is leaving state with intent to defraud his creditors or absconding. Upon being brought before court, he may be ordered to enter into an undertaking with one or more sufficient sureties that he will appear before court when directed, and that he will not, during pendency of proceedings, dispose of any portion of his property not exempt from execution. In default of entering into undertaking, he may be committed to jail. (Alaska Stat. § 9.35.320).

8.06 EXEMPTIONS:

Judgment debtor is entitled to exemptions in property not to exceed aggregate value of $3,000 from following categories of property: (1) Household goods and wearing apparel. (2) Books and musical instruments reasonably held for debtor or dependent. (3) Family portraits and heirlooms. Exemption of jewelry up to $1,000. Judgment debtor is entitled to exemption up to $2,800 for professional books and tools of trade. Judgment debtor is entitled to exemption of pets up to $1,000. Individual is entitled to exemption of one motor vehicle to extent that value not exceed $3,000, if full value of motor vehicle does not exceed $20,000. (Alaska Stat. § 09.38.020). See also property exempt without limitation. (Alaska Stat. § 09.38.015).

Life Insurance Policies.

Policies and their reserves or present value to value of $10,000 thereof are exempt from claims of creditors. (Alaska Stat. § 09.38.025).

Waiver of exemption is not prohibited by statute.

Claim of Exemption.

Property to be held exempt must be selected and reserved by the judgment debtor or his agent at time of levy, or as soon thereafter, and before sale, as levy is known to him. (Alaska Stat. § 09.38.020).

Earnings.

Judgment debtor is entitled to exemption of his weekly net earnings not to exceed $350. If judgment debtor does not receive weekly earnings then maximum of that exemption is $1,400 per month. Creditor may levy upon these earnings if money is held outside correctional facility and claim is for court-ordered restitution resulting from crime conviction or adjudication of delinquency. (Alaska Stat. § 09.38.030).

Child Support Payments.

Amount ordered paid to court trustee as child support payments under Rule 67 Civ. R.P. is exempt from execution. (Alaska Stat. § 09.38.065).

Claims Enforceable Against Exempt Property.

(1) Child support, (2) state and local taxes, (3) one month’s personal service income, (4) purchase price of property or loan for purchase price, (5) labor or materials for property, (6) special assessment for public improvement to property. (Alaska Stat. § 09.38.065).

Homestead Exemption.

See topic 8.10 Homesteads.

See also topic 8.05 Executions.

8.07 FORECLOSURE:

See topic 8.13 Liens; category 20 Mortgages, topics 20.01 Chattel Mortgages, 20.04 Mortgages of Real Property.

8.08 FRAUDULENT SALES AND CONVEYANCES:

Uniform Commercial Code adopted. (Alaska Stat. § 45.01.101). See category 3

Business Regulation and Commerce, topic 3.09 Commercial Code.

Intent to Defraud.

Every conveyance of interest in lands, or the rents or profits thereof, and every charge upon lands or upon the rents and profits thereof, made or created with the intent to defraud prior or subsequent purchasers, for a valuable consideration, of the same lands, rents or profits is void, as against such purchasers. (Alaska Stat. § 34.40.020).

Except as provided in AS Alaska Stat. § 34.40.110, every conveyance or assignment, in writing or otherwise, of any estate or interest in lands, or in goods, or things in action, or of any rents or profits issuing therefrom, and every charge upon lands, goods, or things in action, or upon rents or profits thereof, made with intent to hinder, delay, or defraud creditors or other persons of their lawful suits, damages, forfeitures, debts, or demands, and every bond or other evidence of debt given, action commenced, decree or judgment suffered, with like intent, as against persons so hindered, delayed, or defrauded, is void. (Alaska Stat. § 34.40.010).

Trusts.

Person who in writing transfers property in trust may provide that beneficiary’s interest in trust may not be voluntarily or involuntarily transferred before payment or delivery of interest to beneficiary. If trust contains restriction, creditors and others prevented from satisfying claim out of interest unless certain conditions are met. (AS Alaska Stat. § 34.40.110).

Uniform Fraudulent Conveyance Act not adopted.

8.09 GARNISHMENT:

Garnishment is used as an aid to attachment.

Property Subject to Garnishment.

All property not exempt is subject to attachment. (Alaska Stat. § 09.40.030).

Duties of Garnishee.

Upon service of writ of attachment on a garnishee, he must furnish within reasonable time and within 24 hours a certificate of property of defendant which is in his possession. If he refuses to do so, or certificate is unsatisfactory to plaintiff, garnishee may be required by order to appear for examination on oath concerning same, and disobedience to such order may be punished as contempt. (Alaska Stat. § 09.40.060).

Order for Appearance.

An order requiring a person to appear for examination as garnishee must state the time and place for appearance. (Rule 89[1] Civ. R.P.).

Interlocutory Remedies Against Garnishee.

A garnishee may be restrained from disposing of defendant’s property at time of making order for appearance and before judgment against him. (Rule 89[f] Civ. R.P.). He may be proceeded against for refusal to make or making unsatisfactory certificate to service of the writ of execution the same as when served with writ of attachment. (Rule 98[1]).

Discovery.

Plaintiff may utilize rules of discovery under supervision of court with respect to all matters relating to property of defendant believed to be in possession of garnishee. Refusal or failure to make discovery is governed by Civ. R.P. 89(1)(3).

Reply to Garnishee's Answer.

The plaintiff may reply to the garnishee's answer, and issues are tried as ordinary issues of fact between plaintiff and defendant. (Rule 89[1] Civ. R.P.).

Witnesses may be required to appear and testify in garnishee proceedings. (Rule 89[1] Civ. R.P.).

Judgment Against Garnishee.

If answer or trial disclose that garnishee had any property of the defendant liable to attachment at the time of service upon him of a copy of the writ of attachment, judgment may be given for the value thereof in money. Garnishee may discharge himself at any time before judgment by delivering, paying or transferring property of the debtor held by him to the officer. (Rule 89[1][5] Civ. R.P.).

Execution may issue upon judgment against garnishee as upon ordinary judgment between plaintiff and defendant, and costs and disbursements allowable and recoverable in same manner. (Rule 89[1] Civ. R.P.).

8.10 HOMESTEADS:

For acquiring land in Alaska see subhead Homestead Entry, infra.

Limitations of Value, Area.

A homestead is exempt, but it must be principal residence and cannot in any instance exceed $54,000 in value. (Alaska Stat. § 9.38.010). Homestead exemption may be claimed by owner or owner's spouse, dependent, agent or attorney. (Alaska Stat. § 09.38.090). No discrimination against alien residents. Exemption extends to proceeds of sale of homestead.

Conveyance or Incumbrance.

Husband and wife must join in any deed, conveyance or mortgage of family homestead owned by either. (Alaska Stat. § 34.15.010). Required joinder in execution of conveyance does not create proprietary right not otherwise vested in such joining spouse. Failure of joinder does not affect validity of conveyance unless such nonjoining spouse appears on title; but such conveyance shall be sufficient to convey legal title; provided such conveyance otherwise sufficient and no suit filed in court of record in judicial division, wherein real property situated, within one year from date recording such conveyance, by nonjoining spouse to set aside, alter, change, or reform such conveyance, or nonjoining spouse does not file notice of interest in property within one year with recorder in whose precinct property is situated. (Alaska Stat. § 34.15.010).

Death of Owner.

Homestead is exempt from sale or judicial process after death of person entitled thereto, for the collection of any debts for which same could not have been sold during his lifetime. (Alaska Stat. § 9.35.060).

Homestead Allowance.

See category 14 Family, topic 14.09 Husband and Wife.

Homestead entry on Federal lands in Alaska is to be abolished on tenth anniversary of enactment of P.L. 94-579, Tit. VII, § 702(a), Oct. 21, 1976. Any land formerly available under homestead laws has already been removed by Public Land Order 5418, published in Federal Register Mar. 28, 1974.

State of Alaska under Statehood Act, 72 U. S. St. L. 339, is allowed to select within 25 years after date of admission to Union 400,000 acres of vacant and unappropriated national forest land, and 400,000 acres from other vacant, unappropriated and unreserved public land, all of which must be adjacent to established communities or suitable for prospective community centers and recreational areas. In addition Alaska may select within 25 years after date of admission to Union 102,550,000 acres of public land, vacant, unappropriated and unreserved at time of selection. Any lease, permit, license or contract issued under the Mineral Leasing Act of Feb. 25, 1920 (41 Stat. 437; 30 U.S.C., § 181 et seq., as amended), or under the Alaska Coal Leasing Act of Oct. 20, 1914 (38 Stat. 741; 30 U.S.C., § 432 et seq., as amended), has the effect of withdrawing the lands subject thereto from selection by the state unless application to select such land is filed with Secretary of Interior within period of five years from date of admission of Alaska into Union. (Alaska Statehood Act, 72 Stat. 339, as amended by H.R. 5849, which was signed by the President Aug. 18, 1959).

Homestead entry on state lands classified as agricultural or grazing lands may be authorized by Director of Division of Lands of Department of Natural Resources with approval of Commissioner of Natural Resources. (Alaska Stat. § 38.04.015). Director's office located at Anchorage.

Reserved to the State out of every grant of land are oils, gases, coal, ores, minerals, fissionable materials, and fossils of every name, kind or description, and the right to explore for such minerals, and the right to enter for purpose of opening, developing and working mines and taking out and removing such minerals, and the right to erect, construct, maintain and use all buildings, machinery, pipelines, powerlines, and railroads, remove soil and to remain on the land for the foregoing purposes and to occupy so much of the land as may be necessary or convenient for such purposes. (Alaska Stat. § 38.05.125).

8.11 [RESERVED]

8.12 LEVY:

See topics 8.02 Attachment, 8.05 Executions.

8.13 LIENS:

Uniform Commercial Code adopted. (Alaska Stat. § 45.01.101). See category 3 Business Regulation and Commerce, topic 3.09 Commercial Code.

Artisans.

Any person who makes, alters, repairs, or bestows labor on any article of personal property at request of owner or lawful possessor thereof, has a lien thereon for just, reasonable charges for labor performed and/or material furnished for that purpose, and may hold and retain possession of the personalty until those charges are paid; but no such lien continues, after delivery of the chattel to its owner, as against rights of third persons, who, prior to filing of lien notice, may have acquired title to such chattel in good faith, for value and without knowledge of lien. Before delivery to owner, in order to preserve lien, a "chattel lien notice" must be filed, in office of recorder of recording district in which chattel is kept, stating name of claimant, name of owner, description of chattel, amount for which lien is claimed, date upon which expenditure of labor or material thereon was completed, and signed by claimant or someone in his behalf. Possessor of chattel, under agreement for purchase thereof, whether title is in him or his vendor, is deemed owner. Lien is preferred to any lien, mortgage or other encumbrance which may attach subsequently to time of commencement of performance of labor or furnishing of materials, and is also preferred to any lien, mortgage or other encumbrance which may have attached previously but which was not filed or recorded so as to create constructive notice prior to that time and of which lien, mortgage or other encumbrance claimant has no notice. If claim is not paid within three months, and claimant has not parted with possession of chattel, he may summarily foreclose lien by three weeks' notice published in newspaper or, if no newspaper, posted. If lien notice has been filed, may foreclose by suit in equity brought within six months after filing of lien. (Alaska Stat. § 34.35.175 to Alaska Stat. § 34.35.215).

Carriage, Storage, Pasturage, etc.

Any person who is a common carrier, or who shall, at the request of the owner or lawful possessor of any personal property, carry, convey, or transport the same from one place to another; and any person who shall safely keep or store any grain, wares, merchandise, and personal property at the request of the owner or lawful possessor thereof; and any person who shall pasture or feed any horses, cattle, hogs, sheep, or other live stock, or bestow any labor, care, or attention upon the same at request of owner or lawful possessor thereof, has a lien upon such property for his just and reasonable charges, and may retain possession of such property until such charges are paid. And if not paid within three months after the care, attention, and labor have been performed or bestowed, or the materials or food furnished, lienor may sell the property at public auction, after three weeks published notice of sale. (Alaska Stat. § 34.35.220-225).

Employee Benefit Fund Lien.

When an employer has agreed with an employee or group of employees to make payment to a medical, health, hospital, welfare, or pension fund or such other fund for benefit of employees, or has entered into a collective bargaining agreement providing for payments but fails to make the payments when due, a lien is created in favor of each affected employee on earnings of his employer and on all property of his employer used in operation of his employer's business to extent of the money, plus any penalties due to be paid on employee's behalf to qualify him for participation in the fund and for any expenses incurred by him for which he would have been entitled to reimbursement under the fund if required payments had been made. (Alaska Stat. § 23.10.047).

Logging.

Laborers and loggers have a lien for labor on or in assisting to obtain saw-logs, spars, piles, cordwood, fuelwood, shingle bolts, or other timber. (Alaska Stat. § 34.35.235).

Oil Wells, etc.

Laborers, material men and contractors have a lien for work, labor and materials for the construction, altering, digging, drilling, boring, operating, completing or repairing of gas wells, oil wells, or other wells, gas pipe lines or oil pipe lines. (Alaska Stat. § 34.35.125).

Fish or Aquatic Animals.

Laborers and material men have a lien for labor or materials furnished that contributes to the preparation of fish or aquatic animals for food, fish meal, fertilizer, oil or other article of commerce. (Alaska Stat. § 34.35.320).

Mines, Mining Machinery, etc.

Laborers and miners have a lien for labor and work in, on and about mines and mining property. (Alaska Stat. § 34.35.125).

Work or labor performed on a mine, mining claim, oil, gas or other well, dredge, steam shovel, derrick, mill or machine by person having right of possession thereof or having possession thereof with owner's knowledge is deemed done at instance of owner, mortgagee or lien claimant of the property and interest of such owner, mortgagee or lien claimant is subject to lien for such work or labor unless such owner, mortgagee or lien claimant, within ten days after obtaining knowledge of such work or labor being performed, posts nonliability notices in three conspicuous places on such mine or claim, near such well or on such dredge, steam shovel, derrick, mill or machine. Notice by mortgagee or other lien claimant must state nature of lien and amount due thereon and refer to volume and page of record of lien. (Alaska Stat. § 34.35.150). Notice need not be posted on any drag line, electric shovel, tractor, scraper, hoist, truck or mobile equipment or machinery, or personal property which is readily moveable or is required to be moved from place to place in course of mining operations. (Alaska Stat. § 34.35.150).

Codification.

The laws relating to liens of laborers in and about mines, liens for work on or repair of chattels, liens of carriers and warehousemen, liens for labor on logs, piles and other timber products, and liens of cannery and saltery workers, fishermen and watchmen have been codified and all conflicting laws repealed.

Mechanics' Liens.

Person has lien for contract price if he performs labor on, furnishes materials or equipment used for construction, alteration or repair of building or improvement at request of owner or his agent. General contractors, employee benefit trusts of laborers with direct contract with agent or owner, and those preparing plans, surveys, architectural or engineering plans for owner or agent, whether or not used, also have lien. (Alaska Stat. § 34.35.050). Every contractor, sub-contractor, architect, builder, or other person in charge of such work or part thereof, is deemed agent of the owner in establishing such lien. (Alaska Stat. § 34.35.115).

Mechanic's lien extends to the land on which the structure was constructed, to a sufficient extent for convenient use or occupation, or to the mine developed, provided at the time the materials were begun to be furnished, or labor to be performed, the person causing the same to be done was owner thereof, but only to the extent of his estate therein. The extent of land necessary for use or occupation may be determined by the court, in its discretion.

Stop payment notice may be given to construction lender. (Alaska Stat. § 34.35.062).

Original construction lien preferred to prior encumbrance, but other liens not prior to encumbrances recorded before claim of lien or notice of right to lien recorded. (Alaska Stat. § 34.35.060).

Materials furnished for such an improvement are not subject to legal process against the purchaser, except it be for the purchase price thereof, if in good faith they have been or are about to be used in the improvement. (Alaska Stat. § 34.35.105).

Notice of Nonresponsibility.

Owner of, or person claiming interest in land on which improvement is made, if he had knowledge thereof, is deemed to have caused improvement to be made, and be liable, unless within three days after obtaining knowledge thereof, he posts written and signed notice that he will not be responsible, at conspicuous place where work is being done. Posting is attested to by witness and posting is recorded. (Alaska Stat. § 34.35.065).

Notice of completion may be made by recording notice and giving notice at least five days before recording to all claimants who have given notice of right to lien or stop-payment notice to owner and lender prior to ten days before recording notice of completion. (Alaska Stat. § 34.35.071).

Claim of lien must be filed within ten days after notice of completion is filed. (Alaska Stat. § 34.35.071). Certain claimants have up to 15 days after notice of completion is recorded.

(Alaska Stat. § 34.35.068). If notice of completion not recorded by owner, lien claim must be recorded within 90 days after contract completed, or person ceases to furnish labor, material, services or equipment. (Alaska Stat. § 34.35.068). Claim must contain true statement of demand after deducting all just credits or offsets, name of owner or reputed owner if known, name of person by whom claimant was employed or to whom he furnished material and description of property to be charged. Claim must be verified by oath of claimant or some other person having knowledge of facts. (Alaska Stat. § 34.35.070).

Bond.

If claim of lien is in dispute, owner or contractor or subcontractor may free property from effects of a claim of lien by posting bond in penal sum of 1½ times lien claim, guaranteeing sum lien claimant may claim, together with lien claimant's reasonable cost of suit if he recovers on lien claim. (Alaska Stat. § 34.35.072).

Public Works.

See category 5 Civil Actions and Procedure, topic 5.04 Bonds.

Attachment Lien.

See topic 8.02 Attachment.

Attorney's Lien.

See category 18 Legal Profession, topic 18.01 Attorneys and Counselors.

Collateral Security.

See topic 8.15 Pledges.

Execution Lien.

See topic 8.05 Executions.

Judgment Lien.

See category 5 Civil Actions and Procedure, topic 5.15 Judgments.

Landlord's Lien.

See category 21 Property, topic 21.10 Landlord and Tenant.

Liens on Exempt Property.

See topic 8.06 Exemptions.

Liens on Homestead.

See topic 8.10 Homesteads.

Real Estate Mortgage Lien.

See category 20 Mortgages, topic 20.04 Mortgages of Real Property.

Tax Lien.

See category 22 Taxation, topic 22.15 Property Taxes, subhead Lien.

Foreclosure.

Action to enforce the lien must be commenced within six months after filing the lien claim, or if credit be extended, within six months after expiration of term of credit, or if supplemental notice is filed, within six months of filing, but in any event, within one year. (Alaska Stat. § 34.35.080).

The procedure in foreclosure is similar to foreclosure of a mortgage on real property. Such actions have a preference on the calendar of the court. Costs may be recovered, including expenses of filing claim and recoverable attorney's fees.

Redemption.

There is no specific statute as to redemption from foreclosure sale. But see topic 8.05 Executions, subhead Redemption.

Priorities.

See subhead Mechanics' Liens, supra. Among lien holders, priority where proceeds of sale insufficient as follows: laborers, employment benefit trusts, materialmen, subcontractors and prime contractors, and general contractor. (Alaska Stat. § 34.35.112).

Anticipated Payments.

Payments made by the owner to a contractor or subcontractor, before 90 days after completion of improvement, are invalid as against all other lienholders, except in so far as moneys so paid were applied to payment of such persons. (Alaska Stat. § 34.35.090).

Watchmen of real or personal property have lien for services as such, coordinate with any lien for labor or material. (Alaska Stat. § 34.35.395).

8.14 MECHANICS' LIENS:

See topic 8.13 Liens.

8.15 PLEDGES:

Uniform Commercial Code adopted. (Alaska Stat. § 45.01.101). See category 3 Business Regulation and Commerce, topic 3.09 Commercial Code.

8.16 RECEIVERS:

A receiver may be appointed in any civil action or proceeding, other than an action for the recovery of specific personal property:

(1) Provisionally, before judgment, on either party's application, when party's right to property that is subject of action and that is in adverse party's possession, is probable, and property or its rents or profits are in danger of being lost or materially injured or impaired; (2) after judgment, to carry same into effect; (3) to dispose of property according to judgment, or to preserve it during pendency of appeal, or when execution has been returned, unsatisfied and debtor refuses to apply his property in satisfaction of judgment; (4) by other statute when corporation has been dissolved, or is insolvent or in imminent danger of insolvency, or has forfeited its corporate rights; (5) in case when debtor has been declared insolvent; (6) under Alaska Stat. § 32.06.504 addressing partnerships. (Alaska Stat. § 09.40.240).

8.17 REDEMPTION:

See topics 8.05 Executions, Liens; categories 20 Mortgages, topic Mortgages of Real Property; Taxation, topic Property Taxes, subhead Redemption.

8.18 SUPPLEMENTARY PROCEEDINGS:

See topic 8.05 Executions.

8.19 TRUSTEE PROCESS:

See topic 8.09 Garnishment.

8.20 USURY:

See category 3 Business Regulation and Commerce, topic 3.19 Interest.

9 DISPUTE RESOLUTION

9.01 ALTERNATIVE DISPUTE RESOLUTION:

Mandatory Dispute Resolution.

Alaska Railroad Corporation Employees.

If impasse develops when attempting to resolve disputes, dispute shall go to mediation. (Alaska Stat. § 42.40.840). Alaska Stat. § 42.40.840 details mediation procedure. If mediation ends with no resolution, employees may strike unless corporation enjoins strike. If deadlock still exists after injunction issued, it shall be submitted to binding arbitration. (Alaska Stat. § 42.40.850). See Alaska Stat. § 42.40.850 for details.

Public Employees.

Before employees of municipal school district, regional educational attendance area, or state boarding school can strike, they must first submit to advisory arbitration. (Alaska Stat. § 23.40.200).

Small Claims.

All small claim litigants shall be informed if mediation, conciliation, and arbitration services are available as alternative to litigation. (Alaska Stat. § 22.15.040).

Voluntary Dispute Resolution.

Court may order mediation upon motion by any party or upon its own motion whenever it determines that mediation may result in equitable settlement. (Civ. R.P. 100). For details see Civ. R.P. 100.

Dental and Medical Malpractice.

Patient and healthcare provider may execute agreement to submit dispute arising out of treatment to arbitration. Such agreement must state on its face and in bold print that agreement to arbitrate is not and cannot be condition of treatment or agreement is void. Attorney General must first approve form. Patient has 30 days to revoke agreement. (Alaska Stat. § 09.55.535). For additional details see Alaska Stat. § 09.55.535.

Divorce.

Within 30 days of filing complaint or cross-complaint in action for divorce, party may request settlement mediation. Court may require settlement mediation sua sponte. (Alaska Stat. § 25.24.060).

Landlord and tenant may agree to mediate or arbitrate disputes arising out of rental agreement. (Alaska Stat. § 34.03.345). Such mediation or arbitration agreement shall be included within rental agreement, referenced in rental agreement, or attached to rental agreement. (Alaska Stat. § 34.03.345).

Motor Vehicles.

Under certain circumstances, owner of motor vehicle may be required to submit to nonbinding alternate dispute resolution before pursuing other remedies. (Alaska Stat. § 45.45.355). For details see Alaska Stat. § 45.45.355.

Public employees may agree in writing with employer to submit dispute arising from interpretation or application of collective bargaining agreement. (Alaska Stat. § 23.40.200[e]). Parties to collective bargaining agreement may provide in agreement contract for arbitration to be conducted solely according to Uniform Arbitration Act. (Alaska Stat. § 23.40.200[f]). For details see Alaska Stat. § 23.40.200.

9.02 ARBITRATION AND AWARD:

Uniform Arbitration Act (adopted 1968). (Alaska Stat. § 09.43.010-.180). Applies to agreements to arbitrate made before Jan. 1, 2005, unless parties agree to revised procedure. But does not apply to labor-management contracts unless incorporated by reference or provided for by statute.

Revised Uniform Arbitration Act (2000, adopted 2004). Applies to all agreements to arbitrate made on or after Jan. 1, 2005 and other agreements if parties agree. Fraud exception added to revised Act provision on validity. (Alaska Stat. § 09.43.330).

Voluntary arbitration procedures specifically established for medical malpractice claims. (Alaska Stat. § 09.55.535). In absence of arbitration agreement, court may appoint expert advisory panel in malpractice cases. (Alaska Stat. § 09.55.536).

Contracts to Arbitrate Future Disputes.

Valid, enforceable and irrevocable, except as to grounds in law and equity. (Alaska Stat. § 09.43.010; Alaska Stat. § 09.43.330).

10 DOCUMENTS AND RECORDS

10.01 ACKNOWLEDGMENTS:

Uniform Recognition of Acknowledgment Act (adopted 1981). (Alaska Stat. § 09.63.050-09.63.130).

Within State.

Acknowledgments may be made within State of Alaska before any justice, judge, magistrate, clerk or deputy clerk of court, notary public, postmaster municipal clerk carrying out clerk's duties, or other authorized officer. (Alaska Stat. § 09.63.010). Fee is not regulated by statute.

Outside State.

Notarial acts, including acknowledgments, performed outside state will be recognized if performed by authorized notary public, justice, judge, magistrate, clerk or deputy clerk of court of record in place in which notarial act is performed, officer of foreign service of U.S., consular agency, or person authorized by regulation of Department of State, or other persons authorized to perform notarial acts in place in which act is performed. (Alaska Stat. § 09.63.050).

Persons in or with U.S. Armed Forces.

Commissioned officer in active service with armed forces or person authorized by regulation of armed forces to perform notarial acts may take acknowledgments for merchant seamen of U.S., member of armed forces of U.S., person serving with or accompanying armed forces of U.S. or his dependants. (Alaska Stat. § 09.63.010).

Real Estate Conveyances, Within State.

Acknowledgments may be made within state of Alaska before any clerk of court, notary public, postmaster, or commissioner by subscribing witness or handwriting. Officer must endorse on instrument certificate of acknowledgment and date it was taken under his hand. (Alaska Stat. § 34.15.150).

Real Estate Conveyances, Outside State, But Within U.S.

Acknowledgments may be made within any state, territory, or district of U.S. outside of Alaska, before any judge of court of record, justice of peace, notary public, or other officer authorized to take acknowledgments by law of jurisdiction in which taken. (Alaska Stat. § 34.15.160).

Real Estate Conveyances, Outside U.S.

Conveyance executed in foreign country in accordance with that country's laws may be acknowledged under laws of Alaska. (Alaska Stat. § 34.15.180).

General Requirements as to Taking.

Officer taking acknowledgment must certify that person acknowledging appeared before him and acknowledged execution of instrument and that person acknowledging was known to person taking acknowledgment or person taking acknowledgment must have satisfactory evidence that person acknowledging was person described in and who executed instrument. (Alaska Stat. § 09.63.070).

General Requirements of Certificates.

Certificate must conform to laws and regulations of state or other place in which acknowledgment is taken or certificate must contain words "acknowledged before me" or their substantial equivalent. (Alaska Stat. § 09.63.080). For real estate, endorsement by officer taking acknowledgment of certificate of acknowledgment and date of making acknowledgment. (Alaska Stat. § 34.15.150).

Attorneys in Fact.

Uniform Durable Power of Attorney Act not adopted. Uniform Probate Code applies. (Alaska Stat. § 13.26.332-13.26.358).

Corporations.

No special provisions.

Foreign Acknowledgments.

Conveyance may be executed according to laws of foreign country and execution of it acknowledged under Alaska Stat. § 09.63.050-09.63.130.

Effect of Acknowledgment.

Entitles conveyance to be read in evidence without further proof or recorded and filing is constructive notice of conveyance's contents to subsequent purchasers or mortgagees. (Alaska Stat. § 40.17.090).

Proof by Subscribing Witness or Handwriting.

Proof of execution of an instrument may be made before any officer authorized to take an acknowledgment thereof by a subscribing witness thereto, who must state his own residence, and that he knew the person described in, and who executed the instrument. Officer must either personally know witness or have satisfactory proof of his identity. (Alaska Stat. § 34.15.210). Conveyance may be proved before superior court by proving handwriting of grantor and a subscribing witness. (Alaska Stat. § 34.15.220).

Authentication.

Certificates of acknowledgment shall be recognized if certificate is in form prescribed by laws and regulations of state or other place in which acknowledgment is taken or certificate contains words “acknowledged before me” or their substantial equivalent. (Alaska Stat. § 09.63.080).

Form.

No form is specifically required by statute. Statute includes five forms from Uniform Recognition of Acknowledgments Act for various types of acknowledgments. (Alaska Stat. § 09.63.100).

Alternative to Acknowledgment or Proof.

Matter required or authorized to be supported, evidenced, established or proven by sworn statement, declaration, verification, certificate, oath or affidavit, in writing of person making it (other than deposition, acknowledgment, oath of office, or oath required to be taken before specified official other than notary public) may be supported, evidenced, established or proven by person certifying in writing under penalty of perjury that matter is true. Certification shall state date and place of execution, fact that notary public or other official empowered to administer oath is unavailable and following: “I certify under penalty of perjury that the foregoing is true.” (Alaska Stat. § 09.63.020).

Validation.

Defective acknowledgments of deeds, contracts, leases, powers of attorney, mortgages and other instruments pertaining to real property validated, provided no suit to change, set aside or reform instrument filed in court of record in judicial district wherein property located within ten years from date of instrument or of acknowledgment; judicial sales deeds, executors’ and administrators’ sales and deeds, and defective tax deeds also validated. (Alaska Stat. § 34.25.010).

Married Women.

No special requirements.

10.02 AFFIDAVITS:

Every justice, judge, magistrate, clerk of court, notary public, U.S. postmaster, municipal clerk and commissioned officer under Alaska Stat. § 09.63.050(4) may administer oaths or affirmations. (Alaska Stat. § 09.63.010).

General Requirements.

No prescribed form of jurat.

Use of Affidavit.

Extensively permitted in administration of specific statutory provisions and court proceedings. They may be entitled to recordation. (Alaska Stat. § 27.10.170, Alaska Stat. § 34.20.080).

Alternative to Affidavit.

Matter required to be supported, evidenced, established, or proven by affidavit in writing may be supported, evidenced, established, or proven by person certifying in writing under penalty of perjury that matter is true. Certification shall state date and place of execution, fact that notary public or other official empowered to administer oath is unavailable, and following: “I certify under penalty of perjury that the foregoing is true.” (Alaska Stat. § 09.63.020).

10.03 NOTARIES PUBLIC:

Oath that person is resident of Alaska, resides legally in U.S., at least 18 years of age, and $1,000 bond required. (Alaska Stat. § 44.50.020-.150). Have usual powers. Authority extends throughout state. Seal required for all notarial acts. (Alaska Stat. § 44.50.080). Must state date of expiration of commission in all certificates. False certificate of acknowledgment is misdemeanor. (Alaska Stat. § 44.50.010). Fee for notary public services: Not set.

See also topic 10.01 Acknowledgments.

10.04 RECORDS:

Uniform Commercial Code adopted. (Alaska Stat. § 45.01.101). See category 3 Business Regulation and Commerce, topic 3.09 Commercial Code.

Recordable Instruments.

Conveyances acknowledged, proved or certified may be recorded in recording district where land located. (40.17).

Instruments entitled to record are recorded in the offices of the recorders of the various recording districts.

A certified copy of a public record is admissible in evidence. (Rule 902 evidence). Similar to Uniform Photographic Copies of Business and Public Records as Evidence Act. (Rule 44 Civ. R.P.).

Recording Districts.

Contact State Recorder, Department of Natural Resources, 550 W. 7th Ave., Ste. 1210, Anchorage, AK 99501-3564; Tel. 907-269-8882; http://www.dnr.state.ak.us/ssd/recoff/default.htm.

Requisites for Recording.

Real property conveyances must be acknowledged. (40.17). See topic 10.01 Acknowledgments. Formal requisites for recording documents found at Alaska Stat. § 40.17.030.

Recording fees for all documents: $20 for first page and $5 for each additional page; no charge for releases of tax liens; $2 for indexing each name or location over six; and for filing plats: $20 for first sheet and $5 for each additional sheet.

Inspection.

Public records are subject to inspection by Commissioner of Revenue; but particulars of taxpayer’s business or affairs are confidential except for official investigation or court proceeding.

Torrens system has not been adopted.

Filing Under Commercial Code.

If collateral is consumer goods or farm related products or intangibles, then proper place for filing is office of recorder in recording district of debtor's residence or where property is located if debtor is not resident. If collateral is fixtures then in office where mortgage on real estate would be filed. In all other cases in Department of Natural Resources. (Alaska Stat. § 45.29.501).

Vital Statistics.

Vital Statistics Bureau, 5441 Commercial Blvd., Juneau, AK 99801, Tel: 907-465-3391. Department Health and Social Services is Registrar. For information: http://www.hss.state.ak.us/dph.bvs/. Vital Statistics Act. (Alaska Stat. § 18.50.010-.990). Fee for certificates (marriage, birth, death), $20.

10.05 SEALS:

Uniform Commercial Code adopted. (Alaska Stat. § 45.01.101). See category 3 Business Regulation and Commerce, topic 3.09 Commercial Code.

Private seals and scrolls as a substitute therefor are abolished and are not required to any instrument, but when used, do not alter effect of instrument. (Alaska Stat. § 09.25.095).

10.06 TORRENS ACT:

Not adopted.

10.07 VITAL STATISTICS:

See topic 10.04 Records.

11 EMPLOYMENT

11.01 [RESERVED]

11.02 LABOR RELATIONS:

Department of Labor and Workforce Development enforces all state labor laws. See http://www.labor.state.ak.us/home.htm.

Hours of Labor.

Employment over 40 hours a week and eight hours in one day prohibited unless compensation at 1½ times regular rate paid, with statutory exceptions and exemptions. (Alaska Stat. § 23.10.055, Alaska Stat. § 23.10.060). Overtime provision does not apply to person exempt under § 13(a), (b) and (c) of U.S. Fair Labor Standards Act, 39 U.S.C.A. §§ 201-219, as am'd; person working on mining job where not more than 12 persons employed, where work time is not in excess of 12 hours per day or 56 hours per week during period of not more than 14 work-weeks during mining season. (Alaska Stat. § 23.10.060).

Exception to provisions of act is individual employed in farming; catching fish or shellfish; hand picking shrimp; domestic service in private home; government, U.S., state or political subdivision thereof; work in nonprofit organization if services rendered voluntarily; delivery of newspapers; watchman in plant not in productive use for four months or more; executive, administrative or professional work, outside selling or selling on straight commission basis; search for minerals; part time work of not more than 30 hours per week if employee under 18 years of age; certain employment at nonprofit educational or childcare facility; driving taxicabs; guiding for first 60 days; nonprofit organization where services are rendered under work activity requirement at Alaska temporary assistant program; emergency medical activities or full-time fire department on voluntary basis. (Alaska Stat. § 23.10.060).

Wages.

Not less than $7.15 an hour. (Alaska Stat. § 23.10.065). Exceptions for individuals impaired by physical or mental deficiency, apprentices or learners, upon issuance of certificate by Commissioner of Labor and Workforce Development. (Alaska Stat. § 23.10.070). Employer may not apply tips or gratuities as credit toward payment of minimum wage. (Alaska Stat. § 23.10.065). Wages must be paid in lawful money of U.S. or by negotiable checks, drafts or orders payable, without discount, on presentation, by some bank or depository in Alaska. (Alaska Stat. § 23.10.040). Employer must establish monthly pay days or semimonthly if employee elects, unless annual initial contract provides for monthly, and on such day payment must be made for all labor performed. On termination of employment by employer, wages must be paid within three working days after termination; on termination of employment by employee, payment is due at next regular payday that is at least three days after employer receives notice of termination. (Alaska Stat. § 23.05.140). Employee may collect as liquidated damages amount equal to sum owed him by employer for unpaid minimum wages or unpaid overtime compensation when employer violates act unless employer shows good faith and reasonable grounds for not believing violation of law by clear and convincing evidence. (Alaska Stat. § 23.10.110).

Child Labor.

Children under 14 may be employed outside school hours in domestic employment, baby sitting and handiwork about private homes, newspaper deliveries or sales, or supervised work casing cans in cannery warehouse (Alaska Stat. § 23.10.335) and work by children under direct supervision of parent in business owned and operated by parent or work of child on boat owned or operated by parent is not prohibited (Alaska Stat. § 23.10.330). Children under 16 may be employed between 6 A.M. and 7 P.M. but for not more than total of nine hours school attendance and employment in any one day, nor for more than 23 hours of work in any one week, domestic work and babysitting excepted. (Alaska Stat. § 23.10.340). No minor under 18 years of age may work: (1) More than six days a week; (2) in hazardous excavation or underground in mines; or (3) in occupation dangerous to life or limb or injurious to his health. But commissioner may exempt in writing minor 16-18 years of age. (Alaska Stat. § 23.10.350). No person under 21 may be employed to sell or serve intoxicating liquors or work in any room or place where intoxicating liquors are sold for consumption on premises (Alaska Stat. § 23.10.355), except person 16-18 years of age may enter and remain upon these premises in course of his employment if employment does not require serving or mixing of alcoholic beverages and person has written consent of parent and exemption from Dept. of Labor (Alaska Stat. § 04.16.049; Alaska Stat. § 23.10.355). Also, no child under 17 may work without written permit from Labor Commissioner except pursuant to Labor and Workforce Development Dept. Regulations or for parent-owned business or boat. (Alaska Stat. § 23.10.332).

Female Labor.

See subheads Discrimination, infra and Child Labor, supra.

Discrimination because of race, religion, color, national origin, age, physical handicap, sex, marital status, changes in marital status, pregnancy or parenthood prohibited where reasonable demands of position do not require distinction (Alaska Stat. § 18.80.220); and unequal payment of wages as between sexes for work of comparable character or work in same operations, business, or type of work in same locality is prohibited.

Superior Court has jurisdiction to remedy violations by declaratory or injunctive relief, or award of damages. (Alaska Stat. § 22.10.020, 549 P.2d 1349).

Labor Unions.

Statutory provisions regulating employment agencies do not apply to bona fide labor organizations. (Alaska Stat. § 23.15.330). Public employees may organize for collective bargaining. State and its political subdivisions required to enter into labor organization contracts, unless political subdivisions reject Public Employment Relations Act. (Alaska Stat. § 23.40.070-23.40.260). Complete terms of tentative public employee collective bargaining agreement must be submitted to legislature for review. (Alaska Stat. § 23.40.215).

Labor Disputes.

Commissioner of Labor and Workforce Development authorized to act as mediator in labor disputes. (Alaska Stat. § 23.05.060). Striking employee, or one subject to lockout, shall receive earned compensation on or before next regular pay day. (Alaska Stat. § 23.05.170). No “right to work” law.

Employer’s Liability.

A person, association or corporation engaged in manufacturing, mining, constructing, building, or other business, or occupation, carried on by means of machinery, or mechanical appliances, is liable to employees for damages resulting from negligence of any of employer’s officers, agents or employees, or by reason of any defect, or insufficiency, due to their negligence, in the machinery, appliances and works. Contributory negligence is not a bar to recovery where employee’s contributory negligence was slight and employer’s negligence gross in comparison, but damages shall be diminished proratably to negligence attributable to employee. All questions of negligence and contributory negligence are left to the jury. Recovery cannot be barred by contract of employment, insurance, relief benefit, or indemnity for injury or death. (Alaska Stat. § 23.25.010-040). Survivors may also collect. Action must be brought in two years. (Alaska Stat. § 23.25.040).

Workers’ Compensation.

Program administered by Division of Workers’ Compensation, Dept. of Labor and Workforce Development. Act covers employee of any person or persons, partnership, joint stock company, association or corporation and employee of State or any of its political subdivisions. Includes high school students (treating them as state employees) while performing work under work-study courses. Includes executive officer of corporation other than municipal corporation or charitable, religious, educational or other nonprofit corporation. Sole proprietor or member of partnership may elect coverage as employee by making written application to insurer. Part-time babysitters, cleaning persons, harvest help and similar part-time or transient help, persons who officiate on contractual basis at sporting events where players are not compensated, entertainers employed on contractual basis, and commercial fishermen, certain taxicab drivers, real estate licensees, and participants in Alaska temporary assistance program excluded from coverage. (Alaska Stat. § 23.30.230). Contractors and project owners liable for payment of compensation to employees of subcontractor or contractor, respectively, if not paid by employer. (Alaska Stat. § 23.30.045).

Notice of injury or death must be given within 30 days of such injury or death to Alaska Workers’ Compensation Board and to employer. Notice must contain name and address of employee and statement as to time, place, nature and cause of injury or death. (Alaska Stat. § 23.30.100).

Period of limitations in which claim to compensation for disability must be filed is two years from time employee has knowledge of nature of disability and its relation to employment. Claim for death benefit must be filed within one year after death, except if payment of compensation has been made without award on account of such injury or death, claim may be filed within two years of last payment. Maximum time for filing a claim in any event other than arising out of an occupational disease is four years from date of the injury. However, where latent defects cause compensable disability, Board may make an award without regard to any time limitation. (Alaska Stat. § 23.30.105).

Hearings on claim held before Alaska Workers' Compensation Board, established within Department of Labor. (Alaska Stat. § 23.30.005).

Compensation calculated under Alaska Stat. § 23.30.175. For temporary partial disability see Alaska Stat. § 23.30.200. For permanent partial disability see Alaska Stat. § 23.30.190. For temporary total disability see Alaska Stat. § 23.30.185. For permanent total disability see Alaska Stat. § 23.30.180.

Death benefit includes reasonable funeral expenses up to $5,000. Payment of 80% of average wages of deceased is made to surviving spouse with no children: with one child, 50% to surviving spouse, 40% to child: with two or more children, 30% for surviving spouse and 70% to be divided equally among children; 100% to one child where no surviving spouse; 100% to be divided equally among two or more children where no surviving spouse. If surviving spouse remarries, spouse is entitled to amount that would otherwise have been due had surviving spouse not remarried in two years following date of remarriage. If no surviving wife or dependent husband or children, then for support of father, mother, grandchildren, brothers and sisters, dependent upon deceased at time of injury, 47% of average weekly wage, share and share alike, not exceeding $20,000. Except where surviving spouse is either permanently or totally disabled or has attained age of 52 years, death benefit shall be reduced to 662/3% of benefit then being paid after five years, further reduced to 50% after eight years, and terminated after 12 years. Where benefits are payable to surviving children of deceased by former marriage, benefits shall equal amount payable under decree of child support, any remainder to be distributed pro rata to those entitled. (Alaska Stat. § 23.30.215).

Second Injury Fund.

Contributions on sliding scale of 0-6% based on status of fund reserve for temporary total disability, temporary partial disability, permanent partial disability or permanent total disability. If employee suffers death, is unmarried and leaves no dependents, $10,000 shall be paid to fund (Commercial Fisherman's Fund). (Alaska Stat. § 23.30.040).

Occupational diseases covered by Act. (Alaska Stat. § 23.30.395). Separate fund for disabled fishermen. (Alaska Stat. § 23.35.070).

Lien.

Every employee and every beneficiary entitled to compensation under Act shall have lien, including costs and disbursements and attorney's fees, upon all of property in connection with construction, preservation, maintenance or operation of which work of such injured or deceased employee was being performed at time of injury or death of such employee. (Alaska Stat. § 23.30.165).

Rehabilitation program supervised by WCB includes: Vocational, academic or on job training for new job or special training or worksite modification for same or similar job. (Alaska Stat. § 23.15.010-.210).

Unemployment Compensation.

Benefits are payable to individual who has earned wages in his base period not less than $2,500, paid in at least two of calendar quarters of his base period. Basic weekly benefits run $56—$370 plus allowance increments for each dependent of $24 with $72 as limit on individual allowance for dependants. (Alaska Stat. § 23.20.350). Claimant is not entitled to benefits for first six weeks of unemployment if termination was for misconduct connected with claimant's last work or if claimant left suitable employment voluntarily without good cause, or claimant fails to apply or accept suitable employment. (Alaska Stat. § 23.20.379). Extension of benefits possible. (Alaska Stat. § 23.20.406). See category 22 Taxation, topic 22.05 Employment Taxes, subhead Unemployment Compensation Tax.

11.03 WORKERS' COMPENSATION LAW:

See topic 11.01 Labor Relations.

12 ENVIRONMENT

12.01 ENVIRONMENTAL REGULATION:

General Supervision.

Department of Environmental Conservation duties include coordination and development of programs related to environment of state; responsibility for promulgation and enforcement of regulations setting standards for prevention and abatement of water, land, subsurface land and air pollution; and promote programs for protection and control of environment. (46.03). Department of Natural Resources regulates forests, private and public. (Alaska Stat. § 41.17.030). Lead agency for resource development (Alaska Stat. § 38.05.020) and Alaska coastal management program. (46.40).

Prohibited Acts of Pollution.

Pollution of air, land, subsurface land or water is prohibited. Plans for sewage systems or treatment works must be approved by Department before installed or operated. DDT or other pesticides which may cause damage to health or property and discharge of petroleum or coal products on water or land is prohibited. Ballast water discharge from vessel is regulated. (Alaska Stat. § 46.03.710-.850).

Enforcement.

Department may issue compliance orders when person is violating or about to violate pollution regulations. Department may hold hearings and rescind, modify or affirm compliance order. State employee authorized by Department or state police officer may enforce pollution regulations. (Alaska Stat. § 46.03.850).

Penalties.

Various criminal penalties provided for in Alaska Stat. § 46.03.790.

Violation of Petroleum or Oil Products Pollution.

State may bring civil action for penalty of $1 to $10 per gallon, or $500,000, whichever is less if spill over 18,000 gallons. Penalty increased by five times for gross negligence, intentional spill, or failure to take reasonable measures to contain. (Alaska Stat. § 46.03.758-.759). Civil damages from $500 to $100,000 for initial violation, plus up to $5,000 per day for continuing violations of permits. (Alaska Stat. § 46.03.760).

Permits.

Inquiries regarding any permits that are required prior to conducting activities that may affect environment can be made to Department of Environmental Conservation, 410 Willoughby Ave., Ste. 303, Juneau, AK 99801-1795, or any regional office of department.

http://www.state.ak.us/dec/. Application for required permits issued by various state agencies may be made on one master application to department. Department will coordinate issuance of permits required by other agencies and conduct required hearings. (Alaska Stat. § 46.35.010-210).

Smoking.

Smoking regulated in some places. (Alaska Stat. § 18.35.300). Prohibited in certain vehicles and indoor places (Alaska Stat. § 18.35.305) with exemptions for designated smoking sections (Alaska Stat. § 18.35.320).

Hazardous Materials.

Release of hazardous substances must be reported. (Alaska Stat. § 46.09.010). Containment and cleanup required. (Alaska Stat. § 46.09.020-.040). State will seek reimbursement for costs of containment or cleanup. (Alaska Stat. § 46.08.070).

Recycling.

Solid and hazardous waste reduction and recycling program. (Alaska Stat. § 46.06.010-.150).

Solid Waste Management.

Waste disposal permits. (Alaska Stat. § 46.03.410-.422).

Underground Storage Tanks.

Board of storage tank assistance established. (Alaska Stat. § 46.03.360). Loan fund and cleanup program. (Alaska Stat. § 46.03.410-.422).

12.02 WATER LAW:

Department of Natural Resources determines and adjudicates rights in water of state, its appropriation and use, see Alaska Stat. § 46.15.030 et seq.

Village Safe Water Act. (Alaska Stat. § 46.07.010). Program to provide safe water hygiene and sewage disposal facilities.

13 ESTATES AND TRUSTS

13.01 ADMINISTRATION:

See topic 13.08 Executors and Administrators.

13.02 ADVANCEMENTS:

See topic 13.07 Descent and Distribution.

13.03 ALLOWANCES:

See topic 13.08 Executors and Administrators.

13.04 CLAIMS:

See topic 13.08 Executors and Administrators; category 5 Civil Actions and Procedure, topic 5.17 Pleading.

13.05 DEATH:

Definition.

Irreversible cessation of circulatory and respiratory functions, or irreversible cessation of all functions of entire brain, including brain stem. Death may be pronounced before artificial means of maintaining respiratory and cardiac function are terminated. (Alaska Stat. § 09.68.120).

Person missing continuously for five years is presumed dead. (Alaska Stat. § 13.06.035[3]).

Survivorship.

Person failing to survive decedent by 120 hours is presumed to have predeceased decedent and decedent's heirs determined accordingly. This presumption not applied if state takes intestate estate. (Alaska Stat. § 13.12.104).

Action for Wrongful Death.

Personal representative of decedent may bring action against one whose wrongful act or omission caused decedent's death. Such action must be brought within two years after decedent's death. Damages for loss of statutory beneficiaries and recovery, less expenses of action, inures to exclusive benefit of widow, surviving husband and dependents of children of decedent. If no statutory beneficiaries survive, damages are recovered for loss of estate and amount recovered will be administered as other personal property of decedent. (Alaska Stat. § 09.55.580). Damages for decedent's pain and suffering not recoverable under this statute. Parents and guardians may also maintain action for death of minor. (Alaska Stat. § 09.15.010).

Survivorship Actions.

Personal representative may bring or defend any action decedent could have. (Alaska Stat. § 09.55.570). Decedent's pain and suffering recoverable under this statute.

Certificates of Death.

See category 10 Documents and Records, topic 10.04 Records, subhead Vital Statistics.

Inquiry by jury of six before magistrate may establish presumption of missing person's death, and furnish basis for "Presumptive Death Certificate"; issuance six months thereafter. (Alaska Stat. § 09.55.030).

Uniform Anatomical Gift Act.

Repealed 2004. See replacement Uniform Health Care Decision Act. (Alaska Stat. § 13.52.010). Donor registry program established 2004. (Alaska Stat. § 13.50.100-.190). See topic 13.16 Wills.

Uniform Simultaneous Death Act.

For similar provisions see Alaska Stat. § 13.12.702.

13.06 DECEDENTS' ESTATES:

See topics 13.07 Descent and Distribution, 13.08 Executors and Administrators, 13.16 Wills.

13.07 DESCENT AND DISTRIBUTION:

Uniform Probate Code, including 1975 Official Amendments, adopted with subsequent amendment. (Alaska Stat. § 13.06.005-13.36.100). See topic 13.16 Wills.

Surviving spouse has right of election of one-third of augmented estate. (Alaska Stat. § 13.12.202).

Half Blood.

Inherit same as if whole blood. (Alaska Stat. § 13.12.107).

Posthumous Children or Other Issue.

Posthumous child receives as if born in lifetime of decedent. (Alaska Stat. § 13.12.108).

Illegitimate.

Is child of mother. Is child of father if natural parents participate in marriage ceremony before or after birth of child or paternity is established by adjudication before death of father or established thereafter by clear and convincing proof. Unless father has openly treated child as his and has not refused to support child father cannot inherit from or through child. (Alaska Stat. § 13.12.114).

Adopted Children.

Adopted person is child of adopting parent and not natural parents. (Alaska Stat. § 13.12.114[b]).

Advancements.

Property given in person's lifetime to heir is treated as advancement only if declared in contemporaneous writing by decedent or acknowledged in writing by heir to be advancement. (Alaska Stat. § 13.12.109).

Escheat.

If decedent is survived by no spouse, issue, parent, issue of parent, grandparent or issue of grandparent, then intestate estate passes to state. (Alaska Stat. § 13.12.105).

13.07A ESTATES: (in property)

See category 21 Property, topic 21.16 Real Property.

13.0813.09 [RESERVED]

13.10 EXECUTORS AND ADMINISTRATORS:

Uniform Probate Code, including 1975 Official Amendments, adopted with subsequent amendment. (Alaska Stat. § 13.06.005-13.36). See topic 13.16 Wills.

Uniform Fiduciaries Act not adopted. Providers of fiduciary services regulated. (06.26).

Uniform Principal and Income Act (1997, adopted 2003 with changes). (Alaska Stat. § 13.38.200-13.38.980). Added judicial control of discretionary powers (Alaska Stat. § 13.38.220), conversion to unitrust (Alaska Stat. § 13.38.300-13.38.410), charitable trust election (Alaska Stat. § 13.38.440-13.38.490).

Uniform Simplification of Fiduciary Security Transfers Act not adopted.

Preferences in Right to Administer.

Order of priority for appointment as personal representative: (1) Person nominated in will; (2) surviving spouse of decedent who is also devisee; (3) other devisees; (4) surviving spouse; (5) other heirs; (6) 45 days after death of decedent, any creditor. (Alaska Stat. § 13.16.065).

Eligibility and Competency.

Must be 19 years old or older; no residence requirement. (Alaska Stat. § 13.16.065).

Qualification.

Bond required unless waived in will, beneficiaries waive requirement; personal representative is qualified corporate fiduciary. Must file statement of acceptance which consents to personal jurisdiction. (Alaska Stat. § 13.16.245-.250).

Removal.

Appointment terminates one year after closing statement filed; upon order closing estate; or upon resignation with 15 days' written notice to interested persons, resignation effective upon delivery of assets to appointed and qualified successor representative. (Alaska Stat. § 13.16.290). May be removed for cause by petition of interested person on following grounds: (1) Best interests of estate, (2) intentional misrepresentation of material facts in appointment proceedings, (3) disregard of court order, (4) incapability of discharging duties; (5) mismanagement of estate; (6) failure to perform any duty of office. (Alaska Stat. § 13.16.295).

Inventory and Appraisal.

Inventory must be filed within three months after appointment (Alaska Stat. § 13.16.365). Copy must be sent to interested persons who requested it. (Alaska Stat. § 13.16.365). Supplemental inventory required. (Alaska Stat. § 13.16.375). Qualified and disinterested appraisers may be employed. (Alaska Stat. § 13.16.370).

General Powers and Duties.

Personal representative shall take control of decedent's property. (Alaska Stat. § 13.16.380). Same power as absolute owner except in trust for benefit of creditors and interested persons. (Alaska Stat. § 13.16.390). Transactions authorized, unless restricted or otherwise provided for in will, listed in Alaska Stat. § 13.16.410.

Notice of Appointment.

Within 30 days' of appointment personal representative must give information of appointment to heirs and devisees. (Alaska Stat. § 13.16.360).

Notice to Creditors.

Personal representative shall publish notice once a week for three consecutive weeks in newspaper of general circulation. Claims barred if not presented within four months of date of first publication. (Alaska Stat. § 13.16.450).

Presentation of Claims.

Written statement of claim indicating basis, name and address of claimant, and amount may be delivered or mailed to personal representative or statement of claim may be filed with clerk of court. (Alaska Stat. § 13.16.465). Must be presented within four months from date notice first published. (Alaska Stat. § 13.16.450).

Approval or Rejection of Claims.

Personal representative approves or rejects claim. (Alaska Stat. § 13.16.475). Claimant has 60 days from rejection to file allowance in court or commence proceeding against personal representative or claim barred. (Alaska Stat. § 13.16.475). Failure of personal representative to mail claimant notice of action on claim for 60 days after time for original presentation of claim has expired has effect of notice of allowance. (Alaska Stat. § 13.16.475).

Payment of Claims.

Personal representative will pay allowed claims four months from date of first publication of notice to creditors. (Alaska Stat. § 13.16.480).

Priorities.

If estate insufficient to pay all claims, paid in following order: (1) costs and expenses of administration; (2) reasonable funeral expenses; (3) debts and taxes with preference under federal law, past due child support payments; (4) reasonable and necessary medical and hospital expenses of last illness of decedent; (5) debts and taxes with preference under state law; (6) all other claims. (Alaska Stat. § 13.16.470).

Sales.

Personal representative may acquire or dispose of asset, including land, for cash or credit, at private or public sale. (Alaska Stat. § 13.16.410).

Actions by Representative.

Personal representative of decedent domiciled in this state at death has same standing to sue and be sued as decedent had immediately before death. (Alaska Stat. § 13.16.350).

Allowances.

See Alaska Stat. § 13.12.401-13.12.405.

Widow’s Quarantine.

None.

Final Accounting and Settlement.

Final accounting must include accounting of all cash and property transactions. (AK Probate Rule 12). Petition for settlement must state (a) estate fully administered, (b) all claims presented disposed of, (c) taxes and expenses of administration paid or provided for, (d) amount of compensation paid to personal representative and agents employed by her, (e) date of hearing on formal closing and any objections will be presented prior to hearing and (f) plan of distribution. (AK Probate Rule 12). (See also Alaska Stat. § 13.16.620, Alaska Stat. § 13.16.625, Alaska Stat. § 13.16.630, Alaska Stat. § 13.16.695.)

Liabilities.

Individually liable only if personally at fault. (Alaska Stat. § 13.16.485).

Compensation of Representative.

Personal representative entitled to reasonable compensation. (Alaska Stat. § 13.16.430). Customary fee $10-$20/hr. (Gudschinsky v. Hartill, 815 P.2d 851 [Alaska 1991]).

Small Estates.

When value of entire estate less liens and encumbrances does not exceed allowances, costs of administration, and reasonable and necessary medical and hospital expenses of last illness, personal representative, without giving notice to creditors, may immediately disburse and distribute estate to persons entitled to it and file closing statement. (Alaska Stat. § 13.16.690). To close small estate must file verified statement that (1) to best knowledge of personal representative, estate meets above requirements, (2) estate fully disbursed and distributed to those entitled, (3) copy of closing statement sent to all distributees and unpaid or non-barred creditors, and (4) full account in writing given to distributees. (Alaska Stat. § 13.16.695). Appointment of personal representative terminates one year after filing closing statement if no action pending. (A.S. Alaska Stat. § 13.16.695).

Foreign executors or administrators may file authenticated copies of appointment and official bond if no local administration. (Alaska Stat. § 13.21.030). Upon filing copies, foreign personal representative may exercise as to assets in this state all powers of local personal representative and may maintain actions subject to conditions imposed on nonresident parties generally. (Alaska Stat. § 13.21.035). Application for local administration of estate terminates powers of foreign personal representative. (Alaska Stat. § 13.21.040). Foreign personal representative may be allowed by court to act to preserve estate. (Alaska Stat. § 13.21.040). By filing copies or acting as personal representative in this state subjects her to personal jurisdiction of Alaska Courts. (Alaska Stat. § 13.21.055).

Uniform Anatomical Gift Act adopted. (Alaska Stat. § 13.50.010-.090).

13.11 FIDUCIARIES:

See topics 13.08 Executors and Administrators, and Trusts; also category 14 Family, topic 14.07 Guardian and Ward.

13.12 INTESTACY:

See topic 13.07 Descent and Distribution.

13.13 LIVING WILLS:

See topic 13.16 Wills.

13.14 PROOF OF CLAIMS:

See topic 13.08 Executors and Administrators; category 5 Civil Actions and Procedure, topic 5.17 Pleading.

13.15 TRUSTS:

Uniform Probate Code, including 1975 Official Amendments adopted. Several recent amendments affect trusts. See 2000 SLA c. 40. See also topic 13.16 Wills.

Kinds.

Testamentary trusts providing for settlement of estates of decedents without administration recognized with limitations. (Alaska Stat. § 13.36.005-.390, Alaska Stat. § 13.16.595). Trust powers of banks organized under Alaska Banking Code (06.05) and trust companies organized under state law (06.25) include those of fiscal and transfer agents, trustee under certain mortgages, deeds of trust and bonds, accept municipal and corporate trusts, married women's separate property, by court appointment as trustee for minors, insane, idiots, spendthrifts, drunkards, receivers in insolvency proceedings, executor or administrator of estates of decedents, and any legal trust regarding real and personal property, trusts and powers conferred by any body politic or domestic or foreign corporation; and trust companies may engage in certain limited banking privileges, deal in real estate, deal in and invest in securities, and other lawful trusts.

Creation.

By oral contract or course of conduct regarding personal property and by written contract or court order. Trustee of trust with principal place of administration in state under duty to register trust with court. (Alaska Stat. § 13.36.005). Registration outlined. (Alaska Stat. § 13.36.005 —.025).

Appointment of Trustees.

By trustor, by contract or by court order upon application. Trust protector and trust advisor authorized. (Alaska Stat. § 13.36.370, Alaska Stat. § 13.36.375).

Eligibility and Competency.

No statutory restrictions as to foreign and corporate trustees.

Qualification.

Bond not needed unless required by trust, beneficiaries or court. (Alaska Stat. § 13.36.085).

Removal.

Subject to removal by court for unfitness or violation of terms of trust.

General Powers and Duties.

To accept trusts mentioned in subhead Kinds, supra, and act as trustee subject to limitations of law and as to banks and trust companies under regulations of Department of Community and Economic Development. (Alaska Stat. § 06.05.180). Additionally trust companies have powers conveyed by general corporation laws of state. (Alaska Stat. § 06.26.050).

Sales of real property by trust company required within three years. (Alaska Stat. § 06.25.240). Generally requires court order, public auction, publication of notice, and confirmation where court has jurisdiction of trust. Sales of property conveyed by deeds of trust require public auction and 30 days public notice. (Alaska Stat. § 34.20.070-110).

Income and Principal.

Duties of trustees as to receipts, expenditures, apportionment of income and what constitutes principal. (Alaska Stat. § 13.38.200-13.38.980).

Investments in name of nominee allowed. (Alaska Stat. § 06.25.215). Investments by fiduciaries regulated. (Alaska Stat. § 06.26.250).

Securities in name of nominee allowed by statute. (Alaska Stat. § 06.05.197).

Accounting.

Uniform Trustee’s Accounting Act not adopted.

Uniform Common Trust Fund Act (adopted 1964). (Alaska Stat. § 06.35.010-050).

Uniform Principal and Income Act (1997, adopted 2003). (Alaska Stat. § 13.38.200-13.38.980). Added judicial control of discretionary powers (Alaska Stat. § 13.38.220), conversion to unitrust (Alaska Stat. § 13.38.300-13.38.410), charitable trust election (Alaska Stat. § 13.38.440-13.38.490).

Gifts to Minors.

See category 14 Family, topic 14.10 Infants.

Uniform Fiduciaries Act not adopted.

Uniform Simplification of Fiduciary Security Transfers Act not adopted.

Accumulations.

No statutory provisions.

Perpetuities.

See category 21 Property, topic 21.16 Real Property.

Pour Over Trusts.

See topic 13.16 Wills.

13.16 WILLS:

Uniform Probate Code and 1975 Official Amendments adopted with modifications. (Alaska Stat. § 13.06.005-13.36.100).

Execution.

Must be over 18 years old. (Alaska Stat. § 13.12.501). Must be in writing signed by testator or at testator's direction and witnessed by two people. (Alaska Stat. § 13.12.502). Interested witnesses allowed. (Alaska Stat. § 13.12.505).

Holographic Wills.

Recognized as valid, whether or not witnessed, if signature and material provisions are in handwriting of testator. (Alaska Stat. § 13.12.502; 504).

Revocation.

By subsequent will; by being burned, torn, canceled, obliterated or destroyed with intent and for purpose of revoking it. (Alaska Stat. § 13.12.507). Divorce or annulment after execution revokes any disposition to former spouse. (Alaska Stat. § 13.12.802).

Revival.

Upon revocation of second will which revoked first will, first will only revives if testator's contemporary or subsequent declarations so indicate. (Alaska Stat. § 13.12.509).

Simultaneous Death.

See topic 13.05 Death, subhead Survivorship.

Testamentary Trusts.

See topic 13.15 Trusts.

Unclaimed Legacies.

See category 21 Property, topic 21.01 Absentees.

Uniform Anatomical Gift Act.

Repealed 2004. See replacement Uniform Health Care Decisions Act. (Alaska Stat. § 13.52.010). Donor registry program established 2004. (Alaska Stat. § 13.15.100-.190).

14 FAMILY

14.01 ADOPTION:

Any person may be adopted. (Alaska Stat. § 25.23.010).

Adoption may be by husband and wife together; unmarried adult, including father or mother of person to be adopted; married person without other spouse joining if person to be adopted is not his spouse and if: (1) Other spouse is parent of person to be adopted and consents, or (2) need for consent is excused by court for reason of unexplained absence, etc., or (3) spouses are legally separated. (Alaska Stat. § 25.23.020).

Consent Required.

Written consent to adoption must be executed by: mother of minor; father of minor if married to mother at or after conception, or if minor is already adopted or otherwise legitimated by him under Alaska law; anyone entitled to custody or empowered to consent; court having custody jurisdiction if no other legal guardian is empowered to consent; minor over ten unless court dispenses with minor's consent; spouse of minor to be adopted; any adult to be adopted and his spouse or guardian, if adult is incapacitated. (Alaska Stat. § 25.23.040).

Evidence of Consent.

Consent shall be executed in presence of court or person authorized to take acknowledgments. Consent must state person has right to withdraw consent as provided in A.S. Alaska Stat. § 25.23.070 and person consenting must acknowledge receipt of copy of consent form. Consent operates as power of attorney and is effective upon delivery of child to adoptive parent. (Alaska Stat. § 25.23.060).

Consent and Notice Not Required.

(1) From parent who has abandoned child without providing means of child's identification, or for period of six months under Alaska Stat. § 47.10.080(c) (B); (2) from parent of child which has been in another's custody for a year and who has failed unjustifiably, as by indigency, to communicate with or provide care and support for child as required by law or judicial decree; (3) from father of minor unless married to mother at or after conception or if minor is his adopted or otherwise legitimated child under Alaska law; (4) from parent who has relinquished right to consent or had it terminated by court order; (5) from parent judicially declared mentally incompetent and court dispenses with consent; (6) from parent of child over 19 years of age and court dispenses with consent; (7) from any guardian failing to respond in writing within 60 days to request or who unreasonably withholds consent; spouse of person to be adopted if consent requirement waived by court. (Alaska Stat. § 25.23.050).

Conditions Precedent.

Before final decree of adoption, other than for stepchild, minor must have lived in adoptive home and qualified person designated by court have had opportunity to investigate adoptive home. (Alaska Stat. § 25.23.110).

Jurisdiction and Venue.

In superior court in district where, at time of filing or granting petition, petitioner resides or is in military service or where agency with custody of child is located, or the person to be adopted resides. (Alaska Stat. § 25.23.030).

Petition.

Must be signed and verified by petitioner, filed with clerk of court and contain personal data about petitioner and person to be adopted. Should also include birth certificate, required consents, relinquishments and termination orders. (Alaska Stat. § 25.23.080).

Proceedings.

Commenced by filing petition and financial report of petitioner showing expenses incurred in connection with adoption. Prior to hearing date notice must be given to people whose consent required, and affidavit evidencing reasonable investigation has been made by petitioner or Department of Health and Social Services to notify necessary people. Investigation of adoptive home and conditions and antecedents of minor must be made by person designated by court, and report of investigation with recommendation as to adoption must be filed prior to hearing. Investigation and report may be waived by court for cause. Presence of petitioner and person to be adopted not required at hearing. (Alaska Stat. § 25.23.120).

Name.

New birth certificate in adopted name may be requested within 30 days after final adoption decree. (Alaska Stat. § 25.23.170).

Effect of Adoption.

Except with respect to a spouse of petitioner and relatives of spouse, adoption relieves natural parents of parental rights and responsibilities and terminates all legal relationships between adopted person and his relatives, including inheritance rights unless otherwise provided. Creates parent-child relationship between petitioner and adopted person for all purposes including inheritance and applicability of documents etc., unless expressly otherwise provided. (Alaska Stat. § 25.23.130).

Setting Aside Adoption.

Parent-child relationship may be terminated and right to receive notice of adoption hearings relinquished by writing signed by parent with a copy given to parent, in presence of agency taking custody of child. Parent has right of withdrawal within ten days of signing or of birth of child, otherwise relationship may be terminated: (1) Where petitioner has had custody for two years and parent has received notice of adoption proceeding and court finds granting of adoption in best interest of child; (2) by court order under 47.10 proceeding for abandonment or if parents unreasonably withhold consent. Petition for termination of parent-child relationship may be made by either parent if termination is sought with respect to other parent or by petitioner for adoption by an agency, or by any other person with legitimate interest. Notice of petition hearing must be given. (Alaska Stat. § 25.23.180).

14.02 ALIMONY:

See topic 14.06 Divorce.

14.03 COMMUNITY PROPERTY:

Alaska enacted Alaska Community Property Act which became effective May 22, 1998. (Alaska Stat. § 34.77.010-.995).

Uniform Disposition of Community Property Rights at Death Act (adopted 1984). (Alaska Stat. § 13.41.005–13.41.055).

14.04 DESERTION:

See topics 14.06 Divorce, 14.09 Husband and Wife.

14.05 DISSOLUTION OF MARRIAGE:

See topic 14.06 Divorce.

14.06 DIVORCE:

Uniform Marriage and Divorce Act not adopted. Divorce is governed by 25.24.

Jurisdiction of divorce actions is in the superior court.

Grounds for divorce are: (1) Failure to consummate at time of marriage and continuing at commencement of action; (2) adultery; (3) conviction of felony; (4) willful desertion for one year; (5) cruelty impairing health or endangering life or personal indignities rendering life burdensome; (6) incompatibility of temperament; (7) drunkenness, habitual and gross, contracted after marriage, and continuing for one year before commencement of action; (8) incurable mental illness when spouse confined to institution for at least 18 months preceding commencement of action; (9) addiction after marriage to habitual use of drugs. (Alaska Stat. § 25.24.050). Husband and wife may together petition court to dissolution of marriage on ground of incompatibility if they have agreed on custody, support and property rights. Either spouse may petition separately on ground of incompatibility if other spouse's whereabouts are unknown and spouse cannot be served personally within or without state. (Alaska Stat. § 25.24.200).

Legal Separation.

Action for legal separation available. (Alaska Stat. § 25.24.400 to Alaska Stat. § 25.24.460). Also, in action for divorce, spouse may acquire separate residence or domicile without reference to misconduct or consent of other spouse. (Alaska Stat. § 25.24.110).

Residence Requirements.

When a marriage has been solemnized in state and plaintiff is a resident of state, an action to declare marriage void may be brought at any time. If marriage has not been solemnized in state, action may be maintained if one spouse resident. Residence is defined as physically present 30 days with intent to remain indefinitely. (Alaska Stat. § 01.10.055).

Final decree is entered immediately on determination of issue. Time for hearing governed by Rule 40 Civ. R.P.

Child support is set by formula in Alaska Civil Rule 90.3.

Child Custody.

Uniform Child Custody Jurisdiction and Enforcement Act adopted. (Alaska Stat. § 25.30.300 to Alaska Stat. § 25.30.910).

Community Property.

Alaska Community Property Act became effective May 22, 1998, wherein husband and wife domiciled in Alaska may elect to classify any or all of their property as community property. (Alaska Stat. § 34.77.010-34.77.995). Uniform Disposition of Community Property Rights at Death Act (adopted 1984). (Alaska Stat. § 13.41.005 to Alaska Stat. § 13.41.055). See also 2000 SLA c. 2.

Support and Maintenance.

Uniform Interstate Family Support Act (adopted 1995). (Alaska Stat. § 25.25.101-25.25.903). Uniform Reciprocal Enforcement of Support Act repealed.

Alimony, Maintenance and Custody of Children.

Pending action, court may make order: For one spouse to pay other spouse money to prosecute or defend action; for care, custody, and maintenance of minor children; for freedom of one spouse from other spouse's control during pendency of action; restraining either party or both parties from disposing of property pending action. (Alaska Stat. § 25.24.140). If marriage is declared void or dissolved, court may further decree: For payment by either or both parties of such amount of money, in gross or installments, as may be just and proper for parties to contribute for support and maintenance of children; for recovery by one party from other, without regard to which party is at fault, amount of money, in gross or installments, as may be just and proper for such party to contribute to maintenance of other; for delivery to either of their personal property in other's possession or control at time of giving judgment; to change name of one of parties when he is not party in fault; and for division between parties of joint property of parties, or separate property of each, in such manner as may be just. (Alaska Stat. § 25.24.160).

Division of Property of Spouses.

Essentially marital property state in which property obtained during marriage divided by court. Court may for equity divide property obtained by either spouse prior to marriage. (Alaska Stat. § 25.24.160). However, Alaska enacted Alaska Community Property Act, effective May 22, 1998, which allows husband and wife domiciled in Alaska to classify any or all of their property as community property. (Alaska Stat. § 34.77.010-34.77.995).

Change of name allowed. (Alaska Stat. § 25.24.165; Alaska Stat. § 09.55.010; Rule 84 Civ. R.P.).

Custody of Children.

Court may award shared custody of child if in best interest of child. (Alaska Stat. § 25.20.060). Court should consider best interest of child including emotional needs of child, child's preference, capability of parent, and other factors. (Alaska Stat. § 25.24.150). Court may appoint guardian ad litem to protect interest of child. (Alaska Stat. § 25.24.310).

Foreign Divorce.

Uniform Divorce Recognition Act not adopted.

Remarriage.

No restrictions. (Alaska Stat. § 25.24.180).

Uniform Child Custody Jurisdiction Act (adopted 1977). (Alaska Stat. § 25.30.300-.910).

14.07 [RESERVED]

14.08 GUARDIAN AND WARD:

Uniform Probate Code, including 1975 Official Amendments, adopted. See topic Wills.

Jurisdiction and Venue.

For minor child, in Superior Court pursuant to Uniform Probate Code. For persons under disability in Superior Court at or near place of residence. (Alaska Stat. § 13.26.100). When required for unmarried minor child, if all parental rights of custody have been terminated or suspended by circumstances or prior court order. (Alaska Stat. § 13.26.045). For person under disability, only when necessary to promote and protect well-being of person, and only to extent necessitated by person's actual mental and physical limitation. (Alaska Stat. § 13.26.090).

Selection of Guardian.

For minor child, pursuant to Uniform Probate Code. (Alaska Stat. § 13.26.030-.070). For persons under disability, pursuant to filing petition and subsequent investigation and hearing. (Alaska Stat. § 13.26.105-.116).

Appointment of Guardian.

For minor child, by Judge of Superior Court, pursuant to Uniform Probate Code, preference given to adult family members. (Alaska Stat. § 13.26.030-.065). For person under disability, by Superior Court order, specifying basis for order and specific authority and duties of guardian-ward relationship. (Alaska Stat. § 13.26.116).

Status of Ward.

For minor child, ward has parent-child relationship with guardian. (Alaska Stat. § 13.26.070). For person under disability, ward retains all civil and legal rights except those limited by court or granted to guardian by court.

Powers and Duties.

For minor child: (1) Take reasonable care of ward's personal effects, (2) exercise due care over ward's finances, (3) provide for ward's education and medical requirements, and (4) report on condition of ward and ward's estate as required by court. (Alaska Stat. § 13.26.070). For person under disability, general duty to encourage ward's participation in his own affairs to extent possible. Partial guardian has only duties granted by court. Full guardian has relationship of parent to minor child except for liability for care and maintenance of ward and liability based solely on guardianship for harm caused by ward. Also series of specific limitations concerning civil rights. (Alaska Stat. § 13.26.150).

Securities in Name of Nominee.

No specific provision. See category 13 Estates and Trusts, topic 13.15 Trusts, subhead Securities in Name of Nominee.

Termination of Guardianship.

For minor child, termination upon death, resignation, removal of guardian or upon minor's death, adoption, marriage, or attainment of majority. Resignation must be approved by court. (Alaska Stat. § 13.26.075). For person under disability, by death of guardian or ward, determination of incapacity of guardian, removal of guardian by court, resignation of guardian, by term or period specified by court order establishing guardianship. (Alaska Stat. § 13.26.125).

Special Provisions.

For minor child, court shall appoint person nominated by minor unless not in minor's best interest. (Alaska Stat. § 13.26.055). For person under disability, nonbinding priority given to nominee of ward, spouse, child, or other relatives or friends of ward, private association with guardianship program, or public guardian. (Alaska Stat. § 13.26.145).

Public Guardian.

Public administrator serves as public guardian. Court may order public guardian to act as guardian for specific ward if no private guardian is available. Public guardian has duty to find private guardian if possible. (Alaska Stat. § 13.26.380).

Private Professional Guardian.

License required. (Alaska Stat. § 08.26.010).

Foreign Guardians.

See subhead Selection of Guardian, supra.

Gifts to Minors.

Statutory provisions for gifts of securities to minors providing for custodian, registration, compensation of custodian, liability of custodian, and appointment of successor by court not exclusive method. (Alaska Stat. § 13.46.010-.999). See topic 14.10 Infants.

Testamentary Guardians.

Father, or mother if divorced and awarded custody, may by last will in writing appoint guardian for his child, including after born child, for its minority or a lesser time. Same powers, duties and qualifications as for other guardians except no residence or ownership requirement. (Alaska Stat. § 13.26.035, Alaska Stat. § 13.26.075). For person under disability, parent or spouse may appoint guardian by will and grant all rights held by grantor. (Alaska Stat. § 13.26.095).

Uniform Fiduciaries Act not adopted.

Uniform Simplification of Fiduciary Security Transfers Act not adopted.

14.09 HUSBAND AND WIFE:

No civil disabilities are recognized as to a married person which are not recognized as to other spouse. (Alaska Stat. § 25.15.110).

Separate Property.

Each married person may manage, sell, convey or devise that person's property and pecuniary rights, and these rights acquired by gift, devise or inheritance not subject to debts or contracts of other spouse. (Alaska Stat. § 25.15.060).

Homestead Allowance.

(Alaska Stat. § 09.38.010).

Contracts.

A married person may make contracts, which may be enforced by or against person as if unmarried. (Alaska Stat. § 25.15.100).

Liability for Debts of Spouse.

Neither spouse has such interest in the property of the other as to make his or her property liable in any way for contracts or liabilities of the other. (Alaska Stat. § 25.15.010).

Antenuptial Debts.

Neither a husband nor wife is liable for debts of the other which were incurred before marriage. (Alaska Stat. § 25.15.050).

Agency.

Either spouse may appoint other as attorney in fact. (Alaska Stat. § 25.15.040).

Conveyances, etc.

Either spouse may convey his real property, by separate deed, as though unmarried.

(Alaska Stat. § 25.15.060).

Either spouse may convey, transfer, or execute liens to or in favor of the other, to the same extent as they may to third persons. (Alaska Stat. § 25.15.030).

Tenancy by the Entirety.

Husband and wife who acquire real property hold as tenants by entirety unless expressly declared otherwise. (Alaska Stat. § 34.15.110 and Alaska Stat. § 34.15.150).

Community Property.

Effective May 22, 1998, Alaska enacted Alaska Community Property Act. (Alaska Stat. § 34.77.010-34.77.995). Upon death of married person, who held real or personal property that was acquired as or became, and remained, community property under laws of this or another jurisdiction, or was acquired with rents, issues, or income of, proceeds from or in exchange for that community property, one-half of this property goes to surviving spouse while other half is property of decedent subject to testamentary disposition. (Alaska Stat. § 13.41.005-13.41.015).

Desertion.

Parent, guardian or other person legally charged with care of child under ten years of age commits crime, endangering welfare of minor, by intentionally deserting child under circumstances creating substantial risk of physical injury to child. (Alaska Stat. § 11.51.100).

Displaced Homemakers Program.

Person who worked as homemaker for at least three years, faces significant reduction in income or support and has difficulty in finding employment is eligible for assistance. (Alaska Stat. § 47.90.010-.070).

Domestic Violence.

Person subjected to domestic violence may petition superior or district court for injunctive relief. (Alaska Stat. § 18.66.100-.180).

Uniform Interstate Family Support Act (adopted 1995). (Alaska Stat. § 25.25.101-25.25.903).

Uniform Reciprocal Enforcement of Support Act repealed.

Uniform Child Custody Jurisdiction Act (adopted 1977). (Alaska Stat. § 25.30.300-.910).

14.10 INFANTS:

Age of majority 18 both sexes. (Alaska Stat. § 25.20.010). Person emancipated by lawful marriage or upon reaching marriageable age of consent. (Alaska Stat. § 25.20.020). Person under 21 years may not knowingly consume, possess or control alcoholic beverages except those furnished off licensed premises by parent to child, guardian to ward or spouse to legal spouse. (Alaska Stat. § 04.16.051).

Disabilities.

May be removed by 16 year old living separate and apart from parents or guardian if capable of self-support and financial management upon consent of parent through petition of court. (Alaska Stat. § 09.55.590).

Parental Responsibility.

Liable for malicious or willful destruction of property by unemancipated minor under age of 18 not to exceed $15,000 and court costs, except if insurance then up to $25,000. (Alaska Stat. § 09.65.255).

May waive child's negligence claim against sports or recreation provider. (Alaska Stat. § 09.65.292).

Commits crime of child endangerment by creating substantial risk of injury, leaving with improper custodian, transporting in vehicle while under influence. (Alaska Stat. § 11.51.100).

Infants may commence and prosecute actions either by guardian, guardian ad litem or next friend. (Rule 17[c] Civ. R.P.). Child support, visitation rights and custody are covered in 09.55, 11.51, 25.25 and 47.23.

Infants who have reached age 16 are considered competent to receive and give full acquittance and discharge for insurance payments not exceeding $3,000. (Alaska Stat. § 21.42.290).

Support of Minor.

Crime of criminal nonsupport when person in legal charge of child under 18 years fails to support child. (Alaska Stat. § 11.51.120). Crime of aiding nonpayment of child support. (Alaska Stat. § 11.51.121). Support orders enforced by Child Support Services Agency, Dept. of Revenue (Alaska Stat. § 25.27.010); list of obligors maintained (Alaska Stat. § 25.27.246).

Adoption.

See topic 14.01 Adoption.

Gifts of Securities to Minors Act (Asso. of Stock Exchange Firms form) adopted. (Alaska Stat. § 45.60.010).

Revised Uniform Gifts to Minors Act (adopted 1967). (13.46). Age of majority under Act is 18.

Uniform Securities Ownership by Minors Act not adopted.

Torts of Minors.

See category 5 Civil Actions and Procedure, topic 5.09 Damages.

14.11 MARRIAGE:

Civil contract, persons aged 18 or older. (Alaska Stat. § 25.05.011).

Consent Required.

Persons between 16 and 18 require written, verified consent of parents or guardians or of parent having actual care, custody and control of minor, before license issued. Persons between 14 and 18 may receive court approval if court finds that marriage is in best interest of minor and parents have consented or parental nonconsent unreasonable. (Alaska Stat. § 25.05.171).

License Required.

Before issuance each contracting party shall, under oath, state that contemplated marriage meets requirements of law, giving name, relationship if any, residence, occupation, and age of each party; naming guardians of any party under legal age for marriage; and describing any prior marriage of either party, and manner of its dissolution. Application for license must be

filed three days before issuance thereof. (Alaska Stat. § 25.05.091). In case where three-day waiting period would result in undue hardship, magistrate or marriage commissioner may waive three-day requirement. (Alaska Stat. § 25.05.161).

Ceremonial Marriage.

No waiting period required between issuance of license and solemnization of marriage. Marriages may be solemnized by minister or priest of any church in state anywhere in state; by marriage officer appointed by presiding judge of superior court; by any judicial officer of state in his jurisdiction; or officer of Salvation Army commissioned in state. (Alaska Stat. § 25.05.261[a]). Marriage solemnized before person professing to be minister, priest or judicial officer is not void, nor is validity affected if persons married or either of them believes they have been lawfully married (Alaska Stat. § 25.05.281), and licensed marriage solemnized before religious organization according to established ritual is valid (Alaska Stat. § 25.05.261[b]).

Reports of Marriages.

Reports of licenses issued and marriage ceremonies performed recorded with local registrar of vital statistics within seven days. (Alaska Stat. § 25.05.321; Alaska Stat. § 18.50.270).

Common Law Marriages.

Not recognized, if attempted in Alaska, since 1917. (364 P.2d 60; 555 F.2d 737).

Proxy Marriages.

Not authorized.

Marriages by Written Contract.

Not authorized.

Same Sex Marriage.

Not recognized. (Alaska Stat. § 25.05.013).

Prohibited marriages are: (1) When either party thereto has a husband or wife living at the time of marriage; (2) when the parties thereto are related to each other within and not including the fourth degree of consanguinity, whether of the whole or half blood, computed according to rules of the civil law. Such marriages are void. (Alaska Stat. § 25.05.021).

When either party to a marriage is incapable of consenting for want of legal age or sufficient understanding, or when consent of either party is obtained by force or fraud, or failure to consummate, marriage is voidable, but only at suit of party laboring under disability or upon whom force of fraud is imposed. Such marriages are voidable. (Alaska Stat. § 25.05.031).

Illegitimate children are legitimized by subsequent marriage of parents, written acknowledgment of paternity, or court decree of paternity. (Alaska Stat. § 25.20.050).

Foreign Marriages.

No statutory provisions.

Residence Requirements.

When marriage solemnized and plaintiff is resident of state, action to declare marriage void may be brought any time. If marriage not solemnized in state, residence of other spouse inures to plaintiff and action can be instituted if other spouse is, at its commencement, qualified as to residence to institute similar action. (Alaska Stat. § 25.24.080-.090).

14.12 MARRIED WOMEN:

See topics 14.09 Husband and Wife, Marriage; categories 5 Civil Actions and Procedure, topic Evidence, subhead Witnesses; Debtor and Creditor, topic Homesteads; Documents and Records, topic Acknowledgments; Estates and Trusts, topics Executors and Administrators, Wills; Property, topic Dower.

15 HEALTH

15.01 ABORTIONS:

Availability regulated. (Alaska Stat. § 18.16.010). Informed consent required. (Alaska Stat. § 18.16.060). Consent from parent, guardian or court required for minor under age 17, unmarried and unemancipated, unless authorized by Court. (Alaska Stat. § 18.16.020, Alaska Stat. § 18.16.030). Information web site: http://www.hss.state.ak.us/dph/wcfh/informedconsent/default.htm. (Alaska Stat. § 18.05.032).

15.02 ADMINISTRATION:

Centralized licensing and administration of health care facilities by Department of Health and Social Services. (47.32). Commissioner of Health and Social Services administers state programs of public health and social services. (Alaska Stat. § 44.29.020).

15.0315.04 [RESERVED]

15.05 FOOD, DRUGS, DEVICES AND COSMETICS:

Dept. of Health and Social Services administers and enforces standards regarding food and aquatic farm products (Alaska Stat. § 17.20.010-.075), drugs (Alaska Stat. § 17.20.080-.135) and cosmetics (Alaska Stat. § 17.20.140-.155). Prohibited acts include manufacture or sale of adulterated or misbranded food, drugs, devices or cosmetics. (Alaska Stat. § 17.20.290). Manufacture, distribution, prescription and dispensing of controlled substances regulated. (Alaska Stat. § 17.30.020-.900). Medical use of marijuana privileged but with restrictions. (Alaska Stat. § 17.37.030-.040).

15.06 [RESERVED]

15.07 HEALTH INSURANCE BENEFITS:

Requirements for health insurance policies set out. (Alaska Stat. § 21.51.010-.500; Alaska Stat. § 21.54.010-.500).

15.08 [RESERVED]

15.09 LIVING WILLS:

Uniform Health Care Decisions Act (adopted 2004). (Alaska Stat. § 13.52.010-.395).

15.10 ORGAN DONATIONS:

Uniform Anatomical Gift Act (repealed 2004). Donor registry established. (Alaska Stat. § 13.50.100). See Uniform Health Care Decisions Act. (Alaska Stat. § 13.52.010).

15.1115.12 [RESERVED]

15.13 SMOKING REGULATIONS:

See category 12 Environment, topic 12.01 Environmental Regulation.

16 INSURANCE

16.01 INSURANCE COMPANIES:

Regulated by AS, Title 21.

Supervision by Division of Insurance, Dept. of Commerce, Community and Economic Development. Contact information: http://www.commerce.state.ak.us/insurance/.

Rates regulated by director under provisions of AS 21.39.

Annual audit reports must be filed with director. (Alaska Stat. § 21.09.200).

Policies.

Forms to be filed and approved. (Alaska Stat. § 21.42.120). Standard provisions required (Alaska Stat. § 21.42.140) for particular kinds of insurance: Life (Alaska Stat. § 21.45.020); loans of cash value (Alaska Stat. § 21.45.080); group life (Alaska Stat. § 21.48.010); disability (Alaska Stat. § 21.51.020); group and blanket disability (Alaska Stat. § 21.54.010); credit life and disability (Alaska Stat. § 21.57.030).

Discrimination.

Unfair discrimination defined and prohibited (Alaska Stat. § 21.36.090) and exceptions stated (Alaska Stat. § 21.36.110).

Rebates.

Prohibited to property, casualty and surety insurers. (Alaska Stat. § 21.36.120).

Liens.

During pendency of delinquency proceeding liens obtained within four months of commencement are void. (Alaska Stat. § 21.78.190).

Agents and Brokers.

Agents, brokers, solicitors, and adjusters must be licensed. (Alaska Stat. § 21.27.010). Issuance and renewal of licenses controlled to prevent untrustworthy and incompetent licensees. (Alaska Stat. § 21.27.020).

Process Agent.

Appointment of director required (Alaska Stat. § 21.09.180) and name and address of person to whom process served on director is to be forwarded (Alaska Stat. § 21.09.180[c]).

Investments of domestic insurers are regulated (21.21).

Foreign Insurers.

Certificate of authority required to transact insurance (Alaska Stat. § 21.09.010) with stated exceptions relating to liquidation, contracts without jurisdiction, surplus lines and reinsurance (Alaska Stat. § 21.09.020). Requirements provided as to name (Alaska Stat. § 21.09.050), general eligibility (Alaska Stat. § 21.09.040), capital funds (Alaska Stat. § 21.09.070), deposit of $300,000 (Alaska Stat. § 21.09.090, Alaska Stat. § 21.24.030), and submissions for certificate of authority (Alaska Stat. § 21.09.110).

Retaliatory Laws.

If laws of another state or foreign country impose taxes, licenses, fees, fines, penalties, deposit requirements, prohibitions, or restrictions upon Alaska insurers in excess of those imposed on similar insurers, director shall impose them on insurers of that state or country doing or seeking to do business in this state. (Alaska Stat. § 21.09.270).

Premium Tax.

Imposed at rates of 2.7% for domestic and foreign insurers except hospital and medical service corporations; 6% of gross premiums less claims paid for hospital and medical service corporations. (Alaska Stat. § 21.09.210).

Privilege Tax.

Premium tax is in lieu of all other franchise or privilege taxes or fees measured by income of insurer. (Alaska Stat. § 21.09.210).

Direct Actions Against Insurer.

See category 23 Transportation, topic 23.01 Motor Vehicles, subhead Direct Actions.

Uniform Insurers Liquidation Act adopted. (2l.78.200).

Uniform Unauthorized Insurers Process Act not adopted.

Unauthorized Insurers.

21.33.011-21.33.910 subjects certain insurers to jurisdiction of director on proceedings before director and courts in suits by state, insureds or beneficiaries on insurance contracts.

Viatical Settlements regulated. (Alaska Stat. § 21.89.110).

Medical Indemnity Corp.

Repealed.

16.02 SURETY AND GUARANTY COMPANIES:

Accepted as sureties on bonds and undertakings if they have complied with federal and state statutes.

17 INTELLECTUAL PROPERTY

17.01 TRADEMARKS AND TRADENAMES:

Person who adopts and uses trademark in state may file for registration with Alaska Department of Community and Economic Development. Filing fee is $50. Certificate of registration is issued for five years and may be renewed for five year periods at $50 or assigned at $25. (Alaska Stat. § 45.50.010-.205). Seal for authentic native handicrafts also allowed. (Alaska Stat. § 45.65.010).

What May Be Used.

Trademark is any word, name, symbol, or device but may not consist of immoral or deceptive or scandalous matter, flags of U.S. states or foreign countries, living persons (unless consent by such person), or similar trademark registered to another or mark merely descriptive or deceptively misdescriptive of applicant's goods or primarily surname or primarily geographically descriptive or deceptively misdescriptive. (Alaska Stat. § 45.50.010).

Registration.

Anyone who adopts and uses a trademark in state may file with Department of Community and Economic Development on form supplied together with facsimile or specimen of trademark in triplicate. Fee $50. (Alaska Stat. § 45.50.020-.030).

Assignment.

Must be in writing and recorded with Department of Community and Economic Development upon payment of $25 fee. (Alaska Stat. § 45.50.120).

Infringement.

See subhead Protection Afforded, infra.

Protection Afforded.

Registrant may sue to enjoin infringement and may in certain cases recover damages or profits derived from misuse of trademark. (Alaska Stat. § 45.50.170-.180).

Resale Price Agreements.

No statutory provision.

Tradenames.

No statutory material.

Logs.

Brands may be registered with Department of Natural Resources at prescribed fee, subject to five-year term renewals. (Alaska Stat. § 45.50.210-.325).

17.02 TRADE SECRETS:

Alaska Uniform Trade Secrets Act (adopted 1988; 1985 uniform act amendments not adopted). (Alaska Stat. § 45.50.910-.945).

18 LEGAL PROFESSION

18.01 ATTORNEYS AND COUNSELORS:

Alaska Bar Association created by Alaska Integrated Bar Act. (Alaska Stat. § 08.08.010-08.08.250). Only active members of Alaska Bar may engage in private practice of law.

Admission on Examination.

Bar examinations shall be held in months of Feb. and July of every calendar year in principal cities in state under supervision of Board of Governors.

Applicant for admission on examination: (a) Must be graduate of law school approved or accredited by Council of Legal Education of ABA or Association of American Law Schools when applicant entered or graduated or be person who has not graduated from accredited law school but who has been licensed to practice law in one or more U.S. jurisdictions for five years since his admission; (b) has attained age of 18 years; (c) is of good moral character; (d) must have passed Alaska Bar Examination, and date for examination shall be at least 120 days after application for admission is made. (Rules 2, 3, Alaska Bar Rules). Examination is two and one half days, includes Multi-State Bar Examination (recent scores from other jurisdictions not transferable) and essay exam on Alaska law and Alaska practicum. Attendance at Ethics CLE also required. Multistate Professional Responsibility Exam administered separately also required. Contact Alaska Bar Association, P.O. Box 100279, Anchorage, AK 99510.

Law Clerks.

One may register as law clerk to qualify as general law applicant without completing law school by presenting proof of bachelor's degree and completion of first year of law school. Law clerk must obtain regular and full-time employment with Alaska judge or attorney, have tutor and meet other specified study requirements. (Alaska Stat. § 08.08.207).

Admission Pro Hac Vice.

Member of bar in good standing in other jurisdictions may be entitled to appear in courts of Alaska under rules prescribed by court rule; requires resident associate. (Rule 81, Civ. R.P.).

Liabilities.

See category 5 Civil Actions and Procedure, topic 5.08 Costs.

Compensation and Lien Therefor.

Attorney has lien for his compensation. (Alaska Stat. § 34.35.430). As to attorneys' fees allowed by court, see Rule 82, Civ. R.P.

Discipline.

Attorney may be disbarred or suspended for any violation of standards of Code of Ethics of American Bar Association, or for any other reasons enumerated by Rules of Board of Governors. Upon conviction of serious crime attorney suspended by court until final disposition of disciplinary proceedings. (Rule 26, Alaska Bar Rules).

Licenses.

Annual license fee fixed by Board of Governors.

Unauthorized Practice.

Any person not active member of Alaska Bar who engages in or represents himself as entitled to engage in private practice of law in Alaska, except as authorized by Bar Act, is guilty of misdemeanor and upon conviction shall be punished by fine of not more than $5,000 or imprisonment for not more than one year, or by both fine and imprisonment. (Alaska Stat. § 08.08.230).

Contact with individual about representation within 45 days of accident involving intrastate air carrier precluded; civil penalty up to $10,000 per violation. (Alaska Stat. § 02.40.30).

Professional Corporation.

See category 2 Business Organizations, topic 2.03 Corporations, subhead Professional Corporations.

Attorney Ethics.

American Bar Association Model Rules of Professional Conduct not adopted. See Alaska Code of Professional Responsibility, Code of Judicial Conduct.

19 MINERAL, WATER AND FISHING RIGHTS

19.00A FISHING RIGHTS:

Dept. of Fish and Game manages all fish, game and aquatic plant resource. (Alaska Stat. § 16.05.050). For fisheries and fishing regulations, see Alaska Stat. § 16.10.010-.800. Sport fishing is licensed. (Alaska Stat. § 16.05.330). Subsistence use and allocation of fish is regulated. (Alaska Stat. § 16.05.258). Commercial fishing requires entry permit. (Alaska Stat. § 16.43.010-.990).

Misdemeanor to introduce nonindigenous fish into state water. (Alaska Stat. § 16.35.210).

19.01 MINES AND MINERALS:

Department of Natural Resources, Division of Mines, in charge of all matters affecting exploration, development and mining of mineral resources of State, collection and dissemination of mining information and administration of laws respecting mining. (Alaska Stat. § 27.05.010).

Department may inspect all mines, and machinery and appliances used therein, with view to health and safety of miners. (Alaska Stat. § 27.20.021).

For supplement to United States laws relating to location and holding of mining claims, see Alaska Stat. § 27.10.010; Alaska Stat. § 38.05.200.

See also category 21 Property, topic 21.15 Powers of Attorney, subhead Adverse Claims to Mining Lands.

Grub stake agreements must be in writing subscribed by parties, and recorded in recording district wherein locations are made. Parties and duration must be stated. (Alaska Stat. § 27.10.020).

Mining Tax.

See category 22 Taxation, topic 22.12A Mines, Minerals and Fisheries Taxes, subhead Mining Tax.

Incentive Clause.

All new mining operations exempted from mining tax for 3½ years from date production begins. (Alaska Stat. § 43.65.010).

See also category 2 Business Organizations, topic 2.01 Agency.

Oil and Gas Leases.

Type of competitive bidding chosen by Commissioner. Essentially bids will be cash bonus with fixed royalty of at least 12½% or share of net profit, or both. (Alaska Stat. § 38.05.180). Gas Pipeline Financing Authority created. (44.82). If oil or gas is extracted from well by person without right but who asserts claim of right in good faith or who acts under honest belief, damages are value of oil and gas at time of extraction, without interest. (Alaska Stat. § 31.30.010). Lease of rights-of-way over state land for transportation of oil and gas granted noncompetitively by commissioner. (Alaska Stat. § 38.05.185-.275). Prospecting permits limited to 300,000 acres in aggregate. (Alaska Stat. § 38.05.250).

Surface Mining of Coal.

State program enacted to regulate coal surface mining under standards of federal law. (Alaska Stat. § 27.21.230).

20 MORTGAGES

20.01 CHATTEL MORTGAGES:

Uniform Commercial Code adopted. (Alaska Stat. § 45.01.101). Note: Effective July 1, 2001, 45.09 is repealed in its entirety and recodified with modifications at Alaska Stat. § 45.29.101-.709. See category 3 Business Regulation and Commerce, topic 3.09 Commercial Code.

What May Be Mortgaged.

See U.C.C., Article 9; accounts etc.; consumer goods; contract rights; equipment; farm products; general intangibles; inventory; proceeds (Alaska Stat. § 45.29.102).

After-acquired Property.

See U.C.C. (Alaska Stat. § 45.29.204).

Floating Stock.

See U.C.C.

Future Advances.

See U.C.C. (Alaska Stat. § 45.29.204; Alaska Stat. § 45.29.323).

Requisites of Instrument.

See U.C.C. (Alaska Stat. § 45.29.502-.503).

Execution of Instrument.

Name of debtor and secured party; debtor signature; address for debtor and secured party; description of collateral. (Alaska Stat. § 45.29.502-.503).

Filing.

Central filing in UCC Central File, 550 W. 7th Ave., Suite 1200-A, Anchorage, AK 99501-3564, Tel: 907-269-8899.

Recording.

If collateral is consumer goods, farm equipment etc., in office of recorder of debtor's residence, or if debtor not a resident of state, in office of recorder where goods are kept. If collateral is goods which are or are to become fixtures, in office of recorder where realty concerned is situated. All other cases, central filed in Department of Natural Resources. (Alaska Stat. § 45.29.501).

Refiling or Extension.

Continuation statements may be filed or recorded. (Alaska Stat. § 45.29.708).

Removal of Property by Mortgagor (Debtor).

If removal is default see U.C.C. default procedures. (Alaska Stat. § 45.29.601-.628).

Sale of Property by Mortgagor (Debtor).

If sale is default see U.C.C. default procedures. (Alaska Stat. § 45.29.601-.628).

Concealment or Destruction of Property by Mortgagor (Debtor).

See U.C.C. default procedures. (Alaska Stat. § 45.29.601-.628).

Release.

See U.C.C. release provisions.

Satisfaction or Discharge.

See U.C.C. termination statement provisions. (Alaska Stat. § 45.29.513).

Foreclosure by Court Proceedings.

See U.C.C. provisions. (Alaska Stat. § 45.29.601; Alaska Stat. § 45.09.501).

Sale by Mortgagee (Secured Party).

See U.C.C. collection rights (Alaska Stat. § 45.29.607), right to take possession (Alaska Stat. § 45.29.609), and right to dispose of collateral (Alaska Stat. § 45.29.610).

Redemption.

See U.C.C. provision limited to time prior to disposition or contract to dispose. (Alaska Stat. § 45.29.623).

Foreign Mortgages.

See U.C.C. provisions as to law which prevails. (Alaska Stat. § 45.09.103). Generally, law of jurisdiction where collateral is located when last event necessary to perfect security interest occurs, prevails. (Alaska Stat. § 45.29.101-.110). For exceptions see Alaska Stat. § 45.29.301-.342.

Taxation.

No statutory provisions.

Forms.

All filings and/or file search requests must be on approved forms. For forms and fees, contact UCC Central File, 550 W. 7th Ave., Suite 1200-A, Anchorage, AK 99501-3564. (Tel: 907-269-8899). Checks must be made payable to “Alaska Department of Revenue.”

See also category 23 Transportation, topic 23.01 Motor Vehicles.

20.02 COLLATERAL SECURITY:

Uniform Commercial Code adopted. (Alaska Stat. § 45.01.101). See category 3 Business Regulation and Commerce, topic 3.09 Commercial Code.

20.03 MORTGAGES OF PERSONAL PROPERTY:

See topic 20.01 Chattel Mortgages.

20.04 MORTGAGES OF REAL PROPERTY:

Execution and Recording.

The same rules as to execution, acknowledgments and recording as apply to other conveyances, apply to mortgages. They must be recorded in the office of the recorder of the district in which the land lies. Recording fees are the same as for deeds. See category 21 Property, topic 21.06 Deeds.

Extensions of the liens may be made by recording in office of recorder wherein real estate is situated, prior to expiration of statutory time for bringing action upon original contract, a memorandum of payment on indebtedness, which memorandum must be signed and acknowledged by the owner of the contract of indebtedness. Unless period of instrument disclosed therein, maturity date deemed ten years from date thereof. As to existing recorded lien instruments not disclosing period of instrument, an instrument extending period may be recorded prior to Jan. 1, 1956. (Alaska Stat. § 34.35.145).

A mortgage may be assigned and the assignment recorded, but in the absence of actual notice, the mortgagor is protected as to payments made to the mortgagee. (Alaska Stat. § 34.20.010).

Remedies of Mortgagor.

Mortgagee who neglects or refuses to discharge mortgage or execute and acknowledge certificate of discharge or release for ten days after being requested in writing, mortgage debt being paid, is liable to mortgagor for $300 damages plus all damages occasioned by such neglect or refusal. (Alaska Stat. § 34.20.050).

Remedies of Mortgagee.

A mortgage is not construed as implying a covenant for payment of the money secured, and if there is no express covenant for such payment, or bond, or other instrument to secure it, the remedies of the mortgagee are confined to the land mortgaged. (Alaska Stat. § 34.15.090). In other cases a deficiency judgment may be entered against the mortgagor.

Foreclosure.

A mortgage of real property is not deemed a conveyance so as to enable the owner of the mortgage to recover possession of the real property without a foreclosure and sale according to law, and a judgment thereon. (Alaska Stat. § 09.45.170-220).

Foreclosure may be had in superior court, in accordance with rules of equity. There is no moratorium on mortgage foreclosures.

Redemption.

Property sold under foreclosure may be redeemed according to rules governing redemption of real property sold under execution (Alaska Stat. § 09.45.190). See category 8 Debtor and Creditor, topic 8.05 Executions.

Deeds of Trust.

Where deed of trust has been executed conveying real property to trustee as security for payment of indebtedness providing that in case of default or noncompliance with terms of trust trustee may sell property, trustee may sell property on conditions and in manner set forth in trust deed, without securing court decree of foreclosure and order of sale if not less than 30 days after default and not less than three months before sale trustee records details of deed and default and, within ten days thereafter gives notice to grantor, his successors, lienholders and those in possession of land. Default may be cured before sale if amount of default, plus attorney fees and costs actually incurred by trustee due to default, are paid. Trustee may elect to refuse payment and proceed with sale if notice of default has been recorded twice or more previously under same trust deed. (Alaska Stat. § 34.20.070). Sale shall be at public auction after notice. (Alaska Stat. § 34.20.080). No deficiency judgment on sale pursuant to deed. (Alaska Stat. § 34.20.100). Procedure for reconveyance. (Alaska Stat. § 34.20.115).

Chattel Mortgages.

See Chattel Mortgages.

21 PROPERTY

21.01 ABSENTEES:

Care of Property.

If owner of property disappears and cannot be found after reasonable inquiry, on application of any person who would be an heir if such absentee were dead, a guardian for the estate may be appointed. (Alaska Stat. § 13.26.165). See category 13 Estates and Trusts, topics 13.05 Death, 13.07 Descent and Distribution.

Process Agent.

No statutory provision.

Escheat.

Property held by consignees or bailees not claimed within one year may be sold. (Alaska Stat. § 34.45.030). Intangible property unclaimed for five years presumed abandoned and is subject to custody of state if last known address in state and other conditions. (Alaska Stat. § 34.45.110–34.45.120). Specific types of personal property provided for in Alaska Stat. § 34.45.140–34.45.260. Uniform Unclaimed Property Act. (34.45 et seq.). See category 13 Estates and Trusts, topic 13.05 Death.

Uniform Unclaimed Property Act (1981, adopted with changes 1986). (Alaska Stat. § 34.45.110–34.45.780).

21.02 ADVERSE POSSESSION:

Uninterrupted, adverse, notorious, possession of real property under color and claim of title for seven years or more is conclusively presumed to give title thereto, except as against U.S. or State of Alaska. (Alaska Stat. § 09.45.052). Without color of title, ten-year period required. (Alaska Stat. § 09.10.030).

See category 5 Civil Actions and Procedure, topic 5.16 Limitation of Actions.

21.03 [RESERVED]

21.04 CONVEYANCES:

See topic 21.06 Deeds.

21.05 CURTESY:

Uniform Probate Code (adopted 1972). (13.06-13.36). See category 13 Estates and Trusts, topic 13.16 Wills.

21.06 DEEDS:

Any estate or interest in real property may be conveyed by deed, executed by a grantor of full age, or by a duly authorized agent or attorney. (Alaska Stat. § 34.15.010).

Execution.

Deeds executed outside of the state may be executed in accordance with the laws of the state in which executed and execution of conveyance may be acknowledged under Alaska Stat. § 09.63.050-09.63.130. (Alaska Stat. § 34.15.160).

For circumstances when spouse must join, see category 8 Debtor and Creditor, topic 8.10 Homesteads.

Acknowledgment and Recording.

All deeds must be recorded in recording district in which land affected by conveyance is located. (Alaska Stat. § 40.17.020). For deed to be recorded it must be legible, capable of being copied, accompanied by proper fee, accompanied by or including mailing addresses of all persons named in document who grant or acquire interest under document if it is conveyance, name and address of person to whom document is to be returned after recording. Signature acknowledgment seal or witness is required for document to be eligible for recording only when required for this specific document. (Alaska Stat. § 40.17.030). If not recorded, deed is void as against innocent purchasers in good faith for value whose conveyances are first duly recorded. (Alaska Stat. § 40.17.080).

Reconveyance.

Notice required for reconveyance of trust deed. (Alaska Stat. § 34.20.115).

Married Persons.

Husband and wife shall join in deed or conveyance of family home or homestead. (Alaska Stat. § 34.15.010).

Recording fees are as follows: $15 for first page or fraction thereof, $3 each additional page plus $2 for indexing each name over six.

Covenants are not required, nor are they implied, whether or not the deed contains express covenants. (Alaska Stat. § 34.15.080).

Construction.

The word heirs, or other words of inheritance, are unnecessary for the creation of an estate in fee simple. (Alaska Stat. § 34.15.060). Any deed of real property passes entire estate of grantor, unless contrary intent appears in express terms, or by necessary implication. (Alaska Stat. § 34.15.070).

Deed of quitclaim and release, of a form of common use, is sufficient to pass all the real estate which the grantor could lawfully convey by deed of bargain and sale. (Alaska Stat. § 34.15.050).

Forms.

Statutory Warranty and Quitclaim Deeds. (Alaska Stat. § 34.15.030-.040).

Form

WARRANTY DEED

The grantor [insert name and place of residence] for and in consideration of [insert consideration] in hand paid, conveys and warrants [insert grantees name and residence] the following described real estate [insert legal description of property], located in the State of Alaska.

Dated this ___ day of ______, 20__.

Validation.

May be validated through acknowledgment (Alaska Stat. § 34.15.150), through subscribing witness (Alaska Stat. § 34.15.210), or through proving handwriting (Alaska Stat. § 34.15.220). See also category 10 Documents and Records, topic 10.01 Acknowledgments, subhead Validation.

21.07 DEEDS OF TRUST:

See category 20 Mortgages, topic 20.04 Mortgages of Real Property.

21.08 DOWER:

Dower has been abolished.

21.09 ESCHEAT:

See topic 21.01 Absentees, subhead Escheat; categories 3 Business Regulation and Commerce, topic Banks and Banking, subhead Unclaimed Deposits; Estates and Trusts, topics Descent and Distribution, subhead Escheat, Wills, subhead Unclaimed Legacies.

21.10 LANDLORD AND TENANT:

Kinds of Tenancy.

Tenancies recognized are: Tenancy in common (Alaska Stat. § 34.15.110), tenancy by entirety (Alaska Stat. § 34.15.140), common law tenancy from year to year and month to month. Joint tenancy abolished. (Alaska Stat. § 34.15.130).

Recording.

Lease, other than for less than one year, void as against subsequent innocent purchaser or mortgagee for value whose conveyance is first duly recorded. (Alaska Stat. § 40.17.080).

Exactly conformed copy of a lease may be recorded in district where property located and may be read in evidence in any court in state with same effect as original. (40.17). Defective acknowledgment of lease made in good faith is valid if no suit is filed in judicial district where property located within ten years from date of instrument. (Alaska Stat. § 34.25.010).

Action or Forcible Entry or Unlawful Detainer.

No person may enter upon a tenement except where entry right given by law; entry only by peaceable manner. (Alaska Stat. § 09.45.060). When forcible entry is made upon any premises, or when an entry is made in peaceable manner and possession is held by force, person entitled to premises may maintain an action to recover possession. (Alaska Stat. § 09.45.070).

Lease of public lands must stipulate that annual rental is subject to adjustment at five year intervals. Waiver of adjustment possible if single-family residence best use and actually occurs. (Alaska Stat. § 38.05.105).

Uniform Residential Landlord and Tenant Act (adopted 1974) (Alaska Stat. § 34.03.010-380).—Major variations from ULTA: expands applicability of law under definition of "dwelling unit"; tenant may not sublet premises without landlord's consent unless otherwise agreed in writing; consent may be withheld only on reasonable ground of insufficient credit, number of persons in household, etc. (Alaska Stat. § 34.03.060); security deposit or prepaid rent not to exceed two months periodic rent unless monthly rent exceeds $2,000, and must be paid promptly into special trust account (Alaska Stat. § 34.03.070), omits provisions for lessee self help for minor defects (§ 4.103 ULTA); omits landlord's remedies for failure to maintain (§ 4.202 ULTA); provides for disposition of abandoned property (Alaska Stat. § 34.03.260); expands landlord's actions for possession (Alaska Stat. § 34.03.220-230); allows increased rent if substantial expenditures for capital improvements or increase in property tax or market rental price, etc. (Alaska Stat. § 34.03.310); provides for service of process on nonresident landlords (Alaska Stat. § 34.03.340).

21.11 LEASES:

See topic 21.10 Landlord and Tenant.

21.12 [RESERVED]

21.13 PERPETUITIES:

See topic 21.16 Real Property.

21.14 PERSONAL PROPERTY:

Joint tenancy as to interests in personalty not abolished. (Alaska Stat. § 34.15.130).

21.15 POWERS OF ATTORNEY:

Uniform Durable Power of Attorney Act not adopted.

Formalities.

Must be signed by principal and notarized. (Alaska Stat. § 13.26.332).

Revocation.

Agent's notice of principal's disability or death revokes power of attorney unless it specifically states disability will not affect agent's powers. (Alaska Stat. § 13.26.332, Alaska Stat. § 13.26.356). Execution of new power of attorney revokes old one. (Alaska Stat. § 13.26.332). Principal can revoke at any time. (Alaska Stat. § 13.26.332).

Recorded Powers as Evidence.

For all issues related to recording see 40.17.

Recording Revocation.

No letter of attorney, or other instrument so recorded, shall be deemed to be revoked by any act of the party by whom it was executed unless the instrument containing such revocation be also recorded in the same office in which instrument containing the power was recorded. (40.17).

Adverse Claims to Mining Lands.

During patent proceedings to mining lands the adverse claim allowed (30 U. S. C. 30) may be verified by oath of any duly authorized agent or attorney (30 U. S. C. 31).

Members of Armed Forces.

No statute.

Statutory Form Power of Attorney (Alaska Stat. § 13.26.332-13.26.353) is as follows (health care directives may be given per 13.52. For state-supplied "Living Will" form, see http://www.hss.state.ak.us/dph/director/living_will/):

GENERAL POWER OF ATTORNEY

THE POWERS GRANTED FROM THE PRINCIPAL TO THE AGENT OR AGENTS IN THE FOLLOWING DOCUMENT ARE VERY BROAD. THEY MAY INCLUDE THE POWER TO DISPOSE, SELL, CONVEY, AND ENCUMBER YOUR REAL AND PERSONAL PROPERTY, AND THE POWER TO MAKE YOUR HEALTH CARE DECISIONS. ACCORDINGLY, THE FOLLOWING DOCUMENT SHOULD ONLY BE USED AFTER CAREFUL CONSIDERATION. IF YOU HAVE ANY QUESTIONS ABOUT THIS DOCUMENT, YOU SHOULD SEEK COMPETENT ADVICE.

YOU MAY REVOKE THIS POWER OF ATTORNEY AT ANY TIME.

Pursuant to AS Alaska Stat. § 13.26.338-13.26.353, I, <>, of <>, do hereby appoint <>, my attorney(s)-in-fact to act as indicated below in my name, place, and stead in any way which I myself could do, if I were personally present, with respect to the following matters, as each of them is defined in AS Alaska Stat. § 13.26.344, to the full extent that I am permitted by law to act through an agent:

THE AGENT OR AGENTS YOU HAVE APPOINTED WILL HAVE ALL THE POWERS LISTED BELOW UNLESS YOU DRAW A LINE THROUGH A CATEGORY; AND INITIAL THE BOX OPPOSITE THE CATEGORY.

Real Estate Transactions [ ]

Transactions Involving Tangible Personal Property, Chattels, and Goods [ ]

Bonds, Shares, and Commodities Transactions [ ]

Banking Transactions [ ]

Business Operating Transactions [ ]

Insurance Transactions [ ]

Estate Transactions [ ]

Gift Transactions [ ]

Claims and Litigation [ ]

Personal Relationships and Affairs [ ]

Benefits from Government Programs and Military Service [ ]

Records, Reports, and Statements [ ]

Delegation [ ]

Voter registration and absentee ballot requests [ ]

All Other Matters, Including Those Specified as follows: [ ]

IF YOU HAVE APPOINTED MORE THAN ONE AGENT, CHECK ONE OF THE FOLLOWING:

[ ] Each agent may exercise the powers conferred separately, without the consent of any other agent.

[ ] All agents shall exercise the powers conferred jointly, with the consent of all other agents.

TO INDICATE WHEN THIS DOCUMENT SHALL BECOME EFFECTIVE, CHECK ONE OF THE FOLLOWING:

[ ] This document shall become effective upon the date of my signature.

[ ] This document shall become effective upon the date of my disability and shall not otherwise be affected by my disability.

IF YOU HAVE INDICATED THAT THIS DOCUMENT SHALL BECOME EFFECTIVE ON THE DATE OF YOUR SIGNATURE, CHECK ONE OF THE FOLLOWING:

[ ] This document shall not be affected by my subsequent disability.

[ ] This document shall be revoked by my subsequent disability.

IF YOU HAVE INDICATED THAT THIS DOCUMENT SHALL BECOME EFFECTIVE UPON THE DATE OF YOUR SIGNATURE AND WANT TO LIMIT THE TERM OF THIS DOCUMENT, COMPLETE THE FOLLOWING:

This document shall only continue in effect for ___ years from the date of my signature.

NOTICE OF REVOCATION OF THE POWERS GRANTED IN THIS DOCUMENT.

You may revoke one or more of the powers granted in this document. Unless otherwise provided in this document, you may revoke a specific power granted in this power of attorney by completing a special power of attorney that includes the specific power in this document that you want to revoke. Unless otherwise provided in this document, you may revoke all the powers granted in this power of attorney by completing a subsequent power of attorney.

NOTICE TO THIRD PARTIES

A third party who relies on the reasonable representations of an attorney-in-fact as to a matter relating to a power granted by a properly executed statutory power of attorney does not incur any liability to the principal or to the principal’s heirs, assigns, or estate as a result of permitting the attorney-in-fact to exercise the authority granted by the power of attorney. A third party who fails to honor a properly executed statutory form power of attorney may be liable for the principal, the attorney-in-fact, the principal’s heirs, assigns, or estate for a civil penalty, plus damages, costs, and fees associated with the failure to comply with the statutory form power of attorney. If the power of attorney is one which becomes effective upon the disability of the principal, the disability of the principal is established by an affidavit, as required by law.

IN WITNESS WHEREOF, I have hereunto signed my name this ____ [date].

. . . .

SUBSCRIBED AND SWORN to or affirmed before me at _____ [city] on ____ [date].

. . . .

NOTARY PUBLIC FOR ALASKA

My Commission Expires: . . . .

Additional optional provisions (Alaska Stat. § 13.26.335)

YOU MAY DESIGNATE AN ALTERNATE ATTORNEY-IN-FACT. ANY ALTERNATE YOU DESIGNATE WILL BE ABLE TO EXERCISE THE SAME POWERS AS THE AGENT(S) YOU NAMED AT THE BEGINNING OF THIS DOCUMENT. IF YOU WISH TO DESIGNATE AN ALTERNATE OR ALTERNATES, COMPLETE THE FOLLOWING:

If the agent(s) named at the beginning of this document is unable or unwilling to serve or continue to serve, then I appoint the following agent to serve with the same powers:

First alternate or successor attorney-in-fact

____

(Name and address of alternate)

Second alternate or successor attorney-in-fact

____

(Name and address of alternate)

YOU MAY NOMINATE A GUARDIAN OR CONSERVATOR. IF YOU WISH TO NOMINATE A GUARDIAN OR CONSERVATOR, COMPLETE THE FOLLOWING:

In the event that a court decides that it is necessary to appoint a guardian or conservator for me, I hereby nominate ___(Name and address of person nominated)___ to be considered by the court for appointment to serve as my guardian or conservator, or in any similar representative capacity.

21.16 REAL PROPERTY:

For homesteading of land in Alaska, see category 8 Debtor and Creditor, topic 8.10 Homesteads.

Joint tenancy is abolished, except interests in personalty and tenancy by entirety, and all persons having undivided interests in realty are tenants in common. A tenant in common may sue cotenant for latter's receiving more than his just proportion of rents and profits. (Alaska Stat. § 34.15.120-140).

Tenancy by the entirety is recognized and may be created by husband and wife between themselves. Estates, other than homesteads, by the entirety are liable for debts of either or both tenants. (Alaska Stat. § 34.15.120-140).

Subdivisions and dedications authorized according to prescribed procedures. (Alaska Stat. § 40.15.010).

Rule in Shelley's Case abolished by statute. (Alaska Stat. § 34.27.020).

Rule against perpetuities modified by statute. General or non-general power of appointment not presently exercisable because of condition precedent is invalid unless, within period of 1,000 years after its creation, power is irrevocably exercised or power terminates. (Alaska Stat. § 34.27.051).

Destructibility of contingent remainders abolished by statute. Remainder effective on occurrence of contingency as springing or shifting executory interest. (Alaska Stat. § 34.27.030).

Condominiums.

Horizontal Property Regimes Act enacted 1964. (Alaska Stat. § 34.07.010-.460). Does not apply to common interest community created after 1/1/86. Uniform Common Interest Ownership Act (adopted 1986). (Alaska Stat. § 34.08.010).

Uniform Land Sales Practices Act (adopted 1968). (34.55).

Uniform Probate Code (adopted 1972). (Alaska Stat. § 13.06.004-.460) with some additions and modifications. See category 13 Estates and Trusts, topic 13.16 Wills.

Solar easement must be in writing and is subject to recording requirements for other conveyances of real property. (Alaska Stat. § 34.15.145).

See topics 21.05 Curtesy, Deeds, Dower, Landlord and Tenant; categories 5 Civil Actions and Procedure, topic Partition; Debtor and Creditor, topic Homesteads; Documents and Records, topic Records; Family, topic Husband and Wife; Mortgages, topic Mortgages of Real Property.

21.17 TRUST DEEDS:

See category 20 Mortgages, topic 20.04 Mortgages of Real Property.

22 TAXATION

22.01 ADMINISTRATION:

State and Local Taxes.

Alaska Department of Revenue has general supervision of state tax laws. Taxes imposed by cities and boroughs are administered by officials of these political subdivisions.

Review of Assessment.

By city council or borough assembly. (Alaska Stat. § 29.45.110).

Exemptions.

Nonprofit, religious, charitable, cemetery or educational property exempt. (Art. IX § 4). Otherwise exemptions provided by general law. No exemption for members of Armed Forces, veterans, etc. Property of organizations whose membership is wholly veterans of war of U.S. or auxiliaries, is exempt. Real property, permanent abode of resident 65 years old or older or disabled veteran or surviving spouse of either who is 60 years old or older is exempt. (Alaska Stat. § 29.45.030; Alaska Stat. § 29.45.040; Alaska Stat. § 29.45.50). Municipalities may, by ordinance, exempt certain land, property (real and personal) from taxation as provided for in statute. (Alaska Stat. § 29.45.050).

Penalties.

Generally.

See Alaska Stat. § 43.05.220 for civil penalty, Alaska Stat. § 43.05.225 for interest, and Alaska Stat. § 43.10.035 for lien resulting from failure to file or pay.

Civil penalties of 5% added to tax for each 30 day period or fraction of period during which taxpayer fails to timely file return or fully paid tax due. Penalty not to exceed 25% in aggregate. (Alaska Stat. § 43.05.220). Additional penalties for civil fraud up to 50% of tax due or $500, whichever is greater. (Alaska Stat. § 43.05.220).

Unpaid municipal real property taxes subject property to lien, foreclosure, penalty of 20% of all unpaid taxes, interest at 15%, publication and court costs. Judgment of foreclosure and sale for delinquent taxes operates as conveyance to municipality subject to redemption for one year after which clerk conveys unredeemed property to municipality. (Alaska Stat. § 29.45.250). For enforcement procedures, (Alaska Stat. § 29.45.300-29.45.500).

Unlawful acts against laws or regulations providing for administration of state revenue laws, including failing to file return of tax, or making false or fraudulent return, or concealing property or evidence, constitute misdemeanors punishable by fine of not more than $1,000 for each offense. (Alaska Stat. § 43.05.010-.130).

Enforcement and collection of taxes by Attorney General in civil and criminal actions. (Alaska Stat. § 43.10.010). Distraint on property applicable to all revenue statutes for collection of taxes or license fees. (Alaska Stat. § 43.10.030).

Civil and Criminal Penalties.

All civil and criminal penalties for all violations of Alaska tax statutes governed by Alaska Stat. § 43.05.220 and Alaska Stat. § 43.05.290.

Nonresident Business Tax.

To insure collection of state taxes and license fees, all nonresident businesses, operating as individual, partnership, or corporation, must file with Commissioner of Commerce, Community and Economic Development on or before June 1st each year sworn statement giving name and address of taxpayer, names and addresses of all officers of corporation, estimated gross business receipts for current year, total estimated Alaskan payroll for current year, total estimated taxes and license fees that will be due state for current year, description and fair market value of all realty in Alaska on which such taxes may become first lien. If value of realty is not equal to twice amount of estimated taxes, bond in amount of twice estimated taxes but not less than $1,000 must also be filed with Commissioner, unless showing is made that filing such bond would be undue hardship, in which event Attorney General may waive bond requirement. In addition, there must be filed with Commissioner of Commerce, Community and Economic Development appointment naming Commissioner of Administration agent for service of process in any action for recovery of state taxes or license fees. (Alaska Stat. § 43.10.170).

Utility Cooperatives.

Telephone cooperatives taxed percentage of gross revenue. Electric cooperatives taxed on number of kilowatt hours sold at retail.

22.02 ALCOHOL, BEVERAGES AND TOBACCO TAXES:

Alcoholic Beverage Tax.

Imposed by Alaska Stat. § 43.60.010-.040.

Brewers, distillers, etc. are primarily liable for tax and must give surety bond for $25,000 payable to Dept.of Revenue; retailers and buyers are secondarily liable for tax and State has lien therefor on liquors in their possession. (Alaska Stat. § 43.60.040).

Cigarette Tax.

Imposed by Alaska Stat. § 43.50.080; Alaska Stat. § 43.50.090; Alaska Stat. § 43.50.190; payment by stamps (Alaska Stat. § 43.50.500).

Other Tobacco Products.

(Alaska Stat. § 43.50.300-43.50.390).

22.03 [RESERVED]

22.04 CORPORATE TAXES:

Biennial Corporation Tax.

Domestic corporation must pay $100 before Jan. 2nd of each filing year. Foreign corporations must pay $200 before Jan. 2nd of each filing year. Corporation that fails to pay biennial corporation tax before Feb. 1 of filing year, must pay to commissioner penalty of $25 for each year or part of year of delinquency. (Alaska Stat. § 10.06.845).

Income Tax.

(Alaska Stat. § 43.20.011). There is imposed for each taxable year upon entire taxable income of every corporation derived from sources within state tax computed as follows:

If taxable income is:

Then tax is:

Less than $10,000

1% of taxable income

$10,000 but less than $20,000

$100 plus 2% of taxable income over $10,000

$20,000 but less than $30,000

$300 plus 3% of taxable income over $20,000

$30,000 but less than $40,000

$600 plus 4% of taxable income over $30,000

$40,000 but less than $50,000

$1,000 plus 5% of taxable income over $40,000

$50,000 but less than $60,000

$1,500 plus 6% of taxable income over $50,000

$60,000 but less than $70,000

$2,100 plus 7% of taxable income over $60,000

$70,000 but less than $80,000

$2,800 plus 8% of taxable income over $70,000

$80,000 but less than $90,000

$3,600 plus 9% of taxable income over $80,000

$90,000 or more

$4,500 plus 9.4% of taxable income over $90,000

Corporation that fails to pay tax and file biennial report is precluded from commencing suit action or proceeding in court in this state. (Alaska Stat. § 10.06.848).

22.05 EMPLOYMENT TAXES:

Unemployment compensation tax in form of contribution to Alaska Unemployment Compensation Fund. Employer is any employing unit which for some portion of day within calendar year has or had in employment one or more individuals, except service in farming or domestic service in private home. Wages include all remuneration for service, including commissions and bonuses and cash value of remuneration in any medium other than cash. Rate of contribution according to formula. Benefit payments according to formula. Dependency allowances established. (23.20). See category 11 Employment, topic 11.01 Labor Relations.

22.06 [RESERVED]

22.07 ESTATE TAX:

Estate tax is imposed upon transfer of estate of person who was resident at time of his death, computed as follows: (1) Determine amount of credit allowable under applicable federal revenue act for estate, inheritance, legacy and succession taxes actually paid to several states; (2) determine for each of other states amount of all constitutionally valid estate, inheritance, legacy and succession taxes, actually paid to each of other states in respect to property owned by decedent or subject to these taxes as part of or in connection with his estate; (3) determine for each other state in which property is located, owned by decedent, or subject to estate, inheritance, legacy or succession taxes as part of or in connection with his estate proportion of amount of credit allowable under applicable federal revenue act for estate, inheritance, legacy and succession taxes actually paid to several states, as value of property taxable in that state bears to value of entire gross estate wherever situated.

Amount of tax is amount of allowable credit as determined in (1) less sum of smaller figures of (2) or (3) for each of other states in which decedent's property is situated. (Alaska Stat. § 43.31.011).

In case of nonresident decedent who was resident of U.S., all realty situated and tangible personal property having actual situs in this state, and intangible personal property having business situs in Alaska including stocks, bonds, debentures, notes and other securities or obligations of corporations organized under laws of this state, is taxed in sum equal to such proportion of amount of credit allowable under applicable federal revenue act for estate, inheritance, legacy and succession taxes actually paid to several states as value of property taxable in this state bears to value of estate taxable by U.S. wherever situated. (Alaska Stat. § 43.31.021).

In case of nonresident of U.S., all realty situated in and tangible personalty having actual situs in, and tangible personalty physically present in this state is taxed sum equal to such proportion of credit allowable under applicable federal revenue act for estate, inheritance, legacy and succession taxes actually paid to several states as value of property taxable in this state bears to value of estate taxable by U.S. wherever situated. (Alaska Stat. § 43.31.031).

Situs of Property.

As to property of alien, stock of corporation organized under laws of Alaska is deemed physically within state. Amount receivable, as insurance upon life of alien decedent, and monies deposited in bank by or for alien decedent not engaged in business in U.S. at time of death are not deemed physically present in this state. (Alaska Stat. § 43.31.031[b]).

Returns.

Executor within two months after decedent's death, or after qualifying as such, must give written notice thereof to Department of Revenue on form provided by department designated "Preliminary Notice and Report". If Federal Estate Tax return required, copy of "Federal Preliminary Notice" may be filed in lieu of state form. Return must be made in all cases where executor is required by U.S. laws to file Federal Estate Tax return and when gross estate of decedent who at time of death was not domiciled in U.S. includes realty situated and tangible personalty having actual situs in this state and intangible personalty physically present in state. Department must allow extension of time for filing upon filing of federal extension. On failure to make return, or on making of false return, department must make up return from its own knowledge and information, which will be prima facie good and sufficient for all legal purposes. (Alaska Stat. § 43.31.111-.131).

Payment or Collection.

Tax is due and payable 15 months after decedent's death. Department may extend time, no extension to be more than one year and aggregate of amount of tax at least 11%. (Alaska Stat. § 43.31.141). If deficiency is willful, made with intent to defraud, penalty is 50% of tax or $500, whichever is greater. (Alaska Stat. § 43.05.220). Lien arises when assessment made. (Alaska Stat. § 43.05.225). If tax paid was in excess of amount properly due, it will be refunded by department, but no refund can be recovered after two years from payment of tax or determination of federal tax unless notice of such determination is filed with department within 60 days from final determination. (Alaska Stat. § 43.31.280). Executor is personally liable if distribution is made without having paid or secured tax due, to full extent of full value of property belonging to person or estate which may come into his hands, custody or control. (Alaska Stat. § 43.31.221). Department shall hear questions of tax or deficiency if notice given within 60 days after receipt of notice from department. (Alaska Stat. § 43.05.240). If tax is not paid within 90 days from date due, and time of payment has not been extended, commissioner may levy on and sell real and personal property of estate. (Alaska Stat. § 43.31.191). Tax is payable from whole estate and if one interested person pays all or part of tax, he is entitled to reimbursement from undistributed portion of estate or contribution from other interested persons. (Alaska Stat. § 43.31.201). Executor may sell real property of estate in order to pay tax. (Alaska Stat. § 43.31.230).

Department may sue to recover any tax, penalty or interest. (Alaska Stat. § 43.31.240). Department may make agreement as to amount of taxes due and payment in accordance with such agreement is discharge of tax debt. (Alaska Stat. § 43.31.260). Tax receipt must be given on any payment of tax, and on executor filing completed return and making application for determination of tax and discharge from personal liability therefor, department must notify executor of amount of tax due within one year, and on payment thereof executor is discharged from personal liability for additional tax thereafter found due and entitled to receive from department written discharge. Such discharge does not release gross estate while it remains in hands of executor, heirs, devisees, or distributees; but does release estate after it has passed to bona fide purchaser for value. (Alaska Stat. § 43.31.181). No final account of executor of nonresident estate or estate of resident with value exceeding $60,000 may be allowed by court unless such account shows that all taxes have been paid. (Alaska Stat. § 43.31.250).

Property of estate is deemed acquitted and discharged of all liability for estate or inheritance taxes under this act after lapse of ten years from date notice of debt is filed with department, or after lapse of ten years from date of filing estate tax return with department, whichever occurs first, unless department records notice of lien in recording district where part of estate is situated. No lien for estate and inheritance taxes continues for more than 20 years from death of decedent. (Alaska Stat. § 43.31.320).

Penalties.

Failure to produce records is penalty of not more than $1,000. (Alaska Stat. § 43.31.350). Criminal penalties outlined in Alaska Stat. § 43.05.290.

For purposes of topic Estate Tax, “executor” means executor, administrator or curator or if none then any person who is in actual or constructive possession of property included in gross estate of decedent. (Alaska Stat. § 43.31.420).

22.07A GAMBLING AND ENTERTAINMENT TAXES:

Coin Operated Devices and Punchboards.

Repealed.

22.08 GASOLINE AND SPECIAL FUELS TAXES:

See topic 22.12B Motor Fuels Tax.

22.09 GIFT TAX:

None, but estate tax applies to gifts in contemplation of death or intended to take effect at or after death.

22.10 [RESERVED]

22.11 INCOME TAX:

Income Tax—Individuals.

Personal income tax repealed.

Income Tax—Corporations.

See topic 22.03 Corporate Taxes.

22.12 INHERITANCE TAX:

Repealed. See topic 22.06 Estate Tax.

22.12A MINES, MINERALS AND FISHERIES TAXES:

Fisheries Tax.

Persons engaging in fisheries business required to obtain annual license and pay license based on value of fisheries resources processed, as follows (Alaska Stat. § 43.75.015[a]): Salmon canned at shore-based cannery: 4½%; salmon otherwise processed by shore-based fisheries business: 3%; all other fisheries resources processed by shore-based fisheries business: 3%; fisheries resources processed by floating fisheries business: 5%.

Special rates for persons engaged in fisheries business which includes processing developing commercial fish species. (Alaska Stat. § 43.75.015[b]). Developing commercial fish species processed by shore-based fisheries business: 1%; developing commercial fish species processed by floating fisheries business: 3%.

Tax computation to be based on total fisheries resources processed, including those processed for other fisheries businesses. (Alaska Stat. § 43.75.015[c]).

Security for collection of taxes required from license application. (Alaska Stat. § 43.75.055).

Salmon Enhancement Tax (Alaska Stat. § 43.76.001-.40); Seafood Development Tax (Alaska Stat. § 43.76.350-.385).

Mining tax is imposed on extraction, mining or taking from earth, by any operation, of valuable metals, ores, minerals, asbestos, gypsum, coal, marketable earth or stone, or any of them, but not including extraction or production of oil and gas, based upon net income from Alaska property (computed with allowable depletion) plus royalty on Alaska mining property, viz., over $40,000 but not over $50,000, 3%; over $50,000 but not over $100,000, $1,500 plus 5% of excess over $50,000; over $100,000, $4,000 plus 7% of excess over $100,000. Depletion allowances: coal, 10%; metals, fluorspar, flake graphite, vermiculite, beryl, feldspar, mica, talc, lepidolite, spodumene, varite, ball and sagger clay, rock, asphalt, potash, 15%; sulphur, 23%; of gross income from property during taxable year, excluding from gross income rents or royalties for property; but, not to exceed 50% of net income (computed without depletion allowance, but allowable depletion shall not be less than reasonable cost). Gross income defined, also “ordinary treatment processes”, also net income. (Alaska Stat. § 43.65.010-.060).

Oil and Gas Production Tax.

This is levied on wellhead value of oil and gas based upon amount produced less any amount exempt from taxation. Rates of taxation set by Alaska Stat. § 43.55.011. Surcharge of 4¢ per barrel on certain oil produced from lease or property in state. (Alaska Stat. § 43.55.300). Producers of oil must pay 1¢ per barrel surcharge on oil produced from each lease or property in state in addition to tax. (Alaska Stat. § 43.55.201).

Oil and Gas, Production and Pipeline Transportation Property Tax.

(Alaska Stat. § 43.56.010).

22.12B MOTOR FUELS TAX:

Imposed by Alaska Stat. § 43.40.010-.100.

22.13 [RESERVED]

22.14 MOTOR VEHICLE TAXES:

Biennial registration tax imposed; schedule set forth at Alaska Stat. § 28.10.431.

Fee on new tires—$2.50, plus additional $5 if studded. (Alaska Stat. § 43.98.025).

Fee on rental of passenger vehicles if less than 90 days. (Alaska Stat. § 43.52.010).

22.15 [RESERVED]

22.16 PROPERTY TAXES:

State and Local Tax Rules.

Home rule and first class cities inside boroughs, and boroughs of all classes may levy general property tax not to exceed 3%. Second class cities may by referendum levy general property tax as first class city not to exceed ½ of 1%. (Alaska Stat. § 29.45.010; Alaska Stat. § 29.45.090; Alaska Stat. § 29.45.560; Alaska Stat. § 29.45.590).

Assessment.

By city and borough officials under ordinance. (Alaska Stat. § 29.45.110).

Review of Assessment.

By city council or borough assembly. (Alaska Stat. § 29.45.110).

Payment.

As provided by city or borough ordinances.

Collection.

By city officials except when cities are located within borough. Borough is exclusive agency for assessment and collection for all property within borough. Taxes collected by borough that were levied by city within borough are returned in full to levying city. (Alaska Stat. § 29.35.170). See subhead Assessment, supra.

Lien.

All unpaid real property taxes are liens upon property taxed; liens are superior to all other liens and encumbrances against property assessed. (Alaska Stat. § 29.45.300). Cities and boroughs have right of distraint and sale for unpaid personal property taxes. (Alaska Stat. § 29.45.310).

Sale.

Foreclosure authorized by city or borough levying tax. (Alaska Stat. § 29.45.320). See topic 22.01 Administration, subhead Penalties.

Redemption.

Allowed within one year of decree foreclosing lien of unpaid real property taxes. (Alaska Stat. § 29.45.400).

22.17 SALES AND USE TAXES:

Sales Tax.

Boroughs and cities of all classes, if approved by referendum, may levy sales tax. (Alaska Stat. § 29.45.650-29.45.710).

Use Tax.

No general use tax. Boroughs and cities of all classes levying sales tax may by ordinance levy use tax equal to sales tax. (Alaska Stat. § 29.45.650[b], Alaska Stat. § 29.45.700), but may not levy sales or use tax on state construction contracts. (Alaska Stat. § 29.45.650[k], Alaska Stat. § 29.45.700[g]).

22.18 STAMP AND SEAL TAXES:

Stamp Tax.

No documentary stamp tax.

22.18A TAX INCENTIVES AND EXEMPTIONS:

Investment Tax Credits.

Taxpayer may apply as credit against eligible taxes following percentage of investment credit allowed as to federal taxes under 26 U.S.C. 38 (Internal Revenue Code) on only first $250,000,000 of qualified investment in state for each taxable year after Dec. 31, 1984, for gas processing project, for exploration, drilling of wells, development, or mining of minerals and other natural deposits listed in 26 U.S.C. 613(b) other than sand or gravel unless mining of sand or gravel is ancillary to mining development involving qualified natural deposit other than sand or gravel: (1) 100% on first $50,000,000 of qualified investment; (2) 80% on qualified investment over $50,000,000 but not exceeding $100,000,000; (3) 70% on qualified investment over $100,000,000 but not exceeding $150,000,000; (4) 60% on qualified investment over $150,000,000 but not exceeding $200,000,000; and (5) 40% on qualified investment over $200,000,000 but not exceeding $250,000,000. Credit may not be allowed under this subsection for investment credit that is allowed as to federal taxes for leased property by reason of 26 U.S.C. 168(f).

Taxpayer may not claim investment tax credit unless gas processing project or mining project began operation and production after Dec. 31, 1984. Taxpayer may not claim additional investment tax credit under Alaska Stat. § 43.20.036(b) for investment for which special industrial incentive investment tax credit is claimed. If taxpayer is member of group of affiliated corporations filing consolidated return, amount of investment tax credit is limited to amount taxpayer would have been eligible to claim had consolidated return not been filed. Investment tax credit per taxable year may not exceed 60% of eligible tax liability. Any unused portion of investment tax credit shall be subject to carry forward provisions in 26 U.S.C. 46(b)(3) except that unused credit may not be carried forward to tax years beginning after Dec. 31, 1999. (Alaska Stat. § 43.20.042).

Gas Exploration and Development Tax Credit.

Expires 2013. (Alaska Stat. § 43.20.043).

23 TRANSPORTATION

23.01 MOTOR VEHICLES:

Motor vehicle titles, licensing, and registration, and operator licensing regulated by Dept. of Administration, Division of Motor Vehicles, main office: 1300 W. Benson Blvd., Anchorage, Alaska 99503; for information: 907-269-5551 or http://www.state.ak.us/local/akpages/ADMIN/dmv/home.htm. Highway safety and financial responsibility regulated by Dept. of Administration. See subhead Size and Weight Limits, infra.

Vehicle Registration.

Application for (Alaska Stat. § 28.10.021), suspension of (Alaska Stat. § 28.10.051), registration procedures (Alaska Stat. § 28.10.108), fees (Alaska Stat. § 28.10.421[b]), front and rear registration plates required on each vehicle (Alaska Stat. § 28.10.161 and Alaska Stat. § 28.10.171). Emission testing, if required by municipal ordinance. (Alaska Stat. § 28.10.041). Exemption from registration fee and tax for citizens over 65 or residents with disability that impairs or limits ability to walk available upon written application. (Alaska Stat. § 28.10.411).

Operator's License.

Person must have license to drive vehicle. Issued by Department of Public Safety. License expires on date of birth in fifth year following issuance of license. Age limits: Instructional permit, at least 14; provisional license, 16 with conditions; regular license, 18 or after holding provisional license for six months with other conditions. (Alaska Stat. § 28.15.055). Driver License Compact enacted. (Alaska Stat. § 28.37.010-.190).

Titles.

Application for. (Alaska Stat. § 28.10.211).

Sales.

New owner within 30 days after transfer must apply for new certificate of title and registration. (Alaska Stat. § 28.10.321).

Identification Marks.

Altering, forging, or counterfeiting certificate of title or registration, registration plate, tab, decal or sticker punishable as felony. (Alaska Stat. § 28.10.491).

Operation prohibited to persons under age 16, to persons whose license is revoked, suspended, or canceled in Alaska or any other jurisdiction, persons who fail to appear in court when required to do so for adjudication of vehicle, driver or traffic offense, to persons who are habitual users of alcohol or drugs to degree that person is incapable of safe vehicle operation, persons adjudged mentally ill or disabled and not legally restored to competency, persons medically unable to safely operate vehicle, persons unable to understand traffic control devices and laws, persons who knowingly make false statements in application for driver's license, persons required by AS 28.20 to furnish proof of financial responsibility and who have not done so. (Alaska Stat. § 28.15.031). See also Alaska Stat. § 28.15.161-28.15.211 for grounds for revocation, suspension or cancellation of license.

Size and weight limits regulated by Commissioner of Public Safety. (Alaska Stat. § 28.05.011).

Equipment Required.

Regulated by Commissioner of Public Safety. (Alaska Stat. § 28.05.011).

Lights Required.

Regulated by Commissioner of Public Safety. (Alaska Stat. § 28.05.011).

Liens.

Instrument creating lien or encumbrance filed with Department of Public Safety together with certificate of title last issued. (Alaska Stat. § 28.10.381).

Accidents.

Operator of vehicle involved in accident resulting in injury or death has duty to stop, give information, and render assistance to injured persons. Failure to comply punishable by fine or imprisonment. (Alaska Stat. § 28.35.060). Whenever accident involves injury or death or property damage in excess of $2,000 driver must immediately, by quickest means possible, inform Dept. of Public Safety or local police department if accident occurs within municipality. (Alaska Stat. § 28.35.080). Persons making repairs must report to police if damage appears to be caused by collision. (Alaska Stat. § 28.35.070).

Guests.

No limitation of liability of owner or operator for injury to guest.

Child Safety Devices.

Driver must provide devices for and secure children under 16 years as specified in this section. (Alaska Stat. § 28.05.095-28.05.099).

Proof of Financial Responsibility.

Motor Vehicle Responsibility Act. Deposit of security must be made by driver or owner to Department of Public Safety when involved in accident resulting in injury or death to other person or property damage in excess of $500 to any one person. If security is not given, license suspended. Security not necessary when driver or owner adjudicated not liable, released from liability by injured party, or when agreement made to pay for injury, or when payment made upon judgment. Security not to be less than $50,000 for injury to one person, $100,000 for injury to two or more, and $25,000 for property damage. (Alaska Stat. § 28.20.010-640).

Insurance.

Alaska Mandatory Automobile Insurance Act. Motor vehicle liability insurance required. Both owner and operator of motor vehicle are required to maintain coverage under motor vehicle liability policy or through certificate of self-insurance. Proof of compliance required when accident or charge of traffic law violation. (Alaska Stat. § 28.22.011-.321).

No Fault Insurance.

Not adopted.

Foreign Vehicles.

Vehicles owned by nonresident exempt from registration for 60 days. Nonresident who becomes employed or takes other action evidencing intent to become resident must register within ten days of date of employment or of taking action to become resident. Nonresident owner of vehicle must register vehicle if it is leased or rented to person having established place of business, residence, or employment within state. Full time post-secondary students not required to register foreign vehicle unless student establishes residence or accepts full time employment within state. Exemption only applies to extent state in which vehicle registered allows similar exemption to Alaskan vehicle. (Alaska Stat. § 28.10.121).

Nonresidents.

Nonresident at least 16 years of age who has valid operator's license exempt from state license requirements for 60 days after entry into state except that one must register within ten days after starting employment or otherwise taking action indicating intent to become resident. (Alaska Stat. § 28.10.121).

Actions Against Nonresidents.

Service of process may be made upon Commissioner of Administration. (Alaska Stat. § 09.05.020).

Traffic.

Municipalities of first class by ordinance may regulate traffic, sell abandoned vehicles, fix fares, designate one-way streets. (Alaska Stat. § 29.10.010-.171). State may sell abandoned vehicles. (Alaska Stat. § 28.11.070).

Offenses.

It is unlawful to drive vehicle without owner's consent. (Alaska Stat. § 11.46.360). Reckless driving, driving while under influence of alcoholic beverage, inhalant, or controlled substance prohibited. (Alaska Stat. § 28.35.030). Forfeiture of vehicle, aircraft, or watercraft after hearing authorized. (Alaska Stat. § 28.35.036). Unlawful to use cancelled, revoked or suspended license, or to lend operator's license to someone else, or to use someone else's license, or to permit any unlawful use of license. (Alaska Stat. § 28.15.281 and .291). State may sell abandoned vehicles after notice to owner and lienholders. (Alaska Stat. § 28.11.070). Offenses for minor operating vehicle after consumption of alcohol set out. (Alaska Stat. § 28.35.280-.290).

Implied Consent.

Operation of vehicle gives implied consent to chemical test for determining alcoholic content of blood if lawfully arrested. Refusal to submit to test will result in suspension, denial or revocation of license. (Alaska Stat. § 28.35.031-.032). Refusal to submit to chemical test is Class A misdemeanor. (Alaska Stat. § 28.35.032).

Direct actions not allowed against insurer.

Motor Vehicle Taxes.

See category 22 Taxation, topic 22.13 Motor Vehicle Taxes.

Gasoline Tax.

See category 22 Taxation, topic 22.08 Gasoline and Special Fuels Taxes.

Warranties.

(Alaska Stat. § 45.45.300-45.45.360).

1
ARIZONA LAW DIGEST

—Scope —

Revised for 2010 edition by

FENNEMORE CRAIG, P.C., Phoenix, Tucson, Nogales, Las Vegas, and Denver.

(References, unless otherwise indicated, are to Arizona Revised Statutes, 1956 [cited by section number, i.e., Ariz. Rev. Stat. 21-406], Arizona Rules of Civil Procedure, 1956 [cited by rule number, i.e., R. Civ. P. 5(a)] and Arizona Rules of Civil Appellate Procedure, 1978 [cited by rule number, i.e., App. 7]. Parallel citations begin with 1 Arizona and 25 Pacific Reporter [1866]).

NOTE: This revision covers all Acts adopted by 49th Legislature in its 1st Regular Session (2009) and approved by Governor through July 13, 2009. Legislature meets annually beginning on second Mon. in Jan.

1 INTRODUCTION

1.01 GOVERNMENT AND LEGAL SYSTEM:

The State of Arizona is a constituent state of the United States of America. For further discussion of the U.S. federal system, see Introduction to the Federal Government of the United States at the beginning of this volume. A great many laws are promulgated by the federal government of the United States and are not reflected in the topics below. See the Introduction to this volume for references to the federal law topics covered.

Like all but one of the United States, Arizona has a common law legal system, with roots in English common law. For information on the courts and legislature of Arizona, see category 6 Courts and Legislature.

1.02 [RESERVED]

1.03 HOLIDAYS:

Legal Holidays.

Sundays, and Jan. 1, 3d Mon. in Jan., 3d Mon. in Feb., 2d Sun. in May, last Mon. in May, 3d Sun. in June, July 4, 1st Sun. in Aug., 1st Mon. in Sept., Sept. 17, 2d Mon. in Oct., Nov. 11, 4th Thurs. in Nov. and Dec. 25. (Ariz. Rev. Stat. 1-301[A]).

Holidays Falling on Sat. or Sun.

When any holiday falls on Sat., preceding Fri. is observed as holiday. (Ariz. Rev. Stat. 1-301[C]). When any holiday, other than holiday designed to fall on Sun., falls on Sun., following Mon. is observed as holiday. (Ariz. Rev. Stat. 1-301[B]).

Legality of Transactions on Holidays.

Public offices and courts of justice may not be opened on holidays, and no judicial business may be transacted, except for following purposes: To give instructions to deliberating jury on its request, to receive verdict or discharge jury, and for exercise of powers of magistrates in criminal proceedings. Injunctions, attachments, claim and delivery and writs of prohibition may be issued and served on any day. (Ariz. Rev. Stat. 1-302).

1.04 OFFICE HOURS AND TIME ZONE:

Arizona is in the Mountain (GMT -07:00) time zone. Office hours are generally from 9 a.m. to 5 p.m.

2 BUSINESS ORGANIZATIONS

2.01 AGENCY:

Rules of common law apply in absence of statutory provisions.

2.02 ASSOCIATIONS:

Caveat: For disclosure requirements in conveyances of real property made or taken in representative capacity, see category 21 Property, topic 21.06 Deeds.

Business Trusts.

Permitted as a recognized form of association. (Ariz. Rev. Stat. 10-1871 et seq.). Subject to applicable provisions of general corporate law. (Ariz. Rev. Stat. 10-1879).

Associations Not for Profit.

Cooperative marketing associations and electric cooperative nonprofit membership corporations are governed by Ariz. Rev. Stat. 10-2001 et seq. and 2051 et seq., respectively. Nonprofit electric cooperatives are subject to Ariz. Rev. Stat. 10-2121 et seq. Names for electric cooperatives are governed by Ariz. Rev. Stat. 10-2054. Solicitation of funds for charitable purposes is governed by Ariz. Rev. Stat. 44-6551 et seq.

Fraternal Societies.

Regulated by Ariz. Rev. Stat. 10-2101 et seq. May elect not less than three nor more than nine of their members as trustees to care for property and transact related business of society. (Ariz. Rev. Stat. 10-2101). Such trustees may manage, purchase, lease, hold, convey, mortgage, execute deeds of trust and improve all property of such societies; and may sue and be sued. (Ariz. Rev. Stat. 10-2102). Trustees must be elected annually. (Ariz. Rev. Stat. 10-2104). Classification of trustees permitted. (Ariz. Rev. Stat. 10-2104). Any two may call meeting, and majority may transact business. (Ariz. Rev. Stat. 10-2104).

Professional Corporations.

Governed by Ariz. Rev. Stat. 10-2201 et seq. See topic 2.03 Corporations.

Actions.

Pleading capacity to sue or be sued is as provided by R. Civ. P. 9(a); actions by or against governed by R. Civ. P. 23.2.

2.03 CORPORATIONS:

General Supervision.

Exercised by Arizona Corporation Commission. Administration Division: 1200 W. Washington St., Phoenix, Arizona 85007. Telephone: (602) 542-3076. Facsimile: (602) 542-4111. E-mail: admindiv@azcc.gov. Web: http://www.cc.state.az.us/divisions/administration. General Information: (602) 542-2237. Corporations Division: 1300 W. Washington St., 1st Floor, Phoenix, Arizona 85007. Telephone: (602) 542-3026 or (800) 345-5819. E-mail: For corporations division, see http://www.cc.state.az.us/divisions/corporations/contact.asp. Web: http://www.cc.state.az.us/divisions/corporations.

Arizona Business Corporation Act (Ariz. Rev. Stat. 10-120 et seq.) is based on Model Business Corporation Act (1984), and amendments thereto through 2000, with substantial variations as noted below. Note that new Act applies to all existing corporations as of Jan. 1,

1996. (Ariz. Rev. Stat. 10-1701[A]). Corporations formed prior to Arizona's statehood may take steps to retain previously valid article provisions. (Ariz. Rev. Stat. 10-1701[B]).

Material variations from Official Text, as set forth in Uniform and Model Acts section, are:

§ 1.20 (Ariz. Rev. Stat. 10-120).—Minor variations. Delivery may be made by fax or electronic transmission, pursuant to any format Commission may prescribe. See Ariz. Rev. Stat. 10-122 for schedule of nonrefundable fees.

§ 1.24 (Ariz. Rev. Stat. 10-124).—Documents must be "filed" before they can be corrected.

§ 1.25 (Ariz. Rev. Stat. 10-125).—Documents are not "filed" until Commission has reviewed them for statutory compliance. (Ariz. Rev. Stat. 10-123). If in compliance, documents will be considered "filed" as of date of delivery to Commission. (Ariz. Rev. Stat. 10-123). If not in compliance, documents will be returned unfiled. (Ariz. Rev. Stat. 10-125).

§ 1.26 (Ariz. Rev. Stat. 10-126).—Omitted.

§ 1.27 (Ariz. Rev. Stat. 10-127).—Stamp affixed to copy of document bearing signature of executive director of Commission (which may be in facsimile or electronic form) and seal of Commission is conclusive evidence that original is on file with Commission.

§ 1.28 (Ariz. Rev. Stat. 10-128).—Comparable.

§ 1.29 (Ariz. Rev. Stat. 10-129).—Omitted as duplicative of A.R.S. Title 13, c. 27 and Ariz. Rev. Stat. 10-1631. Officers, directors or agents who knowingly or wrongfully authorize, sign or make false reports, certificates, other statements or public notices, or authorize or make wrongful alterations to books, records or accounts of corporation are jointly and severally personally liable to creditor or shareholder of corporation who relied on false material representations or alterations. Limitation on actions is two years after discovery of false representation or alteration, and six years after certificate, report, public notice or other statement or alteration was made. (Ariz. Rev. Stat. 10-1631). Commission may direct detailed interrogatories to any person listed in certificate of disclosure who has been involved two or more times in corporate bankruptcy, receivership, revocation, administrative dissolution or judicial dissolution in any state. (Ariz. Rev. Stat. 10-1623). Interrogatories must be answered within 30 days after mailing, and failure to comply is Class 1 Misdemeanor. (Ariz. Rev. Stat. 10-1623). False statements constitute Class 5 Felony. (Ariz. Rev. Stat. 10-1623). Commission must not file articles of incorporation or application for authority to transact business by foreign corporation until all outstanding interrogatories are answered to its satisfaction. (Ariz. Rev. Stat. 10-1623). Upon filing petition for bankruptcy or appointment of receiver, corporation must deliver statement to Commission disclosing information regarding all officers, directors, trustees and holders of greater than 20% interests in corporation within one year. If holder of more than 20% of stock is corporation, statement must list similar information for corporate stockholders. (Ariz. Rev. Stat. 10-1623). Failure to comply is Class 1 Misdemeanor, and giving false information is Class 5 Felony. (Ariz. Rev. Stat. 10-1623). See Ariz. Rev. Stat. 10-1631 et seq. for further requirements of interrogatories and additional criminal penalties. Commission may propound to any domestic or foreign corporation any interrogatories it deems reasonably necessary and proper to ascertain compliance with law by corporation, and interrogatories must be answered in writing and under oath within 30 days after mailing. (Ariz. Rev. Stat. 10-1633).

§ 1.41 (Ariz. Rev. Stat. 10-141).—Oral notice not permitted if written notice is specifically required.

§ 2.01 (Ariz. Rev. Stat. 10-201).—Incorporators must deliver certificate of disclosure to Commission along with articles of incorporation.

§ 2.02 (Ariz. Rev. Stat. 10-202).—Substantially revised. Articles may set forth any matters which are not inconsistent with other laws, including limitation or elimination of director liability. Certificate of disclosure must set forth information regarding each officer, director, trustee, incorporator, and 10% or greater shareholder, and must be supplemented, within 60 days, for any person attaining such position after filing articles of incorporation.

§ 2.03 (Ariz. Rev. Stat. 10-203).—Corporate existence begins at time of delivery, not "filing," of articles of incorporation and certificate of disclosure. If articles and certificate are later rejected by Commission as not in compliance with law, corporate existence terminates at time of rejection, and is not retroactively terminated. Articles must be published within 60 days after filing with Commission is approved, and affidavit of publication may be filed with Commission. Foreign corporations may be domesticated in Arizona (Ariz. Rev. Stat. 10-220), and Arizona corporations may transfer their domicile to another jurisdiction (Ariz. Rev. Stat. 10-226).

§ 2.04 (Ariz. Rev. Stat. 10-204).—Imposes joint and several liability for preincorporation and post-termination transactions on persons who act with actual knowledge that no corporation exists.

§ 2.05 (Ariz. Rev. Stat. 10-205).—Requires board of directors to complete organization of corporation after incorporation.

§ 2.06 (Ariz. Rev. Stat. 10-206).—Board of directors must adopt initial bylaws.

§ 3.02 (Ariz. Rev. Stat. 10-302).—Corporate bonds may be signed by facsimile signature, and may be authenticated by trustee.

§ 3.04 (Ariz. Rev. Stat. 10-304).—Attorney General may enjoin corporation from transacting unauthorized business.

§ 4.01 (Ariz. Rev. Stat. 10-401).—"Association" or "bank" may be used to denote corporate form; use of words "bank," "deposit," "trust," "trust company," "limited liability company," "limited company," "L.L.C.," "LLC," "L.C." and "LC" is restricted.

§ 4.03 (Ariz. Rev. Stat. 10-403).—Registration expires one year after application unless renewed.

§ 5.01 (Ariz. Rev. Stat. 10-501).—Corporations must maintain "known place of business" and "statutory agent," which are not required to but may have same address.

§ 5.04 (Ariz. Rev. Stat. 10-504).—If corporation fails to maintain statutory agent, Commission acts as corporation's agent for service of process, notice or demand.

§ 6.02 (Ariz. Rev. Stat. 10-602).—Prior to issuing shares of class or series, corporation must file "statement pursuant to § 10-602" with Commission, which constitutes amendment to articles of incorporation. (Ariz. Rev. Stat. 10-602[D]).

§ 6.20 (Ariz. Rev. Stat. 10-620).—Certain provisions not limited to preincorporation subscriptions. Board of directors may release, compromise or settle any subscription or any claim, dispute or action arising out of subscription. Subscription agreement not enforceable unless in writing and signed by party to be charged or his agent. Remedies of rescission or forfeiture available only when defaulting subscriber fails to cure default after notice.

§ 6.21 (Ariz. Rev. Stat. 10-621).—Stock may not be issued in exchange for promissory notes or future services. Shares issued by banking and insurance corporations may require par value. (Ariz. Const. art. XIV, § 11).

§ 6.24 (Ariz. Rev. Stat. 10-624).—Issuance of rights, options and warrants must be subject to any pre-existing conditions in articles of incorporation. Provisions adjusting terms upon specified occurrences may be included in rights, options or warrants. “Poison pill” and similar provisions are permitted. (Ariz. Rev. Stat. 10-629).

§ 6.25 (Ariz. Rev. Stat. 10-625).—No certificates may be issued unless shares fully paid.

§ 6.27 (Ariz. Rev. Stat. 10-627).—Allows additional restrictions on transfer or registration if not manifestly unreasonable.

§ 6.31 (Ariz. Rev. Stat. 10-631).—Board of directors may file “statement pursuant to Ariz. Rev. Stat. 10-631” with Commission, which constitutes amendment to articles without shareholder action.

§ 7.01 (Ariz. Rev. Stat. 10-701).—Contains special rules for water users’ associations.

§ 7.02 (Ariz. Rev. Stat. 10-702).—Provision allowing certain percentage of shareholders to call special meetings must be included in articles or bylaws to be effective.

§ 7.03 (Ariz. Rev. Stat. 10-703).—Shareholder petitions may be made when three months have passed since annual meeting date specified in bylaws or 15 months since last annual meeting.

§ 7.04 (Ariz. Rev. Stat. 10-704).—Delivery of consent to corporation is not condition of effectiveness. If not specified in consent, effective date is date last shareholder signs, unless ten days’ written notice is required to nonvoting shareholders. Shareholders may revoke consent by delivering signed revocation to president or secretary before date last shareholder signs.

§ 7.05 (Ariz. Rev. Stat. 10-705).—Unless otherwise set by Ariz. Rev. Stat. 10-703 or Ariz. Rev. Stat. 10-707, record date is day before effective date of first notice to shareholders.

§ 7.08 (Ariz. Rev. Stat. 10-708).—Shareholders may use modern communications technology for shareholder meetings, as permitted by sole discretion of board of directors. No other provision for conduct of meeting.

§ 7.21 (Ariz. Rev. Stat. 10-721).—Water users’ associations may further limit voting rights in articles or bylaws.

§ 7.22 (Ariz. Rev. Stat. 10-722).—Appointment of proxy may be for less than 11 but no more than 12 months. Proxies whose appointments are coupled with interest also include persons with purchase options, any other right to acquire shares, and creditors who continue credit to corporation. Water users’ associations may limit or eliminate right to vote by proxy in articles of incorporation.

§ 7.25 (Ariz. Rev. Stat. 10-725).—Articles or bylaws may provide that shares present at meeting may be withdrawn for quorum purposes.

§ 7.28 (Ariz. Rev. Stat. 10-728).—Cumulative voting is mandatory. (Ariz. Const. art. XIV, § 10).

§ 7.29—has not been adopted.

§ 7.30 (Ariz. Rev. Stat. 10-730).—Voting trust agreements may contain any lawful provision consistent with purposes of trust.

§ 7.31 (Ariz. Rev. Stat. 10-731).—Voting agreements may specify that voting agreement is not specifically enforceable.

§ 7.32 (Ariz. Rev. Stat. 10-732).—Board of directors may not be eliminated. Shareholder agreements must be filed with corporation. Procedures in Ariz. Rev. Stat. 10-732 are not exclusive methods of agreement among shareholders.

§ 7.40 (Ariz. Rev. Stat. 10-740).—“Independent person” is defined as having “no personal interest in the transaction and no personal or other relationship which influences the person.”

§ 7.42 (Ariz. Rev. Stat. 10-742).—Derivative proceedings may be commenced sooner than 90 days after demand if statute of limitations will expire within 90-day period.

§ 7.44 (Ariz. Rev. Stat. 10-744).—Requirements differ. Court may dismiss proceedings on motion of corporation “on any legal grounds.”

§ 8.01 (Ariz. Rev. Stat. 10-801).—Corporations must have board of directors.

§ 8.03 (Ariz. Rev. Stat. 10-803).—Restrictions on board of directors materially changing size of board without shareholder approval have been omitted.

§ 8.04 (Ariz. Rev. Stat. 10-804).—Voting groups may be comprised of specified series of stock within class.

§ 8.06 (Ariz. Rev. Stat. 10-806).—Requirements differ. Staggered boards generally permitted without regard to total number of directors and without limiting number of classes. See also 82 Ariz. 299, 313 P.2d 379, which may otherwise limit number of classes.

§ 8.07 (Ariz. Rev. Stat. 10-807).—Notice of resignation may specify event upon which resignation is effective.

§ 8.08 (Ariz. Rev. Stat. 10-808).—If less than entire board is to be removed, director shall not be removed if number of votes sufficient to elect him by cumulative voting is voted against his removal.

§ 8.09 (Ariz. Rev. Stat. 10-809).—Standard for removal is limited to fraudulent or intentional criminal conduct. Time period for which court may remove director is no longer than five years.

§ 8.10 (Ariz. Rev. Stat. 10-810).—Any officer or shareholder may call special meeting of shareholders to fill director vacancies when no directors remain in office.

§ 8.21 (Ariz. Rev. Stat. 10-821).—Directors may revoke consents by delivering signed revocation to president or secretary before date last director signs.

§ 8.24 (Ariz. Rev. Stat. 10-824).—Directors have until 5:00 p.m. on next business day to dissent or abstain from action taken at board meeting.

§ 8.25 (Ariz. Rev. Stat. 10-825).—Committees may consist of one or more members.

Committees may not set director or committee compensation. Board may designate alternate committee members to replace absent members.

§ 8.30 (Ariz. Rev. Stat. 10-830).—Directors retain all legal defenses and presumptions ordinarily available to directors. Directors are presumed to have acted in accordance with law, and burden is on challenging party to rebut presumption by clear and convincing evidence.

§ 8.31—has not been adopted.

§ 8.33 (Ariz. Rev. Stat. 10-833).—Directors must properly dissent to unlawful distributions or will be presumed to have assented if present at meeting. (Ariz. Rev. Stat. 10-833[B]). Limitation on actions against directors is four years.

§ 8.42 (Ariz. Rev. Stat. 10-842).—Officers may rely on directors. Officers retain all legal defenses and presumptions ordinarily available. Officers are presumed to have acted in accordance with law, and burden is on challenging party to rebut presumption by clear and convincing evidence.

§ 8.43 (Ariz. Rev. Stat. 10-843).—Officer resignations may be effective upon specified date or event.

§ 8.50 (Ariz. Rev. Stat. 10-850).—Certain definitions have been expanded, deleted or added. “Liability” includes expenses which have not yet been paid but have been or may be incurred by person to be indemnified. “Outside director” is director who is not also officer, employee or holder of more than 5% of any class of stock.

§ 8.52 (Ariz. Rev. Stat. 10-852).—Outside directors have presumptive right to mandatory indemnification and advancement of expenses, unless articles provide otherwise or court finds that outside director failed to meet standard of conduct.

§ 8.53 (Ariz. Rev. Stat. 10-853).—Procedures differ. Advances to outside directors are governed by Ariz. Rev. Stat. 10-852.

§ 8.54 (Ariz. Rev. Stat. 10-854).—Maintained pre-1994 version with certain additions for expense advances.

§ 8.55 (Ariz. Rev. Stat. 10-855).—Special legal counsel and shareholders exculpated for any determination.

§ 8.58-8.59 (Ariz. Rev. Stat. 10-858).—Portions of 8.58 omitted and 8.59 included in Ariz. Rev. Stat. 10-858.

§ 8.61 (Ariz. Rev. Stat. 10-861).—Burden is on challenging party to prove by clear and convincing evidence that requirements of subsection (B) were not met by director.

§ 10.02—See Ariz. Rev. Stat. 10-1005.

§ 10.03 (Ariz. Rev. Stat. 10-1003).—Shareholders may initiate amendments, if permitted in articles of incorporation.

§ 10.04 (Ariz. Rev. Stat. 10-1004).—Voting right also applies to new class of shares having equal rights or preferences.

§ 10.05—See Ariz. Rev. Stat. 10-1002.

§ 10.06 (Ariz. Rev. Stat. 10-1006).—May state number of shares outstanding and entitled to vote and either vote tally or number of affirmative votes and statement of sufficiency. Articles of amendment must be published within 60 days after filing with Commission is approved, and affidavit of publication may be filed with Commission.

§ 10.07 (Ariz. Rev. Stat. 10-1007).—Procedural differences. Articles of restatement must be published within 60 days after filing with Commission is approved, and affidavit of publication may be filed with Commission.

§ 10.08 (Ariz. Rev. Stat. 10-1008).—Dissenter's rights limited to reorganization plan. Articles of amendment must be published within 60 days after filing with Commission is approved, and affidavit of publication may be filed with Commission.

§ 10.21 (Ariz. Rev. Stat. 10-1021 to Ariz. Rev. Stat. 10-1022).—Right to adopt, amend, or repeal bylaw related to shareholder voting or quorum reserved to shareholders.

§ 11.01—has not been adopted.

§ 11.02 (Ariz. Rev. Stat. 10-1101 to Ariz. Rev. Stat. 10-1107).—Requirements of plan content differs. Foreign corporations deemed to make certain agreements.

§ 11.03 (Ariz. Rev. Stat. 10-1102 to Ariz. Rev. Stat. 10-1107).—Requirements of plan content differs. Foreign corporations deemed to make certain agreements.

§ 11.04 (Ariz. Rev. Stat. 10-1103).—Abandonment of plan is permitted at any time prior to filing of articles of merger or share exchange.

§ 11.05 (Ariz. Rev. Stat. 10-1104).—Plan of merger must be adopted and copy or summary mailed to subsidiary shareholders at least 30 days before filing articles of merger, which may not amend parent's articles of incorporation.

§ 11.06 (Ariz. Rev. Stat. 10-1105).—Plan of merger or share exchange is filed as separate document with Commission. See subsection (A)(2) for requirements of articles of merger or share exchange. Merger or share exchange takes effect as provided in Ariz. Rev. Stat. 10-123. If articles of merger or share exchange include amendments to articles of incorporation of surviving corporation, document must be titled "articles of amendment and merger." Articles of merger or share exchange must be published within 60 days after filing with Commission is approved, and affidavit evidencing publication may be filed with Commission.

§ 11.07 (Ariz. Rev. Stat. 10-1106).—Portions included in Ariz. Rev. Stat. 10-1107.

§ 10-1108.—Domestic and foreign limited liability companies, limited partnerships and registered limited liability partnerships may merge or exchange shares with domestic corporations pursuant to Ariz. Rev. Stat. 10-1108.

§ 12.01 (Ariz. Rev. Stat. 10-1201).—Articles of incorporation may require shareholder approval.

§ 12.02 (Ariz. Rev. Stat. 10-1202).—Asset and income tests omitted.

§ 13.01 (Ariz. Rev. Stat. 10-1301).—Some definitions omitted or altered.

§ 13.02 (Ariz. Rev. Stat. 10-1302).—Some instances of and tests for dissenter's rights omitted. Does not apply if shares of class or series are redeemable securities issued by registered investment company.

§ 13.22 (Ariz. Rev. Stat. 10-1322).—Certain notice requirements omitted. Date for payment demand may not be less than 30 days.

§ 13.24 (Ariz. Rev. Stat. 10-1325).—Immediate payment required.

§ 13.31 (Ariz. Rev. Stat. 10-1331).—Court may assess costs and fees against dissenters and in favor of corporation.

§ 14.03 (Ariz. Rev. Stat. 10-1403).—Additional requirements apply, including tax clearance from Department of Revenue, payment of all fees owed to Commission, and publication of articles of dissolution within 60 days after filing of articles of dissolution with Commission is approved.

§ 14.06 (Ariz. Rev. Stat. 10-1406).—Contingent claims which become known claims after effective date of dissolution may be disposed of pursuant to this section.

§ 14.20 (Ariz. Rev. Stat. 10-1420).—Grounds for administrative dissolution include failure to make publications and file affidavits as required by law, failure to update certificate of disclosure for new officers, directors, trustees or shareholders in accordance with Ariz. Rev. Stat. 10-202(F), material misrepresentations made by officers or other representations in documents submitted pursuant to cc. Ariz. Rev. Stat. 1-17 of Title 10, failure to comply with Ariz. Rev. Stat. 10-1403, and failure to file certificate of disclosure or answer interrogatories as prescribed in cc. Ariz. Rev. Stat. 1-17 of Title 10.

§ 14.21 (Ariz. Rev. Stat. 10-1421).—If corporation has not applied for reinstatement within six months after effective date of dissolution, Commission must release corporate name for use by others.

§ 14.22 (Ariz. Rev. Stat. 10-1422).—Corporations have six years to apply for reinstatement. Applications for reinstatement need only recite corporation name, effective date of administrative dissolution, and nonexistence or elimination of grounds for dissolution. If another corporation or person has adopted corporate name as name of entity or trade name, application for reinstatement shall include articles of amendment adopting new name. (Ariz. Rev. Stat. 10-401 et seq.).

§ 14.23 (Ariz. Rev. Stat. 10-1423).—Omitted. Commission has established administrative procedures for appeal. See Ariz. Admin. Code §§ R14-3-101, 112 (2006).

§ 14.31 (Ariz. Rev. Stat. 10-1431).—Subsection (d) regarding shareholder notices has been omitted.

§ 14.40 (Ariz. Rev. Stat. 10-1440).—Payments may be made to legal representative of creditor, claimant or shareholder who is not competent to receive them. Distributions are processed through Unclaimed Property Division of Department of Revenue, rather than state treasurer.

§ 15.01 (Ariz. Rev. Stat. 10-1501).—Being limited partner or member of limited liability company does not constitute "transacting business" requiring authority from Commission. This section does not apply to insurance corporations or corporations only lending money to religious, social or benevolent associations in Arizona.

§ 15.02 (Ariz. Rev. Stat. 10-1502).—Penalties for failure to obtain authority differ. Attorney general or any other person may bring action to enjoin foreign corporation from transacting business without authority.

§ 15.03 (Ariz. Rev. Stat. 10-1503).—Application requirements differ. Certificate of disclosure is required. Commission must review application for compliance with law. Application must be published within 60 days after filing of application is approved, and affidavit of publication may be filed with Commission. Foreign corporations authorized to transact business are subject to Ariz. Rev. Stat. 10-1623 regarding involvement of persons in corporate bankruptcies, receiverships, revocations, and administrative or judicial dissolutions. (Ariz. Rev. Stat. 10-1623). No certificates are issued; date of filing is date on which Commission grants authority to transact business.

§ 15.04 (Ariz. Rev. Stat. 10-1504).—New authority from Commission must be obtained if foreign corporation changes either its actual name or name under which it was granted authority to transact business. Filing requirements differ. If foreign corporation amends or restates its articles of incorporation for any reason, certified copy must be delivered to Commission within 60 days.

§ 15.06 (Ariz. Rev. Stat. 10-1506).—Words “association” and “bank” may be added to name. Use of “bank,” “deposit,” “trust,” and “trust company” is restricted. Certain other requirements differ.

§ 15.07 (Ariz. Rev. Stat. 10-1507).—Addresses of known place of business and statutory agent need not but may be identical. Statutory agent may be limited liability company.

§ 15.08 (Ariz. Rev. Stat. 10-1508).—Requirements differ. Addresses of known place of business and statutory agent need not be identical.

§ 15.09 (Ariz. Rev. Stat. 10-1509).—Procedures differ.

§ 15.10 (Ariz. Rev. Stat. 10-1510).—If corporation fails to maintain statutory agent, Commission acts as corporation’s agent for service of process, notice or demand.

§ 15.20 (Ariz. Rev. Stat. 10-1520).—Requirements differ. Application for withdrawal is not complete without state tax clearance and payment of all fees owed to Commission. Application for withdrawal must be published within 60 days after filing of application is approved, and affidavit of publication may be filed with Commission. Commission must review application for conformance with law.

§ 15.21 (Ariz. Rev. Stat. 10-1521).—Majority of duly authorized officers of foreign corporation may withdraw foreign corporation by filing application for withdrawal.

§ 15.30 (Ariz. Rev. Stat. 10-1530).—Grounds for revocation include failure to make any publication or file affidavit of publication required by law, failure to update certificate of disclosure, and material misrepresentations made by officers or other representations in any document submitted pursuant to cc. Ariz. Rev. Stat. 1-17 of Title 10. Foreign corporation may apply for reinstatement within six years of revocation of authority. Dissolved corporation’s name is freed for general use if corporation does not reinstate it within six months. (Ariz. Rev. Stat. 10-1531).

§ 15.32 (Ariz. Rev. Stat. 10-1532).—Omitted. Commission has established procedures for appeal to Commissioners. See Ariz. Admin. Code §§ R14-3-101, 102 (2006).

§ 16.01 (Ariz. Rev. Stat. 10-1601).—Corporation must keep corporate records, including copies of any shareholder agreements under Ariz. Rev. Stat. 10-732, at its principal office, known place of business or office of statutory agent.

§ 16.02 (Ariz. Rev. Stat. 10-1602).—Shareholder must be holder of record for at least six months immediately preceding demand, or holder of record of at least 5% of all outstanding shares, before right to inspect arises, unless shareholder obtains court order compelling inspection.

§ 16.05 and 16.06.—Omitted.

§ 10-1621.—Reporting on indemnification or advancement of expenses is not limited to derivative proceedings. Reporting requirement is tied to delivery of annual financial statements, rather than notice of next shareholders' meeting. Section inapplicable if securities traded on an established market.

§ 16.21 (Ariz. Rev. Stat. 10-1622).—Requirements differ. Annual reports must include certificate of disclosure, names of shareholders holding more than 20% of any class of shares, and statement regarding filing of state income tax returns. Filing deadline assigned by Commission. Commission may stagger annual report filing date for all corporations and adjust annual registration fee on pro rata basis.

§ 17.01 (Ariz. Rev. Stat. 10-1701).—All provisions of Act are fully applicable to all existing business corporations and to all new business corporations formed after effective date (Jan. 1, 1996). Corporations organized under laws of territory of Arizona (prior to Arizona's statehood) may amend or restate articles of incorporation and retain any previously valid provisions of their articles, which shall continue to be applicable to corporation and all persons dealing with it. Act does not apply to statutes governing close corporations (Ariz. Rev. Stat. 10-1801 et seq.), business trusts (Ariz. Rev. Stat. 10-1871 et seq.), or professional corporations (Ariz. Rev. Stat. 10-2201 et seq.), except as specifically provided in respective statutes.

§ 17.03 (Ariz. Rev. Stat. 10-1703).—Omitted. Arizona courts have held that substantive legal rights (as distinguished from procedural expectations) may not be impaired once vested. (173 Ariz. 19, 839 P.2d 439).

§ 17.04 (Ariz. Rev. Stat. 10-1704).—Omitted. Arizona has recognized severability. (139 Ariz. 525, 679 P.2d 548).

§ 17.05 (Ariz. Rev. Stat. 10-1705).—Omitted. New Act is complete substitute for prior Arizona corporation law.

§ 17.06 (Ariz. Rev. Stat. 10-1706).—Omitted. Effective date is Jan. 1, 1996.

Takeovers.

Regulated by Ariz. Rev. Stat. 10-2701 et seq.

Deeds.

See category 21 Property, topic 21.06 Deeds.

Name.

Regulated by Ariz. Rev. Stat. 10-401 et seq.; Ariz. Rev. Stat. 10-3401 et seq.

Franchise or License Taxes.

None.

Filing Fees.

Regulated by Ariz. Rev. Stat. 10-3122 (nonprofit corporations).

Income Tax on Corporations.

See category 22 Taxation, topic 22.09 Income Tax, subhead Rates for Corporations.

Sales Tax.

See category 22 Taxation, topic 22.17 Sales and Use Taxes, subhead Transaction Privilege Taxes.

Stock Transfer.

Uniform Commercial Code adopted. (Ariz. Rev. Stat. 47-1101 et seq.). See category 3 Business Regulation and Commerce, topic 3.09 Commercial Code. Uniform Simplification of Fiduciary Security Transfers Act repealed by 1995, c. 153, § 6. See Ariz. Rev. Stat. 47-8101 et seq. for same subject matter.

Unclaimed Dividends.

See category 21 Property, topic 21.01 Absentees, subhead Escheat.

Close Corporations.

Such corporations are subject to provisions of Model Business Corporation Act as adopted in Arizona unless Ariz. Rev. Stat. 10-1801 modifies or differs from those provisions, in which case close corporations act prevails. (Ariz. Rev. Stat. 10-1801 et seq.).

Articles of incorporation must contain name of corporation, names and addresses of managers and original investors (which may not exceed ten), initial contributions of each, aggregate initial contributions to corporation, and name, address and signature of statutory agent. (Ariz. Rev. Stat. 10-1803). See Ariz. Rev. Stat. 10-1804 et seq. for additional provisions regarding close corporations.

Limited Liability Companies.

See topic 2.06 Limited Liability Companies.

Nonprofit Corporations.

In General.

Arizona Nonprofit Corporation Act adopted. (Ariz. Rev. Stat. 10-3101 et seq.). Act replaces corporation code chapter on nonprofit corporations (Ariz. Rev. Stat. 10-2301 et seq.) and adds section regulating sale and merger of nonprofit hospitals (Ariz. Rev. Stat. 10-11251 et seq.). Note new Act applies to all existing corporations as of Jan. 1, 1999. (Ariz. Rev. Stat. 10-11701). Corporations formed prior to Arizona's statehood may elect to retain previously valid article provisions. Filing fees governed by Ariz. Rev. Stat. 10-3122. Solicitation of funds for charitable purposes governed by Ariz. Rev. Stat. 44-6551 et seq.

Immunity.

Directors immune from civil liability from third-party lawsuits for good faith actions in their official capacity. (Ariz. Rev. Stat. 10-3830). Articles of incorporation may limit liability of directors to corporation or members for breach of fiduciary duty. (Ariz. Rev. Stat. 10-3202).

Professional Corporations.

Such corporations are subject to provisions of Model Business Corporations Act as adopted in Arizona, unless Ariz. Rev. Stat. 10-2201 et seq. modifies or differs from those provisions, in which case Professional Corporations Act prevails. Name must include "professional corporation," "professional association," "service corporation," "limited," "chartered," or abbreviation thereof. (Ariz. Rev. Stat. 10-2215). Professional can use any other corporate form not prohibited by licensing authority. (Ariz. Rev. Stat. 10-2213). Business corporations can amend articles to become professional corporations. (Ariz. Rev. Stat. 10-2210). Professional corporations can amend articles to become business corporations. (Ariz. Rev. Stat. 10-2241). Foreign professional corporation must obtain grant of authority to transact business if it maintains or intends to maintain office in Arizona. (Ariz. Rev. Stat. 10-2244 to Ariz. Rev. Stat. 10-2246). Professional corporations may engage in two or more categories of professional service and any other business purpose, unless prohibited by licensing law or authorities (Ariz. Rev. Stat. 10-2211); broad range of other activities permitted (Ariz. Rev. Stat. 10-2211 to Ariz. Rev. Stat. 10-2214). At least 51% of voting shares must be owned by licensed professionals, which may include partnerships, other professional corporations, professional limited liability companies or similar entities in certain circumstances. (Ariz. Rev. Stat. 10-2220). Up to 49% of voting shares may be owned by other persons. (Ariz. Rev. Stat. 10-2220). Shares may be held by employee stock ownership plan. (Ariz. Rev. Stat. 10-2220). Shares held by professionals may be transferred only to professionals; shares held by other persons may be transferred to any qualified person. (Ariz. Rev. Stat. 10-2222). At least one-half of directors and president, if any, must be licensed professionals. (Ariz. Rev. Stat. 10-2230). Professional corporation may merge with any other entity. (Ariz. Rev. Stat. 10-2240).

Uniform Gifts to Minors Act.

Repealed by 1988, c. 81, § 3. See Arizona Uniform Transfers to Minors Act. (Ariz. Rev. Stat. 14-7651 et seq.).

Uniform Securities Ownership by Minors Act not adopted.

Uniform Simplification of Fiduciary Security Transfers Act repealed by 1995, c. 153, § 6. See Ariz. Rev. Stat. 47-8101 et seq. for same subject matter.

2.04 [RESERVED]

2.05 JOINT STOCK COMPANIES:

In General.

Subject to same statutory regulations as corporations.

Professional Corporations.

See topic 2.03 Corporations.

2.06 LIMITED LIABILITY COMPANIES:

One or more persons may form limited liability company by filing articles of organization with Corporation Commission. (Ariz. Rev. Stat. 29-631 et seq.). Unless articles of organization state otherwise, management of limited liability company is vested in its members. (Ariz. Rev. Stat. 29-681). Members of limited liability company may adopt operating agreement which relates to business of limited liability company, conduct of its affairs, its rights or powers and rights or powers of its members, managers, officers, employees or agents. (Ariz. Rev. Stat. 29-682).

Interest in limited liability company may be issued in exchange for capital contribution and/or enforceable promise in writing to make capital contribution in future. (Ariz. Rev. Stat. 29-701). Limited liability company cannot make distribution to member if after making that distribution, liabilities of limited liability company would exceed fair value of assets of limited liability company (Ariz. Rev. Stat. 29-706). Member may bring derivative action to recover judgment in favor of limited liability company. (Ariz. Rev. Stat. 29-831).

Professional limited liability companies are governed by Ariz. Rev. Stat. 29-841 to Ariz. Rev. Stat. 29-847. Professional limited liability companies may render professional services only through members, managers, officers, agents and employees who are licensed persons qualified in Arizona to perform those professional services. (Ariz. Rev. Stat. 29-844).

2.07 LIMITED PARTNERSHIP:

Revised Uniform Limited Partnership Act (1976) with 1985 amendments adopted (Ariz. Rev. Stat. 29-301 et seq.) with material variations and additions, including: (1) Secretary of State is default agent for service of process, notice or demand, if agent not appointed or resigns (Ariz. Rev. Stat. 29-304); (2) banking and insurance are prohibited activities (Ariz. Rev. Stat. 29-306); (3) distributions to limited partners upon withdrawal from limited partnership formed or resulting from merger after Oct. 31, 1996 are governed by Ariz. Rev. Stat. 29-334(B), unless otherwise provided in written partnership agreement; (4) judicial dissolution may be requested by assignees or successors-in-interest (Ariz. Rev. Stat. 29-345); (5) define certain activities by foreign corporations as not transacting business without registration (Ariz. Rev. Stat. 29-354[E]); (6) application to limited partnership existing on July 24, 1982 (Ariz. Rev. Stat. 29-364); (7) effect of enactment on accrued rights (Ariz. Rev. Stat. 29-365); and (8) fees (Ariz. Rev. Stat. 29-366).

2.08 PARTNERSHIPS:

Uniform Partnership Act (1994).

The Uniform Partnership Act (1994) was adopted with significant variations and additions. (Ariz. Rev. Stat. 29-1001 et seq.). Repeal of existing Uniform Partnership Act (Ariz. Rev. Stat. 29-201 et seq.) was delayed until Jan. 1, 2000 (1996, c. 226, § 46). Before Jan. 1, 2000, new Uniform Partnership Act only governed: (1) partnerships formed after July 20, 1996, unless partnership was continuing business of dissolved partnership and (2) existing partnerships that elected to be governed by new Act. (1996, c. 226, § 48[A]). As of Jan. 1, 2000, new Act governs all partnerships, including all general and limited partnerships that have filed statement of qualification or application for registration as limited liability partnership under prior law. (1996, c. 226, § 48[B]). Effect of enactment on accrued rights. (Ariz. Rev. Stat. 29-1111). Liability to third parties of partners in partnerships and limited liability partnerships under new Act. (Ariz. Rev. Stat. 29-1026).

Revised Uniform Limited Partnership Act (1976)

Revised Uniform Limited Partnership Act (1976) with 1985 amendments adopted with material variations and additions. (Ariz. Rev. Stat. 29-301 et seq.). See topic 2.07 Limited Partnership.

Fictitious Names.

Every partnership transacting business under fictitious name or designation must record with county recorder of county in which place of business is located certificate signed and acknowledged by each partner, stating full names of partners and their residence addresses. New certificate must be recorded upon any change in partnership membership. (Ariz. Rev. Stat. 29-102).

Persons doing business contrary to this provision cannot maintain any action based on any contract made or transactions had in their partnership name until they have first recorded required certificate. (Ariz. Rev. Stat. 29-102). This provision does not apply to commercial or banking partnerships established and transacting business outside Arizona nor to law firms, public accounting firms, domestic limited partnerships which have filed or recorded certificates of limited partnership, foreign limited partnership which has registered under Ariz. Rev. Stat. 29-349, domestic limited liability partnership that is registered pursuant to Ariz. Rev. Stat. 29-1101, or foreign limited liability partnership that is registered pursuant to Ariz. Rev. Stat. 29-1106. (Ariz. Rev. Stat. 29-103).

Undisclosed Names.

If a person transacts business as a merchant or trader with the addition of the word "agent," "factor," "company" or "co." or other words of like significance and fails to disclose the name of any other person interested in such business by a sign in letters easy to read, and placed conspicuously at place where business is transacted, or transacts business in his own name without such addition, all property, stock, money and choses in action used or acquired in such business, except property exempt from execution, are liable for his debts and are to be treated in all respects as his property in favor of his creditors. (Ariz. Rev. Stat. 29-101).

Caveat: For disclosure requirements in conveyances of real property made or taken in representative capacity, see category 21 Property, topic 21.06 Deeds.

Conversion.

Of one type of partnership to another governed by Ariz. Rev. Stat. 29-368 et seq. and Ariz. Rev. Stat. 29-1082 et seq.

Merger.

Governed by Ariz. Rev. Stat. 29-1085 et seq.

3 BUSINESS REGULATION AND COMMERCE

3.01 BANKS AND BANKING:

Uniform Commercial Code.

Uniform Commercial Code adopted. See topic 3.09 Commercial Code.

Regulation.

Department of financial institutions, under management of superintendent of banks, has charge of execution of laws in relation to banks and banking. (Ariz. Rev. Stat. 6-110 et seq.). Superintendent may assess civil penalty against any person, or anyone participating in affairs of person, for any knowing violations of laws or rules. (Ariz. Rev. Stat. 6-132). Classifications of criminal penalties for violations of laws and rules. (Ariz. Rev. Stat. 6-133 to Ariz. Rev. Stat. 6-134). To halt violations, superintendent may issue cease and desist order which remains effective until modified or terminated by superintendent or reviewing court. Superintendent may apply to Maricopa County Superior Court for temporary restraining order, preliminary injunction, or permanent injunction. (Ariz. Rev. Stat. 6-137). Reporting requirements imposed if credit card revolving loan accounts are issued. (Ariz. Rev. Stat. 6-140). Acquisition of 15% or more of voting securities or power to elect majority of directors of bank, trust company, savings and loan association or controlling entity thereof requires approval of superintendent, except as provided in Ariz. Rev. Stat. 6-143. (Ariz. Rev. Stat. 6-141 et seq.). In certain situations, superintendent may remove or suspend from office or financial duties any financial director, officer, or financial institution member. If removal order is final, financial institution must receive prior written approval of superintendent to employ removed person. (Ariz. Rev. Stat. 6-161). Banking permit required unless national banking association with home office in Arizona or bank authorized to do business in Arizona. (Ariz. Rev. Stat. 6-201). Merger or consolidation with or acquisition of in-state bank by out-of-state bank requires approval of superintendent. (Ariz. Rev. Stat. 6-321 to

Ariz. Rev. Stat. 6-322). Out-of-state financial institution may establish bank, savings and loan association or holding company through de novo entry. (Ariz. Rev. Stat. 6-324).

Deposits.

Bank deposits may be made in name of two or more persons, including minors, payable to either or any of them or to any or sole survivor. (Ariz. Rev. Stat. 6-235).

In Trust.

Deposits may be made by one or more persons as trustees for one or more beneficiaries. Upon death of last surviving trustee, remaining balance shall be paid to or on order of any living designated beneficiary. Receipt order or acquittance of such beneficiary is sufficient release and discharge of bank. (Ariz. Rev. Stat. 6-236).

Unclaimed Deposits.

See category 21 Property, topic 21.01 Absentees, subhead Escheat.

Stock Assessment.

May be imposed to extent of par value of stock held in addition to amount invested. (Const., Art. XIV, § 11).

Limitation of Loans.

Bank may lend to single borrower amount not more than 20% of its capital plus additional 10% of its capital if additional amounts are fully secured by readily marketable collateral with value at least equal to loan. (Ariz. Rev. Stat. 6-352). No bank may make any loan to its officers, directors, or employees, which loan causes outstanding loans to such person to exceed 1% of bank's capital account, unless loan is expressly authorized by board of directors, with interested director being disqualified to vote. (Ariz. Rev. Stat. 6-353). Balloon payments prohibited on loans of $10,000 or less for term of up to three years if loan is secured by lien (other than primary or first lien) on owner-occupied dwellings, excepting transactions involving sale of real property and excepting all federal or state chartered financial institutions. (Ariz. Rev. Stat. 6-114).

Pledge of Assets.

Bank may pledge assets to secure deposits or borrowings from one business day to next or from Federal Reserve Bank or any federal agency, but may only pledge assets to secure obligations other than deposits when value of assets so encumbered does not exceed capital account unless superintendent of banks approves otherwise. (Ariz. Rev. Stat. 6-245).

Savings Banks.

Regulated by Ariz. Rev. Stat. 6-401 et seq. Investment of funds and interest payments are restricted. (Ariz. Rev. Stat. 6-442, Ariz. Rev. Stat. 6-446).

Advance Fee Loan Brokers.

Regulated by Ariz. Rev. Stat. 6-1301 et seq. Prohibited acts and registration requirement. (Ariz. Rev. Stat. 6-1305, Ariz. Rev. Stat. 6-1309).

Transmitters of Money.

Regulated by Ariz. Rev. Stat. 6-1201 et seq. License required. (Ariz. Rev. Stat. 6-1202). Bond (Ariz. Rev. Stat. 6-1205) and minimum net worth (Ariz. Rev. Stat. 6-1205.01) required.

Escrow Agents.

Regulated by Ariz. Rev. Stat. 6-801 et seq. License requirement and surety bond requirement. (Ariz. Rev. Stat. 6-813 to Ariz. Rev. Stat. 6-814). Making of escrow rates. (Ariz. Rev. Stat. 6-846). Contributions to escrow recovery fund. (Ariz. Rev. Stat. 6-847.02).

Premium Finance Companies.

Regulated by Ariz. Rev. Stat. 6-1401 et seq.

Trust Companies.

Regulated by Ariz. Rev. Stat. 6-851 et seq. Persons engaged in trust business are certified, regulated and may be removed by superintendent of banks. (Ariz. Rev. Stat. 6-859, Ariz. Rev. Stat. 6-863). Banks and savings and loans are exempt from certification and other trust company requirements (except trust account administration requirements) if members of F.D.I.C. or F.S.L.I.C. and otherwise authorized to engage in trust business under federal or state laws. (Ariz. Rev. Stat. 6-853). Certified public accountant must audit corporate records and trust business of each trust company at least annually, with report filed with state banking superintendent. (Ariz. Rev. Stat. 6-859).

Mortgage Brokers, Mortgage Bankers, and Loan Originators.

Regulated by Ariz. Rev. Stat. 6-901 et seq.

Holding Companies.

Regulated by Ariz. Rev. Stat. 6-1101 et seq. Superintendent's approval required for organization to acquire, directly or indirectly, control of financial institution or controlling person. (Ariz. Rev. Stat. 6-1102). Exemptions contained in Ariz. Rev. Stat. 6-1103.

Debt Management Companies.

Regulated by Ariz. Rev. Stat. 6-701 et seq.

Uniform Common Trust Fund Act adopted. (Ariz. Rev. Stat. 6-871 et seq.). Any bank, savings and loan or trust company qualified to act as fiduciary may establish and administer common trust funds. (Ariz. Rev. Stat. 6-871).

Uniform Fiduciaries Act adopted. (Ariz. Rev. Stat. 14-7501 et seq.).

Foreign Banks.

See category 13 Estates and Trusts, topic 13.09 Executors and Administrators.

Building and Loan Association.

Regulated by Ariz. Rev. Stat. 6-401 et seq.

Savings and Loan Associations.

Regulated by Ariz. Rev. Stat. 6-401 et seq. Withdrawal of funds from savings and loan by negotiable order is authorized by Ariz. Rev. Stat. 6-423(B)(1) and Ariz. Rev. Stat. 6-429(C). Superintendent of banks can be appointed receiver to liquidate (Ariz. Rev. Stat. 6-482[A]).

Revised Uniform Unclaimed Property Act adopted with some material variations. (Ariz. Rev. Stat. 44-301 et seq.).

Credit Unions.

Organization and operation regulated by Ariz. Rev. Stat. 6-501 et seq.

Investment in Government Obligations.

Regulated by Ariz. Rev. Stat. 6-386; management and investment of charitable and institutional funds regulated by Ariz. Rev. Stat. 10-11801 et seq.

Permitted Investments.

Bank or trust company acting as fiduciary may invest in securities of open-end or closed-end investment company or investment trust registered under Investment Company Act of 1940, if it discloses to all persons whose funds are invested that bank provides services for and receives fees from investment company or investment trust. (Ariz. Rev. Stat. 6-246).

Sale of Securities.

Financial institutions may only sell or offer to sell equity securities or debt instruments with superintendent's prior written approval and if they disclose to purchaser that equity security or debt instrument is not federally insured. (Ariz. Rev. Stat. 6-116).

3.02 BILLS AND NOTES:

Uniform Commercial Code adopted. (Ariz. Rev. Stat. 47-1101 et seq.). See topic 3.09 Commercial Code.

Attorneys' Fees.

Clause for collection is valid. (77 Ariz. 107, 267 P.2d 740).

Judgment Notes.

See category 5 Civil Actions and Procedure, topic 5.15 Judgments, subhead Judgment by Confession.

3.03 BILLS OF LADING:

See topic 3.09 Commercial Code.

3.04 BILLS OF SALE:

See topic 3.23 Sales.

3.05 BLUE SKY LAW:

See topic 3.24 Securities.

3.06 BROKERS:

Uniform Commercial Code adopted with revisions. See topic 3.09 Commercial Code.

Real Estate Brokers.

Licensed and regulated by State Real Estate Commissioner. (Ariz. Rev. Stat. 32-2121 et seq.). License requirement also applies to cemetery broker and membership camping broker. (Ariz. Rev. Stat. 32-2122). Application, experience, completion of training course and examination required. (Ariz. Rev. Stat. 32-2123 to Ariz. Rev. Stat. 32-2124). Licensee's residential address and phone number are confidential, unless Commissioner determines disclosure is in public interest. (Ariz. Rev. Stat. 32-2125.03). Corporation, limited liability company, and partnership also may be licensed as real estate broker. (Ariz. Rev. Stat. 32-2125). Attorney need not be licensed as broker when performing duties of attorney. (Ariz. Rev. Stat. 32-2121[A][3]). Continuing education requirements for license renewal. (Ariz. Rev. Stat. 32-2130). Under certain circumstances, Commissioner may reinstate license that expired or was cancelled, terminated, suspended, or revoked. (Ariz. Rev. Stat. 32-2131). Administrative penalties no more than $1,000 for each infraction of statutes, for violating rules or orders issued by Commissioner or for unlawful practices. (Ariz. Rev. Stat. 32-2160.01).

Licensed real estate broker or real estate salesperson, when acting for parties or one of parties to sale, exchange, or trade, or renting and leasing of property, has right to draft or fill out, without charge, instruments incident thereto including, but not limited to, preliminary purchase agreements and earnest money receipts, deeds, mortgages, leases, assignments, releases, contracts for sale of realty and bills of sale. (Const., Art. XXVI, § 1).

Mortgage Brokers.

Licensed and regulated by superintendent of banks. (Ariz. Rev. Stat. 6-901 et seq.). Pertains only to persons engaged in business of making or negotiating real property mortgage loans not regulated under another law. (Ariz. Rev. Stat. 6-901). Excludes, e.g., banks, savings and loan associations, trust companies, credit unions, insurance companies, consumer lenders, mortgage bankers and attorneys. (Ariz. Rev. Stat. 6-902).

Bond.

For mortgage brokers, $10,000 bond required for licensees with only institutional investors, and $15,000 bond required for licensees whose investors include any noninstitutional investors. (Ariz. Rev. Stat. 6-903[H]). One year statute of limitation against bond from date of alleged act, except for fraud and mistake claims. (Ariz. Rev. Stat. 6-903[G]). Real estate commissioner may require bond for real estate brokers found in violation of laws or regulations. (Ariz. Rev. Stat. 32-2193.02).

Land Sale Regulation.

See category 21 Property, topic 21.16 Real Property.

3.07 BULK SALES:

Uniform Commercial Code, Chapter 6 repealed Aug. 25, 2004.

See topics 3.09 Commercial Code and 3.23 Sales.

3.08 CARRIERS:

All railroad, electric, transmission, telegraph, telephone or pipeline corporations, for transportation of persons or of electricity, messages, water, oil or other property for profit, and all other corporations operating as common carriers, other than municipal corporations, are public service corporations subject to regulation by Corporation Commission. (Const., Art. XV, §§ 2, 3, 10). Commission prescribes rates, charges, rules and regulations for public service corporations. (Const., Art. XV, § 3).

Rates, rules and regulations must be just and reasonable and must not discriminate. (Const., Art. XV, § 12).

Uniform Commercial Code adopted. See topic 3.09 Commercial Code.

Bills of Lading.

Governed by Commercial Code. (Ariz. Rev. Stat. 47-7101 et seq.). See topic 3.09 Commercial Code.

Gross Receipts Tax.

See category 22 Taxation, topic 22.08 Gasoline and Special Fuels Taxes, subhead Gasoline Tax as to certain carriers.

Motor Vehicle Carriers.

See category 23 Transportation, topic 23.01 Motor Vehicles.

3.09 COMMERCIAL CODE:

Uniform Commercial Code adopted Feb. 20, 1967 and effective Jan. 1, 1968. Chapter 2, Sales, effective Aug. 3, 1984. Chapter 2A, Leases, effective Sept. 30, 1992. Revised Chapter 3, Negotiable Instruments, effective July 17, 1993. Amended Chapter 4, Bank Deposits and Collections, effective Aug. 3, 1984. Chapter 4A, Funds Transfers, effective Sept. 21, 1991. Revised Chapter 5, Letters of Credit, effective July 20, 1996. Revised Chapter 6, Bulk Sales, repealed Aug. 25, 2004. Chapter 7, Documents of Title, effective Aug. 3, 1984. Revised Chapter 8, Investment Securities (1994), effective July 13, 1995. Revised Chapter 9, Secured Transactions (2000), effective July 1, 2001. Revised Uniform Commercial Code is effective July 1, 2001. Arizona Revised Statutes, Title 47, §§ 1101 to 10102. Cite as A.R.S. § 47-1101, etc.

With exception of Chapter 10, section numbers of Arizona U.C.C. follow U.C.C. section numbers. Section numbers of Arizona U.C.C. Chapter 10 and corresponding Official U.C.C. sections (See Uniform and Model Acts section for 1962 Official Text of U.C.C.) follow:

A.R.S.	U.C.C.
47-10101	10–102
47-10102	10–104

Material Variations.

Material variations from 1990 Official Text and 1990 Official Amendments (see Uniform and Model Acts section) are:

§ 2A-219.—New subsection added permitting parties to lease to determine risk of loss by written agreement. (Ariz. Rev. Stat. 47-2A219[C]).

§ 4-107.—Contains additional material: Service on bank as garnishee shall be made pursuant to Ariz. Rev. Stat. 12-1577. Knowledge of or receipt of notice by one bank branch or separate office is not actual or constructive notice to other branches or offices, and does not impair latter's holder in due course rights. (Ariz. Rev. Stat. 47-4107).

§ 8-101.—Revised Chapter 8 (1994) adopted. (Ariz. Rev. Stat. 47-8101 et seq.).

§ 8-102.—Definition of "security" is obligation of issuer or share, participation or other interest in issuer or property or enterprise of issuer, except as otherwise provided in Ariz. Rev. Stat. 47-8103. (Ariz. Rev. Stat. 47-8102[A][15]).

Optional Provisions.

Options and alternatives have been treated as follows:

§ 2-318.—Alternative A adopted. (Ariz. Rev. Stat. 47-2318).

§ 4-106.—Alternative A adopted. (Ariz. Rev. Stat. 47-4106[B]).

§ 9-401(1).—Second alternative subsection adopted. (Ariz. Rev. Stat. 47-9401).

Permanent Editorial Board's Recommendations for Amendments.

1966 Official Amendments to Ariz. Rev. Stat. 2-702, Ariz. Rev. Stat. 3-501 and Ariz. Rev. Stat. 7-209 not enacted.

1972 Official Amendments adopted except for material variations outlined above.

Material Variations.

Material variations from 2000 Revised Chapter 9 and 1999 Amendments (see Uniform and Model Acts section) are:

§ 9-102.—Public finance transaction provisions omitted. (Ariz. Rev. Stat. 47-9102[A][67], Ariz. Rev. Stat. 47-9515[B], Ariz. Rev. Stat. 47-9525[B]).

§ 9-109.—Modified to eliminate exceptions for security interests governed by other statute of this state or another state. (Ariz. Rev. Stat. 47-9109[C][2 to 3]). Adds exceptions for transfers by governmental units and claims for certain federal benefits. (Ariz. Rev. Stat. 47-9109[D][14 to 16]).

§ 9-522.—Record must be retrievable by debtor's name if filed per Ariz. Rev. Stat. 47-9501(A)(1) or by file number if filed per Ariz. Rev. Stat. 47-9501(A)(2). (Ariz. Rev. Stat. 47-9522).

§ 9-523.—Time for filing office to perform acts extended to five business days. (Ariz. Rev. Stat. 47-9523[E]). Filing office may require postage paid envelope for mail requests. (Ariz. Rev. Stat. 47-9523[G]).

§ 9-527.—Omitted in favor of provision of civil and criminal liabilities, remedies and actions relating to filing or recording of unauthorized records, material misstatements, and false claims. (Ariz. Rev. Stat. 47-9527). Nonconsensual liens not valid unless authorized by court or other law. (Ariz. Rev. Stat. 47-9528).

Optional Provisions.

Options and alternatives have been treated as follows:

§ 9-512.—Alternative A adopted with additional debtor name requirement. (Ariz. Rev. Stat. 47-9512).

§ 9-518.—Alternative A adopted with additional debtor name requirement. (Ariz. Rev. Stat. 47-9518).

§ 9-519.—Alternative A adopted, except that office designated for recording real property mortgage need only have capability to retrieve financing statement record by name of debtor. (Ariz. Rev. Stat. 47-9519).

Forms.

Standard U.C.C. financing statement forms adopted (Ariz. Rev. Stat. 47-9521). See end of this Digest. Secured party may file master amendments or assignments affecting more than one financing statement. (Ariz. Rev. Stat. 47-9512[F], Ariz. Rev. Stat. 47-9514[D], Ariz. Rev. Stat. 47-9525[F]).

See also topics 3.01 Banks and Banking, Bills and Notes, Brokers, Carriers, Contracts, Factors, Frauds, Statute of, Sales, Securities, Warehousemen; categories 2 Business Organizations, topic Corporations; Civil Actions and Procedure, topic Limitation of Actions; Debtor and Creditor, topics Assignments, Fraudulent Sales and Conveyances, Liens, Pledges;

Documents and Records, topics Records, Seals; Mortgages, topic Chattel Mortgages.

3.10 CONDITIONAL SALES:

See topic 3.23 Sales.

3.11 CONSIGNMENTS:

See topic 3.14 Factors.

3.12 CONSUMER PROTECTION:

Consumer Fraud.

Use or employment by any person of any deceptive act or practice, fraud, or misrepresentation of any material fact in connection with sale or advertisement of merchandise is unlawful, irrespective of whether anyone has in fact been misled or damaged. (Ariz. Rev. Stat. 44-1522). Attorney General is empowered to investigate fraud, serve subpoenas and seek injunctions or other remedies. (Ariz. Rev. Stat. 44-1524 et seq.). Person found to have willfully violated Ariz. Rev. Stat. 44-1522 is subject to maximum $10,000 civil penalty per violation. (Ariz. Rev. Stat. 44-1531). Person who violates any injunction issued pursuant to Ariz. Rev. Stat. 44-1521 et seq. is subject to maximum $25,000 civil penalty per violation. (Ariz. Rev. Stat. 44-1532). Consumer has private cause of action. (110 Ariz. 573, 521 P.2d 1119). Any person approving extension of credit must take reasonable steps to verify identity of person requesting credit. (Ariz. Rev. Stat. 44-1698).

Motor Vehicles.

Tampering with motor vehicle odometer is fraudulent practice and misdemeanor. (Ariz. Rev. Stat. 44-1223). Retail installment contracts for sale of motor vehicles regulated by Ariz. Rev. Stat. 44-281 et seq. Service companies and contracts regulated by Ariz. Rev. Stat. 20-1095 et seq. Motor vehicle warranty repairs and refunds regulated by Ariz. Rev. Stat. 44-1261 et seq. See category 23 Transportation, topic 23.01 Motor Vehicles, subhead Motor Vehicle Warranties.

Fictitious Names.

Any person other than partnership conducting business under fictitious name must record actual name with county recorder; except for person or corporation that either files trade name certificate with Secretary of State, or that obtains authorization to conduct business as foreign corporation using particular name. (Ariz. Rev. Stat. 44-1236). See also category 2 Business Organizations, topic 2.08 Partnerships.

Labeling of Drugs.

Dispensing and labeling of drugs regulated by Ariz. Rev. Stat. 32-1961 et seq. All drugs, devices, poisons and hazardous substances must be labeled and provided in accordance with applicable federal acts and regulations. (Ariz. Rev. Stat. 32-1962). Labels of prescription-only drugs in final dosage form must identify manufacturer (and, if different, packer or distributor), and quantity information. (Ariz. Rev. Stat. 32-1967[A][16]). Legend drug product in finished solid oral dosage form must be clearly marked with code imprint identifying product and manufacturer or distributor. (Ariz. Rev. Stat. 32-1975).

Consumer Reporting Agencies.

Permissible uses of consumer reports are limited; consumer is guaranteed access to reporting agency file; agency has 30 days to admit or deny mistake once written notice of inaccuracy is received; liability of agency to consumer is limited to refusal to correct inaccuracy, gross negligence and willful and malicious conduct. (Ariz. Rev. Stat. 44-1691 et seq.). Consumer reporting agency must, at request of consumer, place security freeze on that consumer's credit report. (Ariz. Rev. Stat. 44-1698). Consumer reporting agency shall not provide or sell information obtained by insurance inquiry about consumer's credit. (Ariz. Rev. Stat. 20-2113.01). See topic 3.23 Sales.

Home Solicitations and Referral Sales Act adopted. (Ariz. Rev. Stat. 44-5001 et seq.).

Precious Items.

Dealers of precious items must keep records of sale for six months. (Ariz. Rev. Stat. 44-1601 et seq.).

Senior Residential Entrance Fee Contracts.

Regulated by Ariz. Rev. Stat. 44-6951 et seq.

Equipment dealers and suppliers regulated by Ariz. Rev. Stat. 44-6701 et seq.

Pawnbrokers regulated by Ariz. Rev. Stat. 44-1621 et seq.

Scrap metal dealers regulated by Ariz. Rev. Stat. 44-1641 et seq.

Gambling.

Regulated by Ariz. Rev. Stat. 13-3301 et seq. Effective July 1, 2003, legal gambling age, which includes purchase of lottery tickets, is 21. (Ariz. Rev. Stat. 13-3301[6 to 7]).

Health spa contracts regulated by Ariz. Rev. Stat. 44-1791 et seq.

Crib Safety.

Safety standards for baby cribs set by Ariz. Rev. Stat. 36-3521 et seq. Violation of standards is class 1 misdemeanor. (Ariz. Rev. Stat. 36-3522).

Public utilities regulated by corporation commission. (Const., Art. XV, §§ 2 to 4). Interests of residential customers represented by commission's residential utility consumer office. (Ariz. Rev. Stat. 40-461 et seq.). Complaints may be directed to commission in accordance with Ariz. Rev. Stat. 40-246 et seq.

Discount buying services regulated by Ariz. Rev. Stat. 44-1797 et seq.

Bulk Food Sales.

Detailed regulation provided for sales of bulk food. (Ariz. Rev. Stat. 36-971 et seq.).

Charitable solicitation governed by Ariz. Rev. Stat. 44-6551 et seq.

Telephone solicitation governed by Ariz. Rev. Stat. 44-1271 et seq.; requires registration of sales information with Secretary of State. (Ariz. Rev. Stat. 44-1272). Solicitors prohibited from soliciting to number entered in national Do-Not-Call registry. (Ariz. Rev. Stat. 44-1282).

Unsolicited fax advertisements governed by Ariz. Rev. Stat. 44-1482.

Commercial electronic mail governed by Ariz. Rev. Stat. 44-1372 et seq.

Unsolicited Software (Spyware).

Civil remedy available against any person that uploads unsolicited spyware on another's computer. (Ariz. Rev. Stat. 44-7301 et seq.).

Telecommunications services governed by Ariz. Rev. Stat. 44-1571 et seq.; regulations end July 1, 2009. Telephone, utility and communication service records governed by Ariz. Rev. Stat. 44-1376 et seq.

Securities Fraud.

See topic 3.24 Securities.

Pyramid Promotional Schemes.

Person may not establish, operate, advertise or promote pyramid promotional scheme. (Ariz. Rev. Stat. 44-1735). Purchaser may declare such sale or contract void and bring action to recover consideration paid to participate in scheme plus costs and attorneys' fees. (Ariz. Rev. Stat. 44-1733).

Sales Representative Contracts regulated. (Ariz. Rev. Stat. 44-1798 et seq.).

Unsolicited Merchandise.

No duty to return to sender. If addressed to recipient, deemed gift and may be used without obligation, except for goods received by mistake. (Ariz. Rev. Stat. 44-1222).

Gift cards subject to expiration or fee must so state these facts on their face. (Ariz. Rev. Stat. 44-7401 et seq.).

Amusement ride safety governed by Ariz. Rev. Stat. 44-1799.61 et seq.

Retailer Use of Customer Identification Information governed by Ariz. Rev. Stat. 44-7701.

Uniform Fraudulent Transfer Act adopted. (Ariz. Rev. Stat. 44-1001 et seq.).

Uniform Deceptive Trade Practices Act not adopted.

Uniform State Antitrust Act adopted. (Ariz. Rev. Stat. 44-1401 et seq.).

Uniform Trade Secrets Act adopted. (Ariz. Rev. Stat. 44-401 et seq.).

Plain language statutes not enacted.

3.13 CONTRACTS:

Uniform Commercial Code adopted. (Ariz. Rev. Stat. 47-1101 et seq.). See topic 3.09 Commercial Code.

See also categories 10 Documents and Records, topic Seals; Family, topic Infants.

Third Party Beneficiaries.

Contract must reveal parties' intention to benefit third party directly. (128 Ariz. 176, 624 P.2d 854).

Attorneys' Fees.

In any contested action arising out of contract, court (not jury) may award reasonable attorneys' fees to successful party. Fees awarded are intended to mitigate burden of litigation and need not equal or relate to fees actually contracted or paid, but may not exceed amount paid or agreed to be paid. (Ariz. Rev. Stat. 12-341.01).

Indemnification.

Indemnity agreements in construction contracts and architect-engineer professional service contracts void. (Ariz. Rev. Stat. 32-1159).

Electronic Transactions.

Contracts made through electronic means may be given legal effect. (Ariz. Rev. Stat. 44-7001 et seq.).

3.14 FACTORS:

Except as stated below, there are no statutory regulations as to factors or commission merchants.

Uniform Commercial Code adopted with certain material variations. (Ariz. Rev. Stat. 47-1101 et seq.). See topic 3.09 Commercial Code.

Fraud.

Factor who knowingly and with intent to defraud makes to his principal or consignor false statement concerning price obtained for, or quantity or quality of, any property consigned or entrusted to him, is guilty of class 2 misdemeanor. (Ariz. Rev. Stat. 44-1212).

Theft.

Person who knowingly converts for unauthorized term or use services or property entrusted to him or placed in his possession for limited authorized term or use commits theft. (Ariz. Rev. Stat. 13-1802[A][2]).

Farm and Citrus Products.

Commission merchants dealing in citrus products must be licensed by state and keep records of receipt, packing, loading, shipments and sales. (Ariz. Rev. Stat. 3-449 et seq.).

Consignment Agreements.

Sales of fine art by dealers regulated. (Ariz. Rev. Stat. 44-1771 et seq.).

3.15 FRANCHISES:

No general regulatory legislation.

Grant of franchise for public utility by municipal corporation governed by Ariz. Rev. Stat. 9-501 et seq. Corporation cannot lease or alienate any franchise so as to relieve franchise from liabilities incurred during operation or use of franchise. (Const., Art. XIV, § 7).

3.16 FRAUDS, STATUTE OF:

Actions Barred.

No action may be brought in any of following cases, unless promise or agreement or some memorandum thereof is in writing and signed by party to be charged or by some person by him duly authorized (Ariz. Rev. Stat. 44-101):

Charging an Executor or Administrator.

On any promise to answer for debt or damages due from his testator or intestate out of his own estate.

Assuming Another's Debt, Etc.

On a promise to answer for the debt, default or miscarriage of another.

Marriage as Consideration.

On an agreement made on consideration of marriage, except a mutual promise to marry.

Delayed Performance.

On an agreement not to be performed within one year from the making thereof, or an agreement not to be performed in lifetime of promisor, or agreement to make any provision for any person by will.

Agency.

On an agreement authorizing or employing an agent or broker to purchase or sell real property or mines for a compensation or commission.

Sales of Personalty.

On contract to sell for sale of goods or choses in action of $500 value or more, unless buyer accepts part of goods or choses in action and receives same, or gives something in earnest to bind bargain or in part payment; but, when sale is at auction, entry by auctioneer in his sale book of kind of property sold, terms of sale, price and names of parties, is sufficient.

Sales of Realty.

On agreement or sale of real property or interest therein. Authority of any agent to make such contract must be in writing.

Leases.

On agreement for leasing of real property for period of longer than one year.

Loans or Credit.

On agreement to loan money or extend credit, or modify loan or extension of credit, involving amount exceeding $250,000 and not made primarily for personal purposes.

Uniform Commercial Code adopted with certain material variations. (Ariz. Rev. Stat. 47-1101 et seq.). Following situations are covered by Code:

Sale of Goods.

Sale of goods of $500 or more. See U.C.C. provisions. (Ariz. Rev. Stat. 47-2201).

Lease Contract.

See U.C.C. provisions. (Ariz. Rev. Stat. 47-2A201).

Sale of Securities.

See U.C.C. provisions. (Ariz. Rev. Stat. 47-8301 et seq.).

3.17 INFORMATION TECHNOLOGY, INTERNET AND NEW MEDIA:

Information Technology.

Information Technology Authorization Committee is established. (Ariz. Rev. Stat. 41-3521). Committee's powers and duties are evaluating information technology plans and projects. (Ariz. Rev. Stat. 41-3504). Display or broadcast media advertising by licensee soliciting business shall contain licensee's name and license number and such licensee shall not use any false, deceptive or misleading advertising. (Ariz. Rev. Stat. 32-2454).

Computer Software Violations.

Person who knowingly uses, other than for personal, noncommercial use, unauthorized copy of computer software that when used depicts, incorporates or displays or causes to be depicted, incorporated or displayed mark that has been registered under this article for computer software is guilty of class 5 felony. (Ariz. Rev. Stat. 44-1455). Business that owns or licenses unencrypted computerized data that includes personal information must notify affected individuals if it becomes aware of incident of unauthorized acquisition or access to data. (Ariz. Rev. Stat. 44-7501).

Electronic Signatures.

Unless otherwise provided by law, electronic signature that complies with this section may be used to sign writing on document that is filed with or by state agency, board or commission and electronic signature has same force and effect as written signature. (Ariz. Rev. Stat. 41-132).

Telecommunications fraud, classifications, and definitions. (Ariz. Rev. Stat. 13-3707). Obtaining wireless telecommunications service or wireless telecommunications devices fraudulently and other wrongs associated with such services. (Ariz. Rev. Stat. 13-3719).

Performing Arts Electronic Database.

Each performing rights society that licenses music in this state shall maintain electronic computer database of its repertoire. (Ariz. Rev. Stat. 44-6903).

Online Bidding.

Called State Electronic Commerce Fund. Establishes on-line bidding for procurement officers; solicitations must designate opening date and time. (Ariz. Rev. Stat. 41-2671 et seq.).

3.18 INTEREST:

Legal rate is 10% per annum unless different rate is contracted for in writing in which case any rate may be agreed to. Interest on judgment in condemnation proceeding shall be payable at rate prescribed by Ariz. Rev. Stat. 9-409, Ariz. Rev. Stat. 11-269.04, Ariz. Rev. Stat. 28-7101, or Ariz. Rev. Stat. 48-3628 depending on who instituted proceeding. Judgment on agreement bearing higher rate not in excess of maximum permitted by law shall bear rate provided in agreement. (Ariz. Rev. Stat. 44-1201).

Judgments.

See introductory paragraph, supra.

Small Loans.

On loans not exceeding $1,000, licensed money lenders may charge rate not exceeding 3% per month. On loans exceeding $1,000, licensed money lenders may charge rate not exceeding 3% per month of unpaid principal balance not exceeding $500, and 2% per month of unpaid principal balance exceeding $500. Prepaid finance charges (points) prohibited on loans not exceeding $5,000. (Ariz. Rev. Stat. 6-632). Disclosure of charges required by Ariz. Rev. Stat.

6-631.

Installment Loans.

Generally, see Ariz. Rev. Stat. 44-1205.

Usury.

Any person receiving greater value for loan or forbearance of money or goods than maximum permitted by law shall forfeit all interest. (Ariz. Rev. Stat. 44-1202). Where rate of interest is greater than maximum permitted by law, all payments shall be deemed made on account of principal. (Ariz. Rev. Stat. 44-1203). If such payments exceed principal, judgment may be given in favor of debtor with interest thereon at rate of 10% per annum. (Ariz. Rev. Stat. 44-1204). Lender may add to principal and charge interest on any lawful charge, fee, cost or expense paid by or due to lender on behalf of borrower with consent. (Ariz. Rev. Stat. 44-1207).

3.19 LICENSES, BUSINESS AND PROFESSIONAL:

Licensing Eligibility

No individual may receive any license from any state agency or political subdivision without presenting documentation indicating that individual's presence in U.S. is authorized by federal law. (Ariz. Rev. Stat. 41-1080).

Automobile and Driver's License.

See category 23 Transportation, topic 23.01 Motor Vehicles.

Liquor Licenses.

License required for manufacture, sale or dealing in spirituous liquors by individual, corporation, partnership, club, restaurant or motel-hotel. (Ariz. Rev. Stat. 4-101 et seq.). Enumerated qualifications must be fulfilled for issuance of license. (Ariz. Rev. Stat. 4-202). In-state and out-of-state businesses that produce liquor may obtain direct shipment license to ship liquor directly to consumers in Arizona under certain conditions. (Ariz. Rev. Stat. 4-203.04). Domestic farm winery license required. (Ariz. Rev. Stat. 4-205.04). Domestic microbrewery license required. (Ariz. Rev. Stat. 4-205.08). Person who assigns, transfers or sells business which has liquor license must notify director. (Ariz. Rev. Stat. 4-203). Special event licenses and interim or temporary permits may be issued. (Ariz. Rev. Stat. 4-203.01 et seq.). Applicant bears burden of proving license should be issued. (Ariz. Rev. Stat. 4-201). Board may apply to superior court to enjoin selling of liquor without license. (Ariz. Rev. Stat. 4-212). Retailers desiring to prohibit firearms must post conspicuously notice stating: “No firearms allowed pursuant to A.R.S. Section 4-229”. (Ariz. Rev. Stat. 4-229). Retailers required to post conspicuously warning of effects of liquor on pregnant women. (Ariz. Rev. Stat. 4-261). Retailers shall not allow individuals to consume alcoholic beverages between 2:00 a.m. and 6:00 a.m. on weekdays and 2:00 a.m. and 10:00 a.m. on Sundays. (Ariz. Rev. Stat. 4-244). Violation of liquor regulations (Ariz. Rev. Stat. 4-244) subjects violator to fine (Ariz. Rev. Stat. 4-246). Unlawful for liquor wholesaler to use commercial bribery to require liquor retailer to purchase exclusively from that wholesaler; except for promotional items. (Ariz. Rev. Stat. 4-243).

Music Licenses.

Practices relating to licensing of music are governed by Ariz. Rev. Stat. 44-6901 et seq.

Professions and Occupations.

Licenses required for acupuncturists (Ariz. Rev. Stat. 32-3921), adult care home managers (Ariz. Rev. Stat. 36-446 et seq.), agricultural pest control advisors (Ariz. Rev. Stat. 3-

361 et seq.), adjusters (Ariz. Rev. Stat. 20-321 et seq.), ambulance services (Ariz. Rev. Stat. 36-2201 et seq.), architects (Ariz. Rev. Stat. 32-101 et seq.), assayers (Ariz. Rev. Stat. 32-101 et seq.), attorneys-at-law (Sup. Ct. R. Ariz. Rev. Stat. 31-74), audiologists and speech pathologists (Ariz. Rev. Stat. 36-1940 et seq.), bail bond agents (Ariz. Rev. Stat. 20-340 et seq.), barbers (Ariz. Rev. Stat. 32-301 et seq.), bingo (Ariz. Rev. Stat. 5-401 et seq.), cemetery brokers and salespersons (Ariz. Rev. Stat. 32-1381), certified public accountants (Ariz. Rev. Stat. 32-701 et seq.), children's camp operators (Ariz. Rev. Stat. 8-551 et seq.), child welfare agencies (Ariz. Rev. Stat. 8-505, Ariz. Rev. Stat. 36-591), chiropractors (Ariz. Rev. Stat. 32-901 et seq.), cigarette, cigar, tobacco and controlled substance distributors and sellers (Ariz. Rev. Stat. 42-3001 et seq.; Ariz. Rev. Stat. 41-2170), citrus fruit dealers, brokers, packers, shippers, commission merchants (Ariz. Rev. Stat. 3-441 et seq.), clinical laboratories (Ariz. Rev. Stat. 36-451 et seq.), collection agencies (Ariz. Rev. Stat. 32-1001 et seq.), contractors (Ariz. Rev. Stat. 32-1101 et seq.), cosmetologists, aestheticians and nail technicians (Ariz. Rev. Stat. 32-501 et seq.), counselors (Ariz. Rev. Stat. 32-3301), credit unions (Ariz. Rev. Stat. 6-501 et seq.), cremationists and crematory operators (Ariz. Rev. Stat. 32-1393), dairy product processors and distributors (Ariz. Rev. Stat. 3-601 et seq.), day care centers (Ariz. Rev. Stat. 36-881 et seq.), debt management companies (Ariz. Rev. Stat. 6-701 et seq.), deferred presentment companies (pay-day loans) (Ariz. Rev. Stat. 6-1251 et seq.), dentists, denturists and dental hygienists (Ariz. Rev. Stat. 32-1201 et seq.), dispensing opticians (Ariz. Rev. Stat. 32-1671 et seq.), driver training schools and instructors (Ariz. Rev. Stat. 32-2351 et seq.), employment agencies (Ariz. Rev. Stat. 23-521 et seq.), engineers (Ariz. Rev. Stat. 32-101 et seq.), escrow agents (Ariz. Rev. Stat. 6-801 et seq.), fertilizer users and sellers (Ariz. Rev. Stat. 3-261 et seq.), foster homes (Ariz. Rev. Stat. 8-501 et seq.), funeral directors and embalmers (Ariz. Rev. Stat. 32-1321 et seq.), geologists (Ariz. Rev. Stat. 32-101 et seq.), hearing aid dispensers (Ariz. Rev. Stat. 36-1901 et seq.), home inspectors (Ariz. Rev. Stat. 32-101 et seq.), homeopathic physicians (Ariz. Rev. Stat. 32-2901 et seq.), horse and dog racing (Ariz. Rev. Stat. 5-101 et seq.), hospitals and health care centers (Ariz. Rev. Stat. 36-401 et seq.), insurance agents, brokers and solicitors (Ariz. Rev. Stat. 20-281 et seq.), jewelry auctioneers (Ariz. Rev. Stat. 44-1671 et seq.), livestock officers, owner and sellers (Ariz. Rev. Stat. 3-1201 et seq.; Ariz. Rev. Stat. 3-1301 et seq.), manufacturers, salespeople, installers and subassemblers of factory built homes, mobile homes and recreational vehicles (Ariz. Rev. Stat. 41-2175 et seq.), emergency medical services (Ariz. Rev. Stat. 36-2201 et seq.), medical physicians (Ariz. Rev. Stat. 32-1422) and physician assistants (Ariz. Rev. Stat. 32-2501 et seq.), medical services (Ariz. Rev. Stat. 36-2201 et seq.), mammographic technologists (Ariz. Rev. Stat. 32-2841 et seq.), massage therapists (Ariz. Rev. Stat. 32-3401 et seq.), midwives (Ariz. Rev. Stat. 36-751 et seq.), mortgage bankers (Ariz. Rev. Stat. 6-941 et seq.), mortgage brokers (Ariz. Rev. Stat. 6-901 et seq.), naturopaths (Ariz. Rev. Stat. 32-1501 et seq.), nurses (Ariz. Rev. Stat. 32-1601 et seq.), nursing care institution administrators (Ariz. Rev. Stat. 36-446), occupational therapists (Ariz. Rev. Stat. 32-3401 et seq.), optometrists (Ariz. Rev. Stat. 32-1701 et seq.), osteopaths (Ariz. Rev. Stat. 32-1800 et seq.), pawnbrokers (Ariz. Rev. Stat. 44-1621 et seq.), pesticide users and sellers (Ariz. Rev. Stat. 3-363), pharmacists (Ariz. Rev. Stat. 32-1901 et seq.), physical therapists (Ariz. Rev. Stat. 32-2001 et seq.), podiatrists (Ariz. Rev. Stat. 32-801 et seq.), poultry husbandry (Ariz. Rev. Stat. 3-701 et seq.), private investigators (Ariz. Rev. Stat. 32-2401 et seq.), private vocational programs (Ariz. Rev. Stat. 32-3021 et seq.), psychologists (Ariz. Rev. Stat. 32-2061 et seq.), public weighmasters and commercial measuring device servicemen (Ariz. Rev. Stat. 41-2091 et seq.), radiologic technologists (Ariz. Rev. Stat. 32-2801 et seq.), real estate appraisers (Ariz. Rev. Stat. 32-3601 et seq.), real estate brokers and salespersons (including corporations) (Ariz. Rev. Stat. 32-2101 et seq.), real estate certificate schools (Ariz. Rev. Stat. 32-2135), recovery care centers (Ariz. Rev. Stat. 36-448.51 et seq.), practice of respiratory care (Ariz. Rev. Stat. 32-3501 et seq.), schoolteachers (Ariz. Rev. Stat. 15-531 et seq.), scrap metal dealers (Ariz. Rev. Stat. 44-1641 et seq.), security guards and guard agencies (Ariz. Rev. Stat. 32-2601 et seq.), sellers of meat (Ariz. Rev. Stat. 3-2081), slaughterers of animals (Ariz. Rev. Stat. 3-2001 et seq.), solar contractors (Ariz. Rev. Stat. 32-1170 et seq.), speech pathologists (Ariz. Rev. Stat. 36-1940 et seq.), structural pest control companies (Ariz. Rev. Stat. 32-2301 et seq.), surveyors (Ariz. Rev. Stat. 32-101 et seq.), taxidermists (Ariz. Rev. Stat. 17-363), technical and business school operators

and grantors of degrees (Ariz. Rev. Stat. 32-3021 et seq.), timeshare or membership camping brokers and salespersons (Ariz. Rev. Stat. 32-2101 et seq.), title insurance agents (Ariz. Rev. Stat. 20-1580 et seq.), title insurers (Ariz. Rev. Stat. 20-1561 et seq.), transmitters of money (Ariz. Rev. Stat. 6-1201 et seq.), and veterinarians (Ariz. Rev. Stat. 32-2201 et seq.).

Exemption to Professional License Expiration for Military Members

Any professional license issued to any member of Arizona National Guard or U.S. Armed Forces Reserves shall not expire while that member is serving on federal active duty. (Ariz. Rev. Stat. 32-4301, Ariz. Rev. Stat. 15-531.01).

Standards of Competency.

Industrial Commission may establish standards for individuals involved in inspecting, constructing, relocating, altering, dismantling, maintaining or repairing elevators, dumbwaiters, escalators, moving walks, boilers and pressure vessels. (Ariz. Rev. Stat. 23-431).

Collection Agencies.

Persons conducting collection agency must apply to state banking superintendent for license and pay required fees. (Ariz. Rev. Stat. 32-1021, Ariz. Rev. Stat. 32-1028). Financial statement and bond to be computed on basis of gross annual income of licensee must accompany application for each proposed office in state. (Ariz. Rev. Stat. 32-1021 to Ariz. Rev. Stat. 32-1022). License must be renewed annually not later than Jan. 1 of each year. (Ariz. Rev. Stat. 32-1025). Licensed collection agent from another state may be licensed if specified conditions met. (Ariz. Rev. Stat. 32-1024). Failure to obtain license is Class 1 Misdemeanor (Ariz. Rev. Stat. 32-1056), and license subject to suspension or revocation for violation of law (Ariz. Rev. Stat. 32-1055) or state banking superintendent regulations (Ariz. Rev. Stat. 32-1053).

Debt Management Companies.

Persons engaged in receiving money as agent of debtor for distribution to debtor’s creditors must apply to state banking superintendent for license and pay required fees unless specifically exempted from licensing requirement. (Ariz. Rev. Stat. 6-702 to Ariz. Rev. Stat. 6-703, Ariz. Rev. Stat. 6-706, Ariz. Rev. Stat. 6-715). Initial application must be accompanied by not less than $5,000 cash, property or surety bond, and blank copy of contract to be used between licensee and debtor. (Ariz. Rev. Stat. 6-704). Branch agencies may be licensed upon separate application to state banking superintendent. (Ariz. Rev. Stat. 6-705). All licenses must be renewed annually on or before June 15. (Ariz. Rev. Stat. 6-707). Licenses are subject to statutory requirements and prohibitions. (Ariz. Rev. Stat. 6-709 to Ariz. Rev. Stat. 6-710, Ariz. Rev. Stat. 6-715).

Contractors.

Primarily governed by Ariz. Rev. Stat. 32-1101 et seq.

License required for all contractors, subject to limited exemptions. (Ariz. Rev. Stat. 32-1101, Ariz. Rev. Stat. 32-1121, Ariz. Rev. Stat. 32-1151). Enumerated qualifications must be fulfilled for issuance of license. (Ariz. Rev. Stat. 32-1122). Acceptable surety bond is required for benefit of persons damaged by contractor. (Ariz. Rev. Stat. 32-1152). Alternatives to surety bond are cash deposit, bank certificate of deposit, or savings and loan investment certificates or share accounts. (Ariz. Rev. Stat. 32-1152.01). Residential contractors also are required to either contribute to Residential Contractors’ Recovery Fund or furnish additional surety bond or cash deposit. (Ariz. Rev. Stat. 32-1152). Proof of license is prerequisite for contractor to maintain civil suit for collection of compensation. (Ariz. Rev. Stat. 32-1153). License may be suspended or revoked for commission of enumerated acts or omissions (Ariz. Rev. Stat. 32-1154) and fine imposed (Ariz. Rev. Stat. 32-1164). Provision for filing complaint seeking suspension or revocation (Ariz. Rev. Stat. 32-1155) and hearing (Ariz. Rev. Stat. 32-1156). Renewal after suspension possible. (Ariz. Rev. Stat. 32-1161). Contractor criminally convicted of contracting without license is not eligible to obtain license for one year following conviction. (Ariz. Rev. Stat. 32-1122). Licensed contractor also must be licensed solar contractor to install or repair solar devices. (Ariz. Rev. Stat. 32-1170.01).

Registrar of Contractors has both rulemaking powers (Ariz. Rev. Stat. 32-1104 to Ariz. Rev. Stat. 32-1105) and enforcement powers (Ariz. Rev. Stat. 32-1106).

Work on public buildings and structures requires notice to contractors of intention to receive bids and enter contract. (Ariz. Rev. Stat. 34-201). Prior to contract, successful bidder required to post bonds. (Ariz. Rev. Stat. 34-222). Provision is made for preference among contractors, subcontractors, and materials. (Ariz. Rev. Stat. 34-241 et seq.).

Construction of factory built buildings, manufactured homes, mobile homes, recreational vehicles and accessory structures regulated by Office of Manufactured Housing. (Ariz. Rev. Stat. 41-2151 et seq.).

Procurement of government contracts. Must comply with all federal immigration laws and with Ariz. Rev. Stat. 23-214 (verify all employees are authorized for employment in U.S.) in order to procure government contract (Ariz. Rev. Stat. 41-4401).

Residential Contractors’ Recovery Fund.

Person receiving judgment against licensed residential contractor for injury caused by contractor’s act, representation, transaction, or conduct in violation of statute or regulation may recover up to $30,000 from Contractors’ Recovery Fund. (Ariz. Rev. Stat. 32-1131 et seq.). Recovery limited to actual damages. If no actual work has been performed or materials delivered, damages are limited to deposit or down payment plus 10% interest or $30,000, whichever is less. (Ariz. Rev. Stat. 32-1132). Attorneys’ fees and costs will not be awarded except in cases appealed to superior court. (Ariz. Rev. Stat. 32-1132). Two year statute of limitations. (Ariz. Rev. Stat. 32-1136). Fund liability limit of $200,000 for acts of any one contractor. Contractor’s license suspended if fund pays any amount. No renewal without repayment to fund by contractor, with interest. (Ariz. Rev. Stat. 32-1139).

3.20 MONOPOLIES, RESTRAINT OF TRADE AND COMPETITION:

Uniform State Antitrust Act adopted. (Ariz. Rev. Stat. 44-1401 et seq.).

Antitrust Generally.

Contracts, combinations and agreements to fix prices, limit production or regulate transportation of any product are forbidden. (Const., Art. XIV, § 15). Contracts, combinations or conspiracies in restraint of or to monopolize trade are unlawful. (Ariz. Rev. Stat. 44-1402).

Establishment, maintenance or use of monopoly or attempt to establish monopoly for purposes of excluding competition or controlling, fixing or maintaining prices is unlawful. (Ariz. Rev. Stat. 44-1403).

State or county may bring action for injunction and civil penalties, including taxable cost, reasonable attorneys’ fees and other reasonable fees and expenses, for violation. Civil penalty assessed not to exceed $150,000 for each violation. (Ariz. Rev. Stat. 44-1407). State or political subdivision may bring action for injunction and damages, costs and attorneys’ fees; persons threatened with injury or injured may bring action for injunction and damages, costs and attorneys’ fees, damages to be increased as much as three times if violation flagrant. (Ariz. Rev. Stat. 44-1408).

Civil action barred after four years or after one year after conclusion of action by state.

(Ariz. Rev. Stat. 44-1410).

Courts may use constructions of federal antitrust statutes as guide to interpreting state antitrust statute. (Ariz. Rev. Stat. 44-1412).

Unfair Competition in Public Contracts.

Contract, conspiracy or act prohibited by Uniform State Antitrust Act (Ariz. Rev. Stat. 44-1401) regarding contract between governmental agency and person or between subcontractor and contractor for governmental agency for purchase of equipment or construction or repair of highways, buildings, or structures which is in restraint of trade is class 4 felony. (Ariz. Rev. Stat. 34-252). Contract, conspiracy or act prohibited by Uniform State Antitrust Act (Ariz. Rev. Stat. 44-1402) per se unlawful and Class 4 Felony if it involves contract or subcontract with governmental agency for purchase of equipment, services, labor, goods, materials and commodities of any kind. (Ariz. Rev. Stat. 44-1416). Governmental agency entering into contract that is subject of contract, conspiracy or act prohibited by Uniform State Antitrust Act (Ariz. Rev. Stat. 44-1401) may recover actual damages trebled or 10% of contract price trebled and taxable costs, attorneys' fees and expenses. (Ariz. Rev. Stat. 34-254). Person convicted of violating Ariz. Rev. Stat. 34-252 is not eligible, directly or indirectly, to contract with governmental agency for period up to three years from date of conviction. (Ariz. Rev. Stat. 34-255). Person convicted of entering into contract or conspiracy in restraint of trade may be suspended from bidding with governmental agency for up to three years. (Ariz. Rev. Stat. 34-257). Provisions of this article may be enforced by state or by counties. (Ariz. Rev. Stat. 34-258).

Fair Trade Act repealed.

3.21 NEGOTIABLE INSTRUMENTS:

See topic 3.02 Bills and Notes.

3.22 RESTRAINT OF TRADE:

See topic 3.20 Monopolies, Restraint of Trade and Competition; category 17 Intellectual Property, topic 17.01 Trademarks and Tradenames.

3.23 SALES:

Uniform Commercial Code adopted. (Ariz. Rev. Stat. 47-1101 et seq.). See topic 3.09 Commercial Code.

Definitions, Etc.

See U.C.C. § 2-103 et seq. (Ariz. Rev. Stat. 47-2103 et seq.).

Bills of Sale.

Power of real estate broker or salesperson to draft. (Const., Art. XXVI, § 1).

Contracts of Sale.

See U.C.C. § 2-201 et seq. (Ariz. Rev. Stat. 47-2201 et seq.).

Obligations and Warranties.

See U.C.C. § 2-301 et seq. (Ariz. Rev. Stat. 47-2301 et seq.).

Product Liability.

See U.C.C. §§ 2-313 to Ariz. Rev. Stat. 2-317. (Ariz. Rev. Stat. 47-2313 to Ariz. Rev.

Stat. 47-2317). Privity not required of family household or guest in home. See U.C.C. § 2-318. (Ariz. Rev. Stat. 47-2318).

Title.

See U.C.C. § 2-401 et seq. (Ariz. Rev. Stat. 47-2401 et seq.).

Performance.

See U.C.C. § 2-501 et seq. (Ariz. Rev. Stat. 47-2501 et seq.).

Breach, Repudiation and Excuse.

See U.C.C. § 2-601 et seq. (Ariz. Rev. Stat. 47-2601 et seq.).

Remedies.

See U.C.C. § 2-701 et seq. (Ariz. Rev. Stat. 47-2701 et seq.).

Rental-Purchase Agreements.

Special provisions regarding rental-purchase agreements. (Ariz. Rev. Stat. 44-6801 et seq.).

Leases.

See U.C.C. § 2A-101 et seq. (Ariz. Rev. Stat. 47-2A101 et seq.).

Retail Credit Sales.

Special provisions governing retail installment sales practices. Maximum legal finance charge established by contract. If no interest rate specified, legal rate is 10% (A.P.R.). (Ariz. Rev. Stat. 44-1201). Person contracting for, receiving or reserving any greater value than legal rate forfeits all interest. (Ariz. Rev. Stat. 44-1202, Ariz. Rev. Stat. 44-6001 et seq.).

Consumer Protection.

Consumer Fraud Act is Ariz. Rev. Stat. 44-1521 et seq.; Consumer Reporting Agencies Act is Ariz. Rev. Stat. 44-1691 et seq. See topic 3.12 Consumer Protection.

Motor Vehicle Time Sales Disclosure Act adopted. (Ariz. Rev. Stat. 44-281 et seq.).

Fair Trade Act repealed.

Unfair Trade Act repealed.

3.24 SECURITIES:

Uniform Commercial Code adopted. See topic 3.09 Commercial Code.

Blue Sky Law known as "Securities Act of Arizona" in effect. (Ariz. Rev. Stat. 44-1801 et seq.).

Supervision.

Administration of Securities Act is vested in Director of Securities appointed by Corporation Commission. (Ariz. Rev. Stat. 44-1811).

Regulatory Powers of Supervising Authority.

Broad regulatory powers are provided over dealers, salesmen and applicants, as well as over registration. (Ariz. Rev. Stat. 44-1801 et seq.). Registration fees. (Ariz. Rev. Stat. 44-1861). When securities registered by description are recorded in register of securities by Director of Securities, they may be sold by registered dealers or registered salesmen of registered dealers. (Ariz. Rev. Stat. 44-1873). Issuer of securities registered by qualification will be notified by mail that securities may be sold. (Ariz. Rev. Stat. 44-1898).

Commission, Director of Securities or designated agent may make any investigation necessary to determine whether rules have been or will be violated (Ariz. Rev. Stat. 44-1822), and may require testimony and production of records, and may issue and apply to enforce subpoena at request of securities agency or other state administrator (Ariz. Rev. Stat. 44-1823).

Prerequisites to Sales or Offerings.

No securities, except exempt securities, those sold in exempt transactions or those registered by description or qualification or those sold by open-end companies after filing required notices with Corporation Commission, may be sold or offered for sale. (Ariz. Rev. Stat. 44-1841). Violation is class 4 felony. (Ariz. Rev. Stat. 44-1841).

Securities to Which Act Applicable.

Security is any note, stock, treasury stock, bond, commodity investment contract, commodity option, debenture, evidence of indebtedness, certificate of interest or participation in any profit-sharing agreement, collateral-trust certificate, preorganization certificate or subscription, transferable share, investment contract, viatical or life settlement contract, voting-trust certificate, certificate of deposit for security, fractional undivided interest in oil, gas or other mineral rights, real property investment contract, or, in general, any interest or instrument commonly known as “security” or any certificate of interest or participation in, temporary or interim certificate for, receipt for, guarantee of, or warrant or right to subscribe to or purchase, any of foregoing. (Ariz. Rev. Stat. 44-1801[26]).

Exempt Securities.

(1) Securities issued or guaranteed by U.S., any state, territory, or insular possession or by their political subdivisions, by District of Columbia or any agency or instrumentality of foregoing; (2) securities issued by banks, credit or savings and loan associations, insurance companies, railroads and public utilities which are subject to supervision by U.S., or state or territory; (3) securities of bona fide nonprofit corporations; (4) securities listed on New York Stock Exchange, American Stock Exchange, Mid-West Stock Exchange or any other national securities exchange designated by Commission and securities designated on national market system of national securities association requested under Exchange Act; (5) commercial paper which arises out of current transactions or proceeds of which are to be used for current transactions evidencing obligation to pay cash within nine months of date of issuance or sale; (6) securities issued or guaranteed by any foreign government with which U.S. maintains diplomatic relations, if registered under federal securities act; (7) notes or bonds secured by mortgage, deed of trust on, or contract or agreement for sale of, real estate or chattels, if sold or offered for sale as unit, except for real property investment contracts; and (8) mortgage related securities as defined by § 3(a)(41) of Securities Exchange Act. (Ariz. Rev. Stat. 44-1843). Certain industrial development bonds, bond anticipation notes, out-of-state bonds secured by special assessment, improvement district bonds, and public subdivision securities not exempted unless certain conditions met. (Ariz. Rev. Stat. 44-1843.01).

Exempt Transactions.

(1) Transactions by issuer not involving any public offering; (2) sale by executor, administrator, guardian or conservator, bank as trustee, receiver or trustee in insolvency or bankruptcy, or pledgee; (3) sales by owner other than issuer or underwriter in isolated transaction

and not made in repeated or successive transactions of similar character and not made for direct or indirect benefit of issuer or underwriter; (4) stock dividends or distributions out of retained earnings by corporation to stock or other security holders; (5) transactions pursuant to statutory or judicially approved reorganization, merger, triangular merger, consolidation or sale of assets incident to vote by security holders; (6) exchange by issuer with existing security holders; (7) sale to bank, savings institution, insurance company, dealer, or agency of U.S. or of state or to person principal part of whose business consists of buying securities; (8) conversion of securities; (9) issuance to original incorporators, not exceeding ten, where not resold to third parties within 24 months unless incorporator experiences bona fide change in financial circumstances; (10) certain sales by dealers; (11) sale of commodity investment contracts traded on commodities exchange recognized by Commission; (12) sale or issuance of securities in connection with employee benefit plans which qualify under Internal Revenue Code; (13) transactions within exclusive jurisdiction of Commodity Futures Trading Commission granted by Commodity Exchange Act; (14) certain transactions involving purchase of precious metals; (15) commodity investment contract transactions between producers, processors, commercial users, or merchants of such commodity or any by-product; (16) certain nonissuer transactions in outstanding securities; (17) certain sales of securities to nonresidents not present in state which are not blind pool offerings; and (18) transactions involving offers or sales of promissory notes secured by first lien on single parcel of real estate with structure and participation interest exempt under § 4(5) of Securities Act. (Ariz. Rev. Stat. 44-1844).

Arizona Corporation Commission.

Has authority to promulgate general orders exempting securities and transactions other than those enumerated above. (Ariz. Rev. Stat. 44-1845 et seq.). Has authority to investigate, license, and regulate investment companies and investment advisors. (Ariz. Rev. Stat. 44-3131 et seq.). Securities Regulation and Enforcement Fund and Investment Management Regulatory and Enforcement Fund administered by Commission. (Ariz. Rev. Stat. 44-2039, Ariz. Rev. Stat. 44-3298). To enlarge capital markets available to Arizona, Commission is empowered to negotiate formal or informal agreements with other states to lessen burden of registering public securities offerings in multiple states, Mexico and Canada. (Ariz. Rev. Stat. 44-2056).

Registration of Offerors or Issuers.

Must be made by verified application to Commission. (Ariz. Rev. Stat. 44-1941 et seq.).

Registration of Securities.

Must be registered with Commission, either by description or by qualification. Registration by description requires verified registration statement showing name and address of person filing statement and of issuer; title and amount of securities; price per unit and in aggregate, amount of underwriting discounts or commissions or other selling expenses and net amount to be received by issuer; amount of securities to be offered in state, offering price and amount of registration fee; copy of prospectus filed with S.E.C. (if registered under federal Act); statement of facts and financial statements; and consent to service if nonresident or if not registered dealer. (Ariz. Rev. Stat. 44-1872). Commission may register certain securities by uniform limited offering registration. (Ariz. Rev. Stat. 44-1902).

Registration by qualification requires application to Commission stating name and address of issuer; title, amount, unit and aggregate price of securities to be offered; date registered under federal act (if so registered); eligibility in other states; charter and bylaws of issuer; any underwriting agreement; specimens of securities; opinion of counsel as to validity of issuance; statement of corporate structure; amount of securities outstanding; financial statements (Ariz. Rev. Stat. 44-1893); copy of prospectus on file with S.E.C. (Ariz. Rev. Stat. 44-1901). Offering must be made through firm commitment underwriting by members of registered national securities association, registered in state, not affiliated with issuer. If right to purchase shares, offering price and exercise price must be at least $5. Total amount sold must exceed $3,000,000.

Certain undertakings must be avoided for four years after registration. Audit report must not express reservations about viability as going concern or show negative shareholder equity or working capital. For limited partnership interests, investment must not exceed 10% of purchaser's net worth; purchaser must meet income, net worth requirements; and general partners' net worth must exceed $1,000,000. (Ariz. Rev. Stat. 44-1901). Generally, registration effective 20 business days after filing and date registration is effective under Securities Act. (Ariz. Rev. Stat. 44-1901).

Registration of Dealers.

It is felony for any dealer to sell or offer for sale or, under certain circumstances, to purchase securities without being registered with Commission. (Ariz. Rev. Stat. 44-1842). This provision also applies to salesmen and investment advisors. (Ariz. Rev. Stat. 44-1842, Ariz. Rev. Stat. 44-3241). For registration fees, see Ariz. Rev. Stat. 44-1861. For denial, revocation or suspension of dealer's registration, see Ariz. Rev. Stat. 44-1961; for salesmen, see Ariz. Rev. Stat. 44-1962; for investment advisors, see Ariz. Rev. Stat. 44-3201 to Ariz. Rev. Stat. 44-3231.

Except where specifically exempted, all investment companies and their representatives must be licensed by Commission. (Ariz. Rev. Stat. 44-3151 to Ariz. Rev. Stat. 44-3152). They must comply with all Commission regulations and reporting and auditing requirements in order to do business in state. (Ariz. Rev. Stat. 44-3101 et seq.).

Advertisements.

Advertising of registered securities is governed and methods and practices in connection therewith are prescribed by Commission. (Regulation R14-4-103).

Litigation.

State securities law conforms to federal Private Securities Act of 1995. (Ariz. Rev. Stat. 44-1991 et seq.).

Liabilities.

Sale of unregistered security is felony. (Ariz. Rev. Stat. 44-1841). Sale of registered security by unregistered dealer or salesman is felony. (Ariz. Rev. Stat. 44-1842). Engaging in fraudulent practices as defined by Ariz. Rev. Stat. 44-1991 et seq. is felony. (Ariz. Rev. Stat. 44-1995). Violation of rule, regulation or order of Commission for which penalty not provided is misdemeanor. (Ariz. Rev. Stat. 44-2040). Violators of Securities Act or any rule, regulation or order of Commission may be ordered to stop violation and make restitution. (Ariz. Rev. Stat. 44-2032). Penalty of up to $5,000 for each violation of Securities Act or any rule or order of Commission. (Ariz. Rev. Stat. 44-2036 et seq.). Penalty of up to $20,000 for each violation of court order or injunction. (Ariz. Rev. Stat. 44-2037). Sales of unregistered securities are voidable at option of purchaser. (Ariz. Rev. Stat. 44-2001).

Subdivision Offerings.

See subhead Registration of Dealers, supra.

Uniform Simplification of Fiduciary Security Transfers Act repealed July 13, 1995.

Uniform Gifts to Minors Act repealed.

Uniform Securities Ownership by Minors Act not adopted.

Pyramid Sales.

See topic 3.12 Consumer Protection.

3.25 STATUTE OF FRAUDS:

See topic 3.16 Frauds, Statute of.

3.26 TRUST RECEIPT SECURITY:

See category 8 Debtor and Creditor, topic 8.15 Pledges.

3.27 WAREHOUSEMEN:

Uniform Commercial Code adopted. (Ariz. Rev. Stat. 47-1101 et seq.). See topic 3.09 Commercial Code.

4 CITIZENSHIP

4.01 ALIENS:

Constitutional restriction against employment on public works (Const., Art. XVIII, § 10) declared null and void (351 F. Supp. 735).

Corporations and associations not qualified to transact business in Arizona may not buy, lease or sublease state lands. (Ariz. Rev. Stat. 37-240).

Practice of immigration and nationality law by nonlawyers is prohibited. (Ariz. Rev. Stat. 12-2701 et seq.).

5 CIVIL ACTIONS AND PROCEDURE

5.01 ACCORD AND SATISFACTION:

In absence of statute, common law rules control accord and satisfaction as well as compromise and settlement. Answer must plead these defenses affirmatively. (R. Civ. P. 8[c]). See category 3 Business Regulation and Commerce, topic 3.09 Commercial Code.

5.02 ACTIONS:

Generally.

Arizona Rules of Civil Procedure are based on Federal Rules of Civil Procedure. (Civ. Ariz. Rev. Stat. 1-86).

Equity.

Distinction between law and equity abolished. (R. Civ. P. 1).

Forms of Action.

Form known as “civil action” is used. (R. Civ. P. 2).

Commencement.

Civil action is commenced by filing complaint with court. (R. Civ. P. 3). See topics 5.20 Process, Pleading; category 23 Transportation, topic 23.01 Motor Vehicles, subhead Action against Nonresident.

Parties.

Every action must be prosecuted in name of real party in interest, except that executor, administrator, guardian, bailee, trustee of express trust, party with whom or in whose name contract has been made for benefit of another or party authorized by statute may sue without joining party for whose benefit action is brought; and when statute so provides, action for use or benefit of another must be brought in name of state. (R. Civ. P. 17[a]).

Executor, administrator or guardian appointed in Arizona may commence action in same manner as testator or intestate. Judgment is conclusive except for fraud or collusion. (R. Civ. P. 17[b]).

Third-party defendants may be brought in within ten days from date of filing answer without leave of court or subsequently by court order. (R. Civ. P. 14[a]).

All parties jointly interested must be joined as plaintiffs or defendants, but, if consent of one who should have been joined as plaintiff cannot be obtained, he may be made defendant or in proper cases involuntary plaintiff. Court must order such additional parties brought in when complete determination of controversy cannot otherwise be had. (R. Civ. P. 19[a]).

Unknown heirs may be made defendants in action involving title to realty. (R. Civ. P. 4.1[o]). See topic 5.20 Process.

Class Actions.

Representative(s) of class may sue or be sued on behalf of class only if class is so numerous that joinder is impracticable, common questions of law or fact exist, claims or defenses of representative(s) are typical of those of class, representative(s) will fairly and adequately protect interests of class and at least one of additional prerequisites enumerated by R. Civ. P. 23(b) is met. (R. Civ. P. 23[a]). Class action cannot be compromised or dismissed without court approval. (R. Civ. P. 23[e]). For shareholder derivative actions, see R. Civ. P. 23.1.

Intervention.

Any person having statutory right or interest liable to be adversely affected must, on motion, be permitted to intervene. (R. Civ. P. 24[a]). Any person whose claim or defense has question of law or fact in common with main action may, on motion, be permitted to intervene. (R. Civ. P. 24[b]).

Interpleader.

Persons having claims against plaintiff may be joined as defendants and required to interplead when their claims may expose plaintiff to double or multiple liability. Such joinder may be invoked though claims do not have common origin or are not identical, and though it is alleged that interpleaded party is not liable in whole or in part to any or all of claimants. (R. Civ. P. 22[a]).

Joinder.

Party may join as many claims, legal or equitable, as he has against opposing party, as either independent or alternate claims. (R. Civ. P. 18[a]).

Splitting Causes of Action.

See subhead Severance of Actions, infra.

Consolidation of Actions.

Court may consolidate pending actions involving common question of law or fact or may order joint hearing or trial of any issue. (R. Civ. P. 42[a]).

Severance of Actions.

To further avoidance of prejudice, convenience, expedition and economy, court may order separate trial of any claim, crossclaim, counterclaim, third-party claim or separate issue, or of any number thereof, preserving right of jury trial. (R. Civ. P. 42[b]).

Stay of Proceedings.

If party or officer, director or managing agent of party designated to testify on behalf of such party fails to obey court order to permit discovery, to appear before officer who is to take his deposition, to serve answers or objections to interrogatories, or to serve written response to request for inspection, court may stay proceedings. (R. Civ. P. 37[b] and [f]).

Court may stay proceedings in action until plaintiff pays costs, if any, arising from previously dismissed action. (R. Civ. P. 41[d]). No postponement of trial except for sufficient cause, supported by affidavit, or by consent of parties, or by operation of law. (R. Civ. P. 38.1[h]).

Writs of injunction granted to stay proceedings are returnable only to court where action is pending. (R. Civ. P. 65[i]).

Abatement.

Action does not abate by death of party if cause of action survives. Motion for substitution must be made not later than 90 days after death is suggested on record. (R. Civ. P. 25[a]). Action for personal injury or death does not abate on death of defendant. (R. Civ. P. 25[a]-[b]).

Survival of Causes of Action.

Every cause of action, except for damages for breach of promise to marry, seduction, libel, slander, separate maintenance, alimony, loss of consortium or invasion of privacy, survives death of person entitled thereto or liable therefor, and may be asserted by or against personal representative of such person, except that, on death of person injured, damages for pain and suffering of such injured person are no longer allowed. (Ariz. Rev. Stat. 14-3110).

Limitations.

See topic 5.16 Limitation of Actions.

Small Claims.

See category 6 Courts and Legislature, topic 6.01 Courts.

Termination of Actions.

Default or final judgment terminates action. (R. Civ. P. 54 et seq.).

Direct Actions Against Insurer.

See category 23 Transportation, topic 23.01 Motor Vehicles, subhead Direct Actions.

5.03 APPEAL AND ERROR:

Arizona Rules of Civil Appellate Procedure effective for appeals filed after Jan. 1, 1978. (App. Ariz. Rev. Stat. 1-31). Arizona Rules of Civil Procedure are based on Federal Rules of Civil Procedure. (Civ. Ariz. Rev. Stat. 1-86). See topic 5.19 Practice.

To Superior Court.

Appeal may be taken from judgment of justice of the peace to superior court of same county where amount involved exceeds $20, exclusive of costs, or where validity of toll, tax assessment or state statute is involved. (Ariz. Rev. Stat. 22-261).

Notice of appeal and cost bond must be filed with trial court within five days of judgment. (Ariz. Rev. Stat. 12-1179).

Hearing on appeal to superior court is trial de novo. (Super. Ct. R. Civ. App. 10[e]).

To Court of Appeals.

Court of appeals has appellate jurisdiction in all actions and proceedings originating in or permitted by law to be appealed from superior court except criminal actions involving crimes for which sentence of death has been imposed. (Ariz. Rev. Stat. 12-120.21). Judgments and orders which may be appealed are specified in Ariz. Rev. Stat. 12-2101.

Notice of Appeal and Bond.

Appeal from superior court is taken by notice filed with superior court within 30 days from entry of judgment or order appealed from unless different time is provided by law, and by filing within such time bond for costs on appeal. Bond is $500 unless court fixes different amount or unless appellant deems supersedeas bond necessary to prevent execution on his property, in which case bond must be conditioned for satisfaction of judgment together with costs, interest and damages for delay. (Ariz. Rev. Stat. 12-120.22; Super. Ct. R. Civ. App. P. Ariz. Rev. Stat. 7-10).

To Supreme Court.

Appeal may be taken only to supreme court in any criminal matter where sentence of death has actually been imposed. (Ariz. Rev. Stat. 13-4031). In addition, supreme court may review decision rendered by court of appeals if such further review is requested after adverse decision or following denial of motion for rehearing by court of appeals. (Ariz. Rev. Stat. 12-120.24).

5.04 BONDS:

Bond required by law for faithful performance of duty or obligation, or in judicial proceeding must be executed by: (1) Authorized corporate surety; or (2) principal and two sureties, provided each surety is resident and freeholder or householder of Arizona and of county in which bond was given and each surety justifies by affidavit that his worth equals amount of bond over and above all just debts and liabilities, exclusive of property exempt from execution. (Ariz. Rev. Stat. 7-101, Ariz. Rev. Stat. 7-103). Party may deposit money in lieu of bond. (Ariz. Rev. Stat. 7-106).

In state court action, adverse party may object to sufficiency of bond within three days after receiving notice that bond was given. (Ariz. Rev. Stat. 7-107). In proceeding for injunction, attachment or garnishment, defendant may object to irresponsible surety. (Ariz. Rev. Stat. 7-121).

5.05 CERTIORARI:

Relief previously obtained by writ of certiorari (Ariz. Rev. Stat. 12-2001 et seq.) must now be obtained by special action order. See topic 5.19 Practice, subhead Special Actions.

5.06 CHARITABLE IMMUNITY:

See topic 5.09 Damages, subhead Charitable Immunity.

5.07 COMMISSIONS TO TAKE TESTIMONY:

See topic 5.11 Depositions and Discovery.

5.08 COSTS:

Successful party to civil action may recover all costs from adverse party unless otherwise provided by law. (Ariz. Rev. Stat. 12-341). Costs defined in Ariz. Rev. Stat. 12-331 et seq. Although state, county and political subdivisions usually exempt from court costs (Ariz. Rev. Stat. 12-345), in certain circumstances, expenses may be recovered against state or city, town or county (Ariz. Rev. Stat. 12-348). Provision is made for filing of statement of costs and objections thereto. If written settlement offer is rejected and final judgment is equal to or greater than offer, offeror is deemed successful from date of offer and court may award reasonable fees. (Ariz. Rev. Stat. 12-341.01). In contested action arising out of express or implied contract, court may award successful party reasonable attorneys' fees. (Ariz. Rev. Stat. 12-341.01). Attorneys' and reasonable experts' fees may be awarded prevailing party (other than state) in civil actions brought by state against party. (Ariz. Rev. Stat. 12-348). Reasonable attorneys' fees may be assessed in civil actions against party bringing unjustified claims, suing to harass, unreasonably delaying proceedings, or abusing discovery. (Ariz. Rev. Stat. 12-349). Reasonable costs incurred in civil action by nonparty witness complying with subpoena are assessed against requesting party. (Ariz. Rev. Stat. 12-351).

Security for Costs.

Nonresident or resident plaintiff without property in state out of which costs can be obtained by execution is required to give security for costs if defendant brings motion supported by affidavit. Suit will be dismissed without notice if fixed security is not given. (R. Civ. P. 67[d]). If plaintiff within five days of order requiring security makes strict proof of inability to give security, order for security shall be vacated. (R. Civ. P. 67[e]). Intervenor or counterclaiming defendant is required to give such security as is required of plaintiff. (R. Civ. P. 67[f][3]). State, county, board or commission and its officers, and executors, administrators and guardians appointed under laws of state are exempt from giving security for costs. (R. Civ. P. 67[f][1]).

Liability of Attorney.

No provisions for assessment of costs. However, in civil actions, court can assess reasonable attorney fees against attorney or party bringing unjustified claims, bringing claims to harass, unreasonably delaying proceeding, or abusing discovery. (Ariz. Rev. Stat. 12-349).

5.09 DAMAGES:

Common law generally prevails as to compensatory damages. To obtain punitive damages, plaintiff must prove that defendant was guided by evil mind, which may be shown by either: (1) Evil actions; (2) spiteful motives; or (3) outrageous, oppressive or intolerable conduct that creates substantial risk of tremendous harm to others. Future damages arising from medical malpractice action payable in periodic installments or discounted to present value. (Ariz. Rev. Stat. 12-581 et seq.).

Charitable Immunity.

Doctrine of charitable immunity not recognized.

Comparative Negligence Rule.

Adopted. (Ariz. Rev. Stat. 12-2505). May find defendant not liable where plaintiff was under influence of alcohol or drugs, or attempting to commit, or committing or immediately fleeing from felony and was at least 50% responsible for harm. May find defendant not liable where plaintiff was attempting to commit, committing or immediately fleeing from felony or misdemeanor. (Ariz. Rev. Stat. 12-711 to Ariz. Rev. Stat. 12-712). For statute governing comparative fault in Employer's Liability Law, see Ariz. Rev. Stat. 23-806.

Death.

See category 13 Estates and Trusts, topic 13.05 Death, subhead Action for Death.

Defamation.

Defamation retraction governed by Ariz. Rev. Stat. 12-653.01 et seq.

Employer Subsidized Day Care Immunity.

Employer that subsidizes child care given qualified immunity for damages caused by independent licensed day care center. (Ariz. Rev. Stat. 36-883.03).

Governing Body Immunity.

Person on governing body of district not liable for good faith acts within scope of official capacity. (Ariz. Rev. Stat. 48-187).

Health Care Utilization Committee Immunity.

Person on health care utilization committee not liable for decisions absent malice. Absence of malice presumed. (Ariz. Rev. Stat. 36-441).

Interspousal Immunity.

Judicially abrogated. (132 Ariz. 447, 646 P.2d 878).

Manufacturer or Seller of Drugs.

No liability for punitive damages where manufacturer or seller complied with FDA license or where drug is generally recognized as safe and effective. (Ariz. Rev. Stat. 12-701).

Mental Health Providers Immunity.

No liability except as provided by Ariz. Rev. Stat. 36-517.02.

Public Employees' Immunity.

Public employees not personally liable for acts done in official capacity in good faith reliance on written opinion of government lawyer or any authorized private attorney for independent public trust fund. (Ariz. Rev. Stat. 38-446).

Teachers' Immunity.

Teachers are not personally liable for good faith evaluation or grading of students. (Ariz. Rev. Stat. 15-516).

No-Fault Insurance.

Not adopted.

Products Liability.

Affirmative defenses, rights between seller and manufacturer, and evidence of defect governed by Ariz. Rev. Stat. 12-681 et seq. For statute of limitations on strict liability claims, see topic 5.16 Limitation of Actions.

Racketeering.

Person who sustains reasonably foreseeable injury due to pattern of racketeering may recover up to treble damages plus costs. Punitive or emotional damages available in event of bodily injury. (Ariz. Rev. Stat. 13-2314.04).

Sovereign Immunity.

Common law doctrine retained as modified by statute. (Ariz. Rev. Stat. 12-820 et seq.). Absolute and qualified immunities apply to certain conduct (Ariz. Rev. Stat. 12-820.01 and Ariz. Rev. Stat. 12-820.02) and affirmative defenses exist (Ariz. Rev. Stat. 12-820.03). Punitive and exemplary damages may not be assessed against public entity or public employee within scope of employment. (Ariz. Rev. Stat. 12-820.04). For other immunities see Ariz. Rev. Stat. 12-820.05.

Torts of Minors.

Parents or legal guardian liable for malicious or willful misconduct.

Uniform Contribution Among Tortfeasors Act (Revised).

Adopted. (Ariz. Rev. Stat. 12-2501 et seq.).

5.10 DECLARATORY JUDGMENTS:

See topic 5.15 Judgments.

5.11 DEPOSITIONS AND DISCOVERY:

Federal Rules of Civil Procedure followed with some important modifications to require disclosure. (Civ. Ariz. Rev. Stat. 1-86). See topic 5.19 Practice.

Administrative Hearings.

Prehearing depositions and subpoenas for production of documents may be ordered by officer presiding at hearing. (Ariz. Rev. Stat. 41-1062[A][4]).

Before Whom Taken.

Federal Rules of Civil Procedure adopted with no material variation, except that deposition can be taken before officer authorized by State of Arizona. (R. Civ. P. 28).

Limitations.

Right to depose upon oral examination presumptively limited to testimony of parties, any expert witnesses expected to be called, and document custodians to secure production of documents and to establish evidentiary foundation. (R. Civ. P. 30[a]). Depositions must be of reasonable length, and oral depositions must not exceed presumptive limit of four hours. (R. Civ. P. 30[d]). Objections to form of question or responsiveness of answer during taking of deposition must be concise and not suggest answers to witness, and continuous and unwarranted off the record attorney-deponent conferences during deposition are prohibited. (R. Civ. P. 32[d][3][D]-[E]).

Compelling Attendance of Witnesses.

Parties need not be subpoenaed, only noticed (R. Civ. P. 30[b]); all others may be subpoenaed to avoid imposition of costs on deposing party if deponent fails to appear (R. Civ. P. 30[g]). If party or officer, director or managing agent of party fails to appear for duly noticed deposition without applying for protective order, court shall require party failing to appear or attorney advising that party to pay reasonable expenses and attorneys' fees caused by failure unless failure is substantially justified. (R. Civ. P. 37[f]). Superior court clerk must issue subpoena upon proof of service of notice to take deposition. (R. Civ. P. 45[a]). Subpoena to produce documents, if objected to, may be modified or quashed by court. (R. Civ. P. 45[c]). Resident of county in which deposition is to be taken may be required to attend only in county where he resides, is employed or transacts business in person, or at such place as court may order. Nonresident must attend only in county in which he is served with subpoena or within 40 miles of place of service, or at such place as court may order. (R. Civ. P. 45[c]). Person to whom subpoena is directed may, within 14 days after service of subpoena or before time specified for compliance if time is less than 14 days after service, serve upon attorney designated in subpoena written objections to inspection or copying designated material. If objection is made, party serving subpoena shall not be entitled to inspect material except pursuant to court order. (R. Civ. P. 45[c]). Failure to obey subpoena without adequate excuse is contempt of court. (R. Civ. P. 45[e]).

Perpetuating Testimony.

Deposition to perpetuate testimony may be used in any action involving same subject matter subsequently brought between same parties and as permitted by Arizona Rules of Evidence. (R. Civ. P. 32[a]). Federal Rules of Civil Procedure adopted with no material variations. (R. Civ. P. 27[b]).

Within State for Use Within State.

Federal Rules of Civil Procedure adopted with no material variations, except that leave of court must be obtained prior to taking deposition of nonparties (except expert witnesses). (Civ. Ariz. Rev. Stat. 30-32).

Within State for Use Outside State.

Party wishing to take deposition must file application under oath, captioned as is foreign action, which contains: (1) Caption of case, court in which pending and names of all parties and their attorneys; (2) reference to law of foreign jurisdiction authorizing taking of deposition in another state and facts necessary under foreign law to entitle party to take deposition and have subpoena issued; (3) certified copies of notice of taking deposition, court order authorizing deposition, commission or letters rogatory or such other pleadings as, under foreign jurisdiction's law, are necessary in order to take deposition: and (4) description of both notice given to other parties and its service of application to be made on other parties to action. Upon filing application, clerk of superior court of county in which deposition is to be taken will issue subpoena or subpoena duces tecum. Affidavit of service of application on all other parties to action must be filed with clerk. Any party or witness may subsequently make such motions under Arizona Rules of Civil Procedure as may be appropriate. (R. Civ. P. 30[h]).

Form.

No particular form prescribed or required.

Outside of State for Use Within State.

Taking of depositions outside state for use in Arizona is governed by R. Civ. P. 28.

Written Interrogatories.

Federal Rules of Civil Procedure adopted with no material variations except answers or objections required within 40 days of service, but defendant has 60 days after service of summons and complaint. Parties presumptively limited to serving no more than 40 interrogatories (uniform or nonuniform) upon any other party. (Civ. Ariz. Rev. Stat. 33-33.1).

5.12 EQUITY:

See topic 5.02 Actions.

5.13 EVIDENCE:

Witnesses.

Religious opinions or want of religious belief do not disqualify. (Ariz. Rev. Stat. 12-2201).

No person is incompetent because he is party to suit or proceeding or interested in issue tried, or because he has been indicted, accused or convicted of crime. (Ariz. Rev. Stat. 12-2201).

Persons of unsound mind at time they are called to testify and children under age of ten who appear incapable of receiving just impressions are incompetent. (Ariz. Rev. Stat. 12-2202). Children under age of ten may testify concerning sexual offense or physical abuse on or witnessed by minor, if conditions of statute are satisfied. (Ariz. Rev. Stat. 13-1416).

See also topic 5.11 Depositions and Discovery.

Privileged Communications.

Information imparted by reason of confidential relationship may not be disclosed by attorney, physician, surgeon, clergyman, or priest without consent of person from whom obtained. (Ariz. Rev. Stat. 12-2231 et seq.). Persons engaged in newspaper, radio, television or reportorial work not compelled to testify as to source of information procured for publication in newspaper or broadcasting media. (Ariz. Rev. Stat. 12-2237).

Husband and Wife.

One spouse cannot testify against other without consent of other, nor can either testify, during marriage or afterwards, as to communications during marriage, without consent of other, except in action for dissolution or civil action between spouses, action for alienation of affections, action for damages against another for adultery committed by spouse or in criminal proceeding in manner provided for in criminal code. (Ariz. Rev. Stat. 12-2231 to Ariz. Rev. Stat. 12-2232).

Communications or Transactions with Persons Since Deceased or Incompetent.

In action by or against executors, administrators or guardians, neither party is allowed to testify as to transactions with or statements by testator, intestate or ward unless called to testify thereto by opposite party or required to do so by court. This provision also extends to all actions by or against heirs, devisees and legatees or legal representatives of decedent arising out of any transaction with decedent. (Ariz. Rev. Stat. 12-2251).

5.14 INJUNCTIONS:

Arizona Rules of Civil Procedure are based on Federal Rules of Civil Procedure. (Civ. Ariz. Rev. Stat. 1-86). See topic 5.19 Practice.

Jurisdiction and Prerequisites.

Judges of superior court may grant writs of injunction: (1) When it appears that applicant for writ is entitled to relief demanded, and such relief or part thereof requires restraint of some act prejudicial to applicant; (2) when, pending litigation, it appears that party is doing, threatens, is about to do or is procuring or suffering to be done, some act respecting subject of litigation and in violation of applicant’s rights which would tend to render judgment ineffectual; and (3) in all other cases where applicant shows himself entitled to writ under principles of equity. (Ariz. Rev. Stat. 12-1801).

Procedure.

Injunction may be granted at time of commencing action on verified complaint or at any time before judgment on affidavit. (Ariz. Rev. Stat. 12-1803). If injunction is granted on verified complaint or affidavit, copy of complaint or affidavit shall be served with injunction. (Ariz. Rev. Stat. 12-1803[C]). Before hearing on injunction is held, notice of hearing, together with copy of complaint or affidavits upon which application for injunction is based, shall be served on parties sought to be enjoined. (Ariz. Rev. Stat. 12-1804).

Bond.

Judge to whom application for writ of injunction is made fixes amount of bond to be given by applicant as prerequisite to issuance of writ. Bond requirement does not apply to State or officers and agencies thereof. (R. Civ. P. 65[e]).

Answer.

Motions to dissolve or modify preliminary injunction without determining merits of action may be heard after answer is filed and notice is provided to opposite party. (R. Civ. P. 65[c]).

Restrictions.

No injunction may be granted: To stop a judicial proceeding pending at the commencement of the action unless such restraint is necessary to prevent a multiplicity of proceedings; to stay proceedings in a United States court; to stay proceedings in another state upon a judgment of a court of that state; to prevent enforcement of a public statute by officers of the law for the public benefit; to prevent the breach of a contract which would not be specifically enforced; to prevent the exercise of public or private office in lawful manner by person in possession; or to prevent legislative act by municipal corporation. (Ariz. Rev. Stat. 12-1802). Injunctions to stay execution of judgment must be made within one year of date of judgment, except in cases of fraud, by party recovering judgment, made at time of or after judgment, or because of equitable matters arising after date of judgment, or within two years if applicant for injunction was absent from state when judgment was rendered. (Ariz. Rev. Stat. 12-1806).

Temporary Restraining Order.

Valid for not more than ten days, as set by court, unless extended. May be granted without notice to adverse party when it clearly appears necessary and when applicant's attorney provides court written certification of efforts made to give notice or reasons for not giving notice. (R. Civ. P. 65[d]).

5.15 JUDGMENTS:

Arizona Rules of Civil Procedure are based on Federal Rules of Civil Procedure. (Civ. Ariz. Rev. Stat. 1-86). See topic 5.19 Practice.

Judgment is decree or order from which appeal lies. (R. Civ. P. 54[a]). Judgment may be given as to one or more parties and one or more claims for relief, but fewer than all, only on determination that no just reason for delay exists. (R. Civ. P. 54[b]). Judgment may pass title to property without any act to be done by party against whom judgment runs. (Ariz. Rev. Stat. 33-456; R. Civ. P. 70). Judgment may be entered after death of party on verdict or decision upon issue of fact rendered in party's lifetime. (R. Civ. P. 54[e]).

Judgment by Confession.

May not be entered under power of attorney on written instrument for payment of money unless power of attorney was executed and acknowledged subsequent to due date of instrument. (Ariz. Rev. Stat. 44-143).

Judgment on Pleadings.

After pleadings are closed but before trial, any party may move for judgment on pleadings. If matters outside pleadings are presented and not excluded by court, motion will be treated as one for summary judgment. (R. Civ. P. 12[c]).

Summary Judgment.

Either party may move, with or without affidavits, for summary judgment. If made with affidavit, adverse party must set forth specific facts showing genuine issues for trial. Party opposing motion must file response within 30 days after service of motion. Moving party has 15 days thereafter to serve reply. Summary judgment will be given only if no genuine issues of material fact exist and moving party is entitled to judgment as matter of law. Interlocutory judgment may be given on issue of liability alone. (R. Civ. P. 56[a]-[e]).

Judgment by Default.

When party against whom judgment for affirmative relief is sought has failed to plead or otherwise defend as provided by Rules and that fact is shown by affidavit or otherwise, clerk must enter his default on written application by party seeking default. Notice must be given to party in default if whereabouts known and to his attorney if known to be represented by attorney. Default entered by clerk is effective ten days after filing application for entry of default. Court may then enter judgment on motion, where claim is for sum which can by computation be made certain, or on hearing, in all other cases. Court may set aside entry of default for good cause, and may set aside judgment pursuant to Rule 60(c) (see subhead Review, Vacation or Modification of Judgment, infra). (R. Civ. P. 55[a]-[c]).

Offer of Judgment.

Any party may serve offer of judgment on adverse party at anytime more than 30 days before trial. If offer is not accepted within 30 days, it is deemed withdrawn, except that offer made within 60 days after service of complaint remains effective for 60 days. If judgment obtained is equal to, or more favorable to offeror, offeree must pay reasonable expert witness fees, double costs offeror incurred after making offer and prejudgment interest on unliquidated claims from date of offer. (R. Civ. P. 68).

Review, Vacation or Modification of Judgment.

Judgment may be reviewed by motion for new trial or judgment notwithstanding verdict. (R. Civ. P. 50[b], 59[c]). If court's judgment is rendered upon judgment of another state or foreign country and foreign judgment is subsequently reversed, then court shall set aside, vacate, and annul its judgment. (R. Civ. P. 60[d]). Clerical mistakes and errors arising from oversight or omission may be corrected by court at any time. (R. Civ. P. 60[a]-[b]). Party may be relieved from judgment within six months due to his mistake, inadvertence, surprise, excusable neglect or newly discovered evidence, fraud or other misconduct by adverse party. (R. Civ. P. 60[c]). If judgment is rendered on service by publication, defendant who did not appear may apply for new trial within one year and new trial may be granted for good cause shown. (R. Civ. P. 59[j]). Court will not modify or vacate judgment because of error in proceedings unless failure to do so would be inconsistent with substantial justice. (R. Civ. P. 61).

Docketing.

Copy of judgment, certified by clerk, is lien on real property of judgment debtor if filed and recorded in office of county recorder in each county in which property is situated. (Ariz. Rev. Stat. 33-961). In case of reversal or remittitur, clerk must enter on docket and judgment creditor must correct recording. (Ariz. Rev. Stat. 33-965). Judgment creditor must file satisfaction of judgment with county recorder when judgment is paid. (Ariz. Rev. Stat. 33-964).

Lien of Judgment.

If properly recorded, extends to all of debtor's real property in county, except exempt property, and continues for five years from date of rendition of judgment. (Ariz. Rev. Stat. 33-964). Judgment lien in mortgage foreclosure on 2½ acre or smaller parcel used for one or two family residence is not extended to other property. (Ariz. Rev. Stat. 33-729). Judgment against railroad company for injury to any person or property is lien in county where recovered superior to lien of any mortgage or trust deed. (Ariz. Rev. Stat. 33-966).

Revivor or Renewal.

Judgment may be revived by action thereon within five years after date of judgment. (Ariz. Rev. Stat. 12-1611). Judgment may be renewed by affidavit of judgment creditor, his agent or attorney, and continued as lien for five years from date of filing affidavit, which must contain matters prescribed by statute and be made within 90 days next preceding expiration of five year period from date of entry of judgment. Additional renewal affidavits may be filed within 90 days preceding expiration of five year period from date of filing prior renewal affidavit. (Ariz. Rev. Stat. 12-1612 to Ariz. Rev. Stat. 12-1613).

Foreign Judgments.

Foreign judgment is any judgment, decree or order of court of U.S. or any other court entitled to full faith and credit in Arizona. (Ariz. Rev. Stat. 12-1701). Action on foreign judgment must be brought within four years after determination on appeal or passage of time for appeal in other jurisdiction. (Ariz. Rev. Stat. 12-544[3]). Such action is barred in Arizona if, by laws of state or country in which judgment is rendered, such action would be barred and judgment thereupon incapable of being otherwise enforced there. (Ariz. Rev. Stat. 12-549). Filing fee for foreign judgment is governed by Ariz. Rev. Stat. 12-284.

Revised Uniform Enforcement of Foreign Judgments Act adopted. (Ariz. Rev. Stat. 12-1701 et seq.).

Uniform Declaratory Judgments Act adopted. (Ariz. Rev. Stat. 12-1831 et seq.).

5.16 LIMITATION OF ACTIONS:

Actions are barred unless commenced within following periods after particular causes of action accrue (Ariz. Rev. Stat. 12-501 et seq.):

Ten years: To recover any lands, tenements or hereditaments from one having peaceable and adverse possession, cultivating, using and enjoying same. (Ariz. Rev. Stat. 12-526).

Eight years: For action or arbitration based in contract against person who develops real property or who designs, engineers or contracts improvements. No effect on actions for personal injury or death and periods in express written warranties. (Ariz. Rev. Stat. 12-552).

Six years: For debt on any written instrument executed in Arizona. (Ariz. Rev. Stat. 12-548).

Five years: To recover real estate as against adverse possessor paying taxes on same and claiming under recorded deed not forged (Ariz. Rev. Stat. 12-525); city lot, same (Ariz. Rev. Stat. 12-524); against sheriff and his sureties for not returning execution (Ariz. Rev. Stat. 12-547).

Four years: On written instrument executed outside of state; on foreign judgment; for penalty or damages on bond to convey real estate; for partnership accounting; on mutual and current accounts concerning trade between merchants (Ariz. Rev. Stat. 12-544); on bond of executor or guardian (Ariz. Rev. Stat. 12-545); for specific performance of contract to convey real property (Ariz. Rev. Stat. 12-546); on contracts of sale under Commercial Code (Ariz. Rev. Stat. 47-2725); on any action not otherwise provided for by law (Ariz. Rev. Stat. 12-550).

Three years: To recover real estate as against person in peaceable and adverse possession under title or color of title. (Ariz. Rev. Stat. 12-523). For debt not evidenced by writing; on stated or open account other than mutual and current accounts concerning trade between merchants; for relief on ground of fraud or mistake. (Ariz. Rev. Stat. 12-543).

Two years: To recover possession of real estate as against person who claims real property by right of possession only. (Ariz. Rev. Stat. 12-522). For injury to real or personal property; for wrongful taking or detention of personal property; for trespass or conversion; for forcible entry and detainer; for personal injury; for medical malpractice; for wrongful death. (Ariz. Rev. Stat. 12-542).

One year: For libel, slander, malicious prosecution, false imprisonment, breach of promise to marry or seduction, and on liability created by statute other than penalty or forfeiture (Ariz. Rev. Stat. 12-541); for sale of unregistered securities or fraudulent sale of securities (Ariz. Rev. Stat. 44-2004); for all actions against public entity (Ariz. Rev. Stat. 12-821).

Six months: To foreclose mechanics' or materialmen's lien. (Ariz. Rev. Stat. 33-998).

Time From Which Statute Runs.

For personal injury generally, from date of injury; for injury when death ensues, at death; for fraud or mistake, on discovery thereof or from time when exercise of reasonable care would have led to discovery; on mutual and current accounts between merchants, on cessation of dealings; on other stated or open accounts, from date of last item; for partnership accounting, on cessation of dealings; on bond of executor or administrator, from time of his death or removal; for forcible entry or detainer, at commencement of entry or detainer; for improvements on real property, not until substantial completion of improvement.

Saving of Timely Commenced Action.

If action terminated other than by abatement, voluntary dismissal, dismissal for lack of prosecution or final judgment on merits, new action for same cause can be brought within six months of termination. If action terminated for exceptions cited above, court has discretion to provide extension period not exceeding six months. Applies to judgments on appeal. (Ariz. Rev. Stat. 12-504).

Disabilities.

Limitation period for cause of action in favor of or against person who dies ceases to run for 12 months, unless representative qualifies sooner, but automatic four-month tolling. (Ariz. Rev. Stat. 14-3109, Ariz. Rev. Stat. 14-3802). As to tolling during marriage of cause of action barred by interspousal immunity, see 116 Ariz. 512, 570 P.2d 199. Limitations do not run against person of unsound mind until disability is removed. (Ariz. Rev. Stat. 12-502). In actions for recovery of real property, limitations do not run against prisoner until person imprisoned discovers or should have discovered right to bring action. (Ariz. Rev. Stat. 12-528). Limitations do not run against person under 18 years of age. (Ariz. Rev. Stat. 12-502).

Absence.

Limitations do not run in favor of absentee (not amenable to service of process) defendant. (Ariz. Rev. Stat. 12-501).

Acknowledgment of justness of claim made after it becomes due, to affect limitations, must be in writing and signed by party to be charged. (Ariz. Rev. Stat. 12-508).

Person Moving Into State.

Action against person moving into Arizona is not barred by limitations until he has lived within state for one year. But if, prior to his moving into Arizona, his cause of action was barred by law in state of his former domicile, it may not be sued upon in Arizona. (Ariz. Rev. Stat. 12-506 to Ariz. Rev. Stat. 12-507). Same for foreign judgments. (Ariz. Rev. Stat. 12-549).

Pleading.

Statute of limitations is affirmative defense which must be pleaded in order to be available. (R. Civ. P. 8[c]).

Uniform Commercial Code adopted. (Ariz. Rev. Stat. 47-1101 et seq.). See category 3 Business Regulation and Commerce, topic 3.09 Commercial Code.

5.16A PARTITION:

Real Property.

Owner of interest in real estate may compel partition between himself and other owners by filing action for such partition in superior court. (Ariz. Rev. Stat. 12-1211). Upon hearing cause, court must adjudge interest of each party to real estate and settle any matters of title that may be in issue. (Ariz. Rev. Stat. 12-1213). If it appears to court that fair partition of property cannot be made without depreciating value thereof, or that sale is more beneficial to any of parties, court shall enter judgment that property be sold and proceeds divided (Ariz. Rev. Stat. 12-1218); otherwise, court will appoint three commissioners to partition property (Ariz. Rev. Stat. 12-1215). If commissioners find property cannot be equitably divided and court concurs it must order property sold and proceeds divided among parties entitled. (Ariz. Rev. Stat. 12-1218).

Personal Property.

Partitioned in proceedings similar to those for partition of real estate. (Ariz. Rev. Stat. 12-1222).

Estates.

Prior to formal or informal closing of estate, when two or more heirs are entitled to undivided interest in any property, one or more of them may petition court to make partition. After notice to interested parties, court partitions property in manner prescribed for partition actions. If court cannot equitably partition property, personal representative must sell property. (Ariz. Rev. Stat. 14-3911).

5.17 [RESERVED]

5.18 PLEADING:

Arizona Rules of Civil Procedure are based on Federal Rules of Civil Procedure and govern in all civil suits whether cognizable as cases at law or in equity. (R. Civ. P. 1). Each county has particular uniform and local rules.

Pleadings Permitted.

Complaint; answer; reply, if answer contains counterclaim; answer to cross-claim, if answer contains cross-claim; third-party complaint, if person who was not original party is summoned as third-party; answer to third-party complaint. No other pleading is allowed, except court may order reply to answer or third-party answer. (R. Civ. P. 7[a]).

Form of Pleadings.

Every pleading must contain caption setting forth name of court, title of action, file number and designation as to nature of pleading filed. In complaint, title of action must include names of all parties; in other pleadings, it is sufficient to state name of first party with appropriate indication of other parties. All averments of claim or defense must be made in numbered paragraphs. (R. Civ. P. 10). All pleadings must be on 8½ by 11 inch paper. (R. Civ. P. 10[d]).

Every pleading of party represented by attorney must be signed by at least one attorney of record in his individual name, with address stated; unrepresented parties must sign pleading and state their address. (R. Civ. P. 11[a]). Signature of attorney or party certifies pleading is well grounded in fact after reasonable inquiry, supported by existing law or good faith argument for extension or reversal of existing law, and not interposed for improper purpose; sanctions available for violation. (R. Civ. P. 11[a]).

Complaint.

Action commenced when complaint filed. (R. Civ. P. 3). No technical forms of pleadings required. To state claim for relief, pleading must contain short and plain statement of basis for jurisdiction, statement of claim showing that pleader is entitled to relief, plus demand for relief to which he deems himself entitled. Demand for relief in alternative or of different types permitted. (R. Civ. P. 8).

Frivolous Claims.

Sanctions for frivolous pleadings, motions and other papers filed with superior court similar to Rule 11 of Federal Rules of Civil Procedure. (R. Civ. P. 11). Sanctions for frivolous appeals or appellate motions. (Ariz. Rev. Stat. 12-2106).

Answer.

Responsive pleading must state in short and plain terms pleader's defenses to each claim asserted and must admit or deny averments in complaint. If pleader intends in good faith to deny all averments in complaint, he may do so by general denial. (R. Civ. P. 8[b]).

Affirmative Defenses.

Following defenses must be set forth in responsive pleading: Accord and satisfaction; arbitration and award; assumption of risk; contributory negligence; discharge in bankruptcy; duress; estoppel; failure of consideration; fraud; illegality; laches; license; payment; release; res judicata; statute of frauds; statute of limitations; waiver; and any other matter in avoidance or affirmative defense. (R. Civ. P. 8[c]).

Counterclaim.

Pleading may state as counterclaim any claim against opposing party and must state as counterclaim any claim which arises out of same transaction or occurrence as is subject of opposing party's claim. (R. Civ. P. 13[a]-[b]).

Reply.

Reply is mandatory only when answer contains counterclaim denominated as such. Court may in its discretion order reply to answer of defendant or third party. (R. Civ. P. 7).

Amended or Supplemental Pleadings.

Party may amend his pleading once as matter of course at any time before responsive pleading is served, or, if pleading is one to which no responsive pleading is permitted, at any time within 20 days after service. Otherwise, leave of court or written consent of adverse party is necessary. (R. Civ. P. 15).

Bills of Particulars.

If pleading is so vague or ambiguous that party cannot reasonably be required to frame responsive pleading, he may move for more definite statement. (R. Civ. P. 12[e]).

Verification.

Except when otherwise specifically required by rule or statute, pleadings need not be verified. (R. Civ. P. 11[a]). Responsive pleading setting up any of following matters must be verified by affidavit; (1) Plaintiff has no legal capacity to sue; (2) plaintiff is not entitled to recover in capacity in which he sues; (3) another action is pending in Arizona between same parties for same claims; (4) defect of parties exists; (5) denial of party's partnership or incorporation; (6) denial of execution by defendant or by his authority of any instrument in writing on which any pleading is based and alleged to have been executed by him or by his authority; (7) denial of genuineness of written instrument's endorsement or assignment; (8) written instrument on which pleading is based lacks consideration or consideration has failed in whole or in part; or (9) account which is basis of plaintiff's action is not just. (R. Civ. P. 9[i]).

When equitable relief is demanded and party demanding such relief makes oath that allegations of pleading are true, responsive pleading of opposite party must be under oath, unless waived, and each material allegation not denied under oath is taken as admitted. (R. Civ. P. 11[c]).

Verified complaint or affidavit is required in order for temporary restraining order to be granted without notice to adverse party. (R. Civ. P. 65[d]).

Service.

Complaint must be personally served on defendant in accordance with R. Civ. P. 4. Every pleading subsequent to original complaint must be served on each party, unless court orders otherwise because of numerous defendants. (R. Civ. P. 5[a]). Where party represented by attorney, service must be on attorney. (R. Civ. P. 5[c]).

Filing.

Except for offers of judgment under R. Civ. P. 68, all papers after complaint required to be served on party or to be filed with court within specified time must be both filed and served within that specified time. (R. Civ. P. 5[g]). Service of summons and complaint must occur within 120 days of filing of complaint. (R. Civ. P. 4[i]).

Time to Answer or Otherwise Plead.

20 days if served within state and 30 days if served outside state. (R. Civ. P. 12[a], 4.2[m]).

Claims Against Estates.

See category 13 Estates and Trusts, topic 13.09 Executors and Administrators, subhead Proof of Claims.

Accounts.

A pleading need not set forth items of account therein alleged but on a written demand an itemized account must be furnished to the defendant within ten days from the time of the demand. (R. Civ. P. 12[e]).

Small Claims.

See category 6 Courts and Legislature, topic 6.01 Courts.

5.19 PRACTICE:

Regulated by Rules of Civil Procedure based on Federal Rules of Civil Procedure with some important modifications to require disclosure (Civ. Ariz. Rev. Stat. 1-86) and rules made by supreme court (Ariz. Rev. Stat. 12-109). In addition, certain special proceedings are governed by statute.

Discovery.

Federal Rules of Civil Procedure followed with some important modifications to require disclosure. (Civ. Ariz. Rev. Stat. 26-37). Parties to action should make all initial discovery disclosures set forth in R. Civ. P. 26.1(a) as completely as possible, within 40 days after filing of responsive pleading to Complaint, Counterclaim, Crossclaim or Third Party Complaint unless parties agree to different timeline or Court extends time for good reason. (R. Civ. P. 26.1[b]). Generally, subpoena duces tecum for doctor's records must be served ten days before production date and doctor's production of records is only mandatory in certain situations. (Ariz. Rev. Stat. 12-2294.01). Answers or objections to written interrogatories and requests for production of documents and things or admissions required within 40 days after service, except defendant has 60 days after service of summons and complaint. (R. Civ. P. 33[a], 34[b], 36[a]).

Major Limitations on Discovery/Trial Preparation.

Each side is presumptively entitled to one independent expert on an issue. (R. Civ. P. 26[b][4][D]). Parties presumptively limited to serving no more than 40 interrogatories (uniform or nonuniform) upon any other party. (R. Civ. P. 33.1[a]). After commencement of action, parties are presumptively limited to one request for production of documents and things, which presumptively must not provide for more than ten distinct items or specific categories of items. (R. Civ. P. 34[b]). Each party presumptively limited to 25 requests for admissions and each request is limited to one factual matter or request for genuineness of all documents or categories of documents. (R. Civ. P. 36[b]). See also topic 5.11 Depositions and Discovery, subhead Limitations.

Disclosure Statements.

Parties must disclose as fully as possible within 40 days of filing responsive pleading: factual basis of claim or defense; legal theory of claim or defense; names, addresses and telephone numbers of witnesses or others with relevant information, including expert witnesses and those who have given statements; computation and measure of damages alleged; existence and location of tangible evidence; and list of relevant documents. Disclosure duty is continuing, each party must make additional or amended disclosures whenever new or different information discovered. (R. Civ. P. 26.1).

Setting of Civil Cases for Trial.

In every civil case, counsel for plaintiff must, or counsel for any other party may, file and serve on all other parties motion to set and certificate of readiness pursuant to Rule V, Uniform Rules of Practice of Superior Court. In some counties, local rules require listing of witnesses and exhibits by both parties before motion to set and certificate of readiness are filed. Failure to list witnesses and exhibits in timely manner may preclude their use at trial.

Pretrial Statements.

Before each civil case, counsel shall file written statement stipulating contested and uncontested material facts, contested material issues of fact and law, trial exhibits, witness list and summary of depositions to be offered at trial. (R. Civ. P. 16[d]).

Pretrial Conferences.

Upon written request of any party or upon its own motion, court shall schedule comprehensive pretrial conference to determine and narrow issues for trial. (R. Civ. P. 16[a]-[c]).

Mandatory Settlement Conferences.

Except upon good cause shown, settlement conferences required upon request of any party for most cases in which motion to set and certificate of readiness is filed. Each party must furnish court with detailed settlement memorandum. Upon motion of party or on its own motion, court may schedule comprehensive pretrial conference pursuant to Rule 16. (R. Civ. P. 16.1).

Special Actions.

Nature of Special Action.

Relief previously obtained by writs of certiorari (Ariz. Rev. Stat. 12-2001 et seq.), mandamus (Ariz. Rev. Stat. 12-2021 et seq.) and prohibition (common law) must now be obtained by special action order. (Spec. Act. R. 1).

Generally, special action not available where person has equally plain, speedy and adequate remedy by appeal. Rules of Procedure for Special Actions do not alter scope of writs but merely establish uniform procedure for obtaining their remedies. Interpretation of said Rules subsumes decisions under writ law as it stood prior to adoption of Rules. (Spec. Act. R. 1).

Parties.

Persons who previously could institute application for writ of certiorari, mandamus or prohibition now may institute proceeding for special action order. Complaint must join officer, body or person against whom relief is sought as defendant. Where public entity named as defendant, real party in interest must also be joined. Court may allow other persons to intervene, or may order their joinder as parties, or may allow their participation as amicus curiae. Court may direct that notice of action be given to any person. (Spec. Act. R. 2).

Questions Raised.

Only following questions may be raised in special action: (1) Whether defendant has failed to exercise discretion which he has duty to exercise or to perform legal duty as to which he has no discretion; (2) whether defendant has proceeded or is threatening to proceed without or in excess of his jurisdiction or legal authority; or (3) whether determination by defendant was arbitrary and capricious or abuse of discretion. (Spec. Act. R. 3).

Procedure.

Jurisdiction.

Special action may be brought in superior court in any county, court of appeals or supreme court. (Spec. Act. R. 4[a]).

Selection of Court.

Action in superior court is brought in county in which officer or body has or should have determined matter to be reviewed, or, in case of state officer or body, either in Maricopa County or in county of plaintiff’s residence; in case of any public officer or body, or private corporation, in county of same’s principal place of business; or, where private corporation defendant has no principal place of business in Arizona, in Maricopa County or county of plaintiff’s residence, at his option. Action in court of appeals is brought before whichever division has territorial jurisdiction over county in which action may have been brought if in superior court. (Spec. Act. R. 4[b]). Any action may also be brought originally in supreme court. (Spec. Act. R. 4[a]). Whenever plaintiff brings action in appellate court which might lawfully have been initiated in lower court, he must set forth circumstances rendering review by particular appellate court appropriate. (Spec. Act. R. 7[b]).

Time for Service of Complaint and Answer.

Special action may be instituted with or without application for order to show cause why requested relief should not be granted. Service of summons, complaint and order to show cause, if any, are subject to R. Civ. P. 4, unless court otherwise specifies manner and time within which service must be made. (Spec. Act. R. 4[c]).

Pleadings.

Complaint by plaintiff, and answer or such other responsive pleading as may be appropriate by defendant or real party-in-interest. In appellate courts, complaint is called petition and answer is response; plaintiff is called petitioner and defendant is respondent. (Spec. Act. R. 4[d], 7).

Stay of Proceedings Below.

Filing of special action complaint and setting of matter for hearing does not stay proceedings before court or tribunal as to which relief is sought, unless court hearing special action specifically orders stay. Such interlocutory orders are subject to R. Civ. P. 65. See topic 5.14 Injunctions. (Spec. Act. R. 5).

Judgment.

In special action brought in superior court, judgment is in form used for civil actions generally, with no special requirements formerly peculiar to writs. Judgment may grant part or all of relief requested, or may dismiss action either on merits or without prejudice. (Spec. Act. R. 6).

Special Appellate Court Provisions.

Petition and all papers must be served forthwith by petitioner, time and manner of service to be specified by Chief Judge of court of appeals or chief justice of supreme court, according to court where filed. Objections to such relief, in whatever form, must be in writing, and filed and served within seven days after service of petition upon respondent, or such lesser time as court may order. If special action relief is granted, form of order granting relief is as court directs but must be in writing and grounds therefor stated. If relief denied, no written opinion required. (Spec. Act. R. 7).

Appeal and Rehearing.

See Spec. Act. R. Ariz. Rev. Stat. 8-9.

Provisional Remedies.

In response to constitutional attacks on Arizona's law of prejudgment remedies, state legislature in 1976 enacted Ariz. Rev. Stat. 12-2401 et seq., "Provisional Remedies," consolidating and substantially amending prior law as to attachment, prejudgment garnishment and replevin. (Garnishment of wages is not provisional remedy.) Following entry deals with provisions of Ariz. Rev. Stat. 12-2401 et seq. applicable to all three remedies. See also category 8 Debtor and Creditor, topics 8.02 Attachment, 8.09 Garnishment and Replevin for provisions specifically applicable to each.

Who May Issue Remedy.

Judges of superior court and justices of peace. (Ariz. Rev. Stat. 12-2402).

Issuance Without Notice.

Provisional remedy may be issued by any superior court judge or justice of peace before judgment and without prior notice to defendant in any of following cases:

(1) When defendant is about to remove permanently from state and has refused to secure debt, or has secreted, disposed of or is about to dispose of property with intent to defraud creditors.

(2) When plaintiff is lawfully entitled to possession of property claimed, has satisfied affidavit and bond requirements (Ariz. Rev. Stat. 12-1301, Ariz. Rev. Stat. 12-1303), and is seeking provisional remedy in nature of replevin (except that such remedy cannot be used to enforce security interest in consumer goods other than purchase money security interest).

(3) When provisional remedy is required to obtain jurisdiction.

Affidavit.

Before remedy may issue, plaintiff must establish by affidavit to court's satisfaction that facts supporting his claim are sufficient for issuance, that one of Ariz. Rev. Stat. 12-2402(A) requirements has been met and that plaintiff will file such other pleadings and affidavits as may be required by law. (Ariz. Rev. Stat. 12-2402[B]).

See also affidavit requirements under specific provisional remedies.

Motion to Quash.

Upon issue of remedy, defendant may immediately move to quash. Motion must be heard within five days of filing, exclusive of weekends and holidays. Issues at hearing are limited to probable validity of plaintiff's claim(s), defenses and claims of personal property exemptions of defendant, existence of statutory requirements for issuance of specific remedy and existence of Ariz. Rev. Stat. 12-2402(A) requirements. (Ariz. Rev. Stat. 12-2402[C]).

Subsequent Notice.

Within three days of actual attachment, garnishment or seizure, plaintiff must exercise reasonable diligence to notify defendant of action ordered by court and of defendant's right to immediate hearing contesting same. (Ariz. Rev. Stat. 12-2402[D]). Upon filing of provisional remedy application, court must issue notice to defendant in prescribed form. (Ariz. Rev. Stat. 12-2402[E]).

Issuance With Notice.

Except as provided in Ariz. Rev. Stat. 12-2402, supra, provisional remedy may not issue until plaintiff has complied with statutory requirements for specific remedy sought, filed application for issuance of remedy and notice thereof with court and served copies of both on defendant, and until defendant has been afforded hearing or opportunity to request hearing. (Ariz. Rev. Stat. 12-2403). Plaintiff may apply for provisional remedy at any time after filing civil action. Application must set forth factual and legal basis for each remedy sought. (Ariz. Rev. Stat. 12-2404). Court then issues notice to defendant in prescribed form. (Ariz. Rev. Stat. 12-2405).

Service of Notice and Application.

Copies of notices prescribed in Ariz. Rev. Stat. 12-2402 and Ariz. Rev. Stat. 12-2405, and of application for issuance of remedy, must be served on defendant by sheriff, constable or private process server in same manner as summons and complaint. (Ariz. Rev. Stat. 12-2406).

Hearing Request.

Each party must file written request for hearing date with clerk of court within ten days after service of notice. Clerk must mail copy of request to attorney for party seeking provisional remedy. (Ariz. Rev. Stat. 12-2407).

Default.

If defendant makes no hearing request, plaintiff may file affidavit of default stating that service was made, that no hearing request was filed and that defendant was in default. Plaintiff must also file proposed form of written order described in subhead Judicial Review of Default Application, infra. Party in default loses right to hearing. (Ariz. Rev. Stat. 12-2408).

Judicial Review of Default Application.

Within five days, exclusive of weekends and holidays, after entry of default, court must review pleadings, affidavits and other documents on file to determine that: (1) Affidavit has been filed by person who served application and notice, (2) affidavit of default has been filed and default entered, (3) plaintiff's claim(s) are based on sufficient facts in supporting affidavit to make claim(s) valid, (4) any statutory requirement for issuance of specific remedy has been met and (5) any other pleadings or affidavits required as prerequisites for remedy have been filed. (Ariz. Rev. Stat. 12-2409[A]). If these requirements are met, provisional remedy is issued by written order including findings that Ariz. Rev. Stat. 12-2409(A) requirements have been met. (Ariz. Rev. Stat. 12-2409[B] to [C]).

Hearing.

Hearing must be conducted by judge or justice of peace within five days exclusive of weekends and holidays after filing of hearing request, or at later time with consent of all parties. Issues at hearing are limited to probable validity of plaintiff's claim(s), defenses and claims of personal property exemptions of defendant and existence of statutory requirements for issuance of specific remedy. If after hearing court finds probable cause to believe plaintiff's claim is valid and statutory requirements for specific remedy have been met, such remedy is issued. (Ariz. Rev. Stat. 12-2410).

Attorney's Fees.

If hearing is held and original remedy order is quashed or no provisional remedy is ordered, court may award reasonable attorney's fees to defendant. (Ariz. Rev. Stat. 12-2411).

Waiver of Right to Hearing.

Void and unenforceable. (Ariz. Rev. Stat. 12-2412).

Compulsory Arbitration.

See category 9 Dispute Resolution, topic 9.02 Arbitration and Award.

Direct Actions Against Insurer.

See category 23 Transportation, topic 23.01 Motor Vehicles, subhead Direct Actions.

Small Claims.

See category 6 Courts and Legislature, topic 6.01 Courts.

See also topics 5.02 Actions, Appeal and Error, Depositions and Discovery, Injunctions, Judgments, Pleading, Process; category 8 Debtor and Creditor, topics 8.02 Attachment, 8.05 Executions, 8.09 Garnishment.

5.20 PROCESS:

Federal Rules of Civil Procedure followed with some important modifications to require disclosure. (Civ. Ariz. Rev. Stat. 1-86). See topic 5.19 Practice.

Who May Serve.

On filing of complaint, clerk issues summons which may be served only by sheriff, his deputy, person appointed by court, or person not a party or party's attorney, not less than 21 years of age, and registered with clerk as private process server. Fees for service set by statute. (Ariz. Rev. Stat. 11-445). Summons and pleading must be served together within 120 days of filing. (R. Civ. P. 4[i], 4.1[b]).

Personal Service.

Summons and pleading must be served personally or by leaving copies at defendant's dwelling or place of abode with person of suitable age or discretion residing there or upon agent authorized by appointment or law to receive service. Service on minor for whom guardian of estate has been appointed must be on both guardian and ward. Service on minor under 16 made by serving minor and parent, guardian or person in loco parentis; on incompetent, by serving incompetent and either guardian or person designated by court. (R. Civ. P. 4.1). After appearance by counsel, service must be made on attorney unless service on party is ordered by court. (R. Civ. P. 5[c]). Service by mail complete on date acknowledgment of receipt is executed. (171 Ariz. 449, 831 P.2d 448).

Service by Mail within Arizona.

Upon certain persons or entities, service may be effected by first-class mail within Arizona by mailing summons and complaint along with two copies of notice and acknowledgment of receipt to defendant. Absent good cause, defendant must return notice and acknowledgment within 30 days or pay costs of personal service. (R. Civ. P. 4.1[c]).

Summons in action against state must be served upon attorney general. Service of county, municipal corporation or other governmental subdivision must be made by delivering copy of summons and pleading to chief executive officer, secretary, clerk or recording officer thereof. (R. Civ. P. 4.1[h]-[i]).

Summons in action against domestic or foreign corporation or upon partnership or other unincorporated association subject to suit in common name must be served upon officer, partner, managing or general agent or any other agent authorized by appointment or law to receive service and if statute authorizing agent to receive service so requires, by also mailing copy to defendant. (R. Civ. P. 4.1[k]).

Summons in action against partnership may be served on one partner and such service authorizes judgment against partnership and against partner actually served. (Ariz. Rev. Stat. 29-104[A]). Service on limited liability partnership's statutory agent is lawful personal service. (Ariz. Rev. Stat. 29-104[B]).

Summons in action against domestic corporations that have no agents within state upon whom service can be made may be served by delivering two copies of summons and complaint to Corporation Commission. (R. Civ. P. 4.1[l]).

Agent resident in Arizona must be appointed for each domestic and foreign corporation upon whom service of process against corporation may be made. (Ariz. Rev. Stat. 10-501, Ariz. Rev. Stat. 10-1507).

Service on Nonresident Motorists.

See category 23 Transportation, topic 23.01 Motor Vehicles.

Service on Unknown Heirs.

By publication. (R. Civ. P. 4.1[o], 4.2[f]).

Service on Insurance Company.

Service on authorized foreign insurer shall be made on Director of Insurance. (Ariz. Rev. Stat. 20-221). Service on resident insurer shall be made in manner applying to corporations generally or upon insurer's attorney-in-fact if reciprocal insurer. (Ariz. Rev. Stat. 20-221[B]). If resident insurer fails to maintain statutory agent, service shall be on Director of Insurance. (Ariz. Rev. Stat. 20-221[D]). Service on unauthorized insurer may be made on Secretary of State in action by Director (Ariz. Rev. Stat. 20-401.03), or on Director in action by any other person (Ariz. Rev. Stat. 20-403).

Summons, Alternative Methods of Service.

(a) By Registered Mail.—Service when whereabouts of party outside state is known, may be made by mailing copy of summons and complaint in post office by any form of mail requiring signed and returned receipt, and by subsequently filing affidavit showing circumstances warranting service by mail, that copy of summons and complaint was dispatched to defendant, that it was received as evidenced by attached receipt, that receipt is genuine, and on what date receipt was returned to sender. Affidavit is prima facie evidence of personal service. Service is deemed complete on date of receipt by party being served. (R. Civ. P. 4.2[c]). Whenever party has right or is required to do act or initiate proceeding within prescribed period after service on him of notice or other paper (except notice of entry of judgment) and such papers are served by mail, five days are added to prescribed period. (R. Civ. P. 6[e]).

Service by mail may be made upon party within state by mailing copy of summons and complaint to party, together with two copies of notice and acknowledgment of receipt of summons and complaint and return envelope, postage prepaid, addressed to sender. Service is complete on date on which acknowledgment of receipt is executed. (R. Civ. P. 4.1[c]; 171 Ariz. 449, 831 P.2d 448).

(b) Direct Service.—Service out of state may also be made in same manner as provided in R. Civ. P. 4.1(d)-(1) by person authorized to serve process under law of state where such service is made. Service is complete when made. (R. Civ. P. 4.2[b]). Before default, must file affidavit of process showing why R. Civ. P. 4.2 service used, plus process server's affidavit. (R. Civ. P. 4.2[b]).

Service by Publication.

Where by law personal service is not required, and person is subject to service under R. Civ. P. 4.1 (see supra), such service may be made by either of methods set forth in R. Civ. P. 4.2 (see supra) or by publication. Service by publication is made by publication of summons in newspaper published in county where action is pending, and in newspaper published in county of last known address of person to be served, and if no newspaper is published in such county, then in newspaper published in adjoining county, at least once a week for four successive weeks. (R. Civ. P. 4.1[n]). Service is complete 30 days after first publication. (R. Civ. P. 4.1[n]). When residence of defendant is known, party must on or before date of first publication mail copy of summons and complaint, postage prepaid, directed to defendant at his place of abode. Plaintiff must file affidavit showing publication and mailing and circumstances warranting utilization of procedure under R. Civ. P. 4.1 which is prima facie evidence of compliance. If residence is unknown, affidavit must so state. (R. Civ. P. 4.1[n]).

When defendant's present address is unknown, but last known address was out of state, service may be had by publication of summons at least once a week for four successive weeks in newspaper published in county where action is pending. If no newspaper is published in such county, publications shall be made in newspaper published in adjoining county. Service is complete 30 days after first publication (R. Civ. P. 4.2[f]).

Summons, Time Limit.

Court must dismiss without prejudice actions filed but not served within 120 days, unless plaintiff demonstrates good cause why service not made. (R. Civ. P. 4[i]).

Long-Arm Statute.

See subhead Summons, Alternative Methods of Service, supra, for R. Civ. P. 4.2(a).

Mandamus.

Relief previously obtained by writ of mandamus (Ariz. Rev. Stat. 12-2021 et seq.) must now be obtained by special action order. See topic 5.19 Practice, subhead Special Actions.

5.20A PROHIBITION:

Relief previously obtained by writ of prohibition (common law) must now be obtained by special action order. See topic 5.19 Practice, subhead Special Actions.

5.21 REPLEVIN:

Caveat: In response to constitutional attacks on Arizona's law of prejudgment remedies, state legislature in 1976 enacted Ariz. Rev. Stat. 12-2401 et seq., "Provisional Remedies," consolidating and substantially amending prior law as to attachment, prejudgment garnishment and replevin. (Garnishment of wages is not provisional remedy.) See topic 5.19 Practice, subhead Provisional Remedies before proceeding. Remainder of this entry deals only with provisions specifically applicable to replevin.

Affidavit.

If plaintiff claims possession of specific personal property in his complaint, he may at any time after compliance with provisional remedy requirements (Ariz. Rev. Stat. 12-2401 et seq.) and before judgment file affidavit showing: (1) That he is owner of property claimed (sufficiently describing it) or is entitled to possess it; (2) that it is wrongfully detained by defendant; (3) its actual value; and (4) that property has not been seized under any process, execution or attachment, or, if so seized, that it is exempt from such seizure (Ariz. Rev. Stat. 12-1301).

Order for Seizure.

After compliance with provisional remedy requirements (Ariz. Rev. Stat. 12-2401 et seq.) and upon filing of foregoing affidavit, judge or justice of peace must order sheriff or constable to take property specified and deliver it to plaintiff (Ariz. Rev. Stat. 12-1302).

Bond.

Officer to whom order is directed must not take property until plaintiff executes and delivers to him bond payable to defendant in amount not less than double value of property as alleged in affidavit, conditioned that plaintiff will prosecute his action to effect and without delay, that he will return property to defendant if such return is adjudged, and that in default of such return he will pay assessed value of property, all damages for taking and detaining it, and costs in action including reasonable attorneys' fees. (Ariz. Rev. Stat. 12-1303).

Seizure and Delivery of Property.

Officer must take property and deliver it to plaintiff, unless defendant within two days after seizure gives bond for same amount and containing same conditions as required of plaintiff. In such case, defendant remains in possession. (Ariz. Rev. Stat. 12-1304).

Claims of Third Persons.

Third-party claims to personal property are made by presenting written claim under oath to levying officer and posting bond equal to double value of property (Ariz. Rev. Stat. 12-1331), conditioned on claimant's return of property in good condition or payment of its value plus damages and costs if he fails to establish his claim (Ariz. Rev. Stat. 12-1332). Property must then be returned to claimant (Ariz. Rev. Stat. 12-1333), and claim and bond returned to proper court and docketed there for hearing on question of ownership (Ariz. Rev. Stat. 12-1335 et seq.).

Judgment.

If court finds that defendant is owner of property and is entitled to its possession, it must then find value of property together with any damage defendant may have suffered by wrongful seizure. In such case, where judgment must be made both for return of property and also against plaintiff and sureties on replevin bond for value of property, plus damages for its detention, costs of action and reasonable attorneys' fees, defendant must elect whether he will take return of property or money judgment. (Ariz. Rev. Stat. 12-1308). If judgment is for defendant and plaintiff is not in possession of property, judgment is limited to value of property, damages, costs and reasonable attorneys' fees. (Ariz. Rev. Stat. 12-1309).

If judgment is against defendant and he is in possession of property by reason of redelivery bond, judgment must be made both for return of property to plaintiff and also against defendant and sureties on his bond for value of property, damages for its detention and costs of action. Plaintiff must elect between return of property or money judgment. (Ariz. Rev. Stat. 12-1310).

5.22 SEQUESTRATION:

No statutory provision, but see topic 5.19 Practice, subhead Provisional Remedies.

5.23 SERVICE:

See topic 5.20 Process and category 23 Transportation, topic 23.01 Motor Vehicles, subheads Dealers, and Action against Nonresident.

5.24 STAY OF EXECUTION:

See topic 5.03 Appeal and Error; category 8 Debtor and Creditor, topic 8.05 Executions.

5.25 SUBMISSION OF CONTROVERSY:

Uniform Certification of Questions of Law Act (1967) adopted. (Ariz. Rev. Stat. 12-1861 et seq.). Under Act, Arizona Supreme Court may answer questions of state law certified by U.S. Supreme Court, Circuit Courts of Appeal, and Federal District Court if it appears that questions of state law are determinative of cause and it appears to certifying court that there is no controlling Arizona precedent.

Material variations from Official Text are:

§ 1 (Ariz. Rev. Stat. 12-1861).—Alternative permitting certification by courts of another state not adopted.

§ 2 (Ariz. Rev. Stat. 12-1862).—Language expressly authorizing invocation of Act by motion of any party is omitted.

§§ 8-13.—Omitted.

5.26 VENUE:

Superior Court.

General rule is that venue in civil case is in county in which defendant resides, but numerous special rules apply as follows (Ariz. Rev. Stat. 12-401):

Action Against Nonresident.

In county in which plaintiff resides.

Action Against Married Person.

In county in which such person's spouse resides, or, if defendant and spouse are living separate and apart, in county in which defendant resides.

Action Against Transient Person.

In county where defendant is found.

Action for Debt.

In county where debt was contracted or where defendant resides; if debt was contracted outside state, wherever defendant is found.

Action on Written Contract to Perform Obligation in One County.

In such county or where defendant resides.

Action Against Several Defendants.

In county in which one or more of defendants reside.

Action Against Estate of Decedent.

In county of administration.

Action Against Public Officer.

In action for fraud, in county where fraud was committed or defendant resides or may be found; in all other cases, in county where defendant or any of defendants hold office.

Action for Damages for Trespass.

In county where trespass was committed or where defendant resides or may be found.

Action Concerning Personal Property.

In county where such property is located or wherever defendant may be found.

Action Concerning Real Property.

In county where any part of such property is situated.

Action Against Corporation.

In county where cause of action arose, where defendant has agent or representative, or where defendant has property or conducts business.

Action for Dissolution of Marriage or Legal Separation.

In county in which petitioner or petitioners reside at time petition is filed.

Action to Enjoin Court Proceedings.

In county where proceedings are pending or where judgment was rendered.

Action Against County.

In defendant's county or, if there are several defendants, in any defendant's county.

Action Against or on Behalf of State.

In county where seat of government located.

Surety Insurers.

Suable in any county where bond, etc., was made, or where insurer has its principal office. (Ariz. Rev. Stat. 20-1532).

Change of Venue.

Court may order on consent of parties or on usual grounds. (Ariz. Rev. Stat. 12-405). Where change in venue results from improper filing of original complaint, plaintiff must pay transmittal fee set forth in Ariz. Rev. Stat. 12-284 within 20 days of transmittal order, and filing fee required by court to which action is transferred within 30 days, or face dismissal without prejudice. In all other cases, party requesting change of venue must pay transmittal fee set forth in Ariz. Rev. Stat. 12-284 within 20 days after transmittal order. (Ariz. Rev. Stat. 12-407).

Justice Courts.

Rules governing venue in superior court apply also in justice courts, except: Word "precinct" must be substituted for word "county"; actions against estate are brought in precinct in which county seat is located; actions against persons who contract debts in one precinct and thereafter move to another precinct are brought in any precinct of county in which such person is found, at option of plaintiff; actions for collection of account or enforcement of contract are brought in precinct where account or contract was made or entered into, or where defendant lives, at option of plaintiff; and actions involving civil traffic violation are brought in any precinct in which violation is alleged to have occurred. (Ariz. Rev. Stat. 22-202).

Venue may be changed if suit is in wrong precinct. (Ariz. Rev. Stat. 22-204).

6 COURTS AND LEGISLATURE

6.01 COURTS:

United States District Court.

Clerk's office: Sandra Day O'Connor Courthouse, Suite 130, 401 W. Washington Street. SPC 1, Phoenix, Arizona Ariz. Rev. Stat. 85003-2118. Deputy clerk's office: Evo A. DeConcini U.S. Courthouse, 405 West Congress Street, Suite 1500, Tucson, Arizona 85701. Entire state constitutes only one district, but court sits at Phoenix, Prescott, Tucson, Flagstaff and Yuma as cases are set in those communities. Causes may be transferred to any of above places at Court's discretion. Interlocutory orders may be made at any of above places.

Deposits and Fees.

$350 deposit on filing original action or on filing removal in U.S. District Court. Fees are payable in cash, check or post office money order only at time of rendering service.

Supreme Court.

Court consists of five justices. (Ariz. Rev. Stat. 12-101).

Jurisdiction.

Supreme court has original jurisdiction of writs and extraordinary orders, such as habeas corpus, quo warranto, injunction and mandamus (see category 5 Civil Actions and Procedure, topic Practice, subhead Special Actions), directed to state officers; original and exclusive jurisdiction of causes arising between counties concerning boundaries or claims of one against another; appellate jurisdiction in all actions and proceedings except civil and criminal actions originating in courts not of record, unless validity of tax, impost, assessment, toll, statute or municipal ordinance is involved; power to issue writs and extraordinary orders, such as habeas corpus, injunction, review, 5.05 certiorari, mandamus and prohibition (see category 5 Civil Actions and Procedure, topic 5.19 Practice, subhead Special Actions) necessary and proper to complete exercise of its appellate and revisory jurisdiction. Each justice of supreme court has power to issue writs of habeas corpus. (Const., Art. VI, § 5). Court must make rules of pleading, practice and procedure for all state courts (Ariz. Rev. Stat. 12-109); procedure in civil matters is governed by rules which, with some exceptions, are same as Federal Rules of Civil Procedure. Court may answer questions of law certified to it by certain federal courts or tribal courts. (Ariz. Rev. Stat. 12-1861 et seq.).

Sittings.

At Phoenix.

Court of Appeals.

Court of appeals is divided into two divisions designated as Division 1 and Division 2. Division 1 consists of Maricopa, Yuma, La Paz, Mohave, Coconino, Yavapai, Navajo and Apache Counties and its 16 judges sit three each in Departments A, B, C, D and E and chief judge serves as their administrative supervisor. Division 2 consists of Pima, Pinal, Cochise, Santa Cruz, Greenlee, Graham and Gila Counties and its six judges sit three each in Departments A and B. Sessions may be held at places other than Phoenix or Tucson when in opinion of majority of judges of division or department public interest so requires. (Ariz. Rev. Stat. 12-120 to Ariz. Rev. Stat. 12-120.04).

Jurisdiction.

Court of appeals has appellate jurisdiction in all actions and proceedings originating in or permitted by law to be appealed from superior court, except criminal actions involving crimes for which sentence of death has been imposed; jurisdiction to issue writs of certiorari to review lawfulness of awards of Industrial Commission and to enter judgment affirming or setting aside awards; jurisdiction to issue writs and extraordinary orders, such as injunction, review, certiorari, mandamus and prohibition (see category 5 Civil Actions and Procedure, topic 5.19 Practice, subhead Special Actions) necessary and proper to complete exercise of its appellate jurisdiction. (Ariz. Rev. Stat. 12-120.21).

Sittings.

Division 1: at Phoenix. Division 2: at Tucson.

Superior Court.

Only one superior court for whole state, divided into county divisions. Superior court is nisi prius court. Except as provided by other laws, clerk of superior court receives superior court fees classified in Ariz. Rev. Stat. 12-284.

Jurisdiction.

Superior court has original jurisdiction in all cases of equity and of cases at law which involve title to or possession of real property or legality of tax, impost, assessment, toll or municipal ordinance; in all other cases where demand or value of property in controversy amounts to $1,000 or more, exclusive of interest and costs; in actions of forcible entry and detainer; in proceedings in insolvency; of all matters probate; of divorce; in all cases of felonies; in all cases of misdemeanor not otherwise provided for by law; and in all other cases in which jurisdiction is not exclusively vested in other courts. Court has power to issue writs and extraordinary orders, such as habeas corpus, injunction, quo warranto, review, certiorari, mandamus and prohibition (see category 5 Civil Actions and Procedure, topic 5.19 Practice, subhead Special Actions). Court also has exclusive jurisdiction of juvenile matters, and appellate jurisdiction of appeals from justice courts in criminal cases and in civil cases. (Const., Art. VI, §§ 14-18).

Sittings.

Apache County: at St. Johns.

Cochise County: at Bisbee.

Coconino County: at Flagstaff.

Gila County: at Globe.

Graham County: at Safford.

Greenlee County: at Clifton.

La Paz County: at Parker.

Maricopa County: at Phoenix.

Mohave County: at Kingman.

Navajo County: at Holbrook.

Pima County: at Tucson.

Pinal County: at Florence.

Santa Cruz County: at Nogales.

Yavapai County: at Prescott.

Yuma County: at Yuma.

Superior court ordinarily meets at county seat, but sessions may be held at places other than county seat when authorized by county supervisors or when in judge's opinion public interest so requires. (Ariz. Rev. Stat. 12-130). Trial jury must be drawn in each court twice per year, and at other times necessary. (Ariz. Rev. Stat. 21-311).

Superior court may, by rule, provide that all claims in which amount in controversy does not exceed $50,000 must be submitted to arbitration. Court may waive arbitration requirement if good cause shown and parties stipulate in writing. Claims may also be referred to arbitration by agreement of reference signed by parties. (Ariz. Rev. Stat. 12-133).

Upon request of presiding judge of superior court in any county, chief justice of supreme court may appoint judge pro tempore of superior court of such county, subject to approval of board of supervisors. (Ariz. Rev. Stat. 12-141).

Arbitration and Mediation.

Court may use mediation and other alternative dispute resolution procedures to help resolve actions filed in court. (Ariz. Rev. Stat. 12-134, Ariz. Rev. Stat. 12-2238).

Court Commissioners.

Court commissioners may be appointed in counties having three or more judges, with powers as prescribed by supreme court or statute. (Ariz. Rev. Stat. 12-213). Commissioners are presently appointed in Maricopa and Pima Counties. Arizona Supreme Court oversees evaluations of superior court commissioners and allows public to participate in process. (Ariz. Rev. Stat. 12-119.04).

Court of Conciliation.

Courts of conciliation may be created by superior court for purpose of preserving, promoting and protecting family life, institution of matrimony and rights of children, and to provide means for reconciliation of spouses and amicable settlement of domestic and family controversies. (Ariz. Rev. Stat. 25-381.01).

Probate Courts.

Probate jurisdiction is exercised by superior court. (Const. Art. VI, § 14).

Tax Court Jurisdiction is exercised by superior court. (Ariz. Rev. Stat. 12-161). Tax court hears cases involving legality, imposition, assessment, or collection of tax (Ariz. Rev. Stat. 12-163). Principal office in Maricopa County, but hearings may be held in any county seat. (Ariz. Rev. Stat. 12-162). With few exceptions, Rules of Civil Procedure in superior court govern tax court proceedings. (Ariz. Rev. Stat. 12-166). After Oct. 1, 2006 tax court must publish tax decisions. (Ariz. Rev. Stat. 42-2077). Appeals must be filed within 30 days of judgment. (Ariz. Rev. Stat. 12-170). Decisions of public interest other than decisions relating to ad valorem property tax must be published and distributed in same manner as decisions by supreme court. (Ariz. Rev. Stat. 12-171). Taxpayer may sometimes elect to use small claims procedures. (Ariz. Rev. Stat. 12-172). Judgment in small claims case is conclusive. (Ariz. Rev. Stat. 12-174).

Justice Courts.

Counties are divided into justice precincts. Each precinct has justice of peace. Generally, justice courts have original jurisdiction of civil cases when amount involved, exclusive of interest, costs and attorneys' fees is $10,000 or less, and over certain misdemeanors. They do not have jurisdiction over causes in which title to or ownership of real property is in issue but can try right to possession of real property. Justice of peace may require arbitration or other dispute resolution methods. (Ariz. Rev. Stat. 22-201). Rules governing procedure and practice in superior court when applicable and when no other is specially prescribed, govern procedure and practice in justice courts. (Ariz. Rev. Stat. 22-211). Filing fees for justice court are received by justices of peace and are classified in Ariz. Rev. Stat. 22-281.

Small Claims Courts.

Small claims division of justice court has jurisdiction concurrent with justice court, with certain exceptions, of civil matters less than $2,500, exclusive of interest and costs, and certain equitable remedies. (Ariz. Rev. Stat. 22-503). Fees are statutorily set. (Ariz. Rev. Stat. 22-281). Clerk sets hearing date within 60 days after filing of answer. (Ariz. Rev. Stat. 22-515). Hearing is before hearing officer without attorneys unless stipulated by both parties. No appeals allowed, findings of hearing officer are final and binding. (Ariz. Rev. Stat. 22-511 et seq.). See also subhead Justice Courts, supra.

Municipal Courts.

Every incorporated city or town must have municipal court. Municipal courts have jurisdiction of all cases arising under ordinances of city or town and concurrent jurisdiction with justices of peace in precincts where city or town is established over all limits of city or town. (Ariz. Rev. Stat. 22-402).

Military Courts.

In general, Ariz. Rev. Stat. 26-1001 et seq. Jurisdiction over members of National Guard. (Ariz. Rev. Stat. 26-1002). Concurrent jurisdiction with other courts if other courts generally may try person or offense. (Ariz. Rev. Stat. 26-1021). Three types of courts-martial: General, special, summary. General consists of military judge and at least five members (or only one military judge if requested by accused). Powers include fine (not more than $200); forfeiture of pay and allowances; reprimand; dismissal or dishonorable discharge; demotion of noncommissioned officer. Pretrial procedure in Ariz. Rev. Stat. 26-1030 et seq. Trial procedure in Ariz. Rev. Stat. 26-1036 et seq. Punishable offense listed in Ariz. Rev. Stat. 26-1077 et seq. Special consists of at least three members (or only one military judge if requested by accused); cannot impose fine above $100 or try commissioned officers. Summary consists of one commissioned officer; cannot impose fine above $25 or try officers and candidates. (Ariz. Rev. Stat. 26-1016 et seq.).

6.02 LEGISLATURE:

Annual Sessions.

Begin on second Mon. in Jan. Governor may call special session whenever advisable in his judgment. (Const., Art. IV, pt. 2, § 3).

Initiative and Referendum.

Guaranteed by Const., Art. IV, pt. 1, § 1.

Lobbyists.

Any person employed, retained or representing another person, with or without compensation, for purpose of attempting to influence passage or defeat of any legislation by communication or attempted communication with any legislator or for purpose of attempting by communication or attempted communication influencing of official actions of state officer or member of state agency, board, commission or council must be registered by principal with Secretary of State. (Ariz. Rev. Stat. 41-1232). Principal must periodically report certain lobbying expenditures. (Ariz. Rev. Stat. 41-1232.02). Lobbyists must disclose to legislators that they are lobbying. (Ariz. Rev. Stat. 41-1233.01).

6.03 REPORTS:

Cases.

Decisions of supreme court reported from 1866 to date in Arizona Reports and reported from 1883 to date in Pacific Reporter. Decisions of court of appeals reported from 1965 to 1976 in Arizona Appeals Reports (Volumes Ariz. Rev. Stat. 1-27) and reported from 1965 to date in Pacific Reporter. Beginning with Volume 114, Arizona Reports, decisions of supreme court and court of appeals combined in Arizona Reports.

Digests.

Digest by Peter V. Ross covers Volumes Ariz. Rev. Stat. 1-16 of Arizona Reports. Arizona Digest (West Publishing Company and Bancroft Whitney Company), with pocket supplements, covers all reports from 1866 to date.

6.04 STATUTES:

Arizona Revised Statutes (1956), cited A. R. S., contain all statutes in force through 1956 legislative session. This recodification replaces Arizona Code Annotated, 1939. Citations throughout this digest are to section numbers of A. R. S. or to rule numbers of Rules of Civil or Appellate Procedure, which are contained in separate volume. A. R. S. and Rules may be obtained from Arizona Secretary of State or from West Publishing Company.

Uniform Acts adopted are: Acknowledgment (1971) (Ariz. Rev. Stat. 33-511 et seq.); Anatomical Gift (1987 Act) (Ariz. Rev. Stat. 36-841 et seq.); Arbitration (1962) (Ariz. Rev. Stat. 12-1501 et seq.; repealed eff. Jan. 1, 1996); Attendance of Witnesses From Without a State in Criminal Proceedings, Act to Secure (1937) (Ariz. Rev. Stat. 13-4091 et seq.); †Certification of Questions of Law (1967 Act) (Ariz. Rev. Stat. 12-1861 et seq.); Child Custody Jurisdiction and Enforcement (2000) (Ariz. Rev. Stat. 25-1001 et seq.); †Commercial Code (1968) (Ariz. Rev. Stat. 47-1101 et seq.); Common Trust Fund (1971) (Ariz. Rev. Stat. 6-871 et seq.); †Condominium (1985) (Ariz. Rev. Stat. 33-1201 et seq.); †Conservation Easement (1985) (Ariz. Rev. Stat. 33-271 et seq.); †Contribution Among Tortfeasors (Revised) (1984) (Ariz. Rev. Stat. 12-2501 et seq.); Controlled Substances (1970, 1990, and 1994 Acts) (Ariz. Rev. Stat. 36-2501 et seq.); Criminal Extradition (1978) (Ariz. Rev. Stat. 13-3841 et seq.); Custodial Trust (2001) (Ariz. Rev. Stat. 14-9101 et seq.); Declaratory Judgments (1927) (Ariz. Rev. Stat. 12-1831 et seq.); †Disclaimer of Property Interests (1994) (Ariz. Rev. Stat. 14-10001 et seq.); Division of Income for Tax Purposes (1983) (Ariz. Rev. Stat. 43-1131 et seq.); Electronic Transactions (2000) (Ariz. Rev. Stat. 44-7001 et seq.); †Durable Power of Attorney (1974) (Ariz. Rev. Stat. 14-5501 et seq.); Revised Enforcement of Foreign Judgments (1971) (Ariz. Rev. Stat. 12-1701 et seq.); †Evidence, Rules of (1974 Act) (17A A.R.S.); Federal Lien Registration, (1990) (Ariz. Rev. Stat. 33-1031); Fiduciaries (1974) (Ariz. Rev. Stat. 14-7501 et seq.); Fraudulent Transfer (1990) (Ariz. Rev. Stat. 44-1001); †Guardianship and Protective Proceedings (1982 Act) (Ariz. Rev. Stat. 14-5201 et seq.); Insurers Liquidation (1954) (Ariz. Rev. Stat. 20-611 et seq.); Limited Partnership, Revised (1982) (Ariz. Rev. Stat. 29-301 et seq.); Management of Institutional Funds (1999) (Ariz. Rev. Stat. 10-11801 et seq.); Mandatory Disposition of Detainers (1973) (R. Crim. P. R. 8.3[b]); Marriage and Divorce (1973) (Ariz. Rev. Stat. 25-311 et seq.); Minor Student Capacity to Borrow (1971) (Ariz. Rev. Stat. 44-140 to 140.01); Multiple Person Accounts (1994) (Ariz. Rev. Stat. 14-1201, Ariz. Rev. Stat. 14-6201, Ariz. Rev. Stat. 14-6227; Nonprobate Transfers on Death (1994) (Ariz. Rev. Stat. 14-1201, Ariz. Rev. Stat. 14-6101 et seq.); Premarital Agreement Act (1991) (Ariz. Rev. Stat. 25-20l et seq.); Prudent Investor Act (Ariz. Rev. Stat. 14-7601 et seq.); Revised Principal and Income Act (1984) (Ariz. Rev. Stat. 14-7401 et seq.); Probate Code (1973) (Ariz. Rev. Stat. 14-1102 et seq.); Recognition of Acknowledgments (1971) (Ariz. Rev. Stat. 33-501 et seq.); Residential Landlord and Tenant (1973) (Ariz. Rev. Stat. 33-1301 et seq.); Simultaneous Death (1993) (Ariz. Rev. Stat. 14-2702); Single Publication (1953) (Ariz. Rev. Stat. 12-651 et seq.); †State Administrative Procedure (1971) (Ariz. Rev. Stat. 41-1001 et seq.); State Antitrust (1974) (Ariz. Rev. Stat. 44-1401 et seq.); Statutory Rule Against Perpetuities (1994) (Ariz. Rev. Stat. 14-2901 et seq.); TOD Security Registration (1994) (Ariz. Rev. Stat. 14-1201, Ariz. Rev. Stat. 14-6301 et seq.); Testamentary Additions to Trust (1991) (Ariz. Rev. Stat. 14-2511); Trade Secrets (1990) (Ariz. Rev. Stat. 44-401 et seq.); Transfers to Minors (1988) (Ariz. Rev. Stat. 14-7651 et seq.); Unclaimed Property Act (1983-†1995 revised act effective 1/1/2001) (Ariz. Rev. Stat. 44-301 et seq.).

† Adopted with significant variations or modifications. See appropriate topics.

For text of Uniform Acts falling within the scope of the Martindale-Hubbell Law Digest, see Uniform and Model Acts section.

6.05 UNIFORM LAWS:

For list of Uniform Acts in force in Arizona, see topic 6.04 Statutes. For text of Uniform Acts within scope of Martindale-Hubbell Law Digests, see Uniform and Model Acts section.

7 CRIMINAL LAW

7.00A BAIL:

See topic 7.01 Criminal Law.

7.01 CRIMINAL LAW:

Crimes and affirmative defenses are statutory only. (Ariz. Rev. Stat. 13-103). Criminal offenses primarily governed by Ariz. Rev. Stat. 13-101 et seq. Criminal procedure governed by Rules of Criminal Procedure (17 A.R.S.) and by Ariz. Rev. Stat. 13-3841 to Ariz. Rev. Stat. 13-4315.

Indictment or Information.

See Rules of Criminal Procedure, 17 A.R.S. State grand jury created by Ariz. Rev. Stat. 21-421.

Bail.

Capital crimes and crimes involving sexual assault, sexual conduct with minor who is under 15 years of age, molestation of child who is under 15 years of age, or serious felony offenses if there is probable cause to believe that person has entered or remained in U.S. illegally, are not bailable where proof of guilt is evident or presumption thereof is great. (Ariz. Rev. Stat. 13-3961[A]). Convicted felon, sentenced to imprisonment, cannot be bailed unless court determines that continued confinement would endanger his life. (Ariz. Rev. Stat. 13-3961.01). Felonies are not bailable where there is clear and convincing evidence that person charged poses substantial danger to another person or community. (Ariz. Rev. Stat. 13-3961[C]). Defendant charged with offenses bailable as matter of right must be released on recognizance before conviction unless otherwise determined, in which case least onerous conditions to reasonably insure appearance may be imposed. (R. Crim. P. 7.2[a]). Bail after conviction limited. (R. Crim. P. 7.2[b]).

Exclusionary Rule.

Trial court shall not suppress evidence which is otherwise admissible in criminal proceeding if court determines that evidence was seized by peace officer as result of good faith mistake or technical violation. This rule does not apply to unlawful electronic eavesdropping or wiretapping. (Ariz. Rev. Stat. 13-3925).

Guilty Except Insane Defense.

Defendant must prove his insanity by clear and convincing evidence. (Ariz. Rev. Stat. 13-502[c]).

Rules of Criminal Procedure.

Contain provisions covering preliminary proceedings (R. Crim. P. Ariz. Rev. Stat. 2-5); rights of parties (R. Crim. P. Ariz. Rev. Stat. 6-11); pretrial procedures (R. Crim. P. Ariz. Rev. Stat. 12-16); pleas of guilty and no contest (R. Crim. P. Ariz. Rev. Stat. 17); trial (R. Crim. P. Ariz. Rev. Stat. 18-23); post-verdict proceedings (R. Crim. P. Ariz. Rev. Stat. 24-29); appeal and other post-conviction relief (R. Crim. P. Ariz. Rev. Stat. 30-32); powers of court (R. Crim. P. Ariz. Rev. Stat. 33-39).

Interstate Compact for Supervision of Parolees and Probationers adopted. (Ariz. Rev. Stat. 31-461 et seq.).

National Crime Prevention and Privacy Compact adopted. (Ariz. Rev. Stat. 41-1750.01 et seq.).

Uniform Criminal Extradition Act 1926 version, adopted. (Ariz. Rev. Stat. 13-3841 et seq.). Individuals arrested in Arizona for crime committed in another state can waive extradition proceedings. (Ariz. Rev. Stat. 13-3865.01[A]). Governor's warrant not required if prisoner previously waived extradition as term of prior release and proper identification of prisoner has been made. (Ariz. Rev. Stat. 13-3865.01[C]). On conviction of crime that caused to be extradited to state, state or political subdivision, jointly or severally, may recover from convicted person expenses incurred by extraditing agency. (Ariz. Rev. Stat. 13-3870.02).

Uniform Controlled Substances Act adopted. (Ariz. Rev. Stat. 36-2501 et seq.).

Uniform Act to Secure the Attendance of Witnesses From Without a State in Criminal Proceedings adopted. (Ariz. Rev. Stat. 13-4091 et seq.).

Victims' Rights Implementation Act adopted. (Ariz. Rev. Stat. 13-4401 et seq.). Registered neighborhood association may invoke victim's rights. (Ariz. Rev. Stat. 13-4401.01). Within 15 days of commitment, victim must receive notification of right to request not to receive mail from committed youth (Ariz. Rev. Stat. 8-392.01), or from inmate (Ariz. Rev. Stat. 13-4411.01). Victim has right to conference with prosecuting attorney. (Ariz. Rev. Stat. 13-4419). Court shall minimize contact between victim and defendant and victim and defendant's family through appropriate safeguards. (Ariz. Rev. Stat. 13-4431). Victim has right to withhold his phone number, address, and other locating information from defendant and public unless compelling need for information exists. (Ariz. Rev. Stat. 13-4434). Victims have right to notice from court of continuances in defendant's trial. (Ariz. Rev. Stat. 13-4409[C]). Victims have right to notification of sentences imposed on defendant and copies of subsequent appellate opinions and memorandums. (Ariz. Rev. Stat. 13-4411). Victims' contact information shall be redacted from publicly accessible records. (Ariz. Rev. Stat. 13-4434). To assure that victim who comes before court has been advised of rights, judge shall read statement advising victim of constitutional rights. (Ariz. Rev. Stat. 13-4438). Juvenile court judge must also read statement advising victim of constitutional rights. (Ariz. Rev. Stat. 8-421). Parents may exercise victims' rights on behalf of minor children. (Ariz. Rev. Stat. 8-412[G], Ariz. Rev. Stat. 13-4433[H]).

8 DEBTOR AND CREDITOR

8.01 ASSIGNMENTS:

In general, rights, debts and choses in action are assignable in accordance with common law rules.

Maintenance of Action.

Action may be maintained in name of assignee (R. Civ. P. 17[a]; 103 Ariz. 435, 443 P.2d 690), but assignment of chose in action cannot prejudice right to setoff or defense, except as to holder in due course (Ariz. Rev. Stat. 44-144). Holder or assignee of negotiable instrument other than check or draft evidencing consumer obligations may be subject to defenses and setoffs arising from sale or lease if written notice given to seller or lessor by certified mail within 90 days. (Ariz. Rev. Stat. 44-145).

Creation of Security Interest.

Any assignment, pledge or other transaction, irrespective of form, intended to create security interest in personal property or fixtures including goods, documents, instruments, general intangibles, chattel paper or accounts is governed by Art. 9 of Commercial Code. (Ariz. Rev. Stat. 47-9101 et seq.). See category 3 Business Regulation and Commerce, topic 3.09 Commercial Code.

Assignment of Wages.

If person obligated to pay child support or spousal maintenance is in arrears, for amount equal to at least one month's payment, court shall order assignment of portion of person's earnings. Order shall direct holder of monies to withhold and pay to person or agency entitled to receive monies. (Ariz. Rev. Stat. 25-323, Ariz. Rev. Stat. 25-504).

Assignment of Mortgages.

Must be recorded to protect holder of assignment against subsequent purchasers and mortgagees without notice. (Ariz. Rev. Stat. 11-461 to Ariz. Rev. Stat. 11-462, Ariz. Rev. Stat. 33-411; 45 Ariz. 1, 40 P.2d 81).

Uniform Commercial Code adopted. See category 3 Business Regulation and Commerce, topic 3.09 Commercial Code.

8.02 ATTACHMENT:

Caveat: In response to constitutional attacks on Arizona's law of prejudgment remedies, State Legislature in 1976 adopted Ariz. Rev. Stat. 12-2401 et seq., "Provisional Remedies," consolidating and substantially amending prior law as to attachment, prejudgment garnishment and replevin. (Garnishment of wages is not provisional remedy.) See category 5 Civil Actions and Procedure, topic 5.19 Practice, subhead Provisional Remedies before proceeding. Remainder of this entry deals only with provisions specifically applicable to attachment.

When Writ May Issue.

Plaintiff, after compliance with provisional remedy requirements (Ariz. Rev. Stat. 12-2401 et seq.), may attach defendant's property, unless defendant gives security to pay judgment, in following cases: (1) In action on contract, express or implied, for payment of money when payment is not fully secured by real or personal property, or, if originally so secured, when value of such security has, without any act of plaintiff or person to whom security was given, substantially diminished below balance owed; (2) when suit is pending for damages and defendant is about to dispose of or remove his property beyond jurisdiction of court in which action is pending; (3) in action for damages or on contract, express or implied, against nonresident defendant or foreign corporation doing business in state; (4) in action on judgment of any state. (Ariz. Rev. Stat. 12-1521).

See also subhead Debt Not Due, infra.

After compliance with provisional remedy requirements, clerk of Superior Court or justice of peace must issue writ of attachment upon receiving from plaintiff affidavit showing that one or more of requirements for writ set forth in Ariz. Rev. Stat. 12-1521 have been met. (Ariz. Rev. Stat. 12-1522).

Debt Not Due.

After entry of order pursuant to provisional remedy requirements, attachment may issue on debt or demand not yet due (although final judgment may not be entered until such debt or demand becomes due) on filing of plaintiff's affidavit showing: (1) That defendant is indebted to plaintiff on contract, express or implied, for direct payment of money, stating amount and that debt is not due; (2) that such contract was made or is payable in Arizona; (3) that payment has not been secured by mortgage, pledge or lien; (4) character of debt; (5) that there are no legal set-offs or counterclaims against debt; and (6) that defendant is about to remove permanently from Arizona and has refused to secure debt, or that defendant has secreted property for purpose of defrauding creditors, or that defendant is about to remove property from state without leaving sufficient property to pay debts, or that defendant has disposed of property wholly or in part with intent to defraud creditors, or that defendant is about to dispose of property with intent to defraud creditors. (Ariz. Rev. Stat. 12-1523).

Facts set forth in foregoing affidavit may be denied by defendant, and issue so formed must be tried as are other questions of fact. (Ariz. Rev. Stat. 12-1523[D]).

If judgment is for defendant, court must include in judgment reasonable attorney's fees and enter judgment for such fees against sureties on attachment bond. (Ariz. Rev. Stat. 12-1523[E]).

Bond.

Plaintiff must give bond in not less than amount of debt sued for, conditioned that he will prosecute his writ to effect and will pay all damages and costs adjudged against him for wrongfully seeking such attachment. (Ariz. Rev. Stat. 12-1524).

Number of Writs.

One or more writs may issue at same time and to different counties. (Ariz. Rev. Stat. 12-1528).

Quashing Writ.

Attachment issued without affidavit and bond must be quashed on motion of defendant, but affidavit and bond are not void for want of form if they contain all essential matters. (Ariz. Rev. Stat. 12-1525).

Indemnity.

Officer levies at own risk but may require indemnity bond. (Ariz. Rev. Stat. 12-1529[B]).

Levy is made in same manner as writ of execution. Levy on real property is made by filing copy of writ with description of property with county recorder in whose county real property is situated and serving defendant or, failing that, posting property. Levy on personal property is made by seizure when practical. (Ariz. Rev. Stat. 12-1530).

Lien.

Attachment constitutes lien on property from date of levy. (Ariz. Rev. Stat. 12-1532).

Return.

Writs are returnable at any time within 30 days after levy. (Ariz. Rev. Stat. 12-1531).

Sale.

Perishable personal property may be sold prior to final judgment on order of court issuing writ. (Ariz. Rev. Stat. 12-1533).

Release of Property.

At any time before judgment, defendant may replevy attached property by giving bond in double amount of plaintiff's debt or, at defendant's option, for value of property, conditioned that defendant will satisfy any judgment which may be rendered in action or will pay value of property. (Ariz. Rev. Stat. 12-1536).

Claims of Third Persons.

Third-party claim to personal property is made by presenting written claim under oath to levying officer and posting bond equal to double value of property (Ariz. Rev. Stat. 12-1331), conditioned on claimant's return of property in good condition or its value plus damages and costs if he fails to establish his claim (Ariz. Rev. Stat. 12-1332). Property must then be returned to claimant (Ariz. Rev. Stat. 12-1333), and claim and bond returned to proper court and docketed there for hearing of question of ownership (Ariz. Rev. Stat. 12-1335 et seq.).

8.03 [RESERVED]

8.04 CREDITORS' SUITS:

No statutory provision.

8.05 EXECUTIONS:

Arizona Rules of Civil Procedure are based on Federal Rules of Civil Procedure. See category 5 Civil Actions and Procedure, topic 5.19 Practice.

Executions are either general or special. (Ariz. Rev. Stat. 12-1552 et seq.).

Exemptions.

See topic 8.06 Exemptions.

Time for Issuance.

Writs of execution may be issued at any time within five years after entry or renewal of judgment, and are executed by sheriff or constable. No execution shall issue after death of judgment debtor unless it is for recovery of real or personal property or enforcement of lien thereon. This limitation does not apply to judgments and orders for support of minor or for those children whose support is extended beyond age of emancipation pursuant to Ariz. Rev. Stat. 25-501(A) or Ariz. Rev. Stat. 25-320(B). (Ariz. Rev. Stat. 12-1551).

Time for Return.

Executions are returnable in not less than ten nor more than 90 days in superior court (Ariz. Rev. Stat. 12-1555) and in 60 days in justice courts (Ariz. Rev. Stat. 22-244).

Stay of Execution.

Court may stay execution pending disposition of motion for new trial or to amend judgment, for relief from judgment or order, for judgment in accordance with motion for directed verdict, for amendment of findings or for additional findings. (R. Civ. P. 62[b]). No injunction to stay execution may be granted after one year from rendition of judgment unless application was delayed by fraud or false promises of prevailing party at time or after rendition, except for equitable matter or defense arising after rendition. Injunction may be granted within two years of judgment if applicant was absent from state when judgment was rendered. (Ariz. Rev. Stat. 12-1806).

Levy.

To levy on real estate, officer must endorse levy on writ and record copy of same with county recorder. On livestock running at large that cannot be herded or penned without great inconvenience, levy is made by designating number and describing marks and brands in presence of two witnesses, serving notice on owner or agent and recording copy of writ; on outstanding corporate shares of stock, by seizing stock as provided in Ariz. Rev. Stat. 47-8112; on partnership interest, by notice to one or more partners or to clerk of partnership; on personalty, by taking possession or by giving notice to person entitled to possession if other than defendant; on personalty not removable due to bulk or other cause, by recordation of certified copy of execution and return of levy with county recorder in county where located within three days after levy. (Ariz. Rev. Stat. 12-1559).

Sale of Personalty.

Notice of sale under execution of perishable personal property must be given by posting written notices of time and place of sale in three public places, two in precinct and one at door of courthouse of county in which sale is to take place, for reasonable period of time. In case of other personal property, similar notice of place and time of sale must be posted for not less than ten days successively before sale day. (Ariz. Rev. Stat. 12-1621.) Sale must be by public auction. (Ariz. Rev. Stat. 12-1622).

Claims of Third Persons.

Third-party claim to personal property is made by presenting written claim under oath to levying officer and posting bond equal to double value of property (Ariz. Rev. Stat. 12-1331), conditioned on claimant's return of property in good condition or its value plus damages and costs if he fails to establish his claim (Ariz. Rev. Stat. 12-1332). Property must then be returned to claimant (Ariz. Rev. Stat. 12-1333) and claim and bond returned to proper court and docketed there for trial on question of ownership (Ariz. Rev. Stat. 12-1335 et seq.).

Sale of Realty.

Notice of sale must be posted for 15 days successively before sale day in three public places in county, including courthouse door, and copy thereof published in newspaper published within county, for three weeks before day of sale. Real property must be sold at courthouse door of county in which property is situated. (Ariz. Rev. Stat. 12-1621). Sale must be made at public auction to highest bidder, between 10 a.m. and 4 p.m. (Ariz. Rev. Stat. 12-1622).

Redemption.

Real property may be redeemed by judgment debtor from execution or judicial sale, including foreclosure of mortgage, or other lien where estate is greater than leasehold for two years (Ariz. Rev. Stat. 12-1626), within six months from time of sale, except when property was adjudged to be both abandoned and not used primarily for agricultural or grazing purposes, in which case it may be redeemed within 30 days after date of sale. If no such redemption is made by judgment debtor, senior creditor having lien upon premises subsequent to judgment under which sale was made may redeem within five days after expiration of applicable redemption period for judgment debtor, and each subsequent lienholder, in succession, according to priority of liens, may redeem within five days after time allowed to prior lienholder (Ariz. Rev. Stat. 12-1282); provided, however, that to entitle subsequent lienholder to redeem he must, within applicable redemption period, file with county recorder and serve on sheriff of county where sale is made written statement of his intention to redeem (Ariz. Rev. Stat. 12-1284). Deeds are issued at time of expiration of period for redemption. (Ariz. Rev. Stat. 12-1286).

Supplementary Proceedings.

After judgment has been entered and docketed, judgment creditor may conduct examination concerning judgment debtor's property by hearing or deposition. After execution has issued, the creditor, on affidavit that judgment debtor is withholding property from satisfaction of the judgment, may have the debtor brought into court, or any person indebted to or having property of the debtor in excess of $50, and upon hearing the court may order any property of the debtor, not exempt by law, to be applied to satisfaction of the judgment; and if any person denies a debt due to the debtor or claims interest in property adverse to debtor, court may order suit instituted against him. (Ariz. Rev. Stat. 12-1631 et seq.). Property of debtor in possession of third party cannot be seized without notice to debtor. (636 F. Supp. 168).

8.06 EXEMPTIONS:

Statute enumerates large number of articles of personal property, in some instances limited as to value, which may be held exempt from attachment, execution, garnishment, replevin, sale or any final process issued by court. (Ariz. Rev. Stat. 33-1121 et seq.). If married, each spouse entitled to exemptions. Such exemptions may be combined with that of other spouse in same property or taken in different exempt property. (Ariz. Rev. Stat. 33-1121.01). Note that property enumerated is not exempt from process utilized to enforce security interest in or pledge of such property, or to obtain possession of leased property. (Ariz. Rev. Stat. 33-1122). Arizona residents not entitled to federal exemptions provided by federal Bankruptcy Code. (Ariz. Rev. Stat. 33-1133).

Specified household furniture, furnishings and appliances personally used by debtor, up to aggregate fair market value of $4,000, are exempt. (Ariz. Rev. Stat. 33-1123).

Food, fuel and provisions actually provided for debtor's individual or family use for six months are exempt. (Ariz. Rev. Stat. 33-1124).

Personal items (wearing apparel, motor vehicles, etc.) used primarily for personal, family or household purposes are exempt up to specified amounts. (Ariz. Rev. Stat. 33-1125).

Money benefits or proceeds defined and exempted by statute include: Money received by or payable to surviving spouse or child upon life of deceased spouse, parent or legal guardian, not exceeding $20,000; earnings of minor child of debtor, except as against liability created for special benefit of that child; money received by or payable to person entitled to receive child support or spousal maintenance pursuant to court order; proceeds from health, accident or disability insurance policy, except for premiums payable for debt of insured secured by pledge or collection of obligation for which insured or beneficiary has been paid under plan or policy and except for payment of amounts ordered for support of person from proceeds and benefits furnished in lieu of earnings which would have been subject to such order and subject to any exemption applicable to earnings so replaced; money arising from claim of damage to exempt property; cash surrender value of certain insurance policies on specified persons; annuity contracts held by debtor for at least two years where beneficiary is debtor or debtor's spouse, child, parent, sibling or any other dependent family member; claims for damages arising from wrongful taking or detention of exempt property; $150 in single account in any one financial institution; and assets payable from or any interest in retirement plan qualified under Internal Revenue Code, except for amounts contributed within 120 days before bankruptcy filing. Arizona resident age 18 or over who does not claim homestead exemption may claim prepaid rent, including security deposits, for claimant's residence, not exceeding lesser of $1,000 or 1½ months' rent, as personal property homestead exempt from all process. (Ariz. Rev. Stat. 33-1126).

Tools, equipment, instruments and books of debtor or debtor's spouse primarily used in, and necessary to carry on, commercial activity, trade, business or profession of debtor or debtor's spouse, not in excess of $2,500 are exempt. Machinery, utensils, feed, seed, grain and animals not in excess of $2,500 belonging to debtor whose primary income is derived from farming are exempt. (Ariz. Rev. Stat. 33-1130).

Disposable earnings of debtor (wages, salary or compensation minus withholding) are not subject to process beyond lesser of 25% of disposable earnings for each week or amount by which disposable earnings for that week exceed 30 times federal minimum hourly wage. Where court has ordered support of any person by debtor, only 50% of debtor’s disposable earnings for any pay period are exempt. Such exemptions do not apply in case of order of bankruptcy court under c. 13 or debt due for any state or federal tax. (Ariz. Rev. Stat. 33-1131).

Waiver of exemption rights is void and unenforceable except as provided in Ariz. Rev. Stat. 33-1122 (process utilized to enforce security interest or to obtain possession of leased property) and when done with notice. (Ariz. Rev. Stat. 33-1132).

Estates at will or by sufferance are chattel interests not liable as such to sale on execution. (Ariz. Rev. Stat. 33-202).

Homestead exemptions are discussed in topic Homesteads.

8.07 FORECLOSURE:

See category 20 Mortgages, topic 20.03 Mortgages of Real Property.

8.08 FRAUDULENT SALES AND CONVEYANCES:

Uniform Fraudulent Transfer Act adopted with minor variations. (Ariz. Rev. Stat. 44-1001 et seq.).

Goods or Chattels.

Sale or assignment of goods or chattels in transferor’s possession not accompanied by immediate change of possession is prima facie evidence of fraud. (Ariz. Rev. Stat. 44-1061).

Residential Mortgage Fraud.

Special category of fraud created for fraud committed in relation to issuance of residential mortgages. (Ariz. Rev. Stat. 13-2320).

Securities.

See category 3 Business Regulation and Commerce, topic 3.24 Securities.

See also category 3 Business Regulation and Commerce, topic 3.12 Consumer Protection.

8.09 GARNISHMENT:

Caveat: See category 5 Civil Actions and Procedure, topic 5.19 Practice, subhead Provisional Remedies, regarding prejudgment garnishment. (Garnishment of wages is not provisional remedy.)

In response to constitutional attack on Arizona’s post-judgment garnishment proceedings (606 F. Supp. 1453), state legislature in 1986 substantially amended prior law as to garnishment (Ariz. Rev. Stat. 12-1570 et seq.). Garnishment of monies or property governed by Ariz. Rev. Stat. 12-1570 et seq. Garnishment of earnings governed by Ariz. Rev. Stat. 12-1598 et seq.

Property Which May Be Reached.

(1) Indebtedness owed to judgment debtor by garnishee for monies which are earnings. (Earnings become monies other than earnings on their disbursement by employer to or for account of employee, except disbursements into pension or retirement fund.) (Ariz. Rev. Stat. 12-1598.01); (2) indebtedness owed to judgment debtor by garnishee for monies which are not

earnings; (3) monies held by garnishee on behalf of judgment debtor; (4) judgment debtor's personal property that is in garnishee's possession; and (5) judgment debtor's shares and securities of garnishee corporation (Ariz. Rev. Stat. 12-1570.01).

Jurisdiction.

Writs of garnishment issued by justice court or superior court. (Ariz. Rev. Stat. 12-1571, Ariz. Rev. Stat. 12-1598.02).

Proceedings to Obtain.

Judgment creditor must file application (and bond in case of monies that are not earnings if no judgment has been entered) to obtain writ of garnishment and summons. (Ariz. Rev. Stat. 12-1572 et seq., Ariz. Rev. Stat. 12-1598.03 et seq.).

Answer of Garnishee.

Monies or Property.

Answer of garnishee to writ of garnishment must be under oath, signed, and state: (1) Whether garnishee was indebted to or otherwise in possession of monies of judgment debtor when writ served and amount of any such indebtedness or monies; (2) amount of indebtedness or monies withheld and not withheld by garnishee pursuant to writ, and reason for not withholding; (3) whether garnishee held judgment debtor's personal property when writ was served and description of any such property; (4) list of personal property withheld by garnishee pursuant to writ; (5) what other person or entity garnishee knows to be indebted to judgment debtor or in possession of judgment debtor's personal property; (6) if garnishee is corporation in which judgment debtor owns stock or other interest, description of such stock or interest; (7) name, address and telephone number of garnishee; and (8) date and manner of delivery of copy of writ, notice and answer to judgment debtor and copy of answer to judgment creditor. (Ariz. Rev. Stat. 12-1579).

Earnings.

Answer of garnishee to writ of garnishment must be under oath, signed, and state: (1) Whether judgment debtor was employed by garnishee when writ was served; (2) whether garnishee anticipates owing earnings within 60 days after service; (3) if garnishee is unable to determine judgment debtor's identity after good faith effort, statement of effort made and reasons for such inability; (4) dates of next two paydays after service; (5) judgment debtor's pay period (weekly, etc.); (6) amount of judgment due and owing as stated in writ; (7) whether judgment debtor is subject to existing wage assignment, garnishment or levy, and if so, name, address, and telephone number of that judgment creditor; (8) name, address and telephone number of garnishee; and (9) date and manner of delivery of copy of notice and request for hearing form and answer to judgment debtor and copy of answer to judgment creditor. (Ariz. Rev. Stat. 12-1598.08).

Practice.

Monies or Property.

Judgment creditor must serve on garnishee two copies of summons and writ of garnishment, one copy of judgment, four copies of answer form, two copies of notice to judgment debtor and request for hearing form and one copy of instructions. Within three days, excluding weekends and holidays, garnishee must deliver to judgment debtor copy of summons, writ of garnishment, judgment, notice to judgment debtor and request for hearing form. (Ariz. Rev. Stat. 12-1574).

Special procedure must be followed where writ is to be served upon branch of financial institution (banking corporation or association, savings bank, savings and loan association, credit union, trust company or title insurance company). (Ariz. Rev. Stat. 12-1577).

Garnishee must answer writ within ten days. (Ariz. Rev. Stat. 12-1578.01). Judgment creditor and debtor have ten days after receipt of answer to file objection to writ or answer. Hearing on objection must be held within five days of request, excluding weekends and holidays. (Ariz. Rev. Stat. 12-1580).

Garnishee is discharged if his answer shows that he did not owe nonexempt monies to judgment debtor or possess any of judgment debtor's nonexempt personal property when writ was served on him and no written objection to his answer has been timely filed. (Ariz. Rev. Stat. 12-1581).

Earnings.

Judgment creditor must serve on garnishee two copies of summons and writ of garnishment, one copy of judgment, four copies of answer form, two copies of notice to judgment debtor and request for hearing form and instructions, and four copies of nonexempt earnings statement. (Ariz. Rev. Stat. 12-1598.04).

Writ of garnishment is lien on earnings until: (1) Order of continuing lien is entered; (2) no order is entered for 45 days after answer filed; or (3) writ is quashed, released or becomes ineffective. (Ariz. Rev. Stat. 12-1598.05).

Garnishee must answer writ within ten days. (Ariz. Rev. Stat. 12-1598.06). Objection to writ, answer or nonexempt earnings statement must be filed within ten days after receipt of answer or nonexempt earnings statement. Hearing on objection must be held within ten days of request. (Ariz. Rev. Stat. 12-1598.07).

Garnishee is discharged if his answer shows that he did not employ judgment debtor when writ was served, would not owe earnings to judgment debtor within 60 days after service of writ, or was unable after good faith effort to determine identity of judgment debtor. (Ariz. Rev. Stat. 12-1598.09).

Judgment.

Monies or Property.

If no objection to writ or answer is timely filed, on application by judgment creditor, court must enter judgment against garnishee for nonexempt monies of judgment debtor owed or held at time of service of writ or court must enter order against garnishee to hold nonexempt personal property of judgment debtor held at time of service of writ pending writ of special execution. If objection is filed, court must hold hearing before entering judgment or order. (Ariz. Rev. Stat. 12-1584 to Ariz. Rev. Stat. 12-1585). Order expires if no writ of special execution is served on garnishee within 90 days after entry of order. (Ariz. Rev. Stat. 12-1585).

If no judgment or order is entered against garnishee within 90 days after filing of answer, garnishee is discharged on writ unless objection filed. Discharge does not apply to monies or property held for trustee in bankruptcy or under provisional remedies. (Ariz. Rev. Stat. 12-1587).

Earnings.

If no objection to writ or answer is timely filed, on application by judgment creditor, court must order that nonexempt earnings withheld by garnishee after service of writ be transferred to judgment creditor and court must order continuing lien against nonexempt earnings. If objection is filed, court must hold hearing before entering orders. (Ariz. Rev. Stat. 12-1598.10). If court determines that: (1) Writ is valid against judgment debtor, and (2) debt was not, at time of service of writ, subject to effective agreement between judgment debtor and qualified consumer credit counseling service, and (3) garnishee employed judgment debtor when writ was served or garnishee owned or would owe earnings to judgment debtor within 60 days after service of writ, then court shall order transfer of nonexempt earnings withheld by garnishee to judgment creditor and continuing lien against nonexempt earnings of judgment debtor; otherwise, court shall order garnishee discharged from writ. (Ariz. Rev. Stat. 12-1598.10[B] to [C]). While order of continuing lien is in effect, garnishee must withhold judgment debtor's nonexempt earnings (Ariz. Rev. Stat. 12-1598.11) and judgment creditor must follow reporting requirements (Ariz. Rev. Stat. 12-1598.12). Court, sitting without jury, may reduce amount of nonexempt earnings in order to avoid economic hardship by judgment debtor. (Ariz. Rev. Stat. 12-1584, Ariz. Rev. Stat. 12-1598.10[F]).

Exemptions.

See topic 8.06 Exemptions.

Forms.

Justice court, superior court, or city or town magistrate provide forms at no charge. (Ariz. Rev. Stat. 12-1596, Ariz. Rev. Stat. 12-1598.16).

Sanctions.

If party willfully or with gross negligence fails to comply with certain duties imposed by garnishment law, court must award injured party his actual losses, attorney fees, costs and an additional amount. (Ariz. Rev. Stat. 12-1593, Ariz. Rev. Stat. 12-1598.13).

See also topic 8.10 Homesteads.

8.10 HOMESTEADS:

Any person age 18 or over who resides in Arizona may hold as homestead exempt from attachment, execution and forced sale any one of following not exceeding $150,000 in value: (1) interest in real property in one compact body upon which exists dwelling in which claimant resides; (2) interest in one condominium or cooperative in which claimant resides; (3) mobile home in which claimant resides; and (4) mobile home in which claimant resides plus land upon which mobile home is located at time of filing. Only one homestead may be claimed by married couple or single person. (Ariz. Rev. Stat. 33-1101).

Debts or Liabilities Against Which Exemption Not Available.

Consensual lien, including mortgage, deed of trust or contract of conveyance; lien for labor or materials claimed pursuant to Ariz. Rev. Stat. 33-981. (Ariz. Rev. Stat. 33-1103[A]).

Claim and Designation of Homestead.

Person entitled homestead exemption holds exemption by operation of law and no written claim or recording required. If person has more than one property interest to which homestead exemption applies, creditor may require person to designate which property is protected by homestead exemption. (Ariz. Rev. Stat. 33-1102). Homestead is exempt from process and from sale under judgment or lien. (Ariz. Rev. Stat. 33-1103[A]).

Loss of Exemption.

Abandonment of homestead occurs only by declaration or waiver, by grant thereof, or by permanent removal of claimant from residence or Arizona. Claimant may remove from homestead for two years without abandonment or waiver. Declaration of abandonment, waiver or grant shall be executed by claimant and acknowledged. Such declaration is effective only from time of recording in county where homestead is located. (Ariz. Rev. Stat. 33-1104).

Proceeds of Sale.

Judgment creditor, other than mortgagee or beneficiary under trust deed, may elect judicial sale of property in which debtor claims homestead under Ariz. Rev. Stat. 33-1101(A), if its interest in property exceeds sum of judgment debtor's homestead plus amount of any consensual liens on property sharing priority to judgment. Officer in charge of sale may not accept bid which does not exceed amount of homestead exemption plus consensual liens on property plus costs of sale. Proceeds are distributed as follows: (1) Debtor in amount of homestead; (2) priority holders of consensual liens; (3) costs of sale; and (4) judgment creditor in satisfaction of lien. (Ariz. Rev. Stat. 33-1105). If homestead recorded before date of voluntary or involuntary sale of property, homestead exemption not exceeding $150,000 automatically attaches to claimant's interest in identifiable cash proceeds from sale. Such exemption continues for 18 months after date of sale or until claimant files new claim of homestead, whichever period is shorter. (Ariz. Rev. Stat. 33-1101[C]).

Uniform Probate Code (but not 1977 or later amendments) adopted and was substantially amended in 1994. (Ariz. Rev. Stat. 14-1101 et seq.).

8.11 JUDGMENT NOTES:

See category 5 Civil Actions and Procedure, topic 5.15 Judgments, subhead Judgment by Confession.

8.12 LEVY:

See topics 8.02 Attachment, 8.05 Executions.

8.13 LIENS:

Uniform Commercial Code adopted (with minor changes). (Ariz. Rev. Stat. 47-1101 et seq.). See category 3 Business Regulation and Commerce, topic 3.09 Commercial Code.

Personal Property Liens.

Carpenter, mechanic, artisan or other workman has lien for labor or materials on articles, implements, utensils, or vehicles (except motor vehicles) and may retain same until fully paid. (Ariz. Rev. Stat. 33-1021). Drycleaner or launderer has lien for labor on garment, wearing apparel or other article and may retain same until fully paid or may foreclose on same after 90 days if certain notice conditions are met. (Ariz. Rev. Stat. 33-1021.01). Persons who fabricate products from equipment or material furnished by customer have lien on equipment and material in their possession until fully paid. (Ariz. Rev. Stat. 33-1022.01). Proprietors of garages and repair and service stations have liens on motor vehicles and aircraft and parts and accessories thereon for agreed amount of charges for labor, materials, supplies and storage, but lien may not impair other liens or conditional sale contracts of record. (Ariz. Rev. Stat. 33-1022). Except as provided in Ariz. Rev. Stat. 33-1021.01, property held for 20 days pursuant to above liens may be sold at auction after notice specified in Ariz. Rev. Stat. 33-1023. Hotel, inn, boarding house, lodging house, apartment house and auto camp keepers have lien on guests' baggage and other property for accommodation and things furnished at request of guests, and property so liened may be advertised for sale after charges have remained unpaid for four months and sold after four weeks from time of first advertisement. (Ariz. Rev. Stat. 33-951 to Ariz. Rev. Stat. 33-952). Self-service storage facility has lien, for rent due and unpaid, on all stored personal property. (Ariz. Rev. Stat. 33-1703).

Farm Services Liens.

Person who labors, or who furnishes labor, machinery or equipment related to planting crops has lien on crops. (Ariz. Rev. Stat. 33-901 et seq.). Person who furnishes pasture or feed on his premises has lien on stock. (Ariz. Rev. Stat. 3-1295).

Health Care Lien.

Health care provider entitled to lien for customary charges for care and treatment or transportation of injured person. (Ariz. Rev. Stat. 33-931 et seq.). Release of claims on which lien is based is invalid unless lienholder joins therein. (Ariz. Rev. Stat. 33-934). Lien must be recorded in county of injury within 30 days after patient has received services relating to injury, except that hospital may record within 30 days of patient's discharge. (Ariz. Rev. Stat. 33-932). Lienholder may enforce lien against party liable for damages where there has been judgment or settlement with such person. (Ariz. Rev. Stat. 33-934).

Mechanics' and Materialmen's Liens.

Who May Acquire.

Person who labors or furnishes professional services, materials, machinery, fixtures or tools to be used in construction, alteration, or repair of any building or improvement has lien on such building or improvement whether same was done or articles furnished at instance of owner or his agent. Person required to be licensed as contractor who does not hold valid license or person furnishing professional services without valid certificate of registration does not have lien rights. Person furnishing professional services can enforce lien only if he has agreement with owner of property or with architect, engineer or contractor who has agreement with owner. Contractor, subcontractor, architect, builder, or other person having charge or control of work, either fully or in part, is agent of owner, and owner is liable for reasonable value of labor, materials or professional services furnished at instance of such agent. (Ariz. Rev. Stat. 33-981). Owner may avoid lien provisions pertaining to agents by requiring person with whom he contracts to furnish payment bond equal to full amount of contract between them. Bond and contract containing legal description of land on which work is to be done must be recorded in office of county recorder. (Ariz. Rev. Stat. 33-1003[A]). Liens also arise when labor or materials are furnished to factories or mills (Ariz. Rev. Stat. 33-984), to domestic vessels (Ariz. Rev. Stat. 33-985), to cut or load wood, logs or ties (Ariz. Rev. Stat. 33-986), to railroads (Ariz. Rev. Stat. 33-988), in construction or repair of waterways, highways or excavations or improvement of private lands (Ariz. Rev. Stat. 33-987) or for improvements to city lots (Ariz. Rev. Stat. 33-983). Miners and others who furnish labor or materials for use in mines or on mining claims under contract with owners, lessees, purchasers or optionees have priority lien on same for unpaid amounts. (Ariz. Rev. Stat. 33-989). If mine is operated by lessee, owner may avoid lien by posting and recording "no lien" notice. (Ariz. Rev. Stat. 33-990).

Preliminary 20-Day Notice.

Except for person laboring for wages, every person wishing to preserve right to claim lien must file notice with owner, original contractor and construction lender within 20 days of first furnishing labor, materials or professional services. (Ariz. Rev. Stat. 33-992.01). *Caveat:* Licensed subcontractors whose contracts require that they furnish labor or professional services on site and incidental materials and equipment need not give preliminary 20-day notice. (141 Ariz. 381, 687 P.2d 389). Notice must describe what was furnished, contain names of person contracting for and person furnishing labor, materials or professional services, description of jobsite sufficient for identification, and advise owner of procedure to protect against filing of lien. (Ariz. Rev. Stat. 33-992.01[C]). Within ten days after receipt of written request from person intending to file notice, owner must provide such person with description of job site, name and address of owner, name and address of original contractor, and name and address of construction lender. (Ariz. Rev. Stat.

33-992.01[I]). If information in notice is inaccurate, claimant must serve amended notice within 30 days. (Ariz. Rev. Stat. 33-992.01[J]). Additional notices related to same building, structure, or improvement not required unless different contract is involved or actual price exceeds estimated price by 20% or more. (Ariz. Rev. Stat. 33-992.01[G]). Notice may be served by first class, registered or certified mail. (Ariz. Rev. Stat. 33-992.01[F]). Proof of service required. (Ariz. Rev. Stat. 33-992.02).

Extent of Lien.

Lien extends to lot or lots on which building is situated; if situated outside of town, city, subdivision or townsite, to not more than ten acres of land; and if on mining claims, to entire group. (Ariz. Rev. Stat. 33-991). Person who furnishes professional services or material or labors on lot in incorporated city or town or any parcel of land not exceeding 160 acres in aggregate, or fills in or otherwise improves lot or such parcel of land, or street, alley or proposed street or alley, within, in front of or adjoining lot or parcel of land, at instance of owner of lot or parcel of land, has lien on lot or parcel of contiguous land not exceeding 160 acres in aggregate and buildings, structures and improvements on lot for professional services or materials furnished and labor performed. (Ariz. Rev. Stat. 33-983).

Owner-Occupant Dwelling.

No lien is allowed against dwelling of owner-occupant except by person having executed contract directly with owner-occupant. (Ariz. Rev. Stat. 33-1002).

Preference.

Liens generally preferred over subsequent encumbrances and are on equal footing with each other. Lien for professional services does not attach for priority purposes until labor has begun or materials have been furnished. (Ariz. Rev. Stat. 33-992, Ariz. Rev. Stat. 33-1000 to Ariz. Rev. Stat. 33-1001).

Notice and Claim of Lien.

Notice must contain: Legal description of land and improvements; names of owners or reputed owners of property; name of person by whom lienor was employed or to whom he furnished materials; terms of contract, if oral, and copy of contract, if in writing; lienor’s demand after deducting credits and offsets; date of completion of work; and date of service of preliminary 20-day notice and copy and proof of service thereof. Notice must be under oath. (Ariz. Rev. Stat. 33-993[A]).

Perfection of Lien.

Person securing lien, within 20 days after completion, alteration or repair of building, structure or improvement, or if notice of completion has been recorded, within 60 days must make duplicate copies of notice and claim of lien, record one copy with county recorder and, within reasonable time thereafter, serve remaining copy on owner, if found in county. (Ariz. Rev. Stat. 33-993[A]).

Limitation of Lien.

Suit to enforce lien must be brought within six months from time lien is recorded in recorder’s office. In action to enforce lien, court may award successful party attorney fees. (Ariz. Rev. Stat. 33-998). Must file notice of pendency of action pursuant to Ariz. Rev. Stat. 12-1191 in county where property is located.

Release of Lien.

Within 20 days of satisfaction or of request by owner-occupant where lien prohibited, lienholder must issue release to person against whom lien was claimed. Failure to grant release subjects lienholder to statutory penalty. (Ariz. Rev. Stat. 33-1006).

Tax Liens.

Uniform Federal Lien Registration Act adopted. (Ariz. Rev. Stat. 33-1031 et seq.).

Restitution Lien.

State has lien for amount of restitution, fine and other costs owed by convicted criminal. (Ariz. Rev. Stat. 13-804[J]). Lien covers real, personal, and other property. Lien must be filed to be perfected. (Ariz. Rev. Stat. 13-806).

Condominiums.

Condominium association has lien on unit for any assessments or monetary penalties levied against that unit. (Ariz. Rev. Stat. 33-1256). Lien extinguished unless proceedings to enforce lien are instituted within three years from date assessment becomes due. (Ariz. Rev. Stat. 33-1256[F]). Judgment creditor of association holds lien against all units at time judgment entered, not against common elements. (Ariz. Rev. Stat. 33-1257[A]).

Commercial Real Estate Broker Liens.

If written agreement exists that provides compensation for lease or rental transactions, commercial and real estate broker has lien for unpaid compensation on real property subject to agreement. (Ariz. Rev. Stat. 33-1071). Mortgages, consensual liens, mechanics' and materialmen's liens, and deeds of trusts have priority over these liens. (Ariz. Rev. Stat. 33-1071[B], [C]). Lien must be recorded in county where property is located within 90 days after tenant takes possession of premises. (Ariz. Rev. Stat. 33-1072).

Other Liens.

Attachment liens, see topic 8.02 Attachment. Collateral security, see topic 8.15 Pledges. Judgment liens, see category 5 Civil Actions and Procedure, topic 5.15 Judgments. Landlord's liens, see category 21 Property, topic 21.10 Landlord and Tenant. Lien on homestead, see topic 8.10 Homesteads. Real estate mortgage liens and liens on mobile homes, see category 20 Mortgages, topic 20.03 Mortgages of Real Property.

8.14 MECHANICS' LIENS:

See topic 8.13 Liens.

8.15 PLEDGES:

See category 3 Business Regulation and Commerce, topic 3.09 Commercial Code.

Remedies of Pledgee.

Uniform Commercial Code remedies adopted. (Ariz. Rev. Stat. 47-9207, Ariz. Rev. Stat. 47-9501 to Ariz. Rev. Stat. 47-9505).

Trust Receipts.

Uniform Commercial Code adopted. (Ariz. Rev. Stat. 47-1101 et seq.). See category 3 Business Regulation and Commerce, topic 3.09 Commercial Code.

Pawnbrokers.

Regulated. See Ariz. Rev. Stat. 44-1621 et seq.

8.16 RECEIVERS:

Superior court judges may appoint receivers even if action includes no other claim for relief. (Ariz. Rev. Stat. 12-1241). Trustee or beneficiary involved in sale of trust may file action with superior court for appointment of receiver. (Ariz. Rev. Stat. 33-807[C]). Powers of receivers are set forth in R. Civ. P. 66(c).

Application for Receiver.

Application must be verified. (R. Civ. P. 66[a]).

Notice.

Adverse party must be notified except where affidavit shows that reasonable efforts to notify have been made and have failed or where there is substantial cause for appointing receiver before service can be made. (R. Civ. P. 66[a]).

Eligibility.

Party to suit or person interested in suit cannot be appointed receiver in that action, except upon adequate notice when property has been abandoned or duties of receiver will consist chiefly of preserving property. Before commencing duties, receiver must file bond and take oath to discharge duties and obey court orders. (R. Civ. P. 66[b]).

Bond.

Applicant must file bond set by court where no actual notice to adverse party. (R. Civ. P. 66[a]).

Hearing.

May be ordered on application in less than ten days. (R. Civ. P. 66[a]).

Removal.

Receiver may be discharged on motion or by court. (R. Civ. P. 66[c]).

8.17 REDEMPTION:

See topic 8.05 Executions; category 20 Mortgages, topics 20.01 Chattel Mortgages, 20.03 Mortgages of Real Property.

8.18 SUPPLEMENTARY PROCEEDINGS:

See topic 8.05 Executions.

8.19 TRUSTEE PROCESS:

See topic 8.09 Garnishment.

8.20 USURY:

See category 3 Business Regulation and Commerce, topic 3.19 Interest.

9 DISPUTE RESOLUTION

9.01 ALTERNATIVE DISPUTE RESOLUTION:

Mandatory Dispute Resolution.

All civil actions where amount in controversy does not exceed $65,000 or lesser amount set by superior court rules are subject to mandatory arbitration. (Ariz. Rev. Stat. 12-133). Compulsory arbitration clauses in contracts are valid and binding. (Ariz. Rev. Stat. 12-1501). See topic 9.02 Arbitration and Award.

Upon motion of either party, or upon its own initiative after consultation with parties, court may direct parties in any action to submit dispute to alternative dispute resolution program. (R. Civ. P. 16[g]).

Voluntary Dispute Resolution.

Arbitration.

Any case, regardless of whether or not suit has been filed, may be referred to arbitration by agreement of reference signed by parties or counsel for both sides. (Ariz. Rev. Stat. 12-133[d]). Parties to contract may provide that dispute arising under contract will be submitted to arbitration. (Ariz. Rev. Stat. 12-1501 et seq.). See topic 9.02 Arbitration and Award.

Other Alternative Dispute Resolution Programs.

Court may use mediation and other alternative dispute resolution procedures to help resolve cases filed in court. (Ariz. Rev. Stat. 12-134). Mediation process is confidential. With narrow exceptions, communications made, materials created for or used and acts occurring during mediation are not subject to disclosure. (Ariz. Rev. Stat. 12-2238).

9.02 ARBITRATION AND AWARD:

Compulsory Arbitration.

Superior court must require arbitration of claims where amount in controversy does not exceed $65,000 or lesser amount set by superior court, except court may waive arbitration requirement upon showing of good cause if parties file written stipulation waiving it. (Ariz. Rev. Stat. 12-133). Arizona Uniform Rules of Procedure for Arbitration apply. Any party to arbitration proceeding may appeal arbitration award by filing demand for trial de novo with court. (Ariz. Rev. Stat. 12-133).

Uniform Arbitration Act adopted (Ariz. Rev. Stat. 12-1501 to Ariz. Rev. Stat. 12-2101.01) but does not apply to arbitration agreements between employers and employees or their representatives (Ariz. Rev. Stat. 12-1517). Under Uniform Arbitration Act, written agreement to submit controversy to arbitration is binding. Unlike court-ordered compulsory arbitration under Ariz. Rev. Stat. 12-133 (see subhead Compulsory Arbitration, supra), arbitration awards pursuant to arbitration clause may be set aside only in narrowly defined circumstances such as fraud, corruption or other prejudicial misconduct. (Ariz. Rev. Stat. 12-1512).

Any state agency, board, commission or political subdivision of state is permitted to use services of American Arbitration Association or other similar body. State agencies, boards and commissions must include agreements to arbitrate in public works contracts where amount in controversy is less than $100,000, and in contracts subject to compulsory arbitration. (Ariz. Rev. Stat. 12-1518).

See also category 6 Courts and Legislature, topic 6.01 Courts.

10 DOCUMENTS AND RECORDS

10.01 ACKNOWLEDGMENTS:

What Persons May Take.

Governed by Ariz. Rev. Stat. 33-501 et seq., Ariz. Rev. Stat. 33-511 et seq.:

Within State.

Clerk or deputy clerk of court having seal; notary public; county recorder; justice of peace; judge of court of record; recorder of deeds. (Ariz. Rev. Stat. 33-511).

Outside State But Within United States.

Judge, clerk or deputy clerk of court of record; notary public; any other person authorized by laws of other jurisdiction to take acknowledgments. (Ariz. Rev. Stat. 33-501).

Outside United States.

U.S. foreign service officer; consular agent; other person authorized by Department of State; foreign notary public with proof of authority. (Ariz. Rev. Stat. 33-501 to Ariz. Rev. Stat. 33-502).

Acknowledgment of Military Personnel or Merchant Seamen.

Commissioned officers or other persons authorized by Armed Forces regulation. (Ariz. Rev. Stat. 33-501).

Corporations.

Authorized officer or agent. (Ariz. Rev. Stat. 33-505).

Fees.

Authorized fees for taking acknowledgments, set forth. (Ariz. Rev. Stat. 41-316).

General Requirements of Certificate.

Certificate accepted if in form recognized in Arizona or in place where acknowledgment taken or if words “acknowledged before me” or their substantial equivalent appear. (Ariz. Rev. Stat. 33-504).

Electronic Notarization.

Provided for in Ariz. Rev. Stat. 41-351 et seq.

Uniform Acknowledgment Act adopted. (Ariz. Rev. Stat. 33-501 et seq.).

Attorneys-in-Fact and Married Women.

No special requirements in taking acknowledgments of married women, attorneys-in-fact, or corporations.

Authentication.

Required as provided in § 2 of Uniform Recognition of Acknowledgments Act. Clerk of superior court may authenticate certificate of acknowledgment for use outside Arizona. Fee, $26. (Ariz. Rev. Stat. 12-284[A], Ariz. Rev. Stat. 33-501).

Foreign Acknowledgment.

Instrument affecting real property in Arizona must be executed in Arizona, but may be acknowledged and certified in any other state according to law of that state. (Ariz. Rev. Stat. 33-

411). Provisions of Uniform Act also apply.

Effect of Acknowledgment.

No instrument is deemed lawfully recorded unless acknowledged according to law. (Ariz. Rev. Stat. 33-411). Any written instrument, except promissory notes, bills of exchange and wills, may be acknowledged, and proper certificate of acknowledgment entitles instrument to be received in evidence without proof of execution. (Ariz. Rev. Stat. 12-2261).

Letters from U.S.

Letters patent from U.S. or grant from government may be recorded without further acknowledgment. (Ariz. Rev. Stat. 33-411[E]).

Proof by Witnesses.

No statutory provision.

Form.

Certificate must be substantially as follows (Ariz. Rev. Stat. 33-506):

Form

State of . . . . . ., County of . . . . . ., ss.: The foregoing instrument was acknowledged before me this . . . . . . day of . . . . . ., 20. . . ., by (if by natural person, here insert name or names; if by person acting in representative or official capacity, or as attorney in fact, then insert name of person and capacity; if by officer of corporation, then insert name of officer and his title, and name of corporation, and state where incorporated; if by partner or agent of partnership, then insert name of acknowledging partner or agent and name of partnership).

(Notarial Seal)

. . . .

Notary Public

My commission expires

. . . .

See Uniform Recognition of Acknowledgments Act (Ariz. Rev. Stat. 33-501 et seq.) for other forms.

Alternative to Acknowledgment or Proof.

No statutory provision.

10.02 AFFIDAVITS:

See topic Acknowledgments (same rules). As to fees, see topic 10.03 Notaries Public.

Form.

No particular form is required.

Alternative to Affidavit.

No statutory provision.

10.03 NOTARIES PUBLIC:

Bond.

Notary must give bond in sum of $5,000. (Ariz. Rev. Stat. 41-312[B]). Fee for recording bond with secretary of state is no more than $25. (Ariz. Rev. Stat. 41-126).

Residence.

Notary must reside in county from which appointed. (Ariz. Rev. Stat. 41-312[A]).

Seal.

Notary must have seal with notary’s name, name of county in which commissioned, words “notary public,” great seal of Arizona, and expiration date of notarial commission. Official acts must be under seal. (Ariz. Rev. Stat. 41-313). Physical dimensions of seal are described in Ariz. Rev. Stat. 41-321.

Notary Qualifications.

Notary must be at least 18 years old, legal citizen or permanent resident of U.S., resident of Arizona, never have been convicted of felony, and keep reference manual describing duties, authority, and ethical responsibilities of notaries public that is approved by Secretary of State, in addition to responding to requests for information and complying with investigations initiated by same or Attorney General. (Ariz. Rev. Stat. 41-312[E]).

Powers and Duties.

Notary has authority to administer oaths, perform jurat, and affirmations, and to take acknowledgments of instruments in writing and give certificate thereof. (Ariz. Rev. Stat. 41-312 to Ariz. Rev. Stat. 41-313).

Territorial Extent of Powers.

Acknowledgments may be taken and oaths administered by notary in any county of state. (Ariz. Rev. Stat. 41-312[A]).

Records.

Notary must keep, maintain and protect as public record journal of all official acts performed. (Ariz. Rev. Stat. 41-313). Generally, notary must keep only one journal at a time. (Ariz. Rev. Stat. 41-319). Upon resignation, revocation or death, journal must be delivered by certified mail to county recorder in notary’s county of residence. (Ariz. Rev. Stat. 41-317). Notary must keep all records and journals for at least five years after act is performed. (Ariz. Rev. Stat. 41-317).

Official Character of Notary.

Certified by superior court clerk. Fee $18. (Ariz. Rev. Stat. 12-284).

Fees.

Notaries may receive no more than $2 per signature for acknowledgments, for jurat, and for oaths and affirmations without signature. For certified copies, fee may be no more than $2 per page certified. (Ariz. Rev. Stat. 41-316).

10.04 RECORDS:

County records are kept by county recorder. (Ariz. Rev. Stat. 11-461). *For list of* *counties and county seats, see first page for this state in Volume containing Practice Profiles Section.* State records are kept by Department of Library, Archives and Public Records, State Capitol Building, Phoenix, Arizona 85030. (Ariz. Rev. Stat. 41-1331 et seq.).

Any person may request to examine or be furnished copies of public records. (Ariz. Rev. Stat. 39-121.01). Some exceptions apply. (Ariz. Rev. Stat. 11-483). When copies are sought for commercial purpose, certified statement must describe such purpose and fee will be charged accordingly. Penalties prescribed for commercial use of copies obtained without indication thereof in statement. Commercial purpose defined as any use (including resale or solicitation) from which purchaser can reasonably anticipate monetary gain. (Ariz. Rev. Stat. 39-121.03).

Uniform Commercial Code adopted. (Ariz. Rev. Stat. 47-1101 et seq.).

Filing and Recording Under Commercial Code.

See categories 3 Business Regulation and Commerce, topic Commercial Code; Mortgages, topic Chattel Mortgages and end of this Digest for addresses and fees for filing and recording.

Necessity for Recording.

Instruments affecting real property, marriage settlements, deeds of trust and mortgages of either real or personal property are void as against creditors and subsequent bona fide purchasers unless recorded. (Ariz. Rev. Stat. 33-412).

See also category 21 Property, topic 21.06 Deeds, subhead Recording.

Fees for Recording.

Papers required or authorized by law to be recorded with county recorder are $5 for first five pages, plus $1 for each additional page, total not to exceed $250. Fee for recording termination statement under Ariz. Rev. Stat. 47-9513, release of collateral under Ariz. Rev. Stat. 47-9512 or instrument of satisfaction under Ariz. Rev. Stat. 47-10101, $3. For issuing certificate under Ariz. Rev. Stat. 47-9523, $10, plus $1 for each financing statement or statement of assignment reported in certificate. Certified copies are $3, plus $1 per page. If mailing is required, each of these fees is increased by $1. For additional details, see statute. (Ariz. Rev. Stat. 11-475). Fee for recording oversized maps and plats, $20. (Ariz. Rev. Stat. 11-481).

Additional fee of $2 must be paid prior to recording any deed or contract relating to sale or transfer of real property. (Ariz. Rev. Stat. 11-1132). Each deed must have appended to it affidavit declaring value of and other information concerning real property transferred and personal property involved in sale. (Ariz. Rev. Stat. 11-1133).

County may charge extra recording fee of up to $4 per document. (Ariz. Rev. Stat. 11-475.01).

Fees for Filing.

Copy of document in file, 10¢ per page; filing and recording official bond and transmitting commission for notary public, $25; filing application for registration or renewal of trademark or recording assignment of trademark, $15; filing application for registration or renewal of tradename or recording assignment of tradename, $10; issuing certificate of registration of tradename or trademark, $3; filing financing statement or amendment thereto, $3; filing assignment, $3; filing continuation statement, $3; filing statement of release, $2; filing termination statement, $2; issuing certificate as provided in Ariz. Rev. Stat. 44-3146, $6; making copy of filed financing statement, 50¢ per page; certifying copy of financing statement or amendment thereto, assignment, continuation statement, statement of release, termination statement, or certificate as provided in

Ariz. Rev. Stat. 44-3146, $3; filing, recording or certifying any other document not specified, $3. (Ariz. Rev. Stat. 41-126).

Recordable Instruments.

Any instrument may be recorded with county recorder if instrument: (1) Has caption briefly stating its nature, e.g., warranty deed; (2) is original or copy sufficiently legible for recorder to make certified copies; and (3) contains original signatures. (Ariz. Rev. Stat. 11-480). Each instrument dated and executed on or after Jan. 1, 1991 must (1) be no larger than 8½ inches by 14 inches, (2) have print size no smaller than ten point type, and (3) comply with margin requirements. (Ariz. Rev. Stat. 11-480). County recorder may accept digitized image of recordable instrument if it is submitted by certain entities. (Ariz. Rev. Stat. 11-461).

Effect of Recordation.

Any instrument duly recorded in proper county is notice to all persons. (Ariz. Rev. Stat. 33-415 to Ariz. Rev. Stat. 33-416).

Torrens Act.

Not adopted.

Transfer of Decedent's Title.

Sufficiently shown by probate records. No provision for further record. In case of nonresident decedent, ancillary administration is necessary.

Uniform Federal Lien Registration Act adopted. (Ariz. Rev. Stat. 33-1031 et seq.). Filing fee, $3 for each notice.

Vital Statistics.

Records of births and deaths kept by, and certified copies of certificates obtainable from, Department of Health Services, Vital Records Section, P.O. Box 3887, 1818 W. Adams St., Phoenix, Arizona 85030. Fee per copy for birth and death certificates established by director of Department of Health Services. (Ariz. Rev. Stat. 36-342). Vital records electronic systems fund is established and administered by Department of Health Services. All birth certificates 75 years or older available on microfiche for access by anyone through State Department of Library, Archives and Public Records. (Ariz. Rev. Stat. 36-351). Same true for all death certificates 50 years or older. (Ariz. Rev. Stat. 36-351). Marriage license records kept by clerk of superior court of county where marriage performed. (Ariz. Rev. Stat. 25-123). Fee per certified copy, $18. (Ariz. Rev. Stat. 12-284).

Establishing Birth Records.

Births within state are filed with registrar designated by statute. (Ariz. Rev. Stat. 36-333). For infants of unknown parentage, requirements are set forth in Ariz. Rev. Stat. 36-335. New certificate may be issued following adoption, legitimation, paternity determination and sex change. (Ariz. Rev. Stat. 36-337). As to certain foreign-born adoptees and "putative father registry", see category 14 Family, topic 14.01 Adoption.

10.05 SEALS:

Uniform Commercial Code adopted. (Ariz. Rev. Stat. 47-1101 et seq.). See category 3 Business Regulation and Commerce, topic 3.09 Commercial Code.

No private or corporate seal or scroll is necessary to the validity of a contract, bond or conveyance or other instrument affecting either real or personal property, and addition of such seal or scroll does not affect instrument. (Ariz. Rev. Stat. 1-202). Every contract in writing imports consideration. (Ariz. Rev. Stat. 44-121).

10.06 TORRENS ACT:

Not adopted.

10.07 VITAL STATISTICS:

See topic 10.04 Records.

11 EMPLOYMENT

11.01 EMPLOYER AND EMPLOYEE:

See topic 11.02 Labor Relations.

11.02 LABOR RELATIONS:

Industrial Commission (five members) charged with administration and enforcement of all laws for protection of employees where duty not specifically delegated to another board or officer, and assist where duty is so delegated, and authorized and required to promote voluntary arbitration and mediation of labor disputes, regulate processing of workmen's compensation claims, license and supervise private employment agencies, investigate alleged unsafe or injurious employments or places of employment, publish statistics, provide and receive nonpublic, confidential or privileged documents required by administrative needs of regulatory agency, maintain confidentiality of such documents, enter into agreements to govern exchange thereof, meet with officers of other states and officers of United States in matters pertaining to official duties, and protect financial information received from private entities from public inspection when such information pertains to self insurance and is kept confidential in entity's ordinary and regular course of business. (Ariz. Rev. Stat. 23-107). Review of Commission workmen's compensation decisions and child labor cease and desist orders is by writ of certiorari to court of appeals. (Ariz. Rev. Stat. 23-951). Review of all other Commission orders is by superior court. (Ariz. Rev. Stat. 23-946).

Hours of Labor.

Maximum of eight hours per day for employees in laundries (Ariz. Rev. Stat. 23-284) and employees of State or subdivisions (Const., Art. XVIII, § 1). Employees and hoisting engineers at underground mines may work maximum of eight hours per day unless employer has adopted policy of longer periods of employment based upon collective bargaining agreement, in which case affected employees may work up to maximum of 12 hours in 24 hour period. (Ariz. Rev. Stat. 23-282). Statute preventing truck and bus operators from being on duty more than ten consecutive hours per day repealed. Railroad employees may not work more than 16 consecutive hours without at least nine hours rest. (Ariz. Rev. Stat. 23-287).

Wages.

Pay days must not be more than 16 days apart, and all wages up to date of pay day must be paid, except that overtime and exception pay and wages for up to five days prior thereto may be withheld when employee continues in employment, and wages for school employees may be prorated. Overtime and exception pay must be paid no later than 16 days after wages are earned. Employer may personally deliver wages to employee or deposit wages within U.S. mail within required timelines. Employers whose principal places of business and payrolls are located outside Arizona may designate one fixed pay day per month for certain professional, administrative, executive and sales employees. (Ariz. Rev. Stat. 23-351). When employee is discharged, wages must be paid by earlier of three working days or end of next regular pay period; when employee quits, wages must be paid by regular pay day for period during which quitting occurred. (Ariz. Rev. Stat. 23-353). If employer fails to pay wages due, employee may file civil action to recover treble amount of unpaid wages or, if amount does not exceed $2,500, may obtain determination from Industrial Commission's Labor Department. (Ariz. Rev. Stat. 23-355 et seq.). Employer is not liable for failure to pay minimum wage if failure was in good faith. (Ariz. Rev. Stat. 23-365). Department or employee may obtain judgment, garnishment, attachment or other available remedies for collection. (Ariz. Rev. Stat. 23-356).

Equal Wages.

Variation in rates of pay based upon sex of employee is prohibited. (Ariz. Rev. Stat. 23-341).

Priority of Wage Claims.

Wages of salesmen, clerks or laborers earned within 60 days preceding assignment for benefit of creditors or insolvency proceedings, up to $200, are preferred claims. Where employer dies, such wages have priority over all claims except funeral and last illness expenses, estate administration costs and family allowance. (Ariz. Rev. Stat. 23-354).

Wages of Minors.

To extent not pre-empted by federal law, Industrial Commission has duty to investigate wages of minors and, upon recommendation of wage boards appointed for that purpose, establish minimum fair wage rates. Employer must post orders establishing such rates. Minor paid less than minimum wage may recover in civil action treble minimum wage plus attorneys' fees and costs, less amount actually paid as wages. (Ariz. Rev. Stat. 23-311 et seq.).

Assignment of Wages.

See category 8 Debtor and Creditor, topic 8.01 Assignments.

Exemption of Wages.

See category 8 Debtor and Creditor, topic 8.06 Exemptions.

Child Labor.

Certain employments prohibited for children under 18. (Ariz. Rev. Stat. 23-231). Additional employments prohibited for children under 16. (Ariz. Rev. Stat. 23-232). Hours, night work, solicitation sales and door-to-door deliveries are restricted for children under 16 except children delivering newspapers. (Ariz. Rev. Stat. 23-233). Exemptions from child labor restrictions for employment by parents or other specified relative in certain occupations, entertainment performance, career or vocational training, and apprenticeship programs if married or have high school diploma or equivalent. (Ariz. Rev. Stat. 23-235). Employers who violate child labor laws are fined no more than $1,000 and are required to desist from violation. (Ariz. Rev. Stat. 23-236).

Aliens.

Employers subject to probation and possible loss of licenses necessary to operate business if employers knowingly employ unauthorized alien. (Ariz. Rev. Stat. 23-212). Employers have affirmative duty to verify eligibility of employees through E-Verify Program. (Ariz. Rev. Stat. 23-214).

Discrimination.

Unlawful for employer, employment agency or labor organization to discriminate on account of age over age of 40, race, color, religion, sex, disability, familial status or national origin. (Ariz. Rev. Stat. 41-1461 et seq.).

Discharge.

Employer may be liable in civil damages for discharging employee in violation of public policy. Legislature, and not courts, create public policy of state. Employment relationship is contractual in nature, but absent written contract, either party may sever relationship at any time. Employee has wrongful discharge claim if (1) employer terminates employee in breach of written contract, (2) employer terminates employee in violation of state statute, (3) employer terminates employee in retaliation for certain acts of employee, or (4) employee has constitutional, statutory, or other public right to continued employment. (Ariz. Rev. Stat. 23-1501). Constructive discharge limited to specific conditions. (Ariz. Rev. Stat. 23-1502).

Agricultural Labor.

Agricultural Employment Relations Board regulates agricultural employers, employees and labor organizations. Board hears disputes and has power to prevent unfair labor practices. (Ariz. Rev. Stat. 23-1381 et seq.).

Labor Unions.

No person may be denied the opportunity to obtain or retain employment because of nonmembership in a labor organization. (Const., Art. XXV).

Black List.

Prohibited. (Const., Art. XVIII, § 9; Ariz. Rev. Stat. 23-1361). Certain communications between former and prospective employers are allowed and privileged. (Ariz. Rev. Stat. 23-1361).

Occupational Safety and Health.

Industrial Commission's Division of Occupational Safety and Health and occupational safety and health review boards responsible for promulgating and enforcing standards and regulations. (Ariz. Rev. Stat. 23-401 et seq.).

Workers' Compensation Act.

Administered by Industrial Commission. (Ariz. Rev. Stat. 23-107). Act applies to every employer (including state and municipal corporations) (Ariz. Rev. Stat. 23-902) of any employees (sole proprietor may be deemed employee [Ariz. Rev. Stat. 23-901, Ariz. Rev. Stat. 23-901(i)]), which may include volunteer workers of state and local governments (Ariz. Rev. Stat. 23-901.06), except employers of domestic servants (Ariz. Rev. Stat. 23-902), businesses that entered into written agreement with independent contractor (Ariz. Rev. Stat. 23-902), certain real estate licensees (Ariz. Rev. Stat. 23-910), and certain motion picture employers (Ariz. Rev. Stat. 23-909). Exempted employers may come under Act voluntarily. (Ariz. Rev. Stat. 23-902). Act applicable to employment in both intrastate and interstate commerce governed by federal compensation or liability system only where intrastate work is separate and distinct. (Ariz. Rev. Stat. 23-903). Employers may secure compensation by insuring with either state compensation fund or authorized insurance carrier (Ariz. Rev. Stat. 23-961); or by furnishing satisfactory proof of financial self-insurance ability to Industrial Commission (Ariz. Rev. Stat. 23-961), or by joining self-insurance pools with similar employers, subject to approval of Industrial Commission (Ariz. Rev. Stat. 23-961.01). Provisions are compulsory on both employer and employee and remedies provided against both employer and insurance carrier are exclusive except that employees may reject Act and retain right to sue by filing written notice with employer prior to injury. (Ariz. Rev. Stat. 23-906, Ariz. Rev. Stat. 23-1022). Statute preventing employee from receiving compensation if employee is injured while under influence of alcohol or unlawful drugs repealed. Person entitled to workers' compensation, injured or killed by negligence or wrong of another not in same employ, may pursue remedy against such person but, if does not so pursue within one year after cause of action accrues, claim shall be deemed assigned to insurance carrier. (Ariz. Rev. Stat. 23-1023). Compensation is percentage of wages dependent on nature and extent of injury or number of dependents in case of death. Maximum award two-thirds of average monthly wage for life. (Ariz. Rev. Stat. 23-1044 to Ariz. Rev. Stat. 23-1046). In determining employee's earning capacity, Industrial Commission may consider wages that could have been earned from employment if employee is unable to work in any employment after injury due to employee's termination from employment for reasons that are unrelated to industrial injury. (Ariz. Rev. Stat. 23-1044). Maximum average monthly wage set by statute. (Ariz. Rev. Stat. 23-1041). Commission may supplement award with payments from special fund for employees who suffer additional impairment of preexisting physical impairment. (Ariz. Rev. Stat. 23-1065). Commission may grant lump sum commutation not to exceed $150,000. (Ariz. Rev. Stat. 23-1067). Claim must be filed within one year after injury occurs or becomes manifest or when claimant knows or in exercise of reasonable diligence should know he sustained compensable injury. (Ariz. Rev. Stat. 23-1061). Insurance carrier must initiate proceedings against employer within four years after date insurance carrier knows or should know that employer has willfully misrepresented amount of payroll, job description or job function of employee on which premium for worker's compensation is based. (Ariz. Rev. Stat. 23-984). Request for hearing may be filed on any issue connected with claim within 90 days after disputed action. (Ariz. Rev. Stat. 23-947). Hearings held before administrative law judges of Commission. (Ariz. Rev. Stat. 23-941 et seq.). Review of workers' compensation awards is by court of appeals under writ of certiorari. (Ariz. Rev. Stat. 23-951).

Occupational Diseases.

Law is administered by Industrial Commission. Certain occupational diseases are included in definition of "personal injury by accident arising out of the employment," (Ariz. Rev. Stat. 23-901[13]) and thus, are included within general provisions related to workmen's compensation with some special rules applying (Ariz. Rev. Stat. 23-901.01 et seq.).

Employer's Liability Law.

Employers liable for injuries of any employee engaged in hazardous occupation. (Ariz. Rev. Stat. 23-801 et seq.). Comparative negligence may diminish damages. (Ariz. Rev. Stat. 23-806).

Unemployment Compensation.

Administered by Department of Economic Security. (Ariz. Rev. Stat. 41-1953, Ariz. Rev. Stat. 41-1966, Ariz. Rev. Stat. 23-601 et seq.). Unless not employee (Ariz. Rev. Stat. 23-613.01) or exempt (Ariz. Rev. Stat. 23-617), any unemployed resident of state, or individual residing in state which has entered into reciprocal agreement (Ariz. Rev. Stat. 23-644), or under certain conditions individual who is working outside state but is directed or controlled by employer in state, is eligible to file claim for benefits (Ariz. Rev. Stat. 23-771 to Ariz. Rev. Stat. 23-772). Eligibility requirements are contained in Ariz. Rev. Stat. 23-771, Maximum benefits $240 weekly (Ariz. Rev. Stat. 23-779) for 26 weeks not to exceed one-third yearly base pay (Ariz. Rev. Stat. 23-780). Department shall deduct all child support obligations from unemployment compensation. (Ariz. Rev. Stat. 23-789). Individual is entitled to receive shared work unemployment compensation if employer has elected to participate in such program. (Ariz. Rev. Stat. 23-762 to Ariz. Rev. Stat. 23-763). Unemployment compensation is subject to federal and state tax, and individual may elect to have federal and state tax withheld. (Ariz. Rev. Stat. 23-792). Seasonal employment is employment with single employer who experiences substantial slowdown during season or seasons each year, notifies employees of seasonal status in writing, is not delinquent in unemployment insurance tax, and has experience rating account chargeable with 12 consecutive months of benefits. (Ariz. Rev. Stat. 23-793). Individual shall be deemed "unemployed with respect to any week during which the individual performs no services and with respect to which no wages are payable to the individual, or with respect to any week of less than full-time work without any fault on the individual's part if the wages payable to the individual with respect to the week are less than the individual's weekly benefit amount." (Ariz. Rev. Stat. 23-621). Individual shall not be deemed unemployed for any work of less than fulltime work. If individual's loss of fulltime work is directly attributable to fault of individual or "individual is receiving wages in lieu of notice, dismissal pay or severance pay". (Ariz. Rev. Stat. 23-621).

Working Conditions.

Statutory duty to furnish workplace free from recognized hazards. Common condition or practice within industry is not recognized hazard unless standard regarding condition has been developed pursuant to statutes. (Ariz. Rev. Stat. 23-403).

Drug Testing.

Employers are authorized to reliably test their employees and prospective employees for presence of drugs and alcohol impairment. (Ariz. Rev. Stat. 23-493 et seq.).

11.03 WORKERS' COMPENSATION LAW:

See topic 11.02 Labor Relations.

12 ENVIRONMENT

12.01 ENVIRONMENTAL REGULATION:

General Supervision.

Air Pollution Control.

Primarily responsibility of Department of Environmental Quality. (Ariz. Rev. Stat. 49-401 et seq.). Director must maintain state implementation plan as required by federal Clean Air Act. (Ariz. Rev. Stat. 49-404). Director may take any action necessary to abate environmental nuisances. (Ariz. Rev. Stat. 49-141). Governor may designate status and classification of areas of state pursuant to attainment of national ambient air quality standards. (Ariz. Rev. Stat. 49-405). County boards of supervisors adopt rules and regulations to control localized air pollution. (Ariz. Rev. Stat. 49-479). County regulations enforced by county health departments or county air pollution control districts and county air pollution control hearing boards or by multi-county air quality control region and joint region hearing board. (Ariz. Rev. Stat. 49-402, Ariz. Rev. Stat. 49-473 to Ariz. Rev. Stat. 49-478). In vehicle emissions control area, designated agency must develop transportation-related air quality measures. (Ariz. Rev. Stat. 49-402[E]). Governor must certify metropolitan planning organization to conduct transportation planning process in non-attainment areas for ozone, carbon monoxide or particulates and if no such agency exists, Department is so certified. (Ariz. Rev. Stat. 49-406). Motor vehicles in certain counties subject to annual emissions and tampering inspection. (Ariz. Rev. Stat. 49-541 et seq.). Motor vehicles in certain counties subject to voluntary no-drive program. (Ariz. Rev. Stat. 49-506). Travel Reduction Task Force established to review and approve Travel Reduction Programs. (Ariz. Rev. Stat. 49-581 et seq.). Certain gasoline dispensing facilities required to have gasoline vapor control systems. (Ariz. Rev. Stat. 41-2131 et seq.). Gasoline for use in certain areas regulated. (Ariz. Rev. Stat. 41-2124 to Ariz. Rev. Stat. 41-2124.01). Counties with population in excess of 500,000 must establish voluntary lawn mower emissions reduction program. (Ariz. Rev. Stat. 49-474.02). Some cities must develop clean burning fireplace ordinance. (Ariz. Rev. Stat. 9-500.16, Ariz. Rev. Stat. 11-875). Agriculture Best Management Practices Committee established to reduce PM-10 particulate emissions on commercial farms, dairies, beef cattle feed lots, poultry facilities and swine facilities. (Ariz. Rev. Stat. 49-457).

Hazardous Waste.

Primarily responsibility of Director of Department of Environmental Quality, who promulgates rules and regulations on management, construction and operation of hazardous waste disposal facilities and on characteristics, identification, listing, generation, transportation, treatment, storage and disposal of hazardous wastes equivalent to and consistent with federal program. (Ariz. Rev. Stat. 49-905, Ariz. Rev. Stat. 49-922). Owners or operators of underground storage tanks with petroleum or hazardous substances must maintain leak or release detection system, must notify Department of Environmental Quality in event of leak, and must meet other regulatory requirements. (Ariz. Rev. Stat. 49-1001 et seq.). Owners and operators also must take corrective action in event of release from tank. (Ariz. Rev. Stat. 49-1005). Party performing corrective action may informally appeal Department determinations. (Ariz. Rev. Stat. 49-1091). Party performing corrective action also may seek reimbursement of costs up to 90%. (Ariz. Rev. Stat. 49-1019, Ariz. Rev. Stat. 49-1052). Reimbursement payments come from regulated substance fund. (Ariz. Rev. Stat. 49-1015.01). Preapproval of corrective actions is available. (Ariz. Rev. Stat. 49-1053). Person who acquires ownership or control of property where underground storage tank is located is not owner of underground storage tank if satisfies certain requirements. (Ariz. Rev. Stat. 49-1001.01). State Fire Marshall is required to maintain library of all state and local rules and applicable federal regulations relating to hazardous materials control. (Ariz. Rev. Stat. 41-2163). Fund created for cleanup of hazardous substance sites for which no private party will take responsibility. (Ariz. Rev. Stat. 49-282). Transportation, use and disposal of used oil regulated. (Ariz. Rev. Stat. 49-801 et seq.). Manufacturers, packagers, distributors, recyclers, or sellers of engine coolant or antifreeze regulated. (Ariz. Rev. Stat. 41-2086). Contaminated soil remediation standards created. (Ariz. Rev. Stat. 49-151 et seq.). Party may appeal agency decision if it takes action that is arbitrary, capricious, or not in accordance with law. (Ariz. Rev. Stat. 41-1092.12).

Nonhazardous Solid Waste.

Primarily responsibility of Department of Environmental Quality. (Ariz. Rev. Stat. 49-761). Department of Environmental Quality must adopt rules on storage, processing, treatment and disposal of solid waste. (Ariz. Rev. Stat. 49-761). Certain facilities must prepare and obtain approval of solid waste facility plan. (Ariz. Rev. Stat. 49-762). Other facilities must comply with self-certification procedures. (Ariz. Rev. Stat. 49-762.01). Procedures are established for variances. (Ariz. Rev. Stat. 49-763.01). All disposal of solid waste at landfills is regulated. (Ariz. Rev. Stat. 49-761). Sale and disposal of waste tires (Ariz. Rev. Stat. 44-1301 et seq.) and lead acid batteries (Ariz. Rev. Stat. 44-1321 et seq.) regulated. Department must establish medical sharp labeling rules. (Ariz. Rev. Stat. 44-1341).

Radioactive Materials.

Primarily responsibility of Radiation Regulatory Agency and Radiation Regulatory Hearing Board. Regulatory Agency promulgates radiation protection standards and rules and regulations for licensing, registration, transport, and disposal of sources of radioactive materials and radioactive material processing operations. Regulatory Hearing Board conducts hearings, reviews orders, and makes recommendations on regulations. (Ariz. Rev. Stat. 30-651 et seq.).

Water Pollution Standards, Permits, Rules and Regulations.

Promulgated and administered by Department of Environmental Quality. (Ariz. Rev. Stat. 49-201 et seq.). Unless otherwise exempted, aquifer protection permits required for all facilities which add pollutants to land or water. (Ariz. Rev. Stat. 49-241 et seq.). Arizona Pollutant Discharge Elimination System Program adopts rules consistent with requirements of Federal Clean Water Act and requires permits to discharge any pollutant from any source into navigable waters. (Ariz. Rev. Stat. 49-201, Ariz. Rev. Stat. 49-255 et seq.). Director of environmental quality shall provide regulation for all sewage sludge use and disposal activities. (Ariz. Rev. Stat. 49-255.03). City, town, county, or sanitary district may adopt any ordinances necessary for implementing and enforcing pretreatment requirements under Federal Water Pollution Control Act amendments of 1972. Fines not exceeding $25,000 per day may be imposed for violation of such ordinances. (Ariz. Rev. Stat. 49-391). Director of Water Resources in consultation with Director of Department of Environmental Quality may inspect wells for cross contamination and take appropriate remedial actions. (Ariz. Rev. Stat. 45-605[A], Ariz. Rev. Stat. 49-282.04[A]).

Pesticide Control.

Responsibility of Director of Department of Agriculture, which promulgates and enforces rules and orders (Ariz. Rev. Stat. 3-102 et seq.), including publishing list of highly toxic and odoriferous pesticides (Ariz. Rev. Stat. 3-362), adopting rules to regulate pesticides and charging fees and issuing licenses, permits and certificates for pesticide use (Ariz. Rev. Stat. 3-363). Any money collected pursuant to these sections shall be deposited in State General Fund. (Ariz. Rev. Stat. 3-283). Pesticide management areas to be designated by Director. (Ariz. Rev. Stat. 3-366). Integrated pest management program established to reduce use of chemical pesticides. (Ariz. Rev. Stat. 3-381). Pesticide registrants must submit information related to hazards of groundwater contamination to Department of Environmental Quality. (Ariz. Rev. Stat. 49-301 et seq.). Restrictions on ability of Department of Environmental Quality to distribute consumer product information and to recommend substance as pesticide. (Ariz. Rev. Stat. 49-969).

Enforcement.

Air Pollution.

State Department of Environmental Quality has original jurisdiction over sources, permits and violations for certain defined major sources, smelting of metal ore, petroleum refineries, coal fired electrical generating stations, portland cement plants, portable sources, mobile sources for emissions inspections, and in counties without approved permit program. (Ariz. Rev. Stat. 49-402[A]). Counties or multi-county air quality control regions have jurisdiction for other sources. (Ariz. Rev. Stat. 49-402[B]). Adoption of rules and ordinances must comply with regulatory bill of rights providing for adequate notice, hearings and appeals. (Ariz. Rev. Stat. 49-471 et seq.). Jurisdiction not granted as to air pollution solely within commercial or industrial plants or shops. (Ariz. Rev. Stat. 49-448[1]). Unitary (installation/operating) permit required for certain sources of hazardous air pollutants and for persons beginning actual construction or operating any building, structure, facility or installation that may cause or contribute to air pollution or use of which may eliminate, reduce or control omission of air pollution. (Ariz. Rev. Stat. 49-426[A]). Certain sources exempted from permit requirement. (Ariz. Rev. Stat. 49-426[B]). Public notice of permit required, and public comment and hearing provided for. (Ariz. Rev. Stat. 49-426[D]). Special conditions required for permits allowing burning of used oil or hazardous waste or fuel derived thereof in any machine, incinerator or device. (Ariz. Rev. Stat. 49-426[G]). General permits allowed if certain conditions are met. (Ariz. Rev. Stat. 49-426[H]). Changes allowed without permit revision if certain conditions are met. (Ariz. Rev. Stat. 49-426.01). Department must adopt rules to administer and enforce federal and state hazardous air pollutant programs. (Ariz. Rev. Stat. 49-426.03, Ariz. Rev. Stat. 49-426.06). Department may by rule designate state list of hazardous air pollutants (Ariz. Rev. Stat. 49-426.04) and categories of sources subject to state program (Ariz. Rev. Stat. 49-426.05). Permit or permit revision applications must be denied if source will violate emissions statute or rules. (Ariz. Rev. Stat. 49-427). Appeals of Department permit, permit revision or conditional order decisions allowed for applicants and any person who filed written comments, and appeals to superior court allowed under certain conditions. (Ariz. Rev. Stat. 49-428, Ariz. Rev. Stat. 49-443). Transfer of permits allowed under certain conditions. (Ariz. Rev. Stat. 49-429). Department may grant conditional orders allowing applicant to vary from certain rules. (Ariz. Rev. Stat. 49-437 to Ariz. Rev. Stat. 49-441). Public disclosure required of nonconfidential Department records. (Ariz. Rev. Stat. 49-432[C]). Department may request in writing production of documents if reasonable cause of violation appears. (Ariz. Rev. Stat. 49-460). Department may issue order of abatement (Ariz. Rev. Stat. 49-461), seek injunctive relief (Ariz. Rev. Stat. 49-462) and civil penalties of not more than $10,000 per day, per violation (Ariz. Rev. Stat. 49-463). Violators subject to felony and misdemeanor criminal penalties. (Ariz. Rev. Stat. 49-464). Citizen suits to enforce statutes permitted. (Ariz. Rev. Stat. 49-407). Governor may declare air pollution emergencies and restrict, prohibit or condition certain activities. (Ariz. Rev. Stat. 49-465). County air pollution control follows similar enforcement procedure as state. (Ariz.

Rev. Stat. 49-471 et seq.). Department and counties required to establish small business stationary source technical and compliance assistance program. (Ariz. Rev. Stat. 49-456, Ariz. Rev. Stat. 49-507). Certain businesses must stagger work hours to reduce air pollution. (Ariz. Rev. Stat. 49-454). Some major employers must comply with regional travel reduction programs by providing employees with information on alternative transportation. (Ariz. Rev. Stat. 49-588). Various classes of vehicles must meet minimum emissions standards. (Ariz. Rev. Stat. 49-542). Alternate fuel vehicles are also subject to emissions inspections. (Ariz. Rev. Stat. 49-542.05). All gasoline sold in county of 1,200,000 or more persons must comply with certain standards. (Ariz. Rev. Stat. 41-2123). Governor shall appoint agricultural best management committee to determine best management practices to reduce particulate emissions. (Ariz. Rev. Stat. 49-457). County with more than 400,000 persons shall establish voluntary vehicle repair and retrofit program. (Ariz. Rev. Stat. 49-474.03). Certain fleet vehicles required to use alternative fuels. (Ariz. Rev. Stat. 41-803). Civil penalties of up to $100 for violation of burning restrictions on some residential fireplaces. (Ariz. Rev. Stat. 11-871).

Hazardous Waste.

Violation of motor vehicle regulation while transporting hazardous material, substance or waste that Corporation Commission requires to be placarded is subject to criminal and civil penalties. (Ariz. Rev. Stat. 28-5237 et seq.). Director of Department of Environmental Quality is authorized to regulate and set criteria standards for characteristics, identification, listing, generation, transportation, treatment, storage, continuing release and disposal of hazardous waste. (Ariz. Rev. Stat. 49-922). Director may order compliance or seek court injunction. (Ariz. Rev. Stat. 49-923). Person who violates any permit, rule, regulation or order is subject to civil penalty not exceeding $25,000 for each day of violation. (Ariz. Rev. Stat. 49-924). In action brought by Department for release from underground storage tank, State bears burden of proof of violation by owner or operator and damages are limited to party's contribution to contamination. (Ariz. Rev. Stat. 49-1016). Intentional, reckless, or knowing transportation of hazardous waste to unauthorized facility, generation of hazardous waste and causing or allowing transportation of waste to unauthorized facility, or treatment, storage, or disposal of waste without authority is felony. (Ariz. Rev. Stat. 49-925). Any agency required to select possible hazardous waste disposal site shall first send notice to property owners within specified proximity to proposed site. (Ariz. Rev. Stat. 49-941). Parties responsible for release or threatened release of hazardous substance are considered owners, operators, disposers, and transporters. (Ariz. Rev. Stat. 49-283[A]). Limitations on lender and fiduciary liability defined. (Ariz. Rev. Stat. 49-283[I]). In limited circumstances, owner, operator, disposer, or transporter may avoid cleanup liability. (Ariz. Rev. Stat. 49-283[B] to [D]). Provider or user of remediated water not liable for damages caused by use or distribution of remediated water, except on showing of willful, malicious or grossly negligent conduct. (Ariz. Rev. Stat. 49-283.01[A]). Owner or operator of facility must notify Director in event of release of reportable quantity of hazardous substance. (Ariz. Rev. Stat. 49-284). Responsible parties may be held strictly and severally liable for remedial action costs for releases of hazardous substances. (Ariz. Rev. Stat. 49-285). Any person may apply to undertake voluntary remedial action. (Ariz. Rev. Stat. 49-282.05). Remedial action order recipient is entitled to expedited discovery and trial priority if there is threat of imminent and substantial danger to public health or environment. (Ariz. Rev. Stat. 49-287[E]). Based on information of possible release of hazardous substance, Director may conduct preliminary investigation. (Ariz. Rev. Stat. 49-287.01). If Director determines remedial investigation of site necessary and cost recovery may be appropriate, Department must investigate for liable parties. (Ariz. Rev. Stat. 49-287.02). After evaluating site, Director must develop proposed remedial action plan. (Ariz. Rev. Stat. 49-287.04). Additional investigations, proceedings and hearings may be held. (Ariz. Rev. Stat. 49-287.05 et seq.). Remedial actions may be financed by Water Quality Assurance Revolving Fund, if remedial action plan meets certain requirements. (Ariz. Rev. Stat. 49-289). Remedial costs borne by state create lien against contaminated property. (Ariz. Rev. Stat. 49-295). Brownfields cleanup revolving loan fund program established. (Ariz. Rev. Stat. 49-218 et seq.).

Nonhazardous Solid Waste.

Department of Environmental Quality must adopt rules on storage, processing, treatment and disposal of solid waste. (Ariz. Rev. Stat. 49-761). Certain substances are exempt from definition of solid waste. (Ariz. Rev. Stat. 49-701.01, Ariz. Rev. Stat. 49-701.02). Certain facilities must prepare and obtain approval of solid waste facility plan. (Ariz. Rev. Stat. 49-762). Other facilities must comply with self-certification procedures. (Ariz. Rev. Stat. 49-762.01). Director may, in limited circumstances, require corrective actions for solid waste management. (Ariz. Rev. Stat. 49-762.08). Procedures are established for variances. (Ariz. Rev. Stat. 49-763.01). Monies collected from landfill disposal fees used to fund recycling program. (Ariz. Rev. Stat. 49-837). Certain facilities may be partially exempt from disposal fees. (Ariz. Rev. Stat. 49-836). All new facilities must submit plans meeting financial assurance requirements (Ariz. Rev. Stat. 49-770), and all new landfill facilities must also submit plans meeting restrictive covenant (Ariz. Rev. Stat. 49-771) and location restriction requirements (Ariz. Rev. Stat. 49-772). Public notice and hearing requirements for facilities. (Ariz. Rev. Stat. 49-767). Solid waste facilities with certain zoning approval exempt. (Ariz. Rev. Stat. 49-767). Department may issue agency compliance orders (Ariz. Rev. Stat. 49-781), suspend, amend, withdraw, condition or revoke approval to operate (Ariz. Rev. Stat. 49-782), and seek injunctive relief (Ariz. Rev. Stat. 49-783) for violation of solid waste statute, rule or facility plan condition. Violators subject to maximum $1,000 per day civil penalty not to exceed $15,000 per violation. (Ariz. Rev. Stat. 49-783[B]). Violation of solid waste statute, rule or facility plan condition punishable as misdemeanor. (Ariz. Rev. Stat. 49-791[B]). Improper sale or disposal of waste tires or lead acid batteries punishable by civil penalty not to exceed $500 per tire or battery. (Ariz. Rev. Stat. 44-1307, Ariz. Rev. Stat. 44-1324).

Radioactive Materials.

Any person receiving, using, possessing, transferring, installing or servicing any source of radiation must be licensed or exempted by Radiation Regulatory Agency. (Ariz. Rev. Stat. 30-673). Radiation sources shall be registered, licensed or exempt at discretion of Radiation Regulatory Agency and shall be available for inspection. (Ariz. Rev. Stat. 30-671[B]). Sites used for concentration, storage, or disposal of radioactive waste material are regulated by Agency in name of state. (Ariz. Rev. Stat. 30-692). Any person building or operating commercial nuclear generator assessed annual amount set by legislature for development of plan for off-site response to accident at plant. (Ariz. Rev. Stat. 26-306.01). Owners of commercial nuclear generating station must record legal description of land that is within ten mile radius of nuclear generating station. (Ariz. Rev. Stat. 26-319). Southwestern Low-Level Radioactive Waste Disposal Compact adopted. (Ariz. Rev. Stat. 30-721). Disposal of low-level radioactive waste governed by Southwestern Low-Level Radioactive Waste Disposal Compact. (Ariz. Rev. Stat. 30-721).

Water Pollution.

Unlawful to discharge wastes, agricultural, irrigation or drainage waters into waters of state (surface or groundwater) in violation of established standards, or to discharge pollutants into waters of state without such permit as may be required by rules and regulations. (Ariz. Rev. Stat. 49-241). In case of grazing activities that affect surface water quality, Grazing Best Management Practices Advisory Committee shall adopt, and Director of Department of Environmental Quality shall implement, permit program. (Ariz. Rev. Stat. 49-202.01). Director of Department of Environmental Quality is authorized to administer permit program including sewage sludge requirements. (Ariz. Rev. Stat. 49-203, Ariz. Rev. Stat. 49-255 et seq.). Department of Environmental Quality may adopt water quality standards and procedures for enforcement. (Ariz. Rev. Stat. 49-203). Complaint ordering corrective action may be served on violator of law, regulation or order of Department, with right to request hearing. Orders of Director are appealable to court. (Ariz. Rev. Stat. 49-321). Denials of permits are appealable to Water Quality Appeals Board and then to superior court. (Ariz. Rev. Stat. 49-323). Department may inspect property and examine records relating to waste discharges. (Ariz. Rev. Stat. 49-203). Department may seek injunctive relief where necessary to protect public health in event any statutory provision, regulation or permit condition is violated. (Ariz. Rev. Stat. 49-262). Violators subject to civil penalties up to $25,000 per day per violation or guilty of misdemeanor, Class 6 Felony for criminally negligent violations, Class 5 Felony for knowing violations and Class 2 Felony where violation manifests extreme indifference for human life. (Ariz. Rev. Stat. 49-262 to Ariz. Rev. Stat. 49-263). Violators of Arizona Pollutant Discharge Elimination System who knowingly discharge pollutants into navigable waters are guilty of Class 5 felony. (Ariz. Rev. Stat. 49-263.01). Reckless violators are guilty of Class 6 felony; violators acting with criminal negligence are guilty of Class 1 misdemeanor. (Ariz. Rev. Stat. 49-263.01). Violators who discharge with extreme indifference for human life are guilty of Class 2 felony. (Ariz. Rev. Stat. 49-263.01). It is affirmative defense that person harmed has consented to conduct. (Ariz. Rev. Stat. 49-263.01). Citizen suits available against violators, with potential award of attorneys' fees. (Ariz. Rev. Stat. 49-264). Affirmative defense available to civil liability for causing or contributing to violation of water quality standards. (Ariz. Rev. Stat. 49-262[F]). Department of Environmental Quality is designated as responsible agency to take all necessary and appropriate action to insure proper quality of all potable water sold or distributed through public and some semipublic water systems. (Ariz. Rev. Stat. 49-351 et seq.). Department may allocate only $500,000 per year to bioremediation or other alternative technologies. (Ariz. Rev. Stat. 49-282). Wastewater collection and treatment regulated by Ariz. Rev. Stat. 49-361 et seq. Infrastructure and authority of domestic wastewater improvement districts are established. (Ariz. Rev. Stat. 48-909.01, Ariz. Rev. Stat. 48-910).

Pesticide Control.

Certain pesticides cannot be applied in buffer zones around schools, day care centers, health care institutions, child care group home as defined by Ariz. Rev. Stat. 36-897, and neighborhoods of at least 25 residences adjoining fields to be sprayed. (Ariz. Rev. Stat. 3-365). Private right of action provided in superior court. (Ariz. Rev. Stat. 3-367). Director of Department of Agriculture responsible for enforcement and receives all complaints. (Ariz. Rev. Stat. 3-368). Director determines type of violation that has occurred. If de minimis, citation is issued and record kept for three years. If nonserious or serious, citation is issued and hearing set. (Ariz. Rev. Stat. 3-368). Penalty for nonserious and serious violations is probation or suspension, revocation, nonrenewal or denial of permit, license or certification. Penalty may include civil fine not to exceed $500 for nonserious violations and $10,000 for serious violations. Nonserious violators guilty of Class 1 Misdemeanor. Serious violators guilty of Class 6 Felony. (Ariz. Rev. Stat. 3-370). Director or Director of Department of Health Services may issue cease and desist orders to terminate application of pesticides prior to hearing. (Ariz. Rev. Stat. 3-371). Violators may apply for emergency relief from suspension. (Ariz. Rev. Stat. 3-372).

Every pesticide that is distributed must be registered with Environmental Services Division of Department of Agriculture. (Ariz. Rev. Stat. 3-351[A]). Renewable conditional registration for one year is available. (Ariz. Rev. Stat. 49-310). If deemed necessary, submission of complete formula of any pesticide or confidential statement of formula may be required. (Ariz. Rev. Stat. 3-351[F]).

Light Pollution.

Regulated by Ariz. Rev. Stat. 49-1101 et seq.

Hazardous Materials.

Department of Health Services must adopt standards, rules, and remedies regarding lead-based paint. (Ariz. Rev. Stat. 36-1672 et seq.).

Disclosure of Soil Abatement.

See category 21 Property, topic 21.16 Real Property, subhead Land Sale Regulation.

Penalties.

See subhead Enforcement, supra.

Permits.

See subhead Enforcement, supra.

See category 19 Mineral, Water and Fishing Rights, topic 19.01 Mines and Minerals.

See also category 3 Business Regulation and Commerce, topic 3.18 Licenses, Business and Professional, subhead Contractors.

13 ESTATES AND TRUSTS

13.01 ADMINISTRATION:

See topic 13.09 Executors and Administrators.

13.02 ADVANCEMENTS:

See topic 13.07 Descent and Distribution.

13.03 ALLOWANCES:

See topic 13.09 Executors and Administrators.

13.04 CLAIMS:

See topic 13.09 Executors and Administrators; category 5 Civil Actions and Procedure, topic 5.17 Pleading; and category 9 Dispute Resolution, topic Arbitration and Award.

13.05 DEATH:

Person absent from last domicile for five successive years is presumed to have died at end of those five years. (Ariz. Rev. Stat. 14-1107). If estate is acquired on such presumption, it may be subsequently restored to party presumed dead by action in which it is shown that absentee is living. In such case, rents, profits and interest may also be recovered. (Ariz. Rev. Stat. 12-509). See also category 21 Property, topic 21.01 Absentees.

Simultaneous Death.

Uniform Simultaneous Death Act adopted, and, on adoption of Uniform Probate Code, renumbered to become part of Code. (Ariz. Rev. Stat. 14-2702).

Action for Death.

Whenever death is caused by such wrongful act as would have entitled injured person to maintain suit if death had not ensued, person causing such death is liable in action brought by personal representative of deceased. Either parent may sue for death of child; guardian may sue for death of ward. (Ariz. Rev. Stat. 12-611 et seq.).

Time to sue is within two years after death. (Ariz. Rev. Stat. 12-542).

Amount recoverable may not be limited by statute. (Const., Art. II, § 31).

Death Certificate.

See category 10 Documents and Records, topic 10.04 Records, subhead Vital Statistics.

Uniform Anatomical Gift Act adopted. (Ariz. Rev. Stat. 36-841 et seq.). Vascular organ obtained by Organ Procurement Organization designated to service this state must be used in state, given to organization that has entered into reciprocal agreement, or given to entity with regional or national distribution, in compliance with U.S. Department of Health and Human Services contract. (Ariz. Rev. Stat. 36-846).

Living Wills.

See topic 13.16 Wills, subhead Living Wills and Health Care Directives.

13.06 DECEDENTS' ESTATES:

See topics 13.07 Descent and Distribution, Executors and Administrators, Wills; category 8 Debtor and Creditor, topic 8.10 Homesteads.

13.07 DESCENT AND DISTRIBUTION:

Uniform Probate Code (but not 1977 or later amendments) adopted (Ariz. Rev. Stat. 14-1102 et seq.) with following exceptions:

Surviving spouse takes as follows: (1) If intestate left issue, one or more of whom are not issue of surviving spouse also, one-half of intestate separate property and no interest in decedent's one-half of community property; (2) if no surviving issue or issue all of whom are issue of surviving spouse also, entire intestate estate. (Ariz. Rev. Stat. 14-2102).

Election.

Surviving spouse has no right to take elective share.

Governing Instruments.

Definition significantly expanded. (Ariz. Rev. Stat. 14-1201).

Distribution.

"Representation" defined as per capita at each generational level. "Per stirpes" defined by statute. (Ariz. Rev. Stat. 14-2709). "Worthier title" doctrine abolished. (Ariz. Rev. Stat. 14-2710).

Disqualification.

Person who divorces is not surviving spouse, subject to exceptions. (Ariz. Rev. Stat. 14-2802). Person who feloniously and intentionally kills decedent forfeits all rights to estate, and share passes as if it were disclaimed. (Ariz. Rev. Stat. 14-2803).

Right of Exclusion.

Testator may limit or exclude right of succession to property that passes by intestacy. That person's or class' share passes as if excluded disclaimed share. (Ariz. Rev. Stat. 14-2101).

Survival.

120-hour survival requirement for all instruments, including joint bank accounts.

Uniform Disclaimer of Property Interests Act adopted. (Ariz. Rev. Stat. 14-10001 et seq.).

Community Property.

See category 14 Family, topic 14.09 Husband and Wife.

Administrators.

See topic 13.09 Executors and Administrators.

Escheat.

If no taker by will or intestacy laws, intestate estate passes to state. (Ariz. Rev. Stat. 14-2105).

Securities and security accounts may be registered in order to accomplish nonprobate transfer upon death of owner. Such accounts function like joint tenancy accounts. (Ariz. Rev. Stat. 14-6301 et seq.).

13.08 ELECTION:

See topic 13.16 Wills.

13.08A ESTATES: (in property)

See category 21 Property, topic 21.16 Real Property.

13.09 [RESERVED]

13.10 EXECUTORS AND ADMINISTRATORS:

Uniform Probate Code (but not 1977 or later amendments) adopted. (Ariz. Rev. Stat. 14-1102 et seq.). Executor and administrator are included in term “personal representative”. (Ariz. Rev. Stat. 14-1201).

Superior court has jurisdiction of probate and administration. Registrar administers informal probate procedure unless contested. Venue is in county of decedent’s domicile at death, or, if no Arizona domicile, any county where decedent’s property was located at time of death. (Ariz. Rev. Stat. 14-3201).

Eligibility and Competency.

Following cannot serve as personal representative: (1) Minor; (2) person found unsuitable by court; and (3) foreign corporation. (Ariz. Rev. Stat. 14-3203[F]).

Preferences in Right to Administer.

In appointment, preference is given to: (1) Person named in probated will; (2) surviving spouse who is devisee; (3) other devisees; (4) surviving spouse; (5) other heirs; (6) Arizona Veterans Service Commission; (7) 45 days after decedent’s death, any creditor; and (8) public fiduciary. (Ariz. Rev. Stat. 14-3203).

Qualification.

Personal representative must file bond, if required, and statement of acceptance of duties of office. (Ariz. Rev. Stat. 14-3601). If required, bond must be in amount not less than personal representative’s sworn best estimate of decedent’s personal estate, real estate, less encumbrances thereon, and income from personal and real estate during next year. Bond may be reduced by amount of real estate, less encumbrances thereon, if letters restrict sales of realty as in supervised administration. (Ariz. Rev. Stat. 14-3604[A]).

Exemption from Bond.

Personal representative must give bond unless: (1) Will expressly waives bond; (2) all heirs or devisees waive bond in writing; (3) personal representative is bank or savings and loan or title insurance company authorized to do business in state, trust company holding certificate to engage in trust activities or public fiduciary; or (4) value of estate permits summary proceedings and surviving spouse or nominee is personal representative. (Ariz. Rev. Stat. 14-3603).

Issuance of Letters.

Five days after death of resident or 30 days after death of nonresident, and after application for informal appointment submitted under oath, registrar may appoint personal representative. (Ariz. Rev. Stat. 14-3307). Superior court can make formal determination of who is entitled to appointment. (Ariz. Rev. Stat. 14-3414).

Prior to issuance of letters, personal representative must file bond, if required, and written acceptance. (Ariz. Rev. Stat. 14-3601).

Removal.

Any interested person may petition for removal of personal representative at any time for: (1) Best interests of estate; (2) intentional misrepresentation of material facts by personal representative during appointment proceedings; (3) disregard of court order; (4) incapability; (5) mismanagement; (6) failure to perform any duty; or (7) disregard of decedent's written wishes for disposition of remains. (Ariz. Rev. Stat. 14-3611).

Special Kinds of Administration.

In addition, supervised administration is authorized by Ariz. Rev. Stat. 14-3501, whereby personal representative must not make any distribution without prior order of court. Sale of real property requires confirmation by court. (Ariz. Rev. Stat. 14-3504).

Public Administrators.

Office of public fiduciary established and governed by Ariz. Rev. Stat. 14-5601 et seq.

Arizona Veterans Service Commission may act as guardian or conservator for incapacitated veteran or such veteran's incapacitated spouse or minor children. (Ariz. Rev. Stat. 41-603, Ariz. Rev. Stat. 41-605). Before letters testamentary or of administration are issued, public fiduciary may, upon court order, with regard to person who dies intestate or testate without personal representative, take possession of property including real property, make funeral arrangements, and sell perishable property. Pending such court order, law enforcement agency shall protect all properties of deceased person. (Ariz. Rev. Stat. 14-5602 to Ariz. Rev. Stat. 14-5606).

Private Fiduciaries.

Financial institutions or their employees are not required to post bond to qualify as private fiduciaries. (Ariz. Rev. Stat. 14-5651).

Inventory and Appraisal.

Personal representative must file or send copy as provided by Ariz. Rev. Stat. 14-3706 within 90 days of appointment of inventory of property owned by decedent at time of death, showing fair market value, community or separate nature, and type and amount of existing encumbrances. (Ariz. Rev. Stat. 14-3706).

General Powers and Duties.

Personal representative bound by standard of care and duty of accounting applicable to trustees. (Ariz. Rev. Stat. 14-3703). Person on whom duty of burial is imposed must comply with decedent's reasonable, written wishes. (Ariz. Rev. Stat. 36-831.01).

Notice of Appointment.

Within 30 days after appointment, representative must give notice of his appointment by mail or delivery to heirs and devisees. Failure is breach of duty but does not invalidate appointment. (Ariz. Rev. Stat. 14-3705).

Notice to Creditors.

Upon appointment, representative must publish notice once a week for three successive weeks in newspaper of general circulation in county. Representative must give notice to all known creditors, notifying them of personal representative's appointment. (Ariz. Rev. Stat. 14-3801). Claims barred forever if not presented within earlier of either: (1) two years after decedent's death plus time remaining in period commenced by notice pursuant to Ariz. Rev. Stat. 14-3801; or (2) time prescribed by Ariz. Rev. Stat. 14-3801(A) or (B). (Ariz. Rev. Stat. 14-3803).

Presentation of Claims.

All claims which arose before decedent's death must be presented within two years after decedent's death plus time remaining in period commenced by notice, or within time prescribed for creditors who are given actual notice and within time prescribed for all creditors barred by publication. Claims barred if non-claim statute in decedent's domicile. Claims described in Ariz. Rev. Stat. 14-3803 and barred by non-claim statute of decedent's domicile before giving of notice to creditors in this state are barred. All claims arising at or after death must be presented as follows: (1) Claim based on contract with representative, within four months after performance by representative is due; and (2) any other claim, within four months after it arises. Excepted are enforcement of mortgages, pledges or other liens, and actions to establish decedent's or representative's liability covered by liability insurance. All claims not presented within these limits are barred. (Ariz. Rev. Stat. 14-3803).

Proof of Claims.

No particular form of proof of claim is prescribed. Written statement by claimant mailed or delivered to representative is sufficient. Statement must include basis and amount of claim, name and address of claimant, description of contingent or unliquidated nature of claim and any security held for claim. (Ariz. Rev. Stat. 14-3804).

Approval or Rejection of Claims.

Claims approved or rejected by representative. No action by representative within 60 days after expiration of time for original presentation has effect of notice of allowance. Disallowed claims are barred unless claimant files petition for allowance or commences proceeding within 60 days of mailing of notice of disallowance. (Ariz. Rev. Stat. 14-3806).

Payment of Claims.

Representative may pay claims beginning on expiration of earlier of time limitations prescribed in Ariz. Rev. Stat. 14-3803 for presentation of claims, after making provision for statutory allowances, claims already presented and unbarred claims which may yet be presented, and costs and expenses. (Ariz. Rev. Stat. 14-3807).

Priorities.

(1) Costs of administration; (2) reasonable funeral expenses; (3) debts and taxes preferred under federal law; (4) expenses of last illness; (5) debts and taxes due under Arizona law; and (6) all other claims. (Ariz. Rev. Stat. 14-3805). All payments except (1) above subject to statutory allowances. See subhead Allowances, infra.

Sales.

See subhead General Powers and Duties, supra.

Actions by Representative.

Representative may prosecute and defend claims for protection of estate and representative in his duties. (Ariz. Rev. Stat. 14-3715[22]). For claims by decedent not barred by statute of limitations at his death, limitation of action ceases to run until appointment of representative or 12 months after death, whichever occurs first, but in no case sooner than four months after death. (Ariz. Rev. Stat. 14-3109).

Actions Against Representative.

Death of defendant abates actions for breach of promise to marry, seduction, libel, slander, separate maintenance, alimony, loss of consortium and invasion of privacy. All other actions may be continued against personal representative, but pain and suffering damages are not allowed upon death of person injured. (Ariz. Rev. Stat. 14-3110).

Any statute of limitations not measured from death or advertisement of claims against decedent is suspended during four months following death. (Ariz. Rev. Stat. 14-3802). Claim in writing must be delivered or mailed to representative, or action must be commenced in any court having jurisdiction over representative. (Ariz. Rev. Stat. 14-3804). See subhead Presentation of Claims, supra.

Allowances.

If decedent was domiciled in Arizona, following are available: (1) Allowance in lieu of homestead of $18,000 to surviving spouse and dependent children. If no surviving spouse, $18,000 is divided among dependent children. If dependent children reside with surviving spouse or there are no dependent children, allowance is payable to surviving spouse. If dependent child is not living with surviving spouse, allowance may be made partially to child or his guardian and partially to surviving spouse. Allowance in lieu of homestead is exempt from and prior to all claims against estate except administration expenses. (Ariz. Rev. Stat. 14-2402). (2) Exempt personal property with value not in excess of $7,000 to surviving spouse and dependent children. If dependent child is not living with spouse, allowance may be made partially to child or his guardian and partially to surviving spouse. If no surviving spouse, minor or dependent children are entitled jointly to allowance. If assets are encumbered or insufficient, exempt property allowance has priority over all claims against estate except administration expenses, allowance in lieu of homestead and family allowance. (Ariz. Rev. Stat. 14-2403). (3) Family allowance to surviving spouse and dependent children. If dependent child is not living with surviving spouse, allowance may be made partially to child or his guardian and partially to surviving spouse. Allowance may be in periodic installments or lump sum. Representative may determine up to $12,000 lump sum or $1,000 per month for one year. Family allowance is exempt from and prior to all claims except administration expenses and allowance in lieu of homestead. (Ariz. Rev. Stat. 14-2404 to Ariz. Rev. Stat. 14-2405). All statutory allowances are chargeable against any share passing by decedent’s will, unless will provides otherwise. Property specifically devised is not used to satisfy allowance if estate otherwise sufficient. Portion of statutory allowances payable to surviving spouse are chargeable first to decedent’s share of community property. Portion of allowances payable to dependent children are chargeable first to decedent’s separate property. (Ariz. Rev. Stat. 14-2405).

Widow’s Quarantine.

None.

Final Accounting and Settlement.

Estate may be settled by: (1) Petition for order of complete settlement (Ariz. Rev. Stat. 14-3931); (2) petition under informally probated will (Ariz. Rev. Stat. 14-3932); (3) except when under court prohibition or supervision, verified statement of representative that he has published notice to creditors as provided in Ariz. Rev. Stat. 14-3801, first publication occurring more than four months prior to statement, that he has determined that time limit for presentation of creditors' claims has expired, and that he has fully administered estate and made complete accounting thereof to all distributees (Ariz. Rev. Stat. 14-3933).

Consent Settlement.

Representative may compromise claims against estate. (Ariz. Rev. Stat. 14-3813).

Distribution.

Personal representative may settle and distribute estate without court order unless he presents questions to court. If administration is supervised, representative may not distribute without court order. (Ariz. Rev. Stat. 14-3504).

Distribution If Abroad.

No statutory provisions.

Liabilities.

Representative is not liable on contract unless he fails to reveal representative capacity, but representative is liable for obligations and torts during administration if personally at fault. (Ariz. Rev. Stat. 14-3808).

Compensation of Representatives.

Representative is entitled to reasonable compensation for services. He may renounce compensation set forth in will and be entitled to reasonable compensation unless compensation is set by contract with decedent. (Ariz. Rev. Stat. 14-3719).

Foreign Executors and Administrators.

As to assets in Arizona, such representatives exercise all powers of local personal representative and may maintain actions subject to any conditions imposed on nonresidents generally (Ariz. Rev. Stat. 14-4205), but only if no administration or petition for administration is pending in Arizona. Petition for Arizona administration terminates power of foreign personal representative. (Ariz. Rev. Stat. 14-4206).

Summary Administration.

See subhead Small Estates, infra.

When Administration Unnecessary.

Decedent's successor may collect personal property owed decedent at death by affidavit stating that: (1) Value of all personal property in decedent's estate, wherever located, less liens and encumbrances, does not exceed $50,000; (2) 30 days have elapsed since death; (3) proceeding to appoint personal representative is not pending or if granted, representative has been discharged or more than one year elapsed since closing statement was filed; and (4) successor is entitled to payment or delivery of property. Successor may acquire decedent's interest in real property, including any debt secured by lien on real property, by filing with court in county in which decedent was domiciled at time of death or in county where real property is located if decedent was not domiciled in Arizona, affidavit describing real property and decedent's interest therein and stating that: (1) Net value of real property located in Arizona does not exceed $75,000; (2) six months have elapsed since death as shown in certified copy of decedent's death certificate attached to affidavit; (3) no proceedings for appointment of personal representative are pending or if granted, representative has been discharged or more than one year elapsed since closing statement was filed; (4) funeral expenses, expenses of last illness and all unsecured debts have been paid; (5) affiant is entitled to property by reason of allowance in lieu of homestead and exempt property, intestate succession as sole heir or heirs, or by devise under valid last will, copy of which is attached to affidavit or has been probated; (6) no other person has right to property; (7) no federal or Arizona estate tax is due on decedent's estate; and (8) affiant affirms that all statements are true. (Ariz. Rev. Stat. 14-3971). Payment releases payor. (Ariz. Rev. Stat. 14-3972).

Small Estates.

If estate inventory value is less than allowance in lieu of homestead, exempt property allowance, family allowance, administration costs, funeral expenses and expenses of last illness, representative may make immediate distribution and close estate by filing verified statement that: (1) Estate did not exceed items above; (2) representative has distributed estate to those entitled thereto; and (3) representative has sent copy of closing statement to all distributees and to all creditors, and has furnished full written accounting of administration to distributees affected thereby. If no proceedings involving representative are pending in court one year after filing of closing statement, representative's appointment is terminated. (Ariz. Rev. Stat. 14-3973 to Ariz. Rev. Stat. 14-3974).

Uniform Fiduciaries Act adopted. (Ariz. Rev. Stat. 14-7501 et seq.).

Revised Uniform Principal and Income Act adopted with some changes. (Ariz. Rev. Stat. 14-7401 et seq.).

Uniform Simplification of Fiduciary Security Transfers Act repealed July 13, 1995.

Uniform Anatomical Gift Act adopted. (Ariz. Rev. Stat. 36-841 et seq.).

Caveat.

For disclosure requirements in conveyances of real property made or taken in representative capacity, see category 21 Property, topic 21.06 Deeds.

Uniform Disclaimer of Property Interests Act adopted. (Ariz. Rev. Stat. 14-10001 et seq.).

13.11 FIDUCIARIES:

See topics 13.09 Executors and Administrators, Trusts; category 14 Family, topic 14.07 Guardian and Ward.

Uniform Unclaimed Property Act adopted. (Ariz. Rev. Stat. 44-301 et seq.).

Foreign corporation cannot be appointed personal representative but may be appointed testamentary trustee. (Ariz. Rev. Stat. 14-3203). See also topic 13.15 Trusts.

Uniform Fiduciaries Act adopted with minor changes. (Ariz. Rev. Stat. 14-7501 et seq.). See category 3 Business Regulation and Commerce, topic 3.01 Banks and Banking.

Uniform Simplification of Fiduciary Security Transfers Act repealed by 1995, c. 153, § 6. See Ariz. Rev. Stat. 47-8101 et seq. for same subject matter.

Uniform Disclaimer of Property Interests Act adopted. (Ariz. Rev. Stat. 14-10001 et seq.).

13.12 INTESTACY:

See topic 13.07 Descent and Distribution.

13.13 [RESERVED]

13.14 PROOF OF CLAIMS:

See topic 13.09 Executors and Administrators; category 5 Civil Actions and Procedure, topic 5.17 Pleading.

13.15 TRUSTS:

Caveat: For disclosure requirements in conveyance of real property made or taken in representative capacity, see category 21 Property, topic 21.06 Deeds.

Uniform Trust Code adopted, with some changes. (Ariz. Rev. Stat. 14-10101 et seq.).

Uniform Common Trust Fund Act adopted. (Ariz. Rev. Stat. 6-871 et seq.).

Uniform Simplification of Fiduciary Security Transfers Act repealed July 13, 1995.

Uniform Fiduciaries Act adopted with minor changes. (Ariz. Rev. Stat. 14-7501 et seq.). See category 3 Business Regulation and Commerce, topic 3.01 Banks and Banking.

Revised Uniform Principal and Income Act adopted with minor changes. (Ariz. Rev. Stat. 14-7401 et seq.).

Transfers to Minors.

Uniform Custodial Trust Act adopted. (Ariz. Rev. Stat. 14-9101 et seq.). See also category 14 Family, topic 14.10 Infants.

Accumulations.

See category 21 Property, topic 21.12 Perpetuities.

Perpetuities.

See category 21 Property, topic 21.12 Perpetuities.

Pour Over Trusts.

See topic 13.16 Wills.

13.16 WILLS:

Uniform Probate Code (but not 1977 or later amendments) adopted. (Ariz. Rev. Stat. 14-1102 et seq.).

Testamentary Disposition.

Any person 18 years or over and of sound mind may make will. (Ariz. Rev. Stat. 14-2501). Spouse's power of testamentary disposition of community property limited to one-half. (Ariz. Rev. Stat. 14-3101). Testator may dispose of his property in any manner he wishes, subject, however, to right of surviving spouse and dependent children to statutory allowances. (Ariz. Rev. Stat. 14-2401 et seq.). Testator may devise or bequeath property to existing written trust, and terms of such trust instrument govern property even though trust may be amended or revoked after execution of will or after death of testator. (Ariz. Rev. Stat. 14-2511). Heir must survive decedent by 120 hours. (Ariz. Rev. Stat. 14-2104).

Execution.

Will must be in writing, signed by testator or by someone in his presence and at his direction. Will must be signed by at least two persons, within reasonable time after witnessed either signing or acknowledgment of signature or will by testator. Intent to make will may be shown by extrinsic evidence. (Ariz. Rev. Stat. 14-2502). Testator may incorporate existing document into will if will's language manifests this intent and sufficiently describes document. (Ariz. Rev. Stat. 14-2510).

Holographic Will.

Will which does not comply with Ariz. Rev. Stat. 14-2502 is valid as holographic will, whether or not witnessed, if signature and material provisions are in handwriting of testator. (Ariz. Rev. Stat. 14-2503).

Nuncupative Will.

Not recognized.

Self-Proved Will.

Any will may be simultaneously executed, attested and made self-proved by acknowledgment thereof by testator and affidavits of witnesses, each made before officer authorized to administer oaths under laws of state where execution occurs and evidenced by officer's certificate, under official seal, in form and content substantially as follows (Ariz. Rev. Stat. 14-2504):

Form

I, ..., the testator, sign my name to this instrument this . . . . day of . . . . ., 20. . . ., and being first duly sworn, do declare to the undersigned authority that I sign and execute this instrument as my will and that I sign it willingly or willingly direct another to sign for me, that I execute it as my free and voluntary act for the purposes expressed in that document, and that I am eighteen years of age or older, of sound mind, and under no constraint or undue influence.

. . . .

Testator

We, ..., ..., the witnesses, sign our names to this instrument, being first duly sworn and do declare to the undersigned authority that the testator signs and executes this instrument as his/her will and that he/she signs it willingly, or willingly directs another to sign for him/her, and that each of us, in the presence and hearing of the testator, signs this will as witness to the testator's signing, and that to the best of our knowledge the testator is eighteen years of age or older, of sound mind, and under no constraint or undue influence.

. . . .

Witness

. . . .

Witness

STATE OF . . . .

County of . . . .   }   ss.

Subscribed, sworn to and acknowledged before me by . . . ., the testator, and subscribed and sworn to before me by . . . . and . . . ., witnesses, this . . . . day of . . . .

. . . .

(Signed)

(SEAL)

. . . .

(Official capacity of officer)

Attested will may at any time subsequent to its execution be made self-proved by acknowledgment thereof by testator and affidavits of witnesses, each made before officer authorized to administer oaths under laws of state where acknowledgment occurs and evidenced by officer's certificate, under official seal, attached or annexed to will in form and content substantially as follows:

Form

STATE OF . . . .

County of . . . .   }   ss.

We, ... , ... and . . . . . ., the testator and the witnesses, respectively, whose names are signed to the attached or foregoing instrument being first duly sworn do declare to the undersigned authority that the testator signed and executed the instrument as the testator's will and that he/she signed willingly, or willingly directed another to sign for him/her, and that he/she executed it as his/her free and voluntary act for the purposes expressed in that document, and that each of the witnesses, in the presence and hearing of the testator, signed the will as witness and that to the best of his/her knowledge the testator was at that time eighteen years of age or older, of sound mind and under no constraint or undue influence.

. . . .

Testator

. . . .

Witness

. . . .

Witness

Subscribed, sworn to and acknowledged before me by . . . . . . , the testator, and subscribed and sworn to before me by . . . . . and . . . ., witnesses, this . . day of . . . .

(SEAL)

. . . .

(Signed)

. . . .

(Official capacity of officer)

Revocation.

Will or any part thereof is revoked by subsequent will which revokes prior will or part of such will expressly or by inconsistency or by its being burned, torn, canceled, obliterated or destroyed, with intent and for purpose of revoking it, whether or not the burn, tear or cancellation touched any of words of will, by testator or by another person in his presence and by his direction. (Ariz. Rev. Stat. 14-2507). In case of subsequent annulment, divorce or dissolution of marriage, all provisions in will, including provisions conferring some power or office, in favor of former spouse or any issue of former spouse not also issue of testator, are revoked unless will expressly provides otherwise. Decree of legal separation not terminating marital status is not considered divorce or dissolution. Property prevented from passing to former spouse because of revocation passes as if former spouse failed to survive decedent, and other provisions conferring some power or office on former spouse are interpreted as if spouse failed to survive decedent. If provisions are revoked solely by application of this provision, they are revived by testator's remarriage to former spouse. (Ariz. Rev. Stat. 14-2804). No other change of circumstances revokes will or any part thereof. (Ariz. Rev. Stat. 14-2508).

Revival.

If second will which, had it remained effective at death, would have revoked first will in whole or in part, is thereafter revoked by acts under Ariz. Rev. Stat. 14-2507, first will is revoked unless it is evident from circumstances of revocation of second will or from testator's contemporary or subsequent declarations that he intended first will to take effect as executed. If second will is thereafter revoked by third will, first will is revoked in whole or in part except to extent it appears from terms of third will that testator intended first will to take effect. (Ariz. Rev. Stat. 14-2509).

Testamentary Gifts to Subscribing Witnesses.

Will or any provision thereof is not invalid because will is signed by interested witness. (Ariz. Rev. Stat. 14-2505).

Probate.

Jurisdiction over probate matters is vested in superior court. Venue for first informal or formal testacy or appointment proceedings after decedent's death is in county where decedent had his domicile at time of his death, or, if decedent was not domiciled in Arizona, in any county where property of decedent was located at time of his death. (Ariz. Rev. Stat. 14-3201). Art. 3 of Uniform Probate Code gives interested persons right to choose either formal or informal procedures in probate of estate. See topic Executors and Administrators for material variations from Official Text of Code.

Abatement.

Unless will expresses order of abatement, express or implied purpose of devise would be defeated by order of abatement provided by statute, shares of distributees abate in following order: (1) Property not disposed of by will; (2) residuary devises; (3) general devises; and (4) specific devises. For purposes of abatement, general devise charged on any specific property or fund is specific devise to extent of value of property on which it is charged. Abatement within each classification is in proportion to amounts of property beneficiaries would have received if full distribution of property had been made in accordance with terms of will. (Ariz. Rev. Stat. 14-3902).

Unclaimed Legacies.

See topic 13.07 Descent and Distribution, subhead Escheat.

Pretermitted Children.

Intestate share is given to any child born or adopted after execution of will, and not provided for therein, unless: (1) Will shows omission was intentional; (2) testator had one or more children when will was executed and devised substantially all his estate to parent of omitted child; (3) testator provided for child by transfer outside will and statements of testator, amount of transfer or other evidence show that such transfer was intended to be in lieu of testamentary provision; (4) testator devised all or substantially all of estate to other parent of omitted child. If will fails to provide for living children solely because testator believes, at time of execution, that child is dead, child receives intestate share. Where pretermitted child takes share of estate, devises made by will abate as provided in Ariz. Rev. Stat. 14-3902. (Ariz. Rev. Stat. 14-2302).

Lapse.

If devisee who is grandparent or lineal descendant of grandparent of testator is dead at time of execution of will, fails to survive testator or is treated as if he predeceased testator, issue of deceased devisee who survive testator by 120 hours take in place of deceased devisee. If all are of same degree of kinship to devisee, they take equally, but, if of unequal degree, those of more remote degree take by representation. This anti-lapse rule also applies to one who would have been devisee under class gift if he had survived testator. (Ariz. Rev. Stat. 14-2603). Except as provided in Ariz. Rev. Stat. 14-2605, if devise other than residuary devise fails for any reason, it becomes part of residue, or, if residue is devised to two or more persons and share of one of residuary devisees fails for any reason, his share passes to other residuary devisee or to other residuary devisees in proportion to their interests in residue. (Ariz. Rev. Stat. 14-2604).

Contribution.

No statutory provision except for share of pretermitted child. See subhead Pretermitted Children, supra.

Exoneration.

Specific devise passes subject to any mortgage existing at date of death, without right of exoneration regardless of any general directive in will to pay debts. (Ariz. Rev. Stat. 14-2607).

Foreign Executed Wills.

Written will is valid if its execution complies with law at time of execution of place where will is executed, or with law of place where, at time of execution or at time of death, testator is domiciled, has place of abode or is national. (Ariz. Rev. Stat. 14-2506).

Foreign Probate Wills.

Art. 4 of Uniform Probate Code adopted without material variations. See topic 13.09 Executors and Administrators.

Simultaneous Death.

Uniform Simultaneous Death Act adopted. (Ariz. Rev. Stat. 14-2702).

Small Estates.

See topic 13.09 Executors and Administrators, subhead Small Estates.

Living Wills and Health Care Directives.

Person may execute health care power of attorney (Ariz. Rev. Stat. 36-3221), pre-hospital medical care directive (Ariz. Rev. Stat. 36-3251), and living will (Ariz. Rev. Stat. 36-3261). Optional forms in statute. Out-of-state health care directives are valid in Arizona if valid in place where and at time when it was adopted, and if it does not conflict with Arizona criminal laws. (Ariz. Rev. Stat. 36-3208). Health care decisions for adult incapacitated persons made by statutorily-determined surrogate, except for decision to stop artificial administration of food or fluid. (Ariz. Rev. Stat. 36-3231). Interested persons may challenge directive or surrogate in superior court. (Ariz. Rev. Stat. 36-3206).

Person may execute pre-hospital medical care directive banning medical personnel from performing specified emergency procedures. (Ariz. Rev. Stat. 36-3251). Form not prepared by Department of Health Services may be used if it meets requirements of this section. (Ariz. Rev. Stat. 36-3251[J]).

14 FAMILY

14.01 ADOPTION:

Child, or foreign born person 21 or under who is not illegal alien, and who is present within state at time petition for adoption is filed, may be adopted. (Ariz. Rev. Stat. 8-102). Child is person under 18 years of age. (Ariz. Rev. Stat. 8-101). Department of Economic Security regulates adoption agencies (Ariz. Rev. Stat. 8-126) and subsidizes parents adopting child otherwise unadoptable because of physical, mental, developmental, emotional conditions; age, race, sibling relationship or nationality. (Ariz. Rev. Stat. 8-141, Ariz. Rev. Stat. 8-144). Department of Economic Security can enter into compact with other states to provide for reciprocal enforcement of adoption assistance agreements. (Ariz. Rev. Stat. 8-171 et seq.).

Adoptive parents or guardian of adoptee who is at least 18, adoptee who is at least 21, any progeny of deceased adoptee who is at least 21, spouse of deceased adoptee, birth parents of adoptee, parents of deceased birth parent, and biological sibling of deceased adoptee may use services of confidential intermediary to arrange contacts and to obtain information relating to adoption. (Ariz. Rev. Stat. 8-134[A]). State-licensed adoption agency, Department of Economic Security or individual who meets certain requirements may serve as confidential intermediary. (Ariz. Rev. Stat. 8-134[B], Ariz. Rev. Stat. 8-134[F] to [G]).

Consent Required.

Child if age 12 or over; both birth parents unless their parental rights have been judicially terminated or they previously consented to agency placement; court appointed guardian which has been given authority to consent; agency which has been given authority to consent by parents or through legal proceedings; and Department of Economic Security, unless waived by court. (Ariz. Rev. Stat. 8-106). Consent is irrevocable unless obtained by fraud, duress or undue influence. (Ariz. Rev. Stat. 8-106). Consents must be in writing, signed by person giving consent and witnessed or acknowledged. Consent given within 72 hours of birth of child is invalid. (Ariz. Rev. Stat. 8-107).

Before mother consents to adoption, affidavit signed by mother listing all potential fathers must be filed with court. Notice under civil service of process must be served on all potential fathers. Notice must inform potential fathers of planned adoption and of possible right to grant or withhold consent. (Ariz. Rev. Stat. 8-106). Persons claiming paternity may file notice of willingness and intent to support child in "putative father registry" with Department of Health Services. Court shall determine whether claimant is father, and no final decree of adoption may be filed without diligent search of registry. (Ariz. Rev. Stat. 8-106.01). Failure to file paternity action within 30 days of notice bars potential fathers from bringing action to assert interest in child and waives any right to be notified of judicial hearings regarding child's adoption. (Ariz. Rev. Stat. 8-106 to Ariz. Rev. Stat. 8-106.01).

Condition Precedent.

Certification by court of fitness to adopt. Certification issued after investigation by officer of court, person licensed by department of economic security, or state adoption division. (Ariz. Rev. Stat. 8-105). Certification not required for spouse of natural or legal parent or of uncle, aunt, adult sibling, grandparent or great-grandparent of whole or half blood or by marriage or adoption if child resided with person for 24 months prior to death of relative and is not ward of court. Full investigation not required if person previously adopted child or is state licensed foster parent. Update report must supplement prior certification or licensing report. (Ariz. Rev. Stat. 8-105).

Jurisdiction and Venue.

Jurisdiction of adoption cases is vested in superior court (Ariz. Rev. Stat. 8-102.01) and venue is in county in which petitioner resides (Ariz. Rev. Stat. 8-104).

Petition and Proceedings.

Any adult person may adopt another adult person who is stepchild, niece, nephew, cousin or grandchild of adopting person, by agreement approved by adoption court. Foster parent may adopt adult if adoptee was juvenile when placed in foster parent's care and continuous five year familial relationship exists. Agreement shall be in writing and contain consent of both parties. (Ariz. Rev. Stat. 14-8101). Married person, not legally separated, cannot adopt adult person without consent of adopting person's spouse. (Ariz. Rev. Stat. 14-8101[C]). Necessary elements of petition for adoption set forth in Ariz. Rev. Stat. 14-8101(F). Husband and wife may jointly adopt children. (Ariz. Rev. Stat. 8-103). Commenced by verified petition. (Ariz. Rev. Stat. 8-109). Limited payments available to parents of child placed for adoption, including living expenses, with court order; these payments, however, do not obligate birth mother to place child for adoption and valid consent to adoption can only be given after child's birth. (Ariz. Rev. Stat. 8-114[A] to [B]). Limited payments available to attorney assisting in adoption. (Ariz. Rev. Stat. 8-114[D]). Investigation and written report required. (Ariz. Rev. Stat. 8-105). Accounting of adoption-related expenditures required. (Ariz. Rev. Stat. 8-114). Date for removal hearing varies. Removal from adoptive home only by juvenile court order or voluntary return to placing agency. Petitioners have right of physical custody, capacity to give medical, social and athletic consent, and support responsibility during probationary period. (Ariz. Rev. Stat. 8-113). Attorney assisting in direct-placement adoption must file affidavit confirming compliance with adoption laws. (Ariz. Rev. Stat. 8-130). Filing fee, $115. Person contesting adoption proceedings must pay $46 to clerk of court. (Ariz. Rev. Stat. 12-284). Court may charge reasonable fee for costs of pre-adoption investigation of prospective parents. (Ariz. Rev. Stat. 8-133[B]).

Decree.

No interlocutory decree. Court order is final. (Ariz. Rev. Stat. 8-116).

Name.

Petition gives name of child and change of name, if desired. (Ariz. Rev. Stat. 8-109).

Prohibition of Racial Preferences.

Adoption placement must not be denied based on race or national origin of adoptive parents or child. (Ariz. Rev. Stat. 8-105.01).

Foster Parents.

Child must not be removed from foster parents solely because foster parents began adoption proceedings. (Ariz. Rev. Stat. 8-105.02). Department of economic security shall inform licensed foster parent of department's intent to remove child and place child in another foster care placement, unless reason for removal is to protect child from risk of harm, place child in permanent placement, reunite siblings, place child in kinship foster home, place child in least restrictive setting or therapeutic setting, or place child in accordance with Indian Child Welfare Act. (Ariz. Rev. Stat. 8-515.05). If licensed foster parent disagrees with removal, parent shall inform department of economic security within 24 hours and department shall convene case conference to review reasons for removal. (Ariz. Rev. Stat. 8-515.05). If foster parent must leave foster child in custody of another person, foster parent must notify case manager. (Ariz. Rev. Stat. 8-511).

Effect of Adoption.

Upon entry of decree, child receives all rights natural child of adopting parents would have. All rights, duties, etc., between natural parents and child are severed except that, when adoptive parent is spouse of natural parent, relationship to that parent is unchanged. (Ariz. Rev. Stat. 8-117). State registrar must establish new certificate of birth for certain foreign-born adoptees. (Ariz. Rev. Stat. 36-338).

Criminal Penalties.

Knowing violation of adoption laws is punishable as felony. (Ariz. Rev. Stat. 8-128).

14.02 ALIMONY:

See topic 14.05 Dissolution of Marriage.

14.03 COMMUNITY PROPERTY:

See topic 14.09 Husband and Wife.

14.04 DESERTION:

See topic 14.05 Dissolution of Marriage.

14.05 DISSOLUTION OF MARRIAGE:

Governed by Ariz. Rev. Stat. 25-311 et seq.

Grounds for Absolute Dissolution.

Court will enter decree of dissolution of marriage if residency requirements (one party domiciled for 90 days prior to filing) are met, conciliation provisions of Ariz. Rev. Stat. 25-381.09 either do not apply or have been met, marriage is irretrievably broken, or, if marriage is covenant marriage, any of grounds in Ariz. Rev. Stat. 25-903 are met, and, to extent it has jurisdiction, court has considered and provided for child custody and support, spousal maintenance, and property disposition. (Ariz. Rev. Stat. 25-312).

Grounds for Legal Separation.

Court will enter decree of legal separation if requirements for dissolution of marriage have been met (except, as to marriage being irretrievably broken, enough if one or both parties desire to live separately or, if marriage is covenant marriage, any of grounds in Ariz. Rev. Stat. 25-904 are met), and if other party does not object to decree. If other party objects to decree, court will direct that pleadings be amended to seek dissolution once 90-day domicile requirement is met. Decree of separation ends community property rights and liabilities unless parties agree otherwise. (Ariz. Rev. Stat. 25-313).

Annulment.

See topic 14.11 Marriage.

Residence Requirements.

Prior to issuance of decree dissolving marriage, one of parties, at time action is commenced, must be domiciled in state, or stationed in state while member of armed services, for 90 days. (Ariz. Rev. Stat. 25-312). For issuance of decree of legal separation, one of parties, at time action is commenced, must be domiciled in state or stationed in state while member of armed services. (Ariz. Rev. Stat. 25-313).

Jurisdiction.

Superior court vested with original jurisdiction to hear and decide matters relating to dissolution of a marriage. (Ariz. Rev. Stat. 25-311).

Fees.

See Ariz. Rev. Stat. 12-284.

Pleading.

Verified petition must set forth birthdate, occupation and address of parties; length of domicile in this state; date and place of marriage; names, birthdates and addresses of children; and, if duty of support exists, parties must file social security numbers of each party and affected children. (Ariz. Rev. Stat. 25-314). Only defense to petition of dissolution or separation is that marriage is not irretrievably broken. If marriage is covenant marriage, it is defense that none of grounds in Ariz. Rev. Stat. 25-903 or Ariz. Rev. Stat. 25-904 are met. (Ariz. Rev. Stat. 25-314).

Proceedings.

Trial or hearing on dissolution or separation cannot commence until 60 days after service or acceptance of process. (Ariz. Rev. Stat. 25-329).

Maintenance.

Court may grant a maintenance order for either spouse after considering all relevant factors. (Ariz. Rev. Stat. 25-319). In any proceeding in which court orders person to pay spousal maintenance, court may assign that person’s earnings to person or agency entitled to receive maintenance. (Ariz. Rev. Stat. 25-504). Person obligated to pay or person receiving support may file request for ex parte order of assignment. (Ariz. Rev. Stat. 25-504). Without hearing, superior court clerk must order assignment of person’s income sufficient to pay amount requested. (Ariz. Rev. Stat. 25-504). Obligor has 14 days to contest assignment before employer deducts amount. (Ariz. Rev. Stat. 25-504). Employer or payor who does not comply with terms of assignment may be liable for amounts not paid and subject to contempt. (Ariz. Rev. Stat. 25-504). Court may order assignment although person owed support has not requested it. (Ariz. Rev. Stat. 25-504). Assignment has priority over all other attachments, executions, garnishments or assignments. (Ariz. Rev. Stat. 25-504). Out-of-state support orders may produce ex parte assignment of earnings. (Ariz. Rev. Stat. 25-504). Clerk of court may provide consumer reporting agencies with copies of court orders obligating person to pay child support or spousal maintenance. (Ariz. Rev. Stat. 12-283). Failure to pay court ordered spousal maintenance is guilty of class 1 misdemeanor. (Ariz. Rev. Stat. 25-511.01).

Division of Property of Spouses.

See subhead Disposition of Property, infra.

Disposition of Property.

Community property system of distribution. Court assigns each spouse's sole and separate property and divides community, joint tenancy, and other property held in common equitably, though not necessarily in kind, without regard to marital misconduct. Property acquired outside state is deemed community property regardless of date of acquisition if such property would have been community property if acquired in Arizona. Community, joint tenancy or other common property not disposed of by court is held by parties as tenants in common. Court may assign responsibility for community debt interest or equity in property, child support, spousal maintenance to either party, or both. (Ariz. Rev. Stat. 25-318). Court will order equal possession of liquid assets upon request by either party unless good cause exists. (Ariz. Rev. Stat. 25-315). Court may consider accrued or accruing taxes upon sale, receipt or disposition when dividing property. (Ariz. Rev. Stat. 25-318). Court may issue Domestic Relations Order that provides for portion of spouse's retirement benefit plan to be distributed to former spouse. (Ariz. Rev. Stat. 38-822).

Change of Wife's Name.

Court will order restoration of former name of any party upon request at any time prior to court signature of decree of dissolution or annulment. (Ariz. Rev. Stat. 25-325).

Custody of Children.

Superior court vested with jurisdiction to decide child custody matters pursuant to statutory directives. (Ariz. Rev. Stat. 25-401). Court will award custody based on determination of best interests of child. (Ariz. Rev. Stat. 25-403). Court may order sole or joint custody. (Ariz. Rev. Stat. 25-403.01). Court may order joint custody over parent's objection if in child's best interests. (Ariz. Rev. Stat. 25-403.01). Parents must submit proposed parenting plan before joint custody awarded. (Ariz. Rev. Stat. 25-403.02). Court will not order joint custody where significant history of domestic violence. (Ariz. Rev. Stat. 25-403.03). Rebuttable presumption against parent who committed act of domestic violence that custody award against child's best interests. (Ariz. Rev. Stat. 25-403.03). Court may place conditions on parenting time of parent who committed act of domestic violence. (Ariz. Rev. Stat. 25-403.03). Rebuttable presumption against parent convicted of drug offense. (Ariz. Rev. Stat. 25-403.04). No motion to modify custody order may be made for one year unless child's physical, mental, moral or emotional health is seriously endangered or after return of military deployed parent from outside U.S. if court entered order in contemplation or during military deployment. (Ariz. Rev. Stat. 25-411).

Grandparents' and Great-Grandparents' Visitation Rights.

Superior court may grant grandparents and great-grandparents visitation rights, which automatically terminate if minor child has been adopted or placed for adoption, unless spouse of natural parent that remarries adopts child. (Ariz. Rev. Stat. 25-409).

Allowance for Support of Children.

Court shall order either or both parents owing duty of support to child to pay support after considering all relevant factors. (Ariz. Rev. Stat. 25-809, Ariz. Rev. Stat. 25-320, Ariz. Rev. Stat. 25-403.09). Support may be ordered past age of majority for mentally or physically disabled child. (Ariz. Rev. Stat. 25-809, Ariz. Rev. Stat. 25-320). Parent of minor child who knowingly fails to furnish reasonable support for child commits felony. (Ariz. Rev. Stat. 25-511). Exception to duty to provide child support allowed if maternity or paternity resulted from parent's sexual contacts with person who, as result of that contact, has been found guilty of sexual conduct with minor or sexual assault. (Ariz. Rev. Stat. 25-501, Ariz. Rev. Stat. 25-511, Ariz. Rev. Stat. 25-809). Department of Economic Security shall post quarterly on Internet identifying information and photographs of at least ten nonpayers of child support for whom arrest warrants have been issued. (Ariz. Rev. Stat. 25-526). Child support at least six months in arrears may result in hearing to suspend obligor's driver's license. (Ariz. Rev. Stat. 25-517). When child support has not been awarded but court deems it appropriate, court may order payment of past child support without accrual of interest. (Ariz. Rev. Stat. 25-320). Court shall assign responsibility for providing medical insurance for child. (Ariz. Rev. Stat. 25-320). Court must order assignment of earnings of parent who is obligated to pay child support. No portion of pension fund shall be subject to attachment or garnishment. (Ariz. Rev. Stat. 9-931, Ariz. Rev. Stat. 9-968). See topic Garnishment. Employer or payor who does not comply with terms of assignment may be liable for amounts not paid and subject to contempt. Assignment has priority over all other attachments, executions, garnishments or assignments. (Ariz. Rev. Stat. 25-323, Ariz. Rev. Stat. 25-504). Parent who was formerly obligated to pay support may terminate payments upon clear and convincing evidence that paternity was established by fraud, duress or material mistake of fact and may seek reimbursement for overpayment. (Ariz. Rev. Stat. 25-503, Ariz. Rev. Stat. 25-527). On death of supporting parent, future support may be modified, revoked or commuted to lump sum payment and has priority in estate equal to right for family allowance. (Ariz. Rev. Stat. 25-327). Clerk of court may provide consumer reporting agencies with copies of court orders obligating person to pay child support or spousal maintenance. (Ariz. Rev. Stat. 12-283). Relocation of child requires 60 days' prior written notice unless previous order or written agreement, both of which must be dated within one year of proposed relocation, provides otherwise. (Ariz. Rev. Stat. 25-408).

Remarriage.

Parties may remarry immediately after final judgment. Appeal from decree of dissolution which does not challenge that marriage was irretrievably broken does not prevent a party from remarrying. (Ariz. Rev. Stat. 25-325).

Temporary Restraining Order or Permanent Injunction.

Upon filing for separation or dissolution, court clerk will order preliminary injunction to prevent parties from independently selling community property, harassing or disturbing each other or parties' children, or removing any of children from state without consent of court or other party. Certified copy of preliminary injunction may be filed by either party with sheriff in jurisdiction where party resides; moving party must show proof of service on spouse. Orders effective until final decree of dissolution or legal separation filed, or action dismissed. (Ariz. Rev. Stat. 25-315).

Court of Conciliation.

A court of conciliation may be created by superior court for purpose of preserving, promoting and protecting family life, institution of matrimony, rights of children and to provide means for reconciliation of spouses and amicable settlement of domestic controversies. Court has jurisdiction whenever controversy exists between spouses which may result in dissolution or annulment of marriage and there is minor child of either of spouses whose welfare might be affected thereby. (Ariz. Rev. Stat. 25-381.01 et seq.). Court's jurisdiction may be invoked by filing of petition for conciliation which prohibits filing of action for divorce, annulment, separate maintenance, or legal separation for period of 60 days and transfers any such action then pending to court of conciliation (Ariz. Rev. Stat. 25-381.09, Ariz. Rev. Stat. 25-381.18), which can require attendance of parties at one or more conferences as condition to further proceedings (Ariz. Rev. Stat. 25-381.23).

Uniform Child Custody Jurisdiction Act repealed effective Dec. 31, 2000.

Uniform Child Custody Jurisdiction and Enforcement Act adopted effective Dec. 31, 2000. (Ariz. Rev. Stat. 25-1001 et seq.).

Uniform Interstate Family Support Act (UIFSA).

Adopted, effective June 30, 1995. If Arizona handles case arising subsequent to June 30, 1995, from state that has not enacted UIFSA, then Revised Uniform Reciprocal Enforcement of Support Act applies. (Ariz. Rev. Stat. 25-1201 et seq.).

Separation Agreements.

Terms of agreement, except those pertaining to children, will be binding on court and incorporated into final decree if court finds that they are fair. (Ariz. Rev. Stat. 25-317).

Uniform Marriage and Divorce Act adopted. (Ariz. Rev. Stat. 25-311 et seq.).

14.06 DIVORCE:

See topic 14.05 Dissolution of Marriage.

14.07 [RESERVED]

14.08 GUARDIAN AND WARD:

Uniform Probate Code (but not 1977 or later amendments) adopted. (Ariz. Rev. Stat. 14-1102 et seq.). Permanent and/or temporary guardian may be appointed for minor. (Ariz. Rev. Stat. 8-871 to Ariz. Rev. Stat. 8-873, Ariz. Rev. Stat. 14-5201 et seq.). Permanent and/or temporary guardian may be appointed for incapacitated person. (Ariz. Rev. Stat. 14-5301 et seq.). Guardian may be appointed for foreign person. (Ariz. Rev. Stat. 14-5108). Permanent and/or temporary conservator may be appointed for protection of property of minor or person under other disability. (Ariz. Rev. Stat. 14-5401 et seq.). Court may appoint public fiduciary where no person or corporation is qualified and willing to act as guardian or conservator. (Ariz. Rev. Stat. 14-5601 et seq.). Person may for fee serve as court appointed guardian, provided he or she is registered as private fiduciary with supreme court. (Ariz. Rev. Stat. 14-5651).

Jurisdiction and Venue.

Superior court has jurisdiction over both guardianship and protective proceedings, and such proceedings involving same person may be consolidated. (Ariz. Rev. Stat. 14-5102). Venue for guardianship of minor is place where minor resides or is present. (Ariz. Rev. Stat. 14-5205). Venue for guardianship of incapacitated person is county where person resides or is present, or county where court sits which has ordered person admitted to institution. (Ariz. Rev. Stat. 14-5302). For subsequent proceedings, court where minor ward resides has concurrent jurisdiction with court that appointed guardian or in which acceptance of appointment was filed (Ariz. Rev. Stat. 14-5211); for other guardianships, court where ward resides has concurrent jurisdiction with court in which acceptance of appointment was filed (Ariz. Rev. Stat. 14-5313).

Court in which petition seeking appointment of conservator is filed has exclusive jurisdiction to determine need for conservator or other protective order until proceedings are terminated; exclusive jurisdiction to determine how estate of protected person will be managed, expended or distributed; and concurrent jurisdiction to determine validity of claims against person, estate or title of protected person. (Ariz. Rev. Stat. 14-5402). Venue is in county where person to be protected resides, regardless of appointment of guardian elsewhere, or, if person to be protected is nonresident, county in which he has property. (Ariz. Rev. Stat. 14-5403).

Selection of Guardian.

Guardian of unmarried minor may be appointed by parent’s will if minor under 14 years and if minor 14 years or older does not object, or by court if all parental rights of custody have been terminated or suspended. (Ariz. Rev. Stat. 14-5202 to Ariz. Rev. Stat. 14-5204). Any person whose appointment would be in best interests of minor may be guardian, and court may appoint nominee of minor 14 years or older. (Ariz. Rev. Stat. 14-5206). Proposed temporary or permanent guardian or conservator, must provide court, under oath, information requested in Ariz. Rev. Stat. 14-5106. Guardian unrelated to minor may be appointed only after check of fingerprint and criminal history records. (Ariz. Rev. Stat. 14-5206). Permanent guardian may be appointed if child has been in custody of prospective guardian for at least nine months and reunification with parents is not practical, child has been adjudicated dependent child and adoption of child is unlikely due to fact termination of parental rights would be found not in child's best interest. (Ariz. Rev. Stat. 8-871). Any qualified person may be guardian of incapacitated person. (Ariz. Rev. Stat. 14-5311). Court shall appoint qualified investigator to inquire into proposed guardian's background and suitability, as well as to condition of alleged incapacitated person. (Ariz. Rev. Stat. 14-5308). Priority of selection is guardian or conservator, individual or corporation nominated by incapacitated person, person nominated in incapacitated person's most recent durable power of attorney, spouse, adult child, parent, relative with which incapacitated person has resided for more than six months, nominee of person caring for incapacitated person or paying benefits to him, Department of Veterans' Services under certain circumstances, fiduciary, guardian, or conservator. (Ariz. Rev. Stat. 14-5311). If permanent guardian is unable or unwilling to continue to serve as permanent guardian, permanent guardian, division or interested party may file motion for appointment. (Ariz. Rev. Stat. 14-874). Upon filing of motion, temporary custody orders may be granted to protect best interests of child. (Ariz. Rev. Stat. 14-874). Conservator may be individual or corporation, with general power to serve as trustee. Priority of consideration is conservator, guardian of property, or other fiduciary appointed by court where protected person resides, nominee of protected person if latter is 14 years and has sufficient mental capacity, person nominated in protected person's most recent durable power of attorney, spouse, adult child, parent or person nominated by will of deceased parent, relative with whom protected person resided more than six months and nominee of person caring for or paying benefits to protected person, Department of Veterans' Services under certain circumstances, fiduciary, guardian, or conservator. (Ariz. Rev. Stat. 14-5410).

Qualification.

Guardian, conservator, or private fiduciary, unless national banking association, holder of state banking permit, savings and loan authorized to conduct trust business in state, title insurance company qualified to do business in state, trust company holding certificate to engage in trust business from superintendent of banks, or public fiduciary, may be required to furnish bond. (Ariz. Rev. Stat. 14-5105, Ariz. Rev. Stat. 14-5411 to Ariz. Rev. Stat. 14-5412, Ariz. Rev. Stat. 14-5651).

Powers and Duties.

Guardian of minor ward has powers and responsibilities of custodial parent regarding ward's support, care and education, except not personally liable for ward's expenses and not liable to others, solely by reason of guardianship, for acts of ward. Other powers and duties are enumerated. (Ariz. Rev. Stat. 14-5209). Permanent guardian acquires legal custody of minor, but does not terminate parent's rights or child's inheritance rights. Other powers and duties are enumerated. (Ariz. Rev. Stat. 8-871 to Ariz. Rev. Stat. 8-872). Guardian of incapacitated person has powers, rights and duties of parent, except not liable to others, solely by reason of guardianship, for acts of ward. Where conservator also appointed, guardian controls custody and care of ward and is entitled to reasonable compensation for services rendered. (Ariz. Rev. Stat. 14-5312). Guardian shall submit written report to court on each anniversary date of qualification as guardian, on resignation or removal, and on termination of ward's disability. (Ariz. Rev. Stat. 14-5315). Conservator has general duty to act as fiduciary, observing standard of care prescribed by statute for trustees. Other powers and duties include inventory, record keeping, accounting, holding title to all of protected person's property, power of attorney and enumerated statutory powers of administration, distribution, estate planning and claims payment. (Ariz. Rev. Stat. 14-5418 to Ariz. Rev. Stat. 14-5420, Ariz. Rev. Stat. 14-5424 to Ariz. Rev. Stat. 14-5428, Ariz. Rev. Stat. 36-3281 to Ariz. Rev. Stat. 36-3286).

Permanent Guardianship Subsidy.

Subsidies provided to permanent guardians who have applied for all benefits to which child is entitled from other state or federal programs. Subsidies shall not exceed maintenance payment allowable for adoption subsidy, and shall be offset by all benefits from other state or federal programs to which child is entitled. (Ariz. Rev. Stat. 8-814).

Real Estate.

Conservator has power, without court authorization, to collect, hold and retain assets, including land in another state, until he judges disposition should be made; to acquire and dispose of assets, including land in another state, for cash or on credit, at public or private sales; to repair, alter, improve or demolish buildings and other structures; to subdivide, develop or dedicate land; to enter into leases; to grant and take options; and has other enumerated powers. (Ariz. Rev. Stat. 14-5424).

Caveat.

For disclosure requirements in conveyance of real property made or taken in representative capacity, see category 21 Property, topic 21.06 Deeds.

Liabilities.

Conservator may be sued in his fiduciary capacity for claims based on contracts entered into in that capacity, on obligations arising from ownership or control of estate, or on torts committed in course of administration of estate, regardless of individual liability therefore. (Ariz. Rev. Stat. 14-5429).

Accounts.

Conservator must file accounting at least annually, unless for good cause shown filing requirement is relieved by court. (Ariz. Rev. Stat. 14-5419).

Termination of Guardianship.

Guardianship of minor ward terminates on death, resignation or removal of guardian, on minor's death, adoption, marriage or attainment of majority, but guardianship cannot be terminated by resignation until approved by court. (Ariz. Rev. Stat. 14-5210). Permanent guardianship terminates if there is significant change of circumstances. Party petitioning for revocation must prove changed circumstances by clear and convincing evidence and show that revocation is in child's best interests. (Ariz. Rev. Stat. 8-873). Guardianship of incapacitated person terminates on death of guardian or ward, on determination of incapacity of guardian, on removal or resignation of guardian or on formal denial of probate where testamentary appointment under informally probated will. (Ariz. Rev. Stat. 14-5306). Conservatorship is terminated on death if successor waives conservator's final account or upon filing of conservator's closing statement, resignation or removal of conservator for good cause, or on determination that minority or disability of protected person has ceased. (Ariz. Rev. Stat. 14-5415, Ariz. Rev. Stat. 14-5419, Ariz. Rev. Stat. 14-5430).

Insane Persons.

Persons impaired because of mental illness, mental deficiency or mental disorder are included in definition of incapacitated persons. (Ariz. Rev. Stat. 14-5101).

Foreign Guardians.

If no local conservator appointed and no petition in protective proceeding pending, domiciliary foreign conservator may, on filing certified copy of appointment and bond with court in county where protected person has property, exercise as to assets in state all powers of local conservator and maintain action subject to general conditions imposed on nonresident parties.

(Ariz. Rev. Stat. 14-5432).

Transfers to Minors.

See topic 14.10 Infants.

Uniform Fiduciaries Act adopted. (Ariz. Rev. Stat. 14-7501 et seq.).

Uniform Simplification of Fiduciary Security Transfers Act repealed by 1995, c. 158, § 6. See Ariz. Rev. Stat. 47-8101 et seq. for same subject matter.

14.09 HUSBAND AND WIFE:

Separate Property.

All property, real or personal, owned by either spouse before marriage or thereafter acquired by gift, devise or descent, and increase, rents, issues and profits thereof, is separate property of such spouse. (Ariz. Rev. Stat. 25-213). Each spouse has sole management, control and disposition rights of his or her separate property. (Ariz. Rev. Stat. 25-214). Separate property of spouse is not liable for separate debts or obligations of other spouse, absent agreement of property owner to contrary. (Ariz. Rev. Stat. 25-215). Separate property of married person 18 years or older may be conveyed without spouse joining in conveyance. (Ariz. Rev. Stat. 33-451).

Community Property.

All property acquired other than by gift, devise, descent by either husband or wife during marriage or that acquired after service of petition that results in dissolution of marriage, legal separation or annulment. (Ariz. Rev. Stat. 25-211).

Upon person’s death, his separate property and his share of community property pass by testamentary disposition or by intestate succession, subject to allowances, creditors’ claims and administration costs. (Ariz. Rev. Stat. 14-3101). By intestacy, surviving spouse receives decedent’s share of community property and all his separate property when expressly declared in grant, transfer or devise to be estate in community property with right of survivorship, and if no surviving issue or if surviving issue also are issue of surviving spouse. If surviving issue are not issue of surviving spouse, decedent’s share of community property and one-half of decedent’s separate property passes to issue. (Ariz. Rev. Stat. 14-2102 to Ariz. Rev. Stat. 14-2103).

Joint tenancy in husband and wife may be created, provided it clearly appears that spouses agreed that property would be accepted in such status. Agreement may be shown by extrinsic evidence. (11 Ariz. App. 395, 464 P.2d 982).

Either spouse separately may acquire, manage, control or dispose of community property, or bind community (Ariz. Rev. Stat. 25-214); but any transaction of guaranty, indemnity, or suretyship and any conveyance or encumbrance of community realty requires joinder of spouse (Ariz. Rev. Stat. 25-214[c], Ariz. Rev. Stat. 33-452).

Community property is liable, in part, for premarital separate debts of spouse incurred after Sept. 1, 1973, and for spouse’s debts incurred outside Arizona during marriage if such debts would have been community debts if incurred in Arizona. (Ariz. Rev. Stat. 25-215).

Marital rights in property which is acquired in state during marriage by persons married outside of Arizona who then move into state are controlled by Arizona law. (Ariz. Rev. Stat. 25-217).

See also topic 14.05 Dissolution of Marriage, subhead Disposition of Property.

Matrimonial Agreements.

See topic 14.11 Marriage, subhead Matrimonial Agreements.

Contracts.

Except with regard to real property and guarantyship, indemnity or suretyship, either spouse may contract debt and otherwise act for benefit of community. In action on such debt, spouses must be sued jointly and debt satisfied, first from community property, and second from separate property of spouse contracting debt. (Ariz. Rev. Stat. 25-215).

Domestic Violence.

Diversion program for individuals facing prosecution for domestic violence offense. Under diversion program, defendant will be placed on probation, terms of which may include fine, incarceration, restitution, and completion of domestic violence offender treatment program or another counseling or diversionary program. (Ariz. Rev. Stat. 13-3601). Person convicted of misdemeanor domestic violence must complete domestic violence offender treatment program. Second offender may be placed on supervised probation and may be incarcerated. Third or subsequent charge may be filed as felony and conviction shall result in incarceration. (Ariz. Rev. Stat. 13-3601.01). Person convicted of aggravated domestic violence is not eligible for release on any basis until person has served certain number of months in jail. (Ariz. Rev. Stat. 13-3601.02). If domestic violence involved pregnant woman—increased sentencing allowed. (Ariz. Rev. Stat. 13-711).

Agency.

Either spouse may act as attorney in fact for the other with respect to either separate property or community property if so authorized by other spouse and authorization is properly executed and acknowledged. (Ariz. Rev. Stat. 33-454).

Conveyances, Encumbrances, Etc.

Spouses have equal management, control and disposition rights over their community property and have equal power to bind community. (Ariz. Rev. Stat. 25-214).

Court of Conciliation.

See topic 14.05 Dissolution of Marriage.

Interference With Marital Relations.

Common law action for alienation of affections abolished. (Ariz. Rev. Stat. 25-341).

Desertion and Nonsupport.

See topic 14.05 Dissolution of Marriage, subheads Revised Uniform Reciprocal Enforcement of Support Act and Uniform Interstate Family Support Act (UIFSA).

14.10 INFANTS:

Age of Majority.

18 for both sexes. (Ariz. Rev. Stat. 1-215). Exception is minimum age (21) for consumption of alcoholic beverages.

Support of Minor.

See subheads Parental Responsibility, Revised Uniform Reciprocal Enforcement of

Support Act, and Uniform Interstate Family Support Act (UIFSA), infra.

Juvenile Court.

See category 6 Courts and Legislature, topic 6.01 Courts.

Parental Responsibility.

Parents liable for willful torts of minor. See category 5 Civil Actions and Procedure, topic 5.09 Damages. Parents or legal guardians civilly liable for shoplifting thefts of minor. (Ariz. Rev. Stat. 12-692). Parents liable for support of child until age 18 or completion of high school or equivalency program, if child becomes 18 before completion, but only until child reaches 19 unless Court orders otherwise. (Ariz. Rev. Stat. 25-501). Department of Economic Security may act as payee for benefits where it has care, custody or control of child or where it is paying cost of care (Ariz. Rev. Stat. 41-1954[B]), and may seek support order if public assistance payments are being made (Ariz. Rev. Stat. 46-401 et seq.). Court must order assignment of earnings of parent who is obligated to pay child support and may impose lien on property if parent is delinquent at least two months. (Ariz. Rev. Stat. 25-504, Ariz. Rev. Stat. 25-516). Notice and failure to appear in court result in child support arrest warrant, with fee necessary before release. (Ariz. Rev. Stat. 25-681). Liability for child support payments must be disclosed when filing for unemployment compensation. Department of Economic Security shall conduct automated comparison of social security numbers reported by employers and social security numbers on record in state registry of child support orders. If comparison reveals match, Department of Economic Security shall issue income withholding order to employer of person obligated to pay, but employer cannot be penalized for failing to comply with these reporting requirements. (Ariz. Rev. Stat. 23-722.01). Parental obligations of financial support, medical support, child support, and tort liability terminated with emancipation order. (Ariz. Rev. Stat. 12-2452).

Termination of Parental Rights.

Parent-child relationship may be terminated due to abandonment, neglect, willful abuse, mental illness, mental deficiency, chronic drug or alcohol abuse, certain felony convictions, relinquishment, potential father's failure to timely file paternity action or where, pursuant to court order: (1) Child has been in out-of-home placement for cumulative period of nine months and parent has not remedied circumstances which caused child to be placed out-of-home; (2) child has been out-of-home for cumulative period of 15 months, parent has been unable to remedy circumstances which caused child to be placed out-of-home, and there is substantial likelihood that parent cannot exercise proper and effective parental care and control in near future; (3) identity of parent unknown following three months of diligent effort to identify and locate parent; (4) parent had parental rights to another child terminated within preceding two years for same cause and is currently unable to discharge parental responsibilities due to same cause; or (5) child cared for in out-of-home placement, responsible agency made diligent efforts to reunify and (a) child, pursuant to court order, returned to legal custody of parent from whom child removed, (b) within 18 months thereafter, child removed from that parent's legal custody for same cause, is being cared for in out-of-home placement, and parent currently unable to discharge parental responsibilities. (Ariz. Rev. Stat. 8-533). Parental right to minor's income terminated with emancipation order. (Ariz. Rev. Stat. 12-2454).

Disabilities.

Capacity to contract and transfer property governed by common law. (Ariz. Rev. Stat. 47-1103). Infants may be required to pay reasonable price for necessaries. (53 Ariz. 336, 89 P.2d 496). Minor students 16 years or older can contract for educational loans if enrolled. (Ariz. Rev. Stat. 44-140 et seq.). Minors can contract for medical care for diagnosis and treatment of venereal disease. Minors who are emancipated, married, or homeless can contract for hospital, medical, and surgical care. (Ariz. Rev. Stat. 44-132 to 132.01). Minors 12 years or older are deemed to have consented to medical care if under influence of dangerous drug. (Ariz. Rev. Stat.

44-133.01). Parental consent generally required for abortion performed on unmarried minor. (Ariz. Rev. Stat. 36-2152).

Emancipation.

Qualified minor may file petition for emancipation. (Ariz. Rev. Stat. 12-2451). Emancipation hearing held within 90 days. (Ariz. Rev. Stat. 12-2451). Court may stay proceedings and refer parties to mediation or order investigation by Child Protective Services. (Ariz. Rev. Stat. 12-2452). Court must stay proceedings and refer parties to mediation if minor's parent or guardian objects unless mediation not in minor's best interests. (Ariz. Rev. Stat. 12-2452). Court will consider best interests of minor in determining emancipation. (Ariz. Rev. Stat. 12-2453). Emancipation order recognizes minor as adult for certain rights and responsibilities. (Ariz. Rev. Stat. 12-2454). Emancipation order terminates certain rights and responsibilities of parent or guardian. (Ariz. Rev. Stat. 12-2454). State recognizes emancipation order from other state. (Ariz. Rev. Stat. 12-2455). Veteran entitled to benefits under provisions of Servicemen's Readjustment Act of 1944, or spouse of any such veteran, is under no legal disability by reason of minority to make any contract, nor is any contract made by any such veteran, or spouse, invalid or voidable by reason of minority. (Ariz. Rev. Stat. 44-131).

Injuries and Death.

Either parent may maintain action for death or injury of child, and guardian for injury or death of ward. (Ariz. Rev. Stat. 12-612, Ariz. Rev. Stat. 12-641). Child abuse punishable as criminal offense. (Ariz. Rev. Stat. 13-3623). Person is not guilty of child abuse for solely leaving unharmed newborn with safe haven provider. (Ariz. Rev. Stat. 13-3623.01). Infant less than one year of age shall not be deprived of nourishment with intent to cause or allow its death. Infant shall not be deprived of necessary lifesaving medical treatment or surgical care, except where risk to infant's life or health outweighs potential benefit of treatment or care. (Ariz. Rev. Stat. 36-2281). Health care institutions must report suspected incidents of denial of medically necessary treatment or nourishment with intent to allow death of infant. (Ariz. Rev. Stat. 36-2282). Public is to be made aware of Child Protective Services information involving child abuse, abandonment or neglect that has resulted in fatality or near fatality. (Ariz. Rev. Stat. 8-807).

Child Abuse.

Punishable as criminal offense. (Ariz. Rev. Stat. 13-3623). Behavioral health services providers must have employees fingerprinted and certify whether they are awaiting trial or have been convicted of or committed certain crimes against children. (Ariz. Rev. Stat. 36-425.03, Ariz. Rev. Stat. 41-1758.03, Ariz. Rev. Stat. 46-141). Fingerprint clearance required for Department of Economic Security employees in contact with children. (Ariz. Rev. Stat. 41-1968). Subject of investigation of child abuse, alleged victim, and alleged victim's siblings, parents, or guardians have right to privacy, with listed exceptions. (Ariz. Rev. Stat. 8-807).

Legitimacy.

Every child is legitimate child of its natural parents and entitled to support and education as if born in lawful wedlock. (Ariz. Rev. Stat. 8-601).

Maternity and Paternity Proceedings.

Regulated by Ariz. Rev. Stat. 8-106 et seq., Ariz. Rev. Stat. 25-801 et seq., and Ariz. Rev. Stat. 36-334.

Adoption.

See topic 14.01 Adoption.

Restricted Occupations.

Employment of children is regulated as to age, education, character of occupation and hours. Employment of children of specified age in prohibited occupations is misdemeanor. (Ariz. Rev. Stat. 23-230 et seq.)

Uniform Child Custody Jurisdiction Act adopted. (Ariz. Rev. Stat. 25-1001 et seq.).

Uniform Interstate Family Support Act (UIFSA).

Adopted, effective June 30, 1995. If Arizona handles case arising subsequent to June 30, 1995, from state that has not enacted UIFSA, then Arizona tribunal may make findings required by law of responding state. (Ariz. Rev. Stat. 25-1201 et seq.).

Revised Uniform Gifts to Minors Act repealed.

Uniform Transfers to Minors Act adopted with minor changes. (Ariz. Rev. Stat. 14-7651 et seq.).

Uniform Securities Ownership by Minors Act not adopted.

Interstate Compact on Juveniles adopted. (Ariz. Rev. Stat. 8-361 et seq.).

Model Minor Student Capacity to Borrow Act adopted. (Ariz. Rev. Stat. 44-140 to Ariz. Rev. Stat. 44-140.01).

14.11 MARRIAGE:

Consent Required.

Persons under 18 must have parental consent to marry. Persons under 16 must also have approval of superior court judge. (Ariz. Rev. Stat. 25-102).

License.

Persons who wish to marry must procure marriage or covenant marriage license from superior court clerk, authorized city or town clerk, authorized city or town court clerk, or designated justice of peace, and both parties must sign affidavit under oath as to age, name, residential address, and understanding that information on sexually transmitted diseases is available from county health department and that these diseases may be transmitted to unborn children. Social security numbers must be provided separately from affidavit. (Ariz. Rev. Stat. 25-121, Ariz. Rev. Stat. 25-126, Ariz. Rev. Stat. 25-127). Superior court clerk will charge and collect fee of $50 for each marriage license. (Ariz. Rev. Stat. 12-284).

Reports of Marriage.

Clerk of superior court must keep record of all licenses issued and acts of solemnization performed. Person solemnizing marriage shall endorse solemnization on license and return to clerk within 30 days. Persons must reapply if license is lost before endorsement of solemnization. Clerk must issue replacement for license bearing endorsement upon satisfaction of certain requirements. (Ariz. Rev. Stat. 25-123).

Record.

See category 10 Documents and Records, topic 10.04 Records, subhead Vital Statistics.

Blood Test.

Requirement of premarital syphilis tests abolished.

Ceremony.

Solemnization must occur before 12-month marriage license application expires. (Ariz. Rev. Stat. 25-111).

All regularly licensed or ordained clergymen, judges of courts of record, municipal court judges, justices of peace, justices of U.S. Supreme Court, judges of courts of appeals, district courts and courts that are created by act of Congress, bankruptcy court and tax court judges, U.S. magistrate judges, and judges of Arizona Court of Military Appeals may solemnize marriages between persons authorized to marry. (Ariz. Rev. Stat. 25-124).

Contract of Marriage.

Marriage contract must be licensed and solemnized by person authorized by law or by someone purporting to act in such capacity and believed to be such, in good faith, by at least one of parties. Requirements do not apply to conversion of existing marriage to covenant marriage. (Ariz. Rev. Stat. 25-111).

Covenant Marriage.

Couples must sign “declaration of intent”, have received premarital counseling, and have discussed obligation to seek counseling if problems. (Ariz. Rev. Stat. 25-901). Some requirements do not apply to conversion of existing marriage to covenant marriage. (Ariz. Rev. Stat. 25-902). Dissolved only because of adultery, felony with prison or death sentence, living apart one year, “ill-treatment”, abuse, drug or alcohol abuse, or both parties agree. Court may order child support and spousal maintenance. (Ariz. Rev. Stat. 25-901 et seq.).

Common Law Marriages.

Common law marriages may not be contracted in Arizona. Common law marriages valid where contracted are recognized in Arizona. See subhead Foreign Marriages, infra.

Contract or Proxy Marriages.

Not authorized. (Ariz. Rev. Stat. 25-111, Ariz. Rev. Stat. 25-125).

Prohibited Marriages.

All marriages between parents and children, grandparents and grandchildren of every degree; between brothers and sisters of half as well as whole blood; between uncles and nieces, aunts and nephews, and first cousins (except if both cousins are over 65 years old or if one of them is unable to reproduce), and between persons of same gender are void and prohibited. (Ariz. Rev. Stat. 25-101, Ariz. Rev. Stat. 25-125).

Foreign Marriages.

Marriage valid by laws of place where contracted is valid in Arizona, except prohibited marriages. Marriage contracted by Arizona residents in another state to evade Arizona law is void. (Ariz. Rev. Stat. 25-112).

Matrimonial Agreements.

Uniform Premarital Agreement Act adopted. (Ariz. Rev. Stat. 25-201 et seq.).

Annulment.

Marriage may be annulled by superior court because of existence of impediment rendering marriage void. (Ariz. Rev. Stat. 25-301).

No statute or case setting forth time within which suit for annulment on ground of nonage must be brought. Common law rule applies.

Jurisdictional and procedural requirements are same as for dissolution of marriage. Court shall divide property and establish rights concerning any children of marriage. (Ariz. Rev. Stat. 25-302).

Fees.

At commencement of each action for annulment, petitioner must pay $91 and respondent must pay $46. (Ariz. Rev. Stat. 12-284).

14.12 MARRIED WOMEN:

See topics 14.09 Husband and Wife, Marriage; categories 5 Civil Actions and Procedure, topics Actions, Evidence, subhead Witnesses; Debtor and Creditor, topic Homesteads; Documents and Records, topic Acknowledgments; Estates and Trusts, topics Executors and Administrators, Wills; Property, topics Deeds, Dower.

15 HEALTH

15.01 ABORTIONS:

No hospital, physician, or staff member of hospital may be required to facilitate or participate in abortion. No Pharmacy, hospital or health professional, and employees of such may be required to facilitate or participate in providing abortion, abortion medication, emergency contraception or medication or device intended to inhibit or prevent implantation. (Ariz. Rev. Stat. 36-2154). Parental consent is required prior to minor receiving abortion. (Ariz. Rev. Stat. 36-2152). Parents of minors may bring civil action for damages based on failure to obtain consent. (Ariz. Rev. Stat. 36-2152). Physician must inform woman of risks, alternatives, and other required information at least 24 hours prior to performing abortion. Persons prohibited from intimidating or coercing woman to have abortion. Remedies available for breach of this section. Non-physicians prohibited from performing abortions. (Ariz. Rev. Stat. 36-2153).

15.01A AGENCIES AND SERVICES:

In General.

Structure and function of state and local boards and departments of health care set forth in Ariz. Rev. Stat. 36-101 et seq., Ariz. Rev. Stat. 36-131 et seq. and Ariz. Rev. Stat. 36-181 et seq. Structure and function of state health institutions are set forth in Ariz. Rev. Stat. 36-201 et seq.

Vital Records and Public Health Statistics.

Governed by Ariz. Rev. Stat. 36-301 et seq.

Emergency Medical Services.

General provisions, and regulation of ambulances and ambulance services are set forth in Ariz. Rev. Stat. 36-2201 et seq. and Ariz. Rev. Stat. 36-2232 et seq. Responder liability limited. (Ariz. Rev. Stat. 9-500.02).

Mental Health Services.

In General.

Governed by Ariz. Rev. Stat. 36-501 et seq.

Patient’s Civil and Legal Rights.

Governed by Ariz. Rev. Stat. 36-504 et seq.

Voluntary Admissions.

Governed by Ariz. Rev. Stat. 36-518 et seq.

Court-ordered Evaluation and Treatment.

Governed by Ariz. Rev. Stat. 36-520 et seq.

Costs and Services.

Governed by Ariz. Rev. Stat. 36-545 et seq.

Judicial Review.

Governed by Ariz. Rev. Stat. 36-546 et seq.

Hospitalization in Federal Facility.

Governed by Ariz. Rev. Stat. 36-548 et seq.

Community Mental Health Residential Treatment System.

Governed by Ariz. Rev. Stat. 36-550 et seq.

15.01B ALCOHOL AND DRUG ABUSE:

In General.

Generally, see Ariz. Rev. Stat. 36-2001 et seq.

Evaluation and Treatment.

See Ariz. Rev. Stat. 36-2021 et seq.

Controlled Substances.

Regulation, distribution, and dispensing of controlled substances, and penalties for prohibited acts involving controlled substances, are governed by Uniform Controlled Substances Act. (Ariz. Rev. Stat. 36-2501 et seq.). Arizona State Board of Pharmacy monitors prescribing, dispensing, and consumption of controlled substances that are dispensed by medical practitioners. (Ariz. Rev. Stat. 36-2601 et seq.).

15.02–15.03 [RESERVED]

15.04 DURABLE POWER OF ATTORNEY:

Health Care Directives Registry.

Governed by Ariz. Rev. Stat. 36-3291 et seq.

15.05 FOOD, DRUGS, DEVICES AND COSMETICS:

Pure Food Control.

Food standards and labeling requirements are governed by Ariz. Rev. Stat. 36-901 et seq.

Nutritional Supplements.

Distribution, sale, and labeling of nutritional supplements, including Laetrile, are governed by Ariz. Rev. Stat. 36-2451 et seq.

15.06 FRAUD AND ABUSE:

In Obtaining Medicaid.

Governed by Ariz. Rev. Stat. 13-3713.

15.06A HEALTH CARE INSTITUTIONS:

In General.

Generally, see Ariz. Rev. Stat. 36-401 et seq.

Fingerprinting.

Required for any persons who provide direct care at residential facilities, nursing care institution, or home health agency. (Ariz. Rev. Stat. 36-411).

Permit and Licensing Provisions.

Governed by Ariz. Rev. Stat. 36-421 et seq. Construction or modification of any health care institution requires written permit. (Ariz. Rev. Stat. 36-421). License required for operation of health care institution. (Ariz. Rev. Stat. 36-422). Party applying for license must submit to inspection. (Ariz. Rev. Stat. 36-424). License may be revoked for failure to adhere to licensing requirements. (Ariz. Rev. Stat. 36-427).

Review of Rates, Rules, and Regulations.

Governed by Ariz. Rev. Stat. 36-436 et seq. Health care institution’s schedule of rates and charges must be reviewed and approved by director of department of health services. (Ariz. Rev. Stat. 36-436).

Licensing of Administrators.

Governed by Ariz. Rev. Stat. 36-446 et seq.

Recovery Centers.

Licensing provisions and operating standards are governed by Ariz. Rev. Stat. 36-448.51 et seq.

Residential Facilities.

Sanitation, fire and hazard inspection of adult developmental home and child developmental foster home provisions. (Ariz. Rev. Stat. 8-504).

15.06B HEALTH CARE PROFESSIONALS:

In General.

Procedure for regulation of health professions set forth. (Ariz. Rev. Stat. 32-3101 et seq.). Procedure for licensing, certification, or suspension of same set forth. (Ariz. Rev. Stat. 32-3201 et seq.).

Audiologists and Speech-language Pathologists.

Qualification, licensing, and regulation provisions. (Ariz. Rev. Stat. 36-1901 et seq.).

Behavioral Health Professionals.

Qualification, certification, and regulation provisions. (Ariz. Rev. Stat. 32-3251 et seq. and Ariz. Rev. Stat. 32-2065 et seq.).

Chiropractors.

Qualification, licensing and regulation provisions. (Ariz. Rev. Stat. 32-901 et seq.).

Dentists, Dental Hygienists, and Denturists.

Qualification, licensing and regulation provisions. (Ariz. Rev. Stat. 32-1201 et seq.).

Homeopathic Physicians.

Qualification, licensing and regulation provisions. (Ariz. Rev. Stat. 32-2901 et seq.).

Medical Doctors and Surgeons.

Qualification, licensing and regulation provisions. (Ariz. Rev. Stat. 32-1401 et seq.).

Midwives.

Qualification, licensing and regulation provisions. (Ariz. Rev. Stat. 36-751 et seq.).

Naturopathic Physicians.

Qualification, licensing and regulation provisions. (Ariz. Rev. Stat. 32-1501 et seq.).

Nurses.

Qualification, licensing and regulation provisions. (Ariz. Rev. Stat. 32-1601 et seq.).

Nutrition and Feeding Assistants.

Training programs governed by Ariz. Rev. Stat. 36-413.

Occupational Therapists.

Registration and regulation provisions. (Ariz. Rev. Stat. 32-3401 et seq.).

Opticians.

Qualification, licensing and regulation provisions. (Ariz. Rev. Stat. 32-1671 et seq.).

Optometrists.

Qualification, licensing and regulation provisions. (Ariz. Rev. Stat. 32-1701 et seq.).

Osteopathic Physicians and Surgeons.

Qualification, licensing and regulation provisions. (Ariz. Rev. Stat. 32-1800 et seq.).

Pharmacists.

Qualification, licensing and regulation provisions. (Ariz. Rev. Stat. 32-1901 et seq.).

Physical Therapists.

Qualification, registration and regulation provisions. (Ariz. Rev. Stat. 32-2001 et seq.).

Podiatrists.

Qualification, licensing and regulation provisions. (Ariz. Rev. Stat. 32-801 et seq.).

Psychologists.

Qualification, licensing and regulation provisions. (Ariz. Rev. Stat. 32-2061 et seq.).

Physician Assistants.

Qualification, certification and regulation provisions. (Ariz. Rev. Stat. 32-2501 et seq.).

Radiologic Technologists.

Qualification, licensing and regulation provisions. (Ariz. Rev. Stat. 32-2801 et seq.).

15.07–15.09 [RESERVED]

15.10 ORGAN DONATIONS:

Uniform Anatomical Gift Act (1968) adopted 1996, revised version adopted 2007. (Ariz. Rev. Stat. 36-841 et seq.).

15.11 [RESERVED]

15.12 PUBLIC HEALTH:

In General.

See Ariz. Rev. Stat. 36-601 et seq.

Contagious Disease.

Governed by Ariz. Rev. Stat. 36-621 et seq. Person who learns of existence of contagious disease must file report with board of health or health department. (Ariz. Rev. Stat. 36-621). Physician must report, within 24 hours, death from contagious disease. (Ariz. Rev. Stat. 36-623). Quarantine measures governed by Ariz. Rev. Stat. 36-624 et seq. Enhanced surveillance during public health emergencies. (Ariz. Rev. Stat. 36-781 et seq.).

Health Menaces.

See Ariz. Rev. Stat. 36-601 et seq. Smoking in public places governed by Ariz. Rev. Stat. 36-601.01.

Medicaid.

Arizona Health Care Cost Containment System (AHCCCS) program governed by Ariz. Rev. Stat. 36-2901 et seq. Long-term care system governed by Ariz. Rev. Stat. 36-2931 et seq.

School Immunization.

Procedures and requirements governed by Ariz. Rev. Stat. 36-671 et seq.

15.13 SMOKING REGULATIONS:

Advertisements.

Restrained by Master Settlement Agreement between tobacco product manufacturers and state, particularly in exposure to minors. (Ariz. Rev. Stat. 44-7101).

16 INSURANCE

16.01 INSURANCE COMPANIES:

Regulation.

Statutory regulation of insurance and insurance business, including insurance providers, is set out at length in Ariz. Rev. Stat. 20-101 et seq. No person (or company, society, etc.) may transact business of insurance in Arizona, or business involving insurance to be performed in Arizona, without complying with applicable provisions of above statutes. (Ariz. Rev. Stat. 20-282, Ariz. Rev. Stat. 20-401.01). Aggravated or multiple violations of insurance code, including transaction of insurance business after revocation of license, is felony. (Ariz. Rev. Stat. 13-3714). Service companies and service contracts are regulated by Ariz. Rev. Stat. 20-1095 et seq.; mechanical reimbursement reinsurers are regulated by Ariz. Rev. Stat. 20-1096 et seq. Prepaid legal insurance corporations and prepaid legal insurance contracts are regulated by Ariz. Rev. Stat. 20-1097 et seq. Captive insurers are regulated by Ariz. Rev. Stat. 20-1098 et seq. Bail bond agents are regulated by Ariz. Rev. Stat. 20-340 et seq. Risk retention groups are regulated by Ariz. Rev. Stat. 20-2401 et seq. Insurance producers reviewing allocation of inpatient hospital resources, inpatient medical services and outpatient surgery services are regulated by Ariz. Rev. Stat. 20-2501 et seq. Domestic insurers filing risk-based capital reports governed by Ariz. Rev. Stat. 20-488 et seq. Foreign insurers filing risk-based capital reports governed by Ariz. Rev. Stat. 20-488.09. Standard valuation law established at Ariz. Rev. Stat. 20-510.

Administration and Enforcement.

Director of Insurance, appointed by Governor, administers Department of Insurance. Director may make reasonable rules and regulations necessary for effectuating any provision of insurance law. (Ariz. Rev. Stat. 20-143). Copies of rules available on request to Arizona Department of Insurance, 2910 N. 44th Street, Suite 210, Phoenix, Arizona 85018-7269 (http://www.id.state.az.us/). Director has mandatory and discretionary revocation and suspension powers. (Ariz. Rev. Stat. 20-219 to Ariz. Rev. Stat. 20-220). Director can impose civil penalties based on unfair practices (Ariz. Rev. Stat. 20-456, Ariz. Rev. Stat. 20-2117) and for violation of any law relating to insurance or regulation promulgated by director (Ariz. Rev. Stat. 20-220), and may establish grounds for suspension or revocation (Ariz. Rev. Stat. 20-220). Director may issue cease and desist order and seek order enjoining and restraining further violations. (Ariz. Rev. Stat. 20-292, Ariz. Rev. Stat. 20-456). Director may impose fines or suspend or revoke certificate of authority of medical service corporation. (Ariz. Rev. Stat. 20-845). Department of Insurance fraud unit investigators have power equal to that of peace officers. (Ariz. Rev. Stat. 20-466). Director has access to insurer claim files. (Ariz. Rev. Stat. 20-157.01).

Agents and Brokers.

Licensing requirements governed by Ariz. Rev. Stat. 20-281 et seq. Continuing education required with some exceptions. (Ariz. Rev. Stat. 20-2901 et seq.).

Utilization Review Agents.

Regulated by Ariz. Rev. Stat. 20-2508.

Contracts of Insurance.

Act of 1954 did not invalidate or modify contracts legally in force prior to Jan. 1, 1955. (Ariz. Rev. Stat. 20-110). With certain exceptions, policies must be countersigned by resident insurance producer if state of residence of nonresident insurance producer requires countersignature. Exceptions include insurance on life, disability, title and transportation, insurance issued by salaried insurance producers, reinsurance policies issued by vending machines, and bid bonds issued by surety in connection with public or private contracts. (Ariz. Rev. Stat. 20-229). Insurers are required, on written request of contract holder, to provide ten-day free-look period for annuity contracts, and 30-days free-look period for contract holders 65 years of age or older. (Ariz. Rev. Stat. 20-1233). When recommending annuity contract, insurers must have reasonable grounds to believe that annuity is suitable for consumer. (Ariz. Rev. Stat. 20-1243.03). Director can disapprove contract made with health service corporation when benefits unreasonable in relation to premium. (Ariz. Rev. Stat. 20-826).

Statutory provisions governing insurance contracts in general are found in Ariz. Rev. Stat. 20-1101 et seq. Director shall make rules and regulations governing form and readability of policies. (Ariz. Rev. Stat. 20-1110.01). Insurer is estopped from enforcing boilerplate limitation on coverage that conflicts with insured's reasonable expectation of coverage if certain tests are met. (140 Ariz. 383, 394, 401, 682 P.2d 388, 399, 406). Grounds for valid cancellation limited by Ariz. Rev. Stat. 20-1652.

Investigation.

Director shall examine affairs, transactions, accounts, records and assets of each authorized insurer, as often as Director deems advisable. (Ariz. Rev. Stat. 20-156). Each insurer applying for initial certificate of authority to do business in state is examined in like manner. (Ariz. Rev. Stat. 20-156). In lieu of making own examination, Director may accept full report of last recent examination of foreign or alien insurer, certified by insurance supervisory official of another state. (Ariz. Rev. Stat. 20-156). Expense of examination paid by Insurance Examiners' Revolving Fund. (Ariz. Rev. Stat. 20-156, Ariz. Rev. Stat. 20-159).

Fees.

See Ariz. Rev. Stat. 20-167.

Policies.

Disability Insurance.

Regulated by Ariz. Rev. Stat. 20-1341 et seq.

Group and Blanket Disability.

Regulated by Ariz. Rev. Stat. 20-1401 et seq.

Group Life Insurance.

Regulated by Ariz. Rev. Stat. 20-1251 et seq.

Authority.

No person may act as insurer and no insurer may transact business in Arizona except as authorized by subsisting authority granted to it by Director, except as otherwise provided in Act. (Ariz. Rev. Stat. 20-206, Ariz. Rev. Stat. 20-282).

Qualifications.

Generally, see Ariz. Rev. Stat. 20-207.

Kinds of Insurance Insurer May Transact.

See Ariz. Rev. Stat. 20-209, Ariz. Rev. Stat. 20-1661 et seq., Ariz. Rev. Stat. 20-1801 et seq., and Ariz. Rev. Stat. 20-2301 et seq.

Insurance Administrators.

Requirements and limitations regulated by Ariz. Rev. Stat. 20-485 et seq.

Types of Insurers.

Captive Insurers.

Regulated by Ariz. Rev. Stat. 20-1098 et seq.

Domestic Stock and Mutual Insurers.

Regulated by Ariz. Rev. Stat. 20-701 et seq.

Hospital, Medical, Dental and Optometric Service Corporations.

Regulated by Ariz. Rev. Stat. 20-821 et seq.

Title Insurers.

Regulated by Ariz. Rev. Stat. 20-375 to Ariz. Rev. Stat. 20-379, Ariz. Rev. Stat. 20-1561 et seq.

Funds and Deposit Required and Financial Requirements.

See Ariz. Rev. Stat. 20-210 to Ariz. Rev. Stat. 20-214.

Financial Provisions and Procedures.

See Ariz. Rev. Stat. 20-501 et seq.

Investments.

Regulated by Ariz. Rev. Stat. 20-531 et seq. and Ariz. Rev. Stat. 20-562.

Administration of Insolvency.

See Ariz. Rev. Stat. 20-169 et seq. and Ariz. Rev. Stat. 20-661 et seq.

Premium Tax.

Domestic and foreign or alien insurers each pay tax of 2.0% of net premiums, except that tax on fire insurance premiums is 2.2%. (Ariz. Rev. Stat. 20-224). In addition, all insurers pay tax of .4312% of net premiums received for all insurance carried for or on vehicles. (Ariz. Rev. Stat. 20-224.01).

Insurer that paid premium tax of $2,000 or more on net premiums received during preceding calendar year pursuant to Ariz. Rev. Stat. 20-224(B), Ariz. Rev. Stat. 20-224.01, Ariz. Rev. Stat. 20-837, Ariz. Rev. Stat. 20-1010, Ariz. Rev. Stat. 20-1060 and Ariz. Rev. Stat. 20-1097.07 must pay on or before 15th day of each month from Mar. through Aug. 15% of amount paid during preceding year pursuant to Ariz. Rev. Stat. 20-224(B), Ariz. Rev. Stat. 20-224.01, Ariz. Rev. Stat. 20-837, Ariz. Rev. Stat. 20-1010, Ariz. Rev. Stat. 20-1060 and Ariz. Rev. Stat. 20-1097.07. (Ariz. Rev. Stat. 20-224[E]). Overpayments refunded within three months after due date. (Ariz. Rev. Stat. 20-224.02). Insurer who fails to pay tax prescribed by Ariz. Rev. Stat. 20-224, Ariz. Rev. Stat. 20-224.01, Ariz. Rev. Stat. 20-837, Ariz. Rev. Stat. 20-1010, Ariz. Rev. Stat. 20-1060 and Ariz. Rev. Stat. 20-1097.07 subject to civil penalty equal to greater of $25 or 5% of amount due plus interest at rate of 1% per month from date tax was due. (Ariz. Rev. Stat. 20-225). No liability related to calculation or submittal of fire insurance premium taxes based in good faith on fire marshal's certification. (Ariz. Rev. Stat. 20-224[B]). Certificate must be revoked if tax not paid within 30 days of due date. (Ariz. Rev. Stat. 20-225).

Insurance Producers.

Examination is given to applicant for license as insurance provider. (Ariz. Rev. Stat. 20-284). Some exceptions are provided, including waiver of examination in case of one currently licensed in another state or previously held license within 90 days in another state. (Ariz. Rev. Stat. 20-288). Firm or corporation may be licensed only as insurance producer, not as bail bond agent, unless each owner or stockholder is licensed bail bond agent. (Ariz. Rev. Stat. 20-340.01). Bond is required of applicant for agent's license. (Ariz. Rev. Stat. 20-340.02).

Temporary license may be granted in certain cases. (Ariz. Rev. Stat. 20-294).

Foreign agent or broker cannot act as or hold himself out as adjuster unless licensed, except for adjuster licensed in his state of domicile who is sent on behalf of insurer to adjust particular loss or series of losses resulting from common disaster. (Ariz. Rev. Stat. 20-321.01). Foreign insurance producer is subject to continuing education requirements pursuant to Ariz. Rev. Stat. 20-2901 et seq.

License denial, suspension or revocation.

See generally Ariz. Rev. Stat. 20-295.

Rental Car Agent License.

May be issued to rental companies for automobile insurance offered in connection with rental agreements. (Ariz. Rev. Stat. 20-331). Rental car agent not subject to continuing education requirements. (Ariz. Rev. Stat. 20-331).

Unauthorized Insurers.

Unauthorized insurer who knowingly transacts any unauthorized act is guilty of Class 5 Felony. (Ariz. Rev. Stat. 20-401.06). Injunctive relief provided. (Ariz. Rev. Stat. 20-401.02). Contract of insurance effectuated by unauthorized insurer is valid and such insurer may defend actions, but insurer without certificate of authority may not maintain action. (Ariz. Rev. Stat. 20-402).

Premium receipts tax of 3% of gross premiums, less premiums returned due to cancellation or reduction of premium, imposed on industrial insureds obtaining contracts from unauthorized insurers. (Ariz. Rev. Stat. 20-401.07).

Disclosure.

Insured can have access to and request correction of personal information. (Ariz. Rev. Stat. 20-2108 to Ariz. Rev. Stat. 20-2109). Mere fact of previous adverse underwriting decision shall not affect future applications. (Ariz. Rev. Stat. 20-2110 to Ariz. Rev. Stat. 20-2112). Insurer must not, subject to certain exceptions, disclose personal or privileged information unless consented to by insured. (Ariz. Rev. Stat. 20-2113). Disclosure violations may result in imposition of civil penalties. (Ariz. Rev. Stat. 20-2117). Private remedy exists for disclosure violations. (Ariz. Rev. Stat. 20-2118 to Ariz. Rev. Stat. 20-2119). For specific regulations on disclosure of HIV information, see Ariz. Rev. Stat. 20-448.01. See generally Ariz. Rev. Stat. 20-2101 et seq.

Exemptions.

Annual certificate of exemption available to qualifying insurer, employee benefit trust or voluntary employees' beneficiary association transacting life insurance, disability insurance or annuity business. Fee, $65 to $100. (Ariz. Rev. Stat. 20-401.05, Ariz. Rev. Stat. 20-167).

Charitable Gifts.

Charitable organization that enters into agreement for qualified charitable gift annuity must provide written notice to donor in annuity agreement that states charitable gift annuity not insurance under laws of this state. (Ariz. Rev. Stat. 20-119).

Health Insurance Portability and Accountability Act.

Arizona law conforms to this federal act. (Ariz. Rev. Stat. 20-2301 et seq.).

Process.

Each authorized foreign or alien insurer, each licensed foreign insurance provider, and each domestic insurer without statutory agent must irrevocably appoint Director of Insurance as attorney to receive service of legal process. (Ariz. Rev. Stat. 20-221, Ariz. Rev. Stat. 20-291). Service on unauthorized insurer may be made on Secretary of State in action by Director (Ariz. Rev. Stat. 20-401.03), or on Director in action by any other person (Ariz. Rev. Stat. 20-403).

Direct Actions Against Insurer.

See category 23 Transportation, topic 23.01 Motor Vehicles, subhead Direct Actions.

Rates and Rating Organizations.

Regulated by Ariz. Rev. Stat. 20-381 et seq.

Insurance Holding Companies.

Authorized and regulated by Director of Insurance. Registration required. (Ariz. Rev. Stat. 20-481 et seq.).

Health Care Service Organizations.

Regulated by Ariz. Rev. Stat. 20-1051 et seq. and Ariz. Rev. Stat. 20-2501 et seq.

Accountable Health Plans.

Regulated by Ariz. Rev. Stat. 20-2301 et seq. Child medical support regulated by Ariz. Rev. Stat. 25-531 et seq.

Medical Malpractice Insurance.

Malpractice claim reports and investigations required. (Ariz. Rev. Stat. 12-570, Ariz. Rev. Stat. 20-1742, Ariz. Rev. Stat. 32-3203).

Unfair Practices and Frauds.

See Ariz. Rev. Stat. 20-118, Ariz. Rev. Stat. 20-441 et seq. and Ariz. Rev. Stat. 20-461.

Plain Language.

See category 3 Business Regulation and Commerce, topic 3.12 Consumer Protection.

Motor Vehicle Insurance.

See category 23 Transportation, topic 23.01 Motor Vehicles, subhead Insurance.

Reinsurance.

Regulated by Ariz. Rev. Stat. 20-261 et seq. and Ariz. Rev. Stat. 20-486.01 et seq.

Producer Controlled Property and Casualty Insurance.

Regulated by Ariz. Rev. Stat. 20-487 et seq.

16.02 SURETY AND GUARANTY COMPANIES:

Surety and guaranty companies are regulated per Insurance Act, Ariz. Rev. Stat. 20-101 et seq.; surety insurance defined, Ariz. Rev. Stat. 20-257; specific provision, Ariz. Rev. Stat. 20-1531 et seq.; surety bonds, Ariz. Rev. Stat. 7-101 et seq.; premium tax, Ariz. Rev. Stat. 20-224 et seq.

Inspection of Records.

Records, books and files of sureties are at all times liable and subject to visitorial and inquisitorial powers of state. (Const., Art. XIV, § 16).

Action by Creditor.

Any person bound as surety upon contract for payment of money or performance of act, when right of action has accrued, may, by notice in writing, require creditor or obligee forthwith to bring action upon contract. If creditor or obligee, not being under legal disability, fails to bring action within 60 days after receiving notice, and prosecute it to judgment and execution, surety giving notice is discharged from all liability thereon. (Ariz. Rev. Stat. 12-1641).

Subrogation.

Where surety compelled to pay judgment or part thereof, judgment remains in force and right to enforce is subrogated. (Ariz. Rev. Stat. 12-1643).

Licensing.

Surety company authorized to transact business in state, which undertakes to complete contract on which it issued performance or completion bond, is not required to be licensed as contractor, provided all construction work is performed by licensed contractors. (Ariz. Rev. Stat. 32-1121[A]).

Security Under Procedural Rules.

Where Rules of Civil Procedure require or permit giving of security and security involves undertaking with surety, surety submits to jurisdiction, appoints clerk of superior court as agent for service and may be held liable without necessity of independent action. (R. Civ. P. 65.1).

17 INTELLECTUAL PROPERTY

17.01 TRADEMARKS AND TRADENAMES:

Subject to certain prescribed limitations, any person who adopts and uses trademark or service mark in Arizona may file application for registration on form supplied by Secretary of State. Upon determination that application complies with this section, Secretary will issue Certificate of Registration which is admissible in evidence as proof of such registration in any judicial proceeding. Fee, $15. (Ariz. Rev. Stat. 41-126, Ariz. Rev. Stat. 44-1443 to Ariz. Rev. Stat.

44-1444).

Registration is effective for ten years, renewable for successive like terms upon application filed six months prior to expiration of term. Fee, $15. Issuance of Certificate of Registration, $3. (Ariz. Rev. Stat. 41-126, Ariz. Rev. Stat. 44-1445).

Mark and its registration are assignable with goodwill of business. Assignment must be written or filed in electronic format approved by Secretary of State and may be recorded with Secretary of State. Fee, $15. Assignment void as to subsequent bona fide purchasers unless recorded within three months of assignment or prior to each subsequent purchase. (Ariz. Rev. Stat. 41-126, Ariz. Rev. Stat. 44-1446).

Owner of registered mark has cause of action against anyone who uses mark or similar mark in connection with any goods or services in confusing or deceptive manner. Relief may be granted by way of injunction, damages, accounting for profits, costs, attorney fees, confiscation of computer software, or cancellation of registration. This article does not affect rights in marks acquired in good faith at any time at common law. (Ariz. Rev. Stat. 44-1451 to Ariz. Rev. Stat. 44-1452).

Possession or use of counterfeit mark is class 1 misdemeanor. (Ariz. Rev. Stat. 44-1453). Repeat offenses are class 6 or class 5 felony if other criteria are met. (Ariz. Rev. Stat. 44-1453). Manufacture of item bearing counterfeit mark is class 5 felony. (Ariz. Rev. Stat. 44-1453). Commercial use of unauthorized copy of computer software that in any way displays registered mark is Class 5 Felony. (Ariz. Rev. Stat. 44-1455).

Similar provisions for registration of tradenames. (Ariz. Rev. Stat. 44-1460 et seq.). Fee, $10. (Ariz. Rev. Stat. 41-126). Secretary of State cannot file application for registration of any trade name if not distinguishable on record from any other name previously filed and on record with Secretary of State. (Ariz. Rev. Stat. 44-1460.01). Period of registration is five years, renewable for like period upon application filed within six months of end of term. Fee, $10. (Ariz. Rev. Stat. 41-126, Ariz. Rev. Stat. 44-1460.02). Trade name may be assigned and recorded. Fee, $10. (Ariz. Rev. Stat. 41-126, Ariz. Rev. Stat. 44-1460.03). Issuance of Certificate of Registration, $3. (Ariz. Rev. Stat. 41-126, Ariz. Rev. Stat. 44-1460.03). Exclusive right to use trade name available if registered prior to reservation of corporate name or filing of articles of incorporation, subject to right acquired in good faith at common law. (Ariz. Rev. Stat. 44-1460.05).

Fair Trade Act repealed.

Tradenames.

See category 2 Business Organizations, topic 2.08 Partnerships.

17.02 TRADE SECRETS:

Uniform Trade Secrets Act adopted. (Ariz. Rev. Stat. 44-401 et seq.).

18 LEGAL PROFESSION

18.01 ATTORNEYS AND COUNSELORS:

All lawyers must belong to public corporation called “State Bar of Arizona.” (Sup. Ct. R. 31[b]).

Jurisdiction Over Admission.

Vested in supreme court. (Sup. Ct. R. 31).

Eligibility.

Applicant must be over 21 at time of examination, of good moral character, mentally and physically able to practice law, and in good standing in every other state in which he is admitted to practice. (Sup. Ct. R. 34).

Educational Requirements.

Unless he has actively practiced law in another state in five of seven years preceding application, applicant for admission must be graduate of law school fully or provisionally approved by American Bar Association at time of graduation. (Sup. Ct. R. 34). Active State Bar member must complete minimum 15 hours of continuing legal education including three hours of professional responsibility. (Sup. Ct. R. 45).

Residence Requirements.

None.

Registration as Law Student.

Not required.

Application for Admission.

Application and supporting documents, plus examination fee of $250 and filing fee of $125, must be filed not later than first day of Sept. if application is for following Feb. examination, and not later than first day of Feb. if application is for following July examination. (Sup. Ct. R. 34). Information regarding exact dates and fees available at http://www.supreme.state.az.us/admis/schedule_of_fees.htm.

Applications available at http://www.supreme.state.az.us/admis/howtoapply.htm. Requests for materials by mail should be addressed to Arizona Supreme Court, Committee on Character and Fitness, Administrative Offices of the Court, 1501 W. Washington, Suite 104, Phoenix, Arizona Ariz. Rev. Stat. 85007-3231. Send along with $20 check payment to Arizona Supreme Court.

Investigation.

Formal or informal hearings may be held. (Sup. Ct. R. 36[a]-[c]).

Written Examination.

Effective Jan. 1, 2010, applicants meeting specific criteria may be admitted by motion. (Sup. Ct. R. 38). Other applicants for admission must meet examination requirements. Portion of examination consists of Multistate Bar Examination and Multistate Professional Responsibility Examination. Written examinations held in Feb. and July. Transfer of Multistate Professional Responsibility score from another jurisdiction accepted if examination was taken within two years prior to Arizona examination date. (Sup. Ct. R. 35).

Admission Pro Hac Vice.

Attorney practicing in another state may be permitted, on motion, to associate with local counsel in trial of any particular action. (Sup. Ct. R. 33 and 38[a]).

Fees.

Active member of bar must pay annual fee, as required by supreme court. (Sup. Ct. R. 32). Member failing to pay fee after two months notice of delinquency will be suspended from practice, but may be reinstated. (Sup. Ct. R. 32).

Disabilities.

No attorney of record of either party to an action or proceeding may be a surety. (Ariz. Rev. Stat. 7-109).

Suspension or Disbarment.

Disciplinary Commission of Supreme Court of Arizona (six lawyers, three non-lawyers [Sup. Ct. R. 49]), proceeding initially through local hearing committees or hearing officers that have authority to prepare findings of fact and conclusions of law, issue orders and impose discipline. (Sup. Ct. R. 50 and 54). Respondent may appear before committee, hearing officer and commission and if objects to results may appeal to supreme court. (Sup. Ct. R. 57 and 59).

Professional Corporations.

See category 2 Business Organizations, topic 2.03 Corporations.

Attorney Ethics.

Model Rules of Professional Conduct of ABA adopted as amended by Arizona Supreme Court. (Sup. Ct. R. 42).

Unlawful Practice.

It is misdemeanor to practice law unless active member of State Bar in good standing, except that officer of corporation who is not active State Bar member may represent corporation in justice or police court (Sup. Ct. R. 31); parties may be represented by non-lawyer before Industrial Commission (Ariz. Rev. Stat. 23-674) and for small claims procedures in Arizona Tax Court (Sup. Ct. R. 31); parties may be represented by lawyer not member of State Bar in informal proceedings before Civil Rights Division (Ariz. Rev. Stat. 41-1481). Limited practice by clinical law professors and law students allowed. (Sup. Ct. R. 38).

Real Estate Transactions.

See category 3 Business Regulation and Commerce, topic 3.06 Brokers.

19 MINERAL, WATER AND FISHING RIGHTS

19.00A FISHING AND HUNTING RIGHTS:

Licenses.

License and/or Commission approved proof of purchase necessary for taking of wildlife. (Ariz. Rev. Stat. 17-331). Noncompliance with child support order invalidates any such license or proof of purchase. (Ariz. Rev. Stat. 17-331). Fishing license (Ariz. Rev. Stat. 17-333) and migratory bird stamp (Ariz. Rev. Stat. 17-333.03) also required. Apprentice hunting licenses valid under certain circumstances. (Ariz. Rev. Stat. 17-333).

Regulations.

Governed by Arizona Game and Fish Commission. (Ariz. Rev. Stat. 17-301 et seq.).

Watercraft.

Subject to regulations and fees by Arizona Game and Fish Department. (Ariz. Rev. Stat. 5-321 et seq.).

19.01 MINES AND MINERALS:

Governed by Ariz. Rev. Stat. 27-101 et seq.

Requirements for location of lode or placer claims on U. S. public domain (Ariz. Rev. Stat. 27-201) and on state land are substantially same. (Ariz. Rev. Stat. 27-204 et seq.).

Department of Mines and Mineral Resources.

Duties include promotion and development of mineral resources and cooperation with agencies responsible for regulation of state lands, mining securities and mineral technology. (Ariz. Rev. Stat. 27-102).

State Mine Inspector.

Responsible for inspection of mine operations, conditions, safety, machinery, equipment, sanitation and ventilation, mined land reclamation and prevention of hazardous dust conditions. (Ariz. Rev. Stat. 27-124, Ariz. Rev. Stat. 27-128 to Ariz. Rev. Stat. 27-129, Ariz. Rev. Stat. 27-1253 et seq., Ariz. Rev. Stat. 27-411, and Ariz. Rev. Stat. 27-901 to Ariz. Rev. Stat. 27-902).

Arizona Geological Survey.

Duties include investigating and interpreting geological setting of state and its mineral resources. (Ariz. Rev. Stat. 27-152.01). Results of research investigations may be published at discretion of state geologist. (Ariz. Rev. Stat. 27-153).

Mining Rights and Claims.

Lode claims upon public domain of U.S. may be located and secured to discoverer by: (1) Erecting, on surface on centerline within boundaries of claim, monument of stones not less than three feet high or post not less than four feet high and posting signed notice containing name of claim, name and address of locator, date of location, width and length of claim and distance from monument to each end, general course of claim and locality with reference to natural object or permanent monument and section, township and range, if known (Ariz. Rev. Stat. 27-202); and (2) recording within 90 days after location copy of location notice, in office of county recorder where claim is located, attaching plat, map, or sketch of claim (Ariz. Rev. Stat. 27-203). Boundaries of claim must be monumented with monument marked to indicate corner and center of each end line of claim. (Ariz. Rev. Stat. 27-204). Placer and millsite claims can be located in same manner as lode claims, except location notice shall be posted in separate monument and only corners of claim must be monumented. (Ariz. Rev. Stat. 27-205). State lands also may be explored under mineral exploration permit prior to seeking mineral lease. (Ariz. Rev. Stat. 27-251 et seq.).

Improvements and Labor.

Before Dec. 31 of any year in which performance of annual labor or making improvements is required, affidavit may be recorded in office of county recorder where claim is located and constitutes prima facie evidence of performance of labor or improvements. (Ariz. Rev. Stat. 27-208). When mineral lease is obtained on state land, rental is at least average rental assessed per acre by States of Colorado, New Mexico and Utah and royalty is at least 2% of gross value of all minerals produced and sold from mineral leases. (Ariz. Rev. Stat. 27-234). Leases may be offered at public auction. (Ariz. Rev. Stat. 27-235). State Land Commissioner may inspect lands held under mineral lease. (Ariz. Rev. Stat. 27-239).

Operation of Mines.

Statutory provisions govern inspection, safety, reporting, waste dumps, abandoned shafts, use of explosives, hoists, mine structure and maintenance, hazardous dust and gas conditions, open pit mines, and aggregate mining operations. (Ariz. Rev. Stat. 27-301 et seq.).

Oil, Gas and Geothermal Resources.

Oil and Gas Conservation Commission administers provisions on production and conservation of oil, gas and geothermal resources. (Ariz. Rev. Stat. 27-501 et seq., Ariz. Rev. Stat. 27-651 et seq.). Corporation Commission regulates transportation of gas and hazardous liquids and gas and hazardous liquids pipeline facilities. (Ariz. Rev. Stat. 40-441 et seq.). Land Department leases state lands for exploration and development, with exploratory unitization allowed. (Ariz. Rev. Stat. 27-551 et seq.). State lands within known producing structures may be leased only through sealed bids, and leases are subject to annual rental of $1 per acre and minimum royalty of 12½%. (Ariz. Rev. Stat. 27-556). State lands not in known producing structures may be leased noncompetitively with annual rental of $1 per acre and royalty of 12½%. (Ariz. Rev. Stat. 27-555). State Land Commissioner may require lessee to submit trade secret information. (Ariz. Rev. Stat. 27-274). State Land Commissioner may require permittee or lessee of state land to post surety bond which can be used for performance or restoration purposes. (Ariz. Rev. Stat. 37-132). Such leases are renewable after five years if no production has occurred, with additional rental requirements. (Ariz. Rev. Stat. 27-555). If lease continues not producing, lease may be extended for two years where there are diligent drilling, completion or reworking operations. (Ariz. Rev. Stat. 27-555). Lease shall not contain any provisions for assessment other than those required by statute. (Ariz. Rev. Stat. 27-555). Royalties paid to state may be in cash or in kind at option of Land Department. (Ariz. Rev. Stat. 27-563). Arizona refinery business may purchase royalty oil which State Land Department received from lessee. (Ariz. Rev. Stat. 27-565 et seq.). Land Department may exchange unleased or unclaimed subsurface rights and interests and leased oil and gas rights for subsurface rights and interests owned by others subject to certain requirements. (Ariz. Rev. Stat. 37-604.01). Oil, gas, helium or geothermal wells may not be subject to water laws. (Ariz. Rev. Stat. 45-591.01). Geothermal resources not subject to water laws unless commingled or causing impairment to groundwater supply. Wells drilled to obtain groundwater are subject to water laws. (Ariz. Rev. Stat. 27-667). Geothermal leases on state land require minimum wellhead royalty of 12½% and minimum annual rental of $1 per acre. (Ariz. Rev. Stat. 27-671).

Radioactive Materials.

See category 12 Environment, topic 12.01 Environmental Regulation.

Taxes.

Severance tax imposed upon mining activities. (Ariz. Rev. Stat. 42-5072, Ariz. Rev. Stat. 42-5201 et seq.).

Water.

See category 21 Property, topic 21.16 Real Property.

20 MORTGAGES

20.01 CHATTEL MORTGAGES:

Uniform Commercial Code, Article 9 (1972 Official Text), adopted with revisions; repealed by Revised Article 9 (2000 Official Text), adopted with revisions effective July 7, 2001. (Ariz. Rev. Stat. 47-9101 et seq.).

What May Be Mortgaged.

See U.C.C., Art. 9. (Ariz. Rev. Stat. 47-9102, Ariz. Rev. Stat. 47-9109).

After-acquired Property.

See U.C.C. (Ariz. Rev. Stat. 47-9204).

Future Advances.

See U.C.C. (Ariz. Rev. Stat. 47-9323).

Requisites of Instrument.

See U.C.C. (Ariz. Rev. Stat. 47-9203, Ariz. Rev. Stat. 47-9502).

Execution of Instrument.

Security agreements must be authenticated, but debtor need not sign financing statement. (Ariz. Rev. Stat. 47-9203, Ariz. Rev. Stat. 47-9502).

Filing.

If collateral is as-extracted collateral or timber to be cut, or financing statement is filed as fixture filing and collateral is to be fixture, in office where mortgage on related real property is recorded. In all other cases, in Office of Secretary of State, State Capitol Building, Phoenix, Arizona 85007. (Ariz. Rev. Stat. 47-9501).

Refiling or Extension.

Original filing valid for five years. Manufactured home transaction filing valid for 30 years. Continuation statements may be filed or recorded. (Ariz. Rev. Stat. 47-9515, Ariz. Rev. Stat. 47-9516).

Removal of Property by Mortgagor (Debtor).

If removal is default, see default procedures. (Ariz. Rev. Stat. 47-9601 et seq.).

Sale of Property By Mortgagor (Debtor).

If sale is default, see default procedures (Ariz. Rev. Stat. 47-9601 et seq.).

Concealment or Destruction of Property by Mortgagor (Debtor).

See default procedures. (Ariz. Rev. Stat. 47-9601 et seq.).

Release.

See release provisions. (Ariz. Rev. Stat. 47-9406).

Satisfaction or Discharge.

See termination statement provisions. (Ariz. Rev. Stat. 47-9513 et seq.).

Foreclosure by Court Proceedings.

See U.C.C. (Ariz. Rev. Stat. 47-9601 et seq.).

Sale by Mortgagee (Secured Party).

See collection rights (Ariz. Rev. Stat. 47-9607), right to take possession (Ariz. Rev. Stat. 47-9609), and right to dispose of collateral (Ariz. Rev. Stat. 47-9610).

Redemption.

Limited to time prior to disposition or contract to dispose. (Ariz. Rev. Stat. 47-9623 to Ariz. Rev. Stat. 47-9624).

Foreign Mortgages.

To determine which law applies, see U.C.C. (Ariz. Rev. Stat. 47-9301).

Taxation.

No provision.

Forms.

UCC-1, UCC-2, UCC-3 and UCC-4 forms modified and approved by Secretary of State. See end of this Digest.

20.02 COLLATERAL SECURITY:

Uniform Commercial Code adopted. (Ariz. Rev. Stat. 47-9101 et seq.). See category 3 Business Regulation and Commerce, topic 3.09 Commercial Code.

20.03 [RESERVED]

20.04 MORTGAGES OF REAL PROPERTY:

Lien theory prevails. Mortgages are regulated by Ariz. Rev. Stat. 33-701 et seq. Any interest in real property capable of being transferred may be mortgaged. (Ariz. Rev. Stat. 33-701). Every transfer of realty other than in trust, made only as security for performance of another act, is deemed mortgage. (Ariz. Rev. Stat. 33-702). Mortgagor entitled to possession. (Ariz. Rev. Stat. 33-703).

Execution.

Mortgage can be created, renewed or extended only by writing executed with formalities required of deed, including acknowledgment. (Ariz. Rev. Stat. 33-701). Mortgage may provide for assignment to mortgagee of mortgagor's interest in leases, rents, issues, income or profits from covered property. (Ariz. Rev. Stat. 33-702[B]).

Recording.

Unrecorded mortgage valid as between parties but void as to all creditors and subsequent purchasers for valuable consideration without actual notice. (Ariz. Rev. Stat. 33-412). Assignment of mortgage may be recorded, which constitutes notice to person subsequently deriving title to mortgage from assignor. (Ariz. Rev. Stat. 33-706). Recording of false lien creates liability in favor of owner or beneficial title holder of at least $5,000 or treble actual damages, whichever is greater. (Ariz. Rev. Stat. 33-420[A]).

Fee.

$5 for recording first five pages and $1 for each additional page, total not to exceed $250. (Ariz. Rev. Stat. 11-475).

Trust Deeds.

Performance of contract also may be secured through transfer of real property by trust deed. Provisions for foreclosure and sale, deficiency judgment and recordation similar to those for mortgages. (Ariz. Rev. Stat. 33-801 et seq.).

Caveat: For disclosure requirements in conveyances of real property made or taken in representative capacity, see category 21 Property, topic 21.06 Deeds.

Priority of Purchase Money Mortgage.

Mortgage or deed of trust given as security for loan to purchase property secured has priority over all other liens and encumbrances incurred against purchaser prior to acquiring title to property. (Ariz. Rev. Stat. 33-705).

Contracts for Conveyance.

Contracts requiring conveyance of full title upon payment of amounts due are subject to rules mitigating against forfeiture of purchaser's equitable title. Acceleration of amount due limits seller's remedy to foreclosure as mortgage. (Ariz. Rev. Stat. 33-748). Absent acceleration, purchaser's interest can be forfeited only after expiration of fixed period of time determined by percentage of total consideration already paid. (Ariz. Rev. Stat. 33-742[D]). Notice of election to forfeit must be recorded and served after applicable period has expired. (Ariz. Rev. Stat. 33-743). Statutory form of notice provided. (Ariz. Rev. Stat. 33-743[B]). Upon receipt of notice, purchaser must be allowed at least 20 additional days to pay amount due. (Ariz. Rev. Stat. 33-743[D]). Seller must file statutory notice of reinstatement upon payment of amount due by date specified in notice. (Ariz. Rev. Stat. 33-743[F]). If no payment is timely made, seller can complete forfeiture by quiet title action (Ariz. Rev. Stat. 33-744) or, where account servicing agent has been appointed, recordation of statutory affidavit of completion of forfeiture (Ariz. Rev. Stat. 33-745[A]). Rights of all persons having lien or encumbrance on property subordinate to seller's priority are also lost. (Ariz. Rev. Stat. 33-744, Ariz. Rev. Stat. 33-745[B]).

Due On Sale Clauses.

Not enforceable in mortgages made between July 8, 1971 and Oct. 15, 1982 and transferred prior to Oct. 14, 1987 which are secured by residential property containing one to four family units situated on 2½ acres or less. Lender is limited to ½% increase in interest rate when such property is transferred subject to mortgage. (Ariz. Rev. Stat. 33-1571, Ariz. Rev. Stat. 33-806.01[D]).

Satisfaction and Release.

Mortgagee, trustee or person entitled to payment, on receiving full satisfaction of mortgage or deed of trust, must acknowledge satisfaction by delivering to person making satisfaction or by recording sufficient release or satisfaction of mortgage or deed of release and reconveyance of deed of trust. (Ariz. Rev. Stat. 33-707[A]). In addition, seller who receives full payment under contract must deliver payment deed to buyer. For contracts with purchase price less than $500,000, title insurer agency may prepare, execute and record payoff deed. (Ariz. Rev. Stat. 33-750). Executor or administrator of mortgagee's or trustee's estate, upon receiving full satisfaction of mortgage or deed of trust, must acknowledge satisfaction by delivery to person making satisfaction or by recording sufficient release or satisfaction of mortgage or deed of release and reconveyance of deed of trust, where indebtedness is satisfied before decedent's death. (Ariz. Rev. Stat. 33-709). Failure in this respect, after 30 days, creates liability of $100 and for all actual damages suffered by mortgagor. Executor or administrator may be personally liable. (Ariz. Rev. Stat. 33-709, Ariz. Rev. Stat. 33-712[A]). Foreign executor, administrator, conservator or guardian, attorney in fact, or heir or legatee, may release mortgage. Foreign executor, administrator, conservator or guardian must first file and record authenticated copy of appointment in recorder's office in county where mortgage is recorded. (Ariz. Rev. Stat. 33-708, Ariz. Rev. Stat. 33-710 to Ariz. Rev. Stat. 33-711). If lien or any mortgage or deed of trust is not discharged, it will expire later of (1) ten years after date fixed for payment or maturity; (2) if date for payment or maturity is not discernible, then 50 years after recording of deed of trust or mortgage; (3) if notice of intent to preserve mortgage or deed of trust is recorded within time prescribed in (1) or (2), then ten years after such recording. (Ariz. Rev. Stat. 33-714).

Foreclosure.

Mortgage or trust deed securing property located in Arizona and in one or more other states may be foreclosed only by action at law, notwithstanding any provisions therein. (Ariz. Rev.

Stat. 33-721). In contrast, exercise of power of sale does not require court action. (Ariz. Rev. Stat. 33-807). If separate actions are brought on debt and to foreclose mortgage securing it, plaintiff must elect one and other will be dismissed. (Ariz. Rev. Stat. 33-722). In foreclosure action, junior lienholder is entitled to assignment of mortgage holder's interest by paying him amount secured, with interest and costs, together with amount of other superior liens of same holder. (Ariz. Rev. Stat. 33-723). State may be made party to foreclosure action. (Ariz. Rev. Stat. 33-724). Sale of real property shall be credit on judgment in amount of either fair market value or sales price of property, whichever greater. (Ariz. Rev. Stat. 12-1566[B]).

Deficiency Judgment.

Court must render judgment for entire amount determined due under mortgage and direct sale of mortgaged property. (Ariz. Rev. Stat. 33-725[A]). If mortgaged property does not on foreclosure sale bring sufficient price to satisfy judgment, court may issue execution for balance of judgment against mortgagor where there has been personal service on him or he has appeared in foreclosure action. (Ariz. Rev. Stat. 33-725[B], Ariz. Rev. Stat. 33-727[A]). Sale of real property shall be credit on judgment in amount of either fair market value or sales price of property, whichever greater. (Ariz. Rev. Stat. 12-1566[B]). Exceptions made for purchase money mortgages on parcel of 2½ acres or less used for single one-family or single two-family dwelling, where deficiency is not due to debtor's voluntary waste, and for situations in which both mortgage or deed of trust and security agreement are given to secure payment of purchase price of real property and consumer goods or services, when there would be no deficiency under mortgage or deed of trust alone. (Ariz. Rev. Stat. 33-729 to Ariz. Rev. Stat. 33-730). Comparable deed of trust exception requires trustor to have lived in property for six consecutive months. (Ariz. Rev. Stat. 33-814).

Redemption.

Payment to officer directed to sell mortgaged property before sale operates to redeem property and has same effect as satisfaction. (Ariz. Rev. Stat. 33-726). Property sold on foreclosure of mortgage or trust deed may be redeemed under rules applicable to executions. See Ariz. Rev. Stat. 12-1281 et seq., Ariz. Rev. Stat. 33-726 and category Debtor and Creditor, topic Executions.

Form.

Mortgage is created by instrument in form of ordinary deed (see category 21 Property, topic 21.06 Deeds) with defeasance clause added as follows: "to be void upon condition that I pay . . . . . ." (Ariz. Rev. Stat. 33-402).

21 PROPERTY

21.01 ABSENTEES:

Care of Property.

No statutory provisions, but see subhead Uniform Unclaimed Property Act, infra.

Process Agent.

No statutory provisions.

Escheat.

Where death presumed from five year successive absence (see category 13 Estates and Trusts, topic 13.05 Death) and intestate absentee has no heirs, all property escheats to state. (Ariz. Rev. Stat. 12-881). Such property is sold and proceeds paid into state treasury. (Ariz. Rev.

Stat. 12-885). Person entitled to such proceeds may recover same by filing claim form with Department of Revenue within seven years from time of sale of escheated property. (Ariz. Rev. Stat. 12-886). Agreement to recover escheated property charging fee exceeding 30% is unenforceable. (Ariz. Rev. Stat. 12-890). Persons entitled to unclaimed shares or dividends may file claim with Department of Administration. (Ariz. Rev. Stat. 10-1841).

Unclaimed Dispositions.

See category 13 Estates and Trusts, topic 13.09 Executors and Administrators.

Uniform Unclaimed Property Act adopted. (Ariz. Rev. Stat. 44-301 et seq.).

Uniform Probate Code (but not 1977 or later amendments) adopted. (Ariz. Rev. Stat. 14-1102 et seq.).

21.02 ADVERSE POSSESSION:

Possession of real property for two years by one who claims only by right of possession is sufficient to establish that right as against suit to recover by person who shows no better right. (Ariz. Rev. Stat. 12-522).

Character of Possession.

Possession must be uninterrupted and visible appropriation of land with claim of right, inconsistent with and hostile to claim of another, by persons in privity of estate (i.e., tacking permitted). (Ariz. Rev. Stat. 12-521).

Duration of Possession.

Action to recover real property must be commenced within stated periods after cause of action accrues: (1) Three years, if possessor claims land under title or color of title; (2) five years, if land is city lot or being cultivated or otherwise used and possessor claims under duly recorded deed and has paid taxes on land for five years; (3) ten years for land which possessor has cultivated, used and enjoyed, up to 160 acres or lesser area actually enclosed, or land described in written and duly recorded memorandum of title other than deed. (Ariz. Rev. Stat. 12-523 et seq.).

Prescriptive Easements.

Established by continuous hostile use for ten years. (Ariz. Rev. Stat. 12-526).

Disabilities.

Persons of unsound mind or who are under 18 have same time to bring action after removal of such disability as is allowed to others. Period of disability for imprisoned person exists only until person knew or reasonably should have known of right to bring action. (Ariz. Rev. Stat. 12-528).

21.03 [RESERVED]

21.04 CONVEYANCES:

See topic 21.06 Deeds.

21.05 CURTESY:

Abolished. (Ariz. Rev. Stat. 1-201).

21.06 DEEDS:

See topic Real Property for types of estates.

Acknowledgment.

Every deed must be signed by grantor and properly acknowledged before authorized officer. (Ariz. Rev. Stat. 33-401[B]). Despite defects in certificate of acknowledgment, deed recorded for longer than ten years is deemed to be duly acknowledged on or after date of recording. (Ariz. Rev. Stat. 33-401[C]). For purposes of proving notice to subsequent purchasers or lien holders, deed containing any defect, omission, or informality in certificate of acknowledgment recorded for longer than one year is deemed to have been lawfully recorded. (Ariz. Rev. Stat. 33-411[C]).

Uniform Recognition of Acknowledgments Act adopted. (Ariz. Rev. Stat. 33-501 et seq.).

Execution.

No witness is required for deed or other instrument, but all deeds must be acknowledged. (Ariz. Rev. Stat. 33-401). See categories 8 Debtor and Creditor, topic Homesteads; Family, topic Husband and Wife.

Married person who is 18 or older may convey separate property without being joined by spouse in such conveyance, but conveyance or incumbrance of community real property is not valid unless executed and acknowledged by both husband and wife. (Ariz. Rev. Stat. 33-451 to Ariz. Rev. Stat. 33-452). Husband and wife must join in and acknowledge conveyance of family homestead. (Ariz. Rev. Stat. 33-453).

Caveat: Every deed or conveyance of real property located within state, or interest therein, executed after June 22, 1976, in which grantor or grantee is described or acts as trustee, must give names and addresses of beneficiaries for whom grantor or grantee holds title and identify trust or other agreement under which grantor or grantee is acting or refer to document number or docket and page of instrument of public record in county in which land conveyed is located. Grantee who holds title as trustee must record notice of any change in beneficiary within 30 days after receiving actual knowledge of such change. Noncompliance renders conveyance voidable by other party to conveyance. Any action to void conveyance must be commenced within two years of recordation. If any interest in or lien on real property is acquired for value, such interest or lien is not impaired by failure of any person to comply with disclosure requirements. (Ariz. Rev. Stat. 33-404).

“Grant” or “Convey”.

By statute, use of such words in conveyance implies warranty that, at time of execution of instrument, grantor had not conveyed same estate or any right, title or interest therein to other than grantee, and that such estate was free from encumbrances, including taxes, assessments and all liens. Action will lie to enforce such covenants as though expressly stated. (Ariz. Rev. Stat. 33-435).

Grant of Fee.

Presumed, unless estate conveyed is limited by deed. (Ariz. Rev. Stat. 33-432).

Joint Tenancy and Tenancy in Common.

See topic 21.16 Real Property; category 14 Family, topic 14.09 Husband and Wife.

Defective Conveyance.

When written instrument intended as conveyance of real property fails, wholly or in part, it is nevertheless valid as contract, and may be enforced as permitted by law. (Ariz. Rev. Stat. 33-437).

Lien or Encumbrance.

Sale of property subject to lien or encumbrance or where seller's interest is held under option, contract of purchase, or in trust is voidable by buyer unless instrument evidencing lien or encumbrance or option, contract of purchase, or trust agreement expressly states that buyer will receive title free of lien or encumbrance or option, contract of purchase, or trust agreement upon buyer's completion of all required payments and performances, or unless buyer actually receives clear title. Action to void sale must be commenced within two years after discovery or completion of buyer's performance, whichever comes first. Lien or encumbrance does not include taxes, reservations in patents, easements, rights-of-way, reservations of mineral rights, covenants, conditions or restrictions. (Ariz. Rev. Stat. 33-438). Nonconsensual liens disallowed, except for government liens, utility liens, mechanics liens, or liens arising from covenants, conditions, restrictions, or declarations. (Ariz. Rev. Stat. 33-421). Homeowners' association liens on property for assessments have priority to all other liens, interests and encumbrances on unit, except for recorded first mortgage on unit, seller's interest in first contract for sale, recorded first deed of trust on unit, or government taxes. (Ariz. Rev. Stat. 33-1256).

Recording.

Deed must be acknowledged and recorded in office of county recorder in county where land is situated in order to be valid as against creditors and subsequent purchasers for value without notice. (Ariz. Rev. Stat. 33-412[A]). Document evidencing sale or other transfer of any legal or equitable interest in real estate (excluding leases) must be recorded by transferor within 60 days, or else transferor must indemnify transferee in any action contesting latter's interest in real estate. (Ariz. Rev. Stat. 33-411.01). Only documents that are lawfully recorded are deemed to give constructive notice to subsequent purchasers or lien holders. (Ariz. Rev. Stat. 33-411[A]). See category 10 Documents and Records, topic 10.04 Records, subhead Fees for Recording.

Uniform Real Property Electronic Recording Act adopted. (Ariz. Rev. Stat. 11-487 et seq.).

Affidavit.

Affidavit declaring value of property, name and address of seller and purchaser, legal description, transaction conditions, date of sale, price paid, amount of cash down payment, type of financing, amount of personal property, tax code number, use and description of property transferred must be appended to deed evidencing transfer of title or to contract relating to sale of property at time of recording. (Ariz. Rev. Stat. 11-1131 et seq.). Form available from Department of Revenue.

Exemptions.

See Ariz. Rev. Stat. 11-1134.

Taxes.

None.

Forms

Quit Claim.

For the consideration of . . . . . . I hereby quit claim to . . . . . . all my interest in the following real property (description).

Grant and Convey.

For the consideration of . . . . . . I hereby convey to . . . . . . the following real property (description).

Warranty.

Add to last form “and I warrant the title against all persons whomsoever.”

Beneficiary Deed.

I hereby convey to … effective on my death the following real property (description).

21.07 DEEDS OF TRUST:

See category 20 Mortgages, topic 20.03 Mortgages of Real Property.

21.08 DOWER:

Abolished. (Ariz. Rev. Stat. 1-201).

21.09 ESCHEAT:

See topic 21.01 Absentees, subhead Escheat; category 13 Estates and Trusts, topic 13.07 Descent and Distribution, subhead Escheat.

21.10 LANDLORD AND TENANT:

Following principles apply to all landlord-tenant relationships arising out of rental of dwelling units which are not governed by Uniform Residential Landlord and Tenant Act (Ariz. Rev. Stat. 33-1301 et seq.) and Mobile Home Parks Residential Landlord and Tenant Act (Ariz. Rev. Stat. 33-1401 et seq.):

Lease need not be in writing, unless for longer than one year. (Ariz. Rev. Stat. 44-101). As to recording, see category 10 Documents and Records, topic 10.04 Records.

Tenant-in-possession is estopped to deny his landlord’s title. (Ariz. Rev. Stat. 33-324). Person in possession of land out of which rent is due is liable for proportion of rent due from lands in his possession. (Ariz. Rev. Stat. 33-323).

Damage to Building.

Destruction or injury so as to make it unfit for occupancy without fault or neglect of lessee terminates liability for rent unless otherwise provided in lease. (Ariz. Rev. Stat. 33-343).

Tenant’s Obligation.

Tenant must exercise diligence to keep premises in as good condition as when tenant took possession, ordinary wear and tear excepted. Removal or alteration of any part of buildings or furnishings or defacement of or injury to buildings, furnishings, garages or fences is misdemeanor. (Ariz. Rev. Stat. 33-322). Residential tenant must notify landlord of needed maintenance and repairs. (Ariz. Rev. Stat. 33-1241).

Termination of Tenancy.

Tenancy from year-to-year terminates at end of year unless written permission is given to remain longer time; tenancy from month-to-month may be terminated by either party by ten days’ notice. In cases of nonpayment of rent, no notice is required. Tenant on semi-monthly basis may terminate by five days’ notice. (Ariz. Rev. Stat. 33-341). Tenancy of holdover lessee is from month-to-month. (Ariz. Rev. Stat. 33-342). Early termination of lease for victim of domestic violence. Person named in order of protection or departmental report liable to landlord for civil damages due to early termination. Early termination applies to all tenants who are parties to rental agreement. (Ariz. Rev. Stat. 33-1318).

Recovery of Rent.

Owner of any lands, or his assignee or their executors or administrators, may sue and recover rent therefor, or fair and reasonable satisfaction for use and occupation thereof, in any court of competent jurisdiction, in any of following cases:

(1) When rent is due and in arrears on a lease.

(2) When lands are held and occupied without any special agreement for rent or when tenant remains in possession after termination of his right of possession.

(3) When possession is obtained under agreement, written or verbal, for purchase of premises, and before deed is given such right to possession is terminated by forfeiture or in compliance with agreement, and possession is wrongfully refused or neglected to be given on demand made by party entitled to it.

(4) When land is sold upon judgment and deed is issued, and parties to such judgment or persons claiming under them wrongfully refuse or neglect to surrender possession after demand by person entitled to possession. (Ariz. Rev. Stat. 12-1271).

Reentry.

If tenant neglects or refuses to pay his rent when due and it remains unpaid for five days, or whenever tenant violates any provision of his lease, landlord or person to whom rent is due, or his agent, has right to reenter and take possession, or may, without any formal demand of reentry, commence action for recovery of possession of premises in justice or superior court, which must then be tried in not more than 30 days thereafter, and in case of appeal by tenant he must execute bond in amount set by court, and pending appeal he must pay all damages, costs and rent adjudged against him. (Ariz. Rev. Stat. 33-361). Forcible entry and detainer governed by Ariz. Rev. Stat. 12-1171 et seq.

Lien.

Landlord has lien upon all property of tenant not exempt by law, placed upon or used in leased premises until his rent is paid. (Ariz. Rev. Stat. 33-362[A]). If tenant neglects or refuses to pay rent, landlord may seize personal effects of tenant found on premises, unless exempt by law, hold same as security or sell same after 60 days to satisfy claim for rent. (Ariz. Rev. Stat. 33-361[D]). State may sell at public auction any abandoned personal property left on state lands 90 days after termination of lease. (Ariz. Rev. Stat. 37-288.01).

Finder’s Fee.

Property management firm or owner may pay tenants fee as much as $600 per year in rent credits or reductions for finding another tenant for apartment complex. (Ariz. Rev. Stat. 32-2176).

Distress.

Landlord may seize for rent any personal property of tenant found on premises rented and not exempted by law. (Ariz. Rev. Stat. 33-361[D]).

Uniform Residential Landlord and Tenant Act adopted with some modifications and additions. (Ariz. Rev. Stat. 33-1301 et seq.). Early termination of lease, lock change for victim of domestic violence. Landlord must deny access to persons named in order of protection or departmental report. Person named in order of protection or departmental report liable to landlord for civil damages if domestic violence victim terminates lease early. Early termination applies to all tenants who are parties to rental agreement. (Ariz. Rev. Stat. 33-1318).

Mobile Home Parks Residential Landlord and Tenant Act adopted. (Ariz. Rev. Stat. 33-1401 et seq.).

21.11 LEASES:

See topic 21.10 Landlord and Tenant.

21.12 [RESERVED]

21.13 PERPETUITIES:

Uniform Statutory Rule Against Perpetuities adopted prospectively with its two-step "wait and see" approach. (Ariz. Rev. Stat. 14-2901 et seq.). Supercedes common law rule, and courts are authorized to reform instruments that violate Arizona's rule against perpetuities at time of their creation. (Ariz. Rev. Stat. 14-2905 to Ariz. Rev. Stat. 14-2906). Exclusions to rule in Ariz. Rev. Stat. 14-2904.

21.14 PERSONAL PROPERTY:

All property acquired during marriage, except by gift, devise or descent, is community property of husband and wife. (Ariz. Rev. Stat. 25-211 et seq.).

21.15 POWERS OF ATTORNEY:

Attorneys in Fact.

Attorney in fact or agent with power of attorney governed generally by Arizona Probate Code. Authority may continue beyond disability, incapacity or uncertainty as to whether principal is dead or alive, if so provided in writing (Ariz. Rev. Stat. 14-5501), or if attorney in fact or agent acts in good faith without actual knowledge of death or disability of principal (Ariz. Rev. Stat. 14-5502, Ariz. Rev. Stat. 14-5504). Real estate or any interest therein may be conveyed by agent acting pursuant to written authority. (Ariz. Rev. Stat. 33-401).

Caveat: For disclosure requirements in conveyance of real property made or taken in representative capacity, see topic 21.06 Deeds, subhead Execution.

21.16 REAL PROPERTY:

Estates in land are divided into estates of inheritance, for life, for years, at will and by sufferance. (Ariz. Rev. Stat. 33-201). Estate of inheritance and for life are freeholds. Estates for years are chattels real. Estates at will or by sufferance are chattel interests. Estate pur autre vie is freehold during life of grantee and after death is chattel real. (Ariz. Rev. Stat. 33-202).

Fee Tail.

Abolished. Conveyance of fee tail deemed conveyance in fee simple. (Ariz. Rev. Stat. 33-201, 224).

Rule in Shelley's Case.

Abolished. (Ariz. Rev. Stat. 33-231).

Expectant Estate.

Cannot be defeated or barred unless so provided in creation of estate. (Ariz. Rev. Stat. 33-225 to Ariz. Rev. Stat. 33-226).

Estate for Life and Remainder.

May be created in term of years. (Ariz. Rev. Stat. 33-233).

Alternative Future Estates.

Permitted. (Ariz. Rev. Stat. 33-221 to Ariz. Rev. Stat. 33-222, Ariz. Rev. Stat. 33-227, Ariz. Rev. Stat. 33-233). See also topic 21.12 Perpetuities.

Estates Created.

Grant or devise to two or more persons creates tenancy in common, except those to trustees, executors or administrators, in which cases joint tenancy is created. Joint tenancy with right of survivorship may be created by express words in grant. (Ariz. Rev. Stat. 33-431). Grant to husband and wife presumed to establish community tenancy, but joint tenancy between husband and wife may be created if deed contains language expressly creating such estate and deed is expressly accepted and signed by grantees showing knowledge of that provision. (50 Ariz. 265, 71 P.2d 791). Grant to husband and wife may create estate of community property with right of survivorship by express words or by grant from either husband or wife to both husband and wife. (Ariz. Rev. Stat. 33-431[C]). No livery of seisin. (22 Ariz. 461, 198 Pac. 712).

Uniform Disclaimer of Property Interests Act adopted. (Ariz. Rev. Stat. 14-10001 et seq.).

Condominiums.

Permitted and regulated by Ariz. Rev. Stat. 33-1201 et seq. Condominium recovery fund created to compensate buyer for developer’s failure to complete condominium project. (Ariz. Rev. Stat. 32-2193.31 et seq.).

Conservation of Public Lands.

Conservation Advisory Committee established to advise Commissioner of State Land Department. (Ariz. Rev. Stat. 37-316).

Land Sale Regulation.

Sale or lease of trust land for conservation purposes governed by State Land Department. (Ariz. Rev. Stat. 37-313, Ariz. Rev. Stat. 37-314). Sale or lease of certain subdivided and unsubdivided land requires notice by subdivider to real estate commissioner of intent to subdivide or offer for sale or lease. (Ariz. Rev. Stat. 32-2181[A], Ariz. Rev. Stat. 32-2195[A]). Violation of subdivision requirements must be publicly recorded by Department. (Ariz. Rev. Stat. 32-2183.02). Also requires issuance by commissioner of public report authorizing such sale or lease. (Ariz. Rev. Stat. 32-2195[D]). Initial fee, $500. Before issuance of public report, prospective buyer may give reservation deposit, not to exceed $5,000 per single lot. Seller must provide prospective buyer with copy of public report within 15 calendar days after it is issued by commissioner. Upon receiving copy of public report, prospective buyer and prospective seller have seven business days to enter contract for purchase of lot, or else reservation automatically terminates and deposit refunded. (Ariz. Rev. Stat. 32-2181.03). Types of holders of ownership interest, such as corporations, partnerships or trusts, must be identified, and interest of each principal in such entities must be listed in notice to commissioner. (Ariz. Rev. Stat. 32-2181[A][1]). When land is divided for sale or lease into five or fewer lots that does not result in subdivision pursuant to Ariz. Rev. Stat. 32-2101.50, lots must comply with minimum applicable county zoning requirements and have legal access. (Ariz. Rev. Stat. 11-809). Seller of five or fewer parcels of unsubdivided land in unincorporated area must furnish written affidavit of disclosure to buyer at least seven days before transfer. (Ariz. Rev. Stat. 33-422). Access or zoning deficiencies must be noticed in deed. (Ariz. Rev. Stat. 11-809). Plan for sale or lease of unsubdivided lands cannot be materially changed without notifying commissioner. (Ariz. Rev. Stat. 32-2195.10). Advertising and other promotional matters are regulated. (Ariz. Rev. Stat. 32-2183.01, Ariz. Rev. Stat. 32-2195.05[B]). Conveyances of subdivided lands must be accomplished by one of three methods specified in Ariz. Rev. Stat. 32-2185.01(A). Conveyances of unsubdivided lands must be accomplished by one of three methods specified in Ariz. Rev. Stat. 32-2195.04(A). Purchaser of subdivided or unsubdivided lands may rescind purchase agreement within seven days of execution. (Ariz. Rev. Stat. 32-2195.04[D]). Neither instruments transferring interest in subdivided land nor covenants or restrictions affecting real property may contain provisions limiting right of party to appear or testify regarding zoning changes, building permits, or other official acts affecting any real property. (Ariz. Rev. Stat. 32-2181[I], Ariz. Rev. Stat. 32-2195[I]). Private covenants are enforceable under certain circumstances. (Ariz. Rev. Stat. 33-440). Owners with actual knowledge of soil remediation must disclose prior to transfer. (Ariz. Rev. Stat. 33-434.01). Civil penalties apply for violations of statutes, rules or regulations or for unlawful practices. (Ariz. Rev. Stat. 32-2185.09). Special civil procedure applies when purchaser brings civil action against seller relating to condition, design or construction of dwelling, action entails special civil procedures requirements. (Ariz. Rev. Stat. 12-1361 et seq.). All land sold must have provisions made for permanent access by motor vehicles. (Ariz. Rev. Stat. 32-2185.02, Ariz. Rev. Stat. 32-2195[E]).

Protected Development Rights.

Established and regulated by Ariz. Rev. Stat. 9-1201 et seq. and Ariz. Rev. Stat. 11-1201 et seq. Right to undertake and complete development and use of property under terms and conditions of plan submitted by landowner and approved by city or town, without compliance with subsequent changes in zoning regulations and development standards, except as provided by Ariz. Rev. Stat. 9-1204 and Ariz. Rev. Stat. 11-1204. City or town may adopt moratorium on land construction or development in certain situations. (Ariz. Rev. Stat. 9-463.06 et seq.). City or town has broad authority to redevelop slum or blighted areas. (Ariz. Rev. Stat. 36-1471 et seq.). Development rights may be transferred from one municipality to another. (Ariz. Rev. Stat. 9-462.01). City or town containing any portion of military electronic range must notify Office of Installation Commander before approving any land use change on property. (Ariz. Rev. Stat. 9-500.28).

Public Housing.

Regulated by Ariz. Rev. Stat. 36-1401 et seq.

Planned Communities.

Regulated by Ariz. Rev. Stat. 33-1801 et seq.

Soil Remediation Standards.

See category 12 Environment, topic 12.01 Environmental Regulation, subhead General Supervision.

Time Shares.

Real Estate Department regulates real estate time shares. (Ariz. Rev. Stat. 32-2197 et seq.).

Water.

Rights for owners of stream beds established. (Ariz. Rev. Stat. 37-1101 et seq.). Ombudsman represents interest of private property owner in proceedings involving government. (Ariz. Rev. Stat. 41-1311 et seq.). Surface water and water flowing in definite underground channels are administrated by Department of Water Resources under doctrine of prior appropriation. (Ariz. Rev. Stat. 45-101 et seq.). Judicial decisions established that percolating groundwater is subject to doctrine of reasonable use, i.e., owner of land has right to pump amounts of waters needed for reasonable and beneficial use on his land. (45 Ariz. 221, 42 P.2d 403). Under new groundwater code, however, groundwater may not be used and wells may not be drilled in statutorily designated active management areas except pursuant to previously established water rights or permit. (Ariz. Rev. Stat. 45-132 to Ariz. Rev. Stat. 45-133, Ariz. Rev. Stat. 45-512). Permit for underground storage facility required. (Ariz. Rev. Stat. 45-811.01). Water stored pursuant to water storage permit may be used or exchanged only in manner and location in which it was permissible to use or exchange water before it was stored. (Ariz. Rev. Stat. 45-832.01). Stored water is recoverable on annual basis pursuant to certain conditions. (Ariz. Rev. Stat. 45-851.01). “In lieu” water delivered pursuant to groundwater storage facility permit is deemed to be groundwater for all purposes of Title 45, c. 2 as if recipient of “in lieu” water had withdrawn it from well. (Ariz. Rev. Stat. 45-873.01). In active management areas, subdivision lots and subdivided land may not be sold without certificate from Department of Water Resources that sufficient water supply is available and payment made of applicable replenishment fees. (Ariz. Rev. Stat. 45-576, Ariz. Rev. Stat. 11-806.01). Subdivider also may obtain written commitment of water service for subdivision from city, town, or private water company designated as having assured water supply by Director of Water Resources. (Ariz. Rev. Stat. 9-463.01[I]). Outside active management areas subdivided lots may be sold subject to disclosure of adequacy or inadequacy of water supply. (Ariz. Rev. Stat. 32-2181[F], Ariz. Rev. Stat. 32-2183, Ariz. Rev. Stat. 32-2195[H], Ariz. Rev. Stat. 45-108). Water augmentation authorities allowed. (Ariz. Rev. Stat. 45-1901 et seq.). County Water Authority may be established in any county with population more than 90,000 persons and less than 120,000 persons. (Ariz. Rev. Stat. 45-2202). Water deemed reasonably safe and fit for use if it complies with contaminant levels established in Ariz. Rev. Stat. 49-351 to Ariz. Rev. Stat. 49-354 or Safe Drinking Water Act, whichever is more stringent. (Ariz. Rev. Stat. 12-820.08).

Caveat: For disclosure requirements in conveyance of real property made or taken in representative capacity, see topic 21.06 Deeds.

See also topics 21.05 Curtesy, Deeds, Dower, Landlord and Tenant; categories 5 Civil Actions and Procedure, topic Partition; Debtor and Creditor, topic Homesteads; Family, topic Husband and Wife; Mortgages, topic Mortgages of Real Property.

21.17 TRUST DEEDS:

See category 20 Mortgages, topic 20.03 Mortgages of Real Property.

22 TAXATION

—Scope —

Note: Statutes were renumbered effective Jan. 1999.

22.01 ADMINISTRATION:

Department of Revenue has general supervision of most matters relating to generation of revenue. (Ariz. Rev. Stat. 42-1002 et seq.). Department, with approval of attorney general, may abate any uncollectible balance or balance where administration and collection costs exceed amount owed by taxpayer. (Ariz. Rev. Stat. 42-1004). Related liens, if any, are extinguished on abatement. (Ariz. Rev. Stat. 42-1004). Department may require taxpayer to file bond to secure payment. (Ariz. Rev. Stat. 42-1102). In certain circumstances, delinquent taxpayer may be enjoined from engaging or continuing in business. (Ariz. Rev. Stat. 42-1103).

Exemptions.

Exemptions from property tax are set forth in Ariz. Rev. Stat. 42-11101 et seq. With limited exception, taxpayer claiming exemption must appear before county assessor to make affidavit. Further evidence as to eligibility may be required. (Ariz. Rev. Stat. 42-11152). Failure to do so will constitute waiver. (Ariz. Rev. Stat. 42-11153).

Penalties and Interest.

Income, Estate, Use and Transaction Privilege Taxes.

See generally: interest (Ariz. Rev. Stat. 42-1123); forfeiture of commodity subject to luxury privilege tax (Ariz. Rev. Stat. 43-1124); civil penalties (Ariz. Rev. Stat. 42-1125); bad check fee (Ariz. Rev. Stat. 42-1126); criminal penalties (Ariz. Rev. Stat. 42-1127); collection costs (Ariz. Rev. Stat. 42-1128).

Property Tax.

Any person who knowingly fails to file report of taxable property or renders false or fraudulent information is guilty of Class 2 Misdemeanor, and is liable for amount of taxes due plus penalty equal to taxes due on concealed property for year in which discovery was made. (Ariz. Rev. Stat. 42-15055). Penalty for failure to report property when requested by assessor is 10% of value. (Ariz. Rev. Stat. 42-15055[C]).

Statute of Limitations.

Generally, taxpayer’s obligations for any tax are extinguished four years after amount of tax determined to be due becomes final or report of change or correction to federal tax liability is due to state, unless taxpayer fails to file return or report change or correction, files false or fraudulent return with intent to evade tax; six years if taxpayer omits in excess of 25% of income, receipts or proceeds. Taxpayer may consent to extension. (Ariz. Rev. Stat. 42-1104).

Exception.

Suspension of penalty or interest for taxpayers residing in areas affected by disaster, terrorism, military action, or declared state of emergency. (Ariz. Rev. Stat. 42-2079).

22.02 ALCOHOL, BEVERAGES AND TOBACCO TAXES:

Tax on tobacco products imposed by Ariz. Rev. Stat. 42-3201 et seq.

Tax on liquor products imposed by Ariz. Rev. Stat. 42-3351 et seq.

22.03 BUSINESS TAXES:

See also topic 22.17 Sales and Use Taxes, subhead Transaction Privilege Taxes.

Foreign Insurance Company Tax.

See category 16 Insurance, topic 16.01 Insurance Companies.

Surety Company Tax.

See category 16 Insurance, topic 16.02 Surety and Guaranty Companies.

Motion Picture Production.

Incentives. (Ariz. Rev. Stat. 41-1517). Credits for production costs. (Ariz. Rev. Stat. 43-1163).

Research and Development Expenses.

Credit allowed. (Ariz. Rev. Stat. 43-1168).

Successor liability imposed by Ariz. Rev. Stat. 42-1110.

22.04 [RESERVED]

22.05 EMPLOYMENT TAXES:

Unemployment Compensation Tax.

Imposed, in form of “contributions” to unemployment compensation fund. (Ariz. Rev. Stat. 23-730). Standard rate is 5.4% of payroll. (Ariz. Rev. Stat. 23-728). Contributions are due and payable according to regulations prescribed by Department of Economic Security. (Ariz. Rev. Stat. 23-726 et seq.). Contributions may be subject to reductions. (Ariz. Rev. Stat. 23-730). Contributions for each month must be paid in accordance with commission regulations. (Ariz. Rev. Stat. 23-726).

Exempted employments are, among others: Certain agricultural labor; certain domestic service; crews on non-U.S. vessels or aircraft; service in employ of son, daughter or spouse, or service by child under age of 21 in employ of father or mother; service in employ of other state or political subdivisions or U.S. Government; service with organization in which unemployment compensation is provided by Act of Congress generally; service performed in any calendar quarter in employ of certain exempt organizations; service to organizations exempt under federal internal revenue code; service performed in employ of any school, college or university if such service is performed by student who is enrolled and is regularly attending classes at any school, college or university; service to certain public service organizations; service performed as intern or student nurse in employ of hospital; service performed by individual for employing unit, as insurance agent, real estate broker or salesman, or licensed cemetery broker or salesman, if all such service performed by such individual for such employing unit is performed for remuneration solely by way of commissions; service performed by certain individuals in delivery, distribution, or sale of newspapers; service performed in employ of foreign government or of instrumentality wholly owned by foreign government; and casual labor not in course of employer’s trade or business; service of securities salespersons compensated solely by commission; service to hospital by patient of hospital; tax preparers compensated solely by commission. (Ariz. Rev. Stat. 23-617).

22.06 [RESERVED]

22.07 ESTATE TAX:

After repeal of federal state death tax credit, Arizona did not de-couple its estate tax and, therefore, as of 2006, Arizona has no state estate tax.

22.08 GASOLINE AND SPECIAL FUELS TAXES:

Gasoline Tax.

Imposed by Ariz. Rev. Stat. 28-5601 et seq., with some exceptions. (Ariz. Rev. Stat. 28-5610).

Motor Carriers Tax.

Fee based on vehicle weight imposed on vehicles with declared gross vehicle weight of more than 12,000 lbs., unless exempt pursuant to Ariz. Rev. Stat. 28-5432, operating on public highways. (Ariz. Rev. Stat. 28-5851 et seq.). Motor carrier fee amount determined in accordance with Ariz. Rev. Stat. 28-5854. Reduced fees provided for in Ariz. Rev. Stat. 28-5855 to Ariz. Rev. Stat. 28-5857. Light motor vehicle fee of $64 imposed on vehicles with declared gross weight of 12,000 lbs. or fewer that are used to transport for hire persons, freight or property. (Ariz. Rev. Stat. 28-5491 et seq.). Payment of motor carrier or light motor vehicle fees are in lieu of transaction privilege tax. (Ariz. Rev. Stat. 28-5860, Ariz. Rev. Stat. 28-5493). Unlicensed nonresident carriers required to obtain single trip motor carrier fee trip permit. (Ariz. Rev. Stat. 28-5862 to Ariz. Rev. Stat. 28-5863). Rate is $48 for over 50 miles traveled on state highways and $12 for 50 or fewer miles traveled on state highways. (Ariz. Rev. Stat. 28-5863[A]). Permit valid for 96 hours. (Ariz. Rev. Stat. 28-5863[B]). Special 30-day permit available for noncommercial vehicles. (Ariz. Rev. Stat. 28-5864). This tax does not apply to school buses or to motor vehicles used in production videos. (Ariz. Rev. Stat. 28-5853). Motor vehicles powered by alternative fuels generally treated as separate class of vehicle. (Ariz. Rev. Stat. 28-5805).

22.09–22.10 [RESERVED]

22.11 INCOME TAX:

Tax is imposed on natural persons, corporations, trusts and estates. (Ariz. Rev. Stat. 43-1011, Ariz. Rev. Stat. 43-1111, Ariz. Rev. Stat. 43-1311). For Arizona additions to adjusted gross income see Ariz. Rev. Stat. 43-1021 as to individuals, Ariz. Rev. Stat. 43-1121 as to corporations, and Ariz. Rev. Stat. 43-1331 as to estates and trusts. Taxation of nonresident governed by Ariz. Rev. Stat. 43-1091 et seq. For corporations taxed in multiple states, see subhead Uniform Division of Income for Tax Purposes Act, infra. For procedure governing illegally obtained income see Ariz. Rev. Stat. 43-207.

Rates for Individuals and Fiduciaries.

For single persons or married persons filing separately: for first $10,000, 2.9% of taxable income; for $10,001-$25,000, $290 plus 3.3% of excess over $10,000; for $25,001-$50,000, $785 plus 3.9% of excess over $25,000; for $50,001-$150,000, $1,760 plus 4.8% of excess over $50,000; for over $150,000, $6,560 plus 5.17% of excess over $150,000. For married couple filing jointly or single head of household: for first $20,000, 2.9% of taxable income; for $20,001-$50,000, $580 plus 3.3% of excess over $20,000; for $50,001-$100,000, $1,570 plus 3.9% of excess over $50,000; for $100,001-$300,000, $3,520 plus 4.8% of excess over $100,000; for over $300,000, $13,120 plus 5.17% of excess over $300,000. (Ariz. Rev. Stat. 43-1011).

Rates for Corporations.

Corporate tax rate effective Jan. 1, 2000 is 6.968% of net income or $50, whichever is greater. (Ariz. Rev. Stat. 43-1111). All corporations doing business in state must file return, whether taxable or not. (Ariz. Rev. Stat. 43-307).

Uniform Division of Income for Tax Purposes Act adopted (Ariz. Rev. Stat. 43-1131 et seq.) with following variations:

§ 1—Financial organization and public utility definitions deleted. Definition of taxpayer as any person subject to that tax imposed by this title added.

§ 2—Provides that net income and expenses of foreign corporation which is not itself subject to tax imposed by this title shall not be allocated or apportioned to this state unless taxpayer has elected to file consolidated return pursuant to Ariz. Rev. Stat. 43-947.

§ 7—Excludes interest and dividends that constitute business income.

§ 9—Apportionment fraction is adjusted to include two times sales factor in numerator and denominator is four.

§§ 10, 13, 15—Excludes property of foreign corporation not otherwise subject to tax and exempt insurance companies.

§ 18—Additions relating to affiliated groups and consolidated return elections.

Exemptions and Deductions.

Certain additions and subtractions are required in computing adjusted gross income. See generally Ariz. Rev. Stat. 43-1021 et seq. as to individuals; Ariz. Rev. Stat. 43-1121 et seq. as to corporations; and Ariz. Rev. Stat. 43-1331 et seq. as to estates and trusts. Standard deductions are set forth in Ariz. Rev. Stat. 43-1041, itemized deductions in Ariz. Rev. Stat. 43-1042. Exemption amounts are $2,100 for single individual, $4,200 for head of household or married couple, or $6,300 for married couple who claims at least one dependent. (Ariz. Rev. Stat. 43-1043). Other exemptions for blind persons, dependents, and persons over 65 years of age set forth in Ariz. Rev. Stat. 43-1023. Tax credits for individuals are provided in Ariz. Rev. Stat. 43-1071 et seq., for corporations in Ariz. Rev. Stat. 43-1161 et seq., for estates and trusts, at Ariz. Rev. Stat. 43-1381. Nondeductible items listed in Ariz. Rev. Stat. 43-961.

Withholding through Apr. 30, 2009 shall be, at election of employee, 10%, 19%, 23%, 25%, 31%, or 37% of federal income tax withheld if employee's annual wage is less than $15,000, and 19%, 23%, 25%, 31%, or 37% of federal income tax withheld if wage is $15,000 or more. (Ariz. Rev. Stat. 43-401). Above rates increase beginning May 1, 2009 as follows: 10% to 11.5%, 19% to 21.9%, 23% to 26.5%, 25% to 28.8%, 31% to 35.7%, and 37% to 42.6%. Rates decrease beginning Jan. 1, 2009 from 11.5% to 10.7%, 21.9% to 20.3%, 26.5% to 24.5%, 28.8% to 26.7%, 35.7% to 33.1%, and 42.6% to 39.5%. Beginning July 1, 2010, withholding rates are decoupled from federal income tax withheld and determined by table adopted by Arizona Department of Revenue. Certain types of employment excluded from withholding requirement. (Ariz. Rev. Stat. 43-403). Withholdings may be reduced by amount of certain tax credits for which employee qualifies. (Ariz. Rev. Stat. 43-401). Military pensions, payments under U.S. Civil Service Retirement System and annuity payments treated as wages if requested by taxpayer. (Ariz. Rev. Stat. 43-404). Winnings from legalized gambling (Ariz. Rev. Stat. 43-405) and early withdrawal by public employees from certain public pension funds (Ariz. Rev. Stat. 43-406) are subject to withholding. If withheld amount did not exceed average of $1,500 in each of four preceding quarters, withholding must be paid to Department by Apr. 30, July 31, Oct. 31 and Jan. 31 for preceding calendar quarter. If withholding exceeded $1,500 in each of preceding four calendar quarters, withheld amount must be remitted to Department at same time employer is required to make deposits of federal tax pursuant to I.R.C. § 6302. (Ariz. Rev. Stat. 43-401).

Partnership.

Individual carrying on business in partnership shall be liable for tax only in his individual capacity (Ariz. Rev. Stat. 43-1411), and shall include, in computing taxable income, whether distributed or not, his distributive share of partnership's gains, losses, dividends, debts, depreciation, etc. as described in Ariz. Rev. Stat. 43-1412.

Religious, Charitable and other Nonprofit Corporations.

Exempt from tax on income related to their religious, charitable or other purposes which make exemption available. (Ariz. Rev. Stat. 43-1201 et seq.).

Returns and Payment.

Following taxpayers are required to file returns: Individual, if he has for taxable year, Arizona adjusted gross income of $5,500 if single or married filing separate return; or $11,000 if married filing jointly, or gross income of $15,000 or more, regardless of amount of taxable income; (Ariz. Rev. Stat. 43-301); agent or guardian of taxpayer unable to make own return (Ariz. Rev. Stat. 43-303); fiduciary acting for individual, estate, trust, or decedent (Ariz. Rev. Stat. 43-304 to Ariz. Rev. Stat. 43-305); every partnership and corporation (Ariz. Rev. Stat. 43-306 to Ariz. Rev. Stat. 43-307). Returns must be filed if above criteria met regardless whether taxpayer filed federal return or whether taxpayer had taxable income for federal tax purposes. "Gross income" means gross income as defined in Internal Revenue Code minus income included in gross income but excluded from taxation under this title. (Ariz. Rev. Stat. 43-301). Husband and wife may file joint return or separate returns. (Ariz. Rev. Stat. 43-301, Ariz. Rev. Stat. 43-309 to Ariz. Rev. Stat. 43-311).

Returns are due at Department of Revenue on Apr. 15th following close of calendar year or on 15th day of fourth month after close of fiscal year. (Ariz. Rev. Stat. 43-325). Individual must pay tax on 15th day of Apr. following close of calendar year or, if return is made on basis of fiscal year, on 15th day of fourth month following close of fiscal year. (Ariz. Rev. Stat. 43-501). S-corporations must pay tax on 15th day of third month following close of taxable year, and unrelated business income tax of tax exempt organization is due on 15th day of fifth month following close of taxable year. (Ariz. Rev. Stat. 43-501, Ariz. Rev. Stat. 43-1241). Any taxpayer may elect to pay tax in advance. (Ariz. Rev. Stat. 43-504). Individual whose gross income is reasonably expected to exceed $75,000 ($150,000 for joint return) must make payments of estimated tax during tax year as set forth in Ariz. Rev. Stat. 43-581. Corporation subject to tax must make estimated tax payments if tax liability exceeds $1,000 per annum. (Ariz. Rev. Stat. 43-582). Penalties and interest assessed for failure to file timely return or to pay estimated tax. (Ariz. Rev. Stat. 42-1107, Ariz. Rev. Stat. 42-1123, Ariz. Rev. Stat. 42-1125, Ariz. Rev. Stat. 43-581, Ariz. Rev. Stat. 43-582).

Refunds paid within 60 days of last day for filing or 60 days from actual filing do not include interest. Interest at rate determined under I.R.C. § 6621 begins to accrue on 61st day. (Ariz. Rev. Stat. 42-1123).

22.12 INHERITANCE TAX:

None. As to estate tax, see topic 22.06 Estate Tax.

22.12A MINES, MINERALS AND FISHERIES TAXES:

Severance Tax.

Tax imposed upon severer engaged in business of timbering and mining. (Ariz. Rev. Stat. 42-5201 et seq.).

22.12B MOTOR CARRIERS TAX:

See topic 22.08 Gasoline and Special Fuels Taxes.

22.13 [RESERVED]

22.14 MOTOR VEHICLE TAXES:

See category 23 Transportation, topic 23.01 Motor Vehicles.

Trailer-Mobile Home Tax.

See category 23 Transportation, topic 23.01 Motor Vehicles.

22.15 [RESERVED]

22.16 PROPERTY TAXES:

Property Tax Generally.

Levy on real or personal property is lien against property that attaches on Jan. 1 of each year and is prior and superior to any other liens of every kind, regardless of when another lien attached, except liens held by State. (Ariz. Rev. Stat. 42-17153, Ariz. Rev. Stat. 42-19106).

Assessment.

Local Assessment.

County assessor acts under general supervision of Department of Revenue (Ariz. Rev. Stat. 42-13002) and is responsible for conducting property assessments and determining names of all persons owning, claiming or having possession or control thereof, determining full cash value of all such property, and listing property and valuation on tax roll (Ariz. Rev. Stat. 42-13051). Department has power to require equalization among counties. (Ariz. Rev. Stat. 42-13251 et seq.). Listing and assessing of property governed by Ariz. Rev. Stat. 42-15001 et seq. There are special rules for valuation and assessment of historic property (Ariz. Rev. Stat. 42-12101 et seq.), agricultural property (Ariz. Rev. Stat. 42-12151 et seq., Ariz. Rev. Stat. 41-13101 et seq.), golf courses (Ariz. Rev. Stat. 42-13151 et seq.), and shopping centers (Ariz. Rev. Stat. 42-13201 et seq.).

Personal Property.

County assessor must enter following information on personal property tax roll after valuing personal property: name and residence of owner or person possessing the property and reporting it for taxation; description of property sufficient to identify it; location of property; and rate of taxation levied against it. If name of owner of property is not known, property must nevertheless be listed, assessed and entered upon tax roll to “unknown owner.” (Ariz. Rev. Stat. 42-19002). Tax may be declared uncollectible if property and owner are not located. Such property will be removed from records but may be reinstated if either property or owner is located. (Ariz. Rev. Stat. 42-19118). Mobile homes which are permanently affixed to real property are included in personal property tax roll until after affidavit of affixture is filed and are placed on real and secured property tax roll. (Ariz. Rev. Stat. 42-19153).

Central Assessment.

Pursuant to Ariz. Rev. Stat. 42-14001, department of revenue determines valuation of real, personal and improvements to following properties: mines, mills and smelters (Ariz. Rev. Stat. 42-14051 et seq.); oil, gas and geothermal properties (Ariz. Rev. Stat. 42-14101 et seq.); gas, water, and sewer and wastewater utilities (Ariz. Rev. Stat. 42-14151 et seq.); pipelines (Ariz. Rev. Stat. 42-14201 et seq.); airline companies (Ariz. Rev. Stat. 42-14251 et seq.); private car companies (Ariz. Rev. Stat. 42-14301 et seq.); railroad companies (Ariz. Rev. Stat. 42-14351 et seq.); telecommunications companies (Ariz. Rev. Stat. 42-14401 et seq.). Valuation of real property at electric utilities is determined by cost to current owner as of end of preceding calendar year; department determines valuation of real property improvements and personal property. (Ariz. Rev. Stat. 42-14156).

Annual report must be filed by each company with Department of Revenue by Apr. 1 of each year containing information to be considered in making its valuation (Ariz. Rev. Stat. 42-14052, Ariz. Rev. Stat. 42-14152, Ariz. Rev. Stat. 42-14202, Ariz. Rev. Stat. 42-14253, Ariz. Rev. Stat. 42-14303, Ariz. Rev. Stat. 42-14352, Ariz. Rev. Stat. 42-14402, Ariz. Rev. Stat. 42-14103).

Review of Assessment.

Person whose property has been assessed by county assessor must be notified of valuation before Mar. 1 of each year (Ariz. Rev. Stat. 42-15101) and may appeal assessment to county assessor within 60 days after date assessor mailed notice. (Ariz. Rev. Stat. 42-15104, Ariz. Rev. Stat. 42-16051[D]) or to tax court (Ariz. Rev. Stat. 42-15104, Ariz. Rev. Stat. 42-16201). Assessor must rule on taxpayer's petition by Aug. 15 of each year. (Ariz. Rev. Stat. 42-16055). Procedures for supplemental valuation notice in case of new construction, additions, deletions and changes in use are established (Ariz. Rev. Stat. 42-15105). Within 25 days from date of assessor's decision, appeal may be made to county board of equalization if established or to state board of equalization if county board of equalization does not exist, or superior court. (Ariz. Rev. Stat. 42-16056 et seq., Ariz. Rev. Stat. 42-16201 et seq.). Board of supervisors may appoint hearing officer (Ariz. Rev. Stat. 42-16103) and board or hearing officer must convene as often as is necessary in order to hear petitions filed pursuant to Ariz. Rev. Stat. 42-16105. County board must complete all hearings and issue all decisions on or before Oct. 15 of each year. (Ariz. Rev. Stat. 42-16104). Procedures for correcting property tax errors are established. (Ariz. Rev. Stat. 42-16251 et seq.). Fees and other expenses shall be awarded to party successfully challenging state assessment or collection of tax. (Ariz. Rev. Stat. 12-348).

Payment and Collection.

One half of tax on real property and personal property secured by real property is due and payable Oct. 1 and becomes delinquent Nov. 1. Remaining half is due and payable on Mar. 1 and becomes delinquent May 1. (Ariz. Rev. Stat. 42-18052). If amount of tax is $100 or less, full amount is due Oct. 1 and becomes delinquent Nov. 1. (Ariz. Rev. Stat. 42-18052). Special rules may apply when real property is split or consolidated after Sept. 30 of valuation year. (Ariz. Rev. Stat. 42-18057). Up to one year extension of due date for taxpayers residing in areas affected by disaster, terrorism, military action, or declared state of emergency. (Ariz. Rev. Stat. 42-2079).

Taxes may be prorated on certain rented or leased personal property. (Ariz. Rev. Stat. 42-19103).

Lien.

Personal property is liable for taxes levied on real property, and real property is liable for taxes levied on personal property. (Ariz. Rev. Stat. 42-17154). Levy on real or personal property is lien against property that attaches on Jan. 1 of each year and is prior and superior to any other liens of every kind, regardless of when another lien attached, except liens held by State. (Ariz. Rev. Stat. 42-17153, Ariz. Rev. Stat. 42-19106). Where ownership of mineral rights in land is separate from ownership in other interests of land, taxes assessed against one may not be lien against another. (Ariz. Rev. Stat. 42-17154). Department may accept voluntary liens on real or personal property as security for taxes not paid when due. (Ariz. Rev. Stat. 42-1155).

Sale.

Real property upon which taxes, including personal property taxes secured thereby, are unpaid and delinquent, is subject to tax lien sale. (Ariz. Rev. Stat. 42-18101 et seq.). County treasurer sells tax liens on real property in Feb. of each year or at later time if necessary. (Ariz. Rev. Stat. 42-18112). Property tax liens that cannot be sold are conveyed to state in consideration of taxes, interest, penalties and charges. (Ariz. Rev. Stat. 42-18113). State may sell property held under tax deed. (Ariz. Rev. Stat. 42-18301 to Ariz. Rev. Stat. 42-18304). Sale of lien does not extinguish easements on or appurtenant to parcel. (Ariz. Rev. Stat. 42-18115). Notice of sale is mailed to owner and published in newspaper and on website two to three weeks before sale. (Ariz. Rev. Stat. 42-18108 to Ariz. Rev. Stat. 42-18110). Tax lien must be sold for cash at time of sale to person who pays taxes, interest, penalties and charges, and who offers to accept lowest rate of interest upon that amount, not to exceed rate prescribed by Ariz. Rev. Stat. 42-18053, until redeemed. (Ariz. Rev. Stat. 42-18114). State as assignee will charge interest at rate prescribed by Ariz. Rev. Stat. 42-18053, until redemption. (Ariz. Rev. Stat. 42-18113). If tax lien is not redeemed and purchaser fails to commence right of redemption within ten years, certificate of purchase and lien is void. (Ariz. Rev. Stat. 42-18127).

A purchaser at tax sale has been held to have a lien only and therefore may get title by adverse possession. (85 Ariz. 56, 331 P.2d 257).

Unsecured personal property is sold by county sheriff on order of county treasurer given within 30 days after delinquency. (Ariz. Rev. Stat. 42-19108 et seq.). Sheriff seizes property of order and advertises it for sale at auction for cash within one year of seizure. (Ariz. Rev. Stat. 42-19110[A]). He is empowered to enter any real property to make seizure. (Ariz. Rev. Stat. 42-19110[B]). Notice of time, place and terms of sale must be given by posting two notices in public places within county and one where property is located. Sheriff may not sell property until three weeks after notice served on or received by property owner. (Ariz. Rev. Stat. 42-19111). Only so much of personal property is sold as is necessary to pay taxes, interest and costs of sale. (Ariz. Rev. Stat. 42-19113). If no bid is sufficient to pay that amount, property is sold to county which in turn sells it at public auction or private sale for best price obtainable. (Ariz. Rev. Stat. 42-19113, Ariz. Rev. Stat. 42-19114).

Redemption.

Real property may be redeemed within three years or thereafter at any time before delivery of treasurer's deed to purchaser by any person having legal or equitable claim by payment of amount for which real property tax lien was sold with interest thereon, amount of all taxes accruing on property and paid by purchaser with interest thereon and certain statutory fees. (Ariz. Rev. Stat. 42-18151 et seq.). If not redeemed within three years, purchaser or state as assignee may by judicial action foreclose right to redeem and obtain deed. (Ariz. Rev. Stat. 42-18201 et seq.). If not redeemed within five years, state may apply for treasurer's deed. (Ariz. Rev. Stat. 42-18261). Prior to issuing, treasurer must publish notice of application for deed once in each of two consecutive weeks, conduct title search, give 90 days notice to owner by registered mail, and in some cases, post notice on property. (Ariz. Rev. Stat. 42-18263 to Ariz. Rev. Stat. 42-18266). If property is not then redeemed state may be issued deed. (Ariz. Rev. Stat. 42-18267).

Personal property may be redeemed by owner at any time prior to actual sale by paying taxes, interest and costs to sheriff. (Ariz. Rev. Stat. 42-19112).

Real Estate Conveyance Tax.

See category 21 Property, topic 21.06 Deeds.

22.17 SALES AND USE TAXES:

Sales Tax.

See subhead Transaction Privilege Taxes, infra.

Use tax (Ariz. Rev. Stat. 42-5151 et seq.) is imposed on storage, use, mail-order solicitation or consumption within state of tangible personal property purchased from retailer. Rate is determined by reference to combined rates of transaction privilege and other taxes imposed on same type of business activity. (Ariz. Rev. Stat. 42-5155[C]). Exemptions set forth in Ariz. Rev. Stat. 42-5159. Person may pay use taxes directly to department if person satisfies certain requirements. (Ariz. Rev. Stat. 42-5167).

Transaction Privilege Taxes.

Instead of sales tax, transaction privilege tax is imposed on gross proceeds of sale or gross income of certain trades or businesses, in addition to all other licenses and taxes levied by law. (Ariz. Rev. Stat. 42-5001 et seq.). Gross income, gross receipts and gross proceeds do not include transaction privilege taxes passed on to and collected from taxpayer from his customers or direct freight costs billed to and collected from purchaser of tangible personal property. (Ariz. Rev. Stat. 42-5002). Establishing entitlement to deduction for sales to certain purchasers governed by Ariz. Rev. Stat. 42-5009.

Rates.

Tax is imposed at following rates:

(1) 31/8% on mining, quarrying or producing for sale or commercial use oil, natural gas, limestone, sand, gravel or any other nonmetalliferous minerals or combinations thereof. (Ariz. Rev. Stat. 42-5010[A][3], Ariz. Rev. Stat. 42-5072). Any increase in this rate does not apply to contracts entered into or written bids made by prime contractors on or before effective date of increase. (Ariz. Rev. Stat. 42-5010[H]).

(2) 0% on business of leasing use or occupancy of real property for consideration, except property: (a) classified as transient lodging; (b) related to Arizona Coliseum and Exposition Center Board or County Fair Commission; (c) leased to lessee who subleases, if lessee is member of commercial lease or transient lodging class; (d) written leases entered into before Dec. 1, 1967, generally; (e) leased by corporation to affiliated corporation; (f) used for residential, agricultural purposes, or religious worship purposes; (g) leased by certain nonprofit or qualifying organizations associated with enumerated sporting events, vendors, or exhibitors, and (h) other listed property or lessors. (Ariz. Rev. Stat. 42-5010[A][4], Ariz. Rev. Stat. 42-5069).

(3) 5½% on business of operating, for occupancy by transients, certain lodging spaces for less than 30 consecutive days. (Ariz. Rev. Stat. 42-5010[A][2], Ariz. Rev. Stat. 42-5070). Exemptions for certain medical, religious, charitable, educational or governmental purposes, and bread and breakfast establishments. (Ariz. Rev. Stat. 42-5070[B]).

(4) 5% on business of transporting for hire persons, freight or property by motor vehicle, railroads or aircraft intrastate, except: (a) Transport by motor carriers or lightweight motor vehicles subject to other tax; (b) transport by aircraft preempted by federal law; (c) ambulance services; (d) ambulances and public transportation program services for Dial-A-Ride programs and special needs transportation services; and (e) transport by certain railroad operations. (Ariz. Rev. Stat. 42-5010[A][1][a], Ariz. Rev. Stat. 42-5010[G], Ariz. Rev. Stat. 42-5062).

(5) 5% on business of producing or furnishing to consumers electricity, natural or artificial gas and water and ancillary services to electric customers and services, except sale of electricity, gas or water for resale, sales of gas to propel motor vehicles, and certain sales of alternative fuels. (Ariz. Rev. Stat. 42-5010[A][1][b], Ariz. Rev. Stat. 42-5010[G], Ariz. Rev. Stat. 42-5063).

(6) 5% on business of providing intrastate telecommunications services, except sale by cable or similar satellite television systems and Internet access or application services. (Ariz. Rev. Stat. 42-5010[A][1][c], Ariz. Rev. Stat. 42-4010[G], Ariz. Rev. Stat. 42-5064).

(7) 5% on business of operating pipelines for intrastate transportation of oil or natural or artificial gas through pipes or conduits, except sales of gas used to propel motor vehicle. (Ariz. Rev. Stat. 42-5010[A][1][d], Ariz. Rev. Stat. 42-5010[G], Ariz. Rev. Stat. 42-5067).

(8) 5% on business of operating private car company. (Ariz. Rev. Stat. 42-5010[A][1][e], Ariz. Rev. Stat. 42-5010[G], Ariz. Rev. Stat. 42-5068).

(9) 5% on business of publishing newspapers, magazines or other periodicals and publications if published in state, except: (a) Manufacturing or publishing books; (b) sales of magazines or other periodicals or other publications by state to encourage tourist travel. (Ariz. Rev. Stat. 42-5010[A][1][f], Ariz. Rev. Stat. 42-5010[G], Ariz. Rev. Stat. 42-5065).

(10) 5% on business of job printing, engraving, embossing and copying. (Ariz. Rev. Stat. 42-5010[A][1][g], Ariz. Rev. Stat. 42-5010[G], Ariz. Rev. Stat. 42-5066).

(11) 5% on business of prime contracting, which includes: (1) one who undertakes to or offers to undertake to, or purports to have capacity to undertake to, or submits bid to, or does personally or by or through others, construct, alter, repair, add to, subtract from, improve, move, wreck or demolish any building, highway, road, railroad, excavation, manufactured building or other structure, project, development or improvement, or to do any part of such project, including erection of scaffolding or other structure or works in connection with such project; and (2) dealership of manufactured buildings, not resale of used manufactured buildings. (Ariz. Rev. Stat. 42-5010[A][1][h], Ariz. Rev. Stat. 42-5010[G], Ariz. Rev. Stat. 42-5075). Exemptions set forth in Ariz. Rev. Stat. 42-5075(B).

(12) 5% on improvements of real property sold by owner/builder before 24 months after improvement is substantially completed. (Ariz. Rev. Stat. 42-5010[A][1][i], Ariz. Rev. Stat. 42-5010[G], Ariz. Rev. Stat. 42-5076).

(13) 5% on business of operating or conducting various types of amusement, such as theaters, movies, operas, exhibitions, concerts, carnivals, circuses, amusement parks, sporting events, billiard or pool parlors, bowling alleys, and any other business charging admission or user fees for exhibition, amusement, or entertainment, with certain exceptions set forth therein. (Ariz. Rev. Stat. 42-5010[A][1][j], Ariz. Rev. Stat. 42-5010[G], Ariz. Rev. Stat. 42-5073).

(14) 5% on business of operating restaurants, dining cars, dining rooms, lunch rooms, lunch stands, soda fountains, catering services or similar establishments where articles of food or drink are sold for consumption on or off premises, unless exempted therein. (Ariz. Rev. Stat. 42-5010[A][1][k], Ariz. Rev. Stat. 42-5010[G], Ariz. Rev. Stat. 42-5074).

(15) 5% on business of leasing or renting tangible personal property for consideration, with certain limited exceptions. (Ariz. Rev. Stat. 42-5010[A][1][l], Ariz. Rev. Stat. 42-5071).

(16) 5% on business of selling tangible personal property at retail, with numerous exceptions. (Ariz. Rev. Stat. 42-5010[A][1][m], Ariz. Rev. Stat. 42-5010[G], Ariz. Rev. Stat. 42-5061).

Licenses.

Every person or corporation engaged in any activity upon which transaction privilege tax is imposed must procure license which is effective indefinitely and is not transferable. Fee $12. Violation of statute or rules may result in revocation of license. (Ariz. Rev. Stat. 42-5005). Certain contractors and manufacturers of manufactured housing must post bond to assure payment of tax. (Ariz. Rev. Stat. 42-5006, Ariz. Rev. Stat. 42-5007).

Returns and Payment.

Verified return must be made and tax paid by 20th day of month following that for which tax accrued. Tax is delinquent if not postmarked by 25th day of that month or paid by mail or in person on business day before last business day of month. Electronically filed taxes are delinquent if not received on or before last business day of month. Certain taxpayers may pay quarterly. Transient taxpayer may be required to make return and pay tax on daily, weekly or transaction-by-transaction basis. (Ariz. Rev. Stat. 42-5014).

Records.

Appropriate records of gross income, gross receipts and gross proceeds of sales of business, and any other books or accounts necessary to determine his tax liability, required. (Ariz. Rev. Stat. 42-1105, Ariz. Rev. Stat. 42-5025, Ariz. Rev. Stat. 42-5026). All invoices of luxuries purchased for resale must be kept for two years. Such records must be kept available for examination at any reasonable time by Department of Revenue. (Ariz. Rev. Stat. 42-1127, Ariz. Rev. Stat. 42-3151).

Exemptions.

Gross revenues realized from many transactions are exempt from tax. Exemptions are set out in provision applicable to each business category. (Ariz. Rev. Stat. 42-5001 et seq.).

Penalties.

Failure to obtain privilege license is class 3 misdemeanor. (Ariz. Rev. Stat. 42-5005). Failure to allow examination of records is class 2 misdemeanor. (Ariz. Rev. Stat. 42-5025).

Intermunicipal Taxes.

Municipal transaction privilege tax on taxable transaction is payable only once; method of allocating taxpayer liability between municipalities is prescribed. (Ariz. Rev. Stat. 42-6003). Virtually all Arizona cities and towns have adopted Model City Tax Code. Modifications or amendments to Model City Tax Code by municipality requires hearing after 15 day notice and is not effective until 30 days after hearing (Ariz. Rev. Stat. 42-6054).

County Taxes.

County may impose and state will collect county tax on activities taxable under state transaction privilege tax. (Ariz. Rev. Stat. 42-6101 et seq.). Counties also may impose transportation excise tax (Ariz. Rev. Stat. 42-6104 to Ariz. Rev. Stat. 42-6107), hotel tax (Ariz. Rev. Stat. 42-6108 and Ariz. Rev. Stat. 42-6108.01) and/or jail facilities excise tax. (Ariz. Rev. Stat. 42-6109 and Ariz. Rev. Stat. 42-6109.01).

Note: Limited credit is allowed against taxes imposed by Transaction Privilege Tax Section for expenses incurred in accounting and reporting taxes due. (Ariz. Rev. Stat. 42-5017).

Government Property Lease Excise Tax.

Government leases property, levies and collects annual excise tax. Rates based on square footage and usage. Exemptions available. (Ariz. Rev. Stat. 42-6201 et seq.).

Indian Tribal College.

Effective July 1, 2000, Indian tribes which operate colleges on their own land are to receive part of revenue from state sales and severance taxes from operations on tribal lands, for maintenance and renewal of designated community college activities. (Ariz. Rev. Stat. 42-5031.01).

Telecommunication services excise tax imposed by Ariz. Rev. Stat. 42-5251 et seq.

Rental Vehicle Tax.

5% surcharge on rental vehicle contracts for 180 days or less. (Ariz. Rev. Stat. 28-5810).

22.18 STAMP AND SEAL TAXES:

Luxury Privilege Tax.

Stamp taxes, payable by affixing to containers, etc., stamps obtainable from Department of Revenue, are imposed on spirituous liquor, cider, malt liquor, cigarettes, tobacco, and cigars, by Ariz. Rev. Stat. 42-3001 et seq.

22.18A TAX INCENTIVES AND EXEMPTIONS:

Enterprise Zones.

Tax incentives governed by Ariz. Rev. Stat. 43-1074, Ariz. Rev. Stat. 43-1161, and Ariz. Rev. Stat. 20-224.03.

Environmental Technology Manufacturing Incentives.

Tax incentives governed by Ariz. Rev. Stat. 41-1514.02, Ariz. Rev. Stat. 42-5061, Ariz. Rev. Stat. 43-1080 and Ariz. Rev. Stat. 43-1169.

Investment in Small Business.

Tax incentives governed by Ariz. Rev. Stat. 43-1074.02.

Motion Pictures.

Tax incentives governed by Ariz. Rev. Stat. 41-1517, Ariz. Rev. Stat. 43-1075 and Ariz. Rev. Stat. 43-1163.

Municipal Tax Incentives.

Tax incentives inducing new businesses to locate within municipality forbidden by Ariz. Rev. Stat. 42-6010.

Renewable Energy Business.

Tax incentives governed by Ariz. Rev. Stat. 41-1511, Ariz. Rev. Stat. 42-12057, Ariz. Rev. Stat. 43-1083.01, and Ariz. Rev. Stat. 43-1164.01.

22.18B UNIFORM LAWS:

Uniform Federal Lien Registration Act adopted. (Ariz. Rev. Stat. 33-1031 et seq.).

Uniform Division of Income for Tax Purposes Act adopted effective Jan. 1, 1984. (Ariz. Rev. Stat. 43-1131 et seq.).

23 TRANSPORTATION

23.01 MOTOR VEHICLES:

Traffic and Vehicle Regulation.

(Ariz. Rev. Stat. 28-601 et seq.). Vehicle insurance and financial responsibility. (Ariz. Rev. Stat. 28-4001 et seq.). Vehicle Equipment Safety Compact adopted. (Ariz. Rev. Stat. 28-1801 et seq.). Multistate Highway Transportation Agreement adopted. (Ariz. Rev. Stat. 28-1821 et seq.). Nonresident Violator Compact adopted. (Ariz. Rev. Stat. 28-1871 et seq.).

General Supervision.

Board shall develop statewide transportation policy statement (Ariz. Rev. Stat. 28-306) and statewide transportation plan (Ariz. Rev. Stat. 28-307). Division shall develop standardized transportation system performance measures. (Ariz. Rev. Stat. 28-504).

Dealers, including brokers, are regulated by Director and are required to have license, pay filing fee of $15 and annual fee of $100. (Ariz. Rev. Stat. 28-4302, Ariz. Rev. Stat. 28-4335). Wholesale motor vehicle dealers and sellers of mobile medical clinics are required to have license. (Ariz. Rev. Stat. 28-4335). Director may enforce license regulation through suspension of license, issuance of cease and desist order, and imposition of civil penalties. (Ariz. Rev. Stat. 28-4491 et seq.). Director also may bring and maintain action in superior court on behalf of state to restrain violation. (Ariz. Rev. Stat. 28-4497). Director deposits dealer licensing fees and civil penalties in state highway fund. (Ariz. Rev. Stat. 28-4304).

Motor vehicle subleasing regulated by Ariz. Rev. Stat. 12-631 et seq.

Vehicle license by residents required annually. (Ariz. Rev. Stat. 28-2153). Definition of “residents” includes persons who remain in state for aggregate of seven months or more per calendar year, who engage in occupation or are employed within state in other than seasonal agricultural work, who declare residency to obtain residential rates for state license or tuition at public educational institution, or who place children in public schools without payment of nonresident tuition, as well as any individual, partnership, company, firm, corporation or association that operates motor vehicles within state for other than seasonal agricultural work or that maintains main or branch offices or warehouse facilities and bases and operates motor vehicles within state. (Ariz. Rev. Stat. 28-2001). Exceptions exist. (Ariz. Rev. Stat. 28-2001). Registration of vehicle used by nonresident daily commuter. (Ariz. Rev. Stat. 28-2291 et seq.). Foreign vehicle registration by nonresidents. (Ariz. Rev. Stat. 28-2321 et seq.). Temporary general use registration. (Ariz. Rev. Stat. 28-2156). Certain special plates in lieu of regular plates are permitted. (Ariz. Rev. Stat. 28-2401 et seq.). Honored military license plates. (Ariz. Rev. Stat. 28-2451 et seq.). Special licenses for horseless carriages, classic cars and historic vehicles. (Ariz. Rev. Stat. 28-2481 et seq.). Special title and license plate provisions apply to off-road vehicles (Ariz. Rev. Stat. 28-2512) and alternative fuel vehicles (Ariz. Rev. Stat. 28-2416). Penalty for delinquency. (Ariz. Rev. Stat. 28-2161 to Ariz. Rev. Stat. 28-2162). Penalty waived if automotive recycler applies for dismantle certificate of title. (Ariz. Rev. Stat. 28-2162[F]). License plates must be displayed on rear of motor vehicle, trailer, or semitrailer, either on rear or on front and rear of vehicles for which two plates are issued. (Ariz. Rev. Stat. 28-2354). Director may authorize third parties to perform licensing and registration functions. (Ariz. Rev. Stat. 28-5101 et seq.). Official vehicles exempt from registration fees. (Ariz. Rev. Stat. 28-2511). One year exemption for deployed military personnel and spouse, legally designated representative. (Ariz. Rev. Stat. 28-5811).

Operators’ license required. (Ariz. Rev. Stat. 28-3001 et seq.). Driver License Compact adopted. (Ariz. Rev. Stat. 28-1851 et seq.). Certain members of armed services, reserves, and Army/Air National Guard exempt from license requirement while operating commercial motor vehicles for military purposes. (Ariz. Rev. Stat. 28-3152). Nonresident in possession of valid license issued in home state or country exempt from license requirement. (Ariz. Rev. Stat. 28-3152). English proficiency required for certain license classes. (Ariz. Rev. Stat. 28-3153). Licenses expire on 65th birthday, and thereafter on birthday five years after issuance. (Ariz. Rev. Stat. 28-3171[A]). License can be renewed by mail in certain cases. (Ariz. Rev. Stat. 28-3172). Extension up to six months is available by mail for residents who are out-of-state at time license expires and will be out-of-state at least 30 days thereafter. (Ariz. Rev. Stat. 28-3171[E]). Veterans not required to renew license for six months after discharge. (Ariz. Rev. Stat. 28-3171[D]). Family members living out-of-state with military personnel may renew license by mail. (Ariz. Rev. Stat. 28-3172[A]). Licensee required to update photo and pass vision test every 12 years. (Ariz. Rev. Stat. 28-3173). Medical information may be put on licenses. (Ariz. Rev. Stat. 28-3167). Information on license application may not be supplied for commercial purposes, except in specified circumstances, unless driver consents to disclosure. (Ariz. Rev. Stat. 28-455). The director of the Department of Transportation may charge $600 per million records searched with minimum of $30 per thousand records provided. (Ariz. Rev. Stat. 28-455[J]).

Titles, Sales and Liens.

Application for certificate of title must be made within 15 days of purchase or transfer and must be accompanied by odometer mileage disclosure statement if vehicle was previously registered. (Ariz. Rev. Stat. 28-2051). Certificate of title must contain odometer mileage disclosure statement and may contain transfer on death provision. (Ariz. Rev. Stat. 28-2055). Owner of registered vehicle must deliver statement to transferee upon transfer or assignment. (Ariz. Rev. Stat. 28-2058). No vehicle shall be operated upon highways until registered. (Ariz. Rev. Stat. 28-2153). Exceptions exist. (Ariz. Rev. Stat. 28-2153[D]).

Security agreement, conditional sale or other contract of reservation of title (other than lien dependent on possession), and contract for conveyance, deed of trust or mortgage securing lien on both mobile home and real property, is invalid against creditors or subsequent purchasers without notice. (Ariz. Rev. Stat. 28-2131). No new certificate of title issued when outstanding certificate of title shows lien or encumbrance, unless such has been satisfied or its holder has consented in writing to transfer of title (Ariz. Rev. Stat. 28-2132[D]), owner furnishes proof of payment of underlying debt and affidavit that lienholder cannot be found (Ariz. Rev. Stat. 28-2134[D]), or certificate of title issued at least one year prior to time of request by jurisdiction where liens must be recorded does not show lien (Ariz. Rev. Stat. 28-2134[E]). Salvage vehicles restored or rebuilt cannot be transferred until restored salvage certificate of title issued. (Ariz. Rev. Stat. 28-2095).

Identification Marks.

Intentional removal, defacement, alteration, or destruction of manufacturer’s serial or identification number is class five felony. (Ariz. Rev. Stat. 28-2531[A]).

Fuel.

Department of Weights and Measures regulates dispensing machines (Ariz. Rev. Stat. 41-2051 et seq.) and tests machines at random (Ariz. Rev. Stat. 41-2065). Department regulates sale of fuel (Ariz. Rev. Stat. 41-2082 et seq.), oxygenation and other requirements (Ariz. Rev. Stat. 41-2122 et seq.). Standards for fuel (Ariz. Rev. Stat. 41-2083.01), exceptions (Ariz. Rev. Stat. 41-2083.01), and reformulation (Ariz. Rev. Stat. 41-2124.01). Definition of alternate fuel. (Ariz. Rev. Stat. 1-215[4]). Definition of biodiesel fuel. (Ariz. Rev. Stat. 41-2051[1]). Interstate transportation of fuel requires report. (Ariz. Rev. Stat. 28-5724 et seq.).

Size and Weight Limits.

Regulated by Ariz. Rev. Stat. 28-1091 et seq. Special permits for excess weight and size may be obtained. (Ariz. Rev. Stat. 28-1103). Envelope permits may be obtained for fee. (Ariz. Rev. Stat. 28-1141 et seq.).

Driver License Classes and Endorsements.

Regulated by Ariz. Rev. Stat. 28-3101 et seq.

Passenger Restraint System.

Person shall not operate motor vehicle on highways when transporting child under five years of age unless secured in child passenger restraint system. (Ariz. Rev. Stat. 28-907). Exceptions listed in Ariz. Rev. Stat. 28-907(G). Each front seat occupant of motor vehicle built in or after 1972 and designed for ten or fewer passengers, must wear lap and shoulder belt or lap belt. (Ariz. Rev. Stat. 28-909[A]). Driver is responsible for ensuring that each passenger under age 16 is properly utilizing passenger restraint system. (Ariz. Rev. Stat. 28-909[B]).

State Highway Speed Limits.

(Ariz. Rev. Stat. 28-702 et seq.).

Safety.

Driver liable for expenses of emergency response if driver enters street or highway covered by water and barricaded. (Ariz. Rev. Stat. 28-910). Vehicles require safety equipment such as lights, brakes, and mirrors. (Ariz. Rev. Stat. 28-929 et seq.).

Vehicle Emissions Inspection.

Required by Ariz. Rev. Stat. 49-541 et seq.

Modular Motor Homes.

Definitions and disclosure requirements. (Ariz. Rev. Stat. 28-2097).

Off Road Vehicles.

Limits on use and requirements for those who sell or lease. (Ariz. Rev. Stat. 49-457.03 et seq.) Limits on operators. (Ariz. Rev. Stat. 28-1171 et seq.).

Person who signs application for instruction permit, driver's license or motorcycle permit on behalf of minor is liable for negligence or willful misconduct of minor, unless proof of financial responsibility is shown on behalf of minor. (Ariz. Rev. Stat. 28-3160). Owner allowing operation by unlicensed minor under age 18 is liable for negligence or willful misconduct of such minor. (Ariz. Rev. Stat. 28-3163). Owner of car kept for family use is liable for negligence of any family member. (81 Ariz. 325, 305 P.2d 463).

Guests.

No guest statute.

Proof of financial responsibility generally required by Ariz. Rev. Stat. 28-4001 et seq. Exemptions exist. Operators of motor vehicles required to have evidence of current financial responsibility within vehicle. (Ariz. Rev. Stat. 28-4133[B]). Applicant for registration of motor vehicle must consent to comply with state financial responsibility requirements and cooperate with verification efforts. (Ariz. Rev. Stat. 28-4142[A]). Civil penalties for violations, including minimum fine of $500, driver's license suspension, and registration and license plate suspension. (Ariz. Rev. Stat. 28-4135). Compliance with financial responsibility requirements mandatory for reinstatement of suspended license. (Ariz. Rev. Stat. 28-4144[C]).

Operators of commercial vehicles with gross weight exceeding 20,000 pounds, vehicles transporting hazardous substances, and passenger carrying vehicles for hire, except carpool operators, are subject to financial responsibility requirements. (Ariz. Rev. Stat. 28-4032 to Ariz. Rev. Stat. 28-4033).

Insurance.

Mandatory motor vehicle insurance. (Ariz. Rev. Stat. 28-4131 et seq.). Insurance company, at request of insured, must provide insured with uninsured/underinsured motorist coverage. (Ariz. Rev. Stat. 20-259.01). Insured must corroborate any bodily injury or death claim invoking uninsured/underinsured coverage if cause of accident is unidentified motor vehicle. (Ariz. Rev. Stat. 20-259.01[M]). With certain exceptions, insurer is not liable for uninsured or underinsured motorist coverage benefits unless claimant gives written notice within three years after date of accident if accident caused bodily injury. (Ariz. Rev. Stat. 12-555). Limitations imposed on right of auto insurers to cancel or renew insurance (Ariz. Rev. Stat. 20-1631 et seq.) and to increase premiums (Ariz. Rev. Stat. 20-263). Statutory presumptions govern primary and excess coverage when two or more policies cover same loss. (Ariz. Rev. Stat. 28-4010). Automobile rental agency's insurance is primary coverage for rental vehicle, but rental agency is not insurer of renter and has no obligation to defend driver beyond limits of coverage provided. (Ariz. Rev. Stat. 28-2166).

No-Fault Insurance.

Not adopted.

Foreign Vehicle.

Unlawful to operate foreign vehicle owned by nonresident on state highways, unless there is displayed on vehicle current registration number plates issued by owner's state or country of residence. (Ariz. Rev. Stat. 28-2322). Foreign motor carriers must register and follow special provisions. (Ariz. Rev. Stat. 28-5244). Foreign vehicles used in commerce must be registered and licensed in Arizona. (Ariz. Rev. Stat. 28-2321[A]). There are special provisions for registration of vehicles owned by residents of adjoining states. (Ariz. Rev. Stat. 28-2323 to Ariz. Rev. Stat. 28-2324). Nonresident purchaser of unregistered vehicle within state for removal to purchaser's state of residence may secure special 90 day nonresident registration. (Ariz. Rev. Stat. 28-2154[A]). Vehicle owned by foreign government, Indian tribal government, or nonprofit organization need not pay registration fees, but must register and display official plates. (Ariz. Rev. Stat. 28-2511[A]). Licensing and insurance requirements apply to operators of foreign vehicles if foreign country does not grant reciprocal privileges to Arizona operators. (Ariz. Rev. Stat. 28-3152[B], Ariz. Rev. Stat. 28-4037[A]).

Action against nonresident, including minor, insane or incompetent person, arising out of operation of motor vehicle in this state may be commenced by service of process on Director. (Ariz. Rev. Stat. 28-2326[B]). Notice of such service and copy of summons and complaint must be sent to defendant by registered mail or served on him by officer qualified to serve process in state where defendant is found. (Ariz. Rev. Stat. 28-2327[A]). Long-arm jurisdiction exists under R. Civ. P. 4.2.

Consent.

Operators of motor vehicles within state, if arrested or in accident involving serious injury or death, impliedly consent to tests of blood, breath, or urine to determine alcohol or drug content. (Ariz. Rev. Stat. 28-1321 et seq.).

Direct actions against insurer not permitted.

Motor vehicle carriers regulated in accordance with Multistate Highway Transportation Agreement adopted in Ariz. Rev. Stat. 28-1821 et seq. Every manufacturer, shipper, motor carrier and transporter must maintain books and records within state for three years and make available for inspection. (Ariz. Rev. Stat. 28-5231). Director may suspend registration or license if operation of vehicle endangers public safety. (Ariz. Rev. Stat. 28-5232). Penalties for violation governed by Ariz. Rev. Stat. 28-5232 et seq. Commercial vehicles between 20,000 and 26,000 pounds must carry liability insurance of $300,000. (Ariz. Rev. Stat. 28-4033[A][1][b]). Larger vehicles, certain passenger-carrying commercial vehicles and vehicles carrying hazardous substances must have more insurance. (Ariz. Rev. Stat. 28-4033[A]). Motor Vehicle Division may require certification of existence of financial responsibility. (Ariz. Rev. Stat. 28-

4034). Motor vehicle fee reduced for agricultural carriers (Ariz. Rev. Stat. 28-5857) or limited mileage (Ariz. Rev. Stat. 28-5867).

Hours of Labor.

A driver transporting items for agricultural purposes shall not drive after being on duty for 16 hours after being off duty for eight hours, or after having been on duty for 112 hours in any consecutive seven day period, with exceptions. (Ariz. Rev. Stat. 23-286.01).

Taxation of Motor Vehicle Carriers.

See category 22 Taxation, topic 22.08 Gasoline and Special Fuels Taxes, subhead Motor Carriers Tax.

Motor Vehicle Tax.

Tax based on each $100 of value. (Ariz. Rev. Stat. 28-5801[B]). Value for first 12 months is 60% of manufacturer's base retail price. (Ariz. Rev. Stat. 28-5801[B]). Value diminished by 16.25% each 12-month period thereafter. (Ariz. Rev. Stat. 28-5801[B]). Certain veterans and their surviving spouses (Ariz. Rev. Stat. 28-5802) and disabled individuals exempted (Ariz. Rev. Stat. 28-5803).

Motor Vehicle Warranties.

Regulated by Ariz. Rev. Stat. 44-1261 et seq. If new motor vehicle does not conform to express warranty and if consumer reports nonconformity within two years or 24,000 miles following delivery or within term of express warranty, whichever is earlier, repairs must be made. (Ariz. Rev. Stat. 44-1262). If defect substantially impairs use and value of motor vehicle and if, after reasonable number of attempts, repairs cannot conform vehicle to express warranties, manufacturer must replace motor vehicle or refund full purchase price less reasonable allowance for use. (Ariz. Rev. Stat. 44-1263[A]). For manufacturer with prior direct written notification of defect (Ariz. Rev. Stat. 44-1264[C]), it is presumed that reasonable number of attempts have been made if either: (1) Same defect has been subject to repair four or more times within two years or 24,000-mile warranty term, whichever is earlier, or (2) motor vehicle is out of service by reason of repair for cumulative total of 30 or more days during term or two-year period or 24,000 miles, whichever is earlier (Ariz. Rev. Stat. 44-1264[A]). Manufacturer's informal dispute settlement procedures must be resorted to prior to refund or replacement under Ariz. Rev. Stat. 44-1263. (Ariz. Rev. Stat. 44-1265[A]). Statute of limitations for action under this article is six months following expiration of express warranty or two years or 24,000 miles following date of original delivery of motor vehicle, whichever is earlier. (Ariz. Rev. Stat. 44-1265[B]). Consumer entitled to reasonable costs and attorneys' fees. (Ariz. Rev. Stat. 44-1265[B]).

Trailer—Mobile Home Tax.

Mobile homes permanently affixed to real property subject to tax as real property. (Ariz. Rev. Stat. 42-15202). Other mobile homes subject to ad valorem personal property tax. (Ariz. Rev. Stat. 42-19152, Ariz. Rev. Stat. 42-19153). Unlawful to move or sell mobile home unless property tax paid. (Ariz. Rev. Stat. 42-19107). Department of Transportation issues annual listing of delinquent, unsecured personal property taxes on mobile homes. (Ariz. Rev. Stat. 28-2062).

Aircraft operation (Ariz. Rev. Stat. 28-8271 et seq.) and registration. (Ariz. Rev. Stat. 28-8321 et seq.).

Construction of mobile homes and recreational vehicles regulated by Department of Fire, Building, and Life Safety, Office of Manufactured Housing. (Ariz. Rev. Stat. 41-2141 et seq.). Movement of mobile homes on state highways regulated by Ariz. Rev. Stat. 28-1104(E).

Fee Surety Bond.

See category 5 Civil Actions and Procedure, topic 5.04 Bonds.

Gasoline Tax.

Imposed by Ariz. Rev. Stat. 28-5606 et seq., with exceptions. (Ariz. Rev. Stat. 28-5610).

Petroleum Products Franchises.

Full-service gasoline station must provide attendant for physically disabled persons at self-service portion during full-service hours. (Ariz. Rev. Stat. 44-1562).

Use Fuel Tax and Surcharge.

Established by Ariz. Rev. Stat. 28-5601 et seq., Ariz. Rev. Stat. 28-5702 et seq.

Construction of Highways.

Transportation Board may make loans to cities or towns to fund local highway projects. (Ariz. Rev. Stat. 9-500.17, Ariz. Rev. Stat. 28-7673). Highway expansion and extension loan program advisory committee created to form guidelines and review/recommend requests for financial assistance for highway projects. (Ariz. Rev. Stat. 28-7672 et seq.). City or town that agrees to pay Department of Transportation advance money to speed up highway project can issue and sell “Highway Project Advancement Notes” to raise up to $100 million toward project. (Ariz. Rev. Stat. 28-7681 et seq.).

23.02 RAILROADS:

Railroads must disclose information required by A.R.S. 28-9401 to Department of Transportation, which is subject to public hearing and review. See also category 3 Business Regulation and Commerce, topic 3.08 Carriers.

24 Forms

Commercial Code Forms

1
ARKANSAS LAW DIGEST

—Scope —

Revised for 2010 edition by

ROSE LAW FIRM, a Professional Association, of Little Rock.

(Citations, unless otherwise indicated, refer to chapters or sections of Arkansas Code 1987, Official Edition. Subsequent statutes are cited by year and act number. Effective July 1, 1979, Arkansas Supreme Court established certain procedural rules superseding many statutory provisions. These rules are Rules of Civil Procedure (RCP), Rules of Appellate Procedure (RAP), and District Court Rules (ADCR), which are cited by abbreviations indicated in parentheses. Parallel citations to South Western Reporter begin with 47 Ark.)

Note: 2009 legislation includes session laws through May 2009. Legislature meets *in regular session starting second Mon. of Jan. in odd years and in fiscal session starting 2d Mon. of Feb. in even years.*

1 INTRODUCTION

1.01 GOVERNMENT AND LEGAL SYSTEM:

The State of Arkansas is a constituent state of the United States of America. For further discussion of the U.S. federal system, see Introduction to the Federal Government of the United States at the beginning of this volume. A great many laws are promulgated by the federal government of the United States and are not reflected in the topics below. See the Introduction to this volume for references to the federal law topics covered.

Like all but one of the United States, Arkansas has a common law legal system, with roots in English common law. For information on the courts and legislature of Arkansas, see category 6 Courts and Legislature.

1.02 [RESERVED]

1.03 HOLIDAYS:

Legal holidays: New Year's Day (Jan. 1), Dr. Martin Luther King, Jr.'s Birthday and Robert E. Lee's Birthday (3d Mon. in Jan.), George Washington's Birthday and Daisy Gatson Bates Day (3d Mon. in Feb.), Memorial Day (last Mon. in May), Independence Day (July 4), Labor Day (1st Mon. in Sept.), Veterans Day (Nov. 11), Thanksgiving (4th Thurs. in Nov.), Christmas Eve (Dec. 24), Christmas Day (Dec. 25), employee's birthday (employee is granted one holiday to observe his or her birthday). (Ark. Code Ann. 1-5-101). Following days are not legal holidays but are memorial days to be commemorated by appropriate proclamation by Governor: General Douglas MacArthur Day (Jan. 26), Silas Hunt Day (Feb. 2), Abraham Lincoln's Birthday (Feb. 12), Arkansas Teachers' Day (1st Tues. in Mar.), Arbor Day (3d Mon. in Mar.), Patriots' Day (Apr. 19), Arkansas Bird Day (Apr. 26), Good Friday (Fri. preceding Easter), Jefferson Davis' Birthday (June 3), Columbus Day (Oct. 12), Sen. Hattie W. Caraway Day (Dec. 19) (Ark. Code Ann. 1-5-106), POW/MIA Recognition Day (3d Fri. in Sept.) (Ark. Code Ann. 1-5-112), Juneteenth Independence Day (3d Sat. in June) (Ark. Code Ann. 1-5-114), Firefighter Recognition Day (Jan. 27)(Ark. Code Ann. 1-5-115), and Hemophilia Awareness Day (1st Mon. in May) (Ark. Code Ann. 1-5-116).

If legal holiday falls on Sun., the following Mon. is legal holiday. Legal holidays falling on Sat. will be observed on preceding Fri. (Ark. Code Ann. 1-5-101).

Commercial Paper Payable on Holiday.

Bills of exchange, drafts, or promissory notes payable on a legal holiday are payable on the next succeeding day. (Ark. Code Ann. 1-5-105).

Transactions on legal holidays are valid, except that contract made on Sunday is void unless ratified on a subsequent weekday. (205 Ark. 646, 169 S.W.2d 874 [1943]).

1.04 OFFICE HOURS AND TIME ZONE:

Arkansas is in the Central (GMT -06:00) time zone. Office hours are generally from 9 a.m. to 5 p.m.

2 BUSINESS ORGANIZATIONS

2.01 AGENCY:

Agent is person who, by agreement with another called principal, acts for principal and is subject to his control. Agreement may be oral, written, or implied from parties' conduct and may be with or without compensation. (Ark. Model Jury Instr. 701; 326 Ark. 1040, 934 S.W.2d 919).

Model Registered Agents Act, Ark. Code Ann. Tit. 4, c. 20 ("MRAA" or "Registered Agents Act") codifies Model Registered Agents Act and simplifies various registered agent requirements. (Ark. Code Ann. 4-20-101 et seq.).

2.02 ASSOCIATIONS:

Subject to common law rules. An unincorporated association has no legal entity and cannot be sued by its society or company name, but all the members must be made parties (150 Ark. 398, 234 S.W. 464) and may be liable as partners (171 Ark. 399, 284 S.W. 755).

Unincorporated association cannot take title to real property. (259 Ark. 784, 536 S.W.2d 709; 285 Ark. 124, 685 S.W.2d 153).

Benevolent Associations.

See topic 2.03 Corporations, subhead Nonprofit Corporations.

Professional Associations.

See topic 2.03 Corporations, subhead Professional Corporations.

2.03 CORPORATIONS:

Arkansas Business Corporation Act of 1987, codified at Ark. Code Ann. Title 4, c. 27 ("ABCA" or "1987 Act") applies to all domestic corporations incorporated on or after Jan. 1, 1988, and to all foreign corporations desiring to transact business in Arkansas on or after Jan. 1, 1988. All domestic corporations incorporated before Jan. 1, 1988 may irrevocably elect to be governed by ABCA by amending their articles of incorporation. (Ark. Code Ann. 4-27-1701). Foreign corporations qualified to do business in Arkansas on Dec. 31, 1987 are governed by ABCA but need not obtain new certificate of authority. (Ark. Code Ann. 4-27-1702).

Any domestic corporation incorporated before Jan. 1, 1988 not electing to be governed by ABCA will continue to be governed by prior existing Arkansas Business Corporation Act, codified at Ark. Code Ann. Title 4, c. 26. ("pre-1987 Act"). Significant differences exist between pre-1987 Act and 1987 Act with respect to cumulative voting, preemptive rights, voting requirement for fundamental changes, director standards, dissenters' rights, and other areas of corporate law.

ABCA is based primarily upon Revised Model Business Corporation Act (1984) ("Model Act"), with following significant variations:

(1) Articles of Incorporation must set forth (in addition to Model Act provisions): (i) Number of shares corporation is authorized to issue, classes (if any), par value (if any); (ii) name of represented entity's commercial registered agent; or if entity does not have commercial registered agent, name and address of entity's noncommercial registered agent; (iii) primary purpose or purposes for which corporation is organized (Ark. Code Ann. 4-27-202);

(2) Articles of Incorporation may set forth (in addition to Model Act provisions) provision eliminating or limiting director's personal liability to corporation or shareholders for monetary damages for breach of fiduciary duty as director except as provided by statute (Ark. Code Ann. 4-27-202[b][3]);

(3) ABCA controls use of fictitious names (Ark. Code Ann. 4-27-404 – 4-27-405);

(4) Guarantees right of all shareholders to vote on proposal to increase capital stock or bond indebtedness (Ark. Code Ann. 4-27-601[c][1], Ark. Const., art. XII, § 8); board of directors of investment company (defined at Ark. Code Ann. 4-27-140[27]) may increase or decrease authorized stock, unless such act is prohibited by articles of incorporation (Ark. Code Ann. 4-27-601[e]);

(5) Corporation issuing shares pursuant to subscription agreement entered into before incorporation must comply with Act (Ark. Code Ann. 4-27-620);

(6) Consideration for issuance of shares may be money paid, labor done or property actually received; neither promissory notes nor promise of future services constitute valid consideration for issuance of shares (Ark. Code Ann. 4-27-621[b]);

(7) Shares having par value may not be issued for consideration less than par value (Ark. Code Ann. 4-27-621[c]);

(8) Shares may not be issued until full consideration has been paid (Ark. Code Ann. 4-27-621[f]);

(9) Face of share certificate must state par value of shares (if any) (Ark. Code Ann. 4-27-625[b][4]), and must bear corporate seal (Ark. Code Ann. 4-27-625[d][2]);

(10) If allowed by articles or bylaws, board of directors of investment company (defined at Ark. Code Ann. 4-27-140[27]) may delegate to committee or officers of corporation authority to determine amount of, declare and distribute dividends (Ark. Code Ann. 4-27-640[g]);

(11) If articles or bylaws so provide, investment company (defined at Ark. Code Ann. 4-27-140[27]) is not required to hold annual meeting where no action taken that requires shareholders vote, unless such meeting is called by majority of shareholders or directors (Ark. Code Ann. 4-27-701[d]);

(12) Action on proposals to increase capital stock or bond indebtedness of corporation may be taken without meeting of shareholders if written consents are signed by all shareholders. Any other action requiring shareholder approval may be taken without meeting of shareholders if written consents are signed by holders of outstanding shares having not less than minimum number of votes necessary to take such action at meeting where shares were present and voted (Ark. Code Ann. 4-27-704[a]);

(13) Corporation shall notify shareholders of date, time and place of each annual and special shareholders' meeting no fewer than 60 nor more than 75 days before meeting if proposal to increase authorized capital stock or bond indebtedness is to be submitted; in all other cases notice shall be given no fewer than ten nor more than 60 days (Ark. Code Ann. 4-27-705[a]); annual meeting at which proposal to increase authorized capital stock or bond indebtedness is to be submitted, deemed special meeting (Ark. Code Ann. 4-27-705[c]);

(14) Director's indirect interest in transaction with corporation should be considered by board of directors (Ark. Code Ann. 4-27-831[b]);

(15) ABCA provides for indemnification of directors and officers by corporation. (Ark. Code Ann. 4-27-850);

(16) Foreign corporation liable for civil penalty composed of: (1) Total of all fees imposed by ABCA on foreign corporation that properly obtains certificate of authority and all penalties for not obtaining or renewing certificate of authority, and (2) amount not to exceed

$5,000 for each year or partial year during which it transacts business in Arkansas without certificate of authority. Penalties may be recovered in suit brought by Secretary of State. (Ark. Code Ann. 4-27-1502[d]);

(17) Foreign corporation's application for certificate of authority must contain name of represented entity's commercial registered agent; or if entity does not have commercial registered agent, name and address of entity's noncommercial registered agent (Ark. Code Ann. 4-27-1503[a][5]) and statement of par value (if any) of corporation's capital stock owned or to be owned by Arkansas residents (Ark. Code Ann. 4-27-1503[a][6]);

(18) Foreign corporation may use fictitious name only where real name is unavailable (Ark. Code Ann. 4-27-1506[a][2]).

General Supervision.

Secretary of State, Business and Commercial Services, Victory Building, Suite 250, 1401 W. Capitol Avenue, Little Rock, AR 72201; telephone: (501) 682-3409 or (888) 233-0325.

Purposes.

Corporation is organized for any lawful purpose unless articles of incorporation provide otherwise. (Ark. Code Ann. 4-27-301).

Name of corporation must contain certain word or abbreviation and must be distinguishable from any name of any domestic corporation existing under laws of this state or any foreign corporation authorized to transact business in this state, or from any name reserved with Secretary of State. (Ark. Code Ann. 4-27-401, 4-27-402).

Name may be reserved for 120 days by filing written application with Secretary of State, and right to exclusive use thereof may be transferred by filing in office of Secretary of State notice of such transfer, specifying name and address of transferee. Reservation is not renewable. (Ark. Code Ann. 4-27-402). Fee for formal reservation of name is $25. (Ark. Code Ann. 4-27-122).

Fictitious name may be used only where corporation first files with Secretary of State and, in case of domestic corporation, with county clerk of county where corporation's registered office is located (unless it is located in Pulaski County), form supplied or approved by Secretary of State giving full information as required by corporation act. (Ark. Code Ann. 4-27-404).

Term of Corporate Existence.

Corporate existence begins when articles of incorporation are filed, unless provided otherwise. (Ark. Code Ann. 4-27-203). Unless limited in articles of incorporation, corporate existence is perpetual. (Ark. Code Ann. 4-27-302).

Incorporators.

One or more persons (individuals or entities) may act as incorporators. (Ark. Code Ann. 4-27-201).

Articles of Incorporation must state name, distinguishable upon records of Secretary of State from names of other corporations organized, reserved, registered or authorized to transact business in state and containing word “corporation”, “incorporated”, “company”, or “limited” or abbreviation “corp.”, “inc.”, or “ltd.”, or words or abbreviations of like import in another language; primary purpose for which organized; aggregate number of authorized shares, number of classes of shares, number of shares in each class, designation for each class, and par value or statement that such shares are without par value; name and address of each incorporator; name of represented entity's commercial registered agent; or if entity does not have commercial registered agent, name and address of entity's noncommercial registered agent. (Ark. Code Ann. 4-27-202[a]; Ark. Code Ann. 4-27-401; Ark. Code Ann. 4-27-601). If shares have no par value, par value of $25 is assigned for purposes of calculating franchise taxes. (Ark. Code Ann. 26-54-105[e][2]).

Articles of Incorporation may state names and addresses of initial directors (Ark. Code Ann. 4-27-202[b][1]); any provision, not inconsistent with law, for management of business and regulating powers of corporation, directors and shareholders, including imposing personal liability on shareholders to specified extent and upon specified conditions (Ark. Code Ann. 4-27-202[b][2]); with some exceptions, provision eliminating or limiting director's personal liability to corporation or shareholders for monetary damages for breach of fiduciary duty as director (Ark. Code Ann. 4-27-202[b][3]); duration other than perpetual (Ark. Code Ann. 4-27-302); preemptive rights (Ark. Code Ann. 4-27-630); powers of directors in setting preferences, rights, limitations, restrictions of classes and series of stock (Ark. Code Ann. 4-27-602); restrictions on distribution (Ark. Code Ann. 4-27-640); quorum; (Ark. Code Ann. 4-27-725); cumulative voting (Ark. Code Ann. 4-27-728); dispensing with board of directors if 50 or fewer shareholders (Ark. Code Ann. 4-27-801); any provision required or permitted in by-laws (Ark. Code Ann. 4-27-202[b][4]).

It is unnecessary to set forth powers enumerated in corporation act. (Ark. Code Ann. 4-27-202[c]).

Fees.

Articles of incorporation, $50; application for use of indistinguishable name, no fee; application for reserved name, $25; notice of transfer of reserved name, $25; application for registered name, $50; application for renewal of registered name, $25; corporation's statement of change of registered agent or registered office or both, no fee; agent's statement of resignation, no fee; amendment of articles of incorporation, $50; restatement of articles of incorporation with amendment of articles, $100; articles of merger or share exchange, $100; application for fictitious name, $25; articles of dissolution, $50; articles of revocation of dissolution, $150; certificate of administrative dissolution, no fee; application for reinstatement following administrative dissolution, $50; certificate of reinstatement, no fee; certificate of judicial dissolution, no fee; application for certificate of authority, $300; application for amended certificate of authority, $300; application for certificate of withdrawal, $300; certificate of revocation of authority to transact business, no fee; articles of correction, $30; application for certificate of existence or authorization, $15; application of foreign corporation to move domicile to Arkansas, $300; or any other document required or permitted to be filed, $25; service of process on Secretary of State, $25 (subject to recovery); for receiving service of process on behalf of corporations, $25; for receiving service on behalf of individuals, $10; copies, 50¢ per page; certificates, $5. (Ark. Code Ann. 4-20-103; Ark. Code Ann. 4-27-122; Ark. Code Ann. 4-27-1705).

License to do Business.

None.

Organization.

Organizational meeting must be held by incorporators or initial board of directors to adopt by-laws, elect directors (if meeting of incorporators), appoint officers (if meeting of directors), and complete organization of corporation. Meeting may be held inside or outside Arkansas. Any action taken by incorporators may be taken without meeting if evidenced by written and signed consents. (Ark. Code Ann. 4-27-205).

Paid in Capital Requirement.

None.

Amendment of Articles.

Articles of incorporation may be amended at any time by board of directors without shareholder action to change corporate name; extend period of duration; delete names and addresses of initial directors; change information required by § 4-20-105(a), if statement of change on file with Secretary of State; change issued and unissued authorized shares outstanding into greater number of whole shares if only shares of such class are outstanding; make any other change expressly provided by ABCA. (Ark. Code Ann. 4-27-1002). Except as stated above, shareholders must approve any amendment to articles. Board of directors must propose amendment to shareholders, notice is required to be given each shareholder of proposed shareholder meeting, and adoption must be had by majority of shares entitled to vote therein, and vote must meet quorum and voting requirements. (Ark. Code Ann. 4-27-725, 4-27-726, 4-27-1003). If no shares have been issued, incorporators or board of directors may amend articles. (Ark. Code Ann. 4-27-1005).

Articles of amendment must be filed with Secretary of State setting forth name of corporation; text of amendment; date of adoption; if adopted without shareholder action, statement to that effect; if approved by shareholder vote, number of outstanding shares, number of shares entitled to vote for and against amendment; manner for effecting any exchange, reclassification, or cancellation of issued shares if applicable. (Ark. Code Ann. 4-27-1006). Articles may be restated by board of directors at any time with or without shareholder action. (Ark. Code Ann. 4-27-1007).

Articles may be amended to give effect to any plan of reorganization ordered or decreed by court of competent jurisdiction under federal statute so long as articles remain consistent with ABCA provisions. (Ark. Code Ann. 4-27-1008).

Increase or Decrease of Capital Stock or Indebtedness.

All fictitious increases of stock or indebtedness are void; and stock or bonded indebtedness of private corporation may not be increased except in pursuance of general laws nor until consent of persons holding larger amount in value of stock is obtained at meeting held after notice given for not less than 60 days. (Const. art. XII, § 8). The 60 days may be waived by accepting stock or bonds. (104 Ark. 517, 149 S.W. 336).

Shareholders have right to vote on proposal to increase capital stock or bond indebtedness. (Ark. Code Ann. 4-27-601[c][1]; Ark. Const., art. XII, § 8). Action on proposals to increase capital stock or bond indebtedness of corporation may be taken without shareholder meeting if by unanimous written consent of shareholders. (Ark. Code Ann. 4-27-704[a]). Board of directors of investment company (defined at Ark. Code Ann. 4-27-140[27]) may increase or decrease authorized stock, unless prohibited by articles. (Ark. Code Ann. 4-27-601[e]).

Authorized capital stock may be reduced by board of directors without shareholder action if articles of incorporation prohibit reissue of acquired shares and corporation acquires its own shares. (Ark. Code Ann. 4-27-631). Directors may make distributions to shareholders if corporation would be able to pay its debts as they become due in normal course of business and assets not less than sum of liabilities plus amount needed for liquidation preference (unless articles of incorporation provide otherwise). (Ark. Code Ann. 4-27-640). Reacquired shares resume status of authorized but unissued shares, unless articles provide otherwise. (Ark. Code Ann. 4-27-631).

By-laws, not inconsistent with law or articles, shall be adopted for management of affairs of corporation, and, if adopted, must be adopted initially by incorporators or board of directors. (Ark. Code Ann. 4-27-206).

Emergency by-laws may be adopted by directors, subject to repeal or change by shareholders, for managing affairs of corporation during any emergency and until its termination. (Ark. Code Ann. 4-27-207).

Stock.

Business corporation has right to issue shares of different classes, with different voting rights and with such other designations, preferences, limitations and relative rights as stated in articles. (Ark. Code Ann. 4-27-603).

Stock options may be granted to purchase shares. (Ark. Code Ann. 4-27-624).

Stock Certificates.

Each certificate must state name of corporation and that corporation is organized under laws of this state; name of person to whom issued; number and class of shares and designation of series, if any, which such certificate represents; relative rights, preferences and limitations of shares of each class or that corporation will furnish such information upon request, where corporation is authorized to issue shares of more than one class; par value of each share represented by certificate or statement that shares are without par value. Each share certificate must be signed (either manually or in facsimile) by two officers designated in by-laws or by board of directors and must bear corporate seal. (Ark. Code Ann. 4-27-625). Consideration for certificate must be fully paid before it is issued. (Ark. Code Ann. 4-27-621[f]).

Corporations may issue certificates for fractional shares and scrip, subject to limited rights, exchangeable in aggregate for full share. (Ark. Code Ann. 4-27-604).

Issuance of Stock.

Private corporation may not issue stock except for money or property actually received or labor done. (Const. art. XII, § 8). Notes for stock and stock certificates issued thereon are void except in hands of innocent holder. (177 Ark. 190, 5 S.W.2d 937). Board of directors may designate relative rights and preferences of series or class of shares before issuance, if articles so provide. (Ark. Code Ann. 4-27-602).

Subscriptions for shares are irrevocable for six months unless otherwise provided or all subscribers consent to revocation. (Ark. Code Ann. 4-27-620[a]). For failure to pay subscription, corporation may proceed to collect amount due in same as any debt due corporation or, after 20 days demand, may rescind subscription agreement and sell shares. (Ark. Code Ann. 4-27-620[d]).

Transfers of Stock Restrictions.

Governed by Uniform Commercial Code. (Ark. Code Ann. 4-8-101 et seq.). Record date for determining shareholders entitled to notice of meeting, to demand special meeting, to vote or for any proper purpose may not be more than 70 days before meeting. (Ark. Code Ann. 4-27-707). If record date is not fixed by by-laws or board of directors, record date for determining shareholders of record entitled to notice and to vote is day preceding date first notice is given. (Ark. Code Ann. 4-27-705[d]).

Shares having par value may not be issued for consideration less than par value. Before shares are issued, board of directors must determine that consideration is adequate. (Ark. Code Ann. 4-27-621[c], [d]).

Written restriction on transfer or registration of transfer is enforceable if noted conspicuously on certificates subject to restriction. Restriction may be imposed by articles, by-laws, agreement among shareholders, or agreement between shareholders and corporation. (Ark. Code Ann. 4-27-627).

Uniform Securities Ownership by Minors Act adopted. (Ark. Code Ann. 9-26-301 et seq.).

Uniform Simplification of Fiduciary Security Transfers Act not adopted.

Stock Transfer Tax.

None.

Books and Records.

Each corporation must maintain books, minutes and records of accounting, shareholders with names, addresses, number and class of shares held by each, and meetings and actions of shareholders, board of directors, and committees of board of directors. (Ark. Code Ann. 4-27-1601[a], [b], [c]). Corporation must keep at its principal place of business: articles and by-laws; board resolution assigning relative rights to series shares; minutes of shareholder meetings and actions without meetings for last three years; written shareholder communication for last three years; financial statements for last three years; names and addresses of current directors and officers; most recent franchise tax report. (Ark. Code Ann. 4-27-1601[e]).

Any shareholder may, during regular business hours, for proper purpose, and after giving at least five days advance written notice, examine and copy records of corporation. (Ark. Code Ann. 4-27-1602). If refused, shareholder may sue to compel such examination in circuit court of county of corporation’s principal place of business (or, if none in this state, its registered office). (Ark. Code Ann. 4-27-1604).

Corporation must mail to shareholders annual financial statement within 120 days after close of each fiscal year. (Ark. Code Ann. 4-27-1620).

Shareholders.

For failure to pay subscription, corporation may proceed to collect amount due in same manner as any debt due corporation or, after 20 days demand, may rescind subscription agreement and sell shares. (Ark. Code Ann. 4-27-620[d]).

Preemptive Rights.

Shareholders of corporation do not have preemptive rights to acquire newly issued shares unless expressly granted in articles. (Ark. Code Ann. 4-27-630).

Tender Offers.

See category 3 Business Regulation and Commerce, topic 3.24 Securities, subhead Tender Offers.

Stockholders’ Actions.

Shareholder may not sue in right of corporation unless he was holder of shares at time of transaction of which he complains or his shares devolved upon him by operation of law from one who was a holder at such time. Complaint in derivative action must allege with particularity demand made, if any, to obtain action by board of directors and either that demand was refused or ignored or why plaintiff did not make demand. On termination of proceeding, if court finds that it was commenced without reasonable cause, plaintiff may be required to pay any defendant’s reasonable expenses, including attorneys’ fees. (Ark. Code Ann. 4-27-740).

Stockholders’ Liabilities.

None beyond payment for shares, unless otherwise provided in articles. (Ark. Code Ann. 4-27-622).

Stockholders' meetings may be held in or out of state as may be provided in by-laws, and in absence of such provision shall be held at corporation's principal office. Annual meetings must be held as provided in by-laws but failure to hold meetings will not affect validity of any corporate action. (Ark. Code Ann. 4-27-701). Special meetings may be called by directors, holders of not less than 1/10 of all shares entitled to vote, or by such person authorized in articles or by-laws. (Ark. Code Ann. 4-27-702). Corporation shall give shareholders notice of time, date, place and purpose of each annual and special shareholders' meeting not less than 60 nor more than 75 days before date of meeting if to consider proposal to increase authorized capital stock or bonded indebtedness and in all other cases not less than ten nor more than 60 days. (Ark. Code Ann. 4-27-705). Shareholders may waive in writing any notice required by corporation act, articles, and by-laws. Attendance at meeting waives any objection to lack of notice or defective notice, unless shareholder objects at beginning of meeting. (Ark. Code Ann. 4-27-706).

Informal Action.

Other than proposals to increase capital stock or bond indebtedness of corporation (which require unanimous consent), any action required to be taken at meeting of shareholders may be taken without such meeting if written consent setting forth action is signed by all shareholders entitled to vote on subject matter. (Ark. Code Ann. 4-27-704).

Corporation shall make available shareholder list beginning two business days after notice of meeting is given. Failure to keep such list does not affect validity of action taken at meeting. (Ark. Code Ann. 4-27-720).

Unless limited or denied by articles, each share outstanding is entitled to one vote upon each proposal presented. (Ark. Code Ann. 4-27-721). Shareholders may vote by proxy, which is valid for 11 months unless provided otherwise in appointment form. (Ark. Code Ann. 4-27-722).

Action is approved if votes cast within voting group favoring action exceed votes cast against action. (Ark. Code Ann. 4-27-725[c]).

Cumulative voting by shareholders is not allowed in elections for directors unless expressly provided in articles. (Ark. Code Ann. 4-27-728).

Voting trusts are limited in duration to ten years but may be extended by agreement. Counterpart of agreement must be deposited with corporation and shares must be transferred to trustee. (Ark. Code Ann. 4-27-730).

Directors.

Each corporation must have board of directors, unless dispensed under Ark. Code Ann. 4-27-801, who need not be residents of this state or shareholders unless required by articles or by-laws. (Ark. Code Ann. 4-27-802). Number of directors, which may be one or more, must be specified in or fixed in accordance with articles or by-laws. Articles or by-laws may allow directors to fix number of directors, but they may not increase or decrease number by more than 30% from number last approved by shareholders. Variable range for size of board by fixing minimum or maximum number of directors may be established in articles or by-laws. (Ark. Code Ann. 4-27-803).

Unless members of initial board are specified in articles, initial board will be elected by incorporators. (Ark. Code Ann. 4-27-205). Successor boards are elected by shareholders. (Ark. Code Ann. 4-27-803). Articles may authorize particular classes of shareholders to elect all or specified number of directors. (Ark. Code Ann. 4-27-804). Terms of directors expire at next annual meeting following their election unless their terms are staggered. (Ark. Code Ann. 4-27-805). Term of directors may be staggered if there are nine or more directors and articles so provides. (Ark. Code Ann. 4-27-806).

Vacancies may be filled by shareholders or remaining directors, unless articles provide otherwise. (Ark. Code Ann. 4-27-810). Directors may be removed with or without cause at shareholders' meeting called expressly for that purpose, unless articles provide that directors can be removed only for cause. (Ark. Code Ann. 4-27-808).

Directors meetings may be held by any means of communication by which all directors may simultaneously hear each other, within or without state. (Ark. Code Ann. 4-27-820). Unless articles or by-laws provide otherwise, regular meetings may be held, with or without notice, and special meetings with two days notice (Ark. Code Ann. 4-27-822), which notice may be waived in writing or by attendance at or participation in meeting without objection (Ark. Code Ann. 4-27-823). Majority of corporations directors constitutes quorum, and majority of directors present, if quorum is present, is sufficient to approve action, unless articles or by-laws provide otherwise. (Ark. Code Ann. 4-27-824).

Informal Action.

Unless articles or by-laws provide otherwise, any action required or permitted to be taken by at board of directors' meeting may be taken without meeting if written consent describing action taken is signed by all directors and filed with corporate records reflecting action taken. (Ark. Code Ann. 4-27-821).

Powers and Duties of Directors.

Business and affairs shall be managed by directors. (Ark. Code Ann. 4-27-801). ABCA sets forth general standards of conduct for directors to discharge duties: (1) in good faith; (2) with care ordinary prudent person in like position would exercise under similar circumstances; and (3) in manner reasonably believed to be in best interests of corporation. (Ark. Code Ann. 4-27-830). Business judgment of disinterested director, reasonably informed, acting in good faith will generally not be second-guessed by court. (303 Ark. 673, 800 S.W.2d 396).

Committees.

Unless articles or by-laws provide otherwise, board of directors may create one or more committees consisting of at least two directors each. Board committees may exercise authority of board except, among other things, authorize distributions, approve mergers, change by-laws, fill vacancies on board or any committee, and amend articles. (Ark. Code Ann. 4-27-825). Board committee of investment company may be authorized in articles or by-laws to declare and distribute distributions. (Ark. Code Ann. 4-27-640[g]).

Liabilities of Directors.

Corporation may include in its articles provision eliminating or limiting personal liability of directors to corporation and shareholders for monetary damages for breach of fiduciary duty. Limitation does not apply to: (1) breach of duty of loyalty; (2) acts or omissions not in good faith or involving intentional misconduct or knowing violation of law; (3) unlawful distributions; (4) transactions involving improper personal benefit; or (5) any breach creating third party liability. (Ark. Code Ann. 4-27-202[b][3]).

Officers.

Corporation will have officers described in by-laws or appointed by board of directors in accordance with by-laws, and same individual may simultaneously hold more than one office in corporation. By-laws or board must delegate to one officer responsibility for preparing meeting minutes and authenticating records. (Ark. Code Ann. 4-27-840). Board of directors may remove officer at any time with or without cause. (Ark. Code Ann. 4-27-843[b]). ABCA prescribes statutory standards of conduct for officers similar to those for directors. (Ark. Code Ann. 4-27-842).

Liabilities of Officers.

No statutory provisions respecting liability of officers.

Indemnification of Directors and Officers.

Corporation may indemnify any person who was or is party or is threatened to be made party to any threatened, pending or completed action, whether civil or criminal, administrative or investigative (other than action by or in right of corporation), by reason of fact he is or was director, officer, employee or agent of corporation or serving at request of corporation as director, officer, employee or agent of another business entity, against expenses (including attorneys' fees), judgments, fines, and amounts paid in settlement actually and reasonably incurred by him if he acted in good faith and in manner he reasonably believed to be in or not opposed to best interest of corporation and, with respect to criminal action had no reasonable cause to believe his conduct unlawful. Lack of good faith not presumed from settlement or nolo contendere plea. Indemnification of expenses (including attorney's fees) allowed in defense or settlement of derivative actions except no indemnification in respect to any claim, issue or matter as to which any such person has been adjudged to be liable unless court decides indemnification is proper. To extent any such person succeeds on merits or otherwise, he shall be indemnified against expenses (including attorney's fees). Determination that person to be indemnified met applicable standard of conduct is made by board of directors by majority vote of quorum consisting of directors not party to such action, suit or proceeding or, if quorum not obtainable or disinterested quorum so directs, by independent legal counsel or by shareholders. Expenses may be paid in advance upon receipt of undertaking to repay unless it shall ultimately be determined that he is not entitled to be indemnified by corporation. Corporation may purchase indemnity insurance. Right of indemnification continues as to person who has ceased to be director, officer or agent unless otherwise provided in authorization granting or ratifying indemnification or advancement of expenses. (Ark. Code Ann. 4-27-850).

Registered Office and Agent.

See category 2 Business Organizations, topic 2.01 Agency, subhead Model Registered Agents Act.

General Powers of Corporations.

Unless limited by its articles, corporation has power to have perpetual duration and succession in its corporation name; to sue and be sued; to have corporate seal; to make and amend by-laws, not inconsistent with articles or laws of this state, for managing business and regulating corporate affairs; to purchase, receive, lease, acquire, own, hold, improve, use real and personal property; to sell, convey, mortgage, pledge, or otherwise dispose of its property; to acquire or dispose of and deal in and with shares or other interests in, or obligations of, any other entity; to make contracts, guarantees, incur liabilities, borrow money, issue notes, bonds and other obligations and mortgage or pledge any of its property, franchises or income; to lend money, invest or reinvest funds and hold real and personal property as security; to enter into partnerships or joint ventures; to elect directors and appoint officers and define their duties; to conduct business, locate offices, and exercise power within or without Arkansas; to pay pensions and establish pension, profit sharing or other incentive plans; to make donations for charitable, scientific or educational purposes; and to do all other things necessary and convenient for all purposes for which organized. (Ark. Code Ann. 4-27-302).

Dividends.

Subject to any restrictions in articles or by-laws, directors may pay dividends. No dividends may be declared if, after distribution, corporation will be unable to pay its obligations to creditors as they become due in normal course of business or corporation's total assets would be less than its total liabilities plus its liquidation preferences. (Ark. Code Ann. 4-27-640).

Share Dividends.

Unless restricted by its articles, corporation may issue shares of class or series, pro rata without consideration, to its shareholders of same class as share dividend. Shares of one class or series may be issued with respect to shares of another class or series if articles so provide, issuance is approved by majority vote of already outstanding shares of class or series to be issued, or there are no outstanding shares of class or series to be issued. (Ark. Code Ann. 4-27-623).

Repurchase and Redemptions.

See subhead Increase or Decrease of Capital Stock or Indebtedness, supra.

Unclaimed Dividends.

See category 21 Property, topic 21.01 Absentees, subhead Escheat.

Sale or Transfer of Corporate Assets.

Without shareholder approval, directors may sell, lease, or exchange all, or substantially all, property and assets of corporation when done in regular course of business. (Ark. Code Ann. 4-27-1201). When not done in regular course of business, directors must recommend transaction, unless conflict of interest or special circumstance exists, then majority of shares entitled to vote therein must approve transaction. (Ark. Code Ann. 4-27-1202[a], [b]). Notice of shareholders' meeting stating purpose thereof must be given to each shareholder, whether or not entitled to vote. (Ark. Code Ann. 4-27-1202[d]).

Without shareholder approval, directors may mortgage, pledge or encumber any or all of its property whether or not in regular course of business, or transfer any or all of its property to wholly owned subsidiary. (Ark. Code Ann. 4-27-1201).

Reports.

Each corporation must file franchise tax report with Secretary of State on or before May 1 of reporting year for franchise tax due for calendar year 2004 and subsequent years. Any newly formed corporation is not required to file report until year immediately following year of incorporation. Reports must show corporation's condition and status as of Dec. 31 of preceding year. (Ark. Code Ann. 26-54-105). No corporation shall be allowed to file any forms if corporation owes past due franchise taxes to Secretary of State. (Ark. Code Ann. 26-54-114[a]).

Corporate Bonds or Mortgages.

Private corporation may not issue bonds except for money or property actually received or labor done. (Const. art. XII, § 8).

Conversion and Merger.

Organization other than corporation may convert to corporation and corporation may convert to another organization if other organization's governing statute authorizes conversion, is complied with, and conversion is not prohibited by law of jurisdiction that enacted governing statute. (Ark. Code Ann. 4-27-1102). Plan of conversion may be approved if recommended by board of directors and approved by shareholders entitled to vote. (Ark. Code Ann. 4-27-1103). Whether they are entitled to vote or not, all shareholders must receive notice of proposed conversion in accordance with Ark. Code Ann. 4-27-1103. After plan of conversion is approved, articles of conversion or incorporation must be filed with Secretary of State. (Ark. Code Ann. 4-27-

1104). Conversion becomes effective when articles take effect if converted organization is corporation or as provided by governing statute if converted organization is not corporation. (Ark. Code Ann. 4-27-1104). When conversion takes effect, all property and debt of converting organization remain vested in organization. (Ark. Code Ann. 4-27-1105).

After approval or adoption, articles of conversion must be filed with Secretary of State and must include: Statement that corporation has been converted into another organization, name and form of organization and jurisdiction of its governing statute, date conversion is effective under governing statute, statement that conversion was approved as required by this chapter, statement that conversion was approved as required as required by governing statute, copy of plan of conversion, and, if converted organization is not authorized to do business in state, statement confirming that organization has filed statement appointing agent for service of process under Ark. Code Ann. 4-20-112. (Ark. Code Ann. 4-27-1104).

Corporation may merge with any other organization pursuant to plan of merger recommended by board of directors and approved by shareholders. (Ark. Code Ann. 1107). All shareholders must receive notice of proposed merger in accordance with Ark. Code Ann. 4-27-705, but only those shareholders entitled to vote pursuant to articles can vote on plan. (Ark. Code Ann. 4-27-1107). Unless articles of board of directors require otherwise, merger requires majority vote of each group entitled to vote. (Ark. Code Ann. 4-27-1107[e]). Except to extent articles provide otherwise, no vote of shareholders of surviving corporation is required: (1) If agreement does not amend articles of surviving corporation; (2) if each share of surviving corporation outstanding prior to merger is to be identical of surviving corporation after merger; (3) if number of voting shares after merger does not exceed 20% of surviving corporation before merger; and (4) if number of participating shares outstanding after merger does not exceed 20% of total number of participating shares outstanding before merger. (Ark. Code Ann. 4-27-1107). If surviving organization is corporation, merger is effective upon later of filing articles of merger with Secretary of State or date specified in articles. (Ark. Code Ann. 4-27-1109). If surviving organization is not corporation, merger is effective as provided by governing statute of surviving organization. (Ark. Code Ann. 4-27-1109).

Parent company owning 90% or more of outstanding shares of each class of subsidiary may merge subsidiary into itself by resolution of board of directors without shareholder approval. Each shareholder of subsidiary must receive copy of plan of merger. Parent company may not file articles of merger until at least 30 days after mailing copy of plan to shareholders. (Ark. Code Ann. 4-27-1108).

After approval or adoption, articles of merger must be filed with Secretary of State and must include: Name and form of each constituent organization and jurisdiction of its governing statute, name and form of surviving organization and jurisdiction of its governing statute, effective date of merger under governing statute of surviving organization, statement confirming that merger was approved as required by governing statute, copy of plan of merger, and, if surviving organization is foreign organization not authorized to do business in State, statement confirming that organization has filed statement appointing agent for service of process under Ark. Code Ann. 4-20-112, Ark. Code Ann. 4-27-1109.

Dissolution.

Newly formed corporation which has not issued any shares or has not yet commenced business may be dissolved by majority of incorporators or by its initial board of directors. Articles of dissolution must be filed with Secretary of State, with filing setting forth: name of corporation; date of incorporation; either no shares have been issued or no business has commenced; that no debt exists; that net assets remaining after wind up has been distributed to shareholders if shares were issued; and that majority of incorporators or directors authorized dissolution. (Ark. Code Ann. 4-27-1401).

Dissolution may be proposed by board of directors and authorized by majority of shareholders entitled to vote thereon. All shareholders must receive notice stating purpose of shareholders' meeting in accordance with Ark. Code Ann. 4-27-705. (Ark. Code Ann. 4-27-1402). After dissolution is authorized, corporation may dissolve by filing with Secretary of State articles of dissolution setting forth: name of corporation; date dissolution was authorized; number of shares entitled to vote; either total number of votes cast for and against dissolution or total number of undisputed votes for and statement that number cast for dissolution was sufficient for approval; and if voting by voting groups was required, information on voting by each voting group. (Ark. Code Ann. 4-27-1403[a]).

Dissolution is effective upon effective date of its articles of dissolution (Ark. Code Ann. 4-27-1403[b]) but corporation continues for purpose of winding up its affairs (Ark. Code Ann. 4-27-1405).

Written notice must be given to any known claimants to present claims within 120 days. Notice may be given to unknown claimants by publishing in newspaper of general circulation in county of corporation's principal office; unknown claimants have five years to enforce claim. Claims against dissolved corporation that are not timely presented or enforced are thereafter barred. (Ark. Code Ann. 4-27-1406 – 4-27-1407).

Administrative Dissolution.

Secretary of State may commence proceeding under Ark. Code Ann. 4-27-1421 to dissolve corporation for past due franchise taxes, failure to file franchise report or designate or notify change of registered agent, or expiration of period of duration set forth in articles. (Ark. Code Ann. 4-27-1420).

Judicial Dissolution.

Circuit court may dissolve corporation upon petition by corporation, or in proper action by shareholder on grounds that: (1) directors are deadlocked in management of corporation, shareholders are unable to break deadlock, and irreparable injury to corporation is being suffered or threatened or business of corporation can no longer be conducted to advantage of shareholders because of deadlock; (2) shareholders are deadlocked for two or more consecutive annual meetings to elect successor directors; (3) directors or those in control have acted illegally, oppressively, or fraudulently; or (4) corporate assets are being misapplied or wasted. Creditor may seek judicial dissolution if corporation has admitted in writing that it is insolvent, or if creditor has attempted to execute on judgment and execution has been returned unsatisfied. Attorney General may bring proceeding to dissolve corporation for obtaining its articles through fraud or for continuing to exceed or abuse its corporate authority. (Ark. Code Ann. 4-27-1430).

Revocation.

Corporation may revoke its dissolution within 120 days of its effective date. Revocation must be approved in same manner as dissolution was originally authorized, unless revocation by action of board of directors alone is provided. After revocation is authorized, corporation may revoke dissolution by filing with Secretary of State articles of revocation of dissolution, along with copy of its articles of dissolution. Revocation is effective upon effective date of articles of revocation of dissolution, and it relates back to and takes effect as of effective date of dissolution as if dissolution had never occurred. (Ark. Code Ann. 4-27-1404).

Dissenters' Rights.

Shareholder has right to dissent from following corporate actions: (1) merger if shareholder approval is required or if corporation is subsidiary that is merging with its parent; (2) share exchange requiring shareholder approval; (3) sale or exchange of all, or substantially all, of property of corporation other than in regular course of business if shareholder approval is required; (4) amendment to articles that materially and adversely affects rights of dissenters' shares; or (5) any other corporate action taken pursuant to shareholder vote to extent articles, bylaws, or resolution of board provides shareholders are entitled to dissent. (Ark. Code Ann. 4-27-1302).

If proposed corporate action for which dissenters' rights are provided is to be submitted at shareholders' meeting, notice of meeting must state that shareholders are or may be entitled to assert dissenters' rights and be accompanied by copy of ABCA. (Ark. Code Ann. 4-27-1320). Dissenting shareholder must give written notice of intent to make demand payment for his shares prior to vote on proposed action and must not vote for such action. (Ark. Code Ann. 4-27-1321). If corporate action is approved, written dissenters' notice must be sent, no later than ten days after action was taken, to all dissenters. (Ark. Code Ann. 4-27-1322). Dissenting shareholder must demand payment, certify that he owned shares before date of notice of shareholders' meeting, and deposit his certificates. (Ark. Code Ann. 4-27-1323[a]). Corporation must pay each dissenter who complies with all requirements fair value of his shares, plus accrued interest. (Ark. Code Ann. 4-27-1325). If dissenter is dissatisfied with corporation's offer, or corporation fails to offer payment within 60 days of demand date, dissenter may demand payment of shareholder's estimate of fair value of shares. (Ark. Code Ann. 4-27-1328). If demand for payment remains unsettled, corporation shall commence proceeding within 60 days after latest payment demand to have court determine fair value of shares. (Ark. Code Ann. 4-27-1330).

Insolvency and Receivers.

See category 8 Debtor and Creditor, topic 8.16 Receivers.

Close Corporations.

Corporation having 50 or fewer shareholders may dispense with or limit authority of board by describing in articles who will perform duties of board. (Ark. Code Ann. 4-27-801). Tax treatment similar to Federal "subchapter S" treatment may be elected by corporations eligible for like Federal election by filing separate election with Arkansas Department of Finance and Administration. (Ark. Code Ann. 26-51-409).

Foreign Corporation.

No foreign corporation may transact business in state until it obtains certificate of authority from Secretary of State. (Ark. Code Ann. 4-27-1501). Foreign corporation must file with Secretary of State, together with certificate evidencing its corporate existence, application for certificate of authority setting forth name of foreign corporation; name of state or county and date of incorporation; information required by Ark. Code Ann. 4-20-105; name of registered agent at that office; and par value, if any, of shares of corporation's capital stock owned or to be owned by Arkansas residents (Ark. Code Ann. 4-27-1503), and pay $300 fee (Ark. Code Ann. 4-27-122).

Franchise Tax.

Corporations, domestic and foreign, active and inactive, organized or qualified in Arkansas including any person or group of persons, any association, joint stock company, business trust, or other organizations constituting separate legal entity with purpose of obtaining some corporate privilege or franchise which is not allowed to them as individuals or attempting to exercise corporate type acts are subject to franchise tax (not applicable to nonprofit corporations or corporations exempt from federal income tax). (Ark. Code Ann. 26-54-102). Effective with tax reports due on and after Jan. 1, 2004, rates are: Insurance companies having capital stock of less than $500,000, tax is $300; insurance companies having outstanding capital stock of $500,000, or more, tax is $400; legal reserve mutual insurance corporations having assets of less than $100,000,000, tax is $300; legal reserve mutual insurance corporations having assets of $100,000,000 or more, tax is $400; mutual assessment insurance corporation, tax is $300; mortgage loan corporations, tax is 0.3% of that proportion of par value of capital stock that its aggregate outstanding loans in Arkansas bears to its total outstanding loans, minimum tax $300; other corporations without authorized capital stock tax is $300; and other corporations, tax is 0.3% of that proportion of par value of its outstanding capital stock that value of real and personal property in Arkansas bears to total real and personal property of corporation, minimum $150. (Ark. Code Ann. 26-54-104). Stock without par value is computed at $25 share for determining tax. (Ark. Code Ann. 26-54-105). Tax due May 1 of reporting year. (Ark. Code Ann. 26-54-105[c][2][B]). See subhead Reports, supra. Taxes and penalties are first lien on all property of corporation. (Ark. Code Ann. 26-54-108).

Information contained in franchise tax report must be confidential, except: (1) Name and address of corporation; (2) name of corporation's president, vice president, secretary, treasurer, and controller; (3) total authorized capital stock with par value; (4) total issued and outstanding capital stock with par value; and (5) state of incorporation. (Ark. Code Ann. 26-54-105). For franchise tax reports filed by organization formed under Small Business Equity Tax Pass Through Act, names of members, except those designated in franchise tax report as manager, president, vice president, secretary, treasurer, or controller, are confidential unless organization has no registered agent for service of process. (Ark. Code Ann. 26-54-105[h][2]).

Income Tax.

See category 22 Taxation, topic 22.11 Income Tax. See also subhead Close Corporations, supra.

Taxation of Corporate Stock or Securities.

Corporate stock, bonds and securities are assessed and taxed as personal property. (Ark. Code Ann. 26-3-201).

Professional Corporations.

Physicians (Ark. Code Ann. 4-29-301 – 4-29-312), dentists (Ark. Code Ann. 4-29-401 – 4-29-411), and others licensed to perform professional services such as certified public accountants, architects, engineers, and attorneys at law, and including physicians and dentists (Ark. Code Ann. 4-29-201 – 4-29-213), are permitted to form professional corporations under specified conditions. No person is personally liable for any obligation or liability of any shareholder, director, officer, agent or employee of such professional corporation or the professional corporation, itself, solely because such person is shareholder, director, officer, agent, or employee of such professional corporation. (Ark. Code Ann. 4-29-101).

Deeds.

See category 21 Property, topic 21.06 Deeds.

Revised Model Nonprofit Corporation Act adopted, with revisions, effective Jan. 1, 1994, Act 1147 of 1993. (Ark. Code Ann. 4-33-101, et seq.).

Nonprofit Corporations.

The Arkansas Nonprofit Corporation Act of 1993, (Ark. Code Ann. 4-33-101 et seq.) ("ANCA"), applies to all domestic nonprofit corporations incorporated on or after Jan. 1, 1994. (Ark. Code Ann. 4-33-1701). Foreign corporations qualified to do business in Arkansas on Jan. 1, 1994 are governed by ANCA but need not obtain new certificate of authority. (Ark. Code Ann. 4-33-1702).

All domestic nonprofit corporations incorporated before Jan. 1, 1994 may irrevocably elect to be governed by ANCA by amending articles of incorporation. Any domestic nonprofit corporation incorporated before Jan. 1, 1994 not electing to be governed by ANCA will continue to be governed by prior existing act. (Ark. Code Ann. 4-28-101 et seq.; Ark. Code Ann. 4-33-

1701).

2.04 [RESERVED]

2.05 JOINT STOCK COMPANIES:

No statutory provision on formation.

Validity of Massachusetts trusts is recognized. (159 Ark. 621, 252 S.W. 602).

Professional Corporations.

See topic 2.03 Corporations, subhead Professional Corporations, supra.

2.06 LIMITED LIABILITY COMPANIES:

Small Business Entity Tax Pass Through Act, applies to all Limited Liability Companies ("LLCs") organized or doing business in Arkansas on or after Apr. 12, 1993. (Ark. Code Ann. 4-32-101 et seq.).

Name of each Limited Liability Company ("LLC") must contain words "Limited Liability Company" or "Limited Company" or abbreviations of "L.L.C.", "L.C.", "LLC", or "LC". LLC name must be distinguishable from name of any LLC, limited partnership or corporation existing under laws of this state or authorized to transact business in this state, or any name reserved under Ark. Code Ann. 4-32-104, except upon filing of final court decree establishing prior right of applicant to use name in this state. (Ark. Code Ann. 4-32-103[a]-[c]).

Name of LLC which performs professional services shall contain words "Professional Limited Liability Company" or "Professional Limited Company" or abbreviations "P.L.L.C.", "P.L.C.", "PLLC", or "PLC" and may not contain name of person who is not member or deceased former member. (Ark. Code Ann. 4-32-103[d]).

Exclusive right to use name may be reserved by filing with Secretary of State application to reserve specified name. (Ark. Code Ann. 4-32-104[a], [b]).

Purposes.

LLC may be organized under this Act for any lawful purpose including performance of professional services and related activities. (Ark. Code Ann. 4-32-106[a]).

Registered Office and Agent.

See category 2 Business Organizations, topic 2.01 Agency, subhead Model Registered Agents Act.

Service of Process.

Service of legal process to be served upon any LLC shall be made on registered agent of LLC in State of Arkansas. In cases where entity fails to appoint agent, or cases where legal process by due diligence cannot be served on registered agent, service can be by registered or certified mail, return receipt requested, addressed to one or more of governors of entity by name at its principal office. (Ark. Code Ann. 4-20-113[b]). If process, notice, or demand cannot be served on entity as described above, service of process may be made by handing copy to manager, clerk, or other person in charge of any regular place of business or activity of entity, if person served is not plaintiff in action. (Ark. Code Ann. 4-20-113[c]).

Formation.

One or more persons may form LLC by signing or causing to be signed articles of organization and delivering same articles to Secretary of State for filing. (Ark. Code Ann. 4-32-201). LLC is formed when Articles of Organization are delivered to Secretary of State for filing unless delayed effective date is recited. (Ark. Code Ann. 4-32-206[a]).

Articles of Organization shall set forth: name; address of registered office and name and address of registered agent; and if management of LLC is vested in manager or managers, statement to that effect. (Ark. Code Ann. 4-32-202).

Amendment of Articles of Organization.

Articles of LLC may be amended by filing articles of amendment with Secretary of State, stating name of LLC, date articles of organization were filed, and amendment to articles. (Ark. Code Ann. 4-32-203[a]).

Agency Power of Members and Managers.

If Articles of Organization do not provide that management of LLC is vested in manager, every member is agent of LLC for purpose of its business, and act of any member binds LLC, unless member has no authority to act for LLC and person with whom member is dealing has knowledge of lack of authority. If Articles provide that management of LLC is vested in manager, no member solely by reason of being member is agent of LLC and every manager is agent of LLC for purpose of its business, and manager’s act binds LLC, unless manager has no authority to act for LLC in particular matter and person with whom manager is dealing has knowledge of this lack of authority. (Ark. Code Ann. 4-32-301 – 4-32-303).

Liability of Members.

Except for personal liability of person providing professional service (Ark. Code Ann. 4-32-308), member, manager, agent or employee of LLC is not liable for debt or obligation of LLC, or for acts or omissions of any other member, manager, agent, or employee of LLC (Ark. Code Ann. 4-32-304).

Professional Services.

Individual rendering professional service may be personally liable for any results of that individual’s acts or omissions. No member, manager, agent or employee of LLC shall be personally liable for acts or omissions of any other member, manager or employee of LLC. (Ark. Code Ann. 4-32-308).

Management.

Unless operating agreement indicates otherwise, management of LLC shall be vested in members as governed by Ark. Code Ann. 4-32-301. (Ark. Code Ann. 4-32-401).

Duties of Managers and Members.

Unless provided in operating agreement, manager or member will not be liable to LLC or other members for any actions taken or failure to act on behalf of LLC unless act or omission constitutes gross negligence or willful misconduct. (Ark. Code Ann. 4-32-402[1]). Also, unless otherwise provided in articles or operating agreement, members and managers must account to LLC for any profit or benefit received without informed consent of more than one-half by number of disinterested managers or members. (Ark. Code Ann. 4-32-402).

Voting.

Unless otherwise provided in operating agreement or this Act, affirmative vote of more than one half of either members or managers, depending on management structure of LLC, shall be required to decide any matter connected with business of LLC. (Ark. Code Ann. 4-32-403[a]). Unless otherwise provided in operating agreement, affirmative vote of all members shall be required to amend written operating agreement or authorize manager or member to do any act that contravenes written operating agreement. (Ark. Code Ann. 4-32-403[b]).

Limitation of Liability and Indemnification.

Written operating agreement may limit personal liability of members or managers for monetary damages for breach of certain statutory duties (Ark. Code Ann. 4-32-404[1]) and provide for indemnification of members and managers (Ark. Code Ann. 4-32-404[2]).

Records and Information.

Certain information is to be kept at LLC's principal place of business. (Ark. Code Ann. 4-32-405[a]). Members, at member's own expense, have right to inspect and copy LLC's books and records during ordinary business hours. (Ark. Code Ann. 4-32-405[b]).

Contributions.

Member may contribute property, services rendered, cash, promissory note or other obligation to contribute cash, property, or to perform services to LLC in exchange for LLC interest. (Ark. Code Ann. 4-32-501). Member's promise to contribute not enforceable unless in writing and signed by member. (Ark. Code Ann. 4-32-502[a]). Member's obligations to make any agreed contribution may only be compromised as provided for in operating agreement or upon unanimous consent of other members. (Ark. Code Ann. 4-32-502[d]). Creditors may enforce member's obligation to make contribution if credit was extended upon reliance of obligation to contribute. (Ark. Code Ann. 4-32-502[e]).

Profits and Losses.

Members may, in operating agreement, allocate LLC's profits among themselves. Unless otherwise provided, they are to share equally in profits and be repaid their contributions to capital. (Ark. Code Ann. 4-32-503).

Distributions.

In absence of provision to contrary in operating agreement, distributions of cash or other LLC assets are allocated or distributed to members equally and member has no right to receive any distribution in form other than cash. (Ark. Code Ann. 4-32-601 – 4-32-604; Ark. Code Ann. 4-32-905).

Ownership of Property.

Property transferred to or otherwise acquired by LLC is property of LLC and not of members. (Ark. Code Ann. 4-32-701[a]).

Transfer of Real Property.

If articles of organization vest management in manager(s), property of LLC can be transferred by instrument executed by any manager in name of LLC. (Ark. Code Ann. 4-32-702[e]). If articles of organization do not vest management in manager(s), property of LLC can be transferred by instrument executed by any member in name of LLC. (Ark. Code Ann. 4-32-702[a]).

Transfers of Interests.

Member's interest in LLC may, unless otherwise provided in operating agreement, be assigned in whole or in part, and such assignment will not dissolve LLC. However, assignment of member's interest does not automatically entitle assignee to all of rights and privileges held by assignor. Generally, assignment of member's interest only transfers assignor's right to share of LLC's distributions. Assignor of LLC interest continues to be member and to generally have power to exercise any rights of member until assignee of LLC's interest becomes member. (Ark. Code Ann. 4-32-704[a]). Assignee of membership interest may become member of LLC only upon unanimous approval of all members, or as may be provided in operating agreement. (Ark. Code Ann. 4-32-706[a]).

Admission and withdrawal of members are governed by numerous restrictions. (Ark. Code Ann. 4-32-801 – 4-32-802).

Rights of Judgment Creditor of Member.

Judgment creditor of member of LLC can apply to court of competent jurisdiction, and court can charge member's LLC interest with unsatisfied judgment with interest; once so charged, judgment creditor has only rights of assignee of member's LLC interest. (Ark. Code Ann. 4-32-705).

Right to Sue.

Unless otherwise provided in operating agreement, suit on behalf of LLC may generally only be brought in name of LLC by one or more members or managers of LLC who are authorized to do so. (Ark. Code Ann. 4-32-1101 – 4-32-1103).

Merger or Consolidation.

LLC may merge with another LLC, or any other business entity, unless otherwise provided by operating agreement. (Ark. Code Ann. 4-32-1206[a]). Unless otherwise provided in writing in operating agreement, merger or consolidation must be approved by more than one-half of members. (Ark. Code Ann. 4-32-1207[a]). If surviving organization is LLC, merger or consolidation is effective upon later of effective date of filing of articles of merger or consolidation or date set forth in articles of merger or consolidation. (Ark. Code Ann. 4-32-1208[c][1]). If surviving organization is not LLC, then merger is effective as provided in surviving organizations' governing statute. (Ark. Code Ann. 4-32-1208[c][2]).

Dissolution.

LLC is dissolved and shall be wound up upon happening of first of following to occur: expiration of time period stated in articles or operating agreement; written consent of all members; at any time there are no members unless, within 90 days or such other period as provided for in articles or operating agreement, personal representative of last remaining member agrees in writing to continue LLC; or, upon application of member if Circuit Court determines that it is not reasonably practicable for LLC to operate in conformity with its operating agreement. (Ark. Code Ann. 4-32-901 – 4-32-902).

Winding Up.

Generally, members or managers that have authority to manage LLC prior to dissolution or members or managers who have not wrongfully dissolved LLC may wind up affairs of LLC. (Ark. Code Ann. 4-32-903[1], 4-32-904).

Distribution of Assets Upon Dissolution.

Upon winding up of LLC, order of distribution of assets is as follows: (1) Payment to creditors, including members; (2) members or former members in satisfaction of liabilities for distribution; (3) members and former members first for return of contribution and second in proportion to membership interest. (Ark. Code Ann. 4-32-905).

Articles of Dissolution.

After completion of winding up, members or managers may file articles of dissolution with Secretary of State. (Ark. Code Ann. 4-32-906).

Claims Upon Dissolution.

LLC may dispose of known claims against it by filing articles of dissolution and then providing notice to its known claimants of dissolution, giving them at least 120 days to present claim. (Ark. Code Ann. 4-32-907[a], [b]). As to its unknown claimants, LLC may publish notice of its dissolution in newspaper of general circulation in county where LLC's principal office is located, or in Pulaski County if company does not have principal office in this state, requesting that persons with claims against it present them within five years or applicable period of limitation. (Ark. Code Ann. 4-32-908[a], [b]).

Foreign LLC.

Foreign LLC's internal affairs are governed by laws of its state of organization. (Ark. Code Ann. 4-32-1001). In order to "transact business" in Arkansas, foreign LLC must register with Secretary of State. To register, foreign LLC must pay requisite fee, provide evidence of its organization under another state's laws, and submit duplicate application for registration setting forth following: (a) foreign LLC's name and, if company's name is unavailable for use in this state, name under which it will transact business; (b) its state of organization and date of formation; (c) all information required by Ark. Code Ann. 4-20-105; (d) statement confirming that foreign LLC has filed statement appointing agent for service of process under § 4-20-112, and may be served under § 4-20-113 if it fails to appoint or maintain proper agent; (e) address of its principal office; and (f) statement evidencing that foreign LLC is "foreign limited liability company". (Ark. Code Ann. 4-32-1002). Name of foreign LLC must satisfy same requirements as name of Arkansas LLC. (Ark. Code Ann. 4-32-1004). Foreign LLC that is registered in Arkansas may cancel its registration by submitting application for cancellation seeking certificate of cancellation from Secretary of State. (Ark. Code Ann. 4-32-1006). Application for registration of foreign LLC can be amended by filing articles of amendment with Secretary of State. (Ark. Code Ann. 4-32-1005[a]). Foreign LLC transacting business in Arkansas may not maintain action in Arkansas court until it has registered in Arkansas. (Ark. Code Ann. 4-32-1007[a]).

Fees.

Secretary of State shall collect following fees: Articles of Organization—$50; Application for Name—$25; Application for Reserved Name—$25; Transfer of Reserved Name—$25; Change of Registered Agent or Office—no fee; Agent's Statement of Resignation—no fee; Amendment of Articles of Organization—$25; Restatement of Articles of Organization—$25; Articles of Merger or Share Exchange—$50; Articles of Dissolution—$50; Certificate of Authority by Foreign Limited Liability Company—$300; Amended Certificate of Authority by Foreign LLC—$300; Articles of Correction—$30; and Certificate of Existence or Authorization by Domestic LLC—$15. Certificate of Judicial Dissolution—no fee; Application for Certificate of Withdrawal by Foreign LLC—no fee; and Certificate of Revocation of Authority to transact business—no fee. Secretary of State shall collect following fees (including processing fee) when following documents are delivered by electronic means: Articles of Organization for domestic LLC—$45; Certificate of Amendment to Articles of Organization for domestic LLC—$22.50; Notice of Change of Registered Office or Agent or Both for LLC—no fee; Application for Reservation of LLC Name—$22.50; Notice of Transfer of Reserved Name—$25; Application for Certificate of Authority of Foreign LLC—$270; Application for Amended Certificate of Authority by Foreign LLC—$270; Application for Certificate of Withdrawal by Foreign LLC—no fee; and Application for Fictitious Name for Foreign LLC—$22.50. (Ark. Code Ann. 4-32-1301).

Tax Status.

LLC and its member or members shall be classified and taxed for Arkansas income tax purposes in same manner as it is classified and taxed for federal income tax purposes. (Ark.

Code Ann. 4-32-1313).

2.07 [RESERVED]

2.08 PARTNERSHIPS:

Uniform Partnership Act (1996) has been adopted (Ark. Code Ann. 4-46-101 – 4-46-1207) effective Jan. 1, 2000. Revised Limited Partnership Act has been adopted (Ark. Code Ann. 4-43-101 – 4-43-1206) with modifications of liabilities of general partner (Ark. Code Ann. 4-43-403), variations in voting rights (Ark. Code Ann. 4-43-302), provision for persons who erroneously but in good faith believe they are limited partners (Ark. Code Ann. 4-43-304), and conversions, mergers, and consolidations (Ark. Code Ann. 4-43-1201 – 4-43-1206). Uniform Limited Partnership Act and Foreign Limited Partnership Act were repealed by 1991 Act 1175. Uniform Partnership Act (1914) (Ark. Code Ann. 4-42-101 – 4-42-702) was repealed by 1999 Act 1518, repeal effective Jan. 1, 2005. Repealed material is encompassed by Revised Limited Partnership Act.

3 BUSINESS REGULATION AND COMMERCE

3.01 BANKS AND BANKING:

Uniform Commercial Code adopted. See topic 3.09 Commercial Code.

Supervision of financial institutions is by Bank Commissioner, head of State Bank Department, who has authority to issue rules and regulations. (Ark. Code Ann. 23-46-201 – 23-46-212).

Deposits.

Where deposit accounts do not expressly designate ownership interest as tenants in common, money deposited in checking and savings accounts and in certificates of deposit in names of two or more persons is held as joint tenants with right of survivorship and may be paid to either depositor during life or to any one of survivors after death of any one or more of them, unless contrary written designation is given to bank. Similarly, deposits by two individuals who represent they are married, regardless of legal status on date account created, are held by entirety and may be paid to or on order of either depositor during their lifetime, or to or on order of survivor after death of one. Deposits in names of two or more designated as tenants in common may be paid to any one in lifetime of parties unless contrary written designation is given to bank, but after death of one, pro rata share must be paid to surviving tenant and to decedent’s estate. (Ark. Code Ann. 23-47-204[c], [d]).

Unclaimed deposits subject to Uniform Unclaimed Property Act (1995). (Ark. Code Ann. 18-28-201 – 18-28-230).

Trust Powers.

Commissioner may grant to state bank applying therefore right to operate trust department. (Ark. Code Ann. 23-47-701 – 23-47-710). Bank may also utilize affiliate to provide services for any trust or estate for which bank acts as trustee or fiduciary, provided certain requirements are met, without approval, consent or specific authorization in trust instrument. (Ark. Code Ann. 23-47-710). Bank holding company may apply to bank commissioner for authority to create, form and establish subsidiary trust companies. (Ark. Code Ann. 23-47-802[a]; *See generally* Ark. Code Ann. 23-47-801 - 807).

Trust companies, other than national trust companies and subsidiary trust companies, in existence on May 30, 1997, must cease operations as trust companies, and, if such companies have not become banks by complying with law for formation of banks, shall automatically become business corporations subject to Arkansas Business Corporation Act of 1987, Ark. Code Ann. 4-27-101, et seq. (Ark. Code Ann. 23-48-102).

Certain foreign financial institutions engaged in investing in loans secured by real estate that meet definition of investor companies may engage in certain enumerated activities without qualifying to do business in State of Arkansas provided such entities file Consent to Service of Process with Secretary of State. (Ark. Code Ann. 23-32-401 – 23-32-406).

Fiduciaries.

Foreign banks and trust companies are authorized to act as fiduciaries within Arkansas if state where they are organized and have their principal office grants reciprocal authority to Arkansas banks and trust companies. (Ark. Code Ann. 4-31-301 – 4-31-303).

Uniform Common Trust Fund Act adopted with various departures concerning liability, investments, deposits of funds, and services provided by affiliates. (Ark. Code Ann. 28-69-201 – 28-69-207).

Industrial loan institutions are subject to supervision by bank commissioner. (Ark. Code Ann. 23-36-105).

Bank holding companies are regulated. (Ark. Code Ann. 23-48-401 – 23-48-406). Bank Holding Company Act of 1983 allows bank holding company, as defined, to own more than one bank subsidiary (except limited to one subsidiary with its main office in state if such bank has de novo charter) subject to overall limitation prohibiting bank holding company from owning control of banks having more than 25% of total deposits held by banks in Arkansas. (Ark. Code Ann. 23-48-405 – 23-48-406). Bank Holding Company Act of 1983 also provides for ownership by in-state banks of shares of banker’s bank. (Ark. Code Ann. 23-48-325). Emergency acquisitions permitted upon application to Bank Commissioner. (Ark. Code Ann. 23-48-511). There are criminal penalties for willful violation of Act, regulations, or order of Bank Commissioner. (Ark. Code Ann. 23-48-403). Bank Commissioner shall administer and issue regulations. (Ark. Code Ann. 23-48-404). Bank holding company securities are exempt from registration provisions of Arkansas Securities Act. (Ark. Code Ann. 23-42-503). See topic 3.24 Securities. Bank holding companies may apply to bank commissioner for authority to create and establish separate trust company subsidiaries which may assume fiduciary accounts of affiliate banks. (Ark. Code Ann. 23-47-801 – 23-47-807).

Confidentiality of bank department records and submissions. (Ark. Code Ann. 23-46-101).

Bank Directors’ Standard of Care.

(Ark. Code Ann. 23-48-322).

Bank Reorganization; Plan of Exchange.

State bank may reorganize by plan of exchange for shares of outstanding stock held by its shareholders, if adopted by board, approved by majority of bank shareholders and fairness of which is approved by State Bank Commissioner. (Ark. Code Ann. 23-48-601 – 23-48-605).

Reserves.

State bank not member of Federal Reserve Board must maintain reserve fund as required by Federal Reserve Board, unless otherwise provided by State Bank Department. (Ark. Code Ann. 23-48-202).

Branch Banking.

Unless otherwise restricted by applicable law, banks may engage in permitted activities other than core banking activities at main office, any branch, or limited purpose office. (Ark. Code Ann. 23-48-702[a][2]). All communities and markets shall be presumed suitable for bank branches. (Ark. Code Ann. 23-48-702[a][3][A]). Prior existence of main or branch office of any bank in community does not grant bank any right or power to preclude any other bank from branching into community. (Ark. Code Ann. 23-48-702[a][3][B]). If approved by its supervisory banking authority, any Arkansas bank may establish full-service branch anywhere within state in which establishing bank's main banking office is located. (Ark. Code Ann. 23-48-702).

Customer-Bank Communication Terminals.

Bank, individually or jointly with one or more other banks in state, may establish, maintain and use one or more customer-bank communication terminals anywhere in state and in any one or more other states if permitted by applicable law of such other state. (Ark. Code Ann. 23-48-802). Any out-of-state bank may establish customer-bank communications terminal anywhere in state. (Ark. Code Ann. 23-48-804[a]).

Savings and Loan Associations and Building and Loan Associations regulated. (Ark. Code Ann. 23-37-101 – 23-37-812, Ark. Code Ann. 23-38-101 – 23-38-404).

Credit Unions regulated. (Ark. Code Ann. 23-35-101 – 23-35-805).

Application Fee.

In addition to all expenses and costs of department, any applicant to plan of exchange shall pay fee equal to .1% of paid-up capital stock of state bank but not less than $500 and not more than $1,000 as determined by rule or order of commissioner. (Ark. Code Ann. 23-48-601[e]).

Acquisition or Control by Bank Holding Company.

Bank holding companies are prohibited from acquiring control of any bank with its main office or branch office in Arkansas if, after such acquisition purchaser would control, directly or indirectly, more than 25% of total deposits within State of Arkansas held by banks. (Ark. Code Ann. 23-48-401 – 23-48-406).

Reports.

State Banks and subsidiary trust companies must submit reports to Commissioner at least two times each year. In addition, Commissioner has power to call for reports from state banks and subsidiary trust companies whenever deemed necessary. (Ark. Code Ann. 23-46-501).

Examinations.

Thorough examination into affairs of each state bank or subsidiary trust company will be made by Commissioner at least once every 24 month period. (Ark. Code Ann. 23-46-503; *See generally* Ark. Code Ann. 23-46-503 – 23-46-508).

Interstate Bank Mergers and Branching.

With prior approval of Banking Board and Commissioner, state bank may establish one or more branches in other states pursuant to interstate merger transaction in which state bank is resulting bank. State bank must file application with responsible federal bank supervisory agency and Commissioner. (Ark. Code Ann. 23-48-902). Arkansas bank, provided it does not have de novo charter, may enter into interstate merger transaction with out-of-state bank in which out-of-state bank is resulting bank, and out-of-state bank may thereafter maintain and operate branches in Arkansas of any Arkansas bank that was party to merger. (Ark. Code Ann. 23-48-903).

De Novo Interstate Branches.

No state bank may establish or maintain de novo interstate branch or acquire an interstate branch. (Ark. Code Ann. 23-48-904[a]). No out-of-state bank may establish or maintain de novo interstate branch in Arkansas or acquire interstate branch in Arkansas. (Ark. Code Ann. 23-48-904[b]).

3.02 BILLS AND NOTES:

Uniform Commercial Code applies. (Ark. Code Ann. 4-3-101 – 4-3-605). Arkansas Law of Comparative Fault. (Ark. Code Ann. 16-64-122). Standard of failure to exercise ordinary care applies in cases of alteration or unauthorized signatures. (Ark. Code Ann. 4-3-406 and Ark. Code Ann. 4-4-406). See topic 3.09 Commercial Code.

Attorneys' fees may be awarded to successful party by court. (Ark. Code Ann. 16-22-308).

Check-Cashing.

In McGhee v. Arkansas State Board of Collection Agencies, 375 Ark. 52 (2008), Check-Cashers Act, Ark. Code Ann. 23-52-101-117, was held unconstitutional. Under Check-Cashers Act, persons engaged in check cashing activities are required to obtain permit from Arkansas State Board of Collection Agencies. (Ark. Code Ann. 23-52-108). Permit requires presentation of completed application form prescribed by applicable law, and proof of financial responsibility for each location from which such check cashing activities are conducted. (Ark. Code Ann. 23-52-107 – 23-52-108). Fees persons may charge for check cashing may be no more than following percentages of face amount of following: (1) 5% of state public assistance or federal social security benefit; (2) 10% of any personal check or money order; (3) 6% of all other checks. (Ark. Code Ann. 23-52-104[b][1]). Check casher may not charge more than $10 for deferred presentment option involving personal checks and fee to set up initial customer account must not exceed $5. (Ark. Code Ann. 23-52-104[b][2]-[3]). Check cashers must post certain disclosures in conspicuous public location. (Ark. Code Ann. 23-52-105). All agreements for deferred presentment option of check must be in writing and signed by maker of check. (Ark. Code Ann. 23-52-106[c]). Check cashers subject to certain other negotiating requirements including redemption of check by maker and length of time check may be held, and maximum amount of outstanding deferred presentment check which may be purchased. (Ark. Code Ann. 23-52-106). Change of control of check casher subject to prior written approval of Arkansas State Board of Collection Agencies. (Ark. Code Ann. 23-52-110).

Insurance Premiums.

Note for insurance premiums must state for what purpose given and is not negotiable until delivery of policy, unless policy issued in form and at rate applied for and coverage is effective prior to issuance or approval. (Ark. Code Ann. 23-79-122[a]).

Minor's note given to bank for expenses of higher education or necessaries is valid as if minor were of age. (Ark. Code Ann. 23-47-509).

Prepayment.

Obligations secured by lien on real estate used primarily for agriculture or livestock purposes are subject to limitations on prepayment restrictions. Attempt to apply more restrictive prepayment requirements is misdemeanor and causes forfeiture of principal and interest and obligation for debtor's attorney's fees. (Ark. Code Ann. 23-32-203).

Student Loans.

Minority is no defense on loan guaranteed by Arkansas Student Loan Authority. (Ark. Code Ann. 6-81-125).

3.03 BILLS OF LADING:

See topic 3.08 Carriers.

3.04 BILLS OF SALE:

See topic 3.23 Sales.

3.05 BLUE SKY LAW:

See topic 3.24 Securities.

3.06 BROKERS:

The rules of common law apply to brokers (207 Ark. 1, 179 S.W.2d 156) and they may be licensed and taxed by municipalities (Ark. Code Ann. 14-54-103[10]).

Real estate brokers and salesmen are licensed by state. (Ark. Code Ann. 17-42-101 – 17-42-603). Only individuals may be licensed as brokers, but licensed broker may do business as professional corporation. (Ark. Code Ann. 17-42-103[10][A]-[B]).

Uniform Commercial Code applies to brokerage of investment securities. (Ark. Code Ann. 4-8-102[a][14]; Ark. Code Ann. 4-8-108 – 4-8-109; Ark. Code Ann. 4-8-115 – 4-8-116). See topic 3.09 Commercial Code.

3.07 BULK SALES:

Uniform Commercial Code Bulk Transfers Act repealed for transactions after effective date of repeal of July 15, 1991; Bulk Transfers Act applies to transactions before July 15, 1991. (Ark. Code Ann. 4-6-101 – 4-6-111).

See category 8 Debtor and Creditor, topic 8.08 Fraudulent Sales and Conveyances.

3.08 CARRIERS:

Arkansas State Highway and Transportation Department and Arkansas State Highway Commission have jurisdiction over all matters pertaining to regulation and operation of common carriers. (Ark. Code Ann. 23-2-209, Ark. Code Ann. 23-2-302). Uniform Commercial Code has been adopted. See topic 3.09 Commercial Code.

Limiting Liability.

A railroad may not contract for the purpose of abridging its common law or statutory duties as common carrier. (Ark. Code Ann. 23-10-408).

Bills of Lading.

Uniform Commercial Code applies. (Ark. Code Ann. 4-7-101 – 4-7-106, Ark. Code Ann. 4-7-301 – 4-7-603).

Liens.

Uniform Commercial Code applies. (Ark. Code Ann. 4-7-307 – 4-7-308).

Discrimination.

Railroads may not vary rates or give preferences, or discriminate against any person, firm, corporation or company. (Ark. Code Ann. 23-10-104 – 23-10-106, Ark. Code Ann. 23-4-710).

Motor Vehicle Carriers.

See category 23 Transportation, topic 23.01 Motor Vehicles.

3.09 COMMERCIAL CODE:

Uniform Commercial Code was adopted by Act approved Mar. 7, 1961 and became effective midnight Dec. 31, 1961.

1962 Amendments adopted except as noted below.

1972 Official Amendments adopted with effective date of Jan. 1, 1974.

1977 Official Amendments adopted with effective date of June 28, 1985.

1987 Official Amendments (Article 2A), as revised in 1990, adopted with effective date of Aug. 13, 1993.

1988 Official Amendments (Repeal of Article 6) adopted with effective date of July 15, 1991.

1989 Official Amendments (Article 4A) adopted with effective date of July 15, 1991.

1990 Revised Article 3 (With Conforming and Miscellaneous Amendments to Articles 1 and 4) adopted, except revised 4-312, with effective date of July 15, 1991.

1994 Revised Article 8 with conforming and miscellaneous amendments to Articles 1, 4, 5, 9, and 10 adopted with effective date of July 27, 1995.

1995 Revised Article 5 with conforming and miscellaneous amendments to Articles 1, 2, and 9 was approved on Apr. 3, 1997.

1999 Revised Article 9 adopted with effective date of July 1, 2001.

2005 Act 856 amends Articles 1, 3, and 4 to address use of electronic transactions, remotely created items and other banking transactions.

2007 Revised Article 7 with conforming amendments adopted effective Mar. 19, 2007.

Intentional variations from 1962 Official Text in Arkansas Code are as follows:

§ 2.316(3)(d). Implied warranties of merchantability and fitness not applicable to contract for sale of blood and other human tissue. Implied warranty that certain livestock offered for sale is free from disease does not exist unless owner knowingly sells diseased animals. (Ark. Code Ann. 4-2-316[3][d]).

§ 2.318 1966 Optional Amendment Alternative A adopted. Extensive changes to Official Text of 2.318 have been enacted through two additional sections to its Uniform Commercial Code. Lack of privities between plaintiff and defendant shall be no defense in any action brought against manufacturer or seller of goods to recover damages for breach of warranty, express or implied, or for negligence, although plaintiff did not purchase goods from defendant, if plaintiff was person who manufacturer or seller might reasonably have expected to use, consume or be affected by goods. (Ark. Code Ann. 4-2-318; 238 Ark. 534, 383 S.W.2d 885).

§ 2A.103(1)(e) Optional language adopted ($25,000). (Ark. Code Ann. 4-2A-103[1][e]).

§ 2A.104(1) Adds sections (d) and (e) to Ark. Code Ann. 4-2A-104(1) which reads as follows:

"(d) statute of this state creating conditions for the effectiveness and enforceability of the lease contract, including, but not limited to Ark. Code Ann. 6-62-601-602; Ark. Code Ann. 6-62-605-613; Ark. Code Ann. 12-8-301 – 12-8-310; Ark. Code Ann. 14-16-108 – 14-16-110; Ark. Code Ann. 14-94-110; Ark. Code Ann. 14-138-111; Ark. Code Ann. 14-169-1003; Ark. Code Ann. 14-169-1011; Ark. Code Ann. 14-184-119; Ark. Code Ann. 14-219-101; Ark. Code Ann. 14-362-126; Ark. Code Ann. 19-1-213; Ark. Code Ann. 22-2-114; Ark. Code Ann. 22-2-115; Ark. Code Ann. 22-3-1101; Ark. Code Ann. 22-4-105; Ark. Code Ann. 22-4-501; Ark. Code Ann. 23-11-314; Ark. Code Ann. 23-112-404; Ark. Code Ann. 27-65-114; Ark. Code Ann. 28-51-203; Ark. Code Ann. 28-51-303; and Ark. Code Ann. 28-72-204; or

(e) statute of this state dealing with a person's capacity or authority to enter into a lease or contract."

§ 2A.109(2) Words "lack of" are inserted before words "good faith under subsection (1)."

§ 2A.216 Alternative C adopted.

§ 2A-218(3) Words "If a lessee has an insurable interest" are used in place of "Notwithstanding a lessee's insurable interest."

§ 2A-304(2) Words "of that lessor" are omitted.

Revised § 4.106(b) Alternative B adopted.

§ 4.406 provides for modified comparative fault. For unauthorized signature or alteration by same wrongdoer, customer has reasonable time period, not exceeding 30 days to examine item or statement and notify bank. (Ark. Code Ann. 4-4-406[d][2]).

Effective July 15, 1991, Chapter 6 (Bulk Sales) was repealed by enacting Alternative A of 1989 Official Amendment. 1989 Official Amendment for revised Article 6 has not been adopted. For transactions prior to its effective date of repeal, (July 15, 1991), § 6.104(1)(c) omits "or files the list and schedule in (a public office to be here identified)." (1991 Act 344).

For transactions prior to its effective date of repeal, (July 15, 1991), § 6.104(2) Last sentence omitted. (1991 Act 344).

For transactions prior to its effective date of repeal, (July 15, 1991), § 6.106 Optional section omitted. (1991 Act 344).

For transactions prior to its effective date of repeal, (July 15, 1991), § 6.111 is omitted. (1991 Act 344).

§ 9.501(a)(2) provides for local filing with respect to debtors engaged in farming operations for liens on collateral classified as equipment used in farming operations, farm products, and accounts arising from sale of farm products.

§ 10-101 Second sentence omitted; section not codified in Arkansas Statutes.

§ 11-101 to § 11-108 Article 11 not adopted.

Code appears as Title 4 of Ark. Code Ann. (1991). Section Numbers of Arkansas Code with the prefix "4" correspond to those of 1962 Official Text, except with respect to Article 1 which follows Section Numbers of 2001 Revised Article 1 (2005 Act 856); Articles 3 and 4 which coincide to Section Numbers in 1990 Revised Article 3 (With Conforming and Miscellaneous Amendments to Articles 3 and 4) (1991 Act 572); Article 5 which follows Section Numbers adopted in 1990 Revised Article 5 (1997 Act 1070); Article 8 which follows the Section Numbers in 1994 Revised Article 8 (With Conforming and Miscellaneous Amendments to Articles 1, 4, 5, 9, and 10) (1995 Act 425); and Article 9 which coincide to Section Numbers in 1999 Revised Article 9 (2001 Act 1439).

Forms.

See end of this Digest.

Filing Fees.

For offices for filing and fees under Art. 9, see category 10 Documents and Records, topic 10.04 Records, subhead Filing Under Commercial Code.—Place; Fees.

See also topics 3.01 Banks and Banking, Bills and Notes, Brokers, Carriers, Contracts, Factors, Frauds, Statute of, Sales, Securities, Warehousemen; categories 2 Business Organizations, topic Corporations; Civil Actions and Procedure, topic Limitation of Actions; Debtor and Creditor, topics Assignments, Fraudulent Sales and Conveyances, Liens, Pledges; Documents and Records, topics Records, Seals; Mortgages, topic Chattel Mortgages.

3.10 CONDITIONAL SALES:

See topic 3.23 Sales.

3.11 CONSIGNMENTS:

See topic 3.14 Factors.

3.12 CONSUMER PROTECTION:

Following are unlawful practices: Concealment, suppression, or omission of material facts with intent that others rely on it (Ark. Code Ann. 4-88-108[2]); pyramiding devices (Ark. Code Ann. 4-88-109); knowingly making false representations concerning goods or services (Ark. Code Ann. 4-88-107[a][1]); disparaging goods, services or business of another by false or misleading representation of facts (Ark. Code Ann. 4-88-107[a][2]); advertising goods or services with intent not to sell as advertised (Ark. Code Ann. 4-88-107[a][3]); knowingly taking advantage of consumer unable to protect his or her interest (Ark. Code Ann. 4-88-107[a][8]); making false representation that contributions solicited for charitable purposes will be spent in specified manner or for specified purposes (Ark. Code Ann. 4-88-107[a][7]); refusal to deliver with goods any electronic or mechanical apparatus warranty provided by manufacturer (Ark. Code Ann. 4-88-107[a][4]); employment of "bait and switch" advertising (Ark. Code Ann. 4-88-107[a][5]); knowingly failing to identify goods damaged by water, fire or accident (Ark. Code Ann. 4-88-107[a][6]; selling or drafting trust document by nonlawyer (Ark. Code Ann. 4-88-107[a][9]); display or cause to be displayed fictitious or misleading name or telephone number on Arkansas resident's telephone caller identification service (Ark. Code Ann. 4-88-107[a][11]); or any other unconscionable or deceptive practices. (Ark. Code Ann. 4-88-107[a][10]).

Conviction for unlawful practice is punishable as Class A misdemeanor. (Ark. Code Ann. 4-88-103).

Civil enforcement is either by petition of consumer protection division of office of Attorney General to Circuit Court of county where respondent resides or transacts business or by private cause of action by aggrieved party. (Ark. Code Ann. 4-88-111 – 4-88-113). Any person that suffers actual damage or injury as result of unlawful practice has cause of action to recover actual damages and reasonable attorney's fees. (Ark. Code Ann. 4-88-113[f]). Elderly or disabled persons have express cause of action under Act and may recover actual and punitive damages and reasonable attorney's fees. Enhanced civil penalties apply when victim is disabled. Elder and Disabled Victims Fund created by Act to investigate and prosecute deceptive acts against disabled and elderly. (Ark. Code Ann. 4-88-201 – 4-88-207).

Attorney General enforces Act by injunction and court may return to purchaser money or property acquired by any unlawful practice and may award damages and assess costs and fees, suspend corporate charter or other permit to do business of any person in willful violation of Act, and may assess penalties not to exceed $10,000 per violation of Act. (Ark. Code Ann. 4-88-113).

Following are exceptions: practices subject to and in compliance with any rule of Federal Trade Commission (Ark. Code Ann. 4-88-101[1]); dissemination of information by broadcasters, printers and publishers without knowledge of deceptive nature of practice (Ark. Code Ann. 4-88-101[2]); actions or transactions of public utility acting under authority of certain regulatory bodies (Ark. Code Ann. 4-88-101[3]); and actions subject to State and Federal regulatory bodies (Ark. Code Ann. 4-88-101[4]). (Ark. Code Ann. 4-88-101). Any civil action brought under this chapter is subject to five year statute of limitations. (Ark. Code Ann. 4-88-115).

Unsolicited Merchandise.

When delivered to person for whom it is intended, said person may refuse to accept delivery of unsolicited merchandise or may deem it to be a gift and use it or dispose of it at will without obligation to sender. (Ark. Code Ann. 4-86-103).

Equal Consumer Credit.

It is unlawful for any creditor or credit card issuer to discriminate on basis of sex or marital status. (Ark. Code Ann. 4-87-104). Consumer may recover $100 to $500 and costs and attorney's fees. (Ark. Code Ann. 4-87-105). *See generally* Ark. Code Ann. 4-87-101 – 4-87-105.

Mail and Phone Solicitation.

Arkansas Mail and Telephone Consumer Product Promotion Fair Practices Act regulates offering of gifts or prizes by mail or phone intended to induce purchase of consumer product and pay-per-call services. (Ark. Code Ann. 4-95-101 – 4-95-108). Contracts of purchase must be in writing to be enforceable. (Ark. Code Ann. 4-95-106). Violations of Act are punishable as Class B misdemeanor (Ark. Code Ann. 4-95-103); if amount solicited exceeds $200, violations are Class D felonies. (Ark. Code Ann. 4-95-103). All remedies available to Attorney General under Deceptive Trade Practices Act are available under Act. (Ark. Code Ann. 4-95-101 – 4-95-108).

Regulation of Telephonic Sellers.

Act regulates telephonic sellers who solicit sales and imply that prospective purchaser will receive prize or gift or additional items for making purchase or that price offered is below regular price of item and also regulates solicitation made by telephone in response to inquiries generated by notifications sent by sellers indicating or implying that recipient is specially selected or will receive gift. (Ark. Code Ann. 4-99-101 – 4-99-112). Certain solicitations are exempted from regulation. (Ark. Code Ann. 4-99-103). Prospective purchasers must be supplied with certain information at time of solicitation and prior to sale. (Ark. Code Ann. 4-99-108). No telephone seller shall display or cause to be displayed fictitious or misleading name or telephone number on Arkansas resident's telephone caller identification service. Telephonic sellers must obtain bond for $50,000 in favor of State and must register with Consumer Protection Division ten days before doing business in state. (Ark. Code Ann. 4-99-107). Registration is $100 to be paid and renewed annually. (Ark. Code Ann. 4-99-104). Telephonic sellers who fail to register are guilty of Class A misdemeanor. Willful violations of Act are punishable as Class D felony. (Ark. Code Ann. 4-99-110). Attorney General may enforce Act in same manner as Deceptive Trade Practices Act. (Ark. Code Ann. 4-99-101 – 4-99-112).

The Arkansas Consumer Telephone Privacy Act regulates use of telephones to market goods and services to homes and businesses. (Ark. Code Ann. 4-99-401 – 4-99-408). Arkansas Attorney General has established and operates single statewide database comprised of list of telephone numbers of consumers who object to receiving telephone solicitations. (Ark. Code Ann. 4-99-404). It is unlawful for person to make or transmit telephone solicitation to telephone number of any consumer included in database. Certain exemptions apply. (Ark. Code Ann. 4-99-405 – 4-99-406). It is unlawful for any telemarketers to obtain or submit for payment check, draft, or other form of negotiable instrument drawn on person’s checking, savings, share or other depository account without customer’s express written authorization. (Ark. Code Ann. 4-99-203). It is also unlawful for person who calls residential phone number for purpose of offering merchandise or offering prize to consumer to dispatch courier or other individual to residence to collect money. (Ark. Code Ann. 4-99-202). Professional telemarketers who solicit funds for charitable organizations are subject to certain regulations including registration with Arkansas Secretary of State. (Ark. Code Ann. 4-28-401 – 4-28-416). Violations of all of foregoing also constitute violations of Arkansas’ Deceptive Trade Practices Act. (Ark. Code Ann. 4-88-101 et seq.).

Prize Promotion Act.

Requires that Arkansas consumers be provided with all relevant information necessary to make informative decision concerning sweepstakes, contests, and prize promotions. (Ark. Code Ann. 4-102-101 – 4-102-109). Act prohibits misleading and deceptive prize promotions. (Ark. Code Ann. 4-102-105). Defines “prize” as gift, award, or other item or service that is offered or awarded to participant in real or purported contest, etc. (Ark. Code Ann. 4-102-101 – 4-102-102). Requires prize sponsor to provide written prize notice describing identity of sponsor; retail value of prize; odds of receiving such prize; requirements for payment of shipping or handling fees, etc.; any restrictions on receipt; limitations on eligibility; maximum number of persons in group or purported group with enhanced likelihood of receiving prize; etc. Act describes specific form of notice. (Ark. Code Ann. 4-102-106).

Act substantially limits representations that plan sponsor can make, directly or by implication, regarding prizes or probability of receipt of prize. Sponsors are prohibited from requesting any individual to disclose phone numbers, ages, birth dates, credit card ownership, or financial data in connection with prize promotion which is not in compliance with Act. (Ark. Code Ann. 4-102-105).

Exemptions include: advertising media; free prize promotions; promotions in connection with sale or purchase of books, recordings, video cassettes, periodicals, and similar goods through membership group, continuity plan, or subscription arrangement; and sales by catalog seller. Pari-mutuel wagering on horse racing and greyhound racing permitted and regulated by Arkansas law is also exempt. (Ark. Code Ann. 4-102-104).

Violation of Act is also violation of Arkansas Deceptive Trade Practices Act, and subject to those enforcement provisions. (Ark. Code Ann. § 4-88-101 et seq.). In addition, person suffering pecuniary loss because of intentional violation of Act may bring action in court of competent jurisdiction. Recovery includes costs, reasonable attorney’s fees, and greater of (1) $500, or (2) twice amount of pecuniary loss. (Ark. Code Ann. 4-102-103).

Pay-Per-Call.

Arkansas Pay-Per-Call Consumer Protection Act regulates pay per call services. Act requires services to provide delay time in which consumer can disconnect without being charged and disclosure message for services of interest to children under 18. Advertising of pay-per-call services must include specified information. Consumers may recover damages, treble damages, costs, and attorney's fees for violation of Act. Attorney General may enforce in same manner as Deceptive Trade Practices Act. (Ark. Code Ann. 4-98-101 – 4-98-105).

Home Solicitation Sale.

Act regulates sale of certain goods and services in an amount exceeding $25 where solicitation takes place away from premises where seller normally carries on business or where goods are normally offered for sale or by telephone. (Ark. Code Ann. 4-89-102). Seller is required to give statutory notice of right of cancellation to buyer when sales agreement is signed by furnishing completed form captioned "Notice of Cancellation". (Ark. Code Ann. 4-89-108). By mailing or delivering to seller written notice of cancellation buyer has absolute right to cancel home solicitation contract until midnight of third day, excluding Sundays and holidays, after day on which he signs agreement. (Ark. Code Ann. 4-89-107). Within ten days after cancellation, seller must tender any payment or trade-in and note or other evidence of debt received from buyer. (Ark. Code Ann. 4-89-109). Within 20 days after cancellation buyer must tender goods to seller upon demand, but if within this time seller fails to demand possession of goods, goods become property of buyer without obligation to pay for them. (Ark. Code Ann. 4-89-110).

Certain transactions and contracts are excepted from regulation. (Ark. Code Ann. 4-89-103). Violation of Act is Class A misdemeanor. (Ark. Code Ann. 4-89-104). Consumer may recover actual damages plus greater of $100 or 10% of transaction total. (Ark. Code Ann. 4-89-105).

Plain Language.

The Life and Accident and Health Insurance Policy Language Simplification Act sets minimum standards to make policies, contracts and certificates of life insurance and annuities, disability insurance, and credit life insurance delivered in Arkansas easier to read. (Ark. Code Ann. 23-80-201 – 23-80-208). The Property and Casualty Insurance Policy Simplification Act sets minimum language and format standards to make property and casualty insurance policies easier to read. (Ark. Code Ann. 23-80-301 – 23-80-308).

Rental Purchase Agreements.

Rental purchase agreement (as defined in statute) treated as true leases and not as credit sales or retail installment contracts or as creating security interest. (Ark. Code Ann. 4-92-104). Consumer has right to reinstate agreement upon failure to make timely rental payment by paying all rents and charges due or returning merchandise to lessor within specified time. (Ark. Code Ann. 4-92-106). Agreement must disclose: whether merchandise is new or used; amount, timing and number of rental payments; total amount to be paid to acquire ownership; amount and purpose of other charges; that consumer does not acquire ownership rights until ownership terms of agreement are satisfied; and whether consumer is liable for loss or damage to merchandise, and consumer's reinstatement rights. (Ark. Code Ann. 4-92-105). Consumer may recover from lessor: actual damages, 25% of amount equal to total amount of payments required for ownership but in no event less than $100 nor more than $1,000, and reasonable attorney's fees up to 15% of allowable recovery and court costs for violations under Act. (Ark. Code Ann. 4-92-103). Attorney General may enforce Act in same manner as Deceptive Trade Practices Act. (Ark. Code Ann. 4-92-101 – 4-92-107).

Also covered are: Credit services organizations (Ark. Code Ann. 4-91-101 – 4-91-109), automobiles (Ark. Code Ann. 4-90-201 – 4-90-512), credit reporting disclosures (Ark. Code Ann. 4-93-101 – 4-93-104), health spas (Ark. Code Ann. 4-94-101 – 4-94-109), farm machinery (Ark. Code Ann. 4-96-201 – 4-96-202), retail pet stores (Ark. Code Ann. 4-97-101 – 4-97-109), going out of business sales (Ark. Code Ann. 4-74-101 – 4-74-111), and motor vehicle transfers (Ark. Code Ann. 4-100-101 – 4-100-103).

Fracture-Filled or Clarity-Enhanced Diamonds.

Persons engaged in business of selling fracture-filled or clarity-enhanced diamonds or jewelry containing fracture-filled diamonds shall disclose to customer that diamond has been treated. Business required to post notice at conspicuous place at entrance of business. Violation is Class B misdemeanor. (Ark. Code Ann. 4-101-201).

Odometer Fraud.

Act prevents sale or transfer of motor vehicles without statement of actual mileage of vehicle accompanying sale. Transferor of motor vehicle must give transferee written disclosure of cumulative mileage registered on odometer, or state that mileage is not actual if transferor knows that odometer is incorrect. Violators subject to Attorney General enforcement under Deceptive Trade Practices Act and private action by aggrieved party. Violators also subject to maximum criminal penalties of up to three years in prison and $50,000 fine. (Ark. Code Ann. 4-90-201 – 4-90-207).

Credit Cards.

Solicitation on College Campuses.

It is unlawful to offer gifts or other promotional incentives to any person under 21 through direct face-to-face contact, in order to entice person to apply for credit card on college campus or to solicit any person for credit card in academic building and within 100 feet of academic building on campus of institute of higher education. (Ark. Code Ann. 4-104-202). Credit card issuers required to verify identity and age of solicited person by reviewing valid driver's license prior to any personal solicitation of credit card applications on college campus. (Ark. Code Ann. 4-104-202[a][2]). Each violation subject to fine of not less than $500 nor more than $1,000. (Ark. Code Ann. 4-104-204). Does not apply to solicitation of credit card application by bank or credit union located on campus, if such solicitation is made within its office. (Ark. Code Ann. 4-104-202[a][3]).

Balance Transfers.

Any credit card issuer who charges its card holder interest after date on which balance owed to issuer is transferred to another credit card account shall be liable for treble damages to its customer for such conduct. (Ark. Code Ann. 4-107-201 – 4-107-204).

Credit Card Transaction Receipts.

Act makes it unlawful to print more than last five digits of credit card account number on electronically printed receipt of credit card transaction. (Ark. Code Ann. 4-107-303).

Credit Card Processing.

Act requires certain disclosures to be made on contract for credit card processing service and prohibits imposition of certain charges for credit card processing service. Violation of this Act is unfair and deceptive practice. (Ark. Code Ann. 4-115-101 – 4-115-103).

E-Mail.

The Unsolicited Commercial and Sexually Explicit Electronic Mail Prevention Act (§ 4-88-601-607) sets requirements and penalties for sending of unsolicited commercial and sexually explicit e-mail. Violations are Class B misdemeanor and create civil cause of action.

Wheelchairs.

Arkansas has a lemon law for assistive devices, including wheelchairs, scooters, and van lifts. (Ark. Code Ann. 4-105-201 – 4-105-206).

Uniform Deceptive Trade Practices Act has not been adopted.

Home Security Services.

Provider of professional home security services and consumer may enter into contract with fixed initial term and successive or automatic monthly renewal terms, only if renewal clause has conspicuous statement informing consumer of his or her right to terminate contract without additional cost or penalty. (Ark. Code Ann. 4-86-106).

Service Contracts.

The “Service Contracts Act” provides for regulation of certain consumer agreements for product service and maintenance issued on or after Oct. 1, 2007. (Ark. Code Ann. 4-114-101 - 4-114-112).

Identity Theft.

The “Arkansas Consumer Report Security Freeze Act”, effective Jan. 1, 2008, provides procedures for placement and removal of security freeze upon consumer report of person that has been victim of identity theft. (Ark. Code Ann. 4-112-101 – 4-112-114).

Gift Cards.

The “Fair Gift Card Act” regulates unfair and deceptive acts and practices in connection with gift cards. (Ark. Code Ann. 4-88-701 – 4-88-706).

Also covered are: Credit services organizations (Ark. Code Ann. 4-91-101 – 4-91-109), automobiles (Ark. Code Ann. 4-90-201 – 4-90-512), credit reporting disclosures (Ark. Code Ann. 4-93-101 – 4-93-104), health spas (Ark. Code Ann. 4-94-101 – 4-94-109), farm machinery (Ark. Code Ann. 4-96-201 – 4-96-202), retail pet stores (Ark. Code Ann. 4-97-101 – 4-97-109), going out of business sales (Ark. Code Ann. 4-74-101 – 4-74-111), and motor vehicle transfers (Ark. Code Ann. 4-100-101 – 4-100-103).

See also topics 3.17 Interest and 3.23 Sales.

3.13 CONTRACTS:

Commercial Code applies. See topic 3.09 Commercial Code.

Contracts of Infants.

See category 14 Family, topic 14.10 Infants.

3.14 FACTORS:

Liens covered by Uniform Commercial Code. See topic 3.09 Commercial Code.

Consignment agreements intended as security, covered by Uniform Commercial Code. (Ark. Code Ann. 4-9-101 – 4-9-709). Consignments that are not intended as security interests are covered by Uniform Commercial Code. (Ark. Code Ann. 4-2-326).

3.15 FRANCHISES:

Arkansas Franchise Practices Act defines “franchise,” in general, as any agreement providing for grant of license to use trade name, trademark, service mark or related characteristic within area or to sell or distribute goods or services within area. (Ark. Code Ann. 4-72-202[1][A]). Franchisor may not terminate, cancel or fail to renew franchise without good cause, as defined in Act. (Ark. Code Ann. 4-72-204). With limited exceptions, franchisors must give advance written notice of intent to terminate, cancel or fail to renew franchise. In some instances franchisees may remedy deficiencies so as to void notice. (Ark. Code Ann. 4-72-204). Franchisees must provide franchisors written notice of proposed transfers of franchise and franchisors must, within 60 days, either approve of transfer or notify franchisee of material reason relating to character, financial ability or business experience of transferee why transfer will not be permitted. (Ark. Code Ann. 4-72-205). If franchisor terminates franchise without good cause, at franchisee's option, franchisor must repurchase franchisee's inventory, supplies, and equipment. (Ark. Code Ann. 4-72-209).

Certain practices by franchisors are illegal, including: (i) requiring franchisees to waive rights under Act; (ii) prohibiting free association among franchisees; (iii) unreasonable prohibitions against change in management of franchisees; (iv) restricting issuance of equity or debt securities by franchisees to extent such action does not harm financial condition of franchisee or constitute sale of franchise; (v) refusal to deal with franchisees in commercially reasonable manner; (vi) collection from franchisee of advertising fees not used to advertise business of franchisee; (vii) providing term or condition in any agreement that directly or indirectly violates Act. (Ark. Code Ann. 4-72-206). Franchisees' remedies include injunctive relief and/or actual civil damages and right to recover attorneys' fees and costs. (Ark. Code Ann. 4-72-208[b]).

Act prohibits fraud, making fraudulent misrepresentations or omitting to state material fact in connection with offer and sale of franchise. Violations of anti-fraud provisions constitute Class B felony (Ark. Code Ann. 4-72-207[b]) and, if committed by franchisor, will entitle franchisee to recover treble damages (Ark. Code Ann. 4-72-208[a]). Attorney General may bring injunctive proceedings to remedy violations of Act. (Ark. Code Ann. 4-72-208[c]).

Act applies only to franchises entered into, renewed or transferred after Mar. 4, 1977, and certain provisions do not apply to franchises subject to FTC regulations. (Ark. Code Ann. 4-72-203).

Franchises of farm equipment retailers, petroleum products suppliers, dealers, and distributors and restaurants are governed by additional statutory provisions. (Ark. Code Ann. 4-72-301 – 4-72-311; Ark. Code Ann. 4-72-401 – 4-72-403; Ark. Code Ann. 4-72-501 – 4-72-503; Ark. Code Ann. 4-72-601 – Ark. Code Ann. 4-72-603).

3.16 FRAUDS, STATUTE OF:

Memorandum signed by person to be charged, or someone properly authorized, is necessary to bind person for debt of another; to declare or create trust of any land; or promise to pay debt incurred in infancy or to convey land, or lease for longer term than one year; or on promise not to be performed within one year; or on promise by executor or administrator to pay any debt out of estate; or on promise in consideration of marriage; or to extend credit, or modify or renew existing credit, in amount greater than $10,000. (Ark. Code Ann. 4-59-101 – 4-59-103).

Contracts of Sale.

Covered by Uniform Commercial Code. (Ark. Code Ann. 4-2-206; Ark. Code Ann. 4-2-201; Ark. Code Ann. 4-2-209; Ark. Code Ann. 4-2-326).

Promissory estoppel, will estop assertion of statute of frauds where injustice can be avoided only by enforcement of promise. (271 Ark. 840, 611 S.W.2d 201).

Bankrupt's Debts.

Promise to pay debt discharged in bankruptcy must be in writing. (Ark. Code Ann. 4-59-101[b]).

Contract for Lease of Goods.

Covered by Uniform Commercial Code. (Ark. Code Ann. 4-2A-201).

Campaign Services Contract.

No action shall be brought to charge any candidate upon any contract, promise, or agreement for service rendered to candidate unless there is memorandum signed by party to be charged or some other person by him or her thereunto properly authorized in writing. (Ark. Code Ann. 7-6-101).

Part Performance.

Substantial part performance, so that the party having performed cannot be put in status quo without injury, takes case out of the statute. (1 Ark. 391).

3.17 INTEREST:

Non-consumer maximum rate is 5% per annum above Federal Reserve Discount Rate at time of contract. (Const., art. 19, § 13). Contracts calling for more than lawful rate are void as to unpaid interest and debtor may recover twice amount of interest paid. (Const., art. 19, § 13).

Consumer credit maximum rate is 5% per annum above Federal Reserve Discount Rate at time of contract. (Const., art. 19, § 13; 280 Ark. 106, 655 S.W.2d 426). Consumer contracts calling for more than 17% per annum are void as to principal and interest, and buyer retains goods. (Const., art. 19, § 13; 225 Ark. 96, 279 S.W.2d 556).

Default rate is 6% per annum for contracts in which no rate of interest is specified. (Const., art. 19, § 13).

Judgments on contracts bear interest at rate provided in contract or 10% per annum, whichever is greater, but in no event more than that allowed by art. 19, § 13 of Arkansas Constitution. (Ark. Code Ann. 16-65-114).

Other judgments bear interest at 10% per annum, but in no event more than that allowed by art. 19, § 13 of Arkansas Constitution. (Ark. Code Ann. 16-65-114).

Interest on negotiable instruments is governed by Uniform Commercial Code. (Ark. Code Ann. 4-3-112). Open accounts bear interest after maturity. (275 Ark. 235, 628 S.W.2d 869).

3.18 [RESERVED]

3.19 LICENSES, BUSINESS AND PROFESSIONAL:

Licenses are required for a large number of occupations, etc., enumerated and provided for in various statutes. See Arkansas Code, Tit. 17.

Collection agencies are regulated by Ark. Code Ann. 17-24-101 – 17-24-104.

State Board of Collection Agencies authorized to charge annual license fee of $125 for each agency and $15 for each employee. (Ark. Code Ann. 17-24-305).

Collection agencies which fail to remit collections to client within calendar month following month of collection are not entitled to collection fee and must remit total funds to client. (Ark. Code Ann. 17-24-104).

Check-Cashing.

In McGhee v. Arkansas State Board of Collection Agencies, 375 Ark. 52 (2008), Check-Cashers Act, Ark. Code Ann. 23-52-101-117, was held unconstitutional. Under Check-Cashers Act (Ark. Code Ann. 23-52-101 – 23-52-117), persons engaged in check-cashing activities are required to obtain permit from Arkansas State Board of Collection Agencies. (Ark. Code Ann. 23-52-103). Permit requires presentation of completed application form prescribed by applicable law, and proof of financial responsibility for each location from which such check-cashing activities are conducted. (Ark. Code Ann. 23-52-108). Fees persons may charge for check-cashing may be no more than following percentages of face amount of following: (1) 5% of state public assistance or federal social security benefit; (2) 10% of any personal check or money order; (3) 6% of all other checks. (Ark. Code Ann. 23-52-104). Check-casher may not charge more than $10 for deferred presentment option involving personal checks. (Ark. Code Ann. 23-52-104). Check-cashers must post certain disclosures in conspicuous public location. (Ark. Code Ann. 23-52-105). All agreements for deferred presentment option of check must be in writing and signed by maker of check. (Ark. Code Ann. 23-52-106). Check-cashers subject to certain other negotiating requirements including redemption of check by maker and length of time check may be held, and maximum amount of outstanding deferred presentment check which may be purchased. (Ark. Code Ann. 23-52-106). Change of control of check-casher subject to prior written approval of Arkansas State Board of Collection Agencies. (Ark. Code Ann. 23-52-110).

3.20 MONOPOLIES, RESTRAINT OF TRADE AND COMPETITION:

Monopolies.

Corporation, association, partnership or individual entering into agreement (within or without state) with any other to regulate or fix (within or without state) price of any article or price or premium to be paid for insuring property or to maintain said price, or to fix or limit amount or quantity of any article or price or premium to be paid for insuring property is guilty of conspiracy to defraud. (Ark. Code Ann. 4-75-309; Ark. Code Ann. 4-75-310).

Unfair Practices.

Corporation, association, partnership or individual engaging in trade practice with intent to destroy competition through price discrimination, predatory pricing, or secret payments within industry is guilty of unfair practices. (Ark. Code Ann. 4-75-201 – 4-75-211). Anyone engaging in unfair practices guilty of Class A misdemeanor. (Ark. Code Ann. 4-75-204). After three violations, corporation’s charter, franchises, and other rights may be revoked. (Ark. Code Ann. 4-75-205). Civil remedies include injunctions, damages, and treble damages. (Ark. Code Ann. 4-75-211). Trade secrets are protected. (Ark. Code Ann. 4-75-601 – 4-75-607).

Sales of cigarettes, automobiles, milk and other dairy products, and motion pictures are governed by additional provisions. (Ark. Code Ann. 4-75-701 – 4-75-714; Ark. Code Ann. 4-75-401 – 4-75-413; Ark. Code Ann. 4-75-801 – 4-75-809; Ark. Code Ann. 4-75-901 – 4-75-906).

Resale Price Agreements.

See category 17 Intellectual Property, topic 17.01 Trademarks and Tradenames.

Franchising.

See topic 3.15 Franchises.

3.21 NEGOTIABLE INSTRUMENTS:

See topic 3.02 Bills and Notes.

3.22 RESTRAINT OF TRADE:

See topic 3.20 Monopolies, 3.22 Restraint of Trade and Competition.

3.23 SALES:

Uniform Commercial Code applies to sale of goods. (Ark. Code Ann. 4-2-101 – 4-2-725).

Products Liability.

Actions for injuries based on breach of warranty are governed by Uniform Commercial Code (Ark. Code Ann. 4-2-312 – 4-2-318) but for actions based on breach of warranty or on negligence, privity is not required if plaintiff is person whom manufacturer or seller might reasonably have expected to use, consume, or be affected by goods (Ark. Code Ann. 4-86-101). See topic 3.09 Commercial Code.

Person engaged in business of manufacturing, assembling, leasing or otherwise distributing products is liable in damages for harm caused by it if product supplied in defective condition which rendered it unreasonably dangerous and condition was proximate cause. (Ark. Code Ann. 4-86-102).

Implied warranty that livestock offered for sale is free from disease does not exist unless owner knowingly sells diseased animal. (Ark. Code Ann. 4-2-316[3][d][ii]).

Home Solicitation Sales.

Buyer has absolute right to cancel contract until midnight of third day after signing, excluding Suns. and holidays. (Ark. Code Ann. 4-89-107). Home solicitation sales contract must contain statutory Notice of Cancellation. (Ark. Code Ann. 4-89-108[c]). Three day period does not begin until notice given. (Ark. Code Ann. 4-89-108). Violations of home solicitation sale statute constitute violations of Deceptive Trade Practices Act punishable by Attorney General and prosecuting attorneys of various districts and counties of state. (Ark. Code Ann. 4-89-106; Ark. Code Ann. 4-88-101 – 4-88-113). Sales contracts initiated by seller through mail or by telephone by offering gift and failing to fully describe sales terms must be in writing, signed by buyer. (Ark. Code Ann. 4-95-105 – 4-95-106). See also category Consumer Protection, topic Home Solicitation Sales.

Conditional Sales.

Uniform Commercial Code applies. (Ark. Code Ann. 4-9-101 – 4-9-709). 1972 Official Amendments adopted.

There are no statutory requirements as to type size in printed contracts.

Retail Credit Sales.

No special restrictions.

Bulk Sales.

Uniform Commercial Code chapter on Bulk Transfers not adopted. See topic 3.09 Commercial Code; see also category 8 Debtor and Creditor, topic 8.08 Fraudulent Sales and Conveyances.

See also category 23 Transportation, topic 23.01 Motor Vehicles, subhead Liens and Encumbrances.

Contracts of Sale.

There are no statutory requirements as to type size in printed contracts.

Revised Uniform Deceptive Trade Practices Act not adopted.

Consumer Protection.

See topic 3.12 Consumer Protection.

3.24 SECURITIES:

(Tit. 23, c. 42). See also Uniform Commercial Code or Investment Securities. (Ark. Code Ann. 4-8-101 – 4-8-603).

The Arkansas Securities Act is based on the Uniform Securities Act, promulgated by the National Conference of Commissioners on Uniform State Laws, but contains numerous variations from that act. Accordingly, the Arkansas statute is summarized below. For text of the Uniform Act, see Uniform and Model Acts section.

Supervision is by State Securities Commissioner, to whom all requests for information or forms should be addressed. Address: 201 East Markham, Little Rock, AR 72201, (501) 324-9260.

Regulatory Powers of Supervisory Authority.

All broker-dealers, agents, and investment advisers must register annually either with Arkansas Securities Department or Securities and Exchange Commission (Ark. Code Ann. 23-42-301) and pay any prescribed fees (Ark. Code Ann. 23-42-304). Commissioner has supervision over broker-dealers, agents, and investment advisers (Ark. Code Ann. 23-42-301) and over all records of applicants, registered issuers, registered broker-dealers, and registered investment advisers (Ark. Code Ann. 23-42-306). Commissioner may deny, suspend, or revoke registration if he finds it in public interest and applicant or registrant has committed any of specified acts. (Ark. Code Ann. 23-42-308).

Prerequisites to Sales or Offerings.

It is unlawful for any person to offer or sell any security unless registered, security is exempt or security is covered security. (Ark. Code Ann. 23-42-501). Criminal penalties (Ark. Code Ann. 23-42-104 – 23-42-105) and civil liabilities (Ark. Code Ann. 23-42-106) are provided.

Securities to Which Act is Applicable.

Act applies to any instrument commonly known as a security, including any note; stock; treasury stock; bond; debenture; evidence of indebtedness; certificate of interest or participation in any profit-sharing agreement; collateral-trust certificate; pre-organization certificate or subscription; transferable share; investment contract; variable annuity contract; viatical settlement contract or fractionalized or pooled interest therein; voting trust certificate; certificate of deposit for a security; certificate of interest or participation in an oil, gas, or mining title or lease, or in payments out of production therefrom. Act does not apply to any insurance or endowment policy or annuity or variable annuity contract issued by insurance company. (Ark. Code Ann. 23-42-102[15]). Sale of unit in general partnership held to be sale of security within meaning of Arkansas Securities Act. (292 Ark. 602, 732 S.W.2d 836).

Covered Securities.

(Ark. Code Ann. 23-42-509).

Exempt securities are: (1)(A) Any security, including revenue obligation, issued or guaranteed by this state, any political subdivision of this state, or any agency or corporate or other instrumentality of one or more of foregoing, or any certificate of deposit for any of foregoing, (B) any securities that are offered and sold pursuant to § 4(5) of Securities Act of 1933 or that are "mortgage related securities" as that term is defined in § 3(a)(41) of Securities Exchange Act of 1934 are not covered securities in same manner as obligations issued or guaranteed as to principal and interest by U.S. or any agency or instrumentality thereof. These instruments, commonly referred to as private mortgage-backed securities, may be exempt from registration requirements of this chapter provided that transaction or securities are otherwise exempt under this section. This provision specifically overrides preemption of state law contained in § 106(c) of Secondary Mortgage Market Enhancement Act of 1984, Public Law 98-440, of U.S.; (2) any security issued or guaranteed by Canada, any Canadian province, any political subdivision of any Canadian province, any agency or corporate or other instrumentality of one or more of foregoing, or by any other foreign government with which U.S. currently maintains diplomatic relations, if security is recognized as valid obligation by issuer or guarantor; (3) any security issued by and representing interest in or debt of any bank organized under laws of U.S., or any federally insured savings bank, or any bank, savings institution, or trust company organized and supervised under laws of any state, or any bank holding company regulated under Bank Holding Company Act of 1956, as amended; (4) any security issued by and representing interest in or debt of any state or federal savings and loan association, or any federally insured savings bank, or any building or loan or similar association organized under laws of any state and authorized to do business in this state, or any savings and loan holding company regulated by Office of Thrift Supervision or its successor; (5) any security issued or guaranteed by any public utility or holding company meeting certain conditions; (6) any security of world class foreign issuer that meets qualifications as set forth by rule of Arkansas Securities Commissioner; (7) any security issued by any person organized and operated not for private profit but exclusively for religious, educational, benevolent, charitable, fraternal, social, athletic, or reformatory purposes, or as chamber of commerce or trade or professional association. § 6(c) of Philanthropy Protection Act of 1995, Public Law 104-62 of U.S. shall not preempt any provision of this chapter; (8) any investment contract or other security issued in connection with employees' stock purchase, savings, pension, profit sharing, stock bonus, stock option, or similar benefit plan. Plans which do not meet requirements for qualification under U.S. Revenue Code must file with Commissioner prior to any offer or sale notice specifying terms of plan. Commission may by order disallow exemption within ten days; and (9) any security as to which Commissioner by rule or order finds that registration is not necessary or appropriate in public interest or for protection of investors. (Ark. Code Ann. 23-42-503).

Proof of exemption must be first filed as to certain exempted securities and Commissioner must not have disallowed exemption within next ten full business days, before issuance. Filing fee on graduated scale from $100 to $500 required. (Ark. Code Ann. 23-42-503[d][5]).

Exempt transactions (Ark. Code Ann. 23-42-504) are: (a)(1) isolated nonissuer transactions, whether effected through broker-dealer or not; (a)(2) any nonissuer transaction by registered agent of registered broker-dealer, and any resale transaction by sponsor of unit investment trust registered under Investment Company Act of 1940, in security of class that has been outstanding in hands of public for at least 90 days provided, at time of transaction: (a)(2)(A) issuer of security is actually engaged in business and not in organization stage or in bankruptcy or receivership and is not blank check, blind pool or shell company whose primary plan of business is to engage in merger or combination of business with, or acquisition of, unidentified person or persons, (a)(2)(B) security is sold at price reasonably related to current market price of security, (a)(2)(C) security does not constitute whole or part of unsold allotment to, or subscription or participation by, broker-dealer as underwriter of security, (a)(2)(D) nationally recognized securities manual designated by rule or order of Commissioner or document filed with Securities and Exchange Commission that is publicly available through Securities and Exchange Commission's Electronic Data Gathering and Retrieval System (EDGAR) and contains specific information regarding issuer, and (a)(2)(E) issuer of security has class of equity securities listed on national securities exchange registered under Securities Exchange Act of 1934, or designated for trading on National Association of Securities Dealers Automated Quotation System, with certain exceptions; (a)(3) any transaction between issuer or other person on whose behalf offering is made and underwriter or among underwriters; (a)(4) issuance of bond or other evidence of indebtedness secured by mortgage on tangible property where entire mortgage and bonds are sold as unit; (a)(5) transactions by executor, administrator, sheriff, marshal, receiver, trustee in bankruptcy, guardian, or conservator; (a)(6) transactions of bona fide pledgees; (a)(7) any transactions by person who is exempt from registration because he is resident of Canada, has no office or other physical presence in state of Arkansas, and complies with certain other conditions, provided that transaction would be lawful in place of residence of offeree or purchaser had it occurred there instead of in Arkansas; (a)(8) any offer or sale by (A) issuer to person in state other than Arkansas if offer or sale would be lawful in that state; (B) any offer or sale to bank, savings institution, trust company, insurance company, investment company, pension or profit-sharing trust, any other financial institution or institutional buyer, and broker-dealers; (a)(9) (A) transactions pursuant to offer and sale to not more than 35 persons in this state, other than nonprofit corporations, within any period of 12 consecutive months if seller reasonably believes that buyers are purchasing for investment and no commission is paid directly or indirectly for soliciting any prospective buyer unless person receiving such commission is registered broker-dealer or agent in this state; (a)(10) any transaction pursuant to offer to existing security holders of issuer, if no commission or other remuneration (other than standby commission) is paid or given directly or indirectly for soliciting any security holder in Arkansas, with certain exceptions; (a)(11) any offer of security for which registration statements have been filed under this Act and Securities Act of 1933 and no stop order is in effect; (a)(12) and any other transaction as to which Commissioner by rule or order finds that registration is not necessary or appropriate in public interest for protection of investors. (See Ark. Code Ann. 23-42-109, 202, 205, 302-305, 404, 503-506.) Commissioner by Rule 504.01(a)(14) has adopted Uniform Limited Offering Exemption set forth in Rule 506 of Regulation D under Securities Act of 1933, subject to foregoing conditions.

Proof of exemption must first be filed as to certain exempted transactions and Commissioner must not have disallowed exemption within next ten full business days. Filing fee on graduated scale from $25 to $500 required. (Ark. Code Ann. 23-42-504[b]).

Registration of Securities by Notification.

The following securities, whether or not also eligible for registration by coordination, may be registered by notification upon filing required forms and information with Commissioner: (1) any security whose issuer and any predecessors have been in continuous operation for at least five years without default in current fiscal year or within three preceding fiscal years in payment of principal, interest or dividends and has had specified earnings during past three fiscal years; (2) any security other than certificate of interest or participation in oil, gas, or mining title or lease, or in payments out of production therefrom registered for nonissuer distribution if any security of same class has ever been registered pursuant to Arkansas law or if originally exempt. If no stop order is in effect or under hearing, registration by notification is effective at three o'clock, P.M., Central Standard Time, of second full business day after filing registration statement, or at such earlier time as Commissioner may determine. (Ark. Code Ann. 23-42-401).

Registration by coordination may be had for any security for which registration statement has been filed under Securities Act of 1933 and upon filing with Commissioner detailed information and exhibits. Registration statement becomes effective at moment federal registration becomes effective if no stop order is in effect and no proceeding pending under Ark. Code Ann. 23-42-405, registration has been on file with Commissioner for at least 20 days, and statement of maximum and minimum proposed offering prices and maximum underwriting discounts and commissions have been on file two full business days. (Ark. Code Ann. 23-42-402).

Registration by qualification may be had for any security. Detailed information and specified documents must be submitted to Commissioner. (Ark. Code Ann. 23-42-403).

Consent to Service of Process.

Every applicant for registration, every person making notice filing, and every issuer for whom registration or exemption from registration or notice filing is required must appoint commissioner as its agent for service of process for any noncriminal action arising under Act. This provision does not apply to applicants, persons making notice filings and issuers who have place of business in Arkansas, have qualified to do business in Arkansas with Secretary of State, and have either agent for service or have executed consent appointing Secretary of State agent for service. (Ark. Code Ann. 23-42-107).

Registration statement may be filed by issuer, any other person on whose behalf offering is made, or registered broker-dealer. (Ark. Code Ann. 23-42-404[a]).

Fee for filing registration statement is 1/10th of 1% of amount for which securities are to be offered in this state, with a minimum fee of $150 and maximum of $2,000. If registration statement is withdrawn before effective date, or if pre-effective stop order is entered, Commissioner retains $150 of fee. (Ark. Code Ann. 23-42-404[b]).

Registration statement must set forth in detail information as to securities. (Ark. Code Ann. 23-42-404[c]).

Registration statement is effective for one year from effective date and, upon renewal, for any longer period during which security is being offered or distributed in nonexempted transaction except during time stop order is in effect. Renewal registration for subsequent 12 month periods requires written application and payment of additional filing fees. So long as registration statement is effective, Commissioner may require filing of reports to keep reasonably current information contained in statement and to disclose progress of offering. (Ark. Code Ann. 23-42-404[j]-[m]).

Commissioner may require any security issued within past three years or to be issued to a promoter for a consideration substantially different from public offering price, or offered for a consideration other than cash, to be deposited in escrow and proceeds from sale impounded until issuer receives a specified amount. (Ark. Code Ann. 23-42-404[g]).

Stop order may be issued by Commissioner denying, suspending, or revoking effectiveness of registration statement in public interest and if statement is incomplete, false, or misleading, or otherwise in violation of Act. (Ark. Code Ann. 23-42-405).

Registration and Licensing of Dealers.

Broker-dealer, agent, investment adviser, or representative transacting business in state must register annually and may obtain initial or renewal registration by filing with Commissioner or Commissioner's designee application and fee together with consent to service of process. (Ark. Code Ann. 23-42-302). Every applicant for initial registration and every person making notice filing shall pay filing fee of $300 in case of broker-dealer, $75 in case of agent, $300 in case of investment advisor, and $75 in case of representative. (Ark. Code Ann. 23-42-304). If application has been processed, in whole or in part, any filing fee shall be nonrefundable. (Ark. Code Ann. 23-42-304). Minimum capital requirement for broker-dealer is set by Commissioner and for registered investment adviser is $12,500. (Ark. Code Ann. 23-42-303). Minimum net capital requirement shall not apply to any registered investment advisers which maintain their principal place of business in state other than Arkansas, that are registered or licensed as such in that state and are in compliance with applicable net capital requirements of that state. (Ark. Code Ann. 23-42-303[b]). Commissioner may deny, suspend, or revoke any registration in public interest or for numerous enumerated causes. (Ark. Code Ann. 23-42-308).

Tender offers Investor Protection Take Over Act. (Ark. Code Ann. 23-43-101 - 23-

43-117 [repealed]).

Bond to Protect Purchasers.

Subject to certain exceptions, registered broker-dealers must maintain bonds in amounts as Commissioner may prescribe. (Ark. Code Ann. 23-42-305).

Records and Financial Reports.

Subject to certain exceptions, every registered broker-dealer and investment adviser must prepare, maintain and make available such records and financial reports as Commissioner may require. (Ark. Code Ann. 23-42-306).

Advertising.

Commissioner may require filing of prospectus, advertisement, or other sales literature intended for distribution as part of registered or exempt offering. (Ark. Code Ann. 23-42-502).

Information Public.

All information contained in or filed with any registration statement, notice filing, application or report, is available to public, and photostatic or other copies of any document of public record will be furnished upon such charge as Commissioner may prescribe. (Ark. Code Ann. 23-42-206 – 23-42-207).

Opinions.

Commissioner in his discretion may honor requests from interested persons for interpretive opinions under Act. (Ark. Code Ann. 23-42-206[e]).

Appeal from any final order by Commissioner may be taken to any court of competent jurisdiction within 60 days after entry of order. (Ark. Code Ann. 23-42-210).

Liabilities.

Any person who offers or sells a security in violation of act, or by means of misrepresentation, is liable to purchaser for consideration paid for security, together with interest at 6% from date of payment, costs and attorneys' fees, less any income received from security, upon tender of security and any income received on it, or for damages if purchaser no longer owns security. Every controlling person, partner, officer, or director of seller or broker dealer or agent of seller who materially aids in sale is also liable unless he proves he did not, or reasonably could not, know of facts constituting grounds for liability. Limitations on such action are three years after sale. (Ark. Code Ann. 23-42-106). Waiver of liability by purchaser is void. (Ark. Code Ann. 23-42-109). However, cause of action terminates as to purchasers who failed to accept rescission offers by seller which comply with certain requirements of Act. (Ark. Code Ann. 23-42-106[f]). Right of action is in addition to all other remedies at law or in equity. (Ark. Code Ann. 23-42-108).

Money Order and Check Issuers.

Any person other than incorporated telegraph company, governmental department, or bank, credit union, or savings and loan association organized under Federal or Arkansas law which is (i) federally insured and (ii) authorized to do business in state, engaged in business of selling or issuing its check, draft, money order or other written instrument for transmission or payment of money or credit as service or for fee or other consideration must first qualify with State Securities Commissioner and thereafter comply with detailed statutory provisions. (Ark. Code Ann. 23-41-101 – 23-41-122 [repealed]). The Uniform Money Services Act was adopted Apr. 9, 2007 and applies to provision of money services on or after Jan. 1, 2008. (Ark. Code Ann.

23-55-101 to Ark. Code Ann. 23-55-1005).

Pyramid Sales, Etc.

Governed by Arkansas Franchise Practices Act (Ark. Code Ann. 4-72-201 – 4-72-210); Consumer Protection Act (Ark. Code Ann. 4-88-101 – 4-88-112). See topic 3.15 Franchises.

Uniform Simplification of Fiduciary Security Transfers Act not adopted.

Uniform Securities Ownership by Minors Act adopted. (Ark. Code Ann. 9-26-301 – 9-26-307).

3.25 STATUTE OF FRAUDS:

See topic 3.16 Frauds, Statute of.

3.26 TRUST RECEIPT SECURITY:

Uniform Commercial Code applies. 1972 Official Amendments adopted. (Act 116 of 1973). See topic 3.09 Commercial Code; category 8 Debtor and Creditor, topic 8.15 Pledges.

3.27 WAREHOUSEMEN:

A system of bonded warehouses and cooperative marketing of farm, orchard and ranch products is provided in Arkansas Public Grain Warehouse Law. (Ark. Code Ann. 2-17-201 – 2-17-416).

Public grain warehouses are supervised by Director of State Plant Board, No. 1 Natural Resources Drive, Little Rock, Arkansas 72205.

Title to grain in possession of public grain warehouseman does not pass unless owner signs such title over to warehouseman. (Ark. Code Ann. 2-17-303).

Bonds.

Licensed warehouse must execute bond with corporate surety to state. Bond must be in amount of 20¢ per bushel for first 1,000,000 bushels, 15¢ per bushel between 1,000,000 and 2,000,000 bushels, and 10¢ per bushel for over 2,000,000 bushel capacity, with $20,000 minimum; may self insure with permission of Director. (Ark. Code Ann. 2-17-209 – 2-17-210).

Assets.

Licensed warehouse must maintain net assets equal to at least 10¢ per bushel licensed to handle with minimum of $10,000. (Ark. Code Ann. 2-17-217).

License is necessary to operate public warehouse. (Ark. Code Ann. 2-17-206). Licenses are issued by Director upon compliance with bonding and net assets requirement. (Ark. Code Ann. 2-17-211). Director may revoke license if insolvent or violates Act. (Ark. Code Ann. 2-17-215 – 2-17-236).

Supervision.

Certified warehousemen must be in charge of warehouse and are under supervision of State Plant Board, which may regulate charges, refuse permit to do business if there are sufficient facilities in vicinity and close any warehouse and liquidate it for cause. (Ark. Code Ann. 2-17-206 – 2-17-236).

Lien.

See Uniform Commercial Code Ark. Code Ann. 4-7-602 and Ark. Code Ann. 4-9-312.

Penalties.

Issuing receipts without license is Class D felony. (Ark. Code Ann. 2-17-204).

See also category 8 Debtor and Creditor, topic 8.08 Fraudulent Sales and Conveyances, subhead Bulk Sales.

Warehouse Receipts.

Uniform Commercial Code applies. (Ark. Code Ann. 4-7-101 – 4-7-210; Ark. Code Ann. 4-7-401 – 4-7-603).

Receipts must be issued for not more than one year and be on form prescribed by Director, and be consecutively numbered. (Ark. Code Ann. 2-17-220 – 2-17-221, Ark. Code Ann. 4-7-202).

Buyer in ordinary course of business of fungible goods sold and delivered by warehouseman also in business of buying and selling such goods takes free of any claim under warehouse receipt even though it has been duly negotiated.

Self-Service Storage.

Operating rules, establishment of operator’s liens and sale of stored property allowed under Ark. Code Ann. 18-16-401 – 18-16-409.

4 CITIZENSHIP

4.01 ALIENS:

Aliens may acquire any estate in land by deed, inheritance or will, and may hold, alienate and devise or bequeath real or personal property same as citizens. (Ark. Code Ann. 18-11-101 and Ark. Code Ann. 28-9-211). Surviving spouse of alien takes dower or curtesy. (Ark. Code Ann. 28-11-202). Acquisition of any interest to agricultural land, or leasing same for ten or more years, requires registration with Circuit Clerk in county in which land is located within 60 days. (Ark. Code Ann. 2-3-103). Nonresident aliens compensated same as residents under workers compensation laws with certain exceptions. (Ark. Code Ann. 11-9-111). Certain aliens not eligible for employment security benefits. (Ark. Code Ann. 11-10-511).

5 CIVIL ACTIONS AND PROCEDURE

5.01 ACCORD AND SATISFACTION:

Common law rules govern.

Pleading.

Defense of accord and satisfaction must be affirmatively pleaded. (RCP 8[c]).

Uniform Commercial Code adopted. See category 3 Business Regulation and Commerce, topic 3.09 Commercial Code.

5.02 ACTIONS:

All former forms of actions or suits are abolished, and there is but one form of civil action. (RCP 2). Pursuant to Amendment 80 to the Arkansas Constitution, effective July 1, 2001, all actions at law and in equity shall be brought in circuit court.

Commencement.

See topics 5.17 Pleading, 5.20 Process.

Parties.

An action must be prosecuted in name of real party in interest. (RCP 17[a]). Court may order necessary parties who are subject to service of process to be joined. (RCP 19[a]). If necessary party cannot be joined, court shall determine whether action should proceed among parties before it, or should be dismissed. (RCP 19[b]).

Class actions may be brought where (1) class is so numerous that joinder is impracticable, (2) there are common questions of law or fact, (3) claims or defenses are typical of class, and (4) representative parties will fairly and adequately protect interests of class. (RCP 23). Uniform Class Actions Act not adopted.

Intervention.

One with unconditional right of intervention under statute or one claiming interest in property or transaction involved whose ability to protect interest may be impaired by disposition of action may intervene as matter of right. Permissive intervention is authorized when applicant's claim or defense has question of fact or law in common with main action or when state statute confers conditional right of intervention. (RCP 24[a] and [b]).

Interpleader.

Persons with claims against plaintiff exposing plaintiff to multiple liability may be joined and required to interplead. Defendant exposed to similar liability may interplead by cross-claim, third party complaint or counterclaim. Plaintiff who disclaims any interest in money or property that is subject of interpleader action shall, upon depositing money or property in registry of court, be discharged from all liability. (RCP 22).

Third Party Practice.

Rules substantially same as Rule 14 of Federal Rules of Civil Procedure on actions by third party plaintiff are adopted, except that section (c) of Federal Rule is omitted in its entirety. (RCP 14).

Joinder of Causes of Action.

Joinder of all claims is permitted. (RCP 18).

Consolidation of Actions.

Actions involving common question of law or fact may be consolidated by court in its discretion. Court may make such orders concerning proceedings therein as may tend to avoid unnecessary costs or delay in administration of justice. (RCP 42[a]).

Severance of actions or claims may be ordered by court in its discretion for convenience, to avoid prejudice, or when separate trials will be conducive to expedition and economy. (RCP 42[b]).

Revivor.

If action survives, on death of party court may order substitution upon motion. If motion for substitution is not made within 90 days after death is suggested on record, action may be dismissed as to deceased party. If there is no administrator, special administrator may be appointed for action. (RCP 25[a]).

See also category 13 Estates and Trusts, topic 13.08 Executors and Administrators.

Limitation of.

See topic 5.16 Limitation of Actions.

Administration.

See category 13 Estates and Trusts, topic 13.08 Executors and Administrators.

Lis Pendens.

Action affecting title to, or lien on, real or personal property must be accompanied by lis pendens notice filed with recorder of deeds setting forth title and object of cause, description of property, names of parties, and style of court. (Ark. Code Ann. 16-59-101- 102).

Direct Action Against Insurer.

On casualty insurance contract if judgment remains unsatisfied after 30 days from service of notice of entry of judgment upon attorney for insured or upon insured or upon insurer or after execution is returned unsatisfied on account of insolvency or bankruptcy of insured, injured person or his personal representative may sue insurer directly for amount of judgment not exceeding amount of policy (Ark. Code Ann. 23-89-101-102).

Insurer of any cooperative nonprofit organization or state or political subdivision, or self-insurance fund, pooled liability fund or similar fund maintained by medical care provider, or any other person not subject to suit for tort may be sued directly by any person injured by such person so exempt to extent of insurance carried. (Ark. Code Ann. 23-79-210).

Person having claim for personal injury or property damage arising out of use of motor vehicle in foreign country by another who at time of injury or damage was covered by policy with insurer subject to jurisdiction of court of this state may sue insurer directly in county where injured person was resident at time of injury or damage. (Ark. Code Ann. 23-79-201).

Small Claims.

See category 6 Courts and Legislature, topic 6.01 Courts, subheads Justices' Courts, Municipal Courts, Small Claims Courts.

5.03 APPEAL AND ERROR:

Constitutional Amendment 80 authorizes Court of Appeals. Ark. Code Ann. 16-12-101 (repealed) created Court of Appeals. Jurisdiction of Court of Appeals is set by Supreme Court by rule. (Const. Amend. 80, § 5).

Court of Appeals is comprised of 12 members. (Ark. Code Ann. 16-12-101 repealed.) See Ark. Code Ann. 29-20-115.

Supreme Court Rule 1-2 provides all appeals shall be to Court of Appeals except following shall be filed in Supreme Court: interpretation or construction of state Constitution; criminal cases in which death penalty or life imprisonment imposed; extraordinary writs (e.g., mandamus, prohibition) directed to courts or government officials; election cases; discipline of attorneys at law and judges; cases previously appealed to Supreme Court; appeals required by law to be heard by Supreme Court.

From Court of Appeals.

Supreme Court will exercise its discretion to review appeal decided by Court of Appeals only on application by party to appeal, upon certification of Court of Appeals, or if Supreme Court decides it should have originally been assigned to Supreme Court. Court of Appeals may certify matters to Supreme Court if matter should properly be heard by Supreme Court under Rule 1-2 or if it involves matters of significant public interest or legal principle of major importance. (Supreme Court Rule 1-2[e]).

From Circuit, Chancery and Probate Courts.

Appeal of final judgments and certain interlocutory orders may be taken from Circuit Courts to Supreme Court or Court of Appeals. (RAP 2). Appeals shall be taken by filing notice of appeal with clerk of court from which appeal is taken. (RAP 3). Notice shall specify party taking appeal, designate judgment, decree, order or part thereof appealed from, designate contents of record on appeal, and certify transcript has been ordered and required financial arrangements for court reporter have been made pursuant to Ark. Code Ann. § 16-13-510(c). Notice shall also state whether appeal is to Court of Appeals or Supreme Court and basis for Supreme Court jurisdiction. (RAP 3). Generally notice must be filed within 30 days from entry of judgment, decree or order appealed from, and notice of cross-appeal must be filed within ten days after receipt of notice of appeal. (RAP 4). Notwithstanding 30-day period generally applicable, statutory deadline for election cases is controlling as to timeliness of appeal. (RAP 4). Record, prepared by trial court reporter, shall be filed by appellant with clerk of Supreme Court within 90 days from filing of first notice of appeal, except trial court may extend such time up to seven months from date of entry of judgment, decree or order appealed from. (RAP 5). Record of appeals from certain interlocutory orders must be filed in 30 days. (RAP 5).

Stay of Proceedings.

Except where appeal is by State (RCP 62[e]) or where notice of lis pendens was filed by appellant claiming interest in realty (241 Ark. 629, 408 S.W.2d 871) appeal does not stay proceedings on judgment or order unless supersedeas order is issued. Supersedeas order issued by trial court clerk unless record has been lodged with appellate court in which event appellate court clerk issues. (RAP 8). Supersedeas order may not be issued until filing of surety bond conditioned upon satisfaction of that part of judgment stayed, costs, interest and damages for delay. (RAP 8).

Extent of Review.

Fact issues in cases tried to jury will be affirmed if findings are supported by any substantial evidence. (313 Ark. 229, 853 S.W.2d 278). In equity cases cause is heard de novo on appeal, and when error is found, Appellate Court may enter such judgment as lower court should have entered. Factual determinations will be upheld unless clearly erroneous. (28 Ark. App. 295, 773 S.W.2d 853). Court of Appeals does not reverse decree in equity cases unless findings are clearly against preponderance of evidence (6 Ark. App. 37, 638 S.W.2d 263).

From County Courts.

Appeals to circuit court are granted as a matter of right. (Ark. Code Ann. 16-67-201 [superseded by ADCR 9]). Appeals may be taken within 30 days from date of entry of judgment. Trial in circuit court is de novo. (Ark. Code Ann. 16-67-207).

From District Court.

Appeal to circuit court may be taken from any judgment rendered by district court by filing record of proceeding with circuit clerk within 30 days of entry of judgment. (ADCR 9). Trial on appeal is de novo. (Ark. Code Ann. 16-17-703). When appellant desires and is entitled to stay on appeal, he must present supersedeas bond with required surety or sureties for approval by District Court. (ADCR 9).

From Public Service Commission.

Party aggrieved by order must apply to commission for rehearing within 30 days after service of order. Application for rehearing is deemed denied unless acted on by commission within 30 days. Judicial review is obtained by filing notice of appeal with Court of Appeals identifying order complained of and reasons why order is unlawful and praying that order be remanded, modified or set aside. Notice of appeal must be filed within 30 days after commission order on rehearing or within 30 days after application for rehearing is deemed denied. (Ark. Code Ann. 23-2-422-424).

From Workmen's Compensation Commission.

Appeal from decision of administrative law judge must be filed with Commission within 30 days from receipt of order or award. Appeal from decision of Commission lies with Court of Appeals and is taken by filing notice of appeal within 30 days of receipt of order or award. (Ark. Code Ann. 11-9-711).

In Injunction or Receivership Cases.

Appeals shall be taken in same manner as appeals from Circuit Court. Trial Court may suspend, modify, restore or grant injunction during pendency of appeal, as it considers proper for security of rights of adverse party. (RCP 62).

5.04 BONDS:

Bonds required in judicial proceedings may not be held insufficient for want of form if intention of bond can be deduced from its face. (Ark. Code Ann. 16-68-204).

If a bond required in judicial procedures is adjudged defective, new bond may be required with same effect as though given when first was. (Ark. Code Ann. 16-68-205).

Sureties may be required to justify qualifications by affidavit before officer taking bond. When justification so made shows surety sufficient, officer taking is protected. (Ark. Code Ann. 16-68-203). Individual sureties must be Arkansas residents with net worth double sum to be secured and have property in Arkansas liable to execution equal to sum to be secured. (Ark. Code Ann. 16-68-203).

Surety bonds required for public work projects and bid bonds must be made with surety companies which are qualified and authorized to do business in Arkansas. (Ark. Code Ann. 22-9-402).

Certificates of Deposit issued by Arkansas savings and loans or banks, or any direct, general obligation security issued by state, its agencies or instrumentalities or U.S. may be substituted for required corporate surety or security bonds. (Ark. Code Ann. 4-25-102).

Enforcement.

Every bond taken on sale of property under order or decree in equity or on sale under execution, and every stay bond or forthcoming bond, has force and effect of judgment on which execution may issue. (Ark. Code Ann. 16-66-117). Upon affirmance by Supreme Court of superseded judgment, court shall award execution against securities or supersedeas bond. (Ark. Code Ann. 16-67-325[d]).

5.05 CERTIORARI:

Supreme Court shall have power to issue and determine any and all writs necessary in aid of its jurisdiction. (Const. Amend. 80, § 2).

Circuit Court may issue writs of certiorari to inferior tribunals, officers, town councils or boards to correct erroneous or void proceedings; temporary restraining orders may be entered; affidavits and evidence outside record may be introduced. Record of inferior tribunal shall be conclusive but acts of officer or board only prima facie evidence of regularity and legality. Court may enforce its judgment by mandamus, prohibition or other appropriate writ. (Ark. Code Ann. 16-13-205).

5.06 CHARITABLE IMMUNITY:

See topic 5.09 Damages, subhead Charitable Immunity.

5.07 COMMISSIONS TO TAKE TESTIMONY:

See topic 5.11 Depositions and Discovery.

5.08 COSTS:

Costs are recoverable by prevailing party if court so directs unless statute or rule makes such award mandatory. (RCP 54).

Security for Costs.

Nonresident plaintiff, or corporation other than domestic bank, when commencing action, must file bond to be approved by clerk or cash deposit for payment of costs which may accrue in action. (Ark. Code Ann. 16-68-301). Failure to do so subjects action to dismissal on motion of defendant. (Ark. Code Ann. 16-68-301). For minority shareholders bringing derivative action, see category 2 Business Organizations, topic 2.03 Corporations, subhead Stockholders Actions.

Liability of Attorney.

Where a plaintiff who is required to furnish security for costs (see subhead Security for Costs, supra) fails to do so, plaintiff's attorney is liable as surety for costs. (Ark. Code Ann. 16-68-306).

Dismissal of Action.

Costs of action previously dismissed may be recovered from plaintiff who has once dismissed or who has suffered involuntary dismissal of action based upon same claim against same defendant in any state or federal court which is then reinstituted in any state or federal court. (RCP 41).

Attorney Fees.

In civil action to recover account, bill, negotiable instrument, contract, or note relating to purchase or sale of goods or services, or breach of contract, prevailing party may recover reasonable attorney fee unless otherwise provided by law or contract which is subject of action. (Ark. Code Ann. 16-22-308).

Recovery of Attorney Fees for Non-Justiciable Issues.

Where court finds action or defense to be lacking justiciable issue of law or fact and was commenced in bad faith solely to harass or maliciously injure another or to delay adjudication or party or party's attorney knew or should have known of lack of justiciable issue, court shall award attorney fees to prevailing party in amount not exceeding lesser of $5,000 or 10% of amount in controversy. (Ark. Code Ann. 16-22-309).

Offer of Judgment.

If judgment (exclusive of interest from date of offer) finally obtained by offeree is not more favorable than offer, offeree must pay costs incurred after making of offer. (RCP 68).

5.09 DAMAGES:

Compensatory Damages.

Common law generally prevails.

Punitive Damages.

Arkansas's "shocks the conscience" standard of review for awards of punitive damages is constitutional. (99 Ark. App. 315, 260 S.W.3d 307). To recover punitive damages, plaintiff bears burden of proving by clear and convincing evidence that defendant is liable for compensatory damages and either that defendant knew or ought to have known that his conduct would result in injury for which compensatory damages were awarded and he continued with malice or reckless disregard of consequences in which malice can be inferred or that defendant intentionally pursued course of conduct for purpose of causing injury for which compensatory damages were awarded. (Ark. Code Ann. 16-55-206 – 16-55-207). Generally, punitive damages shall not be more than greater of $250,000 or three times amount of compensatory damages, not exceeding $1,000,000. (Ark. Code Ann. 16-55-208).

Statutory penalties may be assessed as follows:

Treble damages for violation of Unfair Trade Practices Act (Ark. Code Ann. 4-75-211); twofold damages for injuries resulting from agreement between manufacturer or wholesale distributor and retail distributor of motor vehicles to finance sale of vehicles only with or through designated person (Ark. Code Ann. 4-75-412); not less than $1,000 nor more than $5,000 for each day of discrimination in rates or service by person engaged in furnishing news for publication (Ark. Code Ann. 4-75-503) in addition to being found guilty of violation and each day's violation is separate offense; double damages for killing or wounding stock by railroad upon failure of railroad to pay damages fixed by arbitration within 30 days (Ark. Code Ann. 23-12-912); double charge made by employer engaged in trade or business for goods sold to employees in payment of wages for prices higher than reasonable or current market value thereof in cash (Ark. Code Ann. 11-4-404); double value of timber, or lumber, staves or shingles made therefrom, knowingly cut, purchased or received from state's or another's land (Ark. Code Ann. 15-32-301); treble damages for knowingly injuring, destroying, or carrying away property of another (Ark. Code Ann. 18-60-102); three times monthly rental value for period of unlawful detainer of property entirely or partly commercial (Ark. Code Ann. 18-60-309); and damages in amount of three times value of improvement for selling, buying, damaging, or removing improvements from land forfeited for taxes after confirmation of title in state (Ark. Code Ann. 5-40-103).

Modified Comparative Fault Rule adopted under which plaintiff's fault must be less than defendant's fault in order for plaintiff to recover. Damages are reduced by degree of plaintiff's fault. (Ark. Code Ann. 16-64-122).

No-Fault Insurance.

See category 23 Transportation, topic 23.01 Motor Vehicles, subhead No-Fault Insurance.

Charitable immunity prevails (246 Ark. 1231, 442 S.W.2d 243) but see topic 5.02 Actions, subhead Direct Action Against Insurer. For immunity of governmental entities and nonprofit, tax-exempt corporations, see Ark. Code Ann. 16-120-101 – 16-120-105. For volunteer immunity, see Ark. Code Ann. 16-6-101 – 16-6-105.

Sovereign immunity prevails but political subdivision of state required to maintain liability insurance on or self insure motor vehicles. (Ark. Const. Art. 5, § 20, Ark. Code Ann. 21-9-301 – 21-9-303).

5.10 DECLARATORY JUDGMENTS:

See topic 5.15 Judgments.

5.11 DEPOSITIONS AND DISCOVERY:

Arkansas Rules of Civil Procedure became effective July 1, 1979 and have been amended several times. They generally follow Federal Rules of Civil Procedure.

Any party may take the deposition of any person, including a party, regarding any matter not privileged, upon oral examination or by written interrogatory for discovery or use as evidence or for both purposes. (RCP 30-32).

When Taken.

Deposition may be taken without leave of court except when plaintiff seeks to take deposition prior to expiration of 30 days after service of summons and complaint or when witness is confined in prison. (RCP 30).

Compelling Attendance of Witnesses.

Upon filing of notice pursuant to RCP 30(b), clerk of court where action pending may issue subpoena, to be served by sheriff, or other authorized person. (RCP 45). Attorney admitted to practice in this state, as officer of court, may also issue and sign subpoena in any action pending in court of this state in which attorney is counsel of record. (RCP 45). Disobedience is punishable as court deems just, and party may be liable in damages to injured party for failing to answer or respond. (RCP 37).

Use of Depositions.

In any trial or hearing, any part or all of deposition may be used as follows: (1) by any party to impeach deponent as witness or for any purpose permitted by Arkansas Rules of Evidence; (2) by adverse party for any purpose if deponent is party or anyone who, at time of taking deposition was officer, director or managing agent of corporation, partnership, association or governmental agency which is party; (3) by any party for any purpose if court finds (a) that witness is dead, or (b) that witness is more than 100 miles distant or out of state unless absence was procured by party offering deposition, or (c) that witness is unable to attend because of age, illness, infirmity, or imprisonment, or (d) that party offering deposition has been unable to procure attendance of witness by subpoena, or (e) upon application and notice, use would be in interest of justice. If only part of deposition is offered, adverse party may require introduction of all parts that in fairness ought to be considered with part introduced. Use is not affected by substitution of parties, and depositions taken in action dismissed may be used in subsequent action involving same subject matter and parties or their representatives or successors in interest and as otherwise permitted by Rules of Evidence. (RCP 32). Once one party has used part of deposition at trial, opposing party may introduce any other parts, regardless of declarant’s availability subject to rules of evidence. (318 Ark. 750, 887 S.W.2d 526). Discovery depositions may be taken in aid of judgment or of execution thereon. (RCP 69). Court may order, upon showing of good cause, videotape depositions which may be presented at trial in lieu of testimony of alleged sexual offense victim under age of 17. (Ark. Code Ann. 16-44-203).

Perpetuating Testimony.

Before action, depositions to perpetuate testimony may be taken on order of circuit court on verified petition filed in county of residence of any expected adverse party. Petition must show that petitioner expects to be party to action which he is presently unable to bring, subject matter and his interest therein, facts to be established and his reasons to perpetuate testimony, parties expected to be adverse and their addresses, names and addresses or descriptions of persons to be examined, and substance of testimony expected to be elicited. Petitioner must serve 20 days notice and copy of petition on all persons expected to be adverse parties, but if such service cannot be made with due diligence, court may order service by publication and appoint attorney to represent adverse parties. Pending appeal, depositions may be taken on order of trial court upon motion. (RCP 27).

Before Whom Taken.

Depositions within U.S. must be taken before officer authorized to administer oaths or before person authorized by court in which action is pending. Depositions in foreign country may be taken on notice before person authorized to administer oaths either by law of that place or of U.S. or before person commissioned by court or pursuant to any applicable treaty or convention or pursuant to letter of request. Depositions may not be taken before relative, employee, or attorney of any of parties, or relative or employee of such attorney, or person financially interested in action. (RCP 28). Unless court orders otherwise, by written stipulation of parties, depositions may be taken before any person at any time or place on any notice and in any manner. (RCP 29).

Within State for Use in Foreign Country.

Judge of circuit court in county where witness resides, upon presentation of letter rogatory authorizing taking of deposition upon notice duly served, issues subpoena requiring witness to attend at specified time and place for examination. (RCP 28).

Within State for Use in Other State.

Upon filing certified copy of notice of deposition in compliance with Rule 30(b) with circuit clerk of county where deposition will be taken, circuit clerk shall issue subpoena in accordance with notice. Objections shall be heard by circuit judge of same county. (RCP 45[F]).

Depositions upon oral examination may be taken by party after reasonable notice in writing given to every other party. Witness must be sworn and his testimony taken by officer personally or by someone under his direction and in his presence recorded stenographically or by sound or sound-and-visual means. Evidence objected to is taken subject to objections noted by officer on deposition. On motion and showing that examination is conducted in bad faith or in such manner as unreasonably to annoy, embarrass, or oppress deponent or party, court in which action is pending or court in district where deposition is being taken may by order terminate deposition or limit scope and manner of its taking. If taking is terminated, it may be resumed only upon order of the court in which action is pending. (RCP 30).

If requested by deponent or party, deponent shall have 30 days after notice that transcript or recording is available to review it, and if there are changes in form or substance, to sign statement reciting such changes and reasons for making them. (RCP 30).

Officer must certify that witness was sworn and that deposition is true record of his testimony. Upon payment of reasonable charges therefore, officer must furnish copy to any party or to deponent. Party taking deposition must furnish one copy for opposing parties and give prompt notice of filing to all parties. (RCP 30).

If party giving the notice to take depositions fails to attend and proceed therewith or fails to serve witness with a subpoena and witness because of such failure does not attend, court may order him to pay the reasonable expenses, including reasonable attorney's fees, of any other party attending in person or by attorney. (RCP 30).

Deposition upon written interrogatories may be taken by service of interrogatories upon every other party with a notice stating name and address of witness and name and address of officer before whom the deposition is to be taken. Cross interrogatories may be served within 14 days; re-direct within seven days; re-cross within seven days. Copy of notice and of all interrogatories must be delivered to officer by party taking deposition. Officer must proceed as in case of depositions upon oral interrogatories to take testimony and prepare, certify, file or mail deposition, with copy of notice and interrogatories attached thereto. When deposition is filed, party taking it must notify all other parties. (RCP 31).

Objections to admissibility may be made at trial or hearing to receive in evidence any deposition or part thereof for any reason which would require exclusion of evidence if witness were present and testifying. (RCP 32). Objection to taking deposition because of disqualification of officer before whom deposition is taken are waived unless made before taking begins or as soon thereafter as disqualification becomes known or could be discovered with reasonable diligence, and errors occurring in oral examination in manner of taking, in form of questions or answers, in oath, or in conduct of parties, and errors which might be obviated if promptly presented, are waived unless objected to at time. (RCP 32). Objections to competency of witness or to competency, relevancy, or materiality of testimony are not waived by failure to make them unless ground of objection might have been obviated at time. Objections to written interrogatories are waived unless timely served in writing upon party propounding them. Objections to manner in which testimony is transcribed or deposition is dealt with by officer are waived unless motion to suppress is promptly made. (RCP 32).

Refusal to Make Discovery.

For refusing to answer questions on oral or written examination, the court in county where deposition is being taken may require the refusing party and the attorney advising the refusal or either of them to pay the examining party reasonable expenses, including reasonable attorney’s fees, for obtaining from the court an order compelling an answer. Refusal to answer after being directed to do so may be considered a contempt of court. Court in which action is pending may make such other orders as are just, including an order that the matters shall be taken to be established in accordance with claim of party who obtained order; an order refusing to allow disobedient party to support or oppose designated claims or defenses; an order striking pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or proceedings or any part thereof, or rendering judgment by default against disobedient party. (RCP 37).

Depositions in Criminal Cases.

If prospective witness unable to attend or prevented from attending trial or hearing, if testimony is material, and if taking of deposition is necessary to prevent failure of justice, court may, after filing of indictment or information, upon motion of either party and with adequate notice, order taking of deposition. At trial or hearing, deposition may be used if it appears witness is out of state, dead, or unable to attend because of sickness or infirmity. Deposition will be taken in same manner as in civil actions, by written interrogatories or orally, upon notice. (Ark. Code Ann. 16-44-201 – 16-44-202; 269 Ark. 44, 598 S.W.2d 96; 227 Ark. 889, 302 S.W.2d 796).

Form

(Caption). The deposition of . ., taken between the hours of . . A.M. and . . P.M., on the . . day of . ., 20. . ., at the . ., in the . . of . . state of . ., to be read as evidence in an action between . ., plaintiff, . . and . ., defendant . ., pending in the . . court, on the part of the . . .

(Certificate).—State of . ., county of . ., I, . ., a qualified . . in and for said county, do hereby certify that the foregoing deposition . . of . . w. . taken before me and w. . read to and subscribed by . . in my presence, at the time and place and in the action mentioned in the caption, the said witness . . having been first sworn by me that the evidence, . . should give in the action should be the truth, the whole truth and nothing but the truth; and . . statements reduced to writing by me in . . presence (or by . . in my presence), the plaintiff . . alone (or the defendant . ., or both plaintiff . . and defendant . ., or either party, in person or by attorney, according to the facts) being present at the examination. Witness my hand and seal this . . day of . ., 20. . .

. . . .

5.12 EQUITY:

See topic 5.02 Actions.

5.13 EVIDENCE:

See topic 5.11 Depositions and Discovery.

Witnesses.

Uniform Rules of Evidence adopted with some changes and with omission of Rules 303(c) and 411 and with addition of Rule 803(25) concerning hearsay statements by children under ten in sex offense cases (Ark. Code Ann. 16-41-101).

5.14 INJUNCTIONS:

Injunctions may issue at any time before judgment by court when it appears by complaint that plaintiff is so entitled and during litigation when it satisfactorily appears by affidavits that sufficient grounds exist. (Ark. Code Ann. 16-113-301). Collection of any illegal tax or assessment may be enjoined. (Ark. Code Ann. 16-113-306). Any citizen may institute suit for himself and others to protect inhabitants of that county, city or town from illegal exactions. (Const., art. 16, § 13).

Jurisdiction is in circuit court. In absence of circuit judge from county, any county judge may issue injunction and other provisional writs as a provisional remedy. (Ark. Code Ann. 16-55-112; Ark. Code Ann. 16-113-301).

Procedure.

Preliminary injunction or temporary restraining order may be granted without notice where by affidavit or verified complaint it is shown that irreparable harm will or might result. In all other cases, reasonable notice and hearing is required. Restraining order or interlocutory injunction to stop construction, ordinary business operations, or nuisance requires notice and bond. If injunction or temporary restraining order is granted without notice, hearing must be held by court as expeditiously as possible. (RCP 65).

Bond.

May be required at court's discretion, and is required on injunctions halting construction, nuisance, or ordinary business operations. (RCP 65).

Duration.

Preliminary injunction or temporary restraining order remains in effect until dissolved or until final order, and may, upon motion and for good cause shown, be made permanent. (RCP 65).

5.15 JUDGMENTS:

Governed in general by Rules of Civil Procedure adopted by Supreme Court effective July 1, 1979, which are similar to Federal Rules of Civil Procedure.

All judgments, orders, and decrees rendered in open court by court of record are effective from date rendered and not from date of entry of record. (Ark. Code Ann. 16-65-121).

Judgment by confession may be entered with consent of plaintiff against defendant personally appearing in court and confessing judgment. (Ark. Code Ann. 16-65-301). Debt or cause of action shall be stated in judgment by confession or writing to be filed as pleadings. (Ark. Code Ann. 16-65-302). It is enforceable as other judgments, and confession operates as a release of errors. (Ark. Code Ann. 16-65-303 – 16-65-304).

Judgments by consent are not appealable. (79 Ark. 95, 94 S.W. 932).

Summary judgment

May be obtained on motion by aggrieved party against principal or surety, against clerk and his or her sureties upon notice prescribed, against officers and their securities on notice prescribed, by client against attorney, by appellees against appellants and sureties where appeal bond has been given but appeal not perfected, and by litigant against sheriff, constable or other officer for money or property collected for litigant. (Ark. Code Ann. 16-65-202).

For Plaintiff.

After 20 days from commencement of action or after service of motion for summary judgment by adverse party, plaintiff may move, with or without supporting affidavits, for summary judgment for all or any part of relief sought. Such motion must be filed no later than 45 days before scheduled trial date, absent leave of court for good cause shown. (RCP 56).

For Defendant.

Defendant may at any time move, with or without supporting affidavits, for summary judgment in his favor as to all or any part thereof. Such motion must be filed no later than 45 days before scheduled trial date, absent leave of court for good cause shown. (RCP 56).

Procedure.

56(c)(1) motion shall specify issue(s) on which summary judgment is sought and may contain supporting materials. Adverse party shall serve response and supporting materials, if any, within 21 days after motion is served. Moving party may serve reply and supporting materials within 14 days after response is served. Court may order time periods extended or reduced. Unless by order of court, no party shall submit supplemental supporting materials after time for serving reply. Court, on its own or at party’s request, may hold hearing on motion not less than 7 days after time for serving reply. Judgment must be rendered forthwith if pleadings, depositions, and admissions on file, together with affidavits, if any, show there is no genuine issue as to any material fact and that moving party is entitled to judgment as matter of law. Partial summary judgment, interlocutory in nature, may be rendered on any issue in case, including liability. (RCP 56).

Case Not Fully Adjudicated on Motion.

If trial is necessary, court, at motion hearing may determine which facts are without controversy and which are controverted; and make order thereupon. (RCP 56).

Form of Affidavits.

Affidavits must be made on personal knowledge, set forth facts admissible in evidence, and show affirmatively that affiant is competent to testify. Sworn or certified copies of all papers referred to in affidavit must be attached thereto or served therewith. Court may permit affidavit to be supplemented or opposed by deposition, answers to interrogatories, or further affidavits. If it appears that any such affidavit is presented in bad faith or solely for purpose of delay, court shall order party employing it to pay other party amount of reasonable expenses incurred, including reasonable attorneys fees, and any offending party or attorney may be adjudged guilty of contempt. (RCP 56).

Declaratory Judgment.

Uniform act adopted with variations. (Ark. Code Ann. 16-111-101 – 16-111-111). Procedure is in accordance with RCP 57.

Default judgments may be entered only by court. Court has power to conduct hearing or require trial by jury on damages or to establish any other issue. Court may set aside upon motion previously entered default. Complaint against defendant who is constructively summoned and does not appear must be proved unless plaintiff files affidavit that allegations are true, and cannot be proved or shown otherwise, except by defendant's answer. (RCP 55; Ark. Code Ann. 16-63-216).

Offer of judgment by defendant more than ten days before trial, which is refused imposes liability for subsequent costs on plaintiff unless recovery exceeds amount offered. Claimant has ten days to respond. (RCP 68).

Vacation or Modification.

Within ninety days after judgment is filed with clerk, court may vacate or modify judgment (except default judgment) by granting new trial because of newly discovered evidence; defendants constructively summoned and who did not appear; for misprision of clerk; fraud of successful party; erroneous proceedings against infant or insane person where neither disability nor error appears on record; death of party before judgment; or for errors shown by infant within one year after reaching majority. Defendant must show valid defense. Plaintiff must show valid cause of action. Default judgment against defendant constructively summoned, except for divorce, may be set aside and if ordered by court, plaintiff must restore all money on property received to defendant. (RCP 60).

Lien.

Judgments and decrees of circuit and supreme court of this state and U.S. district or bankruptcy courts are liens on real estate of defendant within county in which rendered. Such judgments may be made liens on land in other counties by filing certified copies in office of circuit clerks therein. (Ark. Code Ann. 16-65-117). Lien on realty expires at end of ten years, but may be extended for successive ten year periods by scire facias. (Ark. Code Ann. 16-65-117[d]; Ark. Code Ann. 16-65-501). Judgments of inferior courts become lien on real estate by filing certified copy of such judgment with clerk of circuit court. (ADCR 8). Judgment debtor is required to file schedule of exempt property within 45 days of entry of judgment. Final judgment order shall require such filing but failure to do so will not invalidate judgment. (Ark. Code Ann. 16-66-221).

Revival.

All judgments and decrees are barred after ten years, but they may be revived within that period by suing out scire facias and serving it on defendant or his legal representatives. (Ark. Code Ann. 16-65-501).

Sale of judgment or cause of action must be written and acknowledged like deed and filed in action. (Ark. Code Ann. 16-65-120[a]). Transfer is binding upon all persons subsequently dealing with judgment whether persons have actual knowledge of transfer or not. (Ark. Code Ann. 16-65-120[b]).

Satisfaction must be entered upon the judgment record by the party, his attorney or agent duly appointed in writing, within 60 days after receipt of payment. (Ark. Code Ann. 16-65-602). Court may on motion and notice compel entry of satisfaction. (Ark. Code Ann. 16-65-602[b][2]).

Usual form of satisfaction: The within judgment is satisfied in full. (Date and signature.) (Ark. Code Ann. 16-65-602[b][1]).

Judgment notes are not permitted.

Bonds Having Effect of Judgments.

See topic 5.04 Bonds.

Foreign Judgments.

Uniform Enforcement of Foreign Judgments Act has been adopted. (Ark. Code Ann. 16-66-601 – 16-66-608.

5.16 LIMITATION OF ACTIONS:

Uniform Commercial Code prescribes time when an action accrues on contract for sale of goods and imposes limitation of four years for actions brought for breach of contract (Ark. Code Ann. 4-2-725) and prescribes time when action accrues on commercial paper (Ark. Code Ann. 4-3-118) and imposes following limitations:

One year.

Limitation period for reporting to bank unauthorized signature or alteration. (Ark. Code Ann. 4-4-406[f]).

Thirty Days.

Limitation period for reporting to bank unauthorized signature or altered instrument by same wrongdoer. (Ark. Code Ann. 4-4-406[d][2]).

Actions must be commenced within following periods after respective causes of action accrue. (Ark. Code Ann. 16-56-101 – 16-56-127; Ark. Code Ann. 18-11-102 – 18-11-104; Ark. Code Ann. 18-61-101 – 18-61-106).

Ten Years.

Actions on judgments. (Ark. Code Ann. 16-56-114).

Eight Years.

Actions on bonds of executors or administrators. (Ark. Code Ann. 16-56-113).

Seven Years.

Actions for recovery of real property. (Ark. Code Ann. 18-61-101).

Five Years.

Actions to enforce written obligations, duties, or rights (Ark. Code Ann. 16-56-111); actions for deficiency in design, planning, supervision or observation of construction or construction and repair of any improvement to real property or for injury to real or personal property (Ark. Code Ann. 16-56-112); all actions not otherwise provided for (Ark. Code Ann. 16-56-115). For will contest, see category 13 Estates and Trusts, topic 13.16 Wills, subhead Contest.

Four Years.

Actions on official bonds of sheriffs and coroners (but not on bonds of executors or administrators) (Ark. Code Ann. 16-56-110).

Three Years.

Actions founded upon any contract, obligation, or liability not in writing, actions on express or implied contracts or liability, for trespass on lands, for taking or injuring goods or chattels, for libel, and for arrearages in rent not reserved by written instrument. (Ark. Code Ann. 16-56-105). Wrongful death. (Ark. Code Ann. 16-62-102).

Two Years.

Actions for medical malpractice. (Ark. Code Ann. 16-114-203).

One Year.

Actions for assault and battery, false imprisonment, slander, all special actions on case, damages suffered as result of any act or omission of home inspections relating to home inspections report. (Ark. Code Ann. 16-56-104).

New action may be brought after time, if brought within one year after in nonsuit suffered or judgment arrested or reversed on action brought in time. (Ark. Code Ann. 16-56-126[a][1]). Wrongful death action may be refiled within one year of nonsuit. (Ark. Code Ann. 16-62-102).

Deficient Design or Construction.

Actions on contracts for damages resulting from deficiency in design, planning, or supervision of construction or construction of improvements on real property must be brought within five years after substantial completion of construction; for personal injury or wrongful death resulting from such deficiency within four years after substantial completion; for personal injury occurring during third year after substantial completion action may be brought within one year of injury, but not later than five years after substantial completion; above limitations shall not apply in event of fraudulent concealment of defect. (Ark. Code Ann. 16-56-112). Provided no action may lie against person furnishing design if design not used within three years from date furnished. (Ark. Code Ann. 16-56-112).

Foreign Debtors.

If debtor fraudulently absconds from any other state, territory or district to Arkansas without knowledge of his creditor, such creditor may commence suit against such debtor within time prescribed for particular action, period running from time when creditor becomes apprised of residence of absconding debtor. (Ark. Code Ann. 16-56-121).

Disabilities of Plaintiff.

Where person in whose favor cause of action accrues is, at time of such accrual, infant, or insane, action may be commenced within three years after disability is removed. (Ark. Code Ann. 16-56-116).

Person in U. S. armed services while U. S. is engaged in war has one year after the end of such war and six months thereafter in which to sue to collect debt or to recover property, provided action was not barred prior to his entry into the armed services. (Ark. Code Ann. 16-56-118[b]). Statutes of limitation are suspended during time of war so far as they affect claim or cause of action of person in armed forces and for six months thereafter. (Ark. Code Ann. 16-56-118[a]).

Death of Plaintiff.

If person entitled to sue or obtain judgment dies before expiration of limitation, his representative has one year after death to bring action, though limitation expires before end of year. (Ark. Code Ann. 16-56-117).

Death of Defendant.

If action has been commenced and defendant dies before judgment, plaintiff may commence new action against defendant's heirs, executors, or administrators within one year of defendant's death. (Ark. Code Ann. 16-56-117[b][1]).

Barred debts may be revived by part payment or written acknowledgment.

Vendor's or mortgagee's lien expires when the debt is barred, and is not extended by payments unless entered on the margin of the record of the deed and dated and attested by the circuit clerk. (Ark. Code Ann. 18-49-101).

Contractual limitations are permitted. (101 Ark. 310, 142 S.W. 176; 258 Ark. 1009, 531 S.W.2d 8).

Statute as to unknown tortfeasor may be tolled by filing complaint in appropriate court along with affidavit stating that identity of tortfeasor is unknown. (Ark. Code Ann. 16-56-125).

See also category 3 Business Regulation and Commerce, topic 3.24 Securities.

5.16A PARTITION:

Real estate owned in common may be partitioned by proceedings in circuit court (Ark. Code Ann. 18-60-401) and, if it is shown to be incapable of division in kind without great prejudice to owners, may be sold to highest bidder at public auction. (Ark. Code Ann. 18-60-420). When undivided interest in parcel of land containing at least ten acres is purchased after June 28, 1985, by stranger to title, purchaser shall not have cause of action to partition land until expiration of three years. However any persons or entities which individually or in combination own 50% or more of parcel may institute partition proceedings at any time. (Ark. Code Ann. 18-60-404).

5.17 [RESERVED]

5.18 PLEADING:

Rules of procedure adopted by Arkansas Supreme Court on July 1, 1979 are similar to Federal Rules of Civil Procedure.

Pleadings Permitted.

Only pleadings allowed are complaint, answer, counterclaim, reply to counterclaim denominated as such, answer to cross-claim, third party complaint, and third party answer. (RCP 7).

Complaint must contain statement supporting jurisdiction and venue, statement of facts showing pleader is entitled to relief, and demand for relief to which pleader considers himself entitled. (RCP 8). Averments of fraud, mistake, duress or undue influence must be stated with particularity. (RCP 9).

Demurrers are abolished. (RCP 7).

Answer must state defenses to each claim asserted and must admit or deny averments upon which opponent relies. Statement party is without knowledge to admit or deny will act as denial. (RCP 8[b]). General denials are allowed where pleader intends in good faith to controvert all averments. Avoidances and affirmative defenses must be set forth affirmatively. Items not denied are admitted. (RCP 8).

Counterclaim may be unconnected with transaction or occurrence that is subject matter of opposing party's claim. Counterclaims arising from same transaction or occurrence which is subject matter of opposing party's claim must be raised. (RCP 13).

Amendments of pleadings may be made without leave of court at any time. Upon motion, court may strike amendments or grant continuances if prejudice results or if amendment would cause undue delay. Amendments must be answered within time remaining for response to original pleading or within 20 days after service, whichever is longer. (RCP 15[a]).

Verification is generally not required. (RCP 11).

Service of pleadings subsequent to complaint is made by delivering copy to party's attorney or party if so ordered, by mailing to him at his last known address, or by leaving it with clerk of court if no address is known. (RCP 5[b]). See also topic 5.20 Process.

Filing.

Pleadings must be filed with clerk of court either before service or within reasonable time thereafter. (RCP 5).

Time allowed for answer is 20 days after service of summons in state, 30 days for nonresident defendants and 30 days after date of first publication of warning order in case of constructive service. Time for reply to counterclaim or cross-claim is 20 days after service. (RCP 12[a][1]).

Where accounts are sued on, affidavit of plaintiff duly taken and certified, that same are just and correct is taken as prima facie true, unless controverted under oath as to whole or part by defendant, then other evidence is necessary to prove that part disputed. (Ark. Code Ann. 16-45-104).

Frivolous claims are subject to sanctions under RCP 11 which is substantially similar to FRCP 11.

In district court written complaint is required. (DCR 4).

Small Claims.

See category 6 Courts and Legislature, topic 6.01 Courts, subheads Justices' Courts, Municipal Courts, Small Claims Courts.

5.19 PRACTICE:

Governed by Rules of Civil Procedure which are based on Federal Rules with modifications. (Tit. 16, Rules 1-86).

Discovery procedure is generally based on Rules 26-37 of Federal Rules of Civil Procedure with some modifications. Generally, time for answering interrogatories is 30 days. (RCP 33).

Demand for Admission of Facts.

Any party has right to written request for admission of truth of any discoverable matter.

Generally, matter is admitted unless objection is made within 30 days. (RCP 36).

See also topics 5.02 Actions, Appeal and Error, Depositions and Discovery, Injunctions, Judgments, Pleading, Process; category 8 Debtor and Creditor, topics 8.05 Executions, 8.09 Garnishment.

Direct Actions Against Insurer.

See topic 5.02 Actions, subhead Direct Action Against Insurer.

Small Claims.

See category 6 Courts and Legislature, topic 6.01 Courts, subheads Justices' Courts, Municipal Courts.

See also topics 5.02 Actions, Appeal and Error, Depositions and Discovery, Injunctions, Judgments, Pleading, Process; category 8 Debtor and Creditor, topics 8.02 Attachment, 8.05 Executions, 8.09 Garnishment.

5.20 PROCESS:

Summons is issued by clerk upon filing of complaint. (RCP 4).

Who May Serve.

Summons is served by sheriff or person appointed by court for that purpose or by plaintiff or his attorney by mail as allowed by rules. (Service upon defendant, other than unknown tortfeasor, whose identity or whereabouts unknown may be by warning order.) (RCP 4).

Personal Service Inside State.

By delivery of copy of summons and complaint to defendant, or if he refuses it, by offering copy, or by leaving copy at his usual place of abode with some person residing there at least 14 years of age, or by delivering copy to authorized agent. (RCP 4[d]). Service may also be by any form of mail return receipt requested and delivery restricted to addressee or his agent, but such service shall not support default judgment unless record shows signed return receipt or evidence of refusal. (RCP 4[d][8]).

Service Outside State.

May be by personal delivery or by any form of mail with return receipt requested and delivery restricted to addressee. (RCP 4[e]).

Upon Defendant Whose Identity or Whereabouts is Unknown.

Service must be by warning order issued by clerk and published weekly two consecutive weeks in newspaper of general circulation (unless indigent [RCP 4(f)(3)]) in county where action filed and by mailing copy of complaint and warning order to defendant at last known address by any form of mail delivery restricted to addressee. This procedure does not apply to unknown tortfeasors. (RCP 4[f]).

On Infant.

Where defendant is under 14, service must be upon parent or guardian or other person having care and control of infant and with whom infant lives. Where infant is at least 14 years, service shall be upon him. (RCP 4[d] [2]).

On Incompetent Person.

Service must be upon individual and his appointed guardian; if confined to institution for mentally ill, upon superintendent of institution and upon guardian. (RCP 4[d] [3]).

On Incarcerated Defendant.

Service must be upon keeper or superintendent of institution who shall deliver copy of summons and complaint to defendant. Copy of summons and complaint must also be sent to defendant by first class mail and marked as “legal mail.” Copy of summons and complaint shall also be delivered to spouse of defendant, if any, unless court otherwise directs. (RCP 4[d][4]).

Upon Domestic or Foreign Corporation, Partnership, Limited Liability Company or Unincorporated Association.

Service is by delivering copy of summons and complaint to officer, partner other than limited partner, managing or general agent, or to any agent authorized by appointment or by law to receive service. (RCP 4[d][5]).

In Suit Against Insurer.

Domestic insurer is served by serving president, mayor, or chairman of board, unless chairman, mayor, and president not available in which case can serve cashier, treasurer, secretary, clerk or agent. Service on foreign insurers may be had upon Commissioner of Insurance when registered agent has not yet been selected. Registered office or agent may be changed by filing statement of change. (Ark. Code Ann. 23-79-205, Ark. Code Ann. 23-63-301 – 23-63-302).

On Owner or Operator of Motor Buses or Trucks.

Service may be upon any clerk or agent selling tickets or transacting any business for owner or operator, or upon any driver or chauffeur of any bus, coach, or truck being or driven by servant, agent, or employee. (Ark. Code Ann. 16-58-122).

On Issuer of or Dealer in Securities.

In action arising out of sale of securities, service may be upon Securities Commissioner. Plaintiff must send copy to defendant and file affidavit of compliance before return day. (Ark. Code Ann. 23-42-107).

Service on Secretary of State.

Any resident or nonresident who commits acts in state sufficient to give individual cause of action against person committing act deemed to have appointed Secretary of State as agent for service of process. Service on Secretary of State sufficient if person has subsequently absented himself from state or upon executor, administrator, or legal representative of estate if notice sent by certified mail to defendant at last known address and return receipt attached to summons and filed with court. (Ark. Code Ann. 16-58-120). Provisions of Ark. Code Ann. 16-58-120 do not apply to corporation that has agent for service of process registered with Secretary of State.

Long Arm Jurisdiction.

Court may exercise personal jurisdiction over all persons, and all causes of action or claims for relief, to maximum extent permitted by due process of law clause of Fourteenth Amendment of U.S. Constitution.

When exercise of personal jurisdiction is authorized by this section, service may be made either within or outside state. (Ark. Code Ann. 16-4-101).

Uniform Interstate and International Procedure Act adopted with omission of §§ 3.01 and 3.02. (Ark. Code Ann. 16-4-101 – 16-4-108; Ark. Code Ann. 16-4-103 [reserved]; Ark. Code Ann. 16-4-104 [superseded]).

Nonresident Motorist.

See category 23 Transportation, topic 23.01 Motor Vehicles.

5.21 REPLEVIN:

Action in replevin may be brought for the recovery of specific personal property. (Ark. Code Ann. 18-60-809).

Affidavit.

Plaintiff, or someone on his behalf, must file with complaint affidavit describing property, stating its value and any damages for detention, showing plaintiff's ownership or right to possession, asserting cause for wrongful detention, stating that property has not been taken for tax or fine or by judicial process and that cause of action accrued within three years. (Ark. Code Ann. 18-60-810).

If plaintiff files additional affidavit that property has been concealed, removed or disposed of with intent to defeat plaintiff's action, clerk or magistrate must order sheriff or other officer, if property cannot be had, to arrest defendant. (Ark. Code Ann. 18-60-811).

Opportunity for hearing upon notice required before order to deliver property obtained. (Ark. Code Ann. 18-60-805). If petitioner served notice with summons and complaint and defendant fails to object, order may be entered after five business days of service. (Ark. Code Ann. 18-60-808[a]). Plaintiff may obtain possession upon court order by giving bond to defendant that plaintiff will duly prosecute action, perform judgment of court, return property if adjudged, and pay any sum adjudged against him, not to exceed double value of property and costs. (Ark. Code Ann. 18-60-812).

Hearing Before Notice.

Order impounding property prior to hearing may be issued if genuine danger shown that property will be removed, damaged or concealed and if defendant cannot be served. (Ark. Code Ann. 18-60-807).

Redelivery may be obtained by defendant by filing with sheriff, within two days after taking of property by sheriff, bond similar to that required of plaintiff. (Ark. Code Ann. 18-60-816).

Claim of third persons may be asserted by filing with sheriff an affidavit showing right to possession of property. Sheriff is not then required to keep property or deliver it to plaintiff unless plaintiff, within two days after receiving copy of affidavit, gives sheriff a bond in double the value of the property, indemnifying him against such claim. (Ark. Code Ann. 18-60-818).

Judgment for plaintiff is for delivery of the property or its value in case delivery cannot be had, and for damages for detention. Judgment for defendant is for return of property, or its value in case delivery cannot be had, and damages for taking. (Ark. Code Ann. 18-60-820).

Replevin procedure in Ark. Code Ann. 18-60-809 – 18-60-822 may be unconstitutional to extent defendant denied use of property without notice and opportunity for hearing. (407 U.S. 67).

5.22 SEQUESTRATION:

See topic 5.21 Replevin.

5.23 SERVICE:

See topic 5.20 Process.

5.24 STAY OF EXECUTION:

See topic 5.03 Appeal and Error; category 8 Debtor and Creditor, topic 8.05 Executions.

5.25 SUBMISSION OF CONTROVERSY:

A question may be submitted on agreed case of a civil nature to a court in which it might be litigated, without action, if it appears by affidavit that the controversy is real and submitted in good faith, to determine the rights of the parties. The court shall render judgment, enforceable and subject to reversal as in other cases, unless otherwise agreed in the submission. (Ark. Code Ann. 16-118-101).

5.26 VENUE:

Pleading.

Complaint must include facts showing that court has jurisdiction and that venue is proper. (RCP 8[a]).

Real Actions.

Actions for recovery or partition of real property, for foreclosure of incumbrance thereon or injury thereto, must be brought in the county where the land or some part thereof is located. (Ark. Code Ann. 16-60-101).

Personal actions, in general, must be brought in any of following counties: (1) County in which substantial part of events or omissions giving rise to claim occurred; or (2) county in which individual defendant or plaintiff resided, or if entity other than individual, where it had its principal office in this state when action accrued. (Ark. Code Ann. 16-55-213[a]).

Action for personal injury or death occurring inside state must be brought in county where accident occurred or in county where injured/deceased person resided at time of injury. (Ark. Code Ann. 16-60-112). Action for personal injury or death occurring outside state must be brought in county where person injured or killed resided at time of injury or in any other county where any defendant resides or is summoned. (Ark. Code Ann. 16-60-112).

Class Actions.

Residence of any properly joined named class representative or representatives may be considered in determining proper venue in class action. Residency of other class members shall not be considered. (Ark. Code Ann. 16-55-213[b]).

Joinder.

Each plaintiff must satisfy venue rules unless they establish that they assert any right to relief against defendants jointly, severally, or arising out of same transaction or occurrence, substantial number of questions of law or material fact common to all will predominate over individual questions, action can be maintained more economically and efficiently, and it is in interest of justice to join them. (Ark. Code Ann. 16-55-213[c]).

Severance.

Unless waived by defendant(s), if venue is improper for any joined plaintiff, then their claims shall be severed and tried separately. If severance is mandated and venue is appropriate in more than one court, defendant or defendants shall have right to select where action shall be transferred, if there is unanimous agreement among defendants. If multiple defendants are unable to agree, court in which action was originally filed will transfer it. (Ark. Code Ann. 16-55-213[d]).

Medical injury actions brought under Ark. Code Ann. 16-114-201 against medical care provider shall be filed in county where alleged act or omission occurred. (Ark. Code Ann. 16-55-213[e]).

All actions against, or brought by, state, state boards, state commissioners, or state officers on account of their official acts must be brought in Pulaski County. (Ark. Code Ann. 16-60-103).

Contract action by resident subcontractor, supplier or materialman against nonresident prime or subcontractor may be brought in county where plaintiff resided when cause arose. (Ark. Code Ann. 16-60-114[a]).

Action for divorce is brought in county of plaintiff's residence or county of defendant's residence if plaintiff is nonresident (Ark. Code Ann. 9-12-303), but may be transferred to county of either party's residence upon agreement of parties and both courts (Ark. Code Ann. 16-60-207). When spouse initiates action for absolute divorce, divorce from bed and board, or separate maintenance, venue for initial action shall be venue for any of these named actions filed by other spouse regardless of residency of other spouse. (Ark. Code Ann. 9-12-303). If both parties establish residency in another district six months after issuance of final decree, proceedings may be brought in county of residence of custodial parent or where final decree is rendered. (Ark. Code Ann. 9-12-320).

Action on contractor's payment or performance bond may be brought in county where loss occurred, county of insured's residence at time of loss, or county of beneficiary's residence at time of loss. (Ark. Code Ann. 16-60-115).

Action to recover fine, penalty or forfeiture, or against a public officer, or upon official bond of public officer must be brought in county where cause of action, or some part, arose. (Ark. Code Ann. 16-60-102).

Probate and administration of will shall be in county where decedent resided at time of death or, if nonresident, where property is located, where decedent died, or where personal representative can maintain cause of action. (Ark. Code Ann. 28-40-102).

Action to annul marriage may be brought in county where plaintiff resides. (Ark. Code Ann. 9-12-202).

Action against insurance company must be brought in county where loss occurred, or insured died, or county of insured's residence at time of loss or death. (Ark. Code Ann. 23-79-204). Actions brought against insurer when insured is legally immune may be brought in county where damage occurred or where one of plaintiffs resided at time of damage. (Ark. Code Ann. 23-79-204). Venue of other action against domestic insurers are governed by Ark. Code Ann. 16-60-104. (Ark. Code Ann. 23-79-204).

Change of Venue.

Civil actions in jury cases may be changed upon verified motion stating that the party verily believes fair trial cannot be obtained in that county on account of undue prejudice in county or adversary's undue influence. (Ark. Code Ann. 16-60-201). Venue shall not be changed unless court finds that change is necessary to obtain fair and impartial trial of cause. (Ark. Code Ann. 16-

60-202). Domestic relations cases may be transferred to county of either party's residence upon agreement of parties and courts. (Ark. Code Ann. 16-60-207).

6 COURTS AND LEGISLATURE

6.01 COURTS:

United States District Courts.

Eastern District.

Clerk's office: Little Rock 72201.

Eastern Division is composed of following counties: Cross, Lee, Monroe, Phillips, St. Francis and Woodruff. Sessions are held at Helena.

Northern Division is composed of following counties: Cleburne, Fulton, Independence, Izard, Jackson, Sharp and Stone. Sessions are held at Batesville.

Jonesboro Division is composed of following counties: Clay, Craighead, Crittenden, Greene, Lawrence, Mississippi, Poinsett and Randolph. Sessions are held at Jonesboro.

Western Division is composed of following counties: Conway, Faulkner, Lonoke, Perry, Pope, Prairie, Pulaski, Saline, Van Buren, White and Yell. Sessions are held at Little Rock.

Pine Bluff Division is composed of following counties: Arkansas, Chicot, Cleveland, Dallas, Desha, Drew, Grant, Jefferson and Lincoln. Sessions are held at Pine Bluff.

Fees.

A fee of $350 must be deposited with clerk on commencement of an action. In addition, any marshal's fees for service of process must be paid. Out-of-state counsel must associate with local counsel.

Western District.

Clerk's office: Fort Smith 72902.

Texarkana Division is composed of following counties: Hempstead, Howard, Lafayette, Little River, Miller, Nevada and Sevier. Sessions are held at Texarkana.

Fort Smith Division is composed of following counties: Crawford, Franklin, Johnson, Logan, Polk, Scott and Sebastian. Sessions are held at Fort Smith.

Harrison Division is composed of following counties: Baxter, Boone, Carroll, Marion, Newton and Searcy. Sessions are held at Harrison.

El Dorado Division is composed of following counties: Ashley, Bradley, Calhoun, Columbia, Ouachita and Union. Sessions are held at El Dorado.

Hot Springs Division is composed of following counties: Clark, Garland, Hot Spring, Montgomery and Pike. Sessions are held at Hot Springs.

Fayetteville Division is composed of following counties: Benton, Madison and Washington. Sessions are held at Fayetteville.

Fees.

A fee of $350 must be deposited with clerk on commencement of an action. In addition, any marshal's fees for service of process must be paid.

Out of State counsel must associate with local counsel.

Supreme Court.

Supreme Court of Arkansas has statewide appellate jurisdiction of all cases in circuit court, and general superintending control over all inferior courts. (Amend. 80, §§ 2 & 4). Initial appellate jurisdiction for all cases in circuit court lies within Court of Appeals except for following: all appeals involving interpretation or construction of Constitution of Arkansas; criminal appeals in which death penalty or life imprisonment has been imposed; petitions for quo warranto, prohibition, injunction, or mandamus directed to state, county, or municipal officials or to circuit courts; appeals pertaining to elections and election procedures; appeals involving discipline of attorneys-at-law and or arising under power of Supreme Court to regulate practice of law; appeals involving discipline and disability of judges; second or subsequent appeals following appeal which has been decided in Supreme Court; and appeals required by law to be heard by Supreme Court. (Supreme Court 1-2[a]). Supreme Court shall have original jurisdiction to issue writs of quo warranto to all persons holding judicial office, and to officers of political corporations when question involved is legal existence of such corporations; to answer questions of state law certified by court of U.S., which may be exercised pursuant to Supreme Court rule; and to determine sufficiency of state initiative and referendum petitions and proposed constitutional amendments. (Amend. 80, § 2). In addition, Supreme Court has power to issue and determine any and all writs necessary in aid of its jurisdiction and to delegate to its several justices power to issue such writs; and to appoint its clerk and reporter. (Amend. 80, § 2). Any case is subject to reassignment by Supreme Court, and in doing so, Supreme Court will consider but not be limited to following: issues of first impression; issues upon which there is perceived inconsistency in decisions of Court of Appeals or Supreme Court; issues involving federal constitutional interpretation; issues of substantial public interest; significant issues needing clarification or development of law, or overruling of precedent; and appeals involving substantial questions of law concerning validity, construction, or interpretation of act of General Assembly, ordinance of municipality or county, or rule or regulation of any court, administrative agency, or regulatory body. (Supreme Court 1-2[b]).

$150 fee for costs must be paid to Clerk of Supreme Court by appellant or petitioner, in advance, in all civil actions and misdemeanors filed in Supreme Court or Court of Appeals. $25 must be paid, in advance, to Clerk of Supreme Court, by petitioner for each petition for review of decision of Court of Appeals. (Ark. Code Ann. 21-6-401).

Court sits at Little Rock.

Court of Appeals.

Created July 1, 1979; initial appellate jurisdiction for cases in circuit court lies within Court of Appeals. Court of Appeals shall have authority to issue any writs, directives, orders, and mandates that are appropriate, and only those that are appropriate, for determination of cases within its jurisdiction. Initial appellate jurisdiction for cases in circuit court lies within Court of Appeals. Appeals filed with clerk of Supreme Court. Court sits at Little Rock. (Ark. Code Ann. 16-12-102 – 16-12-108; Amend. 80, § 5).

Circuit Courts.

Have appellate and supervisory control over county courts, district courts and justices' courts: have original jurisdiction over all justiciable matters, except when exclusive jurisdiction is given to other courts (Ark. Code Ann. 16-13-201 – 16-13-203; Amend. 80, § 6). In criminal matters, circuit court shall have original jurisdiction, exclusive of district court, for trial of offenses defined as felonies by state law and shall have original jurisdiction concurrent with district court for trial of offenses defined as misdemeanors by state law. (Ark. Code Ann. 16-88-101[a][3]).

District Courts sit as follows (Ark. Code Ann. 16-17-901 et seq.):

Arkansas County: Eleventh Circuit-East; Northern District, court sits at Stuttgart. Southern District, court sits at DeWitt.

Ashley County: Tenth Circuit; court sits at Hamburg and Crossett.

Baxter County: Fourteenth Circuit; court sits at Mountain Home, Briarcliff, Lakeview, Cotter, Gassville, and Norfolk.

Benton County: Nineteenth Circuit-West; Rogers District, court sits at Rogers, Bentonville District, court sits at Bentonville, Cave Springs, and Pea Ridge. Siloam Springs District, court sits at Siloam Springs.

Boone County: Fourteenth Circuit; court sits at Harrison and Alpena.

Bradley County: Tenth Circuit; court sits at Warren.

Calhoun County: Thirteenth Circuit; court sits at Hampton.

Carroll County: Nineteenth Circuit-East; Western District, court sits at Eureka Springs;

Eastern District, court sits at Berryville.

Chicot County: Tenth Circuit; court sits at Lake Village, Dermott, and Eudora.

Clark County: Ninth Circuit-East; court sits at Arkadelphia.

Clay County: Second Circuit; court sits at Corning, Piggot, and Rector.

Cleburne County: Sixteenth Circuit; court sits at Heber Springs.

Cleveland County: Thirteenth Circuit; court sits at Rison.

Columbia County: Thirteenth Circuit; court sits at Magnolia.

Conway County: Fifteenth Circuit; court sits at Morrilton.

Craighead County: Second Circuit; court sits at Jonesboro and Lake City.

Crawford County: Twenty-First Circuit; court sits at Van Buren.

Crittenden County: Second Circuit; Marion District, court sits at Marion. West Memphis District, court sits in West Memphis.

Cross County: First Circuit; court sits at Wynne.

Dallas County: Thirteenth Circuit; court sits at Fordyce.

Desha County: Tenth Circuit; court sits at Dumas and McGehee.

Drew County: Tenth Circuit; court sits at Monticello.

Faulkner County: Twentieth Circuit; court sits at Conway.

Franklin County: Fifth Circuit; Ozark District, court sits at Ozark; Charleston District, court sits at Charleston.

Fulton County: Sixteenth Circuit; court sits at Salem.

Garland County: Eighteenth Circuit-East; court sits at Hot Springs.

Grant County: Seventh Circuit; court sits at Sheridan.

Greene County: Second Circuit; court sits at Paragould and Marmaduke.

Hempstead County: Eighth Circuit-North; court sits at Hope.

Hot Spring County: Seventh Circuit; court sits at Malvern.

Howard County: Ninth Circuit-West; court sits at Nashville.

Independence County: Sixteenth Circuit; court sits at Batesville.

Izard County: Sixteenth Circuit; court sits at Melbourne.

Jackson County: Third Circuit; court sits at Newport.

Jefferson County: Eleventh Circuit-West; court sits at Pine Bluff.

Johnson County: Fifth Circuit; court sits at Clarksville.

Lafayette County: Eighth Circuit-South; court sits at Lewisville.

Lawrence County: Third Circuit; court sits at Walnut Ridge and Hoxie.

Lee County: First Circuit; court sits at Marianna.

Lincoln County: Eleventh Circuit-West; court sits at Star City.

Little River County: Ninth Circuit-West; court sits at Ashdown.

Logan County: Fifteenth Circuit; Northern District, court sits at Paris.

Southern District, court sits at Booneville.

Lonoke County: Twenty-third Circuit; Northern District, court sits at Cabot and Ward. Southern District, court sits at Lonoke, England and Carlisle.

Madison County: Fourth Circuit; court sits at Huntsville.

Marion County: Fourteenth Circuit; court sits at Yellville.

Miller County: Eighth Circuit-South; court sits at Texarkana.

Mississippi County: Second Circuit; Osceola District, court sits at Osceola and Joiner.

Chickasawba District, court sits at Blytheville, Manila, Leachville, Gosnell, and Dell.

Monroe County: First Circuit; court sits at Clarendon and Brinkley.

Montgomery County: Eighteenth Circuit-West; court sits at Mt. Ida.

Nevada County: Eighth Circuit-North; court sits at Prescott.

Newton County: Fourteenth Circuit; court sits at Jasper.

Ouachita County: Thirteenth Circuit; Camden District, court sits at Camden. East Camden District, court sits in East Camden.

Perry County: Sixth Circuit; court sits at Perryville.

Phillips County: First Circuit; court sits at Helena and West Helena.

Pike County: Ninth Circuit-West; court sits at Murfreesboro.

Poinsett County: Second Circuit; court sits at Harrisburg, Marked Tree, Trumann, Tyronza, and Lepanto.

Polk County: Eighteenth Circuit-West; court sits at Mena.

Pope County: Fifth Circuit; court sits at Russellville, Atkins, Dover, London, and Pottsville.

Prairie County: Seventeenth Circuit; Northern District, court sits at Des Arc. Southern District, court sits at Devalls Bluff, Hazen, and Briscoe.

Pulaski County: Sixth Circuit; Jacksonville District, court sits at Jacksonville. Little Rock District, court sits at Little Rock. North Little Rock District, court sits at North Little Rock. Maumelle District, court sits at Maumelle. Sherwood District, court sits at Sherwood. Wrightsville District, court sits at Wrightsville.

Randolph County: Third Circuit; court sits at Pocahontas.

Saline County: Twenty-Second Circuit; court sits at Benton, Bryant, Alexander, Bauxite, Haskell and Shannon Hills.

Scott County: Fifteenth Circuit; court sits at Waldron.

Searcy County: Twentieth Circuit; court sits at Marshall.

Sebastian County: Twelfth Circuit; Greenwood District, court sits at Greenwood. Forth Smith District, court sits at Fort Smith.

Sevier County: Ninth Circuit-West; court sits at De Queen.

Sharp County: Third Circuit; court sits at Ash Flat and Cherokee Village.

St. Francis County: First Circuit; court sits at Forrest City.

Stone County: Sixteenth Circuit; court sits at Mountain View.

Union County: Thirteenth Circuit; court sits at El Dorado.

Van Buren County: Twentieth Circuit; court sits at Clinton.

Washington County: Fourth Circuit; Springdale District, court sits at Springdale. Fayetteville District, courts sits at Fayetteville. Elkins District, court sits at Elkins. West Fork District, court sits at West Fork. Prairie Grove District, court sits at Prairie Grove.

White County: Seventeenth Circuit; court sits at Searcy and Beebe.

Woodruff County: First Circuit; court sits at Augusta, Cotton Plant, and McCrory.

Yell County: Fifteenth Circuit; Danville District, court sits at Danville; Dardanelle District, court sits at Dardanelle.

Probate Courts.

There are no independent probate courts in Arkansas. Probate matters are heard by circuit courts. (See Ark. Code Ann. 16-13-201; Amend. 80, § 19.)

County Courts.

County courts have exclusive original jurisdiction in matters relating to county taxes, paupers, apprenticeship of minors, cases that may be necessary to internal improvement and local concern (Ark. Code Ann. 14-14-1105), and petitions by landowners outside city or town to vacate public utility easements over land (Ark. Code Ann. 18-60-901).

Justices' Courts.

Justices of peace have original jurisdiction coextensive with county. This jurisdiction is concurrent with municipal courts and exclusive of circuit court in actions on contracts involving not more than $100, exclusive of interest, concurrent with municipal courts and circuit court in actions on contracts involving no more than $300, exclusive of interest, in actions of replevin of property not exceeding $300 in value, and in actions for damages to personal property not involving over $100. (Ark. Code Ann. 16-19-401).

Their territorial jurisdiction includes their counties, in cases of replevin, attachment, garnishment, or criminal actions. (Ark. Code Ann. 16-19-402).

District Courts.

There must be at least one district court in each county. If there is only one district court in county, it must have county-wide jurisdiction. (Amend. 80, § 7). Effective Jan. 1, 2005, district courts shall be regarded as continuation of municipal courts, corporation courts, police courts, Justice of the Peace Courts, and courts of common pleas that no longer exist. District courts shall have jurisdiction vested in municipal courts, corporations courts, police courts, justices' courts, and courts of common pleas. (Amend. 80, § 19). There are no civil jury trials in district court. (Ark. Code Ann. 16-17-703). District court's subject-matter jurisdiction is established by supreme court. (Ark. Code Ann. 16-17-704). In criminal matters, district court shall have original jurisdiction, exclusive of circuit court, for trial of violations of ordinances of city or county in which district court is located and shall have original jurisdiction concurrent with circuit court for trial of offenses defined as misdemeanors by state law and committed within territorial jurisdiction of district court. (Ark. Code Ann. 16-88-101[a][4]).

Small Claims Courts.

Pursuant to Amend. 80, § 7(D), judges of district court shall divide that district court into subject-matter divisions, one of which shall be small claims. When small claims division in district is established, claim can be for damages to personal property, matters of contract, or for recovery of personal property which is worth $5,000 or less. Small claim disputes are handled without assistance of counsel, and if judge determines that party is being represented by attorney in case pending in small claims division of any district court, case will immediately be transferred to regular district court docket. Corporations other than those lending money at interest, that are organized under laws of state and that have no more than three shareholders, or corporations in which 85% or more of voting stock is held by persons related within third degree consanguinity and "closely held corporations" by unanimous vote of shareholders may sue and be sued in small claims division. (Ark. S.C. Adm. Order 18, §§ 3-4, eff. Jan. 1, 2005).

See also subheads Justices' Courts and Municipal Courts, supra.

City courts shall continue in existence after effective date of this Amendment unless such city court is abolished by governing body of city or by appropriate action of General Assembly. Immediately upon abolition of such city court, jurisdiction of city court shall vest in nearest district court in county where city is located. (Amend. 80, § 19). In criminal matters, local jurisdiction of district courts shall be of offenses committed within limits of jurisdiction of courts, as prescribed by statutes creating or regulating them. (Ark. Code Ann. 16-88-105). Effective Jan. 1, 2012, all city courts shall be consolidated with district courts and continue to exist as departments of district courts unless city court is abolished by town or city ordinance. (Ark. Code Ann. 16-17-1202[b]).

Juvenile Division of Circuit Court.

Statements made by juveniles during intake process not useable or admissible against juvenile. (Ark. Code Ann. 9-27-321).

Juvenile court may expunge records of juvenile and shall expunge (i.e., destroy) all records of juvenile upon his 21st birthday in delinquency, dependency-neglect, or families in need of services cases. Records of delinquency adjudications for which juvenile could have been tried as adult must be kept for ten years, and records of those designated as extended juvenile jurisdiction offenders must be kept for ten years or until juvenile's 21st birthday, whichever is longer. (Ark. Code Ann. 9-27-309).

Where there is probable cause to believe juvenile is dependent/neglected and that immediate removal of juvenile from custody of his/her parent(s), guardian, or custodian is necessary to protect health or physical well-being of juvenile from immediate danger or prevent juvenile's removal from state, court shall issue emergency ex parte order for juvenile's removal from custody of parent(s), guardian, or custodian. (Ark. Code Ann. 9-27-314).

Where there is probable cause to believe that emergency order is necessary to protect juvenile from severe maltreatment (defined under Arkansas Code Annotated Ark. Code Ann. 12-12-503[16]) court shall issue ex parte order to provide appropriate safeguards for protection of juvenile. Where there is probable cause, court must issue ex parte order to provide appropriate safeguards for protection of juvenile if alleged offender has legal right to custody or visitation, has property right allowing access to juvenile's residence, or is juvenile. (Ark. Code Ann. 9-27-314).

When juvenile is taken into custody, officer must make every effort possible to notify custodial parent or guardian. Juveniles taken into custody on allegation of delinquency and not released shall be given hearing before Court as soon as possible, but in no event later than 72 hours (excluding weekends and holidays) of time juvenile was first taken into custody. (Ark. Code Ann. 9-27-313).

Court Reporters.

Official court reporters in this State are state employees. (Ark. Code Ann. 16-13-501). Court reporters are not liable, criminally or civilly, for unintentional loss, damage or destruction of their official records more than five years old. (Ark. Code Ann. 16-13-507). Transcript fees are set by statute. (Ark. Code Ann. 16-13-506). Director of Administrative Offices of Courts must establish program to make available use of interpreters (transliterators) in cases involving hearing-impaired and bilingual proceedings. (Ark. Code Ann. 16-10-127).

Appointment of Temporary Judge.

Litigants in any court, except in criminal causes, may stipulate to appointment of temporary judge licensed in Arkansas to practice law. (Ark. Code Ann. 16-10-115).

Filing by Facsimile.

If clerk's office has facsimile machine, clerk shall accept facsimile transmission of any paper to be filed and may charge fee of $1 per page. (Ark. R. Cir. Pro. 5[c][3]).

6.02 LEGISLATURE:

Meets starting at 12:00 p.m. on second Mon. of Jan. in odd years. (Ark. Code Ann. 10-2-101).

Special sessions may be called by Governor. (Const., art. 6, § 19).

Initiative and referendum are provided. (Const., amendment 7).

Lobbyists.

Registration and other filings with Secretary of State required within five days after beginning lobbying. (Ark. Code Ann. 21-8-601-607). Lobbyists must file quarterly reports within 15 days after each quarter, and monthly reports within ten days after end of each month in which General Assembly is in session. Lobbyist activity reports shall be open to public inspection. (Ark. Code Ann. 21-8-603).

Extended Session.

In Wells v. Riviere (269 Ark. 156, 599 S.W.2d 375), Arkansas Supreme Court cast doubt on validity of legislative actions taken in extended session (as distinct from extraordinary sessions pursuant to call from governor).

6.03 REPORTS:

Decisions of Supreme Court are reported in Arkansas Reports, beginning with Vol. 1. Decisions of Court of Appeals are reported in Arkansas Reports beginning with Vol. 272 and in Arkansas Appellate Reports beginning with Vol. 1. Arkansas decisions after Vol. 46 Arkansas Reports are also reported in Southwestern Reporter.

Digests are Crawford's Arkansas Digest, six volumes covering vols. 1-181 of reports, with 1938 supplement covering vols. 182-192; and West Pub. Co.'s Arkansas Digest, covering all cases and kept to date with pocket supplements.

6.04 STATUTES:

Official compilation prepared by Michie Company, under direction and supervision of Arkansas Code Revision Commission dated 1987, with pocket supplement, is currently in use.

Uniform Acts are currently adopted: Acknowledgment (1943); †Administrative Procedure (1981); †Adoption, Revised (1977); Anatomical Gift (2006); †Arbitration (1955); Athlete Agents (2001); Attendance of Witnesses from Without the State in Criminal Act (2000); Bus. Corp., Revised (1987); Child Custody Jurisdiction and Enforcement (1999); Classification and

Compensation (2003); Commercial Code (1961), 1972 Official Amendments (1973); Common Trust Fund (1947); †Conservation Easement (1983); Contribution Among Tortfeasors (1941); Controlled Substances (1990); Criminal Extradition (1935); Custodial Trust (1991); Declaratory Judgments (1953); Determination of Death (1985); Disclaimer of Property Interest (1981); Disposition of Community Property Rights at Death (1981); Unclaimed Property, Revised (1979); Division of Income for Tax Purposes (1961); †Durable Power of Attorney (1981); Electronic Transactions (2001); Enforcement of Foreign Judgments (1949); Estate Tax Apportionment (1982); Evidence, Rules of (1974) (*Caveat:* Passed in extended session. See topic 6.02 Legislature; adopted by Arkansas Supreme Court, 290 Ark. 100, 717 S.W.2d 488); Facsimile Signature of Public Officials (1959); Federal Lien Registration (1989); Fraudulent Transfer (1987); Insurers Liquidation (1959); Interstate and International Procedure (1963); Interstate Family Support (2001); Interstate Fresh Pursuit (1959); Intrastate Fresh Pursuit (1941); Law to Oppose Federal Encroachments on States Rights (1943); Limited Liability Company (1996); Limited Partnership (2001); Revised Limited Partnership of 1991 (1979); Machine Gun (1935); Management of Institutional Funds (1992); Military Justice, Code of (1969); †Model Penal Code (1962); Money Services (2000); Motor Vehicle Administration Certificate of Title and Antitheft (1949); Motor Vehicle Driver's License (1937); Motor Vehicle Operators' and Chauffeurs' License (1926); Motor Vehicle Safety Responsibility (1953); *Narcotic Drug (1937); *Amendment to Narcotic Drug (1959); Nonprofit Corporation, Revised (1987); Partnership (1997); Photographic Copies of Business and Public Records as Evidence (1953); Premarital Agreement (1987); Principal and Income (1997); Prudent Investor (1997); Real Estate Time-Share (1982); Registered Agents (2007); Regulating Traffic on Highways (1937); Rendition of Prisoners as Witnesses in Criminal Proceedings (1959); Rights of the Terminally Ill (1987); Sales and Use Tax Administration (2001); Securities (1956); Securities Ownership by Minors (1963); Simultaneous Death (2005); Special Power of Attorney for Small Property Interests (1965); State Subsidized Adoption (1975); State Vital Statistics (1907); Statutory Form Power of Attorney (1999); Testamentary Additions to Trusts (1960); Trade Secrets (1979); Transfer on Death Security Registration (1989); Transfers to Minors (1985); Trust Code (2005); Unauthorized Insurers (1939); Unclaimed Property (1995); Unincorporated Non Profit Association (2008); Vehicle Code (1926); Veteran's Guardianship (1929); Warehouse Receipts (1909).

†Adopted with significant variations or modifications. See appropriate topics.

*Uniform Controlled Substances Act largely supersedes these Acts.

Uniform Commercial Code adopted, effective Jan. 1, 1962. See category 3 Business Regulation and Commerce, topic 3.09 Commercial Code.

For text of Uniform Acts falling within the scope of the Martindale-Hubbell Law Digests see Uniform and Model Acts section.

6.05 UNIFORM LAWS:

For list of Uniform Acts in force in this state, see topic 6.04 Statutes. For text of Uniform Acts within the scope of the Martindale-Hubbell Law Digests, see Uniform and Model Acts section.

7 CRIMINAL LAW

7.00A BAIL:

See topic 7.01 Criminal Law.

7.01 CRIMINAL LAW:

Crimes are defined in Title 5, cc. 1-79 and procedure in Title 16, cc. 80-98 and

Arkansas Rules of Criminal Procedure, 1-38, adopted by Supreme Court rule, effective Jan. 1, 1976.

Indictment or Information.

All offenses required to be prosecuted by indictment may be prosecuted either by grand jury indictment or information filed by prosecuting attorney. (Const. Amend. 21, § 1).

Bail.

All cases are bailable except capital cases in which proof is evident or presumption great. (Const., Art. 2, § 8).

Sentence.

Length of sentence according to classification of offense is found in Ark. Code Ann. 5-4-401.

Fines.

Amounts are set forth according to classification of offense in Ark. Code Ann. 5-4-201.

Drug Paraphernalia.

It is illegal to conduct, finance, manage, supervise, direct or own any part of business that deals in drug devices. (Ark. Code Ann. 5-64-802).

Uniform Act for Out-of-State Parolee Supervision repealed 2001.

Uniform Act to Secure the Attendance of Witnesses from Without the State in Criminal Cases adopted. (Ark. Code Ann. 16-43-401 – 16-43-409).

Uniform Criminal Extradition Act adopted. (Ark. Code Ann. 16-94-201 – 16-94-231).

Uniform Controlled Substances Act, with certain modifications, in effect. (Ark. Code Ann. 5-64-101 – 5-64-510).

Uniform Rendition of Prisoners as Witnesses in Criminal Proceedings Act adopted. (Ark. Code Ann. 16-43-301 – 16-43-311).

8 DEBTOR AND CREDITOR

8.01 ASSIGNMENTS:

Revised Article 9 of Uniform Commercial Code applies. See category 3 Business Regulation and Commerce, topic 3.09 Commercial Code.

All bonds, bills, notes and agreements in writing for the payment of money or property are assignable. (Ark. Code Ann. 4-58-102). Assignments of rent are subject to rules of real property conveyancing. (87 B.R. 565).

Open Accounts.

Written assignments of accounts receivable or of money due on open accounts or contracts are valid, and are completed at time of making assignment. Upon completion and assuming good faith, no interest in account superior to that of assignee may thereafter be acquired from assignor. Payments by debtor without notice of assignment to one acquiring interest in account after assignment acquits debtor for amount of such payment and recipient of payments is liable as trustee to prior assignee. (Ark. Code Ann. 4-58-105).

Instrument Transferring Title.

Assignments of written instruments must be correctly dated. (Ark. Code Ann. 4-58-104). Blank assignments are taken as of date most favorable to defendant. (Ark. Code Ann. 4-58-104).

Judgments or causes of action after suit must be assigned by acknowledged instrument filed with court. (Ark. Code Ann. 16-65-120).

Leases.

Uniform Commercial Code applies to personal property finance leases. (Ark. Code Ann. 4-2A-101 et seq.).

Mortgages, deeds of trust and vendors liens may be assigned by written instrument, which, when acknowledged, may be recorded. (Ark. Code Ann. 18-40-109).

Assignment of wages to secure loan of less than $200 is not valid against employer until accepted by him in writing and filed, with the acceptance, with recorder of county of assignor's residence and assignment of wages by married man is invalid without wife's written consent. (Ark. Code Ann. 11-4-101).

Liability on Assigned Instrument.

Assignors or endorsers of written instruments for the payment of money are equally liable with the maker, and may be sued jointly or severally, provided they are given notice of nonpayment or of protest. (Ark. Code Ann. 4-58-108).

Consideration for assignment need not be set forth on assigned paper. (Ark. Code Ann. 4-58-103).

Assignments for benefit of creditors, to extent not superseded by Bankruptcy Code, controlled by Ark. Code Ann. 16-117-401 – 16-117-407. (184 Ark. 312, 42 S.W.2d 214).

8.02 ATTACHMENT:

Prejudgment attachments are no longer available remedy in Arkansas. Statutory provisions relating to prejudgment attachment in Arkansas (Ark. Code Ann. 16-110-101 through Ark. Code Ann. 16-110-309) were declared unconstitutional (296 Ark. 231, 755 S.W.2d 566).

8.03 [RESERVED]

8.04 CREDITORS' SUITS:

See topics 8.08 Fraudulent Sales and Conveyances, 8.05 Executions.

8.05 EXECUTIONS:

Execution may be issued on any final money judgment of a court of record (Ark. Code Ann. 16-66-101), and upon judgment of justice of peace court (Ark. Code Ann. 16-19-1001 et seq.).

Exemptions.

See topic 8.06 Exemptions.

Notice.

Requirements set forth in Ark. Code Ann. 16-66-104.

Time for Issuance.

Execution may issue after ten days from entry of judgment, and at any time until collection is barred by statute of limitations. (RCP 62; Ark. Code Ann. 16-66-103).

Stay.

On giving of bond with good security for amount of judgment, execution may be stayed for six months from date of judgment. (Ark. Code Ann. 16-66-303). Procedure does not apply to judgment against collecting officer or attorney or agent for failure to fulfill duties of his office or pay over moneys collected, or against principal by his surety, or judgment for specific property, or for enforcement of lien in favor of vendor or mortgagee, or for injuries resulting in death caused by neglect of another. (Ark. Code Ann. 16-66-302).

Stay on Appeal.

Upon giving of supersedeas bond, appellant may obtain stay while appeal is taken. (RCP 62[d]).

Lien.

An execution is a lien on property to which judgment extends from time of delivery of writ to officer in proper county to be executed. (Ark. Code Ann. 16-66-112).

Levy.

Any property, real or personal, not exempt, is liable to seizure under execution (Ark. Code Ann. 16-66-201). Property subject to prior lien is subject to execution and sale by making prior lienor party to process and satisfying prior lien out of proceeds of sale. (Ark. Code Ann. 16-66-203).

Indemnity.

If the officer doubts whether the personal property upon which he makes a levy is subject to execution, he may require of the plaintiff an indemnifying bond before proceeding to subject property to execution. (Ark. Code Ann. 16-66-405). If security was good when taken, officer is protected against action by claimant or purchaser of property. (Ark. Code Ann. 16-66-405).

1995 Amendment.

No officer shall require any agent of State of Arkansas, or any political subdivision thereof, to post indemnifying bond prior to execution on personal property. (Ark. Code Ann. 16-66-405).

Return on execution from court of record must be made in 60 days; on execution from justice court in 30 days. (Ark. Code Ann. 16-66-416; Ark. Code Ann. 16-19-1001).

Claims of Third Persons.

Claimants of personal property levied on may suspend sale by giving bond in double value of property, and have right tried. (Ark. Code Ann. 16-66-304).

Quashing.

Judge of court out of which execution issues may quash same on good cause therefor being shown. (Ark. Code Ann. 16-66-301).

Sale.

All property taken under execution may be disposed of by sale on the day advertised, between 9 :00 A. M. and 3 :00 P. M. at public auction to the highest bidder. (Ark. Code Ann. 16-66-409). Notice of time and place of sale must be advertised for at least 20 days. (Ark. Code Ann. 16-66-408). Except where defendant requests that sale be made on premises, it must be at court house door. (Ark. Code Ann. 16-66-409). If sale fails for want of bidder, officer may hold new sale at court house door or on the premises. (Ark. Code Ann. 16-66-409).

Redemption.

Any debtor, or his representative or his judgment creditor, may redeem real estate sold under execution within 12 months after date of sale by paying purchase price with 15% interest. (Ark. Code Ann. 16-66-502 – 16-66-504).

Supplementary proceedings for discovery in equity may be had after return of no property found. (Ark. Code Ann. 16-66-418). Discovery in aid of judgment or execution is also available in accordance with Rules of Civil Procedure. (RCP 69).

8.06 EXEMPTIONS:

Personal property, to be selected by debtor, not exceeding $500 for a resident of the state married or the head of a family, and $200 for an unmarried resident, and the wearing apparel of the debtor and his family, are exempt from process for collection of a debt founded on contract. (Const., art. 9, §§ 1-2).

Debts Against Which Exemptions Not Allowed.

No article is exempt as against claim for the purchase price thereof while title and possession are held by the vendee. (Const., art. 9, § 1; 48 Ark. 213, 2 S.W. 785).

Waiver of Exemptions.

Except in case of homestead (Ark. Code Ann. 16-66-211 - 212), failure to claim exemption or file schedule prior to execution sale is waiver of exemption. (203 Ark. 714, 158 S.W.2d 269).

Necessity of Claiming Exemption.

Debtor must file petition to claim any of exemptions provided by law (except homestead) specifying particular property claimed to be exempt within 20 days of receiving any writ of execution and statutory notice to defendant. Court to hold prompt hearing to determine validity of claimed exemptions. (Ark. Code Ann. 16-66-104). Within 45 days of entry of final judgment debtor shall prepare schedule, verified by affidavit, of all his property, both real and personal, including monies, bank accounts, rights, credits and choses in action held by himself or others for him, and specify particular property which he claims as exempt under provisions of law. (Ark. Code Ann. 16-66-221).

Wages of laborer for 60 days are exempt if such amount plus value of laborer’s owned personal property does not exceed constitutional exemption. (Const., art. 9, §§ 1-2; Ark. Code Ann. 16-66-208). First $25 per week of net wages of laborer is absolutely exempt without necessity of filing claim for exemption. (Ark. Code Ann. 16-66-208). See also topic 8.09 Garnishment.

Insurance Proceeds.

Former statute (Ark. Code Ann. 16-66-209) allowing exemptions for insurance proceeds was declared unconstitutional as applied to bankruptcy. (93 B.R. 181). (Applicability outside of bankruptcy is questionable.)

Homestead Exemption.

See topic 8.10 Homesteads.

8.07 FORECLOSURE:

See topic 8.13 Liens; category 20 Mortgages, topic 20.04 Mortgages of Real Property.

8.08 FRAUDULENT SALES AND CONVEYANCES:

Transfer made or obligation incurred by debtor is fraudulent as to present and future creditors if (i) debtor made transfer or incurred obligation with actual intent to hinder, delay, or defraud creditor or (ii) without receiving reasonably equivalent value in exchange for transfer or obligation and was engaged or about to engage in transaction for which debtor's remaining assets were unreasonably small or intended, believed or should have believed debtor would incur debts beyond his ability to pay. (Ark. Code Ann. 4-59-204). Defenses of transferee are found in Ark. Code Ann. 4-59-208.

Uniform Commercial Code adopted. (Ark. Code Ann. 4-3-202 – 4-3-203; Ark. Code Ann. 4-2-402 – 4-2-403; Ark. Code Ann. 4-2-702; Ark. Code Ann. 4-2-721).

Uniform Fraudulent Transfer Act adopted. (Ark. Code Ann. 4-59-201 – 4-59-213). Uniform Fraudulent Conveyance Act repealed by Ark. Code Ann. 4-59-213.

Remedies of Creditors.

Creditor may obtain avoidance of transfer to extent necessary to satisfy creditor's claim, attachment or other provisional remedy against asset transferred or other property of transferee, injunction, appointment of receiver, or other relief circumstances may require. (Ark. Code Ann. 4-59-207).

Bulk Sales.

Uniform Commercial Code bulk sales provisions repealed. (1991 Act 344). (Ark. Code Ann. 4-6-101).

8.09 GARNISHMENT:

Wage garnishments may continue until judgment and costs are paid and satisfied. (Ark. Code Ann. 16-110-415).

Salaries of employees of state and its subdivisions and institutions are subject to garnishment after judgment. (Ark. Code Ann. 16-110-413).

Wages of railroad employees cannot be garnished before judgment in an action for less than $200. (Ark. Code Ann. 16-110-414).

Earnings.

See also topic 8.06 Exemptions.

Issuance of Writ.

Writ of garnishment may issue from circuit court of one county to any other county in state. (Ark. Code Ann. 16-110-412). Circuit court shall attach to writ notice of defendant's right to keep certain money and wages despite garnishment. (Ark. Code Ann. 16-110-402).

Proceedings.

When the writ is issued the plaintiff must file any allegations and interrogatories for which plaintiff wishes to obtain answers, with clerk of court, directed to garnishee, concerning any goods, chattels, moneys, credits or effects which he may have belonging to defendant. (Ark. Code Ann. 16-110-403). If garnishee is employer, plaintiff must also serve garnishee with notice referring to exemptions under federal law, and priority of child support awards. (Ark. Code Ann. 16-110-416). Payor may withhold $2.50 in administrative costs from each paycheck for court-ordered withholdings. (Ark. Code Ann. 16-110-417). Garnishee must on return date file answer under oath. If garnishee neglects or refuses to answer interrogatories on or before 20 days after service of writ, court, upon motion of plaintiff, may issue notice to garnishee, requiring him to appear personally at hearing. After hearing and reviewing evidence and testimony of both parties, court may render judgment against garnishee in such amount, if any, as court finds garnishee held at time of service of writ, together with attorney's fees and costs. (Ark. Code Ann. 16-110-407).

8.10 HOMESTEADS:

A resident of the state, who is married or the head of a family, is entitled to an exemption of a homestead. Homestead must be owned and occupied as residence. (Const., art. 9, § 3, Ark. Code Ann. 16-66-210).

Limitation of Value.

The homestead may not exceed $2,500 in value, including improvements, except that in a city, town or village, at least one-quarter acre, and elsewhere at least 80 acres, may be held exempt regardless of value. (Const., art. 9, §§ 4-5, Ark. Code Ann. 16-66-210, 16-66-218).

Limitation of Area.

The homestead may not exceed, in area, one acre in city, town or village or 160 acres elsewhere. (Const., art. 9, §§ 4-5, Ark. Code Ann. 16-66-210). If homestead outside city, town or village is annexed or made part of city, town or village, may retain exemption as long as land remains rural in nature and has significant agricultural use. (Ark. Code Ann. 16-66-210). Corporate city, town or village limits do not control determination of whether property is urban or rural. Use of property and attributes of location are important considerations. (260 Ark. 735; 128 B.R. 224).

The exemption is not available against purchase money, taxes, laborers', mechanics' or other specific liens relating to homestead, or judgment for trust funds. (Const., art. 9, § 3, Ark. Code Ann. 16-66-210).

Alienation or Incumbrance.

A conveyance, mortgage or other instrument executed by spouse and affecting homestead, except purchase money mortgage, or other specified lien, is void unless other spouse joins therein, or conveys by separate document, and acknowledges it. (Ark. Code Ann. 18-12-403).

See category 21 Property, topic 21.06 Deeds, subhead Execution.

Proceeds of Sale.

Proceeds of voluntary sale of homestead are not exempt pending investment in another homestead, but surplus from forced sale to satisfy lien is exempt as long as intention to invest it in another homestead exists. (252 Ark. 701, 480 S.W.2d 567).

Rights of Surviving Spouse and Family.

If decedent and surviving spouse were continuously married to each other for over one year and surviving spouse has no separate homestead, he or she and children during minority succeed to rights of decedent, whether they reside on property or not. If surviving spouse dies, children retain right while minors. If children die, or when they become of age, surviving spouse has entire right. (Const., art. 9, § 6, Ark. Code Ann. 28-39-201).

8.11 JUDGMENT NOTES:

Not permitted.

8.12 LEVY:

See topics 8.02 Attachment, 8.05 Executions.

8.13 LIENS:

The following common law or statutory liens are recognized:

Agent paying taxes on principal's lands has lien for reimbursement. (Ark. Code Ann. 26-35-402).

Attachment Lien.

See topic 8.02 Attachment.

Attorney's Lien.

See category 18 Legal Profession, topic 18.01 Attorneys and Counselors.

Automobile repairmen have a lien upon vehicle for labor and materials. (Ark. Code Ann. 18-45-201). Enforceable, if possession retained, by sale after 30 days from completion of work. Demand by lienholder by registered letter and public notice are required. (Ark. Code Ann. 18-45-204). Notice and bond are required to be filed with justice of peace. (Ark. Code Ann. 18-45-205). If possession surrendered, repairman may file account with circuit clerk within 120 days after completion of work. (Ark. Code Ann. 18-45-206). This lien may be enforced by filing suit within 18 months after accounts are filed. (Ark. Code Ann. 18-45-207). Claimant may have specific attachment of property upon which lien is claimed by praying for it in complaint and providing bond as required by law for attachment. (Ark. Code Ann. 18-45-207).

Lien upon automobile for storage charges may be enforced, if possession of automobile is retained, by sale in the manner provided for liens of automobile repairmen. (Ark. Code Ann. 18-48-401 – 18-48-404).

Blacksmiths, horseshoers, wheelwrights, airplane repairmen, machine shops, farm implement repairmen, and automotive storagemen and firms and corporations who perform labor or furnish materials for others, have lien enforceable in same manner as automobile repairmen's lien, supra. (Ark. Code Ann. 18-45-201 – 18-45-207).

Chattel Mortgage Lien.

Uniform Commercial Code (Revised Article 9) applies.

Cleaners, dyers, laundries, tailors, hat renovators and shoe repairers have lien for labor and material, enforceable in similar manner as automobile repairmen's lien, except that property cannot be sold until 90 days after completion of work. (Ark. Code Ann. 18-45-401 – 18-45-405).

Collateral Security.

See topic 8.15 Pledges.

Cotton ginners have lien for charges on cotton and seed, enforceable by private sale after 30 days, or if possession has been surrendered, by suit within six months. (Ark. Code Ann. 18-48-505 – 18-48-506). Processors of other farm products have similar lien enforceable by private sale. (Ark. Code Ann. 18-48-501 – 18-48-504).

Doctors, dentists, nurses, hospitals, and ambulance services (or ambulance service providers) have lien on patient's cause of action for injury. Verified notice must be served on patient, tortfeasor and circuit clerk of county where services were or are being rendered. Lien expires in 180 days unless renewal notice is served and filed. When patient files suit lienholder may file claim in action and thereafter no renewal notices are required. Tortfeasor settling patient's claim without paying lienholder is liable for amount of lien or up to amount of settlement if less than lien. (Ark. Code Ann. 18-46-101 – 18-46-117).

Electrical equipment repairman has lien for labor and material, enforceable by sale after 90 days. If possession has been surrendered, lienholder may file itemized account with circuit clerk within 90 days after work or labor is performed and bring suit within 90 days after filing. Lien has priority over mortgage if, before commencing work, repairman gives notice to mortgagee by registered mail and no objection to work is made in ten days. (Ark. Code Ann. 18-45-301 – 18-45-305).

Engineers, architects, surveyors, appraisers, abstractors and title insurance agents performing work on land or building under contract with owner or agent have lien on property to extent of agreed or reasonable price for services. Lien does not attach until filed with Circuit Clerk of county in which property is located and is enforceable in same manner as mechanic's lien. (Ark. Code Ann. 18-44-105, 18-44-133).

Merchandise Liens.

Uniform Commercial Code applies. (Ark. Code Ann. 4-9-101, et seq.).

Execution Lien.

See topic 8.05 Executions.

Factor's Lien.

See category 3 Business Regulation and Commerce, topic 3.14 Factors.

Innkeeper's Lien.

The keeper of an inn, hotel, rooming house or boarding house has a lien on the baggage of his guests for his charges and for advancements up to $200. Baggage may be detained until debt is paid. (Ark. Code Ann. 20-26-305). Baggage can be sold after 90 days. Public notice is required. Notice must be mailed to guest.

Judgment Lien.

See category 5 Civil Actions and Procedure, topic 5.15 Judgments.

Laborers' Lien.

Laborers have a lien upon the product of their labor, effective from the time it is performed. Enforceable by suit within eight months. Laborer must make sworn statement before justice of peace or circuit clerk, determined by jurisdictional amount. Notice must be given to defendant. Sheriff or constable takes possession of product of labor at commencement of suit, and court may order its sale. Where labor was done on building, not exceeding two acres of surrounding land may be sold with building. (Ark. Code Ann. 18-43-101 – 18-43-117). Agricultural laborers, including cropdusters, also have laborer's lien. Agricultural laborer's liens must be filed in manner prescribed for materialmen's liens. (Ark. Code Ann. 18-43-118).

Laborer performing work on improvements upon land also has mechanic's lien; see subhead Mechanics' and Materialmen's Liens, infra.

Laborer performing work on oil or gas well, pipe line, quarry or mine has lien, enforceable in same way as mechanic's lien. (Ark. Code Ann. 18-44-201 – 18-44-211; Ark. Code Ann. 18-44-301 – 18-44-305).

Landlord's Lien.

See category 21 Property, topic 21.10 Landlord and Tenant.

Liens on Homestead.

See topic 8.10 Homesteads.

Liens on Exempt Property.

See topic 8.06 Exemptions.

Livery stable keeper has lien for his charges on stock left in his care, enforceable by public sale after 30 days notice to owner and publishing notice. (Ark. Code Ann. 18-48-101 – 18-48-102).

Mechanics' and Materialmen's Liens.

Every contractor, subcontractor, or material supplier who supplies labor, services, material, fixtures, engine, boiler, or machinery in construction or repair of improvement to real estate, or any boat or vessel of any kind, by virtue of contract with owner, proprietor, contractor or subcontractor, has lien upon improvement and up to one acre of land upon which improvement is situated, or to extent to any number of acres of land upon which work has been done or improvements erected or repaired. (Ark. Code Ann. 18-44-101). Lien applies only to interest or title of owner in said land, improvement, etc. (Ark. Code Ann. 18-44-102). Lien attaches to building or improvement in preference to any prior lien or mortgage upon land before said building or improvement was begun, unless prior lien or mortgage was given for purpose of raising funds for improvements. (Ark. Code Ann. 18-44-110). Liens for labor or material under this subchapter shall have equal priority toward each other from date construction or repair first commenced. (Ark. Code Ann. 18-44-110). Every person desiring to avail themselves of Act, must give ten days' notice of amount of labor performed or material furnished before filing of lien setting forth amount and from whom it is due. (Ark. Code Ann. 18-44-114). Service of notice may be by (any form of) mail, return receipt requested delivery restricted to addressee, or by person or officer authorized by law to serve process of civil actions, or means that provide written third party verification of delivery at any place where owner of building or improvement maintains office, conducts business, or resides. (Ark. Code Ann. 18-44-114). For residential real estate containing four or fewer units, suppliers of labor, materials, subcontractors, or other lien claimant acquire no lien pursuant to foregoing provisions unless, prior to furnishing of materials or labor, owner or his authorized agent receives by personal delivery or certified mail, following notice:

"IMPORTANT NOTICE TO OWNER

I UNDERSTAND THAT EACH CONTRACTOR, SUBCONTRACTOR, LABORER, SUPPLIER, ARCHITECT, ENGINEER, SURVEYOR, APPRAISER, LANDSCAPER, ABSTRACTOR, OR TITLE INSURANCE AGENT SUPPLYING LABOR, SERVICES, MATERIAL, OR FIXTURES IS ENTITLED TO A LIEN AGAINST THE PROPERTY IF NOT PAID

IN FULL FOR THE LABOR, SERVICES, MATERIALS, OR FIXTURES USED TO IMPROVE, CONSTRUCT, OR INSURE OR EXAMINE TITLE TO THE PROPERTY EVEN THOUGH THE FULL CONTRACT PRICE MAY HAVE BEEN PAID TO THE CONTRACTOR. I REALIZE THAT THIS LIEN CAN BE ENFORCED BY THE SALE OF THE PROPERTY IF NECESSARY. I AM ALSO AWARE THAT PAYMENT MAY BE WITHHELD TO THE CONTRACTOR IN THE AMOUNT OF THE COST OF ANY SERVICES, FIXTURES, MATERIALS, OR LABOR NOT PAID FOR. I KNOW THAT IT IS ADVISABLE TO, AND I MAY, REQUIRE THE CONTRACTOR TO FURNISH TO ME A TRUE AND CORRECT FULL LIST OF ALL SUPPLIERS AND SERVICE PROVIDERS UNDER THE CONTRACT, AND I MAY CHECK WITH THEM TO DETERMINE IF ALL MATERIALS, LABOR, FIXTURES, AND SERVICES FURNISHED FOR THE PROPERTY HAVE BEEN PAID FOR. I MAY ALSO REQUIRE THE CONTRACTOR TO PRESENT LIEN WAIVERS BY ALL SUPPLIERS AND SERVICE PROVIDERS, STATING THAT THEY HAVE BEEN PAID IN FULL FOR SUPPLIES AND SERVICES PROVIDED UNDER THE CONTRACT, BEFORE I PAY THE CONTRACTOR IN FULL. IF A SUPPLIER OR OTHER SERVICE PROVIDER HAS NOT BEEN PAID, I MAY PAY THE SUPPLIER OR OTHER SERVICE PROVIDER AND CONTRACTOR WITH A CHECK MADE PAYABLE TO THEM JOINTLY.

SIGNED:______________________

____

ADDRESS OF PROPERTY

DATE:________________

I HEREBY CERTIFY THAT THE SIGNATURE ABOVE IS THAT OF THE OWNER, REGISTERED AGENT OF THE OWNER, OR AUTHORIZED AGENT OF THE OWNER OF THE PROPERTY AT THE ADDRESS SET OUT ABOVE.

____

CONTRACTOR"

(Ark. Code Ann. 18-44-115).

Notice must be given exactly as stated, in all capital letters and boldface type. Notice may be incorporated into contract, or affixed thereto, and shall be conspicuous, set out exactly as above, in all capital letters and boldface type. Residential contractor has duty to give notice but other lien claimant may do so. Lien of lien claimant who relies upon lien notice of another lien claimant is prorated to provide lien only for labor and materials supplied after other lien claimant's notice was given. If residential contractor fails to give notice, then residential contractor is barred from bringing action either at law or in equity, including without limitation quantum meruit, to enforce any provision of residential contract. Contractors who fail to give required notice shall be guilty of violation and shall be punished by fine not exceeding $1,000. Notice warns owner of lien possibility and method of protection. Notice not required if bond supplied or if transaction is direct sale to property owner. Statute provides that advance notice requirement is condition precedent to imposition of material supplier's lien only for construction of or improvement to residential real estate containing four or fewer units. (Ark. Code Ann. 18-44-115).

For commercial real estate (and residential real estate containing five or more units), no subcontractor, material supplier, service provider, or laborer shall be entitled to lien unless subcontractor, material supplier, service provider, or laborer notifies owner, owner's registered agent, or owner's authorized agent of commercial real estate being improved, in writing, that such subcontractor, material supplier, service provider, or laborer is currently entitled to payment but has not been paid. Such notice shall be sent to owner, owner's registered agent, or owner's authorized agent and to contractor by (any form of) mail, return receipt requested delivery restricted return receipt requested delivery restricted to addressee, or by person or officer authorized by law to serve process of civil actions, or means that provide written third party verification of delivery at any place where owner, owner's registered agent or owner's authorized agent maintains office, conducts business, or resides before 75 days have elapsed from time that labor was supplied or materials furnished. Such notice shall contain general description of labor, service, or material furnished and amount due and unpaid, name and address of person furnishing labor, service, or materials, name of person who contracted for purchase of labor, service, or materials, description of job site sufficient for identification and following statement set out in bold face type and in all capital letters:

"IMPORTANT NOTICE TO OWNER

IF BILLS FOR LABOR, SERVICES, OR MATERIALS USED TO CONSTRUCT OR PROVIDE SERVICES FOR AN IMPROVEMENT TO REAL ESTATE ARE NOT PAID IN FULL, A CONSTRUCTION LIEN MAY BE PLACED AGAINST THE PROPERTY. THIS COULD RESULT IN THE LOSS, THROUGH FORECLOSURE PROCEEDINGS, OF ALL OR PART OF YOUR REAL ESTATE BEING IMPROVED. THIS MAY OCCUR EVEN THOUGH YOU HAVE PAID YOUR CONTRACTOR IN FULL. YOU MAY WISH TO PROTECT YOURSELF AGAINST THIS CONSEQUENCE BY PAYING THE ABOVE NAMED PROVIDER OF LABOR, SERVICES, OR MATERIALS DIRECTLY, OR MAKING YOUR CHECK PAYABLE TO THE ABOVE NAMED PROVIDER AND CONTRACTOR JOINTLY."

(Ark. Code Ann. 18-44-115).

Mechanic's and materialmen's lien filing must include affidavit of notice containing sworn statement evidencing compliance with applicable notice provisions of Arkansas Code §§ 18-44-114 to Ark. Code Ann. 18-44-116 and copy of each applicable notice given under §§ 18-44-114 to Ark. Code Ann. 18-44-116. (See Ark. Code Ann. 18-44-117.) Clerk must refuse to file lien account that does not contain required affidavits or attachments. (Ark. Code Ann. 18-44-117).

Notice of lien must be published if lien is filed after Aug. 13, 2001 and does not display name, address, and telephone number of lien holder and name of person authorized to release lien. (Ark. Code Ann. 18-1-101).

Contractor has duty to defend at own expense all actions liens filed by persons other than himself. (Ark. Code Ann. 18-44-124). Contractor who knowingly or willfully with purpose to defraud fails to apply payment to discharge of lienable indebtedness within ten days of final receipt of payment under contract subject to fine and/or imprisonment. (Ark. Code Ann. 18-44-132).

Churches and Charitable Institutions.

Action on bond for labor or materials supplied must be brought within six months of completion of improvement. If no bond is filed, lien attaches to property. Contractor must first furnish church or charitable organization bond equal to sum of contract if contract is greater than $1,000. (Ark. Code Ann. 18-44-504).

Public Works.

Highway construction and public building contractors must furnish bonds such as will protect subcontractors, laborers and material men if contract exceeds $20,000. Actions for claims on bond must be brought within 12 months from date final payment was approved on contract. (Ark. Code Ann. 18-44-503).

Criminal Penalty.

Exists for knowingly or willfully, with purpose to defraud,fails to pay supplier or subcontractor within 30 days of final receipt of payment. (Ark. Code Ann. 5-37-525).

Marina Operators.

Operator of marina facility has lien on property stored in leased space for rent, labor, or other related charges. (Ark. Code Ann. 18-48-702).

Miners have lien on output, machinery and tools for amounts due for work, enforceable in same manner as laborer's lien on production of his work. (Ark. Code Ann. 18-43-103).

Railroad Property.

Mechanics, contractors, sub-contractors, builders, artisans, workmen, laborers, supply men, and materialmen, who have helped toward the construction, equipment or operation of railroad, whether under contract with company, or with contractor or sub-contractor, and all persons who shall sustain loss or damage to person or property from a railroad, shall have a lien on said railroad superior, whether prior in time or not, to that of all persons interested as managers, lessees, mortgagees, trustees and beneficiaries under trusts or owners. Limitation on this lien is one year. (Ark. Code Ann. 18-44-401 – 18-44-403).

Real Estate Mortgage Lien.

See category 20 Mortgages, topic 20.04 Mortgages of Real Property.

Self-Service Storage.

See category 3 Business Regulation and Commerce, topic 3.27 Warehousemen.

Tax Lien.

Uniform Federal Lien Registration Act adopted. (Ark. Code Ann. 18-47-201-207). Also see category 22 Taxation, topic 22.18A Tax Liens, subhead Uniform Federal Lien Registration Act.

Redemption.

There is no right of redemption after sale under any of above liens, except mechanic's lien.

8.14 MECHANICS' LIENS:

See topic 8.13 Liens.

8.15 PLEDGES:

Covered by Uniform Commercial Code. (Ark. Code Ann. 4-8-306 and Ark. Code Ann. 4-9-101 – 4-9-709). Revised Article 9 adopted 2001.

8.16 RECEIVERS:

Courts of equity may appoint receivers for any lawful purpose whenever necessary and proper. Bond required. Reports required every six months or as required by court. Others may be employed by receiver on court approval. Good cause required for receiver removal. Court order required to dismiss action where receiver appointed. (RCP 66). Receiver pendente lite may be appointed. (Ark. Code Ann. 16-117-207).

8.17 REDEMPTION:

See topics 8.05 Executions, Liens; categories 20 Mortgages, topic Mortgages of Real

Property; Taxation, topic Property Taxes, subhead Redemption.

8.18 SUPPLEMENTARY PROCEEDINGS:

See topic 8.05 Executions.

8.19 TRUSTEE PROCESS:

See topic 8.09 Garnishment.

8.20 USURY:

See category 3 Business Regulation and Commerce, topic 3.17 Interest.

9 DISPUTE RESOLUTION

9.01 ALTERNATIVE DISPUTE RESOLUTION:

Mandatory Dispute Resolution.

Buyer of agricultural seed damaged by failure of seed to produce or perform as represented by labeling of agricultural seed must initiate arbitration proceeding against dealer within reasonable time after alleged defect or violation becomes apparent as prerequisite to maintaining legal action. (Ark. Code Ann. 2-23-101 – 2-23-110). Report of arbitration shall be binding upon parties to extent they have agreed in contract of sale or have so agreed prior to official filing of arbitration. (Ark. Code Ann. 2-23-107). In absence of agreement to be bound by arbitration, buyer may commence legal proceedings against seller or assert such claim as defense in action brought by seller at any time after receipt of report of arbitration. (Ark. Code Ann. 2-23-107).

Under Arkansas Farm Mediation Act, creditor with secured indebtedness of $20,000 or more may not commence proceeding against farmer to foreclose mortgage on agricultural property, to terminate contract for deed to purchase agricultural property, to repossess or foreclose security interest in agricultural property, to set off or seize account, moneys, or other asset which is agricultural property, or to enforce any judgment against agricultural property, without first obtaining release under Act. (Ark. Code Ann. 2-7-302). Prior to commencing such proceeding, creditor must serve notice on farmer that farmer may request mandatory mediation of farm indebtedness. (Ark. Code Ann. 2-7-303). Creditor may then obtain release from mediation upon request under Act if creditor has paid any required fees and (1) creditor has attended initial mediation meeting with farmer; (2) creditor has served mediation notice on farmer and farmer has not requested mediation within time allowed; (3) farmer has waived mediation; (4) agricultural property has been abandoned by farmer; (5) in discretion of Director of Division of Agriculture Development if default is other than monetary; (6) when court finds that mediation would be unduly burdensome and extreme hardship on creditor; or (7) upon failure of farmer to appear at scheduled mediation meeting. (Ark. Code Ann. 2-7-310).

Voluntary Dispute Resolution.

See also topic 9.02 Arbitration and Award. Act 673 of 1995 (Ark. Code Ann. 16-7-101-104) established Arkansas Alternative Dispute Resolution Commission to promote use of alternative dispute resolution (ADR). Commission has authority and responsibility to establish standards and regulations for certification, professional conduct, discipline, and training of persons serving as neutral parties in ADR; to develop recommended guidelines; to assist local courts and governmental agencies with development and implementation of ADR programs; to develop standardized forms for use in state and local courts for reference of cases to ADR; to establish fees to be levied by courts, governmental and other agencies and paid by parties utilizing ADR processes; and to collect fees for tuition and registration of educational programs and assist in maintaining roster of third-party neutrals. (Ark. Code Ann. 16-7-104).

9.02 ARBITRATION AND AWARD:

Uniform Arbitration Act adopted with modifications. (Ark. Code Ann. 16-108-201 – 16-108-224). Act specifically excludes applicability to personal injury or tort matters, employer-employee disputes, and insured or beneficiary under insurance policy or annuity contract. (Ark. Code Ann. 16-108-201[b]). Exclusion does not apply to written agreement to submit existing controversy to arbitration. (Ark. Code Ann. 16-108-201[a]).

Arkansas Alternative Dispute Resolution Commission.

Commission established to promote and create uniform regulations for alternative dispute resolution. (Ark. Code Ann. 16-7-102).

Prior Laws.

As Uniform Arbitration Act is optional and limited in scope and does not supersede nonconflicting prior laws nor apply retroactively, following material is still of interest:

Parties may submit all controversies, which might be the subject of a suit, for arbitration by rule of court having jurisdiction of the subject matter, or by consent in vacation. (Ark. Code Ann. 16-108-102).

Arbitrators.

Controversies may be submitted to one or more arbitrators or to two arbitrators and their umpire. (Ark. Code Ann. 16-108-102).

Requisites of Submission.

Where no suit is pending, a written agreement stating the matter submitted must be filed and noted on the court record. (Ark. Code Ann. 16-108-102).

Proceedings and Award.

Rule of court must state the time in which the award shall be made, but this time may be enlarged. (Ark. Code Ann. 16-108-102). Arbitrators meet on notice and hear evidence adduced by either party, and make their award in writing, stating therein time it was made, and sign same. One copy is delivered to each contending party and original returned to court, entered of record and made judgment or decree of court, unless on exceptions filed, award is set aside. (Ark. Code Ann. 16-108-107). Every reasonable presumption is in favor of award. (76 Ark. 153, 88 S.W. 915).

Unless the illegality of the decision of the arbitrators appears upon the face of the award, the court will not set it aside on the ground that they mistook the law or decided contrary to the rules of established practice. (44 Ark. 166).

Ark. Code Ann. §§ 16-7-201-205 require courts, state and local officers and agencies, and governments to encourage use of dispute resolution processes as alternatives to litigation and recommends that attorneys do likewise. Ark. Code Ann. § 16-7-206 also makes communications by participants in dispute resolution process confidential. Ark. Code Ann. § 16-7-207 relieves impartial third parties administering or participating in ADR process from liability for civil damages in absence of willful or wanton misconduct.

10 DOCUMENTS AND RECORDS

10.01 ACKNOWLEDGMENTS:

Uniform Acknowledgment Act (not Acknowledgments Act) has been adopted. (Ark. Code Ann. 16-47-201 – 16-47-218). Act provides alternative system for acknowledging instruments, supplemental to other state laws governing acknowledgments. (Ark. Code Ann. 16-47-201). § 16-47-211 concerns validation of unauthenticated writings affecting title to property recorded or executed prior to July 19, 1971.

Within State.

See Ark. Code Ann. 16-47-103 and 16-47-203 for officers who may take acknowledgments. Employment contracts for periods longer than one year must be acknowledged to be enforceable in Ark. Code Ann. 18-42-101.

Outside State but Within U.S.

See Ark. Code Ann. 16-47-103 and 16-47-203 for officers who may take acknowledgments.

Outside U.S.

See Ark. Code Ann. 16-47-103 and 16-47-204 for officers who may take acknowledgments.

Persons in or with U.S. Armed Forces.

See Ark. Code Ann. 16-47-109 validating all acknowledgments of Armed Forces personnel prior to Mar. 20, 1945, and also Ark. Code Ann. 16-47-213 which is § 11 of Uniform Acknowledgment Act.

General Requirements as to Taking.

No special requirements. Officer taking acknowledgment shall know or have satisfactory evidence that person making acknowledgment is person described in and who executed instrument. (Ark. Code Ann. 16-47-106 and 16-47-205).

General Requirements of Certificate.

Certificate of acknowledging officer shall be completed by signature, official seal if applicable, title of office and date commission expires if officer is Notary Public. (Ark. Code Ann. 16-47-208). Failure of Notary Public to state date commission expires does not invalidate acknowledgment. (Ark. Code Ann. 21-14-108).

Married Persons.

No special requirements. Acknowledgment of married person may be made in same form as if he or she were sole, without any examination separate and apart from spouse and without necessity for specific reference to interest conveyed or relinquished. (Ark. Code Ann. 16-47-102).

Corporations.

No special requirements. Statute contains form for acknowledgment by corporation of instruments affecting or purporting to affect title to real estate situated in this state. (Ark. Code Ann. 16-47-107).

Foreign Acknowledgments.

Acknowledgment which is valid where taken in state, territory or possession of U.S. or in District of Columbia, or Philippine Islands is valid in Arkansas. (Ark. Code Ann. 16-47-210).

Effect of Acknowledgment.

Instruments affecting real estate must be proven or acknowledged to be filed of record and when recorded may be read in evidence without further proof. (Ark. Code Ann. 16-47-101 and 16-47-110; Ark. Code Ann. 18-12-201 and 18-12-209). Such instruments are conclusive, but may be rebutted. (Ark. Code Ann. 16-47-110). But defective acknowledgment does not affect validity of mortgage as between makers. (304 Ark. 143, 801 S.W.2d 36).

Proof by Subscribing Witness.

Writings affecting real estate may be proved by affidavit of one or more of subscribing witnesses to court or officer stating that witness saw grantor sign instrument or heard grantor acknowledge instrument and stating that witness subscribed instrument at grantor's request. (Ark. Code Ann. 16-47-106 and Ark. Code Ann. 18-12-206). If witnesses are dead or cannot be had, handwriting of grantor and of at least one subscribing witness may be proved by two or more disinterested persons swearing to each signature. (Ark. Code Ann. 16-47-106 and Ark. Code Ann. 18-12-206).

Authentication.

See § 9 of Uniform Acknowledgment Act. (Ark. Code Ann. 16-47-209).

Forms.

See § 7 of Uniform Acknowledgment Act. (Ark. Code Ann. 16-47-207).

Any form of acknowledgment is sufficient which shows state and county or other place where it was taken, sets out name of person acknowledging and, if he or she acknowledges otherwise than in his or her own right name of entity for whom or which he or she acknowledges and shows that he or she acknowledged execution of instrument. (Ark. Code Ann. 16-47-102).

Certificate of proof by subscribing witnesses may be in the following form or like effect (Ark. Code Ann. 16-47-106):

State of . ., County of . . Be it remembered that on this day came before me, a notary public in and for said county and state, . . one of the subscribing witnesses to the foregoing deed, to me personally well known, who being by me first duly sworn, stated that he saw . . the grantor in said deed, subscribe the same on the day of its date (or that he acknowledged in his presence on the . . day of . ., 20. ., that he had executed said deed for the consideration and purposes therein contained) and that he and . . the other subscribing witness subscribed said deed as attesting witnesses at the request of said grantor. In testimony whereof, I have hereunto set my hand and seal of office on this . . day of . ., 20. . .

(Signature and Title)

Proof of handwriting of grantor and subscribing witness may be in the following form or like effect. (Ark. Code Ann. 16-47-106):

State of . ., County of . . Be it remembered that on this . . day of . ., 20. ., came before me, a notary public in and for said county and state, . . and . . and upon their oaths stated that the signatures of . . the grantor in the foregoing deed, and of . . a witness thereto, are genuine, and are in the handwriting of said . . and . . respectively.

In testimony whereof I have hereunto set my hand and seal of office, on this . . day of . ., 20. . .

(Signature and title).

Validating Acts.

Acknowledgments made subsequent to enactment of Ark. Code Ann. 16-47-203, 16-47-209 and 16-47-218 in accordance with Uniform Acknowledgment Act are validated. (Ark. Code Ann. 16-47-217 and -218). Instruments recorded or executed prior to July 19, 1971 which are defective due to lack of authentication required by Ark. Code Ann. 16-47-209 and 16-47-210 are validated. (Ark. Code Ann. 16-47-211). Acknowledgments taken before Mar. 20, 1945 by officers of U.S. Armed Forces acknowledging signature of soldiers are validated in every respect. (Ark. Code Ann. 16-47-109).

Alternative to Acknowledgment or Proof.

No statutory provision.

10.02 AFFIDAVITS:

Within the State.

May be made within state before judge of a court, justice of the peace, notary public, clerk of a court, or mayor of a city or incorporated town. (Ark. Code Ann. 16-45-102).

Outside of the State.

May be made before a commissioner appointed by the Governor of Arkansas to take depositions, judge of a court, mayor of a city, notary public or justice of the peace, whose certificate is proof of the time and manner of its being made. (Ark. Code Ann. 16-45-102).

Persons in armed services of the U. S. may make oath to any affidavit before any commissioned officer of any branch of the services, who must show rank, branch of service, outfit and place where made, if permissible, in certificate. (Ark. Code Ann. 16-2-104).

Requisites.

Every affidavit must be subscribed by affiant, and certificate of officer before whom it is made must follow the signature of affiant. (Ark. Code Ann. 16-45-103).

Use of Affidavit.

May be read into evidence to verify pleadings; to prove service of process; to obtain provisional remedy, stay of proceedings, or warning order; and to establish account. (Ark. Code Ann. 16-45-101 – 16-45-104).

Alternative to Affidavit.

No statutory authority.

Form

Usual form of jurat: Subscribed and sworn to before me this . . day of . ., 20. . .

10.03 NOTARIES PUBLIC:

Qualification.

Notary must be 18 years of age, employed in Arkansas, literate in English, and file $7,500 surety bond or contract in office of circuit clerk of county of his residence or county where employed in case of resident of adjoining state. (Ark. Code Ann. 21-14-101).

Authentication.

See topic 10.01 Acknowledgments, subhead Authentication.

Seal.

Notary must provide a seal. (Ark. Code Ann. 21-14-107). Facsimile signature and seal of notary public is allowed on commercial documents if notary makes filing with Secretary of State. (Ark. Code Ann. 21-14-201 – 21-14-205).

Powers include administration of oaths, taking of acknowledgments, making declarations and protests, and supervising making of photocopy of original document and attesting that document is copy if document is neither vital record or public record if copy can be made by custodian of public record. (Ark. Code Ann. 21-14-105 – 21-14-106). It is unlawful for notary to acknowledge instrument executed by or to bank or other corporation of which he is stockholder, director, officer, or employee, if notary is party to instrument, individually or as representative of corporation, or to protest negotiable instrument owned or held for collection by such corporation if notary is individually party to instrument. (Ark. Code Ann. 21-14-109).

Territorial Extent of Powers.

Authority to administer oaths and take affidavits and acknowledgments is coextensive with state (Ark. Code Ann. 21-14-104), but office is vacated and powers terminate if notary ceases to be resident of county for which appointed (156 Ark. 216, 245 S.W. 498).

Expiration of Commission.

Date on which commission expires should be stated in certificate, but its omission does not invalidate action of notary. (Ark. Code Ann. 21-14-108).

Fees.

For protest, $5; for notice of protest, $5; for any other certificate, $5. Notary Public who knowingly charges, demands or receives any greater fees is guilty of misdemeanor and can be fined not less than $100 for each offense. (Ark. Code Ann. 21-6-309).

Uniform Acknowledgment Act, as amended by the Conference in 1942, by adding § 11 providing for acknowledgments by persons in the U. S. Armed Forces, has been adopted. (Ark. Code Ann. 16-47-213). See also topic 10.01 Acknowledgments.

10.04 RECORDS:

Circuit clerk of each county is ex-officio recorder. (Ark. Const., Art. 7, § 19).

Necessity for Recording.

Any conveyance affecting the title to real estate must be acknowledged and filed for record in the circuit clerk’s office of county in which real estate is situated, in order to constitute notice to third persons. (Ark. Code Ann. 14-15-404). Such documents may be filed under Uniform Real Property Electronic Recording Act, found at Ark. Code Ann. 14-2-301. (Ark. Code Ann. 14-15-404). *For list of Counties and County Seats see first page for this state in Volume containing Practice Profiles* Section. *Note:* Some counties have two county seats with separate jurisdictions.

Each instrument affecting title to real estate must be accompanied by transfer tax affidavit, must have proper amount of revenue stamps affixed (Ark. Code Ann. 26-60-107) and must bear notation substantially as follows: “This instrument was prepared by . . . ., ... (name) (address)” (Ark. Code Ann. 14-15-403). See also category 22 Taxation, topic 22.18 Stamp and Seal Taxes, subhead Stamp Tax.

Recording of instrument without notation is notice, but one paying recording fees may recover them from Recorder within six months from filing. (Ark. Code Ann. 14-15-403).

Recording Fees.

Instruments to be recorded should be forwarded to circuit clerk of proper county with check in amount of recording costs or request to remit bill for proper amount. Recorder may insist upon payment of recording costs before filing instrument. Fees for most recorded instruments are $15 for first page (one side only) and $5 for each additional page. Costs should be confirmed with county clerk prior to recording. (Ark. Code Ann. 21-6-306).

See also categories 20 Mortgages, topic Mortgages of Real Property; Property, topic Deeds.

Filing Under Commercial Code.—Place; Fees.

Proper place of filing in order to perfect security interest under Art. 9 of Commercial Code (2001 Official Amendments) is as follows: (a) Except as otherwise provided in subsection (b), if local law of this State governs perfection of security interest or agricultural lien, office in which to file financing statement to perfect security interest or agricultural lien is: (1) office designated for filing or recording of record of mortgage on related real property, if: (A) collateral is as-extracted collateral or timber to be cut, or (B) financing statement is filed as fixture filing and collateral is goods that are or are to become fixtures; or through midnight Dec. 31, 2012, (2) office of circuit clerk in county in which debtor is located in this state if debtor is engaged in farming operations and collateral is farm-stored commodity financed by loan through commodity credit corporation or United States Department of Agriculture; or (3) Office of Secretary of State, in all other cases, including case in which collateral is goods that are or are to become fixtures and financing statement is not filed as fixture filing. (b) Office in which to file financing statement to perfect security interest in collateral, including fixtures, of transmitting utility is office of Secretary of State. Financing statement also constitutes fixture filing as to collateral indicated in financing statement which is or is to become fixture. (Ark. Code Ann. 4-9-501).

Fees for filing and indexing record, whether by paper or electronically, other than record of mortgage which is effective as financing statement filed as fixture filing or as financing statement covering as-extracted collateral or timber to be cut, follow. From July 1, 2001 through June 30, 2015, fee for filing and indexing initial financing statement and termination statements for records filed only with Secretary of State (pursuant to Ark. Code Ann. 4-9-501[a][3]) is $16. On or after July 1, 2015 aforementioned fee is $12. Fee for filing and indexing initial financing statements and termination statements, if record consists of one page, for records filed with Circuit Clerks (pursuant to Ark. Code Ann. 4-9-501[a][2]) is $12. Fee for filing records consisting of more than one page is 50¢ per page up to maximum of $100. (Ark. Code Ann. 4-9-525[a][3]).

Fee for filing continuation is $6. Fee for filing termination statement is $6 if it pertains to filing of financing statement before July 28, 1995. Fee for each separate search is $6. Fee for filing assignment is $6. Fee for filing release is $6. Fee for filing amendment is $6. (Ark. Code Ann. 4-9-525[b]).

Filing of statement pertaining to security interest of entity primarily engaged in railroad or street railway business, furnishing telephone or telegraph service, transmission of oil, gas or petroleum products by pipeline, or production transmission or distribution of electricity, steam, gas, or water, in personal property or fixture is in office of Secretary of State and no real estate description is required if goods are to become fixtures, or for security interest in rolling stock, perfection may be as prescribed in § 20(c) of Interstate Commerce Act or under Commercial Code with Secretary of State, and remains effective until terminated without filing continuation statement. (Ark. Code Ann. 4-19-102 – 4-19-104, Ark. Code Ann. 4-9-515). Mailing address of

Secretary of State is: Secretary of State, State Capitol, Room 256, Attention: UCC, Little Rock, Arkansas 72201.

Admissibility in Evidence.

Certified copy of duly acknowledged or proved recorded instrument is admissible on showing that original is lost or not within control of party offering copy. (Ark. Code Ann. 16-47-110, Ark. Code Ann. 18-12-209).

Transfer of Decedent's Title.

Arkansas has no system for determining ownership of real property transferred by death of former owner. Ordinarily it is established by affidavit, though there is occasional litigation which settles matter. Certified copy of decedent's will should be recorded in office of recorder in each county other than county of probate in which real property is situated. (Ark. Code Ann. 28-40-123). Ark. Code Ann. 28-49-101 governs property in hands of personal representative.

Vital Statistics.

Certificates of birth, deaths, fetal deaths, induced terminations of pregnancy, marriage, annulment and divorce must be registered by State Registrar of Vital Records, Arkansas Department of Health, 4815 West Markham, Little Rock, AR. 72205. (Ark. Code Ann. 20-18-201 – 20-18-604).

Establishing Birth Records.

Birth records of Division of Vital Records begin Feb. 1, 1914.

Record of birth, one year or more after date of birth, may be established by filing certificate in accordance with regulation of State Board of Health (Ark. Code Ann. 20-18-402) and if rejected petition to establish date of birth may be filed with court of competent jurisdiction. If court finds petitioner was born in state it must issue order, which order must be registered by State Registrar and constitutes birth certificate. (Ark. Code Ann. 20-18-403).

Fee is $4 for death certificate ($1 for each additional copy) and $5 for all other searches and certificates. (Ark. Code Ann. 20-7-123). No charge made to veterans or their dependents when certified copies are required by Veterans Administration. (Ark. Code Ann. 20-18-306).

10.05 SEALS:

Certain state officers are required to have a seal of office. (Ark. Code Ann. 1-4-108). Use of private seals has been abolished and they are not necessary on any instrument. (Const., Schedule § 1; 32 Ark. 410).

Corporate Seals.

Seals may be used by corporation. (Ark. Code Ann. 4-26-204).

Effect of Seal.

Uniform Commercial Code applies. (Ark. Code Ann. 4-2-203).

10.06 TORRENS ACT:

Not adopted.

10.07 VITAL STATISTICS:

See topic 10.04 Records.

11 EMPLOYMENT

11.01 EMPLOYER AND EMPLOYEE:

See topic 11.02 Labor Relations.

11.02 LABOR RELATIONS:

Department of Labor's purpose is to foster, promote, and develop welfare of wage earners of state, improve their working conditions, and advance their opportunities for profitable employment. (Ark. Code Ann. 11-2-101).

Board of Health shall issue regulations controlling health hazards. (Ark. Code Ann. 11-5-205).

Hours of Labor.

It is unlawful for railroads to permit telegraph dispatcher or telephone operators engaged in handling of trains to remain on duty more than eight hours in any 24 consecutive hours. (Ark. Code Ann. 23-12-510).

See also infra, subheads Child Labor, Female Labor.

Wages must be paid in money and not in goods, penalties being provided for noncompliance. (Ark. Code Ann. 11-4-403 – 11-4-404). Employer may not discriminate in payment of wages as between sexes for comparable work. (Ark. Code Ann. 11-4-610). Employer who discriminates on basis of sex guilty of Class C misdemeanor. (Ark. Code Ann. 11-4-601). Corporations must pay wages at least semi-monthly, unless narrow exception is satisfied, penalties being provided for noncompliance. (Ark. Code Ann. 11-4-401).

Minimum wage is $6.25. (Ark. Code Ann. 11-4-210). Students may work up to 20 hours per week in school year, and 40 hours per week when school is not in session and receive 85% of applicable wage. (Ark. Code Ann. 11-4-210). For employees engaged in occupation where gratuities are customary, employee must not be paid less than $3.62 per hour, provided gratuities bring total compensation to minimum wage. (Ark. Code Ann. 11-4-212). Where furnished, additional allowance of 30¢ per hour may be made for reasonable value of board, lodging or apparel. (Ark. Code Ann. 11-4-213). Special regulations may be made for handicapped workers and for learners, apprentices, and full-time students. (Ark. Code Ann. 11-4-214 - 11-4-215). Employers must maintain records and, post notice of law, and they are subject to penalties for violation. (Ark. Code Ann. 11-4-206, 11-4-216, 11-4-217).

Not less than minimum prevailing rate of wages for work of similar character in county in which work is performed must be paid in construction of public works. (Ark. Code Ann. 22-9-301).

Workweek longer than 40 hours prohibited unless employee paid one and one-half times regular rate of pay. Certain specific workers are exempt from overtime provisions. (Ark. Code Ann. 11-4-211).

As to assignment of wages, see category 8 Debtor and Creditor, topic 8.01 Assignments.

Child Labor.

Children under 14 may not be employed in remunerative occupations except during school vacations and then only by parents or guardians or in occupations controlled by them (Ark.

Code Ann. 11-6-104). Children under 16 may not be employed in following occupations: Those dangerous to life and limbs or injurious to health or morals; those in any place where alcohol of any kind is sold or dispensed (Ark. Code Ann. 11-6-105); those upon stage of any theater in connection with theatrical performance, exhibition or show, except when child and parent or guardian perform together. No child shall be employed who has not passed four yearly grades in public school or equivalent thereof (Ark. Code Ann. 11-6-106). No child under 16 may be employed in following occupations: (1) In, about, or in connection with any processes in which dangerous or poisonous acids or gases or other chemicals are used; (2) in soldering; (3) in occupations causing dust in injurious quantities; (4) in scaffolding; (5) in heavy work in building trades; (6) in any tunnel or excavation; (7) in any mine, coal breaker, coke oven, or quarry; (8) in any pool or billiard room; (9) adjusting any belt to machinery; (10) sewing or lacing machine belts in any workshop; (11) oiling or cleaning machinery; (12) operating circular or band saws, wood shapers, wood jointers, planers, sandpaper, or other kindred employments; (13) in proximity to any hazardous or unguarded belt, machinery, or gearing; (14) upon any railroad. (Ark. Code Ann. 11-6-106 - 11-6-107). No child under 16 may be permitted to work more than six days a week, more than 48 hours a week, more than eight hours a day, or earlier than 6 a.m. or later than 7 p.m., except on nights preceding nonschool days to 9 P.M. (Ark. Code Ann. 11-6-108). No child under 18 may be permitted to work more than six days a week, more than 54 hours a week, more than ten consecutive hours in any one day, before 6 a.m. after 11 p.m., except on nights preceding nonschool days in certain sufficiently safe occupations. (Ark. Code Ann. 11-6-110). These restrictions are not applicable to person who is graduate of high school, vocational, or technical school, or is married or is parent. (Ark. Code Ann. 11-6-102). Except for provisions relating to hours of employment, Act does not apply to employee employed in agriculture outside of school hours of school district where such employee is living while employed, if such employee is at least 14 years of age. (Ark. Code Ann. 11-6-114). Act generally does not apply to any child employed for domestic labor, or any occasional, irregular, or incidental work related to or around private residences, including babysitting, pet sitting, similar household chores, and manual yard work. (Ark. Code Ann. 11-6-115). Act also does not apply to child care services in connection with church services or functions. (Ark. Code Ann. 11-6-115). Act does not apply to minors acting as sports officials under certain circumstances. (Ark. Code Ann. 11-6-116). See also category 19 Mineral, Water and Fishing Rights, topic 19.01 Mines and Minerals.

Civil penalty per violation: Not less than $50 and not more than $1,000. (Ark. Code Ann. 11-6-103).

Female Labor.

Arkansas Civil Rights Act prohibits discrimination based on gender. (Ark. Code Ann. 16-123-101 – 16-123-108).

See also category 19 Mineral, Water and Fishing Rights, topic 19.01 Mines and Minerals.

Hospital Facilities.

Railroad must provide hospital facilities within the state where hospital dues are collected. (Ark. Code Ann. 23-12-508).

Jury Duty.

Employer may not penalize employee serving on grand or petit jury. (Ark. Code Ann. 16-31-106).

Labor Unions.

No person may be denied employment because of membership in or failure or refusal to join a labor union, nor be compelled to pay union dues as a condition to continued employment.

(Ark. Code Ann. 11-3-303).

Foreign labor agent, before entering state to take any labor out of state, must obtain license from Director of Department of Labor. (Ark. Code Ann. 11-11-101).

Employer's Liability.

The fellow servant rule is abolished as to all corporations (Ark. Code Ann. 11-8-103), all railroad companies operating in the state whether or not incorporated (Ark. Code Ann. 23-12-503) and all companies engaged in mining of coal whether or not incorporated (Ark. Code Ann. 11-8-109), but not as to partnerships (143 Ark. 390, 220 S.W. 479).

The doctrines of assumption of risk and of contributory negligence do not apply in case of violation by a corporation or a common carrier of law enacted for safety of employees. (Ark. Code Ann. 23-12-505 – 23-12-506; Ark. Code Ann. 11-8-104 – 11-8-105).

In an action against a corporation for injury to or death of an employee, contributory negligence is not a bar but may reduce damages. (Ark. Code Ann. 11-8-104).

Note: Above provisions superseded by Arkansas Workers Compensation Law for employees coming within that Act. (Ark. Code Ann. 11-9-101 – 11-9-1001).

Blacklisting is prohibited. (Ark. Code Ann. 11-3-202).

Mediation.

Arkansas Mediation and Conciliation Service Nondisclosure Act guarantees confidentiality of information disclosed to Arkansas Mediation and Conciliation Service of State Department of Labor. (Ark. Code Ann. 11-2-204).

Workers' Compensation Law (Ark. Code Ann. 11-9-101 – 11-9-1001) is administered by Workers' Compensation Commission, Justice Building, Little Rock, AR 72201. Act 796 of 1993 effected significant changes to workers' compensation statutes.

Act applies to all employers employing three or more persons, except domestic service, gardening, maintenance, repair, remodeling, or similar work in or about private home of employer, agricultural farm labor, state and its subdivisions (with limited exceptions), person for whom rule of liability for injury or death in course of employment is provided by federal law, charities, persons selling or distributing newspapers, magazines, or periodicals, and person who is both licensee under Ark. Code Ann. 17-42-103(10) and qualified real estate agent under 3508(b)(1) of Internal Revenue Code of 1986 as amended. Act also applies to building contractors employing two or more persons, subcontractors employing one or more employees, and contractors who subcontract having one or more employees. (Ark. Code Ann. 11-9-102).

Insurance.

Employers subject to Act must carry insurance or be self-insured. (Ark. Code Ann. 11-9-404). If application for insurance is rejected, Insurance Commissioner shall designate insurance carrier who must issue policy. (Ark. Code Ann. 23-67-304, 23-67-305). Employer may become self-insurer with consent of Commission. (Ark. Code Ann. 11-9-404). Two or more employers engaged in same type of business activity or pursuit may pool liabilities to qualify as self-insurers and for other purposes. (Ark. Code Ann. 11-9-404). License fee of $100 is required for qualification as self-insurer, and employer must pay tax annually to Commission not to exceed 3% of amount which would otherwise have been required for insurance premiums. (Ark. Code Ann. 11-9-302, 11-9-303, 11-9-306).

License fee of $500 is required for qualification as insurance carrier, and annual tax to be fixed by Commission at not over 3% of all premiums received must be paid to Commission by Apr. 1 of following year. (Ark. Code Ann. 11-9-302-303-306).

Compensation is provided for various injuries and for total and partial disability, including disability resulting from occupational diseases, as defined with qualifications. (Ark. Code Ann. 11-9-501, 11-9-601, 11-9-602). Weekly payments not to exceed 662/3% of employee's average weekly wage, with $20 per week minimum and subject to following maximums: (A) For death or disability occurring July 1, 1987 through Dec. 31, 1988, maximum is $189; (B) for death or disability occurring during 1989, maximum shall be 662/3% of state average weekly wage; (C) for death or disability occurring on or after Jan. 1, 1990 maximum shall be 70% of state average weekly wage; (D) for death or disability occurring on or after Jan. 1, 1996, maximum shall be 85% of state average weekly rate, if certain conditions are met; (E) after Jan. 1, 1994, weekly benefit rate shall be rounded to nearest whole dollar. (Ark. Code Ann. 11-9-501). Benefits may be paid for up to 450 weeks. (Ark. Code Ann. 11-9-502). Maximum limitations of time do not apply to cases of permanent total disability or death. (Ark. Code Ann. 11-9-502). Benefits are not assignable or subject to attachment except for child support and monies retained by Department of Correction under Ark. Code Ann. 12-30-406. (Ark. Code Ann. 11-9-110). Death benefits are payable to dependents. (Ark. Code Ann. 11-9-527). First $75,000 of weekly benefits for death or permanent total disability for injuries occurring on or after Mar. 1, 1981, but before Dec. 31, 2007, is paid by employer or insurer. (Ark. Code Ann. 11-9-502). For injuries occurring after Jan. 1, 2008, employer or insurer must pay not more than 325 times of disability rate set by law. (Ark. Code Ann. 11-9-502). All benefits in excess of $75,000 payable from Death and Permanent Total Disability Trust Fund. (Ark. Code Ann. 11-9-502). Reimbursement for medical and hospital expenses is required (Ark. Code Ann. 11-9-508 – 11-9-517), as are funeral expenses not exceeding $6,000 if death occurred on or after July 1, 1993 (Ark. Code Ann. 11-9-527). Death benefits are payable according to schedule of persons wholly and actually dependent upon deceased. (Ark. Code Ann. 11-9-527). Act authorizes and directs Commission, on or before July 1, 1994, to establish rules and regulations to implement system of managed health care. (Ark. Code Ann. 11-9-508).

Notice of injury or death must be given to employer in form prescribed or approved by Commission, but failure to give notice will not bar certain claims. (Ark. Code Ann. 11-9-701).

Claim for compensation for other than occupational disease or occupational infection must be filed within two years after compensable injury or death, or within one year after discovery of fraud which prevented filing within usual limitation period. (Ark. Code Ann. 11-9-702). Claim for compensation for disability due to occupational disease or infection must be filed within two years of date of last injurious exposure to hazards of disease or infection. (Ark. Code Ann. 11-9-702). Claims are heard before Commission, with right of appeal to Court of Appeals. (Ark. Code Ann. 11-9-704, 11-9-711). This remedy is exclusive, except that employee who fails to recover because of employer's noncompliance with Act may sue in courts and in such case certain common law defenses are denied to employer. (Ark. Code Ann. 11-9-105).

Waiver of compensation is void. (Ark. Code Ann. 11-9-108). Sole proprietor, partner of partnership, member of limited liability company, member of professional association, or self-employed individual who is not subcontractor may exclude himself or herself from coverage under Worker Compensation Laws. (Ark. Code Ann. 11-9-108).

Unemployment Compensation.

Arkansas has compulsory unemployment compensation program. (Ark. Code Ann. 11-10-102). "Employers" (units employing one or more for some portion of ten days within current or preceding calendar year or successor of such units [11-10-209]) pay contributions to State equal to 2.9% of wages paid to be held as unemployment compensation fund (Ark. Code Ann. 11-10-702). Benefits are payable upon involuntary unemployment of individual in amount equal to 1/26th of total wages paid during one quarter of base period in which wages were highest, provided no weekly benefits shall be less than 12% of state average weekly wage for insured employment for preceding calendar year nor more than 662/3% of state average weekly wage for insured employment for previous calendar year. (Ark. Code Ann. 11-10-502). Employee is eligible only if employee files proper claim, has registered for work, is physically and mentally able to work and is available, has been unemployed for waiting period of one week, has earned wages of at least 27 times his weekly benefit amount and has earned wages for insured work in at least two quarters of base period (first four of last five completed calendar quarters immediately preceding first day of benefit year [11-10-201]) (Ark. Code Ann. 11-10-507), and his unemployment is not result of labor dispute (Ark. Code Ann. 11-10-508). “Benefit year” is 12 consecutive month period beginning first day of calendar quarter in which valid claim for benefits is filed. (Ark. Code Ann. 11-10-203). Late contributions bear interest at 1½% per month until paid. (Ark. Code Ann. 11-10-716). Act excludes certain domestic employment, certain agricultural labor, and enumerated other occupations (Ark. Code Ann. 11-10-210), but noncovered employing units may elect coverage (Ark. Code Ann. 11-10-403). Aliens not legally eligible to work are not covered by Act. (Ark. Code Ann. 11-10-511).

Employees engaged in approved shared work program may be eligible for unemployment compensation benefits. (Ark. Code Ann. 11-10-609).

11.03 WORKERS’ COMPENSATION LAW:

See topic 11.02 Labor Relations.

12 ENVIRONMENT

12.01 ENVIRONMENTAL REGULATION:

Arkansas Environmental Quality Act of 1973 adopted in 1973 to protect environment. (Ark. Code Ann. 15-20-301 – 15-20-319). Arkansas Water and Air Pollution Control Act adopted to prevent pollution. (Ark. Code Ann. 8-4-101 - 8-4-409). Arkansas Solid Waste Management Act adopted in 1971 to regulate collection and disposal of solid wastes. (Ark. Code Ann. 8-6-201 – 8-6-222). Arkansas Hazardous Waste Management Act of 1979 regulates hazardous waste disposal. (Ark. Code Ann. 8-7-201 – 8-7-227). Arkansas Resource Reclamation Act of 1979 further regulates hazardous waste disposal and transportation. (Ark. Code Ann. 8-7-301 – 8-7-309). Arkansas Surface Coal Mining and Reclamation Act of 1979 regulates surface coal mining. (Ark. Code Ann. 15-58-101 – 15-58-510). Joint County and Municipal Solid Waste Disposal Act adopted for formation of sanitation authority. (Ark. Code Ann. 14-233-101 – 14-233-122).

General supervision over environment preservation is by Arkansas Natural Heritage Commission, 1500 Tower Building, 323 Center Street, Little Rock, AR 72201. (Ark. Code Ann. 15-20-304 – 15-20-309). General supervision over pollution, and handling and disposal of hazardous waste, is by Arkansas Department of Environmental Quality, 5301 Northshore Drive, North Little Rock, AR 72118. (Ark. Code Ann. 8-4-201 – 8-4-231; Ark. Code Ann. 8-6-207).

Nuclear planning and response program administered by State Department of Health, 4815 W. Markham, Little Rock, AR 72205, to monitor nuclear generating facilities and to formulate emergency evacuation plans. (Ark. Code Ann. 20-21-401 – 20-21-405). Ionizing radiation regulated. (Ark. Code Ann. 20-21-201 – 20-21-222). Radiation from electronic products regulated. (Ark. Code Ann. 20-21-301 – 20-21-312).

Prohibited acts of pollution include discharge into waters of State any sewage, industrial and other wastes to render them harmful, detrimental, or injurious to public health, safety, and welfare, and to domestic, commercial, industrial, agricultural, recreational or beneficial use, or to animal life; to construct or operate any disposal system for doing so without authority of Department; to sell or furnish detergents for laundry or dishwashing that contain phosphorus (Ark. Code Ann. 8-4-217, Ark. Code Ann. 8-4-102); emitting into air any contaminant which may cause it to become materially injurious to human, plant, or animal life or to property; to construct or operate any facility which does so without authority of Department (Ark. Code Ann. 8-4-310, Ark. Code Ann. 8-4-303); operation, construction, or use without permit from Department of any facility for processing or disposing of refuse in solid form, other than disposing of waste from household activities on property owned by disposer under circumstances not creating nuisance or health hazard (Ark. Code Ann. 8-6-205); disposition of solid wastes on land of another without owner's written permission or upon public property (Ark. Code Ann. 8-6-205); handling or disposal of hazardous wastes without license or permit (Ark. Code Ann. 8-7-205). Wastewater treatment plants are regulated by and operators are licensed by Arkansas Department of Environmental Quality. (Ark. Code Ann. 8-5-201 – 8-5-209). Arkansas Privatization Act provides for private ownership and operation of public waste treatment facilities. (Ark. Code Ann. 8-5-601 – 8-5-612). Environmental laboratories may be certified by Arkansas Department of Environmental Quality. (Ark. Code Ann. 8-2-201 – 8-2-209).

Open cut and surface coal mining and subsequent reclamation is under supervision of Arkansas Department of Environmental Quality and is closely regulated. (Ark. Code Ann. 15-57-201 – 15-57-320, Ark. Code Ann. 15-58-101 – 15-58-510). See category 19 Mineral, Water and Fishing Rights, topic 19.01 Mines and Minerals.

Exemptions.

Air pollution does not include: agricultural operations and equipment in growing crops and raising fowl and animals; use of barbecue equipment or outdoor fireplaces for residential use; land clearing operations or land grading; road construction operations; incinerators and heating equipment in residences used exclusively for dwellings for not more than four families; fires authorized by governmental authority, or open fires used at construction site for purposes of warming persons on site during cold weather unless prohibited by municipal or county ordinance and provided fire meets certain statutory specifications. (Ark. Code Ann. 8-4-305). Commission may grant specific variances upon application and based on equitable principles. (Ark. Code Ann. 8-4-313).

Enforcement is by proceedings instituted by Department of Environmental Quality upon ten days notice of alleged violation with appeal to circuit court of county in which business, industry, municipality, or thing involved is situated. (Ark. Code Ann. 8-4-212 – 8-4-214, Ark. Code Ann. 8-4-218 – 8-4-229). Private right of action exists for violation of Arkansas Solid Waste Management Act. (Ark. Code Ann. 8-6-206).

Penalties.

Pollution of State's waters and air is misdemeanor. (Ark. Code Ann. 8-4-103). Punishable by imprisonment for not more than one year and fine of not more than $25,000. (Ark. Code Ann. 8-4-103). For purpose of fines only, each day's continuance of such violation constitutes separate offense. (Ark. Code Ann. 8-4-103). It constitutes felony to purposely, knowingly or recklessly pollute waters or air of State not otherwise permitted by law or to commit any violation and then leave State. (Ark. Code Ann. 8-4-103). Unlawful processing or disposing of solid wastes is misdemeanor and conviction carries imprisonment not to exceed one year and fines not to exceed $25,000 with each day's continuance of such violation constituting separate offense for purpose of fines only. (Ark. Code Ann. 8-6-204). It is felony to unlawfully pollute water or air creating substantial likelihood of adverse effects to humans, animals, plants, or property. (Ark. Code Ann. 8-6-204). Unlawful hazardous waste disposal constitutes misdemeanor and is punishable by imprisonment for not more than one year and fine of not more than $25,000. (Ark. Code Ann. 8-7-204). For purposes of fines only, each day of violation constitutes separate offense. (Ark. Code Ann. 8-7-204). One who purposely, knowingly or recklessly releases hazardous wastes into environment in manner not permitted by law or creates substantial likelihood of endangering human or animal health or property, shall be guilty of felony, punishable by imprisonment for not more than ten years and fine of not more than $100,000. (Ark. Code Ann.

8-7-204). Violation of permits and orders issued under Arkansas Surface Coal Mining and Reclamation Act is misdemeanor punishable by not more than one year imprisonment and $10,000 fine. (Ark. Code Ann. 15-58-304). Each day's violation constitutes separate offense. (Ark. Code Ann. 15-58-304). Interference with Director in performance of duties pursuant to Arkansas Surface Coal Mining and Reclamation Act is misdemeanor punishable by not more than one year imprisonment and $5,000 fine. (Ark. Code Ann. 15-58-305). Engaging in open-cut mining without permit is punishable by civil penalty of $1,000 for first violation, $2,500 for second separate violation of same offense within two years, and $5,000 for third separate or subsequent violation of same offense within two years. (Ark. Code Ann. 15-57-305).

Permits.

Arkansas Department of Environmental Quality may issue, modify, deny and revoke permits for operation of facilities to discharge sewage, industrial and other wastes into waters of State and into air (Ark. Code Ann. 8-4-203 – 8-4-205) and facilities for processing and disposing of solid wastes (Ark. Code Ann. 8-6-207). Permits for hazardous waste disposal issued by Arkansas Department of Environmental Quality. (Ark. Code Ann. 8-7-215 – 8-7-222).

Operators of wastewater plants must be licensed and certified by Arkansas Department of Environmental Quality. (Ark. Code Ann. 8-5-207).

Unless applicant is publicly-held company required to file periodic reports under Securities and Exchange Act of 1934, or wholly-owned subsidiary of publicly-held company, all applicants for issuance or transfer of any permit, license certification, or operational authority issued by Arkansas Department of Environmental Quality shall file disclosure statement with their applications pursuant to Department's requirements herein. (Ark. Code Ann. 8-1-106).

Operators of commercial medical waste incineration facilities must obtain permit from Arkansas Department of Environmental Quality. (Ark. Code Ann. 8-6-1305-1306). Transporters of commercial medical waste must obtain operating license from Arkansas Department of Health. (Ark. Code Ann. 20-32-107).

13 ESTATES AND TRUSTS

13.01 ADMINISTRATION:

See topic 13.08 Executors and Administrators.

13.02 ADVANCEMENTS:

See topic 13.07 Descent and Distribution.

13.03 ALLOWANCES:

See topic 13.08 Executors and Administrators.

13.04 CLAIMS:

See topic 13.08 Executors and Administrators.

13.05 DEATH:

In the absence of proof to the contrary, a resident of the state absent for five successive years is presumed dead in any case in which his death may come into question. (Ark. Code Ann. 16-40-105).

Definition.

Person is legally dead when there is irreversible cessation of circulatory and respiratory functions, or irreversible cessation of all brain and brain stem functions. Determination of death is made in accordance with accepted medical standards. (Ark. Code Ann. 20-17-101).

Survivorship.

Effective Jan. 1, 2006 Uniform Simultaneous Death Act has been repealed and replaced with Uniform Simultaneous Death Act (2005). (Ark. Code Ann. 28-10-201 – 28-10-212).

Action for death may be maintained by the personal representative, or if none by the heirs for the benefit of the surviving spouse, children, and other defined beneficiaries. Suit must be filed within three years. (Ark. Code Ann. 16-62-102). If nonsuit taken, action must be recommenced within one year of nonsuit. (Ark. Code Ann. 16-62-102). Action may also be brought for death of viable fetus. (Ark. Code Ann. 16-62-102).

Except as provided under Workers Compensation Act, damages for death may not be limited. (Const., art. 5, § 32). Punitive damages may be allowed in wrongful death action. Amount recovered is distributed as fixed by judge or apportioned by jury (Ark. Code Ann. 16-62-102), but where action is for death of employee not within coverage of Workmen's Compensation Act against railroad or corporation (except while engaged in interstate commerce), amount recovered is distributed according to pecuniary injury suffered by each claimant (Ark. Code Ann. 23-12-503, Ark. Code Ann. 11-8-103; 186 Ark. 1082, 57 S.W.2d 818).

Death Certificate.

See category 10 Documents and Records, topic 10.04 Records, subhead Vital Statistics.

Rights of the Terminally Ill or Permanently Unconscious Act.

See topic 13.16 Wills, subhead Living Wills.

Uniform Anatomical Gift Act.

See topic 13.16 Wills, subhead Uniform Anatomical Gift Act.

13.06 DECEDENTS' ESTATES:

See topics 13.07 Descent and Distribution, Executors and Administrators, Wills; category 8 Debtor and Creditor, topic 8.10 Homesteads, subhead Rights of Surviving Spouse and Family.

13.07 DESCENT AND DISTRIBUTION:

Regulated by Ark. Code Ann. 28-8-101 to Ark. Code Ann. 28-14-112.

"Heritable estate" is intestate's real and personal property after provision for dower, curtesy, homestead rights, statutory rights and allowance of surviving spouse and minor children, refund on joint federal income tax returns, and administration of estate, if any. (Ark. Code Ann. 28-9-206). "Heritable estate" passes as follows (each class with living members taking to exclusion of subsequent classes) to intestate's: (1) Surviving children and descendants of deceased children; (2) surviving spouse, but if married to intestate less than three years at death, surviving spouse takes only 50%, other 50% passing as if spouse had not survived intestate; (3) surviving parents, sharing equally, or to sole surviving parent if only one living; (4) if survived by no descendant but survived by spouse of less than three years, that portion of estate which does not pass to spouse under subdivision (2) passes to surviving parents; (5) brothers and sisters and descendants of deceased brothers and sisters; (6) surviving grandparents, uncles, and aunts and descendants of deceased uncles and aunts; (7) surviving great-grandparents, great-uncles and great-aunts, and by representation descendants of deceased great-uncles and great-aunts; (8)

surviving spouse, even if married to intestate less than three years; (9) heirs of deceased spouse if marriage not ended by divorce; and (10) county wherein deceased resided at death. (Ark. Code Ann. 28-9-214 – 28-9-215).

Where persons entitled to take are all of same degree of kindred to decedent they take per capita; otherwise they take per stirpes. (Ark. Code Ann. 28-9-204).

Surviving Spouse.

Where intestate leaves no descendants and has been continuously married not less than three years before death, surviving spouse takes all and if continuously married less than three years before death, then only 50%. (Ark. Code Ann. 28-9-214).

Half Blood.

Relatives of half and whole blood share alike. (Ark. Code Ann. 28-9-213)

Posthumous lineal descendants of intestate inherit as if born in lifetime of intestate. (Ark. Code Ann. 28-9-210).

Illegitimate children may inherit from mother and her blood kindred. An illegitimate child whose father marries his mother after birth and recognizes child as his is deemed legitimate. Child conceived following artificial insemination of married woman with consent of her husband shall be treated as their child for purposes of intestate succession. Illegitimate child may inherit from father and his blood kindred if action is commenced against father's estate within 180 days of father's death and statutory conditions evidencing paternity are satisfied. (Ark. Code Ann. 28-9-209). Child created as embryo through *in vitro* fertilization during his or her parent's marriage, but implanted into his mother's womb after death of his father does not inherit from his or her father as posthumous lineal descendant. (372 Ark. 103, 270 S.W.3d 849).

Adopted Children.

See category 14 Family, topic 14.01 Adoption.

Determination of Heirship.

Any person claiming interest as heir or distributee in property of deceased, or personal representative of deceased, may petition circuit court of proper venue for determination of heirs of deceased. Notice thereof required by publication and personal notice or by registered or certified mail, return receipt requested, where addresses are known. (Ark. Code Ann. 28-53-101; Ark. Code Ann. 28-1-117).

Advancements.

If person dies intestate as to all his estate, property given in his lifetime to an heir is treated as an advancement against heir's share of estate if declared in writing by decedent or acknowledged in writing by heir to be an advancement. Value of advancement is that as of time when heir came into possession or enjoyment of property or as of time of decedent's death, whichever first occurs. If recipient of property fails to survive decedent, property is not computed in share of recipient's descendants. (Ark. Code Ann. 28-9-216). Amount of every advancement must be specified in order of final distribution. (Ark. Code Ann. 28-53-109).

Community Property.

Half of all personal property, wherever situated, which was acquired as or became, and remained, community property under laws of another jurisdiction or proportionate part of that property acquired with rents, issues, or income of, or proceeds from, or in exchange for, that community property, or traceable to that community property, and half of all or proportionate part of any real property situated in this state which was acquired with rents, issues, or income of, proceeds from, or in exchange for, property acquired as or which become, and remained, community property under laws of another jurisdiction or property traceable to that community property is property of surviving spouse and is not subject to testamentary disposition by decedent or distribution under Arkansas law of intestate distribution. Remaining half of property is property of decedent and is subject to testamentary disposition or intestate distribution under Arkansas Laws. Half of property which is property of decedent is not subject to surviving spouse's right to elect against will, and no estate of dower or curtesy exists in such property. (Ark. Code Ann. 28-12-101 – 28-12-103).

Disclaimers.

See category 22 Taxation, topic 22.06 Estate Tax, subhead Disclaimers.

Election.

See topic 13.16 Wills, subhead Election.

Escheat.

Where decedent left no issue, kindred or surviving spouse, and where spouse left no heirs, or where spouse left heirs but decedent and spouse divorced before death of decedent, estate escheats to county of decedent's residence at date of death. (Ark. Code Ann. 28-9-215).

13.07A ESTATES: (in property)

See category 21 Property, topic 21.16 Real Property.

13.0813.09 [RESERVED]

13.10 EXECUTORS AND ADMINISTRATORS:

Governed by Title 28, cc. 38-53.

Administration.

Person named executor in will may, before probate of will and granting of letters testamentary, take reasonably necessary action in management and preservation of property and rights of decedent, and, subject to prior rights of members of decedent's immediate family, arrange for his burial. If court refuses to probate will, or if such person does not qualify, he is not liable for acts done in good faith and for which he would not have been liable had he been lawful executor, but he must promptly account to personal representative when appointed. (Ark. Code Ann. 28-40-106).

Venue for probate of will and for administration is county where decedent resided; or if he did not reside in state, then in county wherein is located greater part in value of his property or if decedent had no residence or property within state but died in state, then in county in which he died; or if decedent had no residence or property within state and died outside of state, then in any county in which his personal representative may maintain cause of action. (Ark. Code Ann. 28-40-102).

Any interested person may petition proper court for appointment of executor if one is nominated in will or for appointment of administrator if no executor is nominated or if the person so named is disqualified or unsuitable, or refuses to serve, or if there is no will. He may at the same time petition for probate of will. (Ark. Code Ann. 28-40-107). If no demand for notice is filed, court may, in its discretion, hear petition forthwith. (Ark. Code Ann. 28-40-109).

Any interested person desiring to be notified before will is admitted to probate or before personal representative is appointed may file with clerk demand for notice, and thereafter no will may be admitted to probate and no personal representative, other than special representative may be appointed until notice has been given. (Ark. Code Ann. 28-40-108).

No will shall be admitted to probate and no administration shall be granted unless application for admission to probate is made within five years after decedent's death, subject to few exceptions. (Ark. Code Ann. 28-40-103).

Preference in Right to Administer.

Domiciliary letters are granted in following order of priority: Executor nominated in will, surviving spouse or nominee upon petition filed within 30 days after decedent's death, one or more distributees or nominee upon application within 40 days after decedent's death where there is surviving spouse and within 30 days where there is no surviving spouse, any other qualified person. (Ark. Code Ann. 28-48-101).

Eligibility and Competency.

Married or unmarried woman may serve as executrix or administratrix. (Ark. Code Ann. 9-11-502, Ark. Code Ann. 28-48-101). Letters will not be issued to minor (unless emancipated [9-26-104]); person of unsound mind; convicted and unpardoned felon; corporation not authorized to act as fiduciary in this state; person whom court finds unsuitable; nonresident of state unless he appoints agent to accept service. (Ark. Code Ann. 28-48-101). All persons of age 18 years shall be considered to have reached age of majority and letters may be issues to same. (Ark. Code Ann. 9-25-101).

Letters are issued when bond (if required) is approved and personal representative files with clerk his written acceptance of appointment. Letters of administration are not necessary to empower person appointed to act for estate. Order appointing administrator empowers him or her to act for estate; letters are for purpose of notifying third parties of appointment. (Ark. Code Ann. 28-48-102[a] and [d]).

Ancillary Administrator.

Foreign personal representative, filing authenticated copy of domiciliary letter and bond, and appointing agent for service may be issued letters in Arkansas. (Ark. Code Ann. 28-42-102 – 28-42-104). Corporate foreign personal representative need not qualify to do business in Arkansas to serve as ancillary administrator. (Ark. Code Ann. 28-42-102). Foreign personal representative is preferred for ancillary administration. (Ark. Code Ann. 28-42-102). Prior to final distribution of ancillary estate, court may order transfer of all or part of assets to domiciliary jurisdiction for administration and distribution. (Ark. Code Ann. 28-42-106).

Any time after 60 days from death of nonresident, any person indebted to estate of decedent or having control of personal property belonging to estate of such decedent may pay debt or deliver personal property to domiciliary foreign personal representative of decedent upon being presented with proof of his appointment and affidavit made by or on behalf of representative stating: (1) Decedent's date of death; (2) that no local administration, or application therefor is pending in this state; and (3) that domiciliary foreign personal representative is entitled to payment or delivery. (Ark. Code Ann. 28-42-110).

Removal.

Court may remove personal representative when personal representative becomes mentally incompetent, disqualified, unsuitable, incapable of discharging his or her trust, has mismanaged estate, has failed to perform any duty imposed by law, or when he or she becomes nonresident without appointing agent for service, but removal after issuance of letters does not invalidate his official acts performed prior to removal. (Ark. Code Ann. 28-48-105). Representative of estate of deceased or incompetent personal representative has duty to protect estate until successor or special representative is appointed. (Ark. Code Ann. 28-48-106).

Bond is required, with two or more sufficient sureties, who are residents of state, in not less than double estimated value of property which may reasonably be expected to pass through hands of personal representative, except that if bond is executed by corporate surety authorized to do business in state, amount may not be less than estimated value of such property. (Ark. Code Ann. 28-48-201).

Except for nonresident administrator, court may dispense with or reduce amount of bond when testator so directed, when personal representative is bank or trust company whose deposits are insured by F. D. I. C., or when all distributees are competent, have filed written waivers of bond, and there are no known unsecured claims. (Ark. Code Ann. 28-48-206).

Unless authorized by special order of court, no sheriff, clerk, or deputy of either, judge, or attorney may be surety. (Ark. Code Ann. 28-48-203).

Bond must be examined and approved by court or by clerk, subject to confirmation by court with approval endorsed thereon. (Ark. Code Ann. 28-48-205).

If personal representative fails to give bond or, if no bond is required, fails to file written acceptance of appointment within time fixed by court, another person shall be appointed in his stead and letters, if issued, are revoked. (Ark. Code Ann. 28-48-202).

Special Kinds of Administration.

Upon death, removal or resignation of personal representative, court may appoint a successor. (Ark. Code Ann. 28-48-107). Such successor or administrator with the will annexed has all powers of executor nominated in will except those personal to him. (Ark. Code Ann. 28-48-107). Court may appoint special administrator before or after appointment of executor or general administrator for specified time, to perform duties respecting specified property, or to perform particular acts. Order is not appealable. (Ark. Code Ann. 28-48-103).

Public Administrator.

Sheriff acts as public administrator if person dies in county without known spouse or next of kin and no one petitions for letters, if person dies elsewhere leaving in the county property not in possession of some responsible person, or when court directs him to do so. (Ark. Code Ann. 28-48-301). Public administrator must prepare inventory and accounting (Ark. Code Ann. 28-48-302), and court may require bond (Ark. Code Ann. 28-48-303). If general personal representative is appointed, public administrator must account to him. (Ark. Code Ann. 28-48-304).

Inventory and Appraisal.

Within two months after his qualification or as court may direct, personal representative must file complete inventory of decedent’s property, describing each item and giving his appraisal of the fair market value thereof, with affidavit that inventory is complete to best of his knowledge and belief and that he was not indebted to decedent at the time of his death except as stated in inventory. (Ark. Code Ann. 28-49-110). Filing of inventory may be waived by written waiver of all competent distributees and guardians of estate of all incompetent distributees unless court finds need for inventory or any claimant makes written demand for it. (Ark. Code Ann. 28-49-110). Errors or omissions must be corrected by supplemental inventory or with next accounting or as court may direct. (Ark. Code Ann. 28-49-110).

General Powers and Duties.

Personal representative must take possession of all personal property, subject to the rights of dower, curtsey, and statutory allowances of widow or minor children. (Ark. Code Ann. 28-49-101).

Real property is asset in personal representative's hands when so directed by will or when court finds such property must be sold, mortgaged, leased, or exchanged for payment of claims or legacies, or for protection, distribution, or best interests of estate. (Ark. Code Ann. 28-49-101, Ark. Code Ann. 28-51-103). Personal representative may recover property fraudulently transferred by decedent (Ark. Code Ann. 28-49-109), abandon valueless property and property that is of no benefit to estate upon court order (Ark. Code Ann. 28-49-106), and may compromise claims due or owing to estate (Ark. Code Ann. 28-49-104).

If decedent purchased real or personal property without completing payment therefor or mortgaged real or personal property and neither devised the property nor provided by will for payment or redemption, court may order personal representative to pay balance of purchase price or redeem out of assets of estate. (Ark. Code Ann. 28-49-107-108).

Personal representative may compel discovery of assets (Ark. Code Ann. 28-49-103), may borrow money, execute notes and mortgage property of estate (Ark. Code Ann. 28-49-113), may invest funds of estate in investments permitted by guardians (Ark. Code Ann. 28-49-115), and except as otherwise directed in will, may join with decedent's spouse in making joint income tax return and may consent, for gift tax purposes, to gifts made by decedent's spouse so that such gifts may be treated for gift tax purposes as if made one-half by decedent and one-half by spouse (Ark. Code Ann. 28-49-117). Personal representative must perform decedent's contracts of sale of real and personal property when decedent himself could have been compelled to perform and must, when required by contract, give warranties which are binding on estate. (Ark. Code Ann. 28-49-114). Upon petitioning court and court order, personal representative may lease or mortgage personal and real property under same general provisions relating to sales. (Ark. Code Ann. 28-51-301). Except in cases of oil, gas and other minerals, leases of real property may not exceed three years. (Ark. Code Ann. 28-51-303).

By specific reference to statute in will, broad powers specified in statute may be granted to executor or inter vivos or testamentary trustee as fiduciary. (Ark. Code Ann. 28-69-303 - 28-69-304).

Continuing Decedent's Business.

Unless decedent's will directs otherwise, executor or administrator may continue decedent's business for time period not exceeding one month following date of grant of letters without an order of court and if the business is that of farming it may continue for three months or until the end of the calendar year in which the decedent's death occurred, whichever is longer. Thereafter, the court may order further continuance of the business for additional period not exceeding three months and for additional period not exceeding one year if farming operation. Estate, but not representative, is liable for damages resulting from torts or other acts committed by agents and employees of estate. (Ark. Code Ann. 28-49-112).

Notice to Creditors.

Promptly after letters are granted, the personal representative must publish, once a week for two consecutive weeks in a newspaper published and of general circulation in county of probate, notice of his appointment, stating date thereof, and requiring all persons having claims against estate to exhibit them, properly verified, to him within six months from date of first publication of notice or be precluded from any benefits of estate. Personal representative must serve copy of notice on each known or reasonably ascertainable heir, devisee, and unpaid creditor including Department of Human Services, if it is known or could reasonably be ascertained that Department of Human Services has rendered services to decedent, within one month after publication. (Ark. Code Ann. 28-40-111; Ark. Code Ann. 28-1-112). If value of estate does not exceed $1,000, exclusive of homestead, publication may be by posting notice in courthouse for three weeks. (Ark. Code Ann. 28-40-111).

Disclaimer.

(Ark. Code Ann. 28-2-201 – 28-2-221). See category 22 Taxation, topic 22.06 Estate Tax, subhead Disclaimers.

Presentation of Claims.

No claim is barred which was not barred at time of death if claim is presented to personal representative or filed with court within three months (six months for claims for injury or death caused by negligence of decedent) after date of first publication of notice to creditors. (Ark. Code Ann. 28-50-101). For all claims against estate (not just those for injury or death caused by negligence of decedent) must be filed within six months of date of first publication of notice to creditors. (Ark. Code Ann. 28-50-101 as am'd by Act 231 of 2007). In any event, claims are barred at end of five years after date of decedent's death unless within said period letters have been issued and notice to creditors published (Ark. Code Ann. 28-50-101[d]). Some tort claims involving liability insurance or uninsured motorist coverage may be brought within limitation period otherwise provided. (Ark. Code Ann. 28-50-101[f]).

Revival of action pending against decedent at time of his death and commencement of action against personal representative after decedent's death have effect as claims duly filed from the time of such revivor or commencement if plaintiff files with probate court a copy of petition for revivor or of the complaint or statement signed by plaintiff or his attorney. (Ark. Code Ann. 28-50-102).

Unmatured claims must be presented. (Ark. Code Ann. 28-50-108).

Contingent claims must be presented. (Ark. Code Ann. 28-50-110).

Secured claims must be presented. (Ark. Code Ann. 28-50-109).

Proof of Claims.

Claim must be in writing, describing the nature and amount, and if presented upon a written instrument, the original or a copy with all endorsements must be attached. Original instrument must be exhibited upon demand unless lost or destroyed in which case its loss or destruction must be stated in claim. (Ark. Code Ann. 28-50-103).

Verification.

Claim must be verified by affidavit stating that the amount is justly due, or, if not yet due, when it will or may become due, that no payments have been made thereon which are not credited, that there are no offsets to same, and the nature of any contingent claim, to the knowledge of affiant except as stated therein. A claim assigned after testator's death must be verified by or for person owning claim at date of decedent's death and by or for his assignee. (Ark. Code Ann. 28-50-103). Affidavit can be made out of state before commissioner appointed by Governor of Arkansas to take depositions, or before judge of court, mayor of city, notary public, or justice of peace. (Ark. Code Ann. 16-45-102).

Form

Form of affidavit to claims:

By individual claimant:

I, ..., solemnly swear that the attached claim against the estate of . . . . ., deceased, is correct, that nothing has been paid or delivered toward the satisfaction of the claim except as noted, that there are no offsets to this claim, to the knowledge of this affiant, except as therein stated, and that the sum of . . . . . . Dollars ($. . . .) is now justly due (or will or may become due as stated). I further state that if this claim is based upon a written instrument, a true and complete copy thereof, including all endorsements, is attached.

Date . . . . , ...

. . . .

State of . . . ., County of . . . .

Subscribed and sworn to before me, this . . . . day of . . . ., 20 . . .

. . . .

(Official Title)

If the affidavit is made by anyone other than an individual in his own behalf, the representative capacity of the affiant must be clearly stated. (336 Ark. Appendix 603, 623-624 [1999]).

Allowance or Rejection of Claim.

Any claim approved by personal representative in writing and duly filed may be allowed by court at any time without formal hearing. A claim disapproved or not acted upon by personal representative must be set for hearing. Court must allow claim in whole or in part and classify it or disallow it. Order allowing claim has effect of a judgment and bears interest at legal rate unless claim provided otherwise. (Ark. Code Ann. 28-50-105).

Small Claims.

Notwithstanding requirements on filing claim with verification, personal representative may pay reasonable funeral expenses and medical expenses incident to last illness, as well as claims amounting in aggregate to $3,000 or less none of which may exceed sum of $300, and take credit therefor in his settlement. (Ark. Code Ann. 28-50-105).

Payment of Claims.

Six months after first publication of notice to creditors and final adjudication of all claims filed, personal representative must pay claims allowed against estate. Prior to expiration of six months period, court may order payment of claims and require bond from creditor. (Ark. Code Ann. 28-50-113).

Unmatured Claim.

Allowed at present value and paid as an absolute claim, except creditor must agree where obligation upon which such claim was founded was entered into before effective date of Code; otherwise court may order personal representative to retain sufficient funds to satisfy claim upon maturity; or if distributee gives sufficient bond, court may order such bond to be given in satisfaction of the claim and close estate. (Ark. Code Ann. 28-50-108).

Secured Claim.

If creditor surrenders security, payment is made upon basis of full amount as an unsecured claim. If creditor liquidates and applies to payment of claim the proceeds of all or part of security and surrenders any part not so liquidated, payment is upon basis of balance of claim remaining unpaid as an unsecured claim. Creditor may waive claim against estate and rely only on his security. (Ark. Code Ann. 28-50-109).

Contingent claim is paid as an absolute claim if it becomes absolute before distribution of estate; otherwise court may order personal representative to distribute estate but to retain sufficient funds to pay claim if and when it becomes absolute, but for this purpose estate is not kept open longer than two years after remainder of estate is distributed. (Ark. Code Ann. 28-50-110).

Priorities.

Claims are classified and paid in the following order: (1) costs and expenses of administration; (2) reasonable funeral, medical, and other expenses incidental to last illness, and wages of decedent's employees; (3) claims based on liability for any state tax debt of decedent or due from decedent's estate as result of decedent's death; and (4) all other allowed claims. No preference is given in payment of any claim over another of same class. (Ark. Code Ann. 28-50-106). If assets are sufficient to pay part but not all claims of single class, assets applicable thereto must be apportioned between them. (Ark. Code Ann. 28-50-113).

Sales.

Real and personal property may be sold only by order of court except where power of sale was given to personal representative in will. Sale may be on credit not to exceed 90% of purchase price and to be paid within ten years from date of sale. (Ark. Code Ann. 28-51-102, 28-51-103, 28-51-105). Personal property may be sold at public or private sale, and court may require confirmation. (Ark. Code Ann. 28-51-201). Personal representative may sell perishable personal property without order of court but is responsible for actual value unless he promptly files report and obtains court's approval. (Ark. Code Ann. 28-51-202). Sale of real property, absent power of sale in will, must be on personal representative's petition for hearing upon notice given, except court may waive notice if value of property is not more than $10,000. (Ark. Code Ann. 28-51-301). Certified appraisements by three disinterested persons must be filed with clerk before rendition of order of sale; however, unless heir or beneficiary objects, court may approve appointment of one appraiser to appraise real property. (Ark. Code Ann. 28-51-302). Order must describe property to be sold, require adequate bond of personal representative, provide for private or public auction and, if latter, place of sale. Sale at public auction must be for not less than three-fourths of appraised value and at private sale for not less than full appraised value. (Ark. Code Ann. 28-51-303).

If sale is at public auction, personal representative must publish once a week for three consecutive weeks in newspaper published or having general circulation in county in which real property is located describing property and stating time, place and terms of sale, except if value of property is less than $500, in lieu of newspaper publication, personal representative may post notices in courthouse, on each tract of land to be sold, and in three additional places in county where property is located. (Ark. Code Ann. 28-51-304).

Personal representative must file verified report of sale within ten days after date of sale, and court may confirm or reject sale. (Ark. Code Ann. 28-51-305).

Actions.

There is no suspension of the right to sue on a claim against a decedent's estate and action on a claim may be commenced within the time allowed for presentation thereof, without other presentation. Action pending against decedent at time of death may be continued against representative if cause of action survives. (Ark. Code Ann. 28-50-102).

Allowances.

In addition to their homestead, dower and curtesy rights, surviving spouse and minor children of decedent or either in absence of other may select personal property of value of $4,000 as against distributees and $2,000 as against creditors. In addition and without regard to distributees or creditors, surviving spouse, if living with decedent at time of his or her death, may have furniture reasonably necessary for occupation of his or her dwelling and during period of two months after decedent's death, surviving spouse and minor children or either in absence of other may receive from estate amount not to exceed $1,000 for sustenance. (Ark. Code Ann. 28-39-101).

Accounting and Settlement.

Personal representative must file verified account of administration upon filing petition for final settlement, upon revocation of his letters, upon his application to resign and before his resignation is accepted, annually during the period of administration unless court directs otherwise, and at any time when directed by the court on its own motion or on application of an interested person (Ark. Code Ann. 28-52-103). In absence of written demand for accounting and where all distributees are competent and have filed written waivers, formal accounting need not be filed if personal representative files verified statement that notice to creditors has been published as required and time for filing claims has expired, that there are no unpaid claims, that all state and federal estate taxes have been paid, and copy of federal estate tax return has been made available to distributees bearing portion of tax, and that full distribution has been made to distributees. (Ark. Code Ann. 28-52-104).

Compensation of Representatives.

Compensation is allowable when and as earned but not to exceed 10% of first $1,000, 5% of next $4,000, and 3% of balance of value of personal property (Ark. Code Ann. 28-48-108), but when personal representative has performed substantial duties with respect to real property, court may allow additional compensation to be borne as provided in will or by distributees benefited by such service (Ark. Code Ann. 28-48-108).

Compensation for legal services, unless otherwise contracted with personal representative, heirs, and beneficiaries is allowable on basis of total market value of real and personal property as follows: 5% of first $5,000; 4% of next $20,000; 3% of next $75,000; 2¾% of next $300,000; 2½% of next $600,000; and 2% of balance of value of all other property and may be increased or decreased if necessary under circumstances to provide fee commensurate with value of services rendered. (Ark. Code Ann. 28-48-108).

Distribution.

After the time for filing claims but before final settlement, court may order partial distribution and require security. (Ark. Code Ann. 28-53-102). Final distribution is made upon approval of representative's final account and after hearing on at least 60 days notice but court may approve final account immediately on filing when competent parties and guardians of incompetents waive notice and hearing. (Ark. Code Ann. 28-53-103).

Income During Administration.

Unless will indicates contrary intent: (i) general legacies of solvent estates bear interest at 6% per annum or then prevailing legal rate commencing 15 months after administration begins; (ii) specific devises include income or increment during administration; and (iii) income during administration on items devised to trust shall be treated as income by trustee. (Ark. Code Ann. 28-53-112).

Improper Distributions to Beneficiaries.

Distributee of property improperly distributed or paid is liable for return of property, income thereon, and, interest at 6% per annum on money improperly paid. Distribution without deduction of, or payment for, apportioned death taxes is deemed improper distribution. (Ark. Code Ann. 28-53-110).

Distribution Where Distributee Unavailable.

If distributee cannot be found, or if for any reason personal representative is unable to deliver to distributee his share of estate and take a receipt therefor, court may order personal representative to sell nonliquid assets distributable to such distributee and deposit proceeds in registry of court, and clerk's receipt therefor constitutes an acquittance to personal representative. Court may authorize clerk to deposit fund in a designated bank, the deposits of which are insured by FDIC, or to invest fund in bonds of United States or State of Arkansas until ultimate distribution. (Ark. Code Ann. 28-53-116).

Distribution if Abroad.

No special provision.

When Administration Unnecessary.

Distributees of estate are entitled thereto without administration when no petition for appointment of personal representative is pending or has been granted; 45 days have elapsed since decedent's death; value, less encumbrances, homestead and statutory allowances to spouse or minor children, does not exceed $100,000, and when distributee files with clerk affidavit that there are no unpaid claims and that Department of Human Services furnished no federal or state benefits to decedent or, if it did furnish such benefits, that it has been reimbursed in accordance with state and federal law, and giving itemized description and valuation of decedent's property, including legal description of any real property, names and addresses of persons having possession of or residing on property, and names, addresses and relationship to decedent of persons entitled to and who will receive property, certified copy of which affidavit must be furnished to every person owing any money, having custody of any property, or acting as registrar or transfer agent of any evidence of interest, indebtedness, property or right of estate. In order to allow claims against estate to be presented, distributee of estate containing real property may cause notice of death and filing of affidavit to be published. Notice shall contain decedent's name, address, date of death, statement that affidavit was filed, date of filing, legal description of real property, statement requiring all persons to exhibit claims within three months of first publication of notice or they shall be forever barred, name and address of distributee or his attorney, and date of first publication. Publication of notice is as provided for Notice to Creditors in normal estate administration, discussed above. (Ark. Code Ann. 28-41-101).

Publication of notice does not affect or prevent any action or proceeding to enforce any mortgage, pledge or other lien upon property of estate. (Ark. Code Ann. 28-41-102).

Any person making payment, transfer, or delivery pursuant to such affidavit is released to same extent as if making payment to personal representative, and any person refusing payment or transfer may be compelled by appropriate action to pay. After publication of notice to creditors, distributee of real property is authorized to issue to himself deed of distribution for real property of decedent as if made by personal representative of decedent. (Ark. Code Ann. 28-41-102).

Either with or without administration, if court determines that decedent's personal property does not exceed statutory dower and allowances to spouse or minor children, it may by order specifically describing property vest entire estate in them. (Ark. Code Ann. 28-41-103). Court may set such order aside within one year. (Ark. Code Ann. 28-41-104).

Small Estates.

See subhead When Administration Unnecessary, supra.

Foreign executor or administrator may, upon execution of same bond required of other nonresidents, sue in Arkansas. (Ark. Code Ann. 16-61-110). See also topic 13.16 Wills, subhead Foreign Probated Wills.

Uniform Fiduciaries Act not adopted.

Revised Uniform Principal and Income Act adopted. (Ark. Code Ann. 28-70-101 – 28-70-605).

Uniform Simplification of Fiduciary Security Transfers Act not adopted.

Uniform Anatomical Gift Act.

See topic 13.16 Wills.

Uniform Transfers to Minors Act adopted (Ark. Code Ann. 9-26-201 – 9-26-227); Uniform Gifts to Minors Act repealed (Ark. Code Ann. 9-26-227).

Uniform Trust Code adopted as Arkansas Trust Code with significant modification. (Ark. Code Ann. 28-73-101 – 28-73-1106).

13.11 FIDUCIARIES:

See topics 13.08 Executors and Administrators, Trusts; category 14 Family, topic 14.07 Guardian and Ward.

13.12 INTESTACY:

See topic 13.07 Descent and Distribution.

13.13 [RESERVED]

13.14 PROOF OF CLAIMS:

See topic 13.13 Proof of Claims.

13.15 TRUSTS:

The rules of common law apply generally to trusts. (101 Ark. 451, 142 S.W. 848). Common law of trusts supplements Arkansas Trust Code. (Ark. Code Ann. 28-73-106). All declarations of trusts of lands must be in writing (Ark. Code Ann. 4-59-103), but this is required only of express trusts and not implied or resulting trusts. (136 Ark. 481, 207 S.W. 22). Express trustee may sue without joining beneficiary. (Ark. R. Civ. P. 17). Word “trustee” or “agent” after name of grantee in deed is no notice to any person dealing with land that trust or agency exists and such words are ineffective. (Ark. Code Ann. 18-12-604). Broad fiduciary powers may be granted by reference in instrument to Ark. Code Ann. 28-69-304. (Ark. Code Ann. 28-69-303). Ark. Code Ann. 4-88-107 includes, as deceptive trade practice, offering for sale or drafting of any trust document by nonlawyer, except by bank trust department or trust company.

See also Arkansas Trust Institutions Act. (Ark. Code Ann. 23-51-101 – 23-51-211).

Uniform Trustees’ Accounting Act not adopted.

Revised Uniform Principal and Income Act adopted. (Ark. Code Ann. 28-70-101 – 28-70-605).

Eligibility and Competency.

Trustees of testamentary and inter vivos trusts are defined to include corporations without distinction as to domestic or foreign. (Ark. Code Ann. 28-69-301).

Uniform Testamentary Additions to Trusts Act adopted. (Ark. Code Ann. 28-27-101 – 28-27-106).

Investments by fiduciaries are regulated by Ark. Code Ann. 28-71-101 – 28-71-107, and Arkansas Trust Code, specifically Ark. Code Ann. 28-73-901 – 28-73-908.

Securities in Name of Nominee.

No statutory provision.

Bequests and Devises to Inter Vivos Trusts.

See topic 13.16 Wills.

Uniform Custodial Trust Act adopted. (Ark. Code Ann. 28-72-401 – 28-72-422).

Accounting.

No statutory provision.

Accumulations.

No statutory provision.

Perpetuities.

See category 21 Property, topic 21.12 Perpetuities.

Disclaimer.

See category 22 Taxation, topic 22.06 Estate Tax, subhead Disclaimers.

Divisions of trust into two or more separate trusts authorized if trustee determines that division is in best interest of beneficiaries or could result in federal tax savings. (Ark. Code Ann. 28-69-703).

Uniform Common Trust Fund Act adopted. (Ark. Code Ann. 28-69-202).

Transfers to Minors.

See category 14 Family, topic 14.10 Infants.

Uniform Fiduciaries Act not adopted.

Uniform Simplification of Fiduciary Security Transfers Act not adopted.

Private Foundations.

Governing instrument requirements are supplied for trusts by Ark. Code Ann. 28-72-302, unless avoided by affirmative actions specified in statute.

Pour Over Trusts.

See topic 13.16 Wills, subhead Bequests and Devises to Inter Vivos Trusts.

13.16 WILLS:

Governed by Title 28, cc. 24-27.

Any person of sound mind 18 years of age or older may make a will. (Ark. Code Ann. 28-25-101).

Testamentary Disposition.

There are no limitations upon testator's power to dispose of property, nor any restrictions upon gifts to religious or charitable institutions.

Execution of will (other than holographic) must be by signature of testator and of at least two witnesses. The testator must declare to the attesting witnesses that the instrument is his will and either himself sign, or acknowledge his signature already made; or sign by mark, his name being written near it and witnessed by a person who writes his own name as a witness to the signature, or at his discretion and in his presence have someone else sign his name for him (the person so signing must write his own name and state that he signed the testator's name at the request of the testator), and the signature must be at end of instrument and done in presence of two or more attesting witnesses who must sign at testator's request and in his presence. (Ark. Code Ann. 28-25-103).

Form

The ordinary form of attestation clause is as follows:

"We ___and ___, hereby certify that the testator in the above and foregoing will, subscribed the will in our presence at the time declaring to us that the instrument was his will; and we, at his request, and in his presence, and in the presence of each other, now sign our names hereunto as attesting witnesses, this ___day of ___."

In case subscription was by person other than testator, at testator's request, foregoing form should, of course, be changed to show that fact.

Deposit of will may be made by testator with circuit court of county of his residence with directions to whom it should be delivered after testator's death. During testator's lifetime will may be delivered only to him or to one authorized by him. (Ark. Code Ann. 28-25-108).

Holographic Wills.

When the entire body of the will and the signature are in handwriting of the testator, it may be established by the evidence of at least three disinterested witnesses to the handwriting and signature of the testator, without subscribing witnesses. (Ark. Code Ann. 28-25-104).

Joint wills to take effect at death of survivor are invalid. (35 Ark. 17).

Revocation.

A will, or any part thereof, can be revoked only by subsequent will; or by being burned, torn, cancelled, obliterated or destroyed with intent to revoke, by testator or another person in his presence and at his direction. Where there is partial revocation, reattestation of remainder of will is not required. (Ark. Code Ann. 28-25-109). Subsequent divorce or annulment revokes all provisions of will in favor of testator's spouse so divorced. (Ark. Code Ann. 28-25-109). Testator's subsequent agreement to convey property devised in will does not revoke devise, but property passes subject to same remedies on agreement against devisee as might have been enforced against decedent if he had survived, but contract to devise property must be proven according to statutory standards. (Ark. Code Ann. 28-24-101). Subsequent charge or encumbrance does not revoke previous will but devisee takes subject thereto. (Ark. Code Ann. 28-26-105).

Revival.

Will revoked or which becomes invalid can be revived only by re-execution or by execution of another will in which revoked or invalid will or part thereof is incorporated by reference. (Ark. Code Ann. 28-25-110).

Testamentary gift to subscribing witness does not invalidate will, but, unless will is attested by two qualified disinterested witnesses, interested witness forfeits so much of provision made for him as in aggregate exceeds in value as of date of testator's death what witness would have received had testator died intestate. (Ark. Code Ann. 28-25-102).

Bequests and Devises to Inter Vivos Trusts.

Pour over trusts are in common practice. Uniform Testamentary Additions to Trusts Act adopted. (Ark. Code Ann. 28-27-101 – 28-27-106).

Testamentary Guardian.

See category 14 Family, topic 14.07 Guardian and Ward, subhead Eligibility.

Probate.

Venue for probate of will is the county where decedent resided at time of death; if he had no residence in Arkansas, the county wherein is located the greater part in value of his property; if he had no residence or property in Arkansas but died in Arkansas, county where he died; if he had no residence or property in Arkansas and died outside state, county in which cause of action may be maintained by personal representative. (Ark. Code Ann. 28-40-102).

Any interested person may petition proper court for admission of will to probate, although it may not be in his possession, or may be lost, destroyed, or outside state, and at same time may petition for appointment of executor or administrator. (Ark. Code Ann. 28-40-107). If no demand for notice is filed, court may hear petition forthwith. (Ark. Code Ann. 28-40-109).

Any interested person desiring to be notified before a will is admitted to probate may file with the clerk a request for notice, and thereafter no will may be probated until notice has been given. (Ark. Code Ann. 28-40-108).

Application to probate will must be within five years after decedent's death absent fraudulent concealment. (Ark. Code Ann. 28-40-103).

Testator may bring declaratory judgment action prior to death to establish validity of will. (Ark. Code Ann. 28-40-201 - 28-40-203).

Self-proved Wills.

If probate of will is uncontested, will may be proved by affidavits of attesting witnesses acknowledged before notary public. Affidavit may be made at time of execution of will or after testator's death and shall be written on will, if practicable, or attached to will or true copy. (Ark. Code Ann. 28-25-106, Ark. Code Ann. 28-40-118).

Form

Ordinary form of affidavit is as follows:

Proof of Will

We, . . . and . . ., on oath state:

We are the subscribing witnesses to the attached written instrument, dated . . . day of . . ., 20. ., which purports to be the last will of . . ., deceased. On the execution date of the instrument, the testator, in our presence, and in the presence of the other attesting witnesses, signed the instrument at the end, or acknowledged his signature, declared the instrument to be his will, and requested that we attest his execution of it. Then, in the presence of the testator and the other witness, each of us signed our respective names as attesting witnesses. At the time of execution of the instrument, the testator appeared to be eighteen years of age or older, of sound mind, and acting without undue influence, fraud or restraint.

Dated this . . . day of . . ., 20. .

. . . . .

. . . . .

(Acknowledgment)

Contest.

Probate of a will or any part thereof may be contested before final distribution of estate is ordered and within five years from decedent's death for newly discovered will; and if contest is on any other ground, then before hearing on petition for probate where notice has been given pursuant to demand for notice; within three months after date of first publication of notice of probate or within 45 days after service of notice of probate on him or his predecessor in interest where contestant has been given notice and is not otherwise barred; or within three years after probate of will if contestant is not otherwise barred. (Ark. Code Ann. 28-40-113). Objections to foreign will probated in this state must be filed within same time as against resident's will or thereafter within 45 days after will is set aside in state of decedent's domicile. (Ark. Code Ann. 28-40-113). If will contest was on any other ground other than that another will had been discovered, and if will contestant had been given proper notice, contestant's grounds for objection had to be filed at or prior to time of hearing for probate. (355 Ark. 148, 133 S.W.3d 388).

Executor or administrator with will annexed, in good faith defends will or prosecutes its admission to probate, or other interested person defending will, whether or not successful, is allowed reasonable attorney's fees and necessary expenses out of estate. (Ark. Code Ann. 28-48-109).

Record.

Wills admitted to probate are recorded in probate clerk of circuit court's office. The will, or the record thereof, or the transcript of the record, duly certified, is admissible in evidence without further proof. (Ark. Code Ann. 28-40-122). Personal representative must record, at expense of estate, certified copy of will in recorder's office in each county other than county of probate in which real property of decedent is located. (Ark. Code Ann. 28-40-123).

Children.

Child born or adopted subsequent to execution of will takes as though testator had died intestate unless mentioned or provided for therein specifically or as member of class. Failure to mention then-living child in will at time of execution, specifically or as member of class, creates intestacy as to him. (Ark. Code Ann. 28-39-407).

Legacies.

See topic 13.08 Executors and Administrators, subhead Distribution.

Unclaimed legacies subject to escheat. (Ark. Code Ann. 18-28-202). See also topic 13.08 Executors and Administrators, subhead Distribution Where Distributee Unavailable.

Lapse.

Unless contrary intent is indicated, legacy or devise to child or descendant of testator does not lapse on death of beneficiary before testator if beneficiary leaves child or descendant surviving testator, who then takes. (Ark. Code Ann. 28-26-104).

Election.

When married person dies testate as to any part of estate, surviving spouse if married to decedent more than one year may elect between will and such part of property as would have been taken on intestacy including dower or curtesy and homestead and statutory allowances. If there is residue of property undisposed of by will after assignment of dower or curtesy, payment of all statutory allowances, taxes, and debts, and satisfaction of all bequests and devises, surviving spouse takes residue by intestacy in absence of surviving children, natural or adopted, parent, brother, sister, grandparent, uncle, aunt, great-grandparent, great-uncle, or great-aunt, or lineal descendants of any of them. (Ark. Code Ann. 28-39-401). Election must be made within one month after expiration of time limited for filing claims; provided that if at expiration of such period pending litigation might affect amount to be received by surviving spouse, election may be made within one month after date of final order adjudicating litigation. (Ark. Code Ann. 28-39-403).

Election to take against the will must be in writing, signed and acknowledged, and filed in the office of the probate clerk of circuit court. (Ark. Code Ann. 28-39-404).

Duplicate original or certified copy of election must be filed with recorder of each other county in which testator owned at time of his death estate of inheritance in real property. (Ark. Code Ann. 28-39-404).

Right of election is personal, non-transferable, and does not survive surviving spouse. (Ark. Code Ann. 28-39-405).

An election to take against the will may not be revoked except within the time for filing an election and before any distribution made on the basis of such election, or thereafter for such causes as justify rescission of a deed. (Ark. Code Ann. 28-39-406).

Form

Form for election shall be substantially as follows:

I, A. B., surviving wife (or husband) of C. D., deceased, hereby renounce and disclaim any and all benefits under the will of C. D., and elect to take from the estate of C. D. only the property and benefits which (because of this election) will accrue to me under Section 33 of Act No. 140, approved February 23, 1949, as amended.

Dated: . . . . Signed . . . .

Acknowledgment. (Ark. Code Ann. 28-39-404).

Lost Wills.

Wills lost or destroyed by accident or design are proved in the circuit court in same way as lost deeds. (Ark. Code Ann. 28-40-301). Existence of will at testator’s death or its fraudulent destruction in his lifetime must be proved, and its provisions must be proved by two witnesses, correct copy being equivalent to one witness. (Ark. Code Ann. 28-40-302).

Foreign Executed Wills.

Will executed outside Arkansas in manner prescribed by Arkansas Code or by law of place where executed or by law of testator's domicile at time of execution has same effect in State as if executed in Arkansas in compliance with Code. (Ark. Code Ann. 28-25-105).

Foreign Probated Wills.

Will of nonresident probated elsewhere may be probated in Arkansas by filing authenticated copy thereof with an authenticated copy of order admitting it to probate elsewhere. (Ark. Code Ann. 28-40-120). See also Executors and Administrators, subhead Ancillary Administrator.

Renunciation.

See category 22 Taxation, topic 22.06 Estate Tax, subhead Disclaimers.

Simultaneous Death.

See topic 13.05 Death, subhead Survivorship.

Testamentary Trusts.

See topic 13.15 Trusts.

Revised Uniform Anatomical Gift Act (2006) adopted. (Ark. Code Ann. 20-17-1201 to 1223). Uniform Anatomical Gift Act (1987) repealed.

Living Wills.

Individual of sound mind and 18 years of age or older may execute declaration governing withholding or withdrawal of life-sustaining treatment. Such declaration may direct withholding or withdrawal of such treatment or designate health care proxy to make these decisions for individual. Forms of declaration provided in Ark. Code Ann. 20-17-202. Immunities and penalties established by Ark. Code Ann. 20-17-208, 209. Out of state declarations executed in compliance with law of state of execution or of this state are recognized. (Ark. Code Ann. 20-17-212).

14 FAMILY

14.01 ADOPTION:

Revised Uniform Adoption Act (1977, with 1979, 1983, 1995 and 1997 amendments) adopted (Ark. Code Ann. 9-9-201 – 9-9-224) with modifications in notice of petition, investigation and hearing requirements (§ 12), and application for new birth records (§ 19). It is Class C felony for any parent, or guardian of a minor to receive consideration (other than reasonable reimbursement for expenses incurred or fees for services rendered) in exchange for relinquishment of minor for adoption. (Ark. Code Ann. 9-9-206). Enacted putative father registry for man who is not legally presumed or adjudicated to be biological father of child but who claims or is alleged to be father of child with amended notice procedures for cases involving child born to unmarried mother at time of child's birth. (Ark. Code Ann. 20-18-701 – 20-18-705). Statutory procedure exists for establishment and operation of mutual consent voluntary adoption registry to permit adoptees upon obtaining majority and natural parents to indicate their willingness to have their identity and whereabouts disclosed to each other. (Ark. Code Ann. 9-9-501 – 9-9-508). Adoptees obtain age of majority at age 18 and any qualified person may remove his or her name from registry at any time by filing affidavit. (Ark. Code Ann. 9-9-501 – 9-9-508). Upon registering, registrant must participate in not less than one hour of counseling with social worker employed by entity that operates registry. (Ark. Code Ann. 9-9-504[b]). Any person disclosing confidential information except in accordance with statute or court order is guilty of misdemeanor. (Ark. Code Ann. 9-9-502).

Interstate Compacts on Placement of Children adopted although definition of "placement" was amended and statute revised conditions for placement of child in this state. (Ark. Code Ann. 9-29-201 – 9-29-208). Interstate Compacts on Adoption and Medical Assistance provides public funds to parents who adopt children with special needs. (Ark. Code Ann. 9-29-301). Similar public financial subsidy from state is available through Arkansas Subsidized Adoption Act (Ark. Code Ann. 9-9-401 – 9-9-412) which provides assistance for state-funded adoptions. Amount of subsidy may be readjusted periodically, and subsidy may be for special services, such as health or education services. (Ark. Code Ann. 9-9-409).

14.02 ALIMONY:

See topic 14.06 Divorce.

14.03 COMMUNITY PROPERTY:

System does not apply in Arkansas. See topic 14.06 Divorce for division of property of spouses.

14.04 DESERTION:

See topics 14.06 Divorce, 14.09 Husband and Wife.

14.05 DISSOLUTION OF MARRIAGE:

See topic 14.06 Divorce.

14.06 DIVORCE:

This subject is governed by Tit. 9, c. 12.

Grounds for absolute divorce and divorce from bed and board are adultery subsequent to marriage; impotency at time of marriage continuing to time of bringing action for divorce; conviction of felony or infamous crime; habitual drunkenness for one year; cruel and barbarous treatment endangering life of other; indignities to person of other party rendering his or her condition intolerable; that parties have lived separate and apart for 18 continuous months without cohabitation, whether voluntary by one party or by mutual consent; and willful nonsupport. (Ark. Code Ann. 9-12-301).

Where living apart was due to incurable insanity of defendant, insane spouse must have been continuously confined in institution for at least three years and have been adjudicated to be of unsound mind by court, and proof of insanity is supported by evidence of two reputable physicians. (Ark. Code Ann. 9-12-301).

Even though the cause of divorce occurred out of the state, the laws of Arkansas as to causes of divorce govern exclusively and independently of laws of any other state as to cause of divorce. (Ark. Code Ann. 9-12-307).

Plaintiff who seeks to dissolve covenant marriage must state in divorce petition that he or she seeks dissolution of covenant marriage as authorized under Covenant Marriage Act of 2001. (Ark. Code Ann. 9-12-301). Upon decree of divorce, court shall enter finding that marriage being dissolved is covenant marriage. (Ark. Code Ann. 9-12-324).

Citizenship Requirements.

None.

Residence Requirements.

Plaintiff or defendant must have resided in the state for at least 60 days before commencement of action and for at least three months before final judgment of divorce. (Ark. Code Ann. 9-12-307). Where defendant does not enter appearance or personal service cannot be had, proof of actual residence of plaintiff in state for three months is required before final judgment granting decree of divorce. (Ark. Code Ann. 9-12-307). (See 229 Ark. 842, 318 S.W.2d 793, concerning full faith and credit of Arkansas divorce decree.)

Venue of divorce action is county of plaintiff's residence or county of defendant's residence if plaintiff is nonresident (Ark. Code Ann. 9-12-303), but process may be directed to any county in state. (Ark. Code Ann. 9-12-303). When spouse initiates action for divorce or separate maintenance, venue for initial action shall be venue for subsequent action filed by other spouse regardless of that spouse's residency. (Ark. Code Ann. 9-12-303). Court where final decree is entered retains jurisdiction for all matters following entry of decree. (Ark. Code Ann. 9-12-320). When six months have passed since final decree and both parties have established residence in county of another judicial district within state, either party, or court on its own motion may petition court that granted final decree to transfer case. Where children are involved and justification for transfer has been made, there is initial presumption for transfer to county of residence of custodial parent. (Ark. Code Ann. 9-12-320).

Pleading and Proof.

Plaintiff must prove, but need not allege, that cause of divorce existed or occurred in state, or, if out of state, that it was legal cause of divorce in state; that cause of divorce occurred or existed within five years before commencement of suit. (Ark. Code Ann. 9-12-307).

In contested suits, residence, grounds for divorce, proof of separation, and continuity of separation without cohabitation must be corroborated, but corroboration of injured party's grounds may be waived in writing by other spouse. (Ark. Code Ann. 9-12-306).

In uncontested suits, proof of residence and proof of separation and continuity of separation without cohabitation may be corroborated by either oral testimony or verified affidavit of non-party. (Ark. Code Ann. 9-12-306). Complaint is not taken as true for failure of defendant to answer or because of his or her admission. (Ark. Code Ann. 9-12-305).

Independent action for alimony or separate maintenance without asking for divorce may be brought. (See 21 Ark. App. 287, 731 S.W.2d 786.)

Practice.

Upon application by parties, circuit court is empowered to exclude all individuals except litigants, counsel, and court officers. (Now governed by Ark. Code Ann. 16-13-222[a].) Court still may hear matter in private, at court's discretion pursuant to Ark. Code Ann. 16-13-222(b).

Maintenance and reasonable attorney's fee may be allowed either party during pendency of action of divorce, separate maintenance, or alimony. Court may reduce award to judgment and allow execution upon all marital property except homestead to pay allowance. (Ark. Code Ann. 9-12-309). Court may allow additional attorney's fees for enforcement of alimony, maintenance, and expert witness fees. (Ark. Code Ann. 9-12-309).

Judgment or Decree.

Unless reason for divorce is bigamy, final decree will not be rendered until at least 30 days after filing complaint, except when defendant is constructively summoned by publication of warning order, or there was one year of noncohabitation prior to filing of complaint. (Ark. Code Ann. 9-12-310).

Alimony and Children.

Court may decree alimony and care of children and may require bond for compliance with decree as to care of children (Ark. Code Ann. 9-12-312), income withholding for noncustodial parent delinquent in support payments in amount equal to total court-ordered support payable for 30 days (Ark. Code Ann. 9-10-112), and may enforce decree for alimony or maintenance by sequestration of defendant's property or that of his or her sureties (Ark. Code Ann. 9-12-313).

Alimony may be awarded as reasonable based upon circumstances of parties and nature of case to either party in fixed installments for specific period of time, subject to remarriage of receiving party or death of either party, or such other contingencies as are set forth in award, so that such payments qualify as "periodic payments" under Internal Revenue Code. (Ark. Code Ann. 9-12-312). Alimony will automatically cease unless otherwise ordered by court or agreed by parties upon remarriage of recipient if court orders another person to pay child support to recipient, or if recipient is ordered by court to provide support of another individual. (Ark. Code Ann. 9-12-312).

Upon application of either party, alimony and maintenance may be modified by court as may be proper. (Ark. Code Ann. 9-12-314).

Support of Insane Spouse.

Where divorce was due to incurable insanity of defendant, spouse suing for divorce on that ground must provide for care and maintenance of insane spouse during spouse's lifetime. (Ark. Code Ann. 9-12-301).

Division of Property of Spouses.

On entry of final decree of divorce, non marital property is returned to party who owned it prior to marriage unless court deems some other division more equitable. (Ark. Code Ann. 9-12-315).

All marital property shall be distributed one-half to each party unless court finds such division inequitable. (Ark. Code Ann. 9-12-315). When Court divides marital property other than one-half to each party, it must state in its order basis for unequal division. (Ark. Code Ann. 9-12-315). In making inequitable division of property, Court may consider nine factors: Including federal income tax consequences of division of marital property; length of marriage; age, health, and station in life of parties; occupation of parties; amount and sources of income; vocational skills; employability; estate liabilities, and needs of each party and opportunity of each for further acquisition of capital assets and income; and contribution of each party in acquisition, preservation, or appreciation of marital property, including services as homemaker. (Ark. Code Ann. 9-12-315).

When stocks, bonds or securities of corporation or government entity are marital property, court in final order shall designate specific securities each party is entitled to or determine securities' fair market value and distribute securities to one party on condition other party receives one half of fair market value in money or other property. (Ark. Code Ann. 9-12-315). If real estate cannot be divided, Court shall order sale and divide proceeds. (Ark. Code Ann. 9-12-315).

Estate by entirety is dissolved by divorce decree unless otherwise specifically provided by decree. (Ark. Code Ann. 9-12-317). Court may award estate in entirety to one spouse when other spouse has been convicted of felony during marriage and within three years of filing of complaint for divorce. (Ark. Code Ann. 9-12-317). Decree of divorce shall be bar to all claims of dower and curtesy. (See 206 Ark. 623, 177 S.W.2d 32.) Court is not required to address division of property at time divorce decree is entered if either party is involved in bankruptcy proceedings. (Ark. Code Ann. 9-12-315).

Marital property means all property acquired by either spouse after marriage except: Property acquired by gift, bequest, devise or descent; property acquired in exchange for that acquired before marriage or in exchange for that acquired by gift, bequest, devise or descent; property acquired after decree of divorce from bed and board; property excluded by valid agreement of parties; increase in value of property acquired before marriage or by gift, devise or descent, or in exchange therefor; benefits received or to be received from workers' compensation claim, personal injury claim, or social security claim when those benefits are for any degree of permanent disability or future medical expenses; and income from property acquired prior to marriage or acquired by gift or reason of death of another. (Ark. Code Ann. 9-12-315). Credit card debt incurred during legal separation is marital debt (66 Ark. App. 9, 986 S.W.2d 883).

Change of Wife's Name.

Court may restore previous name to wife. (Ark. Code Ann. 9-12-318).

Remarriage.

No statutory restrictions on remarriage after divorce.

Separation agreements in contemplation of separation or divorce may be enforced by equitable remedies, including sequestration, garnishment and contempt proceedings. (Ark. Code Ann. 9-12-313).

Annulment of Marriage.

See topic 14.11 Marriage.

14.07 [RESERVED]

14.08 GUARDIAN AND WARD:

Governed by Ark. Code Ann. 28-65-101-603 which is cumulative to Uniform Veterans' Guardianship Act (Ark. Code Ann. 28-66-101-124) and in case of conflict Uniform Veterans' Guardianship Act governs in cases where Uniform Veterans' Guardianship Act applies and then only as applicable to assets derived through Veterans' Administration. (Ark. Code Ann. 28-65-102).

Venue for appointment of guardian is county of ward's domicile, or if ward is not domiciled but resides in state, then county of his residence, or if ward is neither domiciled nor resides in state, then county in which greatest part of ward's property by value is situated. (Ark. Code Ann. 28-65-202).

Guardian of person or estate or both may be appointed for unmarried minors, those detained or confined by foreign power, persons who have disappeared, or those who are incapacitated as that term is defined by statute. (Ark. Code Ann. 28-65-104, Ark. Code Ann. 28-65-201).

Not more than one guardian of person may be appointed unless they are husband and wife. One or two guardians of estate may be appointed. (Ark. Code Ann. 28-65-214).

Eligibility.

Natural persons who are residents of state, 18 years of age, of sound mind and not convicted and unpardoned felon may be appointed guardian of person and estate; Department of Human Services or other charitable domestic corporation may be appointed guardian of person and estate of minor primarily supported by it or when parents of minor have abandoned him or are incompetent for duties of guardianship or if there is no other suitable person; parent under 18 may be appointed guardian of person of his children; corporation authorized to do business in state and having proper corporate power may be guardian of estate of ward; bank or similar institution with trust powers may be appointed guardian of estate; nonresident natural person otherwise qualified who has appointed agent to accept service may be appointed guardian. No person found unfit, and no sheriff, probate clerk of circuit court, or deputy of either, nor circuit judge, unless related to ward within third degree of consanguinity may be appointed guardian of person or estate of ward. Except as provided above, no public agency or employee of public agency acting in his official capacity may be appointed guardian of person and can be appointed as temporary guardian only if related to incapacitated person within third degree of consanguinity and court determines any potential conflict of interest is insubstantial and appointment is in best interests of ward. (Ark. Code Ann. 28-65-203).

Temporary guardian may be appointed for specific period not to exceed 90 days if court finds imminent danger to life or health of ward or of loss, damage or waste of ward's property and that such danger requires immediate appointment. Appointment may be to perform duties respecting specific property or to perform particular acts. Immediate notice as specified by statute must be given. Special notice provisions apply where ward is over age 14. Full hearing on merits is required within three working days of entry of temporary guardianship order.(Ark. Code Ann. 28-65-218).

Power of Attorney for Infirm.

See category 21 Property, topic 21.15 Powers of Attorney.

Preference in appointment is to parents of unmarried minor or either of them, if qualified. Otherwise court shall consider request by parent or legal custodian in will or other written instrument, request by minor 14 years of age or older, request by spouse of ward, and relationship by blood or marriage to ward. (Ark. Code Ann. 28-65-204).

Qualification.

Letters of guardianship shall be issued upon court approval of posted bond or upon written acceptance of appointment if no bond is required. (Ark. Code Ann. 28-65-216).

Inventory must be filed by guardian of estate in same manner and subject to same requirements for inventory of decedent's estate, and court may order appraisal by disinterested, qualified person appointed by court. (Ark. Code Ann. 28-65-321).

Powers.

Guardian of person is entitled to custody of ward but cannot bind ward or his property. (Ark. Code Ann. 28-65-301). Guardian of estate has general custody and control of ward's real and personal property, but title remains in ward. (Ark. Code Ann. 28-65-304). All third party actions seeking to charge or benefit estate of ward shall be brought against or by guardian of estate. (Ark. Code Ann. 28-65-305). Ward retains all legal and civil rights except those expressly limited by court order or specifically granted to guardian by court order. (Ark. Code Ann. 28-65-106).

See also category 21 Property, topic 21.01 Absentees.

Duties.

Guardians of person, out of ward's estate, must care for and maintain ward, and, if he is minor, educate and protect him. (Ark. Code Ann. 28-65-301). Guardian of estate must exercise care to protect and preserve it; invest it; perform all other duties required by law; at termination of guardianship deliver it to person entitled to it (Ark. Code Ann. 28-65-301); pay all claims allowed or approved by court whether incurred before or after guardianship and whether arising in contract, tort, or otherwise (Ark. Code Ann. 28-65-317); and may with approval of court sell, mortgage, lease or exchange ward's real or personal property for purpose of providing for ward in his care, maintenance, debts, education, and in any other case where it is for best interest of ward. (Ark. Code Ann. 28-65-314). Specific statutory procedure for court approval of transactions dealing with oil, gas or other mineral interests must be followed, or transaction may be nullity and guardian may be guilty of violation and fined up to $1,000. (Ark. Code Ann. 28-65-315).

Order of appointment shall specify amount of bond to be posted, nature of guardianship, and if limited, specific powers, authorities and duties of guardian. (Ark. Code Ann. 28-65-214).

Bond of guardian of person only must not exceed $1,000 and may be dispensed with entirely; otherwise controlled by provisions relative to bonds of personal representatives of estates of decedents except that value of realty shall not be considered in computing amount of bond, and if estate is all cash bond may be dispensed with if deposited in insured account in institution located in Arkansas and applicable insurance limits are not exceeded. (Ark. Code Ann. 28-65-215).

Accounting is required annually and within 60 days after termination of guardianship. (Ark. Code Ann. 28-65-320).

Investments by guardians are regulated by statute. (Ark. Code Ann. 28-65-311 – 28-65-312).

Securities in Name of Nominee.

See category 13 Estates and Trusts, topic 13.15 Trusts, subhead Securities in Name of Nominee.

Compensation.

Reasonable compensation is allowed to guardian; compensation shall be fixed for attorneys and others employed in connection with discharge of guardian's duties and allowed as administration expense. Compensation may be denied or reduced by court upon finding that guardian failed to perform duty. (Ark. Code Ann. 28-65-108, Ark. Code Ann. 28-65-319).

Termination of guardianship without court order occurs when ward dies or upon adjudication of competency of ward if ward is not minor; as to person but not estate when ward marries if guardianship is solely because of minority. Guardianship is terminated by court order when minor obtains majority or has disabilities removed, when ward becomes nonresident of state, or if guardianship for any reason is no longer necessary. (Ark. Code Ann. 28-65-401). Upon death of ward, guardian of estate may administer estate of deceased ward after further letters are issued to him upon hearing pursuant to petition for letters testamentary or of administration, filed not later than 40 days after date of death, unless upon hearing court grants petition to someone else for letters testamentary or of administration filed not later than 40 days after date of death. (Ark. Code Ann. 28-65-323).

When Guardianship Unnecessary.

Parents, or one of them, if otherwise qualified, are natural guardians of person of each unmarried minor child of parents without judicial appointment, and have care and management of minor's estate derived by gift from parents. Where ward's estate does not exceed $5,000, court may authorize delivery to ward or to someone else for ward's use. (Ark. Code Ann. 28-65-501 – 28-65-502).

Person under duty to pay money or deliver property not exceeding $5,000 yearly to minor may pay or deliver to: (1) person having custody of minor, with whom minor resides; (2) minor, if 18 or married; (3) guardian of person of minor; (4) financial institution, if federally insured savings account in minor's sole name, with notice to minor. If amount so treated exceeds $1,000 yearly, approval must be obtained from circuit court in county of minor's residence. Procedure not available if payor knows that guardian of estate has been appointed or proceeding for appointment of same have been instituted. Persons receiving money (other than minor or financial institution) are obligated to apply money to minor's support and education, but may not pay themselves except to reimburse for out-of-pocket expenses for goods and services necessary for minor's support. Persons paying or delivering money or personal property under procedure are not responsible for proper application of funds. (Ark. Code Ann. 9-26-102).

Procedure for Appointment.

Any person may petition for appointment of qualified person, including himself, as guardian of incapacitated persons. Contents of petition are specified by statute. (Ark. Code Ann. 28-65-205). Notice as specified by statute must be given prior to hearing for appointment with exceptions to notice requirement listed in statute. (Ark. Code Ann. 28-65-207). Except when appointment is being made because of minority, disappearance, detention, or confinement by foreign power, or pursuant to § 28-65-218, evaluation must be conducted prior to petition hearing by professional or professionals with expertise appropriate for respondent's alleged incapacity. Evaluations shall include recommendation on specific area for which assistance is needed and least restrictive alternatives available. (Ark. Code Ann. 28-65-212). Petitioner has burden of proving incapacity by clear and convincing evidence. (Ark. Code Ann. 28-65-213). If respondent is found to be incapacitated, court must determine extent of incapacity and feasibility of less restrictive alternatives to guardianship. (Ark. Code Ann. 28-65-213). Petitioner must bear cost of proceeding but is entitled to reimbursement from ward's estate if guardian is appointed. (Ark. Code Ann. 28-65-211).

Insane Persons.

Person charged with being of unsound mind may be examined and committed by circuit court. (Ark. Code Ann. 20-47-102 – 20-47-105).

Foreign guardians may be authorized to remove ward's property from this state to domiciliary state of guardian and his ward, to sell, mortgage, lease or exchange property located in Arkansas and remove proceeds to domicile of guardian and ward, and to sue in this state in behalf of his ward upon petition by foreign guardian to court in this state in which guardianship of estate is pending or where property of ward is situated or where lawful cause of action may be brought. If foreign guardian is corporation, it need not qualify to do business in this state to entitle it to administer ward's property situated in this state. (Ark. Code Ann. 28-65-601 – 28-65-603).

Conservators act with powers and duties of guardian of estate but may be appointed for one who, by reason of advanced age or physical disability (rather than incapacity), is unable to manage his property and consents to conservatorship. (Ark. Code Ann. 28-67-101 – 28-67-111). Chapter is cumulative to Probate Code. (Ark. Code Ann. 28-67-101).

Transfers to Minors.

See topic 14.10 Infants.

Uniform Fiduciaries Act not adopted.

Uniform Simplification of Fiduciary Security Transfers Act not adopted.

14.09 HUSBAND AND WIFE:

All disabilities of married women are removed, except as hereinafter stated.

Separate Property.

A married woman may acquire and hold real and personal property as her separate estate and property. Property acquired before or after marriage is not subjected to debts of husband. (Const., art. 9, § 7).

Surviving spouse is entitled to refund of federal income tax paid on joint income tax return. (Ark. Code Ann. 28-38-101). Credit card debt incurred during legal separation is marital property. (66 Ark. App. 9, 986 S.W.2d 883).

Control or Use of Spouse's Property.

That married person permits spouse to have control, custody and management of separate property raises presumption that spouse is acting as agent or trustee and is not by itself evidence that married person has relinquished title. But if wife allows her husband to use her separate property as his own, contracting debts on faith of his apparent ownership, she is estopped to claim it as against husband's creditors. (Ark. Code Ann. 9-11-513; 215 Ark. 2, 219 S.W.2d 420).

Conveyances.

Married person may convey or release homestead, dower, or curtesy to spouse's grantee, lessee or mortgagee in any lands, oil, gas, mineral, or timber, or any interest therein, through duly appointed attorney in fact. (Ark. Code Ann. 18-12-503).

Husband and wife may convey to each other by deed. Such deed of conveyance is construed as conveying to grantee entire interest of grantor in property conveyed. (Ark. Code Ann. 18-12-401). Deed by husband to himself and wife creates entirety. (219 Ark. 676, 244 S.W.2d 625).

See category 21 Property, topic Deeds, subhead Execution; also category 8 Debtor and Creditor, topic 8.10 Homesteads, subhead Alienation or Incumbrance.

Antenuptial Contracts.

Man and woman may enter antenuptial contracts. Form, content, effect and enforceability controlled by Ark. Code Ann. 9-11-301 – 9-11-305. Premarital agreements are governed by Arkansas Premarital Agreement Act. (Ark. Code Ann. 9-11-401 – 9-11-412).

Desertion and Nonsupport.

Person is guilty of Class A misdemeanor if without just cause he fails to support physically or mentally infirm or financially dependant spouse, legitimate or illegitimate child less than 18, or dependent child who is physically or mentally infirm. If prior conviction for nonsupport, or if owes at least four months past due support totaling more than $2,500, or if remains outside state to avoid prosecution, then enhanced to Class D felony. (Ark. Code Ann. 5-26-401). Nonsupport is Class C felony if person owes between $10,000 and $25,000 in past-due child support, and Class B felony if violator owes more than $25,000.

Jurisdiction for prosecution lies in county where violation occurred or where defendant may be apprehended or where injured person resides at time of filing indictment or information. (Ark. Code Ann. 5-26-410).

Court may order temporary support of neglected spouse or child, pendente lite, and punish for violation as for contempt. (Ark. Code Ann. 5-26-413).

Court may direct payment of fine in whole or in part to spouse or to guardian or custodian of child. (Ark. Code Ann. 5-26-412).

Court may, before trial with consent of defendant, at trial on plea of guilty, or after conviction, in lieu of penalty, order defendant to make periodic payments for period not to exceed one year to spouse or guardian of child and release defendant on own recognizance or with sureties on condition that he appear in court on day certain. Failure to appear is punishable by imprisonment of not less than ten or more than 90 days and may not be suspended. (Ark. Code Ann. 5-26-414 – 5-26-415).

Marriage and parenthood are proved with same evidence as is required in civil actions. (Ark. Code Ann. 5-26-411).

Business Dealings.

Husband and wife may transact business with each other. (95 Ark. 523, 130 S.W. 515).

Agency.

Either spouse may act as attorney in fact for the other.

Liability of Spouses.

Neither spouse is liable for antenuptial debts of other (Ark. Code Ann. 9-11-506) nor for debts contracted by other in trade or business as to separate property (Ark. Code Ann. 9-11-508).

Actions.

If husband and wife are sued together, wife may defend for her own right and, if husband neglects to defend, for his also. (Ark. Code Ann. 16-61-102). Husband and wife may sue each other. (183 Ark. 626, 37 S.W.2d 696).

Community property system does not apply.

14.10 INFANTS:

Age of majority is 18, except for matters involving sale or purchase of alcoholic beverages. (Ark. Code Ann. 9-25-101).

Uniform Transfers to Minors Act (Ark. Code Ann. 9-26-201 – 9-26-227). Age of majority under Act is 21.

Uniform Securities Ownership by Minors Act (Ark. Code Ann. 9-26-301 – 9-26-307).

Child Welfare Agency Licensing Act (Ark. Code Ann. 9-28-401 – 9-28-413). Unlawful for person, entity or group of entities to operate or assist in operation of child welfare agency that has not been licensed pursuant to this chapter. Also governs foster care placements. (Ark. Code Ann. 9-28-410 – 9-28-413).

Emancipation.

Court may remove disabilities of resident who has reached his or her 16th birthday (Ark. Code Ann. 9-26-104) for general purposes and of nonresident infant of such age in order to enable infant to convey real property in county in which court sits (Ark. Code Ann. 9-26-104).

Powers.

Infants may deposit in, and withdraw from, bank accounts (Ark. Code Ann. 23-47-202) and may invest in, and withdraw from, savings and loan accounts unless parent or guardian restricts authority in writing. (Ark. Code Ann. 23-37-501).

Parental Responsibility.

Recovery up to $5,000 from parents of any minor living with parents who maliciously or willfully destroys property of person or entity, including state or county, city, town or school district bringing action. (Ark. Code Ann. 9-25-102).

Deserting Parents.

Finance and Administration Department is authorized to disclose to Office of Child Support Enforcement of Human Services Department address of any deserting parent from whom support is charged to Enforcement Office. (Ark. Code Ann. 26-51-813).

Support.

Person under duty to pay money, or deliver personal property, to minor may perform, in amounts not exceeding $5,000 per annum, by payment or delivery to: (1) Minor, if 18 years or married, (2) any person having care or custody of minor with whom he resides, (3) guardian of person of minor, or (4) financial institution for deposit in federally insured savings account in sole name of minor and giving notice of deposit to minor; provided, any amount in excess of $1,000 must be approved by court in county in which minor, or person delivering property resides or is domiciled. These provisions are inapplicable if person making delivery has actual knowledge of appointment of guardian of estate or that proceedings for appointment of guardian for estate of minor are pending. (Ark. Code Ann. 9-26-102).

Paternity—Rights of Putative Father.

Man alleging to be father of illegitimate child is authorized to petition court for determination of paternity. (Ark. Code Ann. 9-10-104). Petitions for paternity establishment may also be filed by biological mother; person for whom paternity is not presumed or established by court order, including parent or grandparent of deceased putative father; or Office of Child Support Enforcement. (Ark. Code Ann. 9-10-104).

Illegitimate Children—Custody.

Father who has established paternity may petition circuit court of county in which child resides for custody. (Ark. Code Ann. 9-10-113). Father of illegitimate child responsible for minimum level of support until child attains age 18. (Ark. Code Ann. 9-10-110 – 9-10-111, 9-10-115).

Infants—Testing.

All newborn infants must be tested for hypothyroidism, cystic fibrosis, galactosemia, phenylketonuria, and sickle cell anemia. If reliable and efficient testing techniques are available, infants must be tested for other genetic disorders of metabolism. Statute provides for Medicaid reimbursement for costs of required tests. (Ark. Code Ann. 20-15-302).

Ratification of Infant's Contract.

Promise made after majority to pay debt contracted during infancy must be in writing. (Ark. Code Ann. 4-59-101).

Actions of infant must be brought by next friend or guardian. Defense by guardian, regular or ad litem. (Ark. Code Ann. 16-61-103 – 16-61-104; Ark. Code Ann. 16-61-108).

Rescission of contract by infant 18 years old or older is permitted only upon full restitution by infant of property or money received by infant. (Ark. Code Ann. 9-26-101).

Adoption.

See topic 14.01 Adoption.

14.11 MARRIAGE:

Minimum age of marriage is 17 years for males and 16 years for females. Before marriage license can be issued to males and females under age of 18, satisfactory evidence of consent of parent or parents, or guardian to marriage must be furnished to clerk. (Ark. Code Ann. 9-11-102). Consent of both parents of each party necessary except in certain circumstances. (Ark. Code Ann. 9-11-102). Special rules apply to minimum age requirement where one or both parties are under minimum age and female is pregnant or has given birth to child. (Ark. Code Ann. 9-11-103). There is five day waiting period for marriage licenses issued to males and females under age of 18 years. (Ark. Code Ann. 9-11-102[c]).

Consent Required.

Satisfactory evidence of consent of parent or guardian is required where person is under 18. (Ark. Code Ann. 9-11-102).

License is required; issued by county clerk of any county, but may not be issued when either party is visibly under influence of intoxicating drinks or drugs. (Ark. Code Ann. 9-11-201 – 9-11-203; Ark. Code Ann. 9-11-207). Clerk is required to record social security numbers of persons obtaining license on license application or coupon for marriage license. (Ark. Code Ann. 9-11-201). County clerks usually require both parties to appear in person when applying for license.

Notice of Intention to Marry.

No marriage license may be issued until after notice of intention to marry, signed by both parties, is filed with county clerk and age of applicants is verified. (Ark. Code Ann. 9-11-205). Failure to comply does not make marriage void, but fine of $100 to $500 is provided for noncompliance. If applicable, notice of intention to wed must contain declaration of intent for covenant marriage as provided in Covenant Marriage Act of 2001. (Ark. Code Ann. 9-11-205).

Medical Examination.

No longer required.

Same Sex Marriage.

Void. (Ark. Code Ann. 9-11-109). Amendment 83 to Arkansas Constitution states that marriage is union between one man and one woman. Legal status for unmarried persons that is identical or substantially similar to marital status is not valid nor recognized, with exception of common law marriage from another state between man and woman.

Members of Armed Forces.

County court upon petition and after hearing may waive bond, and consent of parents, and authorize issuance of license to resident of state on active duty with Armed Forces or to resident marrying person on such active duty. (Ark. Code Ann. 9-11-211).

Ceremonial Marriage.

Marriage must be solemnized by Governor, judge of court of record, former justice of Arkansas Supreme Court, justice of the peace of county where ceremony is performed, regularly ordained and registered minister or priest of any religious sect or denomination, mayor of city or town, any official appointed for that purpose by Quorum Court of county where marriage is performed or elected district court judges. (Ark. Code Ann. 9-11-213).

Record.

See category 10 Documents and Records, topic 10.04 Records, subhead Vital Statistics.

Common law marriages are not recognized (97 Ark. 272, 133 S.W. 1037), except a common law marriage contracted in another state and valid there is valid in Arkansas (219 Ark. 813, 244 S.W.2d 958).

Covenant marriages are recognized by Covenant Marriage Act of 2001. Parties may contract to covenant marriage by declaring intent on application for marriage license and executing declaration of intent as provided by statute. (Ark. Code Ann. 9-11-801 – 9-11-811). Parties to covenant marriage must receive authorized counseling from member of clergy of any religious sect, clerks of Religious Society of Friends, or professional marriage counselor. (Ark. Code Ann. 9-11-803 – 9-11-805).

Proxy marriages are not authorized by any statute.

Prohibited Marriages.

Between: Parent and child; grandparent and grandchild; brother and sister (half blood included); uncle and niece; nephew and aunt; first cousins. (Ark. Code Ann. 9-11-106).

Foreign Marriages.

A marriage valid in state where contracted is valid in Arkansas if parties resided in other state at time of marriage and marriage would be valid under laws of that state. (Ark. Code Ann. 9-11-107). This section does not apply to marriage between persons of same sex. (Ark. Code Ann. 9-11-107).

Antenuptial agreements establishing rights and obligations concerning property of either or both parties, whenever and wherever acquired or located, right to buy, sell, encumber, etc. any property, disposition of property upon separation, marital dissolution, death or other event, modification or elimination of spousal support, execution of wills, trusts or other arrangements to carry out agreement, ownership rights in and disposition of death benefit from life insurance policies, choice of law and any other matter including personal rights and obligations, except in violation of public policy or criminal statute, shall be enforceable without consideration. Agreement adversely affecting child support not enforceable. Agreement is not enforceable if party did not execute agreement voluntarily or agreement was unconscionable when executed and before execution that party: (1) was not provided fair and reasonable disclosure of property and financial obligations of other party, (2) did not voluntarily and expressly waive in writing after consulting with legal counsel any right to disclosure beyond that provided and (3) did not have or reasonably could not have had adequate knowledge of property or financial obligations. If premarital agreement modifies or eliminates spousal support and this causes one party to be eligible for public assistance at separation or marital dissolution, court may require support to avoid eligibility. (Ark. Code Ann. 9-11-401 – 9-11-413). If marriage is determined to be void, agreement that would otherwise have been premarital agreement is enforceable only to extent necessary to avoid inequitable result. (Ark. Code Ann. 9-11-407).

Annulment.

Where either party to a marriage was incapable of consent from lack of age or understanding or was incapable from any physical cause, or where consent was obtained by force or fraud, the marriage is void from time its nullity is declared by court of competent jurisdiction. (Ark. Code Ann. 9-12-201).

Action to annul a marriage must be brought in county where plaintiff resides. (Ark. Code Ann. 9-12-202). Action to annul on ground of nonage may be brought before legal age is attained. (180 Ark. 1152, 24 S.W.2d 867).

Abandonment.

Where one party to a marriage abandons the other and resides beyond the limits of the state, and the abandoned spouse is, for five successive years, without knowledge whether the other spouse is living, a presumption arises that such other spouse is dead, and a remarriage of the abandoned spouse is valid. (Ark. Code Ann. 9-11-108).

Separate Property.

Property which married person owns at time of marriage, or which comes to him or her by gift, bequest, descent or transfer from any person; or which he or she has acquired by trade, business, labor or services carried on or performed on his or her sole or separate account, and income and proceeds from all such property shall, notwithstanding marriage, be and remain his or her sole and separate property and may be used or invested in his or her own name and may be sold or transferred without interference of his or her spouse. See topic Divorce for use of “marital property” idea in division of property. No contract made by married person with respect to his or her separate property shall be binding upon his or her spouse. Separate property of married person shall not be liable for his or her spouse’s debts, except as may have been contracted for support of spouse or support of children of marriage. (Ark. Code Ann. 9-11-503 – 9-11-508; Ark. Code Ann. 9-11-515).

See also topic 14.09 Husband and Wife.

14.12 MARRIED WOMEN:

See topics 14.06 Divorce, Husband and Wife, Marriage; categories 5 Civil Actions and Procedure, topic Evidence, subhead Witnesses; Debtor and Creditor, topic Homesteads; Documents and Records, topic Acknowledgments; Estates and Trusts, topics Executors and Administrators, Wills; Property, topic Dower.

16 INSURANCE

16.01 INSURANCE COMPANIES:

Regulated by Tit. 23.

Supervision by Department of Insurance, under Insurance Commissioner, 1200 West 3rd Street, Little Rock, AR 72201, who administers laws regulating all insurance companies and conducts such examinations and investigations of insurance matters as he may deem proper to determine violation of Arkansas’s insurance laws. (Ark. Code Ann. 23-61-102 – 23-61-103). Commissioner may investigate suspected fraudulent insurance acts and persons engaged in business of insurance. (Ark. Code Ann. 23-66-504). Commissioner may also enter into regulatory cooperation and coordination agreements with other governmental regulatory agencies. (Ark. Code Ann. 23-61-103). Commissioner may issue cease and desist orders if it appears to Commissioner upon sufficient grounds or evidence that there has been violation of insurance law, rule, or order.

Fees payable to Insurance Commissioner include: For reviewing all documents for issuance of original certificates of authority $500; for renewal of annual certificate of authority $100; filing annual statement $50; amendment to articles of incorporation $25; original resident license for each property, casualty, surety agent $15; each continuance and license for resident agent $10-$15; original and renewal license for broker $30; copies of documents 25¢ per page; certificate authenticating any document other than certificates of authority, $5. (Ark. Code Ann. 23-61-401). Nonresident agent license fees shall be established by Commissioner.

Rates are regulated in manner to promote competition or to regulate price in absence of competition. (Ark. Code Ann. 23-67-201). Insurance Commissioner determines if noncompetitive market exists. (Ark. Code Ann. 23-67-207).

Rating organizations must be licensed by Insurance Commissioner. (Ark. Code Ann. 23-67-214).

Cancellation.

No policy covering damage to property can be cancelled or not renewed solely as result of claims arising from natural causes. “Natural Causes” is defined by statute. (Ark. Code Ann. 23-63-109). See also subhead Unfair Methods, infra.

Discrimination.

Life companies are prohibited from discriminating among policy holders by allowing a discount on premium under pretense of making policy holder an agent of company. (Ark. Code Ann. 23-66-311). See also subhead Unfair Methods, infra.

Rebates by property, casualty, and surety companies are prohibited. (Ark. Code Ann. 23-66-308). See also subhead Unfair Methods, infra.

Unfair methods of competition and unfair or deceptive acts or practices are prohibited as follows: Misrepresentation of terms of policy contract; publishing false information with respect to the business of insurance or with respect to any person in the conduct of such person’s insurance business; defamation with respect to the financial condition of any person; boycott, coercion, and intimidation resulting in unreasonable restraint of business of insurance; filing false financial statements and keeping false records by insurer; issuing or delivering agency company or other stock as an inducement to insure; unfair discrimination between individuals of the same class and equal expectancy of life with respect to contracts of life insurance or between individuals of the same hazard with respect to contracts of accident or health benefits; rebates of premiums on any contract of life insurance, life annuity, or accident and health insurance, except as expressly provided by law; unfair claim settlement practices; failure to maintain complaint handling procedures; cancellation of policy in force over 60 days, except for nonpayment of premium, fraud, material change in risk, violation of applicable regulations or ordinances substantially increasing risk, nonpayment of dues, or any material violation of material provision of policy; refusing to issue or limiting amount of coverage on property or casualty risk based upon knowledge of insurer’s nonrenewal of previous policy; refusing to insure solely because of race, color, creed, national origin, citizenship, sex or status as domestic abuse victim; churning of business; and failing to maintain conflict of interest procedures. (Ark. Code Ann. 23-66-206). Specific disclosure requirements apply to depository institutions and affiliates’ insurance activities. (Ark. Code Ann. 23-66-606). Discrimination based on genetic testing is unfair practice. (Ark. Code Ann. 23-66-320).

Mandatory Reporting of Fraudulent Acts.

Person engaged in business of insurance that has reasonable belief that fraudulent insurance act is being, will be or has been committed shall provide notice thereof to Commissioner. Knowing noncompliance constitutes Class A misdemeanor. (Ark. Code Ann. 23-66-505). Refusal of any person to fully comply with commissioner’s request for information shall be grounds for suspension, revocation, denial, or non-renewal of any license or authority held by person to engage in insurance or other business subject to commissioner’s jurisdiction. (Ark. Code Ann. 23-66-505).

Agents and Brokers.

Detailed licensing and examination requirements for agents and brokers established by Ark. Code Ann. 23-64-201 – 23-64-232. Licensing requirements for viatical settlement providers established by Ark. Code Ann. 23-81-603.

Policies.

Basic life, health, certain group insurance and accident policies must be approved by Commissioner as to form before issuance. (Ark. Code Ann. 23-79-109).

Accident and health contracts must be filed with and approved by Commissioner as to rates. (Ark. Code Ann. 23-79-109).

Life and accident and health policies must be approved by Commissioner as to language simplicity. (Ark. Code Ann. 23-80-201 – 23-80-208).

Policies insuring against damage to person or property of another must contain a clause subrogating injured person or his representative to insured's rights against insurer. (Ark. Code Ann. 23-89-101). Provisions regulate insurance purchased by creditor providing coverage in connection with credit transaction for personal, family, or household purposes; form of policy and certificate of insurance plus schedule of rates shall be filed with Commissioner. (Ark. Code Ann. 23-101-101 – 23-101-114).

Limitations of right of action provided in policies as to time are void. (Ark. Code Ann. 23-79-202). Provisions depriving insured or beneficiary of right to jury trial are void. (Ark. Code Ann. 23-79-203).

Policy Language.

See category 3 Business Regulation and Commerce, topic 3.12 Consumer Protection, subhead Plain Language.

Policy Loans, Interest.

Guidelines are set for life insurers to include in policies provision for periodic adjustment of loan interest rates. (Ark. Code Ann. 23-81-109).

Health and Accident Insurance.

Contracts must include dental, optometric, psychological, and other statutorily-listed services performed by health care provider if service would be covered if performed by physician. (Ark. Code Ann. 23-79-114). Health care plan or accident and health insurance policies which cover insured and members of insured's family must include coverage for newborn children. (Ark. Code Ann. 23-79-129). Accident and health insurance policies must provide identical outpatient coverage for certain inpatient services, unless policyholder rejects it in writing. (Ark. Code Ann. 23-85-133). Exclusions for preexisting conditions are regulated. (Ark. Code Ann. 23-86-304). Provisions guarantee renewability and availability for employers in group market. (Ark. Code Ann. 23-86-311 – 23-86-312).

Group life insurance is authorized for a restricted class of policyholders and with limited coverages. Form of policy must be approved by Commissioner. (Ark. Code Ann. 23-83-101 – 23-83-127).

Group accident and health policies providing hospital, surgical or major medical coverage must contain provision allowing member and member's eligible dependents to continue coverage upon written request for up to 120 days after membership would ordinarily end due to termination of employment, membership or change of marital status. (Ark. Code Ann. 23-86-114).

Valued Policies.

Property insurance policies on real estate, in case of total loss by fire or natural disaster, except flood or earthquake, are liquidated demands for full amount of policy or full amount upon which premium is charged. Personal property and detached or appurtenant structures are specifically excluded. (Ark. Code Ann. 23-88-101).

Proof of substantial compliance with terms of fire policy on personal property supports recovery. (Ark. Code Ann. 23-79-207).

Fire Insurance.

Applicants for fire insurance must submit anti-arson application disclosing information required by Commissioner. (Ark. Code Ann. 23-88-207). Insurer providing arson information to law enforcement agency must notify insured within 90 days of report. (Ark. Code Ann. 12-13-303).

Life Insurance.

Spouse may insure life of his or her spouse for benefit of himself or herself and children. In case of insured spouse's death, his or her creditors can claim only such sums as were paid for premiums with intent to defraud, and insurance company is justified in paying surviving spouse at any time before it is notified in writing of claims of creditors. (Ark. Code Ann. 23-79-128).

Life Settlement Contracts.

Consent and disclosure requirements apply to agreements to pay less than death benefit in return for policyholder's assignment of policy. (Ark. Code Ann. 23-81-801 - 23-81-805).

Group Annuities—Life Insurance.

Group contracts must comply with statutory provisions. Provisions address specific groups, including employee, labor union, trustee, debtor, credit union, and association groups. (Ark. Code Ann. 23-83-102 – 23-83-127).

Gift Annuities.

Charities issuing gift annuities must comply with Commissioner's regulations. (Ark. Code Ann. 23-63-201).

Standard Valuation Law for Life Insurance and Annuities.

Revised standard valuation law for life insurance and annuities and standard nonforfeiture law for life insurance are adopted. (Ark. Code Ann. 23-84-101 – 23-84-113; Ark. Code Ann. 23-81-201 – 23-81-213).

Standard Nonforfeiture for Individual Deferred Annuities Act adopted. (Ark. Code Ann. 23-81-301 – 23-81-312).

Title Insurance.

There are separate minimum capital and surplus requirements for title insurance companies. (Ark. Code Ann. 23-63-205).

Penalty of 12% and attorney's fees are recoverable as to cargo, property, marine, casualty, fidelity, surety, cyclone, tornado, life, accident and health, hospital, medical or surgical insurance, and farmer's mutual aid for failure to pay in time specified in policy. (Ark. Code Ann.

23-79-208). Not assessable if amount recovered is less than 20% of amount demanded or sought in suit. (Ark. Code Ann. 23-79-208). Claim shall be paid by check, draft, or electronic funds transfer; if insurer unreasonably delays processing of check or draft for more than three days, penalty may be collected. (Ark. Code Ann. 23-63-107, Ark. Code Ann. 23-66-321).

Tort of bad faith for refusal to pay claims may be established if affirmative acts of misconduct which are dishonest, malicious, or oppressive are shown on part of insurer. Failure to pay is not alone sufficient to establish bad faith. (281 Ark. 128, 664 S.W.2d 463).

Coverages not procurable from authorized insurers may be procured from unauthorized insurers subject to specific conditions. (Ark. Code Ann. 23-65-305 – 23-65-306).

Attorney's fee allowed in insurer's suit to cancel policy or insured's suit for reinstatement, if judgment is against insurer. (Ark. Code Ann. 23-79-209). Attorney's fees allowed on loss claims, if judgment is against insurer. (Ark. Code Ann. 23-79-208). Policyholders are not liable for attorney's fees incurred by insurer in defense of cases where insurer held not liable for loss. (Ark. Code Ann. 23-79-208).

Investments of domestic insurers are regulated by Ark. Code Ann. 23-63-801 – 23-63-841.

Foreign insurance companies must file with Commissioner copy of its corporate charter or articles of incorporation, copy of its by-laws if mutual company, certified by secretary or other officer having custody thereof, submit financial statement as of next preceding Dec. 31, copy of report of last examination certified by supervisory official, registration of registered agents for service of process, certificate of supervising official showing authority to transact proposed business, any required bond or deposit, specimen policies, detailed digest of company history detailing successful operation, and, if reciprocal insurer, copies of power of attorney of its attorney in fact along with its subscribers' agreement if separate instrument. (Ark. Code Ann. 23-63-209). Foreign and alien surplus lines insurers must annually file verified statement of financial condition, transactions and affairs. (Ark. Code Ann. 23-65-310). Uniform Unauthorized Insurers Process Act has been adopted. (Ark. Code Ann. 23-65-201 – 23-65-205). See also subhead Fees, supra.

Every foreign insurer and every domestic reciprocal insurer must maintain registered office and agent for service of process in Arkansas. (Ark. Code Ann. 23-63-301 – 23-63-304).

Foreign insurers, with exceptions, must furnish evidence it has been organized and actively engaged in business in state of its incorporation for three years prior to date of applying for admission and must maintain certain reserves. (Ark. Code Ann. 23-63-202). Law provides for regulation of captive insurers. (Ark. Code Ann. 23-63-1601 – 23-63-1623).

Mutual assessment life or accident and health company may not transact business in state unless authorized to do so on Jan. 1, 1960 and after Jan. 1, 1968 must maintain reserves in accordance with Ark. Code Ann. 23-84-101 – 23-84-113 and Ark. Code Ann. 23-63-607, must insert in life insurance policies and annuity and endowment contracts issued after Jan. 1, 1968 nonforfeiture provision in accordance with Ark. Code Ann. 23-81-201 – 23-81-213, and must have at least 2,000 members regularly paying their assessments and at least $10,000 of surplus funds. (Ark. Code Ann. 23-72-104).

Insurance Holding Company Regulatory Act (Ark. Code Ann. 23-63-501 – 23-63-530).—Registered insurers, with exceptions, must refile annually. (Ark. Code Ann. 23-63-514).

Retaliatory Law.

Commissioner shall impose upon any insurer or upon agent or representative of that insurer of any other state or any foreign country doing business in State of Arkansas same taxes, licenses, and other fees, in aggregate, and same fines, penalties, deposit requirements or other material requirements, obligations, prohibitions, or restrictions that are imposed upon Arkansas insurers or upon their agents or representatives by laws of other state or its political subdivisions, or other country, or its provinces or political subdivisions. (Ark. Code Ann. 23-63-102).

Franchise Tax.

See category 2 Business Organizations, topic 2.03 Corporations, subhead Franchise Tax.

Premium Tax.

All foreign companies are subject to an additional tax, payable to state treasurer on or before Mar. 1 of each year, based on total premium receipts from business within state during preceding year less dividends, and reduction in or refund of premiums and premium refunds or returns at following rates: 2½% as to all kinds except ¾ of 1% on gross underwriting profit of wet marine and foreign trade insurance. (Ark. Code Ann. 23-60-102, Ark. Code Ann. 24-11-809, Ark. Code Ann. 26-57-601 – 26-57-607).

Premium tax applies to domestic as well as foreign or alien insurance. (Ark. Code Ann. 23-60-102, Ark. Code Ann. 26-57-601 – 26-57-605). Two-thirds of premium tax revenue on motor vehicles insurance from alien and foreign insurance companies must be paid to qualified Police Officers' Pension and Relief Fund. (Ark. Code Ann. 24-11-301).

Workmen's Compensation Tax.

See category 11 Employment, topic 11.02 Labor Relations.

Uniform Insurers Liquidation Act adopted. (Ark. Code Ann. 23-68-101 – 23-68-134).

Direct Actions Against Insurer.

See category 5 Civil Actions and Procedure, topic 5.02 Actions, subhead Direct Action Against Insurer.

No-Fault Insurance.

See category 23 Transportation, topic 23.01 Motor Vehicles, subhead No-Fault Insurance.

Competitive Bidding for Municipal Insurance Contracts.

Cities of first class may waive requirements of competitive bidding in exceptional situations in which procedure is not deemed feasible or practical for purchase of all types of insurance (Ark. Code Ann. 14-58-303 – 14-58-304).

16.02 SURETY AND GUARANTY COMPANIES:

State Insurance Commissioner has general supervision.

Capital And Deposit Requirements.

Certain minimum capital or surplus requirements apply (Ark. Code Ann. 23-63-205) and securities of market value of not less than $100,000 must be deposited through Insurance Commissioner (Ark. Code Ann. 23-63-206). Securities for deposit must qualify (Ark. Code Ann. 23-63-903) and be made through office of Commissioner (Ark. Code Ann. 23-63-910 – 23-63-912).

Powers.

Such companies may become surety upon judicial, official, administrators, receivers, fiduciary, and other like bonds (Ark. Code Ann. 23-63-1001) and may be sole surety on bonds of State, county or municipal officers (Ark. Code Ann. 23-63-1002).

Agent must file with Commissioner an application for certificate of authority accompanied by applicable fees, certified copy of corporate charter or articles of incorporation, certified by-laws if mutual company, power of attorney and members' agreement if foreign reciprocal insurer or declaration if domestic reciprocal insurer, copy of financial statement as of Dec. 31 next preceding sworn to by at least two executive officers or certified by supervisory official of insurer's domicile which statement may be in form currently approved by National Association of Insurance Commissioners, copy of report of last examination certified by supervisory official registration of registered agents for service of process, if foreign insurer certificate of supervisory official showing authority to transact in state of domicile insurance proposed to be transacted in this State, if alien insurer copy of appointment and authority of U.S. manager certified by its officer having custody of its records, required bond or deposit, specimen copies of policies proposed to be issued, and detailed digest of company's history. (Ark. Code Ann. 23-63-209).

Process Agent.

Foreign or alien insurer and domestic reciprocal insurer must designate and maintain in Arkansas registered office and registered agent. (Ark. Code Ann. 23-63-301). Service on domestic insurer must be as provided for service on corporate defendant. (Ark. Code Ann. 23-79-205). (See also category 5 Civil Actions and Procedure, topic 5.20 Process.)

17 INTELLECTUAL PROPERTY

17.01 TRADEMARKS AND TRADENAMES:

Any individual, firm, partnership, corporation, association or union, adopting and using in this state, any word, name, symbol, or device, or any combination thereof to identify and distinguish goods or services made or sold by person may register such trademark or service mark. (Ark. Code Ann. 4-71-203).

What May Be Used.

Following cannot be registered: immoral, deceptive or scandalous matter; anything which may disparage or falsely suggest connection with persons, living or dead, institutions, beliefs, or national symbols, or which brings them into contempt or disrepute; flag or coat of arms or other insignia of U.S. or of any state or municipality or foreign nation; name, signature or portrait of any living individual without his written consent; mark which is merely descriptive or deceptively misdescriptive, geographically descriptive or deceptively misdescriptive or surname; or mark which so resembles mark registered or used in this state and not abandoned as to cause confusion or mistake or to deceive. (Ark. Code Ann. 4-71-202).

Registration is obtained by filing application with Secretary of State stating name and business address of applicant, and if applicant is corporation, state of incorporation, or if partnership, state in which partnership is organized and names of general partners; goods or services in connection with which mark is used, class of goods as classified in act, and manner in which mark is used; date when mark was first used anywhere and date when it was first used in this State; that applicant is owner and that no other person has right to use it in this State either in its identical form or in such near resemblance as to deceive. Application must be signed and verified by applicant or by member of firm or by officer of corporation. Application must be accompanied by specimen or facsimile of mark in triplicate. Secretary of State shall by regulation prescribe fees payable. (Ark. Code Ann. 4-71-203, Ark. Code Ann. 4-71-217).

Assignment.

See subhead Protection Afforded, infra.

Protection Afforded.

Registration is effective for term of five years, and upon application filed within six months prior to expiration may be renewed for like term. In like manner, registration may be renewed for successive periods of five years. (Ark. Code Ann. 4-71-206).

Assignment of mark may be made with transfer of goodwill of business in which mark is used by written instrument recorded with Secretary of State. Assignment, without such recordation within three months after date of assignment or before subsequent purchase, is void as against subsequent purchaser for valuable consideration without notice. (Ark. Code Ann. 4-71-207).

Infringement may be enjoined. Owner of mark, if prevailing party may recover all profits derived and/or all damages suffered therefrom. (Ark. Code Ann. 4-71-212, Ark. Code Ann. 4-71-214). Court, in its discretion, may enter judgment for treble damages for wrongful acts committed with knowledge or in bad faith by losing party. (Ark. Code Ann. 4-71-214).

Fraudulent Registration.

Any person who procures registration of mark by knowingly making any false or fraudulent representation is liable to pay damages to injured party. (Ark. Code Ann. 4-71-211).

Cancellation.

Marks subject to cancellation: those which are not renewed; for which holder requests cancellation; which court has found to be abandoned, not owned by holder, to have been improperly granted or fraudulently obtained, mark has become generic name of goods or services for which it was registered, or so similar to mark registered by another person in U.S. Patent Office prior to date of filing for registration as likely to cause confusion or to deceive, or which court cancels on any other grounds. (Ark. Code Ann. 4-71-209).

Classification.

Specific goods and services for which marks may be registered are classified for convenience of Secretary of State, but mark may include any and all goods and services for which mark is used. (Ark. Code Ann. 4-71-210).

Common law rights in trademark are not affected by statutory provisions. (Ark. Code Ann. 4-71-216).

Resale Price Agreements.

Arkansas Fair Trade Act repealed, 1975.

Tradenames.

Person conducting a business under any name other than his real name must file in office of county clerk of each county in which he conducts such business an acknowledged certificate setting forth name under which such business is conducted and true full name and post office address of each person conducting same. On disposing of his interest therein, or withdrawing therefrom, each person must likewise file a certificate setting forth that fact. Each day of violation is a separate offense punishable by a fine not less than $25 nor more than $100. Domestic and foreign corporations and domestic and foreign limited partnerships and limited liability companies lawfully doing business in state are exempt. (Ark. Code Ann. 4-70-201 – 4-70-

206).

Franchising.

Governed pursuant to Arkansas Franchise Practices Act. (Ark. Code Ann. 4-72-201 – 4-72-210). See category 3 Business Regulation and Commerce, topic 3.15 Franchises.

17.02 TRADE SECRETS:

Uniform Trade Secrets Act (1979) adopted. (Ark. Code Ann. 4-75-601 – 4-75-607). Act provides exclusive remedies and displaces conflicting common law claims. R.K. Enterprise v. Pro-Comp Mgmt., 356 Ark. 565, 158 S.W.3d 685 (2004). Act does not affect contractual liability. (Ark. Code Ann. 4-75-602).

18 LEGAL PROFESSION

18.01 ATTORNEYS AND COUNSELORS:

The state bar is not integrated.

Eligibility.

Every citizen or alien lawfully residing in U.S. of good moral character and possessing requisite qualifications may be admitted to practice. (Ark. Code Ann. 16-22-201, Rules Governing Adm. to Bar XII, XIII). See subhead Educational Requirements, infra.

Courts of this state, not any single justice or judge, shall have power to license applicants. (Ark. Code Ann. 16-22-204). All applicants must be admitted to practice by state Supreme Court. (Ark. Code Ann. 16-22-206).

Residency requirements eliminated by Per Curiam Order of Supreme Court dated July 1, 1985, 286 Ark. 511, 692 S.W.2d 233.

Registration as law students not required.

General Examination.

Applicant must score 85 or better on Multistate Professional Responsibility Examination. MPRE may be taken before graduation or it must be taken within one year of general examination in which applicant receives passing score. There is no limit to number of times applicant may take MPRE. (Rules Governing Admission to the Bar IX).

Examination.

Administered by Board of Examiners appointed by Supreme Court. Address: Justice Building, 625 Marshall Street, Little Rock, AR 72201. Examinations for admission conducted Feb./Mar. and July/Aug., in Little Rock. (Rules Governing Adm. to Bar II). Application must be made by Nov. 15 for Feb. exam and by Apr. 1 for July exam. (Rules Governing Adm. to Bar X).

Subjects covered by exam include: Business organizations; commercial transactions; wills, estates and trusts; practice and procedure; equity and domestic relations; constitutional law; contracts; criminal law and procedure; evidence; property; and torts. Applicant may elect to retain either average essay score or Multi-State Bar Examination scale score for use in immediately succeeding bar examination. (Rules Governing Adm. to Bar IX). Applicant is not limited in number of times he or she may take Arkansas Bar Examination. (Rules Governing Admission to Bar XII).

Educational Requirements.

To be eligible to take examination, candidate must have graduated from school of law approved by American Bar Association. (Rules Governing Adm. to Bar XII).

Clerkship.

None required.

Admission Without Examination.

Admission under Reciprocity Rule eliminated by Per Curiam Order of Supreme Court dated July 1, 1985, 286 Ark. 511, 692 S.W.2d 233.

Admission Pro Hac Vice.

Nonresident attorneys who meet comity standards may, upon approval by court, practice before all state courts; rules of local court may require association of local counsel. (Rules Governing Adm. to Bar XIV).

Licenses.

Annual license fee as set by court is levied on all attorneys. (Rules Governing Adm. to Bar VII).

Disabilities.

A lawyer may not become surety or bail in any case. (Ark. Code Ann. 16-68-203 but see, Ark. Code Ann. 16-68-306).

Liabilities.

Attorneys are liable for neglect resulting in dismissal (Ark. Code Ann. 16-22-306) and unreasonable increase of costs (Ark. Code Ann. 16-22-305), and summarily liable for retaining client's money (Ark. Code Ann. 16-22-307). Attorneys not liable to persons not in privity of contract except in cases of fraud or intentional misrepresentation or where attorneys were aware primary intent of client was to benefit third parties, but liability to third parties may be limited where attorney identifies in writing to client those persons who may rely on services and sends copy of writing to those persons identified. (Ark. Code Ann. 16-22-310). See also category 5 Civil Actions and Procedure, topic 5.08 Costs.

Compensation is governed by agreement, express or implied, which is not restrained by law (Ark. Code Ann. 16-22-302), except in workmen's compensation claims (Ark. Code Ann. 11-9-715). Contingent fee agreement shall be in writing. (Model Rules of Professional Conduct 1.5).

Lien.

Attorney has lien on client's cause of action, claim, or counterclaim, commencing with service by certified mail, return receipt as proof, upon adverse party of notice specifically enumerating cause(s) of action, signed by client and attorney, that attorney shall have such lien. Lien attaches to any settlement, verdict, or other resolution in client's favor, and proceeds thereof, and cannot be defeated by any subsequent compromise by parties. Same lien attaches where notice is not served, as of commencement of action or special proceeding, or service of answer containing counterclaim on behalf of attorney who signs pleading when attorney had been employed to represent client as to that action or counterclaim. (Ark. Code Ann. 16-22-304). If compromise or settlement is made after service of notice, or suit filed, without consent of attorney, judgment for reasonable fee (not necessarily limited to amount of settlement) may, on motion, be entered against all parties to compromise or settlement. Judgment for fee may also be entered against agent through whom settlement was effected, or against opposing attorney if settlement was with attorney's knowledge or on attorney's advice. (Ark. Code Ann. 16-22-303). Lien shall apply to proceedings before Workers' Compensation Commission. (Ark. Code Ann. 16-22-304[c]).

Disbarment or Suspension.

Lawyers may be suspended or disbarred for malpractice, habitual drunkenness, improperly retaining client's money, being found guilty of any felony or infamous crime, deceit, or misdemeanor in professional capacity or any ungentlemanly conduct in practice of the profession. (Ark. Code Ann. 16-22-401).

Attorney Ethics.

Supreme Court is authorized to make rules governing practice of law and conduct of attorneys (Const. Amendment 28), and has adopted Model Rules of Professional Conduct of American Bar Association, with minor changes, and appointed committee to investigate and prosecute breaches of professional conduct. Trial is before circuit judge of county in which accused resides or in which alleged offense was committed (Ark. Code Ann. 16-22-402), with appeal to Supreme Court for trial de novo on record made below (Ark. Code Ann. 16-22-413).

Unauthorized Practice.

Practicing law without authority is contempt of court and punishable as such. (Ark. Code Ann. 16-22-209).

Mandatory Continuing Legal Education.

Members of Arkansas Bar who are residents of Arkansas must complete 12 hours of CLE annually, at least one hour of which is ethics. (Rules for Minimum Continuing Legal Education 3). Nonresident members must comply with minimum CLE requirements of their resident state, and file annual certification of such compliance. (Rules for Minimum Continuing Legal Education 2). Attorneys on inactive status are exempt from CLE. Twelve excess CLE credits may be carried forward for succeeding reporting period only, which may include one hour of ethics. (Rules for Minimum Continuing Legal Education 3, 5).

Specialty Certification Requirements.

Arkansas Supreme Court in 1982 generally approved plan of specialization to be drafted, implemented and enforced by Board of Legal Specialization. (Per Curiam order of Supreme Court dated July 12, 1982, 276 Ark. 600, 637 S.W.2d 589). Board of Specialization recognizes specialty in tax law. (Per Curiam order of Supreme Court dated Jan. 21, 1985, No. 82-16, 1985 Ark. LEXIS 1769).

Professional Corporation.

See category 2 Business Organizations, topic 2.03 Corporations, subhead Professional Corporations.

19 MINERAL, WATER AND FISHING RIGHTS

19.01 MINES AND MINERALS:

(Title 15, c. 56).

Open-cut mining means surface extraction of clay, bauxite, sand, gravel, soil, shale, or other materials for commercial purposes. (Ark. Code Ann. 15-57-303).

Where land containing minerals belongs to United States recording of mining claim notices may be done with county clerk of county in which land is located. County Recorder must keep plat of each mining claim located for free use of miners. (Ark. Code Ann. 15-56-201 – 15-56-205).

Mining companies are organized under general incorporation law. See category 2 Business Organizations, topic 2.03 Corporations.

Inspection of Mines.

Mining inspector and assistant, who must be practical miners, are appointed by Governor.

Their duties are to inspect all mines and see that the provisions of the act are carried out. Violations of act must be reported to circuit judge, who must restrain operation of mine until law has been complied with. (Ark. Code Ann. 11-7-204 – 11-7-210).

Operation of Mines.

Operation of open cut mining is under supervision of Department of Environmental Quality. Operator must have permit issued by Department and file bond or securities or post cash. (Ark. Code Ann. 15-57-310 15-57-311). Permit fee is $10 per acre with $200 minimum. (Ark. Code Ann. 15-57-311). Requirements for operation are numerous and detailed in Arkansas Open-Cut Land Reclamation Act. (Ark. Code Ann. 15-57-301, et seq.). Violation can result in assessment of amount up to $1,000 for first violation with increasing penalties for subsequent violations. (Ark. Code Ann. 15-57-305). See category 12 Environment, topic 12.01 Environmental Regulation.

Employees.

State certification required for designation as fire boss, hoisting engineer, foreman or coal miner. (Ark. Code Ann. 11-7-403 -414). Noncertified apprentices are allowed. (Ark. Code Ann. 11-7-413).

Safeguarding of Employees.

Escapeways of specified construction and ventilation must be provided; mines must be examined for firedamp; bore holes must be provided 20 feet in advance of working place; not more than eight persons may descend or ascend in cage; suitable means of signaling, cages of specified construction, gates and bonnets and specified safety appliances for engines and gangways must be provided. Water must be used on cutting machines to prevent dust. Washroom facilities and lockers must be provided for all employees. Report of all accidents must be made to state mine inspector. Medical and emergency supplies must be kept at each mine. (Ark. Code Ann. 11-7-304 – 11-7-318).

When employed, fire boss must inspect all working places in mine at least once a day. (Ark. Code Ann. 11-7-315).

In mines with more than three employees, bond for semimonthly payment of wages must be filed with court in county where labor is to be performed. Noncompliance is misdemeanor subject to fine of between $1,000-$5,000 per violation. (Ark. Code Ann. 11-7-319).

Map of entire workings of mine must be deposited with clerk of county court between Jan. 1 and June 1 each year. When mine is worked out or abandoned it must be reported to State Mine Inspector. (Ark. Code Ann. 11-7-303).

Weighing of Coals and Minerals Act (Ark. Code Ann. 15-59-1-15-59-115) was repealed by Ark. Act 380 of 2009.

Oil and Gas.

Drilling for oil and gas is under regulation of Oil and Gas Commission, from which permit must be obtained. Proof of financial responsibility must be filed before permit can be issued. Productive sands must be cased off, gas conserved, abandoned wells plugged, logs of drilling kept and recorded. Provisions for inspection and supervision are comprehensive. (Ark. Code Ann. 15-72-101 - 15-72-218). Surface owner is entitled to reasonable compensation where spill of oil or produced water causes damage to real property and operator must restore damaged land in accordance with applicable rules and regulations. Ark. Code Ann. 15-72-219, enacted Mar. 27, 2007 but effective Sept. 17, 2007. Manufacture of carbon black from natural gas is prohibited. (Ark. Code Ann. 5-69-102). Permit must be obtained from Oil and Gas Commission to perform field seismic operations. Application must have $50,000 to $250,000 financial assurance acceptable to Commission, to be prescribed by Commission. Noncompliance is unlawful and subject to fine of $2,500 per each day of violation. (Ark. Code Ann. 15-71-114).

Continuing production from lands in section, or pooling unit, will extend lease term but will not extend term on other lands under same lease. (Ark. Code Ann. 15-73-201).

Proceeds from sale of production must be paid to lessor within six months of initial sale and thereafter within 60 days from end of calendar month in which sale was made. (Ark. Code Ann. 15-74-601).

Before entering upon site for exploration, notice by certified mail must be given to surface owner, containing proposed location and approximate date of drilling. (Ark. Code Ann. 15-72-203).

Surface owner has lien upon fixtures and equipment of operator to secure payment of all damages recoverable under oil and gas lease or under laws of State of Arkansas. (Ark. Code Ann. 15-72-213).

Severance taxes are imposed. See category 22 Taxation, topic 22.12A Mines, Minerals and Fisheries Taxes, subhead Severance Taxes.

20 MORTGAGES

20.01 CHATTEL MORTGAGES:

Covered by Uniform Commercial Code. (Ark. Code Ann. 4-9-102 – 4-9-507).

1972 Official Amendments adopted.

Filing.

See category 10 Documents and Records, topic 10.04 Records, subhead Filing Under Commercial Code.—Place; Fees.

Forms.

See end of this Digest.

20.02 COLLATERAL SECURITY:

See category 8 Debtor and Creditor, topic 8.15 Pledges.

20.03 MORTGAGES OF PERSONAL PROPERTY:

See topic 20.01 Chattel Mortgages.

20.04 MORTGAGES OF REAL PROPERTY:

Mortgages of real estate are executed and acknowledged in same manner as deed. (Ark. Code Ann. 18-40-101). Arkansas follows lien theory of mortgages. (166 Ark. 455, 266 S.W. 65).

Recording.

In order to become a lien as against third persons, a mortgage must be filed for record in office of circuit clerk of county where land lies. (Ark. Code Ann. 18-40-101 – 18-40-103).

Recording Fees.

$15 first page (one side only) and $5 for each additional page. (Ark. Code Ann. 21-6-306).

See also category 10 Documents and Records, topic 10.04 Records, subhead Necessity for Recording.

Future advances may be covered. (252 Ark. 79, 477 S.W.2d 446; 16 Ark. App. 116, 697 S.W.2d 940). However, when advances are optional, prior mortgagee cannot, after notice that subsequent lien has attached, deplete value of equity to disparagement of its lienors by advances, which if refused, would not have been in force. (Id.).

Priority between mortgages is determined by time of recording unless one mortgage contains recitals recognizing priority of another. (158 Ark. 21, 249 S.W. 354).

Assignment.

Mortgage may be assigned by instrument duly acknowledged and recorded. Circuit clerk must note fact of assignment and reference to record thereof on margin of original record. Clerks in counties which do not use paper recording systems shall not allow assignment by marginal notation after Dec. 31, 1995. (Ark. Code Ann. 18-40-109).

Extension or Renewal.

Requires filing acknowledged written agreement between parties. (Ark. Code Ann. 18-40-103).

Prepayment.

See category 3 Business Regulation and Commerce, topic 3.02 Bills and Notes, subhead Prepayment.

Satisfaction of mortgage must be entered on margin of record if otherwise required by law; provided, marginal notations of satisfaction do not apply to counties which use other than paper recording systems—separate release instruments must be filed. (Ark. Code Ann. 18-40-107). Satisfaction may also be by separate release deed or instrument duly acknowledged and recorded. (Ark. Code Ann. 18-40-107). Trustee must reconvey property encumbered by deed of trust to person entitled to property on written request of beneficiary of deed of trust. (Ark. Code Ann. 18-40-104[c]). Failure to enter satisfaction of mortgage which has been paid, or to request trustee to reconvey property, within 60 days after request, subjects mortgagee or his assignee to civil action for damages, not exceeding amount of mortgage money. (Ark. Code Ann. 18-40-104[d]). Satisfaction on record must be signed by party acknowledging same and attested and dated by circuit clerk. (Ark. Code Ann. 18-40-106).

Foreclosure.

Mortgages on real property held by bank, savings and loan or mortgage company may be foreclosed under power of sale subject to statutory cure provisions. This does not apply to real property used primarily for agricultural purposes. (Ark. Code Ann. 18-50-115 – 18-50-116).

In power of sale foreclosure, mortgage must be properly filed of record, mortgagor must be in default, mortgagee must file of record notice of default and intention to sell, notice must be served on mortgagor and others, no action to recover debt secured by mortgage can be pending, and 60 days must have elapsed since recording of notice of default. (Ark. Code Ann. 18-50-103 – 18-50-104). Notice must be published in newspaper of general circulation once a week for four consecutive weeks with final publication appearing no more than ten days prior to sale. Notice must also be posted at place of county courthouse where foreclosure sales are customarily advertised and third-party internet foreclosure sale notice information service provider must be used. (Ark. Code Ann. 18-50-105). Affidavit of mailing and publication of notice of default must be recorded prior to sale of mortgaged property. (Ark. Code Ann. 18-50-106). Mortgagee may bid at sale, and may credit upon his bid for certain listed amounts. (Ark. Code Ann. 18-50-107). Accepted bid may not be less than two-thirds of entire indebtedness due on date of sale. (Ark. Code Ann. 18-50-107).

In judicial foreclosure, the court renders a decree fixing the amount of the indebtedness and allowing the defendant ten days within which to pay. Upon defendant's failure to pay, clerk of court, as commissioner, advertises property for sale. Property is sold on credit of not less than three, nor more than six, months, lien on land being retained and purchaser giving bond with surety, which has force and effect of judgment. If property is sold for less than amount of decree, difference may be recovered by execution against mortgagor. (Ark. Code Ann. 18-49-102 – 18-49-105). Mortgagee, trustee, or vendor shall publish notice of sale in newspaper published and having general circulation in county in which property is situated or, if this is not available, then in newspaper of general state-wide daily publication one time. Publication shall be at least ten days prior to sale. (Ark. Code Ann. 18-49-104). Mortgagor and all persons who acquired interests in property after effective date of mortgage must be made parties to action. (95 Ark. 97, 128 S.W. 570).

Redemption.

Where property is sold under foreclosure by power of sale, right of redemption is terminated. (Ark. Code Ann. 18-50-108). In judicial foreclosure, mortgagor may redeem property within 12 months of sale by paying purchase price plus interest. Right of redemption is, however, waivable. (Ark. Code Ann. 18-49-106).

Form

No particular form of mortgage is necessary; any instrument showing upon its face an intent that land referred to therein shall secure a debt, undertaking or obligation will be construed as a mortgage. A form in general use is as follows:

MORTGAGE

KNOW ALL PERSONS BY THESE PRESENTS:

(1) That . . . . (hereinafter "Mortgagor"), for a valuable consideration, do hereby grant, bargain, sell, convey and deliver unto . . . . (hereinafter "Mortgagee"), and unto its successors and assigns, the property described in Exhibit "A" hereto.

This mortgage also conveys all buildings and improvements now or at any time hereafter located on any land hereinafter described, together with all of the following equipment now or at any time hereafter located in any such building regardless of the method of annexation or removability, viz: All electrical equipment (including lighting equipment, refrigeration equipment, ceiling fans, attic and window fans, motors and all other electrical paraphernalia) except items attached merely by plugging into wall sockets; all furnaces (including floor furnaces), heaters, radiators and all other heating equipment except small gas stoves in floor; all bath tubs, toilets, sinks, basins, pipes and other plumbing equipment; all screens, awnings, and window shades; all linoleum and other permanent floor coverings; all engines and elevators.

(2) TO HAVE AND TO HOLD the same unto . . . ., its successors and assigns forever.

(3) And Mortgagor covenants with Mortgagee, its successors and assigns, that Mortgagor will forever warrant and defend the title to all said property against all lawful claims whatever.

(4) Provided, however, the foregoing conveyance is given as a Mortgage for the purpose of securing the following:

(a) The payment of a promissory note, of even date herewith, and all successive extensions and renewals of the indebtedness represented thereby, evidencing a principal indebtedness (which indebtedness represents all extensions and renewals thereof and which is hereinafter called the “Primary Indebtedness”) of . . . . Dollars ($. . . . . .), executed by Mortgagor payable to the order of Mortgagee, said note(s) bearing interest from date until maturity at the rate in said note(s), and after maturity (meaning either normal maturity or maturity created by acceleration) at the highest rate allowed by law, said note(s) being payable as to principal and interest as follows:

(b) Also the payment of all future and additional indebtedness, direct or indirect, created after the date of this mortgage, which may be owing by Mortgagor (or by any of the persons herein designated under the term “Mortgagor”) to the holder of the Primary Indebtedness at any time prior to the payment in full with interest of the Primary Indebtedness or the foreclosure of this mortgage therefor (the event occurring first to be controlling); such additional indebtedness to be secured hereby regardless of whether it shall be predicated upon future loans or advances hereafter made by the holder(s) of the Primary Indebtedness, or obligations hereafter acquired by such holder(s) through assignment or subrogation or otherwise, or shall represent indirect obligations (created after the date of this mortgage) based upon any endorsements, guaranties or suretyship; AND IT IS AGREED THAT THIS MORTGAGE SHALL STAND AS SECURITY FOR ALL SUCH FUTURE AND ADDITIONAL INDEBTEDNESS WHETHER IT BE INCURRED FOR ANY BUSINESS PURPOSE THAT WAS RELATED OR WHOLLY UNRELATED TO THE PURPOSE OF THE ORIGINAL LOAN, OR WHETHER IT WAS INCURRED FOR SOME PERSONAL OR NONBUSINESS PURPOSE, OR FOR ANY OTHER PURPOSE RELATED OR UNRELATED, OR SIMILAR OR DISSIMILAR, TO THE PURPOSE OF THE ORIGINAL LOAN.

(c) Also, the repayment to the holder of the indebtedness secured hereby of all reimbursable expenses at any time accruing to such holder(s) under the provisions of Paragraph (7) hereof.

Upon the payment of all such sums, this Mortgage will become void and will be released by proper marginal notation, or at the option of the holder(s) of the secured debt, by a release deed to be recorded at the expense of the Mortgagor.

(5) Mortgagor agrees:

(a) To pay, prior to delinquency, all taxes, special improvement assessments and other governmental charges against the mortgaged property, both real and personal, at any time levied or becoming due.

(b) To carry insurance upon all insurable property encumbered hereby against such hazards, in such amounts and under such form of policies, as shall be acceptable to, or requested by, the holder(s) upon such form as may be approved by the holder(s), and each policy to be delivered to and held by such holder(s). Also to carry liability insurance, and insurance against other hazards, to such extent as may be requested by the holder(s) of the secured indebtedness. In each instance Mortgagor shall have the right to select the insurer, subject to Mortgagee's right to reject the proposed insurer for reasonable cause.

(c) To prevent the mortgaged property from becoming encumbered by any lien or charge having priority over, or on a parity with, the lien of this mortgage; and to comply with all statutes, ordinances and regulations relating to such property.

(d) To protect the mortgaged property from waste, injury or unusual deterioration and, without subjecting the property to any statutory lien, to make all replacements and repairs necessary to keep the mortgaged property in good physical condition. In that connection, it is agreed that Mortgagor may not cut the timber from any land encumbered hereby; moreover, Mortgagor may not remove or substantially remodel or alter any structure on the mortgaged land without the prior written consent of the holder(s) of the secured indebtedness.

(6) The holder(s) of the Primary Indebtedness or any future or additional indebtedness secured hereby under Paragraph (4)(b) hereof (whether such indebtedness then be evidenced by the original note(s) or by any instrument(s) given in renewal or extension of such indebtedness) may, at the option of such holder(s), declare the entire unmatured portion of all indebtedness secured hereby, together with all interest accrued on the entire secured debt, to be immediately due and payable, and the same shall forthwith become immediately due and payable (which acceleration of maturity may be accomplished without notice to anyone), in any one of the following events:

(a) Upon the filing of a voluntary or involuntary petition to subject Mortgagor (or any party obligated as maker, endorser, surety or guarantor for the payment of the secured indebtedness) to any bankruptcy, debt-adjustment, receivership or other insolvency proceeding.

(b) Upon the occurrence of any event, which, under the terms of the instrument(s) at any time evidencing the indebtedness secured hereby, warrants an acceleration (at the option of the payee) of the maturity of said indebtedness.

(c) If default shall be made in payment of any part of the principal indebtedness secured hereby, or any interest accruing on such principal indebtedness, as the same becomes due and payable according to the terms of the original note(s), or of any extension or renewal thereof at any time evidencing such indebtedness.

(d) If Mortgagor shall fail to comply with any of the agreements contained in Paragraph (5) of this mortgage.

(e) If Mortgagor, being a partnership or a corporation, shall be dissolved or reorganized in any manner.

(f) If at any time it should appear that the Mortgagor has attempted to sell free from the lien of this Mortgage any personal property or removable fixture encumbered hereby, or is about to attempt such a sale; or that any personalty or removable fixture encumbered hereby has been, or is about to be, moved to a different jurisdiction, subject to physical damage or unusual deterioration, seized under legal process, or subject by the Mortgagor or a third party to any other disposition which in the opinion of the holder(s) of the secured indebtedness will impair the security value of this instrument.

(g) If at any time it shall appear that any financial statement or other representation made to obtain the loan secured hereby is materially incorrect; or that Mortgagor's title to the mortgaged properties, or any portion thereof, is subject to any prior lien, title or interest not mentioned in this mortgage as a prior encumbrance.

(h) If at any time Mortgagor shall sell or convey the title to or any interest in any realty mortgaged hereunder without the prior written consent of the holder(s) of the secured indebtedness.

It is particularly understood that the foregoing acceleration provisions will be applicable not only to the maturities recited in the original mortgage note(s) but also to any substituted maturities created by extension or renewal. The failure of the holder(s) of the secured indebtedness to declare an acceleration of maturities when a ground therefor exists, even though such forbearance may be repeated from time to time, will not constitute a waiver of the right of such holder(s) to accelerate maturities upon a reoccurrence of the same ground therefor; nor will the act of such holder(s) in remedying any condition resulting from Mortgagor's default bar the holder(s) from declaring an acceleration of maturities by reason of such default.

(7) If the holder(s) of the indebtedness secured hereby shall expend any sum or sums for the protection of any of the mortgaged property or the lien of this mortgage (such holder(s) to have uncontrolled discretion as to the necessity of making any such expenditures), the repayment of such sum or sums on demand (with interest thereon at the highest rate allowed by law from the date of each expenditure) shall be the personal obligation of the Mortgagor; and such obligation to repay will constitute a part of the indebtedness secured hereby. The expenditures thus made reimbursable will include (without limiting the foregoing) taxes, special improvement assessments, insurance premiums, repairs and maintenance expenses, security expenditures, sums paid to discharge prior liens, rents on premises in which mortgaged personalty may be situated, etc. The cost of any abstract or supplemental abstract procured by the holder(s) of the secured indebtedness to facilitate foreclosure will also constitute a part of the reimbursable expenses secured hereby.

(8) In the event of a default hereunder the holder(s) of the indebtedness secured hereby shall be entitled to the following remedies:

(a) Such holder(s) may foreclose this mortgage through equity proceedings in respect to any real estate encumbered hereby.

(b) Such holder(s) may require the Mortgagor to assemble (at Mortgagor's expense) any or all of the personal property encumbered hereby and make it available to such holder(s) at a place specified by such holder(s) which is reasonably convenient to both parties; and such holder(s) may enforce all of its or their remedies, in respect to the encumbered personal property, that may be available under the Uniform Commercial Code. In this last event all expenses of retaking, holding, preparing for sale, selling or the like, as well as reasonable attorney's fees (not exceeding 10%) of the outstanding secured indebtedness plus accrued interest) and lawful expenses incurred by said holder(s) in enforcing such remedies shall be payable to said holder(s) by Mortgagor and shall constitute a part of the secured indebtedness.

(c) The holder(s) of the indebtedness secured hereby may enforce the lien of this mortgage in respect to all real and personal property encumbered hereby by proceedings that are prosecuted simultaneously or are prosecuted in such order as the holder(s) may select.

(9) The Mortgagor releases all right of appraisement hereunder and also releases unto the Mortgagee all right of redemption under the laws of Arkansas, including particularly all right of redemption under § 18-49-106 of the Arkansas Code Annotated.

(10) The Mortgagor, for the considerations aforesaid, hereby releases and relinquishes unto the Mortgagee, its successors and assigns, all of "Mortgagor" rights of dower, curtesy and homestead in and to the above described property.

EXECUTED on this . . . . day of . . . ., 20 . . . . .

ACKNOWLEDGMENT

STATE OF ARKANSAS)) SS.COUNTY OF . . . .)

On this day before the undersigned, a Notary Public, duly qualified and acting in and for the county and state aforesaid, personally appeared . . . . . ., to me well known to be the person whose name appears as mortgagor in the foregoing instrument, and stated that he had executed the same for the consideration, uses and purposes therein stated.

And on the same day also voluntarily and personally appeared before me . . . . . ., wife of said . . . . . ., to me well known to be the person whose name appears as mortgagor in the foregoing instrument, and in the absence of her said husband stated that she had executed the foregoing instrument of her own free will and had signed and sealed the relinquishment of dower and homestead therein expressed, for the purposes and consideration therein stated.

IN WITNESS WHEREOF, I hereunto set my hand and seal on this . . . . . . day of . . . ., 20 . . . . .

. . . .

Notary Public

My Commission Expires:

. . . .

(SEAL)

Chattel Mortgages.

See topic 20.01 Chattel Mortgages.

21 PROPERTY

21.01 ABSENTEES:

Escheat.

Revised Uniform Disposition of Unclaimed Property Act adopted. Act varies time period for presuming abandonment according to particular property. (Ark. Code Ann. 18-28-201 et seq.).

See categories 3 Business Regulation and Commerce, topic Banks and Banking, subhead Unclaimed Deposits; Estates and Trusts, topic Descent and Distribution, subhead Escheat, also topic Wills, subhead Unclaimed Legacies.

Nonresident Wards.

Foreign guardian may, with probate court approval, sell, mortgage, or lease ward's property and remove proceeds or property to domicile of guardian and ward or take other action authorized for local guardian. (Ark. Code Ann. 28-65-601 to 603).

21.02 ADVERSE POSSESSION:

Character and Duration of Possession.

In order for adverse possession to ripen into ownership, possession must be actual, open, notorious, continuous, hostile, exclusive and accompanied with intent to hold against true owner. (278 Ark. 498, 647 S.W.2d 438). Possessor must also have either (1) color of title for seven years and during that time paid ad valorem taxes for seven years on unimproved and unenclosed land or 15 years on wild and unimproved land or (2) color of title to contiguous property and have paid ad valorem taxes on contiguous property for seven years. (Ark. Code Ann. 18-1-106[a]).

Duration of Possession.

Unimproved and unenclosed lands are deemed and held to be in possession of one who pays taxes under color of title for at least seven years in succession. (Ark. Code Ann. 18-11-102). Payment of taxes for 15 consecutive years on wild and unimproved land creates presumption of color of title. (Ark. Code Ann. 18-11-103). Two years' possession is sufficient by one holding tax deed, but such possession is not valid against improvement districts. (Ark. Code Ann. 18-60-212, 10 Ark. App. 5, 660 S.W.2d 943).

Statute of Limitations.

All suits to recover land must be brought within seven years after cause of action accrued. (Ark. Code Ann. 18-61-101).

Easements.

Open, continuous and adverse use by public for more than seven years establishes easement by prescription and easement so acquired is lost by nonuse for seven years. (269 Ark. 126, 598 S.W.2d 752). Use of way over unenclosed and unimproved land is presumed to be permissive rather than adverse. (268 Ark. 901, 597 S.W.2d 828).

Disabilities.

In suits to recover land, infants and insane persons have three years after removal of disability in which to bring action, and tacking of disabilities is not permitted. (Ark. Code Ann. 18-61-101).

Publicly Owned Land.

Title to publicly owned land cannot be defeated by adverse possession. (Ark. Code Ann. 22-1-204).

Cemeteries.

Cemetery located on private land that has been open to public use for at least 50 years shall be deemed public property unless certain conditions are met. (Ark. Code Ann. 18-15-1408).

Tenancy in Common.

Because possession by cotenant is not ordinarily adverse to other cotenants, cotenant must give actual notice to other cotenants that his possession is adverse to their interests or commit sufficient acts of hostility so that their knowledge of his adverse claim may be presumed. (51 Ark. App. 47, 908 S.W.2d 96). When there is family relation between cotenants, stronger evidence of adverse possession is required. (51 Ark. App. 47, 908 S.W.2d 96).

21.03 [RESERVED]

21.04 CONVEYANCES:

See topic 21.06 Deeds.

21.05 CURTESY:

Common law curtesy is abolished in favor of statutory allowance called curtesy. Allowance is same as widow's dower (see topic 21.08 Dower). (Ark. Code Ann. 28-11-301). No conveyance by spouse without assent of other spouse passes title free of curtesy or dower. (Ark. Code Ann. 28-11-201). Also see category 13 Estates and Trusts, topic 13.07 Descent and Distribution.

21.06 DEEDS:

Anyone claiming title to real property may sell and convey his interest as if he were in actual possession of real estate, notwithstanding another may be in adverse possession at the time. (Ark. Code Ann. 18-12-602).

Execution.

Seals are unnecessary. (Const., sched. § 1). Must be executed in presence of two disinterested subscribing witnesses or in default thereof, acknowledged by grantor in presence of two such witnesses, who will subscribe deed. (Ark. Code Ann. 18-12-104; Ark. Code Ann. 16-47-103; Ark. Code Ann. 18-12-203). Deed for lands executed not in presence of witnesses, but acknowledged as required by law, is sufficient authentication; no subscribing witnesses are necessary when execution is duly acknowledged. (5 Ark. 693).

When the grantor's spouse joins, special mention should be made in deed that he or she releases dower or curtesy and homestead rights. (Ark. Code Ann. 18-12-402 - 18-12-403). See also topics 21.08 Dower, subhead Bar, and Real Property; categories 8 Debtor and Creditor, topic Homesteads, subhead Alienation or Incumbrance; Documents and Records, topic Records, subhead Necessity for Recording; Family, topic Husband and Wife, subhead Conveyances.

Recording.

Arkansas has adopted Uniform Real Property Electronic Recording Act for those counties that accept electronic deeds. (Ark. Code Ann. 14-2-301 et seq.). In order to be effective as against third persons without notice, a deed must be recorded in the office of the circuit clerk of the county where the land is situated. (Ark. Code Ann. 16-47-110; Ark. Code Ann. 18-12-209; Ark. Code Ann. 14-15-404). Person recording deed must supply name of grantee and address to which future tax statement should be mailed. (Ark. Code Ann. 26-26-709). Name and address of preparer must appear on face of first page of deed. (Ark. Code Ann. 14-15-403).

It is unlawful to knowingly record instruments lacking authenticity affecting title to real property with intent of adversely affecting title to real property. Person violating this section is guilty of Class A misdemeanor. Owner, lessee, or assignee of real property located in Arkansas who suffers loss or damages as result of such conduct and must bring civil action to remove any clouds from their title or interest in real property is entitled to treble actual damages, punitive damages, attorneys' fees and costs. This provision does not apply to bona fide filings of lis pendens, materialmen's liens, laborer's liens and other legitimate notice and protective filings as provided by law. (Ark. Code Ann. 5-37-226).

Recording fees are $15 for first page (one side only) and $5 for each additional page. (Ark. Code Ann. 21-6-306). Instrument sent for recording should be accompanied by check in amount of fee. See also category 10 Documents and Records, topic 10.04 Records.

Taxes.

For amount of tax and required affidavit, see category 22 Taxation, topic 22.18 Stamp and Seal Taxes, subhead Stamp Tax.

Operation and Effect.

All deeds are construed to convey fee simple title unless expressly limited by appropriate words. (Ark. Code Ann. 18-12-105). Words, “grant, bargain and sell” are construed as express covenant of warranty, unless limited by express words in deed. (Ark. Code Ann. 18-12-102).

The word “trustee”, “as trustee” or “agent” appearing after the name of a grantee, without a statement of the trust, is not sufficient notice, and does not put any person dealing with the land on inquiry, that a trust or agency exists. (Ark. Code Ann. 18-12-604).

Word “heirs” is not necessary to convey complete estate of inheritance in fee simple. (Ark. Code Ann. 18-12-105). Deed purporting to convey in fee simple passes after acquired title (Ark. Code Ann. 18-12-601); rule of after acquired title does not apply to conveyances by quitclaim deed. (201 Ark. 1011, 148 S.W.2d 318).

See topic Real Property for types of estates.

Form

Know all Men by These Presents: That we . . and . ., husband and wife, for and in consideration of the sum of . . dollars, and other good and valuable consideration, the receipt of which is hereby acknowledged, do hereby grant, bargain, sell and convey unto . . and unto . . heirs and assigns forever, the following lands lying in the county of . . and state of Arkansas, to wit: (describe lands) To have and to hold the same unto the said . . and unto . . heirs and assigns forever, with all tenements, appurtenances, and hereditaments thereunto belonging. And . . hereby covenant . . with said . . that . . will forever warrant and defend the title to the said lands against all claims whatever, and that the same is free from all liens and incumbrances. And we, . . for and in consideration of the said sum of money, do hereby release and relinquish unto the said . . all rights of dower, curtesy and/or homestead in and to the said lands. Witness our hands and seals on this . . day of . . 20. . .

(Acknowledgment)

. . . . .L. S.

. . . . .L. S.

If for a single person or one spouse deeding lands, same form may be used with appropriate modifications.

For quitclaim deed, use same form but change granting clause to “grant, sell and quitclaim” and omit warranty.

21.07 DEEDS OF TRUST:

See category 20 Mortgages, topic 20.04 Mortgages of Real Property.

21.08 DOWER:

If person dies intestate leaving surviving spouse and child or children, surviving spouse is vested of life interest in one-third of all real property of which his or her spouse was seized of estate of inheritance during marriage, unless released by surviving spouse in legal form (Ark. Code Ann. 28-11-301), and fee title in one-third of personal property of which decedent died seized (Ark. Code Ann. 28-11-305). When decedent leaves surviving spouse but no children, surviving spouse is entitled to one-half of both real and personal property absolutely as against collateral heirs and one-third as against creditors, except that if real estate be ancestral, dower or curtesy right is life estate in one-half real estate as against collateral heirs and one-third as against creditors. (Ark. Code Ann. 28-11-307). Also see category 13 Estates and Trusts, topic 13.07 Descent and Distribution.

Timber, Oil, Gas and Mineral Property.

If person dies, leaving surviving spouse and child or children, surviving spouse is entitled to one-third of all money received from sale of timber, oil, gas or other mineral leases, royalties or mineral sales from lands in which surviving spouse has dower, curtesy or homestead interest, unless surviving spouse has released same in legal form. (Ark. Code Ann. 28-11-304). See also 29 U. Ark. Little Rock L. Rev. 211 (Winter 2007).

Release.

Married person may release dower or curtesy in real estate by joining in spouse’s deed, or by separate deed to spouse’s grantee or assigns, duly acknowledged. (Ark. Code Ann. 18-12-402). By duly acknowledged and recorded power of attorney, person may authorize another to release dower or curtesy to his or her spouse’s grantee, lessee or mortgagee. (Ark. Code Ann. 18-12-503).

Bar.

Inchoate dower or curtesy in particular land is barred where spouse’s rights have become barred by seven years (see topic 21.02 Adverse Possession) or where spouse’s deed conveying land has been of record for seven years. (Ark. Code Ann. 28-11-203).

Election between dower or curtesy and testamentary provision see category 13 Estates and Trusts, topic 13.16 Wills. See also category 22 Taxation, topic 22.06 Estate Tax, subhead Disclaimers.

21.09 ESCHEAT:

See topic 21.01 Absentees, subhead Escheat; categories 3 Business Regulation and Commerce, topic Banks and Banking, subhead Unclaimed Deposits; and Estates and Trusts, topics Descent and Distribution, Wills, subhead Unclaimed Legacies.

21.10 LANDLORD AND TENANT:

In absence of agreement between parties, common law rules govern as to rights and liabilities of landlord and tenant and as to kinds of tenancy permitted.

Leases for a term longer than one year must be in writing. (Ark. Code Ann. 4-59-101). Acknowledgment is required for recording lease. (Ark. Code Ann. 14-15-402).

Recording in office of circuit clerk of county where lands are situated is necessary to give constructive notice of lease. (Ark. Code Ann. 14-15-404). Tenant’s possession is notice of unrecorded lease. (173 Ark. 633, 293 S.W. 36).

Security Deposit.

Landlord owning more than five units may receive sum equal to no more than two months rent as security deposit. Landlord must give tenant written notice within 30 days after termination that itemizes how security deposit was applied, if at all, to accrued unpaid rent and/or damages; landlord must return balance of security deposit or full refund of deposit. (Ark. Code Ann. 18-16-304, 18-16-305). Tenant has cause of action for deposit plus double amount wrongfully withheld plus costs and reasonable attorneys' fees unless landlord can show good faith dispute. (Ark. Code Ann. 18-16-306).

Lien.

Farm landlord has lien on crop for rent and for value of advances to make and gather crop and such lien is perfected and has priority over conflicting security interest in or agricultural lien on crop regardless of when conflicting security interest or agricultural lien is perfected. Said lien continues for no longer than six months. (Ark. Code Ann. 18-41-101, 18-41-103). Landlord has lien on personalty placed on premises by tenant to secure all sums due under lease. (Ark. Code Ann. 18-16-108). Aside from lien described above in Ark. Code Ann. 18-41-101, purchase money security interest has priority over landlord's conflicting lien. (315 Ark. 218, 866 S.W.2d 390; Ark. Code Ann. 4-9-324). Priority of landlord's lien is dependent upon time of filing or perfection. (Ark. Code Ann. 4-9-322).

Termination of Tenancy.

Landlord may terminate week-to-week tenancy by written notice given to tenant at least seven days before termination. (Ark. Code Ann. 18-17-704). Landlord may terminate month-to-month tenancy by written notice given to tenant at least 30 days before termination. (Ark. Code Ann. 18-17-704). If tenant remains in possession without landlord's consent after expiration of term of rental agreement, landlord may bring action for possession. (Ark. Code Ann. 18-17-704). If tenant's holdover is willful violation of Ark. Code Ann. 18-17-101 et seq., landlord may also recover three months rent or twice actual damages, whichever is greater, and reasonable attorneys' fees. (Ark. Code Ann. 18-17-704).

Holding Over.

When rent is unpaid, holding over premises after ten days notice to vacate is misdemeanor. (Ark. Code Ann. 18-16-101).

Dispossession.

Tenant in default may be dispossessed by unlawful detainer proceedings after three days written notice to vacate. (Ark. Code Ann. 18-60-304). Landlord must give tenant in default statutory notice of intent to issue writ of possession served by sheriff. (Ark. Code Ann. 18-60-307). Expedited procedure is available to obtain writ of possession. (Ark. Code Ann. 18-60-307).

Plaintiff is entitled to rental value of residential property for period of its unlawful detention and triple rental value of commercial property. (Ark. Code Ann. 18-60-309).

Residential Landlord and Tenant.

Arkansas adopted Residential Landlord Tenant Act (Ark. Code Ann. 18-17-101 et seq.) which applies to rental agreements for dwelling units.

Self-Storage Rentals.

Self-storage rentals are Governed by Ark. Code Ann. 18-16-401 – 18-16-409.

21.11 LEASES:

See topic 21.10 Landlord and Tenant.

21.12 [RESERVED]

21.13 PERPETUITIES:

Arkansas adopted Uniform Statutory Rule Against Perpetuities (“Act”) (Ark. Code Ann. 18-3-101 et seq.) abolishing common law rule against perpetuities and making conforming changes to existing law. Act took effect Mar. 9, 2007, has prospective application, and thus applies to nonvested property interest or power of appointment that is created on or after Mar. 9, 2007. However, if nonvested property interest or power of appointment was created before Mar. 9, 2007, and is determined by judicial proceeding to violate common law rule against perpetuities, court may reform document to effectuate transferor’s intent. Act does not apply to trusts that are created for burial lots (Ark. Code Ann. 20-17-904) and likewise does apply to funds in permanent maintenance fund for purpose of administration, care, and maintenance of cemetery, including lots, graves, spaces, crypts, niches, or burial rights (Ark. Code Ann. 20-17-1013).

Accumulations.

Common law rules govern. See also category 13 Estates and Trusts, topic 13.15 Trusts.

21.14 PERSONAL PROPERTY:

Tenancies by entirety exist in personal property (281 Ark. 167, 662 S.W.2d 815; 306 Ark. 646, 816 S.W.2d 878), in bank accounts and certificates of deposit (Ark. Code Ann. 23-47-204), and in savings accounts (Ark. Code Ann. 23-37-502). Simultaneous death results in distribution of one-half property to each spouse’s estate as if each survived. (Ark. Code Ann. 28-10-201 – 28-10-211). All survivorships in personalty are abolished (Ark. Code Ann. 28-8-101); however, statute does not abolish survivorship in choses of action (19 Ark. 267) or where joint tenancy authorized by statute (205 Ark. 523, 169 S.W.2d 643). Bank accounts and certificates of deposit may be held by two or more persons as joint tenants or tenants in common. (Ark. Code Ann. 23-47-204). Savings accounts may be held by two or more persons as joint tenants or tenants in common. (Ark. Code Ann. 23-37-502). As to property subject to bulk transfer issues, Act 344 of 1991 repealed Bulk Transfer Act of Arkansas Uniform Commercial Code.

See categories 3 Business Regulation and Commerce, topic Warehousemen; Taxation, topic Estate Tax.

Conversion of Personal Property.

Statute of limitations is three years. (Ark. Code Ann. 16-56-105, 320 Ark. 1, 896 S.W.2d 856). Must prove exercise of dominion over property in violation of rights of owner or person entitled to possession, or wrongful taking or dominion over one’s property in subversion and denial of his rights irrespective of whether there was demand and refusal for its return.

21.15 POWERS OF ATTORNEY:

Attorneys in Fact.

Conveyance or mortgage of real estate may be executed by attorney in fact, but power of attorney must be acknowledged and recorded in order that record of deed or mortgage constitute notice to third person. (Ark. Code Ann. 18-12-501; 39 Ark. 182).

Durable power of attorney, executed as required by statute, survives principal’s subsequent incapacity. (Ark. Code Ann. 28-68-101, 201-203). Follows Uniform Durable Power of Attorney Act, except portion of UDPAA entitled “Proof of Continuance of Durable Powers of Attorney by Affidavit” omitted. Statutory Power of Attorney Act adopted. (Ark. Code Ann. 28-68-401 – 28-68-419). See Ark. Code Ann. 28-68-401 for statutory form of power of attorney.

Owner of limited property (not exceeding $20,000) or income (not exceeding $6,000) with approval of probate judge of county of his domicile may appoint attorney to manage his person or property or both in lieu of having guardian appointed. (Ark. Code Ann. 28-68-301 – 28-68-313).

21.16 REAL PROPERTY:

Estate in fee simple is presumed unless expressly stated otherwise. (Ark. Code Ann. 18-12-105). An estate in lands that would by common law be a fee tail, becomes an estate for life and remainder in fee simple absolute to the person to whom the estate tail would first pass according to the common law. (Ark. Code Ann. 18-12-301). Grant or devise to two or more creates tenancy in common unless joint tenancy is specified. (Ark. Code Ann. 18-12-603). Joint ownership of husband and wife creates estate by entirety. (61 Ark. 388, 33 S.W. 424). No relationship restrictions on holding property as joint tenants with right of survivorship. (Ark. Code Ann. 18-12-106). Except in specified instances, all instruments affecting homestead of married person must be joined by spouse or conveyed by separate documents, and acknowledged by spouse. (Ark. Code Ann. 18-12-403).

See also topic 21.06 Deeds, and category 8 Debtor and Creditor, topic 8.10 Homesteads.

Rule in Shelley's Case no longer applies in Arkansas. (abolished by Act 1030 of 2003). (Ark. Code Ann. 18-12-303).

Tenancy by Entirety.

Conveyance to husband and wife jointly creates estate of entirety with right of survivorship. (29 Ark. 202).

Condominiums authorized and master deed must be recorded with clerk of subject county. (Ark. Code Ann. 18-13-104).

Time-Share Interests.

The Arkansas Time-Share Act regulates registration, operation, sale and development of time-share interests. (Ark. Code Ann. 18-14-101, 18-14-703).

See also topics 21.05 Curtesy, Deeds, Dower, Landlord and Tenant; categories 5 Civil Actions and Procedure, topic Partition; Debtor and Creditor, topic Homesteads; Family, topic Husband and Wife; Mortgages, topic Mortgages of Real Property.

21.17 TRUST DEEDS:

See category 20 Mortgages, topic 20.04 Mortgages of Real Property.

22 TAXATION

22.01 ADMINISTRATION:

Ad valorem taxes on real and tangible personal property are assessed by all counties. Each county has a tax assessor and tax collector who are responsible for assessment and collection of taxes. (Ark. Code Ann. 26-26-1101; 26-26-1408).

Director of Department of Finance and Administration has general supervision over other state-wide taxes. Director has power to recover and collect delinquent taxes. (Ark. Code Ann. 26-18-301).

Assessment.

Utilities and Carriers.

Arkansas Public Service Commission has supervision over all tax matters, including valuation, assessment, and equalization of all property, privileges, and franchises for utility and carriers. Commission assessed real and personal property of utilities and fixes annually percentum of value for assessment of all property. (Ark. Code Ann. 26-24-101 to -104). Such persons assessed by Commission report on prescribed form to Commission on or before Mar. 1 (Mar. 31 for motor carriers) full information for all property owned Jan. 1 next preceding filing of annual statement. (Ark. Code Ann. 26-26-1602). Hearings may be had prior to assessment on matter of valuation of property of any company. (Ark. Code Ann. 26-26-1609). On or before July 15, Tax Division of Arkansas Public Service Commission must certify to proper official of respective counties in which property is located which it is required to assess so much of value of property as has been assigned to each county, and taxes are extended and collected as are other taxes. (Ark. Code Ann. 26-26-1612). Notice of assessment is given to owner, and petition for review may be filed within ten days after date of notice and must be heard on or before 1st day of Nov. after assessment notice, except hearings on petitions of motor carriers, bus lines, airlines, water transportation companies and private car companies are heard on or before Dec. 31 of assessing year. (Ark. Code Ann. 26-26-1610).

Carriers other than those operating entirely within a city's limits are under jurisdiction of Arkansas State Highway Commission. (Ark. Code Ann. 23-2-209; Ark. Code Ann. 23-2-301 -23-2-303).

Railroads are under jurisdiction of State Highway Commission and Arkansas State Highway and Transportation Department. (Ark. Code Ann. 23-2-209 – 23-2-302; Ark. Code Ann. 23-2-303).

All other property is assessed by county assessors as of Jan. 1, except stocks of merchants and manufacturers, which are assessed at average value in possession and under control during preceding year. (Ark. Code Ann. 26-26-1201). Real property is assessed by assessor annually between first Mon. in Jan. and first day of July. (Ark. Code Ann. 26-26-1101). Property owners must list for assessment all property on or before May 31, after which penalty of 10% of taxes accrues. (Ark. Code Ann. 26-26-201 – 26-26-1408). Assessment of personal property by mail, telephone, or in person is allowed for individuals. (Ark. Code Ann. 26-26-1114). Review of assessor's valuation may be had before county equalization board by 3d Mon. in Sept. if in regular session for equalization or by 3d Mon. in Nov. if meeting in special session. Equalization board begins session on Aug. 1 of each year, and if board raises valuation of any property, it shall immediately mail notice to property owner unless property owner or agent was present before board. (Ark. Code Ann. 26-27-309 – 26-27-315; Ark. Code Ann. 26-27-317).

Overall increases in assessed valuation as result of countywide reappraisal or reassessment of property are generally limited to produce tax revenues no greater than 10% above revenues of base year, which is year in which taxing unit completes reassessment and equalization of taxable real and personal property as part of statewide reappraisal program. (Ark. Code Ann. 26-26-402). Limitation on increase is adjusted for newly discovered real property and new construction and improvements to realty. (Ark. Code Ann. 26-26-402).

Reassessment.

After assessment and payment of any property, privilege or excise tax, no proceedings shall be brought for reassessment except for actual fraud of taxpayer. Failure to assess taxes is prima facie evidence of fraud. (Ark. Code Ann. 26-34-107).

Computerized Assessment.

County utilizing unit tax ledger system may initiate computerized tax assessment and collection process. (Ark. Code Ann. 26-28-301 – 26-28-308).

Interstate Cooperation.

No statutory provisions.

Penalties.

Penalty for delinquency is 10% against all unpaid tax balances remaining after Oct. 10 other than those unpaid tax balances of utility or carrier. (Ark. Code Ann. 26-35-501). As to real and personal property taxes, see also topic 22.15 Property Taxes, subhead Real and Personal Property Taxable. See topics detailing particular taxes.

22.02 ALCOHOL, BEVERAGES AND TOBACCO TAXES:

Alcoholic Beverage Taxes.

Annual license taxes or fees are levied, as follows: on wine and beer (Ark. Code Ann. 3-5-101 – 3-5-1310, Ark. Code Ann. 3-7-201); distilling spirituous liquors and/or manufacturing malt liquors (Ark. Code Ann. 3-4-601 – 3-4-606). In addition, cities, towns and counties may license and tax manufacture and sale of spirituous and malt liquors and vinous liquors, except wine; however, license fee not to exceed one-half of state fee. (Ark. Code Ann. 3-4-202).

Direct taxes on all liquor sold or offered for sale in state are imposed by Ark. Code Ann. 3-7-104 and Ark. Code Ann. 3-7-111. These taxes are paid by stamps affixed by wholesaler. Imported liquors are subject to special regulations. (Ark. Code Ann. 3-7-112).

There is additional special tax on liquor, cordials, liqueurs, specialties, and sparkling and still wines. (Ark. Code Ann. 3-7-201).

Note: Special tax on beer Ark. Code Ann. 3-7-201(a)(3) shall expire on June 30, 2007.

Tobacco Tax.

Tobacco products are taxed under Ark. Code Ann. 26-57-201 – 26-57-262.

22.03 BUSINESS TAXES:

Franchise Taxes.

See categories 2 Business Organizations, topic Corporations; Insurance, topic Insurance Companies.

Premium Tax.

See category 16 Insurance, topic Insurance Companies; insurers under Workmen’s Compensation Act, see category 11 Employment, topic 11.02 Labor Relations.

22.04 CORPORATE TAXES:

Taxation of Corporate Stock or Securities.

See category 2 Business Organizations, topic 2.03 Corporations.

22.05 EMPLOYMENT TAXES:

Unemployment compensation tax is imposed by Ark. Code Ann. 11-10-101 – 11-10-227; Ark. Code Ann. 11-10-401 – 11-10-405; Ark. Code Ann. 11-10-701 – 11-10-722 on every “employer,” which means any individual or employing unit which, for some portion of each of ten or more different days (whether or not consecutive) in current or preceding calendar year, has or had in employment one or more individuals, and meaning of "employer" is extended to include certain combinations of employing units. (Ark. Code Ann. 11-10-209).

Employment within the Act does not include certain enumerated activities. (Ark. Code Ann. 11-10-210[a][4]).

Rate of tax (termed "contributions") is 2.9% of wages, except that after employer has paid tax for three years his rate is adjusted annually according to his benefit experience. Employer also required to pay stabilization tax and advance interest tax based upon variable scale. Maximum wages of employee on which tax is payable is governed by federal unemployment tax act. (Ark. Code Ann. 11-10-204; 11-10-701 - 11-10-709).

Returns must be made and tax paid to Director of the Arkansas Employment Security Department, quarterly on last day of month following close of each quarter. Penalty for failure to file return $10 or 5% of tax, whichever greater, if filed within 20 days after due date; $20 or 10% of tax, whichever greater, if filed more than 20 days after due date; and $30 or 15% of tax, whichever is greater, if employer fails to supply all information or it is necessary to use subpoena to obtain information or director deems it necessary to estimate wage information. (Ark. Code Ann. 11-10-117). Interest at 1½% per month is charged for nonpayment of tax when due. (Ark. Code Ann. 11-10-716).

Employees are not taxed. (Ark. Code Ann. 11-10-107).

Multistate Tax Compact.

State has adopted comprehensive Multistate Tax Compact authorizing state to participate with other states in forming a Commission for adopting uniform regulations covering income, capital stock, gross receipts, sales, and use taxes. (Ark. Code Ann. 26-5-101 – 26-5-108).

22.06 [RESERVED]

22.07 ESTATE TAX:

Effect and Termination of Tax.

Estate tax is repealed for estates of decedents dying on or after Jan. 1, 2005. (Ark. Code Ann. 26-59-103).

Disclaimers.

By compliance with detailed statute, person may disclaim broad class of property interests, whether otherwise passing by will, intestate succession, operation of law, as in insurance policy, or with reference to power of appointment. (Ark. Code Ann. 28-2-201 – 28-2-221).

22.07A GAMBLING AND ENTERTAINMENT TAXES:

Coin operated amusement devices subject to privilege tax and license fee by Ark. Code Ann. 26-57-401 – 26-57-421.

22.08 GASOLINE AND SPECIAL FUELS TAXES:

Gasoline tax imposed by Ark. Code Ann. 26-55-205.

Special fuel tax imposed on distillate special fuels, motor fuel, and liquefied special gas fuels. (Ark. Code Ann. 26-55-1201).

22.09 GIFT TAX:

Arkansas does not impose gift tax.

22.10 [RESERVED]

22.11 INCOME TAX:

Imposed on net income of every resident, individual, trust or estate, and on net income derived from business or occupation carried on or property owned within this state of every nonresident individual, partnership, trust or estate and of every domestic or foreign corporation. (Ark. Code Ann. 26-51-201 – 26-51-205). "Gross income" defined. (Ark. Code Ann. 26-51-404). "Net income" defined. (Ark. Code Ann. 26-51-403).

Exemptions for single individual whose gross income does not exceed $10,200 for any income year; $17,200 for married couple filing joint return with one or fewer dependents; $20,700 for married couple filing joint return with two or more dependents; $14,500 for head of household or qualifying widow or widower with one or more dependents; reduced tax tables are provided for low income individuals. (Ark. Code Ann. 26-51-301).

Certain enumerated entities are entirely exempt from taxation. (Ark. Code Ann. 26-51-303 – 26-51-304).

Certain enumerated taxpayers are entitled to low income tax credit. (Ark. Code Ann. 26-51-301).

Certain provisions of Internal Revenue Code of 1986 as in effect on Jan. 1, 1987, are adopted and incorporated by reference: alimony and separate maintenance under I.R.C. §§ 71, 215 (Ark. Code Ann. 26-51-417), and at-risk limitations under I.R.C. § 465 (Ark. Code Ann. 26-51-436[1]). Miscellaneous itemized deductions are subject to 2% floor. (Ark. Code Ann. 26-51-437).

Certain provisions of Internal Revenue Code of 1986 as in effect on Jan. 1, 1989, are adopted and incorporated by reference: group term life insurance under I.R.C. § 79 (Ark. Code Ann. 26-51-404[b][13]), and disability and health payments under I.R.C. §§ 104-106 (Ark. Code Ann. 26-51-404[b][14] in effect Jan. 1, 1999).

Certain provisions of Internal Revenue Code of 1986 as in effect on Jan. 1, 1993, are adopted and incorporated by reference: expenses and interest relating to tax-exempt income under I.R.C. § 265(a) (Ark. Code Ann. 26-51-431[b]), sale of property to comply with conflict-of-interest requirements under I.R.C. § 1043 (Ark. Code Ann. 26-51-442).

Certain provisions of Internal Revenue Code of 1986 as in effect on Jan. 1, 1995, are adopted and incorporated by reference: moving expenses under I.R.C. § 217 (Ark. Code Ann. 26-51-423[a][4]), itemized deductions limitations under I.R.C. § 68 (Ark. Code Ann. 26-51-436[4]) (effective as of Jan. 1, 2009), exclusion from gain on small business stock under I.R.C. § 1202 (Ark. Code Ann. 26-51-815[c]), inclusion in gross income of reimbursed moving expenses under I.R.C. § 82 (Ark. Code Ann. 26-51-404[b][15]), exclusion from gross income of cost-sharing payments under I.R.C. § 126 (Ark. Code Ann. 26-51-404[b][17]).

Certain provisions of Internal Revenue Code of 1986 as in effect on Jan. 1, 1997, are adopted and incorporated by reference: income tax credit equal to 20% of federal low-income housing tax credit in accordance with I.R.C. § 42 (Ark. Code Ann. 26-51-1702), payments received under cafeteria plans under I.R.C. § 125 (Ark. Code Ann. 26-51-404[b][11]), limitations on deductibility of passive activity losses and credits under I.R.C. § 469 (Ark. Code Ann. 26-51-436[2]), medical and dental expense deductions under I.R.C. § 213 (Ark. Code Ann. 26-51-423[a][2]).

Certain provisions of Internal Revenue Code of 1986 as in effect on Jan. 1, 1999, are adopted and incorporated by reference: disability and health payments under I.R.C. §§ 104-106 (Ark. Code Ann. 26-51-404[b][14]), ITC and depreciation for luxury autos under I.R.C. § 280F(a)-(d) (Ark. Code Ann. 26-51-436[3]), depreciation under I.R.C. §§ 167-168 (Ark. Code Ann. 26-51-428), Roth Individual Retirement Accounts under I.R.C. § 408A (408A[d][3][A][iii] and 408A[d][3][E] have not been adopted) (Ark. Code Ann. 26-51-414), income from discharge of indebtedness under I.R.C. §§ 108 and 1017 (Ark. Code Ann. 26-51-404[b][10]), exclusion from gross income of meals or lodging furnished for convenience of employer under I.R.C. § 119 (Ark. Code Ann. 26-51-404[b][16]), Medicare Plus Choice medical savings program in accordance with I.R.C. § 138 (Ark. Code Ann. 26-51-404[b][23]), gain on sale of qualified small business stock under I.R.C. § 1045 (Ark. Code Ann. 26-51-411[f]).

Certain provisions of Internal Revenue Code of 1986 as in effect on Jan. 1, 2001 are adopted and incorporated by reference: capitalization and amortization of corporation’s start-up expenses under I.R.C. § 195 (Ark. Code Ann. 26-51-439[b]); deduction of costs paid or incurred to improve access to vehicles and facilities for handicapped and elderly persons under I.R.C. § 190 (Ark. Code Ann. 26-51-423[f]); and deduction of losses, expenses, and interest arising from transactions between related taxpayers under I.R.C. § 267 (Ark. Code Ann. 26-51-411[h]).

Certain provisions of Internal Revenue Code of 1986 as in effect on Jan. 1, 2005 are adopted and incorporated by reference: exclusion from income for dependent care assistance under I.R.C. § 129 (Ark. Code Ann. 26-51-404[b][12]); deductibility of contributions made to medical savings accounts by taxpayer or taxpayer’s employer under I.R.C. § 220 (Ark. Code Ann. 26-51-436[5]); exclusion from gross income of gain resulting from involuntary conversion of taxpayer’s property under I.R.C. § 1033 (Ark. Code Ann. 26-51-404[b][1]); exclusion from gross income of gain from sale or exchange of property owned and used as taxpayer’s principal residence under I.R.C. § 121 (Ark. Code Ann. 26-51-404[b][2]); exclusion from income of child care benefits provided to members of U.S. Military under I.R.C. § 134 (Ark. Code Ann. 26-51-404[b][27]); installment method of accounting under I.R.C. §§ 453, 453A, and 453B (Ark. Code Ann. 26-51-411[e]); business expenses under I.R.C. § 162 except subsection (n) (Ark. Code Ann. 26-51-423[a][1]); deduction of costs paid or incurred for cleanup of certain hazardous substances under I.R.C. § 198 (Ark. Code Ann. 26-51-423[e]); capitalization and amortization of corporation’s organizational expenses under I.R.C. § 248 (Ark. Code Ann. 26-51-439[c]); educational individual retirement accounts under I.R.C. § 530 (any penalty shall be 10% of amount of penalty set forth in I.R.C. § 530) (Ark. Code Ann. 26-51-448); and withholding from deferred income (Ark. Code Ann. 26-51-918).

Certain provisions of Internal Revenue Code of 1986 as in effect on Jan. 1, 2007 are adopted and incorporated by reference: leasing transactions between taxpayers under I.R.C. § 470 (Ark. Code Ann. 26-51-436[7]); capitalization and inclusion in inventory costs of certain expenses under I.R.C. § 263A (Ark. Code Ann. 26-51-439[a]); amortization of partnership organizational expenses under I.R.C. § 709 (Ark. Code Ann. 26-51-439[d]); Subchapter M relating to regulated investment companies, real estate investment trusts, and financial asset securitization investment trusts (Ark. Code Ann. 26-51-440); taxation of foregone interest on below market loan under I.R.C. § 7872 (Ark. Code Ann. 26-51-443[b]); deduction from income for amounts deposited to health savings accounts under I.R.C. § 223(a)-(d), (e)(2), (f), and (g) (Ark. Code Ann. 26-51-453[a]); credit for household and dependant care services necessary for gainful employment under I.R.C. § 21 (Ark. Code Ann. 26-51-502[b][1]); amortization of goodwill and other intangibles under I.R.C. 197 (Ark. Code Ann. 26-51-428[c]); corporate liquidations under I.R.C. §§ 332, 334, 336, 337, and 338 (Ark. Code Ann. 26-51-413); U.S. citizens or residents living abroad under I.R.C. §§ 911, 912 (Ark. Code Ann. 26-51-310); charitable remainder trust provisions under I.R.C. § 664 (Ark. Code Ann. 26-51-309); interest deductions under I.R.C. § 163 (Ark. Code Ann. 26-51-415); expensing of property under I.R.C. § 179 (Ark. Code Ann. 26-51-428[a]); corporate organization, reorganization, and recognition of gain under I.R.C. §§ 351, 354-358, 361, 362, 367, and 368 (Ark. Code Ann. 26-51-412[d]); provisions related to annuities, retirement savings, and employee benefit plans under I.R.C. §§ 72, 219, 401-404, 406-416, and 457 (Ark. Code Ann. 26-51-414[a][1]); combat zone compensation of members of the armed forces and income taxes of the armed forces on death under I.R.C. §§ 112 and 692 (Ark. Code Ann. 26-51-306); Subchapter S of I.R.C. (Ark. Code Ann. 26-51-409[a]); deductions for charitable contributions under I.R.C. § 274 (Ark. Code Ann. 26-51-423[b]); depletion under I.R.C. §§ 611-613, 614, 616, and 617 (Ark. Code Ann. 26-51-429[a]); amortization of qualified reforestation expenses under I.R.C. § 194 (Ark. Code Ann. 26-51-423[h]).

Members of U.S. armed services, including auxiliaries, are exempt from income tax on first $6,000 of service pay or allowances. Enlisted personnel (does not include officers) of armed services are exempt from income tax on first $9,000 of service pay or allowance. I.R.C. §§ 112 and 692, as in effect on Jan. 1, 2007, regarding combat zone compensation of members of armed forces and income taxes of members of armed forces on death are adopted. (Ark. Code Ann. 26-51-306).

Certain provisions of Internal Revenue Code of 1986 as in effect on Jan. 1, 2003, are adopted and incorporated by reference: Allocation of unstated interest under I.R.C. § 483 (Ark. Code Ann. 26-51-443[a] effective Jan. 1, 1999), exclusion of employee educational expenses paid by employer under I.R.C. § 127 (Ark. Code Ann. 26-51-404[b][20]), exclusion from gross income of benefits received under employer's adoption assistance program under I.R.C. § 137 (Ark. Code Ann. 26-51-404[b][25]), deferral of gain realized on sale of corporation's shares of stock to corporation's employee stock ownership under I.R.C. § 1042 (Ark. Code Ann. 26-51-414[d]), exclusion from gross income of foster care payments (Ark. Code Ann. 26-51-404[b][18]), exclusion from gross income of fringe benefits under I.R.C. § 132 (Ark. Code Ann. 26-51-404[b][19]).

Exempt income includes certain reinvested gains from involuntary conversions; gains from sale of principal residence; life insurance policy proceeds; value of property acquired by gifts, bequests, devises or inheritances; interest on obligation of U.S. or its possession and obligations of this state or its political subdivisions; receipts through accident or health insurance, workmen's compensation or damages as compensation for sickness or injuries; social security and railroad retirement benefits; dividends received by corporation doing business in this state from 80% owned subsidiary; income from domestic corporations when earned from places of manufacture, production, or merchandising outside state; rental value of home furnished to or rental allowance paid to minister; items other than those listed above are exempt by adopted I.R.C. sections. (Ark. Code Ann. 26-51-404[b]). First $6,000 of benefits received by Arkansas resident from public or private employment-related retirement systems, regardless of method of funding, or individual retirement account is exempt from state income tax. (Ark. Code Ann. 26-51-307).

Rates for all taxpayers apply to income as follows: for individuals, trusts, or estates, on net income 1% on first $2,999 or part thereof; 2.5% on next $3,000 or part thereof; 3.5% on next $3,000 or part thereof; 4.5% on next $6,000 or part thereof; 6% on next $10,000 or part thereof; 7% on $25,000 and above; for corporations, on net income 1% on first $3,000; 2% on next $3,000; 3% on next $5,000; 5% on next $14,000; 6% on next $75,000; on net income exceeding $100,000, flat rate of 6.5%. (Ark. Code Ann. 26-51-201, 26-51-205).

Capital Gains.

30% of capital gains shall be exempt from state income tax; however, this does not apply to C corporations. (Ark. Code Ann. 26-51-815).

Credits.

After tax has been computed, following credits allowed: for single individual, $20; for head of household, surviving spouse or married individual living with husband or wife, $40; husband and wife living together get only one personal tax credit of $40 whether they file jointly or separately; an additional $20 for each single or married taxpayer who is age 65 or older; additional $20 for taxpayer who is deaf or blind; additional $40 for single taxpayer who is deaf and blind; for each dependent with gross income less than $3,000 other than spouse, $20; for each resident fiduciary, $20, but varies where fiduciary died or became insolvent; for nonresident taxpayer, proportion of tax credited that gross income within state bears to entire gross income wherever derived (Ark. Code Ann. 26-51-501); for resident taxpayer deriving income outside of state, amount of income tax paid to any other state or territory on account of such income, not exceeding tax at Arkansas rates (Ark. Code Ann. 26-51-504); for each taxpayer maintaining child with developmental disability in his home, $500. (Ark. Code Ann. 26-51-503). Credit for adoption-related fees, costs, and expenses; credit is 20% of federal credit calculated pursuant to I.R.C. § 23. (Ark. Code Ann. 26-51-445). Adoption of I.R.C. § 151(c)(6) regarding tax treatment of kidnapped children. (Ark. Code Ann. 26-51-501[g]). Credit for qualified taxpayers who incur expenses for household and dependent care services necessary for gainful employment. (Ark. Code Ann. 26-51-502). Credit available for individual is also available to fiduciary and partnership residing or domiciled in Arkansas. (Ark. Code Ann. 26-51-504[c]). Business qualifying under Arkansas Enterprise Zone Act is entitled to income tax credit equal to 100 times average hourly wage paid with maximum of $3,000 per net new full-time permanent employee hired within 60 months following date of approved financial incentive plan of business. (Ark. Code Ann. 15-4-1701 – 15-4-1705; Ark. Code Ann. 15-4-1709). Amount of real property taxes assessed on homestead of each taxpayer shall be reduced by $350 but not below zero (Ark. Code Ann. 26-26-1118); credit is allowed for establishment or expansion of manufacturing enterprise creating new jobs in state (Ark. Code Ann. 26-51-505); for donation of new machinery and equipment to qualified educational institution or sale below cost and for expenditures for qualified research program, 33% credit limited by 100% of net tax liability of corporate or individual taxpayer (Ark. Code Ann. 26-51-1102 – 26-51-1103); credit is allowed for waste reduction, reuse or recycling equipment by taxpayer engaged in business of reducing, reusing or recycling solid waste for commercial purposes (Ark. Code Ann. 26-51-506[14]); credit of $15 for each ton of rice straw over 500 tons that is purchased by Arkansas taxpayer who is end user (Ark. Code Ann. 26-51-512); credit equal to 331/3% of purchase price in capital development company (Ark. Code Ann. 15-4-1026).

Returns and Payment.

Income tax returns for all taxpayers other than corporations must be made to Department of Finance and Administration on or before Apr. 15, or within three and one-half months after close of fiscal year. (Ark. Code Ann. 26-51-806). Income tax returns for corporations are due on Mar. 15, or within two and one-half months after close of fiscal year. (Ark. Code Ann. 26-51-806). Every Subchapter C corporation, as defined in I.R.C. § 1361(a), must attach completed copy of its federal income tax return including all attachments, to its state return. (Ark. Code Ann. 26-51-806). Automatic extension of time to file for same period received on Federal extension if federal application for extension is attached to state form. (Ark. Code Ann. 26-51-807). Tax is payable on date when return is due and bears interest at 10% from due date. (Ark. Code Ann. 26-51-807). Affiliated corporate group may elect to file consolidated return. (Ark. Code Ann. 26-51-805).

Electronic Funds Transfer.

Director of Department of Finance and Administration is authorized to require that tax payments be made by electronic funds transfer for following: when taxpayer’s monthly withholding under income tax, gross receipts tax, compensating tax, privilege tax, special alcoholic beverage excise tax, alcoholic beverage supplemental taxes, and any monthly tax liability on tobacco products or spirituous liquors, wines, and beer equals or severance tax equals or exceeds $20,000 (Ark. Code Ann. 26-19-105); when corporation’s quarterly state income tax liability equals or exceeds $20,000 (Ark. Code Ann. 26-19-106).

Limitations.

Department may assess deficiency within three years after later of filing of return or date return required to be filed, or at any time in case of fraudulent return or failure to file return, or within one year after filing of amended return if net income increased by I.R.S. or, if assessment by I.R.S. is appealed by taxpayer, three years from later of date of final I.R.S. assessment or payment of federal assessment by taxpayer, or within six years if state tax due of net taxable income is understated by 25% or more. Any assessment of tax within limitation period may be collected by levy or proceeding in court within ten years after assessment. Amended return or verified claim for refund must be filed within three years from time return was filed or two years from time tax was paid, whichever is later. Running of periods for filing amended return or verified claim are suspended if individual is financially disabled. (Ark. Code Ann. 26-18-306).

Deficiencies.

Director of Department of Finance and Administration assesses all state taxes. (Ark. Code Ann. 26-18-401). When he determines deficiency exists, he proposes assessment of additional tax plus penalties and must give notice of this to taxpayer. (Ark. Code Ann. 26-18-403). Taxpayer and legal counsel for Director of Department of Finance and Administration may file written protest with Director and/or may request hearing before hearing officer whose findings shall be final unless revised by Director. (Ark. Code Ann. 26-18-404 – 26-18-405). Taxpayer may appeal Director's decision by paying deficiency under protest and filing suit to recover such amount within one year of payment or within 30 days after service on taxpayer of notice and demand for payment by posting bond in double amount of tax deficiency and filing suit within 30 days after filing bond and diligently prosecuting suit to final determination. (Ark. Code Ann. 26-18-406).

Refunds.

Within six months after amended return or verified claim for refund is filed and Director fails to make written determination and give notice to taxpayer whether or not refund is due, taxpayer may seek administrative review and relief in manner provided in Ark. Code Ann. 26-18-404 or judicial relief under provisions of Ark. Code Ann. 28-18-406. (Ark. Code Ann. 26-18-507). Portion of any tax refund may be contributed to U.S. Olympic Committee Program. (Ark. Code Ann. 26-51-441).

Enforcement.

After final assessment, Director must enforce by issuing certificate of indebtedness to appropriate circuit clerk who enters same as judgment against taxpayer. Entry of judgment is lien upon title of any real and personal property of taxpayer located in county. After entry of certificate, clerk shall issue writ of execution directed to Director or sheriff authorizing levy upon taxpayer's property. (Ark. Code Ann. 26-18-701). Transferee liability is imposed on transferee of taxpayer's property. (Ark. Code Ann. 26-18-502). Taxpayers are given certain rights in connection with assessment and collection process. (Ark. Code Ann. 26-18-801 – 26-18-812). Director may relieve innocent spouse filing joint return of liability for tax, penalty, or interest attributable to understatement. (Ark. Code Ann. 26-18-708).

Penalty for failure to file any return, unless failure is due to reasonable cause and not willful neglect, is 5% of tax shown on return for each month or part thereof not to exceed 35%; for failure to pay tax, penalty is 5% (1% for individuals) for each month or part thereof not to exceed 35%; for any deficiency due to negligence or intentional disregard of rules, penalty is 10% of deficiency; for any deficiency due to fraud, penalty is 50% of deficiency. (Ark. Code Ann. 26-18-208). Criminal penalties provided by Ark. Code Ann. 26-18-201 – 26-18-207.

Withholding by employer from wages of employee based on tables to be promulgated by Department of Finance and Administration and reported and paid annually if withheld amount is less than $1,000 per year; or monthly, if withheld amount is $1,000 or more per year. (Ark. Code Ann. 26-51-905, 26-51-908). Penalties are imposed for failure of employer to make timely report or payment. (Ark. Code Ann. 26-18-501).

Estimated tax declarations and first payments are due 15th day of fourth month of income year from all taxpayers who may reasonably expect estimated tax to exceed $1,000. Remaining payments are due on or before 15th days of 6th and 9th months of income year and 15th day of first month after close of year. For corporate income tax, fourth installment is due on or before 15th day of the last month of income year. Individuals whose farming income equals at least two-thirds of total gross income may declare and pay estimated tax on or before 15th day of second month after close of income year or file return and pay tax for year on or before 15th day of third month after close of income year. Joint declarations may be filed by husband and wife. (Ark. Code Ann. 26-51-911 – 26-51-913). Penalty for failure to pay estimates of at least 90% of actual liability, on quarterly basis, is 10% of amount of underestimate. No penalty where estimate equals or exceeds liability shown on return for preceding 12 month year or if tax shown on return for such year is $1,000 or less. (Ark. Code Ann. 26-18-208[6]).

Multistate Tax Compact (Ark. Code Ann. 26-5-101) as enacted to facilitate proper determination of state tax liability of multistate taxpayers, to promote uniformity, and to facilitate taxpayer convenience. Arkansas has also adopted UDITPA (Uniform Division of Income for Tax Purposes Act) which provides for, *inter alia*, allocation and apportionment of taxpayer’s income from activities both within and without state of Arkansas. (Ark. Code Ann. 26-51-701 – 26-51-723).

Refunds on federal income tax, see category 14 Family, topic 14.09 Husband and Wife.

22.12 INHERITANCE TAX:

None.

22.12A MINES, MINERALS AND FISHERIES TAXES:

Severance taxes, at varying rates, are imposed on natural resources (oil, gas, minerals, timber) taken from the soil. (Ark. Code Ann. 26-58-101 – 26-58-303). Effective Jan. 1, 2009, Ark. Code Ann. 26-58-111(5), Ark. Code Ann. 19-6-201, Ark. Code Ann. 26-58-101, Ark. Code Ann. 19-6-301(18), Ark. Code Ann. 27-70-202(a) and Ark. Code Ann. 26-58-125 are amended to provide for, *inter alia*, revised tax scheme for rates, collections, and use of tax revenues related to natural resources. Additionally, Ark. Code Ann. 26-58-127 – 26-58-129 were added to establish and provide for natural gas severance periods on “new discovery gas” and “high cost gas”, as well as apportionment between royalty owner and producer. For basic primer on Arkansas Oil and Gas Law (does not include above amendments) please see 29 U. Ark. Little Rock L. Rev. 211 (Winter 2007).

22.13 [RESERVED]

22.14 MOTOR VEHICLE TAXES:

Privilege Tax Upon Motor Vehicles.

See category 23 Transportation, topic 23.01 Motor Vehicles.

22.15 [RESERVED]

22.16 PROPERTY TAXES:

Real and Personal Property Taxable.

All property is subject to tax (Ark. Code Ann. 26-3-201), except as specified by exemptions (Ark. Code Ann. 26-3-301 – 26-3-306; Ark. Code Ann. 26-3-308; AR Const., art. 16, § 5).

Exemptions.

Public property, (including waterworks systems owned by nonprofit property owners association), churches, cemeteries, school buildings and apparatus, libraries and grounds, and public charity property, are exempt. (AR Const., art. 16, § 5; Ark. Code Ann. 26-3-301, 26-3-305). Homesteads of residents are exempt from state property taxation to extent of $1,000 of assessed value. (AR Const. Amendment 22). Homestead and personal property of disabled veteran and of surviving spouse and minor children of disabled veteran are exempt. (Ark. Code Ann. 26-3-306).

Owner of new manufacturing or processing establishment to be located within state, or owner making addition to existing establishment, may contract with the state for exemption from state property taxes upon such establishment or addition for not more than ten years. (AR Const. Amendment 27).

Textile mills are exempt from property tax for period of seven years after locating in state. (Ark. Code Ann. 26-3-304).

Tangible personal property in transit through State or manufactured, processed or refined in State and stored for shipment outside of State is exempt. (Ark. Code Ann. 26-26-1102).

Items of household furniture and furnishings, clothing, appliances, and other personal property within home, if not held for sale, rental, or other commercial or professional use, are exempt from all ad valorem taxes levied by any city, county, school district, or other taxing unit in this state. (AR Const. Amendment 71).

No exemption for members of the armed forces. However, penalty is not to be assessed for late payment of prepared taxes against any taxpayer who is member of U.S. Armed Forces, Armed Forces Reserves or Arkansas National Guard during taxpayer's deployment plus one tax year after deployment ends. (Ark. Code Ann. 26-36-201).

Intangible personal property is exempt from ad valorem taxation. (Ark. Code Ann. 26-3-302).

Payment.

Real estate and personal property taxes are due and payable anytime from first business day in Mar. to Oct. 10. (Ark. Code Ann. 26-36-201). Taxpayer must pay personal property taxes at time taxpayer pays real estate taxes. (Ark. Code Ann. 26-35-601). Taxes to and including Oct. 10 of year succeeding that in which levy was made may be paid in installments as follows: One-fourth from third Mon. in Feb. to and including third Mon. in Apr.; one-fourth from third Mon. in Apr. to and including third Mon. in July; one-half from third Mon. in July to and including Oct. 10. Penalty for delinquency is 10%. (Ark. Code Ann. 26-35-501).

Proof of payment of personal property taxes is required for registering or renewing motor vehicle registration. (Ark. Code Ann. 26-26-1401).

Tax credits on ad valorem property taxes on home. See topic 22.10 Income Tax, subhead Credits.

Sales.

Sale of real property for delinquent taxes must comply with statutory procedure. (Ark. Code Ann. 26-37-201 – 26-37-214).

Lien for taxes attaches 1st Mon. in Jan. of year of assessment and is superior to all other incumbrances. As between grantor and grantee, lien attaches on last day fixed by law on or before 3d Mon. in Feb. of each year for county clerk to deliver tax books to collector in each year after tax lien attaches. (Ark. Code Ann. 26-34-101; Ark. Code Ann. 26-28-108).

Redemption.

Commissioner of State Lands shall notify owner that tax delinquent lands may be redeemed within two years of state's receipt of land. Actual notice to owner of homestead is necessary unless commissioner receives proof that notice sent by certified mail was received by owner of homestead. Land will be sold at auction if not redeemed within one year. (Ark. Code Ann. 26-37-301). Insane persons, minors, or persons in confinement may redeem land within two years after disability ceases. (Ark. Code Ann. 26-37-305). Exception for insane persons, minors, or persons in confinement is not applicable to improvement district forfeitures. (Ark. Code Ann. 14-86-1503).

Apportionment.

Person who acquires ownership of portion of parcel of real property may request county assessor to apportion current assessment between remaining portion of parcel and that acquired by person making request within 30 days of request. (Ark. Code Ann. 26-26-1115).

Local improvement districts organized under general and special laws assess taxes, which are liens, and all titles are subject thereto and to sale and forfeiture. These districts are numerous and unlimited in number and amount of separate tax. All nonresident owners should acquaint themselves with local situation of their land in this respect. (Ark. Code Ann. 14-86-601 – 14-86-1703).

Technical College Districts.

Formation of technical college districts are authorized, and voters of such districts may levy ad valorem taxes to support districts. (Ark. Code Ann. 6-53-601 – 6-53-605).

Limitation on suits to collect overdue taxes owing because of under-assessment on tangible real and personal property resulting from error of assessor is three years; on intangible property seven years. (Ark. Code Ann. 26-34-105 – 26-34-106).

Real Estate Conveyance Tax.

See topic 22.18 Stamp and Seal Taxes.

22.17 SALES AND USE TAXES:

Sales Tax.

Superseded by gross receipts tax, as to which see subhead Gross Receipts Tax, infra.

Gross Receipts Tax.

(Ark. Code Ann. 26-52-101 – 26-52-1006).

Subject to exemptions hereinafter mentioned, tax of 3% is levied on gross receipts from all sales of tangible personal property, sales of natural or artificial gas, electricity, water, ice, steam, or any other utility or public service except transportation services, sewer services and sanitation or garbage collection services; services of furnishing rooms or lodging on less than month to month basis; services in repair of motors and numerous specified items of personal property; service of cable television and any and all distribution of television, video, or radio services; services of armored cars, cleaning, pagers, telephone answering, landscaping, parking, storing furs, and tanning; printing and photography; sales of admission to athletic, entertainment and recreational events; dues to health clubs and private clubs holding permit to sell alcohol; service contracts and warranties; and sales of any device used in playing bingo and any charge for admittance to play bingo (Ark. Code Ann. 26-52-301 – 26-52-302); special provisions apply to short term rental of tangible personal property (Ark. Code Ann. 26-63-301); gross receipts from certain coin-operated pinball and music machines or other similar devices (Ark. Code Ann. 26-52-308); gross receipts from machinery and equipment used to produce or repair replacement dies, molds, or other repair parts (Ark. Code Ann. 26-52-402[c][2][B]); sales of computer software and services on computer hardware (Ark. Code Ann. 26-52-304); gross receipts or gross proceeds from wrecker and towing services, collection and disposal of solid wastes, cleaning of parking lots and gutters, dry cleaning and laundry services, industrial laundry services, body piercing, tattooing, and electrolysis services, pest control services, security and alarm monitoring services, boat storage and docking fees, furnishing of camping spaces or trailer spaces at public or privately-owned campgrounds, except for federal campgrounds, on less than month-to-month basis, locksmith services, and pet grooming and kennel services (Ark. Code Ann. 26-52-316); and sale of new or used heavy equipment (Ark. Code Ann. 26-52-318); sales of prepaid telephone calling cards and recharge of such cards (Ark. Code Ann. 26-52-314); deduction from gross receipts allowed for bad debts (Ark. Code Ann. 26-52-309). “Sale” is transfer of either title or possession, except in case of leases or rentals, for valuable consideration, regardless of manner by which transfer is accomplished and includes exchange, barter, lease or rental of tangible personal property. Term also includes sale, exchanging or other disposition of admissions, dues or fees to clubs, places of amusement, recreational or athletic events, or for privilege of having access to or use of amusement, athletic or entertainment facilities. (Ark. Code Ann. 26-52-103). If adjoining cities are divided by state line and city in adjoining state is of greater population than Arkansas city, rate in Arkansas city is 1% above state sales tax rate as levied by Arkansas General Assembly (Ark. Code Ann. 26-52-303) provided Arkansas border city has voted to levy additional 1% in lieu of paying state income taxes by individuals. Tax not applicable to out-of-state telephones sent into state for repairs. (Ark. Code Ann. 26-52-418).

Additional excise tax of 1/8 of 1% is levied on all taxable sales of property and services subject to tax levied on Arkansas Gross Receipts pursuant to Ark. Code Ann. 26-52-101 et seq. (AR Const. Amendment 75).

Exemptions.

Gross receipts from following sales are exempt: sales for resale to persons regularly engaged, within or without state, in reselling articles purchased, if purchaser has sales permit (Ark. Code Ann. 26-52-401[12][A]); sales of property to be used in manufacturing, processing or assembling, provided property becomes recognizable integral part of finished product (but all sales to building contractors are taxable) (Ark. Code Ann. 26-52-401[12][B]); sale of new or used motor vehicle, trailer or semi-trailer under $2,500 (Ark. Code Ann. 26-52-510); sales, for human use, of prescription drugs and oxygen (Ark. Code Ann. 26-52-406); isolated sales not made by established business (does not apply to sale of motor vehicles) (Ark. Code Ann. 26-52-401[17]); resale of tangible personal property which was accepted as part of purchase price of other tangible property on which tax was paid (Ark. Code Ann. 26-52-401[22]); taxation of sales for resale which is prohibited by state or federal constitution (Ark. Code Ann. 26-52-401[16]); sales of newspapers, gasoline, and unprocessed crude oil (Ark. Code Ann. 26-52-401[4] – 26-52-401[11];

Ark. Code Ann. 26-52-401[23]); machinery and equipment purchased for and used directly in processing commercial articles manufactured or processed in Arkansas plants (Ark. Code Ann. 26-52-402[a][1]); advertising space in newspapers, periodicals and billboards (Ark. Code Ann. 26-52-401[13]); gate admission fees for fairs and for nonprofit rodeos (Ark. Code Ann. 26-52-401[15]); sales of natural gas and electricity to qualified manufacturers of steel (Ark. Code Ann. 26-52-901 – 26-52-903; Ark. Code Ann. 26-52-911 – 26-52-914); sales of certain farm, dairy and agricultural products when sold by farmer (Ark. Code Ann. 26-52-401[18]); sales by charitable organizations, except when engaged in business for profit (Ark. Code Ann. 26-52-401[2]); sales to federal government (Ark. Code Ann. 26-52-401[5]); sales of motor vehicles and adaptive equipment to disabled veterans purchasing with financial assistance of Veterans Administration under 38 U.S.C. §§ 1901-1905 (Ark. Code Ann. 26-52-401[6]); sales of new cars to veterans blinded by service-connected injuries (Ark. Code Ann. 26-52-415); sales of new motor vehicles to nonprofit corporations for performance of contracts with DHS or purchased with Urban Mass Transit Administration funds, provided that motor vehicles are purchased in lots of ten vehicles or more for use in DHS programs (Ark. Code Ann. 26-52-420); sales of foodstuffs to governmental agencies for free distribution to poor or to inmates of institutions (Ark. Code Ann. 26-52-401[19]); sales to charitable hospitals or sanatoriums (Ark. Code Ann. 26-52-401[21]); sales to orphans' or children's homes not operated for profit (Ark. Code Ann. 26-52-413); sales of cotton, cotton seed, lint cotton, baled cotton, and seed sold for use in production of agricultural products (Ark. Code Ann. 26-52-401[18][A], [B]); sale of baby chickens (Ark. Code Ann. 26-52-401[18][F][v]); machinery and equipment used in feed manufacturing, poultry hatching, and poultry, egg and livestock processing (Ark. Code Ann. 26-52-402); sales of personal property and services to Boys and Girls Club of America (Ark. Code Ann. 26-52-401[8]); sales of some pollution control devices (Ark. Code Ann. 26-52-402); sales of foods in cafeterias of public schools and colleges operated primarily for teachers and students and not operated for profit (Ark. Code Ann. 26-52-401[3]); sales of coin-operated car washes (Ark. Code Ann. 26-52-301[3][C][ii]); sales of motor vehicles to municipalities, counties, state-supported colleges and universities or to public school district in this state (Ark. Code Ann. 26-52-410); sales of agriculture fertilizer, limestone, chemicals and medical preparations used in treating livestock and poultry and chemicals, nutrients and other ingredients used in commercial production of yeast (Ark. Code Ann. 26-52-405); sales of insulin and test strips for testing human blood sugar levels (Ark. Code Ann. 26-52-419); sales of tickets for athletic events and scholastic activities at public and private elementary and secondary schools and colleges and universities (Ark. Code Ann. 26-52-412); sales of electricity used in manufacturing aluminum metal by electrolytic reduction process (Ark. Code Ann. 26-52-401[24]); sales to specified charitable or social organizations (Ark. Code Ann. 26-52-401[10]); sales of following public utilities service: transportation, sewer, sanitation and garbage collection (Ark. Code Ann. 26-52-301[2]); sales or construction of and repairs to vessels, barges and towboats of at least 50 tons load displacement (Ark. Code Ann. 26-52-407); sales of farm equipment and machinery (Ark. Code Ann. 26-52-403); photoprocessing incidental to printing (Ark. Code Ann. 26-52-402[b][9]); processing of scrap metal for steel production (Ark. Code Ann. 26-52-402[b][10]); sale of first 500 kilowatt hours of electricity per month to households with less than $12,000 annual income (Ark. Code Ann. 26-52-416); rental or lease of specialized equipment used in filming of motion picture qualifying for tax incentives under Ark. Code Ann. 26-4-201 (Ark. Code Ann. 26-52-402[c][3]); repair and remanufacture of certain industrial metal rollers (Ark. Code Ann. 26-52-301[3][C][v]); proceeds for transfer of fill material by business engaged in transporting or delivering fill material when such material is obtained by delivery service free of charge and charge to consumer is only for delivery (Ark. Code Ann. 26-52-401[31]); sales of natural gas used as fuel in process of manufacturing glass (Ark. Code Ann. 26-52-423); gross receipts derived from sale of food and food ingredients to nonprofit agencies organized under Arkansas Nonprofit Corporation Act for free distribution to poor and needy (Ark. Code Ann. 26-52-421); sales of publications sold through regular subscription, regardless of type or content of publication or place printed or published (Ark. Code Ann. 26-52-401[14]); sale of any tangible personal property specifically exempted from taxation by Arkansas Compensating Tax Act, § 26-53-101 et seq. (Ark. Code Ann. 26-52-401[29]); sales to Fort Smith Clearinghouse (Ark. Code Ann. 26-52-424); exemption available for service of repairing, modifying, converting or maintaining commercial jet aircraft and for tangible personal property which becomes part of commercial jet aircraft (Ark. Code Ann. 26-52-301[3][C][vi], 401[28]); sale of substitute fuel in producing, manufacturing, fabricating, assembling, processing, finishing, or packaging of articles of commerce at manufacturing or processing plants or facilities in state (Ark. Code Ann. 26-52-425); sales of forms constructed of plaster, cardboard, fiberglass, natural fibers, synthetic fibers, or composites thereof which determine physical characteristics of item of tangible personal property and which are destroyed or consumed during manufacture of item for which form was built (Ark. Code Ann. 26-52-422); sales of school buses for use in Arkansas school district (Ark. Code Ann. 26-52-410[b]); sale of catalysts, chemicals, reagents and solutions consumed or used in manufacturing or processing articles of commerce in state (Ark. Code Ann. 26-52-401[36]); sales of tangible personal property to Arkansas Symphony Orchestra Society, Inc. (Ark. Code Ann. 26-52-401[38]); livestock reproduction equipment or livestock reproduction substance (Ark. Code Ann. 26-52-439); sale of electricity used for production of chlorine and other chemicals using chlor-alkali manufacturing process (Ark. Code Ann. 26-52-438); and sale of tangible personal property or services to qualified museum (Ark. Code Ann. 26-52-440). Person who purchases prepaid funeral contract may pay gross receipts taxes on tangible personal property purchases in lieu of paying such taxes at time of person's death. (Ark. Code Ann. 26-52-511).

Manufactured, Modular and Mobile Homes.

Upon initial sale of new manufactured home or modular home, gross receipts tax shall be collected on 62% of sales price. No tax shall be due on sale of mobile homes or on subsequent sales of manufactured homes or modular homes. (Ark. Code Ann. 26-52-801 – 26-52-803).

Sales Permits.

It is unlawful to transact within state any business subject to tax without obtaining sales permit from Department of Finance and Administration, criminal penalties being provided. Separate permit must be displayed at each place of business. If seller has no established place of business in state, cash deposit must be made, or bond given, to cover their annual sales tax before receiving permit. Permit may be revoked for noncompliance with tax statute, after notice and a hearing from which appeal may be taken to chancery court within 30 days. (Ark. Code Ann. 26-52-201 – 26-52-209). Non-refundable fee of $50 is required with submission of each new application for gross receipts tax permit (Ark. Code Ann. 26-52-203). Permit automatically expires when taxpayer files 12 consecutive monthly reports reporting zero sales. (Ark. Code Ann. 26-52-210).

Records, Returns and Payment.

Persons subject to tax and persons making sales for resale must keep records of sales. (Ark. Code Ann. 26-52-501). Returns for each month must be made to Department of Finance and Administration by 20th day of succeeding month, but returns may be made quarterly if average amount of tax for previous fiscal year beginning on July 1 and ending on June 30 does not exceed $100 in any month. (Ark. Code Ann. 26-52-501). Payment must be made when return is filed, and 2% discount may be taken if payment is made on or before due date of return, with discount being limited to $1,000 per month. (Ark. Code Ann. 26-52-503). Retailers having average net sales exceeding $200,000 per month must make electronic installments of 40% of tax due on monthly average net sales by 12th and 24th of each month or 80% by 24th of each month with balance payable by 20th day of following month. (Ark. Code Ann. 26-52-512). 2% discount may be taken on each installment, if timely postmarked. (Ark. Code Ann. 26-52-512). Department of Finance and Administration may permit purchaser to remit tax directly to Revenue Division instead of paying tax to seller. (Ark. Code Ann. 26-52-509).

Penalty.

See topic 22.10 Income Tax, subhead Penalty.

Criminal penalty for doing business without first obtaining permit from Department of Finance and Administration is Class A misdemeanor and each day of violation is separate offense. (Ark. Code Ann. 26-52-201; Ark. Code Ann. 26-18-206). Willful failure to file return or pay tax is Class D felony. (Ark. Code Ann. 26-18-202).

Wholesalers must furnish to Department of Finance and Administration on its request names of retailers to whom sales have been made and the amount of such sales for any given period. (Ark. Code Ann. 26-50-102).

Tax on automobiles is collected when license is issued, instead of by dealer. (Ark. Code Ann. 26-52-510).

Limitations period for assessment of deficiency, interest or penalty is three years from date set for filing of monthly return provided that return was filed and it was not fraudulent. (Ark. Code Ann. 26-18-306).

Multistate Tax Compact adopted. (Ark. Code Ann. 26-5-101).

Aircraft sellers are specially regulated. (Ark. Code Ann. 26-52-505).

Economic Investment Tax Credit is available for investments exceeding $5 million or $6 million for projects involving multiple locations. (Ark. Code Ann. 26-52-701 – 26-52-706).

Arkansas Enterprise Zone Act.

When specific qualifications are met, Department of Finance & Administration shall authorize refund of sales and use tax imposed by state and municipality or county, if municipality or county authorized refund of its local tax, on purchases of material used in construction of building or buildings, or any addition, modernization, or improvement thereon, for housing any legitimate business enterprise, and machinery and equipment to be located in or in connection with such building. (Ark. Code Ann. 15-4-1704).

Cities of first class, second class or incorporated town may levy tax not in excess of 3% on gross receipts of hotels, motels, house, cabin, bed and breakfast, campground, condominium, restaurants, cafes, and cafeterias. (Ark. Code Ann. 26-75-602).

Regulations governing tax and forms may be obtained from Department of Finance and Administration.

Compensating Tax.

(Ark. Code Ann. 26-53-101 – 26-53-303).

Subject to exemptions hereinafter mentioned, tax of 3% of sales price is levied against each person for privilege of storing, using, distributing, or consuming within state any taxable service or tangible personal property (Ark. Code Ann. 26-53-106 – 26-53-107) including computer software, machinery, equipment, repair or replacement parts, materials and supplies used, stored, distributed, or consumed by contractor taxed at 4½% but no tax due on such property upon which equal or greater tax has been paid in another state provided it grants credit for tax paid on such property in this state (Ark. Code Ann. 26-53-109, 26-53-203). Every vendor selling tangible personal property for storage, use or consumption in state must register with Department of Finance and Administration. (Ark. Code Ann. 26-53-121).

Tax levied against gross purchase price of tangible personal property of motor carriers, railroads, pipeline carriers, air line carriers, telephone and telegraph companies, gas, water and power utilities is 3%. (Ark. Code Ann. 26-53-108).

Exemptions.

Following property is exempt: Property, storage, use or consumption of which state is prohibited from taxing under federal Constitution or laws or state Constitution; property, sales of which are not subject to or specifically exempted from Gross Receipts Tax (Ark. Code Ann. 26-53-112); sales of natural gas and electricity to qualified manufacturers of steel (Ark. Code Ann. 26-53-112[2], Ark. Code Ann. 26-52-901 – 26-52-903; Ark. Code Ann. 26-52-911 – 26-52-914); sales of natural gas used as fuel in process of manufacturing glass (Ark. Code Ann. 26-53-134); unprocessed crude oil (Ark. Code Ann. 26-53-113); machinery and equipment used directly in producing article of commerce at manufacturing plant in Arkansas, or machinery purchased to replace such existing machinery in its entirety, including some pollution control devices (Ark. Code Ann. 26-53-114); some aircraft, aircraft equipment, railroad parts, cars, and equipment, and some tangible personalty owned by aircraft, airmotive, or railroad companies (Ark. Code Ann. 26-53-115); sales, construction of, and repairs to vessels, barges and towboats of 50 tons load displacement (Ark. Code Ann. 26-53-116); modular homes constructed from materials on which gross receipts tax paid or compensating tax (Ark. Code Ann. 26-53-118); agricultural fertilizer, limestone, chemicals, and feedstuffs used in livestock and poultry production (Ark. Code Ann. 26-53-119 – 26-53-120); prescription drugs purchased, sold or used for human use by licensed pharmacists, hospitals or physicians (Ark. Code Ann. 26-53-112[2], Ark. Code Ann. 26-52-406). Property stored for sale or use outside state by contractor is not subject to compensating tax. (Ark. Code Ann. 26-53-201).

Payment and Returns.

Vendor must collect tax from purchaser and remit to Department of Finance and Administration monthly on or before 20th day of month and must file with Department on or before 20th day of each month return for preceding monthly period. (Ark. Code Ann. 26-53-124 – 26-53-125).

Every person subject to the tax and who has not paid the vendor must file with Department on or before the 20th day of each month a return for the preceding monthly period accompanied by a remittance of the tax due. (Ark. Code Ann. 26-53-125). Department may extend, for not more than 180 days, time for making return and by general order may extend time for making returns for any taxpayer. (Ark. Code Ann. 26-18-505).

Penalties and limitations same as in subhead Income Tax, supra.

Multistate Tax Compact adopted. (Ark. Code Ann. 26-5-101).

Contractors and subcontractors are specially regulated. (Ark. Code Ann. 26-53-201 – 26-53-203).

Tax on new and used motor vehicles is collected when license is issued instead of by dealer. (Ark. Code Ann. 26-52-510).

Regulations governing tax and forms may be obtained from Department of Finance and Administration.

Public utilities engaged in distribution of gas, electricity, water or steam for heating purposes are taxed not amount to exceed 2/5 of 1% on gross earnings from properties within state. (Ark. Code Ann. 23-3-110).

22.18 STAMP AND SEAL TAXES:

Stamp tax on conveyances of realty for consideration in excess of $100 is $3.30 for each $1,000 or fractional part thereof, of which one half is paid by seller and one half is paid by purchaser. (Ark. Code Ann. 26-60-105-106). Exclusions are provided for transfers to or from U.S., Arkansas, or any of their instrumentalities, agencies or political subdivisions, instruments solely to secure debt or to correct or replace instrument previously recorded and on which tax had been paid, conveyances of leasehold interest, deeds for timber to be removed within 24 months, instruments for land sold for delinquent taxes, instruments transferring property in judicial action to enforce security interest or instruments for transfers in lieu of or to avoid judicial action to enforce security interest, property settlement transfers pursuant to divorce whether by agreement or court order, instruments conveying new home financed by Federal Housing Administration or Veterans Administration if sales price of house is $60,000 or less and seller files sworn statement by buyer that neither buyer nor buyer's spouse has owned any home within three years of closing and stating sales price, instruments conveying land between corporations or between corporations, partnerships, limited liability companies, or between business entity and its shareholders, partners, or members incident to organization, reorganization, merger, consolidation capitalization, asset distribution or liquidation and beneficiary deaths. (Ark. Code Ann. 26-60-102). This tax is in addition to other recording fees mentioned under topics Deeds, Mortgages of Real Property, and Records.

Willful violation of Act subject to $500 fine or 1% of transaction, whichever is greater and other penalties. (Ark. Code Ann. 26-60-111).

Recordation is forbidden unless stamps, when required, are affixed. (Ark. Code Ann. 26-60-110).

Form.

Instrument must either contain statement that "I certify under penalty of false swearing that the legally correct amount of documentary stamps have been placed on this instrument" which is signed by grantee or his agent and contains grantee's address, or the following affidavit must be attached in triplicate. (Ark. Code Ann. 26-60-107, 26-60-110). Exempt transfers need not have either of above if clearly exempt, but certification or affidavit may be required. (Ark. Code Ann. 26-60-107).

ARKANSAS

REAL PROPERTY TRANSFER TAX AFFIDAVIT

STATE OF ARKANSAS

COUNTY OF

Before the undersigned, Notary Public, duly qualified and acting in and for said county and state, appeared the undersigned, to me well known or satisfactorily proven to be the Affiant herein, who stated under oath that:

1. He/She/They is/are the Grantee(s) in the attached Deed or the Agent of the Grantee(s)

2. That the names and addresses of all parties to the attached real estate transfer transaction are as follows:

A) Grantee (buyer)____________________

Name

____

Address

B) Grantee's Agent: (To be completed only if this Affidavit is being signed by Agent rather than Grantee. If the Agent is a corporation the person signing the Affidavit must show authority to sign for the corporation.)

____

Name

____

Address

C) Grantor (Seller)____________________

Name

____

Address

3. The property was transferred on:____________________

Date

4. The property is located in: ____________________ ____________________

County District

5. The full value of the consideration given for the property was________________ ($_________).

(NOTE: This amount should include down payment, the amount of any mortgage given or assumed as well as the value of any property given in trade.)

OR

The transfer of property reflected on the attached instrument is not subject to the Real Property Transfer Tax because:____________________

NOTE: All transfers of real property for which Grantor (Seller) receives something of value in exchange for the property are subject to the tax except those specifically exempted at Ark. Code Ann. Ark. Code Ann. 26-60-102.

6. Real Property Tax Stamps Affixed to Deed:

Stamp

Denominations:

____

____

____

Stamp Serial

Numbers:

____

____

____

Total Stamp Values

Stamp Values:

____

____

____

$ __________

7. He/She/They understand that a false statement on this Affidavit may constitute perjury; further it is understood that any person signing a deed for record who knowingly, willfully and fraudulently files the same in violation of the Real Property Transfer Tax Act may be subject to a fine of $500.00 or 1% of the transaction; whichever is greater.

____

GRANTEE/BUYER/AFFIANT OR AGENT

Subscribed and sworn to before me this __ day of ____, ____.

____

Notary Public

My Commission Expires:

____

22.18A TAX LIENS:

Uniform Federal Lien Registration Act adopted. (Ark. Code Ann. 18-47-201 – 18-47-207). Revised Uniform Tax Lien Registration Act not adopted.

23 TRANSPORTATION

23.01 MOTOR VEHICLES:

General supervision is by Department of Finance and Administration, P.O. Box 1272, Room 106, Revenue Building, Little Rock, AR. 72203. Office of Motor Vehicles is at 1900 W. 7th Street, Suite 2042, Ragland Building, Little Rock, Arkansas 72202.

Statutes applicable are: Title 27, cc. 1-8.

The Uniform Act Regulating Traffic on Highways has been adopted with many variations. (Ark. Code Ann. 27-49-101). Uniform Motor Vehicle Administration, Certificate of Title and Antitheft Act has been adopted. (Ark. Code Ann. 27-14-101 – 27-14-2212). Uniform Motor Vehicle Safety Responsibility Act has been adopted with variations. (Ark. Code Ann. 27-19-101 – 27-19-721).

Abandoned or Scrap Vehicles.

Procedures are given for disposition of abandoned vehicles (Ark. Code Ann. 27-50-1101), those having only scrap value (Ark. Code Ann. 27-14-913), and for salvage operators to obtain title by bill of sale if no certificate of title is available (Ark. Code Ann. 27-14-913).

Vehicle license required annually. Number plate must be displayed in rear. (Ark. Code Ann. 27-14-716). Registration of semitrailers under reciprocal agreements was repealed by Act 809 of 1997. Some small or medium size trailers and three and four-wheeler all-terrain cycles may be permanently registered. (Ark. Code Ann. 27-14-1201 – 27-14-1207, and Ark. Code Ann. 27-20-207).

Operator's License.

Uniform Motor Vehicle Driver's License Act adopted. (Ark. Code Ann. 27-16-101). Person under 16 years old may not be licensed as operator except that person at least 14 years old may be granted restricted license (Ark. Code Ann. 27-16-604), nor person under 18 as commercial driver (Ark. Code Ann. 27-16-604). Nonresident not required to have commercial driver's license before employed by Arkansas resident if he has in his immediate possession valid commercial driver's license issued by his home state or country and is at least 18 years of age. (Ark. Code Ann. 27-16-603). New resident may obtain Arkansas driver's license by simply surrendering current valid out-of-state license, paying transfer fee and passing eye exam (but not written driver exam). (Ark. Code Ann. 27-16-807). Before securing current license, owner of every vehicle subject to registration in Arkansas must assess vehicle with county tax assessor in county where required by law and within time required by law. (Ark. Code Ann. 27-14-1015). In addition to registration fees, owner must pay $2.50 for each annual license plate validation decal. County assessor and collector will electronically notify Director that vehicle has been assessed and that owner owes no delinquent personal property taxes. (Ark. Code Ann. 27-14-1015). State Revenue Commissioner may issue "drive out tag" good for 14 days for $2 fee. (Ark. Code Ann. 27-14-2103, 27-14-2104). Municipalities may regulate use of mopeds, three wheeled vehicles and similar vehicles. (Ark. Code Ann. 27-49-106).

Any person while operating motor vehicles in service of U.S. armed forces is exempt from requirements for operator's licenses. (Ark. Code Ann. 27-16-603).

Officer issuing citation for offense which authorizes possession and retention of license is required to give cited person option of surrendering his driver's license or posting bond to assure his appearance in court, unless such person is charged with driving while intoxicated. (Ark. Code Ann. 27-50-609).

Liens and Encumbrances.

Liens, other than by possession, are perfected by filing true copy of evidence of lien with Title Department of Motor Vehicle Division, Department of Finance and Administration, and having lien shown on certificate of title. (Ark. Code Ann. 27-14-801 – 27-14-804). Fee is $1 for filing each instrument. (Ark. Code Ann. 27-14-806). Lien holder on motor vehicle may perfect lien by filing copy with Revenue Division of Department of Finance. (Ark. Code Ann. 27-14-805 – 27-14-807).

Identification Marks.

Felony punishable by one to five years to alter or remove serial numbers or other identification marks of maker. (Ark. Code Ann. 27-14-2211 – 27-14-2212).

Operation Prohibited.

Driving when under the influence of intoxicating liquor or drug is punishable by fine and/or imprisonment and revocation of operator's license. (Ark. Code Ann. 5-65-103 – 5-65-105). Completion of Alcohol Education Program shall be required prior to reinstatement of driving privileges for any person whose license is administratively suspended or revoked. (Ark. Code Ann. 5-65-104). License suspension period may be reduced if court orders ignition interlock restriction license. (Ark. Code Ann. 5-65-118).

Size and Weight Limits.

Highway Department may issue permit for operation of vehicles in excess of limits. (Ark. Code Ann. 27-35-201 – 27-35-211). Rules and regulations apply to movement of houses on highways. (Ark. Code Ann. 27-35-309).

Forestry machinery is exempt from width and height limitations, other than on federal interstate highway system. (Ark. Code Ann. 27-35-209). Overweight fees. (Ark. Code Ann. 27-35-202). Maximum gross vehicle weight is established as 80,000 pounds. (Ark. Code Ann. 27-35-203). Federal bridge formula applies with some exceptions. (Ark. Code Ann. 27-35-203).

Equipment Required.

Regulated by Ark. Code Ann. 27-37-201 – 27-37-206; Ark. Code Ann. 27-37-301 – 27-37-306; Ark. Code Ann. 27-37-401 – 27-37-402; Ark. Code Ann. 27-37-501 – 27-37-503; Ark. Code Ann. 27-37-601; Ark. Code Ann. 27-37-701 – 27-37-707. Specific limitations on window tinting. (Ark. Code Ann. 27-37-306).

Lights Required.

Regulated by Ark. Code Ann. 27-36-201 – 27-36-220.

Inspection.

All vehicles must be in good working order and safe mechanical condition or operator may be subject to citation and fines. (Ark. Code Ann. 27-32-101).

Traffic Regulations.

Right turn on red signal permitted after stop unless otherwise prohibited by sign, and left turn on red into one-way street permitted from one-way street unless otherwise prohibited by sign. (Ark. Code Ann. 27-52-107[a][3] [A][i], [ii]).

Mandatory seat belt use required for driver and front seat passengers. Penalty of $25 for noncompliance. (Ark. Code Ann. 27-37-701 – 27-37-707). Evidence of failure to wear properly fastened seat belt is not admissible into evidence in civil action subject to limited exception for certain product liability claims. (Ark. Code Ann. 27-37-703).

Accidents.

Driver must stop, remain at scene of accident for reasonable amount of time, not less than 30 minutes, unless it is necessary for driver to leave to render assistance, give name and address of owner and driver, registration number of vehicle he is driving, and license numbers if demanded, and report accidents to nearest law enforcement agency immediately if accident resulted in injury or death of any person or total property damage of at least $1,000. (Ark. Code Ann. 27-53-103 – 27-53-105; Ark. Code Ann. 27-53-201 – 27-53-211). Leaving scene of auto accident involving death or personal injury is Class D felony. (Ark. Code Ann. 27-53-101). Subsequent to accident involving only property damage, driver must, if possible, remove his vehicle from roadway. (Ark. Code Ann. 27-53-102).

Liability of Owner.

Owner is liable for negligence of others only when car operated by his servant or agent within scope of authority and duty. Owner of car kept for family use not liable for negligence of member of family unless acting in capacity of agent or servant, or owner has knowledge that driver is careless and reckless. (187 Ark. 1107, 63 S.W.2d 971). Driver of vehicle colliding with vehicle stopped illegally on travelled portion of road is not liable for damages. (Ark. Code Ann. 27-51-1303[a][2]). When motor vehicle damages fence or gate of another and damage allows livestock to escape, immunity is given to owner of escaped livestock from damages until actual notice received and opportunity given to repair fence or gate and recover livestock. (Ark. Code Ann. 2-39-109).

Child Passengers.

Children under 15 years of age must be secured in child passenger restraint system meeting federal motor vehicle standards although safety belt is sufficient for children at least six years of age or at least 60 pounds in weight. (Ark. Code Ann. 27-34-104). Violation punishable by fine of $25-$100. (Ark. Code Ann. 27-34-103). Violation carries no presumption of negligence. (Ark. Code Ann. 27-34-106).

Guests.

Owner or operator is liable for injury to or death of guest resulting from owner’s or operator’s negligence. (Act 13 of 1983, repealing Arkansas Guest Statute; Act 13 since repealed, but Guest Statute not included in 1987 Code).

Proof of Financial Responsibility.

Proof of financial responsibility means proof of ability to pay damages resulting from operation of motor vehicle in any one accident of $25,000 for bodily injury to or death of one person, $50,000 for bodily injury to or death of two or more persons, and $25,000 for damage to property (Ark. Code Ann. 27-19-701) and may be made by depositing with Commissioner of Revenues certificate of insurance showing issuance and maintenance of appropriate policies of insurance, or appropriate surety bond, or receipt of Treasurer of State showing deposit with him of approved securities in appropriate amounts (Ark. Code Ann. 27-19-711) or by certificate from Commissioner that person has deposited $75,000 in cash or securities with him (Ark. Code Ann. 27-19-717).

Commissioner must suspend license and all registration plates of any person convicted of negligent homicide arising out of operation of motor vehicle unless such person gives and thereafter maintains proof of financial responsibility (Ark. Code Ann. 27-19-703; Ark. Code Ann. 27-50-307) and of any person who fails, for period of 30 days, to satisfy any qualifying final judgment, payment of amounts specified being satisfaction of judgment for purposes of act (Ark. Code Ann. 27-19-706 – 27-19-707).

Discharge of judgment by bankruptcy relieves debtor from requirements of act. (Ark. Code Ann. 27-19-708). Act applies to nonresidents. (Ark. Code Ann. 27-19-705).

Upon failure, without meritorious defense, to pay within 60 days after notice any claim for property damage for $1,000 or less resulting from motor vehicle collision, defendant is liable for double damages, court costs, and attorneys fee of not less than $250. (Ark. Code Ann. 27-53-402).

Insurance.

Insurance covering vehicle and person's operation of vehicle are mandatory. Satisfactory proof of insurance required prior to issuance of vehicle license. (Ark. Code Ann. 27-13-102; Ark. Code Ann. 27-22-101 – 27-22-104). Check of Vehicle Insurance Database maintained by Revenue Division of Department of Finance and Administration will verify compliance with motor vehicle liability insurance laws (Ark. Code Ann. 27-14-414), and proof of liability insurance need not be shown at registration (Ark. Code Ann. 27-13-102).

No-Fault Insurance.

Every automobile insurance policy covering private passenger motor vehicles must provide minimum medical and hospital benefits, income disability and accidental death benefits for named insured, members of his family residing in same household, passengers injured while occupying insured vehicle, and to persons other than those occupying another vehicle stuck by insured vehicle, without regard to fault. Medical and hospital benefits cover all reasonable and necessary expense incurred within 24 months after accident not to exceed $5,000 per person. Income disability covers 70% loss of income from work during period commencing eight days after accident, not to exceed 52 weeks and not to exceed $140 a week. For non-income earners, benefits cover expenses not to exceed $70 a week reasonably incurred for essential services in lieu of those injured person would have performed without income during period commencing eight days after accident not to exceed 52 weeks. Accidental death benefits are $5,000 if death results from accident within one year. Named insured may reject in writing one or more of coverages, and such rejection continues until insured withdraws it. Insurer may exclude benefits to insured when injury is intentionally self-inflicted or when received in commission of felony or in seeking to elude lawful arrest by officer. Tort liability is retained. Insurer is entitled to reimbursement less costs of collection from recipient out of any settlement or judgment recovered for injury. (Ark. Code Ann. 23-89-202 – 23-89-208).

Foreign Vehicles.

Privately owned passenger vehicles, duly registered in home state or country and displaying license plates required by laws of home state or country may be operated by visitors or tourists without license for occasional trips. Following foreign cars may operate without charge: Vehicles used only for marketing farm products raised by operator or those associated with him; cars owned by nonresidents not operated for hire but used to and from place of regular employment or making trips to purchase goods; vehicles operated by member of U.S. armed forces during any period of emergency. Vehicles used to make occasional trips, not for hire, may get gratuitous permits. (Ark. Code Ann. 27-14-704).

All terrain vehicles of three, four or six wheel variety generally may not be operated on public streets or highways unless driver has serious walking handicap or vehicle is used in farming or hunting operations and must be operated off street to get from one field to another. (Ark. Code Ann. 27-21-106).

Action against nonresident owner or operator of automobile, or against resident owner or operator who becomes nonresident, arising out of accident in state, may be commenced by serving three copies of process on Secretary of State and paying Secretary of State sum of $25. (Ark. Code Ann. 16-58-120). Such service is good and will warrant personal judgment if notice of service and copy of process are forthwith sent by plaintiff or his attorney, by registered mail, to defendant at his last known address and defendant's return receipt or affidavit of compliance are appended to writ and filed with clerk of court. Same rules apply to action against personal representative of owner or operator. (Ark. Code Ann. 16-58-121).

Direct Actions.

See category 5 Civil Actions and Procedure, topic 5.02 Actions, subhead Direct Action

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Against Insurer.

Motor vehicle carriers are regulated by Transportation Commission. (Ark. Code Ann. 23-13-208). Must have special license and must have certificate of public convenience and necessity. (Ark. Code Ann. 23-13-218, 23-13-219). Common carriers must file tariffs showing rates for all services (Ark. Code Ann. 23-13-244) and contract carriers must file schedule of minimum rates for all services (Ark. Code Ann. 23-13-245 – 23-13-250). Bond, or insurance policy, including uninsured motorist coverage, to indemnify passengers and others injured by operation must be filed. (Ark. Code Ann. 23-13-227).

Taxicab operators must carry liability insurance. (Ark. Code Ann. 27-14-1501). Municipalities in county with population in excess of 200,000 may impose additional insurance requirements. (Ark. Code Ann. 27-14-1501[g]).

Motorcycles on highways and licensing of operators regulated by Ark. Code Ann. 27-20-101 – 27-20-117. Motorcycles and motorized bicycles must be registered each year. (Ark. Code Ann. 27-20-105). Persons riding bicycles or animals on highway have same rights and duties as drivers of vehicles. (Ark. Code Ann. 27-49-111).

Gasoline Tax.

See category 22 Taxation, topic Gasoline and Special Fuels Tax.

Privilege tax may be levied by county and/or municipality (Ark. Code Ann. 26-78-102) each not to exceed $5 annually on each motor vehicle operated upon public roads of county and/or municipality (Ark. Code Ann. 26-78-104).

Manufactured home units are any structure unit constructed for use as dwelling, office or classroom exceeding eight feet in width or 60 feet in length, and may be moved on highways, roads, and streets in state by procurement of special permit. Trailers eight feet or less in width and 60 feet or less in length may be moved on highways of state without obtaining permit. (Ark. Code Ann. 27-35-301 – 27-35-304). Manufactured home units in between 16’6” – 18’0” in width may be moved upon public highways of this state by obtaining emergency permit approved by department. (Ark. Code Ann. 27-35-304).

Special permit for moving manufactured home units on highway obtained from any weight station. (Ark. Code Ann. 27-35-304). Rules pertinent to movement of manufactured homes shall apply equally to highways, city streets and county roads. No municipality or county shall require local permits, bonds, fees, or licenses for movement of manufactured homes permitted by department. (Ark. Code Ann. 27-35-304).

Mobile homes are subject to motor vehicle registration unless it is affixed to real property and title has been cancelled by Department of Finance and Administration. (Ark. Code Ann. 27-14-703).

Motor clubs and similar organizations must provide deposit and surety bonds. (Ark. Code Ann. 23-77-101, 23-77-106).

23.02 RAILROADS:

See category 3 Business Regulation and Commerce, topic 3.08 Carriers.

—Scope —

Revised for 2010 edition by LexisNexis.

(For explanations of abbreviations used in citations herein see the topic “Statutes”. Parallel citations to the Pacific Reporter begin with 64 C.—1 Cal. App. “C.C.R.” refers to California Code of Regulations. For explanations of other abbreviations used in citations herein see category 6 Courts and Legislature, topic “Statutes”.)

This Revision incorporates statutes through Chapter 643 of 2009 regular session of the 2009–2010 Legislature, extraordinary sessions 1–7chaptered as of November 2, 2009 and Governor's Reorganization Plan No. 1. Regular sessions of Legislature convene at noon on first Mon. in Dec. of each even-numbered year and adjourn on Nov. 30 of following odd-numbered year.

1 INTRODUCTION

1.01 GOVERNMENT AND LEGAL SYSTEM:

The State of California is a constituent state of the United States of America. For further discussion of the U.S. federal system, see Introduction to the Federal Government of the United States at the beginning of this volume. A great many laws are promulgated by the federal government of the United States and are not reflected in the topics below. See the Introduction to this volume for references to the federal law topics covered.

Like all but one of the United States, California has a common law legal system, with roots in English common law. For information on the courts and legislature of California, see category 6 Courts and Legislature.

1.02 [RESERVED]

1.03 HOLIDAYS:

Legal holidays are Sun., Jan. 1, 3d Mon. in Jan., Feb. 12, 3d Mon. in Feb., Mar. 31, last Mon. in May, July 4, 1st Mon. in Sept., Sept. 9, 2d Mon. in Oct., Nov. 11, Dec. 25, Good Friday from noon until 3 p.m., any day appointed by President or Governor for public fast, thanksgiving or holiday. Except for Thanksgiving Day these holidays do not apply to city, county or district unless made applicable by such governing body. (Govt. C. 6700, 19853).

Holiday Falling on Sunday.

When Jan. 1, Feb. 12, Mar. 31, July 4, Sept. 9, Nov. 11 or Dec. 25 falls on Sun., following Mon. is holiday. (Govt. C. 6701, 19853).

Holiday Falling on Saturday.

When Nov. 11 falls on Sat., preceding Fri. is holiday. (Govt. C. 6701, 19853).

Legality of Transactions on Saturday, Sunday or Holiday.

If any legal holiday falls on Sat., county board of supervisors may provide that alternate day must be holiday for employees of county and superior or municipal courts in county except court clerks or attachés. (Govt. C. 6701). Sat. from noon until midnight is holiday as regards transaction of business in public offices of state, and also in political divisions thereof where laws, ordinances or charters provide that public offices must be closed on holidays; provided, this must not be construed to prevent or invalidate issuance, filing, service, execution or recording of any legal process or written instrument during said 12 hours. (Govt. C. 6702). However, county clerk need not keep his office open on Sat. mornings unless required to do so by judges of superior court of county. (28 Ops. Atty. Gen. 92). But county courts should remain open on statewide election day where county ordinance requires that county offices be open on such day. (48 Ops. Atty. Gen. 99). Special or holidays of limited effect may be appointed by President or Governor. (Govt. C. 6705). Sat. is holiday for acts performed at or by bank, and if July 4, Sept. 9, or Dec. 25 falls on Sat., preceding Fri. is bank holiday. (C.C. 7.1, 9). If Jan. 1, Feb. 12, July 4, Sept. 9, Nov. 11, or Dec. 25 falls on Sun. following Mon. is bank holiday. (C.C. 7.1, 9). When secular act must be performed, or last day for performance of any act falls on holiday, it may be performed on next business day. (Govt. C. 6706; C.C. 11; C.C.P. 13[Deering's]). “Holiday” includes Sat. for last day for performance of act. (C.C.P. 12a[Deering's]). Except as otherwise provided, all elections must be held on a Tues. No election shall be held on day before or day after state holiday. (Elec. C. 1100[Deering's]).

If any city, county, state or other public office (other than branch) is closed for whole of any day, as to its business day shall be considered as holiday in computing time when act is legally required to be performed within specified period. (C.C.P. 12b[Deering's]).

1.04 OFFICE HOURS AND TIME ZONE:

California is in the Pacific (GMT -08:00) time zone. Office hours are generally from 9 a.m. to 5 p.m.

2 BUSINESS ORGANIZATIONS

2.01 AGENCY:

In general, any person having capacity to contract may appoint agent, and any person may be agent. (C.C. 2296). Agent may be authorized to do any acts which his principal might do, except those to which latter is bound to give his personal attention. (C.C. 2304).

2.02 ASSOCIATIONS:

Unincorporated association is legal entity. (17 Cal. App. 3d 824, 95 C. Rptr. 259).

Property.

Any unincorporated association, labor organization, and certain medical associations may, acquire, hold, manage, encumber, or transfer interest in real or personal property. (Corp. C. 18105, 18035, 18115, 21200).

Interest of member of unincorporated association is personal property. (Corp. C. 18100). Association may file its name or insignia with Secretary of State. (Corp. C. 21301). Such name or insignia will be entitled to protection from unauthorized use. (Corp. C. 21307-21309).

Membership.

Applicant for membership in professional organization is entitled to due process in consideration of his application and in event his application is rejected, he is entitled to showing of just cause and opportunity to defend himself. (12 C.3d 541, 116 C. Rptr. 245, 526 P.2d 253).

Rights and Duties of Members.

Articles of association, or constitution, or bylaws, of association constitute contract between association, as a whole, and its members, and rights and duties of members as between themselves and their relation to association in all matters affecting its internal government and management of its affairs are measured by their terms. Membership in association is personal right of which member can, generally, only be divested in manner provided in articles of association or bylaws. (130 C. 116, 62 P. 486).

Member of association is entitled to full and fair hearing on charge leading to expulsion, hearing must be in accordance with rules of association and law of land, member is entitled to adequate notice, adequate opportunity to defend himself, properly constituted tribunal and decision based upon evidence presented. (262 Cal. App. 2d 211, 68 C. Rptr. 653). Internal administrative remedies, if provided, must be exhausted before suit for reinstatement or damages. (17 C.3d 465, 131 C. Rptr. 90, 551 P.2d 410).

Member of association has no general authority to bind his associates. (35 C. 365; 95 Am. Dec. 107).

Liabilities of Members.

Only property of unincorporated association may be resorted to satisfy money judgment against association, unless judgment is also against member who is party defendant. As between themselves, each member liable to pay only his numerical proportion of indebtedness of association. (32 Cal. App. 264, 162 P. 654; Corp. C. 18260).

Members of nonprofit association are not personally liable for debts incurred by association in acquiring lands or buildings for purposes of association, except by written contract, or if with notice of contract, member receives benefit under contract, or member executes contract without disclosing acting on behalf of association, or member executes contract without authority. (Corp. C. 18605, 18610). Members of unincorporated association that is organized medical society are not individually liable for debts incurred to acquire buildings or for other nonprofit purposes of organization. (Corp. C. 21200).

Actions.

Persons associated in business under common name may sue and be sued by such common name. Member of association may be joined as party in action against association, if service of process is made on such member, and judgment may be obtained against him based on personal liability, whether liability is joint, joint and several, or several. (C.C.P. 369.5[Deering's]).

Member of unincorporated association may bring derivative action similar to shareholder's derivative action. (Corp. C. 800). Corp. C. 18200-18220 provide for filing of statement for service of process and govern means of service on association, including, where no agent has been designated or can be found, service on one or more members constitutes service on association.

Dissolution.

Unless otherwise provided for in its articles of association, charter or bylaws, association cannot be voluntarily dissolved except by unanimous consent of all its members. If such consent cannot be had, application must be made to court to declare dissolution. (250 Cal. App. 2d 925, 59 C. Rptr. 180).

Joint Stock Associations.

See topic 2.04 Joint Stock Companies.

Professional Associations.

See topic 2.03 Corporations, subhead Professional Corporations.

Real Estate Investment Trusts.

Defined by statute. (Corp. C. 23000). No shareholder of real estate investment trust shall be personally liable for any liabilities, debts, obligations or claims against real estate investment trust. (Corp. C. 23001). Real estate investment trust shall not issue any security redeemable at option of holder. (Corp. C. 23003). Real estate investment trust treated as corporation for purposes of reorganization and bankruptcy provisions. (Corp. C. 1400, 1402, 23005).

2.03 CORPORATIONS:

(For unincorporated associations, see topic 2.02 Associations.)

General Corporation Law effective Jan. 1, 1977, governs corporations for profit including foreign corporations qualified to do business in California. Law applies to all corporations organized under it or to any business or private corporation organized under predecessor laws. Law contains provision for orderly application to corporations existing on, and to actions taken by directors and shareholders of such corporations before or after, effective date. Law does not affect Corporate Securities Law (see category 3 Business Regulation and Commerce, topic 3.24 Securities), unincorporated associations (see topic 2.02 Associations), partnerships (see topic 2.07 Partnerships), and certain others. Law is contained within Corporations Code, §100 et seq.[Deering's]

Model Business Corporation Act has not been adopted.

General Supervision.

Secretary of State, 1500 11th Street, Sacramento, CA 95814. Phone: (916) 657-5448. Website: http://www.sos.ca.gov/business/business.htm.

Purposes.

Corporation may be formed for any lawful purpose. (Corp. C. 202).

Name.

Any name may be used which is not likely to mislead public, and not already in use unless consent is obtained from current user. Use of words “bank”, “trust”, “trustee”, or words related thereto is restricted. For insurers, Secretary of State will not file articles unless certificate approving name is attached to articles. Close corporation name must contain “corporation”, “incorporated”, or “limited”, or abbreviation thereof. Permissible name may be reserved with Secretary of State for $10 fee for 60-day period which is not consecutively renewable. (Corp. C. 201, 202; Govt. C. 12186). Availability of name may be determined by writing Secretary of State at above address, Attention: Name Availability Unit.

Term of Corporate Existence.

Perpetual, unless expressly limited by law or in articles. (Corp. C. 200).

Incorporators.

One or more natural persons, partnerships, associations or corporations, domestic or foreign, may form corporation. (Corp. C. 200). No statutory restrictions as to citizenship or residence. Existing business association organized as trust may incorporate.

Articles of Incorporation.

Must state: (a) Name; (b) one of five specific statements regarding purpose, depending on whether corporation is “general”, will engage in specific profession permitted to be incorporated, or is professional bank or trust company, insurance company, or professional corporation within meaning of Moscone-Knox Professional Corp. Act; (c) name and address in California of corporation's initial agent for service of process; (d) if only one class authorized, total number of authorized shares; (e) if more than one class of shares or if any class to have two or more series: (1) total number of authorized shares of each class or of each series or that board is authorized to determine number of shares in any series, (2) designation of each class, and designation of each series or that board may determine designation of each series, (3) rights, preferences, privileges and restrictions as to each class or series, or that board of directors may determine or alter rights, preferences, privileges and restrictions upon any wholly unissued class or series. For any series whose number to be fixed by board, articles may authorize board to increase or decrease (but not below number of shares outstanding) number of shares of series after issue of shares or series. (Corp. C. 202). If articles authorize class of shares to be issuable in series, articles must include designation and number of shares for at least one series within class or authorize common shares. If articles authorize, and if articles state number of shares in class, articles may be amended by approval of board alone to increase or decrease (but not below number of shares outstanding) number of shares of series. (Corp. C. 203.5). Articles may contain: (a) Assessment rights, preemptive rights, qualifications concerning shareholders, “super-majority” vote of either shares or directors, limitation on existence, voting rights of debt holders, shareholders' rights as to determination of consideration for shares, requirement of shareholder or share approval for any corporate action, restrictions on corporation's business and powers and provisions limiting director liability for certain monetary damages and providing for indemnification of agent; (b) reasonable restrictions upon right of transfer of unissued shares; (c) names and addresses of initial directors; (d) other lawful provisions. With respect to close corporations, foregoing optional provisions may be contained in shareholders' agreement. (Corp. C. 204). Certain provisions of articles may be made dependent on facts ascertainable outside of articles. (Corp. C. 109.5). Each of initial directors named in articles signs and acknowledges; if initial directors are not named in articles, articles shall be signed by incorporators. (Corp. C. 200).

Filing of Articles.

Original executed articles must be filed with Secretary of State whereupon corporate existence begins. (Corp. C. 200).

Filing Fee.

On filing articles fee of $100 payable to Secretary of State. (Govt. C. 12186). Minimum annual corporation franchise tax of $800 for income years beginning after Dec. 31, 1989 must be paid when articles filed. (See infra, subhead Taxation.)

Organization.

If initial directors not named in articles, incorporator, until directors are elected, may do whatever necessary and proper to perfect organization, including adoption and amendment of bylaws and election of directors and officers. (Corp. C. 210).

Paid-in Capital Requirements.

No statutory requirement as to amount of paid-in capital which corporation must have before commencing business.

Amendment of Articles.

Corporation may amend its articles in any way so long as amended articles contain only such provisions as would be lawful in original articles filed at time of amendment. (Corp. C. 900). Amendment adopted: (1) Before any shares issued, by majority of incorporators or if directors were named in articles or subsequently elected, by majority of directors; (Corp. C. 901), and (2) after shares issued, by board and majority of outstanding shares, except that board alone may adopt amendment for stock split where one class of shares outstanding and to delete first directors or initial agent for process (Corp. C. 902). Amendment must be approved by outstanding shares of class, whether or not entitled to vote thereon, if amendment would: (a) Change aggregate number of authorized shares of class (except for stock split or exercise of option or conversion rights), (b) effect exchange, reclassification or cancellation of shares of class (except for stock split, but including reverse stock split), (c) effect exchange of share of another class into shares of such class, (d) change rights, preferences, privileges or restrictions of shares of class, (e) create new class or increase rights, preferences or privileges or number of authorized shares of any class having rights, preferences or privileges prior to shares of such class, (f) divide class of preferred shares into series having different rights, preferences, privileges or restrictions or authorize board to do so, or (g) cancel or otherwise affect accrued, but unpaid, dividends on shares of class. (Corp. C. 903). Amendment making shares assessable or subjecting fully paid shares to action for collection of assessment must be approved by all outstanding shares affected unless corporation is mutual water company within meaning of Pub. Utils. C. 2705, which in some instances, requires approval by only two-thirds of shareholders affected. (Corp. C. 911[e], 904[b]).

In case of amendments adopted after issuance of shares, officers' certificate of amendment must be filed with Secretary of State, stating: (1) Wording of amendment, (2) that amendment has been approved by board, (3) if approval of outstanding shares is required, that amendment was approved by required vote; total number of outstanding shares of each class entitled to vote; and that number of shares of each class voting in favor of amendment equaled or exceeded vote required, specifying percentage vote required of each class, and (4) if board approval alone is required, statement of facts pertaining thereto. If amendment is pursuant to merger, filing of certificate under such procedure is in lieu of filing of this statement. (Corp. C. 905). In case of amendment adopted by incorporators or board prior to issuance of shares, certificate of amendment signed and verified by majority of incorporators or board must be filed stating that signers constitute at least majority of incorporators or board, that corporation has issued no shares and that they adopt amendment therein set forth and, if amendments are adopted by incorporators, that directors were not named in original articles and have not been elected. (Corp. C. 906). Certificate of amendment must establish wording of amendment or amended articles by: (a) Stating that articles amended to read as therein set forth in full, (b) stating that identified provisions of articles must be stricken from articles or amended to read as set forth in certificate, or (c) stating that provision set forth therein must be added to articles. If purpose is to effect stock split or to reclassify, cancel, exchange or otherwise change outstanding shares, amended articles must state effect on outstanding shares. (Corp. C. 907). Amended articles are effective upon filing of certificate of amendment. (Corp. C. 908).

Corporation formed for limited term may at any time subsequent to expiration of its term amend articles to remove limit and provide for perpetual existence as long as it has continuously acted as corporation and has done business as such. (Corp. C. 909).

Corporation may restate in single certificate entire text of its articles as amended by filing officers' certificate, or where incorporators or board may amend articles pursuant to Corp. C. 901 and 906, certificate signed and verified by majority of incorporators or board, entitled “Restated Articles of Incorporation of (insert name of corporation)” setting forth articles as amended to date of filing. Subject to compliance with provisions for amendment, such certificate may itself alter or amend articles; if certificate alters or amends articles, it is subject to amendment requirements summarized herein. Restated articles of incorporation supersede original articles and all amendments filed prior thereto. (Corp. C. 910).

Bylaws may be adopted, amended or repealed either by approval of majority of outstanding shares or by board of directors, except that after issuance of shares, bylaw changing number of directors may only be adopted by approval of outstanding shares. (Corp. C. 211). Bylaws must set forth number of directors or maximum and minimum number, with exact number to be fixed by board or shareholder approval, unless articles require larger proportion of vote. Bylaws may contain any provision consistent with law and articles for management of business and conduct of affairs of corporation. (Corp. C. 212). Original or copy of bylaws as amended to date must be kept at principal executive or business office of corporation in California for inspection by shareholders or if no such office in state, corporation must furnish, upon request, to shareholders. (Corp. C. 213).

Stock.

Corporation may issue one or more classes or series of shares or both with full, limited or no voting rights and with such other rights, preferences, privileges and restrictions as stated or authorized in articles. Must always have at least one class of stock with full voting rights. Must always have at least one class or series entitled to unlimited dividend and liquidation rights. (Corp. C. 400). Solely for purpose of statute or regulation imposing tax or fee based on capitalization of California corporation, each share deemed to have $1 par value. (Corp. C. 205).

Before corporation issues any shares whose rights, preferences, privileges, restrictions, or number or designation of series, are not set forth in articles, corporation must execute and file officers' certificate setting forth copy of board resolution, number of shares of class or series and stating that none of such shares issued. (Corp. C. 401).

Provisions of filed certificate of determination may be amended by board resolution and filing of officers' certificate setting forth resolution as long as no shares of class or series covered issued yet; if shares issued, certificate may be amended only by adoption and approval of amendment in accordance with provisions regarding amendment of articles summarized above, and filing of certificate of amendment.

Corporation may provide in its articles for redemption at option of corporation at price, time or happening of events as are stated in articles and also, for preferred shares, at option of holder or upon vote of majority of shares to be redeemed, but no mandatory redemption rights may be issued except as to open-end investment company. Method of selecting shares for partial redemption must be set forth in articles. (Corp. C. 402).

Rights, preferences, privileges and restrictions for preferred shares may provide that vote of specified proportion of outstanding shares that is less than majority will approve corporate action, except where majority or greater proportion required by Corp. Code. May also provide that in addition to vote of shares representing 50% of voting power, specified percentage (not to exceed 662/3%) of preferred class or series needed for corporation to voluntarily wind up and dissolve. (Corp. C. 402.5).

If provided in articles, and subject to certain conditions, corporation may issue convertible shares; corporation may also issue convertible debt securities. (Corp. C. 403). Corporation may grant options to purchase shares either in connection with issue of securities or independently thereof. (Corp. C. 404). If, because of exercise of conversion or option rights, which were previously approved by shareholders, insufficient number of shares remain authorized to satisfy such rights exercised, board may without further shareholder approval amend articles to increase authorized shares to such number as will be sufficient to satisfy such exercise. (Corp. C. 405). Unless articles provide otherwise, board may issue securities having conversion or option rights without first offering them to shareholders of any class. (Corp. C. 406). Corporation may issue fractional shares originally or upon transfer; if it does not issue fractional shares, statutory requirements for their disposition must be met at time of original issuance of shares. (Corp. C. 407). Corporation may adopt and carry out employee stock purchase plan or employee stock option plan. (Corp. C. 408).

Stock Certificates.

Each shareholder entitled to have stock certificate certifying number of shares and class or series of shares, signed by chairman or vice-chairman of board or president or vice-president and by chief financial officer or assistant treasurer or secretary or assistant secretary. Signatures may be facsimile. However, if certain conditions are satisfied, corporation may provide for system of uncertificated securities. (Corp. C. 416). If shares are classified or if any class has two or more series, special legend must appear on certificate setting forth rights, preferences, privileges and restrictions or summary thereof and reference to full provisions or statement setting forth location for finding same. (Corp. C. 417). If shares are subject to transfer restrictions, assessable or not fully paid, certificate must conspicuously state such or summary thereof. If shares are subject to voting agreement, irrevocable proxy or other voting restrictions, or redeemable or convertible, certificate must state such. All certificates representing shares of close corporation must contain specific conspicuous legend; and, any attempted voluntary inter vivos transfer of shares of close corporation resulting in number of holders exceeding maximum number specified in its articles is void if certificate contains such legend. (Corp. C. 418).

Issuance of Stock.

Unless exempt, no corporation may offer or sell stock or other securities unless qualified under California Corporate Securities Law of 1968 (see category 3 Business Regulation and Commerce, topic 3.24 Securities).

Shares may be issued as dividend or upon stock split or for such consideration as is determined by board or by shareholders if articles so provide, consisting of: money paid, labor done, services actually rendered to or for benefit of corporation or in its formation or reorganization, debts or securities cancelled, or property actually received; but promissory notes of purchaser (unless adequately collateralized by property other than shares being issued) or future services can not constitute payment for shares. Corporation may issue shares as partly paid subject to call for remainder of consideration to be paid therefor, if certificate states total amount of consideration to be paid therefor and amount paid. Board by resolution must state its determination of fair value to corporation in monetary terms of any consideration other than money for which shares are issued. (Corp. C. 409).

Each subscriber to and original issuee of shares is liable to corporation for full consideration agreed to be paid, which shall be paid prior to or concurrently with issuance of shares, unless they are issued as partly paid shares. (Corp. C. 410).

Transfer of Stock.

Uniform Commercial Code governs. (Com'l. C. 8301 et seq.). See category 3 Business Regulation and Commerce, topic 3.09 Commercial Code. Good faith transferee of partly paid shares, without knowledge, is liable to corporation only for amount stated on certificate as unpaid. (Corp. C. 411).

Uniform Simplification of Fiduciary Security Transfers Act.

Repealed by Uniform Commercial Code. (Com'l. C. 8402-8404, 8318). See category 3 Business Regulation and Commerce, topic 3.09 Commercial Code.

Stockholders.

See following subheads: Stockholders' Liabilities; Stockholders' Meetings; Voting Rights, infra.

Shareholder Actions.

See subhead Shareholders' Derivative Actions, infra.

Stockholders' Liabilities.

Unless shares are assessable, shareholders liable only to extent of full consideration agreed to be paid for shares. Shares are assessable only if articles confer authority upon corporation or board or if otherwise provided by statute, and if assessable board may levy and collect assessments in conformity with Corp. C. 423.

Stockholders' Meetings.

Shareholders' meetings may be held within or out of California as provided in bylaws, and if no place is stated, then at principal executive office of corporation. Annual meeting of shareholders for election of directors shall be held at date and time provided in accordance with bylaws. Court may order annual meeting if no meeting set or held for specific period. Shareholders' special meetings may be called by board, chairman thereof, president, 10% of voting shares or additional persons as provided in articles or bylaws. If bylaws allow and authorized by board of directors, shareholders may participate by electronic transmission or electronic video transmission and vote, providing reasonable measures taken for concurrent participation. (Corp. C. 600).

Notices of meetings must be given not less than ten days or if at least 500 shareholders, 30 days if by third class mail, nor more than 60 days before date of meeting. Notice must specify certain matters. Unless bylaws require, notice need not be given of adjourned meeting if time and place thereof are announced at meeting at which adjournment is taken, provided that if adjournment is for more than 45 days or new record date fixed, notice must be given. Notice may be given by electronic transmission. (Corp. C. 601).

Unless otherwise provided in articles, majority of voting shares, in person or proxy, constitute quorum, but in no event can quorum consist of less than one-third of voting shares or, except in case of close corporation, of more than majority of voting shares. If quorum present, majority vote of shares at meeting carries unless articles or law require supermajority. Withdrawal of shareholders from meeting ending quorum does not disqualify action approved by at least majority of shares required to constitute quorum thereafter taken or, if required by vote of greater number or voting by classes. In absence of quorum shareholders' meeting may be adjourned by majority vote of shares present. (Corp. C. 602).

Unless otherwise provided in articles, action may be taken without meeting and without prior notice if written consent specifying action taken is signed by shareholders having voting power sufficient to take action at meeting. Notice of shareholders approval by less than unanimous written consent must be given at least ten days before consummation of action authorized, and must be sent to shareholders who have not consented. (Corp. C. 603). Notice shall be given as provided in Corp. C. 601.

Voting Rights.

Except as otherwise provided in articles and cumulative voting for directors each outstanding share entitled to one vote on matters submitted to vote of shareholders. (Corp. C. 700). Form of proxy distributed to ten or more shareholders of corporation with 100 or more shareholders must provide opportunity to approve or disapprove each matter other than elections to office and that proxy will be voted accordingly. Proxy marked by shareholder “withhold” in case of election of directors must not be voted for election of director. (Corp. C. 604).

Board may fix record date for voting in advance, not more than 60 nor less than ten days prior to date of meeting. If no record date is fixed, record date for voting is day preceding day notice is sent or, if notice is waived, day preceding meeting. (Corp. C. 701). Voting of shares by fiduciaries, corporations and otherwise governed by Corp. C. 702-704.

No proxy is valid after expiration of 11 months from its date unless otherwise provided in proxy. Proxy continues in effect until revoked by written revocation delivered to corporation, by subsequent proxy executed by person executing previous proxy and presented at meeting, or by attendance at meeting and voting in person by person executing proxy. Proxy not revoked by death or incapacity of maker unless, before vote is counted, written notice of such is received by corporation. Proxy is irrevocable for period specified therein when held by pledgee, purchaser of shares or holder of option to purchase shares, creditor, employee, beneficiary of trust, or person designated in close corporation agreement. Notwithstanding period of irrevocability specified, proxy becomes revocable when events giving rise to irrevocability terminate. Transferee without knowledge of provision that proxy is irrevocable may revoke proxy unless irrevocability appears in legend on certificate. (Corp. C. 705).

Agreement among shareholders of corporation may provide for exercising voting rights as to shares held by them as provided in agreement or in accordance with procedure agreed upon by shareholders. Agreement may provide that transferee is bound. Such agreement is specifically enforceable notwithstanding availability of remedy at law. (Corp. C. 706).

Shares may be transferred to trustee under voting trust agreement for up to ten years, subject to renewal for additional maximum ten-year period. Duplicate of voting trust agreement must be filed with secretary of corporation, open to shareholder or voting trust certificate holder inspection. (Corp. C. 706).

Shareholder may cumulate votes for director whose name has been placed in nomination prior to vote at election of directors, provided that shareholder has given notice at meeting prior to voting of intent to cumulate votes. If any shareholder gives notice, all shareholders may cumulate votes. (Corp. C. 708).

Shareholders' Derivative Actions.

Plaintiff in such action generally must have been record or beneficial shareholder, or holder of voting trust certificates, at time of alleged wrongdoing, or thereafter became owner by operation of law from holder who was holder at such time. Plaintiff must attempt to obtain desired action from board or state why such attempt was not made. Procedure for such action set forth in Corp. C. 800. Plaintiff may be required to furnish security for expenses, including attorney's fees. For discussion of security for expenses, see category 5 Civil Actions and Procedure, topic 5.08 Costs.

Directors and Management.

Subject to law and any limitations in articles as to shareholder action, all corporate powers are exercised by or under direction of board of directors. Close corporation shareholders' agreement permits close corporation to operate without corporate formalities. Members of board need not be shareholders. No statutory requirement as to citizenship or residence of directors. (Corp. C. 300). Except where directors are divided into classes, directors are elected at each annual shareholders' meeting to hold office until next annual meeting and hold office until election and qualification of successors. Articles may provide for election of directors to represent shares of any class or series voting as such. (Corp. C. 301). Directors of “listed” corporations, i.e., corporations listed on NYSE, AMEX, or corporations listed on NASDAQ (or any successor to that entity), may serve for terms of two or three years depending on number of classes involved. (Corp. C. 301.5). Board may declare vacant office of director of unsound mind or convicted of felony. (Corp. C. 302). Directors may be removed without cause prior to expiration of term by approval of outstanding shares; however, no director may be removed (unless entire board removed) when votes against removal would be sufficient to elect director if voted cumulatively at election at which same total number of votes cast and all directors authorized at time of director's most recent election were then being elected. Similarly, no director of classified board may be removed if votes cast against removal were voted cumulatively at election at which same total number of votes cast and either number of directors elected at most recent annual meeting or, if greater, number of directors whose removal sought, were being elected. (Corp. C. 303). Court may at suit of 10% of outstanding shares remove director in case of fraud, dishonesty or gross abuse of authority or discretion with reference to corporation and may bar from reelection any director so removed for period prescribed by court. (Corp. C. 304). Unless otherwise provided in articles or bylaws and except for vacancy created by removal, vacancies may be filled by majority of directors then in office or, if number of remaining directors is less than quorum, by unanimous consent of directors then in office, vote of majority of remaining directors at duly held meeting, or by sole remaining director. Unless articles or bylaws otherwise provide, only majority of shareholders may fill vacancies created by removal. Majority of outstanding shares may elect director to fill vacancy not filled by directors if vacancy was not created by removal. If filling of vacancy by directors results in elected directors constituting less than majority, special meeting of shareholders may be called. Resignation of director effective upon giving notice unless notice specifies later time. (Corp. C. 305). If corporation has not issued shares and no directors in office, court may appoint directors upon application by any party in interest. (Corp. C. 306).

As provided in articles or bylaws, number of directors may be specific or may be not less than stated minimum nor more than stated maximum (not greater than twice stated minimum minus one), with exact number to be fixed by board or shareholders. Minimum number not less than three except that: (1) Before shares issued, number may be one or two, (2) corporation with one shareholder, number may be one or two, (3) corporation with only two shareholders, number may be two. (Corp. C. 212).

Directors' Meetings.

May be called by chair of board or president or any vice-president or secretary or any two directors, unless otherwise provided in articles or bylaws. Regular meetings may be held without notice if time and place fixed by bylaws or board. Special meetings held upon four days' notice by mail or 48 hours' notice delivered personally or by telephone, including voice messaging system or other technology designed to record and communicate messages, facsimile, electronic mail or other electronic means. Notice may be waived by director. Majority of directors present at meeting may adjourn meeting, and if adjourned for more than 24 hours, notice must be given to directors not present. Transactions at meeting validated by directors' waiver of notice, consent to holding of meeting and approval of minutes. Any action required at meeting may be taken without meeting if all members consent in writing. Meetings may be held at place within or without State that has been designated in notice. Meetings may be held by use of conference telephone, electronic video screen communication, or similar communications equipment, so long as all members participating can communicate with all others and each member provided with means of participating in all matters, including proposals and objections, and corporation implements means of verifying that person communicating by electronic means is director and that all statements, questions and votes are made by that director and not another person. Majority of authorized number of directors constitutes quorum. Articles or bylaws may not provide that quorum be less than one-third or less than two, whichever is larger, unless authorized number of directors is one. If quorum exists initially, withdrawal of director does not affect validity of meeting if action taken is approved by majority of required quorum. (Corp. C. 307).

If even-numbered board deadlocked to detriment of corporation, court may appoint impartial provisional director upon action brought by any director or holder of at least one-third of voting power. (Corp. C. 308).

Liabilities of Directors.

Directors' standard of care is to serve, in good faith, in best interests of corporation and its shareholders and with such care, including reasonable inquiry, as ordinarily prudent person in like position would use under similar circumstances. Director may rely on information and other documents prepared by reliable or competent officers or employees, counsel, accountants, or board committees, so long as director acts in good faith after reasonable inquiry as indicated by circumstances. (Corp. C. 309). Interests of director in transaction with corporation do not invalidate contract if full disclosure and shareholder or disinterested board approval or person asserting its validity sustains burden of proving contract just and reasonable. (Corp. C. 310).

Board may delegate board authority to committees except as to: (a) Designated shareholder approval matters, (b) filling of vacancies, (c) fixing of compensation of directors, (d) change of bylaws, (e) change of any board resolution, (f) certain distribution to shareholders, and (g) appointment of other committees or their members. (Corp. C. 311). Corporation must have chairman of board or president or both, secretary, and chief financial officer. May have such other officers as stated in bylaws or determined by board. Unless articles or bylaws provide otherwise, any number of offices may be held by same person. Except as otherwise provided, officers are chosen by board and serve at its pleasure. (Corp. C. 312).

Any corporate instrument when executed by chairman, president or any vice president and secretary, chief financial officer, assistant secretary or assistant treasurer is not invalidated as to corporation by any lack of authority by signing officers if other person is without actual knowledge that signing officers had no authority to execute instrument. (Corp. C. 313). If majority of shareholders entitled to act approve, corporation may make loan or guarantee obligations of any person upon security of its shares or of its parent. Without shareholder approval, loans or guarantees to officers or other persons may be made only under certain circumstances. (Corp. C. 315).

Directors who approve following corporate actions are jointly and severally liable to corporation, for benefit of entitled creditors or shareholders: (1) Making of distribution to shareholders to extent contrary to Corp. C. 500-503, (2) distribution of assets to shareholders after institution of dissolution without paying or adequately providing for known liabilities, and (3) making of loan or guarantee contrary to Corp. C. 315. Director who is present at meeting of board at which such action is taken shall be considered to have approved action if he abstains from voting. (Corp. C. 316).

Corporation may indemnify its agents in proceedings if agents acted in good faith, believed to be in best interests of corporation (and, for [b], its shareholders), as follows: (a) In third party action, for expenses, including attorney's fees, and any amounts paid; and (b) in derivative action, for expenses and amounts paid upon court approval (which is not necessary if agents successful in proceeding). Indemnification requires: (a) Majority vote of quorum of disinterested directors (if such quorum not attainable, opinion of independent legal counsel), (b) approval of disinterested shareholders, or (c) court approval. Corporation may advance corporate funds pending final disposition of proceeding, on agent's undertaking to repay. Indemnification authorized by Corp. C. 317 not exclusive of any additional rights to indemnification for breach of duty if such rights provided in articles and if not involving breach of duty, not exclusive of rights provided by bylaws, agreements, vote of shareholders or disinterested directors. But no indemnification to be made under this section if inconsistent with articles, bylaws, shareholder resolution, agreement, or court-imposed condition to settlement. Corporation may acquire insurance covering agents' liability notwithstanding corporation's power to indemnify. (Corp. C. 317).

Resident Agent.

All corporations must designate, as agent for purpose of service of process, natural person residing in California or corporation which has complied with Corp. C. 1505 and whose capacity to act as such agent has not terminated. If natural person, statement must include person's business or residence address. (Corp. C. 1502).

General Powers of Corporation.

Subject to any limitations in articles and compliance with laws, corporation has all powers of natural person in carrying out its business activities, including power to: (a) Use corporate seal, but failure to affix seal does not affect validity of any instrument; (b) adopt, amend and repeal by laws; (c) qualify to do business in other jurisdictions; (d) deal in and with its own shares and other securities; (e) make donations for public welfare or community fund, hospital, charitable, educational, scientific, civic or similar purposes; (f) pay pensions and employee benefit plans; (g) assume obligations, enter contracts, incur liabilities, borrow and lend money, and secure any of its obligations; and (h) participate in partnership, joint venture or other arrangement. (Corp. C. 207).

Dividends and Other Distributions.

Corporation may make distribution to its shareholders (transfer of cash or property without consideration by way of dividend other than stock dividend, purchase or redemption of shares, or otherwise) either: (1) Out of retained earnings, or (2) if, after giving effect to distribution, assets of corporation (exclusive of certain intangibles) are at least equal to one and one-quarter times its liabilities (excluding certain deferred items) and its current assets are at least equal to its current liabilities or certain other tests are satisfied. In determining amount of assets, profits from exchange of assets not included unless assets received are currently realizable in cash, and corporation can include certain receivables. Amount of distribution payable in property determined on basis of value at which property is carried on corporation's financial statements in accordance with generally accepted accounting principles. With respect to distributions incurred by corporation in connection with purchase of shares: (1) There shall be deducted from liabilities any amount added at time obligation to purchase is incurred, but not in excess of principal unpaid after distribution, and (2) there shall be added to retained earnings any amount deducted therefrom at time obligation was incurred, but not in excess of principal which is unpaid prior to distribution. These provisions do not apply to broker-dealers as long as corporation after distribution in compliance with certain net capital rules. (Corp. C. 500). Notwithstanding above, no distribution may be made if, or as result thereof, corporation likely to be unable to meet its liabilities as they mature. (Corp. C. 501). Further restrictions on distributions to shareholders having junior liquidation or dividend preferences. Articles or bylaws may also impose additional restrictions upon declaration of dividends or purchase or redemption of shares. (Corp. C. 502-505). Above distribution restrictions inapplicable to redemption of deceased or disabled shareholder's shares from life insurance proceeds on such shareholder's life in excess of total amount of all premiums paid by corporation, in order to carry out agreement between corporation and such shareholder. (Corp. C. 503.1-503.2). Distribution provisions inapplicable to dividends declared by regulated investment companies and real estate investment trusts if necessary to maintain status. (Corp. C. 504). Additional restrictions upon declaration of dividends or purchase or redemption of corporation’s share by provision in articles or bylaws is not prohibited. (Corp. C. 505).

Any shareholder knowingly receiving illegal distribution is liable to corporation for benefit of creditors and shareholders for amount received plus legal interest, up to the then amount of liabilities. Any shareholder sued may implead other liable shareholders. (Corp. C. 506). If distribution other than one chargeable to retained earnings, source of distribution to be identified in notice to shareholders. (Corp. C. 507). Under Corp. C. 509, procedure for redemption of shares set forth. When corporation reacquires its own shares, those shares are restored to status of authorized but unissued shares, unless articles prohibit such reissuance. (Corp. C. 510). Corp. C. 510[b]-[f]) contain provisions governing reacquisition of authorized shares of class or series where articles prohibit reissuance of those shares, or reacquisition of authorized shares of series of shares where articles only prohibit reissuance of those shares as shares of same series.

Unclaimed Dividends.

See category 21 Property, topic 21.01 Absentees, subhead Escheat.

Corporate Mortgages.

Board may authorize mortgage, deed of trust, pledge or other hypothecation of corporation's property to secure payment or performance of contract or obligation, without approval of shares unless articles otherwise provide. (Corp. C. 1000).

Sale or Transfer of Corporate Assets.

Corporation may sell, lease or otherwise dispose of all or substantially all of its property in transaction not in usual and regular course of corporation's business if principal terms thereof are approved by board and majority of outstanding shares. Transactions involving reorganization or conversion subject to provisions of Corp. C. 1150 et seq. are excluded from rule. Notwithstanding prior shareholder approval, board may abandon proposed transaction without further shareholder action, subject to any contractual right of third parties. (Corp. C. 1001).

Merger.

Any two or more corporations may be merged into one by agreement stating terms and conditions of merger, any amendments to articles of surviving corporation, name and place of incorporation of constituent corporations, name of surviving corporation, which may be same as any constituent corporation, manner of converting shares of constituent corporations into shares of surviving corporation, and other desired provisions. Equal treatment required of all holders of same class of shares of any constituent corporation unless unanimous consent of class obtained. (Corp. C. 1100 and 1101).

Consolidation Eliminated Under General Corporation Law.

Triangular mergers treated as direct mergers with parent corporation issuing securities. Issuance of securities must be qualified under Corporate Securities Law. Any amendment of articles must comply with amendment procedures.

Merger agreement signed by chairman of board, president or vice-president and secretary or assistant-secretary of each constituent corporation. (Corp. C. 1102). Mergers must be approved by board and, if required by Corp. C. 1200 et seq., by majority of outstanding shares of each class of each constituent corporation. After approvals above and after filing Franchise Tax Board certificate of satisfaction, surviving corporation must file copy of agreement of merger with officers' certificate attached, whereupon merger is effective. (Corp. C. 1103). Agreement of merger may be amended in same manner as original agreement. (Corp. C. 1104). Board may abandon merger notwithstanding shareholders' approval, subject to third party's contractual rights. (Corp. C. 1105). Upon effectiveness of merger, separate existence of disappearing corporations ceases and surviving corporation succeeds to all rights and property thereof and subject to all liabilities thereof. (Corp. C. 1107). Merger of domestic and foreign corporations permitted pursuant to Corp. C. 1108. Prescribed certificate or certified copy of merger agreement filed in county where real property of disappearing corporation is located will evidence record ownership in surviving corporation. (Corp. C. 1109).

Short form merger under Corp. C. 1110 allowed where parent corporation owns all or not less than 90% of outstanding shares of each class of subsidiary corporations. Merger effected by board resolutions and filing of certificate of ownership setting forth matters specified in section, which certificate is filed after filing of Franchise Tax Board certificate of satisfaction. Merger effective upon filing of certificate of ownership. If parent corporation is not owner of all outstanding shares of subsidiary, surviving corporation must give 20 days' notice to other shareholders who are given same right to dissent and receive in cash fair market value of their shares, as in other cases (see below). (Corp. C. 1110).

If parent corporation is merged into one of its subsidiaries, merger plan shall provide for pro rata conversion of outstanding shares of parent corporation into shares of surviving corporation and may require shareholder approval. (Corp. C. 1110[c]).

If disappearing corporation in merger is close corporation and surviving corporation is not, merger must be approved by holders of two-thirds of outstanding shares of disappearing corporation, unless articles or shareholders' agreement provide for lesser vote, but not less than majority. (Corp. C. 1111).

Reorganizations.

Under Corp. C. 181 reorganization defined to encompass three basic methods of combination: (a) Merger other than short-form merger (“merger reorganization”), (b) exchange of shares by corporation for securities of another (“exchange reorganization”), and (c) exchange of securities by corporation for assets of another (“sale of assets reorganization”). If buyer in control or under common control with seller in sale of assets reorganization must be approved by at least 90% of voting power unless: (a) Sale in consideration of nonredeemable common shares of purchasing corporation or its parent, or (b) terms and conditions of sale previously approved by Corporation's Commissioner, Commissioner of Financial Institutions, Insurance Commissioner, or Public Utilities Commission. (Corp. C. 1001). Board approval required of each constituent corporation in merger reorganization, acquiring corporation in exchange reorganization, acquiring corporation in share exchange tender offer, both corporations in sale of assets reorganization, and “parent party” where applicable. (Corp. C. 1200). Majority of all outstanding shares of each class regardless of voting rights must approve, except that if rights of surviving, acquiring or parent corporation's preferred shares remain unchanged, vote of such preferred shares is not required. No shareholder approval is required of corporation if it or its shareholders, after reorganization, own more than 5/6ths of surviving corporation's voting equity securities. However, shareholder approval is required in merger reorganization if articles amended, in merger or sale of assets reorganization if shareholders to receive shares with different rights or if in close corporation, its shareholders are to receive shares of corporation which is not close corporation, or if holders of series become personally liable for any obligations of party. (Corp. C. 1201).

Board approval also required for share exchange offer (Corp. C. 183.5) pursuant to Corp. C. 1200. Principal terms of share exchange tender offer as defined in Corp. C. 183.5 require approval of outstanding shares of each class involved, except that no approval of preferred shares of either corporation necessary if rights, preferences, privileges and restrictions of class unchanged. No shareholder approval required if corporation or its shareholders, after share exchange, own more than 5/6ths of voting equity securities of either corporation making tender offer or corporation whose shares used in tender offer. (Corp. C. 1201.5).

Principal terms of merger reorganization require unanimous shareholder approval if all shares of corporation to be cancelled without consideration; principal terms of merger or sale of assets reorganization require approval by sufficient percentage of class of preferred shares to amend articles, if holders of such class to receive less than amount required by articles; and if parent party is foreign corporation not subject to Corp. C. 2115, necessity of shareholder approval determined by law of jurisdiction of incorporation. (Corp. C. 1202).

Corp. C. 1203 specifies content and procedure for required fairness opinion if tender offer, including share exchange tender offer, or written proposal for approval of reorganization or sale of assets made to shareholders by interested party.

Dissenters' Rights.

Each holder of dissenting shares whose approval is required under reorganization, and those in short form merger, may require issuing corporation to purchase such shares for cash at fair market value, which is determined as of day before first announcement of terms of reorganization or short form merger (excluding any appreciation or depreciation resulting from proposed transaction, and adjusted for any stock split, reverse stock split or share dividend becoming effective thereafter). Dissenting shares defined to exclude listed securities and to constitute shares not voted in favor of reorganization, which holder has demanded that corporation purchase at fair market value, and which holder has submitted to corporation for endorsement. (Corp. C. 1300). Procedure includes: (a) Corporation mailing copy of dissenters' statutes and notice of approval of reorganization setting forth price determined by corporation to represent fair market value and brief description of procedure to be followed, and (b) demand by shareholder setting forth number of class of shares held and statement of shareholder's claim of fair market value, and presentation of share certificates to corporation for endorsement. (Corp. C. 1301 and 1302). If shareholder and corporation fail to agree upon fair market value of shares, court may determine whether shares are dissenting shares and fair market value thereof and may appoint appraiser to make determination. (Corp. C. 1304-1305). If corporation is prohibited from purchasing its own shares (see subhead Dividends and Other Distributions, supra), holders of dissenting shares become creditors of corporation until payment is permissible, subordinate to other creditors in liquidation proceeding. (Corp. C. 1306). Sole remedy of dissenting shareholders is appraisal right. (Corp. C. 1312).

Books and Records.

Corporation must keep books, records of account, minutes of meetings, and record of shareholders. (Corp. C. 1500). Shareholders and directors have rights of inspection as to shareholder records (Corp. C. 1600 and 1602) and accounting books and records and minutes (Corp. C. 1601), which rights of inspection are subject to enforcement by court action.

Reports.

Corporation must send to shareholders annual report within 120 days after close of fiscal year, unless in case of corporation with less than 100 shareholders, such requirement is waived in bylaws. Shareholder of any corporation has right to receive upon written request copy of certain financial statements. Even where such requirement not so waived, reports for corporations with less than 100 shareholders need not conform to generally accepted accounting principles if reasonably set forth assets, liabilities, income and expenses of such corporation and accounting basis used. (Corp. C. 1501). Annual report must contain balance sheet, income statement, statement of changes of financial position, report of independent accountant or officer's certificate if no such report, and where corporation has 100 or more shareholders, no registered securities, must describe briefly various interested transactions, indemnifications or indemnification advances. (Corp. C. 1501). If bylaws allow, reports may be sent by electronic transmission. (Corp. C. 1501).

Corporation annually must file with Secretary of State statement containing: (1) Vacancies on board, (2) names and addresses of incumbent directors, (3) names and addresses of chief executive officer, secretary and chief financial officer, (4) address of principal executive and business office, (5) statement of general type of business, (6) agent of corporation for service of process, and (7) in addition to above, all publicly traded companies must comply with additional reporting requirements. (Corp. C. 1502.1). Statements must be open to public and available online. Corporations pay $5 disclosure fee to cover cost of online database and victims of Corporate Fraud Compensation Fund. (Corp. C. 1502, 1502.5). Victims of Corporate Fraud Compensation Fund established to provide restitution to victims of corporate fraud. (Corp. C. 1502.5). If there has been no change in information of last filed statement, corporation may file on form prescribed by Secretary of State that no changes have occurred. (Corp. C. 1502).

Dissolution.

Involuntary dissolution may be initiated by: (a) One-half or more of directors, (b) shareholders owning at least one-third of outstanding shares or any shareholder of close corporation, (c) any shareholder if corporate period has terminated without extension, or (d) any person expressly authorized to do so in articles, on grounds of (1) corporation abandonment of business for more than one year, (2) even number of directors equally divided and unable to agree, (3) internal dissension with shareholders deadlocked on conducting business to shareholders' advantage or, for two consecutive annual meetings, on election of directors, (4) fraud, mismanagement or abuse of authority by those in control, (5) if 35 or less shareholders, where liquidation is reasonably necessary for protection of rights of complaining shareholders, or

(6) corporate period has terminated without extension. (Corp. C. 1800). Attorney General may also bring action for dissolution upon certain grounds. (Corp. C. 1801). Court has authority to appoint provisional director or receiver in certain instances and may make such orders as required. (Corp. C. 1802-1804). Proceedings in involuntary dissolution, jurisdiction of court, and otherwise, under Corp. C. 1805-1809.

Voluntary dissolution may be had by majority shareholder vote or by board alone where corporation: (a) Has begun business and issued no shares, (b) is bankrupt, or (c) has disposed of all assets and not done business for five years. (Corp. C. 1900). Upon commencement of voluntary dissolution, certificate of election to dissolve must be filed with Secretary of State (Corp. C. 1901), unless vote is by all outstanding shares and statement to that effect added to certificate (Corp. C. 1901). When dissolution completed, certificate of dissolution similarly filed, but only after Franchise Tax Board certificate of satisfaction filed unless dissolution vote is by all outstanding shares, in accordance with Corp. C. 1901. (Corp. C. 1905).

In both involuntary and voluntary dissolution proceedings, corporation or, if it does not elect to purchase, noninitiating shareholders of 50% or more of shares, may avoid dissolution by purchasing shares for cash of initiating shareholders at fair value. Determination of fair value not limited to liquidation value of assets of business, but taken into account is possibility of sale of entire business as going concern. If fair value unable to be agreed upon, court may appoint appraisers for such determination. (Corp. C. 2000).

During dissolution proceedings directors and officers have certain powers and duties. (Corp. C. 2001). After determining that all known debts and liabilities have been paid or adequately provided for, remaining corporate assets distributed among shareholders according to their rights and preferences. (Corp. C. 2004). Distribution may be made in money or property and installments or lump sum. (Corp. C. 2006). Plan of distribution may be adopted by board and shareholders approval. (Corp. C. 2007).

Close Corporations.

Corp. C. 158 defines close corporation and establishes procedures for creation and termination of close corporation status. Corporation may achieve close corporation status by including in its articles provision that all of corporation's issued shares of all classes must be held of record by not more than specified number of persons, not exceeding 35, and statement that “This corporation is a close corporation.” Corporation may elect close corporation status after issuance of shares only upon unanimous approval of shareholders. Close corporation may voluntarily terminate its status by amending articles but two-thirds vote of each class of outstanding shares is required unless articles provide for lesser vote but not less than majority. Close corporation status also terminates if corporation has more than maximum number of holders of record of shares stated in its articles as result of valid transfers of shares. When close corporation status terminates corporation must execute and file amendment to its articles deleting close corporation provisions. Shareholders may provide in agreement among them to vote for termination of close corporation status upon lapse of specified period of time or upon occurrence of certain event or condition or otherwise.

Following sections of Corp. C. contain specific reference to close corporations, as indicated: 186 (shareholders' agreement), 202(a) (name of corporation), 204 (shareholders' agreement, optional articles provisions), 300 (provisions in shareholders' agreement regarding management and effect of failure to observe corporate formalities), 418 (legend on share certificate and restrictions on transfer), 421 (consent to restrictions on transfer), 1111 (merger), 1201 (shareholder approval in reorganizations with non-close corporations), 1800 (involuntary dissolution by any shareholder) and 1904 (voluntary dissolution). Note rules of Cal. Commissioner of Corporations pertaining to securities of small corporations. See category 3 Business Regulation and Commerce, topic 3.24 Securities.

Appraisal.

See subheads Reorganizations, Dissenters' Rights, and Dissolution, supra.

Foreign Corporations.

No foreign corporation may transact intrastate business in California without first having obtained from Secretary of State certificate of qualification. (Corp. C. 2105). Transacting intrastate business is defined as entering into repeated and successive transactions of business in California, other than interstate or foreign commerce. (Corp. C. 191, which also provides for specific exclusions). Foreign corporation not transacting intrastate business may register its corporate name, if name would be available to new California corporation. Such registration may be renewed annually. (Corp. C. 2101). To obtain certificate of qualification, foreign corporation must file on prescribed form statement and designation signed by corporate officer stating name, state or place of incorporation or organization, address of principal executive office, address of principal office in California, name of agent for service of process, and irrevocable consent to service, or to any validly issued and properly served search warrant. Good standing certificate from place of incorporation must accompany statement. (Corp. C. 2105). Fee for filing certificate of qualification is $100. (Govt. C. 12186). Prepayment of franchise tax must also be made. (Rev. & Tax C. 23153[Deering's] and 23221[Deering's]).

Qualified foreign corporations shall file biennially on prescribed form statement with Secretary of State containing: (1) Names and addresses of chief executive officer, secretary, and chief financial officer, (2) address of principal executive office, (3) address of principal office in California, if any, (4) statement of general type of business, and (5) corporation's agent for service of process. (Corp. C. 2117).

Foreign corporation which has qualified may surrender such right by filing officers' certificate of surrender with Secretary of State. (Corp. C. 2112)[a]). Tax clearance certificate issued by Franchise Tax Board pursuant to Rev. & Tax C. 23332[Deering's] must be filed with certificate of surrender. (Corp. C. 2112[a][6]).

No statutory restrictions on holding real property by foreign corporation in California.

Foreign corporation which transacts intrastate business and which has wilfully not qualified may be subject to $20 per day penalty, is deemed to consent to jurisdiction of California, may not maintain any action or proceeding on intrastate business until it has complied and paid $250 penalty, and may be guilty of misdemeanor, punishable by fine of from $500 to $1,000. (Corp. C. 2203 and 2258).

Directors of foreign corporation transacting intrastate business are liable to corporation, its shareholders, creditors, receiver, liquidator or trustee in bankruptcy for making of unauthorized dividends, purchase of shares or distribution of assets or false certificates, reports or public notices or other violations of official duty, whether done in California or elsewhere, which liability may be enforced in California courts. (Corp. C. 2116).

Taxation of foreign corporation, see subhead Taxation, infra.

Under Corp. C. 2115 “pseudo-foreign corporation” is required to comply with certain sections of California law, for protection of California creditors and shareholders, to exclusion of law of jurisdiction in which it is incorporated. Section applies to any foreign corporation (including foreign parent corporation which does not itself transact intrastate business, but excluding foreign association or foreign nonprofit corporation) if more than one-half of its business is conducted in California and more than one-half of its outstanding voting securities are held of record by persons residing in California (subject to certain rules for securities held in names of broker-dealers). Determination of extent of foreign corporation's business conducted in California based on average of corporation's property factor, payroll factor and sales factor, defined in Rev. & Tax Code 25129[Deering's], 25132[Deering's] and 25134[Deering's], for purposes of computing portion of corporation's income allocable to this State in its franchise tax return. Determination of such factors with respect to any parent corporation must be made on consolidated basis. Provisions of law applicable to pseudo-foreign corporation include annual election of directors, removal of directors without cause, removal of directors by court proceedings, filling of director vacancies where less than majority in office elected by shareholders, directors' standard of care, liability of directors for unlawful distributions, indemnification of directors, officers and others, limitations on corporate distributions in cash or property, liability of shareholder who receives unlawful distribution, requirement for annual shareholders' meeting and remedy if same not timely held, shareholders' right to cumulate votes at any election of directors, supermajority vote requirement, limitations on mergers or sales of assets, reorganizations, dissenters' rights, records and reports, actions by Attorney General, and rights of inspection. Pseudo-foreign corporation provisions not applicable to any foreign corporation with outstanding securities listed on NYSE or AMEX or if securities are qualified for trading on NASDAQ National Market, or if all of its voting shares owned directly or indirectly by corporation(s) not subject to pseudo-foreign corporation provisions. Notification of shareholders and employees of status as “pseudo-foreign corporation” required.

Taxation of Corporate Property.

Rules largely same as for taxation of property of individual. See category 22 Taxation, topic 22.16 Property Taxes. Corporate income and franchise taxes are in lieu of personal property tax and license fees (other than those related to motor vehicles) for certain banks and financial corporations. (Rev. & Tax C. 23182[Deering's]).

Taxation.

Bank and Corporation Franchise Tax Law imposes following taxes:

Franchise tax is imposed on all corporations doing intrastate business in California for privilege of exercising corporate franchise. (Rev. & Tax C. 23151[Deering's], 23181[Deering's]). Franchise Tax Board can determine corporation not doing business within state if only corporate activities are: (a) Purchase of personal property or services for its (including affiliates) own use outside state if (i) it has 100 or fewer employees in state with limited duties, (ii) it has 200 or fewer employees in state with limited duties and the personal property or services purchased are used for the construction or modification of a physical plant or facility out of state, and (iii) the combined number of employees in state pursuant to (i) and (ii) is 200 or fewer; and/or (b) presence of its employees for purpose of attending school (Rev. & Tax C. 23101.5[Deering's]). It is annual tax based upon net income from business done in California for preceding year. Rate for corporations other than financial and banks is 8.84% of such net income with minimum annual tax of $800 with respect to corporations other than credit unions ($25 in case of certain mining companies). (Rev. & Tax C. 23151[Deering's], 23153[Deering's]).

Financial corporations, including national banking associations and other banks, are taxed on their net income allocable to state at rate determined by Franchise Tax Board. For taxable years ending Dec. 31, 1995 tax rate on banks and financial institutions shall be rate specified in Rev. & Tax C. 23151[Deering's] plus 2%. (Rev. & Tax C. 23186[Deering's]).

Estates and trusts must pay estimated taxes similar to Federal provisions. (Rev. & Tax C. 19136[Deering's]).

Conformity to Federal Tax Reform.

Areas of taxation which now generally conform to federal law include: REMIC's and Financial Asset Securitization Investment Trusts (except as to prohibited transactions) (Rev. & Tax C. 24870-75.5[Deering's]); alternative minimum tax, with some modifications (Rev. & Tax C.

23400-23459[Deering's]); research and development, and low-income housing based on I.R.C. 28, 41 & 42 (Rev. & Tax C. 23609[Deering's], 23609.5[Deering's], 23610.4[Deering's], 23610.5[Deering's]); business and entertainment expense deductions (Rev. & Tax C. 24343[Deering's], 24343.2[Deering's], 24443[Deering's]); uniform capitalization rules, as per I.R.C. 263A (Rev. & Tax C. 24422.3[Deering's]); passive activity losses and credits as per I.R.C. 469, with some modifications (Rev. & Tax C. 24692[Deering's]); corporate distributions and adjustments are as per I.R.C. Subchapter C (Rev. & Tax C. 24451[Deering's]); S Corporation treatment (with some modifications) when federal election is made, but corporation still pays tax and minimum franchise tax (Rev. & Tax C. 23800-23813[Deering's]); net operating loss deduction, except that NOL carrybacks are not permitted, amount of loss eligible for carryforward by taxpayers other than new and small businesses is reduced by 50% for taxable years before Jan. 2, 2000; 55% for taxable years after Jan. 1, 2000, but before Jan. 1, 2002; 60% for taxable years after Jan. 1, 2004; 100% for any taxable year after 2004; and number of years to which NOL may be carried over is reduced (Rev. & Tax C. 24416-24416.3[Deering's]). References to Internal Revenue Code mean Internal Revenue Code as in effect on specified date (Jan. 1, 1997 for taxable years beginning in 1997) for respective taxable years.

Corporation income tax is imposed only on corporations not subject to franchise tax, such as foreign corporations engaged exclusively in interstate or foreign commerce in California, domestic holding companies, foreign holding companies which have acquired “commercial domicile” here and business corporations not doing business in California but deriving income from California sources. Banks and financial corporations are not subject to such tax. It is annual tax imposed at rate of 8.84% of net income derived from sources within California. For years after Dec. 31, 1979, rate of tax is rate specified for those years in Rev. & Tax C. 23151[Deering's]. (Rev. & Tax C. 23501[Deering's]). There is no minimum corporate tax.

Alternative minimum tax is imposed on corporations (excluding S corporations) at 7% rate. California follows I.R.C. 55-6 with modifications. (Rev. & Tax C. 23400-23459[Deering's]).

Allocation of Income.

Uniform Division of Income for Tax Purposes Act adopted for years beginning after Dec. 31, 1966. “Combined Report” of incomes of commonly controlled corporations may be required where corporations engage in “unitary business”. (Rev. & Tax C. 25104[Deering's]). Certain qualified taxpayers may elect to determine their California income pursuant to water's-edge election that excludes most foreign corporations from group. (Rev. & Tax C. 25110-25112[Deering's]).

Payment.

Franchise and corporation income taxes are payable to Franchise Tax Board. (Rev. & Tax C. 19005[Deering's]). Returns generally are due within two months and 15 days after close of income (calendar or fiscal) year. (Rev. & Tax C. 18601[Deering's]). Board may grant extensions not exceeding seven months for filing return. (Rev. & Tax C. 18604[Deering's]). Taxes are due and payable in full by general corporations on normal due date of return without regard to extensions. (Rev. & Tax C. 19001[Deering's]). Financial corporations and banks pay greater of franchise tax based on total rate for preceding year and minimum tax, on or before 15th day of third month following close of preceding year. Balance, if any, payable on or before 15th day following mailing of notice of Board's determination of current rate. Refund allowed if applicable. (Rev. & Tax C. 19021[Deering's]). Effective Dec. 31, 1998, interest on “large” (over $100,000) corporate tax underpayments governed by I.R.C. 6621(c)(2)(B)(iii). (Rev. & Tax C. 19521[Deering's]).

Estimated Tax.

Every corporation subject to franchise tax and corporate income tax must make estimated tax payments during its income year. (Rev. & Tax C. 19023-19025[Deering's]). If estimated tax is less than minimum tax, entire amount is payable on or before 15th day of fourth month of income year; otherwise payable: as follows: If minimum tax exceeded by first day of fourth month, greater of 25% or minimum tax on or before 15th day of fourth month of income year, and 25% before 15th day of each of sixth, ninth and 12th months; if minimum tax exceeded after last day of third month and before first day of sixth month, 331/3% before 15th day of each of sixth, ninth and 12th months; if minimum tax exceeded after last day of fifth month and before first day of ninth month, 50% on 15th day of each of ninth and 12th months; if minimum tax exceeded after last day of eighth month and before first day of 12th month, 100% on 15th day of 12th month. (Rev. & Tax C. 19025[Deering's]).

Exempt Corporations.

Religious, charitable, etc., corporations and labor unions are not subject to either franchise tax or income tax (Rev. & Tax C. 23701 et seq.[Deering's]) except as to certain “unrelated business income” (Rev. & Tax C. 23731 et seq.[Deering's]). Insurance companies are exempt from Bank and Corporation Tax Law but are taxed under other statutes on basis of premiums or underwriting income. (See category 16 Insurance, topic 16.01 Insurance Companies, subhead Premium Tax.)

Penalties.

Penalty of 5% of tax for each month or fraction thereof that tax is delinquent, up to 25% maximum, for inexcusable failure to file return, and of 25% of unpaid tax for refusal to furnish information or file return after written demand by Franchise Tax Board; if failure to file is fraudulent, penalty is 15% of tax that is delinquent, up to 75% maximum. (Rev. & Tax C. 19131[Deering's], 19133[Deering's]). Rights and privileges of domestic and foreign corporations may be suspended or forfeited if taxes due are not paid within period set by statute. (Rev. & Tax C. 23301 et seq.[Deering's]). Any person attempting to exercise privileges of corporation whose rights have been so suspended is subject to fine and/or imprisonment. (Rev. & Tax C. 19719[Deering's]). Fine and/or imprisonment, together with costs of investigation and prosecution, may result from wilful failure to file return or filing of false return. (Rev. & Tax C. 19701[Deering's], 19705[Deering's], 19706[Deering's]).

Penalty of up to 25% of total unpaid tax for failure to pay tax when due or upon notice. (Rev. & Tax C. 19132[Deering's]). Penalties in conformity with corresponding federal penalties are also imposed for filing of frivolous returns, substantial understatement of tax liability, negligence or disregard of rules, substantial valuation misstatements, promoting abusive tax shelters, aiding and abetting substantial understatement of tax liability and fraud. (Rev. & Tax C. 19164[Deering's], 19178[Deering's], 19179[Deering's], 17024.5[Deering's]).

Addition to tax is made for underpayment of estimated tax. (Rev. & Tax C. 19136 et seq.[Deering's]).

Business and Industrial Development Corporations.

See category 3 Business Regulation and Commerce, topic 3.01 Banks and Banking, subhead Other Related Businesses Regulated by Financial Code.

Professional corporations are regulated by Moscone-Knox Professional Corporation Act (Corp. C. 13400-13410), and where not inconsistent with foregoing, General Corporation Law also applies. (Corp. C. 13403). Corporation may be formed under General Corporation Law for purpose of qualifying as professional corporation and rendering professional services. (Corp. C. 13404). Certificate of registration must be obtained from governmental agency regulating particular profession. (Corp. C. 13404). All shareholders must be licensed professionals. (Corp. C. 13405). Foreign professional corporation may qualify as foreign corporation to transact intrastate business. (Corp. C. 13404.5). Bus. & Prof. C. regulates particular professional corporations. Following professional corporations are authorized: Law corporations (Bus. & Prof.

C. 6160-6172[Deering's]); medical corporations, podiatry corporations and osteopathic corporations (Bus. & Prof. C. 2400-2417[Deering's]); nursing corporations (Bus. & Prof. C. 2775-2781[Deering's]); chiropractic corporations (Bus. & Prof. C. 1050-1058[Deering's]); acupuncture corporations (Bus. & Prof. C. 4975-4979[Deering's]); dental corporations (Bus. & Prof. C. 1800-1808[Deering's], 1658-1658.8[Deering's]); pharmacy corporations (Bus. & Prof. C. 4150-4156[Deering's]); physical therapy corporations (Bus. & Prof. C. 2690-2696[Deering's]); psychological corporations (Bus. & Prof. C. 2995-2999[Deering's]); optometric corporations (Bus. & Prof. C. 3160-3167[Deering's]); accountancy corporations (Bus. & Prof. C. 5150-5158[Deering's]); shorthand reporting corporations (Bus. & Prof. C. 8040-8047[Deering's]); clinical social workers' corporations (Bus. & Prof. C. 4998[Deering's]); marriage, family and child counseling corporations (Bus. & Prof. C. 4987.5[Deering's]); speech, language, pathology and audiology corporations (Bus. & Prof. C. 2536-2537[Deering's]); physician's assistants corporations (Bus. & Prof. C. 3540-3546[Deering's]); professional architectural corporations (Bus. & Prof. C. 5610[Deering's]).

No professional corporation may be formed to cause any violations of laws, rules or regulations relating to fee splitting, kickbacks, etc., by physicians and surgeons or psychologists. (Corp. C. 13408.5).

Deeds.

See category 21 Property, topic 21.06 Deeds.

Model Non-Profit Corporation Act has not been adopted. Nonprofit mutual benefit corporations (Corp. C. 5059), nonprofit public benefit corporations (Corp. C. 5060), and nonprofit religious corporations (Corp. C. 5061) are governed by Non-Profit Mutual Benefit Corporation Law (Corp. C. 7110-8910), Non-Profit Public Benefit Law (Corp. C. 5110-6910), and Non-Profit Religious Corporation Law (Corp. C. 9110-9690), respectively. Nonprofit public benefit corporations may be formed for any public or charitable purpose (Corp. C. 5111), including practice of law (Corp. C. 13406). Nonprofit mutual benefit corporation may be formed for any lawful purpose; however, it may not be corporation all of assets of which are irrevocably dedicated to charitable, religious, or public purposes and which, as matter of law or as required by articles or bylaws, upon dissolution, must distribute assets to persons carrying on charitable, religious or public purpose. (Corp. C. 7111). Nonprofit religious corporations may be formed primarily or exclusively for any religious purposes. (Corp. C. 9111). These statutes provide for: (1) Purposes, powers and formation of such corporations; (2) their articles of incorporation; (3) directors and management; (4) members; (5) distributions; (6) meetings; (7) voting of memberships; (8) amendment of articles; (9) sales of assets; (10) mergers; (11) records, reports and inspection rights; and (12) voluntary and involuntary dissolution. Provisions pertaining to corporation sole are contained in Corp. C. 10000-10015.

See also category 3 Business Regulation and Commerce, topic 3.20 Monopolies, 3.22 Restraint of Trade and Competition.

2.04 [RESERVED]

2.05 JOINT STOCK COMPANIES:

No statutory provisions except for prohibitions against unauthorized use of another's name in advertisement of any joint stock association, existing or intended to be formed, in order to mislead, and against fraud by officers, directors, agents and promoters. (Corp. C. 22000-22003). Director of joint stock association deemed to have sufficient knowledge of affairs of his association to determine if any act of association violates statutory prohibitions. (Corp. C. 22003).

Joint stock companies are hybrid entities having some features of corporation and some of partnership. They are generally regarded as forming distinct class of association of individuals. (35 C. 365). As unincorporated associations, joint stock companies may sue and be sued in common name (C.C.P. 369.5[Deering's]) and in area of liability, usually are treated as partnerships: members are liable as general partners unless agreement with creditor provides otherwise (81 Cal. App. 502, 253 P. 971).

Issuance of securities is within Corporate Securities Law. (Corp. C. 25000). See category 3 Business Regulation and Commerce, topic 3.24 Securities.

2.06 LIMITED LIABILITY COMPANIES:

Beverley-Killea Limited Liability Company Act adopted effective Sept. 30, 1994. (Corp. C. 17000-17705).

Formation of Limited Liability Companies.

Limited liability company must have one or more members. Articles of organization must be filed with Secretary of State, but need not be executed and filed by member of limited liability company. Members must enter into operating agreement. (Corp. C. 17050). Requirements for contents of articles of organization set forth in Corp. C. 17051. Within 90 days of filing original articles and thereafter biennially, limited liability company must file statement containing (1) name of company and Secretary of State's file number, (2) name and address of agent for service of process, (3) street address of principal executive office, (4) name and complete business or residence address of manager or manager and chief executive officer, or if no manager appointed then address of each member, and (5) general type of business constituting limited liability company's principal business activity. (Corp. C. 17060).

Name of Limited Liability Company.

Shall contain either “limited liability company” or abbreviation “LLC” or “L.L.C.” as last words in name. Abbreviations “Ltd.” and “Co.” may be used. Name may contain name of one or more members. Name may not mislead public or be same as or resemble so closely as to deceive, (1) name of any limited liability company that has filed articles of organization under Corp. C. 17050, or (2) name of any foreign limited liability company registered under Corp. C. 17451, or (3) any name reserved for another limited liability company under Corp. C. 17053, except upon consent of that limited liability company and finding by Secretary of State that public not likely to be misled. Name may not contain following words: bank, trust, trustee, incorporated, inc., corporation or corp., insurer or insurance company, or words suggesting issuance of insurance policies, and assuming insurance risks. (Corp. C. 17052).

Amendment of Limited Liability Company Articles.

Amendment of articles of organization allowed at any time where amendments would have been lawful to insert in original articles. Articles amended by filing certificate of amendment with Secretary of State executed by at least one manager (except where greater number is provided in articles of organization) containing name and Secretary of State's file number of limited liability company, and text of amendment. (Corp. C. 17054).

Liability of Members.

Except as provided in Corp. C. 17254, no member is personally liable for any debt, obligation, or liability of limited liability company solely by virtue of membership in company. Member is personally liable for any debt, obligation, or liability of limited liability company under same or similar circumstances and to same extent that shareholder of corporation is personally liable for debt, obligation or liability of corporation. Member may agree to be personally liable for debts, obligations and liabilities under certain statutory guidelines. (Corp. C. 17101).

Management.

Unless articles provide that limited liability company will be managed by one or more managers, every member is agent of limited liability company for purpose of conducting its business or affairs and has ability to bind limited liability company, unless member in fact has no authority to act in particular matter and person with whom member is dealing has actual knowledge of fact that member has no authority. (Corp. C. 17157[a]). However, if articles provide for limited liability company to be managed by one or more managers, no member may act on behalf of company in his or her capacity as member. (Corp. C. 17157[b]). Manager owes members same fiduciary duties that partner owes to partnership and to partners of partnership. (Corp. C. 17153). Managers and officers are not liable for limited liability company obligations solely by reason of being manager or officer. (Corp. C. 17158). Manager may agree to be personally obligated under certain statutory guidelines. (Corp. C. 17158[b]).

Dissolution of Limited Liability Company.

Limited liability company is dissolved and its affairs wound up on happening of whichever occurs first: (a) time specified in articles of organization, or happening of events specified in articles of organization or written operating agreement, (b) vote of majority interest of members or greater percentage of voting interests of members as specified in articles or operating agreement, or (c) entry of decree of judicial dissolution under Corp. C. 17351. (Corp. C. 17350).

Class Actions and Derivative Actions.

Any member of limited liability company may bring class action to enforce claim common to all or class of members. Such actions governed by law governing class actions generally. (Corp. C. 17500).

Mergers.

Limited liability companies permitted to merge with one or more California or out of state limited liability companies, corporations, limited partnerships, general partnerships, business trusts, real estate investment trusts or unincorporated associations, except nonprofit association, if merger would also be allowed in statutes governing merger partner. (Corp. C. 17550[a]). More than 50% but less than 90% owner of California limited liability company cannot force out minority without obtaining fairness determination from California Department of Corporations. (Corp. C. 17551[b]).

Winding Up of Limited Liability Company.

In event of dissolution, winding up of limited liability company may be effected by managers or members upon written notice of commencement of winding up by mail to all known creditors and claimants whose addresses appear on records of limited liability company. (Corp. C. 17352). Managers must file certificate of dissolution of company with Secretary of State which sets forth: (a) name of limited liability company and file number, (b) event causing dissolution and date of dissolution, (c) effective date of certificate of dissolution if it is not effective upon filing, (d) statement that person, limited liability company or other business entity assumes any tax liability of dissolving company, or that tax liability will be satisfied on taxes paid basis, and (e) any other information managers or members determine necessary. (Corp. C. 17356). Under specified circumstances court of competent jurisdiction may decree dissolution. (Corp. C. 17351).

Foreign Limited Liability Companies.

Laws of state or foreign country under which foreign limited liability company organized govern its organization and internal affairs and liability and authority of managers and members. (Corp. C. 17450).

Registration.

Foreign limited liability company must file application with Secretary of State setting forth

(1) name of foreign limited liability company and, if different, name under which it proposes to transact business in California, (2) state and date of organization and statement that company is authorized to exercise its powers and privileges in that state, (3) name and address of agent for service of process as specified in Corp. C. 17061 (unless corporate agent is designated, in which case only name of agent required), (4) statement that Secretary of State is appointed agent of company for service of process if agent has resigned and not been replaced, or if agent cannot be found or served with reasonable diligence, and (5) address of principal executive office and principal office in California, if any. Application must include certificate of good standing from foreign jurisdiction. Secretary of State may cancel registration if payment not made with presentation. Filing obligates corporation to pay annual tax to Franchise Tax Board. (Corp. C. 17451).

Classification of Limited Liability Companies for Federal Tax Purposes.

Limited liability companies can be classified as partnerships for federal tax purposes. (See e.g. Rev. Rul. 88-76, 1988-2 C.B. 360.)

2.07 [RESERVED]

2.08 PARTNERSHIPS:

General Partnerships.

Uniform Partnership Act has been adopted with certain modifications. (Corp. C. 15001-15046).

Limited Partnerships. — Skipped limited partnerships to do later. New law in 2008: Corp. C. 15900.

Uniform Limited Partnership Act was repealed effective July 1, 1984. (1983 Statutes, c. 1223). California Revised Limited Partnership Act. (Corp. C. 15611-15723), effective July 1, 1984, governs limited partnerships organized after July 1, 1984. Limited partnerships organized before July 1, 1984 continue to be governed by prior law unless all partners, or such lesser number as partnership agreement provides, make written election to be governed by new law, and partnership files with Secretary of State certificate (see subhead Formation of Limited Partnership, infra), including date of original filing under prior law. (Corp. C. 15710, 15711, 15712). No action may be maintained by limited partnership in any California court until certificate has been filed. (Corp. C. 15712[b][4]). Following subheads summarize provisions of California Revised Limited Partnership Act, which are applicable to limited partnerships organized after July 1, 1984 and preexisting limited partnerships which elect to be governed by new law. If counsel is advising California limited partnership organized prior to July 1, 1984, provisions of Uniform Limited Partnership Act may still be applicable.

Formation of Limited Partnership.

All partners must sign partnership agreement, general partners must sign, acknowledge, and file with Secretary of State certificate of limited partnership, on prescribed form, stating: (1) Name, (2) street address of principal executive office, (3) names and addresses of general partners, (4) name of agent for service of process and, if not corporate agent, address, (5) other matters general partners determine to include. (Corp. C. 15621[a]). Limited partnership is formed at time of filing of certificate. (Corp. C. 15621[b]).

Name of Limited Partnership.

Shall contain words “limited partnership” or abbreviation “L.P.” at end of name. Shall not contain: (a) Words “bank”, “insurance”, “trust”, “trustee”, “incorporated”, “inc.”, “corporation”, or “corp.”; (b) name which Secretary of State determines is likely to mislead public or name confusingly similar to existing California limited partnership or registered foreign limited partnership, (see subhead Out-of-State Limited Partnership, infra), or reserved name, unless existing partnership (with similar name) consents to such use and Secretary of State determines that public is not likely to be misled. (Corp. C. 15612). Name may be reserved with Secretary of State for 60-day period, not consecutively renewable. (Corp. C. 15613). In case of limited partnership which has filed certificate pursuant to Corp. C. 15621, any name other than name on file will be fictitious business name. (Bus. & Prof. C. 17900[4][Deering's]).

Amendment of Limited Partnership Certificate.

Amendment of certificate of limited partnership, on prescribed form, must be signed, acknowledged, and filed with Secretary of State by all general partners (unless lesser number is provided in certificate of limited partnership) and by each general partner designated in certificate of amendment as new partner (see exception; Corp. C. 15625) within 30 days after: (1) Change in name, (2) change in address of principal executive office, (3) change in address of general partner or agent for service (if not corporation) or appointment of new agent, (4) admission of general partner or cessation of general partner to be general partner, (5) discovery of false or erroneous material statement in certificate or any amendment. (Corp. C. 15622). Certificate may also be amended at any other time in any other respect that general partners determine.

Rights and liabilities of general partner with respect to partnership and other partners may be limited by partnership agreement. (Corp. C. 15643). General partner may hold limited partnership interest that is separately designated in partnership agreement. (Corp. C. 15644).

Admission of and Cessation as General Partner.

Unless otherwise provided by agreement, after filing of partnership certificate, general partner may be admitted only: (1) By written consent of each general partner and vote of majority in interest of limited partners (in cases in which there is no remaining or surviving general partner, greater vote may be required—see Corp. C. 15636); or (2) in case of general partner ceasing to be general partner for reasons other than removal and at least one general partner remaining, all partners agree to admit additional general partners. (Corp. C. 15641).

Rights and Liabilities of Limited Partners.

Limited partner who participates in control of business is liable only to persons who transact business with partnership with actual knowledge of that partner's participation in control and who reasonably believe that partner to be general partner at time of transaction. Limited partner who knowingly permits use of his name in partnership name (other than where business of limited partnership had been carried on under name in which his name appeared before his admission) is liable for partnership obligations to persons who reasonably believed that limited partner was general partner at time of transaction. Limited partner does not participate in control of business solely by doing one or more of following: (a) Being contractor for or agent or employee of limited partnership or of general partner, or officer, director or shareholder of corporate general partner; (b) consulting with and advising general partner with respect to business of limited partnership; (c) acting as surety for limited partnership or general partner or guaranteeing one or more specific debts of limited partnership; (d) approving or disapproving amendment to partnership agreement; (e) winding up partnership; (f) serving on audit committee or committee performing functions of audit committee; (g) executing certificate of limited partnership or certificate of amendment (upon failure of general partner to do so in reasonable time after demand), certificate of dissolution, or certificate of cancellation; (h) exercising any right or power permitted to limited partners under Revised Limited Partnership Act and not specifically enumerated in list in Corp. C. 15632(b); (i) voting on or calling partners' meeting for one or more of following matters: (1) Dissolution and winding up of limited partnership, (2) sale, exchange, lease, mortgage, pledge, or other transfer of all or substantial part of assets of limited partnership other than in ordinary course of business, (3) incurrence of indebtedness by limited partnership other than in ordinary course of business, (4) change in nature of business, (5) transactions in which general partners have actual or potential conflict of interest with limited partners or limited partnership, (6) removal of general partner, (7) election to continue business other than under circumstances described in clauses (9) or (10), (8) admission of general partner other than under circumstances described in clauses (9) or (10), (9) admission of general partner or election to continue business after general partner ceases to be general partner where there is no remaining or surviving general partner, (10) admission of general partner or election to continue business of limited partnership after removal of general partner where there is no remaining or surviving general partner, (11) matters related to business of partnership which partnership agreement states may be subject to approval or disapproval of limited partners. (Corp. C. 15632, 15636). Limited partners have dissenting rights to sell their interest in partnership for fair market value in case of merger, acquisition or reorganization. (Corp. C. 15679.1 et seq.).

Records and Reports.

At an office in California, limited partnership shall keep: (a) Current alphabetical list of names, addresses, contribution, and share in profit and loss of each partner, (b) copies of partnership agreement and amendments and certificate of limited partnership and amendments, with executed copies of powers of attorney under which certificates or amendments were executed, (c) copies of tax or information returns for last six taxable years, financial statements for last six fiscal years, and partnership books and records as they relate to internal affairs of partnership for current and last three fiscal years. (Corp. C. 15615). All of foregoing can be inspected and copied by limited partner during normal business hours on reasonable request, and limited partner can require delivery to him at partnership expense of copies of name list, agreement, certificate, and amendments. Limited partners may obtain from general partners copies of partnership income tax and information returns for each year as soon as they become available. All partners must be sent tax information within 90 days after end of taxable year, and in case of limited partnerships with 35 or fewer limited partners, copy of partnership's federal, state and local income tax or information returns for year must accompany such information. Partners of limited partnership with over 35 limited partners must be sent annual report containing balance sheet, income statement, and statement of changes in financial position within 120 days after end of fiscal year. These and other specified rights of access to and delivery of copies of records are enforceable by court action, with reimbursement of attorney's fees if court finds failure to comply was without justification. (Corp. C. 15634). Attorney General may also under certain circumstances bring suit to enforce such rights. (Corp. C. 15635).

Mergers of limited partnerships are regulated by Corp. C. 15678.1 et seq. which provides, in part, for filing certificate of merger with Secretary of State (Corp. C. 15678.4), creditors' rights (Corp. C. 15678.6) and merger of domestic and foreign limited partnerships (Corp. C. 15678.7). Mergers of limited partnerships with domestic corporations are regulated by Corp. C. 1109, 1113.

Dissolution of Limited Partnership.

Limited partnership is dissolved and its affairs shall be wound up upon happening of first to occur of following: (a) At time or upon happening of events specified in partnership agreement; (b) except as otherwise provided in partnership agreement, written consent of all general partners and majority in interest of limited partners; (c) general partner ceases to be general partner unless: (1) there is at least one other general partner and partnership agreement permits business of limited partnership to be carried on by remaining general partner and such partner does so, or (2) at time there is no remaining general partner, majority in interest of limited partners or greater interest provided in partnership agreement agree in writing to continue business and to admission within six months of new general partner(s); (d) entry of decree of judicial dissolution under §15682. (Corp. C. 15681).

Winding Up of Limited Partnership.

In event of dissolution, winding up of limited partnership may be effected: (a) Except as otherwise provided in partnership agreement (and unless dissolution is by entry of judicial decree), by general partners who have not wrongfully dissolved limited partnership or, if none, limited partners, or (b) by decree of court of competent jurisdiction upon petition of limited partners representing 5% or more of interests of limited partners, or three or more creditors, if winding up appears necessary for protection of any parties in interest. (Corp. C. 15683).

Out-of-State Limited Partnership.

Registration.

Before transacting intrastate business, foreign limited partnership shall file application for registration with Secretary of State setting forth following: (a) Name of foreign limited partnership and, if different, name under which proposes to register and transact business in California; (b) state or country and date of formation and statement that foreign limited partnership is authorized to exercise its powers and privileges in such state or country; (c) name and address of California agent for service of process; (d) statement that Secretary of State is appointed agent of foreign limited partnership for service of process if agent has resigned and has not been replaced or if agent cannot be found or served with exercise of reasonable diligence; (e) address of principal executive office of foreign limited partnership and of its principal office in California, if any; (f) names and business or residence addresses of general partners. Secretary of State may cancel application of payment not made at filing. Registration obligates partnership to pay annual tax to Franchise Tax Board. (Corp. C. 15692).

Penalty for Failure to Register.

Foreign limited partnership transacting intrastate business in California suffers following penalties until it registers in California: (a) Inability to maintain any action in any California court; (b) $20 penalty for each day up to maximum of $10,000. Failure of foreign limited partnership to register in California does not impair validity of any of its contracts or acts or prevent it from defending any action in any California court. Limited partner of foreign limited partnership is not liable as general partner of foreign limited partnership solely by reason of its having transacted intrastate business in California without registration. By law, Secretary of State is appointed agent for service of process on foreign limited partnership transacting intrastate business in California without registration, with respect to actions arising out of such transactions. (Corp. C. 15697).

Out-of-State General and Limited Partnership Designation of Agent for Service of Process.

Every partnership, other than foreign limited partnership subject to c. 3 (commencing with §15611) or c. 5.5 (commencing with §15900) of Tit. 2 of Corp. Code or commercial or banking partnership established and transacting business outside U.S., which is domiciled outside California and has no regular place of business within California, shall, within 40 days of commencing business in California, file statement with Secretary of State designating agent for service of process. By law, service may be made on Secretary of State, Assistant Secretary of State, or Deputy Secretary of State, if agent has not been designated, or if agent designated cannot be found with due diligence, or if agent designated is no longer authorized to act. (Corp. C. 15800).

Classification of Limited Partnerships for Federal Tax Purposes.

In Rev. Rul. 89-123, 1989-2 C.B. 261, Internal Revenue Service determined that California Revised Limited Partnership Act (Corp. C. 15611-15723) corresponds to Uniform Limited Partnership Act for purposes of §301.7701-2 of Treasury's Procedure and Administration Regulations.

Mining Partnership.

See category 19 Mineral, Water and Fishing Rights, topic 19.01 Mines and Minerals.

3 BUSINESS REGULATION AND COMMERCE

3.01 BANKS AND BANKING:

Regulated by.

Banking business in California is primarily regulated by Financial Code (1951, c. 364), Uniform Commercial Code (1962, adopted 1963), and laws, rules and regulations of Federal Deposit Insurance Corporation (12 U.S.C. 1811 et seq.). Statutory scheme divides banks into commercial banks, industrial banks, and trust companies, although banks may carry out trust operations in separate department of bank. (Finan. C. 103[Deering's]; 1500.1[Deering's]). Since only corporations may do banking business (Finan. C. 102[Deering's]), banks are also subject to California corporate laws to extent not inconsistent with Financial Code (Finan. C. 101[Deering's]). Corporation cannot engage in commercial banking or trust business without certificate of authority. (Finan. C. 403[Deering's]).

Banks are subject to supervision of Department of Financial Institutions, chief officer of which is Commissioner of Financial Institutions. (Finan. C. 200[Deering's]; 210[Deering's]). State regulatory scheme calls for extensive examinations and reports concerning banks' condition no less than once every two years. (Finan. C. 1900-1916[Deering's], 1930-1939[Deering's], 1583-1585[Deering's]).

Shares.

Par value may be determined by banks' boards. (Finan. C. 620[Deering's]). Distributions to shareholders may not be made (with some exceptions requiring prior approval by commissioner) in amount which exceeds lesser of retained earnings or net income for last three fiscal years less distributions made during such time. (Finan. C. 640-646[Deering's]).

Deposits and Withdrawals.

Bank accounts by or in name of married person or minors must be held for exclusive right and benefit of such persons, whose receipt is valid release and discharge to bank. (Finan. C. 850-851[Deering's]). Deposits in joint accounts may be made to one or more parties whether or not mention of right to survivorship. (Finan. C. 852[Deering's]; Prob. C. 5130[Deering's]). Bank account agreements can be made providing for payment on death to designated person. Such "pay-on-death" provisions shall not be deemed to effect testamentary disposition of property. (Prob. C. 5100-5407[Deering's]). Totten Trust (defined in Prob. C. 80[Deering's]) may be paid to any trustee. If deceased trustee survived other trustees and beneficiaries, payment to his representative or heirs, unless beneficiary had vested interest. If beneficiary survived all trustees, payment to beneficiary or his heirs. (Prob. C. 5404[Deering's]). Statements of account conclusively presumed correct if no objection within four years from rendition. (Finan. C. 861[Deering's]). Bank under no obligation to customer to pay noncertified check presented more than six months after its date, but bank may charge customer's account for payment made thereafter in good faith. (Com'l. C. 4404). Bank has right of set off against deposits if it has matured claim against depositor. (C.C. 3054.) Set off right limited if depositor is natural person and matured claim relates to personal, family or household debt. (Finan. C. 864[Deering's]; 6660[Deering's]). Any bank certifying check must immediately charge account of drawer. (Finan. C. 970[Deering's]). Checks drawn by authorized agent of depositor in authorized manner may be assumed by bank to be drawn for authorized purpose and within scope of agent's authority, even though drawn to personal order of agent. (Finan. C. 953[Deering's]). Bank cannot charge penalty for failure to deposit or late deposit into savings account where depositor has agreed to make installment deposits. (Finan. C. 863[Deering's]).

Bank deposits and collections are also governed generally by Com'l. C. 4101-4504. See Com'l. C. 3101-3605; 4201-4403 for significant provisions governing checks. See topic 3.09 Commercial Code, subhead Material Variations from 1990 Official Text.

Financial institutions (term that includes, inter alia, banks, savings and loan associations and credit unions) must pay no less than 2% simple annual interest on money prepaid into impound accounts established to protect value of mortgagee's security interest by providing for payment of property taxes, insurance premiums and other property related costs. (C.C. 2954.8).

Account Disclosures.

Provision is made for notifying all customers and potential customers of bank's policy as to when customer may withdraw funds deposited by check in customer's account (Finan. C. 866 et seq.[Deering's]). Sanctions potentially imposed on bank for failure to comply. (Finan. C. 866.4[Deering's]). There are varying maximum holding periods after which depository institution must permit depositor to draw upon deposited amount. (Finan. C. 867[Deering's]).

Unclaimed Deposits.

Governed by Unclaimed Property Law (substantially modified version of Uniform Disposition of Unclaimed Property Act). (C.C.P. 1500-1527[Deering's]). Under this law, and provisions of C.C.P. 1300 et seq.[Deering's] pertaining to unclaimed property, deposits held or owing by banking organizations are presumed abandoned if owner has not, within three years, caused activity in or with respect to them, or owner has not had another deposit or account within banking organization within previous three years. (C.C.P. 1513[Deering's]).

Lien.

Banker, or savings and loan association, has general lien, dependent on possession, upon all property in his hands belonging to customer for balance due from customer in course of business. (C.C. 3054). Banker's exercise of this lien with respect to deposit accounts is subject to limitations and procedures set forth in Finan. C. 864[Deering's]. Lien on depositors' accounts is more accurately termed right of set off, based on general principles of equity. Bank's exercise of right of set off not state action and need not conform to standards of procedural due process. (11 C.3d 352, 113 C. Rptr. 449, 521 P.2d 441). Exercise of right of set off in connection with debt secured by real property constitutes one form of action which precludes foreclosure on real property. (152 Cal. App. 3d 767, 199 C. Rptr. 557). See category 20 Mortgages, topic 20.04 Mortgages of Real Property.

Subsidiary Activities.

State banks and their subsidiaries may engage in real property investment, including partnerships and joint ventures, for purpose of purchasing, subdividing and developing real property. (Finan. C. 751.3[Deering's]). Subsidiaries may engage in other nonbanking activities, subject to regulations of commissioner. (Finan. C. 772[Deering's]).

Sale, Merger and Conversion; Change of Control.

Cross-industry sales, mergers and conversions by and among state banks, national banks, state savings and loan associations and federal savings and loan associations are permitted with approval of appropriate regulator. (Finan. C. 4800 et seq.[Deering's]). Acquisition of control (other than by sale, merger or conversion) requires approval of Department of Financial Institutions. (Finan. C. 700 et seq.[Deering's]).

Foreign banks (other nation and other state) may not maintain office or agency unless licensed. (Finan. C. 1700 et seq.[Deering's]). Other state banks may not transact banking business in state; other nation banks may do so when so licensed. (Finan. C. 1750[Deering's]). Foreign banks when carrying on activities listed in Corp. C. 191(d) shall not be deemed transacting business. (Finan. C. 1750[b][2][Deering's]). Commercial banking activities and trust business of other nation banks are limited. (Finan. C. 1755[Deering's]; 1503[Deering's]).

Savings and Loan Associations.

S&L's are independently regulated by Department of Savings and Loan. (Finan. C. 5000-10050[Deering's]). Statutory framework as to deposits and withdrawals, unclaimed deposits and liens is substantially similar to banks and follows federal deposit disclosure laws. (Finan. C. 6660 et seq.[Deering's]). Significant differences exist in certain areas. Three year, staggered terms for directors are mandated for S&L's. (Finan. C. 6153[Deering's]). Investment powers and permissible service corporation activities more liberal than those of banks requires prior written consent of Savings and Loan Commissioner. (Finan. C. 6500-6530[Deering's]; 7200-7704[Deering's]). Limits on loans to single borrower substantially greater than banks. (Finan. C. 7451[Deering's]; 1221[Deering's]). Shareholder derivative action may only be brought upon notice to Commissioner of Savings and Loan and finding by Commissioner that suit is proposed in good faith and that there is reasonable probability that prosecution of suit will benefit S&L and its shareholders. (Finan. C. 6052[Deering's]).

Other Related Businesses Regulated by Financial Code.

Check sellers and cashers (Finan. C. 12000-12403[Deering's]); credit unions (Finan. C. 14000-16154[Deering's]); escrow agents (Finan. C. 17000-17654[Deering's]); industrial loan companies (including mortgage bankers) (Finan. C. 18000-18707[Deering's]); finance lenders (Finan. C. 22000-22780[Deering's]); trust companies (Finan. C. 1500-1591[Deering's]); business and industrial development corporations (Finan. C. 31000-31953[Deering's]); sellers of payment instruments (Finan. C. 33000-34301[Deering's]).

Franchise tax on banks, see category 2 Business Organizations, topic 2.03 Corporations, subhead Taxation.

3.02 BILLS AND NOTES:

Uniform Commercial Code has been adopted (1962, adopted 1963; see Com'l. C. 3101 to 3805). See topic 3.09 Commercial Code.

Community property is liable for debt incurred by either spouse before or during marriage, regardless of which spouse has management and control of property or whether one or both spouses are parties to debt or to judgment for debt. (Fam. C. 910[Deering's], 911[Deering's]). Earnings of non-debtor spouse during marriage are not liable for debtor spouse's prenuptial debts so long as earnings are held in separate account and not commingled with community property. (Fam. C. 910[Deering's], 911[Deering's]). Debtor's separate property is liable for his debts incurred before or during marriage. (Fam. C. 913[Deering's]). Separate property of non-debtor spouse is not liable for debts of other spouse incurred before or during marriage unless debt was incurred for necessaries while spouses were living together or common necessaries while spouses were separated. Statute of limitations applies if spouse for whom married person is personally liable dies, unless surviving spouse has actual knowledge of debt and personal representative of deceased spouse's estate failed to assert claim. (Fam. C. 913[Deering's], 914[Deering's]). Joinder or consent of one spouse to encumbrance of community property to secure payment of other spouse's debt does not subject non-debtor spouse's separate property to liability for debt unless non-debtor spouse also incurred debt. (Fam. C. 913[Deering's]).

Secured Notes and Bonds.

California abides by “one form of action rule”, which permits only one form of action on debt secured by real estate mortgage or deed of trust. (C.C.P. 726[Deering's]). Deficiency judgments are barred on purchase money mortgages or mortgages of dwelling for not more than four families, occupied by purchaser. (C.C.P. 580b[Deering's]). Deficiency judgments are also barred when mortgagee has elected to foreclose by power of sale rather than through judicial foreclosure. (C.C.P. 580d[Deering's]). Creditor proceeding against both real and personal property security must do so according to laws relating to real property and Commercial Code. See category 20 Mortgages, topic 20.04 Mortgages of Real Property, subheads Foreclosure and Deficiency Judgment. See also topic 3.09 Commercial Code.

Judgment Notes.

See category 5 Civil Actions and Procedure, topic 5.15 Judgments, subhead Judgment by Confession.

3.03 BILLS OF LADING:

See topic 3.08 Carriers.

3.04 BILLS OF SALE:

See topic 3.23 Sales.

3.05 BLUE SKY LAW:

See topic 3.24 Securities.

3.06 BROKERS:

Real Estate Brokers.

Employment of real estate broker must be in writing. (C.C. 1624[d]). Authority to sell real estate includes authority to give usual covenants of warranty. (C.C. 2324).

Real estate brokers and salesmen are required to obtain license from State Real Estate Commissioner, and manner of conducting business is carefully regulated. (Bus. & Prof. C. 10000 et seq.[Deering's]). Statutory definition of “real estate broker” is broad, and includes one who, for compensation and for another, makes certain solicitations or conducts certain negotiations in respect of “business opportunity,” or loans secured by real property. (Bus. & Prof. C. 10131[Deering's]; cf. 10131.1, 10133.1).

Real Property Securities Dealers.

Information which brokers must disclose to prospective purchasers of real property securities (Bus. & Prof. C. 10232.5[Deering's]) and to prospective borrowers of loans secured by real property (Bus. & Prof. C. 10240 et seq.[Deering's]), as well as other features of real estate brokerage transactions, are extensively regulated. See Cal. Code Regs., Tit. 10, c. 6.

Other brokers regulated by legislation and required to be licensed are, inter alia, insurance brokers (Ins. C. 1631 et seq.[Deering's]), finance lenders (Finan. C. 22000[Deering's]), mineral, oil and gas brokers (Bus. & Prof. C. 10500 et seq.[Deering's]), pawnbrokers (Finan. C. 21300 et seq.[Deering's]) and personal property brokers (persons making loans secured by certain contracts for personal property or liens on wages, etc.) (Finan. C. 22000-22780[Deering's]), yacht and ship brokers (Harb. & Nav. Code 700 et seq.[Deering's]). Sellers of travel are also regulated by statute. (Bus. & Prof. C. 17550 et seq.[Deering's]). Uniform

Commercial Code has been adopted. See topic 3.09 Commercial Code.

3.07 BULK SALES:

See category 8 Debtor and Creditor, topic 8.08 Fraudulent Sales and Conveyances.

3.08 CARRIERS:

Common carriers are under jurisdiction, control and regulation of Public Utilities Commission which has power to regulate and supervise carriers and to do any and all necessary acts to exercise its power and jurisdiction. (Pub. Utils. C. 216, 701-02).

Rates.

Freight and passenger rates are established by Public Utilities Commission. (Pub. Utils. C. 201 et seq.). After ejecting passenger, carrier has no right to require payment of any part of fare. (C.C. 2190).

Discrimination.

No discrimination in charges or facilities may be made for same class of freight or passengers. (Pub. Utils. C. 494, 556).

Bills of Lading.

Uniform Commercial Code has been adopted. (1962, adopted 1963). See topic 3.09 Commercial Code, subhead Material Variations from 1990 Official Text. Carrier has lien on goods covered by bill of lading for charges subsequent to date of its receipts of goods for storage or transportation and for expenses necessary for preservation of goods incident to transportation or reasonably incurred in their sale pursuant to law. Carrier loses any such lien on goods voluntarily delivered or goods whose delivery is unjustifiably refused. (Com'l. C. 7307). Enforcement of carriers' liens governed by Uniform Commercial Code and Com'l. C. 7308.

Liens.

Carrier has lien for freightage, for services rendered, for money advanced to discharge prior liens and for fines and expenses due to owner's provision of false or erroneous certifications of gross cargo weight. (C.C. 2144). Common carrier has lien upon luggage of passenger for payment of such fare as he is entitled to from him. (C.C. 2191).

Limited Liability.

Common carrier may limit its liability except for gross negligence, fraud or willful wrong. (C.C. 2175). Common carrier may limit its liability with respect to personal property, when value of such property is not named and also to loss or injury to live animals by stating these limitations of liability on ticket, bill of lading or written contract for carriage accepted by passenger, consignor or consignee. Other modifications of carrier's liability require passenger's signature. (C.C. 2176). Railroad's liability on following items is limited as follows, unless it has consented in writing to assume greater liability: trunk and contents, $100; valise or suit case and contents, $50; box or package and contents, $10. (C.C. 2178). Carriers liable for delay only when caused by want of ordinary care. (C.C. 2196). Under C.C. 2197, 2197.5, party delivering or taking freight who causes delay, liable for specified charges to motor carrier. Carrier must exercise that duty of care with respect to goods which reasonably careful man in like circumstances would exercise. (Com'l. C. 7309).

Conveyances.

Owner of any conveyance, except those under jurisdiction of U.S. Government and certain residential conveyances, must have permit conspicuously posted in conveyance car to operate same issued by Division of Occupational Safety and Health of Department of Industrial Relations. (Lab. C. 7301[Deering's], 7317[Deering's]). Permits issued for one year period, and all conveyances must be inspected at least once a year, unless conveyance subject to full maintenance service contract, in which case may issue for not longer than two years. (Lab. C. 7304[Deering's]).

Motor Vehicle Carriers.

See category 23 Transportation, topic 23.01 Motor Vehicles.

3.09 COMMERCIAL CODE:

Uniform Commercial Code has been adopted (1962, adopted 1963), effective Jan. 1, 1965. California refers to Articles as “Divisions”, Parts as “Chapters” and section numbers without hyphenation. California revisions (1974, c. 997) effective Jan. 1, 1976 bring California's version somewhat in line with 1972 official text, but significant deviations exist. Art. 2A Leases of Official Text governing personal property leases adopted (1988, c. 1359) as Division 10 effective Jan. 1, 1990 with some variations from Official Text. See 10101 et seq. 1995 Revised Art. 5 adopted (1996, c. 176) with no material variations effective July 1, 1996. Adopted Revised Art. 6 with deviations and additional sections. 1994 Revised Art. 8 relating to Investment Securities adopted (1997, c. 497) as Division 8 effective Jan. 1, 1997 with some variations. Revised Division 9 operative July 1, 2001.

Material Variations from 1990 Official Text.

1102: (5)(b) reads: “Words of the masculine or feminine gender include the masculine, the feminine, and the neuter, and when the sense so indicates words of the neuter gender may refer to any gender.”

1109: Omitted.

1201: Adopted 1977 version of subsections (5), (14), and (20); and 1972 version of subsection (9). (3) substitutes “and” for “or” after “trade” in first sentence. (6) adds, “that by its terms evidences the intention of the issuer that the person entitled under the document (Sec. 7403[4]) has the right to receive, hold and dispose of the document and the goods it covers. Designation of a document by the issuer as a ‘bill of lading’ is conclusive evidence of that intention. ‘Bill of lading’ includes an air bill” after “forwarding goods, and” in first sentence. (15) substitutes “gin ticket or compress receipt” for “or order for the delivery of goods” and “entitled under the document (Section 7403[4]) has the right” for “in possession of it is entitled” in first sentence. Substitutes “shall” for “must” and omits “or addressed to” after “to be issued by” in second sentence. (20) “Holder” with respect to negotiable instrument, means person in possession if instrument is payable to bearer, or, in case of instrument payable to identified person, if identified person is in possession. “Holder” with respect to document of title, means person in possession if goods are deliverable to bearer or to order of person in possession. (26) Substitutes “those” for “such” and “that” for “as” in first sentence; and “any of the following occurs” for “when” at end of second sentence. Substitutes “these” for “such” in subsection (b). (31) omitted; subsequent subsections renumbered in sequence. (38) adds after second sentence: “When a writing or notice is required to be sent by registered or certified mail, proof of mailing is sufficient, and proof of receipt by the addressee is not required unless the words ‘with return receipt requested’ are also used.” (45) reworded: “ ‘Warehouse receipt’ means a document evidencing the receipt of goods for storage issued by a warehouseman (Section 7102), and which, by its terms, evidences the intention of the issuer that the person entitled under the document (Section 7403[4]) has the right to receive, hold and dispose of the document and the goods it covers. Designation of a document by the issuer as a ‘warehouse receipt’ is conclusive evidence of such intention.” (37) third paragraph, adds section on motor vehicle and trailer leases.

1202: Reworded: “(1) A bill of lading, policy or certificate of insurance, official weigher's or inspector's certificate, consular invoice, or any other document authorized or required by the contract to be issued by a third party is admissible as evidence of the facts stated in the document by the third party in any action arising out of the contract which authorized or required the document. (2) In any action arising out of the contract which authorized or required the document referred to in subdivision (1): (a) A document in due form purporting to be the document referred to in subdivision (1) is presumed to be authentic and genuine. This presumption is a presumption affecting the burden of producing evidence. (b) If the document is found to be authentic and genuine, the facts stated in the document by the third party are presumed to be true. This presumption is a presumption affecting the burden of proof.”

1206: Adds section on qualified financial contracts.

1209: Optional section adopted.

1210: New section added: “Except as otherwise provided in Section 1202, the presumptions established by this code are presumptions affecting the burden of producing evidence.”

2107: (3) adds “in the same manner” after “recorded.”

2201: Adds section on qualified financial contracts.

2203: Omitted.

2205: Added subdivision: “(b) Notwithstanding subdivision (a), when a merchant renders an offer, oral or written, to supply goods to a contractor licensed pursuant to the provisions of Chapter 9 (commencing with Section 7000) of Division 3 of the Business and Professions Code or a similar contractor's licensing law of another state, and the merchant has actual or imputed knowledge that the contractor is so licensed, and that the offer will be relied upon by the contractor in the submission of its bid for a construction contract with a third party, the offer relied upon shall be irrevocable, notwithstanding lack of consideration, for 10 days after the awarding of the contract to the prime contractor, but in no event for more than 90 days after the date the bid or offer was rendered by the merchant; except that an oral bid or offer, when for a price of two thousand five hundred dollars ($2,500) or more, shall be confirmed in writing by the contractor or his or her agent within 48 hours after it is rendered. Failure by the contractor to confirm such offer in writing shall release the merchant from his or her offer. Nothing in this subdivision shall prevent a merchant from providing that the bid or offer will be held open for less than the time provided for herein.”

2302: Omitted.

2313: Same as 1972 Official Text; additional consumer protection granted in Title 1.7 of Civil Code. See topic 3.12 Consumer Protection, subhead Consumer Warranties.

2318: Omitted.

2326: (3)(a) omitted. Added to (3): “(d): Delivers goods which the person making delivery used or bought for use for personal, family, or household purposes.” Also added “(5) If a person delivers or consigns for sale goods which the person used or bought for use for personal, family, or household purposes, these goods do not become the property of the deliveree or consignee unless the deliveree or consignee purchases and fully pays for the goods. Nothing in this subdivision shall prevent the deliveree or consignee from acting as the deliverer's agent to transfer title to these goods to a buyer who pays the full purchase price. Any payment received by the deliveree or consignee from a buyer of these goods, less any amount which the deliverer expressly agreed could be deducted from the payment for commissions, fees, or expenses, is the property of the deliverer and shall not be subject to the claims of the deliveree's or consignee's creditors."

2402: (2) adds "or void" after each "fraudulent".

2403: (3) adds: "for the purpose of sale, obtaining offers to purchase, locating a buyer, or the like" after "retention or possession."

2501: (1)(c) reworded: "if the contract is for the sale of unborn young or future crops, when the crops are planted or otherwise become growing crops or the young are conceived."

2512: (1)(b) new section reads: "despite tender of required documents, the circumstances would justify injunction against honor under this code (sub. [b] of Sec. 5109)."

2702: In (3) "or lien creditor" deleted following "good faith purchaser".

2718: (1) reads: "(1) Damages for breach by either party may be liquidated in the agreement subject to and in compliance with Section 1671 of the Civil Code[Deering's]. If the agreement provides for liquidation of damages, and such provision does not comply with Section 1671 of the Civil Code[Deering's], remedy may be had as provided in this division."

2719: (3) second sentence reads: "Limitation of consequential damages for injury to the person in the case of consumer goods is invalid unless it is proved that the limitation is not unconscionable." Adds third sentence: "Limitation of consequential damages where the loss is commercial is valid unless it is proved that the limitation is not unconscionable."

2725: Secured party's action to recover deficiency from buyer is barred by this section if more than four years elapse since breach of security agreement, despite fact that date of repossession and resale is within four year period. (62 Cal. App. 3d 1024).

Chapter 8, Retail Sales, §§2800 and 2801 were added to Division 2. (1970, c. 972).

2800: "As used in this chapter 'goods' means goods used or bought for use primarily for personal, family or household purposes."

2801: "In any retail sale of goods, if the manufacturer or seller of the goods issues a written warranty or guarantee as to the condition or quality of all or part of the goods which requires the buyer to complete and return any form to the manufacturer or seller as proof of the purchase of the goods, such warranty or guarantee shall not be unenforceable solely because the buyer fails to complete or return the form. This section does not relieve the buyer from proving the fact of purchase and the date thereof in any case in which such a fact is in issue.

The buyer must agree in writing to any waiver of this section for the waiver to be valid. Any waiver by the buyer of the provisions of this section which is not in writing is contrary to public policy and shall be unenforceable and void."

California enactment of Official Text Article 2A described infra in Section 10102 et seq.

Adopted Revised Art. 3, and Amendments conforming other sections of Code to Revised Art. 3.

3302: (a), introductory text, inserts "both of the following apply" at end.

3303: (a), introductory text, inserts "any of the following apply" at end.

3305: (a), introductory text, inserts “all of” following “subject to”.

3312: Added to UCC in 1991: (b), introductory text, inserts following third sentence: “The warranty is made to the obligated bank and any person entitled to enforce the check.” (c), inserts “after the claim became enforceable,” following “subsection (b)(4) and”.

3404: (d), omits “substantially”.

3416: (a), introductory text, inserts “all of the following” preceding “to the transferee”; (a)(6) added: “(6) If the instrument is a demand draft, creation of the instrument according to the terms on its face was authorized by the person identified as drawer.” Section (e) added: “If the warranty in paragraph (6) of subdivision (a) is not given by a transferor under applicable conflict of law rules, then the warranty is not given to that transferor when that transferor is a transferee.”

3417: (a), introductory text, inserts “all of the following” following “warrant”; Subsection (a)(4) added: “(4) If the draft is a demand draft according to the terms on its face was authorized by the person identified as drawer”; Section (g) added: “(g) A demand draft is a check, as provided in subdivision (f) of Section 3104”; Section (h) added: “(h) If the warranty in paragraph (4) of subdivision (a) is not given by a transferor under applicable conflict of law rules, then the warranty is not given to that transferor when that transferor is a transferee”.

4106: Adopted Alternative B of subsection (b).

4202: (a), introductory text, adds “all of the following” at end.

4207: (a), introductory text, inserts “all of the following are applicable” at end.

4208: (a), introductory text, inserts “all of the following apply” at end.

4210: (a), introductory text, inserts “all of following are applicable” at end.

4406: (a), third sentence inserted “a substitute check”; (b), inserted new third sentence and rewrote final sentence: “If the paid item requested by a customer was presented as a substitute check, the bank shall provide, in a reasonable time, either the substitute check or, if the substitute check has been destroyed or is not otherwise obtainable, a legible copy of the substitute check. A bank shall provide, upon request, and without charge to the customer, at least two items, substitute checks or legible copies thereof, with respect to each statement of account sent to the customer.”; (d), introductory text, inserts “any of the following” preceding “against the bank”; (e), omits “substantially”; (f), first sentence reads: “Without regard to care or lack of care of either the customer or the bank, a customer who does not within one year after the statement or items are made available to the customer (subsection (a)) discover and report the customer's unauthorized signature on or any alteration on the item is precluded from asserting against the bank the unauthorized signature or alteration.”; inserted new subsec. (g), as used in this section, “substitute check” shall have the same meaning as used in Section 229.2 of Title 12 of the Code of Federal Regulations.”; new subsec. (h), “This section shall remain in effect only until Jan. 1, 2010, and as of that date is repealed, unless a later enacted statute, which is enacted before Jan. 1, 2010, deletes or extends that date.”

1995 Revised Art. 5 with no material variations, adopted 1996, c. 176, effective July 1, 1996.

5114: omitted.

5115: elects “cause of action” in each bracketed portion of section.

5116: (d) Omits “4A”.

Adopted Revised Art. 6 (Alternative B) and amendment to Art. 1 of Code conforming to Revised Art. 6 (Alternative B) by L.1990, c. 1191.

6101: Reworded: Bulk Sales. §§6101–6111 vary substantially from Uniform Commercial Code Official Text. Revised Art. 6 with additional §§6106.2 and 6106.4.

6102: (a)(1), inserts “and equipment” following “inventory” in both instances. (3) reads: “(3) ‘Bulk sale’ means either of the following: (i) In the case of a sale by auction or a sale or series of sales conducted by a liquidator on the seller's behalf, a sale or series of sales not in the ordinary course of the seller's business of more than half of the seller's inventory and equipment, as measured by a value on the date of the bulk-sale agreement. (ii) In all other cases, a sale not in the ordinary course of the seller's business of more than half the seller's inventory and equipment as measured by value on the date of the bulk-sale agreement.” (a)(5)(iii) selects Alternative B.

6103: (a)(1) reads: “The seller's principal business is the sale of inventory from stock, including those who manufacture what they sell, or that of a restaurant owner.” (c)(7), inserts “debtor in possession,” following “bankruptcy.” (c)(9)(iv), (c)(10)(iii), and (c)(11)(iii) read: “Records and publishes notice of the assumption not later than 30 days after the date of the bulk sale in the manner provided in Section 6105.” (c)(12)(ii), substitutes “five million dollars ($5,000,000)” for “$25,000,000”. Adds (c)(14) which reads: “A transfer of personal property, if the personal property is leased back to the transferor immediately following the transfer and either there has been compliance with subdivision (h) of Section 3440.1 of the Civil Code[Deering's].” Adds (c)(15) which reads: “A transfer which is subject to and complies with Article 5 (commencing with Section 24070) of Chapter 6 of Division 9 of the Business and Professional Code, if the transferee records and publishes notice of the transfer at least 12 business days before the transfer is to be consummated in the manner provided in Section 6105 and the notice contains the information set forth in paragraphs (1) to (4) inclusive of subdivision (a) of 6105.” Adds (c)(16) which reads: “A transfer of goods in a warehouse where a warehouse receipt has been issued therefor by a warehouseman (Section 7102) and a copy of the receipt is kept at the principal place of business of the warehouseman and at the warehouse in which the goods are stored.”

6104: Section reads: “In a bulk sale defined in subparagraph (ii) of paragraph (3) of subdivision (a) of Section 6102 the buyer shall do each of the following: (a) Obtain from the seller a list of all business names and addresses used by the seller within three years before the date the list is sent or delivered to the buyer. (b) Give notice of the bulk sale in accordance with Section 6105. (c) Comply with Section 6106.2 if the bulk sale is within the scope of that section.”

6105: (b)(3) reads: “(3) Delivered or sent by registered or certified mail to the county tax collector in the county or counties in this state in which the tangible assets are located. If delivered during the period from Jan. 1 to May 7, inclusive, the notice shall be accompanied by a completed business property statement with respect to property involved in the bulk sale pursuant to Section 441 of the Revenue and Taxation Code[Deering's].”

6106: Omitted.

6106.2: (a) This section applies only to bulk sale where consideration is $2,000,000 or less and is substantially all cash or obligation of buyer to pay cash in future to seller or combination thereof. (b) Upon every bulk sale subject to this section except one made by sale at auction or sale or series of sales conducted by liquidator on seller's behalf, it is duty of buyer or, if transaction is handled through escrow, escrow agent to apply cash consideration in accordance with this section so far as necessary to pay those debts of seller for which claims are due and payable on or before date of bulk sale and are received in writing on or prior to date specified as last date to file claims with person designated in notice to receive claims. This duty of buyer or escrow agent runs to each claimant timely filing claim. (c) If seller disputes whether claim is due and payable on date of bulk sale or amount of any claim, buyer or escrow agent shall withhold from distribution amount equal to (1) 125% of first $7,500 of claim, and (2) amount equal to that portion of claim in excess of first $7,500, or pro rata amount under subdivision (b) of §6106.4, if applicable, and shall send written notice to claimant filing claim on or before two business days after distribution that amount will be paid to seller, or to other claimants in accordance with subdivision (b) of §6106.4, as case may be, unless attached within 25 days from mailing of notice. Any portion of amount withheld which is not attached by claimant within that time shall be paid by buyer or escrow agent to seller, or to other claimants in accordance with subdivision (b) of §6106.4 if they have not been paid in full. Attachment of any amount so withheld shall be limited in its effect to amount withheld for attaching claimant and shall give attaching claimant no greater priority or rights with respect to its claim than claimant would have had if claim had not been disputed. For purposes of this subdivision, claimant may obtain issuance of attachment for claim which is less than $500 and which otherwise meets requirements of §483.010 of Code of Civil Procedure[Deering's] or which is secured claim or lien of type described in §483.010 of Code of Civil Procedure.[Deering's] Remedy in this subdivision shall be in addition to any other remedies claimant may have, including any right to attach property intended to be transferred or any other property. (d) If cash consideration payable is not sufficient to pay all of claims received in full, where no escrow has been established pursuant to §6106.4, buyer shall follow procedures specified in subdivisions (a) to (c), inclusive, of §6106.4, and immunity established by paragraph (3) of subdivision (a) of that section shall apply to buyer. (e) Buyer or escrow agent shall, within 45 days after buyer takes legal title to any of goods, either pay to extent of cash consideration claims filed and not disputed, or applicable portion thereof to extent of cash consideration under subdivision (b) of §6106.4, or institute action in interpleader pursuant to subdivision (b) of §386 of Code of Civil Procedure[Deering's] and deposit consideration with clerk of court pursuant to subdivision (c) of that section. Action shall be brought in appropriate court in county where seller had its principal place of business in this state. §§386.1[Deering's] and 386.6 of Code of Civil Procedure[Deering's] shall apply in action. (f) Notice shall state, in addition to matters required by §6105, name and address of person with whom claims may be filed and last date for filing claims, which shall be business day before date stated in notice pursuant to paragraph (4) of subdivision (a) of §6105. Claims shall be deemed timely filed only if actually received by person designated in notice to receive claims before close of business on day specified in notice as last date for filing claims. (g) This section shall not be construed to release any security interest or other lien on property which is subject of bulk sale except upon voluntary release by secured party or lienholder.

6106.4: In any case where notice of bulk sale subject to §6106.2 states that claims may be filed with escrow agent, intended buyer shall deposit with escrow agent full amount of purchase price or consideration. If, at time bulk sale is otherwise ready to be consummated, amount of cash deposited or agreed to be deposited at or prior to consummation in escrow is insufficient to pay in full all of claims filed with escrow agent, escrow agent shall do each of following: (a)(1) Delay distribution of consideration and passing of legal title for period of not less than 25 days nor more than 30 days from date notice required in paragraph (2) is mailed. (2) Within five business days after time bulk sale would otherwise have been consummated, send written notice to each claimant who has filed claim stating total consideration deposited or agreed to be deposited in escrow, name of each claimant who filed claim against escrow and amount of each claim, amount proposed to be paid to each claimant, new date scheduled for passing of legal title pursuant to paragraph (1) and date on or before which distribution will be made to claimants which shall not be more than five days after new date specified for passing of legal title. (3) If no written objection to distribution described in notice required by paragraph (2) is received by escrow agent prior to new date specified in notice for passing of legal title, escrow agent shall not be liable to any person to whom notice required by paragraph (2) was sent for any good faith error that may have been committed in allocating and distributing consideration as stated in notice. (b) Distribute consideration in following order of priorities: (1) All obligations owing to U.S., to extent given priority by federal law. (2) Secured claims, including statutory and judicial liens, to extent of consideration fairly attributable to value of properties securing claims and in accordance with priorities provided by law. Secured creditor shall participate in distribution pursuant to this subdivision only if release of lien is deposited by secured creditor conditioned only upon receiving amount equal to distribution. (3) Escrow and professional charges and brokers' fees attributable directly to sale. (4) Wage claims given priority by §1205 of Code of Civil Procedure.[Deering's] (5) All other tax claims. (6) All other unsecured claims pro rata, including any deficiency claims of partially secured creditors. (c) To extent that obligation of buyer to pay cash in future is part of consideration and cash consideration is not sufficient to pay all claims filed in full, apply all principal and interest received on obligation to payment of claims in accordance with subdivision (b) until they are paid in full before making any payment to seller. In that case, notice sent pursuant to subdivision (a) shall state amount, terms, and due dates of obligation and portion of claims expected to be paid thereby. No funds may be drawn from escrow, prior to actual closing and completion of escrow, for payment, in whole or in part, of any commission, fee, or other consideration as compensation for service that is contingent upon performance of any act, condition, or instruction set forth in escrow.

6107: (c) reads: “A buyer who made a good faith and commercially reasonable effort to comply with the requirements of Section 6104 or to exclude the sale from the application of this division under subdivision (c) of section 6103 is not liable to creditors for failure to comply with the requirements of Section 6104. The buyer has the burden of establishing the good faith and commercial reasonableness of the effort.” (d)(1) adds “except to the extent that the payment or application is applied to a debt which is secured by the assets and which has been taken into consideration in determining the net contract price.” after “seller or a creditor”. (d)(2) adds “except to the extent that the payment or application is applied to a debt which is secured by the assets and which has been taken into consideration in determining the net contract price.” after “which is allocable”. Omitted subsection (11).

6109: Omitted.

6110: Section (3) omitted.

6111: (a) Except to extent provided in subdivision (b), this division shall apply to bulk sale if date of bulk sale is on or after Jan. 1, 1991. (b) If date of bulk sale is on or after Jan. 1, 1991, and date of bulk-sale agreement is before Jan. 1, 1991, all of following shall apply: (1) Paragraph (2) of subdivision (a) of §6103 and subdivision (b) of §6103 shall not apply and this division shall apply only if goods are located in this state. (2) Subdivision (a) of §6104 shall not apply. (3) Buyer is required under subdivision (b) of §6104 to give notice in accordance with §6107, as in effect on Dec. 31, 1990, rather than §6105. (4) Buyer is required under subdivision (c) of §6104 to comply with §6106, as in effect on Dec. 31, 1990, if bulk sale is within scope of that section, rather than §6106.2. (5) §6105 shall not apply, and §6107, as in effect on Dec. 31, 1990, shall apply. (6) §§6106.2 and 6106.4 shall not apply, and §§6106 and 6106.1, as in effect on Dec. 31, 1990, shall apply. (7) No action may be brought under this division as in effect either before or on or after Jan. 1, 1991, if provisions of this division, as in effect on Dec. 31, 1990, have been complied with.

7102: Omits (1)(d) in its entirety. In (1)(g) omits “except that in relation to an unaccepted delivery order it means the person who orders the possessor of goods to deliver” at end of first sentence.

7104: New subdivision (3) added: “(3) A nonnegotiable warehouse receipt and a nonnegotiable bill of lading must be conspicuously (Section 1201) marked ‘nonnegotiable.’ In case of the bailee's failure to do so, a holder of the document who purchased it for value supposing it to be negotiable may, at his option, treat such document as imposing upon the bailee the same liabilities he would have incurred had the document been negotiable.”

7202: (2)(e) adds “and except that where goods are stored in a public utility warehouse having a lawful tariff on file with the Public Utilities Commission, a statement that the rate of storage and handling charges are as provided in such tariff is sufficient” at end of sentence.

7204: (2) adds “nor permit recovery in excess of the actual value of the goods” at end of first sentence. (4) adds “ Section 1630 of the Civil Code[Deering's] nor any of the provisions of the Public Utilities Code or the Agricultural Code or any lawful regulations issued thereunder” at end.

7206: (4) adds “and payment of any amount necessary to satisfy the warehouseman's lien and reasonable expenses incurred under this section” at end.

7209: In (1), substitutes “deposited” for “covered by a warehouse receipt” and adds “processing incidental to storage,” after “charges for storage,” in the first sentence; omits “and it is stated . . . to other goods” before “the warehouseman also has a lien” in second sentence; and omits “in an amount or at a rate” before “specified on the receipt” in third sentence. First sentence of (2) reworded to read: “The warehouseman may also reserve a security interest against the bailor for charges other than those specified in subdivision (1), such as for money advanced and interest, but if a receipt is issued for the goods such a security interest is not valid as against third persons without notice unless the maximum amount thereof is conspicuously specified (Section 1201) on the receipt.”

7210: In (2)(f) adds “published in the judicial district” after “circulation” in first and fourth sentences.

7403: In (1)(b) substitutes “case of damage or destruction by fire” for “such cases”.

7501: In (4) omits “unless it is established that the negotiation is not in the regular course of business or financing or involves receiving the document in settlement or payment of a money obligation” at end.

7502: In (1)(d) omits “In the case of a delivery order the bailee's obligation accrues only upon acceptance and the obligation acquired by the holder is that the issuer and any indorser will procure the acceptance of the bailee.”

7503: Renumbers (3) as (2) and omits (2) in its entirety.

7601: Substitutes “an undertaking” for “security” and “such security” in second and third sentences of (1) and second sentence of (2).

7603: Adds “or warehouseman” after “bailee”.

NOTE: Division 8, enacted in 1984, was repealed in 1996, c. 497. New Division 8, reflecting revised 1994 text of Art. 8 of Uniform Commercial Code, was simultaneously enacted.

8102: (a)(5) adds “any of the following” after “means”. (6) adds “either” after “to”. (13) adds “both of the following apply” after “which”. (15) adds “that is all of the following” after “issuer.” (17) adds “(commencing with Section 8501)” after “Chapter 5”. (18)(c) adds “(commencing with Section 1101” after “Division 1”.

8107: (a)(4) adds: “or the beneficiary of a security as defined in subdivision (d) of Section 5501 of the Probate Code[Deering's], registered in beneficiary form, as defined in subdivision (a) of Section 5501 of the Probate Code[Deering's], if the beneficiary has survived the death of the registered owner or all registered owners”.

8108: (b)(4) adds “all of the following will be applicable” after “purchaser”.

8115: (a) adds “did one or more of the following” after “bailee”.

8208: (a) adds “all of the following” after “warrants”.

8306: (a) adds “all of the following were true” after “signing”. (b) adds “all of the following were true” after “signing”.

8401: (a) adds “the following conditions are met” after “if”.

8404: (a) adds “ in any of the following circumstances” after “registered”.

8408: Repealed, 1996, c. 497.

8503: (c) adds “inclusive” after “8508”.

8601: Reads: “This division becomes operative Jan. 1, 1997”.

8603: (b) adds “Division 9 (commencing 9109)” after “under” and adds “and that financial statement shall contain a statement that it is being filed pursuant to this section” after “perfect” in last sentence.

9102: (a)(13)(B) adds “both of the following conditions are satisfied regarding” prior to “the claim”; (a)(46) adds “or to be provided” after services provided; (a)(52), adds subdivision [designated (B)] which provides: “(B) ‘Lien creditor’ does not include a creditor who by filing a notice with the Secretary of State has acquired only an attachment or judgment lien on personal property, or both.”; (a)(54)(B) inserts “It is a secured transaction” at beginning of sentence.

9108: adds subsection: “(f) A description of investment property collateral also shall meet the applicable requirements of Section 1799.103 of the C.C. A description of consumer goods also shall meet the applicable requirements of Section 1799.100 of the C.C.”

9109: (c)(2) adds second sentence: “These statutes include statutes that provide for pledges, liens, or security interests to secure bonds or other obligations (including, without limitation, leases) of this state or governmental unit, whether the statute is of general application like Section 5450[Deering's] and 5451 of the Gov. C[Deering's]., or is specific to particular types of obligations of this state or of governmental units or to particular governmental units.”; (d)(8) provides: “Any loan made by an insurance company pursuant to the provisions of a policy or contract issued by it and upon the sole security of the policy or contract.” In subsec. (d) adds subdiv. [(14), (15) and (16) in Ca. Act]:

“(14) Any security interest created by the assignment of the benefits of any public constructions under the Improvement Act of 1911 (Div.7 (commencing with Sec. 5000), Streets and Highways Code).”

“(15) Transition property, as defined in Sec. 840 of the Pub. Util. C[Deering's]., except to the extent that the provisions of this division are referred to in Article 5.5 (commencing with Sec. 840) of Chapter 4 of Part 1 of Div. 1 of the Pub. Util. C.”

“(16) Claim or right of employee of dependents to receive workers' compensation under Division 1 or Division 4 of the Lab. C.”

9201: Subsec. (b) provides: “(b) A transaction subject to this division is subject to any applicable rule of law which establishes a different rule for consumers; to Chapter 5 (commencing with Section 17200) of Part 2 of Division 7 of the Business and Professions Code; Chapter 1 (commencing with Section 17500) of Part 3 of Division 7 of the Business and Professions Code; the Retail Installment Sales Act, Chapter 1 (commencing with Section 1801) of Title 2 of Part 4 of Division 3 of the Civil Code; the Automobile Sales Finance Act, Chapter 2b (commencing with Section 2981) of Title 14 of Part 4 (commencing with Section 1738) of Division 3 of the Civil Code, with respect to the applicable provisions of Titles 1 (commencing with Section 1738), 1.3 (commencing with Section 1747), 1.3A (commencing with Section 1748.10), 1.3B (commencing with Section 1748.20), 1.4 (commencing with Section 1749), 1.5 (commencing with Section 1750), 1.6 (commencing with Section 1785.1), 1.6 (commencing with Section 1785.41), 1.6A (commencing with Section 1786), 1.6B (commencing with Section 1787.1), 1.6C (commencing with Section 1788), 1.6D (commencing with Section 1789), 1.6E (commencing with Section 1789.10), 1.6F (commencing with Section 1789.30), 1.7 (commencing with Section 1790), 1.8 (commencing with Section 1798), 1.83 (commencing with Section 1799.5), 1.84 (commencing with Section 1799.8), 1.85 (commencing with Section 1799.20), 1.86 (commencing with Section 1799.200), 2 (commencing with Section 1801), 2.4 (commencing with Section 1812.50), 2.5 (commencing with Section 1812.80), 2.6 (commencing with Section 1812.100), 2.7 (commencing with Section 1812.200), 2.8 (commencing with Section 1812.30), 2.9 (commencing with Section 1812.400), 2.95 (commencing with Section 1812.600), 2.96 (commencing with Section 1812.620), 3 (commencing with Section 1813), 4 (commencing with Section 1884), and 14 (commencing with Section 2872); the industrial Loan Law, Division 7 (commencing with Section 21000) of the Financial Code; the Pawnbroker Law, Division 8 (commencing with Section 21000) of the Financial Code; the California Finance Code Lenders Law, Division 9 (commencing with the Section 22000) of the Financial Code; and the Mobilehomes-Manufactured Housing Act of 1980. Part 2 (commencing with Section 18000) of Division 13 of the Health and Safety Code; and to any applicable consumer protection statute, regulation, or law.”

9207: In subsec. (c) introductory paragraph adds: “may or shall, as the case may be, do all of the following” after “9-107”.

9310: In subsec. (b) adds subdiv. [(11) in Ca. Act]: “(11) It is a security interest or claim in or under, any policy of insurance including unearned premiums which is perfected by written notice to the insurer under paragraph 4 of subdiv. (b) of Section 9312.”

9311: “(C) The provisions of the H. & S. Code which require registration of all interests in approved air contaminant emission restrictions (Secs. 40407 to 40713 inclusive of the H. & S. Code[Deering's]).”

9312: In subsec. (b), adds a subdivision [(4) in Ca. Act]: “(4) A security interest in a claim in or under any policy of insurance, including unearned premiums, may be perfected only by giving written notice of the security interest or claim to the insurer. This paragraph does not apply to a health care insurance receivable. A security interest in a health care insurance receivable may be perfected only as otherwise provided in this division.”

9315: In subsec. (d)(1), introductory paragraph provides: “All of the following are satisfied:”; Adds a subsec. [(f) in Ca. Act]: “(f) cash proceeds retain their character as cash proceeds while in the possession of a levying officer pursuant to Title 6.5 (commencing with Sec. 481.010) or Title 9 (commencing with Sec. 680.010) of Part 2 of the C.C.P.”

9320: In subsec. (a) deletes “, other than a person buying farm products from a person engaged in farming operations,” before “takes free of a security interest”. In subsec. (b), substitutes “if all of the following conditions are satisfied” for “if the buyer buys”; in subsec. (b)(1) through (b)(4) inserts “the buyer buys” at beginning.

9321: Has enacted two secs. 9321 with first operative until Jan. 1, 2007 and second operative Jan. 1, 2007. First sec. adds subsec. [(d) in Ca. Act]: “(d) This section shall remain in effect only until Jan. 1, 2007, and as of that date is repealed, unless a later enacted statute, that is enacted before Jan. 1, 2007, deletes or extends that date.”

Second sec. provides: “(a) A lessee in ordinary course of business takes its leasehold interest free of a security interest in the goods created by the lessor even if the security interest is perfected and the lessee knows of its existence. (b) This section shall become operative on Jan. 1, 2004.”

9329: Subdivs. (2)(B)(ii) and (2)(B)(iii) inserts: “If the collateral is a security entitlement carried in a securities account and” before “if the secured party obtained control.”

9334: Subsec. (e)(2) provides: “(2) The fixtures are readily removable factory or office machines or readily removable replacements of domestic appliances that are consumer goods.” Omits subsec. (j).

9406: Subsec. (j) reads: “Subsection (f) does not apply to an assignment or transfer of, or the creation, attachment, perfection, or enforcement of a security interest in, a claim or right to receive compensation for injuries or sickness as described in paragraph (1) or (2) of subdiv. (a) of Sec. 104 of Title 26 of the United States Code, as amended, or a claim or right to receive benefits under a special needs trust as described in paragraph (4) of subdiv. (d) of Sec. 1396p of Title 42 of the United States Code, as amended, to the extent that subdiv. (f) is inconsistent with those laws.”

9408: Subsecs. (a) and (c) adds: “does or would do, either of the following” at end of introductory paragraph. Subsec. (e) reads: “Subdivision (c) does not apply to an assignment or transfer of, or the creation, attachment, perfection, or enforcement of a security interest in, a claim or right to receive compensation for injuries or sickness as described in paragraph (1) or (2) or subdiv. (a) of Section 104 of Title 26 of the United States Code, as amended, or a claim or right to receive benefits under a special needs trust as described in paragraph (4) of subdiv. (d) of Section 1396p of Title 42 of the United States Code, as amended, to the extent that subdiv. (c) is inconsistent with those laws.”

9409: Subsec. (a) adds “ does or would do either of the following” at end of introductory paragraph.

9501: Subsec. (a)(2) substitutes “the office of the Secretary of State” for brackets. Subsec. (b), in first sentence inserts “the Secretary of State” for brackets.

9503: Subsec. (a), adds “only if it does so in accordance with the following rules” following “name of debtor”.

9512: Selects Alternative B of subsec. (a). Subsec. (a)(2), deletes “[and time]” following “provides the date”.

9518: Selects Alternative B of subsec. (b). Subsec. (b)(1)(B), deletes “[and time]” following “the date”.

9519: Subsection (b)(2) states: “Aids the filing office in determining whether a number communicated at the file number includes a single-digit or transpositional error.” Selects Alt. B of subsec. (f).

9522: Selects Alternative B of subsec. (a). Subsec. (a)(1), deletes “[and time]” following “the date”.

9523: Subsec. (a), substitutes “its written certificate” for bracketed material. In subsec. (e), inserts “described in paragraph (2) of subdiv. (a) of Section 9501” following ”the filing office”. In subsec. (f), substitutes “filing office described in paragraph (2) of subdiv. (a) of Section 9501” for bracketed material.

9525: Subsec. (a), substitutes “as follows” for bracketed material. Subsec. (a)(1), inserts “Ten dollars ($10)”. Subsec. (a)(2), inserts “Twenty dollars ($20)”. Subsec. (a)(3), inserts “Five dollars ($5)”. Omits subsec. (b). Selects Alternative A of subsec. (c). Subsec. (d), uses “issuing a certificate showing”. Subsec. (d)(1), inserts “Ten dollars ($10)”. Subsec. (d)(2), inserts “Five dollars ($5)”.

9526: Subsec. (a) provides: “(a) The Secretary of State shall adopt and publish rules to implement this division. The filing office rules shall be inconsistent with the division.” In subsec. (b), substitutes “Secretary of State” for bracketed material.

9527: Introductory paragraph provides: “The Secretary of State shall report annually on or before Jan. 31 to the legislature on the operation of the filing office. The report must contain a statement of the extent to which both of the following apply.”

9528: New section: “Upon the request of any person, the Secretary of State shall issue a combined certificate showing the information as to financing statements as specified in Section 9523, the information as to state tax liens as specified in Section 7226 of the Government Code[Deering's], the information as to attachment liens as specified in Sections 488.375[Deering's] and 488.405 of the Code of Civil Procedure[Deering's], the information as to judgment liens as specified in Section 697.580 of the Code of Civil Procedure[Deering's], and the information as to federal liens as specified in Section 2103 of the Code of Civil Procedure[Deering's]”.

9602: Subsec. (a), inserts “rights” before “provided by agreement”. Subsec. (b), inserts “the existence of a deficiency and — ” following “which deal with”.

9604: Section provides: “(a) If an obligation secured by a security interest in a personal property or fixtures is also secured by an interest in real property or an estate therein:

“(1) The secured party may do any of the following:

“(A) Proceed, in any sequence, (i) in accordance with the secured party's rights and remedies in respect of real property as to the real property security, and (ii) in accordance with this chapter as to the personal property or fixtures.

“(B) Proceed in any sequence, as to both, some, or all of the real property and some or all of the personal property or fixtures in accordance with the secured party's rights and remedies in respect of the real property, by including the portion of the personal property or fixtures selected by the secured party in the judicial or nonjudicial foreclosure of the real property in accordance with the procedures applicable to real property. In proceeding under this subparagraph, (i) no provision of this chapter other than this subparagraph, subparagraph (C) of paragraph (4), and paragraphs (7) and (8) shall apply to any aspect of the foreclosure; (ii) a power of sale under the deed of trust or mortgage shall be exercisable with respect to both the real property and the personal property or fixtures being sold; and (iii) the sale may be conducted by the mortgagee under the mortgage or by the trustee under the deed of trust. The secured party shall not be deemed to have elected irrevocably to proceed as to both real property and personal property or fixtures as provided in this subparagraph with respect to any particular property, unless and until that particular property actually has been disposed of pursuant to a unified sale (judicial or nonjudicial) conducted in accordance with the procedures applicable to real property, and then only as to the property so sold.

"(C) Proceed, in any sequence, as to part of the personal property or fixtures as provided in subparagraph (A), and as to other of the personal property or fixtures as provided in subparagraph (B).

"(2)(A) Except as otherwise provided in paragraph (3), provisions and limitations of any law respecting real property and obligations secured by an interest in real property and obligations secured by an interest in real property or an estate therein, including, but not limited to, Section 726 of the Code of Civil Procedure[Deering's], provisions regarding acceleration or reinstatement of obligations secured by an interest in real property or an estate therein, prohibitions against deficiency judgments, limitations on deficiency judgments based on the value of the collateral, limitations on the right to proceed as to collateral, and requirements that a creditor resort either first or at all to its security, do not in any way apply to either (i) any personal property or fixtures other than personal property or fixtures as to which the secured party has proceeded or is proceeding under subparagraph (B) of paragraph (1), or (ii) the obligation.

(B) Pursuant to, but without limiting subparagraph (A), in the event that an obligation secured by personal property fixtures would otherwise become unenforceable by reason of Section 726 of the Code of Civil Procedure[Deering's] or any requirement that a creditor resort first to its security, then, notwithstanding that section or any similar requirement, the obligation shall nevertheless remain enforceable to the full extent necessary to permit a secured party to proceed against personal property or fixtures securing obligation in accordance with the secured party's rights and remedies as permitted under this chapter.

(3)(A) Paragraph (2) does not limit the application of Section 580b of the Code of Civil Procedure.[Deering's]

(B) If the secured party commences an action, as defined in Section 22 of the Code of Civil Procedure[Deering's], and the action seeks a monetary judgment on the debt, paragraph (2) does not prevent the assertion by the debtor or an obligor of any right to require the inclusion in the action of any interest in real property or an estate therein securing the debt. If a monetary judgment on the debt is entered in the action, paragraph (2) does not prevent the assertion by the debtor or an obligor of the subsequent unenforceability of the encumbrance on any interest in real property or an estate therein securing the debt and not included in the action.

(C) Nothing in paragraph (2) shall be construed to excuse compliance with Section 2924c of the Civil Code[Deering's] as a prerequisite to the sale of real property, but that section has no application to the right of a secured party to proceed as to personal property or fixtures except, and then only to the extent that, the secured party is proceeding as to personal property or fixtures in a unified sale as provided in subparagraph (B) of paragraph (1).

(D) Paragraph (2) does not deprive the debtor of the protection of Section 580b of the Code of Civil Procedure[Deering's] against a deficiency judgment following a sale of the real property collateral pursuant to a power of sale in a deed of trust or mortgage.

(E) Paragraph (2) shall not affect, nor shall it determine the applicability or inapplicability of, any law respecting real property or obligations secured in whole or in part by real property with respect to a loan or a credit sale made to any individual primarily for personal, family, or household purposes.

(F) Paragraph (2) does not deprive the debtor or an obligor of the protection of Section 580a of the Code of Civil Procedure[Deering's] following a sale of real property collateral.

(G) If the secured party violates any statute or rule of law that requires a creditor who holds an obligation secured by an interest in real property or an estate therein to resort first to its security before resorting to any property of the debtor that does not secure the obligation, paragraph (2) does not prevent the assertion by the debtor or an obligor of any right to require correction of the violation, any right of the assertion by the debtor or an obligor of the subsequent unenforceability of the encumbrance on any interest in real property or an estate therein securing the obligation, or the assertion by the debtor or an obligor of the subsequent unenforceability of the obligation except to the extent that the obligation is preserved by subparagraph (B) of paragraph (2).

(4) If the secured party realizes proceeds from the disposition of collateral that is personal property or fixtures, the following provisions shall apply:

(A) the disposition of the collateral, the realization of the proceeds, the application of the proceeds, or any one or more of the foregoing shall not operate to cure any nonmonetary default.

(B) The disposition of the collateral, the realization of the proceeds, the application of the proceeds, or any one or more of the foregoing shall not operate to cure any monetary default (although the application of the proceeds satisfy the secured obligation) so as to affect in any way the secured party's rights and remedies under the chapter with respect to any remaining personal property or fixtures collateral.

(C) All proceeds so realized shall be applied by the secured party to the secured obligation in accordance with the agreement of the parties and applicable law.

(5) An action by the secured party utilizing any available judicial procedure shall in no way be affected by omission of a prayer for a monetary judgment on the debt. Notwithstanding Section 726 of the Code of Civil Procedure[Deering's], any prohibition against splitting causes of action or any other statute or rule of law, a judicial action which neither seeks nor results in a monetary judgment on the debt shall not preclude a subsequent action seeking a monetary judgment on the debt or any other relief.

(6) As used in this subdivision, ‘monetary judgment on the debt’ means a judgment for the recovery from the debtor of all or part of the principal amount of the secured obligation, including, for purposes of this subdivision, contractual interest therein. ‘Monetary judgment on the debt’ does not include a judgment which provides only for other relief (whether or not that other relief is secured by the collateral such as one or more forms of nonmonetary relief and monetary relief ancillary to any of the foregoing, such as attorneys' fees and costs incurred in seeking the relief.

(7) If a secured party fails to comply with the procedures applicable to real property in proceeding as to both real and personal property under subparagraph (B) of paragraph (1), a purchaser for value of any interest in the real property at judicial or nonjudicial foreclosure proceedings conducted pursuant to subparagraph (B) of paragraph (1) takes that interest free from any claim or interest of another person or any defect in title, based upon that noncompliance, unless:

(A) The purchaser is the secured party and the failure to comply with this chapter occurred other than in good faith; or

(B) The purchaser is other than the secured party and at the time of sale of the real property at that foreclosure the purchaser had knowledge of the failure to comply with this chapter and that the noncompliance occurred other than in good faith.

Even if the purchaser at the foreclosure sale does not take his or her interest free of claims, interests, or title defects based upon that noncompliance with this chapter, a subsequent purchaser for value who acquires an interest in that real property from the purchaser at that foreclosure takes that interest free from any claim or interest of another person, or any defect in title, based upon that noncompliance, unless at the time of acquiring the interest the subsequent purchaser has knowledge of the failure to comply with this chapter and that the noncompliance occurred other than in good faith.

(8) If a secured party proceeds by way of a unified sale under subparagraph (B) of paragraph (1), then, for purposes of applying Section 580a or subdivision (b) of Section 726 of the Code of Civil Procedure[Deering's] to any such unified sale, the personal property or fixtures included in the unified sale shall be deemed to be included in the 'real property or other interest sold', as that term is used in Section 580a or subdivision (b) of Section 726 of the Code of Civil Procedure.[Deering's]"

9608: In subsec. (a)(4), inserts "except as otherwise provided in subdivision (b) of Section 9626," before "obligor is liable". In subsec. (b), adds a second sentence which provides: " Subdiv. (b) of Sec. 701.040 of the CCP[Deering's] relating to the payment of proceeds applies only if the security agreement provides that the debtor is entitled to any surplus."

9615: Subsec. (a)(3), introductory paragraph provides:

(3) The satisfaction of obligations secured by any subordinate security interest in or other subordinate lien on the collateral and to the satisfaction of any subordinate attachment lien or execution lien pursuant to subdivision (b) of Section 701.040 of the Code of Civil Procedure[Deering's] if both of the following conditions are satisfied:"

Subsec. (a)(3)(A) inserts "or notice of the levy of attachment or execution" preceding "before distribution". Subsec. (d)(1), adds "except as provided in Section 701.040 of the Code of Civil Procedure[Deering's]" following "any surplus". Subsec. (d)(2), inserts "Subject to subdivision (b) of Section 9626," preceding "the obligor is liable". Subsec. (e), adds subdivision [designated (2) in Ca. Act], which provides:

"(2) Subdivision (b) of Section 701.040 of the Code of Civil Procedure[Deering's] relating to the payment of proceeds and the liability of the secured party applies only if the security agreement provides that the debtor is entitled to any surplus."

Subsec. (g), inserts "The following rules apply with respect to" preceding "a secured party that receives cash."

9617: Subsec. (a)(3) omits bracketed material.

9625: Omits subsec. (c)(2). Subsec. (d), inserts "in a transaction other than a consumer transaction" after "However".

9626: Subsec. (b) provides: "(b) In a consumer transaction, the following rules apply:

"(1) In an action in which a deficiency or a surplus is an issue:

"(A) A secured party has the burden of proving compliance with the provisions of this chapter relating to collection, enforcement, disposition, and acceptance whether or not the debtor or a secondary obligor places the secured party's compliance in issue.

"(B) If a deficiency or surplus is calculated under subdivision (f) of Section 9615, the secured party has the burden of establishing that the amount of proceeds of the disposition is not significantly below the range of prices that a complying disposition to a person other than the secured party, a person related to the secured party, or a secondary obligor would have brought.

“(2) The debtor or any secondary obligor is liable for any deficiency only if all of the following conditions are met:

“(A) It is not otherwise agreed or otherwise provided in the Retail Installment Sales Act (Chapter 1 (commencing with Section 1801), Title 2, Part 4, Division 3, Civil Code), and, in particular, Section 1812.5 of the Civil Code[Deering's] or any other statute.

“(B) The debtor and obligor were given notice, in accordance with Section 9611, 9612, and 9613, or Section 9614, as applicable, of the disposition of the collateral.

“(C) The collection, enforcement, disposition, and acceptance by the secured party were conducted in good faith and in a commercially reasonable manner.

“(3) Upon entry of a final judgment that the debtor or obligor is not liable for a deficiency by reason of paragraph (2) or subdivision (f) of Section 9615, the secured party may neither obtain a deficiency judgment nor retain a security interest in any other collateral of the debtor or obligor that secured the indebtedness for which the debtor or obligor is no longer liable.

“(4) If, subsequent to a disposition that does not satisfy anyone or more of the conditions set forth in paragraph (2), or subsequent to a disposition that is subject to subdivision (f) of Section 9615, the secured party disposes pursuant to this section of other collateral securing the same indebtedness, the debtor or obligor, may to the extent he or she is no longer liable for a deficiency judgment by reason of paragraph (2) or subdivision (f) of Section 9615, recover the proceeds realized from the subsequent dispositions, as well as any damages to which the debtor may be entitled if the subsequent disposition is itself noncomplying or otherwise wrongful.

“(5) Nothing herein shall deprive the debtor of any right to recover damages from the secured party under subdivision (a) of Section 9625, or to offset any such damages against any claim by the secured party for a deficiency, or of any right or remedy to which the debtor may be entitled under any other law. A debtor or obligor in a consumer transaction shall have any damages owed to it reduced by the amount of any deficiency that would have resulted had the disposition of the collateral by the secured party been conducted in conformity with this division.

“(6) The secured party shall account to the debtor for any surplus, except as provided in Section 701.040 of the Code of Civil Procedure.[Deering's]”

9704: Introductory paragraph provides “All of the following rules apply with respect to a security interest that is enforceable immediately before July 1, 2001, but which would be subordinate to the rights of a person that becomes a lien creditor at the time:”

Former Division 10 (Effective Date and Repealer), corresponding to Article 10 of Official Text, redesignated Division 13 as of Jan. 1, 1990. California enactment of Official Text Article 2A (Personal Property Leases) designated as Division 10.

Material Variations from Article 2A of 1990 Official Text are listed below (references are to California Division 10 numbers where subsections are designated [*a*], [*b*]*, etc. and subdivisions* [*1*], [*2*]*, etc.):*

10103: (a)(5) omits “if the total payments to be made under the lease contract, excluding payments for options to renew or buy, do not exceed $_____ ”. (a)(7)(C)(iii) omits “or” at end. (a)(7)(C)(iv) omits “if the lease is not a consumer lease” at beginning.

10104: (a)(1) reads: “(1) Certificate of title statute of this state, including the provisions of the Vehicle Code that required registration of a vehicle or boat and provisions of the Health and Safety Code that require registration of a mobilehome or commercial coach.” (a)(3) reworded: “(3) Consumer law of this state, both decisional and statutory, including, to the extent that they apply to a consumer lease transaction, Chapter 5 (commencing with Section 17200) of Part 2 of Division 7 of the Business and Professions Code, Chapter 1 (commencing with Section 17500) of Part 3 of Division 7 of the Business and Professions Code, and Part 4 (commencing with Section 1725) of Division 3 of the Civil Code.” (b) reads “(b) In case of conflict between this division, other than Section 10105, subdivision (c) of Section 10304, and subdivision (c) of Section 10305, and a law referred to in subdivision (a), that law controls.”

10106: (b) omits second “or” adding “,” after “thereafter”; adds “or in which the lease is executed by the lessee,” after “to be used”. (b) substitutes “a forum that would not otherwise have jurisdiction over the lessee “with” in a county other than the county in which the lessee in fact signed the lease, the county in which the lessee resides at the commencement of the action, the county in which the lessee resided at the time the lease contract became enforceable, or the county in which the goods are permanently stored”.

10108: Official Text section on unconscionability omitted.

10109: Official Text section on option to accelerate at will omitted.

10201: (a)(1) adds “In a lease contract that is not a consumer lease,” at beginning.

10203: Official Text section providing that seals inoperative omitted.

10216: Official Text section on third party beneficiaries of express and implied warranties omitted.

10221: (2) omits “that is not a consumer lease” after “finance lease”.

10307: (d) omits “or more than 45 days after the lease contract becomes enforceable, whichever first occurs,” and “and before the expiration of the 45-day period.”

10308: (a) adds “or void” after “fraudulent” both places. (b) omits (b) “becomes enforceable, not in current course of trade but in satisfaction of or as security for a pre-existing claim for money, security, or the like, and”.

10309: (a)(2) omits “filed or”. (4)(a) and (b), and (5)(a)-(c) of Official Text combined in California Code into (d)(1)-(6). (d) reads “The interest of a lessor of fixtures has priority over a conflicting interest of an encumbrancer or owner of the real estate if:”. (d)(1) substitutes “a fixture filing covering the fixtures is filed before the goods become fixtures or within 20 days thereafter” for “the interest of the lessor is perfected by a fixture filing before the goods become fixtures or within ten days thereafter” and omits last “or”. (d)(2) substitutes “A fixture filing covering the fixtures is filed” for “the interest of the lessor is perfected by a fixture filing”. (d)(3) omits “and before the goods become fixtures the lease contract is enforceable; or”. (d)(4) omits “or”. (9) of Official Text omitted.

10402: (a) adds “, other than a consumer lease,” before “with respect to”. Subsection (b) added: “(b) The rights and remedies of the parties to a consumer lease in connection with a repudiation of that lease shall be determined under other laws, and this section shall not affect the applicability or interpretation of those laws.”

10406: (a)(2) omits “that is not a consumer lease”.

10504: (a) substitutes “subject to and in compliance with Section 1671 of the Civil Code[Deering's]” for “but only at an amount or by a formula that is reasonable in light of the anticipated harm caused by the default or other act or omission.” (b) omits “or such provision is an exclusive or limited remedy that circumstances cause to fail of its essential purpose”.

10506: (a) adds “In a lease contract that is not a consumer lease” at beginning of second sentence.

10516: (b) adds “other than a consumer lease in which the supplier assisted in the preparation of the lease contract or participated in negotiating the terms of the lease contract with the lessor,” after “finance lease” in second sentence. (c)(2) omits “except in the case of a consumer lease,”. Adds subdivision (f): “(f) Subdivision (c) shall not apply to a consumer lease.”

10517: (b) omits “Except in the case of a finance lease that is not a consumer lease,” at beginning.

10529: (a)(1) omits “within a commercially reasonable time”. (a)(2) adds “where the lessor has never delivered the goods or has taken possession of them or the lessee has tendered them to the lessor” after “contract”.

10600: Transition provision for Division 10 added: “This division shall apply to all lease contracts that are first made or that first become effective between the parties on or after January 1, 1990. This division shall not apply to any lease contract first made or that first became effective between the parties prior to January 1, 1990, or to any extension, amendment, modification, renewal, or supplement of or to the lease contract, unless the parties thereto specifically agree in writing that the lease contract, as extended, amended, modified, renewed, or supplemented, shall be governed by this division.”

New Division 11 governing funds transfers (wholesale wire transfers) which is equivalent of new Article 4A of 1989 Official Text added; applies to fund transfers in which originator's payment order is transmitted on or after Jan. 1, 1991.

Material deviations from Official Text as follows (references are to California Division 11 numbers):

11103(a)(1): Adds “all of the following apply” after “if” at end of opening sentence.

Forms.

See end of this Digest.

See also topics: Banks and Banking, Bills and Notes, Brokers, Carriers, Consumer Protection, subhead Consumer Warranties, Contracts, Factors, Frauds, Statute of, Sales, Securities, Warehousemen; categories Business Organizations, topic Corporations; Civil Actions and Procedure, topic Limitation of Actions; Debtor and Creditor, topics Assignments, Fraudulent Sales and Conveyances, Liens, Pledges; Documents and Records, topics Records, Seals; Mortgages, topic Chattel Mortgages.

3.10 CONDITIONAL SALES:

See topic 3.23 Sales.

3.11 CONSIGNMENTS:

See topic 3.14 Factors.

3.12 CONSUMER PROTECTION:

Consumer Affairs Act (Bus. & Prof. C. 300 et seq.[Deering's]) created Department of Consumer Affairs. Basic purpose of Act is to promote and protect interests of consumer. Department includes Consumer Advisory Council, Licensing Boards and Division of Consumer Services. Director has power and duty to receive complaints from consumers concerning: (a) Unfair methods of competition and unfair or deceptive acts or practices in conduct of trade or commerce, (b) production, distribution, sale and lease of goods and services which may endanger public health, (c) violations of code relating to licensed businesses and professions. Director has authority to: (a) Propose legislation, (b) undertake research, (c) intervene in proceedings to represent consumer interests, (d) hold public hearings, (e) create and develop consumer education programs and other similar functions. Licensing functions of Department cover wide range of professions and vocations.

Financial Privacy.

California Right to Financial Privacy Act (Govt. C. 7460 et seq.) provides that no officer, employee or agent of state or local agency as defined, or any department thereof may request or obtain from financial institution, as defined, copies of financial records or information from such records on any customer except in specified circumstances and by specified procedures and limits use of financial records authorized to be received. Violation is misdemeanor and injunctive relief may be sought. Specified persons, corporations and licensees are required to authorize certain state agencies to examine their financial records as condition of doing business, obtaining license, or exercising privileges of business or profession.

Personal Information.

Information Practices Act of 1977 (C.C. 1798 et seq.) declares that all individuals have right to privacy in connection with information pertaining to them and that this right is being threatened by indiscriminate maintenance, collection and dissemination of personal information and by increased use of computers and other technology. Act establishes Office of Information Practices; requires each state agency maintaining system of records containing personal information to file with Office of Information Practices notice concerning records maintained by agency; requires state agencies to maintain personal information only if necessary to accomplish constitutional or statutory or federally mandated purpose and to collect information directly from individual who is subject thereof if practicable; prohibits disclosure of personal information except where consistent with several specified conditions; provides for individual inquiries and access to records and for individual's right to request amendment in personal information contained in such records and provides for individual's right to bring civil action against agency under certain conditions; specifies penalties for willful violations and prevents agencies from changing or destroying information to avoid compliance with Act.

Confidentiality of Medical Information.

Confidentiality of Medical Information Act (C.C. 56 et seq.) provides specific requirements, exemptions and sanctions concerning dissemination of individual's medical records to outside sources to prevent widespread release of sensitive information in field of health care.

Confidentiality of Social Security Numbers

Person's social security number may not be publicly posted or displayed, printed on card required to access products or services, printed on material mailed to person unless social security number required by law to be on mailed document. Person not required to transmit social security number over internet unless connection secure or number encrypted. Person not required to use number to access internet web site unless password or personal identification number required to access site (C.C. 1798.85–1798.89).

Promotional Techniques, Deceptive Practices.

Unfair competition is defined in Bus. & Prof. C. 17200[Deering's]. It has been held that it includes not only deceptive and fraudulent conduct, but any unlawful act or practice. (Bus. & Prof. C. 17200[Deering's]; 38 C.3d 913, 216 C.Rptr. 345, 702 P.2d 503). Injunctive relief and civil penalties for unfair competition may be sought by Attorney General, district attorneys and other designated prosecuting attorneys. (Bus. & Prof. C. 17201 et seq.[Deering's]). Any person in interest may bring action for injunctive relief or restitution under Bus. & Prof. C. 17203[Deering's].

Under Veh. C. 28050 et seq.[Deering's] tampering with odometer on motor vehicle is unlawful.

Bus. & Prof. C. 17500 et seq.[Deering's] deals broadly with prohibition of false and misleading advertising and contains several detailed provisions relating to particular abuses. Injunctive relief and civil penalties for violation of these provisions may be sought by Attorney General and District Attorney, or other designated prosecuting attorneys. Any person may seek injunctive relief or restitution under Bus. & Prof. C. 17535[Deering's]. Violations of these provisions are included in definition of unfair competition under Bus. & Prof. C. 17200[Deering's]. Label may be advertisement for purposes of this legislation. (58 Ops. Atty. Gen. 297).

Consumer Legal Remedies Act (C.C. 1750 et seq.) was enacted to secure protection to consumer for acts designated in C.C. 1770 as illegal when undertaken in transactions intended to result or which do result in sale or lease of goods or services to consumer. Act provides for recovery of damages as well as injunctive relief and punitive damages; provision is also made for class actions. Act contains specific notice provisions which must be complied with prior to actions for damages.

Discount buying industry is regulated under C.C. 1812.100 et seq. Statute is designed to provide protection to consumer from fraudulent discount buying operations. Discount buying organizations as defined in statute must maintain minimum bonds, establish escrow accounts, make certain disclosures prior to entering into contracts, satisfy certain requirements with respect to form and content of contracts, make goods available within specified period of time and grant to buyer cancellation rights. Remedies include treble damages and reasonable attorney's fees against discount organization.

Lay-away practices governed by C.C. 1749-1749.4. Gift certificates governed by C.C. 1749.5.

“Bait and switch” techniques are unlawful under Bus. & Prof. C. 12024.6[Deering's], providing that it is unlawful to advertise, solicit or represent product for sale or purchase if solicitation is intended to entice consumer into transaction different from transaction originally represented.

Solicitation by invoice prohibited unless document contains specified statement that it is solicitation not bill. Violation constitutes misdemeanor. Violator is liable for civil penalties and person damaged can recover three times sum solicited. (C.C. 1716).

Automatic purchase renewal statutes attempt to regulate practice of ongoing charging of consumers' credit or debit cards for ongoing shipments of products or deliveries of services without consumers' consent (Bus. & Prof. C. 17600–17606[Deering's]).

Unconscionable Contract.—Language of Commercial Code §2302[Deering's], 1962 Official Text has been enacted as C.C. 1670.5. Telemarketing contract must comply with FTC Telemarketing Sales Rule. (16 C.F.R. 310.1 et seq., C.C. 1670.6).

Reassignments of retail installment contracts secured by mortgage prohibited by specified financial institutions when such right is reserved to financial institution as assignee upon default of party to contract. (Bus. & Prof. C. 17350-17351[Deering's]).

Transactions Off Trade Premises.

Persons conducting mail order or catalog business in California, including by catalog, telephone, radio, television, internet or other telecommunication device, involving sale of consumer goods are regulated by provisions of Bus. & Prof. C. 17538 et seq.[Deering's]

Home solicitation contracts and offers are regulated by provisions of C.C. 1689.5 et seq., Bus. & Prof. C. 17500.3[Deering's], and by Contractors State License Law (Bus. & Prof. C. 7000 et seq.[Deering's]) to extent that sales or installations of home improvement goods or services as defined in Bus. & Prof. C. 7151[Deering's] are involved.

Specific Regulations Particular Industries.

Legislative standards have been enacted regulating activities of swimming pool contractors (Bus. & Prof. C. 7165 et seq.[Deering's]), sale of fine prints (C.C. 1740 et seq.), contracts for commercial dance studio lessons (C.C. 1812.50 et seq.), dating and weight loss services (C.C. 1694 et seq.), electronic shopping services (C.C. 1789 et seq.), sellers of travel (Bus. & Prof. C. 17550.3 et seq.[Deering's]), charitable solicitations (Bus. & Prof. C. 17510 et seq.[Deering's]), telephonic sellers (Bus. & Prof. C. 17511 et seq.[Deering's]), electronic and appliance repair dealers (Bus. & Prof. C. 9800 et seq.[Deering's]), proprietary security services (Bus. & Prof. C. 7574 et seq.[Deering's]) and conduct of automotive repair dealers (Bus. & Prof. C. 9880 et seq.[Deering's]) which latter Act establishes in Department of Consumer Affairs, Bureau of Automotive Repair.

Retail Installment Sales Act (C.C. 1801 et seq.), cited as the “Unruh Act”, applies to credit sales of consumer goods and services by retail seller to retail buyer. Finance charge limitations are imposed. Revolving, or open-end, agreements as well as closed end contracts are covered. Form and content of retail installment contract or account are prescribed and specific disclosure requirements are imposed, subject to Federal Truth-in-Lending Act and Regulation Z. Also contains provisions regarding disclosure and finance charge limitations with respect to add-on sales. On default, holder of contract or account may retake goods or recover judgment for balance due. Deficiency judgments are specifically prohibited. Violation of statute is misdemeanor. Holder of contract or account barred from recovery of finance or similar charges if statute not complied with and holder has knowledge, unless violation is non-willful and is rectified in accordance with C.C. 1812.8. Treble damages recoverable for violation of add-on sales provisions. Specific provision is made for application of Act to transactions involving California and another state where specified contacts exist or occur in California. (C.C. 1802.19).

Areias Retail Installment Account Full Disclosure Act of 1986 (C.C. 1810.20 et seq.) requires certain disclosures in any application form or preapproved written solicitation for credit card issued in connection with retail installment account which is mailed on or after Oct. 1, 1987.

Consumer Credit Contracts Act (C.C. 1799.90 et seq.) requires notice in English and Spanish regarding guarantee obligations under consumer credit contracts to be delivered to and acknowledged by debtors who do not receive money, property or services covered by contract, where signature of more than one person is required on such contract (unless persons are married).

Automobile Sales Finance Act (C.C. 2981 et seq.) governs sale of any motor vehicle which is bought for personal or family use pursuant to conditional sales contract. Form and content of any contract are prescribed, required disclosures as to sale and credit terms are set forth, including disclosures required by Regulation Z. Limitations on finance charges provided. Buyer is given certain rights and remedies for failure of seller to comply with statute. Provides for holder's remedies upon buyer's default.

Motor Vehicle Leasing Act (C.C. 2985.7 et seq.) contains detailed provisions relating to lease of motor vehicles for personal or family purposes. Prescribes form and content of lease contract and disclosure requirements including notice that there is no “cooling off” period. (C.C. 2985.8). Provides for civil actions and enforcement by Department of Motor Vehicles. Lessor-retailers (as defined in Veh. C. 373[Deering's]) who make retail sales of vehicles must be licensed by Department of Motor Vehicles. (Veh. C. 11600 et seq.[Deering's]).

The Credit Services Act of 1984 (C.C. 1789.10 et seq.) regulates persons who, with respect to extension of credit by others, sell, provide, or perform, or represent that they can, for consideration, improve or assist with improving buyer's credit record, history or rating, or obtain, or assist with obtaining, extension of credit for buyer. Requires provision of information statement, containing specified disclosures, to customer prior to execution of contract. Prescribes form and content of contract between credit services organization and customer and provides five-day cancellation right to customer. Requires specified disclosures to customers. Provides for recovery by customer of actual and punitive damages, plus attorney's fees and costs. Attorney General, district attorneys and city attorneys may prosecute misdemeanor actions and institute equity procedures for violations.

The California Deferred Deposit Transaction Law (C.C. 1789.30-.39) regulates check cashing businesses requiring them to post: (1) Unambiguous schedules of fees for cashing checks, drafts, money orders or other commercial paper, (2) sale or issuance of money orders, and (3) initial issuance of any identification card. Requires posting of acceptable identification. Requires posting in one-half inch height letters and in conspicuous location. Every check cashier of single check or series of checks in aggregate amount of more than $10,000 for same person in same calendar year must file return required by Rev. & Tax C. 18631.7[Deering's]. (C.C. 1789.30).

Consumer Credit Reporting Agencies Act (C.C. 1785.1 et seq.) is designed to give consumer access to files kept by Consumer Credit Reporting Agencies, to limit information which may be disclosed in consumer credit report, to limit persons to whom consumer credit reports can be provided, to require such agencies to expunge certain types of information contained in files after specified periods of time, to provide consumer opportunity to dispute credit information contained in files, to provide security alerts and freezes at consumer's request, and to provide remedies for violations of statute.

Investigative Consumer Reporting Agencies, which collect noncredit personal information regarding consumers for provision to third parties to be used for employment, insurance purposes, subpoenas, court orders, licensure, and other lawful purposes, receive similar regulation. (C.C. 1786 et seq.).

Holden Credit Denial Disclosure Act of 1976 (C.C. 1787.1 et seq.) requires that creditor inform consumer of creditor's decision whether or not to extend credit within 30 days after receipt of application, and, if credit is denied, creditor must provide statement of reasons for denial or inform consumer of his right to request statement of reasons from creditor and of address from which statement may be obtained. Statement must include both credit and non-credit information that provides basis for denial.

Credit card issuers are regulated by Song-Beverly Credit Card Act of 1971. (C.C. 1747 et seq.). Statute defines standards with respect to issuance and use of credit cards and rights and liabilities which may arise between issuer and card holder. C.C. 1747.8 prohibits requiring identification information on credit card transaction form. C.C. 1748.1 prohibits surcharge for use of credit card in lieu of other means of payment, but permits discount for non-credit card payment. Issuer of credit card must give card holder 30 days written notice of intention to cancel credit card with specified exceptions. (C.C. 1747.85). Areias Credit Card Full Disclosure Act of 1986 requires certain disclosures to be included in any application form or preapproved written solicitation for open-end credit card account to be used for consumer purposes which is mailed on or after Oct. 1, 1987. (C.C. 1748.10 et seq.). Issuer of credit card must give notice to cardholder that cardholder can prohibit release of defined marketing information regarding cardholder. (C.C. 1748.12). Issuers of charge cards (as defined in C.C. 1748.21) are subject to similar disclosure requirements with respect to any charge card application form or preapproved written solicitation for charge card mailed on or after Oct. 1, 1987, pursuant to Areias Charge Card Full Disclosure Act of 1986. (C.C. 1748.20 et seq.).

Several provisions of Financial Code require that banks, savings and loan associations and credit unions make disclosures as to charges, interest rates and dividends to depositors, including persons having interest in any account at any such institution.

See also topic 3.01 Banks and Banking.

Consumer Warranties.

Song-Beverly Consumer Warranty Act (C.C. 1790 et seq.) goes considerably beyond protection set forth in warranty sections of Uniform Commercial Code in placing upon manufacturers and retailers special duties and obligations with respect to fulfillment of warranty obligations and also creates special implied warranties of merchantability and of fitness in favor of purchaser of consumer goods, their duration generally coextensive with express warranty accompanying goods. Contains some provisions governing form of express warranties. There are special provisions on motor vehicle warranties. (C.C. 1795.90 et seq.). Persons installing, servicing or repairing new or used consumer goods must do so in workmanlike manner. (C.C. 1796 et seq.).

Grey Market Goods.

New act requires specific disclosures regarding warranties on grey market goods. (C.C. 1797.8 et seq.).

Consumer Debt Collection.

The Rosenthal Fair Debt Collection Practices Act (C.C. 1788 et seq.) prohibits persons who regularly collect consumer debts, on behalf of themselves or others, from engaging in unfair or deceptive acts or practices, including use of threats, misrepresentations, harassment and obscene language. Prohibits communication by debt collector with debtor's employer, family and others except under certain circumstances. (C.C. 1788.12). Act also prohibits debtors from applying for credit without intention to pay or supplying false information (C.C. 1788.20), and using account after termination (C.C. 1788.22). Debtor is required to notify creditor of change of name, address or employment (C.C. 1788.21), and loss of credit card or similar instrument if creditor has disclosed these requirements to debtor in writing (C.C. 1788.22). Act allows recovery by debtor for violations of actual damages, penalty not less than $100 or greater than $1,000, and attorney's fees and costs. (C.C. 1788.30).

Cemetery Authorities.

Various provisions in Business and Professions and Health and Safety Codes prescribe form of contracts of cemetery authorities to provide plot, niche or vault or merchandise or service. Cemetery authorities must file report of endowment care funds annually to Cemetery Board, which regulates cemeteries, and such reports are available for public inspection. (Bus. & Prof. C. 9600 et seq.[Deering's]).

Labels and Branding.

The Sherman Food, Drug, and Cosmetic Law regulates labeling and branding of food, drugs, devices and cosmetics to protect purchasers from deception and misrepresentation. (H. & S.C. 109875 et seq.[Deering's]). Bus. & Prof. C. 12001 et seq.[Deering's] contain variety of provisions relating to labeling of weights and measures. Fair Packaging and Labeling Act (Bus. & Prof. C. 12601 et seq.[Deering's]) is designed to require disclosure of quantity, contents and source of consumer commodities and protect against deceptively designed containers. Marketing of poisons and hazardous substances is also regulated under California Hazardous Substances Act. (H. & S.C. 108100 et seq.[Deering's]).

Credit Transactions—Marital Status.

No person, regardless of marital status, may be denied credit or offered less favorable terms if such person's earnings and property over which he or she has management and control are such that person of opposite sex with same earnings and property would receive credit. Discrimination based on marital status alone prohibited. Requires credit information concerning spouses and former spouses having joint accounts to be separately maintained by credit agencies. Provides for recovery of actual and punitive damages, injunctive relief, attorney's fees and costs. (C.C. 1812.30-1812.35).

Automatic Dialing—Announcing Devices.

Telephone corporations must approve connection of such devices to telephone lines. Called party must consent to listen to prerecorded message. (Pub. Utils. C. 2871-2876).

Seller Assisted Marketing Plans.

Sellers must make specified disclosures to purchasers, file disclosure statement with Secretary of State, include specified provisions in contracts, refrain from misleading practices, grant to purchasers three day cancellation right. Violations subject to criminal and civil penalties. Provides for recovery of actual and punitive damages. (C.C. 1812.200-1812.221).

See also topic 3.23 Sales.

Organic Products Act of 2003.

H. & S.C.110810-110959[Deering's] specifies standards for sale of food as organic, regulates labeling, establishes record keeping certification and inspection provisions, and makes violations of provisions subject to injunctive relief, and civil penalties.

Aircraft Repair.

Bus. & Prof. C. 9793[Deering's] provides that person having repairs or service on noncommercial aircraft has right on request to written estimate or maximum charge which may not be exceeded without his consent.

Plain Language.

No “Plain Language” statute.

Mobile Homes.

The Mobile Homes-Manufactured Housing Act of 1980 (H. & S.C. 18000 et seq. [Deering's]) governs construction, sale, registration and titling of mobile homes. Mobile home warranties covered by C.C. 1797 et seq. Permit required for dwelling use. (H. & S.C. 18613[Deering's]). Mobile home park construction and operation subject to permit requirements of H. & S.C. 18200 et seq.[Deering's] Tenants' rights are protected by statute. (C.C. 798 et seq.).

Membership Camping Contracts.

C.C. 1812.300 regulates for profit membership camping operators, terms of contracts, required disclosures.

Creditor Remedies: Disability Insurance.

Creditors who directly arrange sale or receive compensation for sale of credit disability insurance may not invoke creditors' remedies because of debtor's nonpayment of sums due during disability until reasonable time has passed for disability insurance claim to be filed, verified and processed. Specified disclosures by creditor required when insurance is sold and by insurer when claim forms sent. (C.C. 1812.400 et seq.).

Athletic Facilities.

Contracts for health studio services are regulated by C.C. 1812.80 et. seq. Contracts must include that warnings regarding sale, use or exchange of anabolic steroids, testosterone and human growth hormone be posted by private and public health facilities, including institutions of higher learning after June 1, 1990.

3.13 CONTRACTS:

Contracts governed by common law as modified and interpreted by C.C. 1549-1701. Uniform Commercial Code has been adopted. (1963, c. 819). See topic 3.09 Commercial Code, subhead Material Variations from 1990 Official Text.

Breach of implied covenant of good faith and fair dealing may give rise to action in tort as well as contract in insurance contracts (50 C.2d 654, 328 P.2d 198). Covenant of good faith and fair dealing applies to employment contracts, but breach of covenant does not give rise to tort damages. (47 C.3d 654, 765 P.2d 373, 254 C. Rptr. 211). There is covenant of good faith and fair dealing implied by law in every contract governed by California law. (34 C.2d 559, 212 P.2d 878).

Seal does not replace consideration required for contract. (C.C. 1629).

See also topics 3.12 Consumer Protection, Frauds, Statute of; categories 5 Civil Actions and Procedure, topic Accord and Satisfaction; Documents and Records, topic Seals; Family, topic Infants.

3.14 FACTORS:

Uniform Commercial Code has been adopted. (1963, c. 819). See topic 3.09 Commercial Code.

Factor Defined.

Factor is agent employed, as independent calling, by another to sell property over which he is given possession and control or is authorized to receive payment therefor. (C.C. 2026).

Authority of Factor.

Factor has ostensible authority to deal with property of his principal as his own in transactions with persons not having notice of actual ownership. (C.C. 2369).

In addition to authority of agents in general factor has actual authority from his principal, unless specially restricted: (1) To insure property consigned to him uninsured; (2) to sell on credit anything entrusted to him for sale, except such things as it is contrary to usage to sell on credit; but not to pledge, mortgage, or barter same; and (3) to delegate his authority to his partner or servant, but not to any person in independent employment. (C.C. 2368). Factor must obey instructions from his principal although, if principal forbids sales at market price, factor, upon notice to principal stating time and place of sale, may, for his reimbursement, proceed as pledgee to make such sales. (C.C. 2027).

Lien.

Factor has general lien, dependent on possession, for all that is due him as such, upon all articles entrusted to him by same principal. (C.C. 3053). No requirement that notice of lien be filed or recorded. But see category 8 Debtor and Creditor, topic 8.13 Liens, subhead Lien on Merchandise.

Consignment Agreements.

Except to extent that Com'l. C. 2326 applicable, no provision for filing or recording consignment agreement in order to protect rights of consignor.

Sales on Credit.

Factor may sell consigned property on such credit as usual but may not extend agreed terms of credit. (C.C. 2028).

Guaranty Commissions.

If factor charges principal with guaranty commission upon sale, he assumes absolutely to pay price when it falls due, as if it was his own debt. He does not thereby assume further responsibility for safe remittance of proceeds. (C.C. 2029). Such liability on guaranty of sales or remittance of proceeds cannot be avoided by factor without consent of principal. (C.C. 2030).

3.15 FRANCHISES:

Franchise as defined in Corp. C. 31005 is (a) contract or agreement, either express or implied, whether oral or written, between two or more persons by which: (1) franchisee is granted right to engage in business of offering, selling or distributing goods or services under marketing plan or system prescribed in substantial part by franchisor; and (2) operation of franchisee's business pursuant to such plan or system is substantially associated with franchisor's trademark, service mark, trade name, logotype, advertising or other commercial symbol designating franchisor or its affiliate; and (3) franchisee is required to pay, directly or indirectly, franchise fee. (b) Franchise is also following: (1) any contractual agreement between petroleum corporation or distributor and gasoline dealer, or between petroleum corporation and distributor, under which petroleum distributor or gasoline dealer is granted right to use trademark, trade name, service mark, or other identifying symbol or name owned by other party to agreement, or any agreement between petroleum corporation or distributor and gasoline dealer, or between petroleum corporation and distributor, under which petroleum distributor or gasoline dealer is granted right to occupy premises owned, leased, or controlled by other party to agreement, for purposes of engaging in retail sale of petroleum and other products of other party to agreement; (2) any contract between refiner and petroleum distributor, between refiner and petroleum retailer, between petroleum distributor and another petroleum distributor, or between petroleum distributor and petroleum retailer, under which refiner or petroleum distributor authorizes or permits petroleum retailer or petroleum distributor to use, in connection with sale, consignment, or distribution of gasoline, diesel, gasohol, or aviation fuel, trademark which is owned or controlled by such refiner or by refiner which supplies fuel to petroleum distributor which authorizes or permits such use. (c) Franchise does not include nonprofit organization operated as cooperative by and for independent retailers which wholesale goods and services primarily to its members. However, such organizations must satisfy additional statutory criteria to be awarded exemption.

Regulation of Offers and Sales of Franchises.

(Corp. C. 31000-31157). California law mandates registration and pre-sale disclosure of franchises, as described below:

Registration of Offers and Sales of Franchises.

It is unlawful to offer or sell franchise in California unless franchise proposed to be offered is registered with Commissioner of Corporations or offer and sale is exempted by statute or regulation of Commissioner. (Corp. C. 31110, 31100-31105). Registration application must be in form of Uniform Franchise Registration Application. (10 C.C.R. 310.111, 310.114.1). Included in application must be prospectus, known as "Uniform Franchise Offering Circular" or "UFOC", referred to below.

Pre-sale Disclosure.

It is unlawful to sell any franchise in California which is subject to registration without first providing to prospective franchisee, at least ten business days prior to execution by prospective franchisee of any binding franchise or other agreement, or at least ten business days prior to receipt of any consideration, whichever occurs first, copy of offering circular, together with copy of all proposed agreements relating to sale of franchise. Copy may be provided by electronic transmission. (Corp. C. 31119). Offering Circular, or "UFOC", must contain information required by Uniform Franchise Registration Application, as amended by North American Securities Administrators Association, Inc., on Nov. 21, 1986. (Corp. C. 31114; 10 C.C.R. 310.114.1). UFOC prescribes information concerning franchisor, controlling persons, franchises being offered, and relevant historical information. Franchisor's audited financial statements, prepared in accordance with generally accepted accounting principles, must be included in UFOC. (Corp. C. 31111). These financial statements must refer to balance sheet as of date within 90 days prior to date of application, and profit and loss statements for each of three fiscal years preceding date of balance sheet and for period, if any, between close of last fiscal year and date of balance sheet. Balance sheet as of date within 90 days prior to date of application need not be audited. However, if it is not audited, audited balance sheet as of end of franchisor's most recent fiscal year must be filed in addition. In extraordinary cases Commissioner may temporarily waive requirement for audited statements if statements have been prepared by independent certified public accountant or public accountant. (10 C.C.R. 310.111.2).

Modification of Franchise.

It is unlawful to solicit agreement of franchisee to proposed material modification of existing franchise without first delivering to franchisee written disclosure, which has been previously registered with Commissioner of Corporations, in form prescribed by Commissioner, either five business days prior to execution of any binding agreement by franchisee to such modification or containing statement that franchisee may, by written notice mailed or delivered to franchisor or specified agent within not less than five business days following execution of such agreement, rescind such agreement to material modification. (Corp. C. 31125). Exemption from requirements in Corp. C. 31110 et seq. if: (1) modification connected to resolution of bona fide dispute between franchisee and franchisor or resolution of franchisee default and (2) franchisee receives written modification at least five business days prior to execution of agreement provided agreement not executed within 12 months after date of franchise agreement and modification does not waive any right of franchisee under Bus. & Prof. C. 20000 et seq.[Deering's], but modification may include general release of all claims by party to modification and (3) modification is not applied on franchise systemwide basis at time it becomes binding. (Corp. C. 31125[c]). Modification may be offered on voluntary basis to fewer than 25% of franchisor's California franchises within any 12 month period, providing franchises are given right to rescind if not in compliance with other provisions; does not substantially adversely impact franchisees' rights/duties under agreement and not made in consecutive years for purpose of evading 25% requirement. (Corp. C. 31125[c-f]). Application for registration of material modification must conform to model in 10 C.C.R. 310.125.

Exemptions.

Exemption from both registration and disclosure requirements of California law is available by statute under following circumstances: (1) transaction relating to bank credit card plans (Corp. C. 31103); and (2) offer and sale of franchise by petroleum corporation or distributor which meets certain experience criteria and other conditions (Corp. C. 31104).

Exemption from registration and disclosure requirements in Corp. C 31110 et seq. [Deering's] also available for offer and sale of franchise by franchisor which satisfies certain minimum net worth and business activity standards and which files with Commissioner notice of exemption and pays prescribed fee prior to offer or sale of franchise during any calendar year in which one or more franchises is sold. (Corp. C. 31101). This exemption, however, does require limited disclosure. (Corp. C. 31101[c]).

Exemption from registration, but not from disclosure, is available by statute for offer or sale of franchise by franchisee for his own account if sale not effected by or through franchisor. (Corp. C. 31102).

Transactions designated by Commissioner or not comprehended within purposes of franchise law may be made exempt from any and all statutory registration and disclosure requirements. By rule of Commissioner following are exempt from both registration and disclosure: (1) offer or sale of franchise subject to registration solely because franchise required to pay fee of $100 or less each year (10 C.C.R. 310.011); and (2) offer or sale of franchise subject to registration solely because franchise purchases or rents business equipment (10 C.C.R. 310.011.1). Commission rules exempt three types of franchise transactions from registration only: (1) offer or sale of subsidiary of company which satisfies minimum net worth requirements of Corp. C. 31101 (10 C.C.R. 310.100); (2) negotiated sales meeting specified criteria (10 C.C.R. 310.100.2); and (3) offer or sale of franchise to resident of foreign state, territory, or country who is neither domiciled in California to knowledge of seller nor actually present in California, and if sale of such franchise is not in violation of any law of foreign state, territory or country concerned or of law of U.S. (10 C.C.R. 310.100.1).

Changes, Renewal.

Franchisor must promptly notify Commissioner in writing by application to amend registration, of any material change in information contained in original registration. (Corp. C. 31123). In addition, registration is normally valid for period of one year (unless Commissioner specifies different period) (Corp. C. 31120) and may be renewed for additional one year periods by submitting registration renewal statement no later than 15 business days prior to expiration of registration period (Corp. C. 31121).

Advertising.

No franchise advertising may be published in California offering franchise subject to registration requirements of California law unless copy of advertisement has been filed with Commissioner of Corporations at least three business days prior to first publication, or unless advertisement exempted by rule of Commissioner. (Corp. C. 31156).

Regulation of Relationship Between Franchisors and Franchisees.

California statutes (Bus. & Prof. C. 20000-20043[Deering's] and Corp. C. 31220) regulate certain substantive aspects of relationship between franchisor and its franchisees, as described below:

Termination of Franchises.

No franchisor may terminate franchise prior to expiration of its term, except for good cause. “Good cause” includes, but is not limited to, failure of franchisee to comply with any lawful requirement of franchise agreement after being given notice thereof and reasonable opportunity, which in no event need be more than 30 days, to cure failure. (Bus. & Prof. C. 20020[Deering's]). Statute also enumerates 11 circumstances, occurrence of which justifies immediate notice of termination of franchise without opportunity to cure. (Bus. & Prof. C. 20021[Deering's]). Grounds for immediate termination without opportunity to cure include: Bankruptcy, abandonment of franchise, mutual written agreement, material misrepresentations by franchisee in connection with purchase of franchise, failure to correct compliance with laws applicable to operation of franchise, repeated contract noncompliance, seizure of franchised business by government official, or foreclosure by creditor, conviction of felony or other criminal misconduct by franchisee relevant to operation of franchise, failure to cure payment default within five days after written notice, and reasonable determination by franchisor that continued operation of franchise by franchisee will result in imminent danger to public health or safety.

Nonrenewal (Bus. & Prof. C. 20025[Deering's]).—No franchisor may fail to renew franchise unless such franchisor provides franchisee at least 180 days prior written notice of its intention not to renew and either (1) gives franchisee opportunity during 180 days prior to expiration to sell his business to purchaser meeting franchisor's then current requirements for granting new franchises, or if it is not then granting new franchises, then current requirement for granting renewal franchises; or (2) refusal to renew is not for purpose of converting franchisee's business premises to company-owned operation and franchisors agree not to seek to enforce any noncompetition covenant or franchise; or (3) termination of franchise would be permitted under prohibitions described in preceding paragraph; or (4) parties agree in writing not to renew; or (5) franchisor withdraws from geographic market served by franchisee and certain other standards are met.

Succession (Bus. & Prof. C. 20027[Deering's]).—No franchisor may deny surviving spouse, heirs, or estate of deceased franchisee or majority shareholder of franchisee opportunity to participate in ownership of franchise under valid franchise agreement for reasonable time after death of franchisee or majority shareholder of corporate franchisee. During that time survivor must either satisfy then current qualifications for purchase of franchisee or sell, transfer or assign franchise to person who does so. Franchisor may exercise right of first refusal. Section does not apply to certain agreements made before 1984.

Notice of Termination (Bus. & Prof. C. 20030[Deering's]).—All notices of termination or nonrenewal required by statute must be in writing, sent by registered, certified or other receipted mail, delivered by telegram or personally delivered to franchisee; and contain statement of intent to terminate or not renew franchise with reasons and effective date of termination or nonrenewal or expiration.

Franchisee Associations (Corp. C. 31220).—It is unlawful (but not crime) for any franchisor, directly or indirectly, to restrict or inhibit right of franchisees to join trade associations or to prohibit right of free association among franchisees.

Uniform Franchise and Business Opportunities Act, promulgated in Aug., 1987 by National Conference of Commissioners on Uniform State Laws (NCCUSL) has not been adopted in California.

3.16 FRAUDS, STATUTE OF:

Uniform Commercial Code has been adopted (1963, c. 819), effective Jan. 1, 1965. See topic 3.09 Commercial Code.

Estate in real property, other than estate at will or for term not exceeding one year, can be transferred only by operation of law, or by instrument in writing, subscribed by party disposing of same, or by party's agent thereunto authorized by writing. (C.C. 1091). (See also C.C.P. 1971[Deering's].)

No evidence is admissible to charge person upon representation as to another's credit, unless such representation or memorandum thereof be in writing, and either subscribed by or in handwriting of party to be charged. (C.C.P. 1974[Deering's]).

Contracts.

Following are invalid, unless same or some note or memorandum thereof be in writing and subscribed by party to be charged, or by his agent: (1) agreement that by its terms is not to be performed within a year from making thereof; (2) special promise to answer for debt, default or miscarriage of another; except in cases specified by C.C. 2794; (3) agreement for leasing for longer period than one year, or for sale of real property, or of interest therein; (4) agreement authorizing or employing agent, broker or any other person to purchase or sell real estate or to lease real estate for longer than one year, or to procure, introduce or find purchaser or seller of real estate or lessee or lessor of real estate where such lease is for longer period than one year, for compensation or commission; (5) agreement which by its terms is not to be performed during lifetime of promisor; (6) agreement by purchaser of real property to pay indebtedness secured by mortgage or deed of trust on property purchased unless assumption is specifically provided for in conveyance of property; (7) contract, promise, undertaking or commitment by person engaged in business of lending money or extending credit for loan or extension of credit exceeding $100,000 and not primarily for personal, family, or household purposes (C.C. 1624[a]); however, C.C. 1624 does not apply to Division 10 (Personal Property Leases) of Com'l. C.; (8) personal representative's special promise to answer in damages or pay decedent's debts out of own estate (Prob. C. 9604[Deering's]); (9) oral contract modifying written contract if contract as modified falls into category of C.C. 1624 (C.C. 1698). Qualified financial contracts not invalid for lack of memorandum or other writing in specific circumstances. (C.C. 1624[b]).

Contracts of Sale of Personal Property, Goods, Securities.

Uniform Commercial Code governs. (Com'l. C. 1206, 2201, 2209, 2326). See topic 3.09 Commercial Code, subhead Material Variations from 1990 Official Text.

Oral Contracts, Enforcement of If Fraud Involved.

Contract required by law to be in writing but if not set in writing due to fraud of party, enforceable against fraudulent party. (C.C. 1623).

Part performance may remove agreement from statute. (163 Cal. App. 2d 384, 329 P.2d 599).

Agent's authority to enter into contract required to be in writing must itself be in writing. (C.C. 2309).

Debts.

Revival of debt barred by statute of limitations must be in writing and signed by person charged. (C.C.P. 360[Deering's]).

3.17 [RESERVED]

3.18 INFORMATION TECHNOLOGY, INTERNET AND NEW MEDIA:

Uniform Electronic Transactions Act (1999, adopted 1999) in effect. (C.C. 1633.1-1633.17).

Copyright Protection.

Digital Millennium Copyright Act of 1998 prohibits use of technology to circumvent copyright management information. (17 U.S.C. 1201 et seq.). Act provides civil remedies and criminal penalties for violators. (17 U.S.C. 1204).

Advertising.

Representations to public, and advertisements for sale of real and personal property; professional or other services; or any circumstance or matter of fact connected with proposed performance or disposition thereof, made over Internet (Bus. & Prof. C. 17538[Deering's]), or by email (Bus. & Prof. C. 17538.5[Deering's]) are subject to regulations governing false advertising (Bus. & Prof. C. 17500[Deering's]). Charitable solicitations that are not made face-to-face must make specified disclosures, including whether or not solicitation is conducted by commercial fund raiser. (Bus. & Prof. C. 17510.3[Deering's]; 17510.4[Deering's]; 17510.85[Deering's]). Particular offenses are enumerated by statute. (Bus. & Prof. C. 17530-17538[Deering's]).

Penalties for advertising by unlicensed person on Internet. (Bus. & Prof. C. 7027.1[Deering's]).

Licensing.

Unless exempted, certain entities within Department of Consumer Affairs (Bus. & Prof. C. 27[Deering's]) are required to provide, on Internet, information regarding status of every license issued by entity in accordance with California Public Records Act (Govt. C. 6250) and Information Practices Act (C.C. 1798). Required disclosures include information on suspensions and revocations of licenses and other enforcement actions taken by entity issuing license.

Other licensing disclosures required to be posted on Internet, unless exempted: physicians and surgeons status of license and hospital staff privileges (Bus. & Prof. C. 2027[Deering's]); Dept. of Real Estate status of licensees, including real estate brokers and agents (Govt. C. 11018.5); long-term health facilities profiles, including history of all citations and complaints (H. & S.C. 1422.5[Deering's]); health care service plans health provider's participation in network (H. & S.C. 1395.6[Deering's]; Ins. C. 10178.3[Deering's]); Medicare supplement insurance providers must comply with certain marketing procedures (Ins. C. 10192.20[Deering's]); and insurers who advertise on Internet and transact insurance in state (Ins. C. 702[Deering's]; 1726[Deering's]) must comply with detailed disclosure requirements (Ins. C. 1726[Deering's]). Investment adviser applications, reports, notices, filings, fees must be filed electronically and transmitted to Web-based Investment Adviser Registration Depository. (Corp. C. 2523[b]).

Government Agencies.

State and local agencies are required to give notice over Internet of public meetings and actions. Abbreviated list of some of more common agencies and actions: Publication of California Code of Regulations (Govt. C. 11344); Dept. of Motor Vehicles consumer remedies (Veh. C. 1656.4[Deering's]); notice of regular and special meetings of state dept. and agencies, including advisory bodies (Govt. C. 11125; 11125.4; 11125.5); notice of meetings of Local Agency Formation Commission (Govt. C. 56300); Public Utilities Comm. meeting notices, information to be discussed, rulings, proposed and alternate proposed decisions and resolutions, and all adopted decisions and resolutions (Pub. Util. C. 311.5[Deering's]); notice of proposed contracting awards (Pub. Con. C. 10345[Deering's]); grant application forms and listings (Govt. C. 8334); notice of public meetings on regulated substances (H. & S.C. 25534.06[Deering's]); display of Cal. EPA enforcement orders (Govt. C. 6253.8); and public assistance programs for streamlined environmental review (Pub. Res. C. 21159.9).

In addition, many state agencies are required to provide for public complaints and comments by electronic mail, Internet, or both: between affected businesses and regulatory agencies (Govt. C. 11340.8); between consumers and Public Utilities Comm. (Pub. Util. C. 311.4[Deering's]); unless exempted, between consumers and licensing agencies (Govt. C. 8331); and between consumers and health care service plan providers (H. & S.C. 1368.02[Deering's]).

Notice must be given to users by state agencies that electronically collect personal information on Internet. (Govt. C. 11015.5). Permission must be obtained for distribution or sale of personal information and upon request of user, discarded. (Govt. C. 11015.5). Confidentiality of health facility data assured and liability for reporting. (H. & S.C. 128735[Deering's]). No home address or telephone number of any appointed or elected official or official's residing spouse or child shall be posted on Internet without permission. (Govt. C. 6254.21). Interactive computer service liable for disclosure only if intends to abet or cause imminent great bodily harm to elected or appointed official. (Govt. C. 6254.1[e]). Secretary of State required to make corporate filing statements available online Dec. 31, 2004. (Corp. C. 1502(h), 1500).

Office of Information Security created in office of State Chief Information Officer with purpose to ensure confidentiality, integrity, availability of state systems and application and promote privacy as part of development and operations of state systems and applications (Govt. C. 11549–11549.4). Office of Privacy Protection created in State and Consumer Services Agency with purpose to protect privacy of individuals' personal information, facilitating development of fair information practices and promoting and protection consumer privacy (Govt. C. 11549.5–11549.10).

Political Reform.

Secretary of State required to maintain online directory of lobbyists, lobbying firms and lobbyist employers, updated weekly. (Govt. C. 86109.5). Online Disclosure Act of 1997 requires Secretary of State to maintain data on late political contributions and late independent expenditures (Govt. C. 84203-84204); and information on any reportable payments, expenses, contributions, gifts or other items over $5,000. (Govt. C. 84605). Complete text of state ballot pamphlet shall be disseminated over Internet. (Elec. C. 9082.7[Deering's]).

Education.

School districts and public libraries providing Internet access must adopt policies regarding student access to harmful matter (Penal C. 313[Deering's]) and make policies available to public (Ed. C. 18030.5[Deering's]). School Accountability Report Card (Ed. C. 35258[Deering's]) must be accessible on Internet (Ed. C. 33126.1[Deering's]). Reading lists for standardized testing and reporting (Ed. C. 60642[Deering's]; 60641[Deering's]) and average scores for each school district (Ed. C. 60812[Deering's]) must be posted on Internet (Ed. C. 60643.1[Deering's]; 60812[Deering's]).

Escrow Agents.

Internet escrow agents (Fin. C. 17004.5[Deering's]); escrow companies (Fin. C. 17003[Deering's]); and customer contact centers (Fin. C. 17005.3[Deering's]) within state (Fin. C. 17005.5[Deering's]) are specifically regulated (Fin. C. 17200.8[Deering's]; 17215[Deering's]; 17403.2-17403.5[Deering's]).

Computer Crimes.

Knowing theft of computer programs, including domain names; knowing introduction of computer contaminant; and knowing access to computer system without permission constitute larceny. (Penal C. 502[Deering's]). Knowingly sending harmful matter (Penal C. 313[Deering's]) to minor is criminal act (Penal C. 288.2[Deering's]). Information relating to persons convicted of violent felonies (Penal C. 667.5[Deering's]) must be posted on Internet (Penal C. 14201.6[Deering's]). Raffles may not be advertised, operated, or conducted in any manner over Internet. (Penal C. 320.5[Deering's]).

Taxation.

California Internet Tax Freedom Act, which prohibited any city, county, or local entity from imposing any discriminatory taxes or fees on Internet access, online computer services, or their use, repealed Jan. 1, 2004. (Rev. & Tax C. 65001-65004[Deering's]).

3.193.16

3.17 INTEREST:

See also topic 3.01 Banks and Banking.

Maximum Rate.

For loans made primarily for personal, family or household purposes rate shall not exceed 10% per annum. For loans not intended primarily for above purposes, which by definition do not include loans primarily for purchase, construction or improvement of real property, maximum allowable interest rate is higher of: (a) 10% or (b) 5% plus discount rate charged by Federal Reserve Bank of San Francisco on 25th day of month preceding earlier of: (i) date of execution of loan agreement or promissory note, or (ii) date loan is actually made. (Const. Art. XV, §1). Foregoing restrictions do not apply to loans made by building and loan associations, industrial loan companies, credit unions, pawnbrokers or personal property brokers, banks, agricultural cooperatives, incorporated insurer, or to any loan made or arranged by licensed real estate broker. As to these classes, legislature may prescribe maximum rates of interest which can be charged.

Following are also exempt from constitutional interest rate limitations by specific legislation: Incorporated insurer (Ins. C. 1100.1[Deering's]), licensed broker-dealers (Corp. C. 25211.5), indebtedness issued pursuant to Corporate Securities Law (Corp. C. 25116), licensed Business and Industrial Development Corp. (Finan. C. 31410[Deering's]), California state bank, or other state bank that maintains branch office in California, acting in fiduciary capacity as trustee (Finan. C. 1504[Deering's]), foreign (other nation) banks (with some special qualifications) (Finan. C. 1716[Deering's]), bank holding companies and their nonbank subsidiaries (Finan. C. 3707[Deering's]), state and federal savings and loan associations, savings and loan holding companies, and their respective service corporation subsidiaries (Finan. C. 7675[Deering's]).

Because of broad class of lenders exempt from California usury law, federal preemption of state usury ceilings in certain loan transactions (pursuant to Federal Depository Institutions Deregulation and Monetary Control Act of 1980) has minimal impact in California.

Rate of interest on judgments if set by legislature not more than 10%. (Const. Art. XV, §1).

Small Loans.

Under Finance Lenders Law (Finan. C. 22000-22780[Deering's]), persons licensed thereunder may charge no more on unpaid balances than 2½% per month on first $225; 2% per month on next $675; 1½% per month on next $750; and 1% per month on remaining balance in excess of $1,650; or, alternatively, greater of: (i) 1.6% per month on unpaid principal balance, or (ii) rate determined by formula adjusted by rate on Federal Reserve Bank of San Francisco advances to member banks (Finan. C. 22303[Deering's], 22304[Deering's]). Administrative fee of lesser of $50 or 5% of loan (exclusive of administrative fee) of not more than $2,500 or of up to $75 on loan (exclusive of administrative fee) in excess of $2,500 also permitted. (Finan. C. 22305[Deering's]).

Industrial loan companies may charge, on unpaid principal balances, up to 2% per month on unpaid balance up to and including $1,000, and 1% on unpaid balance over $1,000, or rate not exceeding 1.6% per month on unpaid principal balance; or alternatively, at rate not exceeding 5/6 of 1% per month plus percentage per month equal to 1/12 of annual rate prevailing on 25th day of second month of calendar quarter immediately preceding calendar quarter during which loan is made. Charges calculated on unpaid balance of any loan. (Finan. C. 18212[Deering's]; 18212.1[Deering's]). No pawnbroker may charge more on unpaid principal balance than 2½% per month on first $225, 2% per month on next $675, 1½% per month on next $750, and 1% on unpaid balance over $1,650 (Finan. C. 21200[Deering's]). However, different schedule pertains to loans of less than $2,500 for not more than 90 days. (Finan. C. 21200.5[Deering's]).

Usury results in forfeiture of all interest, and three times amount of usurious interest paid may be recovered; may also be felony if willful. (1919, p. lxxxiii; G. L. Act 3757; 52 C.2d 834, 345 P.2d 457). Agreement for usurious interest is separable from promise to pay principal sum and does not render latter illegal. (29 C. 267). No cause of action for usury exists for any loan made before Nov. 6, 1979, if loan would not have been usurious under amended usury law found in Const., Art. XV, §1. (109 Cal. App. 3d 141, 167 C.Rptr. 62).

Retail installment sales contracts governed by special provisions. (C.C. 1801-1812.20).

3.18 [RESERVED]

3.19 LICENSES, BUSINESS AND PROFESSIONAL:

Following is abbreviated list of some of more common business and professional activities that are licensed: Life insurance agents (Ins. C. 1622[Deering's], 1631[Deering's]) and insurance brokers (Ins. C. 1623[Deering's], 1631[Deering's]); dealers of agricultural produce (Fd. & Agric. C. 56181-56196[Deering's]); sellers of alcoholic beverages (Bus. & Prof. C. 23000-24210[Deering's]); tobacco products (Bus. & Prof. C. 22972-22974.8[Deering's]); clinical laboratories (Bus. & Prof. C. 1260-75[Deering's]); contractors (Bus. & Prof. C. 7065-7077[Deering's]); health care facilities (H. & S.C. 1250-1300[Deering's]); mobile home dealers (H. & S.C. 18024-18024.6[Deering's]); outdoor advertising (Bus. & Prof. C. 5301[Deering's]); pest control (Fd. & Agric. C. 11701[Deering's]); real estate brokers (Bus. & Prof. C. 10150[Deering's]) or salesmen (Bus. & Prof. C. 10151[Deering's]); mortgage loan originators (Bus. & Prof. C. 10166.01[Deering's], Finan. C. 50140[Deering's]); clinical professional counselors (Bus. & Prof. 4999.10[Deering's]); marriage and family therapists (Bus. & Prof. C. 4980.04[Deering's]); and yacht and ship brokers (Harb. & Nav. C. 719[Deering's]).

Following is partial list of those professions and businesses licensed under Business and Professions Code: Chiropractors, dentistry, medical doctors, midwifery, physical therapy, nursing, pharmacy, accounting, architecture, attorneys, professional engineers, geologists, land surveyors, locksmiths, and automobile repair.

There may also be separate business licensing requirements imposed by local municipality in which business transacts business. (Govt. C. 37101).

3.20 MONOPOLIES, RESTRAINT OF TRADE AND COMPETITION:

All statutory provisions are found in Part 2, Division 7, of Business and Professions Code.

Contracts in Restraint of Trade.

Every contract whereby one is restrained from exercising lawful profession, trade or business is, to that extent, void (Bus. & Prof. C. 16600[Deering's]), except that seller of goodwill of business, or shareholder of corporation disposing of all his shares, or shareholder of corporation which sells (a) substantially all its operating assets and goodwill of corporation, (b) substantially all operating assets and goodwill of division or subsidiary, or (c) all shares of subsidiary, may agree with buyer to refrain from carrying on similar business within specified counties or cities, or parts thereof, in which business sold has been carried on, so long as buyer, or person deriving title to goodwill or shares from him carries on like business therein (Bus. & Prof. C. 16601[Deering's]), and on dissolution of partnership or limited liability company members may agree not to carry on similar business in specified geographic areas so long as any member or person deriving title or goodwill therefrom carries on like business therein (Bus. & Prof. C. 16602[Deering's], 16602.5[Deering's]).

Prohibited Restraints of Competition.

Combination of capital, skill or acts of two or more persons, partnerships, corporations or associations to restrict trade or commerce, limit or reduce production or increase price, prevent competition or fix prices is an illegal trust. (Bus. & Prof. C. 16720[Deering's]). Contracts prohibiting use of or dealing in competing goods are likewise unlawful. (Bus. & Prof. C. 16727[Deering's]). Such combination subjects domestic corporations and associations to forfeiture of charter rights, franchises and privileges (Bus. & Prof. C. 16752[Deering's]), and foreign corporations or associations to revocation of license to do business in state (Bus. & Prof. C. 16753[Deering's]). There is also liability to fine and imprisonment (Bus. & Prof. C. 16755[Deering's]), civil penalty, treble damages, injunctive relief, reasonable attorney's fees, and costs to any person injured regardless whether injured person dealt directly or indirectly with defendant (Bus. & Prof. C. 16750[Deering's]). Mandatory injunction may issue to preserve competition. (Bus. & Prof. C. 16754.5[Deering's]).

Act does not apply to combinations of laborers or agreements setting price of labor (Bus. & Prof. C. 16703[Deering's]) or forbid agreements or combinations designed to promote, encourage or increase competition or which are in furtherance of trade (Bus. & Prof. C. 16725[Deering's]).

Unfair Practices Act (Bus. & Prof. C. 17000 et seq.[Deering's]) prohibits creation of locality price discriminations not based on differences in cost of manufacture, sale, delivery or transportation and sales at less than cost with intent to destroy competition. There is liability to fine and imprisonment as well as civil damages and injunctions.

Express Discrimination Policy of Third Party.

Exclusion of any person from business transaction on basis of express written discrimination policy imposed by third party prohibited. (Bus. & Prof. C. 16721[Deering's]). Unlawful to grant or accept any letter of credit (or similar document) or enter into any contract for exchange of goods or services when document contains any provision which requires any person to discriminate against or to certify that such person has not dealt with any other person on basis of sex, race, color, religion, ancestry or national origin or on basis of person's lawful business association or refuse to grant or accept any letter of credit (or similar document) or refuse to enter into any contract for exchange of goods or services because it does not contain discrimination provision. (Bus. & Prof. C. 16721.5[Deering's]). Adjudication of violation of discrimination policy provisions referred to, may result in substantial fines and potential prison terms, and may result in revocation of corporate license to do business in California for foreign corporation. (Bus. & Prof. C. 16753[Deering's], 16755[a][Deering's]). Express discrimination policy is to be interpreted so as not to conflict with federal law or regulations with respect to foreign or interstate commerce not preempted by Export Administration Act of 1969. (Bus. & Prof. C. 16721.6[Deering's]).

Enforcement.

In addition to private persons, Attorney General and district attorney of county are authorized to prosecute actions for restraint of trade on behalf of state, public agency or political subdivision; district attorneys expenses may be paid from proceeds of action or in amount equal to 10% of such proceeds, whichever is greater. (Bus. & Prof. C. 16750[Deering's], 16753[Deering's], 16754[Deering's], 16755[Deering's] & 16760[Deering's]). Any action for restraint of trade must be commenced within four years after cause of action accrued. (Bus. & Prof. C. 16750.1[Deering's]).

Resale Price Agreements.

See category 17 Intellectual Property, topic 17.01 Trademarks and Tradenames. Fair Trade Act repealed. (1975, cc. 402, 429).

Federal Authority Applies.

Federal decisions under Sherman Act are authoritative in cases under California law. (20 C. 3d 367, 143 C. Rptr. 1, 572 P.2d 1142; 212 Cal. App. 2d 618, 28 C. Rptr. 190).

3.21 NEGOTIABLE INSTRUMENTS:

See topic 3.02 Bills and Notes.

3.22 RESTRAINT OF TRADE:

See topic 3.20 Monopolies, 3.22 Restraint of Trade and Competition.

3.23 SALES:

Uniform Commercial Code has been adopted. (1963, c. 819, Com'l. C. 2101-2801). See topic 3.09 Commercial Code, subhead Material Variations from 1990 Official Text. Division 2 of Commercial Code applies to transactions in goods. (Com'l. C. 2102). Code does not apply to real estate transactions or to insurance or construction contracts. While generally applicable to consumer transactions, Com'l C. provides that in transactions subject also to Retail Installment Sales Act (C.C. 1801 et seq.), Automobile Sale Finance Act (C.C. 2981 et seq.), Industrial Loan Law (Finan. C. 18000 et seq.[Deering's]), Pawn Broker Law (Finan. C. 21000 et seq. [Deering's]), Personal Property Brokers Law, (Finan. C. 22000 et seq.[Deering's]), provisions of such statutes control in case of conflict.

Bills of Sale.

Transfer may be made without writing in every case in which a writing is not expressly required by statute. (C.C. 1052). Sale is defined as passing of title from seller to buyer for price. (Com'l. C. 2106). Subject to Division 2 on sales and Division 9 on secured transactions of Com'l. Code, title to goods passes from seller to buyer in any manner and on any conditions explicitly agreed upon by parties. (Com'l. C. 2401[1]). “Present sale” is defined as sale which is accomplished by making of contract. (Com'l. C. 2106[1]). Thus, except as specifically provided by statute, written bill of sale of personal property is not required. Parties to sale transaction frequently agree to and require use of bill of sale. Interest in ship can be transferred only by operation of law or by written instrument subscribed by party making transfer or by his agent. (C.C. 1135). Transfers of title to nonnegotiable instruments and to accounts receivable, payment intangibles, promissory notes, and chattel paper transferred as part of sale of business are deemed perfected against third persons when such property rights have been endorsed or assigned in writing and, in case of such instruments or chattel paper, delivered to transferee. (C.C. 955). Similarly, transfer of general intangible consisting of any right to payment and transfer of any accounts or chattel paper excluded from coverage of Division 9 of Commercial Code and not property defined in Pub. Util. C. 840[Deering's] or 848[Deering's] is deemed perfected against third persons upon execution and delivery to transferee of assignment in writing. (C.C. 955.1).

Products Liability.

Strict Liability in Tort.

Manufacturers, retailers, and distributors strictly liable in tort for marketing defective article, knowing it will be used without inspection, which causes injury. (59 C.2d 57, 377 P.2d 897, 27 C.Rptr. 697; 61 C.2d 256, 391 P.2d 168, 37 C.Rptr. 896). Occasional sellers exempted. (265 Cal. App. 2d 228, 71 C.Rptr. 306). Second-hand dealers held not strictly liable. (101 Cal. App. 3d 268, 161 C.Rptr. 789). Lessors, bailors, licensors and franchisors may also be liable (2 C.3d 245, 466 P.2d 722, 85 C.Rptr. 178; 3 Cal. App. 3d 319, 82 C.Rptr. 420). Developers of residential homes and buildings may also be held strictly liable in tort for manufacturing and design defects. (See, e.g. 123 Cal. App. 3d 898, 176 C.Rptr. 886.) Employees' exclusive remedy for job site injuries is through workers' compensation unless employers operate in “dual capacity” (39 C.2d 781, 249 P.2d 8), although “dual capacity” concept has been severely limited by Lab. C. 3602[Deering's]. Proper plaintiffs may include ultimate users, innocent third-party bystanders, family members, employees, passengers or licensees. (See, e.g. 70 C.2d 578, 451 P.2d 84, 75 C.Rptr. 652; 38 C.2d 399, 240 P.2d 575; 3 Cal. App. 3d 319, 82 C.Rptr. 420.) Commercial entity generally may not assert strict tort liability claim against another manufacturer or distributor. (55 Cal. App. 3d 737, 127 C.Rptr. 838). Claims may be based on defect in manufacture (e.g., 59 C.2d 57, 377 P.2d 897, 27 C.Rptr. 697), defect in design (e.g., 20 C.3d 413, 573 P.2d 443, 143 C.Rptr. 225), failure to warn of danger or inadequate use instructions (e.g., 95 Cal. App. 3d 338, 157 C.Rptr. 142). Product has been held to be defective in design if it fails to perform as safely as ordinary consumer would expect when used in intended or reasonably foreseeable manner or if there is risk of danger inherent in design which outweighs benefits of that design. (20 C.3d 413, 143 C.Rptr. 225, 573 P.2d 443). Liability may be imposed under certain circumstances based upon manufacturer's market share. (26 C.3d 588, 163 C.Rptr. 132, 607 P.2d 924).

Negligence.

Negligent manufacturers, retailers, distributors, lessors, bailors, and endorsers may be held liable for foreseeable harm done by product to foreseeable plaintiff. Claims against parties in chain of distribution may be based on manufacturing defects, negligent design (e.g., 2 C.3d 465, 85 C.Rptr. 629, 467 P.2d 229), failure to test (e.g., 20 C.2d 410, 126 P.2d 345) or negligent failure to warn (e.g., 218 Cal. App. 2d 855, 32 C.Rptr. 754). Claims against parties not in chain of distribution may be based on negligent misrepresentation. (276 Cal. App. 2d 680, 81 C.Rptr. 519). With respect to manufacturing defects, California courts have adopted Restatement of Torts Section 395. (185 Cal. App. 3d 135, 229 C.Rptr. 605).

Breach of Warranty.

California recognizes six specific statutory warranties (Com'l. C. 2313, 2314, 2315, C.C. 1791.1[a], and 1791.1[b], 1791.2), as well as concept of common law warranty, on which breach of warranty claim may be based. Plaintiff must show that warranty existed, that defendant breached warranty, and that defendant's breach proximately caused injury to plaintiff. (146 Cal. App. 3d 194, 194 C.Rptr. 77). Although California courts generally require privity of contract for maintenance of breach of warranty claim, many exceptions exist; e.g., privity is not required where food and drugs are involved (14 C.2d 272, 93 P.2d 799; 182 Cal. App. 2d 602, 6 C.Rptr. 320) or where plaintiff is family member (14 C.3d 104, 120 C.Rptr. 681, 534 P.2d 377) or employee (54 C.2d 339, 5 C.Rptr. 863, 353 P.2d 575) of purchaser. Buyer of defective product may receive consequential damages, including injury to person on property, proximately resulting from seller's breach of warranty. (Com'l. C. 2715[2]).

Bulk Sales.

See topic 3.09 Commercial Code. Division 6 of Commercial Code applies to bulk transfers.

Retail Credit Sales.

See topic 3.12 Consumer Protection.

Sales of Motor Vehicles.

See topic 3.12 Consumer Protection.

Motor Vehicle Leasing.

See topic 3.12 Consumer Protection.

Consumer Protection.

See topic 3.12 Consumer Protection.

3.24 SECURITIES:

Uniform Commercial Code has been adopted with certain modifications. (1963, c. 819).

California Corporate Securities Law of 1968 has been adopted, effective Jan. 2, 1969. (Corp. C. Title 4, Div. 1). Law governs offers and issues of securities.

Supervision.

Law is administered by California Department of Corporations, chief officer of which is Commissioner of Corporations, 320 West 4th Street, Suite 750, Los Angeles, CA 90013-2344, (213) 576-7500 or (866) 275-2677; 1515 K Street, Suite 200, Sacramento, CA 95814-4052, (916) 445-7205 or (866) 275-2677; 71 Stevenson Street, Suite 2100, San Francisco, CA 94105-2980, (415) 972-8559 or (866) 275-2677; 1350 Front St., Room 2034, San Diego, CA 92101-3697, (619) 525-4233 or (866) 275-2677. :http://www.corp.ca.gov/default.asp.

Regulatory Powers of Supervisory Authority.

See subheads Necessity for Qualification and Civil Liability for Violations of Corporate Securities Law, infra.

Prerequisites to Sales or Offerings.

Unless security or transaction is exempt or not subject to qualification under Corp. C. 25100-25105 (see subhead Exempt Securities, infra), no security may be offered or sold without first qualifying with Commissioner. (Corp. C. 25110 requiring qualification in issuer transactions; 25120 requiring qualification of changes in rights, exchanges, entity conversions, or mergers; and 25130 requiring qualification in nonissuer transactions). Qualification may be by coordination as to security for which registration statement has been filed under Securities Act of 1933 in connection with same offering (Corp. C. 25111), by notification as to security registered under §12 of Securities Exchange Act of 1934 or issued by investment company registered under Investment Company Act of 1940 (Corp. C. 25112), or all securities may be qualified by permit (Corp. C. 25113).

Securities to Which Act Applicable.

Any note; stock; treasury stock; membership in an incorporated or unincorporated association; bond; debenture; evidence of indebtedness; certificate of interest or participation in any profit-sharing agreement; collateral trust certificate; preorganization certificate or subscription; transferable share; investment contract; viatical settlement contract or fractionalized or pooled interest therein, life settlement contract or fractionalized or pooled interest therein; voting trust certificate; certificate of deposit for security; interest in limited liability company and any class or series of such interests (including fractional or other interest in such interest) except membership interest in limited liability company in which person claiming this exception can prove that all members are actively engaged in management of limited liability company; certificate of interest or participation in oil, gas or mining title or lease or in payments out of production under such title or lease; put, call, straddle, option, or privilege on any security, certificate of deposit, or group or index of securities (including any interest therein or based on value thereof); or any put, call, straddle, option, or privilege entered into on national securities exchange relating to foreign currency; any beneficial interest or other security issued in connection with funded employees' pension, profit sharing, stock bonus, or similar benefit plan; or, in general, any interest or instrument commonly known as “security;” or any certificate of interest or participation in, temporary or interim certificate for, receipt for guarantee of, or warrant or right to subscribe to or purchase, any of foregoing. (Corp. C. 25019).

Franchise Investments.

Unless exempt as large franchisor under Corp. C. 31101, offer or sale of franchise must be registered. (Corp. C. 31000-31516). Exemption based upon net worth of franchisor, experience of franchisor, conduct of franchise business, and written disclosure to prospective franchisee. (Corp. C. 31101). California Franchise Relations Act contains provisions pertaining to termination, nonrenewal and transfer of franchises. (Bus. & Prof. C. 20000 et seq.[Deering's]). See topic 3.15 Franchises.

Tender Offers.

See category 2 Business Organizations, topic 2.03 Corporations.

Exempt Securities.

Under Corp. C. 25100, following are among securities exempt from qualification: Those issued or guaranteed by U.S., state, city, county or other governmental entity, Canada, its political subdivisions, or any foreign government with which U.S. currently maintains relations, national or California bank, federal or California savings and loan association, federal land bank, savings associations, joint land bank or national farm loan association; securities whose issuance is subject to Insurance Commissioner, Public Utilities Commissioner or Real Estate Commissioner; interests in real property which are subdivision land (but not if investment contract sold or offered for sale with, or if supplying water for irrigation purposes); mutual capital certificates or savings accounts issued by authorized savings association; securities issued or guaranteed by federal credit unions or credit unions organized and supervised, or regulated, under Credit Union Law; subject to certain conditions, securities of or guaranteed by railroad, other common carrier, public utility, or public utility holding company; subject to certain conditions, securities of nonprofit organizations; subject to certain conditions, notes, drafts, bills of exchange, or banker's acceptances; securities of California agricultural cooperatives; beneficial interests in qualified pension, profit-sharing, stock bonus or similar benefit plans; securities listed or approved for listing on national securities exchange or NASDAQ National Market, certified by Commissioner of Corporations; promissory notes (but not part of series) secured by lien on real property; medical malpractice trust funds; subject to certain conditions, securities of certain consumer cooperatives; and, subject to certain conditions, certain pooled mortgage loans and securities issued as open-end management company or unit investment trust under Investment Company Act of 1940. Additionally, Corp. C. 25101 exempts from non-issuer qualification requirements of Corp. C. 25130, securities issued by person which is issuer of securities listed on national securities exchange or NASDAQ National Market, certified by Commissioner, or, if national securities exchange is not certified by Commissioner, issuer meets certain other conditions, however, exemption does not apply to securities offered pursuant to registration under Securities Act of 1933 if exceeds $50,000.

Exempt Transactions.

Under Corp. C. 25102, following are among transactions exempt from issuer transaction requirements: Offers but not sales in nonpublic offering where agreement contains certain legend, no consideration paid or received and no securities issued until sale qualified; subject to certain conditions, offers but not sales of securities for which registration statement has been filed under Securities Act of 1933 but not yet effective, or for which offering statement under Regulation A has been filed but has not yet been qualified; offers but not sales pursuant to negotiating permit issued by Commissioner of Corporations; transactions between issuer and underwriter or among underwriters if sale is qualified prior to distribution in California or exempt; offers or sales of debt instruments in nonpublic offerings; subject to certain conditions, offers or sales (other than to pension or profit-sharing trust of issuer) to 35 or fewer persons who meet certain criteria for sophisticated investors, and without publication of any advertisement; offers or sales in nonpublic transaction of conditional sale agreement, equipment trust certificate or certificates of interest or participation therein, covering railroad equipment, motor vehicles, or aircraft; subject to certain conditions, offers or sales of voting common stock of any corporation if, immediately after sale and issuance, only one class of stock outstanding owned beneficially by no more than 35 persons, with legend on certificates, no advertisement of offer or sale, no selling expenses paid, consideration for stock only of certain types, no promotional consideration paid, and notice filed with Commissioner of Corporations (see Rules of Cal. Corporations Commissioner pertaining to application of this transactional exemption to small corporations); subject to certain conditions, offers or sales to banks, savings and loan associations, trust companies, insurance companies, registered investment companies, pension or profit sharing trusts, or certain others, or to corporations with outstanding securities registered under §12 of Securities Exchange Act of 1934; subject to certain conditions, offers or sales of certificates in oil or gas title or lease; offers or sales under bankruptcy plan of reorganization or arrangement; offers or sales of options, warrants, puts, calls or straddles, or guarantees of such securities in certain cases by non-issuers; offers or sales of stock to pension, profit-sharing, stock bonus or employee stock ownership plan, subject to certain conditions; any offer or sale of security in transaction, other than offer or sale of security in rollup transaction, that meets certain criteria; any offer or sale of security issued by corporation or limited liability corporation pursuant to purchase plan or agreement or issued pursuant to option plan or agreement, where security at time of issuance or grant is exempt from registration under Securities Act of 1933, however failure to file notice of transaction does not affect eligibility of exemption if certain criteria are met; any offer or sale of nonredeemable securities to accredited investors by persons licensed under Capital Access Company Law; subject to certain criteria, offer or sale of any viatical or life contract transactions. (Corp. C. 25102).

Following transactions exempt from qualification requirements for issuer transactions, recapitalization and reorganization: Negotiations or agreements prior to solicitation of shareholders' approval, and subject to such approval, of changes in rights, preferences, privileges, or restrictions on outstanding securities merger, or entity conversion transaction, consolidation or sale of corporate assets in consideration of issuance of securities; changes in rights, preferences, privileges or restrictions of outstanding securities or entity conversion transaction unless 25% of outstanding shareholders affected adversely are California residents; exchanges incident to merger, consolidation or sale of assets in consideration of issuance of securities of another corporation unless 25% of outstanding shares whose holders are to receive securities are California residents; changes, other than stock split or reverse stock split, in rights, preferences, privileges, or restrictions on outstanding shares except certain changes if they substantially and adversely affect any class of shareholders; stock splits or reverse stock splits except in certain instances; changes in rights of outstanding debt securities except in certain instances if substantially and adversely affect any class of securities; exchanges incident to merger, consolidation, sale of assets, or entity conversion transaction, other than roll up transaction in consideration of issuance of equity securities of another entity, if exchange meets certain conditions, any exchange of securities in connection with any merger or consolidation or sales of corporate assets in consideration wholly or in part of issuance of securities or entity conversion transaction under bankruptcy reorganization plan that has been confirmed or is subject to confirmation by court. (Corp. C. 25103).

Following transactions exempt from non-issuer requirements: Offers or sales by bona fide owner for own account if unaccompanied by advertisement and not effected through broker-dealer in public offering; offers or sales effected by licensed broker-dealer pursuant to unsolicited order or offer to buy; offers or sales to bank, savings and loan association, and others under certain conditions; transactions between person on whose behalf offering is made and underwriter if sale is exempt from qualification at time of or qualified prior to distribution; offers or sales for bona fide secured party selling security in ordinary course of business to liquidate bona fide debt; transactions by executor, administrator, sheriff, marshal, receiver, trustee in bankruptcy, guardian or conservator; offers but not sales of securities for which registration statement filed under Securities Act of 1933 but not yet effective, or for which offering statement under Regulation A has been filed but has not yet been qualified; under certain conditions, offers or sales if qualification of securities of same class was effective within 18 months prior thereto (or longer subject to commissioner order), as to issuer transactions or 12 months as to non-issuer transactions or reorganizations or recapitalizations. (Corp. C. 25104).

Exemption by Commissioner's Rule: Commissioner of Corporations may by rule exempt other transactions. (Corp. C. 25105).

Necessity for Qualification.

Commissioner of Corporations has authority to issue stop order, suspend or revoke qualification or permit previously issued, may refuse to issue permit unless he finds proposed plan of business or of recapitalization or reorganization, or proposed issuance, to be fair, just and equitable; Commissioner may impose as condition of qualification deposit of securities in escrow, imposition of legend condition restricting transferability, impounding of proceeds from sale, limiting expense in connection with sale, restrictions on promotional shares, and otherwise; Commissioner may hold hearings where securities are proposed to be issued in exchange. (Corp. C. 25140-25143).

Consent to Service of Process on Commissioner.

All applicants for qualification or notice under Corp. C. 25100.1, 25101.1, 25102.1, and 25230.1 or for exemption from qualification (other than California corporations, California licensed broker-dealers, and those with consents already on file) shall file consent appointing Commissioner to receive service of process. (Corp. C. 25165).

Civil liability for violations of Corporate Securities Law include rescission and recovery of damages. (Corp. C. 25500-25510). Professionals who pursuant to rule of Commissioner consent to use of their statement as part of offering are jointly and severally liable with any other person liable for untrue statement or omission in connection with sale or purchase of security. (Corp. C. 25504.2). Securities actions for fraud, price or trading manipulation, misrepresentation or insider trading must be brought for proceedings commencing before Jan. 1, 2005: (1) Within four years of act or transaction constituting violation, or (2) within one year of discovery by plaintiff of facts constituting violation, whichever shall expire first; for proceedings commencing on or after Jan. 1, 2005: (1) Within five years after act or violation, or (2) within two years after discovery by plaintiff of facts constituting violation, whichever shall expire first. (Corp. C. 25506). Securities actions against professionals for untrue statements or omissions must be brought within one year after discovery of facts constituting violation, or after such discovery should have been made by exercise of reasonable diligence, but in no event after three years of violation. (Corp. C. 25506.1). Securities actions for failure to qualify securities or failure to comply with condition of qualification shall be brought before expiration of: (1) Two years after violation, or (2) one year after discovery by plaintiff of facts constituting such violation, whichever comes first. (Corp. C. 25507). No buyer may rescind or obtain damages for failure to qualify or failure to comply with qualification condition if before lawsuit is instituted, commissioner-approved rescission letter is delivered to buyer, and buyer fails to accept offer. (Corp. C. 25507). Willful violations may constitute crimes. (Corp. C. 25540-25542). Commissioner of Corporations has power to institute actions for injunction, receivership, etc.; bring class action on behalf of persons injured; make investigations, take possession of records, subpoena, and otherwise; Commissioner may issue desist and refrain orders. (Corp. C. 25530-25534).

Broker-Dealers.

Broker-dealer may not effect transactions in, or induce purchases or sales of, securities unless Commissioner of Corporations has issued certificate authorizing broker-dealer to act (Corp. C. 25210). Broker-dealers registered under Securities Exchange Act of 1934 who have no previously denied or revoked certificates and who have no place of business in California and direct offers to sell or buy only to specified customers are exempt from broker-dealer certificate requirements. (Corp. C. 25200). Real estate broker licensed by Real Estate Commissioner is exempt from broker-dealer certificate requirement when engaged in transactions in any interest in any general or limited partnership, joint venture, unincorporated association, or similar organization (but not corporation) owned by no more than 100 persons and formed solely for purposes of investing in real property. (Corp. C. 25206). Requirements of certificate application are set forth in Corp. C. 25211.

Investment Advisers.

Investment adviser may not conduct business unless Commissioner has issued certificate authorizing him to act. (Corp. C. 25230). Investment advisers who have no place of business in California and: (1) Whose only clients fall into specified categories; or (2) during any period of 12 consecutive months has had fewer than six client residents of state and complies with Corp. C. 25230.1, are exempt from investment adviser certificate requirements. (Corp. C. 25202). Requirements of certificate applications are set forth in Corp. C. 25231.

Commodities.

Commissioner of Corporations regulates offer and sale of commodities and commodity contracts, as defined in Corp. C 29500 et seq.[Deering's]

Commissioner of Corporation has authority to censure, suspend, deny or revoke certificate, may establish standards with respect to training, experience, and other qualifications, may require licensed broker-dealer and investment adviser to post surety bond up to $10,000, and fidelity bond. (Corp. C. 25212, 25216, 25217, 25232, 25236, 25237). See Rules of Cal. Corporations Commissioner for extensive regulation of broker-dealers and investment advisers. (10 C.C.R. 260.200 et seq.).

Insider Trading.

See Corp. C. 25402, 25502, 25502.5, 25506 (statute of limitations), 25540(b).

Advertisements.

Unless exempted, no advertisement concerning securities sold or offered may be made unless true copy thereof first filed in Commissioner's office at least three business days prior to publication. (Corp. C. 25300). No publication may be made after Commissioner's adverse finding and notification to person involved. (Corp. C. 25302).

Uniform Simplification of Fiduciary Security Transfers Act repealed by Uniform Commercial Code. (Com'l. C. 8402-8407). See topic 3.09 Commercial Code.

3.25 STATUTE OF FRAUDS:

See topic 3.16 Frauds, Statute of.

3.26 TRUST RECEIPT SECURITY:

See category 8 Debtor and Creditor, topic 8.14 Pledges.

3.27 WAREHOUSEMEN:

Warehousemen are no longer regulated by State Public Utilities Commission. (1980, c. 1063).

Uniform Commercial Code has been adopted. (1963, c. 819, Com'l. C. 7201-7210). See topic 3.09 Commercial Code. Civil Code Division III, Part 4, Tit. III deals with deposits of goods. C.C. 1851-1857 address deposits for hire. Depositary for hire has lien upon property stored for storage charges, advances and certain insurance and other expenses. (C.C. 1856). C.C. 1880-1881.2 deal with private bulk storage of grain.

4 CITIZENSHIP

4.01 ALIENS:

Resident aliens eligible for citizenship have same rights as citizens, with exception of voting rights. Any alien may take, hold, and dispose of property, real or personal. (C.C. 671).

Sections of Labor Code providing that aliens may not hold public office or be employed by state, county or city governments, were repealed in 1970.

Property Rights.

Sections of Civil Code preventing aliens, not residing in U. S., from taking real or personal property by succession or testamentary disposition were repealed in 1974. Any alien may take, hold and dispose of property, real or personal. (C.C. 671).

5 CIVIL ACTIONS AND PROCEDURE

5.01 ACCORD AND SATISFACTION:

Accord and satisfaction governed by Civil Code and common law.

An accord is an agreement to accept, in extinction of an obligation, something different from or less than person agreeing to accept is entitled. (C.C. 1521).

Though parties to accord are bound to execute it, it does not extinguish obligation until fully executed. (C.C. 1522).

Acceptance, by creditor, of consideration of accord extinguishes obligation, and is called satisfaction. (C.C. 1523).

Part performance of obligation, either before or after breach thereof, when expressly accepted by creditor in writing, in satisfaction, or rendered in pursuance of agreement in writing for that purpose, though without any new consideration, extinguishes obligation. (C.C. 1524).

Part Payment of Disputed Sum.

In case of dispute over total money due on contract, if conceded by parties that part of money is due, debtor may pay, without condition, amount conceded to be due, leaving to other party all remedies to which he might otherwise be entitled as to any balance claimed. (C.C. 1525).

If any conditions attached to payment, this section not deemed to have limited remedies available to other party under other provisions of law on original amount claimed. (C.C. 1525).

Pleading.

Accord and satisfaction must be specially pleaded. (220 C. 402, 31 P.2d 359).

Uniform Commercial Code has been adopted with certain modifications. See category 3 Business Regulation and Commerce, topic 3.09 Commercial Code.

Novation is substitution of new obligation for existing one. (C.C. 1530).

Novation is made by substitution of new obligation between same parties with intent to extinguish old obligation; by substitution of new debtor in place of old one with intent to release latter; or by substitution of new creditor in place of old one with intent to transfer rights of latter to former. (C.C. 1531).

Novation is made by contract and is subject to general rules of contract. (C.C. 1532).

Compromise.

Common law rules govern.

5.02 ACTIONS:

There is only one form of action (C.C.P. 307[Deering's]), which is commenced when complaint is filed (C.C.P. 350[Deering's]). See also topic 5.25 Submission of Controversy.

Equity.

Substantive distinctions between legal and equitable rights and remedies are preserved. Both may be set up in same action, formal distinction of pleadings being abolished. (4 C. 6). Legal or equitable nature of cause of action determined by relief sought. (10 C.3d 665, 517 P.2d 1157).

Commencement.

See topic 5.20 Process.

Parties.

Actions must be prosecuted by real party in interest (C.C.P. 367[Deering's]), except that executor or administrator, or trustee of express trust or other person authorized by statute may sue without joining beneficiary (C.C.P. 369[Deering's]), and homeowners association may sue for enforcement of governing documents and for damages to: (1) Common areas or (2) separate interests which it is obligated to maintain or repair without joining individual owners (C.C. 1368.3, 1368.4).

Persons may join as plaintiffs in a single action if they assert any right to relief jointly, severally or in the alternative, concerning same transaction, occurrence or series of transactions or occurrences and if any question of law or fact common to all will arise in the action. Persons also may join as plaintiffs in a single action if they have a claim, right or interest adverse to defendant in property or controversy which is subject of action. (C.C.P. 378[a][Deering's]). It is not necessary that each plaintiff be interested as to every cause of action or as to all relief prayed for. (C.C.P. 378[b][Deering's]).

All persons may be joined in one action as defendants if there is asserted against them: (1) Any right to relief jointly, severally, or in alternative which arises from same transaction, occurrence or series of transactions or occurrences and if any question of law or fact common to all these persons will arise in action, or (2) claim, right, or interest adverse to them in property or controversy which is subject of action. (C.C.P. 379[a][Deering's]). It is not necessary that each defendant be interested as to every cause of action or as to all relief prayed for. (C.C.P. 379[b][Deering's]). If plaintiff is in doubt as to person from whom he is entitled to redress, he may join two or more defendants, with intent that question as to which, if any, of defendants is liable may be determined between parties. (C.C.P. 379[c][Deering's]).

Any number of lien holders may join in action to foreclose their liens. (C.C. 3149).

Person who is subject to service of process and whose joinder will not deprive court of jurisdiction shall be joined if complete relief cannot be afforded in his absence or if he claims interest in subject of action and is so situated that disposition of action in his absence may impair his ability to protect that interest or expose persons already parties to risk of double, multiple, or inconsistent liability. (C.C.P. 389[a][Deering's]). If such person cannot be joined, court must determine whether action should proceed. In making decision, court should consider extent of possible prejudice to all concerned, possibility of lessening prejudice by protective provisions, adequacy of possible judgment, and alternate remedies available to claimant if action dismissed. (C.C.P. 389[b][Deering's]).

Class Actions.

Requirements generally follow FRCP 23. (12 C.3d 447). But, more lenient regarding notice. See C.C. 1781; 184 Cal. App. 3d 1491. Dismissal of part or entire class action only on court approval.

Intervention.

Upon timely application, any person having interest in matter in litigation or in success of either party may intervene. Intervention takes place by joining plaintiff, by uniting with defendant or by asserting demand adverse to both parties, and is made by complaint filed by leave of court and served upon other parties. (C.C.P. 387[a][Deering's]). Separate provisions found in C.C.P. 389.5[Deering's] (to recover property or to determine conflicting claims thereto), C.C.P. 1250.230[Deering's] (eminent domain) and 1421 (escheat).

Interpleader.

Defendant in an action upon contract or for specific personal property may, prior to answering, apply upon affidavit and notice for court order to discharge him from liability and to substitute another party in his place, upon depositing in court amount of contract claim or property or its value. Alternatively, defendant may file verified cross complaint in interpleader, applying upon notice for order directing another party to deliver amount or value in question to specific person. (C.C.P. 386[a][Deering's]).

Whenever conflicting claims which would give rise to double or multiple liability are or may be made against person, he may bring action to compel them to interplead and litigate their claims. (C.C.P. 386[a][Deering's]). Action of interpleader may be maintained even though claims have no common origin, are not identical but are adverse to and independent of one another. (C.C.P. 386[a][Deering's]). Separate provisions relating to particular claims found in Com'l. C. 7603 (consigned goods); C.C. 3214 (public improvements); Rev. & Tax C. 4988[Deering's] (conflicting property assessments).

Joinder of Causes of Action.

Plaintiff who alleges cause of action against one or more defendants may unite with such cause any other causes which he has alone or with any co-plaintiffs against any such defendants. (C.C.P. 427.10[Deering's]).

Person filing cross-complaint may unite with cause of action asserted in cross-complaint any other causes he has against any of cross-defendants (other than plaintiff in eminent domain proceeding) whether or not such cross-defendant already is a party to action. (C.C.P. 428.30[Deering's]). Must file cross-complaint for indemnity to pursue right under case law adoption of concepts of comparative indemnity. (20 C.3d 578; 578 P.2d 899).

Consolidation or Severance.

Court may consolidate actions involving common question of law or fact and, to further convenience, expedition and economy or avoid prejudice, may order a separate trial of any cause of action or issue, preserving right of jury trial. (C.C.P. 1048[Deering's]).

Survival.

No cause of action is lost by reason of death of any person, but may be maintained by or against his executor or administrator, except exemplary damages may not be awarded against deceased. When person having cause of action dies before judgment, damages recoverable by his personal representatives are limited to damages sustained by decedent before death, including exemplary damages, but excluding damages for pain, suffering or disfigurement. (C.C.P. 377.20 et seq.[Deering's]).

Small Claims.

See category 6 Courts and Legislature, topic 6.01 Courts.

Prohibited Actions.

No cause of action arises for criminal conversation, seduction of a person over the age of consent, alienation of affections or breach of promise to marry. (C.C. 43.5).

Fraudulent promise to marry or to cohabit after marriage does not give rise to cause of action for damages. (C.C. 43.4).

Certificate of Meritorious Malpractice Action.

In most malpractice actions against architects, professional engineers or land surveyors, condition precedent to filing of action is filing of certificate under oath by plaintiff's or cross complainant's attorney that he has reviewed case, has consulted with and received opinion from knowledgeable member of profession involved that defendant or cross-defendant was or was not negligent, and has concluded that there is reasonable and meritorious cause for filing of action. (C.C.P. 411.35[Deering's]). Failure to file is ground for demurrer (C.C.P. 430.10[Deering's]) or motion to strike (C.C.P. 435[Deering's]).

Limitation of.

See topic 5.16 Limitation of Actions.

Administration.

See category 13 Estates and Trusts, topic 13.09 Executors and Administrators.

Direct Actions Against Insurer.

See category 23 Transportation, topic 23.01 Motor Vehicles, subhead Direct Actions.

5.03 APPEAL AND ERROR:

From Limited Civil Cases.

There is appellate division of superior court in every county, which determines appeals in limited civil cases. (C.C.P. 77[Deering's], 904.2[Deering's]). Appeals from small claims court result in trial de novo, and are heard by judicial officer other than one who heard original action. (C.C.P. 77[Deering's], 904.5[Deering's], 116.770[Deering's]). Upon appeal of small claims court judgment no party has right to trial by jury. (C.C.P. 116.770[b][Deering's]).

Appeal may be taken by aggrieved party from final judgment, except judgment of contempt which is final and conclusive. (C.C.P. 902[Deering's], 904.2[Deering's], 1222[Deering's]). Appeal ordinarily may not be taken from interlocutory judgment. (C.C.P. 904.2[Deering's]). In addition to judicial qualifications on “one final judgment” principle, statute specifically authorizes appeal from: Order made after appealable judgment; order changing or refusing to change place of trial; order granting motion to quash service of summons; order granting motion to stay or dismiss on ground of inconvenient forum; order granting new trial or denying motion for judgment notwithstanding verdict; order discharging or refusing to discharge attachment; order granting right to attach; order granting or dissolving injunction, or refusing to grant or dissolve injunction; order appointing receiver. (C.C.P. 904.2[Deering's]).

Appeal is taken, except in appeals from small claims court, by filing notice of appeal with clerk of trial court within 30 days after date of mailing notice of entry of judgment by clerk, or 30 days after date of service of written notice of entry by any party, or 90 days after entry of judgment, whichever is earliest. (Rule 8.751, California Rules of Court[Deering's]). Timely filing of notice of appeal is jurisdictional. Special rules regulate time where certain post-trial motions or cross-appeal involved. (Rule 8.752, California Rules of Court[Deering's]). Special rule requires liberal construction of notice on appeal from small claims court in favor of its sufficiency. (Rule 8.904, California Rules of Court[Deering's]). Underlying statute may mandate additional rules. (Rule 8.751, California Rules of Court[Deering's]).

Plaintiff in Small Claims Court May Not Appeal.

Plaintiff electing to assert claim in small claims court is bound by result; defendant with respect to plaintiff's claim, or plaintiff with respect to claim of defendant, may appeal and secure trial de novo in superior court of county where matter heard, before judicial officer other than one who heard original action. (C.C.P. 116.710[Deering's], 116.770[Deering's]). Defendant's insurer may appeal where judgment exceeds $2,500 and insurer stipulates to coverage. (C.C.P. 116.710[c][Deering's]).

Transfer of Appeals from Superior Court.

Appeal in case within original jurisdiction of superior court may be transferred from superior court or appellate division of superior court to court of appeal when transfer appears necessary to secure uniformity of decisions or settle important questions of law. (C.C.P. 911[Deering's]).

From Superior Court.

Appeal may be taken by aggrieved party from final judgment, except judgment of contempt which is final and conclusive (C.C.P. 1222[Deering's], but see topic 5.05 Certiorari, C.C.P. 1067[Deering's]) and judgment of superior court or its appellate department. (C.C.P. 904.1[Deering's], 902[Deering's]). Appeal ordinarily may not be taken from interlocutory judgment. (C.C.P. 904.1[Deering's]). Appeal may not be taken from judgment granting or denying petition for issuance of writ of mandamus or prohibition directed to superior court or judge(s) thereof which relates to matter pending in superior court except upon petition for extraordinary writ. (C.C.P. 904.1[a][Deering's]). In addition to judicial qualifications on “one final judgment” principle, statute specifically authorizes appeal from: Some interlocutory judgments and certain orders made after appealable judgment; order granting motion to quash service of summons; order granting motion to stay or dismiss on ground of inconvenient forum; order granting new trial; order denying motion for judgment notwithstanding verdict; order discharging or refusing to discharge attachment; order granting right to attach; order granting or dissolving injunction, or refusing to grant or dissolve injunction; order appointing receiver; appropriate interlocutory judgment or order made in action to redeem real or personal property from mortgage or lien; appropriate interlocutory judgment in action for partition; orders and decrees in probate actions or proceedings made appealable by Probate Code or Family Law Act; superior court judgment directing payment of monetary sanctions exceeding $5,000 and orders granting or denying special motions to strike under C.C.P. 425.16[Deering's]. (C.C.P. 904.1[Deering's]). Lesser sanction judgments may be reviewed on appeal after entry of final judgment in main action or, at discretion of court of appeal, upon petition for extraordinary writ. (C.C.P. 904.1[b][Deering's]).

Appeal is taken by filing notice of appeal, and simultaneous delivery of filing fee and any required deposit to clerk of superior court within 60 days after date of mailing notice of entry of judgment by clerk, or 60 days after date of service of written notice by any party, or 180 days after entry of judgment, whichever is earliest. (Rules 8.100, 8.104, California Rules of Court). As to appealable orders, time runs from date of entry in court minutes or date formal order filed (see Rule 8.104, California Rules of Court). Special statutes or rules regulate time for filing where certain post-trial motions, cross-appeals, or special circumstances are involved. (Rules 8.104, 8.108, California Rules of Court). Timely filing of notice of appeal is jurisdictional. Failure to simultaneously deliver fee may result in appeal dismissal. (Rules 8.100, 8.147, California Rules of Court).

Stay of Proceedings.

Appeal from trial court stays proceedings in court below on judgment or order appealed from (C.C.P. 916[Deering's]) except where appeal is from judgment for money (unless bond posted) (C.C.P. 917.1[Deering's]), judgment or order to take remedial actions in response to release or threatened release of hazardous substances (C.C.P. 917.15[Deering's]), judgment or order directing assignment or delivery of personal property or foreclosure sale (C.C.P. 917.2[Deering's]), judgment or order directing execution of instrument (C.C.P. 917.3[Deering's]), judgment or order directing sale or delivery of real property (C.C.P. 917.4[Deering's]), judgment appointing receiver (C.C.P. 917.5[Deering's]), judgment of right to attach order (C.C.P. 917.65[Deering's]), judgment containing provisions dealing with child custody, including orders for return of child to sister state or country made pursuant to Uniform Child Custody Jurisdiction and Enforcement Act (C.C.P. 917.7[Deering's]; Fam. C. 3400[Deering's]), judgment that building or place is nuisance, judgment or order directing corporation to permit inspection of books, and judgment that party usurped public office (C.C.P. 917.8[Deering's]). Where trial court orders parties to post bond but parties fail to do so, judgment or order not stayed by appeal. (C.C.P. 917.9[Deering's]). Generally see C.C.P. 917.1-917.9[Deering's] for details and exceptions as to operation of above mentioned exceptions.

Appeal does not continue attachment in force unless additional bond given by appellant. (C.C.P. 921[Deering's]).

Stay of Execution.

See category 8 Debtor and Creditor, topic 8.05 Executions.

Record on Appeal.

Appeal may be supported by clerk's transcript and original papers (judgment roll); by clerk's transcript (or appendix or joint appendix) and reporter's transcript; by superior court file; by agreed statement; or by settled statement. (Rules 8.130, 8.120, 8.124, 8.128, 8.134 and 8.137 California Rules of Court). Appeal from small claims court involves limited record and trial de novo. (Rules 8.907[Deering's], 8.913, California Rules of Court[Deering's], C.C.P. 116.770[Deering's]).

Statutory Writ to Review Certain Interlocutory Orders.

Statutes specifically provide for review by writ of some orders that may not be appealed. See C.C.P. 400[Deering's] (location of trial); 418.10 (motion to quash service, motion to stay or dismiss action).

5.04 BONDS:

"Admitted surety insurer" means corporate insurer or reciprocal or interinsurance exchange to which Insurance Commissioner has issued certificate of authority to transact surety insurance in California, as defined in Ins. Code 105[Deering's] (C.C.P. 995.120[Deering's]). Unless statute providing for bond requires execution by admitted surety insurer, bond shall be executed by two or more sufficient personal sureties or by one sufficient admitted surety insurer or by combination of sufficient personal sureties and admitted surety insurers. (C.C.P. 995.310[Deering's]). If statute provides for bond with any number of sureties, one sufficient admitted surety insurer may become sole surety on bond. (C.C.P. 995.610[Deering's]).

Neither state, nor any political subdivision thereof, nor any federal agency is required to give bond when it is party in any civil action or proceeding. (C.C.P. 995.220[Deering's]).

Justification.

When undertaking or bond is authorized or required, bond executed by personal sureties shall be accompanied by affidavit of qualification including name, occupation, residence and business address and that they are each residents and either owners of real property or householders, within state, and are each worth sum specified in undertaking or bond, over and above all their just debts and liabilities, exclusive of property exempt from execution; if undertaking or bond exceeds $5,000, affidavit must describe property, nature of affiant's interest, estimate of cash value, amount of outstanding liens and any other known cloud on title; but when amount specified in undertaking or bond exceeds $10,000, and there are more than two sureties thereon, they may state in their affidavits that surety is worth less than amount of bond and bond may stipulate that liability of surety is limited to worth of surety stated in affidavit, so long as aggregate worth of all sureties executing bond is twice amount of bond. (C.C.P. 995.520[Deering's]).

5.05 CERTIORARI:

Writ of certiorari may be denominated writ of review. (C.C.P. 1067[Deering's]).

Jurisdiction to Grant.

Writ of review may be granted by any court, except superior court (limited jurisdiction case), when there is no appeal or, in judgment of court, no plain, speedy and adequate remedy for inferior tribunal, board or officer exercising judicial functions in excess of jurisdiction. Appellate division of superior court may grant writ directed to superior court in limited civil case or in misdemeanor or infraction case. (C.C.P. 1068[Deering's]).

Procedure.

Application is made by verified petition of party beneficially interested, and court may require notice of application to adverse parties, or may grant order to show cause why writ should not be allowed, or may grant writ without notice. (C.C.P. 1069[Deering's]). Demurrer proceedings upon return available as response as well as verified answer, or both. (C.C.P. 1069.1[Deering's], 1089[Deering's]; Judicial Council Rules).

Writ must command party to whom directed to certify fully to court issuing writ, at time and place specified by court (in writ or order), transcript of record and proceedings for review and to desist from further proceedings in matter to be reviewed. (C.C.P. 1071[Deering's]). However, inclusion of stay of proceedings being reviewed in writ lies in discretion of issuing court. (C.C.P. 1072[Deering's]).

Writ must be served in same manner as summons in civil action, except where otherwise expressly directed by court. (C.C.P. 1073[Deering's]). See C.C.P. 413.10-

417.40[Deering's].

Review extends only to determination whether inferior tribunal, board, or officer has regularly pursued its or his authority. (C.C.P. 1074[Deering's]).

Use.

Used frequently to review convictions of contempt. Not available to review decisions of administrative agencies (11 C.3d 28); administrative mandamus is appropriate remedy (C.C.P. 1094.5[Deering's]). Certiorari not substitute for appeal or remedy to review error in nonappealable orders. (148 Cal. App. 3d 891).

5.06 CHARITABLE IMMUNITY:

See topic 5.09 Damages.

5.07 COMMISSIONS TO TAKE TESTIMONY:

See topic 5.11 Depositions and Discovery.

5.08 COSTS:

In general, costs are allowed, as of course, to prevailing party. (C.C.P. 1032[Deering's]). Costs are generally within court's discretion when prevailing party recovers judgment that could have been rendered in court of lesser jurisdiction. (C.C.P. 1033[Deering's]). When party recovers in superior court (limited jurisdiction case) amount less than small claims limit, but suit could not have been brought in small claims court, costs limited to filing fee, service, and if specifically allowed by law, reasonable attorney fees. (C.C.P. 1033[b][Deering's]). Prevailing party in civil action entitled among his costs to expenses of jury, and cost of depositions unless same were unnecessary. (C.C.P. 1033.5[Deering's]).

Security for Costs.

On defendant's motion, nonresidents and foreign corporations, as plaintiffs, may be required to give bond for costs. (C.C.P. 1030[Deering's]).

In shareholder's derivative action, plaintiff may be required to furnish security for costs and attorney's fees, of such nature and amount not exceeding $50,000 as court may direct, upon motion of corporation or of defendant who is officer or director of corporation. Security may be ordered for corporation or for individual defendant if movant shows that there is no reasonable probability that action against it will benefit corporation or its security holders. Security may also be ordered as to individual defendant if he shows that he did not participate in transaction in any capacity. (Corp. C. 800).

In action against licensed architect, engineer, building designer or land surveyor upon motion and supported by affidavit showing claim is frivolous, plaintiff may be required to furnish undertaking of not to exceed $500 as security for costs except for actions for injury, death or small claims court actions. (C.C.P. 1029.5[Deering's]).

In personal injury action against physician, surgeon, other medical and dental professionals for professional negligence, plaintiff may be required to furnish security for costs in sum not to exceed $500 for each defendant. (C.C.P. 1029.6[Deering's]).

5.09 DAMAGES:

Common law generally prevails, various statutes provide for imposition of exemplary damages and penal damages. (C.C. 3294-95, 3345-48).

Exemplary Damages.

May be awarded in actions for breach of noncontractual obligations if proven by clear and convincing evidence that defendant guilty of oppression, fraud or malice. (C.C. 3294[a]). Employer not liable for employee's acts except in specified circumstances. (C.C. 3294[b]). Public Benefit Trust Fund allocation required in cases filed after Aug. 16, 2004 effective until July 1, 2006. (C.C. 3294.5).

Penal Damages.

Provided for, or may be awarded, in cases involving: Unfair or deceptive practices against senior citizens or disable persons or injuries to timber. (C.C. 3345, 3346).

Comparative Fault.

"Pure" form adopted. Liability for personal or property damage assigned in proportion to fault of persons whose negligence caused damage. (13 C.3d 804, 532 P.2d 1226, 119 C. Rptr. 858). Comparative fault applies to government tort liability. (68 Cal. App. 3d 481, 137 C. Rptr. 512). Regarding apportionment of damages among joint tortfeasors, and setoff principles, see 148 Cal. App. 3d 963, 196 C. Rptr. 417 and 26 C. 3d 131, 604 P.2d 208, 161 C. Rptr. 87, respectively.

Principles of comparative fault apply to strict product liability cases. Defendant tortfeasor has equitable cause of action for partial indemnity against other tortfeasors to enforce contribution from them in proportion to their contributing fault. (20 C. 3d 578, 578 P.2d 899, 146 C. Rptr. 182). Equitable principle of apportionment of fault among joint tortfeasors applies between negligent defendant and strictly liable defendant. (21 C. 3d 322, 579 P.2d 441, 146 C. Rptr. 550). However, for causes of action arising after 1986, liability of each defendant for noneconomic damages is several, not joint. (9 Cal. App. 4th 70, 11 C. Rptr.2d 454).

In actions for personal injury, property damage, or wrongful death, each tortfeasor's liability for noneconomic damages is several only and not joint. "Economic damages" means objectively verifiable monetary losses. (C.C. 1431.2).

Loss of Consortium.

Each spouse has action for loss of consortium caused by negligent or intentional injury to other by third party. (12 C.3d 382, 525 P.2d 669, 115 C. Rptr. 765). Children have no action for loss of parental consortium caused by third party's negligence. (19 C.3d 441, 563 P.2d 858, 138 C. Rptr. 302).

Doctrine of charitable immunity does not apply. (37 C.2d 356, 232 P.2d 241).

Guests.

Negligent defendant driver is not protected by "guest statutes". (8 C.3d 855, 506 P.2d 212, 106 C. Rptr. 388).

Liquidated Damages.

Except as set forth below, provision in contract liquidating damages for breach of contract is valid unless party seeking to invalidate provision establishes that provision was unreasonable under circumstances at time of contract. (C.C. 1671[b]). Provision in contract liquidating damages for breach of contract is void under following circumstances unless parties agree upon amount and it would be impracticable or extremely difficult to fix actual damage: (1) Where liquidated damages are sought to be recovered from party to contract for retail purchase, or rental of personal property or services, primarily for personal uses; or (2) where liquidated damages are sought by party leasing dwelling. (C.C. 1671[c]).

Uniform Contribution Among Tortfeasors Act.

Not adopted.

Sovereign Immunity.

Abrogated by “California Tort Claims Act of 1963”. (Govt. C. 814-818.9).

See also category 13 Estates and Trusts, topic 13.05 Death, subhead Action for Wrongful Death.

5.10 DECLARATORY JUDGMENTS:

See topic 5.15 Judgments, subhead Declaratory Judgments.

5.11 DEPOSITIONS AND DISCOVERY:

Within State.

Testimony by deposition may be taken in action after service of summons and in special proceeding after service of petition or appearance of defendant or respondent. Leave of court required if plaintiff notices deposition within 20 days of service of summons or appearance of defendant. (C.C.P. 2025.210[b][Deering's]). Depositions before action or pending appeal allowed with leave of court to perpetuate testimony. (C.C.P. 2035.010[Deering's], 2036.010-030[Deering's]).

Outside of State for Use Within State.

Proceedings for depositions outside state for use within state ordinarily same as those for depositions to be taken within state. Where necessary or convenient, court issues commission, letters rogatory, or letter of request. (C.C.P. 2026.010[Deering's], 2027.010[Deering's]). In foreign state or country depositions may be taken on notice before any person authorized to administer oaths, any person or officer appointed by commission or under letters rogatory, anyone not disqualified by C.C.P. 2025.320[Deering's] or C.C.P. 2025.340(b-f)[Deering's], or anyone agreed to by parties. (C.C.P. 2027.010[d][Deering's]). Person before whom deposition is to be taken may be designated in notices or commissions either by name or descriptive title and letters rogatory or letters of request may be addressed: “To the Appropriate Judicial Authority in [name of foreign nation]”. (C.C.P. 2027.010[d][Deering's]). Within U.S., or its territories or possessions, depositions may be taken before any person authorized to administer oaths or before person appointed by court. Parties may request clerk of court to issue commission authorizing deposition in another state or place. Commission shall request that process issue in place where examination to be held, requiring attendance and production of documents. Clerk shall issue commission without noticed motion or court order. Commission shall contain terms required by foreign jurisdiction, and if court order required by foreign jurisdiction, order may be obtained by ex parte application. (C.C.P. 2026.010[d][Deering's]).

Within State for Use Outside State.

Where by mandate, writ, letters rogatory, letters of request, commission, or by notice or agreement deposition of witness within state for use in action outside state is required, deposition may be taken and attendance compelled in same manner as in actions within state. (C.C.P. 2029.010[Deering's]).

Proceedings upon Oral Examination.

Party may take oral deposition of any person in this state on serving upon every other party previous written notice of date, time and place of examination and name, address and telephone number of each person to be examined if known, otherwise general description sufficient to identify person, class, or group to which person belongs. If documents are sought, materials or categories must be described with reasonable particularity. If deposition to be video or audio taped or recorded by stenographic instant visual display, notice must so state and be given to deposition officer. (C.C.P. 2025.220[a][5][Deering's]). Except for unlawful detainer actions, such notice must be given before deposition by at least ten days, plus five days if notice is given by mail to address located within state of California, or ten days if address is outside state of California but within U.S., or 20 days if address is located outside U.S. (C.C.P. 1013[Deering's], 2025.270[a][Deering's]). In unlawful detainer actions, notice must be given before deposition by at least five days but not later than five days before trial. (C.C.P. 2025.270[b][Deering's]). For good cause shown, court may extend or shorten time. (C.C.P. 2025.270[c][Deering's]). No order for taking of deposition is necessary.

Compelling Attendance of Witnesses.

Subpoena must be served upon nonparty witness to compel his attendance, and must be issued by clerk of superior court of county wherein attendance is pending or by attorney of record for party. (C.C.P. 1986[Deering's], 2020.210[Deering's], 2025.280[b][Deering's]). Any person other than deponent may attend by telephone or other electronic means. Nonparty may appear at his deposition by telephone if court finds good cause and no prejudice to any party. Party deponent must appear in person. (C.C.P. 2025.310[Deering's]). Except as otherwise ordered, deposition of natural person, whether or not party, shall be taken either within 75 miles of deponent's residence, or within county where action is pending and within 150 miles of deponent's residence, at option of party giving notice. (C.C.P. 2025.250[a][Deering's]). Deposition of organization that is party shall be taken either within 75 miles of organization's principal executive business office in California or within county where action is pending and within 150 miles of that office, at option of party giving notice. Deposition of nonparty organization shall be taken within 75 miles of organization's principal executive business office in California. If no executive offices in California, within 75 miles of any business office in California or within county where action is pending. (C.C.P. 2025.250[b][c][d][Deering's]).

Examination of Witnesses.

Examination and cross-examination of deponents may proceed as permitted at trial. (C.C.P. 2025.330[d][Deering's]). Deponent may be examined on any matter not privileged, which is relevant to subject matter of action or pending motion, if matter is admissible or appears reasonably calculated to lead to discovery of admissible evidence. (C.C.P. 2017.010[Deering's], 2025.010[Deering's]).

Deposition may not be suspended without stipulation of all parties present, and deponent unless any party or deponent demands suspension in order to move for protective order. (C.C.P. 2025.470[Deering's]).

If witness refuses to answer any question or produce any document specified in notice, party seeking discovery may apply for order compelling answer or production of documents if motion made within 60 days after completion of record of deposition, and accompanied by declaration stating facts showing reasonable and good faith attempt at informal resolution of each issue presented by motion. (C.C.P. 2025.480[Deering's]).

Video and/or recording of depositions is permitted if notice states that proceedings will be videotaped, or if parties agree. Stenographic transcript made simultaneously is official record, and court may permit use of videotape at trial. (C.C.P. 2025.220[a][6][Deering's], 2025.340[m][Deering's], 2025.510[g][Deering's], 2025.620[Deering's], 2025.330[Deering's]).

Fees.

Any person subpoenaed and required to give deposition is entitled to witness fees and mileage, as if subpoenaed and required to testify before court. (C.C.P. 1986.5[Deering's], 2020.230[Deering's]). Court may set fees of expert witnesses in accordance with prescribed guidelines. (C.C.P. 2034.470[Deering's], Govt. C. 68092.5).

Deposing Organizations.

Partnership, association, governmental agency, or public or private corporation may be named as deponent, in which case subpoena or notice shall specify subject of deposition. Organization is then required to designate and produce officers or employees most qualified to testify on its behalf on specified subject matter. Subpoena shall advise nonparty organization of duty to make such designation and shall describe with particularity matters on which examination is requested. (C.C.P. 2025.230[Deering's]).

Return.

Deposition, when completed, is made available to witness for 30 days for reviewing, correcting and signing, unless parties agree to different period. (C.C.P. 2025.520[Deering's]). For good cause shown, court may shorten time. Original transcript is retained by attorney for party who noticed deposition. If deponent fails or refuses to sign, deposition shall have same force and effect as though signed. It is not filed in court unless contents become relevant to trial. Rough draft of transcript may not be certified or cited at any time to rebut certified transcript of deposition. (C C.P. 2025.520[f][Deering's], 2025.530[d][Deering's], 2025.540[b][Deering's], 2025.550[Deering's]).

To Perpetuate Testimony.

Applicant may file verified petition in superior court of county of residence of any expected adverse party or if no expected adverse party is California resident, in superior court of county where action may be filed. Petition must show that applicant expects to be party, or expects successor in interest to be party, to action cognizable in courts of this state but is presently unable to cause it to be brought, name and address of witnesses to be examined and expected adverse parties, facts to be established and reasons to perpetuate, names and addresses of expected adverse parties subject matter of expected action, and interest therein. Court must consider if present discovery could be conducted by successor in interest instead of petitioner. Notice to expected adverse parties required. (C.C.P. 2035.010[Deering's], 2035.030[Deering's], 2035.040[Deering's], 2035.050[Deering's]).

If deposition is taken to perpetuate testimony, it may be used against any party named in petition as expected adverse party in any subsequent action involving same subject matter. (C.C.P. 2035.060[Deering's]).

Use of Deposition.

At trial or other hearing, any part or all of deposition, so far as admissible under rules of evidence, may be used against any party who was present or represented at taking of deposition or who had due notice thereof, as follows: (1) Deposition may be used to contradict or impeach deponent who testifies as witness; (2) deposition of party, of officer or agent of party, or of person for whose immediate benefit action is brought, may be used by adverse party for any purpose; and (3) deposition of witness may be used for any purpose if witness is unavailable, where exceptional circumstances exist, or when witness resides more than 150 miles from place of trial. If party introduces only part of deposition, any other party may introduce any other parts. (C.C.P. 2025.620[Deering's]).

Substitution of parties does not affect right to use depositions previously taken; and, when action in any court of U.S. or of any state has been dismissed and another action involving same subject matter is afterward brought between same parties or their representatives or successors in interest, all depositions lawfully taken and duly filed in former action may be used in latter as if originally taken therefore. (C.C.P. 2025.620[g][Deering's]).

For depositions taken after Jan. 1, 1998, copy of transcript or other recording of testimony shall be made available to any person requesting copy upon payment of reasonable fee unless protective order issued by court. Subject to restrictions of C.C.P. 2025.320[Deering's], notice to deponent required if transcript not part of court record. (C.C.P. 2025.570[Deering's]).

5.12 EQUITY:

See topic 5.02 Actions.

5.13 EVIDENCE:

See topic 5.11 Depositions and Discovery.

Witnesses.

Except as otherwise provided by statute, every person, irrespective of age, is qualified to be witness except person incapable of expressing himself or herself concerning matter so as to be understood directly or through interpretation, or person incapable of understanding duty of witness to tell truth. In any proceeding held outside presence of jury, court may reserve challenges to competency of witness until conclusion of direct examination of that witness. (Evid. C. 700-01[Deering's]).

See also topic 5.11 Depositions and Discovery.

Privileged Communications.

Attorney cannot, without consent of client, be examined as to any confidential communication made by client to attorney, or attorney's advice given thereon, in course of professional employment. Communication is privileged even if transmitted by facsimile, cellular display or other electronic means. (Evid. C. 950-55[Deering's]). Attorney-client privilege does not apply when: (1) Services of lawyer sought or obtained to aid crime or fraud (Evid. C. 956[Deering's]); (2) communication relevant to an issue between parties all of whom claim through deceased client (Evid. C. 957[Deering's]); (3) communication relevant to issue of breach of duty arising out of lawyer-client relationship (Evid. C. 958[Deering's]); (4) communication relevant to issue of intention or competence of client executing an attested document of which lawyer is an attesting witness, or concerning execution or attestation of document (Evid. C. 959[Deering's]); (5) communication relevant to issue concerning intention of deceased client with respect to deed, will or other writing executed by client purporting to affect interest in property (Evid. C. 960[Deering's]); (6) communication relevant to validity of deed, will or other writing executed by deceased client purporting to affect interest in property (Evid. C. 961[Deering's]); (7) communication relevant in civil proceeding between former joint clients (Evid. C. 962[Deering's]); (8) communication relevant to client act likely to result in death or substantial bodily harm (Evid. C. 956.5[Deering's]). This and other privileges may be waived. (Evid. C. 912[Deering's]).

Penitent may refuse to disclose communication made in confidence to priest, minister, religious practitioner, or similar functionary or religious organization who under religious order is authorized to hear communication and has duty not to disclose it. (Evid. C. 1030-34[Deering's]).

Physician cannot, without consent of patient, disclose information obtained during examination and diagnosis. (Evid. C. 990-992[Deering's]). This privilege does not apply in proceeding to recover damages on account of conduct of patient if communication is relevant to issue concerning condition of patient and good cause is shown for disclosure. (Evid. C. 999[Deering's]). This privilege also does not apply in other situations, including will contests or any actions after death of patient involving validity of any instruments executed by patient conveying or transferring real or personal property, as to matters bearing on physical or mental condition of patient when placed in issue in litigation. (Evid. C. 990-1007[Deering's], 1010-

1026[Deering's]).

Psychotherapist, including sexual assault counselor-victim, domestic violence counselor-victim, family and marriage counselors, and social workers cannot disclose information without patient consent. (Evid. C. 1010 et seq.[Deering's]). No psychotherapist has privilege when patient is child under 16 and psychotherapist has reasonable cause to believe that patient has been victim of crime and that disclosure is in best interests of child. (Evid. C. 1027[Deering's]).

Public officer cannot be examined as to communications made to him or her in official confidence when public interest would suffer by disclosure. (Evid. C. 1040[Deering's]). Privilege for identity of informer is granted if disclosure is against public interest. (Evid. C. 1041[Deering's]). When party in criminal proceeding demands disclosure of informer's identity, hearing may be had outside presence of jury to determine whether nondisclosure will deprive defendant of fair trial. (Evid. C. 1042[Deering's]).

Person connected with or employed on newspaper, magazine, or other periodical publication, press association, wire service, radio or television station cannot be adjudged in contempt for refusing to disclose source of any information procured for and used for news or news commentary purposes, or for failing to disclose any unpublished information obtained or prepared in gathering, receiving or processing such information. (Evid. C. 1070[Deering's]). Evid. Code 1070[Deering's] does not preclude court from holding newspaper reporter in contempt for failure to disclose names of attorneys and court attaches who gave him information in violation of pre-trial publicity order. (22 Cal. App. 3d 60, 99 C.Rptr. 342).

Person has privilege to refuse to disclose tenor of vote at public election where voting by secret ballot unless he voted illegally or previously made unprivileged disclosure. (Evid. C. 1050[Deering's]).

If owner of trade secret or agent or employee claims privilege, owner can refuse to disclose secret, and prevent another from disclosing it, if will not tend to conceal fraud or work injustice. (Evid. C. 1060[Deering's]). Owner of trade secret may seek protective order in criminal proceeding. (Evid. C. 1061[b][Deering's], 1062[Deering's]).

Husband and Wife.

Married person has privilege not to testify against spouse in any proceeding, and not to be called as a witness in any proceedings in which spouse is a party. Witness spouse holds privilege. (Evid. C. 970-973[Deering's]). Both spouses hold privilege during and after marriage to refuse to disclose, and to prevent another from disclosing, confidential communication made during marriage. (Evid. C. 980[Deering's]). Witness privilege and communication privilege do not apply in: (1) Proceeding brought by one spouse against another; (2) spouse's commitment or competency proceedings; (3) certain juvenile court proceedings; (4) proceedings in which spouse charged with crime against other spouse or child, parent, relative, or cohabitant of either or with crime against third person committed in course of crime against spouse; (5) bigamy; (6) proceeding in which spouse is charged with willfully omitting to provide minor child with necessary food, clothing, shelter or medical attendance, abandonment of minor child, or failing to provide support for spouse; (7) child, family, or spousal support proceedings. (Evid. C. 972[Deering's], 982-986[Deering's]). Marital communication privilege does not apply: (1) When communication was made to aid crime or fraud (Evid. C. 981[Deering's]); (2) in proceeding between surviving spouse and person who claims through deceased spouse (Evid. C. 984[b][Deering's]); (3) in criminal proceeding in which communication is offered in evidence by spouse defendant. (Evid. C. 987[Deering's]). For exception in case of enforcement of support obligation, see Fam. C. 4930[Deering's].

Communications or Transactions with Persons Since Deceased.

Dead Man's Statute abolished. Evidence of statement by deceased is not made inadmissible by hearsay rule if offered against plaintiff in action for wrongful death. (Evid. C. 1227[Deering's]).

Evidence of statement is not made inadmissible by hearsay rule when offered in action upon claim or demand against estate of declarant if statement was made upon personal knowledge of declarant at time when matter had been recently perceived by him and while his recollection was clear. (Evid. C. 1261[a][Deering's]).

Evidence of statement is inadmissible under this section if statement was made under circumstances such as to indicate its lack of trustworthiness. (Evid. C. 1261[b][Deering's]).

Self-Incrimination.

Privilege against to extent granted by state (Cal. Const., Art. 1, §15, cl. 6) or federal constitution (Evid. C. 940[Deering's]). Witnesses in felony case may be compelled to testify upon grant of immunity. (P. C. 1324).

Compelling Attendance.

See topic 5.11 Depositions and Discovery.

Adverse Witnesses.

Adverse party or person with adverse interest may be called by party to action and examined as if under cross-examination. (Evid. C. 776[Deering's]).

Electronically Store Information

Subpoena in civil proceeding may require production of electronically stored information (C.C.P. 1985.8[Deering's]). When electronically stored information produced subject to claim of privilege or protection as attorney work product party making claim may notify party receiving information of claim and party so notified shall sequester information and either return information or submit information under seal to court for determination (C.C.P. 2031.285[Deering's]).

5.14 INJUNCTIONS:

Injunctions are governed by Code of Civil Procedure and Rules of Court.

Injunction may issue to protect rights in accordance with generally established principles of equity which have been substantially incorporated into statute and also may be granted in accordance with various statutory provisions. (C.C. 3420 et seq., C.C.P. 525 et seq.[Deering's]).

Jurisdiction.

Temporary restraining orders and preliminary and final injunctions may be granted by superior court. (Const., Art. VI, §10). Superior courts may issue temporary restraining orders and preliminary injunctions to take accounts, and to appoint receivers where necessary to preserve property rights of any party to action of which court has jurisdiction; and to appoint receiver and to make any order or perform any act pursuant to California Enforcement of Judgments Law. (C.C.P. 86[a][8][Deering's]).

Prerequisites.

Injunctions may be provisional or final. (C.C. 3420).

Injunction may be granted when it is shown that applicant is entitled to relief restraining commission or continuance of act; when commission or continuance of some act during litigation would produce waste, or great or irreparable injury, to party; when party is doing, or threatens, or is about to do some act in violation of rights of another party respecting subject of action tending to render judgment ineffectual; when pecuniary compensation would not afford adequate relief or would be extremely difficult to ascertain; where necessary to prevent multiplicity of judicial proceedings; where obligation arises from trust (C.C.P. 526[Deering's]); to prevent harassment or domestic violence (C.C.P. 527.6[Deering's]) or to enjoin concerted acts of violence (C.C.P. 527.7[Deering's]).

Injunctions may also be granted in number of specific instances provided for by statute, e.g., breach of collective bargaining agreements (Lab. C. 1126[Deering's]); labor disputes (C.C.P. 527.3[Deering's] and Lab. C. 1116[Deering's]); nuisance (C.C.P. 731[Deering's]); unfair competition (Bus. & Prof. C. 17203[Deering's]); to protect trademarks, tradenames and business reputation (Bus. & Prof. C. 14330[Deering's], 14340[Deering's], 14402[Deering's], 14493[Deering's]).

Final injunction may be granted where pecuniary compensation is inadequate or difficult to ascertain, to avoid multiplicity of suits or where obligation arises from trust. (C.C. 3422; C.C.P. 526[Deering's]).

Injunctive relief may not be granted: To stay judicial proceedings in federal court, or state court except to prevent multiplicity of such proceedings; to stay proceedings in another state upon judgment of court of that state; to prevent breach of contract (other than certain written contracts involving unique personal services) which could not be specifically enforced; to prevent exercise of public or private office; to prevent legislative act by municipal corporation (C.C. 3423; C.C.P. 526[Deering's]) or to enforce penalty or forfeiture except in case of nuisance or unfair competition (C.C. 3369; Bus. & Prof. C. 17202[Deering's]). It may not be granted to prevent execution of public statute, unless statute unconstitutional. (11 C.3d 842, 523 P.2d 682).

Procedure.

Preliminary injunctions and temporary restraining orders may be granted upon verified complaint or affidavit if they show sufficient grounds. (C.C.P. 527[a][Deering's]). Preliminary injunction may not be obtained without notice to opposite party. Temporary restraining order ordinarily requires notice to other party but may be granted without notice upon showing by affidavit or verified complaint that great or irreparable injury would result prior to hearing on notice and good faith effort made to inform opposition, or other specific good reason. (C.C.P. 527[c][Deering's]). (Court rules in some counties require that notice be given to opposing counsel before issuance of temporary restraining order in all cases.) If temporary restraining order granted without notice, matter must be made returnable on notice or order to show cause within 15 days or, if good cause, 22 days from date of order. (C.C.P. 527[a][Deering's]). Injunction granted without notice may be dissolved or modified on application by party enjoined. (C.C.P. 532[Deering's], 533[Deering's]).

Labor Disputes.

Granting of temporary restraining orders and injunctions in labor disputes is limited by statute. (C.C.P. 527.3[Deering's]).

Bond.

On granting preliminary injunction, except when granted upon application of state, county or municipal corporation, or to either spouse in action against other for dissolution or separate maintenance, court must require written undertaking on part of applicant with sufficient sureties, to effect that he will pay to party enjoined such damages as such party may sustain by reason of injunction if court finally decides that applicant was not entitled thereto. (C.C.P. 529[Deering's]). Regarding construction projects, see C.C.P. 529.1[Deering's]. Undertaking on temporary restraining order is not required by C.C.P. 529[Deering's] (36 Cal. App. 3d 321, 111 C. Rptr. 658) but may in discretion of court be required.

5.15 JUDGMENTS:

See also category 8 Debtor and Creditor, topics 8.05 Executions and 8.06 Exemptions.

Judgment by Default.

If defendant in action upon contract or judgment for recovery of money or damages only, fails to plead or move within specified time from date of service, judgment by default may be entered by clerk or judge upon written application including interest and costs and in certain cases, attorney's fees. (C.C.P. 585[a][Deering's]). In other classes of actions, after entry of default, application supported by evidence must be made to court for relief sought in complaint. (C.C.P. 585[b][Deering's]). Where service is by publication, application for judgment must in all cases be made to court and proof of allegations in complaint is required. If defendant is not California resident, plaintiff shall be examined respecting payments made to plaintiff. Where service is by publication and affects title to or possession of real property, no judgment shall be rendered only upon mere occupancy, unless said occupancy shall have continued for time necessary to confer title by prescription. Where plaintiff bases his claim upon paper title, court shall require evidence establishing plaintiff's equitable right to judgment. (C.C.P. 585[c][Deering's]). Entry of default judgment may be obtained on cross-complaint if judgment properly awardable on cross-complaint and separate judgment on cross-complaint would not substantially delay final disposition. (C.C.P. 585[e][Deering's]). Court may permit use of affidavits in lieu of personal testimony as to all proof required. (C.C.P. 585[d][Deering's]). For further information on default judgments, see C.C.P. 585-587.5[Deering's].

Judgment by confession without action may be entered in following manner in any court having jurisdiction for amount due (C.C.P. 1132[Deering's]): statement in writing must be made, signed and verified by defendant, to following effect: (1) It must authorize entry of judgment for specified sum; (2) if it be for money due or to become due it must state concisely facts out of which indebtedness arose and show that sum confessed therefor is justly due or to become due; (3) if it be for purpose of securing plaintiff against contingent liability it must state concisely facts constituting liability and show that sum confessed does not exceed same (C.C.P. 1133[Deering's]). Judgment will be entered by clerk of court upon filing of such statement with endorsement upon it and payment of fees by plaintiff. (C.C.P. 1134[Deering's]).

Judgment by confession shall be entered only if attorney independently representing defendant signs certificate that he has examined proposed judgment and has advised defendant with respect to waiver of rights and defenses under confession procedure and has advised defendant to utilize such procedure. Certificate must be filed with statement required to be filed that authorizes entry of judgment by confession. (C.C.P. 1132[Deering's]).

See also infra, subhead Foreign Judgments.

Judgments on Pleadings.

Party may move for, or court on own motion may grant, judgment on pleadings. Grounds are failure to state cause of action or sufficient defense or lack of subject matter jurisdiction. (C.C.P. 438[Deering's]).

Declaratory Judgments.

In case of actual controversy relating to legal rights and duties of parties relating to written instrument excluding will or trust, or under contract, or who desire declaration of rights or duties with respect to one another, judgment giving declaratory relief may be had whether or not there has been any breach of obligation. Original action or cross complaint may be filed in superior court. In granting such relief court can determine any question of construction or validity arising under instrument or contract which is basis for action. Such declaration has force of final judgment. (C.C.P. 1060[Deering's]).

Summary judgment may be ordered, in whole or in part, by superior court in all proceedings where plaintiff claims there is no defense or defendant claims action has no merit and there is no triable issue as to any material fact. (C.C.P. 437c[a][Deering's]). Summary judgment should be granted if there is no triable issue as to any material fact and moving party is entitled to judgment as matter of law. (C.C.P. 437c[c][Deering's]). Court will consider all evidence submitted unless timely objection is made. (C.C.P. 437c[Deering's]).

Motion may be made 60 days after opposing party's general appearance, or at earlier time upon court order, but must be heard no later than 30 days before trial, except for good cause. Minimum of 75 days notice is required. Additional five days notice required if notice is served by mail within California. Extra ten days is added if mailing is outside California but within U.S., 20 days is added if place of address is outside U.S. and two court days are added if notice is by facsimile transmission or overnight delivery. (C.C.P. 437c[a][Deering's]).

Motion shall be supported by affidavits, declarations, depositions, admissions, and answers to interrogatories. Supporting papers must set forth a separate statement of material facts that are contended to be undisputed and followed by reference to supporting evidence. Opposing papers must respond to moving party's contentions and must separately set forth material facts contended to be in dispute. Any opposition to motion shall be served and filed not less than 14 days and reply not less than five days preceding hearing date unless court for good cause orders otherwise. Motion shall be granted if no triable issue of material fact and movant entitled to judgment. (C.C.P. 437c[Deering's]).

Summary Adjudication.

Party may move for summary adjudication as to one or more causes of action, one or more affirmative defenses, one or more claims for damages, or one or more issues of duty. (C.C.P. 437c[f][1][Deering's]).

Consent judgment may be entered on stipulation of parties. (13 C. 191).

Offer of Judgment.

Any party may serve written offer upon any other party to allow judgment to be taken against offering party in accordance with terms and conditions stated in offer. Offer must take place not less than ten days before trial or arbitration pursuant to C.C.P. 1281[Deering's] or 1295[Deering's]. If offer is accepted, offer with proof of acceptance shall be filed and judgment shall be entered or proof of acceptance filed with arbitrator. If offer is not accepted before trial or within 30 days of its making, whichever occurs first, offer is deemed withdrawn and cannot be introduced in evidence. If defendant's offer is not accepted and plaintiff's judgment or award is not more favorable than defendant's offer, plaintiff may not recover postoffer costs and must pay defendant's costs from time of offer and court or arbitrator in its discretion may order plaintiff to pay defendant's costs from date of complaint and for experts. If plaintiff's offer is not accepted and defendant does not obtain judgment or award more favorable than offer, court or arbitrator in its discretion may order defendant to pay for plaintiff's experts in addition to plaintiff's costs. If offer made by defendant is not accepted and plaintiff fails to obtain more favorable judgment or award, defendant's costs from time of offer are deducted from plaintiff's award. If costs exceed amount of plaintiff's judgment or award, net difference awarded to defendant and judgment or award entered accordingly. Offer of judgment or award does not apply to plaintiffs in eminent domain actions, enforcement actions by state Attorney General, district attorney or city attorney acting as public prosecutor, or labor arbitrations under Gov't. C. 3512[Deering's]. (C.C.P. 998[Deering's]).

Entry.

Judgment must be entered by clerk within 24 hours after verdict if trial by jury regardless of whether judgment notwithstanding verdict is pending. Judgment is entered immediately after bench trial. Judgment is ineffectual for any purpose until entered. (C.C.P. 664[Deering's]).

Vacation or Modification.

Party may move court to vacate or modify judgment on ground that it was entered on erroneous legal basis, is not supported by facts or by special verdict, or it was taken through mistake, inadvertence, surprise or excusable neglect of party or counsel. (C.C.P. 663[Deering's], 663a[Deering's], 473[Deering's]).

Lien.

Entry of judgment in court by which rendered does not create any lien, but abstract of judgment or decree of any court of record of state or of United States, certified by clerk of court, may be recorded with recorder of any county and from such recording judgment or decree becomes lien on all nonexempt real property of judgment debtor in county, then owned by him or acquired before lien expires. (C.C.P. 697.310-697.410[Deering's]). Certified copies of judgments may be acceptable in specified cases. See C.C.P. 697.320[Deering's] (support payments); 697.320(a), 667.7 (judgment against health care provider); and 697.320(a), 697.330 (worker's compensation awards). Judgment lien on certain types of business personal property also available. (C.C.P. 697.510-697.740[Deering's]). Abstract of judgment or decree of court being recorded must contain all of following: (a) Title of court where judgment or decree is entered and cause and number of action; (b) date of entry of judgment or decree and of any renewals of judgment or decree and where entered in records of court; (c) name and last known address of judgment debtor and address at which summons was either personally served or mailed to judgment debtor or his attorney of record; (d) name and address of judgment creditor; (e) amount of judgment or decree as entered or last renewed; (f) social security and drawer's license number of judgment debtor if known and if not known that fact shall be indicated; (g) whether stay of enforcement has been ordered by court and, if so, date stay ends; (h) date of issuance of abstract. Form for liens prescribed by Judicial Council. Judgment debtor receives automatic exemption from lien on real property for debtor's real property dwelling. (C.C.P. 704.710-704.850[Deering's]). If judgment debtor has recorded declaration of homestead he receives additional exemptions. Judgment debtor must own interest in property and reside there to be eligible for declared homestead status. (C.C.P. 704.910-704.995[Deering's]). Judgment exceptions do not apply, if judgment to be entered is for foreclosure of mortgage, deed of trust, or other lien or encumbrance on property. (C.C.P. 703.010[Deering's], 688.030[Deering's]). Lien continues for ten years unless enforcement of judgment stayed on appeal or by execution of sufficient undertaking. (C.C.P. 697.310[b][Deering's], 697.320[b][Deering's]).

Where property has been attached, lien of judgment, abstract of which is properly recorded, relates back to date of attachment. (C.C.P. 697.020[Deering's]).

Exempt Property from Satisfaction of Judgment: (a) Motor vehicles—equity of $2,300 or less (C.C.P. 704.010[a][Deering's]); commercial motor vehicle up to $4,850 (C.C.P. 704.060[Deering's]); (b) household furnishings, appliances, and personal effects (C.C.P. 704.020[Deering's]); (c) material applied to residence repair or improvement not to exceed $2,425 (C.C.P. 704.030[Deering's]); (d) jewelry, heirlooms, and works of art not to exceed $6,075 (C.C.P. 704.040[Deering's]); (e) health aids (C.C.P. 704.050[Deering's]); (f) tools, specified personal property used in business, up to $6,075 if only used by one spouse, twice the amount, if used by both (C.C.P. 704.060[Deering's]); (g) paid earnings as follows: (1) All of paid earnings are exempt if prior to payment they were subject to earnings withholding order or wage assignment for support; (2) 75% of paid earnings that are levied upon or otherwise sought to be subjected to enforcement of money judgment are exempt if prior to payment they were not subject to earnings withholding order or wage assignment for support (C.C.P.

704.070[Deering's]) (See also C.C.P. 706.050-.052[Deering's] for restrictions on earnings withholding.); (h) deposit accounts—exemption is from $1,225-$3,650 (C.C.P. 704.080[Deering's]); (i) funds of incarcerated judgment debtor at $1,225 per spouse (C.C.P. 704.090[Deering's]); (j) life insurance policies up to $9,700 (C.C.P. 704.100[Deering's]); (k) retirement benefits, including qualified "Roth IRA's" as provided in I.R.C. 408 or 408A (C.C.P. 704.110[Deering's] and 704.115[Deering's]); (l) state employee vacation credits (C.C.P. 704.113[Deering's]); (m) unemployment benefits (C.C.P. 704.120[Deering's]); (n) disability or health insurance benefits (C.C.P. 704.130[Deering's]); (o) personal injury settlement or award (C.C.P. 704.140[Deering's]); (p) wrongful death settlement or award (C.C.P. 704.150[Deering's]); (q) worker's compensation claim and award (C.C.P. 704.160[Deering's]); (r) social services aid (C.C.P. 704.170[Deering's]); (s) relocation benefits (C.C.P. 704.180[Deering's]); (t) financial aid while attending school (C.C.P. 704.190[Deering's]); (u) family and cemetery plots (C.C.P. 704.200[Deering's]). Veterans' federal disability benefits for service connected disabilities exempt from creditors' claims and not subject to attachment, levy or seizure (C.C.P. 483.013[Deering's]).

Revival.

Judgment which has not been enforced within ten years may be revived and enforced by filing application for renewal with court within ten year period of enforceability. (C.C.P. 683.130[Deering's]). Notice of renewal shall be sent to judgment debtor. (C.C.P. 683.160[Deering's]). Application for renewal shall include: (a) Title of court where judgment is entered and number of action; (b) date of entry of judgment and of any renewals of judgment and where entered in records of court; (c) name and address of judgment creditor and name and address of judgment debtor; (d) in case of money judgment, information necessary to compute amount of judgment as renewed. In case of judgment for possession or sale of property, description of performance remaining due. (C.C.P. 683.140[Deering's]). Compliance renews judgment for ten years from date application to renew was filed. (C.C.P. 683.120[b][Deering's]). Rules differ where judgment has already been renewed, (C.C.P. 683.110[b][Deering's]), or where judgment is in installments (C.C.P. 683.130[b][1][Deering's]). Judgment for child or spousal support, including all lawful interest and penalties computed thereon, is exempt from requirements for renewal and is enforceable until paid in full. (C.C.P. 683.130[c][Deering's]). Renewal application may not be filed if judgment has been discharged in bankruptcy. (11 U.S.C. 362).

Assignment of Judgment.

Judgments are assignable, but assignee may not enforce judgment under Enforcement of Judgments Law (C.C.P. 681.010 et seq.[Deering's]) unless acknowledgment of assignment of judgment to that assignee has been filed under C.C.P. 673[Deering's] or assignee has otherwise become assignee of record (C.C.P. 681.020[Deering's]).

Satisfaction of money judgment may be entered on superior or municipal court register of actions or justice court docket upon execution returned satisfied or on acknowledgment of satisfaction filed with clerk or judge, or by court order. (C.C.P. 724.020[Deering's]).

Form for acknowledgment of satisfaction of judgment is prescribed by Judicial Council. Acknowledgment of partial satisfaction of judgment may now be required. (C.C.P. 724.110[Deering's], 724.120[Deering's]).

Actions on Judgments.

Nothing in Enforcement of Judgments Law (C.C.P. 681.010 et seq.[Deering's]) limits judgment creditor's right to bring action on judgment (C.C.P. 683.050[Deering's]). Such action must be brought within ten years. (C.C.P. 337.5[Deering's]).

Foreign Judgments.

Effect of judicial record of sister state is same in this state as in state where it was made, except that it can only be enforced here by action or special proceeding, and except, also, that authority of guardian, conservator, or committee, or of personal representative, does not extend beyond jurisdiction of government under which he was invested with his authority. (C.C.P. 1913[Deering's]).

Effect of judicial record of court of admiralty of foreign country is same as if it were record of court of admiralty of U. S. (C.C.P. 1914[Deering's]).

Judgment obtained by confession in another state, pursuant to terms of promissory note, is enforceable in California. (114 Cal. App. 272, 299 P. 738).

Uniform Enforcement of Foreign Judgments Act has not been adopted.

Uniform Foreign Money-Judgments Recognition Act enacted. (C.C.P. 1713 et seq.[Deering's]).

Enforcement of Sister State Money Judgments.

Expands scope of Foreign Money Judgments Recognition Act providing streamlined process whereby enforcement of sister state money judgments can be obtained by registering new cause of action and judgment based on sister state judgment. Specifically excludes foreign support orders. (C.C.P. 1710.10 et seq.[Deering's]).

Requires that application for entry of judgment be executed under oath and include a statement that an action in California on sister state judgment is not barred by applicable statute of limitations; a statement based on applicant's information and belief that no stay of enforcement of sister state judgment is currently in effect in sister state; a statement of amount remaining unpaid, including accrued interest computed at rate of interest applicable to judgment under law of sister state; statement that no action based on sister state judgment is currently pending in this state and has not been previously entered in California; statement of name and last known address of judgment debtor if individual; if corporation, statement of name, place of incorporation, and whether corporation is qualified to do business in California; statement of name and address of judgment creditor and properly authenticated copy of sister state judgment must be attached to application. (C.C.P. 1710.15[Deering's]). Application must be filed in office of clerk of superior court for county in which judgment debtor resides or if judgment debtor not resident, in any county of state. (C.C.P. 1710.20[Deering's]). On filing of application, clerk shall enter judgment for unpaid amount of sister state judgment plus interest and cost of filing. From time of entry, interest shall accrue at rate of interest applicable to judgment under law of sister state. (C.C.P. 1710.25[Deering's]). Judgment shall not be enforced by any means until at least 30 days after judgment creditor serves notice of entry of judgment and proof filed in accordance with C.C.P. 417.10[Deering's]. (C.C.P. 1710.45[Deering's]). Judgment may be vacated on any ground which would be defense to action in California on sister state judgment including ground that amount of interest is incorrect. (C.C.P. 1710.40[a][Deering's]).

Entry of judgment prohibited where a stay of enforcement is in effect in sister state; where an action based on sister state judgment is pending in any California court; where judgment based on sister state judgment has previously been entered in California proceeding. (C.C.P. 1710.55[Deering's]).

Revised Uniform Interstate Family Support Act adopted. (Fam. C. 4900 et seq.[Deering's]).

5.16 LIMITATION OF ACTIONS:

No limitation on actions to recover money or property deposited with bank, banker, trust company, building and loan association or savings and loan society, or evidenced by certificate issued by industrial loan company or credit union, unless such organization has become insolvent, in which case statute commences to run from beginning of liquidation (C.C.P. 348[Deering's]), or prosecutions for offense punishable by death or by imprisonment in state prison for life or for life without possibility of parole, or for embezzlement of public money including case where defendant is minor at time of commission of offense and prosecutor could have petitioned court for fitness hearing under Welf. & Inst. C. 707[Deering's]. (P. C. 799).

Uniform Commercial Code governs limitation of actions on bulk transfers (Com'l. C. 6110); breach of contract for sale (Com'l. C. 2725); and unauthorized signature on item charged against bank account (Com'l. C. 4406).

See also category 3 Business Regulation and Commerce, topic 3.09 Commercial Code.

Other actions commonly brought must be commenced within following time periods after accrual of cause of action. Action is commenced when complaint is filed. (C.C.P. 350[Deering's]).

Ten years: On bonds or coupons issued by State of California; on general obligation bonds or coupons, not secured by lien on real property, issued by political subdivision of State of California; and on judgment or decree of courts of U.S. or any state (C.C.P. 337.5[Deering's]); real property actions by state (C.C.P. 315[Deering's]); action based on latent defects or deficiency in development or improvement of real property, including action against construction surety or action for indemnity but excluding actions based on willful misconduct or concealment (C.C.P. 337.15[Deering's]). By Attorney General to enforce or impose charitable trust or to recover property or proceeds thereof. (Govt. C. 12596). After determination of liability or during period lien is in force due to recorded abstract or state tax lien, Franchise Tax Board can bring action for taxes, penalties, and interest. (Rev. & Tax C. 19371[Deering's]). Failure to register as sexual offender. (P. C. 801.1).

Eight years: For actions commenced on or after Jan. 1, 1993, or as to any actions filed prior to Jan. 1, 1999 and still pending on that date, civil action for sexual molestation of minor by any person or entity with duty of care to plaintiff shall be brought within eight years of child reaching majority or within three years of discovery of cause of action after majority, whichever is later, but no action may be commenced on or after plaintiff's 26th birthday. (C.C.P. 340.1[Deering's]). Exception for actions where person or entity on notice of unlawful sexual conduct by representative, employee, or agent, and failed to implement reasonable safeguards. (C.C.P. 340.1[b][2][Deering's]).

Seven years: Contract to render personal service, other than contract of apprenticeship, may not be enforced against employee beyond seven years from commencement of service under it unless employee is party to contract to render personal service in production of phonorecords. (Lab. C. 2855[Deering's]).

Six years: Except for bonds or other evidences of indebtedness of public district or corporation, on any bonds, notes or debentures issued by any corporation or pursuant to permit of Commissioner of Corporations, or on any coupons issued with such bonds, notes or debentures (if such bonds, notes or debentures have been issued to or held by public); on any mortgage, trust deed or other agreement pursuant to which such bonds, notes or debentures were issued (C.C.P. 336a[Deering's]); against notary public on his or her bond or in his or her official capacity, except that action based on malfeasance or misfeasance must be commenced within three years of notarial act or within one year of plaintiff's discovery of facts giving rise to cause of action, whichever is later (C.C.P. 338[f][3][Deering's]); injury to unborn child (C.C.P. 340.5[Deering's]); injuries sustained prior to or in course of birth (C.C.P. 340.4[Deering's]).

Prosecution of offense punishable by imprisonment in state prison for eight years or more (P. C. 800).

Five years: Action for mesne profits of real property or violation of restriction related thereto (C.C.P. 336[Deering's]) or for recovery of real property or possession thereof (C.C.P. 318[Deering's]). Action to redeem mortgage of real property. (C.C.P. 346[Deering's]). Deceptive stock practices commencing on or after Jan. 1, 2005 five years from date of transaction or two years from discovery whichever shall first expire. (Corp. C. 25506). Elder/dependent adult abuse. (P. C. 801.6).

Action for civil penalties or punitive damages under Hazardous Waste Control Law. (H. & S.C. 25100 et seq.[Deering's]; 25280 et seq.[Deering's]; 25300 et seq.[Deering's]; C.C.P. 338.1[Deering's]).

Four years: On any contract, obligation or liability founded upon instrument in writing, except as noted above in case of bonds, notes or debentures, provided that action to collect balance due after sale of realty pursuant to foreclosure under deed of trust or mortgage must be brought within three months after time of sale (C.C.P. 337[1][Deering's], 580a[Deering's]); upon book account whether consisting of one or more entries; upon account stated based upon account in writing, but acknowledgment need not be in writing; upon balance due upon mutual, open and current account items of which are in writing, except that time begins to run from date of last item (C.C.P. 337[2][Deering's], 344[Deering's], 345[Deering's]); upon rescission of contract in writing, action accruing on date facts entitling rescission occurred. In cases of fraud or mistake time runs from discovery of facts constituting fraud or mistake. In case of misrepresentation under Ins. Code 359[Deering's], time runs from when representation becomes false (C.C.P. 337[3][Deering's]); upon written lease of real property (C.C.P. 337.2[Deering's]).

Complaints against contractor licensees for acts or omissions must be filed with registrar of contractors within four years; accusations and citations must be filed or referred to arbitration program within four years after act or omission, or within 18 months from complaint filing, whichever is later, except that accusation of misrepresentation in obtaining license may be filed within two years after discovery of facts constituting fraud or misrepresentations. Complaints alleging commission of latent acts or omissions must be filed with registrar within ten years after act or omission; accusations and citations shall be filed within ten years or within 18 months from date of filing of complaint, whichever is later. Accusations of breach of express, written warranty for period in excess of specified time periods shall be filed within duration of warranty. (Bus. & Prof. C. 7091[Deering's]). Prosecutions for contracting without proper licensing unless exempted four years from date of contract proposal, contract, completion or abandonment of work, whichever occurs last. (Bus. & Prof. C. 7028[Deering's]).

Action for damages for patent deficiency (such as is apparent by reasonable inspection) in design, supervision, survey, or construction of improvement to real property, or injury to person or property resulting therefrom, within four years after substantial completion of improvement, except that if injury to person or property occurs during fourth year, action may be commenced within one year after date of injury but not more than five years after substantial completion of improvement. (C.C.P. 337.1[Deering's]).

Deceptive stock practices for proceedings commencing before Jan. 1, 2005, four years from date of transaction, or one year from discovery, whichever shall first expire; for proceedings commencing on or after Jan. 1, 2005 five years from date of transaction or two years from discovery, whichever shall first expire. (Corp. C. 25506).

Prosecution of offenses listed in P. C. 803(c) four years after discovery of commission or four years within completion, whichever is later. (P. C. 801.5).

Actions not otherwise provided for (C.C.P. 343[Deering's]).

Action against sureties on guardian's or conservator's bond may be commenced within four years of guardian's or conservator's removal or discharge subject to tolling if person entitled to bring action was under legal disability. (Prob. C. 2333[Deering's]).

Under Com'l. C. 2725: Secured party's action to recover deficiency from buyer is barred by this section if more than four years elapse since breach of security agreement, despite fact that date of repossession and resale is within four year period. (62 Cal. App. 3d 1024, 133 C. Rptr. 497).

See also category 3 Business Regulation and Commerce, topic 3.20 Monopolies, 3.22 Restraint of Trade and Competition, subhead Enforcement.

Three years: On liability created by statute, other than penalty or forfeiture (C.C.P. 338[a][Deering's]); for trespass upon or injury to real property (C.C.P. 338[b][Deering's]); for taking, detaining or injuring goods or chattels including actions for specific recovery of personal property except that cause of action on theft of any art or artifact is not deemed to accrue until discovery of whereabouts by aggrieved party, his or her agent, or law enforcement agency which originally investigated theft (C.C.P. 338[c][Deering's]); for relief on ground of fraud or mistake, cause of action not deemed to have accrued until discovery of facts by aggrieved party (C.C.P. 338[d][Deering's]); on bond of public official, cause of action based on fraud or embezzlement not deemed to have accrued until discovery of facts (C.C.P. 338[e][Deering's]); against notary public on his or her bond or in his or her official capacity, except that action for misfeasance or malfeasance must be brought within one year of discovery thereof or within three years of notarial act giving rise to action, whichever is later, but in any case within six years (C.C.P. 338[f][Deering's]); for slander of title to real property (C.C.P. 338[g][Deering's]); or for prosecution of offense punishable by imprisonment in state prison; or for prosecution of misdemeanor offense with or against minor under age of 14 (P. C. 801, 802). Action under Bus. & Prof. C. 17536[Deering's], cause not deemed to have accrued until discovery by aggrieved party, Attorney General, district attorney, county counsel, city prosecutor, or city attorney of facts constituting grounds for commencement of action (C.C.P. 338[h][Deering's]); action under Porter-Cologne Water Quality Control Act (Water C. 13000 et seq.[Deering's]), cause of action not deemed to accrue until discovery by State Water Resources Control Board, or regional water quality control board of facts constituting grounds for commencing action (C.C.P. 338[i][Deering's]); action to recover damages to property under theory of eminent domain (C.C.P. 338[j][Deering's]). Action commenced under Division 26 of Health & Safety Code (H. & S.C. 39000 et seq.[Deering's]) is not deemed to accrue until discovery by State Air Resources Board or regional district board of facts constituting grounds for commencing action under its jurisdiction. (C.C.P. 338[k][Deering's]). Action commenced under Fish & G. C. 1603.1[Deering's], 1615[Deering's], or 5650.1[Deering's] not deemed to accrue until discovery by agency bringing action of facts constituting grounds for commencing action. (C.C.P. 338[l][Deering's]). Action challenging validity of levy upon parcel of special tax levied by local agency on per parcel basis. (C.C.P. 338[m][Deering's]). Action commenced under C.C. 51.7 relating to civil rights. (C.C.P. 338[n][Deering's]). Fraudulent use of contractor's license number. (Bus. & Prof. C. 7027.3[Deering's], P. C. 802).

Civil action for sexual molestation of minor by any person or entity with duty of care to plaintiff, three years after discovery, or should have discovered, injury or illness after age of majority or within eight years of child reaching majority, whichever is later. (C.C.P. 340.1[Deering's]). Prosecution of certain sexual offenses committed when victim under 18 may be commenced any time prior to victim's 28th birthday. (P. C. 801.1). Civil actions based on domestic violence three years within last act or three years from date plaintiff discovers or reasonably should have discovered injury resulted from act of violence. (C.C.P. 340.15[Deering's]).

Action against health care provider for professional negligence, within three years after date of injury or one year after plaintiff discovers, or by reasonable diligence should have discovered, injury, whichever is less unless tolled by fraud, intentional concealment, or presence of non-therapeutic, non-diagnostic foreign body in person of plaintiff. Actions by minor under age six years must commence within three years or prior to age eight, whichever is longer, unless tolled by fraud or collusion of parent or guardian and defendant's insurer or health care provider in failure to bring action for minor injured as result of professional negligence. (C.C.P. 340.5[Deering's]).

Action for false claim against state funds under Govt. Code 12652 must be filed within three years after date of discovery by state or political subdivision official and within ten years after violation committed. (Govt. C. 12654).

For payments into or out of Public Employees' Retirement Fund for adjustment of error or omissions. (Govt. C. 20164).

See also category 23 Transportation, topic 23.01 Motor Vehicles, subhead Insurance.

Two years: On contract, obligation or liability (other than accounts governed by C.C.P. 337[2][Deering's]) not founded upon instrument of writing; upon certificate or abstract or guaranty of title of real property or policy of title insurance, cause being deemed to have accrued upon discovery of loss or damage suffered (C.C.P. 339[1][Deering's]); against sheriff, coroner, or constable upon liability arising from his acts or omissions in official capacity including nonpayment of money collected in enforcement of judgment (C.C.P. 339[2][Deering's]); or upon rescission of contract not in writing, action accruing on date facts entitling rescission occurred except in cases of fraud and mistake where time runs from discovery of facts (C.C.P. 339[3][Deering's]); upon lease of real property not in writing, time to run from breach of lease and abandonment of property, or from termination of right to possession, whichever is earlier (C.C.P. 339.5[Deering's]). Action to foreclose street improvement lien must be brought within two years after maturity of last installment of assessment (C.C.P. 329[Deering's]); against public entity or employees of entity (Govt. C. 950.2) if written notice of rejection of claim not given (Govt. C. 945.6[a][2]). Sex discrimination action for wages, except that cause of action arising out of wilful violation may be commenced within three years after it occurs. (Lab. C. 1197.5[h][Deering's]). False advertising of contractor's license. (Bus. & Prof. C. 7027.1[Deering's], P.C. 802). Prosecutions for sexual abuse by doctors, surgeons, psychotherapists, counselors and other health care professionals. (Bus. & Prof. C. 729[Deering's], P.C. 802).

Uninsured Motorist provision. (Ins. C. 11580.2[i][Deering's]).

Action for violation of pest control regulations by director, attorney general, district attorney, city prosecutor or attorney must be within two years of violation or within one year of submission of investigation to director. (Fd. & Agric. C. 11895[Deering's]). Action for violation of agricultural chemicals, livestock remedies, and commercial feeds regulations by director, attorney general, district attorney, city prosecutor or attorney must be within two years of violation or within one year of submission of investigation to director. Actions to collect mill assessments and delinquent fees must be within four years of violation. (Fd. & Agric. C. 13000[Deering's]).

Actions for assault, battery, or injury to, or for death of individual caused by wrongful act of neglect of another. (C.C.P. 335.1[Deering's]).

One year: For libel, slander, false imprisonment, seduction of one below age of consent, wrongful death or injury (C.C.P. 340[c][Deering's]) (unless action is for injury or illness based on exposure to asbestos [C.C.P. 340.2[Deering's]], or against health care provider [C.C.P. 340.5[Deering's]]); upon statute for penalty or forfeiture when action is given to individual or to individual and state unless statute prescribes different limitation (C.C.P. 340[a][Deering's], [b][Deering's]); by depositor against bank for payment of raised or forged check or check bearing forged or unauthorized endorsement (C.C.P. 340[c][Deering's]); against any person who boards or feeds animals or who practices veterinary medicine for such person's neglect resulting in injury or death to said animal (C.C.P. 340[c][Deering's]); against officer to recover damages for seizure of any property for statutory forfeiture to state, or for detention or injury of property so seized or for damages done to any person in making such seizure (C.C.P. 340[d][Deering's]); or for damages against defendant from date of judgment based on commission of felony unless longer period is proscribed for specific action (C.C.P. 340.3[Deering's]); by good faith improver of land of another, action accruing on date true ownership of property discovered (C.C.P. 340[e][Deering's]); prosecution for offense not punishable by death or imprisonment in state prison except that prosecution for misdemeanor sex offenses committed with or upon minor under age 14 must be commenced within three years (P. C. 802). Claims must be presented to public board for all claims against public entities other than for death or injury to person, personal property, or growing crops unless settlement procedure for specific claim involved is otherwise provided for by special statute (Govt. C. 911.2) and failure to present such claim within such time bars action against employees of entity as well as entity (Govt. C. 950.2). Uninsured motorist provision (Ins. C. 11580.2[i][Deering's]); mechanics lien provision (C.C. 3144).

Actions against attorney for wrongful act or omission, other than fraud, arising in performance of professional services, must be commenced within one year after plaintiff discovers, or through use of reasonable diligence should have discovered, facts constituting wrongful act or omission, or four years from date of wrongful act or omission, whichever occurs first. (C.C.P. 340.6[Deering's]).

Request of State Personnel Board to file charges against employee for discipline must be filed within one year of event(s). (Govt. C. 19583.5).

Notice of motion to modify order awarding spousal support must not be filed until one year after entry of previous order unless request for modification is based on significant decrease in income of moving party. (C.C. 4801.9).

Six months: Against public entity or employees of entity (Govt. C. 950.2) if written notice of claim rejection given, time runs from date notice is personally delivered or deposited in mail but is tolled during plaintiff's imprisonment (Govt. C. 945.6). Against officer, or officer de facto to recover certain personal property or value thereof, or damages for making seizures in his official capacity as tax collector (C.C.P. 341[1][Deering's]); to recover stock of corporation sold for delinquent assessment (C.C.P. 341[2][Deering's]); and to set aside or invalidate any action taken or performed by majority of trustees of any corporation heretofore or hereafter dissolved by operation of law, including revivor of any such corporation (C.C.P. 341[3][Deering's]). Actions contesting validity of acts or proceedings for authorization, sale, or issuance of bonds under color of law by certain public bodies must be brought within six months from date of authorization, sale or issuance of said bonds. (C.C.P. 349.2[Deering's]). Actions contesting proceedings for formation, dissolution or change of organization or boundaries of certain public entities (C.C.P. 349.1[Deering's]); tax refunds if notice of action on claim not mailed (Rev. & Tax C. 19085[Deering's]). Claim must be presented to public board for all claims against public entities for death or injury to person, personal property or growing crops (Govt. C. 911.2), and failure to present such claim within such time bars action against employees of entity as well as against entity (Govt. C. 950.2). When such claim is presented late, written notice must be given within 45 days that claim was not filed timely (Govt. C. 911.3) and written application may be made to public entity for leave to present such claims within reasonable time not to exceed one year after accrual of cause of action; special provision when injury/loss as minor, mentally incapacitate, and/or dependent child of juvenile court (Govt. C. 911.4, Gov. C. 911.4[c][Deering's]).

Three months: To collect balance due after sale pursuant to foreclosure under deed of trust or mortgage (C.C.P. 580a[Deering's]); actions contesting validity of proceedings for incorporation, annexation of territory or consolidation of municipal corporation (C.C.P. 3491/2).

One hundred and eighty days: To enjoin, abate, or for damages on account of, underground trespass, use or occupancy, by means of well drilled for oil or gas or both from surface location or for conversion or taking or removing of oil, gas or other liquid, or fluids by means of any such well. (C.C.P. 3493/4).

One hundred days: Service of response requesting correction or vacation of arbitration award. (C.C.P. 1288.2[Deering's]).

Ninety days: For recovery or conversion of personal property from hotel and other named establishments must be brought within 90 days from departure of owner from said establishment (C.C.P. 341a[Deering's]); tax refunds (Rev. & Tax. C. 6933[Deering's], 19083[Deering's], 26103[Deering's]); action to foreclose mechanics lien must be commenced within 90 days after lien recorded (C.C. 3144); action to enforce stop notice against private (C.C. 3172) and public (C.C. 3184, 3210) works of improvement. Actions challenging local government decisions must be commenced within 90 days after legislative body's decision unless action is in support of development of housing projects for low and moderate income in which case one year after accrual of cause of action is allowed. (Govt. C. 65009[c], [d]).

Sixty days: Mechanics lien of original contractor must be recorded within 60 days of recording notice of completion/cessation of work, or if no such notice has been recorded, within 90 days of completion. (C.C. 3115).

Thirty days: Any action to contest assessment levied by legislative body of any municipality under terms of Local Improvement Act of 1901, must be commenced within 30 days after entry upon minutes of such legislative body of resolution provided for in §8 of said Act. (C.C.P. 349[Deering's]). Any action to contest assessment by chartered city against real property for public improvements must be commenced within 30 days of levy of assessment. Any appeal from final judgment in such action must be perfected within 30 days after entry of judgment (C.C.P. 329.5[Deering's]); action against State after relief from late filing (Govt. C. 946.6[f]).

Mechanics lien of subcontractor must be recorded within 30 days of recordation of notice of completion/cessation of work, or if no such notice has been recorded, within 90 days of completion. (C.C. 3116).

Action to determine existence or nonexistence of father and child relationship, brought by man not presumed father for purpose of declaring he is natural father of child having presumed father if mother consents to adoption of child, must be brought within 30 days after he received notice under C.C. 7017 that he could be father, or birth of child, whichever is later. (C.C. 7006).

Fifteen days: Contest of civil penalties for payment of wages less than minimum wage must be commenced within 15 business days after issuance of citation. (Lab. C. 1197.1[Deering's]).

Actions Not Specifically Provided For.

Any cause of action not otherwise provided for must be commenced within four years after it accrues. (C.C.P. 343[Deering's]).

Absence of Defendant.

Time of absence of defendant from state is not part of time limited for commencement of action (C.C.P. 351[Deering's]), provided, however, that statute of limitations is not tolled in cause of action arising out of ownership or operation of motor vehicle (wherein summons may be served upon defendant outside state) commenced since Sept. 7, 1956, except when defendant cannot be located through exercise of reasonable diligence (Veh. C. 17463[Deering's]).

Disabilities of Plaintiff.

Certain disabilities (infancy, insanity, imprisonment) prevent statute running during continuance of disability, except in case of action for damages relating to conditions of confinement, action against public entity or employee on cause of action for which claim is required under Govt. C. (C.C.P. 352[Deering's]) or in case of claim under uninsured motorist clause of automobile policy (248 Cal. App. 2d 517, 56 C. Rptr. 609).

Where person is under disability to commence action because of existence of state of war, time during which such disability continues is not part of time limited for commencing such action. (C.C.P. 354[Deering's]).

Death of Either Party.

Where person entitled to bring action dies before expiration of time limited for commencement thereof, and cause of action survives, action may be brought by representatives after expiration of that time and within six months from death. If person against whom action may be brought dies before expiration of time limited for commencement thereof, and cause of action survives, action may be commenced within one year after date of death and time otherwise limited for commencement of action does not apply. Claim based on action against decedent must be filed within four months after date letters issued unless court grants relief. (C.C.P. 366.1[Deering's], 366.2[Deering's]; Prob. C. 9100[Deering's], 9103[Deering's]).

Acknowledgment, New Promise or Part Payment.

No acknowledgment or promise is sufficient evidence of new or continuing contract by which to take case out of operation of statute of limitations unless same is contained in some writing signed by party to be charged thereby, but payment on account of principal or interest on promissory note is sufficient acknowledgment to stop, from time to time as any such payment is made, running of statute of limitations and to start running of new period, but no such payment of itself revives cause of action once barred. (C.C.P. 360[Deering's]). No waiver bars defense of statute of limitations in any action unless it be in writing and signed by person obligated; and no such writing shall be effective more than four years from expiration of time limited for commencement of action involved, except that waivers executed after expiration of time limited for action involved shall be effective for not more than four years from date thereof. Waiver may be renewed for further four-year period and waivers may be made successively. (C.C.P. 360.5[Deering's]).

Foreign Causes of Action.

When cause of action has arisen in another state, or in foreign country, and by laws thereof, action thereon cannot be maintained against person by reason of lapse of time, action thereon shall not be maintained against him in this state, except in favor of one who has been citizen of this state and who has held cause of action from time it accrued. (C.C.P. 361[Deering's]).

Contractual limitations are permitted if term is not so unreasonable as to show undue advantage. (183 C. 618, 192 P. 292).

Pleading.

It is sufficient to state that cause of action is barred by section of Code of Civil Procedure relied upon. If such allegation be controverted, party pleading must establish facts showing bar. (C.C.P. 458[Deering's]).

5.16A PARTITION:

Partition action may be brought by owner of real or personal property held concurrently with other persons or in successive estates. (C.C.P. 872.210[Deering's]). Real and personal property may be partitioned in one action. (C.C.P. 872.240[Deering's]).

Venue.

See topic 5.26 Venue.

Sale.

If court determines that sale of property would be more equitable than division, or if parties have agreed to sale, court may order entire property sold (C.C.P. 872.820[Deering's]) or part sold (C.C.P. 872.830[Deering's]). Sale may be by public auction or private sale as determined by court to be more beneficial to parties. (C.C.P. 873.520[Deering's]). Sale may be made on terms agreed to in writing by parties or deemed proper by court. (C.C.P. 873.600[Deering's], 873.610[Deering's], 873.630[Deering's]).

5.17 [RESERVED]

5.18 PLEADING:

Code pleading state, but with significant modifications of traditional code pleading. California has not adopted use of Federal Rules of Civil Procedure.

Pleadings Permitted.

Pleadings allowed in civil actions are complaints, demurrers, answers and cross-complaints. (C.C.P. 422.10[Deering's]).

Complaint or cross-complaint must contain statement of facts constituting cause of action in ordinary and concise language and demand for relief. (C.C.P. 425.10[Deering's]). Amount claimed for actual or punitive damages shall be stated unless action is for personal injury or wrongful death, in which event amount shall not be stated in complaint or cross-complaint but shall comply with C.C.P. 422.30[Deering's] and in limited civil cases, with Govt. C. 70613, and must be provided to opposing party within 15 days of request, or if no request, in statement of damages required before default may be taken. (C.C.P. 425.10[Deering's], 425.11[Deering's]). See also topic 5.02 Actions. Plaintiff may include fictitious (“Doe”) defendants if ignorant of name of defendant. (C.C.P. 474[Deering's]).

Answer to complaint or cross-complaint must contain: (1) General or specific denial of material allegations controverted; (2) statement of any new matter, separately stated, constituting defense. (C.C.P. 431.30[b][Deering's]). Material allegations in complaint or cross-complaint not controverted by answer assumed to be true. (C.C.P. 431.20[a][Deering's]). Statement of new matter in answer, in avoidance or constituting defense, deemed automatically controverted. (C.C.P. 431.20[Deering's]). Defenses shall be separately stated. (C.C.P. 431.30[g][Deering's]). Affirmative relief may not be sought in answer. (C.C.P. 431.30[c][Deering's]).

Usual time to respond after service of summons and complaint is 30 days; but time to be specified in summons varies for certain cases. (C.C.P. 412.20[Deering's]; cf., C.C.P. 1167.3[Deering's]—unlawful detainer). Time for response is extended if service is by mail five days if within California, ten days if served outside California but within U.S., and 20 days if outside U.S. (C.C.P. 1013[a][Deering's]).

Filing answer is general appearance. (C.C.P. 1014[Deering's]; and see, C.C.P.

410.50[Deering's]).

Counterclaim.

Counterclaims are abolished, and any cause of action formerly asserted by counterclaim shall be asserted by cross-complaint. (C.C.P. 428.80[Deering's]).

Cross-complaint is filed as of right when filed with answer. (C.C.P. 428.50[Deering's]). Filing after answer requires leave of court. (C.C.P. 428.50[Deering's], 426.50[Deering's]). Joinder of parties governed by usual rules. (C.C.P. 428.20[Deering's]). Third-party defendant in indemnification action may file “special answer” to assert additional defenses to answer to original complaint. (C.C.P. 428.70[Deering's]).

Subject to certain exceptions, related causes of action against complainant must be asserted in cross-complaint. (C.C.P. 426.10[Deering's], 426.30[Deering's], 426.40[Deering's]). Permissively asserted claims include: (1) Any cause of action cross-complainant has against parties who asserted complaint or cross-complaint against him; (2) any cause of action which arises out of same transaction, occurrence, or series of transactions or occurrences as same brought against him, or which asserts claim, right, or interest in property or controversy which is subject of cause brought against him. (C.C.P. 428.10[Deering's]; see also, C.C.P. 428.70[Deering's]).

Reply as such not used in California. Cross-complaint responded to as if complaint. (C.C.P. 432.10[Deering's]).

Standard Pleading Forms.

Judicial council has adopted standard forms that may be used in actions for personal injury, property damage, wrongful death, unlawful detainer, breach of contract and fraud, but use is not mandatory. (C.C.P. 425.12[Deering's]; Rule 982.1, California Court Rules).

Demurrer is appropriate to raise following objections where appearing on face of complaint or cross-complaint or from matter judicially noticeable: (1) Court has no jurisdiction of subject of action; (2) person who filed pleading lacks capacity to sue; (3) there is another action pending between same parties for same cause; (4) there is defect or misjoinder of parties; (5) pleading does not state facts sufficient to constitute cause of action; (6) pleading is uncertain (ambiguous or unintelligible); (7) in action on contract, pleading does not disclose whether contract is written, oral or implied by conduct; (8) in most malpractice actions, failure to file and serve certificate of merit as required by C.C.P. 411.35[Deering's]; (9) in certain construction negligence actions, failure to file certificate of merit as required by C.C.P. 411.36[Deering's]. (C.C.P. 430.10[Deering's], 430.30[Deering's]). Demurrer may also be interposed to answer on grounds (5), (6) and (7) above. (C.C.P. 430.20[Deering's]). Demurrer to complaint or cross-complaint must be filed within 30 days after service of complaint or cross-complaint. Demurrer to answer must be filed within ten days after service of answer. (C.C.P. 430.40[Deering's]). Demurrers in municipal and superior courts in unified counties (limited jurisdiction cases) limited to grounds (1) and (5) above. (C.C.P. 92[Deering's]). Demurrers not available in family law cases. (California Court Rules 1215). Demurrer is general appearance. (C.C.P. 1014[Deering's]).

Amendment.

Any pleading may be amended once by party of course, and without costs, at any time before answer or demurrer filed, or after demurrer and before hearing thereon. (C.C.P. 472[Deering's]). Court may, in its discretion, after notice to adverse party, allow amendment to any pleading or proceeding and postponement of trial. (C.C.P. 473[Deering's], 576[Deering's]).

Supplemental Pleadings.

Either party may be allowed, on motion, to file supplemental complaint or answer, alleging facts material to case occurring after former complaint or answer. (C.C.P. 464[Deering's]).

Affidavits of merits not used in California except in professional malpractice actions. (C.C.P. 411.35[Deering's]). Court order required for claim against officer or director of nonprofit corporation serving without compensation. (C.C.P. 425.15[Deering's]).

Affidavits of defense not used in California.

Bill of Particulars.

Not necessary to set forth in pleadings items of account therein alleged, but upon demand copy of account must be delivered to adverse party within ten days. (C.C.P. 454[Deering's]).

Subscription and Verification.

Complaint need not be verified unless special statute applies. (C.C.P. 446[Deering's]; cf., C.C.P. 527[Deering's]). If complaint verified, general denial precluded, and answer must, with some exceptions, be verified. (C.C.P. 431.30[Deering's], 431.40[Deering's], 446[Deering's]). When plaintiff public agency or officer, answer must with some exceptions be verified. (C.C.P. 446[Deering's]).

Verification must be by party unless absent from county where party's attorney has office, in which event attorney or person having knowledge may verify. (C.C.P. 446[Deering's]). Verification may be affidavit or declaration under penalty of perjury. (C.C.P. 446[Deering's], 2015.5[Deering's]). Verification by corporation may be by any officer. (C.C.P. 446[Deering's]).

Filing and Service.

Filing complaint with clerk commences action and tolls statute of limitations. (C.C.P. 411.10[Deering's]). Summons issued on filing and payment of fees. Court papers may be voided if fees paid by check returned for insufficient funds. (C.C.P. 411.20[Deering's], 412.10[Deering's]). No summons required on cross-complaint against party who has appeared. (C.C.P. 428.60[Deering's]). Where party has attorney in action or proceeding, service of demurrer, answer or cross-complaint can be made on attorney, with alternative methods prescribed by statute. (C.C.P. 1015[Deering's]; 1011 et seq.[Deering's]).

Time.

Complaints must be served within three years of filing date. (C.C.P. 583.210[a][Deering's]). Return of service must be filed within three years and 60 days of filing date. (C.C.P. 583.210[b][Deering's]). Answers and/or demurrers are to be filed within 30 days of date of service of complaint or cross-complaint, with extensions for alternate forms of service, (see subhead Answer, supra).

Pretrial conference order, if there is one, supersedes pleadings; but is also subject to amendment. (California Court Rules 212; C.C.P. 576[Deering's]).

Economic Litigation in Superior Courts (Limited Jurisdiction Cases).

(C.C.P. 90-100[Deering's]). Applies to every superior court action where amount in controversy (defined) does not exceed $25,000. (C.C.P. 91[Deering's]). Pleadings are limited to complaints, cross-complaints, answers, answers to cross-complaints, and general demurrers. Special demurrers are not allowed and motions to strike are limited. (C.C.P. 92[Deering's]). Discovery is limited to any combination of 35 of following: Interrogatories, demands to produce, and requests for admission, and one deposition unless stipulated otherwise or upon good cause showing court grants additional discovery. (C.C.P. 94[Deering's], 95[Deering's]). Plaintiff may serve case questionnaire with complaint and require defendant to serve completed questionnaire with answer. (C.C.P. 93[Deering's]). No more than 45 days nor less than 30 days before trial any party may serve request for witnesses and evidence. Responding party must serve response within 20 days and no additional, amended, or late response can be served except by stipulation or noticed motion. (C.C.P. 96[Deering's]). Serving party may bar witnesses and evidence not disclosed by opposing party, except for impeachment, or unless party calls himself or adverse party, or unless court finds good faith effort to comply and failure due to mistake, surprise, inadvertence or excusable neglect. (C.C.P. 97[Deering's]). Testimony by affidavit is permitted under limited circumstances. (C.C.P. 98[Deering's]). Collateral estoppel effect of judgment is limited. (C.C.P. 99[Deering's]).

Frivolous Claims.

Court has discretion to award or deny costs (C.C.P. 1033[Deering's], 1033.5[Deering's]) and may award defense costs in certain tort cases brought in bad faith (C.C.P. 1038[Deering's]). Court may add just damages to costs of frivolous appeal. (C.C.P. 907[Deering's]).

Special Pleading Requirements.

In certain types of cases special information is required to be pleaded. See, e.g., C.C.P. 429.30[Deering's] (complaints charging infringement of literary, artistic, or intellectual productions) and C.C.P. 1250.310[Deering's], 1250.320[Deering's] (eminent domain actions).

Small Claims.

See category 6 Courts and Legislature, topic 6.01 Courts.

5.19 PRACTICE:

Practice governed by Code of Civil Procedure and Rules of Court.

Discovery.

Depositions of parties and nonparties may be taken by oral examination (C.C.P. 2019.010[Deering's], 2020.010[Deering's], and 2020.010-2029.010[Deering's]) or by written questions (C.C.P. 2028.010-2028.080[Deering's]). (See topic 5.11 Depositions and Discovery.) In addition, written interrogatories may be served on any adverse party, before or after deposition (but at least ten days after service of summons and complaint unless leave of court is obtained). (C.C.P. 2030.010-090[Deering's]). Discovery and production of documents and things for inspection, electronically stored information, copying, or photographing are provided by statute (C.C.P. 2031.010-060[Deering's]) as are physical, mental or blood examinations (C.C.P. 2032.010-610[Deering's]). Sanctions are provided for abuses of discovery process and for failure or refusal to respond to discovery. (C.C.P. 2023.010-040[Deering's]). Motion for protective order as to information demanded provided for by statute (C.C.P. 2031.060[Deering's]).

Demand for Admission of Facts.

After service of summons or appearance, any party may request from any other party admissions with respect to genuineness of any relevant document or to truth of any relevant matters of fact. If not responded to in timely manner, after noticed motion for order that matters be deemed admitted, such requests may be deemed admitted. (C.C.P. 2033.280[Deering's]). Following specified written notice, severe limitations are provided on relief from requests deemed admitted. (C.C.P. 2033.300[Deering's]). After denial of genuineness or truth, demanding party who proves genuineness or truth entitled to ask for expenses, including reasonable attorney's fees. (C.C.P. 2033.220[Deering's], 2033.420[Deering's]).

Discovery of Expert Witnesses, Reports.

Specific procedures provided. (C.C.P. 2034.010-730[Deering's]).

Direct Action Against Insurer.

See category 23 Transportation, topic 23.01 Motor Vehicles, subhead Direct Actions.

Small Claims.

See category 6 Courts and Legislature, topic 6.01 Courts.

See also topics 5.02 Actions, Appeal and Error, Certiorari, Depositions and Discovery, Injunctions, Judgments, Pleading, Process; category 8 Debtor and Creditor, topics 8.02 Attachment, 8.05 Executions, 8.09 Garnishment.

5.20 PROCESS:

Actions are commenced by filing complaint with clerk of court. (C.C.P. 411.10[Deering's]). See also topic 5.17 Pleading.

See topic 5.02 Actions, subhead Certificate of Meritorious Malpractice Action.

By Whom Issued.

On filing complaint and paying fees, plaintiff may have summons issued by clerk. (C.C.P. 412.10[Deering's]).

Content of Summons.

Summons must be signed by clerk, under seal of court, and must contain following: Title of court; names of parties; notice that written answer required within 30 days or default may be entered, which could result in garnishment of wages or taking money or property; introductory legend at top of summons, in boldface type, in English and Spanish, stating “Notice! You have been sued. The Court may decide against you without your being heard unless you respond within thirty days. Read information below.”; a statement, in boldface type, which reads “You may seek the advice of an attorney in any manner connected with the complaint or this summons. Such attorney should be consulted promptly so that your pleading may be filed or entered within the time required by this summons.” Summons in form approved by Judicial Council is deemed satisfactory. (C.C.P. 412.20[Deering's]).

Notice in Spanish.

Warnings regarding default on civil summons forms must be printed in both English and Spanish. Any county may, by ordinance, require that warning appear in any other language. (C.C.P. 412.20[Deering's]).

Who May Serve.

Summons may be served by any person at least 18 years of age, not party to action. (C.C.P. 414.10[Deering's]).

General Rule as to Service.

Summons may be served by personal delivery of copy of summons and complaint (C.C.P. 415.10[Deering's], 416.90[Deering's]); if personal service cannot be accomplished after exercising reasonable diligence, by leaving copy of summons and complaint with person in charge of party's office or competent member of party's household, at least 18, and thereafter mailing copy of summons and complaint to party (C.C.P. 415.20[Deering's]); or by mailing same to person along with notice and acknowledgment specified in C.C.P. 415.30[Deering's]. Summons may be served by first-class mail postage prepaid, requiring return receipt, on persons outside state. (C.C.P. 415.40[Deering's]).

If service is against corporation, dissolved corporation, joint stock company, unincorporated association or public entity, service may be accomplished by leaving copy of summons and complaint at its office during usual office hours with person apparently in charge and thereafter mailing copy of summons and complaint to party. (C.C.P. 416.10-.50[Deering's]).

When service is against corporation (C.C.P. 416.10[Deering's]) or against associates conducting business under common name (C.C.P. 369.5[Deering's]), summons must state that person served is served on behalf of corporation or unincorporated association as person upon whom copy of summons and of complaint may be delivered to effect service. If notice does not appear, no default may be taken. (C.C.P. 412.30[Deering's]). If pleadings allege environmental defects affecting general public and relief sought includes non-monetary damages, attorney general must be served within ten days of filing. (C.C.P. 388[Deering's]).

Process against minor under 18 years of age if at least 12 years old must be served on parent, guardian or other person in care or control of minor and minor if he or she is at least 12 years of age. (C.C.P. 416.60[Deering's]).

Process against incompetent person must be served on incompetent and on his guardian or his conservator but for good cause court may dispense with delivery to incompetent. (C.C.P. 416.70[Deering's]).

Process Against Domestic Partnership.

Governed by C.C.P. 416.40[Deering's] and Corp. C. 18200. May be served by delivery of copy to general partner, or general manager of partnership, or person designated as agent in statement filed with Secretary of State. (C.C.P. 416.40[Deering's]; Corp. C. 18200). If no agent for service is designated and service cannot be effected by alternate means, summons may be served pursuant to court order by delivering copy to member of partnership and mailing copy to partnership's last known address. (C.C.P. 416.40[Deering's]; Corp. C. 18220).

Process against domestic corporation may be served by delivery to president or other head of corporation, vice-president, secretary, assistant secretary, general manager, or person designated for service or authorized to receive service. Process against bank may be served by delivery to any of aforementioned officers or agents or to cashier or assistant cashier. (C.C.P. 416.10[Deering's]; Corp. C. 1701). If such corporate officer or agent cannot be found or no such designation has been made, by delivery to Secretary of State pursuant to court order, and Secretary of State must forward process by registered mail to corporation with request for return receipt. (C.C.P. 416.10[Deering's]; Corp. C. 1702).

Personal Service on Association.

Associates may be sued in name of association, and summons served on one or more of associates. (C.C.P. 412.30[Deering's]). Service may also be made upon agent for service of process in statement filed with Secretary of State, or president, or other officers of association. (C.C.P. 416.40[Deering's]; Corp. C. 18220).

Process Against Joint Stock Company.

See subhead Process Against Domestic Corporation, supra. (C.C.P. 416.30[Deering's]).

Process Against Foreign Corporation.

In suit against foreign corporation, or nonresident joint stock company or association, doing business in state, process may be served on president, vice-president, secretary, assistant secretary, or general manager in this state, or if corporation is bank, on cashier or assistant cashier or on any natural person designated by it as agent for service of process; or if corporation has designated corporate agent on any person named in certificate of such corporate agent; or if no such person can be found after diligent search, on Secretary of State pursuant to court order, who must forward copy of process and court order to specified corporate offices by registered air mail, return receipt requested. (C.C.P. 416.10[Deering's]; Corp. C. 2110, 2110.1, 2111 and 2114).

Service on Foreign Partnership.

Service may be effected on agent for service of process or general partner. (C.C.P. 416.40[Deering's]). General partnership must designate agent for service of process. If none designated, or if designated agent cannot be found with due diligence, service made on Secretary of State, by personal delivery of process, with statement of last-known address, and $50 service fee. Secretary must forward process to defendant by registered mail. (Corp. C. 15800, Govt. C. 12197). If no agent for service is designated for general or limited partnership and service cannot be effected by alternate means, summons may be served pursuant to court order by delivering copy to member of partnership, and mailing copy to partnership's last known address. (Corp. C. 18220).

Service by Publication.

Summons may be served by publication if upon affidavit it appears to satisfaction of court where action pending that party to be served cannot with reasonable diligence be served in another manner and that either cause of action exists against party, or he is necessary or proper party to action, or party has or claims interest in real or personal property in this state which is subject to jurisdiction of court, or relief demanded in action consists wholly or in part in excluding party from any interest in such property. (C.C.P. 415.50[Deering's]). Copy of summons and complaint must be mailed to person to be served if his address is ascertained before expiration of time prescribed for publication. Publication must be at least once a week for four successive weeks. (C.C.P. 415.50[Deering's]; Govt. C. 6064). Court cannot require search of public databases where access prohibited by law. (C.C.P. 415.50[Deering's]).

Personal Service Outside State.

Summons may be served by any manner provided in article or by sending copy of summons and complaint to person to be served by first class mail, postage prepaid; service by this form of mail complete on tenth day after mailing. (C.C.P. 415.40[Deering's]).

Delay in Issuance or Service of Summons.

Unless summons is served within three years after commencement of action, action shall be dismissed. (C.C.P. 583.210[Deering's], 583.250[Deering's]). Time during which defendant was not amenable to process shall not be counted. (C.C.P. 583.240[Deering's]).

Long Arm Statute.

California courts may exercise jurisdiction on any basis not inconsistent with California or U.S. Constitutions. (C.C.P. 410.10[Deering's]).

Proof of Service.

Proof of service of summons must be filed unless defendant has made general appearance. (C.C.P. 417.30[Deering's]). Return must be made within 60 days after deadline for service of summons. (C.C.P. 583.210[Deering's]). Certificate of personal service (C.C.P. 415.10[Deering's]), service on corporation or association (C.C.P. 415.20[Deering's]), substituted service at person's home or usual place of business (C.C.P. 415.20[Deering's]) or service by notice and acknowledgment (C.C.P.415.30[Deering's]) must contain affidavit showing time and place of service; manner of service; facts showing service properly accomplished; and name and title of person to whom delivery was made (C.C.P. 417.10[Deering's]). If service was by notice and acknowledgment, affidavit must include written acknowledgment. Certificate of service by publication must contain affidavit of publisher or printer or certain of their employees and affidavit showing time and place summons and complaint were mailed. (C.C.P. 417.10[Deering's]). Certificate of service by posting (C.C.P. 415.45[Deering's]) must contain affidavit showing time and place of posting and time and place summons and complaint were mailed (C.C.P. 417.10[Deering's]). Proof of service may also be made by written admission of person served. (C.C.P. 417.10[Deering's]). Proof of personal service must be made on form approved by Judicial Council (C.C.P. 417.10[Deering's]). Return of registered process server upon process or notice establishes presumption, affecting burden of producing evidence, of facts stated in return. (Evid. C. 647[Deering's]).

Nonresident Motorist.

See category 23 Transportation, topic 23.01 Motor Vehicles.

5.21 REPLEVIN:

Statutory remedy of claim and delivery supplants common law replevin. (C.C.P. 511.010-516.050[Deering's]).

Proceedings.

Upon filing complaint or thereafter, person claiming property in possession of another may seek writ of possession. (C.C.P. 512.010[Deering's]).

Affidavit.

To gain property during litigation plaintiff or cross-complainant may apply for writ of possession by written application under oath which must show: (1) Basis of plaintiff's claim and right to possession, together with any writing which is basis of claim; (2) wrongful detention of property by defendant; (3) manner in which defendant came into possession; (4) plaintiff's best information and belief as to reason for detention; (5) description of property with statement of value; (6) plaintiff's best knowledge, information and belief as to location of property and if in private place showing of probable cause to believe property located there; and (7) property not taken for tax, assessment or fine, or seized under execution. (C.C.P. 512.010[Deering's]).

Bond.

Court shall not issue temporary restraining order or writ of possession until plaintiff has filed undertaking; if court finds that defendant has no interest in property, plaintiff's undertaking is waived, and shall include order in amount of defendant's undertaking. Bond must be in amount not less than twice value of defendant's interest in property. (C.C.P. 515.010[Deering's]).

Issuance.

No writ of possession issues except after hearing on noticed motion, but writ may issue ex parte if probable cause appears that: (1) Defendant gained possession by felonious taking except where defendant fraudulently appropriated property, or obtained it by fraud, false pretense or embezzlement; (2) property is credit card; or (3) defendant acquired in ordinary course of business for commercial purposes and (i) property not necessary for support of defendant or his family and (ii) existence of immediate danger property will become unavailable to levy due to concealment, removal or substantial impairment in value and (iii) ex parte issuance is necessary to protect property. (C.C.P. 512.020[Deering's]).

Repossession.

Defendant whose property has been seized pursuant to ex parte order may apply for order quashing writ of possession and releasing property by filing noticed motion. Upon defendant's application, court may stay delivery of property pending outcome of hearing. If court determines that plaintiff not entitled to writ of possession, court shall award to defendant damages caused by levy of writ and loss of possession. (C.C.P. 512.020[Deering's]).

Upon issuance of writ, defendant may prevent plaintiff from taking possession or may regain possession if, no later than ten days after levy: (1) Defendant objects to plaintiff's undertaking and court finds plaintiff's undertaking insufficient (C.C.P. 515.030[Deering's]); or (2) defendant files undertaking in amount equal to plaintiff's undertaking or in amount determined by court and providing for payment of all costs and judgment damages sustained by plaintiff because of loss of possession, up to amount of undertaking, if plaintiff recovers judgment (C.C.P. 515.020[Deering's]). Plaintiff may object to defendant's undertaking within ten days after it is filed. (C.C.P. 515.030[Deering's]). If plaintiff's objection fails, court will grant defendant possession and plaintiff may not gain possession of property prior to judgment for possession after trial. If third party claims property, rules applicable in cases of third-party claims after levy under execution apply. (C.C.P. 514.050[Deering's]).

Temporary Restraining Order.

Upon application for writ plaintiff may apply for temporary restraining order which may be issued ex parte under certain conditions. (C.C.P. 513.010[Deering's], 515.010[Deering's]).

Forms.

Judicial Council shall prescribe forms. (C.C.P. 516.020[Deering's]).

5.22 SEQUESTRATION:

No statutory provision.

5.23 SERVICE:

See topic 5.20 Process.

5.24 STAY OF EXECUTION:

See category 8 Debtor and Creditor, topic 8.05 Executions.

5.25 SUBMISSION OF CONTROVERSY:

Parties to question in difference, which might be subject of civil action, may, without action, agree upon case containing facts upon which controversy depends, and present submission of same to any court which would have jurisdiction if action had been brought; but it must appear by affidavit that controversy is real and proceedings in good faith. Court must thereupon hear and determine case, and render judgment thereon, as if action were pending. (C.C.P. 1138[Deering's]).

Judgment must be entered as in other cases but without costs (C.C.P. 1139[Deering's]), and may be enforced in same manner as if it had been rendered in action of same jurisdictional classification (C.C.P. 32.5[Deering's], 85[Deering's]), and is in same manner subject to appeal (C.C.P. 1140[Deering's]).

5.26 VENUE:

Subject to power of court to change place of trial (C.C.P. 397[Deering's]), following actions must be tried in county in which all or part of real property is situated: (1) Actions for recovery of real property or of estate or interest therein or for determination of such right or interest, and for injuries to real property; (2) for foreclosure of liens or mortgages on real property

(C.C.P. 392[Deering's]).

In partition action proper county for trial is: (1) Where subject of action is real property or real and personal property, county in which all or part of real property is situated; (2) where subject of action is personal property, county in which personal property is principally located or in which any defendant resides at commencement of action. (C.C.P. 872.110[b][Deering's]).

Following actions must be tried in county where cause arose, subject to power of court to change place of trial: (1) For recovery of penalty or forfeiture imposed by statute; (2) against public officer for act done by him by virtue of his office. (C.C.P. 393[Deering's]).

Action against executor, administrator, guardian, conservator, or trustee in his representative capacity on claim for money or for recovery of personal property must be tried in county which has jurisdiction of estate. (C.C.P. 395.1[Deering's]).

Proceeding for dissolution of marriage must be heard in county of petitioner's or respondent's residence for three months. (C.C.P. 395[a][Deering's]). In proceeding to enforce obligation of support under Fam. C. 3900[Deering's], county in which child resides is proper county for trial of action. (C.C.P. 395[a][Deering's]).

Proper county for trial in all other cases is county in which defendants or some of them reside at commencement of action, except that action for injury to person or personal property or for death from wrongful act or negligence may be tried in county where injury occurred or where defendants or some of them reside at commencement of action, and action on contract may be tried in county where contract was made or is to be performed, or where any defendant resides. (C.C.P. 395[a][Deering's]).

Action arising from certain unsolicited telephone call or electronic transmission must be tried in county where buyer or lessee signed contract; where buyer/lessee resided at time of entering into contract; or where buyer or lessee resides at commencement of action. (C.C.P. 395[b][Deering's]).

Corporation or association may be sued in county where contract is made, is to be performed, where obligation or liability arises, breach occurs, or in county where it has its principal place of business. (C.C.P. 395.5[Deering's]). Unincorporated association may be sued in any county where plaintiff can sue a member of association (C.C.P. 395[Deering's]; 37[Deering's] C.2d 760, 235 P.2d 607; 43 Cal. App. 3d 219, 117 C.Rptr. 588), however, if association files statement with Secretary of State listing its principal place of business then principal place of business is only in such county for venue purposes (C.C.P. 395.2[Deering's]).

If no defendant resides in state or county of residence is unknown, proper county is any county designated in complaint. (C.C.P. 395[a][Deering's]).

If defendant about to depart from state, action may be tried in any county where either of parties resides or where service is made. (C.C.P. 395[a][Deering's]).

Place of trial may be changed in following cases: (1) When court designated in complaint is not proper court; (2) when there is reason to believe that impartial trial cannot be had therein; (3) when convenience of witnesses and ends of justice would be promoted by change; (4) when from any cause there is no judge of court qualified to act; (5) when proceeding for dissolution of marriage has been filed in county in which petitioner has resided for three months and respondent is resident of state, to respondent's residence when ends of justice would be promoted by change. (C.C.P. 397[Deering's]).

5.27 WITNESSES:

See topic 5.13 Evidence, subhead Witnesses.

6 COURTS AND LEGISLATURE

6.01 COURTS:

United States District Courts.

Fees required are governed by Title 28, U. S. Code §§1914-1917, 1921. Filing fee for civil action is $350 and for application for writ of habeas corpus $5. (28 U.S.C. 1914[a]). Filing fee for notice of appeal is $455.

Northern District.

Clerk's office: U.S. Courthouse, Federal Building, 450 Golden Gate Avenue, San Francisco, CA 94102, (415) 522-2000; 1301 Clay Street, Oakland, CA 94612, (510) 637-3530; 280 South First Street, San Jose, CA 95113, (408) 535-5363; 514 H Street, Eureka, CA 95501, (707) 445-3612. Website: http://www.cand.uscourts.gov/. (N.D. Cal. Civil L.R. 77-1[a]).

Northern District is composed of following counties: Alameda, Contra Costa, Del Norte, Humboldt, Lake, Marin, Mendocino, Monterey, Napa, San Benito, Santa Clara, Santa Cruz, San Francisco, San Mateo and Sonoma.

Court sits at San Francisco, San Jose, Oakland and Eureka. (28 U.S.C. 84[a]).

Eastern District.

Clerk's office: U.S. Courthouse, 501 I Street, Sacramento, CA 95814, (916) 930-4000; U.S. Courthouse, Room 1501, 2500 Tulare Street, Fresno, CA 93721, (559) 499-5600. Website: http://www.caed.uscourts.gov/.

Eastern District is composed of following counties: Alpine, Amador, Butte, Calaveras, Colusa, El Dorado, Fresno, Glenn, Inyo, Kern, Kings, Lassen, Madera, Mariposa, Merced, Modoc, Mono, Nevada, Placer, Plumas, Sacramento, San Joaquin, Shasta, Sierra, Siskiyou, Solano, Stanislaus, Sutter, Tehama, Trinity, Tulare, Tuolumne, Yolo and Yuba.

Court sits at Sacramento, Fresno, and Redding. (28 U.S.C. 84[b]).

Central District.

Clerk's office: U.S. Courthouse, 312 N. Spring St., Los Angeles, CA 90012, (213) 894-1565 or (213) 894-2215; Roybal Federal Building, 255 East Temple Street Los Angeles, CA 90012, (213) 894-1565 or (213) 894-2215; Ronald Reagan Federal Building, 411 West Fourth Street, Room 1053, Santa Ana, CA 92701-4516, (714) 338-4750; U.S. Courthouse, 3470 Twelfth Street, Riverside, CA 92501, (951) 328-4450. Website: http://www.cacd.uscourts.gov/.

Central District is composed of following counties which are organized in divisions: Riverside and San Bernardino in Eastern Division; Los Angeles, San Luis Obispo, Santa Barbara and Ventura in Western Division; and Orange County in Southern Division.

Court sits at cities of Riverside and San Bernardino in Eastern Division; city of Los Angeles in Western Division; and city of Santa Ana in Southern Division. (28 U. S. C. 84[c]).

Southern District.

Clerk's office: U.S. District Court Southern District of California, Office of the Clerk, 880

Front Street, Suite 4290, San Diego, CA 92101, (619) 557-5600. Website: http://www.casd.uscourts.gov/. (S.D. Cal. CivLR 77.1).

Southern District is composed of following counties: Imperial and San Diego.

Court sits at San Diego. (28 U. S. C. 84[c]).

Supreme Court.

Supreme Court is court of last resort in California.

Original Jurisdiction.

Extraordinary relief such as mandamus, certiorari, prohibition and habeas corpus. (Const., Art. VI, §10).

Appellate Jurisdiction.

Has appellate jurisdiction when judgment of death has been pronounced. (Const., Art. VI, §11). May transfer to itself cause in court of appeal before decision in that court becomes final; may review decision of Court of Appeal. (Const., Art. VI, §12). Petition for hearing after decision in Court of Appeal regulated by court rules. (Rule 8.500 et seq. [effective Jan. 1, 2007], California Rules of Court).

Regular sessions held in San Francisco, Los Angeles, and Sacramento on schedule fixed by court; special sessions may be held elsewhere. (Rules of Court, Rule 8.524[Deering's] [effective Jan. 1, 2007]). Court sits mainly at 350 McAllister St., San Francisco, CA 94102-4797; also at Ronald Reagan Building, 300 So. Spring St., Los Angeles, CA 90013; and Stanley Mosk Library and Courts Building, 914 Capitol Mall, Sacramento, CA 95814. Clerk's office at San Francisco location. Telephone: (415) 865-7000. Website: http://www.courtinfo.ca.gov/courts/supreme/.

Courts of Appeal.

These courts are intermediate appellate courts. Number of districts is prescribed by legislature, which may also provide for divisions consisting of presiding justice and two or more associate justices. (Const., Art. VI, §3). There are six districts, of which three are divided into divisions. (Govt. C. 69100 et seq.). Court which sits in divisions will in rare cases sit en banc.

Jurisdiction.

Original: Extraordinary relief such as mandamus, certiorari, prohibition and habeas corpus. (Const., Art. VI, §10).

Appellate: Has appellate jurisdiction when superior courts have original jurisdiction and in other causes prescribed by statute. (Const., Art. VI, §11). Court of Appeal has discretion to transfer appeals pending in appellate departments of superior court to itself where necessary to secure uniformity of decision or settle important questions of law. (C.C.P. 911[Deering's]).

First District must hold regular sessions at San Francisco. Has five divisions with four judges each. (Govt. C. 69101). Comprises counties of Alameda, Contra Costa, Del Norte, Humboldt, Lake, Marin, Mendocino, Napa, San Francisco, San Mateo, and Sonoma. (Govt. C. 69100[a]). Clerk's office: Court of Appeal, First District, 350 McAllister Street, San Francisco, CA 94102-3600. Telephone: (415) 865-7300. Website: http://www.courtinfo.ca.gov/courts/courtsofappeal/1stDistrict/..

Second District has eight divisions with four judges each. One division must hold regular sessions in Ventura County, Santa Barbara County, or San Luis Obispo County; other divisions must hold regular sessions at Los Angeles. (Govt. C. 69102). Comprises counties of Los Angeles, Santa Barbara, Ventura, and San Luis Obispo. (Govt. C. 69100[b]). Clerk's office for Divisions 1-5, 7 & 8: Ronald Reagan State Building, 300 So. Spring St., 2nd Floor, Los Angeles, CA 90013. Telephone: (213) 830-7000. Clerk's office for Division 6: Court Place, 200 East Santa Clara Street, Ventura, CA 93001. Telephone: (805) 641-4700. Website: http://www.courtinfo.ca.gov/courts/courtsofappeal/2ndDistrict/.

Third District must hold regular sessions at Sacramento. Has one division with 11 judges. (Govt. C. 69103). Comprises counties of Alpine, Amador, Butte, Calaveras, Colusa, El Dorado, Glenn, Lassen, Modoc, Mono, Nevada, Placer, Plumas, Sacramento, San Joaquin, Shasta, Sierra, Siskiyou, Sutter, Tehama, Trinity, Yolo and Yuba. (Govt. C. 69100[c]). Clerk's office: Library and Courts Annex, 900 N Street, Room 400, Sacramento, CA 95814. Telephone: (916) 654-0209. Website: http://www.courtinfo.ca.gov/courts/courtsofappeal/3rdDistrict/.

Fourth District has three divisions. One division has ten judges and must hold regular sessions at San Diego; one division has seven judges and must hold regular sessions in San Bernardino/Riverside area; one division has eight judges and must hold regular sessions in Orange County. (Govt. C. 69104). Comprises counties of Imperial, Inyo, Orange, Riverside, San Bernardino and San Diego. (Govt. C. 69100[d]). Clerk's office for Division One: Symphony Towers, 750 B Street, Suite 300, San Diego, CA 92101. Telephone: (619) 645-2760. Division Two located at 3389 Twelfth Street, Riverside, CA 92501; Telephone: (951) 248-0200. Division Three located at 925 N. Spurgeon Street, Santa Ana, CA 92701-3724. Telephone: (714) 558-6777. Website: http://www.courtinfo.ca.gov/courts/courtsofappeal/4thDistrict/.

Fifth District has one division with ten judges and must hold regular sessions at Fresno. (Govt. C. 69105). Comprises counties of Fresno, Kern, Kings, Madera, Mariposa, Merced, Stanislaus, Tulare and Tuolumne. (Govt. C. 69100[e]). Clerk's office: 2424 Ventura Street, Fresno, CA 93721. Telephone: (559) 445-5491. Website: http://www.courtinfo.ca.gov/courts/courtsofappeal/5thDistrict/.

Sixth District has one division with seven judges and must hold regular sessions at San Jose. (Govt. C. 69106). Comprises counties of Monterey, San Benito, Santa Clara, and Santa Cruz. (Govt. C. 69100[f]). Clerk's office: 333 West Santa Clara Street, Suite 1060, San Jose, CA 95113. Telephone: (408) 277-1004. Website: http://www.courtinfo.ca.gov/courts/courtsofappeal/6thDistrict/.

Superior Courts.

Each county has superior court with appellate division. Legislature must prescribe number of judges and provide for officers and employees. (Const. Art. VI, §4). Judges of superior court must have chambers at county seat. (Govt. C. 24261). Sessions may be held in location other than county seat. (C.C.P. 198.5[Deering's]).

Venue.

Rules as to venue are found, in most cases, in C.C.P. 392 et seq.[Deering's]

Original Jurisdiction.

Constitution gives superior courts original jurisdiction in all causes except those given by statute to other trial courts. (7 Cal. App. 4th 921, 9 Cal. Rptr. 2d 516). Superior courts have original jurisdiction in habeas corpus proceedings and other proceedings for extraordinary relief in nature of mandamas, certiorari, and prohibition. Appellate division of superior court has original jurisdiction in proceeding for extraordinary relief directed to superior court. (Const., Art. VI, §10).

Jurisdiction of superior courts (limited jurisdiction cases) is detailed in C.C.P. 86[Deering's] for civil cases. In civil cases: Where amount in controversy is test, action or special proceeding must be treated as limited civil case generally where demand does not exceed $25,000. Equitable jurisdiction of courts is specifically defined by statute. (C.C.P. 86[Deering's]). In criminal cases: Extends to all misdemeanor cases involving offenses committed in county of court's location excepting those coming before juvenile court and those of which other courts are given exclusive jurisdiction.

Probate Court.

Probate jurisdiction is exercised by superior courts in proceedings concerning administration of estates of decedents, in designated departments, which sit as courts of probate. (Prob. C. 7050[Deering's]).

Family Conciliation Court.

Superior court sitting as family conciliation court has jurisdiction over controversies between spouses or unmarried parents that may result in dissolution of marriage or affect household to detriment of minor child, or where controversy involves domestic violence, regardless of minor children. (Fam. C. 1810[Deering's], 1830[Deering's]). Either spouse or parent may invoke jurisdiction of family conciliation court by filing timely petition. (Fam. C. 1831[Deering's]). If petition for dissolution of marriage, for nullity of marriage, or for legal separation of parties is filed, case may be transferred to family conciliation court. (Fam. C. 1841[Deering's]). Family conciliation court may transfer case before it to department of presiding judge of superior court for assignment for trial or other proceedings by another judge. (Fam. C. 1812[Deering's]). Under certain circumstances court may accept case not involving welfare of minor child. (Fam. C. 1842[Deering's], 1830[Deering's]).

Juvenile Court.

Superior court sitting as juvenile court has specially delegated jurisdiction in certain cases involving minors. (Welf. and Inst. C. 202[Deering's], 245[Deering's]).

Mandatory Arbitration.

In each superior court with 18 or more judges, and in such other superior courts as so provided by local rule, cases in which amount in controversy is less than $50,000 must be submitted to arbitration. (C.C.P. 1141.11[Deering's]). Amount in controversy limitation for mandatory arbitration does not limit amount arbitrator may award. (C.C.P. 1141.26[Deering's]). Following cases are, however, excluded: Actions for equitable relief, unless prayer for such relief is frivolous or insubstantial (C.C.P. 1141.13[Deering's]); consumer class actions (C.C.P. 1141.11[c][Deering's]; C.C. 1781); actions in small claims court (C.C.P. 1141.11[c][Deering's]); unlawful detainer actions (C.C.P. 1141.11[c][Deering's]; 1161[Deering's]); actions excepted by Judicial Council (C.C.P. 1141.15[Deering's]); and actions in which all parties stipulate that amount in controversy exceeds $50,000 (C.C.P. 1141.16[a][Deering's]). After arbitration losing party can require trial de novo in court but must pay specified costs if better result is not obtained. (C.C.P. 1141.20[Deering's] and 1141.21[Deering's]).

Small Claims Court.

Superior court judges exercise jurisdiction sitting as small claims courts. Jurisdiction of court is confined to cases for recovery of money, where amount does not exceed $5,000; to actions to enforce payment of unsecured property taxes where amount claimed does not exceed $5,000 and legality of tax is not contested; to confirming, correcting or vacating binding fee arbitration award not exceeding $5,000 between attorney and client or to conducting hearing de novo between attorney and client after nonbinding arbitration of fee dispute involving no more than $5,000; to issuance of writ of possession for innkeepers’ lien if demand does not exceed $5,000; for injunction or other equitable relief when statute expressly authorizes court to award relief. (C.C.P. 116.220[Deering's], 116.231[d][Deering's]). With respect to jurisdiction over defendant guarantor: (1) For any action brought by natural person against Registrar of

Contractors' State License Board as defendant guarantor, small claims jurisdictional limit of $7,500 under C.C.P. 116.221[Deering's] applies; (2) for any action against defendant guarantor that does not charge fee for its guarantor or surety services, jurisdiction exists if amount of demand does not exceed $2,500; (3) for any action against defendant guarantor that charges fee for its guarantor or surety services or action brought by entity other than natural person against Registrar of Contractors' State License Board as defendant guarantor, jurisdiction exists if amount of demand does not exceed $4,000. (C.C.P. 116.220[c][Deering's]). Party may not file more than two actions for more than $2,500 in same calendar year except where claim filed by local public entity does not exceed $5,000. (C.C.P. 116.231[Deering's]). Plaintiff must pay $10 fee for each defendant to whom claim mailed by clerk. (C.C.P. 116.232[Deering's]). Court may also award equitable relief in form of rescission, restitution, specific performance, or reformation in lieu of, or in addition to money damages and shall retain jurisdiction until full payment and performance of any judgment or order. (C.C.P. 116.220[b][Deering's]).

Venue and court location are same as for civil actions. Court shall determine whether venue is proper. If not, court shall dismiss without prejudice unless all defendants are present and agree that action be heard. In lieu of appearance, defendant may challenge venue or court location by writing to court and mailing copy of challenge to each party. (C.C.P. 116.370[Deering's]).

Actions are commenced upon filing of claim. (C.C.P. 116.320[Deering's]).

No claim may be filed or prosecuted in small claims court by assignee of such claim for purpose of collection, except for local governments seeking subrogation for workers' compensation claims (C.C.P. 116.420[Deering's]) and normally no attorney-at-law or person other than plaintiff and defendant may take any part in conduct or defense of small claims action. (C.C.P. 116.530[a][Deering's]). Attorney may advise, testify or represent party in appeal or enforcement of judgment. (C.C.P. 116.530[Deering's]). Corporation or any other entity may appear in small claims court only through employee or elected officer or director who has duties other than exclusive representation of entity in small claims court. (C.C.P. 116.540[b]–[c][Deering's]). Association may appear through agent, management representative, or bookkeeper. (C.C.P. 116.540[i][Deering's]). Representative of insurer may advise litigant, except at hearing. (C.C.P. 116.531[Deering's]). Parties may present evidence by witnesses (C.C.P. 116.520[Deering's]). No formal pleadings other than claim and notice are necessary (C.C.P. 116.310[Deering's]). Defendant may himself file claim in proceeding and must deliver copy of his claim to plaintiff in person at least five days prior to time set for hearing. (C.C.P. 116.360[Deering's]). No attachment may issue from court, but enforcement of judgment may be had pursuant to C.C.P. 680.010–724.260[Deering's], C.C.P. 674[Deering's] and C.C.P. 1174[Deering's] (C.C.P. 116.820[Deering's]), but enforcement is automatically stayed without bond until time for appeal runs (C.C.P. 116.810[Deering's]). If appeal is taken, judgment is stayed until outcome of appeal is determined. (C.C.P. 116.810[Deering's]).

Plaintiff has no right to appeal claims asserted. (C.C.P. 116.710[a][Deering's]). Defendant has no right to appeal judgment on defendant's claims for affirmative relief. (102 Cal. App.3d 164, 162 Cal. Rptr. 167). Otherwise, defendant, with respect to plaintiff's claims, or plaintiff with respect to defendant's claims, may appeal and case shall be tried de novo in superior court before different judicial officer. (C.C.P. 116.710[Deering's] and 116.770[Deering's]). No jury trial on appeal. (C.C.P. 116.770[Deering's]). Defendant's insurer may appeal where judgment exceeds $2,500 and insurer stipulates to coverage. (C.C.P. 116.710[Deering's]). Judgment on trial de novo shall be final and non-appealable (C.C.P. 116.780[Deering's]). Court may award each small claims division of attorney fees up to $1,000 if appeal not based in good faith. (C.C.P. 116.790[Deering's]).

In superior court with seven or more judges, at least one Sat. or night session per month is required for small claims matters other than appeals. (C.C.P. 116.250[Deering's]).

Legal advisors are generally made available to litigants on request at no charge. (C.C.P. 116.260[Deering's] and 116.940[Deering's]).

With consent of parties, court may order case to be heard by temporary judge. (C.C.P. 116.240[Deering's]).

6.02 LEGISLATURE:

Regular sessions convene at noon on first Mon. in Dec. of each even-numbered year and adjourn on Nov. 30 of following even-numbered year. (Const., Art. IV, §3[a]; Govt. C. 9020). Governor may convene legislature in special session on extraordinary occasions. (Const., Art. IV, §3[b]). Powers of initiative and referendum have been reserved to people. (Const., Art. IV, §1). Lobbyists required to register with Secretary of State. Lobbyists' activities regulated; periodic reports required. (Govt. C. 86100-86300). See also topic 6.04 Statutes.

6.03 REPORTS:

California Reports contain Supreme Court decisions; California Appellate Reports contain decision of courts of appeal and, beginning with Volume 106, of appellate departments of superior court. First series of California Reports (1-220) covers period 1850-1934; second series (1-71) covers period 1934-1969; third series (1-54) covers period 1969-1991; and fourth series started with 1 C. 4th in 1991. First series of California Appellate Reports (1-140) covers period 1905-1934; second series (1-276) covers period 1934-1969; third series (1-235) covers period 1969-1991; and fourth series started with 1 Cal. App. 4th in 1991. West's California Reporter, started in 1960, covers decisions of Supreme Court, Courts of Appeal, and appellate departments of superior court, beginning with cases reported in 53 C.2d—176 Cal. App. 2d; first series (1-286) covers period 1959-1991, and second series started with 1 C. Rptr.2d in 1991. California Unreported Cases, series of seven volumes containing opinions of Supreme Court and courts of appeal not officially reported, covers period from 1855 to 1883. Other reporters are Labatt's District Court Reports (1857-8), Myrick's Probate Reports (1872-79), Coffey's Probate Decisions (1883-1915), Ragland, Superior Court Decisions (1921-1926) and California Decisions (1890-1940).

Decisions of California Supreme Court and Courts of Appeal are also reported in Pacific Reporter beginning with cases reported in 64 C.—1 Cal. App. Coverage of cases reported in Cal. App. 2d ends with those reported in 175 Cal. App. 2d. Later decisions of Courts of Appeal are reported in West's California Reporter (C.Rptr.). Beginning with 347 P.2d Pacific Reporter reports only California Supreme Court decisions (1959).

No opinion superseded by granting of review, hearing, rehearing or other judicial action shall be published in Official Reports. (California Rules of Court 976[d]).

Digests.

California decisions are digested in McKinney's New California Digest, McKinney's California Digest of Official Reports 3d Series, West's Pacific Digest, West's California Digest, and West's California Digest, 2d ed. Cyclopedic treatise on California law entitled California Jurisprudence 3d Series, having pocket parts, is also available. Witkin's Summary of California Law, 9th ed., Witkin's California Procedure, 3d ed., Witkin's California Crimes, Witkin's California Criminal Procedure, and Witkin's California Evidence 3d ed. are briefer treatises on California law, each with supplemental volumes or pocket parts.

6.04 STATUTES:

California has following codes, cited herein as shown in parentheses:

(Bus. & Prof. C.)

Business & Professions

(C.C.)

Civil

(C.C.P.)

Code of Civil Procedure

(Com'l. C.)

Commercial

(Corp. C.)

Corporations

(Educ. C.)

Education

(Elec. C.)

Elections

(Evid. C.)

Evidence

(Fam. C.)

Family

(Finan. C.)

Financial

(Fish & G. C.)

Fish & Game

(Fd. & Agric. C.)

Food and Agricultural

(Govt. C.)

Government

(Harb. & Nav. C.)

Harbors & Navigation

(H. & S.C.)

Health & Safety

(Ins. C.)

Insurance

(Lab. C.)

Labor

(Mil. & Vet. C.)

Military and Veterans

(P. C.)

Penal

(Prob. C.)

Probate

(Pub. Cont. C.)

Public Contract

(Pub. Res. C.)

Public Resources

(Pub. Utils. C.)

Public Utilities

(Rev. & Tax C.)

Revenue & Taxation

(Str. & H. C.)

Streets & Highways

(Un. Ins. C.)

Unemployment Insurance

(Veh. C.)

Vehicle

(Water C.)

Water

(Water C. App.)

Water Code Appendix

(Welf. & Inst. C.)

Welfare and Institutions

Former Banking, School and Political Codes have been repealed, their provisions incorporated in other codes.

Official compilation is series of volumes entitled “Statutes and Amendments to the Codes,” published by California State Printer. There are two unofficial annotated compilations, each with many volumes of differing dates, for which pocket supplements are printed. One, known as “Deering's California Codes,” is published by Bancroft-Whitney Company, San Francisco. Some uncodified statutes are published in one volume of this set known as “Uncodified Initiative Measures and Statutes.” Other set, known as “West's Annotated California Codes,” is published by West Publishing Co., St. Paul.

Uniform Acts which have been wholly or substantially adopted: Aircraft Financial Responsibility (1954, adopted 1968); Anatomical Gift (1987, adopted 1988); Child Custody Jurisdiction and Enforcement (1997, adopted 1998); †Commercial Code (1962, adopted 1965); Common Trust Fund (1938, adopted 1947); Controlled Substances Act (1970, 1990, 1994, adopted 1970, 1990, 1994); Determination of Death (1981, adopted 1982); †Division of Income for Tax Purposes (1957, adopted 1966); Divorce Recognition (1947, adopted 1949); Durable Power of Attorney (added 1994); Electronic Transactions (1999, adopted 1999); Facsimile Signatures of Public Officials (1958, adopted 1959); Federal Lien Registration (1978, adopted 1979); Foreign-Country Money Judgments Recognition (approved 2007, effective Jan. 1, 2008); Foreign Money Claims Act (1989, adopted 1991); Foreign Money-Judgments Recognition (1962, adopted 1967, repealed and replaced effective Jan. 1, 2008); Fraudulent Transfer (1984, adopted 1986); Health Care Decisions Act (1993, adopted 1999); Insurers Liquidation Act (1934, adopted 1988); International Wills (1977, adopted 1980); Interstate Arbitration of Death Taxes (1943, adopted 1949); Interstate Compromise of Death Taxes (1943, adopted 1949); Interstate Enforcement of Domestic Violence Protection Orders (2002, adopted 2002); Interstate Family Support (2001, adopted 2002); Limited Partnership Act (added 1949, repealed Jan. 1, 2010); †Limited Partnership Act, Revised (1976, adopted 1983, repealed Jan. 1, 2010); Limited Partnership Act of 2008 (effective Jan. 1, 2007, operative Jan. 1, 2008); Management of Institutional Funds (1972, adopted 1973); Nonprobate Transfers on Death (1991, adopted Parts 1, 2 - 1998); Parentage (1973, adopted 1975); Partnership Act of 1994 (1994, adopted 1997); Photographic Copies of Business and Public Records as Evidence (1949, adopted 1951); Premarital Agreement (1983, adopted 1985); †Principal and Income, Revised (1997, adopted 1999); Prudent Investor Act (1994, adopted 1995); Statutory Form Power of Attorney (1988, adopted 1990); Statutory Rule Against Perpetuities (1990, adopted 1991); Simultaneous Death (1940, adopted 1945); Single Publication (1953, adopted 1955); Supervision of Trustees and Fundraisers for Charitable Purposes (1954, adopted 1959); Testamentary Additions to Trusts (1960, adopted 1965); To Secure Attendance of Witnesses from Without a State in Criminal Proceedings (1936, adopted 1937); TOD Security Registration Act (1989, adopted 1998); Trade Secrets (1979, adopted 1984); Transfers to Minors (1983, adopted 1984); Vendor and Purchaser Risk (1935, adopted 1947).

†Adopted with significant variations or modifications. See appropriate topics, for those acts within scope of Digest.

For text of Uniform Acts falling within scope of Martindale-Hubbell Law Digests, see Uniform and Model Acts section.

6.05 UNIFORM LAWS:

For list of Uniform Acts in force in this state see topic 6.04 Statutes. For text of Uniform Acts within the scope of the Martindale-Hubbell Law Digests see Uniform and Model Acts section.

7 CRIMINAL LAW

7.00A BAIL:

See topic 7.01 Criminal Law.

7.01 CRIMINAL LAW:

Crimes and criminal procedure are defined in Penal Code.

Indictment and Information.

Defendant may be brought to trial by information of district attorney after preliminary examination (P. C. 739), or may be indicted by grand jury (P. C. 917). Defendant no longer entitled to post-indictment hearing. (Const. Art. 1, §14.1).

Bail.

Defendant is entitled to bail before conviction as matter of right except for offenses punishable by death. (P. C. 1270.5, 1271; 9 C.3d 345, 107 C.Rptr. 401, 508 P.2d 721).

Upon appeal, defendant convicted of offense not punishable by death may be released on bail if demonstrates not likely to flee, no danger to community (considering especially whether conviction is for violent felony), and appeal raises substantial legal question. (P. C. 1272.1). Defendant must notify prosecuting attorney five court days in advance of bail hearing. (P. C. 1272). Defendant entitled to bail as matter of right pending appeal of misdemeanor. (P. C. 1272).

Uniform Act for Out-of-State Parolee Supervision (1953 adopted, revised 1955) in effect. (P. C. 11175-11179).

Interstate Corrections Compact (1975 adopted, 1976) in effect. (P. C. 11189-11197).

Uniform Act on Fresh Pursuit (1936, adopted 1937) in effect. (P. C. 852-852.4).

Uniform Act to Secure the Attendance of Witnesses From Without a State in Criminal Proceedings (1936, adopted 1937) in effect. (P. C. 1334-1334.6).

Uniform Controlled Substances Act (1970, 1990, 1994, adopted 1970, 1990, 1994) in effect. (H. & S.C. 11000-11651[Deering's]).

Western Interstate Corrections Compact (1960, adopted 1961) in effect. (P. C. 11190).

Colorado River Crime Enforcement Compact (1985, adopted 1985) in effect. (P. C. 853.1-853.2).

8 DEBTOR AND CREDITOR

8.01 ASSIGNMENTS:

Note: Uniform Commercial Code has been adopted. (1962, adopted 1963). See category 3 Business Regulation and Commerce, topic 3.09 Commercial Code, subhead Material Variations from 1990 Official Text.

Generally, property of any kind may be transferred by assignment. (C.C. 1044). May be oral except where writing expressly required by statute. (C.C. 1052). No particular form is required, but must indicate intent to effect transfer without further action. Consideration generally not required as to completed assignment (C.C. 1040) with principal exceptions of executory transfers and those not enforceable at common law. Despite statutory provision prohibiting assignment of mere possibility not coupled with interest (C.C. 1045), assignment of contingent expectancy enforced by courts (36 Cal. App. 3d 350, 111 C.Rptr. 468). Choses in action are assignable when arising out of obligation or violation of property right, but not when arising out of purely personal contract or personal tort. (C.C. 954; 206 C. 461, 274 P. 959). Statutory procedure relating to assignment for benefit of creditors has been repealed (1980, c. 135); assignment for benefit of creditors pursuant to common law is available. (51 C.2d 294, 333 P.2d 23).

Subject to compliance with any applicable statute requiring recording or filing and except for transfers intended to create security interest, transfer of certain contracts and instruments may be perfected against third persons by endorsement or written assignment and delivery; transfer of certain other rights to payment can be perfected as to third persons by delivery of written assignment, and bona fide assignee can secure priority by written notice to obligor. (C.C. 955-955.1). See category 3 Business Regulation and Commerce, topic 3.09 Commercial Code. Assignment in bulk of stock in trade and of fixtures or equipment of certain businesses requires special procedures. See topic 8.08 Fraudulent Sales and Conveyances and category 3 Business Regulation and Commerce, topic 3.09 Commercial Code.

Effect.

Burden of obligation may be transferred with consent of party entitled to its benefit, but not otherwise except as provided in C.C. 1466. (C.C. 1457).

Assignment of wages not valid unless: (1) Contained in separate written instrument; (2) consented to by husband or wife of assignor or by parent or guardian of minor assignor or contains statement by assignor that he or she is unmarried and an adult; (3) no other assignment, or earnings withholding order is in force. Assignment must be authenticated by notary and filed with employer. Unearned wages cannot be assigned except for, and to person furnishing, necessities of life and then only for amount needed to furnish such necessities. Such restrictions do not apply to certain deductions and withholdings made by employers. (Lab. C. 300[Deering's]). Upon filing of claim, Labor Commissioner will take assignments of claims relating to wages and work. (Lab. C. 96-97[Deering's]). Com'l. C. 9109(d)(3) specifically exempts “wages” from application of Division 9 of Code. See generally Wage Garnishment Law (C.C.P. 706.011-706.154[Deering's]) for procedures for withholding of wages by employers.

Assignment of accounts receivable is governed by Uniform Commercial Code. (Com'l. C. 9101-9508). See category 3 Business Regulation and Commerce, topic 3.09 Commercial Code, subhead Material Variations from 1990 Official Text.

See also category 5 Civil Actions and Procedure, topic 5.15 Judgments.

8.02 ATTACHMENT:

Actions in Which Allowed.

Action must be based upon contract, express or implied, where total amount of claim is fixed or readily ascertainable amount not less than $500, exclusive of costs, interest and attorney’s fees. (C.C.P. 483.010[a][Deering's]). Special rules apply for attaching property of nonresident defendants. (C.C.P. 492.010 et seq.[Deering's]).

Courts Which May Issue Writ.

Attachment may issue from any trial court, except small claims court. (C.C.P. 116.220[Deering's], 483.010[Deering's]).

In Whose Favor Writ May Issue.

Statute places no restriction on types of plaintiff that may obtain attachment.

Against Whom Writ May Issue.

Attachment may issue against any corporation, partnership, or unincorporated association; attachment against natural person allowed only if claim arose out of individual's conduct of trade, business, or profession. (C.C.P. 483.010[c][Deering's]).

Claims On Which Writ May Issue.

Attachment may issue only on claims for money in which total sum claimed is fixed or readily ascertainable and not less than $500. (C.C.P. 483.010[a][Deering's]). Attachment is not available if claim is otherwise secured by any interest in real property unless security has become valueless. (C.C.P. 483.010[b][Deering's]). Attachment is unavailable against defendant who is natural person on claim based on sale or lease or license of property, furnishing of services, or loan of money if such property sold, licensed or leased, services furnished, or money loaned was used primarily for personal, family or household purposes. (C.C.P. 483.010[c][Deering's]).

Grounds.

See subheads Claims on Which Writ May Issue, supra, and Proceedings to Obtain, infra.

Property Subject to Attachment.

In case of corporate or partnership defendants, all corporate or partnership property for which method of levy is provided (see subhead Levy, infra) is subject to attachment. (C.C.P. 487.010[a][Deering's], [b][Deering's]). If defendant is natural person, types of property subject to attachment include most business assets as well as other specified assets. (C.C.P. 487.010[c][Deering's]).

Property Exempt from Attachment.

Property exempt from attachment includes: (1) Property exempt from enforcement of money judgment, (2) property which is necessary for support of defendant who is natural person or family of such defendant supported in whole or part by defendant, (3) earnings defined in C.C.P. 706.011(4)[Deering's] all property not subject to attachment pursuant to C.C.P. 487.010[Deering's] (see topic 8.05 Executions). (C.C.P. 487.020[Deering's]), (5) veterans' federal disability benefits for service connected disabilities (C.C.P. 483.013[Deering's])..

Proceedings to Obtain.

Attachment may be obtained on noticed hearing. (C.C.P. 484.010 et seq.[Deering's]). At time of filing complaint or any time thereafter, plaintiff may apply for right to attach order and writ of attachment. (C.C.P. 484.010[Deering's]). Required papers include application (C.C.P. 484.020[Deering's]), notice of application (C.C.P. 484.050[Deering's]), and supporting affidavits (C.C.P. 484.030[Deering's]). Required papers must be served on defendant within time prescribed in C.C.P. 1005(b)[Deering's]. (C.C.P. 484.040[Deering's]). Defendant wishing to oppose attachment must file notice of opposition and supporting affidavits at least five court days prior to hearing. (C.C.P. 484.060[a][Deering's], 484.070[Deering's]). In notice of opposition, defendant must claim exemption of property described in plaintiff's application. (C.C.P.

484.070[a][Deering's]) and may claim exemption of property not described in such application (C.C.P. 484.070[b][Deering's]). Plaintiff wishing to oppose claim of exemption must file and serve notice of opposition to exemption at least two days prior to hearing. (C.C.P. 484.070[f][Deering's]). At hearing, court shall consider pleadings and other papers of record and, upon good cause shown, court may receive additional evidence, additional points and authorities or even continue hearing for production of such additional evidence or points and authorities. (C.C.P. 484.090[d][Deering's]). Court shall issue right to attach order if it finds claim is one upon which attachment may be issued, plaintiff has established probable validity of claim, attachment is not sought for purpose other than recovery on such claim, and amount to be secured is greater than zero. (C.C.P. 484.090[a][Deering's]). In addition, if court finds defendant has failed to prove property is exempt, and plaintiff has provided undertaking (see subhead Attachment Bond, infra), court shall issue writ of attachment. (C.C.P. 484.090[b][Deering's]).

At time of application for right to attach order, plaintiff may seek temporary protective order to prevent defendant from transferring attachable assets prior to hearing. (C.C.P. 486.010[Deering's]). At ex parte hearing, court shall issue temporary protective order, upon plaintiff's filing sufficient undertaking, if it finds: claim is one upon which attachment may be issued; plaintiff has established probable validity of claim; such order is not sought for purpose other than recovery upon claim; and plaintiff will suffer great or irreparable injury if order is not issued. (C.C.P. 486.020[Deering's]).

Right to attach order and writ of attachment may issue upon ex parte proceeding if, in addition to requirements for granting upon noticed motion, plaintiff shows great or irreparable injury would result if issuance of order is delayed until noticed hearing and amount to be secured is greater than zero. (C.C.P. 485.010[a][Deering's], 485.220[a][Deering's]). Great or irreparable injury is defined. (C.C.P. 485.010[b][Deering's]). Contents of application and affidavits are specified. (C.C.P. 485.210[Deering's]). If writ of attachment issued ex parte, defendant may, upon noticed motion, set aside right to attach order, quash writ of attachment, and release any property upon which writ has been levied. (C.C.P. 485.240[Deering's]). If plaintiff applies ex parte for right to attach order and writ of attachment, court has discretion to deny application for order and writ and instead grant only temporary protective order if it determines that requirements of C.C.P. 485.220[Deering's] are satisfied and issuance of such order would be in interest of justice and equity to parties. (C.C.P. 486.030[Deering's]).

Attachment Bond.

Before court will issue writ of attachment or temporary protective order, plaintiff must file undertaking to pay defendant any amount defendant may recover for any wrongful attachment by plaintiff in action. (C.C.P. 489.210[Deering's]). Amount of bond is $10,000 (C.C.P. 489.220[a][Deering's]); if defendant objects and court determines probable recovery for wrongful attachment exceeds these amounts, court shall order amount of undertaking increased to such amount (C.C.P. 489.220[b][Deering's]).

Levy.

Statute prescribes contents of writ of attachment, contents of notice of attachment and general instructions to levying officers. (C.C.P. 488.010 et seq.[Deering's]).

Statute provides many different methods of levy dependent upon type of property to be attached. (C.C.P. 488.300-488.485[Deering's]).

Indemnity.

Levying officer has no right to require indemnity, though he may require deposit for taking and keeping property. (C.C.P. 488.050[Deering's]). See subhead Attachment Bond, supra.

Lien.

Levy of writ of attachment creates lien on property valid against subsequent transferees. (C.C.P. 488.500[Deering's]). Unless sooner released, no attachment shall have effect at expiration of three years from date of issuance of writ of attachment. (C.C.P. 488.510[a][Deering's]). Lien may be extended one year on noticed motion (C.C.P. 488.510[b][Deering's]), but maximum period of attachment, including extensions, shall not exceed eight years (C.C.P. 488.510[d][Deering's]). Death of debtor whose property is attached does not terminate attachment. (C.C.P. 488.510[e][Deering's]).

Service of temporary protective order creates lien upon property described in order; lien is not valid as against bonafide purchaser or transferee in ordinary course of business. (C.C.P. 486.110[a][Deering's], 697.740[a][Deering's]). Lien of temporary protective order is perfected upon levy of writ of attachment or terminates upon date of expiration specified in order. (C.C.P. 486.110[b][Deering's]).

Attachment lien merges into subsequent lien created by levy of execution (see topic 8.05 Executions); lien of attachment on real property merges into lien of judgment (see category 5 Civil Actions and Procedure, topic 5.15 Judgments). (133 Cal. App. 2d 283, 284 P.2d 185). Attachment lien on real property is defeated by subsequent declaration of homestead (see topic 8.10 Homesteads). (214 C. 753, 7 P.2d 1027). Lien of attachment or of temporary protective order is terminated upon making of general assignment for benefit of creditors and upon filing petition commencing voluntary or involuntary bankruptcy proceeding, if lien was created within 90 days prior to making of general assignment or filing of petition. (C.C.P. 493.010-493.060[Deering's]).

Priorities.

Attachment liens on same property have priority based upon date of creation. (C.C. 2897).

Release of Property.

Post-levy exemption claiming procedures are provided. (C.C.P. 482.100[Deering's]).

Court may allow defendant, upon noticed motion, to substitute undertaking in order to release property from attachment or temporary protective order. (C.C.P. 489.310[Deering's], 489.320[Deering's]).

Levying officer shall release attachment when he receives written directive from plaintiff's attorney or when he receives certified copy of court order for release, or when otherwise required to release property. (C.C.P. 488.730[a][Deering's]).

Sale.

Court may order sale of property subject to attachment prior to judgment if such property is perishable or will greatly deteriorate or greatly depreciate in value or if interests of parties will be best served by sale. (C.C.P. 488.700[a][Deering's]). If levying officer determines property is extremely perishable or will greatly deteriorate or greatly depreciate in value before court order could be obtained, he may take any action necessary to preserve value of property or may sell property. (C.C.P. 488.700[b][Deering's]).

Third Party Claims.

Third party claims treated in same manner as in executions. (See topic 8.05 Executions.) (C.C.P. 488.110[Deering's]).

Vacation or Modification.

Defendant may move to modify or vacate ex parte right to attach order or temporary protective order. (C.C.P. 485.240[Deering's], 486.100[Deering's]).

Wrongful Attachment.

Statute defines acts of wrongful attachment and establishes liability therefor. (C.C.P. 490.010 et seq.[Deering's]). Statute does not limit right to recover for damages caused by attachment or protective order on any common law theory of recovery. (C.C.P. 490.060[Deering's]).

Forms.

Mandatory forms have been promulgated by California Judicial Council to implement attachment statute pursuant to authority granted in C.C.P. 482.030[Deering's].

8.03 [RESERVED]

8.04 CREDITORS' SUITS:

Judgment creditor may bring action against third party who has possession or control of property in which judgment debtor has interest. (C.C.P. 708.210[Deering's]). Judgment creditor may obtain restraining order preventing third party from transferring property. (C.C.P. 708.240[Deering's]). Creditors' suits for claims against property held by third party in which defendant has interest or third party who is indebted to defendant, when property or debt has been attached by lien governed by C.C.P. 491.310-491.370[Deering's]. Statutory summary processes for creditors' suits are attachment (C.C.P. 481.010-488.740[Deering's]), claim and delivery of personalty (C.C.P. 511.010-516.050[Deering's]), third party claims of ownership or possession (C.C.P. 720.110-720.170[Deering's]), third party claims of security interest or lien (C.C.P. 720.210-720.290[Deering's]) and foreclosure of trust deeds or mortgages (C.C.P. 725a-730.5[Deering's]).

8.05 EXECUTIONS:

Judgments are enforceable according to provisions of Enforcement of Judgments Law. (C.C.P. 680.010 et seq.[Deering's]). Comprehensive statutes provide for enforcement of money judgments (C.C.P. 695.010[Deering's]), judgments for possession of personal property (C.C.P. 714.010 et seq.[Deering's]), judgments for possession of real property (C.C.P. 715.010[Deering's]), judgments for sale of real or personal property (C.C.P. 716.010[Deering's]), and other judgments (C.C.P. 717.010[Deering's]).

Exemptions.

See topic 8.06 Exemptions.

Time for Issuance.

Judgment is generally enforceable upon entry (C.C.P. 683.010[Deering's]) and may be enforced for ten years thereafter (C.C.P. 683.020[Deering's]). Judgment creditor may obtain multiple renewals of ten year period by filing application with court in which judgment was entered. (C.C.P. 683.110 et seq.[Deering's]).

Stay of Execution.

Trial court may stay enforcement of any judgment or order regardless of status of appeal, except that if enforcement would be stayed on appeal only by giving of undertaking, stay cannot extend for more than ten days beyond last day to file notice of appeal without consent of adverse party. (C.C.P. 918[Deering's]). C.C.P. 918.5[Deering's] guides court's discretion when judgment debtor has pending claim against judgment creditor. See category 5 Civil Actions and Procedure, topic 5.03 Appeal and Error, subhead Stay of Proceedings.

Lien.

Judgment creditor may create judgment lien on real property by recording abstract of judgment with County Recorder (C.C.P. 697.310 et seq.[Deering's]) and on certain personal property by filing notice of judgment lien in office of Secretary of State (C.C.P. 697.510 et seq.[Deering's]). Levy on property under writ of execution creates execution lien on property from time of levy for two-year period unless sooner satisfied. (C.C.P. 697.710[Deering's]).

Levy.

Except as otherwise provided by statute, all property of judgment debtor is subject to enforcement of money judgment. (C.C.P. 695.010[Deering's]). After entry of money judgment, judgment creditor upon application may obtain writ of execution. (C.C.P. 699.510[a][Deering's]). Writ must require levying officer to enforce money judgment. (C.C.P. 699.520[Deering's]). Detailed statutes provide for methods of levy for various types of property. (C.C.P. 700.010-700.200[Deering's]).

Return.

Levying officer shall return writ to court with report of levying officer's actions and accounting within specified periods not to exceed two years. (C.C.P. 699.560[Deering's]).

Priorities.

Lien of execution has priority based upon date of levy. (C.C. 2897, C.C.P. 697.710[Deering's]).

Claims of Third Persons.

Third person claiming ownership, right to possession, security interest, or lien in property levied upon may file claim with levying officer. (C.C.P. 720.110[Deering's], 720.210[a][Deering's]). Property must be released unless judgment creditor files undertaking or deposits with levying officer amount claimed by secured party or lienholder. (C.C.P. 720.140[Deering's], 720.240[Deering's]). Creditor or third party may petition court to determine validity of claim and disposition of property. (C.C.P. 720.310[Deering's]).

Satisfaction.

Money judgment may be satisfied by payment in full or by acceptance of lesser sum in full satisfaction of judgment. (C.C.P. 724.010[Deering's]). Upon payment of part or all of judgment and demand by judgment debtor, judgment creditor shall execute acknowledgment of payments. (C.C.P. 724.030 et seq.[Deering's]).

Sale.

Written notice of sale of personal property must be given stating date, time, and place of sale, and must describe property to be sold. (C.C.P. 701.530[Deering's]). Written notice of sale of interest in real property must state date, time, place of sale, describe interest to be sold, and give legal description of real property and its street address or other common designation. (C.C.P. 701.540[Deering's]). Statutes provide for distribution of proceeds of sale. (C.C.P. 701.810 et seq.[Deering's]). Sale must be by auction to highest bidder. (C.C.P. 701.570[b][Deering's]).

Redemption.

Execution sale is absolute and may not be set aside, unless sale was improper, judgment creditor was purchaser at sale, and judgment debtor brings action within 90 days to set aside sale. (C.C.P. 701.680[Deering's]).

Supplementary Proceedings.

Judgment creditor may propound written interrogatories to judgment debtor requesting information to aid in enforcement of judgment. (C.C.P. 708.020[Deering's]). Judgment creditor may obtain ex parte order requiring judgment debtor to appear before court to furnish information to aid in enforcement of judgment. (C.C.P. 708.110 et seq.[Deering's]). Court may appoint receiver to enforce judgment. (C.C.P. 708.620[Deering's]).

Body Execution.

Judgment creditor may obtain ex parte order requiring judgment debtor to appear before court to furnish information to aid in enforcement of judgment. (C.C.P. 708.110 et seq. [Deering's]). If judgment debtor fails to appear, court may issue warrants to bring him before court and may punish him for contempt. (C.C.P. 708.170[Deering's]).

8.06 EXEMPTIONS:

There are numerous exemptions from attachment or execution of personal property, in many cases limited as to amount. (C.C.P. 703.010 et seq.[Deering's]). For list of exemptions, see also category 5 Civil Actions and Procedure, topic 5.15 Judgments, subhead Exempt Property from Satisfaction of Judgment.

Substitution.

Debtor who does not own articles specifically exempted may not hold other articles or money exempt in lieu thereof. (2 C.2d 63, 38 P.2d 784).

Waiver of Exemption.

Contractual or other prior waiver of exemptions, other than by failure to claim exemptions, is void. (C.C.P. 703.040[Deering's]).

Necessity of Claiming Exemptions.

Certain property is exempt without making claim. (C.C.P. 704.210[Deering's]). Otherwise, claimant must make claim of exemption (C.C.P. 703.510 et seq.[Deering's]).

Earnings.

Exempt from attachment. (C.C.P. 487.020[Deering's]). Earnings defined as compensation payable by employer to employee for personal services performed by employee, whether denominated as wages, salary, commission, bonus or otherwise. (C.C.P. 706.011[Deering's]).

8.07 FORECLOSURE:

See topic 8.13 Liens; category 20 Mortgages, topics 20.01 Chattel Mortgages, 20.04 Mortgages of Real Property.

8.08 FRAUDULENT SALES AND CONVEYANCES:

Uniform Commercial Code has been adopted (1963, c. 819), effective Jan. 1, 1965.

See also topic 8.01 Assignments, subhead Assignment of Accounts Receivable.

Uniform Fraudulent Transfer Act adopted (1962, adopted 1963) to replace Uniform Fraudulent Conveyance Act (C.C. 3439 et seq.); applies to transfers made on or after Jan. 1, 1987.

Transfer of Personal Property.

Every transfer of personal property made by person in possession or having control of property and not accompanied by immediate delivery and followed by actual and continued change of possession, is void against secured or unsecured creditors of transferor while he remains in possession and against good faith buyers from transferor subsequent to transfer. Several exceptions apply. (C.C. 3440, 3440.1). Subdivision (2) of §2402 and subdivision (1) of §10308 of Commercial Code[Deering's] are not restricted by provisions of this section.

Remedies.

Various creditor's remedies available. (C.C. 3439.07). Remedies also available for good faith transferee or obligee. (C.C. 3439.08).

Bulk Sales.

Uniform Commercial Code governs. See category 3 Business Regulation and Commerce, topic 3.09 Commercial Code, subhead Material Variations from 1990 Official Text. See also C.C. 3440.1.

8.09 GARNISHMENT:

Garnishment is form of attachment or execution and is means by which plaintiff may levy upon property of defendant which is in possession of third party. See topics 8.02 Attachment and 8.05 Executions.

Property Which May Be Reached.

For prejudgment garnishment, all property subject to attachment. Contingent and uncertain obligations are not subject to garnishment. (70 Cal. App. 3d 367, 138 C. Rptr. 807). (See topic 8.02 Attachment, subhead Property Subject to Attachment.) For post-judgment garnishment, all property subject to execution. (See topic 8.05 Executions, subhead Levy.)

Jurisdiction.

See topic 8.02 Attachment, subhead Courts Which May Issue Writ.

Proceedings to Obtain.

See topic 8.02 Attachment, subhead Proceedings to Obtain. See topic 8.05 Executions, subhead Time for Issuance.

Practice.

Any person owing debts to defendant in excess of $250 or having possession or control of personal property of defendant may be required to appear before court for purpose of examination on oath regarding such property. (C.C.P. 491.110[a][Deering's]). If person so examined admits debt, or if he denies debt or claims interest adverse to defendant, but court determines existence of debt or interest in property pursuant to C.C.P. 491.170[Deering's], court may not make order of attachment but make order forbidding transfer or payment to extent authorized by this section. (C.C.P. 491.190[Deering's]). In such proceeding, witnesses, including nonresident, may be required to appear and testify as to matters relating to examination of third person. (C.C.P. 491.120[Deering's]).

Judgment.

If judgment is for defendant, all property in hands of levying officer shall be delivered to person from whom it was collected. (C.C.P. 488.740[Deering's]).

Adverse Claims.

See topic 8.02 Attachment, subhead Third Party Claims. See also topic 8.05 Executions, subhead Claims of Third Persons.

Earnings.

See topics 8.02 Attachment, subhead Property Subject to Attachment; 8.05 Executions, subhead Levy; 8.06 Exemptions.

8.10 HOMESTEADS:

C.C. 1237-1304 relating to declared homestead are superseded by C.C.P. 704.710-704.850[Deering's] (claimed homestead exemption) and 704.910-704.995 (declared homesteads). As restraint on ability to convey, encumber, or partition property (former 1240 and 1242), declared homestead is superseded by more general provisions governing conveyance, encumbrance, and partition of community and separate property and imposing obligations on spouses for mutual support and to provide dwelling; ability of one spouse to affect separate property of other spouse is not continued except as provided in Fam. C. 752-754[Deering's], 2035(c)[Deering's], 2036.5[Deering's]. See Fam. C. 770[Deering's] (wife may convey separate property without husband's consent; husband may convey separate property without wife's consent), 1100 (spouse may not convey or encumber community personal property used as dwelling without written consent of other spouse), 1102 (both spouses must join in conveyance or encumbrance of community real property), 720 (spouses' obligation of mutual support, respect and fidelity), 752; 754; 2035(c) (right to occupy dwelling of spouse and restraining on alienation of dwelling); C.C.P. 872.210(b)[Deering's] (no partition of community property).

Homestead Exemption.

Value Exempt.

$175,000 if judgment debtor or spouse is 65 years or over or is unable to engage in substantial gainful employment due to disability or is 55 years or over with gross annual income of not more than $15,000, or, if married, joint gross annual income of not more than $20,000, and sale is involuntary. $75,000 if judgment debtor or spouse is member of family unit and there is at least one member of family unit who owns no interest in homestead or whose only interest in homestead is community property interest with judgment debtor, $75,000 for all other persons. In any event, aggregate exemptions of both spouses on same judgment may not exceed $100,000 or $175,000 as applicable. (C.C.P. 704.730[Deering's]).

Property Exempt.

Dwelling where person resides continuously from date judgment lien attaches until date court determines dwelling is homestead. Dwelling includes, without limitation: (1) House together with outbuildings and land upon which they are situated; (2) mobile home together with outbuildings and land upon which they are situated; (3) boat or other waterborne vessel; (4) condominium; (5) planned development; (6) stock cooperative; (7) community apartment project. (C.C.P. 704.710[Deering's]).

Enforcement Sale.

Dwelling may be sold to enforce money judgment only upon court order, unless dwelling is personal property or leasehold estate with unexpired term less than two years. (C.C.P. 704.740[Deering's]). If no bid is received at court-ordered sale that exceeds amount of homestead exemption plus any additional amount necessary to satisfy all liens and encumbrances, including but not limited to any attachment or judgment lien, dwelling shall not be sold, and same judgment creditor may not make application for sale for period of one year. Sale must be for 90% or more of fair-market-value of dwelling except upon permission of court to accept highest bid. (C.C.P. 704.800[Deering's]). Sale does not trigger “due-on-sale” clause or prepayment penalty under lien or encumbrance. (C.C.P. 704.810[Deering's]). If judgment debtor is co-owner or owns less than fee, only judgment debtor's interest shall be sold, and judgment debtor is entitled to apply his or her exemption to such interest. (C.C.P. 704.820[Deering's]). Judgment creditor entitled to receive costs incurred in enforcement sale, unless no bid exceeds amount of homestead exemption plus any additional amount necessary to satisfy all liens and encumbrances on property. (C.C.P. 704.840[Deering's]).

Proceeds.

If homestead sold by enforcement sale or damaged or destroyed, or is acquired for public use, proceeds of sale, insurance or condemnation award are exempt to extent of applicable value of exemption for six months after receipt, unless homestead exemption is applied to other property of judgment debtor or spouse during that period. (C.C.P. 704.720[Deering's]).

Declared Homestead.

Value Exempt.

Same as for statutory homestead exemption above. (C.C.P. 704.950[Deering's]). If homestead declaration is recorded and thereafter exemption is increased, applicable exemption is in effect on date creditor obtains lien. (C.C.P. 704.965[Deering's]).

Property Exempt.

Limited to any interest in real property that is “dwelling” as defined in C.C.P. 704.710[Deering's], but does not include leasehold with unexpired term less than two years or interest of beneficiary of trust. (C.C.P. 704.910[Deering's]).

Declaration of Homestead.

Homestead may be formally declared by filing declaration of homestead. (C.C.P. 704.920[Deering's]). Declaration must contain: (1) Name of declared homestead owner; (2) description of declared homestead; (3) statement that declared homestead is principal dwelling of declared homestead owner or spouse and that owner or spouse reside there on date of recordation; and (4) statement that facts stated in declaration are known to be true as of personal knowledge of person executing and acknowledging declaration. Declaration must be executed and acknowledged as though conveyance of real property, and may be executed by guardian, conservator or authorized agent of homestead owner or spouse. (C.C.P. 704.930[Deering's]). Declaration must be recorded in county where dwelling is located. (C.C.P. 704.920[Deering's]).

Enforcement Sale.

Same as statutory homestead exemption above. (C.C.P. 704.970[Deering's]).

Proceeds.

Same as statutory homestead exemption above. (C.C.P. 704.960[Deering's]).

Voluntary Sale.

Proceeds exempt for six months after sale. If reinvested in new dwelling within six months, new homestead may be recorded with effect as though recorded at time prior homestead was recorded. (C.C.P. 704.960[Deering's]).

Abandonment.

Declared homestead may be abandoned by recordation of declaration of abandonment (C.C.P. 704.980[Deering's]) or automatically upon recordation of homestead declaration for different property (C.C.P. 704.990[Deering's]).

Probate Homestead.

Surviving spouse and minor children entitled to remain in possession of family dwelling, and dwelling exempt from enforcement of money judgment, until 60 days after filing probate inventory or as ordered by court. (Prob. C. 6500[Deering's]). Upon application, court may set apart for limited period for use of surviving spouse and/or minor children, one homestead from community, quasi-community, commonly owned property of decedent and spouse or separate property of decedent. (Prob. C. 6520-6528[Deering's]).

Bankruptcy Homestead.

Exemption available in bankruptcy regardless of existing money judgment or money judgment enforced by execution. (C.C.P. 703.140[Deering's]).

8.11 JUDGMENT NOTES:

See category 3 Business Regulation and Commerce, topic 3.02 Bills and Notes.

8.12 LEVY:

See topics 8.02 Attachment, 8.05 Executions.

8.13 LIENS:

No attempt is here made to discuss at length ordinary common-law or equitable liens.

Uniform Commercial Code adopted (1962, adopted 1963). See category 3 Business Regulation and Commerce, topic 3.09 Commercial Code.

California has great number of statutory liens which are non-consensual and which can arise in unexpected situations. Care must be taken when dealing with certain businesses or undertaking certain transactions to ensure that unanticipated statutory liens do not arise to impair party's position. Statutory lien legislation is not located in one particular place in California statutes. Rather, this legislation is dispersed throughout numerous Code divisions. Majority of statutory liens are found in following Codes: Food & Agricultural Code; Civil Code; Commercial Code; Financial Code; Government Code; Harbor and Navigation Code; Health and Safety Code; Public Utilities Code; and Revenue and Taxation Code.

Discussion of selected liens and matters regarding them follows:

Jewelers have lien dependent upon possession, for any account due for work and materials. (C.C. 3052a).

Repairmen and keepers of garages for automobiles have lien, dependent on possession, for their labor, services and materials in caring for and safe keeping such automobiles and trailers. (C.C. 3051, 3068).

Lien on Merchandise.

Uniform Commercial Code governs. (Division 9 of Commercial Code). See category 3 Business Regulation and Commerce, topic 3.09 Commercial Code.

Vendors and Vendees of Real Property.

Vendors of real property have lien independent of possession for unpaid and unsecured portions of purchase price. (C.C. 3046). Vendee of real property has lien, independent of possession, for such part of amount paid as he may be entitled to recover back in case of failure of consideration. (C.C. 3050).

Lien for Services Rendered.

Persons who make, alter or repair items of personal property at request of owner thereof, has special lien, dependent upon possession, for compensation due for his services in amount of reasonable charges and cost of materials. (C.C. 3051). Lien subject to limitations discussed below.

Other Liens.

There are also agricultural laborer's liens, shipmaster's liens, seamen's liens, warehousemen's liens, liens of keepers of apartments, of persons who cut logs and lumber, liens of workers on, and suppliers for, aircraft, and liens of persons who furnish labor, material or services to an oil or gas leasehold. Banker's “lien,” properly “right of set-off,” not state action and not subject to Constitution. (11 C.3d 352, 521 P.2d 441, 113 C.Rptr. 449).

See also topics 8.02 Attachment, Pledges; categories 3 Business Regulation and Commerce, topics Carriers, Factors; Civil Actions and Procedure, topic Judgments; Mortgages, topics Chattel Mortgages, Mortgages of Real Property; Taxation, topic Administration, subhead County and Municipal Taxes, catchline Lien; Transportation, topic Motor Vehicles.

Waiver, Loss or Extinguishment.

Liens under C.C. 3051 are valid in varying amounts depending upon type of lien and whether notice to and consent of owner of property is first obtained. (C.C. 3051a and 3068). Lien is accessory to act performance of which it secures and is extinguishable in like manner with any other accessory obligation. (C.C. 2909). Sale of any property on which there is lien, in satisfaction of claim secured thereby, or in case of personal property, its wrongful conversion by person holding lien, extinguishes lien thereon. (C.C. 2910). Lien is extinguished by lapse of time as provided by statutes of limitation for principal obligation. Special rules exist for extinguishment of liens on real property to secure payment of public improvement assessments. (C.C. 2911). Partial performance of act secured by lien does not extinguish lien upon any part of property subject thereto, even if it is divisible. (C.C. 2912). Voluntary restoration of property to owner by lienholder extinguishes lien dependent upon possession as to owners in absence of agreement to contrary, and extinguishes it as to creditors and subsequent bona fide purchasers notwithstanding such agreement. (C.C. 2913). Foregoing rules do not apply to transactions or security interests governed by Uniform Commercial Code. (C.C. 2914).

Enforcement.

Statutes provide in detail for sale of goods on which there is lien to satisfy principal obligation which is due and unpaid. Goods may be sold at public auction by giving prescribed notice to owner, advertising sale, etc. (C.C. 3052, 3052a, 3066, 3071-3074).

Mechanics' Liens.

Mechanics, materialmen, contractors, subcontractors, lessors of equipment, artisans, architects, machinists, builders, teamsters and draymen, registered engineers, licensed land surveyors and all persons and laborers of every class performing labor upon or bestowing skill or other necessary services on, or furnishing materials or leasing equipment to be used or consumed in, or furnishing appliances, teams, or power contributing to a work of improvement shall have lien upon property upon which they have bestowed labor or furnished materials or appliances or leased equipment for value of such labor done or materials furnished and for value of use of such appliances, teams, or power, whether done or furnished at instance of owner or of any person acting by his authority or under him, as contractor or otherwise. (C.C. 3110). See C.C. 3060 for lien for work or materials relating to mining. Every contractor, subcontractor, architect, builder, or other person having charge of construction, alteration, addition to, or repair, in whole or in part, of any building or other work of improvement shall be held to be agent of owner. (C.C. 3106, 3110). Claim of lien in proper form, verified and containing required information accepted for recording without acknowledgment (C.C. 3084)

Preliminary 20-Day Notice.

Unless he is laborer for wages or under direct contract with owner, person or entity to whom portion of laborer's compensation is paid as described in C.C. 3089(b), lien claimant must give specified notice to owner or reputed owner, original contractor or reputed contractor and construction lender or reputed construction lender not later than 20 days after claimant has first furnished labor, services, equipment or materials to jobsite. (C.C. 3097, 3114).

Claim of Lien.

Each claimant, in order to enforce lien, must record his claim of lien within 90 days after completion of work of improvement if no notice of completion or cessation was recorded, or within 60 days after filing of such notice of completion or notice of cessation in case of original contractor, and within 30 days after such date of notice of completion of cessation in case of other claimants. (C.C. 3115, 3116). Where improvement is made under two or more original contracts, each covering particular portion of work of improvement, owner may, within ten days after completion of any such contract, record notice of completion containing specified data. (C.C. 3093, 3117). Upon such filing, original contractor under contract covered by notice must, within 60 days after filing, and other claimant must, within 30 days after filing, record his claim of lien. (C.C. 3117).

Release Bond.

Owner of, or in certain cases contractor or subcontractor upon, property sought to be charged with claim of lien may free property from such claim by recording bond in penal sum one and one-half times amount of claim. (C.C. 3143).

Amount of Lien.

Mechanics' liens are direct liens shall be for reasonable value of labor, services, equipment, or materials furnished or for price agreed upon by claimant and person with whom he contracts, whichever is less. Such lien is not limited in amount by price stated in contract as defined in C.C. 3088, except as provided in C.C. 3235 and 3236 and owner shall notify prime contractor and construction lenders of any change in contract, if change has effect of increasing price stated in contract by 5% or more. (C.C. 3123, 3235, 3236).

Land Affected.

Land upon which any improvement is situated together with convenient space about same, or so much as may be required for convenient use and occupation thereof, if at commencement of work, or of furnishing of material for same, land belonged to person who caused such improvement to be constructed, but if such person owned less than fee simple estate in such land, then only his interest therein is subject to such lien, except as provided in C.C. 3129. (C.C. 3128).

Duration and Enforcement of Lien.

No lien binds any property longer than 90 days after its recording unless proceedings be commenced in proper court within that time to enforce such lien, or unless credit is given and notice of fact and terms of such credit is recorded prior to expiration of 90-day period; and if enforcement proceedings are not prosecuted to trial within two years after commencement, they may be dismissed at court’s discretion for want of prosecution. (C.C. 3144, 3147). Unless notice of pendency of proceedings filed, no subsequent purchaser or encumbrancer of property has constructive notice. (C.C. 3146).

Priority.

Liens provided other than with respect to site improvements are, subject to exception in C.C. 3138, preferred to any other lien which may attach subsequent to commencement of work of improvement and to any other lien of which lien claimant had no notice and which was unrecorded at time work of improvement was commenced (C.C. 3134) except if holder of lien procures and records specified payment bond as defined in C.C. 3096 in amount not less than 75% of principal amount of such mortgage or deed of trust, and shall record such payment bond in office of county recorder in county where site is located, then such mortgage or deed of trust shall be preferred to liens for labor, services, equipment, or materials furnished after such recordings (C.C. 3138). Site improvements (defined in C.C. 3102) are also preferred to any mortgage, deed of trust, or other encumbrance recorded before commencement of site improvement work which was given for sole or primary purpose of financing such site improvements, unless loan proceeds are placed in control of lender under binding agreement with borrower containing specified restrictions on disposition of proceeds, or unless owner of land or holder of lien procures and records specified payment bond before completion of work of improvement. (C.C. 3096, 3137, 3139).

Stop Notices for Private Works of Improvement.

Any person named in C.C. 3110, 3111, and 3112, other than original contractor: (a) May give stop notice (defined in C.C. 3103) to owner, and (b) unless payment bond recorded in accordance with C.C. 3235, may give stop notice or bonded stop notice (defined in C.C. 3083) to construction lender. (C.C. 3158, 3159). Any person who fails to serve stop notice on owner after written demand from owner therefor, shall forfeit right to mechanic's lien. (C.C. 3158). Service of stop notice or bonded stop notice effective only if made prior to expiration of period within which claim of lien must be recorded under C.C. 3114, 3115, 3116 or 3117, and preliminary 20-day notice given in accordance with C.C. 3097. (C.C. 3160). Upon receipt of stop notice, owner shall and construction lender may, and upon receipt of bonded stop notice construction lender shall, withhold sufficient money to answer claim, unless payment bond recorded in accordance with C.C. 3235. (C.C. 3161, 3162). Upon filing of specified bond in penal sum equal to 1¼ times amount stated in stop notice, funds withheld in response to stop notice or bonded stop notice shall be released. (C.C. 3171). Action to enforce claim stated in stop notice or bonded stop notice may be commenced at any time after ten days from date of service of stop notice upon either owner or construction lender and must be commenced not later than 90 days following expiration of period within which claims of lien must be recorded. (C.C. 3172). Action not brought to trial within two years after commencement thereof may be dismissed in court's discretion for want of prosecution. (C.C. 3173).

Stop Notice for Public Work.

Except for original contractor, any person entitled to mechanic's lien, trust fund lien, site improvement lien, contracting for wastework or furnishing provisions, provender or other supplies to public work (defined in C.C. 3099, 3100) may serve stop notice upon public entity responsible for such public work. (C.C. 3181). To enforce stop notice, claimant must have given preliminary 20-day notice (public work) in accordance with C.C. 3098, and must have served stop notice before expiration of: (a) 30 days after recording of notice of completion or notice of cessation (defined in C.C. 3092), or (b) if neither is recorded, 90 days after completion or cessation. (C.C. 3183, 3184). Upon receipt of stop notice, public entity so notified must withhold money or bonds sufficient to answer claim stated in such stop notice and to provide for reasonable cost of any litigation thereunder. Public entity may satisfy duty by refusing to release money held in escrow pursuant to Pub. Cont. C. 10263[Deering's] or 22300[Deering's]. (C.C. 3186). Public entity may, in its discretion, permit original contractor to file specified bond in amount equal to 125% of claim stated, and public entity shall not withhold moneys or bonds upon filing of such bond. (C.C. 3196). Original contractor who disputes claim may have question determined in summary proceedings pursuant to C.C. 3198-3205. (C.C. 3197). Action to enforce claim stated in stop notice must be commenced at any time after ten days from date of service of stop notice and not later than 90 days following expiration of period within which stop notice must be filed as provided in C.C. 3184. No such action shall be brought to trial or judgment entered until expiration of said 90-day period. No money shall be withheld by reason of any such notice longer than expiration of such 90-day period unless proceedings be commenced in proper court. If such proceedings have not been commenced, such notice shall cease to be effective and withheld money or bond shall be paid to contractor or other person to whom they are due. (C.C. 3210). Notice of commencement of any such action shall be given to public entity within five days after commencement of action described in C.C. 3210 in same manner provided in C.C. 3103. (C.C. 3211). Action not brought to trial within two years after commencement thereof may be dismissed in court's discretion. (C.C. 3212). In all cases upon dismissal of action or upon judgment rendered therein against claimant, stop notice shall cease to be effective and moneys or bonds withheld shall be paid or delivered to person to whom they are due. (C.C. 3213).

Effect on Arbitration Rights.

Recording and enforcing mechanic's lien does not thereby waive any right to arbitration that otherwise exists, if, at time of filing action to enforce lien, claimant does either of following: (1) includes allegation in complaint that claimant does not intend to waive any right of arbitration, and intends to move court, within 30 days after service of summons and complaint, for order to stay further proceedings in action; or (2) at same time complaint filed, claimant files application that action be stayed pending arbitration of any issue, question, or dispute claimed to be arbitrable under agreement and that is relevant to action to enforce claim of lien. (C.C.P. 1281.5[Deering's]).

Constitutionality.

Mechanic's lien and stop notice procedures held constitutional. (17 C.3d 803, 132 C.Rptr. 477; 553 P.2d 637).

Revised Uniform Federal Lien Registration Act enacted (1978, adopted 1979). (C.C.P. 2100 et seq.[Deering's]). California added C.C.P. 2105[Deering's] regarding filings initiated before Jan. 1, 1968. If notice of lien was filed on or before Jan. 1968, any certificate or notice affecting lien shall be filed in same office. (C.C.P. 2105[Deering's]).

Attachment Lien.

See topic 8.02 Attachment.

Judgment Lien.

See category Civil Action and Procedure, topic Judgments.

Collateral Security.

See topic 8.14 Pledges.

Liens on Exempt Property.

See topic 8.06 Exemptions.

Liens on Homesteads.

See topic 8.10 Homesteads.

Tax Lien.

See category 22 Taxation, topic Taxes.

8.14 [RESERVED]

8.15 PLEDGES:

Uniform Commercial Code has been adopted. (1962, adopted 1963). See category 3 Business Regulation and Commerce, topic 3.09 Commercial Code.

Remedies of Pledgee.

Uniform Commercial Code governs. (Com'l. C. Div. 9). See category 3 Business Regulation and Commerce, topic 3.09 Commercial Code, subhead Material Variations from 1990 Official Text.

8.16 RECEIVERS:

When Appointment Proper.

Receiver may be appointed by court in which action is pending:

(1) In action by vendor to vacate fraudulent purchase of property, or by creditor to subject any property or fund to his claim, or between partners or others jointly owning or interested in any property or fund, on application of plaintiff, or of any party whose right to or interest in property or fund, or proceeds thereof, is probable, and where it is shown that property or fund is in danger of being lost, removed or materially injured. (2) In action by secured lender for foreclosure of his deed of trust or mortgage and sale of property upon which there is lien under deed of trust or mortgage where it appears that property is in danger of being lost, removed or materially injured, or that condition of deed of trust or mortgage has not been performed, and property is probably insufficient to discharge deed of trust or mortgage debt. (3) After judgment, to carry judgment into effect. (4) After judgment, to dispose of property according to judgment, or to preserve it during pendency of appeal, or pursuant to Enforcement of Judgments Law (Tit. 9 commencing with C.C.P. 680.010[Deering's]), or after sale of real property or pursuant to decree of foreclosure, during redemption period, to collect, expend, and disburse rents as may be directed by court or otherwise provided by law. (5) Where corporation has been dissolved as provided in C.C.P. 565[Deering's]. (6) Where corporation is insolvent, or in imminent danger of insolvency, or has forfeited corporate rights. (7) In unlawful detainer action. (8) At request of Public Utilities Commission pursuant to Pub. Utils. C. 855 or 5259.5. (9) In all other cases necessary to prove property or rights of any party. (10) At request of Office of Statewide Health Planning and Development, or Attorney General. (11) In action by secured lender for specific performance of assignment of rents provision in deed of trust, mortgage, or separate assignment document. (12) In case brought by assignee under assignment of leases, rents, issues, or profits under C.C. 2938(g). (C.C.P. 564[Deering's]).

Eligibility.

No party, or attorney, or person interested in action, or related to any judge of court by consanguinity or affinity within third degree, can be appointed receiver therein without written consent of parties, filed with clerk. (C.C.P. 566[a][Deering's]).

Bond in Case of Ex Parte Appointment.

If receiver be appointed upon ex parte application, court, before making order, must require from applicant undertaking in amount to be fixed by court, to effect that applicant will pay to defendant all damages he may sustain by reason of appointment of receiver and entry by receiver upon duties, in case applicant shall have procured such appointment, wrongfully, maliciously or without sufficient cause. (C.C.P. 566[b][Deering's]).

Powers.

Receiver has, under control of court, power to: Bring and defend actions in his own name, as receiver; take and keep possession of property; receive rents; collect debts, to compound for and compromise same; to make transfers; and do such other acts as court may authorize. (C.C.P. 568[Deering's]).

8.17 REDEMPTION:

See topics 8.05 Executions, Liens; categories 20 Mortgages, topic Mortgages of Real Property; Taxation, topic Property Taxes, subhead Redemption.

8.18 SUPPLEMENTARY PROCEEDINGS:

See topic 8.05 Executions.

8.19 TRUSTEE PROCESS:

See topic 8.09 Garnishment.

8.20 USURY:

See category 3 Business Regulation and Commerce, topic 3.19 Interest.

9 DISPUTE RESOLUTION

9.01 ALTERNATIVE DISPUTE RESOLUTION:

Legislature has declared that courts should encourage greater use of alternative dispute resolution techniques when administration of justice will be improved and counties should consider increasing use of alternative dispute resolution in their operations as plans for court reform are developed and implemented. (Bus. & Prof. C. 465[d][e][Deering's]).

Mandatory Dispute Resolution.

Various statutes require alternative dispute resolution (ADR) in specific types of cases.

Superior Court Cases Up to $50,000.

Civil case in superior court with 18 or more judges where amount in controversy is $50,000 or less for each plaintiff must be referred to nonbinding arbitration. In superior court with fewer than 18 judges court may provide by local rule, when court determines it is in best interests of justice, that all at-issue civil actions where amount in controversy is $50,000 or less for each plaintiff be submitted to non-binding arbitration. (C.C.P. 1141.11[Deering's]).

Uninsured Motorist Coverage Claims.

Auto insurance policies must provide for binding arbitration of disputes between insurer and insured under uninsured or underinsured motorist coverage. (Ins. C. 11580.2[f][Deering's]).

Public Works Claims Against Local Agency.

Lawsuits for $375,000 or less by public works contractor against local agency must be referred to mediation within 60 days after responsive pleadings filed unless parties stipulate otherwise. (Pub. Cont. C. 20104.4[Deering's]).

Contract Claims Against State.

Arbitration is only remedy available for resolution of contract claim against state. (Pub. Cont. C. 10240[Deering's]).

Child custody and visitation matters must be mediated prior to any contested hearing. (Fam. C. 3160 et seq.[Deering's]).

Attorney-Client Fee Disputes.

If client requests, any suit for attorney fees must be arbitrated by approved local bar association program, or by State Bar if no local program. Attorney must advise client of this option when lawsuit filed. Award binding unless one of parties seeks trial de novo within 30 days after notice of arbitration award. (Bus. & Prof. C. 6200 et seq.[Deering's]).

Cumis Counsel/Insurer Fee Disputes.

Fee disputes between counsel hired by insurer to represent insured because of conflict of interest, if not settled by other means specified in insurance policy, must be resolved by final and binding arbitration using single, neutral arbitrator selected by parties. (C.C. 2860[c]).

Warranty Claims Against Motor Vehicle Manufacturers.

Such disputes must be submitted to qualified third party dispute resolution process, if one has been adopted by manufacturer, before buyer may utilize certain statutory presumption. (C.C. 1793.2, Bus. & Prof. C. 472-472.5[Deering's]).

Complaints Against Contractors.

Complaint against contractor arising from home improvement contract, or alleging violation of contractors' state license law, must be referred to arbitration if contract price or damages alleged is equal to or less than amount of bond required under Bus. & Prof. C. 7071.6[Deering's]. Regardless of contract price, complaint must be referred to arbitration if criteria under Bus. & Prof. C. 7085(a)(2)-(6)[Deering's] satisfied. (Bus. & Prof. C. 7085[b][Deering's]).

Cost of Maintaining Easement.

In suit by easement owner against co-owners for contribution to cost of maintenance, court will appoint private arbitrator to apportion cost according to use. If arbitrator's award not accepted by all owners, court may enter judgment determining proportionate liability. (C.C. 845).

Workers' Compensation Proceedings.

Various issues subject to binding arbitration if claimant is represented by counsel including: (1) existence of insurance coverage, (2) rights of contribution where medical benefits have been provided from several sources. By agreement of parties issues arising under Lab. C. 3200 et seq.[Deering's] or 50 et seq.[Deering's] may be submitted for arbitration. By agreement of parties, any issue arising under Division 1 (commencing with Lab. C. 50[Deering's]) or Division 4 (commencing with Lab. C. 3200[Deering's]) may be submitted for arbitration, regardless of date of injury. (Lab. C. 5275[Deering's]).

Voluntary Dispute Resolution.

Some statutes authorize use of ADR but do not mandate it. Examples include: Certification determinations for escrow agents and employees (Finan. C. 17331.3[Deering's]), and disputes between guide dog schools and users (Bus. & Prof. C. 7215.6[Deering's]). (Inoperative July 1, 2011; Repealed Jan. 1, 2012).

Alternative Dispute Resolution Jurisdictional Commissions.

In relation to judicial arbitration under C.C.P. 1141.10 et seq.[Deering's], presiding judge must designate ADR administrator selected under Cal. R. Ct. 1580.3 to serve as arbitration administrator for supervision of selection of arbitrators for cases on arbitration hearing list, general supervision of arbitration program operation, and any additional duties delegated by presiding judge. (Cal. R. Ct. 1603) (effective until Jan. 1, 2007). Effective in 2007, presiding judge must designate ADR administrator selected under Cal. R. Ct. 10.738, who supervises selection of arbitrators and operation of arbitration program. (Cal. R. Ct. 3.813[a][Deering's]).

See also topic 9.02 Arbitration and Award.

9.02 ARBITRATION AND AWARD:

Written agreement to submit existing or future controversy to arbitration is valid, enforceable and irrevocable, save upon grounds existing for revocation of any contract, waiver of right, or if party to arbitration agreement is also party to pending court action arising out of same transaction and there is possibility of conflicting rulings on common questions. In latter circumstances court, on petition, may order arbitration to proceed, to be stayed or to proceed only as to those persons not party to court proceeding. Separate arbitration proceedings may, on certain conditions, be ordered consolidated. (C.C.P. 1281.2[Deering's]). Right to arbitration pursuant to agreement may be waived. (C.C.P. 1281.2[a][Deering's]). Private arbitration agreements must provide dispute resolution procedures with minimum levels of integrity. Parties can agree to less than totally neutral arbitrator. See 28 C.3d 807, 623 P.2d 165. Significant or substantial business relationships between party and neutral arbitrator must be disclosed. See 108 Cal. App. 3d 772, 166 C. Rptr. 774. Arbitrator must disqualify self upon demand of party where judicial disqualification grounds exist except in arbitration proceedings conducted under collective agreement between employers and employees or between their respective representatives. (C.C.P. 1281.9[e][Deering's]).

Judgment on Award.

In relation to contractual arbitration, within four years after award made, any party may petition court to confirm award. (C.C.P. 1285[Deering's], 1288[Deering's]). If award confirmed, judgment must be entered in conformity therewith. (C.C.P. 1286.4[Deering's]). Within 100 days after service of award, any party may petition court to correct or vacate award (C.C.P. 1288[Deering's]) on grounds specified in C.C.P. 1286.2[Deering's] and 1286.6[Deering's] after satisfying prerequisites of C.C.P. 1286.8[Deering's]. Corrected award must be confirmed by court. (C.C.P. 1286.6[Deering's]).

Enforcement.

In relation to contractual arbitration, award must be in writing and include determination of all necessary questions. (C.C.P. 1283.4[Deering's]). Confirmed award may be entered as judgment and enforced like judgment in civil action of same jurisdictional classification. (C.C.P. 1286.4[Deering's]).

Mandatory Arbitration.

Various statutes require arbitration of disputes including: disputes between community college and employee (Educ. C. 87674[Deering's]), apportionment of liability for hazardous substance clean-up (H. & S.C. 25356.2[Deering's], 25356.3[Deering's]), insurance policies issued to self-employed persons (Lab. C. 5308[Deering's]), garment industry disputes (Lab. C. 2685-2692[Deering's]), value of oil or gas tract (Pub. Res. C. 3647), and protection of fish and game (Fish & G.C. 1603[b][Deering's], 15512[Deering's], 7710.1[Deering's]).

Powers of arbitrators in relation to contractual arbitration are to set time and place, adjourn or postpone, rule on all questions of procedure and evidence at hearing (C.C.P. 1282.2[Deering's]); issue signed but otherwise blank subpoenas to party requesting them (C.C.P.

1282.6[Deering's]); administer oaths (C.C.P. 1282.8[Deering's]); and order depositions for discovery (C.C.P. 1283[Deering's], 1283.05[Deering's]) or for use as evidence. Arbitrator may enforce discovery rights, remedies and procedures just as are available in like circumstances in civil action except lacks power to order arrest or imprisonment of person. (C.C.P. 1283.05[Deering's]).

Award and Enforcement.

Award must be in writing and include determination of all necessary questions. (C.C.P. 1283.4[Deering's]). Confirmed award may be entered as judgment and enforced like civil judgment. (C.C.P. 1287.4[Deering's]).

Powers of Arbitrators in relation to judicial arbitration are those necessary to perform duties under California Judicial Arbitration Act as prescribed by Judicial Council. (C.C.P. 1141.9).

Uniform Arbitration Act has not been adopted.

Jurisdictional Arbitration Acts include California Arbitration Act which governs framework for enforcement of contractual arbitration (C.C.P. 1280-1294.2[Deering's]), and California Judicial Arbitration Act (C.C.P. 1141.10-1141.31[Deering's]).

Other primary arbitration laws include Conflict of Interest between Insured and Insurer (Cumis) (C.C. 2860[c]), Small Claims Court Jurisdiction of Mandatory Arbitration of Attorney Fees (C.C.P. 116.200), Arbitration of Medical Malpractice (C.C.P. 1295[Deering's]), Public Construction Contract Arbitration (C.C.P. 1296[Deering's]), Arbitration and Conciliation of International Commercial Disputes (C.C.P. 1296.11-1296.432), Mandatory Arbitration of Attorney Fees (Bus. & Prof. C. 6200 et seq.[Deering's]), Uninsured Motorist Arbitration (Ins. C. 11580.2 et seq.[Deering's]), and Real Estate Contract Arbitration (C.C.P. 1298[Deering's]).

Standards for arbitrators vary depending on governing law.

Contractual Arbitration.

Arbitrators generally are expected to be neutral. (C.C.P. 1282[Deering's]). Arbitrators in case involving arbitration agreement may be disqualified if certain disclosures not made. (C.C.P. 1281.9[Deering's], 1281.95[Deering's], 1297.121[Deering's]).

Judicial Arbitration.

Arbitrators shall be retired judges, retired court commissioners licensed to practice law prior to appointment as commissioner, or members of state bar. Judge may serve as arbitrator without compensation. Non-attorneys may serve as arbitrators upon stipulation of all parties. (C.C.P. 1141.18[Deering's]). Arbitration administrative committees within each court appoint panels of arbitrators, remove arbitrators from panels, establish procedures for selecting arbitrators, and review administration and operation of arbitration program and make recommendations to Judicial Council to improve program, promote ends of justice, and serve needs of community. (Cal. R. Ct. 1603[b]). Committee seeks attorneys experienced in type of case to be heard. (C.C.P. 1141.10[b][3][Deering's]).

9.02A MEDIATION:

Judicial Mediation Act.

No jurisdictional acts. Civil action mediation governed generally by C.C.P. 1775-1775.8[Deering's]. C.C.P. 1775(f)[Deering's] states that purpose of this title is to encourage use of alternative dispute resolution methods in general, and mediation in particular.

Standards for Mediators.

Mediator(s) must be neutral person or persons. (C.C.P. 1775.1 [a][2][Deering's], Evid. C. 1115[Deering's]).

Mandatory Mediation.

Various statutes require mediation of disputes including: Labor disputes (Lab. C. 65-66[Deering's]; 18[Deering's] Ops. Atty. Gen. 216), habitual truants (Welf. & Inst. C. 601.2-601.3[Deering's]), disputes between public entities and their employee organizations (Govt. C. 3518, 3589, 3590, 3548), and disputes between public transit operators and local agencies (Pub. Utils. C. 120477).

10 DOCUMENTS AND RECORDS

10.01 ACKNOWLEDGMENTS:

No Uniform Acts adopted.

Within State.

May be made, at any place within state, before justice, retired justice or clerk of Supreme Court or any court of appeal, or judge or retired judge of superior court, or Secretary of Senate or Chief Clerk of Assembly. (C.C. 1180); or, at any place within state before notary public, or within county or city and county for which officer was elected or appointed, before clerk of superior court, or retired judge of municipal or justice court, county clerk, court commissioner, district attorney, clerk of board of supervisors or city clerk, county counsel, city attorney, Secretary of Senate or Chief Clerk of Assembly (C.C. 1181). Various officials have power to take acknowledgments specifically given by individual code sections.

Without State but within United States.

May be made, within jurisdiction of officer, before justice, judge or clerk of any court of record of United States or any state; notary public; or any other officer of state where made, authorized by its laws to take such proof or acknowledgment. (C.C. 1182). Commissioners no longer appointed. All authority to appoint commissioners (former Govt. C. 8300-8308) has been repealed.

Without United States.

May be made before minister, commissioner or chargé d'affaires of United States, resident and accredited in country where made; consul, vice-consul or consular agent of United States resident in country where made; a judge of court of record of country where made; commissioners appointed by Governor or Secretary of State for that purpose; or notary public. If before notary public, notary public's signature shall be proved or acknowledged: (1) Before judge of court of record of country where proof or acknowledgment is made, or (2) by any American diplomatic officer, consul general, consul, vice consul or consular agent, or (3) by apostille (certification) affixed to instrument pursuant to terms of Hague Convention Abolishing the Requirement of Legalisation for Foreign Public Documents. (C.C. 1183). Commissioners no longer appointed. All authority to appoint commissioners (former Govt. C. 8300-8308) has been repealed.

Deputies.

When any of above mentioned officers authorized by law to appoint deputy, acknowledgment or proof may be taken by such deputy in name of his principal. (C.C. 1184).

Acknowledgments of Persons in U.S. Armed Forces.

As to notarial powers of officers in Armed Forces, see topic 10.03 Notaries Public. See infra subhead Forms.

General Requirements as to Taking.

Officer taking acknowledgment shall “personally know” or have “satisfactory evidence” (oath or affirmation of “credible witness” or reliance upon certain specified documentary evidence) that person making acknowledgment is individual described in and who executed instrument. (C.C. 1185).

General Requirements of Certificate.

Officer must affix seal of office if required to have such seal by laws of state or country where acknowledgment taken or by whose authority officer is acting. (C.C. 1193).

Attorneys in Fact.

See infra, subhead Forms.

Corporations.

See infra, subhead Forms.

Signature by Mark.

Where instrument is signed by mark, two witnesses to such signature are necessary before acknowledgment. (C.C. 14; C.C.P. 17[Deering's]).

Proof of instrument, as alternative to acknowledgment, may be made by party executing instrument, by subscribing witness or by other witnesses under C.C. 1198 (C.C. 1195) personally known to officer taking proof to be person whose name is subscribed to instrument as witness, or proved to be such by oath of credible witness (C.C. 1196), or by proof of handwriting of party and of subscribing witness, if there is one, when all parties and all subscribing witnesses dead; or, when parties and all subscribing witnesses nonresidents of state; or when place of their residence unknown and cannot be ascertained by exercise of due diligence; or when subscribing witness conceals himself or refuses to testify for space of one hour, after his appearance (C.C. 1198).

Fees.

Fee of notary public for taking acknowledgment or proof, including seal and writing certificate, is $10 for each signature. (Govt. C. 8211). Fee of county recorder for taking acknowledgment is 75¢. (Govt. C. 27375).

Authentication.

Authentication not required of acknowledgment taken within state. (Evid. C. 1451[Deering's]).

If proof or acknowledgment is made before notary public without U.S., signature must be authenticated before certain designated officials. (C.C. 1183). Acknowledgment taken outside California is good if sufficient under laws where made. (C.C. 1189). On documents to be filed without state or in another U.S. jurisdiction, California notary public may complete any acknowledgment form as required provided form does not require notary to determine or certify that signer holds particular representative capacity or to make other determinations and certifications not allowed by California law. (C.C. 1189).

Fee for each certificate to official capacity of any public official is $2.25. (Govt. C.

26852). Fee for each certificate to official capacity of any public official is $6. California notary public must take and subscribe oath of office in office of County Clerk or before another notary public in that county. When oath and bond filed, County Clerk transmits certificate to Secretary of State setting forth fact of filing and containing copy of official oath. County Clerk also delivers bond to County Recorder for recording. (Govt. C. 8207, 8213).

Effect of Acknowledgment or Proof.

Private writings, except wills, when acknowledged or proved and certified, are prima facie evidence of facts recited in certificate and genuineness of signature of each person by whom writing purports to have been signed if certificate is valid under applicable law. (Evid. C. 1451[Deering's]). Certain documents, including letters patent (U. S.), mineral leases in which U.S. is lessor, copies of interdepartmental letters relative to such leases, may be recorded without normal requirement of acknowledgment or further proof. (Govt. C. 27285 et seq.).

Married Women.

No special requirements.

Foreign Acknowledgments.

See supra subhead Without United States.

Validating Acts.

Most significant curative statute provides that instrument affecting title to real property, one year after copy into record book, imparts notice to subsequent purchaser and encumbrancer, notwithstanding any defect or omission in acknowledgment, or absence of such certificate. (C.C. 1207).

Forms

General Form For Within State: State of California, County of . . . . —ss.: On . . . . before me, (name and title of officer), personally appeared. . . . . . ., personally known to me (or proved to me on the basis of satisfactory evidence) to be the person(s) whose name(s) is/are subscribed to the within instrument and acknowledged to me that he/she/they executed the same in his/her/their authorized capacity(ies), and that by his/her/their signature(s) on the instrument the person(s), or the entity upon behalf of which the person(s) acted, executed the instrument.

Witness my hand and official seal.

Signature. . . . .

(Seal). (C.C. 1189).

Note: The following five forms (Individual, Corporation, Public Corporation, Partnership, and Attorney in Fact) were repealed in 1990 but remain valid for acknowledgments provided prior to Jan. 1, 1993.

Individual: State of . . . . , County of. . . .—ss.: On this . . . . day of . . . . in the year 19. . . . before me, ... , a Notary Public of said State, duly commissioned and sworn, personally appeared . . . . personally known to me (or proved to me on the basis of satisfactory evidence) to be the person whose name is subscribed to the within instrument, and acknowledged that he executed the same.

In Witness Whereof, I have hereunto set my hand and affixed my official seal the day and year in this certificate first above written.

. . . .

Notary Public in and for said State. (C.C. 1189).

Corporation: State of . . . ., County of . . . .—ss.: On this . . . . day of . . . . in the year 19. . . . before me, ..., a Notary Public of said State, duly commissioned and sworn, personally appeared . . . . . ., personally known to me (or proved to me on the basis of satisfactory evidence . . . . . .) to be the person who executed the within instrument as president (or secretary) or on behalf of the corporation therein and acknowledged to me that such corporation executed the same.

In Witness Whereof, etc. (as in form for individual). (C.C. 1190).

(This alternative ending may be used with specified evidentiary effect C.C. 1190.1: "and acknowledged to me that such corporation executed the within instrument pursuant to its bylaws or a resolution of its board of directors.")

Public Corporation, Agency or Political Subdivision.

State of . . . . County of . . . . ss: On this . . . . . . day of . . . . . . in the year . . . . . . before me . . . . a Notary Public of said State, duly commissioned and sworn, personally appeared . . . . personally known to me (or proved to me on the basis of satisfactory evidence . . . .) to be the person who executed this instrument as (title of officer) of (name of public corporation, agency or political subdivision) and acknowledged to me that such (public corporation, agency or political subdivision) executed the same.

In Witness Whereof, etc. (as in form for individual). (C.C. 1191).

Certificate of Acknowledgment; Partnership: State of . . . ., County of . . . .—ss: On this . . . . day of . . . . in the year . . . . before me (name and quality of officer), personally appeared . . . ., personally known to me (or proved to me on the basis of satisfactory evidence . . . .) to be the person that executed this instrument, on behalf of the partnership and acknowledged to me that the partnership executed it. (C.C. 1190a).

Certificate of Acknowledgment; Attorney in Fact: State of . . . . County of . . . .—ss: On this . . . . day of . . . . in the year . . . . before me (insert name and quality of officer), personally appeared . . . ., personally known to me (or proved to me on the basis of satisfactory evidence . . . .) to be the person whose name is subscribed to this instrument as the attorney in fact of . . . ., and acknowledged to me that he (she) subscribed the name of . . . . thereto as principal, and his (her) own name as attorney in fact. (C.C. 1192).

Person in U.S. Armed Forces: On this the . . . . day of . . . ., 19 . . . ., before me, ..., the undersigned officer, personally appeared . . . . known to me (or satisfactorily proven) to be (a) serving in or with the Armed forces of the United States (b) spouse of a member of the Armed Forces of the United States (c) a person serving with, employed by, or accompanying the armed forces of the United States outside the United States and outside the Canal Zone, Puerto Rico, Guam and the Virgin Islands, and to be the person whose name is subscribed to the within instrument and acknowledged that . . . . he or she . . . . executed the same. And the undersigned does further certify that he or she is at the date of this certificate a commissioned officer in the active service of the Armed Forces of the United States having the general powers of a notary public under the provisions of Section 936 or 1044a of Title 10 of the United States Code (Public Law 90-632 and 101-510).

Signature of officer, rank, branch of service and capacity in which signed. (C.C.

1183.5).

To any affidavit subscribed and sworn to before such officer there should be attached a jurat in substantially the following form: Subscribed and sworn to before me on this . . . . day of . . . ., 19 . . . . Signature, etc., of officer as above.

Proof by Witness.

No particular form required but following form may be used:

State of . . . ., County of . . . .—ss: On this . . . . day of . . . . 19 . . . . before me, ..., a Notary Public of said State, duly commissioned and sworn, personally appeared . . . . known to me to be the person whose name is subscribed to the within Instrument, as a witness thereto, who being by me duly sworn, deposes and says: That he resides in . . . . and that he was present and saw . . . . personally known to h . . . . to be the same person whose name . . . . subscribed to the within and annexed Instrument, execute and deliver the same, and he acknowledged to said affiant that he executed the same; and that said affiant subscribed h . . . . name thereto as a Witness.

In Witness Whereof, I have hereunto set my hand and affixed my official seal the day and year in this certificate first above written.

. . . . (Signature and title of officer).

Authentication of Officer's Certificate.

No particular form required but following may be used:

State of . . . . County of . . . . ss: I, ... (name of clerk of court), the undersigned , certify: I am the clerk of the . . . . (name of court); that court is a court of record of . . . . (name of county or district) which is the . . . . (either county or district) where the acknowledgment of the instrument to which this certification is affixed was taken.

The officer certifying the acknowledgment is . . . . (name), who is authorized by the law of . . . . (specify jurisdiction) to certify acknowledgments within this . . . . . . (either county or district). The signature of . . . . (name of certifying officer) to the attached certificate of acknowledgment is his true and genuine signature, and the acknowledgment was taken in accordance with the laws of . . . . (specify jurisdiction).

Dated: . . . . Signature of Clerk of Court

Alternative to Acknowledgment or Proof.

Not available for documents signed outside of California. See also topic 10.02 Affidavits, subhead Alternative to Affidavit.

10.02 AFFIDAVITS:

Within the state, affidavits may be taken before every court, judge, court clerk, justice, notary public, officer or person authorized to take testimony in any action or proceeding or to decide upon evidence. (C.C.P. 2012[Deering's], 2093[Deering's]). Fee of notary public for administering oath or affirmation to one person and executing jurat including seal is $10. (Govt. C. 8211). No fee for service to any municipality or county in California, or to state or national government. (Govt. C. 26857).

Without the state but within the United States, affidavits may be taken before commissioner appointed by Governor of this state, notaries public in another state, or any judge or clerk of court of record having seal. (C.C.P. 2013[Deering's]).

Without the United States, affidavits may be taken before ambassador, minister, consul, vice-consul, or consular agent of U. S., or judge of court of record having seal. (C.C.P. 2014[Deering's]).

Affidavits of Persons in U. S. Armed Forces.

See topics 10.01 Acknowledgments, 10.03 Notaries Public.

General Requirement as to Administration.

Although no restriction upon taking affidavit by notary public who also is affiant's attorney, such practice not recommended. (56 C. 588).

General Requirement of Jurat.

Absence of seal is not fatal to affidavit's validity. (160 C. 695, 117 P. 905). Notary public seal must show expiration date of commission; if commissioned on or after Jan. 1, 1992, sequential identification number must also appear. (Govt. C. 8207, 8207.1).

Authentication.

Authentication required, in case of affidavits taken before judge or court outside state, by certificate of clerk of court under seal thereof, verifying genuineness of signature of judge, existence of court and fact that such judge was at the time member thereof. (C.C.P. 2015[Deering's]).

Authentication of signatures, when instruments are to be used without the state, is made by county clerk whose fee is $2.25. (Govt. C. 26852).

Use.

Affidavit may be used to verify pleading or paper in special proceeding; to prove service of summons, notice, or other paper in action or special proceeding; to obtain provisional remedy, examination of witness, or stay of proceedings; in uncontested proceedings to establish record of birth; or upon motion, and in any other case expressly permitted by statute. (C.C.P. 2009[Deering's]).

Publication of document or notice in newspaper may be proved by affidavit of printer, his foreman or principal clerk. (C.C.P. 2010[Deering's]).

Form

No particular form required, the following is usual: State of . . . ., County of . . . .— ss.: . . . ., being first duly sworn, deposes and says: (Here state fully and clearly, but in ordinary language, matters necessary to be shown).

. . . .

Subscribed and sworn to before me this . . . . day of . . . . .

(Signature and full official designation of officer)

Alternative to Affidavit.

Whenever, under any law of this state, or rule, regulation, order or requirement made pursuant to law of this state, any matter is required or permitted to be supported, evidenced, established, or proved by affidavit, such matter may with like force and effect be supported, evidenced, established or proved by unsworn statement in writing of person, stating date and place of execution, and subscribed by him and certified or declared to be true “under penalty of perjury.” Certification or declaration may be as follows: “I certify (or declare) under penalty of perjury under the laws of the State of California that the foregoing is true and correct.” (C.C.P. 2015.5[Deering's]).

10.03 NOTARIES PUBLIC:

For authentication of authority, see topic 10.01 Acknowledgments, subhead Authentication.

Qualification.

To be notary public, person must be 18 years or older, legal resident of California, and for appointments made on or after Jan. 1, 2005, have satisfactorily completed six-hour course approved by Secretary of State concerning functions and duties of notary public, and have satisfactorily completed written examination prescribed by Secretary of State to determine fitness of person to exercise functions and duties of notary public. Applicant for notary public must provide proof he or she has completed six-hour required course. Applicant who already holds notary public commission must provide proof he or she has completed three-hour refresher course prior to reappointment. (Govt. C. 8201[b]). Notary appointed for military or naval reservation must be federal civil service employee at that reservation. (Govt. C. 8203.3). Within 30 days after beginning of notary's term of office, or transfer of notary's principal place of business to another country, bond for $15,000 and oath of office must be filed with clerk of county of notary's principal place of business. (Govt. C. 8212, 8213).

Bond.

See subhead Qualification, supra. On application, court may release surety from responsibility for future acts of notary and cite notary to give other security. (Govt. C. 8216).

Seal of notary must bear name of notary, state seal, words “Notary Public”, county where bond and oath of office are filed and expiration date of notary public commission. Notary must authenticate all official acts with seal. Seal of every notary public commissioned on or after Jan. 1, 1992 shall contain sequential identification number assigned to notary and to manufacturer or vendor. (Govt. C. 8207).

Powers and Duties.

Notaries must, upon request, demand acceptance and payment of foreign and inland bills of exchange and promissory notes; protest such instruments for nonacceptance and nonpayment; with regard to nonacceptance or nonpayment of bills and notes, exercise such other powers or duties as may be performed by notaries under law of nations and according to commercial usages, or by laws of any other state, government, or country; take acknowledgments or proofs of powers of attorney, mortgages, deeds, grants, transfers, and other executed instruments; give certificates of proof or acknowledgments, endorsed on or attached to instrument and signed in notary's own handwriting; take depositions and affidavits and administer oaths and affirmations, signed in notary's own handwriting; certify copies of powers of attorney, signed in notary's own handwriting; furnish Secretary of State certified copies of notary's journal; respond, within 30 days to written requests by Secretary of State for information relating to official acts performed; notary may not accept incomplete acknowledgment or incomplete proof of instrument (Govt. C. 8205); in locked and secured area keep sequential journal of all official acts (which shall include date, time and type of each official act, character of instrument acknowledged or proved, signature of person whose signature is notarized, statement of notary's personal knowledge of identity of person signing or signature of witnesses affirming identity of signer or details of document establishing identity, and fee charged). If document notarized is deed, quitclaim deed, or deed of trust affecting real property, notary shall require signing party to place thumbprint or any available fingerprint if thumbprints unavailable in notary's journal, or explanation of physical condition preventing signing party from giving thumbprint. When requested, and upon payment of no more than 30¢ per page, notary must provide any person copy of any specified line item from journal. Notary must provide journal for examination and copying in his/her presence upon receipt of subpoena duces tecum or court order. (Govt. C. 8206). If notary resigns, is disqualified, is removed, or allows appointment to expire without obtaining reappointment within 30 days, notarial records and papers must be delivered to clerk of county in which notary's current official oath of office is on file. Willful failure or refusal to deliver within 30 days is misdemeanor and creates personal liability for damages to any person injured. Upon death of notary public, deceased's personal representative shall promptly notify Secretary of State and deliver all notarial records to clerk of county in which notary public's official oath of office is on file. (Govt. C. 8209). Notary, who has direct financial or beneficial interest in transaction, may not act as notary with respect to such transaction. This does not include notary who is agent, employee, insurer, attorney, escrow, or lender of person with direct interest in such transaction. (Govt. C. 8224). Notary may not acknowledge or prove instruments signed by him or take his own deposition or affidavit. (Govt. C. 8224.1).

Territorial Extent of Powers.

Notary may act in any part of California. (Govt. C. 8200). Notary for military or naval reservation may act only within boundaries of that reservation. (Govt. C. 8203.2). Name of reservation must appear in notary's jurat. (Govt. C. 8203.5).

Fees.

No fee for notarial service need be charged, except fees required to be remitted to State or any other public agency. (Govt. C. 6100). If charged, fees cannot exceed: Acknowledgment or proof of deed, $10 for each signature; administering oath or affirmation to one person and executing jurat, $10; for all services rendered in connection with deposition, $20 plus $5 for administering oath to witness and $5 for certificate to such deposition; protest for nonpayment of promissory note or nonacceptance for nonpayment of bill of exchange, order, draft or check, $10; for serving every notice of nonpayment of promissory note or of nonpayment or nonacceptance of bill of exchange, order, draft, or check, $5; for recording every protest, $5; for certifying copy of power of attorney, $10. No fee may be charged to notarize signatures on vote by mail ballot identification envelopes or other voting materials. In accordance with Govt. C. 6107, no fee may be charged to U.S. military veteran for notarization of application or claim for pension, allotment, allowance, compensation, insurance, or any other veteran's benefit. (Govt. C. 8211).

Authentication.

See topic 10.01 Acknowledgments.

Court Commissioner.

Subject to supervision of court, every court commissioner may: (1) Hear and determine ex parte motions for orders and alternative writs and writs of habeas corpus in superior court for which commissioner is appointed; (2) take proof and make and report findings as to any fact upon which information is required by court; (3) take and approve any bonds and undertakings in actions or proceedings and determine objections to bonds and undertakings; (4) act as temporary judge when otherwise qualified to do so and when appointed to do so on stipulation of parties; (5) hear and report findings and conclusions to court for approval, rejection, or change all preliminary matters; (6) hear actions to establish paternity and to establish or enforce child and spousal support; and (7) hear, report on and determine all uncontested actions and proceedings. (C.C.P. 259[Deering's]).

Officers of U.S. Armed Forces.

Any officer on active duty or performing inactive duty training in U.S. armed forces having general powers of notary public under 10 U.S.C. 936 or 1044a may perform all notarial acts, in or out of U.S., for any person, or spouse of any person, in armed forces, and for any person employed by or accompanying armed forces. Place of execution or acknowledgment need not be stated and seal or authentication of officer's certificate of acknowledgment or of any jurat is not required, but officer must endorse on or attach to any acknowledgment signed certificate, and to any affidavit signed jurat, substantially in form authorized by California law (see topic 10.01 Acknowledgments). (C.C. 1183.5).

10.04 RECORDS:

Public Records Act governs access to records classified as public records (Govt. C. 6250 et seq.). Whenever reasonable grounds exist that records belonging to state or local agency in hands of persons, organization, institutions not authorized to possess records notice demanding return of records may issue (Govt. C. 6204–6204.4). County recorder has charge of records relating to property.

Uniform Commercial Code has been adopted (1962, adopted 1963). See category 3 Business Regulation and Commerce, topic 3.09 Commercial Code.

Recordable Instruments.

Any instrument or judgment affecting title to or possession of real property may be recorded (Govt. C. 27280), including fictitious oil and gas leases (C.C. 1219) and fictitious mortgages and deeds of trust (C.C. 2952). (For effect see subhead, Necessity for Recording, infra.)

Instrument in foreign language may be recorded only if accompanied by court certified translation, unless provisions in foreign language are translations of English provisions and translations thereof are specifically set forth in state or federal law. (Govt. C. 27293). Keeping of photographed or microfilm copies of instruments is provided for. (Govt. C. 27322, 27322.2-27322.4, 27323).

Place of Recording.

Instruments entitled to be recorded must be recorded by county recorder of county in which real property located. (C.C. 1169). *For list of Counties and County Seats, see first page for this state in Volume containing Practice Profiles Section.*

Requisites for Recording.

In general, before instrument can be recorded it must be properly acknowledged by person executing it or proved by subscribing witness (Govt. C. 27287) or, in specified cases, by proof of handwriting (C.C. 1198, 1199). Certain instruments (Govt. C. 27282-27286; C.C. 1202, 1203, 1219, 2952, 3084, 3093) are exempted from requirements of acknowledgment or further proof to be recordable (Govt. C. 27287). First page of each document shall include 2½ inch blank space at top (for recording information) and 3½ inch space on left-hand margin (to show name of person requesting recording and name and address to which document to be returned after recording). All items for recordation shall be on paper and print that will reproduce legibly by photo or microphotographic process as set forth in Govt. C. 26205.5 and 27322.2 now required. (Govt. C. 27361.6). Uniform Simplification of Land Transfers Act has not been adopted.

Filing Under Uniform Commercial Code.

Secretary of State's office is central filing office for certain financing statements, agricultural liens and other lien documents provided for in Uniform Commercial Code. Documents can be mailed to: Secretary of State, Uniform Commercial Code, P.O. Box 942835, Sacramento, CA 94235-0001. Phone number: (916) 653-3516. Fees for filing too numerous to list but can be accessed at California Secretary of State website: www.ss.ca.gov.

Fees of recorder are fixed by Govt. C. 27360-83, 27387, 27387.1. Among fees so fixed are: for recording and indexing instrument, paper or notice required or permitted by law to be recorded, $4 for recording first page and $3 for each additional page (for forms printed with more than nine lines per vertical inch or more than 22 characters and spaces per inch measured horizontally for not less than three inches in one sentence, there is additional charge of $1 for each page on which such printing appears, unless printing is directive or explanatory or on vital statistics form); $3 fee is charged for filing any document not required by law to be recorded. Additional fees are charged if document refers to more than one other recorded instrument (Govt. C. 27361.2) or if additional indexing is required by law (Govt. C. 27361.8). Each county may charge additional fee of $1 for each document recorded. (Govt. C. 27361.4).

Necessity for Recording.

Every conveyance of real property or estate for years, other than lease for term not exceeding one year, is void as against any subsequent purchaser or mortgagee of same property or any part thereof in good faith and for valuable consideration, whose conveyance is first duly recorded, and as against any judgment affecting title unless such conveyance shall have been duly recorded prior to record of notice of action. (C.C. 1214).

In addition to instruments affecting title to or possession of real property following must be recorded to be valid against all persons: assignments for benefit of creditors, marriage certificates (see infra, subhead Vital Statistics).

Foreign Conveyances and Encumbrances.

Conveyance or encumbrance acknowledged in conformity with law of state where acknowledged may be recorded. (C.C. 1189). See topic 10.01 Acknowledgments, subhead Authentication, for further discussion.

Effect of recording is to charge subsequent purchasers and mortgagees with constructive notice of contents of instrument. (C.C. 1213).

Torrens Act.

System of land registration based on Torrens system, formerly in effect, has been abolished, all registers of title and all documents and records pertaining thereto having become part of records of respective county recorders. (1955, c. 332).

Transfer of decedent's title to real estate to his heirs or devisees is evidenced by recordation in office of recorder of county in which such real estate situated of certified copy of order of distribution. (Prob. C. 7263[Deering's]). Administration in California courts required, even though decedent was nondomiciliary. (Prob. C. 7052[Deering's]).

Vital Statistics.

Reports of births (H. & S.C. 102400[Deering's]), fetal deaths (20 weeks or more gestational age) (H. & S.C. 102950[Deering's]) and deaths (H. & S.C. 102775[Deering's]) must be filed in office of local registrar of births and deaths within ten days for births, eight days for deaths; reports of marriages with local registrar of marriages for county in which marriage license was issued within ten days after ceremony (Fam. C. 359[Deering's], 423[Deering's]); reports of dissolution of marriage, annulment or legal separation with state registrar (H. & S.C. 103200[Deering's]).

Fees vary by county. Base fees for certified copy of fetal death or death record, $3; birth record required by public agency or private adoption agency in ordinary course of business, $3; birth record for any other applicant, $7; marriage or marriage dissolution record required by public agency in ordinary course of business, $3; marriage or marriage dissolution record for any other applicant, $6; in addition, all applicants pay $3 for such certified records to state or local registrar or other public official. (H. & S.C. 103625[Deering's]). Board of supervisors of county that has established county children's trust fund may increase fee for certified copy of a birth certificate by up to three dollars. (H. & S.C. 103625[b][Deering's]). Further fee increases authorized in specified counties. (H. & S.C. 103626[Deering's], 103627[Deering's], 103628[Deering's]). For file search where no copy is made, fee is same as fee charged for certified copies under H. & S. C. 103625[Deering's]. (H. & S.C. 103650).

Establishing Birth, Death and Marriage Records.

If local birth, death or marriage records are unavailable, facts may be established by order of superior court after hearing on prescribed form of verified petition. (H. & S.C. 103450-103490[Deering's]). Birth records containing gender errors may be corrected pursuant to H. & S.C. 103446-103449[Deering's].

Lis pendens.

Lis pendens statutes (C.C.P. 409 et seq.[Deering's]) repealed. C.C.P. 405.20 et seq.[Deering's] now covers filings. C.C.P. 405.30 et seq.[Deering's] now covers expunging.

10.05 SEALS:

All distinctions between sealed and unsealed private writings have been abolished. (C.C. 1629; C.C.P. 1932[Deering's]). Scroll or other sign indicating seal affixed by proper party is deemed private seal. (C.C.P. 1931[Deering's]). Corporation may adopt and use corporate seal, but failure to affix seal does not affect validity of instrument. (Corp. C. 207[a]).

Uniform Commercial Code has been adopted. (1962, adopted 1963). See category 3 Business Regulation and Commerce, topic 3.09 Commercial Code.

10.06 TORRENS ACT:

See topic 10.04 Records.

10.07 VITAL STATISTICS:

See topic 10.04 Records.

11 EMPLOYMENT

11.01 EMPLOYER AND EMPLOYEE:

See topic 11.02 Labor Relations.

11.02 LABOR RELATIONS:

Statutory regulation of labor relations primarily covers following areas: wages, hours and working conditions of adults and minors; mode and manner of wage payment; hours of work; nondiscrimination in employment; industrial homework; apprenticeship standards; workers' compensation; industrial safety and health care. Statutes are administered by Department of Industrial Relations.

Industrial Welfare Commission has authority to establish minimum wages, maximum work hours and standard working conditions for employees and has done so in wage orders applicable to various industries. (Lab. C. 1182[Deering's]). These orders are enforced by Division of Industrial Welfare. (Lab. C. 1193.5[Deering's]). Civil sanctions are imposed for violation of orders. (Lab. C. 1193.6 et seq.[Deering's]).

Child Labor.

Minimum age for most employment is 16 years. (Lab. C. 1290[Deering's], 1394[Deering's]). Specific provisions regulate employment of minors, including requirements for work permits and registration. (Educ. C. 1802[Deering's], 48230[Deering's], Lab. C. 1285-1312[Deering's], 1390-1399[Deering's]).

Hours of Labor.

Maximum hours in most occupations for minors are eight hours per day and 40 hours per week. (Lab. C. 1391[Deering's]). Minors in entertainment industry restricted to working eight hours per day and 43 hours per week. (Lab. C. 1308.7[Deering's]). Hours of labor for minors also regulated by wage orders applicable to particular industry.

With certain specified exceptions (including employees covered by collective bargaining agreement and employment of less than 30 hours per week and six hours per day), no employer shall cause employees to work more than six days in seven. (Lab. C. 552-556[Deering's]). Special provisions relate to hours of labor for employees in railroads (Lab. C. 600 et seq.[Deering's]), smelters and underground workings (Lab. C. 750 et seq.[Deering's]), lumber (Lab. C. 800 et seq.[Deering's]), pharmacies (Lab. C. 850 et seq.[Deering's]), camps (Lab. C. 1182.4[Deering's]) and employers in manufacturing operating 24 hours per day (Lab. C. 1182.6[Deering's]).

Wages.

Effective Jan. 1, 2008, minimum wage is $8.00/hr. for all industries. (Lab. C. 1182[Deering's], 1182.12[Deering's], 1197[Deering's], 1197.1[Deering's], IWC Order No. MW-2007). Two-tiered minimum wage unlawful. See 46 C.3d 1262, 252 C. Rptr. 278. Minimum wages for minors are established in wage orders covering particular industries.

Mode and manner of payment of wages to employees is regulated. (Lab. C. 200-227.3[Deering's]). Wages must be paid at least twice a month on regular pay days, excepting wages of executive, administrative, and professional employees, which may be paid once a month on or before the 26th. (Lab. C. 204[Deering's], 207[Deering's]). With certain exceptions, all earned wages must be paid immediately to employees terminated by employer and within 72 hours to employees who quit without notice. (Lab. C. 201[Deering's], 202[Deering's]). Statutory penalties are provided for failure to pay wages. (Lab. C. 203[Deering's], 210[Deering's], 225.5[Deering's], 256[Deering's]). In action for nonpayment of wages, fringe benefits, or pension funds, court must award reasonable attorney's fees and costs to prevailing party if requested upon initiation of action. (Lab. C. 218.5[Deering's]). Accurate itemized statement showing all deductions must be furnished with each payment of wages. (Lab. C. 226[Deering's]). If payment is by check, it must be payable in cash within California. (Lab. C. 212[Deering's]).

With certain limitations wage claims have preferred status against claims of other creditors. However, wage claims have lower status against other claims in probate proceedings. (C.C.P. 1204-1206[Deering's]; Prob. C. 11402[Deering's], 11420-11421[Deering's]). As to assignment of wages, see Lab. C. 300[Deering's] and category Debtor and Creditor, topic Assignments.

Equal Pay.

Female employees must receive same wage rate as male in same establishment for same quantity and quality of same classification of work. Violators may be liable for additional wages and liquidated damages. (Lab. C. 1197.5[Deering's]). Minors under 18 years who have graduated high school or its equivalent must be paid same rate as adult for performing same job. (Lab. C. 1391.2[Deering's]).

Discrimination.

Fair Employment and Housing Act creates right to employment without discrimination on account of race, religious creed, color, national origin, ancestry, physical disability, mental disability, medical condition, marital status, sex, age, or sexual orientation. (Gov. C. 12920[Deering's]).

Labor Unions.

No statutory provisions, such as in National Labor Relations Act, require employers to recognize or bargain with labor unions. (53 C.2d 455, 349 P.2d 76).

“Yellow Dog” contracts in which employees promise to join or not to join labor unions are against public policy and unenforceable. (Lab. C. 921-922[Deering's]).

Collective bargaining agreements are enforceable at law or in equity, and violations may be restrained by injunctive relief. (Lab. C. 1126[Deering's]; 49 C.2d 45, 315 P.2d 322; 398 U.S. 235).

Mediation services are available to parties involved in labor dispute. (Lab. C. 65[Deering's]).

No “right to work” statutory provisions.

Labor Disputes.

Employees hired during labor dispute, strike or lockout must be informed of existence of disturbance and false representations to prospective employees are unlawful. (Lab. C. 970-974[Deering's]). Advertisement for such employees must contain notice of labor dispute. (Lab. C. 973[Deering's]). Employers are prohibited from knowingly hiring persons who have worked as strike replacements in preceding five-year period on three or more occasions for two or more employers involved in labor dispute. (Lab. C. 1133[Deering's], 1134[Deering's], 1134.2[Deering's]).

Jurisdictional strike is against public policy of state and is unlawful (Lab. C. 1115[Deering's]) and is subject to injunctive relief and damages (Lab. C. 1116[Deering's]).

As to arbitration of labor disputes, see category 9 Dispute Resolution, topic 9.02 Arbitration and Award. As to issuance of injunctions in labor disputes, see category 5 Civil Actions and Procedure, topic 5.14 Injunctions.

Political Activities.

Employers are prohibited from influencing and controlling political activities of their employees. (Lab. C. 1101-1105[Deering's]).

Voting Time.

Under certain circumstances employees must be permitted time off to vote in general and primary elections. (Elec. C. 14000[Deering's]).

Other Employment Regulations.

Right of employer to require bond or photograph of employee or applicant for employment is limited. (Lab. C. 400 et seq.[Deering's]). Employer may not require applicant or employee to submit to polygraph test as condition of employment unless employer is federal, state or local government or any agency or subdivision thereof. (Lab. C. 432.2[Deering's]).

Employer who has agreed through collective bargaining or otherwise to make payments to welfare or pension fund or other plan for benefit of employee must upon written request furnish employee with annual statement of payments. (Lab. C. 227.5[Deering's]).

Employment establishments must meet certain health and sanitation requirements. (Lab. C. 2260-2441[Deering's]).

Mutual obligations of employer and employee and termination of employment are regulated. (Lab. C. 2750-2929[Deering's]). Causes of action permitted against employer for breach of implied contract (24 Cal. 4th 317, 100 C. Rptr. 2d 352) and wrongful termination in breach of public policy (27 C.3d 167, 164 C.Rptr. 839). Erosion of at-will employment as provided by statute. (Lab. C. 2922[Deering's]). Wrongful termination damages limited to foreseeable contract damages. (47 C.3d 654, 254 C.Rptr. 211).

No discrimination allowed against workers injured in course and scope of employment. (Lab. C. 132a[Deering's]).

Industrial Homework.

Industrial homework is regulated (Lab. C. 2650 et seq.[Deering's]) and manufacture of certain specified articles by industrial homework is prohibited (Lab. C. 2651[Deering's]).

Apprenticeship.

Apprentice Labor Standards Act creates apprenticeship council to establish standards for minimum wages, maximum hours and working conditions for apprenticeship agreements. (Lab. C. 3070 et seq.[Deering's]). Certain required provisions for apprenticeship agreements are specified. (Lab. C. 3078[Deering's]).

Employment and Counseling Agencies.

All employment agencies, counseling and job listing services are regulated and must provide customers with written contracts with terms and notices specified in statute. (C.C. 1812.500 et seq.). Chapter does not apply to employment agencies which charge fees only to employee or nonprofit organizations meeting certain requirements. (C.C. 1812.502). Athlete agencies and talent agencies regulated. (Lab. C. 1700.5 et seq.[Deering's]).

Public Works.

Employees on public works must be paid prevailing wage (Lab. C. 1771[Deering's]), and may not work more than eight hours per calendar day and 40 hours during calendar week unless compensated at one-and-one-half times basic rate of pay for each hour in excess of eight in any day (Lab. C. 1811-1815[Deering's]). Employer who fails to pay prevailing wage subject to action by joint labor-management committee. (Lab. C. 1771.2[Deering's]).

Worker's Compensation Law (Lab. C. Div. 4 & 4.5) is administered and enforced by Division of Workers' Compensation (Lab. C. 60[Deering's]). It provides comprehensive worker's compensation and insurance plan constituting exclusive remedy (with minor exceptions noted, infra) before Workers' Compensation Appeals Board applicable to all employees not engaged in interstate commerce (with exceptions). (Lab. C. 3203[Deering's], 3351-52[Deering's]). Occupational diseases are covered. (Lab. C. 5500.6[Deering's]; 183 C. 273, 191 P. 26).

Dispute is subject to arbitration if it involves insurance coverage, right of contribution, or by agreement of parties any issue arising under Lab. C. 50 et seq.[Deering's] or Lab. C. 3200 et seq.[Deering's] (Lab. C. 5275[Deering's]).

Death benefits vary depending on date of injury. Death benefits from $95,000 to $290,000 for two total dependants; $70,000-$290,000 for one total dependant; $70,000-$290,000 plus four times amount annually devoted to support of dependant or dependants but not more than $95,000-$290,000 depending on date of injury for one total dependant and one or more partial dependants. (Lab. C. 4702[Deering's]). Death benefits allocated between dependents. Every employer is required to carry insurance either by private insurers or by State Compensation Insurance Fund or with consent of Division by self insurance, either as individual employer or in group of employers. (Lab. C. 3700[Deering's]). If employer fails to carry insurance, employees may, as alternative to their remedies before Appeals Board, bring action in court, in which action it is presumed that employer was negligent and in which contributory negligence, assumption of risk and fellow servant rule are no defenses. (Lab. C. 3706[Deering's], 3708[Deering's]).

Occupational Diseases.

Except as provided in Lab. C. 5500.6[Deering's], liability for occupational disease or cumulative injury claims filed on or after Jan. 1, 1978, limited to employers who employed employee during four years immediately preceding date of injury or last date on which employee employed in occupation exposing him or her to hazards of occupational disease or cumulative injury, whichever occurs first. (Lab. C. 5500.5[Deering's]).

Safeguarding of Employees.

Safety in employment is rigorously regulated by administrative safety orders of Division of Occupational Safety and Health. (Lab. C. 6500[Deering's]).

Unemployment Insurance Code adopted. Under this code weekly benefits are granted to persons during periods of unemployment (Unemployment Compensation—UC) (Un. Ins. C. 1252[Deering's]) and to persons unable to work because of nonindustrial disability resulting from illness or injury (Unemployment Compensation Disability—UCD) (Un. Ins. C. 2626). Supplemental unemployment benefit plans are approved by statute and are not construed as wages. (Un. Ins. C. 1265).

See also category 22 Taxation, topic 22.05 Employment Taxes, subhead Unemployment Compensation and Disability Tax.

Fair Employment Practices.

Employer may not discriminate in employment or in selection for training program or harass employees on basis of race, religious creed, color, national origin, ancestry, physical disability, mental disability, medical condition, marital status, sex, age, or sexual orientation. (Govt. C. 12940). Physical handicap includes contagious illness (480 U.S. 273), and AIDS (Fair Employment and Housing Commission, No. 83-84, 1987). Sex includes pregnancy, childbirth and related medical conditions, and person's gender as defined in P. C. 422.56. (Govt. C. 12926). Certain restrictions also apply to age discrimination. (Govt. C. 12941). Discrimination based on sexual orientation may be prohibited by local ordinance and may give rise to action for interference with employee's political activity. (Lab. C. 1101[Deering's], 1102[Deering's]; 24[Deering's] C.3d 458, 156 C. Rptr. 14, 595 P.2d 592).

Employer must provide leave and reinstatement to employees disabled by pregnancy. (Govt. C. 12945[a]; 479 U.S. 272). Employer with more than 50 employees subject to family care and medical leave requirements. (Govt. C. 12945.2).

Employer may not discriminate on basis of medical condition which includes (1) health impairment related to or associated with diagnosis of cancer or record or history of cancer, or (2) either (A) any scientifically or medically identifiable gene or chromosome, or combination of altered gene or chromosome, known to be cause of disease or disorder in person or his/her offspring, or that is associated with statistically increased risk of development of disease or disorder and that is presently not associated with any symptoms of any disease or disorder, (B) inherited characteristics that may derive from individual or family member that are known to be cause of disease or disorder in person or his/her offspring, or that are determined to be associated with statistically increased risk of development of disease or disorder and that are presently not associated with symptoms of disease or disorder. (Govt. C. 12921, 12926[h]). Fair Employment & Housing Department has been established to enforce this policy in accordance with procedures prescribed by statute. (Govt. C. 12930).

Employers of 25 or more must reasonably accommodate employee wishing to voluntarily enter alcoholic or drug rehabilitation program. (Lab. C. 1025 et seq.[Deering's]).

Agricultural Labor Relations.

Act creates Agricultural Labor Relations Board. (Lab. C. 1141[Deering's]). Act adopted to provide collective-bargaining rights for agricultural employees. (Lab. C. 1140.2[Deering's]). Board is accorded broad investigatory powers. (Lab. C. 1151 et seq.[Deering's]).

Employees Rights.

Agricultural employees are furnished certain rights with which employers may not interfere. Such rights include right to self-organize, assist labor organizations and bargain collectively through representatives of their choice. (Lab. C. 1152[Deering's], 1153[Deering's]). Restrictions are also placed on activities of labor organizations. (Lab. C. 1154[Deering's]).

Elections.

Specific provisions govern election of labor representatives. (Lab. C. 1156 et seq. [Deering's]).

Prevention of Unfair Practices and Judicial Enforcement.

Board has power to issue complaint and to hold hearings thereon. (Lab. C. 1160.2[Deering's], 1160.3[Deering's]). Decisions of board may be appealed to appropriate court of appeal. (Lab. C. 1160.8[Deering's]). Suits involving agricultural labor contracts are brought in superior court. (Lab. C. 1165[Deering's]).

11.03 WORKERS' COMPENSATION LAW:

See topic 11.02 Labor Relations.

12 ENVIRONMENT

12.01 ENVIRONMENTAL REGULATION:

Environment Reports.

California Environmental Quality Act (Pub. Res. C. 21000 et seq.) requires that public agencies prepare, with input from other agencies and general public, environmental impact report for any project proposed or approved by public agency which may have significant impact on environment, subject to specified exemptions (Pub. Res. C. 21100); if project involves more than one agency, lead agency (Pub. Res. C. 21067) shall prepare Environmental Impact Report (Pub. Res. C. 21100). If lead agency determines proposed project does not have significant effect on environment, it shall adopt negative declaration to that effect. (Pub. Res. C. 21064, 21080). Environmental impact report for military base reuse may be made in context of physical conditions present at time of closure of base. (Pub. Res. C. 21083.8.1). Public agency shall not approve or carry out any project for which Environmental Impact Report shows any significant environmental effects without making one or more of following specified findings: changes have been required in project which mitigate or avoid identified significant environmental effects thereof; changes are within responsibility of another public agency and have been adopted by such other agency or can and should be adopted by it; or specific, economic or social or other considerations make identified mitigation measures or project alternatives infeasible. (Pub. Res. C. 21081). Subsequent or supplemental environmental impact report may be required. (Pub. Res. C. 21166). Act expressly allows actions to review, set aside, void or annul acts or decisions of public agency for noncompliance with Act. (Pub. Res. C. 21167). Subject to specified exceptions, lead agency shall set time limits, not to exceed one year, to certify and complete Environmental Impact Reports on projects and, not to exceed 180 days to complete and adopt negative declaration, measured from date project's approval application is received and accepted as complete by lead agency. (Pub. Res. C. 21100.2).

Development Projects.

Development projects, as broadly defined (Govt. C. 65927 & 65928), must be approved or disapproved by lead agency (1) within 180 days from date of lead agency's certification of environmental impact report, or (2) within 90 days from lead agency's certification of environmental impact report if (a) development project is affordable to very low or low-income households, (b) project applicant notifies lead agency in writing that application for financial assistance from public or federal agency has been made and notice specifies certain other requirements, and (c) there is confirmation that application has been made to public or federal agency prior to certification of environmental impact report; if negative declaration is completed and adopted or project is exempt from regulation, project shall be approved or disapproved within 60 days from lead agency's adoption of negative declaration or exemption determination. Project applicant and public agency may mutually agree in writing to extension of such time limits for period not to exceed 90 days from date of extension. (Govt. C. 65950 et seq.). Other responsible public agencies must act on project within 180 days of either date of approval of project by lead agency or within 180 days of date application to such other responsible agency is received and accepted as complete, whichever is longer. At time decision by lead agency to disapprove development project becomes final, applications for that project filed with responsible agencies shall be deemed withdrawn. (Govt. C. 65952). For reasonable fee, public agencies must determine in writing completeness of application within 30 days of receipt and, if incomplete, specify what is required to complete, but can require no new or additional information from applicant thereafter. (Govt. C. 65943, 65944). Failure of applicant to submit complete or adequate information may be grounds for disapproving project. If lead agency fails to disapprove or approve project within prescribed time limits, this failure to act either may be appealed or, if requisite public notice has been given, will be deemed project approval. (Govt. C. 65956, 65956.5). Lead agency alone determines whether Negative Declaration or EIR is required for project and, for private applicant projects, must do so within 45 days of acceptance of application as complete. (Pub. Res. C. 21080.1, 21080.2).

Air Resources.

Law was recodified in 1975. (H. & S.C. §39000 et seq.[Deering's]).

Controlling motor vehicle emissions (H. & S.C. 43000 et seq.[Deering's]) general responsibility of State Air Resources Board. (H. & S.C. 39500[Deering's]). Board is control agency for all air pollution purposes set forth in federal law (H. & S.C. 39602[Deering's]) and administers and coordinates all air pollution research funded by state (H & S.C. 39703[Deering's]).

Local and regional authorities have primary responsibility for controlling air pollution from non-vehicle sources. (H. & S.C. 40000 et seq.[Deering's]). State divided into air pollution districts, each of which appoints air pollution control officer. (H. & S.C. 40750 et seq.[Deering's]). Each district has hearing boards who may issue abatement orders, permits and variances. Boards have subpoena power and are governed by specified notice to hearing standards. (H. & S.C. 40800 et seq.[Deering's]).

Non-Vehicular Control.

Except as expressly provided, no person shall discharge air contaminants sufficient to cause injury, detriment, etc. to any considerable number of persons. (H. & S.C. 41700 et seq.[Deering's]). Use of open outdoor fires for non-agriculture purposes is restricted. (H. & S.C. 41800 et seq.[Deering's]). Agricultural burning is allowed by permit and according to board standards. (H. & S.C. 41850 et seq.[Deering's]). State Air Resources Board adopts standards and certification procedures for testing of vapor control systems in gasoline marketing operations. Applies to cargo tanks on vehicles as well as stationary tanks. (H. & S.C. 41954 et seq.[Deering's]).

Violation of section is misdemeanor, punishable by fine of up to $1,000 and up to six months in jail. Each day violation occurs is separate offense. (H. & S.C. 42400[Deering's]). Violators also subject to civil penalty of $1,000 for each day violation occurs. (H. & S.C. 42402[Deering's]). No liability in excess of $1,000 under H. & S.C. 42402[Deering's] unless conduct was intentional or negligent. (H. & S.C. 42402[b][2][A][Deering's]). Any person who negligently or intentionally violates any order of abatement is liable for civil penalty of up to $25,000 for each day. (H. & S.C. 42401[Deering's]). Each day person negligently emits air contaminant or owns or operates any source of air contaminant in violation of specified sections of H. & S.C. is guilty of misdemeanor and subject to $25,000 fine, not more than nine months imprisonment or both. (H. & S.C. 42400.1[Deering's]). Any person who emits air contaminant and who knew of emission but failed to take corrective action within reasonable period of time under circumstances, is guilty of misdemeanor punishable by fine not more than $40,000, or imprisonment in county jail for not more than one year, or both (H. & S.C. 42400.2[a][Deering's]) and subject to civil penalties up to $40,000 (H. & S.C. 42402.2[a][Deering's]). Any person who emits air contaminant that causes great bodily injury or death and who knew of emission but failed to take corrective action within reasonable period of time under circumstances, is guilty of misdemeanor and punishable by fine not more than $250,000, or imprisonment in county jail for not more than one year, or both (H. & S.C. 42400.2[c][Deering's]) and subject to civil penalties up to $250,000 (H. & S.C. 42402.2[b][Deering's]).

Use of monitoring devices to detect pollution is encouraged. (H. & S.C. 42700 et seq.[Deering's]).

General Authority.

State board has authority to prescribe emission standards applicable to motor vehicles and to evaluate pollution control devices. (H. & S.C. 43000 et seq.[Deering's]). Special provisions apply to racing vehicles and motorcycles. (H. & S.C. 43001[Deering's], 43107[Deering's].).

New Vehicles.

New vehicles which violate emission standards or test procedures shall not be sold or registered in this state. (H. & S.C. 43105[Deering's]).

Manufacturers and dealers responsible for giving notice of applicable emission standards, and manufacturers and distributors who fail to comply with appropriate standards and test procedures subject to civil penalty of $50 for each such vehicle sold in state. (H. & S.C. 43212[Deering's]). Enforcement is by state board, California Highway Patrol, Department of Motor Vehicles, and bureau of automotive repairs in Department of Consumer Affairs. (H. & S.C. 43213[Deering's]).

Used Vehicles.

State board adopts emission standards for used vehicles but installation of devices on used vehicles must be mandated by statute. (H. & S.C. 43600[Deering's]). Exhaust devices certified for used cars limited by price and maintenance costs. (H. & S.C. 43604[Deering's]). Board sets standards and certifies devices and may also revoke, suspend or restrict certification. (H. & S.C. 43600 et seq.[Deering's]).

Financing.

Authority for public financing of pollution control governed by Calif. Pollution Control Financing Authority Act. (H. & S.C. 44500 et seq.[Deering's]).

Water Pollution.

General Supervision.

State Water Resources Control Board and regional water quality control boards coordinate state activities with regard to water pollution by sewerage, oil and other wastes. (Water C. 13100 et seq.[Deering's]). Statewide and regional protection and abatement of water pollution outlined in Porter-Cologne Water Control Act. (Water C. 13200 et seq.[Deering's]). State divided into nine regional control boards which coincide with nine major drainage basins of state. (Water C. 13200[Deering's]). State authorized to implement Federal Water Pollution Control Act. (Water C. 13370 et seq.[Deering's]). California Safe Drinking Water Act establishes state drinking water regulatory program for delivery of safe drinking water in state (H. & S.C. 116270 et seq. [Deering's]).

Prohibited Acts of Pollution.

Unlawful to discharge sewage or other waste, or effluent of treated sewage or other waste, in any manner which will result in contamination, pollution or nuisance. (H. & S.C. 5411[Deering's]). Pollution of navigable waters with garbage is misdemeanor. (H. & S.C. 117485[Deering's]). Deposit of human excreta from vessels in navigable waters prohibited. (H. & S.C. 117515[Deering's]).

Unlawful to permit certain listed pollutants to pass into state waters or place them where they can pass into state waters. (Fish & G.C. 5650 et seq.[Deering's]).

With exception of certain public entities (Water C. 13270[Deering's]), any person discharging waste or proposing to discharge waste within any region that could affect quality of waters of state, other than into community sewer system, any person who is citizen, domiciliary, or political agency or entity of this state discharging waste, or proposing to discharge waste outside boundaries of state in manner that could affect quality of waters of state within any region, or any person operating or proposing to construct injection well, shall file with regional board report of discharge containing such information as may be required by board. Exceptions for persons supplied with recycled water if suppliers of water meet prescribed requirements. (Water C. 13260[Deering's]).

Any person failing to file such report, or pay fee, when so requested by regional board or discharging hazardous waste, furnishing false report, wilfully failing to report or wilfully withholding material information is guilty of misdemeanor and substantial civil penalties up to $1,000 a day, each day being separate offense, may be assessed. If action before superior court, up to $5,000 a day civil penalty. (Water C. 13261[Deering's]).

Regional board, after any necessary hearing, shall prescribe requirements as to nature of any proposed discharge, existing discharge, or material change in existing discharge, with relation to condition existing in disposal area or receiving waters upon or into which discharge is made or proposed. (Water C. 13263[Deering's]).

No person shall initiate any new discharge of waste or make any material change in any discharge or initiate discharge to, make any material changes in discharge to, or construct injection well, prior to filing required report with control board and prior to whichever occurs first: issuance of waste discharge requirements by that board or expiration of 140 days after compliance with Water C. 13260[Deering's] if certain criteria apply. (Water C. 13264[Deering's]).

Any person discharging waste in violation of discharge restrictions after written notification by regional board is guilty of misdemeanor and liable for substantial civil penalties administratively imposed by regional board up to $1,000 a day. (Water C. 13265[Deering's]). If action before superior court, up to $5,000 a day civil penalty. (Water C. 13265[Deering's]). Civil penalties may be administratively imposed up to $5,000 a day for release of hazardous waste. If action before superior court, up to $25,000 a day civil penalty. (Water C. 13265[Deering's]).

Enforcement board may issue order to cease and desist and direct persons not complying with requirements or discharge prohibitions to (a) comply forthwith, (b) comply in accordance with time schedule set by board, or (c) in event of threatened violation, take appropriate remedial or preventive action. (Water C. 13301[Deering's]).

Any person who discharges waste into waters of state in violation of waste discharge requirement or other order issued by regional board or state board, or who intentionally or negligently threatens to cause, causes or permits any waste to be discharged or deposited where it is, or probably will be, discharged into waters of state and creates or threatens to create a condition of pollution or nuisance, shall upon order of regional board clean up such waste or abate effects thereof or in case of threatened pollution or nuisance, take other necessary remedial action. Owner liable for all costs of abatement, and if agency expends such costs, amount constitutes a lien. (Water C. 13304[Deering's]).

Attorney General, at request of board, when necessary, shall petition superior court for issuance of cleanup or abatement order. (Water C. 13304[Deering's]). Civil penalty for violation of order or requirement not to exceed $15,000 for each day of violation or $20 per gallon of waste discharged. (Water C. 13350[Deering's].) Violations under state authorized federal control act punishable by maximum of sum of $25,000 per day of violation and $425 per gallon of discharged material over 1,000 gallons that are not cleaned up. Sums paid to State Water Pollution Cleanup and Abatement Account. (Water C. 13385[Deering's]). Negligent violations punishable by maximum $25,000 per day, or up to one year imprisonment for first violation or both, and by $50,000 or up to two years imprisonment for violations after previous conviction or both. Willful violations punishable by maximum of $50,000 per day or up to three years imprisonment for first violation, or both. Subsequent willful violations punishable by maximum $100,000 per day or by up to six years imprisonment, or both. Willful violations where person knowingly places another in imminent danger of death or serious bodily injury punishable by maximum $250,000 or up to 15 years imprisonment, or both. Subsequent convictions punishable by maximum $500,000 or up to 30 years imprisonment, or both. (Water C. 13387[Deering's]). For entities other than natural persons maximum penalties $1,000,000 for first criminal conviction, $2,000,000 for subsequent convictions. (Water C. 13387[Deering's]).

Transfers of Oil and Hazardous Substances.

Installation of monitoring devices required to warn against imminent overflow of oil or other “hazardous substances” into state waters during transfer of substances between vessel and shore or another vessel. (Harb. & Nav. C. 135[a][Deering's]). See subhead Hazardous Substances—Clean-Up, Control and Disclosure, infra.

Coast Line Preservation.

California Coastal Zone Act of 1976 (Pub. Res. C. 30000 et seq.) places California Coastal Commission within California Resources Agency. (Pub. Res. C. 30300). California Coastal Commission controls all coastline development within its jurisdiction over permit area from 1,000 yards inland from mean high tide line to seaward limit of State's jurisdiction, with extensive and detailed planning and control functions. (Pub. Res. C. 30103). Persons with vested rights obtained prior to effective date of Act or who have obtained permit pursuant to California Coastal Act of 1972 not required to secure additional permit if no substantial change made in any such development. (Pub. Res. C. 30608).

Enforcement.

Any person may sue to enjoin violation or enforce duties imposed by Act or Commission or any governmental agency, and to recover civil penalties. (Pub. Res. C. 30803-30805). Maximum civil fine $30,000 in addition to $1,000 to $15,000 per day for each day of intentional violation, plus exemplary damages, for intentional violators. (Pub. Res. C. 30820-30822).

Litter Control, Recycling, and Resource Recovery.

Reduction, recycling, reuse of solid waste regulated by Integrated Waste Management plan (Pub. Res. C. 40000 et seq.).

See subhead Hazardous Substances—Clean-Up, Control and Disclosure, infra.

Hazardous Substances—Clean-Up, Control and Disclosure.

The Carpenter-Presley-Tanner Hazardous Substances Control Act is state superfund statute paralleling federal superfund act. (H. & S.C. 25300 et seq.[Deering's]). Act provides money to clean up hazardous waste disposal sites, for emergency response and to compensate victims of hazardous wastes. (H. & S.C. 25301[Deering's]). Law authorizes injunctive relief (H. & S.C. 25358.3[Deering's]) and imposes strict liability standards for clean-up costs. (H. & S.C. 25363[Deering's]). Hazardous waste control statutes regulate generators (H. & S.C. 25100 et seq.[Deering's]), including resource recovery facilities such as recyclers, disposal sites and waste haulers (H. & S.C. 25114[Deering's], 25117.1[Deering's], 25117.2[Deering's], 25167.2[Deering's]) and contain manifest, permit, and reporting requirements. (H. & S.C. 25160 et seq.[Deering's]). Registration required to transport hazardous waste. (H. & S.C. 25163[Deering's]). Extensive regulations are contained in Title 26 of California Code of Regulations. Substantial civil and criminal penalties for violations. (H. & S.C. 25189 et seq. [Deering's]). Law also extends to regulating local land use to extent property is contaminated by hazardous waste. (H. & S.C. 25149.3[Deering's], 25202.5[Deering's], 25220-25241[Deering's]). Used oil also managed as hazardous waste (H. & S.C. 25250 et seq.[Deering's]).

Businesses handling hazardous materials must establish and implement business plan for emergency response to release or threatened release of hazardous material with various agencies. (H. & S.C. 25503.5[Deering's]). Employers must implement written hazard communication program for workplace, which includes proper labeling and employee education. (8 C.C.R. 5194). Acutely hazardous materials are subject to additional reporting requirements. (H. & S.C. 25533-25534[Deering's]). Chemicals which cause cancer or reproductive toxicity may not be released if they might pass into any source of drinking water. (H. & S.C. 25249.5[Deering's]). Businesses must give clear and reasonable warning before intentionally exposing any individual to chemicals which cause cancer or reproductive toxicity. (H. & S.C. 25249.6[Deering's]). State maintains and annually updates list of such chemicals. (H. & S.C. 25249.8[Deering's]). Sellers of nonresidential property must notify buyers of hazardous substances releases on property and lessees must notify lessors in writing of any release of hazardous substances on property. Substantial fines for failures to notify, and lessors may terminate lease. (H. & S.C. 25359.7[Deering's]).

Underground Tank Regulation.

Underground tanks subject to extensive regulatory and monitoring requirements pertaining to their maintenance and removal. (H. & S.C. 25280 et seq.[Deering's]). Permit required for operating underground storage tank. (H. & S.C. 25284[Deering's]). State agency and county or city governments authorized to enforce these statutes and rules. (H. & S.C. 25283[Deering's]). Violations may result in fines of $500 to $5,000 per day. (H. & S.C. 25299[Deering's]). Hazardous substances defined in H. & S.C. 25316[Deering's].

Radiation Control

Radiation Control Law regulates sources of ionizing radiation for protection of occupational and public health and safety (H. & S.C 114960 et seq.[Deering's])

13 ESTATES AND TRUSTS

13.01 ADMINISTRATION:

See topic 13.09 Executors and Administrators.

13.02 ADVANCEMENTS:

See topic 13.07 Descent and Distribution.

13.03 ALLOWANCES:

See topic 13.09 Executors and Administrators.

13.04 CLAIMS:

See topic 13.09 Executors and Administrators.

13.05 DEATH:

Determination of Death.

Disputable presumption of death if person not heard from in five years. (Evid. C. 667[Deering's]).

Uniform Determination of Death Act adopted. (1980, adopted 1982). (H. & S.C. 7180[Deering's]). Person who sustained either irreversible cessation of circulatory and respiratory function or irreversible cessation of all brain functions is dead. (H. & S.C. 7180[Deering's]). Determination of death requires independent confirmation of another physician. (H. & S.C. 7181[Deering's]).

Death Certificate.

See category 10 Documents and Records, topic 10.04 Records, subhead Vital Statistics, catchline Fee.

Survivorship.

Uniform Simultaneous Death Act has been adopted with some variance. (1940, adopted 1945). (Prob. C. 103[Deering's]; 220-226[Deering's]; 230-234[Deering's]; 6403[Deering's]).

Action for wrongful death may be brought by personal representative, decedent's surviving spouse, domestic partner, children, issue of deceased children or certain dependents. If no surviving issue, action may be brought by anyone entitled to decedent's property by intestate succession. (C.C.P. 377.60[Deering's]). Domestic partner defined in Fam. C. 297[Deering's]. (C.C.P. 377.60[Deering's]). Action must be commenced within two years of date of death

(C.C.P. 335.1[Deering's]) but limitation period for action against health care provider is generally three years (C.C.P. 340.5[Deering's]). Awarded damages are measured by pecuniary loss sustained by heirs by reason of decedent's death. (122 Cal. App. 2d 466, 265 P.2d 183). See also 19 C.3d 59, 67-68, 137 C. Rptr. 863, 562 P.2d 1022.

Survival of Actions.

No cause of action is lost by reason of death of any person. (C.C.P. 377.20[Deering's]). Exemplary or punitive damages that would have been recoverable against decedent not recoverable against his executor or administration in action brought pursuant to this section (C.C.P. 377.42[Deering's]); nor are damages for pain, suffering or disfigurement of decedent recoverable in action brought by executor or administrator pursuant to this section (C.C. P. 377.34[Deering's]). For procedure in action for injury to unmarried minor child, see C.C.P. 376[Deering's].

Natural Death Act.

Was repealed and integrated into comprehensive statute which governs health care decision making, known as Health Care Decisions Law. (Prob. C. 4600-4805[Deering's]). Health Care Decisions Law includes Uniform Health Care Decisions Act. (1993, adopted 1999). (Prob. C. 4670 et seq.[Deering's]). Act allows adults to give individual health care instruction in either oral or written form. (Prob. C. 4670[Deering's]). Specific requirements for written advance health care directive. (Prob. C. 4673-4674[Deering's]). Optional form available to create advance health care directive. (Prob. C. 4700-4701[Deering's]). Act relieves health care provider or institution from civil or criminal liability for following advance health care directive. (Prob. C. 4740[Deering's]).

Uniform Anatomical Gift Act.

See topic 13.16 Wills.

13.06 DECEDENTS' ESTATES:

See topics 13.07 Descent and Distribution, Executors and Administrators, Wills; categories 8 Debtor and Creditor, topic Homesteads; Family, topic Husband and Wife.

13.07 DESCENT AND DISTRIBUTION:

All separate property, real and personal, of decedent not disposed of by will, or excess of such property over share of surviving spouse (see infra, subhead Surviving Spouse) or over share of surviving domestic partner (see subhead Domestic Partners, infra), or entire estate if no surviving spouse or domestic partner, descends and is distributed as follows, any class of which member is living taking to exclusion of subsequent classes (Prob. C. 6402[Deering's]): (1) Issue of decedent, equally if all of same degree, otherwise pursuant to Prob. C. 240[Deering's]; (2) parents or surviving parent; (3) issue of parents or either of them, equally if same degree of kinship or, if unequal pursuant to Prob. C. 240[Deering's]; (4) grandparents or issue of grandparents, equally if same degree of kinship or if unequal pursuant to Prob. C. 240[Deering's]; (5) issue of predeceased spouse equally if of same degree, or if unequal pursuant to Prob. C. 240[Deering's]; (6) next of kin of equal degree, except that those claiming through nearest ancestor take to exclusion of those of equal degree claiming through more remote ancestor; (7) parents of predeceased spouse or issue of each parent, equally if same degree or if unequal pursuant to Prob. C. 240[Deering's].

If decedent left no spouse or issue, and predeceased spouse died not more than 15 years before decedent, portion of decedent's estate attributable to decedent's predeceased spouse shall pass in equal shares to issue of predeceased spouse by right of representation, otherwise to parents of predeceased spouse, otherwise to parents or issue of deceased parents of predeceased spouse and their descendants by right of representation. (Prob. C.

6402.5[Deering's]). Portion of decedent's estate attributable to predeceased spouse includes one-half of community property in existence at death of predeceased spouse which such spouse transferred to surviving spouse or which vested in decedent upon death of predeceased spouse. (Prob. C. 6402.5[f][Deering's]). Such portion includes all separate property of predeceased spouse (Prob. C. 6402.5[f][4][Deering's]). Remaining portion of decedent's estate shall be distributed according to intestate rules stated above. If portion of decedent's estate attributable to predeceased spouse would escheat to state because there is no kin of decedent to take, that portion then passes to next of kin of predeceased spouse. (Prob. C. 6402.5[a][5][Deering's]).

Statutory scheme provides for distribution among heirs or beneficiaries, for both intestacy and where will or trust. (Prob. C. 240-247[Deering's]).

Surviving Spouse or Surviving Domestic Partner.

Share of surviving spouse or domestic partner in separate property of deceased spouse is: (1) One-third if decedent left more than one child, one child and issue of one or more deceased children or issue of two or more deceased children; (2) one-half if decedent left only one child or only issue of one deceased child or no issue but parent or parents or issue of deceased parent or parents; (3) all if decedent left none of aforementioned relatives. (Prob. C. 6401[Deering's]).

As to rights of surviving spouse in community property and certain property which is treated as community, see category 14 Family, topic 14.09 Husband and Wife.

Kindred of the half blood inherit same share they would inherit if they were of whole blood. (Prob. C. 6406[Deering's]).

Afterborn Heirs.

Relatives of decedent conceived before decedent's death but born thereafter inherit as if born in lifetime of decedent. (Prob. C. 6407[Deering's]).

Illegitimates.

Uniform Parentage Act adopted (1973, adopted 1975), providing procedures to establish parent-child relationship without regard to marital status of natural parents. (C.C. 7000 et seq.). Rights of succession by natural or adopted child, and by issue through deceased child, are dependent upon existence of parent-child relationship between decedent and child, as defined by C.C. 7000 et seq.; succession to estate of deceased child, by and through parent, also depends upon existence of such relationship.

Foster or Stepchild.

Parent and child relationship exists if relationship commenced during minority of child, continued during joint lives and clear and convincing evidence established that adoption would have been accomplished except for legal barrier to adoption. (Prob. C. 6454[Deering's]).

Adopted Children.

See category 14 Family, topic 14.01 Adoption.

Determination of Heirship.

Any time after first letters are issued to representative and before order for final distribution, representative or any person claiming to be beneficiary or entitled to distribution may petition for court determination of who is entitled to distribution. (Prob. C. 11700[Deering's]). As provided in Prob. C. 1220[Deering's], notice must be mailed to all interested persons. (Prob. C. 11701[Deering's]). Any person may appear and file written statement of interest he claims. (Prob.

C. 11702[Deering's]).

Right of Representation.

Defined as division at nearest generation with living members into equal shares with issue of predeceased members of generation receiving equal share. (Prob. C. 240[Deering's]).

Aliens.

As to right to inherit, see category 4 Citizenship, topic 4.01 Aliens.

Advancements.

Gift before death by decedent to heir is not considered advancement unless that intention is expressed by decedent in contemporaneous writing or acknowledged by donee in writing. (Prob. C. 6409[Deering's]). Gift not taken into account if donee predeceases decedent in determining intestate share of donee's issue unless otherwise provided. (Prob. C. 6409[d][Deering's]).

Election.

Surviving spouse may be required to elect whether to take community share or under will. See topic 13.16 Wills, subhead Election.

Escheat.

If decedent leaves no one to take his estate, it escheats to state as of date of death of decedent with certain exceptions. (Prob. C. 6404[Deering's], 6800 et seq.[Deering's]).

Community Property.

As to rights of surviving spouse therein see category 14 Family, topic 14.09 Husband and Wife.

See also topic 13.09 Executors and Administrators.

Disqualification for Homicide.

Person who feloniously and intentionally kills decedent shall not inherit various described property and rights. (Prob. C. 250-257[Deering's]).

Release or Assignment of Expectancy.

Heir may assign his inheritance. (Prob. C. 11604[Deering's]). Heir may release his expectancy. (104 C. 570, 38 P. 414).

Disclaimer of Inheritance.

Beneficiary may refuse any interest in property and rights to which he would be entitled. (Prob. C. 275[Deering's]). Writing is required. (Prob. C. 278[Deering's]). Disclaimer must occur within reasonable time after heir or next of kin acquires knowledge of interest, and filing within nine months of interest creator's death is conclusively presumed timely in many cases. (Prob. C. 279[Deering's]). Disclaimer relates back to date of creation of interest, and disclaimed interest is distributed as if person disclaiming had predeceased person creating interest. (Prob. C. 282[Deering's]). Right to disclaimer exists regardless of spendthrift provision or other limitation on interest. (Prob. C. 286[Deering's]). Court approval is required for minors, conservatees, and sometimes for decedents. (Prob. C. 277[Deering's]).

13.08 ELECTION:

See topic 13.16 Wills.

13.08A ESTATES: (in property)

See category 21 Property, topic 21.16 Real Property.

13.09 [RESERVED]

13.10 EXECUTORS AND ADMINISTRATORS:

Title to both real and personal property of decedent vests in his heirs, devisees and legatees at time of his death, but both types of property are subject to administration in superior court. (Prob. C. 7000[Deering's], 7001[Deering's], 7050[Deering's]).

Wills must be proved, and estates administered in superior court (1) of county where decedent was domiciled; (2) in case of nondomiciliary of this state, if property is in same county, in county where he died; or (3) otherwise, in any county where he left estate. (Prob. C. 7050-52[Deering's]).

“Personal representative” (hereafter referred to as “representative”) defined as executor, administrator, administrator with will annexed, special administrator, successor personal representative, public administrator acting pursuant to Prob. C. 7660[Deering's], or person performing similar functions under law of another jurisdiction governing person's status. “General personal representative” excludes special administrators. (Prob. C. 58[Deering's]).

Executors.

Except for payment of funeral charges and necessary measures for preservation of estate, no person has any powers as executor until appointed representative. (Prob. C. 8400[Deering's]). In absence of objection, person named as executor in decedent's will has right to appointment as representative unless not competent or waives right. (Prob. C. 8420[Deering's], 8402[Deering's]). If person named executor is minor and another person named, latter may be appointed and may administer estate until majority of minor, who may then be appointed coexecutor. If no other person named, another person may be appointed, but appointment may be revoked when minor reaches majority and is appointed executor. (Prob. C. 8424[Deering's]). Nonresident may serve as representative, subject to certain requirements. (Prob. C. 8570-77[Deering's]). Acceptance by nonresident as representative or removal from state of representative constitutes automatic appointment of Secretary of State as attorney for service of process and notice of motion in any action against such executor relating to estate. (Prob. C. 8572[Deering's]).

Preferences in Right to Administer.

Following persons are entitled to administer intestate estate in this order: Surviving spouse (except if party to separation, maintenance, annulment or dissolution action and living apart from decedent at his death, when has priority after brothers and sisters under Prob. C. 8463[Deering's]), domestic partner, children, grandchildren, other issue, parents, brothers and sisters, issue of brothers and sisters, grandparents, issue of grandparents, children of predeceased spouse or domestic partner, other issue of predeceased spouse or domestic partner, other kin, parents of predeceased spouse or domestic partner, issue of parents of predeceased spouse or domestic partner, conservator or guardian of estate who has filed first account and is not acting as conservator or guardian for any other person, public administrator, creditors, any other person. (Prob. C. 8461[Deering's]). Surviving spouse, domestic partner, or relative of decedent has priority only when entitled to succeed to all or part of estate, takes under will, or entitled to succeed to all or part of estate of another deceased person entitled to succeed to estate. (Prob. C. 8462[Deering's]).

Court may appoint competent person as administrator at written request, filed in court, of person, guardian, or conservator entitled to appointment. If person making request is surviving spouse or domestic partner, child, grandchild, other issue, parent, brother or sister, or grandparent of decedent, nominee has priority next after those in class of person making request; otherwise court, in its discretion, may appoint either such nominee or person of class subsequent in rank to that of person making request; but other members of class of person making request shall have priority over such nominee. (Prob. C. 8465[Deering's]).

Administrator with will annexed granted in same order of priority as administrators, except that one taking under will has priority over one not so taking and need not be entitled to succeed to estate or some portion thereof under laws of succession. (Prob. C. 8441[b][Deering's]). Person who takes more than 50% of value of estate under will may request that court appoint as administrator person not otherwise entitled to be appointed as matter of priority. (Prob. C. 8441[Deering's]).

Eligibility and Competency.

Person not competent to act as representative if minor, subject to conservatorship, or subject to Prob. C. 8502[Deering's] grounds for removal (mismanagement, fraud etc.). Also cannot be nonresident of U.S. or objected-to surviving partner of decedent unless named as executor in will. (Prob. C. 8402[Deering's]).

Foreign corporation may not act as executor or administrator in California unless licensed to do so. (Finan. C. 1750[Deering's], 106[Deering's]).

Bond required unless will waives such requirement or where waived by all beneficiaries (Prob. C. 8480-8481[Deering's]) or executor or administrator is corporation (Prob. C. 301[Deering's]). Court can require bond even though will or beneficiaries have waived bond. (Prob. C. 8481[Deering's]). Court may fix amount of bond but maximum amount cannot exceed sum of (1) estimated value of property; (2) probable annual gross income of estate; (3) if independent administration granted as to real property, estimated value of decedent's interest therein. If bond given by personal sureties, twice above amount. If bond given by admitted surety insurer, court may establish fixed minimum amount based on minimum premium required by insurer. (Prob. C. 8482[Deering's]). Additional bond required before confirming sale of real property. (Prob. C. 8482[Deering's]). Representative allowed reasonable cost of bond. (Prob. C. 8486[Deering's]). Court may order reduction of bond if funds deposited in bank or savings associations subject to withdrawal only on court order. (Prob. C. 8483[Deering's]).

Oath that representative will perform according to law is necessary before letters issue. (Prob. C. 8403[Deering's]). Representative, other than trust company, must file acknowledgment of receipt of statement of duties and liabilities of office. (Prob. C. 8404[Deering's]).

Removal.

In response to petition or whenever court has reason to believe that representative has wasted, embezzled, mismanaged, wrongfully neglected or defrauded estate, or is about to do any such things, or is incapable of executing duties, court must cite representative to show cause why letters should not be revoked. (Prob. C. 8500[Deering's], 8502[Deering's]).

Special Kinds of Administration.

Court may appoint special administrator when needed for immediate preservation of estate. (Prob. C. 8540[Deering's]). Powers are limited to those listed in Prob. C. 8544[Deering's] but may be made general when necessary. (Prob. C. 8545[Deering's]).

Public Administration.

In each county public administrator takes charge of decedent's property within county where no personal representative appointed and property deemed subject to loss, injury, waste or misappropriation, or that is ordered into administrator's possession by court. (Prob. C. 7601[Deering's]). Administrator must petition for appointment as representative if no person having higher priority has petitioned and total value of decedent's estate exceeds $100,000. Public Administrator may also petition for appointment as personal representative for any other estate administrator determines proper. (Prob. C. 7620[Deering's]). Public Administrator: (1) May withdraw money or take possession of any other property of decedent in possession or control of financial institution, government or private agency, retirement fund administration, insurance company, licensed securities dealer or other person; (2) collect debts owed decedent; and (3) sell any of decedent's personal or real property. If gross value of decedent's property not more than $100,000 and if 40 days have lapsed since decedent's death, decedent's successor may collect property that is money due decedent; receive any of decedent's tangible personal property, and have any item that is evidence of decedent's debt, obligation, interest, right, security, or chose in action transferred. (Prob. C. 7661[Deering's], 13100[Deering's]).

Independent Administration of Estates Act creates optional procedure for administration of decedent's estate with minimum court supervision. (Prob. C. 10400 et seq. [Deering's]).

Inventory and appraisement must be filed within four months after appointment of representative, unless court extends time, and shall be in form prescribed by statute. (Prob. C. 8800[Deering's], 8802[Deering's]). Concurrent with filing inventory and appraisement, representative must file certification that Rev. & Tax C. 480[Deering's] requirements satisfied or inapplicable. (Prob. C. 8800[Deering's]). Appraisement is made by representative, expert, or probate referee as set forth by statute. (Prob. C. 8900[Deering's]). Court may waive appointment of probate referee, for good cause. (Prob. C. 8903[Deering's]). Any person interested in estate may challenge values. (Prob. C. 11001[Deering's]).

General Powers and Duties.

Whenever it shall appear to be to advantage of estate, court may authorize representative to execute notes and mortgages (Prob. C. 9800[Deering's]) or leases (Prob. C. 9941[Deering's], 9942[Deering's]), or to sell property (Prob. C. 10000[Deering's]), or exchange it for other property (Prob. C. 9920[Deering's]), or give options to purchase real property (Prob. C. 9960[Deering's]), or continue decedent's business (Prob. C. 9760[Deering's]).

Representative must take possession of all real and personal property and collect all debts due. (Prob. C. 9650[Deering's]).

Court may authorize representative to compromise debt (Prob. C. 9830[Deering's]) or claim for wrongful death or injury to decedent (Prob. C. 9835[Deering's]).

Notice to Creditors.

Additional notice must be provided directly to known or reasonably ascertainable creditors within four months after letters first issued; notice must be given within four months from date letters first issued or 30 days after personal representative first has knowledge of creditor, whichever is later. (Prob. C. 9050-9052[Deering's]).

Notice of Appointment.

Petitioner must publish notice of death and of petition to administer estate at least three times in local newspaper with first publication at least 15 days before hearing. (Prob. C. 8121[Deering's]).

Presentation of Claims.

Claims on contract, funeral expenses, specified taxes and claims for damages for injury to person or property or for death are barred unless presented to representative and clerk of court from which letters issued before expiration of later of: Four months after date letters first issued; or 60 days after date notice of administration given to creditor if notice is at least 60 days prior to expiration of time provided in C.C.P. 366.2[Deering's]. (Prob. C. 9100[Deering's]). Upon petition by creditor or personal representative, court may allow claim to be filed after expiration of time for filing claim in Prob. C. 9100[Deering's] if (1) personal representative failed to send proper and timely notice to creditor and petition is filed within 60 days after creditor has actual knowledge of administration of estate or; (2) creditor has no knowledge of facts reasonably giving rise to existence of claim more than 30 days prior to time for filing claim and petition is filed 60 days after creditor has actual knowledge of facts reasonably giving rise to existence of claim and of administration of estate. (Prob. C. 9100[Deering's], 9103[Deering's]). Court shall not allow claim to be filed after court makes order for final distribution of estate. (Prob. C. 9103[Deering's]). Unmatured claims and claims on which actions were pending when decedent died must be presented like other claims. (Prob. C. 9000[Deering's]). No filing is required where decedent had liability insurance in amount greater than claim or excess is waived. (Prob. C. 554[Deering's], 9390[Deering's]).

Secured claim may be enforced without presentation as to property subject to lien, but must be presented in order to participate in general assets. (Prob. C. 9391[Deering's]).

Proof of Claims.

Claims filed must be verified and must show all particulars, and originals or copies of documents, but reference to record is sufficient in case of mortgages. (Prob. C. 9151[Deering's], 9152[Deering's]). Claims barred by limitation may not be allowed. (Prob. C. 9253[Deering's]). For form for proof of claim, see end of Digest, after UCC forms.

Approval or Rejection of Claims.

Claims should be acted on within 30 days after their presentation; and failure to act on claim within such time may, at claimant's option, be deemed equivalent to rejection on 30th day. (Prob. C. 9256[Deering's]).

Unmatured or Contingent Claims.

Where claim is unmatured or contingent, amount sufficient for payment must be paid into court, there to remain until claim matures or becomes absolute, but if holder of unmatured claim appears and assents to deduction of legal interest until maturity, claim, as thus reduced, may be paid at same time as other claims. (Prob. C. 11462[Deering's], 11463[Deering's]).

Disputed claim against estate may be contested by interested person any time prior to settlement of account reporting claim even though allowed and approved (Prob. C. 11001[Deering's], 1043[Deering's]), and may be compromised by representative and claimant after time for filing creditor's claims expires (Prob. C. 9830[Deering's], 9831[Deering's]).

Priorities for paying debts when estate insufficient to pay all claims in full, in following order: (1) Administration expenses (with respect to obligations secured by mortgage, deed of trust, or other lien, including, but not limited to, judgment lien, only those expenses of administration incurred that reasonably relate to administration of property by which obligations are secured shall be given priority over these obligations); (2) obligations secured by mortgage, deed of trust or lien (excess of secured claim over security prorates with general demands); (3) funeral expenses; (4) expenses of last illness; (5) family allowance; (6) wage claims; and (7) general debts. (Prob. C. 11420[Deering's]).

Sales of estate property are regulated in detail. Some sales may be made without prior court order, especially where representative is granted power of sale by will. Except when acting under independent authority (Prob. C. 10503[Deering's]), sales must be confirmed by court or approved by it (Prob. C. 10308[Deering's]). With some exceptions, no executor or administrator may purchase any property of estate, directly or indirectly. (Prob. C. 9880[Deering's]).

Actions.

Representative may sue or be sued on causes of action surviving decedent. (C.C.P. 377.20[Deering's]). See category 5 Civil Actions and Procedure, topic 5.02 Actions.

Actions Against Representative.

Presentation of claim is condition precedent to right to sue thereon, except to enforce lien on specific property (Prob. C. 9391[Deering's]), and right to sue is suspended until claim is rejected. (Prob. C. 9370[Deering's]). Rejection may be by written notice to claimant, but failure to act on claim within 30 days after its presentation may, at claimant's option, be deemed equivalent to rejection. Action on claim is barred unless commenced within three months after service on claimant of written notice of rejection or, if claim is unmatured, within three months after maturity. (Prob. C. 9256[Deering's], 9353[Deering's]).

Representative may be substituted as party to action pending against decedent when he died, if cause of action survives (C.C.P. 368.5[Deering's]), but no recovery may be had in absence of proof that claim was presented in manner provided by Prob. C. 9370[Deering's].

Allowances.

Surviving spouse, minor children, incapacitated dependent adult children, and in court's discretion other dependent adult children and dependent parent are entitled to reasonable allowance for maintenance, which may be granted by court before or after inventory filed. (Prob. C. 6540 et seq.[Deering's]).

Accounts are to be rendered as ordered by court; final account when estate is in condition to be closed. (Prob. C. 10950-51[Deering's], 10902[Deering's]).

Distribution.

Preliminary distribution of all or portion of estate to beneficiaries may be had at any time after lapse of two months from issuance of letters to general representative when it can be made without loss to creditors or injury to estate or parties. (Prob. C. 11620[Deering's], 11621[Deering's]). If distribution before four months have elapsed, bond required. If after four months, bond only if court requires. (Prob. C. 11622[Deering's]).

Final distribution can only be made when all debts have been paid or provided for, or if estate insolvent and in condition to be closed. (Prob. C. 11640[Deering's]). When order settling final account and distribution entered, representative may immediately distribute property. (Prob. C. 11641[Deering's]).

Uniform Simplification of Fiduciary Security Transfers Act repealed by Uniform Commercial Code. (1962, adopted 1963). (Com'l. C. 8402-8404, 8115). See category 3 Business Regulation and Commerce, topic 3.09 Commercial Code.

Liabilities.

Outgoing representative liable until estate delivered to new representative. (Prob. C. 8525[Deering's]). Representative liable for any damage caused as result of his neglect or misconduct in relation to any sale. (Prob. C. 10380[Deering's]). Representative not liable for acts of corepresentative in absence of collusion, negligence, knowledge, or impropriety. (Prob. C. 2105.5[Deering's]). He must make no profit by increase, nor suffer loss by decrease or destruction without his fault, of any part of estate. (Prob. C. 9657[Deering's]).

Distribution if Abroad.

No special provision for distributees residing abroad, unless whereabouts unknown. Provision made for disposition of personal property payable to distributee to whom it is not possible to distribute property for some reason such as minority or incompetency. (Prob. C. 11850-51[Deering's]). See category 21 Property, topic 21.01 Absentees.

When Administration Unnecessary.

When total value of decedent's property in California, over and above certain wages for services, certain kinds of property in which decedent had joint ownership and any motor vehicle or vessel of which decedent is owner or legal owner, does not exceed $100,000, successors of decedent, or conservator of estate of such person, or guardian of estate of any minor, insane or incompetent successor, or trustee of any trust created during decedent's lifetime, may, 40 days after decedent's death without procuring letters of administration, collect and receive such money and property owing or due from any person or entity having custody of such property upon furnishing affidavit reciting above facts. (Prob. C. 13100[Deering's], 13101[Deering's]). Similar affidavit procedure available for summary transfer of real property where gross value of all decedent's real property in California does not exceed $20,000. (Prob. C. 13200[Deering's]). Summary petition and court order procedure may be used to transfer real property where total gross value of decedent's real and personal property does not exceed $100,000. (Prob. C. 13151[Deering's]). Net estates (over and above all liens and encumbrances at decedent's death, and value of homestead property set apart) under $20,000, under certain circumstances, go to surviving spouse or if none, to minor children subject only to liens, as of time of decedent's death, and expenses of last illness, funeral, and administration, by order of court on verified petition after return of inventory. (Prob. C. 6600 et seq.[Deering's]). If nondomiciliary decedent's property satisfies Prob. C. 13100[Deering's] requirements, sister state representative may use affidavit procedure to collect personal property of decedent. (Prob. C. 12570-72[Deering's]).

Small Estates.

See subhead When Administration Unnecessary, supra.

Foreign executors or administrators ordinarily have no power over decedent's estate in California. (C.C.P. 1913[Deering's]). California courts may order delivery of property in state to foreign representative and if necessary direct a sale of real property and a like delivery of proceeds. (Prob. C. 12540-41[Deering's]).

Foreign and Ancillary Administration.

No procedural distinction between domiciliary and ancillary probate or administration. (Prob. C. 12510-13[Deering's]). See topic 13.16 Wills, subhead Foreign Probated Wills.

Uniform Fiduciaries Act has not been adopted.

Uniform Principal and Income Act has been adopted with variations. (1997, adopted 1999). (Prob. C. 16320-16375[Deering's]).

Uniform Anatomical Gift Act.

See topic 13.16 Wills.

13.11 FIDUCIARIES:

See topics 13.09 Executors and Administrators, Trusts; category 14 Family, topic 14.08 Guardian and Ward.

13.12 INTESTACY:

Domestic Partners.

Under law that took effect July 1, 2003, if domestic partner dies without will, trust, or other estate plan, surviving domestic partner inherits deceased partner's separate property in same manner as surviving spouse. (Prob. C. 6401[Deering's]).

This change means that surviving domestic partner inherits third, half, or all of deceased partner's separate property, depending on whether deceased domestic partner has surviving children or other relatives. This change does not affect any community or quasi-community property that deceased partner may have had. (Prob. C. 6401[c][Deering's]).

See topic 13.07 Descent and Distribution and category 14 Family, topic 14.07 Domestic Partners.

13.13 [RESERVED]

13.14 PROOF OF CLAIMS:

See topic 13.09 Executors and Administrators; category 5 Civil Actions and Procedure, topic 5.17 Pleading.

13.1513.12

13.13 LIVING WILLS:

See topic 13.16 Wills.

13.14 [RESERVED]

13.15 TRUSTS:

(Prob. C.—Division 9; §§15000-18201). Trust of real or personal property or both may be created, subject to rules as to alienation, vesting, etc. (see category 21 Property, topic 21.13 Perpetuities) and Statute of Frauds (Prob. C. 15206[Deering's]), for any purpose that is not illegal or against public policy (Prob. C. 15203[Deering's]). Common law of trusts, as modified by statute, is law governing trusts. (Prob. C. 15002[Deering's]).

Kinds.

Express trusts recognized by statute. (Prob. C. 15200[Deering's]). New Trust Law does not affect prior law relating to constructive or resulting trusts. (Prob. C. 15003[Deering's]). Resulting trust on failure of express trust is also recognized. (1 C.2d 724, 37 P.2d 76; 28 C.2d 154, 168 P.2d 946). Tentative or “Totten” trust doctrine, applicable to bank or savings deposits, has been recognized. (Prob. C. 80[Deering's]).

Jurisdiction over Trusts.

Superior court, as court of general equitable powers, has jurisdiction over inter vivos trusts. (Prob. C. 17000[Deering's]). Court in which will creating trust was probated retains jurisdiction over such trust for most purposes, except for trusts created by will after July 1, 1977 unless trustor provides otherwise. (Prob. C. 17300-01[Deering's]). Procedures are established to remove testamentary trust from continuing court jurisdiction. (Prob. C. 17350-54[Deering's]). Procedures are established to allow acceptance of trusts transferred from outside California

(Prob. C. 17450-57[Deering's]), and to transfer trust to jurisdiction outside California (Prob. C. 17400-05[Deering's]).

Creation.

Trusts may be created inter vivos or by will. Inter vivos trusts may be created by specific methods. (Prob. C. 15200[Deering's]). Oral trusts are valid as to personalty. (Prob. C. 15207[Deering's]). To be enforceable, trusts of realty must be evidenced by writing unless created by operation of law. (Prob. C. 15206[Deering's]).

Appointment of Trustee.

Whenever there is vacancy and trust fails to provide practical method of appointment, vacancy can be filled by trust company if all adult beneficiaries agree. If beneficiary has conservator, conservator may agree to successor trustee on beneficiary's behalf without court approval. If beneficiary has designated attorney in fact who has power to agree to successor trustee, attorney in fact may do so. If vacancy not filled in any of these methods, court can appoint trustee giving consideration to nominee of beneficiaries over age of 14. (Prob. C. 15660[Deering's]). Public guardian shall not be appointed unless court finds no other qualified person willing to act as trustee. (Prob. C. 15660.5[Deering's]).

Eligibility and Competency.

Trustee may be individual, or bank or trust company qualified to conduct trust business in California. (Finan. C. 1500-02[Deering's]).

Foreign corporation cannot act as trustee except to limited extent provided in Finan. C. 1503[Deering's] which permits such corporation to act as trustee for delivery, payment, registration, exchange, cancellation and the like of bonds, or as trustee under indenture securing bonds of railroad operating in California and extending into another state; but it cannot maintain office or agency in California unless complying with applicable provisions of Financial Code.

Qualification.

Trustees of inter vivos trusts and named trustees of testamentary trusts need not furnish bond unless trust instrument so requires or court finds necessary. Unnamed trustees appointed to fill vacancies in trusts must furnish bond except in compelling circumstances. (Prob. C. 15602[Deering's]). No oath is required of trustees.

Removal of Trustee.

Superior court may remove any trustee who has breached, or is unfit to execute trust. (Prob. C. 15642[Deering's]). Where hostility or continued lack of cooperation among co-trustees impairs administration of trust, where trustee fails or declines to act, where trustee's compensation is excessive, where sole trustee is disqualified person under Prob. C. 21350[Deering's], or for other good cause, court may remove one or more trustees. (Prob. C. 15642[Deering's]).

General Powers and Duties of Trustees.

Trustee is general agent and may bind trust property within scope of authority conferred by trust instrument and by law. (Prob. C. 16200[Deering's]). Trustee may give proxies to vote any shares held in trust. (Prob. C. 16234[Deering's], Corp. C. 702-05).

Where there are several co-trustees all must unite in any act to bind trust estate unless trust instrument otherwise provides (Prob. C. 15620[Deering's]), except in emergencies (Prob. C. 15622[Deering's]) or if vacancy in co-trusteeship occurs (Prob. C. 15621[Deering's]).

Sales and Leases.

Sales of trust property may be made in accordance with trust provisions. (Prob. C. 16226[Deering's]). Trustee has power to lease trust property, including options, for term beyond term of trust. (Prob. C. 16231-32[Deering's]).

Investments.

Governed by Prob. C. 16040[Deering's], adopting standard of “prudent persons” managing their own affairs, except as otherwise provided by terms of particular trusts.

Uniform Common Trust Fund Act in substance adopted (1938, adopted 1947), with additional provisions that such fund is separate entity owned by trustee, and that administration of participating relationship requires no allocation or apportionment between capital and income different from that for such fund. (Finan. C. 1564[Deering's]; and see Corp. C. 10250).

Securities in Name of Nominee.

Fiduciary permitted to hold securities in name of nominee without disclosure of trust so that title to security may pass by delivery. (Prob. C. 16238[Deering's]). Trustee may also deposit securities in securities depositary. (Prob. C. 16239[Deering's]).

Bequests and Devises to Inter Vivos Trusts.

See topic 13.16 Wills, subhead Bequests and Devises to Inter Vivos Trusts.

Uniform Simplification of Fiduciary Security Transfers Act repealed by Uniform Commercial Code. (1962, adopted 1963). (Com'l. C. 8402-8404, 8115). See category 3 Business Regulation and Commerce, topic 3.09 Commercial Code.

Accounting.

Uniform Trustees Accounting Act not adopted. Trustees of revocable living trust established before July 1, 1987 not required to account annually. (Prob. C. 16062[b][Deering's]). Annual accountings required of all trustees (Prob. C. 16062[a][Deering's]), unless requirement waived in trust instrument or by beneficiary in writing (Prob. C. 16064[Deering's]).

Court Supervision.

Any trustee or beneficiary may petition superior court to determine among other things, construction of trust, to whom property passes, settle account, instructions, compel accounting, grant powers, fix compensation, appoint or remove trustee, accept resignation of trustee, allow removal to another jurisdiction, amend trust to qualify as charitable trust, divide into two or more separate trusts. (Prob. C. 17200[Deering's]).

Compensation.

Trustee entitled to compensation as provided in trust instrument. Court has authority to raise or lower such compensation as equity demands. (Prob. C. 15680[Deering's]). If instrument does not provide for compensation, reasonable compensation as determined by court is allowed. (Prob. C. 15681[Deering's]). If several trustees, compensation must be apportioned according to services rendered by each, unless trust instrument or trustee agreement provides otherwise. (Prob. C. 15683[Deering's]).

Modification or Termination.

Upon petition of trustee or beneficiary, court may modify or terminate trust if value of trust principal so low in relation to costs of administration that continuance will defeat purposes of trust. (Prob. C. 15408[Deering's]). Trustee may terminate trust worth less than $20,000 without court approval. (Prob. C. 15408[b][Deering's]). All beneficiaries may consent to terminate trust if continuation of trust not necessary to carry out material purpose of trust or court finds material purpose outweighed by circumstances. (Prob. C. 15403[Deering's]). Settler and all beneficiaries may modify or terminate trust. (Prob. C. 15404[Deering's]). Modifications and termination of trust permitted upon showing of changed circumstances. (Prob. C. 15409[Deering's]).

Discharge.

Trustee may resign only by one of following methods: As provided in trust; with court approval; for revocable trust, with consent of person holding power to revoke; for nonrevocable trust, with consent of all beneficiaries or pursuant to court order obtained by trustee under Prob. C. 17200[Deering's]. (Prob. C. 15640[Deering's]). Trustee's resignation does not release him from liability for his actions. (Prob. C. 15641[Deering's]).

Spendthrift Trusts.

Principal and income restrictions valid (Prob. C. 15300-01[Deering's]), subject to certain exceptions for support trusts (Prob. C. 15302[Deering's]), discretionary trusts (Prob. C. 15303[Deering's]), claims for child or spousal support (Prob. C. 15305[Deering's]), public support claims (Prob. C. 15306[Deering's]), and self-settled trusts (Prob. C. 15304[Deering's]). In addition, surplus of income beyond that needed for education and support of beneficiary is liable to creditor's claims when no valid directions for accumulation given. (Prob. C. 15307[Deering's]).

Uniform Principal and Income Act adopted with variations. (1997, adopted 1999). (Prob. C. 16320-16375[Deering's]).

Gifts to Minors.

See category 14 Family, topic 14.10 Infants.

Uniform Fiduciaries Act not adopted.

Uniform Simplification of Fiduciary Security Transfers Act contained in former Corp. C. 30000-30010 repealed by stats. 1963, c. 819, p. 2010, Jan. 1, 1965.

Uniform Supervision of Trustees for Charitable Purposes Act adopted. (1954, adopted 1959). (Govt. C. 12580-99). California version adds sections including charitable corporation defined (Gov. C. 12582.1[Deering's]), Limitation of Action by Attorney General (Gov. C. 12596[Deering's]), Provision in Judgement in action to secure compliance to pay reasonable expenses incurred by state (Gov. C. 12597[Deering's]), and Supervision of charitable trusts; enforcement (Gov. C. 12598[Deering's]).

Uniform Testamentary Additions to Trusts Act adopted (1960, adopted 1965) contained in Prob. C. 6300 et seq.[Deering's] Variation from Uniform Act in Prob. C. 6300[Deering's], which provides “A devise, the validity of which is determined by the law of this state, may be made by a will to the trustee of a trust established or to be established by the testator or by the testator and some other person or by some other person (including a funded or unfunded life insurance trust, although the settler has reserved any or all rights of ownership of the insurance contracts) if the trust is identified in the testator's will and its terms are set forth in a written instrument (other than a will) executed before or concurrently with the execution of the testator's will or in the valid last will of a person who has predeceased the testator (regardless of the existence, size, or character of the trust property). The devise is not invalid because the trust is amendable or revocable, or both, or because the trust was amended after the execution of the will or after the death of the testator. Unless the testator's will provides otherwise, the property so devised (1) is not deemed to be held under a testamentary trust of the testator but becomes a part of the trust to which it is given and (2) shall be administered and disposed of in accordance with the provisions of the instrument or will setting forth the terms of the trust, including any amendments thereto made before or after the death of the testator (regardless of whether made before or after the execution of the testator's will). Unless otherwise provided in the will, a revocation or termination of the trust before the death of the testator causes the devise to lapse.”

Trust deeds to secure debts, see category 20 Mortgages, topic 20.04 Mortgages of Real Property.

Accumulations.

Accumulation of income permitted but may not extend beyond time permitted for vesting of future interests. (C.C. 724). Express direction to accumulate required. (C.C. 733; 38 C.2d 289, 239 P.2d 617.)

Perpetuities.

See category 21 Property, topic 21.13 Perpetuities.

Pour Over Trusts.

See topic 13.16 Wills, subhead Bequests and Devises to Inter Vivos Trusts.

Disclaimer.

All or portion of interest in trust may be disclaimed under certain circumstances by following procedures within reasonable time after person able to disclaim acquires knowledge of interest. (Prob. C. 260-295[Deering's]).

13.16 WILLS:

Every person of sound mind, 18 or older, may make will. (Prob. C. 6100[Deering's]). As to limitations on testamentary power of married persons, see category 14 Family, topic 14.09 Husband and Wife, subhead Community Property System. No limitations on gifts to religious, charitable, etc. institutions. Limitations on transfers to drafters. (Prob. C. 21350 et seq. [Deering's]).

Contract to make or not revoke will or devise or other instrument, or to die intestate, if made after Jan. 1, 2001, can be established by (1) will stating material contract provisions, (2) expressed reference in will or other instrument to contract and extrinsic evidence proving contract terms, (3) writing signed by decedent evidencing contract, (4) clear and convincing evidence of agreement between decedent and claimant or promise by decedent to claimant enforceable in equity, or (5) clear and convincing evidence of agreement between decedent and another person for benefit of claimant or promise by decedent to another person of benefit of claimant that is enforceable in equity. Execution of joint or mutual wills does not create presumption of contract not to revoke. Any contract to make or not revoke will, devise, or other instrument, or to die intestate made prior to Jan. 1, 2001 is governed by former Probate Code 150[Deering's]. (Prob. C. 21700[Deering's]). Conditional wills must be granted or denied probate, or denied effect after probate, in conformity with condition. (Prob. C. 6105[Deering's]).

Execution.

Wills must be in writing, and, other than holographic, must be signed by testator, or by someone for him in his presence and by his direction, or by conservator pursuant to court order to make will under Prob. C. 2580[Deering's]. (Prob. C. 6110[b][Deering's]). Will must be witnessed by being signed by at least two persons each of whom: (1) Being present at same time, witnessed either signing of will or testator's acknowledgment of signature of will and (2) understand that instrument they sign is testator's will. (Prob. C. 6110[c][Deering's]). Any person generally competent to be witness may witness will. (Prob. C. 6112[Deering's]).

Attestation Clause.

Form

The foregoing instrument was on the date thereof, by John Doe, subscribed and declared to be his Will, in the presence of us, who at his request, and in his presence, and in the presence of each other, do sign the same as witnesses thereto.

Andrew Black, residing at . . . .

George Red, residing at . . . .

Holographic Wills.

Will not complying with Prob. C. 6110[Deering's] is valid as holographic will, whether or not witnessed, if signature and material provisions are in testator's handwriting. If holographic will does not state date of its execution and: (1) Omission results in doubt as to whether its provisions or inconsistent provisions of another will control, holographic will is invalid to extent of inconsistency unless time of execution is established as after date of other will's execution; (2) testator lacked capacity when will might have been executed, will is invalid unless established that it was executed when testator had capacity. (Prob. C. 6111[Deering's]).

Statutory Wills.

Specific form of printed statutory will or statutory will with trust with limited choice of dispositive clauses is valid. (Prob. C. 6200-6243[Deering's]).

Revocation.

Marriage after making will revokes will as to surviving spouse, unless spouse is provided for by marriage contract or outside of will in manner indicating intention that transfer be in lieu of testamentary provision, or is mentioned in will in such way as to show intention to make no provision. (Prob. C. 21610[Deering's], 21611[Deering's]). In case of child of such marriage, will is revoked as to child, with similar exceptions, or, if more than one child, substantially all of estate is devised to other parent of omitted child. (Prob. C. 21620[Deering's], 21671).

Divorce or annulment revokes will as to former spouse for most part. (Prob. C. 6122[Deering's]). Termination of domestic partnership revokes will as to former domestic partner. (Prob. C. 6122.1[Deering's]).

Except as aforesaid, will may be revoked or altered only by subsequent will revoking prior will expressly or by inconsistency or by being burnt, canceled, obliterated or destroyed with intent and for purpose of revoking it, by testator or another person in his presence and at his direction. (Prob. C. 6120[Deering's]).

Revival.

Antecedent will not ipso facto revived by revocation of subsequent will. It must appear by terms of such revocation that it was intention to revive first will. (Prob. C. 6123[Deering's]).

Disclaimer.

Beneficiaries and other recipients may disclaim interests in whole or in part. (Prob. C. 260, et seq.[Deering's]).

Testamentary Gift to Subscribing Witnesses.

Will or any of its provisions is not invalid because interested witness signed it. (Prob. C.

6112[b][Deering's]). Unless at least two disinterested witnesses signed will, devise to subscribing witness creates presumption that witness procured devise by duress, menace, fraud or undue influence. (Prob. C. 6112[c][Deering's]). If devise fails because presumption applies and witness fails to rebut it, interested witness takes such proportion of devise as does not exceed share of estate which would be distributed to him if will were not established. (Prob. C. 6112[d][Deering's]).

Testamentary Guardian.

See category 14 Family, topic 14.08 Guardian and Ward, subhead Eligibility.

Probate.

Any interested person, may at any time after death of testator petition superior court having jurisdiction to have will proved. (Prob. C. 8000[Deering's]). Petition for probate of will must state: (1) Date and place of death; (2) address of decedent's residence; (3) name, age, address, relation of heirs and devisees; (4) character and estimated value of property; (5) name of proposed representative; (6) copy of will; (7) whether named executor consents to or waives appointment. (Prob. C. 8002[Deering's]). If no one contests probate, will may be proved on evidence of one of subscribing witnesses such as affidavit to which photographic copy of will is attached or affidavit in original will incorporating attestation clause. If no subscribing witness resides in county, deposition of witness can be elsewhere upon court direction. (Prob. C. 8220[Deering's]). If no evidence of subscribing witness can be procured, will may be proved by handwriting of testator and either handwriting of subscribing witness, writing in will with signatures of all subscribing witnesses or affidavit of person with personal knowledge of execution of will. (Prob. C. 8221[Deering's]).

Self-proved Wills.

Uncontested wills may be admitted on affidavit of subscribing witness to which photographic copy of will attached or which is contained in will and includes attestation clause. (Prob. C. 8220[Deering's]).

Living Wills.

Specific instructions about healthcare, including withholding or withdrawing treatment to sustain life, provided for in Health Care Decisions Law. (Prob. C. 4600 et seq.[Deering's]). Specific statutory advance health care directive form provides instructions for end of life decisions and relief from pain. (Prob. C. 4701[Deering's]). Request to forgo resuscitative measures provided for in Prob. C. 4780-4786[Deering's].

Contest.

Any person interested may contest will by filing written grounds of opposition to probate thereof any time before hearing of petition for probate. (Prob. C. 1043[Deering's]). Within 120 days after will is admitted to probate as recorded in clerk's minutes, any interested party, not party to or with knowledge of prior contest, may contest will. (Prob. C. 8225[Deering's], 8270[Deering's]).

Bequests and Devises to Inter Vivos Trusts.

Uniform Testamentary Additions to Trusts Act adopted. (Prob. C. 6300 et seq.[Deering's]).

Life Insurance and Similar Trusts.

Under certain circumstances, benefits payable on death pursuant to life insurance contracts and employee benefit plans may pass to trustee named in will without becoming subject to administration. (Prob. C. 6321[Deering's], 6323[Deering's]).

Devises.

General pecuniary devise unpaid one year from testator's death bears interest at rate of interest three percentage points less than legal rate on judgments in effect one year after date of testator's death. (Prob. C. 12001[Deering's], 12003[Deering's]).

Gift before death constitutes satisfaction of devise in whole or part only if will so provides; or testator so declares in contemporaneous writing; or devisee so acknowledges in writing. (Prob. C. 6174[Deering's]).

Unclaimed Legacies.

Disposition of unclaimed property from estates of deceased persons governed by C.C.P. 1440-1449[Deering's]. Escheat of estates controlled by Prob. C. 6800 et seq.[Deering's] and C.C.P. 1300 et seq.[Deering's] See also topic 13.09 Executors and Administrators, subhead Distribution if Abroad; and category 21 Property, topic 21.01 Absentees.

Child Not Provided for.

When testator omits to provide in his will for living child solely because he believes child to be dead or is unaware of child's birth, such child receives share in estate equal in value to that which child would receive if testator died intestate. (Prob. C. 21622[Deering's]). When testator fails to provide in will for child born or adopted after execution of will, child receives similar share in estate, unless failure to provide appears from will to be intentional, or child is otherwise provided for. (Prob. C. 21620[Deering's], 21671).

Contribution.

Share of omitted child must first be taken from estate not disposed of by will or trust, balance as necessary from all devisees and legatees proportionately unless will indicates contrary intention. (Prob. C. 21623[Deering's]).

Election.

Surviving spouse has no right of election between testamentary provision, if any, and share of separate property of decedent as in case of intestacy, except in certain cases of nonresidents. (Prob. C. 120[Deering's]). See categories 14 Family, topic Husband and Wife, subhead Community Property System; Property, topics Curtesy, Dower.

Community Property.—If one spouse attempts testamentary disposition of more than half of community property, surviving spouse must elect whether to take under will or to take his or her half of community property. (29 C. 337). Unless terms of will show contrary intent, surviving spouse can take community share as well as property given under will. (166 C. 450, 137 P. 37). Election may be made any time prior to distribution unless will provides contrary or spouse estopped. (147 C. 95, 81 P. 315; 15 C.3d 907, 126 C.Rptr. 820, 544 P.2d 956). Where wife dies before making election and before distribution of husband's estate, executrix may file election on widow's behalf. (15 C.3d 907, 126 C.Rptr. 820, 544 P.2d 956).

When either husband or wife dies intestate, or dies testate leaving all or part of estate passing or belonging to surviving spouse, such property passes to surviving spouse without probate or administration; however, surviving spouse may elect that interest of deceased spouse in community property, or interests of both spouses, be probated or administered. (Prob. C. 13500-13502[Deering's]). Unless interests of both spouses are probated or administered, surviving spouse is personally liable for debts of deceased spouse chargeable against community property and quasi-community property; such liability is limited to value of community property and quasi-community property which did not pass through probate or administration. (Prob. C.

13550-13554[Deering's]). For these purposes, procedures exist for determining community property and apportioning debts. (Prob. C. 13650[Deering's], 11440-46[Deering's]).

Lapse.

If transferee is dead when will executed, or fails or is treated as failing to survive transferor, or until future time required by will, issue of deceased transferee take in transferee's place. Issue of deceased transferee do not take in transferee's place if will expresses contrary intention or substitute disposition. (Prob. C. 21110[Deering's]). Except as provided in Prob. C. 21110[Deering's], if transfer other than residuary gift or future interest fails, property is transferred (1) according to any alternative disposition given in instrument; (2) property becomes part of the residue transferred under the instrument; or (3) property is transferred to decedent's estate. (Prob. C. 21111[Deering's]).

Foreign Wills.

Will made outside of state is valid in state if executed as required by laws of this state, executed according to laws of place where executed or executed according to laws of place where at time of execution or time of testator's death testator is domiciled, has place of abode, or is national. (Prob. C. 6113[Deering's]). Uniform International Wills Act adopted. (Prob. C. 6380 et seq.[Deering's]).

Foreign probated wills or foreign proved or established wills may be probated in appropriate superior court. (Prob. C. 12510[Deering's], 7050[Deering's]). (See topic 13.09 Executors and Administrators.) Authenticated copy of will and of order or decree admitting it to probate or other evidence of its proof or establishment must be filed with petition for letters. Such order, decree or other evidence must satisfy authentication requirements of Evid. C. 1530-32[Deering's]. (Prob. C. 12521[Deering's]).

Simultaneous Death.

See topic 13.05 Death, subhead Survivorship.

Testamentary Trusts.

See topic 13.14 Trusts.

Uniform Anatomical Gift Act adopted. (1987, adopted 1988). (H. & S.C. 7150-7156.5[Deering's]). California added provisions including H. & S.C. 7152.7[Deering's] establishing California organ and tissue donor registry, and H. & S.C. 7155.7[Deering's] regarding removal of organs that constitute anatomical gift from decedent who died under circumstances requiring inquest.

14 FAMILY

14.01 ADOPTION:

Any adult may adopt any unmarried minor child if former is at least ten years older, and if in best interest of both, court may approve adoption by stepparent or certain classes of relatives without regard to relative ages. (Fam. C. 8600-01[Deering's], 8714.5[Deering's]). Any adult may adopt any younger adult person, except adopter's spouse. (Fam. C. 9300-07[Deering's], 9320-28[Deering's], 9340[Deering's]). Relatives of child freed for adoption have placement preference over other applicants if in best interest of child. (Fam. C. 8710[Deering's]). Foster parent considered equally with all other applicants. (Fam. C. 8704[Deering's], 8710[Deering's]). Neither department nor licensed adoption agency that child is freed for adoption to may deny any person opportunity to become adoptive parent or delay or deny placement of child for adoption on basis of race, color or national origin of person or child involved. (Fam. C. 8708[Deering's]). Child's religious background may be considered in determining appropriate placement. (Fam. C. 8709[Deering's]). Jurisdiction is in superior court and hearing may, at court's discretion, be open and public. (Fam. C. 200[Deering's], 212[Deering's], 9307[Deering's]). Statutes provide for payments (Aid for Adoption of Children) to adoptive parents to meet needs of adopted children (Welf & Inst. C. 16115–16125[Deering's]).

Consents Required.

Of child's parents, including presumed father (Fam. C. 7611[Deering's]), if living; in certain cases, consent of single parent having sole custody, after other spouse has been given notice in manner provided for service of summons in civil action. Parent's consent is unnecessary where parent is judicially deprived of child's custody by court, or has deserted child without provision for its identification, or has signed and acknowledged statement relinquishing child for adoption. (Fam. C 8604-8606[Deering's]). Consent to adoption, once given, can be withdrawn by natural parent, in case of independent adoption only within 30 days of signature (Fam. C. 8814.5[Deering's], 8815[Deering's]) and in case of stepparent adoption only if court approves (Fam. C. 9005[Deering's]). Consent of child over age 12 required (Fam. C. 8602[Deering's]), as is consent of spouse of adult or married minor adoptee (Fam. C. 9301[Deering's], 9302[Deering's], 9307[Deering's], 9320-28[Deering's], 9340[Deering's]). Where not lawfully separated from spouse, married person cannot (a) adopt another adult without consent of adopter's spouse or (b) be adopted without consent of adoptee's spouse. (Fam. C. 8603[Deering's], 9301[Deering's], 9302[Deering's], 9320-28[Deering's], 9340[Deering's]). Regarding independent, stepparent, intercountry, and participation by Dept. of Health or licensed agency, see Fam. C. 8800-9007[Deering's].

Illegitimates.

Uniform Parentage Act adopted (1973, adopted 1975), providing procedures to establish parent-child relationship without regard to distinctions based on legitimacy. (Fam. C. 7600 et seq.[Deering's]). Such relationship can exist between child and natural or adoptive parents. (Fam. C. 7601[Deering's], 7610[Deering's]).

Venue.

Petition to be filed in superior court of county in which petitioner resides or, if petitioner is not resident of this state, in county in which placing birth parent or birth parents resided when adoption placement agreement was signed. If child is dependant of juvenile court and has been freed for adoption, petition may be filed in county where petitioner resides or in county where child freed for adoption. (Fam. C. 8714[Deering's]). Certain categories of persons desiring to adopt may file petition in county where petitioner resides, or if petitioner not California resident, in county birth parents resided when adoption placement agreement signed, or in county birth parent or parents resided when petition filed. (Fam. C. 8802[Deering's]).

Proceedings.

Delineated by Fam. C. 8700 et seq.[Deering's], 8800 et seq.[Deering's] and 9000 et seq.[Deering's] for agency, direct, domestic partner, and stepparent adoptions and by Fam. C. 9300-07[Deering's], 9320-28[Deering's], 9340[Deering's], 200[Deering's], 212[Deering's] for adult and married minor adoptions.

Name.

Adoptee may take family name of adopter. (Fam. C. 8616[Deering's], 8618[Deering's], 9304-05[Deering's]).

Effect of Adoption.

Adopter and adoptee sustain legal relation of parent and child with all its rights and duties. (Fam. C. 8616[Deering's], 8618[Deering's], 9304-05[Deering's]). Natural parents of adoptee are relieved of all parental duties and responsibilities and have no rights. (Fam. C. 8617[Deering's]; 9306[Deering's]). Adoptee deemed descendant of adopter as though natural child, for all purposes of succession. Adopted child normally does not succeed to estate of natural parent or relative, and neither natural parent nor relative normally inherits from child adopted by another. (Prob. C. 6451[Deering's]). Under certain circumstances, adopted person in stepparent adoption may succeed to estate of natural parent and relatives and natural parent or relative can inherit from child adopted by another. (Prob. C. 6454[Deering's]).

Setting Aside Adoption.

Within five years from decree of adoption, adopting parents may petition to set aside adoption of minor child because of mental deficiency or mental illness of which adopting parents had no notice. (Fam. C. 9100[Deering's]).

Information on Parentage.

Procedure available for disclosure of names and addresses of adoptees who have reached age of 21 if adult adoptee consents in writing. Disclosure of names and addresses of birth parents contained in records permitted if birth parents consent in writing. Release of information to adoptees under age of 21 authorized if medical necessity or other extraordinary circumstance justifies disclosure. Licensed adoption agencies are mandated to respond to such requests. (Fam. C. 9203[Deering's]).

Information on Siblings.

Procedure available to adoptee 18 or older for disclosure of name and address of biological sibling 18 or older who has also requested contact. (Fam. C. 9205[Deering's]).

14.02 ALIMONY:

See topic 14.05 Dissolution of Marriage.

14.02A ANNULMENT:

See topic 14.11 Marriage.

14.03 COMMUNITY PROPERTY:

See topic 14.09 Husband and Wife, subhead Community Property System.

14.04 DESERTION:

See topic 14.09 Husband and Wife, subhead Desertion and Nonsupport.

14.05 DISSOLUTION OF MARRIAGE:

Subject is covered by Fam. C. 310 et seq.[Deering's] (effective Jan. 1, 1994).

Rules.

Family law matters are governed in large part by California Rules of Court which prescribe specific procedures, such as use of judicial forms. Rules should always be consulted. (Cal. R. Ct. Title Five, Division Ia, 5.10 et seq.).

Grounds.

Court may decree a dissolution of marriage or legal separation on either of following grounds, which shall be pleaded generally: (1) Irreconcilable differences, which have caused irremediable breakdown of marriage; (2) incurable insanity. (Fam. C. 2310[Deering's]).

Irreconcilable differences are grounds determined by court to be substantial reasons for not continuing marriage and which make it appear that marriage should be dissolved. (Fam. C. 2311[Deering's]). Dissolution of marriage on grounds of incurable insanity requires proof on competent medical or psychiatric testimony, that insane spouse was at time petition was filed, and remains, incurably insane. (Fam. C. 2312[Deering's]).

Residence Requirements.

Petitioner or respondent must have been resident of state for six months and of county for three months next preceding commencement of action. (Fam. C. 2320[Deering's]).

In proceedings for aration in which neither party, at time such proceeding was commenced, has complied with residence requirements of Fam. C. 2320[Deering's], either party may upon so complying, amend his pleading to request that judgment decreeing dissolution of marriage be entered and date of filing of such amended pleading shall be deemed to be date of commencement of proceeding for dissolution of marriage for purposes of residence requirement only. (Fam. C. 2321[Deering's]).

Jurisdiction.

Court has jurisdiction to inquire into and render any judgment and make orders that are appropriate concerning status of marriage, custody and support of minor children of marriage, including children born after initial petition or final decree of dissolution, and incapacitated children or parents in need for whom support is authorized under Fam. C. 3910[Deering's], 4400-01[Deering's], support of either party, settlement of property rights and awarding attorney's fees and costs. (Fam. C. 200[Deering's], 2010[Deering's], 2060[Deering's]). If either party has minor child whose welfare might be affected, or if controversy involves domestic violence whether or not either party has minor child, case may be transferred to conciliation court presided over by superior court judge, who will endeavor to effect reconciliation. (Fam. C. 1830 et seq.[Deering's]). See category 6 Courts and Legislature, topic 6.01 Courts, subhead Superior Courts, catchline Family Conciliation Court.

Process.

Dissolution of marriage action commenced by personal service of summons and petition as in other cases. Service may be made by publication in proper cases. See category 5 Civil Actions and Procedure, topic 5.20 Process.

Petition must contain certain factual data, including date and place of marriage, date of separation, years from marriage to separation, number of children of marriage, and age and birthdate of each minor child. (Fam. C. 2330[Deering's]).

Practice.

No decree of dissolution or of legal separation can be granted upon default of one of parties or upon finding of referee. Court must in addition to any finding by referee require proof of alleged grounds by testimony or affidavit. In all cases involving minor children each affidavit or offer of proof shall include estimate of monthly income of each party. If no knowledge of estimated income, declarant or affiant shall state why he or she has no knowledge. In cases where there is community estate, each affidavit or offer of proof shall include estimate of value of assets and debts of declarant or affiant proposed be distributed to each party unless declarant or affiant has filed, or concurrently files, complete and accurate property declaration with court. (Fam. C. 2336[Deering's]).

In any proceeding for legal separation or dissolution of marriage, evidence of misconduct is inadmissible except as otherwise provided by statute. (Fam. C. 2335[Deering's]).

Final Judgment.

If court determines that dissolution ought to be granted, judgment is entered declaring that parties are entitled to have their marriage dissolved. (Fam. C. 2338[Deering's]). Where judgment of dissolution or nullity of marriage or legal separation of parties is to be granted upon default, signature of defaulting spouse must be notarized and clerk must give notice of entry of judgment to each party. No judgment shall be final until six months have expired from date of service of copy of summons and petition or date of appearance of respondent, whichever occurs first. (Fam. C. 2339[a][Deering's]). However, court may extend six-month period for good cause shown. (Fam. C. 2339[b][Deering's]). Decree declaring marriage dissolved must specify date on which decree becomes finally effective for purpose of terminating marriage relationship of parties. (Fam. C. 2340[Deering's]). If appeal is taken from judgment or motion for new trial is made, dissolution of marriage does not become final until such motion or appeal has been finally disposed of. (Fam. C. 2341[a][Deering's]). Filing of appeal or motion for new trial does not stay effect of judgment insofar as it relates to dissolution of marriage status unless appealing party in notice of appeal or motion for new trial specifies objection to termination of marriage status. (Fam. C. 2341[b][Deering's]).

Summary Procedure.

Available pursuant to Fam. C. 2400-06[Deering's]. Couples must file joint petition attesting certain conditions have been met: Either party meets residence requirements of Fam. C. 2320[Deering's]; irreconcilable differences caused irremediable breakdown of marriage; couple was married five years or less; they have limited assets and liabilities; they have no minor children together; they executed agreement for division of community property and liabilities; they waive spousal support, right to appeal judgment of dissolution, and right to move for new trial; parties read and understand summary dissolution brochure provided for in Fam. C. 2406[Deering's]; and parties desire court to dissolve marriage. (Fam. C. 2400-01[Deering's]).

Remarriage.

No restrictions on remarriage of either party after final judgment.

Support of Insane Spouse.

Dissolution of marriage on ground of incurable insanity does not relieve spouse obtaining such dissolution of any obligation imposed by law for support of incurably insane spouse and court may make such order for support or require a bond therefor as circumstances require. (Fam. C. 2313[Deering's]).

Change of Wife's Name.

Whether or not so requested in petition, except in action for legal separation, court must upon request of party, restore that party's birth name or former name (Fam. C. 2080[Deering's]); fraud is only basis for denial (Fam. C. 2081[Deering's]).

Legal Separation.

Either spouse may maintain an action for legal separation and a court may render a judgment decreeing legal separation with consent of both parties or where one party has not made a general appearance. (Fam. C. 2333-34[Deering's], 2345[Deering's]). Court has jurisdiction to inquire into and render such judgments and make such orders as are appropriate concerning status of marriage, custody and support of minor children of marriage, including children born after initial petition or final decree of dissolution, and support of children for whom support may be ordered, support of either party, settlement of property rights and awarding of attorneys' fees and costs. (Fam. C. 200[Deering's], 2010[Deering's]).

Grounds for legal separation are same as for dissolution of marriage (see subhead

Grounds, supra).

Support of Children.

Both parents have equal statutory duty to support and educate minor children. (Fam. C. 3900[Deering's]). This support obligation extends to earlier of age 19 or completion of 12th grade if unmarried child is not self-supporting and goes to school full time. (Fam. C. 3901[Deering's]). If support of minor child is at issue, court may order either or both parents to pay any amount necessary for support, maintenance and education of child. (Fam. C. 4001[Deering's]). Comprehensive statutory scheme establishes mandatory minimum child support level and procedures for determining parents' contribution. (Fam. C. 4050 et seq.[Deering's]). Support payments have priority over debts to creditors. (Fam. C. 4011[Deering's]). Parties required to provide such support may for good cause be required to give reasonable security therefor. (Fam. C. 4012[Deering's]). Any order for child support may be modified or revoked as court may deem necessary, except as to amounts accrued prior to filing motion to amend. (Fam. C. 3651[Deering's]). In any order issued on or after July 1, 1990 which establishes or modifies support, court shall order obligor to assign to obligee that portion of earnings due or to be due in future as will be sufficient to pay support order and shall include amount to be paid toward liquidation of arrearage or past due support amount. (Fam. C. 5253[Deering's], 5238[Deering's]). Obligee alleging arrearages must specify amount. (Fam. C. 5208[Deering's], 5230[Deering's], 5230.5[Deering's]). Court may stay such assignment only upon finding of good cause. (Fam. C. 5260[Deering's]). Where support order issued or modified before July 1, 1990 does not include wage assignment, obligee may seek order by application, notice of motion or order to show cause, or pursuant to Fam. C. 5208[Deering's], 5230-31[Deering's], 5260[Deering's]. (Fam. C. 5208[Deering's], 5250[Deering's], 5251[Deering's]). Order for wage assignment is binding on any existing or future employers of obligor who have been served with copy of such order. (Fam. C. 5231[Deering's], 5281[Deering's], 5282[Deering's]). Such assignment made pursuant to court order has priority over any attachment, execution, or other assignment, as specified in C.C.P. 706.031[Deering's]. (Fam. C. 5243[Deering's]).

Court may require record of employment search from parent who attributes default on support order to unemployment. (Fam. C. 4505[Deering's]). State professional licensing agencies, including Dept. of Motor Vehicles, precluded from issuing or renewing license of parent in violation of child support orders. (Fam. C. 17520[Deering's]).

Custody of Children.

Uniform Child Custody Jurisdiction and Enforcement Act adopted. (1997, adopted 1999). (Fam. C. 3[Deering's], 3400 et seq.[Deering's]). During pendency of actions for dissolution or nullity of marriage, legal separation or custody or visitation, or at any time thereafter, court may issue orders for custody of minor child of marriage, as may seem necessary or proper. Court has wide discretion to award custody according to best interests of child. Parents have fundamental right to custody of their children, and nonparent will not be awarded custody in preference to parent without dual findings that award of custody to parent would be detrimental to child and that particular custody award required to serve best interests of child. (Fam. C. 3020-22[Deering's], 3040[Deering's], 3043[Deering's]). Such order may be modified or revoked thereafter as natural rights of parties and best interests of child require. (Fam. C. 3120[Deering's]).

Upon application of either parent joint custody may be ordered in discretion of court. (Fam. C. 3081[Deering's]) . “Joint custody” (Fam. C. 3002[Deering's]) means joint physical custody (Fam. C. 3004[Deering's]) and joint legal custody (Fam. C. 3003[Deering's]), but court may specify sole physical custody (Fam. C. 3007[Deering's]) or sole legal custody (Fam. C. 3006[Deering's]) as well. (Fam. C. 3080-89[Deering's]). Court must grant reasonable visitation rights to parents unless detrimental to child (Fam. C. 3100[Deering's]) and may grant such rights to stepparents (Fam. C. 3101[Deering's]), other family members in some circumstances (Fam. C. 3102–04[Deering's]), and any other person interested in the child's welfare (Fam. C.

3100[Deering's]). Where visitation ordered in case involving domestic violence and where protective or restraining order issued, visitation order must specify time, day, place and manner of child's transfer so as to limit child's exposure to domestic conflict or violence. If criminal protective order issued, visitation order shall refer to and acknowledge precedence for enforcing protective order. (Fam. C. 3100[c][Deering's]). Court may not award physical or legal custody or unsupervised visitation to person required to be registered as sex offender where victim was minor unless no risk to child and court states reasons for finding no risk in writing or on record. (Fam. C. 3030[a][1][Deering's]). Court may not award custody or unsupervised visitation if anyone residing in person's household is required, as result of felony conviction where victim was minor, to register as sex offender under P.C. 290 unless no significant risk to child and court states reasons for finding no risk in writing or no record. (Fam. C. 3030[a][2][Deering's]). Fact that child is permitted unsupervised contact with person registered as sex offender under P.C. 290 is prima facie evidence that child is at significant risk. (Fam. C. 3030[a][3][Deering's]). Court may not award custody or visitation to person convicted of rape under Pen. C. 261[Deering's] if child was conceived as result of the rape. (Fam. C. 3030[b][Deering's]). Court may not award custody or unsupervised visitation to person convicted of murder in first degree under P. C. 189 where murder victim was other parent of child who is subject of order, unless no risk to child and court states reasons for finding no risk in writing or on record. (Fam. C. 3030[c][Deering's]). Custodial parent has right to change child's residence, subject to court's power to restrain removal that would prejudice child's rights or welfare, but may be ordered to notify other parent of plan to move child. (Fam. C. 3024[Deering's], 7501[Deering's]).

Court may appoint private counsel to represent interests of minor child, determine counsel's compensation and order it paid by parents in proportions deemed just. (Fam. C. 3150-53[Deering's]).

Temporary Spousal and Child Support.

During pendency of any proceeding for legal separation or dissolution of marriage, court may order either spouse to pay any amounts necessary for support and maintenance of other spouse and for support, maintenance and education of children. (Fam. C. 200[Deering's], 3600-04[Deering's]). Order may be modified or revoked prospectively. (Fam. C. 3680 et seq. [Deering's]).

Permanent Support of Spouse.

In any judgment decreeing dissolution of marriage or legal separation, court may order either party to pay for support of other party any amount and for such period of time as court may deem just and reasonable based on standard of living established during marriage having regard for circumstances of respective parties, including duration of marriage, ability to pay, tax consequences, ability of supported spouse to engage in gainful employment without interfering with interests of children of parties in custody of such spouse, balance of hardships to each party, and goal that supported party shall be self-supporting within reasonable period of time. (Fam. C. 4320[Deering's], 4330-37[Deering's], 4339[Deering's]). Except as otherwise agreed by parties in writing, there shall be rebuttable presumption, affecting burden of proof, of decreased need for support if supported party is cohabiting with person of opposite sex. Upon finding circumstances have changed, court may modify payment of support. (Fam. C. 4323[Deering's]). Order for support may be modified prospectively from date notice of motion is filed, or date of order to show cause, or any subsequent date except as provided in Fam. C. 3653(b)[Deering's] or (c) [Deering's]. (Fam. C. 3653[Deering's]). Except as otherwise agreed by parties in writing, obligation of any party under order or judgment for support and maintenance of other party terminates upon death of either party or upon remarriage of obligee. (Fam. C. 4337[Deering's]). Court ordered support payments terminate upon happening of specified contingencies. Failure of supported party to notify other party of happening of contingency renders supported party liable to refund any and all monies received prior to happening of contingency. (Fam. C. 4334[Deering's]). Court ordered support payments terminate at end of specified period and cannot be extended unless jurisdiction is retained in original order. (Fam. C. 4335[Deering's]). Order for support may include necessary costs and expenses of retraining or education. (Fam. C. 4331[Deering's]). Jurisdiction to extend support is retained if support order permits modification. (171 Cal. App. 3d 907, 217 C. Rptr. 589).

In enforcement of its decree, judgment, or order of support, court must first resort to earnings, income, or accumulations of either spouse, while living separate and apart from other spouse, which would have been community property if spouse had not been living separate and apart; then community property; then quasi-community property; and finally separate property of spouse ordered to make support payments. (Fam. C. 4338[Deering's]).

Revocation of Spousal Support.

Except as otherwise agreed to by parties in writing, there shall be rebuttable presumption of decreased need for support if supported spouse is cohabiting with person of opposite sex. If court finds changed circumstance, it may modify support payment. (Fam. C. 4323[Deering's]).

Division of Property of Spouses.

Community property jurisdiction. Parties to dissolution and separation proceedings must make complete preliminary and final written disclosure of all assets and liabilities unless parties stipulate to waiver of such disclosure. (Fam. C. 2100[Deering's], 2104-07[Deering's]). Except upon written agreement by parties or stipulation in open court, court must, in its judgment decreeing dissolution, or upon judgment decreeing legal separation, or at later time if jurisdiction is expressly reserved, divide equally, community and quasi-community property and debts, but court not precluded from awarding particular asset to one party as court deems proper to effect substantially equal division of property, or by way of additional award or offset against existing property where one spouse deliberately misappropriated community or quasi-community property of other spouse. (Fam. C. 2550-53[Deering's], 2600-04[Deering's], 2620-27[Deering's]). Community property personal injury damages shall be assigned to party suffering injuries unless otherwise indicated by economic condition and needs of each party, time elapsed since recovery of damages, and other facts. (Fam. C. 780[Deering's]). Property rights determined in final judgment may in certain circumstances be reconsidered upon such terms as may be just. (C.C.P. 473[Deering's]). Voluntary written agreement regarding property or support should be incorporated into judgment, or court ordered enforcement may be unavailable.

All real property situated in California, and personal property wherever situated, acquired during marriage which is not separate property, is community property. (Fam. C. 700[Deering's], 760[Deering's], 803[Deering's]). Upon dissolution or legal separation, property acquired in joint form, including tenancy in common, joint tenancy and tenancy by entirety is presumed to be community property. Presumption may be rebutted by certain written evidence that it is separate property. (Fam. C. 2581[Deering's]).

Presumption that property acquired during marriage is community property is inapplicable to property, legal and equitable, which is held by person at time of his death, if marriage of party was dissolved more than four years prior to such death. (Fam. C. 802[Deering's]).

Transmutation.

Married persons may agree to transmute separate or community property with or without consideration, so long as it is in writing and expressly declares consent of spouse whose interest is adversely affected. Third parties are not affected by transmutation of real property without notice unless recorded. Gifts of tangible personal property are excepted unless of substantial value. Requirement of writing only applies to transmutations after Jan. 1, 1985. (Fam. C. 850[Deering's], 852[Deering's]).

Attorneys' Fees and Costs.

Court may order any nongovernmental party to pay attorneys' fees and costs of maintaining or defending proceeding. (Fam. C. 2030[Deering's]). Either party may encumber his or her interest in community property to pay reasonable attorneys' fees and costs (Fam. C. 2033[Deering's]), and court may order such fees and costs paid directly to attorney entitled thereto (Fam. C. 272[Deering's]).

Legal separation agreements in writing are valid and may divide property and make provision for support of either party and/or children during separation or upon dissolution of marriage. (Fam. C. 1620[Deering's], 3580[Deering's]).

Annulment of Marriage.

See topic 14.11 Marriage.

Foreign Divorces.

California has adopted Uniform Divorce Recognition Act. (1947, adopted 1949). (Fam. C. 3[Deering's], 2090-93[Deering's]). California added Fam. C. 2093[Deering's] regarding application of title; full faith and credit. Dissolution of marriage obtained in another jurisdiction is of no force and effect if both parties to marriage were domiciled in California at time proceeding was commenced. (Fam. C. 2091[Deering's]). Prima facie evidence that party was domiciled in California includes proof that party was domiciled in California within 12 months prior to commencement of dissolution proceeding and within 18 months after departure, or that such person maintained residence in California. (Fam. C. 2092[Deering's]).

Prenuptial Contracts.

See topic 14.09 Husband and Wife.

14.06 DIVORCE:

See topic 14.05 Dissolution of Marriage.

14.07 DOMESTIC PARTNERS:

Governed by Division 2.5 of Family Code. (Fam. C. 297-99.6[Deering's]).

Definition.

Domestic partners are two adults who have chosen to share one another's lives in intimate and committed relationship of mutual caring. (Fam. C. 297[a][Deering's]). Domestic partnership established when both persons file Declaration of Domestic Partnership with Secretary of State and: (1) Both persons have common residence; (2) neither person is married to someone else or is member of another domestic partnership with someone else that has not been terminated, dissolved or adjudged nullity; (3) both persons are not related by blood in way that would prevent marriage to each other in California; (4) both persons are at least 18 years of age; (5) either both persons are members of same sex, or one or both of persons meet eligibility criteria under Title II of Social Security Act as defined in 42 U.S.C. 402(a) for old-age insurance benefits or Title XVI of Social Security Act as defined in 42 U.S.C. 1381 for aged individuals; (6) both persons are capable of consenting to domestic partnership. (Fam. C. 297[b][Deering's]).

Rights.

Registered Domestic Partners have same rights, protections, and benefits and are subject to same responsibilities, obligations and duties under law as are granted to and imposed upon spouses. (Fam. C. 297.5[Deering's]). Effective Jan. 1, 2008, person entering into domestic partnership may change his or her name, similar to person getting married. (Fam. C.

298.6[Deering's]).

Registration.

Two persons desiring to become domestic partners may complete and file Declaration of Domestic Partnership form (see end of this Digest for form) with Secretary of State. (Fam. C. 298[Deering's], 298.5[Deering's]). Effective Jan. 1, 2008, form will include option to change name. (Fam. C. 298[Deering's], 298.5[Deering's]).

Termination.

Registered domestic partnerships may be terminated without filing proceeding for dissolution of domestic partnership by filing Notice of Termination of Domestic Partnership with Secretary of State provided certain conditions exist at time of filing. (Fam. C. 299[a][Deering's]). Registered domestic partnership terminated six months after date of filing Notice of Termination of Domestic Partnership with Secretary of State, provided neither party has before that date filed with Secretary of State Notice of Revocation of Domestic Partnerships. (Fam. C. 299[b][Deering's]).

Intestate Succession.

See category 13 Estates and Trusts, topic 13.12 Intestacy, subhead Domestic Partners.

Forms.

See end of this Digest.

14.08 GUARDIAN AND WARD:

Guardianships available for minors, conservatorship utilized for adults. Comprehensive statute scheme covers both. (Prob. C. 1400 et seq.[Deering's]). Limited conservatorship for developmentally disabled adults also available. (Prob. C. 1801[d][Deering's]).

Jurisdiction and Venue.

Superior court of county in which minor or conservatee resides or such other county as may be in best interests of proposed ward or conservatee may appoint guardian or conservator of person and/or estate. (Prob. C. 2201[Deering's]). If proceedings for guardianship or conservatorship are instituted in more than one county, guardianship or conservatorship first granted shall govern and all other proceedings shall be dismissed. (Prob. C. 2203[Deering's]).

Selection of Guardian.

Parent may nominate guardian of person or estate by will or otherwise if other parent consents in writing, is dead, lacks legal capacity to consent, or consent would not be required for adoption. (Prob. C. 1500[Deering's]). Court shall appoint person nominated unless court determines nominee is unsuitable. (Prob. C. 1514[Deering's]). Petition for appointment of guardian may be filed by relative of minor or minor if 12 years of age or older. (Prob. C. 1510[Deering's]). Investigation made by court investigator; report filed with court. (Prob. C. 1513[Deering's]).

Selection of Conservator.

Proposed conservatee may nominate conservator if of sufficient capacity to form intelligent preference. Court shall appoint nominee absent finding that nominee not in best interests of conservatee. (Prob. C. 1810[Deering's]). Court guided by best interests of proposed conservatee. (Prob. C. 1812[Deering's]). Preference to be given as follows: (1) Spouse, domestic partner, or nominee of spouse, (2) adult child or child's nominee, (3) parent or nominee of parent, (4) brother or sister or nominee of same, and (5) any other person or entity eligible. Nominees of persons with preference subordinate to other persons in same class. (Prob. C. 1812[Deering's]). Appointment of successor conservator by court after noticed hearing. (Prob. C. 2680[Deering's]). Conservatee entitled to appear personally or present report by court investigator of conservatee's objections. (Prob. C. 2685[Deering's], 2686[Deering's]).

Eligibility.

Any competent person, including nonresident, may be appointed guardian or conservator of estate or person (Prob. C. 2100 et seq.[Deering's]); nonprofit charitable California corporation authorized by articles to act as guardian or conservator in California which has been providing care to proposed ward, under certain circumstances may be appointed guardian or conservator of estate. (Prob. C. 2104[Deering's]). When two joint conservators, both must concur in exercise of power, when more than two, majority must concur. (Prob. C. 2105[Deering's]).

Appointment of Guardian or Conservator.

Temporary guardianships and conservatorships available in expedited proceedings upon showing of good cause for such appointment. (Prob. C. 2250[Deering's]). Legal counsel may be appointed by court for ward, proposed ward, conservatee, or proposed conservatee if person not otherwise represented and appointment would be helpful. (Prob. C. 1470[Deering's]).

Qualifications.

Guardian or conservator must take oath to perform duties of office and, with certain exceptions, give bond for performance as fixed by court. (Prob. C. 2300[Deering's], 2320[Deering's]). Additional bond normally required on sale or mortgage of real property unless court makes express finding stating reason bond should not be increased. (Prob. C. 2330[Deering's]). Applications can be made for reduction of bond or for furnishing of new security. (Prob. C. 2329[Deering's], 2330[Deering's]).

Inventory and Accounts.

Guardian and conservator must return to court verified inventory of estate of ward within 90 days after appointment (Prob. C. 2610[Deering's]) and render verified account one year after appointment and thereafter as directed by court but at least biennially (Prob. C. 2620[Deering's]). With smaller estates, guardian or conservator may, upon meeting certain conditions, file affidavit that all income, if not retained, was spent for benefit of ward or conservatee in lieu of regular accounting. (Prob. C. 2628[Deering's]). Court authorized to require spouse of conservatee to apply community property to support and maintenance of conservatee. (Prob. C. 3080 et seq. [Deering's]).

Powers and duties of guardians and conservators as to person of ward and conservatee include care, custody, control and education. (Prob. C. 2350 et seq.[Deering's]). Guardians or conservators of estate must pay all debts of their wards or conservatees, collect all claims, represent in all actions and otherwise manage estate of their ward or conservatee. (Prob. C. 2400 et seq.[Deering's]). Income from estate used for support, maintenance, and education of ward or conservatee. (Prob. C. 2420[Deering's]). Court authorized to permit transfers of property as gifts, releases of conservatee's power of appointment, right to revoke or modify revocable trust, and other such transfers in same manner as if conservatee or ward had capacity to act. Procedure outlined to permit exercise of “substituted judgment” in Prob. C. 2580 et seq. [Deering's] Action can be initiated by conservator or other interested person. Court also has authority to grant certain delineated extraordinary powers to guardian or conservator if in best interests of ward or conservatee. (Prob. C. 2590[Deering's], 2570-74[Deering's]).

Investments governed by Prob. C. 2570[Deering's].

Securities in Name of Nominee.

See category 13 Estates and Trusts, topic 13.14 Trusts, subhead Securities in Name of Nominee.

Gifts to Minors.

See topic 14.10 Infants.

Real property may be sold, encumbered, or leased when in best interests of estate, but only after authorization by court. (Prob. C. 2540 et seq.[Deering's]).

Liabilities.

Relationship of guardian and ward and conservator and conservatee is fiduciary relationship, and is governed by law of trusts. (Prob. C. 2101[Deering's]). Guardian or conservator who breaches fiduciary duty is chargeable with various liabilities depending on circumstances (Prob. C. 2401.3[Deering's]) but may be excused if acted reasonably and in good faith under circumstances. (Prob. C. 2401.5[Deering's]). Guardian can be removed for mismanagement, failure to perform duties, felony conviction, adverse interest and other causes. (Prob. C. 2650[Deering's]). Settlement of guardian's current account is not final as between guardian and ward. (3 C.2d 225, 44 P.2d 562). Action against sureties on bond must be commenced within four years of removal, discharge or surcharging of guardian or conservator and in no event later than six years after date of judgment or order on which action is based. (Prob. C. 2333[Deering's]). Upon reaching majority, ward may settle accounts with guardian and give valid release if obtained fairly; otherwise guardian is not entitled to discharge until one year after ward reaches majority. (Prob. C. 2627[Deering's]).

Termination.

Guardianship of person or estate terminates when ward attains majority or dies. Guardianship of person terminates on adoption or emancipation of ward under Fam. C. 7002[Deering's]. (Prob. C. 1600[Deering's]). Upon petition, court may terminate guardianship if no longer necessary or in best interests of ward. (Prob. C. 1601[Deering's]). Conservatorship terminated only by death of conservatee or by order of court. (Prob. C. 1860[Deering's]).

Legal Capacity.

Appointment of conservator of estate is adjudication that conservatee lacks legal capacity to enter transactions that obligate conservatorship estate. (Prob. C. 1872[Deering's]). Court may order that conservatee is authorized to enter into certain transactions. (Prob. C. 1873[Deering's]). Person who enters transaction which affects real property of conservatorship estate acting in good faith and for valuable consideration and without knowledge of conservatorship, is not affected by conservatorship unless notice of same recorded in county where real property located prior to transaction. (Prob. C. 1875[Deering's]). Unless adjudged to lack capacity to give informed consent for medical treatment, conservatee may consent to receive medical treatment. If court concludes conservatee lacks capacity to make health care decisions, conservator has exclusive authority to make health care decisions for conservatee that conservator in good faith based on medical advice determines necessary. (Cf. Prob. C. 2354-2357[Deering's]). Conservatorship does not affect capacity of conservatee to marry or to enter into registered domestic partnership, although court may by order determine to contrary. (Prob. C. 1900[Deering's], 1901[Deering's]). Ward's capacity, see topic 14.10 Infants.

Unless otherwise ordered by court, wages and salaries earned by ward and conservatee during continuance of guardianship or conservatorship are to be paid to ward or conservatee and are not part of estate. (Prob. C. 2601[Deering's]).

Conservatee of limited conservatorship retains all legal and civil rights not removed by court. (Prob. C. 2351[Deering's], 2351.5[Deering's]).

Rights and Restrictions.

No ward or conservatee can be placed in mental health treatment facility against his or her will without compliance with provisions of Lanterman-Petris-Short Act. (Welf. & Inst. C. 5000 et seq.[Deering's]). No experimental drugs may be given or convulsive treatment performed on ward or conservatee under authority of provisions of this division. No minor can be sterilized under authority of this division. (Prob. C. 2356[Deering's]).

Other Protective Proceedings.

Up to $5,000, or property not exceeding that value, may be paid to parent of minor entitled to custody, to be held until majority, without requiring appointment of guardian if parent verifies in writing that total estate of minor excluding “custodial property” does not exceed $5,000. (Prob. C. 3400 et seq.[Deering's]).

When minor has disputed claim for damages, money or other property and does not have guardian, parent with custody has right to compromise or settle minor's claim with approval of superior court. If parents live together, then either one may compromise or settle such claims with court's approval. (Prob. C. 3500[Deering's]).

Foreign Guardians or Conservators.

Nonresident with duly appointed guardian, conservator, or comparable fiduciary in place of residence may petition to have property of nonresident removed from this state to place of residence, when no petition for guardianship or conservatorship is pending or contemplated in this state. If court determines removal of property will not impair rights of creditors or nonresident, it shall grant leave to remove, absent showing of good cause to contrary. (Prob. C. 3800 et seq. [Deering's]).

Gifts to Minors.

See topic 14.10 Infants.

Uniform Fiduciaries Act has not been adopted.

Uniform Simplification of Fiduciary Security Transfers Act repealed by Uniform Commercial Code. (1962, adopted 1963). (Com'l. C. 8402-8404, 8115). See category 3 Business Regulation and Commerce, topic 3.09 Commercial Code.

14.09 HUSBAND AND WIFE:

Husband and wife may hold property as joint tenants, tenants in common, as community property, or as community property with right of survivorship. (Fam. C. 750[Deering's]).

Separate Property.

Neither husband nor wife has any interest in separate property of other (Fam. C. 752[Deering's]), but neither can be excluded from other's dwelling (Fam. C. 753[Deering's]), except, in divorce, annulment or separate maintenance proceedings, upon court order (Fam. C. 754[Deering's]).

As to what constitutes separate property as distinguished from community property, see infra subhead Community Property System.

Contracts.

Either spouse may enter into any engagement or transaction with other, or with any other person, respecting property, which either might if unmarried. (Fam. C. 721[Deering's]). But husband and wife cannot, by any contract, alter their legal relations, except as to property (Fam. C. 1620[Deering's]), and except that they may agree, in writing, to immediate separation, and make provision for support of either of them and of their children during such separation (Fam. C. 3580[Deering's]).

Married woman may become bound as surety for any person, including her husband. (26 Cal. App. 589, 147 P. 607).

Uniform Premarital Agreement Act adopted. (1962, adopted 1963). (Fam. C. 1600-1617[Deering's]).

Liability for Debts of Spouses.

Separate property of spouse is liable for that spouse's debts contracted before or during marriage. (Fam. C. 913[Deering's]). However, separate property of either spouse is liable for debts contracted by either spouse for necessaries of life. (Fam. C. 914[Deering's]).

Neither separate property nor earnings after marriage of spouse is liable for debts of other spouse contracted before marriage. (Fam. C. 910[Deering's], 911[Deering's], 913[Deering's]).

Joinder or consent of spouse to encumbrance of community property does not subject separate property to liability unless spouse also incurred debt. (Fam. C. 913[b][2][Deering's]).

Liability for Torts.

Married person not liable for tort of other spouse except where liable if marriage did not exist. If liability of married person arises from activity performed for benefit of community, liability is first satisfied from community estate and second from married person's separate property. Otherwise, liability is first satisfied from married person's separate property and second from community estate. (Fam. C. 1000[Deering's]).

Actions.

Married person may sue or be sued without his or her spouse being joined as party. (C.C.P. 370[Deering's]). If husband and wife are sued together, each may defend his or her own right, and if other spouse neglects to defend, may defend other's right also. (C.C.P. 371[Deering's]). Either spouse may sue other for personal torts, intentional or negligent, and may sue other to recover separate property appropriated by other. (58 C.2d 683, 26 C. Rptr. 97, 376 P.2d 65; 58 C.2d 692, 26 C. Rptr. 102, 376 P.2d 70).

Agency.

Either spouse may act as attorney in fact for other.

Desertion and Nonsupport.

Spouse is not liable for other spouse's support when other spouse by agreement lives separately, unless such support is stipulated in agreement. (Fam. C. 4302[Deering's]). Spouse must support other spouse while they are living together out of spouse's separate property when there is no community or quasi-community property. (Fam. C. 4301[Deering's]).

Uniform Interstate Family Support Act (1996, adopted 1997), provides civil and criminal procedure for enforcement of duties of support where more than one state is concerned. (Fam. C. 4900-5005[Deering's]). Court jurisdiction is vested in superior court. (Fam. C. 200[Deering's]). Uniform Civil Liability for Support Act is in effect. However, sections under that title have been recast in Family Code with only definitions from former Civil Code §241[Deering's] (definitions of state, obligor, obligee, child and parent) omitted. (See Fam. C. 200[Deering's], 3550[Deering's], 3551[Deering's], 3554[Deering's], 3651[Deering's], 4000[Deering's], 4002[Deering's], 4005[Deering's], 4300[Deering's], 4303[Deering's], 4320[Deering's], 4400[Deering's], 4402[Deering's], 4404[Deering's], 4405[Deering's].)

Uniform Reciprocal Enforcement of Support Act adopted (former Fam. C. 4800 et seq.[Deering's]) but repealed and replaced by Uniform Interstate Family Support Act (1996, adopted 1997). (Fam. C. 4900 et seq.[Deering's]).

Separation.

Earnings and accumulations of each spouse after separation are separate property of that spouse. (Fam. C. 771[Deering's]). Debts incurred after separation and unrelated to community are also separate. (74 Cal. App. 3d 591, 600, 141 C. Rptr. 597).

Community Property System.

All property owned by either spouse before marriage, and that acquired afterwards by gift, bequest, devise or descent, with rents, issues and profits thereof, is separate property and may be conveyed without consent of other spouse. (Fam. C. 770[Deering's]). Personal injury damages are separate property, in certain cases. (Fam. C. 781[Deering's]). All other real property situated in this state and all other personal property wherever situated acquired during marriage by married person while domiciled in this state and property held in trust pursuant to Fam. C. 761[Deering's] is community property. (Fam. C. 760[Deering's]). Unless trust instrument or instrument of transfer expressly provides otherwise, community property that is transferred in trust remains community property during marriage if trust provides that it is revocable as to that property during marriage. This section applies to transfers made before, on, or after July 1, 1987. (Fam. C. 761[Deering's]). Exceptions to this rule are that earnings of wife which husband has given or relinquished to her (100 C. 276, 34 P. 775) and earnings of spouse and of children living with or in custody of that spouse while living separate from other spouse are separate property of that spouse (Fam. C. 771[Deering's]). After judgment decreeing legal separation, earnings and accumulations of each party are separate property of acquiring party. (Fam. C. 772[Deering's]).

Quasi-Community Property.

All real and personal property wherever situated heretofore or hereafter acquired (1) by either spouse while domiciled elsewhere which would have been community property if acquiring spouse had been domiciled in state, or (2) in exchange for real or personal property wherever situated, which would have been community property if acquiring spouse had been domiciled in state, is quasi-community property. (Fam. C. 125[Deering's]).

Joint Tenancy.

Property taken in names of husband and wife as joint tenants is not ordinarily community property (214 C. 767, 7 P.2d 1003), but may be shown to be such in accordance with intention of parties (6 Cal. App. 3d 248, 85 C. Rptr. 742). Joint tenancy in dissolution proceeding is presumed to be community property (Fam. C. 2581[Deering's]), but separate property contributions are reimbursed under certain circumstances (Fam. C. 2640[Deering's]).

Transmutation.

Beginning Jan. 1, 1985, transfers from separate to community and community to separate must be in writing. (Fam. C. 850[Deering's], 851[Deering's]).

Respective interests of husband and wife in community property during continuance of marriage relations are present, existing and equal interests. (Fam. C. 751[Deering's]).

Presumptions as to Character of Property.

There is prima facie presumption that property owned by husband or wife is community property, but when property was acquired prior to Jan. 1, 1975, by married woman by instrument in writing presumption is that same is her separate property, and if so acquired by such married woman and any other person presumption is that she takes part acquired by her as tenant in common, unless different intention is expressed in instrument; except that when any of such property is acquired by husband and wife by instrument in which they are described as husband and wife, presumption is that such property is community property, unless different intention is expressed in instrument. These presumptions are conclusive in favor of purchaser or encumbrancer in good faith and for valuable consideration. (Fam. C. 760[Deering's], 803[Deering's]). Property owned at death by person whose marriage was dissolved more than four years prior thereto is not presumed to be community property. (Fam. C. 802[Deering's]).

Management, Control and Disposition of Community Personalty.

Either spouse has management and control of community personal property, with like power of disposition, other than testamentary, as spouse has of his or her separate estate; however, a spouse cannot give away such property or sell, convey, or encumber furniture, furnishings, or fittings of home, or clothing or wearing apparel of other spouse or minor children that is community, without written consent of other spouse. Spouse operating or managing business or interest in business which is community property has primary management and control of said business or interest. Managing spouse may act alone in all transactions but must give prior written notice to other spouse of transaction involving substantially all personal property used in business, unless notice is otherwise prohibited by law. (Fam. C. 1100[Deering's]).

Management, Control and Disposition of Community Realty.

Either spouse has management and control of community real property, but both spouses must join in executing any instrument by which such community real property or any interest therein is leased for longer period than one year; or is sold, conveyed, or encumbered; provided, however, that sole lease, contract, mortgage or deed of husband, holding record title to community real property, to lessee, purchaser or encumbrancer, in good faith without knowledge of marriage relation shall be presumed to be valid if executed before Jan. 1, 1975, and that sole lease, contract, mortgage, or deed of either spouse, holding record title to community real property to a lessee, purchaser, or encumbrancer, in good faith without knowledge of marriage relation, shall be presumed to be valid if executed on or after Jan. 1, 1975. No action to avoid such instrument shall be commenced after expiration of one year from filing for record of such instrument in recorder's office in county in which land is situated. (Fam. C. 1102[Deering's]).

On death of either husband or wife one half of community property and quasi-community property belongs to surviving spouse and other half is subject to testamentary disposition of decedent, and in absence of such disposition goes to surviving spouse. (Prob. C. 100[Deering's], 101[Deering's], 6101[Deering's], 6401[a][Deering's] and [b][Deering's]).

On or after Jan. 1, 1985, when either husband or wife dies intestate, or dies testate leaving all or part of property to surviving spouse, such property passes to surviving spouse without probate or administration; however, surviving spouse may elect that interest of deceased spouse, or interests of both spouses, be probated or administered. (Prob. C. 13500[Deering's], 13502[Deering's]). If probate is not elected, procedures exist for confirmation of spouse's ownership of property passing from deceased spouse. (Prob. C. 13650[Deering's]). Unless interests of both spouses are probated or administered, surviving spouse may be personally liable for debts of deceased spouse chargeable against community property; such liability is limited to value of community property which did not pass through probate or administration. (Prob. C. 13550-52[Deering's]). For these purposes, procedures exist for determining community property and apportioning debts. (Prob. C. 13650[Deering's], 11440-42[Deering's]).

See also category 5 Civil Actions and Procedure, topic 5.09 Damages, subhead Loss of

Consortium.

14.10 INFANTS:

Age of majority is 18. (Fam. C. 6502[Deering's]).

Emancipation.

Under Emancipation of Minors Act (Fam. C. 7000-7110[Deering's]), emancipated minor now defined as any person under age of 18 who: (1) Has entered valid marriage, whether or not marriage subsequently terminated by dissolution; or (2) is on active duty with any of Armed Forces; or (3) received declaration of emancipation pursuant to Fam. C. 7122[Deering's]. (Fam. C. 7002[Deering's]). Minor may petition superior Court of county of residence or where temporarily domiciled for declaration of emancipation by setting forth in verified petition facts showing qualification for emancipation. (Fam. C. 7120[Deering's]). Court is required to sustain petition when it finds that minor is or has been married or in Armed Forces. (Fam. C. 7002[Deering's]). Where petition based solely upon minor living apart from parents or legal guardian and minor is at least 14 years of age and otherwise qualified under Fam. C. 7120[Deering's], court must sustain petition unless emancipation contrary to interest of minor. (Fam. C. 7122[a][Deering's]). Rescission of declaration available in some instances. (Fam. C. 7130[Deering's], 7132[Deering's]).

Emancipated minor treated as adult for purposes of consent to medical treatment, right to contract, right to sue or be sued, right to earnings, right to buy, sell and transfer real and personal property interests, right to make gifts, wills, and trusts, and other delineated rights. (Fam. C. 7050[Deering's]).

Disabilities.

Minor cannot give delegation of power or make contract relating to real property or any interest therein, or relating to any personal property not in his immediate possession or control (Fam. C. 6701[Deering's]), but minor may make any other contract in same manner as adult, subject to his power of disaffirmance and subject to statutes relating to marriage and master and servant (Fam. C. 6700[Deering's]).

Disaffirmance of Contracts.

Minor cannot disaffirm otherwise valid contract to render artistic or creative services in entertainment field, or to render services as participant in professional sports, or contracts under which minor agrees to purchase, secure, sell, lease, license, or dispose of literary, dramatic, or musical property, where such contract has been approved by superior court in county where minor resides or is employed or in county in which any party to contract maintains its principal office in state. (Fam. C. 6750[Deering's], 6751[Deering's]).

Minor cannot disaffirm otherwise valid contract to pay reasonable value of things necessary for his or his family's support, entered into by him when not under care of parent or guardian able to provide for him or them, if such things have actually been furnished to him or his family (Fam. C. 6712[Deering's]); nor can minor disaffirm obligation, otherwise valid, entered into by him under express authority or direction of statute (Fam. C. 6711[Deering's]).

Medical care to unemancipated woman for prevention or treatment of pregnancy (Fam. C. 6925[Deering's]) or for treatment or care of minor of age 12 or older for any infectious, contagious or communicable disease is not subject to disaffirmance (Fam. C. 6926[Deering's]). Consent of parent or court order required for sterilization or abortion. (Fam. C. 6925[Deering's]).

Otherwise, general rule governs that minor may disaffirm either before his majority or within reasonable time thereafter or in case of his death, within that period, by his heirs or personal representatives. (Fam. C. 6710[Deering's]).

If, before minor has disaffirmed, goods he has sold have been transferred to innocent purchaser for value, minor cannot recover them from such innocent purchaser. (Fam. C. 6713[Deering's]).

Torts.

Minor civilly liable for wrong done by him but not liable for exemplary damages unless at time of act he was capable of knowing it was wrongful. (Fam. C. 6600[Deering's]).

Parental Responsibility.

Parents and guardians are civilly liable for death, personal injury, property damage or defacement of property of another with paint or similar substance caused by willful misconduct of minor in their custody and control; such liability not to exceed $34,700 for each tort of minor. (C.C. 1714.1; Cal. R. Ct. App. B (2008); see also, Educ. C. 48904[Deering's]; Govt. C. 53069.5).

Uniform Gifts to Minors Act has been repealed. Uniform Transfers to Minors Act adopted. (1983, adopted 1984). Provides detailed method for lifetime gifts and gifts at death to custodian. (Prob. C. 3900-3925[Deering's]). Latest specified age for lifetime gifts is 21; latest specified age for gifts at death is 25; otherwise custodianship terminates at age 18. (Prob. C. 3920[Deering's], 3920.5[Deering's]).

Uniform Securities Ownership by Minors Act has not been adopted.

Actions.

Minor may enforce his rights by civil action or other legal proceeding in same manner as person of full age except that guardian must conduct same. (Fam. C. 6601[Deering's]).

Uniform Parentage Act (1973, adopted 1975), adopted with some omissions, abolishes incidents of illegitimacy and establishes legal equality of children without regard to marital status of parents. (Fam. C. 7600 et seq.[Deering's]).

Support of Minor.

Father and mother have equal responsibility to support minor child in manner suitable to child's circumstances. (Fam. C. 3900[Deering's]).

Custody.

Mother and father (under presumptions of Fam. C. 7611[Deering's]) of unemancipated minor child are equally entitled to its custody, services and earnings, except for earnings from artistic or creative services as defined in Fam. C. 6750[Deering's]. If either father or mother dead, or unable or refuse to take custody, or has abandoned his or her family, other is entitled to its custody, services and earnings. (Fam. C. 3010[Deering's], 7500[Deering's]). No preference permitted to either parent because of parent's sex. (Fam. C. 3040[Deering's]). Joint physical and legal custody is preferred and presumed in best interest of child if parents agree. (Fam. C. 3080[Deering's]).

Authority of parent ceases: (1) On appointment, by court, of guardian of person of child; (2) on marriage of child; or (3) on its attaining majority. (Fam. C. 7505[Deering's]).

Action to have minor declared free from parental custody and control may be brought when minor abandoned by parent(s), when minor subjected to cruel treatment or neglect, and in certain cases of parental depravity, habitual use of alcohol or certain drugs, felony conviction, nonsupport of minor, mental illness or two-year foster home residence of minor. (Fam. C. 7820 et seq.[Deering's]). Mother of child may bring proceeding to declare father unfit to have custody or control of child if child was conceived as result of rape in violation of Pen. C. 261[Deering's]. (Fam. C. 7825[b][Deering's]).

If parent neglects to provide articles necessary for his child under his charge, according to his circumstances, third person may in good faith supply such necessaries, and recover reasonable value thereof from parent. (Fam. C. 3950[Deering's]).

Parents have equal responsibility to support child in manner suitable to child's circumstances. (Fam. C. 3900[Deering's]). Parents of minor child criminally liable for its nonsupport. (P.C. 270).

Adoption.

See topic 14.01 Adoption.

Child Restraint Systems.

See category 23 Transportation, topic 23.01 Motor Vehicles.

14.11 MARRIAGE:

Statutes fix no age under which persons may not lawfully marry. Marriage requires consent of one unmarried man and one unmarried woman. (Fam. C. 300-303[Deering's]).

Consent Required.

Properly verified written consent of parent or guardian, or superior court order granting permission, must be filed with clerk issuing license where applicant is under age 18. (Fam. C. 302[Deering's]). Court may also order premarital counseling where applicant is under age 18. (Fam. C. 304[Deering's]).

License must be secured from county clerk (Fam. C. 350[Deering's]), and shall not be granted when either party lacks capacity to enter into valid marriage, or is under influence of intoxicating liquor or narcotic drugs at time of making application for license. (Fam. C. 352[Deering's]). License fee is $10. (Govt. C. 26840). License expires 90 days after its issuance. (Fam. C. 356[Deering's]). Effective Jan. 1, 2008, both parties must appear together in person before county clerk to obtain application for marriage license. (Fam. C. 359[Deering's]).

When unmarried man and unmarried woman, not minors, have been living together as man and wife they may, without health certificate, be married upon issuance of appropriate authorization. (Fam. C. 500[Deering's], 501[Deering's]). Person solemnizing marriage must authenticate marriage certificate for parties and file it with county clerk within ten days of ceremony. (Fam. C. 506[Deering's]). No other record is necessary; certificate remains confidential and date of marriage will not be disclosed except upon order of court issued upon showing of good cause. (Fam. C. 511[Deering's]).

Solemnization and consent are necessary to constitute marriage. (Fam. C. 300[Deering's]). Marriage may be solemnized by any judge, retired judge, judge who has resigned from office, commissioner or assistant commissioner of court of record or justice court, commissioners or retired commissioners of civil marriages, federal judge or magistrate, or authorized person of any religious denomination of age of 18 years or older, or by legislator or constitutional officer of California or member of congress who represents district within California while that person holds office. (Fam. C. 400[Deering's], 401[Deering's]).

Reports of Marriages.

Person solemnizing marriage must file license and certificate showing date, place, witnesses, and official position with county recorder within ten days after marriage, and on request give either party marriage certificate. (Fam. C. 422-424[Deering's]). Also certificate of registry setting forth certain information in nature of vital statistics, such as age, former marriages, etc., obtained from county clerk and presented to person performing ceremony, must be filed by him with county recorder within ten days after ceremony. (Fam. C. 359[Deering's]).

Record.

See category 10 Documents and Records, topic 10.04 Records, subhead Vital Statistics.

Common law marriage cannot be contracted within California. (Fam. C. 300[Deering's]). Out of state common law marriage recognized if valid in state where contracted. (Fam. C. 308[Deering's]; 136 Cal. App. 3d 487, 186 C. Rptr. 321; 28 C. 2d 276, 169 P.2d 633).

Proxy marriages are generally not authorized. Beginning in 2008, parties to be married are expressly required to appear in person before county clerk to obtain license (Fam. C. 359[Deering's]) and parties must make declaration in physical presence of person solemnizing marriage. (Fam. C. 420[a][Deering's]). Except overseas servicemen may enter into marriage by appearance of attorney in fact (Fam. C. 420[b][Deering's]) and marriage license may be issued to person who will solemnize marriage if party physically unable to appear in person before county clerk due to hospitalization, incarceration, or other reason proven to clerk's satisfaction with specified affidavit (Fam. C. 426[Deering's]).

Marriages by written contract are not authorized. (Fam. C. 300[Deering's]).

Prohibited Marriages.

Between: Parent and child; ancestor and descendant of every degree; brother and sister, including half-blood; uncle and niece or aunt and nephew whether relationship legitimate or illegitimate. All such marriages are incestuous and are void. (Fam. C. 2200[Deering's]). Bigamous marriages are void. (Fam. C. 2201[Deering's]). California Supreme Court held that language of Fam. C. 300[Deering's] limiting designation of marriage to union between man and woman was unconstitutional and must be stricken from statute, and that remaining statutory language made designation of marriage available both to opposite-sex and same-sex couples. (43 Cal. 4th 757, 76 Cal. Rptr. 3d 683). Same-sex marriage contracted outside of state prior to November 5, 2008 and valid in jurisdiction where contracted valid in California. Same-sex marriage contracted outside of state on or after November 5, 2008 and valid in jurisdiction where contracted has same rights, protections, benefits and subject to same responsibilities, obligations, duties under law as granted to and imposed upon spouses except designation of “marriage” (Fam. C. 308[Deering's]).

Annulment.

Marriage is voidable and may be adjudged nullity on several grounds: minor lacked capacity to consent to marriage; at time of marriage either party had living spouse absent for five prior years and believed dead; party was of unsound mind; consent to marry was obtained by fraud or force; party was physically incapable of entering into marriage state, incapacity continues, and appears incurable. (Fam. C. 2210[Deering's]).

Action to obtain decree of nullity of marriage, for causes mentioned in Fam. C. 2210[Deering's] must be commenced within certain period and by certain parties as per Fam. C. 2211[Deering's]. Attorney's fees and costs may be granted to innocent party. (Fam. C. 2255[Deering's]).

Antenuptial Contracts.

See topic 14.09 Husband and Wife.

Children.

Uniform Parentage Act adopted (1973, adopted 1975), providing procedures to establish parent-child relationship without regard to distinctions based on legitimacy. (Fam. C. 7600 et seq.[Deering's]). Court may provide for custody, care, education, maintenance and support of minor children as may seem necessary and proper. (Fam. C. 2253[Deering's], 3020 et seq.[Deering's]).

Foreign Marriages.

Marriages contracted outside of state and valid under laws of jurisdiction where contracted are valid in California. (Fam. C. 308[Deering's]).

14.12 MARRIED WOMEN:

See topics 14.09 Husband and Wife, Marriage; categories 2 Business Organizations, topic Corporations, subhead Transfer of Stock; Civil Actions and Procedure, topic Evidence, subhead Witnesses; Debtor and Creditor, topic Homesteads; Documents and Records, topic Acknowledgments; Estates and Trusts, topics Executors and Administrators, Wills; Property, topic Deeds.

15 HEALTH

15.01 ABORTIONS:

H. & S.C. 123450[Deering's] requiring unemancipated minor to obtain written consent of parent or legal guardian for abortion declared unconstitutional violation of right to privacy under Const. Art I §1. (16 C. 4th 307, 314; 66 C. Rptr. 2nd 210).

15.02 ADMINISTRATION:

State Department of Health Services (H. & S.C. 100100[Deering's]) under control of Director of Health Services. (H. & S.C. 100105[Deering's]).

15.03 DISEASES:

Communicable disease prevention and control including various reporting requirements governed by H. & S.C. 120100-121710[Deering's].

Occupational Diseases.

See category 11 Employment, topics occupational Diseases, 11.03 Workers' Compensation Law.

15.04 DURABLE POWER OF ATTORNEY:

Adult having capacity may execute power of attorney for health care authorizing agent to make health care decisions. (Prob. C. 4671[Deering's]). Statutory advance health care directive form Part 1 provides power of attorney for health care. (Prob. C. 4701[Deering's]). Power of Attorney Law no longer applies to powers of attorney for health care. (Prob. C. 4050[a][Deering's]). However, Health Care Decisions Law, operative July 1, 2000, does not invalidate valid preexisting documents. (Prob. C. 4665[Deering's]). See also categories 21 Property, topic Powers of Attorney; Estates and Trusts, topic Death, subhead Natural Death Act.

15.05 FOOD, DRUGS, DEVICES AND COSMETICS:

Manufacture, production, processing, packaging, exhibition, sale, and dispensing or supplying any food, drug, device, or cosmetic regulated under Sherman Food, Drug and Cosmetic Law. (H. & S.C. 109875 et seq.[Deering's]). California Retail Food Code regulates health and sanitation standards for retail food facilities (H. & S.C. 113700 et seq.[Deering's])

15.06 [RESERVED]

15.07 HEALTH INSURANCE BENEFITS:

Health care benefits are governed by California Insurance Code. Health disability insurance conversion regulated under Ins. C. 12670 et seq.[Deering's] Access for infants and mothers program regulated by Ins. C. 12695 et seq.[Deering's] California major medical insurance program regulated by Ins. C. 12700 et seq.[Deering's] Life and disability insurance regulated by Ins. C. 10110 et seq.[Deering's]

15.08 LICENSURE AND CERTIFICATION:

Health Care Facilities.

Regulation and licensing of health facilities governed generally by H. & S.C. 1200 et seq.[Deering's]

Managed Health Care.

Governed generally by H. & S.C. 1341 et. seq.[Deering's]

Practitioners.

Licensing of person to practice particular healing arts governed by Business and Professions Code. Persons required to be licensed or registered too numerous to list, but include dentists (Bus. & Prof. C. 1626[Deering's]), physicians and surgeons (Bus. & Prof. C. 2051[Deering's]), physical therapists (Bus. & Prof. C. 2630 et seq.[Deering's]), registered nurses (Bus. & Prof. C. 2732[Deering's]), psychologists (Bus. & Prof. C. 2903 et seq.[Deering's]), optometrists (Bus. & Prof. C. 3040[Deering's]), and pharmacists (Bus. & Prof. C. 4000[Deering's])..

15.09 LIVING WILLS:

See category 13 Estates and Trusts, topic 13.16 Wills, subhead Living Wills. Uniform Health Care Decisions Act (1993, adopted 1999), for health care directives contained in H. & S.C. 4600-4805[Deering's].

15.10 ORGAN DONATIONS:

Uniform Anatomical Gift Act (1987, adopted 1988), contained in H. & S.C. 7150 et seq.[Deering's] California added H. & S.C. 7152.7[Deering's] regarding organ and tissue donor registry, and H. & S.C. 7155.7[Deering's] regarding removal of organs that constitute anatomical gift from decedent who dies under circumstances requiring inquest.

15.10A PATIENTS' BILL OF RIGHTS:

Uniform Health Care Information Act not adopted.

15.11 [RESERVED]

15.12 PUBLIC HEALTH:

California Medical Assistance Program (Medi-Cal) authorized generally by Welf. & Inst.

C. 14100[Deering's], 14105[Deering's], & 14106[Deering's]. Extensive Program regulations contained in 22 C.C.R., Division 3. Provisions relating to Medicare contained in H. & S.C. 1358.1 et seq.[Deering's]

Smoking Regulations.

Smoking is prohibited in most places of employment including restaurants and bars, with some exceptions. (Lab. C. 6404.5[Deering's]). California Indoor Clean Air Act regulates smoking in publicly owned buildings, health facilities, and in retail food production and marketing establishments. (H. & S.C. 118875 et seq.[Deering's]). Smoking in private and public transportation governed by H. & S.C. 118920 et seq.[Deering's]

16 INSURANCE

16.01 INSURANCE COMPANIES:

Pursuant to provisions of Insurance Code, insurance divided into following classes: Life, fire, marine, title, surety, disability, plate glass, liability, workmen's compensation, common carrier liability, boiler and machinery, burglary, credit, sprinkler, team and vehicle, automobile, mortgage, aircraft, mortgage guaranty, insolvency, legal insurance, miscellaneous. (Ins. C. 100[Deering's]). Code extensively defines and regulates business of each class.

Regulation.

Insurers subject to provisions of general corporation law (see category 3 Business Regulation and Commerce, topic Corporations), except as otherwise provided in Insurance Code. (Ins. C. 1140[Deering's]).

Supervision.

Laws with respect to insurance companies and business of insurance are enforced by Insurance Commissioner, who has general power to require from every insurer full compliance with all provisions of Code. (Ins. C. 12921[Deering's], 12926[Deering's]). Commissioner may procure injunction or issue stop orders against unfair or deceptive practices (Ins. C. 790-790.10[Deering's]) and may issue orders reasonably necessary to eliminate practices liable to render insurer insolvent (Ins. C. 1065.1[Deering's]). Commissioner may also take action against unauthorized insurers sending false advertising into California. (Ins. C. 1620.1-1620.7[Deering's]). Automobile liability insurer may not discriminate against applicant on basis of race, color, religion, national origin, ancestry, location within geographic area. (Ins. C. 11628[a][Deering's]). Occupation may be considered condition or risk in determining rate or scope of coverage. (Ins. C. 11628[c][1][Deering's]).

Rates.

Commencing Nov. 8, 1989, and subject to exception for life insurance, title insurance, mortgage insurance and certain classes described in Ins. C. 1851[Deering's], insurance rates must be approved by Insurance Commissioner prior to use (Ins. C. 1861.01[c][Deering's]), and every insurer which desires to change its rates must file a complete rate application (Ins. C. 1861.05[b][Deering's]). Rates may not be excessive, inadequate or unfairly discriminatory. (Ins. C. 1861.05[a][Deering's]).

Certificate of Authority.

Insurer must obtain certificate of authority from Commissioner (Ins. C. 700[Deering's]), which certificate is for indefinite term, but may be revoked if insurer is in arrears for fees, licenses, taxes, assessments, fines, or penalties to state or to any county or city in state, or is otherwise in default for failure to comply with any laws of state regarding governmental control (Ins. C.

701[Deering's]). Unlawful transaction of business is punishable by fine, imprisonment, or both. (Ins. C. 700[Deering's]). Commissioner may suspend certificate of authority of insurer who conducts business fraudulently, does not carry out its contracts in good faith, or habitually compels claimants under policy, or liability judgment creditors of insured, to accept less than amount due or to resort to litigation to secure payment of amount due (Ins. C. 704[Deering's]) or if holder of more than 10% of insurer's shares or director or officer of insurer has been convicted of or pleaded guilty or nolo contendere to certain felonies (Ins. C. 704.5[Deering's]). Commissioner may, for cause, amend, alter, or revoke permit. (Ins. C. 843[Deering's]). Fee for initial application for certificate is $3,599 (Ins. C. 705.1[Deering's]; Cal. Dep't of Ins. Bull. 2003-4); annual fee thereafter is $360 (Ins. C. 705[Deering's]; Cal. Dep't of Ins. Bull. 2003-4). Certificate of authority will not be issued to insurer owned, operated or controlled by foreign governmental subdivision or agency unless insurer fulfills stated criteria (Ins. C. 699.5[Deering's]) nor, with specified exceptions, to unincorporated insurer (Ins. C. 699[Deering's]).

See also subhead Foreign Insurance Company, infra.

Reports.

Every insurer must file, on or before Mar. 1 of each year, statement exhibiting its condition and affairs for year ending preceding Dec. 31 (Ins. C. 900[Deering's]) and, on or before June 30, audited financial report covering same period (Ins. C. 900.2[a][Deering's]). Filing fee is $118. (Ins. C. 900.5[Deering's]). Willful failure to file statement subjects insurer to penalty of $336 and additional penalty of $404 for each month thereafter that such insurer continues to transact business until statement is filed. (Ins. C. 924[Deering's]).

Policies.

Policy must specify parties between whom contract is made; property or life insured; interest of insured in property insured, if he is not absolute owner thereof; risks insured against, period during which insurance continues and either statement of premium or if exact premium then undeterminable, rates and basis on which final premium to be determined. (Ins. C. 381[Deering's]). Standard forms of policies for various kinds of insurance are prescribed by Insurance Code: fire, 2070-2083; county mutual fire, 6010-6021; long-term care, 10231-10235. Insurance Code also prescribes policy provisions for other kinds of insurance: life, 10127.10-10127.13, 10150-10176.3; group life, 10201-10225; funeral, 10244, 10248; group disability, 10270.6; family expense disability, 10270.8; disability, 10369.12; fraternal benefit societies, 11060-11068; liability, 11580-11580.2; workers' compensation, 11651-11663; home protection, 12740-12743.

See also category 23 Transportation, topic 23.01 Motor Vehicles, subhead Insurance.

Discrimination.

Insurance prohibited from discrimination based on sex, race, color, religion, national origin or ancestry. (Ins. C. 679.71[Deering's]).

Liens.

California Major Risk Medical Insurance Program authorized to place lien on compensation or benefits recovered or recoverable by subscriber. (Ins. C. 12716[Deering's]).

Cancellation.

Ins. C. 660-670[Deering's], 673[Deering's], 674-679.5[Deering's] set forth specific requirements and procedure for cancellation or failure to renew automobile insurance policy, financed insurance policy and property insurance policy, respectively. Group health care service providers must notify subscribers in writing of policy cancellation. (H. & S.C. 1367.23[Deering's]; Ins. C. 10199.44[Deering's], 10199.46[Deering's]). Cancellation of insurance other than workmen's compensation or automobile based on marital status, sex, race, color, religion, national origin or ancestry is forbidden. (Ins. C. 679.70-.73[Deering's]).

Payment of Proceeds.

Life insurance proceeds unpaid within 30 days after death of insured bears interest at rate not less than current rate on death proceeds left on deposit with insurer computed from date of death. (Ins. C. 10172.5[Deering's]).

Agents and Brokers.

With certain exceptions, no person may act as insurance agent, broker, solicitor or analyst until license secured from Commissioner. (Ins. C. 1631[Deering's]). Various license fees are provided. (Ins. C. 1750-1751.6[Deering's], 1755[Deering's], 1811[Deering's], 1842[Deering's]).

Referrals.

It is unlawful for any insurance broker or agent to receive any benefit or consideration for referring insured to auto repair facility. (Ins. C. 753[Deering's]).

Stock.

Shares of stock of insurer must have specified par value. (Ins. C. 690[Deering's]).

Sale of Securities.

No insurer may sell any security of its own issue without permit from Commissioner, which, on proper application, is granted if Commissioner finds that (a) proposed plan of business of applicant is not unfair, unjust or inequitable, (b) applicant intends to transact its business fairly and honestly and (c) securities applicant proposes to issue and methods to be used by it will not work fraud on purchaser thereof or upon its stockholders or policy holders. (Ins. C. 827[Deering's], 839[Deering's]).

Any person who is officer or director of domestic insurer or owns more than 10% of stock must file statement of stock holdings with Commissioner, along with additional statements, whenever there is change in his stock holdings. (Ins. C. 1104.2[Deering's]). Short-swing profits by insiders are also governed by Insurance Code. (Ins. C. 1104.2-1105[Deering's]).

As to sale of securities generally, see category 3 Business Regulation and Commerce, topic 3.24 Securities.

Investments are governed by provisions of Insurance Code. (Ins. C. 1100-1254[Deering's]).

Foreign insurance company, before obtaining certificate of authority from Commissioner, must file certified copy of its last annual statement or verified financial statement (Ins. C. 706[Deering's]); certified copy of its articles of incorporation or, if no articles of incorporation, certified copy of law, charter or deed of settlement under which insurer is organized; certificate of officer having supervision of insurance in jurisdiction of its organization, stating that insurer is properly organized and has amount of capital stock or assets required by California Insurance Code (Ins. C. 708[Deering's]); certificate verified by chief officer, secretary, agent, or manager, setting forth (a) nature and character of business, (b) location of its principal office, (c) if not incorporated, names of ten persons who own largest interest or, if incorporated, names of all officers and persons by whom business is managed, (d) amount of actual capital to be employed therein (Ins. C. 709[Deering's]); and copy of written articles of agreement or association (Ins. C. 710[Deering's]). Admitted foreign insurer may become domestic insurer by designating its principal place of business in California. (Ins. C. 709.5[Deering's]).

Alien insurer must deposit securities in amount equal to minimum amount of paid-in capital required by this Code to transact class of business which insurer is transacting, which deposit must be of securities authorized for investment of assets of domestic incorporated insurers. (Ins. C. 1581-1583[Deering's]).

Retaliatory Laws.

Foreign insurers may be subject to retaliation because of laws of home jurisdiction. (Ins. C. 685-685.4[Deering's]). If so, they must file annual retaliatory tax information return by Apr. 1st of each year. (Rev. & Tax C. 12281[Deering's]).

Process Agent.

Foreign corporations must: (a) designate agent for service of process (Ins. C. 1600[Deering's]); and (b) file agreement that, if at any time it leaves this state, ceases to transact business in this state, or is without agent for service of process in this state, service may be made on Insurance Commissioner and shall have same effect as if made on insurer (Ins. C. 1604[Deering's]).

Service of process may be made on nonadmitted foreign insurers, who have not appointed agent for service, by delivering copies thereof to Commissioner. (Ins. C. 1610-1611[Deering's]).

Premium Tax.

Insurance companies are subject to tax based on gross premiums received from business done in California, less returned premiums, at rate of 2.35% per annum, except rate applied to basis in respect to years 1982 to 1985 is 2.33% per annum. Special rates apply to premiums upon policies issued in connection with certain pension or profit-sharing plans. (Const., Art. XIII, §28; Rev. & Tax C. 12202[Deering's], 12221[Deering's]). This tax is in lieu of all taxes except taxes on real estate, retaliatory exactions, ocean marine insurance or motor vehicle or vehicle registration license fees imposed by state. (Rev. & Tax C. 12204[Deering's]). Special provisions apply to surplus line brokers and in cases where title or marine insurance business is done. Person insuring own property with non-admitted insurer must pay tax of 3% per annum on premiums. (Rev. & Tax C. 13201 et seq.[Deering's]).

Rev. & Tax C. 12202.1[Deering's], enacted in 1988, requires Board of Equalization to adjust gross premiums tax rate paid by any insurers for any premiums collected between Nov. 8, 1988 and Jan. 1, 1991 in order to compensate for changes in gross premiums tax revenues that might otherwise result from newly enacted Ins. C. 1861.01 et seq.[Deering's], providing for reduction and control of insurance rates.

Unemployment Insurance Code adopted.

Uniform Insurers Liquidation Act (1939, adopted 1988), found in Ins. C. 1064.1-1064.12[Deering's].

Direct Action against Insurer.

See category 23 Transportation, topic 23.01 Motor Vehicles, subhead Direct Actions.

16.02 SURETY AND GUARANTY COMPANIES:

Such companies organized under general corporation laws but subject to regulation by Insurance Commissioner. Surety insurers (Ins. C. 105[Deering's]), both domestic and foreign (Ins. C. 707[Deering's], 708[Deering's], 709[Deering's]), must procure certificate of authority from such Commissioner (Ins. C. 105[Deering's], 700[Deering's]). Willful failure to obtain such certificate is punishable by imprisonment not exceeding one year and/or fine not exceeding $100,000. (Ins. C. 700[Deering's]). Minimum capital requirement for such companies set forth in Ins. C. 700.01[Deering's]. Such companies must maintain specified financial condition to do business in state. (Ins. C. 12091[Deering's], 12092[Deering's]). Surety companies possessing certificate of authority from Commissioner authorizing them to write surety insurance may act as sole surety in any case where undertaking or bond required by law (C.C.P. 995.310[Deering's]), and special provisions are made for their justification (C.C.P. 995.640[Deering's], 995.660[Deering's]).

17 INTELLECTUAL PROPERTY

17.01 TRADEMARKS AND TRADENAMES:

Model State Trademark Law 2007 adopted, effective Jan. 1, 2008. Trademark is any word, name, symbol, or device, or any combination thereof, used by a person to identify and distinguish goods of that person from goods made or sold by others, and to indicate source of goods. (Bus. & Prof. C. 14202[a][Deering's]).

Service mark means any word, name, symbol, or device, or any combination thereof, used by a person to identify and distinguish services of that person from services of others, and to indicate source of services. Titles, character names, and other distinctive features of radio or television programs may be registered as service marks. (Bus. & Prof. C. 14202[b][Deering's]).

Registration.

With certain categorical exclusions (Bus. & Prof. C. 14205[Deering's]), mark may be registered by one who adopts and uses mark by filing verified application on form furnished by Secretary of State accompanied by $70 filing fee and specimen of facsimile of mark in triplicate (Bus. & Prof. C. 14207[Deering's], Govt. C. 12193). Translation must accompany mark with any part not in English. (Bus. & Prof. C. 14207[g][Deering's]).

Protection Afforded.

Certificates of registration remain in force for five years. Any registration in force on Jan. 1, 2008, continues in full force for its unexpired term. Certificates are subject to renewal for successive five-year terms by filing renewal application within six months prior to expiration of term with Secretary of State accompanied by $30 fee. (Bus. & Prof. C. 14217[Deering's], Govt. C. 12193).

Infringement.

Owner of registered mark may bring civil action against any person who (1) uses without registrant’s consent any reproduction of mark in connection with sale, distribution, or advertising of goods or services when use is likely to cause confusion, mistake, or deception as to source of origin of such goods or services; (2) applies reproduction or counterfeit of mark to labels, signs, prints, packages, or advertisements used in connection with sale or distribution in state of any goods or services; or (3) knowingly assists person to manufacture, use, distribute, display, or sell any goods or services bearing any reproduction, counterfeit, or copy of registered mark without consent of registrant. (Bus. & Prof. C. 14245[Deering's]). Court may grant injunctive relief, order seizure of goods with counterfeited marks, and order compensation of up to three times profits plus three times damages sustained by registered trademark owner. (Bus. & Prof. C. 14250[Deering's]). Owner of famous and distinctive mark is entitled to injunction and other relief against another’s commercial use of mark, if such use begins after the mark has become famous and is likely to cause dilution of famous mark. (Bus. & Prof. C. 14247[Deering's]). Registrant may also prosecute infringement under penal laws, including P. C. 350. (Bus. & Prof. C. 14252[Deering's]).

Comparative advertising not prohibited. (Bus. & Prof. C. 14703[Deering's]).

Enforcement rights of marks acquired in good faith at any time at common law are not adversely affected by statutes. . (Bus. & Prof. C. 14259[Deering's]).

Assignment.

Right to use any mark may be assigned with goodwill of business by written instrument, duly executed and acknowledged, and recorded with Secretary of State for fee of $30. (Bus. & Prof. C. 14220[Deering's], Govt. C. 12193).

Resale Price Agreements.

California Fair Trade Contracts Law repealed. (1975, cc. 402, 429). Resale price agreement is unlawful restraint of trade. (137 Cal. App. 3d 709; 187 Cal. Rptr. 797). See category 3 Business Regulation and Commerce, topic 3.20 Monopolies, 3.22 Restraint of Trade and Competition. Retail price maintenance provisions of Bus. & Prof. C. 24756 et seq.[Deering's] (repealed 1994) (relating to alcoholic beverages) were found invalid as violation of Sherman Antitrust Act. (21 C.3d 431, 146 C.Rptr. 585, 579 P.2d 476).

Trade Names (Fictitious Business Names).

"Fictitious business name" means person doing business in state under fictitious name; or partnership doing business under fictitious name or designation not showing names of all partners, other than limited partnership which has filed certificate of limited partnership, or registered limited liability partnership or foreign limited liability partnership that has filed registration under Corporations Code; or corporation doing business under name other than corporate name stated in articles of incorporation; or in case of individual, name that does not include surname or which suggests existence of additional owners; or in case of limited partnership that has filed certificate of limited partnership with Secretary of State and in case of foreign limited partnership that has filed for registration with Secretary of State, any name other than name of limited partnership as on file with Secretary of State; or in case of limited liability company, any name other than name stated in articles of incorporation and in case of foreign limited liability company that has filed for registration with Secretary of State, any name other than name of limited liability company on file with state, or name that suggests existence of additional owners. (Bus. & Prof. C. 17900[Deering's]). Every person who regularly transacts business in California under fictitious business name must file Fictitious Business Name Statement with county clerk where principal place of business located or, with Sacramento County Clerk if there is no place of business in state (Bus. & Prof. C. 17910[Deering's], 17913[Deering's], 17915[Deering's]). Statement must be published and affidavit of publications filed. (Bus. & Prof. C. 17917[Deering's]). Except as provided in Bus. & Prof. C. 17920(b)[Deering's] and (c) [Deering's], statement expires five years from date it was filed with county clerk. (Bus. & Prof. C. 17920[Deering's]). No person or other entity required to file statement or assignee may maintain action on account of contract made or transaction had under fictitious business name, until statement filed and published. (Bus. & Prof. C. 17918[Deering's]). Nonprofit corporations and certain real estate investment trusts do not have to file statement. (Bus. & Prof. C. 17911[Deering's], 17912[Deering's]).

Filing of Fictitious Business Name Statement establishes rebuttable presumption or exclusive right to use as trade name, fictitious business name. (Bus. & Prof. C. 14411[Deering's]). Filing articles of incorporation in case of domestic corporation or obtaining certificate of qualification in case of foreign corporation establishes rebuttable presumption of exclusive right to use name of corporation as trade name. (Bus. & Prof. C. 14415[Deering's]). Filing Articles of Incorporation pursuant to Corp. C. 200 does not authorize use in this state of corporate name in violation of rights of another under Federal Trademark Act, Trademark Act, Fictitious Business Names Act, or common law. (Bus. & Prof. C. 14417[Deering's]).

For protection of names other than trade names, i.e., names of noncommercial organizations and associations, see Bus. & Prof. C. 14492-14495[Deering's].

17.02 TRADE SECRETS:

Uniform Trade Secrets Act.

Adopted (1979, adopted 1984), with minor revisions, enacted as C.C. 3426 et seq., applies to misappropriations occurring on or after Jan. 1, 1985. California statute does not include Official 1985 Amendments.

Significant Deviations from Uniform Trade Secrets Act (as amended by 1985 Amendments).

(All references to section numbers of California Statute).

3426.1: Subdivision (d)(1) substitutes “from not being generally known to the public or to” for “, and not being readily ascertainable by proper means by,”.

3426.2: Subdivision (a) omits “reasonable” before “period of time.” Subdivision (b) reworded: “If the court determines that it would be unreasonable to prohibit future use, an injunction may condition future use upon payment of a reasonable royalty for no longer than the period of time the use could have been prohibited.”

3426.3: Section on damages reworded:

“(a) A complainant may recover damages for the actual loss caused by misappropriation. A complainant also may recover for the unjust enrichment caused by misappropriation that is not taken into account in computing damages for actual loss.

(b) If neither damages nor unjust enrichment caused by misappropriation are provable, the court may order payment of a reasonable royalty for no longer than the period of time the use could have been prohibited.

(c) If willful and malicious misappropriation exists, the court may award exemplary damages in an amount not exceeding twice any award made under subdivision (a) or (b).”

3426.7: Subdivision (a) reworded “Except as otherwise expressly provided, this title does not supersede any statute relating to misappropriation of a trade secret, or any statute otherwise regulating trade secrets.”

New Subdivision (c) added:

“(c) This title does not affect the disclosure of a record by a state or local agency under the California Public Records Act (Chapter 3.5 (commencing with Section 6250) of Division 7 of Title 1 of the Government Code). Any determination as to whether the disclosure of a record under the California Public Records Act constitutes a misappropriation of a trade secret and the rights and remedies with respect thereto shall be made pursuant to the law in effect before the operative date of this title.”

3426.10: Section on effective date states: “This title does not apply to misappropriation occurring prior to January 1, 1985. If a continuing misappropriation otherwise covered by this title began before January 1, 1985, this title does not apply to the part of the misappropriation occurring before that date. This title does apply to the part of the misappropriation occurring on or after that date unless the appropriation was not a misappropriation under the law in effect before the operative date of this title.”

Tort Liability.—Voluntary, intentional and unauthorized disclosure of trade secrets to competitor in any legislative, judicial or other official proceeding is not privileged publication for purposes of tort liability as defined in C.C. 43 et seq. (C.C. 3426.11).

Evidentiary Rules to Protect Trade Secrets.

Owner of trade secret or agent or employee may claim privilege to refuse to disclose trade secret, and to prevent other from disclosing it, if allowance of privilege will not conceal fraud or work injustice. (Evid. C. 1060[Deering's]). Court may issue protective order protecting trade secret information when owner of trade secret asserts privilege during criminal proceeding and certain criteria met. (Evid. C. 1061[Deering's]). Court may close portions of criminal proceeding to public, pursuant to specified procedures, if necessary to prevent disclosure of trade secrets. (Evid. C. 1062[Deering's]).

18 LEGAL PROFESSION

18.01 ATTORNEYS AND COUNSELORS:

The bar is integrated as "The State Bar of California". (Bus. & Prof. C. 6001[Deering's]).

Members of State Bar are all persons admitted and licensed to practice law, except justices and judges of courts of record during their continuance in office. (Bus. & Prof. C. 6002[Deering's]).

Practice of law is regulated by Bus. & Prof. C. 6000 et seq.[Deering's]

Jurisdiction over Admissions.

Supreme Court is vested with power to admit to bar as attorney at law any applicant certified by examining committee as having fulfilled requirements. (Bus. & Prof. C. 6064[Deering's]).

Eligibility.

Any person, of age of at least 18 years, of good moral character, who possesses necessary qualifications of study and ability, and who has passed uniform examination, is entitled to admission to State Bar and to practice law in California. (Bus. & Prof. C. 6060-62[Deering's]).

No person who advocates overthrow of government of U. S. or of this state by force, violence, or other unconstitutional means, may be admitted to bar. (Bus. & Prof. C. 6064.1[Deering's]).

Law Student Registration and Examination.

Applicant must register with examining committee within 90 days after beginning study of law; committee may for good cause permit later registration. (Bus. & Prof. C. 6060[d][Deering's]).

Student in law school which is not accredited by Committee of Bar Examiners must take preliminary bar examination at end of first year of law study. (Bus. & Prof. C. 6060[h][1][2][Deering's]).

Educational Requirements.

Before commencing study of law applicants for examination must have completed two years of college work, or have attained in apparent intellectual ability equivalent of at least two years of college work. (Bus. & Prof. C. 6060[c][1]-[2][Deering's]). Legal education must have resulted in Juris Doctor (J.D.) degree or Bachelor of Laws (LL.B.) degree from law school accredited by examining committee or approved by American Bar Association (Bus. & Prof. C. 6060[e][1][Deering's]), or proof that applicant has otherwise diligently and in good faith studied law for at least four years as follows: (1) in law school approved to confer professional degrees which requires 270 classroom hours a year (Bus. & Prof. C. 6060[e][2][A][Deering's]); (2) under supervision of State Bar member who has practiced at least last five years (Bus. & Prof. C. 6060[e][2][B][Deering's]); (3) under supervision of state judge (Bus. & Prof. C. 6060[e][2][C][Deering's]); (4) from any authorized correspondence law school (Bus. & Prof. C. 6060[e][2][D][Deering's]); or (5) any combination thereof (Bus. & Prof. C. 6060[e][2][E][Deering's]).

Persons who received legal education in foreign country where common law of England not in effect must demonstrate to examining committee qualification to take bar exam. (Bus. & Prof. C. 6060[e][2][A][Deering's]).

Final bar examinations are held in Feb. and July of each year by examining committee at Los Angeles, Sacramento, San Diego and San Francisco. Application for Feb. bar examination must be filed by preceding Nov. 1, and application for July bar examination must usually be filed by preceding Apr. 1. Examinations use Multi-State Bar Examination. Committee of Bar Examiners of State Bar of California, 180 Howard Street, San Francisco, California 94102 and 1149 South Hill Street, Los Angeles, California 90015 is responsible for preparation, administration and evaluation of state bar examination.

Admission of Out of State Attorneys.

In order to be certified to Supreme Court for admission and license to practice law person who has been admitted to practice law outside of state must: (1) be at least 18 years old, (2) be of good moral character, (3) have passed general bar exam given by examining committee. If person has been active member in good standing of bar of admitting sister state or U.S. jurisdiction, possession or territory for at least four years immediately preceding first day of examination applied for, he or she may elect to take Attorney's exam rather than general bar exam. Attorneys admitted less than four years and attorneys admitted four years or more in another jurisdiction but who have not been active members in good standing of their admitting jurisdiction for at least four years immediately preceding first day of examination applied for must take general bar exam, (4) have passed professional responsibility or legal ethics exam. (Bus. & Prof. C. 6062[a][Deering's]).

Admission of Foreign Attorneys.

In order to be certified to Supreme Court for admission and license to practice law person who has been admitted to practice law outside U.S. or U.S. jurisdiction, possession or territory must: (1) be at least 18 years old, (2) be of good moral character, (3) have passed general bar exam given by examining committee, and (4) have passed professional responsibility or legal ethics exam. (Bus. & Prof. C. 6062[b][Deering's]).

Admission Pro Hac Vice.

Out of state attorney, not admitted and not engaged in regular business or professional activities in California, may be permitted upon written application to appear as counsel pro hac vice, provided that active member of California Bar is attorney of record. (Cal. R. Ct. 983).

Professional Responsibility Examination.

Additional examination covering professional responsibility of attorney must also be successfully taken; examination held three times per year (Mar., Aug. and Nov.). Applications must usually be received by first day of month preceding month of examination.

Licenses.

Annual active membership fee in State Bar is sum not exceeding $400 and is payable on or before Feb. 1 of each year. Inactive membership fee is sum not exceeding $115. (Cal. St. Bar R. App. A, Shedule of Charges and Deadlines for 2008). Inactive members who attain age of 70 shall not be required to pay annual fee. (Bus. & Prof. C. 6141[b][Deering's]). Failure to pay results in suspension from membership. (Bus. & Prof. C. 6143[Deering's]).

Powers.

Attorney may bind client at any stage of action or proceeding by his agreement filed with clerk, or entered upon minutes of court, and not otherwise. Also has power to receive money claimed by client in action or proceeding, during pendency thereof, or after judgment, unless a revocation of his authority is filed, and upon payment thereof, and not otherwise, to discharge claim or acknowledge satisfaction of judgment. (C.C.P. 283[Deering's]).

Change of Attorneys.

Cannot be changed in action or proceeding, except upon consent of both client and attorney, filed with clerk, or entered upon minutes, or by order of court upon application of either client or attorney, after notice from one to other. (C.C.P. 284[Deering's]).

Liabilities.

May be held strictly to a fiduciary and trust character. (206 C. 689, 275 P. 941). Attorney-client relationship is one of special confidence and trust demanding that member of profession be held to strictest account in matters affecting relationship of attorney and client. Attorney is guilty of misdemeanor punishable by imprisonment, fine or both if party to deceit or collusion, willfully delays suit with view to own gain, or misappropriates money or other property of client. (Bus. & Prof. C. 6128[Deering's]).

Compensation.

Stipulations in security instruments as to payment of attorneys' fee, after default are legal, but compensation shall be such as court finds reasonable, not exceeding amount named in instrument. (Com'l. C. 9504). Compensation is left to agreement of parties, except where fixed by statute. (C.C.P. 1021[Deering's]). For proceedings commenced after July 1, 1991, fees in probate cases are fixed on same basis as public administration or personal representative, with exception of additional compensation defined by statute. (Prob. C. 7666[Deering's], 10800[Deering's], 7623[Deering's]). Attorney's fees generally left to private agreement in bringing petition for court order determining ownership of property by surviving spouse. (Prob. C. 13660[Deering's]). Contingency fee contracts generally must be in writing and governed by Bus. & Prof. C. 6146-6147.5[Deering's]. Other fees must be in writing where it is reasonably foreseeable that total expense to client will exceed $1,000. (Bus. & Prof. C. 6148[Deering's]). System for arbitration or mediation of disputes involving attorneys' fees. (Bus. & Prof. C. 6200 et seq.[Deering's]).

Disbarment or Suspension.

Supreme Court may disbar or suspend attorneys. (Bus. & Prof. C. 6100[Deering's]). Member may be disbarred or suspended for conviction of crime involving moral turpitude; record of conviction is conclusive evidence. (Bus. & Prof. C. 6101[Deering's], 6102[Deering's]). It shall constitute cause for disbarment or suspension to engage in insurance fraud. (Ins. C. 1871.1[Deering's], 1871.4[Deering's]; Bus. & Prof. C. 6106.5[Deering's]; P. C. 550). It shall constitute cause for discipline to violate any provision of Miller-Ayala Athlete Agents Act or to violate any provision of c. 1 of Part 6 of Division 2 of Labor Code or to violate any provision of law of any other state regulating athlete agents. (Bus. & Prof. C. 6106.7[Deering's]). Board of Governors of State Bar, after hearing, has power to make disbarment or suspension recommendations to court or to take lesser disciplinary actions. (Bus. & Prof. C. 6078[Deering's]). Although Board's findings are not binding on court, petitioner has burden of showing wherein decision of Board is erroneous or unlawful. (50 C.2d 202, 323 P.2d 1003; 62 C.2d 17, 41 C. Rptr. 1, 396 P.2d 33). Attorney may be subject to involuntary inactive enrollment in discretion of Board for: (i) Failure to comply with Bus. & Prof. C. 6002.1[Deering's] (maintenance of informational records with State Bar), (ii) conducting himself in manner which poses as substantial threat of harm to his clients or public, or (iii) violation of terms of any probation imposed by State Bar. (Bus. & Prof. C. 6007[Deering's]).

Attorney Diversion and Assistance Act.

Enacted to identify and rehabilitate attorneys impaired due to alcohol or drug abuse or mental illness. (Bus. & Prof. C. 6230-38[Deering's]). Attorney entering diversion and assistance program under Bus. & Prof. C. 6232[Deering's] may be enrolled as inactive member of State Bar and not entitled to practice law, or may be required to agree to practice restrictions. (Bus. & Prof. C. 6233[Deering's]).

Attorney-Client Privilege.

Governed by Evid. Code 950 et seq.[Deering's]

Unauthorized Practice.

No one except active members of State Bar may practice law in California. (Bus. & Prof. C. 6125[Deering's]).

Attorney Ethics.

ABA Model Rules of Professional Conduct not adopted. Governed by Rules of Professional Conduct of the State Bar of California (May, 1989) and Bus. & Prof. C. 6000 et seq.[Deering's] Attorney advertising regulated by Bus. & Prof. C. 6157 et seq.[Deering's]

Mandatory Continuing Legal Education.

Within designated 36-month periods, all active members of state bar must complete minimum of 25 hours of legal education activities approved by state bar or offered by state bar approved provider. Four hours of education must be in legal ethics. (Bus. & Prof. C. 6070[Deering's]).

Professional Association or Corporation.

See category 2 Business Organizations, topic 2.03 Corporations, subhead Professional Corporations.

19 MINERAL, WATER AND FISHING RIGHTS

19.01 MINES AND MINERALS:

Extensive 1988 recodification of mining statutes. Pub. Res. C. 2301-26 replaced by 3900-24; 2351-61 by 3940-50; 2551-59 by 3960-68; and 2601-06 by 3980-85. No substantive changes.

General supervision of mines and mining is vested in state geologist who is chief of Division of Mines and Geology, Department of Conservation.

State laws provide for location and development of mining claims. (Pub. Res. C. 3900-24).

Surface Mining and Reclamation Act of 1975 (Pub. Res. C. 2710 et seq.) regulates and requires permits for specified surface mining operations where operations entailing removal of 1,000 cubic yards of overburden or more are undertaken on location of more than one acre.

Corporations for this purpose are organized under general laws. Shareholder may examine any of corporation's mines with his expert on application to president of corporation. $1,000 liquidated damages plus costs by statute for refusal. (Pub. Res. C. 3984).

Mining partnership exists when two or more persons who own or acquire mining claim actually engage in working claim. (Pub. Res. C. 3940). Express agreement to become partners or share profits and losses is not necessary. (Pub. Res. C. 3941).

Member of mining partnership shares in profits and losses thereof in proportion which his interest or share in mine bears to whole partnership capital or number of shares. (Pub. Res. C. 3942).

Each partner has lien on partnership property for debts due creditors thereof, and for money advanced by him for its use. Lien exists, notwithstanding agreement among partners that it shall not. (Pub. Res. C. 3943).

Mining ground, owned and worked by partners in mining, whether purchased with partnership funds or not, is partnership property. (Pub. Res. C. 3944).

One of partners in mining partnership may convey his interest in mine and business without dissolving partnership. Purchaser becomes member of partnership. (Pub. Res. C. 3945).

Purchaser of interest in mining ground of mining partnership takes subject to liens existing in favor of partners for debts due all creditors thereof, or advances made for benefit of partnership, unless he purchased in good faith, for valuable consideration, without notice of such lien. (Pub. Res. C. 3946).

Purchaser of interest of partner in mine when partnership is engaged in working it takes with notice of all liens resulting from relation of partners to each other and to creditors. (Pub. Res. C. 3947).

No member of mining partnership or other agent or manager thereof can, by contract in writing, bind partnership, except by express authority derived from members. (Pub. Res. C. 3948).

Decision of members owning majority of shares or interests in mining partnership binds it in conduct of its business. (Pub. Res. C. 3949).

Upon failure of any co-owner of mine or mining claim to contribute his proportionate share of taxes which have been levied and assessed upon mine or claim for five years, any co-owner who has paid said taxes may serve notice for contribution. (C.C.P. 850[Deering's]).

Safeguarding of Employees.

See category 11 Employment, topic 11.02 Labor Relations.

Oil and Gas.

General supervision of oil and gas is vested in State Oil and Gas Supervisor who is chief of Division of Oil and Gas, Department of Conservation. Supervisor has duty of supervising drilling, operation, maintenance and abandonment of wells and facilities attendant to oil and gas production to prevent damage to life, health, property, natural resources, oil and gas deposits, loss of oil and gas and damage to underground and surface waters. (Pub. Res. C. 3106). "Well" broadly defined to include drilling to inject fluids or gas into earth or utilize underground storage. (Pub. Res. C. 3008). Either blanket or individual well indemnity bonds required from any entity engaging in drilling, redrilling, deepening, or permanently altering casing of any well. (Pub. Res. C. 3204 et seq.). Unreasonable (Pub. Res. C. 3300-14) and willful (Pub. Res. C. 3500-03) waste of gas is prohibited. Where subsidence has occurred, as in Wilmington oil field, supervisor may compel unitization if necessary to repressuring program to ameliorate subsidence and exercise surveillance over all repressuring operations. (Pub. Res. C. 3315-3347). Spacing and location of oil and gas wells is regulated by statute, and improper spacing or location of well may make it nuisance. (Pub. Res. C. 3600-09).

State Owned Land.

Administered by State Lands Commission. Authority for, form and contents of mining prospecting permits and leases (Pub. Res. C. 6890-6996) and oil and gas leases, including those on tide and submerged lands (Pub. Res. C. 6871-79), are prescribed.

See category 3 Business Regulation and Commerce, topic 3.24 Securities, as to jurisdiction of Commissioner of Corporations over certain mineral and oil and gas interests.

Claims.

Method of filing claims covered by Pub. Res. C. 3900, 3924.

Brokers.

State laws provide comprehensive licensing system for mineral, oil, and gas brokers. It is unlawful for person to act as mineral, oil, or gas broker for compensation, or in expectation of compensation, without license. (Bus. & Prof. C. 10500 et seq.[Deering's]).

Servitudes Upon Land.

Right of taking minerals, or other things, may be attached to other land as easement (C.C. 801) or may be granted and held, even though not attached to land (C.C. 802).

Termination of Dormant Mineral Right.

Mineral right may be terminated if, for period of 20 years preceding commencement of action, there is no production of minerals and no exploration, drilling, mining, development, or other operations that affect minerals, no separate tax assessment is made or paid on minerals, and no instrument creating, reserving, transferring, or otherwise evidencing mineral right is recorded. (C.C. 883.110 et seq.).

20 MORTGAGES

20.01 CHATTEL MORTGAGES:

See category 8 Debtor and Creditor, topic Fraudulent Sales and Conveyances, subhead Bulk Sales, as to mortgage of fixture or store equipment of baker, cafe, restaurant or garage owner, machinist, dyer, cleaner or wholesale or retail merchant; see also categories 3 Business Regulation and Commerce, topic Consumer Protection; Debtor and Creditor, topic Liens.

Uniform Commercial Code has been adopted (1962, adopted 1963). See category 3 Business Regulation and Commerce, topic 3.09 Commercial Code, subhead Material Variations from 1990 Official Text.

What May Be Mortgaged.

Uniform Commercial Code governs. (Com'l. C. 9101, Div. 9 esp.).

After-Acquired Property.

Uniform Commercial Code governs. (Com'l. C. 9204).

Future Advances.

Uniform Commercial Code governs. (Com'l. C. 9204).

Requisites of Instrument.

Uniform Commercial Code governs. (Div. 9 esp., 9203, 9303, 9402). See Div. 9 esp., c. 5, 9310.

Filing and Refiling.

Uniform Commercial Code governs. (Div. 9 esp., Ch. 5, 9302, 9403).

Documents Filed.

Uniform Commercial Code Financing Statement (Com'l. C. 9502, 9512), statement of assignment (Com'l. C. 9514), termination statement (Com'l. C. 9513). See category 3 Business Regulation and Commerce, topic 3.09 Commercial Code, subhead Material Variations from 1990 Official Text.

Place of Filing.

If local law of California governs perfection of security interest or agricultural lien, office to file financing statement is either (1) office designated for filing or recording of record of mortgage if collateral is as-extracted collateral or timber to be cut or financing statement is filed as fixture filing and collateral is goods that are or are to become fixtures, or (2) Office of Secretary of State in all other cases. (Com'l. C. 9501).

Fees.

No fee required to record mortgage which is effective as financing statement filed as fixture filing or as financing statement covering as-extracted collateral or timber to be cut. Recording and satisfaction fees that otherwise would be applicable to record mortgage apply. Fee for filing and indexing record other than initial financing statement is: $10 if record in writing and no more than two pages; $20 if record in writing and more than two pages; $5 if record is communicated by other medium authorized by filing office. (Com'l. C. 9525; Govt. C. 12194).

Removal of Property by Mortgagor.

Uniform Commercial Code governs. (Com'l. C. Div. 9 esp., Com'l. C. 9609). Secured party's right to take possession after default.

Mortgages of Motor Vehicles.

See category 23 Transportation, topic 23.01 Motor Vehicles, subhead Liability of Owner.

Foreign Mortgages.

Uniform Commercial Code governs (1962, adopted 1963). (Com'l. C. 9301).

Stipulation for Attorney's Fees.

See category 18 Legal Profession, topic 18.01 Attorneys and Counselors.

Acts of Mortgagor Constituting Theft.

It is theft where with intent to defraud and during existence of mortgage, mortgagor sells, transfers, destroys, or further encumbers mortgaged property (with certain exceptions), or removes mortgaged property from its location at time of mortgage, unless mortgagor informs purchaser of existence of mortgage, and obtains written consent of prior mortgagee. (P. C. 538).

Judgment Liens.

Subject to judgment lien on personal property. (C.C.P. 697.530[Deering's], Com'l. C. 9301). See category 5 Civil Actions and Procedure, topic 5.15 Judgments.

Assignment of debt secured by mortgage carries security. (C.C. 2936).

Redemption.

Uniform Commercial Code governs (1962, adopted 1963). (Com'l. C. 9623).

Taxation.

Mortgages exempt from taxation. (Rev. & Tax C. 212[Deering's]).

Foreclosure.

Uniform Commercial Code governs (1962, adopted 1963). (Com'l. C. Div. 9, c. 6). See category 3 Business Regulation and Commerce, topic 3.09 Commercial Code, subhead Material Variations from 1990 Official Text.

Forms.

No single form for security agreement approved by Secretary of State or in common use. Secretary of State has approved forms at end of this Digest.

20.02 COLLATERAL SECURITY:

See category 8 Debtor and Creditor, topic 8.14 Pledges.

20.03 MORTGAGES OF PERSONAL PROPERTY:

See topic 20.01 Chattel Mortgages.

20.04 MORTGAGES OF REAL PROPERTY:

Any interest in real property which is capable of being transferred may be mortgaged. (C.C. 2947).

Characteristics of Real Property Security Devices.

Deed of trust is most common real property security device in California, with mortgage very seldom used. Mortgage with power of sale is similar in legal effect and economic function to deed of trust. Both are governed by same procedures and limitations with respect to foreclosure whether judicial or nonjudicial and both are subject to same redemption provisions and same antideficiency limitations. Title to property subject to mortgage remains in mortgagor subject to lien of mortgagee. While legal title is said to have passed to trustee in case of deed of trust, courts regard deeds of trust as practically and substantially mortgages with power of sale. (217 C. 644, 20 P.2d 940). One distinction between two devices is application of statute of limitations. In deed of trust title is treated as having passed to trustee and statute does not run against exercise of power of sale even though enforcement of obligation secured has been barred. Statute of limitations runs against mortgage and lien is extinguished when action is barred on principal obligation. (C.C. 2911). Power of sale may be conferred by mortgage. (C.C. 2932). Installment land sale contract is occasionally used as security device and it frequently includes power of sale. Such devices have not received statutory and judicial recognition that has occurred with respect to mortgage and deed of trust. Vendor of real property has lien thereon independent of possession for unpaid balance of purchase price when unsecured otherwise than by personal obligation of buyer. (C.C. 3046). Form and legal effect of deed of trust have never received legislative delineation as compared with mortgage. (C.C. 2920-2955.5). Deed of trust has, however, been treated by analogy to mortgages subject to general features of California real property law and to formalities of conveyancing.

Execution.

Mortgage can be created, renewed or extended only by writing executed with formalities required in case of grant of real property. (C.C. 2922). Same rule applies to deed of trust. Acknowledgment and recordation are not essential to validity of mortgage or deed of trust, but acknowledgment is usual method of proving execution and is prerequisite to recording. Recording in office of county recorder of county in which land is situated is necessary to establish priority over other liens and bona fide purchasers. (C.C. 2898). If property is community property both husband and wife must execute instrument. (Fam. C. 1102[Deering's]).

Recording.

Notice-race statute. (C.C. 1214). Also see subhead Execution, supra.

Recording Fees.

See category 10 Documents and Records, topic 10.04 Records, subhead Fees.

Trust Deeds.

See subhead Characteristics of Real Property Security Devices, supra.

Taxes.

No transfer taxes are required when mortgage or deed of trust is created (Const., Art XIII, §3; Rev. & Tax C. 212[Deering's]), but upon foreclosure sale transfer taxes may be imposed by local ordinance (Rev. & Tax C. 11926[Deering's]).

Obligations Secured.

Mortgage or deed of trust can secure any debt or obligation. (C.C. 2920). Obligation may be that of someone other than mortgagor or trustor and need not carry personal liability of anyone, but existence of underlying and enforceable debt or obligation is essential to validity of lien of mortgage or deed of trust. If obligation secured is not measurable in monetary terms, enforcement of lien may not be possible.

Future Advances.

Mortgage or deed of trust will secure future advances provided instrument so states. (C.C. 2884).

Property Encumbered.

Any interest in real property which is transferable may serve as security for deed of trust. (C.C. 2947). Trust deed must identify and describe security with sufficient clarity. Instrument may include personal property but is not enforceable against third parties unless executed and perfected in accordance with formalities required for personal property security interest. (Com'l. C. 9101 et seq.). Fixtures are included under lien of deed of trust, but lien is lost if fixtures are severed and removed from property. Complicated priority problems may arise with respect to claims by third parties, and “fixture filing” may be required in some circumstances. (Com'l. C.

9334).

Assignment.

Assignment of obligation transfers security. (C.C. 2936). In addition to endorsing note to assignee, there should be instrument assigning beneficial interest under deed of trust or mortgage executed, acknowledged and recorded. Borrower is entitled to notice of transfer and is not liable to assignee for payments made to assign or prior to receiving written notice. (C.C. 2937).

Priorities.

Obligatory advances have priority as of date of recording deed of trust. Optional advances will retain priority over intervening lien if lender making advance does not have actual knowledge of intervening lien. Constructive notice resulting from recordation of intervening lien is not equivalent of actual knowledge. Good practice, however, dictates that lender obtain title search and protection of title insurance before making optional advance. As mechanic's liens attach as of date work of improvement was commenced (C.C. 3134) they may gain priority over deed of trust or mortgage recorded after commencement of work. Mortgage or deed of trust given for price of real property at time of its conveyance has priority over all other liens created against purchaser subject to operation of recording laws. (C.C. 2898). Lender will thus take priority over outstanding judgment liens that immediately attach to any asset purchaser acquires but purchase money lien does not take priority over liens that already encumber property conveyed such as existing mechanic's lien or existing mortgage or deed of trust. (195 Cal. App. 2d 355, 15 C. Rptr. 710; 87 C. 619, 25 P. 919). Lien of deed of trust or mortgage is terminated by foreclosure and sale under prior deed of trust or mortgage properly conducted. General rule, however, as stated in C.C. 2897 is “[o]ther things being equal, different liens upon the same property have priority according to the time of their creation, . . .”. This priority is subject to operation of recording laws.

Subordination.

C.C. 2934 provides that any instrument by which mortgage or deed of trust is subordinated in priority may be recorded and from date of recordation instrument acts as constructive notice to all persons. C.C. 2953.1-2953.4 contain statutory requirements for subordination agreements but subordination agreements exceeding $25,000 or those executed in connection with loan exceeding $25,000 are specifically exempted. (C.C. 2953.5). Protection afforded vendor by these provisions is requirement that security instrument or agreement which effects subordination to another security instrument must contain statement in boldface type at top of instrument to this effect. (C.C. 2953.2, 2953.3). Statutes also require specific notice at bottom of instrument that security interest may or will become subject to another or later security instrument. (C.C. 2953.2, 2953.3). Despite exemption for transactions in excess of $25,000, title insurance companies in California generally require insertion of those provisions on subordinated deeds of trust and subordination agreements which are to be recorded. Several California cases have held that unless subordination clause specifies in considerable detail terms of loan to which seller's security interest will be subordinated to that clause, contract providing for such clause is too indefinite and uncertain to be specifically enforced. (253 Cal. App. 2d 383, 61 C. Rptr. 377). Under “just and reasonable” test announced in Handy v. Gordon (65 C.2d 578, 55 C.Rptr. 769, 422 P.2d 329), unless contract contains terms sufficiently defining and minimizing risk to seller, clause will not be specifically enforceable. Court suggests that such terms might include limits on use of proceeds, maximum amounts of loan not to exceed specified percentage of construction cost or value of property and other similar limits designed to protect security. Court's demands for explicitness concerning enforcement of subordination clauses has been somewhat weakened by recent cases. (See, e.g., 131 Cal. App. 3d 291, 182 C. Rptr. 287; 128 Cal. App. 3d 361, 180 C. Rptr. 253.)

Substitution of Trustee.

There are several methods of substituting trustee in deed of trust: (1) By mutual agreement between beneficiary and trustor; (2) pursuant to express provisions of deed of trust; and (3) pursuant to C.C. 2934a. In practice standard printed forms provided by title insurance companies contain specific language authorizing unilateral substitution by beneficiary by execution of simple document.

Release and Reconveyance.

Within 30 days after mortgage has been satisfied, mortgagee or assignee must execute and record certificate of discharge of mortgage or request to trustee of deed of trust for full reconveyance and failure to do so renders mortgagee or beneficiary liable for all damages sustained together with penalty of $500. (C.C. 2941). Any person willfully violating C.C. 2941 is also guilty of misdemeanor. (C.C. 2941.5). Partial release clauses are encountered in transactions involving incremental development of property such as subdivision of parcel into several small parcels for sale as lots or for construction of improvements and subsequent sale of lot with improvements. It is unlawful for subdivider under Bus. & Prof. C. 11013.2[Deering's] to sell or lease lots or parcels in subdivision that is subject to blanket encumbrance unless there is release clause allowing purchaser or lessee to obtain legal title free and clear of such blanket encumbrance. Just and reasonable test applied in Handy v. Gordon, supra, also applies to release clauses requiring that they be free from ambiguity and uncertainty. Similar weakening of explicit requirement has occurred with respect to release clauses. (See, e.g., 101 Cal. App. 3d 626, 162 C. Rptr. 52.)

Satisfaction.

See subhead Release and Reconveyance, supra.

Discharge.

See subhead Release and Reconveyance, supra.

Maturity of the Obligation.

Normally instrument evidencing obligation such as promissory note will have standard acceleration clause entitling holder to accelerate in event of default in payment of any installment or performance of any provision or condition contained in deed of trust. Absent such provision in note or in deed of trust, or both, foreclosure may be limited to delinquent installments. Acceleration clause is valid accessory to secured note. (Com'l. C. 3108). There is no requirement that beneficiary give notice of his election to accelerate or demand that trustor perform except when beneficiary of deed of trust or mortgage with power of sale elects to sell nonjudicially in which event he must elect and notify by notice of default and notice of sale. (C.C. 2923.5, 2924 et seq.). Security instruments frequently contain “due-on-sale” clause providing that if security or any interest therein is sold or further encumbered secured obligations may at option of holder become immediately due and payable. For specified residential properties, C.C. 2924.5 requires this clause be set forth in its entirety both in body of trust deed or mortgage and on promissory note or other document evidencing secured obligation. C.C. 2949 provides that no mortgage or trust deed may be declared in default nor accelerated solely by reason of owner further encumbering real property where it contains only single family owner occupied dwelling. Financial institutions often limit right of prepayment to specified amounts annually and charge penalty in form of additional interest where prepayment privilege is exercised. C.C. 2954.9, while not eliminating right of lender to make prepayment charge, substantially restricts amount of charge and right of lender to prevent prepayment until loan matures for specified residential properties. Prepayment penalty for higher-priced mortgage loans limited by statute (Finan. C. 4995–4995.6[Deering's]). Late charges on loans secured by certain residential mortgages or deeds of trust after Jan. 1, 1976, may be added no earlier than ten days after payment has become due and late payment charge may not exceed 6% of installment or $5, whichever is greater. (C.C. 2954.4). C.C. 2954.5[a], applicable to most lenders, requires that borrower be given at least ten days from mailing of default notice before assessing late payment charge. C.C. 1916.5 restricts changes in interest rates on certain variable interest loans encumbering residential property. C.C. 1921 requires that certain lenders offering variable interest residential loans provide prospective borrowers copy of most recent available publication of Federal Reserve Board so that public has descriptive information regarding adjustable rate mortgages.

Foreclosure.

Two methods by which mortgage or deed of trust may be foreclosed, providing they contain power of sale, are by court proceedings or by trustee's or mortgagee's sale under instrument's power of sale. If mortgage does not contain power of sale, only method of foreclosure is by court proceedings. Most security instruments used in California expressly provide for power of sale and thus remedies of court foreclosure or foreclosure under power of sale can be exercised alternatively or concurrently. Beneficiary can elect either option at any time prior to sale. “One action” rule set forth in C.C.P. 726[Deering's] requires secured creditor to resort to security until it is exhausted or valueless. Mortgagee or beneficiary cannot circumvent this requirement by waiving security and suing borrower directly on debt. Restriction may, however, be waived by borrower for separate and independent consideration at later time or by failure to raise matter as affirmative defense to action by beneficiary seeking to impose personal liability without foreclosing real property security. While beneficiary must foreclose security even though it was valueless as security at time security instrument was executed, where security was adequate at time transaction was entered into but thereafter became valueless either through destruction or foreclosure of senior encumbrance beneficiary, under certain circumstances, may bring direct action against trustor. While one action rule requires resort to security whether security interest is in form of mortgage or deed of trust, it does not mean that beneficiary of deed of trust may not conduct separate trustee sales on separate items of securities whether they be all real property or combined real and personal property for single debt. Beneficiary is prevented from recovering deficiency judgment by foreclosing nonjudicially (C.C.P. 580d[Deering's]), but he is not prevented by one action rule from holding series of nonjudicial sales. With respect to combined real and personal property, Com'l. C. 9601 gives to creditor several alternatives as to sequence of actions creditor may take to realize upon creditor's security. Creditor must be cautious in selection of its remedy where mixed collateral is involved. Judicial foreclosure is most frequently used where there are questions as to validity of security instrument, complicated priority problems involving number of parties, or where there are problems involving title. Trustee sale under power of sale is most frequently used method of realizing upon security as it is comparatively fast and efficient and terminates debtor's right of redemption effectively and inexpensively. Sale is conducted under provisions of C.C. 2923.5, 2923.6, 2924 et seq. C.C. 2923.5, effective July 8, 2008, operative Sept. 6, 2008, applicable to loans made from Jan. 1, 2003, through Dec. 31, 2007, secured by owner-occupied residential real property, requires that borrower be given 30 days’ advance notice and opportunity to explore options to avoid foreclosure before notice of default may be filed on loan pursuant to C.C. 2924. Mortgagee, trustee or person authorized to take sale shall delay notice of sale, with exceptions, in order to allow parties to pursue loan modification to prevent foreclosure under certain conditions (C.C. 2923.52–2953.55). Loan pool servicing agents owe duty to all parties in pool and act in parties' best interests by agreeing to or implementing loan modification or workout plan when anticipated recovery under loan modification or workout plan exceeds anticipated recovery through foreclosure on net present value basis. (C.C. 2923.6). Upon posting notice of sale pursuant to C.C. 2924f regarding loans secured by residential real property where mortgage note billing address is different than property address, trustee or agent must also post notice on property and mail notice to residents of property that foreclosure process has begun on property. (C.C. 2924.8). Typically title insurance company is named as trustee and sale is conducted by title company's foreclosure department. Upon recordation and mailing of notice of default, when obligation is one which may be reinstated, trustor has until five business days prior to date set for sale of property within which to pay delinquent installments, costs and expenses incurred, and thereby cure default. (C.C. 2924c). Where default is nonreinstatable such as in event of outright sale by trustor where security is subject to due-on-sale clause, it is still required that beneficiary record notice of default in form prescribed in Civil Code, await three month period and thereafter publish notice of sale under C.C. 2924f. Right to reinstate delinquent note is retained by trustor or mortgagor during reinstatement period despite fact that beneficiary has accelerated entire obligation under terms of note itself. Once reinstatement period has elapsed, however, and notice of sale under power of sale has been published before date of sale, then trustee has conducted sale in manner prescribed under C.C. 2924g and h, neither trustor nor any other person having interest in property has any further right of redemption. Statutory right of redemption after judicial sale exists for three months after sale if proceeds of sale are sufficient to satisfy indebtedness with interest and costs of action and sale, and one year after sale if proceeds of sale are not sufficient to satisfy such indebtedness, interest and costs. (C.C.P. 729.030[Deering's]). Civil entity may fine legal owner for failure to maintain property purchased at foreclosure sale. (C.C. 2929.3, effective July 8, 2008).

Deficiency Judgment.

Where foreclosure sale produces net proceeds less than amount of debt and expenses mortgagee or beneficiary may pursue deficiency subject to statutory limitations contained in C.C.P. 580a[Deering's] through d. There can be no deficiency after foreclosure under power of sale in deed of trust, mortgage, or estate for years. (C.C.P. 580d[Deering's]). Beneficiary may, however, without seeking personal liability against trustor, realize on other security that he may have by foreclosing under power of sale. After exhausting all of security by means of foreclosure under power of sale, beneficiary cannot then seek personal deficiency judgment against debtor. After judicial foreclosure, mortgagee or beneficiary may seek deficiency judgment provided that obligation is not within deficiency prohibitions set forth in C.C.P. 580b[Deering's]. This statute prohibits deficiency judgment against buyer under deed of trust, mortgage or contract given to secure any part of purchase price of real property, provided property purchased, purchaser and creditor fall within statutory requirements.

Sales.

See subhead Foreclosure, supra.

Moratorium.

None.

Redemption.

See subhead Foreclosure, supra.

Form.

Code form for real property mortgage is set forth in C.C. 2948. Both mortgage and deed of trust must be in writing but no particular form is required. There are no statutory provisions setting forth form of deed of trust but form has become highly standardized and is printed by institutional lenders and title companies.

Form of Deed of Trust (which is usually used) is as follows (some parts being omitted):

This Deed of Trust, made this . . . day of . . ., TRUSTOR, whose address is . . ., . . ., TRUSTEE, and . . ., BENEFICIARY,

WITNESSETH:

That Trustor irrevocably grants, transfers and assigns to Trustee in trust, with power of sale, that property in . . . County, California, described as: . . . together with the rents, issues and profits thereof, subject, however, to the right, power and authority given in and conferred upon Beneficiary herein to collect and apply such rents, issues and profits.

For the purpose of securing performance of each agreement of Trustor contained herein and payment of the indebtedness evidenced by one promissory note of even date herewith in the principal sum of $. . . executed by Trustor in favor of Beneficiary, and to protect the security of this Deed of Trust, Trustor agrees:

(Here are usually incorporated detailed provisions relating to protection of security.)

Residential Mortgage Lenders

Residential mortgage lenders subject to licensure and regulation under Residential Mortgage Lending Act (Finan. C. 50000 et seq.[Deering's]).

Mortgage Broker Fiduciary to Borrower

Mortgage broker providing brokerage services to borrower fiduciary of borrower and violation of fiduciary duty violation of mortgage broker licensing law. Fiduciary duty includes requirement that broker place economic interest of borrower ahead of broker's own economic interest (C.C. 2923.1).

Chattel Mortgages.

See topic 20.01 Chattel Mortgages.

21 PROPERTY

21.01 ABSENTEES:

Distribution made to named absentee or any known assignee. If absentee is minor or incompetent, distribution made to his fiduciary. If without fiduciary, absentee's whereabouts unknown, or absentee refuses to give receipt for property, distribution may be deposited with county treasurer in absentee's name and can be claimed pursuant to Prob. C. 11854[Deering's]. (Prob. C. 11850-52[Deering's]). Special provisions relating to absentee distribution repealed July 1, 1989.

Care of Property.

Conservator can be appointed for any person who is missing and whose whereabouts are unknown. (Prob. C. 1804[Deering's]). Court must find that missing person owns or is entitled to possession of real or personal property in California, that such estate requires attention and that such person is missing. (Prob. C. 1849[Deering's]). Provisions of conservatorship law apply except those dependent upon knowledge of whereabouts of missing person. (Prob. C. 1848[Deering's]).

Administration and Distribution of Estate.

After five years unexplained absence, California property of absentee may be administered. (Prob. C. 12401-02[Deering's]). Estates may be administered as generally provided for administration of estates of deceased persons. (Prob. C. 12402[Deering's]). Procedure is specified for recovery of property if missing person appears within five years after initial petition. (Prob. C. 12408[Deering's]).

Process Agent.

C.C.P. 1018[Deering's], requiring nonresidents or residents leaving California for over year to designate agent for service of process with respect to tax liability to State, was repealed 1999. ().

Escheat.

Specific provisions covering disposition of unclaimed property contained in C.C.P. 1300 et seq.[Deering's] and C.C.P. 1500 et seq.[Deering's] (substantially modified version of Uniform Disposition of Unclaimed Property Act) titled Unclaimed Property Law.

See also categories 3 Business Regulation and Commerce, topic Banks and Banking, subhead Unclaimed Deposits; Citizenship, topic Aliens; Estates and Trusts, topic Wills, subhead Unclaimed Legacies.

21.02 ADVERSE POSSESSION:

Character of Possession.

When occupant claims under judgment or written instrument possession deemed adverse when continuous occupation for five years and possession of part of single plot or piece deemed possession of whole except where tract divided into lots. (C.C.P. 322-23[Deering's]). Occupation defined as usually cultivated or improved, protected by substantial inclosure, or used for supply of fuel, fencing-timber, pasturage, or ordinary use of occupant. (C.C.P. 323[Deering's]). Where there is no judgment or written instrument land must have been protected by substantial inclosure, usually cultivated or improved. (C.C.P. 325[Deering's]). Occupant claiming adverse possession must pay all taxes during such five-year period. (C.C.P. 325[Deering's]).

Duration of Possession.

Land must be continuously occupied and claimed for period of five years. (C.C.P. 321[Deering's]).

Easements may be acquired by prescriptive user for five years. (C.C. 1007; 1 C.3d 679, 686, 83 C.Rptr. 359, 463 P.2d 711). Necessary elements same as for title except need to pay taxes arises only if easement has been separately assessed. (1 C.3d 679, 686; 83 C. Rptr. 359, 463 P.2d 711).

Disabilities.

If person against whom adverse title is asserted is either under age of majority, insane or imprisoned for term less than life at time he acquires title, time during which such disability continues, not to exceed 20 years, may not be included in five-year period required for acquiring title by adverse possession. (C.C.P. 328[Deering's]). No adverse possession possible of state or public entity land or land dedicated to public use by public utility. (C.C. 1007).

21.03 CONDOMINIUMS:

See topic 21.16 Real Property.

21.04 CONVEYANCES:

See topic 21.06 Deeds, subhead Operation and Effect.

21.05 CURTESY:

No estate by curtesy. (Prob. C. 6412[Deering's]). Surviving spouse of nonresident decedent has same rights to take noncommunity real property against decedent's will as though such property were situated in decedent's domicile. (Prob. C. 120[Deering's]).

See also categories 13 Estates and Trusts, topic Descent and Distribution; Family, topic Husband and Wife, subhead Community Property System.

21.06 DEEDS:

Execution.

Deeds of real property must be in writing, signed and delivered. (C.C. 1054, 1091). Acknowledgment or proof of execution (see category 10 Documents and Records, topic 10.01 Acknowledgments) not necessary to validity of deed between parties but necessary to entitle it to be recorded. (Govt. C. 27287-8). Seals and witnesses unnecessary, except that witnesses required if signature is made by mark. (C.C. 14). Practice is to use quitclaim deed if grantor in doubt regarding his title. See also categories 8 Debtor and Creditor, topic Homesteads; Family, topic Husband and Wife, subhead Community Property System, catchline Management, Control and Disposition of Community Realty.

Recording not necessary to validity of deed as between parties or as to persons not bona fide purchasers (C.C. 1217); but deed must be recorded in office of recorder of county in which land is situated in order to constitute constructive notice to subsequent bona fide purchasers or encumbrancers (C.C. 1169, 1214). See also category 10 Documents and Records, topic 10.04 Records.

Fees vary by county. Basic fees for recording and indexing: $10 for first page (8½ by 14 inches) and $3 per additional page or fraction of page. Additional $1 charged for each page on which there is printing, other than of words which are directive or explanatory in nature or on vital statistics forms, spaced more than nine lines per vertical inch or more than 22 characters and spaces per inch measured horizontally for not less than three inches in one sentence. (Govt. C. 27361 and 27361.5). Each county may charge additional fees for each document recorded. (Govt. C. 27361[d], 27361.4, 27388). See also category 10 Documents and Records, topic 10.04 Records.

Operation and Effect.

If word grant is used in deed conveying title in fee simple or estate of inheritance, it implies, unless restrained by express terms in same conveyance, these covenants only: That grantor has not previously conveyed such estate or any interest therein to any other person; and that at time of conveyance such property is free from any encumbrances done, made or suffered by grantor or any person claiming under him. (C.C. 1113). Unless it appears from conveyance that lesser estate was intended, it is presumed that grant is intended to convey fee simple title. (C.C. 1105).

Conveyance to more than one person presumed to be as tenants in common, unless acquired by partnership, or unless instrument provides specifically for joint tenancy or property acquired as community property. (C.C. 686).

Taxes.

See category 22 Taxation, topic Taxes, subhead Real Estate Conveyance Tax.

Form.

Short form of grant contained in C.C. 1092. Following form will serve most purposes:

Form

I, A B, grant to C D all that real property situated (insert name of county) County, State of California, bounded (or described) as follows: (here insert property description, or if land sought to be conveyed has a descriptive name, it may be described by the name, as for instance, 'The Norris Ranch').

Witness my hand this (insert day) day of (insert month), 20 . . . .

It is not customary to use covenants in deed, custom being to rely on covenants against grantor implied by statute and examination or insurance of title.

Foregoing form may be used for quitclaim deed by substituting “quitclaims” in place of “grants”.

21.07 DEEDS OF TRUST:

See category 20 Mortgages, topic 20.04 Mortgages of Real Property.

21.08 DOWER:

No dower and curtesy rights. (Prob. C. 6412[Deering's]). Surviving spouse of nonresident decedent has same rights to take non-community real property against decedent's will as though such property were situated in decedent's domicile. (Prob. C. 120[Deering's]).

See also categories 13 Estates and Trusts, topic Descent and Distribution; Family, topic Husband and Wife, subhead Community Property System.

21.09 ESCHEAT:

See topic 21.01 Absentees, subhead Escheat; categories 3 Business Regulation and Commerce, topic Banks and Banking, subhead Unclaimed Deposits; Citizenship, topic Aliens; Estates and Trusts, topics Descent and Distribution, subhead Escheat, Wills, subhead Unclaimed Legacies.

21.10 LANDLORD AND TENANT:

Implied promise by landlord to: (1) Allow tenant possession and quiet enjoyment, and; (2) not disturb tenant's possession. (C.C. 1927; 74 Cal. App. 3d 142, 147, 141 C. Rptr. 370, 373).

Uniform Commercial Code Art. 2A (1987, adopted 1988), found in Com'l. C. 10101-10600).

Kinds of Tenancy.

Estate or tenancy for years is right to exclusive use and possession for fixed period of time. Estate or tenancy for years is chattel real. (C.C. 765). Tenancy at will created when parties agree, can be terminated by either party, and has no fixed term. Tenancy at will created when landlord gives tenant permission to occupy premises but no term is specified and no agreement for rent made. (133 Cal. App. 2d Supp 790, 793; 284 P.2d 580, 582). Periodic tenancy continues for successive periods of same length but for indefinite period of time. Examples include week-to-week, month-to-month, or year-to-year. (87 Cal. App. 2d 660, 665; 197 P.2d 345; 221 Cal. App. 3d Supp 13, 17). Tenancy at sufferance created when tenant with right to occupy stays in possession after rental term ends, but without landlord's consent. See topic 21.10 Landlord and Tenant, subhead Holding Over.

Leases.

Agreement for leasing for period longer than year must be in writing and subscribed by party to be charged to be valid. (C.C. 1624). Lease must be acknowledged to be recorded. (Govt. C. 27287). To create tenancy in mobile home park lease must be in writing and must contain specified provisions. (C.C. 798.15). Mobile home park tenant's term of tenancy must be not less than 12 months unless otherwise requested by tenant. (C.C. 798.18).

Security Deposits.

Law governing security deposits for residential property contained in C.C. 1950.5. Separate provisions for security deposits on mobile homes (C.C. 798.39) and floating homes (C.C. 800.49).

Recording.

Unrecorded lease is valid between parties and those who have notice thereof (C.C. 1217), but, except as to lease for one year or less, is void as against any subsequent purchaser or mortgagee in good faith and for valuable consideration, whose conveyance is first recorded and as against any judgment affecting title. (C.C. 1214).

Term.

Hiring of real property other than lodgings and dwelling houses in places where there is no custom or usage on subject is presumed to be month to month tenancy unless otherwise designated in writing. (C.C. 1943).

Hiring of lodgings or dwelling house for unspecified term is presumed to have been made for such length of time as parties adopt for estimation of rent. In absence of any agreement respecting length of time or rent hiring is presumed to be monthly, but hiring of property for agricultural or grazing use is presumed to be for one year unless otherwise expressed. (C.C. 1943, 1944).

No lease or grant of any town or city lot for longer period than 99 years, in which shall be reserved any rent or service of any kind, is valid. (C.C. 718). No lease or grant of land for agricultural or horticultural purposes for longer period than 51 years, in which is reserved any rent or service of any kind, is valid. (C.C. 717).

Holding Over.

Any automatic renewal or extension provision in residential lease is voidable by party who did not prepare lease if lease is printed and provision not printed in at least eight-point boldface type in lease and recited in same type above place where lessee signs. (C.C. 1945.5). If lessee remains in possession after expiration of hiring, and lessor accepts rent from him, parties are presumed to have renewed hiring on same terms and for same time, not exceeding one month when rent is payable monthly, nor in any case one year. (C.C. 1945).

Renewal.

Hiring of real property for term not specified by parties is deemed to be renewed as stated above, at end of term implied by law, unless one of parties gives written notice to other of his intention to terminate same, at least as long before expiration thereof as term of hiring itself, not exceeding 30 days, except that tenancies from month to month may be terminated by 30 days notice at any time; and parties may agree at time such tenancy is created that notice may be given at any time not less than seven days before expiration of term. (C.C. 1946). Hiring of residential real property for term not specified by parties is deemed renewed under C.C. 1945 at end of term implied by law unless one of parties gives written notice to other of intention to terminate. Owner of residential dwelling must give notice 60 days prior to proposed date of termination. Owner must give notice 30 days prior to proposed date of termination if tenant has resided in dwelling for less than one year, or if certain conditions exist. (C.C. 1946.1).

Termination.

Tenancy at will may be terminated by 30 days written notice (C.C. 789), except tenants in mobile home park, who must be given 60 days notice (C.C. 798.55), upon specified grounds (C.C. 798.56).

Rent.

When there is no usage or contract to contrary, rents are payable at termination of holding, when it does not exceed one year. If holding is by day, week, month, quarter, or year, rent is payable at termination of respective period, as it successively becomes due. (C.C. 1947). Utility payments by tenant may be deducted from rent (C.C. 1942.2). Permissible required amount and use of security deposit by landlord is limited. (C.C. 1950.5, 1950.7). Landlord or landlord's agent may charge applicant screening fee to cover costs of obtaining information about applicant. Fee is limited to actual out-of-pocket costs of gathering information, up to $30, adjusted annually after Jan. 1, 1998, commensurate with increase in Consumer Price Index. (C.C. 1950.6).

Repairs.

Lessor of building intended for occupation of human beings must, in absence of agreement to contrary, put it into condition fit for such occupation, and repair all subsequent dilapidations thereof which render it untenantable, except those occasioned by want of ordinary care by tenant. (C.C. 1941). Untenantable dwelling defined as lacking water proofing, weather protection, gas facilities, plumbing, water, heat, electricity, cleanliness, or garbage receptacles or floors, stairways, and railings maintained in good repair. Untenantable dwelling can also be residential unit described in H. & S.C. 17920.3[Deering's] or 17920.10[Deering's]. (C.C. 1941.1). Tenants have affirmative obligations and landlord incurs no duty to repair where tenant's substantial violation of affirmative obligations interferes substantially with landlord's obligation to repair or contributes substantially to existence of dilapidation. (C.C. 1941.2). Failure of landlord within reasonable time after notice to repair dilapidations rendering premises untenantable entitles tenant to repair and deduct cost up to one month's rent, or to vacate and be discharged from lease obligations. This remedy available not more than twice in 12-month period. (C.C. 1942). Retaliation against tenant for exercising available remedies or complaining about tenantability of dwelling is penalized. (C.C. 1942.5). Landlord's breach of implied warranty of habitability bars eviction of residential tenant, provided tenant pays reduced rent determined by court. (10 C.3d 616, 111 C.Rptr. 704, 517 P.2d 1168).

Dispossession.

Landlord may recover possession by summary proceeding known as unlawful detainer action when tenant continues in possession after term or after default in payment of rent and three days notice in writing requiring its payment (stating amount which is due) or possession of property, has been served upon him, or when he continues in possession after failure to perform other conditions or covenants of lease including any covenant not to assign or sublet, and three days notice in writing requiring performance of such conditions or covenants has been served upon him, if conditions or covenants can be performed, or gives notice of intention to terminate hiring or makes offer to surrender possession which is accepted in writing and then fails to deliver possession at time specified. (C.C.P. 1161[Deering's]). If landlord declares forfeiture of lease in notice to quit, lease may remain in effect if tenant performs within three days or if landlord waives breach. (C.C.P. 1161.5[Deering's]). When proceeding is for unlawful detainer after default in payment of rent, execution may not issue for five days after entry of judgment provided: (1) Lease term has not expired and (2) landlord's three-day notice did not forfeit lease, and tenant shall be restored to his estate by payment within such time. (C.C.P. 1174[Deering's]). If judgment declares forfeiture of lease, landlord still may pursue remedies set forth in C.C. 1951.2. (C.C.P. 1174.5[Deering's]).

Plaintiff may have immediate possession on motion to court and filing undertaking where it appears to satisfaction of court, after hearing, that defendant is outside state or cannot be found. (C.C.P. 1166a[Deering's]).

Distress.

There is no distress for rent in this state.

Access to Dwelling.

Landlord may enter dwelling unit only in case of emergency, to make necessary repairs, decorations, alterations or improvements, to supply necessary or agreed services, to show unit to actual or prospective purchasers, mortgagees, tenants, workers or contractors, when tenant has abandoned or surrendered premises, to make inspection pursuant to C.C. 1950.5[f], or pursuant to court order. (C.C. 1954).

Modification or Waiver.

Provision of lease or rental agreement for dwelling unit is void as contrary to public policy if it requires lessee to modify or waive his right to certain statutory remedies, to assert cause of action which may arise in future, to notice or hearing as required by law, to procedural rights in litigation, or to have landlord exercise duty of care to prevent personal injury or property damage. (C.C. 1953).

21.11 LEASES:

See topic 21.10 Landlord and Tenant.

21.12 PARTITION:

Partition of real and personal property governed by C.C.P. 872.010 et seq.[Deering's] Partition action may be commenced by co-owner of personal property or owner of estate of inheritance, estate for life, or estate for years in real property where such property or estate is owned by several persons concurrently or in successive estates. (C.C.P. 872.210[Deering's]). Court determines plaintiff's right to partition. Except as provided in C.C.P. 872.730[Deering's], partition as to concurrent interest in property shall be as of right unless barred by valid waiver. Partition as to successive estates in property allowed if in best interests of all parties. (C.C.P. 872.710[Deering's]).

Jurisdiction and Venue.

Superior court has jurisdiction of partition actions. (C.C.P. 872.110[Deering's]). Proper county for trial is county where some or all of real property, or where personal property is situated. If subject of action is only personal property, proper county for trial is county in which personal property is principally located at commencement of action, or in which any defendant resides at commencement of action. (C.C.P. 872.110[Deering's]).

Proceedings.

Trial for partition action governed by C.C.P. 872.610-872.840[Deering's].

Partition in Kind or Sale.

Partition is by division among parties (C.C.P. 872.810[Deering's]) unless parties agree to sale or court determines sale would be more equitable than division of property (C.C.P. 872.830[Deering's]).

21.13 PERPETUITIES:

Lease to commence at certain time or upon happening of future event becomes invalid if its term does not actually commence in possession within 30 years after its execution. (C.C. 715).

Conditions restraining alienation, when repugnant to interest created, are void. (C.C. 711).

Uniform Statutory Rule Against Perpetuities.

"American common-law" rule against perpetuities in former C.C. 715.2 superseded by Uniform Statutory Rule Against Perpetuities (1990, adopted 1991), in Prob. C. 21205-21208[Deering's]. Exception to rule against perpetuities in first clause of former C.C. 715.3 superseded by Prob. C. 21225(f)[Deering's] (excludes from coverage of Uniform Statutory Rule Against Perpetuities nonvested property interests including pensions, profit-sharing, stock bonus, health, disability, death benefits, and income deferral). Exception from prohibition on accumulations in second clause of former C.C. 715.3 continued in C.C. 724(b) (exception from prohibition on accumulations with regard to income arising from real or personal property held in trust [1] forming part of profit-sharing plan for benefit of employees or [2] forming part of retirement plan). Former C.C. 715.4 restated without substantive change in Prob. C. 21225(h)[Deering's] (excludes from coverage of Uniform Statutory Rule Against Perpetuities trusts that provide beneficiaries with hospital service contracts, group life insurance, group disability insurance, group annuities, or any combination of such insurance). Former C.C. 715.5 superseded by Prob. C. 21220[Deering's] (reformation under Uniform Statutory Rule Against Perpetuities). Former C.C. 715.6 superseded by Uniform Statutory Rule Against Perpetuities, in particular, Prob. C. 21205-21207[Deering's].

Accumulations.

Directions for accumulations are void as respects time beyond above limits. (C.C. 725).

21.14 PERSONAL PROPERTY:

Personal property governed by common law as modified and interpreted by C.C. 654-1422. Tenancy by entirety in personal property is not recognized. (C.C. 683, 702; 156 C. 195, 103 P. 931; 142 Cal. App. 2d 252, 298 P.2d 551). Joint tenancies in safe-deposit boxes are prohibited. (C.C. 683.1).

See also categories 3 Business Regulation and Commerce, topic Commercial Code; Debtor and Creditor, topic Assignments; Mortgages, topic Chattel Mortgages.

21.15 POWERS OF ATTORNEY:

Uniform Durable Power of Attorney Act has been adopted (1979, adopted 1981). (Prob. C. 4124-4127[Deering's], 4206[Deering's], 4304[Deering's], 4305[Deering's]). Incapacity of principal to contract will not terminate agency if instrument creating agency so provides (Durable Power of Attorney). (Prob. C. 4124[Deering's]). On July 1, 2000, durable power of attorney for health care decisions governed by Health Care Decisions Law. (Prob. C. 4600 et seq.[Deering's]). However, Health Care Decisions Law does not invalidate valid preexisting documents. (Prob. C. 4665[Deering's]).

Form of Authorization.

Oral authorization is sufficient for any purpose, except that authority to enter into contract required by law to be in writing (see category 3 Business Regulation and Commerce, topic 3.16 Frauds, Statute of) can only be given by instrument in writing. (C.C. 2309). Where original authority must be in writing, ratification must also be in writing. (C.C. 2310).

Uniform Statutory Form Power of Attorney Act adopted (1988, adopted 1990), in Prob. C. 4400 et seq.[Deering's] provides form that can be used in whole or in part instead of individually drafted forms or forms adapted from form book. (Prob. C. 4401[Deering's]). Form and requirements set forth in Prob. C. 4400 et seq.[Deering's] do not affect or limit use of any other form for power of attorney. (Prob. C. 4408[Deering's]).

Power of attorney to execute mortgage must be in writing, subscribed, acknowledged, or proved, certified, and recorded in order that transaction may be valid as against third persons. (C.C. 2933).

Termination of Agency.

Power not coupled with interest is terminated by revocation by principal, death of principal or incapacity of principal to contract; however, any bona fide transaction entered into without actual knowledge of such revocation, death, or incapacity shall be binding upon principal, his or her heirs and other successors in interest. (C.C. 2356). Revocation may render principal liable in damages (5 C.2d 687, 56 P.2d 226). Where power to execute instruments effecting real property is recorded, revocation must be recorded in same office where originally recorded. (C.C. 1216).

Usable special power of attorney form is as follows:

Form

SPECIAL POWER OF ATTORNEY

I, (name of principal), of (address, city, county and state), do hereby appoint (name of attorney in fact) of (address, city, county and state), my true and lawful attorney in fact, for me and in my name, place, and stead, and for my use and benefit, to (specify powers granted as completely as necessary to confer powers intended).

I further give and grant unto my said attorney in fact full power and authority to do and perform every act necessary and proper to be done in the exercise of any of the foregoing powers as fully as I might or could do if personally present, with full power of substitution and revocation, hereby ratifying and confirming all that my said attorney shall lawfully do or cause to be done by virtue hereof.

(Optional time limitation provision) All power and authority hereinabove granted shall in any event terminate on (specify date).

EXECUTED this . . . . . . day of . . . ., 20 . . . . . ., at (city and state).

(Signature)

(Typed Name)

(If power is to be recorded, it must be acknowledged).

Members of Armed Forces.

If absentee (member of uniformed service determined to be in missing status) executed power of attorney that expires during period of absentee status, power of attorney continues until 30 days after absentee status is terminated. (Prob. C. 3720[Deering's]). Although divorce or legal separation will generally terminate power of attorney as between spouses (as principal and attorney in fact), power of attorney made by person who becomes absentee will not be terminated by divorce or legal separation, if it so provides. (Prob. C. 3722[Deering's], 4154[Deering's]).

21.16 REAL PROPERTY:

Estates in real property, in respect to duration, are either estates of inheritance or perpetual estates, estates for life, estates for years or estates at will. (C.C. 761). Estates tail are abolished. (C.C. 763). Joint tenancy and tenancy in common are recognized and defined (C.C. 682-83, 685), but joint tenancy is created only when expressly declared in transfer to be such (C.C. 683). No tenancy by entirety is recognized. (156 C. 195, 103 P. 931; 142 Cal. App. 2d 794, 299 P.2d 281).

Condominium is recognized as estate consisting of undivided interest in common in portion of parcel of real property together with separate interest in space called unit, with boundaries sufficiently described on recorded final map, parcel map or condominium plan, and filled with air, earth, or water, or any combination thereof. (C.C. 783, 1351[f]).

Rule in Shelley's Case has been abolished. (C.C. 779).

See also topics 21.05 Curtesy, Deeds, Dower, Landlord and Tenant; categories 5 Civil Actions and Procedure, topic Partition; Debtor and Creditor, topic Homesteads; Documents and Records, topic Records; Family, topic Husband and Wife; Mortgages, topic Mortgages of Real Property.

Foreign Conveyances or Encumbrances.

Conveyance or encumbrance acknowledged in conformity with law of state where acknowledged may be recorded. (C.C. 1189).

21.17 TRUST DEEDS:

See category 20 Mortgages, topic 20.04 Mortgages of Real Property.

22 TAXATION

22.01 ADMINISTRATION:

No single officer or board has general supervision of administration of tax laws. Information and forms relating to indicated taxes may be obtained at these offices in Sacramento: State Controller (Estate Tax and Generation-Skipping Tax); Franchise Tax Board (Personal Income and Corporation Tax); State Board of Equalization (Sales and Use). County (or city) assessor administers most property taxes.

Collection.

No legal or equitable process may issue from any court against State or any officer thereof to prevent or enjoin collection of any tax. Legislature may provide manner to recover payment of tax claimed to be illegal, with interest. (Const., Art. XIII, §32). No injunction or writ of mandate or other legal or equitable process may issue in any suit, action, or proceeding against any county, municipality, or district, or any officer thereof, to prevent or enjoin collection of property taxes. (Rev. & Tax C. 4807[Deering's]).

State’s right to collect state tax liability subject to limitation that no levy upon earnings of employee held by employer is effective unless such levy is made in accordance with provisions for wage garnishment. Other methods of collection may not be used to require employer to withhold earnings in payment of state tax liability. (C.C.P. 706.071[Deering's]).

State Controller must instruct, advise, and direct tax collectors as to their duties and may obtain opinion of Attorney General upon any questions of law. (Govt. C. 30300). Committee on County Tax Collecting Procedures appointed by State Controller and consists of ten members, two county auditors, four county tax collectors, two county assessors, and two members of county board of supervisors. (Govt. C. 30302).

Tax collector must collect all property taxes (Rev. & Tax C. 2602[Deering's]) and be redemption officer of county (Rev. & Tax C. 4105[Deering's]).

City legislative body must by ordinance provide system for assessment, levy, and collection of city property taxes. (Govt. C. 43000).

Unless it is city and county, city may transfer assessment and tax collection duties performed by city assessor and tax collector to assessor and tax collector of county. (Govt. C. 51500, 501). Collection of unpaid taxes levied on property by city must be enforced by sale of property in manner, at time, and upon penalties, of property sold for nonpayment of county taxes; real property so sold may be redeemed within time and upon terms of property sold for nonpayment of county taxes. (Govt. C. 51517).

City charter or city ordinance may designate county officers to perform duties of city legislative body, assessor, tax collector, or other officers. (Govt. C. 51542). County assessment roll made annually by county assessor and equalized and corrected by board of supervisors must be basis for levying taxes of chartered cities. (Govt. C. 51546). Levied taxes must be collected at time and in manner of county taxes and be paid into county treasury; after deduction of county's compensation, net amount of taxes must be paid to city. (Govt. C. 51553).

Attorney General or appropriate official of any political subdivision may bring suits in courts of other states to collect taxes legally due State or any political subdivision thereof. Officials of other states that extend like comity to State are empowered to sue for collection of such taxes in courts of State. (Rev. & Tax C. 31[Deering's]).

State Taxes.

California property taxes are generally not administered, assessed or collected by state.

County and Municipal Taxes.

Local property taxes consist of ad valorem property taxes upon all property, real and personal, as defined above.

County taxes levied and collected in accordance with following outline.

Most cities levy and collect property taxes in accordance with county scheme. Many cities assess property and collect taxes through county officers, thus making for uniformity and eliminating confusion.

Exemptions.

See topic 22.16 Property Taxes, subhead Exemptions.

Exemption for timber whose immediate harvest value is so low that, if not exempt, tax would amount to less than cost of administering and collection, but no authority to exempt timber with estimated immediate harvest value of more than $3,000. (Rev. & Tax C. 38116[Deering's]).

Liability of Corporations.

Banks and insurance companies subject to county and municipal taxes on any real estate they possess (but on real estate only). (Const. Art. XIII, §§27, 28[f][1]). Other corporations subject to all local taxes. Upon request of assessor, nonprofit public benefit or nonprofit mutual benefit corporation owning, claiming, possessing or controlling property in state subject to local assessment must make available true copy of business records relevant to amount, cost and value of all property that it owns, claims, possesses or controls within county. (Corp. C. 6214, 8214).

Valuation of Property.

All property subject to general property taxation assessed at full value. (Rev. & Tax C. 401[Deering's]). Certain open-space properties are subject to special valuation treatment. (Const., Art. XIII, §8; Rev. & Tax C. 421-430.5[Deering's]). Maximum amount of any ad valorem tax on real property is limited to 1% of "full cash value" with exception for ad valorem taxes or special assessments to pay interest and redemption charges on certain types of indebtedness.

(Const. Art. XIIIA, §1). Full cash value is defined as fair market value as of lien date for 1975 or, for property which is purchased, newly constructed or changes ownership after 1975 lien date, date of purchase or change of ownership or on which new construction is completed (or, if uncompleted, on lien date). (Rev. & Tax C. 110.1[Deering's]). Adjustments thereafter to full cash value may reflect from year to year change in California Consumer Price Index not to exceed 2% for any given year or comparable data for area under taxing jurisdiction, or may be reduced to reflect substantial damage, destruction or other factors causing decline in value. (Const., Art. XIII A, §2; Rev. & Tax C. 51[Deering's]). Relief from reassessment is provided for certain transfers including intrafamily transfers (Rev. & Tax C. 62[m][Deering's], 62[n][Deering's], 63[Deering's], 63.1[Deering's]), transfers between registered domestic partners (Rev. & Tax C. 62[p][Deering's]), certain transfers by senior citizens or disabled person (Rev. & Tax C. 69.5[Deering's]) and disaster victims (Rev. & Tax C. 69[Deering's]). "Purchased" defined. (Rev. & Tax C. 67[Deering's]). "Change in ownership" defined. (Rev. & Tax C. 60-66[Deering's], 68[Deering's]). "Newly constructed" defined. (Const., Art. XIII A, §2; Rev. & Tax C. 70[Deering's], 73-74.7[Deering's]).

Assessment.

All property (except state-assessed property) within state is assessed by county or city assessors on first day of Jan. preceding fiscal year for which taxes are levied. (Rev. & Tax C. 405[Deering's], 2192[Deering's]). Property changing ownership or newly constructed is subject to supplemental assessments, based upon reappraisals of full cash value on date change of ownership occurs or new construction is completed. (Rev. & Tax C. 75-75.80[Deering's]). New construction does not include alterations done to make structure accessible to disabled persons. (Rev. & Tax C. 74.6[Deering's]).

All persons owning taxable personal property other than manufactured home subject to Rev. & Tax C. 5800 et seq.[Deering's] having aggregate cost of $100,000 or more for any assessment year must file annual signed property statement with assessor. All persons owning personal property that does not require filing of property statement, or real property, shall file property statement upon assessor's request. (Rev. & Tax C. 441[Deering's]). Property statement must show all taxable property owned, claimed, possessed, controlled or managed by person filing. (Rev. & Tax C. 442[Deering's]). Assessor will estimate value of property based upon his own information in absence of compliance with written request therefore. (Rev. & Tax C. 501[Deering's]). Penalty for failure to file annual statement (subject to possible abatement for reasonable cause) is 10% of value of unreported taxable tangible property placed on current roll. (Rev. & Tax C. 463[Deering's]). If any person conceals tangible personal property to evade taxation, penalty imposed is 25% of additional assessed value. If any person obtains reduced assessment of tangible property through fraud, penalty imposed is 75% of additional assessed value. (Rev. & Tax C. 502-04[Deering's]). Interest at rate of 0.75% per month is added to tax. (Rev. & Tax C. 506[Deering's]). Upon change of ownership of real property transferee must file change of ownership statement in county where property located. (Rev. & Tax C. 90[Deering's], 480[Deering's]). Penalty of greater of $100 or 10% of current year's taxes on property for noncompliance (with maximum of $2,500 if noncompliance was not willful and with possibility of abatement if reasonable cause exists). (Rev. & Tax C. 482[Deering's], 483[Deering's]). Changes in control of corporation, partnership, limited liability company or other legal entity are subject to similar requirements. (Rev. & Tax C. 480.1[Deering's], 480.2[Deering's], 482[Deering's]).

Property which escapes assessment shall be assessed within four years after July 1 of assessment year in which it escaped assessment or was underassessed. In event of willful concealment of tangible personal property or required but unrecorded change in ownership, assessment shall be made eight years after July 1 of assessment year in which it was underassessed or escaped assessment. (Rev. & Tax C. 532[Deering's]).

Assessor prepares and delivers to auditor two assessment rolls listing all property in county on or before July 1 of year (unless State Board of Equalization ["SBE"] grants extension of deadline). (Rev. & Tax C. 601[Deering's], 155[Deering's], 616[Deering's], 617[Deering's]). (For procedure regarding supplemental rolls, see Rev. & Tax C. 75.10-75.55[Deering's].) State assessed property and real and personal property, taxes on which are lien on real property sufficient to secure payment of taxes, are placed on secured roll. All other property is placed on unsecured roll. (Rev. & Tax C. 109[Deering's]). Changes in assessments are easiest to obtain from county assessor before completion and delivery of assessment rolls. (See Rev. & Tax C. 616[Deering's], 1614[Deering's]). For later correction of defects not involving exercise of judgment as to value, see Rev. & Tax C. 4831 et seq.[Deering's]

Notice of increases (other than increase due to annual inflation adjustments or to changes in assessment ratio) is given to each assessee of real property on secured roll. (Rev. & Tax C. 619[Deering's]). Persons affected by regular assessment may apply to county board of equalization or assessment appeals board for reduction between July 2 and Sept. 15. (Rev. & Tax C. 1603[b][Deering's]). Applications for reduction of supplemental assessments must be made 60 days from date of special notice. (Rev. & Tax C. 75.31[c][Deering's]). Filing period is 12 months following date of notice if assessor and assessee stipulate in writing to error in assessment resulting from assessor's value determination. (Rev. & Tax C. 1603[c][Deering's]). Application must be in writing (on form prescribed by SBE) and verified, show facts claimed to require reduction, and state applicant's opinion as to full value of property. (Rev. & Tax C. 1603[a][Deering's]).

After giving notice, county board of equalization that hears application for reduction must equalize assessment of property on local roll by determining full value of individual property, by assessing any taxable property that has escaped assessment, correcting amount, number, quantity, or description of property on local roll, canceling improper assessments, and by reducing or increasing individual assessment. (See Rev. & Tax C. 1610.8[Deering's].) Subject to certain exceptions, applicant's opinion of market value will prevail if assessment appeals board fails to make final determination on application within two years of its filing, unless taxpayer and board agree in writing to extension. (Rev. & Tax C. 1604[c][Deering's]).

Claim for refund may be filed with board of supervisors. (Rev. & Tax C. 5097[Deering's]). Grounds for recovery are in Rev. & Tax C. 5096[Deering's]. Claim for refund must be filed within later of four years after making tax payment or one year after later of date tax collector mails notice of overpayment under Rev. & Tax C. 2635[Deering's] or period agreed to pursuant to Rev. & Tax C. 532.1[Deering's]. (Rev. & Tax C. 5097[a][2][Deering's]). Claim for refund of escape assessment must be filed within latter of period in Rev. & Tax C. 5097(a)(2)[Deering's] or 60[Deering's] days after final determination by assessment appeals board. (Rev. & Tax C. 5097[c][Deering's]). Application for reduction of assessment may be sufficient refund claim. (Rev. & Tax C. 5097[b][Deering's]).

Persons whose property was damaged by misfortune or calamity may apply for reassessment of that property within time provided in local ordinance or within 12 months of misfortune or calamity, whichever is later. (Rev. & Tax C. 170[Deering's]). After receiving application, assessor will appraise property to determine its value before and after calamity. If difference is more than $10,000, assessor must determine percentage reduction in value and reduce taxes due on property by same percentage. (Rev. & Tax C. 170[b][Deering's]).

Time for Payment.

Taxes upon property on unsecured roll are due and payable on Jan. 1 lien date. (Rev. & Tax C. 2192[Deering's], 2901[Deering's]). Taxes on unsecured roll as of July 31 if unpaid are delinquent Aug. 31 and thereafter 10% (or possibly greater) penalty payable. Taxes added to unsecured roll after July 31, if unpaid are delinquent and subject to 10% penalty (with possibility of further increases) on last day of month succeeding month of enrollment. (Rev. & Tax C. 2922[Deering's]). Taxes upon all personal property on secured roll, and one-half of taxes upon real property are due and payable on Nov. 1 (Rev. & Tax C. 2605[Deering's]), become delinquent Dec. 10 next thereafter at 5 P.M. and, unless paid prior thereto, are subject to 10% penalty (Rev. & Tax C. 2617[Deering's]). Remaining half of taxes on real property payable Feb. 1 (Rev. & Tax C. 2606[Deering's]), delinquent Apr. 10 at 5 P.M. and unless paid, subject to 10% penalty (Rev. & Tax C. 2618[Deering's]). If Dec. 10 or Apr. 10 is Sat., Sun. or holiday, taxes delinquent at 5 P.M. on next business day. (Rev. & Tax C. 2619[Deering's]). Taxes due on supplemental assessments are due on mailing date of bill and are delinquent on Dec. 10 (first installment) and Apr. 10 (second installment) if assessment is mailed within months of July through Oct. or, otherwise, on last day of month following month in which bill is mailed (first installment) and last day of fourth month following date first installment is delinquent (second installment). (Rev. & Tax C. 75.52[Deering's]).

Medium of Payment.

Taxes must be paid only in permitted mediums. (Rev. & Tax. C. 2501[Deering's]). Tax collector may accept, or require under certain circumstances, electronic funds transfers as payment for purchase at tax sale, any tax or assessment, or redemption. (Rev. & Tax C. 2503.2[Deering's]). Subject to restrictions, negotiable paper may be accepted as payment of any tax or assessment or on redemption. (Rev. & Tax C. 2505[Deering's]). Tax collector may accept any authorized method of payment for tax-defaulted property and tax-defaulted property sold at public auction. (Rev. & Tax C. 3451[Deering's]).

Lien.

Tax, penalty or interest, including redemption penalty or interest, on real property is lien against property assessed. (Rev. & Tax C. 2187[Deering's]). Exception, in some instances, for real property which has escaped assessment and which has been subsequently transferred. (Rev. & Tax C. 531.2[Deering's]). Under certain circumstances personal property taxes may be lien on any real property of owner. (Rev. & Tax C. 2189[Deering's]). Lien attaches on first day in Mar. preceding fiscal year for which taxes are levied and continues until tax paid. (Rev. & Tax C. 2192[Deering's]).

Sale and Deeding for Delinquent Taxes.

On or before June 8, tax collector publishes notice of impending default for failure to pay taxes on real property. (Rev. & Tax C. 3351[Deering's]). On July 1 unpaid taxes areby operation of law declared in default. (Rev. & Tax C. 3436[Deering's]). Annually, on or before Sept. 8, tax collector publishes affidavit that real property is in default together with list of all such real property. (Rev. & Tax C. 3371-3372[Deering's]). Annually, on or before June 8, tax collector publishes notice of intent to sell all property which will be tax defaulted for one of following: (a) Five years or more on date specified; (b) three years or more on date specified in case of residential real property that could serve public health benefit by providing housing or services directly related to low income persons, for which city, county, city and county, or nonprofit organization has made request to offer property at public auction; (c) three years or more in case of nonresidential commercial property defined in Rev. & Tax C. 3691[Deering's] in applicable county on date specified. (Rev. & Tax C. 3361[Deering's]). Notice of such intent also mailed to last known address of last assessee not less than 21 nor more than 35 days before date power to sell for nonpayment of taxes arises. (Rev. & Tax C. 3365[Deering's]). Five years or more after property becomes tax-defaulted, or three years or more in case of nonresidential commercial property, tax collector may sell and shall attempt to sell all or portion of property which has not been redeemed. (Rev. & Tax C. 3691[Deering's]). Property must be offered for sale for not less than total amount necessary to redeem, plus costs. (Rev. & Tax C. 3698.5[Deering's]).

Penalties.

See catchlines Assessment, Time for Payment, Sale and Deeding for Delinquent Taxes, supra.

22.02 ALCOHOL, BEVERAGES AND TOBACCO TAXES:

Alcoholic Beverages Tax.

Various taxes are levied on beverage alcohol. (Rev. & Tax C. 32001 et seq.[Deering's]).

Cigarette Tax.

Imposed by Rev. & Tax C. 30001 et seq.[Deering's]

22.03 BUSINESS TAXES:

Franchise Tax.

See category 2 Business Organizations, topic 2.03 Corporations.

22.04 CORPORATE TAXES:

See category 2 Business Organizations, topic 2.03 Corporations, subhead Taxation.

22.05 EMPLOYMENT TAXES:

Unemployment Compensation and Disability Tax, in form of "contributions" is imposed by Unemployment Insurance Code. (Un. Ins. C. 1 et seq.[Deering's]).

Contributions are required from subject employers to provide for unemployment compensation benefits and from subject employees to provide for disability benefits.

Contributions are required from every employer having in his employ which for some portion of day within current or preceding calendar year employed one or more employees and paid in wages in excess of $100 during any calendar quarter (Un. Ins. C. 675[Deering's], 976[Deering's], 976.6) and from each of his employees (Un. Ins. C. 2901). Each employer must file report of contributions and report of wages paid to his or her workers. (Un. Ins. C. 1088).

Exemptions.

Applicable to both employer and employee contributions include among others, certain domestic service; service on non-American vessel; employment of parents, spouse or minor children of employer; federal government employment except as provided otherwise by federal or state legislation; services for certain nonprofit organizations; services covered by unemployment compensation law enacted by Congress (Un. Ins. C. 629-656).

Rates of contribution are: Employers' rates based on reserve ration and range from 0.1% to 5.4%; no employer is eligible for contribution rate of more or less than 3.4% for any rating period unless his or her reserve account has been subject to benefit charges during period of 12 complete consecutive calendar quarters ending on computation date and he or she is qualified under Un. Ins. C. 977[Deering's] and 977.5. (Un. Ins. C. 977-982[Deering's]). Schedules of rates used vary according to balance in State unemployment fund. Director declares worker contribution rate on wages on or before Oct. 31 each year; rate not to exceed 1.5 percent or be less than 0.1 percent. (Un. Ins. C. 984[Deering's]). No contributions are required on wages from employers after remuneration with respect to employment equal to four times maximum weekly benefit for each calendar year specified in Un. Ins. C. 2655 multiplied by 13 and divided by 55% has been paid to individual by employer. (Un. Ins. C. 985[Deering's]).

Withholding.

Contributions of employees must be withheld from wages by employer. (Un. Ins. C.

986[Deering's]).

Payment.

Employer contributions to state unemployment fund are due and payable on first day of calendar month following close of each calendar quarter. (Un. Ins. C. 1110[Deering's]). Depending upon timing and amounts collected, employee contributions collected during month may be remitted in conformity with I.R.C. 6302, on or before 15th day of month subsequent to collection, or on or before last day of month following close of calendar quarter. Certain large employers are required to remit following end of eighth-monthly periods. Payment by electronic funds transfer required under some conditions. (Un. Ins. C. 13021). If contributions not paid before becoming delinquent, penalty of 10% plus interest at rate determined semiannually by Franchise Tax Board. (Un. Ins. C. 1110-13[Deering's], 13021). Additional penalties are imposed for failure to make required returns. (Un. Ins. C. 1112.5, 1126).

Voluntary Plan.

Employer may make provision for payment of disability benefits under approved voluntary plan of insurance or self insurance (Un. Ins. C. 3251-3272) and in such case no employee contributions are required (Un. Ins. C. 3252) but employer is authorized to deduct amount not exceeding employee contributions authorized in Un. Ins. C. 984[Deering's] and 985[Deering's]. (Un. Ins. C. 3260).

See also category 11 Employment, topic 11.02 Labor Relations, subhead Unemployment Insurance Code.

22.06 ENVIRONMENTAL TAXES:

Energy Resources Surcharge Law.

(Rev. & Tax C. 40016 et seq.[Deering's]).

Hazardous Substances Tax Law.

(Rev. & Tax C. 43001 et seq.[Deering's]).

Mines, Minerals and Fisheries Taxes.

Timber yield tax imposed by Rev. & Tax C. 38101 et seq.[Deering's]

Solid Waste Disposal Site Cleanup and Maintenance Fee Law.

(Rev. & Tax C. 45001 et seq.[Deering's]).

Oil Spill Response, Prevention, and Administration Fees.

(Govt. C. 8670.48; Rev. & Tax C. 46001 et seq.[Deering's]).

Underground Storage Tank Maintenance Fee Law.

(Rev. & Tax C. 50101 et seq.[Deering's]).

22.07 ESTATE TAX:

Whether federal estate tax payable to United States, California estate tax imposed equal to portion of maximum allowable amount of credit for state death taxes, allowable under applicable federal estate tax law, which is attributable to property in California. (Rev. & Tax. C. 13302[Deering's]).

Apportionment.

Where decedent leaves property in California and in another state or states, portion of maximum state death tax credit allowable against federal estate tax law attributable to California property is determined under Rev. & Tax C. 13303[Deering's].

Interstate Cooperation.

Uniform Act on Interstate Arbitration of Death Taxes adopted (1943, adopted 1949). (Rev. 7 Tax C. 13820). Uniform Act on Compromise of Death Taxes adopted (1943, adopted 1949). (Rev. 7 Tax C. 13801 et seq.).

22.08 GASOLINE AND SPECIAL FUELS TAXES:

Fuel Tax.

Imposed by Rev. & Tax C. 7301 et seq.[Deering's]

Gasoline Tax.

See subhead Fuel Tax, supra.

22.09 GIFT TAX:

See topic 22.12A Inheritance Tax and Gift Tax.

22.10 [RESERVED]

22.11 INCOME TAX:

Personal income tax is imposed by Personal Income Tax Law. (Rev. & Tax C. 17001-19443[Deering's]).

On Whom Imposed.

Individuals, fiduciaries, estates, trusts and common trust funds are subject to annual tax on their entire taxable income. Residents are taxed on their worldwide income. Nonresidents are taxed on income derived from California sources. (Rev. & Tax C. 17041[Deering's]). If decedent was resident at time of death, all estate income is taxable by California. Entire trust income is taxable by California if either fiduciary or beneficiary is resident. (Rev. & Tax C. 17742[Deering's]).

Deductions include many of those provided by Internal Revenue Code. Standard deductions are recomputed annually by Franchise Tax Board based upon percentage change in the California Consumer Price Index. (Rev. & Tax C. 17073.5[Deering's]). Standard deductions for 2007 are $3,516 (single or married or registered domestic partner filing separate return) and $7,032 (married or registered domestic partner filing joint return, unmarried head of household, or qualifying widow[er]). (Franchise Tax Bd. Announcement, Aug. 29, 2007).

Credits for Personal Exemptions.

For taxable year beginning on or after Jan. 1, 1989: Single person, married filing separate return, or unmarried head of household $52; married filing joint return or surviving spouse $104; $227 for each dependent, additional $52 for married filing separate return if spouse blind, has no gross income and not dependent of another taxpayer; $52 if taxpayer blind; if age 65 or over, additional $52. (Rev. & Tax C. 17054[Deering's]). Above credits are indexed for inflation. (Rev. & Tax C. 17054[Deering's], 17054.5[Deering's]). Beginning in 1991, personal exemption credits are phased out where federal adjusted gross income exceeds indexed threshold amounts ($200,000 [joint return or surviving spouse], $150,000 [head of household], or $100,000 [single or married filing separate]). (Rev. & Tax C. 17054.1[Deering's]). Credit (maximum amount indexed annually for inflation) is allowed for 30% of net tax otherwise payable by qualified joint custody head of household or other qualified individuals. (Rev. & Tax C. 17054.5[Deering's]). Credit is allowed for 2% of taxable income of qualified senior head of household. (Rev. & Tax C. 17054.7[Deering's]).

Estates and trusts are allowed credits of $10 and $1 respectively against tax. (Rev. & Tax C. 17733[Deering's]).

Nonresidents and part-year residents must prorate credits. (Rev. & Tax C. 17055[Deering's]). Compensation of certain employees of foreign country is excluded. (Rev. & Tax C. 17146[Deering's]).

Credits allowed for household and dependent care (Rev. & Tax C. 17052.6[Deering's]); for research activities (Rev. & Tax C. 17052.12[Deering's]); for establishing, constructing, or contributing to certain child care programs or facilities for primarily taxpayer's employees or employees of taxpayer's tenants (Rev. & Tax C. 17052.17[Deering's], 17052.18[Deering's]) (repealed Dec. 1, 2012); to certain qualified renters (Rev. & Tax C. 17053.5[Deering's]); for 10% of certain wages paid to prisoners (Rev. & Tax C. 17053.6[Deering's]); for 10% of wages paid to persons registered in state employment and training program (Rev. & Tax C. 17053.7[Deering's]); for excess contributions for state disability insurance (Rev. & Tax C. 17061[Deering's]); and for credentialed teacher (Rev. & Tax 17052.2[Deering's]).

Rates.

Personal income tax computed in accordance with following tables; however, these baseline income tax brackets are adjusted annually for inflation. (Rev. & Tax C. 17041[Deering's]):

For resident other than head of household, if taxable income is—

over—	but not over—	computed tax is—		of excess over—
$ 0	$3,650	$	1.0%	$ 0
3,650	8,650	36.50 +	2.0%	3,650
8,650	13,650	136.50 +	4.0%	8,650
13,650	18,950	336.50 +	6.0%	13,650
18,950	23,950	654.50 +	8.0%	18,950
23,950		1,054.50 +	9.3%	23,950

For resident head of household, if taxable income is—

over—	but not over—	computed tax is—		of excess over—
$ 0	$7,300	$	1.0%	$ 0
7,300	17,300	73.00 +	2.0%	7,300
17,300	22,300	273.00 +	4.0%	17,300

22,300	27,600	473.00 +	6.0%	22,300
27,600	32,600	791.00 +	8.0%	27,600
32,600		1,191.00 +	9.3%	32,600

Alternative minimum tax is imposed primarily in accordance with I.R.C. 55-59, at rate of 8.5% for any taxable year beginning on or after Jan. 1, 1991, and before Jan. 1, 1996. For any taxable year beginning on or after Jan. 1, 1996 rate is 7%; credit primarily as per I.R.C. 53. For taxable year beginning on or after January 1, 2009 rate is 7.25% or 7.125% depending on whether Director of Finance notifies Joint Legislative Budget Committee on or after April 1, 2009 (Rev. & Tax C. 17062-17063[Deering's]).

Returns and Payment.

Return must be filed with Franchise Tax Board on or before 15th day of fourth month following close of calendar or fiscal year. (Rev. & Tax C. 18566[Deering's]). Franchise Tax Board may grant up to six month extensions of time to file returns (but not to pay tax) with respect to individual, fiduciary, and partnership returns due on or after Apr. 15, 1992. (Rev. & Tax C. 18567[Deering's]).

Tax is payable at time fixed for filing return, without regard to any extension of time for filing return. (Rev. & Tax C. 19001[Deering's]). Each taxpayer who owes California tax not covered by withholding at source must make estimated tax payments. Amount determined under I.R.C. 6654 as modified by Rev. & Tax C. 19136[Deering's] is added to regular tax due for any underpayment of estimated tax. (Rev. & Tax C. 19136[Deering's]). No amount is added if regular tax (after credits) for current year is less than $200 ($100 for married filing separately). (Rev. & Tax C. 19136[c][2][Deering's]).

Persons in military service serving beyond limits of U.S. and their spouses are granted automatic extension of time for filing returns and paying tax, except on income withheld at source. (Rev. & Tax C. 18570[Deering's]). Franchise Tax Board may grant reasonable extensions for filings including for taxpayers residing or traveling abroad. (Rev. & Tax C. 18567[Deering's]).

Tax Conformity.

California's Personal Income Tax law now incorporates by reference much of Internal Revenue Code. (Rev. & Tax C. 17024.5[a][Deering's]). Areas of taxation which now generally conform to federal law include following: Alternative minimum tax as per I.R.C. 55-59 at rate of 8.5% for any taxable year beginning on or after Jan. 1, 1991, and before Jan. 1, 1996. For any taxable year beginning on or after Jan. 1, 1996, rate is 7%, credit in accordance with I.R.C. 53; for taxable year beginning on or after January 1, 2009 rate is 7.25% or 7.125% depending on whether Director of Finance notifies Joint Legislative Budget Committee on or before April 1, 2009 (Rev. & Tax C. 17062-63[Deering's]); items specifically included in or excluded from gross income (Rev. & Tax C. 17081[Deering's], 17131[Deering's]); annuities as per I.R.C. 72, with some modifications (Rev. & Tax C. 17085[Deering's]); travel expenses (Rev. & Tax C. 17270[Deering's]); nondeductibility of sales tax (Rev. & Tax C. 17201[Deering's]); accounting periods and methods, subject to certain exceptions (Rev. & Tax C. 17551[Deering's]); limit on interest deductions as per I.R.C. 163 (Rev. & Tax C. 17201[Deering's]); pass-through of S corporation income to shareholders (Rev. & Tax C. 17087.5[Deering's]); net operating loss deductions, except that no deduction is permitted for income years beginning before Jan. 1, 1987, or on or after Jan. 1, 2002 and before Jan. 1, 2004. NOL carrybacks are not permitted, amount of loss eligible for carryforward by taxpayers varies depending on year, and number of years to which NOL may be carried over is reduced (Rev. & Tax C. 17276-17276.3[Deering's]).

Penalties.

Inexcusable failure to timely file return, 5% of tax for each month or fraction thereof, not to exceed 25% of tax; if failure to file is fraudulent, penalty is 15% of tax for each month or fraction thereof, not to exceed 75% of tax; if return is 60 days late, minimum penalty is lesser of $100 or 100% of tax (Rev. & Tax C. 19131[Deering's]); lesser of 5% plus 0.5% per month (not to exceed 40 months), and 25% of total unpaid tax, for inexcusable failure to pay tax required to be shown on return within 15 days of demand (Rev. & Tax C. 19132[Deering's]); accuracy-related and fraud penalties imposed as provided in I.R.C. 6662 (Rev. & Tax C. 19164[Deering's]). Penalties are also imposed for failure to timely file information returns (Rev. & Tax C. 19133[Deering's], 19172-19175[Deering's], 19181-19184[Deering's]), for underpayments of estimated tax (Rev. & Tax C. 18682[Deering's]) and failure to meet disclosure requirements with respect to quid quo pro contributions (Rev. & Tax C. 19182.5[Deering's]). Franchise Tax Board may abate interest on deficiency or on payment of tax per Rev. & Tax C. 19033[Deering's] where interest or delay attributable to Tax Board officer or employee. (Rev. & Tax C. 19104[Deering's]). Criminal penalties and fines are also provided for evasion of tax, false returns, and willful failure to remit withheld tax. (Rev. & Tax C. 19701-19714[Deering's]). Collection cost recovery fees also imposed. (Rev. & Tax C. 19254[Deering's]).

As to taxes on corporations, based on income, see category 2 Business Organizations, topic 2.03 Corporations, subhead Taxation; also category 16 Insurance, topic Insurance Companies.

22.12 INHERITANCE TAX:

See topic Inheritance and 22.09 Gift Tax.

22.12A INHERITANCE TAX AND GIFT TAX:

Inheritance Tax and Gift Tax (former Rev. & Tax C. 13301-14902[Deering's] and 15101-16652[Deering's]) repealed effective June 9, 1982. Maximum allowable credit under federal estate tax law for state death taxes is attributable to property located in California imposed as California estate tax. (Rev. & Tax C. 13302[Deering's]).

Procedures respecting administration and collection of such tax enacted effective June 30, 1982, in Rev. & Tax C. 13530 et seq.[Deering's] Personal representative shall file copies of federal estate tax return with state controller. (Rev. & Tax C. 13501[Deering's]). Tax is payable at decedent's death and is delinquent nine months thereafter. (Rev. & Tax C. 13531-13532[Deering's]).

Tax is also imposed on all generation skipping transfers as defined by federal law taxing such transfers, where original transferor is resident of California at date of original transfer, or where property transferred is in California. (Rev. & Tax C. 16702[Deering's], 16710[Deering's]). Provisions respecting administration and collection of tax in Rev. & Tax C. 16800 et seq.[Deering's] Returns reporting generation skipping transfers must be filed on prescribed form stating amount of tax due with State Controller on or before last day for filing comparable federal return. (Rev. & Tax C. 16720-16721[Deering's]). Tax becomes delinquent from and after last day for filing return. (Rev. & Tax C. 16752[Deering's]).

22.13 [RESERVED]

22.14 MOTOR VEHICLE TAXES:

See category 23 Transportation, topic 23.01 Motor Vehicles, subhead Motor Vehicle Taxes.

22.15 PREMIUM AND PRIVILEGE TAXES:

See category 16 Insurance, topic 16.01 Insurance Companies, subhead Premium Tax.

22.16 PROPERTY TAXES:

Assessment.

Governed by Rev. & Tax C. 201 et seq.[Deering's] See topic 22.01 Administration, subhead County and Municipal Taxes, catchline Assessment.

Exemptions.

Property (real or personal) exempt from taxation includes property owned by state or, subject to certain exceptions, by local government (Rev. & Tax C. 202[Deering's]), property of nonprofit and public corporations leased to and used exclusively by government (Rev. & Tax C. 231[Deering's]), property used for free public libraries and museums or for public schools, community and state colleges and state universities (Rev. & Tax C. 202[Deering's]), property used exclusively for religious worship (Rev. & Tax C. 207[Deering's]), certain property used for religious, hospital, scientific or charitable purposes (including property used for housing and related facilities for certain elderly or handicapped families or emergency or temporary shelter for homeless persons, or portion of rental property serving lower income households), or school purposes of less than collegiate grade, or nursery school or noncommercial educational FM broadcast station or educational television station, and owned and operated by certain nonprofit organizations (Rev. & Tax C. 214-214.6[Deering's]), property leased for 35 years or more used exclusively for low income housing and operated by charitable organizations (Rev. & Tax C. 236[Deering's]), all personal and certain real property used for qualifying purposes by Congressionally chartered nonprofit veterans organizations (Rev. & Tax C. 215[Deering's], 215.1[Deering's]), personalty of nonprofit zoological society and possessory interests in publicly owned land used by zoological society (Rev. & Tax C. 222[Deering's], 222.5[Deering's]), property of nonprofit cemeteries (Rev. & Tax C. 204[Deering's]), seed potatoes (Rev. & Tax C. 234[Deering's]), growing crops (Rev. & Tax C. 202[Deering's]), immature fruit and nut trees and vines and certain immature forest trees (Rev. & Tax C. 211[Deering's]), oceanic cargo-containers (Rev. & Tax C. 232[Deering's]), large vessels in state and engaged in transportation of freight or passengers (Rev. & Tax C. 209[Deering's]), large vessels while under construction (Rev. & Tax C. 209.5[Deering's]), certain vessels with market value of $400 or less (Rev. & Tax C. 228[Deering's]), aircraft in state solely for repairs (Rev. & Tax C. 220[Deering's]), aircraft of historical significance under certain conditions (Rev. & Tax C. 220.5[Deering's]), computer equipment of San Diego Supercomputer Center (Rev. & Tax C. 226[Deering's]), business inventories (Rev. & Tax C. 219[Deering's]), notes, debentures, bonds, deeds of trust, mortgages, solvent credits, shares, and cash on hand in ordinary course of business and intangible assets and rights of taxable property (Rev. & Tax C. 212[Deering's]), personal property brought into state exclusively for exhibition (Rev. & Tax C. 213[Deering's]), miscellaneous articles displayed in publicly owned art gallery or museum for at least 90 days during preceding year, including certain aircraft displayed in aerospace museums (Rev. & Tax C. 217[Deering's], 217.1[Deering's]), personal effects, household furnishings and pets (Rev. & Tax C. 224[Deering's]), and many motor vehicles subject to vehicle licensing fees (Rev. & Tax C. 10758[Deering's]). Partial exemptions are available for $7,000 of full value of owner-occupied principal residence (Rev. & Tax C. 218[Deering's]), $100,000-$150,000 for principle residence of blind or disabled veterans or their widows (Rev. & Tax C. 205.5[Deering's]), $4,000 of property of certain veterans or, if deceased, of certain of their parents or unmarried spouses (Rev. & Tax C. 205[Deering's], 205.1[Deering's]), and $1,500 of stock in trade of vending stand operated by licensed blind person (Rev. & Tax C. 216[Deering's]). Exemption claim procedure. (Rev. & Tax C. 251-279.5[Deering's]).

Lien.

Taxes declared as lien on real property, and every public improvement assessment declared by law to be lien on real property have priority over all other liens on property, regardless of time of creation. (Rev. & Tax C. 2192.1[Deering's]). Uniform Federal Lien

Registration Act (1978, adopted 1979), found in C.C.P. 2100 et seq.[Deering's]

Property Taxable.

All property not exempt under laws of California or U.S. is taxable in proportion to its full value (which may be fair market value or other value as specified by California Constitution or state statute). (Const. Art XIII, §1). Property includes all matters and things, real, personal and mixed, capable of private ownership. (Rev. & Tax C. 103[Deering's]).

Redemption.

Tax-defaulted property may be redeemed until right of redemption is terminated. (Rev. & Tax C. 4101[Deering's]). Absolute right to redeem under former statutes anytime within five years of date of declaration of default. (22 Cal.2d 269, 138 P.2d 673). Application to redeem made to tax collector who estimates amount necessary to redeem. (Rev. & Tax C. 4105[Deering's], 4105.1[Deering's]). Upon request of redemptioner, tax collector issues certificate of redemption when tax-defaulted property is redeemed. (Rev. & Tax C. 4105.2[Deering's]). Partial redemption permitted under specified circumstances. (Rev. & Tax C. 4131-4159[Deering's]). Redemption in installments permitted. (Rev. & Tax C. 4216-4226[Deering's]).

Penalties.

See topic 22.01 Administration, subhead County and Municipal Taxes, catchlines Assessment, Time for Payment, Sale and Deeding for Delinquent Taxes. See topics 22.10 Income Tax, subhead Personal Income Tax, 22.17 Sales and 22.19 Use Taxes, subheads State Sales Tax, and State Use Tax, catchline Penalties.

Real Estate Conveyance Tax.

See topic 22.18 Stamp and Seal Taxes, subhead Stamp Tax.

22.17 SALES AND USE TAXES:

Statewide base sales tax rate of 7.25% of gross receipts is imposed on sales of tangible personal property by retailers. (Rev. & Tax C. 6051[Deering's], 6051.2[Deering's], 6051.3[Deering's], 6051.5[Deering's], 7203.1[Deering's], Const. Art. XIII, §35). See State Board of Equalization website detailing components of total statewide base sales tax : http://www.boe.ca.gov/news/sp111500att.htm. Exemptions include, among others: gross receipts from sale of aircraft sold to (or for leasing to) common carriers, foreign governments, and nonresidents (Rev. & Tax C. 6366[Deering's], 6366.1[Deering's]), vessels of more than 1,000 tons burden (Rev. & Tax C. 6356[Deering's]), food products under certain circumstances (Rev. & Tax C. 6359[Deering's]), prescription medicines (Rev. & Tax C. 6369[Deering's]), certain mailing lists (Rev. & Tax C. 6379.8[Deering's]), master tapes or master records (Rev. & Tax C. 6362.5[Deering's]), certain motor vehicle fuel used in propelling aircraft (Rev. & Tax C. 6357[Deering's]), aircraft fuel and petroleum products sold to air common carrier, if first destination is foreign (only until federal exemption is repealed) (Rev. & Tax C. 6357.5[Deering's]), sales, furnishing or service of gas, electricity and water, including steam and geothermal steam brines, and heat, when delivered to consumers through mains, lines or pipes (Rev. & Tax C. 6353[Deering's]), sales to U.S., its agencies, instrumentalities, and wholly owned corporations, and American Red Cross (Rev. & Tax C. 6381[Deering's]), occasional sales (Rev. & Tax C. 6006.5[Deering's], 6367[Deering's]), and certain sales to common carriers or foreign air carriers, for use outside state (Rev. & Tax C. 6385[Deering's]).

Tax also imposed on certain leases of personal property. (Rev. & Tax C. 6006[g][Deering's]). Sales or use tax on rentals payable under lease of tangible personal property is payable only during time personal property is situated in California. (Rev. & Tax C. 6006.1[Deering's], 6010.1[Deering's], 6390[Deering's]).

Unless State Board of Equalization ("SBE") requires different period, payments and returns are quarterly, to be made to SBE before end of month following quarter. (Rev. & Tax C. 6451-6452[Deering's], 6455[Deering's]). SBE may require posting of security to insure payment (Rev. & Tax C. 6701[Deering's]), and if estimated measure of sales and use tax liability averages $17,000 or more monthly, $50,000 monthly contingent upon required certification, as determined by SBE, may require prepayments according to specified schedule. (Rev. & Tax C. 6471-6472[Deering's]). If estimated tax liability averages $10,000 or more monthly, payment by electronic funds transfer required except where person collects use tax on voluntary basis. (Rev. & Tax C. 6479.3[Deering's]). Prepayment may also be required for certain distributions of motor vehicle fuel. (Rev. & Tax C. 6480-6480.9[Deering's]).

Penalties are payable of: 10% of any deficiency assessed upon failure to make return or on late returns and payments (Rev. & Tax C. 6511[Deering's], 6591[Deering's]); additional 25% upon failure to file due to fraud (Rev. & Tax C. 6514[Deering's]). Interest is payable on deficiencies at I.R.C. 6621 rate plus three percentage points. (Rev. & Tax C. 6513[Deering's], 6591[Deering's], 6591.5[Deering's], 6592.5[Deering's], 19521[Deering's]). Relief from interest imposed if noncompliance due to disaster. (Rev. & Tax C. 6593[Deering's]). In addition, 50% penalty is imposed for certain knowing failures to obtain valid seller's permit (Rev. & Tax C. 7155[Deering's]), illegal registration of vehicle, vessel or aircraft outside state (Rev. & Tax C. 6485.1[Deering's], 6514.1[Deering's]), etc. Filing of false or fraudulent return with intent to evade tax is misdemeanor. (Rev. & Tax C. 7152[Deering's]).

Local Sales Tax.

City and county sales and use taxes are authorized and differ by locality.

Bradley-Burns Uniform Local Sales and Use Tax Law, effective Apr. 1, 1956 (Rev. & Tax C. 7200-7212[Deering's]), permits adoption of sales and use taxes by city, county, city and county or city redevelopment agency. Any such sales and use tax ordinance must be substantially similar to state sales and use tax law. (See Rev. & Tax C. 7202[Deering's].) SBE acts as collection agency. Combined state and local return is filed with SBE. County rate is 1¼%, city rate is 1% or less. (Rev. & Tax C. 7202[a][Deering's], 7202[h][1][Deering's]).

Additional Transactions and Use Taxes may be imposed by cities, counties, and special taxing districts. (Rev. & Tax C. 7251-7262[Deering's], 7275-7279.6[Deering's]).

Statewide base use tax at rate of 7.25% of sales price of tangible personal property is imposed on storage, use or other consumption in state of tangible personal property purchased from retailer. (Rev. & Tax C. 6201[Deering's], 6201.2[Deering's], 6201.3[Deering's], 6201.5[Deering's], 7203.1[Deering's], Const. Art. XIII, §35). See State Board of Equalization website detailing components of total statewide base use tax : http://www.boe.ca.gov/news/sp111500att.htm. Exemptions include storage, use or consumption of property, gross receipts from sale of which are subject to the sales tax (Rev. & Tax C. 6401[Deering's]), aircraft sold to common carriers, foreign governments, and nonresidents (Rev. & Tax C. 6366[Deering's], 6366.1[Deering's]), certain food products sold under certain conditions (Rev. & Tax C. 6359[Deering's]), prescription medicines (Rev. & Tax C. 6369[Deering's]), master tapes or records (Rev. & Tax C. 6362.5[Deering's]), certain motor vehicle fuel used in propelling aircraft (Rev. & Tax C. 6357[Deering's]), aircraft fuel and petroleum products sold to air common carrier, if first destination is foreign (until Jan. 1, 1994) (Rev. & Tax C. 6357.5[Deering's]), sales, furnishing or service of gas, electricity and water, including steam brines, and heat, and geothermal steam, when delivered to consumers through mains, lines or pipes (Rev. & Tax C. 6353[Deering's]), certain property purchased from unincorporated agency or instrumentality of U.S. (Rev. & Tax C. 6402[Deering's]), qualified property used in space flight (Rev. & Tax C. 6380[Deering's]), certain tangible personal property purchased by new business for use in manufacturing or research and development (Rev. & Tax C. 6377[Deering's]) and tangible personal property, transfer of which is occasional sale (Rev. & Tax C. 6006.5[Deering's],

6367[Deering's]).

Taxation of certain rentals of personal property is achieved primarily through imposition of use tax on such rentals. (Rev. & Tax C. 6009[Deering's], 6010.1[Deering's], 6390[Deering's]).

Retailer must make returns and payments same as in case of sales tax. Every retailer doing business in state must collect use tax on sales subject thereto. (Rev. & Tax C. 6203[Deering's]). Tax required to be collected by retailer and any amount unreturned to customer that is not tax but was collected from customer under representation by retailer that it was tax constitutes debts owed by retailer to state. (Rev. & Tax C. 6204[Deering's]). Use tax on sales of certain vehicles or undocumented vessels collected by Department of Motor Vehicles or Department of Housing and Community Development. (Rev. & Tax C. 6292-6294[Deering's]).

Penalties basically same as for sales tax (see subhead State Sales Tax, supra).

22.18 STAMP AND SEAL TAXES:

Stamp Tax.

No stamp tax imposed on corporate stock or other instruments.

Documentary transfer on deeds or instruments by which real property valued in excess of $100 (exclusive of existing liens and encumbrances) is transferred, if adopted by city and county. (Rev. & Tax C. 11901 et seq.[Deering's]). County rate is $1.10 per $1,000 of value of interest or property conveyed, and city rate is ½ county rate (with credit against county tax) for conforming ordinances. (Rev. & Tax C. 11911[Deering's]). Both seller and buyer are responsible for tax. (Rev. & Tax C. 11912[Deering's]).

22.18A TAX LIENS:

Uniform Federal Lien Registration Act (1978, adopted 1979).

Enacted in C.C.P. 2100 et seq.[Deering's] California adds C.C.P. 2105[Deering's] regarding filings initiated before Jan. 1, 1968.

22.19 USE TAXES:

See topic 22.17 Sales and 22.19 Use Taxes.

22.20 UTILITIES TAX:

Energy resources surcharge law (Rev. & Tax C. 40001 et seq.[Deering's]), imposes taxes on consumption of electrical energy purchased from electric utility (Rev. & Tax C. 40016[Deering's]). Emergency Telephone Users Surcharge Law (Rev. 7 Tax C. 41001 et seq.), imposes tax on amounts paid by every person in state for intrastate telephone communication service (Rev. & Tax C. 41020[Deering's]).

23 TRANSPORTATION

23.01 MOTOR VEHICLES:

Regulated by State Department of Motor Vehicles, 2415[Deering's] First Ave., Sacramento, CA 95818. No Uniform Laws adopted.

Vehicle License.

Registration required annually. (Veh. C. 4601[Deering's], 1651.5[Deering's]). When only one plate issued, must be displayed rear. (Veh. C. 5200[Deering's]). Specified vehicles exempt from registration fees. (Veh. C. 4002[Deering's], 4003[Deering's]). Nonresident members or spouses of members of Armed Forces on active duty within state exempt if vehicle registered in member's state of residence. Resident and nonresident members or spouses of members of Armed Forces exempt if vehicle registered in state where member was regularly assigned and stationed at time of registration. If member or spouse of member of Armed Forces is owner or driver of motor vehicle, must comply with Veh. C. 16021[Deering's]. (Veh. C. 6701[Deering's]). For registration and license fees, see Veh. C. 9250 et seq.[Deering's]

Operator's license required (Veh. C. 12500[Deering's]); original license valid until fifth birthday following date of application (Veh. C. 12816[Deering's]); renewal license valid until fifth year birthday following expiration of renewed license (Veh. C. 12816[Deering's]); but licenses of servicemen absent from state continue during service (Veh. C. 12817[Deering's]). Persons under 16 may not be licensed, except in special cases (Veh. C. 12513[Deering's]), and may not be employed to drive on highways (Veh. C. 12515, et seq.[Deering's]). Applicants must submit satisfactory proof that presence in U.S. is authorized under federal law. (Veh. C. 12801.5[Deering's]). For members of Armed Forces, see subhead Nonresident Operator, infra.

Titles must be registered with Department of Motor Vehicles, which issues certificates of registration and of ownership. (Veh. C. 4000[Deering's], 4450[Deering's]). Registration of off-road vehicles, as defined (Veh. C. 38006[Deering's]), required (Veh. C. 38010[Deering's]).

Sales.

On sale, certificate of ownership must be endorsed and dated by seller (Veh. C. 5600[Deering's], 5750-53[Deering's]), and purchaser must file same with Department within ten days (Veh. C. 5902[Deering's]). Upon any sale or transfer previous owner must within five days notify Department, giving date of transfer, names and addresses of parties and actual mileage as indicated by odometer. (Veh. C. 5900[Deering's]). Dealer must give notice of transfer of vehicle and mileage indicated on odometer within five days after transfer, except when he transfers new unregistered vehicle to another dealer. (Veh. C. 5901[Deering's]). On sale of new car bill of sale must be issued and filed with Department. Conditional sales contracts for automobiles regulated by Rees Levering Act. (C.C. 2981 et seq.).

Liens.

No security interest in registered vehicle, whether or not registered before creation of interest, is perfected until secured party or his successor or assignee has deposited either physically or by electronic transmission, with Department certificate of legal ownership or application for registration as legal owner. (Veh. C. 6300[Deering's]). Deposit with Department of certificate of ownership showing secured party as legal owner perfects security interest, and rights of all persons in vehicle are subject to Uniform Commercial Code (Veh. C. 6301[Deering's]) but vehicle is subject to certain liens for repairs, storage, etc. (C.C. 3068 et seq., 3051a). Fee for filing application for transfer of registration to secured party is $3. (Veh. C. 9256[Deering's]). Special provisions relate to new security interests created within ten days after discharge of prior security interest (Veh. C. 5905[Deering's]) and security interests in vehicles constituting inventory (Veh. C. 5907[Deering's]).

Identification Marks.

Misdemeanor knowingly to buy, sell, receive, dispose of, offer for sale, or have possession of vehicle or component part thereof from which manufacturer's serial or identification number has been removed, defaced, altered or destroyed unless vehicle or component part has attached identification number assigned or approved by Department of Motor Vehicles. (Veh. C. 10751[Deering's], 40000.9[Deering's]).

Operation Prohibited.

By intoxicated person (0.08% or more blood alcohol) (Veh. C. 23152[Deering's]), or without license (Veh. C. 12500[Deering's]).

Size and Weight Limits.

Regulated by Veh. C. 35000 et seq.[Deering's]

Equipment Required.

Regulated by Veh. C. 24000 et seq.[Deering's] Specific requirements for off-road vehicles. (Veh. C. 38335[Deering's], 38355[Deering's], 38365[Deering's] and 38390[Deering's]).

Lights Required.

Regulated by Veh. C. 24250 et seq.[Deering's]

Inspection.

Upon initial registration, transfer of ownership or registration of previously out-of-state vehicle must have pollution control compliance certificate for most vehicles. (Veh. C. 4000.1[Deering's], 4000.2[Deering's]). Mechanical condition and equipment inspections by California Highway Patrol provided for. (Veh. C. 2814[Deering's]). Other various inspections are provided for. (Veh. C. 2802 et seq.[Deering's]).

Traffic Regulations.

Regulated by Veh. C. 21000-23336[Deering's].

Accidents.

Driver involved in accident must stop (Veh. C. 20001[Deering's], 20002[Deering's]); if property damage only must advise of his and owner's name, address and registration number of vehicle he is driving and exhibit driver's license and evidence of financial responsibility upon request (Veh. C. 20002[Deering's]). If bodily injury or death, driver must give above information and give assistance, and, upon death, report same without delay to authorities if none present at scene, and in all injury or death accidents must file written report within 24 hours with police or highway patrol for accidents in cities and highway patrol for accidents outside cities. (Veh. C. 20003-04[Deering's], 20008[Deering's]). Other reports required to be filed within ten days where property damage exceeds $750 or bodily injury or death involved. (Veh. C. 16000, et seq. [Deering's]; see subhead Financial Responsibility Act of 1975, infra).

Removal of Parked or Abandoned Vehicles

Law enforcement and persons employed by cities, counties, other agencies to enforce parking laws have authority (Veh. C. 22650[Deering's]) to remove vehicles under specified circumstances (Veh. C. 22651[Deering's]). The statutes also regulate storage, impoundment, towing. removal in specific instances and disposition of removed vehicle (Veh. C. 22650 et seq. [Deering's])

Drunk Driving.

Person with 0.08% blood alcohol level (0.01% if under age 21) prohibited from driving motor vehicle. (Veh. C. 23136[Deering's], 23152[Deering's]). Ignition interlock device pilot program implemented in certain counties for first time offenders (Veh. C. 23700–23702).

Liability of Owner.

Owner of motor vehicle is liable for negligence of any person operating same with his consent, express or implied. (Veh. C. 17150[Deering's]). No limitation on liability of owner for his own negligence or that of his agent or servant; but in other cases liability imputed under statute is limited to following amounts in any one accident: $15,000 for death of or injury to one person; $30,000 for death of or injury to two or more persons in same accident; $5,000 for damage to property (Veh. C. 17151[Deering's]); and payment by such owner or bailee of owner, personal representative of decedent owner, or bailee in settlement of bona fide claims, whether reduced to judgment or not, aggregating $30,000 to two or more persons injured or killed in one accident extinguishes liability (Veh. C. 17155[Deering's]). Owner who is held liable under above provision is subrogated to claim against operator. (Veh. C. 17153[Deering's]). Vendor under conditional sale contract or mortgagee not in possession is not owner within meaning of above provision. (Veh. C. 17156[Deering's]).

Guests.

Owner or operator is liable for injury to or death of guest in vehicle through accident in course of operation thereof where such accident was caused by negligence, or willful misconduct of operator. (8 C.3d 855, 106 C.Rptr. 388, 506 P.2d 212. When owner is passenger see Veh. C. 17158[Deering's]).

Financial Responsibility Act of 1975 requires all California licensed drivers to meet certain financial responsibility limits. (Veh. C. 16020 et seq.[Deering's]). Department of Motor Vehicles must suspend driving privilege of any person willfully failing, refusing, or neglecting to make an accident report as required. (Veh. C. 16004[Deering's]). Every driver and owner of a motor vehicle must maintain some form of financial responsibility consisting of either self-insurance; maintenance of a liability insurance policy which covers driver of vehicle involved in accident, bond or cash deposit; or by showing vehicle is owned or operated by U.S., State of California or municipality. (Veh. C. 16020[Deering's], 16021[Deering's]). Minimum limits of policy or bond are set at $15,000 for bodily injury or death to one person or $30,000 for injury or death of more than one person, and minimum of $5,000 for property damage. (Veh. C. 16056[Deering's]). Driving privileges will be suspended for those failing to comply with financial responsibility requirements. (Veh. C. 16070[Deering's]). Veh. C.16070-16078[Deering's] establish procedural details regarding suspensions, burden of proof, and revision of records. Operator's license and registration of vehicles of owner of involved vehicle will be suspended upon showing of failure for 30 days to pay judgment against him. (Veh. C. 16370[Deering's]). Hearing is required prior to suspension to determine whether or not requisite injury or property damage had occurred, and whether driver did or did not have necessary form of financial responsibility. (Veh. C. 16075[Deering's]). Driver whose privilege is suspended may apply for restricted license to drive to work. (Veh. C. 16076[Deering's]).

Insurance.

Must comply with financial responsibility requirements set forth in Veh. C. 16021[Deering's]. (See subhead Financial Responsibility Act of 1975, supra.) There are detailed statutory provisions regarding contents of automobile liability policies. (Ins. C. 11580.05 et seq. [Deering's]).

Uninsured Motorist Insurance, Required Policy Provisions.

Every automobile bodily injury liability insurance policy issued or delivered by any insurer licensed in state upon any vehicle then principally garaged or used in state must contain a provision with coverage limits at least equal to financial responsibility requirements insuring insured for damages he is legally entitled to recover from owner or operator of an uninsured motor vehicle and entitling him to recover them from his own insurer. Policy must provide that determination as to whether insured is legally entitled to recover damages, and if so entitled, amount thereof, shall be made by agreement or by arbitration. Insurer paying such a claim is subrogated to rights of insured against any person causing injury to extent payment was made.

(Ins. C. 11580.2[Deering's]).

No-Fault Insurance.

None.

Foreign Vehicles.

Nonresident owner, including member or spouse of member of armed services on duty in state, of foreign vehicle may operate such vehicle in California without registering or paying fees if vehicle is duly registered in place of residence of owner or, in case of member of or spouse of member of armed services, in place where armed services member was required to be by military orders when plates were issued. (Veh. C. 6700-01[Deering's]). Nonresident with valid license plates from another state may operate motor vehicle in California until gainful employment is accepted in California or until residency is established in California, whichever occurs first. Application to register vehicle must be made within 20 days thereafter. (Veh. C. 6700[Deering's]). Every nonresident with established place of business in California must register vehicle upon entry into state. (Veh. C. 6702[Deering's]). Vehicles used to transport persons for hire or property must register immediately, subject to exception where vehicle is registered as private passenger-carrying vehicle in another state, and subject also to such privileges and exemptions as are reciprocally granted by such state to California vehicles. (Veh. C. 6850[Deering's], 8000[Deering's]). Nonresident vehicles leased to resident or business resident must be registered if used in state except if exempt under reciprocity provisions of Veh. C. 8000 et seq.[Deering's] (Veh. C. 6853[Deering's]).

Nonresident operator over 18, including nonresident servicemen over 18, licensed in home state, or by Office of Foreign Missions of U.S. State Department, may operate vehicle without obtaining California license. If home state does not require license, operator driving his own vehicle may drive for 30 days without California license. Where nonresident operator is under 18 he may operate for only ten days without California license, except minor serviceman has 60 days. Upon establishing residence, former nonresident has ten days to obtain California license. (Veh. C. 12502-05[Deering's] and 12518[Deering's]). Nonresident operator, 21 or older, transporting hazardous material in commercial vehicle and possessing valid license with appropriate endorsement from other state or jurisdiction or Canadian driver's license and copy of current training certificate to transport hazardous materials may operate vehicle without California License. (Veh. C. 12502[a][2][Deering's]).

Actions against nonresident growing out of accidents occurring within California may be commenced by service of process (binding upon executor or administrator if so served when nonresident is deceased) upon Director of Department of Motor Vehicles, provided plaintiff forthwith sends notice of such service and copy of summons and complaint to defendant, or his estate's representative, by registered mail and secures return receipt from defendant. (Veh. C. 17450 et seq.[Deering's]). Special rule for tolling of statute of limitations prevails. (Veh. C. 17459-17463[Deering's]).

Direct Actions.

Insurance policy issued or delivered to any person in California must provide that whenever judgment is secured against insured or deceased insured's executor or administrator in action based upon bodily injury, death, or property damage, action may be brought against insurer on policy, subject to its terms and limitations, by such judgment creditor to recover on the judgment. (Ins. C. 11580[Deering's]). Garnishment of obligations of insurer of nonappearing nonresident for purposes of quasi in rem jurisdiction not permitted. (17 C.3d 629).

Motor vehicle carriers are regulated by Public Utilities Commission. (Pub. Util. C. 3901[Deering's], 3902[Deering's]).

Motor Vehicle Taxes.

Vehicle License Fee Law (Rev. & Tax C. 10701 et seq.[Deering's]) imposes annual license fee ("in lieu tax") for privilege of operating motor vehicle. Although it is excise/privilege tax, not property tax, it is measured by vehicle value currently .65% of market value. (Rev. & Tax C. 10752[Deering's]). Exemptions. (Rev. & Tax C. 10781-10789[Deering's]).

Lemon Law.

Automotive Consumer Notification Act (C.C. 1793.23, 1793.24), requires manufacturer to inscribe ownership certificate with "Lemon Law Buyback" and affix decal to vehicle under Veh. C. 11713.12[Deering's] if manufacturer knew or should have known vehicle needed to be replaced or accepted as restitution.

Gasoline Tax.

See category 22 Taxation, topic 22.08 Gasoline and Special Fuels Taxes.

Child Restraint System.

Parents and legal guardians must transport child under six years or 60 pounds in rear seat in approved child passenger restraint system on highways. (Veh. C. 27360-27364[Deering's]). Others must also transport such children in rear seat in approved child passenger restraint system. (Veh. C. 27360[b][Deering's]). Exception where child passenger restraint system would be impractical because of child's physical unfitness, medical condition, or size. (Veh. C. 27363[Deering's]). Parents, legal guardians, and others must transport child six or older but less than 16, or under six but 60 pounds or more in approved child restraint system or safety belt. (Veh. C. 27360.5[Deering's]). Sale of child passenger restraint system in use by child during motor vehicle accident prohibited. (Veh. C. 27362.1[Deering's]).

Off Highway Vehicles

Statutes provide for registration, transfers of title or interest, operating rules and equipment for off-highway vehicles, including all-terrain vehicles (Veh. C. 38000–38506[Deering's]).

23.02 RAILROADS:

See category 3 Business Regulation and Commerce, topic 3.08 Carriers.

24 Forms

Commercial Code Forms

(Click here to view)

1
COLORADO LAW DIGEST

—Scope —

Revised for 2010 edition by

HOLME ROBERTS & OWEN, LLP, of Denver, Boulder and Colorado Springs.

(Citations, unless otherwise noted, are to titles, articles and sections of Colorado Revised Statutes (C.R.S.). “Rule” indicates Rules of Civil Procedure and “App. Rule” indicates Appellate Rules. Parallel citations to Pacific Reporter begin with 7 Colo. and 1 Colo. App. and official reports end with 199 Colo. and 43 Colo. App., 1980. HB and SB refer to those House Bills or Senate Bills that have been enacted into law.)

Note: This revision covers all enactments of 67th General Assembly, First Regular Session, May 6, 2009. Legislature meets annually no later than second Wed. in Jan.

1 INTRODUCTION

1.01 GOVERNMENT AND LEGAL SYSTEM:

The State of Colorado is a constituent state of the United States of America. For further discussion of the U.S. federal system, see Introduction to the Federal Government of the United States at the beginning of this volume. A great many laws are promulgated by the federal government of the United States and are not reflected in the topics below. See the Introduction to this volume for references to the federal law topics covered.

Like all but one of the United States, Colorado has a common law legal system, with roots in English common law. For information on the courts and legislature of Colorado, see category 6 Courts and Legislature.

1.02 [RESERVED]

1.03 HOLIDAYS:

Legal holidays are: Jan. 1; 3d Mon. in Jan.; 3d Mon. in Feb.; last Mon. in May; July 4; 1st Mon. in Sept.; 2d Mon. in Oct.; Nov. 11; 4th Thurs. in Nov.; Dec. 25; and any day appointed by governor or president as day of fasting, prayer or thanksgiving. (C.R.S. 24-11-101[1]). Legal holidays treated as Sun. for holding of court and all purposes regarding payment, acceptance, protesting or giving notice of dishonor of negotiable instruments. (C.R.S. 24-11-101[1]). If legal holiday falls on Sun., following Mon. shall be considered holiday and shall be treated as Sun. (C.R.S. 24-11-101[2]). Any return or adjournment date in any suit, matter or hearing before court on any day above mentioned is continued to next succeeding day, unless Sun., then next succeeding secular or business day. (C.R.S. 24-11-101[2]).

When public offices are closed on holidays, Sats., or otherwise, official acts or duties, appearances or filings required then to be performed are continued until next full business day. (C.R.S. 24-11-110).

Agencies in executive branch of state government may do business on any legal holiday. Employees under jurisdiction of state personnel system who are required to work on any legal holiday are granted alternate day off in same fiscal year or are paid in accordance with state personnel system or state fiscal rules in effect on Apr. 30, 1979. (C.R.S. 24-11-101[3]).

Banking institutions may close on Sats. in which event Sat. is equivalent of legal holiday with respect to bank. (C.R.S. 11-105-103). However, fact that bank remains open for business on all, or less than all, Sats. shall not make that day, or any part thereof, banking day for purposes of C.R.S. 4-4-104(A)(3) of Uniform Commercial Code. Sats., Suns. and holidays are excluded from code definition of banking day (C.R.S. 4-4-104[A][3]).

1.04 OFFICE HOURS AND TIME ZONE:

Colorado is in the Mountain (GMT -07:00) time zone. Office hours are 8:30 a.m. to 5:00 p.m.

2 BUSINESS ORGANIZATIONS

2.01 AGENCY:

The common law governs the relation of principal and agent except as affected by the Uniform Fiduciaries Law. (C.R.S. 15-1-101 to 113).

2.02 ASSOCIATIONS:

Nonprofit organizations generally may be incorporated under Colorado Revised Nonprofit Corporation Act (C.R.S. 7-121-101 to C.R.S. 7-137-301) or may operate as unincorporated nonprofit associations under Uniform Unincorporated Nonprofit Association Act (C.R.S. 7-30-101 to 119). Cooperative associations may be incorporated under C.R.S. 7-55-101 to 121 for cooperative transaction of any lawful business, except banking (C.R.S. 7-55-102[1]). Cooperative associations may also be incorporated under Colorado Cooperative Act (C.R.S. 7-56-101 to 901) for transaction of any lawful business (C.R.S. 7-56-201[1]). Any domestic or foreign entity lawfully doing business in Colorado may elect to be subject to Colorado Cooperative Act. (C.R.S. 7-56-205).

Fraternal benefit society may be formed as unincorporated society, order or lodge, without capital stock, and operated on lodge system, having representative government and providing death, endowment, annuity, disability, medical, monument or tombstone benefits or other benefits authorized for life insurers. (C.R.S. 10-14-101 to 705). Certain officials of churches and religious societies may incorporate their offices as corporations solely for purpose of holding title to property, contracting, suing and being sued on behalf of churches or religious societies. (C.R.S. 7-52-101 to 106). Labor unions and associations are declared not to be unlawful. (C.R.S. 8-2-101).

Actions.

Unincorporated association may sue or be sued in its common name. (C.R.S. 13-50-105 and C.R.C.P. 17[b]). Judgment binds only joint property of association and separate property of named parties personally served or who have entered appearance. (C.R.S. 13-50-105 and C.R.C.P. 54[e]). Action brought by or against members of unincorporated association as class by naming certain representative members may be maintained only if representative members will fairly and adequately protect interests of association and its members. (C.R.C.P. 23.2).

Professional Associations.

Medical practice by use of professional corporations, limited liability companies and limited liability partnerships are permitted provided, however, their sole purpose is to conduct medical practice through persons licensed by Colorado, and all shareholders are licensed practitioners and actively engaged in practice of medicine in offices of corporation. Shareholders are jointly and severally liable unless liability insurance carried by shareholders or corporation meets certain standards. (C.R.S. 12-36-134). Dental practice by use of professional corporations, limited liability companies and limited liability partnerships are permitted on same terms as medical practice. (C.R.S. 12-35-116). Professional corporations, limited liability companies and limited liability partnerships for practice of podiatry (C.R.S. 12-32-109.5), chiropractic (C.R.S. 12-33-124), optometry (C.R.S. 12-40-125), physical therapy (C.R.S. 12-41-124), and psychology (C.R.S. 12-43-211) are authorized. Professional corporations, limited liability companies and limited liability partnerships are also authorized for accountants (C.R.S. 12-2-117), architects (C.R.S. 12-4-110), engineers (C.R.S. 12-25-104) and surveyors (C.R.S. 12-25-204). Attorneys are permitted to form professional corporations, limited liability companies and limited liability partnerships by Supreme Court Rule. See category 18 Legal Profession, topic 18.01 Attorneys and Counselors.

2.03 CORPORATIONS:

NOTE: Colorado Business Corporation Act adopted effective July 1, 1994, based on Model Business Corporation Act (1984), prepared by Committee on Corporate Laws (Section of Corporation, Banking and Business Law) of American Bar Association. For text of Model Business Corporation Act (1984), see Uniform and Model Acts section. Law as digested below relates only to variances of Colorado Business Corporation Act from Model Business Corporation Act (1984), contained in Uniform and Model Acts section.

General Supervision.

Secretary of State, 1700 Broadway, #200, Denver, Colorado 80290, telephone (303) 894-2200; telecopy (303) 869-4864; website http://www.sos.business.state.co.us/; email sos.business@sos.state.co.us.

Filing, Service, and Copying Fees.

§ 1.22 of Model Act not adopted. Secretary of State charges and collects fees as provided in C.R.S. 24-21-104(3); website fee schedule http://www.sos.state.co.us/pubs/business/main.htm.

Uniform Transfers to Minors Act.

11-50-101.

Uniform Commercial Code adopted. (C.R.S. 4-1-101). See category 3 Business Regulation and Commerce, topic 3.09 Commercial Code.

Stock Transfer Tax.

None.

General Provisions of Colorado Business Corporation Act.

C. 1 (Art. 101).

Filing Requirements.

§ 1.20 (C.R.S. 7-90-301). Each document that is required or permitted to be filed with Secretary of State and shall be subject to C.R.S. 7-90-301 to 313. Document filed may be paper copy containing all information in document. Electronic versions of document may be delivered, provided that all information delivered is readily retrievable from data delivered. (C.R.S. 7-90-301[4]). Document shall state names and addresses of individuals who cause document to be delivered for filing. (C.R.S. 7-90-301[8]). No signature or execution of document shall be required. Articles filed with Secretary of State. See subhead General Supervision, supra.

Forms.

§ 1.21 (C.R.S. 7-90-302). § 1.21 of Model Act modified to provide that Secretary of State may prescribe forms for documents, and if so must furnish them. Information contained in any form or cover sheet controls over contrary information elsewhere in document. However: (a) Use of forms not mandatory unless Secretary of State specifically requires use; and (b) requirement that form be used does not preclude inclusion in document of any item not prohibited, nor require inclusion of item not required. Except for resignation of registered agent, must note or be accompanied by address for returning filed copy.

Effective Time and Date of Documents.

§ 1.23 (C.R.S. 7-90-304). If document states delayed effective date, document may be prevented from becoming effective by delivering to Secretary of State, prior to earlier of stated effective date or 11:59 p.m. on 90th day after document is filed, statement of correction revoking filed document. (C.R.S. 7-90-304[3]). Two or more simultaneously delivered documents shall be deemed to have been filed simultaneously if each document identifies to satisfaction of Secretary of State others and states all such documents are to be deemed to have been filed simultaneously. (C.R.S. 7-90-304[4]).

Correcting Filed Documents.

§ 1.24 (C.R.S. 7-90-305). Statement of correction, used to correct documents that were incorrect when filed, states entity name, true name, trade name and name of person conducting business under name or statement of trademark registration as appropriate; identifies incorrect filed document; states each incorrect statement; corrects each incorrect statement. If incorrect filed document is revoked correction shall state that filed document is revoked.

Statement of Change.

(C.R.S. 7-90-305.5). Statement of change, used to change documents that became incorrect after filing due to changed circumstances, states entity name, true name, trade name and name of person conducting business under name or statement of trademark registration as appropriate; identifies filed document; states information to be changed; states each change.

Filing Duty of Secretary of State

Manner of Filing.—§ 1.25 (C.R.S. 7-90-306). Secretary of State has ten days to return document refused for filing. (C.R.S. 7-90-306[3]).

Appeal from Secretary of State’s Refusal to File Document.

§ 1.26 (C.R.S. 7-90-307). Appeal within 45 days to district court of county of principal office, or, if principal office is not in Colorado, where registered agent is located, or, if no registered agent, district court of City and County of Denver. (C.R.S. 7-90-307[1]).

Evidentiary Effect of Copy of Filed Document.

§ 1.27 (C.R.S. 7-90-308). If copy of document is attached to certificate bearing Secretary of State’s signature and seal and stating document is filed with Secretary of State, it is prima facie evidence that document is so filed.

Certificates of Existence.

§ 1.28 (C.R.S. 7-90-309). Secretary of State will issue copy of any document filed by Secretary of State and certificate endorsed on or accompanying copy of any filed document identifying filed document and certifying that copy is true copy of filed document. (C.R.S. 7-90-309[1]).

Penalty for Signing False Documents.

§ 1.29 not adopted. See subhead Filing Requirements, supra.

Powers.

§ 1.30 (C.R.S. 7-101-301). See subhead General Supervision, supra.

Act Definitions.

§ 1.40 (C.R.S. 7-101-401). “Delivery” to Secretary of State means actual receipt by

Secretary of State. (C.R.S. 7-101-401[12]). “Principal office” means office, in or out of state, designated by corporation as principal office in most recent document on file with Secretary of State providing such information, including notice of change of principal office. (C.R.S. 7-101-401[25]). “Proceeding” includes arbitration or mediation. (C.R.S. 7-101-401[26]). Adds definitions of “address”, “affiliate”, “assumed entity name”, “bylaws”, “cash” and “money”, “control”, “entity name”, “effective date”, “mail”, “receive”, “street address”, “registered agent”, “registered office”.

Notice.

§ 1.41 (C.R.S. 7-101-402). Notice by publication or broadcast not listed. If three successive notices to shareholder returned as undeliverable, no further notices necessary until another address made known to corporation.

Number of Shareholders.

§ 1.42. Not included.

Incorporation.

C. 2 (Art. 102).

Incorporators.

§ 2.01 (C.R.S. 7-102-101). Incorporator who is individual must be at least 18 years old.

Articles of Incorporation.

§ 2.02 (C.R.S. 7-102-102). Articles must also state address of corporation’s principal office. For corporations formed after 1958, cumulative voting is mandatory for election of directors unless statement denying it is included in articles. For provisions limiting liability of directors, see C.R.S. 7-108-402. Any matter conditioned on provision in bylaws satisfied if provision present either in articles or bylaws. (C.R.S. 7-102-102[5]).

Liability for Preincorporation Transactions.

§ 2.04 (C.R.S. 7-102-104). Persons acting without good faith belief that they have authority jointly and severally liable.

Paid in Capital Requirements.

None.

Organization of Corporation.

§ 2.05 (C.R.S. 7-102-105). Organizational meetings permissive, rather than mandatory. Incorporators may adopt bylaws. (C.R.S. 7-102-105[1][a]).

Bylaws.

§ 2.06 (C.R.S. 7-102-106). Adoption permissive, rather than mandatory. Board may adopt; if no board, incorporators may; if neither board nor incorporators adopt, shareholders may.

Purposes and Powers.

C. 3 (Art. 103). Corporations may appoint, in writing, agents or attorneys-in-fact to convey real estate. (C.R.S. 7-103-105).

Name.

C. 4 (Art. 104).

Corporate Name.

§ 4.01 (C.R.S. 7-90-601). Omits "words or abbreviations of like import in another language." Name must be distinguishable from name of any Colorado entity, name of foreign entity registered with Secretary of State, name under which foreign entity is authorized to do business or conduct affairs in Colorado, name reserved with Secretary of State, or trade name.

Reserved Name.

§ 4.02 (C.R.S. 7-90-602). Name reservation may be renewed.

Registered Name.

§ 4.03 (C.R.S. 7-90-604). Foreign corporation may register name through end of year if name satisfied C.R.S. 7-90-601, by filing application for registration with Secretary of State. Registration may be renewed each year and may be transferred.

Office and Agent.

C. 5 (Art. 90).

Registered Office and Registered Agent.

§ 5.01 (C.R.S. 7-90-701). Corporation may serve as its own registered agent so long as its usual place of business is in this state. (C.R.S. 7-90-701). Entity's registered agent is agent authorized to receive service of process or delivery of any document from Secretary of State. Entity required to maintain registered agent may be served at its principal address by registered or certified mail if it has no registered agent, or if agent is not located under its name at its address, or if agent cannot be served with reasonable diligence. (C.R.S. 7-90-704).

Change of Principal Office Address.

§§ 5.02 and 15.08 (C.R.S. 7-90-705). Change principal office address on file by stating different one in: statement of change, dissolution, or dissolution of articles; annual report; form or cover sheet prescribed by Secretary of State.

Change or Resignation of Registered Agent.

§§ 5.03 and 15.09 (C.R.S. 7-90-702). Corporation may change its registered agent, registered agent name or registered agent address by filing statement of change, annual report, or any prescribed form or cover sheet. (C.R.S. 7-90-702[1]). If registered agent name or address changes, registered agent shall deliver statement of change that includes: registered agent name and address; and statement that registered agent has delivered notice of change to entity. (C.R.S. 7-90-702[2]). If registered agent resigns or otherwise is no longer registered agent, registered agent or its legal representative may deliver statement of change that includes: registered name and address; date of resignation; statement that notice of change has been delivered to entity. (C.R.S. 7-90-702[4]). Resignation is effective on 31st day after date of filing of statement of change, or on another selected date later than 31 days but not later than 90 days after date of filing of statement of change or on effective date of statement of change appointing different person as registered agent, whichever occurs first. (C.R.S. 7-90-702[5]).

Correction of Registered Agent.

(C.R.S. 7-90-703). Registered agent may correct name or address by filing statement of correction that includes statement that copy of statement of correction has been delivered to entity. (C.R.S. 7-90-703[1]). Any person appointed as registered agent who has not consented to that appointment may file statement of correction that includes: that person is not registered agent; that person has delivered notice of correction to entity.

Shares and Distributions.

C. 6 (Art. 106).

Reverse Split.—(C.R.S. 7-106-105). Permits reverse split with vote of each class to be reverse split and each other voting group that is entitled, under articles, to vote. If articles amended (e.g., to change number of authorized shares or par value), must follow procedures for amendment of articles.

Subscription for Shares Before Incorporation.

§ 6.20 (C.R.S. 7-106-201). Corporation's acceptance of preincorporation subscription, and authorization of issuance pursuant thereto, is subject to provisions for issuance of shares. (C.R.S. 7-106-201[2]).

Issuance of Shares.

§ 6.21 (C.R.S. 7-106-202). Future services not permitted consideration. (C.R.S. 7-106-202[2]). Promissory notes acceptable only if full-recourse, negotiable and secured by collateral other than shares issued with fair market value equal to note amount. (C.R.S. 7-106-202[5]). Unless prohibited by articles or bylaws, shares may be issued for less than any par value. (C.R.S. 7-106-202[6]).

Liability of Shareholders.

§ 6.22 (C.R.S. 7-106-203). Good-faith transferee without notice not liable for any unpaid consideration for shares. (C.R.S. 7-106-203[3]).

Share Dividends.

§ 6.23 (C.R.S. 7-106-204). Bylaws or, in absence of applicable bylaw, board, may fix future record date. (C.R.S. 7-106-204[3]).

Share Options.

§ 6.24 (C.R.S. 7-106-205). Subject to articles, corporation may create and issue options and other rights for purchase of shares, assets or obligations of corporation. Terms of options may include restrictions that preclude or limit exercise, transfer, or receipt of options by persons owning or offering to acquire percentage of outstanding voting securities of corporation, or any transferee, or provide that such persons receive shares, assets or obligations different from other holders of such options. (C.R.S. 7-106-205[2]). Provisions of C.R.S. 7-106-205 apply to all options notwithstanding date of grant (C.R.S. 7-106-205[3]).

Form and Content of Certificates.

§ 6.25 (C.R.S. 7-106-206). Certificates may contain other information corporation considers necessary or appropriate. Only one officer's signature required.

Restrictions on Transfer of Shares and Other Securities.

§ 6.27 (C.R.S. 7-106-208). Restriction may affect shares issued before restriction adopted if holders of shares acquire with knowledge or otherwise consent to restriction. (C.R.S. 7-106-208[1]).

Shareholders' Preemptive Rights.

§ 6.30 (C.R.S. 7-106-301). For corporations existing on June 30, 1994, shareholders have preemptive rights except as otherwise provided in articles and except that rights do not exist (i) to acquire shares issued to directors, officers or employees after shareholder approval; (ii) to acquire shares for other than cash; (iii) for holders of preferred stock; (iv) for holders of common stock to acquire nonconvertible preferred stock; (v) for holders of nonvoting common stock to acquire voting common stock; (vi) for shares of corporation incorporated before Jan. 1, 1959 that are acquired by corporation and are not cancelled or restored to status of authorized but unissued shares (and any such shares existing on June 30, 1994 or acquired thereafter not deemed restored to status of authorized but unissued shares). (C.R.S. 7-117-101[3] to [6]).

Corporation's Acquisition of Its Own Shares.

§ 6.31 (C.R.S. 7-106-302). If articles prohibit reissuance of acquired shares, corporation shall file amendment to articles without shareholder action to reduce number of authorized shares by amount equal to number of shares acquired by corporation. (C.R.S. 7-106-302[2]).

Distributions to Shareholders.

§ 6.40 (C.R.S. 7-106-401). Board may fix record date only if no applicable bylaw. Unless otherwise provided in articles or bylaws, statement of par value of shares does not limit distributions. (C.R.S. 7-106-401[7]).

Unclaimed Distributions.

(C.R.S. 7-106-402). If corporation has mailed three successive distributions to shareholder's address in corporate record and distributions returned as undeliverable, no further attempt need be made until another address made known to corporation, at which time all distributions accumulated must be mailed to shareholder.

Shareholders.

C. 7 (Art. 107).

Annual Meeting.

§ 7.01 (C.R.S. 7-107-101). Failure to hold annual meeting at time fixed in bylaws or by board resolution does not work forfeiture or dissolution of corporation. (C.R.S. 7-107-101[3]).

Special Meeting.

§ 7.02 (C.R.S. 7-107-102). If not otherwise fixed, record date for determining shareholders entitled to demand special meeting is earliest date of demand or 60 days prior to date first written demand received by corporation, whichever is later. (C.R.S. 7-107-102[2]).

Action Without Meeting.

§ 7.04 (C.R.S. 7-107-104). Unless articles require action at meeting, shareholder action may be by written consent of all shareholders entitled to vote. Written consent must be received by corporation and may be transmitted electronically unless otherwise provided in bylaws. Action is effective as of date corporation receives last writing necessary to effect action unless all writings necessary to effect action state another date as effective date. (C.R.S. 7-107-104[2]). Shareholder may deliver written revocation of consent before effectiveness of action. (C.R.S. 7-107-104[3]). § 7.04(d) of Model Act not adopted. District court of county of corporation's principal office, or if no principal office in Colorado, registered agent's office, or if no registered agent, district court for city and county of Denver may state record date for consents and enter other appropriate orders. (C.R.S. 7-107-104[7]).

Notice of Meeting.

§ 7.05 (C.R.S. 7-107-105). If number of authorized shares to be increased, 30 days' notice required. (C.R.S. 7-107-105[1]).

Conduct of Meeting.

§ 7.08 of Model Act not adopted.

Meetings by Telecommunication.

(C.R.S. 7-107-108). Unless otherwise provided in bylaws, shareholders may participate in meetings by any means of communication by which all persons participating can hear each other. Shareholders so participating deemed to be present at meeting.

Shareholders' List for Meeting.

§ 7.20 (C.R.S. 7-107-201). Shareholders' list available for inspection beginning on earlier of ten days before meeting for which list prepared or two business days after notice of meeting given and continuing through meeting and adjournments. (C.R.S. 7-107-201[2]). Provision requiring shareholder to copy list at own expense omitted. (C.R.S. 7-107-201[2]). Corporation may charge for copying. (C.R.S. 7-116-103[3]). If court orders inspection or copying of list, unless corporation proves it refused inspection or copying in good faith because it had reasonable basis for doubt about right of shareholder to inspect/copy: (a) court must order corporation to pay shareholder's costs, including attorney's fees; (b) court may order corporation to pay shareholder for damages incurred; and (c) court may grant shareholder other remedies. (C.R.S. 7-107-201[5]). Court may impose restrictions on use of list by shareholder. (C.R.S. 7-107-201[6]).

Voting Entitlement of Shares.

§ 7.21 (C.R.S. 7-107-202). Each fractional share entitled to corresponding fractional vote. (C.R.S. 7-107-202[1]). § 7.21(b) of Model Act modified; "special circumstances" exception replaced with exception for order by court upon finding that purpose of subsection would not be violated. (C.R.S. 7-107-202[2]).

Proxies.

§ 7.22 (C.R.S. 7-107-203). Without limiting ways in which shareholder may appoint proxy, following ways are valid: (a) appointment form; or (b) electronic transmission providing written statement of appointment. (C.R.S. 7-107-203[2]). Copy or facsimile of appointment may be used in lieu of original appointment. (C.R.S. 7-107-203[4]). Appointment coupled with interest may include enumerated persons or their designees. (C.R.S. 7-107-203[5]). Revocation of appointment does not affect right of corporation to accept proxy's authority unless: (a) corporation had notice of appointment coupled with interest and notice that interest is extinguished is received by corporation's secretary before proxy exercises authority; or (b) other notice of revocation is received by secretary before proxy exercises authority. (C.R.S. 7-107-203[7]). Corporation not required to recognize appointment made irrevocable if it has received writing revoking appointment signed by shareholder or attorney-in-fact, notwithstanding that revocation may be breach of obligation of shareholder to third person. (C.R.S. 7-107-203[8]).

Shares Held by Nominees.

§ 7.23 (C.R.S. 7-107-204). Corporation may also recognize in beneficial owner rights or privileges other than voting. (C.R.S. 7-107-204[2][b]).

Corporation's Acceptance of Votes.

§ 7.24 (C.R.S. 7-107-205). Procedures regarding corporation's acceptance of votes apply as well to proxy appointment revocations. (C.R.S. 7-107-205[1]). Corporation may also accept name signed not corresponding to shareholder name if acceptance otherwise proper under rules established by corporation. (C.R.S. 7-107-205[2][f]).

Quorum and Voting Requirements for Voting Groups.

§ 7.25 (C.R.S. 7-107-206). Quorum may not be fewer than one-third of votes entitled to be cast. (C.R.S. 7-107-206[1]).

Greater Quorum or Voting Requirements.

§ 7.27 (C.R.S. 7-107-208). If authorized in articles, such requirements may be created by bylaws adopted by shareholders.

Voting for Directors; Cumulative Voting.

§ 7.28 (C.R.S. 7-107-209). At each election of directors, each shareholder entitled to vote at election has right to vote for as many persons as are directors to be elected and for whose election shareholder has right to vote, unless articles provide otherwise. Cumulative voting provisions in effect if required per C.R.S. 7-102-102[3]. Articles may provide that shares otherwise entitled to vote cumulatively may not be so voted unless notice of meeting so states or shareholder with right to cumulate votes gives notice not less than 48 hours before meeting of intent to cumulate votes. (C.R.S. 7-107-209[2]). In election of directors, that number of candidates equaling number of directors to be elected having highest number of votes are elected. (C.R.S. 7-107-209[4]).

Inspectors of Election.

§ 7.29 of Model Act not adopted.

Voting Trusts.

§ 7.30 (C.R.S. 7-107-301). Trustee must promptly inform corporation of changes in beneficial interest list and amendments to voting trust agreements. (C.R.S. 7-107-301[1]). Extension of voting trust valid for no more than ten years, unless signed within two years before expiration date, in which case valid for up to ten years after expiration date. (C.R.S. 7-107-301[3]).

Shareholder Agreements.

§ 7.32 of Model Act not adopted.

Derivative Proceedings.

C. 7D of Model Act not adopted. No derivative action may be brought unless plaintiff was shareholder at time of transaction complained of, or received shares by operation of law from such shareholder. In action begun after 1958, if court finds that action was begun without reasonable cause, it must require plaintiff to pay costs of defense (but not attorneys fees); and if plaintiff holds less than 5% of outstanding shares (unless valued greater than $25,000), corporation may require plaintiff to give security for its costs (but not attorneys fees). If court finds that action was begun without reasonable cause, corporation has recourse to such security in amount determined by court. (C.R.S. 7-107-402).

Directors and Officers.

C. 8 (Art. 108).

Requirement for and Qualifications of Board of Directors.

§ 8.01 (C.R.S. 7-108-101). § 8.01(c) of Model Act not adopted. Except as otherwise provided in articles, corporation must have board, and articles may provide that other persons perform duties of board. Directors must be individual at least 18 years old. Bylaws may prescribe other qualifications. (C.R.S. 7-108-102).

Number and Election of Directors.

§ 8.03 (C.R.S. 7-108-103). Number of directors (or range of numbers) fixed in accordance with bylaws. If range established, number may be changed within range by shareholders or board. § 8.03(b) of Model Act not adopted.

Election of Directors by Certain Classes of Shareholders.

§ 8.04 (C.R.S. 7-108-104). Applies to series as well.

Terms of Directors Generally.

§ 8.05 (C.R.S. 7-108-105). Terms of initial directors expire at first shareholders' meeting at which directors elected, unless board has staggered terms. (C.R.S. 7-108-105[1]). Term of director elected by board to fill vacancy expires at next election at annual shareholders meeting. Term of director elected by shareholders to fill vacancy is unexpired term of predecessor, unless predecessor was elected by board to fill vacancy, in which case term is unexpired term of last predecessor elected by shareholders. (C.R.S. 7-108-105[4]). After expiration of term, director continues to serve until successor elected and qualifies. (C.R.S. 7-108-105[5]). See subhead Filing Requirements, supra.

Staggered Terms for Directors.

§ 8.06 (C.R.S. 7-108-106). Omits condition precedent of nine or more directors to institute staggered terms. Terms of two or three years, as case may be, begin upon expiration of initial staggered terms.

Resignation, Removal of Directors by Shareholders and Judicial Proceeding.

§§ 8.07, 8.08, 8.09 (C.R.S. 7-108-107, 108, 109). Director who is removed or resigns may deliver to Secretary of State for filing statement of resignation or removal. See subhead Filing Requirements, supra.

Vacancy on Board.

§ 8.10 (C.R.S. 7-108-110). Unless articles provide otherwise, if vacant office was held by director elected by voting group: (a) If one or more directors elected by same voting group, only such directors are entitled to vote to fill vacancy if vacancy is filled by directors; and (b) only holders of shares of that voting group entitled to vote to fill vacancy if vacancy is filled by shareholders. (C.R.S. 7-108-110[2]).

Action Without Meeting.

§ 8.21 (C.R.S. 7-108-202). Action taken without meeting at time last director signs writing describing action taken, unless, prior to that time, any director has revoked consent. (C.R.S. 7-108-202[2]). Action taken without meeting effective at time taken, unless directors establish different effective date. (C.R.S. 7-108-202[3]).

Waiver of Notice.

§ 8.23 (C.R.S. 7-108-204). Waiver of notice should be delivered to corporation for filing with corporate records, but delivery and filing not conditions to its effectiveness. (C.R.S. 7-108-203[1]). If special notice of purpose of meeting was required, director does not waive notice by attendance or participation if he objects to transacting business with respect to purpose for which notice was required and does not vote for action taken with respect to such purpose. (C.R.S. 7-108-203[2]).

Quorum and Voting.

§ 8.24 (C.R.S. 7-108-205). Quorum of directors not less than majority of number fixed, or if not fixed, of number in office immediately before meeting begins. (C.R.S. 7-108-205[2]).

Committees.

§ 8.25 (C.R.S. 7-108-206). Board may authorize committee or any officer to approve issuance or sale of shares or determine designation and rights, preferences and limitations of class or series of shares. (C.R.S. 7-108-206[4][h]).

Standards of Liability for Directors.

§ 8.31 of Model Act not adopted. Loans, guaranties or other transactions with directors and certain related entities ("conflicting interest transactions") not void or voidable and do not give rise to injunction or damages if: (a) Material facts disclosed or known to board or committee that approves transaction in good faith by vote of majority of disinterested directors (though less than quorum); (b) material facts disclosed or known to shareholders who approve transaction in good faith; or (c) transaction fair to corporation. Definition excludes transactions between 100% parent and subsidiary. (C.R.S. 7-108-501[1], [2]).

Loans to Directors.

Loans and guaranties to directors and certain related entities permitted only after ten days notice of transaction to shareholders entitled to vote if transaction were submitted to vote of shareholders. So long as federal law prohibits following, directors of "issuer" (as defined in § 2 of federal "Sarbanes-Oxley Act of 2002," 15 U.S.C. § 7201) or subsidiary of issuer shall not extend or maintain or arrange for extension or renewal of extension of credit in form of personal loan to director if done on same terms as offered to public, does not apply to: extension of credit or guarantee maintained on effective date of this Act, so long as there is no material modification or renewal; to home improvement loan or manufactured home loan; to consumer credit loan; to extension of credit under open end credit plan; to charge card; to extension of credit by broker dealer to employee for securities transactions; or to extension of credit. (C.R.S. 7-108-501[4]).

Limitation of Certain Liabilities of Directors and Officers.

(C.R.S. 7-108-402). If provided in articles, corporation shall eliminate or limit director liability for monetary damages for breach of fiduciary duty, except liability for breach of duty of loyalty, acts or omissions not in good faith or involving intentional misconduct or knowing violation of law, unlawful distributions, or transaction from which director derives improper personal benefit. Directors and officers not personally liable for torts of employees unless they were personally involved or committed criminal offense.

Directors' Liability for Unlawful Distributions.

§ 8.33 (C.R.S. 7-108-403). Amount of contribution from each shareholder who knowingly accepted unlawful distribution is amount of distribution to shareholder that exceeds what could have been distributed to that shareholder without violating law governing distributions or articles of incorporation. (C.R.S. 7-108-403[2][b]).

Officers.

§ 8.40 (C.R.S. 7-108-301). Officers must be natural persons at least 18 years old. (C.R.S. 7-108-301[1]). Officers may be appointed by board or in any other manner as board or bylaws provide. (C.R.S. 7-108-301[2]).

Resignation and Removal of Officers.

§ 8.43 (C.R.S. 7-108-303). If officer's resignation made effective at later date, board may fill vacancy and provide that successor not take office until effective date or remove officer at any time prior to effective date and fill resulting vacancy. (C.R.S. 7-108-303[3]). Officer who resigns or is removed or whose appointment expires may deliver to Secretary of State for filing statement of resignation. (C.R.S. 7-108-303[5]). See subhead Filing Requirements, supra.

Indemnification.

(Art. 109).

Definitions.

§ 8.50 (C.R.S. 7-109-101). Definition of “director” as used in this part includes individual who while director of corporation was serving as associate, manager, member, proprietor or fiduciary or similar position of another corporation, person, or employee benefit plan. (C.R.S. 7-109-101[2]).

Permissible Indemnification.

§ 8.51 (C.R.S. 7-109-102). § 8.51(a)(2) of Model Act modified to provide that director’s conduct as to employee benefit plan for purpose director did not reasonably believe to be in interests of plan beneficiaries deemed not to be in good faith. (C.R.S. 7-109-102[2]).

Determination and Authorization of Indemnification.

§ 8.55 (C.R.S. 7-109-106). Corporation may not advance expenses to director unless authorized in specific case after written affirmation and undertaking received and required determination made. (C.R.S. 7-109-106[1]). § 8.55(b)(4) modified to provide that determination be made by shareholders (C.R.S. 7-109-106[3]). If corporation indemnifies or advances expenses to director in proceeding by or in right of corporation, notice must be given to shareholders with or before notice of next shareholders meeting or before action by written consent of shareholders (if taken at instigation of board). (C.R.S. 7-109-110).

Officers.

§ 8.56 (C.R.S. 7-109-107). Also applies to fiduciaries of corporation. Requirement in § 8.56(1) and (2) of Model Act that officer, employee, fiduciary, or agent not be director omitted (C.R.S. 7-109-107[1]).

Insurance.

§ 8.57 (C.R.S. 7-109-108). Applies as well to fiduciaries of corporation. Insurance may be procured from any insurance company designated by board, whether formed under laws of state or not, including company in which corporation has interest.

Variation by Corporate Action.

§ 8.58 (C.R.S. 7-109-109). Contract referred to in § 8.58 of Model Act does not include insurance policy. (C.R.S. 7-109-109[1]).

Amendment of Articles of Incorporation and Bylaws.

C. 10 (Art. 110).

Amendment Before Issuance of Shares.

§ 10.02 (C.R.S. 7-110-105). Incorporators may adopt amendments only if no board appointed.

Amendment by Board of Directors and Shareholders.

§ 10.03 (C.R.S. 7-110-103). Notice need be given only to shareholders entitled to vote on amendment. (C.R.S. 7-110-103[4]). Act, articles, bylaws adopted by shareholders or directors may require greater vote. (C.R.S. 7-110-103[5]). For corporations in existence on June 30, 1994, unless articles establish vote required to amend articles, amendment requires vote by each voting group entitled to vote, by two-thirds of all votes entitled to be cast by that group. (C.R.S. 7-117-

101[7]). Amendment to articles of such corporation to reduce vote required (which may not be less than would be required to take action if action were taken by corporation formed on or after July 1, 1994) for actions described in C.R.S. 7-117-101(7) to (10) (amendment to articles, merger or share exchange, disposition of substantially all assets and dissolution) requires same vote as such actions require in C.R.S. 7-117-101(7) to (10) (C.R.S. 7-110-103[5]). For corporations formed after June 30, 1994, unless articles, bylaws adopted by shareholders or proposing board or proposing shareholders require greater vote, amendment must be approved by shareholders by vote required for other shareholder action. (C.R.S. 7-110-103[5]).

Amendment by Board of Directors.

§ 10.05 (C.R.S. 7-110-102). § 10.02(1) of Model Act not adopted. Board may delete statement of names and address of individuals who cause articles to be filed. (C.R.S. 7-110-102[1][b]). Board may adopt amendment to change corporate name in connection with reinstatement following dissolution. (C.R.S. 7-110-102[2]).

Articles of Amendment.

§ 10.06 (C.R.S. 7-110-106). § 10.06(b) of Model Act not adopted. Corporation amending articles of incorporation shall deliver to Secretary of State articles stating domestic entity name of corporation, text of each amendment adopted; and, if amendment provides for exchange, reclassification, or cancellation of issued shares, provisions for implementing amendment if not contained in amendment itself.

Restated Articles of Incorporation.

§ 10.07 (C.R.S. 7-110-107). Incorporators may restate if no shares issued and no directors appointed. (C.R.S. 7-110-107[1]). If shareholder approval required, notice need be given only to shareholders entitled to vote on restatement. (C.R.S. 7-110-107[3]). Information on separate certificate required by § 10.07(d) of Model Act should be set forth in restatement; no separate certificate need be filed (C.R.S. 7-110-107[4]). § 10.07(f) of Model Act not adopted.

Amendment of Bylaws by Board of Directors or Shareholders.

§ 10.20 (C.R.S. 7-110-201). Board may not amend bylaw if law or articles reserve power exclusively to shareholders or if bylaw expressly prohibits board from doing so. (C.R.S. 7-110-201[1]).

Mergers and Share Exchanges.

C. 11 (Art. 111).

Merger.

§ 11.02 (C.R.S. 7-111-101). Plan of merger must state any amendment to articles of surviving corporation to be effected by merger. (C.R.S. 7-90-203.3).

Action on Plan of Merger or Share Exchange.

§ 11.04 (C.R.S. 7-111-103). Corporation need only give notice of shareholder meeting to shareholders entitled to vote. (C.R.S. 7-111-103[4]). This Act, articles, or bylaws adopted by shareholders or directors may require greater vote. (C.R.S. 7-111-103[5]). Unless articles of corporation existing on June 30, 1994 establish vote required, merger or share exchange requires approval by each voting group entitled to vote, by two-thirds of all votes entitled to be cast on proposal by that group. If corporation incorporated before July 1, 1978, each share (unless redeemable and called for redemption under C.R.S. 7-107-202[4]) entitled to vote even if articles provide otherwise, unless articles amended after June 30, 1978, by same vote that would have been necessary at time of amendment to approve plan, so as to restrict or eliminate right of such share to vote on plan (C.R.S. 7-117-101[8]).

Merger Between Parent and Subsidiary or Between Subsidiaries.

§ 11.05 (C.R.S. 7-111-104). Board must adopt and shareholders approve, if shareholders so required, plan of merger. Plan of merger must set forth: (a) names of parent and subsidiary and of surviving entity; (b) terms and conditions of mergers; (c) manner and basis of converting shares of each corporation; (d) any amendments to articles of surviving corporation to be effected by merger; and (e) any other provisions relating to merger deemed desirable. (C.R.S. 7-111-104[2]). Vote of shareholders of subsidiary not required with respect to merger. If subsidiary will be surviving corporation, approval of shareholders of parent must be sought. If parent will be surviving corporation, no vote of its shareholders required if vote of shareholders of surviving corporation would not be required if provisions of C.R.S. 7-111-103(7) are met; otherwise, vote of parent's shareholders required (C.R.S. 7-111-104[3]). §§ 11.04(d) and (e) of Model Act not adopted. Effective date of merger may not be earlier than date on which all shareholders of subsidiary waived mailing requirement or ten days after date parent mailed copy or summary of plan of merger to each shareholder or subsidiary who did not waive mailing requirement. (C.R.S. 7-111-104[5]).

Articles of Merger or Share Exchange.

§ 11.06 (C.R.S. 7-111-105). After plan of share exchange has received requisite approval, acquiring corporation shall deliver to Secretary of State for filing statement of share exchange stating: name and principal office address of each acquiring corporation; and statement that acquiring corporation acquires shares of other corporation. (C.R.S. 7-111-105[1]).

Effect of Merger or Share Exchange.

§ 11.07 of Model Act not adopted. (C.R.S. 7-90-204). Every merging entity merges into surviving entity and separate existence of every merging entity ceases. Merger is effective when all rights, privileges, powers, and obligations of each merging entity, all real, personal, and mixed property; as well as all other things and causes of action of each merging entity, shall vest as matter of law in surviving entity and shall thereafter be rights, privileges, powers, and property of, obligations due to, surviving entity.

Merger or Share Exchange with Foreign Corporation.

§ 11.07 (C.R.S. 7-111-107). Once merger or share exchange takes effect, surviving corporation must: (i) Appoint registered agent if foreign corporation has none; (ii) maintain registered agent in state to accept service of process for parties merged in survivor; (iii) be considered to have authorized service on it at principal office; (iv) promptly pay dissenting shareholders or corporation party to merger or share exchange amount to which entitled under dissenters' rights provisions; and (v) comply with foreign corporation provisions if it is to transact business in state. (C.R.S. 7-111-107). See subhead Foreign Corporations, infra.

Conversion of Entity into or Merger with Other Kind of Entity.

Corporation may convert to (C.R.S. 7-90-201) or merge with (C.R.S. 7-90-203) other types of domestic or foreign entities.

Abandonment of Merger or Share Exchange.

§ 11.08 of Model Act not adopted. Before becoming effective, merger, plan of conversion, or plan of share exchange may be abandoned, subject to contractual rights, without shareholder action, in accordance with stated plan, or if no plan, by determination of board. Statement of change may be delivered before effective date to prevent effectuation of filed statement of merger or share exchange with delayed effective date. (C.R.S. 7-111-103[9]).

Redomestication as Domestic Insurer.

(C.R.S. 7-111-108). Foreign insurer may submit three copies of articles of redomestication to commissioner of insurance and attorney general for their approval; then to be filed with Secretary of State. See subhead Filing Requirements, supra.

Disposition of Assets.

C. 12 (Art. 112).

Shareholder Approval of Certain Dispositions.

§ 12.02 (C.R.S. 7-112-102). Disposition of property in connection with dissolution, other than in regular course of business, requires shareholder approval, but if pursuant to court order not subject to shareholder approval. (C.R.S. 7-112-102[1]). If corporation entitled to vote or otherwise consent, other than in regular course of business, with respect to disposition of property of another entity which it controls, and if interests held by corporation in other entity constitute all or substantially all property of corporation, then corporation can consent to transaction only if board proposes and shareholders approve consent. (C.R.S. 7-112-102[2]). Notice of meeting at which transaction will be voted upon need be given only to shareholders entitled to vote on transaction. (C.R.S. 7-112-102[5]). § 12.02(e) of Model Act modified to provide that unless Act, articles, bylaws adopted by shareholders, or board required greater vote, transaction must be approved by each voting group entitled to vote on transaction by majority of all votes entitled to be cast on transaction by that voting group (C.R.S. 7-112-102[6]). Unless articles of corporation existing on June 30, 1994 establish vote required, transaction requires approval by each voting group entitled to vote, by two-thirds of all votes entitled to be cast on transaction by that group. (C.R.S. 7-117-101[9]).

Appraisal Rights.

C. 13 (Art. 113).

Definitions.

§ 13.01 (C.R.S. 7-113-101). “Interest” is calculated at average rate corporation pays on principal bank loans or, if none at rate set forth in C.R.S. 5-12-101, currently 8% (C.R.S. 7-113-101[5]).

Right to Appraisal.

§ 13.02 (C.R.S. 7-113-102). Shareholders entitled to dissent whether or not entitled to vote. (C.R.S. 7-113-102[1]). Model Act provisions of § 13.02(a)(3) denying dissenters’ rights in case of sale of assets for cash whereby net proceeds will be distributed to shareholders within one year not adopted. Model Act § 13.02(a)(4)(iii) not adopted. Shareholders may dissent from disposition of all or substantially all property of entity controlled by corporation if shareholders entitled to vote upon consent of corporation to disposition. (C.R.S. 7-113-102[1][d]). No right to dissent if shares listed on national securities exchange or held of record by more than 2,000 holders, provided that shareholders receive only shares of another corporation listed on national securities exchange or held of record by more than 2,000 holders and cash in lieu of fractional shares. (C.R.S. 7-113-102[1.3], [1.8]). Shareholder may dissent from reverse split if shares will be reduced to fractional share that is acquired for cash or voided as scrip. (C.R.S. 7-113-102[2.5]). Shareholder may dissent consummation of conversion in which corporation is converting entity. (C.R.S. 7-113-102[1][e]).

Assertion of Rights by Nominees and Beneficial Owners.

§ 13.03 (C.R.S. 7-113-103). Corporation may require that when record shareholder dissents with respect to shares held by beneficial shareholders, each beneficial shareholder must certify to corporation that both he and record shareholders of all shares owned beneficially by him have asserted or will assert dissenters' rights as to all shares not limited in ability to exercise dissenters' rights. Certification requirement must be stated in dissenters' notice. (C.R.S. 7-113-103[3]).

Notice of Appraisal Rights.

§ 13.20 (C.R.S. 7-113-201). § 13.20 modified to provide that if proposed corporate action creating dissenters' rights submitted to vote at shareholders' meeting, meeting notice must be sent to all shareholders of corporation as of applicable record date, whether or not entitled to vote at meeting. Notice must state shareholders are or may be entitled to assert dissenters' rights. Notice must be accompanied by copy of Art. 113 of Act and materials required to be given shareholders entitled to vote on proposed action at meeting. Failure to give notice as required to shareholders does not affect any action taken at shareholders' meeting for which notice was to have been given, but any shareholder who is not given notice is not precluded from demanding payment because of failure to give notice of intent to demand payment. (C.R.S. 7-113-201[1]). If proposed corporate action creating dissenters' rights authorized without meeting of shareholders, any solicitation of shareholder to execute written consent to action without shareholder meeting must be accompanied or preceded by written notice stating shareholders are or may be entitled to assert dissenters' rights, by copy of Art. 113 of Act and by material required to be given to shareholders entitled to vote on proposed action if proposed action were submitted to vote at shareholders' meeting. Failure to give notice as required to shareholders does not affect any action taken at shareholders' meeting for which notice was to have been given, but any shareholder who is not given notice is not precluded from demanding payment because of failure to give notice of intent to demand payment. (C.R.S. 7-113-201[2]).

Notice of Intent to Demand Payment.

§ 13.21 (C.R.S. 7-113-202). If proposed corporate action creating dissenters' rights authorized without meeting of shareholders, shareholder who wishes to assert dissenters' rights may not execute writing consenting to proposed corporate action. (C.R.S. 7-113-202[2]).

Appraisal Notice and Form.

§ 13.22 (C.R.S. 7-113-203). Dissenters' notice must: (a) State that corporate action was authorized and state effective date; (b) state address at which corporation will receive payment demands and address at which certificates for certified shares must be deposited; (c) inform holders of uncertificated shares to what extent transfer of shares will be restricted after payment demand received; (d) supply form for demanding payment, which requests dissenter to state address to which payment made; (e) set date by which corporation must receive payment demand and certificates for certificated shares, not less than 30 days after date dissenters' notice given; (f) state any requirement that beneficial shareholders must certify to corporation that dissenters' rights are asserted as to all shares beneficially owned by them for which dissenters' rights may be asserted; and (g) be accompanied by copy of Art. 113 of Act (C.R.S. 7-113-203[2]).

Perfection of Rights; Right to Withdraw.

§ 13.23 (C.R.S. 7-113-204). § 13.23(a) and (b) of Model Act substantively modified. Shareholder who wishes to assert dissenters' rights according to terms of dissenters' notice must: (a) deliver to corporation payment demand, which may be payment demand form supplied per C.R.S. 7-113-203(2)(d) or another writing; and (b) deposit certificates for certified shares in accordance with terms of dissenters' notice (C.R.S. 7-113-204[1]). Shareholder who demands payment retains all rights of shareholder except right to transfer shares, until effective date of proposed corporate action giving rise to exercise of dissenters' rights and has only right to receive payment for shares after effective date of corporate action. (C.R.S. 7-113-203[2]). Except as provided in C.R.S. 7-113-207 or C.R.S. 7-113-209(1)(b), demand for payment is irrevocable (C.R.S. 7-113-204[3]).

Payment.

§ 13.24 (C.R.S. 7-113-206). Payment made to shareholder on later of effective date of corporate action creating dissenters' rights and receipt by corporation of payment demand. (C.R.S. 7-113-206[1]). Balance sheet (from most recent fiscal year or, if not available, from fiscal year ending not more than 16 months before payment date) and statements sent with payment must only include statement in changes in shareholders' equity and statement of cash flow and be audited, if corporation customarily provides such statements to shareholders. (C.R.S. 17-113-206[2][a]). Corporation also must send: explanation of interest calculation.

After Acquired Shares.—§ 13.25 (C.R.S. 7-113-208). Corporation may require shareholder to certify in writing whether he acquired beneficial ownership before date of first announcement to media or shareholders of proposed corporate action. (C.R.S. 7-113-208[1]).

Voluntary Dissolution.

C. 14 (Art. 114).

Dissolution by Incorporators or Initial Directors.

§ 14.01 of Model Act not adopted. If corporation has not issued shares, majority of directors, or if no directors, majority of incorporators, may authorize dissolution. (C.R.S. 7-114-101).

Dissolution by Board of Directors and Shareholders.

§ 14.02 of Model Act not adopted. Corporation dissolved on expiration of period of duration stated in articles, without filing of articles of dissolution. (C.R.S. 7-114-102.5, 103[4]). After shares issued, board must propose dissolution to shareholders. (C.R.S. 7-114-102[1]). Corporation need only give notice of shareholder meeting to shareholders entitled to vote. (C.R.S. 7-114-102[4]). Proposal to dissolve must be approved by each voting group entitled to vote separately on proposal, by majority of all votes entitled to be cast on proposal by that voting group, unless greater vote required by Act, articles, bylaws adopted by shareholder, or board. (C.R.S. 7-114-102[5]). Unless articles of corporation existing on June 30, 1994 establish vote required, dissolution or revocation of dissolution requires approval by each voting group entitled to vote, by two-thirds of all votes entitled to be cast on proposal by that group. If corporation incorporated before July 1, 1978, each share (unless redeemable and called for redemption under C.R.S. 7-107-202[4]) entitled to vote even if articles provide otherwise, unless articles amended after June 30, 1978, by same vote that would have been necessary at time of amendment to approve plan, so as to restrict or eliminate right of such share to vote on plan (C.R.S. 7-117-101[10]).

Articles of Dissolution.

§ 14.03 (C.R.S. 7-114-103). Articles of dissolution must also set forth: address of principal office; if dissolution authorized by board of incorporators, statement to that effect; any additional information required by Secretary of State. § 14.03(a)(3) and (4) of Model Act modified. After effective date of dissolution, entity name of dissolved corporation must include words "a dissolved Colorado corporation" and year of dissolution. (C.R.S. 7-114-103.5).

Revocation of Dissolution.

§ 14.04 of Model Act not enacted.

Known Claims Against Dissolved Corporation.

§ 14.06 (C.R.S. 7-90-911). Written notice to known claimants may be delivered any time on or after effective date of dissolution (C.R.S. 7-90-911[2]); and must state that unless sooner barred by other state statute limiting action, claim barred if action to enforce claim not begun by deadline stated in notice, which may not be less than two years after notice given (C.R.S. 7-90-911[2], -[3]). Contingent liabilities or claims based on event occurring after effective date of dissolution are not barred. (C.R.S. 7-90-911[4][a]). Action to enforce claim may be civil action or arbitration. (C.R.S. 7-90-911[4][a]).

Disposition of Claims by Publication.

§ 14.07 (C.R.S. 7-90-912). Notice must state that unless sooner barred by other state statute limiting action, action barred if action to enforce not begun within five years after publication or, if later, within four months after claim arises. (C.R.S. 7-90-912[2][b]). Disposition of claims by publication applies to all claims, known or unknown, due or to become due, absolute or contingent, liquidated or unliquidated, except where permitted to be disposed of under C.R.S. 7-90-911 (C.R.S. 7-90-912[4]). Action to enforce claim may be civil action or binding arbitration. (C.R.S. 7-90-912[4]).

Enforcement of Claims Against Dissolved Corporation.

§ 14.07 (C.R.S. 7-90-913). § 14.07(d)(2) of Model Act modified to provide that claim may be enforced against owner of dissolved corporation, if assets distributed in liquidation; but owner's total liability may not exceed total value of assets distributed to him, as value determined at time of distribution. Any owner required to return any portion of value of assets entitled to contribution from all other owners. Contribution must be in accordance with owners' respective rights and interests and may not exceed value of assets received in liquidation. (C.R.S. 7-90-913[1][b]).

Director Duties.

§ 14.09 of Model Act not enacted.

Grounds for Administrative Dissolution.

§ 14.20 (C.R.S. 7-114-201). § 14.20(4) of Model Act not adopted. No 60 day grace period before Secretary of State may proceed to dissolve corporation.

Procedure for and Effect of Administrative Dissolution.

§ 14.21 (C.R.S. 7-114-202). Secretary of State may (but not required to) dissolve corporation when grounds exist after expiration of 60 days following service of notice. (C.R.S. 7-114-202[2]). Secretary of State dissolves corporation by serving written notice on corporation, stating effective date, and delivering copy of notice to last registered agent. (C.R.S. 7-114-202[2]).

Reinstatement Following Administrative Dissolution.

§§ 14.22-14.23 (C.R.S. 7-90-1001). §§ 14.22-14.23 of Model Act not adopted.

Vote or Consent Required—Effect of Opposition.

(C.R.S. 7-90-1002). Domestic corporation that has filed constituent document and that has been dissolved may be reinstated following: receipt of required consent of owner(s); no indication that persons who brought about dissolution oppose reinstatement; if entity was dissolved involuntarily in proceeding initiated by owner(s), receipt of consent of such owner(s); if entity was dissolved involuntarily in proceeding initiated by creditor(s), satisfaction of obligations of such creditor(s); if entity was dissolved involuntarily in proceeding initiated by Secretary of State, satisfaction of grounds for dissolution and receipt of consent of Secretary of State.

Articles of Reinstatement.

(C.R.S. 7-90-1003). Reinstatement requires delivery to Secretary of State articles of reinstatement stating: entity name; date of formation; statute under which entity existed immediately prior to dissolution; date of dissolution; entity name following reinstatement; that all applicable conditions have been satisfied; entity's principal office address; registered agent name and address; and copy of constituent documents, if missing from records of Secretary of State.

Entity Name Upon Reinstatement.

(C.R.S. 7-90-1004). Entity name after reinstatement shall be domestic entity name, determined without regard to C.R.S. 7-90-601.5, at time of reinstatement if it complies with C.R.S. 7-90-601. If that name unavailable it shall be that name followed by "Reinstated" and year of reinstatement.

Effect of Reinstatement.

(C.R.S. 7-90-1005). Existence of entity shall be deemed, for all purposes, to have continued without interruption. Rights arising by reason of reliance on dissolution shall not be adversely affected by reinstatement.

Grounds for Judicial Dissolution.

§ 14.30 (C.R.S. 7-114-301). Attorney general, shareholder or creditor may bring action to liquidate corporation under judicial supervision, in case of dissolution by voluntary action. (C.R.S. 7-114-301[4]).

Procedure for Judicial Dissolution.

§ 14.31(d) of Model Act not adopted. Action by shareholder or creditor for judicial dissolution must be brought in district court of county where principal office or registered agent located, or if no principal office in state and no registered agent, in district court for city and county of Denver. (C.R.S. 7-114-302[1]).

Decree of Dissolution.

§ 14.33 (C.R.S. 7-114-304). Decree of dissolution may be appealed as in other civil proceedings. (C.R.S. 7-114-304[3]).

Election to Purchase in Lieu of Dissolution.

§ 14.34 of Model Act not adopted.

Deposit with State Treasurer.

§ 14.40 of Model Act modified (C.R.S. 7-114-401). Cash from assets of dissolved corporation that should be transferred to creditor, claimant or shareholder who cannot be found or is not legally competent deposited with state treasurer in accordance with Uniform Unclaimed Property Act. See category 21 Property, topic 21.01 Absentees, subhead Escheat.

Foreign Corporations.

C. 15 (Art. 90).

Authority to Transact Business Required.

§ 15.01 (C.R.S. 7-90-801). Foreign corporation may not transact business or conduct activities in state until statement of foreign entity authority filed by Secretary of State. Does not apply to foreign general partnerships that are not foreign limited liability partnerships or foreign unincorporated nonprofit associations. (C.R.S. 7-90-801). "Transact business" and "conduct business" do not include: maintaining proceeding or dispute; conducting internal affairs such as meetings of owners or managers; maintaining bank accounts; maintaining offices for transactions in its own securities; selling through independent contractors; soliciting orders that must be accepted outside this state before becoming contracts; creating or enforcing indebtedness, mortgages or security interests; owning property; conducting isolated transaction; participating in interstate commerce; or, in case of foreign nonprofit corporation, granting funds or distributing information to members. (C.R.S. 7-90-801). Section does not affect right to subject foreign corporation to jurisdiction of courts. (C.R.S. 7-90-801). Section does not permit foreign entity to engage in profession or occupation described in Title 12, C.R.S. (Professions and Occupations).

Consequences of Transacting Business Without Authority.

§ 15.02 (C.R.S. 7-90-802). In addition to corporation, no person may maintain proceeding on corporation's behalf for collection of its debts until application filed. (C.R.S. 7-90-802). Corporation liable for unpaid fees and penalties. Civil penalty for transacting business without authority: up to $5,000. Court may issue injunction in addition to or instead of civil penalty. (C.R.S. 7-90-802).

Application for Certificate of Authority.

§ 15.03 (C.R.S. 7-90-803). Statement of foreign entity authority to transact business or conduct activities must also set forth: form; date corporation commenced or expects to commence transacting business in state; additional information required by Secretary of State (C.R.S. 7-90-803). § 15.03(a)(6) not adopted.

Amended Certificate of Authority.

§ 15.04 (C.R.S. 7-90-804). § 15.04 of Model Act not adopted. Upon any change that makes statement of foreign entity authority no longer true, foreign entity must file appropriate statement of change.

Certificate of Authority.

§ 15.05 (C.R.S. 7-90-805). Corporation's formation jurisdiction's laws govern organization and internal affairs and liability of owners and managers.

Corporate Name of Foreign Corporation.

§ 15.06 (C.R.S. 7-90-604). § 15.06 of Model Act modified. Foreign corporation whose entity name is not available for use in this state must assume entity name that is available. (C.R.S. 7-90-603). See subhead Name, catchline Corporate Name, supra.

Registered Office and Registered Agent of Foreign Corporation.

§ 15.07 (C.R.S. 7-90-701). Foreign corporation may serve as own registered agent so long as its usual place of business is in this state. (C.R.S. 7-90-701).

Resignation of Registered Agent of Foreign Corporation.

§ 15.09. See subhead Office and Agent, supra.

Withdrawal of Foreign Corporation.

§ 15.20 (C.R.S. 7-90-806). Foreign entity may withdraw by delivering statement of foreign entity withdrawal stating: true name and assumed entity name; name and address of registered agent or mailing address to which service of process may be mailed; principal office address; formation jurisdiction; that it will no longer transact business or conduct activities in this state and relinquishes authority to do so; that all registrations of trade names are withdrawn. (C.R.S. 7-90-806).

Service on Foreign Corporation.

§§ 15.10 and 15.20 (C.R.S. 7-90-807). Withdrawn foreign corporation must either: (a) Maintain registered agent in state, or (b) be considered to have authorized service of process to address of principal office or address in application for withdrawal. (C.R.S. 7-90-807). Means of service described not exhaustive. (C.R.S. 7-90-807).

Records and Reports.

C. 16 (Art. 116).

Corporate Records.

§ 16.01 (C.R.S. 7-116-101). Mandatory records include copies of most recent annual reports delivered to Secretary of State under C.R.S. 7-90-501, and records of all waivers of notices of meetings of shareholders, board or committees. Shareholder record must have names and addresses, in form that permits preparation of shareholder list: (a) Arranged by voting group and class or series; (b) alphabetically within each class or series; and (c) showing address of and number of shares of each class and series held by shareholder. (C.R.S. 7-116-101[3]). § 16.01(e)(3) of Model Act not adopted.

Inspection of Records by Shareholders.

§ 16.02 (C.R.S. 7-116-102). Waivers of notices included in material subject to inspection and copying. (C.R.S. 7-116-102[2][a]).

Scope of Inspection Right.

§ 16.03 (C.R.S. 7-116-103). Corporation may charge reasonable amount for copying, but may not charge for information respecting shares.

Court-Ordered Inspection.

§ 16.04 (C.R.S. 7-116-104). If court orders inspection or copying of records, unless corporation proves it refused in good faith with reasonable basis for doubt about right to inspect or copy, court may order corporation to pay shareholder for damages incurred; in case of records that shareholder is entitled to inspect or copy under C.R.S. 7-116-104(2), court may order corporation to pay inspection and copying charges; court may grant any other legal remedy (C.R.S. 7-116-104[3]).

Inspection of Records by Directors.

§ 16.05 of Model Act not adopted.

Exception to Notice Requirement.

§ 16.06 of Model Act not adopted.

Financial Statements for Shareholders.

§ 16.20 (C.R.S. 7-116-105). Financial statements, if any, required to be sent only on written request of shareholder.

Information Respecting Shares.

(C.R.S. 7-116-106). Upon written request of shareholder, corporation must mail information respecting shares, whether or not information also on shareholder's share certificate.

Annual Report for Secretary of State.

§ 16.21 (C.R.S. 7-90-501). Annual report filed with Secretary of State. See subhead Filing Requirements, supra. § 16.21 of Model Act not adopted. Annual report must include entity name, formation jurisdiction, and, if different from most recent information in records of Secretary of State: registered agent name and address and principal office address. (C.R.S. 7-90-501[1]). Annual report shall be in manner prescribed and delivered by Secretary of State. Form shall first be delivered to registered agent on year after calendar year in which entity was formed. Thereafter, delivered annually. Information in annual report to be current as of date delivered to Secretary of State. (C.R.S. 7-90-501[4]). Annual report shall be delivered no later than last day of second calendar month following first anniversary month. (C.R.S. 7-90-501). Failure or refusal to deliver within time prescribed and pay prescribed fee shall be subject to penalty, except if caused by Secretary of State's untimely delivery of form.

Interrogatories by Secretary of State.

(C.R.S. 7-90-402). Secretary of State may propound interrogatories to foreign or domestic corporation subject to Act and to any manager to determine compliance with Act. Interrogatories must be answered in writing within 30 days after mailing. Corporation failing to answer is guilty of misdemeanor with fine of not more than $5,000. (C.R.S. 7-90-402[3]). Manager failing to answer or who signs document delivered to Secretary of State knowing it to be false in any material respect guilty of misdemeanor with fine of not more than $10,000. (C.R.S. 7-90-402[4]).

Transitional Provisions.

C. 17 (Art. 117).

Application to Existing Domestic Corporations.

§ 17.01 (C.R.S. 7-117-101). Effective date July 1, 1994. Applies to all corporations existing on June 30, 1994. Provisions of prior Act retained for existing corporations with respect to preemptive rights (C.R.S. 7-117-101[3]; see subhead Shares and Distributions, catchline Shareholders' Preemptive Rights, supra), voting on amendments to articles (C.R.S. 7-117-101[7]; see subhead Amendment by Board of Directors and Shareholders, supra), voting on mergers and share exchanges (C.R.S. 7-117-101[8]; see subhead Merger and Share Exchange, supra); voting on dispositions of all or substantially all assets (C.R.S. 7-117-101[9]; see subhead Sale of Assets Other Than in Regular Course of Business, supra); and voting on dissolution (C.R.S. 7-117-101[10]; see subhead Authorization of Dissolution After Issuance of Shares, supra).

Repeal.

§ 17.05 not adopted. Colorado Model Business Corporation Act (title 7, Arts. 101 to 117) replaces repealed Colorado Corporation Code (title 7, Arts. 1 to 10).

Effective Date.

§ 17.06 (C.R.S. 7-117-105). Effective date July 1, 1994. See subhead Application to Existing Domestic Corporations, supra.

Taxation of Corporate Property.

Generally, corporate property is taxed like individual property. See category 22 Taxation, topic 22.03 Business Taxes.

Franchise Tax.

Colorado does not impose franchise tax. See, however, category Taxation, topic Income Tax.

Professional Corporations.

Professional persons entitled to form professional corporations include: accountants (C.R.S. 12-2-117), chiropractors (C.R.S. 12-33-124), dentists (C.R.S. 12-35-116), engineers (C.R.S. 12-25-104), optometrists (C.R.S. 12-40-125), physical therapists (C.R.S. 12-41-124), physicians and surgeons (C.R.S. 12-36-134), podiatrists (C.R.S. 12-32-109.5), psychologists (C.R.S. 12-43-211). Attorneys are permitted to form professional service corporations by Supreme Court Rule. See category 18 Legal Profession, topic 18.01 Attorneys and Counselors.

Cooperative Housing Corporations.

Nonprofit cooperative housing corporation may be formed by any three or more adult residents for purpose of providing stockholders with right to occupy, for dwelling purposes, house or apartment owned or leased by corporation. (C.R.S. 38-33.5-101).

Deeds.

See category 21 Property, topic 21.06 Deeds.

Model Non-Profit Corporation Act adopted with significant variations, effective July 1, 1998. (C.R.S. 7-121-101). Applies to nonprofit corporations organized before July 1, 1998, pursuant to C.R.S. 7-40-101, C.R.S. 7-50-101 or C.R.S. 7-51-101 that have elected to accept it (C.R.S. 7-137-201).

Limited Liability Companies.

See topic 2.06 Limited Liability Companies.

2.04 [RESERVED]

2.05 JOINT STOCK COMPANIES:

Provisions of C.R.S. 7-121-101 to C.R.S. 7-137-301 and C.R.S. 7-51-101 to 113 apply to joint stock associations organized before Jan. 1, 1968 for religious, benevolent or educational purposes, unless such associations elected to be governed by Nonprofit Corporation Act (C.R.S. 7-121-101 to C.R.S. 7-137-301). Other types of joint stock companies not authorized by statute.

Professional Corporations.

See topic 2.03 Corporations, subhead Professional Corporations.

2.06 LIMITED LIABILITY COMPANIES:

Colorado Limited Liability Company Act.

(C.R.S. 7-80-101 to 913).

Date of Adoption.

Apr. 18, 1990.

General Supervision.

Secretary of State.

Purposes.

Limited liability companies may be organized for any lawful business. (C.R.S. 7-80-103).

Powers.

Very broad, include all powers necessary or convenient to effect purposes for which limited liability company may be organized. (C.R.S. 7-80-104).

Name.

Must contain term or abbreviation “limited liability company,” “ltd. liability company,” “limited liability co.,” “ltd. liability co.,” “limited,” “L.L.C.” or “ltd.” (C.R.S. 7-90-601[3][c]). Names may be reserved for 120 days by submitting application and required fee to Secretary of State, and initial reservation may be renewed for additional 120 days. (C.R.S. 7-90-602).

Formation.

One or more persons by delivering articles of organization to Secretary of State. Any such person who is natural person must be 18 years of age or older. (C.R.S. 7-80-203).

Articles of Organization must include name and principal place of business of limited liability company, name and business address of registered agent for service of process, true name and mailing address of each person forming limited liability company, statement as to whether limited liability company is member managed or manager managed, and that there is at least one member of limited liability company. (C.R.S. 7-80-204). Articles of Organization may be filed electronically. (C.R.S. 7-90-301[4]).

Amendment to Articles of Organization.

Articles must be amended when there is change in name of company or there is false or erroneous statement in Articles of Organization, and may be amended at any time and for any purpose. (C.R.S. 7-80-209).

Members are owners of limited liability companies. (C.R.S. 7-80-102). Members may be natural persons or entities. After filing of articles, additional members may be admitted only upon receipt of consent of all members unless written agreement provides otherwise. (C.R.S. 7-80-108, 701). Interest of member constitutes personal property and may be assigned. However, unless assignee is admitted as member, assignee shall have no right to participate in management or become member unless all members of company so consent unless written agreement provides otherwise. (C.R.S. 7-80-108, 702). Transferee is entitled only to receive his share of profits, losses and distributions. (C.R.S. 7-80-702). Members are not liable for debts, obligations or liabilities of limited liability company. (C.R.S. 7-80-705). Judgment creditors of members have only rights of assignee of interest. (C.R.S. 7-80-703).

Operating Agreement.

Members may enter into operating agreement governing affairs of company and conduct of its business. (C.R.S. 7-80-102). Operating agreement may grant to all or specified group of members right to consent, vote, or agree, on per capita or other basis, upon any matter. (C.R.S. 7-80-706).

Management responsibility may be vested in members or one or more managers. Decisions shall be made by majority of members or, if articles of organization provide, by majority of managers. Unless provided for in operating agreement, consent of each member is necessary to amend articles, operating agreement, and to authorize act not in ordinary course of business of company. (C.R.S. 7-80-108, 401). Company whose articles provide for company to be managed by managers may appoint one or more managers. Manager who is individual shall be 18 years of age or older. Managers may be selected and removed by consent of majority of members. (C.R.S. 7-80-402). Company may appoint one or more persons to be officers or agents other than managers, with such duties and designations as company may determine. (C.R.S. 7-80-403).

Members and managers are obligated to perform duties that member in limited liability company in which management is not vested in managers, or appointed manager or managers, owe to company including duty to account to company and hold as trustee for it any property, profit, or benefit derived by member or manager in conduct or winding up of company business or derived from use by member or manager of property of company, including appropriation of opportunity of company; refrain from dealing with company in conduct or winding up of company business as or on behalf of party having interest adverse to company; refrain from competing with company in conduct of company business before dissolution of company; and comply with provisions of operating agreement. Each of these obligations may be limited, eliminated or defined if not unreasonable and in compliance with C.R.S. 7-80-108. Member or manager owes to company duty of care in conduct and winding up of business of company, which shall be limited to refraining from engaging in grossly negligent or reckless conduct, intentional misconduct, or knowing violation of law. Member or manager shall discharge member's or manager's duties to company and exercise any rights consistently with obligation of good faith and fair dealing. Member or manager shall not violate duty or obligation to company solely because member's or manager's conduct furthers member's or manager's own interest. (C.R.S. 7-80-404). Indemnification of managers, employees and agents permitted. (C.R.S. 7-80-407).

Records.

Company must maintain specified financial and other records at principal office. Such records are subject to inspection and copying at reasonable request of, and at expense of, any member during normal business hours. (C.R.S. 7-80-408).

Capital.

Contributions of members may be in cash, property or services rendered or promissory note or other obligation to contribute cash or property or to perform services. Person may be admitted to company as member without making contribution or, unless provided in operating agreement, person may be admitted as member without acquiring membership interest in company. Person may be admitted as sole member of company without making contribution or being obligated to make contribution or acquiring membership interest in company. (C.R.S. 7-80-501). Promise to contribute to company is enforceable against member if in writing, and may not be waived without consent of all members. (C.R.S. 7-80-502). Unless otherwise provided in operating agreement, profits and losses of company will be allocated among members and among classes of members on basis of value of contribution made by each member. (C.R.S. 7-80-503). Unless otherwise provided in operating agreement, distributions of cash or other assets will be allocated among members and among classes of members on basis of value of contribution made by each member. (C.R.S. 7-80-504).

Distributions.

Members entitled to distributions only to extent set forth in operating agreement. (C.R.S. 7-80-601). Member does not have right to demand or receive any distribution except in cash, except as set forth in operating agreement. (C.R.S. 7-80-108, 604). Member may not receive distribution from company except to extent that, after giving effect to distribution, fair value of company's assets exceeds its liabilities. (C.R.S. 7-80-606). Members are liable under certain circumstances if they receive return of their contribution. (C.R.S. 7-80-607).

Resignation.

Member may resign at any time by giving written notice. If resignation violates operating agreement, company may recover damages from resigning member. (C.R.S. 7-80-602). Upon resignation, member is entitled only to receive share of profits to which such member would have been entitled if it had not resigned. (C.R.S. 7-80-603).

Registered Agent.

Company must maintain registered agent and deliver report to Secretary of State of any change in registered agent or his business address. (C.R.S. 7-90-701, 702).

Reports.

Each domestic and foreign limited liability company must file periodic reports with Secretary of State indicating name of company (and, in case of foreign company, state of organization), name and business address of registered agent (and, in case of foreign company, address of principal office in state of its organization) and principal office address of company's principal office. Reports due annually. Penalties are imposed if reports are not filed. (C.R.S. 7-90-501).

Dissolution.

Company will be dissolved upon unanimous agreement of all members or occurrence of events specified in writing in operating agreement. (C.R.S. 7-80-801). Voluntary and involuntary dissolution is governed by C.R.S. 7-80-801 to 813.

Foreign limited liability companies are recognized and must qualify to do business in Colorado. (C.R.S. 7-90-801, 802).

2.07 [RESERVED]

2.08 PARTNERSHIPS:

General.

Colorado has adopted Uniform Partnership Act (1994) (Colorado Uniform Partnership Act [1997], C.R.S. 7-64-101 to 1206) effective Jan. 1, 1998 with revisions relating primarily to limited liability partnerships. Colorado Uniform Partnership Act (1997) will govern partnerships formed after effective date and partnerships that elect to be governed. (C.R.S. 7-64-1205). Partnerships formed prior to effective date that do not elect to be covered by Colorado Uniform Partnership Act (1997) continue to be governed by Uniform Partnership Act. (Colorado Uniform Partnership Law, C.R.S. 7-60-101 to 154).

Partnership or other unincorporated association may sue or be sued in its common name. (C.R.S. 13-50-105). See category 17 Intellectual Property, topic Trademark and Tradenames, subhead Tradenames for filing requirements as to partnership name.

Colorado Deviations from Uniform Partnership Act (1994).

Domestic partnership may be converted into domestic limited partnership or foreign limited partnership. (C.R.S. 7-64-902). Domestic limited partnership may be converted into domestic partnership or foreign partnership. (C.R.S. 7-64-903). Unless lesser vote is provided for in partnership agreement, conversion of limited partnership into partnership requires approval of all partners. (C.R.S. 7-64-903). Non-consenting limited partner to conversion of limited partnership to partnership or merger with another partnership considered to have withdrawn from partnership but not considered to be wrongfully withdrawn. (C.R.S. 7-64-903, 905).

Partnership presumed to have been formed in jurisdiction in which it has its chief executive office. (C.R.S. 7-64-106). Law of Colorado governs relationships among partners and partnerships, as well as liability of partners in registered limited liability partnership. (C.R.S. 7-64-106). Duties of partner to partnership pertain to all transactions connected with formation, conduct or liquidation of partnership. (C.R.S. 7-64-404). Upon partner request, partnership dissolved by judicial determination upon showing that partnership is not reasonably likely to pay liabilities against which it has obligation to indemnify dissociated partner. (C.R.S. 7-64-801). Partnership agreement may only be amended by unanimous consent. (C.R.S. 7-64-401).

Limited Partnerships.

Colorado has adopted Uniform Limited Partnership Act (1916) (Colorado Uniform Limited Partnership Law of 1931, C.R.S. 7-61-101 to 130) and Uniform Limited Partnership Act (1976 with 1985 amendments) (Colorado Uniform Limited Partnership Act of 1981, C.R.S. 7-62-101 to 1201) with numerous minor variations. Limited partnerships electing registration governed by Colorado Uniform Partnership Act (1997), and partnerships not making election governed by Colorado Uniform Partnership Law. (C.R.S. 7-62-1104). Out-of-state limited partnerships must register with Secretary of State before transacting business in Colorado. (C.R.S. 7-62-902).

Colorado Uniform Limited Partnership Act of 1981 applies to all limited partnerships formed on or after Nov. 1, 1981. (C.R.S. 7-62-1101). Limited partnership formed prior to Nov. 1, 1981 governed by provisions of Colorado Uniform Limited Partnership Law of 1931 unless it elects to be governed by Colorado Uniform Limited Partnership Act of 1981. Election must be made in manner provided. (C.R.S. 7-62-1103). In case not provided for in Colorado Uniform Limited Partnership Act of 1981, provisions of Colorado Uniform Partnership Law, or Colorado Uniform Partnership Act (1997), shall apply. (C.R.S. 7-62-1104).

Provisions that have been added to Colorado version of Uniform Limited Partnership Act (1976 with 1985 amendments) include following: provisions to expand words or abbreviations that must appear in name to indicate limited partnership or limited liability limited partnership status (C.R.S. 7-62-102), to permit renewal of reservation of name for additional periods of 120 days (C.R.S. 7-62-103) and to provide for mergers and consolidations of limited partnership (C.R.S. 7-62-210). Permits majority of limited partners to admit additional general partner upon withdrawal of last remaining general partner where partnership agreement does not provide for such appointment, unless prohibited by partnership agreement; and permits district court for county in which registered agent is located to admit additional general partner upon application by any limited partner after such withdrawal, unless limited partnership was formed before June 3, 1997 and any partner prior to June 2, 1998 delivers written election to general partner against application of such provision. (C.R.S. 7-62-401, 801). In addition, Colorado provides that in absence of appointment of agent for service of process, service will be made on Secretary of State for either domestic limited partnership (C.R.S. 7-62-108) or foreign limited partnership (C.R.S. 7-62-909). Certificate of limited partnership must state that there are at least two partners, at least one of whom is limited partner (C.R.S. 7-62-201[1][d]), need not specify dissolution date and may specify effective date within 90 days after filing (C.R.S. 7-62-201). Colorado extends liability for false statement in certificate of limited partnership, certificate of amendment or statement of dissolution to any general partner who knew or should have known that statement was false when certificate was approved. (C.R.S. 7-62-207).

In derivative action by limited partner, Colorado requires, in addition to elements that must be established under Uniform Limited Partnership Act (1976 with 1985 amendments), that limited partner establish that general partner’s decision not to sue constitutes abuse of discretion or conflict of interest. (C.R.S. 7-62-1001). Court may require plaintiff who brings derivative action without reasonable cause to pay costs and fees other than attorneys fees. (C.R.S. 7-62-1002). Limited partnership may require plaintiff in derivative action who owns less than 5% or $25,000 to give security for costs and expenses. (C.R.S. 7-62-1003).

Limited Liability Partnerships, Limited Liability Limited Partnerships, Limited Partnership Associations.

Partnership may register as limited liability partnership and limited partnership may register as limited liability limited partnership. (C.R.S. 7-64-1002). Limited liability partnership is for all purposes partnership. (C.R.S. 7-64-202[1]). Limited partnership association is formed with indefinite duration. (C.R.S. 7-63-116). Foreign limited liability partnership or foreign limited liability limited partnership may register as such with Secretary of State. (C.R.S. 7-90-801). Foreign limited liability partnership or foreign limited liability limited partnership may not transact business in Colorado or maintain any court action for collection of debts in Colorado until it is registered. (C.R.S. 7-90-802).

Registration statement for limited liability partnership or limited liability limited partnership must contain: partnership name, address of chief executive office; if its chief executive office is not located in Colorado, name and street address of registered agent. (C.R.S. 7-64-1002). Registered limited liability partnership and limited liability limited partnership without chief executive office within Colorado must maintain registered office and registered agent who is individual resident, domestic corporation, or registered foreign corporation. (C.R.S. 7-64-1113). Name of limited liability partnership must contain words limited liability partnership or abbreviation L.L.P. or LLP, and name of limited liability limited partnership must contain words limited liability limited partnership or abbreviation L.L.L.P. or LLLP. (C.R.S. 7-64-1003[1][A]).

Except as provided in written partnership agreement, person is not liable, directly or indirectly, or through indemnification, contribution, assessment or otherwise, solely by being partner, for partnership obligations incurred while partnership is limited liability partnership. (C.R.S. 7-64-306).

Except for reasonable compensation for current services, limited liability partnership or limited liability limited partnership shall not make distribution to general partner to extent that at time of distribution, after giving effect to distribution, all liabilities of limited liability partnership or limited liability limited partnership, other than liabilities to general partners on account of their partnership interests only to extent that fair value of that property exceeds that liability. (C.R.S. 7-64-1004). Courts must apply corporate case law regarding piercing corporate veil to determine personal liability of general partners of limited liability partnership or limited liability limited partnership. (C.R.S. 7-64-1009).

Requirements for filing partnership, limited partnership, limited liability partnership and limited liability limited partnership documents established. (C.R.S. 7-64-1103). Partnership may change registered office or registered agent by filing with Secretary of State statement including partnership name, street address of current registered office, address of new registered office, name of current registered agent, name of new registered agent, and statement that after change street address of registered agent will be identical to business office of registered agent. (C.R.S. 7-64-1114).

Colorado Corporations and Associations Act.

Various entities may convert to or merge with other types of entities. (C.R.S. 7-90-201).

3 BUSINESS REGULATION AND COMMERCE

3.01 BANKS AND BANKING:

Uniform Commercial Code adopted. See topic 3.09 Commercial Code. Uniform Consumer Credit Code adopted.

Banking Days.

Bank may determine to dispense with or restrict its hours on Sat. (C.R.S. 4-4-104). Defined to mean that part of any day, excluding Sat., Sun., and holidays, on which bank is open to public for carrying on substantially all of its banking functions. (C.R.S. 11-105-103).

Regulated by.

Colorado Banking Code is based on Model State Banking Code of American Banker Association. (Tit. 11, arts. 101 to 109, 10.5). Banking corporations, including savings banks, and all national banks to extent applicable (C.R.S. 11-101-401[5]; C.R.S. 11-101-301), are governed by this Code. General Corporation Code otherwise generally applicable. (C.R.S. 11-107-111). Separate provisions govern nonbanking trust companies (C.R.S. 11-109-101 to 907), savings and loan associations (C.R.S. 11-40-101 to C.R.S. 11-48-107), credit unions (C.R.S. 11-30-101 to 125) and industrial banks (C.R.S. 11-108-101 to 803). See appropriate subheads, infra.

Division of banking exercises general control over all state banks. (C.R.S. 11-102-101[1]). Within division there is banking board and bank commissioner. (C.R.S. 11-102-101[2]; C.R.S. 11-102-102[1]). Board exercises all policy-making and rule-making authority for division, and commissioner is responsible for internal administration thereof (C.R.S. 11-102-105), including organization, merger, consolidation, conversion, sale of assets, liquidation, dissolution, and reorganization (C.R.S. 11-101-301 and C.R.S. 11-102-104). Board may delegate to commissioner any power, duty or function of board except all powers vest in board unless delegated to commissioner by statute. (C.R.S. 11-102-104[15]). Review of decision of board is vested in district court or court of appeals. (C.R.S. 11-102-204). Every state bank must file three reports annually with commissioner, detailing resources and liabilities. (C.R.S. 11-102-302[1]). Changes in voting stock control of state banks require prior application to banking board for approval. (C.R.S. 11-102-303[1] to [7]). Commissioner makes examination of state banks as often as directed by banking board. (C.R.S. 11-102-301). Costs of examinations and administrative expenses of division are assessed against state banks in proportion to their assets. (C.R.S. 11-102-401).

Stockholders.

When banking board has reason to believe capital of any state bank is inadequate, it shall cause bank to assess stockholders pro rata to make good such deficiency and if any stockholder fails to pay such assessment bank may sell his stock at public auction or private sale to make good such assessment. (C.R.S. 11-103-202[1]). If assessment not paid within time period specified in order (not to be less than 30 days), commissioner, with approval of board, may proceed with liquidation or reorganization. (C.R.S. 11-103-202; C.R.S. 11-103-802 to 805).

Shareholders of every state bank are individually responsible equally and ratably for debts of bank to extent of double amount of stock ownership at par value (in addition to amount invested in such shares) unless bank is member of federal deposit insurance corporation. (C.R.S. 11-103-203).

Branch Banking.

Losing its title as country's only unit banking state, Colorado adopted broad in-state branching legislation (C.R.S. 11-105-601 to 606) in 1991 applicable to all "financial institutions", defined to include commercial banks, industrial banks, savings and loan associations, federal savings banks and their respective holding companies. Provisions include: (1) Conversion of any or all affiliated institutions to branches; (2) de novo branching (one or more branch per bank, industrial bank and savings and loan); and (3) authority for all affiliated Colorado financial institutions to contract on behalf of each other to receive deposits, close and service loans, and receive payments on loans, without becoming branch banks.

Interstate Banking and Branching.

Pursuant to interstate banking law (C.R.S. 11-104-201 to 203), Colorado bank holding company may acquire control of out-of-state state holding company or bank and out-of-state holding company may acquire control of Colorado holding company or bank. Acquisitions by out-of-state holding companies limited to Colorado holding companies and banks in operation for at least five years at time of acquisition of control. Out-of-state holding company may not acquire Colorado holding company or bank if acquisition would result in control of more than 25% of aggregate deposits in all federally-insured Colorado financial institutions.

Interstate branching in any form was prohibited in Colorado prior to June 1, 1997. Since then Colorado banks in existence at least five years may be acquired and converted into branches, but under no circumstances may out-of-state banks or bank holding companies establish de novo branches or acquire branches of existing banks.

Insurance.

Subject to laws and rules applicable to state or national banks, as case may be, banks may act as agent in solicitation and sale of insurance. (C.R.S. 11-105-101[4]).

Nonbank Banks.

Prohibited within state as to ownership by domestic or foreign bank holding company or other “company”. (C.R.S. 11-104-201).

Deposits.

Banks may receive deposits from minors. (C.R.S. 11-105-104). Joint deposits may be paid to either depositor, deemed in joint tenancy with right of survivorship. (C.R.S. 11-105-105). For deposit accounts opened by one or more persons expressly acting as trustee for someone else pursuant to written trust agreement, trustee may provide bank with certificate of trust to evidence that relationship in form indicated by statute. (C.R.S. 11-105-111). Multiple-person accounts, including P.O.D. accounts, are governed by C.R.S. 15-15-201 to 227, part of Colorado Probate Code. See category 13 Estates and Trusts, topic 13.16 Wills.

Maximum annual rate of interest payable by state banks on all types of deposits or accounts may be set by board regulation or, in absence thereof, by applicable federal law. (C.R.S. 11-105-102). Depositor must object to statement of his account within one year. (C.R.S. 11-105-106). See topic 3.09 Commercial Code. Bank need not recognize adverse claim to deposit in absence of court order or posted bond. (C.R.S. 11-105-107).

Unclaimed Deposits.

Upon liquidation of state bank, such funds shall be held six years by commissioner and then paid over to county treasurer. (C.R.S. 11-103-801; C.R.S. 11-103-804[11]). Colorado has also adopted version of Uniform Unclaimed Property Act, which requires financial institution that holds money and intangible property belonging to customers to file reports with and deliver property to state treasurer at specified intervals. (C.R.S. 38-13-101 to 134). See category 21 Property, topic 21.01 Absentees, subhead Escheat.

Trust Companies.

Regulated by Trust Company Act. (C.R.S. 11-109-101 to 1007). Trust companies have powers to: Act in any fiduciary or representative capacity, act as transfer agent, registrar, escrow agent, or attorney-in-fact and receive, manage, and apply sinking funds; maintain and rent safekeeping facilities; maintain savings deposits, time deposits, and certificates of deposit for investment of fiduciary funds and other accounts for which trust company is empowered to act, and pay interest thereon at rates permitted state banks under C.R.S. 11-105-102(3), but all such deposits must be insured by federal deposit insurance corporation (C.R.S. 11-109-204); exercise same investment powers as individual fiduciary under like circumstances; accept and execute any fiduciary business permitted by laws of Colorado or any other state and U.S. and establish common trust funds as provided by C.R.S. 11-24-101 to 107; take oaths and execute affidavits by oath or affidavit of specified officers; act as agent in solicitation and sale of insurance under rules of state insurance commissioner (C.R.S. 11-109-201[3]); act as investment adviser under any applicable law; and do and perform any other acts necessary or proper to exercise foregoing powers; but are otherwise prohibited from conducting banking business and cannot use word bank in their names. (C.R.S. 11-109-201).

Uniform Common Trust Fund Act adopted. (C.R.S. 11-24-101).

Savings and Loan Associations.

Regulated by Savings and Loan Association Law (Tit. 11, arts. 40 to 46) administered by state commissioner of financial services (C.R.S. 11-44-101). May branch to same extent as other financial institutions. See subhead Branch Banking, supra. Broad corporate powers (C.R.S. 11-41-112), but business is to be primarily accumulation of funds through sale of shares, notes, debentures, acceptance of savings deposits, loan or investment of funds to its members to acquire real estate, make improvements and pay off encumbrances (C.R.S. 11-40-103). May act as agent in solicitation and sale of insurance under rules of financial services board and state insurance commissioner. (C.R.S. 11-41-112[1]). Unless authorized by commissioner, savings and loan association may not act as fiduciary, other than as escrow agent. (C.R.S. 11-41-112.5). Investments limited to specified categories. (C.R.S. 11-41-114[1]). In general, may accept deposits, borrow money and make loans to same extent as federal savings and loan associations. (C.R.S. 11-41-114[2]; C.R.S. 11-41-119).

Credit Unions.

Regulated by state's credit union statutes (C.R.S. 11-30-101 to 124) administered by state commissioner of financial services (C.R.S. 11-30-124). Credit union has power to receive deposits, accept share drafts, make loans to members, make investments, hold individual retirement accounts, belong to central credit union, merge, dissolve, with commissioner approval sell any portion of its assets or purchase assets of another credit union, and generally engage in any activity that federally chartered credit union may engage in. (C.R.S. 11-30-104).

Industrial banks are governed by state law (C.R.S. 11-108-101 to 803), administered by state banking board (C.R.S. 11-108-101). Generally, they may make all types of loans (C.R.S. 11-108-202) but may carry only savings deposits, which must be insured by federal deposit insurance corporation (C.R.S. 11-108-703). May act as agent in solicitation and sale of insurance under rules of state insurance commissioner (C.R.S. 11-108-201[6]) and may branch to same extent as other financial institutions. See subhead Branch Banking, supra.

3.02 BILLS AND NOTES:

Uniform Commercial Code adopted. See topic 3.09 Commercial Code.

Uniform Consumer Credit Code adopted.

Judgment notes have been held to be enforceable in Colorado but are not in common use. Judgments so obtained will be vacated upon showing of meritorious defense. (160 Colo. 523, 418 P.2d 289). Uniform Consumer Credit Code renders void any authorization to confess judgment on claim arising out of consumer loan, credit sale or lease. (C.R.S. 5-2-415; C.R.S. 5-3-407).

Attorney fee collection clauses are valid and enforceable if reasonable in amount (28 Colo. App. 441, 476 P.2d 292) and include fees incurred on appeal (635 P.2d 882). Uniform Consumer Credit Code authorizes reasonable attorney's fee not in excess of 15% of unpaid debt after default on consumer loans, credit, sales or leases referred to attorney not salaried employee of creditor. (C.R.S. 5-3-404; C.R.S. 5-2-413).

Bad Checks.

Person who draws check not paid upon presentment is liable to holder for amount of check plus actual damages, or amount of check plus any posted or contractual charge not exceeding $20 and any collection agency cost equal to 20% of check's face value. If total amount due is not paid within 15 days after written notice of nonpayment on presentment, drawer is liable to holder for treble amount of check but not less than $100. Certain statutory exceptions apply. Court costs and reasonable attorney fees are recoverable by prevailing party. (C.R.S. 13-21-109).

Special Defenses.

Assignee of consumer paper subject to claims and defenses of buyer against seller or lessor even if assignee is holder in due course. (C.R.S. 5-2-403).

3.03 BILLS OF LADING:

See topic 3.08 Carriers.

3.04–3.05 [RESERVED]

3.06 BROKERS:

Towns and cities may tax, license and regulate brokers, provided that they do not interfere with persons required by law to sell property at auction. (C.R.S. 31-15-501[p]).

Real Estate Brokers.

No person, firm, partnership, limited liability company, association, or corporation may engage in business or capacity of real estate broker unless license is obtained from real estate commission. (C.R.S. 12-61-102). Licensing statute does not require one to have broker's license to negotiate on own behalf. (C.R.S. 12-61-101[2][b][IV]; 697 P.2d 34). Broker and salesperson are defined by statute. (C.R.S. 12-61-101).

To collect finder's fee or commission, one who brings together buyer and seller must have real estate license if subject matter of sale involves change in ownership of interest in real estate. (196 Colo. 503, 593 P.2d 314). Broker's right to commission limited by statute. (C.R.S. 12-61-201 to 203).

Broker must be at least 18 and must meet educational requirements and pass written examination under supervision of commission. (C.R.S. 12-61-103). Applicant for broker's license must submit set of fingerprints for purpose of criminal history record check. Applicant must pay fee established by Colorado bureau of investigation for conducting fingerprint-based criminal history record check. Results of such criminal history record check must be forwarded by Colorado bureau of investigation to real estate commission. (C.R.S. 12-61-103). Special requirements apply to operation of independent brokerage practice and employment of brokers. (C.R.S. 12-61-103[6]). Mandatory insurance is required. (C.R.S. 12-61-103.6).

A nonresident may become a licensed real estate broker by complying with statute, but need not maintain place of business in this state if definite place of business maintained in another state. (C.R.S. 12-61-107[1]).

Examination and license fees are as set forth in C.R.S. 12-61-110 and C.R.S. 12-61-111.5. Continuing education requirements are as set forth in C.R.S. 12-61-110.5. Unless commission establishes procedures for renewal on anniversary date, broker or salesperson license expires on Dec. 31 of first year. Each renewal is for three years. (C.R.S. 12-61-110[4]). Renewal conditioned upon fulfillment of continuing education requirements and submission of fingerprints. (C.R.S. 12-61-110.5, 110.8). Licenses may be suspended or revoked, or licensee may be fined or censured by commission on various grounds (C.R.S. 12-61-113, 306) after hearing (C.R.S. 12-61-114). Subpoena power provided (C.R.S. 12-61-120), penalty for failure to obey (C.R.S. 12-61-121), and injunction power (C.R.S. 12-61-122).

Person who solicits fee or consideration from prospective tenant for furnishing information concerning availability of real property must be licensed as real estate broker. (C.R.S. 12-61-101[2][a][X]).

Broker relationships in real estate transactions governed by statute. (C.R.S. 12-61-801 to 811). Dual agent, limited agent, single agent, buyer's agent, landlord's agent, seller's agent, tenant's agent, subagent and transaction-broker are each defined by statute (C.R.S. 12-61-802) and respective duties, restrictions and obligations of each established by statute (C.R.S. 12-61-803 to 810).

Agricultural Broker.

Those who engage in business of soliciting or negotiating sales of farm products between vendor and purchaser are regulated by statute (C.R.S. 12-16-101 to 118); must be licensed by commissioner of agriculture (C.R.S. 12-16-104); and be bonded or file irrevocable letter of credit (C.R.S. 12-16-106).

Securities Broker.

See topic 3.24 Securities.

Uniform Commercial Code adopted. (C.R.S. 4-1-101 to C.R.S. 4-11-102). See topic 3.09 Commercial Code.

3.07 BULK SALES:

See topic 3.09 Commercial Code; category 8 Debtor and Creditor, topic 8.08 Fraudulent Sales and Conveyances.

3.08 CARRIERS:

The public utilities commission is vested with power and authority to adopt all necessary rates, charges, and regulations to govern and regulate all rates, charges, and tariffs of every public utility of state; also with power to correct abuses, prevent unjust discriminations and extortions in such rates, charges, and tariffs, and generally to supervise and regulate all public utilities (except for utilities exempted by state constitution). (C.R.S. 40-3-102). Common carriers are public utilities. (C.R.S. 40-1-103[1][a]). Commission has full jurisdiction in home rule cities. (Colo. Const. art. XXV). Property carriers by motor vehicle, charter or scenic buses, children's activity buses, and off-road scenic charters are subject to special provisions. (C.R.S. 40-16-101 to 110). Certain nonprofit transportation of persons and operators of amusement rides also excluded from definition of public utility. (C.R.S. 40-1-103; C.R.S. 40-1.1-104).

Licenses.

See category 23 Transportation, topic 23.01 Motor Vehicles.

Rates.

No public utility may, without commission approval, directly or indirectly, provide free service, or service at rates greater or less than rates set by commission. (C.R.S. 40-3-105). There are special provisions for rate regulation of rail carriers. (C.R.S. 40-2-119, 120; C.R.S. 40-3-104 to 106). Emergency telephone access at discounted rates available for low-income individuals. (C.R.S. 40-3.4-101 to 111).

Discrimination.

Unreasonable differences in rates and services of public utilities prohibited. (C.R.S. 40-3-

106). Common carrier, unlike contract carrier, must convey for all desiring its transportation. (C.R.S. 40-1-102; 192 Colo. 537, 561 P.2d 1252).

Limiting Liability.

Carriers are liable for damages incurred as result of certain statutory violations. (C.R.S. 40-9-103[1]). Carriers are liable as insurers of property received for transportation. (C.R.S. 40-9-103[2]). Rail carrier may establish rates under which liability is limited to valuation declared by shipper or agreed upon by shipper and carrier and which provide for deductibles. (C.R.S. 40-9-103[3]).

Liability of carrier for goods lost in transit is measured by full actual loss caused by carrier. (663 P.2d 621).

Common carrier by railroad in the state is liable for injury to or death of employee resulting wholly or partly from negligence of any officer, agent or employee of carrier. Carrier may not exempt itself from liability by contract. Contributory negligence is not bar, although it may diminish recovery so long as employer's violation of state or federal statute did not contribute to death or injury. Employee may not be held to have assumed risk. Injury or death arising out of and in course of employment is presumptive evidence of negligence of carrier. (C.R.S. 40-33-101 to 109).

Penal statute makes carriers liable for damages not exceeding $10,000 nor less than $3,000 per person killed if death is caused by negligence, unskillfulness or criminal intent of officer, agent, servant or employee, or defect or insufficiency in conveyance. (C.R.S. 13-21-201). Damages are punitive, not compensatory. (57 Colo. 90, 140 P. 463). Alternatively, wrongful death action for compensatory damages may be brought, with $250,000 noneconomic damages limitation or $50,000 solatium in lieu of noneconomic damages. (C.R.S. 13-21-202, 203, 203.5). If wrongful act, neglect or default causing death constitutes felonious killing, then there is no limitation on damages. (C.R.S. 13-21-203).

Uniform Commercial Code adopted. See topic 3.09 Commercial Code.

Bills of lading must be issued for all intrastate shipments. Carrier cannot exempt itself from liability by terms of bill of lading, but it is not liable for greater sum than value fixed in bill of lading if such valuation is stated. (C.R.S. 40-9-103[2]). Otherwise, Uniform Commercial Code governs. Optional language in U.C.C. § 7-403 not adopted. See topic 3.09 Commercial Code.

Hazardous Materials.

See category 23 Transportation, topic 23.01 Motor Vehicles.

Liens.

Carrier has lien on property transported at request of owner for reasonable transportation and storage charges. (C.R.S. 38-20-105). Otherwise, Uniform Commercial Code governs. See topic 3.09 Commercial Code.

Motor Vehicle Carriers.

See category 23 Transportation, topic 23.01 Motor Vehicles.

3.09 COMMERCIAL CODE:

Uniform Commercial Code has been adopted. Code is designated as Tit. 4 of Colorado Revised Statutes. Colorado Revised Statute section numbers contain that title number followed by Uniform Commercial Code article and section numbers, e.g., C.R.S. 4-1-101.

Action on Official Text and Amendments.

1962 Official Text adopted (with variations discussed below) effective July 1, 1966.

1966 Official Amendments and Optional Amendments adopted (with variations discussed below), effective Jan. 1, 1978, to §§ 2-702 and 3-501.

1973 Official Amendment to § 8-102(3) adopted effective Apr. 9, 1973.

1977 Official Amendments to Art. 8 adopted (with variations discussed below) effective July 1, 1981. 1977 conforming amendments to Art. 8 adopted (with variations discussed below) effective July 1, 1985.

1977 Official Amendments to Art. 1, 5 and 9 adopted (with variations discussed below) effective July 1, 1985.

1987 Official Text of Art. 2A and conforming amendments to Arts. 1 and 9 as amended in 1990 adopted effective July 1, 1992.

1990 Official Text of Art. 4A and confirming amendment to § 1-105(2) adopted effective Apr. 12, 1990.

1990 Official Text repealing Art. 6 adopted effective July 1, 1991.

1990 Revised Art. 3 and Amended Art. 4 with conforming amendments to Revised Art. 3 adopted (with variations discussed below) effective Jan. 1, 1995.

1995 Revised Art. 5 and Revised Art. 8, each with conforming amendments adopted (with variations discussed below) effective July 1, 1996.

2001 Official Text of Art. 9 and related sections adopted (with variations discussed below) effective June 1, 2001.

2006 Official Text of Art. 1 and Art. 7 and conforming amendments adopted effective Sept. 1, 2006.

Material Variations from Official Text, Omissions, and Action on Optional Provisions.

Listed below by Code section number are material variations made in Colorado from official text (including variations from official amendments adopted as set forth above), sections omitted, and action taken with respect to optional provisions in Colorado:

§ 1-108—Deleted.

§ 1-201(3.5)—Added " 'Authenticate' means: (a) To sign; or (b) With the intent to sign a record, otherwise to execute or adopt an electronic symbol, sound, message, or process referring to, attached to, included in, or logically associated or linked with, that record."

§ 1-201(5)—After words "means a person in" insert "control of a negotiable electronic document of title or a person in" and after words "negotiable instrument," insert "negotiable tangible".

§ 1-201(6)—After words "means a document" insert "of title" and after words "in the business of" insert "directly or indirectly". After sentence insert "The term does not include a warehouse receipt."

§ 1-201(9)—Amended to read: " 'Buyer in ordinary course of business' means a person that buys goods in good faith, without knowledge that the sale violates the rights of another person in the goods, and in the ordinary course from a person, other than a pawnbroker, in the business of selling goods of that kind. A person buys goods in the ordinary course if the sale to the person comports with the usual or customary practices in the kind of business in which the seller is engaged or with the seller's own usual or customary practices. A person that sells oil, gas, or other minerals at the wellhead or minehead is a person in the business of selling goods of that kind. A buyer in ordinary course of business may buy for cash, by exchange of other property, or on secured or unsecured credit, and may acquire goods or documents of title under a preexisting contract for sale. Only a buyer that takes possession of the goods or has a right to recover the goods from the seller under Article 2 of this title may be a buyer in ordinary course of business. A person that acquires goods in a transfer in bulk or as security for or in total or partial satisfaction of a money debt is not a buyer in ordinary course of business."

§ 1-201(10)(a)—After words "heading in" delete "capitals" and insert "capital letters".

§ 1-201(11)—Renumbered as § 1-201(10.5).

§ 1-201(12)—Renumbered as § 1-201(11). After word "Contract" delete, "as distinguished from 'agreement' " and after words "as determined by" insert "this title". After sentence insert "Compare Agreement."

§ 1-201(14)—Renumbered as § 1-201(13). After words "in a counterclaim" delete ", cross claim,".

§ 1-201(15)—Renumbered as § 1-201(14). After words "with respect to an" insert "electronic document of title, means voluntary transfer of control and with respect to an" and after word "instrument," insert "a tangible".

§ 1-201(16)—Renumbered as § 1-201(15). Revised to read: " 'Document of title' means a record (i) that in the regular course of business or financing is treated as adequately evidencing that the person in possession or control of the record is entitled to receive, control, hold, and dispose of the record and the goods the record covers and (ii) that purports to be issued by or addressed to a bailee and to cover goods in the bailee's possession that are either identified or are fungible portions of an identified mass. The term includes a bill of lading, transport document, dock warrant, dock receipt, warehouse receipt, and order for delivery of goods. An electronic document of title means a document of title evidenced by a record consisting of information stored in an electronic medium. A tangible document of title means a document of title evidenced by a record consisting of information that is inscribed on a tangible medium."

§ 1-201(17)—Renumbered as § 1-201(16). After words "means a" delete "default, breach, or" and after word "act" delete "of" and insert ",". After word "omission" insert "breach, or default".

§ 1-201(18)—Renumbered as § 1-201(17). After word "means" insert "either".

§ 1-201(19)—Renumbered as § 1-201(18).

§ 1-201(20)—Renumbered as § 1-201(19). After words "except as" delete "otherwise" and after words "provided in" delete "Article 5" and insert "Article 5 of this title".

§ 1-201(21)(b)—Renumbered as § 1-201(20)(b). After words "possession of a" insert "negotiable tangible". Insert "or" at end.

Insert § 1-201(21)(c)—"The person in control of a negotiable electronic document of title."

§ 1-201(22)—Renumbered as § 1-201(21).

§ 1-201(23)—Renumbered as § 1-201(22). Delete words " 'Insolvent' means:" and insert "An 'insolvent' person is a person that:".

§ 1-201(23)(a)—Renumbered as § 1-201(22)(a). Delete word "having" and insert "Has" and after words "result of" insert "a". Insert "as to the debts" at end.

§ 1-201(23)(b)—Renumbered as § 1-201(22)(b). Delete word "being" and insert "Is".

§ 1-201(23)(c)—Renumbered as § 1-201(22)(c). Delete word "being" and insert "Is".

§ 1-201(24)—Renumbered as § 1-201(23).

§ 1-201(25)—Renumbered as § 1-201(24).

§ 1-201(26)—Renumbered as § 1-201(25). Delete word "distinguished" and insert "distinct" and after word "from" insert "a". Insert "this title" at end.

§ 1-201(27)—Renumbered as § 1-201(26). Delete word "governmental" and insert "government" and after word "instrumentality," delete "public corporation,".

§ 1-201(28)—Renumbered as § 1-201(27).

Insert § 1-201(28)—Revised to read: " 'Presumption' or 'presumed' means that the trier of fact must find the existence of the fact presumed unless and until evidence is introduced that would support a finding of its nonexistence."

§ 1-201(35)—After words "property or fixtures" delete "which" and insert "that". Delete words "Security interest" and insert "The term also". Delete words "Article 9. 'Security interest' does not include the" and insert "Article 9 of this title. The". Delete words "Section 2-401," and insert "Section 4-2-401 is not a 'security interest',". After words "Article 9." insert "of this title." After word "Section" insert "Section 4-". Delete "2A" and insert "2.5 of this title". After words "complying with Article 9" insert "of this title". After words "pursuant to Section" insert "4-".

§ 1-201(42)—Delete "receipt" and insert "document of title". (C.R.S. 4-2-401).

§ 1-202(b)—Delete " 'Knows' has a corresponding meaning."

§ 1-202(c)—Delete "reason to know" and insert "notice".

§ 1-202(d)—After words "notification to another" delete "person" and after words "inform the others" delete "person".

§ 1-202(e)—After words "subsection (f)" insert "of this section".

§ 1-203(b)(2)—After "(2)" insert "The lessee is bound to renew" and after word "the" delete "lessee is bound to renew the".

§ 1-203(b)(3)—After "(3)" insert "The lessee has an option to renew" and after word "the" delete "lessee has an option renew the".

§ 1-203(c)(3)—After words "agrees to pay" delete "with respect to the goods" and after words “maintenance costs” insert “with respect to the goods”.

§ 1-203(d)(3)—After words “lease agreement” delete “must” and insert “shall”.

§ 1-204—After words “Articles 3, 4, and” insert “5 of this title”.

§ 1-205—After words “action required by” insert “this title”.

§ 1-206—Renumbered as C.R.S. 4-1-201(b)(28).

§ 1-301—Amended to read “(a) Except as otherwise provided in this section, when a transaction bears a reasonable relation to this state and also to another state or nation the parties may agree that the law either of this state or of such other state or nation shall govern their rights and duties.”

“(b) In the absence of an agreement effective under subsection (a) of this section, and except as provided in subsection (c) of this section, the “uniform commercial code” applies to transactions bearing an appropriate relation to this state.”

“(c) If one of the following provisions of the “uniform commercial code” specifies the applicable law, that provision governs and a contrary agreement is effective only to the extent permitted by the law so specified: (1) section 4-2-402; (2) sections 4-2.5-105 and 4-2.5-106; (3) section 4-4-102; (4) section 4-4.5-507; (5) section 4-5-116; (6) (reserved); (7) section 4-8-110; (8) sections 4-9-301 to 4-9-307.” (C.R.S. 4-2-402; C.R.S. 4-2.5-105; C.R.S. 4-2.5-106; C.R.S. 4-4-102; C.R.S. 4-4.5-507; C.R.S. 4-5-116; C.R.S. 4-8-110; C.R.S. 4-9-301 to 307).

§ 1-302(a)—After words “subsection (b)” insert “of this section” and after words “elsewhere in” insert “this title” and after words “provisions of” insert “this title”.

§ 1-302(b)—After words “prescribed by” insert “this title” and after word “Whenever” insert “this title” and after word “requires” delete “an” and insert “any”. After words “reasonable time,” delete “a” and insert “any”.

§ 1-302(c)—After words “provisions of” insert “this title”.

§ 1-303(c)—After words “scope of such a usage” delete “must” and insert “are to”.

§ 1-303(e)—After words “section (f)” insert “of this section” and after words “usage of trade” delete “must” and insert “shall”.

§ 1-303(f)—After words “subject to Section” insert “4-”.

§ 1-304—After words “contract or duty within” insert “this title”.

§ 1-305(a)—After words “remedies provided by” insert “this title” and after words “specifically provided in” insert “this title”.

§ 1-305(b)—After words “obligation declared by” insert “this title”.

§ 1-307—After words “issued by third party” delete “is” and insert “shall be”.

§ 1-308(b)—After words “Subsection (a)” insert “of this section”.

§ 2-102—After words “does not apply to” inserted “(a)”. Added “(b) The donation, whether for or without valuable consideration, acquisition, preparation, transplantation, injection, or transfusion of any human tissue, organ, or blood or component thereof for or to a human being."

§ 2-103(3)—Before words "The following definitions" insert " 'Control' as provided in Section 4-7-106 and". After words " 'Consumer goods'. Section" insert "4-", delete "109" and insert "102". (C.R.S. 4-7-106).

§ 2-202(a)—After words "course of dealing," delete "or" and after words "usage of trade," delete "(section 4-1-205)". After words "performance (section" delete "4-2-208". [C.R.S. 4-1-205; C.R.S. 4-2-208]).

§ 2-208(2)—After words "trade (section" delete "1-205" and insert "4-1-303". [C.R.S. 4-1-303]).

§ 2-210(2)—Added "Except as otherwise provided in section 4-9-406" to beginning of first sentence. (C.R.S. 4-9-406).

§ 2-210(2.5)—Added with no Code counterpart: "The creation, attachment, perfection, or enforcement of a security interest in the seller's interest under a contract is not a transfer that materially changes the duty of or increases materially the burden or risk imposed on the buyer or impairs materially the buyer's change of obtaining return performance within the purview of subsection (2) of this section unless, and then only to the extent that enforcement actually results in a delegation of material performance of the seller. Even in that event, the creation, attachment, perfection, and enforcement of the security interest remain effective, but (i) the seller is liable to the buyer for damages caused by the delegation to the extent that the damages could not reasonably be prevented by the buyer, and (ii) a court having jurisdiction may grant other appropriate relief, including cancellation of the contract for sale or an injunction against enforcement of the security interest or consummation of the enforcement."

§ 2-310(c)—After words "subsection (b)" insert "of this section" and after words "payment is due" insert ", regardless of where the goods are to be received, (i)" and after words "buyer is to receive" insert "delivery of". After word "documents" insert "," and delete "regardless of where the goods are to be received" and insert "or (ii) at the time the buyer is to receive delivery of the electronic documents and at the seller's place of business or, if none, the seller's residence".

§ 2-318—Alternative A adopted with modifications: Substituted "natural person who is in the family or household of his buyer or who is a guest in his home if it is reasonable to expect that such person may" with "person who may reasonably be expected to." Deleted "in person."

§ 2-323(2)—After words "subsection (1)" insert "of this section a tangible".

§ 2-326—Deleted "except as provided in subsection (3)" from first sentence of § 2-326(2). Deleted § 2-326(3). Renumbered § 2-326(4-5) to § 2-326(3-4).

§ 2-401—Added "(5) Notwithstanding any other provision of this section, when livestock have been delivered under a contract of sale, if on the accompanying brand inspection certificate or memorandum of brand inspection certificate the seller has conspicuously noted that payment of the consideration for the sale has not been received, title does not pass until payment is made."

§ 2-401(3)(a)—After words "seller is to deliver a" insert "tangible" and after words "the place where" delete "he" and insert "the seller". After words "delivers such documents," insert "and if seller is to deliver an electronic document of title, title passes when seller delivers the document".

§ 2-401(3)(b)—After words “no documents” insert “of title”.

§ 2-403—Added “(1.5) Notwithstanding any other provision of this section when livestock have been delivered under a transaction of purchase and on the accompanying brand inspection certificate or memorandum of brand inspection certificate the seller has conspicuously noted that payment of the consideration for the transaction has not been received, the buyer does not have power to transfer good title to a good faith purchaser for value until payment is made.”

§ 2-502(1)—After words “Subject to” delete “subsection (2)” and insert “subsections (2) and (3) of this section” and after words “goods in which he” insert “or she”. After words “the provisions of” delete “the immediately preceding” and insert “section 4-2-501”. After words “from the seller if” insert “: (a) In the case of goods bought for personal, family, or household purposes, the seller repudiates or fails to deliver as required by the contract; or (b) In all cases,”. After words “installment on their price” insert “(2) The buyer’s right to recover the goods under paragraph (a) of subsection (1) of this section vests upon acquisition of a special property, even if the seller had not then repudiated or failed to deliver. (3)”. After words “identification creating his” insert “or her”. After words “by the buyer” insert “,” and after word “he” insert “or she”. (C.R.S. 4-2-501).

§ 2-503(4)(b)—After words “document of title or of a” delete “written direction to” and insert “record directing”. After words “seasonably objects, and” insert “except as otherwise provided in Article 9 of this title,”.

§ 2-503(5)(b)—After words “draft accompanying” insert “or associated with”.

§ 2-505(1)(b)—After words “bill of lading to” delete “himself of his” and insert “the sellers or the seller’s”. After words “retains possession” insert “or control”.

§ 2-505(2)—After words “negotiable document” insert “of title”.

§ 2-506(2)—After words “financing agency” delete “which” and insert “that”. After words “relevant document” delete “which” and insert “that”. Delete “on its face” at end of sentence.

§ 2-509(2)(a)—After word “On” delete “his” and insert “the buyer’s”. After words “receipt of” insert “possession or control of”.

§ 2-509(2)(c)—After word “After” delete “his” and insert “the buyer’s”. After words “receipt of” insert “possession or control of”. After words “title of other” delete “written” and after words “direction to deliver” insert “in a record”.

§ 2-511—Added “(4) (a) When livestock has been delivered under a transaction of purchase and on the accompanying brand inspection certificate or memorandum of brand inspection certificate the seller has conspicuously noted that payment of the consideration for the transaction has not been received, the seller shall send a certificate of payment stating that payment has been made either within ten days after receipt of a check drawn and payable within the United States or, in any other case, within three business days after payment has been made.”

“(b) Unless otherwise agreed, when payment has been made, the buyer shall have a specifically enforceable right to the unqualified certification of payment from the seller and, where the seller has failed to provide the certification of payment in accordance with the provisions of this subsection (4), the seller will be deemed to have failed to make delivery of the livestock.”

§ 2-605(2)—After words “defects apparent” delete “on the face of” and insert “in”.

§ 2-705(2)(c)—After words “reshipment or as” delete “warehouseman” and insert “a warehouse”.

§ 2-705(3)(c)—After words “stop until surrender” insert “of possession or control”.

§ 2-716(3)—Added after final sentence “In the case of goods bought for personal, family, or household purposes, the buyer’s right or replevin vests upon acquisition of a special property, even if the seller had not then repudiated or failed to deliver.”

§ 2-725(1)—Insert as last sentence: “This period of limitation may not be varied by agreement of the parties.”

Section 2A of Code renumbered as 2.5.

§ 2.5-103(1)(a)—After words “unsecured credit and includes” delete “receiving” and insert “acquiring”.

§ 2.5-103(1)(o)—After words “unsecured credit and includes” delete “receiving” and insert “acquiring”.

§ 2.5-103(1)(e)—$25,000 limit.

§ 2.5-103(2), (3)—Substituted “ ‘Account.’ ‘Section 9-106’ ” with “ ‘Account’ ‘Section 4-9-102(a)(2)’ ”. Substituted “ ‘chattel paper’. ‘Section 9-105(1)(b)’ ” with “ ‘chattel paper’ ‘Section 4-9-102(a)(11)’ ”. Substituted “ ‘Consumer Goods’ ‘Section 9-109(1)’ ” with “ ‘Consumer Goods’ ‘Section 4-9-102(a)(23)’ ”. Substituted “ ‘Document.’ ‘Section 9-10e5(1)(f)’ with “ ‘Document’ ‘Section 4-9-102(a)(30)’ ”. Deleted “ ‘General Intangibles’ ‘Section 9-106’ ”. Substituted “ ‘Instrument’ ‘Section 9-105(1)(i)’ ” with “ ‘Instrument’ ‘Section 4-9-102(a)(47)’ ”. Substituted “ ‘Mortgage’. ‘Section 9-105(1)(j)’ ” with “ ‘Mortgage’ ‘Section 4-9-102(a)(55)’ ”. Substituted “ ‘Pursuant to commitment’ ‘Section 9-105(1)(k)’ ” with “ ‘Pursuant to commitment’ ‘Section 4-9-102(a)(68)’ ”. (C.R.S. 4-9-102[a][11]; C.R.S. 4-9-102[a][23]; C.R.S. 4-9-102[a][30]; C.R.S. 4-9-102[a][47]; C.R.S. 4-9-102[a][55]; and C.R.S. 4-9-102[a][68]).

§ 2.5-216—Alternative C adopted.

§ 2.5-303—Substituted “4-9-102(1)(b)” with “4-9-109(a)(3)” in § 303(1). Deleted “and (4)” and substituted “subsection (4)” with “subsection (5)” in § 303(2). Deleted § 303(3) and renumber § 303(4-8) to § 303(3-7). Substituted “subsection (5)” with “subsection (4)” in new § 303(3). Substituted “and (4) of this section” with “of this section and subsection 4-9-407” in new § 303(4). Substituted “subsection (5)” with “subsection (4)” in new § 303(4)(b). (C.R.S. 4-9-102[1][b]; C.R.S. 4-9-109[a][3]; C.R.S. 4-9-407).

§ 2.5-305(1)—Modified to give same rights to buyer or sublessee from any transferor.

§ 2.5-306—Lien takes priority over interest “of the party to the lease at whose instance the services or materials were furnished, but does not take priority over any such interest of the other party to the lease contract.”

§ 2.5-307—Amended to read: “Priority of liens arising by attachment or levy on, security interests in, and other claims to goods. (1) Except as otherwise provided in section 4-2.5-306, a creditor of a lessee takes subject to the lease contract. (2) Except as otherwise provided in subsection (3) of this section and in sections 4-2.5-306 and 4-2.5-308, a creditor of a lessor takes subject to the lease contract unless the creditor holds a lien that attached to the goods before the lease contract became enforceable. (3) Except as otherwise provided in sections 4-9-317, 4-9-321, and 4-9-323, a lessee takes a leasehold interest subject to a security interest held by a creditor of the lessor.” (C.R.S. 4-2.5-306; C.R.S. 4-2.5-306; C.R.S. 4-2.5-308; C.R.S. 4-9-317; C.R.S. 4-9-321; C.R.S. 4-9-323).

§ 2.5-309(b)—Substituted “9-402(5)” with “4-9-502(a) and (b)”. (C.R.S. 4-9-502[a], [b]).

§ 2.5-506(1)—After words “must be commenced within” delete rest of sentence and insert “the time period prescribed in section 13-80-101, C.R.S. This period of limitation may not be varied by agreement of the parties.” (C.R.S. 13-80-101).

§ 2.5-518(2)—After words “parties (section” delete “1-102(3) and 2A-503” and insert “4-1-302”. After words “period of the new lease term” delete “which” and insert “that”. After words “original lease agreement” insert “(ii) interest on the amount computed under clause (i) of this subsection (2) from the date of commencement of the term of the new lease agreement until the date of entry of judgment at the same rate used in computing present value, and”; renumbered original (ii) as (iii). (C.R.S. 4-1-302).

§ 2.5-519(1)—After words “parties (section” delete “1-102(3) and 2A-503” and insert “4-1-302”. After words “original lease agreement,” insert “plus interest on the remainder so computed from the date of default until the date of entry of judgment at the same rate used in computing present value,”. (C.R.S. 4-1-302).

§ 2.5-526(2)(c)—After words “reshipment or as” delete “warehouseman” and insert “a warehouse”.

§ 2.5-527(2)—After words “parties (section” delete “1-102(3) and 2A-503” and insert “4-1-302”. After words “period of the new lease term” delete “which” and insert “that”. After words “original lease agreement,” insert “(iii) interest on the amount computed under clause (ii) of this subsection (2) from the date of commencement of the term of the new lease until the date of entry of judgment at the same rate used in computing present value and”; renumbered original (iii) as (iv). (C.R.S. 4-1-302).

§ 2.5-528(1)—After words “parties (section” delete “1-102(3) and 2A-503” and insert “4-1-302”. After words “same lease term” insert “(iii) interest on the sum of the amounts described in clauses (i) and (ii) of this subsection (1) from the date of default to the date of entry of judgment at the same rate used in computing present value, and”; renumbered original (iii) as (iv). (C.R.S. 4-1-302).

§ 2.5-528(2)—Delete “If the measure of damages provided in subsection (1) is inadequate to put a lessor in as good a position as performance would have, the measure of damages is” and insert “At his or her option, lessor may recover from the lessee as damages for a default of the type described in subsection (1) of this section, in lieu of the damages recoverable under said subsection (1),”. After words “damages allowed under section” delete “2A-530” and insert “4-2.5-530”. (C.R.S. 4-2.5-530).

§ 2.5-533—Added with no code counterpart: “*Other measure of damages*. Notwithstanding any other provision of this Article, except as otherwise provided with respect to damages liquidated in the lease agreement (section 4-2.5-504) or otherwise determined pursuant to agreement of the parties (sections 4-1-302 and 4-2.5-503), a party to a lease contract, at his (or her) option, may recover for the other party’s default, in addition to or in lieu of the damages expressly authorized by this Article, such additional or different damages as may be necessary to put such party in as good a position as if the other party had performed in accordance with the lease contract, determined in a reasonable manner.” (C.R.S. 4-2.5-504; C.R.S. 4-1-302; C.R.S. 4-2.5-503).

§ 3-103—Definitions (2) “Consumer account”, (3) “Consumer transaction”, (11) “Principal obligor”, (14) “Record”, (16) “Remotely-created consumer item”, (17) “Secondary obligor” not adopted. Paragraphs renumbered accordingly.

§ 3-104(f)—Added “or (iii) demand draft.” at end of first sentence.

§ 3-104(k)—Added “ ‘(i) Demand draft’ means a writing not signed by the customer that is created by a third party under the purported authority of the customer for the purpose of charging the customer’s account with the bank. A demand draft shall contain the customer’s account number and shall contain any or all of the following: (1) The customer’s printed or typewritten name; (2) A notation that the customer authorized the draft; or (3) The statement ‘no signature required’ or words to that effect. (ii) A demand draft shall not include a check purportedly drawn by the bearing the signature of a fiduciary, as defined in section 4-3-301(a)(1).” (C.R.S. 4-3-301[a][1]).

§ 3-121—Alternative B adopted.

§ 3-312(b)(iv)—After sentence ending “made in the declaration.” add new sentence: “The warranty is made to the obligated bank and any person entitled to enforce the check.”

§ 3-312(c)—After “under subsection (b)(4) and added,” add “, after the claim became enforceable,”.

§ 2-326(3)—Deleted.

§ 3-404(d)—Removed “substantially” from “that failure substantially contributes”.

§ 3-405(b)—Removed “substantially” from “that failure substantially contributes”.

§ 3-406(a) and (b)—Removed “substantially” from “that failure substantially contributes”.

§ 3-416(a)—Added “(6) If this instrument is a demand draft, creation of the instrument according to the terms on its face was authorized by the person identified as drawer. Nothing in this section shall be construed to impair the rights of the drawer against the drawee.

(e) If the warranty in paragraph (6) of subsection (a) of this section is not given by a transferor under applicable conflict of law rules, then the warranty is not given to that transferor when that transferor is a transferee.”

§ 3-417(a)—Added “(4) If the draft is a demand draft, creation of the demand draft according to the terms on its face was authorized by the person identified as drawer. Nothing in this section shall be construed to impair the rights of the drawer against the drawee.

(g) A demand draft is a check, as provided in section 4-3-104(f). (C.R.S. 4-3-104[f]).

(h) If the warranty in paragraph (4) of subsection (a) of this section is not given by a transferor under applicable conflict of law rules, then the warranty is not given to that transferor when that transferor is a transferee.”

§ 3-506—Added with no Code counterpart: “Recording credit card or social security numbers prohibited. (a) When payment is made by check or other negotiable instrument, a person shall not record or require the maker of the check to record a credit card or social security number given as identification or proof of creditworthiness. (b) Subsection (a) of this section shall not prohibit: (1) The recording of a credit card number when a check or other negotiable instrument is issued to pay the credit card designated by the credit card number. (2)(i) The recording of a person's social security number on a check or other negotiable instrument issued to pay a student loan. (ii) For the purposes of this paragraph (2), "student loan" means a loan to finance higher education opportunities that is made, originated, disbursed, guaranteed, or serviced by the Department of Higher Education, CollegeInvest, an agency of another state, the federal government, or an institution of higher education, including, but not limited to, a loan that is secured pursuant to part 2 of article 3.1 of title 23, C.R.S., and a loan authorized by title IV, part B of the federal 'Higher Education Act of 1965', as amended."

§ 4-104(a)(3)—After "any day" added ", excluding Saturday, Sunday and holidays,".

§ 4-104(c)—Insert " 'Control' as provided in Section 4-7-106 and" and delete " 'Control' Section 4-7-106". (C.R.S. 4-7-106).

§ 4-106—Optional language not adopted; alternative B adopted.

§ 4-202(a)(2)—Optional language adopted.

§ 4-207(a)—Added "(6) If the item is a demand draft, creation of the item according to the terms on its face was authorized by the person identified as drawer. Nothing in this section shall be construed to impair the rights of the drawer against the drawee.

(f) If the warranty in paragraph (6) of subsection (a) of this section is not given by a transferor or collecting bank under applicable conflict of law rules, then the warranty is not given to that transferor when that transferor is a transferee, nor to any prior collecting bank of that transferee."

§ 4-208—Added "(g) a demand draft is a check, as provided in section 4-3-104(f)." (C.R.S. 4-3-104[f]).

(h) If the warranty in paragraph (4) of subsection (a) of this section is not given by a transferor under applicable conflict of law rules, then the warranty is not given to that transferor when that transferor is a transferee." (C.R.S. 4-3-104[f]).

§ 4-210(c)—After words "possession of the item or" insert "possession or control of the".

§ 4-208(a)—Added "(4) If the draft is a demand draft, creation of the demand draft according to the terms on its face was authorized by the person identified as drawer. Nothing in this section shall be construed to impair the rights of the drawer against the drawee."

§ 4-210(c)(1)—Substituted "9-9-203(1)(a)" with "4-9-203(b)(3)(A)." (C.R.S. 4-9-203[b][3][A]).

§ 4-212(b)—Optional subsection adopted.

§ 4-405(a)—Substituted "a determination" for "an adjudication" preceding "of incompetence" in first and second sentences.

§ 4-406(a)—Added new sentence at end of subsection: "If the bank does not return the items, it shall provide in the statement of account the telephone number that the customer may call to request an item or legible copy thereof pursuant to subsection (b) of this section."

§ 4-406(b)—Added new sentence at end of subsection: "A bank shall provide, upon request and without charge to the customer, at least two items or a legible copy thereof with respect to each statement of account sent to the customer."

§ 4-8-106(d)(3)—Amended to read “Another person has control of the security entitlement on behalf of the purchaser or, having previously acquired control of the security entitlement, acknowledges that it has control on behalf of the purchaser.”

§ 4.5-105(a)(7)—After words “(section 4-1-201” insert “(b)”. (C.R.S. 4-1-201).

§ 4.5-106(a)—After words “stated in section 4-1-” delete “201(27)” and insert “202”.

§ 4.5-204(b)—After words “stated in section 4-1-” delete “204(1)” and insert “205”.

§ 5-103(c)—After words “prohibited in sections 4-1-” delete “102(3)” and insert “302”.

§ 5-115—Adopted “cause of action” alternative.

§ 5-117.5—Added with no Code counterpart: “*Security interest of issuer or nominated person.* (a) An issuer or nominated person has a security interest in a document presented under a letter of credit to the extent that the issuer or nominated person honors or gives value for the presentation.

(b) So long as and to the extent that an issuer or nominated person has not been reimbursed or has not otherwise recovered the value given with respect to a security interest in a document under subsection (a) of this section, the security interest continues and is subject to Article 9 of this title, but: (1) A security agreement is not necessary to make the security interest enforceable under Section 4-9-203(b)(3); (2) If the document is presented in a medium other than a written or other tangible medium, the security interest is perfected; and (3) If the document is presented in a written or other tangible medium and is not a certificated security, chattel paper, a document of title, an instrument, or a letter of credit, the security interest is perfected and has priority over a conflicted security interest in the document so long as the debtor does not have possession of the document.” (C.R.S. 4-9-203[b][3]).

§§ 6-101-6-111—Repealed effective July 1, 1991.

§ 6-112—Right under §§ 6-101 to 6-111 arising before repeal valid until July 1, 1992.

§ 7-104(a)—After words “subsection (c)” insert “of this section”.

§ 7-104(b)—After words “document of title” insert “,”. After words “subsection (a)” insert “of this section”.

§ 7-105(b)—After words “subsection (a)” insert “of this section”.

§ 7-105(d)—After words “Upon issuance of” delete “the” and insert “an”.

§ 7-106(b)—After words “subsection (a)” insert “of this section”.

§ 7-106(b)(1)—After words “(5), and (6)” insert “of this subsection (b)”.

§ 7-202(c)—After words “not contrary to” delete “the uniform commercial code” and insert “the provisions of this title”.

§ 7-204(d)—Not adopted.

§ 7-206(b)—After words “in subsection (a)” insert “of this section”. After words “under subsection (a)” insert “of this section”.

§ 7-209(b)—After words “in subsection (a)” insert “of this section”. After words “governed by article 9” insert “of this title”.

§ 7-209(c)—After words “expenses under subsection (a)” insert “of this section”. After words “interest under subsection (b)” insert “of this section”.

§ 7-209(d)—After words “under subsection (a)” insert “of this section”.

§ 7-210(a)—After words “provided in subsection (b)” insert “of this section”.

§ 7-210(b)(1)—After words “interest in the goods” delete “must be” and insert “are”.

§ 7-210(b)(2)—After words “The notification” delete “must include” insert “includes”.

§ 7-210(b)(3)—After words “The sale” delete “must conform” and insert “conforms”.

§ 7-210(b)(4)—After words “The sale” delete “must be” and insert “is”.

§ 7-210(c)—After words “Before any sale” insert “held”.

§ 7-210(h)—After words “subsection (a) or (b)” insert “of this section”.

§ 7-302(a)—After words “through bill of lading” insert “,”, and after words “performing carrier” insert “,”.

§ 7-302(c)—After words “obligation under the” delete “bill or other”.

§ 7-304(a)—After words “violation of this subsection” insert “(a)”.

§ 7-304(e)—After words “with part 4” insert “of this article”.

§ 7-307(b)—After words “expenses under subsection (a)” insert “of this section”, and after words “liens under subsection (a)” insert “of this section”.

§ 7-307—Insert “(d) A mover, as defined in section 40-14-103, C.R.S., that does not have a current and valid registration under article 14 of title 40, C.R.S., does not have a lien under this Section. A mover that acquires a lien under this Section and whose registration lapses or is revoked during the pendency of the lien loses its lien.” (C.R.S. 40-14-103).

§ 7-308(b)—After words “Before any sale” insert “is held”.

§ 7-309(a)—After words “This subsection” insert “(a)”.

§ 7-309(b)—After words “in the bill of lading” delete “or in a transportation agreement”, and after words “stated in the bill” delete “or transportation agreement”.

§ 7-309(c)—After words “bill of lading” delete “or a transportation agreement”.

§ 7-403(a)—After words “subsections (b) and (c)” insert “of this section”.

§ 7-503(c)—After words “with part 4” insert “of this article”.

§ 7-509—After words “or 5” insert “of this title”.

§ 7-601(b)—After words “indemnify any person” insert “that is” and after words “by the delivery” delete “which” and insert “and that”.

§ 7-703—Renumbered as § 7-702. After word “This” delete “Act” and insert “article”. After words “on or after” delete “The effective date of This Act” and insert “September 1, 2006”. After word “this” delete “act” and insert “article”. After words “that arises before” delete “the effective date of this Act” and insert “September 1, 2006,”. After words “be subject to this” delete “Act” and insert “article”. After words “on or after” delete “the effective date of this Act” and insert “September 1, 2006.” After word “This” delete “Act” and insert “article”. After words “has accrued before” delete “the effective date of this Act” and insert “September 1, 2006.”

§ 7-704—After words “effective date of this” delete “[act]” and insert “article, as amended”. After words “repealed by” delete “[act]” and insert “article”.

§ 8-103(f)—Substituted “4-9-115” with “4-9-102(a)(15).” (C.R.S. 4-9-102[a][15]).

§ 8-103—Insert “(g) A document of title, is not a financial asset unless section 4-8-102(a)(9)(iii) applies.” (C.R.S. 4-8-102[a][9][iii]).

§ 8-106(d)(3)—Amended to read: “Another person has control of the security entitlement on behalf of the purchaser or, having previously acquired control of the security entitlement, acknowledges that it has control on behalf of the purchaser.”

§ 8-301(a)(3)—Amended to read “A securities intermediary acting on behalf of the purchaser acquires possession of the security certificate, only if the certificate is in registered form and is (i) registered in the name of the purchaser, (ii) payable to the order of the purchaser, or (iii) specifically indorsed to the purchaser by an effective indorsement and has not been indorsed to the securities intermediary or in blank.”

§ 8-106(f)—Substituted “(c)(2)” with “(c)” and “(d)(2)” with “(d)”.

§ 8-110(e)—Amended to read: “(e) The following rules determine a ‘securities intermediary’s jurisdiction’ for purposes of this section: (1) if an agreement between the securities intermediary and its entitlement holder governing the securities account expressly provides that a particular jurisdiction is the securities intermediary’s jurisdiction for purposes of this part 1, this article, or this title, that jurisdiction is the securities intermediary’s jurisdiction. (2) If paragraph (1) of this subsection (e) does not apply and an agreement between the securities intermediary and its entitlement holder governing the securities account expressly provides that the agreement is governed by the law of a particular jurisdiction, that jurisdiction is the securities intermediary’s jurisdiction. (4) If none of paragraphs (1), (2), or (3) of this subsection (e) applies, the securities intermediary’s jurisdiction is the jurisdiction in which the office identified in an account statement as the office serving the entitlement holder’s account is located. (5) If none of paragraphs (1), (2), (3), or (4) of this subsection (e) applies, the securities intermediary’s jurisdiction is the jurisdiction in which the chief executive office of the securities intermediary is located.”

§ 8-302(a)—Deleted “upon delivery” and “to a purchaser, the purchaser” and added “a purchaser” after “of this section,”.

§ 8-510—Added “(a) In a case not covered by the priority rules in Article 9 of this title or the rules stated in subsection (c) of this section,” at the beginning of section.

§ 8-510(c)—Final sentence amended to read: “Except as otherwise provided in subsection (d) of this section, purchasers who have control rank according to priority in time of: (1) The purchaser’s becoming the person for whom the securities account, in which the security entitlement is carried, is maintained, if the purchaser obtained control under section 4-8-106(d)

(1); (2) The securities intermediary's agreement to comply with the purchaser's entitlement orders with respect to security entitlements carried or to be carried in the securities account in which the security entitlement is carried, if the purchaser obtained control under section 4-8-106(d)(2); or (3) If the purchaser obtained control through another person under section 4-8-106(d)(3), the time on which priority would be based under this subsection (c) if the other person were the secured party." (C.R.S. 4-8-106[d][1]; C.R.S. 4-8-106[d][2]; C.R.S. 4-8-106[d][3]).

§ 9-102(a)(5)—Amended to read: "Agricultural lien means an interest in farm products:".

§ 9-102(a)(46)—Substituted "which" with "that".

§ 9-102—Before words "The following definitions" insert " 'Control' as provided in Section C.R.S. 4-7-106 and". After words "Section 4-8-201" insert " 'Issuer' (with respect to documents of title) Section 4-7-102". (C.R.S. 4-8-201; C.R.S. 4-7-102).

§ 9-102(a)(77)(B)—Replaced "this paragraph (74)" with "this paragraph (77)".

§ 9-102(6)(A) and (B)—Substituted "or other Minerals." Added "Oil, Gas, Minerals, or other substances of value that may be extracted from the earth".

§ 9-102(6)(A)(i)—Added "or such other substances" after "Minerals".

§ 9-102(8.5)—Added with no Code counterpart: " 'Business day' means any day other than Saturday, Sunday, or a State of Colorado or federal legal holiday."

§ 9-102(22.5)—Added with no Code counterpart: " 'Consumer Deposit Account' means a deposit account held in the name of one or more natural persons and used by him, her, or them primarily for personal, family, or household purposes."

§ 9-102(a)(30)—After words "7-201" delete "(2)" and insert "(b)".

§ 9-102(67)—Deleted and reserved §§ (65)-(67). §§ (68)-end renumbered.

§ 9-108(a)—Substituted "and (e)" with "(e), and (f) of this section".

§ 9-108(b)(2)—Substituted "category" with "category, including a category determined by use of a numerical or other code included in forms and formats adopted from time to time by the secretary of state".

§ 9-108(f)—Added with no Code counterpart: "Any description in the security agreement of personal property that includes consumer goods is sufficient as to the consumer goods only if it specifically identifies and itemizes such consumer goods."

§ 9-109(c)(2)—Amended to read "A statute of this state governs or a constitutional provision provides authority for the creation, perfection, priority, or enforcement of tax liens;".

§ 9-109(d)(13.5)—Added with no Code counterpart: "An assignment of a deposit account in transactions where the principal or the maximum line of credit on a revolving loan account do not exceed one hundred thousand dollars, but Sections 4-9-315 and 4-9-322 apply with respect to proceeds and priorities in proceeds. A 'revolving loan account' means an arrangement between a creditor and a debtor whereby the lender may permit the debtor, from time to time, to purchase or lease on credit or to obtain loans from the creditor." (C.R.S. 4-9-315; C.R.S. 4-9-322).

§ 9-109(d)(14)—Added with no Code counterpart: “An assignment of an individual retirement account as defined in 26 U.S.C. sec. 408; or”.

§ 9-109(d)(15)—Added with no Code counterpart: “An assignment of any plan as defined in 26 U.S.C. sec. 401.”

§ 9-109(e)—Added with no Code counterpart: “The creation, perfection, priority, and enforcement of a security interest, lien, or pledge created by this state or a governmental unit of this state shall be governed by section 11-57-208(2), C.R.S., and this article shall not apply to such a security interest, lien, or pledge regardless of whether, pursuant to section 11-57-204(1), C.R.S., the state or such governmental unit elected to apply Part 2 of article 57 of title 11, C.R.S., to such a security interest, lien, or pledge.” (C.R.S. 11-57-208[2]; C.R.S. 11-57-204[1]).

§ 9-201(b)—Amended to read: “A transaction subject to this article is subject to any applicable rule of law that establishes a different rule for consumers and any other statute or regulation of this state that regulates the rates, charges, agreements, and practices for loans, credit or other extensions of credit and any consumer protection statute or regulation of this state, including, but not limited to, the ‘Uniform Consumer Credit Code’, articles 1 to 9 of title 5, C.R.S., the ‘Colorado Consumer Protection Act’, article 1 of title 6, C.R.S., ‘assignment of wages’, article 9 of title 8, C.R.S. ‘property and earnings exempt’, article 54 of title 13, C.R.S., and the ‘Colorado Fair Debt Collection Practices Act’, article 14 of title 12, C.R.S.”

§ 9-201(c)—First sentence amended to read: “In case of conflict between this article and a rule of law, statute, or regulation described in subsection (b) of this section, the rule of law, statute, or regulation controls.”

§ 9-203(b)(3)(D)—After words “investment paper,” delete “or” and after word “rights,” insert “or electronic documents,”. After words “has control under section” delete “9-104, 9-105, 9-106, or 9-107” and insert “4-7-106, 4-9-104, 4-9-105, 4-9-106, or 4-9-107”. (C.R.S. 4-9-104; C.R.S. 4-9-105; C.R.S. 4-9-106; C.R.S. 4-9-107).

§ 9-203(j)—Added with no Code counterpart: “No security interest in consumer goods owned by a married person and used primarily for personal, family, or household purposes, other than property referred to in section 4-9-311 and other than any purchase money security interest, shall be enforceable unless the security agreement describing the collateral in accordance with section 4-9-108 is authenticated by both husband and wife if they are residing together at the time the security interest is created.” (C.R.S. 4-9-311; C.R.S. 4-9-108).

§ 9-207(c)—After words “control of collateral under section” delete “9-104, 9-105, 9-106, or 9-107” and insert “4-7-106, 4-9-104, 4-9-105, 4-9-106, or 4-9-107”.

§ 9-208(b)(2)(B)—Amended to read: “At the request of debtor, transfer the balance on deposit into a deposit account in the debtors names providing sufficient information so that the debtor can access the deposit account”. (C.R.S. 4-7-106; C.R.S. 4-9-104; C.R.S. 4-9-105; C.R.S. 4-9-106; C.R.S. 4-9-107).

9-208(b)(2.5)—Added with no Code counterpart: “The amount due the debtor shall also include all interest earned on the deposit account to the extent not already credited to the deposit account or paid to the debtor from the date the conditions in subsection (a) of this section are satisfied”.

§ 9-208(b)(4)—After words “by the secured party” delete “and”.

§ 9-208(b)(5)—After words “to the secured party” insert “and”.

§ 9-208—Insert “(6) A secured party having control of an electronic document shall: (a) Give control of the electronic document to the debtor or its designated custodian; (b) If the debtor designates a custodian that is the designated custodian with which the authoritative copy of the electronic document is maintained for the secured party, communicate to the custodian an authenticated record releasing the designated custodian from any further obligation to comply with instructions originated by the secured party and instructing the custodian to comply with instructions originated by the debtor; and (c) Take appropriate action to enable the debtor or its designated custodian to make copies of or revisions to the authoritative copy that add or change an identified assignee of the authoritative copy without the consent of the secured party.

§ 9-210(f)—Added: “for each (i) an accounting, (ii) regarding a list of collateral, and (iii) regarding a statement of account” at end of first sentence. Substituted “$25” with “fifteen dollars”. Added “Wherever the term ‘Debtor’ is used in this section, it means either the debtor or the person designated by the debtor to receive a response in a notification authenticated by the debtor and received by the secured party or other applicable person at or prior to the time of a request” at end of subsection.

§ 9-301(3)—After words “of this section, while” insert “tangible”.

§ 9-304(b)(1)—Amended to read: “If an agreement between the bank and its customer governing the deposit account expressly provides that a particular jurisdiction is the bank’s jurisdiction for purposes of this part 3, this article, or this title, that jurisdiction is the bank’s jurisdiction.”

§ 9-309—Added “(14) A sale by an individual of an account that is a right to payment of winnings in a lottery or other game of chance.”

§ 9-309(a)(8)—Substituted “Section 5-118” with “Section 4-5-117-5”. (C.R.S. 4-5-117-5).

§ 9-310(b)(5)—After words “or instruments” delete “which” and insert “that”. After words “without filing,” insert “control”.

§ 9-310(b)(8)—After words “chattel paper,” insert “electronic documents”, and after word “rights” delete “which” and insert “that”.

§ 9-311(a)(2)—Amended to read: “(2) Certificate-of-title statute of this state covering automobiles or other goods which provides for a security interest to be indicated on the certificate as a condition or result of perfection.”

§ 9-312(e)—After words “taking of possession” insert “or control”.

§ 9-313(a)—After words “security interest in” insert “tangible”.

§ 9-313(j)—Added with no Code counterpart: “References in subsections (g) or (i) of this section regarding violation of the rights of a debtor shall not be construed as limiting the debtor’s rights.”

§ 9-314(a)—After word “rights,” delete “or” and after words “chattel paper,” insert “or electronic documents”. After words “9-104, 9-105, 9-106, or 9-107” insert “4-7-106, 4-9-104, 4-9-105, 4-9-106, or 4-9-107”. (C.R.S. 4-9-106; C.R.S. 4-9-104; C.R.S. 4-9-105; C.R.S. 4-9-106; C.R.S. 4-9-107).

§ 9-314(b)—After word “rights,” insert “or electronic documents”. After words “9-104, 9-105, or 9-107” insert “4-7-106, 4-9-104, 4-9-105, or 4-9-107”. (C.R.S. 4-7-106; C.R.S. 4-9-104;

C.R.S. 4-9-105; C.R.S. 4-9-107).

§ 9-317(b)—After words "tangible chattel paper," insert "tangible".

§ 9-317(d)—After words "electronic chattel paper," insert "electronic documents,".

§ 9-317(e)—After words "delivery of the collateral," insert "or if a person perfects under article 6 of title 42, C.R.S., a purchase-money security interest in a motor vehicle, other than inventory, before or within thirty days after the debtor receives delivery of the motor vehicle,".

§ 9-323(b)—Added "while the security interest is perfected only" after "becomes a lien creditor".

§ 9-324(a)—After words "twenty days thereafter" insert ", or, if the collateral is a motor vehicle, as defined in section 42-6-102, C.R.S., within thirty days thereafter."

§ 9-331(b)—Amended to read: "This article does not limit the rights of or impose liability on a person to the extent that the person is protected against the assertion of an adverse A claim under article 8 of this title."

§ 9-334(j)—Deleted.

§ 9-338(2)—After words "in the case of" insert "tangible", and after words "chattel paper," insert "tangible".

§ 9-401(c)—Added with no Code counterpart: "(c) This section shall not be construed as being inconsistent with criminal sanctions now or hereafter applicable to transactions involving collateral or as justifying any transfer that would otherwise be a violation of law."

§ 9-406(d)—Added "and (k) of this section and sections 4-2.5-303, 4-9-407, 8-80-103, 8-42-124, 13-64-210, and 24-4.1-114, C.R.S." and deleted "sections 2A-303 and 9-407". (C.R.S. 4-2.5-303; C.R.S. 4-9-407; C.R.S. 8-80-103; C.R.S. 8-42-124; C.R.S. 13-64-210; C.R.S. 24-4.1-114).

§ 9-406(f)—Substituted "sections 2A-303 and 9-407" with "sections 4-2.5-303, 4-9-407, 8-80-103, 8-42-124, 13-64-210, and 24-4.1-114, C.R.S." (C.R.S. 4-2.5-303; C.R.S. 4-9-407; C.R.S. 8-80-103; C.R.S. 8-42-124; C.R.S. 13-64-210; C.R.S. 24-4.1-114).

§ 9-406(j)—Reserved.

§ 9-406(k)—Subsection (j) relettered (k) and amended to read: "Subsection (d) of this section does not apply to the assignment, transfer, or creation of a security interest in: (1) A claim or right to receive compensation for injuries or sickness as described in 26 U.S.C. sec. 104(a) (1) or (2), as amended; or (2) A claim or right to receive benefits under a special needs trust as described in 42 U.S.C. sec. 1396p(d)(4), as amended."

§ 9-408(c)—Added "Except as provided in Sections 8-80-103 and 8-42-142, C.R.S.," at beginning of subsection. (C.R.S. 8-80-103; C.R.S. 8-42-142).

§ 9-408(e)—Deleted and reserved.

§ 9-408(f)—Added with no Code counterpart: "Subsections (a) and (c) of this section do not apply to the assignment, transfer, or creation of a security interest in: (1) A claim or right to receive compensation for injuries or sickness as described in 26 U.S.C. sec. 104(a) (1) or (2), as amended; or (2) A claim or right to receive benefits under a special needs trust as described in 42

U.S.C. sec. 1396p(d)(4), as amended."

§ 9-501(a)(2)—Substituted "or any office duly authorized by" with "the secretary of state."

§ 9-501(b)—Substitute "[ ]" with "the secretary of state."

§ 9-501(c)—Added with no Code counterpart: "The office in which to file an effective financing statement pursuant to Article 9.5 of this title is the office of the secretary of state."

§ 9-510(b)—Amended to read: "A record authorized by one secured party of record does not affect the financing statement with respect to another secured party of record."

§ 9-510(c)—Amended to read: "Subject to section 4-9-528 and subsection (d) of this section, a continuation statement that is not filed within the six-month period prescribed by section C.R.S. 4-9-515(d) is ineffective." (C.R.S. 4-9-528; C.R.S. 4-9-515[d]).

§ 9-510(d)—Added with no Code counterpart: "Any continuation statement filed on or after July 1, 1996, and before January 1, 1998, including one that was perfected by filing with both the offices of the secretary of state and a county clerk and recorder, continues the perfection in all of the collateral listed on the filing. With respect to continuation statements filed on or after July 1, 1996, and before January 1, 1998, the filing of a single continuation statement shall maintain the effectiveness of financing statements that name identical collateral but have been filed in multiple locations."

§ 9-510(e)—Added with no Code counterpart: "No continuation statement filed on or after July 1, 1995, shall be ineffective solely because it failed to include a statement that the original financing statement is still effective."

§ 9-512—Adopted Alternative A.

§ 9-512(a)(2)—Amended to read: "Provides the date that the initial financing statement was filed or recorded."

§ 9-514(b)—After words "financing statement" delete "which" and insert "that".

§ 9-514(b)—Add "(1.5) Provides the date that the initial financing statement was filed or recorded;".

§ 9-514(b)(2)—Amended to read: "Provides the name of the assignor; and".

§ 9-514(d)—Add "(d) An assignment that was filed in accordance with this section prior to August 5, 2009, and that is on file in the filing office as of August 5, 2009, whether or not it provides the date that the initial financing statement was filed or recorded, shall be deemed to have been filed pursuant to and in accordance with this section as amended and shall have the same effect as if filed pursuant to this section as amended."

§ 9-515(d)—Added "of this section, or the five-year period specified in Section 4-9-528(a)(1)" after "subsection (b)". (C.R.S. 4-9-528[a][1]).

§ 9-518(a)—Add "(1)" before text. Delete "A" and insert "Any" before "person". After "person" insert "named as debtor". After "indexed there under the" delete "person's" and insert "debtor's". Add "(2) ANY PERSON NAMED AS A SECURED PARTY MAY FILE IN THE FILING OFFICE A CORRECTION STATEMENT WITH RESPECT TO A RECORD FILED THERE IN WHICH THE PERSON IS IDENTIFIED AS A SECURED PARTY, CONSIGNOR, LESSOR, OR

THE LIKE IF THE PERSON BELIEVES THE RECORD IS INACCURATE OR WAS WRONGFULLY FILED. (3) ANY PERSON WHO INCORRECTLY FILES AN AMENDMENT AFFECTING A RECORD MAY FILE A CORRECTION STATEMENT WITH RESPECT TO THE RECORD".

§ 9-518(b)—Adopted Alternative B.

§ 9-518(b)(1)(B)—Amended to read: "If the correction statement relates to a record filed or recorded in a filing office described in section 4-9-501(a)(1), the date that the initial financing statement was filed or recorded;". (C.R.S. 4-9-501[a][1]).

§ 9-518(d)—Add "(d) THE FILING OF A CORRECTION STATEMENT IS NOT EFFECTIVE AS AN AMENDMENT TO A FILED FINANCING STATEMENT AND IS NOT SUFFICIENT TO EFFECT A CHANGE IN THE MANNER IN WHICH THE FILING OFFICE HAS INDEXED A FINANCING STATEMENT OR INFORMATION CONTAINED IN A FINANCING STATEMENT".

§ 9-519(b)—Deleted.

§ 9-519(f)—Adopted Alternative B. Deleted "and time" from § 9-519(f)(1)(A).

§ 9-519(i)—Deleted.

§ 9-520(b)—Deleted "in the case of a filing office described in section 9-501(A)(2)," and substituted "Two Business Days" with "Five Business Days".

§ 9-521(a)—Amended to read: "A filing office that accepts written records may not refuse to accept a written initial financing statement in the form and format adopted from time to time by the secretary of state, except for a reason set forth in section 4-9-516(b)." (C.R.S. 4-9-516[b]).

§ 9-521(b)—Amended to read: "A filing office that accepts written records may not refuse to accept a written record in the form and format adopted from time to time by the secretary of state, except for a reason set forth in section 4-9-516(b)." (C.R.S. 4-9-516[b]).

§ 9-522(a)—Adopted alternative A. Added "and the date that the record was filed and recorded" to end of section.

§ 9-523(c)(1)(a)—Amended to read: "Designates a particular debtor;".

§ 9-523(d)—Adopted optional language "a record that can be admitted into evidence in the courts of this state without extrinsic evidence of authenticity."

§ 9-523(e)—Substituted "two business days" with "five business days."

§ 9-523(f)—Adopted optional language "filing office" and substituted "in every medium" with "in such digital or electronic medium as is".

§ 9-525(a)—Amended to read: "Except as otherwise provided in subsection (f) of this section and subject to section 24-75-402, C.R.S., fees for services rendered by the secretary of state under this Part 5 shall be determined and collected pursuant to section 24-21-104, C.R.S.". (C.R.S. 24-75-402; C.R.S. 24-21-104).

§ 9-525(b)—Amended to read: "Except as otherwise provided in subsection (f) of this section, the fee for filing and indexing a record under this Part 5 in a filing office described in section 4-9-501(a)(1) shall not exceed: (1) Ten dollars if the record is communicated in writing and consists of one or two pages; (2) Fifteen dollars if the record is communicated in writing and consists of more than two pages; and (3) Five dollars if the record is communicated by another medium authorized by filing-office rule." (C.R.S. 4-9-501[a][1]).

§ 9-525(c)—Adopted Alternative A.

§ 9-525(d)—Amended to read: "The secretary of state must set the fee for responding to a request for information from the secretary of state, including the fee for issuing a certificate showing whether there is on file any financing statement naming a particular debtor. The secretary of state need not set a fee for remote access to the secretary of state's data base."

§ 9-525(e)—Renumbered as subsection (f). Subsection (e) amended to read: "The fee for responding to a request for information from a filing office described in section 4-9-501(a)(1), including for issuing a certificate showing whether there is on file any financing statement naming a particular debtor, shall not exceed: (1) Five dollars if the request is communicated in writing; and (2) Three dollars if the request is communicated by another medium authorized by filing-office rule." (C.R.S. 4-9-501[a][1]).

§ 9-526(a)(2)—Substituted " 'state administrative procedure act', Article 4 of Title 24, C.R.S." for insert.

§ 9-526(b)—Substituted "secretary of state" for insert.

§ 9-526(b)(2)—After "association" delete "corporate" and insert "commercial".

§ 9-527—Inserted "June 30" after "Annually on or before."

§ 9-522(2)—After "association" delete "corporate" and insert "commercial".

§ 9-528—Adopted with no Code counterpart *"Refiling required."* "(a) (1) The effectiveness of a financing statement that was filed before July 1, 1996, and that has not otherwise lapsed by December 31, 1997, shall lapse in the manner provided in section 4-9-403(2) of former article 9 of this title on December 31, 1997, unless a continuation statement was filed on or after July 1, 1996, but on or before December 31, 1997, that identified the original statement by filing office, file number, and date of filing and contains a statement indicating the types or describing the items of collateral indicated in the financing statement. If a continuation statement was filed in accordance with this paragraph (1), the effectiveness of the original financing statement is continued for five years after the last date to which the filing would otherwise have been effective, whereupon it lapses in the manner provided in section 4-9-515 unless another continuation statement is filed pursuant to section 4-9-515 prior to such lapse. (2) No continuation statement filed pursuant to this subsection (a) on or after July 1, 1996, shall be ineffective solely because it: (A) Failed to identify the original statement by county, if the filing office was the office of the secretary of state and the statement so stated, or by time of filing; (B) Indicated the types or described the items of the collateral indicated in the financing statement instead of listing the collateral of the original filing; or (C) Failed to include a statement that the original financing statement is still effective.

(b) For purposes of the refiling provisions of this section only, a continuation statement does not have to be filed during the period beginning July 1, 1996, to December 31, 1997, when the only collateral on a financing statement is timber to be cut; minerals or other substances of value which may be extracted from the earth; fixtures; a mortgage or deed of trust effective as a fixture filing; collateral, including fixtures, of a transmitting utility; or accounts subject to Section 4-9-103(5) of former Article 9 of this title.

(c) References in this section to former article 9 of this title are to article 9 of this title as in effect immediately before July 1, 2001." (C.R.S. 4-9-403[2]; C.R.S. 4-9-515; C.R.S. 4-9-103[5]).

§ 9-529—Added with no Code counterpart: *"Electronic and other filings",* "(a) The secretary of state shall ensure that presentation for filing may be accomplished electronically, without the necessity for the presentation of a physical original document or the image thereof, if all required information is included and readily retrievable from the data transmitted. All electronic filings shall be retained in a form that facilitates location of the information so filed and production of a true and accurate physical printout or other representation of the information so filed.

(b) The secretary of state is hereby specifically authorized to establish prepaid accounts, an electronic debit system, a system for the acceptance of credit cards or electronic funds transfers, or any combination thereof.

(c) To facilitate the filing of documents in the office of the secretary of state electronically, the secretary of state is hereby specifically authorized to adopt, by rule, technical standards governing such filings and to reject documents that do not comply with such standards. Such standards may include, without limitation, the specification of commercially available software or the dissemination of software compatible with the secretary of state's reception, storage, and retrieval system. Where national standards are available and have been promulgated by a recognized professional organization, the secretary of state shall consider and may use such national standards as the basis for the rules."

§ 9-530—Repealed. Proper office to file certain amendments.

§ 9-531—"Removal of social security numbers from financing statements in the custody of the secretary of state." "(a) As soon as feasible, but no later than July 1, 2003, the secretary of state shall remove social security numbers from the publicly accessible electronic records of all financing statements in the custody of the secretary that were filed with a filing office on or after April 6, 1989, and before July 1, 2001, pursuant to repealed provisions of this article that required that any such financing statement contain a social security number.

(b) A financing statement from which the secretary of state removes a social security number pursuant to subsection (a) of this section shall not be rendered insufficient or ineffective by such removal."

§ 9-601(b)—After words "control of collateral under" delete "9-104, 9-105, 9-106, or 9-107" and insert "4-7-106, 4-9-104, 4-7-105, 4-7-106, 4-7-107". (C.R.S. 4-7-106; C.R.S. 4-9-104; C.R.S. 4-7-105; C.R.S. 4-7-106; C.R.S. 4-7-107).

§ 9-601(h)—Added with no Code counterpart: "(h) For purposes of this part 6, in taking possession of collateral by self-help, 'breach of the peace' includes, but is not limited to, engaging in the following actions without the contemporaneous permission of the debtor: (1) Entering a locked or unlocked residence or residential garage; (2) Breaking, opening, or moving any lock, gate, or other barrier to enter enclosed real property; or (3) Using or threatening to use violent means."

§ 9-603(a)—Deleted "Manifestly" from "manifestly unreasonable".

§ 9-603(b)—Amended to read: "subsection (a) of this section does not empower the parties to set standards affecting the duty under section 4-9-609 to refrain from breaching the peace." (C.R.S. 4-9-609).

§ 9-604(d)—Deleted "other than the Debtor" from first sentence.

§ 9-607(d)—Added “reasonable” before “legal expenses”.

§ 9-608(a)(1)(A)—Added “reasonable” before “legal expenses”.

§ 9-609(d)—Added with no Code counterpart: “If the collateral is a manufactured home or trailer coach, as defined in section 42-1-102(106), C.R.S., and is used and occupied by the debtor as a place of residence, the secured party may take possession of the collateral pursuant to this section without judicial process only if there is clear and convincing evidence that the debtor has vacated or abandoned the collateral or the debtor voluntarily surrenders the collateral to the secured party.” (C.R.S. 42-1-102[106]).

§ 9-609(e)—Added with no Code counterpart: “In exercising its rights under paragraph (2) of subsection (a) of this section with respect to collateral, a secured party may not disable or render unusable any computer program or other similar device imbedded in the collateral if immediate injury to any person or property is a reasonably foreseeable consequence of such action. Any secured party who disables or renders unusable such a computer program or other similar device in such circumstances shall be liable in accordance with applicable rules of law to any person who sustains an injury to person or property as a reasonably foreseeable result of the secured party’s action.”

§ 9-610(e)(2)—Added “ ‘prior to completion of the transaction’ ” after “purchaser.”

§ 9-611(a)(2)—Added “as provided in section 4-9-624(a)” at end of sentence. (C.R.S. 4-9-624[a]).

§ 9-611(d)—Amended to read: “Subsection (b) of this section does not apply if the collateral is perishable or the creditor in good faith believes that the collateral threatens to decline speedily in value or is of a type customarily sold on a recognized market. The specific reference to good faith in this subsection (d) does not abrogate the general obligation of the secured party to proceed in a commercially reasonable manner.”

§ 9-613(a)(3)(B)—Amended to read: “Minor errors that do not cause damages to a person who relies on the information.”

§ 9-613(a)(5)—Form amended by adding “or writing us at [address]” after “by calling us at [telephone number].”

§ 9-614(a)(1)(C)—Added “and mailing address” after “telephone number.”

§ 9-614(a)(3)—Amended by adding “or write to us at [secured party’s address]” after “call us at [telephone number]” and by amending final sentence of paragraph beginning “If you want us to explain” to read “We will charge you $ for the explanation if we have already sent you an explanation of the type requested within the last six months.”

§ 9-615(a)(i)—Added “reasonable” before “legal expenses”.

§ 9-616(c)(4)—Added “reasonable” before “expenses” and “attorneys fees.”

§ 9-616(d)—Substituted “are not seriously misleading” with “do not cause damages to a person who relies on the information.”

§ 9-616(e)—Substituted “one response” with “three responses.”

§ 9-617(a)(3)—Amended to read “Discharges any subordinate security interest or other subordinate lien”.

§ 9-620(b)—Deleted and reserved.

§ 9-625—Added: "(h) If a person in the course of taking possession of collateral by self-help breaches the peace as defined in paragraph (1), (2), or (3) of subsection (h) of section 4-9-601 or uses uniformed law enforcement officers without the benefit of judicial process, that person shall be liable to the debtor for one thousand dollars as a penalty. (i) The prevailing party in any legal action, other than a class action, under this section may also recover reasonable attorney's fees and reasonable legal expenses; except that as to consumer transactions, such attorney's fees for any party shall not exceed fifteen percent of the unpaid debt or such additional fee as may be directed by the court. (j) The number "five hundred dollars" as provided in subsections (e) and (f) of this section shall be increased on July 1, 2004, and on July 1 of each third succeeding year in accordance with any aggregate increase in the United States Department of Labor Bureau of Labor Statistics Consumer Price Index for all urban consumers for the Denver-Boulder consolidated metropolitan statistical area for the preceding three calendar years as reflected in the final consumer price index for the Denver-Boulder consolidated metropolitan statistical area for the calendar year immediately preceding the calendar year in which the adjustment is to be made; except that: (1) Such dollar amount shall be increased if such final consumer price index does not reflect an aggregate increase in the consumer price index for the preceding three calendar years and shall not be decreased if such final consumer price index reflects an aggregate decrease in the consumer price index for the preceding three calendar years. (2) The dollar amount as adjusted pursuant to this subsection (j) shall be rounded to the nearest ten dollars." (C.R.S. 4-9-601).

§ 9-626—Added "reasonable" before "expenses" and "attorney's fees".

§ 9-626(b)—Added "subject to section 5-5-103, C.R.S., the" before "limitation of the rules in subsection (a)". (C.R.S. 5-5-103).

§ 9-628(c)(1)—Amended to read: "A record authenticated by the debtor concerning the purpose for which collateral was to be used, acquired, or held, or indicating that collateral is not a consumer deposit account; or"

§ 9-628(c)(2)—Amended to read: "A record authenticated by the obligor concerning the purpose for which a secured obligation was incurred."

§ 9-628(D)—Repealed effective July 1, 2003.

§ 9-628(d)(2)—Deleted.

§ 9-629—Added with no Code counterpart: *"Secured party's liability when taking possession after default-legislative declaration - fund."* "(a) The general assembly recognizes that, in the past, certain debtors may have been disadvantaged by the actions of repossessors and that such debtors were then unable to obtain just redress for their losses in the courts, especially in cases in which the creditor who initiated the action by employing or contracting with the repossessor was shielded from liability because the repossessor was categorized by the courts as an independent contractor. The general assembly wishes to ensure that the repossessor is bonded or that the secured party or assignee is held responsible at law as a principal under the general principles of agency law for the actions of a repossessor who is acting at the behest of the creditor in the event that no bond has been posted.

(b) A secured party or such secured party's assignee who wishes to contract with a person to recover or take possession of collateral upon default, including a motor vehicle repossessed pursuant to section 42-6-146, C.R.S., shall contract to recover or take possession of collateral only with a person who is bonded for property damage to or conversion of such collateral in the amount of at least fifty thousand dollars. Such bond shall be filed with and drawn in favor of the attorney general of the State of Colorado for use of the people of the State of Colorado, and shall be revocable only with the written consent of the attorney general pursuant to rules promulgated by the office of the attorney general. The office of the attorney general may charge a fee to be paid by the person filing such bond in order to cover the direct and indirect costs incurred by such office in fulfilling its duties under the provisions of this section.

(c) A secured party or secured party's assignee who employs or contracts with a person who has not complied with the requirements specified in subsection (b) of this section shall be liable as principal for the actions of any person the secured party or assignee employs or contracts with to recover or take possession of the collateral after default as provided in section 4-9-609 in the same manner as if such person were the agent of the secured party or assignee, whether or not such person has been or may be deemed to be acting as an independent contractor in law.

(d) A repossessor shall not engage in repossessing, recovering, or removing collateral or personal property on behalf of a secured creditor or assignee without first disclosing to such secured creditor or assignee whether such repossessor is bonded pursuant to this article. Any person who fails to disclose or misrepresents to a secured party such person's bonded status or fails to file such bond with the attorney general shall be in violation of the 'Colorado Consumer Protection Act', article 1 of title 6, C.R.S., and shall be subject to remedies or penalties or both pursuant to said article.

(e) Any person who knowingly falsifies a repossessor bond application or misrepresents information contained therein commits a class 1 misdemeanor and shall be punished as provided in section 18-1.3-501, C.R.S.

(f) All moneys collected by the attorney general pursuant to this section shall be transmitted to the state treasurer, who shall credit the same to the general fund.

(g) Notwithstanding any provision by contract or common law, in exercising its rights after default, a secured party or lessor taking possession of a motor vehicle may not disable or render unusable any computer program or other similar device embedded in the motor vehicle if immediate injury to any person or property is a reasonably foreseeable consequence of such action. Any secured party or lessor who disables or renders unusable such a computer program or other similar device in such circumstances shall be liable in accordance with applicable rules of law to any person who sustains an injury to person or property as a reasonably foreseeable result of the secured party's or lessor's action." (C.R.S. 42-6-146; C.R.S. 4-9-609; C.R.S. 18-1.3-501).

§ 9-701. Amended to read: *"Effective date."* "This act takes effect on July 1, 2001. References in this part 7 to 'this act' refer to the repealed and reenacted article 9 of this title as contained in Senate Bill 01-240, enacted at the first regular session of the sixty-third general assembly. References in this part 7 to 'former Article 9' are to article 9 of this title as in effect immediately before July 1, 2001."

§ 9-702—Substituted "this Act takes effect" with "July 1, 2001."

§ 9-702(b)—Substituted "4-9-709" with "4-9-710". (C.R.S. 4-9-709; C.R.S. 4-9-710).

§ 9-703—Substituted "[Act] takes effect" with "July 1, 2001" and the words "[Act] if, when this [Act] takes effect" with "Act if, on July 1, 2001".

§ 9-703(b)(2)—Amended to read: "After June 30, 2002, only if the security interest becomes enforceable under section 4-9-203 before July 1, 2002; and". (C.R.S. 4-9-203).

§ 9-703(b)(3)—Amended to read: “Remains perfected after June 30, 2002, only if the applicable requirements for perfection under this act are satisfied before July 1, 2002.”

§ 9-703(c)—Added with no Code counterpart: “(c) Notwithstanding subsections (a) and (b) of this section, a lien, pledge, or security interest granted by a governmental unit prior to July 1, 2001, that is enforceable immediately before July 1, 2001, and that would have priority over the rights of a person that becomes a lien creditor at that time, shall remain enforceable and continue to have such priority on or after July 1, 2001.”

§ 9-704—Substituted “this [Act] takes effect” with “July 1, 2001”.

§ 9-704(2)—Amended to read: “remains enforceable after June 30, 2002, only if the security interest becomes enforceable under section 4-9-203 on or before June 30, 2002; and”. (C.R.S. 4-9-203).

§ 9-705—Substituted “within one year after this [Act] takes effect” and “the expiration of that period” with “Act on or before June 30, 2002”, “on July 1, 2002”.

§ 9-706(a)(2)—Amended to read: “The pre-effective-date financing statement was filed in an office in another state, another office in this state, or in the office of any clerk and recorder in this state; and”.

§ 9-710—“Effectiveness of filing in clerk and recorders’ offices.” “Except as provided in this section, a pre-effective-date financing statement filed with respect to a security interest in the office of any clerk and recorder in this state shall be treated as if it had been filed in the office of the secretary of state. The preceding sentence does not apply to a financing statement to the extent that the financing statement: (1) covers timber to be cut, or as-extracted collateral; or (2) was filed as a fixture filing.”

Colorado adopted and later repealed Art. 9.3, having no Code counterpart.

Colorado adopted Art. 9.5, having no Code counterpart:

§ 9.5-101—“*Short title.* This article shall be known and may be cited as the ‘Central Filing of Effective Financing Statement Act’.”

§ 9.5-102—“*Legislative declaration.* The general assembly finds, determines, and declares its intent to adopt a central filing system for security interests relating to farm products pursuant to section 1324 of the federal ‘Food Security Act of 1985’, P.L. 99-198. The general assembly further finds, determines and declares that upon the certification and operation of this central filing system, security interest holders shall use such system in lieu of any other notice provided by section 1324 of the federal ‘Food Security Act of 1985’ for farm products used or produced in the state of Colorado which are included in the central filing system, except as otherwise allowed by this article or required by law.”

§ 9.5-103—“*Definitions.* As used in this article, unless the context otherwise requires:

(1) Deleted.

(2) ‘Buyer of farm products’ or ‘buyer in the ordinary course of business’ means a person who, in the ordinary course of business, buys farm products from a person engaged in farming operations who is in the business of selling farm products.

(2.5) ‘Central Filing Officer’ means the Secretary of State.

(3) 'Central Filing System' means a system for filing effective financing statements on a statewide basis and which has been certified by the secretary of the United States department of agriculture pursuant to section 1324 of the 'Food Security Act of 1985'. It is the intention of the general assembly that, effective January 1, 2000, the filing system established by section 4-9-501 shall constitute the central filing system.

(4) 'Commission merchant' means any person engaged in the business of receiving any farm product for sale, on commission, or for or on behalf of another person.

(5) 'Crop year' means: (a) For a crop grown in soil, the calendar year in which it is harvested or to be harvested; (b) For animals, the calendar year in which they are born, acquired or owned; (c) For poultry or eggs, the calendar year in which they are sold or to be sold.

(6) 'Debtor' means a person who owns a product and subjects it to a security interest, whether or not that person owes a debt to the secured party.

(7) 'Effective financing statement' means a statement that: (a) Is an original or reproduced copy thereof; (b) Is filed with the central filing officer by the secured party; (c) Is signed, authorized, or otherwise authenticated by the debtor unless the statement is filed by electronic transmission in which case it shall be signed, authorized, or otherwise authenticated electronically pursuant to section 24-71-101 C.R.S.; (d) Contains: (I) The name and address of the secured party; (II) The name and address of the debtor, which, in the case of a natural person, shall have the surname appear first, and, in the case of a corporation or other entity not a natural person, shall have the name appear beginning with the first word or character not an article or punctuation mark; (III) The social security number of the debtor or, in the case of a debtor doing business other than as an individual, the federal internal revenue service taxpayer identification number of such debtor; (IV) A description of the farm products by categories included in subsection (8) of this section subject to the security interest created by the debtor including: The amount of such products, unless all of a particular farm product is subject to the particular security interest; identification of each county, utilizing the county code or other numeric method of identification used to identify the county established by the central filing officer; where the farm product is produced or stored or to be produced or to be stored, and the crop year, unless every crop year for the duration of the effective financing statement is subject to the particular security interest; (V) Further details of the farm product subject to the security interest if needed to distinguish it from other farm products owned by the same person but not subject to the particular security interest; and (VI) Such other additional information as the central filing officer may require to comply with 7 U.S.C. Sec. 1631, or to more effectively carry out the purposes of this article; (e) Shall be amended in writing within three months after any material change. Such amendment shall be signed, authorized, or otherwise authenticated and filed with the central filing officer by the secured party, and if such amendment is filed by electronic transmission it shall be signed, authorized, or otherwise authenticated electronically, pursuant to section 24-71-101, C.R.S. However, if the security interest is terminated as to one or more of the farm products shown on the filed effective financing statement and the effective financing statement is to remain effective as to one or more other farm products, the secured party shall, within thirty days after such partial termination, file an amendment reflecting such partial termination with the Central Filing Officer. Such amendment shall be signed, authorized, or otherwise authenticated electronically, pursuant to section 24-71-101, C.R.S. If the affected secured party fails to file an amendment reflecting such partial termination within the thirty-day period, the secured party shall be liable to the debtor for five hundred dollars, and, in addition, for any loss caused to the debtor by such failure; (f) Remains effective for a period of five years after the date of filing subject to extensions for additional periods of five years each by filing one or more continuation statements in accordance with section 4-9.5-106; (g) Lapses on either the expiration of the effective period of the statement or the filing of a notice of termination signed by the secured party that the statement has terminated, whichever occurs first, as provided in section 4-9.5-107; (h) May, for any given debtor, cover more than one farm product located in

more than one county; (i) May cover more than one debtor; (j) Is accompanied by the requisite filing fee, established pursuant to section 4-9-525; (k) Is on a form prescribed by the central filing officer; and (l) Substantially complies with the requirements of this subsection (7) even though it contains minor errors that are not seriously misleading.

(8) ‘Farm product’ shall mean an agricultural commodity, a species of livestock used or produced in farming operations, or a product of such crop or livestock in its unmanufactured state, that is in the possession of a person engaged in farming operations. ‘Farm product’ shall include, but is not limited to, apples, artichokes, asparagus, barley, cantaloupe, carrots, cattle and calves, chickens, corn, cotton, cucumbers, dry beans, eggs, fish, flax seed, fur-bearing animals, grapes, hay, hogs, honey, honeydew melon, horses, legumes, milk, muskmelon, oats, onions, pecans, popcorn, potatoes, pumpkins, raspberries, rye, seed crops, sheep and lambs, silage, sorghum grain, soybeans, squash, strawberries, sugar beets, sunflower seeds, sweet corn, tomatoes, trees, triticale, turkeys, vetch, walnuts, watermelon, wheat, and wool. The central filing officer may add other farm products in addition to those lists specified in this subsection (8) if such products are covered by the general definition contained in this subsection (8).

(9) ‘Food Security Act of 1985’ means P.L. 99-198, as amended: section 1324 thereof has been codified at section 1631 of title 7 of the United States Code.

(10) ‘Person’ means any individual or any partnership, corporation, trust, or any other business entity.

(11) ‘Receipt’ and other forms of the word ‘receive’ means the earlier of actual receipt or the tenth day after deposit in the United States mails, first-class mail, postage prepaid.

(12) ‘Registrant’ or ‘registered buyer’ means any buyer of farm products, commission merchant or selling agent, who has registered with the central filing officer pursuant to section 4-9.5-104(4).

(13) ‘Secured party’ means a person in whose favor there is a security interest.

(14) ‘Security interest’ means an interest in farm products that secures payment or performance of an obligation.

(15) ‘Selling agent’ means any person, other than a commission merchant, who is engaged in the business of negotiating the sale and purchase of any farm product on behalf of a person engaged in farming operations.” (C.R.S. 4-9-501; C.R.S. 24-71-101; C.R.S. 24-71-101; C.R.S. 4-9.5-106; C.R.S. 4-9.5-107; C.R.S. 4-9-525; C.R.S. 4-9.5-104[4]).

§ 9.5-104—“*Central filing system.* (1) The central filing officer shall be responsible for the design, implementation, and operation of a central filing system for effective financing statements. The system shall provide a means for filing effective financing statements with the central filing officer. The system shall include requirements: (a) That an effective financing statement be filed in the office of the central filing officer; (b) That the central filing officer record the date and hour of the filing of effective financing statements; and (c) That the central filing officer assign a file number to each effective financing statement.

(2) The central filing officer shall compile all such statements or notices into a master list: (a) Organized according to farm product; (b) Arranged within each such farm product: (I) In alphabetical order according to the last name of the individual debtors or, in the case of debtors doing business other than as individuals, the first word in the name of such debtors; (II) In numerical order according to the social security number of the individual debtors or, in the case of debtors doing business other than as individuals, the federal internal revenue service taxpayer identification number of such debtors; (III) Geographically by county; and (IV) By crop year; (c)

Containing the information referred to in section 4-9.5-103(7)(d).

(3) (a) The central filing officer shall cause the information on the master list to be published in lists: (I) By farm product arranged alphabetically by debtor; and (II) By farm product arranged numerically by the debtor's social security number for individual debtors or, in the case of debtors doing business other than as individuals, the federal internal revenue service taxpayer identification number of such debtors. (b) If a registered buyer or other interested person so requests, the list or lists for such buyer or person may be limited to any county or group of counties where the farm product is used or produced or to any crop year or years or a combination of such identifiers.

(4) All buyers of farm products, commission merchants, selling agents, and other persons may register with the central filing officer or its designee to receive lists described in subsection (3) of this section. Any buyer of farm products, commission merchant, selling agent, or other person conducting business from multiple locations may be considered as one entity, at its option. Such registration shall be on an annual basis. The central filing officer or its designee shall provide the form for registration that shall include the name and address of the registrant and the list or lists described in subsection (3) of this section that such registrant desires to receive. A registration shall not be completed until the form provided is properly completed and received by the central filing officer accompanied by the proper fee for the desired list or lists.

(5) (a) The lists as identified pursuant to subsection (3) of this section shall be distributed by the central filing officer and shall reflect all then effective filings effective as of the date stated on the list, and shall be in writing or printed and shall also be stored in computer-readable form. The central filing officer shall determine the frequency with which the lists identified pursuant to subsection (3) of this section shall be distributed. Such lists may be distributed on an annual basis with three quarterly cumulative supplements or more frequent supplements as determined by the central filing officer reflecting all new filings, changes, and terminations since the last list, if it is cost-effective, requested by registered buyers, and permitted by applicable federal law. The central filing officer shall also provide for the distribution of the lists in direct computer access form and establish reasonable fees therefor pursuant to subsection (8) of this section. The central filing officer may also develop other forms in which to distribute lists and establish fees therefor pursuant to subsection (8) of this section. The lists shall be distributed by first-class mail, postage prepaid. A registrant is deemed to be registered only as to those products, counties, and crop years for which he requests a list. If the name of the seller of a farm product is not on a list requested and received by a registrant, the registrant shall have no liability under this article except as to those farm products for which the registrant has received direct notification of the existence of security interests pursuant to 7 U.S.C. Section 1631 (e)(1) and (g)(2)(A). The registrant may rely on the representation of the seller as to the seller's identity, so long as the reliance is in good faith. (b) The central filing officer shall establish the dates upon which the lists will be distributed, the dates after which a filing of an effective financing statement will not be reflected on the next distribution of lists, and the dates by which a registrant must complete a registration to receive the next list.

(6) The central filing officer shall remove terminated effective financing statements from the master list prior to preparation of the lists required to be distributed by subsection (5) of this section.

(8) The central filing officer shall establish fees for distributing the master list or portions thereof to buyers of farm products, commission merchants, selling agents, or other interested parties pursuant to this article in written, printed, or computer-readable form. Such fees shall be established and collected in accordance with section 24-21-104, C.R.S." (C.R.S. 4-9.5-103[7][d]; C.R.S. 24-21-104).

§ 9.5-105—"*Confirmations.* (1) Oral and written inquiries regarding information provided by the filing of effective financing statements may be made at the office of the central filing officer between the hours of 8:30 A.M. and 5 P.M. on business days.

(5) A buyer of farm products, whether or not registered, may rely conclusively on an oral or written confirmation received pursuant to this section, regardless of any errors or omissions committed by the central filing officer in the preparation or issuance of the confirmation. If the central filing officer confirms orally or in writing to such buyer that the name of the seller is not on the list for a specified product, such buyer shall have no liability under this article and the buyer may rely on the representation of the seller as to the seller's identity, so long as the reliance is in good faith."

§ 9.5-106—"*Continuation statements.* (1) A continuation statement may be filed within six months prior to the expiration of the five-year period of an effective financing statement. Any such continuation statement shall identify the current effective financing statement by file number. Upon timely filing of the continuation statement, the effectiveness of the statement shall be continued for five years after the last date to which the filing was effective, whereupon it shall lapse unless another continuation statement is filed prior to such lapse. If an effective financing statement exists at the time insolvency proceedings are commenced by or against the debtor, the effective financing statement shall remain effective until termination of the insolvency proceedings and thereafter for a period of sixty days or until the expiration of the five-year period, whichever occurs later. Succeeding continuation statements may be filed in the same manner to continue the effectiveness of the original statement."

"(2) An effective financing statement filed before July 1, 1996, that has not lapsed by December 31, 1997, shall lose its perfection and priority rights unless a new continuation statement is filed on or after July 1, 1996, but on or before December 31, 1997. Any such continuation statement shall identify the original statement by filing office, file number, and date of filing. The filing of such continuation statement shall preserve the priority of the original filing and shall be effective for the later of five years after the expiration of the original filing or the expiration of any continuation statement filed before July 1, 1996.

(3) The effectiveness of an effective financing statement filed before July 1, 1996, that lapses after July 1, 1996, but before December 31, 1997, may be continued by filing a continuation statement in accordance with this section. If such continuation statement is filed before July 1, 1996, such effective financing statement or continuation statement shall be continued by the timely filing of a further continuation statement, pursuant to subsection (2) of this section."

§ 9.5-107—"*Notice of termination.* (1) Whenever there is no outstanding secured obligation and no commitment to make advances, incur obligations or otherwise give value, the secured party shall, within thirty days file with the central filing officer a notice of termination of the effective financing statement and provide notice to the debtor of such filing, unless the debtor otherwise requests. If the affected secured party fails to file a termination statement within the thirty-day period, the secured party shall be liable to the debtor for five hundred dollars, and, in addition, for any loss caused to the debtor by such failure.

(1.5) Termination statement filed pursuant to either subsection (1) or subparagraph (I) of paragraph (a) of subsection (1.3) of this section does not terminate or otherwise impair perfection of any security interest perfected by effective financing statement for purposes of art. 9 of this title.

(2) (a) The notice of termination of an effective financing statement shall: (I) Be signed, authorized, or otherwise authenticated by the secured party, and if such notice is filed by electronic transmission it shall be signed electronically, pursuant to section 24-71-101, C.R.S.; [(II) Identify the effective financing statement to be terminated by file number; and (III) state that

the effective financing statement is to be removed from the master list.]

(b) Termination shall be effective as of the date and hour of filing the notice with the central filing officer." (C.R.S. 24-71-101).

§ 9.5-108—"*Filings generally.* (1) The central filing officer shall accept for filing all filings pursuant to this title during regular business hours. The central filing officer shall record the date and hour of the filing of such statements. In the event of an electronic filing made other than during regular business hours, the central filing officer shall record the date of filing as follows: If an electronic filing is made other than during the regular business hours of the filing office, the date of filing shall be the day on which such office next commences business, and the hour of filing shall be the commencement of business on such day. All filings made pursuant to this title that are filed as paper documents and not electronically shall be filed in duplicate, and one copy of the statement shall be returned to the filing party stamped to show the time of receipt of the filing. All filings shall be submitted for filing on forms prescribed by the central filing officer. Nothing in this section shall be construed to require the central filing officer to accept for filing any item the rejection of which is required or permitted under section 4-9-520.

(2) A document filed pursuant to this article shall not constitute notice for purposes of section 38-35-109, C.R.S.

(3) Any termination, amendment, assignment, or release of collateral filing made pursuant to this article shall be signed, authorized, or otherwise authenticated by the secured party, and if such filing is made by electronic transmission it shall be signed electronically, pursuant to section 24-71-101, C.R.S." (C.R.S. 4-9-520; C.R.S. 38-35-109; C.R.S. 24-71-101).

§ 9.5-109—"*'Food Security Act of 1985'.* Whether a buyer of farm products takes subject to a security interest shall be determined by section 1324 of the federal 'Food Security Act of 1985' and applicable provisions of Colorado law."

§ 9.5-110—"*Fees—rules and regulations.* (1) Deleted.

(2) The central filing officer is hereby authorized to adopt such rules and regulations as are necessary to carry out the provisions of this article, and to conform the central filing system to the requirements of the federal 'Food Security Act of 1985'.

(3) The central filing officer may contract with one or more public or private parties to perform some or all of its duties under this article, except that the central filing officer may not delegate the power to make rules or regulations, conduct public hearings, prescribe forms, and establish services and fees therefor.

(4) Deleted.

(5) Revenues collected by the central filing officer pursuant to this article shall be transmitted to the state treasurer, who shall credit the same to the department of state cash fund created in section 24-21-104(3), C.R.S.

(6) (a) Any unexpended and unencumbered moneys remaining in the central information system cash fund created in section 4-9.3-105 on July 2003, shall be transferred to the department of state cash fund created in section 24-21-104(3), C.R.S. (b) This subsection (6) is repealed, effective July 1, 2004." (C.R.S. 24-21-104[3]).

§ 9.5-111—"*Penalties.* Any debtor or third party who provides any false or misleading information concerning the name of the owner of any farm products or the existence of any security interest affecting farm products with the intent to deprive the secured party of any of his or her security under the security interest or to defraud or mislead the buyer of any farm product as to the existence of the security interest or fails to pay to the secured party any moneys realized out of the sale of collateral in violation of any security agreement and with the intent to deprive the secured party of such party's rights thereto, or makes a filing subject to section 4-9.5-108(3), that is not signed, authorized, or otherwise authenticated by the secured party as required by section 4-9.5-108(3), shall be deemed to have violated section 18-5-206, C.R.S., and shall be subject to the penalties described in said section. Any penalty so collected shall be transmitted to the state treasurer who shall credit the same to the department of state cash fund in section 24-21-104(3), C.R.S." (C.R.S. 4-9.5-108[3]; C.R.S. 18-5-206; C.R.S. 24-21-104[3]).

§ 9.5-112—Deleted.

§ 9.5-112.5—"Immunity. (1) Except in cases of willful misconduct or bad faith, the contractors retained by the central filing officer, as well as the employees of such contractors, shall be exempt from personal liability as a result of an error or omission in receiving, entering, storing, or providing information or performing their duties as required by this title.

(2) Any error or omission described in subsection (1) of this section shall constitute a tort and not a breach of any express or implied contract."

Colorado adopted Art. 9.7, having no Code counterpart:

§ 9.7-101. "*Short title*. THIS ARTICLE SHALL BE KNOWN AND MAY BE CITED AS THE 'COLORADO STATUTORY LIEN REGISTRATION ACT'."

§ 9.7-102. "*Scope.* (a) THIS ARTICLE SHALL APPLY TO THE FILING OF A RECORD RELATING TO A DESIGNATED STATUTORY LIEN.

(b) THIS ARTICLE SHALL NOT APPLY TO THE FILING OF:

(1) NOTICES, CERTIFICATES, OR OTHER RECORDS PERTAINING TO ANY LIEN CREATED PURSUANT TO THE LAWS OF THE UNITED STATES; OR

(2) A FINANCING STATEMENT OR OTHER RECORD FILED PURSUANT TO ARTICLE 9 OR 9.5 OF THIS TITLE OR ANY SUCCESSOR STATUTES.

(c) THIS ARTICLE SHALL NOT BE CONSTRUED TO CREATE A FILING REQUIREMENT FOR ANY LIEN WHERE THE APPLICABLE SUBSTANTIVE STATUTE DOES NOT REQUIRE FILING.

§ 9.7-103. "*Definitions*. (a) AS USED IN THIS ARTICLE, UNLESS THE CONTEXT OTHERWISE REQUIRES:

(1) 'CLAIMANT' MEANS A PERSON IDENTIFIED AS A BENEFICIARY OR OWNER OF A DESIGNATED STATUTORY LIEN IN A NOTICE OF LIEN OR NOTICE OF AMENDMENT FILED IN THE OFFICE OF THE SECRETARY OF STATE PURSUANT TO THIS ARTICLE.

(2) 'CONTINUE' MEANS TO RENEW OR OTHERWISE EXTEND THE EFFECTIVENESS OF A NOTICE OF LIEN.

(3) 'DESIGNATED STATUTORY LIEN' MEANS:

(A) A HARVESTER'S LIEN PURSUANT TO ARTICLE 24.5 OF TITLE 38, C.R.S.;

(B) AN AGISTOR'S LIEN PURSUANT TO PART 2 OF ARTICLE 20 OF TITLE 38, C.R.S.;

(C) A HOSPITAL LIEN PURSUANT TO ARTICLE 27 OF TITLE 38, C.R.S.;

(D) A RESTITUTION LIEN PURSUANT TO SECTION 16-18.5-104, C.R.S.;

(E) A CHILD SUPPORT LIEN PURSUANT TO SECTION 14-10-122, C.R.S.;

(F) A SECURITY INTEREST HELD BY A HOUSING AUTHORITY PURSUANT TO SECTION 29-4-712, C.R.S.; OR

(G) ANY OTHER LIEN PROVIDED FOR BY A STATUTE OF THIS STATE THAT REQUIRES OR EXPRESSLY PERMITS A NOTICE OR OTHER RECORD CREATING, EVIDENCING, OR PERFECTING THE LIEN TO BE FILED IN THE OFFICE OF THE SECRETARY OF STATE, EXCEPT AS PROVIDED IN SECTION 4-9.7-102 (b) AND (c).

(4) “NOTICE OF AMENDMENT” MEANS A RECORD FILED IN THE OFFICE OF THE SECRETARY OF STATE PURSUANT TO THIS ARTICLE THAT CHANGES, CORRECTS, CONTINUES, TERMINATES, SUBORDINATES, OR OTHERWISE MODIFIES A NOTICE OF LIEN.

(5) ‘NOTICE OF LIEN’ MEANS A RECORD FILED IN THE OFFICE OF THE SECRETARY OF STATE PURSUANT TO THIS ARTICLE THAT IDENTIFIES ONE OR MORE CLAIMANTS WITH RESPECT TO A DESIGNATED STATUTORY LIEN; IDENTIFIES, TO THE EXTENT REQUIRED BY THE APPLICABLE SUBSTANTIVE STATUTE, THE PROPERTY ASSERTED TO BE SUBJECT TO THE LIEN; IDENTIFIES THE OWNER OR OWNERS OF THE PROPERTY; AND OTHERWISE COMPLIES WITH THE REQUIREMENTS OF THIS ARTICLE.

(6) ‘OWNER’ MEANS A PERSON IDENTIFIED IN A NOTICE OF LIEN OR NOTICE OF AMENDMENT IN THE OFFICE OF THE SECRETARY OF STATE PURSUANT TO THIS ARTICLE AS AN OWNER OF PROPERTY SUBJECT TO A DESIGNATED STATUTORY LIEN.

(7) ‘RECORD’, EXCEPT AS USED IN THE PHRASES ‘FOR RECORD’, ‘OF RECORD’, ‘RECORD OR LEGAL TITLE’, AND ‘RECORD OWNER’, MEANS INFORMATION THAT IS INSCRIBED ON A TANGIBLE MEDIUM OR THAT IS STORED IN AN ELECTRONIC OR OTHER MEDIUM AND IS RETRIEVABLE IN PERCEIVABLE FORM.

(8) ‘SUBSTANTIVE STATUTE’ MEANS THE STATUTE CREATING, PROVIDING FOR, OR GIVING RISE TO A DESIGNATED STATUTORY LIEN.

(9) ‘TAXPAYER IDENTIFICATION NUMBER’ MEANS A SOCIAL SECURITY NUMBER, AN EMPLOYER IDENTIFICATION NUMBER, OR AN INDIVIDUAL TAXPAYER IDENTIFICATION NUMBER.

(10) ‘TERMINATE’ MEANS TO RELEASE OR OTHERWISE EXTINGUISH THE EFFECTIVENESS OF A NOTICE OF LIEN.”

§ 9.7-104. *Contents of notice of lien or notice of amendment.*

(a) (1) A NOTICE OF LIEN SHALL STATE:

(A) THE NAME OF ONE OR MORE OWNERS;

(B) THE NAME OF ONE OR MORE CLAIMANTS;

(C) A CITATION TO THE SECTION OF THE SUBSTANTIVE STATUTE PURSUANT TO WHICH THE NOTICE OF LIEN IS FILED;

(D) TO THE EXTENT REQUIRED BY THE APPLICABLE SUBSTANTIVE STATUTE, AN IDENTIFICATION OF THE PROPERTY ASSERTED TO BE SUBJECT TO A DESIGNATED STATUTORY LIEN AND ANY OTHER INFORMATION THAT THE APPLICABLE SUBSTANTIVE STATUTE REQUIRES TO BE CONTAINED IN OR INCLUDED WITH THE NOTICE OF LIEN;

(E) THAT ANY OTHER INFORMATION OR RECORD REQUIRED TO BE FILED WITH THE OFFICE OF THE SECRETARY OF STATE PURSUANT TO THE APPLICABLE SUBSTANTIVE STATUTE HAS BEEN INCLUDED WITH OR ATTACHED TO THE NOTICE OF LIEN; AND (F) SUCH ADDITIONAL INFORMATION AS THE SECRETARY OF STATE MAY REQUIRE.

(2) A NOTICE OF LIEN MAY STATE:

(A) THE MAILING ADDRESS OF ONE OR MORE OWNERS; AND

(B) THE MAILING ADDRESS OF ONE OR MORE CLAIMANTS.

(b) (1) A NOTICE OF AMENDMENT SHALL STATE:

(A) THE ORIGINAL FILING NUMBER OF THE NOTICE OF LIEN TO WHICH THE NOTICE OF AMENDMENT RELATES;

(B) THAT ANY OTHER INFORMATION OR RECORD REQUIRED TO BE FILED WITH THE OFFICE OF THE SECRETARY OF STATE PURSUANT TO THE APPLICABLE SUBSTANTIVE STATUTE HAS BEEN INCLUDED WITH OR ATTACHED TO THE NOTICE OF AMENDMENT; AND

(C) ANY ADDITIONAL INFORMATION THAT THE SECRETARY OF STATE REQUIRES.

(2) A NOTICE OF AMENDMENT MAY CONTAIN ANY INFORMATION NECESSARY TO INDICATE THE MANNER AND EXTENT TO WHICH THE NOTICE OF AMENDMENT AFFECTS THE NOTICE OF LIEN.

(c) A NOTICE OF LIEN SHALL REMAIN EFFECTIVE FOR THE PERIOD PROVIDED FOR BY THE APPLICABLE SUBSTANTIVE STATUTE OR UNTIL A NOTICE OF AMENDMENT THAT TERMINATES THE NOTICE OF LIEN IS FILED IN THE OFFICE OF THE SECRETARY OF STATE.

§ 9.7-105. "*Acceptance and refusal to accept for filing.* (a) THE SECRETARY OF STATE SHALL REFUSE TO ACCEPT A NOTICE OF LIEN OR NOTICE OF AMENDMENT FOR FILING IF:

(1) THE APPLICABLE FILING FEE IS NOT TENDERED;

(2) THE NOTICE IS NOT COMMUNICATED BY A METHOD OF COMMUNICATION AUTHORIZED BY THE SECRETARY OF STATE;

(3) THE NOTICE OF LIEN DOES NOT STATE THE NAME OF AN OWNER;

(4) THE NOTICE OF LIEN DOES NOT STATE THE NAME OF A CLAIMANT;

(5) THE NOTICE OF AMENDMENT DOES NOT INDICATE THE ORIGINAL FILE NUMBER OF THE NOTICE OF LIEN TO WHICH THE NOTICE OF AMENDMENT RELATES; OR

(6) THE NOTICE OF LIEN OR NOTICE OF AMENDMENT FAILS TO STATE ANY ADDITIONAL INFORMATION THAT THE SECRETARY OF STATE REQUIRES.

(b) THE SECRETARY OF STATE MAY REFUSE TO ACCEPT A NOTICE OF LIEN OR NOTICE OF AMENDMENT FOR FILING IF THE NOTICE OF LIEN OR NOTICE OF AMENDMENT DOES NOT INCLUDE THE ADDRESS OF ONE OR MORE CLAIMANTS.

(c) FILING DOES NOT OCCUR WITH RESPECT TO A NOTICE OF LIEN OR NOTICE OF AMENDMENT THAT THE SECRETARY OF STATE REFUSES TO ACCEPT FOR A REASON SET FORTH IN SUBSECTION (a) OR (b) OF THIS SECTION."

§ 9.7-106. "*Duties of filing officer*. (a) IF A NOTICE OF LIEN IS COMMUNICATED TO AND ACCEPTED BY THE SECRETARY OF STATE FOR FILING, THE SECRETARY OF STATE SHALL CAUSE THE NOTICE TO BE MARKED, MAINTAINED, AND INDEXED IN ACCORDANCE WITH THE PROVISIONS OF SECTION 4-9-519 AS IF THE NOTICE WERE A FINANCING STATEMENT AND EACH OWNER IDENTIFIED IN THE NOTICE WERE A DEBTOR WITHIN THE MEANING OF SECTION 4-9-519.

(b) IF A NOTICE OF AMENDMENT IS COMMUNICATED TO AND ACCEPTED BY THE SECRETARY OF STATE FOR FILING, THE SECRETARY OF STATE SHALL:

(1) CAUSE THE NOTICE OF AMENDMENT TO BE MARKED, MAINTAINED, AND INDEXED AS IF THE NOTICE WERE AN AMENDMENT OF A FINANCING STATEMENT WITHIN THE MEANING OF SECTION 4-9-512;

(2) IF THE NOTICE OF AMENDMENT TERMINATES A NOTICE OF LIEN, CAUSE THE NOTICE OF AMENDMENT TO BE MARKED, MAINTAINED, AND INDEXED AS IF THE NOTICE WERE A TERMINATION STATEMENT WITHIN THE MEANING OF SECTION 4-9-513; OR

(3) IF THE NOTICE OF AMENDMENT CONTINUES A NOTICE OF LIEN, CAUSE THE NOTICE OF AMENDMENT TO BE MARKED, MAINTAINED, AND INDEXED AS IF THE NOTICE WERE A CONTINUATION STATEMENT AS DEFINED IN SECTION 4-9-102 (27) AND EXTEND THE EFFECTIVENESS OF THE NOTICE OF LIEN BY THE APPROPRIATE PERIOD PURSUANT TO THE APPLICABLE SUBSTANTIVE STATUTE.

(c) IF THE SECRETARY OF STATE REFUSES TO ACCEPT A NOTICE OF LIEN OR NOTICE OF AMENDMENT FOR FILING, THE SECRETARY OF STATE SHALL COMMUNICATE TO THE PERSON THAT PRESENTED THE RECORD THE FACT OF AND REASON FOR THE REFUSAL. THE COMMUNICATION SHALL BE MADE AT THE TIME AND IN THE MANNER PRESCRIBED BY THE RULES ADOPTED BY THE SECRETARY OF STATE PURSUANT TO SECTION 4-9.7-109.

(d) THE SECRETARY OF STATE MAY REMOVE A NOTICE OF LIEN FROM THE RECORDS OF THE SECRETARY OF STATE ONE YEAR AFTER THE NOTICE EXPIRES IN ACCORDANCE WITH SECTION 4-9.7-104 (d).

(e) THE SECRETARY OF STATE SHALL COMMUNICATE OR OTHERWISE MAKE AVAILABLE IN A RECORD THE FOLLOWING INFORMATION TO ANY PERSON THAT REQUESTS THE INFORMATION:

(1) WHETHER THERE IS ON FILE ON A DATE AND TIME SPECIFIED BY THE SECRETARY OF STATE ANY NOTICE OF LIEN OR NOTICE OF AMENDMENT THAT:

(A) DESIGNATES A PARTICULAR OWNER; AND

(B) HAS NOT EXPIRED UNDER SECTION 4-9.7-104 (d); AND

(C) IF THE REQUEST SO STATES, HAS EXPIRED UNDER SECTION 4-9.7-104 (d) AND A RECORD OF WHICH IS MAINTAINED BY THE SECRETARY OF STATE UNDER SUBSECTION (d) OF THIS SECTION;

(2) THE DATE AND TIME OF FILING OF EACH NOTICE OF LIEN AND NOTICE OF AMENDMENT DESCRIBED IN PARAGRAPH (1) OF THIS SUBSECTION (e); AND

(3) THE INFORMATION PROVIDED IN EACH NOTICE OF LIEN AND NOTICE OF AMENDMENT DESCRIBED IN PARAGRAPH (1) OF THIS SUBSECTION (e)."

§ 9.7-107. "*Fees.* SUBJECT TO SECTION 24-75-402, C.R.S., FEES FOR SERVICES RENDERED BY THE SECRETARY OF STATE UNDER THIS ARTICLE SHALL BE DETERMINED AND COLLECTED PURSUANT TO SECTION 24-21-104, C.R.S."

§ 9.7-108. "*Effect of filing.* A NOTICE OF LIEN OR NOTICE OF AMENDMENT THAT IS COMMUNICATED TO THE OFFICE OF THE SECRETARY OF STATE WITH TENDER OF THE FILING FEE, BUT WHICH THE SECRETARY OF STATE WRONGFULLY REFUSES TO ACCEPT, IS EFFECTIVE AS A FILED RECORD IN THE RECORDS OF THE SECRETARY OF STATE EXCEPT AS AGAINST A PURCHASER OF THE PROPERTY DESCRIBED IN THE NOTICE WHO GIVES VALUE IN REASONABLE RELIANCE UPON THE ABSENCE OF THE RECORD IN THE RECORDS OF THE SECRETARY OF STATE."

§ 9.7-109. "*Filing office—rules.* (a) THE SECRETARY OF STATE SHALL ADOPT AND PUBLISH ANY RULES NECESSARY TO IMPLEMENT THIS ARTICLE. THE RULES SHALL BE:

(1) CONSISTENT WITH THIS ARTICLE; AND

(2) ADOPTED AND PUBLISHED IN ACCORDANCE WITH THE 'STATE ADMINISTRATIVE PROCEDURE ACT', ARTICLE 4 OF TITLE 24, C.R.S."

§ 10-101(1)—Specific calendar date set as effective date: July 1, 1966.

§ 10-101(2)—Colorado placed what appears in official text as § 10-102(2) in § 10-101 as subsection (2).

§ 10-102—Deleted.

§ 10-103—Amended to read: "Except as provided in section 4-10-104, all statutes, acts, and parts of acts inconsistent with the provisions of this title are hereby repealed as of July 1, 1966." (C.R.S. 4-10-104).

§ 10-104(2)—Blank completed with "or modify part 6 of article 1 of title 15, C.R.S., being" and "cited as" deleted.

Effective Date and Transition Provisions.

Art. 11 of 1972 Official Amendment (§§ 11-101 through 11-108) was adopted and renumbered 4-10-201 to 4-10-208. (C.R.S. 4-10-201; C.R.S. 4-10-208).

§ 11-101 [4-10-201]—Amended to read: "The 1978 amendments as defined in section 4-10-202(2) shall become effective at 12:01 a.m. on January 1, 1978." (C.R.S. 4-10-201; C.R.S. 4-10-202[2]).

§ 11-102 [4-10-202]—Amended to read: "As used in this part 2, unless the context otherwise requires: (1) '1966 code' means this title as originally enacted and as amended prior to January 1, 1978. (2) '1978 amendments' means the amendments to this title enacted by House Bill No. 1400, chapter 62 of the Session Laws of Colorado 1977. (3) '1978 code' means this title on and after January 1, 1978."

§ 11-103 [4-10-203]—Amended to read: "Transactions validly entered into after June 30, 1966, and before January 1, 1978, and which were subject to the provisions of the 1966 code and which would be subject to the provisions of the 1978 amendments if they had been entered into after January 1, 1978, and the rights, duties, and interest flowing from such transactions remain valid after the latter date and may be terminated, completed, consummated, or enforced as required or permitted by the 1978 code. Security interest arising out of such transactions which are perfected when the 1978 amendments become effective shall remain perfected until they lapse as provided in the 1978 code and may be continued as permitted by the 1978 code, except as stated in section 4-10-205." (C.R.S. 4-10-203; C.R.S. 4-10-205).

§§ 11-103 to 11-108 [4-10-203 to 4-10-208]—New U.C.C. referred to as "1978 amendments" or "1978 code"; old U.C.C. referred to as "the 1966 code"; effective date of old U.C.C. given as June 30, 1966; effective date of new U.C.C. given as Jan. 1, 1978. (C.R.S. 4-10-203; C.R.S. 4-10-208).

§ 11-206[4-10-206]—Effective July 1, 1996, deleted requirement that financing statement must be signed by either debtor or secured party. (C.R.S. 4-10-206).

Forms.

All financing statements required to be filed with Secretary of State must be typewritten and must include debtor's tax identification number. All filings must be in duplicate (one original plus one copy). Secretary of State prefers filings on Colo. 8½ × 11 inch form, but will accept national and other forms if they include all required Colorado information, i.e., county code, collateral codes, EFS information, etc. Access Colorado forms at: www.sos.state.co.us/pub/main.htm.

Filing Fees.

Colorado adopted Art. 11, with no official code counterpart, dealing with fees. *Note*, pursuant to § 4-9.3-105 there is a $1 surcharge on any and all filings and recordings made with division of commercial recordings, in addition to amount shown below. (C.R.S. 4-9.3-105).

§ 11-102—"Fees for filing, indexing, and furnishing data pursuant to sections 4-9-403 to 4-9-408. (1) The filing officer shall charge a uniform fee in accordance with the following schedule:

(a) For filing, indexing, and furnishing filing data for an original financing statement, pursuant to section 4-9-403 or an original effective financing statement pursuant to section 4-9.5-108: $15.

(a.5)(I) For filing a continuation statement between July 1, 1996, and December 31, 1997: $5.

(II) For filing, indexing, and furnishing filing data for a continuation statement, except between July 1, 1996, and December 31, 1997: $15.

(b) For filing and indexing a separate statement of assignment pursuant to section 4-9-404 or 4-9.5-108: $15.

(c) For filing and indexing a termination statement pursuant to section 4-9-404 or 4-9.5-107: $15.

(d) For filing, indexing, and furnishing filing data for a financing statement indicating an assignment of a security interest in the collateral described in the statement, pursuant to section 4-9-405(1) or 4-9.5-108: $15.

(e) For filing, indexing, and furnishing filing data for a separate written statement of assignment, pursuant to section 4-9-405 or 4-9.5-108: $15.

(f) For filing and noting a statement releasing all or a part of any collateral described in a filed financing statement, pursuant to section 4-9-406 or 4-9.5-108: $15.

(g) (I) For issuance of a certificate, pursuant to section 4-9-407 (2): Five dollars for the first year searched, plus two dollars for each additional year searched.

(II) For furnishing a copy of any filed financing statement or other statement, pursuant to section 4-9-407 (2): One dollar and twenty-five cents per page, plus one dollar for certifying such copy and affixing the seal thereto.

(h) Deleted.

(2) Deleted.

(3) When a document is not submitted on a standard form established by the central filing officer for such purpose, the filing officer shall charge a five-dollar fee in addition to any other fee imposed pursuant to this section for filing, indexing, and furnishing data pursuant to subsections (1)(a), (1)(a.5)(II), (1)(b), (1)(c), (1)(d), (1)(e), and (1)(f) of this section.

(4) Notwithstanding the amount specified for any fee in subsection (1) of this section, the central information system board, created in section 4-9.3-103, shall, by rule or as otherwise provided by law, reduce the amount of one or more of the fees if necessary pursuant to section 24-75-402(3), C.R.S., to reduce the uncommitted reserves of the fund to which all or any portion of one or more of the fees is credited. After the uncommitted reserves of the fund are sufficiently reduced, the central information system board may increase the amount of one or more of the fees as provided in section 24-75-402(4), C.R.S. (C.R.S. 4-9-403; C.R.S. 4-9-408; C.R.S. 4-9.5-108; C.R.S. 4-9-404; C.R.S. 4-9.5-107; C.R.S. 4-9-405[1]; C.R.S. 4-9-406; C.R.S. 4-9-406; C.R.S. 4-9-407; C.R.S. 4-9.3-103; C.R.S. 24-75-402[3]; C.R.S. 24-75-402[4]).

§ 35-15-105—"*Fees for filing documents relating to effective financing statements pursuant to article 9.5 of title 4.* (1) The board shall establish fees and charges in amounts necessary to defray the anticipated costs of the central filing system. The board shall design, implement, and operate the central filing system in such a manner as to keep costs to a minimum while providing the state-of-the-art, cost effective services contemplated in article 9.5 of title 4, C.R.S. The fees and charges may be adjusted by the board from time to time as necessary or appropriate, but shall not exceed the maximums for the specific services described in subsection (2) of this section. The board is encouraged to develop additional methods of providing the services contemplated in article 9.5 of title 4, C.R.S., with the same or better manner and at lower costs.

(2) The board shall establish pursuant to subsection (1) of this section fees and

charges for the following services not to exceed the amounts indicated:

(a) For filing an effective financing statement pursuant to article 9.5 of title 4, C.R.S., $15;

(b) For filing a continuation statement, partial release, assignment of or amendment to an effective financing statement pursuant to article 9.5 of title 4, C.R.S., $15;

(c) For filing a termination statement for an effective financing statement pursuant to article 9.5 of title 4, C.R.S., $15;

(d) For registering as a buyer of farm products, commission merchant, or selling agent pursuant to article 9.5 of title 4, C.R.S., no charge;

(e) For distributing the master list or portions thereof to buyers of farm products, commission merchants, and selling agents, or for providing such master list or portions thereof to other interested parties pursuant to article 9.5 of title 4, C.R.S., in photocopy, microfiche, or computer-readable form, such reasonable charges as may be developed by the board to cover the actual cost of providing the lists in the form requested;

(f) For issuing an oral and follow-up written confirmation of the existence of an effective financing statement pursuant to article 9.5 of title 4, C.R.S., $15 per debtor;

(g) For permitting a physical inspection of all filings of effective financing statements pursuant to article 9.5 of title 4, C.R.S., no charge; and

(h) For issuing a written confirmation in response to a written request of the existence of any effective financing statement on file pursuant to article 9.5 of title 4, C.R.S. $15 per debtor."

See also topics: Banks and Banking, Bills and Notes, Brokers, Carriers, Contracts, Factors, Frauds, Statute of, Sales, Securities, Warehousemen; categories Business Organizations, topic Corporations; Civil Actions and Procedure, topic Limitation of Actions; Debtor and Creditor, topics Assignments, Fraudulent Sales and Conveyances, Liens, Pledges; Documents and Records, topics Records, Seals; Mortgages, topic Chattel Mortgages.

3.10 [RESERVED]

3.11 CONSIGNMENTS:

See topic 3.23 Sales.

3.12 CONSUMER PROTECTION:

Advertising.

False or misleading advertising of credit with respect to consumer credit sale is prohibited under Consumer Credit Code. (C.R.S. 5-3-110). False or misleading statements in advertisement or sale of real property subject to provisions of Colorado Consumer Protection Act. (660 P.2d 1295). Bait and switch advertising and other activities constitute deceptive trade practices prohibited under Colorado Consumer Protection Act. (C.R.S. 6-1-101 to 115). Promotion of pyramid scheme is class 1 misdemeanor on first conviction and class 5 felony on second or subsequent conviction. Bait advertising is class two misdemeanor. (C.R.S. 18-5-303). Misleading advertising of meats and frozen foods intended for storage prohibited. (C.R.S. 35-33.5-103). False advertisement of food, drug, device or cosmetic prohibited. (C.R.S. 25-5-403[e]). May not advertise goods that are not available unless provide way to supply them. (C.R.S. 6-2-114).

Audiologist.

Deceptive trade practice to represent oneself as audiologist unless licensed. (C.R.S. 12-5.5-301 to 302).

Assignment of Wages.

See category 8 Debtor and Creditor, topic 8.01 Assignments.

Buyers' Clubs.

Contracts for membership in buyer's clubs are regulated. (C.R.S. 6-1-706).

Bulk Foods.

Sanitary maintenance and protection of bulk foods and equipment used to display and disperse bulk foods is regulated. (C.R.S. 25-4-1301).

Closing and Settlement Services.

Such services are regulated by statute. Only collected funds may be disbursed at closing. (C.R.S. 38-35-125).

Collection agencies are required to obtain license. Their communication and contact with customers is regulated. (C.R.S. 12-14-101).

Credit Card Receipts.

Printing of credit card receipts regulated. (C.R.S. 6-1-711).

Consumer Credit Code.

Colorado has adopted Uniform Consumer Credit Code (1969 Act) with substantial variations. (C.R.S. 5-1-101 to C.R.S. 5-9-102.5).

Consumer Credit Reporting Agencies.

Activities of consumer credit reporting agencies are regulated. (C.R.S. 12-14.3-101).

Credit Services Organizations.

Activities of credit services organizations are regulated. (C.R.S. 12-14.5-101).

Dairy Products.

Standards, inspection, and other public safety measures of dairy products and frozen desserts are regulated. (C.R.S. 25-5.5-101).

Dance Studios.

Activities of dance studios are regulated. (C.R.S. 6-1-705).

Deaf Interpreter.

Deceptive trade practice to represent oneself as deaf interpreter, sign language interpreter or other similar specified professional unless have appropriate credentials. (C.R.S. 6-1-707[e]).

Debt Management Services.

Activities of debt settlement and debt management services are regulated. (C.R.S. 12-14.5-201).

Dietitians.

Deceptive trade practice to represent oneself as dietitian unless have appropriate credentials. (C.R.S. 6-1-707[b]).

Disability Assisting Facilitative Devices.

Certain activities in connection with sales and services of devices that assist persons with disabilities (e.g. hearing impaired telephone devices, voice recognition computer equipment, etc.) are regulated (C.R.S. 6-1-501 to 511) and express warranties required (C.R.S. 6-1-502).

Drug Pricing.

Charging unconscionable amount (generally increase of 10% or more) for sale of drugs following declaration by Colorado Department of Public Health and Environment of critical shortage of such drugs is prohibited. (C.R.S. 6-1-714).

Foreclosure consulting contracts and purchases of residences in foreclosure are regulated. Various agreements must comply with required form. (C.R.S. 6-1-105[1][xx] and C.R.S. 6-1-1101 to 1120).

Health Clubs.

Activities of health clubs are regulated. (C.R.S. 6-1-704).

Hearing Aids.

Dispensing of hearing aids is regulated. (C.R.S. 6-1-701).

Home Solicitation Sales.

See topic Consumer Credit. (C.R.S. 5-2-501 to 505).

Labeling and Packaging.

All labels of consumer commodities, as defined in C.R.S. 25-5-402(4), must conform to requirements for declaration of net quantity of contents of federal Fair Packaging and Labeling Act, unless exempted from federal Act. (C.R.S. 25-5-419). Misleading packages prohibited; except as otherwise provided, commodity in package form must bear definite, plain and conspicuous declaration of quantity and, when package not sold on premises where packed, name and place of business of manufacturer, packer or distributor. (C.R.S. 35-14-118, 119).

Loan Finders.

Activities of loan finders are regulated. (C.R.S. 18-15-109).

Manufactured Homes.

Certain actions in connection with sales and installation of manufactured homes are regulated. (C.R.S. 6-1-105[ss], 113[2.5], [2.7], 601 to 606, 709; C.R.S. 24-32-3101 to 3110).

Misrepresentations of Academic or Honorary Degrees.

Misrepresentation concerning academic or honorary degrees is prohibited. (C.R.S. 6-1-105[1][dd]).

Misrepresentation of Quantity or Price.

Misrepresentation of quantity (C.R.S. 35-14-110) or price (C.R.S. 35-14-111) of commodity or service prohibited.

Mortgage Loans.

Mortgage brokers must escrow fees earned only upon closing of loan. (C.R.S. 38-40-101). Mortgage lenders must give written disclosure of settlement costs and conditions to guaranties of loan terms. (C.R.S. 38-40-102). Mortgage services must give notice of transfer of servicing responsibilities and annual report of loan activities, must respond to written inquiries for information, and must pay real property taxes on or before due date or be liable for penalties and interest. (C.R.S. 38-40-103). Loan origination procedures are regulated. (C.R.S. 38-40-105). Activities of mortgage brokers are regulated. (C.R.S. 6-1-105[1][aaa], [bbb]).

False and misleading advertising, statements and representations, consummation of mortgage loan agreement with unconscionable terms are prohibited. (C.R.S. 38-40-105).

Motor Vehicle Sales and Leases.

Certain practices in connection with sale or lease of motor vehicle or financing of such sale and lease are regulated and certain disclosures are required prior to sale of motor vehicle. (C.R.S. 6-1-708).

Motor vehicle rental contracts are regulated with regard to collision damage waiver provisions. (C.R.S. 6-1-201).

Motor Vehicle Repairs.

Certain activities in connection with motor vehicle repairs are regulated. (C.R.S. 42-9-101 to 113). Installation or reinstallation of air bags or objects in lieu thereof regulated. (C.R.S. 6-1-711).

Motor Vehicle Service Contracts.

Issuance of motor vehicle service contracts is regulated. Issuer must obtain policy of insurance backing issuer's contractual liability. (C.R.S. 42-11-102 and C.R.S. 6-1-105).

Notary Publics.

Representations made and scope of services provided by notary publics who are not lawyers licensed to practice law in Colorado are regulated. (C.R.S. 12-55-110.3 and C.R.S. 6-1-105[1][vv]).

Optician.

Deceptive trade practice to represent oneself as certified optician unless have appropriate credentials. Scope of services regulated. (C.R.S. 6-1-707[d]).

Pet Animal Facilities.

Activities of pet animal facilities are regulated. (C.R.S. 6-1-105[2] [oo]).

Plain Language Statute.

None.

Product Liability.

One who sells article to be used as food impliedly warrants its fitness for purpose for which sold. (147 Colo. 358, 363 P.2d 667). Doctrine of res ipsa loquitur recognized. (137 Colo.

544, 328 P.2d 88). Seller's warranty, either express or implied, extends to any person who may reasonably be expected to use, consume, or be affected by goods. (C.R.S. 4-2-318). Negligence or willful misconduct required to recover for damages from impure blood. (C.R.S. 13-22-104). Doctrine of strict liability in tort recognized with statutory limitations. (190 Colo. 57, 544 P.2d 983; C.R.S. 13-21-401 to 406; C.R.S. 13-21-501 to 505).

Prizes.

Offering of prizes or free merchandise is regulated. (C.R.S. 6-1-105[1][y], [jj]; C.R.S. 6-1-803).

Radon.

Misrepresentation of radon test results is prohibited. (C.R.S. 6-1-105[1][ll]).

Real Estate Appraisals.

Real estate appraisals of dwellings securing mortgage loans are regulated. (C.R.S. 6-1-105[1][zz] and C.R.S. 6-1-717).

Rental Purchase Agreements are regulated. (C.R.S. 5-10-101; C.R.S. 6-1-105[1][ee]).

Remedies.

Attorney general may make examination for violations, take testimony and make copies of evidence. Attorney general can seek to enjoin deceptive practices and sue for civil penalties. Private civil actions for damages and attorneys fees are available against one who has acquired money or property by use of deceptive trade practices. (C.R.S. 6-1-113).

Uniform Consumer Credit Code (1969 Act) adopted with numerous changes. (C.R.S. 5-1-101 to C.R.S. 9-102.5).

Replacement Automobile Crash Parts.

Sale of nonoriginal equipment crash repair parts is regulated. (C.R.S. 10-3-1301).

Seeds.

Colorado Seed Act adopted and effective July 1, 1993. (C.R.S. 35-27-101 to 124). Deceptive trade practice to hold oneself out as being authorized to perform any action under act which requires registration without registering (C.R.S. 6-1-105; C.R.S. 35-27-113[3][e]), soliciting to perform any of acts for which registration is required without registering (C.R.S. 6-1-105 and C.R.S. 35-27-113[3][f]), or making false, misleading, deceptive or fraudulent advertisements about specific lot of seed (C.R.S. 6-1-105; C.R.S. 35-27-113[3][i]).

Soil and Hazard Analyses.

Developer of residential property must give purchaser written report of soil conditions 14 days before closing. (C.R.S. 6-6.5-101).

Sweepstakes and contests are regulated. (C.R.S. 6-1-801 to 804).

Telephone Solicitations.

Prevention of Telemarketing Fraud Act adopted and effective July 1, 1993. (C.R.S. 6-1-301 to 306). Unlawful telemarketing practices include failure to register with state as commercial telephone seller (C.R.S. 6-3-303 and C.R.S. 6-3-304); failure to allow cancellation at any time before expiration of three business days after purchaser's receipt of goods, services or property

(C.R.S. 6-3-304); failure to refund payments within 30 days of cancellation of goods or services, if possible, or return of goods (C.R.S. 6-3-304); failure to disclose cancellation rights to purchaser (C.R.S. 6-3-304); misrepresentation that any person has won contest, sweepstakes or drawing, or that person will receive free goods, services, or property (C.R.S. 6-3-304); representing goods, services or products as free when seller charges fee for providing or delivering them (C.R.S. 6-3-304); referencing compliance with act without informing purchaser that such compliance does not constitute governmental approval (C.R.S. 6-3-304); listing cellular telephone number in directory for commercial purpose without consent (C.R.S. 6-3-304); making commercial telephone solicitation to cellular telephone (C.R.S. 6-3-304); and engaging in deceptive trade practices as defined by Consumer Protection Act (C.R.S. 6-1-105; C.R.S. 6-1-701 to 709; C.R.S. 6-3-304). It is deceptive trade practice for telephone solicitor to fail to identify self, who solicitor represents and purpose of call within first minute of conversation or repeatedly call or engage in telephone conversation repeatedly or continuously with intent to annoy or harass. (C.R.S. 6-1-702[a]). Attorney general's office may petition court for restraining orders and injunctions (C.R.S. 6-1-110; C.R.S. 6-1-305), and civil penalties (C.R.S. 6-1-112; C.R.S. 6-1-305). Violations may also lead to misdemeanor prosecutions (C.R.S. 6-1-305), and civil actions by private parties for damages to $250,000 and for costs and reasonable attorney fees (C.R.S. 6-1-113; C.R.S. 6-1-305). Under Colorado No-call List Act (C.R.S. 6-1-901 to 908), persons must register with state prior to making telephone solicitations to residential telephone or wireless telephone service subscribers within state. Persons may not make telephone solicitations to telephone numbers on state-maintained "no-call list" nor may solicitors block or otherwise circumvent telephone "caller identifications services". Charitable and political solicitations are exempt from these restrictions.

Ticket Sales.

Deceptive trade practice to use software running automated tasks over Internet to purchase tickets in excess of authorized limits for on-line event ticket sale with intention to resell such tickets, or to use software application to circumvent or disable any electronic queue, waiting period or other sales volume limitations in connection with on-line ticket event sale. (C.R.S. 6-1-720).

Titles and Degrees.

Deceptive use of titles and degrees prohibited. (C.R.S. 6-1-707).

Time Share Arrangements.

Misrepresentations in advertisement or sale of vacation time shares are prohibited. Seller must afford purchaser five-day right of rescission and contract must contain notice of such right. (C.R.S. 6-1-703).

Unsolicited Electronic Mail.

Delivery of unsolicited commercial electronic mail is regulated. (C.R.S. 6-1-702.5).

Unsolicited Facsimiles.

Unauthorized advertisements sent to telephone facsimiles prohibited; telephone facsimiles must contain certain information about sender. (C.R.S. 6-1-702; C.R.S. 6-1-105[1][ww]).

Unsolicited Goods.

Person receiving unsolicited goods has right to refuse to accept delivery and is not bound to return goods to sender. Goods addressed to or intended for recipient are gift to recipient. Sending bill or dunning communication for unsolicited goods constitutes class two petty offense. (C.R.S. 6-6-101 to 103).

Uniform Deceptive Trade Practices Act adopted with modifications. It makes it unlawful to knowingly engage in deceptive trade practices which include misleading representations, advertisements and sales. (C.R.S. 6-1-102). Deceptive trade practices also include representing goods as guaranteed without clearly and conspicuously disclosing nature and extent of guarantee, material conditions or limitations imposed by guarantor, manner in which guarantor will perform, and identity of guarantor. (C.R.S. 6-1-105).

Usury.

See topic 3.17 Interest.

Colorado has opted out of subsection 501(a)(1) of P.L. 96-221 removing limits on rate or amount of interest, discount points, finance charges, or other charges which may be charged, taken, received, or reserved with respect to loans, mortgages, credit sales, and advances made to apply in this state. (C.R.S. 5-13-101).

Colorado has opted out of § 511 of P.L. 96-221 setting interest rates on business and agricultural loans. (C.R.S. 5-13-102).

Colorado has opted out of § 524 of P.L. 96-221 which prescribes interest rates for small business loans. (C.R.S. 5-13-103).

Wheelchairs.

Certain activities in connection with sales and services are regulated (C.R.S. 6-1-401 to 412) and specified express warranties required (C.R.S. 6-1-403).

3.13 CONTRACTS:

Common law generally prevails. Seal or scroll is not necessary to proper execution of conveyance of real property. (C.R.S. 38-30-118). Scroll has same effect as seal. (C.R.S. 38-30-125).

By statute those 18 years old and older can legally contract as adult but such obligation shall not be considered family expense of person’s parents. (C.R.S. 13-22-101). See categories 10 Documents and Records, topic Seals; Family, topic Infants.

Legislative Department Contracts.

Contract to which house of representatives is party must be approved by speaker of house; contract to which senate is party must be approved by president of senate; contract to which both house of representatives and senate are parties must be approved by both speaker of house and president of senate; contract to which legislative council, office of legislative legal services, joint budget committee, office of state auditor, or commission on uniform state laws is party must be approved by chairperson or vice chairperson of governing committee of such agency. (C.R.S. 2-2-320[1]). For other approval requirements, see C.R.S. 2-2-320(2).

Public Construction Contracts.

Special provisions exist for retentions and payments in construction contracts, with public entities, exceeding $150,000. (C.R.S. 24-91-101 to 110).

Marriage Contracts.

No contract to marry made within or outside Colorado will give rise to cause of action, and any contract made in settlement of any claim under such contract to marry is void. (C.R.S. 13-20-202 to 204). These provisions, however, do not affect common law principles governing gifts made on condition of marriage. (198 Colo. 36, 596 P.2d 61).

Contracts to Make Will.

Contract to make or not to revoke will or devise executed after July 1, 1974 can be established only by provisions of will stating material provisions of contract, express reference in will to contract and extrinsic evidence proving terms of contract or writing signed by decedent evidencing contract. (C.R.S. 15-11-701, effective until 7/1/95 and C.R.S. 15-11-514, thereafter).

Uniform Commercial Code adopted. See topic 3.09 Commercial Code.

3.14 FACTORS:

Uniform Commercial Code adopted. See topic 3.09 Commercial Code.

License Requirements.

Commodity handler dealing in farm products must have annual state license; must keep records of consignments and sales; and must file bond. (C.R.S. 12-16-101). See topic 3.04 Brokers, subhead Agricultural Broker.

Liens.

Factors have general lien for advances made. (21 Colo. App. 494, 123 P. 110).

There is no statutory provision apart from Uniform Commercial Code for filing or recording in order to protect rights of consignor or lien of factor or commission merchant.

See also topic 3.23 Sales, subhead Consignments.

3.15 FRANCHISES:

No special legislation.

3.16 FRAUDS, STATUTE OF:

Contracts for leasing for period longer than one year or for sale of land or any interest therein, are void unless contract or memorandum thereof, expressing consideration, is in writing and subscribed by lessor or seller. (C.R.S. 38-10-108). No trust or power over in any way relating to lands can be created, granted, assigned, surrendered or declared, except by operation of law, or by deed or conveyance in writing, subscribed by party creating, granting, assigning, surrendering or declaring it. (C.R.S. 38-10-106). However, statute of frauds does not prevent declaration of constructive trust. (198 Colo. 36, 596 P.2d 61). If court imposes constructive trust, oral agreement to reconvey real property is enforceable, despite statute of frauds. (197 Colo. 306, 592 P.2d 792).

Following are void unless agreement or memorandum thereof is in writing and subscribed by party to be charged therewith: Every agreement that by its terms is not to be performed within year from making thereof; every special promise to answer for debt or default of another; every agreement, promise or undertaking made upon consideration of marriage, except mutual promises to marry. (C.R.S. 38-10-112). However, no debtor or creditor may file or maintain action on credit agreement involving more than $25,000 in principal unless agreement is in writing and signed by party against whom enforcement is sought. (C.R.S. 38-10-124). Oral listing contracts for sale of real estate are valid (43 Colo. App. 467, 608 P.2d 830), as are oral settlement agreements (698 P.2d 1369), if to be performed within one year. Also, courts of equity may compel specific performance of agreements in cases of part performance. (C.R.S. 38-10-110).

Uniform Commercial Code adopted. (C.R.S. 4-1-101 to C.R.S. 4-11-102). See topic 3.09 Commercial Code.

Sale of Goods.

Contract for sale of goods for price of $500 or more is not enforceable unless there is some writing signed by party to be charged or party's agent, sufficient to indicate contract for sale made between parties; writing is not insufficient because it omits or incorrectly states term agreed upon, but contract is not enforceable beyond quantity of goods shown in writing. However, no writing is necessary between merchants if written confirmation of contract has been received, and receiving party fails to object within ten days. Such contract is also enforceable if: (i) Goods are to be manufactured specially for buyer and are not suitable for sale to others in ordinary course of seller's business, and seller, before notice of repudiation, makes substantial beginning toward manufacture or commitment for procurement; (ii) payment for goods has been made and accepted or goods have been received and accepted; or (iii) party to be charged admits in litigation that contract for sale was made. (C.R.S. 4-2-201).

Lease contract requiring total payments of $1,000 or more, excluding payments for option to renew or buy, is not enforceable unless there is some writing signed by party to be charged or party's agent, sufficient to indicate lease contract made between parties and to describe goods leased and lease term; writing is not insufficient because it omits or incorrectly states term agreed upon, but contract is not enforceable beyond quantity of goods shown in writing. Lease contract without such is also enforceable if: (i) Goods are to be manufactured specially for buyer and are not suitable for lease or sale to others in ordinary course of lessor's business, and lessor, before notice of repudiation, makes substantial beginning toward manufacture or commitment for procurement; (ii) goods have been received and accepted; or (iii) party to be charged admits in litigation that lease contract was made. (C.R.S. 4-2.5-201).

Sale of Securities.

Contract for sale of securities is not enforceable unless: (1) There is some writing signed by party to be charged or party's agent or broker sufficient to indicate contract made for stated quantity of described security at defined or stated price; or (2) delivery of certificated security or transfer instruction has been accepted, or transfer of uncertificated security has been registered and transferee has failed to send written objection to issuer within ten days after receipt of initial transaction statement confirming registration, or payment has been made, but contract enforceable only to extent of such delivery, registration or payment; or (3) written confirmation within reasonable time of contract of sale or purchase sufficient against sender under (1) has been received and receiving party fails to object within ten days; or (4) party to be charged admits in litigation that contract was made for sale of stated quantity of described securities at defined or stated price. (C.R.S. 4-8-319).

Security Agreement.

If collateral is not in possession of secured party, and subject to other Uniform Commercial Code provisions, security interest is not enforceable against debtor or third parties unless security agreement signed by debtor with description of collateral and, in case of crops or timber to be cut, description of land concerned, and unless value has been given and debtor has rights in collateral. No security interest in consumer goods used primarily for family or household purposes and owned by married person, residing with spouse when security interest created, other than purchase money security interest or certain other exemptions, is enforceable unless security agreement is signed by both spouses. Transaction is also subject to other statutes regulating loans and retail installment sales, such as Consumer Credit Code. In event of conflicting statutory provisions, such other statute controls. (C.R.S. 4-9-203).

Sale of Personal Property Not Otherwise Covered.

Contract for sale of personal property other than goods, securities, or security agreements is not enforceable beyond $5,000 in amount or value of remedy unless there is some writing signed by party to be charged or party's agent indicating that contract for sale has been made between parties at defined or stated price and reasonably identifying subject matter. (C.R.S. 4-1-206).

3.17 INTEREST:

Legal rate is 8%. (C.R.S. 5-12-101). For money or property which has been "wrongfully withheld", prejudgment interest rate 8%, compounded annually, or rate which fully recognizes gain or benefit realized by person withholding money or property. Interest payable from date money or property wrongfully withheld or after it becomes due until date of payment or when judgment entered, whichever occurs first. (C.R.S. 5-12-102[1]). Where no agreement, creditor allowed 8% from date due on any instrument or mutual settlement of accounts. (C.R.S. 5-12-102[2]). Maximum rate that may be contracted for, except on loans hereinafter mentioned, is 45% per annum, calculated as annual percentage rate with all finance charges taken into account. (C.R.S. 5-12-103). Criminal penalties apply for knowingly exceeding 45% annual percentage rate. (C.R.S. 18-15-104). Rate for personal injuries set by Secretary of State. (C.R.S. 13-21-101[3], [4]). Public policy does not prohibit or limit agreements. Agreements in advance to pay interest on interest or compound interest are not prohibited or limited by public policy. (C.R.S. 5-12-103[3]). Interest on consumer loans may not exceed 12% except for certain types or amounts of loans, unless made by supervised lender. (C.R.S. 5-2-201). Interest which may accrue to savings and loan associations shall not be deemed usurious. (C.R.S. 11-41-115[4]). Real estate lender may not increase loan's interest rate in excess of 1% per annum above existing interest rate upon sale of residence. (C.R.S. 38-30-165[1][b]). Federal law preempts state law in area of interest rate increases in federal loan agreements. (649 P.2d 323).

Uniform Consumer Credit Code adopted.

Credit Service Charge for Consumer Credit Sales.

For closed-end accounts, rate may not exceed greater of: (1) Sum of following amounts: 36% per year on unpaid balance not exceeding $1,000, 21% per year on balance over $1,000 but not exceeding $3,000, and 15% per year on balance over $3,000; or (2) 21% per year on unpaid balance. (C.R.S. 5-2-201[2]). For revolving credit accounts, maximum rate is 21% per year on unpaid balance. (C.R.S. 5-2-201[3]).

Judgment.

Interest runs on Colorado judgments from date of entering until satisfaction at normal rate specified in contract or instrument and, if normal rate variable, then at rate in effect on date of judgment, but if no rate is specified, then at 8% compounded annually. (C.R.S. 5-12-102[4]). In civil case where there is no written agreement as to interest, interest on judgments appealed by judgment debtor is greater of 8% or rate certified by Secretary of State, compounded annually, from date of entry of judgment until paid. (C.R.S. 5-12-106). Certified rate based on 2% above discount rate for commercial banks at federal reserve in Kansas City using government bond or other eligible paper as security, rounded to nearest full percent. (C.R.S. 5-12-106[2]). If judgment modified or reversed with direction to enter judgment in trial court, interest on amount of final judgment from date of first entry of judgment. (C.R.S. 5-12-106[1][b]). See also category 5 Civil Actions and Procedure, topic 5.15 Judgments.

Mechanics' Liens.

See category 8 Debtor and Creditor, topic 8.11 Liens.

3.18 [RESERVED]

3.19 LICENSES, BUSINESS AND PROFESSIONAL:

Licenses required for many businesses and occupations, under various statutes. See specific topics.

Collection Agency.

Collection agencies and collection managers must register with and obtain license from collection agency board. (C.R.S. 12-14-115, 120, 121). Must maintain liquid assets of not less than $2,500 more than amounts due to all of agency's clients (C.R.S. 12-14-123), and bond must be posted (or evidence of savings account, deposit or certificate of deposit must be presented) in sum of at least $12,000 (C.R.S. 12-14-124). For reasonable cause, administrator may conduct investigations of agencies. (C.R.S. 12-14-130). Licensee must maintain trust account in which deposited at all times amounts sufficient to pay all amounts due to clients, submit upon request of board complete set of all form notices and form letters, maintain office in state open to public with at least one full-time employee, keep board informed of any changes in location or name and certain ownership or management changes and refrain from use of certain collection tactics. (C.R.S. 12-14-122, 123, 128). Decisions of administrator may be judicially reviewed pursuant to Administrative Procedure Act. (C.R.S. 12-14-130).

3.20 MONOPOLIES, RESTRAINT OF TRADE AND COMPETITION:

Restraint of Trade and Commerce.

Contracts or combinations in nature of trust or conspiracy in restraint of trade or commerce are illegal. Contracts, combinations, etc., intended to restrain or prevent competition in supply or price of commodity; or which control price or limit quantity of commodity; or monopolize or attempt to monopolize trade, are illegal. (C.R.S. 6-4-101).

Mergers.

Acquisitions, which may lessen competition, are illegal. (C.R.S. 6-4-107).

Monopolization and attempted monopolization declared illegal. (C.R.S. 6-4-105).

Exemptions.

Certain labor, agricultural and horticultural organizations excluded. Human labor not commodity. (C.R.S. 6-4-103). Health care peer review committees immune from suit for good faith professional review actions resulting in denial or restriction of physician privileges. Sole remedy for unreasonable anticompetitive conduct is complaint before state board of medical examiners which may set aside peer review committee action. (C.R.S. 6-4-103; C.R.S. 12-36-118; C.R.S. 12-36.5-101 to 106). Voluntary process of state approval of health care cooperative agreements with hospitals and corresponding antitrust exemption. (C.R.S. 24-32-2701 to 2715).

Illegal Agreements.

Agreements made by conspirator which are connected with any violation are void; conspirator may not recover on agreements and payments to conspirator made under agreements can be recovered. Four year statute of limitations. (C.R.S. 6-4-106).

Enforcement.

Violators are subject to both criminal prosecution punishable by fine (up to $100,000 for individual and $1,000,000 for business entity) and imprisonment (C.R.S. 6-4-102, 104, 107); and civil suits for injunction and single damages (C.R.S. 6-4-105, 108).

Unfair Practices Act.

Area or location discrimination in sale of goods or services, selling goods or services below cost, and secret rebates, are unlawful. (C.R.S. 6-2-103, 105, 108).

Area Discriminations.

It is unlawful, with intent to destroy competition of competitor or prevent competition of potential competitor, to discriminate in price (including rebates and other devices) in goods or services between different areas or locations. Exceptions for differences in grade, quality, quantity and transportation cost, and meeting competition. Some regulated public utilities excluded. Special provisions apply to motion pictures and written material. (C.R.S. 6-2-103).

Sales Below Cost.

It is unlawful, for purpose of injuring competitors or destroying competition, to sell, or offer or advertise to sell, goods or services below cost or give them away. (C.R.S. 6-2-105). Exceptions in certain cases for close out sales; sales of seasonable, perishable or damaged goods; judicial sales; and meeting competition. Persons renovating personal property excluded. (C.R.S. 6-2-110). Cost, which includes overhead, is defined (C.R.S. 6-2-105, 106, 113) and proof of cost examined (C.R.S. 6-2-106, 107, 112, 115). Repealed.

Secret Rebates.

Secret payment or allowance of rebates, refunds, commissions, or unearned discounts, monetary or otherwise, or discriminatory and secret extension of special services or privileges, to injury of competitor and where tending to destroy competition, unlawful. (C.R.S. 6-2-108).

Illegal Contracts.

Contracts made by person in violation of above provisions illegal; no recovery thereon may be had. (C.R.S. 6-2-109).

Enforcement.

Violators are subject to both criminal prosecution punishable by fine and imprisonment (C.R.S. 6-2-116); and civil suits for injunction and treble damages (C.R.S. 6-2-111). Officer, director or agent who assists or aids person or business entity in violation of above provisions equally liable; in prosecution, it is sufficient to prove unlawful intent of person or entity for which he acts. (C.R.S. 6-2-104).

Other Provisions.

Unlawful to advertise goods not available. (C.R.S. 6-2-114). Use of other deceptive trade practice is prima facie evidence of intent to injure competitors and destroy or lessen competition. (C.R.S. 6-1-105[2]).

3.21 NEGOTIABLE INSTRUMENTS:

Uniform Commercial Code adopted. See topics 3.09 Commercial Code; 3.02 Bills and Notes.

3.22 RESTRAINT OF TRADE:

See topic 3.20 Monopolies, 3.22 Restraint of Trade and Competition.

3.23 SALES:

Uniform Commercial Code adopted. See topic 3.09 Commercial Code.

Bill of sale for livestock must definitely describe property sold in manner required by statute and guarantee to defend title against all lawful claims. (C.R.S. 35-54-103). Livestock bill of sale laws not superseded by U.C.C.; passage of title to livestock is accomplished by compliance with C.R.S. 35-54-101 to 106. When neither party has complied, U.C.C. governs passage of title. (687 P.2d 962). There are no statutory limitations on size of type in printed contracts of sale.

Consignments.

(C.R.S. 4-2-326). Work of fine art consigned by artist to dealer for exhibition or sale not subject to claims, liens or security interests of consignee’s creditors, provisions of U.C.C. notwithstanding. (C.R.S. 6-15-102[3]).

Conditional sales governed by Art. 9, Uniform Commercial Code. See topic 3.09 Commercial Code.

Bulk Sales.

See topic 3.09 Commercial Code.

Sales of Motor Vehicles.

See category 23 Transportation, topic 23.01 Motor Vehicles.

Retail credit sales are governed by C.R.S. 5-1-101 to C.R.S. 5-9-103, Uniform Consumer Credit Code.

Sales of Secondhand Property.

Every “secondhand dealer” must make record (on form designed by Colorado bureau of investigation or reasonable facsimile thereof) of each sale or trade of secondhand property which equals or exceeds $30 in value. Record must be mailed/delivered to local law enforcement agency within three days of sale or trade; copy of record must be maintained for one year and must be available for inspection by peace officers. (C.R.S. 18-13-114). Secondhand dealer must keep and preserve for period of three years all invoices of goods and merchandise purchased for resale and such invoices must be open for examination by department of revenue or any peace officer. (C.R.S. 18-13-117).

Consumer Protection.

See topic 3.12 Consumer Protection

Uniform Consumer Credit Code adopted.

3.24 SECURITIES:

Title of Act; Supervision.

Colorado Securities Act; administered by Securities Commissioner, Division of Securities, 1560 Broadway, Suite 900, Denver, Colorado 80202.

Effective Date.

July 1, 1990. Offerings begun before that date and completed by Jan. 1, 1991 generally governed by prior statute. (C.R.S. 11-51-802). Broker-dealers and sales representatives registered or exempt prior to July 1, 1990 became automatically licensed on that date.

Regulatory Powers of Supervising Authority.

It is unlawful for any person to offer or sell any security in Colorado unless security is registered, security is exempt, or transaction is exempt. (C.R.S. 11-51-301).

Securities to Which Act Applicable.

"Security" means note, stock, treasury stock, bond, debenture, evidence of indebtedness, certificate of interest or participation in profit-sharing agreement, collateral-trust certificate, preorganization certificate of subscription, transferable share, investment contract, viatical settlement investment, voting-trust certificate, certificate of deposit for security, certificate of interest or participation in oil, gas, or mining title or lease or in payments out of production under such title or lease, or, in general, any interest or instrument commonly known as "security" or any certificate of interest or participation in, temporary or interim certificate for, guarantee of, or warrant or right to subscribe to or purchase any of above. "Security" does not include insurance or endowment policy or annuity contract under which insurance company promises to pay sum of money either in lump sum or periodically for life or some specified period. "Investment contract" need not involve more than one person nor be limited to circumstances where there are multiple investors who are joint participants in same enterprise.

Exempt Securities.

Following securities are exempt from registration under C.R.S. 11-51-307: (1) Securities issued or guaranteed by U.S. or state or political subdivision or agency or instrumentality thereof or any certificate of deposit for any of them; (2) securities issued or guaranteed by Canada or province or political subdivision or agency or instrumentality thereof, or by other foreign governments with which U.S. maintains diplomatic relations; (3) securities representing interests in or debt of or guaranteed by depository institutions organized under U.S. law, or organized and supervised under any state's law; (4) securities issued or guaranteed by federal credit union or Colorado credit union or industrial loan or similar association; (5) securities issued or guaranteed by certain railroads, other common carriers, public utilities or holding companies thereof; (6) securities listed or approved for listing on notice of issuance on any national securities exchange registered under U.S. Securities Exchange Act of 1934, as amended, or any other securities of same issuer that are of senior or substantially equal rank to such listed or approved security or called for by subscription rights or warrants so listed or approved, or any warrants or rights to purchase any of them; (7) securities issued by person organized and operated not for private profit but exclusively for religious, educational, benevolent, or charitable purposes or as chamber of commerce or trade or professional association and offered or sold to bona fide constituent or member of such organization or association, if no direct or indirect commission or remuneration is paid in connection with offer or sale except to licensed broker-dealer; or securities issued by cooperative association engaged in sale or production of electricity and regulated by Colorado public utilities commission; (8) commercial paper arising out of current transaction or proceeds of which have been or are to be used for current transactions and which evidence obligation to pay cash within nine months of date of issuance, exclusive of days of grace, or renewal of such paper which is likewise limited, or guarantee of such paper or of such renewal; (9) securities issued in connection with employee's stock purchase, savings, pension, profit-sharing, or similar benefit plan; (10) securities issued by cooperative association as defined in C.R.S. 7-55-101; (11) securities of certain registered investment companies or unit trusts; and (12) other securities exempted by rule of securities commissioner (C.R.S. 11-51-309).

Exempt Transactions.

Following transactions are exempt from registration under C.R.S. 11-51-308: (1) Isolated nonissuer transactions whether or not through broker-dealer; (2) nonissuer distributions of outstanding securities: (a) if recognized securities manual contains name of issuer, names of issuer's officers and directors, balance sheet of issuer as of date within 18-month period immediately preceding date of distribution, and profit and loss statement for either fiscal year preceding that date or most recent year of operations, (b) if securities have fixed maturity or fixed interest or dividend provisions and there has been no default by issuer during current fiscal year or within three preceding fiscal years, or during existence of issuer and predecessors if less than three years, in payment of principal, interest, or dividend on any security of issuer, (c) if any class of securities of issuer is registered under § 12 of Securities Exchange Act of 1934, (d) if issuer is investment company registered under Investment Company Act of 1940, or (e) if issuer of securities has filed and maintained with securities commissioner, for not less than 90 days next preceding transaction, such information as securities commissioner may specify by rule and has paid exemption fee; (3) nonissuer transactions effected by or through licensed broker-dealer pursuant to unsolicited order or offer to buy, if either confirmation of transaction delivered to customer clearly states that transaction was unsolicited or broker-dealer obtains written acknowledgment signed by customer that transaction was unsolicited and copy of confirmation or acknowledgment is preserved by broker-dealer for such period as securities commissioner may, by rule, require; (4) transactions between issuer or other person on whose behalf offering is made and underwriter or among underwriters; (5) transactions in bonds or other evidences of indebtedness secured by mortgage, security interest, or deed of trust or by agreement for sale of real estate or chattels, if entire mortgage, security interest, deed of trust, or agreement together will all bonds or other evidences of indebtedness secured thereby is offered and sold as unit; (6) transactions by executor, administrator, sheriff, marshal, receiver, trustee in bankruptcy, guardian, or conservator; (7) transactions executed by bona fide pledgees without purpose of evading provisions of statute; (8) offers or sales to financial or institutional investors or to broker-dealers, whether purchaser is acting for itself or in fiduciary capacity; (9) transactions not involving any public offering; (10) transactions pursuant to offering of securities directed to not more than 20 persons (other than those designated in [8] above) in Colorado and sold to not more than ten buyers (other than those designated in [8] above) in Colorado during any period of 12 consecutive months, whether or not offeror or offerees or buyers are then present in Colorado, if: (a) seller reasonably believes that all buyers in Colorado (other than those designated in [8] above) are purchasing for investment, and (b) no commission or other remuneration is paid or given directly or indirectly for soliciting any prospective buyer in Colorado (other than those designated in [8] above) except to licensed broker-dealer or sales representative; (11) offers or sales of preorganization certificates or subscriptions if no commission or other remuneration is paid or given directly or indirectly for soliciting any prospective subscriber, if number of subscribers does not exceed 25, and if no payment is made by any subscriber; (12) transactions pursuant to offers to existing security holders of issuer, including persons who are holders of convertible securities, nontransferable warrants, or transferable warrants exercisable within not more than 90 days of their issuance, if no commission or other remuneration (other than standby commission) is paid or given directly or indirectly for soliciting any security holder in Colorado except to licensed or exempt broker-dealer; (13) transactions involving offers to sell, but not sales, if: (a) registration or offering statement or similar document as required under Securities Act of 1933 has been filed with securities and exchange commission, but is not effective, (b) registration statement, if required, has been filed under C.R.S. 11-51-303, but is not effective, and (c) no stop order of which offeror is aware has been entered by securities commissioner or securities and exchange commission; (14) transactions involving offers to sell, but not sales, if: (a) registration statement has been filed under C.R.S. 11-51-304 but is not effective, and (b) no stop order of which offeror is aware has been entered by securities commissioner; (15) transactions in which security holders vote for certain reclassifications of securities, mergers, consolidations or similar plans of acquisition, or for transfers of assets if (a) plan provides for dissolution of entity whose security holders are voting, (b) securities will be distributed to securities holders, (c) board or similar representative causes such dissolution or distribution within one year after such vote, or (d) such transfer of assets is part of preexisting plan for distribution of securities (C.R.S. 11-51-201[13][g]); (16) offers or sales of securities in compliance with exemption from registration with securities and exchange commission pursuant to regulations adopted under 3(b) or 4(2) of Securities Act of 1933 and issuer files with securities commissioner notification of exemption, upon such form as securities commissioner may prescribe, and pay exemption fee; and (17) other transactions exempted by rule of securities commissioner (C.R.S. 11-51-309). Transactions exempt under Securities Act of 1933 (except intrastate offerings) also exempt in Colorado. (C.R.S. 11-51-311).

Registration of Securities.

Securities for which registration statement has been filed under Securities Act of 1933 may be registered by filing. (C.R.S. 11-51-303). Securities may be registered by qualification. (C.R.S. 11-51-304). If issuer has principal office and majority of full-time employees in Colorado, if at least 80% of proceeds are to be used in Colorado, and if gross proceeds less than $1,000,000 in any 12 month period, limited offering registration procedure may be used. (C.R.S. 11-51-304[6]).

Licensing of Dealers, Brokers, and Others.

In order for broker-dealer, sales representative, investment adviser or investment adviser representative to transact business in Colorado, such person must be licensed. (C.R.S. 11-51-401). Exam may be required by securities commissioner for broker-dealer not registered under Securities Exchange Act of 1934 and for sales representative acting for such broker-dealer (C.R.S. 11-51-405), and for investment adviser representative.

Following broker-dealers are exempt from license requirement under C.R.S. 11-51-402(1): (1) Broker-dealers registered as broker-dealers under Securities Exchange Act of 1934 who have no place of business in Colorado if business transacted in Colorado as broker-dealer is exclusively with issuers in transactions involving their own securities, other broker-dealers licensed or exempt from licensing in Colorado, except when acting as clearing broker-dealer for such other broker-dealers, financial or institutional investors, individuals who are existing customers of broker-dealer and whose principal places of residence are not in Colorado, and during any 12 consecutive months, not more than five persons in Colorado, excluding persons described above; and (2) other broker-dealers securities commissioner by rule or order exempts. Following sales representatives are exempt from license requirement under C.R.S. 11-51-402(2): (1) Sales representatives employed or otherwise engaged by exempt broker-dealer; (2) sales representatives employed or otherwise engaged by issuers in effecting transactions only in certain exempt securities (including government, depository institution, credit union and cooperative association securities); (3) sales representatives employed by issuers in effecting transactions only with employees, partners, officers, or directors of issuer or of parent or subsidiaries of issuer, if no commission or other similar compensation is paid or given directly or indirectly to sales representative for soliciting employee, partner, officer, or director in Colorado; (4) licensed real estate brokers or salesmen trading only in securities comprised of notes, bonds, or evidences of indebtedness secured by mortgages or deeds of trust on real estate, where brokers or salesmen act as agent for buyer or seller of real estate securing note, bond, or evidence of indebtedness being traded and is neither issuer nor affiliated with or under direct or indirect control of issuer or affiliate of issuer of note, bond, or evidence of indebtedness (C.R.S. 11-51-402[3]); and (5) other sales representatives securities commissioner by rule or order exempts. Following investment advisers are exempt from license requirement under C.R.S. 11-51-401(5): (1) those exempt from Federal registration; (2) those whose only clients in Colorado are: other investment advisers; Federal registered advisers; broker-dealers; depository institutions; insurance companies; employee benefit plans with assets of not less than $1,000,000; other institutional investors other than local government investment pool trust funds, as securities commissioner by rule or order exempts; (3) those with not more than five clients during preceding 12 months, other than those specified in (2); (4) other investment advisers securities commissioner by rule or order exempts. Investment adviser representatives employed by or otherwise associated with exempt investment adviser are exempt from license requirement.

Liabilities.

Injunctive action by securities commissioner, including damages or other equitable relief. (C.R.S. 11-51-602). Securities commissioner may issue consent orders, summary stop orders and orders to show cause. (C.R.S. 11-51-606). Criminal penalties for willful violations. (C.R.S. 11-51-603). Civil liability for consideration paid with interest at statutory rate from date of payment, costs and reasonable attorney fees, less income received on security, upon tender of security, or for damages if buyer no longer owns security. (C.R.S. 11-51-604). Damages are amount recoverable on tender, less value of security when buyer sold it, and interest at statutory rate from date of sale. No liability for failure to file notification of exemption or pay fee for transactions exempt under 3(b) or 4(2) of Securities Act of 1933. Same civil liability for violation of broker-dealer and sales representative licensing requirements, with limited exceptions. (C.R.S. 11-51-604[2][b]). Same civil liability for sales in which untrue statements of material facts are made or material facts omitted (buyer not knowing of untruth or omission), unless seller sustains burden of proof that he did not know and in exercise of reasonable care could not have known of untruth or omission. (C.R.S. 11-51-604[4]). For violations of anti-fraud provisions made recklessly, knowingly or with intent to defraud, such legal or equitable relief as court deems appropriate. (C.R.S. 11-51-604[3]). Controlling persons are liable for violations of registration and broker-dealer and sales representative licensing requirements unless they sustain burden of proof that they did not know, and in exercise of reasonable care could not have known, of existence of facts by reason of which liability is alleged to exist. Controlling persons are liable for violations of anti-fraud provisions unless they sustain burden of proof that they acted in good faith and did not, directly or indirectly, induce acts constituting violation or cause of action. Any person who knows that another person is liable under anti-fraud provisions and who gives substantial assistance to such conduct is liable to extent as such other person. (C.R.S. 11-51-604[5]). Contribution may be sought on basis of actual relative culpability of persons jointly liable. (C.R.S. 11-51-604[13]). In case of certain willful violations of securities commissioner orders, Denver District Court may impose contempt sanctions. (C.R.S. 11-51-604[14]).

Statute of Limitations.

In civil actions for violation of registration and broker-dealer and sales representative licensing requirements, two years after contract of sale. In civil actions for violation of anti-fraud provisions, three years from discovery of facts giving rise to cause of action or after discovery should have been made by exercise of reasonable diligence, and in no event more than five years after purchase or sale. (C.R.S. 11-51-604[8]). In criminal actions, five years from commission of offense.

Special District Bonds.

Bonds issued by special districts must be registered unless exempt. (C.R.S. 11-59-106).

Nonrated Public Securities Report.

State, political subdivisions thereof and other public corporate bodies that issue nonrated public securities must file annual information report with Department of Local Affairs for years ending on or after Dec. 31, 1991. Excludes conduit financings. (C.R.S. 11-58-101).

Uniform Transfer on Death Security Registration Act adopted. (C.R.S. 15-15-301).

Uniform Simplification of Fiduciary Security Transfers Act adopted. (C.R.S. 15-1-601).

3.25 STATUTE OF FRAUDS:

See topic 3.16 Frauds, Statute of.

3.26 TRUST RECEIPT SECURITY:

Uniform Commercial Code adopted. See topic 3.09 Commercial Code.

3.27 WAREHOUSEMEN:

Uniform Commercial Code adopted. See topic 3.09 Commercial Code.

4 CITIZENSHIP

4.01 ALIENS:

Aliens may not vote or hold office as governor, lieutenant governor, secretary of state, state treasurer, attorney general, senator, representative, justice, judge or district attorney or be elected or appointed to any civil or military office in state. (Colo. Const., art. IV, § 4; art. V, § 4; art. VI, §§ 8, 11, 13-16; art. VII, §§ 1, 6). No unemployment benefits may be paid on basis of services performed by alien not lawfully admitted into U.S. for permanent residence or to perform such services or permanently residing in U.S. under color of law at time services were performed. (C.R.S. 8-73-107[7][a]). Alien not eligible for public assistance unless is legal immigrant otherwise eligible in all respects except for citizenship, and if has resided in U.S. less than three years is not eligible for old age pension without showing his sponsor, other than relative, now lacks sufficient resources to meet needs of alien. (C.R.S. 26-2-111[1][a], [2][c]). Department of revenue may not issue driver's license to illegal alien. (C.R.S. 42-2-104[3][e]). Failure to advise alien criminal defendant of immigration consequences of guilty plea may be ineffective assistance of counsel, if counsel had sufficient information for reasonable belief that client was alien. (Const., art. II, § 16; 746 P.2d 523, 529).

Property.

Aliens, who are or may become bona fide residents of state, may acquire, inherit, possess, enjoy and dispose of property, real and personal, as native born citizens. (Const., art. II, § 27). No person is disqualified to take as heir, devisee, grantee, lessee, mortgagee, assignee, or other transferee because he or person through whom he claims is or has been alien. (C.R.S. 15-11-111).

5 CIVIL ACTIONS AND PROCEDURE

5.01 ACCORD AND SATISFACTION:

Governed by common law. Executory accord does not bar cause of action to collect original debt without evidence of express acceptance as satisfaction thereof, unless there is intent that performance of accord agreement is condition precedent to discharge of original agreement. (163 Colo. 408, 431 P.2d 14; 642 P.2d 47). Executory accord suspends performance of original obligation until accord is breached or satisfied. (689 P.2d 1166). Non-dischargeable judgment against one defendant operates as accord and satisfaction as to plaintiff and that defendant, but not as to remaining defendant who was not party to judgment. (695 P.2d 317). Satisfaction of corporate obligation by one director discharges obligation of other directors who were jointly liable on same claim. (770 P.2d 1352).

Uniform Commercial Code adopted. See category 3 Business Regulation and Commerce, topic 3.09 Commercial Code.

Compromise.

If claim is disputed, lesser amount paid in compromise discharges liability. (6 Colo. 162, 1882 Colo. LEXIS 62). Acceptance and negotiation of check tendered in full satisfaction of obligation discharges underlying obligation notwithstanding restrictive endorsement. (680 P.2d 1342). Uniform Commercial Code 1-207 (C.R.S. 4-1-207) does not alter rule concerning "conditioned" checks, but restrictive endorsement on check giving partial refund of security deposit is void under C.R.S. 38-12-103(7). (737 P.2d 417). Settlement agreements and general releases of liability are void if entered into between person who was injured and receiving treatment as result of occurrence which might give rise to liability and person whose interest is adverse to injured party, if agreement or release is obtained within 30 days from date of injury. (C.R.S. 13-21-301).

Uniform Consumer Credit Code adopted.

Pleading.

Must be affirmatively pleaded as a defense. (C.R.C.P. 8[c]).

5.02 ACTIONS:

Rules for civil action are based upon Colorado Rules of Civil Procedure. See topic 5.19 Practice. Additional rules for civil actions are set forth in Rules of County Court Civil Procedure.

Equity.

No separate equity jurisdiction. However, traditional equitable grounds must be shown for equitable relief.

Forms of Action.

There is but one form of action known as "civil action." (C.R.C.P. 2). Special forms of pleadings in habeas corpus, mandamus, certiorari, quo warranto, prohibition, scire facias and other remedial writs are abolished. (C.R.C.P. 106[a]).

Conditions Precedent.

No general rule. See particular topics.

Commencement.

Civil action is commenced by filing complaint with court or serving summons and complaint upon defendant. If action is commenced by service of summons and complaint, complaint must be filed within ten days after service, or service of summons shall be deemed to be ineffective and void without notice. In such case court may, in its discretion, tax reasonable sum in favor of defendant to compensate defendant for expense and inconvenience, including attorney's fees, to be paid by plaintiff or his attorney. Ten-day filing requirement may be expressly waived by defendant and shall be deemed waived upon filing of responsive pleading or motion to complaint without reserving issue. (C.R.C.P. 3[a]). Court has jurisdiction from filing of complaint or service of summons and complaint, provided that if more than ten days elapses after service upon defendant before filing complaint, jurisdiction as to defendant shall not attach by virtue of service. (C.R.C.P. 3[b]). See also topics 5.20 Process, 5.17 Pleading.

Mandatory Arbitration.

No civil action filed in any judicial district after July 1, 1991, is subject to mandatory arbitration. (C.R.S. 13-22-402). Local court rules may require nonbinding alternative dispute resolution procedures.

Parties.

Action must be prosecuted in name of real party in interest. Executor, administrator, guardian, conservator, trustee of express trust, party with whom or in whose name contract has been made for benefit of another, or party authorized by statute may sue in his own name without joining with him party for whose benefit action is brought. (C.R.C.P. 17[a]). Partnership or unincorporated association may sue or be sued in its common name. (C.R.C.P. 17[b]).

Person subject to service must be joined if in his absence complete relief cannot be afforded those already parties or if he claims interest in subject of action and disposition of action in his absence may either endanger that interest or create a risk of further liability to present parties to action. (C.R.C.P. 19[a]). If such person cannot be joined, court must determine whether interests of justice require dismissal. (C.R.C.P. 19[b]). Persons having joint interest must be joined on same side, except that one who should be joint plaintiff but refuses to join may be made defendant or an involuntary plaintiff. (686 P.2d 1357; C.R.C.P. 19[a]). Joined party must be dismissed from action if he objects to venue and his joinder would make venue improper. (C.R.C.P. 19[a]). Court may order parties to be dropped or added. Misjoinder of parties is equivalent to dismissal without prejudice of claim against that party. (C.R.C.P. 21; 641 P.2d 916). Leave of court may be required to add or replace parties even though no responsive pleading has been filed. (641 P.2d 916).

All persons asserting any right to relief in respect of or arising out of same transaction or occurrence may join as plaintiffs, and all persons against whom any such right is asserted may be joined as defendants, provided, in either case, that some question of law or fact common to all of them will arise in the action. (C.R.C.P. 20[a]). All or any persons jointly and severally liable may be sued in same action. (C.R.C.P. 20[c]).

In actions affecting real property, no persons claiming under or through named defendant need be made parties, unless interest shown of record, but are bound by judgment. Persons in possession must be joined in action to recover actual possession. (C.R.C.P. 105[b]; C.R.S. 38-35-114).

Pretrial Procedure Prior to Jan. 1, 1995.

In every action except juvenile, mental health, marriage dissolution proceedings and mandatory arbitration unless ordered by court, disclosure certificate must be filed 180 days after case is at issue but no later than 90 days before trial whichever is first. (C.R.C.P. 16[a]). Limited disclosure certificate supplementation. (C.R.C.P. 16[b]). Disclosure certificate binding. (C.R.C.P. 16[c]). Discovery cut-off 30 days prior to trial. (C.R.C.P. 16[f]). Expert witness summaries due 80 days before trial. (C.R.C.P. 16[g]).

Pretrial Procedure as of Jan. 1, 1995.

In every action except domestic relations, juvenile, mental health, probate, water law, forcible entry and detainer, and expedited actions, lead counsel shall confer with each other about nature and basis of claims and matters to be disclosed pursuant to C.R.C.P. 26(a)(1) no later than 15 days after case is at issue, shall accomplish C.R.C.P. 26(a)(1) disclosures no later than 30 days after case is at issue, shall explore possibilities of prompt settlement or resolution of case no later than 35 days after case is at issue, and shall file proposed case management order no later than 45 days after case is at issue (C.R.C.P. 16[b]). Case is at issue when all parties have been served and all pleadings permitted by C.R.C.P. 7 have been filed or defaults or dismissals have been entered against nonappearing parties, or such other time as court shall direct (C.R.C.P. 16[b]). Proposed trial management order shall be filed no later than 30 days prior to date scheduled for trial or such time as court shall direct. (C.R.C.P. 16[c]). There are limited rights to modify or diverge from case management orders and trial management orders. (C.R.C.P. 16[b] and [c]). No less than seven days prior to trial, each party shall identify witnesses to be called, order they are to be called, and their anticipated length of testimony. (C.R.C.P. 16[c][4]). Set of proposed jury instructions and verdict forms shall be filed with courtroom clerk jointly by counsel for parties no later than three days prior to trial. (C.R.C.P. 16[d]). For further details, consult C.R.C.P. 16, C.R.C.P. 26, C.R.C.P. 29, C.R.C.P. 30 to 34, C.R.C.P. 37, C.R.C.P. 121-1-11, C.R.C.P. 121-1-12, C.R.C.P. 121-1-15, and C.R.C.P. 121-1-19, as amended to take effect Jan. 1, 1995.

Class Actions.

Any action may be maintained as class action if court finds that requirements of C.R.C.P. 23 have been met (C.R.C.P. 23[b]). Class action cannot be compromised or dismissed without court approval. (C.R.C.P. 23[e]). Judgment may only include members of class. (34 Colo. App. 405, 527 P.2d 899). Uniform Class Actions Act not adopted.

Intervention may be of right or permissive as defined by C.R.C.P. 24. In absence of showing that he is not adequately represented by existing parties to action, taxpayer cannot intervene as matter of right in action brought or defended by municipality. (152 Colo. 567, 384 P.2d 96).

Interpleader.

Plaintiff or defendant exposed to multiple liability may interplead claimants. (C.R.C.P. 22).

Third Party Practice.

Defendant may bring in third party who is or may be liable to him for all or part of plaintiff's claim and plaintiff may proceed similarly with respect to counterclaim. Unless third-party plaintiff files his complaint within ten days after service of his answer, he must obtain permission from court on motion with notice to all parties. (C.R.C.P. 14.)

Joinder of Causes of Action.

A party may join as many claims, legal or equitable, as he has against an opposing party either as independent or alternate claims. (C.R.C.P. 18[a]).

Splitting Causes of Action.

See subhead Severance of Actions, infra.

Consolidation of Actions.

Court may consolidate pending actions involving common question of law or fact or may order joint hearing or trial of any or all issues. (C.R.C.P. 42[a]).

Consolidated Multidistrict Litigation.

Actions involving common question of law or fact that are pending in different judicial districts may be transferred to any judge for hearing or trial provided that any jury trial is held in place prescribed by C.R.C.P. 98 and that actions are consolidated in accordance with C.R.C.P. 42 (C.R.C.P. 42.1[b]).

Motions for transfer may be initiated by panel on consolidated multidistrict litigation or by party in any action in which transfer may be appropriate. (C.R.C.P. 42.1[c]).

Panel will rule on motions for transfer and will transfer actions if one judge hearing all of actions will promote just and efficient conduct of actions and will serve ends of justice. (C.R.C.P. 42.1[g]).

Severance of Actions.

Court may order separate trial of any issue or of any number of claims, cross-claims, counterclaims or third-party claims. (C.R.C.P. 42[b]).

Stay of Proceedings.

In order for pendency of one action to be ground for stay of another action, suits must be identical such that disposition in one will determine all issues in other. (132 Colo. 144, 285 P.2d 831).

Abatement and Revival.

All causes of action except libel or slander survive and may be brought or continued after death of party in favor of or against whom accrued. (C.R.S. 13-20-101[1]). Claim for exemplary damages expires with death of personal injury plaintiff. (42 Colo. App. 141, 594 P.2d 1064). Must serve personal representative of deceased defendant and file claim against estate within time and in manner required for other claims against estate. (C.R.S. 13-20-101[2]). See also category 13 Estates and Trusts, topic 13.08 Executors and Administrators.

Limitation of.

See topic 5.16 Limitation of Actions.

Small Claims.

See category 6 Courts and Legislature, topic 6.01 Courts.

Termination of Actions.

Actions, counterclaims, cross-claims or third party claims may be dismissed voluntarily or by court upon defendant's motion for failure to prosecute or failure to comply with Rules or court order. Involuntary dismissal operates as adjudication upon merits unless court specifies otherwise, except that dismissals for failure to prosecute (C.R.C.P. 121) that do not specify are deemed without prejudice (C.R.C.P. 41).

Prohibited Actions.

All civil causes of action for breach of promise to marry, alienation of affections, criminal conversation, and seduction are abolished (C.R.S. 13-20-202), although this abolition does not extend to affect common law principles governing gift made on condition of marriage, with condition broken by donee (198 Colo. 36, 596 P.2d 61). Actions based on flight of aircraft over lands or waters within state are prohibited unless other than nominal damage results or irreparable damage is probable. (C.R.S. 13-21-118). Action by individual for bodily injury caused by motor vehicle accident where medical expenses are $2,500 or less is prohibited. (C.R.S. 10-4-714). See category 23 Transportation, topic 23.01 Motor Vehicles, subhead No-Fault Insurance.

Administration.

See category 13 Estates and Trusts, topic 13.08 Executors and Administrators.

Direct actions against insurer not authorized by statute. See category 23 Transportation, topic 23.01 Motor Vehicles, subhead Direct Actions.

5.03 APPEAL AND ERROR:

Appeal to supreme court and court of appeals governed by Colorado Appellate Rules, which are patterned on Federal Rules of Appellate Procedure. See also topic 5.05 Certiorari and category 6 Courts and Legislature, topic 6.01 Courts.

Matters Appealable.

Appeal to appellate court may be taken from: final judgment of any district, superior, probate or juvenile court; judgment and decree, or any portion thereof, in proceeding concerning water rights; order refusing, granting, modifying, canceling, affirming or continuing in whole or in part conditional water right, or determination that reasonable diligence or progress has or has not been shown in enterprise granted conditional water right; order granting or denying temporary injunction; and order appointing or denying appointment of, or sustaining or overruling motion to discharge, receiver. (App. Rule 1[a]). Matters designated by statute to be reviewable by writ of error are now reviewed on appeal. (App. Rule 1[c]).

Interlocutory orders in civil cases are generally unappealable, although supreme court will exercise original jurisdiction where judicial discretion has been abused and damage to party could not be cured on appeal. (196 Colo. 102, 581 P.2d 302). Where alternative theories asserted and one theory dismissed, such dismissal is not decision on entire claim for relief and therefore not appealable. (682 P.2d 501). Dismissal of complaint against one of multiple defendants on ground of lack of personal jurisdiction may be certified under C.R.C.P. 54(b) as appealable final judgment. (685 P.2d 769).

Supreme Court.

Appeal lies directly to supreme court in: (a) Cases in which statute, municipal charter provision, or ordinance has been declared unconstitutional; (b) cases concerned with decisions or actions of public utilities commission; (c) water cases involving priorities or adjudications; (d) cases appealed from county court to district court; (e) writs of habeas corpus; (f) summary proceedings in connection with elections (C.R.S. 13-4-102[1]); and (g) cases in which sentence of death has been imposed (C.R.S. 13-4-102[1][h]; App. Rule 4[d]).

Extent of Review.

Ordinarily, confined to questions of law and sufficiency of evidence. For exceptions, see subheads To District Court and To County Court, infra.

Judgment or Order on Appeal.

Appellate court may affirm, reverse or modify judgment or order, and may remand for further proceedings. (App. Rule 35).

To Court of Appeals.

Court of appeals has initial appellate jurisdiction over appeals from final judgments of district court, and probate and juvenile courts of Denver, except as to matters listed in (a) through (g) in subhead Supreme Court, supra. It also has initial jurisdiction to review awards or actions of industrial claim appeals office, orders of banking board granting or denying charters for new state banks, decisions of state personnel board, actions and orders of state grievance board, final decisions and orders of civil rights commission and real estate commission, decisions of board of education in proceedings for dismissal of teacher, and all final actions and orders appropriate for judicial review of board of engineers and professional land surveyors, podiatry board, board of assessment appeals, state electrical board, board of chiropractic examiners, board of nursing, board of pharmacy, passenger tramway safety board, coal mine board of examiners, Colorado state board of architects, examining board of plumbers, directors of division of registration and racing commission. Court of appeals has initial jurisdiction over appeals from actions of board of medical examiners and board of dental examiners granting, revoking or suspending licenses or placing holder thereof on probation and actions of board of optometric examiners in refusing to grant or renew, revoking or suspending license, issuing letter of admonition, or placing on probation and to review final actions and orders of Colorado state board of nursing in division of registrations in department of regulatory agencies, Commissioner of Insurance, and final actions and orders of Department of Revenue relating to penalties for violations of statutes relating to sale of cigarettes and tobacco products to minors. (C.R.S. 13-4-102[2]).

Certification of Cases to Supreme Court.

Court of appeals, prior to final determination, may certify any case before it to supreme court for its determination. Supreme court may accept certification or remand to court of appeals. (C.R.S. 13-4-109[1], [2]). Supreme court may decide any case pending before court of appeals by ordering certification (C.R.S. 13-4-109[3]), granting writ of certiorari (App. Rule 50[a]), or requiring transfer (App. Rule 50[b]).

Limitation on Taking Appeal.

Filing of motion for post-trial relief is not condition precedent to appeal. All post-trial motions for relief must be filed within 15 days of date of judgment, or such greater time as court may allow, including motion for new trial based on newly discovered evidence. (C.R.C.P. 59).

Generally, notice of appeal required by App. Rule 3 must be filed with appellate court and advisory copy served on trial court within 45 days of entry of judgment or order being appealed from. (App. Rule 4[a]). Filing timely post-trial motion terminates running of time for filing appeal, and time begins to run anew with denial of motion. Court must determine any post-trial motion within 60 days of filing such motion; otherwise, motion deemed denied for all purposes upon expiration of 60-day period and time for appeal commences as of that date. (C.R.C.P. 59[j]). Timely filing of notice of appeal is mandatory and jurisdictional, and parties to appeal may not stipulate to amend or waive this jurisdictional requirement. (36 Colo. App. 181, 538 P.2d 1343). App. Rules 10 and 11 set time limits for designation and transmission of record on appeal.

Stay of Proceedings.

Application for stay of judgment, approval of supersedeas bond or order affecting injunction during pendency of appeal must ordinarily be made first in trial court. However, motion for such relief may be made to supreme court or court of appeals, but must recite reason for so proceeding. (App. Rule 8[a]). Appellate court may condition relief upon filing of bond or other appropriate security in trial court. Court may dispense with or limit amount of bond in case of fiduciary, where fiduciary bond is sufficient, and bond need not be furnished by public officers or bodies or charitable and educational institutions of state. (App. Rule 8[b], [c]).

Appeal Bond.

Unless appellant exempted by law or has filed supersedeas bond which includes security for payment of costs on appeal, bond for costs on appeal or equivalent security in sum of $250 must be filed in civil cases with notice of appeal, unless trial court fixes different amount. (App. Rule 7).

See topic 5.19 Practice.

To District Court.

Appeals from final judgments of county courts and municipal courts of record are taken to district court for judicial district in which county or municipal court is located. Appeals are based upon record made in trial court. (C.R.S. 13-6-310; C.R.S. 13-10-116[2]). On review of trial court judgment, district court reviews case on record, and may affirm, reverse, remand, or modify judgment, or may remand case for new trial with such instructions as it may deem necessary, or it may direct that case be tried de novo before district court. (C.R.S. 13-6-310). Motion for new trial is not a prerequisite to appeal. (C.R.C.P. 359[a]). If motion for new trial is filed, it must be in writing and be filed within 15 days of entry of judgment. (C.R.C.P. 359[b]). If motion is made, only matters raised in motion shall be considered on appeal. Notice of appeal must be filed in trial court within 15 days after date of entry of judgment (unless motion for new trial is made, in which event time for appeal is extended to 15 days after disposition of motion [C.R.C.P. 359]), with appeal bond (or cash deposit) which must also be filed with court clerk within 15 days. (C.R.S. 13-6-311; C.R.C.P. 411). If bond is used, it must be furnished by corporate surety authorized and licensed to do business in Colorado, or by one or more sufficient private sureties. Bonds are conditioned to pay costs and judgment amount if appealing parties fail, and must be approved by judge or clerk. Appellant must docket appeal and pay docket fee within 30 days after filing notice of appeal. Appellant must deposit estimated fee for preparing record with clerk. After filing of notice, bond, and estimated record fee, county court must recall any execution issued. Record transcript or stipulation must be prepared within 40 days after judgment. Parties have 15 days after notification of completion of record to file objections thereto. Record is certified by trial judge and filed with clerk of district court by clerk of trial court. Appellant must file brief within 20 days after such filing and appellee may file answering brief within 20 days after service of appellant’s brief, unless court extends time for filing. (C.R.S. 13-6-311[4]; C.R.C.P. 411).

To County Court.

Appeals from municipal courts not of record are made to county courts where trial is de novo. (C.R.S. 13-10-116[1]).

5.04 BONDS:

Sureties.

Any bond executed as surety by company qualified as provided in statutes constitutes full compliance with any law, charter, ordinance, rule or regulation requiring that bond be executed by one or more sureties or that sureties be residents, householders or freeholders or possess any other qualifications. (C.R.S. 10-4-301). Statutory requirement of surety bond as condition to licensure or authority to conduct business or perform duties may, in certain situations, be satisfied by qualified savings account or certificate of deposit. (C.R.S. 11-35-101; C.R.S. 11-35-101[1]; C.R.S. 11-35-101.5). When surety given pursuant to C.R.C.P., surety submits himself to jurisdiction of court. (C.R.C.P. 65.1).

Actions on bonds in civil actions follow the same rules as other civil actions.

5.05 CERTIORARI:

In Supreme Court.

Writs of certiorari lie to review judgments of court of appeals (CRS 13-4-108), cases pending in court of appeals (App. Rule 50), and judgments of district courts on cases appealed from county courts (CRS 13-6-310). Certiorari granted by supreme court within its judicial discretion and is granted only when special and important reasons exist. (App. Rule 49). Additionally, court of appeals may review decisions of industrial claim appeals office. (App. C.R.C.P. 3.1).

Procedure.

Petition, proof of service, certified transcript of record below, and filing fee (petitioner, $150; respondent, $75) must be filed with clerk of supreme court. (App. Rule 51).

Review of Court of Appeals Judgment.

Petition for rehearing is optional. If petition for rehearing is filed and subsequently denied, petition for writ of certiorari must be filed within 30 days of denial. If rehearing petition is not filed, then within 30 days after deadline for filing rehearing petition. For worker’s compensation cases, substitute 15 days for 30 days above. (App. Rule 52[c]).

Review of Case Pending in Court of Appeals.

Certiorari petition may be filed by either party or by stipulation of parties. Transfer may be requested by court of appeals or as required by supreme court. (App. Rule 50[b]).

Review of District Court Judgment on Appeal from County Court.

Certiorari petition must be filed within 30 days after final judgment. (App. Rule 52[a]).

In District Court.

Relief in nature of certiorari may be obtained in district court where any governmental body or officer or lower judicial body exercising judicial or quasi-judicial functions exceeded its jurisdiction or abused its discretion and no plain, speedy and adequate remedy exists. (C.R.C.P. 106[a][4][II]).

Procedure.

Initiated by complaint in district court. (C.R.C.P. 106[a][4][II]). If no time within which review may be sought is provided by statute, complaint seeking review under C.R.C.P. 106(a)(4) must be filed in district court within 30 days after final decision of body or officer (C.R.C.P. 106[b]). Thirty-day time limitation is jurisdictional. (807 P.2d 541).

See also topic 5.03 Appeal and Error.

5.06 CHARITABLE IMMUNITY:

See topic 5.09 Damages.

5.07 [RESERVED]

5.08 COSTS:

Civil.

Except where express provision therefor by statute or court rule, costs in civil action (C.R.C.P. 54[d]) and on appeal (App. Rule 39[a]) awarded to prevailing party, unless court in exercise of sound discretion otherwise directs. Costs shall be imposed against state, its officers or agencies only where permitted by law. (C.R.C.P. 54[d]; App. Rule 39[b]). Costs may be assessed against public entity sued pursuant to Governmental Immunity Act. (718 P.2d 221).

Procedure.

Bill of costs must be filed within 15 days of judgment or such greater time as court may allow. (C.R.C.P. 121, § 1-22[1]). Costs may be taxed by clerk on one day's notice, subject to review by court upon motion served within five days after clerk's taxing. (C.R.C.P. 54[d]). On appeal, following costs are taxable in appellate court, upon itemized and verified bill of costs filed within 14 days after entry of judgment: docket fees and cost of printing or producing copies of briefs or records. (App. Rule 39[c]). All other costs on appeal are taxable in trial court. (App. Rule 39[e]).

Recoverable Costs.

Items that may be taxed as costs include, without limitation, docket fees, jury fees and expenses, sheriff's fees, expert witness charges, court reporter's fees, mileage fees, witness fees, photocopying fees, costs of depositions for perpetuating testimony, service of process fees and attorneys' fees when authorized by statute or court rule. (C.R.S. 13-16-122). Recoverable costs on appeal include costs of printing or producing copies of briefs or copies of records, docket fees, preparing and transmitting record, reporter's transcript, and premiums for bonds. (App. Rule 39[c], [e]). Attorneys' fees recoverable upon motion, or by court, for substantially frivolous, groundless or vexatious actions or if action interposed for delay or harassment or if attorney or party unnecessarily expanded proceeding. (C.R.S. 13-17-102[4]). If appeal is frivolous, appellate court may award damages, including attorneys' fees and single or double costs. (App. Rule 38[d]; 40 Colo. App. 556, 580 P.2d 825).

Security For Costs.

Cost bonds required for injunction (C.R.C.P. 65[c]), receiver (C.R.C.P. 66[b]), attachment (C.R.C.P. 102[d]), replevin (C.R.C.P. 104[e]) and election contests (C.R.S. 31-10-1302). Cost bonds may be required if court concludes resident plaintiff unable to pay costs of suit. (C.R.S. 13-16-102). Cost bond of $250, or as otherwise fixed by trial court, required for appeal. (App. Rule 7). If plaintiff previously dismissed action and later recommences same action against same defendant, court may order payment of costs in previous action and stay proceedings pending compliance. (C.R.C.P. 41[d]).

Liability of Attorney.

Attorneys' fees are recoverable against attorneys for frivolous, groundless or vexatious action or if action was interposed for delay or harassment or if attorney or party unnecessarily expanded proceeding. (C.R.S. 13-17-102).

Criminal.

Costs paid by state if defendant acquitted or unable to pay (C.R.S. 16-18-101), but by defendant if convicted (Crim. Rule 32[c]). Additional costs are taxable to defendant for victim compensation fund where defendant convicted or judgment and sentence deferred. (C.R.S. 24-4.1-119).

5.09 DAMAGES:

Compensatory Damages.

Common law generally governs compensatory damages. However, comparative negligence as described in subhead Comparative Negligence, infra, applies in negligence cases. Recovery for noneconomic loss or injury (such as pain, suffering, emotional distress, impaired quality of life) ordinarily shall not exceed $250,000 against each defendant (866 P.2d 1361) and damages for derivative loss or injury ordinarily shall not be awarded to persons suffering indirect harm or injury (C.R.S. 13-21-102.5[3]). However, direct noneconomic damages may be increased up to but no more than $500,000, and derivative damages awarded up to but no more than $250,000, if court finds they are justified by clear and convincing evidence. (C.R.S. 13-21-102.5[3]). These limitations shall not be disclosed to jury, but shall be imposed by court before judgment. (C.R.S. 13-21-102.5[4]). Recovery for physical impairment or disfigurement not limited. (C.R.S. 13-21-102.5[5]). Claim for breach of contract, damages for noneconomic loss or injury or for derivative noneconomic loss or injury are recoverable only if recovery for such damages is specifically authorized in contract that is subject of claim; or in any first-party claim brought against insurer for breach of insurance contract plaintiff demonstrates by clear and convincing evidence that defendant committed willful and wanton breach of contract, or contract clearly indicated that damages for noneconomic loss or injury or for derivative noneconomic damages or loss were within contemplation or expectation of parties. (C.R.S. 13-21-102.5[6]. See also subhead Mitigation, infra. Collateral source rule changed. Injured plaintiff who receives gratuitous benefits from collateral source will have recovery reduced by amount of benefits. (C.R.S. 13-21-111.6). Ski Safety Act of 1979 amended to limit damages against ski area operators to $1,000,000 present value; also $250,000 cap on noneconomic damages and derivative claims. (C.R.S. 33-44-113).

Wife has same right as husband for loss of consortium in tort actions. (C.R.S. 14-2-209). But see C.R.S. 13-21-102.5(3). Damages in action for wrongful death limited, except where cause of death is felonious killing, in which case there is no limitation on damages recoverable. (C.R.S. 13-21-102.5[2][b], 201 to 203.5). See also category 13 Estates and Trusts, topic 13.05 Death, subhead Action for Death.

Joint and several liability abolished in any action brought as result of death or injury to person or property. (C.R.S. 13-21-111.5). No defendant liable for amount greater than degree or percentage of negligence or fault attributable to that defendant. Exception: Joint liability shall be imposed on two or more persons who consciously conspire and deliberately pursue common plan and design to commit tortious act. (C.R.S. 13-21-111.5[4]). Consideration of degree or percentage of negligence or fault of nonparties to action authorized. (C.R.S. 13-21-111.5). C.R.S. 13-20-602 Certificate of Review required to designate licensed health care provider as nonparty at fault. (C.R.S. 13-21-111.5[3]). Special verdict procedure specified. (C.R.S. 13-21-111.5).

Medical Malpractice.

C.R.S. 13-64-101 effective as to acts and omissions occurring on and after July 1, 1988. Statute: (a) Provides for periodic payments where award of future damages exceeds present value of $150,000 and allows court discretion to allow periodic payments for future damages of less than that amount. (C.R.S. 13-64-203). It specifies method of funding of periodic payments and how such periodic payments are determined and handled (C.R.S. 13-64-207), including attorney fees (C.R.S. 13-64-205); (b) provides cap on damages of $1,000,000 present value per patient and not more than $250,000 present value per patient attributable to noneconomic loss or injury (C.R.S. 13-64-302). For actions filed on or after July 1, 1995, interest on damages from date action accrues to date of filing (C.R.S. 13-21-101) is deemed to be part of damages awarded, and subject to limitations of C.R.S. 13-64-101(1) and C.R.S. 13-64-101(2). Court may increase limit by present value of economic losses if, upon good cause shown, court determines that present value of past and future economic damages would make imposition of limitation unfair (C.R.S. 13-64-302); (c) provides for minimum qualifications of persons who testify as expert witness and prohibits expert in one medical subspecialty to testify against physician in another subspecialty unless standards of care and practice in two fields are similar (C.R.S. 13-64-401); (d) provides that written notice must be given to health, sickness or accident insurance providers and their rights of subrogation recognized through specified procedures, and provides for waiver of those rights if written notice of claim not filed with Court 90 days after receipt of notice from plaintiff (C.R.S. 13-64-402); (e) permits voluntary agreements between patient and health care providers to submit malpractice disputes to binding arbitration under certain specified safeguards, provides required language of agreement, including right of patient to rescind such agreement by written notice to health care provider within 90 days after signature if person is not hospitalized, or within 90 days after discharge from hospital if hospitalization was contemplated (C.R.S. 13-64-403). Health care provider cannot withhold services because of person’s refusal to sign agreement containing provision for binding arbitration (C.R.S. 13-64-403); (f) makes special provisions and limits liability for health care professionals and health care institutions involved in labor, delivery or immediate post-delivery care and vaccine-related injury or death (C.R.S. 13-64-502). In actions against licensed professional or acupuncturist plaintiff must file review certificate within 60 days after service or complaint dismissed. (C.R.S. 13-20-602[4]). Review certificate is representation that another professional qualified under C.R.S. 13-64-401 has been consulted, and that consulted professional has concluded that claim does not lack substantial justification under C.R.S. 13-17-102(4). If certificate of review (C.R.S. 13-20-602) filed rebuttably presumed that claim not frivolous or groundless (C.R.S. 13-17-102[2.1]). For actions filed on or after Feb. 1, 1999, review certificate must be filed for each company that employed licensed professional or acupuncturist, even if licensed professional or acupuncturist is not named as party. (C.R.S. 13-20-602[b]). C.R.C.P. 11 still applicable.

Ad Damnum Clause.

Rule 8(a) amended by Colo. Supreme Court prohibits statement of dollar amounts in prayer for relief in civil damage complaints as of and after Jan. 1, 1987.

Exemplary damages may be awarded where injury to person or property attended by circumstances of fraud, malice or willful and wanton conduct. (C.R.S. 13-21-102). Exemplary damages may also be awarded for wrongful death attended by circumstances of fraud, malice or willful and wanton conduct. (C.R.S. 13-21-203[3]). Willful and wanton defined by statute to mean conduct purposefully committed which actor must have realized as dangerous, done heedlessly and recklessly, without regard to consequences, or rights and safety of others. (C.R.S. 13-21-102[1][b]). Exemplary damages require proof beyond reasonable doubt. (C.R.S. 13-25-127). Ordinarily exemplary damages may not exceed actual damages, but court may increase them up to treble amount of actual damages on basis of willful or wanton conduct during pendency of case, or reduce or strike if deterrent effect accomplished, conduct ceased or purpose for such damages otherwise served. (C.R.S. 13-21-102). Exemplary damages may not be awarded in administrative or arbitration proceedings. (C.R.S. 13-21-102[5]). Exception: Punitives authorized in medical malpractice arbitrations. (C.R.S. 13-64-403[1.5]). Income or net worth of party may not be considered. (C.R.S. 13-21-102[6]). May recover treble amount of check, draft, or order fraudulently made, plus costs and reasonable attorneys' fees. (C.R.S. 13-21-109). Claim for exemplary damages may not be included in initial claim against health care provider (C.R.S. 13-64-302.5) or for wrongful death (C.R.S. 13-21-203[3]); only added after sufficient discovery; no exemplary damages against health care provider for use of any drug or product approved by state or federal regulatory agency (C.R.S. 13-64-302.5), or used in accord with standard of care, and with informed consent (C.R.S. 13-64-302.5[a][b]); no punitives against health care professional as result of acts of others unless acts specifically directed to be done or ratified (C.R.S. 13-64-302.5).

Assumption of Risk.

Defense of assumption of risk reinstated (C.R.S. 13-21-111.7) and shall be considered in apportioning negligence pursuant to Colorado Comparative Negligence Act (C.R.S. 13-21-111).

Comparative Negligence.

Contributory negligence not bar to recovery if negligence of person seeking recovery not as great as negligence of person against whom recovery is sought. Damages allowed are reduced in proportion to amount of negligence attributable to each person seeking recovery. (C.R.S. 13-21-111). Negligence of multiple defendants is to be combined when compared against plaintiff's negligence and damages may be recovered from multiple defendants found liable unless plaintiff was 50% or more at fault. (660 P.2d 883). Each defendant severally liable in proportion to his percentage of fault as found by trier of fact—no joint and several liability among tortfeasors. (C.R.S. 13-21-111.5). Exception: Joint liability shall be imposed on two or more persons who consciously conspire and deliberately pursue common plan and design to commit tortious act. (C.R.S. 13-21-111.5[4]). Negligence of settling nonparty or nonparty named by defendant may be considered in apportioning fault. (C.R.S. 13-21-111.5[3][b]). Assumption of risk is factor in apportioning fault. (C.R.S. 13-21-111.7). For civil actions commenced after July 1, 1987, trial court shall instruct jury on effect of its finding of degree or percentage of negligence or fault between plaintiff and defendant(s), but not as to allocation of fault among two or more defendants. (C.R.S. 13-21-111.5[5]). On July 1, 1990, liability of ski area operators (C.R.S. 33-44-103) and equine sponsors (C.R.S. 13-21-120) limited because of risks and dangers inherent in those sports.

In products liability action, person seeking recovery not barred by his own negligence. Damages reduced in proportion to amount of negligence attributable to person seeking recovery. (C.R.S. 13-21-406[1]).

See also category 13 Estates and Trusts, topic 13.05 Death, subhead Action for Death.

Charitable Immunity.

Doctrine of charitable immunity bars levy of execution which would deplete trust funds. (419 P.2d 312).

Sovereign Immunity.

Doctrine of sovereign immunity abolished, and recognized in Colorado only to extent provided for by statute. (C.R.S. 24-10-102). Application of sovereign immunity bars claim against public entity. (C.R.S. 24-10-108). Sovereign immunity does not bar actions for damages for injuries resulting from: (1) Operation of motor vehicle, owned or leased by public entity, by public employee in course of employment (except certain emergency vehicles); (2) operation of certain public facilities; (3) dangerous condition of public buildings and certain other public facilities; (4) dangerous condition of public highway, road, or street which physically interferes with movement of traffic; (5) operation and maintenance of qualified state capital asset that is subject of leveraged leasing agreement pursuant to C.R.S. 10-82-1001 to 1005 (C.R.S. 24-10-106). Public entity may waive immunity by adopting prospective resolution, and likewise may withdraw waiver. (C.R.S. 24-10-104). Providing services or adopting policies or regulations does not create duty of care in public entity. (C.R.S. 24-10-106.5). Person claiming injury by public entity or public employee must file detailed written notice within 180 days of discovery of injury as jurisdictional prerequisite to any action. (C.R.S. 24-10-109). Liability of all public employees or entities limited to $150,000 per person and $600,000 per occurrence, unless increased by governing body. (C.R.S. 24-10-114). Judgment may be claimed against State in excess of maximum limits, but State not liable for payment of excess unless approved by bill of State Legislature. (C.R.S. 24-10-114). Actions against public employees for acts or omissions during performance of their duties and within scope of their employment, subject to notice requirements and damage limitations. (C.R.S. 24-10-118). Allegations in complaint against public employee of willful and wanton conduct must set forth specific factual basis or be subject to dismissal. (C.R.S. 24-10-114). Notice under Whistle Blower Statute is governed by 180-day limitation. (C.R.S. 24-10-109; 752 P.2d 559).

Just compensation clause of constitution creates exception to sovereign immunity (601 P.2d 1082). Public entity not liable for exemplary or punitive damages or for outrageous conduct. (C.R.S. 24-10-114[4]). Employees not liable for punitive or exemplary damages. (C.R.S. 24-10-118[1][c]). Public entity liable for costs of defending employee if employee acting within scope of employment. (C.R.S. 24-10-110[1.5]). Department of Personnel controls defense of claims against state. (C.R.S. 24-30-1504). State self-insured and recovery on claims against state arising after Sept. 15, 1985, only through risk management fund. (C.R.S. 24-30-1501, 1510). State claim board manages risk management fund (C.R.S. 24-30-1509) and has limited power to settle claims (C.R.S. 24-30-1515). Promise to indemnify or hold public entity harmless from entity’s own negligence void as against public policy. (C.R.S. 13-50.5-102[8]).

Guest Statute.

Repealed effective Apr. 9, 1975. (L. 75, § 1, p. 1568).

Alcoholic Beverages.

Common law cause of action against commercial vendor or social host abolished, and liability for each statutory action limited to $150,000. (C.R.S. 12-46-112.5 and C.R.S. 12-47-128.5). Commercial vendor liable only where alcohol served willfully and knowingly to underage or visibly intoxicated person. Social host liable only where alcohol served willfully and knowingly to underage person. (C.R.S. 12-46-112.5 and C.R.S. 12-47-128.5).

Health Care.

No member of hospital utilization review committee liable for damages to patients by reason of recommendations made in exercise of proper function of committee unless willful or reckless disregard for patient’s safety is shown. (C.R.S. 13-21-110[1]). Persons providing mental health care to violent persons are exempt from liability in some circumstances. (C.R.S. 13-21-117).

Good Samaritan Rule.

Doctrine of assumed duty abolished; persons volunteering assistance or services exempted from civil liability for their good faith acts and omissions. (C.R.S. 13-21-116). Includes teachers, coaches, trainers, etc. who perform service or assistance for any program, organization, service group, social, recreational group, nonprofit corporation serving young persons or providing sporting programs. (C.R.S. 13-21-116[2.5][a]). Young persons means 18 years of age or less. (C.R.S. 13-21-116[2.5][b]). No civil liability for rendering uncompensated emergency medical or voluntary telephone hotline services (C.R.S. 13-21-108) or for mine rescue (C.R.S. 13-21-114). C.R.S. 13-21-108(1) amended to clarify limitation of liability not applicable if physician renders emergency care to existing patient.

Nonprofit Corporations.

Assets of any nonprofit corporation which would, but for statutory provisions governing nonprofit corporations, be immune form levy and execution shall nonetheless be subject to levy and execution to extent such nonprofit corporation would be reimbursed by proceeds of liability insurance policies carried by it were judgments levied and executed against its assets. (C.R.S. 7-123-105). Member of board of directors not liable for official acts or omissions unless willful or wanton. (C.R.S. 13-21-116[2][b]).

Dams and Reservoirs.

Owners and operators of water storage reservoirs liable only for negligence. (C.R.S. 37-87-104[1]). No negligence if state engineer's 100-year flow predictions are followed (C.R.S. 37-87-102[3.7]), and state engineer and staff not liable for errors in calculations (C.R.S. 37-87-115). Stockholders, officers, directors not liable if owner is adequately insured under statute. (C.R.S. 37-87-104[3]).

Landowners.

Liability of owner or possessor of real property for injuries occurring on his land determined under statute. C.R.S. 13-21-115 declared unconstitutional by 779 P.2d 856, and reenacted in 1990 as new C.R.S. 13-21-115. Landowner's duty of care varies with plaintiff's purposes for being on land. (C.R.S. 13-21-115).

Minors.

Parents with malicious or willfully destructive children under 18 years of age living with them shall be responsible for their actual damage to extent of $3,500, plus costs and attorneys' fees. (C.R.S. 13-21-107). See also category 14 Family, topic 14.10 Infants.

No-Fault Insurance.

See category 23 Transportation, topic 23.01 Motor Vehicles, subhead No-Fault Insurance.

Firearms and Ammunition.

Recovery in products liability action against maker or seller of firearms or ammunition must be based on actual defect in design or manufacture of product. (C.R.S. 13-21-501 to 505).

Damages for Blowing Soil.

Where damages are caused by blowing soil, C.R.S. 35-72-101 to 108 provide special rules for bringing actions for recovery of such damages.

Uniform Contribution Among Tortfeasors Act.

Adopted. (C.R.S. 13-50.5-101 to 106).

Material Variations from Text:

§ 2—replaced with following: "The relative degrees of fault of the joint tortfeasors shall be used in determining their pro rata shares." (13-50.5-103).

§ 4(a)—replaced with following: "It does not discharge any of the other tortfeasors from liability for their several pro rata shares of liability for the injury, death, damage, or loss unless its terms so provide; but it reduces the aggregate claim against the others to the extent of any degree or percentage of fault or negligence attributable by the finder of fact, pursuant to section C.R.S. 13-21-111 (2) or (3) or section C.R.S. 13-21-111.5, to the tortfeasor to whom the release or covenant is given; and". (C.R.S. 13-50.5-105).

Mitigation.

Failure to mitigate damages is affirmative defense which must be pleaded and proven by defendant. (C.R.C.P. 8[c]; 549 P.2d 1087). Evidence of nonuse of seatbelt by driver and front seat passengers in motor vehicle equipped with safety belt system is admissible in civil action to reduce damages recoverable for pain and suffering resulting from injuries sustained in accident. (C.R.S. 42-4-236[7]).

Attorneys' Fees and Costs.

In any civil action of any nature commenced or appealed, court may award attorneys' fees if it finds that party brought or defended action which was substantially frivolous, groundless or vexatious, was interposed for delay or harassment, or that attorney unnecessarily expanded proceeding by improper conduct. (C.R.S. 13-17-101 to 106). Court has discretion to award attorneys' fees for frivolous claim. (712 P.2d 491). If appellate court determines that appeal is frivolous, it may award just damages and single or double costs to appellee. (Colo App. Rules 38[d]; 674 P.2d 363). If plaintiff does not substantially prevail against public employee in action for exemplary damages, Court shall award attorney fees against plaintiff or plaintiff's attorney or both. (C.R.S. 24-10-110[5]). Attorney's fees may be awarded in breach of trust actions to make injured party whole. (657 P.2d 992, C.R.C.P. 11). Rebuttable presumption not frivolous or groundless if (C.R.S. 13-20-602) certificate of review filed.

See also topic 5.07 Costs.

Baseball.

Spectators at professional baseball games presumed to know of and to assume inherent risks of injury, including risks of being struck by baseball or baseball bat (C.R.S. 13-21-120[4][a]); assumption of inherent risks is complete bar and defense to suit against owner of team or stadium (C.R.S. 13-21-120[4][b]), except when owner (a) fails to use reasonable effort to design, alter, and maintain stadium in reasonably safe condition; (b) intentionally injures spectator; or (c) fails to post notice required by statute (C.R.S. 13-21-120[5][6]). Effective Jan. 1, 1994.

Statutory Interest.

See topic Interest.

5.10 [RESERVED]

5.11 DEPOSITIONS AND DISCOVERY:

Federal Rules of Civil Procedure are basis for Colorado Rules of Civil Procedure. See topic 5.19 Practice.

Within State For Use Within State.

Federal Rules of Civil Procedure adopted with modifications. Limitation on number of depositions to one deposition of each adverse party and two other persons. (C.R.C.P. 26[b][2][A]).

Outside of State for Use within State.

See subhead Commissions, infra.

Perpetuating Testimony.

Deposition to perpetuate testimony may be taken when applicant expects to be party to action in this state or when proof of some fact is necessary to perfect title to property or to establish any other matter which it may thereafter become material to establish. Proceeding is commenced by filing verified petition in district court. Order allowing examination must be served personally (C.R.C.P. 4[e]) on persons named in petition as expected adverse parties. If expected adverse parties are stated to be unknown and real property is to be affected by testimony, copy of order must be served on county clerk and recorder of county in which property is located and published for not less than two weeks in some newspaper to be designated by court. (C.R.C.P. 27[a][1]). Testimony taken must be signed and sworn to in writing by each witness and certified by court. Any personal service required by Rule must be given at least ten days before testimony is to be taken. If any witness is absent from county in which proceedings are pending, court must designate some person authorized to administer oaths to take and certify his testimony. (C.R.C.P. 27[a][2]). Such deposition may at any time thereafter be used in trial in which petitioner or any successor in interest is party, or between any parties in trial in which it is material to establish facts which such testimony proves or tends to prove where witness giving deposition is unable to be present at trial. (C.R.C.P. 27[a][4]).

Where permitted by court, depositions may be taken at any time within 30 days from entry of judgment or during pendency of appeal to perpetuate testimony for use in further proceedings. (C.R.C.P. 27[b]).

Before Whom Taken.

Depositions may be taken within U.S., or any territory or possession subject to dominion of U.S., before officer authorized to administer oath by laws of Colorado, of U.S. or of place where examination is held or before person appointed by court in which action is pending. (C.R.C.P. 28[a]). Depositions of persons in military service may be taken anywhere by commissioned officer in active service of U.S. (C.R.S. 24-12-104[1]). No deposition may be taken before relative, employee, attorney or counsel of any party, or one who is financially interested in action. (C.R.C.P. 28[b]).

Commissions.

Commission or letters rogatory shall be issued when necessary, on application and notice, and on terms that are just and appropriate. Both commission and letters rogatory may be issued in proper cases. Officers may be designated in commission either by name or descriptive title. Clerk shall issue commission in form prescribed by jurisdiction where deposition is to be taken, such form to be prepared by party seeking deposition. Original sealed deposition shall be filed and sealed and commission shall so inform officer. (C.R.C.P. 28[c]).

Examination of Witnesses.

Federal Rules of Civil Procedure adopted with no material variations.

Return.

Federal Rules of Civil Procedure adopted with no material variation.

Form.

Full instructions as to captions, certificates, etc., accompany commissions and are printed on back side of dedimus issued by clerk of court.

Compelling Attendance of Witnesses.

Attendance of witnesses may be compelled by subpoena, but Colorado resident may be required to attend deposition only in county wherein he resides, is employed or transacts business in person or such other convenient place as court directs. Nonresident of Colorado may be required to attend within 40 miles of place of service or in county where he resides, is employed, or transacts business in person or such other convenient place as court directs. (C.R.C.P. 45[a], [d][2]).

Subpoenas must be issued by clerk of court in which case is docketed or by counsel whose appearance has been entered. (C.R.C.P. 45[e]). Written objection to inspection or copying must be made within ten days of service or before time for compliance if earlier. (C.R.C.P. 45[d][1]). Notice of deposition must be given to all parties. (Colorado Ethics Opinion No. 86).

Depositions on Written Questions.

Party desiring to take depositions on written questions must serve them on every other party with notice stating name and address of person who is to answer them and name or descriptive title and address of officer before whom deposition is to be taken. Within 20 days thereafter, parties so served may serve cross-questions on all other parties. Within ten days thereafter latter may serve redirect questions on all other parties. Within ten days after being served with redirect questions party may serve recross questions. (C.R.C.P. 31[a]).

A copy of notice and copies of all questions served must be delivered by party desiring to take deposition to designated officer, who will take questions as provided in C.R.C.P. 30 and certify and file or mail deposition attaching thereto copy of notice and questions received by him. (C.R.C.P. 31[b], [c]).

Depositions on Oral Examination.

Federal Rules of Civil Procedure adopted with modification limiting number of depositions to one deposition of each adverse party and two other persons. (C.R.C.P. 26[b][2][A]). Reasonable notice of deposition must not be less than five days. (C.R.C.P. 121-1-12[1]).

5.12 EQUITY:

See topic 5.02 Actions.

5.13 EVIDENCE:

Witnesses.

(C.R.S. 13-90-101 to 210).

Generally no person is incompetent as witness because of interest in action (subject to exceptions, e.g., deadman's statute [C.R.S. 13-90-102]), conviction for crime (though conviction for felony within five years may be shown to affect credibility), or religious belief (C.R.S. 13-90-101). Persons of unsound mind may not testify. Children under ten years who appear incapable of understanding facts or relating them truly may not testify, except in proceedings for child abuse, sexual abuse, sexual assault, or incest, when child able to testify as to facts or events in language appropriate to child of that age. (C.R.S. 13-90-106).

See also topic 5.10 Depositions and Discovery.

Privileged Communications.

Communication to attorney, clergy member, physician or registered professional nurse (except in proceedings before certain review boards, suits brought by patient, proceedings involving allegations of child abuse [C.R.S. 19-3-311], certain insured claims based on nurse's actions, and certain civil actions involving injuries occurring during labor, delivery, or immediate postdelivery period), public officer, certified public accountant, licensed psychologist, professional counselor, marriage and family therapist, social worker, licensed addition counselor, counselor to victims of domestic violence or sexual assault, or unlicensed psychotherapist privileged if made in confidence and in connection with professional relationship (C.R.S. 13-90-107). Confidential communications with certain employees of same also privileged. (C.R.S. 13-90-107). Parent may not be examined as to any communication made in confidence by parent's minor child to parent when communication was made in presence of certain persons, such as attorneys, physicians, clergy members, etc. (C.R.S. 13-90-107[1]). Physician-patient privilege applies even to essential witness in criminal proceedings. (195 Colo. 386, 578 P.2d 647). Psychologist-client and physician-patient privileges extend to information disclosed for purpose or diagnosis or treatment but not to information disclosed for purpose of preparing for litigation. (785 P. 2d 132). Communication between patient and physician, registered professional nurse, licensed mental health professional, or certified school psychologist not privileged if it results in child abuse report under C.R.S. 19-3-304 (C.R.S. 19-3-311). Communication to or knowledge of state or local health department employee or any health care provider or facility, third-party payor, physician, clinic, laboratory, blood bank, or other agency as to report or investigation concerning individual with AIDS infection privileged unless individual subject to public health order or restrictive action. (C.R.S. 25-4-1404). Newspersons have privilege against disclosure of news information gathered or received from others except in certain circumstances such as where news information based on newsperson's personal observation of crime if substantially similar news information cannot reasonably be obtained by any other means. (C.R.S. 13-90-119). Communication made in official confidence to confidential intermediary privileged when public interest would suffer by disclosure. (C.R.S. 13-90-107[1][i]). Qualified interpreter of communications between hearing-impaired person and another, one of whom is privilege-holder under C.R.S. 13-90-107, cannot be examined without written consent of privilege-holder (C.R.S. 13-90-107[1][h]). Psychologist-patient privilege, like physician-patient privilege, is not qualified, and once privilege attaches only basis for disclosure is expressed or implied waiver. (668 P.2d 3). In civil case, implied waiver of privilege occurs by privilege-holder's assertion of his physical or mental condition as basis for claim or affirmative defense. (668 P.2d 3). In criminal case, defendant who places mental condition at issue by pleading not guilty by reason of insanity under C.R.S. 16-8-103, asserting affirmative defense of impaired mental condition under C.R.S. 16-8-103.5, waives privilege as to his communications with physician or psychologist made during exam or treatment for such mental condition for purposes of trial or hearing on issue of mental condition (C.R.S. 16-8-103.6).

Husband and Wife.

Communication by one spouse to other generally privileged.(C.R.S. 13-90-107[1][a][I]). Privilege does not apply to proceeding involving allegations of child abuse (C.R.S. 19-3-311[2]), suit between spouses, criminal suit for crime committed by one against other, or criminal suit against one or both of spouses for alleged offense occurring before marriage (C.R.S. 13-90-107[1][a][I]). Privilege does not apply to communications made to aid commission of future crime or present continuing crime.(C.R.S. 13-90-107[1][a][III]). Above privilege does not apply to any of certain felony proceedings, in which case spousal communications intended to be confidential are privileged.(C.R.S. 13-90-107[1][a][II]).

Communications or Transactions with Persons Since Deceased or Incompetent.

In any civil action by or against person incapable of testifying, i.e., any decedent or any other person who is otherwise not competent to testify, each party and person in interest with party shall be allowed to testify regarding oral statement made by person incapable of testifying if (a) statement was made under oath at time when such person was competent to testify; (b) statement is corroborated by material evidence of independent and trustworthy nature; or (c) opposing party introduces evidence of related communications. (C.R.S. 13-90-102).

Self-Incrimination.

No person can be compelled to testify against himself in criminal case. (Const., art. II, §

18). State's attorney may petition court for order compelling witness' testimony over claim of privilege against self-incrimination, but such testimony, and information derived from it, may not be used against such witness in any criminal case, except prosecution for perjury, false statement or otherwise failing to comply with order. (C.R.S. 13-90-118).

Compelling Attendance.

See topic 5.10 Depositions and Discovery.

5.14 INJUNCTIONS:

Application for, hearing on and granting of injunctions are covered by the general rules governing actions of a civil nature.

Jurisdiction generally is in district court (C.R.C.P. 65), with county court being able to issue injunctions only in very limited circumstances when movant has been physically attacked or threatened (County Court Rule 365).

Prerequisites.

Federal Rules of Civil Procedure adopted without material variation. See topic 5.19 Practice.

Procedure.

Federal Rules of Civil Procedure adopted without material variation.

Security.

Federal Rules of Civil Procedure adopted without material variation.

Preliminary Injunction.

Federal Rules of Civil Procedure adopted without material variation.

Mandatory Injunction.

May obtain mandatory injunction if merely restraining doing of act will not give movant relief. (C.R.C.P. 65[f]).

Temporary Restraining Order.

Federal Rules of Civil Procedure adopted without material variation.

Matrimonial Actions.

Rule inapplicable to suits for dissolution of marriage, legal separation, maintenance, child support, or custody of minors. In such suits, court may make prohibitive or mandatory orders without notice or bond, as may be just. (C.R.C.P. 65[h]).

5.15 JUDGMENTS:

Colorado Rules of Civil Procedure are based on Federal Rules of Civil Procedure. (Court Rules, Colo. Rev. Stat.). See topic 5.19 Practice.

Judgments may be either interlocutory or final. (C.R.C.P. 54[b]). See category 8 Debtor and Creditor, topic 8.02 Attachment.

Docketing.

Immediately on rendition of any judgment, clerk is required to enter same in register of actions. (C.R.C.P. 58[a] and C.R.C.P. 79[d]).

Declaratory Judgments.

Uniform Act adopted. (C.R.S. 13-51-101 to 115; C.R.C.P. 57).

Default Judgments.

Federal Rules of Civil Procedure adopted with following immaterial variations to C.R.C.P. 55. In all civil actions court may enter judgment based upon affidavit of party seeking affirmative relief. (C.R.S. 13-63-101[1]). Rule governs listing of documents which must be filed with motion for entry of default judgment. (C.R.C.P. 121, §§ 1-14). Court may, upon own motion, require such supporting evidence as it deems necessary in addition to affidavit or require formal hearing on any and all issues. (C.R.S. 13-63-101[2]).

Offer of Judgment.

Repealed C.R.C.P. 68 and substituted Offer of Settlement Procedure C.R.S. 13-17-202. Procedure differs from federal rule.

Lien.

Judgments are liens on personal property of judgment debtor from time execution thereon is delivered to proper officer. Personal property lien only in county where execution delivered. Judgments are liens upon real estate within any county as soon as transcripts thereof, certified by the clerk of the court rendering the same, are recorded in office of county recorder. Lien continues six years from entry of judgment unless revived, in which case lien continues for additional six years. (C.R.S. 13-52-102). Judgment debtor's lien against joint tenant attaches to interest of only joint tenant debtor, and terminates if joint tenant debtor dies prior to attachment or levy having been made upon his interest. (660 P.2d 13).

Revival.

A judgment may be revived against one or more judgment debtors on motion alleging date of judgment and amount unsatisfied. The clerk thereupon issues a notice requiring judgment debtor to show cause within ten days after service thereof why the judgment should not be revived. Revived judgment must be entered within 20 years after entry of original judgment, and may itself be revived in same manner. (C.R.C.P. 54[h]). Filing transcript of entry of revivor before expiration of lien in judgment docket with clerk and recorder of appropriate county shall continue lien of judgment for same period as original lien. (C.R.C.P. 54[h]).

Judgments by Confession.

Provision authorizing confession of judgment on claim arising out of consumer credit sale or consumer lease (C.R.S. 5-2-415) or consumer loan (C.R.S. 5-3-407) is void.

Assignment.

No particular form necessary.

Judgments by Consent.

Court has some discretion in entering judgment by consent. (126 Colo. 298, 248 P.2d 825).

Satisfaction in whole or part of money judgment may be entered in judgment record (C.R.C.P. 79[d]) upon execution returned satisfied in whole or part, or upon acknowledgment of such satisfaction filed with clerk, made in manner of acknowledgment of conveyance of real property by judgment creditor, or by judgment creditor's attorney of record unless revocation of authority previously filed, or by signing such satisfaction, attested by clerk, upon judgment record by one authorized to execute acknowledgment of satisfaction. (C.R.C.P. 58[b]).

Form

Form of Satisfaction.

For and in consideration of the sum of . . . . . Dollars and . . . . Cents paid to me by . . . ., the defendant in the above entitled action, full satisfaction is hereby acknowledged of a certain judgment rendered in said . . . . . Court, in the above entitled action, on the . . . day of . . ., 20. . ., in favor of . . . ., the plaintiff in the said action, and against the said defendant, for the sum of . . . . . Dollars and . . . . . Cents, besides . . . . . Dollars and . . . . . Cents, costs, and recorded in Book . . . of Judgments, at page . . . of the Records of said Court, and I hereby authorize and direct the Clerk of said Court to enter of record satisfaction of said judgment in said action.

Witness my hand and seal this . . . day of . . ., 20. . . .

. . . .

Presumption of Satisfaction.

Judgments of courts of record are presumed to be satisfied in 20 years, but may be revived as provided above so as to be continued beyond that time. Execution may issue thereon at any time within 20 years, or after, if revived. (C.R.S. 13-52-102; C.R.C.P. 54[h]).

Vacation or Modification.

Covered by C.R.C.P. 59, 60 and 61. C.R.C.P. 59 differs materially from Federal Rules of Civil Procedure in that it lists six grounds on which motion for new trial will be granted and requires affidavits in some cases.

Foreign Judgments.

An official record kept within U.S. or within a territory or possession subject to dominion of U.S. may be evidenced by a copy, attested by the officer having legal custody of the record, or by his deputy, and accompanied by a certificate that such officer has custody. If the office in which the record is kept is within U.S. or within territory or possession subject to dominion of U.S., certificate may be that of judge of court or record of district or political subdivision in which record is kept, authenticated by seal of court, or may be made by any public officer having seal of office and having official duties in district or political subdivision in which record is kept, authenticated by seal of his office. (C.R.C.P. 44[a][1]). Other official records may be evidenced by copy, attested by person authorized to make attestation and accompanied by final certification as to genuineness of signature and official position of attesting person or of any foreign official whose certificate of genuineness relates to attestation or is in chain of certificates relating to attestation. If office in which record is kept is in foreign country, certificate may be made by secretary of embassy or legation, consul general, consul, vice-consul, or consular agent, or by any officer in foreign service of U.S. stationed in foreign state or country in which record is kept. (C.R.C.P. 44[a][2]). Final certification is unnecessary if record and attestation are certified as provided for in treaty or convention to which U.S. and foreign country in which official record is located are parties.

In case the office or officer authenticating any document has no official seal, authentication by official publication or by seal is dispensed with. (C.R.C.P. 44[d]).

If a foreign jurisdiction has a reciprocal provision, Colorado courts will recognize orders, judgments, and decrees therefrom in cases of divorce, dissolution of marriage, legal separation, separate maintenance, annulment, declaration of invalidity of marriage, or for support of minor children or spouse, and after personal service of process (see topic 5.20 Process), may amend, modify, set aside, and enforce same, including awards of temporary alimony, support money and attorneys' fees. (C.R.S. 14-11-101).

Uniform Enforcement of Foreign Judgments Act has been adopted. (C.R.S. 13-53-101 to 108). Fee for filing foreign judgment is $166. (C.R.S. 13-53-106[1]).

Material Variations from Official Text.

§ 2—adds "court which would have had jurisdiction over the original action had it been commenced first in this state" at end of sentence beginning "A copy"; omits sentence beginning "The Clerk"; inserts "in which filed" preceding "and may be enforced" in sentence beginning "A judgment". (C.R.S. 13-53-103).

Uniform Foreign Money-Judgments Recognition Act has been adopted. (C.R.S. 13-62-101 to 112).

Material Variations from Official Text.

§ 1—adds "which governmental unit has entered into a reciprocal agreement with the United States recognizing any judgment of a court of record of the United States, or any state, district, commonwealth, territory, insular possession thereof, or the Panama Canal Zone, the Trust Territory of the Pacific Islands, or the Ryukyu Islands, and providing for procedures similar to those contained in the article" at end of sentence beginning " 'Foreign state' ". (C.R.S. 13-62-102[1]).

Judgment Notes.

See category 3 Business Regulation and Commerce, topic 3.02 Bills and Notes.

Summary Judgment.

Federal Rules of Civil Procedure, C.R.C.P. 56 adopted with minor variations.

5.16 LIMITATION OF ACTIONS:

Actions are barred unless commenced within the following periods after the respective causes of action accrued:

Eighteen years: To recover real property, except as hereinafter mentioned (C.R.S. 38-41-101); on public securities (C.R.S. 11-55-107).

Fifteen years: To foreclose mortgage (C.R.S. 38-39-205) except as limited by extinguishment of lien at time right to sue to enforce payment of underlying debt is barred (C.R.S. 38-39-207, 730 P.2d 308). See also category 20 Mortgages, topic 20.04 Mortgages of Real Property, subhead Foreclosure.

Ten years: To enforce or procure any right or title to real property under contract of sale or bond for deed, by person not in possession. (C.R.S. 38-41-116, 117).

Seven years: To recover real property where: (a) Defendant is and has been in possession for that time under claim and color of title, made in good faith, and has paid all taxes during that period; (b) the land is vacant and defendant holds under claim of title and has paid all taxes; or (c) title or right under which defendant claims has been of record for seven years, unless such record has been annulled by proper judicial proceedings or plaintiff has been deprived of possession within two years of commencement of actions (C.R.S. 38-41-108, 109, 111); to question or set aside purported foreclosure (C.R.S. 38-29-208); to commence civil action for relief under Colorado Uniform Controlled Substances Act, C.R.S. 18-18-101 to 605 (C.R.S. 18-18-603).

Six years: Actions to recover liquidated debt or unliquidated, determinable amounts of money except actions under C.R.S. 38-35-124.5(3) (see subhead One Year, infra); for rent in arrears; to enforce rights in instrument securing payment of debt; to recover damages for nonpayment of negotiable instrument upon presentment under C.R.S. 13-21-109, except rights to treble damages under C.R.S. 13-21-109(2) (see subhead Two Years, infra); actions in replevin to recover personal property encumbered by instrument securing debt and actions by Public Employees' Retirement Association to collect unpaid contributions from employers; actions for restitution and civil penalties for filing of false Medicaid claims (C.R.S. 13-80-103.5); actions for damages to persons or property and against architects, contractors, builders or builder vendors, engineers, or inspectors caused by design, planning, supervision, inspection, or construction after substantial completion of improvement (C.R.S. 13-80-104), (see subheads Two Years, and Three Months, infra); civil actions based on sexual assault or sexual offense against child, time running from date disability is removed under C.R.S. 13-81-101(1) or six years after cause of action accrues, whichever occurs later (C.R.S. 13-80-103.7).

Five years: Action for recovery of land sold for taxes (C.R.S. 39-12-101); actions for forfeiture, seizure or recovery of personal property for violations of outfitter licensing requirements under C.R.S. 12-55.5-110, abatement of public nuisance under C.R.S. 16-13-301, under contraband forfeiture act C.R.S. 16-13-501, under organized crime control act C.R.S. 18-17-106, and violations of C.R.S. 42-5-107 (C.R.S. 13-80-103.8), and for violations of Colorado Commodity Code (C.R.S. 11-53-101 to 210).

Four years: Civil actions for violations of Colorado Antitrust Act of 1992, C.R.S. 6-4-101 to 122, after facts giving rise to such are discovered or should have been discovered with reasonable diligence (C.R.S. 6-4-118).

Three years: Civil actions: on contract not otherwise covered including actions under Uniform Commercial Code, except as provided in C.R.S. 13-80-103.5; all actions for fraud or deceit except as provided in C.R.S. 13-80-102(1)(j) and C.R.S. 13-80-103 (see subheads Two Years and One Year, infra); for determination of paternity; for breach of trust or fiduciary duty; under Uniform Consumer Credit Code, except C.R.S. 5-5-201(5); of replevin or for taking, detaining or converting goods or chattels, except as provided in C.R.S. 13-80-103.5 (see subhead Two Years, infra); under Colorado Rental Purchase Agreement Act (C.R.S. 5-10-101 to 1001); under Motor Vehicle Financial Responsibility Act (C.R.S. 42-7-101 to 510); under tit. 10, art. 4, part 6; accruing outside Colorado if limitation of place where action accrued is greater than Colorado limitation; of debt under C.R.S. 40-30-102; for recovery of erroneous refunds of any tax under C.R.S. 39-21-102 (C.R.S. 13-80-101); actions for fraud, misstatements of material fact or omission of material fact in sale or purchase of security, after facts giving rise to such action are discovered or should have been discovered with reasonable diligence, but in no event more than five years after such purchase or sale (C.R.S. 11-51-604[8]); against land surveyor licensed under tit. 12, art. 25, part 2, for damage from negligent or defective land survey, from time negligence or defect was discovered or should have been discovered with reasonable diligence and concern, but in no case more than ten years after completion of survey on which claim is based (C.R.S. 13-80-105); for misappropriation of trade secret under Uniform Trade Secrets Act (C.R.S. 7-74-107); for collection of various fuel, tobacco, sales, use or severance taxes and charges on oil and gas production (C.R.S. 39-21-107[1]); tort actions for bodily injury or property damage arising from motor vehicle use, except for strict liability or failure to warn provided in C.R.S. 13-80-102(1) or C.R.S. 13-80-106; to commence action or arbitration of "uninsured motorist" insurance claim after cause of action accrues (C.R.S. 13-80-107.5), for damages against business or hospital enterprise arising out of Year 2000 failure (C.R.S. 13-80-101[1]).

Two years: Civil actions: of every kind in action not otherwise covered; for tort except as otherwise provided; for strict or absolute liability, or failure to warn; against persons or organizations in veterinary medicine; against any public or governmental entity or employee for which insurance coverage is provided under C.R.S. 24-14-105, except as provided in C.R.S. 13-80-103 (see subhead One Year, infra); actions against field labor contractors for violation of wage laws under C.R.S. 8-4-110(2); upon liability, other than forfeiture or penalty, created by federal statute which prescribes no limitation; for fraud or deceit in used car sales under C.R.S. 42-6-208; to recover damages for three times face amount of negotiable instrument under C.R.S. 13-21-109(2) (C.R.S. 13-80-102); after action accrues under C.R.S. 13-80-108(1), against health care institutions and health care professionals for action arising in tort or contract, but in no case shall such action be brought more than three years after act or omission giving rise to action, unless (1) act or omission was knowingly concealed or consisted of leaving object in patient, in which case action must be commenced within two years after discovery, (2) physical injury and cause are not known or could not be known through exercise of reasonable diligence, (3) action is on behalf of minor under eight years who was under six years on date of action or omission giving rise to action, which must be brought before minor attains eight years of age or (4) action is on behalf of person otherwise under disability under C.R.S. 13-81-101, in which case C.R.S. 13-81-103 applies (C.R.S. 13-80-102.5); against employer for personal injury or death in course of employment (C.R.S. 8-2-204); after claim for relief arises against architects, contractors, builders or builder vendors, engineers or inspectors for recovery of damages for deficiency in design, planning, inspection, supervision or construction of real property improvement or for injuries to persons or real or personal property caused by such deficiency, but in no case shall such action be brought more than six years after substantial completion of real property improvement, unless action arises in fifth or sixth year after substantial completion, in which case must commence within two years of when it arises (C.R.S. 13-80-104); actions to recover mining or placer claims, from commencement of actual possession obtained under tax deed (C.R.S. 39-12-102); actions, except those under C.R.S. 4-2-725, against manufacturer or seller of product for injury or damage resulting from construction, design, labeling or failure to warn or protect against hazard in use or misuse of product (C.R.S. 13-80-106); actions against manufacturer, seller or lessor of new manufacturing equipment, but not later than seven years after such equipment was first used for intended purpose unless claim arises from hidden defects or prolonged exposure to hazardous material or from intentional misrepresentation or fraudulent concealment by manufacturer, seller or lessor of material fact proximately causing death, injury or property damage, but such limit does not apply to certain claims under express written warranties extending beyond two years and arising during warranty period (C.R.S. 13-80-107); actions against ski area operator for injury to person or property arising out of operation of ski area (C.R.S. 33-44-111); actions after date of contract of sale against seller of unregistered security or unlicensed broker-dealer (C.R.S. 11-51-604[8]).

One year: For assault and battery, false imprisonment, libel or slander; against sheriff, coroner, police or other law enforcement authority; for statutory penalty or forfeiture but not claims for exemplary damages (634 P.2d 1036); and except for forfeitures related to certain criminal activities (see subhead Five Years, supra); under Motor Vehicle Repair Act C.R.S. 42-11-101 to 109; for all actions under tit. 12, art. 20; for negligence, fraud, willful misrepresentation or conversion of trust funds under C.R.S. 12-61-303, alleging liability for penalty arising from class A or B traffic infractions as defined in C.R.S. 42-4-1501 (C.R.S. 13-80-103); to enforce terms of any building restriction on real property (C.R.S. 38-41-119); to make demand on another insurer for initial arbitration proceedings under Auto Accident Reparations Act after first payment of benefits (C.R.S. 10-4-717); to commence enforcement of hospital lien (C.R.S. 38-27-103); to collect unsecured amounts from obligor due to error in payoff statement (C.R.S. 38-35-124.5).

Six months: To give notice to public authority of claim after discovery of injury (638

P.2d 816; C.R.S. 24-10-109); to commence action to foreclose mechanic's lien after last labor performed or laborers material furnished or after completion of structure or other improvement (C.R.S. 38-22-110); to commence action to foreclose lien on oil wells or oil field equipment after filing of lien statement (C.R.S. 38-24-105).

Three months: To commence action to foreclose harvester's lien on grain and harvested crops after filing of lien statement (C.R.S. 38-24.5-107); to commence action to foreclose mechanics' lien on personal property after charges for work are due (C.R.S. 38-20-107); to commence action against person who maybe liable to claimant for all or part of claimant's liability to third person (C.R.S. 13-80-104[1][b][II]).

Two months: To commence action to foreclose liens of innkeepers, agistors, common carriers and mechanics on personal property after charges for work or rent are due. (C.R.S. 38-20-107).

No Right of Recovery.

Actions also are barred and no right exists to recover damages for personal injury sustained during commission of or immediate flight from commission of felony, provided person causing injuries acted under reasonable belief that physical force was reasonable and appropriate to prevent injury or to prevent commission of felony. (C.R.S. 13-80-119).

Uniform Commercial Code adopted. See category 3 Business Regulation and Commerce, topic 3.09 Commercial Code.

Accrual of Cause of Action.

Generally, accrual of cause of action is controlled by statute in effect at time claim for relief first arose (115 Colo. 358, 174 P.2d 346), but subsequent amendment may be applied retroactively where no deprivation of due process (663 P.2d 1066). Causes of action are deemed to accrue at following times: for injury to person, property, reputation or status and for uninsured motorist action at time injury and cause are known or should have been known by exercise of reasonable diligence; for wrongful death on date of death; for fraud, deceit, breach of contract, warranty or trust, or for wrongful possession of personal property, at time such fraud, deceit, breach or wrongful possession is discovered or should have been discovered by reasonable diligence; for debt or performance on date such debt or performance becomes due; for balance due on open account at time of last proved item; for any other cause of action for loss or damage when loss or damage is discovered or should have been discovered by reasonable diligence; and for penalties when determination of overpayment or delinquency giving rise to penalties are no longer subject to appeal; for recovery of erroneous refunds of any tax under C.R.S. 39-21-102 on date refund is issued; on date of traffic infraction for penalty arising from class A or B traffic infractions as defined in C.R.S. 42-4-1501; for unpaid employer contributions by Public Employees' Retirement Association, when nonpayment is discovered or should have been discovered by exercise of reasonable diligence (C.R.S. 13-80-108); for injury in course of employment, at date of injury or, if death results, at date of death (C.R.S. 8-42-204); to bring action on express or resulting trust, at time claimant attains, or reasonably could have attained, notice of trustee's use of trust property in manner inconsistent with claimant's interest; to establish constructive trust, at time claimant is aware, or reasonably should be aware, of facts which would make reasonable person suspicious of wrongdoing asserted as basis of trust (198 Colo. 477, 601 P.2d 1376). Uniform Commercial Code governs accrual of certain actions against bank for unauthorized signature or alteration of instrument for payment of money (C.R.S. 4-4-406); certain actions on commercial paper (C.R.S. 4-3-122); actions under bulk sales provisions (C.R.S. 4-6-111); and actions for breach of contract for sale of goods (C.R.S. 4-2-725). Damage to land from water seepage, when property is first visibly affected. (163 Colo. 575, 431 P.2d 1007).

Absence or Concealment.

Statute does not run in favor of defendant while he is absent from state or in hiding. (C.R.S. 13-80-118). Tolling statutes remedial, and not given retroactive application in absence of express direction from General Assembly. (660 P.2d 510).

Death.

No statute running on cause of action of decedent which had not been barred at date of death shall bar cause of action surviving death sooner than one year after death. (C.R.S. 13-80-112 and C.R.S. 15-12-109). See topic 5.02 Actions, subhead Abatement and Revival.

Disabilities.

If person entitled to bring action is under 18 years, insane, imprisoned, or absent from U.S. at time cause of action accrues, such person may bring action within time respectively limited after disability is removed. (C.R.S. 13-81-103). Special provisions regarding removal of disability in cases of sexual assault on minors. (C.R.S. 13-80-103.7). Claim for injury is considered to accrue on date injury and its cause is known or should have been known by exercise of reasonable diligence. (C.R.S. 13-80-108[1]). Special provisions regarding redemption rights of owners of real property conveyed by tax deed to another. (C.R.S. 39-12-104). Statute of limitations is not tolled if person was not imprisoned until after cause of action accrued. (34 Colo. App. 223, 524 P.2d 1394).

Persons under legal disability when a cause of action concerning real property accrues and also when the period of limitation applicable to such action expires may bring action within two years after such expiration, but not later. (C.R.S. 38-41-112; 109 Colo. 467, 126 P.2d 1036).

If a person under disability has, when a cause of action in his favor accrues, a legal representative, or a representative appointed by instrument in writing giving him power to take action to enforce a right, the statutory period runs as though there were no disability; if a legal representative for such person is appointed after cause of action has accrued, the period runs from time of such appointment provided that two years from such time are allowed. (C.R.S. 13-81-103). If disability of any person is terminated before expiration of period of limitation and no legal representative has been appointed for him, then such person shall be allowed to take action within period fixed by statute of limitation which would apply in similar case to person not under disability, or within two years after removal of disability, whichever period expires later. (C.R.S. 13-81-103).

If person under disability dies before disability is removed and before cause of action has become barred, and if cause of action survives, executor or administrator may sue within one year after such death. (C.R.S. 13-81-103).

New Promise or Part Payment.

A new promise in writing or a partial payment will remove the bar of the statute, but only as to the promisor or payor and not as to joint obligors. (C.R.S. 13-80-113, 114, 116).

Causes Barred in State of Origin.

Uniform Conflict of Laws-Limitations Act has been adopted. (C.R.S. 13-82-101 to 107).

Commencement of a New Action Upon Involuntary Dismissal.

If action which was commenced within allowable period is terminated because of lack of jurisdiction or improper venue, plaintiff or his personal representative may commence new suit on said action within 90 days after termination of original action or within period otherwise allowed, whichever is later. (C.R.S. 13-80-111).

Pleading.

Defense of statute of limitations must be set forth affirmatively. (C.R.C.P. 8[c]).

Contractual Limitations.

Shorter than statutory limitations established by contract are enforceable if reasonable. (53 Colo. 416, 128 P. 449). No contractual variation permitted for contract for sale of goods. (C.R.S. 4-2-725).

Setoffs.

Limitation provisions of C.R.S. 13-80-101 to 119 apply to debt or contract alleged, by way of setoff, by defendant, except that counterclaim or setoff arising out of transaction that is subject of opposing party's claim must be commenced within one year after service of complaint by opposing party.

5.16A PARTITION:

Any person having interest in real or personal property may maintain action to partition same. (C.R.S. 38-28-101).

Jurisdiction and Venue.

Court is empowered to make complete adjudication of rights of all parties to property (C.R.S. 38-28-103), and may make such orders as it deems necessary to completely adjudicate every question concerning title, rights and interest of all persons known or unknown, in being or not, and may direct payment and discharge of liens, have property sold free of liens or may apportion liens among persons to whom partition is made (C.R.S. 38-28-110). Process, practice and procedure shall comply with Colorado rules of civil procedure. (C.R.S. 38-28-104). Venue shall be in county where subject of action or substantial part of it is situated. (C.R.C.P. 98[a]).

Proceedings.

All persons having any interest must be made parties (C.R.S. 38-28-102) and court must make complete adjudication of rights of all (C.R.S. 38-28-103). Upon entry of order for partition, court appoints one or more commissioners who view property and make partition thereof in writing assigning each party his share. Report is presented to court for confirmation and parties may file objections within time permitted by court. (C.R.S. 38-28-105).

Partition in Kind or Sale.

If commissioner reports and court finds that partition cannot be made without manifest prejudice to rights of interested party, court may direct public sale upon such terms as court may fix. Notice of sale given in same manner as required for sales of real estate upon execution. (C.R.S. 38-28-107). Report of person making such sale must be confirmed by court and then court directs execution of proper instruments of conveyance and distribution of net proceeds of sale and any undistributed income from such property. (C.R.S. 38-28-108).

5.17 [RESERVED]

5.18 PLEADING:

Federal Rules of Civil Procedure form the basis for Colorado's pleading rules. (C.R.C.P. 7 through 16.2). See topic 5.19 Practice. Colorado C.R.C.P. 10(d) contains specific provisions regarding format of pleadings, including designations for courts, paper size, line spacing and order of identifying document information. C.R.C.P. 10(e) provides illustration of preferred case caption format.

Pleadings Permitted.

Federal Rules of Civil Procedure adopted with exception that reply to affirmative defense permitted and court may order any pleading in addition to those enumerated. (C.R.C.P. 7[a]).

Complaint.

Federal Rules of Civil Procedure adopted with exception that parties may commence action without pleading by filing agreed statement of facts supported by affidavit. (C.R.C.P. 7[d]). No dollar amount shall be stated in prayer for relief. Complaint (other than domestic relations, probate, water, juvenile, or mental health action) must be accompanied by civil cover sheet as shown in Appendix to cc. 1 to 17, Form 1.2, at time of filing. Failure to file cover sheet shall not be considered jurisdictional defect in pleading but may result in clerk's show cause order requiring its filing. (C.R.C.P. 8[a]). See topic 5.19 Practice.

Answer.

Federal Rules of Civil Procedure adopted with exception that mitigating circumstances reducing damages must be affirmatively pleaded. (C.R.C.P. 8[c]). For pleading requirements regarding mandatory arbitration, see topic 5.19 Practice.

Counterclaim or Set-Off.

Federal Rules of Civil Procedure adopted with addition of provisions for claims against assignees and personal representatives. (C.R.C.P. 13[j], [k]). No dollar amount shall be stated in prayer for relief. (C.R.C.P. 8[a]).

Reply.

Federal Rules of Civil Procedure adopted with no material variation.

Affidavits of Merits.

Not used in Colorado.

Affidavits of Defense.

Not used in Colorado.

Filing.

All papers after initial pleading required to be served on party, together with certificate of service, must be filed with court within reasonable time after service. Deposition transcripts, discovery requests and responses, requests for admission, and requests to permit entry upon land not filed until used in court proceedings. (C.R.C.P. 5[d]).

Proof of Claims.

No statutory provision. Uniform Enforcement of Foreign Judgments Act adopted. (C.R.S. 13-53-101 to 108). Fee of $166 required to be paid to clerk of court by person filing foreign judgment. (C.R.S. 13-53-106).

Demurrer.

Demurrers, pleas and exceptions for insufficiency of a pleading shall not be used. (C.R.C.P. 7[c]).

Amended or Supplemental Pleadings.

Federal Rules of Civil Procedure adopted with no material variation. (C.R.C.P. 15).

Motion for Separate or More Definite Statement.

Before responding to pleading or, if no responsive pleading is permitted, within 20 days after service of pleading upon him, party may file motion for statement in separate counts or defenses, or for more definite statement, of any matter not averred with sufficient definiteness to enable him to prepare his responsive pleading. (C.R.C.P. 12[e]).

Verification or affidavits need not accompany pleadings (C.R.C.P. 11) except disclosures made under C.R.C.P. 16.1(k)(1)(A), petitions or motions for depositions to perpetuate testimony (C.R.C.P. 27[a][1]), temporary restraining order (C.R.C.P. 65[b]), indirect contempt (C.R.C.P. 107[c]), service by mail (C.R.C.P. 4[g]), service by publication (C.R.C.P. 4[g]), entry of default and default judgment (C.R.C.P. 55[a]; C.R.C.P. 121, § 1-14), new trial on specified grounds (C.R.C.P. 59[a], [c]) and order authorizing sale under power and response thereto (C.R.C.P. 120[a], [c]).

Every pleading of party represented by attorney must be signed by attorney, who shall also state his address and party's address. Attorney must state his supreme court registration number on initial pleading filed by him. Party who represents himself must sign his pleading and state his address. (C.R.C.P. 11). See subhead Frivolous Claims, infra.

Service.

See topic 5.20 Process. Federal Rules of Civil Procedure adopted with no material variation. (C.R.C.P. 5[a], [b]).

For purposes of service a resident attorney must be associated as an attorney of record with any foreign attorney practicing in any courts of Colorado. (C.R.C.P. 5[b]).

Time.

Defendant must file answer or other response within 20 days after service of summons and complaint or within 30 days if, pursuant to special order, copy of complaint was not served with summons or summons was served out of state, or by publication; party served with cross-claim or counterclaim, or desiring to reply to affirmative defense, must file reply within 20 days. If pleading ordered by court, reply must be filed within 20 days after entry of order. If court denies motion under C.R.C.P. 12 or C.R.C.P. 98 or postpones disposition until trial on merits, responsive pleadings shall be filed within ten days after notice of court's action. Upon grant of motion for more definite statement or statement in separate counts or defenses, responsive pleading must be filed within ten days after service of more definite statement or amended pleading. (C.R.C.P. 12[a]). Upon grant of motion to change venue, responsive pleading must be filed within ten days of docketing action in court to which action removed or, where motion to change venue denied, responsive pleading must be filed within ten days of order so denying. (C.R.C.P. 98[e][2]).

Demand for trial by jury must be made within ten days after service of last pleading directed to issue (C.R.C.P. 38[b]); if party has demanded trial by jury for only some issues, any other party may, within ten days after service of demand, demand trial by jury for other issues (C.R.C.P. 38[d]). Jury fee must be paid with demand. (C.R.C.P. 38[a]).

Motion for new trial must be filed within 15 days after entry of judgment, unless court grants longer period. (C.R.C.P. 59[a]). Filing of motion for post-trial relief is not condition precedent to appeal or cross-appeal, and filing of such motion does not limit issues that may be raised on appeal. (C.R.C.P. 59[b]). Affidavit supporting motion for new trial required, except when motion based on grounds of excessive or inadequate damages or error in law. Opposing party has 15 days after service to file opposing affidavits; this period may be extended by written stipulation or leave of court. (C.R.C.P. 59[d]). Within time allowed parties, court may order new trial on its own initiative. (C.R.C.P. 59[c]).

Computation of time controlled by C.R.C.P. 6 which adopts Federal Rules of Civil Procedure with exceptions that when period of time prescribed is less than 11 days, intermediate Sats., Suns. and legal holidays excluded from computation.

Small Claims.

See category 6 Courts and Legislature, topic 6.01 Courts.

See also topic 5.09 Damages.

Frivolous Claims.

Sanctions for any pleading that is substantially frivolous, groundless, or vexatious. (C.R.C.P. 11, 121, § 1-15[7]; C.R.S. 13-17-102). Signature of attorney on pleading constitutes certificate by him that he has read pleading, that to best of his knowledge, information and belief formed after reasonable inquiry, it is well grounded in fact and is warranted by existing law or good faith argument for extension, modification, or reversal of existing law, and that it is not interposed for improper purpose, such as to harass or to cause unnecessary delay or needless increase in cost of litigation. Sanctions for violation include costs and attorneys fees incurred because of pleading. Sanctions not imposed if voluntary dismissal or withdrawal occurs within reasonable time after knowledge that party would not prevail on claim, action, defense, or motion. (C.R.S. 13-17-102).

5.19 PRACTICE:

Practice in courts of record is governed by Colorado Rules of Civil Procedure which in most instances, are similar to Federal Rules of Civil Procedure. (Court Rules, Colo. Rev. Stat.). Practice before administrative agencies is governed in most cases by Colorado State Administrative Procedure Act. (C.R.S. 24-4-101 to 108). As of Apr. 1, 1988, all local court rules abolished and only reinstated with specific permission of Supreme Court. No local rules in effect. C.R.C.P. 121 sets forth statewide practice including procedures for: entry of appearance and withdrawal; special admission of out-of-state attorneys; jury fees; access to court files; settings for trials or hearings; consolidation; dismissal for failure to prosecute; continuances; matters related to discovery; default judgments; determination of motions; pretrial procedure and settlement; jury instructions; bonds in civil actions; and other administrative matters.

Requests for Admission of Facts.

Federal Rules of Civil Procedure adopted except presumptive limit of 20 requests. (C.R.C.P. 36[a]; C.R.C.P. 26[b][2][E]).

Small Claims.

See category 6 Courts and Legislature, topic 6.01 Courts.

See topics 5.02 Actions, Appeal and Error, Certiorari, Depositions and Discovery, Injunctions, Judgments, Limitation of Actions, Partition, Pleading, Process, Replevin, Venue; categories 5 Civil Actions and Procedure, topic Evidence, subhead Witnesses; Debtor and Creditor, topics Attachment, Creditors' Suits, Executions, Garnishment, Receivers; Family, topic Divorce.

Case Management.

Except for domestic relations, juvenile, mental health, probate, water law, forcible entry and detainer, sales under powers, or other expedited hearings, lead counsel must meet not later than 15 days after case is at issue and discuss claims, defenses, and whether modified case management order is appropriate. (C.R.C.P. 16[b][3]). Case is at issue when all parties served and pleadings permitted under C.R.C.P. 7 filed. Unless modified, presumptive case management order will govern pretrial proceedings. (C.R.C.P. 16[b]). Except as provided, parties shall not file case management order. (C.R.C.P. 16[b]). Presumptive case management order sets forth time for trial setting (C.R.C.P. 16[b][4]), disclosure obligations and timing (C.R.C.P. 16[b][5]), settlement discussions (C.R.C.P. 16[b][6]), time for joining parties and amending pleadings (C.R.C.P. 16[b][8]), time for filing pretrial motions (C.R.C.P. 16[b][9]), and discovery schedule (C.R.C.P. 16[b][10]). No later than 45 days after case is at issue, responsible attorney (C.R.C.P. 16[b][2]) will file certificate of compliance with C.R.C.P. 16(b)(3)-(6). Any provision of presumptive case management order may be modified by entry of modified case management order. (C.R.C.P. 16[c]). Parties may stipulate to modified case management order within 45 days of at issue date. (C.R.C.P. 16[c][1]). Good cause is required for stipulated modification. (C.R.C.P. 16[c][1]). Party may file disputed motion to modify presumptive case management order. (C.R.C.P. 16[c][2]). Good cause required. (C.R.C.P. 16[c][2]). Party may seek case management conference (C.R.C.P. 16[d]), which may be conducted by phone (C.R.C.P. 16[d]). Party may move to amend case management order for good cause shown. (C.R.C.P. 16[e]).

Counsel also must confer and develop Trial Management Order, which is due 30 days before trial. (C.R.C.P. 16[f]). It must include in specified format statement of claims and defenses, stipulated facts, pretrial motions, legal issues, itemization of damages, proposed trial efficiencies, and identification of witnesses and exhibits. (C.R.C.P. 16[f][3]). Court approves this Order. (C.R.C.P. 16[f][4]). Order controls subsequent course of proceedings. (C.R.C.P. 16[f][5]). Counsel also must confer and develop jury instructions and verdict forms. (C.R.C.P. 16[g]).

Rule 16.1 provides for simplified procedure in certain civil cases. Simplified procedure is available for all civil actions other than civil actions in which any party seeks monetary judgment against any other party of more than $100,000 (including attorneys' fees, but exclusive of interest and costs), and other than civil actions that are class actions, domestic relations, juvenile, mental health, probate, water law, forcible entry and detainer, C.R.C.P. 120, and other similar expedited proceedings, unless otherwise stipulated by parties. (C.R.C.P. 16.1[b][1],[2]). In cases subject to C.R.C.P. 16.1, claimant's right to monetary judgment against any one party is limited to maximum of $100,000, including any attorney fees, penalties, or punitive damages, but excluding interest and costs. Jury is not informed of $100,000 limitation. If jury returns verdict for damages in excess of $100,000, then trial court must reduce verdict to $100,000. $100,000 limitation does not, however, restrict award of non-monetary relief. (C.R.C.P. 16.1[c]).

Cases subject to simplified procedure set forth in C.R.C.P. 16.1 are not subject to C.R.C.P. 16, 26-34, and 36 of Colorado Rules of Civil Procedure, except as expressly set forth in C.R.C.P. 16.1. Instead, each party is to make disclosures pursuant to C.R.C.P. 26(a)(1), 26(a)(4), 26(a)(6), and 26(c), 26(e), and 26(g) no later than 30 days after case is at issue, and disclosing party must sign all disclosures under oath (C.R.C.P. 16.1[k][1][A]). C.R.C.P. 16.1 further provides for additional disclosures in personal injury actions and employment actions (C.R.C.P. 16.1[k][1][B]). Disclosure of expert witnesses proceeds as in other civil actions. (C.R.C.P. 16[k][2]). In addition, each party must serve written disclosure statements identifying name, address, telephone number, and detailed statement of expected testimony for each witness that party intends to call at trial whose deposition has not been taken and from whom expert reports have not been provided. (C.R.C.P. 16.1[k][3]). Witnesses whose depositions have not been taken shall be limited to testifying on direct examination about matters disclosed in reasonable detail in written disclosures, although party may call witnesses for whom written disclosures were not previously made for purpose of authenticating exhibits, if opposing party made timely objection to authenticity of such exhibits. (C.R.C.P. 16.1[k][7]).

Rule 16.1 shall apply unless, no later than 35 days after case is at issue, any party files written notice, signed by party and its counsel, if any, stating that party elects to be excluded from application of simplified procedure set forth in C.R.C.P. 16.1. In event that such notice is filed, C.R.C.P. 16 shall apply (C.R.C.P. 16.1[d]). Conversely, in actions excluded by C.R.C.P. 16.1(b)(2), relating to civil actions in which party seeks monetary judgment in excess of $100,000, within

45 days after case is at issue, parties may file stipulation to be governed by C.R.C.P. 16.1. In such event, parties shall not be bound by $100,000 limitation on judgments contained in C.R.C.P. 16.1(c). (C.R.C.P. 16.1[e]).

Rule 16.2 governs case management in domestic relations cases. In such cases, court provides active case management from filing to resolution or hearing on all pending issues. Parties, counsel and court evaluate each case at all stages to determine scheduling of that individual case, as well as resources, disclosures/discovery, and experts necessary to prepare case for resolution or hearing. (C.R.C.P. 16.2[b]). If both parties are represented by counsel, counsel may submit stipulated case management plan signed by counsel and parties. Counsel must also exchange mandatory disclosures and file certificate of compliance. Court retains discretion to require status conference after review of stipulated case management plan. (C.R.C.P. 16.2[c][1][C]). Initial status conference must take place, or stipulated case management plan must be filed with court, no later than 40 days from filing of petition. (C.R.C.P. 16.2[c][1][E]). At each conference, parties should be prepared to discuss what needs to be done and determine timeline for completion. Parties confer in advance on any unresolved issues. (C.R.C.P. 16.2[c][2][A]).

Disclosure Duties.

Except for domestic relations, juvenile, mental health, probate, water law, forcible entry and detainer, sales under powers, or other expedited hearings, each party must provide to other parties name of each individual likely to have discoverable information, listing and copy or description of all documents relevant to facts alleged with particularity in pleadings, damage computation, and any relevant insurance agreement. (C.R.C.P. 26 [a][1]). Disclosure must be made within 30 days after case is at issue. (C.R.C.P. 16[b]). Unless otherwise specified in Case Management Order, expert testimony must be disclosed by claiming party under complaint, counterclaim, cross-claim or third party claim no later than 120 days before trial, and by defending party 30 days later. (C.R.C.P. 26[a][2]). Rebuttal expert testimony must be disclosed 20 days after disclosure of expert evidence which it is meant to rebut. All disclosures must be signed, and signature constitutes attestation that disclosure is complete and correct. (C.R.C.P. 26[g][1]). Court can compel disclosure or order sanctions if party fails to comply with disclosure obligations. (C.R.C.P. 37[a][2][A]).

Rule 16.2(e) governs disclosure duties in domestic relations cases. Parties must affirmatively disclose all information material to resolution of case without awaiting inquiry from other party. This disclosure shall be conducted in accord with duty of candor owing among those whose domestic issues are to be resolved under C.R.C.P. 16.2. (C.R.C.P. 16.2[e][1]). Parties must, without formal discovery request, provide mandatory disclosures listed in Appendix to cc. 1 to 17A, Form 35.1 and provide completed financial affidavit as shown in Form 35.2. (C.R.C.P. 16.2[e][2]). Parties must, without formal discovery request, provide list of expert and lay witnesses whom they intend to call at contested hearing or final orders no later than 60 days before proceeding. (C.R.C.P. 16.2[e][3]). Certificate of compliance must accompany mandatory disclosures and must be filed with court. (C.R.C.P. 16.2[e][7]).

Discovery.

Broad powers of discovery are provided. (C.R.C.P. 26 to 37). Unless otherwise ordered by court, party may depose each adverse party once, take two other depositions (exclusive of experts), propound 30 interrogatories, and make 20 document requests and 20 requests for admission.

Rule 16.2(f) governs discovery in domestic relations cases. Rule allows depositions of parties and non-parties. (C.R.C.P. 16.2[f][1], [2]). Appendix to cc. 1 to 17A, Form 35.3 lists pattern interrogatories for document production. Parties shall only undertake discovery agreed to in initial status conference or stipulated case management plan, and they may serve each adverse party with any of pattern interrogatories and requests for production of documents contained in Forms 35.3 or 35.4, plus additional ten written interrogatories and ten requests for document production. (C.R.C.P. 16.2[f][3]). Court may authorize additional discovery for good cause. (C.R.C.P. 16.2[f][4]). All discovery shall be initiated so as to be completed not later than 30 days before hearing, except for extensions allowed by court for good cause or to prevent manifest injustice. (C.R.C.P. 16.2[f][5]). See topic 5.10 Depositions and Discovery.

5.20 PROCESS:

Process runs in the name of "The People of the State of Colorado" and is based on Federal Rules of Civil Procedure. See topic 5.19 Practice. (Colo. Const., art. VI, § 22).

Summons may be signed and issued by clerk, under seal of court, or by plaintiff's attorney. Separate, additional or amended summons may issue against any defendant at any time. All other process must be issued by clerk, except as otherwise provided by Rules. (C.R.C.P. 4[b]).

Contents of Summons.

Summons must state name of court, names or designations of parties, county in which brought, must be directed to defendant, state time in which defendant must appear and defend and that failure to do so may subject him to judgment by default. If served by publication, summons must state money or relief demanded. Summons must state name, address, and registration number of plaintiff's attorney, if any, and if not, plaintiff's address. Except for service by publication or other court order, complaint must be served with summons, and if such other order issues, it must be served with summons. (C.R.C.P. 4[c]).

Who May Serve.

Process may be served: inside or outside of state by sheriff, or his deputy, or by any other person over age of 18 not party to action. (C.R.C.P. 4[d]).

Personal service within the state may be made as follows: (1) On a natural person over the age of 18 by delivering a copy personally or leaving copy at his usual place of abode with some member of family over age of 18, or at usual place of business with stenographer, bookkeeper or chief clerk, or by delivering copy to agent authorized by appointment or by law to receive service of process. (2) On natural person between ages of 13 and 18 by delivering copy to him and copy to his father, mother, or guardian, or if there be none in state by delivering copy to any person in whose care or control he may be or with whom he resides or in whose service he is employed; upon natural person under age 13 by delivery of copy to his father, mother, or guardian. (3) On person for whom conservator has been appointed by delivering copy thereof to such conservator. (4) On any form of corporation, partnership, association, cooperative, limited liability company, limited partnership association, trust, organization, or other form of entity that is recognized under laws of this state or of any other jurisdiction, (including any such organization, association or entity serving as agent for service of process for itself or for another entity) by delivering copy to registered agent for service as set forth in most recent documents on file with secretary of state of Colorado or other jurisdiction, or by delivering copy to: officer if entity has officers; general partner of any form of partnership; manager of limited liability company or limited partnership association if management is vested in managers rather than members; member of limited liability company or limited partnership association if management is vested in members or if management is vested in managers and there are no managers; trustee of trust; or to functional equivalent of any of preceding, regardless of title, as described by: organization or entity's filed documents by which entity or any or all owners obtain status as entity or attributes of limited liability; or law pursuant to which entity is formed or law that governs entity. If none of persons described in (4) can be found in Colorado, service may be made on any shareholder, member, partner, or person with ownership or similar interest in entity, or upon any director, agent, or principal employee of such entity, who can be found in this state; or by service as otherwise provided by law; (5) repealed; (6) On municipal corporation by delivering copy thereof to mayor, city manager, clerk or deputy clerk of such corporation. (7) On county by delivering copy to county clerk or his chief deputy, or county commissioner. (8) On school district by delivering copy to superintendent. (9) On state by delivering copy thereof to attorney general. (10) (A) On officer, agent, or employee of state, acting in his official capacity, by delivering copy thereof to officer, agent, or employee, and by delivering copy to attorney general; (B) On department or agency of state, subject to suit, by delivering copy to principal officer, chief clerk, or other executive employee, and by delivering copy to attorney general. For all purposes day of service upon officer, agent, employee, department or agency shall control, except that failure to serve copies upon attorney general within three days of service upon officer, agent, employee, department or agency shall extend time within which officer, agent, employee, department or agency may file responsive pleading for 60 days beyond time otherwise provided by rules. (C.R.C.P. 4[e][10][C]). (11) On other political subdivisions of State of Colorado, special districts, or quasi municipal entities, by delivering copy to any officer or general manager, unless otherwise provided by law. (12) For any of preceding in (4)-(12), service may be made by delivering copy to any designee authorized to accept service, or by delivering to person authorized by appointment or law to receive service. (C.R.C.P. 4[e]). See topic 5.17 Pleading, subhead Time.

Jurisdiction of Courts.

Engaging, either in person or by agent, in transaction of any business within this state; commission of tortious act within this state; ownership, use, or possession of any real property situated in this state; contracting to insure any person, property, or risk residing or located within this state at time of contracting; or maintenance of matrimonial domicile within state if one party to marriage continues without interruption to be domiciled within state, submits such person and, if natural person, his personal representative to jurisdiction of courts of this state, concerning any cause of action arising from such acts. (C.R.S. 13-1-124).

Service by mail or publication is allowed only in cases affecting specific property or status or other proceedings in rem. (C.R.C.P. 4[g]). Service by mail or publication not permitted in personal injury action seeking compensatory damages even if defendant willfully conceals himself from service. (709 P.2d 1383). Registered mail as used in Colorado statutes includes certified mail. (C.R.S. 2-4-401[12]).

Service by mail may be secured on motion to court verified by oath of party or someone in his behalf for order for service by mail. Motion must state address of person being served and facts showing why service by mailing is advisable. Court may hear motion ex parte and direct party to send copy of process and pleading to person being served. Such service becomes complete on filing of party’s proof, together with return receipt showing delivery of registered letter and signed by addressee. (C.R.C.P. 4[g][1]).

Service by publication may be by filing verified motion for order of publication with specified information which court may grant following ex parte hearing if satisfied that due diligence has been used to obtain personal service within state or that efforts to obtain such service would have been of no avail. Publication is made for five weeks in newspaper published in county in which action pending or if none, designated paper in adjoining county. Within 15 days after order of publication party must mail copy of process to each person whose last known address has been stated in motion. Service becomes complete on day of last publication. (C.R.C.P. 4[g][2]).

Refusal of Service.

If person to be served refuses to accept process, service shall be sufficient if person serving states name of process and offers to deliver copy, and leaves copy in conspicuous place. (C.R.C.P. 4[k]).

Long Arm Statute.

See subhead Jurisdiction of Courts, supra.

Nonresident Motorist.

See category 23 Transportation, topic 23.01 Motor Vehicles.

Proof of Service.

If service is made upon person, by duly acknowledged statement certified by sheriff, marshal or similar government official or statement duly acknowledged under oath by any other person completing service as to date, place, and manner of service. If service is made by mail, by affidavit showing date of mailing with return receipt attached, where required. If service is by publication, by affidavit of publication, together with affidavit as to mailing of copy of process where required. If served by waiver, by written admission or waiver of service by person or persons served, duly acknowledged, or by their attorney. If served by substituted service, by duly acknowledged statement as to date, place, and manner of service, accompanied by affidavit that process was also mailed to party to be served by substituted service, setting forth address where process was mailed. (C.R.C.P. 4[h]).

Amendment.

The court may, at any time and on such terms as it deems just, allow any process or proof of service thereof to be amended unless it clearly appears that material prejudice would result to the substantial rights of the party against whom the process issued. (C.R.C.P. 4[j]).

5.21 REPLEVIN:

Rule 104, Colorado Rules of Civil Procedure.

County Court Rule 404 is substantially similar to C.R.C.P. 104, but jurisdiction is limited to recovery of property of value not exceeding $15,000 (C.R.S. 13-6-104). Actions to replevin personal property not exceeding $7,500 in value may be brought in small claims court. (C.R.S. 13-6-403).

Plaintiff in an action to recover possession of personal property may at any time before trial claim delivery of such property to him. Although C.R.C.P. 104 does not specify that demand be made, Colorado case law indicates demand must precede replevin when person in possession acquired property in good faith by purchase or when necessary to terminate defendant's right of possession or to confer that right on plaintiff, but demand may be made after commencement of action for possession. (9 Colo. 390, 12 P. 434; 41 Colo. 164, 91 P. 1110). Common law writs of replevin are archaic under current law and practice, since C.R.C.P. 104 normally contemplates only issuance of show cause order followed by preliminary hearing prior to issuance of order for possession (72 F. 464). Purpose of C.R.C.P. 104 prejudgment replevin hearing is to ensure that defendant's constitutional property rights are not jeopardized by unduly summary claim and repossession proceedings (601 P.2d 626). Although district court sits as court of general jurisdiction in action to replevin personal property, its powers are limited in C.R.C.P. 104 prejudgment hearing to deciding issue of which party, with reasonable probability, is entitled to possession, use, and disposition of property pending final adjudication of claims of parties. (601 P.2d 626). Court conducting hearing under C.R.C.P. 104 lacks jurisdiction to affect possessory rights in any property not brought within its purview by duly issued order to show cause, and jurisdiction over parties and subject matter does not authorize trial court to enter under C.R.C.P. 104 whatever remedial orders it deems necessary to finally adjust equities between parties. (601 P.2d 626).

Proceedings.

Where delivery is claimed, plaintiff must by verified complaint or by complaint and affidavit under penalty of perjury show court following: (1) That plaintiff is owner of property claimed or entitled to possession thereof and source of such title or right; if plaintiff’s interest is based upon written instrument, a copy thereof must be attached; (2) that property is being detained by defendant against plaintiff’s claim of right to possession, means by which defendant came into possession thereof, and specific facts constituting detention against right of plaintiff to possession; (3) particular description of property, statement of its actual value, and statement to his best knowledge, information and belief concerning location of property and of residence and business address, if any, of defendant; (4) that property has not been taken for tax assessment or fine pursuant to statute, or seized under an execution against property of plaintiff; if so seized, that it is by statute exempt from such seizure. (C.R.C.P. 104[b]).

Court must examine complaint and affidavit, and upon being satisfied that it meets above requirements, it must issue an order directed to defendant to show cause why property should not be taken from defendant and delivered to plaintiff. Such order shall fix time and date of hearing thereof. Hearing date must not be more than ten days from date of issuance of order and order must have been served at least five days prior to hearing date. Plaintiff may request hearing date beyond ten days, which request shall constitute waiver of right to hearing not more than ten days from date of issuance of order. Such order shall inform defendant that he may file affidavits on his behalf with court and may appear and present testimony in his behalf at time of such hearing, or that he may, at or prior to such hearing, file with court written undertaking to stay delivery of property, in accordance with C.R.C.P. 104(j) and that, if he fails to appear at hearing on order to show cause or file undertaking, plaintiff may apply to court for order requiring sheriff to take immediate possession of property described in complaint and deliver same to plaintiff. Summons and complaint, if not previously served, and order must be served on defendant and order must fix manner in which service shall be made which shall be by service in accordance with provisions of C.R.C.P. 4, or in such manner as court may determine to be reasonably calculated to afford notice thereof to defendant under circumstances appearing from complaint and affidavit (C.R.C.P. 104[c]).

Subject to limitations of § 5-104 of Uniform Consumer Credit Code, as modified (C.R.S. 5-5-104), prohibiting prejudgment replevin of most goods in connection with collection actions arising out of consumer credit transactions, upon examination of complaint and affidavit and such other evidence or testimony as court may thereupon require, court may issue order of possession prior to hearing, if probable cause appears that any of following exist: (1) Defendant gained possession of property by theft; (2) property consists of one or more negotiable instruments or credit cards; (3) by reason of specific, competent evidence shown, by testimony with personal knowledge of affiant or witness, property is perishable, and will perish before any noticed hearing can be had, or that defendant may destroy, dismantle, remove parts from, or in any way substantially change character of property, or defendant may conceal or remove property from jurisdiction of court to sell property to innocent purchaser; or (4) that defendant has by contract voluntarily and intelligently and knowingly waived his right to hearing prior to losing possession of property by means of court order (C.R.C.P. 104[d]).

Where an order of possession has been issued prior to hearing under provisions described above, defendant or other persons from whom possession of said property has been taken, may apply to court for an order shortening time for hearing on order to show cause, and court may upon such application shorten time for hearing, and direct that matter be heard on not less than 48 hours notice to plaintiff. (C.R.C.P. 104[d]).

Before prehearing order of possession can issue under C.R.C.P. 104(d), bond must be filed by plaintiff with such surety as court may require in amount set by court in its discretion, but not to exceed double value of property as stated in affidavit, for return of property to defendant, if such return thereof be ordered, and for payment to defendant of any sum that may from any cause be recovered against plaintiff (C.R.C.P. 104[e]). Written exception to sureties on any bond required must be taken by party within two days after notice thereof or objection waived. Language of C.R.C.P. 104(e) “any sum that may from any cause be recovered” concerning amount of bond covers only claims of possession and loss thereof and not underlying claims unrelated to possession or loss of property at issue. (586 P.2d 243).

At hearing on order to show cause, court must make preliminary determination which party is, with reasonable probability, entitled to possession of property, pending final adjudication. Court may require bond in such amount and with such surety as will protect rights of parties. Failure of defendant to be present does not constitute default in main action. (C.R.C.P. 104[g]).

In addition to issuance of order to show cause or in lieu of immediate issuance of order for prehearing possession, court may issue such temporary orders, directed to defendant, prohibiting or requiring such acts with respect to property as may appear to be necessary for preservation of rights of parties and status of property. (C.R.C.P. 104[f]).

Contents of Possession Order.

Order of possession shall describe specific property to be seized, and shall specify location or locations where there is probable cause to believe property or some part thereof will be found. It shall direct sheriff to seize same as it is found and to retain it in his custody. Order shall inform defendant that he has right to except to sureties or amount of bond upon undertaking or to file a written undertaking for redelivery of such property. (C.R.C.P. 104[h]).

Sheriff shall forthwith take property if it be in possession of defendant or his agent, and retain it in his custody; except that when personal property is then occupied as a dwelling, sheriff shall take constructive possession of property and shall remove its occupants and take property into his actual custody at expiration of ten days after issuance of order of possession, or at such earlier time as property shall be vacated. (C.R.C.P. 104[h]).

Sheriff May Break Open Building; When.

If property or any part thereof is in a building or enclosure, sheriff is to demand delivery of property, announcing his identity, purpose, and authority under which he acts. If property is not voluntarily delivered, he is to cause building or enclosure to be broken open in such manner as he reasonably believes will cause least damage to building or enclosure and take property into his possession. (C.R.C.P. 104[i]).

Return to Defendant.

At any time prior to hearing on order to show cause, or before delivery of property to plaintiff, defendant may require return thereof upon filing with court written undertaking, in amount set by court at its discretion not to exceed double value of property and executed by defendant and such surety as court may direct for delivery of property to plaintiff, if such delivery be ordered, and for payment to plaintiff of such sum of money as may for any cause be recovered against defendant. (C.R.C.P. 104[j]).

Claims of Third Persons.

Person other than defendant or plaintiff claiming property may intervene under provisions of C.R.C.P. 24, and in event of a judgment in his favor, he may also recover such damages as he may have suffered by reason of any wrongful detention of property (C.R.C.P. 104[m]).

Precedence on Docket.

All proceedings brought to recover possession of personal property must, upon request of any party thereto, be given precedence by courts in which such actions are pending over all other civil actions, except actions to which special precedence is otherwise given by law, in manner of setting of same for hearing or trial, and in hearing or trial thereof, to end that all such actions shall be quickly heard and determined. (C.R.C.P. 104[o]).

Judgment.

In an action to recover possession of personal property, judgment for plaintiff may be for possession or value in case where delivery cannot be had and damages for detention. If property has been delivered to plaintiff, and defendant claims a return thereof, judgment for defendant may be for return of property, or value thereof where return cannot be had and damages for taking and withholding same. C.R.C.P. 13 relating to counterclaims applies to replevin actions (C.R.C.P. 104[p]).

Trial of principal action in which replevin order is issued proceeds in same manner as ordinary civil action. It is not affected by fact that property involved has been replevied or by plaintiff's failure to prevail on claim for prejudgment order of possession under C.R.C.P. 104.

5.22 SEQUESTRATION:

No legislation.

5.23 [RESERVED]

5.24 STAY OF EXECUTION:

See topic 5.03 Appeal and Error; category 8 Debtor and Creditor, topic 8.05 Executions.

5.25 SUBMISSION OF CONTROVERSY:

Actual justiciable controversy may be submitted, without pleadings on agreed statement of facts, supported by affidavit to court of competent jurisdiction, which may render judgment thereon as in action. (C.R.C.P. 7[d]).

Office of Dispute Resolution.

Persons are eligible for mediation services through state office of dispute resolution after having filed complaint in civil action in county or district court. Proceedings regarded as settlement negotiations, and statements made therein of limited discoverability and admissibility at trial. Agreements reduced to writing and presented to court as stipulation, and if approved, are enforceable as order of court. (C.R.S. 13-22-301 to 313). Subject to certain limitations, any court of record may refer any case to early neutral evaluation by court appointed evaluator to narrow, eliminate, or simplify issues, or refer case to mediation, or other alternative dispute resolution procedures. (C.R.S. 13-22-302 to 313).

5.26 VENUE:

Subject to exceptions below, actions may generally be tried in any county where any defendant resides at commencement of action, or in county where plaintiff resides when service is made upon defendant in such county; or on nonresident defendant, in any county where defendant may be found or in county designated in complaint. If defendant is about to depart state, action also may be brought in county where plaintiff resides or in county where service is made. (C.R.C.P. 98[c][1]). Substance, rather than form, of action controls venue determination. (702 P.2d 262).

Real Property, Franchises and Utilities.

Actions affecting real property, franchises and utilities must be tried in county in which subject of action, or substantial part thereof, is situated. (C.R.C.P. 98[a]).

Penalties and Public Officials.

Action to recover statutory penalty or against public officials must be brought in county where claim, or part thereof, arose. (C.R.C.P. 98[b]). Claim for injunctive relief against public official arises in county in which public body had its official residence. (187 Colo. 113, 528 P.2d 1305).

Injunction to Stay Proceedings.

Action to stay suit or judgment must be brought in county where judgment was obtained or suit is pending. (C.R.C.P. 98[d]).

Consumer Contracts.

Consumer contract is transaction by person primarily for personal, family or household purposes, involving $25,000 or less. (C.R.C.P. 98[c][3][A]). Action on consumer contract must be brought in county where contract was entered into by any defendant, where any defendant resides at commencement of action or resided when contract entered into or on nonresident defendant, in any county where defendant may be found or in county designated in complaint. (C.R.C.P. 98[c][3][B]). If defendant is about to depart state, action also may be brought in county where plaintiff resides or in county where service is made upon such defendant. (C.R.C.P. 98[c][3][B]). Contract provision in consumer contract fixing venue in place unauthorized by rule is void. (C.R.C.P. 98[c][3][C]). Debt collectors covered by provisions of federal “Fair Debt Collection Practices Act” must comply with venue provisions in 15 U.S.C. 1692i. (C.R.C.P. 98[c][3][D]).

Other Contracts.

Except for consumer contracts, contract action also may be brought in county where contract to be performed as well as in counties covered by general venue provisions. (C.R.C.P. 98[c][2], [4]). Action on book account or for goods sold and delivered also may be tried in county where plaintiff resides or goods were sold. (C.R.C.P. 98[c][2]).

Torts.

Tort action may be brought in county where tort committed as well as in counties covered by general venue provisions. (C.R.C.P. 98[c][5]).

Interpleader action may be brought in county where claimant resides as well as in counties covered by general venue provisions. (C.R.C.P. 98[c][6]).

Change of venue may be granted if action is brought in improper county or when convenience of witnesses and ends of justice would be promoted. (C.R.C.P. 98[f]). If district court concludes, upon motion of party, that fair trial could not be obtained in county, venue must be changed. (C.R.C.P. 98[g]). Venue also may be changed upon agreement of all parties. (C.R.C.P. 98[i] and [j]). Party obtaining change of venue is only entitled to one change upon same grounds. (C.R.C.P. 98[k]).

6 COURTS AND LEGISLATURE

6.01 COURTS:

United States District Court.

Clerk’s office: 901 19th Street, Room A105, Denver 80294-3589, 303-844-3433.

Docket Fee.

On commencement of civil action, fee of $350 is required. One district covers entire state.

Court sits at Denver. Court sits when required at Boulder, Pueblo, Grand Junction, Montrose, Durango and Sterling. All papers should be filed at Denver. All documents in civil cases must be filed in Electronic Case Filing (ECF). Court has enacted Local Rules of Practice; copies available from clerk's office and online.

Supreme Court.

Court consists of seven justices, who sit en banc. Four votes are required to decide any matter coming before court, except for grant of certiorari petition, which requires three votes.

Docket Fee.

$150 for appellant or petitioner; $75 for appellee or respondent.

Court has jurisdiction to review some final judgments of court of appeals, district, probate, county and juvenile courts by writ of error, appeal or certiorari; it also has power to issue certain original writs. Court shall review any death sentence. (App. Rule 4[d]).

Court sits at Denver. See category 5 Civil Actions and Procedure, topic 5.03 Appeal and Error.

Court of Appeals.

Court consists of 22 judges who sit in divisions of three judges. (C.R.S. 13-4-103).

Docket Fee.

$150 for appellant or petitioner; $75 for appellee or respondent.

Bond for Costs.

$250 for civil cases, unless trial court fixes different amount. (App. Rule 7).

Court has initial jurisdiction over appeals from final judgment of district courts, and probate and juvenile courts of Denver, except: Cases involving constitutionality of statutes, charters, and ordinances, cases involving public utilities commission, water priority and adjudication cases, writs of habeas corpus, post conviction relief when death sentence imposed (C.R.S. 13-4-102[1][h]), cases appealed from county court to district court, and certain summary proceedings described in C.R.S. 13-4-102(1)(g).

Court also has initial jurisdiction to review awards or actions of industrial claims appeals office, orders of banking board granting or denying charters for new state banks, decisions of medical examiners and of board of dental examiners refusing to grant, revoking, or suspending licenses or placing holder thereof on probation, decisions of board of education dismissing teacher, final decisions and orders of civil rights commission, and orders or decisions of numerous other administrative agencies, boards or licensing authorities. (C.R.S. 13-4-102).

Cases may be certified to supreme court for public interest, expedience and importance of legal principles involved. (C.R.S. 13-4-109). See category 5 Civil Actions and Procedure, topic 5.03 Appeal and Error.

District Courts.

These courts have original jurisdiction of all causes at law and in equity, including divorce cases. They have original jurisdiction to try all criminal cases, whether involving a felony or a misdemeanor, and exclusive original jurisdiction in criminal cases where penalty may be death. They have appellate jurisdiction in all cases commenced in county courts. (C.R.S. 13-4-102). They have exclusive jurisdiction for certain water matters which are heard by designated water judges. (C.R.S. 37-92-203). There are 22 districts.

Docket Fee.

As set forth in C.R.S. 13-32-101 to 113.

Districts.

For list of counties that are within particular judicial district, as well as names of court seats, see Colorado Courts' official website, http://www.courts.state.co.us.

County Courts are courts of record established in each county. Jurisdiction is state-wide, subject to venue provisions. County courts have original jurisdiction in hearings concerning impoundment of motor vehicles. (C.R.S. 42-13-106). County courts have original jurisdiction concurrent with district courts in civil actions involving claims not exceeding $15,000, and counterclaims not exceeding $15,000. County courts also have concurrent jurisdiction with district courts in actions of forcible entry, forcible detainer, and unlawful detainer, where judgments for damages, rent, etc. do not exceed $15,000, exclusive of costs and attorney's fees. (C.R.S. 13-6-104). County courts have jurisdiction in petitions for change of name or issuance of delayed or corrected birth certificates, and to issue peace bonds and restraining orders to prevent assaults and threatened personal harm and in actions to foreclose liens under C.R.S. 38-20-101 to 116. County courts have only limited jurisdiction, and have no power over matters of probate, mental health, matters of divorce, declaration of invalidity of marriage, support, matters affecting children (including adoption, support, guardianship, dependency and delinquency), matters affecting boundaries or title to real property, or original injunction proceedings (except as specifically authorized), such as orders to enforce restrictive covenants on residential property. (C.R.S. 13-6-105). County courts have original criminal jurisdiction in misdemeanor or petty offense actions, including misdemeanor traffic offenses (C.R.S. 13-6-106; 42 Colo. App. 187, 591 P.2d 600), arising under state law, except in cases involving children over which Denver juvenile court or district courts of state have exclusive jurisdiction. (C.R.S. 13-6-106). They may issue warrants, conduct preliminary examinations, issue bindover orders, and admit persons to bail in both felony and misdemeanor matters. (C.R.S. 13-6-106). County court must transfer to district court any attachment proceedings where value of indivisible property at issue exceeds $15,000. County court must also transfer to district court any original suit where court shall issue writ of attachment in favor of creditor whose claim exceeds $15,000, excluding costs. Appeals from county courts are to district court. Appellant must file notice of appeal and appeal bond with county court, within 15 days after date of entry of judgment appealed from. (C.R.S. 13-6-301 to 311; C.R.C.P. 411).

Courts sit at county seat of each county (see subhead District Courts, supra).

Docket Fee.

$31 for plaintiff; and $26 for defendant.

Probate Courts.

A probate court, court of record, has been established for city and county of Denver, having original and exclusive jurisdiction over administration, settlement and distribution of estates of decedents, wards, and absentees, granting of letters testamentary, of administration, of guardianship and by conservatorship; administration of guardianships of minors and incompetent persons, and conservatorship of incompetents and absentees, lunacy proceedings, determination of heirship, administration of testamentary trusts, and all other probate matters. (C.R.S. 13-9-101 to 123).

In all other counties, such probate and estate jurisdiction rests in district courts.

Small Claims Courts.

In each county court there is division designated as small claims court. Small claims courts have original jurisdiction concurrent with county and district court in civil actions involving claims and counterclaims, exclusive of interest and costs, not exceeding $7,500, including such civil penalties as may be provided by law. (C.R.C.P. 508; C.R.S. 13-6-403). Small claims courts are not courts of general jurisdiction and only have jurisdiction specifically conferred by law. Small claims courts do not have jurisdiction over matters excluded from county court jurisdiction, matters involving claims of defamation by libel or slander, actions of forcible entry, forcible detainer or unlawful detainer, class actions, and actions seeking prejudgment remedies, injunctive relief, except actions to enforce restrictive covenants on residential property when compliance will not exceed $7,500, exclusive of interest and costs (C.R.S. 13-6-403), traffic violations and other criminal matters or awards of body execution. Unless party objects, cases are heard and decided by appointed referees who are attorneys admitted to practice in Colorado or county judges. Individuals represent themselves before small claims court, and organizations by active officers, partners, directors or full time employees or court-appointed personal representative, conservator, or guardian of real party in interest. (C.R.S. 13-6-407). Attorneys may appear and take part in filing, prosecution or defense of any matter in small claims court only when acting pro se or when active, full-time employee, general partner, officer, or member of association, union, or corporation which is party to action. (C.R.S. 13-6-407). However, if defendant files written request not less than seven days before appearance date stating that he desires to be and will be represented by attorney, and upon payment of additional docket fee, clerk of small claims court shall transfer claim to county court, where matter will be tried under rules and procedures of small claims court. Thereupon, plaintiff may also be represented by attorney. If defendant fails to appear or appears without attorney after transferring claim to county court, and court finds transfer was made for purpose of delay, court may award plaintiff any costs and attorney's fees occasioned by delay. If plaintiff learns defendant will be represented by attorney in small claims court, plaintiff may transfer action to county court if plaintiff will be represented by attorney as consequence. (C.R.C.P. 503). Purpose of small claims court is to provide inexpensive, speedy, and informal resolution of small claims in forum in which rules of substantive law apply, but rules of procedure, pleadings and technical rules of evidence do not.

Trials are conducted to do justice between parties. Unless parties agree at or prior to trial that there shall be no appeal and that decision of referee or judge be final and binding on both parties, appeals may be taken pursuant to county court rules. No plaintiff may file more than two claims per month, or 18 claims per year in any county. Each claim filed must certify number of claims filed in that month, and for year in small claims court of that county. State supported institutions of higher learning may file no more than 30 claims per month in all small claims courts of State. (C.R.S. 13-6-411). Procedure applicable is governed by Rules of Procedure For Small Claims Courts, C.R.C.P. 501 to 521.

Docket Fee.

Docket fees vary depending on size of claim asserted, up to maximum of $23 for claimant and $15 for defendant.

Municipal Courts.

All incorporated cities and towns must have a municipal court having exclusive original jurisdiction of all cases arising under ordinances of city within which it is organized. If a court of record, appeal is to district court or superior court if established. If not court of record, appeal is to county court or superior court if established and tried de novo. (C.R.S. 13-10-101 to 125).

Juvenile Courts have original jurisdiction over proceedings involving neglected, dependent or delinquent children under 18, and persons who contribute to such conditions, and over proceedings in adoption, custody, support, relinquishment, guardianship, and other disposition of children under 18, and care and protection of such children from neglect, cruelty or abuse. Legislature has established comprehensive system of juvenile justice. (C.R.S. 19-2-101 to

1305). Generally, in cases of violation of municipal ordinances, penalty for which may be jail sentence, or state law not amounting to felony, juvenile court has exclusive jurisdiction if under 18. Other courts retain jurisdiction in matters of custody by writ of habeas corpus, determination of custody, support, etc., incidental to other causes, and property or estates of children.

Office of Dispute Resolution.

Persons are eligible for mediation services through state office of dispute resolution before or after having filed complaint in civil action in county or district court. Proceedings regarded as settlement negotiations, and statements made therein of limited discoverability and admissibility at trial. Agreements reduced to writing and presented to court as stipulation, and if approved, are enforceable as order of court. (C.R.S. 13-22-301 to 313). Any court of record may refer case to mediation. (C.R.S. 13-22-311).

Colorado Courts Homepage.

www.courts.state.co.us

6.02 LEGISLATURE:

Meets annually no later than second Wed. in Jan. Regular sessions limited to 120 calendar days. (Const., art. V, § 7).

Special or extraordinary sessions may be called by governor or by written request of two-thirds of members of each house. (Const., art. V, § 7).

Initiative and referendum both provided for. (Const., art. V, § 1; C.R.S. 1-40-101 to 135).

Lobbyists must register and file disclosure statements with Secretary of State. (C.R.S. 24-6-302, 303).

6.03 REPORTS:

Decisions of supreme court through Sept. 1980 term are published in Colorado supreme court reports, beginning with volume 1 and ending with volume 200. Court of appeals was abolished in 1915 and reestablished in 1970. Pre-abolition decisions reported in Colorado court of appeals reports, Vols. 1-27. Newly created court of appeals decisions, reported in Vols. 28-44, are published on selective basis as determined by majority of all court of appeals judges.

Pursuant to C.R.S. 13-2-124, Supreme Court has designated West Publishing Company as official reporter of decisions of supreme court and court of appeals. Opinions of both courts as printed in Pacific reporter and Colorado reporter are official reports for all cases announced by supreme court subsequent to last cases appearing in volume 200 of Colorado supreme court reports and all cases of court of appeals selected for official publication subsequent to last cases appearing in volume 44 of Colorado court of appeals reports. Only caption material and text of all opinions announced by both courts constitute official report; synopses, headnotes and key numbers provided by publisher merely informational. Court of appeals decisions which are not selected for official publication but are published in Pacific reporter must bear legend to such effect. (App. Rule 35[f]). Advance sheets of opinions of both courts published monthly in The Colorado Lawyer, official publication of Colorado Bar Association.

Digest is Colorado digest (West Pub. Co.), containing digests of all Colorado supreme court and court of appeals decisions and federal decisions arising in Colorado.

6.04 STATUTES:

Colorado Revised Statutes 2008 has displaced all prior compilations. Colorado Revised Statutes 2009 are cited as "C.R.S."

Administrative Procedures.

State Administrative Procedure Act applicable to rule making and licensing procedures. (C.R.S. 24-4-101 to 108).

Administrative Regulations.

Code of Colorado Regulations (Colo. Code Regs.) is official publication of rules and regulations of agencies of executive branch. (C.R.S. 24-4-103).

Uniform Acts of the National Conference of Commissioners on Uniform State Laws which have been adopted, some, if not all with variances, modifications or omissions, are: Adult Guardianship and Protective Proceedings Jurisdiction Act (2008); Alcoholism and Intoxication Treatment (1973); Anatomical Gift (2007); Arbitration (2004); † Athlete Agents Act (2008); Act to Secure the Attendance of Witnesses from Without a State in Criminal Proceedings (1972); †Bus. Corp. (1958); Certification of Questions of Law (1970); Child Abduction Prevention (2007); Child Custody Jurisdiction and Enforcement (2000); †Commercial Code (1965); †Common Interest Ownership (1991); †Common Trust Fund (1947); Conflict of Laws-Limitations (1984); †Consumer Credit Code (1971); Contribution Among Tortfeasors (1977); Controlled Substances (1990 Version) (1992); Criminal Extradition (1953); Custodial Trust (1999); Debt-Management Services (2007); †Deceptive Trade Practices (1966 version) (1969); Declaratory Judgments (1923); Determination of Death (1981); Disposition of Community Property Rights at Death (1973); Division of Income for Tax Purposes (1968); †Durable Power of Attorney (1973); Duties to Disabled Persons (1973); Electronic Transactions (2002); Emergency Volunteer Health Practitioners (2007); Enforcement of Foreign Judgments (1969); †Evidence (1979); Facsimile Signatures of Public Officials (1969); †Federal Lien Registration (1988); Fiduciaries (1923); Foreign Money Claims (1990); Foreign-Country Money Judgments Recognition Act (2008); Foreign Money-Judgments Recognition (1977); †Fraudulent Transfer (1991); †Guardianship and Protective Proceedings (2000); Insurers Liquidation (1955); International Wills (1989); Interstate Arbitration of Death Taxes (1953); Interstate Compromise of Death Taxes (1953); Interstate Depositions and Discovery Act (2008); Interstate Family Support (2003); Judicial Notice of Foreign Law (1967); †Jury Selection and Service (1971); Limited Partnership (1916 Version) (1931), (1985 Version) (1986); Management of Institutional Funds (1973); Mandatory Disposition of Detainers (1969); †Marriage and Divorce (1971, 1973); Multiple-Person Accounts (1990); †Non-Profit Corp. (1967); †Parentage (1977); Partnership (1997); Photographic Copies of Business and Public Records as Evidence (1955); Power of Attorney (2009); †Principal and Income (2008); †Probate (1973); †Prudent Investor (1995); Prudent Management of Institutional Funds Act (2008); †Reciprocal Transfer Tax (1943); Recognition of Acknowledgments (1969); Rendition of Accused Persons (1972); †Securities (1961); Simultaneous Death (1967); Statutory Construction (1973); Statutory Form Power of Attorney (1992); Statutory Rule Against Perpetuities (1991); †Testamentary Additions to Trusts (1967); Trade Secrets (1986); Transboundary Pollution Reciprocal Access (1984); Transfers to Minors (1984); †Unclaimed Property (1987); Unsworn Foreign Declarations Act (2008); Veterans Guardianship (1945).

For text of Uniform Acts falling within the scope of the Martindale-Hubbell Law Digests see Uniform and Model Acts section.

† Adopted with significant variances, modifications, or omissions. See appropriate topics as to Acts within scope of Digests volume.

Other Uniform Acts adopted are: Transfer on Death Security Registration (1990).

6.05 UNIFORM LAWS:

For list of Uniform Acts in force in this state see topic 6.04 Statutes. For text of Uniform Acts within the scope of the Martindale-Hubbell Law Digests see Uniform and Model Acts section.

7 CRIMINAL LAW

7.01 CRIMINAL LAW:

Most statutes relating to criminal procedure are contained in C.R.S., Title 16 (Criminal Proceedings), articles 1 to 13 being Code of Criminal Procedure; Title 17 (Parole and Corrections); Title 18 (Criminal Code); Title 19 (Children's Code); Title 42 (Vehicles and Traffic) (see category 23 Transportation, topic 23.01 Motor Vehicles). Colorado supreme court has power to prescribe rules of pleading, practice and procedure in criminal cases in all courts (C.R.S. 13-2-109), and has adopted Colorado Rules of Criminal Procedure (Court Rules, Book 2, C.R.S.).

Indictment or Information.

Felony cases are begun by grand jury indictment, complaint filed in county court, or information filed in district court. Misdemeanor cases are begun by filing complaint in county court. (C.R.S. 16-5-101).

Bail.

All persons shall be bailable before conviction except persons accused of capital offense, when proof is evident or presumption is great, or persons alleged to have committed crime of violence while on parole, probation, bail, or after two previous felony convictions, or one previous felony conviction if for crime of violence, appealing conviction or awaiting sentencing for crime of violence, when proof is evident or presumption is great and public would be placed in significant peril. (C.R.S. 16-4-101). Burden is upon prosecution to establish that such proof is evident or presumption is great. (C.R.S. 16-4-101[3]). Excessive bail forbidden. (Const., art. II, § 20). Juvenile has only qualified right to bail. (623 P.2d 1253).

After conviction, either before or after sentencing, defendant may be released on bail as matter of discretion. (C.R.S. 16-4-201).

Uniform Act for Out-of-State Parolee Supervision in effect. (C.R.S. 24-60-301 to 309).

Uniform Criminal Extradition Act in effect. (C.R.S. 16-19-101 to 134).

Uniform Mandatory Disposition of Detainers Act in effect. (C.R.S. 16-14-101 to 108). When prisoner substantially complies with provisions of Act and prosecution has actual notice of prisoner's request, it is within trial court's discretion to dismiss pending charges under Act. (742 P.2d 302).

Uniform Act to Secure the Attendance of Witnesses From Without a State in Criminal Proceedings in effect. (C.R.S. 16-9-201 to 205).

Other Acts.

Crime Victim Compensation Act in effect. (C.R.S. 24-4.1-100.1 to 124). Interstate Compacts and Agreements are found at Title 24, Art. 60.

8 DEBTOR AND CREDITOR

8.01 ASSIGNMENTS:

Uniform Commercial Code adopted. See category 3 Business Regulation and Commerce, topic 3.09 Commercial Code.

Instrument Transferring Title.

Rights, except for contractual rights involving matters of personal trust or confidence or for personal services (122 Colo. 79, 220 P.2d 864), debts and/or choses in action are freely assignable. Except for requirements of Uniform Commercial Code for negotiable instruments and securities, no special form of instrument and no acknowledgment or witnesses required to transfer title.

Filing necessary only when required to perfect assignment of accounts in which case perfect in accordance with law of state where assignor is located, except for accounts resulting from sale of timber to be cut or minerals or the like (including oil and gas) at wellhead or minehead, file in real estate records in county where real estate concerned is located. (C.R.S. 4-9-501).

Recording.

See category 21 Property, topic 21.06 Deeds, subhead Recording. Where a recorded instrument constituting a promise or obligation for the payment of money and giving a lien on real estate as security therefor purports to bear on its face or back an assignment, this is prima facie evidence of the fact of assignment whether or not such purported assignment has been acknowledged. (C.R.S. 38-35-102).

Notice to obligor not necessary to complete assignment as between assignee and assignor. (14 Colo. 58, 23 P. 88). Object of notice is to inform debtor that his creditor has divested himself of right to collect and invested assignee with that right. (6 Colo. 508, 1883 Colo. LEXIS 154).

Effect.

Assignee receives rights and remedies of assignor and is subject to defenses and claims good against assignor which arose prior to notice of assignment. (175 Colo. 406, 487 P.2d 1333).

Assignment of wages not already earned at time of assignment and disability benefits, or of any other sum to become due to assignor, is not valid against assignor’s creditors who have had no actual notice of assignment at time it is made unless same is recorded in county wherein wages are to be earned or such sums are to become due within five days from date thereof. (C.R.S. 8-9-103). No such assignment, except for child support, is valid if assignor is married and residing with spouse unless spouse joins in assignment which is duly acknowledged before person authorized to take acknowledgments. (C.R.S. 8-9-104). No assignment of wages by employee to any person for benefit of such employee is valid. All assignments of wages must be in writing and for fixed and definite part of wages earned or to be earned within 30 days from date of assignment. Assignments post- or ante-dated are void. (C.R.S. 8-9-101). Copy of assignment must be given or sent by registered mail to employer within five days after execution and copy given to assignor. (C.R.S. 8-9-102). If creditor of assignor contests assignment, assignee has burden of proof to sustain validity thereof. (C.R.S. 8-9-105). Checkoffs for union dues and payroll deductions authorized by employee for medical, hospital, stock-purchase, savings, insurance, charities, credit unions, banks, savings and loans, or any other financial institution, or other similar purposes, or for rent, board and subsistence provided in connection with employment if authorization is revocable, are exempt from these provisions. (C.R.S. 8-9-106, 107). All assignments of wages are subject to provisions of Uniform Consumer Credit Code. (C.R.S. 8-9-101). Assignment of workmen’s compensation benefits is regulated by statute. (C.R.S. 8-42-124).

Uniform Commercial Code specifically exempts transfer of claim for wages, salary or other compensation of employee from application of Art. 9 of Code. (C.R.S. 4-9-109[d]).

Uniform Consumer Credit Code adopted.

8.02 ATTACHMENT:

Actions in Which Allowed.

In courts of record attachments allowed, if cause exists, in actions on express or implied contracts, or in tort actions if tort committed against person or property of resident. (C.R.C.P. 102).

Courts Which May Issue Writ.

District or county court (C.R.C.P. 102 and C.R.S. 13-56-102) may issue writs of attachment.

In Whose Favor Writ May Issue.

Any party may have nonexempt property of party against whom claim is asserted attached. (C.R.C.P. 102[a]).

Against Whom Writ May Issue.

Writ may issue against: (1) Foreign corporation without certificate of authority to do business; (2) defendant who has been absent from state for four months, or whose whereabouts are unknown, or who is nonresident of state, if all reasonable efforts to obtain in personam jurisdiction over defendant have failed; (3) defendant who conceals himself to evade service of process; (4) defendant who is about to remove his property from state with intent to delay creditors; (5) defendant who has fraudulently conveyed property to delay creditors; (6) defendant who has fraudulently concealed or disposed property to delay creditors; (7) defendant who is about to convey property to delay creditors; (8) defendant who is about to fraudulently conceal or dispose of property to delay creditors; (9) defendant who has departed or is about to depart from state with intention of removing property from state. (C.R.C.P. 102[c]).

Claims on Which a Writ May Issue.

See supra, subhead Actions in Which Allowed.

Grounds.

See supra, subhead Against Whom Writ May Issue.

Proceedings to Obtain.

In court of record, to obtain writ of attachment, plaintiff must file affidavit stating nature and amount of claim and that cause exists for attachment. (C.R.C.P. 102[b]). Defendant, by affidavit, may at any time before trial traverse plaintiff's affidavit, and if plaintiff shall establish reasonable probability of one of causes alleged in affidavit, attachment shall be sustained. Hearing on defendant's traverse shall be held within seven days from filing with at least two days' notice to plaintiff. (C.R.C.P. 102[n]). If hearing on traverse shows that evidence does not prove cause alleged in plaintiff's affidavit, but another cause, then on motion plaintiff's affidavit may be conformed to proof. (C.R.C.P. 102[o]).

Attachment Bond.

In court of record, plaintiff must give bond in amount set by court not exceeding double amount claimed, conditioned that, if court finds plaintiff not entitled to attachment, plaintiff will pay costs awarded defendant and damages sustained by wrongful attachment. (C.R.C.P. 102[d]). Whenever it appears to court that bond is insufficient, court may order another one and if plaintiff fails to comply within 20 days, writ of attachment must be dismissed. (C.R.C.P. 102[x]).

Levy.

In court of record sheriff to whom writ directed must execute upon real estate by filing copy of writ together with description of property attached with county recorder, and upon personal property by taking it into custody. (C.R.C.P. 102[h]).

Indemnity.

Sheriff must require undertaking of corporate surety company or two sureties for full value of attached property before releasing any property held under any writ of attachment. (C.R.C.P. 102[v]).

Lien.

Attachment liens on real estate last six years unless judgment satisfied sooner (C.R.S. 13-56-103), and certificate that levy has been made upon real estate must be filed in office of recorder in county where land is situate (C.R.S. 13-56-101).

Release of Property.

In court of record writ of attachment will not issue if defendant gives sufficient security to pay judgment (C.R.C.P. 102[a]; C.R.C.P. 102[f]); after writ of attachment has been levied defendant may post bond in sum fixed by sheriff, not less than value of property attached, and upon posting this bond property subject to attachment must be released (C.R.C.P. 102[v]).

Sale.

Where perishable property attached, any party to the action may apply to court for sale thereof, and upon sale proceeds must be deposited with court clerk. (C.R.C.P. 102[q]).

Third Party Claims.

In a court of record no final judgment may be rendered until expiration of 30 days from date levy made, and any creditor within 30 days may file affidavit setting forth his claim against defendant, and must then be made party plaintiff with same remedies as original plaintiff (C.R.C.P. 102[k][1]), and judgment creditor may, upon motion without filing affidavit, be made party plaintiff having like remedies as original plaintiff (C.R.C.P. 102[k][2]). When additional creditor is made party, dismissal by first attaching creditor of his cause of action does not operate as dismissal as to any other creditor. (C.R.C.P. 102[1]).

Priorities.

Upon final judgment each creditor takes pro rata from money realized from attachment proceedings, provided that when property is attached while defendant is removing same or secreting same for purpose of defrauding creditors, court may allow creditors whose diligence procured property priority over other attachments or judgment creditors. (C.R.C.P. 102[m]). Any third person claiming property attached may intervene and, in case judgment is in his favor, may recover damages by reason of attachment. (C.R.C.P. 102[p]).

Vacation or Modification.

Allowed in attachment proceedings as in other actions. (C.R.C.P. 102[y]).

See also topics 8.05 Executions, 8.09 Garnishment, 8.06 Exemptions.

8.03 [RESERVED]

8.04 CREDITORS' SUITS:

Creditor's suit may be joined in a single action with suit on the claim itself. Thus, a plaintiff may state a claim for money and a claim to set aside conveyance fraudulent as to him without first obtaining judgment establishing claim for money. (C.R.C.P. 18[b]).

Relief obtained through action may to great extent be obtained through supplementary proceedings (C.R.C.P. 69[d], [e], [f], and [g]) (see topic 8.05 Executions), but such proceedings are not adapted to reach disputed property of judgment debtor, as no contested title can be determined therein (89 Colo. 292, 1 P.2d 924).

Under C.R.C.P. 69(a), post-judgment writ of garnishment can be issued without writ of execution preceding it. (40 Colo. App. 179, 570 P.2d 1320). (See topic 8.09 Garnishment.)

Uniform Commercial Code adopted. See category 3 Business Regulation and Commerce, topic 3.09 Commercial Code.

Creditor with security interest in both real and personal property may, in case of default, proceed simultaneously against personalty and realty. (C.R.S. 4-9-604; 632 P.2d 282).

Creditor can recover prejudgment and postjudgment interest. (C.R.S. 5-12-102).

Liens for state sales taxes are first and prior liens upon goods and business fixtures of or used by any retailer and take precedence over other creditor's claims of whatever kind, including Uniform Commercial Code Art. 9 security interest. (C.R.S. 39-26-117; 632 P.2d 1053).

Uniform Fraudulent Transfer Act adopted, effective July 1, 1991. See topic 8.08 Fraudulent Sales and Conveyances.

8.05 EXECUTIONS:

All goods and chattels, lands, tenements and real estate of every person against whom any judgment is obtained in court of record, either at law or in equity, or against whom any foreign judgment is filed pursuant to Uniform Enforcement of Foreign Judgments Act (C.R.S. 13-53-101 to 108) are liable to be sold on execution to satisfy said judgment (C.R.S. 13-52-102[1]) except such property as is specifically exempted (C.R.S. 13-54-102).

Exemptions.

See topic 8.06 Exemptions.

Issuance.

Execution from a court of record may issue 15 days after judgment unless further stay granted. (C.R.C.P. 62[a]). It may issue to any county within state. (C.R.S. 13-52-110).

Lien.

Execution is a lien on goods and chattels of debtor in such county from the time it is placed in hands of sheriff, who must indorse on execution the time when he received it and make his return within 90 days. (C.R.S. 13-52-111; 19 P. 839).

Levy.

Except for property exempt by law from execution, judgment creditor may elect on what property execution levied, however, real estate on which judgment debtor resides must be taken last. (C.R.S. 13-52-101). See category 5 Civil Actions and Procedure, topic 5.09 Damages, subhead Nonprofit Corporations.

Return.

All executions returnable 90 days after date of issue, unless sale is pending. Sheriff or officer must endorse back of writ with hour and date of receipt and enter information in public records. (C.R.S. 13-52-111).

Priorities.

Liens entitled to priority in accordance with respective dates of their delivery to sheriff or officer. (13 Colo. 491, 22 P. 804).

Sales.

Must be public sale after advertisement of personalty for ten days (C.R.S. 13-57-101) and real estate for 20 days (C.R.S. 13-56-201). Sale may be set aside or other action taken where sale results in unconscionable condition. (636 P.2d 1280).

Redemption.

As set forth in C.R.S. 38-38-301 to 306, 501.

Stay of Execution.

There is an automatic stay of execution for 15 days after entry of judgment in district court. (C.R.C.P. 62[a]). Interlocutory or final judgment in action for injunction or in receivership action is not so stayed. (C.R.C.P. 62[a]). Trial court may suspend, modify, restore or grant injunction on such terms as it considers proper for security of rights of adverse party. (C.R.C.P. 62[a], [c], [d]). There is no automatic stay of execution in county court. (County Court Rule 362).

Court may, in its discretion and on such conditions for security of adverse party as are proper, stay execution of, or any proceedings to enforce, judgment pending disposition of motion for new trial, for relief from judgment or order, for judgment in accordance with motion for directed verdict, for amendment to findings or for additional findings, or pending filing and determination of application to Supreme Court for supersedeas. (C.R.C.P. 62[b], [d]). Posting of supersedeas bond is condition precedent to stay of enforcement of judgment. (814 P.2d 869).

As to stay pending writ of error, see category 5 Civil Actions and Procedure, topic 5.03 Appeal and Error.

Supplementary Proceedings.

At any time after entry of final money judgment, judgment creditor may cause subpoena or subpoena to produce to be served (as provided under C.R.C.P. 45) requiring judgment debtor to appear before court, master or referee to answer concerning his property (C.R.C.P. 69[e]). If judgment debtor fails to appear after being properly served, judgment creditor may request court to issue bench warrant ordering sheriff to arrest judgment debtor and bring him before court for further proceedings under Rule. (C.R.C.P. 69[e][2]). Subpoenas and subpoenas to produce require conspicuous notice that failure to appear will result in arrest. (C.R.C.P. 69[e][1]). Judgment creditor may also serve written interrogatories. (C.R.C.P. 69[d]).

At any time after entry of final money judgment, on proof that person has property of judgment debtor or is indebted to him in amount exceeding $500 not exempt from execution, court may issue subpoena or subpoena to produce to such person to appear before court, referee, or master at specified time and answer concerning same, or court may order property of judgment debtor, not exempt from execution, in hands of such debtor or any other person or due to judgment debtor to be applied towards satisfaction of judgment. (C.R.C.P. 69[f], [g]).

Body Execution.

In tort actions, when specifically pleaded in summons and complaint, and where verdict or findings state that defendant was guilty of malice, fraud, wilful deceit or negligence consisting of reckless or wilful disregard of rights or safety of others, defendant may be imprisoned up to one year at plaintiff's expense unless plaintiff shows by affidavit he is poor and unable to pay costs of such imprisonment. No execution shall issue if judgment has been paid or if decedent has been convicted in criminal prosecution for same tort. (C.R.S. 13-59-103, 105). Statute held unconstitutional in 746 P.2d 542; C.R.C.P. 101 governing body executions repealed.

See also topics 8.02 Attachment, 8.06 Exemptions, 8.09 Garnishment.

8.06 EXEMPTIONS:

In addition to homestead exemption every person is entitled to hold exempt from levy, attachment, execution and garnishment issued out of any court large number of enumerated articles, most of which are limited as to value, said articles including wearing apparel; jewelry; personal library, family pictures and school books; burial sites; household goods; food; fuel; certain livestock and implements in case of farmers; tools of trade; motor vehicles used for business purposes or by elderly or disabled debtor for purposes of obtaining medical care; professional library; house trailer; moveable structure; mobile home; certain military pensions; life insurance proceeds; casualty insurance proceeds if lost property exempt; compensation under victim reparation law; public or private disability benefits; utility security deposits; articles of military equipment personally owned by members of national guard; proceeds derived from personal injury claim unless claim arose from treatment of such injuries and funds from pension, retirement or deferred compensation plans, including ERISA plans, IRAs, Roth IRAs and Keogh plans. (C.R.S. 13-54-102). Other exemptions (some limited as to value, or subject to conditions or exceptions) are: Cemetery company property (C.R.S. 7-47-106); workers' compensation benefits (C.R.S. 8-42-124; C.R.S. 13-54-104[1][b][IV]; and C.R.S. 13-54.5-101[2][d]); employment security benefits (C.R.S. 8-80-103); delinquent insurance company assets (C.R.S. 10-3-556); group life insurance proceeds (C.R.S. 10-7-205); sickness and accident insurance benefits (C.R.S. 10-8-114); benefits paid by fraternal benefit society (C.R.S. 10-14-403); constitutional state officers' fees or salaries (exempt from garnishment only) (C.R.S. 13-61-101); state employees' retirement benefits and public employees' retirement benefits (C.R.S. 24-51-212; Tit. 24, arts. 52, 54, 54.5, 54.6; C.R.S. 24-54.7-108); public assistance payments (C.R.S. 26-2-131); public police pension benefits (C.R.S. 31-30-313; C.R.S. 31-30-616; C.R.S. 13-54-102); and firemen's pension payments (C.R.S. 31-30-412; C.R.S. 31-30.5; C.R.S. 13-54-102).

Debts Against Which Exemptions Not Allowed.

No property is exempt in action to enforce obligation for purchase money thereof, or from sale for payment of any taxes legally assessed. (C.R.S. 13-54-103, 105). Effective July 1, 1996, and applicable to all civil actions filed after that date, all property of person who has committed felonious killing shall be subject to attachment or levy in satisfaction of judgment awarded as result of such felonious killing. (C.R.S. 13-54-102[4]). Debtor may not avoid consensual lien on property otherwise eligible for exemption. (C.R.S. 13-54-102[5][a]).

Necessity of Claiming Exemption.

Debtor must claim exemption within ten days after being served with notice of levy or seizure. (C.R.S. 13-55-101). In case of garnishment, debtor must attempt to resolve disputes regarding exemption of earnings within five days after receipt of writ of continuing garnishment, and must claim exemptions regarding property other than earnings within ten days after receipt of notice of exemption and pending levy. (C.R.S. 13-54.5-108). In non-garnishment cases, failure to claim exemption conclusively constitutes waiver. (C.R.S. 13-55-107).

Exemption statutes apply only to civil actions and cannot defeat a levy for fines and costs arising out of criminal prosecutions. (68 Colo. 110, 187 P. 729).

Earnings.

Maximum amount subject to garnishment, levy or attachment is lesser of 25% of disposable earnings or amount by which disposable earnings exceeds 30 times state minimum wage under § 15, Art. XVIII of Colorado Constitution (C.R.S. 13-54-104[2][a][I]) or, solely with respect to enforcement of debts for fraudulently obtained public assistance, lesser of 35% of disposable earnings, or amount by which disposable earnings exceeds 30 times federal minimum wage, or amount by which disposable earnings exceeds 30 times state minimum wage (C.R.S. 13-54-104[D][a][II]). Maximum amount to enforce support order where debtor supporting another spouse or dependent child is 50% of disposable earnings, otherwise 60% of disposable earnings; if support payments more than 12 weeks in arrears maximums increase to 55% and 65%. (C.R.S. 13-54-104[3][b]). Funds from workers' compensation benefits, unemployment insurance benefits, or pension, retirement or deferred compensation plans, interest, dividends, partnership distributions, tips and insurance proceeds to extent such proceeds are in lieu of wages are subject to garnishment only for arrearages in child support or for restitution for theft, embezzlement, misappropriation, or wrongful conversion of public property, or to collect judgment for willful and intentional violation of fiduciary duty to public pension plan. (C.R.S. 13-54-104[1][b][II]). Payments due or received from third parties to cover child's health care costs, but not yet applied to health care costs, are subject to garnishment by state medical assistance program to enforce judgment for medical support. (C.R.S. 13-54-104[1][b][III]). Maximums do not apply to bankruptcy court orders under c. 13 nor to state or federal tax debts. (C.R.S. 13-54-104[3][a]). Disabled persons may be subject to lesser garnishments by court order. (C.R.S. 13-54-104[3][b][iii]).

See also topic 8.09 Garnishment.

Child Support Obligations and Payments Exempt.

Any past or present payment received arising from child support obligation or as child support is exempt from levy under any writ of attachment or execution. (C.R.S. 13-54-102.5[1]). Child support payments are exempt only if they are deposited in custodial account for benefit of child and such payments, and any interest thereon, are not commingled with any other funds. (C.R.S. 13-54-102.5[2]).

Waiver.

General waiver in note of all possible exemptions void as against public policy. (79 Colo. 537, 246 P. 789). Personal property security agreement creates implied waiver of statutory exemption as to secured property described with particularity. (713 P.2d 1294).

Homestead Exemption.

See topic 8.10 Homesteads.

Exemptions in Bankruptcy.

Exemptions in 11 U.S.C. § 522(d) are denied to residents of Colorado (C.R.S. 13-54-107).

8.07 FORECLOSURE:

See topic 8.11 Liens; categories 3 Business Regulation and Commerce, topic

Commercial Code; Civil Actions and Procedure, topic Limitation of Actions; Mortgages, topic Mortgages of Real Property.

8.08 FRAUDULENT SALES AND CONVEYANCES:

A conveyance of any interest in land made to defraud prior or subsequent bona fide purchasers is void. (C.R.S. 38-10-101). Transfer of realty or personalty in trust for transferor is void as against existing creditors. (C.R.S. 38-10-111). Except as provided by Uniform Commercial Code (C.R.S. 4-2-402), or except when evidence of transaction is included in central registry maintained with respect to transactions relating to title or is duly noted on certificate of title by issuing authority, or is included in records of proper filing office for security interest (C.R.S. 4-9-501), or is transaction described in C.R.S. 4-9-309 or C.R.S. 4-9-310; sale by vendor or any assignment of personalty in possession of vendor or assignor is presumed fraudulent as against creditors or bona fide purchasers of such vendor or assignor, unless followed by immediate delivery and actual and continued change of possession (C.R.S. 38-10-114).

Uniform Fraudulent Conveyance Act not adopted.

Uniform Fraudulent Transfer Act adopted and became effective on July 1, 1991. (C.R.S. 38-8-101 to 112). Transfer of property is fraudulent as to present or future creditor if it was made: (1) With actual intent to delay or defraud or (2) without receiving reasonably equivalent value in exchange and debtor making transfer was engaged in business for which remaining assets were unreasonably small or intended to incur debts beyond his ability to pay as they become due. (C.R.S. 38-8-105). Transfer of property is fraudulent as to present creditor if it was made without receiving reasonably equivalent value in exchange for transfer and debtor making transfer was either insolvent at time or became insolvent as result of transfer. (C.R.S. 38-8-106). Transfer of property is also fraudulent as to present creditor if it was made to insider for antecedent debt, debtor was insolvent at that time, and insider had reasonable cause to believe that debtor was insolvent. (C.R.S. 38-8-106). Transferee may be held personally liable in damages for value of fraudulently transferred property. (164 Colo. 206, 433 P.2d 772).

Remedies.

See topic 8.03 Creditors' Suits.

Criminal Liability.

Willful participation in a fraudulent conveyance to defeat or impair security interest is punishable as crime. (C.R.S. 18-5-206).

Uniform Commercial Code adopted. See category 3 Business Regulation and Commerce, topic 3.09 Commercial Code.

Bulk Sales.

Uniform Commercial Code, Art. 6 (C.R.S. 4-6-101 to 112), governing bulk transfers, repealed effective July 1, 1991 (C.R.S. 4-6-101 to 112). See category 3 Business Regulation and Commerce, topic 3.09 Commercial Code.

Colorado Consumer Protection Act adopted with modifications. (C.R.S. 6-1-101 to 709). See category 3 Business Regulation and Commerce, topic 3.12 Consumer Protection.

8.09 GARNISHMENT:

Colorado's statutes (C.R.S. 13-54.5-101 to 111) governing garnishments are implemented by C.R.C.P. 103. C.R.C.P. 103 is exclusive process for garnishment and provides five different types of writs: (1) Writ of continuing garnishment; (2) writ of garnishment with notice of exemption and pending levy; (3) writ of garnishment for support; (4) writ of garnishmentjudgment debtor other than natural person; and (5) writ of garnishment in aid of writ of attachment. All writs must be served on garnishee as provided in C.R.C.P. 4. C.R.C.P. 103 contains very detailed instructions on execution of various writs. Although summary of highlights of C.R.C.P. 103 follows, complete Rule should be consulted before proceeding with garnishment. Forms pertaining to writs are contained in Appendix of Colorado Rules of Civil Procedure. Forms 26-34. To determine earnings and other property subject to garnishment, see topic 8.06 Exemptions.

Writ of Continuing Garnishment.

Provides exclusive procedure for withholding earnings of judgment debtor to successive pay periods for payment of judgment debt other than judgment for support. (C.R.S. 13-54.5-101[1]). Writ of continuing garnishment to recover fraudulently obtained public assistance, whenever served, has priority over any other continuing garnishment, other than continuing garnishment for support. (C.R.S. 13-54.5-104[1][C]). See subhead Writ of Garnishment for Support, infra. Writ will be lien and continuing levy against nonexempt earnings owed by garnishee to judgment debtor at time of service of writ (C.R.S. 13-54.5-103), as well as nonexempt earnings of judgment debtor for 180 days following service of writ or for 180 days following expiration of any writs with priority, with both of these periods limited to 90 days, if garnishment is entered to support enforcement of any judgment entered before Aug. 8, 2001. (C.R.S. 13-54.5-102; C.R.C.P. 103, § 1[f]). Such lien will terminate before 180 (or 90) days if underlying judgment is vacated, modified, or satisfied in full, or writ is dismissed, except when such writ is suspended for specific period of time by judgment creditor upon agreement with judgment debtor. Such agreement must be in writing and filed by judgment creditor with clerk of court where judgment was entered. Garnishee also must receive copy. (C.R.S. 13-54.5-102[2]; C.R.C.P. 103, § 1[f][1], [j]). Judgment creditor must serve two copies of writ on garnishee, one of which garnishee must deliver to judgment debtor along with calculation of amount of exempt earnings. (C.R.S. 13-54.5-105; C.R.C.P. 103, § 1[d], [h]).

Writ of Garnishment (on Personal Property Other than Earnings of Natural Person) with Notice of Exemption and Pending Levy.

Provides exclusive procedure by which personal property of any kind (other than earnings of natural person) in possession or control of garnishee is required to be held for payment of judgment debt. (C.R.C.P. 103, § 2[a]). Writ issues after entry of judgment when writ of execution may issue; writ with notice will be issued by clerk of court upon request. (C.R.C.P. 103, § 2[c]). Under such writ, any indebtedness, intangible personal property, or tangible personal property capable of manual delivery, other than earnings of natural person, owed to, or owned by, judgment debtor, and in possession or control of garnishee at time of service of such writ upon garnishee, will be subject to garnishment. (C.R.C.P. 103, § 2[c]). Following service upon garnishee, copy of writ with notice along with claim of exemption form shall be served on each judgment debtor in accordance with C.R.S. 13-54.5-107(2). Proceeds of federally guaranteed student loans are also not subject to garnishment for antecedent debt. (769 P.2d 1058).

Writ of Garnishment for Support or Restitution.

Provides exclusive procedure for withholding earnings of judgment debtor for payment of judgment debt for child support arrearages, child support debts, maintenance when combined with child support or maintenance, along with debts for restitution for theft, embezzlement, misappropriation, or wrongful conversion of public property, or to collect on judgment for willful and intentional violation of fiduciary duty to public pension plan. (C.R.C.P. 103, § 3[a][1]). Writ of garnishment for support is continuing and requires garnishee to withhold, pursuant to law, portion of earnings subject to garnishment at each succeeding earning disbursement interval until judgment is satisfied or garnishment released by court or released in writing by judgment creditor. (C.R.C.P. 103, § 3[f][1]). Writ of garnishment for support has priority over any writ of continuing garnishment notwithstanding fact such other writ may have been served upon garnishee previously. (C.R.C.P. 103, § 3[f][2]).

Writ of Garnishment—Judgment Debtor Other than Natural Person.

Provides exclusive procedure by which personal property (of any kind) of judgment debtor other than natural person is required to be held by garnishee. (C.R.C.P. 103, § 4[a]).

Writ of Garnishment in Aid of Writ of Attachment.

Provides exclusive procedure through which personal property of defendant in attachment action (other than earnings of natural person) is required to be held by garnishee. (C.R.C.P. 103, § 5[a]). After issuance of writ of attachment in accordance with C.R.C.P. 102, writ of garnishment will be issued by clerk of court on request. Under such writ of garnishment, plaintiff in attachment may garnish personal property of any description, except earnings of natural person, owed to, or owned by, such defendant in attachment in possession or control of garnishee. (C.R.C.P. 103, § 5[c]).

Judgment Debtor's Objection—Written Claim of Exemption—Hearing.

If judgment debtor objects to initial or subsequent calculation of amount of exempt earnings, judgment debtor shall have five days from receipt of copy of writ of garnishment or calculation of amount of exempt earnings for subsequent pay periods, within which to resolve issue of such miscalculation by agreement with garnishee. If not resolved, judgment debtor may file, within ten days from such receipt, written objection setting forth, with reasonable detail, grounds for such objection. (C.R.S. 13-54.5-108[1][a]; C.R.C.P. 103, § 6[a]). When garnishee, pursuant to writ with notice, holds personal property of judgment debtor, other than earnings, which judgment debtor claims to be exempt, judgment debtor, within ten days after being served copy of such writ, will make and file written claim of exemption with clerk of court in which judgment was entered. (C.R.S. 13-54.5-108[1][b]; C.R.C.P. 103, § 6[b]). Upon filing of objection or claim of exemption, court in which judgment was entered will set time for hearing of objection or claim of exemption which will be not more than ten calendar days after filing of objection or claim of exemption. (C.R.S. 13-54.5-109[1][a]; C.R.C.P. 103, § 6[c][1]). Effective July 1, 2006, garnishee shall not be required to deduct or plead any exemption for or on behalf of judgment debtor except as set forth in writ. (C.R.S. 13-54.5-108.5).

Failure of Garnishee to Answer (All Forms of Garnishment).

If garnishee, having been served with any form of writ provided for by C.R.C.P. 103, fails to answer within time required, clerk of court will enter default against such garnishee upon request; no default shall issue until expiration of 30 days following service of writ of garnishment upon garnishee (C.R.C.P. 103, § 7[a]).

Traverse of Answer (All Forms of Garnishment).

Judgment creditor, plaintiff in attachment or intervenor in attachment may file traverse of answer to any form of writ provided by C.R.C.P. 103, provided such traverse filed within greater time period of 20 days from date that such answer should have been filed with court, or 20 days after such answer was filed with court. Failure to timely file traverse deemed as acceptance of answer as true (C.R.C.P. 103, § 8[a]).

Intervention (All Forms of Garnishment).

Any person who claims interest in any personal property of any description of judgment debtor or defendant in attachment, which property is subject of any answer made by garnishee, may intervene as provided in C.R.C.P. 24 at any time prior to entry of judgment against garnishee (C.R.C.P. 103, § 9).

Set-Off by Garnishee (All Forms of Garnishment).

Every garnishee is allowed to claim as set-off and retain or deduct all demands or claims on part of garnishee against any party to garnishment proceedings, which garnishee might have claimed if not summoned as garnishee. (C.R.C.P. 103, § 10).

Garnishee Not Required to Defend Claims of Third Persons (All Forms of Garnishment).

Garnishee with notice of claim of third person in any property of any description of judgment debtor or defendant in attachment which is subject of any answer made by garnishee in response to any form of writ provided for by C.R.C.P. 103 will not be required to defend on account of such claim, but must state in answer that garnishee has notice of such third party claim (C.R.C.P. 103, § 11[a]).

Clerk of court shall issue summons to such third person, and upon garnishee's delivery of such property to clerk of court or sheriff, and service of summons upon third party, garnishee shall be released from any liability on account of such indebtedness, to extent of any property delivered.

Release and Discharge of Garnishee (All Forms of Garnishment).

Judgment against garnishee will release and discharge such garnishee from all claims or demands of judgment debtor or defendant in attachment to extent of all sums paid or property delivered by garnishee pursuant to judgment. (C.R.C.P. 103, § 12[a]).

Garnishment of Public Body (All Forms of Garnishment).

Any writ provided in C.R.C.P. 103 wherein public body is designated as garnishee, must be served upon officer of such body whose duty it is to issue warrants, checks or money to judgment debtor or defendant in attachment, or, such officer as public body may have designated to accepted service (C.R.C.P. 103, § 13).

8.10 HOMESTEADS:

Every homestead in state occupied as home by owner or family is exempt from execution and attachment arising from debt, contract or civil obligation, but only to extent of $60,000 actual cash value if occupied as home by owner and $90,000 if occupied as home by disabled or elderly owner in excess of any liens or encumbrances. (C.R.S. 38-41-201).

Limitation of Value.

$60,000 or $90,000 depending upon status of owner. (C.R.S. 38-41-201).

Limitation of Area.

None.

Debts or Liabilities against Which Exemptions Not Available.

Taxes (C.R.S. 13-54-105); debt for purchase price (C.R.S. 13-54-103); mobile home loans, debts, or obligations incurred prior to Jan. 1, 1983 (C.R.S. 38-41-201.6); however, another exemption may be claimed on mobile home which is not subject to this date limitation (C.R.S. 13-54-102[1][o][II]). See topic 8.06 Exemptions.

Designation of Homestead.

Homestead exemptions shall be deemed created and may be claimed if occupancy requirements (C.R.S. 38-41-203) and type of property requirements (C.R.S. 38-41-205) are met. Mobile or manufactured home meeting certain requirements is homestead entitled to exemption. (C.R.S. 38-41-201.6). For homestead to apply to debts or obligations incurred before July 1, 1975, owner of property or owner's spouse must record in clerk's office of county where situate written acknowledged instrument describing such property, setting forth nature and source of owner's interest and stating that owner is homesteading such property. (C.R.S. 38-41-202[2]).

Claim of Exemption.

Homestead entry is not retroactive and exemption must have attached or been entered prior to specific levy or lien on land to be effective. (100 Colo. 247, 67 P.2d 73).

Although written claim of valid homestead exemption is not required, better practice is to interpose a claim by filing with clerk of court of record where writ was issued within ten days after property levied upon, seized or taken into possession by officer. (15 Colo. 223, 25 P. 183).

Waiver of Exemption.

Any person purchasing or redeeming pursuant to foreclosure sale under mortgage, deed of trust, or other lien containing waiver of homestead rights acquires property free of homestead rights and without compliance with C.R.S. 38-41-206 (requiring filing by creditor of affidavit regarding value of property and minimum sale price in relation to value) (C.R.S. 38-41-212[1]). Any person purchasing or redeeming pursuant to foreclosure sale under mortgage, deed of trust or other lien, except in case of tax sale under Art. 11 of Title 39, C.R.S., which contains no waiver of homestead rights will be subject to homestead rights (C.R.S. 38-41-212[2]).

Loss of Exemption.

Property is exempt only while occupied as a home by owner thereof, or his or her family. (C.R.S. 38-41-203; 685 P.2d 260).

Alienation or Encumbrance.

Homestead created by automatic provisions of C.R.S. 38-41-202(1) may be conveyed or encumbered by owner without signature of spouse, however, if created by filing, both husband and wife must execute conveyance or encumbrance of their respective interests (C.R.S. 38-41-202[3], [4]). Both may be done in same instrument. Conservator may convey for incompetent upon court order. (C.R.S. 38-35-118[1], [4]).

Levy on Homestead.

Before proceeding against homesteaded property, creditors must file with county clerk affidavit showing description and value of property, that fair market value of property less any prior liens or encumbrances exceeds amount of homestead exemption fixed in C.R.S. 38-41-201, that no previous execution arising out of same judgment has been levied on property, and also appraisal of property by independent qualified appraiser (C.R.S. 38-41-206[1]). Property must bring more than 70% of value shown on affidavit or sale is terminated. (C.R.S. 38-41-206[2]).

Proceeds of sale are exempt for one year if kept separate from other moneys and can be identified. If used in acquiring another home, homestead carries over to new property, except against lien of vendor or purchase money mortgagee. (C.R.S. 38-41-207).

Rights of Surviving Spouse and Family.

Decedent's spouse or minor children, or both, are entitled to decedent's homestead exemption. (C.R.S. 38-41-204; 685 P.2d 260). Homestead exemption inures to spouse and minor children if joint tenants of decedent. (C.R.S. 38-41-208[1]). Exemption is in addition to allowance to widow and minor children of decedent and preferences granted to dependents of protected persons under articles 10 to 20 of title 15, C.R.S (C.R.S. 38-41-211).

8.11–8.12 [RESERVED]

8.13 LIENS:

Liens are given to feeders, veterinarians or other persons to whom pet animals are entrusted in their keep. (C.R.S. 38-20-102[1]). No partido or share contracts (whereby livestock is delivered to be kept on shares for period of time at end of which they, or any number are returned, as provided by contract) are valid, except between parties to contract, unless contract is filed or recorded in office of county clerk and recorder of deeds in county where livestock is to be kept. (C.R.S. 35-54-106).

Keepers of hotels, motels, inns, boarding houses and trailer courts have liens upon personal property of tenants on premises, motor vehicles excepted. (C.R.S. 38-20-102[2]).

Persons renting rooms, apartments or trailer space for housekeeping purposes of tenants have liens on personal property of tenant on premises, some personal property excepted. (C.R.S. 38-20-102[3][a]).

Common carriers of personal goods and passengers and any person who stores personal goods at owner's request have liens on personal property for reasonable charges. (C.R.S. 38-20-105). Any person has lien on articles of personal property for making, repairing or altering same at request of owner. (C.R.S. 38-20-106). Liens asserted under C.R.S. 38-20-106 terminate if lien holder does not commence judicial action within 90 days after charges, or final installment thereof, are due and payable. Liens under C.R.S. 38-20-102, C.R.S. 38-20-105, and C.R.S. 38-20-106.5 (lien for motor vehicle repairs) terminate after 60 days. Period of limitation may be extended for as much as 30 days by agreement between parties. (C.R.S. 38-20-107; 41 Colo. App. 433, 586 P.2d 243). Agency or other authority issuing building permit for improvement, repair, restoration, or remodeling of or for construction of addition to residential property must send statutory notice to property. Notice by agency shall indicate that contractors, subcontractors, laborers or persons furnishing laborers providing labor or material for residential properties may collect money by filing lien against property. (C.R.S. 38-22-105.5). Mechanic who surrenders possession of repaired motor vehicle upon payment by check, draft, or order for payment may have lien restored if check, draft, or order is not honored for full payment or is dishonored. (C.R.S. 38-20-106.5).

Provision on removal and storage of abandoned vehicles which are provided for in C.R.S. 42-4-1102, 1103 and 1108 will prevail over more general abandonment provisions in C.R.S. 38-20-116 (abandoned property—notice for sale). (42 Colo. App. 347, 593 P.2d 1387).

Person performing service on property, such as dry cleaning clothes, and storage thereof, has special lien on customers' property serviced, dependent on possession. (C.R.S. 38-21-101, 103).

Persons performing labor or furnishing materials in connection with drilling of oil, gas, or other wells have liens on property. (C.R.S. 38-24-101; 624 P.2d 355). Lien statement must be filed within six months after furnishing labor or materials. (C.R.S. 38-24-104). Lienholder must commence suit in district court within six months of filing lien statement. (C.R.S. 38-24-105).

Person harvesting grain or other crops for use or benefit of others has lien upon grain and other crops harvested. (C.R.S. 38-24.5-101 to 108). Notice of lien must be served within ten days after harvesting, and lien must be filed within 20 days after notice. (C.R.S. 38-24.5-103[1]).

Hospitals have lien for services rendered to injured person upon net amount payable to such person, his heirs, assigns or legal representatives as damages for negligence or wrongful act of another, whether by settlement, compromise or judgment, but not upon amounts payable under Workers' Compensation Act. (C.R.S. 38-27-101).

Owners of self-service storage facilities have liens on all personal property of occupant located at facility. (C.R.S. 38-21.5-102).

Person filing pleading claiming affirmative relief affecting title to real property may record notice of lis pendens creating lien against property. (C.R.C.P. 105[f]).

Attorneys (see category 18 Legal Profession, topic Attorneys and Counselors) and common carriers (see category 3 Business Regulation and Commerce, topic 3.08 Carriers) have liens.

Uniform Commercial Code adopted. See category 3 Business Regulation and Commerce, topic 3.09 Commercial Code.

Uniform Federal Lien Registration Act adopted. (C.R.S. 38-25-101 to 107).

Material Variations from Official Text.

All references to “Act” are replaced with “article”.

§ 2(b) omits “filed” and inserts “recorded” preceding “in the office”. (C.R.S. 38-25-102[1][b]).

§ 2(b)(2)—omits “in the office of the [ ] of the [ ]”; omits “resides” after “applies”; inserts “has his, her, or its principal residence in this state” after “applies”; omits “filing” and inserts “recording” preceding “of the notice of lien”; inserts “the notice of lien shall be recorded in the office of the secretary of state” after “of the notice of lien”; (C.R.S. 38-25-102[2][d]).

§ 2(c)(1)—(C.R.S. 38-25-102[2][a]); omits “or” after corporation, inserts “or limited liability company” after “partnership,” omits “principal” and inserts “chief” before “executive office,” (C.R.S. 38-25-102[2][a]).

§ 4(a)(2)—omits “file it alphabetically or enter it in an alphabetical index” and inserts “record and index in the real estate records in accordance with the provisions of §§ 30-10-408 and 30-10-409, C.R.S.”; omits “the serial number of the district director of internal revenue” and inserts “the title and address of the official or entity certifying the lien”; omits “of tax, interest, penalties, and costs” and inserts “appearing on the notice of lien” after “amount” (C.R.S. 38-25-104[1][b]; C.R.S. 30-10-408, 409).

§ 4(c)—omitted and replaced with “If a refiled notice of federal tax lien referred to in subsection (1) of this section or any of the certificates or notices referred to in subsection (2) of this section is presented for recording to any county clerk and recorder, such clerk and recorder shall enter the refiled notice or the certificate with the date of recording in the index in accordance with the provisions of Sections 30-10-408 and 30-10-409, C.R.S.” (C.R.S. 38-25-104[3]; C.R.S. 30-10-408, 409).

§ 4(d)—inserts “or recorded” after “whether there is on file,”; omits last two sentences beginning with “The fee for a certificate” and inserts “The fee for the issuance of a certificate by the Secretary of State shall be determined and collected pursuant to section 24-21-104(3), C.R.S., and the fee for the issuance of a certificate by a county clerk and recorder shall be five dollars. Upon request, filing officer shall furnish copy of any notice of federal tax lien or notice or certificate affecting federal tax lien. Fee for furnishing and for certifying such copy and affixing seal thereto shall be determined and collected pursuant to section 24-21-104(3), C.R.S., if furnished by Secretary of State, and said fee shall be five dollars, if furnished by county clerk and recorder.” (C.R.S. 38-25-104[4]; C.R.S. 24-21-104[3]).

§ 5—replaced with, "(1)(a) A fee shall be charged for filing and indexing each notice of lien or certificate or notice affecting the lien: (I) For a tax lien on real estate; (II) For a lien on tangible and intangible personal property; (III) For a certificate of discharge or subordination; (IV) For all other notices, including a certificate of release or nonattachment. (b) The fee charged by a county clerk and recorder for filing and indexing each notice of lien or certificate or notice affecting the lien shall be five dollars. (c) When the Secretary of State is the central filing officer, the fees required by this subsection (1) shall be determined and collected pursuant to section 24-21-104(3), C.R.S.". (C.R.S. 38-25-105); inserts "or other appropriate federal officials" after "internal revenue" (C.R.S. 38-25-105; C.R.S. 24-21-104[3]).

New section added which reads as follows: "Prior to the time of the filing of a notice of lien in the office of the Secretary of State or the county clerk and recorder, as the case may be, the lien shall not be valid as against any mortgagee, purchaser, or judgment creditor. (C.R.S. 38-25-106).

Enforcement of Liens.

A special lien for cleaning services on clothing, household goods, or any other items may be enforced by sale after 90 days. Notice to owner is required if owner's address was given at time property was delivered. Whether or not address was given at time property was delivered, such property may be disposed of after 180 days without notice to owner. (C.R.S. 38-21-102, 103, 104). Other liens may be enforced by sale after shorter period. (C.R.S. 38-20-107 to 113).

Mechanics' Liens.

(C.R.S. 38-22-101 to 133). Whoever does any work or furnishes or supplies laborers, material, or equipment by contract express or implied with owner of any land, owner's agent or contractor, for construction, enlargement, alteration or repair of any building or other structure upon such land, shall have lien on land and buildings for amount and value of such work, laborers, materials, or equipment with interest at contract rate, or in absence of contract rate, at 12%. (C.R.S. 38-22-101[1][5]). Owner of single-family, owner occupied residence has affirmative defense to any action to enforce lien if owner has paid amount sufficient to satisfy owner's contractual and legal obligations, including purchase price or contract amount plus all additions, to general contractor. (C.R.S. 38-22-102[3.5]). In bankruptcy, once mechanics' lien perfected, relates back to date work commenced. (38 Bankr. 148). Owner's interest in property may be subjected to lien for unauthorized improvements made with owner's knowledge or for improvements authorized by landlord or vendor in lease or contract, unless owner posts notice that his or her interest will not be subject to lien. (C.R.S. 38-22-105; 640 P.2d 1130). Payments made by owners prior to commencement of work or prior to time when due shall not be valid to defeat, diminish, or discharge any lien except to contractor or person to whom payment was made. (C.R.S. 38-22-102[2][3]). However, exception is made when liened property is single-family dwelling unit. (C.R.S. 38-22-102[3.5] and 113[4]). Laborer on modular home later placed on real property of owner has no lien on real property. (34 Colo. App. 117, 523 P.2d 137). Lumber supplier of home building material seller has no lien on buyer-landowner's property. (715 P.2d 329). Mechanics' lien statute does not apply to public property (1997 Colo. LEXIS 524) or to partner's claim for improvements to partnership property (42 Colo. App. 281, 599 P.2d 262). In order to preserve any lien, notice of intent to file lien must be served upon owner and principal contractor at least ten days before filing lien statement, and affidavit of such service must be filed with lien statement. (C.R.S. 38-22-109[3]; 653 P.2d 90). For residential property, agency issuing building permit must deliver prescribed notice, either directly to owner, or by mail addressed to property. Notice by agency shall indicate that contractors, subcontractors, laborers or persons furnishing laborers providing labor or material for residential properties may collect money by filing lien against property. (C.R.S. 38-22-105.5). Notice not required for new residential construction or for property with more than four living units. (C.R.S. 38-22-105.5). Laborers who have not furnished materials must file lien with clerk and recorder of county wherein land is situated after last labor for which lien claimed has been performed and before expiration of two months after completion of building or structure; all other lien claimants must file lien before expiration of four months after day on which last labor was performed or last material furnished by such lien claimant; within applicable time for filing lien statement, extension to four months after completion of structure or six months after filing of notice, whichever comes first obtained by filing notice of potential lien claim. (C.R.S. 38-22-109[10]). Special rules apply to bona fide purchasers of single or double family dwellings. Special rules apply to owners, lenders, disbursers and others in connection with lien claimants under Art. 22 for loans or other funds proceeds of which are disbursed for work upon structure or other improvement (see C.R.S. 38-22-126 re mechanics' liens). Liens may be assigned (C.R.S. 38-22-117), and suit to foreclose same must be commenced within six months from time of completion of building or structure, performance of last work or furnishing of last materials. Mechanics' lien is extinguished upon claimant's failure to initiate action within statutory six-month period. (C.R.S. 38-22-110; 656 P.2d 1321). Subject to limitation of six months after completion of improvements, lien is valid for a year, with yearly extensions if affidavit filed stating improvements have not been completed. (C.R.S. 38-22-109). Liens are foreclosed in essentially same manner as mortgages. Proceeding is in rem (C.R.S. 38-22-113[3]) and provision is made for service by publication (C.R.S. 38-22-115). Filing of notice of lis pendens must accompany action to enforce lien. (C.R.S. 38-22-110; 153 Colo. 109, 384 P.2d 938). Laborers have priority as to proceeds of sale. Somewhat different provisions apply to liens on mines, and mining property, railways, public roads and repair of ditches (C.R.S. 38-23-101 to 110), oil, gas and other wells (C.R.S. 38-22-104; C.R.S. 38-24-101 to 111). Liens on mining property do not attach against owner for work done or for labor or material furnished to lessee. (C.R.S. 38-22-104). Statutory proceeding equitable in nature—no right to jury trial. (643 P.2d 31). Remedial portions of mechanics' lien statutes are liberally construed but those statutory requirements upon which right to existence of lien depends and with respect to acts necessary to perfect lien are strictly construed. (660 P.2d 925). Mechanics' lien may be extinguished if it is shown that there is no reasonable probability that amount claimed is due or if it is shown that lien claimant had both knowledge and intent to cheat or defraud in claiming such amount. (C.R.S. 38-22-128; C.R.S. 38-22-123). Disbursers have duties to check filings, ascertain amounts due, etc. (C.R.S. 38-22-126). Provisions for performance bonds included. (C.R.S. 38-22-129 to 133).

Public Works.

General contractor for public works for county, city, school district or other political subdivision, whose contract exceeds $50,000, must file bond for faithful performance of contract and payment of claims for labor and material (but not equipment) used. General contractor for public works for state whose contract exceeds $100,000 must also file bond. (C.R.S. 38-26-106). If labor or material claim is filed prior to final settlement, enough to satisfy is withheld for 90 days, during which period claimant may commence suit and file lis pendens with governing body. (44 Colo. App. 467, 615 P.2d 68). If suit not so commenced contractor receives money. (C.R.S. 38-26-107). General contractor for public works for county, city, town or school district must file bond for labor and materials used. Suit may be commenced on bond within six months of completion of project. (C.R.S. 38-26-105). Suppliers of labor and of materials have preferred positions in terms of demands upon retained funds in public works contracts. (655 P.2d 860).

State Tax Lien.

See category 22 Taxation, topic 22.13 Property Taxes.

Unemployment Contribution Lien.

State has first and prior lien for payment of unemployment contributions upon real and personal property of employer. (C.R.S. 8-79-103[1]).

Vendors' liens are recognized. (44 Colo. 495, 99 P. 758; 63 Colo. 22, 164 P. 504).

Requirements for Filing Liens.

All instruments which create liens on real property except mechanics' liens and judgment liens shall include street address or comparable identifying numbers, if any. (C.R.S. 38-35-122).

Redemption from foreclosure of liens, see topic 8.05 Executions.

For other liens see topics 8.02 Attachment, Executions, Homesteads; categories 3 Business Regulation and Commerce, topics Banks and Banking, Carriers, Factors; Civil Actions and Procedure, topic Judgments; Legal Profession, topic Attorneys and Counselors; Mortgages, topics Chattel Mortgages, Mortgages of Real Property; Property, topic Landlord and Tenant; Taxation, topic Income Tax; Transportation, topic Motor Vehicles. Collateral security, see topic 8.14 Pledges. Liens on exempt property, see topic 8.06 Exemptions.

See also topic 8.03 Creditors' Suits.

8.14 [RESERVED]

8.15 PLEDGES:

Common law of pledges applies except as stated below.

Uniform Commercial Code adopted. See category 3 Business Regulation and Commerce, topic 3.09 Commercial Code.

Uniform Consumer Credit Code adopted.

8.16 RECEIVERS:

A receiver may be appointed by the court in which an action is pending: (1) Before judgment, provisionally, on application of either party, when he establishes a prima facie right to the property, or to an interest therein, which is the subject of the action and is in possession of an adverse party, and such property, or its rents, issues and profits are in danger of being lost, removed beyond the jurisdiction of the court or materially injured or impaired; (2) by or after judgment, to dispose of the property according to the judgment, or to preserve it during appellate proceedings; (3) in other cases where proper and in accordance with established principles of equity. (C.R.C.P. 66). Receiver may also be appointed under statute where action to foreclose mortgage, deed of trust, or other instrument securing indebtedness has been commenced and it appears that security is inadequate, or property may be damaged or removed so as to render security inadequate (C.R.S. 38-38-601), or after foreclosure and during redemption period to prevent waste (C.R.S. 38-38-602). Action must be pending before court in order for it to appoint receiver (672 P.2d 221), but application for receiver may be sole claim for relief (C.R.C.P. 66[d]), and motion under C.R.C.P. 120 for order of court authorizing sale under written power of sale is action in which receiver may be appointed (703 P.2d 1314). Appointment of receiver is within discretion of trial court. (Id.).

Proceedings.

Motion may be made to appoint a receiver and when such motion is based on facts not appearing of record, the court may direct that the matter be heard on affidavits, oral testimony and/or depositions. (C.R.C.P. 43[e]).

Qualification.

Receiver must take an oath and furnish bond approved by court and executed to the people of the State of Colorado with sufficient surety in such sum as the court directs. (C.R.C.P. 66).

Compensation.

There is no statute governing compensation of receivers.

8.17 REDEMPTION:

See topics 8.05 Executions, Liens; categories 20 Mortgages, topic Mortgages of Real Property; Taxation, topic Property Taxes, subhead Redemption and Actions to Recover Property.

8.18 SUPPLEMENTARY PROCEEDINGS:

See topic 8.05 Executions.

9 DISPUTE RESOLUTION

9.01 ALTERNATIVE DISPUTE RESOLUTION:

Mandatory Dispute Resolution.

Rule 2.1 of Colorado Rules of Professional Conduct requires attorneys to advise their clients of alternative forms of dispute resolution for any matter involving or expected to involve litigation. Additionally, Colorado mandates that parties meet within 15 days after case is at issue, discuss possible settlement within 35 days and submit case management order to court within 45 days. (C.R.C.P. 16). In that case management order, parties must affirmatively state that they have discussed settlement and describe their future efforts to effectuate settlement. (C.R.C.P. 16[b][1]). Court, upon request of party, may conduct settlement conference. Judge assigned to case may not conduct conference, and discussions at settlement conferences may not be disclosed to trial judge. (§ 1-17 of C.R.C.P. 121). Court, at its discretion, may refer any case to any form of alternative dispute resolution except where one of parties claims to have been victim of physical or psychological abuse or where injunction is only remedy sought. (C.R.S. 13-22-311[1], 313). Court may exempt referral where party moves for exemption within five days of being referred to A.D.R. and demonstrates compelling reason for exemption. (C.R.S. 13-22-311, 313[1]). Beyond this, local court rules may govern referrals.

Voluntary Dispute Resolution.

Colorado’s Office of Dispute Resolution provides mediation services on voluntary basis. (C.R.S. 13-22-305). Statements made in mediation are not admissible in evidence or subject to discovery except: (i) With written consent of parties and mediator; (ii) where someone reveals intent to commit crime, injure another or threatens safety of child; (iii) where statute requires it; or (iv) where statements are relevant to action alleging willful or wanton misconduct of mediator. (C.R.S. 13-22-307). Any settlement agreement, whether full or partial, is, upon approval by court, enforceable as order of court. (C.R.S. 13-22-308). Any pending court hearing shall be continued if parties and mediator so request and represent to court that they are engaging in good faith mediation. (C.R.S. 13-22-311[3]). Mediation of workman’s compensation matters prior to administrative hearing permissible upon consent of all parties. (C.R.S. 8-43-205).

See also topic 9.02 Arbitration and Award.

9.02 ARBITRATION AND AWARD:

Colorado’s new Uniform Arbitration Act took effect Aug. 4, 2004. (C.R.S. 13-22-201 to 230). It repeals “Uniform Arbitration Act of 1975” and replaces it, with significant changes. Act applies to any arbitration agreement made on or after Aug. 4, 2004. It also can apply to prior agreements if parties consent. (C.R.S. 13-22-203). Colorado also still recognizes common law arbitrations. (52 Colo. 121, 117 P. 896).

Colorado's Uniform Arbitration Act allows parties to waive or modify effect of Act within limits. (C.R.S. 13-22-204). Parties cannot unreasonably restrict rights regarding notice, arbitrator disclosures, representation by lawyer, and effect of certain actions by arbitrator. (C.R.S. 13-22-204[2], [3]). Finally, they cannot waive effect of certain provisions regarding judicial action.

Enforceability of Arbitration Agreements.

Agreement to arbitrate "contained in a record" regarding any existing or future controversy is valid, enforceable and irrevocable, except on grounds for revocation that would apply to any contract. (C.R.S. 13-22-206[1]). Submission to arbitrate may be oral for common law arbitration. (52 Colo. 121, 117 P. 896).

Court decides whether agreement to arbitrate exists or whether specific controversy is subject to agreement to arbitrate. (C.R.S. 13-22-206[2]). Arbitrator decides whether condition precedent has been fulfilled or whether contract containing arbitration agreement is enforceable. (C.R.S. 13-22-206[3]). Colorado public policy favors arbitration so doubts regarding arbitrability must be resolved in favor of arbitration. (38 Colo. App. 360, 559 P.2d 255). However, right to arbitrate may be waived. (612 P.2d 92). If party challenges agreement to arbitrate in court, arbitration proceeding may continue pending resolution of issue. (C.R.S. 13-22-206[4]).

Role of Court.

Court decides: (1) Whether agreement to arbitrate exists; or (2) whether specific controversy is even subject to arbitration agreement. Act mandates that court summarily decide any motions to compel arbitration under C.R.S. 13-22-207(1) as well as any motions alleging that no agreement to arbitrate exists (C.R.S. 13-22-207[2]). If party files motion to compel arbitration, court must stay any judicial proceedings involving claim alleged to be subject to arbitration. (C.R.S. 13-22-207[7]). It may also grant preliminary injunctive relief to preserve status quo pending arbitration. (C.R.S. 13-22-208; 927 P.2d 1325; 672 P.2d 1015). If court finds dispute is arbitrable, it must order arbitration and stay any action involving arbitrable issue or, if issue is severable, stay arbitrable issue and order arbitration. (C.R.S. 13-22-207[7]).

New rules also allow court to consolidate arbitrations. (C.R.S. 13-22-210). Court may order consolidation of separate proceedings as to all or some of claims if all parties: (1) Consent and separate agreements to arbitrate exist; (2) claims arise in substantial part from same transaction or series of related transactions; (3) common issue of law or fact creates possibility of conflicting decisions; and (4) prejudice from failure to consolidate outweighs any risk or undue delay, hardship, or prejudice to rights of parties opposing consolidation. (C.R.S. 13-22-210).

Powers of Arbitrators.

After being appointed, arbitrator may conduct arbitration in manner appropriate for fair and expeditious resolution. (C.R.S. 13-22-215). This includes issuing interim awards if necessary to protect effectiveness of process, just as court would in civil case. (C.R.S. 13-22-208[2][a]). Arbitrators may hold conferences before hearing and determine admissibility, relevance, materiality and weight of any evidence. (C.R.S. 13-22-215). They also may issue subpoenas for attendance of witnesses and production of documents, permit depositions of witnesses who cannot be subpoenaed or who are unable to attend hearings, allow discovery, and issue protective orders. (C.R.S. 13-22-217). Upon motion and proper notice to parties (with opportunity to respond), arbitrators can summarily dispose of claims or particular issues. (C.R.S. 13-22-215). Finally, they can award reasonable attorneys fees if same type of action would allow for them were case before court. (C.R.S. 13-22-221).

Role of Arbitrators.

Unless agreement to arbitrate provides otherwise, arbitrators have authority to decide all contested issues of fact and law properly presented for decision. (642 P.2d 922; 781 P.2d 119).

Arbitrators are not bound by any particular substantive or procedural rules of law unless agreement to arbitrate so provides. (996 P.2d 771; 656 P.2d 54). Arbitrators do not exceed their powers by rendering decision that is contrary to rules of law that would have been applied by court, so long as there is no violation of express term of agreement to arbitrate. (996 P.2d 771; 892 P.2d 422).

Medical Malpractice Arbitrations.

Under Health Care Availability Act, C.R.S. 13-64-403, exemplary or punitive damages may be awarded by arbitrator with respect to medical malpractice claims, subject to certain procedural requirements set forth in C.R.S. 13-64-302.5. Agreement to arbitrate medical malpractice claims may also be declared invalid if agreement to arbitrate fails to meet certain statutory criteria. (C.R.S. 13-64-403[10]).

Wage Claim Act Arbitrations.

Anti-waiver provision of Wage Claim Act, C.R.S. 8-4-121, prohibits employers from requiring employees to submit disputes over compensation to arbitration. (903 P.2d 1126).

Award and Enforcement.

Statutory arbitration award must be written and signed by arbitrators joining in award. (C.R.S. 13-22-210). Confirmation upon filing of award with district court (C.R.S. 13-22-213), unless vacated (C.R.S. 13-22-214) or modified (C.R.S. 13-22-215).

Trial de novo clause allowing insured or insurer to demand trial on merits after arbitration where award exceeds specified limit is unenforceable. (952 P.2d 342).

Damage Limitations.

Claim for exemplary damage not allowed in initial claim for relief. (C.R.S. 13-21-102[1.5][a]). Unless otherwise provided by law, exemplary damages may not be awarded in administrative or arbitration proceedings, even if award or decision is enforced or approved in action commenced in court. (C.R.S. 13-21-102[5]).

Judgment on Award.

For statutory arbitration, judgment entered upon order confirming, modifying or correcting award. (C.R.S. 13-22-216). Common-law award reduced to judgment by civil suit. (76 Colo. 409, 232 P. 680).

10 DOCUMENTS AND RECORDS

10.01 ACKNOWLEDGMENTS:

Uniform Recognition of Acknowledgments Act has been adopted. (C.R.S. 12-55-201 to 211). Uniform Act supplements but does not supersede other statutes dealing with acknowledgments. (C.R.S. 12-55-209).

May be taken by following officers:

Within State.

Any instrument—notary public. (C.R.S. 12-55-110). Instruments affecting interest in or title to real estate—judge, clerk or deputy clerk of any court of record; clerk and recorder of any county or his deputy; any notary public. (C.R.S. 38-30-126[1]).

Fees for taking acknowledgments are as follows: Judge, clerk or deputy clerk of court of record, $1 (C.R.S. 13-32-104); county clerk and recorder, $2 (C.R.S. 30-1-103); notary public, not to exceed $5 for each acknowledgment, or not to exceed $10 for notary public's electronic signature. (C.R.S. 12-55-121).

Outside State but within U.S. or any Territory Thereof.

Any instrument—see Uniform Recognition of Acknowledgments Act. Instruments affecting interest in or title to real estate—Secretary of State or territory; clerk of court of record having seal; notary public; commissioner of deeds; any other officer authorized by laws of state or territory to take acknowledgments. (C.R.S. 38-30-126[2]).

Outside United States.

Any instrument—see Uniform Recognition of Acknowledgments Act. Instruments affecting interest in or title to real estate—judge, clerk or deputy clerk of any court of record, or chief magistrate or other chief executive officer of any province, colony, island possession, bailiwick, or mayor or chief executive officer of any city, town, borough, county or municipal corporation having seal, of foreign kingdom, empire, republic, state, principality, province, colony, island possession or bailiwick; or any ambassador, minister, consul, vice consul, consular agent, vice-consular agent, charge d'affaires, vice-charge d'affaires, commercial agent, vice-commercial agent, or diplomatic, consular or commercial agent or representative or deputy thereof of any government; and, additionally, if within any colony, island possession or bailiwick belonging to or under control of U.S., any judge, clerk or deputy clerk of any court of record, chief magistrate or other chief executive officer, mayor or chief executive officer of any city, town, borough, county, or municipal corporation having seal, or notary public. (C.R.S. 38-30-126[3]-[4]).

There is sufficient proof of authority of person authorized by laws and regulations of foreign country to perform notarial act if either official seal of person performing notarial act is affixed to document, or, in case of electronic record, such information that is required in lieu of notary seal by laws of place granting notarial authority to person performing notarial act is attached to or logically associated with document. (C.R.S. 12-55-204[2][b]).

Persons in or with U.S. Armed Forces.

See subheads Uniform Recognition of Acknowledgments Act, supra and Forms, infra; and topic Notaries Public.

General Requirements as to Taking.

Person acknowledging instrument affecting title to real property must be personally known to officer or be identified by credible person known to such officer. (C.R.S. 38-35-101). Effective Jan. 1, 1999, if taken by notary public, person acknowledging instrument must do so while in physical presence of such notary public, and must be personally known to such notary public or such notary public must receive satisfactory evidence of identity. (C.R.S. 12-55-110[4]). See also Uniform Recognition of Acknowledgments Act.

General Requirements of Certificate.

Acknowledgment certificates must be under seal of officer taking acknowledgment and date of expiration of officer's commission must be stated if taken by notary public. (C.R.S. 12-55-112; C.R.S. 38-35-101). In case of notarization of electronic record, application of notary's electronic signature in lieu of handwritten signature and rubber stamp seal or seal embosser is sufficient. Notary public shall not use electronic signature unless notary uses journal if maintaining such journal is required by C.R.S. 12-55-111 and notary attaches to document document authorization number issued by Secretary of State (C.R.S. 12-55-112[4.5]).

Married Women.

No special requirement.

Foreign Acknowledgments.

Uniform Recognition of Acknowledgments Act adopted. See also subheads Outside State but within U.S. or any Territory Thereof, Outside United States.

Effect of Acknowledgment.

Acknowledgment of instrument affecting title to real estate constitutes prima facie evidence of proper execution and, if properly recorded, of due delivery. (C.R.S. 38-35-101).

Proof by Subscribing Witness.

Where an instrument is not acknowledged, execution thereof may be proved by testimony of a subscribing witness taken and reduced to writing by an officer authorized to take acknowledgments and subscribed by subscribing witness. (C.R.S. 38-30-136).

Authentication.

When instrument affects title to real property, certificate of officer not specifically named in statute taking acknowledgment outside state but within U.S. must be authenticated by clerk of court of record where officer resides. (C.R.S. 38-30-126[2]). See also Uniform Recognition of Acknowledgments Act.

Electronic Records.

Notaries public are empowered to attest electronic records. (C.R.S. 12-55-110[1][a]). Secretary of State is empowered to promulgate rules necessary to establish standards, procedures, practices, forms and records relating to notary's electronic signature; but in every instance, electronic signature of notary public must contain notary's name, words "notary public" and "state of Colorado", document authorization number issued by Secretary of State, and words "my commission expires" followed by expiration date of notary's commission, each of which must be immediately perceptible and reproducible in electronic record to which notary's electronic signature is attached. (C.R.S. 12-55-106.5[1]).

Forms.

Following form is statutory for all instruments affecting title to real property, whether made by individual or corporation. (C.R.S. 38-35-101). See also Uniform Recognition of Acknowledgments Act for other forms.

Form

State of . . . ., County of . . . . ss. The foregoing instrument was acknowledged before me this . . . . day of . . . ., 20. . . ., by . . . ., (if by natural person or persons, insert name or names; if by person acting in representative or official capacity or as attorney-in-fact, insert name of person as executor, attorney-in-fact or other capacity or description; if by officer of corporation, insert name of such officer or officers as the president or other officers of such corporation, naming it). Witness my hand and official seal.

. . . .

Title of Officer.

My commission expires . . . .

Form for acknowledgment before officer in Armed Forces (C.R.S. 24-12-104):

Form

The foregoing instrument was acknowledged before me this . . . . day of . . . ., 20. . . ., by . . . ., serving in or with the armed forces of the United States. The undersigned further certifies that he is a commissioned officer of the rank stated below and is in the active service of (or performing inactive-duty training in) the armed forces of the United States. (Signature, rank and branch of service or subdivision thereof.)

Validating Acts.

Any instrument affecting title to real property, whether acknowledged, unacknowledged or defectively acknowledged, after being recorded in county where real property is located is notice to all persons claiming interest in such real property. (C.R.S. 38-35-106[1]). Any instrument which has remained of record in county for ten years, although unacknowledged or defectively acknowledged is deemed to have been properly acknowledged. (C.R.S. 38-35-106[2]).

Alternative to Acknowledgment or Proof.

No statutory provision.

10.02 AFFIDAVITS:

Affidavit may be sworn to before any court, judge, clerk and deputy clerk within jurisdiction of court, before certain officers in armed forces and before notary public in any county. (C.R.S. 24-12-103, 104). They may be sworn to within or without state before any officer authorized by law to take and certify acknowledgment of deeds conveying lands. (C.R.C.P. 108). See topic Acknowledgments for fees.

General Requirements.

Affiant must swear to, or affirm (C.R.S. 24-12-101 and 102) affidavit, before same person who takes it (C.R.S. 12-55-205). See generally, Uniform Recognition of Acknowledgments Act. (C.R.S. 12-55-201 to 211).

Use of affidavits in evidence is permitted, as authorized in specific statutory provisions or rules of procedure, such as acknowledgments relating to real property (C.R.S. 38-35-104) or depositions before action (C.R.C.P. 27[a]). If they affect title to real property they may be recorded. (C.R.S. 38-35-109).

Form.

No prescribed form of jurat. Form in general use: “Subscribed and sworn to before me this . . . . . day of . . . ., 20. . . . . . My commission expires . . . .” followed by signature and seal of notary public.

Alternative to Affidavit.

No statutory provision.

10.03 NOTARIES PUBLIC:

Qualification.

Every applicant for appointment as notary must take affirmation set forth in C.R.S. 12-55-105, and meet qualifications of C.R.S. 12-55-104 (resident of Colorado, at least 18 years of age; read and write English; no felony conviction or conviction for notary misconduct or, in prior five years, misdemeanor conviction involving dishonesty; notary commission has never been revoked;

lawful presence in U.S.) and submit handwritten sample of signature of legal name. Application may also contain applicant's electronic signature if applicant is issued journal. Secretary of State may require by rule that notaries complete training program. (C.R.S. 12-55-103.5).

Appointment and Term.

Appointments are by Secretary of State; term is four years. (C.R.S. 12-55-103).

Seal.

Notary must have rubber stamp or embosser seal and affix same to acknowledgments. Acknowledgment of electronic record consists of attachment of electronic signature of person performing notarial act containing required information. (C.R.S. 12-55-112). Electronic signature of notary must be accompanied by notary's name; words "NOTARY PUBLIC" and "STATE OF COLORADO"; document authentication number issued by secretary of state; and words "my commission expires" followed by expiration date of notary's commission. (C.R.S. 12-55-106.5[1]).

Powers.

Notary may take acknowledgments, administer oaths and affirmations, attest documents and electronic records, take depositions and perform any other act permitted by law. Notary is disqualified from performing any notarial act if he receives any property or interest exceeding in value his fee or if he is party to transaction. (C.R.S. 12-55-110). Notary cannot notarize any blank document. (C.R.S. 12-55-110[3]).

Journals.

Notary must keep journal of every notarial act (or copy of document reflecting notarial act if document contains required journal information) and give copy or certificate of journal or any notarial act if required. (C.R.S. 12-55-111).

Fees are provided by statute. Fees of notaries public may be, but shall not exceed, $5 for each acknowledgment, except as otherwise provided by law.

Misconduct.

Notary who knowingly and willfully, violates his duties is guilty of official misconduct, class 2 misdemeanor, which results in his liability to any person damaged thereby. (C.R.S. 12-55-116). Commission may be revoked or suspended, or letter of admonition issued, if notary makes substantial and material misstatement or omission of fact in application; is convicted of official misconduct or felony or, in prior five years, misdemeanor involving dishonesty; fails to exercise powers or perform duties of notary public; knowingly uses false or misleading advertising regarding powers or authority; engages in unauthorized practice of law; or notarizes blank document. (C.R.S. 12-55-107[1]).

Commissioners of deeds have general notarial powers. (C.R.S. 38-30-130 to 133). Fees are same as for notaries public. (C.R.S. 38-30-134).

Authentication.

See topic 10.01 Acknowledgments.

Commissioned officers of U. S. Armed Forces have general notarial powers. (C.R.S. 24-12-104).

10.04 RECORDS:

Records relating to real property are kept by county clerk and recorder of county where property is located. Uniform Commercial Code adopted. (C.R.S. 4-1-101 to 4-9.7-109). See category 3 Business Regulation and Commerce, topic 3.09 Commercial Code, and subhead Filing Under Commercial Code, infra, for places for filing personal property records. Uniform Federal Lien Registration Act adopted. (C.R.S. 38-25-101 to 107).

Recordable Instruments.

All deeds, powers of attorney, agreements or other instruments conveying, encumbering or affecting title to real property, certificates and certified copies of orders, judgments and decrees of courts of record may be recorded. (C.R.S. 38-35-109). All must be recorded to be valid against any person with any kind of rights who first records, except parties to instrument and those with notice. In all cases in which instrument may be filed with county clerk and recorder, filing is deemed equivalent to recording. (C.R.S. 38-35-109[1]). Filing notice of lis pendens is notice to all persons thereafter acquiring any interest in property described. (C.R.S. 38-35-110). Clerk and recorder may, however, refuse to accept for recording any spurious lien or spurious document. (C.R.S. 38-35-202[1]).

Place of Recording.

Recording is in office of clerk and recorder of county where land is situated. (C.R.S. 38-35-109[1]). *For list of counties and county seats, see first page for this state in volume containing Practice Profiles Section.*

Requisites for Recordings.

Acknowledgment or proof by witnesses not required. (C.R.S. 38-35-106[1]). All documents of title, including instruments creating liens on real property, except mechanics' and judgment liens, should include immediately preceding or following legal description street address or comparable identifying numbers for property if displayed on property or any building (C.R.S. 38-35-122[1]), but failure to do so does not render document invalid (C.R.S. 38-35-122[3]). Any instrument creating lien on real property, except mechanics' liens, when recorded shall include current mailing address of lienor and lienee. Lienor of judgment lien shall place such addresses on document. (C.R.S. 38-35-123[1]). Failure to state mailing address does not render document or its recordation invalid. (C.R.S. 38-35-123[2]). No deed will be recorded without notation of grantee's legal address, but acceptance of deed in violation of statute does not make deed invalid. (C.R.S. 38-35-109[2]). Power of attorney must be recorded in same office as instrument executed by attorney-in-fact. (C.R.S. 38-30-123). Document required or permitted to be acknowledged affecting title to real property that is signed in person's official capacity by public trustee, county treasurer, county sheriff, or deputy of such official acting for that official that contains seal of such official shall be deemed to have been properly acknowledged. (C.R.S. 38-35-106[3]). Any person who offers to have recorded or filed in office of clerk and recorder any document purporting to create lien against real property knowing or having reason to know document is forged, groundless, contains material misstatement or false claim, or is otherwise invalid, is liable to owner for greater of $1,000 or actual damages together with reasonable attorneys' fees. Any grantee or person purportedly benefitted by such recorded document who willfully refuses to release document of record upon request of owner is liable to owner for greater of $1,000 or actual damages, together with reasonable attorneys' fees. (C.R.S. 38-35-109[3]).

Uniform Simplification of Land Transfers Act not adopted.

Recording Fees.

Recording fee schedule is as follows (C.R.S. 30-1-103):

Taking and certifying affidavit	$ 2.00
Certificate and seal, each	1.00

Filing bond and license	5.00
Certificate of magistracy under seal	2.00
Taking acknowledgments	2.00
Recording town, subdivision and other plats and all documents larger than 8" wide or 14" long	10.00 per sheet
Entering subsequent taxes paid in tax sale record	5.00 each certificate
Entering certificate of redemption in tax sale record	5.00 each certificate
Recording all documents containing name of one or more mining claims	5.00 per page plus 0.25 per mining claim named therein
Copies of records (unless fee is otherwise prescribed by law)	0.25 per standard page or actual cost of reproducing records in format other than standard page.

Foreign Conveyances or Encumbrances.

Instrument affecting title to real property executed and acknowledged in language of foreign country where executed may be recorded only if accompanied by sworn translation into English. (C.R.S. 38-30-140). For validity of foreign conveyances or encumbrances, see category 21 Property, topic 21.16 Real Property, subhead Foreign Conveyances or Encumbrances.

Effect of Record.

No unrecorded instrument is valid against any person with any kind of rights who first records, except between parties and those who have notice thereof. (C.R.S. 38-35-109[1]). Recording statute classified race-notice. (C.R.S. 38-35-109[1]). Proper acknowledgment and recording of any instrument relating to real property is prima facie evidence of due delivery, despite lapse of time between date of instrument and date of recording. (C.R.S. 38-35-101[4]). Recorded instruments acknowledged in proper form may be proved in evidence by certified copy of record without further proof of execution. (C.R.S. 38-35-104). Unacknowledged or defectively acknowledged instrument of record ten years deemed properly acknowledged. (C.R.S. 38-35-106[2]). No spurious lien or spurious document shall affect property longer than 30 days after filing or recording, unless action to enforce lien is commenced and notice of lis pendens is filed or recorded. (C.R.S. 38-35-203[1]).

Torrens Act.

Uniform Land Registration Act adopted. (C.R.S. 38-36-101 to 199). Owner may apply for registration of land (C.R.S. 38-36-101) to district court of county where land is situated and court may inquire into condition of title to and any interest in land and may make all orders and decrees necessary to determine, establish and declare title or interest, legal or equitable, as against all persons, known or unknown, and all liens and encumbrances thereon and to declare order, priority and preference as between them and to remove all clouds from title (C.R.S. 38-36-108). Court will refer application to examiner of titles who shall examine title, search records and file report, including certificate of examiner's opinion on title. (C.R.S. 38-36-118). Based on report and results of hearing, if necessary, court will issue decree of confirmation of title, and registration shall be entered that binds land and quiets its title. (C.R.S. 38-36-130). Every person receiving certificate of title pursuant to decree and each subsequent purchaser of registered land who takes for value and in good faith shall hold land free from all encumbrances except those noted in last certificate of title in office of registrar of titles and except rights and encumbrances specified by statute. (C.R.S. 38-36-133[1]). Thereafter, no title in derogation of that of registered owner may be acquired by prescription or adverse possession (C.R.S. 38-36-137), and subsequent encumbrances or changes in title must be registered with registrar and on original and duplicate certificates of title and will take effect only from time of registration, and new certificates of title shall be issued to subsequent owners of land (C.R.S. 38-36-159 to 182). Schedule of registration fees is provided by statute. (C.R.S. 38-36-198).

Transfer of Decedent's Title.

Transfer of decedent's title to real estate is shown of record by recording personal representative's deed describing, in case of testate estates, will and time and place of probate, and in case of intestate estates, death of decedent. (C.R.S. 15-12-711, 907, 908). In all cases, deed should recite date of appointment of personal representative and should note state documentary fee. (C.R.S. 15-12-714, 910).

Certified copy of documents of appointment, release of Colorado and U.S. estate tax liens should also be recorded. If no personal representative has been appointed, marketable title cannot be conveyed until creditors' claims are barred one year after decedent's death. (C.R.S. 15-12-803[1][a][III]).

In addition, for nonresident decedent, certified copy of authenticated documents of appointment, as filed with and certified by Colorado court (see category 13 Estates and Trusts, topic 13.16 Wills, subheads Foreign Executed Wills and Foreign Probated Wills, as to testate nonresidents), and releases of Colorado and U.S. estate tax liens should be recorded. (C.R.S. 15-13-204).

In case of joint tenancy, life tenancy or other person whose record interest in real property terminates upon death of another person, certified copy of death certificate, supplementary affidavit and releases of Colorado and U.S. estate tax liens should be recorded. Supplementary affidavit must be properly sworn to or affirmed by one person of legal age having personal knowledge of facts and having no record interest in real property, must include legal description of real property and statement that person referred to in death certificate was at time of death owner of joint tenancy, life tenancy or other interest in real property that terminates upon death. (C.R.S. 38-31-102). Deed executed and delivered by one joint tenant, but not recorded until after his death, is effective to sever joint tenancy; rebuttable presumption of delivery created by recording relates back to execution of deed. (188 Colo. 303, 535 P.2d 197).

Filing Under Commercial Code.

Colorado adopted revised UCC Art. 9 (with variations), including central filing system, effective June 1, 2000. See category 3 Business Regulation and Commerce, topic 3.09 Commercial Code, and subhead Filing Under Commercial Code, infra, for places for filing personal property records. Colorado had previously adopted central filing system based on revised UCC Art. 9 (1998 revision), effective Jan. 1, 2000. From Jan. 1, 1996 to Dec. 31, 1999, most non-real estate-related filings could be made either in office of Secretary of State or office of clerk and recorder of any county. Financing statements filed before July 1, 1996 for non-real estate-related filings lapsed effective Jan. 1, 1998, unless continuation statement was filed between July 1, 1996 and Dec. 31, 1997 in any office in which original financing statement was required to be filed.

Vital Statistics.

State registrar in department of public health and environment administers state system of registration of births and deaths (C.R.S. 25-2-103) and will furnish to applicant with direct and tangible interest certified copy of any registered birth or death certificate (C.R.S. 25-2-117, 121). Fee is $17 for first copy, $10 for each additional copy ordered at same time and $6 credit card convenience charge, subject to change annually. Address: Vital Records, 4300 Cherry Creek Dr. South, Denver, CO 80246-1530, http://www.cdphe.state.co.us/certs/.

Establishing Records.

If birth or death in state has not been recorded, delayed recording may be accomplished with submission of such evidence and compliance with such regulations as required by state registrar, who may be contacted at above address. (C.R.S. 25-2-114).

10.05 SEALS:

Corporations, including nonprofit corporations, may have and use corporate seal, or facsimile thereof, including rubber stamp, by impressing or affixing it or by reproducing it in any other manner. (C.R.S. 7-103-102[b]; C.R.S. 7-123-102[b]). It is not necessary to proper execution of any conveyance affecting real property that same shall be executed under seal of grantor, nor that any seal or scroll or other mark be set opposite name of grantor. (C.R.S. 38-30-118). Private corporation, authorized by law to convey, mortgage or lease any of its real estate, may convey, mortgage or lease same by instrument under its common seal. (C.R.S. 38-30-144). Any instrument to which maker affixes scroll, by way of seal, shall be of same effect as if sealed. (C.R.S. 38-30-125).

Whenever any law, rule, or regulation requires use of seal, it is sufficient that rubber stamp with facsimile of seal required is placed or stamped upon document with indelible ink. (C.R.S. 12-55-211).

Uniform Commercial Code adopted. See category 3 Business Regulation and Commerce, topic 3.09 Commercial Code.

10.06 TORRENS ACT:

See topic 10.04 Records.

11 EMPLOYMENT

11.01 EMPLOYER AND EMPLOYEE:

See topic 11.02 Labor Relations.

11.02 LABOR RELATIONS:

Director of division of labor, department of labor and employment, has jurisdiction over any employer-employee dispute affecting conditions of employment, or wages or hours, only when employer and employee request such intervention or when dispute, according to executive director, affects public interest. (C.R.S. 8-1-125). Strike or lockout in industry affected with public interest may not occur prior to or during investigation, hearing or arbitration of dispute by director. (C.R.S. 8-1-126). Persons participating, inciting or encouraging such strike or lockout guilty of misdemeanor. (C.R.S. 8-1-129).

Combinations of employees to secure fair treatment from employers, better wages and conditions, or for purpose of aiding and protecting interests of employees in any other lawful manner are not unlawful. (C.R.S. 8-2-101). Combinations may not prevent or intimidate employees from continuing employment by displays of force or threats of bodily or financial injury, nor boycott or intimidate employer. (C.R.S. 8-2-101). Unlawful for employer to attempt to prevent employees from joining or continuing membership in union or political party (C.R.S. 8-2-102), or from participating in politics (C.R.S. 8-2-108). Violations are misdemeanors. (C.R.S. 8-2-103, 108). Noncompetition covenant in employment contract is void and unenforceable, except when included in contract for sale of business or business assets, in limited instances when protecting trade secrets (44 Colo. App. 155, 609 P.2d 1125), when included in contract provision for recovery of education and training expenses when employee served employer less than two years, or when applied to executive and management personnel, officers and professional staff thereto (C.R.S. 8-2-113[2]; 680 P.2d 1339). Covenant may not restrict physician's right to practice medicine, but may provide for damages. (C.R.S. 8-2-113[3]). Valid covenants must be reasonable in both duration and geographic scope; court may modify overly broad covenant or decline to enforce. (681 P.2d 546).

Employer may not maintain blacklist or notify any other employer that any current or former employee has been blacklisted by such employer for purpose of preventing such employee from obtaining employment. (C.R.S. 8-2-114[2]). However, any employer that, upon request by prospective employer or current or former employee, provides information about current or former employee's job history or job performance is immune from civil liability for such disclosure and consequences of such disclosure unless information disclosed was false and employer knew or reasonably should have known that such information was false. (C.R.S. 8-2-114[3]). Employer who provides written information to prospective employer about current or former employee, must, upon request of such current or former employee, provide current or former employee copy of information provided to prospective employer. (C.R.S. 8-2-114[5]).

Hours of Labor.

Except in emergencies, eight-hour day is maximum for cement and plaster manufacturing plants. (C.R.S. 8-13-110). Varying provisions exist as to hours for workers at mining and smelting operations and fire departments. (C.R.S. 8-13-101 to 103, 107, 108, and 111). Criminal penalties for violations. (C.R.S. 8-13-103, 108, 111). Colorado Minimum Wage Order No. 25 should be consulted for other issues regarding hours of labor and wages.

Wages.

All nonpublic employers must pay employees at least monthly unless there is mutual agreement for another period. Agricultural employees may not agree otherwise. (C.R.S. 8-4-105). Statute excepts independent contractors. (C.R.S. 8-4-101[4]). Statute does not apply to profit-sharing plans, pension plans or other deferred compensation programs. (C.R.S. 8-4-105[3]). Wages or compensation are not due until such time as they are earned, vested, and determinable. (C.R.S. 8-4-101[8]). "Wages" may mean bonuses, commissions, and vacation pay (C.R.S. 8-4-101[8]), but does not include severance pay (C.R.S. 8-4-101[8]). Employer must post written notice of paydays. (C.R.S. 8-4-107). $50 per day penalty payable to state for each refusal to pay each employee on time. (C.R.S. 8-4-113[1]). Greater of 50% penalty or ten days' wages payable to employee for refusal to pay discharged employee at time of termination, unless employer's accounting unit is not then operational, or refusal to pay quitting employee at next regular pay day, unless employer had good faith legal justification therefor. Penalty inapplicable where employee not available to receive payment or fails to make written demand within 60 days. (C.R.S. 8-4-109[3]). If employee fails to recover greater sum than amount tendered by employer, court may award employer reasonable costs and attorney fees when employee's claims for wages or compensation exceeds greater of $7,500 or jurisdictional limit for small claims court, whether or not filed in small claims court. If employee, in such action, recovers sum greater than amount tendered by employer, court may award employee reasonable costs and attorney fees. (C.R.S. 8-4-110[1]). Employer may set-off debt of employee (C.R.S. 8-4-104[3]), and shortages due to theft by employee under certain circumstances (C.R.S. 8-4-105). Specifically, deductions are allowed for value of property or money not properly returned to employer at end of employment. Ten extra days are allowed to calculate amount of these deductions. (C.R.S. 8-4-105[1]).

Wages must be paid in cash or by negotiable instruments, payable on demand, or direct deposit or paycard. (C.R.S. 8-4-102). Use of scrip prohibited. (C.R.S. 8-4-102). District Attorneys may enforce requirements. (C.R.S. 8-4-111[2]).

Certain mining employers, before commencing work in any period for which payment of wages is to be made, are required to have funds or readily saleable securities on hand or on deposit to pay such wages. (C.R.S. 8-4-104). Definite places for payment of wages in event of termination of employment established, and definite times for payment of wages in event of strikes specified. (C.R.S. 8-4-108).

Employer may not discriminate on basis of sex in payment of wages or salary to employees. (C.R.S. 8-5-102). Commission hearing and judicial review similar to procedures under Workmen's Compensation Act available for enforcement. (C.R.S. 8-5-103).

Director has authority to set minimum wage rates for different occupations and is bound by state law and state constitution. Director is bound by federal law or rules if they set higher minimum wage. (C.R.S. 8-6-105, 106, 107, 109, 111). Employer's failure to pay minimum wage is misdemeanor and employee working for less may have action for difference from minimum despite any contract with employer.

Assignment of wages, see category 8 Debtor and Creditor, topic 8.01 Assignments.

Child Labor.

Employment of children is governed by Colorado Youth Employment Opportunity Act of 1971. (C.R.S. 8-12-101 to 117). Children nine and over are permitted enumerated and similar employments including certain types of delivery, shoe-shining, gardening, snow shoveling, and caddying. (C.R.S. 8-12-106). Children 12 and older are permitted to engage in enumerated and similar employments including door-to-door selling, babysitting, operation of division of labor approved power-driven lawn equipment, operation of power-driven snow removal equipment, and certain agricultural work. (C.R.S. 8-12-107). Children 14 and older are permitted to engage in enumerated and similar employment including nonhazardous manufacturing, public messenger service, operation of automatic enclosed elevators, janitorial service, office work, warehousing, nonhazardous construction and repair, retail food service, certain jobs in gasoline stations, restaurants, hotels, or motels, and jobs relating to parks and recreation. (C.R.S. 8-12-108). Children 16 and over are allowed to use motor vehicles. (C.R.S. 8-12-109). Children under 18 may not, except under certain circumstances, work in enumerated hazardous employments, including operation of certain boilers, work at certain elevations, manufacture, transportation, or storage of explosives, mining, logging, any occupation which would expose them to radiation, operation of certain power-driven machinery, livestock slaughter, manufacture of brick or clay products, wrecking or demolition, roofing and excavation. (C.R.S. 8-12-110[2]). Exceptions are provided for minors over age 14 employed in certain programs or with specified training. (C.R.S. 8-12-110[1]). Director may grant exemptions from provisions of Act under certain circumstances. (C.R.S. 8-12-104).

No child under age 16 is permitted to work in excess of six hours if next day is school day. (C.R.S. 8-12-105[2]). No child under age 16 may work during school hours, unless child has school release permit. (C.R.S. 8-12-105[2]; C.R.S. 8-12-113). No child under age 16 may work between 9:30 p.m. and 5:00 a.m. unless as babysitter or next day is not a school day. Children under 18 may not work more than eight hours in one day or 40 hours in one week, with certain exceptions for children over 14 in seasonal employment relating to perishable products. (C.R.S. 8-12-105).

Employers may require proof of age. (C.R.S. 8-12-111). Children age 14 and age 15 may apply for school release permit. (C.R.S. 8-12-113). Employers and those having legal responsibility for minors are subject to fines, and to fines and imprisonment for subsequent violations of Act. (C.R.S. 8-12-116).

Discrimination.

Antidiscrimination Act adopted. (C.R.S. 24-34-301 to 802). Discrimination, including harassment, against employees on basis of race, creed, color, sex, sexual orientation, religion, age, national origin, ancestry, disability, marriage to co-employee, is unlawful. (C.R.S. 24-34-402). Discrimination against "otherwise qualified" worker on basis of handicap is unlawful, unless no reasonable accommodation for handicap can be made by employer, handicap actually disqualifies person, and handicap has significant impact on job. (C.R.S. 24-34-402). In certain cases, dismissal on basis of marriage to co-employee is unlawful. (C.R.S. 24-34-402). Termination of employment for engaging in lawful activity off employer's premises is unlawful, unless restriction relates to bona fide occupational requirement, is reasonably and rationally related to employment activities and responsibilities of particular employee or employee group, or is necessary to avoid conflict of interest or appearance thereof. (C.R.S. 24-34-402.5). Employer and insurer liable for sex discrimination when insurance offered employees excluded benefits for normal pregnancy. (759 P.2d 1358). Employer must allow employee to request or take up to three working days of leave from work in any 12-month period, with or without pay, if employee is victim of crime, underlying factual basis of which has been found by court on record to include act of domestic violence. (C.R.S. 24-34-402.7). Discrimination charges must be filed within six months of complained-of act. (C.R.S. 24-34-403). Unlawful for publicly-financed employer to discriminate on basis of handicap unless disability prevents performances of work. (43 Colo. App. 446, 614 P.2d 891; C.R.S. 24-34-801[1]).

Labor Unions.

Union security provisions between employer and union are unfair labor practices unless approved in secret ballot election by over half of bargaining unit employees eligible to vote or three-quarters of employees voting, whichever is greater. (C.R.S. 8-3-108[1][c][I]). Union-security provision in effect as of June 29, 1977 may be ratified by agreement between employer and union, and certified by director of labor but is subject to deauthorization election upon petition by at least 20% of employees covered. (C.R.S. 8-3-108[1][c][II]). Division of labor and state courts have authority to resolve disputes regarding unfair labor practices arising out of such elections or petitioning. (C.R.S. 8-3-110; 199 Colo. 182, 606 P.2d 441). Union-security agreement in building and construction industry may be certified by director. (C.R.S. 8-3-109[3]). Promises to join, not to join, or to withdraw from labor or employer organization unenforceable. (C.R.S. 8-3-119).

Obtaining workmen by false representations, false advertising, etc., or by failing to advise of strike lockout or other current labor trouble illegal and misdemeanor (C.R.S. 8-2-104); actual damages and attorney fees are recoverable for violation thereof (C.R.S. 8-2-107). Blacklisting of employees (C.R.S. 8-2-110, 111, 114) and publishing notices of boycott (C.R.S. 8-2-112) are misdemeanors (C.R.S. 8-2-115). There are numerous statutes dealing with certain classes of labor and conditions of employment (i.e. mines, child labor, women, etc.).

No public employment relations law, but public employers have authority to enter into collective bargaining contracts not in conflict with existing statutes. (191 Colo. 411, 553 P.2d 793).

Although public employee is not entitled to due process in discharge if employment contract is for indefinite term, discharge is unlawful if effected contrary to statute or charter. (43 Colo. App. 60, 598 P.2d 527).

Procedural and substantive rights of public school teachers are governed by statute. (C.R.S. 22-63-101 to 403). Based upon chief administration officer's recommendation, school board may choose not to renew probationary teacher. (C.R.S. 22-63-203[4]). Probationary full-time teachers automatically reemployed for next academic year unless school board gives contrary written notice on or before June 1. (C.R.S. 22-63-203[3]). Teacher may be dismissed for good and just cause, in accordance with statutory procedures. (C.R.S. 22-63-301 to 302).

Labor Disputes.

Governed by Labor Peace Act. (C.R.S. 8-3-101 to 123). Act proscribes various unfair labor practices. (C.R.S. 8-3-108). Division of labor, department of labor and employment administers Act and holds hearings regarding unfair labor practices. (C.R.S. 8-3-110). State courts have no jurisdiction to enjoin peaceful picketing in labor dispute. (155 Colo. 54, 392 P.2d 601; C.R.S. 8-3-118).

Arbitration, see categories 5 Civil Actions and Procedure, topic Actions, subhead Mandatory Arbitration; Dispute Resolution, topic Arbitration and Award.

Workers' Compensation Act (C.R.S. 8-40-101 to C.R.S. 8-47-209) administered by division of workers' compensation, department of labor and employment (C.R.S. 8-47-101).

Employers and Employees Subject to Act.

Every person, association, firm or corporation, including public service corporations, personal representatives, assignees, trustees and receivers, that has one or more persons in same business or employment under any express or implied contract of hire (except common carriers by railroad and other employers for whom rule of liability has been established by U.S. [C.R.S. 8-41-201] and employers of part-time domestic servants, part-time home and certain business repair or maintenance employees and elected or appointed advisors of eleemosynary, charitable, fraternal, religious or social groups receiving less than $750 per year [C.R.S. 8-40-302]) are subject to provisions of Act (C.R.S. 8-40-203). Public employers also covered by Act. (C.R.S. 8-40-203). Employer in bona fide cooperative education or student internship program subject to Act, but if student-employees do not receive pay or remuneration, educational institution sponsoring students must provide insurance coverage or agree to pay employer's insurance costs. (C.R.S. 8-40-302[7]). Independent contractor who fails to obtain insurance cannot sue under Act. (C.R.S. 8-41-401). $15,000 cap on damages to independent contractor. (C.R.S. 8-41-401). Lessors and contractors-out are generally considered employers of employees of their lessees and contractors, and are liable to pay compensation for injury or death suffered by lessees, sublessees, contractors, and subcontractors and their employees or employees' dependents. (C.R.S. 8-41-401). However, when lessee, sublessee, contractor, or subcontractor has workers' compensation insurance for its employees, it and its employees and insurer have no right of contribution or action of any kind against lessor or contractor. (C.R.S. 8-41-401). Anyone contracting with landowner or lessee to perform specified farming or ranching operation must maintain insurance coverage for his employees. (C.R.S. 8-41-401). Certain owners and occupants of residential real property exempted from employer status under Act for work contracted-out on home. (C.R.S. 8-41-402). Lessor or sublessor renting or leasing real property to lessee or sublessee for purpose of lessee's or sublessee's business excluded from requirements of article. (C.R.S. 8-41-403). Employer loaning services of employee normally liable for compensation for any injury or death to loaned employee. (C.R.S. 8-41-303). Definition of employee is very broad and includes persons in service of both public and private employers, with some exceptions. (C.R.S. 8-40-202, 301). Off-duty police officer, deputy sheriff, or firefighters injured while performing temporary emergency duty outside jurisdiction continues to be treated as employee of his jurisdiction. (43 Colo. App. 10, 601 P.2d 648; C.R.S. 29-5-109). Members of volunteer fire departments deemed employees, including retired firefighters receiving pension benefits who volunteer after retirement. (C.R.S. 8-40-202). Student teacher is considered to be employee of school district in which student teacher is working, not of sponsoring institution. (C.R.S. 22-62-105[2]). Public officials who receive no compensation for services may be excluded from coverage of Act if their employer files notice at least 45 days in advance of policy year in which exclusion is to be effective and notifies public officials of exclusion. (C.R.S. 8-40-202[1][a][I][B]). Certain corporate officers and members of limited liability companies may reject coverage. (C.R.S. 8-41-202). Commission real estate brokers excluded. (C.R.S. 8-40-301[2]). Most prison inmates are excluded. (C.R.S. 8-40-301).

Election.

Employer not otherwise covered elects to accept by securing compensation insurance for employees in conformity with Act (C.R.S. 8-40-302[5]) and such election by employer constitutes surrender of all other rights and remedies, statutory or common law, on account of personal injuries or death of employee, and binds employee and employee's personal representative, successors, heirs or assigns (C.R.S. 8-41-104). Apparent inconsistency concerning employee's right to elect not to come under Act. (C.R.S. 8-41-103, 104). Employee may elect between compensation or common law remedy if his employer uninsured at time of accident. (674 P.2d 1011). Defenses of assumed risk, negligence of fellow servant, and negligence of injured employee not available to uninsured employer. (C.R.S. 8-41-101 to 103). Employee may elect to sue third party responsible for injury, and insurer will be subrogated to extent compensation benefits paid to employee. (C.R.S. 8-41-101 to 103). Third party generally has no right to indemnification or contribution from employer. (749 P.2d 431).

Due Process.

By acquiescence in industrial commission procedures until an adverse decision was given, defendant waived any claimed denial of due process. (178 Colo. 65, 495 P.2d 546).

Notice.

Employer must give notice of injury for which compensation and benefits payable within ten days thereafter, or immediate notice in case of death or of accident in which three or more employees are injured, to division on forms prescribed by division. Two copies must be either delivered or sent by registered mail to division office in Denver. If notice not given by employer, any person may give notice. (C.R.S. 8-43-101, 103). Right to compensation or benefits is barred unless notice of claim for compensation given by employee or someone on his behalf within two years after injury or after death resulting therefrom, provided such limitation does not apply if claimant has received compensation or division finds within three years after injury or death that reasonable excuse for failure to file existed and employer's rights have not been prejudiced thereby (C.R.S. 8-43-103[2]), and further provided that if death or disability results from exposure to radioactive sources or uranium, or from asbestosis, silicosis, or anthracosis, notice must be given within five years (C.R.S. 8-43-103[3]). If employer with notice of injury fails to submit required report to division of labor, statute of limitations barring claim for compensation shall not begin to run until filing of report. (C.R.S. 8-43-103[2]; 720 P.2d 571). Report of accident filed by employer is insufficient substitute for employee's notice of claim. (43 Colo. App. 521, 608 P.2d 366). Employee or someone in his behalf must report injury in writing to employer within four days of occurrence of injury or within 30 days of first manifestation of occupational disease. If employee is physically or mentally unable to give notice, supervisor or manager with notice of injury shall give such written notice to employer. (C.R.S. 8-43-102). Employer must keep record of all injuries which result in fatality to, or permanent physical impairment of, or lost time from work for injured employee in excess of three shifts or calendar days. (C.R.S. 8-43-101).

Procedure and Hearing on Claim.

Employer or his insurer must give written notice admitting or contesting liability to Division and injured employee or dependents of deceased within 20 days after report is, or should have been, filed with division pursuant to C.R.S. 8-43-101. (C.R.S. 8-43-203; 676 P.2d 1196). Notice must reference claimant's obligations under C.R.S. 8-42-113.5. (C.R.S. 8-43-203[1][b]). Penalty attached for failure to file timely admission or denial. (C.R.S. 8-43-203[2]). Admission of liability must include notification that claimant may contest admission. (C.R.S. 8-43-203[2]). If liability is admitted, such notice must specify amount, to whom paid, period of and type of disability for which compensation will be paid and payment thereon must be made forthwith. (C.R.S. 8-43-203[2]). Admission of liability for final payment of compensation shall include statement that this is final admission, that claimant may contest, to whom to contest, and that claimant must contest and request hearing within 30 days or case closed. (C.R.S. 8-43-203[2]). Hearings to determine controversies shall be conducted by division director or appointed administrative law judge. (C.R.S. 8-43-201, 207). Any party, or Division director or administrative law judge, may request pre-hearing conference not less than ten days before hearing. (C.R.S. 8-43-207.5). Any party may, within 20 days of decision, petition for review by division or at administrative courts in department of personnel if order entered by administrative judge who may make supplemental order. (C.R.S. 8-43-301). Any party may petition commission for review of supplemental order within 20 days of issuance. (C.R.S. 8-43-301[6]). Commission has 60 days in which to issue order. Commission may not disturb findings of fact if supported by substantial evidence. (C.R.S. 8-43-301[8]). Any party dissatisfied with commission's order may commence action for judicial review in court of appeals, within 20 days of final order. (C.R.S. 8-43-301[10]; 307). Review of court of appeals judgment by supreme court is limited to summary review of questions of law. (C.R.S. 8-43-313). If commission does not issue order in 60 days, party has 30 days to commence action for judicial review in court of appeals. (C.R.S. 8-43-301[11]). Unless petition for review is filed, order, corrected order, or supplemental order is final. (C.R.S. 8-43-301[1]). Party attempting to reopen issue or claim shall bear burden of proof as to any issues sought to be reopened. (C.R.S. 8-43-303[4]). Employer or insurer violating Act or lawful order under Act subject to fine of up to $500 per day for each such offense, 75% payable to aggrieved party and 25% payable to subsequent injury fund. (C.R.S. 8-43-304, 305). Defense to penalty may be established if violation cured within 20 days and applicant for penalty cannot show alleged violator knew or reasonably should have known of violation. (C.R.S. 8-43-304[4]).

Benefits may be available for injury caused by certain job-related mental impairments and by certain mental impairments arising from accidental physical injuries. (C.R.S. 8-41-301[2]).

Benefits unavailable where claimant not within scope of employment at time of injury. (677 P.2d 416).

Scale of compensation is established for all injuries or death, based upon the earnings of the injured person. (C.R.S. 8-42-102 to 117). Certain widows, widowers, and minor children presumed wholly dependent. (C.R.S. 8-41-501). Use of not medically subscribed controlled substances, use of alcohol resulting in certain blood alcohol level, and willful failure to adhere to safety standards reduce certain benefits by 50%. (C.R.S. 8-42-112, 112.5). Employer who continues to pay full wages to temporarily disabled employee may be reimbursed, if insured, or receive credit, if self-insured, for amount of statutory compensation otherwise due employee. (C.R.S. 8-42-124[8]). As to computation of earnings, see C.R.S. 8-42-102. Disability and death benefits may be reduced by part or all of amounts of federal disability insurance or employer-financed pension plan or disability payments to employee. (C.R.S. 8-42-103[1][c] and [d]). Employee required to give notice of receipt of such amounts and employer or insurer may recover overpayments for such amounts not originally reflected in benefit calculation. (C.R.S. 8-42-113.5). Unemployment insurance will reduce total or partial disability payments. (C.R.S. 8-42-103[1][f]).

Compensation for death is payable to decedent's dependents as determined as of time of injury, with exception for dependent children who are students between 18 and 21 years old. (C.R.S. 8-41-503). Requirement in C.R.S. 8-42-115 that death benefits be paid to subsequent injury fund if employee not survived by dependents does not deprive non-dependent heirs of property. (196 Colo. 30, 580 P.2d 794). Death benefits terminate upon happening of following, and survive to remaining dependents, if any: (a) Remarriage of widow or widower; (b) death of any dependent; (c) when child or brother or sister of deceased reaches 18 years, with exception as provided in C.R.S. 8-41-501; (d) expiration of six years after death in case of partial dependents (C.R.S. 8-42-120). Some benefit available upon remarriage if no dependent children. (C.R.S. 8-42-120). Insurer who makes support payments on claim is entitled to reimbursement out of judgment recovered in wrongful death action from third party tortfeasor. (39 Colo. App. 251, 567 P.2d 806).

Enforcement of Awards.

Awards constitute lien upon assets of employer and bear interest at 8% per annum from date payments are ordered to be made. (C.R.S. 8-43-410). Failure to comply with order of department renders guilty party subject to penalty of up to $500 per day for each such offense, 75% payable to aggrieved party and 25% payable to subsequent injury fund. (C.R.S. 8-43-304, 305). Attorney general or district attorney has duty to enforce awards at request of department. (C.R.S. 8-43-401).

Attorneys' Fees.

Standards for reasonable fees. (C.R.S. 8-43-403).

Insurance is permitted: (a) With Colorado Compensation Insurance Authority; (b) with stock or mutual corporations authorized to transact business of Workmen's Compensation Insurance in Colorado; (c) by procuring self-insurance permit from executive director or insurance commissioner. (C.R.S. 8-44-101). Employer liable for 50% penalty for failure to comply with insurance provisions or failure to pay judgment. (C.R.S. 8-43-408). Employer may appeal calculation of experience modification factors and classification assignment decisions made by insurance provider. (C.R.S. 8-55-102).

Department may impose fine against employer or may issue cease and desist order and obtain injunction against continuance of employer's business if he fails effectively to insure. (C.R.S. 8-43-409). Department director may verify that all employees are covered by workers' compensation plan. (C.R.S. 8-43-409).

Intentional wrongs arising out of and in course of employment covered. (C.R.S. 8-41-301; 645 P.2d 1300).

Sexual assault covered if arising out of and in course of employment. (759 P.2d 17; 32 P.3d 470 [Worker's Compensation Act not intended to cover injuries resulting from sexual harassment]).

Occupational Diseases.

Disability or death from occupational disease compensated under Workers' Compensation Act. (C.R.S. 8-41-301).

Unemployment Compensation.

Employment Security Act adopted. (C.R.S. 8-70-101 to C.R.S. 8-82-105). Covers full-time employees generally, with statutory exceptions for certain agricultural labor, domestic service employees, casual labor, family employees, U.S. government employees, employees of educational institutions, hospital employees, newspaper deliverers, salesmen, insurance agents, nonprofit organization employees, U.S. citizens performing services for American employers outside of U.S., and others. (C.R.S. 8-70-103[11], 122, 125 to 140.2). Illegal aliens are not eligible for benefits. (C.R.S. 8-73-107[7]). Benefits available for persons unemployed through no fault of their own. (C.R.S. 8-73-108[1]). Benefits available to claimant terminated because of addiction to alcohol or drugs under limited circumstances, but award charged to unemployment compensation fund, not employer's account. (C.R.S. 8-73-108[4][b]). Reduced awards available in appropriate circumstances. (C.R.S. 8-73-108[5]). Claimant ineligible where unemployment due to strike in which employee has direct interest. (C.R.S. 8-73-109; 669 P.2d 1049). Full award available where employer disregards its own discharge policy. (677 P.2d 447). Employee leasing company considered employing unit provided it has certain rights and responsibilities pursuant to employee leasing contract. (C.R.S. 8-70-114[2]). Statutes should be consulted for numerous other conditions bearing on eligibility determination.

Benefit rates for totally unemployed persons generally are 60% of 1/26 of wages paid during two consecutive quarters base period in which such total wages were highest, with a maximum of one-half of average weekly earnings in all covered Colorado industries as published by U.S. bureau of labor statistics and minimum of $25. (C.R.S. 8-73-102). Maximum award recoverable is for 26 weeks. (C.R.S. 8-73-104). Employee may be eligible for full award or reduced award. (C.R.S. 8-73-108).

Procedure and Appeal.

Initial determination of entitlement by deputy. (C.R.S. 8-74-102). Interested parties, dissatisfied with deputy's decision, may obtain hearing of disputed claim before hearing officer. (C.R.S. 8-74-103). Parties may appeal from hearing officer's decision to industrial claim appeals panel. (C.R.S. 8-74-104). Party dissatisfied with panel's decision must petition panel for review of initial decision before appeal to court of appeals. (C.R.S. 8-74-107). Employer with interest that could be adversely affected by outcome is indispensable party for perfecting appeal. (620 P.2d 65). Factual findings of panel conclusive as to unemployment compensation issues if supported by substantial evidence in absence of fraud. (C.R.S. 8-74-107[4]). Determinations made during course of unemployment proceeding are not binding upon any other agency or court. (C.R.S. 8-74-108).

Employment-At-Will/Wrongful Discharge.

Employment terminable at will of either party absent fixed term contract. (35 Colo. App. 1, 530 P.2d 984). Employment at will presumed, but implied contract can be found in handbooks or manuals distributed to employees based on acceptance by continued employment or prejudicial reliance. (731 P.2d 708; 903 P.2d 820). Under certain circumstances, contract not implied where handbook contains disclaimers. (799 P.2d 458; 711 F. Supp. 570; 670 F. Supp. 1517; 765 P.2d 619). Promises may override disclaimer. (765 P.2d 619). Implied contract found on basis of letter offer of employment. (914 P.2d 909). Requirement of "good cause" for discharge will not be implied. (593 F. Supp. 1279). Wrongful discharge tort unavailable where statutory remedy exists (684 P.2d 265); public policy exception recognized where employee fired for filing workmen's compensation claim (770 P.2d 1367) or for refusing to violate statute (765 P.2d 619). Termination of employment for engaging in lawful activity off employer's premises is unlawful, unless restriction relates to bona fide occupational requirement, is reasonably and rationally related to employment activities and responsibilities of particular employee or employee group, or is necessary to avoid conflict of interest or appearance thereof. (C.R.S. 24-34-402.5).

12 ENVIRONMENT

12.01 ENVIRONMENTAL REGULATION:

General Supervision.

Most environmental regulation within ambit of Department of Public Health and Environment, air, water, and hazardous materials and waste management divisions. Department of Natural Resources responsible for mine reclamation.

Air Quality Control.

Ambient air standards and emission control regulations promulgated by air quality control commission. (C.R.S. 25-7-108, 109). Air pollutant emission notices and permits required for new emissions. (C.R.S. 25-7-114). Stationary sources of air pollution must pay annual emission fee unless exempted. (C.R.S. 25-7-114.7). State regulations for prevention of significant deterioration set forth. (C.R.S. 25-7-201). Certain areas have been designated pristine areas for sulfur dioxide; increases in sulfur dioxide concentrations in such areas limited to increases for Class I areas under federal act. (C.R.S. 25-7-209). Air quality related values program for Class I areas established. (C.R.S. 25-7-1001 to 1008). Accidental release prevention program established. (C.R.S. 25-7-109.6). Hazardous air pollutant control and reduction program established. (C.R.S. 25-7-109). Construction and operating permits required. (C.R.S. 25-7-114.2, 114.3). Small business stationary source technical and environmental compliance assistance program established. (C.R.S. 25-7-109.2). Program to reduce and to prevent exposure of public to asbestos. (C.R.S. 25-7-501 to 512). Local authorities may establish more stringent laws in area of local air pollution. (C.R.S. 25-7-128).

Air pollution limitations enforced and state program administered by air quality control division. (C.R.S. 25-7-111). Private citizen may request investigation of suspected discharge. (C.R.S. 25-7-112). Following conference, compliance order issued; opportunity for hearing if requested within 20 days. (C.R.S. 25-7-115). Compliance orders enforceable by injunction. (C.R.S. 25-7-121). Delayed compliance orders may be issued. (C.R.S. 25-7-118). Division or commission determinations judicially reviewable. (C.R.S. 25-7-120). Civil penalties provided for violation of Air Quality Control Act. (C.R.S. 25-7-115; C.R.S. 25-7-122; C.R.S. 25-7-123). Criminal penalties also available. (C.R.S. 25-7-122.1).

Open burning prohibited in designated areas unless permit obtained. Open burning does not include using fire for grassland, forest or habitat management activities. Such activities are deemed "commercial purposes". (C.R.S. 25-7-123[1][b]). Owners or managers of large parcels of land, who used fire for grassland or forest management, shall prepare plans regarding role and air quality impacts that result from using fire as management tool. (C.R.S. 25-7-106[7][f]).

Lead-based paint abatement program enacted. (C.R.S. 25-7-1101 to 1107). Air quality control commission to promulgate rules to implement "Residential Lead-based Paint Hazard Reduction Act". (C.R.S. 25-7-1103). Air pollution control division to implement training and certification requirements. (C.R.S. 25-7-1104[1]). Division may delegate implementation and enforcement to local health and building departments. (C.R.S. 25-7-1104[2]). Division may commence enforcement action. (C.R.S. 25-7-1106).

Air quality control commission has promulgated rules and regulations for controlling emissions from new wood stoves. (5 Colo. Code Regs. 1001-6). Regulations detail, among other things: Requirements for sale; certification procedure; emission standards, quality control and testing; labeling requirements; and standard method for measuring emissions. Certification required for sale of wood stoves after Jan. 1, 1987. (C.R.S. 25-7-405). Boards of county commissioners must enact building code provisions to minimize emissions from fireplaces. (C.R.S. 30-28-201[2]). Resale of used noncertified wood-burning devices prohibited unless device meets stringent standards adopted by commission. (C.R.S. 25-7-405.5).

Colorado Clean Indoor Air Act restricts smoking in most public indoor areas. (C.R.S. 25-14-201). Complete list of all prohibited areas is detailed at C.R.S. 25-14-204.

Automobile inspection and readjustment program instituted (C.R.S. 42-4-301); proposed emissions standards of vehicle exhaust gases adopted by air quality control commission (C.R.S. 42-4-306). Program consists of basic emission (C.R.S. 42-4-302) and enhanced emission program (C.R.S. 42-4-301). Biennial emission control inspection for 1982 and newer vehicles and annual inspection for 1981 and older models. (C.R.S. 42-4-310). If vehicles not in compliance with emission standards, adjustments and repairs to be performed. (C.R.S. 42-4-310). Standards for emissions from motor vehicles and motorcycles powered by gasoline or other fuel and from diesel-powered motor vehicles established. (C.R.S. 42-4-412). Visible diesel emissions prohibited, effective Jan. 1, 1987, subject to fine as misdemeanor traffic offense. (C.R.S. 42-4-413). Diesel inspection program established for Front Range counties. (C.R.S. 42-4-407). Includes diesel-fueled motor vehicles with four wheels or more. Does not include off-road diesel-powered vehicles, heavy construction equipment, farm or ranch vehicles, or collectors' items. (C.R.S. 42-4-401[5]). No heavy or light-duty diesel vehicle can be sold, registered or re-registered unless certificate of emission control has been issued. (C.R.S. 42-4-406). Requirements for inspectors and inspection stations detailed. (C.R.S. 42-4-407 to 409). Heavy duty diesel fleets of nine or more are exempted (C.R.S. 42-4-411) unless owner commits two excessive violations in 12-month period (C.R.S. 42-4-414[3]). Inspection program to be fully implemented for heavy-duty diesel trucks by Jan. 1, 1987. (C.R.S. 42-4-414).

Water Quality Control.

Waters of state classified by water quality control commission. (C.R.S. 25-8-203). Water quality standards developed. (C.R.S. 25-8-204). Water quality designations established. (C.R.S. 25-8-209). State program administered, and enforcement and permitting conducted by water quality control division. (C.R.S. 25-8-302, 303). Discharge of pollutants into state waters from point source without permit prohibited. (C.R.S. 25-8-501). Program for prevention of groundwater pollution from agricultural chemicals established. (C.R.S. 25-8-205.5). Permits required for discharge of all pollutants except agricultural wastes. (C.R.S. 25-8-501 to 509). Service of notice required for violations of orders, permits or control regulations. (C.R.S. 25-8-602). Cease and desist orders issued after written notice of violation. (C.R.S. 25-8-605). Clean up orders may be issued. (C.R.S. 25-8-606). Injunctions are available. (C.R.S. 25-8-607). Civil and criminal penalties authorized. (C.R.S. 25-8-608, 609).

Department of Public Health and Environment authorized to require disinfection or treatment of drinking water supplied to public. (C.R.S. 25-1.5-203[1][b]). Board may promulgate standards for contaminants or substances if no federal standard exists. (C.R.S. 25-1.5-202). Laboratory certification program established for ensuring competent testing of drinking water. (C.R.S. 25-1.5-203[1][d]).

Minimum standards established for regulation of individual sewage disposal systems. (C.R.S. 25-10-104, 105). Regulations enforced primarily by local health departments and boards of health. (C.R.S. 25-10-112). Permit required before construction or modification of structure not serviced by sewage treatment works. (C.R.S. 25-10-112). Permits may be prohibited in certain areas after public hearings before local board of health. (C.R.S. 25-10-111). Local authorities may establish more stringent laws. (C.R.S. 25-10-104).

Solid Waste Disposal.

Solid waste disposal sites and facilities require certificate of designation to operate. (C.R.S. 30-20-102, 103). Minimum standards established. (C.R.S. 30-20-110). Governing body having jurisdiction over area where site is or is proposed to be shall review application to maintain solid waste disposal facility. (C.R.S. 30-20-103). Certificate of designation revocable for improper maintenance of facility. (C.R.S. 30-20-112). Local authorities may enforce local solid waste ordinances. (C.R.S. 30-20-114). Violation of solid waste disposal statute is misdemeanor punishable by fine and/or imprisonment. (C.R.S. 30-20-114). Civil penalties provided for violation of Act. (C.R.S. 30-20-113). Recycling of plastics statute enacted. (C.R.S. 25-17-101 to 105; C.R.S. 8-19.5-101; and C.R.S. 39-22-114.5). Waste tire recycling program established. (C.R.S. 25-17-201 to 204).

Hazardous Waste Disposal.

State Hazardous Waste Siting Act enacted. (C.R.S. 25-15-200.1). Colorado given implementation authority under “Resource Conservation and Recovery Act” on Nov. 2, 1984, and under “Hazardous and Solid Waste Amendments” on July 14, 1989. (C.R.S. 25-15-301 to 316). Department of Public Health and Environment, through hazardous materials and waste management division, regulates hazardous waste management. (C.R.S. 25-15-301). Permit required for treatment, storage, or disposal of hazardous wastes. (C.R.S. 25-15-303). Hazardous waste disposal sites require certificate of designation to operate. (C.R.S. 25-15-201). Any deed for property used for disposal of hazardous waste, subject to federal, state permit, certificate of designation or interim status must contain notation that property has been used for hazardous waste disposal. (C.R.S. 25-15-303[4]). Income tax credit is provided for redevelopment of contaminated land meeting certain criteria. (C.R.S. 39-22-526). Criminal and civil penalties provided for violation of hazardous waste statutes. (C.R.S. 25-15-212, 309, 310). Statute enacted to limit environmental third party liability for lenders. (C.R.S. 13-20-701 to 703).

Statute providing for regulation of underground petroleum storage tanks containing regulated substance enacted. (C.R.S. 8-20.5-201 to 209). Statute providing for regulation of aboveground storage tanks containing fuel product enacted. (C.R.S. 8-20.5-301 to 304). Director of Division of Oil and Public Safety promulgates and enforces regulations for underground and aboveground storage tank. (C.R.S. 8-20.5-202, 302). Infectious waste statute enacted. (C.R.S. 25-15-401 to 407). Abandonment of vehicle containing hazardous material or intentionally spilling hazardous material on public property prohibited. (C.R.S. 42-20-113).

Department of Public Health and Environment authorized to participate in federal implementation of "Comprehensive Environmental Response, Compensation, and Liability Act of 1980" (CERCLA). (C.R.S. 25-16-101). State accepts provision requiring payment of necessary state share of response costs. (C.R.S. 25-16-104). Effective July 1, 1985, hazardous substance response fund established in state treasury to provide state's necessary share of costs of cleaning hazardous waste sites. (C.R.S. 25-16-104.6). Natural resource damage recovery fund created. (C.R.S. 25-16-104.7). Solid waste user fee imposed as of Jan. 1, 1986. (C.R.S. 25-16-104.5). Voluntary cleanup of contaminated property authorized. (C.R.S. 25-16-301 to 310).

Pollution Prevention Advisory Board created. (C.R.S. 25-16.5-104). Duties include providing policy guidance, coordination and advice in development and implementation of pollution prevention activities program. (C.R.S. 25-16.5-105 to 106). Technical assistance program to award grants. (C.R.S. 25-16.5-107). Pollution prevention fees assessed on certain facilities. (C.R.S. 25-16.5-108).

State requirements for environmental covenants are found at C.R.S. 25-15-318 to 327, including when they are required, provisions that must be included, creation of state registry of covenants, and enforcement provisions.

Hazardous Materials Transportation Act of 1987 enacted. (C.R.S. 42-20-101). Permit required for motor vehicles requiring placarding under 49 C.F.R. 172 or 173 to transport hazardous materials. (C.R.S. 42-20-201, 202). Criminal and civil penalties authorized. (C.R.S. 42-20-204). State patrol, in consultation with local authorities, designates which public roads can be used for transportation of hazardous materials. (C.R.S. 42-20-301). Persons deviating from designated routes are subject to penalties. (C.R.S. 42-20-305). Persons who transport or cause to be transported certain hazardous materials must have proof of liability insurance. (C.R.S. 42-20-202).

Safe transportation of nuclear material regulated by statute. (C.R.S. 42-20-401). All vehicles carrying nuclear materials are subject to inspection. (C.R.S. 42-20-404). Permit is required to operate motor vehicle carrying nuclear materials upon public roads of Colorado. (C.R.S. 42-20-501[1]). Each carrier must submit permit application prior to beginning transportation. (C.R.S. 42-20-501[2]). State requires permit fees and fees for each shipment. (C.R.S. 42-20-502). Criminal (C.R.S. 42-20-405) and civil (C.R.S. 42-20-406, 407) penalties are provided for as well as injunctive relief (C.R.S. 42-20-408). Any person who causes release of nuclear material being transported is strictly liable for all injuries and damages from release. (C.R.S. 42-20-509).

Regulation of transportation and management of low-level radioactive wastes provided by Rocky Mountain Low-Level Radioactive Waste Compact entered into with neighboring states. (C.R.S. 24-60-2201). Nuclear and radioactive wastes may not be disposed of underground except on finding of no significant pollution by division of administration of Department of Public Health and Environment through water quality control division. (C.R.S. 25-8-506). Board of health to regulate naturally occurring radioactive material once federal regulations are promulgated. (C.R.S. 25-11-104).

Roadside Advertising.

State Outdoor Advertising Act enacted. (C.R.S. 43-1-401). Erection and maintenance of advertising devices adjacent to state highways regulated by statute. (C.R.S. 43-1-402). Rules and regulations developed by Department of Transportation for enforcement of roadside advertisement laws. (C.R.S. 43-1-404, 407). Department authorized to institute appropriate action in court to prevent or remove violation. (C.R.S. 43-1-417). Violation of roadside advertising provisions misdemeanor punishable by fine. (C.R.S. 43-1-417). Permit required for erection or maintenance of nonconforming advertising devices, directional advertising devices, advertising devices in certain areas zoned industrial or commercial, and advertising devices on bus bench or bus shelter. (C.R.S. 43-1-407). Local authorities may establish more stringent laws. (C.R.S. 43-1-416).

Noise Control.

Statewide standards for noise level limits for various time periods and areas established. Noises prohibited constitute public nuisance. (C.R.S. 25-12-101 and C.R.S. 30-15-401[1][m]). Maximum permissible noise levels established on decibel basis for residential, commercial, light industrial and industrial zones. (C.R.S. 25-12-103). Exemptions for aircraft or other activities subject to federal noise control law, use of property for vehicle speed or endurance events, use of property for manufacturing or maintaining machine-made snow, use of property by not-for-profit entities for public events, and for electric transmission facilities. (C.R.S. 25-12-103). Separate rules for motor vehicles. (C.R.S. 25-12-106 and C.R.S. 30-15-401[m][I]). Residents may bring action to abate and prevent public nuisance. (C.R.S. 25-12-104). Violation of injunction against public nuisance deemed contempt of court punishable by fine for each day of offense. (C.R.S. 25-12-105). Local authorities may establish more stringent laws. (C.R.S. 25-12-108).

Other.

State Recreation Land Preservation Act enacted. (C.R.S. 25-13-101). Minimum controls to prevent degradation of natural environment of recreational mountain areas established. (C.R.S. 25-13-102). Facilities for sewage disposal to be provided by operator of campground. (C.R.S. 25-13-106). Water supplies to campground to be conformed to requirements of standards, rules and regulations adopted by board. (C.R.S. 25-13-108). Enforcement by various authorities. (C.R.S. 25-13-111). Discharge of untreated sewage, deposit or burial of refuse except in provided receptacles, use of cleansers and defacing or cutting of rocks, trees, and shrubbery prohibited in public recreation areas. (C.R.S. 25-13-105). Violation of provisions against discharge of untreated sewage, etc., in public recreation area constitutes misdemeanor punishable by fine. (C.R.S. 25-13-114). Environmental self-evaluation privilege established. (C.R.S. 13-25-126.5).

Pollution control equipment certification program established. (C.R.S. 25-6.5-201 to 203).

Uniform Transboundary Pollution Reciprocal Access Act adopted. (C.R.S. 13-1.5-101). Any person in reciprocating jurisdiction injured by pollution originating in Colorado has same right to relief as if injury occurred within state. (C.R.S. 13-1.5-104). State law to be applied. (C.R.S. 13-1.5-105). Defense of sovereign immunity limited. (C.R.S. 13-1.5-108).

Endangered Species. List established of species or subspecies of wildlife indigenous to this state which are determined to be endangered or threatened within state, as well as fund to support program. (C.R.S. 33-2-105 and C.R.S. 24-33-111). Introduction or reintroduction of species must be initiated through General Assembly. (C.R.S. 33-2-105.5).

Reclamation.

Colorado Mined Land Reclamation Act enacted. (C.R.S. 34-32-101). Operator of any proposed mining operation must obtain permit from mined land reclamation office or board. (C.R.S. 34-32-109). Permit authorizes mining operations on affected land for life of mine. (C.R.S. 34-32-112). Reclamation required on all affected land and application for permit must include detailed reclamation plan. (C.R.S. 34-32-112). Duties of operator established. (C.R.S. 34-32-

116). Operator required to supply personal and financial warranty. (C.R.S. 34-32-117).

Provisions for operations affecting less than two acres and less than ten acres and extracting less than 70,000 tons of mineral or overburden per year subject to section concerning limited impact operations. (C.R.S. 34-32-110[1], [2]).

Prospecting must be preceded by notice of intent to conduct prospecting operations including description of measures to reclaim any affected lands and posting of financial warranty. (C.R.S. 34-32-113).

Board or office may issue cease and desist order for any violation of Act, notice, permit or regulation. (C.R.S. 34-32-123, 124). Attorney general may bring suit in district court to enjoin failure to comply with cease and desist order. (C.R.S. 34-32-124[3]). Violation of permit provision may result in suspension, modification or revocation of permit. (C.R.S. 34-32-124[6]). Board may request attorney general to institute proceedings to secure or recover amounts warranted by forfeited financial warranties. (C.R.S. 34-32-118).

Colorado Land Reclamation Act for the Extraction of Construction Materials enacted. (C.R.S. 34-32.5-101). Construction material is defined as rock, clay, silt, sand, gravel, limestone, dimension stone, marble and shale. (C.R.S. 34-32.5-103). Operator required to obtain reclamation permit for new operation after July 1, 1995 from mined land reclamation office or board. (C.R.S. 34-32.5-109).

Expedited permitting procedures for operations of less than ten acres. (C.R.S. 34-32.5-110). Special permit for operations to commence within specified short period of time and affecting less than 30 acres and is conducted solely to obtain materials for highway, road, utility, or similar construction purposes under federal, state, county, city, town or special district contract. (C.R.S. 34-32.5-111). Notice to conduct exploration operations must be filed with board. (C.R.S. 34-32.5-113). Duties of operators established. (C.R.S. 34-32.5-116). Performance and financial warranties are required. (C.R.S. 34-32.5-117).

Forfeiture of financial warranties for violation of cease and desist order, default under performance warranty or failure to maintain financial warrant in good standing. (C.R.S. 34-32.5-118). Board can issue order for forfeiture and can request attorney general to secure or recover amounts warranted. (C.R.S. 34-32.5-118). Board may issue cease and desist order for any violation of Act, notice, permit or regulation. (C.R.S. 34-32.5-124). Attorney general may bring suit in district court to enjoin for failure to comply with cease and desist order. (C.R.S. 34-32.5-124[3]).

Colorado Surface Coal Mining Reclamation Act enacted. (C.R.S. 34-33-101). Permit is required to conduct surface coal mining and reclamation operations. (C.R.S. 34-33-109). Surface activities incident to underground mining and in situ operations included. (C.R.S. 34-33-103[26]). Extraction by landowner or lessee for own noncommercial use, and extraction incident to government financed highway construction excluded from permit requirement. (C.R.S. 34-33-129). Exploration permits required. (C.R.S. 34-33-117). Permit applications submitted to office of mined land reclamation. (C.R.S. 34-33-110). Permits to require operators to rehabilitate, restore or replace residential dwellings or noncommercial buildings damaged be subsidence form underground coal mining or compensate owner. (C.R.S. 34-33-121). Colorado mine subsidence protection program established to protect owners of private residential structures against damages caused by land subsidence from underground coal mines. (C.R.S. 34-33-133.5).

All permits require that mining operation be conducted so as to meet environmental protection performance standards (C.R.S. 34-33-120) unless experimental practices are authorized by board and approved by secretary of interior (C.R.S. 34-33-134).

Board and office are empowered to make on-site inspections and persons adversely affected by mining operations may request inspection be held. (C.R.S. 34-33-122). Office is authorized to order cessation of all mining operations or that portion relevant to violation where inspection discloses infractions creating imminent danger to health or safety or significant imminent environmental harm, and to issue notice of violation for other violations. When necessary to abate imminent danger or harm, affirmative obligations may also be imposed. Failure to abate violation set forth in notice of violation is grounds for ordering cessation of all mining operations or portion relevant to violation. If office determines permit improvidently issued, office authorized to impose additional permit conditions or issue order to show cause why permit should not be suspended or revoked. (C.R.S. 34-33-123). Notices of violation and cessation orders may be appealed to board for review. (C.R.S. 34-33-124). Provision also is made for assessing civil penalties. Civil penalties are required if cessation order issued. Failure to correct violation is ground for assessing civil penalty of up to $750 or more. (C.R.S. 34-33-123[8][i]). Willful and knowing violations are grounds for fine and imprisonment; corporate officers or agents may be assessed civil penalties and may be fined or imprisoned for willfully and knowingly authorizing, ordering or carrying out certain violations. (C.R.S. 34-33-123[10]). Judicial review available for board orders on civil penalties and permit suspensions and revocations. (C.R.S. 34-33-128).

Abandoned Mine Reclamation program established. (C.R.S. 34-30-101). Limitation on liability extended to owners of abandoned mining operations on land made available for public recreational purposes. (C.R.S. 33-41-103[2][e][II]).

Uranium Mill Tailings Remedial Action Program Fund established to provide funding source to match federal funds available under Uranium Mill Tailings Radiation Control Act of 1978 to clean up certain sites designated in Colorado. Department of Public Health and Environment is directed to report annually to oversight committee on progress of cleanup. (C.R.S. 39-29-116).

13 ESTATES AND TRUSTS

13.01 ADMINISTRATION:

See topic 13.08 Executors and Administrators.

13.02–13.03 [RESERVED]

13.04 CLAIMS:

See topic 13.08 Executors and Administrators; category 5 Civil Actions and Procedure, topic 5.17 Pleading.

13.05 DEATH:

Death may be determined by various means, including five years' unexplained absence. (C.R.S. 15-10-107).

Determination of Death.

Individual is determined to be dead if he or she has sustained irreversible cessation of circulatory and respiratory functions, or has sustained irreversible cessation of all functions of entire brain, including brain stem. Determinations made in accordance with accepted medical standards. Uniform Determination of Death Act adopted. (C.R.S. 12-36-136).

Disposition of Last Remains Act.

Adopted. (C.R.S. 15-19-101). Competent adults may direct, in signed, written instrument, disposition of last remains and any ceremonial arrangements to take place after declarant's death. In absence of written declaration, Act establishes priority among persons for determination of same.

Living Will (Right to Accept or Reject Medical or Surgical Treatment).

See topic 13.16 Wills.

Survivorship by 120 hours is generally required except as provided by governing instrument. (C.R.S. 15-11-702).

Action for Death.

Right of action exists where death is caused by negligence, unskillfulness or criminal intent of operator of conveyance of persons or freight for hire (C.R.S. 13-21-201) or by wrongful act, neglect or default where, absent death, such action would have been actionable by decedent (C.R.S. 13-21-202). Plaintiff must elect to proceed under C.R.S. 13-21-201 or C.R.S. 13-21-202 (C.R.S. 13-21-203). In first year after death, action lies exclusively in spouse or, upon written election of spouse, in spouse and heir or heirs. In second year after death, action lies in spouse alone, heir or heirs alone or in spouse and heirs. If no surviving spouse, without regard to year, action lies in heir or heirs, or if none survive, in parents. (C.R.S. 13-21-201[1][a], [b], [c]). Punitive damages are not recoverable. (150 Colo. 110, 371 P.2d 422). Judgments recovered under C.R.S. 13-21-201, C.R.S. 13-21-202, or C.R.S. 13-21-203 are owned by deceased's heirs at law, and person bringing action is liable to other heirs for their shares. (144 Colo. 597, 357 P.2d 649).

Action must be brought within two years from date of death. (C.R.S. 13-80-102[1][d] and C.R.S. 13-80-108[2]). Limitation period will not apply to action arising out of use of motor vehicle. Limitation period may be tolled by statute. (690 P.2d 1248).

Recovery under C.R.S. 13-21-201 never less than $3,000 or more than $10,000 (C.R.S. 13-21-201). For actions accruing before Jan. 1, 1998, generally, recovery under C.R.S. 13-21-202 for noneconomic loss or injury limited to $250,000. For actions accruing on or after Jan. 1, 1998, generally, recovery under C.R.S. 13-21-202 for noneconomic loss or injury is limited to $250,000 (C.R.S. 13-21-102.5[3][c]). Damages for loss or injury in medical malpractice action governed by C.R.S. 13-64-302. If wrongful act constitutes felonious killing (C.R.S. 15-11-803[1][B]), there is no limitation on damages for noneconomic loss or injury recoverable (C.R.S. 13-21-203). If death is attended by circumstances of fraud, malice or willful and wanton conduct, exemplary damages also available, but not to exceed award of actual damages. Plaintiff may sue for solatium of $50,000 in lieu of noneconomic damages. (C.R.S. 13-21-203.5).

Remedy for death of employee, see category 11 Employment, topic 11.02 Labor Relations.

For special action against carriers, see category 3 Business Regulation and Commerce, topic 3.08 Carriers, subhead Limiting Liability.

For survival of action, see category 5 Civil Actions and Procedure, topic 5.02 Actions, subhead Abatement and Revival.

Death Certificate.

Official certificate of death may be obtained from registrar in department of public health, for fee set annually, see topic Records, subhead Vital Statistics. (C.R.S. 25-2-117; C.R.S. 25-2-121). Address: Colo. Dept. of Health, Vital Records, 4300 Cherry Creek Dr. S., Denver, CO 80246-1530. Phone: (303) 692-2200. http://www.cdphe.state.co.us. Certificate may only be obtained by someone with direct and tangible interest in information. (C.R.S. 25-2-117). Direct and tangible interest defined as significant legal relationship to person who is subject of record.

(184 Colo. 282, 519 P.2d 1189). See category 10 Documents and Records, topic 10.04 Records, subhead Vital Statistics.

Uniform Anatomical Gift Act.

Adopted. (C.R.S. 12-34-101). See topic 13.16 Wills.

13.06 [RESERVED]

13.07 DESCENT AND DISTRIBUTION:

See also topics 13.08 Executors and Administrators and 13.16 Wills.

Intestate Succession.

1990 Amendments to Uniform Probate Code adopted with modifications. Rules apply to any part of decedent's estate not effectively disposed of by will or otherwise. (C.R.S. 15-11-101). Portion not passing to surviving spouse (see subhead Surviving Spouse, infra) (or entire intestate estate if no surviving spouse) passes to: Designated beneficiary in designated beneficiary agreement, except that if decedent has surviving children, designated beneficiary receives one-half and surviving children receive one-half of intestate estate; descendants per capita at each generation; if no surviving descendant, to parents equally if both survive or to surviving parent; if no surviving descendant or parents, to surviving descendants of parents or either of them per capita at each generation; if there is no surviving descendant, parent, or descendant of parents, but decedent is survived on both paternal and maternal sides by one or more grandparents or descendants of grandparents, one-half to decedent's paternal grandparents, or survivor of them, or if both are deceased, to descendants of decedent's paternal grandparents, per capita at each generation, and one-half to decedent's maternal grandparents, or survivor of them, or if both are deceased, to descendants of decedent's maternal grandparents, per capita at each generation, provided, however, that if decedent is survived by one or more grandparents or descendants of grandparents on paternal side but not maternal side, or vice versa, then such portion passes to grandparent or grandparents or descendants of grandparents on side with surviving members as set forth above. If none of above heirs survive and decedent has one or more deceased spouses who have children who survive decedent, then equal share passes to descendants of each deceased spouse per capita at each generation. (C.R.S. 15-11-103). Survivorship by 120 hours is required. (C.R.S. 15-11-104). One related to decedent through two lines is entitled to only single share based on relationship entitling him to larger share. (C.R.S. 15-11-113).

Survivorship.

Uniform Simultaneous Death Act reenacted (1973). (C.R.S. 15-11-613).

Representation.

Per capita at each generation defined at C.R.S. 15-11-106. For example, if one of decedent's three children survives and deceased children each leave decedent's grandchildren who survive, surviving child gets 1/3 and all grandchildren split other 2/3 equally.

Surviving Spouse.

Surviving spouse's share of intestate estate is: All if no descendant or parent of decedent survives; if no descendant survives, but one or both parents survive, first $300,000 plus 75% of balance; if decedent has surviving descendants: (i) all if decedent's and spouse's surviving descendants are all descendants of both decedent and surviving spouse, (ii) if decedent has other surviving descendants, first $150,000 plus 50% of balance, and (iii) if only surviving spouse has other surviving descendants, first $225,000 and 50% of balance. (C.R.S. 15-11-102).

Surviving spouse has right to elect to take up to 50% (5% for each year of marriage) of augmented estate as defined in C.R.S. 15-11-202 if decedent domiciled in Colorado (C.R.S. 15-11-201[1]). Certain supplemental elective share up to $50,000 may apply. (C.R.S. 15-11-201[2]). (See topic 13.16 Wills, subhead Election.) Surviving spouse is entitled to exempt property and family allowance whether or not elective share taken. (C.R.S. 15-11-206 and C.R.S. 15-11-201[3]). If decedent not domiciled in Colorado, spouse's right to elective share of property in Colorado governed by law of decedent's domicile at death. (C.R.S. 15-11-201[4]). One divorced from decedent or whose marriage to decedent has been annulled is not surviving spouse unless remarried to decedent. (C.R.S. 15-11-802[1]). Rights of election and to property allowance, family allowance and homestead exemption may be waived, before or after marriage, by writing signed by waiving spouse after fair disclosure. (C.R.S. 15-11-207). Dollar amounts set forth in this paragraph are adjusted for inflation. (C.R.S. 15-11-102[6]; C.R.S. 15-11-201[2][b]).

Half Blood.

Relatives of half blood inherit same share they would inherit if they were of whole blood. (C.R.S. 15-11-107).

Posthumous Children or Other Issue.

Child in gestation on date of decedent's death is deemed to have been living on date of decedent's death if child lives at least 120 hours after birth. (C.R.S. 15-11-104[1][b]). Child conceived after decedent's death through method of assisted reproduction is considered to have been in gestation on date of decedent's death if (i) child is in utero no later than 36 months after decedent's death or (b) child is born no later than 45 months after decedent's death. (C.R.S. 15-11-120[11]).

Illegitimates.

Birth parent may not inherit from or through child if such birth parent's parental rights were terminated and not reestablished or if child died before age 18 and birth parent's parental rights could have been terminated because of nonsupport, neglect, abuse, abandonment or other action or inaction by parent. (C.R.S. 15-11-114[1]).

Adopted Children.

For purposes of intestate succession, parent-child relationship exists between adopted child and adoptive parent or parents. (C.R.S. 15-11-118). See also subhead Intestate Succession, supra, for limited additional rights of birth children.

Determination of Heirship.

Where no action has been brought for administration of estate within one year after death, alleged heir or devisee or person claiming interest derived from alleged heir or devisee (C.R.S. 15-12-1301) may petition appropriate court in county of decedent's residence to determine heirs or devisees (C.R.S. 15-12-1302). Among other requirements, verified petition must include statements that: (a) one year has passed since decedent's death; and (b) estate administration not granted in Colorado or, if granted, estate settled without determination of descent or succession of all or part of decedent's property. Petition may include more than one decedent if related by successive interests in property. (C.R.S. 15-12-1302). Court must determine standing of petitioner to bring action, heirs and devisees of decedent, owners by inheritance of property, description of property, and other pertinent facts. (C.R.S. 15-12-1305). Adjudication of heirship required in formal testacy and intestacy proceedings. (C.R.S. 15-12-401; C.R.S. 15-12-409). See topic 13.16 Wills, subhead Probate, regarding jurisdiction and venue.

Advancements.

Property given to heir during decedent's lifetime treated as advancement against heir's share of intestate estate only if declared in contemporaneous writing by decedent or acknowledged in writing by heir. Property valued as of date of death or date heir came into possession or enjoyment, whichever occurs first. If recipient does not survive decedent, property does not affect intestate share of recipient's descendants unless declaration or acknowledgment provides otherwise. Heir who has received from intestate more than heir's share not required to refund except where necessary to fund surviving spouse's elective share of augmented estate. (C.R.S. 15-11-109; C.R.S. 15-11-203).

Election.

See subhead Surviving Spouse, supra and topic Wills, subhead Election.

Renunciation/Disclaimer.

Devisees and heirs or their fiduciary, attorney-in-fact or agent, may disclaim partial or entire interest in estate by filing, within time limits prescribed by C.R.S. 15-11-801(2), written and signed instrument containing description of property or interest disclaimed (C.R.S. 15-11-801).

Escheat.

Undistributed balance at time of final settlement of decedent's estate, because heirs unknown, unqualified or no takers exist, is paid to state treasurer. In addition, any fiduciary possessing unclaimed moneys for which proper receipt cannot be obtained may turn such moneys over to state treasurer. State treasurer must retain funds, subject to claims of persons entitled thereto, for period of 21 years. If no claim asserted within 21 year period, such balance becomes property of state and is transferred to public school fund. (C.R.S. 15-12-914).

13.07A ESTATES: (in property)

See category 21 Property, topic 21.16 Real Property.

13.08–13.09 [RESERVED]

13.10 EXECUTORS AND ADMINISTRATORS:

Except in Denver, where a probate court has been established, jurisdiction of administration of estates is in district courts. (C.R.S. 15-10-201[10]).

Venue for first proceedings after decedent's death is county of decedent's domicile or residence or, if decedent neither domiciled in nor resident of Colorado, any county where property of decedent located at time of death. Venue for subsequent proceedings is same as first proceedings unless initial proceeding transferred. (C.R.S. 15-12-201).

Uniform Probate Code adopted, with substantial modifications, effective July 1, 1974. Code is given Colorado Revised Statutes (C.R.S.) Tit. number 15, Arts. 10 to 17. Later amendments to Code adopted with modifications.

Preferences in Right to Administer.

Persons not disqualified have priority for appointment as personal representative in following order: Person with priority as determined by probated will; surviving spouse, if devisee; other devisees; surviving spouse; other heirs; 45 days after death, any creditor. (C.R.S. 15-12-203[1]).

Eligibility and Competency.

Persons under age 21 and persons found unsuitable by court in formal proceedings not qualified to be personal representative. (C.R.S. 15-12-203[6]).

Qualification.

Personal representative qualifies by filing with appointing court any required bond and statement of acceptance of duties. (C.R.S. 15-12-601).

Exemption from Bond.

Informal Proceedings.

No bond required of personal representative except: Upon appointment of special administrator; where specifically required by will; or if determined by court to be desirable upon demand pursuant to C.R.S. 15-12-605 by one with interest or claim in excess of $5,000 (C.R.S. 15-12-603[1]).

Formal Proceedings.

Bond may be required by court order at time of appointment of personal representative. Bond not required if waived by will unless court finds bond desirable upon request of interested party. Bond required by will may be dispensed with by court if found to be unnecessary. (C.R.S. 15-12-603[2]).

Issuance of Letters.

Letters of appointment must be issued by court in formal and informal appointment proceedings. (C.R.S. 15-12-103). If no local administration or application therefor pending, domiciliary foreign personal representative may file authenticated copies of appointment and of bond in county where property located (C.R.S. 15-13-204) and may exercise powers of local administrator, subject to general rules for nonresidents (C.R.S. 15-13-205).

Removal.

Personal representative may be removed by court for cause at any time. (C.R.S. 15-12-611). Attorney’s fees awarded to representative, successful or not, in suits for removal, provided defended in good faith but not beneficiary seeking removal for his or her benefit alone. (C.R.S. 15-12-720; 713 P.2d 412).

Special Kinds of Administration.

Supervised administration authorized by C.R.S. 15-12-501, under which no distributions may be made without prior order of court (C.R.S. 15-12-504). Court may appoint special administrator upon petition of interested person and finding after notice and hearing that appointment necessary to preserve or properly administer estate. Prior to appointment of or after termination of appointment of personal representative registrar may appoint special administrator upon application of interested person when necessary to protect estate. (C.R.S. 15-12-614). Special administrator appointed by registrar has duty to collect, manage, account for, preserve and deliver to personal representative assets of estate. (C.R.S. 15-12-616). Special administrator appointed by court has power of personal representative as limited by court. (C.R.S. 15-12-617).

Public Administrators.

Probate or district court in each judicial district may appoint public administrator to administer estate of decedent where no individual can be found to administer estate by virtue of being nominated by will to act as personal representative or entitled to receive portion of decedent’s estate as heir or devisee. Court may appoint public administrator to act as conservator, temporary or special conservator, trustee or other fiduciary of any estate with assets requiring protection. Court may appoint administrator by its own motion without notice if it determines emergency exists. (C.R.S. 15-12-614[1][b]). Payment of administrative fees and costs of public administrator has priority over all other claims and exempt property or family allowances. (C.R.S. 15-12-619 to 623). Public administrator may petition court for appointment to act as conservator to protect assets of person missing, detained or unable to return to United States if uninterested person has initiated petition to accomplish this purpose. (C.R.S. 15-12-622[4]).

Inventory and Appraisal.

Personal representative must, within three months of appointment, prepare inventory of property owned by decedent at time of death, showing fair market value and type and amount of existing encumbrances and must send it to interested persons who request it or may file original inventory with court. (C.R.S. 15-12-706).

General Powers and Duties.

Representative has all powers specified in Colorado Fiduciaries' Powers Act (C.R.S. 15-1-801) to extent consistent with will or order of court in formal proceeding (C.R.S. 15-12-715), including power to mortgage or lease assets not otherwise specifically bequeathed or devised (C.R.S. 15-1-804[2][g], [h]). Duties of personal representative include: settle and distribute estate expeditiously (C.R.S. 15-12-703); inform heirs and devisees of appointment within 30 days after appointment (C.R.S. 15-12-705); inventory and appraise assets (C.R.S. 15-12-706); possess and control estate (C.R.S. 15-12-709). See subheads Notice of Appointment, infra, and Inventory and Appraisal, supra.

Notice of Appointment.

Within 30 days of appointment, representative other than special administrator must give notice of appointment by mail or delivery to heirs and devisees. Failure is breach of duty but does not invalidate appointment. (C.R.S. 15-12-705).

Notice to Creditors.

Unless one year or more has elapsed since date of death of decedent, representative must publish notice to creditors once a week for three successive weeks in newspaper of general circulation in county. Representative may give written notice to any creditor. (C.R.S. 15-12-801).

Presentation of Claims.

All claims that arose before decedent's death must be presented as to creditors barred by publication, within time in published notice; as to creditors barred by written notice, within time set in written notice; as to all creditors, within one year of decedent's death. Claims arising at or after death must be presented within four months after arising or, if claim based on contract with personal representative, within four months after personal representative's performance due. Excepted are enforcement of mortgages, pledges or other liens; actions to establish decedent's or representative's liability covered by liability insurance; and collection of compensation for services rendered and reimbursement for expenses advanced by or for personal representative, attorney or accountant. (C.R.S. 15-12-803).

Proof of Claims.

No particular form of proof of claim is prescribed. Claimant may present claim by mailing or delivering to personal representative or filing in court written statement including basis and amount of claim, name and address of claimant, description of contingent or unliquidated nature of claim and any security held for claim (C.R.S. 15-12-804). Written claim must include request or demand for payment from estate and sufficient information to allow personal representative to investigate and respond to claim. (998 P.2d 1097).

Approval or Rejection of Claims.

Claims approved or rejected by representative. Claims disallowed by appropriate notice are barred unless claimant files petition for allowance or commences proceeding within 60 days of mailing of notice of disallowance. (C.R.S. 15-12-806). Failure of representative to disallow claim (C.R.S. 15-12-806[1]) generally amounts to allowance of claim (633 P.2d 1100).

Payment of Claims.

Representative may pay claims after making provision for statutory allowances, claims already presented and unbarred claims which may yet be presented (including costs and expenses of administration). (C.R.S. 15-12-807).

Priorities.

(1) Property held by deceased as fiduciary or trustee; (2) costs of administration; (3) reasonable funeral expenses; (4) debts and taxes preferred under Federal law; (5) expenses of last illness; (6) debts and taxes preferred under Colorado law; (7) claims of department of human services for medical assistance, per C.R.S. 26-4-403.3(5); (8) claims of county department of social services or state department of human services for excess public assistance paid for which recipient was ineligible; and (9) all other claims (C.R.S. 15-12-805). All payments, except (1) above subject to statutory allowances. See subhead Allowances, infra.

Sales.

See subhead General Powers and Duties, supra.

Actions by Representative.

Representative may prosecute and defend claims for protection of estate. (C.R.S. 15-12-709). Claim by decedent not barred by statute of limitations at his death may not be barred sooner than one year after death. (C.R.S. 15-12-109).

Actions Against Representative.

Before claim may be presented, decedent's estate must first have been commenced in court of appropriate jurisdiction by filing of application or petition. Claimant may thereafter present claim pursuant to C.R.S. 15-12-804 (666 P.2d 1109). See subhead Presentation of Claims, supra.

Allowances.

If decedent was domiciled in Colorado, following are available: (1) Exempt property allowance of $26,000, payable from estate in form of cash or other property, to surviving spouse, or divided among dependent children if no spouse survives. Exempt property allowance is exempt from and prior to all claims against estate except administration and funeral expenses and family allowance. (C.R.S. 15-11-403). (2) Family allowance to surviving spouse, children under 18 and dependent children. Family allowance is exempt from and prior to all claims against estate except administration and funeral expenses. (C.R.S. 15-11-404). Statutory allowances are not chargeable against any share passing to spouse or children by decedent's will, unless will provides otherwise. (C.R.S. 15-11-403, 404). Statutory allowances are in addition to and not in lieu of homestead exemption. (C.R.S. 38-41-211). Statutory allowances and homestead exemption may be waived, in whole or in part, before or after marriage, by writing signed by waiving party after fair disclosure and such waiver will be enforced as long as all conditions of C.R.S. 14-2-307 are satisfied (C.R.S. 15-11-207).

Widow's Quarantine.

None.

Intermediate Accounting.

Representative must file annual interim accountings in supervised administration unless otherwise ordered by court. (Probate Court Rule 30).

Final Accounting and Settlement.

Estate may be settled by: (1) Petition for order of complete settlement (C.R.S. 15-12-1001); (2) petition under informally probated will (C.R.S. 15-12-1002); (3) except when under court prohibition or supervision, verified statement of representative that personal representative has fully administered estate by payment, settlement or other disposition of lawful claims, expenses of administration and estate, inheritance and other death taxes and distributed assets to persons entitled (C.R.S. 15-12-1003).

Consent Settlement.

Representative may compromise claims against estate. (C.R.S. 15-12-813).

Distribution.

Special provisions relating to distribution. (C.R.S. 15-12-901 to 916). See also topic 13.06 Descent and Distribution.

Unsupervised Administration.

Representative may settle and distribute estate without court order but may present questions to court. (C.R.S. 15-12-704).

Supervised Administration.

Representative may not distribute without court order. (C.R.S. 15-12-504). Partial distribution may be ordered by court during pendency of supervised administration upon application. (C.R.S. 15-12-505).

Distribution If Abroad.

No statutory provisions.

Liabilities.

Unless provided in contract, representative is not liable on contract unless he fails to reveal representative capacity, but is liable for obligations and torts during administration if personally at fault. (C.R.S. 15-12-808).

Compensation of Representatives.

Representative is entitled to reasonable compensation for services. Personal representative may renounce compensation set forth in will and be entitled to reasonable compensation unless compensation is set by contract with decedent. (C.R.S. 15-12-719).

When Administration Unnecessary.

Any successor may collect personal property owed by decedent at death by affidavit asserting as follows: Net estate is $50,000 or less; ten days have elapsed since death; there are no pending proceedings to appoint personal representative, and successor has right to payment. (C.R.S. 15-12-1201).

Small Estates.

If estate inventory value, minus liens and encumbrances, does not exceed value of personal property held by decedent as fiduciary or trustee, exempt property allowance, family allowance, administration expenses, funeral expenses and expenses of last illness, representative may make immediate distribution and close estate by filing verified statement that: (1) Estate did not exceed items above; (2) representative has distributed estate to those entitled thereto; and (3) representative has sent copy of closing statement to all distributees and to all creditors, neither paid nor barred, and has furnished full written accounting of administration to distributees affected thereby. (C.R.S. 15-12-1203, 1204). If no proceedings involving representative are pending in court one year after filing of closing statement, representative's appointment is terminated. (C.R.S. 15-12-1204).

Foreign Executors and Administrators.

As to assets in Colorado, upon filing authenticated copies of appointment, foreign personal representative may exercise all powers of local personal representative and may maintain actions subject to any conditions imposed on nonresidents generally (C.R.S. 15-13-204, 205), but only if no administration or petition for administration is pending in Colorado (C.R.S. 15-13-204, 206). Petition for Colorado administration terminates power of foreign personal representative. (C.R.S. 15-13-206).

Uniform Fiduciaries Law.

Adopted. (C.R.S. 15-1-101).

Revised Uniform Principal and Income Act.

Adopted. (C.R.S. 15-1-401).

Uniform Statutory Rule Against Perpetuities.

Adopted with significant modification. (C.R.S. 15-11-1101).

Uniform Anatomical Gift Act.

See topic 13.16 Wills.

13.11 FIDUCIARIES:

See topics 13.08 Executors and Administrators, Trusts; category 14 Family, topic 14.07 Guardian and Ward.

13.12–13.13 [RESERVED]

13.14 PROOF OF CLAIMS:

See topic 13.08 Executors and Administrators; category 5 Civil Actions and Procedure, topic 5.17 Pleading.

13.15 TRUSTS:

Uniform Probate Code adopted with substantial modifications, effective July 1, 1974. 1990 amendments to Article II, Uniform Probate Code adopted with modifications. Sections pertaining to administration of trusts are C.R.S. 15-16-101 to 401. Amendments dealing with succession without administration have not been adopted. Uniform Trust Code has not been adopted.

Registration; When Required.

Trustee of trust having its principal place of administration in Colorado must register trust in court in county of principal place of administration within 30 days after his acceptance of trust. Unless otherwise designated in trust agreement, principal place of administration is trustee's usual place of business where records pertaining to trust are kept, or at trustee's residence if he has no such place of business. In case of co-trustees, principal place of administration, if not otherwise designated in trust instrument, is usual place of business of corporate trustee if there is but one corporate trustee, or usual place of business or residence of individual trustee who is professional fiduciary if there is but one such person and no corporate co-trustee, and otherwise usual place of business or residence of any of co-trustees as agreed upon by them. (C.R.S. 15-16-101[1]).

Registration not required if, in another jurisdiction in which trust is being administered, trustee cannot obtain release and if registration in Colorado would be inconsistent with foreign court's retained jurisdiction. (C.R.S. 15-16-101[1]). Registration not required of trust which has no asset other than rights to receive property upon occurrence of some future event, or which is nominally funded with assets having value of $500 or less, until occurrence of such event or until assets having value in excess of $500 are deposited therein. (C.R.S. 15-16-101[2]). Registration not required for fully and presently revocable inter vivos trust until grantor's power to revoke is terminated, nor is registration required if all assets of such trust become then distributable outright to beneficiaries. (C.R.S. 15-16-101[3]). Only one registration required for trust which divides corpus into multiple trusts, or multiple testamentary trusts created by one will. (C.R.S. 15-16-101[4]). Registration not required for trust created under C.R.S. 15-14-412.5 and C.R.S. 15-14-412.6 (C.R.S. 15-16-101[5]).

Effect of Registration.

By registering trust, or accepting trusteeship of registered trust, trustee submits personally to jurisdiction of court in any proceeding initiated by interested parties pertaining to internal affairs of such trust. Beneficiaries also subject to jurisdiction of court in such proceedings, provided proper notice given to them. (C.R.S. 15-16-103).

Effect of Failure to Register.

Any trustee failing to register trust is subject to personal jurisdiction of court where trust could have been registered. Any trustee failing to register within 30 days of written demand by settlor or beneficiary subject to removal and denial of compensation or surcharge. Any trustee who wrongfully and wilfully fails to register trust within 30 days of his acceptance of trust required to be registered may have imposed civil penalty of $100 per day for each day trustee fails to register trust, not to exceed $1,000. (C.R.S. 15-16-104).

Life insurance policy may designate as beneficiary trustee of existing living or testamentary trust and such trust may be valid though there is no corpus other than trustee's right to receive insurance proceeds. (C.R.S. 15-15-101[2]).

Trustee as Beneficiary Under Will.

Trust without funds or corpus whose only right is to receive benefits under will at settlor's death is valid. (C.R.S. 15-15-101[2]).

Eligibility and Competency.

Foreign corporate trustee is required to qualify as foreign corporation doing business in Colorado if it maintains principal place of administration of any trust within Colorado. Foreign co-trustee not required to qualify solely because its co-trustee maintains principal place of administration in Colorado. Unless otherwise doing business in Colorado, local qualification by corporate or individual foreign trustee not required in order for that foreign trustee to receive distributions from local estate, or to hold, invest in, or manage or acquire property in Colorado or to maintain litigation. (C.R.S. 15-16-105).

General Powers and Duties of Trustee.

Except as otherwise provided by terms of trust, trustee must deal with trust assets as prudent man dealing with property of another and, if trustee has special skills or is named trustee on basis of representations of special skills or expertise, he is under duty to use those skills. (C.R.S. 15-16-302). Except as otherwise provided by terms of trust, trustee shall invest and manage trust assets as prudent investor would by considering purposes, terms, distribution requirements and other circumstances of trust. Trustee who has special skills or is named trustee on basis of representation of special skills, is under duty to use those skills. (C.R.S. 15-1.1-102). See Colorado Fiduciaries' Powers Act for list of general powers. (C.R.S. 15-1-804).

Investments.

Uniform Prudent Investor Act adopted. (C.R.S. 15-1.1-101 to 115). See also C.R.S. 15-1-301 to 308.

Securities in Name of Nominee.

Fiduciary may hold securities in name of nominee. (C.R.S. 15-1-804[2][o]).

Bequests and Devises to Inter Vivos Trusts.

See topic 13.16 Wills.

Uniform Common Trust Fund Act.

Adopted. (C.R.S. 11-24-101 to 107).

Uniform Custodial Trust Act.

Adopted. (C.R.S. 15-1.5-101 to 121).

Revised Uniform Principal and Income Act.

Adopted. (C.R.S. 15-1-401 to 417).

Uniform Transfers to Minors Act.

Adopted. (C.R.S. 11-50-101 to 126). See category 14 Family, topic 14.10 Infants.

Uniform Guardianship and Protective Proceedings Act.

Adopted. (C.R.S. 15-14-101 to 433). See category 14 Family, topic 14.07 Guardian and Ward.

Uniform Fiduciaries Act.

Adopted. (C.R.S. 15-1-101 to 113).

Uniform Simplification of Fiduciary Security Transfers Act.

Repealed.

Uniform Statutory Rule Against Perpetuities.

Adopted with significant modification. (C.R.S. 15-11-1101 to 1107). See category 21 Property, topic 21.11 Perpetuities.

Pour Over Trusts.

See topic 13.16 Wills, subhead Testamentary Dispositions.

Renunciation.

For renunciation, by beneficiary, of benefits under testamentary trust, see topic 13.16 Wills, subhead Renunciation/Disclaimer. Beneficiary of nontestamentary instrument or his fiduciary may disclaim, in whole or part, right of succession or transfer to him of any property, real or personal, or interest therein, by filing or delivering written disclaimer within time and at place provided in C.R.S. 15-1-902 (C.R.S. 15-1-901).

Charitable; Amendment.

Trustee of charitable trust with consent of all beneficiaries allowed to amend governing instrument to conform to provisions of §§ 508(e), 664, 2055(e) and 2522(c) of Internal Revenue Code (C.R.S. 15-1-1002[3]).

Charitable; Enforcement.

Attorney General empowered to enforce trusts. (C.R.S. 24-31-101[5]).

Trusts in land, except trusts arising by operation of law (C.R.S. 38-10-107), must be in writing signed by party creating, granting, assigning, surrendering or declaring same or by his lawful agent authorized in writing (C.R.S. 38-10-106).

Conveyances of real property to trustee must describe representative capacity of trustee by: (1) Naming beneficiary; (2) identifying trust or court appointment under which trustee acts; or (3) referring to writing containing statute description of representative capacity of trustee that is recorded with county clerk for county in which land is situated, otherwise shall not be notice of trust or of representative capacity of grantee. (C.R.S. 38-30-108). Where conveyance does not comply with statute, property not available to trustee's judgment creditors who did not rely on nonconforming conveyance, duty of inquiry on subsequent takers to ascertain nature and effect of trust relationship is eliminated and undisclosed beneficiaries prevented from contesting interest of subsequent takers who obtain property from trustee or through trustee's chain of title (996 P.2d 1281) (decided prior to current version of C.R.S. 38-30-108). Trustees may file statement of authority (C.R.S. 30-30-172[2]) with county clerk to evidence existence of trust and trustee's authority to deal in any interest in real property (C.R.S. 38-30-108.5).

Upon death of sole or surviving trustee of express written trust affecting real property which does not provide for successor, trust vests in Public Trustee of county in which such real estate is situated, provided that district court may appoint new trustee upon application of any party in interest. (C.R.S. 38-34-104).

13.16 WILLS:

See also topics 13.06 Descent and Distribution, 13.08 Executors and Administrators.

Uniform Probate Code adopted, with substantial modifications, effective July 1, 1974. Code is given Colorado Revised Statutes (C.R.S.) Tit. number 15, Arts. 10 to 17. 1990 amendments to Article II, Uniform Probate Code adopted with modifications. Uniform International Wills Act adopted. (C.R.S. 15-11-1001 to 1011).

Testamentary Dispositions.

Persons 18 years of age or older and of sound mind may make wills. (C.R.S. 15-11-501). To satisfy mental capacity testator must understand nature of his act, know extent of his property, understand proposed testamentary disposition, know natural objects of his bounty and will must represent testator's wishes. (992 P.2d 1167). Testator also lacks testamentary capacity if affected by insane delusion that materially affects disposition. (992 P.2d 1167). Testator may dispose of property in any manner testator wishes, subject, however, to right of surviving spouse to elect against will (see subhead Election, infra). There are no limitations as to date of will or amount in relation to what may be given to religious, charitable, etc. institutions. Testator may devise or bequeath property to written trust, and terms of such trust instrument shall govern property even though trust may be amended or revoked after execution of will or after death of testator. (C.R.S. 15-11-511). Will may refer to written statement to dispose of tangible personal property not otherwise specifically disposed of by will. (C.R.S. 15-11-513).

Execution.

Will must be in writing, signed by testator, or in testator's name by someone in testator's presence and at testator's direction. (C.R.S. 15-11-502). Will must either (a) be signed by at least two persons either prior to or after testator's death, each of whom signed within reasonable time after he or she witnessed either signing or testator's acknowledgment of signature of will or (b) be acknowledged before notary public or another person authorized to take acknowledgments. (C.R.S. 15-11-502).

Holographic Will.

Will which does not comply with C.R.S. 15-11-502, valid as holographic will, whether or not witnessed, if signature and material provisions are in handwriting of testator (C.R.S. 15-11-502).

Writings Intended as Wills.

Although document or writing upon document not executed in compliance with C.R.S. 15-11-502, document or writing is valid as will, partial or complete revocation of will, addition to or alteration of will, or partial or complete revival of revoked will or revoked portion of will if proponent establishes by clear and convincing evidence that decedent intended document to constitute such (C.R.S. 15-11-503[1]). Generally, writing or document must be signed or acknowledged by decedent to be given effect. (C.R.S. 15-11-503[2]).

Nuncupative Will.

Not recognized.

Self-proved Will.

Any will may be simultaneously executed, attested, and made self-proved by acknowledgment thereof by testator and affidavits of witnesses, each made before officer authorized to administer oaths under laws of state where execution occurs and evidenced by officer's certificate, under official seal, in form and content substantially as follows (C.R.S. 15-11-504):

Forms

I, ..., the testator, sign my name to this instrument this . . . . . . day of . . . ., and being first duly sworn, do hereby declare to the undersigned authority that I sign and execute this instrument as my will and that I sign it willingly (or willingly direct another to sign for me), that I execute it as my free and voluntary act for the purposes therein expressed, and that I am eighteen years of age or older, of sound mind, and under no constraint or undue influence.

. . . .

Testator

We, ...,. . . . ., the witnesses, sign our names to this instrument, being first duly sworn, and do hereby declare to the undersigned authority that the testator signs and executes this instrument as [his] [her] will and that [he] [she] signs it willingly (or willingly directs another to sign for [him] [her]), and that [he] [she] executes it as [his] [her] free and voluntary act for the purposes therein expressed, and that each of us, in the conscious presence of the testator, hereby signs this will as witness to the testator’s signing, and that to the best of our knowledge the testator is eighteen years of age or older, of sound mind, and under no constraint or undue influence.

. . . .

Witness

. . . .

Witness

THE STATE OF . . . .

COUNTY OF . . . .

Subscribed, sworn to and acknowledged before me by . . . ., the testator, and subscribed and sworn to before me by . . . ., and . . . ., witnesses, this . . . . . . day of . . . .

(SEAL)

. . . .

(Signed)

. . . .

(Official capacity of

officer)

An attested will may at any time subsequent to its execution be made self-proved by acknowledgment thereof by testator and affidavits of witnesses, each made before officer authorized to administer oaths under laws of state where acknowledgment occurs and evidenced by officer’s certificate, under official seal, attached or annexed to will in form and content substantially as follows:

THE STATE OF . . . .

COUNTY OF . . . .

We, ..., ..., and . . . ., the testator and the witnesses, respectively, whose names are signed to the attached or foregoing instrument, being first duly sworn, do hereby declare to the undersigned authority that the testator signed and executed the instrument as the testator’s will and that [he] [she] had signed willingly (or willingly directed another to sign for [him] [her]), and that [he] [she] executed it as [his] [her] free and voluntary act for the purposes therein expressed, and that each of the witnesses, in the conscious presence of the testator, signed the will as witness, and that to the best of [his] [her] knowledge the testator was at that time eighteen years of age or older, of sound mind and under no constraint or undue influence.

. . . .

Testator

. . . .

Witness

. . . .

Witness

Subscribed, sworn to and acknowledged before me by . . . ., the testator, and subscribed and sworn to before me by . . . . and . . . ., witnesses, this . . . . . . day of . . . .

. . . .

(Signed)

. . . .

(Official capacity of

officer)

Revocation.

Will or any part thereof is revoked by a subsequent will which revokes prior will or part of such will expressly or by inconsistency or by its being burned, torn, canceled, obliterated, or destroyed, with intent and for purpose of revoking it, by testator or by another person in testator's presence and at testator's direction. (C.R.S. 15-11-507). Cancellation of duplicate original raises presumption that testator intended to cancel original will in possession of another. (619 P.2d 91). C.R.S. 15-11-507 permits will or part thereof to be revoked by performing revocatory act on will.

Individual who is divorced from decedent or whose marriage to decedent has been annulled, is not surviving spouse unless, by virtue of remarriage, he or she is married to decedent at time of death. (C.R.S. 15-11-802).

Revival.

If subsequent will that wholly revoked previous will is revoked by revocatory act under C.R.S. 15-11-507(1)(b), previous will remains revoked unless it is evident from circumstances of revocation of subsequent will or testator's contemporaneous or subsequent declarations that testator intended previous will to take effect (C.R.S. 15-11-509[1]). If subsequent will that partly revoked previous will is revoked by revocatory act under C.R.S. 15-11-507(1)(b), revoked part of previous will is revived unless it is evident from circumstances of revocation of subsequent will or testator's contemporaneous or subsequent declarations that testator did not intend revoked part to take effect (C.R.S. 15-11-509[2]). If subsequent will that revoked previous will in whole or part is revoked by another, later will, previous will remains revoked in whole or part, unless it appears from terms of later will that testator intended previous will to take effect. (C.R.S. 15-11-509[3]).

Testamentary Gifts to Subscribing Witnesses.

Will or any provision thereof is not invalid because will is signed by an interested witness. (C.R.S. 15-11-505).

Bequests and Devises to Inter Vivos Trusts.

See subhead Testamentary Dispositions, supra.

Testamentary Guardians.

See category 14 Family, topic 14.07 Guardian and Ward.

Probate.

Jurisdiction over probate matters is vested in probate court in Denver and district court in other counties. (C.R.S. 15-10-302). Court maintains prowers and authority of fiduciary oversight, removal, sanctions, and contempt. (C.R.S. 15-10-501 to 505). Venue for first informal or formal testacy or appointment proceedings after decedent's death is in county where decedent was domiciled or resided at time of death or, if decedent was neither domiciled in nor resident of this state, in any county where property of decedent was located at time of death. (C.R.S. 15-12-201). Interested persons have right to choose either formal or informal procedures in probate of estate (C.R.S. 15-12-301 to 311; C.R.S. 15-12-401 to 414) and to petition court for supervised administration (C.R.S. 15-12-501 to 505) or determination or heirs, devisees and property interests by special proceeding (C.R.S. 15-12-1301 to 1309).

Contest.

Informal probate can be contested by petition to prevent or set aside informal probate. (C.R.S. 15-12-401). In formal probate proceedings, written objections must be filed. (C.R.S. 15-12-404). After formal probate order, vacation or modification may be sought by (1) proponents of later-offered will, if without knowledge of its existence at first proceeding or if without knowledge and without actual notice of first proceeding, (2) heirs (in case of order of intestacy and determination of heirs) without knowledge of death, heirship or notice of proceedings, or (3) others for good cause. Time for filing petition to vacate or modify depends on proceedings used in first probate. (C.R.S. 15-12-412, 413).

Challenger of will not barred by res judicata or collateral estoppel where court previously denied challenger's petition for allowance of claim. (4 P.3d 504).

If alleged decedent not dead, may always recover property from personal representative, and from distributees if equitable. (C.R.S. 15-12-412[2]).

Except for fraud, creditor's actions against distributees to recover property improperly distributed are barred one year after decedent's death. Any other claimant is barred three years after decedent's death or one year after distribution, whichever is later. (C.R.S. 15-12-1006).

Legacies.

Personal representative in formal or informal probate may petition court for order directing distribution at any time after time for presenting claims has expired. Interested party may petition one year after appointment and must wait until after time for presenting claims. (C.R.S. 15-12-1001, 1002). Except in supervised probate, personal representative may distribute without court approval. Personal representative may file closing statement with court no earlier than six months after appointment or one year after date of death, whichever occurs first. (C.R.S. 15-12-1003).

Ademption.

Ademption of securities and certain specific devises is limited by C.R.S. 15-11-605, 606. Ademption by satisfaction occurs only if expressly stated in will or contemporaneous writing by testator, or if devisee acknowledges satisfaction in writing. (C.R.S. 15-11-609).

Abatement.

Unless will has express or implied abatement order, shares of distributees abate in following order without difference between real and personal property: (1) property not disposed of by will; (2) residuary devises; (3) general devises; and (4) specific devises. (C.R.S. 15-12-902).

Unclaimed Legacies.

See topic 13.06 Descent and Distribution, subhead Escheat.

Lapse.

If devisee fails to survive testator and is grandparent or descendant of grandparent of testator, following apply, except as provided below: (1) If devise not in form of class gift, substitute gift is created in devisee's surviving descendants, who take per capita at each generation; (2) if devise is in form of class gift other than gift to "issue", "descendants", or class described by similar language, substitute gift is created in deceased devisee's surviving descendants. Words of survivorship like "if he survives me" are not, in absence of additional evidence, sufficient indication of intent contrary to these rules. Foregoing substitute gifts are superseded by alternate devise in will only if expressly designated devisee of alternate devise is entitled to take under will. (C.R.S. 15-11-603). Except as provided in C.R.S. 15-11-603, if devise other than residuary devise fails for any reason, it becomes part of residue (C.R.S. 15-11-604[1]). Except as provided in C.R.S. 15-11-603, if residue is devised to two or more persons and share of one of residuary devisees fails for any reason, that share passes to other residuary devisee, or to other residuary devisees in proportion to their interests in residue (C.R.S. 15-11-604[2]).

Children.

Except as provided below, if testator fails to provide in will for child born or adopted after execution of will, omitted child receives share of estate as follows: (1) If testator had no living child when will executed, omitted child receives intestate share unless will devised all or substantially all of estate to other parent of omitted child and that parent survives testator; or (2) if testator had one or more children living when will executed and will devises property to one or more then living children, omitted child entitled to receive share of estate that child would have received had testator included all omitted children with children to whom devises were made under will and had given equal share of estate to each child. For this purpose, portion of testator's estate in which omitted child may share is limited to devises made to testator's then living children under will. Above rules not applicable if will shows omission intentional or testator provided for child outside will and statements of testator or other evidence show that transfer was intended to be in lieu of testamentary provision. (C.R.S. 15-11-302).

Election.

Notwithstanding provisions of testator's will, surviving spouse may, within nine months after date of decedent's death or six months after will admitted to probate, whichever is later, elect to take possession of up to one-half of decedent's augmented estate by filing in court and mailing or delivering to personal representative, if any, petition for elective share. (C.R.S. 15-11-201; C.R.S. 15-11-205[1]). Amount of elective share is determined by length of time spouse and decedent were married to each other. (C.R.S. 15-11-201[1]). Court may extend time for election for cause shown upon petition of spouse made within nine months after decedent's death. (C.R.S. 15-11-205[2]). In case of spouse who is incapacitated, court shall set aside elective share amount in trust for support of spouse. Upon surviving spouse's death, unexpended trust property shall be transferred under residuary clause, if any, of predeceased spouse's will, as if that predeceased spouse died immediately after surviving spouse or to predeceased spouse's heirs. (C.R.S. 15-11-206). Election negates will provision regarding payment of taxes as administrative cost; taxes apportioned after calculation of elective share as in C.R.S. 15-12-916(2). (708 P.2d 476).

Contribution.

Where surviving spouse elects to take elective share (C.R.S. 15-11-201), property already received by surviving spouse is charged against elective share, and decedent's probate estate and certain of decedent's non-probate transfers to others are so applied that liability for unsatisfied balance of elective share amount is equitably apportioned among recipients of decedent's probate estate and of that portion of decedent's non-probate transfers to others in proportion to value of their interests therein (C.R.S. 15-11-203[1], [2]). Where omitted child takes share of estate under C.R.S. 15-11-302(1)(a), devises abate as provided in C.R.S. 15-12-902 (C.R.S. 15-11-302[4]). Where omitted child takes share of estate under C.R.S. 15-11-302(1)(b), devises to testator's children who were living when will was executed abate ratably. (C.R.S. 15-11-302[1][b][IV]).

Renunciation/Disclaimer.

Person to whom interest in property devolves may disclaim it by filing, within time limits and at places prescribed by C.R.S. 15-11-801(2), written disclaimer in form prescribed by C.R.S. 15-11-801(3). (C.R.S. 15-11-801).

Exoneration.

Specific devise passes subject to any mortgage interest existing at date of death, without right of exoneration, regardless of general directive in will to pay debts. (C.R.S. 15-11-607).

Foreign Executed Wills.

Written will is valid if its execution complies with law at time of execution of place where executed, or law of place where testator is domiciled, has place of abode or is national, either at time of execution or at time of death. (C.R.S. 15-11-506). Uniform International Wills Act adopted. (C.R.S. 15-11-1001 to 1011).

Foreign Probated Wills.

See topic Executors and Administrators for material variances from articles 3 and 4 of Uniform Probate Code, and those articles pertaining to probate of estate.

Living Will (Right to Accept or Reject Medical or Surgical Treatment).

Competent adults may, if procedural requirements met, execute declaration directing life sustaining procedures and artificial nourishment to be withheld or withdrawn if, at future time, declarant in terminal condition and either unconscious or otherwise incompetent to decide if medical procedure should be accepted or rejected. (C.R.S. 15-18-101 to 113; C.R.S. 15-18.6-101 to 108). Health care provider may rely upon medical treatment decision of proxy decision-maker selected in accordance with proper procedure. (C.R.S. 15-8.5-101 to 103).

Simultaneous Death.

See topic 13.05 Death, subhead Survivorship.

Testamentary Trusts.

See topic 13.15 Trusts.

Uniform Anatomical Gift Act.

Adopted. (C.R.S. 12-34-101 to 109).

Uniform Statutory Rule Against Perpetuities adopted with significant modification. (C.R.S. 15-11-1101 to 1107).

Uniform Guardianship and Protective Proceedings Act.

Adopted. (C.R.S. 15-14-101 to 433).

14 FAMILY

14.01 ADOPTION:

Any child (under 18) (C.R.S. 19-5-201) or adult (C.R.S. 14-1-101), may be adopted. With court approval person 18 or over and under 21 may be adopted as child (C.R.S. 19-5-201). Minor with court approval or any person over 21 may petition for adoption of minor, provided married person must petition jointly with spouse unless such spouse is birth parent of or has previously adopted child. (C.R.S. 19-5-202). Any person may petition for adoption of adult. (C.R.S. 14-1-101). Birth parent may specify adoptive applicant for placement. (C.R.S. 19-5-206).

Consent Required.

Adoption of a person under 18 requires written and verified consent of (1) court-appointed guardian if parents deceased; (2) parent in stepparent adoption where other parent is deceased or his rights in child have been terminated or relinquished or where other parent has abandoned child for period of one year or more or has failed without cause to provide reasonable support for one year or more, (3) parent no longer having custody as result of divorce proceeding where it is spouse of parent having custody who seeks to adopt, (4) parent or parents in stepparent adoption where child is conceived and born out of wedlock, (5) sole legal parent in second-parent adoption where sole legal parent wishes child to be adopted by specified second adult. (C.R.S. 19-5-203[1]). Written consent of person to be adopted required if 12 or over. (C.R.S. 19-5-203[2]).

In order to comply with due process of law, grounds underlying termination order must be established by clear and convincing evidence. (654 P.2d 312).

When child placed for adoption by department of human services, child placement agency or individual, written consent of such person and notices received under C.R.S. 24-60-1801 to 1803 must be filed with petition to adopt (C.R.S. 19-5-207).

If placement for adoption occurred in another state department of human services must submit statement as to whether placement was carried out by placement agency authorized by other state's laws to make placement. (C.R.S. 19-5-203[g]). If custody acquired in another state adoption requires verification by department of human services, child placement agency or attorney for petitioner that custody was acquired by proceedings or written consent complying with this or other state's laws and verification by department of human services that custody acquired by proceedings sanctioned by federal immigration and naturalization service whenever authorized or advised by federal law. (C.R.S. 19-5-203[1][h] and [i]).

Adoption decree from foreign country may be declared valid upon petition by state resident if child is permanent resident or naturalized citizen of U.S. (C.R.S. 19-5-205).

Interstate Compact on Placement of Children enacted. (C.R.S. 24-60-1801).

No person may transport child into state for foster care or adoption without notice to and consent of department of human services. Notice must contain: (a) Name, date, birthplace of child; (b) identity and address of parent or guardian; (c) identity and address of person transporting child; (d) name and address of person to whom child is transported; (e) full statement of reasons and evidence of authority for placement. (C.R.S. 26-6-104[5]).

Conditions Precedent.

Court order terminating or decreeing voluntary relinquishment of all parental rights required in cases other than where consents and statements described above are required. (C.R.S. 19-5-203).

Written report showing general health and background of child and suitability of proposed petitioner must also be filed. (C.R.S. 19-5-207). Also, criminal history records check for any prospective adoptive parent or any adult residing in home. (C.R.S. 19-5-207[2.5]). Except for stepparent adoptions, kinship adoptions, custodial adoptions and where placement for adoption has been made by court, if consent and report required by C.R.S. 19-5-207 is not filed with petition, court must order investigation and report (C.R.S. 19-5-209).

Jurisdiction.

Juvenile court in Denver and juvenile division of district courts elsewhere have exclusive original jurisdiction. (C.R.S. 19-1-104[1][g]).

Venue.

Petition may be filed in county where petitioner(s) reside, or where licensed child placement agency is located. (C.R.S. 19-5-204).

Petition for adoption of child must be verified by petitioner and substantially entitled: "In the matter of the petition of . . . . for the adoption of a child." Must contain: (a) Name, date and place of birth, race, and place of residence of each petitioner, including maiden name of adopting mother and date of marriage, if any, of petitioners; (b) name, date and place of birth, and place of residence, if known by petitioner, of child to be adopted; (c) relationship, if any, of child to petitioner; (d) full name by which child to be known after adoption; (e) full description of child's property, if any; (f) names of child's parents and address of each living parent, if known to petitioner; (g) names and addresses of guardian of child and/or estate of child, if any have been appointed; (h) name of agency or person to which custody of child has been given by proper court order; (i) length of time child has been in care and custody of petitioner or petitioners; (j) names of other children, natural and adopted, living and dead, of adopting parents; and (k) residence and occupation of each petitioner at or about time of birth of child. (C.R.S. 19-5-208).

In each case to which terms of federal Indian Child Welfare Act, 25 U.S.C. 1901, apply, petition must include statement indicating what continuing inquiries county department of social services or child placement agency has made in determining whether child who is subject of proceeding is Indian child; identify whether child is Indian child; and include identity of Indian child's tribe, if child is identified as Indian child. (C.R.S. 19-5-208). If notices were sent to parent or Indian custodian of child and to Indian child's tribe, pursuant to C.R.S. 19-1-126, postal receipts, or copies thereof, shall be attached to petition for adoption and filed with court or filed within ten days after filing of petition for adoption (C.R.S. 19-5-208).

In stepparent, second parent, custodial and kinship adoptions, petition must include statement informing court whether prospective adoptive parent was convicted of any enumerated crime, including child abuse, spousal abuse and any crime of violence; and petitioner must attach to petition current criminal records check. (C.R.S. 19-5-208[5]). In custodial and kinship adoptions, petition must include statement that petitioner has consulted with social services concerning eligibility of petitioner and child for public assistance programs. (C.R.S. 19-5-208[6]). Petition must be accompanied by standardized affidavit of amounts charged by any person or agency for adoption. (C.R.S. 19-5-208[4]).

Proceedings.

Denver juvenile court requires one year waiting period after date of marriage for stepparent adoption. Petition must be filed not later than 30 days after child is first placed in home of adoptive applicants for purpose of adoption unless court finds reasonable cause or excusable neglect for delay. (C.R.S. 19-5-208). Hearing closed to public and in court's discretion to child to be adopted if under 12, but court may interview child. (C.R.S. 19-5-210[5]). No person may give or receive money or other consideration in connection with relinquishment and adoption except attorneys fees and other fees approved by court. Violation of this section is misdemeanor. (C.R.S. 19-5-213).

Decree.

After hearing, court may continue petition, dismiss petition, or no sooner than six months from date of hearing unless time extended or shortened by court for good cause shown, may enter final decree of adoption. (C.R.S. 19-5-210). In certain stepparent adoptions final decree may be entered at time of hearing but hearing may not be held less than 30 days after notice is served on other parent. (C.R.S. 19-5-203[1][d][II]). Before making final decree, court must be satisfied as to: (1) Availability of child for adoption, (2) good moral character, ability to support and educate, and suitableness of home of petitioner, (3) mental and physical condition of child as proper subject for adoption in proposed home, (4) fact that best interest of child will be served by proposed adoption, and (5) if child is part of sibling group, whether it is in best interests of child to remain in intact sibling group. (C.R.S. 19-5-210[2]).

Name by which child to be known after adoption must be stated in petition and that name, not former, is stated in final decree. (C.R.S. 19-5-208[2][d] and C.R.S. 19-5-210[3]).

Effect of Adoption.

After entry of final decree, person adopted is entitled to all rights and privileges and subject to all obligations of child born in lawful wedlock. Birth parents are divested of all legal rights and obligations and adopted child is free from all legal obligations, including maintenance, to birth parents; but adoption of child by spouse of birth parent has no effect on relationship between child and that birth parent. (C.R.S. 19-5-211).

For purposes of intestate succession, adopted person is child of adopting parent and not of birth parents. (C.R.S. 19-5-104[5]; C.R.S. 19-5-211[2]; C.R.S. 15-11-114[2]).

With exception of equitable adoption for intestate succession (170 Colo. 465, 463 P.2d 305), this statute is only method of legal adoption (185 Colo. 400, 525 P.2d 1148).

Setting Aside Adoption.

Motion to vacate final decree for jurisdictional or procedural defects must be filed within 90 days of entry of final decree. Motion to vacate final decree by reason of fraud must be filed within one year of entry of final decree, except in cases of stepparent adoption. (C.R.S. 19-5-214). Requirements of due process under both federal and state constitutions take precedence over statutory enactments. (163 Colo. 122, 428 P.2d 909).

Adoption of Adults.

Person desiring to adopt person over 18 as heir at law may file petition in juvenile court of county of petitioner's residence or residence of person sought to be adopted and summons is served on person sought to be adopted. Such person must file answer within time required by summons either consenting or disclaiming desire for such adoption. If disclaimer filed, petition is dismissed; if consent filed, decree is entered declaring such person to be heir at law of petitioner. Consent to be given by adult to be adopted, but if such person non compos mentis at time consent may be given by conservator or other representative. Such decree may or may not change name of such adopted person. Jurisdiction and procedure same insofar as practicable as for adoption of children. (C.R.S. 14-1-101).

Registry Established.

State registrar of vital statistics maintains confidential registry of consenting adult adoptees and birth parents who authorize release of information to each other. (C.R.S. 25-2-113.5).

Access to Information.

Any adult adoptee or adoptive parent may obtain specified “non-identifying information” such as physical description, educational background and medical information concerning birth parents to extent information is available through State Department of Human Services. (C.R.S. 19-5-402).

14.02 [RESERVED]

14.03 COMMUNITY PROPERTY:

Not in Colorado.

14.04 [RESERVED]

14.05 DISSOLUTION OF MARRIAGE:

Governing statute is based on Uniform Marriage and Divorce Act. Unless otherwise provided, Rules of Civil Procedure govern process, service thereof, practice and procedure. (C.R.S. 14-10-105).

Grounds for Dissolution.

Irretrievable breakdown of marriage relationship. (C.R.S. 14-10-106). Irretrievable breakdown is finding of fact and must be proven as essential element of action. (189 Colo. 499, 542 P.2d 845).

Grounds for Legal Separation.

Same as for dissolution of marriage. Decree granted in this form if one party so requests and other does not object. (C.R.S. 14-10-106). Converted to dissolution of marriage after six months on motion of either party and proof of notice to other party. (C.R.S. 14-10-120).

Maintenance.

Without regard to marital misconduct, court may grant, for either spouse, only upon finding that spouse seeking maintenance order lacks sufficient property and is unable to support self through appropriate employment or is custodian of child whose circumstances make it appropriate that custodian not seek employment. (C.R.S. 14-10-114).

Citizenship and Residence Requirements.

One spouse must have been domiciled in state for 90 days next preceding commencement of action. (C.R.S. 14-10-106).

Jurisdiction.

District court has exclusive jurisdiction over all actions for dissolution of marriage, legal separation, maintenance. District court entering decree has continuing jurisdiction to enforce child support orders through contempt power but different district court has no jurisdiction to punish contempt absent change of venue. (629 P.2d 1074). If out-of-state respondent waives court’s lack of personal jurisdiction, court has jurisdiction both over subject matter and parties, and must divide marital property. (647 P.2d 693).

Venue.

Proper venue lies in county in which respondent resides at commencement of action or in county in which petitioner resides when service is made on respondent in such county. (C.R.C.P. 98[c]).

Process.

Same as in other civil actions. Where personal service cannot be obtained, service by one publication may be ordered, and default judgment may be entered 30 days after publication. (C.R.S. 14-10-107).

Pleading.

Petitioner must allege irretrievable breakdown of marriage, and set forth residence and length of residence in state of each party, date and place of marriage, date on which separation of parties occurred, names, ages and addresses of any living children of marriage and whether wife is pregnant, any arrangements as to custody and support of children and maintenance of spouse, and relief sought. (C.R.S. 14-10-107).

Practice.

Rules of Civil Procedure govern, except as otherwise specifically provided. (C.R.S. 14-10-105). Decree may not be entered absent court finding that 90 days or more have elapsed since it acquired jurisdiction over respondent, either by service of process, or by respondent joining as copetitioner or otherwise entering appearance. (C.R.S. 14-10-106). Appeals from district court to court of appeals lie as in all other civil cases.

By affidavit of either or both parties if no minor children and wife not pregnant, or both spouses represented by counsel have entered into separation agreement as to custody and child support; and adverse party properly served; and no genuine issue of material fact; and no marital property or parties have entered into property division agreement. Will not shorten statutory waiting period for entry of decree and court may require formal hearing on own motion. (C.R.S. 14-10-120.3).

Judgment or Decree.

Court must make finding that marriage is irretrievably broken or continue matter for further hearing for not less than 30 days nor more than 60 days. At adjourned hearing, court must make finding whether marriage irretrievably broken. (C.R.S. 14-10-110).

Temporary Maintenance.

In proceeding for dissolution of marriage or legal separation, or proceeding for disposition of property, maintenance or support following dissolution of marriage, court may order temporary maintenance payments, debt payments, use of property, parental responsibilities, child support or attorneys fees on motion of either party. (C.R.S. 14-10-108 to 114). When temporary maintenance is requested and combined income of two parties is $75,000 or less, there is rebuttable statutory presumption in favor of award of temporary maintenance from higher income party to lower income party based on statutory formula. If combined income of parties exceeds $75,000, statutory formula does not apply and court may grant temporary maintenance only if spouse seeking maintenance lacks sufficient property to provide for his or her reasonable needs, is unable to support himself or herself through appropriate employment, or is custodian of child whose condition or circumstances make it appropriate that custodian not seek employment. (C.R.S. 14-10-114).

Protection Order.

Provision is made for protection orders, temporary injunctions, and enforcement thereof. (C.R.S. 14-10-107 to 109). Party to action may seek, and court may issue, temporary or permanent protection order. (C.R.S. 14-10-108).

Allowance for Prosecution of Suit.

Costs and attorney's fees may be granted. (C.R.S. 14-10-119).

Permanent Maintenance.

In proceeding for dissolution of marriage or legal separation or in separate proceeding for maintenance after dissolution of marriage, court may make reasonable and just order for maintenance of either spouse only if it finds spouse lacks sufficient property and is unable to secure sufficient employment to maintain self or is custodian of child whose circumstances make it appropriate that custodian not seek employment (C.R.S. 14-10-114), and may require payment to clerk of court as trustee or to family support registry and enforce payment by contempt or collection proceedings or by any other proceeding available under laws of state (C.R.S. 14-10-117). Written agreement as to maintenance executed before or during marriage enforceable unless unconscionable at time enforcement sought. (C.R.S. 14-2-307). Except where decree expressly precludes or limits modification, court which rendered decree may modify provisions for maintenance as to future installments upon showing of changed circumstances so substantial and continuing as to make terms unconscionable. Where decree expressly precludes modification, court can modify provisions for maintenance only on showing of fraud or overreaching. (38 Colo. App. 319, 558 P.2d 450). Modification can only be made upon motion at time when circumstances have changed and no automatic presumption as to unconscionability can be made in original decree. (44 Colo. App. 355, 618 P.2d 692). Unless otherwise agreed in writing or expressly provided in decree, death of either party or remarriage of party receiving maintenance terminates obligation to pay future maintenance. (C.R.S. 14-10-122). Carrying life insurance in favor of former spouse may be required as maintenance device. (44 Colo. App. 305, 612 P.2d 1161). Whether maintenance shall be awarded in lump sum or periodic payments is in discretion of court. (190 Colo. 491, 549 P.2d 404). Court may award maintenance as tool to balance equities and compensate spouse whose work enabled other spouse to obtain education, but such tool is available only where statutory requirements of need are met. (641 P.2d 300).

Division of Property of Spouses.

Property distributed upon dissolution or legal separation by giving each spouse his or her separate property and then dividing marital property in proportions as court deems just. (C.R.S. 14-10-113). Court to disregard marital misconduct and consider contributions (including contributions as homemaker), value of property set aside for each spouse, increase, decrease or depletion of separate property, and economic circumstances of each party. (C.R.S. 14-10-113). Property acquired in first marriage and given to spouse in divorce settlement remains separate property if parties remarry. (632 P.2d 1048). Written agreement executed before or during marriage but prior to filing of dissolution generally enforceable as to property division. (C.R.S. 14-2-301 to 310). Not enforceable if execution involuntary or disclosure of property or obligations at time of execution incomplete. (C.R.S. 14-2-307).

Change of Wife's Name.

Court may restore the wife's maiden name. (C.R.S. 13-15-101, 102).

Custody of Children.

Court must determine custody, after considering specified factors, in accordance with best interests of child. (C.R.S. 14-10-124). Court may interview child to determine wishes of child. (C.R.S. 14-10-126). Court may order joint custody. (C.R.S. 14-10-123.5). Court may modify custody decree only on finding that circumstances have changed and that modification serves best interest of child. (868 P.2d 387; C.R.S. 14-10-131). Motion for modification cannot be filed within two years of prior motion for modification unless child at physical or emotional risk. (C.R.S. 14-10-131). Court is not limited to inquiry as to legal right by which child is held, but must determine broad question of what will best serve child's interest. (186 Colo. 381, 527 P.2d 811). Court is not to presume that sex of any person proposed as custodian enables that person better to serve interests of child. (C.R.S. 14-10-124[3]). Court may allow custodial parent to remove child from state of Colorado permanently if custodial parent shows that there is sensible reason to leave state. Burden shifts to non-custodial parent to demonstrate that removal is not in child's best interest. (834 P.2d 1287). In any child custody case, grandparent of child may seek court order granting him legal custody or reasonable grandchild visitation rights. (C.R.S. 19-1-117). Court may award custody of child to interested person not party to action. (631 P.2d 1183). If parent is absent or leaves home because of spouse abuse by other parent, such absence or leaving not to be considered in determining best interests of child. (C.R.S. 14-10-124[4]).

Visitation.

Term "visitation" has been changed to "parenting time" throughout the act when visitation refers to time non-custodial parent spends with his or her child.

Uniform Child Custody Jurisdiction and Enforcement Act adopted. (C.R.S. 14-13-101).

Material Variations.

Adopted without material variations. Effective July 1, 2000. (C.R.S. 14-13-101 to 403). Broadened definition of "Person acting as a parent" in C.R.S. 14-13-102(13) to include person who has been allocated parental responsibility. Also limits C.R.S. 14-13-104 to foreign countries, deletes provisions regarding application of Act to Indian Tribes, and recognizes Indian Child Welfare Act, 25 U.S.C. §§ 1901 to 1963. Deleted provisions in Uniform Act re role of prosecutor, law enforcement, and/or public officials in enforcement proceedings. (§§ 315 to 317).

Allowance for Support of Children.

Guidelines and schedule of basic child support obligations establish rebuttable presumption of amount and allocation of support based on combined gross income of parents, number of children, and custody arrangements. (C.R.S. 14-10-115). Court may deviate from guidelines where inequitable, but must specify reasons for deviation. (C.R.S. 14-10-115). Court may in proceeding for dissolution of marriage, legal separation, maintenance or child support make such order as may be reasonable and just for support of children dependent upon parents for support. (C.R.S. 14-10-115). Unless otherwise emancipated, support terminates when last or only child attains age 19, unless parties otherwise agree, child is mentally or physically disabled, or child is still in high school or its equivalent. If child marries, child shall be considered emancipated as of date of marriage. If marriage is annulled, dissolved, or declared invalid, child support may be reinstated. If child enters into active military duty, child shall be considered emancipated. (C.R.S. 14-10-115[15][b][iv], [v]). Court may order parents to contribute to child's post-secondary education up to age 21 or upon obtaining undergraduate degree, whichever occurs first. Court may not order child support and contribution for post secondary education for same child. (C.R.S. 14-10-115[15][d]). Defines gross income for determination of child support. (C.R.S. 14-10-115[5][a][I]). Provision of decree respecting support may be modified only as to installments accruing subsequent to motion for modification. (C.R.S. 14-10-122[1]; 44 Colo. App. 502, 614 P.2d 913). Rebuttable presumption that child support shall not be modified unless basis for modification will result in change of child support amount by 10% or more. (C.R.S. 14-10-122[1]). May be lump sum charge against real property of father. (189 Colo. 103, 536 P.2d 1135). Upon request of any party or upon court's own motion, court shall order wage assignment. (C.R.S. 14-14-107). Wage assignment order mandatory unless defense asserted that allegedly delinquent payment not due or was paid. (692 P.2d 329). Obligation to support survives death of parent. (C.R.S. 14-10-122[3]). Court may order that income from gift made to children during marriage shall not reduce support payments later imposed on donor parent. (42 Colo. App. 433, 598 P.2d 524). Orders which resolve financial rights and obligations of parties, including issues of child support, even on temporary basis, are final for purposes of review. (650 P.2d 1352). Effects of inflation proper factors for consideration in action for child support modification, but there must be proper proof of rate of inflation and its specific effects on petitioner's circumstances. (635 P.2d 933). County and state child support enforcement units may certify past-due amounts of child support to Internal Revenue Service without court order for judgment or verified entry of judgment for purposes of intercepting federal tax refund. Court shall order immediate deductions from income for child support (C.R.S. 14-14-111) absent good cause shown or written agreement of parties. Notice to deduct income for family support binding on employer. (C.R.S. 14-14-111[4]). Lottery prize proceeds (C.R.S. 26-13-118) and state income tax refunds (C.R.S. 26-13-111) subject to offset for delinquent child support.

Child support enforcement procedures set forth in C.R.S. 14-14-101 to 113.

Uniform Interstate Family Support Act adopted without material variations. Effective Jan. 1, 1995. (C.R.S. 14-5-101 to 903). Adds new sections without counterparts in Act relating to venue (C.R.S. 14-5-1001), arrest of obligor (C.R.S. 14-5-1002), duty of officials of Colorado as responding state (C.R.S. 14-5-1003), proceedings not to be stayed (C.R.S. 14-5-1004), and enforcement of interstate income withholding (C.R.S. 14-5-1007).

§ 201—Subsection (7) omitted.

§ 301—State Department of Social Services is state information agency.

§ 701—Parentage is determined by applying Uniform Parentage Act.

Remarriage.

Either party may remarry after final decree of dissolution of marriage and time for appeal has expired. An appeal not challenging finding of irretrievable breakdown does not delay finality of decree as to dissolution of marriage and parties may remarry pending such appeal. (C.R.S. 14-10-120[1]).

Notice.

Notice provisions governed by, C.R.C.P. 4 (C.R.S. 14-10-105; 620 P.2d 62). Court clerk required to give notice of entry of dissolution decree to department of health, office of registrar of vital statistics; information made public on request. (C.R.S. 14-10-120[3]).

Separation Agreement.

Terms, other than those providing for custody, support, and visitation of children, are binding upon court unless found to be unconscionable. Terms of agreement set forth in decree may be enforced by all judgment remedies, including contempt, but not as contract terms. Agreement terms must be set forth in decree, unless agreement provided otherwise, in which case decree must identify agreement and indicate finding that it is not unconscionable. (C.R.S. 14-10-112). Where terms of agreement incorporated in decree are uncertain, parol evidence is admissible to show intention of parties. (44 Colo. App. 252, 611 P.2d 590).

Defenses.

Failure to establish case and lack of jurisdiction are only defenses. All earlier existing defenses abolished by statute. (C.R.S. 14-10-107[5]).

Marriage Counseling.

Provided for on a voluntary basis. (C.R.S. 14-12-101).

14.06 DIVORCE:

See topic 14.04 Dissolution of Marriage.

14.07 [RESERVED]

14.08 GUARDIAN AND WARD:

Jurisdiction over guardianship and conservatorship proceedings is in probate court in Denver, district courts elsewhere, and in juvenile courts with respect to children under juvenile court's jurisdiction by reason of Children's Code. (C.R.S. 15-14-106; C.R.S. 19-1-104). Venue for guardianship proceedings for minor is where minor resides or is present. (C.R.S. 15-14-108). Venue for guardianship proceedings for incapacitated person is where person resides or in appointment of emergency or temporary substitute guardian, where respondent is present, or, if admitted to institution pursuant to court order, venue is also in county where court sits. (C.R.S. 15-14-108). Venue for conservatorship proceedings is where protected person resides or, if person does not reside in state, where he has property. (C.R.S. 15-14-108).

Uniform Probate Code adopted, with substantial variations from official text. (C.R.S. 15-10-101 to C.R.S. 15-17-103). Sections pertaining to protection of persons under disability and their property are C.R.S. 15-14-101 to C.R.S. 15-14-611.

Selection of Guardian.

Parent of minor child may appoint guardian by will or other instrument. (C.R.S. 15-14-202). Minor 12 or older has right to consent or refuse to consent to appointment of guardian by filing with court in which will is probated, or written instrument filed, written consent to appointment. (C.R.S. 15-14-203). If child refuses to consent, appointment is under judicial procedure of C.R.S. 15-14-204. Parent of incapacitated person may appoint guardian by will or other writing. (C.R.S. 15-14-310[1][g]). Spouse of incapacitated person may appoint guardian by will or other writing and has priority over parent. (C.R.S. 15-14-310[1][e]). Guardian nominated by incapacitated person has priority over other nominees. (C.R.S. 15-14-310).

Appointment of Guardian.

If parents consent, all parental rights have been terminated, parents unwilling or unable to exercise parental rights, or guardian previously acting died or is incapacitated, court may appoint guardian whose appointment would be in best interests of minor. (C.R.S. 15-14-204). Court shall appoint guardian nominated by minor (who is 12 years of age or older), unless court finds appointment contrary to best interests of minor. (C.R.S. 15-14-206).

Upon petition by incapacitated person or any person interested in his welfare, court may appoint guardian if incapacity is proved by clear and convincing evidence and needs cannot be met by less restrictive means. (C.R.S. 15-14-311). Priority for appointment given to: Acting guardian, person nominated by incapacitated person in writing prior to incapacity, spouse, adult child, parent or person nominated by will or other writing signed by deceased parent, any adult with whom incapacitated person resided for more than six months prior to filing of petition. (C.R.S. 15-14-310).

Person to be protected, any person interested in his estate, affairs, or welfare, including parent, guardian, or custodian, or any person adversely affected by lack of effective management of his property or affairs, may petition for appointment of conservator. (C.R.S. 15-14-403). Court may appoint as conservator individual, trust company, or bank with general power to serve as trustee, with priority given as follows: Fiduciary appointed or recognized by court of other jurisdiction where protected person resides; nominee of protected person, if 12 or over and having sufficient capacity to express preference, including nominee of adult protected person named in writing; spouse; adult child; parent; adult with whom protected person resided for more than six months prior to filing of petition. (C.R.S. 15-14-413).

Eligibility and Competency.

Any person 21 or older, resident or nonresident, may be appointed guardian of minor, guardian of incapacitated person, or conservator of estate of protected person. (C.R.S. 15-14-102). “Person” includes individual, corporation, business trust, estate, trust, partnership, LLC, association, joint venture, government, governmental subdivision, agency or instrumentality, or any other legal or commercial entity. (C.R.S. 15-14-102).

Qualification.

No statutory provision regarding oath or bond of guardian of person of minor or incapacitated person. Court may require conservator of estate to furnish bond. (C.R.S. 15-14-415, 416). Guardian of minor must file written acceptance of appointment with court in which will is probated or written instrument filed. (C.R.S. 15-14-202). By acceptance of appointment, guardian or conservator submits to personal jurisdiction of court in any proceedings related to guardianship or conservatorship. (C.R.S. 15-14-111).

Inventory.

Conservator must file with appointing court complete inventory of estate of protected person within 90 days after appointment. (C.R.S. 15-14-419).

Powers and Duties.

Subject to limitation by appointing court, guardian of person has same powers and duties as parent respecting unemancipated child, except not required to provide for ward from own funds and not liable to third persons for acts of ward solely by reason of parental relationship. (C.R.S. 15-14-207, 208, 209, 314, 315, 316). Subject to enlargement or limitation by appointing court (C.R.S. 15-14-425, 427), conservator has powers and duties conferred by law, including Colorado Fiduciaries’ Powers Act (C.R.S. 15-1-801 to 807), on trustees in administration of protected estate and distribution for support, education, care, or benefit of protected person and dependents (C.R.S. 15-14-425, 427).

Investments.

See category 13 Estates and Trusts, topic 13.15 Trusts, subhead Investments.

Securities in Name of Nominee.

See category 13 Estates and Trusts, topic 13.15 Trusts, subhead Securities in Name of Nominee.

Real Estate.

Conservators’ powers governed by Colorado Fiduciaries’ Powers Act. (C.R.S. 15-1-801 to 807).

Liabilities of Guardian.

Guardian of minor is not liable for injury to ward by reason of consent to medical or other professional care, unless consent by parent would have been illegal. (C.R.S. 15-14-209). Conservator may be sued in fiduciary capacity on contracts entered into as conservator, on obligations arising from ownership and control of estate, and on torts committed in administration, whether or not personally liable therefore. Conservator is personally liable for obligations of estate and acts or omissions committed in administration only if personally at fault. (C.R.S. 15-14-430).

Accounts.

Guardian must report condition of his minor ward and of ward's estate subject to his possession or control, as required by court or court rule. (C.R.S. 15-14-207). Conservator must file accounting annually, unless otherwise directed by court. (C.R.S. 15-14-420).

Termination of Guardianship.

Guardianship of minor terminates on death, resignation, or removal of guardian, or on minor's death, adoption, marriage, majority or as ordered by court. (C.R.S. 15-14-112, 210). Guardianship of incapacitated person terminates on death, resignation or removal of guardian, death or order of court. (C.R.S. 15-14-112, 318). Conservatorship is terminated on death, resignation, or removal of conservator, or upon death of protected person or order of court. (C.R.S. 15-14-112, 431). Denial of probate of formally probated will appointing guardian also terminates guardianship of person so appointed. (C.R.S. 15-14-112).

Insane Persons.

Provisions relating to incapacitated persons apply to mentally impaired or deficient persons. (C.R.S. 15-14-102). Unless stated in court order, mentally ill person does not forfeit any legal right or suffer legal disability. (C.R.S. 27-10-104).

Foreign Guardian.

If no local conservator has been appointed and no petition in protective proceeding is pending in this state, upon filing authenticated copies of his appointment and any official bond already filed or additionally required, domiciliary foreign conservator may exercise as to assets in this state all powers of local conservator and may maintain actions and proceedings subject to any conditions imposed upon nonresident parties generally. (C.R.S. 15-14-433).

Transfers to Minors.

See topic 14.10 Infants.

Uniform Fiduciaries Act adopted. (C.R.S. 15-1-101 to 113).

Uniform Simplification of Fiduciary Security Transfers Act repealed.

14.09 HUSBAND AND WIFE:

With respect to holding, selling and conveying property, suing and being sued, carrying on business and contracting, married woman may act as if sole. (C.R.S. 14-2-201, 202, 203, 207, 208).

Disabilities of Married Women.

Chief common law disabilities have been removed. (42 Colo. 367, 94 P. 360). Right to maintain separate domicile. (C.R.S. 14-2-210).

Separate Property.

Married woman retains property owned at marriage; rents, issues, profits, and proceeds thereof; and property which comes to her by descent, devise, or bequest, or gift of any person, except her husband, including some gifts from her husband, as her sole and separate property and such property not subject to disposal of her husband or liable for her husband's debts. (C.R.S. 14-2-201).

Liability for Debts.

Property of both spouses is liable for family expenses and education of children, jointly and severally (C.R.S. 14-6-110), except that common law governs if husband and wife living separate and apart at time expense was incurred (65 Colo. 70, 173 P. 544).

Liability for Torts.

Husband not liable for torts committed by wife without his presence and in which he in no manner participated. (42 Colo. 367, 94 P. 360). Wife may be sued for torts in same manner as if she were unmarried. (C.R.S. 14-2-202). Judgments, decrees or orders may be enforced against wife, as if sole. (C.R.S. 14-2-208).

Contracts.

Wife may contract debts in her own name and upon her own credit, and may execute notes, bonds, and other instruments in writing, and enter into any contract, as if sole. (C.R.S. 14-2-208). There is no statutory prohibition against her becoming bound as surety.

Antenuptial Contracts.

See subhead Marital Agreements, infra.

Domestic Abuse.

Courts authorized to issue protection orders and emergency protection orders to prevent domestic abuse. (C.R.S. 14-4-102, 103). Violation of order is class 1 or class 2 misdemeanor. (C.R.S. 18-6-803.5[2][a]). Second or subsequent violation of order is extraordinary risk crime subject to sentencing range specified in C.R.S. 18-1.3-501(3). (C.R.S. 18-6-803.5[2][a.5]). Peace officer has duty to use reasonable means to enforce orders, including arrest of restrained person upon probable cause for knowing violation. (C.R.S. 18-6-803.5[3]). Special sentencing provisions apply for crimes involving domestic violence. (C.R.S. 18-6-801).

Actions.

Wife may sue or be sued as if sole. (C.R.S. 14-2-202; C.R.C.P. 17[b]). Wife may sue husband in tort (97 Colo. 19, 46 P.2d 740) and either spouse may sue to recover separate property from other spouse (87 Colo. 607, 290 P. 285). Wives have same right for loss of consortium as is afforded husbands in like actions. (C.R.S. 14-2-209).

Agency.

Either spouse may act as agent for other. Agency of one spouse to act for other may be proved by less convincing evidence than is required to establish agency between strangers. (139 Colo. 496, 340 P.2d 869).

Conveyance or Encumbrance of Property.

Neither spouse requires the consent or joinder of the other in order to convey or encumber his or her separate property (C.R.S. 14-2-207) except homestead (C.R.S. 38-35-118). See category 8 Debtor and Creditor, topic 8.10 Homesteads.

Marital Agreements.

Agreement enforceable without consideration if in writing and signed by both parties (C.R.S. 14-2-303) as to rights and obligations of parties in property of either or both parties; acquisition, disposition, management and control of property; disposition of property upon separation of parties, dissolution of marriage, death of either party or other event; spousal maintenance; making of will or trust or other arrangement to carry out provisions of agreement;

ownership and disposition of life insurance; rights and obligations regarding employee benefit or retirement plans (except as prohibited by federal law); choice of law; and any other matter not in violation of public policy or criminal statute. (C.R.S. 14-2-304[1]). Marital agreement may not adversely affect right of child to support. (C.R.S. 14-2-304[3]). Agreement may be signed by prospective spouses in contemplation of marriage or by present spouses if signed by both parties prior to filing of action for dissolution. (C.R.S. 14-2-302[1]). Agreement unenforceable against party who did not execute agreement voluntarily (C.R.S. 14-2-307[1][a]), or if before execution of agreement such party was not provided with fair and reasonable disclosure of property or financial obligations of other party (C.R.S. 14-2-307[1][b]). Provisions as to maintenance of spouses upon dissolution unenforceable if, at time enforcement sought, such provisions are unconscionable as matter of law. (C.R.S. 14-2-307[2]).

Maintenance and Support.

Person failing to support spouse or children under 18 years old, or who willfully fails, refuses or neglects to provide proper care, food or clothing in case of spouse or child's sickness, or who willfully fails to pay expenses of child legally inmate of state, county or children's home in state, or any parent who willfully leaves child with intent to abandon or any man who willfully neglects, fails or refuses to provide proper care, food and clothing to mother of his child during childbirth and attendant illness shall be deemed guilty of class 5 felony. (C.R.S. 14-6-101). It is affirmative defense that inability to provide such support, care and maintenance is due to physical incapacity or other good cause. (C.R.S. 14-6-101). Obligation of mother equal to that of father to provide care of child. (186 Colo. 65, 525 P.2d 457). Proceedings instituted by complaint filed in any court of record by prosecuting attorney or other appropriate agency or in county court of county where offense committed. (C.R.S. 14-6-104). Venue is in county where child or spouse is present. (C.R.S. 14-6-106). In any proceeding for above mentioned offenses, either spouse is competent witness against other spouse and no consent is required. (C.R.S. 14-6-105). Extradition is provided for. (C.R.S. 14-6-103).

Uniform Interstate Family Support Act (1992) adopted effective Jan. 1, 1995. (C.R.S. 14-5-101 to 1007). See topic 14.04 Dissolution of Marriage.

Material Variations.

§ 101(6) modified: " 'Income-withholding order' means an order or other legal process to withhold support from the income of the obligor directed to an obligor's employer, employers, or successor employers or other payor of funds as described in section C.R.S. 14-14-107 relating to wage assignments and in section C.R.S. 14-14-111 relating to immediate deductions for family support obligations." (C.R.S. 14-5-102[6]).

Added Part 10, Colorado Implementation Provisions. (C.R.S. 14-5-1001 to 1007).

Community property system does not obtain in Colorado.

Uniform Disposition of Community Property Rights at Death Act (1973) adopted. (C.R.S. 15-20-101).

Material Variations.

§ 3—Sentence beginning "With respect to property" omitted.

§ 4—Added "or by a trustee of an inter vivos trust created by the decedent" before "title of the surviving spouse" and substituted "The personal representative shall have no" for "Neither the personal representative nor the court in which the decedent's estate is being administered has a".

§ 5—Added following subsections having no Act counterpart: "(2) Written demand in this section and in section C.R.S. 15-20-105 shall be made by a surviving spouse, the spouse's successor in interest, or the decedent's heirs or devisees not later than six months after the decedent's will has been admitted to probate, or not later than six months after the appointment of an administrator if there is no will, or not later than six months after the decedent's death if the property to which this article applies is held in an inter vivos trust created by the decedent; and written demand by a creditor of the decedent shall be made not later than six months from the decedent's date of death. (3) Written demand in this section and in section C.R.S. 15-20-105 shall be delivered in person or by registered mail to the personal representative. As used in this article, the personal representative may also mean the trustee of an inter vivos trust created by the decedent who has legal title to, or possession of, the property to which this article applies."

14.10 INFANTS:

For purposes of Colorado Revised Statutes, age of majority for both sexes is 21 except where otherwise provided expressly by statute. (C.R.S. 2-4-401[6]). Among statutory exceptions are statute that deems age of emancipation to be 19 for purposes of termination of child support absent specified conditions (C.R.S. 14-10-115[1.5][a]) and statutes that deem person otherwise competent to be of legal age at age 18 to: (1) Enter into any legal contractual obligation and be bound to same extent as any other adult person, but such obligation not considered family expense of parents of person who entered into contract under C.R.S. 14-6-110; (2) manage his estate in same manner as any other adult person, except for custodial property given or held under terms of Colorado Uniform Transfers to Minors Act or property held for protected person; (3) sue and be sued to same extent as any other adult person, without necessity for guardian ad litem or someone acting in his behalf; (4) make decisions in regard to his own body and body of his issue, whether natural or adopted by such person, to full extent allowed to any other adult person; (5) register for and vote at all elections (C.R.S. 13-22-101; C.R.S. 1-2-101[1]).

Adoption.

See topic 14.01 Adoption.

Emancipation.

Common law rules govern. Presumption of emancipation arises at age of majority. (667 P.2d 1374). Presumption of emancipation invalid when child incapable of supporting himself by reason of physical or mental disability. (667 P.2d 1374). In situations to which presumption inapplicable, emancipation is question of fact. (492 P.2d 81). To determine whether child emancipated, trier of fact should consider whether child financially independent of parents; whether child established domicile separate from parents; whether child maintains relationships incompatible with subordinate position in parents' family; whether evidence reveals domestic situation radically inconsistent with parental control over child. (564 P.2d 961; 629 P.2d 1069; 670 P.2d 31).

Disabilities.

Common law rules govern generally. Specific statutory disabilities include: (1) Children under ten cannot testify in court if unable to relate facts accurately or truly, except in any proceeding involving child abuse, sexual abuse, assault or incest when child can relate facts in language appropriate to child's age (C.R.S. 13-90-106); (2) children under 18 cannot work in mines except in office, janitorial or food service capacities or other non-extraction, preparation or production activities (C.R.S. 34-24-104); children under 21 cannot serve, purchase or possess alcohol in certain locations (C.R.S. 12-47-128). Minor 16 or over may contract for property and liability insurance. (C.R.S. 10-4-104).

Ratification of Contracts.

Common law rules govern. Executed contracts are binding until avoided while executory contracts, except for necessaries, are not binding until affirmed. (87 Colo. 301, 287 P. 284). Partly executed contracts are considered executory. (17 Colo. 506, 30 P. 245). No new consideration is needed to ratify and language relied on may be oral or written; however, acts or words or both must amount to new promise, simple acknowledgment being insufficient. (17 Colo. 506, 30 P. 245). Child may ratify by acts recognizing contract within reasonable time after attaining majority. (623 P.2d 370).

Children's Code.

Whenever it appears that child is within court's jurisdiction, any person may refer matter to district attorney, who shall determine whether interests of child or community require further action. (C.R.S. 19-2-510[1]). Children's Code is to be construed favorably to best interests of child and society. (182 Colo. 157, 511 P.2d 898).

Jurisdiction.

Juvenile court has exclusive original jurisdiction in most proceedings concerning delinquent children; neglected or dependent children; legal custody, guardianship or custodianship of children otherwise within court's jurisdiction; termination of parent-child relationship; issuance of orders of support; determination of parentage; adoption of person of any age; judicial consent to marriage, employment or enlistment; treatment or commitment of mentally ill or disabled children; petitions for review of need for placement. (C.R.S. 19-1-104).

Venue.

Delinquency proceedings in county where alleged violation took place, except that court may order change of venue based upon written findings that change of venue is necessary to ensure that juvenile receives fair trial. (C.R.S. 19-2-105). Proceedings for support in county where child is physically present or resides or where obligor parent resides, or where public assistance paid. (C.R.S. 19-6-102). Adoption proceedings in county where petitioner resides or where placement agency is located. (C.R.S. 19-5-204). Proceedings to determine parentage in county where child or respondent resides or is found or where public assistance paid or, if respondent deceased, where probate of his estate could be commenced. (C.R.S. 19-4-109). Child support enforcement unit may establish noncontested paternity in administrative procedure. (C.R.S. 19-4-109 and C.R.S. 26-13.5-101).

Support.

Any person may commence support proceedings by filing verified petition with court prior to 21st birthday of child. (C.R.S. 19-6-101). Upon finding that respondent has obligation to support child, court may order respondent to pay support reasonable under circumstances. (C.R.S. 19-6-104). Non-parent obtaining legal custody not obligated to continue to serve as legal custodian and provide support after loss of physical custody in marriage dissolution action. (580 P.2d 836). Genetic tests and other tests of inherited characteristics are usable to determine parentage and may overcome presumption of legitimacy. (C.R.S. 13-25-126). Spouse who adopts children of other spouse is obligated to support said children even though dissolution of marriage occurs soon after decree of adoption. (629 P.2d 1108). See topic 14.04 Dissolution of Marriage, subhead Allowance for Support of Children.

Parental Responsibility.

Any person, entity or political subdivision may recover damages up to $3,500, plus court costs and attorneys' fees, from parents of child under 18, living with parents, who maliciously or willfully destroys property, and any person may recover same from parents of child under 18, living with parents, who knowingly inflicts bodily injury. (C.R.S. 13-21-107). Parents of unemancipated minor who shoplifts from mercantile establishment liable to owner for actual damages plus penalty of $100 to $250. (C.R.S. 13-21-107.5). Parent of child under 18 required to give affidavit of liability for child to obtain driver's license or instruction permit. Subsequent negligence or willful misconduct of child under 18 while driving motor vehicle imputed to parent who signed affidavit. (C.R.S. 42-2-108).

Actions.

Court must appoint guardian ad litem to protect child's interests in all dependency or neglect cases involving abuse (C.R.S. 19-1-111[1]) and in hearing to determine involuntary termination of parent-child relationship for child and for minor parent (C.R.S. 19-3-602). Court may appoint guardian ad litem in: (1) Delinquency proceeding (C.R.S. 19-1-111[2]); (2) proceeding under School Attendance Law of 1963 (C.R.S. 19-1-111[2]); (3) proceeding for review of placement (C.R.S. 19-1-115); (4) action to determine parentage (C.R.S. 19-4-110). In proceeding to hospitalize child for mental health services, if child under 15 and ward of department of human services, guardian ad litem must be appointed. (C.R.S. 27-10-103[3.1]). Uniform Probate Code adopted, with substantial modifications, effective July 1, 1974. 1975 Amendments adopted with modifications. 1982 amendment dealing with succession without administration has not been adopted.

Termination of Parental Rights.

Parent-child relationship may be terminated where child has been adjudicated dependent or neglected and has been abandoned or child has been adjudicated dependent or neglected and no appropriate treatment to address unfitness of parents can be devised. (C.R.S. 19-3-604). Act provides extensive criteria and procedures for termination of parental rights by court order upon filing of written motion alleging factual grounds for termination and subsequent hearing. (C.R.S. 19-3-602[1]). Motion must be filed at least 30 days before hearing. (C.R.S. 19-3-602[1]). Court order terminates all rights and obligations except rights of child to inherit from parent and to receive benefits from third parties, including Indian tribes. (C.R.S. 19-3-608).

See topic 14.07 Guardian and Ward.

Uniform Transfers to Minors Act adopted. (C.R.S. 11-50-101). Age of majority under Act is 21. (C.R.S. 11-50-102).

Uniform Securities Ownership by Minors Act not adopted.

Uniform Child Custody Jurisdiction Act adopted. (C.R.S. 14-13-101). See topic 14.04 Dissolution of Marriage.

Uniform Interstate Family Support Act adopted. (C.R.S. 14-5-101). See topic 14.04 Dissolution of Marriage.

Uniform Parentage Act adopted with material variations. (C.R.S. 19-4-101). Order in dissolution of marriage proceeding concerning parentage issue reversible if court fails to follow procedures in Uniform Parentage Act. (689 P.2d 726; 854 P.2d 1346). Uniform Parentage Act provides no basis for obtaining genetic testing for purpose of providing basis for diagnosing problems minor child may encounter. (197 Colo. 510, 595 P.2d 223). Failure of Uniform Parentage Act to grant right to bring action for determination of paternity to claiming birth father with respect to child born to birth mother during her marriage to another violates equal protection clause of Federal and Colorado Constitutions as well as equal rights amendment to Colorado Constitution. (200 Colo. 345, 615 P.2d 666).

Assessment of costs and attorney fees against state human services department required to bring paternity action is not precluded by supremacy clause of U.S. Constitution. (647

P.2d 239).

Uniform Guardianship and Protective Proceedings Act adopted. (C.R.S. 15-14-101). See topic 14.07 Guardian and Ward.

14.11 MARRIAGE:

Consent Required.

Parents or guardian or judge of juvenile court must give consent for each party over 16 but less than 18. If under 16 party must have consent of parents or guardian and judge of juvenile court. (C.R.S. 14-2-106[1][a][I], 108).

Medical Examination.

None required after July 1, 1989.

License may be obtained from county clerk upon appearance of one party, payment of fee, and presentation of: Application signed by both parties; proof of age or consent; and proof that marriage not prohibited. (C.R.S. 14-2-106). License is valid for 30 days. (C.R.S. 14-2-107).

Waiting Period.

None.

Marriage may be solemnized by judge, retired judge or court magistrate, public official who has power or parties to marriage, or by any mode of solemnization recognized by any religious denomination or Indian nation or tribe. (C.R.S. 14-2-109).

Report of Marriage.

Person solemnizing marriage must complete certificate and forward to county clerk within 60 days; thereafter late fees are assessed. (C.R.S. 14-2-109[1]).

Record.

See category 10 Documents and Records, topic 10.04 Records, subhead Vital Statistics.

Common Law Marriage.

Recognized. (130 Colo. 225, 274 P.2d 605).

Proxy Marriage.

Authorized. (C.R.S. 14-2-109[2]).

Marriage by Written Contract.

Not authorized.

Prohibited Marriage.

Marriages between only one man and one woman are recognized as valid in Colorado, but other marriages whether contracted within or outside state are not so recognized. (C.R.S. 14-2-104). Marriage prohibited when entered into: Prior to dissolution of party's earlier marriage to another; between ancestor and descendant, or brother and sister, whether whole or half blood; between uncle and niece or aunt and nephew, whether whole or half blood, except as permitted by aboriginal cultures. (C.R.S. 14-2-110[1]). Children of prohibited marriage are legitimate. (C.R.S. 14-2-110[2]; C.R.S. 14-10-111[4]). Putative spouse of prohibited marriage has rights.

(C.R.S. 14-2-111).

Foreign Marriage.

Marriage contracted outside Colorado valid by laws where contracted or domicile of parties also valid in Colorado. (C.R.S. 14-2-112).

Annulment.

District court declares marriage invalid upon application of specified party if marriage was void where contracted, is prohibited, or if party: lacked capacity to consent because of infirmity, incapacity, alcohol or drugs; was incapable of consummating marriage through intercourse; was under age and lacked consent; or married due to fraud, misrepresentation, duress, jest or dare. (C.R.S. 14-10-111[1]). Time limits for actions for declaration of invalidity variously six months, one year, and 24 months, but in no case after death of other party to marriage unless brought by child of marriage prior to final settlement of estate. (C.R.S. 14-10-111[2], [3]). No decree shall be entered unless one of parties has been domiciled in state for 30 days preceding action or unless marriage contracted in state. (C.R.S. 14-10-111[7]). Provisions applicable to dissolution apply to declaration of invalidity. (C.R.S. 14-10-111[6]). Children of invalid marriage are legitimate. (C.R.S. 14-10-111[4]).

16 INSURANCE

16.01 INSURANCE COMPANIES:

Division of insurance within department of regulatory agencies charged with execution of laws relating to insurance and has supervisory authority over business of insurance in Colorado. (C.R.S. 10-1-103[1]). Commissioner of insurance is head of division of insurance. Commissioner appointed by governor subject to senate confirmation. (C.R.S. 10-1-104[1]). Most regulatory laws are collected in C.R.S. Tit. 10. Declaratory judgment petitions may be accepted by Commissioner pursuant to Regulations 1-1-3, 3 Colo. Code Regs. 702-1.

Reserves.

Following must maintain certain reserves or minimum surplus: Life insurance companies (C.R.S. 10-7-101, 310); state employees and officials group benefit plans (C.R.S. 24-50-613); title insurance companies (C.R.S. 10-11-110); employers mutual liability insurance companies (C.R.S. 10-12-210); interinsurance groups (C.R.S. 10-13-107); fraternal benefit societies (C.R.S. 10-14-604); preneed funeral contracts (C.R.S. 10-15-107); nonprofit hospital and health service corporations (C.R.S. 10-16-310); prepaid dental care plans (C.R.S. 10-16-505, 506); and health maintenance organizations (C.R.S. 10-16-411, 412).

Deposits.

Cash or securities representing statutory minimum paid in capital or guaranty fund requirements for life, fire, casualty, multiple line and title insurance companies stated in C.R.S. 10-3-201. Requirements for nonadmitted insurers in C.R.S. 10-5-108.

Deposit requirements for other companies stated in Article relating to such companies. Examples include: Captive insurance companies (C.R.S. 10-6-116); employers mutual liability insurance (C.R.S. 10-12-211); preneed funeral contracts (C.R.S. 10-15-107); nonprofit hospital and health service corporations (C.R.S. 10-16-310[2]); prepaid dental care plans (C.R.S. 10-16-505); health maintenance organizations (C.R.S. 10-16-412); and interinsurance (C.R.S. 10-13-107). Fund deposits are required of alien and foreign companies, except life insurers. Such deposits held for benefit of all policyholders of such insurer in all states. Credit allowed for deposits in other states. (C.R.S. 10-3-302).

Fees Paid to Commissioner.

Fees paid by every entity regulated by Division of Insurance transacting business of insurance in state contained in C.R.S. 10-3-207 include: $500 for investigating and processing initial application for authorization or licensure; annual fee between $500 and $3,345 depending upon volume of insurance written; $425 for investigation and prosecution of alleged insurance fraud; and other reasonable fees for administrative services (C.R.S. 10-3-207).

Other Fees and Taxes.

See category 2 Business Organizations, topic 2.03 Corporations. After filing articles with Secretary of State, no further filing is required in that office other than amendments to articles. (C.R.S. 10-3-108). Employers' mutual liability companies pay Secretary of State filing fee in amount equal to filing fee for domestic corporations capitalized at $75,000. (C.R.S. 10-12-203). Foreign and domestic companies pay costs of commissioner's examination outside of state. (C.R.S. 10-1-204[9]).

Rates and rating organizations are covered in C.R.S. 10-4-401 to 421 for all kinds of insurance except reinsurance, life and annuities, sickness and accident, nonprofit hospital and health services, health maintenance organization services, and surplus lines insurance. Mutual liability in C.R.S. 10-12-208. Commissioner does not have power to approve rates conditionally. (41 Colo. App. 380, 585 P.2d 929).

Legislative policy favors expeditious handling of liability claims. (C.R.S. 10-4-101). Voluntary partial payment of liability claims may be made without admission of liability. (C.R.S. 10-4-103). Cancellation, nonrenewal, decreases in coverage, limits on some types of liability, and increases in premiums on most policies are restricted. (C.R.S. 10-4-107 to 110.7 and C.R.S. 10-4-601 to 611). Insurance companies required to participate in joint underwriting association authorized to issue commercial liability insurance otherwise unavailable. (C.R.S. 10-4-1101 to 1114). Rating organizations and rate advisory organizations authorized. (C.R.S. 10-4-408, 410). Anticompetitive behavior prohibited. (C.R.S. 10-4-415). Colorado insurance guaranty association and life and health insurance protection association provide mechanism for payment of covered claims and for avoidance of loss to policyholders because of insolvency of insurer. (C.R.S. 10-4-501 to 520 and C.R.S. 10-20-101 to 120). High risk health plan available. (C.R.S. 10-8-501 to 533). Assigned risk available for motor vehicle insurance. (C.R.S. 10-4-412).

Surplus line insurance (i.e., coverage placed with approved nonadmitted insurer) is regulated. (C.R.S. 10-5-101 to 119).

Captive insurance companies authorized and regulated. (C.R.S. 10-6-101 to 130).

Insurance sales by financial institutions covered in C.R.S. 10-2-601 to 606.

Reports and Statements.

Annual financial statement of insurance company is due commissioner on Mar. 1 (C.R.S. 10-3-208) and synopsis of statement, together with certificate of authority must be published in newspaper (C.R.S. 10-3-109). Investigation by commissioner of proposed mergers in C.R.S. 10-3-803. Loss and expense experience and certain other data must be reported. (C.R.S. 10-4-404). Fraternal benefit society annual statement is due commissioner Mar. 1. (C.R.S. 10-14-602). Interinsurance reports are covered in C.R.S. 10-13-108. Insurance holding company systems are regulated under C.R.S. 10-3-801 to 814. Malpractice claims subject to reporting requirements under C.R.S. 10-1-120 to 125.

Policies are regulated in detail. Seal is not required but secretary must attest. (C.R.S. 10-1-116). Life policy requirements are in C.R.S. 10-7-102. Mutual protective associations in C.R.S. 10-12-101. Assessment accident associations in C.R.S. 10-3-123. Group life in C.R.S. 10-

7-201. Credit insurance in C.R.S. 10-10-101 to 118. Title insurance in C.R.S. 10-11-101 to 123. Preneed funeral contracts in C.R.S. 10-15-101 to 121. Fraternal benefit societies in C.R.S. 10-14-101 to 707. Small group health benefit plans in C.R.S. 10-16-105. Mandatory health care coverage provisions in C.R.S. 10-16-101 to 708. Rate regulation and rules for expected rate increases in C.R.S. 10-16-107. Description of forms required for each health benefit plan or Medicare supplemental coverage policy in C.R.S. 10-16-108.5. Powers of health maintenance organizations in C.R.S. 10-16-403. Medicare supplement policies or certificates issued on or after July 1, 1989, in C.R.S. 10-18-101 to 109. Long-term care insurance in C.R.S. 10-19-101 to 115. Risk management programs mandated for commercial policies in C.R.S. 10-4-420. Coordination of benefits provisions are permissible in group health plans in accordance with Regulation 4-6-2, 3 Colo. Code Regs. 702-4. Suicide after one year is no defense to payment of policy unless policy specifically limited to accidental death. (C.R.S. 10-7-109). Group life insurer may pay certain verifiable expenses incident to last illness or death of insured. (C.R.S. 10-7-202). Policy may designate trustee named in inter vivos or testamentary trust as beneficiary. (C.R.S. 15-15-101[2]). Claims-made policies are regulated in C.R.S. 10-4-419 and C.R.S. 10-5-119. Limitations placed on nonrenewability of individual health benefit plans (C.R.S. 10-16-201.5) and automobile insurance policies (C.R.S. 10-4-604). Notice of intent to cancel or nonrenew required for homeowner's insurance. (C.R.S. 10-4-110.7). Required notice of loss history report and limits on use of credit scoring and insured's inquiries about coverage for homeowner's insurance. (C.R.S. 10-14-110.8, 116, 117). Insurer offering homeowner's insurance in Colorado must file underwriting methodologies with commissioner. (C.R.S. 10-4-110.7). Required disclosures for insurers issuing policies of dwelling fire insurance, homeowners insurance, or automobile insurance. (C.R.S. 10-4-111). Procedures for denial of health plan benefits covered in C.R.S. 10-16-113. Requirement for prompt payment of health insurance claims in C.R.S. 10-16-106.5. Multiple employer welfare arrangement pilot program in C.R.S. 10-16-901 to 910. Discount health plans and cards regulated in C.R.S. 6-1-712. Standardization of health benefit plan information cards in C.R.S. 10-16-135.

Standard Nonforfeiture and Valuation Act adopted. (C.R.S. 10-7-301 to 316). Standard Nonforfeiture Law for Individual Deferred Annuities adopted. (C.R.S. 10-7-501 to 510).

Viatical settlements authorized. (C.R.S. 10-7-601 to 620).

Unfair Competition and Prohibited Discrimination.

Following are unfair methods of competition and unfair trade practices: Misrepresentations and false advertising of insurance policies, but misrepresentation may not be construed where written comparison of policies is made factually disclosing relevant features and benefits for which policy is issued and by which informed decision can be made; false information and advertising generally; defamation; boycott, coercion and intimidation; using stock and advisory board contracts as inducement to insurance; unfair discrimination including discrimination between individuals of same class and equal expectation of life with respect to life insurance or annuities; unfair discrimination between individuals of same class or between neighborhoods within municipality and of essentially same hazard; any classification solely on basis of marital status or sex unless for purpose of insuring family units where justified by actuarial statistics; any classification solely on basis of blindness, partial blindness, or specific physical disability unless based upon unequal expectation of life or expected risk of loss different than that of other individuals; denial of health care coverage based on participation in certain recreational activities; failure to comply with all provisions of C.R.S. 10-3-1104.5 regarding HIV testing; rebates; unfair claim settlement practices; failure to maintain complaint handling procedures; misrepresentation in insurance applications; requiring any insured or claimant to submit to any polygraph test concerning any application or claim; violation or noncompliance with any insurance law; failure to make full refund or credit of all unearned premiums upon termination of insurance coverage; requiring or otherwise inducing health care provider to utilize arbitration agreements with patients; violations of or noncompliance with any provision of Model Quality Replacement Parts Act; issuing claim-made or automobile policy form that does not comply with statute; reducing benefits by adding exclusionary rider except in specified circumstances; violations of C.R.S. 10-3-1104.5 or C.R.S. 10-3-1104.7 relating to HIV testing and genetic testing; failure to comply with provisions of C.R.S. 10-16-108.5 and C.R.S. 10-16-105 regarding health benefit plans; creation or operation of improper affiliated business arrangement; violation of C.R.S. 25-1-801 to 803 regarding patient access to medical records (C.R.S. 10-3-1104). Private cause of action created for first-party claimant whose claim has been unreasonably delayed or denied. (C.R.S. 10-3-1116).

Consumer Protection Standards Act for the Operation of Managed Care Plans establishes requirements for creation and maintenance of provider networks. (C.R.S. 10-16-701 to 708).

Agents and Brokers.

Soliciting for unauthorized companies is forbidden. (C.R.S. 10-3-104). Qualification, pre-licensing education, examination, licensing and continuing education of insurance producers is required. (C.R.S. 10-2-201 to 203). ("Insurance producers" defined in C.R.S. 10-2-103 and C.R.S. 10-2-105.) License required for public insurance adjusters. (C.R.S. 10-2-417). Commissioner authorized to enter into reciprocal agreements with other states regarding licensing requirements. (C.R.S. 10-2-501 to 503). Commissioner shall set reasonable fees by rule. (C.R.S. 10-2-413).

Insurance producers' fiduciary responsibilities relating to premiums set out in C.R.S. 10-2-704. Grounds and procedures for disciplinary actions against insurance producers set out in C.R.S. 10-2-801 to 804.

Reinsurance Intermediary Model Act and Managing General Agents Act adopted. (C.R.S. 10-2-901 to 912; C.R.S. 10-2-1001 to 1008).

Process Agent.

Commissioner must be appointed in writing as attorney for service of process on foreign companies. (C.R.S. 10-3-107; C.R.S. 10-14-118).

Investments.

Domestic insurance companies may invest their funds in categories of assets described in Tit. 10, Art. 3. All permitted investments admitted assets except to extent quantitative limitations exceeded. Subject to specific exceptions insurance companies may own nonadmitted assets. (C.R.S. 10-3-213[1]). Required to reasonably diversify investments and maintain sufficient degree of liquidity. (C.R.S. 10-3-213[2]). Securities lending covered in C.R.S. 10-3-228.5, derivative transactions in C.R.S. 10-3-243.

Foreign insurance companies must procure certificate of authority from commissioner. (C.R.S. 10-3-105). Insurance agencies must file with commissioner list of individual insurance producers. (C.R.S. 10-2-406). Certified copy of charter and financial statement must be filed with commissioner. (C.R.S. 10-3-108). Foreign insurer authorized to transact business in Colorado may become domestic insurer. (C.R.S. 10-3-125). Certificate of authority required for foreign fraternal benefit society transacting business in state. (C.R.S. 10-14-608). No insurance company owned or financially controlled by another state can do business in Colorado except as provided in C.R.S. 10-3-105.

Retaliatory Laws.

If state of domicile of insurance company imposes more onerous fees, taxes, etc., than does Colorado, such company may be subject to same in Colorado, except for taxes, if such company maintains a home or regional home office in state. (C.R.S. 10-3-209[2]).

Premium Tax.

Insurance companies are taxed on premiums collected or contracted for in this state less reinsurance premiums on Colorado business, amounts refunded under credit life, credit accident and health insurance policies terminated prior to maturity date of indebtedness and (for other than life companies) payments to policyholders as return premiums. Rate of tax is 2.20% for 1996, then reduced by .05% annually until 2000, when rate will remain at 2.00%. (C.R.S. 10-3-209). If, however, companies maintain home or regional home offices in state, tax is 1%. If domestic company with its principal place of business in Colorado has 30% of its assets invested in bonds or warrants of Colorado or municipality therein, there is no tax on policies issued prior to 1959 where premium is fixed and contractually binding on company. Section should be consulted for other exceptions. (C.R.S. 10-3-209[1]). Insurance companies liable for more than $5,000 in taxes pay quarterly estimates of such taxes. (C.R.S. 10-3-209[3]). Fraternal and benevolent associations organized and doing business under Colorado law are exempt from all but real estate and office equipment taxes. (C.R.S. 10-14-504).

Insurers’ Rehabilitation and Liquidation Model Act.

Provides comprehensive scheme for rehabilitation and liquidation of insurance companies; governs conduct of delinquency proceedings against insurers. (C.R.S. 10-3-501 to 559).

Direct Actions Against Insurer.

See category 23 Transportation, topic 23.01 Motor Vehicles, subhead Direct Actions.

No-Fault Insurance.

See category 23 Transportation, topic 23.01 Motor Vehicles, subhead No-Fault Insurance.

Plain Language.

See category 3 Business Regulation and Commerce, topic 3.12 Consumer Protection.

16.02 SURETY AND GUARANTY COMPANIES:

Insurance company shall not do business in state unless it possesses specified combined minimum in cash capital or guaranty fund and accumulated surplus in cash or marketable securities. (C.R.S. 10-3-201). Foreign companies not maintaining home office or regional home office in state must appoint commissioner of insurance as agent for service of process. (C.R.S. 10-3-107).

17 INTELLECTUAL PROPERTY

17.01 TRADEMARKS AND TRADENAMES:

Trademarks.

Trademark means any word, name, symbol, device or combination thereof including packaging, configuration of goods, or other trade dress used to identify and distinguish person’s goods or services from those manufactured, sold, or rendered by others and to indicate source of goods or services, even if that source is unknown. (C.R.S. 7-70-101).

Registration.

One who adopts and makes use in commerce of trademark in Colorado may deliver to Secretary of State for filing statement of trademark registration to which specimen and, if trademark is special form trademark, drawing is attached. Statement of registration shall state: true name of registrant if registrant is entity, form of entity and jurisdiction under law of which entity is formed; if registrant is individual, individual's principal address; if registrant is entity other than reporting entity, entity's principal address; if registrant is neither individual resident of Colorado nor entity that is required to maintain registered agent pursuant to C.R.S. 7-90-701 to 706, either of following: if registrant desires to appoint registered agent pursuant to C.R.S. 7-70-108, registered agent name, registered agent address, and statement that person appointed as registered agent for registrant has consented to being so appointed; or mailing address to which service of process in any proceeding based on cause of action with respect to statement of trademark registration may be mailed pursuant to C.R.S. 7-70-108; if trademark is standard character trademark, characters constituting trademark; if trademark is special form trademark, description of attached drawing; detailed description of goods or services in connection with which trademark is used and class into which such goods or services fall; description of attached specimen sufficient to identify nature of specimen; date of first use in commerce of trademark in Colorado by registrant or registrant's predecessor in interest; and that registrant is currently using trademark in commerce in Colorado and that registrant believes, in good faith, that: registrant has right to use trademark in connection with goods or services, and registrant's use of trademark does not infringe rights of any other person in that trademark. Statement of trademark registration shall not state delayed effective date. (C.R.S. 7-70-102). Registration is effective for five years and, upon application within 60 days prior to expiration of term and payment of renewal fee, may be renewed for like terms. (C.R.S. 7-70-104).

Withdrawal.

Statement of trademark registration may be withdrawn by registrant by delivering to Secretary of State, for filing pursuant to C.R.S. 7-90-301 to 313, statement of withdrawal of trademark registration. Statement of withdrawal of trademark registration shall state true name of registrant; identify statement of trademark registration in manner satisfactory to Secretary of State; state that statement of trademark registration is withdrawn, and include such other information as Secretary of State may require. (C.R.S. 7-70-105).

Transfer.

Statement of transfer of trademark registration may be delivered by registrant or transferee to Secretary of State, for filing pursuant to C.R.S. 7-90-301 to 313, following transfer of trademark to another person by registrant or by operation of law. Statement of transfer of trademark registration shall state true name of registrant prior to transfer; state true name of transferee; if transferee is entity, state form of entity and jurisdiction under law of which it is formed; if transferee is individual, state individual's principal address. If transferee is entity other than reporting entity, state entity's principal address; if transferee is neither individual resident of Colorado nor entity that is required to maintain registered agent pursuant to C.R.S. 7-90-701 to 705 state if transferee desires to appoint registered agent pursuant to C.R.S. 7-70-108, registered agent name, registered agent address, and statement that person appointed as registered agent for registrant has consented to being so appointed; or mailing address to which service of process in any action relating to statement of trademark registration may be mailed pursuant to C.R.S. 7-70-108; identify statement of trademark registration in manner satisfactory to Secretary of State; state that registrant has transferred to transferee, or that transferee has by operation of law succeeded to, rights to trademark, including all associated goodwill, to which statement of trademark registration pertains; and include such other information as Secretary of State may require. Filling of, or failure to file, statement of transfer of trademark registration shall not affect validity or effectiveness of underlying transfer of trademark. (C.R.S. 7-70-106).

Trade Names.

Except for certain nonprofit entities, person shall not transact business in Colorado under name other than true name of person or, in case of general partnership that is not limited liability partnership, under name other than true name of each general partner of general partnership, not unless effective statement of trade name is on file with Secretary of State. (C.R.S. 7-71-101). Statement of trade name shall state: (1) True name of person; (2) if person is entity, entity's form and jurisdiction of formation; (3) if person is individual, street address of individual's primary residence or usual place of business in Colorado if individual has one, or outside Colorado if individual has no primary residence or usual place of business in Colorado, and, if different, mailing address of individual; if registrant is entity other than reporting entity, street address of entity's usual place of business in Colorado if it has one, or outside Colorado if it has no usual place of business in Colorado and, if different, mailing address of entity; (4) trade name; (5) brief description of kind of business to be carried on under trade name; (6) such other information required by Secretary of State. (C.R.S. 7-71-103). Penalty for lack of compliance is inability to maintain proceeding in any court in Colorado, until assumed name certificate is filed, and civil penalties. (C.R.S. 7-71-102).

Uniform Deceptive Trade Practices Act (1966 Revision) adopted, with significant variations, omissions, and additional matter is incorporated in Colorado Consumer Protection Act. (C.R.S. 6-1-101 to 114).

17.02 TRADE SECRETS:

Uniform Trade Secrets Act adopted with minor variations, except that "trade secret" is defined as whole or any portion or phase of any scientific or technical information, design, process, procedure, formula, improvement, confidential business or financial information, listing of names, addresses, or telephone numbers, or other information relating to any business or profession which is secret and of value. To be trade secret owner thereof must have taken measures to prevent secret from becoming available to persons other than those selected by owner to have access thereto for limited purposes. (C.R.S. 7-74-101).

Criminal Penalties.

Theft of trade secret is class 1 misdemeanor for first offence, and class 5 felony for second offence committed within five years. (C.R.S. 18-4-408).

18 LEGAL PROFESSION

18.01 ATTORNEYS AND COUNSELORS:

The state bar is not integrated.

Jurisdiction Over Admission.

Supreme court is vested with jurisdiction to admit attorneys to practice of law (C.R.S. 12-5-101), and has promulgated Rules Governing Admission to the Bar (C.R.C.P. 201). Members of bar are appointed to "law committee" and "bar committee", to aid court in passing on applicants. (C.R.C.P. 201.2).

Eligibility.

No person may be denied license to practice law on account of race, creed, color, religion, disability, age, sex, sexual orientation, marital status, national origin, or ancestry. (C.R.S. 12-5-102). Applicant must be mentally stable and morally and ethically qualified for admission. (C.R.C.P. 201.6). Determinations of mental instability or ethical or moral disqualification are reviewed by inquiry panel of bar committee. After 15 days notice, applicants may be interviewed by inquiry panel. Upon written request applicant may appeal adverse determination to formal hearing panel. (C.R.C.P. 201.7 to 201.10). Membership in professional organization or bar association not prerequisite to licensure. (C.R.S. 12-5-101).

Registration as Law Student.

Law student interns may appear and participate in civil and criminal proceedings under certain circumstances. (C.R.S. 12-5-116.1 to 116.5; C.R.C.P. 226).

Classification of Applicants.

Class A: Those who (a) have been admitted to bar of another state, territory or district of U.S. that admits members of Colorado Bar without examination, (b) immediately preceding application for admission in Colorado have actively and substantially practiced in that state, territory, or district that admits members of Colorado Bar without examination, and (c) have actively practiced for five of seven years immediately preceding application for admission in Colorado. "Practice" includes private practice of law, employment as legal counsel or advocate by corporation or other entity, teaching in A.B.A.-accredited law school, employment by U.S. government, state or other political subdivision in position requiring performance of specified legal services, or as judge, law clerk, or similar official, provided such position is available only to lawyer; or, any combination of preceding. (C.R.C.P. 201.3, 201.5). Class B: All other applicants. (C.R.C.P. 201.3[5]).

Educational Requirements.

Class A applicants must have obtained first professional law degree from A.B.A.-accredited law school. (C.R.C.P. 201.5[1]). Class B applicants (see subhead Classification of Applicants, supra) must have received by time of written examination first professional law degree from A.B.A.-accredited law school, or first professional law degree from state-approved law school, provided applicant is admitted to bar of another state, territory, or district of U.S. and has actively practiced for five of seven years immediately preceding application in Colorado, as defined by C.R.C.P. 201.3(2), or first professional law degree from law school in common law, English-speaking nation if applicant is admitted to bar of nation where first professional degree was received and has actively practiced, as defined by C.R.C.P. 201.3(2), for five of seven years immediately preceding application in Colorado (C.R.C.P. 201.5).

All Class A and B applicants must have achieved scaled score of at least 85 on Multi-State Professional Responsibility Examination within two years before acceptance of application for admission in Colorado. (C.R.C.P. 201.5[3]).

Petition for Admission.

Applications must be made on forms furnished by board. (C.R.C.P. 201.4[1]). They may be obtained from Executive Director, State Board of Law Examiners, 1560 Broadway, Suite 1820, Denver, CO 80202.

Class B applications must be received or postmarked on or before first day of Dec. preceding Feb. bar exam or on or before first day of May preceding July bar exam. Fees for all applicants to be fixed by court must accompany application and may be paid by cash, bank cashier's check or money order. (C.R.C.P. 201.4[2]; [3]). Bar committee may require additional evidence of applicant's mental stability and moral and ethical qualifications reasonably related to standards for admission it deems appropriate, including current mental status examination. Costs of mental status examination or obtaining additional information required by bar committee borne by applicant. (C.R.C.P. 201.6[2]). Applicants must certify compliance with child support orders. (C.R.C.P. 201.6[3]).

Examination.

Law committee gives examinations twice a year (in Feb. and July) in Denver area. (C.R.C.P. 201.2). Decision of law committee as to whether examinee has passed or failed bar examination will be final. Beginning 20 days after results are mailed and ending on 60th day thereafter, any unsuccessful examinee will be entitled to inspect examinee's answers to essay portion of examination. No inspection of multi-state bar examination is permitted. (C.R.C.P.

201.13).

Multi-state bar examination used. Additional local subjects that may be tested are: business associations (including agency, partnership, and corporations), civil procedure, commercial transactions (including Uniform Commercial Code, creditors' rights, and sales), family law, public law (including administrative law and constitutional law), wills, estates, and trusts.

Residency Requirements and Oath.

Applicants must take oath of admission no later than 18 months after approval of application (Class A) or 18 months after announcement of passing exam (Class B). (C.R.C.P. 201.14). Applicants, prior to taking oath, must complete required course on professionalism. (C.R.C.P. 201.14[3]). Class A applicants admitted on motion have six months after admission to take required professionalism course. (C.R.C.P. 201.14[4]).

Clerkship.

No requirement for any period of clerkship.

Admission Without Examination.

No examination required for applicants in Class A (see subhead Classification of Applicants, supra). (C.R.C.P. 201.3[5]). Full-time commissioned officer and U.S. judge advocate stationed in Colorado may be admitted temporarily without exam only for purposes of practice as judge advocate. (C.R.C.P. 201.3[3]). Law professor who is member of bar of another state, territory or district of U.S. may be admitted temporarily while full-time faculty member of Colorado law school. (C.R.C.P. 201.3[4]).

Admission Pro Hac Vice.

"Out-of-state attorney" may appear in state trial court if: (1) Trial court grants verified motion requesting permission to appear and including information specified in C.R.C.P. 221; (2) motion also filed with clerk of Supreme Court at attorney registration office together with $250 fee; (3) motion served on all counsel of record and client; and (4) attorney designates associate attorney who is admitted and licensed in Colorado (C.R.C.P. 221). "Out-of-state attorney" may appear in appeal of same action by filing updated affidavit with clerk of Supreme Court; no additional fee required. (C.R.C.P. 221[6][a]). "Out-of-state attorney" may appear in appellate action in which attorney was not admitted at trial or administrative level by complying with requirements of C.R.C.P. 221(1) including filing verified motion and affidavit and paying filing fee (C.R.C.P. 221[6]). "Out-of-state attorney" is attorney who is licensed, on active status, and in good standing in another state, not domiciled or with office in Colorado, and not soliciting or accepting clients in Colorado. (C.R.C.P. 220). "Out-of-state attorneys" who practice law in Colorado under C.R.C.P. 220 deemed to have obtained Colorado license for limited practice in Colorado and are subject to Colorado Rules of Professional Conduct and rules of procedure concerning attorney discipline (C.R.C.P. 220), except requirement of establishing business account and trust account in Colorado financial institution (C.R.C.P. 221[7]). "Out-of-state attorney" admitted pro hac vice is subject to Colorado Rules of Civil Procedure, except general registration fees (C.R.C.P. 227) and mandatory continuing legal education (C.R.C.P. 260).

Attorney not licensed to practice in Colorado may be certified to act as counsel for single client (which may include organization and its affiliate) upon approval of application by Supreme Court and payment of $725 certification fee if attorney: (1) Has established domicile in Colorado; (2) is licensed, admitted and in active practice in another state, is in good standing in all jurisdictions in which admitted and submits good standing certificates from each jurisdiction; (3) certifies that attorney is representing only single client and single client has been so advised by attorney and is aware that attorney is not licensed in Colorado and of limited scope of Colorado practice. (C.R.C.P. 222). Client must certify that attorney has advised client that attorney is not licensed in Colorado and will be employed exclusively by client. Attorney admitted under this rule is deemed to be licensed in Colorado for limited scope of practice, is issued certification number, is subject to Colorado Rules of Professional Conduct and attorney discipline, must comply with continuing legal education requirements applicable to Colorado attorneys, and must pay annual registration fee. (C.R.C.P. 222). Attorney has six months after admission to take required course on professionalism. (C.R.C.P. 201.14[4]).

Admission Before State Agencies.

"Out-of-state attorney" (C.R.C.P. 220) may be admitted to practice before any state agency for hearing or argument of any cause in which attorney employed, at discretion of administrative hearing officer (C.R.C.P. 221.1). Attorney must follow requirements for pro hac vice admission (C.R.C.P. 22[1]), except for designating associate Colorado attorney (C.R.C.P. 221.1).

Pro Bono/Emeritus Attorneys.

Pro bono/emeritus attorneys may, under auspices of Colorado nonprofit entity whose purpose is or includes providing pro bono legal representation to indigent or near-indigent persons, provide legal representation to such persons. (C.R.C.P. 223). Attorney licensed to practice in Colorado must presently be on inactive status and in good standing with no pending disciplinary proceeding. (C.R.C.P. 223[2][a]). Attorney not licensed in Colorado may qualify as pro bono/emeritus attorney if attorney is licensed and on active, inactive, or equivalent status in another U.S. jurisdiction, is in good standing in all courts and jurisdictions in which licensed to practice, has no pending disciplinary proceeding, agrees to be subject to Colorado Rules of Professional Conduct, rules regarding attorney discipline and disability proceedings, and remedies set forth in C.R.C.P. 234(a) and to limit his or her practice to the conduct permitted under C.R.C.P. 223, and completes application (including certifications that: [1] Attorney agrees to C.R.C.P.[2][b][iv] [consent to be subject to Colorado rules] and [v] [limitation of practice] and [2] attorney is in good standing in all courts and jurisdictions to which admitted and has no pending disciplinary proceedings) and pays one-time administrative fee of $50.00 (C.R.C.P. 223[2][b]). All pro bono/emeritus attorneys must not receive or expect to receive compensation or other direct or indirect pecuniary gain for legal services rendered under this rule, but may receive reimbursement for recoverable costs. (C.R.C.P. 223[2][a][iv], [2][b][v], [6]). Pro bono/emeritus attorney is not required to pay annual registration fee. (C.R.C.P. 223[4]). In addition, each pro bono/emeritus attorney must file annual registration statement on or before Feb. 28 of each year that identifies agency for which attorney volunteered during preceding calendar year, or, in alternative, attorney may pay registration fee applicable in preceding calendar year to inactive attorneys. (C.R.C.P. 223[5]).

License.

No person may practice law without license. (C.R.S. 12-5-101). Amount of license fee shall be as prescribed by Supreme Court under rules for admission to bar. (C.R.S. 12-5-103).

Registration Fee.

On or before Feb. 28, every attorney admitted to practice (including judges, those admitted on provisional or temporary basis, those admitted as judge advocate, and those certified under C.R.C.P. 222 as single client counsel but not including pro bono/emeritus attorneys under C.R.C.P. 223) must pay annual fee. During first three years after first admission, annual registration fee is $180. Thereafter, annual registration fee is $225. Annual fee for attorney on inactive status $95. Annual fee collected by clerk of Supreme Court, who shall send and receive notices for payment. Any attorney who pays annual fee or files annual registration statement after Feb. 28 but on or before Mar. 31 shall pay late fee of $50 in addition to registration fee. After Mar. 31, additional late fee is $150. Any attorney who fails to pay required fee is summarily suspended 30 days after mailing of notice of delinquency unless excused on grounds of financial hardship.

(C.R.C.P. 227[4]).

Registration Statement.

All persons required to pay annual registration fee must file on or before Feb. 28 of every year a statement on a form prescribed by clerk, setting forth: (1) Date of admission to Colorado Supreme Court, (2) registration number, (3) current residence and office addresses, and (4) certification of whether attorney ever ordered to pay child support and whether attorney in compliance with child support order and (5) such other information as clerk may direct. (C.R.C.P. 227[2][a]). In addition to statement, every attorney must file supplemental statement of change in information previously submitted within 30 days of such change. (C.R.C.P. 227[2][b]). Pro bono/emeritus attorneys file annual registration statement described in C.R.C.P. 223.

Attorney who has retired or is not engaged in practice shall file notice in writing that he or she desires to transfer to inactive status and discontinue practice of law. Upon filing such notice, attorney is no longer eligible to practice law but must continue to file required statements annually. Attorney must pay $95 annual fee until age 65. (C.R.C.P. 227). Attorney need not comply with continuing legal education requirements. (C.R.C.P. 260.6[11]). Attorney wishing to resume practice must file application, pay registration renewal fee and meet any post-graduate study requirements determined to be applicable. (C.R.C.P. 227, 260.2[5], 260.6[11]).

Conflict of Interests.

Attorney may not become surety in any bond authorized by statute to be taken for payment of any sum of money in court in default of principal, without consent of judge of district first having approved such surety. (C.R.S. 12-5-117).

Liabilities.

See category 5 Civil Actions and Procedure, topic 5.07 Costs.

Compensation.

Rules of Professional Conduct require reasonable fees (Colo. Rules Prof. Conduct 1.5[a]), limit fee sharing (Colo. Rules Prof. Conduct 1.5[d]), prohibit referral fees (Colo. Rules Prof. Conduct 1.5[e]), and permit contingent fees in accordance with Colorado Rules of Civil Procedure “rules Governing Contingent Fees” (Colo. Rules Prof. Conduct 1.5[c]). No contingent fee agreement shall be enforceable unless there has been compliance with Supreme Court Rules governing contingent fees, which, in part, prohibit such agreements in certain classes of cases and require that permissible contingent fee arrangements be reduced to writing. (c. 23.3, Rules Governing Contingent Fees).

Lien.

Attorneys with liens upon any money, property, choses in action, claims or demands of their clients in their hands, and on judgments obtained by them, for compensation for professional services; must file notice with clerk of court; after giving such notice lien attaches to moneys due client in hands of adverse party, and also to any papers of clients which have come into their possession in course of employment. This lien is enforceable by proper civil action. (C.R.S. 12-5-119, 120).

Disbarment or Suspension.

Rules provide, among other things, for seven-member attorney regulation committee (four of whom must be members of Colorado Bar; three of whom must be members of public), plus chair and vice-chair (both of whom must be members of Colorado Bar), all appointed by Supreme Court, full time regulation counsel to be appointed by Supreme Court, grounds for discipline and procedure. (C.R.C.P. 251.1 to 251.34; C.R.S. 12-5-108, 114.)

Unauthorized Practice.

No person may practice as attorney unless admitted to bar by supreme court and licensed thereby. Unlicensed person who holds himself out as attorney is guilty of contempt. (C.R.S. 12-5-108, 112). Corporations, except professional service corporations (C.R.C.P. 265), cannot practice law (99 Colo. 50, 59 P.2d 468). Professional corporations and limited liability companies, except professional service companies (C.R.C.P. 265), cannot practice law. Supreme Court has exclusive jurisdiction to define practice of law and prohibit unauthorized practice (C.R.C.P. 228 to 240.1). See also, Rules of Professional Conduct, C.R.C.P. 5.4(d) and 5.5.

Mandatory Continuing Legal Education.

Attorneys must take 45 “units,” as accredited by board of continuing legal education every three years, at least seven units of which must be devoted to legal ethics. Noncomplying attorneys are subject to summary suspension. (C.R.C.P. 260, C.R.C.P. 260.6[5], [13]). Attorneys admitted to Colorado bar after Jan. 1, 1979, must satisfy continuing education requirements. (C.R.C.P. 260.2[3]). All attorneys, prior to taking oath of admission, must complete required professionalism course. (C.R.C.P. 201.14[3]). Class A applicants admitted on motion and single client applicants admitted under C.R.C.P. 222 must take required professionalism course within six months of admission (C.R.C.P. 201.14[4]). Attorneys who provide uncompensated legal services to indigent or near-indigent clients in civil matters or who mentor another attorney or law student providing such representation may receive up to nine units of general credit in each three-year compliance period under certain circumstances. (C.R.C.P. 260.8).

Professional Service Companies.

Supreme Court Rule permits lawyers licensed to practice in Colorado to form “professional companies” for practice of law under specified conditions. “Professional companies” includes professional corporations, limited liability companies, limited liability partnerships, registered limited liability partnerships, and joint stock companies. Name must contain words “professional company”, “professional corporation”, “limited liability company”, “limited liability partnership”, “registered limited liability partnership”, or abbreviations thereof that are authorized by law. Officers, directors, shareholders, partners, members, or managers must be duly licensed persons actively engaged in practice of law except as permitted by Supreme Court Rule. Professional company must be formed solely for purpose of practicing law. Professional company required to carry professional liability insurance. Usual standards of professional conduct apply to professional company and anyone acting on its behalf. (C.R.C.P. 265).

Attorney Ethics.

Effective Jan. 1, 1993, Supreme Court adopted ABA Model Rules with modifications, titled Colorado Rules of Professional Conduct. Until Jan. 1, 1993, Colorado Code of Professional Responsibility in effect.

19 MINERAL, WATER AND FISHING RIGHTS

19.01 MINES AND MINERALS:

Hardrock mining on federal lands regulated mainly by federal laws, but varied by local law as to acts of location, size of claims, notice and recording. Federal laws may preempt local laws which interfere with party’s right to validate claims under federal law. (652 P.2d 1050; 2006 Colo. App. LEXIS 2071).

Mineral Estate and Royalties.

Severance of mineral interest creates two separate and distinct freehold estates. (125 Colo. 267, 243 P.2d 412). Conveyance of royalty interest in minerals creates real property interest. (C.R.S. 38-30-107.5). Reservation of overriding royalty interest is real property interest for nonresident tax purposes. (182 Colo. 337, 513 P.2d 208; 886 P.2d 652). Unless otherwise agreed, payments to persons entitled to share of proceeds from oil or gas must begin within six months of first production sold and minimum information which must accompany payments is prescribed by statute. (C.R.S. 34-60-118.5).

Lode and placer claims may be located on open federal lands and, by compliance with law regarding discovery of valuable minerals, location, posting of notice and recording, may be held as valid claims by filing of annual notice of intent to hold and payment of maintenance fees to federal Bureau of Land Management and county in which claim is located. (C.R.S. 34-43-114). Location of mineral claims other than claims for coal and oil shale may be made upon unleased mineral lands belonging to state subject to additional requirements. (C.R.S. 36-1-140).

State-owned minerals, including stone, coal, oil and gas, geothermal resources and renewable energy resources, may be leased from state board of land commissioners. (C.R.S. 36-1-113, 147). Mining claims may be located on unleased state mineral lands but within 60 days of discovery must be converted to state mining lease. (C.R.S. 36-1-140).

State Legislation.

Director of division of reclamation, mining and safety in department of natural resources is responsible for directing activities of office of active and inactive mines, as well as prospecting. (C.R.S. 34-20-101; C.R.S. 34-21-101 to 110). Annual report detailing production and other information due Jan. 31. (C.R.S. 34-24-101). Notification required prior to opening or abandoning mine. (C.R.S. 34-24-105). Geothermal resources regulated (C.R.S. 37-90.5-101 to 108) and must be specifically mentioned in deed or presumed not included in references to minerals or mineral rights (C.R.S. 38-35-121). Mineral estate owner must receive notice from surface owner before date of initial public hearing to consider application for development of surface estate. (C.R.S. 24-65.5-101 to 105).

Inspection of Mines.

Inspection of nonproducing mines and mines that are open to public are not controlled solely by federal legislation, Mine Safety and Health Act, P.L. 95-164. (C.R.S. 34-20-101 to C.R.S. 34-25-101). Nonproducing “tourist mine” inspected by state office of active and inactive mines. (C.R.S. 34-21-110). Certificates of competency required to work certain positions in coal mines issued by coal mine board. (C.R.S. 34-22-105). Abandoned workings must be covered or fenced. (C.R.S. 34-24-110).

Oil and Gas.

Underground storage of natural gas is authorized and procedure for condemnation and closure for that purpose provided. (C.R.S. 34-64-101 to 107). Oil and gas conservation commission regulates activities of all producers to prevent waste, regulate size of drilling units, protect public health, safety and welfare minimize adverse impacts to wildlife resources and ensure accuracy of production reporting. (C.R.S. 34-60-101 to 126). Counties and home-rule charter municipalities may regulate by laws not in conflict with operation of state regulations or intent of state legislature. (830 P.2d 1045; 830 P.2d 1061). In addition to filing and service fee, conservation charge not to exceed one and one-half mills and environmental response fund charge not to exceed two-tenths of one mill on each dollar of market value of production is payable. (C.R.S. 34-60-106[1][f], 122). Oil and gas mineral interests may be leased from state through state board of land commissioners. (C.R.S. 36-1-113). Oil and gas leases have implied covenants to drill, to develop after discovery, to operate diligently and prudently, including marketing during primary term, and to protect against drainage. (109 Colo. 401, 125 P.2d 964; 808 P.2d 358). Operator must provide surface owner 30-day written notice before commencement of drilling operations. (C.R.S. 34-60-106[14]).

See also generally, “Fuel Products.” (C.R.S. 8-20-101 to 904).

Mineral leases which contain options to purchase must so state in title thereof (C.R.S. 38-42-101, 103); otherwise lessor may elect to have option voided and nonetheless keep any money paid for lease (C.R.S. 38-42-102). Lessee of recorded mineral lease is obligated to record surrender thereof within 90 days after forfeiture or expiration thereof. (C.R.S. 38-42-104). If lessee neglects or refuses to do so, lessor may sue and recover $100 plus costs and attorney’s fees. (C.R.S. 38-42-105).

Record notice of lessee’s interest in oil, gas, or other mineral lease expires six months after expiration of primary or definite term unless lessee has recorded affidavit claiming extension. (C.R.S. 38-42-106).

Taxes.

Severance tax instituted on certain nonrenewable resources. (C.R.S. 39-29-101 to 115). Coal, oil and gas, coalbed methane, carbon dioxide, metallic minerals, oil shale, and molybdenum have separate severance taxes imposed in addition to property taxes. (C.R.S. 39-29-102 to 107). Tax on gross income attributable to sale of oil and gas severed in state for tax years commencing on or after Jan. 1, 2000, levied at rate of 2%, 3%, 4% and 5% respectively for incomes under $25,000; $25,000-99,999; $100,000-299,999; $300,000 and over. (C.R.S. 39-29-105[1]). Credit against ad valorem taxes on such resources may be available. (C.R.S. 39-29-105[2]). Credit against local government portion of severance tax available for certain taxpayer contributions made to assist local governments in solving impact problems from new mining operations. (C.R.S. 39-29-107.5).

Mining surface disturbance subject to control of Colorado Mined Land Reclamation Board and permit requirements. (C.R.S. 34-32-101 to C.R.S. 34-33-137). Act amended effective July 1, 1993 and July 1, 2008 to regulate operations using toxic or acidic chemicals for metallurgical extraction, exposing or disturbing acid or toxic forming materials or involving extraction of uranium resources by in situ or conventional methods. (C.R.S. 34-32-103).

See also category 12 Environment, topic 12.01 Environmental Regulation.

20 MORTGAGES

20.01 CHATTEL MORTGAGES:

Uniform Commercial Code adopted. Chattel mortgages governed by Art. 9 of Uniform Commercial Code. See category 3 Business Regulation and Commerce, topic 3.09 Commercial Code.

Manufactured Homes.

Security interest in manufactured (i.e., mobile) home to be effective as valid lien against third persons, must be filed for public record with county clerk and recorder (manager of revenue or other official appointed by mayor in City and County of Denver) and noted on certificate of title. (C.R.S. 38-29-125[1]; C.R.S. 38-29-128; C.R.S. 38-29-129; C.R.S. 42-1-210). Perfection of security interest in manufactured home held for sale or lease which constitutes inventory as defined in C.R.S. 4-9-109 is governed by provisions of Art. 9 of Uniform Commercial Code (C.R.S. 38-29-125[2]). Mortgage enforceable if certificate of title, whether issued in Colorado or another state, bears adequate notation to apprise purchaser, creditor or mortgagee of existence of mortgage at time third person acquires right in manufactured home. (C.R.S. 38-29-127). Priority of mortgages governed by first-to-file rule. (C.R.S. 38-29-134). If mortgagee repossesses manufactured home, must notify law enforcement agency within 12 hours (police department, town marshall or other local law enforcement agency if repossession takes place in incorporated city or town, and county sheriff if repossession takes place in unincorporated area) of fact of repossession, identity of owner and identity of mortgagee or assignee. (C.R.S. 38-29-142).

Motor Vehicles.

See category 23 Transportation, topic 23.01 Motor Vehicles, subhead Liens, for requirement as to perfection of security interest in motor vehicle.

Execution and Requisites.

Governed by Art. 9, Uniform Commercial Code. (C.R.S. 4-9-203, 318, 319, 502, 503, 506). See category 3 Business Regulation and Commerce, topic 3.09 Commercial Code.

Filing.

Art. 9 of Uniform Commercial Code governs necessity (C.R.S. 4-9-309) and place (C.R.S. 4-9-501) of filing.

Forms.

Forms following and at end of this Digest have either been approved by Secretary of State and County Clerk and Recorders Association or have been suggested for use.

Form

Security Agreement.

Debtor:

Name: . . . .

Address:

Residence . . . .

No. Street City State

Business . . . .

No. Street City State

Secured Party:

Name: . . . .

Address: . . . .

No. Street City State

Debtor, for consideration, hereby grants to Secured Party a security interest in the following property and any and all additions, accessions and substitutions thereto or therefor (hereinafter called the “COLLATERAL”): . . . . To secure payment of the indebtedness evidenced by . . . . certain promissory note . . . of even date herewith, payable to the Secured Party, or order, as follows: . . . .

DEBTOR EXPRESSLY WARRANTS AND COVENANTS:

1. That except for the security interest granted hereby Debtor is, or to the extent that this agreement states that the Collateral is to be acquired after the date hereof, will be, the owner of the Collateral free from any adverse lien, security interest or encumbrances; and that Debtor will defend the Collateral against all claims and demands of all persons at anytime claiming the same or any interest therein.

2. The Collateral is used or bought primarily for:

Personal, family or household purposes;

Use in farming operations;

Use in business.

3. That Debtor's principal place of business or residence is as stated above, and the Collateral will be kept at

. . . .

No. and Street City County State

4. If any of the Collateral is crops, oil, gas, or minerals to be extracted or timber to be cut, or goods which are or are to become fixtures, said Collateral concerns the following described real estate situate in the . . . . County of . . . . and State of Colorado, to wit: . . . .

5. Not to sell, transfer or dispose of the Collateral, and promptly to notify Secured Party of any change in the location of the Collateral within the State of Colorado and not to remove the same from the State of Colorado without the prior written consent of the Secured Party.

6. To pay all taxes and assessments of every nature which may be levied or assessed against the Collateral.

7. Not to permit or allow any adverse lien, security interest or encumbrance whatsoever upon the Collateral and not to permit the same to be attached or replevined.

8. That the Collateral is in good condition, and that he will, at his own expense, keep the same in good condition and from time to time, forthwith, replace and repair all such parts of the Collateral as may be broken, worn out, or damaged without allowing any lien to be created upon the Collateral on account of such replacement or repairs, and that the Secured Party may examine and inspect the Collateral at any time, wherever located.

9. That he will not use the Collateral in violation of any applicable statutes, regulations or ordinances.

UNTIL DEFAULT Debtor may have possession of the Collateral and use it in any lawful manner, and upon default Secured Party shall have the immediate right to the possession of the Collateral.

DEBTOR SHALL BE IN DEFAULT under this agreement upon the happening of any of the following events or conditions:

(a) default in the payment or performance of any obligation, covenant or liability contained or referred to herein or in any note evidencing the same;

(b) the making or furnishing of any warranty, representation or statement to Secured Party by or on behalf of Debtor which proves to have been false in any material respect when made or furnished;

(c) loss, theft, damage, destruction, sale or encumbrance to or of any of the Collateral, or the making of any levy, seizure or attachment thereof or thereon;

(d) death, dissolution, termination of existence, insolvency, business failure, appointment of a receiver of any part of the property of, assignment for the benefit of creditors by, or the commencement of any proceeding under any bankruptcy or insolvency laws of, by or against Debtor or any guarantor or surety for Debtor.

UPON SUCH DEFAULT and at any time thereafter, or if it deems itself insecure, Secured Party may declare all Obligations secured hereby immediately due and payable and shall have the remedies of a secured party under Article 9 of the Colorado Uniform Commercial Code. Secured Party may require Debtor to assemble the Collateral and deliver or make it available to Secured Party at a place to be designated by Secured Party which is reasonably convenient to both parties. Expenses of retaking, holding, preparing for sale, selling or the like shall include Secured Party's reasonable attorney's fees and legal expenses.

No waiver by Secured Party of any default shall operate as a waiver of any other default or of the same default on a future occasion. The taking of this security agreement shall not waive or impair any other security said Secured Party may have or hereafter acquire for the payment of the above indebtedness, nor shall the taking of any such additional security waive or impair this security agreement; but said Secured Party may resort to any security it may have in the order it may deem proper, and notwithstanding any collateral security, Secured Party shall retain its rights of setoff against Debtor.

All rights of Secured Party hereunder shall inure to the benefit of its successors and assigns; and all promises and duties of Debtor shall bind his heirs, executors or administrators or his or its successors or assigns. If there be more than one Debtor, their liabilities hereunder shall be joint and several.

Dated this . . . . day of . . . ., 20. . .

Debtor:

. . . .

. . . .

20.02 [RESERVED]

20.03 MORTGAGES OF PERSONAL PROPERTY:

See topic 20.01 Chattel Mortgages.

20.04 MORTGAGES OF REAL PROPERTY:

Mortgages and deeds of trust to private trustee or that secure obligations other than evidence of debt may be foreclosed only through courts. (C.R.S. 38-39-101). Most common security instrument is deed of trust to public trustee which may be foreclosed by public trustee or sheriff under statutory procedure (C.R.S. 38-38-101) or through courts. Certain definitions provided for in C.R.S. 38-38-100.3 will be used herein. Sale by public trustee also requires legal holder of indebtedness to obtain order authorizing sale from courts. (C.R.S. 38-38-105; C.R.C.P. 120). Public trustees are appointed for all first and second class counties and in all other counties county treasurer is public trustee. (C.R.S. 38-37-102).

Foreclosure through public trustee is available if obligation secured is evidence of debt, such as note or bond (C.R.S. 38-39-101; C.R.S. 38-38-100.3[8]), but release may not be granted unless original cancelled note or statutory substitute is delivered to public trustee (C.R.S. 38-39-102). (See subhead Release, infra.)

Execution.

Mortgages must be signed by obligor or attorney-in-fact, but seals and witnesses are unnecessary. (C.R.S. 38-30-118). Powers of attorney must be acknowledged and recorded. (C.R.S. 38-30-123). Although mortgages and deeds of trust by corporation need not bear corporate seal to be valid, seal is customary. Acknowledgment is not necessary for validity but is necessary for presumption of proper execution (C.R.S. 38-35-101[3]) and, together with recording, for presumption of due delivery (C.R.S. 38-35-101[4]).

Recording.

Recording is necessary for validity as against persons with any kind of rights except those who are parties to unrecorded instrument or who have notice thereof prior to acquiring their rights. (C.R.S. 38-35-109[1]). Recording may be done at any time but is notice to third parties without other notice only from date of recording. Recording statute classified as race-notice. (C.R.S. 38-35-109[1]). Recording must be in office of clerk and recorder in county where property is located. (C.R.S. 38-35-109[1]). Instruments conveying title to state or political subdivision must be recorded in office of clerk and recorder in county where property is located within 30 days of conveyance. (C.R.S. 38-35-109.5). If instrument may be filed by law, filing in office of county clerk and recorder where property is situated is equivalent to recording. (C.R.S. 38-35-109[1]). Master form mortgages and master form deeds of trust, without any acknowledgment, signature, identification of specific property, naming specific mortgagor, mortgagee, trustee, beneficiary or trustee, may be recorded in any county and provisions thereof may be incorporated by reference in subsequent documents. (C.R.S. 38-35-109[1.5]).

Recording Fees.

Recording fee in amount determined pursuant to C.R.S. 24-72-205(5).

Taxes.

None.

Trust Deeds.

Deeds of trust to public trustee are commonly used instead of mortgages because they may be foreclosed under power of sale as well as through judicial foreclosure. Because delivery of original evidence of debt, such as note or bond (or statutory substitute), is required for release, is imperative that owner of debt retain original. See subheads Release; Foreclosure; Forms; infra. Public trustee has no responsibility for determining amount or reasonableness of bid at foreclosure sale, allowable costs and expenses, amount necessary for reinstating loan or redeeming property, or description of property in partial release. (C.R.S. 38-37-104[4]).

Future Advances.

Mortgages and deeds of trust will secure up to total maximum principal amount, if one is expressly set forth in such deed of trust or mortgage. (C.R.S. 38-39-106[1]). To protect lender's right to advance beyond stated total maximum principal amount for revolving loan, deed of trust or mortgage must state that it was made pursuant to revolving credit arrangement. (C.R.S. 38-39-

106[3]).

Priorities.

Rule in Colorado is first in time, first in right except as modified by recording statute that unrecorded encumbrance is not notice to any person with any kind of rights who first records, unless person is party or has notice prior to acquiring rights. (C.R.S. 38-35-109[1]). Colorado rule may be supplemented or avoided by agreements between secured parties as to priority. (620 P.2d 58).

Subordination Agreements.

No statutory restriction.

Assignment.

See category 8 Debtor and Creditor, topic 8.01 Assignments.

Release.

Mortgage shall be released by separate instrument of release executed with formality required for conveyances. (C.R.S. 38-39-104). Deed of trust to public trustee shall be released by filing with public trustee written request for release signed and acknowledged by holder of evidence of debt and accompanied by original or certified copy of deed of trust and original cancelled evidence of debt. (C.R.S. 38-39-102). If original evidence of debt cannot be produced, public trustee may accept corporate surety bond, indemnification agreement from title insurance company, or indemnification agreement together with certified resolution from certain enumerated financial institutions pursuant to which holder agrees to indemnify and defend public trustee against any claim, limited to actual economic loss, court costs, reasonable attorney fees and costs in defending claims brought for failure to produce original evidence of debt. (C.R.S. 38-39-102[3][a]). Public trustee's fee for execution and acknowledgment of release is $15 (C.R.S. 38-37-104[1]) and fee for recording release is $5 per page (C.R.S. 30-1-103). Same procedure is followed for partial release of deed of trust except that evidence of debt is not cancelled. If purpose of deed of trust has been partially or fully satisfied but indebtedness has not been paid, then release may be obtained by exhibition of original evidence of debt or statutory substitute and statement on request for release that purpose of deed of trust has been partially or fully satisfied. (C.R.S. 38-39-102[2]).

Satisfaction.

Satisfaction of mortgage may be entered only by separate release deed or instrument of release executed with formalities required of conveyance. (C.R.S. 38-39-104).

Discharge.

See subhead Release, supra.

Foreclosure.

Foreclosure under deed of trust to public trustee is initiated by legal holder of evidence of debt electing to enforce instrument by declaring violation of any covenant of deed of trust and filing with public trustee executed copy of written notice of election and demand for sale signed by legal holder of indebtedness or attorney or agent with original evidence of debt, such as note or bond, or bond in amount one and one-half times face value of evidence of debt, or copy of evidence of debt and certification in accordance with C.R.S. 38-38-101(b)(II), original or certified copy of deed of trust, certificate executed by beneficiary under deed of trust or legal holder of indebtedness secured, or agent or attorney for such beneficiary or holder which states name and address of current owner of property to best knowledge of person executing such certificate, affidavit of principal balance due and list of names and addresses to which all notices required by statute must be mailed. (C.R.S. 38-38-101, 103). Public trustee shall advertise premises for sale in accordance with terms of sale specified in deed of trust (C.R.S. 38-38-103[5]), and shall, within ten business days of receipt, record notice of election and demand for sale (C.R.S. 38-38-102[1]). Period of advertising notice of sale is four weeks (once each week for five successive weeks) in newspaper of general circulation in county where property is situated, unless longer period of advertising is provided in deed of trust. (C.R.S. 38-38-103[5]). If county where property is located has no newspaper of general circulation, then newspaper printed wholly or partially in adjoining county and having general circulation in county where property is located may be used. (C.R.S. 24-70-103). Foreclosure sale must be initially scheduled not less than 110 days and not more than 125 days for non-agricultural property and not less than 215 and not more than 230 days after recording notice of election and demand for sale with county clerk and recorder, unless extended in accordance with statute. (C.R.S. 38-38-108). Public trustee shall mail printed copy of notice within 20 days after recording of notice of election and demand to original grantor, others liable on debt and occupant of property. Public trustee shall also mail combined notice between 45 and 60 days prior to initial sale date to persons set forth in most recent amended mailing list. If there is no amended mailing list, combined notice shall be sent to persons set forth in mailing list. (C.R.S. 38-38-103[1][a]). Such notice is good against all others claiming through grantor even if indebtedness is claim against estate of deceased or incompetent. (C.R.S. 38-38-505). Beneficiary may cause foreclosure sale date to be postponed for up to nine months from initially scheduled date. Postponement of foreclosure sale postpones statutory deadlines for cure. (661 P.2d 1161; see subhead Right to Cure, infra.) Beneficiary may terminate foreclosure proceedings by filing written withdrawal of notice of election and demand for sale, which shall be recorded. (C.R.S. 38-38-109[3]). All costs of foreclosure shall be borne by grantor. (C.R.S. 38-38-107). Excess proceeds of sale shall be held in escrow by public trustee during redemption period (C.R.S. 38-38-111, see subhead Redemption, infra) and then paid first to foreclosing party to extent of any deficiency and balance to junior lienors who have duly filed intent to redeem in order of priority whose liens have not been redeemed in full up to unpaid amount and finally to owner of record as of day of recording notice of election and demand if owner claims excess within five years or, if such owner does not claim after statutory requirements satisfied, to county general fund (C.R.S. 38-38-111[3]). Public trustee sale may be enjoined where amount and priority of claims in dispute. (C.R.C.P. 105; C.R.C.P. 120; 626 P.2d 724). Fees payable to public trustee are fixed by statute. (C.R.S. 38-37-104).

Foreclosure under mortgage is largely matter of contract, subject to applicable court rules and statutes. In action to foreclose mortgage, court may adjudicate and determine rights, titles, interests, claims and demands adverse and paramount to such mortgage or remove clouds from title to mortgaged property. (C.R.C.P. 105[a]). Person claiming under or through named defendant need be made party only if person’s interest is shown of record or he is in actual possession and action seeks recovery of possession. (C.R.C.P. 105[b]).

Person who has filed pleading seeking affirmative relief affecting title to real property may file notice of lis pendens in office of recorder of county where property is located, containing names of parties and describing claim made and property, and lis pendens shall be constructive notice from time of its filing to 45 days from earlier of entry of final judgment in trial court or entry of order determining that property will not be affected by judgment on issues then pending. (C.R.C.P. 105[f]). If timely notice of appeal filed while lis pendens in effect, lis pendens remains in effect until otherwise ordered. (C.R.C.P. 105[f][4]).

All foreclosures require court order authorizing sale under power of sale which may be satisfied by motion and order under C.R.C.P. 120. Verified motion requesting such court order which describes instrument containing power of sale and property and specifies default or other facts claimed to justify invocation of power of sale, and to which copy of instrument is attached shall be filed with district court. If obligation secured by deed of trust is not consumer obligation as defined in C.R.C.P. 120(f), proceeding may be heard in any county. (C.R.C.P. 120[f]). Motion shall also state to lienor's knowledge and belief names of each person who has interest in property and who would be materially affected by order with such person's last known address. If power is contained in deed of trust to public trustee, then motion need state only names and addresses of grantor and current record owner, of those with record interest in property prior to recording of notice of election and demand for sale but subsequent to recording of deed of trust, and of persons believed to be personally liable on indebtedness. Hearing shall be set not less than seven days before actual sale date (661 P.2d 1161), and movant shall serve notice on persons named at least 15 days before hearing. (C.R.C.P. 120[b]). Any interested person who disputes movant's entitlement to order authorizing sale may file and serve response verified by oath. (C.R.C.P. 120[c]). Scope of inquiry in C.R.C.P. 120 proceeding is limited to existence of default or other circumstances authorizing exercise of power of sale and other issues required by Service Members Civil Relief Act of 2003, as amended (C.R.C.P. 120[d]). Court may consider all relevant evidence, including possible oral modification of written loan instruments, to determine whether there is reasonable probability that default exists. (665 P.2d 613). Scope of court's inquiry does not include determination of amount or whether attorneys' fees can be recovered. (662 P.2d 483). Court shall summarily grant or deny motion upon determination of reasonable probability of default and propriety of sale and shall approve it if sale was conducted in conformity with order. Action for wrongful foreclosure not governed by foreclosure statute of limitations. (620 P.2d 56).

Mortgage payable in installments may be wholly or partially foreclosed as to any one or more past due installments plus sums advanced for taxes, insurance, liens, assessments or similar charges, but no more than one partial foreclosure proceeding may be brought in any 12-month period. (C.R.S. 38-38-201).

Attorneys' fees in any foreclosure action based upon one or more past due installments without declaring whole amount due may not exceed 10% of sum for which property is foreclosed. (C.R.S. 38-38-201[1][a]). Foreclosure does not affect lien of mortgage for balance of obligation. (C.R.S. 38-38-201[1][g]). Holder of indebtedness may exercise acceleration option in mortgage notwithstanding partial foreclosure. (C.R.S. 38-38-201[2]).

Redemption from sale under court order is governed by same rules as redemption from execution sale. (C.R.S. 38-38-301).

Right to Cure.

When default is nonpayment, owner as of recording of notice of election and demand or party liable on indebtedness and other parties specified by statute (see subhead Foreclosure, infra) may cure by filing written notice of intention to cure with officer conducting sale at least 15 calendar days prior to sale. (C.R.S. 38-38-104). When default is failure to furnish balance sheets or tax returns, default may be cured by providing required balance sheets, tax returns or other adequate evidence of financial condition provided all sums currently due under evidence of debt have been paid and all costs, expenses, late charges, attorney and other fees incurred by holder of indebtedness in connection with foreclosure are paid. (C.R.S. 38-38-104). Where suit is brought on promissory note alone and not to foreclose, debtor has no statutory or equitable right to cure default. (597 P.2d 1043). Debtor may exercise right to cure more than once. (612 P.2d 1149).

Sales.

Anyone purchasing land under foreclosure sale of trust deeds or mortgages or sale under execution or order of court and who has received certificate of purchase may pay any special or general taxes, ditch or water assessments, insurance premiums, interest, costs and expenses of defending, protecting and maintaining property and holder's interest therein, and sums due on prior lien or encumbrance and, upon filing receipts with officer making sale, shall have additional claim against lands sold which is added to amount due on redemption. (C.R.S. 38-38-301; C.R.S.

38-38-302).

Within nine business days after later of expiration of all redemption periods or receipt of certificate of purchase or certificate of redemption and upon receipt of written request for issuance of confirmation and receipt of all statutory fees and costs, officer shall execute and record confirmation deed. Under no circumstances shall officer be required to issue confirmation deed unless officer has received order authorizing sale that meets requirements of C.R.S. 38-35-105(2)(a). (C.R.S. 38-38-501). Any deed executed by officer conducting sale is prima facie evidence of compliance with all statutory requirements for sale, of execution of deed and of recitals contained in deed. (C.R.S. 38-38-504).

Holder of any debt secured by deed of trust being foreclosed, or holder's attorney or agent, may submit bid to public trustee in writing instead of appearing personally to buy property at sale. Bid, substantially in form prescribed by statute, must be received by public trustee before 12:00 noon on or before second business day prior to sale and be signed by holder or holder's attorney or agent. (C.R.S. 38-38-106).

Subject to right to cure and right to redeem provisions of C.R.S. 38-38-506 and C.R.S. 38-41-212(c), such title shall be free and clear of all liens and encumbrances junior to lien foreclosed. (C.R.S. 38-38-501).

Certificate of purchase may be assigned by endorsement. (C.R.S. 38-38-403). Receiver may be appointed to preserve property pending foreclosure of mortgage or deed of trust if security clearly inadequate or premises in danger of being materially injured or reduced in value as security by removal, destruction, deterioration, accumulation of prior liens or otherwise. (C.R.S. 38-38-601[1]). Receiver may also be appointed pursuant to agreement of parties. (C.R.S. 38-38-602). Foreclosure sale through court action shall be held not less than 45 days after commencement of foreclosure action, or in case of public trustee sale shall be initially scheduled not less than 110 or more than 125 days after commencement for non-agricultural property. (C.R.S. 38-38-108).

Deficiency Judgments.

Foreclosing party must bid at least its good faith estimate of fair market value of property (less amounts authorized by statute). (C.R.S. 38-38-106).

Moratorium.

None.

Redemption.

Notice of redemption rights must be given to original grantor of trust deed or mortgage, subsequent owners of record, persons who might be liable for deficiency, occupant of property and persons having right to redeem as shown by interest recorded subsequent to recording of deed of trust and prior to recording of notice of election and demand for sale. (C.R.S. 38-38-103).

In appropriate circumstances, extension of statutory period of redemption is within equity powers of court, even after redemption period has expired and public trustee's deed or sheriff's deed has issued. (665 P.2d 613). Junior encumbrancers or lienors may redeem in succession according to priority of lien starting 15 business days after sale within successive five day periods each by payment of amounts specified by statute (C.R.S. 38-38-302), or redemption amounts previously paid with interest, and amounts of all prior liens. (C.R.S. 38-38-302). Lienors and encumbrancers may redeem only if they file notice of intention to redeem with officer conducting sale within ten business days after sale (this deadline may be extended if statutory conditions are satisfied [C.R.S. 38-38-302]) and lien appears of record prior to recording of notice of election and demand (C.R.S. 38-38-302[1]). Last lienor redeeming shall receive payment from escrow of proceeds not to exceed amount of lienor's lien and excess proceeds treated in accordance with C.R.S. 38-38-306. If lienor redeems, lienor's recorded certificate of redemption acts as assignment to him of estate and interest acquired by purchaser at sale subject to rights of persons entitled to redeem subsequently. (C.R.S. 38-38-304[3]).

Lessee is considered lienor and, if subsequent lienor redeems from lessee then he takes subject to lease. (C.R.S. 38-38-305). Judgment creditor has no right to redeem unless judgment is made lien of record. (C.R.S. 38-38-306).

Duration of Lien.

No lien created by mortgage, deed of trust or other written instrument securing payment of indebtedness shall remain longer than 15 years after final principal payment was due and payable as shown by such recorded instrument and thereafter shall have no more effect than unrecorded instrument (C.R.S. 38-39-201) unless extended by recordation within 15-year period of written instrument signed by beneficiary, owner or legal holder of indebtedness describing mortgage and date to which it is extended (C.R.S. 38-39-202). Recording date considered due date if instrument recorded is silent. (C.R.S. 38-39-201). Extension is limited to maximum of 30 years beyond original maturity date. (C.R.S. 38-39-202[2]). Recordation of notice of pending foreclosure proceedings extends period until final disposition of proceedings. (C.R.S. 38-39-204). Once lien has expired, public trustee and other officers of state have no authority to act and no foreclosure action may be brought. (C.R.S. 38-39-205). Lien is also extinguished when right to bring action to enforce payment of underlying obligation is barred. (C.R.S. 38-39-207). Statute of limitations on promissory note is six years and runs from date of maturity (C.R.S. 13-80-108[4]; 48 P. 276) or, in case of demand note, date of execution (705 P.2d 533).

No action to question or set aside any foreclosure where purchaser took possession may be maintained after seven years from date of deed issued pursuant to foreclosure. (C.R.S. 38-39-208).

Action for wrongful foreclosure not governed by foreclosure statute of limitations. (620 P.2d 56).

Unreasonable Restraint on Alienation.

Following practices are prohibited by statute when applied to real property utilized as residential dwelling units except motels, hotels or nursing homes (C.R.S. 38-30-165): Acceleration of maturity of indebtedness on sale or transfer of real estate or on assumption of indebtedness unless transferee is reasonably determined to be financially incapable of retiring indebtedness; increase of interest rate more than 1% per annum on occurrence of such events except that such limitations do not apply to federally chartered savings and loans (502 F. Supp. 658); charge, collect or attempt to collect fee greater than ½ of 1% of outstanding principal amount not including charges appertaining to sale; or enforcement of any provisions in mortgage, deed of trust or real estate security instrument executed on or after July 1, 1975 which are contrary to these prohibitions. (C.R.S. 38-30-165[1]). Security interests excepted from this section are those in which indebtedness is matured by secretary of department of housing and urban development on multiple-family housing projects in accordance with federal housing administration regulations and those interests held by one not regularly engaged in business of making real estate loans. (C.R.S. 38-30-165[4], [5]). If party assuming indebtedness declines to agree to increased interest rate, he may prepay indebtedness without penalty or increased interest within 60 days after assumption; if he does not timely make such prepayment, he thereafter must proceed in accordance with increased interest rate from date of assumption and prepayment term in instrument of indebtedness. (C.R.S. 38-30-165[6]). Except as provided by C.R.S. 38-30-165, due-on-sale provisions are per se reasonable restraints on alienation. (661 P.2d 257).

Forms.

Statutory short form of mortgage is as follows:

Forms

. . . ., whose address is . . . ., County of . . . . and State of . . . . hereby mortgages to . . . ., whose address is . . . ., County of . . . . and State of . . . ., to secure the payment of . . . . dollars, due as follows: . . . . the following described real property in the County of . . . ., and State of Colorado, to wit: . . . . with all its appurtenances, and warrants the title to the same subject to . . . . .

Signed this . . . . day of . . . . 20. . . . .

(C.R.S. 38-30-117[1]).

Such mortgage should be acknowledged. (See category 10 Documents and Records, topic 10.01 Acknowledgments.) Street address of encumbered property and current mailing address of grantor and grantee (or beneficiary of deed of trust) should appear on face of instrument and assessor's schedule or parcel number may appear, but failure to state address, assessor's schedule or parcel number, county or state of residence or current mailing address of grantor or grantee does not affect validity. (C.R.S. 38-30-117[2]; C.R.S. 38-35-122; and C.R.S. 38-35-123[2]).

Every such mortgage when properly executed is a mortgage to secure the payment of the moneys therein specified, and if it contains the words, "and warrants the title to the same," it is construed as warranting covenants of seisin, right to convey, against encumbrances except as stated in instrument, and quiet enjoyment (C.R.S. 38-30-113[2]); but if the words, "and warrant the title to the same," are omitted, no such covenants are implied. (C.R.S. 38-30-117[3]).

There are many forms of public trustee deeds depending upon circumstances. Following is one form which is occasionally used with variations containing addition of waiver of homestead and provision for receivership in case of default.

This Indenture, made this . . . . day of . . . ., 20. . . ., between . . . ., whose address is . . . . County of . . . ., State of Colorado, part . . . . of the first part, and the Public Trustee of the . . . . County of . . . ., State of Colorado, party of the second part, Witnesseth:

That Whereas, The part. . . . of the first part ha. . . . executed . . . .h. . . . promissory note . . . . bearing even date herewith, for the . . . . principal sum of . . . . Dollars, payable to the order of . . . ., whose address is . . ., on or before . . . ., with interest thereon from date until maturity at the rate of . . . .% per annum, interest payable. . . .

And Whereas, The said part. . . . of the first part . . . . desirous of securing said promissory note . . . . in whose hands soever the said note may be.

Now Therefore, The said part. . . . of the first part for the purpose aforesaid, do . . . . hereby grant, bargain, sell, and convey unto said Public Trustee the following described property situate in the . . . . County of . . . ., State of Colorado, to-wit:

To have and to hold in trust nevertheless that in case of default (specify as appropriate), the beneficiary hereunder or the legal holder of the indebtedness secured hereby may declare a violation of any of the covenants herein contained and elect to advertise said property for sale and demand such sale, then, upon filing notice of such election and demand for sale with the Trustee, who shall upon receipt of such notice of election and demand for sale cause a copy of the same to be recorded in the recorder's office of the county in which said real estate is situated, it shall and may be lawful for the Trustee to sell and dispose of the same at public auction at the (specify) door of the Court House in the County of (specify), State of Colorado, for the highest and best price the same will bring in cash, four weeks' public notice having been previously given of the time and place of such sale, by advertisement, weekly, in some newspaper of general circulation at that time published in said county of (specify) (insert covenants and agreements, if any, as: seisin; against encumbrances; for insurance; taxes, expenses of release; attorneys' fees in case of foreclosure; and option of beneficiary that debt become due on default or breach of covenant).

In Witness Whereof, The said party . . . . of the first part has . . . . hereunto set . . . . hand. . . . and seal. . . . the day and year first above written.

Form of Release.

A form of release of a deed of trust in common use is as follows:

Know All Men by These Presents, That whereas, ... of the County of . . . ., State of Colorado, by . . . . certain Deed of Trust, dated the . . . . day of . . . ., 20. . . ., and duly recorded in the office of the County Clerk and Recorder of . . . . County, State of Colorado, on the . . . . day of . . . ., 20. . . ., in book . . . . of said . . . . County Records, on page . . . . conveyed to the Public Trustee in said . . . . County, certain real estate in said Deed of Trust described, in trust to secure the payment of indebtedness referred to therein.

And Whereas, The said . . . . has . . . . paid and fully satisfied said note . . . ., together with all interest and charges thereon, according to . . . . tenor:

Now, Therefore, At the request of the legal holder of the indebtedness secured by said Deed of Trust, and in consideration of the premises, and the payment of the statutory sum, the receipt of which is hereby acknowledged, I . . . . as the public Trustee in said . . . . County, do hereby remise, release and quitclaim unto . . . . the said . . . . and . . . . heirs and assigns forever, all the right, title and interest which I have in and to the said real estate, as such Public Trustee, in said Deed of Trust mentioned, and more particularly described as follows: to-wit: . . . . situate, lying and being in the County of . . . ., State of Colorado.

To Have and to Hold the Same, Together with all and singular the privileges and appurtenances unto the said . . . . heirs and assigns forever. And further, that the said Trust Deed is, by these presents, to be considered as fully and absolutely released, cancelled and forever discharged.

Witness my hand and seal, this . . . . day of . . . ., 20. . . . .

. . . .

As the Public Trustee in said

. . . . County.

. . . . as the Public Trustee in said . . . . County.

Please execute this release, the indebtedness secured by the above mentioned Deed of Trust having been fully paid.

. . . .

(To be signed and acknowledged by the legal holder of the indebtedness secured by said deed of trust).

The same form may be used for a release of a mortgage by substituting “Mortgage” for “Deed of Trust”, by substituting name of mortgagee for references to Public Trustee and by omitting request to Public Trustee to execute release.

Partial Release of Deed of Trust.

Form in common use is identical to Release of Deed of Trust except for addition of “And whereas, by the terms of said Deed of Trust partial releases are to be made from time to time upon certain conditions as in said Deed of Trust set forth, and whereas, said conditions have been performed as to the real estate hereinafter described.”

Chattel Mortgages.

See topic 20.01 Chattel Mortgages.

Homestead Exemption.

See category 8 Debtor and Creditor, topic 8.10 Homesteads.

Uniform Consumer Credit Code adopted.

Public Trustee Sale Bid.

Written bids submitted in public trustee sales must itemize all amounts due under note and deed of trust and all allowable expenses, including appraisal fees, attorney fees and costs, and are required to be substantially in following form:

(2) BID

TO:____________________

Public Trustee (or Sheriff) of the County (or City and County) of __________, State of Colorado (hereinafter the “Officer”)

DATE:____________________

__________________, whose mailing address is __________________, bids the sum of $______ in your Sale No. _____ to be held on the ______ day of _________, 20___.

The following is an itemization of all amounts due the Holder of the evidence of debt secured by the Deed of Trust or other lien being foreclosed.

(Inapplicable Items May be Omitted):

Principal $____________

Interest ____________

Late Charges ____________

Allowable Prepayment Penalties or Premiums ____________

Other Amounts Due under the Evidence of Debt (Specify) ____________

Less Impound/Escrow Account Credit ____________

Plus Impound/Escrow Account Deficiency ____________

Other (Describe) ____________

Category Subtotal: $____________

Plus Fees and Costs for the Following:

Title Commitments and Insurances or Abstractor Charges ____________

Property, General Liability, and Casualty Insurance ____________

Court Docketing ____________

Appraisals ____________

Property Inspections ____________

Statutory Notice ____________

Postage ____________

Electronic Transmissions ____________

Photocopies ____________

Attorney Fees ____________

Telephone ____________

Category Subtotal: $____________

Plus Fees and Costs for the Following:

Officer ____________

Publication ____________

Other (Describe) ____________

Category Subtotal: $____________

Plus the Following:

Permitted Amounts Paid On Prior Liens ____________

Taxes and Assessments ____________

Utility Charges Owed or Incurred ____________

Homeowners’ Association Assessments Paid ____________

Permitted Lease Payments ____________

Category Subtotal: $____________

Total Due Holder of the Evidence of Debt ____________

Bid $____________

Deficiency $____________

I enclose herewith the following items:

1. Order Authorizing Sale.
2. Check (if applicable) to your order in the sum of $_______ covering the balance of your fees and costs.
3. Other:____________________.

Please send us the following:

1. Certificate of Purchase.
2. Confirmation Deed.
3. Promissory Note with deficiency noted thereon.
4. Refund for overpayment of Officer's fees and costs, if any.
5. Other:____________________.

NAME OF HOLDER OF THE EVIDENCE OF DEBT OR THE ATTORNEY FOR THE HOLDER

By:____________________

Address:____________________

Telephone:____________________

RECEIPT

Receipt of the foregoing bid with respect to Public Trustee Sale No. _____ is hereby acknowledged this ______ day of __________________, ______, by the undersigned.

Public Trustee of the (City and) County of _____________

By:

Name:___________________

Title:____________________

21 PROPERTY

21.01 ABSENTEES:

There is no general provision affecting rights or liabilities of absentees or nonresidents. For particular related provisions, see following: categories Business Organizations, topic

Corporations; Civil Actions and Procedure, topics Limitation of Actions, Process; Debtor and Creditor, topic Attachment; Estates and Trusts, topics Death, Executors and Administrators; Family, topic Husband and Wife; Transportation, topic Motor Vehicles.

Care of Property.

See category 14 Family, topic 14.07 Guardian and Ward.

Process Agent.

Foreign entity, including nonresident corporations, limited liability companies, limited liability partnerships and limited liability limited partnerships, must file statement of foreign entity authority with Secretary of State in order to transact business or conduct activities. (C.R.S. 7-90-801). Statement of authority must contain designation of registered agent for service of process. (C.R.S. 7-90-803). Service on foreign entity not in compliance with C.R.S. 7-90-801 may be by registered or certified mail, return receipt requested, addressed to entity at its principal address. (C.R.S. 7-90-704). Owners of lands registered under Torrens Title Registration Act must appoint agent residing in state. (C.R.S. 38-36-114).

Escheat.

Uniform Unclaimed Property Act adopted with modifications, effective July 1, 1987. (C.R.S. 38-13-101 to 134). If there is no known qualified taker of interest in decedent’s estate, personal representative reduces interest to cash and that interest is held by state treasurer for 21 years, subject to claims of persons legally entitled to it. (C.R.S. 15-12-914[1]). At end of 21 year period, interest becomes property of state. (C.R.S. 15-12-914[3]). Any person, corporation or other entity holding unclaimed moneys in fiduciary capacity may pay such moneys to state treasurer to be held in same manner, such payment discharging such person from further liability. (C.R.S. 15-12-914[2]). Dividends remaining unclaimed after approval of final report of liquidation of savings and loan association may be transferred to commissioner of savings and loan associations, who may elect, after six years, to pay such dividends over to state treasurer to be held for 21 years prior to escheat. (C.R.S. 11-41-132).

Voting.

Any registered elector who expects to be absent from precinct or unable to attend polls may cast mail-in or early voter’s ballot. (C.R.S. 1-8-101 to 118).

21.02 ADVERSE POSSESSION:

Character of Possession.

Possession must be actual, adverse, hostile, under claim of right, exclusive and uninterrupted for statutory period. However, if claimant is in actual possession of land under claim and color of title, made in good faith, and pays all legally assessed taxes and both possession and payment of all legally assessed taxes continue for seven successive years (C.R.S. 38-41-108) or if lands are vacant and unoccupied and claimant pays all legally assessed taxes for seven successive years and holds color of title in good faith (C.R.S. 38-41-109), then claimant acquires legal ownership to extent of his paper title. Possession may be tacked where there is privity of possession. (C.R.S. 38-41-108, 109). Possession necessary to establish title to property need not always be personal possession, but may be established by conduct of another authorized by adverse claimant. (635 P.2d 926). Execution of written agreement acknowledging exclusive title and right to use in another prior to running of applicable statute of limitations constitutes fatal interruption of period of adverse possession. (628 P.2d 166). Standard of proof is “preponderance” of evidence. (C.R.S. 13-25-127[1]; 768 P.2d 701). No adverse possession of property owned by state, county, city or municipality. (C.R.S. 38-41-101[2]). Adverse possession of surface is not adverse possession of severed mineral estate. (119 Colo. 561, 206 P.2d 600).

Duration of Possession.

Title may be obtained by 18 successive years of adverse possession without color of title (C.R.S. 38-41-101) or after seven years of possession under color of title made in good faith and payment of all legally assessed taxes for seven successive years, to extent of paper title (C.R.S. 38-41-108) or after seven years of payment of legally assessed taxes and color of title held in good faith for vacant and unoccupied lands, to extent of paper title (C.R.S. 38-41-109).

Easements.

Easements may be obtained by adverse possession for 18 years. (116 Colo. 221, 179 P.2d 671). Possession may be tacked. (152 Colo. 342, 382 P.2d 191). Solar easement cannot be acquired by prescription. (C.R.S. 38-32.5-101). All roads over private lands used adversely without interruption or objection for more than 20 years become public highways. (C.R.S. 43-2-201[1][c]). Mere footpath across unenclosed vacant lands in urban area is not public highway. (687 P.2d 1299).

Title to property acquired by adverse possession matures into absolute fee interest after running of applicable statute. (C.R.S. 38-41-101; 181 Colo. 435, 510 P.2d 336). Transfer of property thereafter only effected by validly executed deed, adverse possession, or other legal means. (632 P.2d 644).

Disabilities.

Disabilities in existence when cause of action accrued and which are still in existence when applicable limitation period has run entitle disabled person to two additional years in which to commence action, after which his rights are cut off. (C.R.S. 38-41-112).

21.03 [RESERVED]

21.04 CONVEYANCES:

See topic 21.06 Deeds.

21.05 CURTESY:

Abolished. (C.R.S. 15-11-112).

21.06 DEEDS:

See topic Real Property for types of estates.

Execution.

Deeds may be signed by grantor or by attorney in fact under recorded power of attorney. (C.R.S. 38-30-113; 123). Acknowledgment is not required for validity of deed or for recording (C.R.S. 38-35-106[1]), but acknowledgment in statutory form is prima facie evidence of proper execution (C.R.S. 38-35-101[2]). Powers of attorney may be acknowledged and proved like deed. (C.R.S. 38-30-124).

See also topic 21.16 Real Property; categories 8 Debtor and Creditor, topic Homesteads, subhead Alienation or Encumbrance; Documents and Records, topic Acknowledgments; Family, topic Husband and Wife, subhead Conveyance or Encumbrance of Property.

Execution by Corporation.

Common method of conveyance for private corporation is execution by president, with attestation by secretary. Private corporation authorized by law to convey, mortgage or lease property may use standard form of execution or may convey by instrument under its common seal, subscribed by its president, vice president or other head officer. (C.R.S. 38-30-144[1]). If latter method of conveyance is used, instrument shall be deemed to have been executed in usual course of business and shall be binding on corporation as against bona fide purchasers, encumbrancers and other persons relying on instrument. (C.R.S. 38-30-144[2]). Alternatively, domestic or foreign corporations may appoint agents or attorneys-in-fact to convey real estate and it is not necessary to affix corporate seal to any conveyance so executed. (C.R.S. 7-103-105).

Recording.

All deeds and other instruments affecting title to real property are within jurisdiction of recording act. (C.R.S. 38-35-109[1]). Recording statute classified race-notice. (C.R.S. 38-35-109[1]). Recording is not necessary for validity of rights as between parties and third persons with notice, but unrecorded document is not valid against any other person who first records. (C.R.S. 38-35-109[1]). There is no time limit for effective recording (C.R.S. 38-35-101[4]), except that conveyances to state, county or municipality must be made within 30 days of conveyance (C.R.S. 38-35-109.5), but recording must be in office of county clerk and recorder in county where property is situated (C.R.S. 38-35-109[1]). All documents of title should include immediately preceding or following legal description street address or comparable identifying numbers for property if displayed on property or any building (C.R.S. 38-35-122[1]), but failure to state address does not render document invalid nor render title unmarketable if legal description appears in deed (C.R.S. 38-35-122[3]). Any deeds or other instruments containing newly created legal description of real property must include name and address of person who created such legal description, but failure to state such name and address does not render such instrument invalid or not recordable and does not confer liability upon person who prepared such instrument. (C.R.S. 38-35-106.5). Legal description controls if variance or ambiguity exists by including street address. (C.R.S. 38-35-122[2]). Clerk and recorder's office will not record any deed which does not include notation of grantee's legal address. (C.R.S. 38-35-109[2]). If instrument is executed by attorney-in-fact, power of attorney must be recorded in same office to show grantor's assent. (C.R.S. 38-30-123). If instrument may be filed by law with county clerk and recorder, then filing with county clerk and recorder is equivalent to recording and, recording thereof in office of such county clerk and recorder shall be equivalent to filing thereof. (C.R.S. 38-35-109[1]). Master form mortgages or deeds of trust may be recorded in any county without acknowledgment, signature, identifying any property or naming any parties. (C.R.S. 38-35-109[1.5]). State and local employees may either accept or reject for recording or filing any spurious document (C.R.S. 38-35-202[1]), and such employees are relieved from any liability for either accepting or rejecting for recording or filing any document such employee believes in good faith to be spurious document (C.R.S. 38-35-202[2]). Spurious document is one that is forged, groundless, fraudulent or otherwise patently invalid. (C.R.S. 38-35-201[3]). Spurious document is only valid for 30 days following its recording or filing. (C.R.S. 38-35-203[1]). Any person who offers to have recorded or filed in office of county clerk and recorder any document purporting to create lien against real property, knowing or having reason to know that such document is forged, groundless, contains material misstatement or false claim, or is otherwise invalid, shall be liable to owner of such real property for sum of not less than $1,000 or for actual damages caused thereby, whichever is greater, together with reasonable attorneys' fees. Any grantee or other person purportedly benefited by such recorded forged, groundless, or false document who willfully refuses to release such document of record upon request of owner of real property affected shall be liable to owner for damages of not less than $1,000, together with reasonable attorneys' fees. (C.R.S. 38-35-109[3]). Instrument may be recorded whether or not acknowledged or properly acknowledged. (C.R.S. 38-35-106[1]). Recordation of acknowledged instrument is prima facie evidence of due delivery. (C.R.S. 38-35-101[4]). Unacknowledged or defectively acknowledged deed which has remained of record for ten years is deemed properly acknowledged. (C.R.S. 38-35-106[2]).

Deeds or other instruments affecting title to real property and acknowledgment or proof of execution thereof written in foreign country and language may be recorded only if accompanied by sworn translation. If so translated, instrument may be read in evidence and recorded as if it were written in English language, but translation is not conclusive upon any party desiring to question correctness thereof. (C.R.S. 38-30-140).

Recording Fee.

See category 10 Documents and Records, topic 10.04 Records.

Operation and Effect.

Deed is deemed to convey estate in fee simple unless limited expressly or lesser estate is conveyed by operation of law. (C.R.S. 38-30-107). Deed is valid conveyance of after-acquired title if it purports to convey fee simple absolute; grantor is deemed to hold title in trust for his vendee. (C.R.S. 38-30-104). Person claiming right or title to land may convey his interest even if he is out of possession or if there is adverse possession against him. (C.R.S. 38-30-105). All conveyances carry right to immediate possession unless future day is specified. (C.R.S. 38-30-120). Water rights, except where held as ownership of stock in ditch company, must be conveyed with same formalities as real estate. (C.R.S. 38-30-102). Estate in joint tenancy is created only by express declaration in instrument of conveyance that property is conveyed in joint tenancy, except when conveyance is to two or more personal representatives, trustees, or other fiduciaries which shall be presumed to create estate in joint tenancy. (C.R.S. 38-31-101). Conveyance to grantee named in representative capacity shall also describe representative capacity, name beneficiary and define source of representative's authority, or refer to recorded or filed writing containing such information by citing recording or filing information. Failure to do so will be deemed description of person only and not notice of his representative capacity; provided that affidavit may subsequently be filed to provide notice of representative capacity. (C.R.S. 38-30-108).

Livery of seisin is unnecessary. (C.R.S. 38-30-103). If conveyance would have been of estate in fee tail at common law, that grantee shall be deemed to be seized of estate in fee simple. (C.R.S. 38-30-106). Affixation of scroll by way of seal shall have same effect as seal. (C.R.S. 38-30-125).

Covenants.

Statutory form of warranty deed deemed to contain covenants of seisin, right to convey, freedom from encumbrances, warranty of peaceable possession. (C.R.S. 38-30-113[2]). Covenants of seisin, peaceable possession, freedom from encumbrances, and warranty in instrument of conveyance run with premises and inure to benefit of subsequent purchasers and encumbrancers. (C.R.S. 38-30-121). Warrantee may not sue warrantor once possession has been actually delivered until party menacing warrantee's possession has begun proceedings to obtain possession and warrantor has had notice and refused to defend. (C.R.S. 38-30-122). Statutory form of special warranty deed contains covenant that grantor will warrant and defend title against persons claiming title by, through or under grantor. (C.R.S. 38-30-115). Statutory forms of bargain and sale and quitclaim deeds contain no warranties. (C.R.S. 38-30-115, 116).

See also categories 3 Business Regulation and Commerce, topic Frauds, Statute of; Mortgages, topic Mortgages of Real Property.

Taxes.

See category 22 Taxation, topic 22.13 Property Taxes, subhead Real Estate Conveyance Tax.

Forms.

Deeds may be substantially in following forms:

Warranty Deed.

. . . ., whose street address is . . . ., City or Town of . . . ., County of . . . . and State of . . . ., for the consideration of . . . . Dollars, in hand paid, hereby sell(s) and convey(s) to . . . . whose street address is . . . ., City or Town of . . . ., County of . . . . and State of . . . ., the following real property in the County of . . . . and State of Colorado, to wit: . . . . with all its appurtenances and warrant(s) the title to the same, subject to . . . .

Signed this . . . . day of . . . ., 20. . . . . .

Such deed may be acknowledged. (C.R.S. 38-30-113[1]).

Special Warranty Deed.

Deed executed according to above form with phrase “and warrant the title against all persons claiming under me” is special warranty deed. (C.R.S. 38-30-115).

Bargain and Sale Deed.

Deed executed according to above form with words, “and warrant the title to the same,” omitted therefrom has the same force and effect as a bargain and sale deed, without covenants of warranty, at common law and will pass after-acquired title of grantor. (C.R.S. 38-30-115).

Quitclaim Deed.

A deed executed according to the above form with the word “quitclaim,” substituted for “convey,” and the words “and warrant the title to the same,” omitted therefrom, is a deed of quitclaim. (C.R.S. 38-30-116).

See category 12 Environment, topic 12.01 Environmental Regulation, subhead Hazardous Waste Disposal, for requirements for deeds of property used for disposal of hazardous wastes.

21.07 DEEDS OF TRUST:

See category 20 Mortgages, topic 20.04 Mortgages of Real Property.

21.08 DOWER:

Abolished. (C.R.S. 15-11-112).

21.09 ESCHEAT:

Uniform Unclaimed Property Act was passed with modifications, effective July 1, 1987. (C.R.S. 38-13-101 to 134). Act includes unclaimed intangible property held in fiduciary capacity. (C.R.S. 38-13-108). See category 3 Business Regulation and Commerce, topic 3.01 Banks and Banking, subhead Unclaimed Deposits.

See also topic 21.01 Absentees; category 13 Estates and Trusts, topic 13.06 Descent and Distribution.

21.10 LANDLORD AND TENANT:

Uniform Commercial Code Art. 2A.

Adopted with amendments. (C.R.S. 4-2.5-101 to 533). See topic Commercial Code.

Kinds of Tenancy.

Tenancies may be at will or at sufferance, periodic, or for certain term.

Leases for a longer period than one year must be in writing. (C.R.S. 38-10-108). All manufactured home leases must be in writing. (C.R.S. 38-12-202[1][a]). Witnesses are not necessary. Acknowledgment is not necessary for validity or for recording but is necessary for presumption of proper execution (C.R.S. 38-35-101[2]) and, together with recording, for presumption of due delivery (C.R.S. 38-35-101[4]).

Security Deposits.

Term “security deposit” as used in C.R.S. 38-12-101 et seq. applies only to rentals of residential premises (38-12-102[2]). With respect to such residential security deposits, following provisions apply. Landlord must return security deposit in full within one month of termination of tenancy or term, or surrender and acceptance of premises, whichever is later, unless lease extends period up to 60 days (C.R.S. 38-12-103[1]), or within, generally, 72 hours if termination due to hazardous gas condition (C.R.S. 38-12-104). Security deposit cannot be retained for ordinary wear and tear. If actual cause exists for retaining deposit, landlord must deliver to tenant written statement of reasons for retention and difference between amount retained and amount deposited. (C.R.S. 38-12-103[1]). Statement may be mailed to tenant’s last known address. (C.R.S. 38-12-103[1]). Failure to provide statement forfeits landlord’s right to retain any part of security deposit. (C.R.S. 38-12-103[2]). Landlord is liable for treble damages, reasonable attorneys’ fees, and court costs for willful retention of security deposit in violation of statute (C.R.S. 38-12-103[3][a], [b]) unless court finds landlord acted in good faith (194 Colo. 160, 570 P.2d 532). Tenant must give seven days notice of intent to file legal proceeding. (C.R.S. 38-12-103[3][a]). Statute of limitations for treble damages is one year. (C.R.S. 13-80-104). Statute of limitations for recovery of deposit and attorneys fees is six years. (193 Colo. 391, 566 P.2d 1073). Landlord has burden of proving withholding was not wrongful. (C.R.S. 38-12-103[3][b]). Upon cessation of his interest in dwelling, landlord must transfer deposited funds to his successor in interest and give notice of transfer to tenant or return funds to tenant. (C.R.S. 38-12-103[4]). Requirements regarding security deposits apply to short term rentals of condominium units as well as other residential premises.

Manufactured home lease security deposits may not exceed statutory limits. (C.R.S. 38-12-207). Such deposits must be deposited in separate account administered by landlord as private trustee. (C.R.S. 38-12-209[2][b]).

Recording is not necessary even as against third persons where tenant is in possession (55 Colo. 287, 134 P. 107) and is never necessary as between parties or those with actual notice (C.R.S. 38-35-109). If recorded, lease should include street address or comparable identifying numbers immediately preceding or following legal description. (C.R.S. 38-35-122[1]). Failure to include address does not invalidate instrument. (C.R.S. 38-35-122[3]).

Rent.

Obligation to pay rent is governed by common law. In absence of express provision in lease to contrary, tenant not obligated to pay future rents if tenant vacates in compliance with landlord’s notice to pay or quit premises. (660 P.2d 907).

Rent Control.

Counties and municipalities may not enact rent control legislation on private residential property. (C.R.S. 38-12-301).

Lien.

Landlord renting furnished or unfurnished rooms or apartments for tenants' housekeeping purposes has lien upon tenants' household furniture, goods, appliances and other personal property, excluding specified items, and personal effects, for amount of unpaid board, lodging or rent and reasonable costs of enforcement, but not attorneys' fees. (C.R.S. 38-20-102[3][a]). Landlord must allow tenant access to premises to remove property not covered by lien. (C.R.S. 38-20-102[3][b]). If tenant has not vacated premises, landlord may enter to assert lien and may peaceably assert dominion over property covered by lien. If landlord's assertion substantially interferes with tenant's right to reasonably occupy and enjoy premises, lien is forfeited and tenant has action for damages. (C.R.S. 38-20-102[3][c]). Lien terminates if not foreclosed in 60 days after charges become due. (C.R.S. 38-20-107). If charges for which lien is given are not paid within 30 days after due and payable, landlord may file foreclosure action in county or district court of county in which lease was executed or entered into or in which tenant resided at time lease was entered into or at time foreclosure action commenced. Landlord need not file foreclosure action if property held falls within statutory definition of abandoned property. (C.R.S. 38-20-107[3], 116). Summons issued by court clerk upon filing of complaint, commanding tenant to file answer and appear before court at specified time and date no less than three nor more than five days from date of issuance, and giving notice of consequences of failure to answer. (C.R.S. 38-20-108). After receiving judgment, landlord may sell property at public auction for cash after giving ten days notice of sale by publication and after delivering copy of notice to owner of property or mailing copy to his usual place of abode if he does not reside in county. (C.R.S. 38-20-109[1]). Landlord may retain amount of charges and costs, including maximum of $90 for storage, and must return excess and unsold property to owner. (C.R.S. 38-20-109[1]). Lienor may purchase at sale. (C.R.S. 38-20-111). Lien does not bar landlord's right of action for charges remaining after sale. (C.R.S. 38-20-113). Court may order accelerated sale if property may deteriorate or is expensive to keep. (C.R.S. 38-20-109[2]).

Injuries.

Lessor liable for injuries outside premises caused by dangerous activity on premises, notwithstanding lessor's relinquishment of control under lease. (44 Colo. App. 429, 618 P.2d 706; 768 P.2d 1260).

Consent to Assignment.

Lease assignable unless covenant to contrary. (175 P.2d 392). Covenant requiring consent is enforceable, but landlord's withholding of consent must be reasonable if lease does not give landlord absolute right to withhold. (540 P.2d 1149; 699 P.2d 1343; 731 P.2d 700; 972 P.2d 276). Whether landlord unreasonably withheld consent is question of fact based upon standard of conduct of reasonably prudent person, and cannot be based upon arbitrary considerations of personal taste, convenience, sensibility or racial reasons. (638 P.2d 824).

Termination of Tenancy.

Notice is not required for a term certain. Law presumes tenancy at will after assent of owner is shown. Tenancy for a year or more requires three months notice of termination; tenancy for six months to a year, one months notice; tenancy for one to six months, ten days notice; tenancy for one week to one month, tenancy after substantial violation or tenancy at will, three days notice; and tenancy of less than one week, one days notice. Notice shall describe property and time of termination and shall be signed by person giving notice or his agent or attorney. (C.R.S. 13-40-107). Notice may be served by delivery to tenant or another occupant of premises, by leaving with member of tenant's family more than 15 years old residing in or in charge of premises, or by posting in conspicuous place if no one is on premises when service is attempted. (C.R.S. 13-40-108). Special rules for manufactured home parks. (C.R.S. 38-12-201 to 217). Foreclosure on property terminates recorded junior or subordinated leases (864 P.2d 116; 867 P.2d 111), and unrecorded junior lease if lessee named and notified in foreclosure (C.R.S. 38-38-

101[7][a]). Developer who converts existing multi-unit dwelling into condominium units must notify each residential tenant of dwelling of such conversion in accordance with statutory provision. (C.R.S. 38-33-112). Tenant can vacate premises and terminate lease if landlord fails to repair hazardous gas condition within, generally, 72 hours of written notice of condition. (C.R.S. 38-12-104[3], [4]).

Manufactured home leases may be terminated only upon written notice containing specified information (C.R.S. 38-12-202), and only for reasons limited by statute (C.R.S. 38-12-203 to 205).

Abandonment.

Two requisite elements of abandonment include act of abandonment and intent to relinquish premises. Landlord can take possession of abandoned lease premises without resort to legal process. (623 P.2d 49).

Holding Over.

Landlord/tenant holdover doctrine discussed, 864 P.2d 116. See also subhead Proceedings to Recover Possession, infra.

Dispossession.

See subhead Proceedings to Recover Possession, infra.

Distress.

See subhead Proceedings to Recover Possession, infra.

Proceedings to Recover Possession.

Proceedings to recover possession may be brought for forcible entry, forcible detainer, or unlawful detainer. (C.R.S. 13-40-109). Unlawful detainer includes tenant at will or at sufferance holding over after termination (C.R.S. 13-40-104[1][c]), tenant holding over without permission after default in rent payment and after three days written notice demanding payment or possession (C.R.S. 13-40-104[1][d]), and tenant holding over after substantial violation or without landlord's permission in breach of other covenant or condition of lease and after three days written notice requiring possession (C.R.S. 13-40-104[1][d.5], [e], [e.5]). Agreement under which tenant holds possession must not contain waiver by tenant of three days notice requirement. (C.R.S. 13-40-104[1][d]). In absence of clear lease language preserving tenant's liability for unaccrued rent, notice to pay rent or quit premises constitutes election by landlord to terminate unless tenant's subsequent rent payment renders notice ineffective. (660 P.2d 907; 684 P.2d 957). Notices required must state grounds for right to possession and must be signed. (C.R.S. 13-40-106).

Proceedings commenced by filing written complaint in district or county court describing property, grounds for recovery, name of person in possession or occupancy, and prayer for recovery of possession. Complaint may also include prayer for rent due or to become due, for present and future damages, and for costs and other relief. (C.R.S. 13-40-110). Court clerk or plaintiff's attorney issues summons for defendant to appear in no less than five business days nor more than ten calendar days or take default judgment. (C.R.S. 13-40-111). Personal service may be had as in any civil case. If personal service can't be had by person qualified under Colorado Rules of Civil Procedure to serve process, such person may serve by posting summons and complaint on premises. If personal service not obtained, plaintiff must mail, no later than next day following day on which he files complaint, copy of summons or if alias summons is issued, copy of alias summons, and copy of complaint to defendant at premises by postage-paid, first class mail. Personal service or service by posting must be made at least five business days before day for appearance specified in summons. (C.R.S. 13-40-112[3]). Defendant must file written answer, at or before time specified for appearance, describing grounds for claim for possession, presenting all defenses, and admitting or denying all material allegations of complaint. (C.R.S. 13-40-113[1]). If service by posting, judgment may be only for restitution, but court may continue case until personal service obtained. (C.R.S. 13-40-115[1]). If personal service obtained, judgment may be for restitution, rent, damages and costs. (C.R.S. 13-40-115[2], 123). Prevailing party entitled to recover damages, reasonable attorney fees and costs, except that residential landlord or tenant who is prevailing party must not be entitled to receive reasonable attorneys fees unless residential rental agreement between parties contains provision for either party to obtain attorneys fees. (C.R.S. 13-40-123). If plaintiff's action, upon trial, is dismissed or if plaintiff fails to prove right to possession of premises, defendant gets judgment and execution for his costs. (C.R.S. 13-40-116). Writ of restitution cannot be issued until 48 hours after entry of judgment. (C.R.S. 13-40-122). If either party appeals, all proceedings shall be stayed (C.R.S. 13-40-117[2], and if defendant appeals, he shall deposit with trial court all rents found due and specified in judgment, and thereafter deposit with appellate court all future rents as they come due. Penalty for failure to pay such rents due is appellate court's affirmance of judgment with costs. (C.R.S. 13-40-118). If appellee believes he may suffer serious economic harm during appeal, he may petition court for additional undertaking by appellant and court shall order such undertaking only after hearing and upon finding substantial likelihood of economic harm to appellee not protected by appeals bond and deposit of rent. (C.R.S. 13-40-117[3]).

Discrimination in rental or lease of housing or refusal to show, rent, or lease housing by any person with right of ownership or possession on account of race, creed, color, sex, sexual orientation, marital status, familial status, religion, national origin, ancestry or disability is prohibited (C.R.S. 24-34-502[1][a]), except that "housing" does not include any room offered for rent or lease in single family dwelling maintained and occupied in part by owner or lessee as his household (C.R.S. 24-34-501[2]), and familial status does not apply to housing for older persons (C.R.S. 24-34-502[7]), nor to certain private individual owners of single family houses (C.R.S. 24-34-502[8]). Remedies include administrative conciliation proceeding, injunctive relief and cease and desist order. (C.R.S. 24-34-306, 508).

Uniform Residential Landlord and Tenant Act.

Not adopted.

Rental Location Agents.

See category 3 Business Regulation and Commerce, topic 3.04 Brokers.

21.11–21.12 [RESERVED]

21.13 PERPETUITIES:

Common law rule against perpetuities has been superseded by statute in Colorado, with respect to nonvested property interests or powers of appointment created on or after May 31, 1991. (C.R.S. 15-11-1101 to 1107). Statute also has some applicability to nonvested property interests or powers of appointment created before May 31, 1991. (C.R.S. 15-11-1106[2]).

Rule against perpetuities has no application to transfers in trust of not more than $25,000 for purpose of creating or maintaining grave, tomb, monument, etc. (C.R.S. 38-30-110).

Rule against perpetuities does not apply to trust for benefit of employees or their beneficiaries or pension, stock bonus, disability, death benefit or profit sharing plan existing on Sept. 29, 1951. (C.R.S. 38-30-111, 112).

21.14 PERSONAL PROPERTY:

Joint tenancy in personal property created by declaration of joint tenancy in instrument evidencing ownership. (C.R.S. 38-11-101).

21.15 POWERS OF ATTORNEY:

Attorneys in Fact.

A conveyance or mortgage of real estate may be executed by attorney in fact acting under power of attorney, provided power is recorded, in same offices in which conveyances themselves are required to be recorded. (C.R.S. 38-30-123). Power of attorney authorizing agent to receive principal's workmen's compensation benefits generally void. (C.R.S. 8-42-124).

Formalities.

Power of attorney for conveying, leasing or releasing interests in real property may be acknowledged or proved in same manner as deeds. (C.R.S. 38-30-124).

Revocation.

If power of attorney contains words showing intent of principal that authority conferred is exercisable notwithstanding disability, then it is exercisable notwithstanding disability, incapacity, or later uncertainty as to whether principal is dead or alive. (C.R.S. 15-14-501). Power of attorney not containing such words not revoked so long as attorney acts in good faith without actual knowledge of death, disability or incompetence of principal. (C.R.S. 15-14-502).

Uniform Durable Power of Attorney Act.

Adopted with significant modifications. (C.R.S. 15-14-501, 502).

Colorado Patient Autonomy Act authorizes principal to grant to agent medical durable power of attorney to consent to or refuse medical treatment on behalf of principal. (C.R.S. 15-14-503 to 509).

Uniform Statutory Form Power of Attorney Act.

Legislatively sanctions prescribed form of power of attorney for broad range of powers (C.R.S. 15-1-1302) and interprets scope of agent's empowerment for each type of power (C.R.S. 15-1-1304 to 1318).

Members of Armed Forces.

No special statutory provision.

Other Provisions.

Statutes also provide generally for applicability and duration of agency instruments, duties of agents, reliance by third parties on agency instruments and related matters, and form agent's affidavit regarding power of attorney. (C.R.S. 15-14-601 to 611).

21.16 REAL PROPERTY:

Joint tenancy and tenancy in common are recognized. Tenancy by entirety is not. (62 Colo. 461, 163 P. 76). Except when real property is conveyed or devised to executors, trustees or fiduciaries, tenancy in common presumed unless declared in instrument conveying or will devising property that property conveyed or devised in joint tenancy. (C.R.S. 38-31-101). Grantor may be one of grantees in such instrument of conveyance. (C.R.S. 38-31-101).

Grant deemed to be in fee simple unless limited by express words, or by operation of law; no words of inheritance necessary. (C.R.S. 38-30-107). Estates in fee tail are abolished; persons who would have taken at common law take in fee simple. (C.R.S. 38-30-106).

Rule in Shelley's Case.

Colorado supreme court has assumed, without deciding, rule is in force. (71 Colo. 401, 207 P. 332).

Foreign Conveyances or Encumbrances.

All instruments affecting title to real estate acknowledged or proved in another state before a notary public or other officer empowered by laws of Colorado to take acknowledgments, if the form of acknowledgment is in substantial compliance with laws of state where taken or with requirements in Colorado (see category 10 Documents and Records, topic 10.01 Acknowledgments), are deemed prima facie to have been properly acknowledged before proper officers and such instruments or record thereof are prima facie evidence of execution, acknowledgment and delivery thereof. (C.R.S. 38-35-105). Instruments affecting title to real property executed in any foreign country may be executed and acknowledged in language of such foreign country but may only be recorded if such instruments accompanied by sworn translation thereof into English, and acknowledgment or proof of execution, as translated, has same effect as if written in English, except not conclusive in challenge to correctness of translation. (C.R.S. 38-30-140).

Condominiums.

Estates, rights and interests in areas above surface of ground, whether or not contiguous to it, are severable from land and are recognized estates, rights and interests. (C.R.S. 38-32-101). Condominium ownership and interval ownership of property is recognized. (C.R.S. 38-33-102; 38-33.3-201; and C.R.S. 38-33-110). Developers must notify residential tenants of condominium conversion. (C.R.S. 38-33-112). Uniform Condominium Act has not been adopted.

Cooperatives.

Cooperative housing corporations may be formed by any three or more adult residents of Colorado associating themselves to form nonprofit corporation, specific purpose of which must be to provide each stockholder with right to occupy, for dwelling purposes, house or apartment in building owned or leased by such corporation. (C.R.S. 38-33.5-101). Corporation may have only one class of stock outstanding; interest of each stockholder deemed estate in real property rather than personal property. (C.R.S. 38-33.5-102). Bylaws of cooperative housing corporation must provide that no less than 80% of gross income of property in any taxable year be derived from tenant-stockholders. (C.R.S. 38-33.5-103[1]). Bylaws must also provide that each tenant-stockholder be credited with his proportionate payment of real estate taxes and interest paid or incurred and depreciation on real and personal property related to lands and improvements thereon. (C.R.S. 38-33.5-103[2]).

Common Interest Ownership Act applies to condominiums, cooperatives and planned communities, imposes requirements for creation, alteration and termination of such common interest communities (C.R.S. 38-33.3-201 to 222) and makes provisions for management (C.R.S. 38-33.3-301 to 319), including allowable lien of homeowners' association for six months' unpaid association assessments, with priority over other liens, except taxes (C.R.S. 38-33.3-316). Large planned community of at least 200 acres and approved for development of at least 500 residential units and 20,000 square feet of commercial use may be exempted from certain provisions. (C.R.S. 38-33.3-116.3). Certain small and limited expense communities also exempted from most provisions. (C.R.S. 38-33.3-116).

Discrimination in housing because of disability, race, creed, color, sex, sexual orientation, national origin, marital status, familial status, religion, or ancestry by any person is prohibited. (C.R.S. 24-34-502). Before start of construction of residential project including seven or more residential units, contract must be made with municipality or county where project located to guarantee that specific number of units be constructed for access by persons with disabilities. (C.R.S. 9-5-112).

Soil Analysis.

Soil and hazard analysis report of land and site recommendations developed for new residence must be provided to purchaser by builder or developer at least 14 days prior to closing. For sites with significant potential for expansive soils, buyer must be supplied with additional pertinent information. (C.R.S. 6-6.5-101). Failure to so provide subjects builder or developer to $500 fine payable to purchaser. (C.R.S. 6-6.5-101[2]).

Uniform Simplification of Land Transfers Act has not been adopted.

See also topics 21.02 Adverse Possession, Curtesy, Deeds, Dower, Landlord and Tenant; categories 3 Business Regulation and Commerce, topic Securities; Civil Actions and Procedure, topic Partition; Debtor and Creditor, topic Homesteads; Family, topic Husband and Wife; Mortgages, topic Mortgages of Real Property.

21.17 TRUST DEEDS:

See category 20 Mortgages, topic 20.04 Mortgages of Real Property.

22 TAXATION

22.01 ADMINISTRATION:

Department of Revenue, headed by executive director and including division of enforcement, administers and enforces state taxes other than property tax and home rule taxes. (C.R.S. 24-35-101). Colorado Division of Property Taxation, headed by Property Tax Administrator, charged with assisting and cooperating in administration of all property tax laws, supervising activities of assessors, reviewing methods used by assessors and county boards of equalization, issuing manuals for appraisers and valuing public utilities. (C.R.S. 39-2-109). Board of Assessment Appeals Reviews and hears appeals from decisions of property tax administrator, county boards of equalization, county assessors, and county commissioners. (C.R.S. 39-2-125). State Board of Equalization supervises overall property tax process. (C.R.S. 39-9-103).

Constitution requires annual study of county assessor compliance with constitutional assessment standards and mandates corrective action by state board of equalization. (Const., art. X, § 3[2]; C.R.S. 39-1-105.5).

Local taxes enacted by home rule jurisdictions are administered by municipal government. (Const., art. X, § 7). Usually this is done by city finance director.

Statutes exempting property not specified in constitution void. (Const., art. X, § 6). Levy must be uniform on all nonexempt property within jurisdiction of levying authority. (Const., art. X, § 3[1][a]).

Certificate of Taxes Due.

All public entities required to provide taxpayer or person authorized by taxpayer on 30 days' request certificate of taxes due from taxpayer and copies of returns or summary of tax payments for current and preceding three years. (C.R.S. 38-25.5-102, 103). General taxes on real property excluded. (C.R.S. 38-25.5-102[4]).

Interest on deficiencies for taxes administered by department is computed at prime rate reported by Wall Street Journal on July 1 of preceding year plus three points. (C.R.S. 39-21-110.5). For refunds issued after Jan. 1, 2004, unless taxpayer demonstrates good cause for overpayment that resulted in refund, for refunds greater than or equal to $5,000 and 10% of taxpayer's net tax liability for applicable period, interest will be computed at prime rate reported by Wall Street Journal on July 1 of preceding year, rounded to nearest full percent. Department must waive three points in excess of prime if taxpayer pays deficiency within 30 days, unless deficiency results from willful neglect or failure to pay tax. (C.R.S. 39-21-109[1.5]). Payment of deficiency under protest does not relieve taxpayer from protesting deficiency administratively.

Penalties.

Any person who willfully evades any tax administered by department in addition to other penalties provided by law is guilty of class 5 felony and shall be punished as provided in 18-1.3-401, and/or by fine of not more than $100,000 ($500,000 for corporation) together with costs of prosecution (C.R.S. 39-21-118). Included among penalties for failure to comply with Colorado tax provisions are following:

Income Tax.

Penalties ranging from $5 to 150% of tax due for failure to pay tax, failure to file return, fraudulent or willful failure to file return, and fraudulent or willful filing of false return and filing frivolous return. (C.R.S. 39-22-621).

Penalties are cumulative and are collected at same time and in same manner as tax. (C.R.S. 39-22-621[2][i]).

If failure of person which may have subjected him to penalties listed above was due to good cause, in judgment of director, director may waive or reduce any of such penalties. (C.R.S. 39-22-621[2][j]).

Any person who willfully fails to make return, keep required records or supply required information, in addition to other penalties, will be fined and/or imprisoned as provided in C.R.S. 39-21-118 (C.R.S. 39-22-621[3]).

Any person required to file timely annual information report shall be subject to fine of $50 for each failure. (C.R.S. 39-22-601[9]).

Any person who willfully fails to collect, account for or pay over taxes required to be collected, accounted for or paid over or who willfully fails to pay any tax, or in any manner evades or defeats any tax or payment thereof, in addition to other penalties, will be fined and/or imprisoned as provided in C.R.S. 39-21-118 (C.R.S. 39-22-621[3]).

Estate Tax.

Following penalties apply: (1) For failure to timely pay—greater of $15 or 5% of amount of tax due for first month with additional 5% for each succeeding month to maximum of 20%; (2) willful or fraudulent failure to file—greater of $75 or 100% of tax; (3) filing fraudulent return—greater of $100 or 150% of tax; (4) failure to timely pay after assessment, determination, and notice—15% of tax; (5) fraudulent failure to pay tax when due or attempt to evade payments—150% of tax; (6) failure to file within extension granted by director—5% of tax due with additional 5% for each succeeding month to maximum of 20%. (C.R.S. 39-23.5-110). Any person who willfully fails to file return, files fraudulent return, or fails to pay tax will be fined and/or imprisoned as provided in C.R.S. 39-21-118 (C.R.S. 39-23.5-113).

Sales Tax.

See topic 22.17 Sales and Use Taxes, subhead Sales Tax.

Use Tax.

See topic 22.17 Sales and Use Taxes, subhead Use Tax.

Real and Personal Property Taxes.

See topic 22.13 Property Taxes.

Gasoline and Special Fuel Tax.

Specific penalties for violations concerning gasoline and special fuel tax include greater of $30 or 10% of taxes due with additional 1.5% for each succeeding month to maximum of 18% plus interest for failure to file statement or filing false statement. (C.R.S. 39-27-105[2], 105.5[5]). Penalty for distributor's refusal to file sworn statement required by C.R.S. 39-27-105(1) or for incorrect or fraudulent statement or tax return is 30% plus interest pursuant to C.R.S. 39-21-110.5 (C.R.S. 39-27-105[3]). Penalty to nondistributor or nonsupplier for not filing statement when special fuel is diverted within state ranges from $5,000 to $15,000. (C.R.S. 39-27-105.5[3.8], [8]). Penalty for importing special fuel without license or single-trip permit also ranges from $5,000 to $15,000 plus revenue agents may detain shipment until excise tax is paid. (C.R.S. 39-22-105.5[3.5], [8]). Willful refusal or failure to report or pay gasoline or special fuel tax punishable by fine and/or imprisonment as provided in C.R.S. 39-21-118 (C.R.S. 39-27-108, 108.5). Violator may also be subject to suspension or loss of license and injunction against selling gasoline. (C.R.S. 39-27-120, 120.5).

Cigarette and Tobacco Products Taxes.

Any wholesaler or retailer selling cigarettes without stamps is subject to fine and/or imprisonment as provided in C.R.S. 39-21-118 (C.R.S. 39-28-108[1]); distributor or agent who sells or distributes tobacco products without license or who willfully violates provisions is subject to fine and/or imprisonment for class 5 felony (C.R.S. 39-28.5-110[1]); and any person who neglects or refuses to pay cigarette or tobacco tax assessed additional penalty equal to 10% with ½% for each succeeding month up to maximum of 18% plus interest at rate computed under C.R.S. 39-21-110.5 (C.R.S. 39-28-108[2]; C.R.S. 39-28.5-110[2]).

22.02 ALCOHOL, BEVERAGES AND TOBACCO TAXES:

Liquor Taxes.

Fermented malt beverages (containing not more than 3.2% alcohol by weight) may be manufactured and sold only under licenses granted by executive director of department of revenue (C.R.S. 12-46-104) and local licensing authority (C.R.S. 12-46-107). Fees for manufacturers, importers, wholesalers and retailers set out in C.R.S. 12-46-104 and C.R.S. 12-47-501. Licensing authorities will charge application fees to cover expenses. (C.R.S. 12-46-105, 107).

Excise tax of 8¢ per gallon (or equivalent unit volume tax applied to metric measure) imposed on fermented malt beverages; manufacturer or wholesaler receiving beverage from out of state primarily liable. Tax is due on 20th of month following first sale; manufacturers and wholesalers must file monthly returns on 20th with state licensing authority and department of revenue. (C.R.S. 12-47-503[4]).

Excise tax on liquors sold or offered for sale in state is 8¢ per gallon (or equivalent unit volume tax applied to metric measure) on all malt liquors; 7.33¢ per liter on all vinous liquors (plus surcharge of 4¢ to 6¢ per liter); 60.26¢ per liter on all spirituous liquors. Tax payable by manufacturer or first licensee receiving liquor in Colorado, unless proof liquor sold out of state. (C.R.S. 12-47-503).

Annual liquor license fees payable to department of revenue range from $50 to $1,050 depending on type of license and/or establishment, plus application fees. (C.R.S. 12-47-501). Following additional annual license fees are payable to city, town or county where licensee is located: Retail liquor stores, drug-stores, and beer and wine licenses, $150 if located within any city, or town or city and county; $250 if located elsewhere; resort hotel beer and wine licenses, $200; hotels, taverns, racetracks and restaurants licenses, $325; all resort grounds—additional $50, clubs licenses, $100; bed and breakfast permit, $25. (C.R.S. 12-47-505).

Cigarette and Tobacco Products Taxes.

Tax of 10 mills per cigarette levied and paid by licensed wholesalers. (C.R.S. 39-28-103). Stamp affixed on cigarette packages evidence of payment of taxes. (C.R.S. 39-28-104). Municipalities may impose additional taxes on cigarettes. (C.R.S. 39-28-112). Sales to U.S. government, sales in interstate commerce, or transactions where U.S. Constitution forbids taxation are exempt. (C.R.S. 39-28-111). Each wholesaler must file monthly report by tenth day of following month. (C.R.S. 39-28-109). Department may read and inspect approved metering machines monthly and determine amount of tax due. (C.R.S. 39-28-105[2]).

Tax imposed on sale, use, consumption, handling, or distribution of all tobacco products other than cigarettes, in Colorado at rate of 20% of manufacturer's list price. (C.R.S. 39-28.5-102). License required for distributors at $10 annual fee. (C.R.S. 39-28.5-104). Distributors must file report and pay tax minus 31/3% (21/3% on or after July 1, 2003 and before July 1, 2005) collection discount on 20th day of month following month when purchase made. (C.R.S. 39-28.5-106). Nondistributors in possession of tobacco products for which taxes have not otherwise been remitted shall be liable for uncollected tax pursuant to C.R.S. 39-28.5-106(4)(a). Executive director may impose penalty on any person who fails to make required tax payment in amount not to exceed 500% of such payment. (C.R.S. 39-28.5-106[4][b]).

22.03 BUSINESS TAXES:

Corporate Tax.

See category 2 Business Organizations, topic 2.03 Corporations, subhead Taxation of Corporate Property. Officers of corporation willfully evading any tax are subject to penalty equal to 150% of tax evidenced and other penalties provided by law. (C.R.S. 39-21-116.5).

Franchise Taxes.

See categories 2 Business Organizations, topic Corporations; Insurance, topic Insurance Companies.

22.04 [RESERVED]

22.05 EMPLOYMENT TAXES:

Old Age Pension Fund Tax.

Following fees assessed and allocated to old age pension fund: additional 10% of fees due and payable on incorporation of corporation or association for profit; and additional 10% of inheritance taxes payable. (C.R.S. 26-2-113[2]).

Unemployment Compensation Premiums.

Imposed on employers. (C.R.S. 8-76-101).

"Employer" is defined to include any employing unit that both has one or more employees employed on each of twenty different days during current or preceding calendar year and pays wages of $1,500 or more during any calendar quarter in current or preceding calendar year, unless exempt. (C.R.S. 8-70-113). Employment units not covered by Act can elect coverage. (C.R.S. 8-76-107).

Premium applies to first $10,000 paid in calendar year of wages or other remuneration required to be subject to tax under federal law. (C.R.S. 8-70-103[6.5]). Standard rate is 1.7% for most first year employers and thereafter based on benefit experience of employer up to maximum standard rate of 5.4% (without regard to solvency surcharges). (C.R.S. 8-76-103). Certain employers are eligible for credit of 20% of premiums otherwise due. (C.R.S. 8-76-103[7]). Certain employers (e.g. nonprofit organizations and political subdivisions) may elect to reimburse actual charges in lieu of paying applicable premiums. (C.R.S. 8-76-108 to 110). Experience rates may transfer to new employer in case of transfer of employing unit. (C.R.S. 8-76-104).

Colorado uses the three digit North American Industry Classification Code issued by Federal Management and Budget office. (C.R.S. 8-76-103).

22.06 [RESERVED]

22.07 ESTATE TAX:

Colorado estate tax (C.R.S. 39-23.5-101 to 117) is based on credit for state death taxes allowable under federal estate tax (Internal Revenue Code § 2011). Gross estate has same meaning as under federal law. (C.R.S. 39-23.5-102[9]). Colorado has not "decoupled" from federal estate tax state death tax credit (Internal Revenue Code § 2011). For estates of decedents dying after 2004, credit for state death taxes allowable under federal law is repealed. (Internal Revenue Code § 2011[f]). Therefore, after 2004, Colorado effectively imposes no estate tax.

22.07A GAMBLING AND ENTERTAINMENT TAXES:

Bingo and Raffles.

Charitable gaming, when authorized, is permitted. (C.R.S. 12-9-103). Fees for licenses are set forth in C.R.S. 12-9-103.5.

Gaming.

Colorado permits limited stakes gaming. (C.R.S. 12-47.1-101 to 1602). Gaming tax is set by Gaming Control Commission and shall not exceed 40% of adjusted gross proceeds. (C.R.S. 12-47.1-601). License fees are set forth in C.R.S. 12-47.1-512.

Lottery.

Colorado State Lottery is operated under Department of Revenue. (C.R.S. 24-35-202). All expenses and prizes of lottery must be paid from proceeds derived from lottery. (C.R.S. 25-35-210). Prizes are subject to state income tax.

Racing Tax.

Is imposed on receipts derived from pari-mutuel wagering on races of greyhounds and horses. (C.R.S. 12-60-701 to 706). Through July 1, 1994, 5% tax is imposed on gross receipts derived from pari-mutuel wagering at race or simulcast race of greyhounds. (C.R.S. 12-60-701[1]). Of 5%, operator of simulcast facility that is not located at class B must pay one percent to operator of class B track from which simulcast races were received. After July 1, 1994, tax is 4.5%. Tax of ¾% imposed on gross receipts of pari-mutuel wagering at race or simulcast race of horses. Tax for operation of class B track is greater of (1) actual cost of regulation up to $2,500 per race day or ¾% of gross receipts at race. (C.R.S. 12-60-701[2][a][I]). Additional ¼% tax on certain gross receipts from pari-mutuel wagering at races of horses is paid to Colorado State University for racing-related equine research. (C.R.S. 12-60-701[2][a][II]). Additional one-half of 1% tax on gross receipts from simple pari-mutuel wagering and 1.5% on complex wagers at races of horses is paid to department for horse breeders' and owners' awards. (C.R.S. 12-60-701[2][b]). Except for breeders' tax which is remitted day of race, all taxes and accompanying returns are due to department on business day following race. (C.R.S. 12-60-705). Failure to file return or pay tax is penalized $15 per failure or 10% of tax plus penalty interest of ½% per month not to exceed 18%. Regular interest charged on tax due at rate set in C.R.S. 39-21-110.5 (C.R.S. 12-60-705[4]).

22.08 GASOLINE AND SPECIAL FUELS TAXES:

Excise tax in lieu of all other taxes, excluding certain aviation fuel tax (C.R.S. 39-27-111), imposed and collected on gasoline or special fuel sold or used in state for any purpose (C.R.S. 39-27-102). Any distributors, suppliers, importers, exporters, terminal operators, carriers or blenders holding license must file statement by 26th day of month concerning shipments received for gasoline or special fuels acquired from any source whatsoever or exported during preceding calendar month. (C.R.S. 39-27-105, 105.5). Statement concerning gasoline shall be submitted electronically. (C.R.S. 39-27-105[f]). Nondistributors using or possessing supplies of gasoline in state over amount in vehicle tanks must report such use or possession and pay excise tax. (C.R.S. 39-27-107). Tax imposed on gasoline at 22¢ per gallon or fraction thereof (C.R.S. 39-27-102[1][a][II][A]), and tax imposed on special fuel is 20.5¢ per gallon or fraction thereof (C.R.S. 39-27-102[1][a][II][B]).

Credit or refund of gasoline tax allowed for destruction of 100 gallons or more by causes beyond control of distributor or transporter and for gasoline purchases of 100 gallons or more by federal government and political subdivisions of state. (C.R.S. 39-27-103[1], [2]). Refund of tax on 20 or more gallon purchase or use of gasoline allowed for: (1) Operation of stationary gas engines, (2) motor vehicles operated on or over fixed rails, (3) farm machinery used on farms or ranches for agricultural purposes, (4) motorboats, (5) any non-highway related commercial use, (6) scheduled air carriers or commuter airlines and (7) 50% credit for licensed agricultural applicator aircraft. (C.R.S. 39-27-103[3]). Special fuels tax does not apply to motor vehicles using liquefied petroleum gas or natural gas and displaying decal. (C.R.S. 39-27-102.5[5]). Operators of such vehicles generally pay $70-$125 annual fee based on gross weight. (C.R.S. 39-27-102.5[5], [7]).

Unlawful to distribute, supply, import, export, carry or blend gasoline or special fuel without license issued by executive director of revenue. (C.R.S. 39-27-104). Applicant for license to distribute or refine gasoline or special fuel must show evidence of savings account, deposit or certificate of deposit meeting requirements of C.R.S. 11-35-101 or surety bond or negotiable certificate of deposit. Executive director fixes amount of required security. (C.R.S. 39-27-104[2][a]). State has lien on all operator's property for failure to pay tax. (C.R.S. 39-27-113).

22.09 GIFT TAX:

Colorado does not impose gift tax.

22.10 [RESERVED]

22.11 INCOME TAX:

Colorado income tax law (C.R.S. 39-22-101 to 3204) is patterned after federal income tax provisions. Generally, terms have same meaning as when used in comparable context in federal tax law. (C.R.S. 39-22-103[11]). Persons otherwise required to file return whose only activity in Colorado is annual sales less than $100,000 may be able to elect gross receipts tax of .5% in lieu of income tax. (C.R.S. 39-22-104[5]). *Note:* Some deductions and credits require state tax receipts to exceed specific levels, check relevant citations.

Individuals.

Resident individuals, estates, and trusts, taxed at rate of 4.63% beginning Jan. 1, 2000, 4.75% for 1999 and 5% prior to 1999, on federal taxable income determined under Internal Revenue Code § 63 subject to following adjustments: Federal taxable income increased by: (1) Federal net operating loss deductions carried over from years beginning prior to Jan. 1, 1987, (2) interest income excluded from gross income pursuant to Internal Revenue Code § 103(a) less amortization of premium on obligations of any state or political subdivision thereof, other than interest income on obligations of Colorado or its political subdivisions issued on or after May 1, 1980, or before if such interest specifically exempt from income taxation under law authorizing issuance of such obligations, (3) deduction allowed by Internal Revenue Code § 402(e)(3), (4) for years beginning on or after Jan. 1, 1992 amount equal to deduction claimed for state income taxes pursuant to Internal Revenue Code § 164(a)(3), (5) expenses incurred at certain restricted membership clubs, and (6) amounts withdrawn from medical savings accounts pursuant to C.R.S. 39-22-504.7(3)(b)(II) and (III). (C.R.S. 39-22-104[3]). Federal taxable income decreased by: (1) Interest income on U.S. obligations and its possessions and qualified Colorado investment deposits to extent included in federal taxable income, (2) certain portions of gains or losses from sale or other disposition of property having higher adjusted basis for Colorado income tax purposes than for federal income tax purposes, (3) amounts necessary to prevent taxation of annuity or other income or gain properly taxed under Colorado law for prior tax years to taxpayer or certain related parties, (4) net operating loss deduction allowed under C.R.S. 39-22-504 to extent carried over from taxable year beginning prior to Jan. 1, 1987, (5) refund or credit for overpayment of income taxes imposed by Colorado or other taxing jurisdiction to extent included in gross income for federal income tax purposes but not previously allowed as deduction for Colorado income tax purposes, (6) certain amounts received as pensions or annuities from any source, to extent included in federal adjusted gross income or otherwise included in adjustments to federal taxable income, up to $20,000 per year if recipient is 55 years of age or older or if benefits are received because of death of original recipient, (7) amounts contributed to medical savings account by employer pursuant to C.R.S. 39-22-504.7(2)(e) if not claimed as deduction by taxpayer and income distributed for qualified beneficiaries pursuant to qualified state tuition programs (C.R.S. 39-22-104[4]), and (8) beginning on or about Jan. 1, 2000 joint filers can deduct up to twice standard federal individual deduction available under Internal Revenue Code § 63(c)(2), (C.R.S. 39-22-104[4]); plus deduction allowed under I.R.C. § 63(c)(3). (C.R.S. 39-22-104[3][d]).

Nonresidents are taxed on Colorado nonresident federal taxable income. (C.R.S. 39-22-109). Colorado nonresident federal taxable income is federal taxable income, modified as in case of resident, derived from sources within state. (C.R.S. 39-22-109[2][a]). Income is derived from Colorado sources if attributable to: Ownership of interest in real or tangible property in Colorado; business, trade, profession or occupation carried on in Colorado; use or disposition of intangible personal property to extent employed in business, trade, profession or occupation carried on in Colorado; distributive share of partnership, limited liability company, estate or trust income, gain, loss, and deduction derived from Colorado sources; and share of subchapter S corporation income, gain, loss, credit and deduction allocable or apportionable to Colorado. (C.R.S. 39-22-109[2][a]). Compensation paid by U.S. to servicemen residing but not domiciled in state is not income derived from sources within Colorado. (C.R.S. 39-22-109[2][b]). Nonresident's federal itemized or standard deduction and federal exemption deduction allowed in ratio of Colorado adjusted gross income to federal adjusted gross income. (C.R.S. 39-22-109).

Part year residents taxed on federal taxable income relating to period of residence in Colorado and on remaining portion of federal income as nonresident if income received from Colorado sources for that period. (C.R.S. 39-22-110).

Credits against tax payable are allowed to resident individuals for taxes on Colorado net income accrued to another state subject to certain limitations. (C.R.S. 39-22-108[1]). Individuals engaged in business in Colorado also allowed certain other credits allowed corporations. See subhead Corporations, infra. For income less than $50,000, $100,000 joint, credit for long term care insurance up to $150 per policy. (C.R.S. 39-22-122). After Jan. 1, 2000 there is transferable credit for granting perpetual conservation easements. (C.R.S. 39-22-522[2]). Alternative minimum tax (AMT) imposed in addition to income tax on individuals, estates, and trusts. AMT tax equal to excess of (a) 3.47% of AMT tax base over (b) regular tax computed under C.R.S. 39-22-104. AMT tax base equals federal alternative minimum taxable income under Internal Revenue Code § 55, reduced by § 55 federal exemptions, with same adjustments required by C.R.S. 39-22-104 for regular tax, except that no state or local interest income added back and any interest income from debt of Colorado or political subdivision thereof that is included in federal alternative minimum taxable income is subtracted. (C.R.S. 39-22-105[1]). Credit against AMT allowed equal to 18% of federal § 53 credit for years beginning after Jan. 1, 1988. (C.R.S. 39-22-105[3]). Beginning Jan. 1, 2000, charitable contributions over $500 by those using standard deductions. (C.R.S. 39-22-104[m][I]).

Nonresidents apportion AMT and credit against AMT in ratio of modified federal alternative minimum taxable income from Colorado sources to total from all sources. (C.R.S. 39-22-105[4]).

Partnerships are not subject to tax (C.R.S. 39-22-201), although return must be filed (C.R.S. 39-22-601[5]). Partners are taxed in individual capacities. (C.R.S. 39-22-201 to 206). Limited liability partnerships and limited liability limited partnerships authorized. (C.R.S. 7-60-144).

Limited liability companies must file return. (C.R.S. 39-22-601[4.5]). LLC that qualifies as partnership under Internal Revenue Code § 761(a) is defined as partnership for state tax purposes. (C.R.S. 39-22-103[5.6]).

Corporations, both domestic and foreign, are taxed on net income derived from sources within state. (C.R.S. 39-22-301[1]). Small business corporations which have election in effect under subchapter S of Internal Revenue Code not subject to corporate tax. (C.R.S. 39-22-302 and 320 to 330). S corporations may elect to pay tax on behalf of nonresident shareholders. (C.R.S. 39-22-601[2.5][e]). Corporations doing business in Colorado and in other state may elect to attribute income to Colorado (C.R.S. 24-60-1301, Art. 3) by either: (1) Apportioning entire net income according to two-factor (property, revenue) formula (C.R.S. 39-22-303) or (2) allocating nonbusiness income and apportioning business income according to three-factor apportionment (property, payroll, sales) formula pursuant to Multi-State Tax Compact (C.R.S. 24-60-1301, Art. 4). Executive director may vary apportionment formula to prevent inequity or income distortion, or distribute or allocate income and deductions among corporations owned or controlled by same interests; this may require filing of combined report or consolidated return. (C.R.S. 39-22-303[5], [6], [11]). Changes in method of apportioning income may limit ability to deduct net operating loss carryovers. (C.R.S. 39-22-504[5]). Income from outside of U.S. not includable in combined report if 80% or more of corporation's property and payroll is assigned to locations outside of U.S. (C.R.S. 39-22-303[8]). Amount of foreign source income considered in apportionment formula varies according to federal tax treatment of foreign taxes paid. (C.R.S. 39-22-303[10]). Two or more members of affiliated group may elect to file combined return or may be required to file combined return if three of six listed objective unitary facts exist for current and two preceding tax years. (C.R.S. 39-22-303[11][a]).

Net income of corporations means federal taxable income, as defined in Internal Revenue Code for taxable year, with certain modifications including certain of those applicable to federal taxable income of resident individual, as specified in C.R.S. 39-22-104 and 304, and adjustments for foreign source income (C.R.S. 39-22-303).

Taxable income of corporation taxed: (1) For tax years commencing on or after July 1, 1993, but before Jan. 1, 1999, at 5% of Colorado net income. (2) For tax years commencing Jan. 1, 1999, 4.75% of Colorado net income. (C.R.S. 39-22-301[1][d]). (3) For years after Jan. 1, 2000, 4.63%.

Credits against tax payable are allowed for payments of estimated taxes (C.R.S. 39-22-609[2]), for overpayments of tax (C.R.S. 39-21-108), to all taxpayers for portion of federal investment tax credit that would have been allowed had federal credit not been repealed for investment in depreciable property used in Colorado, (C.R.S. 39-22-507.5); to all taxpayers for portion of enterprise zone credit which is triple allowable federal investment credit or 3% of total qualified investment (C.R.S. 39-22-507.5[12] and C.R.S. 39-30-104), rural enterprise zones provide enhanced credits (C.R.S. 39-30-103.2); for qualified job training programs to improve skills of enterprise zone employees (C.R.S. 39-30-104[4]), for qualified school to work program (C.R.S. 39-30-104[5]), for research and experimental expenditures in enterprise zones (C.R.S. 39-30-105.5), for contributions to enterprise zone administrator to implement zone's economic development plan (C.R.S. 39-30-103.5), for rehabilitation of historic properties from tax year 1991 to 2000 (C.R.S. 39-22-514) or vacant building in enterprise zones (C.R.S. 39-30-105.6), for investments in plastic recycling technology (C.R.S. 39-22-114.5), up to 16% of total Colorado personal property taxes paid (C.R.S. 39-22-124[4.5]), 1/3 of repayments to student loans made by qualified rural healthcare professional (C.R.S. 39-22-126[3]), to corporations credit for increase in purchases of Colorado coal (C.R.S. 39-22-308); portions of purchase price of up to 50 business cars or trucks licensed in Colorado that use clean burning alternative fuel or is hybrid vehicle (C.R.S. 39-22-516); 20% of cost to purchase qualified property for use in child care center or family care home (C.R.S. 39-22-517); 10% of investment in qualified school-to-career program (C.R.S. 39-22-520); 20% of cost (for first two years) of providing child care services, health or dental insurance, job training, or transportation to and from work for employees on public assistance (C.R.S. 39-22-521); value of perpetual easements not to exceed $100,000 per gift per year except for tax years on or after Jan. 1, 2003 and additional 40% credit over $100,000 in gift value up to $260,000 (C.R.S. 39-22-522); contributions to Colorado High-Tech Scholarship Fund (C.R.S. 39-22-103[h]); 25%, up to $100,000, for donations to Individual Development Accounts (C.R.S. 39-22-524); costs for environmental remediation up to $300,000 (C.R.S. 39-22-526); nonreimbursed foster home expenses up to $500 (C.R.S. 39-22-127[2]), up to $15,000 for qualified agricultural cooperatives (C.R.S. 39-22-527) and 25% of total value of monetary or in-kind contributions to promote child care (C.R.S. 39-22-121); and certain job creation activities (C.R.S. 39-22-531).

Child care expense credit for tax years on or after Jan. 1, 1998 will vary depending upon state revenues and individual income. (C.R.S. 39-22-119). Part-year residents must pro rate tax (C.R.S. 39-22-119[4]). Excess credit may not be carried forward. (C.R.S. 39-22-119[2]). Person receiving state child care assistance, except to extent of unreimbursed out-of-pocket expenses that result in federal credit for child care expense, is not allowed child care expense credits allowed under C.R.S. 39-22-119(1) and (1.5) (C.R.S. 39-22-119[3]).

Certain persons and corporations whose sole activity in state consists of making sales which result in annual gross receipts of not more than $100,000, and who do not own or rent real estate in Colorado, may pay tax of ½ of 1% on annual gross receipts in lieu of income tax. (C.R.S. 39-22-104[5]).

Returns must be made to executive director by 15th day of 4th month following close of taxable year. (C.R.S. 39-22-608[2]). Returns must be filed by every individual whose adjusted gross income is equal to or greater than his Colorado standard deduction plus his Colorado exemptions (whether exemptions are attributable to individual, to his spouse if filing jointly, or to being age 65 or older); every fiduciary for such individuals, for resident estate, or trust whose income exceeds $850 multiplied by annual inflation factor, or for nonresident estate or trust whose taxable income exceeds its Colorado exemption; every corporation subject to taxation; and every partnership, limited liability company and every person who is required by federal rules to file annual reports concerning tips or remuneration from services or direct sales. (C.R.S. 39-22-601). State recognized innocent spouse rule under Internal Revenue Code § 6015. (C.R.S. 39-22-1075). Frivolous returns are prohibited. (C.R.S. 39-22-621[2]).

Taxpayers must file amended return within 30 days of any federal adjustment. (C.R.S. 39-22-601).

Tax is payable when return is due. Executive director may grant extension of time for payment (C.R.S. 39-22-609).

Withholding.

Department determines whether employer is quarterly, monthly, weekly or seasonal filer based on review of Colorado withholding tax reported in preceding 12 month period July 1 through June 30 ("lookback period"). (C.R.S. 39-22-604[4][a], [b]; Colo. Dept. of Rev. Reg. 39-22-604.4). Before date established by § 6071 of Internal Revenue Code, currently Mar. 31 of following year, employer must submit annual statement summarizing withholding information for each employee to department. Penalty for failure to provide annual statement for each employee is $5 to $50 in addition to civil and criminal penalties. (C.R.S. 39-22-604[6]).

Persons making payment of winnings subject to federal withholding must withhold 4% of such winnings. (C.R.S. 39-22-604[17]; Colo. Dept. of Rev. Reg. 39-22-604.17).

Employer holds deducted amounts in trust for state. State has lien senior to all other liens on employer's assets and on property used in employer's trade or business to secure payment upon delinquency. (C.R.S. 39-22-604[7][a]). However, exemption certificate may be obtained for property subject to mortgage, etc., if bond posted (C.R.S. 39-22-604[7][b]), and equipment leased to employer may be exempted if reasonably identifiable from lease and employer has no right to acquire it (C.R.S. 39-22-604[7][c]).

Certain entities providing closing and settlement services required to withhold 2% of sales price or net proceeds, from sale of Colorado real property interests to certain nonresidents. (C.R.S. 39-22-604.5).

Estimated Tax by Individuals.

Every individual, resident or nonresident, whose estimated tax for current year can reasonably be expected to exceed allowable credits by $1,000 must file state declaration and pay state estimated tax that executive director may prescribe, less amounts to be withheld and anticipated credits. (C.R.S. 39-22-605[1]). If prior to Apr. 1, taxpayer expects estimated tax to exceed $1,000, he must file declaration on or before Apr. 15 of tax year. If taxpayer first expects estimated tax to exceed $1,000 after Apr. 1 but before June 2, declaration is due on or before June 15. If taxpayer first expects estimated tax to exceed $1,000 after June 1 but before Sept. 2, declaration is due on or before Sept. 15. If taxpayer first expects estimated tax to exceed $1,000 after Sept. 1, declaration is due on or before Jan. 15 of next tax year. (C.R.S. 39-22-605[2][a]). If declaration is filed on or before Apr. 15, estimated tax is paid in four equal installments due on date declaration is filed, June 15, Sept. 15, and Jan. 15 of next year. (C.R.S. 39-22-605[2][b][I]). If declaration is filed after Apr. 15 and before June 16, estimated tax is paid in three equal installments due on date declaration is filed, Sept. 15, and Jan. 15 of next tax year. (C.R.S. 39-22-605[2][b][II]). If declaration is filed after June 15 and before Sept. 16, estimated tax is paid in two equal installments due on date declaration is filed and Jan. 15 of next tax year. (C.R.S. 39-22-605[2][b][III]). If declaration is filed after Sept. 15, estimated tax is paid in full on date declaration is filed. (C.R.S. 39-22-605[2][b][IV]).

For tax years commencing on or after Jan. 1, 1987, underpayments of estimated tax deemed not to have occurred if taxpayer payments and credits pursuant to filed declaration equal or exceed taxpayer's actual Colorado tax liability before allowable credits for preceding tax year or 70% of taxpayer's Colorado tax liability before allowable credits for current tax year. (C.R.S. 39-22-605[4]).

Estimated Tax by Corporations.

Every corporation must file declaration of estimated tax if its tax for current year can reasonably be expected to exceed $5,000. (C.R.S. 39-22-606[1][a]). Estimated tax is based on computation of tax on expected income, less $5,000, and amounts expected to be withheld from oil and gas royalty payments. (C.R.S. 39-22-606[1][b]). Declaration generally due by Apr. 15. (C.R.S. 39-22-606[2]). First installment due at time declaration filed, other installments due on 15th of June, Sept., and Dec. (C.R.S. 39-22-606[4][b]).

Statute of Limitations.

Taxpayer must file refund claims within time permitted under federal income tax law, plus one year. (C.R.S. 39-21-108). Unredeemed tax refund warrants expire in six months and taxpayer has claim under Unclaimed Property Act. (C.R.S. 38-13-104).

22.12 INHERITANCE TAX:

Colorado does not impose inheritance tax for decedents dying on or after Jan. 1, 1980.

22.12A MINES, MINERALS AND FISHERIES TAXES:

Oil, Gas and Other Minerals Severance Tax.

See category 19 Mineral, Water and Fishing Rights, topic 19.01 Mines and Minerals.

22.13–22.15 [RESERVED]

22.16 PROPERTY TAXES:

Is imposed on all real and personal property not expressly exempted (C.R.S. 39-1-102[16]) including partial interests (C.R.S. 39-1-106) and severed mineral interests (C.R.S. 39-1-104.5).

Exemptions.

There are numerous constitutional and statutory exemptions from state property tax, including, among others: Property used solely and exclusively for strictly charitable purposes (Const., art. X, § 5; C.R.S. 39-3-101); household furnishings not used for production of income (C.R.S. 39-3-102; Const., art. X, § 3[1][c]); personal effects never used to produce income (C.R.S. 39-3-103; Const., art. X, § 3[1][c]); ditches, canals and flumes if used to irrigate owner's lands (C.R.S. 39-3-104); property of state, counties, cities, towns, other municipal corporations and public libraries (C.R.S. 39-3-105; Const., art. X, § 4); property owned and used exclusively for religious purposes (C.R.S. 39-3-106; Const., art. X, § 5); property owned and used exclusively for nonprofit schools (Const., art. X, § 5; C.R.S. 39-3-107); nonresidential property of nonprofit health care facilities or domestic water companies (C.R.S. 39-3-108; Const., art. X, § 5); property owned and used by nonprofit community corrections agency for community correctional facility or program (C.R.S. 39-3-108.5); certain residential property used as integral part of church, charitable health care facility, school or other exempt institution (C.R.S. 39-3-109); property used as integral part of qualifying child care center (C.R.S. 39-3-110); certain property of qualifying fraternal and veterans organizations (C.R.S. 39-3-111); certain property of qualifying health care providers who provide medical health care service to poor (C.R.S. 39-3-111.5); certain residential property of qualifying orphanages and homes for disabled, elderly, homeless, or low income housing (C.R.S. 39-3-112, 112.5); ½ of first $200,000 of value for persons 65 or older and qualifying disabled veterans if occupied as residence for past ten years (C.R.S. 39-3-203); certain in-construction residential property that will be used for charitable purposes (C.R.S. 39-3-113); nonprofit cemeteries (C.R.S. 39-3-117); intangible personal property including computer software (C.R.S. 39-3-118); inventories (C.R.S. 39-3-119); personal property (C.R.S. 39-3-119.5); mobile homes while in dealer inventory (C.R.S. 39-5-203[3][a]); livestock (C.R.S. 39-3-120); agricultural and livestock products (C.R.S. 39-3-121); agricultural equipment (C.R.S. 39-3-122); works of art, literary materials or artifacts loaned to governmental entity or to library, gallery or museum of charitable organization, while on loan (C.R.S. 39-3-123); property leased by exempt governmental entity to which it can take title at end of lease with no (or nominal) payment (Const., art. X, § 4; C.R.S. 39-3-124); horticultural improvements resulting from planting of trees are disregarded in assessing land value until earlier of 30 years or trees becoming economically useful (C.R.S. 39-3-126); certain property used to hold county fairs (C.R.S. 39-3-127); personal property rented for 30 days or less similar in nature to merchandise inventories (C.R.S. 39-1-102[7.2]); airport authorities classified as political subdivisions by general assembly (C.R.S. 41-3-102, 107; 681 P.2d 945); nonproducing unpatented mining claims that are possessory interests in real property by virtue of leases from U.S. (Const., art. X, § 3[1][b]).

Certain property owners do not have to apply to state to have property granted exempt status. For local units of government to be exempt, they must have power to levy property tax, or have specific statutory exemption. (30 P.3d 177). Exempt status, however, will not be recognized under C.R.S. 39-3-106 to 113 and C.R.S. 39-3-116 until exempt status applied for and granted by property tax administrator (C.R.S. 39-2-117[2]). Initial filing fee for exemption application is $150. (C.R.S. 39-2-117[1]). Denial of exemption must be timely appealed to county board of equalization. (C.R.S. 39-3-206). After initial exemption is granted annual reports and $53 fee must be filed by Apr. 15. (C.R.S. 39-2-117[3][a][I]). Delinquent annual reports accepted between Apr. 15 and July 1 with additional $150 late fee. If report not filed by July 1, exemption is forfeited. (C.R.S. 39-2-117[3][a][II]). Annual report not required of previously exempt fraternal or veterans organizations if declaration filed that nonexempt use is below certain hour limit or gross income levels. (C.R.S. 39-2-117[3][a][I]). Religious organizations receive special considerations. (C.R.S. 39-2-117[3][a][III]). If any property subject to exemption under C.R.S. 39-3-106 to 113 is used by other than owner, both owner and user must be exempt for property to be exempt from tax (C.R.S. 39-3-116). Use of exempt property for nonexempt purposes does not destroy exempt status if non-qualifying use is less than 208 hours annually, adjusted for partial usage where applicable, or if such usage meets specified limits on gross rentals and/or unrelated trade or business income. (C.R.S. 39-3-106.5).

Apportionment required if real property becomes (or ceases to be) exempt during year or if portion becomes exempt. (C.R.S. 39-3-129 to 132). No proration of property tax for personal property. (C.R.S. 39-3-129[1], 130).

Tax Deferral for Elderly or Persons called into Military Service.

Taxpayer over 65 years old or persons called into military service may elect to defer property taxes on home he owns and occupies. (C.R.S. 39-3.5-101 to 119). Deferral continues until taxpayer dies, moves, sells or uses property to earn income. (C.R.S. 39-3.5-110). Persons called into military service may defer only real property taxes payable in year in which person is called into military service. (C.R.S. 39-3.5-102[1][b][2.5]). Deferral amount becomes lien junior to prior mortgages and deeds of trust, senior to subsequent encumbrances. (C.R.S. 39-3.5-105[4]). State treasurer pays deferred amount to county treasurer, whereupon right to payment and to enforce lien vests in state treasurer. (C.R.S. 39-3.5-106, 107).

Tax Work-Off for Elderly or Persons with Disability.

Taxing entities may establish work-off programs that allow taxpayers over 60 years old or who are persons with disability to work for taxing entity in lieu of paying money for real property taxes on homestead. (C.R.S. 39-3.7-102).

Motor Vehicles.

Graduated specific ownership taxes apply in lieu of ad valorem taxes to motor vehicles, trailers, and self-propelled construction equipment, other than mobile homes, inventory and such items undergoing manufacture. (Const., art. X, § 6). Statutes classify vehicles and set tax rates. (C.R.S. 42-3-101 to 312). Qualified owners may elect two or five year registration and tax periods. (C.R.S. 42-3-102). Specific ownership tax does not apply to: Government property (C.R.S. 42-3-104[3]); property leased to state or subdivision if department approves lease agreement (C.R.S. 42-3-104[4]); one noncommercial vehicle owned by U.S. armed forces disabled veteran (C.R.S. 42-3-104[5]); one noncommercial vehicle owned by certain former U.S. armed forces prisoners of war (C.R.S. 42-3-104[6]); property owned or leased by entities exempt from ad valorem tax (C.R.S. 42-3-104[7]); or certain vehicles owned by service member (C.R.S. 42-3-104[9]).

Assessment.

Residential real property (excluding hotels and motels) and mobile home parks valued for assessment at assessment percentage of actual value. (Const., art. X, § 3; C.R.S. 39-1-104; C.R.S. 39-1-102[4.5]). For tax years 2007-2009 level is 7.90%. (C.R.S. 39-1-104.2[3]). Bed & Breakfasts are mixed use, residential and commercial. (C.R.S. 39-1-103). Time shares and condos in resort hotel are generally residential. (C.R.S. 39-1-102[5.5]). Producing mines and lands or leaseholds producing oil or gas valued for assessment as portion of value of actual annual or average annual production of unprocessed material. All other taxable property valued for assessment at 29% of actual value. (Const., art. X, § 3[1][b]; C.R.S. 39-1-104).

Assessor lists all taxable property in county on assessment date except public utility property. (C.R.S. 39-5-101). Real property in cities and towns and mining claims listings based on municipal and land office records. (C.R.S. 39-5-103, 103.5; C.R.S. 39-6-103). Level of value will be based on 18 months preceding July 1 immediately prior to Jan. 1 assessment date, unless there is lack of data, then period increases in six month intervals until necessary data is available. (C.R.S. 39-1-104). Oil and gas properties, above exemption levels, valued on percentage of product sales in prior year. (C.R.S. 39-7-102). Land and most improvements valued separately. (C.R.S. 39-5-105). Taxpayer must list all taxable personal property on schedule furnished by assessor or face penalty up to 25% of value of omitted property. (C.R.S. 39-5-107; 116). Disclosure of information to assessor may be compelled by court order. (C.R.S. 39-5-119). Failure to obtain schedule does not impair assessor's valuation. (C.R.S. 39-5-118). Owners and operators of mines and oil or gas leaseholds must supply production and sales information. (C.R.S. 39-6-106; C.R.S. 39-7-101).

Actual value must be determined using cost, market, and income approaches to appraisal, except for residential real property (only market approach used, and change of use after sale may not be comparable sale [C.R.S. 39-8-108]); agricultural lands (earning or productive capacity used) (Const., art. X, § 3[1][a]); and, after Jan. 1, 1999, nongaming property located in district where gaming is authorized (C.R.S. 39-1-103[18][a]). Primary indicator for valuation of superfund water treatment facility is income approach. (C.R.S. 39-1-103[16][a]). No presumption of correctness attaches to assessing authority's determination of actual value. (Const., art. X, § 20). Sales by lenders and governmental entities not automatically excluded in market approach. (Const., art. X, § 20). Where cost, market, and income approaches fail to produce actual value of real property, value determined by comparison of surface use to property with similar surface use (except nonproducing oil, gas, and mineral interests which must use income approach capitalizing annual net rental income at appropriate market rate). (C.R.S. 39-1-101). Five sales of reasonably similar property required to establish market for use of market approach for oil shale mineral interests. (C.R.S. 39-1-103[8][a][II]). Special rules apply for use of income approach for nonproducing oil shale interests. (C.R.S. 39-1-103[12]). Other special rules govern valuation for assessment of: Oil and gas leaseholds and producing mines (Const., art. X, § 3[1][b]; C.R.S. 39-7-101 to 109; and C.R.S. 39-6-106); nonproducing mines (C.R.S. 39-1-103[11] and C.R.S. 39-6-111); public utilities (C.R.S. 39-4-101 to 110); water rights (C.R.S. 39-5-105); newly constructed taxable buildings in growth impacted counties (C.R.S. 39-5-132); and mobile homes (C.R.S. 39-5-201 to 206). Special provisions set or apportion assessed value of movable equipment (C.R.S. 39-5-113) and destroyed property (C.R.S. 39-5-117).

Review of Assessment.

Notice of valuation of real property must be mailed annually by assessor by May 1. (Const., art. X, § 20; C.R.S. 39-5-121[1]). Protests must be submitted in writing by June 1. (C.R.S. 39-5-122). Notices of change in value of tangible personal property must be sent by June 15 and protests must be postmarked or physically delivered by June 30. (C.R.S. 39-5-121[1.5]). Initial hearings before assessor on taxpayer protests begin on first working day after notices are mailed for real property, June 15 for personal property. (C.R.S. 39-5-122[1], [2]). Denials may be appealed first to county board of equalization for real property by July 15 or, after Jan. 1, 1999, in large counties electing alternate protest procedure, by Sept. 15, for real and personal property by July 20 (C.R.S. 39-5-122[3]; C.R.S. 39-8-106, 107), then, within 30 days of decision, to either board of assessment appeals (C.R.S. 39-2-125[1][c]), district court of county where property is located (C.R.S. 39-8-108[1]) or to binding, non-appealable, arbitration (C.R.S. 39-8-108[1], 108.5). Taxpayer may appeal adverse decision by board of assessment appeals or district court to court of appeals pursuant to appellate rules and Administrative Procedure Act. (C.R.S. 39-8-108[2]; C.R.S. 24-4-106). County can appeal adverse decision on basis that it is either matter of statewide concern, would result in significant reduction of total assessed valuation or contains procedural errors or errors of law. (C.R.S. 39-8-108[2]). Above procedure for individual taxpayer; no class certification. State board of equalization may review decision of board of assessment appeals only with regard to valuation of classes and subclasses of property. (C.R.S. 39-9-103). Complaints relating to valuation of classes and subclasses of property may also be filed with property tax administrator (C.R.S. 39-2-111, 114) who may petition state board of equalization for reappraisal (C.R.S. 39-2-111, 114). Decisions of state board of equalization subject to judicial review. (C.R.S. 39-9-108; C.R.S. 24-4-106). Public utilities are valued by property tax administrator and utility or county may protest value by June 15. (C.R.S. 39-4-108[1], [2]). If protest denied, utility or county may appeal to board of assessment appeals (C.R.S. 39-2-125[1][b][I]) and thereafter to court of appeals (C.R.S. 39-4-109).

Taxpayer may request administrative abatement or refund if taxes were levied erroneously or illegally because of erroneous valuations, levy irregularity, clerical error or overvaluation. (C.R.S. 39-10-114[1]). Petition for abatement or refund must be filed within two years after Jan. 1 of year following year in which taxes were levied. (C.R.S. 39-10-114[1]). Abatements may not be granted on overvaluation grounds if property valuation was protested at time of valuation. (C.R.S. 39-10-114).

Tax refunds include interest except for errors caused by taxpayer in filing personal property declarations. (C.R.S. 39-10-114).

Payment.

Taxes payable Jan. 1, and delinquent on Apr. 30, payable to county treasurer. (C.R.S. 39-10-102). Treasurer required to mail statement of taxes due. (C.R.S. 39-10-103). Payment may either be in full before last day of Apr. or in two equal installments due last day of Feb. and June 15. (C.R.S. 39-10-104.5). Interest and penalties apply for late payment. (C.R.S. 39-10-104.5). Unit operator of hydrocarbon wells must remit tax for all fractional interests or be liable for tax.

(C.R.S. 39-10-106[2]). Unit operator may withhold from royalty payments or arrange for purchasers of well output to do so. Operator remains liable unless fractional interest owner provides inaccurate revenue information to unit operator. (C.R.S. 39-10-106).

Incentive Payments.

Taxpayer establishing qualifying new business facilities in designated enterprise zones may negotiate incentive payments for property located in such zones. (C.R.S. 39-30-107.5).

Collection.

Tax collected by county treasurer (C.R.S. 39-10-101), who prepares list of delinquents (C.R.S. 39-10-109) and publishes it one time in Sept. (C.R.S. 39-10-110). Treasurer may institute action to collect unpaid taxes (C.R.S. 39-10-111, 112), and to prevent removal or transfer of taxable personal property (C.R.S. 39-10-113; C.R.S. 4-6-101 to 111). Treasurer may employ collection agency to collect unpaid taxes. (C.R.S. 39-10-112[1][a]). Collection agency is selected through bid process and cannot be paid more than one-third of amount recovered. (C.R.S. 39-10-112[1][b]). Treasurer may accept partial payments for delinquent personal property taxes pursuant to written payment plan. (C.R.S. 39-10-110.5).

Lien.

Attaches on assessment date, Jan. 1, at 12 noon, on real and personal property (including tax liens levied on new construction in growth impacted counties) (C.R.S. 39-1-105, 107[1]), and is perpetual prior lien thereafter until paid in full. Lien for general taxes that are deferred replaced by new lien when tax deferral for elderly or person called into military service elected. (C.R.S. 39-3.5-102[c]).

Taxes on possessory interests are personal judgments and do not create lien on fee holder. (C.R.S. 39-1-107[4]).

Sale.

At any time after Oct. 1, county treasurer, after mailing and publishing notice of delinquency, shall enforce collection of delinquent taxes on personal property, and on mobile homes and public utility property, by distraint, seizure, and sale. (C.R.S. 39-10-111[1], [11]; C.R.S. 39-5-202). Notice of amount demanded and time and place of sale must be furnished owner (C.R.S. 39-10-111[2]), and published or posted (C.R.S. 39-10-111[3]). Time fixed for sale must be within ten days of notice, but may be adjourned for not more than 30 days. (C.R.S. 39-10-111[4]). Sale is by public auction, with property offered at minimum price, including taxes, penalty interest and costs of advertising and seizure. (C.R.S. 39-10-111[5]). Levying county may cause county to which property has been removed to seize and sell it (C.R.S. 39-10-111[1][b]) or may seize property to prevent removal from county (C.R.S. 39-10-113). County may employ collection agency or sue taxpayer if property cannot be located or if sale proceeds inadequate to pay tax. (C.R.S. 39-10-112).

In case of sales of tax liens on real property, notice of delinquency is mailed to owner delinquent in taxes no later than Sept. 1, which notice shall indicate payment must be received by specified date not less than fifteen days after notice, or process for sale of tax lien will commence. (C.R.S. 39-11-101). Notice of sale is then published and posted at least four weeks before sale date, for period of four weeks. (C.R.S. 39-11-102). Sales to commence on or before 2d Mon. in Dec., (C.R.S. 39-11-109), unless, for any cause, due publication and sale cannot be had by that time, in which case property may be sold at subsequent time (C.R.S. 39-11-110). If no bids, tax lien is sold to county, city, town, or city and county for amount of taxes, interest, and costs. (C.R.S. 39-11-108). Sales are for cash (C.R.S. 39-11-111) to highest bidder; bid must equal or exceed taxes, interest, and costs (C.R.S. 39-11-115). If bidder fails to pay, tax lien may be resold or bidder sued. (C.R.S. 39-11-116). Treasurer gives purchaser certificate of purchase (C.R.S. 39-

11-117) which is assignable (C.R.S. 39-11-118), and which may be exchanged for tax deed at expiration of three years (C.R.S. 39-11-120) after notice to persons in possession and record owner, if possible, and publication if actual notice not possible (C.R.S. 39-11-128). Owners of easement concerning common areas of subdivision are “record owners” and must be notified or tax deed void. (689 P.2d 720). Tax deed is prima facie evidence of regularity of sale, when acknowledged and recorded. (C.R.S. 39-11-136). Suits to quiet title by holder under tax deed are authorized by statute (C.R.S. 39-11-133), and are common practice to make tax title merchantable.

Redemption and Actions to Recover Property.

Real property for which tax lien was sold for taxes may be redeemed by owner or his agent, or “any person having legal or equitable claim therein.” (C.R.S. 39-12-103). Holder of tax sale certificate may redeem from sale subsequent to time of issuance of his certificate. (C.R.S. 39-12-103). Redemption may be made at any time before execution of treasurer’s deed to purchaser, his heirs or assigns, upon payment to treasurer, to be held by him subject to order of purchaser, of amount of taxes, penalty interest, and costs for which tax lien on property was sold, with interest from date of sale at statutorily determined rate, plus all taxes accruing after sale paid by purchaser and endorsed on certificate, with interest on such interest. (C.R.S. 39-12-103[3]). Person under legal disability when tax deed issued may redeem within lesser of nine years from recording of tax deed or two years from removal of disability. (C.R.S. 39-12-104). Undivided interest may be redeemed by paying ratable amount of sum necessary to redeem whole. (C.R.S. 39-12-113). Assessor shall ascertain such proportionate redemption amount on request. (C.R.S. 39-12-113).

Mobile home owners may redeem within one year of date of sale if home on leased land, three years if on owned land. (C.R.S. 39-10-111[10]). Redemption period is 60 days if value of mobile home is less than $1,000. (C.R.S. 39-10-111[12]).

Five year limitation period for suit to recover land for which tax deed issued, commencing with execution and delivery of deed. (C.R.S. 39-12-101). But, taxpayer who was under legal disability when deed issued may sue during extended redemption period. (C.R.S. 39-12-101). Limitation period two years from actual possession under tax deed for mining claims. (C.R.S. 39-12-102).

Real Estate Conveyance Tax.

Documentary fee when consideration paid by purchaser, inclusive of amount of any liens or encumbrance, exceeds $500. (C.R.S. 39-13-102). Computed at rate of 1¢ for each $100 or major fraction thereof. (C.R.S. 39-13-102[2]). No deed will be recorded unless fee paid. (C.R.S. 39-13-105). Declaration of actual sales price required. (C.R.S. 39-14-102).

22.17 SALES AND USE TAXES:

Sales Tax.

Tax at 2.91% (C.R.S. 39-26-106) is imposed upon purchase price of certain retail sales of tangible personal property, telephone, telegraph, gas, electric and steam service, meals at place regularly furnishing meals to public (C.R.S. 39-26-104), portion of factory-built housing (except subsequent sales of such housing after once subject to tax) (C.R.S. 39-26-721), and lodging except when there is written agreement for 30 consecutive days’ lodging (C.R.S. 39-26-704[3]).

Purchase price includes all amounts paid by consumer, excluding any direct taxes and excluding fair market value of property exchanged if exchanged property is to be sold thereafter in usual course of retail business or if exchanged property is vehicle exchanged for another vehicle, and both vehicles subject to state licensing, registration or certification requirements.

(C.R.S. 39-26-102[7]). Sales price is gross value of all materials, labor, service, and profit included in price charged customer. (C.R.S. 39-26-102[12]). Tax is added to sales price and, except for liquor by drink, separately stated. (C.R.S. 36-26-106[2]). Misdemeanor to represent to customer that tax absorbed by seller or not added to sale. (C.R.S. 39-26-108). Motor vehicle may not be registered nor certificate of title issued until tax paid. (C.R.S. 39-26-113). Refunds of amounts erroneously paid may be sought under procedures of C.R.S. 39-26-703(2). Short term lodging is subject to additional taxes up to 2%. (C.R.S. 30-11-107.5). Beginning, Aug. of 2002, only jurisdiction of primary use may tax mobile phone changes. (C.R.S. 29-1-1002).

For calendar year commencing Jan. 1, 1999, qualified biotechnology and clean technology taxpayers may claim refund for sales and use taxes paid on sale, storage, use or consumption of tangible personal property to be used in research and development of biotechnology or clean technology during calendar year. (C.R.S. 39-26-401 to 403).

Statutory Exemptions.

There are numerous exemptions from state sales tax, including, among others: Sales to governmental units (C.R.S. 39-26-704[1]); sales to charitable organizations (C.R.S. 39-26-718[1][a]); sales prohibited from taxation under constitution or laws of U.S. or Colorado and sales to noncorporate residents of adjoining states where such sales within 20 miles of Colorado boundary and not taxed by adjoining state (C.R.S. 39-26-704[2]); cigarettes (except that cigarettes purchased after June 30, 2009 and before July 1, 2001 shall not be exempt). (C.R.S. 39-26-706[1][a]); prescription drugs and certain medical appliances (C.R.S. 39-26-717[1][a]); sales of lodging to permanent resident of hotel, lodging house, etc. (C.R.S. 39-26-704[3]); certain fuels subject to other fuels taxes or used on farms and ranches (C.R.S. 39-26-715[1][a][I]; C.R.S. 39-26-716[2][a]); sales to nonprofit schools (C.R.S. 39-26-704[4]); certain trucks and trailers (C.R.S. 39-26-712[1][a], [b]); sales to interstate railroads for track maintenance (C.R.S. 39-26-710[1][a]); certain leases of tangible personal property that are for less than three years if lessor pays tax on acquisition (C.R.S. 39-26-713[1][a]); products that are temporarily in Colorado for testing, modification and inspection prior to ultimate use out of state (C.R.S. 39-26-713[1][c]); sales to contractors and subcontractors for use in building or repairing public facilities owned and used by governmental units, charitable organizations and nonprofit schools (C.R.S. 39-26-708[1]); food (C.R.S. 39-26-707[1][e]); electricity and certain fuels for residential use (C.R.S. 39-26-715[1][a][II]); commercial aircraft used in interstate commerce (C.R.S. 39-26-711[1][b]); tangible personal property permanently affixed as component part of aircraft (C.R.S. 39-26-711[1][b]); tangible personal property affixed as component part of railroad car or equipment (C.R.S. 39-26-710[1][b]); locomotives, freight cars, railroad work equipment and other railroad rolling stock used in interstate commerce (C.R.S. 39-26-701[1][c]); Internet access services (C.R.S. 24-79-102[1.5]); certain livestock and all farm close-out sales (C.R.S. 39-26-716[4][a]); feed, bedding, seeds and orchard trees (C.R.S. 39-26-716[4][b], [c]); sales not exceeding 15¢ from registered and complying vending machines (C.R.S. 39-26-714[1][a]); after Jan. 1, 2000 all sales of food by vending machines (C.R.S. 39-26-714[2]); 48% of first purchase price, and 100% of purchase price on subsequent sales, of factory-built housing (C.R.S. 39-26-721[1]); sales of manufacturing machinery, machine tools or parts over $500 (C.R.S. 39-26-709[1][a][II]); part of price paid for nonautomotive lubricating oil (C.R.S. 39-26-715[3]); refractory materials and carbon electrodes for manufacture of iron and steel, and inorganic chemicals for processing vanadium-uranium ores (C.R.S. 39-26-706[3]); sale of certain precious metal bullion and coins (C.R.S. 39-26-706[4]); occasional sales by charitable organizations (C.R.S. 39-26-718[1][b]); all sales and purchases of tangible property used as component parts in manufacturing goods which are then donated by manufacturer with aggregate value over $1,000 to tax exempt organizations (C.R.S. 39-26-713[1][d]); pallets and crates for shipping agricultural products if purchased by farmer (C.R.S. 39-26-716[1][c]); on farm dairy equipment sold after July 1, 2001 (C.R.S. 39-26-716[1][c]); sales, by parents and teachers, charitable organization, or public schools if proceeds from such sales benefit school or school activities, or are used to pay reasonable expenses of organization (C.R.S. 39-26-718[1][c]); vehicles, power sources and conversion parts for low emission vehicles (C.R.S. 39-26-719); ag-compounds for livestock care (C.R.S. 39-26-716); sale of pre-press preparation printing materials (C.R.S. 39-26-102[19]); certain sales of electricity and fuel for industrial uses (C.R.S. 39-26-102[21]); bingo and raffle equipment (C.R.S. 39-26-720); sale and use of component parts used in production of electricity from renewable sources, including but not limited to wind (C.R.S. 39-26-724); sale of automobiles to nonresidents for use outside Colorado (C.R.S. 39-26-113[5]); purchases of machinery or tools over $500 used exclusively in enterprise zone (C.R.S. 39-30-106[1][a]). Taxpayers establishing qualifying new business facilities in enterprise zone may negotiate refund of other sales tax levied in zone. (C.R.S. 39-30-107.5). Refunds of taxes incurred for equipment or supplies to produce or modify biotechnology products after Jan. 1, 1999. (C.R.S. 39-26-402). Pollution control equipment sold after July 1, 2000 is eligible for state sales tax refunds. Strong presumption that taxation is rule and exemption exception. (665 P.2d 626). State-chartered credit unions not exempt. (Id.).

Collection of Tax.

Seller at retail must obtain license from executive director with annual renewal. Executive director may revoke for violation of sales tax law. (C.R.S. 39-26-103[4]). Seller liable for tax and must make monthly report of sales and remit 3% tax, less 31/3% of tax (after July 1, 2003, 21/3% of tax) retained to cover collection and remittance expenses. (C.R.S. 39-26-105). Seller must also remit any excess over 3% collected. (C.R.S. 39-26-112). Credit seller generally may return and remit as payments received. (C.R.S. 39-26-111). Executive director may, at seller's written request, accept reports at other intervals to prevent hardship. (C.R.S. 39-26-109). Seller with two or more locations may file combined returns. (C.R.S. 39-26-110). Entities that purchase at least $7.5 million per year in taxable goods or services are eligible to seek from Department of Revenue direct pay permit to self-assess and report taxes. (C.R.S. 39-26-103.5).

Penalties and Enforcement.

Seller must keep record of sales adequate to determine amount due. (C.R.S. 39-26-116). Tax due becomes lien on taxpayer's goods and business fixtures and on business property leased to taxpayer unless exempted. (C.R.S. 39-26-117). Penalty for underpayment due to negligent or knowing disregard of regulations 10% of deficiency, 100% if due to fraud with intent to evade, plus interest and penalty interest in each case. (C.R.S. 39-26-115). Refusal to file or filing fraudulent return felony punishable by fine, imprisonment or both, as provided in C.R.S. 39-21-118 (C.R.S. 39-26-120, 121). If taxpayer neglects or refuses to file, executive director may estimate tax, add interest and penalty and, following notification, levy on and distrain taxpayer's property. (C.R.S. 39-26-118). Penalty and interest may be waived for good cause. (C.R.S. 39-26-118[9]). Action to collect tax must begin within three years from date tax due, unless seller fails to file return or files false or fraudulent return with intent to evade tax, in which case action to collect tax may be begun at any time. (C.R.S. 39-26-125).

Use Tax.

2.91% imposed upon storage or acquisition charges or costs for privilege of storing, using or consuming any articles of tangible personal property purchased at retail. (C.R.S. 39-26-202). Property not subject to tax includes: Property subject to sales tax, property held for resale in state in regular course of business, motor fuel, property of nonresident temporarily in state, property of U.S. or Colorado and its political subdivisions used in governmental capacity, property of charitable organizations used in conduct of regular charitable functions, personalty acquired outside of state and used by nonresident acquiring residency, personalty having value less than $100 purchased by resident outside of state, certain machinery or machine tools used in manufacturing, food purchased in grocery stores for consumption at home or sold through vending machines, electricity, coal, gas, fuel, oil and coke used in residences, certain precious metal bullion or coins, Internet access services, storage, use or consumption of aircraft used in interstate commerce, and storage, use or consumption of tangible personal property permanently affixed as component part of aircraft, storage, use or consumption of tangible property used as component parts in manufacturing goods which are then donated by manufacturer with aggregate value over $1,000 to tax exempt organizations, clear air emission vehicles, farm equipment, aqcompounds for livestock. (C.R.S. 39-26-705 to 716, 719 to 721). Payments of tax must be made to department of revenue on 20th of each month following month in which cumulative tax due is in excess of $300, Jan. 20 of year following if less than $300 for calendar year. (C.R.S. 39-26-204).

If taxpayer neglects or refuses to make return, executive director makes appealable determination of tax due plus 10% penalty and interest for delinquency period. (C.R.S. 39-26-204[5]). Willful failure to make return or to pay tax felony punishable by fine, imprisonment or both, as provided in C.R.S. 39-21-118 (C.R.S. 39-26-206). Penalty interest accrues on unpaid tax and executive director may, through attorney general, sue to recover tax plus interest. (C.R.S. 39-26-207). Tax constitutes prior lien on property unless exempted. (C.R.S. 39-26-205). Automobile may not be registered or certificate of title issued until tax paid. (C.R.S. 39-26-208).

Action to collect tax must begin within same time period applicable to sales tax. (C.R.S. 39-26-210).

Local Sales and Use Tax.

Statutory cities and counties may levy sales and use taxes on tax base similar to state sales and use tax base. Local tax rate when combined with state tax rate cannot exceed 7.3% until Jan. 1, 2001 then 7.21%. Regardless of combined rate limit, local tax rate may always be 1% or less. (C.R.S. 29-2-108[1]). Home rule cities may impose sales and use taxes on broader base and at higher rates. (C.R.S. 29-2-107). There are numerous home rule cities in Colorado which have enacted their own tax systems and collection and enforcement requirements.

Special Districts.

Specific statutory districts may be enacted and empowered to levy sales and use tax, up to maximum rate, if approved by voters in such district. Such taxes are collected by state. They include: RTD, 1.0% (C.R.S. 32-9-119[2]), sports venues, .1% (C.R.S. 32-15-107); cultural facilities, .1% (C.R.S. 32-13-105), low income housing, 1.0% (C.R.S. 29-1-204.5[3][f.1]), mass transit, .5% (C.R.S. 29-2-103.5[1]) and local improvements, .5% (C.R.S. 30-20-604.5).

22.18 STAMP AND SEAL TAXES:

No general documentary stamp tax. See topics 22.02 Alcohol, Beverages and Tobacco Taxes, subhead Liquor Taxes; 22.13 Property Taxes, subhead Real Estate Conveyance Tax.

22.18A TRANSPORTATION TAXES:

Highway Compensation Tax.

See category 23 Transportation, topic 23.01 Motor Vehicles, subhead Motor Vehicle Carriers.

23 TRANSPORTATION

23.01 MOTOR VEHICLES:

Executive director of Colorado department of revenue has general supervision (C.R.S. 42-1-201): Executive Director, Colo. Dept. of Revenue, 1375 Sherman Street, Room 409, Denver, CO 80261, 303-866-3091.

Vehicle Equipment Safety Compact adopted. (C.R.S. 24-60-901 to 912).

Driver License Compact adopted. (C.R.S. 24-60-1101 to 1107).

Vehicle Registration and Licenses.

All vehicles, except those exempted by C.R.S. 42-3-104, must be registered (C.R.S. 42-3-103) within 45 days of purchase; vehicles previously registered in another state must be registered within 90 days of Colorado residency. Registration expires at end of each 12-month registration period (C.R.S. 42-3-102) or on transfer of vehicle (C.R.S. 42-3-115). Vehicles may be registered at intervals of less than one year upon payment of appropriate fees and specific ownership tax. (C.R.S. 42-3-102[3]). Generally, vehicle must be registered in county of owner's residence. (C.R.S. 42-6-139).

Numbered plates must be displayed front and rear and registration card carried in vehicle. (C.R.S. 42-3-113, 202). Registration fee is payable in accordance with C.R.S. 42-3-304 or 306. In addition, specific ownership tax imposed on vehicles in lieu of personal property taxes. (C.R.S. 42-3-105 to 112). Various exemptions from payment of fees available. (C.R.S. 42-3-104, 304). Designated government officers and dealers required to verify vehicle information by physical inspection. (C.R.S. 42-3-105[1][c][I]). Department or its designated agents will not register motor vehicle unless applicant provides proof of complying motor vehicle insurance policy or certificate of self-insurance. (C.R.S. 42-3-105[1][d][I]).

Operator's License Required.

Persons at least 21 years old are licensed as drivers and persons at least 16 years old but not yet 21 years old are licensed as minor drivers. (C.R.S. 42-2-104). Temporary license is valid for up to one year. (C.R.S. 42-2-106[2][c]). Following classes of operator's licenses established: Class A includes any vehicle or combination of vehicles except bus or motorcycle; Class B includes any single vehicle except bus or motorcycle, and will permit licensee to tow one other vehicle of less than 10,000 pounds; Class C is basic driver's license and permits operation of any two-axle vehicle, but does not permit operation of vehicles described in Class A, B, S, or M, and does permit towing of one other vehicle or trailer of less than 10,000 pounds gross vehicle weight; Class M permits only operation of motorcycles and motor-driven cycles and can be sole classification of license or can be added as endorsement to any other class; Class S permits operation of vehicle which is equipped for carrying ten or more persons (but does not permit operation of school buses). (1 Colo. Code Regs. 204-6). Valid driver's or minor driver's license authorizes operating low power scooter. (C.R.S. 42-2-103). Fees and expiration dates for drivers' licenses governed by C.R.S. 42-2-114. Commercial licenses regulated by C.R.S. 42-2-401 to 409. License, permit or identification card must be exhibited on demand of any peace officer who reasonably suspects traffic violation. (C.R.S. 42-2-115).

New residents have 30 days to obtain license. (C.R.S. 42-2-102[2]). Exemption for persons operating federally owned military vehicle while serving in U.S. armed forces. (C.R.S. 42-2-102[1][a]). Exemption for nonresident student, 16 years or older with valid out-of-state license. (C.R.S. 42-2-102[1][f]).

Department of revenue authorized, upon specific statutory conditions, to restrict, cancel, suspend, or revoke operator's license. (C.R.S. 42-2-122 to 135). In general, unlawful use or possession of license is misdemeanor. (C.R.S. 42-2-136). Penalties imposed for driving without valid license (C.R.S. 42-2-101) or with license under restraint (C.R.S. 42-2-138). Habitual offenders of laws shall have their licenses revoked. (C.R.S. 42-2-201 to 208). Persons convicted of driving while under influence of alcohol must hold restricted license for at least one year before obtaining driver's or minor driver's license. (C.R.S. 42-2-132.5).

Titles.

Certificate of title, which may be electronic record (C.R.S. 42-6-107[1]), required before certificate of registration or license plates may be issued (C.R.S. 42-6-106). Such certificate may be obtained by filing verified application with director through county motor vehicle office upon form provided and by presenting evidence of ownership. (C.R.S. 42-6-116). If applicant cannot show right to certificate by sufficient evidence, certificate may nevertheless issue, provided applicant furnishes director with his statement setting forth source of title to, and liens against, vehicle and sufficient security or surety bond. (C.R.S. 42-6-115). Certificate of title is prima facie evidence of contents of record and that person named therein is lawful owner. (C.R.S. 42-6-107[2]). If certificate is lost, duplicate may be issued by Director. (C.R.S. 42-6-135). Mobile home titles governed by separate statutes administered by director. (C.R.S. 38-29-101 to 143).

Sales.

Transfer of motor vehicle must be accompanied by delivery to transferee of certificate of title. (C.R.S. 42-6-109). Although certificate of title may be electronic, paper copy is necessary if either seller or purchaser is not in Colorado or if purchaser pays entirely with cash. (C.R.S. 42-6-109[2]). Within 60 days of transfer, transferee must present certificate to director, together with application for new certificate and transfer fee of $7.20, whereupon new certificate will be issued. (C.R.S. 42-6-110, 137). Upon transfer by dealer of new motor vehicle, dealer must execute bill of sale to transferee and manufacturer’s certificate of origin. Upon presentment thereof to director by transferee, new certificate of title may be obtained. (C.R.S. 42-6-113). Upon transfer of motor vehicle by inheritance or operation of law or lien or mortgage foreclosure, director may issue new certificate of title upon receipt of proper application and upon surrender of old certificate of title or presentation of other proof of ownership or court order. (C.R.S. 42-6-114).

Any transfer of motor vehicle without complying with Act is misdemeanor. (C.R.S. 42-6-142). Altering or forging certificate of title or knowing use or transfer thereof is felony. (C.R.S. 42-6-143). Sunday sales of motor vehicles prohibited. Violation constitutes misdemeanor. (C.R.S. 12-6-302, 303).

Sales subject to regulations. (1 Colo. Code Regs. 205-1).

Terms of installment sales regulated by Uniform Consumer Credit Code. (C.R.S. 5-1-101 to C.R.S. 5-9-102.5). Motor vehicle dealers, used motor vehicle dealers, salesmen, wholesalers, distributors, auctioneers, manufacturers and manufacturer representatives licensed by motor vehicle dealer licensing board. (C.R.S. 12-6-101 to 125). Applicants for licenses must post surety bond and appoint agent for service of process in state. (C.R.S. 12-6-111, 112, 115[6]). Right of action against dealers, salesmen, wholesalers, auctioneers, manufacturers and manufacturer representatives for fraud or commission of certain prohibited acts, including deceptive trade practices. (C.R.S. 12-6-122; C.R.S. 6-1-101 to 205). Certain deceptive trade practices prohibited in sale or lease of motor vehicles. (C.R.S. 6-1-708; C.R.S. 42-6-202). Civil penalties of up to $10,000 for violations committed against elderly persons (defined as persons of 60 years of age or older). (C.R.S. 6-1-102, 112[3]).

Repairs.

No repairs on covered motor vehicle may be performed by repair garage without provision of written cost estimate and written consent of customer, except written consent may be waived by customer where vehicle has been towed to garage or left at garage outside of business hours or by specific statutory written waiver, but repairs made under such waiver will be limited to $100 maximum. (C.R.S. 42-9-104). When estimate has not been waived, repair charges will be limited to cost estimate plus 10% or $25, whichever is less, unless customer gives written or oral consent to additional charges before performance of additional work. (C.R.S. 42-9-105). Certain deceptive and unfair practices relating to repair of motor vehicles prohibited. (C.R.S. 42-9-111). Statutory violation may result in criminal conviction; aggrieved customer may recover damages including attorney fees and costs. (C.R.S. 42-9-112).

Liens.

Transactions creating security interests in motor vehicles (other than mobile homes) held for sale or lease which constitute inventory governed generally by Art. 9, Uniform Commercial Code. (C.R.S. 4-9-101 to 507). Security interests in motor vehicles not constituting inventory governed only by certificate of title statute. (C.R.S. 42-6-120). To be valid against third persons, holder of chattel mortgage or refinancing mortgage must file signed original, signed duplicate original or electronic version of original of mortgage or copy thereof; authorized agent thereupon files mortgage for record, notes mortgage upon certificate of title and forwards same to director, who issues new certificate containing description of mortgage. (C.R.S. 42-6-121 to 123). Such mortgage may remain lien for ten years after filing, after which time lien may be extended for successive three year periods. (C.R.S. 42-6-127). No mortgage or lien on motor vehicle recorded in any other state valid against third persons having no actual notice thereof unless certificate of title to such vehicle bears notation adequate to apprise such third persons of existence of mortgage. (C.R.S. 42-6-133).

Any mechanic or other person who performs repairs at request of owner shall have lien upon vehicle for amount due for such repairs or material furnished and for all costs incurred in enforcing lien for so long as person who performed repairs maintains possession or, if vehicle has been released, upon receipt of payment in form of check, draft, or order for payment which is not honored for full payment or is dishonored. (C.R.S. 38-20-106, 106.5).

Identification Marks.

Except for legitimate repairs, removal, alteration, or obliteration of vehicle identification number, manufacturer’s number, or engine number, as well as knowing possession of vehicle on which these numbers have been tampered with, is felony. (C.R.S. 42-5-102[2]).

Size and Weight.

Regulated by C.R.S. 42-4-501 to 512.

Lights Required.

Regulated by C.R.S. 42-4-204 to 222.

Equipment Required.

Regulated by C.R.S. 42-4-223 to 237. Child restraints mandated. (C.R.S. 42-4-236). Drivers and front seat passengers required to use safety belts. (C.R.S. 42-4-237).

Inspection.

No safety inspection program. Annual emissions control inspection required for vehicles registered in certain heavily populated locations. (C.R.S. 42-4-304[20]). At time of registration, county may collect emission inspection fee. (C.R.S. 42-3-304[19]). Comprehensive legislation and regulatory program enacted regarding motor vehicle emissions (C.R.S. 42-4-301 to 317; 5 Colo. Code Regs. 1001-15 to 16), including provisions permitting buyers to return vehicles out of compliance with emissions standards to motor vehicle dealers for repair or refund (C.R.S. 42-4-309). See also category 12 Environment, topic 12.01 Environmental Regulation.

Traffic Regulations.

Provisions regarding driving, overtaking and passing. (C.R.S. 42-4-1001 to 1013). Provisions regarding vehicle speed. (C.R.S. 42-4-1101 to 1105). Provisions regarding parking and backing. (C.R.S. 42-4-1201 to 1211). Provisions regarding towing of abandoned vehicles. (C.R.S. 42-4-1801 to 1814). Provisions regarding other traffic offenses. (C.R.S. 42-4-1401 to 1415). Provisions regarding penalties and procedure. (C.R.S. 42-4-1701 to 1718).

Any person operating motor vehicle in Colorado deemed to consent to (i) blood or breath test for alcohol and (ii) blood, saliva or urine test for drugs. (C.R.S. 42-4-1301.1). For purposes of prosecution, alcohol levels at the time of the alleged offense give rise to the following presumptions: not under influence and ability not impaired if less than or equal to .05; ability impaired, but other evidence necessary for proving under influence if greater than .05 but less than .08; under influence if greater than or equal to .08. (C.R.S. 42-4-1301[6]). If while driving or within two hours after driving blood or breath test for alcohol levels show .20 or greater, Level II alcohol and drug education required. (C.R.S. 42-2-132[2][a][II][B]). Driving includes "actual physical control"; person in driver's seat of motor vehicle with ignition key in on position is in actual physical control. (804 P.2d 873). Miranda warnings need not be given prior to performing driver roadside sobriety test in connection with routine traffic stop. (719 P.2d 1091). Roadside sobriety test can be administered only with probable cause or consent and cannot be compelled (633 P.2d 1071); however, revocation of license for specified violations or refusal to take sobriety test mandated (C.R.S. 42-2-126[3][c]). Chemical test need only be requested within "reasonable time". (766 P.2d 665). Breath tests not automatically inadmissible due to lack of evidence of testing officer's certification. (753 P.2d 239). Mandatory license revocation prescribed for conviction of driving under influence. (C.R.S. 42-2-125[1][b]). Mandatory revocation of commercial driver's license for possession or knowing transportation of illegal drugs. (C.R.S. 42-2-405[2]).

Accidents.

Driver of car involved in accident causing injury to person or property must stop, give name, address and car registration and render reasonable assistance to injured including carrying victim or causing victim to be carried to medical assistance. (C.R.S. 42-4-1602, 1603). Driver of car striking unattended vehicle must locate its owner or attach thereto note giving name, address and registration number of vehicle. (C.R.S. 42-4-1604). All accidents causing injury to person or property must be reported immediately to nearest police authority. (C.R.S. 42-4-1606). If personal injury, death or any property damage results, operator or owner must report in writing to director within ten days. (C.R.S. 42-4-1606[2] and C.R.S. 42-7-202).

Vehicular Homicide and Assault.

Driver guilty of vehicular homicide if he operates or drives motor vehicle recklessly or while under influence of alcohol or drugs and such conduct is proximate cause of death of another. (C.R.S. 18-3-106). Driver guilty of vehicular assault if he operates or drives motor vehicle recklessly or while under influence of alcohol or drugs and such conduct is proximate cause of serious bodily injury to another. (C.R.S. 18-3-205).

Liability of Owner.

Family car doctrine recognized. (63 Colo. 365, 167 P. 966). However, elimination of joint and several liability (see category 5 Civil Actions and Procedure, topic 5.09 Damages) may also affect liability of owner.

Guest Statute repealed effective Apr. 9, 1975. (1975, c. 379).

Financial Responsibility.

Motor Vehicle Financial Responsibility Act (C.R.S. 42-7-101 to 609) provides that driver's license may be suspended if person at fault in an accident fails to furnish to director adequate security for satisfaction of any liability arising out of accident up to $35,000, and proof of financial responsibility in future (C.R.S. 42-7-301). Future responsibility may be shown by certificate of insurance coverage, deposit of money or securities, or posting of bond. (C.R.S. 42-7-408). License may also be suspended where liable party fails to satisfy judgment within 30 days, or fails to comply with terms of order of restitution made as condition of probation in criminal proceeding arising from use or operation of motor vehicle. (C.R.S. 42-7-401).

The "free from any fault" exception to requirement of posting security by an uninsured motorist following an accident means no reasonable possibility of a judgment being rendered against him, and motorist has burden of bringing himself within that exception. (179 Colo. 270, 499 P.2d 1169).

Insurance.

Insurance required for every owner of motor vehicle who operates it in state; noncompliance sanctions imposed by Motor Vehicle Financial Responsibility Act (see subhead Financial Responsibility, supra). (C.R.S. 10-4-616). Policy must provide: legal liability coverage for injury or death up to $25,000 per person and $50,000 to all persons in one accident, and $15,000 for property damage in one accident. (C.R.S. 10-4-617). Person with more than 25 registered motor vehicles can qualify as self-insurer. (C.R.S. 10-4-621). Proof of insurance required. (C.R.S. 42-4-1409). Underinsured and uninsured coverage must be offered. (C.R.S. 10-4-609).

No-Fault Insurance.

Former no-fault thresholds and reparation benefits were repealed, effective July 1, 2003. (C.R.S. 10-4-726).

Foreign vehicles, properly licensed in home state, may operate without Colorado license, except that vehicle carrying goods or persons for hire must have Colorado license but only in accordance with registration reciprocity between Colorado and foreign state. (C.R.S. 42-3-117).

Nonresident Operators.

Nonresident over 16 having in his possession operator’s license issued by his home state may operate vehicle as private operator. (C.R.S. 42-2-102[c]).

Actions against Nonresident.

Service of process personally made outside state in action arising from transaction of any business; ownership, use, or possession of any real property; contracting to insure any person, property or risk; maintenance of matrimonial domicile; agreeing to dispute resolution through arbitration or similar means within state; or commission of tortious act within state gives state court jurisdiction over person served. (C.R.S. 13-1-124, 125).

Direct actions not authorized by statute.

Snowmobiles.

No person shall operate or have in his possession snowmobile in state unless registered and licensed by division of wildlife. (C.R.S. 33-14-102).

Motor Vehicle Carriers.

Common carrier transporting persons or property must obtain certificate of convenience and necessity from public utilities commission (C.R.S. 40-10-104), unless in interstate commerce in which case registration, but no certificate, is required (C.R.S. 40-10-120). Filing fee $35 for intrastate and $15 for interstate commerce. Fee for transfer of certificate or registration $35 for intrastate commerce and $5 for interstate commerce. (C.R.S. 40-10-109). Carriers must also pay identification fee, set administratively by commission, per vehicle every year. (C.R.S. 40-2-110.5). Common carrier must file liability insurance policy or surety bond. Policy limits or bond amount must comport with regulations of commission. (C.R.S. 40-10-110). Common carrier does not include ridesharing arrangements, carriers of household goods, luxury limousines, charter or scenic busses, offroad scenic charters, children’s activity bus, motor vehicle carrier exempt from regulation as public utility, commercial transport of ashes, trash, waste, rubbish, garbage, industrial waste products or other discarded materials, except sludge and fly ash, nonemergency transportation of persons with disabilities, hearses, ambulances or emergency vehicles. (C.R.S.

40-1-102[3]; C.R.S. 40-10-104; C.R.S. 40-16-101).

Contract carrier in interstate commerce must register with public utilities commission. (C.R.S. 40-11-115). If in intrastate commerce must obtain permit from commission. (C.R.S. 40-11-103). Filing fees parallel those for common carriers. (C.R.S. 40-11-108). Must file liability insurance policy or surety bond in compliance with commission regulations. (C.R.S. 40-11-109). Exceptions from regulation generally coincide with exceptions to common carrier regulation. In addition, "contract carrier" excludes common carriers and carriage of friend or neighbor on trip. (C.R.S. 40-11-101[3], 102[2]). Commission has power and duty to prescribe minimum rates for contract carriers in competition with common carriers. (C.R.S. 40-11-105). Commission has promulgated numerous regulations regarding contract carriers. (4 Colo. Code Regs. 723-6).

Towing carriers must obtain permit from public utilities commission. (C.R.S. 40-13-103). Commission may revoke or deny permit if carrier, within five years, has been convicted or pleaded guilty or nolo contendere to felony. (C.R.S. 40-13-103[3]). Fee for permit is $150. (C.R.S. 40-13-104). Insurance or surety bond required. (C.R.S. 40-13-105).

Person injured by violation of statutes hereinbefore cited may apply to court of competent jurisdiction for enforcement by injunction or other proper process; such person also has cause of action in damages. (C.R.S. 40-10-115[4]; C.R.S. 40-11-113[4]; C.R.S. 40-13-112[4]).

Certain Transported Materials.

Transport of hazardous and nuclear materials subject to detailed regulations. (C.R.S. 42-20-101 to 511).

Highway Compensation Tax.

In addition to regular registration and license fees, carriers subject to various passenger-mile and ton-mile taxes. (C.R.S. 42-3-304, 306). Certain interstate carriers may apply for special 72-hour laden weight registration in lieu thereof. (C.R.S. 42-3-305[7]).

Military Selective Service.

Every male between age of 18 and 26 years who applies for state identification (C.R.S. 42-2-302[4][a]), instructional permit or driver's license (C.R.S. 42-2-1072.5[a]), or commercial license (C.R.S. 42-2-403) must register with Selective Service.

Gasoline Tax.

See category 22 Taxation, topic 22.08 Gasoline and Special Fuels Taxes.

Ownership Tax.

See category 22 Taxation, topic 22.13 Property Taxes.

23.01A COMMERCIAL CODE FORMS:

See also categories 3 Business Regulation and Commerce, topic Commercial Code and Mortgages, topic Chattel Mortgages. For National Forms, see Part III, Uniform and Model Acts, Commercial Code Amendments. Also, Colorado forms can be accessed at: http://www.sos.state.co.us/pubs/business/main/htm.

1

CONNECTICUT LAW DIGEST

—Scope —

Revised for 2010 edition by

PULLMAN & COMLEY, LLC, of Hartford and Bridgeport.

(Citations, unless otherwise indicated, refer to sections of the General Statutes, Revision of 1958, as codified through Jan. 1, 1995. “c.” citations refer to chapters of the General Statutes. “PA” citations refer to Public Acts of the legislature passed during the session year noted in the citation. “SA” citations refer to Special Acts of the legislature passed during the session year noted in the citation. “Am'd” means “amended by.” Citations to 2002 legislation include all enactments through the February regular session and the June special session. “Const.” citations refer to Article and section of the Connecticut Constitution of 1965. “CPB” citations refer to the Connecticut Practice Book and indicate sections thereof. Parallel citations to the Atlantic Reporter begin with 53 Conn. “CLJ” refers to the Connecticut Law Journal, cited by volume and number. “CGS” refers to Connecticut General Statutes.)

Note: This revision covers all legislation passed by Governor through Aug. 2009. Legislature, in odd numbered years, meets in Jan. and must adjourn by June; in even numbered years, meets in Feb. and must adjourn by May (budgetary).

1 INTRODUCTION

1.01 GOVERNMENT AND LEGAL SYSTEM:

The State of Connecticut is a constituent state of the United States of America. For further discussion of the U.S. federal system, see Introduction to the Federal Government of the United States at the beginning of this volume. A great many laws are promulgated by the federal government of the United States and are not reflected in the topics below. See the Introduction to this volume for references to the federal law topics covered.

Like all but one of the United States, Connecticut has a common law legal system, with roots in English common law. For information on the courts and legislature of Connecticut, see category 6 Courts and Legislature.

1.02 [RESERVED]

1.03 HOLIDAYS:

Legal holidays are: Jan. 1, 1st Mon. occurring on or after Jan. 15, Feb. 12, 3d Mon. in Feb., last Mon. in May, July 4, 1st Mon. in Sept., 2d Mon. in Oct., Nov. 11, Dec. 25, and any day appointed by Governor or President for thanksgiving, fasting, or religious observance. When holiday occurs on Sun., next Mon. is holiday; holiday on Sat., preceding Fri. is holiday. (§ 1-4).

Certain contracts (e.g., those made by car dealers or contractors) are voidable if made on Sun. upon return of consideration. (§§ 52-207, C.G.S. 53-300a, C.G.S. 53-301, C.G.S. 53-302a, C.G.S. 53-303b–53-303e, C.G.S. 53-303f). Contracts affecting real property not voidable. (§ 53-300a).

1.04 OFFICE HOURS AND TIME ZONE:

Connecticut is in the Eastern Standard (GMT -05:00) time zone. Office hours are generally from 9 a.m. to 5 p.m.

2 BUSINESS ORGANIZATIONS

2.01 AGENCY:

In general, the common law governs. Statutes govern agents of student athletes. (§ 20-553, et seq.).

State Agency Affirmative Action.

Any state agency with 20 or fewer full-time employees shall file biennial affirmative action plan. Such agencies must provide diversity training to any employee working more than 20 hours per week. (§ 462-68).

State Agency Purchase Orders.

Purchase order or other documentation approved by comptroller is necessary for budgeted agency to incur obligation. (§ 4-98[a]).

Public Agency Employment Agreements.

Agreements between public agencies and employees terminating employment relationship must contain confidentiality provision prohibiting disclosure of agreement or cause for termination of employment. (§ 1-214a).

2.02 ASSOCIATIONS:

Formation.

Voluntary associations are formed by agreement among members. Except for agricultural or horticultural societies (§ 29-119 et seq.) and fraternal benefit societies (§ 38-206 et seq.), there are no statutes relating specifically to their formation or dissolution.

Rights and Powers.

Association holds property by its members as individuals, and member who abandons association abandons his interest in its property. (19 Conn. 154, 166).

Associations as such cannot hold legal title to land (44 Conn. 259), and conveyances should be to trustees (§ 47-6). However, devise to association operated for purposes of public charity will not be allowed to fail for want of devisee. (17 Conn. 181, 187).

Association is treated as employer separate from its members for purposes of fair employment practices (§§ 31-122, C.G.S. 31-275); workers' compensation (§ 31-275); and labor relations (§ 31-101).

In becoming member of association, one submits himself to its jurisdiction, and consents to abide by its law, rules and usages as incident of membership. (58 Conn. 552, 557, 20 A. 671).

Liabilities.

Where association is formed to engage in business for profit, members are liable as partners; but where association is nonprofit, authorization or ratification is prerequisite to member liability. (119 Conn. 681, 179 A. 201).

Voluntary associations and their members, as individuals, are liable to be sued in civil actions both in contract and tort, but no civil action, except under contract, may be brought against members of such association without joining such association, if it is located or has property subject to attachment in this state. (§ 52-76). Individual property of members is not liable to attachment or levy unless they are joined. Judgment must be satisfied first from personal property of association and then from property of any member against whom judgment was rendered. Attachment liens on personal property of members shall not expire until two months, and on real estate four months, after levy of execution against personal property of associations. Judgments in actions of tort may be satisfied out of real estate of association. (§ 52-292).

Professional Associations.

Any three or more persons licensed or authorized to practice profession by State, may associate to practice such for profit, if articles of association of members provide that association has three of following four attributes: (a) Continuity of life so that death, insanity, bankruptcy, retirement, resignation or expulsion of any member will not cause dissolution; (b) centralized management so that any one or more but less than all manage the operations; (c) limited liability; and (d) free transferability of interests. Such articles of association must be signed by all members and recorded with Secretary of State (fee $25) and office of Town Clerk in town wherein association has its principal offices. Such association may become professional service corporation. (§ 34-82).

See also topic 2.03 Corporations, subhead Professional Corporations.

2.03 CORPORATIONS:

For unincorporated organization, see topic 2.02 Associations.

Connecticut has enacted Connecticut Business Corporation Act (§§ 33-600 through C.G.S. 33-998) substantially changing current provisions regarding stock corporations. Effective date of new legislation is Jan. 1, 1997.

Provisions in stock corporation's certificate of incorporation already in effect on Jan. 1, 1997 which were permissible under then-existing law, but are contrary to, inconsistent with, or in addition to permissible provisions under new law, will continue to govern. (§ 33-601).

Stock Corporations.

One or more persons (§ 33-635) may form corporation for any lawful business except that of state bank and trust company, savings bank, industrial bank, building and loan association, telegraph, gas, electric light, water or cemetery company, or which shall need to condemn lands or occupy highways, except telephone company. (§ 33-645). But this section does not prohibit formation of corporation for transaction of any business in any other state which business is not prohibited by laws thereof. No corporation may be formed for purpose of transacting business of insurance company or surety or indemnity company, unless: (1) It is affiliate of insurance company chartered by, incorporated, organized or constituted within or under laws of this state, and (2) at time of filing of its articles of incorporation, there is also filed certificate issued by insurance commissioner pursuant to § 33-646 authorizing formation of corporation. No corporation shall have power to transact in this state business of insurance company or surety or indemnity company until it has procured license from insurance commission in accordance with provisions of § 38a-41. There is no requirement as to citizenship or residence of incorporators. LLCs and LLPs may serve as registered agents for foreign corporations, LLCs, and LLPs. (§§ 33-926[a]; and C.G.S. 33-1216[a]).

Articles of incorporation must be filed, showing: Name; authorized capital; street address of corporation's initial registered office and name of initial registered agent at that office; and name and address of each incorporator. (§ 33-636[b], am'd PA 06-68, § 27). Articles may contain any other provisions regulating corporation, must meet statutory requirements and must be signed by one incorporator and filed in office of Secretary of State. (§ 33-608). Document may be sent to Secretary of State by electronic transmission. (§ 33-608). Certificate of incorporation shall set forth classes of shares and prescribe distinguishing designation per class prior to issuance. All shares of class or series shall have identical terms with those of other shares of same class. (§ 33-665). (See also §§ 33-666, C.G.S. 33-675, C.G.S. 33-800.)

Corporate existence commences upon filing of articles of incorporation by Secretary of State; filing by Secretary of State conclusive evidence of incorporation in all courts, except as against state in action to cancel or revoke certificate of incorporation. (§ 33-637).

Corporate name must contain “corporation,” “company,” “incorporated,” “limited,” or “Societa per Azioni” or abbreviation “corp.,” “co.,” “inc.,” “ltd.” or “S.PA” if formed after Jan. 1, 1961 and must not describe corporate powers, purposes or authority which corporation does not possess. (§ 33-655). Secretary of State examines name reservation application and if available, name may be reserved for 120 days from date of filing with Secretary of State (§ 33-656), fee $30 (§ 33-167). Any existing corporation may register name with Secretary of State if name is such as to distinguish it upon state records. (§ 33-657). Must be annually renewed for following year between Oct. 1 and Dec. 31, fee, $30. (§ 33-288). No informal name clearance authorized.

Taxes and fees incident to organization are: On filing articles of incorporation, or articles of amendment to increase capital, or on merger or consolidation franchise tax of 1¢ per share up to and including first ten thousand authorized shares, one-half cent per share for each authorized share in excess of 10,000 shares up to and including 100,000 shares, 1/4¢ per share for each authorized share in excess of 100,000 shares up to and including 1,000,000 shares, and 1/5¢ per share for each authorized share in excess of 1,000,000 shares. Minimum franchise tax is $150. (§ 33-618).

Amendments.

Corporation may amend its articles of incorporation at any time, so long as amended articles contain only such provisions as would be lawful in new certificate of incorporation filed at time of making such amendment. (§ 33-795).

Amendments to articles may be made in following manner: (a) Unless existing articles provide otherwise, board of directors, without shareholder approval, may amend articles (1) to extend duration of corporation, (2) to delete names of initial directors, (3) to delete name of original registered agent, (4) to change authorized shares of outstanding class into greater number of whole shares if corporation has only shares of that class outstanding, (5) to change corporate name to substitute word or words required by § 33-655 or to add, delete or change geographical attribution for name, or (6) to make any other change expressly permitted by Connecticut Business Corporations Act to be made without shareholder action (§ 33-796); (b) where shareholder action required, at shareholder meeting by majority vote (unless existing articles require greater vote) of those entitled to vote, after recommendation approving change from board of directors, and notice to shareholders (both voting and nonvoting) (§ 33-797).

By-laws shall be promulgated initially by incorporators or board of directors and may contain any provision for managing business and regulating affairs of corporation not inconsistent with law or existing articles of incorporation. (§ 33-640). Emergency by-laws, for use in case of catastrophic event preventing assembly or quorum of board of directors, authorized. (§ 33-641).

Organization.

Before or after incorporation, board of directors (if named in articles of incorporation) or incorporator(s) (if board not named) shall hold organizational meeting to complete organization by electing board (if necessary). Board shall complete organization by appointing officers and adopting by-laws. (§ 33-639). Each corporate officer shall certify that financial statements of corporation fairly represent, in all material respects, financial condition and results of corporation's operation. False certifications shall subject one to imprisonment for ten years or less and/or fine of $1,000,000. (§ 33-1333). Corporate fraud accountability. (§§ 33-1331, C.G.S. 33-1332, C.G.S. 33-1336).

Any two or more offices may be held by the same person. (§ 33-763). Officer performs duties set forth in by-laws. (§ 33-764). Officers may be removed, with or without cause, but without prejudice to their contract rights, if any. Mere appointment or election for specified term does not of itself create contract rights. (§§ 33-766, C.G.S. 33-767).

Directors.

Corporation may have board of directors consisting of one or more individuals. Directors need not be residents of this state or shareholders of corporation unless by-laws so require. (§ 33-736). Articles of incorporation may provide for classification of directors either as to their term of office or as to their election by one or more classes of shareholders exclusively or both. (§ 33-738). Terms of initial directors expire at first shareholders meeting at which directors are elected. Unless terms are staggered, all other directors' terms expire at next annual meeting of shareholders. (§ 33-739, am'd PA 09-55, § 12). Terms may be staggered in up to five groups of directors, with terms expiring at successive annual meetings. (§ 33-740). Qualified director defined. (§ 33-605).

Directors shall manage or direct management of corporation subject to any provisions contained in articles of incorporation (§ 33-735), or shareholder agreement (§ 33-717). Shareholder agreement ineffective once corporation goes public. (§ 33-717[d]).

Directors' committees are authorized if allowed by -laws, to exercise all such authority as may be delegated to them by board of directors. (§ 33-753). Directors' meetings may be held either within or without State by any means of communication by which all directors may simultaneously hear each other at meeting. Director shall cease to be in office on: (1) Death; (2) resignation; (3) removal from office pursuant to bylaws; (4) court order removing him by reason of incompetency; or for any other lawful cause. (§§ 33-741–33-743). Directors may take action without meeting if each director signs consent document describing action, and document is delivered to corporation. (§ 33-749).

Liability of Directors.

Directors may be personally liable for willful nonpayment of taxes collected under sales tax and admission, cabaret or due tax. (§§ 12-414a; C.G.S. 12-547a). Directors taking advantage of business opportunity are not liable for damages if opportunity is first timely offered to corporation and either directors or shareholder disclaim interaction. Noncompliance does not create inference that opportunity should have been first presented to corporation or shift burden of proof. (§§ 33-785, 33-1131). Director is not liable for any action taken as director, or any failure to act, if he or she performed duties of director (1) in good faith; (2) with care ordinarily prudent person in like position would exercise under similar circumstances; and (3) in manner director reasonably believes to be in best interests of corporation. (§ 33-756). In discharging duties, director entitled to rely upon reports, data, and statements if prepared and presented by (1) corporate officers whom director reasonably believes to be competent and reliable; (2) legal counsel, public accountant, or other persons as to matters director reasonably believes to be within professional or expert competence of individual; or (3) committee of board of directors if director reasonably believes committee merits confidence. Director is deemed not to be acting in good faith if he or she has knowledge concerning issue in question which makes reliance unwarranted. (§ 33-756). Bank directors may be subject to fingerprinting upon (re)election. (§ 36a-102). Damages against directors in shareholder proceeding on grounds that director has interest respecting corporate transaction are limited to conflicting interest transactions. (§ 33-782; see also § 33-1128). Directors in director's conflicting interest transaction not required to make required disclosures provided director has reasonable belief that doing so would violate legal duty or professional ethics. (§ 33-783; see also § 33-1129).

Indemnification of Directors and Officers.

Indemnification may be mandatory, discretionary, or prohibited depending upon circumstances. Detailed statutory provisions govern. (§§ 33-770, am'd PA 09-55, § 29; C.G.S. 33-771–33-779). Regarding directors' conflicting interest transactions. (§ 33-1121).

Stock.

Shares may but need not be represented by certificates. If shares issued without certificates; corporation must send shareholder written statement of required information. (§ 33-677). Each certificate must set forth (1) name of corporation; (2) statement that corporation is organized under laws of this State; (3) name of person to whom issued or that same is issued to bearer; (4) number, class and designation of series, if any. Where there is more than one class of stock authorized certificate must summarize differing rights, preferences, or limitations, or state that corporation will furnish to stockholder on request and without charge, full or summary statement of designations, rights, terms, limitations and preferences of various classes. (§ 33-676).

Before issuance of shares, board of directors must determine that consideration received or to be received for shares is adequate. (§ 33-672). Consideration for shares may consist of any tangible or intangible property or benefit to corporation, including cash, promissory notes, services performed, contracts for services to be performed or other securities of corporation.

A corporation may purchase its own shares which thereupon become or revert to authorized but unissued shares (concept of “treasury” shares abolished). (§ 33-684).

Preemptive Rights.

Except for corporations in existence prior to Jan. 1, 1997 whose articles of incorporation do not prohibit preemptive rights, such rights do not exist unless articles of incorporation specifically provide for same. (§ 33-683).

Voting.

Stockholders may vote in person or by proxy, and each share entitles its owner to one vote. Redeemable shares are not entitled to vote after notice of redemption mailed and sum sufficient to redeem deposited to pay holders. (§ 33-705). Holders of debt securities of corporation may have voting rights, if articles of incorporation so provide. (§ 33-705[e]).

Voting Trusts.

One or more stockholders of any corporation may by written agreement transfer stock to a voting trustee, vesting in such trustee right to vote thereon for a period not exceeding ten years. Copy of such agreement must be promptly filed in principal office of corporation in Connecticut. All or some of parties to voting trust may extend same for additional terms of ten years by executing written agreement to that effect. Extension affects only those who are parties thereto. (§ 33-715).

Transfer of Stock.

Governed by Uniform Commercial Code. (Tit. 42a).

Uniform Securities Act Compliance.

“Broker-dealer” does not include bank per Securities Exchange Act of 1934 § 3(a)(6) when conducting activities that would except it from definitions of “broker” or “dealer” under Act's §§ 3(a)(4) or (5). (§ 366-3[5]).

“Investment adviser” does not include bank per Investment Advisers Act of 1940 § 202(a)(2), or bank holding company per Bank Holding Company Act of 1956 that is excepted from definition per § 202(a)(11) of Investment Advisors Act of 1940. (§ 36b-3[10]).

Tender offers must comply with Connecticut Tender Offer Act. (§§ 36b-40–36b-52). No person shall make tender offer, or acquire equity securities pursuant to such offer, unless registration statement is filed with bank commissioner or exempted by him. Copy must be sent by certified or registered mail to principal office of target company and terms thereof publicly disclosed. (§ 36a-458). Registration statement must: (1) Be submitted on forms prescribed by bank commissioner, (2) be accompanied by consent of offeror to service of process, and (3) contain information specified in § 36b-43. Filing fee: $500. (§ 36b-49). Tender offer defined generally as offer to acquire equity security of target company if after acquisition offeror would be record or beneficial owner of more than 10% of any class of outstanding equity securities of target company. (§§ 36b-41[8]).

Stockholders.

§ 52-572j governs derivative actions by shareholders or members.

Meetings of Stockholders.

Within two business days after notice of each stockholders' meeting, complete list of stockholders entitled to notice is required to be prepared, which must be opened to inspection. (§ 33-704). Annual stockholders' meetings may be held either within or without this state as may be provided in by-laws. (§ 33-695). At least ten and not more than 60 days written notice of all meetings must be given. (§ 33-699).

Directors have power to fix record date for determination of stockholders entitled to notice and vote if by-law does not fix such date. Period between meeting date and record date may not exceed 70 days. (§ 33-701).

Special meetings must be called if demanded by board of directors, person authorized by articles of incorporation, or upon written request of holders of at least one-tenth of outstanding stock entitled to vote at that meeting.

Dividends.

Distributions may be made to shareholders subject to restrictions in articles of incorporation and subject to following: (1) No distribution is permissible if corporation would not be able to pay its debts as they become due in usual course of business; or (2) corporation's total assets would be less than sum of total liabilities plus amount needed, upon dissolution, to satisfy preferential rights of those shareholders not receiving distribution but whose rights are superior to those receiving distribution. (§ 33-687).

Unclaimed Dividends.

See category 21 Property, topic 21.01 Absentees, subhead Escheat.

Reports.

Every corporation, except banks, trust companies, insurance, or surety companies, building and loan associations, and public service companies shall file annual report with Secretary of State. (§ 33-953).

First such report is to be filed within 30 days after organization meeting. Each annual report must be filed as provided by regulations of Secretary of State.

Report must contain: Name of corporation; its principal office; names and respective business and residence addresses of directors and officers unless good cause (including personal security considerations) excuses disclosure. (§ 33-953).

Failure to File.

Corporation which fails to file its annual or biennial report on or before due date is in default.

Secretary of State shall not accept report until any default for failure to file prior report is cured. If report does not conform to law, Secretary of State may return it for correction along with any fee submitted with it. If not corrected on or before due date, corporation shall be in default and late filing fee is assessed unless report is filed within 18 days of rejection by Secretary of State. (§ 33-954).

Dissolution.

Corporation may be dissolved: (1) By board of directors and shareholders (§ 33-881); (2) by decree in judicial proceedings to liquidate corporate assets (§ 33-896, am'd PA 09-55, § 23); (3) by forfeiture action by Secretary of State. (§ 33-890). In normal case, dissolution by resolution requires affirmative vote of majority of voting power of shares entitled to vote thereon and recommendation by Board of Directors. Other shareholder voting proportions may be established by articles of incorporation. Articles of dissolution in required form must be filed with Secretary of State. (§ 33-882). Dissolution may be revoked within 120 days. (§ 33-883). Superior Court may, by judicial decree, dissolve corporation: (1) In proceeding brought by shareholder, if is established that (A) directors are deadlocked, shareholders cannot break deadlock, and irreparable injury to corporation is threatened, or affairs can no longer be conducted to shareholders' advantage generally, because of deadlock, (B) directors or those in control are, have, or will act illegally, oppressively, or fraudulently, (C) voting shareholders are deadlocked and have failed for two consecutive annual meetings, to elect successors to directors whose terms have expired, or (D) corporate assets have been misapplied or wasted; (2) in proceeding brought by creditor (A) if creditor has claim against corporation reduced to judgment and execution on judgment has been returned unsatisfied and corporation is insolvent, or (B) corporation has admitted in writing that creditor's claim is due and owing and corporation is insolvent. (§ 33-896, am'd PA 09-55, § 23). In event of proceeding brought by shareholder, corporation or one or more non-petitioning shareholders may elect to purchase shares of petitioner at fair value, to be determined by agreement or by court order. Election to purchase must be made within 90 days after filing of petition to dissolve or at such later time as court in its discretion may allow. (§ 33-900, am'd PA 09-55, § 27).

Administrative dissolution may occur when Secretary of State determines corporation has failed to maintain registered agent or agent cannot be found. Upon issuance of notice to corporation of impending administrative dissolution, corporation has three months to file new appointment of agent. (§ 33-890). Corporation has three years to apply for reinstatement after administrative dissolution (§ 33-892), which application must be accompanied by documentation and fees necessary to cure default.

Procedure on Dissolution.

If dissolution is by action of board of directors and shareholders, corporation may publish notice in newspaper published in this state and having general circulation in town of corporation's principal office. Any action, suit or proceeding against dissolved corporation for any right or claim existing at, or for any liability incurred prior to, dissolution shall be barred if not commenced within three years after last publication of notice above provided for. However, corporation may shorten this period of limitation as to known creditors and claimants as follows: Written notice shall be sent to all known claimants of corporation warning them to present their claims. Such notice to creditors shall state to whom, at what place and time limit within which, which time limit shall not be less than 120 days after date of mailing such notice, such claims are to be presented. Notice shall also state expressly that claims not presented as therein provided will be barred. Claims of known claimants not thereafter presented within 120 days are barred. If claim presented, and corporation rejects claim, claimant has 90 days from rejection to bring court action to enforce claim. Procedure for filing certificate of dissolution. (§ 33-1172).

Upon discharge of all obligations, a dissolved corporation may distribute assets to its stockholders, but no final liquidating distribution may be made without first obtaining current statements from both the State Tax Commissioner and the State Unemployment Compensation Administrator to the effect that all current and future corporate obligations to these two offices have been satisfied. (§ 33-885).

Involuntary Dissolution.

If corporation is dissolved by court order, court may appoint receiver, to wind up business. Such receiver, may be director or other corporate officer. Court may limit period for presentation of claims to four months, dissolve corporation and take such other action as it deems advisable to expedite dissolution and determine rights of parties. (§ 33-898, am'd PA 09-55, § 25).

Consolidation or Merger.

Corporations may merge or consolidate in accordance with detailed provisions. (§ 33-815). (See also §§ 33-816 to C.G.S. 33-821; C.G.S. 33-840 to C.G.S. 33-845.)

Dissenter's Rights.

Certain fundamental changes trigger right of shareholder to demand payment for shares upon surrender of same. These actions are: (1) Consummation of merger if shareholder approval was required; (2) consummation of share exchange in which corporation's shares will be acquired; (3) consummation of disposition of assets; (4) amendment to articles of incorporation that reduces number of shares of class or series owned by shareholder to fraction of share if corporation has obligation or right to repurchase fractional share so created. (§ 33-856). Corporation considering action which will trigger appraisal rights must notify affected shareholders of their rights, and give shareholders form by which they can exercise their right. Within 30 days after form is due, corporation shall pay what it determines to be fair value of shares. If shareholder is dissatisfied with amount, he must present his estimate of fair value to corporation and demand that amount. (§ 33-864, et seq.).

Corporations Without Capital Stock.

Governed by Connecticut Non-Stock Corporation Act (§ 33-1000, et seq.); follows closely provisions of Connecticut Business Corporations Act. (§§ 33-1000 to C.G.S. 33-1290).

Corporate Powers.

Unless its articles of incorporation provide otherwise, every corporation has perpetual duration and succession in its corporate name and has same powers as individual to do all things necessary or convenient to carry out its business and affairs, including without limitation power: (1) To sue and be sued, complain and defend in its corporate name; (2) to have corporate seal, which may be altered at will, and to use it, or facsimile of it, by impressing or affixing it or in any other manner reproducing it; (3) to make and amend by-laws, not inconsistent with its articles of incorporation or with laws of this state, for managing business and regulating affairs of corporation; (4) to purchase, receive, lease or otherwise acquire, and own, hold, improve, use and otherwise deal with, real or personal property, or any legal or equitable interest in property, wherever located; (5) to sell, convey, mortgage, pledge, lease, exchange and otherwise dispose of all or any part of its property; (6) to purchase, receive, subscribe for or otherwise acquire, own, hold, vote, use, sell, mortgage, lend, pledge or otherwise dispose of, and deal in and with shares or other interests in, or obligations of, any other entity; (7) to make contracts and guarantees, incur liabilities, borrow money, issue its notes, bonds and other obligations, which may be convertible into or include option to purchase other securities of corporation, and secure any of its obligations by mortgage or pledge or any of its property, franchises or income; (8) to lend money, invest and reinvest its funds, and receive and hold real and personal property as security for repayment; (9) to be promoter, partner, member, associate or manager of any partnership, joint venture, trust or other entity; (10) to conduct its business, locate offices and exercise powers granted by §§ 33-600–33-988, inclusive, within or without this state; (11) to elect directors and appoint officers, employees and agents of corporation, define their duties, fix their compensation and lend them money and credit; (12) to pay pensions and establish pension plans, pension trusts, profit sharing plans, share bonus plans, share option plans and benefit or incentive plans for any or all of its current or former directors, officers, employees and agents; (13) to make donations for public welfare or for charitable, scientific or educational purposes; (14) to transact any lawful business that will aid government policy; and (15) to make payments or donations, or do any other act, not inconsistent with law, that furthers business and affairs of corporation.

Emergency corporate powers, for use in event of catastrophic event preventing assembly of quorum of board of directors, authorized. (§ 33-648). Such powers may (1) modify lines of succession to accommodate incapacity of any director, officer, employee, or agent; and (2) relocate principal office, or designate alternate principal office.

Fees.

Secretary of State shall charge and collect following fees for filing documents and issuing certificates: (1) Filing application to reserve, register or renew registration of corporate name, $30; (2) filing transfer or reserved corporate name, $30; (3) filing articles of incorporation, including appointment of statutory agent, $50; (4) filing change of address of registered agent or change of statutory agent, $25; (6) filing amendment to articles of incorporation, $50; (7) filing restated articles of incorporation, $50; (8) filing articles of merger or share exchange, $30; (9) filing articles of correction, $50; (10) filing certificate of surrender of special charter and adoption of general articles of incorporation, $50; (11) filing articles of dissolution, $25; (12) filing articles of revocation of dissolution, $25; (13) filing certificate of administrative dissolution, $25; (14) filing annual report, $75 except as otherwise provided in §§ 33-953 and C.G.S. 33-954; (15) filing application of foreign corporation for certificate of authority to transact business in this state and issuing certificate of authority, $50; (16) filing application of foreign corporation for amended certificate of authority to transact business in this state and issuing amended certificate of authority, $50; (17) filing application for withdrawal of foreign corporation and issuing certificate of withdrawal, $50; (18) filing application for reinstatement, $75; and (19) filing corrected annual report, $50.

Miscellaneous Charges.

Secretary of State shall charge and collect following miscellaneous charges: (1) At time of any service of process on Secretary of State as statutory agent of corporation, which amount may be recovered as taxable costs by party to suit or action causing such service to be made if party prevails in suit or action, plaintiff in process so served shall pay $25; (2) for preparing and furnishing copy of any document, instrument or paper filed or recorded relating to corporation: For each copy of each such document thereof regardless of number of pages, $25; for affixing his certification and official seal thereto, $5; (3) for preparing and furnishing his certificate of existence or authorization under § 33-636, which certificate may reflect any and all changes of corporate names and date or dates of filing thereof, $60; and (5) for other services for which fees are not provided by general statutes Secretary of State may charge such fees as will in his judgment cover cost of services provided.

Foreign Corporations.

Each foreign corporation shall pay to Secretary of State license fee of $225 at time of filing its application for certificate of authority to transact business in this state, and annually thereafter on or before last day of calendar month in which falls anniversary of day of issuance of its certificate of authority, until such time as it has filed certificate of withdrawal from state or its certificate of authority to transact business in this state has been revoked.

Reports.

Every corporation, except banks, trust companies, insurance or surety companies, building and loan associations, or public service companies shall file annual report with Secretary of State. (§ 33-953).

First such report of corporation shall be filed within 30 days after its organization meeting. Subsequent annual reports shall be filed at times provided by Secretary of State's regulations.

Nonstock corporations which are charitable in nature (except those granted exemption in § 17-21h) and which seek to solicit funds from general public are required to register with and are regulated by Department of Consumer Protection (§ 17-21g).

Close Corporations.

§ 11 modifies § 12-719(c)(3) regarding S-Corps and shareholders' pro rata share. (§§ 12-719[b][c]; C.G.S. 12-276). “S-Corporation” definition includes any subsidiary of such corporation that is qualified subchapter S subsidiary (I.R. Code § 1361[b][3][B]; § 12-213).

Foreign corporations may purchase, hold, mortgage, lease, sell and convey real and personal estate in this state, but may not engage in banking insurance or public utilities business unless empowered to do so by some general or special law of this state.

No foreign corporation shall transact any business within the state without first obtaining a certificate of authority from the Secretary of State. (§ 33-920).

A foreign corporation may not be appointed administrator. (74 Conn. 625, 51 A. 609). It may be appointed executor or trustee if, but not unless, state of its domicile extends a like privilege to Connecticut corporations, if its charter authorizes it so to act, if it is expressly so named and if it appoints Secretary of State its agent for service of process. (§ 45a-206).

Qualification.

In order for a foreign corporation to procure a certificate of authority to do business within this state, it must make application to the Secretary of State. Such application shall be made on forms procured from the Secretary of State and shall set forth: (1) The name of the corporation and the state under the laws of which it is incorporated; (2) the date of incorporation and the period of duration of the corporation; (3) the address of the principal office of the corporation in the state under the laws of which it is incorporated and the address of the executive offices of the corporation; (4) the address of the proposed principal office of the corporation in this state, if any; (5) name of its registered agent at that office; and (6) names and respective residence addresses of directors and officers of corporation. (§ 33-922).

Application shall be accompanied by certificate, attesting to corporation's legal existence at time of execution of application in state of incorporation, and required license fee. (§ 33-922).

See also subhead Foreign Limited Partnership—Authority to do Business, infra.

Agent for Process.

Foreign corporation with office or place of business in this state (except insurance and surety companies) must appoint in writing registered agent, who may be (A) individual who resides in this state; or (B) domestic or foreign corporation whose business office is identical to registered office. (§ 33-926).

Failure to comply may result in fine of $300 per month or part thereof, plus all fees and taxes (with interest) which would have been imposed on such corporation had it duly applied for and received certificate of authority. Attorney General may bring action to recover fees and penalties, including action to restrain such corporation from transacting business until penalties have been paid. Noncomplying corporation may not be plaintiff in action in this state except upon compliance and payment. (§ 33-921, am'd PA 09-83, § 1).

See also subhead Taxes and Fees, supra.

Reports.

Foreign corporations authorized to conduct business in Connecticut must file with Secretary of State annual reports similar to those required of domestic corporations. (§ 33-1243).

Foreign Limited Partnership—Authority to do Business.

In order for foreign limited partnership to procure certificate of authority to do business within this state, it must make application to Secretary of State. Such application shall be made on forms procured from Secretary of State and shall set forth: (1) Name of foreign limited partnership under which it proposes to register and transact business in state; (2) state and date of its formation; (3) general character of business it proposes to transact; (4) name and address of agent for service of process on foreign limited partnership which shall be either: (a) Secretary of State, or (b) individual resident of state or domestic corporation or foreign corporation authorized to do business in this state; (5) address of office required to be maintained in state and its organization by laws of that state; (6) name and business address of each general partner; (7) address of office at which is kept list of names and addresses of limited partners and their capital contributions; and (8) date foreign limited partnership commenced transacting business in this state. Any foreign limited partnership which transacts business in this state without registering with Secretary of State as required shall be levied fine in sum of $2,000. (§ 34-38g).

Corporation business tax is imposed on most corporations doing business in state at rate of 10.75% of net income. Phased rate reduction to 7.5% is ongoing. (§ 12-214). Companies subject to tax shall file declaration of estimated tax by June 15 if preceding year's tax or estimate of current year's tax obligation exceeds $1,000. (§ 12-242b). Commencing Jan. 1, 1997, tax phased out over five years as to Subchapter S corporations, but net income of Subchapter S corporations distributed to individual shareholders that is no longer taxed is subject to personal income taxes.

Out of state corporations whose only contact with Connecticut is participation as limited partner in investment partnership are exempt. (§§ 12-213–12-219b; C.G.S. 12-221a; C.G.S. 12-223a). Exemptions from imposition of taxes; includes non-U.S. corporation whose sole activity in Connecticut consists of trading in stocks or securities for its own corporation is exempt. (§ 12-214; I.R. Code §§ 7701[2][5]; 864[b][2][A][ii]).

Any company subject to tax imposed by § 12-214(a) shall pay, for each such income year additional tax in amount equal to 15% of tax calculated under subsection (a) for such income year, without reduction of tax so calculated by amount of any credit against tax. (§ 12-214[b]).

Minimum franchise tax is imposed (if greater than that based on income mentioned above), and it is larger of following: (1) 31/10 mills per dollar of invested capital which is specially defined; (2) flat sum of $200 for each income tax year. (§ 12-219).

Building and loan associations, savings and loan associations, mutual savings banks, telephone companies, production credit associations, every company engaged in business of carrying passengers for hire over highways of this state in common carrier motor vehicles, and all other corporations doing business in this state which are subject to federal income tax, except insurance companies, domestic international sales corporations, housing corporations, railroads, other public utility companies, political campaign organizations, and companies engaged in research, manufacture or sale of alternative energy systems, are required to pay this tax (§ 12-214) except, however, minimum tax is lower (§ 12-219).

Banks in general are required to pay only tax measured by income, but all other corporations subject to this tax must pay the higher tax. (§ 12-219).

Nonprofit Corporations.

Unrelated business income of nonprofit corporations is taxable. (§§ 12-242aa–12-242bb).

Net income is computed in same manner as required for federal tax, except that no deductions are allowed for federal tax paid on income or profit, losses of prior years, interest from government and municipal securities, specific exemptions, or interest paid. (§ 12-213).

Where corporation business is not carried on wholly within this state only such proportion of net income as is attributable to business done in state or such proportion of net worth as is allocated to state is taxed. To apportion corporation must conduct business in other state. Detailed provisions for allocation are contained in statutes. (§ 12-218).

Additional credit of 5% may be obtained for expenditures for industrial waste treatment facilities. (§ 12-217d). Tax credit for donation of land for education purposes. (§ 12-217ff). Taxpayers to be credited for wages paid to apprentices in construction trades in qualified apprenticeship training programs. (§ 12-217g[c]).

Exemption from Property Tax.

Corporations paying franchise tax pay no property tax on intangible personal property.

Returns and Payments.

Corporation subject to this tax must file annual return with, and pay tax to, Commissioner of Revenue Services on or before Apr. 1. (§§ 12-222; C.G.S. 12-233). Corporation, where tax of preceding income year or expected tax of income year did or may exceed $1,000, must file with Commissioner by 15th day of ninth month of said income year declaration of estimated tax, but if expectation occurs after last day of eighth month, declaration must be filed by 15th day of 12th month. Requirements for filing tax return. (§ 12-222). Taxpayers included in consolidated federal tax return may elect to file combined return with other companies subject to tax who are included in federal tax return (§ 12-223a); such election shall be in effect per initial income year and for subsequent years until revoked. Payments required: by 15th day of third month of income year, 30% of required amount; by 15th day of sixth month, 40%; by 15th day of ninth month, 10%; by 15th day of 12th month, 20%. Quarterly payments (§ 12-242d); “required annual payment” redefined; recapture of reductions in required installments; calculation of annualized income installments; applicable percentages for quarterly installments set forth. Company failing to make such payments on account must pay by due date. For late filing of return, 1% per month interest, plus penalty of 10% of tax due for negligent or intentional failure to file and 25% penalty for fraud. Criminal sanctions for failure to file return or falsify same may include fine up to $5,000 and/or imprisonment up to five years. (§§ 12-229–12-235). Consolidated returns may be filed in some circumstances. (§ 12-223a).

Tax Credit.

Corporation business tax credit for new manufacturing or economic development activities. Applicable to income years of corporations commencing on or after Jan. 1, 1993. (§§ 12-217n, [e], [f]; C.G.S. 12-217u; C.G.S. 12-217z; C.G.S. 32-90; C.G.S. 32-9r). Business tax exemption to promote development of aero-derived gas-turbines. (§ 12-214). Total amount of business tax credits to which business firms entitled may not exceed four million dollars per fiscal year. Two million dollars out of total allowable tax credit may be granted to business firms eligible for tax credits per § 12-635. (§ 12-632). Order for claiming tax credits. (§ 12-217aa). Order delineated for claiming more than one tax credit to which corporation may be entitled; at no time may credit be claimed more than once. (§ 12-217t). Conditions precedent to five years carry forward/back of investment tax credit. (§ 12-217p[h]). Fixed capital held by corporation for more than three years and for which corporation has claimed tax credit; recapture of credit. (§ 12-217[g], [l], [w]). Taxpayer or business eligible for tax credit per statute may carry remaining tax credit forward to any income year on or after 1/1/98. (See §§ 12-217c, C.G.S. 12-217d, C.G.S. 12-252a, C.G.S. 12-252b, C.G.S. 12-265b, C.G.S. 12-265c, C.G.S. 176-740.)

Computer Equipment Tax Credit.

Effective with respect to all personal property taxes paid on account of equipment appearing on grand list of Oct. 1, 1994 and subsequent lists, 100% credit afforded to corporations for personal property taxes paid on computer equipment, including printers, peripherals, and bundled software. Credit available only after all other available credits have been exhausted, and cannot be used in lieu of quarterly estimated income tax payments or to pay interest or penalties on account of overdue taxes. (§ 12-217t).

Enterprise Zones.

Abatements and credits are available to entities which establish new facilities and new jobs in towns and cities with enterprise zones, based on sliding scale. (§ 12-81, am'd PA 09-176, § 1, PA 09-226, § 1). Commissioner of Economic and Community Development shall establish program of financial assistance for job development and creation, neighborhood revitalization and promotion of business stability and development within enterprise zones designated under § 32-70. (§ 32-70e, am'd PA 09-40).

Model Non-Profit Corporation Act not adopted.

Deeds.

See category 21 Property, topic 21.06 Deeds.

Private Foundations.

Charitable corporation deemed “private foundation” under federal Internal Revenue Code authorized to make necessary expenditures to avoid federal taxes, and prohibited from actions endangering charitable status. (§ 33-281c). Any hospital or health system may organize to become medical foundation by filing articles with Secretary of State. (PA 09-212, §§ 1-6).

Uniform Prudent Management of Institutional Funds Act adopted. (§ 45a-535 - § 45a-535i).

Professional Corporations.

See also topic 2.02 Associations, subhead Professional Associations. Individual members of profession (dentists, naturopaths, physicians and surgeons, physician assistants, (§ 33-182a) optometrists, architects, professional engineers, landscape architects, land surveyors and attorneys-at-law, veterinarians, certified public accountants and public accountants and chiropractors) offering professional service are generally authorized to incorporate and become shareholders (§§ 33-182a–33-182j, am'd PA 09-212, § 7); see also § 20-298b[b]).

No such professional corporation may render services thereunder unless rendered through its duly licensed practitioners (§ 33-182d), and corporate shield in no way diminishes otherwise professional responsibility and liability (§ 33-182e).

Ophthalmologists and Optometrists included in law. (§ 33-182a).

No such professional corporation shall engage in any business other than professional service for which it was incorporated. (§ 33-182f).

Restriction is placed on transfer of stock, mergers, and corporate name shall contain words “Professional Corporation” or “P.C.” (§ 33-182g-i).

Physicians and chiropractors may jointly practice as professional corporation or limited liability company. (§§ 33-182a, C.G.S. 33-182c, C.G.S. 34-119).

Limited Liability Companies.

See topic 2.06 Limited Liability Companies.

2.04 [RESERVED]

2.05 JOINT STOCK COMPANIES:

A corporation organized under the general law is a “joint stock company” as distinguished from a “corporation” chartered by the General Assembly. (89 Conn. 583, 94 A. 984; 84 Conn. 618, 80 A. 791). In practice and throughout statutes both are, in general, spoken of as corporations.

There are no statutes relating to unincorporated associations having transferable shares of stock. See topic 2.02 Associations.

Professional Corporations.

See topic 2.02 Associations, subhead Professional Associations.

2.06 LIMITED LIABILITY COMPANIES:

Connecticut Limited Liability Company Act effective Oct. 1, 1993, recognizes entity. (§ 34-100 et seq.). Limited Liability Company (LLC) formed by filing “articles of organization” with Secretary of State. (§§ 34-120–34-121). Company may file articles of organization electronically or file copies of originals if there is good cause. (§ 34-110). Company name, which may be reserved, must contain words “Limited Liability Company” or abbreviations LLC or L.L.C. (§§ 34-102–34-103). Owners set forth respective rights and obligations in “operating agreement” (§§ 34-101, C.G.S. 34-140), similar to partnership agreement. Owners are “members”, not stockholders or partners. Any member may bind LLC as any partner binds partnership, unless articles invest management in one or more managers, equivalent to corporate board of directors. (§§ 34-140, C.G.S. 34-131). Any LLC changing its managers or members within 30 days after filing its annual report must file notice with Secretary of State. (§ 34-229). Interest in LLC may be given in exchange for property, services, promissory note or promise to provide services. (§ 34-150). Allocation of profits and losses per operating agreement. Absent express provision, value of contribution determines allocation. (§§ 34-151–34-152). Absent provision in operating agreement, no member may transfer interest without consent of majority in interest of members, excluding interest of transferor. (§ 34-170). Procedures for merging LLCs. (§ 34-193). Upon death, dissolution, or bankruptcy of member, LLC dissolved unless majority in interest of remaining members consent to continue enterprise, absent operating agreement provision to contrary. (§ 34-206). LLC generally deemed to be “person” for purposes of numerous definitional statutes. (§

34-9). Service of process. (§ 34-104). Annual report. (§ 34-106). Licensed or certified alcohol and drug counselors may form LLCs, but only if members include professionals in fields of medicine and surgery, occupational therapy, and social work. (§§ 34-101[23]; C.G.S. 34-119[b] and [c]).

Foreign Limited Liability Companies.

Service of process. (§ 34-224, am'd PA 09-38, § 4). Annual report. (§ 34-229).

2.07 [RESERVED]

2.08 PARTNERSHIPS:

Uniform Partnership Act (1994) adopted. (§§ 34-39–34-80). (See category 6 Courts and Legislature, topic 6.04 Statutes, subhead Uniform Acts.) Additional section (§ 34-82) authorizes professionals who cannot incorporate to form special partnership which permits taxation as corporation and allows creation of qualified pension plans; this section provides also for incorporation of professional associations (§ 34-82), and delineates events upon which partnership may be dissolved or wound up. (§ 34-372[2]).

Receivership of Partnership.

See category 8 Debtor and Creditor, topic 8.16 Receivers.

Limited Partnership.

Revised Uniform Limited Partnership Act adopted, 1979. (§§ 34-9–34-38n). Secretary of State may propound any limited partnership under act to interrogatories to ascertain compliance with act which must be answered within 30 days. Failure to answer in timely fashion results in fine. (§§ 34-13d; C.G.S. 34-412). See category 6 Courts and Legislature, topic 6.04 Statutes, subhead Uniform Acts. Limited partnerships may merge with foreign partnerships. (§ 34-33a[a]).

Limited Liability Partnerships.

Effective Jan. 1, 1996, new entity known as “Limited Liability Partnership” or “LLP” authorized. (§ 34-300, et seq.). Registration and regulations closely tracks that of Limited Liability Companies (see topic 2.03 Corporations). LLP partners are liable for LLP contracts and obligations, but exempt from personal liability for LLP's debts, obligations, and liabilities arising from negligence, wrongful acts, or misconduct committed in course of LLP's business by another LLP partner, employee, agent, or representative not under their direct supervision or control. (§§ 34-13–34-15). (§ 34-13; § 34-13b, am'd PA 09-38, § 1). Service of process. (§ 34-38p, am'd PA 09-38, § 2). Circumstances under which statutory agents are required. (§§ 34-408, C.G.S. 34-507).

Authority to do Business.

See topic 2.03 Corporations, subhead Foreign Limited Partnership—Authority to do Business.

3 BUSINESS REGULATION AND COMMERCE

3.01 BANKS AND BANKING:

Title 36A of CGS is entitled “The Banking Law of Connecticut,” and Title 36B is entitled “The Securities and Business Investment Laws of Connecticut,” containing Connecticut Tender Offer Act, Uniform Securities Act, and Business Opportunity Investment Act. (§ 36a-72).

New codification creates new general category “Connecticut banks”, encompassing state bank and trust companies, savings banks, and savings and loan associations. Formerly separate provisions concerning each type of bank's organization, administration, mergers, conversions, general powers, permissible loans and investments have been unified so as to apply to all “Connecticut banks”, generally by adopting least restrictive former provision. § 1 modifies § 36a-70 regarding application to organize Connecticut bank (§ 36a-70[c]); requirements for publishing copy of order for hearing regarding organization (§ 36a-70[f]); when approved, temporary certificate issued is valid for 18 months and may be extended after hearing. § 2 modifies § 36a-125 regarding merger of two or more Connecticut banks into one, resulting bank shall not commence business unless insurable accounts and deposits are insured by FDIC or successor (§§ 33-700; 36a-34, am'd PA 09-100, § 4; C.G.S. 33-855–33-872, am'd PA 09-55); new codification prescribes minimum amounts of assets that banks must keep on deposit (§ 36a-70); dissenters to merger or consolidation are entitled to appraisal rights and to obtain payment of fair value of such shareholder's shares (§ 36a-125); mutual savings banks shall not merge or consolidate if resulting bank is to be capital stock bank unless prior to or during merger or consolidation, mutuals have converted to capital stock banks (§ 36a-136). Fees for merger or consolidation of Connecticut bank: $2,500 if two institutions are involved and $5,000 if three or more institutions are involved. (§ 36a-145). At least annually, Connecticut banks shall adopt loan policy procedures which include internal controls reasonably designed to ensure compliance with loan policies. (§ 36a-260). Procedures pertaining to obligations created, at least in part, for benefit of another. (§ 36a-262). Banks must maintain minimum amount of assets on deposit. (§ 36a-2). Notice requirements associated with organizing bank. (§ 36a-70[f]).

Each bank director shall, upon election, subscribe to oath or affirmation regarding diligent and honest performance of duties. (§ 36a-101).

Act expands banks' authority to open limited branches, requires prior notice for closing branches, streamlines and simplifies procedures for interim banks, and adds new application fees in connection with these activities.

Provisions of this new codification are expressly provided to control over any inconsistent provision of Connecticut general corporate laws in Title 33 (see topic Corporations).

Connecticut banks and credit unions may close day before or after bank and credit union holiday. (§ 36a-23[a]).

Commissioner of Banking shall have additional time to act on applications to establish Connecticut banks if good cause is shown. (§ 36a-70[e]).

Banker's Bank.

Definition expanded to include Connecticut credit unions, bankers' banks, federal credit unions or out-of-state credit unions having their principal office in Connecticut, Maine, Massachusetts, New Hampshire, New York, Rhode Island or Vermont, in addition to Connecticut banks owned exclusively by any combination of banks and out-of-state banks. (§ 36a-70).

Banking Commissioner has general supervisory powers. (§ 36a-11). Commissioner must report annually to governor and joint standing committee on banks on his administration of C. 662c of general statutes. (§ 36a-14, am'd PA 09-100, § 2). Commissioner may conduct investigations to determine if any provision of general statutes within Commissioner's jurisdiction has been violated. (§ 36a-50 pre-empted by Wachovia Bank, N.A. v. Burke, 414 F.3d 305 [2nd Cir. 2005]). Commissioner has authority to approve mergers and conversions. (§§ 36a-468a-c). Connecticut has adopted Truth in Lending Act (§ 36a-676), virtually identical to Federal Truth in Lending Act, and exemption from Federal Act has been obtained. Banking Commissioner is charged with enforcement of state Act. Home Mortgage Disclosure Act prohibits discrimination in mortgage lending and requires financial institutions to report to bank commissioner and public certain information regarding loans. (§ 36a-735 et seq.). Banking Commissioner's right to involuntarily liquidate state branches of foreign banks. (§ 36a-428n). Commissioner or any employee of Department of Banking may not disclose certain types of records of Department of Banking. (§ 36a-21[a], am'd PA 09-100, § 3, am'd PA 09-209, § 1). Commissioner may disclose records outlined in § 36a-21(a) under certain conditions. (§ 36a-21[b], am'd PA 09-209, § 1). No director, officer, employee or agent of any Connecticut bank shall disclose any nonpublic information in examination report about such bank without written consent of commissioner. (§ 36a-21[c], am'd PA 09-209, § 1). Disclosure requirements of § 36a-21 do not apply to records maintained by Commissioner with national mortgage licensing system. (§ 36a-21[d], am'd PA 09-209, § 1). Commissioner may authorize closing of all Connecticut banks and/or credit unions whenever such action is required by emergency, or for good cause shown. (§ 36a-23).

All Connecticut mutual banks must provide periodic reports of condition and income to commissioner. (§ 36a-16).

Fraudulent conduct by both registrants and licensees is prohibited. (§ 36a-53b, § 36a-488). Commissioner shall have remedies for fraudulent conduct. (§§ 36a-587[b], 36a-657; 36a-804[b]).

Commissioner shall have expanded authority to issue cease and desist orders. (§ 36a-53[c]).

Community Banks and Credit Unions Act provides investment funding up to $100,000,000 from State's operating cash. (§§ 3-24j; C.G.S. 3-24k).

Investigation and Processing Fees.

Fees payable to Department of Banking for various investigations and processing activities including, but not limited to, sale or relocation of branches, establishment of mobile branches, mergers and consolidations of holding companies, bank organizations and closings. (§ 36a-65).

Conversions/Reorganizations of Mutual Savings Banks.

Governed by § 36a-136, 36a-192. Mutual savings bank's plan of conversion may be approved by majority of converting bank's corporations only if greater percentage is not required by bank's charter or certificate of incorporation. (§ 36a-136[e]).

Receivership.

Governed by §§ 36a-220–36a-239. Bailment contracts. (§ 36a-226a). Termination of fiduciary positions and surrender of property so held. (§ 36a-221a). Payment of claims against bank. (§ 36a-237f). Transfer of fiduciary records. (§ 36a-237g). Persons entitled to protection in receivership. (§ 36a-237h).

Financial Privacy.

Each financial institution defined in § 36a-41, et seq. must comply with 15 U.S.C. § 6801 (Gramm-Leach-Bliley Modernization Act of 1999) and related regulations. (§§ 36a-41–36a-45). Financial institution customers may attempt to quash subpoenas for their financial records served upon institution at any time. (§ 36a-43[b]).

Uniform Commercial Code adopted. (Title 42a).

Uniform Securities Act.

Commissioner shall have additional authority under CUSA and may enforce additional violations; definition of security is expanded; and investment advisors and broker dealers are subject to changes in registration requirements. (§§ 36b-3, 36b-6, 36b-7, 36b-14, 36b-15, 36b-21, 36b-23, 36b-26, 36b-27, am'd PA 09-160, § 11; 36b-31, 36b-33).

Interstate banking is governed by § 36a-410 of general statutes. Nation-wide system of interstate banking was implemented in 1990. New rules regarding interstate banking.

As of Jan. 1, 1988, savings bank or employee selling insurance must be licensed under § 38a-76a. (§ 36a-285). Maximum face value of $100,000 for one individual. Maximum face value of $200,000 for one individual under group policy. No person may have savings bank life insurance in excess of aggregate face value of above limits. (§ 36a-285).

Branch banks, including limited service branches, may be established and operated by state banks and trust companies. Relocate defined as moving within same immediate neighborhood without substantially affecting nature of business or customers served. Banks may relocate with commissioner's approval. (§ 36a-145, am'd PA 09-100, § 8). Branches need not be open on days before or after any bank holiday. (§ 36a-145[a][1]). Certain fees associated with establishing branch bank are eliminated. (§ 36a-65[d]; see also § 36a-145). Commissioner must consider certain factors when approving application to establish bank. (§ 36a-145[b][1]). Bank may not establish in-state branch on property of affiliate if affiliate engages in commercial activities. (§§ 36a-145[b][1], [c][1]; 36a-412).

Community banks shall commence business with minimum raised equity capital of at least $3,000,000. Such banks are organized pursuant to § 36a-252, as amended, and upon receipt of final certificate. (§ 36a-70[r]).

General powers of Connecticut banks fully described by statute. (§ 36a-1). Commissioner of Banks must submit annual report summarizing commissioner's actions. (36a-251a). Commissioner may authorize closing of all banks or Connecticut credit unions if it is required due to emergency or for good cause shown. (36a-23[b]).

Interstate merger transactions between Connecticut banks and out-of-state banks, and de novo interstate branching, permitted prior to June 1, 1997 by special legislation passed in response to federal Riegle-Neal Interstate Banking and Branching Efficiency Act of 1994. (§ 36a-410a).

License Renewals.

Renewal application procedures for certain lenders. (§§ 36a-491[a][1]; 36a-514[a][1]; 36a-542[a], 36a-558[a], 36a-801[b][1], am'd PA 09-208, § 34).

Small Loan Lenders.

Licensing procedures and restrictions when changing business location. (§§ 36a-559; 36a-562).

Loan Limits.

See §§ 36a-261–36a-262.

Automated banking devices permitted subject to regulation. (§§ 36a-155, et seq.). Subject to regulations of U.S. Treasury Department, banks and savings and loans may serve as Treasury tax and loan depositories. (§ 36a-301).

State banks with assets greater than $2 million may provide home banking services to customers. Any electronic transfer of funds by such services are governed by 15 U.S.C. § 1693. (§ 36a-170).

Home Loan Lending Practices.

Regulation of lending practices including substance of documentation, unlawful practices and penalties. (§§ 36a-3, am'd PA 09-100, § 1, am'd PA 09-100, § 1; 36a-53, § 15; 36a-680, 36a-521; 36a-521[d]; C.G.S. 49-102; §§ 36a-53-36a-54). Regulation of non-prime home loans. (§ 36a-760b - § 36a-760j, am'd PA-209, § 26).

Refund Anticipation Laws.

Loans arranged to be paid directly from proceeds of borrower's income tax refund. Refund loan facilitators must disclose certain facts when borrower applies for loan. (§ 42-480, et seq.). Refund anticipation loan must be made at locations where principal business is tax preparation. Interest rate must not exceed 60% per year for initial 21 days of loan and 20% per year for period commencing on 22nd day of loan and ending on day of payment. One who violates these provisions shall be fined $500 for each violation and liable to aggrieved borrower for three times amount of refund anticipation loan fee, plus attorney's fees. (§ 42-480).

Bank Parity.

No provision of § 36a-41-36a-45, as amended, shall prohibit certain examinations, publications, disclosures, reports, etc. pursuant to statute. (§ 36a-44).

No provision of §§ 36a-41–36a-45 shall prohibit disclosure of information to information network for fraud prevention accessed by financial institutions, and disclosures made to victim of identity theft pursuant to Fair Credit Reporting Act. (§ 36a-44).

Check cashing services, other than those regulated by federal or state banking law, must be licensed by Banking Commissioner. Maximum fee for cashing state check to welfare recipient is 1% of amount of check. Commissioner shall establish maximum fees for cashing check, draft, or money order drawn on depository institution. No check cashing service shall cash item in excess of $2,500. (§§ 36a-584–36a-585). No check cashing service shall cash check in excess of $6,000 unless payee is not individual and all recordkeeping and reporting requirements are met. (§§ 36a-580, 36a-584). Regulation of check-cashing fees. (§ 36a-585). Issuers of electronic payment instruments must be licensed. (§§ 36a–586, 596, 598, 599, 602). People seeking licenses for engaging in business of money transmissions must apply to commissioner following specified procedures and must meet detailed qualifications. (§§ 36a-598, am'd PA 09-208, § 15 to 36a-606). Connecticut credit unions may provide check-cashing and wire and electronic transfer services to individuals who are eligible to become members of credit union, but do not wish to do so. (§ 36a-455a). Check cashing, paying instrument, or money transmission licensee cannot change its name without paying fee and obtaining approval from commissioner; requirements for location changes. (§§ 36a-580 to 36a-589, 36a-581[d]; 36a-582, 36a-598, am'd PA 09-208, § 15, 36a-599[a]). License effective dates. (§ 36a-601[a]). Penalties for violation. (§ 36a-587[b]).

ATM Deposits.

Banks and federal credit unions may limit use of satellite automated teller machines by individuals who are not their customers. (§ 36a-156).

Withdrawals.

Any savings bank or savings department of state bank and trust company (§ 36a-298) may, despite any contrary provisions in its charter or by-laws, require three months notice of depositor's intention to withdraw funds, and Commissioner may extend period. Despite such notice requirement such bank may within notice period pay out such sums weekly or at other intervals to depositors as it may deem prudent. Where depositor withdraws all funds before end of earning period, financial institution must pay interest on pro rata basis from first earning period day to withdrawal date. (§ 36a-307). Commercial Banks may pay checks of a dead or incompetent customer for a period of ten days after such event, regardless of knowledge of such fact. (§ 42a-4-406). Charge for stop payment order shall cover initial stop payment order for six months plus six month extension. (§ 36a-317a).

No institution may impose before Sept. 1, 1990, hold periods on checks deposited in customer accounts which exceed one business day if drawn on same institution, three business days if drawn on in-state institution, five business days if drawn on out-of-state institution unless depository institution has reason to believe check will not clear. Banking commissioner may extend maximum time limitations. (§ 36a-302). Time limits do not apply to items deposited when opening account, provided customer is so informed. (§ 36a-302). Except as otherwise provided, on and after Sept. 1, 1990 each institution must comply with applicable provisions of Expedited Funds Availability Act, 12 USC 4001 et seq. (§ 36a-302).

Financial institutions must accept identity card issued by Connecticut Department of Motor Vehicles as identification sufficient to establish account. (§ 36a-306).

Statements of Account.

Bank may charge account of apparent drawer of forged, raised or altered check with full amount thereof unless, within one year from time of rendering statement showing payment of such check, customer notifies bank of such forgery or alteration. See § 42a-1-201. Depositor may not question correctness of statement of account except within seven years after its rendition. (§ 36a-295). Disclosure of interest rates paid on time deposits and various account charges regulated by statute. (§ 36a-317).

Unclaimed Deposits.

Savings, demand or matured time deposits presumed abandoned after five years of total inactivity. Checking accounts after five years and contents of safe deposit boxes five years after expiration of last rental period. (§ 3-57a).

Holding institution must give notice to record owner of such property within one year prior to time such presumption arises, and if property still unclaimed must pay or deliver it over to State Treasurer within 90 days after presumption arises. (§§ 3-65a; C.G.S. 3-65a[b]). Thereafter, such sums are treated as abandoned property (see discussion under category Property, topic Absentees, subhead Escheat).

Commercial Bank Deposits and Collections governed by Uniform Commercial Code. (§§ 42a-4-101–42a-4-504). Optional Provisions of 1962 Official Code Text adopted include: § 4-106, bracketed material omitted; included bracketed material in § 4-202. (§ 42a-4-202).

Investment Advisers.

Upon request, investment advisers shall provide customers or clients with schedules of any changes, fees, or penalties associated with trading securities. (§ 36b-22a).

Investments and Loans.

Permissible investments are detailed in § 36a-276. There are percentage limits on investments in debt and/or equity instruments. Regulation of prepaid finance charges. (§ 36a-746c, § 36a-746e, § 36a-746g, § 36a-521[a]).

Foreign banks cannot do business in this state, except that they can make mortgage loans in-state, secured by in-state real estate. (§ 36a-425). New England bank holding companies may establish or acquire ownership of any Connecticut bank, savings bank, savings and loan or holding bank, provided Banking Commissioner finds that benefit to public clearly outweighs anticompetitive effects of transaction. (§§ 36a-425; 36a-411). Any New England bank, bank holding company, savings bank, or savings and loan which acquires such control shall comply with § 42-133C. (§ 36a-411). If any New England bank ceases to be New England bank and does not become Connecticut state bank, Commissioner may order immediate divestiture of ownership of stock of Connecticut bank acquired by it. After Mar. 30, 1990, Commissioner must order immediate divestiture. (§ 36a-411). No Connecticut bank may purchase all or significant part of federal bank, federal credit union or out-of-state bank, and no Connecticut credit union may purchase all or significant part of assets and business of federal credit union without commissioner approval. To do so, Connecticut banks and credit unions must file application with commissioner, including copies of all information in connection with purchase filed with regulators, plus information required by commissioner. (§ 36a-210[g]). Commissioner shall annually assess foreign banks who have established state branch or state agency. (§ 36a-428b[e]). Definition of home state for savings and loan holding companies that function in trust or fiduciary capacities. (§ 36a-410).

Discrimination in Federal Credit Union Loans.

Federal credit unions must not discriminate in making or setting terms of mortgage loans on one to four family, owner occupied, residential real property. (§ 36a-737).

Credit unions for the purpose of accumulating payments on shares from their members and making loans therefrom to members, are under and regulated by §§ 36a-435–36a-474. Credit unions are subject to provisions regarding trusts. (§ 36a-296). Governor is authorized to designate and appoint legal holidays upon which banks and/or credit unions shall be closed. (§§ 36a-23; C.G.S. 4-33[c]; C.G.S. 7-402[c]; 38a-20).

Must be licensed annually on June 30 by Commissioner, which license is revocable for cause after hearing. (§ 36a-436). Credit unions may merge, with approval of Commissioner. (§ 36a-470). Credit union organized in another state may do business as credit union in Connecticut with approval of Commissioner. (§§ 36a-472–36a-473). Federal credit unions may engage in activities in which they are authorized to engage, but must obtain authorization from commissioner prior to doing so. (§ 36a-441[21]). Connecticut credit unions are cooperative, nonprofit financial institutions organized under Connecticut law. (§ 36a-2). Connecticut credit union service organizations are credit union services incorporated under Connecticut law, located in this State and established by at least one Connecticut credit union. (§ 36a-2). Connecticut credit unions have been modernized and are regulated. (§§ 36a-435a–36a-471a).

Commissioner may withhold or condition approval of amendment of certificate of organization by community credit unions pursuant to § 36a-3(6).

All credit unions shall have and maintain share insurance as provided by Federal Credit Union Act. Failure to obtain and maintain share insurance shall terminate its corporate existence. (§ 36a-446).

Eligibility requirements for Connecticut credit union are expanded. (§ 36a-438a).

Federal credit unions are required to keep pending mortgage applications of members of armed forces on file for specified time. (§ 36a-737).

Conversions.

When converting mutual institution to capital stock institution, commissioner may waive any regulations adopted pursuant to § 36a-136(f) that are inconsistent with regulations of Office of Thrift Supervision if necessary to comply with FDIC or its successor. (§ 36a-136[h]). When converting Connecticut capital stock bank to national banking association, converting bank must notify Commissioner of its intent to convert and submit its charter. (§ 36a-137).

Trust Companies.

§ 36a-2 defines out-of-state trust company as one chartered to act as fiduciary but not chartered in Connecticut, banks, out-of-state banks, Connecticut credit unions, federal credit unions or out-of-state credit unions (§ 36a-2); amendment of savings deposit definition (§ 36a-2); includes out-of-state trusts whose trustees are corporations acting as fiduciaries as those entities which are exempt from application of licensure requirement (§§ 36a-380–36a-381–386; 395; 45a-206); redefines permissible investment (§§ 36a-596, am'd PA 09-208, § 13; 36a-2); out-of-state trust companies may establish offices to do business in Connecticut as long as states chartering them permit such business (§§ 36a-425; C.G.S. 33-920; C.G.S. 33-1210; C.G.S. 34-223; C.G.S. 34-429); employees must be bonded; Commissioner may examine out-of-state trust companies' practices at companies' expense; such companies must give notice of events which affect their control, transfers of all or substantially all accounts out of state, or closing of their offices. Conversion of certain mutual banks and savings and loans may convert into other mutual banks and savings and loans if they comply with certain laws, rules and regulations; converted institution shall not commence business unless insurable accounts and deposits are insured by FDIC or successor. (§ 36a-135). Conditions for approval of merger. (§ 36a-136[j]). Requirements for conversion of capital stock Connecticut or federal banks into similarly organized entities except capital stock federal banks cannot convert into another capital stock federal bank; FDIC or successor agency insurance required. (§ 36a-137). Conditions for approval of conversion; FDIC or successor agency insurance required. (§ 36a-138). Requirements for approval of offer, invitation, request, agreement or acquisition of beneficial ownership of holding companies and banks (§ 36a-184); offer, etc., shall be disapproved under certain circumstances (§ 36a-185). Requirements and means of reorganizing mutual savings bank or mutual savings and loan association to form mutual holding company. (§§ 36a-125; 36a-192[b]; 36a-193). Requirements and means of expanding powers of community banks to operate within § 36a-7(r)(3) as Connecticut bank. (§ 36a-252). Requirements for conversion of Connecticut credit unions or federal credit unions into mutual savings banks or mutual savings and loans or mutual community banks. (§ 36a-469a). Commissioner of Banking has discretion to hold hearings regarding application filed with Commissioner and otherwise regarding matters within his discretion (§ 36a-70); Commissioner shall hold hearings regarding acquisition of beneficial ownership of holding companies and banks (§ 36a-184) if bank or holding company so named files written request, statement of issues which, if proven, would constitute grounds for disapproval (§§ 36a-184; 36a-185).

Bank holding companies, defined as companies holding 25% or more of voting shares of any state bank and trust company, or private bank, or controlling selection of majority of directors of such bank, or selection of majority of officials of bank holding company, are regulated. (§ 36a-187–36a-188). Holding company means company that controls bank for purposes of §§ 36a-180–36a-191, inclusive. (§ 36a-2[33]). Connecticut holding company is holding company which holds subsidiary that is Connecticut bank. (§ 36a-53). Among other things, acquisition plan must be filed with Bank Commissioner. Person acquiring more than 10% of bank or bank holding company must file acquisition statement, including specified information as to his background and intentions. (§§ 36a-184; 36a-181–36a-184; 36a-185–36a-191). Sale or purchase of all or substantially all of assets and business of institution requires prior approval of two-thirds of shareholders, voting members, or corporators as applicable. (§ 36a-65).

Mutual holding company may be formed by reorganizing mutual savings bank or mutual savings and loan association. Accomplished when mutual savings institution establishes subsidiary capital stock savings bank or savings and loan association with at least 51% of its stock owned by mutual holding company. Any reorganized savings institution shall commence business with minimum capital stock of $1,000,000 with capital surplus at least equal in amount. Capital stock and surplus must be paid for before business may commence. Application must be submitted to commissioner for approval. Insurable amount must be insured by FDIC or FSLIC. Mutual holding company may exercise all powers of mutual savings and loan except deposit-taking powers. Acquisition rules are same as for bank holding companies. (§ 36a-192, et seq.).

Director's Liability.

Article of incorporation or charter of banking institution may contain provision limiting personal liability of director to institution or its members or its stockholders for monetary damages for breach of duty as director to amount that is not less than compensation received by director for serving institution during year of violation if such breach did not (1) involve knowing and culpable violation of law by director; (2) enable director or associate, as defined in subdivision 3 of § 33-374d of general statutes, to receive improper personal economic gain; (3) show lack of good faith and conscious disregard for duty of director to institution under circumstances in which director was aware that his conduct or omission created unjustifiable risk of serious injury to institution; (4) constitute sustained and unexcused pattern of inattention that amounted to abdication of director's duty to institution; or (5) create liability under § 36a-58.

Issuing Secondary Mortgage Loans.

Any person who engages in secondary mortgage loan business in this state as lender or broker without obtaining license required under this chapter, as amended by this act, shall be assessed civil penalty of not more than $2,000 for each violation. Each secondary mortgage loan negotiated, solicited, placed, found or made without license shall constitute separate violation. Attorney General may bring action in Superior Court to force provisions of this section. (§ 36a-511). Any lender who fails to comply with provisions of this act shall be liable to borrower in amount equal to sum of (1) amount by which total of all loan fees, points, commissions, transaction fees, other prepaid finance charges, and brokers fees and commissions exceeds 10% of principal amount of loan; (2) 10% of principal amount of loan or $2,500, whichever is less; and (3) costs incurred by borrower in bringing action under this section, including reasonable attorneys' fees, as determined by court, provided no such lender shall be liable for more than amount specified in this subsection in secondary mortgage loan transaction involving more than one borrower. (§ 36a-521; § 36a-521[d]). Release from secondary mortgage. (§ 36a-498b).

Out-of-State Bank.

Merger or consolidation with, or acquisition of, Connecticut bank is governed by § 36a-412.

Out-of-State, State-Chartered Credit Union.

May establish branch, or accept new members in Connecticut pursuant to § 36a-462b.

3.02 BILLS AND NOTES:

Governed by Uniform Commercial Code, particularly §§ 42a-3-101 to 42a-3-805. In § 42a-3-121 Connecticut adopted Alternative A as Set Forth in 1962 Uniform Commercial Code Official Edition. (§ 3-121 of Official Edition).

Wagering Contracts.

The validity of a negotiable instrument held by a person who acquired the same for value and in good faith without notice of illegality in the consideration is not affected by the fact that the instrument was based on a wagering contract. (§ 52-553).

Attorney Fees.

If note contains provision for payment of reasonable attorneys fees, they may be advanced as item of costs. (19 Conn. Sup. 422, 116 A.2d 447).

Special Defenses, Consumer Instruments.

Holder in due course subject to defenses of buyer against seller if buyer has made written demand on seller. Same rule applies to notes arising from "consumer service" transactions payments which include supply of accommodations, exercise and health club programs, instruction or education, and any work for personal, family, or household purposes. (§ 52-572g).

Dishonored Checks.

Payee of dishonored check may impose service charge not to exceed $20. Additionally, drawer shall be liable to payee for damages in addition to face amount of check in event that drawer does not pay full face amount of check within 30 days of second written demand for payment. Written demand for payment of dishonored check must comply with statutory requirements. (§ 52-565a).

3.03 BILLS OF LADING:

See topic 3.08 Carriers.

3.04 BILLS OF SALE:

See topic 3.23 Sales.

3.05 BLUE SKY LAW:

See topic 3.24 Securities.

3.06 BROKERS:

Uniform Commercial Code adopted. (Title 42a).

Insurance brokers must be licensed by Insurance Commissioner. (See category 16 Insurance, topic 16.01 Insurance Companies.) Brokers of securities must be registered with Bank Commissioner. See topic 3.24 Securities.

Keeping a “bucket shop” is unlawful. (§§ 53-313–53-315).

Real estate brokers are licensed by Department of Consumer Protection after investigation of character. (§§ 20-311; C.G.S. 20-314; C.G.S. 20-315–20-319; C.G.S. 20-320–20-324, §§ 1-4; C.G.S. 20-325, C.G.S. 20-325a; C.G.S. 20-325b–20-329bb). Grounds for refusal of license (§§ 20-316, C.G.S. 20-316[c]), and for suspension or revocation (§ 20-320), after notice and hearing (§ 20-321) as specified. Nonresident brokers must be licensed but are extended reciprocity if licensed by state with similar reciprocal requirements and if no disciplinary proceeding or unresolved complaint is pending against him/her. (§ 20-317). Technical Revisions to c. 392 (Real Estate Brokers and Salespersons) and c. 400g (Real Estate Appraisers). (§ 2-500, et seq.).

Real estate brokers and salesmen must pay fees to a real estate guaranty fund, which is held by real estate commission, and anyone aggrieved by fraud, embezzlement, etc., of real estate broker, may recover from such fund up to $25,000 for any one transaction or claim. (§§ 20-324a–20-324j). Requirements for retention of records. (§ 20-325m).

Certain activities are exempt from real estate broker licensing statutes, including certain persons involved with communications-related property negotiations. (§ 20-329). No real estate broker may recover fee for services performed without written contract. (§ 20-311). Licensure requirements for real estate brokerage companies. (§ 20-312).

Unsecured Loan Brokers.

Advance fees prohibited. (§§ 36a-615–36a-620; 36a-623).

See also topic 3.09 Commercial Code.

3.07 BULK SALES:

See category 8 Debtor and Creditor, topic 8.08 Fraudulent Sales and Conveyances. Article 6 of Uniform Commercial Code. (§ 42-107; 42a-1-104; 42a-2-403; 42a-6-101–42a-6-111 repealed PA 93-107).

3.08 CARRIERS:

Uniform Commercial Code adopted. (Title 42a).

Supervision.

Common carriers are subject to regulation and supervision by Public Utilities Control Authority as to rates, routes, adequacy and safety of equipment and facilities, method of operation, prevention of accidents at crossings, large financial matters, etc., and must report accidents to Public Utilities Control Authority and file annual reports with Authority. Appeal lies from Public Utilities Control Authority to Superior Court. (§§ 16-1–16-50x).

Rates must be sufficient to cover operating costs, attract capital and maintain financial integrity (§§ 16-19; C.G.S. 16-19a; C.G.S. 16-19b; C.G.S. 16-19c–16-19h, C.G.S. 16-19i–16-19x; C.G.S. 16-19y–16-22; C.G.S. 16-41[a]), freight rates for short haul may not exceed rate for longer haul over same route (§ 16-69); nor may any one or more connecting carriers be discriminated against in rates or in facilities furnished for cooperative handling of passengers and freight (§ 16-65). Carrier may be required to establish requisite connections and operate cars delivered to it by connecting carrier. (§ 16-63).

Liens.

Railroad may not charge storage for less than two consecutive days excluding Sundays and holidays. (§ 16-172). Lien for transportation and storage charges exists if company delivers to consignee on request a copy of a bill of charges as same appears on way-bill held by company. (§ 16-173).

Bills of Lading.

Governed by Uniform Commercial Code. (Tit. 42a).

Motor Vehicle Carriers.

See category 23 Transportation, topic 23.01 Motor Vehicles.

See also topic 3.09 Commercial Code.

3.09 COMMERCIAL CODE:

Uniform Commercial Code adopted, effective Oct. 1, 1961. By amendment Conn. has adopted 1962 Official Text. (§ 42a-1-201). 1972 Official Amendments adopted. 1990 Official Amendments adopted.

Revisions to Art. 1 adopted concerning general provisions in order to conform with recent changes in uniform laws. (§§ 42a-1-101–42a-1-103, 42a-1-105, 42a-1-106, 42a-1-201–42a-1-206, 42a-1-301–42a-1-310, 42a-2-103, 42a-2-202, 42a-2-402, 42a-2A-102, 42a-2A-704, 42a-2A-721, 42a-3-103, 42a-4-104, 42a-4A-105, 42a-4A-106[a], 42a-4A-204[b], 42a-5-102[a], 42a-5-103[c], 42a-5-108[g], 42a-8-102[a], 42a-8-111, 42a-9-102[a][43], C.G.S. 1-1a, C.G.S. 1-268[b], C.G.S. 1-281[d], C.G.S. 12-81[70][c], C.G.S. 12-407[a][12], C.G.S. 12-407[a][15][A]; C.G.S. 14-165[8], C.G.S. 14-167, 36a-770[c], C.G.S. 42-221[d], C.G.S. 42-240[4], C.G.S. 42-252, C.G.S. 42-391[b], 47a-21[c], C.G.S. 53-129a[5]).

Connecticut has adopted the following options in the 1962 Official Text, and made following other changes.

Art. C.G.S. 1-209—1966 Official Optional Amendment not adopted.

Art. C.G.S. 2-318—1966 Official Optional Amendment not adopted. Connecticut text of § 2-318 (§ 42a-2-318) is as follows:

“A seller's warranty whether express or implied extends to any natural person who is in the family or household of his buyer or who is a guest in his home if it is reasonable to expect that such person may use, consume or be affected by the goods and who is injured in person by breach of warranty. This section is neutral with respect to case law or statutory law extending warranties for personal injuries to other persons. A seller may not exclude or limit the operation of this section.”

See also topic 3.23 Sales, subhead Blood, Human Tissue, or Organs.

Art. C.G.S. 2-702—1966 Official Amendment adopted.

Art. 2A—“Uniform Commercial Code—Leases” added. (§§ 42a-1-105, 42a-1-201[37], 42a-9-102[a][72], 42a-9-102[b], 42a-9-109[a], 42a-9-110, 42a-9-203[c], 42a-9-309, 42a-9-311[d], 42a-9-322, 42a-9-325, 42a-9-406[d] and [f]).

Art. C.G.S. 3-121—Alternative A adopted. (§ 42a-3-121).

Art. C.G.S. 3-501—1966 Official Amendment not adopted.

Re Art. 3—See topic 3.02 Bills and Notes, subhead Special Defenses, Consumer Instruments, for non-negotiability.

Art. C.G.S. 4-104(c)—“Banking Day” for purpose of midnight deadline does not include Saturday.

Art. C.G.S. 4-106—Bracketed material omitted. (§ 42a-4-106).

Art. C.G.S. 4-107(2)—Item or deposit received on a day not a banking day treated as received on opening of next banking day.

Art. C.G.S. 4-202—Bracketed material in paragraph C.G.S. 4-202(1)(6) included. (§ 42a-4-202[1][6]).

Art. C.G.S. 4-212—Bracketed material in paragraph C.G.S. 4-212(2) included. (§ 42a-4-212[2]).

Art. C.G.S. 4A-101–108—Adopted. (PA 90-202, § 1 [§ 42a-4A-101 - § 420-4A-108]).

Art. C.G.S. 4A-201–4a-212—Issue and acceptance of payment orders, adopted. (§ 42a-1-105).

Art. C.G.S. 4A-301–4A-305—Execution of sender's payment order by receiving bank, adopted. (§ 42a-1-105). § 33 modifies § 42a-9-305—Security interest in letters of credit and letters of advice may also be perfected by taking possession of collateral. (§ 42a-9-313).

Art. C.G.S. 4A-401–4A-406—Payment, adopted. (§ 42a-4a-101).

Art. C.G.S. 4A-501–4A-506—Adopted. (§ 42a-4a-105).

Art. C.G.S. 5-107—Last seven words of C.G.S. 5-107(2) included (not an option but these words omitted in Massachusetts enactment of Code). (§ 42a-5-107[2]).

Art. C.G.S. 5-112—Bracketed material included. (§ 42a-5-112[b]).

Art. C.G.S. 5-113—Subsections (a) and (b) of subsection 2 included (not listed as option but omitted in Massachusetts enactment of code). (§ 42a-5-113).

Art. C.G.S. 5-114—Bracketed material (Optional provisions C.G.S. 5-114[4] and [5]) included. (§ 42a-5-114).

For purposes of Art. 6, municipal tax collector considered a creditor. (§ 42a-5-113).

Art. 6—Repealed. (PA 93-107).

Art. 7—Revised. (§§ 42a-7-101, et seq.).

Art. C.G.S. 7-209—1966 Official Amendment not adopted.

Art. C.G.S. 7-403—Bracketed provisions in Official Draft (C.G.S. 7-403[1][c]) are excluded.

Art. 8.—Revised as to Investment Securities. (§§ 42a-8-101, et seq.).

Revised Article 9 adopted effective 10/1/01. Revised Article 9 further amended PA 03-62. Connecticut will accept national UCC forms on same basis as State forms. (§ 42a-9-101, et seq.). UCC-1 Filing Fee is $25. (§ 42a-9-525).

Forms.

See end of this Digest.

See also topics: Banks and Banking, Bills and Notes, Brokers, Carriers, Contracts, Factors, Frauds, Statute of, Sales, Securities, Warehousemen; categories Business Organizations, topic Corporations; Civil Actions and Procedure, topics Accord and Satisfaction, Limitation of Actions; Debtor and Creditor, topics Assignments, Fraudulent Sales and Conveyances, Liens, Pledges; Documents and Records, topics Records, Seals; Mortgages, topic Chattel Mortgages.

3.10 CONDITIONAL SALES:

See topic 3.23 Sales.

3.11 CONSIGNMENTS:

See topic 3.14 Factors.

3.12 CONSUMER PROTECTION:

Department of Consumer Protection.

Generally responsible for food quality and purity, labeling, weights and measures. (§§ 21a-1–21a-12; C.G.S. 43-3). Under §§ 42-144–42-149, which prohibits referral or multi-level sales schemes and declares contracts for same void, Department empowered to investigate same, and to secure injunction and or restitution via attorney general in superior court action. Provides Architectural Licensing Board in Department of Consumer Protection (§ 20-289); provides no person shall receive license until such person has passed examination (§ 20-654). Adds Liquor Control Commission and Boxing Promotion Commission to boards within Department of Consumer Protection. (§ 21a-6). Architectural licensing exemptions. (§ 20-298). Penalties for fraudulent procurement of architectural license. (§ 20-294). Dept. of Consumer Protection and Dept. of Agriculture shall continue as separate agencies. (§ 4-38c). Commissioner of weights and measures to adopt regulations regarding dating of non-dairy perishable foods. (§ 43-8a).

Bar Code Scanning Machines.

Sellers using bar codes to total purchases must mark individual products with price unless excused by § 21a-79(a)(2). Sellers in retail area 10,000 square feet or larger using bar codes to total purchases must have item-by-item display of scanned products visible to consumer. (§ 21a-79). Products sold on store end-cap displays need not be marked with retail price. (§ 21a-79).

Unfair Trade Practices.

Unfair and deceptive acts as defined by Federal Trade Commission Act prohibited. (§§ 42-110a–42-110q). Commissioner of consumer protection empowered to promulgate rules and regulations, conduct investigations and hearings, and to issue cease and desist orders, enforcing them through court action. Award of attorney's fees against violators. (§§ 42-110m–42-110o). Court may order restitution, revocation of license to do business or appointment of receiver. Willful violation punishable by civil penalty of up to $5,000 for each violation. Private parties may also institute actions under Act. Jury trial specifically authorized by statute. (§ 42-110g).

Music Advertising and Performance.

Prohibition against advertising and conducting live musical performances through false, deceptive or misleading affiliation between performing group and recording group; injunction, disgorgement, and civil penalties. (§ 42-116aa).

Beer Packaging.

Permittee who sells beer not to be consumed on premises may sell bottles or cans only if in original packaging or if repackaged so as to not mislead consumer or omit or obscure labeling required by statute or regulation. § 30-92b.

Bedding manufacturers must not use contaminable or second hand materials unless proper disclosures are made to consumers. (§§ 21a-231; 21a-232).

Affirmative Action Officer.

Appointment, training, and jurisdiction governed by § 46a-68. See also § 46a-70a.

Cellular Mobile Telephone Directories.

Cellular mobile telephone providers may not list customers' information in directory unless customer gives permission. (§§ 16-247s, C.G.S. 16-247t, C.G.S. 16-41).

Telephone Record Confidentiality.

Unless authorized by law or otherwise, no one may knowingly procure, solicit or conspire to procure or sell telephone records without authorization. Telephone companies that maintain such records shall establish reasonable procedures to maintain their confidentiality. Violation of statute is Class C misdemeanor and unfair trade practice under § 42-110b(a).

Consumer Creditor.

Creditor is liable for use of abusive, harassing, fraudulent, deceptive or misleading representation, device or practice to collect debt in violation of § 36a-646 or regulations adopted pursuant to § 36a-647. (§ 36a-648).

Consumer Collection Agencies.

Actions of third-party collection agencies retained by creditors strictly controlled. (§§ 42-127–42-133a). Consumer collection licensees must post bonds with Secretary of State. (§ 36a-492).

State Child Protection Act.

Act defines hazardous and banned substances and prohibits placing in commerce or receipt of any misbranded or banned hazardous substance or tampering with labeling of any such substance. First offense is Class C misdemeanor, with civil penalty up to $500 for each offense, second offense or offense committed with intent to defraud punishable by sentence of up to one year imprisonment and $3,000 fine. (§§ 21a-335, 21a-346). Products containing lead paint must carry warning statements. (§ 21a-349).

Senior Citizen Protection.

Any person, firm or corporation offering senior citizens discount must post conspicuous signs with details. Fine is $50. (PA 09-53).

Contractors.

Any contractor who provides repair or remediation work for insured must provide insured with estimated total price before commencing work. (§ 38a-313a).

Credit Repair Services.

Regulated by statute. (§ 36a-700).

Credit Transaction Discrimination.

Unlawful for any creditor in credit transaction to discriminate on basis of sex, age, race, color, religious creed, national origin, ancestry, marital status, mental retardation, blindness, or physical disability against anyone 18 years of age or older. (§ 46a-66). For violating Act, creditor held liable for actual damages and punitive damages of up to $1,000. (§ 46a-98).

Fair Credit Reporting.

Various safeguards and procedures to protect and allow consumer to dispute and rectify derogatory credit reports. (§ 36a-696). Public utility providers must send statutory notice to customer of delinquency at least 30 days prior to sending such notice to credit rating agency. (§ 16-262d[g]).

Consumer Credit Bureaus.

Must offer security freezes to protect residents from crimes committed with use of fraudulently obtained credit reports. (§§ 36a-701–36a-701b).

Check Cashing Services.

See topic 3.01 Banks and Banking.

Conn. Anti-Trust Act.

Patterned after Federal anti-trust act, Conn. legislation prohibits contract, combination, or conspiracy: in restraint of any part of trade or commerce, to monopolize, attempt to monopolize or monopolization. Act specifies certain acts as unlawful without limiting violations to those specified and places enforcement responsibility under attorney general. Injunctive relief, treble damages and civil penalties of up to $250,000 are provided for in Act. (§§ 35-25–35-71).

Construction Industry.

New act re: fairness in financing entails party definition terms required in contracts; events of default; notice requirements; prohibited acts; remedies for default. (§§ 49-33; C.G.S. 52-249). Use of owner-controlled insurance programs in certain state and municipal construction projects shall be restricted. (§ 49-41).

Retainage.

Retainage shall be deposited into Connecticut escrow accounts, and monthly reports shall be tendered to contractor as to value of escrow account and any additions to it or payments made from it. Report shall be made available for review by subcontractors. Form and provisions of escrow account shall be included in all solicitations for construction services, and provided to contractor and subcontractor prior to contracting. Penalties for failure to comply. (§ 42-158p; see § 42-158i; see also §§ 20-417a, C.G.S. 20-417e, C.G.S. 20-427[b], C.G.S. 42-135a).

Claim for materials and services greater than $10 and pursuant to agreement with or consent of lessee, then leasehold interest in real estate property is subject to payment of claim. (§ 49-33).

Attorneys' fees and costs recoverable under lien are also recoverable under substituted bond. (§ 52-249).

Contractors.

If contractor violates provisions of § 20-420, Commissioner of Consumer Protection shall notify Commissioner of Motor Vehicles and registrations will not be issued for commercial motor vehicles owned by contractor until compliance. (§ 20-427a).

Home Heating Oil.

Dealers must obtain certificates of registration, and display its registration number in all advertisements and other materials prepared or issued by dealer (§ 16a-23m) annually from Dept. of Consumer Protection, pay fee and present proof of adequate insurance coverage. Dealers need only one registration certificate annually for both heating oil and propane gas. (§ 16a-23m; see also § 16a-23n, § 16a-23s). All contracts must be in writing and all dealer subcontractors must be registered or licensed. Dept. may suspend or revoke registrations for violations and/or gross incompetence. (§ 16a-23m-r). All dealers that advertise price shall offer said price for period of no less than 24 hours or until next price is advertised. (§ 16a-23n). No retail sales of fuel oil or propane gas without disclosing all purchaser's costs in writing at time of contract. (§ 14-329).

Computers.

Regulations, use and penalties re: unauthorized use of computers and other offenses. (§ 52-59b[a][5]).

Air Bag Fraud.

Sale of air bags that do not meet federal safety requirements provided in 49 CFR

571.208 by one who knows, or should know, of such deficiency shall be unfair or deceptive trade practice, and Class A misdemeanor. (§ 14-106d).

Concessionaire Affiliates.

Definitions and licensing requirements. (§ 12-578[a]). Gaming Policy Board shall issue affiliate of association licenses to qualified business organizations; executive director shall issue affiliate of concessionaire licenses to qualified business organizations. (§ 12-574[h]).

Public Accountants.

Fees that may be charged for services performed by licensed public accountant. (§§ 20-281e; C.G.S. 20-281; C.G.S. 20-280[g]). Rules pertaining to audits of publicly held corporations. (§ 33-1332). Violations of § 20-281g are subject to penalties of $50,000. (§ 20-281g[a]). Recruiting and practice privileges for out-of-state accountants. (§ 20-281n).

Diet Companies.

New rules regarding disclosures, cancellations and rebate of contract price for diet programs. (§ 42-280).

Health Clubs.

Each location of health club must be licensed. (§ 21a-223). Health club contracts are regulated by statute, must be in writing, specify club location, and be signed by member. Contracts may not contain automatic renewal clause unless such renewal period does not exceed one month, renewal becomes effective after renewal payment, and member may cancel further renewals upon no more than one month's notice. Health club operator must disclose renewal rate or its method of calculation or make information accessible to its members. (§§ 21a-218–21a-221).

Garbage Removal and Disposal.

Automatic renewal provision in contract for garbage removal or disposal is unenforceable unless contract contains specific statutorily-required language. (§ 42-158aa).

Well Drilling and Well Casting.

Qualified contractors who have obtained registration certificates can perform well drilling and casting. (§ 25-129).

Extended Warranties.

Providers and procedures for such warranties regulated by statute. (§ 42-260, am'd PA 09-24, § 1).

Truth in Lending Act.

Requires complete disclosure of all finance charges and closing costs in any consumer credit transaction, including true annual percentage rate at time of down payment or, for real estate transaction, at time of creditor's commitment. Where real property of obligor is used as security in consumer credit transaction, obligor may rescind transaction at any time until midnight of third business day following consummation of transaction or delivery of required disclosures, whichever is later. Unless corrected within 15 days after discovery, any creditor who failed to provide proper disclosure, is liable for any actual damage sustained plus costs of collection, including reasonable attorney fees. In addition, in individual action, creditor is liable for twice finance charge up to $1,000 or minimum of $100. In class action, no minimum recovery and total recovery limited to $500,000 or 1% of net worth of creditor. (§§ 36a-180; 36a-675–36a-676; 36a-678–36a-685).

Uniform Consumer Leases Act.

Consummation of consumer lease occurs when lessee signs record evidencing lessee's contractual obligation under lease for term of more than four months and goods are to be used primarily for personal, family or household purposes, with certain exceptions. (§ 42-393). Lessee may consummate consumer lease even if it is subject to subsequent credit or other approval by lessor or its assignee. Consumer lease may not be deemed credit sale, loan or security interest to make transaction subject to coverage by other law in lieu of this Act. Lessor shall make disclosures required by Federal Consumer Leasing Act. If lease is not subject to said Act, lessor shall make disclosures as if lease were subject to said Act. Obligations of guarantor enforceable if all conditions satisfied. (§ 42-405). Act sets forth terms and conditions of consumer leases. (§ 42-390, et seq.).

Computer Leases.

Between 30 and 120 days prior to lease expirations, lessor must provide notice of expiration date, rights, and obligations upon expiration, and purchase option price, if applicable. (§ 42-406).

Leased Vehicles.

New law regulates how retail vehicle lease must be calculated; non-compliance deemed to be unfair trade practice under § 42-110b. (§§ 42-158a, C.G.S. 42-158d).

Home Solicitation Sales Act.

No home solicitation sale agreement effective if not signed and dated by buyer or if seller: (1) Fails to furnish buyer with copies of completed receipts and contracts at time of sale. Contract must: (a) Be in same language as was used in sales presentation; (b) show address of seller; (c) inform buyer of right to cancel transaction within three business days. (2) Fails to furnish buyer with completed form captioned “Notice of Cancellation”. (3) Includes in receipt or contract any confession of judgment or waiver of buyer's rights. (4) Fails to orally inform buyer of right to cancel or misrepresents such right. (5) Fails to honor valid notice of cancellation within ten business days of receipt. (6) Transfers note or other evidence of indebtedness to third party within five business days of sale. (§ 42-135a).

Transfer of note or other evidence of indebtedness given by buyer in home solicitation sale is assignment only and transferee takes subject to all defenses and claims of buyer against seller arising under act. Note must include specified statement that instrument is not negotiable. (§ 42-136). Buyer may cancel until midnight of third business day after signing, and seller must thereafter return all payments and/or notes within ten business days. (§ 42-138). Buyer must return goods within 20 days upon demand of seller, at buyer's address. (§ 42-139). Referral sale schemes prohibited. (§ 42-140). Violation of Act punishable by imprisonment up to 90 days and/or $500 fine, and constitutes unfair or deceptive act or practice as defined by § 42-110b. (§ 42-141).

Consumer Protection for New Home Construction Act.

Outlines registration requirement for person to engage in new home construction; requirements for new home construction contract and disclosure; violation is unfair trade practice under § 42-110b; provides for fund to reimburse consumer with judgment against contractor. (§ 20-417j). Contractors required to provide documents prior to entering contract with consumer for new home. (§ 20-417d, am'd PA 09-18, § 1).

Home Improvement Act.

No home improvement contract is valid unless it: (1) Is in writing; (2) is signed by homeowner and contractor; (3) contains entire agreement; (4) contains date of transaction; (5) contains name and address of contractor; (6) contains starting and completion dates; (7) is contract for construction or sale of new home, or portion thereof, prior to occupancy (§ 20-417a); and (8) is entered into by registered salesman or registered contractor. Home improvement contracts are subject to requirements of Home Solicitation Sales Act. (§§ 20-418–20-431). Contractor may still recover reasonable value of services if court determines denial of recovery would be inequitable. (§§ 20-419; C.G.S. 20-429, am'd PA 09-18, § 2).

Uniform Food and Drug and Cosmetic Act (not proposed by Nat. Conf. of Commissioners on Uniform State Laws) adopted. (§§ 21a-91 to 21a-120).

Labeling of dangerous toys required. (§ 21a-337).

Prepaid Calling Cards.

Companies selling prepaid calling cards must clearly and conspicuously disclose calculation of rates, surcharges, fees, restrictions and consumer assistance number. (§ 42-370).

Unsolicited Goods.

Voluntary and unsolicited sending of goods not actually ordered or requested by recipient deemed unconditional gift. Trial offers include written procedures to cancel products or services. (§ 42-126b).

Credit Cards.

Fine of not more than $100 for sending unsolicited credit card or charge plate. (§ 53-311a). Credit card companies must restrict business offers on college campuses. (PA 09-167, § 1-2).

Facsimiles.

No person shall use machine that electronically transmits facsimiles to transmit unsolicited advertising material which offers to sell goods or services. (§ 52-570c).

Electronic Mail.

No one may send unsolicited advertising by electronic mail to Connecticut residents unless advertisement lists toll-free number or valid electronic mail address to unsubscribe and states “ADV” in subject line. Penalties assessable if further solicitation after receipt of unsubscribe request. (§ 52-570c). Civil and criminal (Class D felony) causes of action for “phishing” which includes use of electronic mail to fraudulently solicit personal information by electronic mail or Internet. (§ 53-454).

Relief from Facsimile & Electronic Mail Violations.

Persons aggrieved by violation may bring civil action to enjoin further violation and to recover damages, costs, attorney fees and $500 for each violation. (§ 52-570c).

Telephone Solicitation.

Department of Consumer Protection to establish and maintain “no sales solicitation calls” listing of consumers who do not want unsolicited sales calls. List shall be updated quarterly and consumers may be added to list by telephonic request or deleted from list upon request. No telephone solicitation to consumers: (1) on list; (2) between 9 p.m. and 9 a.m.; (3) by electronic facsimile or (4) by recorded message device. Solicitors may not block call identification devices. Other than telephone companies, solicitors may not sell lists that contain names of consumers on no-solicitation list. Violations are deemed violations of § 42-110b. (§ 42-288a).

Solicitation of Charitable Funds Act.

Commissioner of Consumer Protection shall publish terms of contract between solicitor and charitable organization. (§ 21a-190f). Registration requirements, procedures, prohibited actions, and penalties under Charitable Funds Act. (§§ 21a-190b, am'd PA 09-102, §§ 2-3, 21a-190c, am'd PA 09-102, §§ 2-3, 21a-190h).

Plain Language.

Every consumer contract, in which consumer leases residence or receives up to $25,000 in credit, but excluding mortgages, real estate deeds, insurance policies or securities documents, must be written in plain language. Provides subjective and objective tests for determining compliance, and exempts real property descriptions and language expressly required by court, statute or regulation. Consumer contract violating this chapter is enforceable, but creditor or seller is liable for statutory damages of $100 plus $100 attorney's fees. (§§ 42-151–42-158).

Liquidated Damages.

Liquidated damages clause in certain consumer contracts for goods and services is unenforceable unless contract states in specific font type and size that “I acknowledge that this contract contains liquidated damages provision” and consumer signs or initials next to such statement. (§ 42-150u).

Lemon Law.

Manufacturer must repair or replace vehicle which does not conform to express warranties. (§ 42-179). If motor vehicle does not conform to warranties, it is presumed reasonable number of attempts undertaken to conform vehicle to warranties. No claim may be used unless at least one attempt to repair nonconformity has been made by manufacturer or agent, or manufacturer agent has refused to repair such nonconformity. (§ 42-179[e]). Consumer grievances may be brought to arbitrator, not afflicted with motor vehicle business, appointed by Commissioner of Consumer Protection if manufacturer has not established approved dispute settlement procedure. (§ 42-181). Term “consumer” does not include lessee who purchases vehicle at end of lease term pursuant to lease contract option. (§ 42-220). Resale, transfer or lease of motor vehicle returned pursuant to lemon law must be disclosed as “manufacturer buyback”. (§ 42-179[g]).

Malpractice Insurance.

Health care providers, including physicians, osteopaths, chiropractors, podiatrists, and naturopaths required to maintain malpractice insurance in minimum amount of $500,000. Failure to do so grounds for license denial or revocation. (§§ 20-11b, 13c, 28b, 29, 39a, 40, 58a, 59; 38a-393, 542).

Property Condition Disclosure.

Effective Jan. 1, 1996, person offering for sale, exchange, or lease with purchase option, residential property consisting of four dwelling units or less must provide prospective buyer with written “condition report” in form to be developed by Commissioner of Consumer Protection. Form will cover such issues as: radon, lead, environmental matters, subsurface sewage disposal. If seller fails to provide report, seller must credit purchaser $300 toward purchase price. Transfers exempt from requirement are: (1) sales between or among existing co-owners; (2) transfers to certain family members without consideration; (3) court-ordered transfers; (4) new construction; (5) transfers by executors, administrators, trustees, or conservators; (6) governmental transfers; (7) deeds in lieu of foreclosure, or transfers pursuant to foreclosure by sale; (8) transfers pursuant to exercise of option obtained prior to effective date. (§§ 20-327b, am'd PA 09-127; C.G.S. 20-327c–20-327e).

Right to Privacy.

No retailer who has issued discount card or device to consumer may sell, lease or relinquish consumer information to unaffiliated person, firm or company unless reasonable, written prior notice is provided to consumer, consumer is given opportunity, at outset, to prevent dissemination and consumer doesn't prevent retailer from such dissemination; certain minor exceptions apply. (§ 42-371). Holders required to protect Social Security numbers and other personal information. (§ 42-471, am'd PA 09-239, § 13, am'd PA 09-71, § 1).

Telemarketers, sweepstakes promotions, buying clubs, telecommunication services regulated. (§§ 42-284, et seq.; C.G.S. 16-256i–16-256j). All telecommunications companies must clearly label bills and provide customers with toll-free number for complaints. (§ 16-256j).

Utility Companies.

Requirements for notice of termination of utility services. (§ 16-262d). Before terminating service to residential dwelling, supplier shall obtain some form of reasonable identification from person or entity seeking termination. (PA 09-31, § 1).

See also topics 3.17 Interest, Sales; category 16 Insurance, topic 16.01 Insurance Companies.

3.13 CONTRACTS:

See topic 3.02 Bills and Notes; categories 10 Documents and Records, topic Seals; Family, topic Infants.

Wagering contracts void except for regulated State lottery, off-track betting facilities, and pari-mutuel systems (§§ 52-533; C.G.S. 12-557–12-582, am'd PA 09-132), but see topic 3.02 Bills and Notes. Referral sales contracts offering rebate contingent upon procuring additional contracts are unlawful and void. (§ 42-146). Home solicitation sales regulated by statute and voidable at any time before midnight of third business day following signing of contract at election of buyer. (§ 42-137). Contracts for illegal sale of alcoholic liquors are void. (§ 30-103). Negative option service contracts by home improvement contractors are void. (§ 20-429, am'd PA 09-18, § 2).

Uniform Commercial Code adopted, effective Oct. 1, 1961. (Title 42a). By amendment, Connecticut has adopted 1962 Official Text. See topic 3.09 Commercial Code.

§ 19-6a makes any agreements exempting owners and contractors from liability for negligence void and unenforceable. (§ 19-6a). See topic 3.20 Monopolies, 3.22 Restraint of Trade and Competition.

Surety Requirements.

Bond required for each contract exceeding $100,000 concerning any public building or public work or its subdivision. (§ 49-41[a], am'd PA 09-146, § 2). Contracting officer may require performance bond or other security in addition to bond required by § 49-41(a). (§ 49-41[b]). Person who must supply bond is not required to obtain bond from specific surety, agent, broker or producer. (§ 49-41[c]). Contract amount for which municipality must receive bond on construction or public works project is increased to ensure that small and minority contractors may bid on projects within their capabilities but beyond their bonding capacity. (§ 49-41). Required language in certain surety contracts involving public buildings. (§ 49-41[f]).

Construction Contracts.

Regulation of construction contracts including payments to subcontractors and suppliers. (§§ 42-158i to C.G.S. 42-158n).

Subcontractors must be prequalified for subcontracts exceeding $500,000 in state funds. (§ 4b-91).

Commission of Public Works may enter into manager at-risk construction contract to carry out provisions in Tit. 46 for construction, renovation, or alteration of building facilities provided that contract has maximum guaranteed price for construction and appropriate public notice given on opportunities to bid on elements of project. (§ 46-103).

Commissioner has discretionary authority to delegate State Building Code power to University of Connecticut. (§ 29-252a[e]). Memorandum of understanding required to provide temporary assignment of personnel to ensure compliance with Fire Safety and State Building Codes. (§ 10a-109ff).

University of Connecticut must provide public notice to contractors interested in prequalifying for total cost basis contracts for construction to exceed $500K through newspaper advertisement unless project is deemed emergency. University shall not enter into manager at-risk delivery contract without maximum guaranteed cost of construction price; construction managers at-risk must provide appropriate public notice of opportunities to bid on project. (§ 10a-109n[c]).

Duties of board of trustees include, but not limited to, fulfilling requirements concerning audit and review of UConn 2000 projects and establishing construction assurance office. (§ 10a-104[b]). Trustees to select independent auditor to audit UConn 2000 projects (§ 10a-109z); review audit reports of UConn 2000 projects (§ 10a-109aa); establish construction management oversight committee to review and approve policies and procedures developed by University to undertake UConn 2000 projects and report assessment (§ 10a-109bb); establish construction assurance office to review and report on performance of UConn 2000 projects to management oversight committee (§ 10a-109cc). University to conduct review and submit budgets concerning deferred maintenance to construction management committee (§ 10a-109dd); funds allocated for deferred maintenance to be expended for that purpose (§ 10a-109ee).

3.13A CULTURE AND TOURISM:

Connecticut Commission on Culture and Tourism.

Commission shall promote culture, history, the arts, including film and digital media and motion picture industries. (§ 10-392). Commission must administer tax credit voucher system for certified film and digital animation activities in State. (§ 12-217jj).

3.14 FACTORS:

Governed by Uniform Commercial Code. (Tit. 42a).

3.15 FRANCHISES:

No franchisor shall, directly or through any officer, agent or employee, terminate, cancel or fail to renew franchise, except for good cause, including, but not limited to franchisee's refusal or failure to comply with any material and reasonable obligation of franchise agreement. See § 42-133f(e). Franchisor shall give franchisee written notice of such termination, cancellation or intent not to renew, at least 60 days in advance with cause stated; provided, in event franchisor elects not to renew, franchisor shall give franchisee written notice of such intent not to renew at least six months prior to expiration of current franchise agreement. Provisions of this section shall not apply: (1) Where alleged grounds are voluntary abandonment by franchisee, in which event, notice may be given 30 days in advance of termination, cancellation, or failure to renew, (2) where alleged grounds are conviction of franchisee in court of competent jurisdiction of offense punishable by term of imprisonment in excess of one year and directly related to business conducted pursuant to franchise, such notice may be given any time following conviction and shall be effective upon delivery and written receipt of such notice.

If franchise which is subject of notice of termination, cancellation or failure to renew is operated on premises leased by franchisor to franchisee under lease which terminates upon termination of franchise, if franchisor seeks to terminate lease, notice shall be served and shall expressly state that lease shall terminate upon termination of franchise.

Upon termination of any franchise, franchisee shall be allowed fair and reasonable compensation by franchisor for franchisee's inventory, supplies, equipment and furnishings.

Notwithstanding provisions of § 52-550, no franchise entered into or renewed on or after Oct. 1, 1973 whether oral or written shall be for term of less than three years and for successive terms of not less than three years thereafter unless cancelled, terminated or not renewed.

Franchisor may elect not to renew franchise which involves lease by franchisor to franchisee of real property and improvement, in event franchisor: (1) Sells or leases such real property and improvements to other than subsidiary or affiliate of franchisor for any use; or (2) sells or leases such real property to subsidiary or affiliate of franchisor who shall not use real property for operation of same business of franchisee; or (3) converts such real property and improvements to use not covered by franchise agreement; or (4) has leased such real property from person not franchisee and lease from person is terminated or not renewed. (§ 42-133f). Gasoline franchisors must not require or coerce franchisees to sell gasoline at specific price or within specified price range. (§ 42-133l[f]). Special rules and requirements for franchisor or successor owner concerning gasoline franchise who intend to sell or sells franchisor's or successor owner's interest in premises. Restrictions concerning successor owner's requirements of franchisee. (§ 42-133mm). Gasoline seller may offer discount to induce buyer to use specified means of payment. (§ 42-133ff[c]).

Uniform Franchise and Business Opportunities Act not adopted.

3.16 FRAUDS, STATUTE OF:

No action can be maintained upon an agreement of an executor or administrator to answer damages out of his own estate, or against any person upon any promise to answer for the debt, default or miscarriage of another; or upon any agreement made in consideration of marriage; or upon any agreement for the sale of real estate or any interest in or concerning it (except lease for one year or less in pursuance of which lessee actually occupies leased premises); or upon any agreement that is not to be performed within one year, unless such agreement, or a memorandum thereof, be in writing and signed by the party to be charged therewith, or his agent (§ 52-550), contracts for sale of personal property are governed by Uniform Commercial Code (§§ 42a-1-206; 42a-2-201; 42a-8-319).

3.17 INTEREST:

Judgments.

Legal rate of accrual as addition to debt in absence of agreement to contrary is 8%. (§ 37-1). This rate is collectible on past due obligations, running accounts, and judgments. Interest recoverable as damages in civil action at rate of 10%. Reasonable and just interest on compensation awarded for taking property by eminent domain shall be calculated as follows: if period for which interest is owed does not exceed one year, interest shall be calculated from date of taking at annual rate equal to weekly average, one-year constant maturity yield of U.S. Treasury securities for calendar week preceding date of taking. (§ 37-3c; § 37-3a). Interest on debts arising out of hospital services is discretionary and rates may vary. (§§ 37-3a, C.G.S. 52-352b; C.G.S. 52-356a, C.G.S. 52-356d, §§ 7, C.G.S. 8-10).

Maximum Rates.

Contract to pay interest in excess of 8% need not be in writing, but loans at greater rate than 12% prohibited (§ 37-4), except by national bank, state bank or trust company or wholly owned subsidiary, except on consumer loans, federal or state savings and loan association, or credit union or federal credit union (§ 37-9), duly licensed small loan company (§ 36a-563), or pawnbroker (§ 21-44) or on real estate mortgage for sum in excess of $5,000 or in commercial loans in excess of $10,000, or on obligations or loans made by state, local government, or public agencies (§ 37-9). Maximum for financing purchase of new cars, boats, or recreational vehicles is 16%, on used is 18%. (§ 37-9). Maximum on loans by institution of higher education to students is greater of: Rate allowed in § 37-4 or 5% above current discount rate on 90-day commercial paper. (§ 37-9). This limitation may not be evaded by taking note for greater amount than actually loaned (§ 37-5) nor by charges for inquiries, expenses, etc. (§ 37-6).

Borrower cannot recover back or set-off interest paid in excess of 6%. (§ 37-2 but see §§ 37-1, C.G.S. 37-3a). Whenever maker of note is nonresident or mortgage security is located in another state, resident obligee or holder may recover any agreed rate of interest not exceeding legal rate in state where contract made or mortgage security located. (§ 37-3a).

Small Loans.

Every person, partnership or corporation licensed under Small Loan Act may loan up to $15,000 excluding charges and may receive thereon charges on loans not exceeding $1,800 at per annum rate not to exceed $17 per $100 on that part of cash advance not exceeding $600, and $11 per $100 on any remainder, on loans exceeding $1,800 charges not to exceed $11 per $100, and proportionally at those rates over longer or shorter term of loan. Such charges must be computed at time loan is made on full amount of cash advance, must be added to cash advance, resulting sum becoming face amount of note and all payments, except for default and deferment charges are deemed applied to unpaid installments. Default periods and deferred payment and charges are regulated (§ 36a-555, am'd PA 09-208, § 40, am'd PA-09-209, § 18). Credit life insurance may not be made condition of small loan. (§ 36a-566).

No one may make loan of money or credit in amount below $15,000 and receive or contract for greater rate of interest, charge or consideration than 12% with some exceptions. (§ 36a-555, am'd PA-09-209, § 18).

Pawnbrokers may charge 5% per month on loans not exceeding $15; 3% per month on loans exceeding $15 but not exceeding $50; and 2% per month on loans exceeding $50. Monthly rate may be charged for fractions of a month. (§ 21-44).

Credit Cards.

After effective date of Act, retail seller may apply maximum interest 1½% per month on average daily balance or unpaid balance at end of billing cycle. (§ 42-133c).

Usury.

No action may be brought to recover principal or interest or any part thereof on any loan at a rate of interest exceeding that permitted by law, or upon any cause arising from the negotiation of such loan. (§ 36a-573, am'd PA 09-208, § 41). But this does not prevent national bank, state bank, federal or state savings and loan association, which has acquired negotiable instrument in good faith and for value, without notice of illegality in consideration, from recovering principal thereof and interest thereon. (§ 37-9). Accommodation endorser may contest usurious note same as maker might. (102 Conn. 34, 127 A. 907).

3.18 [RESERVED]

3.19 LICENSES, BUSINESS AND PROFESSIONAL:

Licenses and permits from different authorities, on varying conditions, and at various fees are required for a large number of occupations and activities. Municipality or district health department may withhold or revoke any license or permit from business enterprise more than one year delinquent in municipal personal property tax. (§ 12-146a). Licenses for specific occupations are governed by Titles 12 and 20. Amendments to Acupuncturist licensing requirements. (§ 20-206bb).

Town Clerk Liability Regarding Licenses.

Within 15 days following close of each calendar year, town clerk shall send to commissioner: (1) All license forms allotted to such clerk; (2) annual report in such form as is required by commissioner; and (3) affidavit attesting to accuracy of accounting. Town clerks shall remit two-thirds of fees paid to State Librarian for deposit in bank account of State Treasurer and crediting to historic documents preservation account established under § 11-8i. (§ 26-36).

Amusement Rides.

Commissioner of Public Safety must inspect amusements before issuing license. All injuries to be reported to Commissioner within four hours. (§ 29-136). Amusement ride owner must display warning sign in accordance with Commissioner's regulations. (§ 29-136).

Marriage, Family and Health Providers.

Therapists, sanitarians, speech pathologists, podiatrists, opticians, acupuncturists, clinical social workers and massage therapists must be licensed. (§ 20-195, §§ 20-50, C.G.S. 20-74, C.G.S. 20-146; § 20-206b[c], am'd PA 09-182, § 1, § 20-408, am'd PA 09-232, §§ 61, 62; § 20-411, am'd PA 09-232, § 63). Speech and language pathologist continuing education requirements. (PA 09-232, § 67). Only licensed massage therapist may advertise massage services and use term “massage” in advertisements. (§ 20-206g). Physical therapists, occupational therapists and practical nurses must be licensed. (§ 20-70a).

Motor fuel sellers must provide air compressors for tire inflation free to public. (§ 14-325a).

Retail Liquor Permittees.

Upon transfer of package store business, seller/transferor must file affidavit asserting that all outstanding obligations for purchase of liquor have been paid. (§ 30-48[c]).

Alcohol and Drug Counselors.

One who has Masters degree and is certified by The Dept. of Mental Health and Addiction Services shall be deemed licensed alcohol and drug counselor. One who does not have Masters degree must obtain certification and will then be deemed certified alcohol and drug counselor. Methods of obtaining certification are delineated in statute as are exceptions to licensure and certification and penalties for noncompliance. (§§ 17a-450a; 19a-14, 19a-88; C.G.S. 20-195o, am'd PA 09-1, § 18 –20-195q; C.G.S. 20-74o–20-74s).

Athletic Trainers.

Licensing governed by §§ 19a-14; 19a-88; C.G.S. 20-1; C.G.S. 20-9; C.G.S. 20-65f to C.G.S. 20-65l. (§§ 20-65j, § 22; C.G.S. 20-65k[b][c]). Dept. of Public Health to take action if athletic trainer licensed under § 20-65k fails to conform to accepted standards of trainer profession. Commissioner may order license holder to undergo reasonable physical or mental examination if subject of investigation. (§ 20-65m).

Automobile Dealers and Repairers.

Persons seeking license to deal or repair motor vehicles in municipality with population of 20,000 or more must present commissioner with valid certificate of approval from Zoning Commission. Not required for certain charges or transfers in ownership. Persons seeking license to deal or repair in municipality with population of less than 20,000 must present to commissioner certificate of approval from designated town authority. (§ 14-54).

Building Officials.

Commissioner of Public Safety must require certain continuing educational programs for licensed building officials. (§ 29-262[a]-[c]).

Hotels and Restaurants.

Hotel and restaurant retail liquor permittees shall allow patrons to remove sealed, partially consumed bottles of alcohol from premises. (§§ 30-21, C.G.S. 30-22). Patron may remove partially consumed bottle of wine from premises only if bottle was purchased and partially consumed with full course meal on premises. (§ 30-22).

Food service establishments must display signs educating employees on choking prevention techniques. (§ 19a-36c). Regulations pertaining to food service establishments require qualified food operators to be tested on knowledge of food allergies. (§ 19a-36, am'd PA 09-11, § 5).

Juice Bars.

Notice of scheduled event at juice bar must be provided to chief law enforcement officer for location 48 hours or more prior to event. (§ 30-22c).

Physical Therapist.

Physical therapist is one licensed to practice physical therapy in Connecticut. Physical therapy includes modification of physical therapy programs, treatment planning, instruction, wellness care, peer review and consultative services. Each physical therapist shall complete minimum of 20 hours of continuing education during each registration period. (§ 20-73b). Nothing shall prevent physical therapist from providing wellness care within scope of physical therapy practice to symptomatic persons without referral. Nothing shall require employer or insurer to pay for such wellness care. (§ 20-73). Required to maintain professional liability insurance with applicable coverage limits. (§ 20-73d).

Physical Therapy Assistants.

Licensing governed by §§ 20-66, am'd PA 09-232, § 17, C.G.S. 20-70–20-73; C.G.S. 20-73a, § 5; C.G.S. 20-74; 19a-88. (See also §§ 20-70–20-74; C.G.S. 19-99[c][5]; 19a-16a–19a-16c.)

Physicians.

Disciplinary guidelines and procedures. (§§ 20-8a[c]; C.G.S. 20-8a[g]; C.G.S. 20-13b; C.G.S. 20-13j[b]; C.G.S. 20-13j[k], C.G.S. 20-13k). Continuing education requirements. (§§ 20-10b,am'd PA 09-232, § 16; C.G.S. 20-13). License renewal requirements for physicians in armed forces. (§ 19-88b). No fee renewal of license when practice at least 100 hours per year solely at public health facility. (§ 20-10c). Only licensed medical practitioners may use words to make another believe person practices medicine, is licensed to practice medicine, and may diagnose or treat for ailment. (§ 53-341; see also cc. C.G.S. 369-388).

Homeopathic Physician.

Licensing requirements. (§ 20-12n; § 20-41a).

Naturopathic Physician.

Licensing requirements. (§ 20-37b).

Physician's Assistant.

Licensing requirements. (§§ 20-12b; **C.G.S. 20-12c**). Performance of medical functions. (§ 20-12d).

Audiologist.

Audiologist and assistant licensing requirement and qualifications. (PA 09-232; § 53 et seq.). License fee, renewal and suspension. (PA 09-232, §§ 56, 58). Requirements for sale and fitting of hearing aids. (PA 09-232, § 82).

Tanning Facilities.

Municipal and District Health Depts. under cc. 368e and 368f to enforce operation of facilities. No persons under 16 may use tanning devices without written consent of parent or guardian. (§ 19a-232).

Acupuncturist.

Licensing requirements. (§§ 20-206bb, C.G.S. 20-206bb[d], §§ 20-206bb, am'd PA 09-21, § 1).

Clinical Social Workers.

Limits on those who may hold themselves out as licensed clinical social workers; prescribes licensing requirements, exceptions to licensing and renewal procedures. (§§ 20-195q, C.G.S. 20-195o, am'd PA 09-01, § 18).

School Social Work.

Person licensed to do school social work may satisfy continuing education requirements by successfully completing professional development activities. (§ 20-195o, am'd PA 09-01, § 18).

Bounty Hunters.

Governed by §§ 29-152e, et seq.; 38a-660; 38a-660a; C.G.S. 52-571e; C.G.S. 54-66a.

Check Cashing Services.

Servicers must post bond and satisfy other licensing requirements. (§ 36a-581, am'd PA 09-209, § 40). Bases and procedure for surety bond cancellation. (§ 36a-602). May self-insure with investments instead of posting surety bond. Licensee to hold investment with bank, credit union or federal credit union for period license remains in force and two years thereafter; must comply with conditions set forth by Commissioner for protection of consumers and public interest. (§ 36a-602).

Child day care centers and homes are regulated. (§§ 19a-77, am'd PA 09-232, §§ 42, 102, 104; 19a-79–80). Commissioner of Public Health shall make periodic inspections of licensed day care centers. (§ 19a-82). Deposits must be returned if wait-listed child is not accepted after six months. (§ 19a-80q).

Chiropractors seeking license renewal required to participate in continuing education programs. (§ 20-32).

Commercial travelers need not be licensed. (§ 21-27).

Credit collection licensees must post surety bond, and follow previously existing procedures to receive licenses. (§§ 36a-492; 36a-664[a], am'd PA 9-23, § 1).

Counselors and Marriage and Family Therapists.

Governed by § 19a-14. Applicants for professional counseling license must submit satisfactory evidence of completion of master or doctoral degree from accredited institution with major within field of counseling. (§ 20-195c, am'd PA 09-232, § 44; § 20-195dd).

Collection Agencies.

Governed by § 36a-805-809.

Public Accountants.

Regulations to issue permitting one holding Connecticut public accountant license to convert said license to certified public accountant license without examination. (§ 20-280e).

See also category 16 Insurance, topic 16.01 Insurance Companies, subhead Agents, Brokers and Adjusters.

Dental Office.

Personal representative or estate of deceased person may keep license to operate dental office for limited period of time following dentist's death or incapacity. (§ 20-122).

Private Detective and Security Personnel Agencies.

Required to apply for and obtain license. Any agency failing to satisfy licensing standards shall be liable for civil penalties. (§§ 29-161g–29-161x). (See also §§ 29-153; **C.G.S. 29–154a; C.G.S. 29–154c; C.G.S. 29–155; C.G.S. 29–155a-29–155d; C.G.S. 29–156; C.G.S. 29–156a; C.G.S. 29–156b; C.G.S. 29–156d; C.G.S. 29–156e; C.G.S. 29–156g; C.G.S. 29–156h; C.G.S. 29–158, am'd PA 09–7, § 3; C.G.S. 29–161; C.G.S. 29–161a; C.G.S. 29–161b; C.G.S. 29–161c; C.G.S. 29–161q; C.G.S. 29–161z**)

Electricians, plumbers, glaziers, hoisting equipment/crane operators, and similar tradesmen must be licensed. (§§ 20-330, am'd PA 09-153, § 3; C.G.S. 20-331; C.G.S. 20-334a; C.G.S. 20-340; 21a-6). Commissioner of Consumer Protection may grant license, without examination, to any electrician who is licensed in another state or any territory or commonwealth of U.S. (§ 20-333a). Accredited continued professional education required for licensed electricians and plumbers; certain exceptions apply. (§ 20-344d). Applicants for renewal shall furnish evidence of continuing education. (§ 20-335). Issuance of limited sheet metal power industry licenses. (§ 20-334a). Underground storage tank remover must have completed hazardous materials training program, must have liability insurance of $1 million, and must have evidence of surety bond of $250,000. (§§ 20-419, C.G.S. 20-420, am'd PA 09-122, § 1). People who install, repair, replace, alter, or maintain piping or tubing that conveys liquid or gas for chemical manufacturing must be licensed. (§§ 20-330, am'd PA 09-153, § 3, C.G.S. 20-340). Any contractor performing solar electricity work must have special license from Dept. of Consumer Protection. (§§ 20-330, am'd PA 09-153, § 3, C.G.S. 20-334a[b], C.G.S. 20-334b, C.G.S. 20-340, C.G.S. 20-340c, C.G.S. 20-419).

Asbestos Abatement Workers.

Certification required and governed by §§ 20-437–20-439.

Paramedics.

Governed by §§ 19a-14, 19a-175, am'd PA 09-16, §§ 2-3, 19a-197a, am'd PA 09-232, § 38; C.G.S. 20-206m. Procedure for lapsed paramedical licenses. (§ 19a-179, am'd PA 09-232, § 30).

Emergency Medical Personnel.

Any person certified as emergency medical technician whose certification has expired may apply to Department of Public Health for reinstatement of certification. (§ 19a-179, am'd PA 09-232, § 30; § 19a-195b, am'd PA 09-232, § 37).

Nursing.

Nurses' aides must complete 100-hour training program. (§ 20-102ee). Advanced nursing practice defined. (§ 20-87a).

Psychologists.

Applicant shall present evidence to Dept. of Public Health that applicant is competent practitioner or that applicant holds current certificate from Association of State and Provincial Psychology Boards. (§ 20-190).

Pharmacist renewing his/her license may obtain required continuing education contract hours through either live or written accredited programs. (§ 20-600[a]).

Poultry Dealers.

Licensure requirements. (§§ 22-326s, C.G.S. 51-164n, am'd PA 09-7, § 4, C.G.S. 51-344a, am'd PA 09-52, § 5).

Veterinarians.

Regulations concerning licensure and practice of veterinary science. (§ 20-196, et seq.). Licensure requirements. (§ 20-197). Requirements for issuance of licenses to graduates of foreign veterinary medicine programs. (§ 20-198). Temporary permit may be issued if certain requirements are met. (§ 20-200). Continuing education requirements. (PA 09-232, § 10).

Youth Camp Licensee.

Circumstances under which Commissioner may take action against licensee; required procedures. (§ 19a-423, am'd PA 09-232, § 100). Confidentiality provision for persons reporting to Dept. of Public Health their belief that youth camp is operating in violation of license, regulations, or in any manner posing danger to children receiving youth camp services; investigation procedures and authority. (§ 19a-429).

Farmers' Markets.

Farmer's kiosk at farmers' market is extension of farmer's business for purpose of state regulations. (§ 22-65).

Farm Wineries.

To receive manufacturer's permit, wineries must grow at least 25% of fruit used in manufacture of farm winery permittee's wine on farm's premises or on property adjacent under same ownership and control of permittee. (§ 30-16[e]).

Business Assistance.

One-stop business registry in Department of Economic and Community Development (DECD); allows joint contracts between DECD, Office of Policy and Management with private entities to implement registry. Such registry will provide information and forms to those doing business in State or intending to do business. (§ 32-349). Commissioner shall establish business incubator program providing grants to incubator facilities. (C.G.S. 32-356). There shall be Connecticut development and research and economic assistance matching grant program to provide aid to Connecticut small businesses, consortia and micro businesses. (§ 32-345). Microloan program established for microenterprises with ten or fewer employees and gross revenues of less than $500,000; overseen by Commissioner of Economic and Community Development. (§§ 8-240o - 240s).

Family Farm Assistance.

DECD shall consult with Commissioner of Agriculture and Consumer Protection to policies, activities, plans, and programs to assist in preservation of family farms. (§ 8-37u; § 4a-51; see also §§ 22-38b, C.G.S. 7-131o).

Established Connecticut Water Guarantee Fund to issue or make advance commitments to issue guarantees of loans or other investments. Limitations on guarantees which would result in issued and outstanding guarantees to exceed four times amount available in fund plus unpaid parts authorized by DECD. (§ 32-261).

Milk Regulation.

Milk industry must comply with requirements to ensure safe production, handling, manufacture and sale of milk and milk products. (§§ 19a-29a, 21a-44, C.G.S. 22-127, C.G.S. 22-133, C.G.S. 22-136, C.G.S. 22-150a, C.G.S. 22-165, C.G.S. 22-172, C.G.S. 22-183, C.G.S. 22-193, C.G.S. 22-203a; C.G.S. 2-203d, C.G.S. 22-205, C.G.S. 22-230, C.G.S. 22-231, C.G.S. 22-235a, C.G.S. 22-236, C.G.S. 22-245). Commissioner of Agriculture or authorized agent may seize, destroy, dispose of or embargo milk products not in compliance and/or unsafe. Product must have label warning of non-compliance and agent to be notified within 24 hours. Persons aggrieved may request hearing within five days of order. (§ 22-129a). Records of animals treated with drugs must be maintained by retail raw milk producers and interstate dealers with ten or fewer milking age animals. (§ 22-203a).

Pharmacy technician regulations require registration and fee. (§§ 20-571, C.G.S. 20-598a).

Radiographer.

Shall be licensed before operating x-ray equipment; waiver of licensure under certain circumstances (§ 20-74bb, am'd PA 09-232, § 49). Licensees applying for renewal must either maintain registration as radiographer, radiation therapist or radiologist assistant, or comply with continuing education requirements; must maintain compliance records. May be granted waiver or extension due to medical disability or illness. (§ 20-74aa - § 20-74ff; PA 09-232, § 68, §§ 83-90).

Respiratory Therapist.

Licensees applying for renewal must either maintain respiratory therapist credentialing or complete continuing education requirements; maintain compliance records. May be granted waiver or extension due to medical disability or illness. (§ 20-162r).

Radon Mitigator.

Shall be certified. Penalties assessable for employment of non-certified workers. (C.G.S. 20-420, am'd PA 09-122, § 1, **C.G.S.** 20-427). Dept. of Health to maintain list of persons or entities approved for national radon proficiency programs. (§ 19a-14b, am'd PA 09-220, § 4).

Money Transmission Agencies.

Any person who engages in business of transmitting money without obtaining license as provided in § 36a-600, shall be guilty of Class D felony. (§ 36a-597).

Raffle Permittees.

Number of annual raffle permits available to organization regulated. (§ 7-175).

Value of prizes that senior citizens may win at bingo games is increased to $20. (§ 7-169c[a]). Requirements for use of bingo products and registration for bingo product manufacturers and dealers. (§ 7-169d).

Social clubs may conduct bazaars and raffles if town where they are located has adopted Bazaar and Raffles Act. (§ 7-172). Organization authorized to operate bazaar or raffle under § 7-172 may operate annual frog race raffle. (§ 7-185a). Organization authorized to operate raffle under § 7-172 may offer raffle for tuition prizes once yearly. (§ 7-185b).

Use of sealed ticket dispensing machines regulated. (§ 7-169).

Podiatrists.

Must be licensed and either board qualified or certified, and may engage in medical non-surgical treatment of ankle. Podiatrist may engage in surgical treatment of ankle with permit from Department of Health. (§ 20-54).

Gas Hearth Installers.

Must hold limited contractor or journeyman license unless licensed to perform gaspiping or similar work. (§ 20-334f). Home improvement contractors shall not perform gas hearth product work without license to do so. (§ 20-140).

Venture Capital.

Program to provide financing to new or expanding companies in state. Criteria to be developed for financial awards. (§ 32-41w).

3.20 MONOPOLIES, RESTRAINT OF TRADE AND COMPETITION:

State antitrust law in effect; restraint of trade and monopolization of any part of trade or commerce unlawful. (§§ 35-24–35-43, 35-42, am'd PA 09-68, 35-38, am'd PA 09-68).

Fairness in Franchising Act.

§§ 42-133e–42-133h. See topic 3.15 Franchises.

Unfair Sales Practices.

Sales practices determined to be unfair or deceptive by Federal Trade Commission Act rules or regulations are prohibited. Cigarettes are also governed by special provisions. (§§ 12-322–12-326).

Unfair competition and trade practice affecting intrastate commerce in food, drugs, devices, and cosmetics are restricted by §§ 21a-93, 128. Regulatory power is vested in Commissioner of Food and Drugs. (§ 21a-115). Unfair competition and trade practices in advertisement and sale of alcoholic liquors are prohibited. (§ 30-63, et seq.). Unfair trade practice in improper posting of gas prices. (§ 16a-15). Unfair drug and pharmaceutical trade practices regulated. (§ 38-174). Unfair merchandising schemes regulated by Commissioner of Consumer Protection, enforced by Attorney General. (§§ 42-144–42-150). Acquisition or merger of banks must be approved by Banking Commissioner. (§§ 36a-411–36a-412). Retailer that uses electronic system to monitor returns must state clearly that system is being used, and that consumer's ability to return goods is terminated; violation of first requirement is unfair trade practice. (§ 42-110aa).

Standard marketing contracts with duly organized cooperative marketing corporations requiring members to sell for a period of time, not over ten years, exclusively to or through the corporation are valid (§ 33-212); liquidated damage provisions are enforceable and corporation may obtain injunction against threatened or actual breach and is entitled to decree of specific performance (§ 33-213).

Petroleum product franchisors are subject to special regulation. (§§ 42-133j).

Posting Gas Prices.

Gasoline retailers must display and maintain in same manner price for public and members of club, retail membership organization, or people who qualify for special discount on each gasoline price sign. (§ 16a-15[c]).

Electric Energy Cooperatives.

Modifies § 7-233x re: municipal electrical utilities may enter agreements with electric energy cooperatives. (§ 7-233x).

Connecticut Energy Advisory Board.

Board shall represent state in regional energy system planning processes conducted by regional independent system operators (§ 16a-3), and develop infrastructure criteria guidelines for evaluation (§§ 16a-7b, 16a-7c).

International Trade.

Policy on major State investment holdings in companies doing business in Sudan. (§ 3-21e). Treasurer to report on companies in which State funds were diverted pursuant to business in Sudan contrary to State policy. (§ 3-37[a]).

Telecommunications.

Concerning requirements for certification and regulation of telecommunications providers by Department of Public Utility Control. (§§ 16-1; C.G.S. 16-41; C.G.S. 16-247a–16-247h; C.G.S. 16-262c; C.G.S. 16-262h–16-262j). Telecommunications infrastructure layout technicians must be licensed in accordance with applicable procedures and must meet proficiency requirements. (§ 20-357m). Identification required by prospective residential customers. (C.G.S. 16-49e). Regulation of telecommunications coverage plans and data bases. (§§ 7-163b, C.G.S. 7-163c, C.G.S. 16-50dd, C.G.S. 16-50ee, C.G.S. 16-50v). Identification of competing telecommunications services, promotion of broadband Internet competition, and investigation of violations. (§ 16-247f). Annual reports required from telephone companies to gauge impact of competition on industry. (§ 16-247i). Active prepaid wireless telephone providers and voice over internet protocol service providers must assess emergency C.G.S. 9-1-1 surcharge against subscribers. (§§ 28-30b – 30d). Broadband Internet Coordinating Council established to monitor communications infrastructure trends and intrastate developments. (§ 4d-100).

Video Cable Services.

Application for certificate of video franchise authority must be filed with Department of Public Utility Control. (§§ 16-331e - 331p). Community antenna television companies may apply to Department of Public Utility Control for certificate of cable franchise. (§ 16-331p). Requirements for company issued certificate of cable franchise authority. (§§ 16-331q - 331bb).

Electrical distribution companies to be restructured and unbundled as of Oct. 1, 1998. (§ 16-244e). Services delivered through transitional standard offer. (§ 16-244c). Dept. of Public Utility Control programs require companies to distribute informational summaries to customers. (§ 16-244d). Licensure and registration regulated by §§ 16-245, C.G.S. 16-245a re: renewable energy certificates. Customers' rights to privacy are protected from unwanted solicitation. (§§ 16-245o[a], [e]). Franchise renewal. (§ 16-331).

Public Utilities.

Department of Public Utility Control shall hold either special public hearing or combine investigation with ongoing four-year review or with general rate hearing on need for interim rate decrease. (§ 16-19[g]). Department may also conduct general rate hearing in lieu of periodic review and investigation proceedings required by § 16-19a(1). (§ 16-19a[2]). Installation of submeters at marinas and other recreational areas. (§ 16-19ff). Public service companies shall obtain approval from Dept. of Public Utility Control to merge, consolidate, sell, lease, or assign. (§ 16-43[a]). Utilities in state highway rights of way governed by §§ 13a-126, 13a-126c, C.G.S. 16-19b, C.G.S. 16-245d. Department may authorize water company to use rate adjustment mechanism based on infrastructure assessment report filed by water company. Requirements for infrastructure assessment reports. (§§ 36a-43, 36a-136).

Energy Efficiency and Electrical Distribution Reforms.

General legislation to promote energy efficiency standards and develop new procedures for electrical distribution companies; modifies numerous provisions of existing law. (§§ 16a-38k-p; § 16a-40b; § 16a-41h; § 16a-46e; §§ 16a-47a-e; § 16a-48; § 16a-49).

3.21 NEGOTIABLE INSTRUMENTS:

See topic 3.02 Bills and Notes.

3.22 RESTRAINT OF TRADE:

See topic 3.20 Monopolies, 3.22 Restraint of Trade and Competition.

3.23 SALES:

Governed by Uniform Commercial Code. (Tit. 42a, especially §§ 42a-2-101–42a-2-725). Note should be taken of fact that 42a-2-725 provides a four year statute of limitations for causes of action governed by Article 2 of Code.

Conditional Sales.

Filing.

Conn. has central filing with Secretary of State under Uniform Commercial Code for all documents except those pertaining to motor vehicles, which are filed with Motor Vehicle Commissioner (Uniform Motor Vehicle Certificate of Title and Anti-Theft Act [14-165—14-211]) and fixtures, which are filed in town where real estate is located. Conditional sales contracts filed prior to Oct. 1, 1961, need not be refiled and continue to be effective for three years after final payment date stated in conditional sales contract. (C.G.S. 16-290). For schedule of fees see category 10 Documents and Records, topic 10.04 Records.

Retail credit sales, home solicitation and referral sales specially regulated. (§§ 42- 134–42-143).

Retail Installment Sales Financing.

Special provisions govern retail installment contracts or installment loan contracts including “consumer goods” and “equipment” as defined in § 42a-9-109(1) and (2) of Uniform Commercial Code made after Oct. 1, 1947 on chattels personal having sale price of $6,000 or less. Detailed restrictions are imposed upon form and contents of such contracts (§§ 36a-771; C.G.S. 38-57; C.G.S. 42-96), upon foreclosure, including retaking possession, notice of intention of retake, redemption, resale, etc. (§ 42-98), upon anticipation of payments and refund therefor (§§ 45a-203; C.G.S. 42-96) and upon renewals and extensions of such contracts (§ 42-97). Connecticut Truth in Lending Act, virtually identical to Federal Truth in Lending Act, has been adopted. (§§ 36a-675, et seq.).

In cases not governed by the retail installment sales financing act, the relative rights of buyer and seller are governed by the contract terms, which normally allow vendor to reclaim possession upon default (76 Conn. 221, 56 A. 494), or bring action to recover the purchase price. If latter course is followed, sale becomes absolute and vendor cannot thereafter reclaim. (118 Conn. 220, 171 A. 658). If vendor has right under contract to sell property after repossession upon default and recover any deficiency, he may not retain property and still get deficiency judgment (117 Conn. 251, 167 A. 734), but may sue for balance due after resale (116 Conn. 364, 165 A. 203). §§ 42-84a and C.G.S. 42-84b concern errors in retail transactions.

Interest rate cap on certain open end credit plans. See topic 3.17 Interest, subhead Credit Cards.

Consumer Protection.

See subhead Retail Installment Sales Financing, supra. See also topic 3.12 Consumer Protection, subhead Home Solicitation Sales Act.

Bulk Sales.

Art. 6 of Uniform Commercial Code repealed PA 93-107.

Sales of Motor Vehicles.

See category 23 Transportation, topic 23.01 Motor Vehicles.

Cigarette Products.

Any tobacco manufacturer selling cigarettes shall place certain sums into qualified escrow account by Apr. 15 of each following year; sums shall be adjusted for inflation. (§ 4-28). Delivering cigarettes to anyone except those authorized by statute to receive and resell cigarettes is prohibited; criminal and civil sanctions for violations (§ 12-285c); cigarette manufacturers' licensure (§ 12-285b). Penalties for distributors who violate prohibition on selling cigarettes below cost. (§§ 12-295, C.G.S. 12-326g). One who sells, offers to sell or possesses to sell tobacco products at retail without dealer's license is subject to monetary fine or imprisonment. (§ 12-286[d], [e]). Dealer's license is required from Commissioner of Revenue Services to sell taxed tobacco products. (§ 12-287). Distributors required to conspicuously display license on premises; Commission shall publish list of licensees on Dept. of Revenue Services website. (§ 12-330b). One who acquired taxed tobacco products shall be licensed as retailer, not distributor. (§ 12-330d[b][1]). All cigarettes sold to consumers, distributors under State manufacturer's license must meet specified testing criteria, be listed in certification of Office of State Fire Marshal and contain specified package marking. (§§ 29-416 - 29-421).

Alcoholic Liquor Products.

Retail permittee may advertise existence of manufacturers' rebates or net price of alcoholic liquor products provided certain disclosures are made. (§ 30-68n). Dram Shop Act governs sale of alcoholic beverages to intoxicated persons. (§ 30-102). Liquor Control Act governs sale of alcohol in retail stores. (§ 30-1[6]). Procedures for shipment of wine directly to Connecticut residents. (§§ 30-16; C.G.S. 30-16[e]; C.G.S. 30-16[f]; C.G.S. 30-18; C.G.S. 30-18[a]; C.G.S. 30-19[f], C.G.S. 30-48, C.G.S. 12-436). Manufacturers permits are applicable to beer, cider, apple wine, apple brandy, and eau-de-vie. Fees set by statute. (§ 30-16, am'd PA 09-47, § 1; C.G.S. 30-16[e]; C.G.S. 30-16[f]; C.G.S. 30-16[f]). Permit and fee structures under Liquor Control Act. (§ 30-1 et seq.; see also § 30-39). Remonstrance procedures under Liquor Control Act. (§ 30-39[c]). Wholesalers and manufacturers must post their liquor prices monthly with Dept. of Consumer Protection; retailers are prohibited from selling any alcoholic beverage below defined cost. (§§ 30-63; C.G.S. 30-68m). All permitted manufacturers, wholesalers and out-of-state shippers who ship or sell alcoholic beverages must register with and be approved by Dept. of Consumer Protection and pay three-year registration fees. (§ 30-63).

Cosmetic Contact Lenses Restrictions.

Plano Cosmetic contact lenses may be sold only by licensed optician in registered optical establishment. (§ 20-150).

Product Liability.

Connecticut has abolished necessity for privity in breach of warranty actions; no requirement in negligence cases. (148 Conn. 710, 174 A.2d 294). Regulations governing sales and use of laser pointers; precludes sale to minors; educational use; identifies harassing use; infractions for noncompliance. (§ 53-206e).

Unsolicited Merchandise.

See topic 3.12 Consumer Protection, subhead Unsolicited Goods.

Blood, human tissue, or organs not goods subject to sale, but medical services, and implied warranties or merchantability and fitness not applicable. (§ 19a-280).

Outdoor Advertising Businesses.

Penalties for violations of statutory and regulatory requirements are increased; there shall be no liability when establishment advertising emergency alert. (§§ 52-557q, C.G.S. 21-63, 13a-123[k]). When advertising structure acquired through eminent domain, relocation costs may be required. (§ 8-273a).

3.24 SECURITIES:

Uniform Securities Act adopted. (§§ 36b-2–36b-33). See Uniform and Model Acts section for text of Uniform Securities Act. Act, as adopted in Connecticut, does not permit registration of securities by notification, and contains lengthier lists of exempted securities (§ 22[6]) and exempted transactions (§ 22[6]) than Uniform Act. Penalties in event of violations specifically include restitution and disgorgement of profits. (§§ 36b- 2–36b-33; see also §§ 36b-6, 36b-8, 36b-12, 36b-15; 36b-21[b], 36b-29[f]).

Supervision of Act conferred upon bank commissioner.

Uniform Commercial Code adopted, Tit. 42a. See topic 3.09 Commercial Code.

Tender Offers.

See category 2 Business Organizations, topic 2.03 Corporations.

Uniform Fraudulent Transfer Act.

(§ 52-557).

Uniform Simplification of Fiduciary Security Transfers Act not adopted.

Uniform Securities Ownership by Minors Act not adopted.

Fairness and Franchising Act.

(§§ 42-133e–42-133h). See topic 3.15 Franchises.

3.25 STATUTE OF FRAUDS:

See topic 3.16 Frauds, Statute of.

3.26 TRUST RECEIPT SECURITY:

Governed by Uniform Commercial Code (Tit. 42a) recordation is with Secretary of State, or in case of motor vehicles, with Motor Vehicle Commissioner. (§§ 14-165– C.G.S. 14-211).

3.27 WAREHOUSEMEN:

Any person may establish and maintain a public warehouse and receive commodities for storage, but receipts may not be issued unless conspicuous “Public Warehouse” sign is displayed on front of building where commodities are stored. (§ 40-1).

Bonds.

No statutory provisions.

Licenses.

No statutory provisions.

Warehouse Receipts.

Governed by Uniform Commercial Code. (§§ 42a-7-101–42a-7-603). Under optional provisions provided by Official Text of Code (1958) Connecticut excluded bracketed material in § 7-403.

4 CITIZENSHIP

4.01 ALIENS:

Any alien, whether or not resident in U.S. has same rights relative to real estate in this state as citizen hereof. Prior transfers of real estate to aliens validated. (§ 47-7a). Under “most favored nation” provisions of treaties most aliens may now inherit realty as well as personality and may otherwise acquire land for any purpose. Any person who has legal settlement in some other state who becomes pauper may be deported. Land inherited by nonresident alien must be sold to avoid escheat. (§§ 17-269; C.G.S. 45-249).

Permit to carry or sell pistol or revolver may not be issued to alien. (C.G.S. 29-28[b]). No person, firm or corporation shall sell at retail, deliver or otherwise transfer any pistol or revolver to any alien. (C.G.S. 29-33).

5 CIVIL ACTIONS AND PROCEDURE

5.01 ACCORD AND SATISFACTION:

Agreement to accept lesser sum in full payment of amount due is enforceable if founded on new contract based on new consideration with unmistakable mutual assent to the satisfaction. (109 Conn. 244, 146 A. 288).

Compromise.

Claim subject to actual good faith controversy may be compromised by acceptance of lesser amount. (85 Conn. 50, 81 A. 972).

Pleading.

Accord and satisfaction must be specially pleaded. (CPB § 10-50; 83 Conn. 241, 252, 76 A. 533).

See category 3 Business Regulation and Commerce, topic 3.09 Commercial Code.

5.02 ACTIONS:

See also topic 5.25 Submission of Controversy.

Equity.

Remedies at law and in equity may be enforced in the same suit. (§ 52-97).

Forms of Action.

Common law forms are discontinued and one form of civil action provided. (§ 52-91).

Conditions Precedent.

In action for negligence against party bound to keep road, sidewalk or bridge in repair, following written notice of injury is required: against municipality, 30 days if injury due to ice or snow, two years from date of injury in all other cases (§ 13a-149); against Commissioner of Transportation, 60 days (§§ 13a-144; 13a-149); 90 days notice to Commissioner of Transportation (§ 13a-144). In civil action against health care provider for personal injury or wrongful death, attorney party filing action must make reasonable inquiry that there are grounds for good faith belief that there has been negligence in care or treatment of claimant. (§ 52-190[a]).

Commencement.

Action is commenced by legal process consisting of writ of summons or attachment, accompanied by complaint. (§ 52-89). Service upon defendant is considered commencement of action. Attachment or garnishment may be made after hearing held pursuant to prejudgment remedy procedure unless defendant: Is avoiding service of process; is about to leave state or remove property from state; is fraudulently conveying assets or has waived hearing (in commercial transactions only). (§§ 52-278a–52-278g). See also topic 5.20 Process; category 8 Debtor and Creditor, topic 8.02 Attachment.

Parties.

When parties are numerous, one may represent all. (§ 52-105). Where complete determination cannot be had without the presence of other parties court may direct that such other parties be brought in; if person not party has interest or title which judgment will affect, court, must, on his application, direct him to be made party. (§ 52-107). New parties may be added and summoned in, and parties misjoined may be dropped, by order of court, at any stage of action. (§ 52-108). If action is commenced in name of wrong person as plaintiff, court may allow any other person to be substituted or added as plaintiff if satisfied that it was so commenced through mistake and that change is necessary for determination of dispute. (§ 52-109). When counterclaim raises questions affecting interests of third parties, defendant may cause them to be summoned in as parties. (§ 52-110). In commencing civil action by or against partnership plaintiff may, within first three days of court, amend without costs, by inserting names of partners. (§ 52-112).

Persons in whom any right to relief in respect to, or arising out of, the same transaction or series of transactions is alleged to exist jointly or severally may be joined as plaintiffs; separate trials allowable for proper cause. (§ 52-104).

Release of a joint tortfeasor does not discharge other tortfeasors except to extent release so provides. (§ 52-572e[b]).

Intervention.

In any action in which property has been attached, any person may appear and defend in the name of the defendant on filing an affidavit that he is creditor of defendant and has good reason to believe that amount claimed by plaintiff at commencement of action is not due and that he, creditor, is in danger of being defrauded by recovery by plaintiff. (§ 52-86).

Interpleader is expressly provided for in case of goods in possession of warehouseman (§ 40-18) or carrier (§ 41-23), or between claimants to a condemnation award (§ 48-21), or, between insured and municipal, state, or nonprofit hospital or ambulance owner as to amount due by reason of accident not covered by Workmen's Compensation Act (§ 49-73).

Action in nature of interpleader is permitted whenever any person has any money or other property in his possession which is claimed by two or more persons. (§ 52-484).

Joint Debtors.

A discharge of one joint debtor purporting to discharge him only does not discharge the others, who may still be sued and who may defend as though the action were brought against all. (§ 52-142).

Joinder of Causes of Action.

Several causes of action may be united in the same complaint but, to be so united, they must all be brought to recover either: (1) Upon contract, express or implied; (2) for injuries, with or without force, to person and property, or either, including a conversion of property to the defendant's use; (3) for injuries to character; (4) upon claims to recover real property, with or without damages for the withholding thereof, and the rents and profits of the same; (5) upon claims to recover personal property specifically, with or without damages for the withholding thereof; (6) upon claims arising by virtue of a contract or by operation of law in favor of or against a party in some representative or fiduciary capacity; or (7) upon claims, whether in contract or tort, or both, arising out of the same transaction or transactions connected with the same subject of action. The several causes so united must not only belong to one of these classes but, excepting actions for the foreclosure of mortgages or liens, must affect all the parties to the action and not require different places of trial. They must also be separately stated. The same union is permissible in counterclaim and set-off. (§ 52-97).

Severance of Actions.

The court has power to sever causes of action joined as aforesaid if it deems severance wise. (§ 52-97).

Abatement.

No right of action or pending action (except civil actions on a penal statute or actions which are rendered useless by the death of any party thereto) is lost or abated by death of any party, but survives in favor of or against his personal representative, or may be continued by or against such personal representative. The personal representative of a deceased plaintiff may enter and prosecute the suit within six months of death. Plaintiff may within one year after death of any defendant apply to court for order to substitute defendant's personal representative. (§ 52-599).

Action will not abate by reason of death (after death is noted on record) of co-plaintiff or co-defendant. (§ 52-600). In any action by or against personal representative, public officer or trustee, as such, in case of his death, his successor in office may enter and prosecute, or be cited in to defend. (§§ 52-601; C.G.S. 52-602). Successor to public officer may bring any action which would have accrued to predecessor in his official capacity. (§ 52-603).

Limitation of.

See topic 5.16 Limitation of Actions.

New Trial.

Petitions must be brought within three years after judgment or decree unless petition is based on DNA evidence not discoverable or available at time of original trial; such petitions may be brought at any time after discovery or availability of new evidence. (§ 52-582).

Termination of Actions.

Actions may be terminated by judgment, dismissal for failure to prosecute with diligence (CPB § 14-3), nonsuit, or default (CPB § 17-20).

Small Claims.

See category 6 Courts and Legislature, topic 6.01 Courts.

Direct Actions Against Insurer.

See category 23 Transportation, topic 23.01 Motor Vehicles, subhead Direct Action.

Medical Malpractice.

Lawsuit may not be filed until attorney or claimant has filed good faith certificate. (§ 52-190a). Procedure to determine whether case is complex litigation case. (§ 52-190b). Procedure for filing offer of compromise by either party. (§§ 52-192a; C.G.S. 52-193–52-195). §§ 52-192a–52-195 applicable to causes of actions accruing prior to Oct. 1, 2005. (§ 52-192b). Defendant may introduce evidence of damages recovered by plaintiff for same injury from another health care provider. (§ 52-184e). Expressions of sympathy are inadmissible in evidence. (§ 52-184d). Court must review award of damages over $1 million to determine whether amount is excessive. (§ 52-228c).

Action Against State.

Claims against State must be filed with Claims Commissioner within one year of occurrence. (§ 4-160). Claims Commissioner may authorize suit against State. (§ 4-160). Medical malpractice claims against State shall be authorized for suit after claim and good faith certificate are filed. (§ 4-160). Any party asserting any provision of Freedom of Information Act as claim or defense must provide notice of such claim or defense to Freedom of Information Commissioner. (§ 1-242). Person wrongfully convicted and incarcerated may claim for compensation. (§ 54-102uu).

Actions Between Spouses.

See category 14 Family, topic 14.09 Husband and Wife, subhead Actions.

Action for Personal Injury Concerning Injury Sustained While Being Transported to or from School.

Concerning vehicle owned, leased, hired by or operated under contract with town, school district or municipality, it shall be no defense that transportation is in line of governmental duty, mandated by state, provided by independent contractor or suit is barred by sovereign immunity. (§ 52-557).

Actions for Killing or Stealing Companion Animals.

Owner may bring civil action against one who has intentionally killed or injured companion animal; owner may recover economic and punitive damages. (§ 22-351a). One who steals, confines or conceals companion animal is also subject to civil action for damages. (§ 22-351).

5.03 APPEAL AND ERROR:

Courts of Appellate Jurisdiction.

Appeals from any final judgment or action of Superior Court, except small claims matters, which are not appealable, and under certain other statutes taken to Appellate Court within 20 calendar days after issuance of notice of judgment.

Zoning cases may be appealed to Appellate Court only upon certification by two judges of Appellate Court. Appeal period is: five days in summary process (landlord/tenant eviction) matters; seven days in applications to dissolve mechanics' lien and prejudgment remedy matters, and in certain zoning issues related to standing.

Appeals of serious felony convictions, decisions declaring state or federal statute or constitutional provision unconstitutional, and judicial review matters bypass Appellate Court and are heard by Supreme Court. Supreme Court may exercise discretion to transfer sufficiently important cases from Appellate Court docket to its own docket for determination.

Decisions of Appellate Court are appealable to Supreme Court only upon certification by three justices of Supreme Court. (§ 51-197f).

Appeals lie from probate courts to Superior Court, in which case Superior Court tries case de novo. (§ 45a-186, am'd PA 09-114, § 14). Appeals lie from workmen's compensation commissioners to Compensation Review Division. (§ 31-301). Appeals also lie from various special boards and commissioners to Superior Court. For example, Superior Court has exclusive jurisdiction of appeals from any municipal board, officer or commission and from liquor control commission. (§ 52-7). Appeals on questions of law only lie from superior courts to Supreme Court.

Appeals to Appellate and Supreme Courts are in large measure governed by rules of court and not by statute. (CPB §§ 60-1–86-2). Appeal to Supreme Court must be filed within 20 days after issuance of notice of rendition of judgment, and must be accompanied by $400 bond or recognizance guaranteeing payment of costs; at time appeal is filed, record and entry fees of Supreme Court must be paid. (CPB §§ 61-10, C.G.S. 62-7, C.G.S. 52-259, am'd PA 09-152, § 2).

Reservation of questions of law for advice of Supreme Court or Appellate Court is permitted, upon consent of all parties to record, in all cases in which appeal could lawfully have been taken to said court had judgment been rendered therein. (§ 52-235).

Appeals to Inferior Courts.

In general method of appeal from compensation commissioners to superior court is same as method of appealing to Supreme Court. In general other appeals to inferior courts are analogous to bringing of an original action.

Appeal from probate is to superior court (§ 45a-186, am'd PA 09-114, § 14) and must be taken within 30 days, except that parties who had no notice to be present and were not present may appeal within 12 months (§ 45a-187); minors without guardian or guardian ad litem may appeal within 12 months after coming of age, and nonresidents who had no legal notice to be present and were not present may appeal within 12 months, or within one month of receipt of actual legal notice given by executor, administrator, or trustee (§ 45a-188).

Appeals to Agencies.

Petition for reconsideration to agency regarding its final decision may be filed within 15 days of personal delivery or mailing of final decision. If reconsideration granted, agency has 90 days to issue decision. If decision issued within 90 days, it will become final decision for purposes of appeal to Superior Court; otherwise, original final decision will control. (§ 4-181a[a]). Appeal to Superior Court. (§ 4-183[c]).

Fees.

For appeal to Supreme or Appellate Court, $250, plus $50 record fee to Appellate Court. For each civil cause in Superior Court, $185, except $75 for case in Superior Court when sole claim for relief is damages less than $2,500. (§ 52-259, am'd PA 09-152, § 2).

Stay of Execution.

Stay of execution until final determination of cause, which is incident of appeal (C.G.S. 52-264), applies to every judgment in civil action providing for recovery of damages or requiring performance of act (CPB § 61-11; §§ 22a-34, 22a-43). Court proceedings may be stayed by agreement of parties upon commencement of mediation; stay terminates upon termination of mediation. (§ 8-8[e]). All subdivision plans shall be delivered to applicant no more than 30 days after later of time for taking appeal or after date modified plans are delivered to Commissioner. If appeal is taken, delivery shall take place not more than 30 days after termination of appeal. (§ 8-25).

5.04 BONDS:

When one is required to give bond by statute surety is requisite. (§ 1-26 and CPB § 8-10). In action on bond in penal amount judgment may be entered only for what is equitably due and where breach has been partial, scire facias may be brought to obtain further judgments up to face of bond with interest. (§ 52-238).

Professional bondsmen are required to obtain license from State Police Commissioner, fee, $100 (§§ 29-145; C.G.S. 29-146), and are limited in fees they may charge (§ 29-151).

5.05 CERTIORARI:

Applies to appeals from Appellate Court to Supreme Court and, in zoning cases, to appeals from Superior Court to Appellate Court. See topic 5.03 Appeal and Error.

5.06 CHARITABLE IMMUNITY:

See topic 5.09 Damages.

5.07 COMMISSIONS TO TAKE TESTIMONY:

See topic 5.11 Depositions and Discovery.

5.08 COSTS:

Costs are fixed by statute (§§ 52-240–52-254; C.G.S. 52-257) and rule of court (CPB §§ 18-1–18-19) and are taxed by clerks of several courts. Costs allowed are small but include nominal indemnity for proceedings before trial and trial of issue of fact, entry fees, witness fees (§ 52-571h, am'd PA 09-239, § 7) travel expenses, expenses of depositions and judicial sales, title examination, fees paid experts, jury fees, etc. If court finds in any criminal or civil matter that party is indigent, court shall waive costs which shall be paid by state. (§ 52-259b, am'd PA 09-9, § 31). Premiums upon bonds provided pursuant to statute rule or order of court or stipulation of parties, including bonds in lieu of or in release or dissolution of attachment, are allowed as costs in reasonable amount. (§ 52-257). Division of Criminal Justice shall pay witness fees of police and other prosecution witnesses. (§ 51-279[b]).

Bonds for cost are made requisite to validity of complaints in civil actions by nonresident and by residents unless attorney signing writ is satisfied of ability of plaintiff to pay same. (§ 52-185). Amount of such bond is usually $150 in Superior Court, $75 in other courts; but larger bond may be ordered by court. Person filing lawsuit may post bond either before or after writ, summons and complaint is signed. (§ 52-185[a]).

No costs are taxed in any court in proceedings under Workmen's Compensation Act except where appeal for vexation or delay. (§ 31-301c).

5.09 DAMAGES:

Common Law generally prevails.

Punitive Damages.

Treble damages may be assessed for knowingly cutting or destroying timber on land of another except damages five times reasonable value may be assessed for cutting any tree to be used as Christmas tree (§ 52-560); theft (§ 52-564) injury to highway markers or milestones (§ 52-567).

Double damages allowed for forgery (§ 52-565) and intentionally throwing down fences and gateways (§ 52-569).

In actions for libel, if plaintiff proves malice in fact or that defendant failed to retract libel, after request in writing, he may recover actual expenses of his action less taxable costs. (§§ 52-237; 92 Conn. 236, 102 A. 640).

Person prosecuting civil action without probable cause liable for double damages (treble damages if prosecuted with malicious intent). (§ 52-568).

Parental Liability for Torts of Child.

Parent or guardian of unemancipated minor child liable for minor's willful or malicious misconduct up to the amount of $5,000. Statute does not affect any other rights which may exist against minors themselves. (§ 52-572).

Comparative negligence rule adopted; economic or noneconomic damages may be reduced in proportion to percentage of negligence attributable to recovering party; if more than one person liable, each person against whom recovery is allowed shall be liable to claimant only for his share of recoverable economic and noneconomic damages. (§ 52-572h). Neither contributory negligence nor comparative negligence bar recovery in strict tort liability. (§ 52-5721). In recovery for economic or noneconomic damages over $200,000 parties may agree to payment schedule or court will order lump sum payment. (§ 52-225d).

Right of contribution exists in persons paying more than their equitable share of damages. Action must be brought within two years. (§ 52-572h).

Charitable Immunity.

Defense abolished. (§ 52-557[d]). Person who serves as uncompensated director, officer or trustee of tax-exempt organization is immune from civil liability if acting in good faith and within scope of employment, unless reckless, willful or wanton. (§ 52-557m).

Sovereign Immunity.

Claims Commissioner may authorize suit against State. Action must be brought within one year of authorization. Any applicable statute of limitation is tolled until date authorization to sue is granted. Jury not allowed. (§ 4-160). Political subdivisions of state shall be liable for certain negligent acts. (§ 52-557n). General Assembly shall review determinations by Claims Commissioner according to stated procedures, and must submit annual report to General Assembly concerning Connecticut's risk management program and status and disposition of claims against state. (§§ 4-154, C.G.S. 4-158, am'd PA 09-44, § 1, C.G.S. 4-159, C.G.S. 4-160, 4a-20, 4a-21).

See category 7 Criminal Law, topic 7.01 Criminal Law; Estates and Trusts, topic Death, subhead Action for Death; Transportation, topic Motor Vehicles, subhead Accidents.

5.10 DECLARATORY JUDGMENTS:

See topic 5.15 Judgments.

5.11 DEPOSITIONS AND DISCOVERY:

Within State for Use Within State.

Parties to civil action may take testimony from any person by deposition after giving written notice to adverse party. Court order is required to take deposition of prisoner, or if initiator of action seeks to take deposition within 20 days of commencement of proceedings. However, court order not required if initiator states that person to be examined is about to leave state. Depositions may be taken by judge, clerk of any court, justice of peace, notary public, or commissioner of superior court. Witness must be cautioned to speak whole truth and carefully examined; must subscribe depositions and make oath thereto before authority taking same, and such authority must attest same and certify that adverse party or his agent was present (if so) or that he was notified; and must also certify reason for taking such deposition, seal it up, direct it to court where it is to be used, and deliver it, if desired, to party at whose request it was taken. Party on whose behalf deposition of adverse party is taken shall be subject to having his deposition taken on behalf of such adverse party. (§§ 52-148a–52-148d). Testimony of any expert medical witness may be taken by deposition in lieu of expert appearing at hearing. (§ 52-149a). Procedure for taking of depositions of person residing in state for use in nationwide civil or probate proceedings. (§ 52-148e[f]).

Within State for Use Elsewhere.

Taken in same manner as if to be used in Connecticut. (§ 52-148e).

Outside of State for Use Within State.

Depositions taken outside of state by notary public, commissioner appointed by Connecticut Governor or magistrate having power to administer oaths. If taken in foreign country may also be taken by any foreign minister, secretary of legation, consul or vice consul appointed by U.S. or any person appointed by him for that purpose and having authority under laws of country where taken. Official character of such person may be proved by certificate from secretary of state of U.S. (§ 52-148c).

Commissions.

Court in which action is pending may commission person to take out-of-state deposition. Person so commissioned has power to administer oaths and take testimony. (§ 52-148c).

Compelling Attendance.

Subpoena and capias are available to compel attendance of deponent before commissioner or others authorized to take deposition. (§ 52-148e).

Notice.

Party desiring to take deposition of any person must give written reasonable notice to every other party. If whereabouts of adverse party is unknown, deposition may be taken after such notice as court may direct.

Form.

The following may be used:

Form

A.B. vs. C. D. . . . . . . Court,. . . . . . County, Connecticut.

I,. . . . . . of the town of. . . . . . County of. . . . . . and State of Connecticut, of lawful age, being duly cautioned, examined and sworn, depose and say:

The deposition may be by questions and answers or in narrative form, and may be in handwriting of witness or magistrate, but must not be written by any party to the action, nor his attorney. (§ 52-150). Cross-examination should be headed: Cross-examination on the part of the plaintiff (or defendant) by. . . . . . and examination in rebuttal and reply should be similarly indicated. Papers referred to in the deposition and annexed as exhibits should be signed by the witness and magistrate. Objections to testimony should be minuted by the magistrate; but magistrate cannot exclude any question as inadmissible. Adjournments may be had from time to time, not necessarily to the next day. The fact of adjournment should be noted.

Return of magistrate should read:

State of.......... Town of..........

County of. . . . . ss.

Personally appeared the above named. . . . . . signer of the foregoing deposition, and after having been duly cautioned to speak the whole truth, and carefully examined, did subscribe the same and make oath before me that the same contains the truth, the whole truth, and nothing but the truth.

The foregoing deposition is taken pursuant to the annexed notice at the request of the (plaintiff or defendant), to be read on the trial of an action pending before the. . . . . . Court within and for the County of. . . . . . and State of Connecticut, in which action. . . . . . plaintiff, and. . . . . . defendant. The cause of taking this deposition is (the witness resides out of the State) or (other cause as the case may be). The adverse party was notified to be present at the taking of this deposition, and was (or was not) present thereat (by his attorney). (Official signature and seal). The magistrate should then seal up the package and endorse thereon: To the Clerk of the. . . . . . Court, County of. . . . . . (the town), Connecticut. The deposition of X., Y. and Z. to be used in said cause: Taken, sealed up and addressed by me, John Doe, notary public. In the care of. . . . . . Esq.

The package may be then enclosed in another cover and addressed to its destination in usual manner for mailing, or may be delivered to care of the party or his attorney taking the same.

Perpetuation of Testimony.

In addition to the depositions taken in connection with pending actions because of the inconvenience of testifying at the trial, depositions may be taken for the purpose of perpetuating testimony concerning any matter which is or may be the subject of a suit, the person desirous of perpetuating such testimony presenting a petition in writing to any judge of the superior court upon due notice to other persons interested. The judge may prescribe the times and places for taking the depositions and may appoint a commissioner to take them. Fee $3 per day. (§ 52-156).

5.12 EQUITY:

See topic 5.02 Actions.

5.13 EVIDENCE:

See topic 5.11 Depositions and Discovery.

Expert Witnesses.

In actions for recovery of damages for personal injuries or death, and in defined proceedings, any party offering in evidence signed report and bill for treatment from certain health professionals may have report and bill admitted into evidence as business entry. (§ 52-174[b]).

Witnesses.

Witness is not disqualified because of his interest in outcome of action as party or otherwise or of his disbelief in existence of supreme being, or of his conviction of crime, but such interest or conviction may be shown for purpose of affecting his credibility. (§ 52-145). Adverse parties or their agents in civil action or probate proceeding may be compelled to testify. (§ 52-178). Counsel for any party may argue during closing arguments that adverse influence should be drawn from another party's failure to call witness who has been proven available to testify; however, court shall not instruct jury of same. (§ 52-216c). Witness must possess some sense of moral responsibility, justly comprehend and appreciate nature, purpose, and obligation of oath or affirmation and have intelligent understanding of facts to be developed, and no child is conclusively presumed to be disqualified as witness. (104 Conn. 585, 134 A. 73).

Employer shall not coerce or penalize employee because employee obeys legal subpoena to appear before court in criminal proceeding. Violation by employer results in criminal contempt and fine not more than $500 or imprisonment for not more than 30 days or both. Employee has action for damages. (§ 54-856).

See also topic 5.11 Depositions and Discovery.

Privileged Communications.

Reports, notices, and records of Commissioner of Labor on serious accidents to employees (§§ 31-40; C.G.S. 31-40a) and reports and communications of members of Armed Forces of State in line of duty (§ 27-99) are privileged. Conversations of juvenile court judge with child or youth whose case is before court are privileged. (§ 17-67). Communication between student and professional employee of board of education re drugs or alcohol privileged. (§ 10-154a). Communications between person and clergyman privileged. (§ 52-146b). Information disclosed to states' attorney for purpose of enabling him to perform duties of his office is privileged. (128 Conn. 124, 20 A.2d 613).

Information provided to Court Support Services Division for release is confidential, will be retained in Bail Commissioner's Office and is not subject to subpoena or other court process for use in any other proceeding or for any other purpose. (§ 54-63d).

Communications between attorney and client are normally privileged, but there are exceptions. (71 Conn. 576, 42 A. 654).

Communications or records may be disclosed to commissioner of health services in connection with any inspection, investigation or examination of institution pursuant to §§ 19a-490 and 19a-498.

Husband and Wife.

In criminal case accused and spouse of accused are competent witnesses, and spouse may elect or refuse to testify for or against accused, except that when wife has received personal violence from her husband for which action is brought or is spouse of one who is charged with violation of §§ 53-21, 23, 25, 304, 53a-70, 70a, 71, C.G.S. 83-88, she may be compelled to testify. (§ 54-84[a]). Wife may be compelled to testify in action brought against her husband for necessaries furnished her while living apart from him. (§ 52-146). Communications between husband and wife are normally privileged, but there are exceptions; not privileged if overheard. (47 Conn. 518; 49 Conn. 378).

Communications or Transactions with Persons Since Deceased or Incompetent.

In actions by or against representatives of deceased persons and by or against beneficiaries of life or accident insurance policy insuring person deceased at time of trial, relevant entries, memoranda and declarations of deceased are admissible, and in action by or against representative of deceased persons in which any trustee or receiver is adverse party, relevant testimony of deceased given at his examination, upon application of trustee or receiver, is admissible. (§ 52-172). Whenever entries and written memoranda of deceased would be admissible in favor of his representatives, such evidence is admissible in favor of any person claiming title under or from decedent. (§ 52-173). Where party to action at time of trial is mentally ill, or unable to testify because of incurable sickness, failing mind, old age, infirmity or senility, his relevant entries or memoranda, made while sane, are admissible. Whenever such evidence of such mentally ill person would be admissible in his favor in action to which he was party, evidence may be admitted in favor of any person claiming under or from mentally ill person. (§ 52-175).

Self-incrimination.

No person may be compelled to give evidence against himself, except as otherwise provided by statute, nor may such evidence when given be used against him (§ 51-35) and right of witness not to answer self-incriminating question may be claimed by him or his counsel (§ 52-199). There are number of exceptions to self-incrimination rule in official investigations and proceedings, in most of which cases there is immunity from prosecution as to matters disclosed. (§§ 2-47; C.G.S. 16-8; C.G.S. 54-85; C.G.S. 45-262; C.G.S. 31-95). In criminal action accused is competent witness and may testify or refuse to do so, but neglect or refusal to testify may not be commented upon to court or jury. (§ 54-84).

Immunity.

In criminal case involving narcotics, arson, bribery, gambling, election law violations, felonious crimes of violence or any violation of tit. 25, superior court may grant immunity to witness claiming self-incrimination on application by state's attorney. (§ 54-47a).

Mediation.

Limitations on disclosure of written or oral communications obtained during mediation. (§ 52-235d).

Witness Fees.

When any healing arts practitioner (§ 20-1), real estate appraiser or psychologist gives expert testimony, including deposition, court shall determine reasonable fee to be paid. (§ 52-260[f]). Parties shall also receive compensation and reimbursement. (§ 52-257[b]). Police and firefighters testifying in criminal or civil actions are entitled to witness fees if they are not otherwise compensated by their employers. Such fees are to be billed as costs. (§ 52-260[b]-[d]).

5.14 INJUNCTIONS:

Jurisdiction.

Any court of equity jurisdiction or any judge thereof, when court is not in session, may on motion grant and enforce writs of injunction in all actions for equitable relief. (§ 52-471).

Procedure.

The facts alleged must be verified by oath of the plaintiff or some competent witness (§ 52-471), and temporary injunction will not issue until party making application has given bond, with surety satisfactory to court, to opposite party to answer all damages in case plaintiff fails to prosecute action to effect (§ 52-472).

Issuance.

Injunctions may be granted immediately, if circumstances demand, or court may cause immediate notice that defendant show cause why injunction should not be granted. (§ 52-473).

Dissolution.

Any such judge who has granted temporary injunction may hear motion to dissolve same, or designate another judge therefor. (§ 52-475).

See also category 11 Employment, topic 11.02 Labor Relations.

5.15 JUDGMENTS:

Judgment of court is final, but execution may not issue for at least ten days. (CPB §§ 61-11, C.G.S. 61-13, C.G.S. 61-14, C.G.S. 66-6). Clerk of any court, may, when directed by court, make up, amend, and complete any imperfect or unfinished record in such manner as court may direct. (§ 51-52a).

Judgments by Confession.

Lender under Small Loan Act may not take confession of judgment (§ 36a-568), nor is provision for confession of judgment in retail installment contract or installment loan contract valid or enforceable (§ 42-88).

Judgment by consent is as conclusive as one upon controverted facts (135 Conn. 405, 65 A.2d 577) and ordinarily cannot be appealed from or reviewed on writ of error (110 Conn. 208, 147 A. 675).

Summary judgment may be entered in any action to recover a debt or liquidated demand in money, with or without interest arising (a) on a negotiable instrument, a contract under seal or a recognizance; (b) on any other contract, express or implied, excepting quasi contracts; (c) on a judgment for a stated sum; (d) on a statute where the sum sought to be recovered is a fixed sum or in the nature of a debt; (e) on a guaranty, whether under seal or not, when the claim against the principal is in respect of a debt or liquidated demand and in any other action; (f) for the recovery of specific chattels, with or without a claim for withholding the same; (g) to quiet and settle title to real estate or any interest therein; and (h) to discharge any claimed invalid mortgage, lien, caveat, or lis pendens. (§ 51-15; CPB § 17-44). Judgment may enter, upon motion supported by such documents as may be appropriate, unless defendant within 15 days after motion and affidavit shows by affidavit facts sufficient to entitle him to defend. (CPB § 17-45). If action is by or against corporation, affidavit of officer is sufficient. These rules also apply to counterclaims.

Declaratory Judgments.

Superior court may, in any action or proceeding, declare rights and legal relations on request, and such declaration has force of final judgment. (§ 52-29).

Default Judgments.

Where process has been duly served on defendant and returned to court and defendant does not appear on or before second day after return day, judgment by default may be entered against him. (§ 52-84).

Default judgment may enter where party fails to plead according to the rules and orders of court (§ 52-119) after notice and hearing (§ 52-121). Default may also enter for failure to give proper bond for prosecution (§ 52-186), if nonresident defendant in realty action does not give proper cost bond (§ 52-188), or if notice of intention to suffer a default is filed (§ 51-55).

If resident defendant is absent from state at commencement of action and does not enter appearance, case is continued for 30 days and if defendant does not then appear, judgment by default may be entered. In case of nonresident defendant case is continued for three months and notice of pendency of action by publication or otherwise ordered, or may authorize any person duly empowered to serve process by the laws of the foreign jurisdiction in which such defendant resides to serve upon such defendant a copy of the summons, complaint, and order of notice and such person shall make affidavit of his doings thereon on the original order or notice; and if defendant does not appear within such period judgment by default may be entered. (§ 52-87).

If defendant or his counsel fails to appear after default, damages and special damages may be proven by affidavit. (§ 52-221a).

Offer of judgment may be filed with clerk of court before trial in action on contract or for recovery of money only. (§§ 52-192a; C.G.S. 52-193). Plaintiff may file offer of judgment and give notice of defendant or counsel no sooner than 180 days after service of process and no later than 30 days before trial; defendant may file offer of judgment no later than 30 days before trial. (§§ 52-192a, C.G.S. 52-193). Defendant may file acceptance within 30 days of notice by plaintiff and prior to verdict or award by court. (§ 52-192a). If acceptance not filed, offer is deemed rejected. If plaintiff recovers amount equal to or greater than that stated in offer, court will add to amount so recovered 8% interest per annum on amount contained in offer, from date action was commenced if offer was filed within 18 months of commencement. If offer is made more than 18 months after commencement, interest is calculated from date of offer and plaintiff may receive attorneys' fees up to $350. (§ 52-192a). (See § 52-195 re: Defendants' offers of judgment). §§ 52-192a–52-195 shall be applicable to any cause of action accruing prior to Oct. 1, 2005. (§ 52-192b).

Vacation or Modification.

Judgment rendered or decree passed on default or nonsuit may be vacated within four months after rendition, and case reinstated, upon verified complaint showing reasonable cause, or that good cause of action or defense existed at time of judgment and party prevented by mistake, accident, or other reasonable cause from appearing to make this defense. (§ 52-212).

Judgment may not be abated, suspended, set aside, or reversed for any kind of circumstantial error, mistake, or defect, if the person and cause may be rightly understood and intended by the court (§ 52-123), but may be vacated for prejudicial irregularity (120 Conn. 235, 180 A. 507). Judgment of strict foreclosure may be opened and modified. (§ 49-15, am'd PA 09-209, § 37). Notice of bankruptcy shall be filed with clerk of court in which foreclosure is pending. (§ 19-15[b]).

Lien.

Judgments are not liens upon property of defendant except property which has been attached in the action, in which case the lien continues against personal property for 60 days and against real estate for four months after final judgment, if execution is levied within those periods. (§ 52-328). One owning unsatisfied judgment at any time may cause to be recorded in town clerk's office in any town where defendant owns real estate certificate of claim of lien, setting forth action, judgment, amount due thereon, and describing real estate. Such judgment from time of filing such certificate will constitute lien upon such real estate, and if filed within four months from date of judgment against real estate attached in said suit lien will hold from date of attachment. Lien remains in force for 20 years and may be foreclosed or property redeemed like real estate mortgage. (§ 52-380a). If not foreclosed within 20 years, automatically released. (§§ 49-40a; C.G.S. 49-40b).

For form which may be used to release or discharge judgment lien see category 20 Mortgages, topic 20.04 Mortgages of Real Property.

Assignment.

Assignee of judgment may cause judgment lien to be recorded (§ 52-380a), and may sue in his own name (82 Conn. 213, 72 A. 1083). See also category 8 Debtor and Creditor, topic 8.01 Assignments.

Satisfaction, in whole or in part, is entered by clerk of court on record. (§§ 52-356a, 131, 154). If judgment is returned unsatisfied there may be examination of debtor. (§ 52-397). Judgment is presumed satisfied after 20 years. (74 Conn. 652, 51 A. 857).

Action on Judgment.

To predicate suit upon judgment requires complete and final judgment and one upon which execution may issue. (57 Conn. 329, 18 A. 254).

Title to real estate may be passed by decree of court of equitable jurisdiction, which decree, when recorded in land records of town where land lies is as effectual to transfer land as deed of party or parties holding title. (§ 52-22).

Foreign Judgments.

Limitation period on contracts does not apply to action on foreign judgments. (§ 52-576).

Uniform Enforcement of Foreign Judgments Act adopted. (§§ 52-604 to C.G.S. 52-609).

Uniform Foreign Money-Judgments Recognition Act adopted with modification that, upon appeal or showing of grounds for stay, court shall stay enforcement provided defendant furnishes security for satisfaction of judgment. (§ 50a-30, et seq.).

Judgment Notes.

See category 3 Business Regulation and Commerce, topic 3.02 Bills and Notes.

Release of Judgment Against Joint Tortfeasors.

See topic 5.02 Actions, subhead Parties.

5.16 LIMITATION OF ACTIONS:

The statutes limit the time within which actions may be brought, as follows:

Forty years: To foreclose town lien against real property of pauper. (§ 17b-125).

Twenty-five years: On action based upon judgment for money damages rendered in court of this state, except in small claims actions where time limit is 15 years. (§ 52-598, am'd PA 09-215, § 1).

Twenty years: To reclaim property which has been deposited with state as abandoned property. (§ 3-70a[a]).

Fifteen years: To recover real property (§ 52-575), to foreclose judgment lien (time running from recordation) (§ 49-36).

Seven years: After substantial completion of an improvement to real property, on action against architects, professional engineers, and architectural designers by anyone other than possessor of improvement. (§ 52-584a).

Six years: On simple or implied contract, sealed or unsealed written contract, or account (§ 52-576); against surety on probate bond, time running from final settlement and acceptance of account of principal (§ 52-579); against city or town for damages caused by change in grade or excavation of highway (§ 52-578).

Five years: Recovery of distributed property of heir presumed dead. (§ 45a-446). To enforce judgment rendered in small claims.

Four years: Under Uniform Commercial Code on breach of contract for sale (including actions in warranty) regardless of knowledge of breach. Parties by agreement may reduce limitation period to one year but may not extend it beyond four years. (§ 42a-2-725).

Three years: On express oral contract not governed by Uniform Commercial Code (§ 52-581); for torts except those hereinafter specified (§§ 52-577; C.G.S. 52-577a); bastardy proceedings from date of birth or date of cessation of support whichever is later (§§ 52-435; C.G.S. 52-435a); petition for new trial (§ 52-582); nuisance (121 Conn. 579, 186 A. 629; 20 Conn. Supp. 31, 120 A. 156); after actual or constructive knowledge of violation of private real property restriction recorded in land records of municipality in which property is located, other than easements, utility lines, park or open space land (§ 52-575a); on strict liability action against manufacturer or seller (time running from discovery of injury; however no action may be brought later than ten years from the date manufacturer or seller last parted with possession or control of product, except nonemployee claimant may escape ten year “statute of repose” by proving harm occurred during useful safe life of product) (§ 52-577a); for indemnification (running from date and determination of action, by judgment or settlement, against party seeking indemnification) (§ 52-598a).

Two years: For death or injuries resulting in death (running from when injury sustained, discovered, or should have been discovered; no more than three years from act or omission) (§ 52-555); for injury to person, or to real or personal property, caused by negligence, or by reckless or wanton conduct, or by malpractice of a physician, surgeon, dentist, hospital, or sanitarium, but counterclaim may be interposed in action brought within two years at any time before pleadings finally closed (§ 52-584); against sheriff, constable or deputy for neglect (§ 52-583); for payment of remuneration for employment payable periodically, except this limitation will be tolled upon filing complaint with labor commissioner pursuant to § 52-596; for libel or slander (§ 52-597); against commissioner of transportation for damages for injuries sustained on state highways or sidewalks (notice or commencement of action with 90 days of injury required, however) (§ 13a-144); for sale or offer of security employing untrue statements or material omissions (running from sale) except period altered to one year from discovery of fraud or misrepresentation, if done intentionally in connection with sale of limited partnership interests not required to be registered under Securities Act of 1993 (but not more than five years from sale) (§§ 36b-29, am'd C.G.S. 93-169).

One year: For forfeiture under penal statute (§ 52-585); scire facias against garnishee (§ 52-586). One year limitation applies to action for loss or expense resulting from injury to person other than plaintiff. (83 Conn. 503, 77 A. 950).

Against municipality, volunteer fireman's or policeman's negligence (§ 7-308); on bond substituted for artificer's lien (§ 49-67). Action after entry into lands (§ 52-575); on negotiable note obtained by fraud where holder given written notice of fraud, time running from date of notice (§ 52-588); against surety on bond or recognizance for costs only or on appeal bond in civil actions, or bail bond, time running from final judgment in suit in which bond or recognizance given (§ 52-587); against adjoining owner for purchase of division fence, time running from division and appraisal (§ 47-49); against liquor seller where purchaser does damage, if 120 days notice given within date of injury or if 180 days notice given in case of death or incapacity (§ 30-102). Under executory contract to sell real estate, action must be begun within one year after date for performance under contract or within 18 months of date of execution if no performance date established. (§ 47-33a). Action against State must be brought within one year of authorization by claims commissioner. (§ 4-160).

Six months: For forcible entry and detainer (§ 52-589).

Four months: On claim disallowed by executor, administrator, administrator de bonis non, guardian, conservator, or trustee required to account to court of probate, time running from date written notice of disallowance given. If creditor dies within four months and before suit is brought, further period of four months from death allowed. This period does not apply in tort cases. (§§ 45a-398, 45a-402, 45a-399). On claim to set aside judgment rendered upon default or nonsuit (§ 52-212). On claim for apportionment by defendant in tort action, measured from return date in original complaint (stated as 120 days, not four months). (§ 52-102b).

Three months: On claims disallowed against bank selling assets, time running from receipt of written notice of disallowance. (§ 36a-210).

Sixty days: On action to contest validity of municipal bond, time running from vote approving sale. (§ 7-386).

Two weeks: Writ of Error. (§ 52-273).

New Action.

Where an action begun within the period of limitations fails for matter of form, or judgment is arrested or reversed, new action may be begun within one year of such failure or reversal of judgment, although statute of limitations would otherwise have run by that time. Where action begun or continued against executor or administrator fails, new action must be begun within six months (§ 52-592); and where action fails because of naming wrong defendant, new action may be begun within one year of such failure (§ 52-593).

When judgment in favor or plaintiff suing in representative character or for benefit of third persons is reversed on ground of mistake in complaint or improper parties thereto and time for new action expires during suit, parties for whose special benefit action brought may bring new action in individual names within one year after judgment reversed, if original action could have been so brought. (§ 52-591).

Actions Not Specifically Provided For.

There is no general limitation statute for actions not specifically provided for.

No limitation on town claim for reimbursement for support of pauper or persons mentally ill. (§ 17b-122).

Foreign Causes of Action.

Connecticut limitation statutes apply to suit brought in Connecticut, unless foreign cause of action arose under foreign statute which not only creates the liability and remedy but imposes the limitation thereon. (131 Conn. 671, 42 A.2d 147).

Absence of or Concealment by Defendant.

Time during which defendant is out of state (§ 52-590) or fraudulently conceals existence of cause of action (§ 52-595) is excluded from computation; however, excluded time may not exceed seven years.

Absence of plaintiff from state has no effect on running of statute. (24 Conn. 432).

Disability of Plaintiff.

In actions to recover possession of real estate plaintiff, if a minor, non compos mentis or in prison, may bring action within five years next after removal of disability or his heirs may bring such action within five years after his death. (§ 52-575). Ordinary actions based on contracts (except book debts and actions based on express oral contracts) where plaintiff is legally incapable of bringing action when right of action accrues, may be brought within three years next after plaintiff has become legally capable of bringing such action. (§ 52-576). Limitation on suit on probate bonds does not apply to infant parties in interest. (§ 52-579). Except as aforesaid, there is no provision tolling running of limitations during incapacity of plaintiff.

Death of Plaintiff.

If right of action survives death and time has not expired, the executor or administrator has one year after the death of claimant. (§ 52-594). See category 13 Estates and Trusts, topic 13.05 Death.

Suspension.

Running of statute is suspended by presentation of claim to solvent estate of deceased person until written disallowance of claim or expiration time allowed by court for presentation of claims, whichever is earlier, if limitation period would otherwise expire within time so allowed by court. (§ 45a-402).

If process delivered to state marshal by date statute runs and served within 15 days thereafter, cause of action preserved. (§ 52-593a).

Revival of barred claims by new promise or part payment is a matter governed by common law except that in an action against the representative of a deceased person a new promise will not take the case out of the statute of limitations unless the same be in writing, signed by the party to be charged, but this does not alter the effect of part payment. (§ 52-176).

Contractual limitations, if not unreasonably short, are permissible. (90 Conn. 226, 96 A. 926; 91 Conn. 57, 98 A. 353). Insurance company may not limit time for suit against it on: (1) Fidelity or surety bond for less than three years, (2) construction performance bond or payment bond for less than three years, (3) uninsured motorist provisions on policy for less than two years, (4) all other policies for less than one year. (§ 38a-290).

Statute tolled if, prior to judgment, attorney ceases to be member of bar, or becomes physically, mentally, or otherwise disabled, for 30 days. (§ 52-235b).

Pleading.

Defense of limitation statutes must be raised by answer, unless complaint anticipates such defense, then raised by demurrer. (114 Conn. 731, 159 A. 657). Creditor appearing and defending in name of a defendant may not plead the statute of limitations. (§ 38a-290).

Abandonment.

Statute of limitations for recovery of money or property shall not affect presumption of abandonment, duty to file report, or duty to turn over to State Treasurer. (§ 3-73b).

5.16A PARTITION:

When title to property is vested in two or more persons, either ordinarily is entitled to partition or sale (14 Conn. 360), but parties may enter into reasonable agreement which will expressly, or impliedly, bar them from seeking partition, nor will partition be granted when it would violate trust or defeat its purpose (110 Conn. 516, 148 A. 358). To lose right to partition cotenant must have been ousted of possession. (133 Conn. 424, 52 A.2d 2). Interest of joint tenant with right of survivorship treated the same as interest of tenant in common. (§§ 47-14a–47-14k).

Jurisdiction and Venue.

Courts of equitable jurisdiction may order partition of real property: (1) When held in joint tenancy, tenancy in common, coparcenary, or by tenancy in tail, and may appoint committee for that purpose (§ 52-495); or (2) when any deceased tenant in common, joint tenant or coparcener has devised freehold interest to any person with contingent interest to any other person, born or unborn (§ 52-496). Jurisdiction of court is determined by value of property. (50 Conn. 256). No partition or sale may be made of any property belonging to estate being settled in probate court until estate is ready for distribution. (§ 52-503). But when person dies owning undivided interest in property, not specifically devised or bequeathed, probate court, during settlement of estate, may order partition upon petition of personal representative and owner of major portion of other interest therein. (§ 45a-326).

Partition in Kind or Sale.

Court may order sale instead of partition when sale would better promote the interests of the owners. (§ 52-500). When one or more persons owning real or personal property has only minimal interest in property, court can order equitable distribution of interests. (§ 52-500[a]). Probate court may also order sale when it would better promote interests of owners, or when estate cannot be beneficially divided for purposes of distribution. (§ 45a-326).

Proceedings.

In proceeding in probate court (which has jurisdiction in cases involving estates only), there must be public notice of hearing unless all parties in interest sign petition. (§ 45a-326). Upon sale, court may make any orders necessary to protect rights of all parties and carry sale into effect, order distribution of proceeds, and make orders relative to custody or investment of shares of unknown parties. (§§ 52-502; 45a-326).

Decree of partition of real property must be recorded in town where land lies. (§§ 52-497; 45a-326).

5.17 [RESERVED]

5.18 PLEADING:

Code system prevails, and each pleading must contain plain and concise statement of material facts, such statement being divided into paragraphs numbered consecutively. (CPB § 10-1). Detailed rules on pleading are contained in Connecticut Practice Book. (CPB §§ 10-1 to C.G.S. 10-79). Electronic filing of pleadings to be permitted after rules are promulgated by judges of Superior Court. (§ 51-193c).

Pleadings Allowed and Their Order.

(1) Complaint, (2) motion to dismiss complaint, (3) request to revise complaint, (4) motion to strike complaint, (5) answer, (6) request to revise answer, (7) motion to strike answer, (8) reply to special defenses. (CPB § 10-6).

Complaint accompanies process and must contain statement of facts constituting cause of action, demand for relief, allegation that matter is within court's jurisdiction and statement that amount, legal interest, or property in demand is less than $15,000 or is not less than $15,000 exclusive of interests and costs. If amount, legal interest or property is less than $5,000 or less than $2,500, statement shall be included in complaint. In contract action for only money damages under $15,000, demand must state whether remedy is based on express or implied promise. (§ 52-91; CPB § 10-20).

Counterclaim or set-off may be made subject of separate trial upon order of court. (§ 52-97). In action for recovery of debt, defendant may set-off mutual debts in certain cases. (§ 52-139). Set-off is allowed in some suits by assignee of non-negotiable chose in action. (§ 52-140). In action for trespass to property other than action for taking property exempt from execution and in action for tort unaccompanied with force when injury is consequential, debts, except those acquired by purchase or assignment after cause of action accrued, may be set off. (§ 52-141). Set-off is also allowed where one joint debtor has been discharged. (§ 52-142).

Motion to dismiss used to assert: (1) Lack of jurisdiction over person or subject matter, (2) improper venue, (3) insufficiency of process or service of process. If defendant contests jurisdiction may file motion within 15 days after entering general appearance. Motion must always be supported by memo of law. (CPB § 10-31).

Request to revise used to obtain: (1) More particular statement of adverse party's pleading, (2) deletion of part of pleading, (3) separation of causes of action, or (4) any other correction in adverse party's pleading. (CPB § 10-35).

Reply to special defenses may admit some allegations and deny others or by general denial put defendant upon proof of all material facts alleged therein.

Motion to strike pleading must distinctly specify reason or reasons why pleading is insufficient. (§ 52-92).

Amendments are freely permitted. (§§ 52-130; C.G.S. 52-138).

Affidavits verifying cause of action, amount due, and belief of no defense, are required in action for summary judgment, under Practice Act. See topic 5.15 Judgments. Affidavit as to military service in case of nonappearing defendant is required when default judgment is sought. Motion to reopen judgment of default or nonsuit must be verified. (§ 52-212).

Filing.

Pleadings must be in writing and filed with Clerk of Court. (104 Conn. 322, 133 A. 99). Copies of all pleadings must be mailed to all parties appearing of record. Certification of same must be made over signature of individual counsel.

Time to Plead.

Beginning with return day of writ, pleadings must advance at least one step every 15 days. (CPB § 10-8). When pleading is amended, adverse party may plead within 15 days, or if he has already pleaded, alter his pleading within ten days. (CPB § 10-61).

Pleadings in summary process are dealt with in CGS § 47a-15, et seq.

Appearance must be entered on or before the second day after return date or default may be entered. (§ 52-84).

Plaintiff has a right to amend within 30 days after return day. (CPB § 10-59).

Claims on open accounts should be presented with the names and residences of debtor and creditor and a statement of the account, with dates; which information is sufficient for institution of the action.

Small Claims.

See category 6 Courts and Legislature, topic 6.01 Courts.

5.19 PRACTICE:

Practice and procedure are regulated by Practice Act, Titles 51, 52 and 54, and court rules contained in Connecticut Practice Book. Supreme Court, Appellate Court and Superior Court judges have power to make orders and rules on practice and procedure. (§ 51-14).

Government Attorney-Client Privilege.

In civil, criminal, legislative or administrative proceeding confidential communication privileged and can only be waived with public agency's consent. (§ 52-146r).

Equity and law are distinct in substance but the distinction between actions at law and suits in equity and the forms of these actions have been abolished. (§ 52-91).

Discovery.

In any civil action court, upon motion, may order disclosure of facts or records by any party, material to mover's cause of action or defense and within knowledge, possession or power of adverse party. (§§ 52-197; C.G.S. 52-199). Court may deny disclosure which is mere fishing expedition or which would result in unjustifiable delay. (114 Conn. 165, 158 A. 219; 166 Conn. 501, 353 A.2d 800). Rules for discovery are contained in Connecticut Practice Book. (CPB §§ 13-1–13-32).

Independent action for discovery in equity still exists. (126 Conn. 382, 11 A.2d 800; 166 Conn. 501, 353 A.2d 800).

Demand for Admission of Facts.

Any party to civil action may, by written notice, request another party to admit existence and due execution of material document, saving all just exceptions. If opposing party unreasonably neglects or refuses to make this admission within reasonable time, costs of proving such document shall be paid by party neglecting or refusing, to make admission regardless of result of action. (§ 52-206).

Direct Actions Against Insurer.

See category 23 Transportation, topic 23.01 Motor Vehicles, subhead Direct Action.

Freedom of the Press.

Act delineating requirements which must be satisfied before news media may be compelled to provide information or disclose sources of information (§ 52-146t); publication of information does not waive right to be free from compulsion (§ 52-146t).

Small Claims.

See category 6 Courts and Legislature, topic 6.01 Courts.

See also topics 5.02 Actions, Appeal and Error, Depositions and Discovery, Injunctions, Judgments, Pleading, Process; category 8 Debtor and Creditor, topics 8.02 Attachment, 8.05 Executions, 8.09 Garnishment.

5.20 PROCESS:

Process in civil actions is writ of summons or attachment. (§ 52-45a). Form at § 52-45b.

General Requisites.

Writ must describe parties, court to which it is returnable, return day, and date and place for filing appearance, must be accompanied by complaint. Such writ must be signed by commissioner of Superior Court, or judge or clerk of court to which it is returnable. (§ 52-45a). Attorneys of state in good standing are commissioners of Superior Court and have power to issue subpoenas. (§ 51-85). Return day for action is any Tues. of any month. Return day in any summary process action may be any Mon. through Sat., except holiday. All process shall be made returnable not later than two months after date of process and shall designate place where court is to be held. (§ 52-48). Process to Superior Court must be served at least 12 days and returned at least six days before return day. (§§ 52-46; C.G.S. 51-347). In small claims matters, if plaintiff is domestic corporation, U.S. corporation, foreign corporation or limited liability company, civil process shall be returnable to superior court facility designated to serve area where defendant resides, is doing business or where transaction occurred. (§ 51-345[g]). Assignment of action to appropriate judicial district. (§ 51-345[a], [b]).

Who May Serve.

Service may be made by state marshal, his deputy, constable, and, under certain stated conditions, by indifferent person. (§ 52-50). If any officer commences service of process within his precincts, he may complete attachment or service outside his precincts, or may deliver process to officer of other precinct for service upon any defendant or garnishee residing in such precinct. (§ 52-56). If officer commences service of process within his precinct, he may attach property of, or serve process upon, any defendant named in process outside his precinct. (§ 52-56). If process may be served upon Secretary of State or Commissioner of Motor Vehicles, service may be made by any officer of any precinct with such process in his hands. (§ 52-56). Marshal fees are governed by § 52-261(a). Fees and form for service of tax warrants are governed by § 12-162(b) and § 12-162(c). If service pertaining to administrative appeal is personally delivered to state marshal, and process is served within 30 days of delivery, cause of action shall not be lost. (§ 52-593a).

Personal Service on Individual.

Service of a writ of summons is made by officer reading it and accompanying complaint in hearing of defendant or by leaving an attested copy thereof with him, or at his usual place of abode in state. If service at place of abode, return of process must note address where left. (§ 52-54). Person domiciled in or subject to jurisdiction of courts of state may be served without state by anyone qualified to serve, or by attorney of place of service. (§ 52-57a).

Personal Service on Incompetent.

Service of process on any person confined in any institution for mentally ill or mentally deficient is made by sending a copy of writ and complaint by registered mail to Commissioner of Welfare at Hartford and a copy to institution where person confined or by service upon superintendent of institution where person confined. (§ 4-68f).

Personal Service on Domestic Corporation.

Service is made upon any officer, teller, general or managing agent, manager, or upon any director resident in the state. If no such officer can be found, service may be made upon any person in charge of the business of the corporation or any person who is in charge of the principal office of the corporation. (§ 52-57).

Personal Service on Partnership.

Service may be made by serving one partner personally in state or, if none of partners are state residents, service may be made on Secretary of State, provided copies of writ and complaint are mailed by certified or registered mail, return receipt requested, to every partner not personally served. (§ 52-57).

Personal Service on Association.

Service of process against a voluntary association may be made upon the presiding officer, secretary or treasurer. If these officers are nonresident and the association is doing business or carrying out its operations or functions within the state, service may be made by serving the Secretary of State at least 12 days before return day, and by mailing another true and attested copy to the defendant by registered mail with an endorsement thereon of service upon the Secretary of State. (§ 52-57).

Personal Service on Foreign Corporation.

Service may be made upon the same officers or agents as for a domestic corporation, or upon the Secretary of State, or with any clerk having charge of the corporation department of his office, if foreign corporation doing business in state has appointed him its agent pursuant to § 33-929. Each foreign corporation must designate agent for service of process before transacting business in state. (§ 33-926). Constructive service upon Secretary of State for corporations doing business in state who have not registered with Secretary of State provided. (§ 33-929).

Personal jurisdiction over nonresident individual or foreign partnership, or his or its executor or administrator, may be exercised where he or it, in person or through an agent: (1) Transacts business in state; or (2) commits tortious act other than defamation of character in state; or (3) commits tortious act outside state causing injury to person or property within state, if (a) regular doing or solicitation of business, persistent conduct, or revenue from within state, or (b) in interstate commerce, and expects or should expect act to have consequences in state; or (4) interest in real property in state. Jurisdiction based on any of these acts does not confer jurisdiction for unrelated cause of action. (§ 52-59b). Constructive service on Secretary of State and registered or certified mailing to defendant's last known address required. (§ 52-596).

Personal service on nonresident fiduciaries in any action founded or arising from acts or omissions as executor, administrator, conservator, guardian, or trustee may be made by leaving a true and attested copy with the judge of probate in the district where the estate is in settlement. (§ 52-61). Process against a foreign corporation acting as executor or trustee in this state may be served upon the Secretary of State. (§ 45a-206).

Personal Service on Municipalities or State.

Process may be served in action against town, upon its clerk, assistant clerk, manager, or one of its select men; against city, upon its clerk, assistant clerk, mayor or manager; against school district, upon its clerk or one of its committee; against other municipal or quasi-municipal corporation, board, commission, department or agency upon its clerk or its chief presiding officer, or managing agent, against municipal employee in action relating to employee's municipal duties, upon city's clerk or employee (§ 52-57); against state or any institution, board, commission, department, or administrative tribunal thereof, (1) upon leaving true and attested copy of process and complaint with Attorney General, or at his office in Hartford, or (2) sending true and attested copy of process, including summons and complaint, by certified mail, return receipt requested, to Attorney General in Hartford. (§ 52-64).

Personal Service Outside the State.

Personal service outside the state is not equivalent to an appearance or to a submission to the jurisdiction of the court. (89 Conn. 214, 93 A. 232).

Substituted Service.

Any licensed operator or owner of registered motor vehicle, who or whose car has caused injury and upon whom it is impossible to make service at his address on file in the motor vehicle department, may be served with process by leaving true and attested copy of process with motor vehicle commissioner, with certification by officer of impossibility of service, and by sending by registered mail a similar copy to the defendant at the address on file in the motor vehicle department. (§ 52-63). Nonresident causing boat to be operated on Connecticut waters is deemed to have appointed Commissioner of Agriculture as his agent for service of process, true and attested copy of such process to be sent to his last known address by registered or certified mail. (§ 15-140a). Quo warranto information against nonresident usurping office in Connecticut corporation may be served on him personally or by leaving copy with resident secretary or treasurer of corporation, or if no such resident officers, service may be made upon attorney general. (§ 52-65).

Out-of-state creditor foreclosing mortgage or mechanic's lien can be served by serving his attorney and mailing copy by certified or registered mail to defendants at his last known address. (§ 52-59c).

Service by Publication.

The judge or clerk may make such order as is reasonable in regard to notice to be given of the institution or pendency of all complaints, writs of errors and appeals from probate, when the adverse party, or parties, reside out of the state, or when the names and residences of such parties are unknown, and such notice given and proved is sufficient service and notice. (§ 52-68). Such service is valid in all actions which are substantially proceedings in rem. (89 Conn. 214, 93 A. 232). Order need not require publication of recital of details pertinent to application which are not essential parts of notice to be given. Either return of any officer authorized to serve process or affidavit of any person showing that publication was made as directed is sufficient to prove publication of notice. (§ 52-52).

For special provisions for banks, foreign insurance companies and corporations, nonresident motorists or aviators, or nonresident fiduciaries, see the appropriate categories and topics.

Service of Process of Foreign Attachment.

When any corporation is named as the agent, trustee, or debtor of the defendant in an action commenced by process of foreign attachment, service may be made by some proper officer by leaving true and attested copy with, or at the usual place of abode of, its secretary or clerk or any agent or clerk employed by such corporation to keep its accounts, when corporation is engaged in transacting business in any other town than that in which its secretary or clerk resides. (§ 52-335). Whenever a bank or trust company is named as garnishee, process is served by leaving a copy with any officer or teller at the garnishee's principal office during its regular hours of business. (§ 52-337). Service on a branch of such bank or trust company, if located in a town different from the principal office and named as garnishee must be made at such branch as above described. (§ 52-337). When the garnishee does not reside in the state, but is engaged in the transaction of business herein by an agent, process may be served on such garnishee by leaving a true and attested copy with the agent. (§ 52-338). When a partnership is named as garnishee, service is made by leaving a copy of the process with, or at the usual place of abode of, the members of such partnership, or acting partner or partners, agent or agents. (§ 52-339).

Long Arm Statute.

See subhead Personal Jurisdiction Over Nonresident Individual or Foreign Partnership, supra.

Proof of Service.

Return of officer must state compliance with requirements of law. (5 Conn. 400). Officer serving process must endorse thereon items of his fees, with number of miles traveled by him. (§ 52-70).

Failure of Defendant to Appear.

In any case where a civil action is begun against a defendant absent from the jurisdiction at the time of service of process, if such defendant does not enter his appearance the action in the case of residents must be postponed for 30 days before default may be taken; in the case of nonresidents it must be postponed for three months, and further notice by publication may be given, or foreign process served, but this provision does not apply to quiet title actions nor to certain equitable actions against the estate of deceased persons nor to nonexistent individuals or foreign partnerships over whom court has personal jurisdiction pursuant to § 52-59b(a)(4) and is served process pursuant to § 52-59b(c). (§ 52-87). Action need not be postponed more than 12 days beyond date of receipt of actual notice by defendant. (§ 52-88).

Nonresident Motorist.

See category 23 Transportation, topic 23.01 Motor Vehicles.

5.21 REPLEVIN:

The action of replevin may be maintained to recover any goods or chattels in which plaintiff has general or special property interest with a right to immediate possession, and which are wrongfully detained from him in any manner, together with damages for detention. (§ 52-515).

Proceedings.

Replevin writ must contain an affidavit by the plaintiff or other credible person, stating the true value of the goods and that the plaintiff is entitled to immediate possession, and a bond of a person of responsibility, with at least one surety, in double the sworn value of the property, must be furnished by plaintiff. (§ 52-518). Suggested form of writ, affidavit, and bond is provided. (§ 52-519). Special provisions also govern pleadings and defenses. (§§ 52-522; C.G.S. 52-525).

Writ must be served within three days after replevy, and replevying officer must retain replevied property in his custody for 24 hours after leaving copy of process with defendant, unless defendant endorses on writ that he is satisfied with amount and sufficiency of bond. If defendant is not satisfied, he may, before return day, bring motion for new bond. If order for new bond is not complied with, or officer does not comply with law, replevin writ is null and void. (§ 52-521). Defendant may defend on ground that third person was entitled to possession without connecting himself with latter's title. If plaintiff's right to possession is in issue, he must prove it, and may also show damages for detention, and if defendant counterclaims for damages for replevin, he may show them. (§ 52-525).

Repossession.

No statutory provision.

Judgment for the plaintiff is for his damages and costs, and if for the defendant for a return of the property and his damages and costs (§ 52-529) but no judgment for return of goods, or for damages, may be given under mere denial, nor may judgment for return be rendered if defendant files disclaimer or has not filed counterclaim seeking return of goods replevied (§ 52-526).

Property attached may be replevied in certain instances. (§ 52-517).

5.22 SEQUESTRATION:

No statutory provision for sequestration.

5.23 SERVICE:

See topic 5.20 Process.

5.23A STATUTORY INTERPRETATION:

If meaning of statute is clear and unambiguous, and does not yield absurd or unworkable results, extratextual evidence shall not be considered. (§ 1-2z).

5.24 STAY OF EXECUTION:

See topic 5.03 Appeal and Error; category 8 Debtor and Creditor, topic 8.05 Executions.

5.24A STRUCTURED SETTLEMENTS:

Model State Structured Settlement Protection Act. Structured settlements must comply with statutory requirements including court approval, disclosure statements, transfer of right to payment. (§§ 52-225g, C.G.S. 52-225h, C.G.S. 52-225i, C.G.S. 52-225j, C.G.S. 52-225k, C.G.S. 52-225l). (See also procedure for transfer of payment rights, § 52-225f.)

5.25 SUBMISSION OF CONTROVERSY:

Parties to a question in difference which might be the subject of a civil action between them may, without action, agree upon a case containing the facts upon which the controversy depends and submit it to any court in the county in which either of them resides, in which a suit might have been brought, together with an affidavit of the parties or their attorneys that the controversy is real and the proceeding is in good faith. The court upon payment of court and clerk fees may hear the case and render judgment, which may be enforced in the same manner as if it had been rendered in an action. (§ 52-406). Judgment may be appealed upon questions of law. (§ 52-407). All costs incurred in such amicable suit are borne equally by contesting parties. (§ 52-254).

(c. 895).

Land actions concerning title or trespass are brought in superior court in judicial district where land is with enumerated exceptions. (§ 51-345).

Consumer transactions shall be brought in county or judicial district within which defendant resides or within which transaction occurred. (§ 51-345).

All other civil actions, except where provision otherwise is made, are brought in judicial district where plaintiff or defendant dwells, if either or both are inhabitants of state. If neither is inhabitant of state action is brought in judicial district where: (A) Injury occurred, (B) transaction occurred, or (C) property is located or lawfully attached. (§ 51-345). Small claims actions are brought in geographical area, established pursuant to § 51-27, within which defendant resides or is doing business or within which transaction occurred. (§ 51-349a). In summary process actions, plaintiff may elect to bring action in geographical district where defendant resides, or where leased premises or trailer located or if defendant is corporation, where it has office or place of business, or if defendant is non-resident where plaintiff resides or where land lies. (§ 51-349). Support actions brought in geographical area, established under § 51-27a, in which party to be supported resides or where party to provide support resides. (§ 46b-215, §§ 57-58). Civil Actions generally, see §§ 51-345; C.G.S. 51-349. See category 6 Courts and Legislature, topic 6.01 Courts.

Foreclosure or redemption suit, with minor exceptions, is brought in county or judicial district where land is located; if land crosses dividing line, in either county or judicial district. (§ 51-345).

Action by trustee for sale of land when trust cannot be executed is brought in superior court of county where land is located. (§ 52-498). Action by trustee for sale of land to promote interest of beneficiaries is brought in superior court of county within which probate court admitting will is located. (§ 52-499).

Foreign corporation suit against inhabitant of state is brought in town or county where one of defendants resides, but corporation organized under laws of United States and located in any town in state may sue before same courts in which any inhabitant of town may sue. (§ 51-27a).

Action on savings bank insurance or annuity policy must be brought in county where issuing bank is located. (§ 36a-285).

Action to compel arbitration is brought in superior court of county in which one of parties resides or, if concerning land controversy, in county in which land is situated. (§ 52-410).

Habeas Corpus application is brought in county in which person is claimed to be confined illegally. (§§ 52-466; C.G.S. 52-466[a]).

Juvenile court petition concerning delinquent children is heard in district where delinquency occurred or, like other juvenile court petitions, in district where child resides. (§ 46b-150).

Change of name complaint is brought in superior court of county in which person resides. Clerk may be required to provide notice of change to Commissioner of Public Safety. (§§ 52-11, 45a-99). Certain requirements must be satisfied for sexual offender to change name. (§ 45a-99, § 52-11).

Change of Venue.

Jury case in superior court may be transferred to any other county, if, upon motion, judge finds that cause of justice requires such transfer, any case may be transferred to another county or from one circuit court to another by agreement of parties, and chief court administrator may order transfer on his own motion in any case when required for efficient operation of courts and to insure prompt and proper administration of justice. (§ 51-347[a], [b]). No cause shall fail on ground that it has been made returnable to improper location. (§ 51-351).

6 COURTS AND LEGISLATURE

6.01 COURTS:

United States District Court.

Bridgeport Office of Clerk: 915 Lafayette Boulevard 06604; Hartford Office of Clerk: 450 Main Street 06103; New Haven Office of Clerk: 141 Church Street 06510.

Supreme Court.

Supreme Court is highest court in state and sits for direct appeal in certain matters including those where Superior Court declares invalid state statute or provision of state constitution and on certain criminal judgments. (§ 51-199). Supreme Court also empowered to issue writs necessary to aid its jurisdiction. (§ 51-199). Uniform Certification of Questions of Law Act adopted. (§§ 9-325, C.G.S. 9-328).

Judges of Supreme Court are by law also judges of Superior Court, but judges of Superior Court are not judges of Supreme Court. If, by reason of sickness or otherwise, quorum cannot be had Chief Justice may call to bench temporarily judge of Superior Court. (§§ 51-199; C.G.S. 51-207). Panel assigned to hear appeal to Supreme Court may include no more than one judge referee (i.e. retired justice or judge) who previously sat as justice or judge of either Supreme or Appellate Court. (§§ 52-434, 434c).

Court sits at Hartford.

The Connecticut Supreme Court Historical Society.

Creation of non-profit organization to preserve judicial and constitutional tradition of Connecticut Supreme Court. (SA 05-5).

Appellate Court.

Appellate Court consists of nine judges, who are also judges of Superior Court, and who sit in panels of three or en banc at times and in such locations as may be necessary. Panel assigned to hear appeal to Appellate Court may include no more than one state referee (i.e. retired justice or judge) who previously sat as justice or judge of either Supreme or Appellate Court. (§§ 52-434, 434c). Appeals from final judgments or actions of Superior Court, not within Supreme Court jurisdiction, are taken to Appellate Court.

Determination by Appellate Court is final except that review of final decision by Supreme Court is available if appellate panel certifies on its own motion such appeal, or Supreme Court certifies on petition by aggrieved party or appellate panel which heard matter. (§§ 51-197a–51-197f).

Superior Court.

There is Superior Court for State of Connecticut which holds terms and sessions in each county of state.

Jurisdiction.

Superior Court has jurisdiction in all criminal matters and in all civil matters in law and equity and over administrative appeals. Superior Court has jurisdiction in all causes of action, except actions over which courts of probate have original jurisdiction. (§ 51-164s).

Return day of writ is any Tues. not later than two months after date of writ. (§ 52-48). Must be served upon defendant at least 12 days before return day (§ 52-46), and returned to court at least six days before return day (§ 51-347).

Small claims procedures are applicable to all actions claiming money damages not in excess of $5,000. (§ 51-15[d]).

Small Claims.

All claims for money damages of $3,500 (§ 51-15[d]) or less, except for libel or slander, may be brought before small claims division without writ or formal pleadings, on payment of entry fee of $30. (§§ 51-15; C.G.S. 52-259, am'd PA 09-152). Damages may exceed jurisdictional monetary limit if damages (§ 47a-21) and costs are awarded in security deposit action (§ 51-15[d]). Venue is same as in ordinary civil actions. Magistrates may hear small claims matters. (§ 51-193t). Statement of claim is made to clerk and is entered in docket in concise, nontechnical form. Service is made by registered mail. Actual cash disbursements of prevailing party for entry, mailing, witness and officer's fees must be allowed as costs. Further costs, not exceeding $25, may be awarded by special order of court against any party who has in any way sought to hamper party or court in securing speedy determination of cause. Any party interested in cause, other than plaintiff, may secure transfer to regular docket upon motion prior to date of hearing provided such motion is accompanied by affidavit stating that good defense exists to claim and, when appropriate, that jury trial is desired, and provided further that moving parties comply with such terms as are fixed by judge, which must at least provide for payment of entry and jury fee. (§ 52-259[a]). Whenever plaintiff prevails after defendant has transferred to regular docket, court may allow plaintiff his costs, plus reasonable attorney's fees. (§ 52-251a).

Contingency fee agreements may provide for certain factors which will warrant deviation from agreed upon percentages. (§ 52-251c).

Parties may, by agreement, submit controversy to commissioner for speedy hearing. At hearing commissioner not bound by rules regarding admissibility of evidence. (§ 52-549, et seq.).

Record Retention.

Chief Court Administrator determines which court records are to be retained or destroyed per statute, and dates for destruction. (§ 51-36).

Service of Process.

Compensation for any process served by State Judicial Dept. officer must comply with stated schedule of fees. (§ 52-261a).

Protective Orders.

Chief Court Administrator shall establish and maintain automated registry of protective orders. Information included in Registry shall not be subject to disclose and may be accessed only in accordance with Act. (§ 51-5c). Foreign order of protection may be registered in Connecticut. (§ 46b-15a). (See also §§ 51-5c[a], 53a-107, 53a-217, 53a-217c, 53a-223b.)

Probate Courts.

Probate courts have jurisdiction in all matters pertaining to probate of wills, settlement of estates of deceased persons and insolvent debtors, trusts, adoption, estates and persons of minors and incompetents and commitment of insane. (See generally § 45a-98, et seq.) Appeals lie to superior court. They have no stated terms for holding their courts, but sit daily, weekly, or whenever occasion requires, at discretion of judge. State is divided into large number (over 100) of probate districts—some of which consist of only one town while others are comprised of two or more towns. (§ 45a-2; see also § 45a-8a[b]-[c]). Judges are elected by people quadrennially and are not necessarily lawyers. Judge of probate, if lawyer, may not appear as attorney in any probate court in any contested matter (§ 45a-25); and partner or associate of probate judge may not practice in that judge's court (§ 45a-26). Supervisory powers of Probate Court Administrator. (§ 4a-79a). Administration of Probate Courts, including hours and nomination of special assignment probate judges. (§ 45a-79b; § 45a-79c, am'd PA 09-114, § 16). Matter is ``contested'' when any party informs court of any objection or opposition. (§ 45a-25). In probate court proceeding, court can issue order for disclosure of medical information relevant to determine matter before court. Such information shall remain confidential. (§ 45a-98b). All Probate Court proceedings must be recorded. (§ 45a-186a; § 45a-186b).

Certain acts of probate court concerning jurisdiction of nonresident decedents, orders of sale of real estate by non-statutory means, limitation of time for presentation of estate claims, orders for sale of real property not consummated within ten years, are all validated. (§ 42a-341). If probate court does not render decision within 120 days of completion date of hearing, any party may petition Probate Court Administrator for relief. (§ 45a-128). Probate court must hold hearing on any petition for termination of parental rights based on consent of parent. (§ 45a-187[a]).

Probate Court Costs.

Costs charged by probate courts are uniform and governed by statute. (§ 45a-106, 107). Estate settlement charges based on percentage of gross taxable estate, with specified adjustments. (§ 45a-107). Basic costs payable to courts of probate for any proceeding other than in connection with settlement of estate of deceased person or periodic accounts of trustees, guardians, conservators or other fiduciaries shall be as follows: Except for such proceedings for which basic costs are specified in subdivisions (2), (3), and (4) of this subsection in general statutes, there shall be payable to court of probate with respect to each application, petition or motion filed with court to commence matter before it, entry fee of $100 which shall be paid by person making application, petition or motion. (§ 45a-106). Additional fees authorized for lengthy matters.

Court of probate, may upon request of fiduciary responsible for filing account, issue certificate, prior to acceptance of final administration account, if it is in best interests of parties. (§ 45a-450).

Court Reporters.

Fees governed by § 51-63(c). (§ 51-63).

Judge Referees.

§§ 52-434 and C.G.S. 8-132, C.G.S. 8-132a, regarding appointment, designation, compensation and duties of trial judge referees. Superior Court can refer cases resulting from demand for trial after arbitrator's decision without consent of either party. (§ 52-434).

Judicial Review Council.

Duties. (§§ 51-51l[b], C.G.S. 51-51q).

Chief State's Attorney.

May appear in court on behalf of state with prior consent of State's Attorney for judicial district. (§ 51-277). State's attorneys need not collect, compromise and settle certain fees and charges. Instead, failure to pay them will result in driver's license suspension. (§§ 51-286a, C.G.S. 14-140[b]).

Magistrates.

Proper venue for hearing motor vehicle infractions and violations. (§ 51-348[d]).

6.01A JUSTICES OF THE PEACE:

Office still exists. However, justices have been stripped of most of their former authority. There are specific provisions concerning term and number of justices each municipality must have. (§§ 9-183a to C.G.S. 9-184; C.G.S. 9-184c; C.G.S. 9-186; C.G.S. 51-95; C.G.S. 51-95b).

6.02 LEGISLATURE:

In odd numbered years, meets in Jan. and must adjourn by June of same year. Any business appropriate to legislature may be acted on in these sessions. In even numbered years, meets in Feb. and must adjourn by May in same year. In even year session, cannot consider business other than budgetary revenue and financial matters, bills and resolutions raised by committees of General Assembly and matters certified by Speaker of House of Representatives and President pro tempore of Senate to be of emergency nature. (Const. 3, 2). Governor may call Special Session. No provision for initiative or referendum.

Fiscal Accountability.

Legislature shall be held fiscally accountable: its two fiscal committees shall meet annually; fiscal notes must be included with proposed bills and updated on enacted bills; bond meeting agenda must be available to committee members by certain deadline. (§§ 2-17, C.G.S. 2-24a, C.G.S. 2-36b, C.G.S. 2-71c[c], C.G.S. 3-20). Other than refunding bonds, all resolutions authorizing Bond Commission to issue bonds for any project must contain statement of full project and estimated operating costs for any project to be constructed. (§ 3-20[g]).

Lobbyists activities regulated by Code of Ethics, including detailed registration provisions. (§§ 1-84; C.G.S. 1-84[i]; C.G.S. 1-84[s]; C.G.S. 1-79; C.G.S. 1-80; C.G.S. 1-79l; C.G.S. 1-80[a], [b]; C.G.S. 1-81; C.G.S. 1-82; C.G.S. 1-91; C.G.S. 1-92; C.G.S. 1-93; C.G.S. 1-93a; C.G.S. 1-93b–1-101). Lobbying activities by ex-legislators curtailed. Legislators elected in 1994 will be unable to lobby for one year after term expires. (§ 2-16a). Definition of client lobbyist. (§ 1-95).

Ethics Reform.

Changes to legislation concerning goods and services given to public officials and state employees. (§ 1-79). (See also §§ 1-84[j], [k], [m]; C.G.S. 1-91[g]; C.G.S. 1-96[e]; C.G.S. 1-97; 53a-147; 53a-148; C.G.S. 1-79a; C.G.S. 1-92; C.G.S. 1-93a; C.G.S. 1-83; C.G.S. 1-84b; C.G.S. 9-333[b]; C.G.S. 1-82[d]; C.G.S. 1-84[i]; C.G.S. 1-88[a], [b]; C.G.S. 1-89[a]; C.G.S. 1-93[d]; C.G.S. 1-99[a], [b]; C.G.S. 1-100[a].) Donation of goods or services to state agency permitted. (§ 1-84c). No governor's spouse shall accept honorarium or fee in his/her official capacity, but may be reimbursed for necessary expenses; must file report within 30 days of receipt of reimbursement. (§ 1-84[k]). Affidavit required as condition precedent to submitting bid or proposal for certain state contracts. (§ 4-251). Written certifications required from state agencies and quasi-public agencies prior to executing certain state contracts. (§ 4-252). Publication of state ethics laws. (§ 1-81b). Office of State Ethics and Citizen's Ethics Advisory Board established. (§§ 1-79[d], C.G.S. 1-80; C.G.S. 1-80c–1-80e, C.G.S. 1-81; C.G.S. 1-81a–1-81b, C.G.S. 1-82; C.G.S. 1-82a, C.G.S. 1-83, C.G.S. 1-84b, C.G.S. 1-86, C.G.S. 1-86d, C.G.S. 1-87, C.G.S. 1-88, C.G.S. 1-89a, C.G.S. 1-91[c], C.G.S. 1-92, C.G.S. 1-93, C.G.S. 1-93a, C.G.S. 1-94, C.G.S. 1-95–1-96e, C.G.S. 1-98, C.G.S. 1-99, C.G.S. 1-101, C.G.S. 4-9a, 4b-4[a], C.G.S. 5-266a[b], C.G.S. 3-13l).

Ethical rules for public officials and state employees. (§§ 1-84; C.G.S. 1-84[i]; C.G.S. 1-84[s]).

Campaign Advertisements.

Must include attributions. (§ 9-621).

Campaign Finance.

Changes and additions to campaign finance legislation concerning campaign contributions and reporting requirements. (§§ 1-79; C.G.S. 1-91; Cross ref. C.G.S. 9-333j, C.G.S. 9-333j[e][1]; C.G.S. 9-333j[c]; C.G.S. 9-333k; C.G.S. 9-333h; C.G.S. 9-333b; C.G.S. 9-3331; C.G.S. 9-333e; C.G.S. 9-333a; C.G.S. 9-333n[d] and [e]; C.G.S. 9-333m; C.G.S. 9-333f; C.G.S. 1-79[e]; C.G.S. 1-91[g]; and C.G.S. 9-333w, C.G.S. 9-333b[b], C.G.S. 9-333d, C.G.S. 9-333g, C.G.S. 9-333i, C.G.S. 9-333i[g][2]; C.G.S. 9-333o, C.G.S. 1-84[k]; C.G.S. 9-333x; C.G.S. 9-333l; C.G.S. 9-333l[a]). Qualified candidate committee of major party candidate eligible to receive grants from Citizens' Election Fund. (§§ 9-701, C.G.S. 7-705). Limitation of expenditures. (§ 9-702[c]; see also §§ 9-703[a], C.G.S. 9-706[d], and C.G.S. 9-712). Exempts candidates appearances on public access TV from definition of contribution. (§ 9-333b). No person who is principal of investment services firm doing business with State Treasurer shall make campaign contributions. (§§ 9-333n[f]; C.G.S. 9-333n[i], C.G.S. 9-333n[h]. Candidacy petition requirements and endorsements. (§§ 9-404a, C.G.S. 9-404b). (See also §§ 9-7b[a][1], [a][2], [3], C.G.S. 9-55[e], C.G.S. 9-183b, C.G.S. 9-283c, C.G.S. 9-329a[a]; C.G.S. 9-329b, C.G.S. 9-333, C.G.S. 9-333a, C.G.S. 9-333e[a], C.G.S. 9-333f[d], C.G.S. 9-333i[e], [f], [g], C.G.S. 9-333j[c], [e], C.G.S. 9-333l[d], C.G.S. 9-333m, C.G.S. 9-333n[a], C.G.S. 9-333r, C.G.S. 9-333x, C.G.S. 9-361, C.G.S. 9-372, C.G.S. 9-374, C.G.S. 9-383, C.G.S. 9-387, C.G.S. 9-390[d]; C.G.S. 9-390–391, C.G.S. 9-393, C.G.S. 9-394a, C.G.S. 9-395; C.G.S. 9-400, C.G.S. 9-400[a], [b]; C.G.S. 9-405, C.G.S. 9-405[a]; C.G.S. 9-406, C.G.S. 9-409–410, C.G.S. 9-412, C.G.S. 9-414–417, C.G.S. 9-420, C.G.S. 9-423, C.G.S. 9-426, C.G.S. 9-428, C.G.S. 9-430, C.G.S. 9-433, C.G.S. 9-435, C.G.S. 9-436[c], C.G.S. 9-437[a], [b], [h], C.G.S. 9-440, C.G.S. 9-443–445, C.G.S. 9-446; C.G.S. 9-450, C.G.S. 9-453i[a], C.G.S. 9-453e, C.G.S. 9-453j, C.G.S. 9-453k[a], C.G.S. 9-453o[a], C.G.S. 9-436[a], C.G.S. 9-453a.) Campaign finance laws regarding use of campaign funds, internal records, and public disclosure of campaign expenses incurred by use of credit card. (§ 9-333i). Filing dates and penalties related to campaign finance reports. (§§ 9-608, C.G.S. 9-623). Congressional vacancies. (§§ 9-211, am'd PA 09-170, § 1; C.G.S. 9-212; C.G.S. 9-450[3]). Nomination of Congress representatives and probate judges. (§ 9-450[1]). Requirements for distribution of funds from Citizens' Election Fund to participating candidates in event of expenditures by nonparticipating candidates in excess of 100% of applicable grant for participating candidates. (§ 9-713).

Receipt of “Soft Money” Funds Banned.

State parties and political committees organized for ongoing political activities are prohibited from receiving “soft money” funds from national political parties. (CGS § 9-333, et seq.).

Campaign Contribution Limitations.

No party, legislative caucus or legislative leadership committees shall make organizational contribution for benefit of participating candidate or its committee in Citizens' Election Program for primary campaign for state senator or state representative, or for general election campaign for state senator in excess of $10,000, or for general election campaign for state representative in excess of $3,500. (§ 9-718).

Person is guilty of corrupt election practices if individual or through others offers inducement to procure signatures for nominating, primary or referendum petitions; or votes or refrains from voting in consideration of value or thing paid to his advantage. (§§ 9-333x, C.G.S. 9-333y).

6.02A MUNICIPALITIES:

Two or more municipalities may jointly perform any function that each may perform separately under any provisions of jurisdiction, special act, charter, or home-rule ordinance. (§ 7-148cc). Municipalities may acquire interest in property for improvement. (§ 12-656). Municipality or state can grant conservator or preservation restriction. (§ 47-42a). Intrastate Mutual Aid Compact established to transcend political jurisdictional boundaries in responding to disasters. (§ 28-22a).

Public Hearing on Ordinances.

District commissioner shall conduct public hearing on any proposed or revised ordinance. Notice of time and place of hearing shall be placed in newspaper having substantial circulation in metropolitan district. Proposed ordinance shall be filed with town clerk ten days before hearing. (§ 33 of 511 of Special Acts of 1929, am'd § 2 of Special Act C.G.S. 77-54, am'd Special Act C.G.S. 01-3).

Special District Powers.

Implementation of tick control measures added to special district powers. (§ 7-326, am'd PA 09-173, § 1).

Voter Registration and Election Procedure.

Requires notification of registration to conservators of persons in residential facilities. (§§ 9-159s, 45a-703). Registration at Dept. of Motor Vehicles. (§ 9-19h[b]). Town registrars and clerks. (§ 9-23g[b]). Vote checkers governed by § 9-235d. Creation of state-wide voter registration system. (§ 9-50b). Municipalities may govern distribution of ballots for presidential elections. (§ 9-158c[a]). Secretary of State shall provide voter registration services at certain naturalization ceremonies. (§ 9-20b). Certain voter registration information must not be disclosed. (§ 9-23r[a]). Secretary of State shall publish online voter guide. (§ 9-4a). Standards for direct electronic voting machines and procedures for elections that use them. (§§ 9-242, C.G.S. 9-242b). Primary need no longer be held before election to fill congressional or multi-town probate judicial vacancies. (§ 9-450[1]). Absentee voting eligibility and procedures. (§§ 9-135, C.G.S. 9-140[a], C.G.S. 9-140, C.G.S. 9-159q, C.G.S. 54-56e[c]). State Election Enforcement Commission shall have increased authority to impose penalties for voting violations. (§§ 9-7b[a], C.G.S. 12-15[b]). Criminal penalties for registration and voting fraud. (§§ 9-358, C.G.S. 9-360, C.G.S. 9-361). Person may appeal his qualifications as elector. (§ 9-311). Voting Technology Standards Board shall be established to ensure integrity of Connecticut's voting system. (§§ 9-241; C.G.S. 9-242[d][5], C.G.S. 9-242b, C.G.S. 9-242c). Felons may have their voting rights restored in certain situations, including payment of all fines associated with conviction. (§ 39-46a[a], [b]). Registrars of voters must conduct manual audit of votes in at least ten percent of voting districts within certain time after any federal or state election or primary. Audited voting districts must be randomly selected by Secretary of State. Selection process must be open to public. Secretary of State must order ballot recount where discrepancy exists between manual and voting machine counts in certain close elections. (§ 9-320f).

Local Capital Improvement Project.

Entails municipal capital expenditure project for purposes stated in § 7-536(a)(4).

Municipal Development Agencies may be established by municipalities. (§ 7-163d).

Municipal Parking Regulations.

Towns or cities consolidated as of 1896 may authorize parking authority to enforce parking regulations and receive fees remitted for violations. (§ 7-204a). (See also §§ 7-204, C.G.S. 14-33; C.G.S. 14-150.)

Connecticut Rural Development Council created in accordance with Federal Farm Security and Rural Investment Act of 2002 to monitor, report and comment on policies and programs to address coordination of relationships and promotion of fiscal autonomy of rural municipalities. (§ 32-710).

Small Town Economic Assistance Program.

Towns may continue to qualify for Small Town Economic Assistance Program grants after State designates them distressed municipality or public investment community. Criteria for designating enterprise corridor zones. (§ 4-66g[b]).

Sale, Lease or Transfer of Municipal Property.

Notice and hearing procedures. (§ 7-163e).

Vacancies.

Procedure for filling vacancies when municipal officer is elected to more than one office, but may hold only one. (§§ 9-322b; C.G.S. 9-450[1]).

6.03 REPORTS:

Reports are: Kirby, 1 vol. (C.G.S. 1786-88); Root, 2 vols. (C.G.S. 1796-1797); Day, 5 vols. (C.G.S. 1802-1813); Connecticut Reports, the current series, beginning with vol. 1 reports Supreme Court decision; Connecticut Appellate Reports reports Appellate Court decisions from Nov. 1983 to date; Connecticut Supplement reports Superior and Common Pleas decisions of note from 1935 to date; Connecticut Circuit Court Reports report Circuit Court cases, C.G.S. 1963-1974. (§ 52-21). Weekly editions of Connecticut Law Tribune and Connecticut Law Reporter report Superior Court decisions and offer periodic bound volumes collecting decisions.

Digests are: Baldwin's, vol. 1 (pub. 1870); vol. 2 (pub. 1892); Index Digests—Andrews & Fowler (pub. 1896) covering Kirby to 63 Conn., and Maltbie & Townshend (pub. 1924) covering 64 to 97 Conn.; Phillips (pub. 1934) covering 97 Conn. to 117 Conn.; Phillips (pub. 1937) covering 118 Conn. to 121 Conn.; Phillips (pub. 1940) covering 122 Conn. to 125 Conn.; Philips (pub. 1945) covering Kirby to 130 Conn., with supplement covering 131 Conn. to 161 Conn. Dowling (pub. 1982). Digest to each volume of official reports appears at back of volume. Connecticut and Atlantic Digest, with annual pocket parts, covers all Connecticut cases.

Cemeteries.

Selectmen of town in which cemetery is located may appoint cemetery committee consisting of not fewer than three nor more than seven members who are residents of town to assume care for cemetery fund. (§ 19a-302).

6.03A STATE MARSHALS:

Sheriff's Reform Act.

An Act Reforming the Sheriff System was enacted. Some sections of Act are effective on Apr. 12, 2000, others are effective Dec. 1, 2000. (Ct. Legis. S.J.R. 15 [2000]). Words “sheriff”, “deputy sheriff” or “special deputy sheriff” shall be replaced by words “state marshal” in nearly all instances.

Judicial Dept. is responsible for transportation of prisoners between courthouses and places of confinement. (§ 6-32d[a][1]). Male and female prisoners transported will be segregated. (§ 6-32d[a][2]). Judicial Dept. is responsible for prisoner custody in courthouses (§ 6-32d[a][3]), employment of judicial marshals for prisoner custody and transportation duties (§ 6-32d[b]), and for contact with state agencies for management, training and coordination (§ 6-32d[c]).

Judicial Dept. is responsible for courthouse security and will employ judicial marshals for that purpose. Chief Court Administrator is responsible for custody, care and control of courthouse facilities. (§ 6-32f). Chief Court Administrator to require criminal background investigation of applicants. (§ 6-32g). Chief Court Administrator may establish employment standards and implement training programs by Dec. 1, 2000. (§ 6-32d[b]).

State marshals are peace officers while exercising statutory authority. (§§ 53-278a[9], 53a-3[9]). State marshals are authorized to provide legal execution and service of process pursuant to § 6-38 as fee-compensated, independent contractors with right of entry on private property in exercising those duties. (§ 6-38a). No private entity may charge state marshal fee for performing marshal's statutory duties. (§ 6-39a). State Marshal Commission is created to adopt rules for conduct of internal affairs and for application and investigation requirements for filling vacancies. (§ 6-38b). Chief Court Administrator to employ staff to support transferred functions of county sheriff system. (§ 6-32h).

Sheriffs in charge of prisoner custody and transportation after Act is effective are deemed Judicial Dept. employees (§ 6-38i), and those so employed before July 1, 1999 are deemed members of state employees retirement system (§§ 5-187b, C.G.S. 5-187c), and may participate in group benefit plans (§ 5-259[1]).

No high sheriff may, directly or indirectly, solicit contributions or expenditures from deputy sheriff, special deputy sheriff, employee of high sheriff, or their immediate families, or from business client, for exploratory, candidate or political committees established by high sheriff to aid or promote success or defeat of referendum question or for other purposes set forth in c. 150. Violation of statute is class D felony. (§ 6-38l).

6.04 STATUTES:

Latest revision is General Statutes, Revision of 1958, Revised to 1999.

Uniform Acts which have been adopted and the years of adoption are: Acknowledgement (1961); Aircraft Financial Responsibility (1959); Anatomical Gift (1969); Certification of Questions of Law (1985); Child Custody Jurisdiction (1978); Code of Military Justice (1967); Commercial Code (1959); Common Interest Ownership Act (1983); Controlled Substances (1972); Criminal Extradition (1957); Enforcement of Foreign Judgments (1973); Federal Lien Registration (1967); Foreign Money-Judgments Recognition Act (modified, 1988); Fraudulent Transfer (1991); Interstate Arbitration of Death Taxes (modified, 1947); Interstate Compromise of Death Taxes (modified, 1947); Interstate Family Support (1998); Judicial Notice of Foreign Law (1918); Land Sales Practices (1969); Limited Partnership Act, Revised (1976) Version (1979); Management of Institutional Funds (1973); Motor Vehicle Certificate of Title and Anti-Theft Act (1957); Partnership Act (1994); Photographic Copies of Business and Public Records as Evidence (1961); Principal and Income (1958); Proof of Statutes (1947); Prudent Investor (1997); Prudent Management of Institutional Funds (2007); Reciprocal Enforcement of Support 1952 version (1953); Recognition of Acknowledgments (1969); Securities (1977); Simultaneous Death (1943); State Administrative Procedure, Revised (1971); Statutory Rule Against Perpetuities (1989); Testamentary Additions to Trusts (1961); To Secure Attendance of Witnesses from Without a State in Criminal Proceedings (1937); Trade Secrets (1983) (N.B. 1985 amendments not adopted.); Transboundary Pollution Reciprocal Access (1992); Transfers to Minors (1995).

No Uniform Acts adopted with significant variations or modifications, except for Uniform Securities Act, as to which see topic Securities and Uniform Common Interest Ownership Act, as to which see category 21 Property, topic 21.16 Real Property.

Uniform Commercial Code has been adopted. (CGS Tit. 42a-1-101–42a-10-103).

For text of Uniform Acts falling within the scope of the Martindale-Hubbell Law Digests see Uniform and Model Acts section.

6.05 UNIFORM LAWS:

For list of Uniform Acts in force in this state see topic 6.04 Statutes. For text of Uniform Acts within the scope of the Martindale-Hubbell Law Digests see Uniform and Model Acts section.

7 CRIMINAL LAW

7.00A BAIL:

See topic 7.01 Criminal Law.

7.01 CRIMINAL LAW:

New Penal Code (Tit. 53a) became effective Oct. 1, 1971. Most sections of old penal code (Tit. 53) were repealed but some remain in effect. Criminal procedure was formerly provided for by Tit. 54 but some procedural sections are included in Tit. 53a. Tit. 54 still in effect. Procedure primarily governed by CPB C.G.S. 36-1-44-37.

Many basic elements of criminal liability and defenses set out in statutory form. (§§ 53a-4–53a-23).

In addition to usual defenses, certain new “affirmative defenses” available, which defendant must prove by preponderance of evidence. (§ 53a-12).

Felonies divided into Class A, B, C, D, and unclassified, and capital felonies carrying death penalty. (§ 53a-25). All felony sentences are indeterminate, with court setting maximum and minimum based on class of felony. (§ 53a-35). Persistent dangerous felons face more severe sentences. (§ 53a-40).

Misdemeanors divided into Class A, B, C, and unclassified (§ 53a-26), with appropriate definite sentence (§ 53a-36). Hate crimes classified as Class A or Class D misdemeanors. (§ 46a-58).

Conditional discharge may be imposed as sentence, with less restriction than probation. (§§ 53a-28–53a-33). Psychiatric or psychological counseling, or participation in animal cruelty prevention and education program may be ordered for animal cruelty infractions. (§ 53a-30). Persons who intentionally injure or kill animals engaged in search and rescue teams are subject to fines and imprisonment. (§ 53-247).

No degrees of murder. Certain classes of murder carry death penalty: (a) Murder of policeman, corrections officer or conservation officer; (b) murder by one hired for pecuniary gain; (c) murder by defendant previously convicted of intentional murder or murder committed while committing a felony; (d) murder by prisoner under life sentence; (e) murder by kidnapper; (f) where illegal sale of cocaine, heroin or methadone, directly causes death of buyer; (g) murder committed in course of commission of 1st degree sexual assault; (h) murder of two or more persons at same time or in course of single transaction. (§ 53a-54b).

Burglary.

One is guilty of burglary in second degree when one enters or remains unlawfully in dwelling with intent to commit crime while one, other than malfeasor, is present in dwelling. (§

53a-102).

Cocaine - Sale or Possession with Intent to Sell.

Equalizes minimum amounts of crack and powder cocaine that non-drug-dependant person must possess to be guilty of this offense. (§ 21a-278[a]).

Disorderly Conduct.

Includes simple trespass and intentional observance of another, without knowledge or consent, inside his dwelling where he has reasonable expectation of privacy. (§ 53a-182).

Alcohol Vaporization Devices.

One who possesses, sells or purchases alcohol vaporization device is subject to fines or imprisonment. (§ 30-116).

Accelerated Rehabilitation generally not applicable to persons charged with Class A or B felony. Includes criteria for inclusion and exception. (§ 54-56e[c]).

Shoplifting.

One in possession of device or thing specifically designed or adapted to advance or facilitate shoplifting as defined (§ 53a-119) where intent to use is manifested, is guilty of class A misdemeanor of possession (§ 53a-127f).

Unlawful Possession of Scanning and Reencoding Devices.

It is Class A misdemeanor to use scanning device or reencoder to access, read or maintain information from payment card without permission and with intent to defraud owner. Penalties include fines and imprisonment. (§ 53-388a).

Unlawful Use of Recording Device.

Operation of audiovisual recording function of device is prohibited in facility where motion picture is being exhibited; violator is subject to civil suit and/or criminal penalties. (§ 29-128f).

Air Bag Fraud.

Person commits larceny when, with intent to defraud, he knowingly installs or reinstalls any object in lieu of air bag. Sale of air bags that do not meet federal safety requirements provided in 49 CFR 571.208 by one who knows, or should know, of such deficiency shall be unfair or deceptive trade practice, and Class A misdemeanor. (§ 14-106d).

Interference with Emergency Calls.

It is Class A misdemeanor to intentionally prevent or hinder completion of C.G.S. 9-1-1 telephone call or any other call or radio communication to law enforcement agencies seeking protection or reporting crime. (§ 53a-183b). It is Class B misdemeanor to misuse emergency C.G.S. 9-1-1 system by purposely reporting false information to C.G.S. 9-1-1. (§ 53a-180d).

Competency to Stand Trial.

In cases in which defendant is found not competent to stand trial, court must make determination that defendant will regain competency within maximum period of placement order. (§ 54-56d[d]; § 54-56d, generally). Court may order continued involuntary medication of defendant if, inter alia, such medication has rendered defendant competent to stand trial. (§ 54-56d[k]).

Criminal Justice Information System.

System that allows criminal justice agencies (§ 54-142[g]) to share criminal history record information as limited by (§ 54-142q, am'd PA 09-26, § 1). Definitions of governing board and offender-based tracking system; Governing Board shall be within Office of Policy and Management for administrative purposes only. (§ 54-142q, am'd PA 09-26, § 1). Any data must be available to Chief Information Officer of Dept. of Information Tech. and to Judicial Dept.; inquiries from general public regarding data must be directed to criminal justice agencies from which such data originated. (§ 54-142r). Before disclosing purchased criminal records, such records must be properly updated. (§ 54-142e). Applicants for employment with Dept. of Developmental Services, as well as any coach involved in police-sponsored athletic activity, may be subject to criminal history record check. (§ 53a-183b).

Funeral Service Contracts.

Crimes related to funeral service contracts. (§§ 42-200, C.G.S. 42-201, C.G.S. 42-206a–42-206c). Funeral service contract must be in writing and must meet statutory requirements. Funeral service establishment must maintain copies of all funeral service contracts for six years after completion of services. (§ 42a-200). Requirements for depositing sums into escrow and notice to purchaser. (§ 42-202). Records, death certificate copies, burial permits, cremation authorizations and other related documentation must be maintained for six years or more after death of subject deceased. (§ 20-222, am'd PA 09-232, § 13). Persons issued inspection certificate must, upon transfer of 50% ownership, discontinuance or termination of funeral services: (1) Notify persons who purchased prepaid funeral contracts and Dept. of Public Heath, (2) mail letter to each person for whom funeral business is storing cremated remains, and (3) provide Dept. of Public Health list of all unclaimed cremated remains held by funeral service business. (C.G.S. 20-222c).

Disruption of Funeral.

Willful and unauthorized disruption of funeral or memorial service is Class A misdemeanor. (C.G.S. 53a-183c).

Conveyance of Electronic Wireless Communications.

Anyone conveying electronic wireless communication device to inmate of correctional institution is guilty of Class A misdemeanor. (§ 53a-174b).

Hate Crime Law.

Person is guilty of intimidation based on bigotry or bias in first degree when such person maliciously and intentionally intimidates or harasses another person because of actual or perceived race, religion, ethnicity or sexual orientation. (§ 53a-181j). Hate crime law extended to protect victims from crimes based on victims' disabilities, gender identity or expression. (§§ 53a-181j–53a-181l; §§ 1-3). Hate crime law extended to property desecration. (§ 46a-58).

Racial Profiling Prohibition Act.

Prohibits racial profiling and orders police department to keep traffic stops statistics. Police depts. and State Dept. of Public Safety are required to provide annual traffic stop reports to Chief State's attorney and African-American Affairs Commission which then must provide results and recommendations to Governor and Legislature annually. (§§ 54-11; C.G.S. 54-1m).

Acts of Terrorism.

One is guilty of act of terrorism when he, with intent to intimidate or coerce civilian population or unit of government, commits felony involving unlawful use or threatened use of physical force or violence. (§ 53a-300). Persons who create chemical or biological weapons are guilty of Class B felony. (§ 53-209a). One who renders criminal assistance to another engaging in certain felonies subject to imprisonment to more than ten years is guilty of Class C felony of hindering prosecution. (§§ 53-209a, 53a-165aa). Other felonies include damage to public transportation with intent to intimidate or coerce civilians or government (§ 53a-304); contamination of public water or food supplies (§ 53a-303); commission of computer crimes in furtherance of terrorist purposes (§ 53a-301); criminal misrepresentation in falsification, concealment or cover up of material fact in investigation (§ 53a-302; §§ 54-47[a] to [h], and 53a-62). Commissioner of Public Safety may assess threats to public safety to determine genuine terrorist threat and notify Commissioner of Emergency Management and Dept. of Homeland Security. (§ 29-1p). Procedures for communication in event of bomb threats. (§ 29-1q).

Human Trafficking.

Creation of Trafficking in Persons Council. (§ 46a-170). One is guilty of trafficking if one commits coercion and other person is compelled or induced to engage in conduct in violation of § 53a-83 or to work; trafficking is Class B felony. (§ 53a-192a). One aggrieved may file civil action for damages. (§ 52-571i). Coercion through trafficking shall be affirmative defense to violation of § 53a-82 (prostitution). (§ 53a-82).

Acts of Cruelty.

Anyone who intentionally tortures or anyone who, with criminal negligence, deprives another person of necessary food, clothing, shelter or proper physical health shall be fined not more than $5,000 or imprisoned not more than five years or both. Person in control of child under age 19 guilty of said activity shall be fined not more than $5,000 or imprisoned not more than one year or both. (§ 53-20).

Identity Theft.

Person is guilty of identity theft when he intentionally obtains and uses personal identifying information of another person without authorization from that person. (§ 53a-129a, am'd PA 09-239, § 1). (See also §§ 54-1d, C.G.S. 362-699, C.G.S. 52-571h.)

Threatening.

One is guilty of threatening in first degree if he threatens to commit crime involving use of hazardous substance with intent to terrorize another person or cause public inconvenience, including the evacuation of building; or if he threatens to commit crime of violence with intent to cause serious public inconvenience, including evacuation of building. (§ 53a-61aa).

Criminal Trespass.

Persons shall be liable for fines of not more than $500 for trespass upon certain state property. (§ 46-11). Criminal trespass and criminal mischief include certain acts committed on public land; violators must pay fine, including surcharge, in part to municipality where offense took place or Dept. of Environmental Protection if offense took place on conservation land. (§§ 22a-250, C.G.S. 26-6[a], 53a-44a, 53a-100, 53a-107, 53a-108, 53a-109, 53a-115–53a-117a).

Assault on Pregnant Woman.

Person is guilty of assault on pregnant woman if he causes termination of pregnancy when committing assault in first degree. (§ 53a-59c).

Assault on Prosecutor.

Person is guilty of assault of prosecutor if he causes physical injury with intent to hinder, harass or retaliate against another for performing duties as prosecutor. (§ 53a-167d).

Death Penalty.

Carried out by lethal injection. (§ 54-100). Imposed only after separate penalty phase hearing focusing upon aggravating/mitigating factors. Aggravating factors to be considered include whether defendant committed offense set forth in § 53a-54b(i) to avoid arrest or detection of crime or to prevent victim from carrying out official duties. Court shall not impose death sentence if defendant is found to be person with mental retardation as defined by § 1-1g. (§ 53a-46a).

Rape Shield Law.

(C.G.S. 10-182j[d]).

Sexual Assault Law.

Defines sexual assault and degrees of sexual assault. (§§ 53a-70; 53a-71).

Stalking Law.

(§ 53a-181c, et seq.).

Criminal penalties for enticing minor to engage in sexual activity through use of interactive computer system. (§ 53a-90a).

Criminal penalties for voyeurism, class D felony, defined as photographing another for sexual purposes without consent and while subject has reasonable expectation of privacy. (§§ 53a-189a; 53a-189b).

Violation of Restraining or Protective Order.

One is guilty of violating restraining order (issued under § 46b-15) when he does not stay away from, contact, or in any way threatens, assaults, or attacks person in violation of that order; he is subject to imprisonment and/or fine (§ 46b-38c). This offense is Class A misdemeanor. (§ 53a-223b). One is guilty of Class D felony violation when order is issued under §§ 46b-38c(e), C.G.S. 54-1k or C.G.S. 54-82r. (§ 53a-223). Violation of restraining order is Class D criminal felony. (§ 53a-223b). Harassment in first and second degrees are offenses subject to protective orders. (§ 54-1k). Notice requirements for protective orders. (§ 46b-15[e]). Protective order under § 46b-38c and § 54-1k may extend to animals owned or kept by victim. (§ 46b-38c[e]; § 54-1k).

Violation of Probation, Conditional Discharge or Failure to Appear.

Arraignment to take place at court with jurisdiction over underlying offense. (§ 54-1d[a]).

DNA Testing and DNA Evidence.

Any person convicted of criminal offense against minor, non-violent sexual offense or sexually violent offense, or felony, and is incarcerated, shall give DNA sample prior to release from custody. Failure to do so will subject individual to criminal proceedings and/or penalties. Assignment of blood collection to relevant agencies. (§§ 54-102g, C.G.S. 54-102h). Blood and other biological samples shall be analyzed, classified, and filed under Division of Scientific Services within Dept. of Public Safety. (§ 54-102j).

Sex Offenses.

(§ 54-193b).

Person may be prosecuted for violations of §§ 53a-70, 70a, 70b, 71, 72a or 72b not later than 20 years after offense if victim notified state's attorney or police of act within five years of commission and identity of offender has been established through DNA collected at time of commission. State's Attorney has discretion to transfer within ten days of arraignment, case of child charged under § 53a-70(a)(2). (§ 46b-127[a]). Second degree sexual assault includes sexual intercourse with person in position of power or control with person under 18 years of age. (§ 53-71). Hearings held prior to finalization of transfer shall be private and conducted separate and apart from proceedings pertaining to adults charged with crimes. (§ 46b-127[a], [b]).

New trial petitions must be brought within three years after judgment or decree unless petition is based on DNA evidence not discoverable or available at time of original trial; such petitions may be brought at any time after discovery or availability of new evidence. (§ 52-582).

Court is required to give sexual assault victim information regarding HIV and AIDS when accused is tested for either or both diseases. (§ 54-102c).

Child Pornography Law.

(§ 53a-196d). Child pornography defined. (§ 53a-193). Possessing child pornography is Class B, C or D felony, depending on quantity possessed. (§ 53a-196d). In criminal proceeding, property deemed child pornography shall be retained by State. State's attorney must make such property available to defendant at State facility or other agreed upon facility. (§ 54-86m).

New Act making it crime to appropriate and use without permission personal identifying information of another. (§ 53a-129a, am'd PA 09-239, § 1).

Includes criteria for crime of assault against elderly, blind, disabled or mentally retarded person. (§§ 1-1g, 53a-59a–53a-61a).

Registration of Sexual Offenders.

Criminal History Searches new fee schedule. (§ 29-11). Requirements concerning registration of sexual offenders. (§§ 54-250–54-258, am'd PA 09-199). Requirement that state or political subdivision of state that provides public access to sexual offenders registry post warning regarding improper use of information subjects user to criminal prosecution. (§ 54-258a).

Penalties for Sexual Assault of Minors.

No person may be prosecuted for any offense, except Class A felony, involving sex offenses of minor except within 30 years from date victim attains majority or within five years from date victim notifies any police officer or State's attorney. (§ 54-193a). Sexual and/or indecent physical contact with minor is Class B felony and where victim is under 13 years of age enhanced penalties exist. Endangerment or sale of minor is Class C Felony. (§ 53-21). Person who is instructor or coach is guilty of sexual assault in second degree when he engages in sexual intercourse with minor. (§ 53-71).

Money Transmission Agencies.

Any person who engages in business of transmitting money without obtaining license as provided in § 36a-600, shall be guilty of Class D felony. (§ 36a-597).

Damages for Personal Injury from Sexual Assault.

Action to recover damages for personal injury due to sexual assault may be brought at any time after crime if offender has been convicted of violation of §§ 53a-70 or 70a. (§ 52-577e). No action to recover damages for personal injury to minor, including emotional distress, caused by sex crime may be brought by victim later than 30 years from date victim attains majority. (§ 52-577d). There is no time limit on actions to enforce awards for personal injury to minor due to sexual assault. (§ 52-598[a]).

Jury Trials.

No trial by jury in criminal actions where maximum penalty is fine of $199. (§ 54-82b).

Plea of Nolo Contendere.

When defendant enters plea of nolo contendere prior to trial; conditional on right to take appeal from court's denial of motion to suppress or dismiss, defendant may appeal after sentencing, provided trial court has determined such ruling on motion to suppress or dismiss would be dispositive of case. (§ 54-94a).

Warrants and Criminal Process.

Bench warrants, subpoenas and capias for witnesses, and all other criminal process may issue from any Superior Court judge or authorized judge trial referee. (§§ 54-2a, C.G.S. 54-33a, 36a-44, C.G.S. 54-33b, C.G.S. 54-33c, C.G.S. 54-33f, C.G.S. 54-154). Inspectors of Division of Criminal Justice, among other officers, may serve search warrants. (§ 54-33a[c]).

Electronic Transmission of Photographs and Fingerprints.

Persons arrested for crimes described in § 29-11 will be fingerprinted, photographed, and physical description taken. If fingerprint or photograph is taken electronically, it will be immediately transmitted to State Police Bureau of Identification. (§ 29-12).

Indictment or Information.

No person charged by state shall be put to plea or held to trial for any crime punishable by death or life imprisonment unless court at preliminary hearing determines there is probable cause to believe offense charged has been committed and that accused person committed it. Accused person may knowingly and voluntarily waive probable cause hearing. (§ 54-46a). Prosecution by complaint or information in other cases. (§ 54-46). Search warrants must also include time and date of issuance, though inadvertent failure by judge to include this information will not, in and of itself, invalidate warrant. (§ 54-33a[c]).

Accused arrested upon bench warrant issued by superior court.

No limitation for prosecution of capital felony, class A felony or violations of §§ 54a–54d or 53a-169. (§ 54-193).

Bail.

All offenses bailable except capital offenses in which proof evident or presumption great. (Const 1, 8; 159 Conn. 264, 268 A.2d 667). Any person arrested and charged with Class A, B, C, or D felony, with certain exceptions, shall be released on bail if court can be reasonably assured of appearance of arrested person in court and that safety of others will not be endangered. Conditions of release found sufficient to meet these specifications are: (1) Execution of written promise to appear without special conditions; (2) execution of written promise with nonfinancial conditions; or (3) execution of bond. (§ 54-63d). Bail Commissioner or probation officer may order participation in zero-tolerance drug supervision program. (§§ 53a-32; 53a-39d; C.G.S. 54-56e; C.G.S. 54-63d; C.G.S. 54-64a; 53a-39d; 53a-32; C.G.S. 54-56e[d]; C.G.S. 54-76j). Bail Commissioner may impose restrictions regarding travel and activities. (§ 54-63d). Court may also order person to submit to drug testing and to participate in program of drug treatment if it has reason to believe person is drug dependent. Result of this test will not be admissible in any criminal proceeding. Courts may also consider following factors to determine whether arrested person will appear in court or if safety of another person will be in danger: (a) Nature, and circumstances of offense; (b) person's previous convictions; (c) person's past record of appearance in court proceedings after being admitted to bail; (d) person's family ties; (e) person's employment record; (f) person's financial resources, character and mental condition; (g) person's community ties; (h) number and seriousness of charges pending against arrested person; (i) weight of evidence against arrested person; (j) arrested person's history of violence; (k) whether arrested person has previously been convicted of similar offenses while released on bond; and (l) likelihood, based upon expressed intention of arrested person, that such person will commit another crime while released. (§ 54-64a). Prisoner who has not made bail appears in court at least every 45 days for review of amount of bail. Prisoner detained pursuant to bench warrant of arrest, arraignment, sentencing or trial for class D felony or misdemeanor, appears in court at least 30 days for review of amount of bail. (§ 54-53a). Any person who has not made bail may be heard at any time by court upon motion for modification of bail. (§ 54-53a). Persons ultimately sentenced to imprisonment who were previously confined in lockup for lack or denial of bail are entitled to credit for number of days in such lockup. Presumption of one day's lockup and credit therefor. Such credit for lockup confinement does not negate requirement of minimum 48 hour confinement for convictions pursuant to § 14-227a(a). (§ 18-98d). Rules regarding transporting defendants to correctional facilities to post bail. (§ 54-64d).

Armed Forces Indemnification.

Indemnification for military duty performed by armed forces of state while under state active duty. (§ 4-165).

Police Officer Indemnification.

Police officers exonerated of criminal charges may bring Superior Court action to recover economic losses including necessary legal fees. (§ 53-392). Special police officer in special investigation section of Dept. of Revenue Services may be justified in using physical force in certain situations, similar to peace officers. (§§ 53a-19[b], 53a-22, 53a-23, 53a-167a, 53a-167b, 53a-167c).

Indemnification and Representation of State Officers and Employees.

State officers, employees, or public defenders may sue State in Superior Court to enforce provisions on indemnification for their financial losses from certain claims based on their actions while discharging their duties or acting within their scope of employment. (§ 5-141d).

Sentencing.

Upon good cause, court may sentence person convicted of any violation of any provision of CGS c. 420b, except for violation (§§ 21a-278a[a] and [b], to sentence that departs from prescribed mandatory minimum sentence. Crime victims may be allowed to make statements concerning sentencing. (§ 51-196).

Voting Rights.

Commissioner of Correction shall transmit to Secretary of State list of persons who have been convicted in Superior Court of felony. Upon release from confinement of person convicted of felony, person shall have right to become elector; he shall be given document certifying release and electoral privileges shall be restored. (§§ 9-45, C.G.S. 9-46, C.G.S. 9-46a).

Court Support Services Division is new name for Office of Adult Probation. (§§ 17a-692, 17a-694, 17a-696[c], 17a-697, 17a-698, 17a-699[c], 17a-700, 17a-701, C.G.S. 29-33[h], 53a-30[b], 53a-31, 53a-39a, C.G.S. 54-56e[d]-[f], C.G.S. 54-105, C.G.S. 54-123b, C.G.S. 54-215, C.G.S. 54-250[10], C.G.S. 54-261, C.G.S. 54-761).

Parole.

Commissioner of Correction shall not release from confinement to supervised home release program any prisoner convicted and incarcerated after Oct. 1, 1991 unless such prisoner has served at least 25% of sentence. As of Oct. 1, 1992 prisoners must serve at least 40% of sentence before being released into such programs. Commission may petition to waive such requirements in order to reduce inmate population to acceptable size. Home release program requirements. (§ 18-100). Prisoner eligible for parole (§ 54-125a) shall not be released on parole if prisoner has more than three years remaining in sentence (§ 54-125b[b]). Chairman of Board of Parole shall establish pilot zero-tolerance drug supervision program. (§ 54-125f). Board of Pardons and Board of Paroles combined into Board of Pardons and Paroles. Board has independent authority to grant or deny paroles, to establish conditions of parole, to rescind or revoke parole, to commute punishment or releases for certain criminal offenses, and to rule on paroles. (§ 54-124a). Revision of eligibility provisions for applicants for administrative pardons and deletion of requirement that chairperson adopt regulations for administration of Interstate Parole Compact. (§§ 54-124a[j], C.G.S. 54-124a[h]). Modification of criteria for parole eligibility. (§§ 54-125a, C.G.S. 54-124b, C.G.S. 54-124e). Authority to transfer inmates between various levels of supervised facilities including substance abuse facilities. (§§ 18-100, C.G.S. 18-100f, C.G.S. 54-125h). State shall have claim against inmate for costs of incarceration; inmate's property may be used to satisfy claim; claim must be brought within two years of release or inmate's death while incarcerated. (§ 18-85a). State may have lien against person obligated to pay cost of incarceration. (§§ 18-85b, C.G.S. 18-85c). Board may grant compassionate parole release, except to inmates convicted of capital felonies, based upon physical or mental debilitation, and he has served at least one-half of his sentence. (§ 54-131k). Employees of Board of Pardons and Paroles shall perform certain duties despite vesting of supervision function in Dept. of Correction. (§§ 1-24, C.G.S. 1-217[a], C.G.S. 14-10[e], 46a-152[g], C.G.S. 51-5c[b], 53a-22, 53a-167c).

Family Violence Crimes.

Police officers must arrest persons suspected of family violence crimes, regardless of victim's preference and relationship between parties. (§ 46b-38b).

Firearms.

No person should store loaded firearm if they have reason to know minor is likely to gain access to firearm without parent or guardian's permission unless person keeps firearm in reasonably secure place or carries it on his person. Person is guilty of criminally negligent storage of firearm, class D felony, when he violates this provision and minor obtains firearm and causes death or injury to himself or others unless minor obtains firearm as result of unlawful entry. (§ 29-37i). Person prohibited from transporting, possessing, or receiving firearms under federal law is guilty of criminal possession of firearm and ineligible for state gun permit. (§§ 53a-217, 53a-217c, C.G.S. 29-28, C.G.S. 29-36f). Lost or stolen firearm or assault weapon must be reported to local police within 72 hours of discovery of loss or theft. (§ 53-202g). Person is guilty of firearm trafficking when he causes another who is prohibited from owning or possessing firearm to control or possess firearm. Firearm trafficking is Class B or C felony, depending on quantity trafficked. (§ 53-202aa).

Retail Sale of Firearms.

Any person, firm or corporation selling firearms shall provide trigger lock, gun lock, and written warning against unlawful storage penalties, as well as post at their service counter same written warning. Violators will be fined not less than $500. (§ 29-37b).

Person who sells, delivers or provides firearm who knows or should know that transferee will use firearm in criminal activity is liable as principal. (§ 53a-8).

In or on school property class D felony. (§ 53a-217b).

Purchase, sale, transfer and possession of pistols, revolvers, and assault weapons, all as defined, strictly regulated. Waiting periods, eligibility requirements, and mandatory sentencing for violations all provided for. (§§ 29-27 to C.G.S. 29-38). Establishment of protocol to ensure that persons who become ineligible to possess firearms will transfer firearms to others. (§§ 29-36k and n).

National Instant Criminal Background Check System shall be implemented in Connecticut. (§ 29-36l).

Possession of Assault Weapons.

Purchase and notice requirements allowing certain persons to possess assault weapons. Defendant not encompassed within affirmative defenses provided in §§ 29-37j and C.G.S. 53-202(a-k) shall be guilty of Class D felony and sentenced to at least one-year imprisonment. (§ 53-202[c], am'd PA 09-62, § 1, C.G.S. 53-202n, C.G.S. 53-202o).

Firearms Databank.

Div. of Scientific Services shall establish firearms evidence databank to be used for investigatory purposes. Databank shall comply with all detailed guidelines and procedures. (§ 29-7h).

Costs of Incarceration.

State is entitled to recover costs of incarceration. (§§ 18-85b, C.G.S. 18-85c).

Credit Against Unpaid Fines.

Person committed to confinement for conviction of criminal offense and ordered to pay fine shall be discharged from confinement when time served equal to $50 per day totals fine. Community service may be ordered and will end when such service at $50 per day equals fine imposed. (§ 18-50).

Fireworks.

Person of at least 16 years of age may offer for sale, or purchase, possess or use sparklers of not more than 100 grams of pyrotechnic mixture per item, which are nonexplosive and non-aerial. Violation of law is Class A misdemeanor unless injury or death results which is subject to penalty of imprisonment and/or fine. (§ 29-357, am'd PA 09-117, § 17). “Fireworks” do not include sparklers or fountains. (§ 29-356). Permits required for supervised display of fireworks or for indoor use of pyrotechnics, sparklers and fountains by commercial vendors/professional. (§ 29-357, am'd PA 09-117, § 17).

Fire marshals or police may order building vacated if there exists risk of death or injury from blockage, failure to maintain fire protection systems, storage of excess flammable materials, use of pyrotechnics or overcrowding. (§ 29-306). Prior to use of building used for public gatherings of more than 100 people, owner, proprietor or manager must publicly announce location of emergency exits. (§ 29-381). All main entrances to places of public assembly constructed after July 2003 must allow emergency exit of two-thirds of capacity. (§ 29-381a).

Crime Victims' Compensation.

No award of compensation to victim will be provided if offender is unjustly enriched. If commission has reason to believe that offender will be unjustly enriched by award greater than $250, commission shall investigate any relationship between victim and offender and financial responsibilities and resources of victim and offender. Compensation will be awarded for crimes committed outside state provided victim is resident of this state and state in which crime occurred does not have program for compensation. Dependents of victims are eligible to apply for compensation within two years of date person discovers that person upon whom he is dependant was victim. (§ 54-211[a]). Deadline for seeking waiver after two-year date is abolished. (§ 54-211[a]). There is Office of Victim Advocate. (§§ 46a-13b–46a-13g). Victim advocates' duties include assistance to victims exercising their rights throughout criminal justice process. (§ 54-220). In determining compensation for victim, court considers financial resources of offender, rehabilitative effect on offender and impact on victim. (§ 53a-28). Manner of payments to be determined by Office of Victim Services. (§ 54-208[f]). Creation of account to fund sexual assault victims' crisis services. (§ 19a-112d).

Compensation.

Innocent victims of crime or their dependents may be eligible for compensation. (§§ 54-143; C.G.S. 54-201 to C.G.S. 54-217, C.G.S. 54-211). Survivors of victims of homicide are entitled to compensation for attending court proceedings. (§ 54-210). Personal injury includes injury to guide/assistance dogs for blind or disabled. (§ 54-201[2]).

Constitutional Rights of Crime Victims.

Any Superior Court judge shall advise any victim before court of his constitutional rights. (§ 54-85q).

Victim Notification.

Victim's right to attend court proceeding free of incrimination or retaliation from employers. (§ 54-85d).

Board of Pardons must make effort to notify victim of offenses involving use, attempted use or threatened use of force if Board grants pardon or commutation to individual. (§ 18-27a).

Dept. of Children and Families is obligated to notify school officials if there is risk of injury to person from juvenile offender. (§ 10-233k).

Office of Victim Services and Dept. of Correction must notify victim and consider victim's statement when sexual offender seeks exemption from registration. (§ 54-251).

There shall be Criminal Justice Information System Governing Board. Board shall oversee criminal justice agencies. (§ 54-142g). Dept. of Correction must notify Office of Victim Services when furlough is granted for purpose of reintegrating inmate into community. (§ 54-231). Notification procedures when inmate to be furloughed and released. (§§ 54-228, C.G.S. 54-230[d]). When prosecuting official files request with Dept. of Correction to receive notification whenever inmate files for relief, request must be filed with Victim Services Unit of dept. hereinafter established. (§§ 18-78b, C.G.S. 54-227, C.G.S. 54-228, C.G.S. 54-229, C.G.S. 54-230a, C.G.S. 54-251[d], C.G.S. 54-255).

Victim in Juvenile Matters.

Victim in juvenile matter has several protected rights including right to be heard; court may issue protective order in case not involving familial relationship if necessary. (§§ 46b-122, C.G.S. 54-76h, C.G.S. 54-76q, C.G.S. 54-222a).

Juvenile Matters.

Child defined as one under 16 years or over 16 years who prior to reaching 16 violated federal, state, local or municipal law or ordinance; child may be convicted as delinquent if he has violated such laws except ordinance regulating behavior of child in family with service needs, violated Superior Court Orders or conditions of probation. (§ 46b-120). Establishment of secure or supervised residential facilities for juveniles referred by court and development of constructive programs for prevention and reduction of delinquency and crimes through Court Support Services Division. (§ 46b-121k). Transfer from juvenile to regular criminal docket. (§ 46b-127). Separate docket for truancy matters. (C.G.S. 51-181d). File to remain sealed until end of tenth working day after arraignment in regular criminal docket. State attorney may file motion for transfer to juvenile docket not later than ten days after arraignment for proceedings in accordance with statute. (§ 46b-127). Cases involving charges of Class A or B felonies by children 14 or older must be transferred from juvenile to regular criminal docket. However, all hearings taking place prior to completion of transfer must be private. (§ 46b-127).

Chief State's Attorney may also appoint special juvenile prosecutors and special inspectors on contractual basis for temporary period. (§ 51-285[a]).

By motion of juvenile prosecutor and order of court case may be transferred from juvenile to regular criminal docket if above conditions met. Court in regular criminal docket may return case to juvenile docket not later than ten working days after date of transfer and proceeding. (§ 46b-127).

If case remains in regular criminal docket, child to be tried and sentenced as if 16 years of age. If action dismissed or nollied, or if child not guilty of charge transferred for or any lesser included offense, child to resume status as juvenile until 16 years of age. Photograph, name and custody status of juvenile arrested for capital or class A felony may be disclosed to public. (§§ 46b-124; 46b-133). Disclosure and confidentiality requirements regarding information obtained during any mental health screening or assessment of child and certain court orders directed at youth in crisis. (§ 46b-124).

Upon arrest or referral for commission of delinquent act, and child isn't placed in detention or referred to diversionary program, officer shall serve written complaint and summons on child and parent, guardian or other person in control of child.

When population of juvenile detention center exceeds or equals maximum capacity, detention supervisor to admit child only if, inter alia, child is subject of order to detain or outstanding custody order. If convicted as delinquent and sentenced to probation, child is entitled to credit on probation for time spent in detention centers or lockups. (§ 46b-141d). Commissioner of Children and Families, in consultation with other agencies, shall establish program alternatives to incarcerating female juvenile offenders. (SA 04-5). No female juvenile offender shall be placed at Connecticut Juvenile Training School. (§ 46b-140[j] and [k]).

Substitute “count” for “charge” (§ 46b-33); required residence and prohibited acts of child under probation (§ 46b-140); conditions for erasure of child's record (§ 46b-146); juvenile matters included in criminal session (§ 46b-121); confessions and statements made by child to police or juvenile court official (§ 46b-137); and disclosure of records of youth adjudged and youthful offender on or after Oct. 1, 1995 (§ 54-761).

Court discretion to modify or enlarge probation or suspended commitment (§ 46b-140a); court may order psychiatric or psychological counseling (§ 46b-140[c]); service of court order; terms of alternative incarceration programs; arrest or notice to appear for violation of conditions of probation or suspended commitment; penalties for violation (§ 46b-140a); notice of and provision of medical/dental services to child (§ 46b-132a) and CPR training of persons who directly supervise child (§ 172-131).

Eligibility requirements for youthful offender status. (§ 54-76c). No child whose family has been adjudicated as family with service needs (FWSN) may be held in juvenile detention center or adjudicated delinquent solely for violating court's FWSN order; and no judge may order detention of FWSN child unless there is no less restrictive alternative available. (§§ 46b-120, 46b-148).

Juvenile Escapes.

Juvenile is guilty of escape from custody if he: (1) Escapes from custody, or (2) has been committed to Department of Children and Families and (a) fails to return from authorized leave, or (b) escapes from state or private facility where he has been assigned by Commissioner of Children and Families. Information concerning escaped youthful offender may be disclosed by law enforcement officials. (§ 53a-171). DCF, Judicial Dept. and Board of Education must give superintendents any records about serious juvenile offender entering or returning to school. (§ 10-233k).

Interstate Juvenile Compact.

Adoption of updated Interstate Compact for Juveniles that addresses management, monitoring, supervision and return of juveniles, delinquents and status offenders who are on probation or parole, and who have absconded, escaped or run away from supervision and control to state other than state where they were sentenced. (§ 46b-151h). (See also §§ 17a-6, 17a-96, 46b-149[f].)

Youthful Offender Proceedings.

Governed by statute. (§§ 54-76b, C.G.S. 54-76c, C.G.S. 54-76d, C.G.S. 54-76h, C.G.S. 54-76i, C.G.S. 54-76j, C.G.S. 54-76l).

Juvenile Training School.

Operated under auspices of Dept. of Children and Families. Statutory requirements for staff training, individualized treatment plans, health, mental and educational assessments. (§ 17a-3a). (See also §§ 4b-55; 4b-58; 4b-91; C.G.S. 7-63; C.G.S. 17-409; 17a-3, am'd PA 09-205, § 1; 17a-11; am'd PA 09-185, § 6, 17a-12; 17a-27; 17a-27b to 27f; 17a-32; 17a-185; 22a-1f; 46b-140; C.G.S. 52-261a; C.G.S. 53-164).

Witness Protection Program.

Outlines qualifications for Witness Protection Program and charges Chief State's Attorney with implementation of program. Also provides for restraining order against person guilty of intimidating witness. (§§ 53a-107; 53a-151a; 53a-223; C.G.S. 54-82g; C.G.S. 54-82r; C.G.S. 54-82t; C.G.S. 54-82u).

Welfare and Benefits.

Food service for inmates. (§ 18-88). *Note:* § 8 (new) regarding education and assistance (§ 18-992); establishment of schools for inmates (§ 18-99b).

Police Officer Certification.

Procedures for cancellation or revocation of certification. (§ 7-294d[c]). Conditions for reinstatement of police officers upon return from international peace keeping operations. (§ 7-294aa).

Pretrial Drug Education.

Persons referred to such programs shall agree to accept placement upon recommendation; may be allowed to attend out of state treatment programs (§ 54-56i); participation in service labor program minimum terms (§ 53a-39c); persons ineligible for accelerated rehabilitation programs (§ 54-56e).

Pretrial Alcohol Education.

Person charged with driving under influence may apply to participate in such programs. Court can order participation in victim impact program, or portion thereof, for those convicted of DUI. (§§ 54-56g; C.G.S. 14-227a). Circumstances permitting operation of motor vehicle following license suspension. (§ 14-227a).

Records.

New Act re: exemption of certain Department of Correction records from disclosure under

Freedom of Information Act including certain documents re: drafts, notes, investigations, testing strategy and negotiation, trade secrets, real estate appraisals, personal finances, taxes, and others. (§§ 1-210; C.G.S. 1-210[b][5]; C.G.S. 1-210[b][22]-[24]). Records created pursuant to § 20-635 may not be disclosed for six months following creation. (§ 20-635). Law enforcement officials may request ex parte authority to compel disclosure of telephone and Internet records. (§ 54-47aa).

Public Safety Commissioner may provide expedited service for people requesting criminal history record checks, may contract with any person or entity to provide this service, and must charge and collect additional $25 fee for each record check. (§ 29-17a).

National Crime Prevention and Privacy Compact.

New act adopting this compact. Purpose of compact is to provide for federal and state exchange of criminal records information for noncriminal justice uses, such as, employment suitability or licensing determinations. Compact outlines rules and procedure for implementing this purpose. (§ 29-164f).

Notification of Criminal Charges Against Connecticut Physicians.

Office of chief State's Attorney must notify Dept. of Public Health when criminal charges are brought against physician licensed by dept. (§ 20-131).

Interstate Compact for Adult Offender Supervision.

This statute outlines procedures and rules for implementing this compact to be followed by Connecticut and other states that adopt compact. Purpose of compact is to provide cooperation between states for tracking adult offenders authorized to travel from state to state as well as controlling and restricting movement of these offenders and notifying victims of offenders' movements. (§ 54-133). Applicable to youthful offenders. (§ 54-76b).

Address Confidentiality Act enabling victims of family violence, sexual assault, stalking or those with minors at risk of injury to participate in program to ensure address confidentiality. Participant must obtain and periodically renew program certification. (§ 54-240, et seq.).

Crime Prevention.

State Prevention Council will establish prevention framework. (§§ 4-67s–4-67v).

Medication for Persons Not Competent to Stand Trial.

Procedures and regulations are established for involuntarily medicating incompetent, criminal defendants to restore their competency to stand trial. Patient who is unable to consent to treatment may have special, limited conservator appointed solely to make decision. If patient is able, but unwilling, hospital may obtain probate order to forcibly medicate patient if he is danger to himself or others. (§ 17a-540).

Criminal Defendants Awaiting Civil Commitment.

All desperate and dangerous prisoners who are incompetent to stand trial must be held only at Whiting Forensic Institute; time requirements for restoration of competency hearings. (§§ 17a-517, C.G.S. 54-56d[k][1]; C.G.S. 54-56d[p]).

Criminal Justice Policy and Planning Division shall be created in Office of Policy and Management to plan and promote more effective and cohesive state criminal justice system. (§§ 4-68m–4-68p). (See also §§ 18-87j, C.G.S. 18-87k, am'd PA 09-223.) Comprehensive re-entry strategy developed in coordination with Criminal Justice Policy and Planning Division for custody, care and control of offender being supervised in community. (§§ 18-81w; C.G.S. 4-68m; § 2; C.G.S. 4-68p; C.G.S. 18-87j; C.G.S. 18-87k, am'd PA 09-223).

Psychiatric Security Review Board.

Membership. (§ 17a-581[b]). Jurisdiction over acquittees who have previously escaped from psychiatric facilities. (§ 17a-522). Requirements or temporary leave of acquittee. (§ 17a-587, am'd PA 09-162).

8 DEBTOR AND CREDITOR

8.01 ASSIGNMENTS:

Uniform Commercial Code adopted. (Title 42a).

Assignee and equitable and bona fide owner of any chose in action, not negotiable, may sue thereon in his own name (§§ 42-123; C.G.S. 52-118), or at common law in assignor's name (102 Conn. 425, 435, 129 A. 221). Partial assignments are valid in equity, and rights thereunder may be enforced by suit to which assignor is party. (CPB 95).

Benefits under Workmen's Compensation Law (§ 49-73), unemployment compensation benefits, aid to dependent children (§ 17-99), embalmer's licenses (§ 22-18) and liquor permits (§ 30-14) are not assignable.

Instrument Transferring Title.

Assignment of chose in action should be in writing. (§ 42-123). There are no statutory requirements for witnesses and acknowledgment.

Filing and Recording.

No requirements except as imposed by Commercial Code (Title 42a) or by trademark law. (§ 35-11a).

Accounts Receivable.

Governed by applicable provisions of Uniform Commercial Code. (Title 42a).

Earnings.

Wages, salaries, commissions and other earnings may not be assigned except for payment of union dues and support in public welfare cases. (§§ 52-361a[g], [d]). See also topic 8.05 Executions, subhead Supplementary Proceedings.

8.02 ATTACHMENT:

Constitutionality.

See Pinsky v. Duncan, 898 F.2d 852 (2d Cir. 1990), affd. Connecticut v. Doehr, 501 U.S. 1, 111 S.Ct. 2105, 115 L.Ed 2d 1 (1991), where ex parte attachment of real estate as permitted under then effective version of § 52-278e found to violate due process.

Actions in Which Allowed.

Upon original writ in any action for recovery of money, but no attachment may be made in action for slander, libel, or invasion of privacy except upon court order. (§§ 52-279, 10a-24). Plaintiff, or defendant on counterclaim may obtain attachment. (§§ 52-278a–52-278g; C.G.S. 52-278e).

In Whose Favor Writ May Issue.

There is no distinction in favor of local creditors.

Against Whom Writ May Issue.

Writ may issue against either resident or nonresident defendant. No prejudgment attachment may be issued against municipal officer for act or omission while acting in discharge of his duties unless malicious, wanton or willful. (§ 52-278e).

Claims on Which Writ May Issue.

It is not necessary that the claim sued on should be insured or payable within the state.

Grounds.

Attaching party at hearing must show probable cause that his claim will be sustained. (§ 52-278d).

Proceedings to Obtain.

Plaintiff must apply for prejudgment remedy, submit affidavit and serve defendant with application at least four days prior to required hearing. Temporary restraining order may be obtained. (§ 52-278c). Hearing's purpose is to ascertain: (1) whether probable cause exists that judgment will be obtained by plaintiff in amount sought or in greater amount, considering any defenses, counterclaims, or set-offs; (2) whether insurance available to adequately secure any judgment; (3) whether property sought is exempt from attachment; (4) if court grants remedy, whether plaintiff should post bond to protect defendant from damage caused by prejudgment remedy or whether defendant can post bond in lieu of attachment or remedy sought. (§ 52-278d, am'd C.G.S. 93-431). Upon motion for disclosure defendant may be ordered to disclose property in which he has interest sufficient to satisfy prejudgment remedy. (§ 52-278n). Effective Jan. 1, 1994, applicant seeking attachment of any prejudgment remedy without prior notice of hearing must show that there is reasonable likelihood that defendant: (a) has evaded or will evade service of process; (b) is about to leave Connecticut or remove property sought to be attached from state; or (c) had made or will make fraudulent conveyance. (§ 52-278e).

In determining whether to authorize prejudgment remedy sought and in what amount, reviewing court must consider any known defenses, counterclaims or set-offs. (§ 52-278c).

Process served upon defendant prior to hearing or after issuance of order authorizing remedy sought must include court-prescribed “notice and claim form” specifying defendant's right to: (a) contest remedy sought as improper or excessive, due to available defenses, set-offs, or counterclaims; (b) demonstrate availability of liability insurance to cover any judgment; (c) ask court to require applicant to post bond to cover damages caused by prejudgment remedy; (d) ask court to allow defendant to post bond in lieu of remedy sought; (e) claim property sought to be attached as exempt under applicable law. (§ 52-278d).

Procedure not applicable to commercial transactions, as defined, where written waiver previously secured, but process notifying defendant of attachment or other remedy pursuant to waiver must contain prescribed notice of rights to hearing to contest remedy. (§ 52-278f).

Defendant asserting set-off, counterclaim for money damages or plaintiff after commencement of action may obtain attachment on application and hearing as provided above. (§ 52-282).

Attachments secured prior to May 30, 1973 shall retain their effectiveness by filing a motion for a hearing. (§ 52-278g).

Post-Judgment Remedies.

Post-Judgment Remedies Act represents comprehensive update of creditor remedies and debtor protections, including new discovery rights, equitable enforcement procedures, and exemption notice and claim provisions. (§§ 52-347 to C.G.S. 52-400c). Money judgment may be enforced against any property of judgment debtor unless property is exempt. Amount of judgment may include statutory fees and costs, interest and any allowable attorney's fees. (§ 52-350f). Judgment creditor may obtain discovery from judgment debtor, certain third persons, or from any financial institution pursuant to statute's procedures. (§ 52-351b). Disputes between judgment debtor or creditor and third persons concerning interests in personal property sought to be levied on may be heard by Superior Court. (§ 52-356c).

Forms.

Following forms are to be used:

Forms

Application for Prejudgment Remedy.

(CPB Form 101.5).

To the Superior Court for Judicial District of..........

The undersigned represents:

1. That. . . . . is about to commence an action against. . . . . of. . . . . (give name and address of defendant) pursuant to the attached proposed unsigned Writ, Summons, Complaint and Affidavit.

2. That there is probable cause that a judgment will be rendered in such matter in favor of the applicant and to secure the judgment the applicant seeks an order from this court directing that the following prejudgment remedy be issued to secure the sum of $. . . . .:

a. To attach the following described (real) property of the defendant located in the town of (name of town) and further described as follows: (insert description)

b. To garnishee. . . . ., as he is the agent, trustee, debtor of the defendant and has concealed in his hands the goods, effects and estate of the defendant and is indebted to him.

c. (Other Type of Prejudgment Remedy Requested.)

Name of Applicant

By..........

His Attorney

Order.

(CPB Form 101.5).

The above application having been presented to the court, it is hereby ordered, that a hearing be held thereon on. . . . . at. . . . . a.m. and that the plaintiff give notice to the defendant of the pendency of the application and of the time when it will be heard by causing a true and attested copy of the application, the proposed unsigned writ, summons, complaint, affidavit and of this order to be served upon the defendant by some proper officer or indifferent person on or before. . . . ., and that due return of service be made to this court.

Dated at. . . . . this. . . . . day of. . . . ., 20. . .

....

....

Clerk of the Court

Summons.

(CPB Form 101.5).

To a state marshal of the County of. . . . ., his deputy, or either constable of the Town of. . . . ., in said County,

Greeting:

By authority of the State of Connecticut, you are hereby commanded to serve a true and attested copy of the above application, unsigned proposed writ, summons, complaint, affidavit and order upon. . . . ., of. . . . . . by leaving the same in his hands or at his usual place of abode on or before. . . . . .

Hereof fail not but due service and return make.

Dated at. . . . . this. . . . . day of. . . . ., 20. . . . . .

....

Commissioner of the Superior

Court

Times for Issuance of Writs.

Attachment may issue on commencement of action or anytime thereafter upon court order or pursuant to temporary restraining order. (§ 52-278b). See subhead Proceedings to Obtain, supra.

When the court cites in a new party to an action pending before it, it may include in such citation an order for a supplemental attachment against the property of such new party. (§ 52-103).

Upon amendment of defective process, if court after notice and hearing finds that parties had notice of pendency of action and have not been prejudiced by the defect, attachment made by original process is preserved as though proper from date of service of original process. (§ 52-72).

Property Subject to Attachment.

Attachment may be levied on any estate of defendant not exempt. (§§ 52-279; C.G.S. 52-280). As to exempt property, see topic 8.06 Exemptions.

Equitable interests (114 Conn. 79, 157 A. 638), future interests (71 Conn. 149, 41 A. 284), and partial interests in land (68 Conn. 1, 35 A. 804) are subject to attachment if sufficiently definite to be capable of appraisal; but security interests such as interest of vendor or mortgagee may be reached only by garnishing debt secured and filing certificate of garnishment for record with town clerk for town where the land is situated (§ 52-346). Income from trust fund, if available to defendant by terms of trust (see category 13 Estates and Trusts, topic 13.15 Trusts), may be availed of by equitable decree requiring trustee to pay income to creditor. (§ 52-321). Interest of partner in partnership property may be attached, but any party to action or partner may, by bill in equity, cause dissolution of attachment and division of partnership property on equitable principles. (§ 52-299).

Fixtures of telephone, telegraph, light or power companies are attachable in manner and effect the same as real estate by lodging a certificate of attachment with the Secretary of State. (§ 52-287).

Public Servants.

No attachments of property of municipal officials, policemen, or members, teachers, or employees of board of education or members of any other municipal board or commission, in action involving official conduct, except on court order, or, in case of policeman, on dismissal. (§ 52-279).

Levy.

Attachment is made under order of court after hearing. (§§ 52-89; C.G.S. 52-90; C.G.S. 52-278a to C.G.S. 52-278g). State marshal or constable makes attachment by serving writ of attachment on defendant, and, in case of personal property by seizing and removing property where practicable (§ 52-280; 107 Conn. 300, 140 A. 354), and, in case of real estate (§ 52-285) or leaseholds (§ 52-286) by lodging in office of town clerk in town where real estate is located certificate that he has made such attachment and true and attested copy of process authorizing same (§ 52-285).

Estate of nonresident defendant is attached as above described, a copy of the process being left with the agent or attorney of the defendant within the state, or in the absence of such agent or attorney, with the person in charge or possession of the estate attached; if there is no person in charge or possession of the estate attached, the court may order reasonable notice to be given to the defendant, and such notice, having been given and proved, is deemed sufficient service of process, and such attachment thereupon becomes effective. (§ 52-284). Not applicable to garnishments. (79 Conn. 15, 17, 63 A. 641; C.G.S. 52-88).

Shares of stock in corporation, together with dividends due thereon, may be attached by officer leaving attested copies of process and complaint at office of corporation, and officer in charge thereof must issue to him certificate of amount of stock owned, encumbrances thereon and dividends due; but no such attachment shall be valid until stock certificate be seized by officer, or be surrendered to corporation. (§ 52-289).

Attachments of certain cumbersome articles not moveable without manifest injury may be effectual without removal thereof if properly filed within 48 hours in town clerk's office in town where property situated and with secretary of state. In some cases, posting on building containing property required. (§ 52-283).

Lien.

Attachment constitutes lien on property attached to secure payment of attaching creditor's claim, and priority of levy of attachment gives priority of lien. (36 Conn. 578). Real estate attachment is not lien after 15 years unless reduced to judgment and judgment lien filed. (§ 52-327, am'd PA 09-213, § 11).

Attachment holds until the execution is levied, provided the levy is made within 60 days after final judgment when personal estate is attached. No real estate that has been attached may be held subject to attachment to respond to judgment obtained in suit, either against debtor or any other creditor, unless judgment creditor places judgment lien on real estate within four months after final judgment. (§ 52-328).

Sale.

Upon order of court, perishable property or property difficult or expensive to care for and preserve levied on under attachment may be sold (§ 52-293), provided the plaintiff gives bond with surety in double the value of such property, conditioned on prosecution to effect and payment of damages sustained by sale at less than appraised value (§ 52-294). Proceeds of such sale are paid into court and are there subject to attachment by other creditors. (§ 52-297). Defendant may take proceeds at any time during suit upon giving bond with surety conditioned on refund in event of adverse judgment. (§ 52-298).

Priorities.

Where several attachments of the same property are made, the debt and costs of suit of the first attaching creditor must first be fully satisfied, and subsequent attaching creditors are paid in the order of their several attachments. (85 Conn. 573, 578, 84 A. 119; 36 Conn. 578).

Property of Nonresidents.

The property of a nonresident defendant may be attached in the same manner as other property is attached except that the writ and complaint is served by leaving a copy with the defendant's agent or attorney in state, if known and by giving such notice to said defendant as court, on application made to it, shall require. (§ 52-284).

Release of Property.

Defendant may secure release of attached property and dissolution of attachment lien upon substitution of surety bond or lien on other property which has equal or greater net equity value than amount secured by attachment (§ 52-304); all persons interested may be heard in relation to amount and sufficiency of bond or substitute lien, and amount must equal value of estate which process directed to be attached, except in tort action for unliquidated damages in which case reasonable bond or substitute lien is sufficient (§ 52-307). Lien on real estate of surety on bond may be obtained by filing in office of Town Clerk. (§ 49-86). Release may also be obtained by court order following hearing in probable cause. (§§ 52-278a to C.G.S. 52-278g).

Dissolution.

When attachment of record is for any reason of no effect, any person interested in estate may require plaintiff (§ 52-322, am'd PA 09-213, § 9) or clerk of court (§ 52-324, am'd PA 09-213, § 10) to file certificate of dissolution with Town Clerk. If plaintiff fails to execute and deliver a release within 30 days after demand, he is liable to person aggrieved at $100 per week, up to $5,000 or in amount equal to loss sustained by aggrieved person, whichever is greater. (§§ 49-8, C.G.S. 49-13, am'd PA 09-213, § 5).

When the attachment is dissolved, the defendant must file a certificate of dissolution signed by the plaintiff or the plaintiff's attorney with the town clerk if real estate was attached, with the served officer of the corporation if corporate stock was attached, or with the garnishee in case of goods or effects in hands of garnishee, before the corporation or garnishee can be held liable for refusing to transfer stock, pay debts or return goods and effects. (§ 52-310).

Bond.

By application to court defendant may secure dissolution of attachment lien upon substitution of a surety bond or lien on other property which has equal or greater net equity value than amount secured by attachment. (§ 52-304). Amount and sufficiency of bond or substitute lien are subject to hearing, but amount must equal value of estate which process directed to be attached, except in action of tort for recovery of unliquidated damages where court may take bond or substitute lien for amount deemed reasonable. (§ 52-307).

8.03 [RESERVED]

8.04 CREDITORS' SUITS:

Since legal and equitable remedies can be granted in the same action, a creditor can in the same complaint have judgment for his debt and also the equitable aid necessary to reach intangible assets; therefore, the former creditor's bill is ordinarily unnecessary. (100 Conn. 712, 124 A. 715). See also topics 8.05 Executions, 8.08 Fraudulent Sales and Conveyances.

8.05 EXECUTIONS:

Money judgment may be enforced against any property of judgment debtor, unless exempt property, by execution or foreclosure of real property lien. Clerk of court rendering judgment must receive application from judgment creditor before issuing execution through sheriff, deputy sheriff or constable.

Exemptions.

Natural person's exempt property listed in § 52-352b. See topic 8.06 Exemptions. Executions must be accompanied by exemption claim form when served.

Levy and Sale.

The officer in levying execution must first make demand of the sum due and upon refusal of the judgment debtor to pay, he then levies the execution on nonexempt personal property other than debts due from banks or earnings. Officer advertises for sale and sells such personal estate so levied after 20 days, or if property be perishable or livestock, after shorter period. (§ 52-356a[b]). If personal estate sufficient to satisfy judgment cannot be found, officer may levy execution on real property of debtor held in his own right through judgment lien. (§ 52-380a).

Execution on Bank Account.

An execution may be granted against any debts due judgment debtor not natural person from any banking institution, including federal credit union, and upon service at any office such institution must, before its midnight deadline, pay to serving officer amount of such indebtedness not exceeding amount due on such execution. Failure to pay renders institution personally liable for such amount. (§ 52-367a). Upon receipt of execution, banking institution immediately segregates funds, and sends notice to debtor, including exemption claim form. Debtor must claim exemption within 15 days to avoid payment by banking institution to executing creditor. If exemption claimed, court conducts hearing to determine validity of claim. (§ 52-367b).

Execution on Cumbersome Articles Not Moveable Without Manifest Injury.

Notice of such levy must be posted on the outer door of building in which the property is located; such property is held by such levy as effectively as if it had been removed. (§ 52-356a).

The owner of a judgment may, instead of taking out execution, file a judgment lien on debtor's land and foreclose same. (§ 52-355a). See category 5 Civil Actions and Procedure, topic 5.15 Judgments. Bank served with order to execute upon funds must leave $800 in debtor's account if it recently received electronic deposits that are readily identifiable as exempt social security benefits or federal retirement benefits. (§ 52-367b).

Stay of Execution.

In all actions, there is automatic stay of execution until time to take appeal has expired and on appeal or notice thereof such stay is extended until final determination, unless on contrary order of court. (CPB 4065–4067, 4107).

When in foreign attachment it appears that debt garnished is not yet due the defendant, execution must be stayed until it becomes due. (§ 52-386).

Satisfaction.

Each clerk of court to whom an execution is returned after service must note on the margin or on the record of the judgment upon which it was issued whether and to what extent such execution was satisfied. (§ 52-356a).

No redemption from an execution sale.

Supplementary Proceedings.

A judgment debtor against whom execution is returned unsatisfied may be examined touching his property and means before a judge of superior court or court of common pleas, which would have jurisdiction of an action on said judgment or before a committee appointed by such judge. (§ 52-397). Debtor will not be excused from answering on ground that it might show him party to any fraud, or fraudulent conveyance, but his answers cannot be used against him in any criminal proceeding except for perjury (§ 52-398), and on refusal to appear or answer he may be committed for contempt (§ 52-399).

When creditor seeks satisfaction of his claim out of wages of debtor, the court, as part of, or after, its final judgment in the action, may make reasonable orders, and modify the same from time to time, for payments to be made by the judgment debtor into court toward satisfaction of such judgment. On failure to obey order, judgment creditor may on application to court obtain execution on salary or wages, which when served on employer of judgment debtor becomes a lien on debtor's wages or salary. Wage execution limited to lesser of: (a) 25% of disposable earnings, or (b) disposable income which exceeds higher of 40 times minimum wage or full minimum fair wage defined in § 31-58. (§ 52-361a). Priority of levy of execution gives priority of lien. Employer (whether private individual, corporation, the state or a subdivision thereof) who fails to pay out under such execution becomes personally liable to judgment creditor. (§ 52-361a).

Body Execution.

In contract action in which defendant might have been arrested on mesne process (§ 52-355; see Arrest) or in any tort action (111 Conn. 225, 149 A. 770) or in action based on fraud in contracting debt, concealing property from legal process, or refusal to disclose rights of action so that same can be taken by foreign attachment (§ 52-362), judgment creditor may, by writ of execution, have defendant arrested and held for payment of judgment if officer cannot find sufficient personal estate to satisfy judgment (§ 52-369).

8.06 EXEMPTIONS:

Exempt property: (1) Necessities; (2) tools, books, instruments, farm animals and livestock feed necessary for occupation, profession or farming operation; (3) burial plot; (4) public assistance payments; (5) health and disability insurance payments; (6) health aids; (7) workers' compensation, social security, veterans and unemployment benefits; (8) court approved payments for child support; (9) military equipment of member of armed forces; (10) one motor vehicle to value of $3,500; (11) wedding and engagement rings; (12) residential utility deposits; (13) certain payments under pension plans; (14) alimony and support to certain extent; (15) award under Crime Reparations Act; (16) sickness or incapacity benefits exempt; and (17) insurance money due on exempt property (§ 52-352b).

Substitution.

Debtor who does not own articles specifically exempted may not hold other articles or money exempt in lieu thereof.

Earnings.

For exemption of wages, see topic 8.09 Garnishment.

Liquor permits are exempt. (§ 30-14).

Homestead Exemption.

See topic 8.10 Homesteads.

8.07 FORECLOSURE:

See topic 8.13 Liens; category 20 Mortgages, topics 20.01 Chattel Mortgages, 20.04 Mortgages of Real Property.

8.08 FRAUDULENT SALES AND CONVEYANCES:

All conveyances made with intent to avoid any debt or duty belonging to others are void as against those persons only, their heirs and representatives, to whom such debt belongs. (§ 52-552).

Remedies.

Injured creditor may attach or levy execution on property as property of debtor, or may proceed in equity to set aside conveyance, which equitable proceeding may be joined with his suit on the debt. (68 Conn. 384, 36 A. 813; 100 Conn. 712, 124 A. 715).

Deed from husband to wife not presumed to lack consideration. (76 Conn. 197, 56 A. 558).

Uniform Fraudulent Conveyance Act not adopted.

Bulk Sales.

Governed by the Uniform Commercial Code. (§§ 42a-6-101, 42a-6-110). Connecticut has adopted less stringent option re bulk sales than Code. See category 3 Business Regulation and Commerce, topic 3.09 Commercial Code.

8.09 GARNISHMENT:

Garnishment proceedings, called the process of “foreign attachment” in this state, may be had against any person who as agent or trustee holds property belonging to the defendant or who is indebted to him. (§ 52-329).

Property Which May Be Reached.

In general, effects, debts, legacies or distributive shares belonging to defendant may be garnisheed. Debtor's interest in note secured by mortgage may be garnisheed. (§§ 52-346; C.G.S. 52-278a). Amounts in checking accounts in excess of $5,000 may be garnisheed only on court order for good cause shown. (§ 52-289a). See topic 8.06 Exemptions.

Earnings.

Wages may not be garnisheed but in lieu thereof extraordinary supplementary proceedings in aid of collection therefrom are provided. See topic 8.05 Executions.

Jurisdiction.

Garnishment may be directed subject to requirements of § 52-278a in any civil action in which judgment or decree for payment of money may be rendered. (§ 52-329).

Proceedings to Obtain.

Plaintiff inserts in his writ a direction to officer to leave a true and attested copy of writ and complaint with garnishee at least 12 days before return day. (§ 52-329).

Service.

See category 5 Civil Actions and Procedure, topic 5.20 Process.

Answer of Garnishee.

Garnishee, in the writ, may be summoned to appear on return day and disclose under oath whether he has property of defendant or is a debtor of defendant. (§ 52-330). A disclosure to the sheriff at the time of service is usually sufficient, although the plaintiff if he desires may examine the garnishee in court. (§ 52-331).

Practice.

From time of serving such process on garnishee, any debt owing by him to defendant, and any property held by him belonging to defendant shall be secured in hands of garnishee to pay such judgment as plaintiff may recover. (§ 52-329).

Adverse Claims.

If a negotiable note is garnisheed and defendant has notice of garnishment he is liable to plaintiff in a civil action for fraud if he transfers note to bona fide purchaser, but bona fide purchaser is protected. (§ 52-341). If scire facias is brought to recover a debt or effects taken by garnishment, the defendant having notice of any assignment of the property may give notice to all persons claiming as assignees that such scire facias is pending so that they may appear and defend. (§ 52-387).

Judgment.

If after judgment is recovered the garnishee fails to pay the judgment to the amount of such debt or to produce such property after demand made by the officer with the execution in hand, so that execution may be levied on it, the garnishee becomes personally liable to the plaintiff in the amount of such debt not exceeding the amount of the judgment, such liability being enforced by scire facias proceedings instituted by the plaintiff as a separate action against the garnishee. (§ 52-381).

8.10 HOMESTEADS:

“Homestead”, defined as owner-occupied real property or mobile manufactured home used as primary residence, exempt from attachment to value of $75,000, provided value to be determined as fair market value less amount of any statutory or consensual lien which encumbers it. (§ 52-352b).

8.11 JUDGMENT NOTES:

See category 3 Business Regulation and Commerce, topic 3.02 Bills and Notes.

8.12 LEVY:

See topics 8.02 Attachment, 8.05 Executions.

8.13 LIENS:

Uniform Commercial Code adopted. (Title 42a).

Equitable liens are governed by common law.

Board or Lodging.

When there has been any special agreement regarding the price for board or lodging the keeper of the boarding or lodging house has a lien on the baggage and effects of the boarder or lodger, and if his bill is not paid within 60 days his effects may be sold and the proceeds applied on the debt. (§ 49-68). Hotel keepers have similar liens, but may sell the goods after 30 days after advertising the sale in a newspaper for three days commencing at least five days before the sale. (§ 49-69).

Remainderman having vested interest in real property has lien for costs of necessary repairs and improvements and may apply to probate court during continuance of life estate, or within 60 days thereafter, for ascertainment of amount and for sale of so much of estate as will repay sum advanced. (§ 45a-334).

Hospitals receiving state aid or owned or operated by a municipality or by state may have a lien on accident and liability policies. (§ 49-73).

Municipal liens on proceeds of fire insurance for taxes and demolition expenses allowable (§§ 49-73a–i; C.G.S. 12-172). Tax or municipal liens upon real estate, continued by certificate on land records, are invalid if no action is taken within 15 years of recording date. (§ 12-175, am'd PA 09-213, § 2).

Vessels are subject to lien for claim of not less than $50 for work, materials, and expenses connected with building, repairing, mooring, dockage or storage. Vessel lien must be filed with Secretary of State within 60 days after ceasing furnishing goods or services, and it is subordinate to previously filed security interests. (§§ 49-55; C.G.S. 49-55c). Upon satisfaction of claim or judgment for defendant, must be released within ten days upon request. (§ 49-56a).

Water rent lien, where municipal or private corporation by law may have lien on real estate, continues one year from time rent due, unless proper certificate filed on land records before year expires, in which case lien continues two years from date of filing. (§ 49-72).

Release of Artificer's Lien.

Owner of personal property held by bailee for hire or by one having legal or equitable interest therein claiming lien thereon may apply for dissolution of lien upon substitution of bond with surety. If no application made within three months from completion of work by bailee, bailee may sell upon giving prescribed statutory notice. If property is car, notice must also be given motor vehicle commissioner. (§ 49-61).

Succession Lien.

There is no fee for certificate of release of lien for succession tax. (§ 12-364).

Mechanics' Liens.

Any person having claim for labor or material furnished in construction or repair of any building or in improvement of any lot or site development or subdivision of any plot of land by virtue of contract with or by consent of owner exceeding $10 in amount, may have lien on same, land on which it stands, or lot or plot of land. (§ 49-33).

Total amount of mechanics' liens cannot exceed total amount which owner has agreed to pay for building and its appurtenances or for development of lot or plot of land; if they exceed this amount lienors other than original contractor must first be paid in full and, if necessary, prorate any loss. In determining the amount, owner is credited with whatever payments he has made in good faith to the original contractor before receiving notice of the lien. No payment made in advance of the time stipulated in the original contract is considered as made in good faith, unless written notice of intention to make such payment is given at least five days before such payment is made to all persons known to have furnished materials or rendered services. (§ 49-36).

Certificate of Lien.

Although mechanics' liens originate as of date of beginning of services or furnishing materials, they are not valid unless lienor, within 90 days, after he has ceased performing work or furnishing materials, files certificate of lien in office of town clerk for town in which property involved is situated, which certificate must be recorded with deeds of land and, prior to or within same time, but not later than 30 days after filing such certificate, serves true and attested copy of such certificate upon owner. This certificate must be under oath and must describe premises and state amount claimed, name or names of person against whom lien is being filed, date of origin of lien and that amount claimed is justly due. (§ 49-34). If certificate does not contain name of owner, town clerk must index it according to such information as he can obtain. (§ 7-28).

Notice of Lien.

Validity of lien is also destroyed if lienor, not being original contractor or subcontractor whose contract is in writing, does not give written notice to owner at some time after origin of lien and before expiration of 90 days after ceasing to work or furnish materials that he intends to claim such lien. (§ 49-35).

Proceedings to Discharge or Reduce.

Owner may make application to Superior Court for hearing to determine whether lien should be discharged or reduced and must serve lienor with such application at least four days before hearing. Entry fee of $20 required. At hearing lienor must first establish probable cause to sustain validity of lien. Court may: (1) Deny application if probable cause to sustain validity of lien established; or (2) order lien discharged if (A) probable cause to sustain its validity not established, or (B) by clear and convincing evidence its invalidity established; or (3) reduce amount of such lien if amount found to be excessive by clear and convincing evidence; or (4) order lien discharged or reduced conditioned upon posting of bond with surety sufficient to indemnify lienor. Order automatically stayed for seven day appeal period during which party taking appeal may file application requesting further stay. Upon hearing court must, upon motion of party taking appeal, set amount of bond with surety sufficient to indemnify adverse party for damages resulting from stay and must grant stay if bond given. Order of discharge, reduction, or stay effective upon recording certified copy thereof in office of town clerk in which certificate of lien originally recorded. Similar procedure available to any party to pending action for foreclosure of lien by motion to court. (§ 49-35a-c).

Forms.

Following forms are to be used (§ 49-35a):

APPLICATION FOR DISCHARGE OR

REDUCTION OF MECHANIC'S LIEN

To the. . . . . . Court of. . . . . .

The undersigned represents:

1. That. . . . . . is the owner of the real estate described in Schedule A attached hereto.

2. That the names and addresses of all other owners of record of such real estate are as follows:

3. That on or about....................,

(date) (name of lienor)

of.......... placed a mechanic's lien on such real estate and

(address of lienor)

gave notice thereof.

4. That there is not probable cause to sustain the validity of such lien (or: That such lien is excessive).

5. That the applicant seeks an order for discharge (or reduction) of such lien.

(Name of Applicant)

By..........

His attorney

ORDER

The above application having been presented to the court, it is hereby ordered, that a hearing be held thereon at. . . . . . on. . . . . at. . . . . . a.m. and that the applicant give notice to the following persons: (Name and addresses of persons entitled to notice) of the pendency of said application and of the time when it will be heard by causing a true and attested copy of the application, and of this order to be served upon such persons by some proper officer or indifferent person on or before. . . . . . and that due return of such notice be made to this court.

Dated at. . . . . . this. . . . . . day of. . . . . . 20. . . .

SUMMONS

To a state marshal of the county of. . . . . ., his deputy, or either constable of the town of. . . . . ., in said county,

Greeting:

By authority of the State of Connecticut, you are hereby commanded to serve a true and attested copy of the above application and order upon. . . . . ., of. . . . . . by leaving the same in his hands or at his usual place of abode (or such other notice as ordered by the court) on or before. . . . . .

Hereof fail not but due service and return make. Dated at. . . . . . this. . . . . . day of. . . . . . 20. . . .

....

Commissioner of the Superior Court

Duration of Lien.

Lien will not continue longer than one year from date of perfection of lien unless proceedings are commenced to foreclose same, and lis pendens recorded with town clerk, within one year of date or recording, or within 60 days of any final disposition of appeal, whichever is later. (§ 49-39). If time limit not met, lien automatically extinguished. (§ 49-39).

Priorities.

Lien originates as of time of commencement of such services or furnishing of such materials and is entitled to priority over all encumbrances originating subsequent thereto except other mechanics' liens. If encumbrance not mechanic's lien originates subsequent to origin of one set of mechanics' liens and prior to another set, order of priority is: (1) Mechanics' liens originating prior to intervening encumbrance; (2) intervening encumbrance; (3) mechanics' liens originating subsequent to intervening encumbrance. If lienor releases or waives claim of priority over such encumbrance, lien is classed with, and has not priority over, liens originating prior to such encumbrance. (§ 49-33).

Enforcement.

Mechanic's lien may be foreclosed in same manner as mortgage. (§ 49-33h).

Release or Discharge.

For form which may be used to release or discharge mechanic's lien see category 20 Mortgages, topic 20.04 Mortgages of Real Property.

Railroad Property.

Similar liens may be had against railroad properties for materials or labor furnished under contract with the railroad company, certificate of which should be filed in the office of the Secretary of State. (§ 49-38).

Public Works.

General contractor on public construction job exceeding $100,000 must furnish bond in amount of contract with surety for protection of persons supplying labor and material, providing no bond required for any general bid where total estimated cost of labor and material is less than $100,000 or for any sub-bid where total estimated cost of labor and material is less than $100,000. (§§ 49-41; C.G.S. 49-41[a]). Suit may be brought on bond by unpaid persons if payment not made within 90 days after last labor was done or last material furnished. Any person who furnishes labor or materials, including one having contract with sub-contractor but not with principal, may sue on bond provided he gives proper notice to surety and to principal within 180 days from date of performing last labor or supplying last material. (§ 49-42). Suit on bond must be brought within one year after last labor performed or material supplied by plaintiff. (§ 49-42[b]). If sub-contractors' work is set forth in requisition or estimate for payment, 180-day and one-year limitations period run from payment date to contractor, rather than date of last work or material supplied. (§ 49-42). Public works contracts must require payment of subcontractors by general contractors within 30 days. If payment not made within 30 days, subcontractor must set forth his claim, and ten days thereafter general contractor liable for interest at 1% per month and, at subcontractor's written demand, must place claimed amount plus interest in bank escrow account. Contractor may refuse to fund escrow on ground that subcontractor failed to perform but is liable for subcontractor's attorney's fees and interest if litigation or arbitration determines that subcontractor in fact performed. General contractor must require each subcontractor to pay amounts due to its subcontractor or materialmen within 30 days of subcontractor's receipt of payment. (§ 49-41a[b]).

Dissolution of Liens on Real Estate.

Owner or any one interested in real estate may apply to judge of superior court or court of common pleas to dissolve lien thereon and substitute therefor bond. If certified copy of judge's order is filed with town clerk where real estate is situated within ten days lien is dissolved. Suit upon bond must be brought within one year. (§ 49-37). Principal or surety on bond may make application to court for hearing to determine whether lien for which bond was substituted should be declared invalid or reduced in amount. (§ 49-37). See catchline Proceedings to Discharge or Reduce, supra, for procedure and issues upon hearing.

Redemption.

There is no right to redeem property after a sale to enforce a lien.

For various other liens, see §§ 7-118; C.G.S. 14-150; C.G.S. 15-75; C.G.S. 15-76; C.G.S. 16-129; C.G.S. 17-25; C.G.S. 17-280; C.G.S. 17-281; C.G.S. 20-325a; C.G.S. 40-60; C.G.S. 49-60; also topics Attachment, Pledges; categories Business Regulation and Commerce, topics Banks and Banking, Carriers, Factors; Civil Actions and Procedure, topic Judgments; Legal Profession, topic Attorneys and Counselors; Mortgages, topics Chattel Mortgages, Mortgages of Real Property; Property, topic Landlord and Tenant; Taxation, topic Taxes.

8.14 MECHANICS' LIENS:

See topic 8.13 Liens.

8.15 PLEDGES:

Uniform Commercial Code adopted. (Tit. 42a). Governs most Pledge Relationships.

Pawnbrokers must obtain license and are regulated as to records, reports, interest, and sale of pledged property. (§§ 21-39; C.G.S. 21-46).

8.16 RECEIVERS:

Receivers may be appointed by any court of equitable jurisdiction as auxiliary to action for equitable relief. (73 Conn. 587, 48 A. 759). See topic 8.05 Executions; categories 2 Business Organizations, topic Corporations; Business Regulation and Commerce, topic Banks and Banking; Insurance, topic Insurance Companies.

Proceedings.

Application is made in court where action pending, or if such court is not in session, to Superior Court, and appointment is made after due notice is given. (§ 52-504). Superior Court in judicial district where partner resides or partnership property is located may appoint receiver when partnership has been dissolved and partners cannot agree on settlement of its affairs. (§ 52-509). Superior Court, on application of any partner or party to action, may appoint receiver in action in which partnership assets have been attached to secure claim against individual partner. (§ 52-299). Commencement of proceedings for appointment of corporation or partnership receiver dissolves all attachments, and all executions not completed, made within 60 days, but they revive if property is subsequently taken from receiver so that it cannot be subject to order of court, or if receivership is terminated. Legal costs of attaching or levying creditor before receivership are preferred claim if claim upon which attachment is founded is allowed in whole or in part. (§ 52-514). See also categories 2 Business Organizations, topic Corporations; Business

Regulation and Commerce, topic Banks and Banking; Insurance, topic Insurance Companies.

Receiver may be appointed for association, community, or corporation organized wholly or partly for support of its members and having property upon which members depend for support (§ 52-505) or for credit union (§ 36a-462).

Qualification.

Receiver must file bond with surety payable to state, in amount ordered by court before assuming duties. (§ 52-506).

Powers and Duties.

Receiver of corporations has right to possession of all its books, papers, and property, may bring or defend actions, and do all other acts necessary in execution of his trust. Under order of court he may have power of directors to call in subscriptions of stock. (§ 52-507). Partnership receiver is entitled to possession of all its property, subject to order of court (§ 52-511) which has power over management of partnership and disposition of its property (§ 52-510).

Reports.

Receiver must file semi-annual reports of his doings in Apr. and Oct. (§ 52-508).

Removal.

Court may remove receiver at its pleasure, and fill vacancy in event receiver is removed, dies, or declines to act. (§ 52-513).

8.17 REDEMPTION:

See topics 8.05 Executions, Liens; categories 5 Civil Actions and Procedure, topic Judgments; Mortgages, topic Mortgages of Real Property; Taxation.

8.18 SUPPLEMENTARY PROCEEDINGS:

See topic 8.05 Executions.

8.19 TRUSTEE PROCESS:

See topic 8.09 Garnishment.

8.20 USURY:

See category 3 Business Regulation and Commerce, topic 3.17 Interest.

9 DISPUTE RESOLUTION

9.01 ALTERNATIVE DISPUTE RESOLUTION:

Variety of court-sanctioned and independent programs exist to encourage resolution of civil disputes without necessity of full-scale trial on merits before judge or jury. All are voluntary. By court rule (CPB C.G.S. 23-67), parties may stipulate to pursue program of alternative dispute resolution, and court will stay judicial proceedings for period not to exceed 90 days. See also category 5 Civil Actions and Procedure, topic 5.13 Evidence, subhead Witnesses, catchline Mediation.

9.02 ARBITRATION AND AWARD:

An agreement in any written contract or in a separate writing executed by the parties to any written contract or in the articles of association or by-laws of an association or corporation to which both parties are members to arbitrate any controversy which may arise between them in the future, or an agreement in writing between two or more persons to submit to arbitration any controversy existing between them at the time of the agreement to submit, is valid, irrevocable and enforceable except when sufficient cause at law or equity exists for the avoidance of written contracts generally. (§ 52-408).

Uniform Arbitration Act not adopted.

UNICITRAL Model Law on International Commercial Arbitration is enacted. (§ 50a-100, et seq.).

Court proceedings may be stayed upon motion of any party to the arbitration agreement who is willing to proceed with such arbitration, when it appears that an agreement to arbitrate has been made. (§ 52-409).

Compelling Proceeding with Arbitration.

If one party to an arbitration agreement neglects or refuses to proceed with the arbitration thereunder, the other party may apply to the superior court having jurisdiction for an order directing the parties to proceed with the arbitration in compliance with their agreement. (§ 52-410).

If the agreement to arbitrate contains no method of appointing an arbitrator or if the method so provided for any reason fails to name an umpire, any party may apply to the superior court having jurisdiction for the appointment of an arbitrator. (§ 52-411).

Attendance of Witnesses and Production of Documents.

Any arbitrator or umpire or any other person qualified to issue subpoenas in civil actions may issue subpoenas for attendance of witnesses and production of documents at arbitration hearings. (§ 52-412).

Hearing.

All the arbitrators must meet and act together during the hearing, but, when met, a majority, or, in the event of an equal division of opinion, the presiding arbitrator (§ 51-183e) may determine any question. If additional arbitrator is selected or appointed after evidence is heard, matter must be reheard unless such rehearing is waived in writing. (§ 52-414).

Assistance of Court.

Upon request of all the parties to the arbitration, the arbitrator must make application to any designated court or judge for a decision on any issue, provided such parties agree that such decision shall be final and bind the arbitrator. (§ 52-415).

Time for Rendering Award.

If time within which an award must be rendered is not fixed in agreement, arbitrator must render award within 30 days after completion of hearings or submission of additional material after hearings. Award thereafter made is void unless parties expressly, in writing, extend time in which award may be made. (§ 52-416).

Court Action on Award.

At any time within one year after the rendition and notification of an award by arbitrators, either party may apply to superior court in judicial district in which one of parties resides (or, if controversy concerns land, in county in which land is situated) for order confirming award, which award court must confirm unless it vacates, modifies or corrects it. (§ 52-417). Award shall be vacated if procured by fraud, corruption or undue means, if partiality or corruption on part of any of arbitrators is evident, if arbitrators have been guilty of misconduct in refusing to postpone hearing or to hear material evidence or if arbitrators exceeded or imperfectly executed their powers. If vacated, court may order rehearing by arbitrators if time for rendering award has not expired. Notice of application to vacate award of State Board of Mediation and Arbitration shall be made to Board and Attorney General within five days of filing. (§ 52-418). Superior court may modify or correct award in event of evident material mistake on their own principles upon application of any party to arbitration. (§ 52-419). Any motion to vacate, modify or correct award must be made within 30 days of notice of award to moving party. (§ 52-420). If award is confirmed it may be enforced (§ 52-421) and is subject to appeal (§ 52-423) in same manner as any judgment of superior court.

Arrest on Execution.

See category 8 Debtor and Creditor, topic 8.05 Executions.

10 DOCUMENTS AND RECORDS

10.01 ACKNOWLEDGMENTS:

Uniform Acknowledgment Act adopted. (§§ 1-28–1-41). See category 6 Courts and Legislature, topic 6.04 Statutes, subhead Uniform Acts.

May be taken by following officers or in accordance with Uniform Acknowledgments Act.

Within state: judge of U.S. or state court of record; clerk of superior or district court or court of common pleas; justice of peace (in county for which elected); secretary of school fund (§ 3-47); commissioner of superior court (§ 51-85); in conveyance of real estate, notary public (anywhere in state); town clerk or assistant town clerk. Not necessary that seal of office be affixed. (§ 47-5A). Fee shall not exceed $1 plus 15¢ for each mile of travel. (§ 3-95). Social workers, social worker trainees, paralegals, and certified legal interns performing duties within Public Defender Services Commission, bail commissioners and family relations counselors employed by Judicial Dept. (§ 1-24), and any state trooper or member of local police department may take acknowledgment with reference to any statement made by or to police. (§ 1-24).

Without state but within U.S.: in conveyance of real estate, any officer authorized to take acknowledgments of deeds in state or territory where taken; commissioner appointed by Governor of Connecticut and residing in such state or territory (§§ 4-21; C.G.S. 47-5A); clerk or deputy clerk of any federal court; clerk or deputy clerk of any court of record of any state or other jurisdiction; notary public; commissioner of deeds; for instrument pertaining to real property located in this state or power of attorney, any attorney admitted to bar of this state.

Without U.S.: in conveyance of real estate, ambassador, minister, chargé d'affaires, consul, vice consul, deputy consul, consul general, vice consul general, deputy consul general, consular agent, vice consular agent, commercial agent or vice commercial agent of U.S.; notary public or justice of peace or any other public officer before whom oaths may be taken or acknowledgments made, of country where taken within territorial limits of his jurisdiction (§ 47-5A); for instrument pertaining to real property located in this state or power of attorney, any attorney admitted to bar of this state.

Officers in U. S. Armed Forces.

Acknowledgment of any person in U. S. Armed Forces may be taken by any officer of such forces of the rank of Second Lieutenant, Ensign or higher. No authentication of officer's certificate is required but he must endorse thereon his rank and command to which he is attached. (§ 27-137).

Uniform Recognition of Acknowledgments Act adopted (§§ 1-57–1-65), whereby, in addition to recognition accorded by any of above cited statutes: Notarial acts performed outside state by following recognized: (1) Notary public of place where act performed; (2) judge, clerk, or deputy clerk of court of record of place where act performed; (3) officer of U.S. Foreign Service, consular agent, or other person authorized by U.S. Department of State; (4) commissioned officer or other authorized person, in case of person in or with armed forces, merchant seaman, or dependents; or (5) anyone else authorized to perform notarial acts in place performed.

Proof of Authority.

Classifications (1) through (4) above: Signature, rank or title, and serial number, if any, sufficient. Person authorized by foreign country: U.S. foreign service officer resident in U.S. certifies authority of person holding such an office; or official seal affixed; or title and indication of authority appears in digest of foreign law or customarily used list. Notarial act by any other person: Certificate of clerk of court of record of place of act.

Following short forms may be used:

Forms

(1) For an individual acting in his own right:

State of..........

County of..........

The foregoing instrument was acknowledged before me this (date) by (name of person acknowledged.)

(Signature of person taking acknowledgment)

(Title or rank)

(Serial number, if any)

(2) For a corporation:

State of..........

County of..........

The foregoing instrument was acknowledged before me this (date) by (name of officer or agent, title or officer or agent) of (name of corporation acknowledging) a (state or place of incorporation) corporation, on behalf of the corporation.

(Signature of person taking acknowledgment)

(Title or rank)

(Serial number, if any)

(3) For a partnership:

State of..........

County of..........

The foregoing instrument was acknowledged before me this (date) by (name of acknowledging partner or agent), partner (or agent) on behalf of (name of partnership), a partnership.

(Signature of person taking acknowledgment)

(Title or rank)

(Serial number, if any)

(4) For an individual acting as principal by an attorney in fact:

State of..........

County of..........

The foregoing instrument was acknowledged before me this (date) by (name of attorney in fact) as attorney in fact on behalf of (name of principal).

(Signature of person taking acknowledgment)

(Title or rank)

(Serial number, if any)

(5) By any public officer, trustee, or personal representative:

State of..........

County of..........

The foregoing instrument was acknowledged before me this (date) by (name and title of position).

(Signature of person taking acknowledgment)

(Title or rank)

(Serial number, if any)

Interest in a corporation or a voluntary association does not disqualify a person from witnessing or taking the acknowledgment of the grantor in deeds to or from such corporation or the trustees of such association. (§ 47-6).

Married women acknowledge like other persons; no special requirements.

Proof by Subscribing Witness.

Proof by a subscribing witness in lieu of an acknowledgment is not provided for in Connecticut.

Authentication.

Secretary of State authenticates signatures of judges and clerks and clerks of superior court, of state's attorneys and state marshals, and of clerks and assistant clerks appointed by judges of superior court. (§ 3-96). Fee $25. (§ 3-99).

See also topic 10.03 Notaries Public.

Validating Acts.

Any duly recorded instrument pertaining to or affecting any interest in real property, the acknowledgment of which was not completed, or was erroneously taken or recited, or was taken by a person without authority, or where such authority was not stated or authenticated, or where no acknowledgment was taken, was validated by 1967 Special Act.

Form.

The following form may be used:

Form

State of. . . . . ., County of..........ss. (City where taken) (Date).

Personally appeared John Jones, president of the A. B. Company, signer and sealer of the foregoing instrument, and acknowledged the same to be his free act and deed, and the free act and deed of said A. B. Company, before me..........

Or, Personally appeared John Doe and Anne Doe, signers and sealers of the foregoing instrument, and severally acknowledged the same to be their free act and deed, before me..........

(Official seal). ....(Official title)

See also forms contained in Uniform Acknowledgments Act. (§§ 1-28–1-41).

Alternative to Acknowledgment or Proof.

No statutory provision.

10.02 AFFIDAVITS:

Affidavits may be sworn to before notary public, or any magistrate authorized to administer oaths in place where they are made, but should have annexed certificate of official capacity from clerk of court of record. (§ 47-5a).

No particular form is prescribed. Person objecting to taking oath may execute affidavit on solemn affirmation. (§ 1-23).

Affidavits are generally used in ex parte proceedings such as uncontested divorces, uncontested foreclosures, injunction and receivership proceedings, where a finding of fact may be based on an affidavit. Files, records, votes and proceedings of any court, community, corporation, society or public board having a clerk may be proved by sworn copies. (§ 52-171).

Alternative to Affidavit.

No statutory provision.

10.03 NOTARIES PUBLIC:

Term begins on date of appointment and ends five years later on last day of month of appointment unless notary is suspended or resigns. Certificate of oath must be recorded by town clerk of town in which notary resides within 30 days. (§ 3-92). Notary must be at least 18. (§ 3-91). Notary who ceases to reside within state must resign immediately by filing with Secretary of State signed, written notice of resignation. (§ 3-94p).

Appointments.

Secretary of State may appoint as notary public any person who: (1) Is 18 years of age or older; (2) is resident of state of Connecticut at time of application and appointment, or has one's principal place of business in Connecticut; (3) passes written examination approved or administered by secretary; (4) submits application accompanied by: (a) application fee of $60, and (b) recommendation of individual who has personally known applicant for one year. Secretary may deny application based on: (1) Applicant's conviction of felony or crime involving dishonesty or moral turpitude; (2) revocation, suspension or restriction of notary public appointment or professional license issued to applicant by this state or any other state; or (3) applicant's official misconduct whether or not any disciplinary action has resulted. (§ 3-94b).

Reappointments.

Notary public may apply for reappointment on form provided by secretary with fee of $60 after being notified by secretary 90 days prior to expiration of previous term. (§ 3-94d).

Police Notaries.

Secretary of State may appoint as notary publics any number of state police majors, captains, lieutenants and sergeants. Secretary shall not charge any such person application fee. Notary appointed under this section shall exercise his authority only on administration of oaths and affirmations in taking of acknowledgments as pertain to official police matters. Upon terminating employment with state police notary appointed under this section shall immediately resign in writing. (§ 3-94e).

Behavior in Office.

Notary public shall not influence person to enter into or refrain from lawful transaction. Notary public shall not unreasonably refuse to perform notarial acts. Notary public is disqualified from performing notarial act if notary is: (1) Signatory of or named in document that is to be notarized; (2) will receive directly from transaction any commission, fee, advantage, right, title, interest, cash, property or other consideration that exceeds in value statutory fee permitted for performing notarial act; or (3) is legally related to person for whom notarial act is to be performed. Notary public shall not: (1) Notarize any document that contains statement known by such notary to be false; (2) notarize blank document; (3) perform any official action with intent to deceive or defraud; or (4) use notary title or seal in endorsement or promotional statement for any product, service, contest, or other offering. Notary public, except those appointed within state police, may keep and use official notarial seal. In completing notarial act notary public shall sign on notarial certificate only his or her own name. If notary public utilized notarial seal, notary shall affix impression in notarial seal which shall include: (1) Notary's name exactly as it appears on notary certificate of appointment; (2) words “notary public” and “Connecticut”; and (3) “My Commission Expires” with commission expiration date following. If notary does not utilize notarial seal or stamp words “notary public” and “My Commission Expires” shall be typed or printed legibly by notary near notary's official signature. (§§ 3-94f–3-94k).

Liability.

Notary public shall be liable to any person for all damages proximately caused to that person by notary's official misconduct. Employer of notary shall be liable to any person for any damages proximately caused to that person by notary's official misconduct related to employer's business if employer directed, encouraged, consented to, ratified or approved notary's official misconduct. Employer of notary shall also be liable to notary for all damages recovered from notary as result of official misconduct that was coerced by threat of employer if threat was made in reference to particular notarial act or implicitly by employer's previous actions. Employer shall also be liable to notary for damages caused by demotion, dismissal or other action resulting from notary's refusal to commit official misconduct. (§ 3-941).

Powers of Secretary of State.

Secretary may deliver written official warning and reprimand to notary as result of such notary's official misconduct or on any ground for which application for employment as notary may be denied. Lapse of appointment as notary shall not stop or preclude any investigation into such notary's conduct by secretary. Within 30 days after resignation, revocation or suspension of notary's certificate of appointment secretary shall notify all town clerks within state of such resignation, revocation or suspension. (§ 3-94m).

Powers.

Notaries may administer oaths (§ 1-24), take acknowledgments on deeds with or without his seal (§ 47-5a), take depositions (§ 52-148c), issue subpoenas to deponents (§ 52-148e), and at request of Commissioner appointed to take testimony, may issue subpoenas or capias, and on failure of witness to appear and testify, may commit him to prison (§ 52-155).

Notary may exercise functions of office at any place in state. (§ 3-91).

Notarial seal is normally sufficient evidence of his official capacity. (38 Conn. 230).

Certificate of authority and official acts of notary may be given by clerk of town where notary resides or is employed. (§ 3-92). Fee $10 for recording commission and oath of notary; $2 for certifying under seal to official character of notary. (§ 7-34a[a]).

Fees.

Fee for any act performed by notary in accordance with provisions of general statutes must not exceed $5, plus additional 35¢ for each mile of travel. (§ 3-95). For taking acknowledgment of any instrument or signing and issuing subpoena or capias, 25¢; for administering oath out of court, 10¢. $2 fee is charged by superior court for recording certificate and oath, and for certificate of authority. (§ 52-259[a]).

Commissioners of deeds for other states, District of Columbia, and any U. S. territory, are appointed by Governor for term of five years from date of commission. (§ 4-21). Before exercising powers Commissioner must file with Secretary an affidavit of faithful performance of duties. He has power to take acknowledgments of deeds and other instruments required to be acknowledged, administer oaths or affirmations, examine witnesses and take depositions for use in courts of state. (§ 4-21).

Officers of U. S. Armed Forces, in active service, may take acknowledgments. (§ 1-38). See topic 10.01 Acknowledgments.

Legal officers and officers of rank of Lt. Comm. or Major or above may administer oaths to persons serving in armed forces and their spouses. (§§ 1-24; C.G.S. 3-91).

Veterans of U.S. Armed Forces may file military discharge document with town clerks to assist in determining eligibility for benefits. (§ 1-219).

10.04 RECORDS:

Town clerks have charge of records relating to real property. (§§ 7-24; C.G.S. 7-25).

For records maintained by public agency, all persons shall be allowed to inspect, copy, and receive copy of such records according to statute. (§ 1-210[a]).

Municipality may store original documents off-site it statutory requirements are met. (§ 7-35a).

Filing Under Commercial Code.

Uniform Commercial Code governs most personal property records with respect to security interests and personalty which are filed with Secretary of State (30 Trinity Street, UCC Division, Hartford, CT 06106), except motor vehicles subject to Uniform Certificate of Title and Anti-Theft Act which are filed with Commissioner of Motor Vehicles, and fixtures which are filed with Town Clerk. Fees for filing with Secretary of State are as follows: Financing statements, $25; Statement of Continuation, Partial Release, Assignment, (UCC-3), $25, Termination Statement (#3 copy of Original UCC-1), $25; Request for Information (UCC-11), $25; Request for Copies (first three pages), $5, each additional page, $5; Certification (additional fee), $5; financing statement covering timber to be cut or covering minerals or the like, including oil and gas or accounts subject to subsection (5) of § 42a-9-402 or when financing statement is filed as fixture filing and collateral is goods which are or are to become fixtures, $6 in addition to appropriate filing fee; Bulk Transfer—Notice of Affidavit of No Creditors, $20; Bulk Transfer—Schedule of Property and List of Creditors, first two pages, $25; Lien Notice, $25, Copy, $20, Release, $25; Notice of Attachment, $25; Releases of Attachment, $25. (§ 42a-9-403). Submit all fees for different types of transactions on separate checks.

Inspection of Statements filed with secretary of state, $25 per debtor filed in alphabetical index. (§ 42a-9-403).

Recordable Instruments.

Conveyances of land, mortgages, assignments and liens on real estate must be recorded with the clerk of the town in which the land lies, in order to be effectual against any other person than the grantor and his heirs (§ 47-10), and same is true of leases for more than one year or which provide for renewal thereof or option to purchase real estate involved (§ 47-19). Defectively executed deeds, land sale contracts and other instruments creating equitable interest in land, in which land is adequately described, may be recorded, and thus be notice of equitable interest created. (§ 47-17).

Validation of Acts and Deeds.

No assessment list completed prior to effective date of act will be deemed invalid because assessor failed to perform certain enumerated duties and tasks with respect to the list.

No assessment list completed prior to effective date of act will be deemed invalid because board of tax review or its member(s) failed to perform certain enumerated duties and tasks with respect to the list. No tax lien with certificate recorded prior to effective date of act will be deemed invalid due to certain enumerated acts or omissions of municipal officials and/or employees. Commissioner may use electronic signature on tax lien certificate. (§ 12-35b).

No vote or action fixing tax rates providing discounts for early payment, nor collection proceedings thereunder will be deemed invalid.

Related legislation pertaining to tax assessment/collection errors and omissions. (§§ 8-8; C.G.S. 12-121f; C.G.S. 12-173; 45a-166; C.G.S. 47-36aa; C.G.S. 47-222).

Lis Pendens.

Notice of lis pendens may be recorded in actions affecting real property. (§ 52-325). Notice of lis pendens prohibited if based on allegation of illegal, invalid, or defective transfer of real estate interest unless court claim concerning such transfer contains date of challenged transfer and transfer occurred fewer than 60 years before court claim. (§§ 52-325, et seq.). Notice expires after 15 years unless rerecorded. (§ 52-325e). Certain railroad conveyances must be filed with Secretary of State. (§ 16-59).

In addition, the following instruments affecting title to land must be recorded in office of town clerk for town where land lies: probate certificate of freedom from claim for succession taxes in case of joint ownership of real property (§§ 12-363; C.G.S. 12-364); certificate of change of name of person or corporation (§ 47-12, 13); certificate of attachment (§§ 7-30; C.G.S. 52-285); certificate of judgment lien (§§ 52-380a; C.G.S. 49-46a); certificate of garnishment of mortgage debt (§ 52-346); certificate of tax lien (§ 12-173); certificate of foreclosure (§ 49-16); certificate of satisfaction of judgment of foreclosure (§ 49-21); certificate of mechanic's lien (§§ 49-34; C.G.S. 49-39); certificate of appointment of conservator (§ 45a-658); certificate of taking land by appraisal (§ 47-15). Liens in favor of U.S. may be recorded. (§§ 49-36; C.G.S. 49-32). Development maps may be filed. (§ 7-34a[a]). Public service companies must file any maps prepared in connection with acquisition of any interest in real property. (§ 16-50a). Electric light, water, gas, power and railway company mortgages may be recorded with Secretary of State instead of with various town clerks. (§§ 16-59; C.G.S. 49-5).

See further, as to other instruments which must be filed or recorded, categories Business Organizations, topics Corporations, Partnerships, subhead Limited Partnership; Business Regulation and Commerce, topic Banks and Banking; Debtor and Creditor, topic Liens; Insurance, topic Insurance Companies; Intellectual Property, topic Trademarks and Tradenames; Property, topic Landlord and Tenant.

Requisites for Recording.

Instruments that must be recorded on land records must be signed by grantor with his own hand or with his mark with his name thereto annexed, or by his attorney, and attested by two witnesses with their own hands and acknowledged by the grantor or his attorney to be his free act and deed. (§ 47-5). Alternatively, one may comply with Uniform Real Property Electronic Recording Act as enacted. (§§ 7-35aa – 7-35gg, am'd PA 09-224, § 2). Any person whose social security number appears on document to be recorded on land records may expunge number prior to recording document. (§ 7-27b).

Recording Fees.

$10 for recording first page of statutory form warranty deed, quit claim deed, mortgage deed, or assignment of mortgage together with $2 if conveyance for consideration. $5 for each additional page of such documents. $1 for each marginal notation of assignment of mortgage. (§ 7-34a[a]). For each page or part thereof of other documents $10 for first page and $5 for subsequent page or part thereof. (§ 7-34a[a]). Page must not exceed 8½ x 14 inches. $1 additional for any document without typed, printed or stamped names of persons executing, witnessing or acknowledging instrument; $5 additional where no current mailing address; $5 for filing survey map; $5 for indexing survey or map ($15 if subdivision map); and $5 for filing any other document. (§ 7-34a[a]). Additional $5 fee is charged for recording certain documents with respect to which data must be submitted to state tax commissioner. (§ 7-34a[a]). $10 fee for recording commission and oath of notary public; $2 for certifying under seal to official character of notary. (§ 7-34a[a]). In addition to above, town clerks receive additional fee of $3 per document recorded. (§ 7-34[a][d]).

Foreign Conveyances or Encumbrances.

A conveyance, mortgage, release of mortgage or lien of real estate located in Connecticut, or any power of attorney authorizing another to convey any interest in Connecticut land, executed and acknowledged in another state or territory in accordance with the laws of that state or territory or in accord with laws of this state is valid. (§ 47-7).

Effect of Records.

Land records constitute constructive notice. (109 Conn. 433, 146 A. 843). Conveyances, mortgages, assignments, and other instruments affecting title must be recorded in order to be valid against subsequent purchasers or encumbrancers, and one who relies in good faith upon record title apparently complete is protected against any claimed interests not of record of which he has no notice. (117 Conn. 558, 169 A. 192). Time of recording, in most instances, determines priority of claim, but deed recorded in reasonable time after delivery prevails over attachment made after delivery but prior to record. (40 Conn. 83).

Transfer of Decedent's Title.

In case of death of owner, mortgagee, or lienor of real estate situated in Connecticut, administration of estate, either domiciliary or ancillary, is necessary to clear title of his heirs or devisees. Executor or administrator must, within two months after qualification, file with town clerk for town where real estate is situated certificate stating death of owner, his residence and whether he left will. (§ 45a-205). After completing settlement of estate, executor or administrator must obtain from probate court certificate of devise or descent, describing land and probate proceedings with reference thereto and method by which land was divided, set out or descended to persons entitled thereto, which certificate must be filed with town clerk for town where land lies within one month after acceptance of final account. (§ 45a-450).

Vital Statistics.

Records of births, upon affidavit of mother or father, deaths and marriages are filed in office of registrar of vital statistics of town where they occur. (§ 7-42). Statutes govern contents, indices, etc., of records. (§§ 7-36, C.G.S. 7-45). Duties of registrar of vital statistics. (§ 7-38). No fee required for filing; fee of $15 for certified copy of certificate of birth and $15 for certification of birth registration. (§ 7-74). Such fees not required of state or federal agencies. Fee for marriage license, $10 plus $20 surcharge. (§ 7-73). Certified copy of death certificate, $10. (§ 7-74[b]). Burial or removal permit, $3. (§ 7-73). Physicians assistants and nurses may sign death certificates. (§ 7-62b).

Establishing Birth Records.

Any adult, or guardian of person of any minor, for whose birth no certificate is on file, may, with two other persons having knowledge of facts, make affidavit as to facts required, which are as follows: name, place and date of birth, sex, name of father, maiden name of mother, age, color, residence and birthplace of each of parents, occupation of father, number of child, name and address of medical attendant, and any other information required by State Department of Health. Affidavit must be filed with town clerk in town of birth, who thereupon prepares certificate, or if registrar finds affidavit unsatisfactory, probate court will, on hearing after application, order registrar to issue certificate based on facts found by probate court. (§ 7-57). No certificate may contain any reference to illegitimacy. (§ 7-42).

As to birth certificate in adoption cases, see category 14 Family, topic 14.01 Adoption.

Medical records must be disclosed to patient or representative with authorization. (§ 19a-490a). Fee for copy of records limited. (§ 19a-490). Limitations on disclosure. (§ 17a-548).

Electronic Records.

New Act re: use of electronic records; signatures by government; includes definitions, descriptions of record categories, authorization and promulgation of regulations. (§ 1-266, et seq.).

Disclosure of Individuals' Photographs and Images by State Agencies.

New act prohibits disclosure of individual's photographs or images by state without individual's written consent except under certain limited circumstances. (§ 1-17a).

Freedom of Information Act.

Amendments concerning information disclosed and persons to whom it may be disclosed. (§§ 1-210[b][d]; C.G.S. 1-210[b][5]; C.G.S. 1-210[b][22]-[24]; 4b-131[b]; § 1-212). Voicemail disclosure regulated. (§ 1-213).

10.05 SEALS:

All instruments executed by any person or corporation not having official or corporate seal, purporting and intended to be specialties or under seal, and not otherwise sealed than by addition of word “seal” or letters “L.S.” or in case of official or corporate seal, by impression of seal upon paper are deemed to be sealed instruments, and received in evidence as such (§ 52-179) but word “seal” or letters “L.S.” do not make instrument specialty unless instrument itself purports to be one (110 Conn. 413, 148 A. 367).

Corporation Seal.

Duly organized corporation has power to make and use common seal and alter same at pleasure.

Effect of Seal.

Presence of seal imports consideration, but real consideration may be inquired into. (97 Conn. 193, 116 A. 239). Contract under seal may be varied by parol agreement. (121 Conn. 163, 183 A. 887).

10.06 TORRENS ACT:

Not adopted in Connecticut.

10.07 VITAL STATISTICS:

See topic 10.04 Records.

10A EDUCATION

10A.01 BRAILLE LITERACY:

Dept. of Education must expend funds and provide resources for education of blind. (§ 10-295).

Governor shall appoint Executive Director of Board of Education and Services for Blind who meets statutory requirements. (§ 10-294). Requirements for members of Board of Education and Services for the Blind. (§ 10-293). Board of Education and Services for Blind shall provide certain services for blind and visually impaired children and must notify Dept. of Motor Vehicles of blind individuals. (§§ 10-298, C.G.S. 10-293, C.G.S. 10-294, C.G.S. 10-294a, C.G.S. 10-295-296, C.G.S. 10-298a-b, C.G.S. 10-306).

10A.02 COMPUTER TRAINING:

At least 15 hours of continuing education required for certified employees of local and regional boards of education shall be in computer training—unless employees can demonstrate technology competency based on state-wide standards. (§ 10-145b[c][1], am’d PA 09-1, § 2). In-school access to information technology. (§§ 4d-85, C.G.S. 10-262n[a], C.G.S. 10-283[a][1], am’d PA 08-169, § 26).

10A.03 EMPLOYMENT DIVERSITY:

Each local or regional board of education must develop and implement written plan for minority staff recruitment. (§§ 10-220[a]; C.G.S. 10-4a[3]).

Teachers.

Employment.

If notified on or after July 1, 2000, tenured teacher may also be considered for termination for incompetence based on teacher guidelines § 10-151(b). (§ 10-151[d]). Board of Education's failure to establish and follow procedures for teacher evaluations is subject to grievance procedures in collective bargaining agreements. (§ 10-151b[a]). Nationally board-certified teachers with specified educational experience qualify for Connecticut certification. (§ 10-145b[k], am'd PA 09-1, § 2).

Any worker placed in school who has direct student contact may be required to submit to state and national criminal history record checks. (§ 10-221). State Board of Education shall periodically conduct criminal history checks. (§ 10-221d, am'd 09-1, § 8). Teaching certificates may not be issued or reissued if applicant convicted. (§ 10-145, am'd PA 09-1, § 5).

School Violence Prevention Program; penalties for use or threatened use of physical violence in or on real property of private or public elementary or secondary school or school sponsored activity (§ 46b-133e); conditions for suspension of prosecution; counseling; prosecution; and violence prevention program application for participation and monitoring (§ 54-56j).

Establishment of alternate route certification program for school administrator, superintendents and early childhood teachers. (§ 10-155d).

State Board of Education may issue temporary international teacher permit in subject shortage area specified in § 10-8b upon request of school board. (§ 10-145k).

Youth Future Committee.

Establishment of youth futures committee organized to develop guidelines for: (1) Delivery of services relating to health, safety and education, (2) to improve communications between agencies, and (3) to assess existing funding resources, networks and investment returns. (PA 06-182, § 1). Youth policy council established to continue work and implement recommendations of Youth Futures Committee. (PA 08-3, §§ 1, 2).

Joint approval of international cooperative agreements by State Board of Education and Board of Governors of Higher Education required by institutions of higher education. (§ 10-220a[d]).

Graduate of national corps of teachers may be employed in public schools in Bridgeport, Hartford and New Haven if position is elementary or secondary level, no certified and suitable teacher is available, and individual meets enrollment and minimum competency requirements. (§ 10-145).

Coaches.

Boards of education terminating or declining to renew contracts of athletic coaches who have held same position for three or more years are required to give notice and allow appeal of decision in manner boards prescribe. Coaches can still be terminated at any time for immoral misconduct or insubordination. (§ 10-222e).

Wages.

Dept. of Social Services to develop initiatives within available funds to increase wages to child day care providers to further education. (§ 176-733).

Teachers' Retirement System.

Teachers must be properly certified to receive credits in teachers’ retirement system. (§ 10-183rr).

Teachers may purchase credited service pursuant to schedule to receive retirement benefits. (§ 10-183e). Former teacher receiving retirement benefits may be re-employed by local board of education. Upon approval by board, former teacher will be eligible for health insurance. (§ 10-183v).

Bilingual Education.

Each school that is required to provide bilingual education must provide teachers and instructors with information on second language acquisition. (§§ 10-145a, am'd PA 09-1, § 1; C.G.S. 10-220a[a]). Certification requirements for bilingual educators. (§ 10-145h[d], am'd PA 09-1, § 4).

Literacy Training.

Professional certification curricula for teachers must include literacy training instruction. (§ 10-145a).

Educational Budgets.

If town fails to approve educational budget before end of its fiscal year, it must pay proportionate share of town's appropriations to school district until new budget is approved. (§§ 7-405, C.G.S. 10-51[a]). Election referendum procedures. (§§ 7-405, C.G.S. 9-369b, C.G.S. 9-371b, C.G.S. 10-51). Appropriations for reserve fund for capital and nonrecurring expenditures may be made from estimated surplus in end of year operating funds. Unexpended portion made for project or acquisition shall revert back to fund. Board may terminate appropriations if unforeseen circumstances render project or acquisition impossible. (§ 10-51[d]). Board of Education may create reserve fund for employee sick leave and severance benefits. (§ 10-51b).

Funding for Tribal Agency—Placed Children.

State shall reimburse school districts for costs associated with children placed by tribal government in same way it reimburses those placed by State agencies. (§§ 10-76d[e], C.G.S. 10-76g[a], C.G.S. 10-253).

Education Grants.

Act concerning requirements for towns, local boards of education and individuals to obtain grants and aid concerning education from state in various subject areas. Committees and officials are designated to oversee various grant applications and administration. (§§ 4d-80; 4d-82). Grant programs for after-school programs developed and monitored. (§ 10-16x). Commission has discretionary authority to submit application for universal service funds on behalf of each local and regional board of education and public library. (§ 4d-82[b]). See also changes and additions to State Teachers' Retirement System. (§§ 10-183b, 10-183rr; C.G.S. 10-183g; C.G.S. 10-183j; C.G.S. 10-183n; C.G.S. 10-183t; C.G.S. 10-183ii; C.G.S. 10-183oo; C.G.S. 10-183pp; §§ 10-183c, 183b, 183e[c], [g], [m], [n], 183g, 183k, 183jj[e], 183n, 183t[d]). Grant programs to include certain magnet school programs. (§ 10-74d). Creation of Connecticut Student Loan Foundation to assist persons in meeting post-secondary education expenses. (§ 10a-201). Connecticut Student Loan Foundation shall enhance, expand, and improve education financing programs and services in conformance with current education loan and capital market practices. (§§ 10a-202, 10a-203[a]; 10a-204; 10a-206, 10a-210–10a-211). Creation of Credit Union League of Connecticut Student Loan Program. (PA 09-110). Technical changes to education grant statutes. (§§ 10-76f[h], C.G.S. 10-262[f][15][16]; C.G.S. 10-262[f][31], C.G.S. 10-262l[a], C.G.S. 10-16p[d]). Boards of education shall provide or pay costs for student to receive agricultural science and technology education. (§ 10-64). Requirements and procedures for obtaining grants for towns in financially disqualified districts. (§ 10-262h[a][6]). Grants established to promote collaborative research applications with industry. (§§ 4-124ff[b], C.G.S. 4-124hh, C.G.S. 4-124ii). Special consideration to grant applicants for use of regional educational service centers/joint purchasing agreements of instructional or other supplies, testing materials or food. (§ 10-66o). Grant funds available to educational service centers providing applicable summer school education programs for interdistrict magnet school students. (§ 10-264l[c]). Minimum expenditures for non-forfeiture of public school funding. (§ 10-262j[a]). Competitive grant program established pursuant to subsection (a) must provide up to 2% of authorized bond funding for regional vocational-technical school system. (§ 10-4h[a]). Computation of grants for projects involving turn-key purchase per § 10-282(20) for facility used for school purposes. Percentage cap on eligible grant assistance to fund construction change orders. Such change orders must be submitted to Commissioner of Education. (§ 10-286). Limitations imposed on reimbursement for authorized school building projects eligible for grant funding. (§ 10-283[a][2]). Progress report must be submitted to Dept. of Education by priority districts indicating progress toward reducing reading achievement gap when receiving grant funds pursuant to subsection (d). (§ 10-265m[d]).

School Readiness Programs.

Dept. of Education, and Commissioner of Social Services, and other state and local agencies to coordinate and develop network of school readiness programs including pre-school and head start programs. (§§ 10-16o–10-16r, C.G.S. 10-16u). School readiness program staff must have at least nine credits of early childhood development classes from approved, accredited academic institution. (§ 10-16p[b]). Requirements, qualifications, and costs related to school readiness programs (§§ 10-14h, C.G.S. 10-14n, C.G.S. 10-16p[a], [b], C.G.S. 10-16q, C.G.S. 10-16r[a], C.G.S. 10-16s, 10a-194h[c], C.G.S. 10-285a[e], C.G.S. 10-285a[h]); development of personal reading program for students requiring remedial assistance based on mastery test performance (§ 10-265l).

Director of school readiness program may administer medication to children enrolled in program in accordance with State Board of Education regulations. Director is not liable for personal injuries caused by such medication administrator, except in cases of gross negligence. (§ 10-212a[a][3]).

School Building Construction.

In case of new school construction, extension or replacement, town or regional board of education and building committee shall provide for Phase I environmental site assessment. (§ 10-291). Dept. of Education may not approve any school building projects that do not comply with radon and minimum roofing standards. (§ 10-291[b]).

Board or any issuing agency or underwriter may provide policy or policies of group life insurance to insure repayment of loans made or guaranteed by corporation. (§ 102-204[1]).

Standard of contractual relationship between any school district and consultants providing architectural services for c. 173 funding; restrictions on disclosure of information; grant reduction penalty. (§ 10-290e). Dept. of Education to develop standardized construction contracts for use by school districts. (§ 10-29f). Vocational-technical school building projects-related person restriction imposed on architects and construction managers. (§ 10-283b[b]).

Educational Support Orders.

Court may require parent to provide support for children to attend up to total of four years at institute of higher education. (§ 46b-56c).

Educational Opportunity For Children of Military Families.

Interstate Compact on Educational Opportunity serves to remove barriers, improve and facilitate access to education for children of military families. (§ 10-15f).

Pledge of Allegiance.

Time shall be reserved each day for students to recite “Pledge of Allegiance”. (§ 10-230).

Bullying in Schools.

Boards of Education must create and implement policies for reporting, investigating, documenting and responding to acts of school bullying or grant money will be withheld. (§ 10-222d).

School Nutrition, Health and Fitness.

Boards of Education must require schools to offer: 30-minute periods of exercise for elementary school students and 20-minute lunch periods offering nutritious meal options. (§§ 10-221o, C.G.S. 10-221p). Dept. of Education shall develop guidelines for addressing physical health needs of students. (§ 10-203a). Limitation on type and size of beverages sold to students. (§ 10-221q). Development of nutritional standards for food offered for sale to students. (§ 10-215e; § 10-215f). Establishment of In-Classroom School Breakfast Program providing grant funding to ten severe need schools, application process, and award criteria. (§ 10-215g). Establishment of school to farm program to facilitate and promote sale of Connecticut-grown farm products to educational institutions and related operational duties of Depts. of Agriculture and Education. (§ 22-38d).

Nursing Education.

Establishing Connecticut nursing incentive program to be administered at selected community and technical colleges to encourage entrance into nursing profession. (§ 10a-19c). Pilot family nurse practitioner training program established. (§ 17b-32).

Nursing Schools.

Nursing faculty incentive program will provide grants, within available funds, to higher education institutions that work with hospitals to expand nursing education and/or to encourage licensed nurses to serve as full or part-time faculty at these institutions. (§ 4-124ee).

Private Occupational Schools.

Defined. (§ 10a-22a). Letter of credit requirements for private occupational schools. (§ 10a-22c, am'd PA 09-99, § 2). Evaluations (§ 10a-22b, am'd PA 09-99, § 1). Periods of authorization. (§ 10a-22d, am'd PA 09-99, § 3). Written notification required prior to closure. (§ 10a-22m). Maintenance of school records. (§ 10a-22n).

Vocational Schools.

Dept. of Education to conduct study on relationship between admissions scores and performance in vocational school system. Dept. shall periodically report results from such study and provide report outlining study data and procedures used. (§ 10-95m). Achievement goals for vocational technical schools to be established for measuring students. (§ 10-95).

High School Graduation Requirements.

Graduation requirements for high school students, requiring that each student have total of 20 credits to graduate from high school. Students are required to obtain specified minimum number of credits in certain subject areas specified in statute. (§ 10-221a). Local or regional board of education may award high school diploma to World War II veteran if individual left high school to serve in armed forces. (§ 10-221a[b]).

Boards of Education must specify basic skills required for graduating classes beginning in 2006 and provide assessment tools, including mastery exam, to test skill competency. Board must also develop courses of study to help students reach goals by graduation. (§ 10-223a).

Doctoral Degrees.

Doctoral and post-graduate degrees for Connecticut state institutions of higher education governed by statute. (§ 10a-149).

Mastery Test Exemptions.

Exemption applies to all special education students except when individual student's placement team determines that alternate assessment is appropriate. (§ 10-14g).

Special Education.

Services recommended by planning and placement teams and certain licensed practitioners may be reimbursed by Medicaid. (§ 10-76d[a]). Each board of education must provide professional service to identify children in need and to prescribe programs; no child may be required to obtain prescription as condition of attendance. (§ 10-76d[a][1]). Local boards of education may arrange for special education services in other school systems or private schools if educational plan is in place. (§ 10-76d[d]). Hearing requests by parents, guardians, surrogates or other interested parties must be made in writing. (§ 10-76h). Advisory council for special education to oversee hearing requests. (§ 10-76i[a]). If parents or guardians of child requiring special education cannot be identified, child shall become ward of State and surrogate parent shall be appointed. (§ 10-94g[a]).

Vaccination.

Effective fall of 2002, each public or private college or university in Connecticut shall require each student residing in campus housing to be vaccinated against specified illnesses; each public or private college or university shall provide information about meningitis to all prospective students. (§ 10a-155b). Department of Education shall provide information to local and regional boards of education regarding meningococcal meningitis. (§ 19a-7l, am'd PA 09-11, § 4).

In-State Tuition.

Out-of-state students classified as in-state students provided certain requirements are satisfied. (§ 10a-29).

Tuition for Military.

Active duty military stationed in Connecticut are entitled to in-state tuition. (§ 10a-29). Qualified veterans may be applicable for tuition waivers at Connecticut State University System. (§ 10a-77, am'd PA 09—159, § 4; § 10a-99, am'd PA 09-159, § 5; § 10a-105, am'd PA 09-159, § 6).

10A.04 FREEDOM TRAIL:

Connecticut Commission on Arts, Tourism, Culture, History and Film must recognize, document, and mark sites commemorating slavery abolition in consultation with Amistad

Committee of New Haven. (§ 10-320e).

10A.05 HIGHER EDUCATION:

Procedures that Univ. of Connecticut must follow in borrowing money for health center projects. (§§ 10a-114a, 10a-186a[d]). Connecticut public universities shall develop plans to increase faculty members. (§ 10a-154c). Creation of early childhood education certification opportunities for teachers. (§ 10a-19d). Commissioner of Higher Education may investigate regulatory violations and assess administrative penalties. (§ 10a-34a). Commissioner of Higher Education may seek injunction to prevent regulatory violations. (§ 10a-34b). All higher education institutions must prepare uniform campus crime report and have emergency response plan. (§ 10-55a).

10A.06 INTERNATIONAL STUDY:

State shall encourage students, teachers, administrators, etc. to participate in international studies and exchange programs to advance cultural awareness. Commissioner of Education shall establish international education advisory committee to explore international learning opportunities and make recommendations for expansion of international education. (§ 10-27). State Board of Education shall encourage and establish criteria for local boards of education to create sister school partnership programs with foreign schools. (§ 10-27).

10A.07 NEW HIRES:

Dept. of Education to contact previous employers to obtain information and recommendations for new hires. (§ 10-222c).

10A.08 SPECIAL EDUCATION:

Identification of Children Requiring Special Education.

Each board of education must provide professional services to identify children needing special education and to prescribe appropriate programs. (§ 10-76d[a][1]).

Prescriptions.

No child may be required to obtain prescription as condition of attending school. (§ 10-76[a][1]).

Agreements With Other Boards of Education.

Local board of education may arrange for special education services in other school systems or private schools as long as educational plan is in place. (§ 10-76d[d]).

Hearing requests must be submitted in writing with copy to Dept. of Education. Such requests may be made by parent, guardian, surrogate parent or several other interested parties. (§ 10-76h[a][1], am'd C.G.S. 06-18, § 4).

Advisory Council for Special Education.

There shall be Advisory Council for Special Education which shall engage in hearing activities described in § 10-76h. (§ 10-76i[a], am'd C.G.S. 06-18, § 7).

Wards of State.

When parents or guardians of child who requires special education cannot be identified, child will be ward of state and commissioner shall appoint surrogate parent. (§ 1094g[a], am'd C.G.S. 06-18, § 8).

10A.09 STATE HISTORIAN:

Board of Trustees of Univ. of CT to appoint State Historian whose duties include editing public records and providing information to members of government. (§ 11-1d).

11 EMPLOYMENT

11.01 EMPLOYER AND EMPLOYEE:

See topic 11.02 Labor Relations.

11.02 LABOR RELATIONS:

Working conditions and wages are under supervision of Commissioner of Labor. (§§ 31-1–31-76m). Labor disputes are under supervision of Board of Mediation and Arbitration and State Board of Labor Relations. Fair employment practices are under supervision of Commission on Human Rights and Opportunities. (§ 460a-60, et seq.). Information and notices regarding carcinogens required to be posted by employer. (§ 31-40[d], [e], [f]). Employer required to notify employees of electronic monitoring; does not apply to criminal investigations. Civil fines up to $3,000 per offense. (§ 31-48d).

Workforce Development.

Office of Workforce Competitiveness shall submit a report by 10/1/02 recommending methods to generate sufficient number of workers to meet workforce needs. (§ 4-124w). By 9/1/03, career ladder programs for high school students seeking careers in areas experiencing workforce shortages shall be established. (§ 10-21f).

Office of Workforce Competitiveness (OWC) shall establish Innovation Challenge Grant Program to encourage partnership and collaboration between technology-based businesses and higher education institutions and vocational-technical schools to develop educational programs in emerging inter-disciplinary technological fields. Council of Advisers on Strategies for the Knowledge Economy is also created to advise OWC to promote industry-university partnership, and to set benchmarks and goals. (§ 4-124ff; see also § 124w). Connecticut New Opportunities Fund established for purpose of investing in seed stage and emerging growth companies in state. (§ 32-41v). State's economic development agencies and Univ. of Connecticut shall recommend plan to facilitate scientists and business people to find ways to apply research and new technologies. (§§ 32-716–32-718). Commissioner of Economic and Community Development may establish program to increase entrepreneurial potential in inner cities, and next generation manufacturing competitiveness enhancement programming. (§§ 32-9uu, C.G.S. 32-238). OWC shall establish program to develop film industry workforce in State. (§ 4-124uu).

Office of Workforce Competitiveness pilot program for qualifying individuals with minor children providing access to training to obtain and maintain employment. (§ 4-124tt).

Hours.

Eight hours of labor in any one day is a legal day's work unless otherwise agreed. (§ 31-21). No person is required to work for more than seven consecutive hours without 30 consecutive minutes for meal. Exemption from requirements possible if compliance is adverse to public safety, duties of position performed only by one employee, etc. Provisions do not apply to employees of board of education of any town or school district. (§ 31-51ii). No mechanic in state institution may work more than eight hours a day except in case of emergency. (§ 5-73). Contract for construction or repair of public building must provide that no person may work more than eight hours a day or more than 40 hours a week on such work, but in emergency Comptroller may suspend this limitation. (§ 31-57).

Employee in state institution, except one employed in professional capacity may work only an average of 48 hours per week during any six weeks period, except in case of unavoidable emergency. (§ 5-73). See also catchline Minors, Elders 66 or Over, Handicapped, Disabled Veterans, infra.

Licensed and registered nurses cannot be required to work overtime in hospitals. Refusal to work overtime is not grounds for dismissal. (§ 19a-490l).

Minors, elders 66 or over, handicapped, disabled veterans, not permanent salaried employees in executive, administrative or professional positions, normally may not work in any manufacturing or mechanical establishment more than nine hours in one day or 48 hours in calendar week, but under certain conditions exception may be made (§ 31-12), in mercantile establishment, not more than eight hours daily, nor more than six days weekly, nor more than 48 hours weekly, but here also Commissioner may make exception (§ 31-13). Hours in which above may work in public restaurant, dining room, barber shop, hair dressing or manicuring establishment, amusement or recreational establishment, bowling alley, shoe shining establishment, billiard or poolroom or photographic gallery are limited. (§ 31-18). Night work in manufacturing, mechanical or mercantile establishment by minors under 18 between 10 P.M. and 6 A.M. is forbidden unless Governor suspends this limitation or unless minor has graduated from secondary institution. (§ 31-14). Night work by minor in messenger service also is limited. (§ 31-16). Minors under 16 may not be employed in any manufacturing, mercantile, mechanical or theatrical industry, restaurant, bowling alley, shoe-shining establishment or barber shop (§ 31-23[a]), nor in certain hazardous employment (§ 31-24), nor in operation of elevator (§ 31-25). 15-year-old minors may be employed in mercantile establishment as baggers, stock clerks, cashiers, or as caddies or pro shop employees at golf courses. (§§ 31-23[b]; C.G.S. 10-193[a]). Hours strictly limited during school year. (§ 31-23[b]). Violations are subject to civil penalties (§ 31-69a, am'd PA 09-101, § 1) and to imprisonment (§ 31-15a).

Minor may not be employed in occupation pronounced hazardous by State Department of Health or Department of Labor and Factory Inspection unless 16 or over and either apprentice in bona fide apprenticeship course in manufacturing or mechanical establishment, vocational school or public school, or vocational or secondary school graduate. (§ 31-23[b]). Employer of minor must also obtain certificate from this Board. (§§ 31-23[c]1; C.G.S. 10-193). Statutes as to hours and conditions of minors apply to home workers. (§ 31-30). Minors under 18 may not work in tavern or other permit premises except package store. (§§ 31-81; C.G.S. 31-90a). Minors under 14 may not be employed in agriculture, and hours and conditions for minors under 16 employed in agricultural work are strictly regulated. (§§ 22-13; C.G.S. 22-14). Minors are precluded from employment in gaming facilities. (§ 53-343a).

Charitable Work.

State employees may accrue additional vacation time for each full year employee participates in Big Brother and Big Sister Programs. Eligibility for additional vacation time shall be determined. (§ 5-248j).

Career Ladder Programs.

Connecticut Career Ladder Advisory Committee created to promote enhancement of career ladder programs for occupations with projected workforce shortages. (§ 4-124bb).

Hazardous Conditions.

Private, state and municipal employees have right to act concerning hazardous conditions. (§ 31-40t). Public construction contracts over $100,000 must contain provision that workers have completed course on construction safety and health. (C.G.S. 31-53b).

Industrial Homework.

Person using residential building for manufacturing must obtain license from Commissioner (§ 31-29), and all homeworkers must obtain permits (§ 31-33). Terms and conditions of such work are regulated. (§§ 31-29 to C.G.S. 31-33).

Wages.

Except for hotel and restaurant industry workers, minimum wage will be no less than $7.40 effective Jan. 1, 2006 and no less than $7.65 effective Jan. 1, 2007. (§ 31-58); sunset provision, now permanent, allows hotels and restaurants "tip credit" towards minimum wage requirements for employees who regularly receive gratuities (§ 31-60[b]); or ½ of 1% more than highest federal minimum wage, whichever is higher. Industrial employees must be paid weekly wages earned within eight days of such payment: but upon application, labor commissioner may waive requirements as to any particular weeks and may permit less frequent but at least monthly, payments (§ 31-71i). If employee leaves voluntarily, he must be paid in full on next regular pay day, and if discharged, on next business day after discharge. Discrimination in amount of compensation paid an employee on account of sex is prohibited. (§ 31-75, am'd PA 09-101, § 2). Employer withholding wages because of express agreement as to notice before leaving is subject to fine. (§ 31-70). Employer may not deduct or receive refund as fee for severing or continuing employment (§ 31-73) nor may employer make discount or deduction from wages when they are paid at earlier time than that at which such wages would regularly have been paid (§ 31-74). Promissory notes to pay employer if employee leaves employment before certain date are prohibited as condition of employment. Agreements requiring employee to repay loans, observe conditions of sabbatical leaves, or comply with programs bargained for collectively are not prohibited. (§ 31-51r).

Regular deduction of specified amount for payment of union dues in accordance with contract between employer and employees or their collective bargaining agent is allowed. (§§ 52-361a; C.G.S. 52-361[g]).

Workers on construction, remodeling or repair of public building must be paid prevailing wage for same work in town where building is located unless total cost of all work is less than $200,000. (§ 31-53). All "persons", as opposed to all "employees", performing work on state-funded projects must be paid prevailing wages and be listed on certified payrolls. (§ 31-53). Standard wage rates created for employers that provide food, building, property or equipment services to state or state agency through contract or agreement. (§ 31-57f, am'd PA -09-184, § 4). Exemptions from payments of overtime. (§ 31-60).

Claim for wages due from corporation or partnership in receivership or from insolvent debtor for labor within three months of receivership or insolvency proceedings are preferred up to amount allowed pursuant to 11 USC 507(a)(4). (§§ 33-115; C.G.S. 52-512). In insolvent estates claim for wages due from deceased for work within three months of death are entitled to 4th priority. (§ 45a-392). Where unpaid wages of decedent are less than $5,000, employer may pay them directly to next of kin, physician, or funeral director under certain circumstances. (§ 45a-273).

For assignment of wages, see category 8 Debtor and Creditor, topic 8.01 Assignments.

Where Commissioner finds that any substantial number of workers in any occupation, other than domestic service or farm labor, are receiving less than reasonable wages, he may appoint a wage board to report on establishment of minimum fair wage rate of not less than the federal minimum wage per hour for that occupation. (§ 31-59). Board consists of equal number of representatives of employees, employers and public, has full powers of investigation, and reports minimum fair wage standard with reasonable differentiations as to type of work, employee, locality, etc. (§ 31-61). Upon acceptance of report by Commissioner and proper hearing after notice he issues appropriate order to carry report into effect. (§ 31-62). Person aggrieved by order may seek review in Superior Court. (§ 31-63). Orders may be reconsidered (§ 31-64) or modified

(§ 31-65). Any deficiency in wages paid below minimum fixed by order may be recovered in civil action by employee or by Commissioner as trustee for employee, and agreement to work for less is no defense. (§ 31-68).

Sales Representatives' Commissions.

When contract between principal and sales representative is terminated, sales representative is entitled to all commissions due on or before effective termination date, contract date, or 30 days after effective date of termination. Failure to do so will make principal liable for twice full amount of commission owed. Partial commission payment will not release obligation for payment of total sum due unless payment is pursuant to binding, final, written settlement agreement. (§§ 42-481–42-484).

Annual Adjustments To Prevailing Wages.

Each contractor awarded contract on or after Oct. 1, 2002, for construction of state highway or bridge, or construction, remodeling, refinishing, refurbishing, rehabilitation, alteration or repair of any public works project shall contact Labor Commissioner on or before July first of each year to obtain prevailing hourly wage and amount of payment or contribution paid or payable per mechanic, laborer or worker. (§ 31-55a).

Notice Period Pay.

No dismissed employee shall receive notice period pay or any other separation pay at rate exceeding dismissed employee's rate of compensation, at time of dismissal, for two weeks, or amount provided for in applicable collective bargaining agreement. (§ 5-240[c]).

Regional Workforce Development Boards.

Effective Oct. 1, 2002, board shall annually submit to Office of Workforce Competitiveness comprehensive performance measures detailing employment training activities funded by monies allocated to board. (§ 31-3k).

Apprentice Training Program.

Each person registered as apprentice with Labor Dept. on or after July 1, 2003, shall pay registration fee of $25. Labor Commissioner shall report to joint standing committees matters relating to labor and education and employment advancement, feasibility of establishing on-lien systems for registering apprentices and apprenticeship programs. (§§ 31-22r, C.G.S. 31-22s).

Non-Permanent State Service.

Persons employed by State as general workers shall be credited with work experience when applying for full-time State position in program support or technical services. (§ 5-209a).

Teachers' Retirement Benefits.

Qualification requirements for teachers (§§ 10-183e; C.G.S. 10-183f; C.G.S. 10-183g; C.G.S. 10-183h; C.G.S. 10-183i; C.G.S. 10-183jj); survivorship and monthly benefits (§ 10-183h). Employers must submit reports and information necessary for proper administration of teachers' retirement system by fifth business day of following month or be subject to interest assessment. (§ 10-183n). Participants in health benefit plans offered by Connecticut Teachers' Retirement System must be Medicare Part A participants. (§ 10-183t[a]).

Life Insurance.

Employer providing life, health, disability or retirement benefits may, with person's consent, purchase life insurance on their eligible employees or retirees. (§ 38a-291).

Medical records must be kept by employer for no less than three years following employee termination. (§ 31-128c).

Family and Medical Leave.

As of July 1, 1991 maximum leave for employees of employers with 75 or more employees, with family or medical reasons shall be 16 weeks of unpaid leave within any two year period. (§ 31-51kk, et seq.). Many provisions of Federal Family and Medical Leave Act adopted. (§ 31-51kk, et seq.). Employers denying employees sick leave under Family and Medical Leave Act are subject to penalties. (§ 31-51pp). Leave calculated under § 31-51ll. (§ 31-51ll, am'd PA 09-70, § 1). Family and medical leave requirements for municipal employees who are parties to civil unions or organ or bone marrow donors. (§ 31-51rr).

Leave for Canine Search and Rescue Teams.

Persons who are members of volunteer canine search and rescue teams may leave work to respond to calls without losing pay, vacation or sick leave time. (§ 5-249).

Drug testing of applicants and employees regulated. (§§ 31-51t–31-51aa).

Second Hand Smoke.

Statutory guidelines dictate smoking area restrictions. (§ 19a-342). Each employer with five or more employees shall prohibit smoking in any business facility except in designated smoking rooms. (§ 31-40q).

Privacy Rights.

State employees not required to disclose information or records concerning voluntary participation in employee assistance program sponsored or authorized by state. Except as permitted, no employee assistance program shall disclose information concerning employee's participation without employee's prior written consent. (§ 31-128i).

Debarment Reform.

No general contractor who enters into contract with state may award any work to any entity that is named on Labor Commissioner's disbarment list. (§ 31-53a).

Labor Unions.

No “right to work” legislation enacted.

Labor disputes may be submitted by parties to State Board of Mediation and Arbitration with written statements of grievances and complaints upon promise to stay at work without strike or lockout until Board renders decision, but such promise is not binding unless written decision rendered within ten days after investigation completed. No panel of said board may consider any claim that issue before panel is improper for arbitration unless party making claim has notified opposing party and chairman of panel of claim, in writing, at least ten days prior to hearing date, except panel may consider claim if it determines there was reasonable cause for failure to comply with notice requirement. (§ 31-97). In case of strike or lockout, actual or seriously threatened, Board must endeavor to effect settlement, and may inquire into causes of trouble and issue subpoenas. (§ 31-99). Powers and duties of Board in case of strike or lockout may be exercised or performed in case of dispute that has not reached strike or lockout stage, upon request of either party. (§ 31-95).

Picketing of residences is forbidden. (§ 31-120). No employer, except state or any political subdivision thereof, or employee organization involved in labor dispute shall hire any member of municipal police department in town in which dispute taking place for protection or other duties related to dispute during period of dispute. (§ 31-48c).

State Employee Collective Bargaining Procedures.

Parties may begin negotiating new contract 330 days before expiration of existing contract; party may initiate binding arbitration 60 days after negotiations begin; arbitrator's authority to waive deadline is eliminated; and Superior Court can vacate or modify reward reached by arbitrator. (§ 5-276a).

Occupational Licenses.

Any person, who engages in or practices work or occupation that requires license without license or apprentice permit, or willfully employs or supplies for employment, without license shall be guilty of Class B misdemeanor. Such violation is unfair or deceptive trade practice under § 42-110b(a). (§§ 20-341, am'd PA 09-153, § 2; C.G.S. 20-341[a]).

Act Protecting Displaced Workers.

Contractors or subcontractors who award or enter into contract to perform food and beverage services at Bradley International Airport are obligated to provide name of successor contractor to its employees at termination or nonrenewal service contract. Terminated contractor must provide successor contractor with names and employment information of all employees. Successor contractor must hand-deliver written offers of employment to terminated employees. (§ 31-57g).

Second Injury Fund.

Employer's mutual association may make payments without penalty or interest over five-year period for any outstanding assessment due Second Injury Fund. (§ 31-349g). Revisions regarding liability of fund, assessments, audits, penalties, settlement authority and collection and payment responsibilities of insurance carriers. (§§ 31-299b, C.G.S. 31-306[a][2], C.G.S. 31-306[c]-[d], C.G.S. 31-307a–31-307b, C.G.S. 31-310[a], C.G.S. 31-349g, C.G.S. 31-353, C.G.S. 31-354[a], C.G.S. 31-355, 38a-844).

Unemployment Compensation.

Unemployed person whose prior services fall within scope of § 31-222 et seq. is eligible for weekly benefits if: (1) He has made claim under § 31-240 and has registered for work at designated public employment bureaus; (2) he is able and willing to work, and is making reasonable efforts to get work; (3) he has earned from employer subject to provisions of Unemployment Compensation Act (§ 31-222, et seq.) at least 40 times his benefit rate for total unemployment during base period of his current benefit year as defined in § 31-230; (4) he has been totally or partially unemployed as defined in § 31-228 and § 31-229 for one week, called waiting week, during which, although eligible, he has received no benefits under any provisions of Act (§ 31-235). Use of alternative base period for computation of unemployment compensation benefits is extended. (§ 31-230). Individual disqualified from receiving benefits if discharged for committing larceny. (§ 31-236). Willful misconduct defined. (§ 31-236[a][16]). Employee may not be penalized or discriminated against for filing claim for benefits. (§ 31-226a). Employee eligible for benefits if voluntarily quits due to domestic violence, however employer's account not charged for claim. (§ 31-236). Eligibility of claimant with disability determined by § 31-325. Employers must notify current and prospective employees of employer's non-participation in unemployment compensation system. (§ 31-223a).

Self-sufficiency measurement established to assist in education, training and employment (§ 4-66e, am'd PA 09-9, § 1); Department Social Services to administer Employment Services Program for persons receiving benefits under Temporary Assistance For Needy Families Program (§ 17b-688e); assessment of eligibility and pilot programs for recipients (§§ 17b-689c; C.G.S. 31-3ee; 17b-688f); willful misconduct defined (§ 31-236[a][2]). Administrator of

Unemployment Compensation or its agent may entertain offers of compromise for contributions due from employers. (§ 31-266c).

Acquiring persons or businesses are prohibited from abusing employer's lower unemployment tax experience rating. (§ 31-223b).

See also category 22 Taxation, topic 22.04 Employment Taxes, subhead Unemployment Compensation Tax.

Unfair employment practices involving racial, marital status, age, sex, and mental, physical disability, genetic information or religious discrimination by employers, unions or others are prohibited. (§ 46a-60). Sexual orientation or civil union status discrimination prohibited. (§§ 46a-81a–46a-81b, am'd PA 09-13, § 14, am'd PA 09-209, § 25; 46a-81c–46a-81f; 46a-81g–46a-81r, repealed PA 09-13, § 20). Employers may not discriminate against crime victims and persons whose criminal records have been erased. (§§ 54-85b, C.G.S. 31-51i). Mental disability refers to person having disorder defined in most recent edition of American Psychiatric Association's ``Diagnostic and Statistical Manual of Mental Disorders''. (§ 46a-51). Commission on Human Rights and Opportunities has power to investigate such practices (§ 46a-82; §§ 46a-82a–46a-90a); hear complaints of persons aggrieved by such practices and issue cease and desist orders. Commission's powers defined. (§ 46a-54). Complaints must be filed within 180 days of alleged act of discrimination, except that any complaint based on § 4-61o(a) must be filed within 30 days. Orders may be enforced by injunction or otherwise, and person aggrieved by Commission order may appeal within 30 days after mailing of notice of final decision, to superior court for judicial district of Hartford-New Britain or judicial district wherein aggrieved resides. (§§ 52-48; C.G.S. 52-49). Commission must rule within 90 days of close of evidence. (46a-82c). Circumstances under which sexual harassment complaints may be disclosed in government employment. (§ 46a-70).

Commission composed of seven human rights referees appointed by governor for term of three years. (§ 46a-57). Human rights referees shall serve full-time and conduct hearings regarding discriminatory practice complaints. Within 20 days after filing of any discriminatory practice complaint, commission shall serve complaint upon respondent. (§ 46a-83[a]). Respondent shall file written answer to complaint under oath within 30 days of receipt of claim. (§ 46a-83[a]). Within 90 days of filing of answer commission's executive director, or designee shall review file including any response to respondent's answer. If executive director or designee determines that complaint fails to state claim for relief or is frivolous on its face, that respondent is exempt from provisions of chapter or that there is no reasonable possibility that investigating complaint will result in finding of reasonable cause, complaint shall be dismissed. (§ 46a-83[b]). Executive Director may grant complainant's request for release from CHRO Commission if complaint was dismissed pursuant to § 46a-83(b) and complainant requests reconsideration of dismissal or reconsideration and request has not been acted upon. (§ 46a-83a). If complaint is dismissed for lack of reasonable cause, complainant may request reconsideration of such finding within 15 days. (§ 46a-83[e]). If complainant does not request reconsideration, executive director shall issue release and complainant may, within 90 days of receipt of release from commission, bring action against respondent in Superior Court. (§ 46a-83a). If investigator makes determination that there is reasonable cause of discrimination, complainant and respondent shall have 20 days from receipt of notice of reasonable cause finding to elect civil action in lieu of administrative hearing. (§ 46a-83[b]). If commission investigator fails to eliminate discriminatory practice complained of within 50 days of finding reasonable cause, within ten days he shall certify complaint for hearing. (§ 46a-84). Commission may reopen any previously closed matter if complainant applies in writing to Commission within two years of Commission's final decision; standards for reopening matter may include: material mistake of fact or law; arbitrary or capricious finding; clearly erroneous finding; and new material evidence. (§ 46a-94a). Complainant may seek release of pending complaint from commission and file claim in Superior Court. (§ 46a-101). Any Superior Court action must be brought within 90 days of receipt of release of jurisdiction. Complainant and respondent jointly may request that complainant receive release from commission. (§ 46a-101a). Any Superior Court action must be brought within two years of date of filing of complaint with commission. (§ 46a-102).

Noncompete Agreements.

Certain employees, including broadcast industry employees, must not be required to enter into noncompete agreements by employer. Aggrieved employee may bring civil action. (§ 31-50a; § 31-50b).

Employment of Disabled.

Disabled persons not served by Dept. of Developmental Services and Mental Health and Addiction Services are eligible for employment opportunity program administered by Bureau of Rehabilitation Services of Dept. of Social Services. (§ 17b-666).

Whistleblower protection provided by § 31-51m, but action alleging violation must be brought within 90 days of discharge. Whistleblower protection applies to state departments and agencies, quasi-public agencies or employees of large state contractors (§ 4-61dd, am'd PA 09-185, § 2), public service companies, public holding companies, nuclear regulatory commission licensees (§§ 16-8a; C.G.S. 31-279). Connecticut Occupational Safety Health Act provides protections to whistleblowers. (§ 31-379). Whistleblower protection for health care employees. (§ 19a-498a).

Labor Relations Act gives employees the right of self-organization, to form, join or assist labor organizations, to bargain collectively, and to engage in concerted activities. (§ 31-104). It is an unfair labor practice for an employer (1) to spy upon employees' activities in the exercise of their rights; (2) to engage in blacklisting activities; (3) to interfere with formation or administration of any employee organization or contribute support to it by any means, except that employer may permit employee to confer with him during working hours without loss of time or pay; (4) to require employee or potential employee to join company union or to refrain from participation in labor organization of his own choosing; (5) to encourage membership in company union or discourage membership in labor organization by discrimination in regard to hire or tenure or any term or condition of employment, but employer may agree with labor organization to require membership therein as condition of employment if organization is representative of employees under Act; (6) to refuse to bargain collectively or discuss grievances with representative of employees, subject to provisions of Act; (7) to discharge or discriminate against any employee because he has participated in proceeding under Act; (8) to do any other acts which restrain, coerce or interfere with employees in exercise of their rights under Act. (§ 31-105).

The Board of Labor Relations supervises and regulates the method and procedure for selection of exclusive employee representative for purposes of collective bargaining. When petitioned, Board has power to investigate question of representation through agent, order elections, certify results. (§§ 31-106[b]; C.G.S. 5-275[a]; C.G.S. 7-471). When petitioned, Board has power of clarification or modification of existing unit. (§ 7-471). Board has power to prevent unfair labor practices, including power to hold hearings, issue findings, order cessation of unfair practices, to withdraw recognition or refrain from bargaining with company union, and order reinstatement with or without back pay, but Board may not require as condition of taking action or issuing order that employees on strike or engaged in any other lawful concerted activity shall discontinue strike or activity. (§ 31-107). Board may petition Superior Court for enforcement of its orders and for appropriate temporary relief or restraining order, Superior Court has exclusive jurisdiction to review final orders of board. (§ 31-109). Persons subject to National Labor Relations Act, Federal Railway Labor Act unless federal agency declines to assert jurisdiction, political subdivisions, charitable, educational or religious organizations and persons engaged in farming, are not “employees” under Act. (§ 31-101). Employees not included in collective bargaining units of state employees may file group appeal with Employees' Review Board regarding termination, layoff, or other grievances. (§ 5-202).

Willful interference with Board's functions or with employees' right to select representative is punishable by fine or imprisonment or both. (§ 31-111).

Injunctive relief in labor disputes is strictly limited (§ 31-113) and may be used only in certain cases. (§ 31-115). Liability of unions and union officers for unlawful acts of individuals is restricted. (§ 31-114). Injunction may not be made permanent unless plaintiff proves written notice to Commissioner of willingness to submit dispute to arbitration or mediation. (§ 31-117). Person aggrieved by issuance or denial of temporary injunction in labor dispute may appeal to Appellate Court on question of law. (§ 31-118).

Personnel Files Act.

Superior Court shall have jurisdiction to enter appropriate orders to enforce Personnel Files Act which requires employers to disclose subpoenaed documents during course of labor and employment investigations. (§ 31-128j).

Workers' Compensation Act (§§ 31-275–31-355a) is administered by Workers' Compensation Commission, 16 person board, one who serves as chairman (§ 31-276[a]). Employer-employee advisory board to assist chairperson. (§ 31-280a, am'd PA 09-104, § 31-286a[d]).

Persons Included.

Employee is any person employed, either within or without state, including municipal employees and members of General Assembly. But term excludes out-workers, casual employees, members of employee's family unless said family member's wages or salary are included in payroll upon which insurance premium is based, persons performing services around private dwellings not regularly employed more than 26 hours per week and corporate employees electing not to be covered by provisions of this Act and persons not resident in Connecticut but injured in state, unless person spends 50% or more of time in state or is working under contract of employment to be performed in this state (§ 31-275). State armed forces personnel must file claim only under State Workers' Compensation System. State Military Dept.'s authority over such matters has been repealed. (§§ 27-67, C.G.S. 31-275). Employer is not liable unless injury can be traced to employment other than through weakened resistance or lowered vitality nor for accidental injury due to habitual use of alcohol or narcotic drugs nor due to willful misconduct of employee. Policemen and firemen covered portal to portal. (§ 31-275). “Injury” deemed not to include: (A) Injury which results from voluntary participation in any activity of social or recreational nature such as athletic events, parties, picnics which employer pays some or all expenses of; (B) mental or emotional impairment not arising from physical injury or occupational disease; (C) mental or emotional impairment which results from personnel action (transfer, promotion, demotion, termination). (§ 31-275).

Employer is not liable for action in damages, the employee's exclusive remedy being under this Act. Common law may provide for damages for intentional tort by employer. Employer who fails to provide worker's compensation insurance or to adequately self-insure potential liability to workers may be sued. (§ 31-284). Each employer must either furnish Compensation Commission satisfactory proof of solvency and financial ability to pay injured employee, or insure his full liability. Willful failure to comply with this provision results in fine of not more than $1,000 for each failure. (§ 31-275). Parties, by agreement and with approval of Commissioner, may pro rate single, lump-sum payment over life expectancy of injured employee. (§ 31-302).

Construction design professional and his employees not liable for injury on construction project for which compensation is payable under this chapter, except for negligent preparation of design plans or specifications, or unless responsibility expressly assumed by contract. (§ 31-293).

Professional engineers who provide services in conjunction with state or national emergency shall not be liable for civil damages provided services have been provided with reasonable care and within professionally recognized standards. (§ 20-308a). Commissioner of Corrections shall make quarterly reports regarding worker's compensation claims to prison custodial staff. (§ 18-81t, am'd PA 09-39, § 1).

Any person, firm, association or corporation which suffers damages as result of competitive bid for project involving construction, repair, remodeling, alteration, conversion or renovation of building or structure not being accepted due to another person, firm, association or corporation knowingly violating provisions of c. 567 or 568 of general statutes, may bring action for damages in Superior Court. For purposes of action brought pursuant to this section, employee status shall be determined by applicable provisions of Internal Revenue Code of 1986, or any subsequent corresponding Internal Revenue Code of U.S. as from time to time amended. (§ 52-570e).

If principal employer has work done, which is part or process of his trade or business, on or about premises under his control, by contractor, or through him by subcontractor, he is liable to pay compensation to same extent as if work were done without intervention of such contractor or subcontractor. Principal employer does not have immunity from civil action to recover damages for personal injury or wrongful death unless he has paid injured employee or his dependents workers' compensation benefits. (C.G.S. 31-291). When worker temporarily lent to another by employer, latter under Act continues to be employer of such worker while he is so lent or hired by another. (§ 31-292).

When injuries are sustained under circumstances rendering employer liable under Act and some third person liable at common law, either employer or employee may sue third person, but must notify other in writing who may join in suit. Failure to so join suit abates action of nonjoining party. If employer and employee are thus joined in suit against negligent third person damages recovered go first to reimburse employer for compensation which he has paid or become obligated to pay and balance goes to employee. Compromise by either with third person does not affect rights of other unless assented to. Workers' compensation insurers, unions, and union members are immune from third party liability for failure to furnish safety inspections incident to providing workers' compensation insurance. (§ 31-293). Dependents of any deceased employee of Dept. of Correction injured in course of employment shall be paid compensation. (§ 31-275). Workers' compensation coverage may be available for mental or emotional impairment to police officer who uses deadly force or is target of use of deadly force while in line of duty. (§§ 31-275[16], C.G.S. 31-294h).

Injured employee must forthwith notify employer of fact of injury, and commissioner may reduce award proportionate to any prejudice sustained by employer by such failure. (§ 31-294b). No proceeding for compensation may be maintained unless written notice of claim is given within one year from date of accident or within three years of occupational disease symptom. If employer wishes to contest liability for injury, he must notify commissioner of this fact within 20 days of time he first has knowledge of injury or death. (§ 31-297). To contest liability for injury or death which occurs on or after effective date of this Act, employer must notify commission within 28 days of receiving written notice of claim. Provided employer commences payment of compensation on or before 28 days of notice of claim, employer shall have additional period of one year from notice to contest liability. (§ 31-294c). However, if death has resulted within two years from date of accident or symptom, dependent of decent employee may make claim within said two year period, or within one year of death. (§ 31-294b). Notice to employer must give name and address of injured party, date and place of accident, and nature of injury or disease. On notice of injury, employer is required to provide competent medical care from list of approved physicians maintained by commission. If employer fails to do this medical care may be obtained by employee and charged to employer. Medical reports must be furnished employer, employee or his attorney. If employee refuses medical care, his rights under this act are suspended during such refusal. (§§ 31-294d–31-294e).

No compensation is payable under this act for total or partial incapacity of three days or less. If incapacity is more than three but less than seven days, compensation begins at expiration of just three days. If incapacity is more than seven days, compensation runs from date of injury. Day of injury does not count as day of incapacity and employee must be paid full wages for that day. (§ 31-295).

If employer and employee reach settlement agreement, such must be approved by commissioner. Employee's request for hearing on proposed discontinuance or reduction of benefits is given priority over requests for hearings on other matters. If commissioner finds that employer reduced or discontinued any payments without approval, employer shall be required to make such payments with interest, at rate of 1¼% per month or portion thereof. (§ 31-296). If no agreement is reached, commissioner may be notified by either party. Commissioner then schedules hearing on matter within ten days' notice to both parties. Hearings are held in town where employee lives, if possible. (§ 31-297). Hearing is informal and both parties and/or their attorneys may appear. Commissioner not bound by rules of evidence or procedure. No fees are taxed, but commissioner must allow subpoenaed witnesses usual fees and traveling expenses to be paid by person in whose behalf subpoena was issued. If liability or extent of disability is contested and employee prevails, he may recover reasonable fees paid physicians or surgeons for X-rays, medical tests, and testimony and 1/5 of weekly compensation (as computed under Workers' Compensation Act) for each day of attendance at hearing. (§ 31-298). As soon as possible but no later than 120 days after conclusion, commissioner must notify each party of his findings and award. Appeal therefrom must be taken within 20 days. If party files motion after Commissioner's finding of decision, 20-day period for filing appeal begins on date such motion is decided. (§ 31-301[a]). If no appeal, execution may be made as in Superior Court actions. Payments due from voluntary agreement, award or second injury fund must be paid on or before tenth business day after date of agreement or award. (§ 31-300). Where commissioner finds adjustment of claim has been unduly delayed, he may add interest at rate prescribed in § 37-3a and reasonable attorney's fee. If payments of compensation are unduly delayed, commissioner may add interest at rate of 12% per annum and reasonable attorney's fee. (§ 31-300). Payments not begun within 35 days after filing of written notice are presumed unduly delayed unless notice to contest is filed in accordance with § 31-297. (§ 31-300). Commissioner may allow successful claimant to be reimbursed for medical deposition/testimony costs. (§ 31-298).

Employer may not discontinue payments awarded on account of total or partial incapacity, if employee claims incapacity continues, without giving commissioner and employee notice of proposed discontinuance and obtaining commissioner's written approval. Upon notification, commissioner must render decision within 14 days and notify parties within seven days of decision. If commissioner finds for employer, employee must refund payments received from date of notice to decision. Employer who last employed successful claimant liable for compensation. Commissioner may apportion liability to prior employers. (§ 31-299[b]). Where commissioner finds for employee, he must allow reasonable attorney's fee and interest at rate prescribed in § 37-3a on discontinued payments. (§ 31-300). Appeal from commissioner lies to compensation review division by filing in office of commissioner from which award originated. Appeal must be taken within 20 days. (§ 31-299b). Such actions are privileged. No costs are taxed. (§ 31-301).

A husband or wife living with spouse at time of injury or receiving support regularly from spouse, a child under 18, or child over that age but physically or mentally incapacitated from earning, living with, or receiving regular support from, deceased parent, are conclusively presumed to be totally dependent. In all other cases questions of dependency shall be determined in accordance with the facts. Within 30 days of stopping disability benefits because of disabled employee's death, employer sends form notifying deceased employee's dependents of possible death benefits. Commissioner will approve form by Oct. 1, 1998. (§§ 31-306; C.G.S. 31-

306b; C.G.S. 31-307a; C.G.S. 31-349e).

The compensation payable in case of death is (1) Burial expenses $4,000 if death arises out of and in course of employment or from occupational disease where employee died on or after Oct. 1, 1988. If there is no person wholly or partially dependent upon deceased, burial expenses will be paid to person who assumes responsibility of paying funeral expenses; (2) to those wholly dependent on deceased weekly compensation of 75% of average weekly after-tax earnings of deceased at time of injury, but not less than $20 nor more than maximum benefit rate set forth in Act for totally incapacitated employees; (3) if spouse is sole surviving presumptive dependent, then shall receive compensation until death or remarriage; (4) if presumptive dependent spouse and presumptive dependent children, all of which children are either children of surviving spouse or living with such spouse, payments will be made as in (2) above. However, if any such children are neither children of surviving spouse nor living with such spouse, share payments will be made to each such dependent, or his guardian, not living with presumptive dependent spouse; (5) if compensation being paid to surviving spouse terminates for any reason, or there is no surviving dependent spouse at time of death, but there are presumptive dependent children, they must be paid as class for maximum of 780 weeks, or until all children reach 18 years of age (22 years of age for unmarried full-time students; 22+ years of age for same earning postsecondary degree) and are physically and mentally capable of earning their own living whichever is sooner; (6) payments to partial dependents must be paid according to their relative degree of dependence, for 312 weeks or until dependency ceases, whichever occurs sooner. (C.G.S. 31-306; C.G.S. 31-308). Dependents of any deceased employee injured on or after Jan. 1, 1974, and who has subsequently died, must be paid compensation retroactively to date of employee's death. Cost of payment paid by employer or his insurance who shall be reimbursed from second injury fund as provided in § 31-354. (§ 31-306).

Dependents of any deceased employee injured between 1/1/52 and 12/31/73 shall be paid compensation retroactive to date of employee's death. Cost of payment paid by employer or by his insurer shall be reimbursed from second injury fund per § 31-354. Dependants of any deceased employee injured before 1/1/52 who died on or before 10/2/91 shall be paid compensation retroactive to date of employee's death. Cost of payment paid by employer or by his insurer shall be reimbursed from second injury fund per § 31-354. (§ 31-306).

Compensation for total incapacity is 75% of average weekly after-tax earnings at time of injury but not more than 100%, nor less than 20%, of average production wages for all workers in state for year in which injury occurred as determined by Labor Commissioner. (§§ 31-307; C.G.S. 31-309).

If employee is partially incapacitated, compensation amounts to 75% of difference between after-tax wages currently earned by employee in position comparable to position previously held by injured employee and after-tax amount he is able to earn thereafter, but not to exceed 100% of state's average weekly wage. Compensation continues for actual period of partial disability or 520 weeks, whichever is less. Certain awards are designated for specified injuries, i.e., loss of master arm, 75% of average weekly after-tax earnings for 208 weeks; loss of one leg at or above knee, 75% of average weekly after-tax earnings for 155 weeks, etc. (§ 31-308). Regulatory definitions of both disfigurement and scarring have been codified. (§ 31-275). If injury caused by employer's violation of health and safety regulations result in total incapacity to work, employee shall receive 100% of average weekly earnings. (§ 31-307). Any award for compensation pursuant to § 31-308 shall be paid to employee, or in event of such employee's death, to surviving spouse, if no spouse, to dependents in equal shares or if no dependents, to children in equal shares. (§ 31-308).

Provisions require employer or employer’s representative to keep record of injuries (§ 31-316), prevent employer from avoiding law by contractual or other devices (§ 31-290), provide for retention of employee at suitable, full-time work while being rehabilitated (§ 31-313), and provide for Commissioner approval of attorneys' and physicians' fees (§ 31-319).

Employees with pre-existing physical defects may by contract execute acknowledgment of physical defect in cases where such physical defect contributes in material degree to injury. (§ 31-325).

Employee entitled to hearing before commissioner, upon employee's claim that employer failed to provide suitable, full-time work during rehabilitation. (§ 31-313).

Employee with previous disability who incurs second disability in course of employment, resulting in permanent disability, may recover for total disability, even if greater than second disability. Second Injury and Compensation Assurance Fund created to supplement employee's compensation payments. (§§ 31-349–31-355a). Second Injury Fund also provides payments for cost of living adjustments for permanently totally disabled worker. (§ 31-310). Second Injury Fund also pays cost of accident and health insurance for employee receiving compensation payments whose employer shuts down or moves operations from Connecticut on or after Jan. 1, 1985 and fails to provide coverage or proof of financial ability and solvency. (§ 31-349). Fund liable for cost of insurance coverage equivalent to employee's coverage prior to relocation or shutdown of employer's operations, beginning on date custodian is notified and continuing as long as individual receives workers' compensation pursuant to chapter. (§ 31-349). Second injury fund closed to claimants whose injuries occur on or after July 1, 1995. (§ 31-349).

Provision is made for the formation of employer mutual companies to insure in compensation cases. (§§ 31-328–31-338).

Employers who fail to obtain coverage or furnish proof of financial ability and solvency may be fined not more than $1,000 (§ 31-284), and attorney general may bring civil action to enjoin employer from entering into any employment contracts to employ additional employees until employer complies (§ 31-284). Employer who willfully and repeatedly fails to comply with workers' compensation provisions may be enjoined from conducting business in Connecticut pending compliance. (§ 31-289b).

Employers with high incidence of injuries required to form health and safety committees. (§ 31-40v).

Employers failing to conform with other provisions of the act may be fined not more than $250. (§ 31-285).

Workers' Compensation Commissioner shall offset disability retirement benefits from workers' compensation benefits to avoid unnecessary payment of benefits by State. (§§ 5-169[g], C.G.S. 5-170[c], C.G.S. 5-192p[d]).

Private Employee Benefits.

Private employers must pay filing fee for filing untimely unemployment compensation quarterly returns. (§ 225a[j]).

Municipal Employee Benefits.

Relief for police officers injured/rendered ill in line of duty and dependents of police officers killed in line of duty (§ 3-122); relief for firefighters and their dependents (§ 5-144); relief for state officers/general assembly members and their dependents (§ 5-144); notification of injury of state employee (§ 5-145); insurance for certain state/municipal employees (§ 5-259[2]). Losses from cardiac emergencies presumed suffered within scope of firefighter's or police officer's employment. (§ 31-294i). Relief to dependents of tier II employees (§ 5-192t). Employees of certain nonprofit organizations receive coverage under State Employee Health Plan. (§ 5-259, am'd PA 09-114, § 7). Comptroller and association group plans may pool health insurance rates for small employers that they insure; small employer plans offered by Comptroller or associations shall be exempt from premium tax; community rating law is amended; definition of small employer is revised. (§§ 5-259[i], C.G.S. 12-202a, 38a-564[4], 38a-567[5-6], 38a-567, 38a-569[b]). Commissioner must approve any health insurance policy that uses variable networks and enrollee cost-sharing if policy meets certain requirements. (§ 38a-476c). Any state employee injured in responding to emergency or code at correctional facility may collect hazardous duty benefits. (§ 5-142). Unionized state correction officer may collect higher level of disability retirement benefit when injury is result of extraordinary circumstances. (§ 18-101e). Under certain circumstances, health insurance coverage may be extended to remarried, surviving spouses of police and firefighters. (§ 5-259, am'd PA 09-114, § 7). Health insurance shall be extended for persons formerly employed in Board of Education and Services for Blind workshops. (§ 5-259, am'd PA 09-114, § 7). Permanent employees are entitled to medical leave for bone marrow and organ donation. (§ 5-248a, am'd PA 09-70, § 3). Requirements for creation, management and funding of municipal post employment health and life benefit systems. (§§ 7-403a; C.G.S. 7-450; C.G.S. 7-450a). State employees continue to accrue vacation and sick time while in active military service and are entitled to paid leave of absence under § 27-33. (§ 5-259d[c]). Issuance of bonds, notes, obligations to fund reserve fund for property or casualty losses. (§ 7-374b[b]). Definitions re: pension deficit funding bonds. (§ 7-374c). Municipal pension solvency account established within State General Fund. (§§ 7-406m – 7-406p). Allocation limitations on budget-making authority's power to direct investment of reserve fund between equity and non-equity investments. (§ 7-403a[c]). Loss and retiree benefit reserve fund may be, among other things, transferred to trust established to hold and invest assets of pension, retirement or other post-employment health and life benefit system of municipality. (§ 7-403a[e]). Municipalities and special taxing districts are prohibited from diminishing or eliminating pension or retirement benefits for retired employee when such benefits were in effect on date of employee's retirement. (§ 7-450c). Special health care plans for small employees for use by Health Reinsurance Association subject to Commissioner's approval. (§ 38a-565).

Payment of Prescription Medication for Workers' Compensation Claimant.

Any employer may establish plan for provision of medical care that employer provides for treatment of any injury. Plan shall require listing of all pharmacies that will provide services under plan to which employer shall make direct payments. (§ 31-279).

Payment of Prescription.

Employer or insurer, shall be responsible for paying cost of prescription directly to provider. (§ 31-294d).

Fraudulent Claims.

Any person making false claim for benefits through intentional misrepresentation or nondisclosure, or any person or employer intentionally aiding another in making such claims shall be guilty of class C felony if amount of benefits claimed is less than $2,000. If amount exceeds $2,000, such person is guilty of class B felony and will also be liable for treble damages in civil proceeding under § 52-564. (§ 31-290c).

Workers' compensation fraud unit under supervision of chief state's attorney has been established. (§ 31-290d).

12 ENVIRONMENT

12.01 ENVIRONMENTAL REGULATION:

Connecticut Environmental Policy Act.

Any agency sponsoring actions that may significantly affect environment must conduct public scoping process, including providing notice to public of proposed action, inviting public comment, following public meeting procedures and considering public comments. Sponsoring agency must submit environmental impact valuation to Office of Policy and Management, which then analyzes and makes determination concerning environmental impact evaluation. Sponsoring agency must take account of determination in finally deciding to take proposed action. (§ 22a-1e-f).

General Supervision.

Department of Environmental Protection, headed by Commissioner of Environmental Protection has broad jurisdiction over air, water, and other natural resources (§ 22a-2 et seq.) and has consolidated jurisdiction over areas such as water resources, coastal area management (§§ 22a-90–22a-112), air pollution, noise pollution (§ 22a-67), litter control (§§ 22a-27, 22a-80, 22a-89), pesticide control (§§ 22a-46–22a-66z), solid waste (22a-209f, am'd PA 09-211, § 1), parks, and fisheries and game formerly regulated by variety of agencies (§ 22a-5), harvested and nonharvested wildlife, chemical discharges (§ 22a-122). Greenhouse Gas Emissions Act promulgated. (§§ 22a-200; 22a-200a; 22a-200b). Greenhouse gas labels required for motor vehicles with model years 2009 and later. (§§ 22a-201; 22a-201a - 201c).

Office of Emergency Management and Homeland Security established within Military Dept. (§§ 28-1b; C.G.S. 28-1h, C.G.S. 28-1i; C.G.S. 4-6 to C.G.S. 4-8; C.G.S. 4-38c; C.G.S. 5-182[d]; C.G.S. 5-213[d]; C.G.S. 7-521; C.G.S. 16-32e[b]; 16a-13b[b]; 16a-106[c]; 22a-601[a]; 22a-603; C.G.S. 27-20; C.G.S. 28-1; C.G.S. 28-1a; C.G.S. 28-4; C.G.S. 28-5; C.G.S. 28-7; C.G.S. 28-7[a]; C.G.S. 28-8; C.G.S. 28-9; C.G.S. 28-16; C.G.S. 28-20; C.G.S. 28-29a; C.G.S. 28-31[e]; C.G.S. 54-142q, am'd PA 09-26, § 1).

Council on Environmental Quality, appointed by governor, speaker of house and president pro tempore of senate, submits annual environmental quality report to governor, has consultative and advisory authority concerning state agency construction plans, and refers citizen complaints to appropriate agency. Council on environmental quality within Department of Environmental Protection for administrative purposes only.

Power Facility Evaluation Council reviews plans for electric transmission lines, fuel transmission lines, and associated facilities for environmental compatibility. (§ 16-50g). Land acquisition or construction cannot commence without certificate of environmental compatibility and public need from council. (§§ 16-50k, C.G.S. 16-50k[a]).

Emergency Response Commission reviews and processes chemical information and notifications made pursuant to Emergency Planning and Community Right-to-Know Act, 42 USC 11001, et seq., and makes recommendations for state enforcement of that Act's provisions. (§§ 22a-600–22a-604).

Office of Policy and Management shall review reports from state agencies regarding methods available to reduce energy costs. (§ 16a-37v; see also § 16a-37u). Secretary of the Office of Policy and Management along with Dept. of Public Utility Control shall establish minimum energy efficiency standards for certain products. (§ 16a-48).

Face of Connecticut Steering Committee shall direct funds expended for acquisition, restoration or stewardship of property. (§ 22a-27s; § 22a-27t).

Brownfields.

Establishment of Office of Brownfield Remediation and Development (``OBRD'') within Dept. of Economic and Community Development. (§ 32-9cc). Agency that receives grants from OBRD shall be ``innocent party,'' and not liable under §§ 22a-432, 22a-433, 22a-451, 22a-452. (§

32-9ee, am'd PA 09-235, § 4). Transfer upon remediation. (§ 32-9dd, am'd PA 09-235, § 3). Persons who may acquire title to remediated property. (§ 32-9ee[c], am'd PA 09-235, § 4). Brownfields defined. (§§ 32-9cc; C.G.S. 32-9gg). Commissioner of Economic and Community Development may provide funds for Brownfield redevelopment through grant program not to exceed four million. (§ 32-9kk). Program to identify Brownfield sites. (§ 32-9kk). Abandoned Brownfield Cleanup Program established. (PA 09-235, § 7). Whenever state agency solicits bids for environmental remediation on Brownfield property, such bid must consider green remediation technologies. (PA 09-235, § 11).

Flood Plain Management.

Commissioner of Environmental Protection shall develop guidelines to be used by municipalities in revising their ordinances concerning flood storage and conveyance of water for flood plains. Such guidelines shall include model ordinance for adoption by municipalities. Commissioner shall also establish grant program to reimburse municipal costs related to mitigation of damages from flooding, high winds, and wildfires. (§§ 16a-27, am'd PA 09-230, § 3, § 10, C.G.S. 25-68j, C.G.S. 25-68k). Amendments to flood management statutes and stream channel encroachment line statutes. (§§ 25-68b, C.G.S. 25-68h, 22a-349).

Call-Before-You-Dig Program.

Provides civil penalties for any person, public agency or public official for failing to comply with § 16-41. (§ 16-356).

Electric Generation Facilities.

Assessment of facilities. (§ 12-94d). Energy facilities shall supply services at reasonable cost, protect environment, and develop new and improved methods of generating, storing, and transmitting electricity. (§§ 16-50g, C.G.S. 16-50i[a]). Dept. of Public Utility Control to adopt regulations by Jan. 1, 2005 to allow direct billing and collection services by electric suppliers. (§ 16-244i). Procedures for applying to create electric generating or storage facilities. (§ 16-50l). Performance standards for electricity generation must no longer focus on limiting carbon monoxide and mercury emissions. (§ 22a-174j).

Sustainable Biomass.

Defined. (§ 16-1[a][45]; see also 22a-209a).

Electric Transmission Lines.

Any application for electric transmission line with capacity of 345 KW or more filed on or after May 1, 2003, shall have rebuttable presumption of meeting public benefit for such facility if it is substantially above ground. Such presumption may be overcome by evidence submitted to satisfaction of council. (§§ 16-50p, C.G.S. 16-50p[a], [c]). Procedures and criteria for selecting sites for electric transmission lines. (§§ 16-50l, C.G.S. 16-50o, C.G.S. 16-50p, C.G.S. 16-50t). Connecticut Energy Advisory Board shall establish infrastructure criteria guidelines including: (1) Environmental preference standards; (2) efficiency standards; (3) generation preference standards; (4) electric capacity, use trends, and forecasting needs; (5) natural gas capacity use trends and forecasted needs; and (6) reliability criteria for regional bulk power grid. (§ 16a-7b).

Energy Efficiency and Electrical Distribution Reforms.

General legislation to promote energy efficiency standards and develop new procedures for electrical distribution companies and encourage renewable energy projects. (C.G.S. cc. 277, 283, 295 and 298).

Farm Waste Management.

Federal and state government may pay up to 90% of cost of farm environmental management practices. (§ 22-6c).

Preservation of Agricultural Lands.

Requirements and procedures for filing and holding permit relating to property that is subject to conservation; Commissioner may enter into joint ownership agreements with non-profits and incorporate deed requirements; attorney general may enforce public interest in conservation and preservation restrictions. (§§ 47-42a, C.G.S. 47-42c, C.G.S. 47-42d, C.G.S. 22-6e, C.G.S. 22-26cc).Commissioner of Agriculture must administer loan program for municipalities to purchase agricultural lands. (§ 22-26mm). Farmland Preservation Advisory Board established to assist and advise Commissioner of Agriculture on program for purchase of agricultural land development rights. (§ 22-27ll). Farmland not meeting criteria of farmland preservation program may be preserved at discretion of Commissioner. (§ 22-26nn).

Preservation of Trees.

Removing, pruning, injuring or defacing trees within public way or grounds is prohibited; court may order restorative measures or cost of restoration including attorney's fees and special damages. (§ 23-65[b]).

Preservation of Open Space Land.

Persons are prohibited from conducting any activity on open space land as defined or on any land in which state holds conservation easement which causes damage or alteration to land or vegetation unless land owner has granted permission or easement. (§ 52-560a).

Preservation of Equine Trails.

Equine Advisory Council established to assist Department of Environmental Protection with preservation of equine trails in State. (§ 23-10d).

Protection of Long Island Sound.

No state agency shall interfere with project relating to electric powerline, gas pipeline, or telecommunications crossing of Long Island Sound. Environmental assessment and plan shall be completed by Institute for Sustainable Energy. Applications for electric power line, gas pipeline, or telecommunication line crossing the Sound shall be in accordance with environmental plan. (§ 25-157a; § 25-157). Bi-State Long Island Sound Committee is established to recommend legislation to avoid, minimize and mitigate impact of proposed industrialization and private use of Sound's public trust resources. (§§ 25-138, C.G.S. 25-140, am'd PA 09-151, §§ 2, 3, C.G.S. 25-140a, C.G.S. 25-141). Commissioner of Environmental Protection shall issue general permit for publicly-owned treatment works daily load limits for nitrogen. Commissioner may also issue general permit to private sector entities that discharge nitrogen with additional limitations. (§ 22a-522). Commissioner may also adopt regulations pertaining to municipalities or private sector. (§ 22a-526). Commissioner must establish municipal storm water authority pilot program to provide grants to municipalities bordering Long Island Sound. (§§ 22a-497 – 22a-499).

Harbor Management.

Commissioner of Environmental Protection shall select two harbor management commissions to jointly recommend standards and criteria for construction and location of private residential docks and piers. (§ 25-102m).

Harvesting of Shellfish.

Commissioner of Agriculture may lease all shellfish areas for period of years. Lessee must make good faith effort to cultivate and harvest. Any utility lines or public use structure owner impacting on shellfish area shall pay lessee costs of removing or relocating shellfish. Commissioner may hold public hearing prior to approving or denying shellfish application. (§§ 26-194, C.G.S. 26-240, C.G.S. 26-266). Public hearings to be conducted. (§ 22a-361[b]).

Endangered species program established to conserve, protect, restore and enhance any endangered or threatened species and essential habitat. (§ 26-305).

Wildlife.

Licenses.

All hunting and fishing licenses will expire on last day of year issued and may not be altered, transferred or lent to another. Licensees may be required to temporarily surrender license in wildlife study areas. All licensees must file written, annual report describing wildlife killed or trapped. Licensees may not carry pistols or revolvers. (§ 26-35). Commissioner may suspend licenses. (§ 26-80a). Blind persons and persons with mental retardation shall have lifetime fishing licenses. (§ 26-29). Persons who are physically disabled shall have lifetime hunting, fishing and trapping licenses. (§ 26-29b). Non-transferability of shellfish licenses. (§ 26-212). Must have license for marine waters fishing. (PA 09-173, § 4). Commissioner shall allow transfer of fishing licenses upon death or relinquishment under certain conditions. (§ 26-142b, am'd PA 09-195, § 2). Fines exist for intentionally discarding fishing line or litter into water. (§ 26-27e). Commissioner may adopt regulation concerning lobster management plan. (§ 26-157a). Commissioner shall establish lobster restoration program. (§§ 26-157d, C.G.S. 26-157e). Any person hunting nuisance wildlife must obtain license from Commissioner which will be valid for two years. (§ 26-47).

Wildlife Refuges.

Upon obtaining written consent, Commissioner may establish wildlife refuges on private land. Such areas may be closed to hunting or public use if necessary to manage wildlife or for public safety. Notice to be posted near boundaries of area. (§ 26-101).

Commissioner.

Commissioner of Wildlife Protection has authority to enforce laws, enter orders and employ and train personnel to ensure protection and safety of wildlife. (§ 26-3). May also establish regulations for management of salmon; migratory game birds. (§ 26-48a). One who disturbs, hunts, or kills bald eagle, or disturbs active bald eagle nest shall be fined maximum of $100,000 and/or imprisoned for maximum of 30 days. One who enters protected bald eagle area shall be fined maximum of $1,000 and/or imprisoned for maximum of 30 days. (§ 26-93). All license fees must be used for protection and propagation of fish and game. (PA 09-173, § 7).

Commissioner of Public Safety, conservation officers, special conservation officers and patrolmen appointed by Commissioner of Environmental Protection shall have jurisdiction over land purchased by state. (§ 23b-86; see also § 26-5). Commissioner of Environmental Protection must not reduce amount of state hunting land without providing for equal amount elsewhere. (PA 09-173, § 3). Persons eligible for appointment as special conservation officers. (§ 26-5, am'd C.G.S. 06-70, § 1).

Damage Control.

Land owners or lessees may obtain damage permits enabling them to hunt wildlife causing damage to their property. Such hunting and distribution of animals is regulated by statute. (§ 26-82).

Deer Management.

Establishes regulations for deer management, including type of weapon, permits required, prohibited hunting days, and penalties for violation of regulations. (§§ 26-86a, C.G.S. 26-82).

Weapons.

Game hunting regulations. (§§ 26-86a, C.G.S. 26-86c).

Permits may be issued for bow and arrow hunting to qualified applicants. (§ 26-86c).

Hunter Education.

§§ 26-31 and C.G.S. 26-61.

Dangerous Animals.

No one shall possess wildlife deemed potentially dangerous. Ownership of such animals shall result in payment of costs of confiscation, disposal, and civil penalties. (§ 26-40a).

Persons whose hunting licenses have been suspended for hunting safety violations must successfully complete remedial hunter education course prior to restoration or reinstatement. (§§ 26-31; C.G.S. 26-61). One who has caused death of person or non-wild animal, or damaged property may have license suspended and must successfully complete remedial hunter education course. (§ 26-62). Criminal penalties for negligent hunting. (§ 53a-3).

Lakeside Zoning.

General Assembly shall conduct annual study of definitions of bodies of water appropriate for zoning regulations. (PA 05-263, § 1).

Forestry Management.

Commissioner of Environmental Protection may develop and administer plans for management of publicly-owned woodlands in conjunction with state forester. Such plans may include harvesting of wood products from publicly-owned woodlands. Proceeds from such sales go to General fund and Conservation fund. Commissioner to adopt regulations concerning standards for forest stocking and distribution, and procedure to classify parcel as forest land. (§ 23-20).

Protected Rivers Act (§ 25-200, et seq.) restricts activities in river corridors, designated by Commissioner to be eligible and worthy of protection.

Conservation Plans.

Planning commissions are to develop plans for conservation and development for municipalities at least once every ten years. (§§ 8-23, am'd PA 09-230, § 73; C.G.S. 8-23[g]). Revision of conservation and development plans. (§ 16a-32, am'd PA 09-230, § 6). See also § 52-560a.

Traprock ridges, as defined, may be protected by setback regulations, if adopted by local zoning authorities, to control development. (§ 8-2c).

Roadway Lights.

Public utility companies must comply with regulations regarding energy conservation when installing or replacing roadway lights. (§ 13a-110a).

Poisonous Plants.

Connecticut Poison Control Center shall maintain and furnish list of poisonous plants to retailers. (§ 21a-84a).

Invasive Plants.

Invasive Plants Council shall educate and inform regarding invasive plants, and maintain list of invasive plants. (§§ 22a-381a, 22a-381b, 22a-381c). Importation, sale, transportation, and purchase of banned plants and penalties for violation. (§ 22a-381d, am'd PA 09-52, § 3).

Hazardous Road Glare and Light Pollution.

No floodlight intended for private property illumination shall be located within state's right of way on state highways unless luminaire is designed to maximize energy efficiency and minimize light pollution, glare and light trespass. (§ 13a-143d).

Solid Waste Management.

Solid Waste Commission established. (§ 22a-279). Restriction on Commissioner’s authority to issue solid waste facility permit to sites within 150 feet of housing authority-owned developments. (§ 22a-208aa).

Resource Recovery Facilities.

Commissioner must determine need before issuing permits for resource recovery facilities. Must submit written plan for approval prior to closure of facility. (§ 22a-208a; see also § 22a-207). Commissioner shall monitor emissions, conduct dioxin studies, inspect facilities, establish qualifications for operators. (§ 22a-240a). Resource recovery authority. (§ 22a-261). Restrictions on hydraulic loading or unloading equipment use at resource recovery facilities. (§ 31-39a).

Solid Waste Law.

With regard to disposal, recycling and tipping fee fund are governed by § 22a-220 of general statutes. If solid waste collector is delinquent in paying tipping fees, solid waste facility shall notify all municipalities in which collector operates. (§ 22a-220c). No grass clippings deposited in solid waste facility. (§ 22a-208).

Illegal Dumping Act.

No person shall dump material upon public or private property not owned by them except when: (1) Property is designated by State or political subdivision for dumping, or property is licensed facility; and (2) person is authorized to use it. (§§ 22a-250[c] and [d]).

Recycling.

State-wide plan to be developed. (§ 22a-241).

The Beneficial Reuse of Glass Act.

Owners or operators of solid waste facilities may use crushed, recycled glass as cover material. Crushed, recycled glass may be used as fill in place of sand or stone in subgrade construction if glass does not constitute more than 10% of clean fill. (§ 22a-208g).

Sulfur Dioxide Reduction.

Requirements with which operators must comply to reduce amount of sulfur dioxide emissions at power plants. (§§ 22a-197, 22a-198).

Nitrogen Reduction.

Commissioner of Dept. of Environmental Protection must issue permits limiting amount of nitrogen discharged into Long Island Sound based on total maximum daily load. (§ 22a-477, am'd PA 09-12, §§ 2-3). Fund availability for nitrogen removal. (§ 22a-478).

Mercury Reduction.

To create and maintain healthful environment, use of mercury and mercury-added products should be eliminated. No such products to be sold or distributed unless prior notice is given. Products that contain mercury and are necessary to comply with federal or state health or safety requirements may be exempt. Creation of collection system to remove and collect mercury-added products. (§ 22a-612, et seq.). Sale or distribution of button cell batteries containing mercury prohibited. (§§ 22a-616, 22a-620[f]). Regulation of mercury emissions from load-fired electricity generators. (§ 22a-19). Standards for disposing of mercury waste. (§ 22a-209).

Sulfur Reduction.

Reduction in levels of sulfur in home heating oil and off-road diesel fuel. (§ 16a-21a).

Biomedical Waste.

Each generator must submit to commissioner name of person contracted to dispose of biomedical waste, amount of waste and site of disposal. (§ 22a-213a).

Radioactive Waste.

Creation of hazardous waste management service. (§ 22a-134bb, repealed PA 06-76, § 31).

Notification of Chemical Spills.

Department of Health Services shall cause all information concerning discharge, spillage, uncontrolled loss, seepage or filtration of oil or petroleum or chemical liquids or solid, liquid or gaseous products or hazardous wastes upon any land or into any of waters of state or into any offshore or coastal waters which may result in threatened danger to public health to be transmitted to Commissioner of Environmental Protection, and Chief Executive Officer and local Director of Health of municipality in which such discharge, spillage, uncontrolled loss, seepage or filtration occurs. Such information shall be proved in timely manner. (§ 19a-47). If environmental professional discovers contamination on parcel which is causing contamination of drinking water well (PA 09-30, § 1), that professional must notify property owner of contamination within 24 hours. If owner does not notify Commissioner of Environmental Protection of contamination, client of environmental professional shall notify Commissioner. If owner becomes aware of contamination caused to drinking water well, he shall notify Commissioner orally within 24 hours of discovery of contamination, and, in writing, within five days of oral notice. If environmental professional determines that there is pollution of parcel above applicable criteria levels, professional shall notify his client and property owner of discovery of contamination. Parcel owner shall then notify Commissioner of such contamination in writing within 24 hours which notice shall include information about property owner, local director of public health, persons that file requests to receive such information, and other persons so identified. Commissioner must then notify Division of Occupational Safety and Health where applicable. Deadlines for notification of such contamination are dependent on affected media (i.e. soil or water), and severity of contamination. (§ 22a-6u).

Prohibited Acts of Pollution.

Causing air pollution to degree that is injurious to public welfare, health, or property or unreasonably interferes with enjoyment of life or property (§§ 22a-170; 22a-184); pollution of, or discharge of wastes into (§ 22a-427), or discharge of sewage into (§ 26-26), waters, in violation of regulatory statutes (§§ 22a-422– 22a-453), discharge into class A waters of less than tertiary treated sewage (§ 26-26a); failing to report oil spills in state waters (§§ 22a-425; 22a-450); operation of motor vehicles so as to produce noise exceeding decibel level set by Commissioner of Motor Vehicles, which shall not exceed maximum set by federal law (§ 14-80a); violate statutes concerning registration and use of pesticides (§ 22a-63); violate regulations to be established re noise pollution (§ 22a-67); dumping refuse at other than proper facilities (§ 22a-250); selling products packaged in or composed in whole or in part of polystyrene foam if foam manufactured using any controlled substance (§ 22a-194a); placing used batteries in mixed municipal solid waste (§ 22a-256g); operating woodburning facility in violation of regulatory statutes (§ 22a-2081). No person shall operate outdoor wood burning furnace unless it was installed prior to this act or complies with certain specifications; violations subject to fines. (§ 22a-174k).

Electronics Recycling.

Each manufacturer of electronic devices must participate in statewide electronics recycling program. (§ 22a-631).

Enforcement.

Air Pollution.

Commissioner of Environmental Protection enforces commission regulations by order. (§§ 22a-177; 22a-178). Hearing may be held after order issued, and after hearing, order may be affirmed, modified, or revoked. (§ 22a-178). If Commissioner issues order to two or more persons including landowner and person causing pollution or creating or maintaining potential air pollution source, each such person shall be jointly and severally liable. If Commissioner has reasonable cause to believe that any person has violated any regulation, order or permit, he may issue order to such person to investigate by monitoring, production of records, or any other means, source of air pollution. (§ 22a-178). Commissioner must file copy or notice of final order in land records. (§ 22a-178[g]). Commissioner to cause certified copy or notice of final order to be filed on land records. (§ 22a-178[g]). Action may be brought in superior court to impose civil penalties and/or for injunction. (§ 22a-180). Commissioner develops internal performance evaluation program to provide for planning and monitoring of programs and annually submits reports to joint standing committee of general assembly outlining departments progress and assessing state's air quality. (§ 22a-166). Commissioner may, upon showing of cause, modify, revoke or suspend any permit. Grounds for doing so include violation of c. 446c, or any regulation, permit or order adopted or issued thereunder or misrepresentation of facts at any time by holder of permit. (§ 22a-174c). Commissioner may observe and inspect application of pesticides. (§ 22a-59).

Water Pollution.

Commissioner enforces by orders prohibiting or abating water pollution (§§ 22a-416–22a-434), and Commissioner can request attorney general to bring action for injunction (§ 22a-435). Commissioner can also apply to attorney general to bring injunction action against installation or maintenance of new wastewater discharge into state waters without permit, or to remediate effects of discharge. (§ 22a-430). Violations of state regulations or authorized municipal regulations concerning inland wetlands and water courses can be restrained by Superior Court or ordered corrected or removed. Permits are required for regulated activity conducted upon any inland wetland or watercourse. (§ 22a-42a, am'd PA 09-181, § 3). No permit shall be issued for alternative on-site sewage treatment system unless certain conditions are met. (§ 22a-430; § 22a-44). Commissioner of Public Health, as opposed to Commissioner of Environmental Protection, has jurisdiction to issue or deny permits for alternative on-site sewage treatment systems with capacities of five thousand gallons or less per day. (§ 19a-35a, am'd PA 09-220, § 3). Commissioner may issue order to municipality or person(s) responsible for pollution, to provide potable drinking water. (§ 22a-471). Commissioner may file notice of contaminated well on land records of town. (§ 22a-434a). Control of discharge of sewage from vessels is regulated by § 15-170.

Endangered Species.

Commissioner enforces by orders prohibiting taking, killing, injuring or reducing likelihood of survival of species. (§ 26-312).

State Veterinarian serves as chief livestock health official for State. State Veterinarian shall annually issue and distribute list of reportable animal and avian diseases. (§ 22-26f).

Declaratory and equitable relief available to attorney general, any governmental authority, or any private party against any other such party. (§ 22a-16). Court may grant permanent or temporary relief on showing of unreasonable pollution, or impairment or destruction of public trust in air, water, or other natural resources. (§§ 22a-17; 22a-18). It is affirmative defense that no feasible and prudent alternative, and conduct is consistent with public health, safety, and welfare. (§ 22a-17). Proceeding is supplemental to administrative proceedings, and court may remand to administrative agency (§§ 22a-18; 22a-20), but if administrative procedure inadequate, court action may be maintained. (§ 22a-20). Certified copies of Orders of the Commissioner as to correction, abatement or penalties shall be filed on town land records and constitute notice until submitted with order certifying compliance or revocation. (§§ 22a-5c, 22a-434).

Environmental Use Restriction.

Commissioner empowered to establish new interest in title to contaminated land entitled “environmental use restriction” to prohibit activities on or uses of particular parcel which may increase exposure to pollutants and environmental hazards. Restriction, once executed by owner and Commissioner, requires subordination of all other interests (including mortgages) and runs with land. Termination/release provided for on stated terms and conditions. Violation of restriction can result in civil penalty up to $25,000 per day. (§§ 22a-133a–22a-133aa; 22a-209d; 22a-471; C.G.S. 32-23qq; C.G.S. 47-33d).

Environmental Justice.

Residents of distressed municipalities or low income communities must have opportunity to participate in decisions about proposed facility that may affect residents’environment or health. (§ 22a-20a).

Fees.

Commissioner may require payment of fee to cover cost of reviewing application, monitoring compliance with state or federal permit and providing status reports concerning compliance. (§ 22a-6).

Penalties.

General Civil Penalties may be imposed by Commissioner of Environmental Protection up to $25,000 per violation per day. (§ 22a-6b).

Air Pollution.

For not taking preventative or corrective measures after tenth day following deadline in commission order, up to $5,000 per week. If any person fails to comply with any protective provision of order within six months, and: (1) No request from such person for hearing on such order is pending, (2) time for making such request has expired, and (3) commissioner determines that noncompliance is not due to factors beyond control of person, Commissioner will request Attorney General to bring action in superior court for injunctive relief to secure compliance with order. (22a-180). For open air burning violation, up to $50 for first violation or up to $200 for subsequent violations. Any person who willfully or with criminal negligence violates any provision of this chapter shall be fined or imprisoned or both. Any person who knowingly makes any false statement representation, or certification in any application, record, report, plan or other document filed or required to be maintained under this chapter shall upon conviction be fined or imprisoned or both. (§ 22a-175). If Commissioner finds that: (1) Violation of terms of permit issued pursuant to § 22a-174, exists and (2) person alleged to be committing such violation has received written notification of two violations in preceding year, Commission will require emission test of air contaminant source at expense of source and if results indicate noncompliance, order requiring abatement will be issued. (§ 22a-178).

Any Water Pollution Statute.

Knowing violation, up to $10,000 per violation or per day. Criminal violation of statutes, up to $25,000 per day for each day of violation and/or imprisonment up to one year, subsequent violations, up to $50,000 per day for each day of violation and/or imprisonment up to two years. Responsible corporate officers are not immune to penalties. (§ 22a-438). Violation of inland wetlands or water courses statutes or regulations punishable by civil penalty up to $1,000 for each day of violation. For willful or knowing violation up to $1,000 per day, up to six months in prison or both. For subsequent violation up to $2,000 per day or up to one year in prison or both. (§ 22a-44).

Solid Waste.

For knowing violation of provision, regulation, order or permit under chapter, civil penalty not to exceed $25,000. (§ 22a-226). $100,000 or less fine for violation of § 22a-226 which puts another in imminent danger of death or serious bodily injury. (§ 22a-226). Penalties for illegal disposal of solid waste at landfill operated by municipality, may be established by municipality as long as they do not exceed $1,000 for first offense, $2,000 for second and $3,000 for any subsequent offense. (§ 7-152d). Appeals must be made pursuant to §§ 7-125b, 6.

Any Pesticide Statute.

Knowing violation by commercial applicant, up to $5,000 and/or imprisonment up to one year; knowing violation by private applicant, up to $1,000 and/or imprisonment up to 30 days. State may bring suit to recover civil penalty up to $2,500 per day for each violation. (§ 22a-63). Any person who is not certified commercial applicator who solicits to perform commercial application of pesticide or commercial applicant who solicits to perform activity requiring supervisory permit may be fined between $1,000 and $2,000. (§ 22a-63). Any person with intent to defraud, who uses or reveals formulas must be fined $10,000. (§ 220-63).

Oil Spill or Hazardous Material Pollution.

Responsible party liable to state for costs and expenses over $5,000 in controlling and removing and for 1½ times costs and expenses if negligent. Also responsible for reimbursement for short-term and long term provision of potable drinking water. (§ 22a-451). Liable to private party for removal of oil if spill was due to negligence. (§ 22a-452). State may bring suit to recover costs of detecting, controlling, abating violations of pollution statutes. Civil penalties established. (§ 22a-6a). Criminal penalties for knowing violations; up to $50,000 per day and two years imprisonment for first conviction. (§ 22a-131a).

Voluntary Site Remediation.—Under certain limited circumstances, in areas where groundwater has been classified as GB or GC (i.e. not suitable for public drinking water supply) and no prior enforcement orders have been issued, landowner, lessor, or lender may undertake voluntary remediation of spill without direct DEP involvement, but with DEP approval. Studies and remediation plans conducted or overseen by pre-approved contractors pursuant to DEP guidelines, and certified as such by said contractors, will be accepted without prior approval. DEP may agree to exempt landowner, lessor, or lender from liability for acts or omissions prior to date of clean-up. Exemption, known as covenant not to sue, may be transferred with land.

Allows municipalities to agree to abate property tax due from property owner for seven years if owner agrees to site assessment, demolition and remediation contingent upon such action continuing; abatement terminates on sale/transfer; recapture may be required; forgiveness may be granted; approval of abatement or other actions required; notification of decisions to act; (§§ 12-82r; 22a-133m; 22a-134, am'd PA 09-235, §§ 2, 8; regarding transfer of establishment clarifying that transfer does not include conveyance of parcel which prior to July 1, 1997 had been developed solely as residential and has not changed or conveyance of parcel to entities operating under c. 130 or 132 or to urban rehabilitation agency (§ 8-292), to municipality (§ 32-225), to Connecticut Development Authority or its subsidiaries; (§ 22a-134[1], am'd PA 09-235, § 2); new section “h”—joint identification by Environmental Protection and Department of Economic and Community Development commissioners of urban community sites which have or may have environmental contamination which if remediated and developed would improve urban environment; (§ 22a-133m); covenant not to sue property owner or prospective purchaser if detailed plan of remediation or Brownfield investigation plan and remediation schedule has been approved by Environmental Protection Commissioner; includes “owner” within text of statute; covenant not to sue precludes action against holder of covenant to remediate unless property not remediated per approved plan or if environmental land use restriction has not been recorded or if there is failure to comply with restrictions; purchaser or owner shall pay fee equal to percentage of property value (§§ 22a-133aa, x; 22a-133); conditions for issuance of covenants not to sue between Commissioner of Environmental Protection and prospective purchasers or owners; conditions upon which Commissioner shall enter into covenant not to sue; upon compliance with statutory requirements, covenants not to sue shall issue not later than 45 days after compliance (§§ 22a-133u; 22a-133bb); establishment of subsidiaries to encourage and carry out remediation development and financing (§ 32-11a); State policy to encourage pollution prevention and remediation (§ 32-23pp); Environmental Assistance Revolving Loan Fund and issuance of grants, loans and credits (§ 32-23qq); regarding definition of remediation activities (§ 32-23rr); regarding addition of owners of contaminated property located in a GA or GAA classification area (§ 22a-133x, am'd PA 09-235, § 10); *Note:* exceptions to liability for lenders (§ 22a-452f); Regional Economic Development Assistance Revolving Fund (§ 32-7e); and § 12 (new) regarding exceptions to liability for licensed environmental professionals hired or retained by municipalities (§ 22a-133d; see also § 22a-133v).

Underground Storage Tank.

Clean-up Fund established. (§ 22a-449a). State loan program for environmental investigation and remediation. (§ 22a-133a). Responsible party liable to state for costs and expenses less than $10,000 or more than $5,000,000 with exceptions. (§§ 22a-449c[a]; 22a-449c–22a-449i). After Oct. 1, 2003, all underground storage tanks installed, used or operated must be double-walled. (§ 22a-449o). Direct reimbursement may be provided to owner of residence where Underground Storage Tank Petroleum Clean-Up Account Review Board determines that owner may not receive reimbursement from its contractor. Owner may be reimbursed where he contracted with state for removal services. Board may accept applications for reimbursement post-deadline in certain circumstances. (§§ 22a-449d[d], 22a-449l[c][1], 22a-449l[d]). Commissioner of Environmental Protection may license terminals for loading/unloading oil, petroleum or chemical liquids. (§ 22a-449[b]). Owners or operators of more than ten facilities with underground storage tank systems containing petroleum may store certain records in central location in State. (§ 22a-449q).

School Air Quality.

Provision for adoption of air quality program for maintenance and review of indoor air quality of facilities. (§ 10-220, am'd PA 09-220, § 6, am'd PA 09-81, § 2; see also §§ 10-282, C.G.S. 10-283[b], C.G.S. 10-286[a]). Grants to be increased to accommodate heating, ventilation or air conditioning systems if needed. (§ 10-286). Air quality emergency shall exist if building condition presents substantial and imminent adverse health risk that requires remediation; remediation of emergencies. (§ 10-282).

State Building Air Quality.

Prior to entry into lease, renewal or purchase of building by State department, such department must provide for inspection and develop protocol for periodic assessment of indoor air quality in such building. (§ 4b-15b).

Littering.

$250 fine; for dumping refuse at other than proper facility, fine up to $10,000. (§ 22a-250).

Note: Effective Jan. 1, 1980, § 22a-77-79 provides that all beverage containers shall be recyclable, having refund value of 5¢ or more.

Hazardous Waste Tax imposed upon generators of hazardous waste. See category 22 Taxation, topic 22.06 Environmental Taxes, subhead Hazardous Waste Tax.

Violation of hazardous waste program up to $25,000 per day. (§ 22a-131). “Minor” violations of hazardous waste laws, as defined, which may be addressed by violator within 30 days on expedited basis, may, after certification by commissioner, escape further enforcement action or liability. (§ 22a-6s).

Biomedical Waste.

Violation of any provision of c. 446d or 446k of general statutes fined $25,000 or less for each offense. (§ 22a-213).

Waste Water.

Regulation of sale, collection and disposal of waste water. (§ 22a-358).

Endangered Species.

For committing, taking part in or assisting in violating §§ 26-40c, C.G.S. 26-40d, fined up to $1,000 or imprisoned up to six months for each offense. Taking of each species deemed separate offense. (§ 26-40f).

Asbestos Dumping.

No person shall dump, discard or otherwise dispose of more than one cubic foot of any substance containing asbestos or asbestos-containing material, as defined in § 19a-332 of general statutes, except at solid waste facility which has been granted permit pursuant to § 22a-208a of general statutes. Any person who knowingly violates any provision of this act or § 22a-208a of general statutes, any permit issued under this section or under § 22a-250(c) or (d), or regulation adopted under § 22a-209 or § 22-231 or any order issued pursuant to § 22a-225, shall be fined not more than $25,000 per day for each day of violation or imprisoned not more than one year, or both. Subsequent conviction for any such violation shall carry fine of not more than $50,000 per day for each day of violation or imprisonment for not more than two years, or both (§§ 22a-226a, 252). No person must permanently place or store more than 1,000 cubic yards of soil containing asbestos on site that abuts residential property or at height greater than four feet above existing land. (§ 22a-901).

Permits.

Air Pollution.

Exemption from regulations may be granted by permit from Commission on Environmental Protection if no danger to public health and safety, and compliance would produce hardship. (§ 22a-183). Relative interests of applicant and public must be balanced. (§§ 22a-183; 22a-176). New contaminant source may not be installed or employed without permit from Air Pollution Control Commission. (§§ 22a-174; 22a-184). Applicant for permit must give written notification to people whose property abuts applicant's land within ten days of filing application. Applicant must send written notification to Commissioner. Commissioner must not make decision on application less than 45 days after receipt of written notification. (§ 22a-174). Each source of air pollution must register biannually with Commissioner. (§ 22a-174). Upon presentation of petition signed by at least 25 persons, or upon request of any person if activity is subject to Federal Clean Air Act, public hearing will be held. (§§ 22a-174–22a-175).

Waters.

Any new discharge into state waters requires permit from Commission on Environmental Protection; satisfactory treatment plan required for new discharge which might cause pollution. Permit lasts ten years except 30 years for discharges into subsurface sewerage disposal systems. Detailed permit procedures. (§ 22a-430). Discharges not reasonably expected to cause pollution are exempt from permit but must be registered with Commissioner. (§ 22a-430b). Permit for operation on inland wetlands or water courses requires permit from Commissioner of Environmental Protection. (§§ 22a-36– 22a-45). There shall be no discharge of sewage from any vessel in no discharge zone. Applications for determination of adequacy of sewer capacity related to proposed land use, sewer hookups or approval of proposals for waste water treatment or disposal. (§ 7-246a).

Oil.

Terminals for loading or discharge of oil from vessel must be licensed annually by Commission on Environmental Protection. (§ 22a-449). Permit valid for fixed term not exceeding five years is needed for business of collecting or disposing of waste oil. (§ 22a-454). Permit required for aerial spraying of pesticides. (§ 22a-54).

Notice.

Commissioner may require any applicant for any permit provided for under Title 22a to post conspicuous notice on site of activity for which permit is being sought. (§§ 22a-61; 22a-361).

Hazardous waste facilities strictly regulated. (§§ 22a-115 through 22a-125). Hazardous Waste Management Service will prepare state plan for low-level radioactive waste disposal. (§§ 22a-163 to 22a-163aa, 22a-164, 22a-165 to 22a-165h, repealed, PA 06-76, § 31). Commissioner shall discover and evaluate hazardous waste sites and clean up with state funds, if necessary, seeking reimbursement from responsible party. (§§ 22a-133a–22a-133aa; 22a-448–22a-449, am'd PA 09-117, § 23). Significant fees triggered by transfers of hazardous waste establishments requiring remediation. (§§ 22a-134e; 22a-134[1], am'd PA 09-235, § 2). Commissioner shall charge each nuclear powered commercial electric power generating plant $60,000 annual fee to monitor radiation released, and plants must post to websites any plans for releases of radiation. (§ 22a-135). Fund established to assist state in disposal of low-level radioactive waste, financed by tax on Nuclear Regulatory Commission licensees. (§ 22a-164, repealed PA 06-76, § 31). Commissioner may adopt regulations for storage of hazardous substances near water courses. (§ 22a-134p).

Transfer Act.—Special disclosure rules govern “transfers” of “establishments”. “Establishment” is: (A) dry cleaner in operation at any time on or after May 1, 1967; (B) furniture stripping establishment in operation at any time on or after May 1, 1967; (C) vehicle body repair shop or vehicle painting shop in operation at any time on or after May 1, 1967; or (D) any real property or business operation which, at any time on or after Nov. 19, 1980, generated 100 kilograms of hazardous waste in any one month. “Transfer” is any transaction or proceeding through which establishment undergoes change of ownership, but does not mean (A) conveyance or extinguishment of easement; (B) conveyance pursuant to foreclosure or foreclosure of municipal tax lien (§ 22a-134[1], am'd PA 09-235, § 2); (C) deed in lieu of foreclosure; (D) conveyance of mortgage or other security interest; (E) conveyance, assignment, execution or termination of lease of period less than 99 years; (F) conveyance by probate court decree; (G) devolution to surviving joint tenant, or by intestate succession, or to trustee, administrator, or executor under will or testamentary trust; (H) corporate reorganization not substantially affecting ownership; (I) issuance of stock by entity which owns establishment; (J) transfer of stock representing less than 40% of ownership; (K) immediate family transfers; (L) conveyance of or interest in establishment to trustee for benefit of immediate family; (M) conveyance of portion of parcel upon which portion no establishment is or was located and no spill occurred, provided portion is 50% or less of entire parcel, or written notice of such proposed partial conveyance is provided to DEP 60 days prior to closing of transfer; (N) conveyance of service station; (O) conveyance of land continuously used as residence since July 1, 1997 or before; (P) conveyance to entity created per Chapter 130 or 132; (Q) conveyance in connection with acquisition of properties to development of project; (R) conversion of general or limited partnership to LLC; (S) transfer of property of general partnership to general partnership; (T) transfer of property of general partnership to LLC; or (U) acquisition of establishment by governmental condemning authority. (§ 22a-134, am'd PA 09-235, §§ 2, 8). (§ 22a-134a[d] includes Form II). Persons appointed by court to sell, convey, partition real property, or bankruptcy trustee, are not deemed parties associated with transfer of establishment, and need not comply with §§ 22a-134–134e, inclusive. (§ 22a-134a[a]). Includes universal waste which incorporates batteries, pesticides, thermostats, lamps and used electronics. (§ 22a-134, am'd PA 09-235, §§ 2, 8). Exemptions from Transfer Act definition of transfer of establishment. (§ 22a-134, am'd PA 09-235, §§ 2, 8). Conveyance of unit in common interest community exempt from Transfer Act upon provision of surety bond or other financial assurance. (§ 22a-134i).

Prior to transfer of establishment, transferor must deliver to transferee Form I negative declaration (no spill has ever occurred on-site), or Form II declaration (spill occurred, but complete, approved remediation was carried out); either form must be filed with DEP within ten days after transfer. If transferor cannot execute Form I or Form II, some party must execute either Form III (either environmental conditions are unknown or spill has occurred, and certifying party agrees to investigate and remediate as needed) or Form IV (spill occurred, remediation done except follow-up monitoring, and further remediation, if indicated by monitoring, will be performed by certifying party). Form III or Form IV to be filed with DEP within ten days after transfer. (§ 22a-134, et seq., am'd PA 09-235, §§ 2, 8, 9). Upon completion of remediation for portion of establishment, certifying party may submit verification by licensed environmental professional, or request that Commissioner determine that requirements have been satisfied; certifying party shall then be deemed to have satisfied requirement for that portion of establishment. (§ 22a-134a[g], [h], am'd PA 09-235, § 9).

Establishments requiring remediation will be remediated either: (A) pursuant to prior DEP review and approval; or (B) by licensed environmental professionals, who will subsequently verify remediation performed to applicable standards.

Various fees are required at time of filing of Form I, II, III, or IV declarations, based on sliding scale keyed to projected remediation costs. (§ 22a-134e).

Enforcement of Environmental Statutes.

Commissioner may issue, modify or revoke orders to correct or abate violations of c. 446m. Orders must be served by certified mail or by indifferent person or state marshal. Aggrieved persons may file request for hearing within 30 days of issuance; otherwise order becomes final. Final orders are subject to appeal under §§ 4-183 to C.G.S. 4-184 in Judicial District of New Britain. (§ 22a-626).

If Commissioner determines one has or is about to engage in acts in violation of c. 446m, Attorney General may bring action in Superior Court for Judicial District of New Haven for orders of compliance or restraint. Violations subject to civil penalties. (§ 22a-627). One who violates C.G.S. Chapter 446m, Mercury Reduction and Education, knowingly or who makes false statement or representation or certification in documents submitted including, but not limited to, plans, applications, or notifications or requests for exemption, or with criminal negligence shall be subject to civil penalties and/or imprisonment. (§ 22a-628).

Newsprint Recycling.

Percentage of recycled fiber contained in newsprint used by all publishers governed by statute. If percentages specified are not achieved by publishers as to dates specified, Commissioner of Environmental Protection may levy fines against publishers as well as printers. Each newsprint user must also submit annual report to Commissioner of Environmental Protection indicating percentage of recycled fiber used in preceding calendar year. Commissioner of Environmental Protection may exempt publisher or printer from compliance with provisions in this statute for particular reasons. (§§ 22a-256m–22a-256u).

Electronic Device Recycling.

Manufacturers of covered electronic devices must register with Department of Environmental Protection and participate in recycling program. Retailers generally prohibited from selling goods manufactured by non-conforming manufacturers. Municipalities must arrange for recycling within town. (§§ 22a-629 – 22a-640).

Lead Paint.

Lead Poisoning Prevention and Control Act (§ 19a-111) requires abatement of defective surfaces in residential buildings where children under age six reside. Act also has reporting requirements for exposure to lead. (§ 19a-110). Intact surfaces also must be abated if child resident exhibits elevated blood-lead concentration. Abatement contractors must be licensed by state. (§ 20-475).

Lawn Care Pesticides.

Use of lawn care pesticide, as defined, is restricted on grounds of schools and day care facilities, except for regional agriculture science and technology centers. (§§ 19a-79a, am'd PA 09-56, § 1, C.G.S. 10-231a, am'd PA 09-56, § 2; C.G.S. 10-231b, am'd PA 09-56, § 2; C.G.S. 10-231b[b]).

Remediation Costs.

In reassessment of special damages or benefits, trial referee will consider costs of environmental remediation. Property owner entitled to set-off of such costs in action to recover remediation costs for property. (§ 13a-76).

State Agency Purchases.

Dept. of Administrative Services is required to establish procedures to promote procurement and use of environmentally preferable products by State agencies. Vehicles purchased by State shall meet EPA specified gasoline mileage ratings and comply with 10 CFR 490 regarding alternative-fueled vehicles. (§§ 4a-67d; 4a-67e, 4a-67h).

State Buildings.

Cleaning products used inside State-owned building must meet certain environmental standards approved by Department of Administrative Services in consultation with Commissioner of Environmental Protection. (§ 4b-15a).

State Land Transfers.

Prior to sale or transfer of State land by State entity, notice of transfer must be filed with council on Environmental Quality, Secretary of Office of Policy and Management, and Commissioner of Environmental Protection. 30-day public comment period must follow notice publication. (§ 46-47).

Minimum Water Flow Regulations.

Interim and long-term water flow regulations shall be established to provide for sufficient flow of water to preserve and protect natural aquatic life. (§§ 26-141a–26-141c).

Scrap Metal.

Scrap metal processor is required to document scrap metal delivery and maintain such documentation for two years. (§ 21-11a, am'd PA 09-35, § 9). Misdemeanor not to comply with statutory recordkeeping and notification requirements. (§ 21-11a).

13 ESTATES AND TRUSTS

13.01 ADMINISTRATION:

See topic 13.09 Executors and Administrators.

13.02 ADVANCEMENTS:

See topic 13.07 Descent and Distribution.

13.03 ALLOWANCES:

See topic 13.09 Executors and Administrators.

13.04 CLAIMS:

See topic 13.09 Executors and Administrators; category 5 Civil Actions and Procedure, topic 5.17 Pleading.

13.05 DEATH:

One absent and unheard of for seven years is presumed dead and administration may be granted on his estate. Former bond and five year waiting period for distribution abolished. (§ 45a-329). Where beneficiary has been unheard of for seven years trustee may settle estate and pay it over to remainderman on latter filing in probate court bond with surety for return of trust estate to trustee or his successor if beneficiary should return within 13 years. (§ 45a-483).

Autopsy.

Consent for autopsy may be given in person, by phone, electronically, by mail or by courier. Persons authorized to consent to autopsy to arrange and pay for autopsy to be performed in any institution routinely performing autopsies. State to develop minimum requirement for consent form. (§ 19a-286).

Survivorship.

Uniform Simultaneous Death Act has been adopted. (§ 45a-440).

Deaths of husband and wife are presumed to be simultaneous when there is no evidence to indicate priority of death, except as set forth in § 45a-440a.

Action for Death.

The right of action for injuries resulting in death survives to the executor or administrator of the person killed. (§ 52-599). Action must be commenced within two years from date when injury is first sustained or discovered and in no event may action be brought more than three years from date of act or omission complained of. (§ 52-555). All damages recovered for injuries resulting in death, after payment of costs and expenses of suit, all expenses of last illness and all funeral bills, expenses of administration, claims against estate, and such amount for support of surviving spouse or family of deceased during settlement of estate as court of probate may allow, shall be distributed as personal estate in accordance with last will and testament of deceased, or if intestate in accordance with laws governing intestacy. Recovery not subject to transfer or succession taxes. (§ 45a-448).

Actions Against Health Care Providers.

Standard of care for health care providers is that level of care, skill, and treatment which, in light of all relevant surrounding circumstances, is recognized as acceptable and appropriate by reasonably prudent similar health care providers. (§ 52-184c).

Death certificate may be obtained from Registrar of Vital Statistics of town where person died. (§ 7-62b). Certified copy of death certificate is $10. (§ 7-74). Burial or removal, transmit and burial permit is $3. (§ 7-73). Certification of death. (§§ 20-86b; C.G.S. 7-62b[c]).

Disposition of Remains.

Person 18 years or older with sound mind may request to be cremated upon death by executing Dept. of Public Health authorized form including name, address and phone number for spouse or next of kin who shall be notified within 48 hours of cremation. If such person is unavailable, matter shall be referred to Probate Court. (§ 45a-318a). If Dept. of Public Health cremation form is expected, and there was good faith effort to contact spouse or next of kin and follow Probate Court orders, funeral director may carry out cremation in accordance with § 19a-323, and no person shall challenge such action if reasonable and warranted. (§ 45a-318b). Person may execute writing directing disposition of her remains at death and designating individual for custody and control of such remains and to act as agent to carry out disposition. (§ 45a-318). Crematories shall be inspected by Dept. of Public Health and subject to zoning regulations. (§ 19a-320; PA 09-232, §§ 39, 40). Boards of directors of cemetery associations are subject to certain annual meeting and disclosure requirements. (§ 19a-296). Procedures concerning disposition of unclaimed cremated remains by funeral directors. (§§ 19a-323, am'd PA 09-232, § 12; C.G.S. 20-230c–20-230d).

Commission on Medico-Legal Investigations established to act through chief medical examiner to investigate violent, sudden, suspicious, employment related, etc., deaths. (§§ 19a-400–19a-414).

Anatomical Donations.

(§§ 19a-279a–19a-2791).

See also topic 13.16 Wills, subhead Living Wills.

13.06 DECEDENTS' ESTATES:

See topics 13.07 Descent and Distribution, Executors and Administrators, Wills; category 8 Debtor and Creditor, topic 8.10 Homesteads.

13.07 DESCENT AND DISTRIBUTION:

Subject to interests of surviving spouse, real and personal estate descends and is distributed as follows, each class of which a member is living taking to exclusion of subsequent classes: (1) Children and representatives of deceased children, advancements being taken into consideration (§ 45a-438) (child in gestation at time of intestate's death inherits equally with prior born children); (2) parent or parents, provided such parent has not abandoned minor child and continued such abandonment until time of death; (3) brothers and sisters and their representatives; (4) next of kin of equal degree, no representation being permitted, and kinship being reckoned according to civil law (relatives of half and whole blood share equally); (5) stepchildren and their representatives (§ 45a-439).

Issue of deceased children, brothers or sisters take by representation, even though there be no surviving child, brother or sister of the intestate. (See 25 Conn. 387; 115 Conn. 239, 161 A. 94.)

Real property subject to life use of husband or wife, remaining at end of term, is distributed as above provided, or may be so distributed during term subject to life interest. (§ 45a-439).

Surviving spouse or conservator or guardian of his or her estate of intestate decedent takes as follows: if no surviving issue or parents of deceased, entire estate; if no surviving issue but deceased parents alive, $100,000 plus three-quarters of remainder; if issue of deceased survive and are all issue of surviving spouse, $100,000 plus one-half of remainder; if issue of deceased survive who are not issue of surviving spouse, one-half of estate absolutely. (§ 45a-437). Issue shall include children born out of wedlock and issue of children who qualify for inheritance under provisions of § 45a-438 of general statutes. Share of surviving spouse may be set out in realty or personalty or both. Probate court can set out allowance for support during settlement. (§ 45a-436). Different rules shall apply to estates of all persons dying on or after July 1, 1985.

Surviving spouse is not entitled to statutory share of estate or to elective or intestate share where, without sufficient cause, spouse has abandoned other spouse and continued abandonment to time of death. (§ 45a-436a).

As to election to take against will, see topic 13.16 Wills.

Except as provided in 45a-731, individual is child of his genetic parents, regardless of marital status of such parents. With respect to child born out of wedlock, father shall be considered parent if father and mother marry after child's birth, father has been adjudicated father of child by court of competent jurisdiction, father has acknowledged under oath in writing that he is father of child, or after death of father or child, paternity is established by Probate Court by clear and convincing evidence that father acknowledged in writing that he is father of child and openly treated this child as his. (§ 45a-438[b]).

Adopted Children.

See category 14 Family, topic 14.01 Adoption.

Person convicted as principal or accessory to murder or capital felony may not inherit from his victim. (§ 45a-447, am'd PA 09-201, § 1).

Advancements.

Children or other descendants who have received estate by advancement of the intestate in his or her lifetime, or their representatives, take only so much of the estate as will, together with such advancements, make their share equal to what they would have been entitled to receive had no such advancement been made. (§ 45a-438).

Disclaimers of interests in property are regulated by statute. (§§ 45a-578–45a-585).

Escheat.

On failure of heirs estate shall be presumed to be abandoned and shall escheat to state (§ 45a-452), subject to reclamation (§ 3-70a).

See also topic 13.09 Executors and Administrators.

13.08 ELECTION:

See topic 13.16 Wills.

13.08A ESTATES: (in property)

See category 21 Property, topic 21.16 Real Property.

13.09 [RESERVED]

13.10 EXECUTORS AND ADMINISTRATORS:

Estates of decedents dying on or after Oct. 1, 1987 are subject to 1987 amendments regarding: Notice requirements, filing periods and order of preference of claims.

Jurisdiction of administration of decedent's estate is in court of probate of district where decedent was domiciled at his death (§ 45a-283) or where estate or part of estate of nonresident decedent (§ 45a-287) is found.

Original probate or administration may not be granted after ten years unless for a good cause. (§ 45a-330).

Judicial Compensation.

Calculation of probate judge's salary based on annual weighted workload of probate court. (§§ 45a-92[k], 45a-82[j], am'd PA 09-114, § 2).

Appointment and Qualification.

Executor named by will, if found by probate court to be willing and able to serve, qualifies by filing bond. If no executor is named, or if executor named is dead or unwilling or unable to serve and no alternate or successor has been named, probate court appoints administrator c.t.a. If executor or administrator c.t.a. dies in office, resigns or is removed, and no alternate or successor has been named, probate court appoints administrator d.b.n. c.t.a. (§ 45a-290). Executor or administrator c.t.a. is ex officio administrator of intestate portion of estate. (§ 45a-291).

No oath of office is taken.

Bond with resident surety or authorized surety company is required of representative, amount usually being double the value of the personalty. (§§ 45a-139, 45a-289). Where will directs that no bond be required of executor, probate court shall excuse posting of any bond if no objection to will is filed, but amount of any bond required may be not less than double debts or amount of penalty and succession tax, whichever is greater. Bond may be reduced after interim accounting. (§ 45a-289). Probate bonds may be waived depending upon assets of estate. (§ 45a-139).

Preferences in Right to Administer.

Administration of intestate estates (§ 45a-290), and of testate estates when it becomes necessary to appoint administrator c.t.a., is granted to surviving spouse or next of kin (unless there is will and they are not interested in such will) or, on their refusal or incapacity or reasonable objection by creditor or heir, to such other person as court deems proper.

Temporary administrator with limited powers may be appointed without notice pending probate of will or appointment of administrator. (§ 45a-316).

Eligibility.

Married woman may be executor or administrator and husband is not liable for her acts or defaults. Nonresident may serve as executor or administrator (§ 45a-396) and foreign corporation may be executor under some circumstances, but not administrator (see category 2 Business Organizations, topic 2.03 Corporations). As to appointment of process agent by foreign corporation or nonresident individual, see category 21 Property, topic 21.01 Absentees. (§ 45a-206).

Allowance in court's discretion may be ordered out of and during settlement of an estate for support of surviving spouse and family with provision for: allowance to run for a fixed period or entire period of settlement; payment of lump sum; vesting of allowance in spouse regardless of remarriage or death; or for ultimately charging all or part of allowance against spouse or family member supported (§ 45a-320) and property of deceased spouse exempt from execution may be set out to surviving spouse where estate is insolvent (§ 45a-435). As matter of practice such allowances are usually granted ex parte unless hearing is specifically requested.

Notice and Limitation to Creditors.

If estate is settled as solvent, the probate court, on original appointment or qualification of representative, limits time (not less than three nor more than 12 months) within which claims must be presented to representative. Notice is published by publishing same in a newspaper having circulation in subjectprobate district, or both, and by such other notice as court may direct. For cause shown upon hearing after public notice, court may limit further time for presentation of claims, not exceeding period which it might originally have limited. (§ 45a-395).

With respect to estates where settlement was commenced six years or more prior to effective date of 1997 Amendment, no creditor will be deemed to have filed claim outside of order of limitation where estate fiduciary has failed to provide notice of limitation period to creditor or has failed to make sworn return of order to court. (S.A. C.G.S. 97-6, § 4; H.B. 6402).

Applies to Decedents Dying on or after Oct. 1, 1987.

Notice to creditors by newspaper publication within 14 days after appointment of first fiduciary. State agencies from which decedent or family received aid or care shall be notified by certified mail and may present claims within 90 days or be forever barred. Fiduciary and beneficiaries may notify specific creditors giving such creditors at least 90 days to present claims or be forever barred from recovery unless creditor requests and is granted extension from probate court. No claim may be presented more than two years from date claim arose (if it arose after decedent's death) or from appointment of first fiduciary (or after statute of limitations applicable to claim expires). (§§ 45a-353–45a-357).

Estate Represented Insolvent.

If estate is represented insolvent and it is deemed expedient by court to settle it as such, two or more commissioners are appointed by court to receive and pass on claims, and time is similarly limited within which claims may be exhibited to them. Representative must give similar public notice of time and place of commissioners' meeting and send copy thereof to each known creditor within ten days of their appointment. (§§ 45a-406–45a-407).

An estate not represented as insolvent at the start may be represented as such after the time limited for presentation of claims has expired, in which event, if deemed expedient commissioners are appointed and, without further limitation (unless found necessary), claims presented to representative are committed to commissioners and passed on by them. (§§ 45a-408; 45a-407).

When it appears that the estate is no more than sufficient to pay expenses of administration, funeral, last sickness, taxes, and allowances for family and surviving spouse, the court may decree its settlement without commissioners. (§ 45a-409).

Applies to Decedents Dying on or after Oct. 1, 1987.

Probate court will determine at hearing if estate is insolvent. Newspaper notice shall be published within 14 days after insolvency determined. Fiduciary shall notify all creditors allowing creditors 210 days to present claims or be forever barred unless creditor requests and is granted extension by probate court. (§ 45a-390, et seq.).

Presentation of Claims.

Claims must be presented (by all creditors whether resident or nonresident) in writing and, if required by representative or probate court, with affidavit of creditor (§ 45a-391) within time limited therefor, or within such further time as court may limit to permit late presentation in deserving cases, such further limitation not to extend more than 30 days beyond one year from date of first limiting decree (§ 45a-395).

Applies to Decedents Dying on or after Oct. 1, 1987.

Claims in writing to fiduciary or court of probate. Fiduciary may require affidavit proving justice of claim. Personal delivery or mail allowed. Date determined by date of receipt or of mailing if properly addressed. (§ 45a-358).

Debts Absolutely Due and Owing.

Claims for debts absolutely due and owing (whether matured or not matured) which are not so presented, are absolutely barred, unless, in the case of an insolvent estate, the claimant can show some estate of the deceased not included in the inventory. (§ 45a-395).

Debts Not Absolutely Due and Owing.

Claims against solvent estates not absolutely due and owing may be presented within four months of their accrual, and if so presented claimant may collect out of estate remaining after payment of claims duly presented (no notice necessary if claim is subject of action pending in any court against decedent) (§ 45a-395) or, if distribution has taken place, may charge legatees or distributees, or may procure probate sale of real property in hands of heirs or devisees or purchasers from them (86 Conn. 462, 85 A. 682; 102 Conn. 644, 129 A. 854; 6 Conn. 258), but no such sale may be had after heir or devisee has sold to bona fide purchaser for value except within first ten years after decedent's death (§ 45a-327).

Tort Claims.

No requirement of notice in case of tort claims on which action is pending in court at time of death. If person against whom a claim founded in tort dies on day applicable statute of limitations expires or within 30 days prior to such day, period of 30 days from appointment of executor or administrator allowed to file suit. (§ 45a-395).

Actions Pending at Death.

Where action on claim was pending at time of debtor's death, such claim need not be presented if, within one year after the death, action is properly continued against executor or administrator under survival statute. (§ 52-599; 98 Conn. 201, 118 A. 915).

Secured claim need not be presented to protect security but must be presented to participate as to excess over security. If a creditor has security against an insolvent estate, the commissioners appraise such security and the representative notifies the creditor of the valuation thus placed on the security and the amount of the claim allowed. Unless within 15 days after such notice the creditor files in court a written relinquishment of the security he is entitled to a dividend only on the amount of his claim allowed in excess of the appraised value of the security. (§ 45a-412).

Applies to Decedents Dying on or after Oct. 1, 1987.

If fiduciary fails to reject, allow, or pay claim within 90 days of presentation, claimant may give fiduciary notice to act. Failure to act within 30 days from such notice will be deemed rejection of claim. (§ 45a-360).

Aggrieved claimant of solvent estate may file suit within 120 days from date of rejection or make application to court of probate within 30 days of rejection to hear and decide claim. Claimant of insolvent estate may apply to probate court to hear and decide grievance within 30 days of rejection. (§ 45a-401).

If representative is nonresident, claims may be left with judge of probate. (§ 45a-396).

Proof of Claims.

All claims must be presented in writing and, if required by representative or probate court, with affidavit of proof signed by creditor. (§ 45a-391).

The following form may be used for proof of claims:

Form

To . . . . . . Administrator of the estate (or executor of the will) of . . . . . . late of . . . . . . deceased. The subscriber represents that: (1) The above named deceased was at the time of his death, and his estate is still, justly and truly indebted to the subscriber in the sum of . . . . . . dollars, with interest thereon from . . . . . . day of . . . . . ., 20. . . ., at . . . . . . per cent per annum. (2) The nature and consideration of said debt is as follows: Merchandise as per itemized statement filed herewith and made part hereof (or promissory notes, copies of which are filed herewith and made part hereof, etc.). (3) No part of said debt has been paid and there are no setoffs or counterclaims to the same. (4) The subscriber has not nor has any person by his order, for his use, had or received any manner of security for said debt except as follows: . . . . . . Wherefore, the subscriber presents a claim to you as administrator of the estate (or executor of the will) of said deceased for the sum of . . . . . . dollars and . . . . . . cents and with interest from the . . . . . . day of . . . . . ., 20. . . . .

(Conn. Probate Practice, § 500).

. . . .

Approval or Rejection of Claims.

Representative should notify creditor of disallowance of claim, which notice in the case of insolvent estate must be given within six days after the return of commissioners' report (§ 45a-413) and in case of solvent estate should, for representative's protection, be given no later than 30 days after expiration of time limited for presentation of claims (§§ 45a-397; 45a-402).

Commissioners of insolvent estates must file with probate court a report of their doings as soon as practicable after expiration of time limited for presentation of claims, which report must contain a list of claims with the amounts, presented, allowed and disallowed. (§ 45a-413).

Any claimant who has presented claim (§§ 45a-391; 45a-396–45a-398) and has not received written notice of disallowance of claim within 30 days following end of limitation period for presenting claims may bring suit within four months of notice to executor that claimant intends to bring suit. (§§ 45a-400; 45a-401).

Applies to Decedents Dying on or after Oct. 1, 1987.

Creditor of secured claim may only share in estate with respect to excess of claim over value of security unless creditor elects in writing to relinquish security. Fair market value of security determined by fiduciary may be challenged in probate court within 30 days. (§ 45a-379).

Payment of Claims.

Real estate is subject to being appropriated for payment of claims, but only by taking out administration on the estate, following which the executor or administrator sells the real estate at probate sale and brings the proceeds into the administration account. (83 Conn. 75, 75 A. 93; 60 Conn. 63, 22 A. 488).

If estate is insufficient, the order of appropriation of assets for payment of claims is: (1) personal estate not specifically bequeathed; (2) real estate not specifically devised; (3) personal estate specifically bequeathed; (4) real estate specifically devised. (71 Conn. 521, 42 A. 641; 60 Conn. 63, 22 A. 488).

In insolvent estate, the claims are paid in the following order: (1) Funeral and administration expenses; (2) debts due for last illness; (3) taxes due the state or the United States; (4) wages due for personal services performed within three months of the decease; (5) other preferred claims; (6) all other debts pro rata. (§ 45a-392).

Applies to Decedents Dying on or after Oct. 1, 1987.

Preference of claims in settlement of decedent's estate: (1) Funeral expenses; (2) expenses of settling estate; (3) claims for last illness of decedent; (4) taxes and claims of state and U.S.; (5) personal wages due laborers or mechanics within three months prior to decedent's death; (6) other preferred claims; (7) all other claims in proportion to respective amounts. (§ 45a-365).

Actions on Claims.

Payment of claim allowed but not paid may be enforced by suit on representative's bond (§ 45a-654) or by application for removal of representative for neglect of duty (§ 45a-242).

Claimant against solvent estate whose claim has been disallowed may apply within 30 days of notice of disallowance to probate court for hearing upon same or appointment or one or more commissioners to decide upon claim. If application for hearing or appointment of commissioner denied, creditor may bring suit within four months after denial of application. Appeal is to Superior Court. (§§ 45a-193; 45a-402; 45a-401).

Claimant against insolvent estate whose claim has been disallowed by commissioners has choice of two remedies: (1) To file, within 14 days, written objections to the acceptance by the probate court of the commissioners' report, which report may be rejected only for misconduct of commissioners affecting validity of report as whole (§ 45a-413); (2) if his claim exceeds $50, to appeal from doings of commissioners to Superior Court within one month of acceptance of report by probate court (§ 45a-190).

Actions pending at death may be revived or continued against executor or administrator and right of action against deceased person survives against executor or administrator (§ 52-599); but no suit thereon (except for taxes, expenses of last sickness and funeral expenses) may be brought if estate is in settlement as insolvent estate (§ 45a-414), and creditor of solvent estate may not sue representative within time allowed for presentation of claims unless representative has given written notice of disallowance (§ 45a-402).

Applies to Decedents Dying on or after Oct. 1, 1987.

Claimant of solvent estate may file suit against fiduciary within 120 days of rejection of claim. Suit may be brought against beneficiaries if claims are unsatisfied. (§ 45a-368).

No suit shall be brought against fiduciary of insolvent estate except as provided in § 45a-380. (§ 45a-382).

Inventory and Appraisal.

An inventory and appraisal of all the decedent's property, except foreign real estate, must be made and sworn to by the representative and filed in the probate court within two months after his qualification. This time may be extended by court, for cause shown, but not to exceed four months from qualification. (§ 45a-341). Failure to file within time limited is grounds for removal of fiduciary. (§ 45a-342). Appraisal is at fair market value by fiduciary. (§ 45a-341).

In case of nonresident decedent, the inventory must list all property, real and personal, located within this state.

Administration and Distribution of Estate.

The following steps are usually taken by executors and administrators after qualification and compliance with order of notice to creditors:

(1) Publish notice to creditors within ten days after order of notice. (§ 45a-395).

(2) Apply to probate court for authority to continue decedent's unincorporated business (§ 45a-328), unless such authority is contained in will (106 Conn. 602, 138 A. 795).

(3) Record death notice in each town where real estate is situated within two months after qualification. (§ 45a-322).

(4) Return inventory and appraisal within two months of qualification. (§ 45a-341).

(5) Within nine months after death file with probate court a report of any transaction which may be a taxable transfer inter vivos or by survivorship. (§ 12-359). See category 22 Taxation, topic 22.07 Estate Tax.

(6) Take custody of the real estate not specifically devised or occupied by the family of deceased as a dwelling house, bringing the income therefrom into the account as personal property (§ 45a-321), and sell or mortgage real estate only on probate court order and on furnishing special bond, unless executor or administrator is authorized bank or trust company (§ 45a-169), if such sale or mortgage is requisite to pay claims or legacies (§ 45a-427), or is otherwise reasonable (§ 45a-169), such sale being public or private (§ 45a-164) on such notice as court directs. Where deceased owned undivided interest in real estate not specifically devised, representative may, by petition joined by owners of major portion of other interests therein, procure partition thereof by committee of three appointed for that purpose by probate court, which committee must file return of their doings with court. Subject to court's approval, portion set over

to estate thereafter will be treated same as if it had come to deceased by partition during his life. (§ 45a-169).

(7) Take custody of and title to the personal property, selling it as required or expedient. (§ 45a-162). Upon written application of fiduciary, after notice and hearing, if court finds it would be for best interest of parties in interest, it may authorize person other than fiduciary to sell any of deceased's personal estate, upon posting of bond. Such sale may be public or private; if public upon such notice, and if private upon such terms, as court may direct; and at any sale so made fiduciary may be purchaser. (§ 45a-169).

(8) Within 30 days of expiration of time limited for presentation of claims, in case of solvent estate, file with probate court a sworn return stating that notice was given creditors as required, listing claims presented and amounts allowed or disallowed. (§ 45a-397).

(9) Where for the best interests of estate, compromise doubtful or disputed claims in favor of or against the estate, first procuring probate court order therefor. (§ 45a-151, § 26).

(10) As a general rule pay funeral expenses, expenses of last sickness, and allowance for support of family or surviving spouse without delay.

(11) So far as estate will obviously permit, pay specific and cash bequests and claims.

(12) Within nine months of date of death, unless time extended, file with tax commissioner and probate court a succession tax return. (§ 12-359[a]). See category 22 Taxation, topic 22.07 Estate Tax, subhead Succession and Transfer Tax.

(13) *Final Account.*—File final account usually within one year of appointment, on which the representative is charged with the amount of inventory, additions thereto, gains thereon, income, etc., and is credited with his expenses, compensation, allowance to family, claims paid, loss on inventory, legacies paid, etc., and estate on hand for distribution. After notice to parties in interest probate court passes on propriety of account, subject to appeal to superior court and if necessary orders it corrected, and this action renders res judicata all matters covered by account. (62 Conn. 218, 25 A. 109). No resignation may be accepted until representative has fully and finally accounted as above. (§ 45a-242). Where representative dies during distribution, final account in somewhat different form must be prepared by his executor or administrator. Partial accounting prior to final account is sometimes filed but this is open to collateral attack on hearing on final account. (56 Conn. 1, 12 A. 513; §§ 45a-645; 45a-653; 45a-654; 45a-655–45a-662).

(14) *Distribution.*—At time of acceptance of final account procure probate court order of distribution, ascertaining heirs and distributees of intestate estate and of testate estate so far as will may leave them necessary to be defined. (§ 45a-431). For settlement of will contests see § 45a-434.

(15) Distribute property to heirs or distributees and file return of distribution with probate court. (§ 45a-434).

(16) On acceptance by probate court of return of distribution, deliver possession of the real estate as indicated therein, transfer the personal estate as indicated therein, pay the amount of the succession and estate taxes, if not already paid, and file a return of distribution with the probate court, in the nature of a supplemental account, showing that this has been done.

(17) Within 30 days of acceptance of final account, file with town clerk for town where real estate is located certificate of devise, descent or distribution. (§ 45a-450). See category 10 Documents and Records, topic 10.04 Records.

(18) If additional estate is afterward discovered, administer on it without further appointment, filing supplemental account of doings with reference thereto. (16 Conn. 310).

(19) Court will defer to decision of fiduciary unless there has been abuse of discretion, for which remedies are available. (§ 45a-543).

(20) Estate's executor or administrator shall have access to electronic mail of deceased person upon receipt of written request or order from probate court by electronic mail service provided. (§ 45a-334a).

Distribution if Abroad.

Where legatee or distributee is not within territorial limits of the U. S., any probate court may order such property converted into available funds and paid to the State Treasurer, to be invested by him, and to be held pending such further order as the probate court may make. (§ 45a-449).

When a testator orders an estate to be divided among two or more devisees or legatees without appointing any person to divide it, or if he appointed persons to divide it who refuse or are unable to do so, or where in any will any estate or interest is given to two or more persons jointly, and the same is susceptible of a division, the executor or other fiduciary charged with the administration of the estate makes the division, provided the court before which such will was proved may, in its discretion, during the settlement of the estate of the testator, on its own motion or on the request of any one interested, appoint three disinterested persons to make the division; and such division, when accepted by the court, is binding on all persons interested; but, if the devisees, legatees or heirs are legally capable of acting and make a division in writing, in the manner provided for the division of intestate estates, such division is valid. (§ 45a-434).

Intestate estates, after deducting expenses and charges, are distributed by the administrator or other fiduciary charged with the administration of the estate; provided the court of probate may, in its discretion, on its own motion or upon application by any interested person, appoint three disinterested persons to make the distribution; but if all the persons interested in the estate are legally capable of acting, and make and file in such court a division of the same, made, executed and acknowledged like deeds of land, such division, being recorded in the records of such court, constitutes a valid distribution of such estate. When it appears that a legatee, distributee or beneficiary living outside the United States or its possessions would not have the benefit, use, or control of property due him, probate court may order property to be converted into funds and paid to State Treasurer to be held and invested by him subject to further order of such court or to be held for purchase of food, clothing, medicine and necessities of life and periodic transmittal of same to legatee or beneficiary. (§ 45a-449).

Liabilities of Executors and Administrators.

Representative may obtain practical immunity from errors in judgment in selling personal property paying or compromising claims and making other payments by obtaining probate court's approval in advance. (§ 45a-202). Person with claim against representative for money paid or services rendered to estate may sue representative or his successor and such claims may be ordered paid out of estate, but this does not prevent claimant from electing to hold representative personally liable for debts contracted for estate or from holding representative liable for any balance which estate is insufficient to pay. (§ 52-202).

Limitation.

When claim against representative as such cannot be adjusted, the claimant must bring suit within four months of notice of disallowance. (§§ 45a-399–45a-401).

Applies to Decedents Dying on or after Oct. 1, 1987.

Following final distribution of all assets known to fiduciary any suit on unsatisfied obligation is against beneficiary. Fiduciary is not chargeable for any assets distributed in good faith after 150 day period has elapsed. (§ 45a-356).

Compensation to executor or administrator is allowed on his final account at such amount as is claimed by him if found by probate court to be reasonable, there being no statutory rate of compensation. (98 Conn. 374, 119 A. 341). In practice, executors and administrators, particularly corporations, often compute their compensation on the basis of a fixed percentage of the gross estate administered.

Foreign Executors and Administrators.

Ordinarily the executor or administrator at the place of residence will be favored for appointment as ancillary administrator in this state. (49 Conn. 411). Ordinarily foreign executors and administrators have no standing in this state unless qualified either as ancillary executors or administrators. (2 Root 462). However, payment of a debt to a foreign executor or administrator not qualified in this state is a lawful payment. (32 Conn. 308). A foreign executor or administrator of a deceased mortgagee may release or assign a mortgage without obtaining ancillary appointment, on filing with clerk of town where the land is located a certificate of appointment. (§ 49-12). Foreign corporations duly qualified to act as executor or testamentary trustee may hold stocks in name of nominee upon compliance with statutory conditions. (§ 45a-207). See category 2 Business Organizations, topic 2.03 Corporations, subhead Foreign Corporations, as to foreign corporation acting as executor or administrator.

See also Wills, subhead Foreign Probated Wills.

Distribution Without Administration.

Where administration is not taken out within 30 days after decedent's death, corporate stocks or bonds, bank deposits, equities in building or savings and loan shares, wages due, death benefits from insurance policies, personal property, tangible or intangible or unreleased interest in mortgage, not exceeding $40,000 in aggregate, left by decedent, may be paid to husband, wife, next of kin, creditor to whom debt is due for last sickness of decedent or undertaker, on application, without administration. (§ 45a-273[a]). If value of decedent's property exceeds claims against estate, and decedent left will providing for distribution different from that under laws of intestate succession, excess is paid in accordance with terms of will. If decedent left no will, or if will provides for distribution same as under laws of intestate succession, excess is distributed as though decedent died intestate. (§ 45a-273).

Applies to Decedents Dying on or after Oct. 1, 1987.

When court determines assets of deceased do not exceed expenses of funeral, settling estate, last sickness, taxes and claims of government (excluding allowance for family support), it may order settlement. (§ 45a-383).

When Administration Unnecessary.

See subhead Distribution Without Administration, supra.

Small Estates.

See subhead Distribution Without Administration, supra.

Sterilization.

Orders for sterilization pursuant to §§ 45-690, et seq. must be stayed for ten days to allow for appeal. (§ 45a-690).

Third parties having knowledge as to any estate before the probate court may be summoned upon the written application of any person having interest in any matter or upon court's own motion to give testimony under oath relating to such matter. (§ 45a-129).

Attendance may be compelled by subpoena and capias. (§ 45a-129).

Incorporation by Reference.

Testator can incorporate by reference certain broad powers for executors or administrators c.t.a. or administrators c.t.a., d.b.n. or their successors or ancillary fiduciaries without setting forth powers at length. (§ 45a-234). Also, other further powers can be specifically and individually incorporated. (§ 45a-235). See also topic 13.15 Trusts, subhead Incorporation by Reference.

Uniform Fiduciaries Act not adopted.

Uniform Principal and Income Act adopted. See topic 13.15 Trusts, subhead Accounting.

Uniform Prudent Investor Act adopted. (§ 45a-541).

Uniform Simplification of Fiduciary Security Transfers Act.

Not adopted.

Uniform Anatomical Gift Act repealed but see topic 13.05 Death, subhead Anatomical Donations. (§§ 19a-270a–19a-2791). Signed statement or donor card is prima facie evidence of good faith attempt to conform to donor's intent and physician or health care provider or facility not civilly or criminally liable if they abide by statutes or another State's law. (§ 19a-279b).

13.11 FIDUCIARIES:

See topics 13.09 Executors and Administrators, Trusts; category 14 Family, topic 14.07 Guardian and Ward.

13.12 INTESTACY:

See topic 13.07 Descent and Distribution.

13.13 [RESERVED]

13.14 PROOF OF CLAIMS:

See topic 13.09 Executors and Administrators; category 5 Civil Actions and Procedure, topic 5.17 Pleading.

13.15 TRUSTS:

Kinds.

Inter vivos trusts are mostly within jurisdiction of courts of equity, which also have some jurisdiction with probate courts over testamentary trusts. (102 Conn. 96, 128 A. 292).

Animal trusts may be created to provide for any animals alive during settlor's lifetime. (PA 09-169).

Charitable trusts may be created by deed or by will (§ 45a-514) and need not designate a particular charitable purpose, provided the trustee or any other person has the power to select, from time to time, the charitable purpose, and no gift or bequest in trust accompanied by such power of selection is void for uncertainty (§ 45a-515). Gift by deed or will to charitable community trust may incorporate by reference terms and conditions of any existing written charitable community trust, and no gift or bequest so made is void for uncertainty or invalid for failure of community trust to comply with statutes on wills. (§ 45a-516). Community trustee must render annual account to probate court. (§ 45a-517). Where current market value of charitable trust is under $150,000 steps may be taken to terminate trust. (§ 45a-520). See catchline Private Foundations, infra.

Cemetery trust for perpetual care or improvement of a cemetery or lot therein is valid, and may be received by town, ecclesiastical society or cemetery association. (§ 19a-299; 73 Conn. 56, 46 A. 278).

Common trust funds held by any fiduciary under stated conditions are valid. (§ 36a-365).

Employees' trust funds created by employer as part of stock bonus, pension, disability, death benefit, or profit-sharing plan is exempt from rule against perpetuities and suspension of power of alienation, and income may be accumulated in accordance with terms of trust. (§§ 45a-505–45a-508).

Life insurance and annuity proceeds may be held by company in trust upon such terms and restrictions as to revocation by insured and control by beneficiaries and with such exemptions from claims of creditors of beneficiaries other than insured as are agreed to in writing by company and insured. (§§ 38a-453, 38a-454). Insurance trust agreement with third person as trustee is not a testamentary trust. (119 Conn. 570, 177 A. 742).

Spendthrift trust must give trustee power to accumulate or express authorization to withhold income, or income must be expressly given for support of beneficiary or his family, or else income is liable in equity for claims of creditors. (§ 52-321; 95 Conn. 216, 111 A. 182). Settlor cannot create such trust for his own benefit. (129 Conn. 211, 27 A.2d 166).

Constructive trust arises by operation of law and is founded on fraud, actual or constructive, misrepresentation, imposition, circumvention, artifice, concealment, or abuse of confidential relations. (121 Conn. 153, 183 A. 394).

Resulting or presumptive trust rests upon presumed intention of parties to create a trust. (94 Conn. 350, 109 A. 249).

Dry or simple trust is conveyance in trust without further duties or directions to trustee and beneficiary has right of possession and can compel trustee to execute necessary conveyances. (93 Conn. 402, 106 A. 326).

Naked trust is recognized, and trustee has none of ordinary duties of trustee as to care of property. (56 Conn. 284, 15 A. 791).

Precatory trust requires clear intent to make expectation of testator binding upon donee, certainly as to subject matter of the expectation, and certainly as to the object to be benefited. (86 Conn. 516, 86 A. 7).

Statutory trusts authorized and governed by Connecticut Statutory Trust Act. (§§ 34-500–34-547).

Private Foundations.

If charitable trust considered “private foundation” under federal Internal Revenue Code, authorized to make necessary expenditures to avoid imposition of taxes, and trustees prohibited from certain acts endangering charitable status under Internal Revenue Code. (§ 33-281c).

Creation.

Where donor by inter vivos agreement wishes to establish voluntary trust by appointing a third person as trustee, he must make such a transfer of the property that nothing remains to be done on his part to make the gift effective. (131 Conn. 307, 39 A.2d 895). Express trust in real estate must be in writing (124 Conn. 140, 198 A. 577). Trusts of personal property may be created verbally, by direct and express statements, or by implication from the circumstances showing intention of donor to be creation of trust. (104 Conn. 169, 132 A. 902). Trust under a will may not be created by oral declarations. (86 Conn. 516, 86 A. 7). Declaration of trust arises when owner of property without making any transfer declares that he holds property in trust. (82 Conn. 504, 74 A. 781). Connecticut has adopted Uniform Testamentary Additions to Trusts Act. (§ 45a-260).

Beneficiary Interests.

In trust matters, where there is no conflict of interest, holder(s) of any power of appointment represent(s) potential appointees and takers in default. Court-appointed conservators or guardians may represent and bind State or ward. Authorized agent may represent and bind principal. Trustee may represent and bind beneficiaries. Executor or administrator may represent and bind persons interested in estate. Parent may represent and bind minor or unborn child. Minors, incapacitated and unknown persons may be represented and bound by persons with substantially identical interest or court-appointed guardian ad litem. Notice to representative is binding on those represented. (§ 45a-487e).

Appointment of Trustee.

Donor or testator can appoint trustee and determine how to fill vacancy, but surviving trustee cannot appoint successor unless instrument or will so provides. (84 Conn. 494, 80 A. 758). Probate court in district where estate is, when no provision is made by law or in inter vivos instrument for contingency of death, refusal to act or resignation of trustee, and in district where will proved when in testamentary trust no trustee is appointed or trustee dies, becomes incapable, refuses to accept or resigns, may appoint suitable person to fill the vacancy. (§ 45a-474). Superior court may also appoint trustee of inter vivos trust and may appoint testamentary trustee where trust would otherwise be defeated. (60 Conn. 314, 22 A. 945; 60 Conn. 32, 22 A. 447). Upon death, resignation, or removal of testamentary trustee for incapacity, neglect, or waste, court of probate may fill vacancy unless will provides otherwise. (§ 45a-242). Legal title vests in successor upon appointment and qualification, and certificate of appointment on land records in town where property is situated is evidence that legal title is vested in him. (§ 45a-476).

Superior court may suspend powers of trustee of inter vivos trust during his war service and appoint substitute. (§ 45a-479). Probate court may appoint foreign trustee of nonresident life tenant as trustee in Connecticut (§ 45a-477), may appoint trustee of life estate in personalty where no trustee named, if life tenant does not give bond (§ 45a-451) and may appoint trustee of estate of person who has disappeared (§ 45a-478). Upon sale of undivided interest in estate, probate court may appoint trustee for any unknown or unascertained party entitled to share in proceeds. (§ 45a-326).

Eligibility and Competency.

Corporations other than national and state banks may not act as trustee without specific legislative authority and license from Bank Commissioner. (§§ 36a-380–36a-386). Foreign corporation authorized by its charter to act as trustee and named as trustee in will of Connecticut resident or nonresident leaving property in state or so named by any person or persons to whom power of appointment of trustee was granted in such will, or so named by any corporation may qualify and act as testamentary trustee if state of its domicile extends similar privilege to Connecticut corporation, if it appoints Secretary of State and probate judge its agents for service of process. (§§ 45a-206; C.G.S. 52-60). National bank may act as trustee. (94 Conn. 648, 110 A. 54). Judge of probate may not appoint as trustee any corporation of which he is director or salaried officer unless such corporation has been nominated by testator or trustor. Nonresident may act as trustee, but appointment does not take effect until he appoints probate judge his agent for service of process. (§ 52-60). Probate court can reject trustee nominated by testator for any cause impeaching his integrity or capacity. (54 Conn. 325, 8 A. 136).

Qualification.

Trustee qualifies upon accepting trust and giving necessary bond, and qualification dates from time bond filed and not from when bond approved by probate court. (73 Conn. 435, 47 A. 665). Testamentary trustee appointed by testator or trustee appointed by probate court to fill vacancy must give bond with surety, unless will provides otherwise, and refusal to give bond is deemed a refusal to accept or perform duties of trustee. Public or charitable corporation or cemetery association as trustee may give bond without surety. (§ 45a-473). When will requires no bond or bond is deemed insufficient by probate court, court, upon application by interested party, may require trustee to furnish sufficient probate bond. (§ 45a-473). Trustee for missing person must give bond before taking charge of estate (§ 45a-478), as must successor trustee (§ 45a-242). Probate bond need not be required of state bank or trust company or foreign bank or trust company which has qualified and been approved as trustee. Court may also dispense with bond requirement if not needed for protection of interested parties. (§ 45a-169).

Removal of Trustee.

Trustee may be removed for being incapable of executing trust, lack of cooperation among co-fiduciaries, substantially impairing administration of estate, change in circumstances, for neglect, and for wasting estate, upon motion of probate court, or complaint of interested party or surety on his bond, and all suits in favor or against trustee removed survive to successor. (§ 45a-242). Trustee may also be removed for failure to substitute new bond, for mismanagement, for failure to give additional bond (§ 45a-141), and for failure to file succession tax return in time (§ 12-359[a]). Insolvency or bankruptcy of trustee individually is not of itself ground for removal. (117 Conn. 573, 169 A. 602). Trustee may appeal from probate court decree of removal. (§ 45a-243). Trustee removed must file account and turn over estate to successor, and probate court may enforce delivery to successor in same manner as court of equity might do. (§ 45a-244; 80 Conn. 459, 68 A. 990).

General Powers and Duties of Trustees.

Courts of equity possess broad powers to advise trustees concerning their powers and duties, including construction of trust instrument, but will not interfere in exercise of discretionary powers in absence of fraud, bad faith, or abuse of discretionary power. (116 Conn. 588, 165 A. 807). Fiduciary appointed or whose appointment was approved by probate court may receive authority from it to compromise and settle (§ 45a-151) and to arbitrate claims (§ 45a-153). Trustee shall allocate receipts and expenditures to principal or income of trust in accord with terms of trust or with provisions of this act or, if neither is applicable, with what is reasonable and equitable. (§ 45a-215). If claim against fiduciary required to account to probate court is disallowed, claimant must commence suit against trustee within four months after receiving written notice of disallowance. (§ 45a-399). Trustee of estate of deceased nonresident may execute release of mortgage of Connecticut real estate provided he files certificate of appointment with release. (§ 49-12). Payment or delivery of property by trustee in good faith under proper probate court order and before appeal is taken from such order does not make him liable for such money or property although the order is later reversed, vacated, or set aside. (§

45a-202). Testamentary trustee must pay real estate taxes due from estate before making final settlement of his account. (§ 45a-333). Claim for moneys paid or services rendered estate in hands of trustee may be paid out of estate, but if estate is not sufficient, claimant may bring civil action against trustee for balance or may hold trustee liable to his personal responsibility for any debt contracted in execution of trust. (§ 52-570a). Trustee having personalty subject to property tax must file return (§ 12-45) and if not done, he forfeits to town where return should be made 2% of cash value of taxable property for each year of such neglect (§ 12-46). Trustee is liable for estate tax due on property received by him until it is paid. (§ 12-392). Trustee of inter vivos or testamentary trust may divide single trust into two or more separate trusts if division is in best interest of beneficiaries. Procedures for division set forth by statute. (§ 45a-488).

Trustees of "private foundations" under federal Internal Revenue Code prohibited from certain acts endangering charitable status. (§ 33-281c).

Sales and Mortgages.

Trustee has broad power under authority of probate court to mortgage and sell property. (§§ 45a-162–45a-169). When real estate is held in trust created by deed or will, and by reason of change of circumstances or in condition of real estate since creation of trust, execution of trust in exact accordance with trust is impossible or there would be failure to secure objects intended in trust, superior court in county where land is located may order sale of it. (§ 52-498). Superior court may also order sale of real estate when it will best promote interest of trust beneficiaries. (§ 52-499). Use of word "trustee" following name of grantee in deed, with or without name of cestui appearing, and without any other language expressly limiting powers or interest of grantee does not, in absence of separate instrument duly executed and recorded defining powers of grantee, affect right of grantee to sell, mortgage, or otherwise dispose of real estate in same manner as if word "trustee" had not been used, and transferee or mortgagee from grantee is not liable for claim of any undisclosed beneficiary or for application of any money paid by him. (§ 47-20).

Investments.

Trust funds, unless otherwise provided in trust instrument, may be invested in such real estate mortgages as savings banks in this state may be authorized by law to invest in, or may be deposited in savings banks incorporated by this state or in savings departments or state banks and trust companies located in this state, or may be paid into accounts of savings and loan associations located in this state insured by Federal Savings and Loan Insurance Corporation, or may be invested in any bonds, stocks including mutual funds registered under Federal Investment Company Act of 1940, or other securities selected by trustee with care of prudent investor. Trustee may, unless otherwise provided in trust investment, invest in securities of open-end or closed-end management investment company or investment trust registered under Investment Company Act of 1940. (§ 45a-209). Banking institution acting as fiduciary may purchase up to 10% of issue of state or municipal bonds or securities underwritten by it or affiliate provided such bonds or securities are within top four rating categories recognized by state Banking Commissioner, beneficiaries receive annual disclosure that banking institution has interest in underwriting of bonds or securities, and purchase is made with care of prudent investor. (§ 45a-203).

Funds may be kept invested in same securities as when received by fiduciary unless court directs, or trust instrument provides, otherwise. (§ 45a-204). Temporarily uninvested funds may be deposited by trust company in bank. (§ 36a-384). Funds over $1,000 and held for 30 days must be invested in income-producing media with rate of return at least equal to highest publicly-announced rate paid by such banking institution on similar deposits (§ 36a-351).

Trustee cannot invest in purchase of shares on margin (89 Conn. 226, 93 A. 526), nor ordinarily make permanent improvements to real estate, in absence of authority in instrument creating the trust (109 Conn. 187, 145 A. 648), nor may trustee make personal loans from fund without security (130 Conn. 332, 33 A.2d 540). In a proper case courts can modify legislative or will provision as to trust fund investments. (133 Conn. 89, 48 A2d 266). Court will not interfere with investments made by trustee with discretionary power, unless there is bad faith, fraud, or abuse of discretion. (116 Conn. 588, 165 A. 807).

Common law requirement that security should disclose on its face that it is held in a particular trust renders impracticable investment of trust funds in participating mortgages. (121 Conn. 558, 186 A. 543).

Investments held by state bank and trust company or national banks as trustee must be segregated and not mingled with other assets and must clearly set forth the fiduciary capacity of the bank; but such bank as trustee may hold stock in name of nominee without mention of trust, if co-fiduciaries given prior consent, fiduciary retains possession of stock certificate and maintains adequate records indicating ownership, except may be held by clearinghouse. Fiduciary is personally liable for any loss resulting from act of nominee in connection with stock so held. (§ 36a-352).

Fiduciary, with consent of probate court, may subscribe for and take shares of increased capital stock to which estate is entitled or may sell and transfer right to subscribe to such stock. (§ 45a-205).

Accounting.

Allocations between principal and income are governed by Principal and Income Act. (§§ 45a-542a–45a-542ff). Upon foreclosure, premises foreclosed or proceeds of sale are held by trustee in same manner for benefit of same persons and for same purposes as money secured by mortgage would be if collected without foreclosure, and if premises are not sold, are to be distributed or disposed of to persons who would have been entitled to money if collected. (§ 49-18). Premises acquired upon conveyance or foreclosure by trustee become principal asset in lieu of mortgage and tenant for life or limited term is entitled to income from such property from date of its acquisition. (§ 45a-480).

Probate court has jurisdiction over interim and final accounts of testamentary trustees and trustees appointed by such court. Probate court, upon application of trustee, may take jurisdiction of an inter vivos trust accounting, which jurisdiction is limited only to such account or, upon its own motion, court may appoint auditor to examine accounts. Probate court may grant beneficiary of inter vivos trust petition for accounting by trustee(s) if: (A) beneficiary has interest in trust entitled to accounting, (B) cause shown for accounting, (C) petition not to harass. Court has jurisdiction if: Trustee of trust resides in its district, principal place of business in district where corporate trustee, any of trust assets maintained or evidence of intangible property of trusts situated in district, or settlor resides in district. (§ 45a-175). Such trustees, except those excused by will creating trust, must render account under oath at least once every three years, and such account must show fully how principal of trust is invested and items of income and expenditure. (§ 45a-177). If amount held in trust is less than $2,000, or in case of corporate fiduciary under supervision of bank commissioner or any other fiduciary bonded by surety company authorized to do business in this state less than $10,000 no account is required unless ordered by court. (§ 45a-177). But requirement of account every three years does not preclude probate court from ordering other accounts from time to time. (92 Conn. 286, 102 A. 586). Court may adjust and allow account after hearing upon notice to interested parties. (§ 45a-178). Trustees of charitable community trust are subject to same requirements as to annual accounts. (§ 45a-517). Probate court may require accounting from trustee for missing person. (§ 45a-478). Surety upon any bond taken by probate court, or interested party, may apply for order requiring trustee to exhibit condition of estate held by him. (§ 45a-143). When testamentary trustee dies before completion of accounting for his trust, his executor or administrator must settle account of decedent. (§ 45a-180).

A hearing must be held on all final accounts (§ 45a-179), and no resignation of trustee will be accepted until trustee has fully and finally accounted to probate court. (§ 45a-242).

Uniform Trustees' Accounting Act not adopted.

Compensation.

Trustee of an express trust is entitled to reasonable compensation, but trustee of a resulting trust is not. (135 Conn. 584, 67 A.2d 409). There is no statute regulating the fees of trustees and matter of compensation is within discretion of appropriate court. (124 Conn. 472, 200 A. 809). Ordinarily a trustee is not entitled to compensation in addition to that fixed in the trust instrument or by statute, but may be allowed an additional sum for special and extraordinary services outside and beyond the general duties of the trust. (120 Conn. 322, 180 A. 469).

Discharge.

Trustee must file final account and have it accepted by probate court when trust is under jurisdiction of such court, before he can make distribution. (98 Conn. 471, 120 A. 317). He must also make distribution and have the return of distribution accepted by the court. (92 Conn. 286, 102 A. 586). Upon termination of trust, a testamentary trustee may, unless the will creating the trust provides otherwise, after settling his final account, deliver the property to the remainderman upon order of the probate court, without returning it to the estate of the decedent. (§ 45a-481). For judicial termination of a trust, all parties must be sui juris and request it, all interests must have vested, and the design and object of the trust must be accomplished, and termination must not disturb restrictions put on by trustor. (125 Conn. 640, 7 A.2d 652; 90 Conn. 63, 96 A. 149). If assets of charitable trust are less than $150,000, beneficiary or trustee may terminate. (§ 45a-520[b]). Probate court may terminate non-spendthrift trust if value is less than $40,000 and continuing trust is uneconomic or not in best interest of beneficiaries. (§ 45a-484).

Gifts to Minors.

See category 14 Family, topic 14.10 Infants. See also category 14 Family, topic 14.01 Adoption, subhead Effect of Adoption.

Common trust funds provided for. (§ 36a-365).

Uniform Principal and Income Act.

Adopted with modifications. Known as Connecticut Principal and Income Act. (§§ 45a-542–45a-542ff).

Uniform Fiduciaries Act not adopted.

Uniform Simplification of Fiduciary Security Transfers Act not adopted.

Accumulations.

Except in cases where charity is beneficiary, it is illegal to accumulate more than period measured by rule against perpetuities. (132 Conn. 96; 42 A.2d 796).

Perpetuities.

See category 21 Property, topic 21.12 Perpetuities.

Taxation of Income.

See § 12-701.

Pour Over Trusts.

See topic 13.16 Wills, subhead Bequests and Devises to Inter Vivos Trusts.

Incorporation by Reference.

Testator or settlor can incorporate numerous broad trustee powers enumerated in §§ 45a-233(c); 45a-234; additionally, certain other further trustee powers can be specifically and individually incorporated by reference (§ 45a-235). See also topic 13.09 Executors and Administrators, subhead Incorporation by Reference.

13.16 WILLS:

All persons of the age of 18 years and of sound mind may dispose of their estate by will. (§ 45a-250).

Testamentary disposition is not restricted, and except for spouse's right to elect statutory share (see subhead Election, infra) will may dispose of all testator's property. There is no restriction as to amount which may be given to religious or charitable institutions. Devise purporting to convey all real estate of testator is construed to convey all real estate belonging to him at time of his decease, unless will clearly shows contrary intent. (§ 45a-261). Any person may, by will, deed or other instrument, give, devise or bequeath property, real or personal or both, to any trustee or trustees, and may provide in such instrument that such property so given, devised or bequeathed shall be held in trust and income or principal applied in whole or in part for any charitable purpose. Donor or testator is not required to designate in such will, deed or other instrument particular charitable purpose or class of purposes for which such property shall be used or such income applied. Any such gift, devise or bequest is valid and operative, provided donor or testator gives to trustee or trustees thereof or to any other person or persons, power to select, from time to time and in such manner as such donor or testator may direct, charitable purpose or purposes to which such property or income thereof shall be applied. (§§ 45a-515; C.G.S. 47-2).

Execution.

Will or codicil is not valid unless it is in writing, subscribed by testator and attested by two witnesses, each of whom must subscribe in presence of testator, but a will executed in compliance with laws of state or country where executed may be admitted to probate here and is effectual to pass any estate situated in this state. (§ 45a-251). It is unnecessary that witnesses should subscribe in each other's presence. (57 Conn. 182, 17 A. 926).

Uniform International Wills Act adopted. (§§ 50a-1–50a-9).

Attestation.

The following is sufficient:

Form

Subscribed, sealed and declared to be his last will and testament by the said . . . . . . in the presence of us, who, in his presence, and at his request, and in the presence of each other, have hereunto subscribed our names as witnesses this . . . . . . day of . . . . . . A. D., 20. . .

. . . . .of. . . .(city). . . . . .
(state) . . . .

. . . . .of. . . . .

. . . . .of. . . . .

Any or all attesting witnesses may make and sign an affidavit before any officer authorized to administer oaths in or out of this state, stating facts required to prove the will in court, which affidavit should be written on the will or on a paper annexed thereto, and oath of witness so taken will be accepted as though made in court. (§ 45a-285). Affidavit may be in following form:

State of

County of } ss. (name of city) (date)

Then and there personally appeared the within named . . . . . ., ... and . . . . . . who, being duly sworn, depose and say: That they witnessed the execution of the within will of the within named testator, ...; that said testator subscribed said will and declared the same to be his last will and testament in their presence; that they thereafter subscribed the same as witnesses in the presence of said testator and in the presence of each other and at the request of said testator; that the said testator at the time of the execution of said will appeared to them to be of full age and of sound mind and memory, and that they make this affidavit at the request of said testator.

. . . .

. . . .

. . . .

Subscribed and sworn to before me,

(seal)

. . . .

Notary Public.

Holographic will executed in Connecticut is not admissible. But such a will properly made outside the state is valid. (86 Conn. 630, 86 A. 664).

Nuncupative will executed in Connecticut is invalid. (74 Conn. 304, 50 A. 744).

Revocation.

Will executed before Jan. 1, 1997 is completely revoked by subsequent marriage, divorce, or dissolution of marriage, or birth or adoption of child or birth of child by heterologous artificial insemination or artificial insemination with semen of donor, as defined in §§ 45a-69f–45a-69n, if no provision for such event is made therein. As to wills executed after Dec. 31, 1996, subsequent marriage, dissolution of marriage, or birth or adoption of child will not revoke unaffected provision of will; surviving spouse receives intestate share if will executed before marriage and makes no provision for surviving spouse, unless it appears omission was intentional or testator appears to have provided for surviving spouse by other means; subsequent dissolution of marriage (including annulment but not including legal separation) revokes all testamentary dispositions or appointments of property to former spouse, and nominations as guardian, trustee, conservator, or other fiduciary; in cases where testator is without living children when will is executed, but subsequently has or adopts child or children, child or children receives intestate share, unless will gives all or substantially all to other parent, who survives testator; in cases where child or children at time of execution of will are provided for, but subsequently born or adopted child is omitted, omitted child receives share equal, as nearly as possible, to share each child receives under will, reduced proportionately if necessary, unless omission appears intentional or omitted child was provided for by other means; if it appears that testator's intention was to provide only for testator's then-living children, subsequently born or adopted child receives intestate share. (§§ 45a-257a–452-247f). It cannot be revoked in any other manner except by burning, canceling, tearing or obliteration by testator or some person in his presence by his direction, or by later will or codicil. (§ 45a-257).

Revival.

A will is not revoked by the mere execution of a subsequent will, although the latter contains a revocatory clause, and if the later will is destroyed by testator with knowledge that the former will is still in existence, that will, if allowed to stand until death of testator, is revived. (98 Conn. 21, 118 A. 454).

Testamentary gift to subscribing witness or spouse of subscribing witness is void unless will or codicil is legally attested without the signature of such witness or unless the devisee or legatee is an heir of the testator, but the competence of such witness is not affected by the gift. The interest of any witness in any community, church, society, association, or corporation, beneficially interested in any such gift does not affect the gift or the competency of witness. (§ 45a-258).

Bequests and Devises to Inter Vivos Trusts.

Devise may be made by will to trustee of a trust established or to be established by any person provided the separate trust instrument is identified and is a written instrument executed at same time or before testator's will or is in a valid will or codicil thereto, regardless of date of such will or codicil. Devise is not invalid because trust is amendable or revocable or was amended after execution or death of testator. (§ 45a-260). Devise to trust will not render trust or any part thereof subject to probate jurisdiction where not otherwise subject. (§ 45a-259).

Uniform Testamentary Additions to Trusts Act adopted. (§ 45a-260).

Probate.

Will is probated in court of probate of district where testator was domiciled at his death, and every person having knowledge of his designation in will as executor of testator's estate must present will in that court within 30 days after testator's death. (§ 45a-283). If testator lived out of state, will may be proved in any district in which estate conveyed or any part of it is, but if there is such estate in more than one district first court in which proceedings are commenced has jurisdiction over all property of deceased in state. (§ 45a-287). Upon application for admission of will to probate, court must hold hearing with notice to all parties known to be interested in estate (normally surviving spouse, executor if any, and known heirs-at-law), unless all such parties sign and file written waiver of notice, or unless court for cause dispenses with such notice. Finding that estate is only large enough to pay administration and funeral expenses and expenses of last illness is sufficient cause to dispense with notice. (§ 45a-286).

Self-proved Wills.

See subhead Attestation, supra.

Contest.

Will is contested in probate proceedings, and the probate court must allow the executor his reasonable expenses of defending the will in that court, whether or not the will is admitted. If appeal is taken to Superior Court from order admitting or refusing to admit the will, executor is also allowed his reasonable expenses in maintaining or defending the appeal. These expenses are charged pro rata against the respective shares of the beneficiaries under the will and the distributees of the estate. (§ 45a-294). Acts of executor in settling estate during pendency of appeal are valid to same extent as if no appeal had been taken, but executor may pay no legacies while appeal pending. (§ 45a-296).

Legacies.

All pecuniary legacies are a charge on real property not specifically described and devised if personal property is insufficient for their payment, unless will directs otherwise. Specific legacies may not be taken or sold for payment of debts and charges against estate when there is other real or personal property, sufficient and available therefor and not specifically devised or bequeathed, but real property may be sold in lieu thereof, when necessary for this purpose, unless will directs otherwise. (§ 45a-426). Encumbrances on real property or life insurance of decedent are chargeable to property or proceeds of policies and not to estate, unless expressly indicated, or to testamentary or named beneficiaries. (§ 45a-266). Land specifically devised is not subject to payment of debts until other assets are exhausted. (120 Conn. 77, 179 A. 479).

Legacies are normally payable one year after death, and bear 6% interest thereafter, but there are exceptions to this rule. (53 Conn. 102, 22 A. 678). If will provides time of payment, interest runs from that time. (121 Conn. 106, 183 A. 400). Specific legacies are entitled to the income therefrom from date of death. (106 Conn. 19, 137 A. 20). No legacies may be paid while appeal from admission of or refusal to admit will to probate is pending. (§ 45a-296).

Bequest of use for life or term of years of livestock, wearing apparel, and other personal property which will necessarily be consumed by using gives legatee an absolute estate in such property. (§ 45a-267).

Total ademption occurs when the testator gives the legatee in his lifetime what he left him in his will or when before his death he so deals with the subject of the bequest as to render it impossible to effect the transfer or payment which the will directs. (75 Conn. 683, 55 A. 171). A specific legacy or devise is adeemed when the testator disposes of the property in his lifetime, whatever may have been his motive or intent in doing so. (133 Conn. 725, 54 A.2d 510). Ademption of a general legacy payable out of general assets of estate depends upon the intent of the testator. (56 Conn. 240, 13 A. 414).

Unclaimed Legacies.

See subhead Lapse, infra, and topic Descent and Distribution, subhead Escheat.

Lapse.

When a devisee or legatee who is the child, grandchild, brother or sister of the testator dies before the testator, and the will makes no provision for this contingency, the issue of the devisee or legatee take the devise or legacy. (§ 45a-441). If a specific devise of real property in will executed after Oct. 1, 1947, is void or lapses or for any other reason fails to take effect, it passes under residuary clause unless will provides otherwise. (§ 45a-442). Lapsed bequest of personalty also falls into residue. (97 Conn. 245, 116 A. 182). Lapsed gift of portion of residue passes by intestacy. (101 Conn. 142, 125 A. 253).

Children living when will is executed may be disinherited by mere failure to mention them. (§§ 45a-257; 45a-257b). See also category 14 Family, topic 14.01 Adoption, subhead Effect of Adoption.

Election.

Provision in will for surviving spouse is taken to be in lieu of statutory share in estate unless contrary intention clearly appears from will. But in any such case surviving spouse may elect to take statutory share in lieu of provision of will. Surviving spouse must, by signed written notice to probate court within 150 days of appointment of first fiduciary, elect to take one-third of estate for life. In absence of such election spouse is deemed to have accepted will and is barred of statutory share. Statutory share is set out by administrator of estate or by person appointed by probate court and may consist of both personal and real property. (§ 45a-436).

Contribution.

When spouse elects to take statutory share in lieu of provision in will, general legacies are taken to satisfy that share, before specific devises or legacies are disturbed. (120 Conn. 77, 179 A. 479). When any estate bequeathed or devised to any person is taken for payment of debts and charges, all other legatees and devisees must contribute their proportional part to person from whom estate was taken. (§ 45a-429). This section applies only when will is silent or intent uncertain (68 Conn. 201, 36 A. 38), and only in favor of specific legatees or devisees who have been deprived of property by judicial sale (71 Conn. 521, 42 A. 641; 77 Conn. 705, 60 A. 664).

Foreign executed wills may be admitted to probate in this state. See subhead Execution, supra.

Foreign probated wills conveying property in state may be proved in state by filing for record in probate court in district in which any of property is located (1) a duly authenticated and exemplified copy of will and of record of proceedings proving and establishing it and (2) complete statement of property of deceased in state. If copies are admitted, after hearing upon notice, they have the same effect as if will originally proved in such court. (§ 45a-288).

Living Wills.

Physician or hospital will not be liable for damages or subject to criminal prosecution for withholding or removing life support system if patient is legally incapacitated, and decision to withhold life support system is based on best medical judgment of attending physician in accordance with usual and customary standards of practice; attending physician determines patient to be in terminal condition, or in consultation with physician qualified to make neurological diagnosis who has examined patient and deems patient to be permanently unconscious and attending physician considers patient's wishes concerning withholding or withdrawal of treatment. In determining wishes of patient, attending physician shall consider wishes of patient as expressed in document executed in accordance with §§ 19a-575 and 19a-575a. (§ 19a-571). Any person 18 years or older may execute document designating another adult to make decisions on behalf of maker of document. (§ 1-56r). Bases for revocation of appointed health care representative, effect of revocation on living will, and criminal and civil liability of persons who carry out advanced health care directives. (§ 19a-575a). Probate Courts' jurisdiction over capacity of health care representative and standing of representative who seeks to challenge revocation of appointments. (§ 19a-580c). Conservator must comply with ward's health care instructions made while not incapacitated; may not revoke ward's advanced health care directives unless appointing court authorizes; takes subordinate position to health care representative with respect to health care decisions except as indicated. (§ 19a-580e). Validity of health care instruction or appointment of health care proxy executed in another state or foreign territory. (§ 19a-580g).

Simultaneous Death.

Uniform Simultaneous Death Act adopted. (§ 45a-440).

Uniform Anatomical Gift Act repealed but see topic 13.05 Death, subhead Anatomical Donations. (§§ 19a-279a–19a-2791).

Testamentary Guardian.

See category 14 Family, topic 14.07 Guardian and Ward, subhead Foreign Guardians.

Testamentary Trusts.

See topic 13.15 Trusts.

—Scope —

Probate Court Administrator shall hear and determine all children's matters as may come before court. (§ 45a-8a[d]).

14.01 ADOPTION:

Unless child is to be adopted by new spouse of one already parent (§ 45a-724), child must be free for adoption, i.e., have no living parents or all parental rights have been terminated under Connecticut law (§ 45a-725).

Child may be given for adoption by: Statutory parent appointed after parental right terminated, single parent or guardian. (§ 45a-724). Married persons must join in adoption, unless probate court finds sufficient reason for nonjoinder. (§ 45a-732).

Application and agreement of adoption filed in court of probate for district where adopting parent resides or in district where main office or any local office of statutory parent is located. (§ 45a-727). Court of probate must upon motion of any party except adopting parent or may on its own motion or that of adopting parent transfer case to Superior Court. (§ 45a-715).

Petition for validation of foreign adoption if necessary to obtain U.S. citizenship may be filed with court of probate. (§ 45a-727).

Termination of Parental Rights.

See topic 14.10 Infants. Continuing jurisdiction conferred on court in pre-adoptive proceedings (§ 17a-112) does not confer continuing jurisdiction on court for purposes of reopening judgment terminating parental rights (§ 52-212a). Motion to open decree terminating parental rights may not be granted if final decree of adoption has been issued. (§ 45a-719). Foster parents, prospective adoptive parents, and relative caregivers have right to comment in proceedings regarding custody of children formerly in their care. (§ 46b-129, am'd PA 09-185, § 3). (See also §§ 17a-152; 17a-175.) Applicability of §§ 17a-152, 17a-175 to placement of child from another state. (§§ 17a-112, 46b-129, am'd PA 09-185, § 3).

Adoption of children in state foster care. (§§ 17a-110; 17a-110a; 17a-112; 17a-116c; 17a-117; 45a-707). Probate court administrator shall create pilot program of regional children's courts to oversee all probate matters involving termination of parental rights and other children's matters. (§ 45a-8a).

New - re: program for concurrent permanency planning to identify permanent placements- prospective parents; guidelines; protocols; technical assistance, support and training. (§ 17a-110a).

Person licensed to accept child is licensed as foster family or prospective adoptive family; criminal record check for applicant and any persons 16 years of age or older living in household of applicant from state and national criminal history records and child abuse registry. (§ 17a-114).

Placement with unlicensed relative or certain non-relative for up to 90 days must be in best interests of child. After 90 days, caregiver subject to licensure. (§ 17a-114). When Dept. of Children and Families determines it is in child's best interest to remain in foster care with relative or relative of child's sibling, Dept. must inform relative of licensure procedure and provide information on state services and eligibility for benefits including subsidy programs under § 17a-126. (§ 17a-98a). Relative caregiver may request guardianship subsidy if caring for child for not less than 6 months. (§ 17a-126[b]; § 17a-50a). Child ten years of age or older can be placed with special study foster parent for up to 90 days. (§ 17a-114).

Biennial review of special need periodic subsidies. (§§ 17a-117[a], 17a-118[a]).

Prospective needs of child and emphasis on keeping siblings together. (§ 45a-276[b]).

Physical and mental genetic histories of children; dissemination of records to adoptive parents. (§ 45a-727).

New - post-adoptive counseling may be provided by Department of Children and Families. (§ 45a-727). Dept. of Children and Families to report on status of youth in care and custody of Dept. (§ 17a-6c).

No delay of placement to match ethnicity or race; advisory committee to promote adoption of difficult placements; cultural sensitivity training for employees. (§§ 45a-726b; 17a-116b–17a-116c).

Post-adoption agreements between birth parents and adoptive parents and situations may be permitted by court. (§ 17a-112; § 45a-715).

Proceedings.

Adoption is instituted by filing application in court of probate, together with written agreement of adoption in duplicate. Application shall include declaration that to best of knowledge and belief of declarant there is no other proceeding pending or contemplated in any court affecting child's custody or detailing nature of such proceeding and averring that it will not interfere with adoption. Probate court shall then request commissioner of children and youth services or child-placing agency to make investigation and written report to it within 90 days. On return of such report to court, hearing is held upon agreement, at which time court may deny application, enter final decree approving adoption, enter interlocutory decree, or order further investigation. If interlocutory decree is entered, hearing on final approval or disapproval must be held not less than 12 nor more than 13 months from institution of proceedings. At such hearing, adoption may be approved, disapproved or continued for further investigation as hereinbefore described. While interlocutory decree is in effect, child is deemed for all purposes to have been adopted. (§ 45a-727). Where stepparent or certain blood relatives adopting, procedure slightly different, and probate court may waive notice to, and report by, Commissioner of Children and Families or child placing agency. (§ 45a-733).

Temporary Custody.

Children placed in care and custody of Commissioner of Children and Families pursuant to temporary custody order must be provided visitation with their parents and siblings unless prohibited by court order. (§ 17a-10a). Dept. of Children and Families must notify grandparents of removal of child from parent custody within 15 days of removal. (§ 17a-10b).

Change of name of adoptee, as requested by the adopting parents, may be made by any court of probate as part of its final decree. (§ 45a-736).

Records of adoption are confidential; no person other than adopting parents or adopted person, or person whose guardian or parents were removed, if over 18, for cause shown, may have access thereto except upon order of court. (§ 45a-754). However, genetic parents, including person claiming to be father, who was not party to termination of parental rights proceedings, and adult biological siblings may make written request for release of identifying information. If adopted person consents, information may be released. (§§ 45a-743–45a-744; 45a-750–452-751; 45a-753). New birth certificate listing adopting parents shall be issued. (§ 7-53).

An adult younger than adopter may be adopted, but not without consent of husband or wife, if any, of adoptee. (§§ 45a-734–45a-735).

Effect of Adoption.

Upon the entry of a final decree approving the adoption, an adopted child inherits from its adopting parents and their relatives and not from its natural parents and their relatives, and the adopting parent inherits from such child, except that when one parent has died and surviving parent has remarried, adoption by person with whom such remarriage is contracted does not bar child from inheriting from relatives of deceased parent. (§ 45a-734). Custody and support of adopted children governed by same rules as pertain to natural children. (§ 46b-58). Words “child,” “issue,” “decedent,” “heir,” “grandchild” or their plurals used in any will or trust agreement executed after Oct. 1, 1959 include legally adopted persons unless such document indicates contrary intention. (§ 45a-731). When surviving parent of child remarries, or when mother of child born out of wedlock marries, or when single person who has adopted child marries, other party to such remarriage or marriage may adopt such child, and such child, whether minor or adult, then inherits from such adopting parent and relatives instead of from relatives of any parent deceased at time of such adoption. (§ 45a-734).

Hard-to-Place Child.

If so designated by Commissioner of Children and Families, adoption shall be subsidized. (§ 17-44a-d). Adoption fees waived. (§§ 17-44a–17-44d).

Arrests.

Peace officers must not threaten to arrest all parties to incident of family violence in order to discourage requests for law enforcement intervention. (§ 46b-38b).

14.02 ALIMONY:

See topic 14.05 Dissolution of Marriage.

14.03 COMMUNITY PROPERTY:

System does not obtain in Connecticut.

14.03A DEPT. OF SOCIAL SERVICES:

Audits.

Procedures. (§ 17b-99).

State Supplement Recipients.

Commission of Social Services must annually increase unearned income disregard for recipients of State supplement to Federal Supplement Security Income Program by amount equal to federal cost of living adjustment. (§ 17b-106).

Payments to Providers.

Dept. may make payments directly to providers of services for DSS clients pursuant to stated procedures. (§ 17b-3[a]).

Utility Allowances.

Dept. must not prorate standard utility allowance under Food Stamp Program when assisted household shares utility with someone who is not member of household. (§ 17b-105a[c], am'd PA 09-9, § 18).

14.04 DESERTION:

See topic 14.09 Husband and Wife.

14.05 DISSOLUTION OF MARRIAGE:

Governing statute is Tit. 46b.

Grounds for dissolution of marriage are: finding that marriage has broken down irretrievably or that parties have lived apart for a continuous period of at least 18 months due to incompatibility and no reasonable prospect of reconciliation exists, or for any of following: adultery, fraudulent contract, willful desertion for a year with total neglect of duty, seven years' absence unheard from, habitual intemperance, intolerable cruelty, sentence to imprisonment for life, any infamous crime involving a violation of conjugal duty and punishable by imprisonment for more than a year, or legal confinement because of mental illness for an accumulated period of at least five years within the six-year period next preceding complaint. (§ 46b-40).

Legal Separation.

On petition of party who would be entitled to dissolution of marriage, court may decree legal separation having effect of dissolution of marriage except that parties are not free to remarry. Procedure and power of court are same as for dissolution of marriage. Parties may resume marital relations on filing with clerk of court their written declaration of such resumption, signed, acknowledged and witnessed. If relations are not resumed, either party may petition court for final decree of divorce. (§ 46b-51). Wife who is separated from her husband through no fault of her own may obtain equitable decree for support. (114 Conn. 575, 159 A. 489; 111 Conn. 124, 149 A. 246).

Process is same as in ordinary civil actions (§ 46b-45), except that when any married person has been convicted of offense against chastity, which offense would be ground for dissolution of marriage or annulment of marriage, any person aggrieved may petition Superior Court within four months of conviction, and, upon notice to person so convicted, such court may grant dissolution of marriage, annulment, or such other relief as it may determine; but right to apply to civil side of said court for similar relief is preserved in such circumstances. (§ 46b-48). When ground of action is mental illness, copy of writ and complaint must be served on adverse party, conservator of adverse party, if any, and welfare commissioner in Hartford. (§ 46b-47).

Pleading.

Complaint claiming dissolution of marriage must state date and place of marriage, jurisdictional basis of court, whether or not there are minor children of parties, and, if so, date of birth of each and name of any individual or agency presently responsible by virtue of judicial award for custody or support of any such child. (§ 46b-40; CPB 453).

Defendant may counterclaim for dissolution.

Either party may submit request for conciliation, court may order conciliator named after which two mandatory consultations are required. (§ 46b-53).

If, during pendency of dissolution or annulment of marriage, wife is pregnant, she may so allege in pleadings. Parties may in their pleadings allege and answer that child born of pregnancy will or will not be issue of marriage. (§ 46b-45a).

Amendment to complaint for dissolution stating ground for dissolution arising subsequent to commencement of action may be permitted by court. (CPB 455).

Citizenship Requirement.

None.

Residence.

Complaint may be filed any time after either party has established residence. Decree granting dissolution or legal separation granted if: (1) One party has been resident for year preceding filing of complaint; (2) either party was domiciled in state at time of marriage and has returned with intention of remaining permanently; (3) cause of dissolution arose after removal of either party to state. (§ 46b-44).

Any plaintiff who has served or is serving with Armed Forces or Merchant Marine and who was a resident of this state at time of his or her entry into Armed Forces, shall be deemed to have continuously resided in this state during time he or she served with forces or Merchant Marine. (§ 46b-44).

Jurisdiction.

Superior court shall have exclusive jurisdiction of all complaints seeking decree of annulment, dissolution of marriage or legal separation. (§ 46b-42).

Time for Hearing and Decree.

No complaint may be heard or final decree granted until 90 days after return day; except whenever dissolution of marriage is claimed under a cross-complaint, amended complaint or amended cross-complaint. Such case may be heard and a decree granted thereon after expiration of 90 days from date on which original complaint in such action is made returnable and 20 days after such cross-complaint, amended complaint or amended cross-complaint has been filed. The 20-day delay does not apply (a) when waived by opposing counsel or (b) defendant not appearing, and amendment does not set forth a cause of action or one not contained in original complaint. (§ 46b-67).

Temporary Orders.

Court may enter temporary order at any time after return date of writ awarding alimony and support pendente lite to either party. Court may also award exclusive use of family home or any other dwelling unit which is available for use as residence (§ 46b-83) to either party (§ 46b-83).

Decree.

Final decree is entered as soon as issues are determined; no interlocutory decree.

Agreements concerning custody, support, alimony, etc., scrutinized by court for fairness. If written agreement approved, incorporated in decree; if disapproved, court makes other orders. (§ 46b-66). Agreements entered July 1, 2000 and later regarding care of children under 18 years may be changed to same extent as other provisions in accordance with § 46b-86. (§ 46b-66). Divorcing couples may submit disputes, except those involving child support, visitation, or custody, to binding arbitration. (§§ 16b-66, C.G.S. 52-408). Court may order parties to maintain life insurance for other party or minor children unless decree precludes modification. (§ 46b-86a).

Court may order party to obtain life insurance as security unless proven beyond preponderance that insurance is not available to that party. (§§ 46b-82, 46b-84[f], [g]).

Evidence.

Where parties make oral or written stipulation that marriage has broken down irretrievably and they have submitted an agreement concerning custody, care, education, visitation, maintenance or support and alimony and disposition of property, testimony of either party, uncorroborated by other evidence is sufficient to permit finding by court. (§ 46b-51). In case of action claiming dissolution of marriage on ground of habitual intemperance, it is sufficient if cause of action is proved to have existed until time of separation of parties. In case of willful desertion for a year, with total neglect of duty, furnishing of financial support does not, in absence of other evidence, disprove total neglect of duty.

Alimony.

Either party may be ordered to pay alimony and support while suit pending. (§ 46b-83). Court may assign definite portion of either party's estate to other, in addition to which, alimony may be granted to either spouse. (§ 46b-81). Attachment to secure financial interest available by court order after hearing and notice whether or not money demand made in complaint; or by filing lis pendens on land records where real estate located including names of parties, nature of complaint, court, date of complaint and description of real property, provided, notice of lis pendens may be discharged by substitution of bond with surety. (§ 46b-80).

Periodic alimony may be continued, set aside or modified by court upon showing of substantial change in circumstances by either party whether or not contemplated at dissolution, unless agreement specifies changes which will not alter agreement. (§ 46b-86).

Lump sum alimony cannot be modified. (179 Conn. 277, 426 A.2d 271).

Division of Property of Spouses.

Superior Court may assign to either husband or wife all or part of estate of other. Court may pass title to real property to either party or to third person or may order sale of such real property, without any act by either husband or wife, when in judgment of court it is proper mode to carry decree into effect. (§ 46b-81[a]).

In fixing nature and value of property, if any, to be assigned, court shall consider length of marriage, cause of dissolution, age, health, station, occupation, amount and sources of income, vocational skills, employability, estate, liabilities, and needs of each of parties and opportunity of each for future acquisition of capital assets and income. Court shall consider contribution of each of parties in acquisition, preservation or appreciation in value of their respective estates. (§ 46b-81[c]).

Court has broad discretion under § 46b-81 in assigning property upon dissolution of marriage. (173 Conn. 273, 377 A.2d 260).

Name.

Woman may have name changed to her birthname or former name after dissolution decreed. (§ 46b-63).

Paternity.

If wife is pregnant during pendency of dissolution of marriage and parties disagree as to whether husband is father of child, court shall hold hearing within reasonable time after child's birth to determine paternity. (§ 46b-45a).

Custody of Children.

Decree assigning custody of minor children, whether or not adopted, to either party or both jointly may be made pending suit or after termination thereof, and amended at any time. (§ 46b-56). Allows court pursuant to § 46b-6 to recommend psychiatric or psychological therapy for child where court deems it to be in best interests of child. (§ 46b-56). In deciding issues of child custody, support and visitation, court may consider certain factors in determining best interest of child. (§§ 46b-54, 46b-83).

Uniform Child Custody Jurisdiction Act adopted. (§§ 46b-90–46b-114).

Uniform Child Custody Jurisdiction and Enforcement Act.

Addresses jurisdictional priority between Connecticut courts of other jurisdictions with respect to child custody determinations. (§§ 46b-115, et seq.).

Support of Children.

Uniform Interstate Family Support Act.

Effective Jan. 1, 1998. (§§ 46b-212–46b-213w).

Petitions to be filed with Family Support Magistrate Division; administrative and non-judicial functions may be performed by Superior Court Support Enforcement Division. (§ 17b-291). Comprehensive act pertaining to extent of jurisdiction to enforce/modify orders of support (§§ 46b-212d–46b-212i); priority of multiple support orders (§§ 46b-212j–46b-212l, am'd PA 09-8, § 12); registration of support orders (§ 46b-212m); standing to maintain support proceeding (§ 46b-212n); choice of laws (§ 46b-212o); distribution of information and orders (§ 46b-212p, am'd PA 09-08, § 13); notice (§§ 46b-212q–46b-212r); enforcement assistance (§ 46b-212s); legal representation (§ 46b-212t); negligent enforcement contingencies (§ 46b-212u); information resources (§ 46b-212v); content of petition for support or modification (§ 46b-212w); confidentiality (§ 46b-212x); assessment and allocation of fees (§ 46b-212y); personal jurisdiction (§ 46b-212z); conclusiveness of paternity (§ 46b-213); introduction of evidence (§ 46b-213a); interstate dissemination of information (§ 46b-213b); interstate discovery (§ 46b-213c); disbursement and maintenance of records of proceeds (§ 46b-213d); issuance of support orders (§ 46b-213e); administrative enforcement of support orders (§ 46b-213f); registration of foreign order for enforcement (§§ 46b-213g–46b-213i); calculation of obligation under orders (§ 46b-213j); notice to party of registration of foreign order (§ 46b-213k); contesting validity of registered order and burden of proof (§§ 46b-213l–46b-213m); confirmation of registered order (§ 46b-213n); modification of foreign order and subsequent enforcement (§§ 46b-213o–46b-213q, am'd PA 09-08, § 14); enforcement of modified order (§ 46b-213r); support order modification during incarceration (§ 46b-215e); paternity determination (§ 46b-213s); demand and extradition of violators (§ 46b-213u). Reasonableness of order (§ 16b-745[b]); jurisdiction over nonresident (§ 46b-46[b]); closed hearing (§ 46b-49); payment of attorney's fees (§ 46b-62); marriage dissolution, annulment, separation (§ 46b-69); paternity (§ 46b-160, am'd PA 09-8, § 11); withdrawal of petition (§ 46b-170); acknowledgment of paternity and support (§ 46b-172a); recordation of paternity judgments (§ 46b-179a); recognition of foreign paternity judgment (§ 46b-179b); notice of paternity judgment (§ 46b-179c); appeal from foreign paternity judgment (§ 46b-179d); enforcement of reasonable orders (§ 46b-215); payment guidelines (§ 46b-215b[a]); Family Support Magistrate's Act (§ 46b-231); service of process (§ 52-57); attorney's fees for state (§ 52-251d); income withholding (§§ 52-362; C.G.S. 52-362f). No consumer collection organization can charge more than 25% of overdue child support collected. (§ 36a-805).

Title IV D Child Support Courses.

Authority and limitations on redirection of child support by Bureau of Child Support Enforcement (§ 17b-179[b]); by IV D Agency (§§ 17b-745[a][6]; 46b-171[a][1][A]; 46b-172[b][3], [5]; 46b-215[c]; 46b-231[u]). Low income obligor. (§ 46b-215a). Non-custodial parents may be liable for court-ordered health care contribution costs. (§§ 17b-745[a][1], [2]; 46b-84[f], [g]; 46b-

171[a][1]-[3]; 46b-215[a][1], [2]. Participation in mandatory education, skill based training or similar rehabilitation programs. [PA 09-175, § 2]). Father's liability for past-due support for child born out of wedlock limited to three years preceding filing of petition. (§§ 17b-745[a][5], [6]; 46b-171[a][1] to [3]; 46b-172[b], [c]; 46b-215[c]). Payment order in IV D support case must be distributed as required by Title IV of Social Security Act. (§§ 17b-745a[6]; 46b-231[m][7]).

Disclosure requirements of § 17b-137[a][1][A] related to property, wages or indebtedness of recipients of state aid, care or child support enforcement services extend to IV D support investigation and may be compelled by subpoena. IV D agency given access to certain records held by public entities including, but not limited to, telecommunication providers. (§ 17b-137[a], [b]).

Dissemination of and procedures for enforcing foreign income withholding order. (§ 46b-213w).

Child Support Reform.

Institution modification of procedures to assist in locating parents and other persons who have deserted children and may be liable for support. (§§ 42-18; C.G.S. 7-42; C.G.S. 7-48; C.G.S. 7-50; C.G.S. 7-62b).

Voluntary acknowledgments of paternity (§§ 19a-42a; 18b-27; 17b-90; 17b-137[a], [b]; 17b-179; 17b-745; 19a-42[c]; 36a-42; C.G.S. 362-43[c]; C.G.S. 382-497a[e]; 46b-25, am'd PA 09-13, § 5; 46b-84); reports identifying paternity are admissible without further foundation than certification by creator or custodian (§§ 52-174a, 46b-160; 46b-168[c]; persons must submit to paternity testing unless otherwise excused (§§ 46b-168a; 46b-171; 46b-172; 46b-172a[f]; 46b-215; 46b-231; C.G.S. 52-251d[a]; C.G.S. 52-362d[a]; C.G.S. 52-362e); cost of allocation of testing (§§ 46b-168[c]; 46b-168a[b], [c]); past due support (§§ 52-362j; 46b-220; 46b-221); recordation of social security numbers (§§ 17b-137a; 46b-69b; 46b-231[m], § 7-48); family support magistrate may order parenting education participation (§§ 46b-69b; 46b-231; 46b-164). Hospitals or other institutions where births occur may participate in voluntary paternity establishment program requiring creation of protocols as to staff training and provision of information. (§ 17b-27).

Child Support Enforcement.

Support Enforcement Services shall assume all powers, duties and obligations of Support Enforcement Division and its staff. (§ 51-1e). Family support magistrates may issue certain writs of habeas corpus, authorize support enforcement orders to initiate support order modifications, sign capias mittimus orders when obligor fails to appear in court, and extend obligation of support for children up to age 19. (§§ 176-745[a][1] and [2]; 46b-171[a][1] to [3]; 46b-172[b], [c]; 46b-215[a][1], [2]).

Welfare Reform.

Effective July 1, 1997. (§ 46b-231).

General legislation to research and implement procedures to streamline aid to families and financial assistance to municipalities, modifies numerous provisions of existing law. (§§ 1b, 4, 7–10, 12, 16a, 17b, 18a, 19a, 19b, 31, 32, 36a, 38a, 42, 45a, 46b, 52, 54 and 97). Rental assistance for elderly (§§ 8-119kk; 19a-122b); computerized information/case management system (§ 17b-688b); employment assistance program (§ 17b-688c); transitory rental assistance program (§ 17b-811a, am'd PA 09-118, § 2); ``frail elderly'' defined (§ 8-119n[a]); enhancing effectiveness of employment services (§ 17b-688d); conviction of substance abuse/possession (§ 17b-112d); qualified aliens eligible for [temporary] assistance (§§ 17b-112c; 17b-352; 17b-353, am'd PA 09-8, § 9; 17b-272; C.G.S. 8-11g; C.G.S. 8-115a[2]); establishment of registry of persons terminated from employment due to abuse/neglect and terms of employment of those persons (§§ 17a-247b; 17a-247c–17a-247d; 2c-2b[a], am'd PA 09-232, § 78; C.G.S. 42-207; C.G.S. 10-303[2]; 17b-113; 17b-115; 17b-180–17b-182; 17b-680–17b-688a; 17b-689a; 17b-690–17b-693; 17b-811). Calculation of family assistance benefits. (§ 17b-112[d], am'd PA 09-9, § 23).

Remarriage.

No restrictions. Divorced person applying for marriage license must present certified copy of dissolution decree. (§ 46b-31). Remarriage of husband does not affect his obligation to pay alimony (116 Conn. 632, 166 A. 67) but remarriage of wife terminates her right to alimony (112 Conn. 256, 152 A. 302) unless decree specifies otherwise.

Foreign Divorces.

Certain foreign matrimonial judgments become judgments of court of this state upon filing certified copy of judgment in court of this state. (§ 46b-70).

Effect of Divorce on Will.

See category 13 Estates and Trusts, topic 13.16 Wills.

Annulment of Marriage.

See topic 14.11 Marriage.

Provisions for Maintenance of Wife or Children in Case of Nonsupport.

See topic 14.09 Husband and Wife.

14.06 DIVORCE:

See topic 14.05 Dissolution of Marriage.

14.06A ELDERLY:

Health professionals who reasonably suspect abuse, neglect, exploitation or abandonment of elderly shall report such conduct within 72 hours to Commissioner of Dept. of Social Services, § 17b-407; and Commissioner must investigate allegations of elder abuse, and may obtain confidential records to do so. (§ 17b-452, et seq.). (See also §§ 17b-408, 17b-451, 17b-460.) Such conduct is subject to criminal penalties. (§ 51-286n). Commission on Aging shall be moved to legislative branch for administrative purposes only. Membership of Commission shall be increased. Commission shall meet regularly with State agency representatives, review and comment on Dept. of Social Service's budget for its Unit on Aging, and may enter into contracts. (§ 17b-420).

14.07 [RESERVED]

14.08 GUARDIAN AND WARD:

Father and mother are joint guardians of their children under age of 18. If unfit, either or both may be removed upon application to probate court by any adult relative (blood or marriage) of child, by court on own motion, or by counsel for child. (§§ 45a-606; 45a-614). Probate court will appoint guardian of minor's estate, if he has one, which guardian may be same as guardian of his person or different one. (§ 45a-629). Trust companies may be guardians of estates but not of person. (§ 36a-57a). Court of probate may determine visitation rights to any person removed as guardian temporarily pending hearing. (§§ 45a-607, am'd PA 09-185, § 4-45a-612). Person appointed guardian of person must report annually to probate court. (§ 45a-625). Guardian may make decisions concerning funeral arrangements and disposition of body upon death of minor. (§

45a-604[5][c]). Parent may appoint guardian of minor by will or writing signed by parent and attested to by witnesses. Appointment is effective upon filing with Probate Court. (§§ 45a-596[a], [c]).

Probate court may appoint counsel if abuse or neglect of minor is suspected by court. Probate court may also appoint guardian ad litem if deemed appropriate. (§§ 45a-619, 620). Probate court may request investigation and written report if it suspects abuse or neglect (§ 45a-619), or order minor examined (§ 45a-150a).

Parent, spouse, or guardian of minor may not receive or use minor's property exceeding $5,000 in value until formally appointed guardian of estate. (§ 45a-631).

Incapable Persons.

Statutory provision made for guardianship (called conservatorship) of incapables. (§§ 45a-645–45a-660; § 45a-645; § 45a-648 – § 45a-656; § 45a-659 – § 45a-660). ``Incapable'' defined as person with physical or mental infirmities rendering him unable to adequately manage his own affairs. (§ 45a-644). Person subject to proceedings to determine incapacity or person who is found to be incapable has right to be represented by counsel during Probate Court proceedings. Probate Court may appoint counsel if party is indigent. (§ 45a-649a). Ward may apply for writ of habeas corpus directed to guardian or conservator/guardianship. (§ 45a-705a). Dept. of Developmental Services may make finding of mental retardation even where there is no diagnosis of mental retardation, intellectual or developmental disability within individual's school or medical records. (§ 17a-210b). Duties of conservator similar to duties of guardian. Include duty to support family of incapable. (§ 45a-655). If no suitable conservator can be found, Commissioner on Aging or Commissioner of Human Resources shall accept appointment as conservator of any ``incapable'' 60 years or older. (§ 45a-651). Incapable may be restored to capacity upon court hearing and upon death of incapable, property turned over to estate. Conservatorship may be terminated if court determines ward has no assets. (§ 45a-660). Commissioner on Aging shall establish and administer all rules and laws for Dept. on Aging regarding care and protection of elderly persons. (§ 17a-317).

§§ 19a-458–19a-458f provides procedures and details powers needed to investigate cases of abuse of mentally retarded persons.

Records pertaining to application to probate court for placement of person with Department of Developmental Services shall be sealed and made available to certain persons only after hearing with notice. Application to contain information relevant to need to place person in care. (§§ 17a-274[b]; 45a-670). Applications for determination of ability to give consent to sterilization are similarly sealed. (§ 45a-692).

Procedures for appointing temporary conservator and its required duties. (§§ 45a-654, 45a-644[c]). With certain exceptions, conservator may not dispose of ward's property or change ward's residence without Probate Court permission. (§ 45a-656b).

Guardianship of Persons with Mental Retardation.

Parent, guardian or conservator of person, or person himself, may object to proposed program of behavior, modifying medications or aversive procedures. Dept. of Developmental Services must provide notice and opportunity for hearing regarding such proposals. (§ 17a-210c). Guardian shall be principal decision maker with respect to programs affecting well-being of person within authority granted by court or approved by recognized institutional review board. (§§ 45a-677[e], § 1; 45a-677). Minimum of two Dept. of Developmental Services staff must assess individual as part of probate court hearing to determine necessity of guardianship. (§ 45a-674). Periodic guardianship reviews of persons with mental retardation required to assess condition of ward. (§ 45a-681[a]). Ombudsman Office regulated by § 17a-210a, am'd PA 09-11, § 2. In certain circumstances, Commissioner of Developmental Services and Commissioner of Mental Health and Addiction Services shall act as representatives of applicant for social security benefits and Medicare Part D. (§§ 17b-492b, 17b-492c).

Dept. of Developmental Services.

Self advocates shall be eligible for sick leave, vacation and personal leave, and holidays. (§ 5-259[e]). Membership and duties of Birth to Three Program and regional interagency coordinating councils that advise program's managers. (§§ 17a-248b[a], 17a-248c). Ombudsman office director remains in office until successor is appointed. (§ 17a-210a[c]). Disability policy specialists are not included in State classified service or collective bargaining coverage. (§ 5-270[b]; see also § 5-198). Dept. and Office of Protection and Advocacy shall enter agreement on investigation of allegations of abuse and neglect on people with mental retardation. (PA 05-256, § 8). Hearings may be requested to contest Dept. of Developmental Services decisions assigning priority for residential placement, services, or support. (§ 17a-210). Commission on Developmental Services must not establish single fixed wage for employees providing services in community living arrangements, but consider different variables. (§ 17b-244a).

Standby Guardian.

Parent or guardian may designate standby guardian for minor child using specified form of affidavit, for period of up to one year, such designation to take effect upon occurrence of specified contingency, including but not limited to mental incapacity, physical disability, or death of principal. (§ 45a-624d).

Foreign Guardians.

When any personal property in this state belongs to a nonresident who has a guardian of his estate appointed under the laws of his place of residence, such guardian may, by application to the probate court for the district where the property is located and on showing that the property is not subject to debts in this state and that he has provided a proper bond, remove such property to the state of residence of ward. (§ 45a-635).

Foreign guardian may remove proceeds of sale of real estate upon like procedure. (§§ 45a-635–45a-636).

Surviving parent may by will appoint a guardian or guardians of person and estate of minor and guardian(s) may be nonresidents. (§§ 45-51[a]; 45a-616).

Noncustodial parent may appoint guardian for child by will if (1) child is minor; (2) custodial parent dies; and (3) probate court has not already appointed different guardian. (§ 45a-596).

Relocation of Custodial Parent.

Burden of proof on relocating parent; hearing held in Superior Court. (§ 46b-56d).

Real Estate.

Guardians may lease (§ 45a-633), partition (§ 45a-637), mortgage or sell real property under order of probate court (§ 45a-164).

Gifts to Minors.

See topic 14.10 Infants.

Uniform Fiduciaries Act not adopted.

Uniform Simplification of Fiduciary Security Transfers Act not adopted.

Child Custody.

See topic 14.05 Dissolution of Marriage.

14.09 HUSBAND AND WIFE:

Rights and Disabilities.

Married women are subject to none of common law disabilities associated with that status.

Separate Property.

Wife's separate earnings are her sole property and she may contract with her husband or third persons, may convey and receive conveyance of real and personal property and may sue and be sued in her own name, her property being subject to attachment and execution. (§ 46b-36).

Actions.

Husband and wife may transact business with each other and one spouse may act as attorney in fact for other. Wife may sue or be sued by her husband in contract or tort. (88 Conn. 42, 89 A. 889; 103 Conn. 583, 131 A. 432). In civil actions arising out of personal injury or property damage as a result of which husband of plaintiff has made or will be compelled to make expenditures or has contracted indebtedness, amount of such expenditures or indebtedness may be recovered by plaintiff, provided a recovery by plaintiff bars claim of husband, except in an action in which husband is a defendant. (§ 52-204). Spouses may bring action against one another for negligence in operation of motor vehicle even if accident happened in state which would bar action. Rights, including standard of care, determined as if injury occurred in Connecticut. (§ 52-572d). Any adult person who has been subjected to threat of present physical pain or physical injury by his or her spouse may apply to superior court for relief. (§ 46b-15).

Agency.

Both spouses liable for necessary family expenses. Joint duty of each spouse to support family. No action maintained against either spouse during or subsequent to separation for any liability of other spouse if spouse who is liable for support has provided other spouse with reasonable support. (§ 46b-37).

Special rules for abandoned spouses. (§ 46b-37).

Antenuptial Contracts.—Governed by Connecticut Premarital Agreement Act, effective Oct. 1, 1995. (§§ 46b-36a–46b-36j).

Conveyances.

Either spouse may freely dispose of his or her property, inter vivos, without the other spouse joining in the conveyance. (§ 46b-36; 68 Conn. 91, 35 A. 783; 71 Conn. 233, 41 A. 773).

All the foregoing applies where the marriage occurred on or after Apr. 20, 1877. Where the marriage occurred before that date, the common law disabilities of coverture apply in somewhat modified form.

Desertion or Nonsupport.

If person neglects to furnish reasonably necessary support to his spouse, minor child or parent under 65, when physically and otherwise capable of doing so, he is subject to imprisonment of not more than one year, but execution of sentence may be suspended by court on condition of payment of support commensurate with necessities of case and abilities of individual. Failure to pay is punishable as contempt and in addition thereto or in lieu thereof, priority execution may be issued. (§ 53-304). See category 7 Criminal Law, topic 7.01 Criminal Law.

Uniform Reciprocal Enforcement of Support Act (1952 version) has been adopted. (§§ 17-327–17-355b). Civil enforcement is by Superior Court.

Community property system does not obtain in Connecticut.

14.10 INFANTS:

Any person under age 18 years is minor, except as otherwise provided by statute. (§ 1-1d). In regards to Liquor Control Statutes, any person under age 21 years is minor. (§ 30-1[20]. Infants are liable for reasonable value of necessaries. (§ 42-2). In general common law as to liability on contracts obtains. Infants may sue only through next friend, but married minor may prosecute or defend dissolution of marriage or legal separation in his or her own name. (§ 46b-43). No civil nor criminal judgment nor juvenile court proceeding, nor probate proceeding against infant is legal unless guardian ad litem has been appointed by court. (§ 45a-132). Minor may sue parent for tort in motor vehicle actions. (§ 52-572[c]).

A minor 15 years old or more may contract for life, health and accident insurance upon his own life for his (or her) own benefit or for that of his father, mother, husband, wife, child, brother or sister. (§ 38-157).

Place of public accommodation may not restrict mother's right to breast-feed child. (§ 46a-64).

HIV Testing and Treatment.

See generally c. 368x et seq. am'd PA 09-133. Parental consent not required for HIV testing and treatment. (§ 19a-592).

Emancipation.

Notice of hearing for minors seeking emancipation filed with Commissioner of Children and Families, Attorney General and other interested persons. Attorney General may file appearance and may be required to remain party. (§§ 46b-150; 46b-172a[a]).

Parental Responsibility.

Parent or guardian of unemancipated minor who willfully or maliciously causes personal or property damage is liable for such damage up to $5,000. (§ 52-572).

Minor charged with commission of any offense must be accompanied in court by parent or guardian, unless court waives. (§ 54-199).

Any veteran or other person eligible for a loan pursuant to the Servicemen's Readjustment Act of 1944 may enter into and contract in this state for a loan or loans pursuant to such Act although he is a minor. The claim of infancy may not be pleaded in any action arising out of any such loan. (§ 36a).

Uniform Transfers to Minors Act adopted. (§ 45a-557; § 45a-558k; § 45a-559e).

Uniform Securities Ownership by Minors Act not adopted.

Termination of Parental Rights.

Probate court may terminate parental rights upon petition of: (1) Either or both parents; (2) guardian; (3) selectman of any town having charge of any foundling; (4) officer of any child-care or child-placing agency; or (5) blood relative of child when child has been deserted; if over age of 12, child's consent is necessary. (§ 45a-715). Contested cases may be transferred to Superior Court. AG may file appearance and shall be party to action if child is receiving aid from State or support enforcement services. (§ 45a-716[b]). Notice of hearing on petition must be given to all interested parties including Attorney General, father of minor child born out of wedlock if paternity has been acknowledged or adjudicated. If either or both parents contest termination, commissioner of child and youth services must make investigation and report. (§§ 45a-715–45a-716; 45a-716[b]).

Court may terminate parental rights if in best interest of child and it is found that parent voluntarily and knowingly consents to termination, or that child has been abandoned or abused. Court order terminates all rights and responsibilities except child's right of inheritance and religious affiliation. (§§ 45a-706–45a-708; 45a-717–45a-718).

Motion to open or set aside judgment terminating parental rights may not be granted if final decree of adoption has been issued prior to filing of motion. (§ 45a-719).

Safe Havens.

Each hospital operating emergency room shall designate all members of emergency room nursing staff as authorized to take physical custody of any infant 30 days or younger following voluntary surrender of physical custody of said infant by parent or lawful agent. (§§ 17a-57–17a-61). If parent or agent leaves infant 30 days or younger with designated employee pursuant to §§ 17a-57–17a-61, such act shall not constitute felony. (§§ 53-21, 23).

Adoption.

See topic 14.01 Adoption.

Alcoholic Beverages.

Drinking Age is 21 for both sexes. (§ 30-1[20]). Licensed seller of alcohol may use scanning devices to check validity of identification presented by buyer. Restrictions as to information to be obtained from scanning, its recordation, maintenance and use. Permittees may photocopy drivers' licenses or identity cards to verify age. (§ 30-86b). In prosecutions for sale of alcohol to minor, it is affirmative defense that scan showed valid identity card. (§§ 30-86, C.G.S. 53-344). Provisions of § 12-436 do not require individual to be physically present at purchase point to import alcoholic beverages. (§ 30-77).

Notice of Child Abuse.

In case of single, custodial parent or guardian, notice of substantiated child abuse complaint must be given by Department of Children and Families by certified mail to custodial and non-custodial parents and guardian of child. Content of notice is proscribed by Act and proof of service must be obtained. (§ 17a-103b). Persons required, but failing to, report abuse of children shall participate in educational training program. (§ 17a-101, am'd PA 09-1, § 17). Oral reports shall be made within 12 hours. (§ 17a-101b).

Reporting Suspected Child Abuse.

Within ten days of receiving report of suspected child abuse, Dept. of Children and Families must provide written notification of report to child's legal guardian and child's attorney. (§ 17a-103c). Commissioner of Dept. of Children and Families shall adopt regulations and develop notice, hearing and appeals protocols by July 1, 2006 and act according to certain protocols until that date when investigating and pursuing child abuse/neglect claims. (§§ 17a-101, am'd PA 09-185, § 8; 17a-28, am'd PA 09-185, § 1 and am'd PA 09-232, §§ 101, 102; 17a-6a, 19a-77a, C.G.S. 19a-80f, am'd PA 09-232, § 98, 19a-87b). Investigation by Dept. of Children and Families of reports of child abuse or neglect must be completed not later than 45 calendar days after receipt of report. (§ 17a-101g[a]). Requirements for Dept. of Children and Families Commissioner to notify employing school district if she finds reasonable cause to suspect teacher is abusing child. (§ 17a-101i[a]). Dept. of Children and Families and Dept. of Health jointly investigate reports of abuse or neglect occurring at child day care center, group day care, youth home or youth camp. (§ 19a-80f, am'd 09-232, §§ 98, 99).

Education.

Programs and financing pertaining to special education including but not limited to benefits and grants (§ 10-66[ee]; § 10-66[gg]; C.G.S. 10-74d; C.G.S. 10-76a; C.G.S. 10-262h; C.G.S. 10-262i[b]; C.G.S. 10-2641); custodial/institutionalized children (§ 10-76d[e][2]); access and support (§ 10a-54); financial responsibility (§ 10-253[b]); school profile reports (§ 10-220); school curriculum committee (§ 10-220[e]); review/reporting procedures (§ 10-66gg); advisory board/judicial oversight (§ 10-76i); interdistrict programs (§§ 10-266j; C.G.S. 10-266aa); classification of children (§ 10-17[f]); procedures for determining educational needs (§ 10-76ff); grants (§§ 10-262m, 263c); accessing resources (§ 10-76gg); and minority teacher incentive programs (§ 10a-168a).

All persons providing interpretation services for hearing impaired shall register annually with Commission on the Deaf and Hearing Impaired. Interpreters must pass written tests, be certified and satisfy continuing education requirements. There are additional requirements for interpreters in medical and legal fields. (§§ 46a-27, et seq.; 46a-33a, am'd PA 09-8, § 10; C.G.S. 51-245; C.G.S. 51-245a).

Local and regional boards of education shall loan assistive devices to public school students for free and prescribe rules for their care and use. (§ 10-228).

All professions regulated by Dept. of Public Health must engage in continuing education, obtain certificate demonstrating participation, and are subject to disciplinary action for failure to comply; waivers may be available under certain circumstances. (§§ 20-219a; C.G.S. 20-74t, C.G.S. 20-206f). Nursing home administrators are subject to continuing education requirements. (§ 19a-515).

Behavioral Problems.

New act creating Children's Behavioral Health Advisory Committee (§ 17a-4a) and Children's Behavioral Health Council (§ 17a-1, et seq.). Advisory Committee to render reports biannually to State Advisory Council on Children and Families. (§ 17a-4a). Children's Behavioral Health Council to advise state departments and legislature on delivery of behavioral health services to children.

Child Fatality Act.

Creation of child fatality review panel composed of 13 specific members and no more than three additional, temporary members. (§ 46a-13l[b]).

14.11 MARRIAGE:

Consent Required.

If either party is under supervision or control of a guardian or conservator, written consent of such guardian or conservator signed in the presence of one witness and acknowledged before a notary public must be filed with the registrar. If either party is a minor, written consent similarly witnessed and acknowledged must be given by parent or guardian; if minor is under 16 years, written consent of judge of probate of district where minor lives is also required. (§ 46b-30). Person married without required consent acquires no right by marriage in property of any person who is under supervision of conservator at time of marriage. (§ 46b-29).

License.

Persons intending to be married must obtain certificate from Registrar of Vital Statistics in town in which such marriage is to be celebrated. It is sufficient that the application for certificate be signed and sworn to by one party if, before certificate is granted, the other party signs and swears to the application before the Registrar. If applicant has been divorced or marriage dissolved, certified copy of divorce or dissolution decree or certificate from clerk of court issuing decree must be presented. (§ 46b-31).

Certificate is license for authorized person to perform marriage within town named and is good for 65 days after issuance. (§ 46b-24, am'd PA 09-232, § 73).

Fee for marriage license is $10 plus $20 surcharge. (§ 7-73). See category 10 Documents and Records, topic 10.04 Records, subhead Vital Statistics.

Ceremonial Marriage.

Marriage must be solemnized by judge, justice of the peace appointed in Connecticut or ordained or licensed clergyman belonging to this or other state so long as he continues in work of the ministry. No public official, his assistant or deputy legally authorized to issue license may perform marriage under license issued by such official assistant, or deputy. Marriages celebrated by any other person are void, but any marriage solemnized according to the forms and usages of any religious denomination shall be valid. All marriages that were performed before effective date of this act are valid so long as justice of peace represented himself to be duly qualified, and such persons reasonably relied upon such representation. (§ 46b-22).

Civil Unions.

Defined as union between two eligible persons, including persons not parties to another civil union or marriage, of same sex, and at least 18 years of age. (§§ 46b-38aa - 46b-38mm, inclusive, § 46b-38nn, repealed PA 09-13, § 21). Union participants entitled to same benefits and responsibilities under law as marriage. (§ 46b-38nn, am'd PA 09-13, § 10).

Validation of Marriages.

Marriages performed by justice without valid certificate of qualification are validated. (§ 46b-22a). Marriages based on licenses issued outside of town where marriage celebrated or persons resided are valid. (§ 46b-24a).

Report of Marriages.

Person performing the ceremony must certify upon the license the fact, time, and place of such marriage and return it to issuing Registrar before end of first week of month next succeeding the marriage. If person fails to return marriage certificate, one may provide notarized affidavit. (§ 46b-34). Such certificate or recorded affidavit is prima facie evidence of facts stated therein. (§ 46b-35). Registrar must record certificate and send certified copy to state health commissioner. (§ 7-42).

Record.

See category 10 Documents and Records, topic 10.04 Records, subhead Vital Statistics.

Common law marriages are not recognized. (165 Conn. 277, 334 A.2d 437). No decision on local recognition of out-of-state common law marriage.

Proxy marriages are not authorized.

Marriages by written contract are not authorized.

Prohibited Marriages.

Relatives nearer than first cousins may not marry, and incestuous marriage is void. (§ 46b-21). Common law determines voidable marriages.

Foreign marriage, where one party is Connecticut citizen, is valid if celebrated in conformity with law of country of marriage, provided each party would have legal capacity to contract such marriage in this state. (§ 46b-28). Any party where foreign matrimonial judgment rendered must file certified copy of marriage judgment in state that such judgment is final. Certificate must have full name and last known address and name and address of court in foreign state where judgment rendered. Foreign matrimonial judgment becomes judgment of court where filed and enforced in same manner as any like judgment of court of state. (§ 46b-71).

Annulment.

When marriage from any cause is void or voidable under Connecticut law, or law of state of celebration, Superior Court must declare such marriage void and may make such order as to children, who shall be deemed legitimate, or alimony as it might in a proceeding for dissolution of marriage. (§§ 46b-40, 46b-60). Spouse of person convicted in any court of offense against chastity which would be ground for annulment may, within four months, petition Superior Court for annulment. (§ 46b-48).

Connecticut Premarital Agreement Act governs such agreements effective Oct. 1, 1995. (§§ 46b-a–46b-j).

14.12 MARRIED WOMEN:

See topics 14.09 Husband and Wife, Marriage; categories 5 Civil Actions and Procedure, topic Evidence, subhead Witnesses; Debtor and Creditor, topic Homesteads; Documents and Records, topic Acknowledgments; Estates and Trusts, topics Executors and Administrators, Wills; Property, topic Dower.

15 HEALTH

15.00A ANIMAL CONTROL:

Veterinarians certified to participate in animal population control program may determine that dog or cat is medically unfit for surgical procedure or unsuitable because of age for sterilization. (§§ 22-380e–22-380m, am'd PA 09-9, § 38).

$20 of $45 fee required by pound before selling or giving away unspayed or unneutered dog or cat may be refunded. $25 nonrefundable payment required of bona fide animal rescue or adoption organizations for purchase or adoption of any unspayed or unneutered dogs or cats. Funds to be deposited by municipality into animal population control account. Upon payment, pound to provide voucher, to be signed by recipient, granting sterilization and vaccination benefits to person buying or adopting dog or cat. Voucher is void 60 days after adoption unless participating veterinarian certifies animal unfit for surgery. Certification will include date animal will be fit for surgery. If surgery is performed more than 30 days after that date, voucher is void. If animal is permanently unfit for surgery, owner may apply to commissioner for $45 refund. (§ 22-380f).

Commissioner of Agriculture to establish animal population control program for spaying and neutering for eligible dogs and cats, and establish animal population control account to hold moneys collected by program. Commissioner shall also create standard dog licensing form for veterinarians to make available to dog owners. Commission must also establish program to assist non-profit rescue groups and low-income persons, sterilize and vaccinate dogs and feral cats. (§ 22-380g). Commissioner may suspend program if balance of account is less than $3,000 and reinstate it if balance is more than $3,000. Commissioner will cooperate with any national plan for animal disease control. (§ 22-286). Commissioner shall create Animal Abuse Recovery Account, and vest ownership in animals with private, non-profit, animal adoption organizations. (§ 22-329a).

To become participating veterinarian, licensed veterinarians shall spay and neuter in accredited facilities, maintain records and allow inspection of records. Any veterinarian denied participation in program may appeal denial within ten days of receiving notice and Commissioner will hold hearing on appeal. Complaints received by Commissioner regarding participating veterinarians shall be referred to Board of Veterinary Medicine of Dept. of Public Health. (§ 22-380h).

Participating veterinarians shall receive amount equivalent to voucher issued and submitted pursuant to § 22-380f for each sterilization and accompanying vaccinations performed on cats or dogs of eligible owners. Owners shall pay any difference between voucher amount and veterinarian's fee. (§ 22-380i).

Failure of owner to retrieve sterilized animal shall not result in denial of payment to veterinarian. Veterinarian will transfer custody of such animals to animal control officer. (§ 22-380j). Regulations concerning treatment of impounded animals. (§ 22-333).

15.00B HEALTH CARE:

Public Health Emergency Response Act.

Authorizes Governor to declare public health emergency, to provide for imposition and implementation of orders of isolation, quarantine or vaccination, and to provide hearings and appeals of such orders. (§ 20-206f). (See also §§ 19a-221; 45a-82[c], am'd PA 09-114, § 2.)

Before earlier of execution of contract for continuing care, or transfer of money or other property to provider, provider shall deliver to contracting party or his legal representative conspicuous statement notifying prospective resident that: (1) Contract is investment which may be at risk; (2) provider's ability to meet its contracted obligations depends on its financial performance; (3) prospective resident is advised to consult attorney or other professional advisor; and (4) Department of Social Services does not guarantee security of investment. (§§ 17b-520; 17b-535; 17b-524; 17b-525; C.G.S. 42-152; § 17b-349c).

Public Health Preparedness.

Emergency medical technicians or paramedics shall be under direction of chief medical officer of team. (§ 19a-179b). Physicians assistant may work under supervision of physician unregistered by Dept. of Public Health as supervising physician. (§ 20-12c). EMS personnel defined. (§§ 28-1; C.G.S. 28-1[5]). Granting immunity from liability for personnel using nerve agent antidote kits and automatic external defibrillators. (§§ 28-8b, C.G.S. 52-557b, am'd PA 09-59, § 1). Scope of medical practice may include treatment modalities not specified in state regulations. (§ 19a-179a, am'd PA 09-232, § 31).

Health Care Provider.

Person licensed to provide health care services. (§§ 368v, C.G.S. 370-373, C.G.S. 375-

383c, 384a-384c or 400; § 38a-816[15][c]). Incorporates marital and family therapists, and professional counselors licensed under c. 383a and c. 383c. respectively. (§ 5-206a). Home health care agency that provides hospice services to rural areas may obtain waiver from certain licensing regulations. (§ 19a-492c). Health care providers licensed in Connecticut may use electronic prescribing systems. (§ 19a-25b). Licensed health care institutions may maintain medical records system in electronic format in medium which is reproducible and secure. (§ 19a-25c). Managed care organization that does not provide resolution of complaint within no later than 60 days shall be fined $25 for each failure to provide notice. (§ 38a-478m). Commissioner of Social Services shall establish prior authorization procedures under Medicaid for home health care. (§ 17b-242a). No individual or group health policy providing coverage of type specified under § 38a-469(1), (2), (4), (11), and (12) shall deny coverage for health care services rendered to person who sustained injury while under influence of alcohol or drugs. (§ 38a-498c).

Health care professional, society or membership organization may establish assistance program for health care professionals who have drug or alcohol problems or physical or mental illnesses. Such program must include medical review committee and periodic assessment of professional's ability to practice. Assistance program must notify Department of Public Health if professional fails to meet programs requirements or can no longer practice safely. (§ 19a-12a). Department must develop assistance program oversight committee. (§ 19a-12b).

Mail Order.

No health insurance policy issued on individual basis may require any person covered thereunder to obtain prescription drugs from mail order pharmacy as condition of obtaining such drugs. (§ 38a-510).

Health Care Facilities.

Changes to service and transfers of ownership require filing of certificates of need, and compliance with statutory requirements. (§§ 19a-638a–638c, 19a-639, am'd PA 09-232, § 93). Commissioner of Public Health shall have authority to enforce statutory provisions requiring health care institutions to file strike contingency plans. (§ 19a-497). Certificate of need process no longer requires $400,000 capital expenditure threshold for review of proposals involving purchase, lease, or donation acceptance of various types of equipment. (§§ 19a-638[a][4], am'd PA 09-232, § 92, 19a-639[a], am'd PA 09-232, § 93, 19a-639[c], am'd PA 09-232, § 93, 19a-639a, am'd PA 09-232, § 94, 19a-639c, am'd PA 09-232, § 96).

Letter of intent prerequisite to submitting certificate of need application under §§ 19a-638 and 19a-639 available by Commissioner upon sufficient showing that particular function or service, or ownership change, control or termination is necessary to maintain continued access to health care services. (§§ 19a-638[b], am'd PA 09-232, § 92; 19a-639[b][2], am'd PA 09-232, § 93).

Health Care Workforce Board.

Established by Connecticut Allied Health Workforce Policy Board to monitor career ladders and workforce size in sectors of health care industry. (§ 4-124dd).

Hospital billing and collection practices are regulated by statute. (§§ 19a-649, 19a-509b, 19a-673; 19a-649[a]). Regulation of collections practices. (§§ 19a-673b, 19a-673c, 19a-673d).

Outpatient surgical facilities established under auspices of Dept. of Public Health. (§ 19a-490). Outpatient surgical facility defined. Requires compliance with certain certificate of need licensing laws applicable to institutional care providers. (§§ 19a-493b, 19a-630[1]; 19a-493b[c]). In certain circumstances, requirement for obtaining license from Dept. of Public Health may be delayed until Mar. 30, 2007. (§ 19a-493b[b]). Each hospital and outpatient surgical facility must develop and follow pre-surgical protocols. (§ 19a-490m). Determination of fees. (§ 17b-239).

Assuring Quality Health Care.

Following measures shall be implemented in order to provide better quality health care: (1) Dept. of Health will maintain quality of care program; (2) all hospitals to implement performance improvement plans; (3) "adverse events" defined as injuries caused by or associated with medical management that result in death or disability. (§ 19a-127n). Each hospital to establish staffing committee, draft and make available nurse staffing plan. (§ 19a-89e). Advisory committee in Dept. of Public Health shall evaluate and explore utilization of existing data collection system for cardiac outcomes. (§ 19a-127l). Hospitals are allowed to administer pneumococcal polysaccharide vaccines to patients without physician's order. (§ 19a-490k). Creation of patient safety organizations to safeguard and monitor quality of health care. (§ 19a-127o). Commissioner of Public Health shall keep list of all certified medical assistants who are state residents. (§ 19a-6f). Commissioner of Mental Health and Addiction Services shall create and maintain website to provide timely access to mental health care information. (§ 17a-453e).

Hospital Patients' Rights.

Each hospital must notify each patient in writing of rights enumerated in federal Medicare conditions of participation. (§ 19a-550a).

Office of Health Care Access.

"Affiliate" is redefined for purposes of Certificate of Need review and deadline is established for which person seeking public hearing on application must make request to Office of Health Care Access (OHCA). (§§ 19a-630a, am'd PA 09-212, § 8, 19a-638[c], 19a-639[b], am'd PA 09-232, § 93). Laws concerning applications and data that hospitals and other health care providers must submit to OHCA. Penalties for failure to file shall be extended to wider range of health care entities. OHCA's authority concerning hospital funds. (§§ 19a-613, 19a-637[b],[c], 19a-639[e], 19a-639a, am'd PA 09-232, § 94, 19a-639e, 19a-641, 19a-643[a], 19a-645, 19a-653, am'd PA 09-232, § 97, 19a-676; 19a-681, 19a-617a, 19a-640, 19a-493b[c]).

Health Insurance Assistance Program.

Federally recognized State health insurance assistance program ("CHOICES") provides free information and assistance related to health insurance issues and concerns of older persons. (§ 17b-427).

Medicaid Pharmaceutical and Therapeutics Committee established to work with Social Services Dept. to, inter alia, assist Dept. with issues concerning preferred drug lists for state-assisted programs. (§ 17b-274d). Financial eligibility requirements for Medicaid recipients. (§ 17b-257). Reimbursement of legend drugs for state-assisted programs. (§ 17b-280[a]). Reduction of benefits for families receiving temporary family assistance under certain circumstances. (§ 17b-688c[b]). Subsidization applied to replacement drugs if eligible person signs written statement that original dosage is lost, stolen or destroyed. (§ 17b-491[a]). Comptroller required to maintain flexible health care spending accounts for state employees. Such funds remain employer's property. (§§ 5-264d–5-264e).

Coverage for Smoking Cessation.

Commissioner of Social Services shall amend Medicaid State plan to provide coverage for treatment for smoking cessation prescribed by physician. (§ 17b-278a). Establish cancer plan to provide related services such as smoking cessation and colorectal screening. (§ 19a-73a).

Medicaid recipients are subject to co-pays for certain services including outpatient medical services and prescription drugs. (§ 17b-259a). Medicaid eligibility shall be extended for certain periods of time for families who become ineligible for medical assistance under Social

Security while employed, or due to receipt of child support. (§ 17b-261). Medicaid eligibility expedited for pregnant women. (§ 17b-277, am'd PA 09-08, § 7). State's provision of transitional medical assistance under Medicaid program must be in compliance with federal law. (§ 17b-261[g]). Social Services Commissioner must apprise Medicaid applicants of availability and eligibility for services provided by Nurturing Family Network per § 17a-56. (§ 17b-261[a]). Medicaid reimbursement received by any local or regional board of education for student shall not be deducted from grants paid. (§ 10-76hh). Screening diagnostic and treatment services to be provided for all persons under 21 and otherwise eligible for medical assistance. (§ 17b-261).

Medical assistance for children shall be provided to any child under supervision of Commissioner of Children and Families who is not receiving, or has not qualified for, Medicaid. (§ 17b-261). Presumptive eligibility for children applying for Medicaid. (§ 17b-292, am'd PA 09-8, § 8).

Emergency Contraception for Sexual Assault Victims.

Licensed health care facility providing emergency treatment to sexual assault victims must provide accurate and objective information regarding emergency contraception. Facility must provide emergency contraception at victim's request, except if victim is found to be pregnant through FDA-approved pregnancy test. (§ 19a-112e).

Defibrillators.

Training standards for automatic external defibrillators. (§ 19a-197b). Public golf courses must maintain at least one automatic external defibrillator in central location on premises. (§ 19a-197c).

Dental Plan Organizations.

Increase in amount of surplus to greater of $700,000 or equivalent of 2% of premiums. (§ 38a-580).

Dental Services.

Commissioner of Social Services shall enhance and expedite dental services to those eligible under Medicaid. (§ 17b-28f).

Dentists.

Dept. of Public Health may renew at reduced fees licenses of retired dentists who practice for free at certain public health facilities, but nowhere else in the State. (§ 19a-88). Scope of practice for dentists, dental hygienists, and dental assistants; licensure requirements and continuing education requirements. (§§ 19a-88[a], 19a-88b; C.G.S. 20-108; C.G.S. 20-123, C.G.S. 20-74ee[a], am'd PA 09-232, § 50, C.G.S. 20-107, C.G.S. 20-112a, C.G.S. 20-126l, am'd PA 09-232, § 4, C.G.S. 20-113b, C.G.S. 20-114[a], C.G.S. 20-126, C.G.S. 20-126c, C.G.S. 20-126i).

Office of Oral Public Health established within Department of Public Health. (§ 19a-4l).

Dialysis Patient Care Technicians may initiate and terminate dialysis while under supervision of registered nurse who is experienced in dialysis care. (§§ 19a-269a, C.G.S. 20-101).

Alzheimer's Respite Care Demonstration Program.

Allows state to provide services to caretakers of individuals with Alzheimer's disease. (§ 17b-349c). Alzheimer's special care units must provide written disclosure of treatment provided that is distinct from treatment required by applicable licensing rules and regulations. (§ 19a-562). Employee training requirements. (§ 19a-562a, am'd PA 09-108, § 2).

Use of State Facilities.

Commissioner may make available premises under control of Dept. of Mental Health and Addiction Services to nonprofit community organizations or self-help groups. (§ 17a-45a[q][1]).

Funeral Expenses.

Commissioner of Social Services to reimburse funeral expenses up to $1,800 for indigent persons in licensed state institutions and beneficiaries under state-administered general assistance programs.

Acceptance of Electronic Signatures by Commissioner of Social Services.

Dept. of Social Services must accept electronic records and electronic signatures of any individual authorized to submit records to Dept. Dept. must also consider any signature from licensed health care practitioner that may be required on document if document was provided to agency before seeking reimbursement for services provided. (§ 17b-242).

Family Planning.

Commissioner of Social Services must apply for Medicaid waiver to provide coverage for family planning services in households with incomes that make them otherwise ineligible for Medicaid services. (§ 17b-260c).

Nursing Homes.

Public offering of stock of any corporation that owns, conducts, maintains, operates such facility shall not be considered change in ownership if licensee and officers and directors remain unchanged; public offering cannot result in individual or entity owning 10% or more of stock of corporation; owner must provide information to properly identify current status of ownership. (§ 19a-493[b][2]). Dept. of Public Health shall conduct random inspections in at least 70% of Medicaid or Medicare licensed nursing homes. Such inspections are to be conducted with no prior disclosure. (§ 19-521a). Dept. of Public Health shall make recommendations for minimum and maximum temperatures within nursing homes. (§ 19a-522a). License renewal. (§ 19a-491a[c], am'd PA 09-197, § 1). Licensure for homes for veteran care. (§ 27-106a).

Commissioner may provide interim rate increase for chronic care facilities for stated reasons. (§ 17b-340). Certificate from Dept. of Public Health required to provide nursing facility management services. Application fee, criteria for issuance and renewal, authority of Dept. to initiate disciplinary action, and discretionary power of Dept. to limit and restrict services rendered. (§ 19a-561).

Prevention of Influenza and Pneumonia in Nursing Homes.

Commissioner shall adopt regulations which: (1) Assure that each patient admitted to facility is adequately immunized against influenza and pneumococcal disease; (2) specify that each patient be immunized annually against influenza and pneumonia; and (3) provide appropriate exemptions for patients for whom immunizations are medically contraindicated and/or those who object to immunization on religious grounds. (§ 19a-522).

Cancer Initiative.

Establish breast and cervical cancer early detection treatment referral program to educate public of benefit of early detection; recommended frequency of screening; to provide underserved populations with clinical breast examinations, screening mammograms and pap tests. (§ 19a-266). Sources of funding. (§ 19a-73b).

Child Day Care Centers.

All child day care centers and group day care homes shall not deny services on basis of child's known or suspected allergies or because of need for injectible equipment to treat allergies. Within three weeks of such child's enrollment, center or home shall have staff trained in use of equipment. (§ 19a-79). One certified by approved course or licensed medical practitioner who is member of staff of before or after school program who administers cartridge injector on emergency basis will not be liable for civil damages for any personal injuries which may result from acts or omissions and which may constitute ordinary negligence. (§ 52-557b, am'd PA 09-59, § 1). See also § 19a-900.

Nursing Home Closure.

Any facility intending to transfer all or part of its ownership or control prior to being initially licensed; to introduce any additional function or service into its program of care or expand existing function or service; or to terminate service or substantially decrease total bed capacity must request permission from Dept. of Social Services and notify Office of Long-Term Care Ombudsmen. Facility must also provide written notice to all patients, guardians, legally liable relatives or other responsible parties. Public hearing may be held by Commissioner of Social Services on facility's request. (§ 17b-352).

Long-Term Care.

Every three years, Long-Term Care Planning Committee will prepare plan for long-term care for all persons needing such care, placing them in community or least restrictive setting when appropriate. (119 S. Ct. 217b; § 176-337). Commissioner of Social Services may reimburse pharmacists for services provided to residents. (§ 17b-363b). Patients' bill of rights for any patients in long-term care centers, including nursing homes, in accordance with Social Security Act. (§ 19a-550[b], am'd PA 09-168, § 1). Establish long-term care planning committee to exchange information on long-term care issues and coordinate policy development to allow individuals with long-term care needs to choose and receive least restrictive long-term care. (§ 17b-337[a]).

Long-Term Acute Care Hospitals.

Chronic disease hospitals may apply to establish, operate, and demonstrate efficacy of “demonstration projects” for long-term acute-care hospitals. (§ 19a-617b). No patient must be admitted to chronic disease hospital unless medical director determines that hospital and its staff are capable of providing adequate care and treatment to patient. (§§ 19a-253; 19a-6). Commissioner of Social Services must establish procedures for admissions and lengths of stay in chronic disease hospitals. (§ 17b-239b).

Medicare Prescription Drug Discount Cards.

Residents must satisfy certain income and personal asset thresholds to receive prescription drug discount cards under CONNPace program. Part D recipients responsible for co-pays, co-insurance, and deductibles unless they exceed CONNPace co-payment requirements. (§ 17b-492, am'd PA 09-2, § 15).

Medicare Supplement Plans.

Medicare supplement providers are amended to meet federal requirements; regulations are adopted to enable Connecticut to continue to regulate Medicare supplement plans. (§§ 38a-473–38a-474, 38a-481, am'd PA 09-123, 38a-495b, 38a-495c, 38a-513). Medicare supplement provider must refund prepaid premium when insured cancels policy prior to coverage period expiration. (§ 38a-495d).

Medicare Part D.

Council established to advise on matters related to administration and implementation of Medicare Part D program. (§ 17b-492d). Procedures in event of denial of Medicare Part D claims based on formulary issues. (§ 17b-265e, am'd PA 09-8, § 6, am'd PA 09-14, § 2). Eligibility and enrollment of persons with HIV and AIDS under Medicare Part D. (§ 17b-256).

Administration of Medication in Residential Care Homes.

Allows unlicensed personnel in residential care home to get certified to administer medication. (§ 20-14e). People who receive special training but are not licensed by Public Health Dept. may administer medication to people receiving individual and family support services from Developmental Services, Children and Families Mental Health and Addiction Services, and Correction Depts. (§§ 20-14h–20-14j).

Reporting Prescription Errors and Continuing Education.

Pharmacies shall visibly display signs concerning reporting of prescription errors to prescription drug customers. Each pharmacy dispensing prescriptions to consumers shall include printed statement on packaging discussing prescription error reporting. Commissioner of Consumer Protection must adopt regulations concerning implementation of quality assurance programs to detect, identify and prevent prescription errors. Commissioner shall not authorize renewal of pharmacist's license unless pharmacist submits signed statement as to satisfactory completion of 15 or more hours of accredited continuing professional education in year immediately preceding expiration of his license. (§§ 20-600, C.G.S. 20-635). Pharmacists must require photographic identification before issuing controlled substances to persons unknown to them. (§ 20-612a).

Pharmacy Regulation.

Dept. of Consumer Protection must submit report summarizing regulations according to Pharmacy Practice Act, Federal Food Drug and Cosmetic Act, and State Controlled Substance Act. (PA 05-212, § 1). Univ. of Connecticut Health Center must submit report identifying deficiencies in administration of drugs in correctional facilities. (PA 05-212, § 2). Commissioner must inspect each retail pharmacy at least once every four years and develop methodology to sample prescriptions dispensed by retail pharmacies for compliance with state laws. (§ 20-577). Certain persons may jointly dispose of excess stock of controlled substances in long-term care facility and outpatient surgical facility. (§ 21a-262). At least once every three months, Dept. of Consumer Protection must compile report regarding any disciplinary actions or sanctions against pharmacy or pharmacist. (§ 20-632). Pharmacist may administer influenza vaccine to adults. (§ 20-633). Practitioners may not prescribe anabolic steroids solely for enhancing patient's athletic ability or performance. (§ 21a-249, am'd PA 09-22, § 5). Prescriptions for controlled substances are invalid if based solely on results of electronic questionnaire and not physical examination. (§ 20-613a). Penalties for violating § 20-631 and § 20-635. (§ 20-581). Commissioner of Consumer Protection to establish electronic drug monitoring program to collect information on controlled substances from pharmacies. (§ 21a-254). Transfers of controlled substance between pharmacies during declared emergency. (§ 28-32).

Health Emergencies.

Initiation of health hazard evaluations; investigations and studies; recommendations to employers to reduce risks; notification of employees of potential risk, treatment; failure to comply. (§ 31-400).

E C.G.S. 9-1-1 Commission.

Provides enhanced subsidization of regional public safety emergency telecommunications center for municipalities with population in excess of 40,000. (§ 28-24).

Licensed Professional Counselors.

Communications between patients and licensed professional counselors relating to diagnosis and/or treatment of patient are privileged and disclosure is restricted, absent certain circumstances, unless such privilege is waived by patient or his authorized representative. (§ 52-146s).

Nursing-Midwives.

Professional restrictions on practice; mandated relationship with obstetrician-gynecologist and applicable standard of care. (§§ 20-86b to C.G.S. 20-86e; § 20-86b). Authority to practice. (§ 20-86i). Fetal death certificates may be signed by midwives where physician is not in attendance. (§ 7-60).

Substance Abuse Counselors.

Any person hired by Dept. of Correction for position as substance abuse counselor must be licensed or certified alcohol and drug counselor or certified and practicing under supervision of licensed counselor. (§ 20-74s).

Children and Psychotropic Drugs.

School personnel may not recommend psychotropic drugs for any child. (§ 10-212b). Parents' refusal to administer psychotropic drugs to their child is not, alone, sufficient cause for Dept. of Children and Families to take custody of child unless that refusal results in neglect or abuse of child. (§ 17a-131a). Any school board that allows school nurses to administer medical preparations must adopt written policies. (§ 10-212a[a], am'd PA 09-155, § 1).

Food Allergies.

Depts. of Education and Public Health must develop and make available guidelines for management of students with life-threatening food allergies. (§ 10-212c, am'd PA 09-155, § 2).

Temporary Permits.

From time person graduates training program until results of licensing exam are reported, that person may receive 120-day temporary permit for several Dept. of Public Health-regulated professions. (§§ 20-12b[b]; C.G.S. 20-70[b]; C.G.S. 20-70[a]; C.G.S. 20-74d; C.G.S. 20-74bb[f]; C.G.S. 20-94; C.G.S. 20-94a[a]; C.G.S. 20-97; C.G.S. 20-101; C.G.S. 20-195[a]; C.G.S. 20-206e; C.G.S. 20-236[a], am'd PA 09-232, § 45; C.G.S. 20-254, am'd PA 09-232, § 46; C.G.S. 20-195n).

Access to Prescription Drugs.

Dept. of Social Services shall evaluate potential reimportation of prescription drugs from Canada under Conn. PACE program. (§ 17b-492). Individuals who qualify for Conn. PACE program must obtain prescription drug discount card and re-apply for card annually. (§ 17b-492, am'd PA 09-2, § 15). Electronic data intermediary may transfer electronically transmitted data between prescribing physician and pharmacist of patient's choice. (§ 20-614, am'd PA 09-22, § 1). Dept. of Social Services shall oversee newly established Pharmacy Outreach Program to help state residents obtain reduced or no-cost medicine from participating manufacturers, and educate residents about related programs available in Connecticut. (§§ 17b-499, 17b-499a). Licensed wholesalers of prescription drugs must provide Commissioner of Consumer Protection inventory report of specified drugs based on anticipated medication requirements for public health preparedness and pharmacological-terrorism prevention or response, and are subject to fine or imprisonment for noncompliance. (§ 28-32a).

Prescriptive Authority of Physician Assistants.

Physician assistants may prescribe and administer drugs including controlled substances in Schedule II, III, IV, or V in all settings. Schedule II and III prescriptions must document physician approval of order in patient's medical record within one calendar day. (§ 20-12d[a]).

Psychologists mandated to report cases of abuse, neglect and exploitation of elderly. (§ 17b-451).

Utilization review company determinations related to mental or nervous conditions will be reported separately. (§ 38a-226c[a][12]).

Registry of Data.

Each hospital shall make available to registry data concerning each traumatic brain injury patient admitted to hospital. (§ 17a-174[2]). Dept. of Public Health may be allowed to access certain health care data (§ 19a-45a), including patients' records to accomplish objectives of diagnosis, treatment or referral (§ 17a-451, am'd PA 09-149 §§ 1, 2).

Late or Missing Data.

Office of Health Care Access may refuse to accept letter of intent or certificate of need application from any person or health care facility that failed to submit required data or information or whose filing was incomplete or untimely. (§ 19a-639e).

Registry of Terminated Employees.

Department shall maintain registry of persons terminated from employment as result of substantiated abuse or neglect. At least semiannually, Department will issue notice to employers containing names of persons on registry along with identifying information. (§ 17a-247c).

Interstate Compact on Adoption and Medical Assistance.

State joins this compact which provides assistance to adoption of children with special needs. (§ 17b-74g).

State to develop plan for coordinated delivery of services to children with special health care needs. Children must be under 18, have one or more serious chronic medical conditions, disabilities per § 17a-219a and ongoing care needs. (SA 01-8).

Legal Immigrants.

Eligible legal immigrants are entitled to state-funded assistance programs. (§§ 17b-112c; 17b-116[e]; 17b-257b; 17b-342[a], am'd PA 09-9, § 27).

Linguistic Access in Acute Care Hospitals.

Act orders hospitals to take certain actions to accommodate non-English speaking patients, such as, providing interpreters to extent possible. (§ 19a-490i).

Evaluation of Persons with Psychiatric Disabilities.

Police officer, psychologist or clinically licensed social worker with certain qualifications, if they believe individual has psychiatric disabilities and is dangerous or gravely disabled may issue emergency certificate that directs that person to be taken to hospital for examination. (§ 17a-503). Individual may also apply to probate court with jurisdiction if individual believes respondent has psychiatric disabilities and is danger and court may order examination. (§ 17a-503[b]). Probate court may order psychosurgery or shock therapy for no more than 45 days for patient who cannot give informed consent if, after hearing, court finds patient incapable of informed consent, and there is no other less intrusive beneficial treatment. (§ 17a-543[c]). Person confined to institution for treatment of alcohol or drug addiction may apply for writ of habeas corpus directed to institution head to determine legality of confinement. (§ 17a-686a).

Child Poverty Council.

Creation of council to develop ten year plan to reduce number of children living in poverty. Dept. of Children and Families shall establish guidelines for use and management of psychotropic medications for children and youth under its care, through establishment of prevention goals, recommendations, and measuring prevention service outcomes, and to establish and maintain database to track such drug use. (§ 17a-21a). Several recommendations of Child Poverty Council are implemented to reduce child poverty. (§§ 4-67x; 17b-16).

Families with Services Needs Advisory Board to monitor progress by Dept. of Children and Families in developing services and programming for girls from families with service needs. (PA 06-188, § 42, am'd PA 08-86, § 6).

Mental Health Facility.

Includes any facility for care or treatment of mentally ill or emotionally disturbed adults including out-patient treatment facilities providing services to patients 16 or older receiving services from Dept. of Mental Health and Addiction Services. (§ 19a-490[g]).

Home Health Services.

Patients receiving home health services must be visited and assessed by registered nurse at least every 60 days; fee must be assessed. (§ 19a-491[g]). Nurse employed by licensed home health care agency is allowed to administer flu and pneumococcal polysaccharide vaccines to patient in patient's home without physician's order. (§ 19a-492d).

Exchange of Information.

In event of serious injury or unexpected death of person served by Dept. of Mental Health, Addiction Services, and Dept. of Children and Families, each agency may share information and records in its custody relating to treatment of said person. (§ 17a-487).

Brain Injury Group Home.

Community-based organizations may operate residences for adults with acquired brain injuries. Medicine may be administered to residences by trained individual pursuant to written orders of licensed person. Commissioner of Public Health and Commissioner of Mental Health will develop standards for operation of such residences. (§ 17a-468b[b]).

Persons with Disabilities.

Director of Office of Protection and Advocacy for Persons with Disabilities has broad authority to advocate, investigate, and educate on behalf of persons with disabilities. Establishment of advisory board. (§ 46a-11, am'd PA 09-65, § 1).

Stem Cell Research.

Stem cell research is permitted in Connecticut, but cloning of human beings is prohibited. (§§ 19a-32d–19a-32g; see also § 4-28e[c]). Penalties for violation of stem cell research laws. (§ 19a-32d). Stem Cell Research Committee. (§ 19a-32f).

Testing of inmates for tuberculosis is required. (§ 54-102bb).

Inmates with Mental Illness.

Department of Correction must consider psychiatrist's diagnosis of mental illness in order to provide competent mental health services to inmate. All custodial staff members at correctional facilities must receive training on mental health issues. Prior to release of mentally ill inmate, Department must collaborate with other State agencies to assist inmate in obtaining housing, mental health treatment, public benefits and employment counseling. (§ 18-96a).

Medical Testing by Respiratory Therapists.

Respiratory therapists may perform tuberculosis tests. (§ 20-162n).

Accreditation for Magnetic Resonance Imaging Equipment.

Any licensed health care practitioner operating or replacing any magnetic resonance imaging equipment shall obtain accreditation by American College of Radiology for all equipment and personnel involved with such magnetic resonance imaging activities. Any practitioner group at which moderate anesthesia is administered shall be accredited by proper authorities. (§ 19a-690).

Youth Camps.

No annual inspection of facilities used as youth camps shall be required by Dept. of Public Health if license's facilities are located at and inspected by college or university. (§ 19a-426). School physical examinations may be used to satisfy physical requirements of youth camp. (§ 19a-428).

Collaborative Practice Between Physicians and Pharmacists.

Licensed pharmacists employed by hospital may collaborate with physicians to manage patients' drug therapy. (§ 20-631). Collaborative drug therapy management agreement pilot program shall be established. (§ 20-631a).

Sale of Nonprofit Hospital.

Any transaction whereby nonprofit hospital transfers material amount of its assets or operations, or effectuates change in control to any entity that is organized for profit is governed by § 19a-486, et seq.

16 INSURANCE

16.01 INSURANCE COMPANIES:

The business of insurance in general is governed by Title 38a, and is under the supervision of the Insurance Commissioner. (§ 38a-8). See also c. 592 (Hospital Service Corporations); c. 593 (Medical Service Corporations).

Insurance Commissioner has general supervision over domestic, foreign and nonresident companies, and insurance agents, solicitors, brokers and adjusters, and has duty to see that laws relating to insurance are faithfully executed, as well as enforcing provisions of Title 38a through his or her enumerated powers of those powers reasonable and necessary to protect public interest. (§ 38a-8). Whenever all parties to claim for medical malpractice agree, they may request insurance commissioner select nonbinding pretrial screening panel. (§§ 38a-32–38a-36). Commissioner may conduct investigations and hearings concerning insurance. (§ 38a-16). Division of Consumer Affairs shall review and mediate complaints. (§ 38a-9). Insurance department maintains brokered transactions guaranty fund from which any resident aggrieved by action of insurance broker or unlicensed person engaged in business of insurance may recover compensation not exceeding $25,000. (§ 38a-880, et seq.).

Each company doing business in Connecticut must, by Mar. 1 of each year, file with commissioner, and electronically with National Association of Insurance Commissioners, on forms prescribed by Commissioner, report of its condition on preceding Dec. 31. In addition to annual report, Commissioner may require quarterly or even more frequent reports. (§§ 38a-53; 38a-53[e]; C.G.S. 33-160). By Mar. 31 of each year, insurance companies shall file reports detailing information received and investigations regarding insurance fraud under motor vehicle policies. (§ 38a-356). If he finds that company is doing business in illegal or improper manner (as, for instance, by granting rebates or other inducements not included in policy (§ 38a-825, am'd PA 09-188, § 14) by issuing false or misleading information as to terms of policies or financial condition [§§ 38a-826; 38a-828] by using unauthorized policy forms, or failing to meet capital, surplus, reserve and deposit requirements) or if he finds that company is failing to adjust and pay losses and obligations when due, except claims to which in his judgment there is substantial defense, he may order discontinuance of such practices or payment of such losses and obligations. (§ 38a-17). Enforcement of such order is provided for by power of revocation of license in case of foreign or nonresident company (§ 38a-41), and by power to cause receivership and dissolution in case of domestic company (§ 38a-18).

Commissioner shall review conduct of domestic insurance company within 30 days of change of control and must give written approval before company can engage in specified transactions for up to three years. (§ 38a-129).

When Governor declares existence of banking emergency affecting local companies, Commissioner, with approval of Governor, may issue and enforce such regulations for management and operation of insurance companies as may be for the protection of policy holders and stockholders. (§ 38a-20).

Commissioner may adopt regulations to establish security and privacy standards consistent with Title V of Gramm-Leach-Bliley Act. (§ 38a-8a).

Commissioner shall develop comprehensive public education outreach program to educate health insurance consumers about availability and eligibility requirements of various health insurance options in Connecticut. (§ 38a-472d).

Commissioner shall protect consumers in annuity transactions by adopting regulations. (§ 38a-432a).

Commissioner must review malpractice insurance rates. (§§ 38a-676, 38a-676a).

License.

No insurance company (domestic, nonresident, or foreign) may do business in state without a license from Commissioner. Application for license must include certified copy of charter, evidence of compliance with laws of state or country where organized, and statement of financial condition with evidence of its correctness. Before license may be issued, there must be compliance with laws as to process agent, capital and deposit requirements, etc. Commissioner may for cause suspend, revoke or refuse to renew license. Insurance company which writes or receives more than 10% of premiums from employees of employer who controls insurer cannot be licensed. (§ 38a-41). Commissioner may refuse or revoke license to company incorporated in state or country refusing permission to Connecticut company to do business on certificate of solvency and good management issued by him and on compliance with reasonable laws of that state or country as to deposits of money or securities, until his certificate is recognized. (§ 38a-43).

Any foreign insurer admitted to do business in state for purpose of writing insurance may become domestic insurer. Any domestic insurer may transfer its domicile and become foreign insurer. (§ 38a-58a).

Issuance of burial contracts or certificates constitutes insurance (§ 38a-464), but guarantee of workmanship and materials by seller of property does not (§ 38a-319).

Risk retention groups must be chartered and licensed under state's insurance laws. (§ 38a-251).

Unauthorized insurers, doing insurance business in Connecticut, deemed to have appointed secretary of state agent for process in any action by insurance commissioner or state, and insurance commissioner agent for all other process. To file pleading in court or administrative proceeding, unauthorized insurer must post cash, securities, or bond with surety; or become authorized. Contracts of such insurer are unenforceable, and fines are provided for doing unauthorized insurance business. (§§ 38a-271–38a-278).

Investigators, adjusters, and insureds involved in unauthorized insurance must report to commissioner of revenue services. 4% premium receipts tax plus penalties for nonpayment, imposed on such an insured. (§ 38a-551).

Connecticut Life and Health Insurance Guarantee Act provides coverage to any beneficiary, assignee or payee of covered person, except nonresident certificate holder. (§ 38a-860). Terms used in §§ 38a-858–38a-875 are redefined. (§ 38a-862). Connecticut Life and Health Insurance Guarantee Association life insurance and annuity account will have three subaccounts: annuity accounts including retirement plans owned by government, annuity account excluding contracts owned by government and life insurance accounts. (§ 38a-863). Responsibilities of member insurers. (§ 38a-865). Membership assessment. (§ 38a-866[c]).

Capital and Surplus Requirements.

Accounting rules shall be adopted in accordance with National Association of Insurance Commissioners Accounting Practices and Procedures Manual Version effective Jan. 1, 2001 and subsequent revisions. (§§ 38a-70, 38a-71, 38a-72, 38a-80). No fire, marine, or casualty insurance company can be initially licensed to do business in Conn., unless it complies with following requirements: To transact fire, marine, accident, health, workmen's compensation, liability, fidelity and surety, or title insurance, company must have capital of $500,000. Must also have paid-in surplus of $250,000 for fire and marine insurance, and $500,000 for other lines. To transact mortgage guaranty insurance, company must have capital of $2,000,000 and paid-in surplus of same amount. (§ 38a-72). To transact more than one of above forms of insurance, company must meet total minimum requirements, as to capital and surplus, of all forms to be transacted, except no need to have more than $2,000,000 capital and $2,000,000 surplus in aggregate. (§ 38a-72[b]).

Mutual insurance company may be licensed to transact any or all forms of insurance when net surplus of such company is at least as great as capital and surplus requirements for companies with capital stock. (§ 38a-72).

Prohibited Communications.

No insurer may knowingly send or permit to be sent any written communication or oral statement to any person known or believed to have claim for bodily injury or wrongful death that affirmatively advises against need for or discourages retention of attorney. (§ 38a-832). Disclosures to Dept. of Public Health related to investigation of health care provider pursuant to § 19a-14 are excluded from general prohibition on disclosing personal or privileged information concerning individual collected or received in connection with insurance transaction. (§ 38a-988).

Connecticut Domiciled Insurers.

Connecticut may charge out-of-state insurers same taxes, fees, and assessments imposed by other states on Connecticut insurers to equalize costs imposed on insurers domiciled in Connecticut. (§ 12-211).

Captive Insurance Companies.

Standards and licensing requirements for captive insurance companies in Connecticut. (§§ 38a-91aa – 38a-91qq).

Foreign Insurance Companies.

See infra, subheads Deposits; Risk Limits.

Foreign insurance companies are to be treated as domestic companies for purposes of state taxes. (§ 12-212).

Deposits.

Where other states require deposits of securities with Connecticut state officer before doing business in such other states, State Treasurer may be depository for domestic insurance companies, and may issue certificates of deposits. Legal title to securities deposited is transferred to him in trust, but company may receive income from these securities. (§ 38a-83). He must return deposit to company when all policies paid, cancelled, or reinsured and all liabilities extinguished or assumed by another company (§ 38a-83[b]), or deliver them to receiver in case of receivership (§ 38a-84).

Foreign insurance company to transact fire, marine or casualty insurance must furnish certificate showing it has cash deposit with treasurer of this state, or proper officer of some other state, of not less than minimum capital and surplus requirements for similar nonresident insurance companies, or $750,000, whichever amount is less. (§ 38a-72[c]).

Trusteed surplus of foreign insurance company, for purposes of Connecticut insurance laws, consists of aggregate value of its money or securities deposited as above, plus real estate mortgages legal for investment by such companies in states where land lies, plus all other assets in United States in which similar domestic insurance companies may invest, after deducting for losses, liabilities, and unearned premiums. Such mortgages and other assets must be held by United States citizen trustees approved by Commissioner for benefit of policyholders and creditors. (§ 38a-74). Trustees are appointed by company and are subject to examination by the Commissioner. (§ 38a-75).

Medical Discount Plans.

Standards and licensing requirements for discount health plan organizations that market discount health plans in Connecticut. (§§ 38a-479qq). (See also § 38a-11.)

Personal Risk Insurers.

Those that charge fee when insured pays his premiums late must conspicuously display fee policy holder's bill. (§ 38a-323c).

Reserves.

Every company transacting business in state must at all times maintain reserves equal to amount of its liability under all its policies, computed according to statute or requirements of Commissioner, to protect policyholders and secure solvency of company. (§ 38-76).

Life insurance companies' reinsurance reserves are computed by Commissioner after receipt of each annual report by valuing all outstanding policies upon net premium basis, according to company valuation standard, but must equal legal minimum standards prescribed by statute. Minimum standard varies, depending upon date policy issued. (§ 38a-77). Companies transacting health, accident and liability insurance in Connecticut must maintain premium reserve equal to unearned portion of gross premiums charged for covering the risks. (§ 38a-80).

Risk Limits.

No risk of stock insurance company doing business in state, after deducting portion reinsured in another company authorized to do business in Connecticut, may exceed 10% of its paid-up capital and surplus. One risk of mutual insurance company doing business in state, after deducting reinsurance, may not exceed 10% of total of net surplus and two and one-half times the amount of its total cash premiums or premium deposits in force. In no event, however, may risk exceed amount authorized by charter, by-laws, or directors. (§ 38a-73).

Rates.

Rating organizations permitted, but regulated, and all insurers must be given equal access to services of rating organizations. No insurers may agree between or among themselves to set same rates. Insurance Commissioner is responsible for determining whether rates or rating schedules are neither excessive nor inadequate according to statutory standards. (§§ 38a-663–38a-681; 38a-680). Division of rate review shall review and determine if rates violate statutory requirements. (§ 38a-9). Any insurance company delivering medical supplement policies which seeks to increase rates must file request with insurance department 60 days prior to proposed effective date of increase. After public hearing, Insurance Commissioner must approve or deny request within 45 days of its receipt. (§ 38a-474).

Discrimination.

No company, agent, or broker may pay or allow any premium rebate, or any special favor in dividends or benefits or other inducement not specified in the policy. (§ 38a-825, am'd PA 09-188, § 14). Similar prohibition applies to life insurance (§ 381-446); nor may life insurance company discriminate against persons of African descent (§ 38a-447). If application of colored person refused, affidavit of examining physician stating grounds of refusal must be furnished applicant. (§ 38a-448). No discrimination solely because of blindness. (§ 38a-816[14]). Another unfair practice would be discrimination against offspring of female parent who was exposed to diethylstilbestrol (DES). (§ 38-61[13]).

No individual health policy or group providing coverage under § 38a-469(1), (2), (4), (11), (12) shall deny coverage for health care services rendered to persons who sustain injury while under influence of alcohol. (§ 38a-498c; § 38a-525c).

Person or company selling real or personal property or engaged in business of financing the purchase of real or personal property or of lending money on the security of real or personal property may not require as condition to such sale, financing or lending that purchaser or borrower must negotiate insurance on property through particular company, agent, or broker. (§ 53-323).

Declination, cancellation or non-renewal of policy for auto insurance is prohibited if based upon: (1) Race, religion, nationality or ethnicity of applicant; (2) lawful occupation of applicant; (3) principal location of insured motor vehicle; (4) age, sex or marital status or applicant; (5) fact that applicant got insurance before through residual market; (6) another insurer previously declined to insure applicant; (7) first or second accident within current experience period which applicant or insured was not convicted and not at fault (§ 38a-358); declination, cancellation or non-renewal of health insurance is prohibited if based on genetic information (§ 38a-816, am'd PA 09-188, § 15); or travel destination (§ 38a-827a).

Agents, brokers and adjusters and casualty adjusters must be licensed by Commissioner. (§§ 38a-704, 38a-769, 38a-792). License issued after May 1, 1956, continues in force until cancelled, suspended or revoked if insurance company annually notifies commissioner of names of agents whose licenses it wishes to continue. (§ 38a-769). License holder must notify Commissioner not later than 30 days of changes of address, employer, home, or licensed members of firm as stated in license application. (§ 382-771). In addition to required qualifications of good moral character and financial responsibility applicable to all applicants, new applicants for title insurance license must show that commissioner of Superior Court that applicant is in good standing. (§ 38a-769). Agent for Risk Retention Group must be licensed according to § 38a-769. (§ 38a-263). License may be suspended or revoked for cause, or fine of up to $5,000 imposed, and person aggrieved by such action or by refusal to grant or reissue license may within 30 days, take privileged appeal to court of common pleas in Hartford. Appeal is to Superior Court of Hartford County or judicial district wherein aggrieved resides. (§ 38a-774). Temporary agent's license may be issued to executor, administrator, conservator or next of kin of deceased or disabled licensed agent. (§ 38-783).

Brokered Guaranty Fund.

Insurance department shall establish and maintain brokered transactions guaranty fund from which residents aggrieved by action of insurance agent or unlicensed person in insurance business may recover if approved by department. (§ 38a-880). Any licensed insurance broker or agent or person who receives license for first time on Oct. 1, 1989 must pay $10 fee credited towards fund. (§ 38a-881).

Insurance Administrator's license may be issued upon application to Commissioner, examination and filing of $150,000 bond. Fee for biannual renewal, $100. License may be suspended or revoked for cause, or fine of up to $1,000 may be imposed. Administrator cannot act as such without written agreement with insurer or party using his services. Detailed records of all transactions must be maintained for inspection and audit by Commissioner. (§§ 38a-11, 38a-783). Filing fee for agency appointments may be waived when insurer is domiciled in state or foreign country that offers reciprocal waivers to Connecticut insurers. (§ 38a-11[a]).

Excess line brokers license may be issued upon application after examination and filing of $25,000 surety bond (§ 38a-795) to licensed insurance agent domiciled or maintaining an office in this state, authorizing licensee to procure insurance through insurer not licensed to do business here. Fee for application and for annual renewal, $250. Commissioner may suspend or revoke license for cause shown after notice and hearing. Appeal from such action must be in accord with § 4-183, except venue is in Hartford-New Britain district. Appeals shall be privileged as to order of trial assignment. (§ 38a-794). Detailed records of each such policy must be kept and report made to Commissioner in affidavit form of each such policy within 30 days after issuance. See infra, subhead Taxation. (§ 38a-794).

Except for the foregoing, no person may solicit or procure insurance except on his own person or property, or do any business by or with any insurer not authorized to do business in state (§ 38a-703) and any person making contract of insurance on behalf of company not authorized to do business in state is personally liable to insured for performance of contract (§ 38a-714). Company or agent may not pay commission to unlicensed agent or broker (§§ 38a-717, 38a-711), but licensed agents may share commissions (§ 38a-706).

Insurance agent, other than industrial life insurance agent, receiving only commissions for service is exempt from unemployment compensation. (§ 31-222[a][5][K]).

Penalty for soliciting business for unlicensed insurance or surety company is no more than $2,000 or six months imprisonment or both. (§ 38a-703).

Penalty for failure to pay accident or health claim within time period set forth in § 38a-816(15)(b) is amount of claim plus interest at 15% per annum in addition to statutory penalties. (§ 38a-816[15][b]).

Unfair competition and deceptive practices are prohibited for both agents and insurers. (§§ 38a-815–38a-818). Nonpayment of mandatory fees to Insurance Commissioner is no longer unfair and deceptive insurance practice. (§ 38a-816[20]).

Process Agent.

No nonresident or foreign insurance company may, directly or indirectly, issue policies, take risks or transact business in this state, until it shall have first appointed in writing Insurance Commissioner to be its attorney in this state, upon whom all lawful process, in any action or proceeding against it, may be served with same effect as if company was domestic corporation. Such power of attorney must agree that it will remain in effect as long as any policy or liability remains outstanding in this state. Certificate of appointment must be certified and authenticated. (§ 38a-25). Commissioner, when thus served, collects $25 fee from plaintiff and must mail copy to secretary or resident manager of company. (§§ 38a-11; 38a-25). Commissioner may appoint person in his office upon whom, in his absence, service may be made. (§ 38a-25). Captive insurers must provide certain information to Insurance Commissioner. (§§ 38a-25, 38a-91k).

Insurance Producer.

One who sells, solicits or negotiates insurance is required to be licensed by state. (§ 38a-702a). Licensing is governed by §§ 38a-458, 38a-702a-702h, 38a-702j; 38a-702k, 38a-702n, 38a-704, 38a-713, 38a-775, 38a-782, 38a-784. Insurance Commissioner may waive producer license examination requirement. (§ 38a-702[c]). Insurance producer must renew his licenses on his birthday and pay annual license fee. (§§ 38a-784, 38a-11). Insurance producers must disclose compensation arrangements to consumers. (§ 38a-707a). (See also § 38a-816[1].)

Merger.

With approval of Insurance Commissioner, domestic insurance company may merge or consolidate with another insurance company, provided Connecticut corporation results. Prior to approval, Commissioner may hold hearing and must satisfy himself that interests of policy holders and stockholders, if any, are protected. (§§ 38a-153–38a-154). Procedure follows general corporation law or special charter provision, if any. (§§ 38a-153; C.G.S. 33-423[e]).

With approval of Commissioner after written notice to all stockholders of both companies and after advertised hearing and prior approval of stockholders, a domestic insurance company may issue its authorized capital stock in exchange for outstanding stock of another insurance company, or partly for stock and partly for cash. If, immediately prior to exchange, domestic company owns beneficially or of record 90% or more of voting securities of other company, prior approval of stockholders not required. After Commissioner has approved merger, consolidation of insurance and exchange of stock, copy of director's agreement as to terms together with commissioner's approval thereof must be filed in office of Secretary of State. (§ 38a-152).

Acquisition of subsidiary by mutual life insurance company authorized where subsidiary in business complementary to insurance, where company owns majority of subsidiary, and no more than 10% of assets invested in subsidiaries (§ 38a-100).

Acquisition.

Anyone proposing to acquire a total of 10% or more of voting power in an insurance company must file with Commissioner, the company, and have distributed to stockholders of company, specified extensive data concerning his background, financial condition, and intentions. After public hearing, Commissioner must approve or disapprove proposal. (§ 38a-130).

Insurance Holding Company Systems.

Insurance companies which are part of such systems must register with Commissioner if not similarly registered in another state, and they are regulated as to transfers among affiliates and fair dealing among affiliates. (§§ 38a-135–38a-136).

Reports.

See supra, subhead Insurance Commissioner.

Insolvency, Receivership and Dissolution.

Commissioner, on application to Superior Court in Hartford, may become ancillary receiver of foreign or nonresident company in receivership. (§ 38a-958).

Connecticut insurance guaranty association comprised of licensed insurance companies, which must become members, conducts business of insolvent companies, including premium rebates and claim adjustment. (§§ 38a-836–38a-853). Connecticut Insurance Guaranty Association Act governed by § 38a-838, et seq. (§ 38a-838). Association is not responsible for claim that arises out of policy issued by insurer who was not licensed to transact insurance in Connecticut; definition of insolvent insurer. (§ 38a-838).

Connecticut Life and Health Insurance Guaranty Association comprised of life insurers, health insurers and annuity insurers fulfills obligations of insurers which are insolvent or may be unable to fulfill contractual obligations by guaranties, payments of contractual obligations, loans, etc. Funded by assessments on member insurers. (§§ 38a-858–38a-875).

Interlocal risk management pools organized between July 1, 1995 and July 1, 2005 may forgo contingency fund requirements until July 1, 2010. (§ 7-479e, § 1).

Policies.

No nonresident or foreign company may issue or deliver policy or make insurance contract unless licensed. (§ 38a-41).

Insurance company doing business in state may not limit time within which suit may be brought against it or with respect to (d) of this paragraph, any claim shall be submitted to arbitration on: (a) Fidelity or surety bond to period less than three years from time of loss; (b) construction performance bond to period less than three years from date when claimant last performed work; (c) construction payment bond to period less than three years from date when claimant last performed work; (d) uninsured motorist provisions of policy for period of less than two years from date of accident; and (e) all other policies to period less than one year from time loss occurred. (§ 38a-280).

Fire insurance companies may also cover windstorm, tornado, hail, frost and other risks of damage to property or of liability for damage to property from the elements, from war, from explosion (except steam boiler), from collisions, from burglary and theft, etc., and may effect reinsurance of any such risk taken by them. (§ 38a-305).

Domestic mutual and stock companies writing fire, marine, casualty, fidelity and surety, or boiler and machinery insurance may issue participating and nonparticipating policies. (§ 38a-46).

Standard form of fire policy is specified. (§§ 38a-306; 38a-310; 38a-311; 38a-312; 38a-341). No condition is valid unless stated in body of policy. (§ 38-105). If policy is issued by a mutual, co-operative or reciprocal insurer having special regulations with respect to the payment by the policyholder of assessments, such regulations must be printed upon the policy. (§ 38a-308). Domestic companies may use, in other states, forms complying with local laws. (§ 38a-315). Policy may be cancelled at any time at request of insured with refund of excess of paid premium above customary short rate for expired time. Company may not cancel without 30 days written notice accompanied by reason therefor and return of excess of paid premium above pro rata premium for expired term. Where cancellation for nonpayment of premium, at least ten days written notice of cancellation accompanied by reason therefor. (§ 38a-307, am'd PA 09-164, § 1). Where owner obtains fire policy payable to mortgagee and fails to file proof of loss, mortgagee, upon notice, must render proof of loss in statutory form within 60 days thereafter. Insured must render proof of loss within 60 days after occurrence of loss. (§ 38a-307, am'd PA 09-164, § 1). Standard form fire insurance policy for State of Connecticut adopted; required terms set forth in statute. (§ 38a-307, am'd PA 09-164, § 1).

Mass marketing of personal lines of property and casualty insurance authorized for employees, officers, directors, and partners of same employer, labor union members, credit union members, and professional associations. Guaranteed issue with limited exceptions. (§§ 38a-802–38a-810).

Life insurance company may not discriminate in premium, dividends, benefits, terms for conditions between insureds of same class and expectation of life, nor may company, agent, sub-agent or broker make any contract with insured regarding the insurance not plainly expressed in policy (§ 38a-446) nor may policy be dated back to produce lower premium (§ 38a-442). However, companies may insure on group plan with special rates for such policies, but must keep mortality experience for group insureds separate and report separately to Commissioner on annual report. (§ 38a-431). Domestic life companies may also issue annuities (§ 38a-432), and insure against loss of life or personal injury from any cause and loss of time from sickness (§ 38a-434) and may insure minors 15 years of age or over with same effect as if of age (§ 38a-284). Educational, ecclesiastical, benevolent, charitable and eleemosynary corporations may be made beneficiaries. (§ 38a-450). Company may hold policy proceeds under trust agreement, with such exemption from claims of creditors and such control by beneficiary as may be agreed, and need not segregate trust fund. (§ 38a-454). Beneficiary of life policy, except insured, is entitled to policy proceeds as against representative or creditor of insured unless policy or designation of beneficiary was procured in fraud of creditors, in which event policy proceeds become part of estate of insured so far as necessary to pay debts and administration expenses. In so far as premiums have been paid in fraud of creditors, such amount plus interest must be deducted from policy proceeds and become part of estate of insured. However, company may safely pay beneficiary unless given notice of fraud claimed and unless suit is brought to establish claim within three months thereafter. (§ 38a-453). Individual life policies in this state require notice to insured that policy may be cancelled by return to company or agent by mail within ten days of insured's receipt of policy. (§ 38a-436). “Policy loan” includes cash loans and automatic premium loans secured by cash surrender value or collateral assignment of policy or contract. (§ 38a-444).

Life insurance policy with long term care benefits may contain rider that such benefits become payable upon exhaustion of life insurance benefits. Elimination period limitations apply only to life insurance policy and there shall be no additional elimination period. Rider may calculate premium waiver from time benefits are payable under rider. (§ 38a-458). Insurers licensed for both health and life insurance may combine certain life, annuity or endowment insurance with long-term care insurance. (§ 38a-458a).

Viatical settlements are permitted and monitored by statute. (§§ 38a-465, et seq.; §§ 38a-11[a], 38a-25[11]). Insurer must use 2001 Commissioners' Standard Ordinary Mortality Table for policies issued after Dec. 31, 2003, but for policies issued before Apr. 1, 2005, insurers are prohibited from using 2001 table to effect premium reduction. (§§ 38a-78, 38a-439[e]).

Accelerated Life Insurance.

Any life insurance company or fraternal benefits society doing business in Connecticut may issue accelerated benefits life insurance policies and certificates, riders or endorsements to existing life insurance policies which provide accelerated benefits. Such policy shall not include policy providing for disability, income protection coverage or long term care coverage. Death benefits may not be reduced more than amount of accelerated benefits paid plus any applicable actuarial discount appropriate to policy design if policy is without additional premium payments. When accelerated benefit is paid amount paid may be considered as: (1) Pro rata reduction in cash value or death benefits; or (2) lien against death benefit of contract and access to cash value shall be restricted to any excess of cash value over sum of other outstanding loans and lien. Accidental death benefit in policy shall not be affected by payment of accelerated benefit. All accelerated benefits policies shall comply with following disclosure requirements: Face of every accelerated benefits policy shall contain: (a) description of coverage which uses terminology “accelerated”, and (b) following statement: “benefits as specified under this policy will be reduced upon receipt of accelerated benefit”. Insurance Commissioner may adopt such regulations as he deems necessary for purpose of governing accelerated life insurance policies. (§ 38a-457, am'd PA 09-216, § 1).

Unclaimed funds held by any life insurance company doing business in state upon matured policy are covered by § 3-58a.

Dental insurance policies shall provide that insurer must, upon request, estimate reimbursement for certain dental services. (§ 38a-472c).

Health and accident insurance policy forms must have Commissioner's approval, subject to appeal to superior court. (§ 38a-481, am'd PA 09-123). They must express entire consideration therefor, must indicate effective and termination dates, must not purport to insure more than one person except when issued to head of family to cover expenses incurred by him on behalf of sickness or injury of self, spouse or children, must contain certain standard provisions and no inconsistent provisions, may contain certain additional standard optional provisions, and size of printing of various parts is specified. (§§ 38a-482; 38a-483). However, policies issued by foreign and nonresident companies may contain language required by state of incorporation, and policies issued by domestic companies for use elsewhere may comply with law of state where used. (§ 38a-483). Falsity of statement in application is not bar to recovery unless such false statement materially affected either acceptance of risk or hazard assumed. (§ 38a-485). Acknowledgment of notice, furnishing forms for proof of loss, accepting proofs, or investigation is not waiver of policy defense. (§ 38a-486).

Managed care organizations engaged in appeals concerning health care determinations must pay filing fees, and provide documentation of insurance to Insurance Commissioner. (§ 38a-478n[d], am'd PA 09-49, § 2).

There are standard forms for health and accident policies written in this state. No group accident, health or medical services policy may contain an offset provision as defined by § 38a-519. (§§ 10-66c; 38a-482; 38a-480). Where husband and wife work for same employer and are covered by group policy, neither required to pay any premium not resulting in greater coverage than if policy provided to only one spouse. (§§ 38a-540–38a-541).

Guidelines, requirements and procedures established for insurance coverage of routine patient care costs incurred by patients engaged in cancer clinical trial treatments. (§§ 38a-504a–38a-504f, 38a-542a–38a-542g).

Coverage of physically or mentally handicapped dependent children must be continued under individual and group health insurance policies and membership hospital and medical insurance contracts, despite termination of coverage provision in policy. If child is and continues to be: (1) Incapable of self-support and (2) chiefly dependent upon policy holder for support. Proof of these elements is required. (§§ 38a-489; 38a-515).

Comptroller shall arrange and procure group hospitalization, medical, and surgical insurance plans for certain state employees. (§ 5-259, am'd PA 09-114, § 7). State employees are ineligible for group life insurance policies as both retirees and active employees. (§ 5-257[a]).

Provision made for insurance policies to provide coverage for unmarried State residents under age of 26. (§ 38a-497, am'd PA 09-124, § 1). Insurance policies shall provide coverage for children legally placed for adoption. (§ 38a-508).

Statute concerning preexisting condition coverage. (§ 38a-476). If individual meets certain time requirements outlined in this statute, health insurance plans must provide coverage for individual's preexisting condition(s). (§ 38a-476[c]). If individual meets certain time requirements and was not covered under previous insurance for preexisting condition, new insurer must credit time individual was previously covered to exclusion provision of preexisting condition provision. (§ 38a-476[d]). Short term health insurance policy issued on nonrenewable basis for six months or less which imposes preexisting conditions provision must meet certain requirements. (§ 38a-476[g]). Comprehensive health care plans issued through Health Reinsurance Association must cover pre-existing conditions for those newly insured after Oct. 1, 2005 if insureds' former plans covered condition. (§ 38a-553). Certain insurance plans are not considered “health insurance” for comprehensive health care plan purposes. (§ 38a-551).

Small employers, as defined in § 38a-564, may group together solely for purpose of securing group health insurance coverage.

Coverage may be provided for municipal employees including volunteer firefighters and ambulance personnel. (§ 7-464).

Group medical benefit contracts must cover mental or nervous conditions to limited extent. (§§ 10-66c; 38a-514). Coverage for individual and group health insurance policies must provide coverage for laboratory and diagnostic tests for diabetes and in some cases provide coverage for treatment of diabetes. (§§ 38a-492d, 38a-518d). Every major medical expense policy in state on or after effective date of act shall provide home health care to residents whose benefits are no longer provided under Medicare or any other plans. (§ 38a-493). Individual health care plan must be available to all residents except those 65 or older and eligible for Medicare. (§ 38a-552). Insurers must offer group hospital or medical plans providing coverage of expenses incurred for comprehensive rehabilitation services. (§ 38a-523). Health insurance benefits applicable for children must apply to new born child from moment of birth. (§ 38a-538). Every group hospital or medical expense insurance policy or service plan contract delivered, issued for delivery or renewed on or after Oct. 1, 1989 must provide benefits for preventive pediatric care for children covered by policy at following approximate age intervals: every two months from birth to six months, every three months from nine to 18 months, annually from two years to six years. (§ 38a-535). Individual, surviving spouse and dependents losing eligibility in group medical plans may qualify for continued group coverage for limited period. (§ 38a-538). Insurers shall provide required minimum coverage for tumor removal and leukemia treatment, including outpatient chemotherapy, reconstructive surgery and non-dental prosthesis. (§ 38a-658). All health and hospitalization policies must include coverage for services provided by veterans' homes and hospitals. (§ 38a-502). Individual or group health insurance policy providing coverage under § 38a-469(1), (2), (4), (6), (10), (11) and (12) must contain specified definitions for ``medically necessary'' or ``medical necessity''. (§ 38a-482a; § 38a-513c). Each individual health insurance policy must provide coverage and payment for medically necessary ambulance services. (§ 38a-498). Insurers must cover costs of newborn screening and medication for cystic fibrosis. (§ 38a-492c). Insurers must provide required minimum benefits for mammographic examinations to any woman covered under policy. (§ 38a-503). Insurance policy must provide additional benefits for comprehensive ultrasound screening if such screening is recommended for women classified under certain categories by Breast Imaging Reporting and Data System of Amer. Coll. of Radiology, or if woman is believed to be at increased risk for breast cancer. (§§ 38a-503; 38a-530; 38a-503). Insurers must provide required minimum benefits for mastectomy and breast reconstruction after mastectomy. (§§ 38a-503d, 38a-504, am'd PA 09-188, § 7, 38a-530d, 38a-542, am'd PA 09-188, § 8). Health insurance companies must cover portion of cost of wigs for chemotherapy patient. (§ 38a-504, am'd PA 09-188, § 7). Insurers must offer group hospital or medical plan coverage of expenses for diagnosis and treatment of infertility, including in-vitro fertilization procedures. (§ 38d-536). Health insurance coverage is required for medically necessary infertility diagnosis and treatment expenses. (§§ 38a-509, § 38a-536). Insurers must provide same coverage for chiropractic services licensed under c. 372 of general statutes as provided by physician if services treat condition covered by policy and are within services chiropractor licensed to perform. (§ 38a-507). Each individual group health insurance policy must provide coverage for wound care supplies medically necessary for treatment of epidermolysis bullosa and administered under direction of physician. (PA 09-51, §§ 1, 2). Employers who deduct from employees' wages for group hospital or medical insurance and fail to procure coverage are liable for benefits to same extent as insurer or hospital or medical insurance company had insurance been procured. Corporate officers responsible for procuring coverage for employees and who willfully fail to procure coverage are personally liable for benefits same as if coverage had been procured. Personal liability imposed only if amount owed employee cannot be collected from corporation. (§ 38a-537). No medical benefits issued by insurance company, hospital service corporation, medical service corporation or health care center may require covered individual to obtain prescription drugs from mail order pharmacy as condition of obtaining benefits for such drugs. (§ 38a-544). No insurer, health care center, hospital and medical service corporation or other entity delivering, issuing, renewing, continuing or amending individual health insurance policy in Connecticut on or after July 1, 2000, nor any dental services plan may refuse to accept or make reimbursement pursuant to assignment of benefits to dentist or oral surgeon if charges for insured person are no more than for uninsured person and records are available for review. (§§ 38a-491b; 38a-517b). No insurer or health care center providing coverage under § 38d-469(1), (2), (4), (6), (10), (11) and (12) may rescind, cancel or limit coverage based on information submitted or omitted from insurance application if insurer or health center failed to perform thorough underwriting process, unless Insurance Commissioner grants approval. Coverage under such policies may not be rescinded, cancelled, or limited more than two years after effective date. (§ 38a-477b).

Private employers providing health insurance to employees and deducting portion of premiums from pay must offer employees option of having portion excluded from gross income, except in certain specified cases. (§ 31-51uu).

Failure to Pay Claims.

Insurers must pay undisputed claims within 45 days or pay 15% interest on said claim, plus applicable penalties. Each insurer must annually report to commissioner percentage of claims interest was paid on and total amount of interest payments. (§ 38a-816, am'd PA 09-188, § 15).

Policies issued in violation of law are valid but are construed in accordance with law. (§ 38a-484). Certain statutes on health and accident insurance do not apply to liability or workmen's compensation insurance, group policies, certain life insurance policies, fraternal benefit societies, insurance issued in conjunction with automobile liability policy, and accident ticket policies. (§§ 10-66c; 38a-480).

Limited Benefit Medical Plan.

Act contains required language for policies providing coverage under § 38a-469(1), (2), (11) and (12) and limitations on insurers' replacement of comprehensive health insurance with limited coverage plans. (§ 38a-482b; § 38a-513d).

Health Care Fraud.

Person intentionally making false statements to support claim for health insurance subject to penalties for larceny. (§ 53-440, et seq.). Person who acts as runner or uses runner to obtain health care benefits or assert claim against insurance company shall be fined up to $5,000, imprisoned for less than one year or both. (PA 09-222, § 1).

Plain Language.

All insurance policies must be made readable. Tests for readability include Flesch reading ease test. All filings must include certification by officer of insurer that policies meet test requirements. This chapter does not increase risk assumed by insurer. (§§ 38a-297–38a-299).

See also category 3 Business Regulation and Commerce, topic 3.12 Consumer Protection.

Liability Insurance.

Insurer against liability on account of death, personal injury or damage to property becomes absolutely responsible whenever a liability covered by the policy arises, and if a judgment against the assured is not satisfied within 30 days after it becomes final, the judgment creditor is subrogated to rights of insured on policy and may sue insurer. (§ 38a-321).

Company writing commercial risk insurance must submit annual report beginning June 1, 1988 concerning earnings, losses, and reserves. (§ 38a-696).

Professional liability insurance means contracts for (1) physicians and surgeons, (2) hospitals, (3) lawyers, (4) dentists, (5) architects and engineers, and such other categories as Insurance Commissioner shall provide. (§§ 38a-325; 38a-393–38a-395). Licensed dentists are required to maintain professional liability insurance with mandated coverage limits; exemptions may apply when providing dental services at clinic licensed by Dept. of Public Health. (§ 20-126d).

Insurer must give 90 days notice before canceling or refusing to renew professional liability policy. (§ 38a-323[e]). Any individual, partnership, corporation or unincorporated association providing professional liability insurance coverage for its employee shall furnish each insured employee upon cancellation or discontinuance of such professional liability insurance notice of cancellation or discontinuation of such insurance. Such notice shall be delivered to insured employee not less than 45 days next preceding effective date of cancellation or discontinuation. This section shall apply to any of above individuals, partnerships, corporations or unincorporated association which substitute one policy providing such professional liability insurance coverage for another such policy with no interruption in coverage. In event of failure to furnish notice, individual or entity shall be liable for benefits to same extent as professional liability insurer would have been liable if coverage had not been cancelled or discontinued. (§ 38a-325).

Insurers who discontinue offering medical malpractice insurance policies in Connecticut must continue to honor policy clauses that obligate insurer to provide coverage for prior acts upon retirement of health care provider. (§ 38a-394).

Homeowners Insurance.

Each insurer shall file its rules and regulations and any modifications thereto with insurance commissioner. There is 30-day waiting period until rules or modifications are effective. Waiting period may be extended upon written notice to insurer. Rules are approved unless rejected and written notice given to insurer. (§ 38a-689).

Automobile Liability Insurance.

See category 23 Transportation, topic 23.01 Motor Vehicles, subheads No-Fault Insurance and Proof of Financial Responsibility. Automobile liability insurance can be cancelled only for certain reasons, and notice of cancellation with reason specified must be given at least 45 days before effective date of cancellation. (§§ 38a-341, 321), and not renewed unless 60 days notice is given (§ 38a-323). Each insurer shall file its rules and regulations and any modifications thereto with insurance commissioner. There is 30-day waiting period until rules or modifications are effective. Waiting period may be extended upon written notice to insurer. Rules are approved unless rejected and written notice given to insurer. (§ 38a-349). Insurer need no longer provide people covered under automobile insurance policy with written notice of full glass repair or replacement coverage. (§ 38a-339).

No-Fault Insurance.

See category 23 Transportation, topic 23.01 Motor Vehicles, subhead No-Fault Insurance.

Workers' compensation insurance companies must report all risks to Board of Workers' Compensation Commissioners, and cancellation does not become effective until one week after filing of notice of cancellation with appropriate Compensation Commissioner. (§ 31-348).

Advisory board shall meet twice yearly and all actions of board shall require affirmative vote of majority of those members present and voting. (§ 31-349e). State treasurer may bring action against employer or private insurer that fails to comply with Second Injury Fund requirements. Any employer or private insurer aggrieved by assessment of employer for liabilities of Second Injury Fund may appeal decision to Superior Court. (§ 31-349j).

Title Insurance.

No corporation can insure or guarantee titles to Connecticut realty except subject to and in accordance with its insurance laws generally. No corporation doing title insurance business or mortgage guaranty insurance business may do any other line of business. (§ 38a-45). Title insurer shall have such minimum capital and surplus as is required by statute. (§ 38a-72). Net retained liability of title insurer for single risk on property located in this state, whether assumed directly or as reinsurance, may not exceed 50% of sum of its total surplus to policyholders and reserve, less value assigned to title plants, as shown in most recent annual statement of insurer on file in office of commissioner. (§ 38a-406). General guidelines for title insurance in state of Connecticut were substantially revised in (§ 38a-400, et seq.).

Retaliatory Law.

Where any state or country or political subdivision imposes upon Connecticut companies doing business therein taxes, fees, obligations, prohibitions or restrictions more onerous than those imposed by the laws of Connecticut on foreign or nonresident insurance companies doing business in this state, companies of such state or country doing business in Connecticut are subject to the same fees, obligations, etc., as are imposed by such state or country upon Connecticut companies, but this does not apply to ad valorem taxes on real or personal property or to personal income taxes or fees for agents' licenses or special purpose assessments. (§ 12-211). Insurance companies organized under laws of foreign nations which do not regulate insurance companies in the same manner as the several states of the United States, shall be deemed to be organized under laws of state of its entry into U.S. (§§ 38a-11; C.G.S. 12-58).

Fees.

For each annual license issued to domestic insurance companies, $10; for receiving and filing annual reports of domestic insurance companies, $25; for filing all documents prerequisite to the issuance of a license to domestic insurance companies, $175; for filing any additional paper required by law, $15; for each certification of valuation, organization, reciprocity or compliance, $20; for each certified copy of license to a company, $20; for each certified copy of report or certificate of condition of a company to be filed in another state, $20; for amending a certificate of authority, $100; for each license issued to an agent of a domestic insurance company, $40, and to agent of any other insurance company, $5; for each license issued to rating organization, $100; for each license issued to insurance broker, $88; for each license issued to public adjuster, $125; for each certificate requested, whether issued or not, that license has been issued to agent, broker, or adjuster, $13 (§ 38a-11); for deposit of securities by domestic company with State

Treasurer, $150 annually; for accepting service of process, $25 payable by plaintiff to Commissioner (§ 38a-11); for issuing license to broker, $88, to public adjuster, $100 (§ 38a-11); for issuing license to casualty adjuster, $20 per year (§ 38a-792); all payable to Commissioner (§ 38a-11).

Taxation.

Domestic insurance companies pay a tax of 2½% of net direct life insurance premiums written before July 1, 1973 on property or risks located or resident in this state and 2¾% of all other net direct premiums. Tax on all net direct premiums after June 30, 1973 is 2%. (§ 12-39a). Effective Jan. 1, 1995, rate drops to 1.75%. There are credits against tax. This franchise tax is in addition to excise tax on investment income imposed by §§ 12-202; C.G.S. 12-203. Newly licensed insurance companies incorporated in another state or foreign country, must pay commissioner of revenue services, within 45 days after license becomes effective, tax on net direct premiums received for preceding five years from policies written on property or risks located in this state, except marine insurance, at rate in effect for each of those years. Annual returns to be filed in Mar. and provides information regarding officers, principal place of business subsidiaries, interest, dividends, premiums, gross income, deductions from gross income; tax due and payable on Mar. 1st. (§ 12-205). Foreign insurance companies doing business in state must, annually, pay tax of 2% of all net direct premiums from instate policies, except marine insurance. Upon ceasing to transact new business in state, company must continue to pay tax upon renewals at rate applicable at time of cessation of business. (§ 12-210). Excess line broker must pay to Commissioner each Mar. 1st 4% of gross premiums charged insureds by insurers for excess line insurance, less amount of return premium. This tax does not apply to any policy issued to state or municipality. (§ 38a-743).

Such companies may also be subject to retaliatory tax. See supra, subhead Retaliatory Law.

Foreign insurance companies must file estimated tax return and remit estimated tax due on June 15 and Dec. 15 of each year. (§ 12-210). Any insurance company aggrieved by action by Commissioner may apply for hearing within one month after notice of such action. (§ 12-208). Company may appeal tax levied to superior court of Hartford. (§ 12-208).

Assessment insurance companies are governed by special provisions. (§§ 38a-77).

Savings bank life insurance is governed by special provision. (§ 36a-285). See category 3 Business Regulation and Commerce, topic 3.01 Banks and Banking.

Insurers Controlled by Lending Institution or Bank Holding Company.

Cannot insure real or personal property securing loan by lending institution or bank holding company if loan contingent on such insurance. (§ 38a-718).

Certified insurance consultants may not use that title or similar titles unless licensed as an insurance consultant. Examination is required for such a license. Insurance consultants must give written statements of services rendered and receipts for fees. (§§ 38a-731–739; 38a-786, 38a-776, 38a-732–38a-735).

Uninsured children and youth covered by special government funded ``HUSKY Plan'' for medical coverage. (§§ 17b-294–17b-295). Commissioner of Social Services may seek waiver to authorize use of funds to promote enrollment in HUSKY Plan. In addition, Commission shall establish procedures to determine eligibility for HUSKY Plan. (§§ 17b-290, 17b-292; 17b-299). Date of eligibility for Part A Benefits for parents and caretaker relatives under HUSKY Plan is extended. (§ 17b-261). Income eligibility limit is increased from 100% to 150% of federal poverty level to expand eligibility for HUSKY Plan A medical coverage; new and higher cost sharing requirements imposed. (§ 17b-261). Caretaker relatives and pregnant women also qualify for HUSKY Plan, Part A benefits under family Medicaid criteria. (§§ 17b-289[b]; 17b-290[13]). Children diagnosed with cancer eligible for Husky coverage will receive coverage without prior authorization for neuropsychological testing. (§ 17b-278d; § 38a-492l; § 38a-516d). Commissioner or servicer to rely upon eligibility information contained in application unless reason to consider inaccurate. (§ 17b-292[j], am'd PA 09-8, § 8). Reimbursement under Husky Plan Part A for services provided by home health care agency in child's home. (§ 17b-261g).

Commissioner of Social Services must establish health insurance premium assistance program for certain employees with dependent children who have access to employer-sponsored health insurance. (PA 07-185, § 10). Commissioner must develop and implement preventative health services system for children under HUSKY Plan. (§ 17b-306). Commissioner must establish child health quality improvement program for HUSKY Plan providers. (§ 17b-306a).

Husky Insurance Premiums.

Cost-sharing requirement on all parent and needy caretaker relatives with incomes exceeding 100% of federal poverty level includes payment of portion of premium and implementation of co-pay. (§ 17b-261, am'd PA 09-8, § 3).

Cancellation Notices.

Insurers issuing or endorsing automobile or homeowners insurance policies shall allow persons over age 55 to designate third party to receive cancellation notices. (§ 38a-323a).

Insurance premium finance companies licensed and regulated. (§§ 38a-160–38a-170).

Direct Actions Against Insurer.

See category 23 Transportation, topic 23.01 Motor Vehicles, subhead Direct Action.

Indemnification of directors, officers, and employees of mutual insurance companies allowed on much the same terms as corporate personnel. (§ 38a-62b). See category 2 Business Organizations, topic 2.03 Corporations, subhead Indemnification of Directors and Officers.

Personal liability of director of mutual insurance company allowed on much same terms as corporate directors. (§ 38a-63). See category 2 Business Organizations, topic 2.03 Corporations, subhead Directors.

16.02 SURETY AND GUARANTY COMPANIES:

Such corporations are under the supervision of the Insurance Commissioner, and are governed to a considerable extent by the laws applicable to insurance companies. See topic 16.01 Insurance Companies.

Financial Guaranty Insurance Act subjects companies issuing surety bonds, indemnity contracts and similar guaranties to substantial license, reporting, and disclosure requirements concerning financial strength, over and above applicable insurance company requirements. (§ 38a-92, et seq.). Such companies shall establish and maintain contingency reserve accounts in accordance with accounting requirements of National Association of Insurance Commissioners Accounting Practices and Procedures Manual effective Jan. 1, 2001 and subsequent revisions. (§§ 38a-92c[2]; 38a-92d; 38a-92e). If reinsurance agreement is non-proportional, contribution to contingency reserve shall equal 50% of quarterly written insurance premium. (§ 38a-92m[a][2][b]).

Rights and Powers.

Whenever any bond is required by law, it must be a bond with surety. (§ 1-26).

Rates on surety and guaranty bonds are regulated. (§§ 38a-663–683).

Reports.

Each surety company doing business in state must file annual report, in which gross amount of risks are classified as commissioner directs, and reserve fund is classified as liability. Commissioner may order cessation of business for failure to report or for taking excessive risks. (§§ 33-953; C.G.S. 33-1243).

Agents.

Person acting as agent without license or without being reported as agent of any particular company is subject to fine not more than $2,000. (§ 38a-703). For other requirements, see topic 16.01 Insurance Companies.

Nonresident or foreign surety company to do business in the state must have a capital of at least $500,000 and a paid-in surplus of not less then $500,000. Mutual surety company must have net surplus at least as great as capital and surplus requirements for stock companies. Company must also furnish certified copy of its charter, copy of its last annual report, and certificate showing cash deposit to this or other state of minimum capital requirement. (§ 38a-72). For other requirements, see topic 16.01 Insurance Companies.

Taxation.

No special taxes. See topic 16.01 Insurance Companies.

Managed Care.

New requirements exist for submitting information to Insurance Commissioner regarding managed care plans. (§§ 38a-226–38a-226d; 38a-226c[2][a], 38a-226c[d]; 38a-478–38a-478t, am'd PA 09-46, § 1, PA 09-49, § 1; 38a-993). Managed Care Ombudsman and office's advisory committee must file annual reports by Mar. 1 and Apr. 1 respectively. (§§ 38a-1049, 38a-1050). Health insurers must follow same grievance requirements as managed care organizations; notice requirements when appeal to reverse denial of claim is unsuccessful. (§§ 38a-226c[a][1], 38a-478m, 38a-478n, am'd PA 09-49, § 2; C.G.S. 38-478s). Permit enrollees and providers may combine multiple appeals of denials or determinations by managed care organizations or utilization review companies into single appeal in certain circumstances. (§ 38a-478n[b][1], PA 09-49, § 2). Managed Care Ombudsman shall be renamed Healthcare Advocate. (§§ 17b-427[e], 38a-47, 38a-48, 38a-478n[f], am'd PA 09-49, § 2, 38a-479ee, 38a-479ff, 38a-1041; 38a-1042–38a-1050). Must enable providers to access reimbursable fees under provider contracts. (§ 38a-479, and PA 09-204, § 1). Requirements for fee schedule changes between contracting health organizations. (PA 09-204, § 2). Insurer or health care center shall include written notice with each application for individual or group health insurance coverage that discloses such insurer's or health care center's medical loss ratio. (PA 09-46, § 2; 38a-478c), am'd PA 09-46, § 3; 38a-478g, am'd PA 09-46, § 4).

Pharmacy Benefits Manager.

Any person administering prescription or pharmacist services for health plan must register with Insurance Commissioner unless operating under licensed affiliate organization. (§ 38a-479aaa – § 38a-479hhh).

17 INTELLECTUAL PROPERTY

17.01 TRADEMARKS AND TRADENAMES:

Trademarks and Servicemarks.

(Note: § 35-18a is based on Model State Trademark Bill of U.S. Trademark Association with certain modifications). See also § 35-11a and for tradenames see § 35-1.

A trademark or service mark (including titles, character names and other distinctive features of radio or television programs), used in conjunction with or on and to identify such goods or services distributed or offered within this state, may be registered with Secretary of State, such registration being effective for five years (ten years if registered prior to Oct. 1, 1993), renewable thereafter for like term, and open for public inspection. Nonuse for two consecutive years shall be prima-facie evidence of abandonment. (§ 35-11c).

Registration.

Application for registration must be made to Secretary of State, stating: Applicant's name and business address; goods or services with and manner in which mark is used; date when mark was both first used and used within this state; that no other person has a right to use such a mark in this state either in identical form or in such near resemblance as to cause confusion or deceive; and whether an application(s) has been made to U.S. Patent Office, giving full particulars including filing date(s), serial number(s) and status thereof. Application must be signed, verified and accompanied by three specimens or photographs showing mark as actually used in commerce. (§ 35-11c).

Secretary of State may refuse to register such mark if: Deceptive, scandalous, misdescriptive, falsely connective with or disparaging of persons, institutions or beliefs; or if primarily a surname, or geographically descriptive, or comprising the name, signature or portrait of a living person without consent; or if likely to cause confusion or mistake. Mandamus may be used to compel registration where refusal to register is improper. (§ 35-18d). Right to use trademark is assignable by duly executed instrument, but is good only against assignor unless recorded with Secretary of State three months after execution or three months prior to subsequent purchase of a bona fide purchaser for value without notice.

Assignment.

Any registered mark is assignable with goodwill of business in which mark is used. Assignment shall be by instruments in writing duly executed and filed in Office of Secretary of State with payment of $25 transfer fee for each mark assigned plus $5 for each additional mark. (§§ 35-11f; C.G.S. 35-18f).

Fees.

A fee of $50, payable to Secretary of State, is required with every application or renewal (§§ 35-11c; C.G.S. 35-11e). Fee of $25 for each mark assigned must accompany assignment documentation.

Protection Afforded.

Any person, who used a copy or imitation of any registered trade or service mark on or in advertising or distributing any goods or services with knowledge that such is intended to deceive, cause confusion or mistake, or who, on behalf of himself or any other person, procures registration by knowingly making false representations in any manner, is liable for all damages sustained or profits. An aggrieved party may enjoin wrongful manufacture, use, display or sale of an imitation or counterfeit mark and may, notwithstanding absence of competition or confusion, enjoin use of any mark likely to injure business reputation or dilute the distinctive quality of a registered mark. Court may award damages of three times actual profits and reasonable attorney's fee if acts are done with knowledge or in bad faith. (§ 35-11i).

Persons who, fraudulently and with intent to deceive, apply a registered trademark to goods other than those which the trademark is designed and appropriated to protect, are subject to criminal penalty. (§ 35-18a).

Any person or corporation manufacturing, bottling or selling soda, mineral, or aerated waters, near beer, ginger ale, milk, cream or other beverages or medicines, medicinal preparation, perfumery, oils, compounds or mixtures in bottles, cans, jars, siphons, boxes or cases with his name or other marks or devices handed, stamped, engraved, etched, blown, impressed or otherwise produced thereon, or any person engaged in business of supplying towels, coats, aprons, or toilet cabinets to others for hire with his name or other marks or devices thereon may register and renew a description of name, mark or devices used with Secretary of State. (§ 35-19). Use of such name, mark, or device without written consent of owner results in criminal penalties. (§ 35-20).

State Board of Education is authorized to obtain patents, trademarks, and copyrights. (§ 10-4f).

Trade Union Labels, etc.

Persons, trade associations or trade unions desiring to mark goods as products of their labor may secure the exclusive right to use a label, trademark, term, design, device or form of advertisement distinguishing the goods by filing two copies, counterparts or facsimiles thereof for record with the Secretary of State and obtaining from him a certificate of record, fee $1. (§ 35-18a). Unauthorized use of such mark thereafter is forbidden. (§ 35-18h). Any society, association, incorporated club, or labor union may in similar manner secure exclusive use of its insignia, flag, ribbon, badge, rosette, seal, button or emblem. (§ 35-18a). Persons thus securing right to exclusive use of such label, mark, etc., may obtain injunction against, or damages, sustained on account of unauthorized use. (§ 35-18h).

Infringement.

Any person who reproduces or counterfeits registered mark without consent of registrant shall be liable for damages. Owner may enjoin wrongful use of such mark if there is likelihood of injury to business reputation or dilution of distinctive quality of mark. Treble damages may be available. (§ 35-11i).

Incontestable Right.

Where mark has been in use for five years, right to use mark in commerce shall be incontestable. (§ 35-11m).

Tradenames.

Person or corporation conducting or transacting business in the state under an assumed name or under any designation, name, or style, corporate or otherwise, other than the real name of the person or persons conducting such business must file with the town clerk in the town in which such business is conducted an acknowledged certificate executed by all persons doing such business, stating the name under which the business is conducted and the names and addresses of each person conducting business. Filing fee is prescribed in § 7-34a(a). This provision does not apply to use of partnership name or designation if it includes true surname of at least one of partners nor to limited partnership if it has filed certificate as provided in § 34-10. Failure to comply with this provision results in fine or imprisonment. (§ 35-1).

A partnership, common law trust, association, or individual using a tradename may not use as part of its name the word “bank,” “banking,” “bankers,” “trust,” “savings,” except the word “bankers” or “trust” may be used when qualified and immediately preceded by the word “investment” if not followed by the word “company” or “corporation.” This provision does not apply to a charitable or athletic association or a state bank, or building and loan associations. (§ 35-2).

Name of brand, tradename or other distinctive characteristic by which liquors are bought and sold must be registered with, and approved by liquor control commission. (§ 30-74).

A motor vehicle may not be registered under a tradename unless a certified copy of certificate is filed in office of Commissioner. (§ 14-12).

17.02 TRADE SECRETS:

Uniform Trade Secrets Act has been adopted in State of Connecticut. Act was adopted in 1983. (§ 35-50, et seq.). Connecticut Uniform Trade Secrets Act has not incorporated 1985 amendments to Uniform Trade Secrets Act, as shown in Volume 14 of Uniform Laws Annotated, Master Edition.

Definitions.

§ 35-51.

Injunctive Relief.

Actual or threatened misappropriation may be enjoined under application to any court of competent jurisdiction. Injunction shall be terminated when trade secret has ceased to exist, but injunction may be continued for additional reasonable period of time in order to eliminate commercial advantage that otherwise would be derived from misappropriation. (§ 35-52).

Damages.

In addition to or in lieu of injunctive relief, complainant may recover damages for actual loss caused by misappropriation. Complainant also may recover for unjust enrichment caused by misappropriation that is not taken into account in computing damages for actual loss. If court finds willful and malicious misappropriation, court may award punitive damages in amount not exceeding twice any award made. (§ 35-53).

Protection of Trade Secrets by Court.

In action under this chapter court shall preserve secrecy of alleged trade secret by reasonable means, which may include granting protective orders in connection with discovery proceedings, holding in-camera hearings, sealing records of action and ordering any person involved in litigation not to disclose alleged trade secret without prior court approval. (§ 35-55).

18 LEGAL PROFESSION

18.01 ATTORNEYS AND COUNSELORS:

State bar is not integrated.

Jurisdiction Over Admission.

State Bar Examining Committee, consisting of 24 members appointed by judges of Superior Court, assisted by Standing Committees on Recommendations for Admission in each county, has jurisdiction over admissions. (CPB C.G.S. 9-20). Admission of attorneys is exclusive province of judicial branch, and attempts by legislative branch to control it are unconstitutional. (148 Conn. 177; 169 A.2d 654).

Eligibility.

Applicant for admission to bar must satisfy Bar Examining Committee that he is citizen of

U. S., or of country which allows U. S. citizens to become members of its bar on same terms as its citizens, 18 years of age, and that he is of good moral character. (CPB 16). Bar Examining Committee may receive confidential information from State Police Bureau of Identification. (§ 29-16). Such information includes state, multistate, and federal criminal records and any cost incurred by State Police Bureau of Identification will be paid for by State Bar Examining Committee. (§ 29-11).

Examination.

Multi-State Bar Examination is used. Transfer of scores from other jurisdictions not accepted. (Bar Examining Committee, P.O. Box 1964, New Haven, 06509).

Annual examinations are held in New Haven on those dates on which National Multi-State examination is given. First day's exam consists solely of Multi-State questions, second day contains two three-hour essay sessions. There is no limitation to number of times applicant may take examination. State Bar Examining Committee shall develop and implement procedure to adapt administration of exam to needs of persons with disabilities. (§ 51-81).

Registration as Law Student.

Applicant must file with administrative director of bar examining committee application to take examination and for admission to bar. Committee shall determine fee for application. (CPB § 2-8).

Educational Requirements.

Legal.

Applicant must show that he has obtained a bachelor of laws or equivalent degree from a law school accredited by committee or obtained a master of laws degree for postgraduate work acceptable to committee at a law school accredited by committee, having already obtained a bachelor of laws or equivalent degree at a law school for work acceptable to committee. He must also have passed course in professional responsibility in accordance with committee regulations, or passed committee-administered examination in professional responsibility. (CPB 16).

Petition for Admission.

Should be made to Clerk of Superior Court in judicial district where applicant intends to practice.

Clerkship.

There is no requirement of serving clerkship for a specified time before admission.

Admission Without Examination.

Applicant who has practiced five years in highest court of original jurisdiction in state with approved standards (ten years if he has once failed Connecticut Bar examination), meets general requirements, including U. S. citizenship or alien lawfully residing in U.S., is of good moral character and has passed course or examination in professional responsibility in accordance with or administered by committee's regulations, respectively, intends that major portion of time devoted to practice shall be in Connecticut and pays fee that committee will from time to time determine, may obtain temporary license for one year without taking examination. (CPB §§ 2-13; C.G.S. 2-14).

If, since admission, applicant is engaged for major portion of year in practice of law in Connecticut and intends to continue so to practice, temporary license may be made permanent on motion to court between 30 and 60 days before expiration of such temporary license. (CPB 23).

Compensation.

If contingent fee agreed to, it shall be exclusive method of payment and shall not exceed percentages in § 52-251c(b). Fee shall be percentage of: (a) Damages awarded and received by claimant or (b) settlement amount. Expenses incurred, other than ordinary office overhead, are not included in fee. (§ 52-251c). Letter to new clients required setting forth terms and scope of engagement.

Client Solicitation.

Limitations placed upon written communications to prospective client for purpose of obtaining professional employment. Shall take effect Oct. 1, 1993. (§ 51-87a).

Misconduct.

Statewide Grievance Committee exists to review allegations of attorney misconduct; committee comprised of lawyers and lay persons; procedures for hearing and determination of complaints specified. (§ 51-90).

Disbarment or Suspension.

Superior Court for just cause may suspend or disbar attorney. (CPB § 28-31).

Unauthorized Practice.

No person not duly admitted to the bar may practice law, solicit employment for a lawyer or hold himself out to the public as being a lawyer. (§ 51-88).

Professional Association or Corporation.

See category 2 Business Organizations, topic 2.02 Associations, subhead Professional Associations, and topic 2.03 Corporations, subhead Professional Corporations.

Taxation.

See category 22 Taxation, topic 22.03 Business Taxes, subhead Professional Taxes, catchline Attorneys and Judges.

Escrow Agreements.

Otherwise valid escrow agreements are not invalid solely because escrow agent is attorney for one or more of parties. (§ 51-81h).

Lawyers' Trust Accounts Program.

Funds deposited in certain accounts to receive loan proceeds from mortgage lender shall be subject to program to provide legal scholarships and legal services to poor. (§ 51-81c).

19 MINERAL, WATER AND FISHING RIGHTS

19.00A FISHING RIGHTS:

Commercial fisheries may be required to provide information to Department of Environmental Protection. (§ 26-157b). Licensing requirements for commercial fisheries. (§§ 26-142a–26-142c). Limitations on fishing methods. (§§ 22-455; C.G.S. 26-142a). Regulations and penalties for removing certain fish from waterways. (§§ 26-128a, C.G.S. 26-141, C.G.S. 26-186).

Exemption from seafood dealer licensing for licensed commercial fishermen who barter or sell their own catch. (§ 26-142a). Transferability of commercial finfish license, commercial fishing license, and commercial lobster pot license. (§ 26-142b[c]-[f], am'd PA 09-195, § 2). Depts. of Public Health, Agriculture and Public Health shall, in their designated capacities, study health standards for shell fish testing, effect of pollution and other factors on oyster populations, and revoke licenses of shellfish harvesters who harvest in non-designated grounds. (§§ 25-192b; C.G.S. 26-192a–26-192c, C.G.S. 26-192f, C.G.S. 26-194, C.G.S. 26-215, C.G.S. 26-235).

19.01 MINES AND MINERALS:

No special legislation as to operation and taxation. Nonresident alien may acquire, hold and convey land for mining purposes upon certain conditions. (§ 47-7a).

Aquaculture and dredging activities regulated by state; permit required. (§ 22a-361).

19.01A WATER COMPANY LANDS:

Upon purchasing certain lands from water companies, Dept. of Public Utility Control must make portion of lands available for recreational purposes. (§ 16-43[d] and [e]). When water company is acquired by another water company for failing to comply with Depts. of Public Health and Public Utility Control (DPUC) orders, acquired company must properly execute and transfer all documents needed to complete title transfer within 60 days after DPUC order. (§ 16-262o).

19.01B WATER DIVERSIONS:

Commissioner of DEP must publish dated notice of availability of reporting form and its submission date. (§ 22a-368a). Procedures for sabotage prevention for water supplies shall be provided separately from water supply plans and shall remain confidential. (§ 25-32d, am'd PA 09-220, § 2). Exemptions from water diversion permitting are available. (§ 22a-377; see also 22a-378a[d]).

20 MORTGAGES

20.01 CHATTEL MORTGAGES:

Governed by Uniform Commercial Code. (Tit. 42a). Conn. has central filing with Secretary of State, except in case of motor vehicles, which are filed with Motor Vehicle Commissioner (§ 14-173) pursuant to Uniform Certificate of Title and Anti-Theft Law (§§ 14-165 to C.G.S. 14-211; C.G.S. 14-174d; C.G.S. 14-192c; C.G.S. 14-197c) and fixtures which are filed in town where real estate is located. Chattel mortgages filed prior to Oct. 1, 1961 need not be refiled and are effective for three years after date of final payment as provided in original chattel mortgage. Filing fee is $25; $25 fee for filing termination statement.

Retail Installment Sales Financing.

Any security agreement made after Oct. 1, 1947, evidencing agreement to pay retail purchase price of goods having cash price of $25,000 or less (§ 42-83[b][3]) in installments over period of time is subject to special restrictions as to form and content (§§ 42-88–42-96; C.G.S. 42-91), foreclosure, including repossession, redemption, resale, etc. (§ 42-98), renewals and extensions (§ 42-97), and anticipation of payments (§ 42-96).

Mortgage Rate Lock-In.

Requirements strengthened to reflect current industry practices. (§ 36a-706).

Concealment of mortgaged property with intent to place it beyond control of mortgagee is crime carrying penalty of three months imprisonment or $500 fine. (§ 53-129a).

Sale of the mortgaged property without informing vendee of existence of mortgage subjects mortgagor to imprisonment of not more than three months, fine of $500 or both. (§ 53-129a).

Equipment Rental.

Materials for which recovery is permitted in event of nonpayment include construction equipment and machinery that is rented or leased for use in prosecution of contract or in construction, raising, removal of any building or improvement of any lot or subdivision or site development of plot of land per § 49-33. (§ 49-42[c]).

Forms.

Forms below and at end of this Digest are in general usage. However, any form containing pertinent information is accepted by filing office. No prescribed or officially suggested form for security agreement.

Form

SECURITY AGREEMENT

(Date)

. . . ., a corporation having

Name of Corporation

its office and principal place of business at . . . .

Address

in the City of . . . ., County of . . . ., and State of . . . .

(hereinafter called “Debtor”), hereby grants to . . . .

. . . . (hereinafter called “Secured Party”),

Name and description of Corporation,

a security interest in the following property (hereinafter called the “Collateral”):

(Herein insert brief description of security interest created).

Upon failure or refusal of the Debtor to repay the Secured Party such sums as may be due it, the Secured Party may, at its exclusive option, declare any and all obligations immediately due and payable whether or not said obligations shall have matured and shall have the rights and remedies of a secured party under the Uniform Commercial Code.

Debtor

. . . .

Secured Party

. . . .

Name

By . . . .

Its

Name

By . . . .

Its

20.02 COLLATERAL SECURITY:

See category 8 Debtor and Creditor, topic 8.15 Pledges.

Lenders of first mortgages must timely transfer loan proceeds to mortgagee by wire. Banking Commissioner may refuse or revoke license to first mortgage lender. (§ 36a-758a, repealed PA 07-91, § 38).

20.03 MORTGAGES OF PERSONAL PROPERTY:

Uniform Commercial Code adopted. (Title 42a). Filings are with Secretary of State only excepting motor vehicles, which are filed with Department of Motor Vehicles under Uniform Motor Vehicle Certificate of Title and Anti-Theft Act, and fixtures which are filed in town where fixtures located.

See also topic 20.01 Chattel Mortgages.

20.04 MORTGAGES OF REAL PROPERTY:

Mortgage conveys title and leaves only an equitable title to redeem. (51 Conn. 64). As to variable rate mortgages and deferral of interest see § 36a-265.

Execution.

Mortgages are executed, attested, acknowledged and recorded like deeds of land (see category 21 Property, topic 21.06 Deeds), and are usually warranty deeds with conditional clause of defeasance added. Statutory form may be used which incorporates by reference following mortgage covenants: “The mortgagor covenants with the mortgagee that he is lawfully seized in fee simple of the mortgaged premises; that the same are free from all encumbrances, except as therein set forth; that he has good right, full power and lawful authority to sell and convey the same to the mortgagee and that he, the mortgagor, and his heirs and assigns, executors and administrators shall and will warrant and defend the same to the mortgagee and his heirs and assigns forever against the claims and demands of all persons except as therein set forth,” and following statutory condition: “Provided, and this conveyance is made upon the express condition, if the mortgagor or his heirs, executors, administrators or assigns shall pay to the mortgagee or his heirs, executors, administrators or assigns the principal and interest of that certain promissory note or notes secured by this deed, at the time provided in said promissory note or in this deed, and shall also pay all taxes and assessments of every kind levied or assessed upon or in respect of the mortgaged premises or upon the note or notes secured thereby, then this deed, and also said promissory note, shall be absolutely void; otherwise the same shall remain in full force and effect.” (§§ 47-5; C.G.S. 47-5a). See subhead Forms, infra.

Recording.

Mortgages, assignments, and releases must be recorded with the clerk of the town in which the land lies, to be effective against any other person than the grantor and his heirs. (§§ 47-36a-1[o]–47-36a-1[r]; C.G.S. 47-10). Reasonable time is allowed to record. (91 Conn. 421, 99 A. 1045). See category 10 Documents and Records, topic 10.04 Records.

Lending institution may record master form containing lengthy standard terms, then record only portions of individual mortgages, incorporating standard terms on master form. (§ 49-5a).

Mortgages of electric light, power and similar utility companies, covering lines in more than one town, may be recorded in the office of the Secretary of State, provided a certificate containing the names of mortgagor and mortgagee, the date of the mortgage and the fact that the mortgage is recorded with the Secretary of State is recorded with the town clerk of each town wherein any of the lines covered by the mortgage are located. (§ 49-31c).

Licensing.

All first mortgage brokers and lenders in this State must be licensed. (§ 36a-486, am'd PA 09-209, § 5; § 36a-487498, am'd PA 09-209, §§ 6-17). Licensee who files application for registration of originator which contains knowing material misstatements has violated § 36a-53a. (§ 36a-489, am'd PA 09-207, § 5). Originator is one employed or retained by or otherwise acts on behalf of mortgage lender or secondary mortgage broker with expectation of valuable consideration for negotiation, solicitation, arrangement or finding secondary mortgage loan. (§ 36a-510). Exemptions from licensing requirements. (§ 36a-512). Licenses must designate location where business is to be conducted and are non-assignable or transferable. (§ 36a-540). License applicants must file bond. (§ 36a-664[a], am'd PA 09-23, § 1). Licenses may be suspended, revoked or not renewed in event of fraud, material misstatements in application or violations of statutes or regulations governing conduct of business. (§§ 36a-804; 36a-494[a][2]). Out-of-state mortgage broker can engage in commercial real estate transactions with licensed broker if he complies with all statutory requirements. (§ 20-325l). Banking Commissioner has remedies should licensee or registrant commit fraud or fail to perform agreement with borrower. (§§ 36a-491[b]; 36a-494, 36a-517[b]; 36a-498; 36a-498[a], [b], [f]). No licensed mortgage lender or first mortgage broker may enter agreement to accept fee for valuable consideration lost for failure to consummate first mortgage loan. (§§ 36a-498, am'd PA 09-207, § 6; 36a-498[a], [b], [f]; 36a-521; 36a-521[d]).

Banking Commissioner shall participate in national mortgage licensing system and may establish requirements as necessary for participation. (§ 36a-534b, am'd PA 09-209, § 3).

Recording Fees.

See category 10 Documents and Records, topic 10.04 Records.

Taxes.

No tax upon recording. See also category 22 Taxation.

Trust Deeds.

Statutes as to mortgages apply.

Insurance.

No mortgage lender shall require any prospective mortgagor to obtain fire insurance policy in excess of replacement value of covered premises as condition for granting of such mortgage. (Repealed PA 82-267, § 3, eff. May 24, 1982.) Any lender that requires borrower to pay for mortgage insurance must disclose to borrower in writing: (1) Purpose of insurance to protect lender from loss because of default by borrower, (2) insurance required as condition for loan and conditions which may release borrower and (3) good faith estimate of initial cost and monthly cost if any. Provisions not applicable to any first mortgage loan insured or guaranteed by any agency by federal government or any state or municipal government or quasi-government agency where mortgage insurance is required in connection with loan. (§ 36a-726).

Future Advances.

First mortgages to secure future advancements of money for construction or repairs of buildings or improvements, including site improvements, are valid to secure money actually advanced in accordance with its provisions, up to amount of full loan authorized, with same priority as if it had been advanced at time mortgage was delivered if mortgage contains description of loan in substantially statutory form. Time for completing buildings or improvements may be changed by recorded instrument signed by parties, and priority not affected. In event of default, mortgagee may complete work and add cost to mortgage, up to face amount. Time and amount of future advances may be at sole discretion of mortgagee or advances may be by stage payments. (§ 49-3).

Subsequent advancements for repairs on mortgaged property may be made to original mortgagor or subsequent owner but cannot exceed difference between debt at time of advancement and original mortgage debt, nor can time of repayment in original mortgage be extended. These provisions apply only to mortgages executed and recorded after Oct. 1, 1947. For mortgages executed and recorded after Oct. 1, 1955, advancements for any purpose may be made to original mortgagor or successor under open-end mortgages, but stated amount of indebtedness cannot be exceeded nor time of repayment in original mortgage lengthened and mortgage must be clearly headed “open-end mortgage” and specifically allow advancements. Written notice to mortgagee destroys priority of advancements made subsequent to such notice. (§ 49-2, am'd PA 09-161, § 1).

Open End Mortgages.

(§§ 49-2[c], am'd PA 09-161, § 1; C.G.S. 49-4b[a], am'd PA 09-161, § 2).

Priorities.

See subhead Redemption, infra.

Subordination Agreements.

Mortgage may be subordinated to subsequent mortgages even though subordination agreement does not contain terms or provisions of subsequent mortgages. (§ 49-31c). Construction and effect of lien waiver depends upon intent of parties and circumstances. Waiver may relinquish all lien or claim of lien, or merely waive priority of lien. (101 Conn. 92, 125 A. 367).

Assignment.

Whenever any obligation secured by mortgage shall be assigned in writing which describes mortgage, and is executed, attested and acknowledged as provided for deeds of land, title held by virtue of mortgage vests in assignee. (§ 49-10). Statutory Form may be used. See subhead Forms, infra. Mortgagor has good faith defense for payments to assignor without notice of assignment. (§ 49-10). Mortgagor is grantor for purposes of assignment, collateral assignment, subordination or other transfer of interest in mortgage. (§ 7-25).

Release.

Upon satisfaction of a mortgage or bona fide offer to satisfy or partially satisfy same in accordance with terms of mortgage, mortgagee must execute and deliver a release to extent of such satisfaction, and if mortgagee fails to do so within 60 days of receipt of written request, mortgagee is liable to aggrieved party at rate of $200 for each week of such failure after this 30 day period, but not for more than total of $5,000 or amount equal to loss sustained by aggrieved party as result of failure, whichever is greater. (§ 49-8). If mortgagee fails to execute and deliver release within 60 days of payoff, attorney or title insurance agent may, on behalf of mortgagor or his assigns, execute and record affidavit attesting mortgage has been paid off, more than 60 days have elapsed since said payoff, affiant has given mortgagee 15 days notice, in writing, of intention to execute affidavit, states names and recording information on mortgage, and provides proof that payment has been received. Such affidavit, when recorded, shall constitute release. (§ 49-8a). Mortgage of real and personal property, judgment lien, mechanic's lien or power of attorney for conveyance of land may be released by instrument in writing executed, attested, and acknowledged like land deed, and short form of release is sufficient. (§ 49-9[a]). Partial release of mortgage may be effected by quit-claim deed (see category 21 Property, topic 21.06 Deeds) or by short form release stating extent to which such mortgage is partially released with sufficiently definite and certain description of that part of property being released. (§ 49-9[b]). Interests released. (§ 49-9). Payoff statement or reinstatement payment statement provided upon request. (§ 49-10a).

After ten years of undisturbed possession and non-recognition of mortgage, mortgagor or person owning his interest may bring action in superior court of county where land located seeking judgment that mortgage invalid as lien. Such judgment is granted if no evidence is offered of any act in recognition of its existence as valid mortgage and must be recorded within 30 days in town where property located; thereafter no action to enforce title under such mortgage may be maintained. (§ 49-13). Lien shall automatically become invalid within five years if mortgagor files affidavit of lis pendens in town land records stating that mortgage has been paid in full, and mortgagee has received no demand for payment within last two years. (§ 49-9a). Time period for validity of undischarged mortgage encumbering property when all conditions of mortgage have been satisfied, and mortgagor remains in undisturbed possession. (§ 49-13a).

Executor, administrator, spouse, next-of-kin, guardian, or other person deemed suitable by court may on payment, satisfaction or sale of mortgage debt, release legal title. (§ 49-11). Executor, administrator, trustee, conservator or guardian of deceased may release or assign mortgage on Connecticut real estate, provided he files with clerk of town where land is located certificate of appointment and qualification from court having jurisdiction of estate. (§ 49-11).

Real property passing through estate will not be exonerated from mortgage unless specifically and clearly indicated that testator's intention was to have mortgage exonerated. (§ 45a-266).

Mortgage to, or lien in favor of, state or its treasurer may be released by treasurer under his hand and official seal. (§ 47-8).

Railroad mortgages are governed by special provisions. (§§ 16-216; C.G.S. 16-227).

Trustees under mortgage or deed of trust, other than national banks and state banks and trust companies, where the notes or bonds secured by mortgage are sold as investments (§ 36a-395) must register with Bank Commissioner, submit to examination by him, file annual reports before Jan. 30, pay annual fee of $25 (§ 36a-396), keep assets and records in trust name, and are subject to injunction and removal for violation of statute or in case of insolvency (§ 36a-399). Such trustees have power, unless expressly forbidden, to accept conveyance of mortgaged property instead of foreclosing, but may not release right to deficiency judgment without consent of investors. After acquiring title to property by deed or foreclosure, and in stated instances to obtain funds to protect property, they may mortgage it to any Connecticut savings bank, or to any other bank under supervision of Commissioner. (§ 36a-398).

Debt secured by mortgage or lien includes: (1) Insurance premiums, taxes and assessments paid by mortgagee, and payments of interest and principal due on prior mortgage or lien to protect interest of subsequent mortgagees or lienor; (2) advances made by mortgagee as outlined under subhead Future Advances, supra; (3) interest paid currently or to accrue. Accrued interest is added to principal mortgage debt. (§ 49-2, am'd PA 09-161, § 1).

Agreements concerning expenses and attorneys fees contained in note or mortgage for collecting debt or foreclosing mortgage or in protecting lien of mortgage are valid but are construed to allow fair compensation only, and court may determine amount allowed even though agreement specifies larger amount. (§ 49-7).

Strict foreclosure is by suit in equity against owner of equity of redemption and subsequent lienors, brought to Superior Court of county where land located. Amount of matter in demand is amount of debt described in mortgage. (§ 52-38). Court in its judgment fixes conditions on which redemption may be had by ascertaining debt due and fixing time within which owner or subsequent lienors must pay or be forever barred. Such judgment may, on written motion of any person having interest therein, be opened or modified upon such terms as court deems reasonable, but judgment may not be opened after title has become absolute in any encumbrancer. (§ 49-15, am'd PA 09-209, § 37). However, upon filing of bankruptcy petition under 11 U.S.C., any judgment against mortgagor foreclosing title by strict foreclosure shall be opened automatically. (§ 49-15, am'd PA 09-209, § 37).

On failure to redeem within the time limited, title becomes absolute in mortgagee, whereupon he must record within one month in town where land lies a certificate of foreclosure describing premises, mortgage, foreclosure proceedings and date title became absolute, or else is subject to fine. (§ 49-16). If plaintiff demands possession in foreclosure action, court may issue execution of ejectment against person in possession if party to action, or transferee or lienor who is bound by judgment by virtue of lis pendens. (§ 49-22). In absence of contrary mortgage provision possession may be obtained by peaceable entry (117 Conn. 218, 167 A. 728) or by ejectment independently of or prior to foreclosure (2 Conn. 1), but tender of debt with interest and costs of suit is bar to further prosecution of ejectment (§ 49-23).

Right to foreclosure is not barred by running of statute of limitations on debt (119 Conn. 355, 176 A. 880), but is barred by adverse possession for 15 years after right to foreclose arose (76 Conn. 223, 56 A. 524).

Foreclosure Protection.

Mortgagee of owner-occupied one or two unit residential dwelling may apply for limited protection from foreclosure, if income requirements met (i.e., unemployment or “underemployment”). Protection may include mandatory restructuring.

Sale.

Mortgage or other lien may, upon motion of any party and in discretion of court, be foreclosed by decree of sale instead of strict foreclosure (§ 49-24), in which event court appoints committee to make sale, directs manner and time of sale, and appoints three appraisers. If plaintiff is paid judgment debt and costs before sale, all further proceedings stayed. (§ 49-25). If redemption is not thus made, committee after sale and its ratification by court executes deed to purchaser, which vests in him same estate as in strict foreclosure, and is valid only against all parties to action, and court may order possession be given him as well as issue execution of ejectment. (§ 49-26). Proceeds of sale are distributed to persons specified in supplemental judgment, but if mortgagee is purchaser he need only bring into court excess of proceeds over judgment debt, interest and costs. (§ 49-27). Judgment and cost of mortgagee are first paid out of proceeds, and parties receiving balance are allowed costs. (§ 49-29).

Deficiency Judgment and Other Enforcement of Debt.

Foreclosure is a bar to any further action upon the debt against persons liable for payment who are or could have been made parties to foreclosure (§ 49-1), but debt may be enforced in separate action either prior to or during strict foreclosure (102 Conn. 644, 129 A. 854). Expiration of law day, without redemption, results in appropriation of property (120 Conn. 16, 179 A. 339) and further action on debt is then barred if value of property at that time is equal to or in excess of debt (109 Conn. 329, 146 A. 724). Statutory provision for appraisal and deficiency judgment is not exclusive remedy against persons made parties in foreclosure suit. (§ 49-14; 91 Conn. 586, 101 A. 332).

In foreclosure by sale, other proceedings for collection of debt are stayed during pendency of suit. If proceeds of sale exceed appraised value but are not sufficient to pay debt, deficiency judgment may be rendered against any person liable to pay debt who is party to suit. Such deficiency judgment abates other proceedings for collection of debt. If property is sold for less than appraised value, no judgment for deficiency in foreclosure or in other proceedings may enter against person on whose motion sale is ordered, nor may unpaid portion be collected by any other means, until one-half of difference between appraised value and sale price has been credited on debt as of date of sale. (§ 49-28).

Redemption may be had until day set for redemption in strict foreclosure has passed or until sale in foreclosure by sale has been made, but not after those dates nor after 15 years after mortgagee has taken possession in assertion of his right thereto as mortgagee. Junior encumbrancer as to part of land may redeem as to whole. (§ 49-20).

Priorities are determined in strict foreclosure by foreclosure judgment which assigns to owner of equity and junior encumbrancers in the reverse order of priority successive days in which to redeem, and such redemption by any such person is subject to the lien of those encumbrancers whose days for redemption are subsequent to his, but cuts off the lien or title of those whose days for redemption are prior to his. (§ 49-19). Person redeeming must obtain from one receiving payment a certificate of satisfaction of the foreclosure judgment, which must be filed in court, and certified copy of certificate of satisfaction, and of judgment must be recorded with town clerk. (§ 49-9). In foreclosure by sale priorities are determined by supplemental decree directing disposition of proceeds of sale. (§ 49-27).

Uniform Act.

Connecticut has adopted its version of Uniform Common Interest Ownership Act. Act is comprehensive regulation of all common interest communities, including condominiums, cooperatives, and planned communities. (§ 47-200, et seq., am'd PA 09-225). Training for members of common interest communities. (§ 47-261a).

Forms.

The following may be used:

Forms

Mortgage: To all people to whom these presents shall come, greeting:

Know ye, That . . . . . . of . . . . . . for the consideration of . . . . . . full satisfaction of . . . . . . do give, grant, bargain, sell and confirm unto the said . . . . . . his heirs, successors, or assigns (description of premises).

To have and to hold the above granted and bargained premises, with the appurtenances thereof, unto . . . . . . the said grantee . . . . . . heirs and assigns forever, to . . . . . . and their own proper use and behoof. And also, ... the said grantor . . . . . . do . . . . . . for . . . .sel. . . . heirs, executors, and administrators, covenant with the said grantee . . . . . . heirs and assigns, that at and until the ensealing of these presents, ... well-seized of the premises, as a good indefeasible estate in fee simple; and have good right to bargain and sell the same in manner and form as is above written; and that the same is free from all encumbrances whatsoever . . . .

And furthermore, ... the said grantor. . . . do by these presents bind . . . . sel . . . . and . . . . . . heirs forever to warrant and defend the above granted and bargained premises to . . . . . . the said grantee . . . . . . heirs and assigns, against all claims and demands whatsoever.

The condition of this deed is such, that whereas the said grantor . . . . . . justly indebted to the said grantee . . . . . . in the sum of . . . . . . dollars, as evidenced by . . . . . . promissory note for . . . . . . dollars, of even date herewith, payable to said grantee . . . . . . or order, as follows: . . . . . .

Now therefore, if said note shall be well and truly paid according to its tenor, then this deed shall be void, otherwise to be and remain in full force and effect.

In witness whereof, ... have hereunto set . . . . . . hand and seal . . . . . . this . . . . . . day of . . . . . ., in the year of our Lord 20. . .

Signed, sealed and delivered

. . . . (L. S.)

in the presence of

. . . .

. . . .

(Acknowledgment).

Mortgage, Statutory Form:

MORTGAGE DEED

. . . . of . . . . .to secure payment of . . . . dollars with interest payable as provided in a certain promissory note dated . . . . . . with final maturity on . . . . . . grant to . . . . of . . . . with MORTGAGE COVENANTS . . . .

(Description and Encumbrances, if any and any additional provisions)

This mortgage is made upon the STATUTORY CONDITION

Signed this . . . . day of . . . ., 20 . . .

Witnessed by:

. . . .

. . . .

(Acknowledgment)

Assignment: Know all men by these presents, that . . . . . . of the Town of . . . . . ., County of . . . . . . and State of Connecticut, in consideration of the sum of . . . . . . Dollars, lawful money of the United States, to . . . . . . in hand paid by . . . . . . of the Town of . . . . . ., County of . . . . . . in said State, at or before the ensealing and delivery of these presents, the receipt whereof is hereby acknowledged, ha. . . . granted, bargained, sold, assigned, transferred and set over, and by these presents do. . . . grant, bargain, sell, assign, transfer and set over unto the said . . . . . . a certain indenture of mortgage, made and executed by . . . . . . in favor of . . . . . . bearing date the . . . . . . day of . . . . . . in the year nineteen hundred and . . . . . . and recorded in . . . . . . Town Records, Vol. . . . . . ., Page . . . . . ., to which reference may be had for a more particular description of said mortgage and of the land therein described, together with the debt, note and obligation therein described, and the money due or to become due thereon with the interest.

To have and to hold the same unto the said . . . . . . h. . . . heirs and assigns forever, subject only to the proviso in said indenture of mortgage mentioned: And . . . . . . do hereby make, constitute and appoint the said . . . . . . true and lawful attorney, irrevocable in . . . . . . name or otherwise, but at . . . . . . proper cost and charges, to have use and take all lawful ways and means for the recovery of the said money and interest; and in case of payment, to discharge the same as fully as might or could do if these presents were not made.

In witness whereof, ... have set . . . . . . hand and seal this . . . . . . day of . . . . . ., in the year of our Lord 20. . .

. . . . (L. S.)

Signed, sealed and delivered

in the presence of

. . . .

. . . .

(Acknowledgment).

Assignment, Statutory Forms:

ASSIGNMENT OF MORTGAGE

. . . . of . . . . for consideration paid, assign to . . . . all interest in a mortgage
from . . . . to . . . .
dated . . . . and recorded in Volume . . . . at
Page . . . . of the . . . . Connecticut Land Records.

Signed this . . . . day of . . . ., 20. . .

Witnessed by:

. . . .

. . . .

(Acknowledgment)

ASSIGNMENT OF MORTGAGE (§ 49-10[a]).

Know all men by these presents, that . . . . . . of . . . . . . in the County of . . . . . . and State of . . . . . . does hereby grant, bargain, sell, assign, transfer and set over a certain (mortgage, assignment of rent or assignment of interest in a lease) from . . . . . . to . . . . . . dated . . . . . . and recorded in the records of the Town of . . . . . . County of . . . . . . and State of Connecticut, in book . . . . . . at page . . . . . . In witness whereof . . . . . . have hereunto set . . . . . . hand and seal, this . . . . . . day of . . . . . .
A.D. . . . .

Signed, sealed and

delivered in the

presence of

(Seal)

(Acknowledgment).

Release.

(§ 49-9[a]): Know all men by these presents, that . . . . . of . . . . in the county of . . . . . and state of . . . . do hereby release and discharge a certain . . . . . from . . . . . to . . . . dated . . . . and recorded in the records of the town of . . . . . in the county of . . . . and state of Connecticut, in book . . . . at page . . . .

In witness whereof . . . . . . have hereunto set . . . . . . hand and seal, this . . . . . . day of . . . . . ., A.D. . . . . .

Signed, sealed and delivered

in the presence of

(Seal)

. . . .

. . . .

(Acknowledgment).

The above form also may be used to discharge a chattel mortgage, or a mechanic's lien. (§ 49-9[a]). Banking Commissioner duties with respect to forms. (§§ 49-2b, C.G.S. 49-31j).

Chattel Mortgages.

See topic 20.01 Chattel Mortgages.

21 PROPERTY

21.01 ABSENTEES:

Every civil action in which the defendant shall be an inhabitant of this state but shall be absent from State at commencement of action and shall continue to be absent until after return day, without having entered any appearance therein, shall be continued or postponed for 30 days by order of court; and, if defendant shall not then appear and no special reason be shown for further delay, judgment by default may be entered against him. If defendant is not inhabitant or resident of this state at commencement of action and does not appear therein, court shall continue or postpone it for period of three months, and may, if it deem further notice advisable, direct further notice of pendency of action to be given to defendant by publication in some newspaper; or may authorize any person duly empowered to serve process by laws of foreign jurisdiction in which such defendant resides to serve upon defendant copy of summons and complaint and of order of notice; any such person serving process in foreign jurisdiction shall make affidavit of his actions concerning process on original order or notice; and, if upon expiration of said three months, defendant shall not then appear and no special reason be shown for further delay, judgment may be rendered against defendant by default. Upon expiration of three month continuance, it shall be presumed prima facie that no special reason for further delay exists. Continuance or postponement under this section shall not be granted, or if granted, shall terminate if actual notice is shown. (§ 52-87).

Any such continuance must terminate and cause may be brought to trial whenever court finds that absent defendant has received actual notice of pendency of action at least 12 days prior to such finding. (§ 52-88).

Care of Property.

When any person having property shall have disappeared so that after diligent search his whereabouts cannot be ascertained, court of probate in district in which he resided or had his domicile at time of his disappearance or, if such person shall have resided outside of this state, then in district in which any of his property is situated within this state, upon proper application shall, after public notice and hearing thereon, appoint trustee of estate of such person. (§ 45a-478).

Escheat.

Money or property of another held for specified period of total unexplained inactivity is presumed to be abandoned. (§§ 3-57a–3-64a).

Holder must notify record owner of such money or property within one year prior to time such presumption arises, and, if property still unclaimed, must turn same over to State Treasurer within 90 days after presumption arises. Except upon request of a holder of 200 or more items in each category of unclaimed funds, Treasurer may approve aggregate reporting where each of the items is less than $25 and cost of reporting would be disproportionate. Holder so electing assumes responsibility for any valid claim made within 20 years. (§ 3-65a). State Treasurer must thereafter comply with certain further notice requirements (§ 3-65a) and reduce to cash (§ 3-68a). If still unclaimed, money is paid over to general fund of State. (§ 3-69a). Any person claiming interest in property surrendered to treasurer may claim property, or proceeds from sale, at any time thereafter. Any person claiming interest in such property must file certified claim with Treasurer including facts upon which party claims to be entitled to recover money or property. (§ 3-70a[a]). After termination of this last period, provision is made for action in rem to formally bar further claim. (§ 3-65a). See also categories 3 Business Regulation and Commerce, topic Banks and Banking, subhead Unclaimed Deposits; Estates and Trusts, topics Descent and Distribution, subhead Escheat, Wills, subhead Unclaimed Legacies; Transportation, topic Motor Vehicles, subhead Proof of Financial Responsibility, catchline Return of Security. Gift certificates shall not escheat to State if not used within three years of their purchase date. (§§ 3-73a, C.G.S. 42-460, C.G.S. 3-65b).

Dormancy Charges.

Retailers and other property holders may not impose dormancy charges on gift certificates. (§ 3-65c).

21.02 ADVERSE POSSESSION:

In order to gain title by adverse possession, the owner must be kept out of possession for 15 uninterrupted years by open, visible and exclusive possession of adverse possessor and his privies without license from or consent of owner. (171 Conn. 149, 367 A.2d 1380; 156 Conn. 510, 244 A.2d 385; § 52-575). User must be as one's own, but need not be under claim of title. (83 Conn. 627, 78 A. 432; 108 Conn. 1, 142 A. 400). Title by adverse possession cannot be obtained to railways or canal land (§ 47-26), nor by or against railroad, street railway or class I or class II land belonging to investor-owned water companies (§ 47-27) nor against state (56 Conn. 508, 16 A. 548).

To interrupt adverse possession, owner must (a) serve, in manner provided for service of legal process, notice of intent to dispute adverse possessor's claim, (b) record notice on land records, and (c) within one year of recordation, commence legal action to settle title. (§ 52-575).

Conveyance or lease of any building, land or tenement of which the grantor or lessor has been ousted by the entry and possession of another is void, unless made to the person in possession. (§ 47-21).

Disabilities.

Where owner, at time his title accrues, is legally incapable by reason of minority, insanity, imprisonment, etc., title of adverse possessor is not good until five years after owner's death or restoration to capacity. (§ 52-575).

Easements may be acquired by 15 years adverse, exclusive, open, visible, continuous user as of right and not in subordination to owner. (§ 47-37; 124 Conn. 398, 200 A. 330). User may be exclusive though in common with owner. (105 Conn. 722, 728, 136 A. 684). Right to keep, maintain or enjoy any window or light may not be acquired by adverse possession so as to prevent owner of adjoining premises from erecting any building thereon. (§ 47-25). Owner may prevent acquisition of easement by prescription, no matter for how long user may continue after such notice, by serving notice on person claiming easement that his right thereto is denied, and recording same on land records of town where land lies (§ 47-38); or if owner of dominant tenement is unknown, notice may be conspicuously posted on dominant estate and copy thereof served on person to whom estate was last assessed for tax purposes (§ 47-40).

21.03 CONDOMINIUMS:

See topic 21.16 Real Property.

21.04 CONVEYANCES:

There are certain instances in which conveyance documentation will not be deemed invalid despite errors or omissions in its creation or administration. (§ 7-26).

21.05 CURTESY:

No curtesy where marriage took place after Apr. 20, 1877.

21.06 DEEDS:

See topic Real Property for types of estates.

All conveyances of land must be in writing subscribed with or without seal by grantor with his own hand, or with his mark with his name thereto annexed, or by his attorney authorized for that purpose by power executed and acknowledged in manner provided for conveyances, and attested by two witnesses with their own hands and acknowledged by grantor or by such attorney to be his free act and deed or using Power of Attorney form in § 47-5(b). (§ 47-5).

Any conveyance of land situated in this state, executed and acknowledged in any other state in conformity with laws of such state, or with laws of this state, is valid, provided officer taking acknowledgment indicates date of expiration of current commissions. (§ 47-7).

Deed by person ousted of possession is void. (§ 47-21).

If marriage took place on or after Apr. 20, 1877, it is not necessary for spouse to join in execution of deed. See also category 14 Family, topic 14.09 Husband and Wife.

Only time wife need join in deed is when she is an actual party to the transaction.

Corporate deed must be executed in name of corporation by agent appointed by directors, attested by two witnesses, subscribed by duly authorized person and acknowledged. Person interested in corporation may be witness or take acknowledgment. (§§ 47-5; C.G.S. 47-6).

Recordation in town where land lies is necessary to render deed effectual against creditors and bona fide purchasers for value. If deed is executed under power of attorney this must be recorded with deed. (§ 47-10).

As to recording generally, effect of recording defective instrument and recording fees, see category 10 Documents and Records, topic 10.04 Records.

Taxes.

See category 22 Taxation, topic 22.15 Property Taxes, subhead Real Estate Conveyance Tax.

Forms.

Following statutory short forms for warranty deeds and quit-claim deeds have been adopted. (§ 47-36c):

Warranty Deed

. . . . . . of . . . . . . for consideration paid, grant to . . . . . . of . . . . . . with WARRANTY COVENANTS

(Description and Encumbrances, if any and any additional provisions)

Signed this . . . . . . day of . . . . . ., 20. .

Witnessed by:

. . . .

. . . .

(Acknowledgment)

Quit-Claim Deed

. . . . . . of . . . . . . for consideration paid, grant to . . . . . . of . . . . . . with QUIT-CLAIM COVENANTS

(Description and any additional provisions)

Signed this . . . . . . day of . . . . . ., 20 .

Witnessed by:

. . . .

. . . .

(Acknowledgment)

Above statutory short forms incorporate following covenants:

Deed following form entitled “Warranty Deed” shall, have effect of conveying title in fee simple to grantee, with covenants of grantor to grantee, for himself and for his heirs, executors and administrators: (1) That at time of delivery of such deed he is lawfully seized in fee simple of granted premises, (2) that granted premises are free from all encumbrances except as therein set forth, (3) that he has good right, full power and lawful authority to sell and convey same to grantee and (4) that grantor shall, and his heirs, executors and administrators shall, warrant and defend granted premises to grantee and his assigns forever against claims and demands of all persons, except as therein set forth. (§§ 47-36d–47-36e).

Deed entitled “Quit-Claim Deed” shall have effect of conveyance to release of all releasor's right, title and interest in and to property described therein except as otherwise limited therein, but without any covenants of title. (§§ 47-36f–47-36g).

Statutory forms also exist for mortgage deeds, assignments of mortgages, conservators' deeds, testamentary trustees' deeds, executors' deeds, and administrators' deeds. (§§ 47-36c; C.G.S. 47-36o–47-36r).

Establishment of new statutory short forms does not preclude use of following forms:

Warranty Deed: To all People to whom these Presents shall come. Greeting: Know Ye, That . . . . . . for the consideration of . . . . . . received to . . . . . . full satisfaction of . . . . . . do give, grant, bargain, sell and confirm unto the said . . . . . ., heirs, successors and assigns, To Have and to Hold the above granted and bargained premises, with the appurtenances, thereof, unto . . . . . . the said grantee, heirs and assigns forever, to . . . . . . and their own proper use and behoof. And also . . . . the said grantor . . . . . . do for . . . .sel. . . . heirs, executors and administrators, covenant with the said grantee, ... heirs and assigns, that at and until the ensealing of these presents . . . . . . well seized of the premises, as a good indefeasible estate in fee simple; and have good right to bargain and sell the same in manner and form as is above written; and that the same is free from all incumbrances whatsoever . . . . And Furthermore, the said grantor. . . . do by these presents, bind . . . .sel. . . . and . . . . . . heirs forever to warrant and defend the above granted and bargained premises to . . . . . . the said grantee. . . . heirs and assigns, against all claims and demands whatsoever.

In Witness Whereof . . . . . . have hereunto set . . . . . . hand and seal this . . . . . . day of . . . . . . in the year of our Lord, 20—.

Signed, sealed and delivered in presence of

. . . . .L. S.

(Acknowledgment)

Quitclaim Deed: Know all Men by these Presents: That . . . . . . for divers good causes and considerations thereunto moving, especially for . . . . . . received to . . . . . . full satisfaction of . . . . . . have remised, released and forever quit-claimed and do by these Presents for . . . . . . and successors, heirs justly and absolutely remise, release, and forever Quitclaim unto the said Releasee . . . . . . successors, heirs and assigns forever all such right and title as . . . . . . the said Releasor have or ought to have in or to . . . .

To Have and to Hold the premises, unto . . . . . . the said Releasee and to . . . . . . successors, heirs and assigns, to the only use and behoof of the said Releasee . . . . . . successors, heirs and assigns forever, so that neither . . . . . . the said Releasor nor any other person or persons in . . . . . . name and behalf shall or will hereafter claim or demand any right or title to the premises or any part thereof, but they and every one of them shall by these presents be excluded and forever barred.

In Witness Whereof . . . . . . have hereunto set . . . . . .hand and seal this . . . . . . day of . . . . . . in the year of our Lord, 20. . .

Signed, sealed and delivered in presence of

. . . . .L. S.

(Acknowledgment)

21.07 DEEDS OF TRUST:

See category 20 Mortgages, topic 20.04 Mortgages of Real Property. Deed following form entitled “Trustee's Deed,” when duly executed, has force and effect of conveying fee simple title to grantee pursuant to trustee's qualification and authority. (See § 47-36c).

. . . . . . of . . . . . , trustee under . . . , . . duly qualified as trustee, for consideration paid, grant to . . . . . . with TRUSTEE'S COVENANTS

(Description and Encumbrances if any and any additional provisions)

Signed this . . . . . . day of . . . . . ., 20 .

Witnessed by:

. . . .

. . . .

(Acknowledgment)

21.08 DOWER:

No dower where marriage occurred after Apr. 20, 1877.

21.09 ESCHEAT:

See topic 21.01 Absentees, subhead Escheat; categories 3 Business Regulation and Commerce, topic Banks and Banking, subhead Unclaimed Deposits; Estates and Trusts, topics Descent and Distribution, subhead Escheat, Wills, subhead Unclaimed Legacies; Transportation, topic Motor Vehicles, subhead Proof of Financial Responsibility.

21.10 LANDLORD AND TENANT:

General rights and liabilities of parties are governed by §§ 47a-1–47a-21. Tenant is liable for waste. (§ 52-563).

Identification of Landlord.

Municipalities may require nonresident owners of rental real property to file in designated municipal office, current residential address of agent in charge of property. Failure to file address will result in use of landlord's address where property tax bills are mailed. (§ 47a-6a). Violations are subject to monetary penalties. (§ 47a-6b).

Leases.

Lease for life or for a term exceeding one year or which contains renewal provision or option to purchase is not effectual against persons other than parties to the lease or their heirs, successors or personal representatives unless either the lease itself or a notice thereof is written, executed, attested, acknowledged and recorded as a deed of land (§ 47-19). Reasonable time is allowed to record lease. (76 Conn. 44, 55 A. 670). Actual possession of tenant probably is not notice of unrecorded lease. Lease for term exceeding one year, or for term of one year to begin in future, is not enforceable against either party if not in writing, signed by party to be charged or his agent. (§ 52-550; 86 Conn. 32, 84 A. 104). Parol leases reserving monthly rental where no time for termination is agreed on are for one month only. (§ 47a-3d). Lease which does not fix definite term is month to month tenancy, unless rent is paid weekly, then tenancy is week to week. (§ 47a-3[c]). Lease shall not provide that tenant waives certain rights and remedies nor that tenant is liable for attorneys fees in excess of 15% of amount of judgment in any action where money damages awarded. (§ 47a-4). Heat and utility surcharges in residential leases are prohibited. (§ 47a-4).

Lease for any term of any building or land of which lessor has been ousted by the entry and possession of another is void unless made to the person in actual possession. (§ 47-21). Foreign corporation may lease real estate in state (§ 33-136), and guardians may lease ward's real estate for period not extending beyond minority of the ward, upon approval of probate court (§ 45a-633). Leasehold interests in real estate are attachable. (§ 52-286). Leases under terms of franchise agreement regulated. (§ 42-133f, g).

Landlord required to place advanced rent or each security deposit in separate bank account and pay interest at rate indexed to average rate paid by insured commercial banks on savings deposits, but in no event less than 1.5%. (§ 47a-21). Landlord liable for twice value of security deposit for failure to refund within 30 days after termination of lease. (§ 47a-21[d]). Security deposit may not exceed two months rent. In case of tenant who is 62 or older said security deposit shall not exceed one month's rent and tenant may request return of excess amount. (§ 47a-21[b]). Security deposit exempt from attachment and execution by creditor of landlord. (§ 47a-21[c]). Landlord liable for civil penalties for leasing premises without certificate of occupancy.

Rent.

State rent control has expired but several cities have local rent control. Both husband and wife are liable for rent of premises occupied by them as their residence. (§ 46b-37). If tenement house is occupied for human habitation in violation of state building code, no rent is recoverable by owner or lessee on such premises for period of such unlawful occupation, and no action or special proceedings may be maintained therefor. (§ 19a-362). If landlord fails to provide essential services, tenant, after notice to landlord, may: (1) Procure such essential service and deduct cost from rent; or (2) procure substitute housing during absence of essential service; or (3) terminate tenancy and recover quarter of two months rent or double damages if landlord's failure to provide was willful. (§ 47a-13). If tenement becomes uninhabitable through no fault of tenant, he is not liable for rent. If only portion becomes unusable, tenant may vacate that part and rent will be reduced accordingly. (§ 47a-14). If rent is unpaid for nine days after due (four days after due if one-week tenancy), landlord may terminate rental agreement according to §§ 47a-23–47a-23b. (§ 47a-15a). Week-to-week tenancies are terminated by delivering notice to terminate rental agreement for week in which notice is served, and shall convert tenancy to tenancy at sufferance. (§ 47a-23[d]). If premises used for sale of illegal drugs landlord may elect to evict under violation of subsection h of § 47a-11. Burden on tenant to show that he did not have knowledge of nuisance. (§ 47a-15). Pleadings advance one step every three days. (§ 47a-26c). Notices to quit in event of termination of employment. (§ 47a-30[a]).

If judgment has been entered against resident and occupants, no rent/use and occupancy has been paid for four months and 60 days has elapsed since expiration of stay of execution and home remains on lot, mobile home park owner may file petition in summary process action, without additional fee; and after notice and hearing, must sell mobile home by public sale if so ordered. (§ 21-80[e]).

If Notice to Quit contains use and occupancy disclaimer it is not equivocal as long as disclaimer does not take effect until after later of date in Notice to Quit Possession or Occupancy or date of completion of predetermination process. (§ 47a-23).

Rents deposited with receiver to remedy housing code violations, lack of heat, running water, electricity, light, sewage disposal, or other dangerous conditions, upon judgment in special form of class action by tenants. (§§ 47a-14a–47a-14g). Landlord can avoid by undertaking work and posting security. (§ 47a-14f).

Broker's Liens.

Broker claiming lien over real property need not provide notice of lien to tenants and prospective buyers who are unknown to broker. (§ 20-325[e]-[r]).

Cash Receipts.

Landlords must provide detailed receipts upon acceptance of cash payments. (§ 47a-3a[c]m).

Housing and Support Services.

Commissioner may enter into leases or rental agreements for housing on behalf of persons receiving services from Dept. of Mental Health and Addiction Services when such person is unable to do so. Agreements shall not exceed fair market price. (§ 17a-455a).

Mobile Home Subsidy.

Connecticut Housing Finance Authority shall set aside funds for loans to assist Connecticut residents in purchasing mobile homes. (§ 8-251).

State-assisted Rentals.

If constructed or substantially rehabilitated after Oct. 1, 2004, and containing four or more units, such rental housing must comply with State Building Code handicap accessibility requirements unless waived. (§ 29-271; § 29-273). State Fire Marshal or State Building Inspector may grant variances. (§ 29-381a).

Land Trust Program.

Nonprofit corporations holding title to real property acquired with state assistance may also transfer units in such property to another eligible nonprofit as determined by State Bond Commissioner. (§ 8-214d[b]).

Housing Projects.

No entity purchasing housing project from housing authority shall disclose to public social security number or bank account number of tenant. (§ 8-64b).

Lien.

Boarding or lodging houses (§ 49-68) and hotels (§ 49-69) have liens by statute against baggage and effects of boarder or guest.

Termination of Tenancy.

Conviction of lessee for illegal use of premises renders lease void and lessee subject to ouster by summary process without notice. (§ 52-539). Where tenement becomes uninhabitable through no fault of tenant, he may terminate tenancy. (§§ 47a-12; 47a-14).

Holding over after expiration of term of original lease is no evidence of agreement for a further lease. (§ 47-22).

Dispossession.

Under state law, use of summary process to recover possession is strictly limited. (§§ 47a-2, 47a-23; 47a-23a; 47a-23c; 47a-25). When specified grounds exist, action may be brought, but there is five-day stay of execution and, on issuance of writ of error (§ 47a-36), further stay of six months or more may be granted at end of which additional nine month stay may be granted if dwelling unit declared conversion condominium (§ 47a-39). It is affirmative defense if plaintiff brought action in retaliation for defendant seeking to remedy, by lawful means, illegal condition of premises or for complaining to fair rent commission or if municipal agency filed notice, complaint, or order regarding violation, or if defendant requested plaintiff make repairs, or is affiliated with tenant's union. (§ 47a-33).

Special rules for abandonment by occupants. (§ 47a-11b).

Special rules of pleading apply to action. Defendant must appear within two days of return date and pleadings must move forward each two days thereafter. (§§ 47a-26[a]–47a-26[f]). On motion and without hearing, unless defendant files objection within five days of filing of motion, court shall order defendant to deposit with court, within ten days of filing of motion, use and occupancy payments equal to last agreed upon rent during pendency and appeal of eviction action. If defendant files objection, court may order defendant to turn over to court use and occupancy payments during pendency and appeal of eviction action. Last agreed-upon rent shall be prima facie evidence of fair rental value. Party claiming different amount shall have burden of proving that it is not said fair rental value. (§§ 47a-26[a]–47a-26[f]).

Summary process judgment binds named defendants and occupants whose presence is known or should be known and who are properly named or served. Persons claiming not to be subject to summary process may file claim prior to execution. (§§ 47a-23a, 47a-26h).

Court will enter judgment for failure to appear on court date after endorsed copy of motion for judgment is filed. (§§ 47a-26, 47a-26i).

Fees for service of execution and for removal of occupants and personal effects limited to $50 and $75 per hour, respectively. (§ 52-261[b]).

Death of Tenant.

Landlord may dispose of personal effects and possessions of deceased monthly lease tenant after filing affidavit with Probate Court and providing sufficient notice to next of kin. (§ 47a-

11d).

Other Remedies.

Availability of summary process does not prevent the use of common law remedies such as ejectment. (§ 47a-34). Forcible entry or ejectment subject to double damages. (§ 52-465). Lockouts by landlord criminal violation. (§ 53a-214). Intentional damage to landlord's property subjects tenant to criminal sanctions. (§§ 53a-117e–53a-117g).

Distraint does not obtain in Connecticut.

Discrimination.

Lessors of public accommodations prohibited from discriminating on basis of age, race, creed, color, national origin, ancestry, sex, marital status (except cohabitation of single males and females), military status, mental retardation, or physical disability, including blindness and deafness. No landlord or his agent shall refuse to rent to any tenant or potential tenant because such tenant occupies or intends to occupy dwelling unit with minor children. Does not apply to one or two family homes, owner-occupied building, with four or less units, or if rental would violate local, state, or Federal law, or condominium bylaw. (§§ 46a-64; 46a-64a; 46a-98a; 46a-51[8]; 46a-54; 46a-86[c]; 46a-91[a]; 46a-64c; § 52-571bb). Establishing state-wide electronic database regarding availability of housing for disabled and status of units (§ 8-119x); grants-in-aid to public and private operators of housing for elderly to employ supervisors and implement programs to assist residents; based on need and availability of matching funds (§§ 8-114d; C.G.S. 18-99b); employment of resident service coordinators (§ 8-114d); and federally or other publicly funded housing grants (§ 7-510). Procedures for processing housing discrimination complaint and available remedies. Commission's legal counsel shall serve as supervising attorney for Commission on Human Rights and Opportunities. (§§ 46a-54[3], 46a-55, 46a-83[d], 46a-89).

Energy Assistance.

Energy assistance must be applied equitably to eligible households regardless of type of energy used for heating. (§ 16a-41a).

Conditions precedent to construction/renovation of state buildings. (§ 29-252a). Potential bidders for public building construction work must comply with bid requirements and qualifications to perform work. (§§ 4b-91; 4b-91[b]; 4b-92; 4b-100; 4a-101, 4a-101[c]). Procedure to petition Dept. of Administrative Services for prequalification. (§§ 4a-100; 4a-101, 4b-101a).

Eligibility of Elderly and Totally Disabled Renters.

Grants and tax relief for elderly and disabled renters. (§ 12-170d).

Elderly Housing Projects.

Training and responsibilities of resident service coordinators in elderly housing projects. (§ 8-114d). State social service agencies shall assist local housing authorities to identify and access their services; agencies shall develop plans for outreach efforts; comprehensive study shall examine rental assistance needs of elderly; and reports shall be submitted to Legislature. (§§ 8-37ff, C.G.S. 8-119ll; PA 05-239, § 1). No liability of elderly tenant on 30 days written notice to landlord of acceptance into elderly housing project and intent to vacate. (§ 8-116d).

Connecticut Homecare Option Program for the Elderly established to provide for individual savings accounts, comprising trust fund managed by State Comptroller. Funds from accounts may be used by elderly to pay for instrumental activities of daily living so that elderly can remain in own homes or non-institutional setting. (§ 3-123aa – 3-123gg).

Military Facilities.

Military facility is any state-owned military building. Adjutant General responsible for use, maintenance, and leasing of such facilities. (§ 27-39).

Mobile Home Parks.

Special rules (§ 21-70), including provision allowing association of mobile home owners to purchase park from owner intending to close or sell (§ 21-70). Mobile manufactured home park owners shall notify residents of violations or possible violations of Dept. of Environmental Protection regulation in writing if such violation or possible violation has occurred on plot of ground where such mobile manufactured home park is located. (§ 21-84b).

Lead Paint Abatement.

See category 12 Environment, topic 12.01 Environmental Regulation.

Licensure of Home Inspectors.

Board shall issue to applicant home inspector's license provided applicant meets requirements of § 20-492b(a); person engaged in practice of home inspections for compensation prior to July 1, 2000; and has performed not less than 80 home inspections for compensation prior to July 1, 2001. (§ 20-492b).

Certificates of Occupancy.

Applicants for certificates of occupancy may provide notice of application by publication or other method approved by ordinance; notice must contain required information. (§ 8-3[f]).

Tenant Rights in State Public Housing.

Statute outlines requirements for each housing authority which receives financial assistance from state concerning tenant rights. (§ 8-68f). Definitions and requirements for covered programs for low and moderate income multi-family rental housing. (§ 8-68c).

Housing Projects.

Construction work defined and regulated by State authorities. (§ 8-44).

Land Records.

Commissioner of Environmental Protection will file notice of final orders to correct violations and certification of compliance with such orders in land records. (§§ 22a-5c, 22a-434).

Grocery Store Beer Permittees.

Grocery store beer permittees may lease up to 50% of total square footage of their premises for lawful purposes, but no sale or consumption of liquor will be permitted. (§ 30-51a).

21.11 LEASES:

See topic 21.10 Landlord and Tenant.

21.12 [RESERVED]

21.13 PERPETUITIES:

Uniform Statutory Rule Against Perpetuities adopted, 1989. (§ 45a-490, et seq.). In applying rule to interest in real or personal property created before effective date of this act, limited to take effect at or after termination of one or more life estates in, or lives of, persons in being when period of rule commences to run, validity of interest determined on basis of facts existing at termination of such one or more life estates or lives. For purposes of this rule, interest which must terminate not later than death of one or more persons is life estate although it may terminate at earlier time. If interest created before effective date of this act would violate rule against perpetuities as amended because such interest is contingent upon any person attaining or failing to attain age in excess of 21 years, age contingency shall be reduced to 21 years. (§§ 45a-95–45a-96).

Rights of entry and reverters extinguished if contingency does not occur within 30 years. (§ 45a-505). Estates granted for charitable uses (§ 47-2) and charitable trusts (§ 45a-514) are not within the rule against perpetuities (109 Conn. 529, 147 A. 181; 123 Conn. 549, 196 A. 785). Certain employees' trust funds are exempt from the rule against perpetuities and suspension of the power of alienation. (§§ 45a-508, 45a-235).

21.14 PERSONAL PROPERTY:

No statutory authorization for tenancy by entireties in personal property. See comparable legislation with regard to real estate in § 47-14a.

21.14A POWERS OF APPOINTMENT:

A power of appointment is a power of disposition given to a person over property not his own by someone who directs the mode in which power shall be exercised, by a particular instrument. (131 Conn. 307, 39 A.2d 895). Power restricted as to appointee is a special power. (133 Conn. 221, 50 A.2d 168). Right reserved by insured to change beneficiary is in nature of power of appointment. (120 Conn. 633, 182 A. 472). Donee of general or special power to appoint absolute estate may appoint lesser one unless such exercise would violate intent of donor of power. (133 Conn. 221, 50 A.2d 168). Except to extent otherwise expressly provided in instrument creating power, donee of power of appointment over trust may appoint any or all property subject to power in further trust and create further special powers of appointment. (§§ 45a-568–45a-572).

Donee of special power to appoint must not appoint property to himself, his estate, his creditors or creditors of his estate. May appoint to anyone not expressly excluded from class of permissible appointees. (§§ 45a-573–45a-573b).

“General Power of Appointment” defined for succession and transfer tax by § 12-345b.

Exercise.

Method prescribed in instrument creating power must be strictly followed in its exercise (84 Conn. 494, 80 A. 758) and to constitute a valid exercise, the intention of the donee must be clear (127 Conn. 359, 17 A.2d 8). Donee of general or special power to appoint absolute estate may appoint lesser one unless such exercise would violate intent of donor of power. (133 Conn. 221, 50 A.2d 168).

Legal effect of attempt to exercise power of appointment depends upon law of residence of donor of power. (111 Conn. 594, 151 A. 252).

Creditors of donee who has exercised general power of appointment may reach property subject to this power (111 Conn. 594, 151 A. 252), but this doctrine does not apply in favor of a corporate surety (124 Conn. 416, 200 A. 567).

Release of power is governed by c. 783. Under this chapter a power includes all powers which are in substance and effect a power of appointment regardless of language used in creating it. Such power whether or not coupled with an interest, whether or not existing July 8, 1943, and whether held by donee in individual or fiduciary capacity may be released wholly or partially by donee unless otherwise expressly provided in instrument creating the power. (§§ 45a-568–45a-572).

Method of Release.

Power may be released by delivery of written release executed by donee, for consideration or under seal, to any person who could be adversely affected by exercise of power, to person holding in trust property subject to power, or in case of power created by will, by filing release in probate court in which will proved. Release of power is not valid as to land in state subject to power, except as against releasor and persons having actual notice of release unless, in case of power created by will or other written instrument, it is acknowledged like a deed and recorded in land records of town where land is located, and, in case of power created by will, it is also filed in probate court. Such release is effective to extent provided therein. (§§ 45a-568–45a-572).

Effect Upon Other Donees.

Release by one donee, unless instrument creating power otherwise provides, does not prevent or limit exercise or participation in exercise by other donee or donees of a power exercisable by two or more persons in conjunction or successively. (§§ 45a-568–45a-572).

Taxation.

See category 22 Taxation, topic 22.07 Estate Tax, subhead Succession and Transfer Tax.

21.15 POWERS OF ATTORNEY:

Attorneys in Fact.

No special form is required for letters of attorney but powers of attorney to convey real estate must be witnessed and acknowledged like deeds. (§ 47-5).

While no specific form of power of attorney is required, State has adopted statutory short form power of attorney (§§ 1-42–1-56) allowing incorporation by reference of extremely broad attorney powers. Party using statutory form grants broad powers to attorney unless specific power is specifically excluded. Power of attorney may, under certain circumstances, survive subsequent incompetence of principal, but will terminate upon appointment of conservator. (§ 45a-562). Connecticut recognizes “springing” power of attorney, taking effect upon occurrence of specified contingency. (§§ 1-56h–1-56k).

Power of attorney executed in another state in accordance with laws of that state or with laws of this state authorizing one to convey real estate in this state is valid. (§ 47-7). Power of attorney must be recorded with deed. (§ 47-10).

Agent is not liable for acting under power of attorney from person in U. S. Armed Forces, after death of principal, where agent acted in good faith without knowledge of such death. (§ 45a-479).

21.16 REAL PROPERTY:

Proprietor in fee simple has absolute and direct dominion. (§ 47-1).

Fee tail estate becomes fee simple in issue of first donee in tail. (§ 47-3).

Rule in Shelley's Case is abolished, and grant or devise to a person for life and then to his heirs invests the grantee with a life estate only. (§ 47-4).

Collateral warranty of land, made by one who had no estate of inheritance in the land at the time of making such warranty, is void as against his heirs. (§ 47-4).

Implied warranties upon sale of newly constructed single family dwelling include: (1) Freedom from faulty materials; (2) construction according to sound engineering standards; (3) construction in workmanlike manner; (4) fitness for habitation; and, if purchaser reveals purpose and relies on vendor's skill and judgment, (5) fitness for purpose. Warranties may be expressly excluded or modified by sale contract if unit completed. (§§ 47-116–118).

Joint tenancy is recognized, but presumption against same and conveyance to more than one person is deemed to create tenancy in common unless words "as joint tenants," which mean joint tenants with right of survivorship, follow names. (§ 47-36a). Conveyance to joint tenants shall be deemed to be in survivorship. (§ 47-14a). Joint tenancies may be converted into tenancy in common by conveyance (§ 47-14c); mortgage (§ 47-14e); attachment and execution (§ 47-14f); or dissolution of marriage (§ 47-14g) of interest of one or more but less than all joint tenants. Joint tenants may hold equal or unequal shares in realty. (§ 47-14a).

Tenancies by the entirety are not recognized. (11 Conn. 337).

Perpetuities.

Act adopting Uniform Statutory Rule Against Perpetuities is enacted. (§ 45a-490, et seq.). See topic 21.12 Perpetuities.

Uniform Act.

Connecticut has adopted Uniform Common Interest Ownership Act. Act is comprehensive regulation of all common interest communities including condominiums, cooperatives, and planned communities. (§ 47-200, et seq., am'd PA 09-225).

Condominiums.

Condominium Act of 1976 (§§ 47-68a–47-90c) now in effect for method of establishing real property ownership of individual units in multi-unit structures popularly known as condominium. There are certain instances in which condominium documentation will not be deemed invalid despite errors or omissions in its creation or administration. (§ 47-204).

Condominium Resale Fees.

Fees for document preparation associated with result of condominium units must not exceed $125. Additional fee of $10 or less may be required for expedited preparation. (§ 47-270[b]).

Time Sharing Plans.

Defined and governed by PA 09-156. (§ 42-103w-103bb repealed PA 09-156, § 30). Recording of time-share plans. (PA 09-156, § 5). Registration with Dept. of Consumer Protection. (PA 09-156, §§ 7,8). Share disclosure statements and exchange disclosure statements. (PA 09-156, §§ 11, 12). Required language within purchase contract. (PA 09-156, § 15).

Maps and Plans.

No deed, mortgage, lease or other instrument recorded prior to effective date of act will be deemed invalid despite errors or omissions with respect to maps and plans. (§ 47-68a).

Action to quiet title may be brought by any person claiming title to or any interest in land against all persons asserting adverse claims, including unknown persons whose possible claims are described by plaintiff. (§ 47-31).

Harvesting.

"Harvesting" expanded to include fruits and vegetables. Landowners who permit entry on land to nonprofit organizations to harvest wood or fruits and vegetables at no charge for nonprofit distribution are not liable for personal injury to invitee unless injury results from landowner's failure to warn. (§ 52-557k, am'd C.G.S. 01-82).

Rights of entry and reverters extinguished if specified contingency does not occur within 30 years (for instruments effective after Oct. 1, 1955). (§ 45a-505).

In ejectment defendant may recover value of improvements made in good faith, or plaintiff may confirm title in defendant and be awarded such sum as defendant equitably ought to pay therefor. (§ 47-30).

Foreign Conveyances or Encumbrances.

Conveyance, mortgage, release of mortgage or lien of real estate located in state, and power of attorney authorizing conveyance of such real estate, executed and acknowledged in another state in accordance with laws of that state as to real estate are valid. (§ 47-7).

Systematic Sales of Lots Located Outside Connecticut.

Seller must accept service through secretary of state, post bond, produce prospectus and other information, apply for license and pay fee, and deliver prospectus to customer. (§§ 20-329a–20-329m).

Claims of title to real property good if unbroken 40 years prior to date marketability is to be determined. (§§ 47-33a–47-33k). Some question among bar concerning whether title searches should nevertheless still be taken back 60 years. All actions taken by certain municipal and/or administrative entities with respect to real property will be deemed valid despite errors or omissions in compliance with notice provisions where no appeal from action is pending or time for such appeal has not expired. (§§ 47-33b–47-33l). Court records concerning title to land may be microfilmed and retained in electronic format. (§ 51-36).

Limitation on enforceability of land use restrictions, see category 5 Civil Actions and Procedure, topic 5.16 Limitation of Actions, subhead Three Years.

Commercial Real Estate Brokerage.

If landlord or tenant in commercial real estate transaction enters into agreement for payment of compensation to real estate broker for brokerage services, agreement is binding upon landlord or tenant, and landlord or tenant's grantees, successors, and assigns. (§ 20-325k).

Property Acquired with State Financial Assistance.

Nonprofit corporations holding title to real property acquired with state financial assistance may convey titles to such structures and improvements on real property to low income families, limited equity cooperatives, or other corporations so long as: (1) Property is only used for low income housing; (2) nonprofit corporation retains title to real property upon which such structures and improvements are situated; and (3) nonprofit corporation shall have first option to purchase any structures and improvements transferred at below market price. (§ 8-214d). When nonprofit organization can no longer manage State-funded limited equity cooperative, Economic and Community Development Commissioner shall take steps to insure that property is used to house low and moderate income families. (§ 8-214f).

See also topics 21.05 Curtesy, Deeds, Dower, Landlord and Tenant; categories 5 Civil

Actions and Procedure, topic Partition; Debtor and Creditor, topic Homesteads; Documents and Records, topic Records; Family, topic Husband and Wife; Mortgages, topic Mortgages of Real Property.

Conveyance Disclosure Requirements.

Residential Property Disclosure report must be delivered by seller to buyer prior to contract. (§ 20-327b). Existence of any non-material fact concerning real property need not be disclosed in real estate transaction. (§§ 20-329cc, C.G.S. 20-329dd). Sellers of certain residential property are relieved of requirements under § 22a-134f to provide notice of location of certain hazardous waste facilities. (§ 20-327f). Seller or his agent must provide notice to purchaser if real property was suspected site of homicide, suicide or any felony. (§§ 22a-134f, C.G.S. 20-329ee).

Real property owner upon which hunting regularly occurs may submit property location to town clerk to include on list. List is open to public inspection. Sellers of certain residential property may provide notice to purchaser of town's list in order to satisfy disclosure duty. (§§ 7-32k; 20-327g).

Definition of displaced person who is required to move from real property due to displacement by agency or governmental entity no longer includes business which is so required to move, but which has also reached end of its lease term or has been evicted for nonpayment of rent as long as agency acquired property at least ten years prior to move. (§ 8-267).

Real estate appraisers must be licensed and certified. (§ 20-501[2]). Licenses and renewals shall expire no later than Sept. 30, 2003; and no license shall be issued or renewed after Oct. 1, 2003. Nonresident of this state who is licensed in another state as real estate appraiser may become real estate appraiser in this state by conforming to all provisions of §§ 20-500–20-528. (§ 20-515). Persons who execute contracts with real estate brokers who provide estimates of value of real estate may be entitled to credit for payment of such valuation estimates. (§ 20-526).

Records Retention.

All licensed real estate brokers are required to retain certain records for minimum of seven years. (§ 20-325m).

Real Estate Courses.

Dept. of Consumer Protection's regulations regarding location of real estate courses shall no longer require that course be given in location approved by fire marshal if conducted in building of public assembly. (§ 20-314a).

Revaluation.

Towns permitted to expedite or to be exempt from revaluation upon application and under certain guidelines and circumstances. (§§ 12-62k, repealed PA 06-148, § 10; C.G.S. 12-62[h], C.G.S. 12-62[k], C.G.S. 9-199[c], C.G.S. 12-81[11]).

Planning and Zoning.

Governed by § 8-1, et seq. There are certain instances in which conveyance of title in subdivision will not be deemed invalid despite errors or omissions in subdivision approval. (§ 8-6). All plans for subdivisions and resubdivisions must be submitted for approval by application. Written notice of subdivision plan must also be given. (§ 8-26). (See also §§ 8-3[a], C.G.S. 8-3b, C.G.S. 8-3c[b], C.G.S. 8-7, C.G.S. 8-7d, am'd PA 07-85, § 1; C.G.S. 8-25[a], C.G.S. 8-26b; C.G.S. 8-26d, C.G.S. 8-26e, 22a-42a[b], [c].) Penalties for failure to comply with zoning regulations. (§ 8-26a[b]).

Requirements and processes for preparing state, regional, and local land use plans. (§§ 8-23, am'd PA 09-230, § 7, am'd PA 08-182, § 16; C.G.S. 8-35a; 16a-27, am'd PA 09-230, § 3; 16a-28, am'd PA 09-230, § 4). Requirements for land use applications. (§ 8-7d).

"Housing authority" means any of public corporations created by § 8-40. Commissioner of Economic and Community Development may be deemed eligible developer to preserve state's interest in any contract for financial assistance that results in state acquiring title to housing projects. (§ 8-37x).

Hold harmless protections for housing authority employees shall extend to part-time employees. (§ 8-41a).

Housing authority may consider information re: applicant or occupant's abuse of alcohol and whether he is subject to registration for sexually violent offense (§ 8-45a).

Housing does not have to be solely for families; may set aside housing for elderly living alone. Such housing must conform to statutory and regulatory requirements and meet elderly needs. Maximum standard income and assets must be set and approved; application receipts must be provided and maintained. False statements punishable by fine or imprisonment. (§ 8-716a). Any appeal or action by aggrieved person to set aside decision for zoning board noncompliance with law must be taken not more than one year after board's decision or action. (§ 8-8[g]). Procedure for service of process in land use appeals. (§ 8-8[f]). Affordable housing land use appeals are governed by § 8-30g.

Commissioner may make or adopt regulations re: development, operation and management of housing projects as well as income limits for application and continued occupancy. (§ 8-115a[d]).

Fire safety requirements for new and existing buildings. (§ 29-293). Fire protection sprinkler systems work includes maintenance of systems. (§ 20-330). New residential buildings must have carbon monoxide detectors. (§ 29-292, am'd PA 09-35, § 3, PA 09-153, § 3). Fire safety requirements for nursing homes. (§§ 29-315[f], C.G.S. 29-315a, 10a-194i). Emergency floor proximity path markings to be installed in new construction to identify paths for emergency egress. (§ 29-256d).

State Fire Marshal may grant exemptions or variations of regulations issued under § 29-292 where strict compliance would entail unnecessary hardship, as long as variation or exemption still secures public safety. State Fire Marshal and Building Inspector may jointly grant variances or exemptions when strict compliance with sprinkling regulations would cause unnecessary hardship for buildings with educational occupancy. (§ 29-315). Any application for variation received by local fire marshal must be forwarded to State Fire Marshal. (§ 29-296).

Charging Commissioner of Public Works with assuring compliance with security regulations for public buildings. (§§ 4b-1[a], 4b-2, 4b-52; 4b-52[d]).

Commissioner of Public Works must consider proximity of railroad and bus routes when leasing or purchasing state facility. (§ 4b-24a).

Low income energy advisory board shall be established to help create, develop, and implement energy assistance programs for low income housing. (§ 16a-41b).

Residences for Disabled Children.

Parties responsible for costs of education and services for children shall not be relieved from responsibility by establishing or placing child in community residence which houses six or fewer mentally retarded or disabled persons and staff under § 17a-227 or §§ 172-145 to 17a-151.

(§§ 8-3e, C.G.S. 8-3f). All staff at such residential facilities must be certified in cardiopulmonary resuscitation and trained in emergency procedures. (§ 17a-227). No State-owned property currently being used to house people with mental retardation may be sold, leased, or transferred from July 1, 2005 to June 30, 2007. (§ 17a-238a[a]).

21.17 TRUST DEEDS:

See category 20 Mortgages, topic 20.04 Mortgages of Real Property.

22 TAXATION

22.01 ADMINISTRATION:

Commissioner of Revenue Services has general supervision over administration and enforcement of tax laws. (§ 12-2).

At their option, state and local authorities may allow payment of taxes, penalties and interest by credit card. (§§ 12-39r; C.G.S. 12-141a).

In general, any partial payment of taxes applied first to any penalties (unless waived), then interest on tax, then taxes due, in that order. (§ 12-39h). Beginning with taxes due after July 1, 1995, accrual of interest on overdue taxes is limited to amount of tax liability, instead of liability plus applicable penalty.

Uniform system of enforcement of taxes due state (other than inheritance or succession tax) permits, where not otherwise provided for, addition of 10% penalty 30 days after due date or $50 whichever amount is greater and interest at 1¼% per month (§ 12-35), acceleration of due date by commissioner or other enforcement agency where delay would in his opinion jeopardize collection (§ 12-36), and enforcement of tax with penalty and interest and costs by (1) Civil action brought by Attorney General; (2) levy on taxpayer's property by sheriff, constable or any person or employee of state collection agency designated for such purpose by commissioner or other enforcement agency in manner provided for collection of property tax by tax collector (§§ 12-35; C.G.S. 12-36); (3) foreclosure of tax lien, if one has been provided for, by ordinary foreclosure action in name of state (§ 12-36). Prosecution for willful failure to pay tax or file return must be within three years of violation. (§§ 12-268e, C.G.S. 12-306b, C.G.S. 12-330j, C.G.S. 12-428).

Failure to Report Listed Transactions.

Failure shall result in penalties for both corporate business and personal income tax payers. (§§ 12-30c, C.G.S. 12-233, C.G.S. 12-728[a], C.G.S. 12-733[c]). Enhanced penalties are retroactive to returns filed in 2003 and 2004. (§§ 12-233[b], C.G.S. 12-728[a]).

Penalties.

See topics/subheads detailing particular taxes.

Comity.

Attorney General authorized to bring suit in other states for delinquent taxes and to collect delinquent succession and transfer taxes, and political subdivisions can sue in other states for delinquent. Same privilege accorded other states in courts of this state if they allow Connecticut to sue. (§§ 12-387a–12-387c). Commissioner of Revenue Services authorized to enter into agreements with other states for reciprocal enforcement of tax laws. (§ 12-34c). Definitions of “taxpayer”, “claimant state”, “taxes”, “refund”, “tax officer” for purposes of collection of taxes to different state; conditions upon which refunds may be withheld and paid to another state; certification of out-of-state obligation, notification. (§§ 12-35f, C.G.S. 12-459).

Appeals.

Two judges of Superior Court will be designated to hear only appeals from various orders, decisions and disallowances of Commissioner of Revenue Services under variety of tax statutes. (§ 12-391). Orders from which appeals may be taken. (§ 12-391). Posting bond during objection to assessment. (§§ 12-3h; C.G.S. 12-39m).

Dissemination of Information.

Employees of state and of others who have access to tax returns shall not disclose or inspect return information except in accordance with Act and statutes. (§ 12-15). Deficiency assessments of taxes payable to municipalities; notice and hearing; written objections; interest rate of 1% per month from date tax due and payable; penalty of greater of $50 or 10% of tax assessed in event of negligent or intentional disregard of provisions of c. 223; if intent to evade or defraud, penalty shall equal 25% of deficiency assessment; no more than one penalty per same tax period. (§§ 12-415; C.G.S. 12-330e). If no timely appeal made, Commissioner may collect taxes as if due state per § 12-35 and as if such term expressly included taxes, penalties and interest. (§§ 12-39g[2]; C.G.S. 12-739[a]). Office of Fiscal Analysis may obtain available tax return information from Commissioner of Revenue Services; limited by applicable redactions to documents; disclosure of information to persons under contract to provide revenue estimates and forecasts. (§ 12-7b[f]).

Receipt of Various Tax Revenues.

Dept. of Revenue Services shall determine if tax receipts meet deadlines solely according to when DRS receives payment, instead of according to either receipt date or postmark; certain deadlines are extended. (§§ 3-114c–3-114h, C.G.S. 3-114m–3-144n).

22.02 ALCOHOL, BEVERAGES AND TOBACCO TAXES:

Alcoholic Beverage Tax

Tax is levied on sale of alcoholic beverages by distributors within state. Tax does not apply to sales to licensed distributors, sales in course of which beverage is transported to point outside of state or sales of malt beverages consumed on premises covered by manufacturer's permit. (§ 12-435). By distributor is meant any person or his backer, who holds wholesaler's or manufacturer's permit under Liquor Control Act. (§ 12-433). Such distributor must obtain license from Commissioner of Revenue Services and only licensed distributor may import alcoholic beverages or sell untaxed wine. (§ 12-436). Licensed distributors must file with Commissioner of Revenue Services, before last day of each month, returns computing tax for preceding calendar month and signed under penalty of false statement (§ 12-437) and must pay tax with return or submit to penalty of 10% of tax due or $50 whichever is greater plus interest at rate of 1% per month (§§ 12-439–12-440). Criminal sanctions for failure to file return or falsify same may include fine up to $5,000 or imprisonment up to five years or both. (§ 12-452). Uniform system of enforcement of taxes due state is applicable, and tax is lien on all property used in business, but such lien has priority only from time of filing certificate of lien with town clerk. Purchaser of business becomes liable for seller's tax. (§ 12-441). Where Connecticut beverages are taxed in another state at rate greater than beverages manufactured in that state, additional tax in same proportion is levied on sale in Connecticut of beverages manufactured in that other state. (§ 12-451). Tax upon storage or use within state of any untaxed alcoholic beverages in possession of person other than licensed distributor or carrier for transit from without state to licensed distributor within state. (§ 12-435b). Any advertisement for sale of untaxed alcoholic beverages for use and consumption in this state shall contain words on container or be announced “These alcoholic beverages are subject to payment of Connecticut alcoholic beverage use tax and Connecticut use tax and may be subject to seizure as contraband goods.” (§ 12-435c).

Places where Karaoke is performed alone or without performer are excused from definition of “cabaret or other similar place” (§ 12-540); nor does it include room in restaurant where permits for beer or beer and wine only have been issued (§§ 30-22[b]; C.G.S. 30-22[c]; C.G.S. 30-22[e]).

Noncommercial organizations may obtain limited permits to sell beer or liquor and retain proceeds. Number of permits issued to one organization annually is also limited. (§ 30-35).

Under certain circumstances, restaurant patron who has consumed meal may remove unsealed bottle of wine from premises for off-premises consumption. (§ 30-22).

Cigarette Tax.

55.5 mills (§§ 12-296, C.G.S. 12-316) for each cigarette held for sale, payment being evidenced by dealers and distributors affixing to packages stamps purchased from Tax Commissioner, who will redeem unused stamps (§§ 12-296–12-339b). Any written advertisement in this state for sale of untaxed cigarettes for use and consumption in this state shall contain words “These cigarettes are subject to the payment of the Connecticut cigarette use tax and the Connecticut use tax and may be subject to seizure as contraband goods.” (§ 12-292). Definition of “chain store” for purposes of certain cigarette tax statutes shall exclude franchisors. Chain store consists of at least five retail stores under common control and ownership. (§§ 12-286[a], C.G.S. 12-326a[a]).

Tobacco.

Tax imposed on all untaxed tobacco products held in state by any person, taxed at rate of 20% of wholesale sales price or wholesale value if no price set. Tax imposed on distributor or unclassified importer at time tobacco product manufactured, purchased, imported, received or acquired in state. Each distributor or unclassified importer must obtain license issued by Commissioner before manufacturing, purchasing, importing, receiving or acquiring any tobacco products in state. Fee for distributor's license, $100. There shall be no fee for unclassified importer's license. Each distributor and unclassified importer shall keep complete and accurate records of all tobacco products. (§ 12-330c[a][1]). Procedures for claiming refund of tax overpayments. (§ 12-330p). Each calendar year, tobacco companies must execute certifications stating names of all products in their “brand families,” number of units of each brand sold, and other information. (§§ 4-28h to C.G.S. 4-28j). Every tobacco product manufacturer must secure annual cigarette manufacturer's license from Commissioner to be listed in DRS director of manufacturers that comply with tobacco settlement agreement and to sell cigarettes. (§ 12-285b). DRS shall prescribe content and timing of cigarette vending machine reports. (§ 12-293a). Licensed tobacco products distributors who do not acquire untaxed tobacco products need only file annual reports with DRS. Commissioner may adopt regulations exempting unclassified importers from certain requirements if it would not undermine tax enforcement. (§ 12-330d).

22.03 BUSINESS TAXES:

Professional Taxes.

Professional Tax.

Members of numerous specified professions (e.g., medicine, accounting, etc.) pay annual license fee. (Tit. 20).

See also catchline Attorneys and Judges, infra.

Attorneys, including those admitted pro hac vice, and judges subject to annual tax of $450 due Jan. 1. Chief court administrator and judges of Superior Court notified of failure to pay.

$25 penalty and 1¼% per month interest for nonpayment. If removed from roll of attorneys or retired or in armed forces, not liable for tax. (§ 51-81b).

State assistance means any grant, loan, loan guarantee or issuance of tax benefit not for general applicability but for purpose of economic development that is: (1) Made to business operated for profit, (2) over $1,000,000. Promulgation of terms and conditions of agreements for State assistance. (§ 32-700, et seq.).

Industrial Waste Facilities.

(§§ 12-217d; C.G.S. 12-247b; C.G.S. 12-252b; C.G.S. 12-258c; C.G.S. 12-265c). (Repealed by PA 97-295 effective July 8, 1997, but remaining tax credits carry forward.)

Child Day Care Credit.

Any business firm which desires to subsidize its employees for child day care from licensed providers or desires to pay or incur expenditures for facilities for establishing child day care facility may apply to commissioner of human resources for allocation for tax credit. (§ 12-634).

Computer Donation Tax Credit.

Tax credits for donations of computer equipment to nonpublic schools. (§ 10-228b[a] and [b]).

Technological Upgrade Exemption.

Business organizations purchasing new machinery and equipment for upgrading manufacturing process in distressed municipality, enterprise zone or targeted investment community may receive certain tax exemptions. (§ 12-81, am'd PA 09-176, § 1, PA 09-226, § 1).

Research and Development Tax Credit.

Governed by § 12-217ee(a).

Hospitals must pay quarterly taxes upon gross earnings, as defined. Current rate is 9.25%, and is being phased down to 6.25%, effective Oct. 1, 1999. (§ 12-263b). Taxation of gross earnings of hospital at rate of 11% in each taxable quarter for taxable quarters commencing prior to 10/1/96; 9¼% on or after 10/1/96; 8¼% on or after 10/1/97 but pre-10/1/98; 7¼% on or after 10/1/98 but pre-10/1/99; and 6¼% on or after 10/1/99; returns file quarterly and signed by principal officer. (§ 12-263b).

Gross Revenue Tax on Petroleum Companies.

Any petroleum company including any corporation, partnership, limited partnership, association, individual or any fiduciary thereof engaged in refining and distribution of petroleum products shall pay quarterly tax of 5% on gross earnings in each taxable quarter derived from sale within state of petroleum products except number 2 heating oil and propane gas used for residential heating. Any company that imports or causes to be imported into Connecticut petroleum products for its use and consumption, other than company that is already subject to and has paid petroleum products gross earnings tax on such petroleum products, must pay quarterly tax at rate of 5% of consideration given, or contracted to be given, for such petroleum product is consideration for all such deliveries during quarterly period for which tax is to be paid exceeds $100,000. “Use” includes sale of imported petroleum products in regular course of business. (§§ 12-587, C.G.S. 12-587a). Tax exemption for gross earnings derived from first sale of certain petroleum products. (§ 12-587[b][2]). Within 30 days of due date for tax imposed under § 12-587, one third of total amount of tax due shall be credited by treasurer to Underground Storage Tank Petroleum Clean Up Fund to be used by Commissioner of Environmental

Protection. (§§ 22a-449a–22a-449h). Tax imposed under this Act shall be in addition to any other tax imposed by Connecticut for which petroleum company is liable. Returns must be filed on last day of month succeeding Jan., Apr., July and Oct. for prior quarter. Failure to do so results in penalty of 10% of tax due for negligent or intentional failure to file and 25% penalty for fraud. If return is more than three months late Commissioner of Revenue Services may estimate tax and add 25% or $50 penalty. Criminal sanctions for willful failure to file return or falsify same may include fine up to $5,000 and/or imprisonment up to five years. Commissioner has broad investigatory powers and can examine returns up to three years after filing. Interest on overdue taxes 1% per month. Unpaid taxes shall be lien against all real estate of company within state. Petroleum company shall not increase wholesale rack prices to compensate for this tax. Superior Court in Hartford has jurisdiction over all complaints arising under this Act. (§§ 12-587–12-602).

Out-of-State Contractors.

Revisions of timetables, definitions and procedures for providing security for Connecticut taxes due in connection with nonresident contractor activities. (§ 12-430[7]).

Urban and Industrial Sites Reinvestment Program.

Facilitation for business investment in smaller projects that build, expand or rehabilitate facilities; businesses may transfer tax credits to more than one taxpayer. (§§ 32-9t[j], C.G.S. 32-9t[h]).

22.04 [RESERVED]

22.05 EMPLOYMENT TAXES:

Old age assistance tax has been repealed.

Unemployment Compensation Tax

Application of chapter to employers governed by detailed provisions. (§§ 31-222–31-275). Employers subject to c. 374 and to taxation under title IX of federal social security act must pay Commissioner of Labor and Factory Inspection contributions (not deductible from wages) generally equal to 5.4% of payroll (no tax on wages in excess of $4,200 yearly to any individual), but rate subject to adjustment in accordance with § 31-225a(d).

Contributions are payable quarterly or more often as Commissioner may determine, and employer must furnish information reports. (§ 31-225). Past due contributions bear interest for each month (§ 31-265) and payment may be enforced by uniform method of collecting state taxes (§ 31-266). In case of employer's insolvency or termination of employer's corporate existence, claim for contributions has priority over all other claims except taxes. (§ 31-267). In case of failure to file report when due or error in report, Commissioner may determine amount of contribution, subject to appeal to superior court for judicial district of Hartford-New Britain within 30 days. (§ 31-270). Knowing failure to pay contribution is Class A misdemeanor. (§ 31-273).

The amount due is a lien, from the due date until discharged by payment, against all the property of the employer within the state whether real or personal, except such as is exempt from execution, including debts to the employer, and a certificate of such lien without specifically describing such real or personal property signed by the administrator or the executive director may be filed in the office of the clerk of any town in which such real property is situated or, in the case of personal property in office of secretary of state, which lien shall be effective from date on which it is recorded. (§ 31-266).

Definition of “compensation” excludes compensation received from certain charitable organizations. (§ 31-222, et seq.).

Tax Exempt Bonds for Empowerment Zones.

New act concerning requirements for municipality to issue tax exempt bonds to provide funding for enterprise zone business in area designated as urban empowerment zone by Secretary of Housing and Urban Development. (§§ 7-620; C.G.S. 7-620d).

Entertainment Wage Tax Credit.

Connecticut Commission on Culture and Tourism shall allow eligible production company producing qualified production in Connecticut to receive 25% wage tax credit against tax imposed under c. 208 based on wages. (§ 12-217jj).

22.06 ENVIRONMENTAL TAXES:

Hazardous Waste Tax.

Generators of hazardous waste must pay 5¢ per gallon of metal hydroxide sludge and 6¢ per gallon of any other hazardous waste plus additional charges but no assessment is paid if total assessment would be less than $20 per year. (§ 22a-132). Department of Environmental Protection to develop plan of assessment upon Nuclear Regulatory Commission licensees for financing of state low-level radioactive waste disposal fund. Note: Imposition and collection of this tax to end June 30, 2001. (§ 22a-132).

Recycling Tax.

Owners of resource recovery facilities or mixed municipal solid waste landfills shall pay $1 per ton of solid waste processed or disposed of. Failure to do so will result in penalty of 10% of amount due. Owners must also submit quarterly returns. (§ 22a-234a).

22.07 ESTATE TAX:

Estate tax is imposed on the transfer of the estate of each person dying resident in this state, equal to the amount by which Federal credit allowed for such taxes under the provisions of the Federal Revenue Code in force at date of decedent's death exceeds the total estate, inheritance, legacy, transfer and succession taxes actually paid to the states and territories of the United States (including this state) in respect to the estate of such decedent. (§ 12-391). This tax is due at date of taxable transfer and payable nine months thereafter. (§ 12-392). Commissioner of Revenue Services assesses this tax on basis of information contained in succession tax returns to probate court, appeal lying from Commissioner to Superior Court for judicial district of Hartford. (§ 12-391). Administrative provisions of succession tax law are applicable to this tax so far as adapted to it except no lien for estate tax. (§ 12-395).

Federal and state estate taxes are equitably prorated among persons interested in estate, in absence of will provision to the contrary. (§ 12-401).

Where Commissioner has determined that joint tenant has died and that succession tax is assured or not due, release of lien may issue conclusively releasing property from succession tax lien. Certificate may be recorded with town clerk where real property is situated upon finding by Commissioner that tax payment is adequately assured by bond, other security or surety, or payment of tax or appointment of bonded executor or administrator. Commissioner may adopt regulations prescribing circumstances under which probate court may issue lien release certificate. (§ 12-364).

Succession tax lien in favor of state is not valid against lienor, creditor, mortgagee, bona fide purchaser or judgment creditor without notice until recorded or filed with town clerk. Commissioner may adopt regulations prescribing circumstances under which probate court may discharge lien by payment of tax. (§ 12-366).

Where probate judge does not believe estate is taxable, judge may send written opinion to Commissioner with tax return. After 60 days, judge's opinion is conclusive evidence that estate's real property is tax-free with respect to deceased. If on or before sixth day, Commissioner files objection or appraised value is raised or taxability is increased by more than $1,000, court may correct errors in opinion. After 60 days, judge may issue certificate. (§ 12-378).

One who transfers or permits transfer of property subject to taxation, without consent of Commissioner; and if no administration granted by probate court, and has actual knowledge of transferor's death, is liable for penalty three times tax found due. (§ 12-382).

Valuation Date.

Estate is taxed on value as of date of death. (141 Conn. 257, 105 A.2d 654).

Interstate Co-operation.

Commissioner of Revenue Services may compromise (§ 12-372) or arbitrate (§ 12-374) with taxing authorities of other states when domicile of decedent is in dispute.

Apportionment Against Inter Vivos Dispositions.

Connecticut has statutes allowing proration. (§§ 12-400–12-405).

Nonresident Estate.

Any fiduciary of nonresident estate in excess of $20,000 (as reported on Federal Fiduciary Tax Return) shall be deemed “taxpayer” for purposes of §§ 12-405c, 405d, or 405k. (§ 12-405c).

“Fiduciary” means executor or administrator of resident or nonresident estate, whether or not such executor or administrator is taxpayer. (§ 12-405a[h]).

Commissioner has been granted broad investigatory and enforcement powers in estate tax areas. (§§ 12-405c; C.G.S. 12-405d).

Regulations under §§ 12-405e–12-405i eliminate estimated estate taxes under said statute.

Succession and transfer tax (***NOTE:*** Succession and transfer tax will be phased out over several years, beginning with respect to deaths occurring after Jan. 1, 1997, and will be completely eliminated with respect to deaths occurring after Jan. 1, 2005.) Imposed on transfer, in trust or otherwise, by residents or nonresidents, of all real estate located in Connecticut, all tangible personal property having situs in Connecticut, and (in case transferor is Connecticut resident but not otherwise) all other tangible personal property not having actual situs without this state and all intangible personal property. (§ 12-340). Tax applies only to transfers: (a) By will; (b) by intestate succession; (c) in contemplation of death (transfers made within three years prior to death being presumed to be so made); (d) by gift or grant intended to take effect in possession or enjoyment at or after death of transferor (including any transfer where transferor retains for life or other period not ascertainable without reference to his death, or for period of such duration as to evidence intention that he should retain or receive for his life (1) possession or enjoyment of income from, or right to income from property or (2) right, either alone or in conjunction with any person, to designate person who shall possess or enjoy property or income therefrom) (but does not include property where decedent retained reversionary interest which valued actuarially immediately before death, would not amount to more than 5% of value of property transferred); (e) in payment of claim arising from contract (except antenuptial agreement) made during obligor's life, but payable by its terms at or after his death (§§ 12-341; C.G.S. 12-341b); (f) in trust where settlor reserves powers of revocation, alteration or amendment, revesting trust res in settlor (to extent of value of property subject to such powers) (§ 12-345); (g) by succession to jointly owned property by rule of survivorship, but tax is only on fractional share owned by decedent which is determined by dividing value of property by number of joint owners; (h) by transfer deemed to have taken place when decedent has at time of death general power of appointment irrespective of whether exercised, or exercises power of appointment as in (c) or (d) or if exercises power of appointment by creating new power of appointment (§ 12-345c). “General Power of Appointment” defined in § 12-345b. See also category 21 Property, topic 21.14A Powers of Appointment. In case of joint checking or savings accounts and U.S. war or savings bonds, payable to survivor, only fractional share in excess of $5,000 is taxable, but this does not prevent taxation in whole or in part under (c) or (d). (§ 12-48). Payment of life or accident insurance proceeds to beneficiary thereof, including trustee under inter vivos or testamentary trust or to trustee of life insurance trust, whether revocable or not, and including proceeds payable to decedent's estate, is not taxable transfer. (§ 12-342). If property is transferred to executor or trustee in lieu of commission or allowance for services, excess of value of property above amount of commission payable in absence of such transfer is taxable. (§ 12-346).

Exemption from state succession taxes for certain transfers of open-space land is described in § 12-347(c).

Transfers to the United States, any state or territory or political subdivision thereof, District of Columbia, public institutions for exclusively public purposes, Connecticut corporations or institutions receiving money appropriations from Legislature; transfers to any strictly non-profit making organization incorporated or organized under laws of Connecticut or any other state whose laws provide similar exemption of transfers to similar Connecticut organizations, formed for charitable, educational, literary, scientific, historical or religious purposes, provided property transferred is to be used for such purposes; and transfers in trust for care of cemetery lots, are exempt. (§ 12-347).

Valuations.

Fiduciary or transferee determines valuations of gross estate which shall be fair market value as of decedent's date of death or date it was transferred. Commissioner of Revenue Services or any interested party may file objection within 120 days thereafter and if none, fiduciary's determination stands. Commissioner may file objections to fiduciary's return. Commissioner has 60 days in which to modify request by fiduciary for extension of time in which to file his return. (§ 12-359[b], [c]). In ascertaining value of property transferred inter vivos, deduct any consideration in money's worth given for transfer. (§ 12-341). Payments from qualified pension trust plans, retired serviceman's benefit protection plans, Social Security, Railroad Retirement Act plans or self-employed pension plans made after decedent's death are excluded from gross estate. (§ 12-349). Gross estate calculations (§ 12-349); gross estate is fair market value of all property transferred subject to tax under Part I except value of real property classified as farm land (§ 12-107c) under certain circumstances including, but not limited to, ownership at time of death.

Deductions.

In case of resident transferor, net taxable estate is determined by deducting from gross taxable estate: ante-mortem claims, personal property taxes assessed and income taxes accrued prior to death, amount of mortgages and tax liens on decedent's Connecticut property, funeral expenses, allowance to dependents, executors', administrators', attorneys' and probate fees, other administration expenses except those chargeable to income, and net taxable estate passing to surviving spouse. (§ 12-350). State and federal inheritance, succession, estate, and transfer taxes are not deductible. (§ 12-351). But see topic 22.07 Estate Tax. Commissioner of Social Services must apply exemptions for burial funds, burial plots, and funeral contracts uniformly throughout state. (§ 17b-9).

If transferor died after July 1, 1949, not resident in Connecticut deductions are similar except that ordinarily no deduction for ante-mortem claims, accrued income, personal property taxes accrued, income taxes accrued, capital losses, inheritance, succession, estate or transfer taxes payable to other states and countries or federal government, are allowed; and deduction for administration expenses is limited to those incurred in Connecticut ancillary proceedings, and includes fees of Connecticut administrator or executor and of Connecticut attorneys. (§ 12-352). Where domiciliary estate is insolvent, amount of Connecticut estate necessary to be taken to pay claims and domiciliary administration expenses will be exempt from Connecticut succession tax. (§ 12-352).

In case of transfer other than by will or intestate succession deduction allowed only for property includable in decedent's gross taxable estate to extent transferee has actually paid deductible items. (§ 12-350). Federal and state estate, inheritance, succession, and transfer taxes are not deductible, but reasonable fees for Connecticut attorneys may be deducted. (§§ 12-350; C.G.S. 12-352).

Exemptions and Computation of Tax.

Entire property transfer of which is subject to tax at transferor's death (viz., net taxable estate passing by will or intestate succession, ascertained as above, plus property subject to inter vivos taxable transfers and to taxable succession by survivorship) is divided into three classes according to relationship which beneficiaries bear to decedent. There is a single exemption for each class and rates of tax on excess over exemption vary according to amount transferred to class as a whole (not according to amount transferred to each beneficiary). Tax is computed on entire amount passing to class and apportioned among members of class according to amount passing to each member. Classification, exemptions and rates are as below. (§ 12-344; see 93 Conn. 648, 107 A. 506; 178 Conn. 81, 420 A.2d 1160).

Rates.

See § 12-344 for current rates of tax and exemption amounts. Succession and transfer tax being phased out over 1997 to 2005. But see topic 22.07 Estate Tax.

Reports.

Within two months after appointment of fiduciary of estate, an inventory of decedent's assets is filed with Probate Court. For a resident, inventory includes all assets of decedent except real property outside state, and for nonresident, inventory includes only real and tangible personal property located in this state and all intangible property if Connecticut proceeding is not ancillary to that in another state. Only one extension of two additional months may be granted if good cause shown. (§ 45a-341). Within nine months after learning of death of transferor, fiduciary, beneficiary or donee concerned in transaction which may be taxable transfer inter vivos must file with probate court having jurisdiction of administration of transferor's estate, copy of instrument evidencing transfer or, if there is none, written statement of details of transaction; and unless taxability or nontaxability is conceded, probate court decides question of taxability. (§ 12-359).

Filing of reports as to inter vivos transfers may be dispensed with by probate court, upon request, where such transfers are of cash, bank accounts or U.S. savings bonds and all other property subject to tax is less than the applicable tax exemption. Inventory or appraisal of cash, bank accounts, or U.S. savings bonds may also be waived in certain cases. (§§ 12-360; C.G.S. 12-361).

Within six months after transferor's death, unless time is extended, fiduciary (or transferee) must file with Probate Court a statement (in duplicate) containing all items necessary for correct computation of tax, indicating which items (including non-probate items) are conceded taxable. Probate Court, within ten days after receipt, must forward a copy of this report to

Commissioner of Revenue Services who, within 120 days thereafter, may file objection. If fiduciary and commissioner cannot agree, either may file application for Probate Court hearing on commissioner's objections, and decree of Probate Court shall be conclusive unless appeal is taken. Extensions for filing return may be requested by fiduciary before due date to commissioner and if commissioner does not grant request within 30 days, fiduciary may ask Probate Court for extension. Failure to file return when due shall be grounds for summary dismissal of fiduciary. (§ 12-359). § 12-358 is repealed and substituted. Probate clerks submit uniform report monthly to Commissioner of Revenue Services along with letters testamentary or administration containing required information, certified copies of all wills submitted to probate and returns pursuant to § 12-359. (§§ 12-358, C.G.S. 12-378).

Certificate of Nontaxability.

If no tax is due, commissioner shall issue certificate of nontaxability and no final accounting shall be issued without such certificate. (§ 12-378). Probate Court, however, may issue certificate of nontaxability if such is its opinion, and if commissioner does not object within 60 days thereafter, no tax shall be due from estate. (§ 12-378).

Determination of Tax.

Within 120 days of receipt of tax return (or if objection is filed by Commissioner of Revenue Services, within 60 days after objection is settled) tax commissioner shall file computation of tax with Probate Court and fiduciary. If fiduciary objects to computations, he must file objection with Probate Court within 60 days thereafter, and Probate Court thereupon shall make tax computation after hearing. Computations of commissioner shall be conclusive if no objection is made. (§ 12-367).

Collection and Penalties.

Taxes: (a) Not paid within six months of transferor's death bear interest thereafter at 12% per annum, if time for payment is extended, 11¼% per annum, if extension expires then 12% per annum (§ 12-376[a]); (b) are lien on land transferred, to extent of tax on transfer of that land, from date of filing of certificate of lien in appropriate town clerk's office (§ 12-366); (c) are personal debt of fiduciary to extent of value of property received by him and of transferee to extent of proportion of tax chargeable to transfer to him (§ 12-384); (d) are to be retained by executor or administrator out of estate distributed and, in absence of contrary provisions in will, charged pro rata to distributees receiving taxable transfers (§§ 12-376a; C.G.S. 12-385); (e) are to be collected, if necessary, by fiduciary from transferees liable therefor by probate sale of such portion of transferred property as is necessary to satisfy tax on transfer thereof (§ 12-385). Refunds to estate for overpayment accrued at .67% per month. (§ 12-376[a]).

Where a nonresident decedent leaves an estate in Connecticut that state will protect the domiciliary state in the collection of its inheritance tax if that state furnishes similar protection to Connecticut. Such protection is afforded by Commissioner of Revenue Services furnishing domiciliary state with full information pertaining to estate, by refusing to accept final account of executor or administrator until he has furnished proof of payment of such foreign inheritance tax, and by authorizing foreign tax authorities to petition for accounting and for decree ordering transmission to fiduciary of domiciliary state of sufficient personal property to secure payment of such tax. (§ 12-371).

Refunds.

Where refunds due overpayment shall bear interest at rate of .67% per month. (§ 12-367).

22.07A GAMBLING AND ENTERTAINMENT TAXES:

Admissions and Club Dues.

Tax is imposed equal to 10% paid as dues or fees to social, athletic or sporting clubs. Organization is exempt if its dues are $100 or less. (§ 12-543).

Exemptions for organizations controlled by charitable or religious organizations, government agencies, or nonprofit educational institutions, or organizations operating under lodge system, or college fraternities. (§ 12-543).

Collection procedures and penalties are same as under subhead Amusement Tax, above. (§§ 12-544–556; C.G.S. 33-286).

If corporation fails to file return or pay admissions, cabaret or dues tax and it cannot be collected from corporation, and if responsible corporate officer willfully made that failure, officer is personally liable for full tax. (§ 12-547a).

Amusement tax of 10% is imposed upon any person paying admission to certain amusements except for admission charges less than $1, or for motion picture shows less than $4.50. (§ 12-541). Tax does not apply to organizations exempt from federal income taxes or organizations determined similar by Commissioner of Revenue Services. (§ 12-541).

Each collector must file return for preceding month with tax commissioner last day of next month, or else is subject to penalty of 10% of tax due or $50 whichever is greater plus interest at rate of 1% added interest per month. (§ 12-547). Tax must be paid with return. If commissioner determines deficiency, penalty of 10% of deficiency (or $50 whichever is greater) plus 1% added interest per month. (§ 12-548). Criminal sanctions for willful failure to file return or falsify same may include fine up to $5,000 or imprisonment up to five years or both. (§ 12-551). Collector may appeal to commissioner within 30 days after tax determined in writing. (§ 12-553). Collector may appeal within one month of commissioner's order to Superior Court at Hartford. (§ 12-554).

Municipality may impose 10% tax on charge for admission to any pari-mutuel or off-track betting facility located within municipality. Where tax is imposed, return and tax due on 20th of each month. Penalty for failure to pay tax when due is $10 plus 10% of tax, plus 1% of amount due for each additional month's delay. (§§ 12-579; C.G.S. 12-581).

22.08 GASOLINE AND SPECIAL FUELS TAXES:

Gasoline Tax.

On or after July 1, 1998, 32¢ per gallon of fuel sold, 31¢ per gallon of gasohol sold, payable by distributors to state treasurer for account of consumers, computed on basis of monthly reports filed with Motor Vehicle Commissioner on 25th of each month. (§ 12-458). Fuel consumption by industrial customers and vessels primarily engaged in interstate commerce is subject to taxes at different rates. (§ 12-458). Aviation fuel is not subject to tax. (§ 12-462).

Provision is made for refund of state tax to school, airport bus operators, to those who purchased fuel for use other than propelling of motor vehicles over highway, to U.S. Government, governmental agencies, ambulances owned by hospitals or civic nonprofit organizations, high occupancy commuter vehicles owned or leased by transit district, taxicab owners and livery service operators. (§ 12-459). Circumstances under which Commissioner licenses dealers to purchase tax exempt fuel from distributors and sell it directly (§ 12-462[a]); distributors of fuel who are contractors performing contract services for municipality or school district in this state may file tax returns and pay tax quarterly, not monthly (§ 12-458b); claims for fuel tax refunds are filed in May (§ 12-459[b]).

Health Care Centers.

Each health care center must pay percentage tax on net subscriber charges. (§ 12-202a[a]).

22.09 [RESERVED]

22.10 HOTEL AND RESTAURANT TAXES:

Meals Tax.

See topic 22.17 Sales and Use Taxes.

22.11 INCOME TAX:

Capital gains tax imposed on gains of taxpayer during taxable year from sales or exchanges of capital assets (not otherwise exempt in § 12-506) at rate of 4.5%. (§ 12-506). Tax will not apply to gains received, accrued or credited on or after Jan. 1, 1992. (Act 3 [S.B. 2010], § 156) corresponding to date when personal income tax became fully effective.

Personal Income Tax.

Tax is imposed on Connecticut taxable income of each resident individual, trust or estate at rate of 1.5% for tax years beginning on or after Jan. 1, 1991 and prior to Jan. 1, 1992, and at rate of 4.5% of such Connecticut taxable income for tax years beginning after 1991 and before 1996. Effective Jan. 1, 1996, tax is reduced slightly with 3% rate applied to lowest income bracket, irrespective of taxpayer class or total income level. Initial 3% bracket further increased effective Jan. 1, 1997. (§ 12-700). Tax is imposed on Connecticut taxable income derived from or connected with sources within Connecticut of each nonresident individual, estate and trust. Part-year residents included as well. Credit to taxpayers for tax imposed by another state; notice required for changes in tax paid to other states due to change in income or corrections to returns; time for notice; concession of accuracy of determinations of identification of errors; notice of differences in tax credits due to other state taxes; Commissioner may, by regulation, prescribe exemptions (§ 12-704); taxation of income earned by athletes, entertainers, or performing artists from closed circuit and cable television transmissions of special events taking place in this state but only to extent such transmissions were received or exhibited in this state (§ 12-711); if any taxpayer omits from his income tax return income derived from source in this state, notice of deficiency assessment may be mailed to him within six years after return is filed (§ 12-733b). Commissioner shall follow new and updated procedures for conducting tax deficiency hearings, and garnishing payroll wages. (§§ 12-475, C.G.S. 12-491; C.G.S. 12-707). Commissioner may withhold state income tax refund if taxpayer is in default of student loan made or guaranteed by Connecticut Student Loan Foundation or Connecticut Higher Education Supplement Loan Authority. (§ 12-742[b][1]).

Connecticut Adjusted Gross Income.

Defined as federal adjusted gross income with Connecticut modifications. (§ 12-701[a][20][B]). Holocaust victims' settlement payments are excluded for purposes of determining eligibility for needs-based programs. (§ 1-1l).

Personal Exemptions.

Any individual who files federal income tax return for such tax year as unmarried individual or as married individual filing separately is entitled to personal exemption of $12,000. Amount of personal exemption increases each year and varies through 2007. (§ 12-702[a]). However, if taxpayer's Connecticut adjusted gross income for tax year exceeds $24,000, exemption is reduced by $1,000 for each $1,000 or fraction by which taxpayer's adjusted gross income for tax year exceeds $24,000. In no case can reduction exceed 100% of exemption.

Heads of households are allowed personal exemption of $19,000. If such taxpayer's Connecticut adjusted gross income for tax year exceeds $38,000, exemption is reduced by $1,000 for each $1,000 or fraction by which taxpayer's adjusted gross income exceeds $38,000. Reduction cannot exceed 100% of exemption.

Taxpayers filing joint return and surviving spouses are entitled to personal exemption of $24,000. If such taxpayer's adjusted gross income exceeds $48,000, exemption is reduced by $1,000 for each $1,000 or fraction by which taxpayer's adjusted gross income exceeds $48,000. Reduction cannot exceed 100% of exemption. (§ 12-702).

Credits.

Individuals are allowed income tax credit in amounts ranging from 75% to 1% of tax due depending on filing status and Connecticut adjusted gross income. Amount of tax credit indexed each year through 2007. (§ 12-703[a]). Commencing with 1996 income year, varying credit available for actual property taxes paid on primary residence or privately-owned motor vehicles. (§ 12-704c).

Rebate.

For 1998 income years, individuals received income tax rebate up to $150 of actual tax paid for property taxes paid on primary residence or privately owned motor vehicles. (§ 12-746).

Residents entitled to $50 sales tax rebate in 1999. (§ 12-2q).

Withholding.

Employers maintaining office or transacting business in Connecticut and making payment of any wages subject to personal income tax must deduct and withhold tax from such wages for each payroll period. (§ 12-705).

Payment of Tax.

Returns and payment of tax are due on or before 15th day of fourth month following close of taxpayer's tax year. (§ 12-719). Applicable income tax provisions related to filing, payment, refund, credit and deficiency for nonresident partners of partnership and shareholders of S-corporations doing business or having income derived from or connected with sources in Connecticut. (§ 12-719[b], [c]). Underpayments bear interest at rate of 1% per month. (§ 12-722). Penalties for underpayment exist. (§ 12-722). Extensions. (§§ 12-723, C.G.S. 12-735). No penalty for nonpayment of excess tax due if such unpaid tax is no greater than 10% of tax shown on return and balance due is paid on or before extension date. If taxpayer's federal income tax return is modified by authorized entity, taxpayer must provide notice of charge/correction to Commissioner by filing amended return within 90 days after final determination and concede accuracy of determination or challenge errors. Commissioner may redetermine tax and taxpayer shall be required to pay tax for any taxable year without regard to statutes of limitation otherwise applicable (§ 12-727[b]); if taxpayer complies with § 12-704 and timely files amended tax returns and is entitled to refund, such claim shall be deemed timely regardless of statute of limitations (§ 12-732[b]).

Estimated Tax.

If taxpayer's Connecticut taxable income or, in case of nonresident, such taxpayer's Connecticut taxable income derived from or connected with sources within this state, can reasonably be expected to exceed $200, taxpayer is required to make declaration and payment of estimated tax. No taxpayer is required to make such declaration if tax on taxpayer's

Connecticut taxable income, other than $200 from wages can reasonably be expected not to exceed tax withheld. Declaration of estimated tax must be filed on or before Apr. 15 of tax year, and payments of estimated tax are due at time of filing declaration and on or before 15th day of June, Sept. and following Jan. Declaration of estimated tax is due later in year and fewer installments are required if requirements for reporting and paying estimated tax are first met later in year. (§ 12-722).

Estate Income and Gift Tax.

Connecticut estate income tax does not apply to income of any estate for any income year beginning on or after Jan. 1, 1991. Tax had been imposed to absorb maximum credit allowed against federal estate tax.

For calendar year 1991 and each year thereafter, tax is imposed on transfer of property by gift during tax year by any individual resident or nonresident. However, for 1991 only, tax is imposed only on those gifts that are transferred on or after Sept. 1, 1991. (§ 12-640). Tax does not apply to transfer of any tangible personal property and real property having situs outside Connecticut. (§ 12-641).

Gift tax rate varies depending upon amount of taxable gift. (§ 12-642[a]). Tax is to be paid by donor. (§ 12-642). Returns and payments are due on or before Apr. 15 following close of calendar year during which gift was made, except, where gift is made during calendar year when donor dies, filing deadline is governed by applicable federal estate tax deadline. (§§ 12-645; C.G.S. 12-644). Taxes imposed on undisclosed gifts may be assessed at any time. (§ 12-644). Credit against succession tax for gift tax paid with respect to gifts includable in donor's gross taxable estate. (§ 12-648). Exemption from transfer taxes (gift or succession) provided for “annual exclusion gifts” made ($10,000 per year per donee; $20,000 with spousal gift splitting). (§ 12-643). Gift tax overpayment refundable with statutory interest. (§ 12-647).

Electronic Funds Transfer.

Taxes withheld from income electronically transferred by employer and time for crediting tax; imposition of penalty for untimely tax payments. (§§ 12-39a, C.G.S. 12-687).

Dividend and interest income tax increases from 0.75% to 9.5% on adjusted gross income starting at $54,000 and is imposed along with capital gains tax. Similar conditions of taxpayer liability apply as in capital gains tax imposition. (§ 12-506). Tax will not apply to dividends and interest received, accrued, or credited on or after Jan. 1, 1992, corresponding to date when personal income tax became fully effective.

Other Income Taxes.

Corporation Business Tax.

See category 2 Business Organizations, topic 2.03 Corporations.

LLC, LLP, LP, and S-Corporations.

Liable for tax imposed by § 12-248b for each taxable year, or portion thereof, that such company, partnership or corporation is affected business entity as defined by subsection (a)(6). (§ 12-284b[b]).

Insurance Companies.

See category 16 Insurance, topic 16.01 Insurance Companies.

Railroad and street railway corporations must pay on or before July 1 annual tax upon gross earnings from all sources of operation in state. (§ 12-249). Street railway rate is 3%. Rate for other railways varies from 2% to 3½% depending on extent to which operating net income exceeds 8% of gross earnings. If operating net income does not exceed 8% of gross earnings, rate is 2%, if it exceeds 8%, but not 10% rate is 2¼%, etc. Allocation formula is used where only part of railway lies in state. (§ 12-251). Certain railroads may qualify for tax exemption upon certification by PUC if net income is less than 12% of gross earnings, upon payment of $20 fee. (§ 12-251). Taxation of railway operating revenues; return to be filed 7/1 and signed by Treasurer and specify operational information as of 12/31 or portion of year in which company did business including assessed value of property. (§ 12-250).

Taxes on gross earnings are in lieu of all other taxes, except that real estate, when not used exclusively for railroad purposes, is taxed locally. (§ 12-255). Amount of such real estate taxes is deducted from amount of tax on gross earnings. (§ 12-251). Owners of securities of such corporations incorporated in state are exempt from tax thereon. (§ 12-255).

Annual return must be filed with Commissioner of Revenue Services on or before July 1. (§ 12-250). Companies may file objections with commissioner to apportionment method in § 12-249. (§ 12-268a). Interest on unpaid tax is 10% (or $50 whichever is greater). (§ 12-268d). Penalty for fraudulent filing not more than $1,000. (§ 12-268e). Fiduciaries responsible for filing and tax payments. (§ 12-268b).

Water, gas, electric and power companies must pay quarterly tax upon gross earnings from operations in state. Company that sells water is not taxable unless it is water company as defined under public utility control statutes defined in § 16-1. (§ 12-264). Rate of tax of 5% of gross earnings (rate of 4% for seller or distributor of gas or electricity to be used for light, heat or power), but deduction may be made of all sales of water, steam, gas, and electricity to other public service corporation for resale, and of sales of appliances using water, steam, gas, or electricity, whether or not such purchasers are Connecticut public service corporations or Connecticut municipal utilities. (§ 12-265). Public utility sales of natural gas as motor vehicle fuel exempt from gross earnings tax through 1999. (§ 12-264). If part of business is outside state, portion of gross earnings, represented by ratio of miles of water or steam pipes, gas mains or electric wires operated within state to total number of miles operated is subject to tax. (§ 12-265). This tax is in lieu of all state license or income taxes and of all taxes upon intangibles.

Quarterly return with payment must be filed on or before last day of Jan., Apr., July, and Oct. of each year. (§ 12-264). Commissioner determines tax and notifies company of amount before June 15. It is payable on July 15 and is lien on property on account of which tax is laid until paid, and takes precedence over any other encumbrance. Unpaid taxes bear interest of 1½% per month. Interest rate drops to 1% per month, effective July 1, 1995. (§ 12-268h). Company may appeal action of Commissioner within 30 days to superior court of county in which taxpayer is located. (§ 12-33). Taxation of utility companies; returns to be signed by Treasurer or authorized agent or officer and must specify gross earnings, name and type of utility, miles of pipeline operated on first and last calendar days of prior year. (§ 12-264).

Persons operating community television system or certified competitive video service and business that provides one-way to video programming subscriber by satellite must pay quarterly tax upon gross earnings (§ 12-256); 5% flat-tax on gross earnings; computation dependent on whether persons doing business are wholly within State limits (§ 12-258); for telecommunications companies subject to rate regulation and in markets in which competition is prohibited, tax equals assessed personal property of company times median mill rate for all towns in state (§§ 12-256; C.G.S. 12-258). Taxation of telecommunications service providers and election of manner of taxation dependent upon whether taxpayers were subject to tax under c. 211 or 219. (§ 12-80a). Tax collectors' rights upon delinquency. (§ 12-80a[b]). Allocation is made where company also has operations without state. (§ 12-256). This tax is in lieu of all other taxation in state upon such companies and upon companies furnishing, leasing, or operating railroad cars, and upon tangible and intangible personal property used in such business. Real estate here is assessed and taxed locally. (§ 12-30).

Company must file quarterly return. (§ 12-256). Company may appeal within one month to superior court in county where taxpayer is located. (§ 12-33). If tax not paid, it bears interest at 1½% per month until paid.

Air carriers which make landing or take-offs in state are subject to corporation business tax. (§ 12-248). Special provision governs allocation of income attributable to business done in state. (§ 12-244). Real and personal property, except flight equipment, is taxed locally in accordance with applicable law. (§ 12-245).

Returns must be filed on calendar year basis unless books closed on a fiscal basis with approval of Civil Aeronautics Board. (§ 12-246). Certain provisions of corporation business tax are made expressly applicable. (§ 12-248). See category 2 Business Organizations, topic 2.03 Corporations.

Motor Vehicles.

Liability for property tax for motor vehicles registered between Oct. and Apr. of assessment year; pro rata taxation if motor vehicle registered after Oct. (§ 12-71b).

22.12 INHERITANCE TAX:

No tax denominated as such, but see under topic Estate Tax.

22.13 [RESERVED]

22.14 MOTOR VEHICLE TAXES:

Road Tax.

Motor carriers using Connecticut highways are subject to road use tax at rate equal to gasoline tax per gallon of fuel burned on Connecticut highways, but are credited for amounts of fuel purchased within state. (§§ 12-478–12-493).

Automobile Rental Surcharge.

Surcharge equal to 3% of total amount charged to rent private passenger vehicle for period of less than 31 days is to be collected and remitted by lessor. (§ 12-692). Motor vehicle repair shops exempted. “Rental company” excludes entities licensed as new car dealer, repairer or limited repairer or as used car dealer that is not primarily engaged in business of renting passenger motor vehicles without driver in Connecticut to lessees (§ 12-692[a][2]); “lessee” defined as one who leases passenger motor vehicle from rental company for personal use; registration and titling fees where rental company rents vehicle from another and then re-leases vehicle. Rental truck is vehicle rented without a driver and with gross weight rating of 26,000 lbs. or less and used to transport personal property; or trailer with gross weight of not more than 6,000 lbs. (§ 12-692). Surcharge shall be imposed on rental of heavy equipment, similar to surcharge currently existing on rental motor vehicles and trucks. (§ 12-692). Truck rental companies that accept reservations for transportation of personal property secured with financial instruments must provide vehicle rented, or comparable vehicle, at time and date specified, and post notices to that effect. (§ 42-451).

22.15 [RESERVED]

22.16 PROPERTY TAXES:

Property tax applies to all real estate, not otherwise exempted, located in Connecticut (§ 12-64); all tangible personal property located in any town for three months or more owned by nonresident having no established place for conducting business in town (§§ 12-43; C.G.S. 12-59) and all other tangible personal property owned by residents of Connecticut (§ 12-71, am'd PA 08-150, § 56), except certain property specifically exempted (§§ 12-81, am'd PA 09-176, PA 09-226, § 1).

Assessment.

Assessor's duties and responsibilities, methods of assessment, property inspections, access to public records, notice of revaluation, penalties for failure to revalue, use of revaluation companies, and notice to taxpayers governed by § 12-62. (See also § 12-62.) Real estate including easements in air space is subject to tax in town where located. (§ 12-64). Personal property is taxed in town of residence. (§ 12-71). Tangible property of nonresident is taxed in town where it is located. (§ 12-43). Property of trading or mechanical business is assessed in name of owner in town where business is carried on. (§ 12-58). Increases in tax assessments may be phased in over course of no more than five years including revaluation year. (§ 12-62c, am'd PA 09-196, § 4). Municipalities may limit increases in assessments of residential property and apartments resulting from revaluation. (§ 12-62n). When municipality has elected to phase-in assessment increases, annual assessed value must reflect same percentage increase in assessments of comparable properties for same assessment year. (§ 12-62m). Municipality may adjust market values annually based on prior year sales. (§ 12-62o).

Taxpayers must, on or before Nov. 1 of each year, file with assessors of towns in which their property is taxable, on forms provided them, list of their taxable personal property owned as of preceding Oct. 1. (§ 12-41). Supplement shall be provided for machinery and equipment eligible for grant. Town will determine value of depreciated property for purposes of § 12-94b. (§ 12-63). Assessors may require owners of rental income property to disclose annual rental income and operating expenses on or before June 1. (§ 12-63c, am'd PA 09-196, § 3). In case of business organization with goods for sale, average monthly quantity of goods on hand during preceding year, instead of amount on hand on Oct. 1, must be listed. (§ 12-58). For failure to file list, taxpayer is liable to 25% increase in assessment. (§§ 12-41, C.G.S. 12-43, C.G.S. 12-53; C.G.S. 12-111). Assessors fill in and list valuation of property at “its present true and actual value” or at uniform percentage of true and actual valuation (§ 12-64), revalue property at least every five years as of Oct. 1 (§§ 12-62; C.G.S. 12-62a[a]–12-62[d]), notify taxpayer of any additions to list or increases in valuation over prior years, and if there is increase in personal property assessment, and assessor or board of assessors used different methodology than that previously used notice shall include statement concerning change in methodology (§§ 12-53, C.G.S. 12-55), examine persons failing to file lists as required (§ 12-54), make out lists for those failing to file lists or where property has been omitted (§§ 12-42, C.G.S. 12-53), arrange all lists thus prepared in alphabetical order (which set of lists constitutes “grand list”) and lodge grand list, together with abstract of lists, with town clerk for public inspection, all on or before Jan. 31 next following date for filing lists (§ 12-55), unless extension not exceeding one month is granted by Secretary of Office of Policy and Management (§ 12-117, am'd PA 06-148, § 3). Commencing Oct. 1, 2006, town-wide reassessment of taxable real estate must be undertaken at least every five years. (§ 12-62, am'd PA 06-148, § 1). However, Office of Policy Management may permit postponement of revaluation to next assessment date upon written request of Board of Assessment of Appeals if appeals pending before such Board are too numerous. (§§ 12-117; C.G.S. 12-62a[d] and [e], repealed, PA 06-176, § 4; C.G.S. 12-62a[f], repealed PA 06-148, § 10). Towns may apply to Secretary of Office of Policy and Management for exemption or pay penalty for failure to revalue. (§ 12-62). Valuation of land classified as farm land, forest land, open space or maritime heritage land is based on use. (§ 12-63[a]). Commissioner of Agriculture may provide advisory opinion as to what constitutes agriculture or farming or what land may be classified as farm or open space land. (§ 22-4c). Buffer strips near wetlands shall be taxed at same rate as wetlands. (§§ 12-63g, C.G.S. 12-107a, am'd PA 07-127, § 3; C.G.S. 12-107c[b]; C.G.S. 12-107d[g], C.G.S. 12-107e, C.G.S. 12-504a; C.G.S. 12-504c–12-504f; C.G.S. 12-504h). Depreciation schedule established for electronic data processing equipment. (§ 12-63[b]).

Review of Assessment.

Board of assessment appeals of each town meets during month of Mar. each year (§ 12-110) to review doings of assessors in behalf of taxpayers appealing to board for relief, or on its own motion (§ 12-111), and prepares, after due notice to affected taxpayers, supplemental lists showing additions or deductions of items and increases or decreases in valuation (§§ 12-111; C.G.S. 12-115), resulting from board's deliberations, all of which duties board must complete no later than last business day of Mar. (§ 12-110); unless extension not exceeding one month is granted by Office of Policy and Management (§ 12-117). Board of assessment appeals of each town also meets at least once in Sept. solely to hear appeals relating to motor vehicle assessments. This duty must be completed before last business day of Sept. (§§ 12-110; C.G.S. 12-112). Property owner appealing assessment must do so in writing prior to Feb. 20th, unless extension granted to municipality to complete reassessment pursuant to statute, in which case deadline for appeal to board of assessment appeals is Mar. 20. (§ 12-111). Board of assessment appeals to schedule hearing during Mar. or Apr. depending upon filing deadline, and provides minimum of seven days' notice to taxpayer. Board need not schedule hearing on commercial, industrial, apartment, or utility property assessed at more than $500,000. (§ 12-111). Appeal from local board to superior court which may grant equitable relief to persons aggrieved. (§ 12-117a). Appeal must be brought within two months of board's determination. (§ 12-117a). Venue is judicial district in which property at issue is located. (§ 12-117a).

Credit.

Certain persons over 65 with qualifying income under $20,000 if married and under $16,200 if unmarried are entitled to credit based on amount of their “qualifying income.” (C.G.S. 12-170aa). Municipalities may provide property tax relief to residents 65 or over and residents eligible because of disability. (§ 12-129n). Reduction in payment of real property taxes by owner, tenant for life or tenant for term of years if certain conditions are satisfied. (§§ 12-48, C.G.S. 12-129b, C.G.S. 12-129c). In addition, tax benefit to owners of damaged buildings who provide for their complete demolition. (§ 12-64a). Residents subject to tax per § 12-701(a)(1) are entitled to income tax credit regarding liability under c. 229 for all or portion of property tax due and paid during taxable year on primary residence or motor vehicle as set forth (§ 12-704c); “property tax” defined as amount of property tax exclusive of interest, fees or charges thereon for which taxpayer(s) are liable. Property tax first becomes due, if due and payable in single installment, on date designated by municipality, if due and payable in two or more installments, on date designated by municipality or, at election of taxpayer, on date designated by municipality or date on which earlier installment was due and payable.

Exemptions.

There are variety of exemptions for governmental, charitable, scientific, education and other entities. In addition, qualifying taxpayers are entitled to numerous exemptions. (See §§ 12-81, am’d PA 09-176, PA 09-226, § 1, et seq.; C.G.S. 12-91; C.G.S. 12-92; C.G.S. 12-104; C.G.S. 12-107a; C.G.S. 12-88a.) In general, exemptions are lost upon acquisition of property by another taxpayer, and acquiring taxpayer is liable for pro rata portion of tax for part of year of his ownership. (§ 12-81a). Qualifying income does not include veterans' disability payments. (§ 12-81l). Municipality that purchases property from State may elect tax exemption or payment in lieu of taxes. (§ 12-125b).

Abatement.

A corporation unable to secure working capital loan from a United States Government Agency because of real or personal property taxes assessed may apply to town for abatement, which may be granted only with approval of Commissioner of Revenue Services. Withdrawal of loan application or failure to receive loan applied for rescinds abatement. (§ 12-125).

Municipality may abate real or personal property taxes due or paid by nonprofit land conservation organization in certain instances. (§ 12-81dd).

Payment and Collection.

After completion of work of board of assessment appeals, town levies tax on grand list as supplemented, at such rate as is necessary to raise requisite revenue. (§ 12-122). Town then gives to tax collector of town signed rate bill showing proportion due from each taxpayer, accompanied by warrant ordering collection. (§ 12-130). Payment date is fixed by town, which may provide for installment payments. (§ 12-142). Any property tax due in any municipality of state in amount not in excess of $100 must be paid in single payment. (§ 12-144). Tax collector may enforce collection of any tax if he believes delay will jeopardize collection. (§ 12-163).

Collection may be made by any tax collector, state marshal or constable of municipality where tax, water or sanitation charge is due upon proper warrant or alias tax warrant in any part of state. (§ 12-135).

Tax collector has same authority as state marshal for execution of tax warrants. Forms and fees for execution of warrant are governed by statute. (§ 12-162).

Tax Identification Numbers.

Municipal tax collectors are authorized to obtain social security and tax identification numbers to identify taxpayers (§ 12-148); Commissioner of Revenue Services shall furnish to town tax assessors list of names/addresses of motor vehicle owners, and vehicle registration numbers, tax identification and/or social security numbers (§ 14-163).

Elderly Homeowners.

Reduction in property tax for elderly homeowners who meet statutory criteria. Procedures for applying for reduction. (§ 12-170v; § 12-170w).

When final day for payment of any tax occurs on Sat., Sun. or legal holiday, payment may be made without interest or penalty on following business day. (§ 12-169).

Lien.

Real estate tax is prior lien on taxed real estate from assessment date until two years from payment date unless continued (§ 12-172), which may be done by collector causing to be recorded by proper town clerk certificate of lien, after which continuation lien remains good for 15 years from continuation date (§ 12-175).

Personal property tax is lien on taxpayer's goods in Connecticut. Lien has priority over all subsequently perfected liens except certain security interests, and is effective for ten years from filing date. (§ 12-195b).

Receiver of Rents.

Where owner is delinquent on property taxes with respect to income-producing property, municipality may petition superior court for appointment of receiver to collect rents or use and occupancy payments. Receiver, upon collection, applies proceeds as follows: (1) current taxes; (2) current utility charges; (3) receiver's fees and costs; (4) municipality's reasonable legal fees; (5) delinquent taxes; (6) such other obligations and/or parties as court may direct. (§ 12-163a).

Sale.

Property tax, water or sanitation charges may be enforced by collector by levy on and sale of taxpayer's personal property in manner of executions or, if person property proves insufficient, collector may levy upon real property (§ 12-155), but his sale of real property must be advertised in manner provided and all owners and encumbrancers must be notified by registered mail (§ 12-157). Taxes become debt enforceable by action in name of community in whose favor assessed. (§ 12-161). Real estate tax lien may be enforced by levy and sale, if completed during life of lien (§ 12-172) by foreclosure in manner of mortgage foreclosures (§ 12-181) or by summary foreclosure proceedings in nature of action in rem when market value of realty is less than encumbrances on property and not more than $50,000 (§ 12-182). No redemption from tax sale is provided for.

By action of selectmen of town, mayor and aldermen of city, or warden and burgesses of borough, collection may be deferred for unusual financial or other circumstances of the taxpayer, and while so deferred interest will not run. (§ 12-174, am'd PA 09-213, § 1).

Refund for overpayment of property tax may be obtained on application in writing to tax collector within three years. (§ 12-129).

Penalties.

Failure to file list of taxable property may result in 25% additional assessment. (§ 12-42). Failure to pay property taxes on time results in assessment of interest at rate of 1½% per month or fraction thereof. (§ 12-145). Provision also made for lien of real estate (§ 12-173) and foreclosure thereof with tax sales (§ 16-256d). Assessor, if authorized by ordinance, may waive 25% penalty. List of waivers must be published. (§ 12-119a).

Apportioning in Eminent Domain.

When condemning authority apportions real property taxes in manner other than customary, amount of taxes condemned must pay in excess of usual apportionment is element of damages. (§ 48-14a).

Real Estate Conveyance Tax of .50% and .11% of consideration for interest in real property conveyed by such deed, instrument or writing, credited to state general fund and general revenue of municipality, respectively when consideration for interest or property conveyed equals or exceeds $2,000. (§ 12-494[a], [c]). No tax imposed on deeds enumerated in § 12-498 or deeds of principal residence of person approved for assistance under § 12-129b or C.G.S. 12-170a or deeds of property located in enterprise zone designated in § 32-70. (§ 12-498). Qualifying income (§ 12-170d[b]); if married renter applies for grant and is legally separated on 12/31 preceding date of application, he may apply as unmarried person for purposes of qualifying income; reduction of property tax for qualifying residents over age of 65 (§ 12-170aa[b]); exemption of taxation of certain deeds per § 12-494 (§ 12-498[a]). Real estate conveyance tax provisions of § 12-494 shall not apply to employers or other entities in business of purchasing homes from employees who have moved pursuant to employee relation program. (§ 12-498[a]). No tax imposed on transfer of burial rights to cemetery lot. (§ 12-497a). If conveyance of real property used for any purpose other than residential use at time of conveyance tax shall be imposed at 1% of consideration for interest in real property conveyed and if conveyance is of residential estate for which consideration is in excess of $800,000 tax shall be imposed at ½% of consideration up to and including amount of $800,000; rate of 1% on portion over $800,000. (§ 12-494[b]). Tax of .50% of consideration for interest in real property conveyed to financial institution which holds mortgage on such real property which has been delinquent for not less than six months. (§ 12-494[b]). Tax of .11% imposed on any sale or transfer of controlling interest in any entity which possesses interest in real property in state when value of interest so conveyed equals or exceeds $2,000. Tax payable by person conveying such controlling interest. Return and payment due from sale or transfer due on or before last day of month following month sale or transfer occurred. (§§ 12-638b; C.G.S. 12-638c). Conveyance tax between 1% and 10% on sale of open space land within ten years of initial classification, and conversion of such land to other uses taxable as conveyance. Said tax also applied upon sale of farm or forest land within ten years of initial classification or purchase by vendor. (§ 12-504[a]). Said tax also applied if controlling interest in property also sold or conveyed. (§ 12-638l).

22.16A REAL ESTATE CONVEYANCE TAX:

See topic 22.15 Property Taxes, subhead Real Estate Conveyance Tax.

22.17 SALES AND USE TAXES:

Sales Tax.

Imposed upon retailers for privilege of "making any sales . . . . ." (§ 12-407; see also § 12-408[1]). "Sale" and "selling" mean and include: (a) Any transfer of title, exchange or barter, in any manner of tangible personal property for consideration; (b) any withdrawal of tangible personal property from place located for delivery to point in this state for purpose of sale; (c) producing, fabricating, processing, printing or imprinting of tangible personal property for consideration for materials used but not limited to, computer programming, sign construction, photofinishing, duplicating, and photocopying (*Note:* sales tax on computer and data processing services being phased out over six years in 1% increments beginning July 1, 1997 [12-408(1)]); (d) furnishing and distribution of tangible personal property for consideration by social clubs, etc.; (e) furnishing, preparing, serving food, meals, drinks, for consideration; (f) transaction which transfers possession of property but not title as security for payment of price; (g) transfer for consideration of title of tangible personal property produced, fabricated, or printed to special order of customer or publication, including but not limited to computer programming, sign construction, photofinishing, duplicating, and photocopying; (h) transfer for consideration of occupancy of any room or rooms of hotel or lodging house for 30 consecutive days or less; (i) rendering of certain services for consideration, specified in § 12-407; (j) leasing or rental of tangible personal property; (k) rendering of telecommunications service as defined in subsection 26 of § 12-407; (l) rendering of community antenna television service so defined in § 12-407(27); (m) rendering of transportation service as defined in subsection 28 of § 12-407; (n) transfer for consideration of space for purpose of storing or mooring any noncommercial vessel; (o) business services for evaluating, preventing, or treating hazardous waste, or contaminants of air, water, or soil that are not hazardous wastes. Tax on coin operated telephones shall be computed to nearest multiple of 5¢ except if tax midway, higher multiple applies. (§ 12-408). Term "distributor" changed to "importer" regarding penalties for failure to comply with statute (§ 12-330e); refund of tax paid by retailers to be reimbursed by taxing consumers, collecting sums and depositing in special trust for state; credit for tax will be allowed within three years unless special waiver obtained (§ 12-408[2]). Definition of "retailer" includes persons who make retail sales of items of tangible personal property from outside state to destination within state and do not maintain place of business in state who repair or service such items, under warranty, in state, either directly or indirectly through agent, independent contractor or subsidiary. (§ 12-407[a][12]). Definition of "engaged in business" includes retailer who meets requirements of § 15 above. (§ 12-407[a][15]). Definition of "services" governed by § 12-407). Services taxed are exclusive of services by employee for his employer. (§ 12-407[a][2]). Renovation and repair services provided to other than industrial, commercial or income-producing real property: paving of any sort, painting or staining, wallpapering, roofing, siding and exterior sheet metal work. Amusement and recreation services included in Major Group 79 of Standard Industrial Classification (SIC) Manual are subject to tax, excluding any such service provided by government, state of Connecticut (or subdivisions), nonprofit charitable hospitals, or charitable or religious organizations. Photographic studio services, tax preparation services, and miscellaneous personal services included in Industry Group 729 of SIC Manual. Rendering of transportation service for consideration is exclusive of any such service rendered by employee for his employer. Tax does not apply to transportation services rendered by any person along regular, scheduled route or any person causing to be operated taxicab or commercial motor vehicle. (§§ 12-407; C.G.S. 12-412). Hybrid passenger cars exempt from gross receipt taxes. (§ 12-412[115]).

Rate of sales tax is 6% of gross receipts, except that differing rate of gross receipts is imposed on: (a) Sales of machinery used exclusively in manufacturing process, (b) rendering of certain services specified in §§ 12-407; C.G.S. 12-408; per § 12-408, sales tax rate is 4½% of gross receipts for sale of motor vehicles to members of armed forces of U.S. on full-time active duty in this state who are residents of another state per 50 App. USC 574 or to such individuals and their spouses (§ 12-408[1]); and (c) sales of 8¢ or less, provided records acceptable to Commissioner of Revenue Services are maintained. Commissioner of Revenue Services is authorized to permit alternative method of reporting sales tax by multiplying total receipts by 94.3% to determine what portion thereof represents sales tax. (§ 12-414). Any person doing business with nonresident contractors may be required to deposit 5% of total contract with Commissioner of Revenue Services. (§ 12-430). Exemptions: (1) Sales of tangible personal property and services to U.S., State of Connecticut or any political subdivisions thereof, or its or their respective agencies; (2) sales or services which State of Connecticut is prohibited from taxing under federal constitution; (3) sales, furnishing, or service of gas (including bottled gas), electricity when delivered to consumers through mains, lines, pipes or bottles and used in residential building or directly in agricultural production fabrication of finished products to be sold or industrial manufacturing plant provided exemption only allowed at metered building, location or premise at which not less than 75% of gas, or electricity consumed is used for production, fabrication or manufacturing; sale or furnishing of telephone service and community antenna television and cable service; sale, furnishing or service of water, steam, telegraph, when delivered through mains, lines, pipes, or bottles (§ 12-412); (4) sale of medicine, syringes and needles only by prescription and certain non-prescription drugs or medicines including those used to treat eye diseases (§ 12-412[48]); (5) sales or services to and by nonprofit charitable hospitals, payments for patient care services received by hospital (§§ 12-407, C.G.S. 12-408); (6) subscription newspapers and magazines (§ 12-412[6]); (7) sales or services to charitable and religious organizations, and educational institutions; (8) sales of cigarettes (which are taxed under different formula); (9) children's clothing; (10) sale of clothing or footwear costing less than $300/item from 3d Sunday of Aug. through succeeding week (§ 12-407e); (11) personal services (except those described in § 12-407[a][2]); (12) sales of livestock and poultry, equines, except horses racing at commercial racetrack in Connecticut, feed, seeds, plants and fertilizer; (13) sales of certain food products; definitions of “food products”, “meal” and “eating establishment” (§ 12-412[13]); (14) motor vehicle fuel (which is taxed under different formula) and domestic fuel; (15) containers (§ 12-412[14]); (16) sales and storage or use of any equipment that becomes ingredient or component part in fishing industry or industrial plant where finished product may be sold (§ 12-412[18]); (17) sale of and storage, use and consumption of tangible personal property for use in agricultural production; production materials which become part of tangible personal property to be sold or are used directly in agricultural production or in process of manufacture of tangible personal property to be sold; also materials used in furnishing power, gas, steam, water or electricity when delivered to consumers through mains, lines or pipes; (18) sales of and repair services related to oxygen, blood, crutches, wheel chairs, hearing aids, artificial limbs, supports, life support equipment, etc.; (19) flyable aircraft and equipment; (20) sale or consumption of tangible personalty for control or elimination of air pollution; (21) sales of U.S. and Connecticut state flags; (22) municipal publications such as zoning regulations, etc., and library book sales; (23) sales, under $5 by public libraries or by municipality at auction; (24) sales for not more than $20 by nonprofit youth organizations and schools (§ 12-412); (25) sale of tangible personal property to and by senior citizen organizations; (26) sales of and storage, use, other consumption of tangible personal property acquired for incorporation, use or consumption in operation of moderate and low income facilities constructed by nonprofit housing organizations; (27) sales and storage, use and consumption of ambulance type motor vehicles used exclusively as such, except transportation for payment; (28) sales of and storage, use or other consumption of any equipment designed exclusively for use by persons who are deaf or blind for purposes of communication by telephones; (29) sales or installation of alternative energy systems including their parts and components, prior to 7/1/85, primary purpose of which is reducing use of conventional energy sources; (30) sales of any replacement parts for machinery to any business entity located in any enterprise zone (§ 12-412[43]); (31) sales of services used to determine human health (§ 12-412[41]); (32) sales of vessels designed exclusively for use in commercial fishing (§ 12-412[40]); (33) sales of aircraft held for resale by certain air carriers (§§ 12-411; C.G.S. 12-412[42]); (34) sales of home delivered meals to elderly, disabled, and other homebound persons (§§ 12-412[46]; C.G.S. 12-412[13]); (35) sale of clothing or footwear less than $50 (§ 12-412[47]); (36) property tax on leased motor vehicles paid by lessee; (37) motion picture leasing or rental; (38) sales of certain services by corporate shareholder or partner in joint venture for new or experimental products with corporation or partnership; (39) any sale of cloth or fabric for noncommercial sewing; (40) sales of certain products used in care of diabetes; (41) sales of personal property by funeral establishment up to $2,500; (42) sales of item for not more than $100 made by gift shops located in nonprofit nursing homes, convalescent homes or adult day care centers provided profit from sales are retained for benefit of patients (§ 12-412); (43) sale of aviation fuel used in experimental testing (§ 12-412); (44) sale of motor vehicle to nonresident (§ 12-412); (45) sale, storage, use of ambulance licensed under § 19a-180, am'd PA 09-232, §§ 33, 71 (§ 12-412); (46) receipts from purchase of any motor vehicle, snowmobile, vessel or aircraft other than from licensed motor vehicle dealer, snowmobile dealer, licensed marine dealer or aircraft retailer shall not be included in measure of sales tax but purchaser shall pay use tax on total purchase price (§ 12-431); (47) sales of and storage, use, other consumption of equipment used directly in production and cleaning of computer discs (§ 12-412); (48) sales, rentals and leasing of commercial trucks, truck tractors, tractors and semitrailers, and vehicles used in combination therewith, which: (a) have gross vehicle weight rating in excess of 26,000 lbs., or (b) are operated actively and exclusively for carriage of interstate freight pursuant to certificate or permit issued by Interstate Commerce Commission (§ 12-412); (49) machinery, equipment, tools, materials and supplies used exclusively in production of printed material by commercial printer are exempt from tax. Also exempt are machinery, equipment, tools, materials and supplies used exclusively in production of typesetting, color separation, finished copy with type proofs and artwork or similar content mounted for photomechanical reproduction, or other similar products to be sold for use in production of printed materials (§ 12-407, C.G.S. 12-412); (50) sale of any part of machine purchased exclusively for purpose of assembling machine for use directly in manufacturing production process; (51) sale, storage or use of aviation fuel for aviation purposes; (52) on or after July 1, 1993, sale, storage or use of aircraft repair or replacement parts; (53) on or after July 1, 1993, sale of aircraft repair services; (54) on or after July 1, 1993, sale, storage or use by aircraft manufacturer of materials, tools, fuel, machinery and equipment used in facility; (55) sale, storage or use of bunker fuel oil, intermediate fuel, marine diesel oil and marine gas oil for use in vessel displacing 4,000 dead weight tons; (56) sale, storage or use of special equipment installed in motor vehicle for exclusive use of person with physical disabilities (§ 12-412); (57) on or after July 1, 1996, sales and services provided to private water company for use in maintaining, operating, managing, or controlling any water distribution system or plant that services 50 or more customers (§§ 12-407, C.G.S. 12-412, C.G.S. 12-458); (58) on or after July 1, 1997, sales tax for boat repair and maintenance services is phased out in two steps, eliminated entirely on July 1, 1999; (59) sales of tangible property made on hospital property by tax-exempt organizations. (§ 12-412[5]).

Retailer must make return and pay tax to Commissioner of Revenue Services quarterly on last day of month succeeding close of calendar quarter. (§ 12-414). Reimbursement for tax is collected by retailer from consumer, with certain exceptions. Nonresident contractor who enters into contract for tangible personal property to be consumed in State of Connecticut shall deposit with commissioner 3% of total amount to be paid under contract or furnish guarantee bond in that amount to secure payment of sales tax. Person dealing with nonresident contractor shall deduct 3% from payment of contract or secure guarantee bond in that amount and pay over same to commissioner. (§ 12-430).

If corporation fails to file return or pay sales tax and it cannot be collected from corporation, and if responsible corporate officer willfully made that failure, officer is personally liable for full tax. (§ 12-414a).

Changes and additions to sales tax collection and proceeds allocation. (§ 32-305). Payment of up to 50% of assessed tax actually collected to another state's revenue agent if information provided by that agent was instrumental in making assessment. (§§ 12-407, C.G.S. 12-416; C.G.S. 12-416b).

Use Tax.

Excise tax is imposed on storage, acceptance, consumption or any other use in this State of tangible personal property purchased from any retailer, for storage, use or other consumption in this State, or for any service as described in § 12-407, at rate of 6% except: (a) at rate of 5½% for repair or replacement parts for use in agricultural or manufacturing machinery as in § 12-412, (b) 4½% rate for motor vehicles sold to armed forces member on full time active duty in state but permanent residence out-of-state, (c) 12% of rent paid for hotel room not exceeding 30 days, (d) vessels purchased from any retailer and used in state by out-of-state resident, lesser of (1) 6% of sales price of (2) percentage payable as use tax in purchaser's state of residence (§ 12-411[1]); also except: (1) Storage, acceptance, consumption or other use in this state of property, gross receipts from sale of which are required to be included in measure of sales tax; (2) exemptions under sales tax; (3) storage, use or other consumption in this state of property purchased from any unincorporated agency or instrumentality of U.S. except (a) any property reported to Surplus Property Board of U.S. as surplus by any owning agency, and (b) any property included in any contractor inventory; (4) individual purchase of tangible personal property when price does not exceed $25, provided purchase is for personal use or consumption, and not for use in business or trade (§ 12-413). Retailer must make returns and payments same as in case of sales tax. (§ 12-411). Excise tax of 4½% of sale price of vehicle purchased for storage, acceptance, consumption or use in this state by one in armed forces of U.S. on full-time active duty in this state who is resident of another state per 50 App. USC 574 or to such individual and spouse. (§ 12-411[1]). Companies subject to quarterly petroleum tax; changes to definitions of “company”, “gross earnings”, “first sale of petroleum products in this state”, exempt gross earnings; tax rates. (§§ 12-412, C.G.S. 12-587; C.G.S. 14-344d; 16a-22c). Companies liable for tax on gross earnings from first sale of petroleum products within this state for export and sale outside of state. (§§ 12-587a, b).

Penalties.

(Apply to both Sales and Use Taxes.)

Deficiency assessment may be made by Commissioner to bear interest at 1¼% per month to date of payment. Additional 10% penalty on amount of assessment imposed if negligent or intentional failure to file and 25% penalty for fraud. (§ 12-415). Jeopardy assessments (§ 12-418) and liens of real estate (§ 14-420) are provided as collection methods. Criminal sanctions for failure to file return or falsify same may include fine up to $5,000 and/or imprisonment up to five years. (§ 12-428). Minimum prison sentence of one year. (§ 12-428). Notices of deficiency to be mailed within three years after last day of month following period for which tax is proposed to be assessed or within three years of filing return. (§ 12-415[7]).

Dry Cleaners Surcharge.

Effective July 1, 1994, surcharge of 1% of gross retail receipts levied on all dry cleaners using tetrachlorethylene or Stoddard solvent or other chemicals for cleaning clothing or furniture. Proceeds are to be applied to new Dry Cleaning Establishment Remediation Account, available for grants to fund containment, mitigation, and/or remediation of dry cleaner-related pollution. Grant applicant for environmental remediation will receive no more than $300,000 per calendar year. Eligible dry cleaning establishment defined. (§ 12-263m, am'd PA 08-124, §§ 2, 3). Payments and return due quarterly, beginning with quarter commencing July 1, 1994. (§ 12-263m, am'd). If surcharge is not paid when due, penalty of greater of 10% of amount due or $50 shall be imposed. (§ 12-263m).

22.18 STAMP AND SEAL TAXES:

Stamp Tax.

None, except on cigarettes. No stamps required on corporate stock or other instruments.

22.18A TAX LIENS:

Uniform Federal Lien Registration Act adopted. (§ 49-32a).

23 TRANSPORTATION

23.00A BOATS:

Connecticut Maritime Commission created within Dept. of Transportation; it is successor to Connecticut Port Authority pursuant to §§ 4-38d, C.G.S. 4-39. (§ 13b-51a). Rules for boating safety. (§ 15-131 et seq.). Rules for navigation lights incorporated from federal requirements. (§ 15-129a). Penalties for operating boat or personal watercraft when boating certificate or registration is suspended or revoked, and when failing to stop in effort to elude law enforcement. (§§ 15-156, am'd PA 09-140, § 13, C.G.S. 15-154, am'd PA 09-140, § 12). Penalties for operating boat while under influence. (PA 09-140, § 1, 15-140e, am'd PA 09-140, § 2). Vessels that are not required to display registration decals. (§ 15-143). Fines for failing to submit boat for onsite noise test. (§ 15-129). Permissible uses of vessels registered to marine dealers are expanded. (§ 15-145[d]). No person shall operate or sell motorboat without muffler system in order to enable operation in compliance with noise levels law sets. (§ 15-129). (See also § 15-140b.)

23.01 MOTOR VEHICLES:

Commissioner of Motor Vehicles has general supervision. (§ 14-3). Department of Motor Vehicles, 60 State Street, Wethersfield, Connecticut 06109.

Vehicle registration is renewed every two years. No motor vehicle registration may be renewed by commissioner for any private passenger motor vehicle unless applicant signs and files statement that he or she will maintain minimum security required by § 38-327. Such form shall contain name of applicant's insurance company and his policy number. (§ 14-12b). Commissioner may accept proof of substantially equivalent insurance issued by insurer licensed to transact business in state where motor vehicle is registered in special use registration cases. (§ 14-12b[a]). Registration certificate must be carried with car (§ 14-13[b]), and number plates furnished by Commissioner displayed on rear (§ 14-18[a]). Vehicle validly registered in another state may be driven for 60 days on its old registration following owner's establishment of residence in this state. (§ 14-12[a]). Applicant must furnish personal identification and Connecticut driver's license if he/she has been resident of State for more than 30 days. (§ 14-12[d]). However, Connecticut resident, one who lives in this State for more than six months in one year (§ 14-1), may be fined after 60 days for failing to register vehicle in Connecticut (§ 14-12). No registration of ten-year old vehicle not previously registered in state unless it has passed Connecticut safety inspections; fees to be charged. (§ 14-12[g]). Before issuing registration for used vehicle not previously registered in state Commissioner of Motor Vehicles may require Vehicle Identification Number inspection. (§ 14-12r). “Emancipated minors shall be deemed over 18 years of age for purpose of registering motor vehicles.” (§ 14-12). Registrations expire in accordance with schedules established by Commissioner. (§ 14-22). No registration passed until applicant supplies insurance identification card. (§§ 14-12c-14-12d; C.G.S. 14-12f, am'd PA 09-187, § 12; C.G.S. 14-21b; C.G.S. 14-213b; C.G.S. 38-319a[b]). Vehicles operating without required insurance coverage shall be subject to DMV's standard registration suspension process and $200 fine. (§§ 14-12, C.G.S. 14-50b, am'd PA 09-187, § 52). Mere operation of unregistered vehicle is not negligence nor nuisance. (114 Conn. 262, 158 A. 545). Operation of unregistered vehicle may result in forfeiture. (§§ 14-12h; C.G.S. 14-150). No restoration of registration until evidence of security provided. (§ 14-213b[c]). Fees for temporary registration of commercial and non-commercial vehicles. (§ 14-49[n]). Greenhouse gas reduction fee added to motor vehicle registration fees after Jan. 1, 2007. (§ 22a-201c).

Trailers require special permit. (§ 14-263).

Motorcycles are specially regulated. (§§ 14-50; C.G.S. 14-80). High mileage motor vehicles are specifically regulated in part. (§§ 14-1[a][39]; C.G.S. 14-12b; C.G.S. 14-14; C.G.S. 14-34[a]; C.G.S. 14-49[x]; C.G.S. 14-286; C.G.S. 38-319; C.G.S. 38-319a; C.G.S. 38-323[a]; C.G.S. 7-479e[d]; C.G.S. 14-103b).

Pick-up Trucks. Defined. (§ 14-1). Registration. (§ 14-49[e]). Limitations on maximum gross vehicle weight rating (GVWR) for pick-up trucks and combination registrations. (§§ 14-1[a][12], C.G.S. 14-1[a][70], C.G.S. 14-49[e]). No person operating pick-up truck may have dog in rear compartment unless it is secured. (§ 14-272b).

Snowmobiles and all terrain vehicles regulated for safety and noise pollution concerns (§§ 14-387, C.G.S. 79-390) by municipalities. (§ 14-390). Registration specifically regulated. (§§ 14-381; C.G.S. 14-382).

Farm vehicles required to register every two years. Commissioner shall receive biennial fee of $28 for registration of each farm vehicle. (§ 14-49). No farm registration issued to person operating farm that has less than $1,000 gross annual sales. (§ 14-49).

Members of Armed Forces.

Upon induction of vehicle owner into armed forces, he may surrender vehicle registration and receive pro rata rebate (§ 14-23), no other exemption. Examination waived for two years after separation from military service under certain circumstances. (§ 14-36). Fee waived for Connecticut resident member of armed forces during military service and for two years thereafter. (§ 14-50c). Members of armed forces called to active duty may be exempt from certain fines and late fees. (§ 27-102a[2]).

Operator's License.

Driver License Compact enacted. Effective Jan. 1, 1993.

Each motor vehicle operator's license must be renewed every four or six years from date of operator's birthday. (§ 14-41[a], am'd PA 09-187, § 10). Automobile club or association may perform license renewals at its offices. (§ 14-41[b]). Motor vehicle operator license fees. (§ 14-41). Where license belongs to individual 65 years of age or older, it may, at discretion of licensee, be renewed for either two- or four-year period (§§ 14-41a; C.G.S. 14-50). No motor vehicle license may be issued to any person between 16 and 18 years of age unless certificate prescribed by commissioner signed by parent of applicant or guardian, or spouse or uncle or aunt. Applicants between 16 and 18 required to obtain learner's permit and successfully complete course in motor vehicle operation and complete course of not less than eight hours on safe driving practices including minimum of four hours on alcohol and drug education. (§ 14-36). Driver's license requires minimum of 40 hours of “behind the wheel” instruction. (§ 14-36[d]). 16 & 17 year old drivers must not drive between 11 p.m. and 5 a.m. absent exceptions. Teenage drivers are exempt from certain license restrictions if performing official emergency response duties and may carry more than one parent during first six months of driving. (§ 14-36g). Applications for drivers' licenses may be made subject to statutory penalties for false statement in second degree. (§ 14-36[e]). Secondary school driver education courses may contain 20 hours of "behind the wheel" instruction. (§ 14-36e[b]). Valid operator's license of another state is good for period of 30 days following establishment of residence by owner thereof (§ 14-36), notice of renewal of license (§ 14-41d). Commissioner of Motor Vehicles shall determine if license applicant has held or holds license from another jurisdiction and, under certain circumstances, may refuse to issue license. (§ 14-111k). Driver control records shall be maintained. (§ 14-111l). Persons operating passenger transportation vehicles must first obtain commercial driver's license and passenger endorsement or, if applicable, school bus endorsement. (§ 14-44). Person must obtain special license to operate camp vehicle. (§§ 14-1, C.G.S. 14-36a[c]). Person driving commercial motor vehicle must be licensed in this state or another, exceptions exist for learner permits and military personnel. (§ 14-44a[1], am'd PA 09-187, § 11). One holding commercial driver's license found driving motor vehicle other than commercial vehicle with blood alcohol content of 0.08% shall be suspended from driving commercial vehicle for one year. (§ 14-44k[c]).

Commissioner may legally enter into drivers license agreement with any other state. (§ 14-111i). Provisions of §§ 14-36a and C.G.S. 14-44d are applicable to all new and renewed licenses beginning July 1, 2005. (§ 14-44o).

Requirements for operator's license and identity card contents. (§ 14-36h).

In emergency and with Governor's approval, Commissioner may extend expiration date of licenses and other credentials. (§ 14-5c).

License Plates.

Commissioner of Motor Vehicles may issue commemorative license plates to enhance public awareness of state efforts in particular area of concern or interest. Funds generated from such plates shall be deposited in state accounts for those purposes. (§§ 14-21q, C.G.S. 14-21r, C.G.S. 14-21s, C.G.S. 14-21t, § 14-21u; § 14-21v, am'd PA 09-187, § 25). State shall also enact account known as Childhood Cancer Awareness Account. State shall also issue wildlife conservation commemorative number plates to enhance public awareness of state efforts to conserve wildlife species and their habitats in Connecticut. State shall also establish account which shall be known as Wildlife Conservation Account.

Motorcycles.

No person under 18 may operate or be passenger on motorcycle without protective headgear which conforms to minimum specifications in Code of Federal Regulations Title 49, § 571.218. (§§ 14-36, C.G.S. 14-40a). Any applicant issued training (§ 14-40a) permit must wear protective headgear. Any applicant who has not yet had Connecticut motor vehicle operator's license with motorcycle endorsement (§ 14-40a) within preceding two years must demonstrate to Commissioner or agent that applicant is knowledgeable of motorcycles, laws concerning motorcycles, other motor vehicles and rules of road. Any applicant under 18 years of age must also demonstrate he has successfully completed novice motorcycle training course. (§ 14-40a).

Boating.

No resident, person owning real property or vessel in state shall operate on waters of state vessel required to be registered pursuant to c. 268 unless individual has obtained certificate of boating operation from Commissioner. (§ 15-140[h]). Certificate valid for life of person issued to. No certificate shall be issued unless applicant successfully passed equivalency examination prepared and administered by Commissioner or has successfully completed course in safe boating operation approved by Commissioner. (§§ 15-133, C.G.S. 15-133c; C.G.S. 15-140e–15-140j, re: passenger safety). Certificate required to be on board or on person at all times. No person less than 16 years of age shall operate motor powered vessel unless accompanied by person more than 18 who has been issued certificate for at least two years. (C.G.S. 15-140[e]). No person shall operate personal watercraft without certificate. (C.G.S. 15-140). Notice of conviction of violation of §§ 15-133–15-134, am'd PA 09-14, given to Commissioner of

Environmental Protection within 30 days. (§ 15-133c[b]). Operation of boat while under influence of intoxicating liquor or drugs prohibited. (§§ 15-133, am'd PA-09-14, § 4; C.G.S. 15-140e, 140j, 140l, 140n, 140o, 140q, 140r, 15, 133c, am'd PA 09-14, §§ 5-11; C.G.S. 14-227f, am'd PA 09-187, § 6, am'd PA 09-14, § 3, C.G.S. 54-56g[a], C.G.S. 54-56g[b]).

Mobile Homes.

Commissioner of Transportation shall adopt regulations to allow mobile homes between 14 and 16 feet wide, or mobile home in tow with combined length of one hundred feet or less to be operated on any highway or bridge. (§ 14-262b).

Titles.

Upon transfer of ownership, registration expires, but upon death of owner registration continues until end of registration year or until transfer. Registered owner must return certificate of registration and number plate or plates within 24 hours unless another car registered for remainder of year. (§ 14-16a).

Owner of motor vehicle may designate in writing another person to assume ownership after owner's death. (§ 14-16).

Dealers and repairers, except dealers in boat trailers, must be licensed by Commissioner, receive planning and zoning approval (§ 14-54; §§ 14-51–14-65; C.G.S. 10-153m; C.G.S. 14-65b–14-65d), and may obtain distinguishing number plates which may be used on all commercial vehicles owned by them or in their custody (§ 14-59). They need only receive location approval from zoning commission. (§ 14-54). Leasing companies are also licensed. (§ 14-15). Such licenses must be renewed biennially (§ 14-15), and renewal may be refused if dealer or repairer has been convicted of fraud, larceny or deprivation or misappropriation of property (§ 14-52a). Certain exemptions apply. (§ 14-65). Commissioner has remedies against dealers and repairers who fail to secure, account for, or surrender official registration plates and materials. (§ 14-64). Dealers may apply electronically for registration and certificate of title on behalf of customers buying vehicle. (§ 14-61a).

Uniform Motor Vehicle Certificate of Title and Anti-Theft Act adopted. (§§ 14-165–14-211). Note: Certain technical amendments have been made in uniform law to dovetail it with appropriate sections of Uniform Commercial Code. (§§ 14-165; C.G.S. 14-167; C.G.S. 14-185).

Sales.

Sale of motor vehicle must be evidenced by order signed by buyer and seller and by invoice, both of which must contain make, year of model, whether sold as new or used, and on invoice identification number, deposit (words specifying type of deposit required, i.e., “not refundable,” “conditionally refundable,” or “unconditionally refundable”), cash selling price, finance charges and statement as to insurance, allowance on and description of car traded in, and specific statement as to guarantee. (§ 14-62). See category 22 Taxation, topic 22.17 Sales and Use Taxes, subhead Use Tax. New motor vehicle warranties regulated. (§ 42-179).

Used car dealers must furnish buyer, at sale, with title, assignment and warranty of title, disclosure of any liens, security interest in or other encumbrances on vehicle. (§ 14-62).

Auctions.

Any person or entity selling vehicle at private or public auction must furnish buyer, at sale, with title assignment and warranty of title, disclosure of any liens, security interest in or other encumbrances on vehicle. (§ 14-62[e]).

Rental company may recover rental vehicle from lessee if vehicle was rented for 30 days or less, and at least 72 hours have elapsed since vehicle was due to be returned. (§ 14-15c). Company may require any customer who wants to rent for cash to apply for approval up to three business days before expected rental. (§ 14-153b).

Liens.

Filed with State Department of Motor Vehicles. See Uniform Motor Vehicle Certificate of Title and Anti-Theft Act. (§§ 14-165–14-211).

Identification Marks.

It is misdemeanor to remove, deface, obliterate or change any factory, serial or other identification number or mark on motor vehicle. (C.G.S. 14-149; C.G.S. 14-149a; 53a-122, 53a-123, am'd PA 09-243, § 1). Possession of motor vehicle with evidence of forcible entry, forcible removal of ignition or alteration, mutilation or removal of vehicle identification number is prima facie evidence that person in possession or control knows or should have known motor vehicle is stolen and he possesses it with larcenous intent. (§§ 14-149; C.G.S. 14-149a; 53a-122, 53a-124). Fines for violation. (§ 14-149). Any officer discovering vehicle with its factory or serial number mutilated must take vehicle and operator into custody. (§ 14-149). Each new car dealer must offer purchaser optional service of etching identification number of vehicle on windshield and each window in vehicle. (§ 14-99h).

Operation Prohibited.

By persons under age of 16 (§ 49-36); by persons under influence of intoxicating liquor or drugs (§ 14-227a, for purposes of § 14-277a, “motor vehicle” includes snowmobiles and all-terrain vehicles as defined by § 14-379 (§ 14-227a[a]); or by persons previously convicted and charged again, but not yet convicted, for similar offense (§ 14-227b); use of ignition interlock devices (§ 14-227a[g]; § 14-36); by one whose license has been suspended, refused or revoked (§ 14-215[a]); by minor unless vehicle properly insured (§ 14-216); by persons whose licenses have been suspended for failure to appear in court (§ 14-215a). Penalties for operation of motor vehicle, including snow mobiles and all-terrain vehicles, while under influence subject to penalties under § 14-227a. (§ 14-386a). Penalty for operating motor vehicle without operator's license and during and after period of license suspension; length of license suspension and eligibility for special operator's license. (§§ 14-215b, C.G.S. 14-36a[b], C.G.S. 14-36[h]; C.G.S. 14-111; C.G.S. 14-215[b]; C.G.S. 14-227b, am'd PA 09-187, § 63, § 14-36i). Breath samples required from operators whose motor vehicles have been involved in accidents resulting in serious physical harm or death if police officer has probable cause to believe operator was under influence or if operator has been charged with motor vehicle violation in connection with accident and has reasonable and articulable suspicion that operator operated motor vehicle under influence or both. (§ 14-227c[b]).

Ignition Interlock Device.

Any person who violates prohibited act may be ordered by Court not to operate motor vehicle unless vehicle is equipped with ignition interlock device. No person should tamper with ignition interlock device when it has been installed in vehicle. (§§ 14-227j, C.G.S. 14-227k). Requirements for use of ignition interlock device vehicles. (§§ 14-227a[i], am'd PA 09-187, § 42, C.G.S. 14-227j[a]). Any person failing to follow ignition lock restriction subject to resuspension of license. (§ 14-111[l]).

Prohibited acts are, among others, speeding (§§ 14-218a; C.G.S. 14-219, am'd PA 09-187, § 14), reckless driving (§ 14-224, am'd PA 09-120), overcrowding (§ 14-257), racing (§ 14-224, am'd PA 09-120), solicitation of rides on other than limited access highways (§ 53-181), stopping vehicle to solicit alms or make sales (§ 53-180), leaving vehicle in dangerous condition (§ 14-228), operation at unreasonably slow speed (§ 14-220), endangerment of highway worker (§ 14-212d; § 14-212e), stealing number plates or inserts (§ 14-147), tampering with odometer (§

14-145), tampering with vehicle and larceny (§ 53a-119b), operate vehicle at any time during periods of precipitation without illuminating lighted lamps (§ 14-96a), carrying children in back of pick-up truck or open bed truck having gross weight of 7,500 pounds or less without approved restraint, except in parade or for farming or recreational hayride (§ 14-272a), passing bicyclist to make right turn and impeding travel of bicyclist (§ 14-242[f]). Assessment of $5 shall be imposed against all people convicted of speeding, reckless driving or driving under influence. (§ 14-295a; see also §§ 14-219, am'd PA 09-187, § 14, C.G.S. 14-222, C.G.S. 14-227a).

Period of Continuous Operation.

Operator of commercial or public service vehicle who has been continuously on duty for 12 hours must thereafter have at least eight hours off duty; if he has been on duty 16 hours in any 24-hour period he must then have at least ten hours off duty. (§ 14-274). Special procedures for service while transporting persons for purposes of relief or assistance during major loss of utility service, disaster or state of emergency. (§§ 14-274[c], C.G.S. 14-163c[b]).

Traffic Signal Preemption Devices.

Traffic signal preemption devices shall not be used by or be part of any vehicle unless such person is working on behalf of federal, state, or municipal government or involved in operating ambulance in emergency situation. No person shall possess, sell, or transfer traffic signal preemption device unless he is manufacturer or vendor specializing in repair or sale of such devices. Violations shall result in fines up to $5,000 and/or imprisonment up to 90 days. Violations resulting in traffic accidents will result in fines up to $15,000 and/or up to five years' imprisonment. (§ 14-299a).

“Black Box” Event Data Recorders.

Requirements for obtaining data from motor vehicle by registered owner, peace officer, or other authorized person. (§ 14-164aa).

Size and Weight Limits.

Regulated by §§ 14-262–14-270. Commissioner of Public Safety and Motor Vehicles regulates hours and staffing of weigh stations. (§§ 14-270c–14-270d). Whenever signs displayed on highway indicate scale is in operation, drivers of commercial vehicles shall stop and weigh vehicle. (§ 14-267a[g]). Escort vehicle requirement for vehicles “under or over certain specified widths” that have permit to travel on undivided highways. (§ 14-270). Violation of posted height and weight restrictions is prohibited. (§ 14-298a).

Equipment Required.

Regulated by §§ 14-96a–14-97b. Regulation of flashing lights on school buses and emergency vehicles. (§§ 14-96p; C.G.S. 14-96q). Requirements for other emergency vehicles. (§ 14-96p[4]). Police vehicles must include manufacturer-installed fire suppression system. (§ 29-6b). Requirements for flashing lights permits. (§§ 14-96p[a], C.G.S. 14-96q[c]).

Equipment Required.

Regulated by §§ 14-80–14-106. Seat belts are required on all new cars sold or registered in state. As of Jan. 1, 1986, all drivers and any front seat passenger must wear seat belts and driver is responsible for front passengers between ages of four and 16 wearing seat belts. Children under six and weighing less than 40 pounds are required to wear child restraint system; anyone transporting child under one must require child to ride rear-facing in child restraint system; anyone transporting child under 12 is required to use child restraint system or safety belt; and anyone transporting child in student transportation vehicle is required to use child restraint system; use of booster seats shall be in conjunction with safety belt. (§§ 14-100a; 14-100a). Vehicles transporting individuals in wheelchairs must use devices designed to secure such individuals while being transferred to and from vehicle. (§ 14-100a[e]). Child restraint systems (approved by Department of Motor Vehicles) must be used on all children under age of four. Tamper-resistant odometer required on 1971 and later models. (§§ 14-106a; C.G.S. 14-106b). Various motorcycle regulations (re: brakes, height of handlebars, etc.) are described in § 14-80. Additional motor vehicle equipment regulations (re: wheels, windshield, and license plates) are described in §§ 14-80b; C.G.S. 14-99f; C.G.S. 14-99g; C.G.S. 14-18. See also subhead Operator's License, catchline Motorcycles, supra. Those owners or lessors of registered vehicles issued reflectorized plates must display them. (§ 14-216[c]). Specifications for mechanical equipment are governed by § 14-80. Fines apply to violations of mechanical and noise requirements. (§ 14-80). Any truck equipped with engine compression brake device must be equipped with muffler for device. (§ 14-80h). Video displays must be disabled within 15 seconds after vehicle is put in reverse. (§ 14-105).

Hand-held Mobile Telephones.

Motor vehicle operators may not use hand-held mobile telephone without hands-free accessory. Persons driving school buses or driving with learners' permits may not use hand-held mobile telephones at all; some exceptions to statutory prohibitions. Violations subject to monetary penalties. (§§ 14-296aa, C.G.S. 51-164n[b], am'd PA 09-177, § 19).

Inspection.

Commissioner may establish and maintain a system of voluntary examination of equipment of motor vehicles registered in this state by approved automobile dealers and garages. (§ 14-103). Requirements for service bus safety inspections. (§ 14-103[d]). As of Jan. 1, 1981 all vehicles registered in this state shall be inspected annually for exhaust emissions in accordance with rules and regulations established by Commissioner. (§ 14-100c). Commissioner of Environmental Protection to implement California's light duty motor vehicle emission standards. (§ 22a-174g). Sticker requirement for tinted windows after factory delivery. (§ 14-99g). Motor vehicles ten model years or older and antique vehicles must be inspected upon transfer of ownership prior to new registration. (§ 14-16a). Commissioner may elect to reject registration of any vehicle ten model years or older which has not previously been registered in this state until it has been inspected. (§ 14-12[g]). Certain vehicles exempted from emissions inspection. (§ 14-164c). Official emissions inspection station means emissions inspection facility approved by Commissioner, including any such facility located on premises of licensed dealer or repairer. (§ 14-164b[5]).

Upon discovery of any motor vehicle or major component part, vehicle identification, engine or factory number of which has been mutilated, altered or removed, any inspector shall take such motor vehicle or component part into custody. (§ 14-149).

Accidents.

Operator causing injury to person or property must stop, render needed assistance and give name, address, and operator's license and registration number to officer, injured person or witness, if requested. (§§ 14-224, am'd PA 09-120; C.G.S. 14-225). Accident causing death, personal injury or $1,000 property damage to property of any one person must be reported to Commissioner by all operators involved within five days. Commissioner of Transportation shall forward to Commissioner of Motor Vehicles copy of accident reports where person is killed or involving school bus or public service vehicle. Commissioner of Motor Vehicles may then investigate any accident reported with assistance of state police. Police officer or other investigator must use reasonable effort to identify any person killed and notify member of person’s family. (§ 14-108). Operator causing injury to or death of dog must report to owner, police officer or motor vehicle inspector. (§ 14-226). Driver who deliberately or recklessly violates rules of road may be subject to double or treble damages for resulting injuries. (§ 14-295). Some failures to yield right of way to pedestrian not negligent per se. (§ 14-30[f]).

Manufacturers.

Businesses that built utility trailers need not acquire DMV manufacturer license. (§ 14-1[a][47]).

Motor Vehicle Races.

Governed by § 14-164a. Motor cross racing facilities are exempt from requirement to have posted restricted area where only those with proper credentials may be admitted. (§ 14-164a[a]). No one shall possess motor vehicle under circumstances manifesting intent to race vehicle or use it at event prohibited by § 14-224, am'd PA 09-120; to act as starter, timekeeper or spectator at prohibited race or event; or to wager on outcome of race or event. (§ 14-224, am'd PA 09-120).

Non-Driver Photo Identification Cards.

DMV must notify cardholders prior to card's expiration. (§ 1-1h[b]).

Organ Donation.

Commissioner of Motor Vehicles shall provide to federally-designated organ and tissue procurement organizations names and other pertinent information of drivers who have agreed or intend to donate organs, including information contained on identity cards. (§§ 14-10[f], C.G.S. 14-42a, 19a-279a; 19a-279b; 19a-279e).

Liability of Owner.

Owner is not generally liable for negligence of operator except in case of agency, of which there is a rebuttable presumption. (§ 52-183). With certain exceptions, owner of rented car is liable for damage by operator, if operator would have been liable. (§ 14-154a). Family car doctrine is adopted and where operator is husband, wife, parent or child of owner car is presumed to be operated as family car within scope of general authority from owner. (§ 52-182).

State Transportation Service Liability.

Operator not considered arm and agent of State and may not assert defense of sovereign immunity in civil action for accident. (§ 13b-34[a]).

Guests.

No statutory restriction of liability for injury to guest.

Proof of Financial Responsibility.

Unless operator and/or owners of motor vehicle in any manner involved in accident involving death, injury, or damage to property of any one person in excess of $400: (1) Has in effect automobile liability policy (minimum limits $20,000 per person. $40,000 per accident bodily injury or death and $5,000 property damage, except that for motor vehicles registered in another state security may be deposited for difference with respect to vehicle involved) or (2) is covered as to such accident by liability policy if not owner or (3) is, in judgment of Commissioner, covered as to such accident by any other form of liability policy or bond, or qualifies as self-insurer or operator for self-insurer (registered owner of more than 25 motor vehicles approved and certified by Commissioner), Commissioner or his designee holds hearing and determines whether there is reasonable possibility judgment(s) may be recovered against such owner or operator. If such possibility found, such owner and/or operator must, within 20 days after filing accident report, furnish evidence satisfactory to Commissioner that: (1) He has been released from liability or (2) has been finally adjudicated not to be liable or (3) has executed duly acknowledged written agreement providing for payment of agreed amount in installments with respect to all claims resulting from accident. (§ 14-117). Commissioner may require one to file certificate of financial responsibility before issuing or renewing motor vehicle registration. (§ 14-112[a]).

Suspension and Security.

If such evidence is not so filed with Commissioner, he determines amount of security which is sufficient in his judgment to satisfy any judgment for damages that may ensue, and unless security in such sum is deposited with him, he must suspend license of each operator and all registrations of each owner in default in depositing security. In case of a nonresident owner or operator, privilege of operation or use of any motor vehicle within this state is suspended and certified copy of record of such action is forwarded to proper official of other state. (§ 14-117).

Notice of Suspension.

In all cases, Commissioner must give such operator and/or owner ten days written notice of contemplated suspension including statement of amount of security required. (§ 14-117).

Exemption from Security and Suspension.

In addition to exemption arising from insurance coverage, security and suspension requirements do not apply: (1) To operator or owner of motor vehicle involved in accident wherein no injury or damage was caused to person or property of anyone other than such operator or owner; (2) to operator or owner of motor vehicle legally parked at time of accident; (3) to owner of vehicle if, at time of accident, it was being operated or had been parked without his permission, express or implied; or (4) was legally stopped at stop sign or stop light or at direction of police officer or in line of traffic including at least three motor vehicles; (5) if other driver has been convicted of manslaughter or similar charge arising out of such accident; (6) if, prior to date when Commissioner would otherwise invoke suspension, evidence of release from liability, final adjudication of nonliability, or agreement for payment, as above described, has been filed with him; (7) motor vehicles owned by United States, this state or any political subdivision of this state; and (8) public service motor vehicles or busses subject to § 14-29(a), (b) (except as to filing of accident reports [14-119]).

Duration of Suspension.

Suspension of license, registration and operating privilege continues until: (a) Deposit of required security is made; (b) two years have elapsed following date of accident and evidence satisfactory to Commissioner has been filed with him that no action for damages arising out of such accident has been instituted; (c) satisfactory evidence has been filed of release from liability, final adjudication or agreement for payment, as above described. If operator or owner has no license or registration or is nonresident, he is not allowed license or registration until he complies with Act to same extent as would have been necessary had he held license or registration at time of accident. (§ 14-120).

Reciprocity.

Commissioner is enjoined to take necessary action to secure security or suspension of license or registration of nonresident if law of other state provides such action. Upon receipt of certification that operating privilege of resident of this state has been suspended in another state pursuant to law providing for deposit of security for payment of judgments arising out of motor vehicle accident, under circumstances which would require suspension of nonresident's operating privilege had accident occurred in this state, and if law of such other state contains reciprocal provisions, Commissioner must suspend license of such resident if he was operator and all of his registrations if he was owner. Suspension continues until evidence of compliance with laws of other state relating to deposit of security is furnished. (§ 14-121). Commissioner of Transportation authorized to enter into reciprocal agreements with any state for vehicles engaged in livery services. (§ 13b-108a).

Security is in such form and amount as Commissioner may require but in no case in excess of $20,000 per person for death or personal injury and $1,000 for property damage. If Commissioner deems amount excessive, he may reduce same within six months of accident. (§ 14-122). Such security is placed in custody of State Treasurer and is applicable to payment of law judgments for damages rendered against person on whose behalf deposit was made and arising out of action in question or to payment of agreed settlements. (§ 14-123).

Return of security occurs upon filing with Commissioner of satisfactory evidence of release from liability, final adjudication, or agreement for payment, as above described, or upon running of statute of limitations with no action pending or judgment unpaid. Security deposits unclaimed escheat to state ten years after deposit date. (§ 14-123).

Judgment requires immediate suspension of license and registration or operating privilege, continuing until such judgment is stayed, satisfied, or discharged in full. (§ 14-125).

Transfer of title while registration suspended pursuant to financial responsibility statute is prohibited until Commissioner is satisfied that transfer is proposed in good faith and not for purpose or effect of defeating purposes of statute. Rights of conditional vendor, chattel mortgagee or lessor are protected. (§ 14-126).

Criminal penalties are imposed for failure to file accident report, giving false information or forged or unauthorized evidence of proof of financial responsibility, failure to deliver to Commissioner license and/or registration promptly upon suspension, and for violation of any other provision of statute. (§ 14-133).

Insurance exemption above described is not available unless policy is issued by company authorized to do business in this state, except in case of motor vehicle not registered in this state on effective date of policy in which case policy is effective if in sufficient amount and if unauthorized company executes a power of attorney authorizing the Commissioner to accept service on its behalf in any action upon such policy arising out of such accident. (§ 14-117).

Appeal from any act or order of Commissioner lies to Superior Court for county in which such person resides, or for Hartford County, at instance of any party in interest. Court determines whether appeal stays such order or decision, and may modify, affirm or reverse in whole or in part. Appeals taken under this section have precedence over non-privileged cases in respect to order of trial. (§ 14-114).

Police Pursuits.

Regulated by § 14-283a.

Assault of Officers.

Any motor vehicle operator who strikes officer or fire police officer engaged in traffic control or regulation has committed infraction, and is subject to fine or imprisonment. (§ 14-223a).

Emergency vehicles include vehicles operated by Dept. of Correction officers while in course of duties, or while responding to emergency calls. (C.G.S. 814-283). Emergency vehicles include bicycles operated by police, fire fighters, emergency service personnel over age of 16, and who have satisfied certain training requirements. Such operators are exempt from §§ 14-286, C.G.S. 14-286a–14-286c, and C.G.S. 14-289 when using audible warning device. (§ 14-286e).

Other Financial Liability.

Proof also is required of owners who permit their cars to be operated by persons under 18 years old (§ 14-216), owners who are under 18 years old, except for registration of private passenger vehicle as described in § 38-319(g) (§ 14-14), and owners or lessees of public service motor vehicles (§§ 14-29[a]–14-29[b]), and may be required of any owner or operator who has violated certain laws or whose driving record is such that Commissioner deems such proof necessary for protection of others. Owner or operator failing to furnish required proof forfeits registration and operator's license. Nonresident forfeits privilege of operating in state. (§ 14-111[k][2], am'd PA 09-187, § 35; § 14-112).

Owner or lessee of public service vehicle must insure liability for personal injury or death up to maximum of $300,000 for each vehicle depending on seating capacity, and for property damage $10,000 or procure certificate of financial responsibility from Commissioner of Transportation. (§§ 14-29; C.G.S. 14-26[c]). Other owner or operator must furnish to Commissioner of Motor Vehicles proof of responsibility up to $20,000 per person; $40,000 per accident for personal injury or death and $10,000 for property damage. Proof may consist of certificate of licensed Connecticut insurance agent that sufficient insurance has been issued, bond with professional surety or individual surety owning real estate or sufficient cash deposit with State Treasurer. (§ 14-112).

Such insurance or bond must be non-cancelable except upon ten days written notice to Commissioner. Bond constitutes lien in favor of state upon real estate of any surety, which lien exists in favor of holder of judgment on account of damage caused by operation of car, upon notice to town clerk in town where land is located. Insurance company named in agent's certificate must notify Commissioner of renewal, or of cancellation or termination of policy at least ten days before cancellation or termination. Bond or deposit is held to satisfy any execution issued in damage suit against owner or operator for operation of vehicle, and is only subject to attachment or execution in action for damages resulting from operation of vehicle. If judgment against bond principal is not satisfied within 30 days, plaintiff may for his own use and at own expense bring action in name of state against surety. (§§ 14-112[a]; C.G.S. 14-112[f]–14-112[g]).

Insurer Designated Repair Shops.

Insurance companies prohibited from designating repair shops for motor vehicle repairs. (§ 38a-354, am'd PA 09-237, § 2).

Certificate of Title.

Any insurance company which takes possession of motor vehicle for which certificate of title has been issued in any state other than Connecticut that has been declared total loss, and that is offered for sale by insurance company as result of settlement of claim for damage or theft, shall attach copy of appraiser's damage report to vehicle. (§ 14-16c). If two or more persons are identified on certificate, then any such person may transfer title. (§ 14-179).

No-Fault Insurance.

Former no-fault thresholds and reparation benefits were repealed, effective Oct. 1, 1993. (PA 93-297).

Insurance policies must contain provision conforming coverage to that required by other governments in U.S. and Canada while vehicle is operated therein and must specify whether coverage is provided for rented vehicles. (§ 38a-335).

Tow trucks shall notify police of tow or removal within two hours. (§ 14-145[b]). Owners need not provide general release of liability to tower as condition of release when their vehicles removed from private property without their authorization. (§ 14-145b[b]).

Impounded Vehicles.

Parking authority shall provide written notice to owner and lienholders, if any, that motor vehicle has been towed and stored. (§ 14-150[e] to [g]).

Wrecker Rates.

Procedures in establishing rates and charges; wrecker operators may charge for nonconsensual vehicle towing and storage. (§ 14-66[a]).

Foreign Vehicles.

Reciprocity of motor vehicle registration as between states is recognized. (§§ 14-12b; C.G.S. 14-34a).

Nonresident operator over 16 years old, who may legally operate motor vehicles in home state or country, may operate any motor vehicle (except public service vehicle) in Connecticut, without registration or operator's license, for same time that home state or country accords similar privilege to Connecticut residents, but if operator is under 18, vehicle must be insured for $20,000 for personal injury and $1,000 for property damage. (§§ 14-39; C.G.S. 14-40; C.G.S. 14-40a).

Actions Against Nonresidents.

Nonresident causing motor vehicle to be operated in the state is deemed to have appointed Commissioner of Motor Vehicles his agent on whom process may be served in any civil action for damages for negligence of such person, his agent or servant, while operating in the state. Service on Commissioner has same validity as if process served personally upon nonresident. True and attested copy must be served upon Commissioner at least 12 days before return day, and similar copy with endorsement of service on Commissioner must be sent by registered mail to nonresident at his last known address. Death of nonresident does not revoke appointment of Commissioner. (§ 52-62).

Direct Action.

Not authorized.

Actions Between Spouses.

See category 14 Family, topic 14.09 Husband and Wife, subhead Actions.

Antique Vehicles.

Definition and emissions requirements. (§§ 14-1[a][3], C.G.S. 14-1[a][49], C.G.S. 14-164c[c]).

Handicapped Vehicles.

Parking spaces for handicapped vehicles must meet dimensional requirements, and parking garages must have sufficient vertical clearance to admit handicapped passenger vans. (§ 14-253a[h], [i], am'd PA 09-187, § 37).

Motor vehicle carriers, including motor busses, school busses, taxicabs, and livery vehicles must be specially registered. (§§ 14-26; C.G.S. 14-44). Carrier means any local or regional school district, any educational institution providing elementary or secondary education or any person, firm or corporation under contract in such district or institution engaged in business of transporting school children. (§ 14-212). On and after 7/1/91, no motor vehicle having: (1) Wheel base of less than 101 inches, or (2) convertible top or open body, may be used by carrier for transportation of students under age of 21 years to and from school. General registration to cover more than one vehicle may be issued, but $10,000 bond may be required. Before registration owner must have certificate of public convenience and necessity from Department of Transportation and furnish proof of financial responsibility. (§ 14-26). Each motorbus, taxicab, livery vehicle must carry number plates which indicate vehicle is licensed by Commissioner. (§

14-27). Public service operators must obtain special license; must be 18, already hold regular operator's license, show good character and no criminal record, be fingerprinted and must pass examination to determine ability to operate public service vehicle, except no physical examination is required of operator complying with safety regulation of U.S. Dept. of Transportation. (§ 14-44). Driver disqualified if operating commercial vehicle with blood alcohol ratio of 4/100 of 1% or more. (§ 14-44k). Nonresident operators must also obtain special license, unless holding valid, out-of-state public service operator's license and not engaged in intra-state commerce. (§ 14-39). School bus operators are regulated. (§ 14-276). Each serious accident involving school bus or student transportation vehicle as defined in § 14-212 of general statutes must be reported to Commissioner of Motor Vehicles. Serious accident means any accident in which: (1) Any occupant of school bus or student transportation vehicle is killed, or (2) fire occurs in, or there is rollover of, school bus or student transportation vehicle. (§ 14-281c). Student transportation vehicles must have distinctive license plates. (§§ 14-25c, C.G.S. 14-102a).

Owner or operator of busses traveling in state between points out of state or between points in state and points out of state are under jurisdiction and regulation of Department of Transportation (§ 16-313) and must obtain permit and certificate of public convenience and necessity. Motor Vehicle Commissioner has jurisdiction over registration and lighting and licensing of operators of such busses. (§§ 14-273[a], C.G.S. 16-309–16-317). Carrier shall require each person whom it intends to employ to operate school bus, as defined in § 14-275, or student transportation vehicle, as defined in § 14-212, to submit to urinalysis drug test in accordance with provisions of §§ 31-51v and C.G.S. 31-51w. No carrier may employ any person who has received positive test result for such test which was confirmed as provided in subdivisions (2) and (3) of § 31-51u.

Persons engaged in transportation of milk and milk products must obtain permit and inspection report and meet safety specifications. (§ 22-203e).

Owners of such vehicles are common carriers and subject to regulation by Department of Transportation as to rates, public convenience and necessity, routes (in case of motor buses) and adequacy of service. They must obtain from said Department certificate of public convenience and necessity or, in case of livery service, permit describing character of service, and in case of motor busses, permit describing routes and terminals. (§§ 16-329; C.G.S. 14-27; C.G.S. 16-309, C.G.S. 16-314a, C.G.S. 16-320). Busses purchased for fixed route service by transit district or state-subsidized entity after 4/18/88 must be equipped with mechanical lift or other device to provide access to persons with disabilities. (§ 14-97b).

Persons engaged in motor transportation of property for hire must obtain permit from Department of Transportation, which will issue only after finding of public necessity and convenience and after proof of financial responsibility; and such carriers are subject to regulation by Commission as to rates, routes, adequacy and necessity of service, etc. (§§ 16-253, C.G.S. 16-284, C.G.S. 16-286, C.G.S. 16-304, C.G.S. 16-308). Five persons may be carried on daily round trip for hire without permit from Department of Transportation, or livery license if transportation is between place of residence and place of employment. In addition, corporation or employee may operate for hire vehicles for 15 passengers to and from place of employment without permit or livery license. (§ 16-328). “Motor vehicle in livery service” means and includes every motor vehicle used by any person, association or corporation in business of transporting passengers for hire except motorbuses, taxicabs, those hired through contract with federal or state agency, and those operated by community-based regional transportation systems for elderly. (§ 13b-101).

Persons engaged in transportation of milk by tankers must maintain permit and current inspection report aboard tanker. (§ 22-203f).

Many types of vehicles are specifically excepted from these provisions. (§ 16-284).

Interstate carriers for hire must obtain permit and are subject to regulation as to routes and terminals. (§§ 14-261a; C.G.S. 16-313). All busses, however owned, are deemed to be common carriers, and as such subject to regulation by Department of Transportation. (§§ 16-312a, C.G.S. 16-313).

There is a Department of Transportation with general authority in motor carrier area. (Tit. 13b).

Act concerns transportation services for elderly. (§ 13b-11a).

School Bus.

Each school bus and student transporting vehicle shall display lighted head lamps while transporting school children. (§ 14-281a).

Snowmobiles and all-terrain vehicles must be registered. (§§ 14-380; C.G.S. 14-381; C.G.S. 14-388). Snowmobiles and all-terrain vehicles as motor vehicles per § 14-379. (§ 14-227a[a]). DVM Commissioner need not issue snowmobile and all terrain vehicle dealers distinguishing plates nor temporary plates to attach when vehicle is sold. (§§ 13b-59[f], 13b-76[a]-[g], 13b-77[c], 13b-79a).

Mini-Motorcycles must not be operated on private property unless it is property of owner or operator, or with written permission from private property owner. Violations include 48-hour impoundment of vehicle. Sale, lease, or rental of mini-motorcycle is prohibited without labels warning of sale and legal use of vehicle, and consequences of violations. (§ 14-289j).

Livery Vehicles.

All livery vehicles having seating for 35 or more passengers may have seat located even with or forward of driver's seat. (§ 13b-110).

Safety.

At request of municipal legislative body, State Traffic Commission or local traffic authority may designate any part of state highway as school zone and post signs; Superior Court jurisdiction over violations. (§§ 14-212b; C.G.S. 14-218a; C.G.S. 14-219, am'd PA 09-187, § 14). Regulation of cattle crossings. (§ 14-248b).

Seat safety belt regulations found in § 14-100a.

Mobile Phones.

Use of handheld mobile telephones by operators of motor vehicles is prohibited as of Oct. 1, 2005. (§ 14-296aa). Use of mobile electronic device is prohibited when operating motor vehicle absent certain limited exceptions. (§ 14-296aa[b]-[d], am'd PA 09-54, § 1).

Gasoline Tax.

See category 22 Taxation, topic 22.08 Gasoline and Special Fuels Taxes.

Traffic Control.

Terms “rotary” and “roundabout” shall replace term rotary traffic island. (§ 14-212; see also §§ 14-239, C.G.S. 14-241, C.G.S. 14-297).

Wildlife Killed or Wounded by Motor Vehicle.

Any deer, moose or black bear killed by motor vehicle may become property of operator after inspection by police. (§ 26-86).

23.02 RAILROADS:

Crossing Railroad Tracks.

It is infraction to cross railroad tracks after being warned by signal that train is approaching. (§ 13b-344a). Requirements for certain vehicles to stop at railroad grade crossings. (§§ 14-249, C.G.S. 14-250).

See category 3 Business Regulation and Commerce, topic 3.08 Carriers.

24 Forms

Commercial Code Forms

(Click here to view)

1
DELAWARE LAW DIGEST

—Scope —

Revised for 2010 edition by

RICHARDS, LAYTON & FINGER, P.A., of Wilmington.

(Citations, unless otherwise indicated, are to the Delaware Code (1974 Revision) by Title and Section or Chapter (c.) number. “Del.” indicates Delaware Reports. “Del. Ch.” indicates Delaware Chancery Reports. “Del. L.” indicates Delaware Laws not codified. Parallel citations to the Atlantic Reporter begin with 12 Del. and 6 Del. Ch. After 220 A.2d only Atlantic Reporter cited. “Supr. Ct. Rule” indicates Supreme Court Rule. “Super. Ct. Civ. Rule” and “Super. Ct. Crim. Rule” indicate Superior Court Rules. “Ch. Ct. Rule” indicates Chancery Court Rule. “J.P. Civ. Rule” indicates Justice of Peace Court Rule. “C.P. Ct. Civ. Rule” indicates Court of Common Pleas Rule. “DRE” indicates Delaware Uniform Rules of Evidence rule. Reference to court rules without designation of court indicates similar or identical Superior Court and Court of Chancery Rules.)

NOTE: This revision covers legislation adopted and approved by Governor through Aug. 1, 2009.

(Volume 75, Chapter 446, Laws of Delaware). Legislature meets annually.

1 INTRODUCTION

1.01 GOVERNMENT AND LEGAL SYSTEM:

The State of Delaware is a constituent state of the United States of America. For further discussion of the U.S. federal system, see Introduction to the Federal Government of the United States at the beginning of this volume. A great many laws are promulgated by the federal government of the United States and are not reflected in the topics below. See the Introduction to this volume for references to the federal law topics covered.

Like all but one of the United States, Delaware has a common law legal system, with roots in English common law. For information on the courts and legislature of Delaware, see category 6 Courts and Legislature, infra.

1.02 [RESERVED]

1.03 HOLIDAYS:

Legal Holidays are: Jan. 1; 3d Mon. in Jan.; 3d Mon. in Feb.; Good Friday; last Mon. in May; July 4; first Mon. in Sept.; 2d Mon. in Oct.; Nov. 11; 4th Thurs. and Fri. in Nov.; Dec. 25; Sats.; day of general election as it biennially occurs; and in Sussex County, Return Day, 2d day after general election, after 12:00 Noon. (1 Del. Code Ann. 501).

Saturday is legal holiday for all state offices except State police, employees assigned to rotating hours or shiftwork and Dept. of Safety; for latter, all Saturdays are holidays, except last two of each quarter. (29 Del. Code Ann. 5104). In New Castle County, Dept. of Safety and Homeland Security and firemen also exempted. (9 Del. Code Ann. 9106).

Holiday Falling on Sunday.

Next Mon. a holiday. (1 Del. Code Ann. 501).

Holiday Falling on Saturday.

If legal holiday other than Sat. falls on that day, Fri. preceding is legal holiday. (1 Del. Code Ann. 501).

Legality of Transactions on Saturday, Sunday or Holiday.

Holiday, as opposed to Sabbath, is not dies non. (15 Del. 336). Transactions and legal proceedings done on any of enumerated legal holidays listed in 1 Del. Code Ann. 501 are not thereby rendered invalid. (1 Del. Code Ann. 502).

1.04 OFFICE HOURS AND TIME ZONE:

Delaware is in the Eastern (GMT -05:00) time zone. Office hours are generally from 9 a.m. to 5 p.m.

2 BUSINESS ORGANIZATIONS

2.01 AGENCY:

Common law rules govern.

2.02 ASSOCIATIONS:

No general statute governing unincorporated associations.

Formation.

No unincorporated association may transact business in state, unless individual names of all concerned are first certified by an officer of the association and filed in office of Prothonotary of each county. (6 Del. Code Ann. 3104). Requisites of certificates are same as in case of limited partnership. See topic 2.08 Partnerships.

Rights and Powers.

No statutory provisions.

Liabilities.

See subhead Actions, infra.

Actions.

Unincorporated association of persons, including partnership, may sue and be sued in its common name. Judgment recovered in such case is lien and may be executed by levy, seizure and sale of personal or real estate of association or of persons composing same as if they had been made parties defendant by their individual names. (10 Del. Code Ann. 3904). Class actions may be brought by or against members of unincorporated association. (Ch. Ct. Rule 23.2).

Dissolution.

No statutory provisions. Absent agreement, withdrawal of part of membership will not effect dissolution. (39 Del. Ch. 221, 163 A.2d 242).

Professional Associations.

See topic 2.03 Corporations, subhead Professional Corporations.

2.03 CORPORATIONS:

Incorporation is under general law, except for municipal or banking corporations, and those for charitable, penal, reformatory or educational purposes sustained in whole or part by state. (8 Del. Code Ann. 101 et seq.; Const., art. IX, § 1). There are special provisions applicable to public utility corporations operating in Delaware. (26 Del. Code Ann. 201 et seq.). Corporations organized prior to 1897 must accept provisions of present constitution before amending or renewing their charters. (Const., art. IX, § 2). General Corporation Law, as amended to date (8 Del. Code Ann. 101 et seq.), provides for incorporation of any lawful business except those prohibited by law. Following provisions, unless otherwise noted, are from that law. (Model Business Corporation Act not adopted.)

General Supervision.

Secretary of State, Division of Corporations, P.O. Box 898, Dover, DE 19903, exercises general supervision over corporations.

Purposes.

See subhead Certificate of Incorporation, infra.

Name.

For requirements as to corporate name, see subhead Certificate of Incorporation, infra.

Corporate name may be reserved for 120 days by filing application with Secretary of State containing name to be reserved and name and address of applicant. Name may be reserved for successive 120-day periods. (8 Del. Code Ann.102[e][4]). Fee of up to $75 for each reservation or renewal. (8 Del. Code Ann. 391[a][24]).

Term of Corporate Existence.

Corporate existence begins when certificate is filed, and fees and taxes are paid. (8 Del. Code Ann. 103[c]; 8 Del. Code Ann. 106). Unless limited, corporate existence is perpetual. (8 Del. Code Ann. 102[b][5]). If dissolved, existence continues three years, or longer as Court of

Chancery directs, after dissolution for winding up its affairs. (8 Del. Code Ann. 278).

Incorporators.

Any person, partnership, association, singly or jointly with others, regardless of residence, domicile or state of incorporation may incorporate. (8 Del. Code Ann. 101). If persons to serve as directors until first annual meeting have not been named in certificate of incorporation, incorporators, until directors elected, may do whatever necessary and proper to perfect organization, including adoption of by-laws and election of directors. (8 Del. Code Ann. 107).

Certificate of incorporation must state: (1) Name of corporation which (i) must contain one of following words: association, company, corporation, club, foundation, fund, incorporated, institute, society, union, syndicate or limited, or words or abbreviation of like import of foreign countries or jurisdictions (requirement may be waived upon filing certificate stating total assets at least $10 million), and (ii) must distinguish it upon records in office of Division of Corporations in Department of State from names of other corporations, partnerships, limited partnerships, limited liability companies or statutory trusts organized, reserved or registered as foreign corporations, partnership, limited partnerships, limited liability companies or statutory trusts under laws of Delaware, except with written consent of other foreign corporation or domestic or foreign partnership, limited partnership, limited liability company or statutory trust executed, acknowledged and filed with Secretary of State, and (iii) may only contain word bank if entity is bank reporting to State Bank Commissioner, to subsidiary of bank or savings association (as determined by 12 U.S.C. § 1813), or corporation regulated under 12 U.S.C. § 1841 et seq., or 12 U.S.C. § 1461 et seq.; word bank may be used in context clearly not referring to banking business or in otherwise non-abusive or non-misleading manner; (2) address (including street, number, city and county) of registered office in state and name of registered agent; (3) nature of business; sufficient to state purpose as “to engage in any lawful act or activity for which corporations may be organized under General Corporation Law of Delaware”; (4) number of shares with their par value, or that they have no par value; description of classes of stock; where there is more than one class of stock, number and par value of shares of each such class; powers, preferences, rights, qualifications, limitations, restrictions of any class or series of any class of stock, fixing of which by certificate of incorporation is desired; (5) name and mailing address of incorporators; (6) if power of incorporators to terminate upon filing of certificate of incorporation names and mailing addresses of persons to serve as directors until first annual stockholder meeting or until successors elected and qualify. (8 Del. Code Ann. 102[a]).

Certificate of incorporation may state: (1) Any provisions, not contrary to state law, for management of business and conduct of affairs of corporation and for creating, defining, limiting and regulating powers of corporation, directors and stockholders; and/or any provision required or permitted in by-laws; (2) authorization of binding compromise or arrangement of debts due creditors and rights of stockholders and agreement for reorganization on application to court by corporation, creditor, stockholders, receivers or trustees in liquidation upon majority vote of three-fourths in value of class affected and approval by court; (3) grant of preemptive rights to stockholders to subscribe to additional issues (otherwise, no preemptive rights exist); (4) requirement for any corporate action of vote of larger portion of stock, any class or series, or any securities having voting power, or of larger number of directors than required by statute; (5) limitation of corporation’s existence to specified date (otherwise, corporation is perpetual); (6) imposition of personal liability for debts of corporation on stockholders to specified extent and upon specified conditions (otherwise, stockholders not personally liable except as may be by reason of own conduct and acts); (7) elimination or limitation of director’s personal liability to corporation or stockholders for monetary damages for breach of fiduciary duty as director provided such provision shall not eliminate or limit liability of director for breach of director’s duty of loyalty, for acts or omissions not in good faith or which involve intentional misconduct or knowing violation of law, liability under 8 Del. Code Ann. 174, or for transactions where director derived improper personal benefit. (8 Del. Code Ann. 102[b]).

Certificate of incorporation need not state any powers conferred on corporations by General Corporation Law. (8 Del. Code Ann. 102[c]).

Corporations without capital stock must state in certificate of incorporation that they have no authority to issue stock. Certificate must state conditions of membership or provide that conditions of membership stated in by-laws. (8 Del. Code Ann. 102[a][4]).

Copies.

Signed instrument delivered to Secretary of State. (8 Del. Code Ann. 103[c][1]).

Signatures.

Incorporators, if directors not named within. (8 Del. Code Ann. 103[a][1]).

Acknowledgment.

See category 10 Documents and Records, topic 10.01 Acknowledgments, subhead Forms, catchline Secretary of State.

Filing of Certificate.

Signed instrument delivered to office of Secretary of State may be by facsimile, conformed signature or electronically transmitted signature (8 Del. Code Ann. 103[c], [h]). Taxes and fees must be paid, filing date affixed to instrument with date and hour of filing, which is conclusive of date and time of filing absent fraud, instrument is filed and indexed and copy of each instrument is permanently kept and maintained by Secretary of State. (8 Del. Code Ann. 103[c]). As to filing fee, see subhead Incorporation Tax or Fee, infra.

Correcting Filed, Inaccurate Documents.

Any document containing incorrect record of corporate action, or defectively or erroneously executed, sealed or acknowledged may be corrected by filing with Secretary of State certificate of correction or by filing corrected instrument. (8 Del. Code Ann. 103[f]). Corrected instrument effective as of original filing date, except as to those substantially and adversely affected by correction. (8 Del. Code Ann. 103[f]). Secretary of State not liable for defectively filed document. (8 Del. Code Ann. 103[g]).

Incorporation Tax or Fee.

Paid to Secretary of State upon receipt for filing certificate of incorporation: Tax computed on basis of 2¢ per share up to 20,000 shares; 1¢ per additional share up to 200,000 shares; 2/5¢ per additional share in excess of 200,000 shares. For authorized stock without par value, 1¢ for each share up to 20,000 shares; ½¢ for each share in excess of 20,000 shares up to 2 million shares; 2/5¢ for each share in excess of 2 million shares; minimum tax of $15. Par value stock defined in $100 units for purposes of taxation. (8 Del. Code Ann. 391[a][1]). Fee for receiving, filing and indexing certificate of incorporation, $25. (8 Del. Code Ann. 391[a][7]). Fee for receiving, filing and indexing certificate of foreign corporation, $125. (8 Del. Code Ann. 391[a][8]). Other fees apply based on instrument filed. (8 Del. Code Ann. 391). In addition to fees charged under 8 Del. Code Ann. 391(a), there shall be paid to Secretary of State for all services described in 8 Del. Code Ann. 391(a) additional charge of up to $7,500 if 30-minute service is requested, up to $1,000 if one-hour service is requested, up to $500 if two-hour service is requested, up to $300 if same day service is requested or up to $150 if 24-hour service is requested. (8 Del. Code Ann. 391[h]).

Fee for Certifying and/or Copying.

$50 for each document certified, plus $2 per page if Secretary of State provides copy of document. (8 Del. Code Ann. 391[a][10]).

Recording fee payable to recorder, according to length of certificate. In all counties, fees are established by ordinance. (9 Del. Code Ann. 9617; 9 Del. Code Ann. 9619).

Assessment Fee.

$24 for each one-page instrument and $9 for each additional page for instruments over one page filed under 8 Del. Code Ann. 103. (8 Del. Code Ann. 103[c][6]).

Failure to Pay Fee or Tax.

In connection with filing any instrument or certificate with Secretary of State, failure to pay appropriate fee or tax upon demand may cause corporation to cease to be in good standing and to lose right to file subsequent instruments or certificates with Secretary of State. (8 Del. Code Ann. 391[i]).

License to Do Business.

No provisions, as such. General licensing provisions for particular occupations actually transacting business in state appear in 24 Del. Code Ann. 101 et seq.

Organization meeting must be held by incorporator or incorporators or by board of directors if initial directors named in certificate of incorporation to adopt by-laws, elect directors (if meeting is of incorporators), elect officers (if meeting is of directors), do any other acts to perfect organization and transact any business coming before first annual meeting. Any action permitted at organization meeting may be taken without meeting if incorporators or directors unanimously sign instrument stating action taken. Two days' written notice of meeting necessary. Notice need not be given anyone attending meeting or signing waiver. Meeting may be held anywhere. (8 Del. Code Ann. 108).

Paid in Capital Requirements.

None.

Amendment of Certificate.

Certificate may be amended to change corporate name; change, substitute, enlarge or diminish nature of business or corporate powers and purposes; increase, decrease or reclassify authorized capital stock; cancel or change right of holders of any class shares to receive dividends which have accrued but have not been declared; create new classes of stock with rights and preferences prior and superior or subordinate and inferior to authorized stock; change period of duration; make any change provided that amended provisions are lawful and proper to insert in original certificate as of time of filing of amendment. (8 Del. Code Ann. 242[a]). If certificate requires greater vote by directors, or holders of any class or series of stock or securities with voting power than is required by any section of statute, such provision can be altered only by such greater vote. (8 Del. Code Ann. 242[b][4]).

For corporation with capital stock, amendment is effected by resolution of directors, followed by vote of majority of outstanding voting shares at meeting called by board of directors for purpose of voting on proposed amendment or at annual meeting. Resolution adopted may grant directors authority to abandon proposed amendment, notwithstanding prior stockholder approval. In addition, class vote provided where any proposed amendment would adversely alter or change preferences, special rights or powers of one or more classes of stock or series of stock. Certificate setting forth amendment and its adoption must be filed with Secretary of State. In case of corporations without capital stock, certificate may require approval of specified percentage or class of members. (8 Del. Code Ann. 242[b], [c]).

Increase or Decrease of Authorized Capital Stock.

Directors may issue capital stock at any time within amount authorized in certificate. (8 Del. Code Ann. 161). Authorized capital stock may be increased by amendment of certificate. (8 Del. Code Ann. 242[a][3]). Authorized capital may be reduced, by resolution of board of directors, if assets remaining after such reduction are sufficient to pay any debts for which payment has not been otherwise provided. (8 Del. Code Ann. 244).

On filing of certificate of amendment increasing authorized capital stock, tax is payable equal to difference between tax computed at rates under 8 Del. Code Ann. 391(a)(1) upon total authorized capital stock of corporation including proposed increase, and tax computed at same rates upon total authorized stock excluding proposed increase, in no case less than $30. Tax for filing certificate of amendment reducing authorized capital stock is $30. (8 Del. Code Ann. 391[a][2-3]). Fee (where no other is prescribed) for receiving, filing and indexing certificate, $115. Certifying and recording fees, as set forth above, apply. (8 Del. Code Ann. 391[a][7]). Expedited service available for additional charge of up to $7,500 if 30-minute service is requested, up to $1,000 if one-hour service is requested, up to $500 if two-hour service is requested, up to $300 if same day service is requested, and up to $150 if 24-hour service is requested. (8 Del. Code Ann. 391[h]).

By-laws.

Original or other by-laws may be adopted, amended or repealed by incorporators, by initial directors if named in certificate, or, before corporation has received any payment for any of its stock, by its board of directors. After corporation has received any payment for any of its stock, power to adopt, amend or repeal shall be in stockholders entitled to vote or in directors if authorized by certificate (latter does not divest or limit stockholders of power to adopt, amend or repeal by-laws). By-laws may contain any provision, not inconsistent with law or certificate, relating to business of corporation, conduct of its affairs, its rights or powers, or rights or powers of stockholders, directors, officers or employees. In nonstock corporation, power to adopt, amend or repeal by-laws resides in members entitled to vote or in governing body if charter permits. (8 Del. Code Ann. 109).

Board, subject to repeal by shareholders, may adopt emergency by-laws for enemy attack, atomic disaster, catastrophe or similar emergency conditions. (8 Del. Code Ann. 110).

Stock.

If shares of stock are owned by nonresidents, they are not taxable in Delaware. (Const., art. IX, § 6).

Stock; common, preferred or special, may be with or without par value. (8 Del. Code Ann. 151[a]). No-par value stock may be issued for such consideration as may be fixed by directors or by stockholders (if provided by certificate). (8 Del. Code Ann. 153[b]).

Stock; common, preferred or special, with or without par value, may be issued in classes or in series within classes, each class or series having such voting powers, preferences, rights, qualifications, limitations or restrictions as stated in certificate of incorporation, amendment thereof or in resolution of directors providing for issue pursuant to authority expressly stated in certificate. (8 Del. Code Ann. 151[a]). If issued under resolution of directors, “certificate of designations” fully stating rights and privileges must be filed with Secretary of State and copy recorded in same manner as certificate of incorporation. (8 Del. Code Ann. 151[g]).

Stock of any class or series may be made redeemable at option of corporation or stockholder provided corporation shall have outstanding shares of at least one class or series with full voting powers not subject to redemption. (8 Del. Code Ann. 151[b]). Only such stock may be made redeemable. (8 Del. Code Ann. 160[a][3]). Any redeemable stock may be redeemed at such times and prices as are stated in certificate of incorporation or resolution of directors providing for issue. Such stock may be redeemed for cash, property or rights, including securities of same or another corporation. (8 Del. Code Ann. 151[b]). Redeemed stock is not considered outstanding for voting purposes. (8 Del. Code Ann. 160[d]).

Stock may be purchased or otherwise acquired by corporation unless capital is or will become impaired. (8 Del. Code Ann. 160[a][1]). Stock redeemable at option of corporation may not be purchased for price greater than redemption price. (8 Del. Code Ann. 160[a][2]). Corporation may exchange debt security for its stock as long as capital is not impaired. (8 Del. Code Ann. 160[a][1]).

Corporation may retire any shares of its capital stock that are issued but not outstanding. (8 Del. Code Ann. 243[a]). Retired shares resume status of authorized and unissued shares unless certificate of incorporation provides otherwise. If certificate of incorporation prohibits reissuance of retired shares, certificate so stating must be filed in accordance with 8 Del. Code Ann. 103. (8 Del. Code Ann. 243[b]). No reduction of capital may be made unless assets remaining are enough to pay debts for which payment has not otherwise been provided. (8 Del. Code Ann. 244[b]).

Stock of any class or series is convertible into or exchangeable for any other class or series of stock as stated in certificate or resolution of directors providing for issue. (8 Del. Code Ann. 151[e]).

Uncertificated Stock.

Any stock of any class or series may, by resolution of board of directors, be represented by uncertified shares. Any such resolution shall not apply to shares represented by certificate until certificate is surrendered to corporation. (8 Del. Code Ann. 158).

Stock Certificates.

Every holder of stock represented by certificates shall be entitled to have certificate signed by chairperson or vice-chairperson of board or president or vice-president, and by treasurer or assistant treasurer, or secretary or assistant secretary of such corporation. Any or all such signatures may be facsimile. (8 Del. Code Ann. 158).

Issuance of Stock.

Issued stock is deemed fully paid and nonassessable upon receipt by corporation of consideration consisting of cash, any tangible or intangible property or any benefit to corporation, or any combination thereof. Board of directors may issue stock as partly paid shares pursuant to 8 Del. Code Ann. 156. (8 Del. Code Ann. 152).

Directors may require payment on 30 days notice (8 Del. Code Ann. 163), and may sue for payment, or sell, or forfeit stock if payment is not made. (8 Del. Code Ann. 164).

Transfer of Stock.

Governed by Art. 8, Uniform Commercial Code. (6 Del. Code Ann. 8-101 et seq.). Record date for determination of stockholders of record entitled to notice of meeting may be not more than 60 nor less than ten days before meeting. If no record date fixed, date for determining stockholders entitled to notice of and to vote at meeting must be at close of business on day next preceding day on which notice is given, or, if notice waived, at close of business on day next preceding day on which meeting is held. (8 Del. Code Ann. 213[a]).

For purposes other than meetings, record date must not precede date upon which resolution fixing record date is adopted and which date must not be more than ten days after resolution date. If no record date, date shall be when first written consent is received by corporation or, if prior action taken by board, date must be at close of business on day board adopts resolution taking such prior action. (8 Del. Code Ann. 213[b]).

Restrictions.

Written restriction on transfer of security is enforceable if noted conspicuously on security or in notice sent to holders of uncertificated shares pursuant to 8 Del. Code Ann. 151(f); if not so conspicuously noted, enforceable only against any person with actual knowledge. (8 Del. Code Ann. 202[a]). Restriction may be imposed by certificate, by-laws, or agreement among security holders or among such holders and corporation. (8 Del. Code Ann. 202[b]). Restriction may provide: (1) Right of first refusal, (2) obligate corporation or other holders to buy securities, (3) require consent of corporation or shareholders, (4) obligate owner to sell or transfer particular quantity to corporation, or (5) restrict classes of potential purchasers if not manifestly unreasonable. (8 Del. Code Ann. 202[c]).

Business Combinations with Interested Stockholders.

Corporation may not engage in business combination with interested stockholder for three years following time such stockholder becomes interested stockholder, unless: (1) Prior to such time, board approved business combination or transaction by which stockholder became interested stockholder, (2) upon such time, interested stockholder owned 85% or more of outstanding voting stock at time transaction commenced (excluding shares owned by directors who are officers and by certain employee stock plans), or (3) upon or after such time, business combination is approved by board and stockholders authorize by vote at annual or special meeting, and not by written consent, of at least two-thirds of outstanding voting stock not owned by interested stockholder. (8 Del. Code Ann. 203[a]). Such restrictions shall not apply to corporation when: (1) Original certificate of incorporation expressly rejects statutory restrictions, (2) within 90 days of Feb. 2, 1988 (effective date of statute), board permanently amends by-laws expressly rejecting restrictions, (3) majority of voting shares amends by-laws (which board cannot further amend) or certificate of incorporation expressly rejecting restrictions, (amendment is effective immediately if corporation has never had class of voting stock described in [4] below and certificate of incorporation of corporation has never elected to be governed by this section, otherwise amendment not effective until 12 months after its adoption and not applicable to business combination and person or entity becoming interested stockholder on or prior to date of adoption), (4) no class of voting stock is listed on national securities exchange, or held of record by more than 2,000 stockholders, unless any of foregoing results from act of interested stockholder or as result of transaction by which stockholder becomes interested stockholder, (5) stockholder becomes interested stockholder inadvertently and subsequently divests, and would not have been interested stockholder (except for inadvertent acquisition) for three year period before business combination involving such stockholder, (6) business combination with interested stockholder is proposed subsequent to public announcement of, and prior to consummation or abandonment of, merger, sale of 50% or more of corporate assets, or tender offer for 50% or more of voting stock, or (7) business combination is with interested stockholder who became interested stockholder at time when restrictions in this section did not apply by reason of (1) through (4) above, provided, however, that this paragraph (7) shall not apply if at time such interested stockholder became interested, certificate of incorporation provided that any amendment to certificate of incorporation shall not apply to restrict business combination between corporation and interested stockholder if interested stockholder became such prior to effective date of amendment. (8 Del. Code Ann. 203[b]). For purposes of statute, “business combination” and “owner” of voting stock are broadly defined. (8 Del. Code Ann. 203[c][3], [9]). Chancery Court has exclusive jurisdiction over foregoing matters. (8 Del. Code Ann. 203[e]).

Uniform Securities Ownership by Minors Act not adopted.

Uniform Simplification of Fiduciary Security Transfers Act (1958, adopted 1963)

(12 Del. Code Ann. 4301) not repealed by Art. 8, Uniform Commercial Code (6 Del. Code Ann. 10-104).

Uniform Commercial Code adopted. See category 3 Business Regulation and Commerce, topic 3.09 Commercial Code.

Stock Transfer Tax.

None.

Stockholders Actions.

Stockholder may recover from corporation amount paid by stockholder for any debt of corporation for which corporation is liable under Tit. 8. (8 Del. Code Ann. 326). In derivative action, stockholder must aver that he was stockholder at time of transaction of which he complains or that stock thereafter devolved upon him by operation of law. (8 Del. Code Ann. 327). Complaint must allege demand upon directors or reason for no demand. (Ch. Ct. Rule 23.1). Action may be settled or dismissed only with court approval. (Ch. Ct. Rule 23.1). Stockholder in derivative or class action must fairly and adequately protect interests of class. (Ch. Ct. Rule 23).

Stockholders' Liabilities.

Personal liability for debts of corporation may be imposed to extent and upon conditions specified in certificate; otherwise not liable except as may be by reason of own conduct or acts. (8 Del. Code Ann. 102[b][6]). If stock not fully paid, and assets insufficient to satisfy creditors' claims, stockholder liable up to sum necessary to complete amount of unpaid balance of consideration for which shares issued. (8 Del. Code Ann. 162[a]). No person holding unpaid shares as collateral security shall be personally liable but person pledging shares shall be liable. (8 Del. Code Ann. 162[d]). No reduction of capital shall release any liability of any stockholder whose shares have not been fully paid. (8 Del. Code Ann. 244[b]).

Stockholders' meetings may be held at such place, either within or without State, as provided by certificate of incorporation or by-laws, or if not so designated, as determined by board of directors. If in accordance with aforementioned, board has discretion over meeting location, and whether meeting will be held solely by means of remote communications. (8 Del. Code Ann. 211[a]).

Unless directors are elected by written consent in lieu of annual meeting, annual meeting is required by statute. (8 Del. Code Ann. 211[b]). Unless certificate of incorporation provides otherwise, stockholders may act by written consent to elect directors. (8 Del. Code Ann. 211[b]). However, if such consent is less than unanimous, action by written consent may be in lieu of annual meeting only if all directorships which directors could be elected at annual meeting are vacant and are filled by such action. (8 Del. Code Ann. 211[b]). Failure to hold meeting will not affect otherwise valid corporate acts or work a forfeiture or dissolution of corporation unless specifically provided in this chapter. (8 Del. Code Ann. 211[c]). Chancery may order holding of overdue meeting upon application of any stockholder or director. (8 Del. Code Ann. 211[c]).

For record date, see subhead Transfer of Stock, supra.

Written notice required of any meeting at which stockholders required or permitted to take action. (8 Del. Code Ann. 222[a]). Notice must state place, if any, date and hour of meeting, means of remote communications, if any, by which stock and proxy holders may be deemed present and able to vote, record date for determining stockholders entitled to vote at meeting (if different from notice record date) and purpose(s) of special meeting. (8 Del. Code Ann. 222[a]). Notice must be given at least ten and not more than 60 days before meeting. (8 Del. Code Ann. 222[b]). (See also, however, subheads Sale or Transfer of Corporate Assets, and Merger and Consolidation, infra.) No notice necessary for adjourned meeting unless adjournment for more than 30 days, new record date fixed, or time, place, and means of remote communications, if any, by which stockholders and proxy holders may be deemed to be present at adjourned meeting not announced at meeting where adjournment taken. If after adjournment new vote record date is fixed, board must fix new notice record date pursuant to 8 Del. Code Ann. 213(a). (8 Del. Code Ann. 222[c]). Any notice required by statute, certificate of incorporation or by-laws may be waived in writing or by electronic transmission, either before or after meeting. (8 Del. Code Ann. 229). Attendance at meeting is waiver of notice except attendance to object at beginning of meeting that it is not lawfully called or convened. (8 Del. Code Ann. 229). Neither business to be transacted nor purpose of any regular or special meeting need be specified in any written waiver unless required by certificate of incorporation or by-laws. (8 Del. Code Ann. 229).

Unless otherwise provided in certificate of incorporation, vote on any particular action required or permitted to be taken at meeting of stockholders or members of non-stock corporation, may be dispensed with if that number necessary to approve particular action at meeting consent thereto in writing, or by electronic transmission, and consents are delivered to corporation’s registered office in state, principal place of business, or to officer having custody of book recording proceedings of shareholder meetings. (8 Del. Code Ann. 228[a], [b]). No notice need be given to any person with whom communication is unlawful. (8 Del. Code Ann. 230[a]). No notice need be given to any stockholder or member of non-stock corporation to whom notice has been mailed to his or her address as shown on records of corporation and returned undelivered if: (1) Notices of two consecutive annual meetings and all notices of meetings and actions by written consent between such annual meetings given, or (2) all and at least two dividend or interest payments (if sent by first-class mail) during 12 month period mailed. (8 Del. Code Ann. 230[b]). Exceptions shall not be applicable to any notice returned as undeliverable if notice was given by electronic transmission. (8 Del. Code Ann. 230[c]).

Stock ledger is only evidence of stockholders who are entitled to vote or to examine stock ledger. (8 Del. Code Ann. 219[c]). List of stockholders entitled to vote must be open for examination by any stockholder, for at least ten days prior to meeting, for any purpose germane to meeting: (i) On reasonably accessible electronic network, provided information allowing access to system is provided with notice of meeting; or (ii) during ordinary business hours at principal place of business of corporation. If vote record date less than ten days before meeting, list must reflect stockholders entitled to vote as of 10th day before meeting. (8 Del. Code Ann. 219[a]).

One vote allowed for each share unless otherwise provided in certificate of incorporation. (8 Del. Code Ann. 212[a]). Voting may be by proxy granted by stockholder in writing or by some form of electronic transmission to persons acting as proxy. (8 Del. Code Ann. 212[b], [c]). Proxy is good for three years unless otherwise stated. (8 Del. Code Ann. 212[b]). Irrevocable proxies may be recognized. (8 Del. Code Ann. 212[e]). Certificate of incorporation may authorize cumulative voting for all elections of directors or for elections held under specified circumstances. (8 Del. Code Ann. 214).

Corporation must appoint inspector or alternate to: (1) Ascertain outstanding shares and voting power, (2) determine shares represented and validity of proxies and ballots, (3) count votes, (4) determine and retain challenges to inspector’s decisions, (5) certify determination of shares represented at meeting and count of votes. (8 Del. Code Ann. 231[a], [b]). No voting changes after polls close, unless Chancery Court determines otherwise. (8 Del. Code Ann. 231[c]). Unless certificate of incorporation or by-laws provide, section does not apply if no voting stock is listed on national securities exchange, authorized for interdealer quotation, or held of record by more than 2,000 stockholders. (8 Del. Code Ann. 231[e]).

Voting Trusts.

Stockholders may, by agreement in writing, create voting trust for any period. Copy of agreement and any amendments must be filed in registered office of corporation in Delaware, open to inspection of any stockholder or beneficiary of agreement. Certificates of stock or uncertified stock must be issued to voting trustee to represent any stock of original issue deposited with trustee. Certificates of stock or uncertificated stock deposited under said agreement must be cancelled and new certificates or uncertificated stock issued to voting trustees, in which certificates, if any, and on stock ledger, it must appear that they are issued under agreement. Voting trustees may vote in person or by proxy, but incur no liability as stockholder, trustee, or otherwise, except for individual malfeasance. Majority of voting trustees determine manner of voting unless otherwise provided in agreement; if equally divided, vote must be divided equally among trustees. (8 Del. Code Ann. 218[a]).

Voting Agreements.

Any amendment to voting trust agreement must be made by written agreement. (8 Del. Code Ann. 218[b]). Signed and written agreement between stockholders may provide for shares to be voted as provided in agreement or as parties agree. (8 Del. Code Ann. 218[c]).

Directors.

Board of directors must consist of one or more members each of whom must be natural person (as designated in certificate or by-laws). Each director must hold office until his successor is elected or until his earlier resignation or removal. (8 Del. Code Ann. 141[b]). Directors need not be stockholders unless required by certificate of incorporation or by-laws. (8 Del. Code Ann. 141[b]). Directors may be divided into one, two or three classes with staggered terms. (8 Del. Code Ann. 141[d]). Directors may be removed by holders of majority of shares, with or without cause. Cause must be shown for: (1) Classified board unless certificate of incorporation provides otherwise, or (2) corporations having cumulative voting if votes cast against removal are sufficient to elect director if cumulatively voted at election of entire board or, if there be classes of directors, at election of director’s class. (8 Del. Code Ann. 141[k]).

Unless directors are elected by written consent, directors are elected at annual meeting of stockholders. (8 Del. Code Ann. 211[b]). Election is by written ballot unless otherwise provided in certificate of incorporation. (8 Del. Code Ann. 211[e]). Failure to hold annual meeting or to elect sufficient directors to conduct business of corporation will not affect otherwise valid acts or work forfeiture or dissolution of corporation. (8 Del. Code Ann. 211[c]). Chancery may compel holding of annual meeting under certain circumstances. (8 Del. Code Ann. 211[c]). Unless otherwise provided in certificate of incorporation or by-laws, majority of directors in office, although less than quorum, may fill vacancies or newly created directorships. (8 Del. Code Ann. 223[a][1]). If no directors in office, any officer, stockholder or executor, administrator, trustee, guardian or other fiduciary of stockholder may call special stockholder meeting or apply to Chancery to order election. (8 Del. Code Ann. 223[a][2]).

Upon application of any stockholder, Chancery may appoint custodian(s) to continue business of corporation and not to liquidate its affairs and distribute its assets, except when Court shall otherwise order and except in cases arising under paragraph (3) of subsection (a) of this section or paragraph (2) of subsection (a) of 352 of this title. (8 Del. Code Ann. 226).

Directors’ meetings may be held outside of state, unless otherwise restricted by certificate of incorporation or by-laws. (8 Del. Code Ann. 141[g]). Majority of total number of directors constitutes quorum unless certificate of incorporation or by-laws require greater number. (8 Del. Code Ann. 141[b]). Unless certificate provides otherwise, by-laws may provide for quorum of less than majority but in no case less than one-third of total number of directors except where board of one director authorized. (8 Del. Code Ann. 141[b]). Certificate of non-stock corporation may provide for quorum of less than one-third members of governing body. (8 Del. Code Ann. 141[j]). Vote of majority of directors present at meeting at which quorum is present is act of board unless certificate of incorporation or by-laws provides otherwise. (8 Del. Code Ann. 141[b]). Any action required or permitted to be taken at any meeting of board may be taken without meeting if all members consent in writing or by electronic transmission, and writings or electronic transmissions are filed with board minutes unless certificate of incorporation or by-laws provide otherwise. (8 Del. Code Ann. 141[f]). Interested directors may be counted in quorum of meeting which authorized transaction. (8 Del. Code Ann. 144[b]). Participation of interested director in meeting will not void transaction if material facts as to his interest or relationship are disclosed or known to board or shareholders who approve in good faith, or if transaction is fair as of time it is authorized by board, committee or shareholders. (8 Del. Code Ann. 144[a]).

Powers and Duties of Directors.

Business of every corporation is managed by or under direction of board of directors except as provided in certificate. (8 Del. Code Ann. 141[a]). When authorized by majority vote of stockholders, directors may sell, lease or exchange all or substantially all corporate assets, including goodwill and franchises, for money or other property, including stock and securities. (8 Del. Code Ann. 271[a]). Notwithstanding stockholder authorization or consent, board of directors may abandon such proposed sale, lease or exchange without further action by stockholders, subject to rights, if any, of third parties under any contract relating thereto. (8 Del. Code Ann. 271[b]). No stockholder vote required for sale, lease or exchange of assets to or with direct or indirect wholly-owned and controlled subsidiary. Assets of such subsidiary treated as assets of ultimate parent for purposes of subsection (a). (8 Del. Code Ann. 271[c]). Except as certificate of incorporation provides otherwise, directors may mortgage or pledge assets without stockholder consent. (8 Del. Code Ann. 272). Corporation may agree to submit matter to vote of stockholders whether or not board determines at any time subsequent to approving such matter that such matter is no longer advisable and recommends that stockholders reject or vote against matter. (8 Del. Code Ann. 146).

Committees (of corporations incorporated prior to July 1, 1996) of one or more directors may, to extent provided in resolution of board or by-laws, exercise powers of board in management of business. Committees may not amend certificate of incorporation (but may adopt certificate of designation), adopt merger agreement, recommend asset sales, dissolution, or revocation of dissolutions or amend by-laws and may not authorize issuance of stock or declare dividend unless specifically authorized by by-laws, resolution appointing committee or certificate of incorporation. (8 Del. Code Ann. 141[c][1]). For corporations incorporated on or after July 1, 1996, and corporations incorporated prior to July 1, 1996 that by resolution elect to be governed by § (2), committees may be designated with resolution passed by majority of whole board. Such committees may have powers and authority of board delegates, but may not approve, adopt or recommend to stockholders action required by this chapter to be submitted for stockholder approval, and may not adopt, amend or repeal by-laws. (8 Del. Code Ann. 141[c][1], [2]). Committee may create one or more subcommittees, each to consist of one or more committee members, and delegate any or all powers and authority of committee unless otherwise provided in certificate of incorporation, by-laws or resolution of board designating committee. (8 Del. Code Ann. 141[c][3]).

Liabilities of Directors.

Directors are fully protected in relying in good faith upon records of corporation or reports made to corporation by any officer or by person director reasonably believes is expert selected on behalf of corporation by board. (8 Del. Code Ann. 141[e]). Directors are jointly and severally liable for payment of unlawful dividend and for unlawful stock purchase or redemption unless dissent or absence from meeting is noted in minutes. (8 Del. Code Ann. 174[a]). Where certificate of incorporation so provides, liability for breach of fiduciary duty may be limited or eliminated, provided that such provision shall not eliminate or limit liability of director (i) for any breach of director's duty of loyalty to corporation or its stockholders; (ii) for acts or omissions not in good faith or which involve intentional misconduct or knowing violation of law; (iii) under § 174 of title 8; or (iv) for any transaction from which director derived improper personal benefit. (8 Del. Code Ann. 102[b][7]). See topic Process.

Officers.

Any number of offices may be held by same person unless certificate of incorporation or by-laws provide otherwise. Corporation may have such officers as are desired, chosen in such manner and holding office for such terms as prescribed by by-laws or determined by directors. One officer shall record proceedings of stockholder and directors' meetings in book for that purpose. (8 Del. Code Ann. 142[a]). Vacancies are filled as provided in by-laws; otherwise by directors. (8 Del. Code Ann. 142[e]). Failure to elect officers annually will not dissolve corporation. (8 Del. Code Ann. 142[d]).

Liabilities of Officers.

No statutory provisions respecting liability of officers.

Indemnification of Directors and Officers.

Corporation may indemnify any person who was or is a party or is threatened to be made a party to any threatened, pending or completed action, suit or proceeding, whether civil, criminal, administrative or investigative (other than action by or in right of corporation), by reason of fact person is or was a director, officer, employee or agent of corporation or serving another corporation at request of corporation, against expenses (including attorneys' fees), judgments, fines, and amounts paid in settlement, actually and reasonably incurred by person if person acted in good faith and in manner person reasonably believed to be in or not opposed to best interests of corporation and, with respect to criminal action or proceeding, had no reasonable cause to believe conduct was unlawful. Lack of good faith not presumed from settlement or nolo contendere plea. (8 Del. Code Ann. 145[a]). Indemnification of expenses (including attorneys' fees) allowed in derivative actions except no indemnification in respect to any claim, issue or matter as to which any such person has been adjudged to be liable unless Chancery decides indemnification is proper. (8 Del. Code Ann. 145[b]). To extent any such person succeeds on merits or otherwise in defense of action referred to in subsections (a) and (b) of this section, such person shall be indemnified against expenses (including attorneys' fees). (8 Del. Code Ann. 145[c]). Determination that person to be indemnified met applicable standard of conduct is made by board of directors by majority vote of directors not party to such action, suit or proceeding even if not quorum, by committee of directors designated by majority vote of such directors, even though less than quorum, or if there are no such directors, by independent legal counsel or by stockholders. (8 Del. Code Ann. 145[d]). Expenses (including attorneys' fees) may be paid in advance upon receipt of undertakings to repay by director or officer if it is ultimately determined that such person is not entitled to be indemnified by corporation. (8 Del. Code Ann. 145[e]). Right to indemnification cannot be eliminated after occurrence of event that is subject of proceeding for which indemnification is sought, unless indemnification provision in effect at time of event allows for elimination after occurrence of event. (8 Del. Code Ann. 145[f]). Corporation may purchase indemnity insurance. (8 Del. Code Ann. 145[g]). Right of indemnification provided by section continues as to person who has ceased to be director, officer or agent unless otherwise provided in authorization. (8 Del. Code Ann. 145[j]). Court of Chancery has exclusive jurisdiction for advancement of expenses or indemnification. (8 Del. Code Ann. 145[k]).

Registered Office.

Every corporation must maintain registered office in state. It need not be same as place of business. (8 Del. Code Ann. 131[a]). Corporation may change registered office to any other place in state by resolution of board of directors. (8 Del. Code Ann. 133). Certificate of change must be filed with Secretary of State in accordance with 8 Del. Code Ann. 103. (8 Del. Code Ann. 133).

Registered Agent.

Every corporation must maintain registered agent in state. Agent may be any of corporation itself, individual resident in state, domestic corporation (other than corporation itself), domestic partnership (whether general [including limited liability partnership] or limited [including limited liability limited partnership]), domestic limited liability company or domestic statutory trust, or foreign corporation, foreign partnership (whether general [including limited liability partnership] or limited [including limited liability limited partnership]), foreign limited liability company or foreign statutory trust. Every registered agent must, if entity, maintain office in State which is generally open, or if person, be present at location in state at sufficiently frequent times to accept process and perform functions of registered agent. (8 Del. Code Ann. 132[a]). Corporation may change its registered agent to any other person or corporation including itself. (8 Del. Code Ann. 133). Certificate of change must be filed with Secretary of State. (8 Del. Code Ann. 133). Registered agent may change its name or address of registered office by filing certificate with Secretary of State. (8 Del. Code Ann. 134). Registered agent may resign and appoint successor by filing certificate with Secretary of State. (8 Del. Code Ann. 135). Corporation must ratify and approve substitution. (8 Del. Code Ann. 135). If registered agent resigns without appointing successor, resignation not effective for 30 days after filing of certificate. (8 Del. Code Ann. 136[a]). Certificate must state that agent notified corporation of resignation by mail or delivery to corporation’s last known address, and set forth date of notice. Notification must be at least 30 days before filing of certificate. (8 Del. Code Ann. 136[a]). Corporation must appoint new registered agent within 30 days of filing of certificate of resignation by registered agent, or Secretary of State will declare its charter forfeited. (8 Del. Code Ann. 136[b]). If it is foreign corporation, Secretary of State will forfeit its authority to do business in state. (8 Del. Code Ann. 136[b]). If no new registered agent is designated as provided, service of legal process against corporation must be upon Secretary of State. (8 Del. Code Ann. 136[c]).

Powers of Corporations.

Corporation has power to have perpetual succession by its corporate name, unless certificate of incorporation limits period of duration; to sue or be sued; to have corporate seal; to purchase, receive, take by grant, gift, devise, bequest or otherwise, lease, or otherwise acquire, own, hold, improve, employ, use and otherwise deal in and with real or personal property, or any interest therein, wherever situated, and to sell, convey, lease, exchange, transfer or otherwise dispose of, or mortgage or pledge, all or any of its property and assets, or any interest therein, wherever situated; to appoint officers and agents and pay them; to adopt, amend and repeal by-laws; to wind up and dissolve itself; to conduct business and have offices and exercise its powers within or without state; to make donations for public welfare or for charitable, scientific or educational purposes; to be incorporator, promoter or manager of other corporations; to participate with others in any corporation, partnership, limited partnership, joint venture or other association, or in any transaction, undertaking or arrangement which participating corporation would have power to conduct by itself, whether or not such participation involves sharing or delegation of control with or to others; to transact any lawful business in aid of governmental authority; to make contracts, including contracts of guaranty and suretyship, incur liabilities, borrow money, issue notes, bonds and other obligations, and secure any of its obligations by mortgage, pledge or other encumbrance of all or any of its property, franchises and income; to lend money, invest and reinvest its funds, and take, hold and deal with real and personal property as security for payment of funds so invested; to pay pensions and establish and carry out pension, profit sharing, stock option, stock purchase, stock bonus, retirement, benefit, incentive and compensation plans, trusts and provisions for any and all directors, officers and employees and for those of its subsidiaries; to provide insurance for its benefit on life of any directors, officers or employees or on life of any stockholder to acquire at his death his shares of its stock; to renounce in certificate of incorporation or by action of directors any interest or expectancy in business opportunities or classes or categories of business opportunities presented corporation, officers, directors, or stockholders (8 Del. Code Ann. 122); to indemnify its officers, directors, employees, agents or persons serving at request of corporation and to purchase liability insurance (8 Del. Code Ann. 145); to lend money to or guarantee any obligation of any officer or employee, including officers and employees who are directors, with or without interest and security (8 Del. Code Ann. 143); to merge or consolidate (8 Del. Code Ann. 251); to deal in securities of other corporations or entities and exercise all rights of ownership, including right to vote (8 Del. Code Ann. 123). No act of corporation and no conveyance or transfer of property is invalid by reason of fact corporation was without capacity or power to do such act. (8 Del. Code Ann. 124). Banking powers expressly denied. (8 Del. Code Ann. 126).

Dividends.

Subject to any restrictions in certificate of incorporation, directors may pay dividends out of surplus or, if no surplus is available, out of net profits for fiscal year in which dividend is declared and/or preceding fiscal year. (8 Del. Code Ann. 170[a]). No dividends may be declared while capital is impaired to extent that it amounts to less than aggregate amount of capital represented by issued and outstanding stock of all classes having preference on distribution of assets. (8 Del. Code Ann. 170[a]). Dividends may be paid in cash, in property, or in shares of corporation's capital stock. (8 Del. Code Ann. 173). If dividend is paid in shares of theretofore unissued capital stock, amount not less than aggregate par value of par value shares being declared as dividend (or amount determined by board of directors for shares without par value) must be transferred from surplus to capital account by resolution of board of directors. (8 Del. Code Ann. 173). No such transfer is required if additional shares are distributed pursuant to stock split or division rather than as dividend. (8 Del. Code Ann. 173).

Unclaimed Dividends.

Part III, c. 11, subc. IV of Tit. 12. (12 Del. Code Ann. 1197). See topic Absentees, subhead Escheat.

Sale or Transfer of Corporate Assets.

Board of directors or governing body as authorized by affirmative vote of majority of voting stock at stockholders' meeting or by majority of members of non-stock corporation having right to vote for election of members of governing body may sell, lease or exchange all or substantially all of corporate assets. (8 Del. Code Ann. 271[a]). Consideration may include money or other property, including stock or securities of any other corporation. (8 Del. Code Ann. 271[a]). Notwithstanding stockholder authorization or consent to proposed sale, lease or exchange of corporation's property and assets, board of directors may abandon such proposed sale, lease or exchange without further action by stockholders or members, subject to rights, if any, of third parties under any contract relating thereto. (8 Del. Code Ann. 271[b]). No stockholder vote required for sale, lease or exchange of assets to or with direct or indirect wholly-owned and controlled subsidiary. Assets of such subsidiary treated as assets of ultimate parent for purposes of subsection (a). (8 Del. Code Ann. 271[c]). See also subhead Business Combinations with Interested Stockholders, supra.

Books and Records.

Any records maintained in regular course of business, including stock ledger, books of account, and minute books, may be kept by any information storage device if readily convertible into legible paper form. (8 Del. Code Ann. 224). Stockholder of record, beneficial owner of stock, or member of nonstock corporation, in person or by attorney or agent, may, upon written demand under oath stating purpose, inspect, copy and extract for any proper purpose stock ledger, list of stockholders and other books and records as well as subsidiary's books and records, to extent that corporation has actual possession and control of such records or could obtain such records through control over subsidiary; provided, however, on date of demand such inspection would not constitute breach of agreement between subsidiary and corporation and subsidiary would not have legal right to deny corporation access. (8 Del. Code Ann. 220[a], [b]). When stockholder is other than record holder and seeks to inspect, oath must establish that person is stockholder, and provide evidence of beneficial ownership with statement averring document true and correct. Proper purpose means purpose reasonably related to such person's interest as a stockholder. (8 Del. Code Ann. 220[b]). If corporation refuses inspection, stockholder may apply to Chancery to compel it. (8 Del. Code Ann. 220[c]). Certificate of incorporation may confer upon bond and debenture holders same right of inspection. (8 Del. Code Ann. 221). Director may examine stock ledger, list of stockholders and other books and records for purpose reasonably related to position as director. (8 Del. Code Ann. 220[d]).

Reports.

On or before Mar. 1, Delaware corporations must make annual franchise tax report to and on form designated by Secretary of State. Report must be signed by corporation's president, secretary, treasurer or other proper officer, or by any director, or by any incorporator if directors not yet elected. Individual's signature is prima facie evidence that individual is authorized to certify report. Title or position of signer must be designated. Report must contain following information: Location of registered office in Delaware; name of agent upon whom process may be served; location of principal places of business; names and addresses of directors as of filing date of report and of officer who signs report; number of shares and par value per share of each class of capital stock having par value and number of shares of each class of stock without par value which corporation is authorized to issue; if exempt from taxation for any cause, specific facts entitling corporation to exemption; and, such information, schedules and attachments as Secretary requires to ascertain franchise tax due to State. (8 Del. Code Ann. 502[a]). Corporation may file with franchise tax report statement of number of shares of each class of stock actually issued, and total amount of gross assets, including good will. (8 Del. Code Ann. 503[b]). Filing of such statement permits corporation to pay franchise tax according to formula in 8 Del. Code Ann. 503(a)(2). (8 Del. Code Ann. 503[b]). See subhead Franchise Tax, infra. Corporations that have unpaid franchise tax balance due to state or do not have completed annual franchise tax report on file for relevant period cannot be issued certificate of good standing. (8 Del. Code Ann. 502[f]).

Corporate Bonds or Mortgages.

Corporation may issue bonds, and may secure any obligation by mortgage. (8 Del. Code Ann. 122[13]). Bondholders may be granted same rights as stockholders to vote and to inspect corporate books, accounts and records. Certificate of incorporation may provide that holders of debt securities shall be deemed to be stockholders for any voting purposes and it may place exclusive power to vote in hands of bondholders (8 Del. Code Ann. 221) except as to class votes on charter amendments that would increase or decrease aggregate number of authorized class shares or their par value, or that would alter powers, preferences or special rights so as to affect them adversely (8 Del. Code Ann. 242[b][2]). Usury may not be pleaded in defense to any action on bond, note or other evidence of indebtedness. (8 Del. Code Ann. 330). Except to extent certificate of incorporation provides otherwise, authorization or consent of stockholders not necessary to mortgage or pledge corporate property or assets. (8 Del. Code Ann. 272).

Merger and Consolidation.

Any two or more Delaware corporations may merge pursuant to resolution of board of directors (8 Del. Code Ann. 251[a], [b]) approved by vote of majority of total number of outstanding shares of capital stock of each corporation. Stockholder vote may be at annual or special meeting. Notice must be mailed to each stockholder at least 20 days prior to meeting. Certified agreement must be filed with Secretary of State in accordance with 8 Del. Code Ann. 103. (8 Del. Code Ann. 251[c]). In lieu of filing full agreement, surviving or resulting corporation may file certificate of merger or consolidation executed in accordance with 8 Del. Code Ann. 103. (8 Del. Code Ann. 251[c]). Agreement may contain provision permitting termination or certain modifications of agreement at any time prior to time that agreement (or certificate in lieu thereof) filed with Secretary of State becomes effective in accordance with 8 Del. Code Ann. 103, by board of any constituent corporation notwithstanding approval of stockholders. (8 Del. Code Ann. 251[d]). Except to extent certificate of incorporation provides otherwise, no vote of stockholders of surviving corporation necessary: (1) If agreement does not amend certificate of incorporation of surviving corporation, (2) if each share of surviving corporation outstanding prior to merger is to be identical outstanding or treasury share of surviving corporation after merger, and (3) either no shares of common stock of surviving corporation and no shares, securities or obligations convertible into such stock are to be issued or delivered under plan of merger, or authorized unissued shares or treasury shares of common stock of surviving corporation to be issued or delivered under plan of merger plus those initially issuable upon conversion of any other shares, securities or obligations to be issued or delivered under plan do not exceed 20% of shares of common stock of constituent corporations outstanding prior to merger. No vote of stockholders is necessary if no shares of stock of such corporation have yet been issued. (8 Del. Code Ann. 251[f]). Notwithstanding majority vote requirements of 8 Del. Code Ann. 251(c), no vote of shareholders of constituent corporation is necessary to authorize merger with or into single direct or indirect wholly owned subsidiary corporation if requirements of 8 Del. Code Ann. 251(g) are met. (8 Del. Code Ann. 251[g]).

Surviving or resulting corporation possesses all rights, privileges, powers and franchises and is subject to all restrictions, disabilities and duties of each constituent corporation. All property and debts of each corporation are vested in surviving or resulting corporation. All rights of creditors and liens upon property survive. (8 Del. Code Ann. 259[a]). Merger does not abate actions against any constituent corporation. (8 Del. Code Ann. 261). Surviving or resulting corporation may issue bonds to cover payments or obligations in effecting merger and may mortgage its franchise, rights, privileges and property to secure bonds. (8 Del. Code Ann. 260).

Delaware corporation may merge or consolidate with one or more foreign corporations if law of state of incorporation of foreign corporations permits. (8 Del. Code Ann. 252[a]). If surviving or resulting corporation is to be governed by laws of another state, it must consent to be served with process in Delaware in any proceeding for enforcement of any obligation of any constituent Delaware corporation or of any obligation of surviving or resulting corporation arising from merger, including suit for appraisal rights under 8 Del. Code Ann. 262. (8 Del. Code Ann. 252[d]). Corporation shall irrevocably appoint Secretary of State as its agent to accept service of process. (8 Del. Code Ann. 252[d]). Delaware corporation may merge or consolidate with non-U.S.A. corporation if laws of foreign jurisdiction permit. (8 Del. Code Ann. 252[a]).

Parent company may merge with or into 90% or more owned subsidiary on filing certificate setting forth resolution of board of directors (8 Del. Code Ann. 253[a]); but, if Delaware corporation party to merger is not wholly owned by parent, stockholders have appraisal rights under 8 Del. Code Ann. 262. (8 Del. Code Ann. 253[d]). (See subhead Appraisal, infra.) And, if parent corporation is not surviving corporation, approval of majority of outstanding stock of parent is necessary. (8 Del. Code Ann. 253[a]). Corporation may merge with joint stock association in accordance with 8 Del. Code Ann. 251 or 8 Del. Code Ann. 255 and for joint stock association, in accordance with governing articles, regulations, and laws. If corporation survives, agreement effective on filing and recording in accordance with 8 Del. Code Ann. 251 or on filing of certificate of merger or consolidation executed in accordance with 8 Del. Code Ann. 103. If joint stock association survives, agreement effective on filing in accordance with laws of joint stock association. (8 Del. Code Ann. 254[d]).

Two or more non-stock corporations may merge regardless of whether either is profit or nonprofit (8 Del. Code Ann. 255[a]) as may non-stock with stock corporations regardless of whether any is profit or nonprofit (8 Del. Code Ann. 257[a]). Domestic corporation may merge or consolidate with one or more general or limited partnerships, except for partnerships formed under laws of state which forbid such merger or consolidation. (8 Del. Code Ann. 263[a]). Mergers of mutual insurance companies governed by 18 Del. Code Ann. 5521.

Filing Tax.

On filing of certificate of consolidation or merger, tax is equal to difference between tax computed on total authorized stock of corporation created by merger or consolidation, and that computed on total authorized capital stock of constituent corporations, minimum tax being $75. This tax shall be in addition to any required under any law of state for noncorporate entity in connection with filing of certificate of merger or consolidation. (8 Del. Code Ann. 391[a][4]). Secretary of State may permit extension of credit for taxes or fees so required. (8 Del. Code Ann.

391[e]). Secretary shall retain from taxes and fees collected sum sufficient at all times to provide fund of at least $500, but not more than $1,500, out of which he may refund excess payments. (8 Del. Code Ann. 391[f]).

Dissolution.

If corporation has not issued shares or commenced business, majority of incorporators or directors, if named or elected, may surrender corporation's rights and franchises by filing with Secretary of State certificate that no shares of stock have been issued or business has not begun; that no part of capital has been paid or, if some has been paid, that amount less disbursements for necessary expenses has been returned; that if corporation has begun business but has not issued shares, all debts have been paid; that if corporation has not begun business but has issued certificates that all issued stock certificates have been surrendered and cancelled; and that all rights and franchises of corporation are surrendered. Upon filing certificate in accordance with 8 Del. Code Ann. 103, corporation is dissolved. (8 Del. Code Ann. 274). Filing tax is $40, or $10 if corporation has no assets and has ceased doing business; and has paid only minimum franchise tax under 8 Del. Code Ann. 503; and has paid all franchise taxes or fees due through end of year in which dissolution certificate filed. (8 Del. Code Ann. 391[a][5]).

Dissolution of any corporation may be effected by resolution of directors followed by approval of majority of outstanding voting stock at stockholder meeting for which notice has been mailed to each stockholder having voting power. Dissolution may also be effected in certain instances by unanimous written consent of shareholders having voting power. Certificate of dissolution must be filed with Secretary of State in accordance with 8 Del. Code Ann. 103. (8 Del. Code Ann. 275).

No corporation may be dissolved or merged until all franchise taxes due or assessable have been paid. (8 Del. Code Ann. 277).

Corporate existence continues for three years, or longer period as Chancery directs, after dissolution for prosecuting and defending suits, settling business, disposing of property, discharging liabilities and distributing assets to stockholders. (8 Del. Code Ann. 278). Chancery may appoint one or more directors as trustees or may appoint receivers to wind up business. (8 Del. Code Ann. 279). Suits begun by or against corporation prior to or within three years after dissolution must proceed until fully disposed of. (8 Del. Code Ann. 278).

Joint Venture Having Two Stockholders.

If stockholders each own 50% of stock and are unable to agree on desirability of discontinuing venture, either stockholder may, unless certificate of incorporation or written agreement provides otherwise, file with Court of Chancery petition and proposed plan for discontinuance along with certificate that petition and plan have been transmitted in writing to other stockholder. (8 Del. Code Ann. 273[a]). If stockholders do not file within three months certificate that plan agreed to and within one year certificate that distribution of assets completed, Court may dissolve corporation and appoint trustees or receivers to wind up affairs. Either or both periods may be extended by agreement of stockholders with certificate filed in Chancery prior to expiration of period. (8 Del. Code Ann. 273[b]).

Revocation.

At any time within three years, or such longer period as Chancery may have directed, following voluntary dissolution, revocation thereof may be effected by resolution of directors, and majority vote at noticed special meeting of outstanding stockholders of record on date dissolution became effective. (8 Del. Code Ann. 311[a]). Certificate stating name of corporation, names and addresses of officers and directors, and affirmative vote of majority of stockholders or in lieu of vote written consent of stockholders must be acknowledged and filed in accordance with 8 Del. Code Ann. 103. (8 Del. Code Ann. 311[a]).

Insolvency and Receivers.

When corporation becomes insolvent, Court of Chancery, on application of any creditor or stockholder, may appoint one or more persons to be receivers for corporation, to take charge of its affairs, to collect debts and property due, to prosecute and defend all claims and suits, and to appoint agents to act for corporation for so long as Chancery deems necessary. (8 Del. Code Ann. 291). Appointed receivers are vested with all title and rights of corporation. Receiver must file copy of appointment within 20 days with recorder in each county in which corporation owns real estate. (8 Del. Code Ann. 292). Receiver must file full itemized inventory of all assets in office of Register in Chancery in county in which proceeding is pending and complete inventory of all assets and accounting of all debts due. (8 Del. Code Ann. 294).

All creditors must prove under oath respective claims against corporation and cause same to be filed within time fixed by Rules of Court of Chancery. Creditors failing to do so within time prescribed by this section or by order of Court may be barred from participating in distribution of assets of corporation. Notice of such time by publication or otherwise may be required by Court. (8 Del. Code Ann. 295). Within 30 days after receiving notice of claim from Chancery, receiver, if not satisfied with validity of claim, must notify creditor of disputed claim. Receiver shall require creditors whose claims are disputed to submit themselves to examination in which creditors will produce books relating to claims as required. (8 Del. Code Ann. 296[a]). Creditors or claimants may appeal from disallowance to Chancery within 30 days. (8 Del. Code Ann. 296[b]).

Chancery may order receiver to sell property which will deteriorate in value and is encumbered by liens. (8 Del. Code Ann. 297). Chancery, before distributing assets, must first allow for reasonable compensation to receiver for services, administrative expenses and court costs out of assets of insolvent corporation. (8 Del. Code Ann. 298). Receiver, upon application to court, shall be substituted as party plaintiff in place of corporation. No action against receiver shall abate because of death, but shall be continued against successor or against corporation if no new receiver is appointed. (8 Del. Code Ann. 299).

Employees of insolvent corporation have lien upon assets for wages due, not exceeding two months wages, which will be paid prior to any other debts of corporation. “Employee” not construed to include officers of corporation. (8 Del. Code Ann. 300).

Liquidation of insolvent corporation may be discontinued if it is established that cause for liquidation no longer exists. Chancellor may dismiss proceedings and direct receiver to redeliver all remaining assets to corporation. (8 Del. Code Ann. 301).

Reorganization.

Any decree or order by court or judge entered pursuant to Federal Bankruptcy Code may be carried out without further action by directors or stockholders. (8 Del. Code Ann. 303[a]).

Forfeiture of Charter.

Charter may be forfeited in Chancery for abuse, misuse or nonuse of its powers, privileges or franchise on motion of Attorney General in county of registered agent or upon relation of proper party in county of corporation’s registered office. (8 Del. Code Ann. 284[a]). No proceeding for nonuse will be brought during first two years of incorporation. (8 Del. Code Ann. 284[c]). Charter may also be revoked for failure to pay franchise tax for one year (8 Del. Code Ann. 511) or for failure to appoint new registered agent within 30 days of filing of certificate of resignation by registered agent (8 Del. Code Ann. 136[b]).

Renewal or Revival of Certificate of Incorporation.

Any corporation may, at any time before expiration of time limited for its existence, and any corporation whose certificate of incorporation has become inoperative for nonpayment of taxes, has expired for failure to renew same or has been renewed invalidly, has expired due to nonappointment of successor registered agent within 30 days after resignation by registered agent, may at any time procure renewal or revival of its certificate of incorporation by filing with Secretary of State certificate stating: Name of corporation and date of filing of its original certificate of incorporation, name and office address of registered agent; whether renewal is to be perpetual, and, if not, length of its existence; in case of renewal before expiration of time limited for its existence, date when such renewal is to commence, which must be prior to date of expiration of old certificate of incorporation; that corporation was duly organized in Delaware; date when certificate would expire or other facts showing certificate has been forfeited or become void; that certificate is filed by authority of those on board at time certificate expired or those elected to replace such directors. Renewal or revival validates all lawful acts done before or during period when certificate of incorporation was inoperative or void. All franchise taxes, penalties and interest due at time certificate of incorporation became void or expired must be paid, but in case of corporation which has been inoperative for more than five years, it shall instead pay sum equal to three times amount of annual franchise tax that would be due and payable by such corporation for year in which renewal or revival is effected, computed at then current rates. (8 Del. Code Ann. 312[a]-[e], [g]).

Close Corporations.

If certificate of incorporation states in heading that it is a close corporation (8 Del. Code Ann. 343) and provides that all issued stock is not to be held by more than thirty persons, that all issued stock is subject to one or more restrictions on transfer permitted by 8 Del. Code Ann. 202, and that corporation does not offer any stock at “public offering” within meaning of Securities Act of 1933, as amended (8 Del. Code Ann. 342[a]) then corporation may be organized as close corporation (8 Del. Code Ann. 343). Existing corporation may become close corporation by amending certificate of incorporation to comply with 8 Del. Code Ann. 342. Amendment must be approved by vote of two-thirds of outstanding shares of each class of stock. (8 Del. Code Ann. 344). Corporation may terminate status as close corporation by amending certificate of incorporation to delete provisions required by 8 Del. Code Ann. 342. (8 Del. Code Ann. 346[a]). Amendment must be approved by vote of two-thirds of outstanding shares of each class of stock (8 Del. Code Ann. 346[a]) unless certificate requires greater than two-thirds vote to terminate (8 Del. Code Ann. 346[b]). If any of provisions required by 8 Del. Code Ann. 342 are breached, corporation’s status as close corporation is terminated unless within 30 days of breach or within 30 days of its discovery, whichever is later, corporation files certificate in accordance with 8 Del. Code Ann. 103 stating breached provision has ceased to be applicable, furnishes copy of this certificate to each stockholder, and takes steps necessary to correct situation threatening its status as close corporation, including refusal to register wrongfully transferred stock. (8 Del. Code Ann. 348[a]). Upon suit by corporation or stockholder, Chancery may enjoin or set aside any act inconsistent with provisions required by 8 Del. Code Ann. 342. (8 Del. Code Ann. 348[b]).

If stock certificate conspicuously notes qualifications or number of persons entitled to be holders of record and stock is issued or transferred in breach of qualifying conditions, person taking is presumed to have notice of ineligibility. (8 Del. Code Ann. 347[a]-[c]). Corporation may then refuse to register transfer unless all stockholders consent to transfer or corporation amends certificate of incorporation as provided by 8 Del. Code Ann. 346. (8 Del. Code Ann. 347[d], [e]). If restriction on transfer shall be found not authorized by 8 Del. Code Ann. 202, corporation has option for 30 days after judgment setting aside transfer is final, to acquire restricted security at price agreed on by parties, or if no agreement is reached, or at fair value as determined by Chancery. (8 Del. Code Ann. 349).

Written agreement among majority of stockholders is not invalid on grounds of restricting discretion or powers of directors. Agreement places liability for managerial acts or omissions on stockholders who are parties to agreement, rather than directors as long as agreement in effect. (8 Del. Code Ann. 350). Certificate of incorporation may provide business of close corporation to be managed by stockholders. No meeting of stockholders must be called to elect directors. Unless context requires otherwise, stockholders are deemed directors for applying provisions of corporate law, and are subject to all liabilities of directors. Certificate of incorporation may be amended to include such provision if all incorporators and subscribers or all holders of record of stock with or without voting power so authorize. Amendment to delete such provision must be adopted by holders of majority of outstanding stock with or without voting power. If such provision in effect, it must be noted conspicuously on each stock certificate. (8 Del. Code Ann. 351).

No written agreement among stockholders or provision of certificate of incorporation or by-laws is invalid on ground it is attempt to treat corporation as partnership. (8 Del. Code Ann. 354).

Certificate of incorporation may grant option to have corporation dissolved to any stockholder or holders of any specified number or percentage of shares. Stockholder must give written notice of exercise of option to all other stockholders and 30 days thereafter dissolution shall commence. (8 Del. Code Ann. 355[a]).

Certificate may be amended to include provision under 8 Del. Code Ann. 355(a) by affirmative vote of holders of all outstanding stock with or without voting power unless certificate authorizes such amendment by at least two-thirds vote. (8 Del. Code Ann. 355[b]). If such provision is in effect, it must be noted conspicuously on each stock certificate. (8 Del. Code Ann. 355[c]).

Chancery may appoint custodian of insolvent corporation upon application of any stockholder if stockholders are deadlocked or if petitioning stockholder has right of dissolution under 8 Del. Code Ann. 355. (8 Del. Code Ann. 352[a]). In lieu of custodian, Chancery may appoint provisional director. (8 Del. Code Ann. 352[b]). Provisional director may also be appointed regardless of solvency, in certain cases where directors are deadlocked. (8 Del. Code Ann. 353). Provisional director must be impartial and cannot be stockholder or creditor of corporation or affiliate. Provisional director has same rights and powers as elected director until removed by court, by majority vote of shareholders, or by two-thirds vote of class of shareholders which filed application for his appointment. (8 Del. Code Ann. 353[c]).

Appraisal.

If proposed merger for which appraisal rights are provided is to be submitted at stockholder meeting, corporation must give at least 20 days notice to each stockholder of record on record date of meeting who is entitled to appraisal, and must include copy of 8 Del. Code Ann. 262(d). Each stockholder electing appraisal must make written demand prior to vote on merger. Demand sufficient if it reasonably informs corporation of stockholder’s identity and his intent to demand appraisal. Proxy or vote against merger insufficient. Surviving or resulting corporation must give notice to stockholders who have demanded appraisals within ten days of approval of merger. (8 Del. Code Ann. 262[d]). Similar procedure for action where there is no meeting (8 Del. Code Ann. 228), or for shares of subsidiary Delaware corporation where parent merges with or into 90% to 100% owned subsidiary (8 Del. Code Ann. 253). Appropriate notice of appraisal rights must be given within ten days after merger. (8 Del. Code Ann. 262[d][2]). Any stockholder who has complied with foregoing may, within 120 days after merger, petition Court of Chancery demanding valuation of stock of such stockholder. Stockholder may withdraw demand and accept offered terms within 60 days after merger, unless stockholder filed appraisal petition or joined proceeding as named party. (8 Del. Code Ann. 262[e]). Upon application of stockholder for appraisal proceeding, court may order all or part of expenses, including attorney’s fees and expenses of experts, to be charged pro rata against value of shares entitled to appraisal. (8 Del. Code Ann. 262[j]). Appraisal not available to holders of shares of any class of stock which are registered on national securities exchange or held of record by more than 2,000 stockholders or to stockholders of corporation surviving merger if merger did not require vote of stockholders of surviving corporation as provided in 8 Del. Code Ann. 251. (8 Del. Code Ann. 262[b][1]). (See subhead Merger or Consolidation, supra.) Above restrictions on appraisal not applicable to holders of class or series of stock of constituent corporation if, under terms of merger or consolidation pursuant to 8 Del. Code Ann. 251, 252, 254, 257, 258, 263 and 264, such holders are required to accept for such stock anything except: (a) stock of corporation surviving or resulting from merger or consolidation, (b) stock of any other corporation which at record date were either registered on national securities exchange or held of record by more than 2,000 stockholders, (c) cash in lieu of fractional shares of corporation described in (a) and (b), or (d) combination of stock and cash in lieu of fractional shares as set forth in (a), (b), and (c). (8 Del. Code Ann. 262[b][2]). Corporation in charter may provide for appraisal in transactions other than mergers. (8 Del. Code Ann. 262[c]).

Foreign Corporations.

No foreign corporation may do business in state until it files with Secretary of State a certificate evidencing its corporate existence and stating name and address of its registered agent, its assets and liabilities and authorized business it proposes to do in state, and pays fee of $80. (8 Del. Code Ann. 371[b]). Secretary of State will insure name of foreign corporation is distinguishable from other entities in Delaware. (8 Del. Code Ann. 371[c]). Certificate of Secretary of State is prima facie evidence of company's right to do business in state. (8 Del. Code Ann. 371[c]).

Change of registered agent effected by filing certificate with Secretary of State listing name and address of registered agent and revocation of previous agents. (8 Del. Code Ann. 377[a]). Registered agent may resign by filing signed statement with Secretary of State including post office address of main or headquarters office. (8 Del. Code Ann. 377[b]). If registered agent dies or is not in state or resigns, foreign corporation must substitute, designate and certify to Secretary of State replacement within ten days. (8 Del. Code Ann. 377[c]). Certificate containing all charter amendments and all articles of merger or consolidation must be filed with Secretary of State within 30 days of amendment or merger. (8 Del. Code Ann. 372[a], [b]).

Annual report must be filed on or before June 30 each year with Secretary of State. Report must be made by president, secretary, treasurer, or other authorized officer or by two directors or by any incorporator if directors not elected. Report must state address of registered office in Delaware and name of registered agent; address of main or headquarters place of business outside state; names and addresses of all directors and officers and their terms; date of next annual stockholder meeting for election of directors; number of shares of each class of authorized capital stock and par value if any; number of shares of each class actually issued; amount of capital invested in real and other property in state and tax paid thereon; if exempt from tax in state, specific facts entitling exemption. (8 Del. Code Ann. 374). Filing fee is $125, with $125 penalty for failure to file. (8 Del. Code Ann. 391[a][8]). Failure to file report within any two-year period may result in termination of right to do business in state. (8 Del. Code Ann. 375).

Service of process upon qualified foreign corporation may be made on registered agent or, if there is no such agent, on any officer, director or other agent of corporation then in state. If such service is impossible, service may be made upon Secretary of State and additional $50 fee will be assessed from plaintiff. (8 Del. Code Ann. 376). Service of process upon corporation not qualified to do business in Delaware as foreign corporation, but transacting business in state may be made on Secretary of State. Provisions of 8 Del. Code Ann. 373 shall not apply in determining whether any non-qualifying foreign corporation is transacting business in state for purpose of service of process. (8 Del. Code Ann. 382[a], [b]).

Unqualified foreign corporation, doing business in state, may not maintain any action or special proceeding in state until it has become authorized to do business in state and has paid state all fees, penalties and franchise taxes for period business done without authority. Failure to qualify will not prevent foreign corporation from defending any action or special proceeding in state or impair validity of any contract or act. (8 Del. Code Ann. 383).

Exceptions.

Foreign corporation is not deemed to be doing business in state and need not comply with 8 Del. Code Ann. 371 and 8 Del. Code Ann. 372 if it is mail order business accepting orders outside state; if it employs salespersons in state but approves orders outside state, with all goods shipped from outside state, and no sales, repairs, or replacements made from stock in state; if it delivers into state under contract made outside state equipment whose installation requires skilled supervision and furnishes such supervision as provided by contract; if it is any other business operation wholly interstate in character; if it is insurance company doing business in state; if it creates, as borrower or lender, or acquires evidences of debt, mortgages or liens on real or personal property; if it secures or collects debt or enforces any rights in property by securing same. (8 Del. Code Ann. 373).

Powers.

Foreign corporation with requisite certificate of incorporation or by-laws may act as executor, guardian, trustee or other fiduciary under testamentary instrument probated in state, deed of trust, mortgage, or agreement when and to extent that laws of its state of organization confer like powers on corporation organized in Delaware. (8 Del. Code Ann. 380). No foreign corporation shall have banking powers. (8 Del. Code Ann. 379). Foreign corporation owning lands in state may exercise all rights and privileges of ownership to same extent as if incorporated in state. (25 Del. Code Ann. 305).

Withdrawal.

Foreign corporation qualified to do business in state may withdraw by filing with Secretary of State address to which process against corporation may be mailed and: (1) Certificate executed in accordance with 8 Del. Code Ann. 103, surrendering authority to do business; or (2) certified copy of certificate of dissolution; or (3) certified copy of order or decree of dissolution. (8 Del. Code Ann. 381). Filing tax and fees of $10 must be paid. (8 Del. Code Ann. 391[a][6]).

Penalties.

Chancery may enjoin any foreign corporation from doing business in state if corporation not qualified or if certificate of authority secured by false or misleading representations. (8 Del. Code Ann. 384). Foreign corporation doing business of any kind in state without complying with provisions for foreign corporations subject to fine of $200 to $500 for each offense. Agent of any foreign corporation doing any business in state before corporation has complied subject to fine of $100 to $500 for each offense. (8 Del. Code Ann. 378).

Filing of any required instrument with Secretary of State abolishes need to file with Recorder of Deeds of County. (8 Del. Code Ann. 385).

Franchise Tax.

(Contained in 8-c. 5). Every corporation must file franchise tax report with Secretary of State on or before Mar. 1. (8 Del. Code Ann. 502[a]). (For contents of report see subhead Reports, supra.) Filing fee $25 for exempt corporations. $50 for all others. Corporate name reservation fee $75. (8 Del. Code Ann. 391[a][18], [24]).

Following classes of corporations are exempt from general franchise tax: banking corporation, savings bank, building and loan association, religious, charitable, educational, or any corporation for drainage and reclamation of lowlands, or any company, association or society which exists to assist sick, needy or disabled, to defray funeral costs, or care for families after death. (8 Del. Code Ann. 501). Railroad car, telephone, cable and telegraph, express, insurance and utility and pipeline companies are subject to franchise taxes. (8 Del. Code Ann. 501).

Franchise tax is imposed on “taxable income” of banks and trust companies. “Taxable income” on which tax is imposed is calculated by multiplying .56 and sum of net income reduced by: (1) Gross securities losses; (2) net income from subsidiary or foreign branch established in United States, or other branch established outside of Delaware, which are subject to taxation in another state; (3) net income from international branch offices; (4) gross income from international banking transactions; (5) gross income from international banking facility, minus deductions or expenses; (6) interest income from volunteer fire companies; and (7) any examination fee paid to office of State Bank Commissioner. (5 Del. Code Ann. 1101).

Failure to file report or pay tax subjects corporation to tax amount in accordance with 8 Del. Code Ann. 503 as determined by Secretary of State, plus penalty of $125. (8 Del. Code Ann. 502[c]).

Unpaid franchise tax will prevent issue of certificate of good standing. (8 Del. Code Ann. 502[f]).

If corporation neglects or refuses for period of one year to pay franchise taxes assessed against it, charter of corporation shall be void and all powers conferred by law upon corporation are declared inoperative, unless Secretary of State had given further time for good cause shown. (8 Del. Code Ann. 510).

Domestic corporations pay annual franchise tax to Secretary of State based on whichever of two following formulas results in smaller tax: (1) Where authorized capital stock does not exceed 5,000 shares, $75; where authorized capital stock exceeds 5,000 shares, but is not more than 10,000 shares, $150; and further sum of $75 on each 10,000 shares or part thereof; (2) $75 where assumed no par capital of corporation does not exceed $500,000; $150 where assumed no par capital exceeds $500,000 but is not more than $1,000,000; and further sum of $75 for each $1,000,000 or part thereof of such additional assumed no par capital. (8 Del. Code Ann. 503 [a]). “Assumed no-par capital” is determined by multiplying number of authorized shares of capital stock without par value by $100. To tax attributable to assumed no-par capital add tax of $350 on each $1,000,000 or fraction thereof in excess of $1,000,000 of assumed par value capital for par value shares; assumed par value capital arrived at by dividing total assets by total number of issued shares of all denominations, and multiplying resulting quotient by number of authorized par shares. When quotient is less than par value of any class of authorized par value shares, “assumed par value capital” is determined by multiplying number of shares of each class by par value, and number of authorized shares having par value to be multiplied by quotient shall be reduced by number of shares whose par value exceeds quotient; and where, to determine assumed par value capital, it is necessary to multiply class or classes of shares by quotient and also to multiply class or classes of shares by par value of shares, assumed par value capital of corporation shall be sum of products of multiplications. If total assumed par value capital is less than $1,000,000, tax bears same relation to $350 as assumed par value capital bears to $1,000,000. (8 Del. Code Ann. 503[a]). Minimum tax for any taxable year $75, maximum $180,000. (8 Del. Code Ann. 503[c]). “Total assets” are defined as those reported on IRS Form 1120 Schedule L or on replacement schedule designated by Secretary of State, if Schedule L is no longer in use. (8 Del. Code Ann. 503[i]).

Regulated investment company may compute its tax under (1) or (2) above or on basis of $350 per $1,000,000 of average gross assets or fraction thereof, whichever is least, but in no case is tax to exceed $90,000. (8 Del. Code Ann. 503[h]).

Inactive companies which have stated in their annual reports that they are not engaged in any business pay only one-half of usual tax for inactive period. (8 Del. Code Ann. 503[f]).

Taxes become payable on Mar. 1, except for corporations whose current estimated franchise tax liability is $5,000 or more, in which case return and tax payable quarterly based on preceding year's liability: 40% of estimated tax due June 1, 20% due Sept. 1, 20% due Dec. 1, and 20% due Mar. 1. If unpaid on due dates, tax bears interest at 1½% per month thereafter. (8 Del. Code Ann. 504). If corporation neglects or refuses for period of one year to pay taxes, Secretary of State may allow extension of time for payment where good cause shown, in which case certificate must be filed stating reason for failure to pay. (8 Del. Code Ann. 510).

Where entire assets of corporation are in unfriendly country from which it is impossible to remove them or withdraw income or with which communication is illegal, tax may be abated at Secretary of State's discretion. (8 Del. Code Ann. 518).

Income Tax.

See category 22 Taxation, topic 22.11 Income Tax.

Professional Corporations.

May be formed by persons performing personal services to public which require obtaining of a license or other legal authorization and which formerly by reason of law could not be performed by corporation. Such persons may include architects, certified or other public accountants, chiropodists, chiropractors, dentists, doctors of medicine, optometrists, osteopaths, professional engineers, veterinarians, and, subject to Supreme Court Rules, attorneys. (8 Del. Code Ann. 601; 8 Del. Code Ann. 603). Other than rendering professional services for which it specifically incorporated, owning real estate or making investments or mortgages, professional corporations may not conduct any business. (8 Del. Code Ann. 609).

Deeds.

See category 21 Property, topic 21.06 Deeds.

Model Non-Profit Corporation Act not adopted.

Limited Liability Companies.

See topic 2.06 Limited Liability Companies.

2.04 [RESERVED]

2.05 JOINT STOCK COMPANIES:

Business Trusts.

Recognized by statute as alternative form of business organization designed primarily as means of protecting and managing property. (12 Del. Code Ann. 3801[g]). Any other business entity may convert to business trust. (12 Del. Code Ann. 3820). Business trust may convert to another business entity. (12 Del. Code Ann. 3821). Substantial contractual flexibility permitted in structuring of governing instrument. (12 Del. Code Ann. 3801[c]). At least one trustee must be resident of state or have principal place of business in state unless business trust is registered investment company. (12 Del. Code Ann. 3807[a], [b]). Each business trust must file certificate of trust with Secretary of State (12 Del. Code Ann. 3810), signed by all trustees (12 Del. Code Ann. 3811), containing name of trust, name and business address of at least one trustee meeting requirements of 12 Del. Code Ann. 3807, and effective date of certificate if not effective upon filing. (12 Del. Code Ann. 3810). Filing fee is $300. (12 Del. Code Ann. 3813[a][2]). Except as provided in governing instrument of business trust, property held by trust may be held in name of trustee. (12 Del. Code Ann. 3805[f]). Creditors of trustee, as individual, have no legal right to such property. (12 Del. Code Ann. 3805[g]). Except as provided in governing instrument, beneficial owners or trustees may take action without meeting, if necessary number of owners/trustees submit written votes. (12 Del. Code Ann. 3806[f]). Certificate cancelled upon dissolution and completion of winding up of trust. Certificate deemed cancelled upon filing of: (a) Certificate of merger if trust not surviving entity, (b) certificate of transfer, or (c) certificate of conversion to non-Delaware other entity. (12 Del. Code Ann. 3810[d]). Certificate of cancellation or amendment must be filed with Secretary of State. (12 Del. Code Ann. 3810[d], [f]). Name of trust may be reserved. (12 Del. Code Ann. 3814[d]).

2.06 LIMITED LIABILITY COMPANIES:

Delaware Limited Liability Company Act ("Act") permits formation of limited liability company ("LLC"). (6 Del. Code Ann. 18-101-1109).

Certificate of Formation Requirements.

One or more persons may form LLC. To form, one or more authorized persons must execute certificate of formation ("Certificate"), which must be filed with Secretary of State ("Secretary"). Certificate must state LLC's (a) name, (b) address of registered office and name and address of registered agent for service of process, and (c) other desired provisions. (6 Del. Code Ann. 18-201).

Name.

LLC's name must include words "Limited Liability Company" or abbreviation, "L.L.C." or designation "LLC". LLC's name must be distinguishable from name filed by any other entity reserved, registered, formed or organized under Delaware law or qualified to do business or registered as foreign corporation, foreign limited partnership, foreign business trust, foreign partnership or foreign LLC in Delaware, unless written consent of other entity is obtained and filed with Secretary. (6 Del. Code Ann. 18-102). Name may be reserved by filing executed application and filing fee of $75 (6 Del. Code Ann. 18-1105[a][1]) with Secretary (6 Del. Code Ann. 18-103).

Purpose.

Delaware limited liability companies can conduct any lawful business purpose, whether or not for profit, except banking. (6 Del. Code Ann. 18-106[a]).

Registered Office and Registered Agent.

LLC must maintain registered office in Delaware. LLC must maintain resident agent in Delaware to accept service of process. Agent's office must be identical with LLC's registered office and must be open during normal business hours. Change of address of LLC's registered office or of identity of LLC's registered agent must be filed with Secretary along with fee of $200. (6 Del. Code Ann. 18-104; 6 Del. Code Ann. 18-1105[a][2]). Registered agents must: (a) If entity, maintain business office in Delaware which is generally open, or if individual, be generally present at designated location in Delaware to perform functions of registered agent, or if foreign entity, be authorized to transact business in Delaware; (b) accept service of process and other communications directed to LLC; and (c) forward statement for annual tax described in § 6-18-1107 to LLC. (6 Del. Code Ann. 18-104[e]). Any registered agent who serves as registered agent for more than 50 entities at one time ("Commercial Registered Agent") must satisfy following qualifications: (a) If natural person, maintain principal residence or principal place of business in Delaware, maintain Delaware business license, be generally present at designated Delaware location to perform functions of registered agent, and upon request, provide Secretary with information identifying and enabling communication with Commercial Registered Agent; (b) if domestic or foreign entity, have business office in Delaware at which officer, director or managing agent who is natural person is present during normal business hours, maintain Delaware business license, and upon request, provide Secretary with information identifying and enabling communication with Commercial Registered Agent. (6 Del. Code Ann. 18-104[f]). LLC formed under laws of Delaware or qualified to do business in Delaware must provide to registered agent and occasionally update name, business address and business telephone number of natural person who is member, manager, officer, employee or designated agent of LLC who is then authorized to receive communications from registered agent. (6 Del. Code Ann. 18-104[g]). Upon application of Secretary, Court of Chancery may enjoin any person or entity from serving as registered agent or as officer, director or managing agent of registered agent. (6 Del. Code Ann. 18-104[i]). Upon entry of court order enjoining any person or entity from acting as registered agent, Secretary must deliver notice to each affected LLC. (6 Del. Code Ann. 18-104[i][4]). If LLC fails to designate new registered agent within 30 days of notice, then in case of domestic LLC, certificate of formation will be cancelled, and in case of foreign LLC, LLC will be disqualified in Delaware and registration will be cancelled. If court enjoins person or entity from acting as registered agent and no new registered agent is designated in requisite time and manner, service of legal process against LLC for which registered agent had been acting will thereafter be upon Secretary in accordance with § 6-18-105 or § 6-18-911. Upon application of Secretary, Court of Chancery may enter orders to give Secretary access to information in former registered agent's possession to facilitate communication with LLC's former registered agent served. (6 Del. Code Ann. 18-104). Secretary is authorized to make list of registered agents available to public. (6 Del. Code Ann. 18-104[j]).

Amending Certificate.

Amendment of Certificate must state: (a) Name of LLC and (b) amendment to Certificate. Certificate of amendment is filed with Secretary and is effective on filing date, unless later time is specified.

False statements or outdated information in Certificate must be amended promptly by manager, or, if there is no manager, by any member aware of error or change. (6 Del. Code Ann. 18-202).

Powers.

LLC may carry on any lawful business, purpose or activity, whether or not for profit, except banking operations. LLC may exercise all powers and privileges granted by Act or any other law or by its limited liability company agreement ("Agreement"), together with any powers incidental thereto. (6 Del. Code Ann. 18-106[a], [b]). LLC, subject to restrictions in Agreement, may make contracts of guaranty and suretyship and enter into interest rate, basis, currency, hedge or other swap agreements or cap, floor, put, call, option, exchange or collar agreements, derivative agreements, or other similar agreements. (6 Del. Code Ann. 18-106[c]).

Limited Liability Company Agreement.

Written, oral or implied agreement of member or members as to affairs of LLC and conduct of its business. (6 Del. Code Ann. 18-101[7]). Limited liability company agreement binds members, managers of limited liability company and assignees of limited liability company interest even if such persons do not execute agreement. (6 Del. Code Ann. 18-101[7]). Any action to interpret, apply, or enforce Agreement, duties of LLC to managers and members, duties of managers and members to LLC, duties among managers and members, or rights and restrictions of LLC may be brought in Court of Chancery. (6 Del. Code Ann. 18-111).

Limited Liability Company Interest.

LLC interest ("Interest") is member's share of profits and losses of LLC and member's right to receive distributions of LLC's assets. (6 Del. Code Ann. 18-101[8]).

Limited Liability.

Unless Agreement provides otherwise, no member or manager of LLC is personally liable for LLC's obligations solely by reason of being member or manager. (6 Del. Code Ann. 18-303).

Management.

Unless otherwise provided in Agreement, LLC shall be managed by its members in proportion to their then current percentage or other interest in LLC's profits owned by all of members, with decision of those owning more than 50% of such percentage or interest controlling. Agreement may provide for management, in whole or in part, by manager, chosen by members as provided in Agreement. Unless Agreement provides otherwise, each member and manager has authority to bind LLC. LLC may have more than one manager. (6 Del. Code Ann. 18-402). Manager who is also member has rights and powers, and is subject to restrictions and liabilities, of manager and, except as provided in Agreement, is subject to restrictions and liabilities of member to extent of his participation in LLC as member. (6 Del. Code Ann. 18-403). Agreement may provide for classes or groups of managers and specify their relative rights, powers and duties including right to vote. Agreement may provide for taking of action, including amendment of Agreement, without vote or approval of any manager or class or group of managers. Unless prohibited by agreement, managers may take action by written consent to act by proxy and such proxy may be granted in writing, by means of electronic transmission or as otherwise permitted by applicable law. (6 Del. Code Ann. 18-404).

Manager and member are protected by good faith reliance on LLC's records, and upon other information presented to LLC by any of its managers, members, officers, committees or employees, or by any other person, as to matters manager reasonably believes are within such other person's professional or expert competence. (6 Del. Code Ann. 18-406). Agreement may specify penalties or consequences for failure of manager to comply with terms of Agreement or upon happening of specified events. (6 Del. Code Ann. 18-405).

Upon application of member or manager, Court of Chancery may determine validity of admission, election, appointment, removal or resignation of manager, right of persons to serve as managers, and result of any vote of members or managers. (6 Del. Code Ann. 18-110). Unless Agreement provides otherwise, members and managers may delegate rights and powers to manage and control. Such delegation shall not alter manager's or member's power to control LLC. (6 Del. Code Ann. 18-407).

Members.

Person may become member of LLC and receive interest therein without making contribution or being obligated to make contribution to LLC. Unless Agreement provides otherwise, person may become member without acquiring interest in LLC. Unless Agreement provides otherwise, member shall have no preemptive right to subscribe to any additional issue of interest or other interests in LLC. (6 Del. Code Ann. 18-301[d], [e]).

After merger, consolidation or during domestication or conversion of limited liability company one is admitted as member of surviving or resulting limited liability company as provided in limited liability company agreement of surviving or resulting limited liability company or agreement of merger or consolidation. If two documents conflict, agreement of merger or consolidation controls. If one is admitted as member of limited liability company after merger or consolidation when limited liability company is not survivor to merger or consolidation, one is admitted according to limited liability company agreement of limited liability company. (6 Del. Code Ann. 18-301[b][3]). Contribution of member to LLC may be in cash, property, services or promissory note or other obligation to contribute cash, property or services. (6 Del. Code Ann. 18-501). Member failing to contribute agreed property or services for any reason must, at option of LLC, contribute cash equal to agreed value (as stated in LLC's records) of contribution not made. Unless Agreement provides otherwise, member's obligation to make contribution or return money or other property paid or distributed in violation of this chapter may be compromised only by consent of all other members. Creditors may under certain circumstances enforce member's obligation to make contribution or return money or other property to LLC regardless of consented compromise. Member's LLC interest may be reduced, eliminated, or subordinated to nondefaulting members, or subject to other penalties or consequences, for failure to pay contribution obligation if agreement so provides. (6 Del. Code Ann. 18-502).

Profits and losses of LLC shall be allocated among members, and among classes or groups of members, as provided in Agreement. In absence of Agreement, profits and losses shall be allocated on basis of agreed value (as stated in LLC's records) of contributions made by each member to extent received by LLC and not returned. (6 Del. Code Ann. 18-503).

Unless Agreement provides otherwise, distributions shall be made to members, and among classes or group of members on basis of agreed value (as stated in LLC's records) of contributions made by each member to extent received by LLC and not returned. (6 Del. Code Ann. 18-504). No obligation of member or manager to LLC shall be subject to defense of usury. (6 Del. Code Ann. 18-505).

Distribution (not including amounts constituting reasonable compensation for present or past services, retirement plan, or benefit program) not allowed if, after distribution, all liabilities of LLC, other than liabilities to members on account of their interests and liabilities for which recourse of creditors is limited to specified property of LLC, exceed fair value of its assets, except that fair value of property subject to liability for which recourse of creditors is limited must be included in assets of LLC only to extent that fair value of that property exceeds that liability. If member knowingly receives improper distribution, LLC may recover amount for up to three years. After three years such member shall not be subject to liability under this chapter unless action to recover sum was commenced before expiration of three-year period and such member was found liable as result of that action. (6 Del. Code Ann. 18-607).

Member's interest is personal property and member has no interest in specific property of LLC. (6 Del. Code Ann. 18-701). Member's interest is assignable in whole or in part except as provided in Agreement. Unless provided in Agreement, assignment of interest does not entitle assignee to become or exercise any rights or powers of member; however assignment entitles assignee to share in such profits, losses, distributions, allocation of income, gain, loss, deduction, or credit or similar item to which assignor was entitled, to extent assigned. Member ceases to be member and to have power to exercise any rights or powers of member upon assignment of all his interest. Unless Agreement provides otherwise, pledge of, or granting of security interest, lien or other encumbrance in or against any or all interest of member shall not cause member to lose membership or power to exercise any rights or powers thereof. Unless provided in LLC agreement, member's interest in LLC may be evidenced by certificate of membership issued by LLC. LLC agreement may provide for assignment or transfer of any LLC interest represented by such certificate and make other provisions with respect to such certificates. LLC shall not issue certificate in bearer form. Unless agreement provides otherwise, assignee is not liable as member solely because of assignment. Unless Agreement provides otherwise, LLC may acquire any interest of member or manager, after which interest will be deemed canceled. (6 Del. Code Ann. 18-702). Assignee of member may become member as provided in Agreement and upon (a) approval of all members of LLC other than assignor, or (b) compliance with any procedure specified in Agreement. Assignee who becomes member has rights and powers to extent assigned and is subject to restrictions and liabilities as provided in Agreement. Assignee-member is subject to assignor's liability to make contribution under § 6-18-502, but not under §§ 6-18-601 through 6 Del. Code Ann. 18-607. Assignee not subject to liabilities including that of assignor to make contribution under 6 Del. Code Ann. 18-502 if assignee did not know about obligations at time he became member and such obligations could not be ascertained from Agreement. (6 Del. Code Ann. 18-704).

Service of Process, Manager or Member.

Manager or liquidating trustee may be served with process in all civil actions or proceedings brought in Delaware even if he is not manager or liquidating partner at time suit is commenced. Serving as manager or liquidating trustee is consent to appointment as LLC's registered agent, or, if none, Secretary being such person's agent upon whom service of process may be made. Serving as manager or liquidating trustee shall also constitute consent that service of process in compliance with this section is valid and of legal force as if served upon such manager or liquidating trustee. (6 Del. Code Ann. 18-109[a]). In Agreement or other writing, manager or member may consent to non-exclusive jurisdiction of courts of, or arbitration in, specified jurisdiction, or exclusive jurisdiction of courts of, or exclusivity of arbitration in, Delaware, and to be served with legal process in manner prescribed in such Agreement or writing. Except by agreeing to arbitrate in specified jurisdiction or State of Delaware, member who is not manager may not waive right to maintain legal action in courts of State of Delaware with respect to matters relating to organization or internal affairs of LLC. (6 Del. Code Ann. 18-109[d]).

Records.

Member may, subject to reasonable standards as set forth in Agreement or otherwise established by manager or, if no manager, then by members, obtain from LLC upon reasonable demand for any purpose reasonably related to member's interest as member of LLC: (a) Information regarding status of LLC's business and financial condition, (b) LLC's federal, state and local income tax returns for each year, (c) current list of name and last known business, residence or mailing address of each member and manager, (d) copy of any written Agreement and Certificate and amendments thereto, as well as copies of any written powers of attorney by which such documents have been executed, (e) information regarding amount of cash and description and statement of agreed value of any other property or services contributed by each member and which each member has agreed to contribute in future, and date on which each became member, and (f) any other information that is reasonable. (6 Del. Code Ann. 18-305[a]). Manager may also examine any of foregoing for purpose reasonably related to his position as manager. (6 Del. Code Ann. 18-305[b]).

Manager may keep confidential from members for reasonable period of time any information which manager reasonably believes to be in nature of trade secrets or other information disclosure of which manager in good faith believes is not in best interest of LLC or could damage LLC or its business or which LLC is required by law or agreement with third party to keep confidential. (6 Del. Code Ann. 18-305[c]).

Any action to enforce any right under § 6-18-305 shall be brought in Court of Chancery which is vested with exclusive jurisdiction to determine whether person seeking information under § 6-18-305 is entitled to such information. Court of Chancery may order LLC to permit member access to information of subsection (a)(3) (member list) on condition that member first pay cost of obtaining information. Court may impose other conditions, limitations and restrictions it finds appropriate. (6 Del. Code Ann. 18-305[f]).

Rights of member or manager to obtain information may be restricted in original LLC agreement or in any subsequent amendment approved or adopted by all members and in compliance with LLC agreement. (6 Del. Code Ann. 18-305[g]).

Managers, members and liquidating trustees of limited liability company can rely on information, opinions, reports or statements presented by another manager, member or liquidated trustee, officers or employees of limited liability company, committees of limited liability company, members or managers, and others as to matters within such person's professional or expert competence. Reliance on information regarding value and amount of assets or reserves sufficient to pay or make reasonable provisions to pay claims and obligations of limited liability company is allowed. (6 Del. Code Ann. 18-406).

Derivative Actions.

Member or assignee of LLC interest may bring action in Court of Chancery on behalf of LLC to recover judgment in its favor if: (a) Managers or members with authority to do so have refused to bring action, or (b) if effort to cause those members or managers to bring action is not likely to succeed (6 Del. Code Ann. 18-1001); and (c) plaintiff is member or assignee of LLC interest at time of bringing suit; and (d) plaintiff is member or assignee at time of transaction of which he complains, or (e) plaintiff's status as member or assignee of LLC interest devolved upon him by operation of law or by terms of Agreement from person who was member at time of transaction. (6 Del. Code Ann. 18-1002). Complaint shall state with particularity effort, if any, of plaintiff to secure initiation of action by manager or reasons for not making such effort. (6 Del. Code Ann. 18-1003). If derivative action is successful, in whole or in part, by judgment, compromise or settlement, court may award plaintiff reasonable expenses, including attorney's fees, from any recovery in such action or from LLC. (6 Del. Code Ann. 18-1004).

Resignation.

Member may resign from LLC only at time and in manner specified in Agreement. Notwithstanding anything to contrary under applicable law, unless provided for in Agreement, member may not resign prior to dissolution and winding up of LLC. (6 Del. Code Ann. 18-603). Upon resignation from LLC, member is entitled to receive such distribution as is provided in Agreement and except as otherwise provided, member shall receive within reasonable time after resignation, fair value of member's interest as of date of resignation based upon his right to share in distributions from LLC. (6 Del. Code Ann. 18-604).

Voting.

Agreement may provide for classes or groups of members and their relative rights, powers and duties. Agreement may grant to all or certain identified members or specified class or group of members right to vote separately or with all or any class or group of members or managers, on any matter. Voting by members may be on per capita, number, financial interest, class, group or any other basis. Agreement may provide for taking of action, including amendment to Agreement, without vote or approval of any member or class or group of members. Unless otherwise provided, members may vote by proxy or in person and such proxy may be granted in writing, by means of electronic transmission or as otherwise permitted by applicable law. (6 Del. Code Ann. 18-302). Upon application of member or manager, Court of Chancery may determine results of any vote pursuant to Agreement. (6 Del. Code Ann. 18-110[b]). Court may also determine validity of admission, election, appointment, removal or resignation of LLC manager. (6 Del. Code Ann. 18-110[a]).

Merger and Consolidation.

LLC may merge or consolidate with or into one or more domestic LLC or "other business entities" with such domestic LLC or other business entity as agreement shall provide being surviving or resulting domestic LLC or other business entity. Unless agreement provides otherwise, members must approve merger or consolidation or, if there is more than one class or group of members, then each class or group of members must approve merger or consolidation. In either case, members who own more than 50% of then current interest in LLC's profits owned by all members or by members in each class must approve merger or consolidation. Rights or securities of, or interests in domestic LLC or other business entity, may be exchanged for same, cash, or property in entity resulting from merger or consolidation or may be cancelled. Entity surviving or resulting from merger must file certificate of merger or consolidation with Secretary and include detailed information required by Act. Merger or consolidation approved in accordance with § 6-18-209 may effect any amendment to Agreement or adoption of new Agreement. Upon effectiveness of merger, surviving or resulting entity succeeds to all rights, powers and privileges, and all property, real, personal and mixed, and all debts, of merged entities, as well as all other things and causes of action belonging to such merged entities. Unless otherwise agreed, merger or consolidation of domestic LLC shall not require that LLC wind up its affairs under § 6-18-303 or pay its liabilities and distribute its assets under § 6-18-804. Agreement may provide that LLC shall not merge or consolidate under § 6-18-209. (6 Del. Code Ann. 18-209). Corrections to defective, inaccurate certificates may be filed in certificate of correction or new corrected certificate may be filed. (6 Del. Code Ann. 18-211).

Agreement may provide for contractual appraisal rights available to any class or group or series of members in connection with amendments of Agreement, mergers, consolidations, conversions, transfers, continuance or sale of all or substantially all LLC's assets. (6 Del. Code Ann. 18-210).

Domestication.

Non-U.S. entity may become domesticated LLC upon approval in manner provided by instrument governing internal affairs of entity and upon filing with Secretary certificate of domestication which states: (i) Date on which and jurisdiction where entity came into being; (ii) name of entity immediately prior to filing of certificate of domestication; (iii) name of limited liability company set forth in certificate of formation that complies with § 6-18-201 and has been executed by one or more authorized persons in accordance with § 6-18-204; (iv) future effective date of domestication as LLC if not to be effective upon filing of certificate of domestication; (v) jurisdiction that constituted seat, siege social, or principal place of business or central administration of non-U.S. entity immediately prior to filing of certification of domestication; and (vi) domestication has been approved in accordance with governing instrument. Obligations and liabilities of domesticating non-U.S. entity become attached to and may be enforced against domestic LLC. (6 Del. Code Ann. 18-212).

Rights or securities of, or interests in, non-U.S. entity to be domesticated may be exchanged for or converted into cash, property, rights or securities of, or interests in, domestic LLC or other entity or may be cancelled. (6 Del. Code Ann. 18-212[j]).

Transfer.

Domestic LLC may transfer to any jurisdiction, other than any state, that permits transfer to, domestication or continuance in such jurisdiction of LLC, and, in connection therewith, may elect to continue as domestic LLC, which must be approved in writing by managers and members of LLC who own more than 50% of then current percentage or other interest in profits of LLC owned by all members or by members in each class or group unless otherwise provided in Agreement, and which shall occur upon filing of certificate of transfer or certificate of transfer and continuance with Secretary which shall state: (i) Name of LLC; (ii) date of filing of original certificate of formation; (iii) jurisdiction to which LLC will transfer or be domesticated; (iv) future effective date or time of transfer or domestication, if not upon filing of certificate; (v) approval of transfer or continuance in accordance with § 6-18-213; (vi) agreement to service of process in Delaware and appointment of Secretary as agent to accept service of process; (vii) address to which service of process shall be sent by Secretary; and (viii) in case of continuance as domestic LLC, statement of continuance. Transfer or domestication out of Delaware does not affect liabilities incurred prior to transfer. Rights or securities of, or interests in, LLC may be exchanged for or converted into cash, property, rights or securities of, or interests in, business form in which LLC will exist in such other jurisdiction as consequence of transfer or another business form or may be cancelled. Upon effectiveness of transfer, entity succeeds to all rights, powers, and privileges and all property, real, personal, and mixed, and all debts, with all rights of creditors preserved unimpaired. Agreement may provide that LLC shall not transfer, domesticate or continue under § 6-18-213. (6 Del. Code Ann. 18-213).

Conversion to LLC.

Any other entity may convert to domestic LLC upon: (i) Approval of conversion to LLC in manner provided for by document governing internal affairs of entity; (ii) filing of certificate of conversion to LLC that has been executed by one or more authorized persons in accordance with § 6-18-204; and (iii) filing of certificate of formation that complies with § 6-18-201 and has been executed by one or more authorized persons in accordance with § 6-18-204. (6 Del. Code Ann. 18-214).

Series of Members.

LLC agreement may establish or provide for establishment of designated series of members, managers, LLC interests or series having separate rights, powers and duties with respect to specified property or obligations or profits and losses of LLC. (6 Del. Code Ann. 18-215).

Conversion from LLC.

LLC may convert to other business entity as authorized by LLC agreement. If not specified or authorized by Agreement, conversion must be authorized in manner specified for approval of merger or consolidation, and if not specified, then by approval of members, or if more than one class or group of members then by each group or class of members, in either case by members who own more than 50% of then current percentage or other interest in profits of LLC owned by all of members or by members in each class or group. Unless otherwise agreed, conversion will not require LLC to wind up affairs or pay liabilities or distribute assets. Agreement may provide that LLC shall not convert under § 6-18-216. (6 Del. Code Ann. 18-216).

Dissolution and Winding Up.

LLC is dissolved and its affairs wound up upon first to occur of following: (a) Expiration of period stated in Agreement; (b) happening of events specified in Agreement; (c) unless Agreement provides otherwise, affirmative vote or written consent of members, or, if more than one class or group of members, then by each group or class of members, in either case, by members who own more than two-thirds of then current percentage or other interest in profits of LLC owned by members in each class or group; (d) at such time as there are no members, except for when: (i) Unless otherwise provided in Agreement, personal representative of last member agrees in writing to continue LLC and to admit personal representative of last member or its nominee or designee as member of LLC within 90 days of event that terminated membership of last member or other such period provided for in Agreement; (ii) member is admitted effective within 90 days of terminating event, or within such other period provided in Agreement, pursuant to provision of Agreement allowing admission of member after there are no other members; and (e) decree of judicial dissolution by Court of Chancery on application by or for member or manager. (6 Del. Code Ann. 18-801[a]). Unless otherwise provided, death, retirement, expulsion, resignation, bankruptcy or dissolution of any member or occurrence of other event terminating continued membership shall not result in dissolution in winding up of LLC's affairs; upon occurrence of such event LLC shall continue without dissolution. (6 Del. Code Ann. 18-801[b]). Unless Agreement provides otherwise, manager who has not wrongfully dissolved LLC or, if none, members or person approved by members or, if more than one class of members, then by each class, in either case, by members who own more than 50% of then current percentage or other interest in profits of LLC owned by all members or by members in each class or group, as appropriate, may wind up LLC's affairs. Court of Chancery may wind up LLC's affairs upon application of any member or manager, his representative or assignee, and upon cause shown. Court may appoint liquidating trustee in connection therewith. (6 Del. Code Ann. 18-803[a]). Upon winding up, assets distributed in following order: (a) To creditors of LLC, including members and managers who are creditors, to extent otherwise permitted by law, in satisfaction of liabilities of LLC (whether by payment or reasonable provision for payment thereof) other than liabilities for distributions to members and former members under 6 Del. Code Ann. 18-601 ("Interim distributions") and 6 Del. Code Ann. 18-604 ("Distribution upon resignation"); (b) unless Agreement provides otherwise, to members and former members in satisfaction of liabilities for distributions under 6 Del. Code Ann. 18-601 and 6 Del. Code Ann. 18-604; (c) unless Agreement provides otherwise, return of members' contributions and subsequently respecting their interests, in proportions in which members share in distributions. (6 Del. Code Ann. 18-804[a]). Dissolved LLC shall pay or make provision to pay all known claims and obligations. If assets are insufficient to pay them in full, such claims and obligations shall be paid or provided for according to their priority. Liquidating trustee shall not be personally liable to claimants of dissolved LLC. (6 Del. Code Ann. 18-804[b]). Certificate of formation shall be cancelled upon dissolution and completion of winding up. Upon dissolution and completion of winding up, certificate of cancellation shall be filed with Secretary containing: (a) Name of LLC; (b) date Certificate was filed; (c) future effective time of cancellation, if not upon time of filing; (d) any other information person filing for cancellation determines. (6 Del. Code Ann. 18-203). After certificate of cancellation is filed, Chancery Court may, on application of creditor, member, or manager, appoint receiver, or manager as trustee, for final settlement of unfinished business of LLC. (6 Del. Code Ann. 18-805).

Notwithstanding events set forth in § 6-18-801(a)(1), (2), (3) or (4), LLC will not dissolve or be wound up if, prior to filing certificate of cancellation, LLC is continued by vote or written consent of remaining LLC members, and anyone else required by agreement, or personal representative of last remaining member if no remaining member. If dissolution caused by vote or written consent, dissolution is not revoked unless each member and other person, or representative, who voted in favor of, or consented to, dissolution has voted or consented in writing to continue LLC. If no remaining LLC member and personal representative of last remaining member votes or gives written consent to continue LLC, personal representative is required to agree in writing to admission of personal representative of member, its nominee, or designee as LLC member, effective on event terminating last member. (6 Del. Code Ann. 18-806).

Foreign LLC Qualification.

Foreign LLC's internal affairs and liability of its members and managers governed by law of state, territory, possession, or other jurisdiction or country of organization. Foreign LLC will not be denied registration in Delaware based on any difference between laws of LLC's place of organization and Delaware law. Foreign LLC may carry on any lawful business, purpose or activity, except banking and shall possess same powers and privileges, together with any powers incidental thereto, as Act grants to domestic LLCs. (6 Del. Code Ann. 18-901). Before doing business in Delaware, foreign LLC must register with Secretary. To register, foreign LLC must pay requisite fee and application for registration signed by authorized person set forth: (a) Its name and, if different, name under which it proposes to register and do business in Delaware; (b) state, territory, possession or other jurisdiction or country where formed and statement from authorized person that, at filing, foreign LLC validly exists under laws of jurisdiction of formation; (c) nature of business to be conducted in Delaware; (d) address of registered office and name and address of registered agent to receive service of process; (e) statement appointing Secretary as its agent for service of process under circumstances set forth in § 6-18-910(b); (f) date it first did or intends to do business in Delaware. (6 Del. Code Ann. 18-902).

Foreign LLC is not doing business when: (1) Maintaining, defending, or settling action or proceeding; (2) holding meetings of members or managers or carrying on other internal affairs; (3) maintaining bank accounts; (4) maintaining offices or agencies for transfer, exchange, or registration of LLC's own securities or maintaining trustees or securities depositories; (5) selling through independent contractors; (6) soliciting or obtaining orders if orders require acceptance outside of Delaware; (7) selling and agreeing, through contract consummated outside Delaware, to deliver into Delaware, machinery, plants or equipment, construction, erection or installment of which within State of Delaware requires supervision of technical engineers or skilled employees performing services not generally available, and agreeing to furnish only such services, to vendee at time of construction, erection, or installment; (8) creating or acquiring indebtedness with or without mortgage or other security interest in property; (9) collecting debts or foreclosing mortgages or other security interests in property securing debts, and holding, protecting, and maintaining property so acquired; (10) conducting isolated transaction not in course of similar transactions; (11) conducting interstate commerce; (12) doing business in Delaware as insurance company; or (13) solely being member or manager of domestic or foreign LLC. (6 Del. Code Ann. 18-912).

Construction and Application of Chapter and LLC Agreement.

Rule that statutes in derogation of common law are to be strictly construed does not apply to Chapter 18. Policy of chapter is to give maximum effect to principle of freedom of contract and to enforceability of Agreements. To extent that, at law or in equity, member or manager or other person has duties (including fiduciary duties) relating thereto to LLC or to another member or manager, those duties can be expanded or restricted or eliminated, and liability for breach of contract or duties can be limited or eliminated, by provisions in Agreement, provided that Agreement cannot eliminate implied covenant of good faith and fair dealing. Unless otherwise provided in Agreement, member or manager or other person shall not be liable for breach of fiduciary duty for good faith reliance on LLC agreement. (6 Del. Code Ann. 18-1101).

2.07 [RESERVED]

2.08 PARTNERSHIPS:

Revised Uniform Partnership Act 1999 adopted with modifications. (6-c. 15).

Formation.

Partnership forms where two or more people: (a) Associate as co-owners to operate business for profit whether or not they intend to form partnership, or (b) associate with intention to form partnership for not for profit purpose or activity. (6 Del. Code Ann. 15-202[a]). Joint tenancy, tenancy in common, tenancy by entireties, joint property, common property or part ownership, and sharing gross returns do not by themselves establish partnership. (6 Del. Code Ann. 15-202[c][1] and [2]). Person receiving share of business profits presumed to be partner in business, unless profits received in payment of debt, for services, of rent, of annuity, of interest, or for sale of business. (6 Del. Code Ann. 15-202[c][3]). Person may become partner only with consent of all partners. (6 Del. Code Ann. 15-401[i]). Partnership is separate legal entity which is partnership distinct from its partners unless otherwise provided in statement of partnership existence or statement of qualification and partnership agreement. (6 Del. Code Ann. 15-201[a]).

Name.

Partnership name may contain name of partner, “Company,” “Association,” “Club,” “Foundation,” “Fund,” “Institute,” “Society,” “Union,” “Syndicate,” “Trust,” or abbreviations of those terms. (6 Del. Code Ann. 15-108[a]). Name must be distinguishable from name of any business entity organized under Delaware laws and reserved or registered with Secretary of State or qualified to do business and registered as foreign entity, unless written consent is obtained from other entity and filed with Secretary. (6 Del. Code Ann. 15-108[c]). Name reserved pursuant to § 6-15-109.

Administration of Partnership Property.

Partnership property is that acquired in name of or transferred to partnership (6 Del. Code Ann. 15-203; 6 Del. Code Ann. 15-204[a][1]), or to one or more persons with indication in instrument transferring title of person’s capacity as partner or of partnership existence but without indicating partnership name (6 Del. Code Ann. 15-204[a][2]), and is not property of individual partners (6 Del. Code Ann. 15-203). Partnership property may be transferred by partner in partnership name or by partner(s) in whose name property is held. (6 Del. Code Ann. 15-302).

Statement of Partnership Existence.

Partnership may file statement of partnership existence, which must include names of partnership, address of registered office and name and address of registered agent for service of process. Statement of partnership existence may limit authority of partner to enter into certain transactions. (6 Del. Code Ann. 15-303[a]).

Rights and Liabilities of Partners Inter Se.

Each partner has account credited with amount equal to money and other property, minus liabilities, that partner contributes to partnership, and partner's share of partnership profits minus partner's share of partnership losses. (6 Del. Code Ann. 15-401[a] and [b]). Partners reimbursed for payments made and indemnified for liabilities incurred while acting in ordinary course of business. (6 Del. Code Ann. 15-401[c]). Partners have equal rights to manage and conduct partnership business, may use or possess partnership property only on behalf of partnership, are not entitled to remuneration for services performed for partnership except on winding up business, and can delegate their rights and powers to another person. (6 Del. Code Ann. 15-401). Partner has no right to demand and receive any distribution from partnership in kind but may be compelled to accept distribution of any asset in kind if percentage of asset distributed equals partner's percentage shares in distributions from partnership. (6 Del. Code Ann. 15-402). Partners, former partners and legal representatives have right of access upon reasonable demand to information, books and records about partnership's business and affairs for any purpose reasonably related to partner's interest in partnership. (6 Del. Code Ann. 15-403). Partners owe duty of loyalty and duty of care to partnership and other partners. (6 Del. Code Ann. 15-404). Partnership may maintain action against partners and partners may maintain action against partnership and other partners. (6 Del. Code Ann. 15-405). Partnership Agreement may provide classes or groups of partners with different rights. (6 Del. Code Ann. 15-407).

Reliance on Reports by Partner or Liquidating Trustee.

Liquidating trustees, LLP partners, and partners of partnership other than LLP are protected in relying in good faith upon partnership records and information presented by partner, officer, employee, another liquidating trustee, committees of partnership, or any person's information that person relying reasonably believes to be within that person's professional or expert competence. (6 Del. Code Ann. 15-409).

Dissociation.

Partner may dissociate at any time, rightfully or wrongfully, by express will (6 Del. Code Ann. 15-602[a]) or upon occurrence of other events stipulated in § 6-15-601. Dissociation is wrongful only if in breach of partnership agreement or, in certain circumstances, before expiration of term or completion of undertaking agreed to. (6 Del. Code Ann. 15-602[b]). Wrongfully dissociating partner is liable to partnership and partners for damages. (6 Del. Code Ann. 15-602[c]). Dissociated partner's interest in partnership shall be purchased. (6 Del. Code Ann. 15-701).

Rights and Liabilities of Partners as to Third Persons.

Each partner is agent of partnership and their acts for carrying on partnership's business bind partnership unless partner acted without authority and person with whom partner was dealing had notice of such lack of authority. (6 Del. Code Ann. 15-301). All partners are liable jointly and severally for all partnership obligations unless: (a) Otherwise agreed by creditor; (b) person admitted as partner into existing partnership after obligations incurred; or (c) obligation incurred while partnership was limited liability partnership, unless liability due to individual partner's negligence or willful misconduct. (6 Del. Code Ann. 15-306). Partnership may sue and be sued in name of partnership. (6 Del. Code Ann. 15-307).

Dissolution.

Partnership is dissolved and its business must be wound up where: (a) In partnership at will, partnership's having notice from partner of that partner's will to withdraw as partner; (b) in partnership for definite term or particular undertaking, (i) within 90 days of partner's dissociation, (ii) at express will of all partners, or (iii) upon expiration of term or completion of undertaking; (c) event occurs agreed to in partnership agreement resulting in winding up; (d) event that makes it unlawful to continue partnership business and affairs; (e) application to Court of Chancery by transferee; (f) application to Court of Chancery or determination of Court that it is not reasonably practicable to continue partnership business, purpose or activity in conformity with agreement. (6 Del. Code Ann. 15-801).

Partnership continues after dissolution only to wind up partnership affairs (6 Del. Code Ann. 15-802[a]), partner may participate in dissolution (6 Del. Code Ann. 15-803), and partner's act binds partnership if act is appropriate to wind up business or if act would have bound partnership before dissolution and other party did not have notice of dissolution (6 Del. Code Ann. 15-804). At any time after dissolution and before completing winding up of partnership business or affairs, all partners other than wrongfully dissociating partner can waive right to wind up and terminate partnership, and partnership will resume its business or affairs. (6 Del. Code Ann. 15-802[b]).

After dissolution partnership may file statement of dissolution. (6 Del. Code Ann. 15-805). Partners settle their accounts according to § 6-15-807.

Conversion to Partnership.

Any "other entity" may convert to partnership upon: (i) Approval of conversion in manner provided for by document governing internal affairs of entity; (ii) filing of certificate of conversion to partnership that has been executed in accordance with § 6-15-105, and (iii) filing of statement of partnership existence that complies with § 6-15-303 and has been executed in accordance with § 15-105; and, for conversion to LLP, filing of statement of qualification in accordance with subsection (c) of § 15-1001. (6 Del. Code Ann. 15-901).

Merger or Consolidation.

Partnership may merge with or into one or more domestic partnerships or "other business entity" formed or organized under laws of State of Delaware or any other state or foreign country or other foreign jurisdiction with such domestic partnership or other business entity as agreement shall provide being surviving or resulting domestic partnership or other business entity. Unless partnership agreement provides otherwise, merger or consolidation must be approved by all partners of partnership. Rights or securities of, or interests in domestic partnership or other business entity, may be exchanged for same, cash, or property in entity resulting from merger or consolidation or may be cancelled. If domestic partnership is merging or consolidating, it must file statement of partnership existence if it has not already done so. Entity surviving or resulting from merger or consolidation must file certificate of merger or consolidation with Secretary and include detailed information required by Act. Agreement of merger may effect any amendment to partnership agreement or adopt new partnership agreement. Upon effectiveness of merger, surviving or resulting entity succeeds to all rights, powers and privileges, and all property, real, personal and mixed, and all debts, of merged entities, as well as other things and causes of action belonging to such merged entities. Unless otherwise agreed, merger or consolidation of domestic partnership shall not require that partnership wind up its affairs or pay its liabilities and distribute its assets under § 6-15-807. Merger or consolidation does not constitute partnership dissolution. Agreement may provide that partnership must not merge or consolidate under § 6-15-902. (6 Del. Code Ann. 15-902).

Conversion from Partnership.

Partnership may convert to other business entity as authorized in partnership agreement. If not authorized in partnership agreement, then conversion shall be approved in same manner as merger or consolidation or, if merger or consolidation is not provided for, then by all partners. Agreement may provide that partnership must not convert under § 6-15-903. (6 Del. Code Ann. 15-903).

Registration of General Partnership Name.

See category 17 Intellectual Property, topic 17.01 Trademarks and Tradenames.

Limited Liability Partnership.

Existing general partnership may become LLP by vote necessary to amend partnership agreement and by filing statement of qualification. LLP may form by stating in original partnership agreement that it is LLP and by filing statement of qualification. (6 Del. Code Ann. 15-1001).

Statement of qualification for LLP must include LLP name, address of registered office, name and address of registered agent for service of process, number of partners at time statement of qualification is effective, statement of election and effective date and time. (6 Del. Code Ann. 15-1001[c]). LLP becomes effective on later date of filing statement or effective date in statement. (6 Del. Code Ann. 15-1001[d]). LLP continues to be same entity that existed before filing statement of qualification. (6 Del. Code Ann. 15-201[b]). LLP is for all purposes partnership. (6 Del. Code Ann. 15-202[a]).

Filing of statement with Secretary of State makes it unnecessary to file any other documents under c. 31 (Registration of Trade Names, etc.) of this title. (6 Del. Code Ann. 15-105[f]). LLP must file annual report with Secretary by June 1. (6 Del. Code Ann. 15-1003).

Yearly fee of $200 per partner with maximum fee of $120,000 per partnership must be paid by LLP. (6 Del. Code Ann. 15-1207[a][3]).

Name must include “Limited Liability Partnership,” “LLP,” or “L.L.P.” as last words or letters of name. (6 Del. Code Ann. 15-108[b]). Name must distinguish LLP from other Delaware business entities; LLP may register under similar or identical name only with written consent of other entity. (6 Del. Code Ann. 15-108[c]). Right to exclusive name may be transferred or cancelled by filing notice with Secretary of State. LLP can reserve exclusive right to name for renewable periods of 120 days for $75 fee. (6 Del. Code Ann. 15-109).

Liability incurred while partnership is LLP, whether arising in contract, tort or otherwise, is obligation of partnership, and partners are not personally liable by indemnification, contribution, assessment or otherwise, solely for being or acting as partner. (6 Del. Code Ann. 15-306[c]). Partner may agree to be personally liable for obligations of LLP. (6 Del. Code Ann. 15-306[e]).

Distributions must not be made to partner to extent that at time of distribution, all liabilities of LLP, other than liabilities to partners, exceeded fair value of LLP assets. (6 Del. Code Ann. 15-309[a]).

Foreign LLP governed by law under which entity formed (6 Del. Code Ann. 15-1101) and must register with Secretary statement of foreign qualification to do business in Delaware (6 Del. Code Ann. 15-1102).

Upon dissolution, LLP must pay or make reasonable provision to pay all claims and obligations known to LLP, pending against LLP, or are likely to arise or become known to LLP within ten years after dissolution date. (6 Del. Code Ann. 15-807[h]). Partner receiving distribution in violation of 6 Del. Code Ann. 15-807(h) and knew of violation will be liable to LLP for amount of distribution. (6 Del. Code Ann. 15-807[i]). Partner who receives distribution from LLP has no liability for amount of distribution after three years pass since date of distribution. (6 Del. Code Ann. 15-807[j]).

Limited Partnerships.

Revised Uniform Limited Partnership Act adopted with certain modernizing modifications. (6-c. 17). Limited partnership (“LP”) may engage in any lawful business, purpose, or activity, whether or not for profit, except banking. (6 Del. Code Ann. 17-106[a]). LP may indemnify and hold harmless partners or other persons from and against any and all claims and demands whatsoever. (6 Del. Code Ann. 17-108).

LP agreement may be written or oral, and may provide that person may be admitted as limited partner of limited partnership or may become assignee of LP interest, and become bound by LP agreement, by execution of LP agreement or any writing evidencing intent to be bound by LP agreement, or by compliance with conditions for becoming limited partner or assignee in LP agreement. In absence of such provision, limited partner or assignee is bound by agreement even if partner or assignee did not execute agreement. LP agreement may provide rights to any person, including person who is not party to partnership agreement. (6 Del. Code Ann. 17-101[12]).

Certificate of LP must be executed by all general partners. Limited partners need not execute certificate. Certificate must state name of LP, address of registered office, name and address of registered agent for service of process, and name and business, residence or mailing address of each general partner, and any other matters partners determine to include therein and must be filed with Secretary of State. (6 Del. Code Ann. 17-201).

Merger or consolidation of domestic LP with or into one or more LPs or other business entities is permitted, pursuant to agreement of merger or consolidation. Unless otherwise provided in partnership agreement merger must be approved by all general partners and by LPs, by class if applicable, who own more than 50% interest of current profits of all LPs, or constituent class. Surviving entity must file certificate of merger or consolidation with Secretary of State. Amendments set forth in certificate of merger shall be deemed amendment to certificate of limited partnership. (6 Del. Code Ann. 17-211). Partners of surviving partnership are admitted pursuant to surviving partnership agreement and merger agreement with latter controlling. (6 Del. Code Ann. 17-301[b][3]). Domestic LP or other business entity, as agreement provides, shall be surviving or resulting domestic LP or other business entity. “Other business entity” means corporation, business trust or association, statutory trust, real estate investment trust, common-law trust, limited liability company, or unincorporated business, including partnership (whether general [including limited liability partnership] or limited [including foreign limited liability limited partnership], but excluding domestic limited partnership). (6 Del. Code Ann. 17-211).

Conversion may occur. LP may convert to new entity including non-Delaware entity. When LP has been converted to another business form, other business form will be deemed same entity as LP. (6 Del. Code Ann. 17-219). Other entities may convert to LP pursuant to 6 Del. Code Ann. 17-217. LP may transfer to or domesticate in another jurisdiction pursuant to 6 Del. Code Ann. 17-216. Partnership agreement may provide that domestic LP must not convert pursuant to 6 Del. Code Ann. 17-219. (6 Del. Code Ann. 17-219).

Broad voting rights and powers may be exercised by limited partners, under statutory “safe harbors” or pursuant to LP agreement or other agreement, without limited partners being deemed as participating in control of business of LP. (6 Del. Code Ann. 17-303). Limited partner has right, enforceable by Chancery Court, to LP information reasonably related to interest as limited partner, except that trade secrets or other confidential information may be withheld by general partners. (6 Del. Code Ann. 17-305). Classes or groups of limited partners, with varying rights, powers and duties permitted pursuant to LP agreement (6 Del. Code Ann. 17-302), and series of partners permitted (6 Del. Code Ann. 17-218). Designated series with separate rights, duties and powers regarding specified property or obligations incurs debts, liabilities, obligations and expenses limited to and enforceable against series’ assets only. (6 Del. Code Ann. 17-218). Such series must meet certain statutory requirements to claim such limited liability. (6 Del. Code Ann. 17-218).

Reliance on Reports.

Limited partners, liquidating trustees, and LP general partners are protected in relying in good faith upon LP records, information, opinions, reports, statements by general partner, officer, employee, another liquidating trustee, committees of LP, limited partners or any person's information that person relying reasonably believes to be within that person's professional or expert competence. (6 Del. Code Ann. 17-407).

Admission of additional general partner after filing of LP's initial certificate requires written consent of all partners, unless LP agreement provides otherwise. (6 Del. Code Ann. 17-401). General partner ceases to be general partner upon occurrence of statutorily-defined "event of withdrawal". (6 Del. Code Ann. 17-402). General partner may contractually modify liability to other partners and to LP. (6 Del. Code Ann. 17-403). Unless agreement provides otherwise, general partner has: (a) Same rights, powers, restrictions and liabilities as partner in partnership, (b) power to delegate general partner rights and powers to manage, and (c) personal liability if statutory conditions met. (6 Del. Code Ann. 17-403). Classes or groups of general partners, with varying rights, powers and duties permitted pursuant to LP agreement. (6 Del. Code Ann. 17-405). General partner may withdraw from LP upon occurrence of events specified in partnership agreement or with written notice at any time, notwithstanding 6 Del. Code Ann. 17-402, though LP may recover against such partner if withdrawal violates LP agreement. Agreement may state that general partner does not have right to withdraw. (6 Del. Code Ann. 17-602).

Failure to make required contribution to LP may result in penalty to partner's interest in LP, or in specific performance against partner, pursuant to LP agreement. (6 Del. Code Ann. 17-502[c]). Contribution may be cash, property, services rendered, or obligation to contribute same. (6 Del. Code Ann. 17-501). LP agreement may provide for allocations of profits and losses, and distributions of cash and assets to partners. (6 Del. Code Ann. 17-503, 504).

Wrongful distribution to partner who knew that distribution violated statute makes partner liable to LP for amount of distribution. (6 Del. Code Ann. 17-607).

Assignment of LP interest, in whole or in part, may be governed by LP agreement. (6 Del. Code Ann. 17-702). Assignment does not dissolve LP or give assignee rights and powers of partner, but gives assignee right to distributions and share in profit and losses to extent assigned. (6 Del. Code Ann. 17-702[a]). LP may not issue certificate of partnership interest in bearer form. (6 Del. Code Ann. 17-702[b]). Assignee may become limited partner pursuant to LP agreement or if all partners consent. (6 Del. Code Ann. 17-704).

Charging Orders.

Judgment creditor of partner or partner's assignee may apply for charging order for partnership interest. Entry of charging order is judgment creditor's exclusive remedy and no creditor of partner has any other right to LP property. (6 Del. Code Ann. 17-703).

Dissolution of LP may occur: (i) at time upon events specified in LP agreement; (ii) by affirmative vote or written consent of all general partners and limited partners, or if more than one class or group of limited partners, then by each class or group, in either case, by limited partners who own more than two-thirds of then current percentage or other interests in profits of LP owned by all limited partners or by limited partners in each class or group, as appropriate; (iii) following withdrawal of general partner, and remaining general partners, if any, may not, pursuant to LP agreement, or do not, continue LP; provided that, LP agreement may permit majority of limited partners to appoint new general partner and continue business; or (iv) by entry of decree of judicial dissolution; or (v) there are no limited partners at time. (6 Del. Code Ann. 17-801, 802). Upon application of partner, Chancery Court may appoint liquidating trustee to wind up business. (6 Del. Code Ann. 17-803). Dissolved LP must pay, or establish reasonable reserves for payment of, all claims and obligations known or unknown likely to become known to LP within ten years after date of dissolution. Liquidating trustee winding up LP's affairs in compliance with this section will not be personally liable to claimants of LP because of his actions in winding up of partnership affairs. (6 Del. Code Ann. 17-804[b]). Certificate of cancellation of LP must be filed with Secretary of State. (6 Del. Code Ann. 17-203).

Revocation of LP's Dissolution.

Notwithstanding events set forth in § 6-17-801(1)-(5), LP will not dissolve or be wound up if, before filing certificate of cancellation, LP is continued by affirmative vote or written consent of remaining partners, remaining general partners and personal representative of last remaining limited partner if no remaining limited partner, remaining limited partners if no remaining general partner, or personal representative of last remaining limited partner if no remaining limited or general partners (and any others required by agreement). For dissolution caused by vote or written consent, dissolution is not revoked unless each voter for dissolution votes or consents in writing to continue LP. If personal representative of last remaining partner continues LP, representative will be required to agree in writing to admission of personal representative of such member, its nominee, or designee as LP member, effective upon event terminating last member. (6 Del. Code Ann. 17-806).

Foreign LP must register with Secretary of State before doing business in State. (6 Del. Code Ann. 17-902). Foreign LP is not doing business when: (1) Maintaining, defending, or settling action or proceeding; (2) holding meetings of partners or other internal affairs; (3) maintaining bank accounts; (4) maintaining offices or agencies for transfer, exchange, or registration of LP's own securities or maintaining trustees or securities depositories; (5) selling through independent contractors; (6) soliciting or obtaining orders if orders require acceptance outside of Delaware before becoming contracts; (7) selling and agreeing, through contract made outside Delaware, to deliver into Delaware machinery, plants or equipment, where construction, erection or installment of which within Delaware requires supervision of technical engineers or skilled employees performing services not generally available, and agreeing to furnish only such services, to vendee at time of construction, erection, or installment; (8) creating or acquiring indebtedness with or without mortgage or other security interest in property; (9) collecting debts or foreclosing mortgages or security interests in property securing debts, and holding, protecting, and maintaining property so acquired; (10) conducting isolated transaction not in course of similar transactions; (11) conducting interstate commerce; (12) doing business in Delaware as insurance company; or (13) being partner of domestic or foreign LP. (6 Del. Code Ann. 17-912).

Derivative action may be brought in Chancery Court by limited partner or assignee of limited partner if general partners have refused to bring action or effort to cause general partners to bring action is futile. (6 Del. Code Ann. 17-1001).

Annual tax of $250 required of each domestic LP and foreign LP registered to do business in State. (6 Del. Code Ann. 17-1109). Failure to pay tax shall result in both loss of good standing and right of access to courts (6 Del. Code Ann. 17-1109[g], [k]) and may result in loss of right to transact business in State (6 Del. Code Ann. 17-1109[i]).

Limited Liability Limited Partnership.

LLLP is limited partnership complying with § 6-17-214. (6 Del. Code Ann. 17-101[7]). To become and continue as LLLP, limited partnership must file statement of qualification pursuant to 6 Del. Code Ann. 15-1001 and annual report pursuant to 6 Del. Code Ann. 15-1003, as permitted by partnership agreement or with approval of all general partners and by limited partners, by class if applicable, who own more than 50% of current percent of profits of all LPs, or constituent class. (6 Del. Code Ann. 17-214[a]). Any statement must be executed by at least one general partner of LP. (6 Del. Code Ann. 17-214[b][1]).

Name must have as last words or letters "Limited Liability Limited Partnership" or "L.L.L.P." or "LLLP." (6 Del. Code Ann. 17-214[a][2]).

Partners' liability for LLLP's debts and other obligations limited to liability afforded partners of LLPs. No limited partner of LLLP has liability for entity's liability under 6 Del. Code Ann. 17-303(a). (6 Del. Code Ann. 17-214[c]).

3 BUSINESS REGULATION AND COMMERCE

3.01 BANKS AND BANKING:

Uniform Commercial Code (1962, adopted 1967). (6-Art. 4). See topic 3.09 Commercial Code.

Regulation by.

Banks and trust companies are regulated by Tit. 5.

Banks and trust companies except savings banks and national banks are created under corporation law for State banks and trust companies. (5 Del. Code Ann. 701). Banking powers may not be exercised by corporations formed under general corporation law (8 Del. Code Ann. 126) or by foreign corporations (8 Del. Code Ann. 379). Any bank or trust company, if authorized by charter, may open Delaware branch office or mobile branch upon authorization of State Bank Commissioner. (5 Del. Code Ann. 770[a][1], 5 Del. Code Ann. 770[c][1]). Any bank or trust company having paid-in capital and surplus exceeding $1,000,000 or more may open branch offices or places of business outside state upon issuance of certificate of authority by State Bank Commissioner. However, Commissioner is authorized to exempt certain out-of-state facilities from being included within meaning of term "branch offices or places of business without the State." (5 Del. Code Ann. 771[a]). Banks and trust companies are allowed reasonable time to commence business. (5 Del. Code Ann. 734).

Exercise of bank powers is subject to regulation by State Bank Commissioner. (5 Del. Code Ann. 761[b]).

Three or more persons, including two Delaware citizens and residents, required to create corporation to form bank or trust company. (5 Del. Code Ann. 722).

Banks and trust companies doing business in Delaware may not merge or consolidate with other banks or trust companies without approval by State Bank Commissioner. (5 Del. Code Ann. 751[a]).

No acquisition of any Delaware bank or trust company is permitted without minimum of 60 days prior written notice of such proposed change in control to State Bank Commissioner, who shall have authority to approve or disapprove such acquisitions. (5 Del. Code Ann. 160[a]).

Stockholders.

Private property of stockholders not subject to payment of corporate debts unless otherwise provided in articles of association. (5 Del. Code Ann. 747). No stock issued until par value fully paid in cash, and no business transacted until all stock subscribed for and paid for in cash. (5 Del. Code Ann. 746).

Deposits.

Deposits of minors, deposits of decedents, deposits in names of two or more persons, and deposits in trust governed by 5 Del. Code Ann. 920, 922-924.

Unclaimed Deposits.

See category 21 Property, topic 21.01 Absentees, subhead Escheat.

Collections.

Uniform Commercial Code (1962, adopted 1967). (6 Del. Code Ann. 4-301-303).

Trust Companies.

General powers of corporation organized under 5-c. 7 set forth at 5 Del. Code Ann. 761. Trust companies established under 5-c. 7 authorized to act as fiduciaries (5 Del. Code Ann. 765) and as corporate agents (5 Del. Code Ann. 766).

Uniform Common Trust Fund Act not adopted, but common fund investments by bank or trust company authorized to act as fiduciary or trustee are permitted in accordance with statutory regulations. (12 Del. Code Ann. 3307[a]).

Foreign Banks.

Banking powers generally denied to foreign corporations. (8 Del. Code Ann. 379). Foreign banks may transact business in State under certain conditions. Foreign bank authorized by its charter and under laws of its country of organization may apply to State Bank Commissioner for certificate of authority to establish and maintain foreign bank agency. (5 Del. Code Ann. 1402[a]; 5 Del. Code Ann. 1403). Such authorized foreign banks may engage in general banking business subject to statutory and administrative restrictions on authority to exercise fiduciary powers and to engage in general deposit-taking business. (5 Del. Code Ann. 1404). In addition, foreign banks with U.S. branches may engage in interstate branching by merger with Delaware banks in same manner as out-of-state banks. (5 Del. Code Ann. 1432; 5 Del. Code Ann. 1433).

Credit Card Institutions.

State chartered credit card institutions are allowed if they engage only in credit card operations, do not accept demand deposits or deposits that depositor may withdraw by check or similar means for payment to third parties or others, do not accept any savings or time deposits of less than $100,000, maintain only one office that accepts deposits, do not engage in business of making commercial loans, and are excepted from definition of “bank” in Bank Holding Company Act of 1956, as am’d, 12 U.S.C. § 1841 et seq. (5 Del. Code Ann. 1501). These credit card institutions may convert to banks, upon filing application with State Bank Commissioner. (5 Del. Code Ann. 1544; 5 Del. Code Ann. 793).

Securities Powers.

Bank or trust company may engage in sale, distribution and underwriting of, and deal in, stocks, bonds, debentures, notes or other securities. (5 Del. Code Ann. 761[a][12]). Such securities activity is not subject to investment limitations on banks and trust companies. (5 Del. Code Ann. 910[2]).

Investments.

Bank or trust company may without approval of State Bank Commissioner invest up to 50% of its capital, surplus, and undivided profit in real estate suitable for conduct of its business. Such amount includes money invested in other organizations holding real estate for use in conduct of business, but excludes any investment made prior to July 1, 1933. (5 Del. Code Ann. 762; 5 Del. Code Ann. 911).

No bank or trust company shall hold more than 10% of capital stock of any other bank or trust company without approval of State Bank Commissioner. (5 Del. Code Ann. 769).

Acquisition of Existing Savings Banks.

Under certain conditions, out-of-state savings institution, out-of-state savings and loan holding company or out-of-state bank holding company (or any subsidiary of such institution) may acquire Delaware savings bank or a Delaware savings and loan holding company. (5 Del. Code Ann. 832). Any institution proposing to make such acquisition must apply to State Bank Commissioner for approval. (5 Del. Code Ann. 832; 5 Del. Code Ann. 833).

Agency.

Delaware and Federal Banks can act as agent on behalf of any affiliated insured depository institution with approval of State Bank Commissioner. (5 Del. Code Ann. 796A).

Loans to person or association are limited to percentage of lender's total capital. (5 Del. Code Ann. 909[a]). Limit does not apply to loans secured or guaranteed by U.S. or State obligations, or those secured by certain commercial instruments or segregated deposit. Limit also does not apply to loans arising from discount of commercial or consumer paper or to sale of federal funds to F.D.I.C. insured banks or to purchase of securities under agreement to resell. (5 Del. Code Ann. 909[b]). Bank or trust company may make loans to directors and executive officers in amounts exceeding lesser of $500,000 or 5% of bank's total capital only after borrowers submit statement of financial condition and loan is approved by majority of whole board of directors or majority of whole empowered committee. (5 Del. Code Ann. 909[d]).

Delaware and federal banks may extend credit under revolving credit plan and may take such security as collateral as may be acceptable to bank. No borrower loan limits, unless imposed by charter or law. (5 Del. Code Ann. 942). Periodic interest may be charged pursuant to plan agreement (5 Del. Code Ann. 943), and bank may apply variable interest rates to all outstanding balances (5 Del. Code Ann. 944). In addition to or in lieu of interest, bank may impose membership fee, transaction charges, periodic charge for period of outstanding credit, service fees, expense reimbursements or other fees incident to plan, returned payment charges, documentary evidence charges, stop payment fees, over-limit charges, prepayment charges authorized by 5 Del. Code Ann. 945(b), automated teller machine charges, and any other fees and charges set forth in plan, subject to limitations of 5-c.9. (5 Del. Code Ann. 945[a]). None of aforementioned charges imposed in addition to or in lieu of interest shall be deemed void as penalty or otherwise unenforceable. (5 Del. Code Ann. 945[c]). Different terms on purchase and loan balances may be utilized. (5 Del. Code Ann. 946). If bank provides overdraft checking, customary charges imposed on negative balances chargeable to borrower's account may be treated as loan even if charge not mentioned in plan agreement. (5 Del. Code Ann. 947). Bank may allow borrower to omit monthly installments (5 Del. Code Ann. 948), require borrowers under listed circumstances to obtain insurance (5 Del. Code Ann. 949[b]), charge any borrower late fee as interest for delinquent installments (5 Del. Code Ann. 950), collect attorneys' fees and costs of collection, where agreement so provides (5 Del. Code Ann. 951), amend terms of plan unless agreement otherwise provides and upon borrower's continued use, apply changes to entire outstanding balance (5 Del. Code Ann. 952). Bank may not engage in "tying arrangements." (5 Del. Code Ann. 929[a]).

Delaware and federal banks may extend closed-end credit subject to bank charter and legal limitations. (5 Del. Code Ann. 962). Periodic interest may be charged pursuant to loan agreement (5 Del. Code Ann. 963), and variable interest rates may apply to all outstanding balances pursuant to agreement (5 Del. Code Ann. 964). In addition to or in lieu of periodic interest, bank may charge loan fees, points, finders' fees, front-end and periodic charges (but in case of individual borrower, agreement must provide for such charges), returned payment charges, documentary evidence charges and fees for services rendered or expenses incurred by bank in connection with loan. (5 Del. Code Ann. 965). Bank may permit borrower to defer installment payments and charge as interest deferral charges (5 Del. Code Ann. 966), may require borrowers under listed circumstances to obtain insurance (5 Del. Code Ann. 967[b]), may charge late fee for payments in default; individual borrower pays late fee only if agreement so provides (5 Del. Code Ann. 968). Bank may charge individual borrower for attorneys' fees and collection costs where agreement so provides. (5 Del. Code Ann. 971). If individual borrower fully prepays loan bearing precomputed interest, bank must refund unearned portion of precomputed interest charge (5 Del. Code Ann. 969[b]); individual borrower not subject to prepayment charge except as provided in residential mortgage loan agreement (5 Del. Code Ann. 969[e]). Terms of loans to nonindividual borrowers regarding extended or deferred payment, prepayment and refinancing charges, late charges, attorneys' fees, and collection costs are matters of contract. (5 Del. Code Ann. 972).

All terms, conditions, and other provisions of and relating to plan or in agreement governing plan, other than those which are interest under revolving credit and closed-end credit subchapters, are deemed material terms. (5 Del. Code Ann. 955; 5 Del. Code Ann. 975).

Revolving credit plans between bank and individual borrower, and agreement, bond, note, or other evidence of loan between bank and individual borrower are governed by Delaware law. (5 Del. Code Ann. 956; 5 Del. Code Ann. 976).

Regulation of mortgage loan brokers governed by 5-c.21.

Merger, Consolidation and Conversion.

State or national bank may merge or convert into resulting national bank pursuant to approval by 2/3 of each class of voting stock of state bank. (5 Del. Code Ann. 782). Any dissenting shareholders shall have right to receive value of their shares at time of merger in cash, value to be determined by appraisal. (5 Del. Code Ann. 788).

State or national bank may merge to result in Delaware state bank or national bank may convert into Delaware state bank. (5 Del. Code Ann. 783). Merger requires approval from board of directors of each merging bank (5 Del. Code Ann. 784[a]) and State Bank Commissioner (5 Del. Code Ann. 784[b]). Commissioner approval automatic if no action taken within 30 days after receipt of completed application. (5 Del. Code Ann. 784[c]). Following approval, procedure for merger will be in manner prescribed by 8-c.1 which governs merger or consolidation of Delaware corporations. (5 Del. Code Ann. 785). Stockholders dissenting from merger have right to receive value of their shares at time of merger in cash, value to be determined by appraisal. (5 Del. Code Ann. 788). Conversion of national bank into Delaware state bank also subject to approval of State Bank Commissioner; approval automatic if no action taken within 30 days after receipt of completed application. (5 Del. Code Ann. 786).

Any credit card institution formed under 5-c.15 may convert to Delaware state bank upon filing application with State Bank Commissioner. (5 Del. Code Ann. 793[a]). Building and loan association with voting stock regulated by 5-c.17 may convert into Delaware state bank upon filing application with Commissioner and following 45-day notice and comment period. (5 Del. Code Ann. 794).

In both mergers and conversions into state bank, if resulting state bank is not to exercise trust powers, State Bank Commissioner shall not approve merger or conversion until satisfied that adequate provision has been made for successors to fiduciary positions held by merging banks or converting bank. (5 Del. Code Ann. 789). If merging or converting state bank has assets or conducts business not conforming with Delaware law, it may be allowed reasonable time to conform. (5 Del. Code Ann. 790). Resulting bank may not value assets higher than they were valued before merger or conversion on books of merging or converting bank without approval of State Bank Commissioner. (5 Del. Code Ann. 791). Any application for merger or conversion requires payment of fee to Commissioner. (5 Del. Code Ann. 792).

Delaware state or national bank may merge or consolidate with out-of-state bank when Delaware bank is resulting bank. (5 Del. Code Ann. 795C, D). Delaware state or national bank may merge or consolidate into out-of-state state bank pursuant to same procedures required for merger of Delaware state banks. (5 Del. Code Ann. 795F). Delaware state or national bank may merge or consolidate into out-of-state national bank pursuant to procedures required by laws of U.S. (5 Del. Code Ann. 795E). Commissioner may approve merger in which resulting bank has concentration of more than 30% of total insured deposits in state. (5 Del. Code Ann. 795H). Commissioner may approve emergency merger of failing Delaware state bank with out-of-state bank, upon determining that merging Delaware state bank is in default or in "danger of default," provided default or danger of default not caused for purpose of emergency merger. (5 Del. Code Ann. 795G). Offices of merging bank may continue as branch offices of resulting bank. (5 Del. Code Ann. 795B[a]). State Bank Commissioner's approval is required for additional branch offices in Delaware of resulting banks that are out-of-state banks. (5 Del. Code Ann. 795B[b]). Commissioner may examine branch offices, require periodic reports and enter into cooperative agreements with other regulatory authorities. (5 Del. Code Ann. 795J). Commissioner may also promulgate regulations to carry out Commissioner's responsibilities. (5 Del. Code Ann. 795L).

See also subhead Bank Holding Companies, catchline Acquisitions, infra.

Taxation.

Franchise tax is imposed on taxable income of banking organizations and trust companies. "Taxable income" is computed by net operating income before taxes plus net securities gains or losses before taxes, minus net operating income before taxes of subsidiaries and certain foreign branch offices, multiplied by factor of .56. (5 Del. Code Ann. 1101). Rate of tax is 8.7% of taxable income not exceeding $20,000,000; 6.7% on $20,000,000-$25,000,000; 4.7% for $25,000,000-$30,000,000; 2.7% in excess of $30,000,000; 1.7% in excess of $650,000,000. (5 Del. Code Ann. 1105[a]). All banking organizations, trust companies, and federal savings banks not headquartered in but maintaining branches in state, are subject to franchise tax, but exempt from Delaware corporation income tax, occupational taxes, and taxes on income, capital and assets; but real estate owned not exempt. (5 Del. Code Ann. 1101; 5 Del. Code Ann. 1109). Affiliated finance companies taxed on basis of their capital base. (30 Del. Code Ann. 6303).

Any claim for assessment is subject to three-year statute of limitations. (5 Del. Code Ann. 1111). However, in case of fraudulent return with intent to evade tax or failure to file return, tax may be assessed at any time. (5 Del. Code Ann. 1111[b]). Any claim for credit or refund is subject to two-year statute of limitations from time tax paid. (5 Del. Code Ann. 1112).

Building and loan associations subject to annual franchise tax of net operating income at same rate as provided for banking organizations, above. (5 Del. Code Ann. 1801). Upon failure to pay tax, tax due becomes lien in favor of State on property and rights thereto. (5 Del. Code Ann. 1803).

Bank Holding Companies.

State Bank Commissioner empowered to regulate Delaware bank holding companies. (5 Del. Code Ann. 855). Delaware corporation regulated under Federal Bank Holding Company Act or Federal Savings and Loan Holding Company Act may use "trust" in corporate name without being subject to regulation by State Bank Commissioner. (8 Del. Code Ann. 395).

Acquisitions.

Out-of-state bank holding company or subsidiary may acquire more than 5% of voting share or substantially all assets of any bank located in Delaware without having to satisfy listed requirements or submit application to Commissioner. (5 Del. Code Ann. 803[a], [b]). Out-of-state holding company must file with Commissioner, upon Commissioner's request, all reports required under § 13 or 15(d) of Securities Exchange Act of 1934, as amended, excluding portions not available to public. (5 Del. Code Ann. 805).

Out-of-state bank holding company or subsidiary may acquire or retain ownership or control of bank or bank holding company located in Delaware upon application to Commissioner. (5 Del. Code Ann. 843; 5 Del. Code Ann. 844). Commissioner may approve acquisition even if it would result in concentration of 30% or more of total insured deposits in State in same out-of-state bank holding company together with any affiliated insured depository institution. (5 Del. Code Ann. 843[b]).

See also subhead Merger, Consolidation and Conversion, supra.

Bidco.

"Bidco" is business and industrial development corporation licensed under c. 33 of Title 5, "Delaware Bidco Act". (5 Del. Code Ann. 3301; 5 Del. Code Ann. 3303). Bidco provides financing and management assistance to business firms. (5 Del. Code Ann. 3322[a]). State Bank Commissioner supervises and regulates Bidco. (5 Del. Code Ann. 3306).

3.02 BILLS AND NOTES:

Uniform Commercial Code (1962, adopted 1967). (6, Art. 3). See topic 3.09 Commercial Code.

Judgment Notes.

May be entered without declaration or cognovit, but confession of judgment is subject to procedures in Super. Ct. Civ. Rule 58.1. (10 Del. Code Ann. 2306; 10 Del. Code Ann. 3908). See, however, topic Consumer Protection.

Attorney's Fee Clauses.

Enforceable up to 20% of amount adjudged for principal and interest. (10 Del. Code Ann. 3912).

3.03 BILLS OF LADING:

See topic 3.09 Commercial Code.

3.04 [RESERVED]

3.05 BLUE SKY LAW:

See topic 3.24 Securities.

3.06 BROKERS:

Every person in business of buying and selling for other persons for commission or profit is broker. (30 Del. Code Ann. 2301[a][4]).

Licenses.

Broker must obtain license from Department of Finance before engaging in business. (30 Del. Code Ann. 2101; 30 Del. Code Ann. 2301). Fee is $75 plus surtax plus 0.4147% of gross receipts, plus $25 for each additional branch or location. (30 Del. Code Ann. 2301[a], [d]). Brokers over 65 years old with gross receipts from previous year less than $10,000 pay reduced fee. (30 Del. Code Ann. 2105).

Real Estate Brokers.

Must obtain licenses. (30 Del.Code Ann. 2101). Fee for real estate broker is $75 plus surtax plus 0.4147% of gross receipts, plus $25 for each additional branch or location. (30 Del.

Code Ann. 2301[a], [a][16], [d]). Brokers and salesmen must also obtain certificates of registration from State Real Estate Commission. (24 Del. Code Ann. 2901[a][4], 24 Del. Code Ann. 2906). License fees for brokers, including nonresidents, and salespersons computed by Division of Professional Regulation at beginning of calendar year. (24 Del. Code Ann. 2908). Prior to licensing, nonresident broker applicants shall consent to service of process. (24 Del. Code Ann. 2909[b]). Real estate brokers 65 years old or older with gross receipts from previous year less than $10,000 pay reduced fee. (30 Del. Code Ann. 2105).

Uniform Commercial Code (1962, adopted 1967). See topic 3.09 Commercial Code.

3.07 BULK SALES:

Uniform Commercial Code (6, Art. 6) repealed.

3.08 CARRIERS:

Public Service Commission empowered to regulate and fix rates. (26 Del. Code Ann. 201[a]).

Uniform Commercial Code (1962, adopted 1967). (6, Art. 7). See topic 3.09 Commercial Code.

Rates.

Sixty days notice to Commission prior to rate change required. (26 Del. Code Ann. 304). Commission either upon complaint or own initiative may enter upon hearing. (26 Del. Code Ann. 305).

Discrimination.

Unjust, unreasonable, unduly preferential, unjustly discriminatory rates and practices prohibited. (26 Del. Code Ann. 303[a]).

Limiting Liability.

Can generally be limited by contract, but emphasis placed on notice. (22 Del. 15, 64 A. 252).

Bills of Lading.

Uniform Commercial Code (1962, adopted 1967). (6, Art. 7). See topic 3.09 Commercial Code.

Liens.

Subject to provisions of Uniform Commercial Code, charges may be collected out of proceeds of sale of goods within 60 days after demand and after notice of sale published in local newspaper and printed on handbills. (25 Del. Code Ann. 3501).

3.09 COMMERCIAL CODE:

Uniform Commercial Code (1962, adopted 1967). (Title 6). With the addition of Title 6, statutory numbering corresponds to Official Text.

Material Variations from Official 1995 Text.

2-316(5)—Blood, blood plasma or tissue or organs shall not be considered commodities subject to sale or barter, but shall be considered medical services.

2A-309(9)—Section omitted.

2A-506(1)—Parties in original lease contract may reduce period of limitation to not less than one year, where not consumer lease.

3-118(h)—Does not affect state common law pertaining to instruments under seal.

Revised Art. 5—Not adopted.

Art. 6—Repealed.

Revised Art. 6—Not adopted.

Revised Art. 8—Adopted, effective Jan. 1, 1998.

8-102(11)—Spelling of defined term differs from official UCC spelling. UCC version defines term “Indorsement,” Delaware Code defines term “Endorsement.”

8-110-d – Issuers organized under Delaware law cannot specify law of another jusisdiction.

8-112(a), (b) – Add “Except to the extent otherwise provided or permitted by §§ 169 and 324 of Title 8, §§ 365, 366 and Chapter 35 of Title 10, and Subsection (d) hereof.”

Delaware Code § 8-602(b)—Grace period for improperly perfected security interest is one year.

Delaware Code § 8-602(c)—Security interests with respect to uncertificated interests in general and limited partnerships that are perfected by Jan. 1, 1998 will remain perfected until lapse or continuation as provided by Art. 9.

Delaware Code § 8-602(d)—If only filing of financing statement remains to perfect already perfected certificated security after Jan. 1, 1998, security interest is perfected for three years thereafter.

Revised Art. 9—Adopted, effective July 1, 2001.72 Del. Laws Ch. 401 (1999).

Alternate Provisions and Options.

1-105–1995 Amendment not adopted.

1-209—Section not adopted.

2-318—Alternative B adopted but omitting “in person”.

2-512(1)(b)—1995 Amendment not adopted.

2A-103(1)(e)—Optional language not adopted.

2A-216—Alternative C generally followed.

4-106—Alternative B adopted.

7-204(4)—Omitted.

7-403(1)(b)—Bracketed words omitted.

8-112(a), (b)—Insert “Except to the extent otherwise provided or permitted by §§ 169 and 324 of Title 8, §§ 365, 366 and Chapter 35 of Title 10” at the beginning of Subsections (a), (b).

9-521(b) – Provides for alternate form of UCC-3 financing statement amendment and addendum.

Permanent Editorial Board’s Recommendations for Optional Amendments.

1-209–1966 Official Optional Amendment not enacted.

Filing Fees.

See category 10 Documents and Records, topic 10.04 Records, subhead Filing Under Uniform Commercial Code. See also categories 8 Debtor and Creditor, topic 8.01 Assignments; 20 Mortgages, topic 20.01 Chattel Mortgages.

See Uniform and Model Acts section of this volume for 1962 Official Text of Uniform Commercial Code and later Official Amendments and Official Optional Amendments.

Forms.

See end of this Digest.

See also topics: Banks and Banking, Bills and Notes, Brokers, Carriers, Contracts, Factors, Frauds, Statute of, Sales, Securities, Warehousemen; categories Business Organizations, topic Corporations; Civil Actions and Procedure, topic Limitation of Actions; Debtor and Creditor, topics Assignments, Fraudulent Sales and Conveyances, Liens, Pledges; Documents and Records, topics Records, Seals; Mortgages, topic Chattel Mortgages; Property, topic Leases.

3.10 CONDITIONAL SALES:

See topic 3.09 Commercial Code.

3.11 CONSIGNMENTS:

See topic 3.09 Commercial Code.

3.12 CONSUMER PROTECTION:

Telemarketing.

Purpose of Delaware Telemarketing Fraud Act is to set standards for conduct for organized commercial telemarketing in or into Delaware and to protect consumers from unfair, deceptive or abusive practices by telemarketers and companies using established telemarketing methods to promote and sell products, services and investments. (6 Del. Code Ann. 2501A).

No person may transact any business with any customer who is located in Delaware through telemarketing as seller or telemarketing business without having first filed registration statement with Director of Consumer Protection Unit of Department of Justice (“Director”), unless exempted. (6 Del. Code Ann. 2503A[a], [f]). Registration statement must be filed at least 30 days prior to transacting any business with any customer who is located in Delaware and must renew such registration yearly. (6 Del. Code Ann. 2503A[b]). Registrants must file corporate surety bond in principal sum of $50,000. (6 Del. Code Ann. 2503A[d]). Registration requirements do not apply in certain circumstances. (6 Del. Code Ann. 2503[e]-[g]).

Any seller or telemarketing business must preserve its individual records for period of 24 months from date records are produced. Record, to extent seller or telemarketing business, or both, created it in ordinary course of business, must be kept in form, manner, format or place as such record is maintained in ordinary course of business. (6 Del. Code Ann. 2504A[a]).

Certain telemarketing activities are exempt. (6 Del. Code Ann. 2505A).

At beginning of call, telemarketer must state purpose of call, telemarketer's name, and nature and description of what is being sold. Before call is completed and before payment is requested telemarketer must disclose total amount to be paid, and all material aspects of sale, including any restrictions or limitations applicable to product, terms of any refund, material aspects of any investment being offered, and material elements of any prize promotion. Unless either customer has option of full refund or merchant guarantees complete satisfaction, transaction will only be considered final seven business days after customer has received written notice meeting specific requirements as set forth in statute regarding his or her right to cancel sale. Telemarketer may not engage in unfair or deceptive conduct that may lead to likelihood of confusion or misunderstanding by reasonable consumer. (6 Del. Code Ann. 2506A).

Telemarketer may not obtain check from customer without express and verifiable authorization; represent that he or she is endorsed by government; willfully contact customer for ten years after having been asked to cease and desist; assist any seller known to be in violation of telemarketing registration statute; request payment in advance to aid in return of money or any item from prior transaction; or use professional courier or pickup service to obtain payment, unless customer has had opportunity to inspect merchandise before payment. (6 Del. Code Ann. 2507A). Sales by unregistered and nonexempt telemarketing business are voidable by customer. Harmed customers may receive actual and punitive damages, attorney's fees, court costs and any other remedy provided by law. (6 Del. Code Ann. 2508A).

Home Solicitation Sales.

General Provisions interpreted to protect consumers from high-pressure tactics and resultant inequities found in certain ambiguous or misleading contracts, poor quality merchandise and quick discounting of evidence of indebtedness. (6 Del. Code Ann. 4401). "Door-to-door sale" defined as sale, lease or rental of consumer good at least $25, where seller or its representative personally solicits, and buyer's agreement is made at other than place of seller's business. Sale or rental of real property, insurance or registered securities excluded. Telephone sales included unless buyer initiates transaction conducted entirely by mail or telephone. (6 Del. Code Ann. 4403[3]).

Seller must furnish buyer with completed receipt or copy of contract, in same language used in oral sales presentation, containing conspicuous statement of buyer's right to cancel within three business days (Sat., Sun., legal holidays excluded); and completed form in duplicate of Notice of Cancellation, as described. Seller must inform buyer orally of right to cancel, may not misrepresent it, and must honor Notice of Cancellation. Contract may not contain confession of judgment or waiver of rights. (6 Del. Code Ann. 4404). Enforcement by Consumer Protection Division of Department of Justice. (29 Del. Code Ann. 2517).

Credit Cards.

Credit cards may not be distributed unless requested, or unless 14 days notice given of intent to issue, containing conspicuous legend of right to refusal, and prepaid preaddressed envelope or card upon which refusal can be indicated. Use constitutes acceptance; no liability prior to use; subchapter does not apply to issuance of renewal or substitute cards. (6 Del. Code Ann. 2542). Violators subject to fine of $100-$500 per offense, or appropriate injunction. (6 Del. Code Ann. 2543; 6 Del. Code Ann. 2544).

Advertising.

Merchandise may not be advertised, publicly and falsely, and with intent to deceive, advertise or otherwise represent that goods, are or were, in whole or in part, as being property of insolvent or bankrupt or their assignee, or as in whole or in part damaged by fire or accident of any kind. (6 Del. Code Ann. 2501). Violators fined $100. (6 Del. Code Ann. 2503).

Consumer Fraud.

General provisions (6 Del. Code Ann. 2511–6-2527) construed liberally to protect consumers from unfair or deceptive merchandising. (6 Del. Code Ann. 2512).

Unlawful to use deception, fraud, false pretense, false promise, misrepresentation, or concealment, suppression, or omission of any material fact with intent that others rely in connection with sale, lease or advertisement, whether or not any person has been misled, deceived or damaged. (6 Del. Code Ann. 2513). Attorney General on Superior Court or Chancery Court order may serve investigative demand on any person believed to be engaged in unlawful practice (6 Del. Code Ann. 2514), and may institute action to enjoin it, or for other appropriate relief. (6 Del. Code Ann. 2522). Court of Chancery may grant equitable relief including appointment of receiver (6 Del. Code Ann. 2523; 6 Del. Code Ann. 2524). Consumer Protection Fund established. (6 Del. Code Ann. 2527).

Products Liability.

Uniform Commercial Code adopted and preempts products liability actions where applicable. Seller's liability under warranty may extend to third parties. (6 Del. Code Ann. 2-318).

Retail Credit Sales.

General regulatory provisions for retail installment sales. (6-c.43). Regulatory provisions cannot be waived. (6 Del. Code Ann. 4302). Retail installment contract must be dated, in writing, and printed portion in at least eight point type. (6 Del. Code Ann. 4303). Delinquency charges limited to $5 or 5% of installment, whichever is less. (6 Del. Code Ann. 4308). Seller must furnish buyer signed copy of contract (6 Del. Code Ann. 4309) unless contract made by telephone or mail without solicitation of salesman (6 Del. Code Ann. 4310). Contracts may not contain provisions whereby buyer agrees not to assert claims or defenses or waives rights of action or remedies against seller, or whereby maturity of contract may be accelerated in absence of buyer's default. (6 Del. Code Ann. 4311). Service charges are regulated. (6 Del. Code Ann. 4315, 4317). Generally, service charge may be specified in retail sales contracts. (6 Del. Code Ann. 4315). (See topic 3.17 Interest.) Buyer may pay contract in full at any time and receive refund of any unearned prepaid service charge. (6 Del. Code Ann. 4322). Retail installment accounts may be established. (6 Del. Code Ann. 4334-4343). Deferral of installment and deferral charges allowed. (6 Del. Code Ann. 4324). Minimum service charge of $1 may be established. (6 Del. Code Ann. 4337). For special provisions regarding automobile installment sales, see 5-c.29. Uniform Commercial Code (1962, adopted 1967) as to installment deliveries. (6 Del. Code Ann. 2-612).

Computer Security Breaches.

Individual or commercial entity that conducts business in Delaware and that owns or licenses computerized data that includes personal information must give notice to Delaware resident of any security breach where resident's unencrypted personal information was, or is reasonably believed to have been, acquired by unauthorized person. (6 Del. Code Ann. 12B-102[a]). Notice may be delayed if law enforcement agency determines that notice will impede criminal investigation. (6 Del. Code Ann. 12B-102[c]). Notice must be made in good faith, without unreasonable delay and as soon as possible after law enforcement agency determines that notification will no longer impede investigation. (6 Del. Code Ann. 12B-102[c]).

Attorney General may bring action in law or equity to address violations and for other appropriate relief. (6 Del. Code Ann. 12B-104). Enforcement by Consumer Protection Division of Department of Justice. (6 Del. Code Ann. 12B-104; 29 Del. Code Ann. 2517).

Uniform Deceptive Trade Practices Act (1964, adopted 1965). (6 Del. Code Ann. 2531 et seq.).

Attorney General may institute proceedings to halt fraudulent and deceptive merchandising practices. (6 Del. Code Ann. 2514 et seq.). Person likely to be damaged by deceptive trade practice of another may be granted injunction against it; court may also award attorney's fees to prevailing party in exceptional circumstances. (6 Del. Code Ann. 2533[a], [b]). Victim of deceptive trade practice may recover treble damages. (6 Del. Code Ann. 2533[c]). Attorney General may seek remedies for violations of § 2532. (6 Del. Code Ann. 2533[d]).

"Unsolicited goods" may be returned without penalty or treated as gift. (6 Del. Code Ann. 2505).

Plain Language.

No statutory provision.

See topics 3.17 Interest, 3.23 Sales.

3.13 CONTRACTS:

Uniform Commercial Code (1962, adopted 1967). (6 Del. Code Ann. 1-101 et seq.). Special statutes on Motor Vehicle financing (5-c.29) and retail installment sales (6-c.43). See topics 3.23 Sales, Commercial Code; categories 10 Documents and Records, topic Seals; Family, topic Infants.

3.14 FACTORS:

Uniform Commercial Code (1962, adopted 1967). (6 Del. Code Ann. 1-101 et seq.). (Compare with 25-c.35.) See topic 3.09 Commercial Code.

License Requirements.

There is a state merchants' license fee. (30 Del. Code Ann. 2901 et seq.).

Liens.

Where factor has lien under existing law, failure to pay for goods within 60 days exposes goods to public sale. (25 Del. Code Ann. 3501).

Consignment Agreements.

Uniform Commercial Code (1962, adopted 1967). (6 Del. Code Ann. 1-107 et seq.). See topic 3.09 Commercial Code.

3.15 FRANCHISES:

Definitions.

Franchised distributor is individual, partnership, corporation or unincorporated association with place of business within State that purchases or takes on consignment products bearing trademark or trade name of manufacturer, producer or publisher for selling to retail outlets; or sells in or through retail outlets products bearing trademark or trade name of no more than three manufacturers, producers, publishers, trademark or trade name licensors; or purchases, or takes on consignment books, magazines, journals, newspapers or other publications for selling to retail outlets; or operates service or filling station, store, garage or other place of business for sale of motor fuel for delivery into service tank or tanks of any vehicle propelled by internal combustion engine. Franchisor is individual, partnership, corporation or unincorporated association that distributes or sells to franchised distributors, for itself or others, products bearing trademark or trade name of manufacturer, producer or publisher; or licenses use of trademarks or trade names to franchised distributors; or distributes or sells books, magazines, journals, newspapers and/or other publications to one or more franchised distributors; or produces or refines petroleum products or produces any automotive products sold by service station. Franchise is contract or other arrangement governing business relationship within State between franchised distributor and franchisor where franchised distributor pays more than $100 to enter into contract, provided, franchise distributor operating service or filling station, store, garage, or other place of business for sale of motor fuel for delivery into vehicle tanks not required to have paid consideration. Products are tangible items for sale irrespective of their nature, including publications. (6 Del. Code Ann. 2551).

Unjust Termination.

Termination of or failure to renew franchise deemed unjust if termination or failure to renew is without good cause or in bad faith. (6 Del. Code Ann. 2552[a], [b]). Provision of franchise permitting franchisor to terminate or fail to renew franchise which does not specify grounds construed to permit franchisor only to terminate justly or justly fail to renew. (6 Del. Code Ann. 2552[c], [d]). Refusal of franchisor to renew lease for property except upon payment of unreasonable or excessive rent or other charge in light of use to which property has been placed by franchisor and/or franchisor’s interest in such property deemed unjust termination of franchise. (6 Del. Code Ann. 2552[j]).

Remedies.

Franchised distributor entitled to recover damages from franchisor and obtain order from Court of Chancery enjoining termination or failure to renew franchise if franchisor unjustly terminates or unjustly fails to renew, or threatens or attempts or gives notice that it intends to attempt unjustly to terminate or unjustly to refuse to renew franchise. Pending issuance of such order, franchised distributor must be entitled to order enjoining such termination pendente lite, or in case of failure to renew they may get mandatory order extending franchise pendente lite. (6 Del. Code Ann. 2553[a]). Franchised distributor entitled to recover damages from franchisor, including loss of profits, and obtain order from Court of Chancery directing franchisor to deal with franchised distributor on fair and competitive terms, if franchisor unjustly refused to deal with franchised distributor with whom franchisor has been dealing for at least two years. (6 Del. Code Ann. 2553[b]). Damages recoverable include but not limited to: portion of franchised distributor’s real and personal tangible assets in State used with respect to terminated or unrenewed franchise, loss of goodwill, loss of profits, other damages as allowed by State, and attorney’s fees and costs. (6 Del. Code Ann. 2553[c]).

Notice for Termination or Election Not to Renew.

90 days notice must be given when terminating or electing not to renew franchise notwithstanding franchise agreement to contrary. (6 Del. Code Ann. 2554).

Uniform Franchise and Business Opportunities Act not adopted.

3.16 FRAUDS, STATUTE OF:

Uniform Commercial Code (1962, adopted 1967). (6 Del. Code Ann. 1-101 et seq.). See topic 3.09 Commercial Code.

Contracts and Agreements Generally.

No action may be brought to charge any person upon any agreement made upon consideration of marriage, or upon any contract or sale of lands, tenements, or hereditaments, or any interest in or concerning them, or upon any agreement that is not to be performed within one year of its making, or to charge any person to answer for debt, default, or miscarriage of another, in any sum of $25 and upwards, unless contract is reduced to writing, or some memorandum, or notes thereof, are signed by party to be charged therewith, or some other person thereunto by him lawfully authorized in writing; except for goods, wares and merchandise, sold and delivered, money loaned and other matters which are properly chargeable in account, in which case oath or affirmation of plaintiff, together with record regularly and fairly kept, must be allowed into evidence in order to charge defendant with sums therein contained. (6 Del. Code Ann. 2714[a]). Contract, promise, undertaking or commitment to loan money or to grant or extend credit, or any modification thereof, greater than $100,000, not primarily for personal, family, or household purposes, made by person engaged in business of lending or arranging lending of money or extension of credit is invalid unless it or some note or memorandum thereof is in writing, subscribed by charged party or by party's agent. For purposes of this section, contract, promise, undertaking or commitment to loan money secured solely by residential property consisting of one to four dwelling units is deemed to be for personal, family or household purposes. (6 Del. Code Ann. 2714[b]).

A promise to pay for the default, debt or miscarriage of another for a sum under $5 is good if proved by the oath or affirmation of the persons to whom such promise is made. (6 Del. Code Ann. 2712). Where sum is between $5 and $25, oath or affirmation of one credible witness, or some memorandum, or note in writing signed by party to be charged is required. (6 Del. Code Ann. 2713). Where sum is $25 or more, writing signed by party to be charged is necessary. (6 Del. Code Ann. 2714[a]).

Agreements as to Wills.

No action may be brought against the personal representative or heirs of a deceased person upon any agreement to make will or give legacy or make devise unless such agreement is reduced to writing, or some memorandum thereof is signed by person whose personal representative or heir is sought to be charged or someone authorized in writing, by decedent, to sign for him. This does not apply to agreements made prior to May 1, 1933. (6 Del. Code Ann. 2715).

Rental Agreements.

No rental agreement, except in writing, is effective for term longer than one year. (25 Del. Code Ann. 5106[a]).

Sales of Goods.

No sale of any good or chattel is good except against vendor, unless valuable consideration for same is paid, or in good faith secured to be paid, and unless goods and chattels actually delivered into possession of vendee as soon as convenient after sale. (6 Del. Code Ann. 2711[a]). If goods, so sold, come into possession of vendor, he will be liable to demands of all creditors. (6 Del. Code Ann. 2711[b]).

Uniform Commercial Code (1962, adopted 1967). (6 Del. Code Ann. 1-101 et seq.). See topic 3.09 Commercial Code.

Part performance of a parol contract within the Statute of Frauds removes the bar of statute; and part payment of price, if admitted by vendee or acknowledged in writing, is such part performance. (10 Del. Ch. 63, 84 A. 878).

3.17 INTEREST:

Maximum Rate.

Interest rate for loans insured by Federal Housing Administration agreed upon in writing cannot be more than 5% over Federal Reserve discount rate including, any surcharge. Where no express contract rate, legal interest rate must be 5% over Federal Reserve discount rate. (6 Del. Code Ann. 2301[a]). No limit on rate of interest where loan exceeds $100,000 and is not secured by mortgage against borrower’s principal residence. (6 Del. Code Ann. 2301[c]). Bank may charge and collect periodic interest: (i) Under revolving credit plan on outstanding unpaid indebtedness in borrower’s account, and (ii) at such periodic percentage rate as agreement provides. (5 Del. Code Ann. 943 and 5 Del. Code Ann. 963). Licensee may charge and collect interest: (i) Under revolving credit plan on outstanding unpaid indebtedness in borrower’s account, and (ii) at such periodic percentage rate as agreement provides. (5 Del. Code Ann. 2216 and 5 Del. Code Ann. 2229). Retail seller or holder of retail installment contract may charge and collect finance charge on retail installment transaction and may calculate such charge in manner and at rate or rates specified in contract. (5 Del. Code Ann. 2908[a]). Service charge on retail installment sale calculated in manner and at rate specified in sales contract. (6 Del. Code Ann. 4315). Service charge on outstanding unpaid indebtedness in buyer’s retail installment account calculated in manner and at rate specified in agreement governing retail installment account unless charge is less than $1 per month, if so, service charge of $1 per month can be charged. (6 Del. Code Ann. 4337).

Judgments.

Interest accrues on legal and equitable judgments from date of entry. (25 Del. Ch. 388, 22 A.2d 865).

Open Accounts.

Payment of money bears interest from date of its entry, but equitable consideration may affect such rule in particular case. (31 Del. Ch. 76, 66 A.2d 425).

Usury.

When rate of interest exceeds lawful rate, debtor is not required to pay excess. If whole debt is paid with interest exceeding lawful rate, debtor may recover three times amount of excess interest or $500 whichever is greater, by action brought within one year of payment. (6 Del. Code Ann. 2304[b]). No corporation, limited partnership, statutory trust, business trust or limited liability company, and no association or joint stock company having any powers and privileges of corporations not possessed by individuals or partnerships, may interpose defense of usury. (6 Del. Code Ann. 2306). Individual indorser or guarantor to corporate note may not assert usury defense when statute prevents corporate maker from doing so. (325 A.2d 108).

3.18 [RESERVED]

3.19 LICENSES, BUSINESS AND PROFESSIONAL:

Practically all pursuits and occupations are licensed in this state. (30 Del. Code Ann. 23 et seq.).

Commercial Travelers.

Persons engaging in business as “transient retailers” subject to $25 license fee and gross receipts tax of .7776% for goods and services rendered within Delaware which exceed $3,000. (30 Del. Code Ann. 2905[f], [g]).

For various other license fees, see category 22 Taxation, topic 22.03 Business Taxes, subhead License Fees.

Collection Agencies.

Collector of commercial accounts, except attorney, is classified as mercantile agent and must procure license from Division of Revenue. Fee $75 plus $25 for each additional place of business. (30 Del. Code Ann. 2301[a][11]; 30 Del. Code Ann. 2905[a]).

3.20 MONOPOLIES, RESTRAINT OF TRADE AND COMPETITION:

Contracts, combinations, conspiracies or trusts in restraint of trade are unlawful and civilly actionable by Attorney General. No criminal provisions or private right of action, but Attorney General may sue as parens patriae. (6 Del. Code Ann. 21). Exemptions for certain labor, agricultural and horticultural associations, public utilities, nonprofit institutions, securities dealers, banking institutions, and persons acting pursuant to Insurance Code or regulations. (6 Del. Code Ann. 2104).

Unfair Trade Practices.

Price discrimination between geographical sections intended to destroy or prevent competition is unlawful and punishable by fine of not less than $200, nor more than $5,000 and/or maximum imprisonment of one year. (6 Del. Code Ann. 2504).

Resale Price Agreements.

See category 17 Intellectual Property, topic 17.01 Trademarks and Tradenames.

3.21 NEGOTIABLE INSTRUMENTS:

Uniform Commercial Code adopted. (6 Del. Code Ann. 1-101 et seq.). See topic 3.09 Commercial Code.

3.22 RESTRAINT OF TRADE:

See topic 3.20 Monopolies, Restraint of Trade and Competition.

3.23 SALES:

Uniform Commercial Code (1962, adopted 1967). (6 Del. Code Ann. 1-101 et seq.). Special regulatory provisions apply to financing of motor vehicle sales. (5 Del. Code Ann. 29). Printed portion of motor vehicle sales contracts must be at least eight-point type, with certain portions in at least ten-point bold type. (5 Del. Code Ann. 2907[b]).

Contracts of Sale.

See topics 3.16 Frauds, Statute of, 3.09 Commercial Code, 3.12 Consumer Protection.

Conditional Sales.

Uniform Commercial Code (1962, adopted 1967). (6 Del. Code Ann. 1-101 et seq.). See topic 3.09 Commercial Code.

Bulk Sales.

See topic 3.09 Commercial Code.

Sale of Motor Vehicles.

See category 23 Transportation, topic 23.01 Motor Vehicles.

Consumer Protection.

See topic 3.12 Consumer Protection.

Bills of Sale.

No special requirements.

Retail Credit Sales.

See topic 3.12 Consumer Protection.

Products Liability.

Strict liability not available where plaintiff covered by warranties. (373 A.2d 218). Strict liability recognized in bailment-lease situation. (353 A.2d 581).

3.24 SECURITIES:

Uniform Commercial Code adopted. (6 Del. Code Ann. 1-101 et seq.).

Blue Sky law contained in 6 Del. Code Ann. 7301 et seq.

Supervision.

Attorney General may designate Deputy Attorney General to act as Securities Commissioner. (6 Del. Code Ann. 7325[a]).

Regulatory Powers of Supervising Authority.

Commissioner may: (1) Issue stop order (6 Del. Code Ann. 7308[a]); (2) deny, suspend, revoke or cancel any registration of broker-dealer or investment adviser (6 Del. Code Ann. 7316); (3) suspend trading in any security for ten days (6 Del. Code Ann. 7318[b]); (4) initiate public or private investigations (6 Del. Code Ann. 7319[a]); (5) seek injunction under specified conditions (6 Del. Code Ann. 7320); (6) require escrow of proceeds from sale of securities (6 Del. Code Ann. 7321). Orders of Commissioner are subject to review in Court of Chancery upon filing of complaint within 60 days after order is entered. (6 Del. Code Ann. 7324[a]).

Prerequisites to Sales or Offerings.

Registration required unless exempted. (6 Del. Code Ann. 7304; 6 Del. Code Ann. 7309; 6 Del. Code Ann. 7312).

Securities to Which Act Applicable.

“Security” means any note; stock; treasury stock; bond; debenture; evidence of indebtedness; certificate of interest or participation in any profit-sharing agreement; collateral-trust certificate; pre-organization certificate or subscription; transferable share; investment contract, including pyramid promotion which includes any plan or operation for sale or distribution of property, services, or any other thing of value wherein a person for consideration is offered an opportunity to obtain benefit based in whole or in part on inducement, by himself or by others, of additional persons to purchase same or similar opportunity; voting-trust certificate; certificate of deposit for security; certificate of interest of participation in oil, gas or mining title or lease or in payments out of production under such title or lease; options on commodities; or, in general, any interest or instrument commonly known as a “security,” or any certificate of interest or participation in, temporary or interim certificate, for, receipt for guarantee of, or warrant or right to subscribe to or purchase, any of foregoing. “Security” does not include any insurance or endowment policy or annuity contract under which an insurance company promises to pay money either in a lump sum or periodically for life or some other specified period. (6 Del. Code Ann.

7302[a][17]).

Exempt Securities.

Any security: (1) Issued or guaranteed by governmental body, including valid obligations of certain foreign governments; (2) any interest in, debt of, or debt guaranteed by Federal or state chartered banks, federal savings and loan associations, or any trust company, building and loan associations and insurance companies licensed to do business in Delaware; (3) any security issued or guaranteed by Federal credit union, or credit union, industrial loan association or similar association licensed to do business in Delaware; (4) any security issued or guaranteed by certain governmentally regulated companies; (5) any security, including warrants and subscription rights therefor listed on certain national and regional exchanges and any other security of same issuer which is of senior or substantially equal rank; (6) any security issued by certain nonprofit organizations; (7) any commercial paper, renewal or guarantee thereof, proceeds of which are for current transactions and due within nine months; (8) any investment contract issued by employee's pension plan, etc., provided written notice is given to Commissioner; (9) any security issued by agricultural cooperative organized under 3 Del. Code Ann. 85, or foreign cooperative association authorized to do business in Delaware; (10) any security traded pursuant to NASDAQ for which Commissioner has determined registration not necessary for protection of investors. (6 Del. Code Ann. 7309[a]).

Exempt Transactions.

(1) Any isolated transaction by non-issuer whether effected by broker-dealer or not; (2) any non-issuer transaction by registered agent of registered broker-dealer, and any resale transaction by sponsor of unit investment trust registered under Investment Company Act of 1940, in security of class that has been outstanding in hands of public for at least 90 days, provided certain conditions exist; (3) any non-issuer transaction through registered broker with unsolicited offer to buy, but Commissioner may require customer to acknowledge on specified form sale was unsolicited; (4) transactions between issuers and underwriters or among underwriters; (5) unitary sales of bonds or other evidences of indebtedness secured by chattel or real mortgage or deed of trust or by agreement for sale of real estate or chattels; (6) any transaction by enumerated fiduciaries; (7) any transaction by bona fide pledgee without any purpose of evading Act; (8) any offer or sale to financial institutions, institutional investors or to broker-dealer; (9) any transaction by offeror not involving more than 25 persons in state within any consecutive 12 month period where seller reasonably believes that domestic purchasers are buying for investment (expanded to include sales to not more than 35 purchasers by Rule 9[b][9][I] of Regulations promulgated by Del. Securities Commissioner. See Blue Sky Rep. [CCH] ¶ 15, 109 and 419); (10) any offer or sale involving preorganization certificates or subscriptions to ten or fewer persons, provided no remuneration is paid and no payment is made by solicited subscribers; (11) any transaction pursuant to offer to existing security holders of issuer if no remuneration other than standby commission is paid or issuer first files notice and Commissioner does not object within next five full business days; (12) any offer (but not sale) of security for which registration statement has been filed and no stop order is in effect or pending and offeror complies with § 7306 (d); (13) any offer or sale of security by or through registered broker-dealer if such offer or sale is not for benefit of issuer or 10% beneficial owner of outstanding voting securities of issuer, and no administrative stop order or injunction is in effect with respect to security offered or any security of same class. (6 Del. Code Ann. 7309[b]). These exemptions may be denied or revoked by Commissioner. (6 Del. Code Ann. 7309[c]).

Registration of Securities.

Coordination.

Any security for which a registration statement has been filed under Securities Act of 1933 in connection with same offering may be registered by coordination. (6 Del. Code Ann.

7305[a]). Detailed registration statement must be filed, and filing fee paid. (6 Del. Code Ann. 7305[b]).

Qualification.

Security may be registered by qualification. (6 Del. Code Ann. 7306[a]). Detailed registration statement required. (6 Del. Code Ann. 7306[b]).

Registration of Broker-Dealers, Investment Advisers and Agents.

No broker-dealer or agent may transact business in Delaware unless registered. (6 Del. Code Ann. 7313[a]). Initial application and each annual renewal application must be accompanied by $250 filing fee for broker-dealers and investment advisers, and $50 for initial, transfer or renewal registration as agent. (6 Del. Code Ann. 7314[c]). Commissioner may require minimum capital for registered broker-dealers and establish minimum financial requirements for investment advisers. (6 Del. Code Ann. 7314[e]). Broker-dealers and investment advisers must maintain such records, report such information, and submit to such audits as Commissioner by rule shall prescribe. (6 Del. Code Ann. 7315[a], [e]). Certain advisory and contractual practices of investment advisers prohibited. (6 Del. Code Ann. 7317).

Bonds.

Commissioner may require registered broker-dealers, agents and investment advisers to post surety bonds in amounts as Commissioner may prescribe. (6 Del. Code Ann. 7314[f]).

Advertisements.

Commissioner may require filing of sales and advertising literature for nonexempt securities and transactions. (6 Del. Code Ann. 7312).

Criminal Penalties.

Willful violator may be fined up to $200,000 or imprisoned not more than five years, or both per violation. (6 Del. Code Ann. 7322[a]). Five year statute of limitations. (6 Del. Code Ann. 7322[d]).

Civil Liabilities.

Any person who offers, sells or purchases a security by means of any untrue statement of a material fact or any omission of a material fact necessary in order to make statements made, in light of circumstances under which they are made, not misleading (buyer or seller not knowing of untruth or omission), and who does not sustain burden of proof that he did not know, and in exercise of reasonable care could not have known of untruth or omission and any person who offers or sells security in violation of any registration requirement or stop order, is liable to person buying or selling security from or to him, who may sue either at law or in equity to recover consideration paid for security, together with legal interest from date of payment costs, and reasonable attorneys' fees, less amount of any income received on security, upon tender of security, or for damages if he no longer owns security. (6 Del. Code Ann. 7323[a][2]). Three year statute of limitations runs from date of sales contract. (6 Del. Code Ann. 7323[e]).

Tender Offers.

See category 2 Business Organizations, topic 2.03 Corporations.

Pyramid Sales.

Sales device whereby person is granted franchise license which he may further perpetuate upon condition that he part with money, property or other thing of value is pyramid or chain distribution scheme. (6 Del. Code Ann. 2561[2]). Use of such scheme is unlawful, regardless of limitations. (6 Del. Code Ann. 2562; 6 Del. Code Ann. 2564).

Uniform Simplification of Fiduciary Security Transfers Act adopted under title "Uniform Act for Simplification of Fiduciary Security Transfers". (12 Del. Code Ann. 4301 to 4311).

Uniform Securities Ownership by Minors Act not adopted.

3.25 STATUTE OF FRAUDS:

See topic 3.16 Frauds, Statute of.

3.26 TRUST RECEIPT SECURITY:

See topic 3.09 Commercial Code.

3.27 WAREHOUSEMEN:

Uniform Commercial Code adopted (6 Del. Code Ann. 1-101 et seq.). See topic 3.09 Commercial Code.

Licenses.

Annual general service license fee is $75. (30 Del. Code Ann. 2301[b]). Fee is $25 for each additional place of business. (30 Del. Code Ann. 2301[a]). Individuals 65 or older whose yearly gross receipts are less than $10,000 must pay one fourth of such fees. (30 Del. Code Ann. 2105). Every person must also pay license fee at rate of 0.4147% of aggregate gross receipts attributable to licensed activity. (30 Del. Code Ann. 2301[d][1]).

4 CITIZENSHIP

4.01 ALIENS:

Property.

Real and personal property situate in state may be taken, acquired, held and disposed of by aliens in same manner as by citizens of state. (25 Del. Code Ann. 306). Good title to property may be derived through, from or in succession to alien. (25 Del. Code Ann. 307). All prior conveyances to or from aliens are validated, ratified and confirmed; purchaser receives same estate and rights as if conveyance had been made between citizens of state. (25 Del. Code Ann. 308). No person disqualified as heir because of alienage. (12 Del. Code Ann. 507).

5 CIVIL ACTIONS AND PROCEDURE

5.01 ACCORD AND SATISFACTION:

Common law rules govern (42 Del. 432, 36 A.2d 40) except as modified by Uniform Commercial Code. See category 3 Business Regulation and Commerce, topic 3.09 Commercial Code.

Compromise.

Acceptance of payment tendered in full settlement constitutes accord and satisfaction if claim is subject to bona fide dispute as to amount owing. (34 Del. Ch. 354, 104 A.2d 378).

Pleading.

Must be set forth as affirmative defenses in Chancery Court. (Ch. Ct. Rule 8[c]).

5.02 ACTIONS:

To great extent, suits in equity follow common law forms. Court Rules governing suits at law are analogous to Federal Rules. See also topics 5.25 Submission of Controversy and 5.19 Practice.

Equity.

Distinction between legal and equitable remedies is fully observed. (32 Del. Ch. 413, 85 A.2d 724).

Forms of Action.

Form of action is known as civil action. (Ch. Ct. Rule 2).

Conditions Precedent.

No general requirements.

Commencement.

See topic 5.20 Process.

Parties.

Assignees of bonds, specialties and notes in writing may sue in their own name. All assignments of bonds or specialties shall be under hand and seal, and executed before at least one credible witness. (6 Del. Code Ann. 2702[a]). Person to whom contract, express or implied, has been transferred or assigned, either in accordance with statute or with common law, may sue thereon in his own name. (10 Del. Code Ann. 3902). Superior Court and Court of Chancery have similar rules 17(a) (except Chancery rule is subject to Rule 23 dealing with class actions), and identical rules 19(a), 20(a) and 21; these rules are identical to corresponding federal rules (except for difference noted above, modification of rule 17(a) for state purposes and Federal Rule 20(a) includes any vessel, cargo or other property subject to admiralty process in rem as defendants who can be joined in one action) and cover real party in interest, necessary joinder, permissive joinder, and misjoinder.

Class Actions.

Uniform Class Actions Act not adopted. Maintainable in equity and at law. (Ch. Ct. Rule 23). Special class action rules for derivative actions by shareholders (Ch. Ct. Rule 23.1) and actions against unincorporated associations (Ch. Ct. Rule 23.2). Complaint must allege that plaintiff was shareholder or member at time of transaction of which he complains. It must also allege her efforts to obtain action she desires from directors and reasons for failure to obtain action or not making effort. (Ch. Ct. Rule 23.1).

Action against members of unincorporated association as class may only be maintained if representative parties will fairly and adequately protect interests of association and its members. (Ch. Ct. Rule 23.2).

Intervention is matter of right by motion: (1) When statute confers unconditional right to intervene; or (2) when applicant claims interest relating to property or transaction which is subject of action and action may impair or impede his ability to protect that interest. (Ch. Ct. Rule 24).

Interpleader.

Court may order interpleader of third person in law action if defendant brings subject matter of case into court, disclaims interest, and alleges interest of third party. (10 Del. Code Ann.

3910). Interpleader is a recognized remedy in equity also. (Ch. Ct. Rule 22).

Third Party Practice.

Defendant, or plaintiff if counterclaim filed, may cause complaint to be served on third party defendant any time. Within ten days after answer leave of parties not required. Thereafter leave of court required upon notice to all parties involved. (Ch. Ct. Rule 14; 10 Del. Code Ann. 6306).

Joinder of Causes of Action.

Claims against opposing party may be freely joined. (Ch. Ct. Rule 18).

Splitting Causes of Action.

Suit by partial assignees of chose in action must be *in solido* unless maker consented to assignment. (22 Del. Ch. 309, 2 A.2d 128).

Consolidation of Actions.

Courts may consolidate actions when common questions of law or fact are involved. (Ch. Ct. Rule 42[a]).

Severance of Actions.

Courts may order separate trials of claims and issues to avoid delay, embarrassment, additional expense, or prejudice. (Ch. Ct. Rule 20[b], 42[b]).

Stay of Proceedings.

Cases referred to mediation may be stayed, at court's discretion, pending conclusion of mediation process. (Ch. Ct. Rule 174).

Abatement and Revival.

Action will not abate upon death of one or more of several plaintiffs or defendants but may be prosecuted by or against surviving plaintiff or defendant if cause of action survives. (10 Del. Code Ann. 3702). Substitution of parties in event of death is governed by Ch. Ct. Rule 25(a). In case of death of party plaintiff, suggestion of such death is entered of record; in case of death of party defendant scire facias is necessary. (Del. Const., art. IV, § 23). All personal causes of action, except for defamation, malicious prosecution or upon penal statute, survive to or against personal representatives of deceased party. (10 Del. Code Ann. 3701). Pending action for personal injury survives death of plaintiff and personal representatives may be substituted. (10 Del. Code Ann. 3704). See category 13 Estates and Trusts, topic 13.10 Executors and Administrators.

Small Claims.

See category 6 Courts and Legislature, topic 6.01 Courts.

Termination of Actions.

Plaintiff may voluntarily dismiss without order of court by: (i) Filing notice of dismissal prior to service of answer, or motion for summary judgment (except in replevin); or (ii) by filing stipulation of dismissal signed by all parties who have appeared in action. (Super. Ct. Rule 41[a][1]). Otherwise dismissal only upon order of court. (Rule 41[a][2]). Same rules applicable to counterclaim, crossclaim, or third party claim. (Rule 41[c]). Action may be dismissed for inaction of one year, subject to Rules 23, 23.1, and 23.2. (Ch. Ct. Rule 41[e]). Thirty day notice of dismissal is sent to parties in actions pending in court for six months during which time there have been no proceedings taken. (Super. Ct. Rule 41[e]). Equity rule is subject to Chancery Court Rules 23, 23.1, and 23.2.

Administration.

See category 13 Estates and Trusts, topic 13.08 Executors and Administrators.

Prohibited Actions.

No action permitted against party opposing land use application through judicial review by another party to review as result of seeking such review. (9 Del. Code Ann. 2699, 4999, 6999). See category 21 Property, topic 21.16 Real Property, subhead Judicial Review of Land Use Application.

Limitation of.

See topic 5.16 Limitation of Actions.

Direct Actions Against Insurer.

See category 23 Transportation, topic 23.01 Motor Vehicles, subhead Direct Actions.

5.03 APPEAL AND ERROR:

From Courts of General Jurisdiction.

Writs of error may be taken, from Superior Court and from Court of Chancery to Supreme Court. (Del. Const., art. IV, § 11).

From Minor Courts.

Appeals lie to Court of Common Pleas in civil cases from justices of peace where demand or judgment exceeds $5 and is given without referee trial (10 Del. Code Ann. 9570), and cases are tried de novo according to usual or required mode of procedure. (250 A.2d 507). Appeals from Court of Common Pleas taken within 30 days to Superior Court in county from which final order, ruling, decision or judgment was rendered and such appeals are on record and not de novo. (10 Del. Code Ann. 1326). Notice of appeal from Court of Common Pleas is filed with Prothonotary within 15 days of entry of judgment. (10 Del. Code Ann. 9571; 415 A.2d 497). Appeals from Family Court on civil matters are to Supreme Court. (10 Del. Code Ann. 1051[a]; 549 A.2d 95).

Appeals from inferior courts to Superior Court are allowed in criminal cases where fine or imprisonment exceeds $100 or one month (Const., art. IV, § 28) but all motor vehicle convictions are appealable to Court of Common Pleas (21 Del. Code Ann. 708).

Appeals may be taken from Register of Wills to Court of Chancery. (57 Del. L., c. 402, § 4).

Time.

Appeals from final decree of Chancery Court (10 Del. Code Ann. 145) or final judgment of Superior Court in criminal or civil action (10 Del. Code Ann. 147; 10 Del. Code Ann. 148) must be filed in Supreme Court within 30 days. Appeals from interlocutory order, judgment or decree of Chancery or Superior Court to Supreme Court must be filed within 30 days after entry (10 Del. Code Ann. 143); failure to appeal from such order will not bar objection to such order upon appeal from final judgment (10 Del. Code Ann. 144). Any person not appearing at proof of will has right to review at any time within six months after entry of order of probate (12 Del. Code Ann. 1309[a]); in partition cases, appeals must be made within three months (25 Del. Code Ann. 750);

and exceptions to account of executor or administrator must be filed within three months after notice given (12 Del. Code Ann. 2302[d]). Appeals from Family Court to Supreme Court involving civil proceeding, and to Superior Court involving criminal proceeding, must be within 30 days of order appealed. (10 Del. Code Ann. 143; 10 Del. Code Ann. 1051).

Appeals from justices of peace to Court of Common Pleas must be taken within 15 days from day of giving judgment. (10 Del. Code Ann. 9571). Appeals from Common Pleas to Superior Court must be taken within 30 days of judgment. (10 Del. Code Ann. 1326).

Disability usually tolls the above periods. (10 Del. Code Ann. 146).

Appeal considered filed when received and filed by Office of Clerk, not when mailed. (554 A.2d 778).

Appeal Bond.

Court of Common Pleas establishes supersedeas bond requirements for appeals from justices of the peace (10 Del. Code Ann. 9571[d]); amount of supersedeas bond must be sufficient to cover judgment plus interest and court costs (Super. Ct. Civ. Rule 62[c]).

Stay of Proceedings and Supersedeas.

Appeals not of executors or administrators to Supreme Court do not stay proceedings in court below unless bond is filed, conditioned for prosecution of appeal to effect. (Const., art. IV, § 24). In civil cases, bond binds principal obligor to pay judgment money, including damages for delay. (Supr. Ct. Rule 32[c]). Approval of bond is contingent on service on appellee and filing of notice of appeal in appellate court. (Supr. Ct. Rule 32[c]).

Extent of Review.

Supreme Court generally confines its review to questions of law and the existence of evidence to support findings of fact although some flexibility exists in equity if factual issue unresolved by record. (34 Del. Ch. 267, 103 A.2d 234).

Character of Hearing.

Review, except appeals to Superior Court from justices of peace, where trial de novo provided. (250 A.2d 507).

Judgment or Order on Appeal.

Supreme Court may issue mandates and special forms of mandates where appropriate. (Supr. Ct. Rule 19).

5.04 BONDS:

Official bonds (9 Del. Code Ann. 9114[d]), official obligations (9 Del. Code Ann. 9114[a]), and those ordered by Court of Chancery are recorded (10 Del. Code Ann. 375). Judgments on bonds are not liens on real property until filed with Prothonotary. (10 Del. Code Ann. 4718).

Sureties.

Whenever any bond or other obligation is required or permitted to be made with surety such undertaking may be executed by any duly authorized Delaware insurer. (18 Del. Code Ann. 7701[a]). See category 16 Insurance, topic 16.01 Insurance Companies.

Enforcement.

Persons injured by breach of condition of public bond may bring suit in name of State, but for their own use. (10 Del. Code Ann. 7502).

5.05 CERTIORARI:

Jurisdiction.

Supreme Court can issue writs of certiorari to Superior Court and Court of Chancery. (Const., art. IV, 11; 10 Del. Code Ann. 142). Federal courts as well as highest appellate court of other states can certify questions of law to Delaware Supreme Court. (Const., art. IV, § 11). Superior Court can issue writs of certiorari necessary for bringing action to such court. (10 Del. Code Ann. 562).

Grounds.

Writ lies to correct errors of law, to review proceedings not conducted according to law and to restrain an excess of jurisdiction. (42 Del. 198, 29 A.2d 369).

Proceedings.

From courts of general jurisdiction; see topic 5.03 Appeal and Error.

In appeals where action is tried de novo: Action is commenced in Superior Court upon filing with Prothonotary praecipe, certified transcript of record and deposit for costs and fees. (Super. Ct. Civ. Rule 3[c]-[e]).

Review.

Review on certiorari is confined to the record. (42 Del. 198, 29 A.2d 369).

5.06 CHARITABLE IMMUNITY:

See topic 5.09 Damages.

5.07 COMMISSIONS TO TAKE TESTIMONY:

See topic 5.11 Depositions and Discovery.

5.08 COSTS:

Party for whom final judgment is given in court of law in any civil action, or on writ of error, upon such action, shall recover costs of suit, to be awarded at discretion of court. (10 Del. Code Ann. 5101; 358 A.2d 717).

Subject to express provision in statute, Super. Ct. Civ. Rules, or Supr. Ct. Rules, costs in Superior Court allowed to prevailing party as matter of course unless court directs otherwise. (Super. Ct. Civ. Rule 54[d]).

Costs will follow judgment of court. (Supr. Ct. Rule 20[d]).

Upon affirmance of judgment by Supreme Court, costs of appellee to be added to his costs in first judgment. (10 Del. Code Ann. 5107).

Generally, party prevailing on appeal from justice of peace recovers costs both from action before justice and from appeal. (10 Del. Code Ann. 5110[a]).

Prepayment of Costs or Fees by Nonresidents.

No Prothonotary, Register in Chancery, clerk of any court, or justice of peace is compelled to issue any writ or other original process in civil action, or any writ of execution on any judgment, in favor of nonresident of state, unless costs of issuing such writ shall be first paid. Likewise no sheriff, coroner or constable shall be compelled to execute any such writ until his legal fees are paid. (10 Del. Code Ann. 3102).

Security for Costs.

Usual initial deposit to begin suit in Chancery is $100 (Ch. Ct. Rule 3[b]); civil action fee for new case with one or two defendants is $250; and for three or more defendants, $350 (Ch. Ct. Rule 3[bb]). Justice of Peace Court requires $30 initial deposit. (J.P. Civ. Rule 77[h][3]). Initial deposit fee in Court of Common Pleas for filing civil complaint is $75 and is nonrefundable. (C.P. Ct. Civ. Rule 109). In Court of Common Pleas jury trial, additional nonrefundable deposit equals amount required in Superior Court currently, $125. (C.P. Ct. Civ. Rules 3[e], 109; Super. Ct. Civ. Rule 3[e]). Superior Court filing fee is $175 plus Sheriff's service. (Super. Ct. Civ. Rule 77[h]). In Chancery, Superior and Common Pleas Court, out-of-state plaintiff may be made to post security for costs. (Ch. Ct. Rule 3[c]; Super. Ct. Civ. Rule 3[f]; C.P. Ct. Civ. Rule 3[f]). In Family Court, filing fee is generally $40 and $75 for divorce and annulment cases. (Fam. Ct. Civ. R. 3[c]).

Where any party unnecessarily swells record or causes unnecessary expense, court may, in its discretion, tax such expenses against offending party, regardless of outcome of action. (Ch. Ct. Rule 54[e]; Super. Ct. Civ. Rule 54[e]; C.P. Ct. Civ. Rule 54[e]).

If action for debtor or damages is pending, defendant may pay into court amount sought plus costs. (Const., art. IV, 22). If plaintiff refuses, plaintiff cannot recover more than such amount, or recover costs after such payment unless executor or administrator. (Const., art. IV, 22).

5.09 DAMAGES:

Common law generally prevails as to compensatory damages except as modified in category Transportation, topic Motor Vehicles, subhead No-Fault Insurance and in this topic, subhead Medical Malpractice. Punitive damages allowed only where act is malicious, willful, or wanton. (24 Del. 107, 75 A. 1014).

Charitable Immunity.

Charitable corporations responsible for own negligent actions and subject to doctrine of respondeat superior when such acts are clearly incidental to business of corporation. (46 Del. 350, 83 A.2d 753).

Comparative negligence rule adopted. (10 Del. Code Ann. 8132).

See also category 13 Estates and Trusts, topic 13.05 Death, subhead Actions for Death.

Sovereign Immunity.

Waived (18 Del. Code Ann. 6511) only for claims in state court (406 F. Supp. 4) and when claim covered by state insurance program (18 Del. Code Ann. 6511). See also State Tort Claims Act which provides limited immunity and indemnity. (10 Del. Code Ann. 4001).

Uniform Contribution Among Tortfeasors Act.

Adopted. (10 Del. Code Ann. 6301–10-6308).

No-Fault Insurance.

See category 23 Transportation, topic 23.01 Motor Vehicles, subhead No-Fault Insurance.

Medical Malpractice.

Court may deduct from medical malpractice award, and pay to plaintiff amount covering plaintiff’s attorney’s fees, litigation expenses, past health care expenses and pain and suffering incurred to date, leaving remainder to be paid in monthly installments, including interest on unpaid balance, except as it is necessary to release more money to cover continuing medical expenses. (18 Del. Code Ann. 6864[a]). If plaintiff dies within 20 years of award, and before all installments have been paid, court deducts from balance due amount for future pain and suffering and medical care, and remainder is paid to plaintiff’s estate. (18 Del. Code Ann. 6864[b]). Evidence of public collateral source of compensation for injuries to person seeking damages for such injuries in medical negligence action, and changes in marital, financial or other status of such persons, except those regarding life insurance or private compensation or benefits, may be introduced and, if introduced, shall be considered by trier of fact. (18 Del. Code Ann. 6862). Punitive damages may be given only by special, separate award of trier of fact, which must find that injury was maliciously intended or was result of willful or wanton misconduct. (18 Del. Code Ann. 6855). See also category 6 Courts and Legislature, topic 6.01 Courts, subhead Superior Court, catchline 16.01 Jurisdiction—Medical Malpractice; also topic Limitation of Actions; category 16 Insurance, topic Insurance Companies.

5.10 DECLARATORY JUDGMENTS:

See topic 5.15 Judgments.

5.11 DEPOSITIONS AND DISCOVERY:

See also topic 5.19 Practice.

Rules of Court, 26, 28, 32, 37 based on corresponding Federal Rules.

Within State for Use Within State.

Parties may obtain discovery regarding any matter, not privileged, which is relevant to subject matter involved in pending action, whether it relates to claim or defense of party seeking discovery or to claim or defense of any other party. (Ch. Ct. Rule 26[b][1]; Super. Ct. Civ. Rule 26[b][1]). Not grounds for objection that information sought will be inadmissible at trial if information sought appears reasonably calculated to lead to discovery of admissible evidence. (Ch. Ct. Rule 26[b][1]; Super. Ct. Civ. Rule 26[b][1]).

Within State for Use Elsewhere.

Commissions issued by courts of other jurisdictions are honored and Prothonotary of Superior Court will issue subpoenas duces tecum and Superior Court may proceed to enforce obedience in same manner as in case of subpoena initially issued by court itself. (10 Del. Code Ann. 4311).

Outside of State for Use Within State.

Rules of Court based upon Federal Rules. Same as within state except applicant may have to pay attendance expense and fee of one attorney for adversary if proposed deposition at place more than 150 miles from courthouse where action was commenced. (Ch. Ct. Rule 30[h]; Super. Ct. Civ. Rule 30[h]). See also subheads Before Whom Taken; Commissions, infra.

Outside of County.

In civil debt actions, witness outside of county may answer depositions upon written questions before justice of peace of county where he resides. (10 Del. Code Ann. 9531). Register of Wills has similar power in such cases to award commission to take witnesses' depositions. (12 Del. Code Ann. 2503).

De Bene Esse.

Court rules providing for use of depositions modeled after Federal Rules. (Ch. Ct. Rule 26; Super. Ct. Civ. Rule 26). But Federal Rule 27, Deposition Before Action or Pending Appeal, not adopted in Delaware. (Ch. Ct. Rule 27; Super. Ct. Civ. Rule 27).

Uniform Act to Secure Attendance of Witnesses From Without a State in Criminal Proceedings adopted. (11 Del. Code Ann. 3521-26).

Perpetuating Testimony.

Any person interested in perpetuating testimony respecting boundaries or landmarks may file petition in Chancery, naming tenants and owners of adjoining land, and court will issue to one or more persons commission to take depositions on interrogatories filed after ten days written notice of filing thereof. (25 Del. Code Ann. 1102). See also Rules of Court based upon Federal Rules.

Before Whom Taken.

In U.S., depositions taken before officer authorized to administer oaths by law of place of deposition or before person appointed by court in which action is pending. (Ch. Ct. Rule 28[a]; Super. Ct. Civ. Rule 28[a]). Outside U.S., depositions taken pursuant to applicable treaty or convention, letter of request, before officers authorized to administer oaths by law of place of deposition, or before person with court commission. (Ch. Ct. Rule 28[b]; Super. Ct. Civ. Rule 28[b]).

Commissions.

Court of Chancery may award commissions for taking answers and examining witnesses. (10 Del. Code Ann. 368).

Compelling Attendance of Witnesses.

Party issuing notice of deposition may serve subpoena upon person to be deposed, commanding latter to give testimony. (Ch. Ct. Rule 30[a]-[b][1]; Super. Ct. Civ. Rule 30[a]-[b][1]). Such subpoena may also command person to whom it is directed to produce documents or tangible things (Ch. Ct. Rule 34[a]); but this person may move for protective order (Ch. Ct. Rule 26[c]; Super. Ct. Civ. Rule 26[c]). Command to produce evidence or to permit inspection may be joined with command to appear at trial, hearing or deposition. (Ch. Ct. Rule 45[a][2]; Super. Ct. Civ. Rule 45[a][2]).

Examination of Witnesses.

Rules of Court based upon Federal Rules.

Return.

Completed deposition is examined and signed by witness (Ch. Ct. Rule 30[e]), and officer certifies that it is true record of testimony (Ch. Ct. Rule 30[f]). Officer then seals deposition and transmits it to attorney by registered or certified mail. (Ch. Ct. Rule 30[f][1]). Party taking deposition shall give prompt notice of its filing to all parties. (Ch. Ct. Rule 30[f][3]; Super. Ct. Civ. Rule 30[f][3]). Officer shall retain copy of recording. (Ch. Ct. Rule 30[f][2]; Super. Ct. Civ. Rule 30[f][2]).

Form:

Return of person taking deposition orally: I, ..., the officer before whom the foregoing deposition was taken, do hereby certify that the witness whose testimony appears in the foregoing deposition was duly sworn by me, and that said deposition is a true record of the testimony given by said witness; that I am neither attorney nor counsel for, nor related to or employed by any of the parties to the action in which this deposition is taken, and further that I am not a relative or employee of any attorney or counsel employed by the parties hereto or financially interested in the action.

See also topic 5.19 Practice.

5.12 EQUITY:

See topic 5.02 Actions.

5.13 EVIDENCE:

Delaware has enacted Uniform Rules of Evidence based on Federal Rules of Evidence with modifications based, in part, on Uniform Rules of Evidence. (DRE).

See also subhead Witnesses, infra; topic Depositions and Discovery.

Witnesses.

Every person competent except as otherwise provided in Rules of Evidence. (DRE 601).

A party to the record may interrogate unwilling or hostile witness by leading questions, and may call adverse party or person for whose immediate benefit any action or judicial proceeding is brought or defended or officer or director of any corporation, partnership or association which is adverse party and interrogate, impeach and contradict witness as if called by adverse party. (Ch. Ct. Rule 43[b]). Witness may be cross-examined, contradicted and impeached by or on behalf of adverse party also. (Ch. Ct. Rule 43[b]).

See also topic 5.11 Depositions and Discovery.

Husband and wife may testify for or against each other in any court (DRE 504[e]) in criminal cases and in civil cases unless testifying as to confidential communication and privilege is asserted (DRE 504[a]-[b]).

Communications or Transactions with Persons Since Deceased or Incompetent.

Delaware Dead Man's Statute superseded. (DRE 601).

Privileged Communications.

Attorney-client privilege recognized. (DRE 502). Priest-penitent privilege recognized as to certain communications made to clergyman in his professional capacity. (DRE 505). Physician and psychotherapist-patient privilege recognized. (DRE 503). Other privileged information provided for in Art. V of DRE. Reporters' Privilege Act adopted. (10 Del. Code Ann. 4320-26).

Self-Incrimination.

Accused shall not be compelled to give evidence of criminal misconduct against himself. (U.S. Const. amend. V; Del. Const., art. 1, § 7).

Compelling Attendance.

See topic 5.11 Depositions and Discovery.

5.14 INJUNCTIONS:

Generally, see Rules of Court of Chancery based upon Federal Rules. (Ch. Ct. Rule 65).

Jurisdiction.

Court of Chancery has jurisdiction to hear all matters and causes in equity. (10 Del. Code Ann. 341). Court has all of jurisdiction that was possessed by High Court of Chancery in England. (26 Del. Ch. 344, 28 A.2d 676).

President Judge or any Associate Judge of Superior Court has power during absence of Chancellor and all Vice-Chancellors to grant restraining orders and preliminary injunctions pursuant to laws of Court of Chancery. (Del. Const., art. IV, § 14).

Prerequisites.

See subhead Temporary Injunction, infra.

Procedure.

Application for injunction may be filed after complaint filed; motion to dissolve injunction may be made at any time. (Ch. Ct. Rule 65[a][1]). See subhead Temporary Injunction, infra.

Bond.

No restraining order or preliminary injunction shall issue except upon giving of security by applicant in such sum as Court deems proper, for payment of costs and damages which may be suffered. (Ch. Ct. Rule 65[c]).

Temporary Injunction.

A preliminary injunction will not be ordered without notice, and unless it be specifically prayed for, or by affidavit-supported motion. (Ch. Ct. Rule 65[a][1]).

Temporary restraining order will not issue unless prayed for. Nor will one issue without notice unless immediate and irreparable injury, loss or damage will probably result and applicant's attorney certifies in writing efforts to give notice and reasons why notice should not be required. (Ch. Ct. Rule 65[b]).

If a preliminary injunction or restraining order be issued, defendant may, upon two days' notice to plaintiff, appear before Court, put in his answer, under oath or affirmation, for purpose of moving to dissolve or modify injunction. (Ch. Ct. Rule 65[b]). (Rules of Court based upon Federal Rules.) See also topic 5.19 Practice.

5.15 JUDGMENTS:

Generally, see 10 Del. Code Ann. 4701 to 4787; Court Rules based on Federal Rules. See topic 5.19 Practice.

Judgment by confession, entered on obligation containing warrant for confession of judgment, is not entered as final judgment until defendant is given written notice by certified mail of hearing to determine whether defendant understandingly waived his right to notice and opportunity to be heard. (10 Del. Code Ann. 2306[a], [b]). In case of defendant who was nonresident when he signed confession authorization, plaintiff must file with Prothonotary affidavit signed by defendant setting forth authorization of judgment in specific county, sum of money for which judgment may be entered, contact with State in transaction, and defendant's mailing address and residence where he would most likely receive mail. (10 Del. Code Ann. 2306[c]). Defendant is not deemed to have waived right to present defenses of which he had no knowledge at time of signing authorization, or which arose after that time; and stay of execution is given until defendant gets hearing on these defenses. (10 Del. Code Ann. 2306[j]). Warrant of attorney may furnish provision for collateral security. (10 Del. Code Ann. 2306[a]). See also Super. Ct. Rules 58.1-58.3 and category Business Regulation and Commerce, topic Consumer Protection.

Judgments by Consent.

Valid absent mutual mistake or proof that judgment does not reflect agreement. (364 A.2d 826; Super. Ct. Rule 60[b]).

Judgments on Pleadings.

Court Rules based on Federal Rule. (Ch. Ct. Rule 12[c]; Super. Ct. Civ. Rule 12[c]).

Summary Judgments.

Court Rules based on Federal Rule. (Ch. Ct. Rule 56; Super. Ct. Civ. Rule 56).

Declaratory Judgments.

Except where State Constitution provides otherwise, courts have power to declare rights and other legal relationships, whether or not further relief is prayed for. Such declaration has effect of final judgment. (10 Del. Code Ann. 6501 and Court Rules based on Federal Rules).

Default Judgments.

In actions upon bills, notes, bonds or other instruments of writing for payment of money or for recovery of book accounts, on foreign judgments, and in all actions of scire facias on recognizances, judgments or mortgages, plaintiff, if he notates demand on complaint and files instrument or judgment, has right to require defendant to answer all allegations of complaint by affidavit explaining specific nature of each defense and factual basis thereof; special exceptions under 10 Del. Code Ann. 3901(b) if defense applies to only one part of claim. (10 Del. Code Ann. 3901[a], [b]). When party against whom judgment for affirmative relief is sought has failed to appear, plead, or otherwise defend, default judgment may be entered. (Ch. Ct. Rule 55[b]; Super. Ct. Civ. Rule 55[b]).

Offer of Judgment.

Any time more than ten days before trial begins, party defending against claim may serve upon adverse party offer to allow judgment to be taken against defending party to effect specified in offer, with costs then accrued. If within ten days after service of offer, adverse party serves written notice offer is accepted, either party may then file offer and notice of acceptance and proof of service thereof and clerk will enter judgment. Offer not accepted deemed withdrawn and evidence of it not admissible except to determine costs. If judgment finally obtained by offeree not more favorable than offer, offeree must pay costs incurred after making of offer. Fact that offer is made but not accepted does not preclude subsequent offer and when liability has been determined by verdict or judgment, but extent thereof has not, party adjudged liable may make offer. (Super. Ct. Civ. Rule 68).

Docketing.

Judgment dockets are kept by the prothonotary. (10 Del. Code Ann. 2304; 10 Del. Code Ann. 4731).

Vacation or Modification.

Court may relieve party from final judgment for following reasons: (1) Mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence; (3) fraud, misrepresentation or misconduct of adverse party; (4) void judgment; (5) judgment has been satisfied, released or discharged, or prior judgment on which it is based has been reversed or vacated, or equity demands that it no longer have prospective application; or (6) any other reason justifying relief from operation of judgment. (Ch. Ct. Rule 60; Super. Ct. Civ. Rule 60).

Lien.

Judgments shall bind lands only from time of actually entering or signing them. (10 Del. Code Ann. 4702). Judgments of Justice of Peace Courts become lien on all property of debtor in that county when filed in Superior Court on transfer. (10 Del. Code Ann. 9569[b]).

Lien effective for period of ten years after day following entry of judgment and may be renewed and continued by written agreement signed by plaintiff and defendant, or by scire facias sued out within ten years. (10 Del. Code Ann. 4711).

The lien attaches to equitable as well as legal interests in land, except in the case of an active trust. (7 Del. 476).

A judgment binds all personal property of the debtor for three years from the time of levy by sheriff, provided such levy occurs within 60 days after execution writ is delivered to sheriff. (10 Del. Code Ann. 5081). To extent that this provision conflicts with 6 Del. Code Ann. 2-403, this provision has been superseded. (343 A.2d 599).

Revival.

No execution of judgment issued after death of defendant, nor after five years from first date execution could have issued, unless judgment revived by scire facias. (10 Del. Code Ann. 9581[a]).

Assignment.

Assignment of judgment does not authorize assignee to proceed in own name in civil action for debt. (10 Del. Code Ann. 9510[c]).

Subrogation.

When surety pays judgment entered against principal and surety, creditor must mark the judgment to the use of the surety. (18 Del. Code Ann. 7712[a]).

Satisfaction of Judgments.

Satisfaction of judgment must be entered on record forthwith and signed by holder or his attorney. (10 Del. Code Ann. 4751[a]; 10 Del. Code Ann. 4753). Fine of not more than $500 (10 Del. Code Ann. 4751[b]) and liability for civil damages of $10 to $500 unless special damages to larger amount were proved (10 Del. Code Ann. 4754) for willful failure to enter satisfaction.

Form

Form of Power of Attorney to Satisfy Judgment: Whereas . . . . had and received full payment and satisfaction of the above stated judgment . . . . . . Therefore, ... do hereby authorize and empower . . . . . . in . . . . . . County and State last aforesaid, to enter satisfaction for . . . . . . and in . . . . . . name as . . . . . . attorney, of and on the aforesaid judgment, debt, interest and costs, and for so doing this shall be his sufficient warrant and authority.

In witness whereof . . . . . . have hereunto set . . . . . . hand and seal this . . . . . . day of . . . . . . A.D. . . . .

Actions.

Action against liable officers, directors or stockholders based on unsatisfied judgment against corporation can be maintained only after judgment against corporation and execution are returned unsatisfied. (8 Del. Code Ann. 325[b]). After 20 years, rebuttable presumption of satisfaction arises. (50 Del. 424, 132 A.2d 60). Status of appeal is matter of defense. (21 Del. Ch. 9, 186 A. 916). Beneficiary must prove validity of jurisdiction in action on judgment. (43 Del. 298, 46 A.2d 643).

Foreign Judgments.

Foreign judgments, properly proven, may be filed in office of any Prothonotary of this State. (10 Del. Code Ann. 4782). Affidavit must be filed by judgment creditor. (10 Del. Code Ann. 4783[a]). No execution of foreign judgment until 20 days after filing. (10 Del. Code Ann. 4783[c]).

Uniform Enforcement of Foreign Judgments Act.

Adopted. (10 Del. Code Ann. 4781–10-4787).

Uniform Foreign Money-Judgments Recognition Act.

Adopted. (10 Del. Code Ann. 4801–10-4808).

5.16 LIMITATION OF ACTIONS:

Actions must be brought within following periods, which run, except where otherwise noted, from time cause of action accrues:

Twenty Years.

Entry on real property (10 Del. Code Ann. 7901); seisin or possession (10 Del. Code Ann. 7902); collection of state inheritance or estate taxes (10 Del. Code Ann. 8129).

Seven Years.

Action upon official obligation of escheator, against either principal or sureties, from expiration of his term of office. (10 Del. Code Ann. 8105). Return of commissions to mark and bound lands are conclusive if action challenging location of such lands is not brought within seven years unless disabled or in possession of land. (10 Del. Code Ann. 8122).

Six Years.

Actions against either principal or surety on official recognizance of sheriff or testamentary or administration bond; limitation period running from time of recognizance or bond (10 Del. Code Ann. 8101); action on promissory notes, bills of exchange or acknowledgment under hand of party of subsisting demand (10 Del. Code Ann. 8109); action resulting from deficiency in construction, supervision, or planning of improvement in real property, from whichever of several specified dates is earliest (10 Del. Code Ann. 8127[b]).

Five Years.

See category 11 Employment, topic 11.02 Labor Relations, subhead Workers' Compensation Act.

Four Years.

Action for breach of any contract for sale of goods. Parties by agreement may reduce to not less than one year but may not extend. (6 Del. Code Ann. 2-725[1]). Uniform Commercial Code adopted. Action for fraudulent transfer generally but subject to exceptions under 6 Del. Code Ann. 1309. (6 Del. Code Ann. 1309[1], [2]).

Three Years.

Actions: on guardian bond, from end of guardianship (10 Del. Code Ann. 8102); actions against surety in recognizance taken in Chancery with condition for payment of appraised value or purchase money of lands or tenements, from time when last money mentioned in condition fell due (10 Del. Code Ann. 8103); on official bond (10 Del. Code Ann. 8104); actions for trespass, to regain possession of personal chattels, for damages for detention of personal chattels, to recover debt not evidenced by record or instrument under seal, arising out of contractual or fiduciary relations and based on detailed statement of mutual credit or debit demands, based on promise, based on statute, or to recover damages from injury unaccompanied with force or resulting indirectly from act of defendant, subject to exceptions set forth in other listed sections applying to some of these actions (10 Del. Code Ann. 8106); waste (10 Del. Code Ann. 8112); actions for antitrust. (6 Del. Code Ann. 2111).

Two Years.

Actions for wrongful death; injury to personal property (10 Del. Code Ann. 8107); on corporate officers' bonds (10 Del. Code Ann. 8114); personal injuries (10 Del. Code Ann. 8119), with certain possible exceptions in suits brought against construction contractors. (10 Del. Code Ann. 8127).

Medical Malpractice.

Action for personal injuries arising out of medical negligence must be brought within two years from date of injury, except that in case of injury that could not through reasonable diligence have been discovered by injured person within two years of injury, action may be brought within three years of injury, and except that child under six has time allowed him under above provisions, or until his sixth birthday, whichever is later, in which to bring action except, that statute of limitations may be tolled for up to 90 days after two years to investigate upon sending notice of intent to investigate to each potential defendant. (18 Del. Code Ann. 6856).

See also category 11 Employment, topic 11.02 Labor Relations, subhead Workers' Compensation Act.

One Year.

Civil actions for forfeiture under penal statute (10 Del. Code Ann. 8115); action on wages, salary, overtime, labor or personal services performed, damages, interest or penalties for failure to pay such claim or benefit claim (10 Del. Code Ann. 8111); certain penalty refunds to public improvement contractors (29 Del. Code Ann. 6962[d][10][b][4]). Negligence action against Mayor and Council of Wilmington or any departments, officers, agents or employees thereof, for death or personal or property injuries, may only be brought if Mayor is notified of injury in writing within one year from its occurrence. (10 Del. Code Ann. 8124). Action for fraudulent transfer to insider with reasonable cause to believe that debtor was insolvent. (6 Del. Code Ann. 1309[3]).

See also category 11 Employment, topic 11.02 Labor Relations, subhead Workers' Compensation Act.

Eight Months.

Claims against decedent's estate arising before death of decedent. (12 Del. Code Ann. 2102[a]).

Six Months.

Certain property valuations and assessments (10 Del. Code Ann. 8125). Bulk transfers and Sales, formerly under Uniform Commercial Code; applies only to claims regarding rights and obligations that arose under 6 Del. Code Ann. 6-111 before repeal on May 28, 1996. (6 Del. Code

Ann. 6-111 repealed). Claims against decedent's estate arising at or after death. (12 Del. Code Ann. 2102[b]).

Sixty Days.

Challenge of zoning or land subdivision ordinance, code, regulation or map from time notice of adoption of ordinance is published in newspaper. (10 Del. Code Ann. 8126).

Uniform Commercial Code adopted. See category 3 Business Regulation and Commerce, topic 3.09 Commercial Code.

Medical Malpractice.

See subhead Two Years, catchline Medical Malpractice, supra.

Actions Not Specifically Provided For.

Action on sealed instrument, presumption of payment arises after 20 years. (23 Del. Ch. 45, 2 A.2d 85). No general limitation for actions not specifically provided for.

New Actions.

In personal action, where there is insufficient service by any unavoidable accident, or by neglect of officer in charge, where writ is abated or action is defeated by death of party, or for any matter of form, where judgment is not given on verdict for plaintiff because of error on face of record, or where judgment for plaintiff is reversed on appeal, new suit may be commenced for same cause of action within one year after abatement, determination or reversal of original action. (10 Del. Code Ann. 8118[a]).

Accounts.

Three year limitation under 10 Del. Code Ann. 8106 does not begin on mutual and running accounts between parties as long as they are open and current. (10 Del. Code Ann. 8108).

Foreign Causes of Action.

Action cannot be brought on cause of action arising outside Delaware after expiration of statute of limitations of jurisdiction where cause of action arose or of Delaware, whichever is shorter, except that Delaware statute of limitations applies where person in whose favor cause of action accrued was Delaware resident at time of accrual. (10 Del. Code Ann. 8121).

Disabilities of Plaintiff.

Generally, for actions under 10 Del. Code Ann. 8101 through 10 Del. Code Ann. 8115, statutory period does not run while plaintiff is infant or insane, and action not barred until three years after disability ceases. (10 Del. Code Ann. 8116). Action for entry on real property or for lands or tenements may be brought within ten years after disability is removed, notwithstanding 20 years specified in 10 Del. Code Ann. 7901 and 10 Del. Code Ann. 7902. (10 Del. Code Ann. 7903).

Defendant's Absence or Concealment of Defendant.

Absence from state prevents running of statute of limitations against plaintiffs (10 Del. Code Ann. 8117), as does concealment of acts on which action is based (27 Del. Ch. 33, 29 A.2d 801).

Interruption of Statutory Period.

If after cause of action accrues, defendant departs and remains out of state, statutory period interrupted until return to state. (10 Del. Code Ann. 8117).

Revival of Barred Claims.

Statute of limitations will be started over and debt revived if liable party issues oral or written acknowledgment of and promise to pay debt. (2 Marv. 332, 43 A. 166).

Contractual Limitations.

Limitation to less than three years in life insurance policy prohibited. (18 Del. Code Ann. 2926[a][1]).

Pleading.

Statute of Limitations must be specially pleaded as affirmative defense. (Ch. Ct. Rule 8[c]; Super. Ct. Civ. Rule 8[c]).

5.16A PARTITION:

Jurisdiction and Venue.

Where two or more persons hold land as joint tenants or tenants in common or have interest therein either in possession or remainder, or as parceners under Delaware intestate laws, any one or more of lawful age or guardian of any minor may present petition for partition to Chancery Court of county where land is situated. (25 Del. Code Ann. 721[a]).

Proceedings.

Upon petition of any such person of lawful age or of guardian of such as are not of lawful age Chancery Court shall order summons in partition to be issued, directed to others interested and not joining petition to show cause why such petition should not be granted. (25 Del. Code Ann. 721[b]). After issuance of summons, all parties must receive service of summons either by party petitioning for partition or by Court before decree of partition is ordered. (25 Del. Code Ann. 722).

Upon return of summons, if parties summoned do not appear, or appear but fail to show sufficient cause against making partition, Court will enter decree that such partition be made among parties interested. Court may then direct that commission be issued, authorizing three commissioners to go upon premises and make just partition thereof, or if partition would be detrimental to interests of parties entitled, to make no partition, but appraise premises at true value, and return, if land, with survey of premises made by skillful surveyor that is appointed by them. (25 Del. Code Ann. 724).

Upon return of commissioners, if it appears that partition of premises has been made, and such partition is approved by Chancery Court, final decree is entered that partition shall remain permanently firm and stable; such proceedings and decree are conclusive upon parties and all claiming under them. (25 Del. Code Ann. 726).

Partition in Kind or Sale.

If from return of commissioners it appears that no partition of premises has been made and return is approved by Court or if partition of said premises is detrimental to interests of parties entitled, Court makes order for sale of same by trustee at public venue to highest bidder therefor, upon notice of time and place of said sale as prescribed in order. After sale is approved by Court, and purchase money paid into Court, or secured as Court directs, Court orders deed to be executed by trustee, conveying said premises to purchaser. (25 Del. Code Ann. 729).

5.17 [RESERVED]

5.18 PLEADING:

Superior Court and Chancery rules are modeled on Federal Rules of Civil Procedure and have the same rule numbers. See topic 5.19 Practice.

Pleadings Permitted.

Rules modeled on Federal Rules. (Ch. Ct. Rules 7, 8, 9, 10, 11, 12, 13, 15; Super. Ct. Civ. Rules 7, 8, 9, 10, 11, 12, 13, 15).

Complaint must contain short and plain statement of claim and demand for relief. (Ch. Ct. Rule 8[a]; Super. Ct. Civ. Rule 8[a]). In actions on notes or other written instruments for payment of money, and in actions of scire facias, plaintiff may file with complaint, requiring defendant to answer by affidavit. (Super. Ct. Civ. Rule 3[b]).

Answer must admit or deny the averments of the complaint unless party is without knowledge sufficient to do so. (Ch. Ct. Rule 8[b]; Super. Ct. Civ. Rule 8[b]).

Counterclaim or Set-Off.

Pleading shall state as counterclaim any claim against opposing party arising out of same transaction or occurrence unless claim involves third parties over whom court does not have jurisdiction or claim is subject of another pending action and may state as counterclaim any claim against opposing party not arising out of same transaction or occurrence. (Ch. Ct. Rule 13[a], [b]; Super. Ct. Civ. Rule 13[a], [b]).

Reply.

After defendant has answered, plaintiff or defendant will answer defendant’s crossclaim or counterclaim, if any. (Ch. Ct. Rule 7[a]; Super. Ct. Civ. Rule 7[a]).

Demurrer.

No longer in use. (Ch. Ct. Rule 7[c]; Super. Ct. Civ. Rule 7[c]). Purpose accomplished by motion to dismiss, for judgment on the pleadings or motion for summary judgment. (Ch. Ct. Rules 12[b], [c], 56; Super. Ct. Civ. Rule 12[b], [c], 56).

Amended or Supplemental Pleadings.

Rule modeled on Federal Rule. (Ch. Ct. Rule 15; Super. Ct. Civ. Rule 15).

Affidavits of Merit.

Not required generally. In all actions in State upon healthcare negligence, affidavit of merit as to each defendant signed by expert witness stating reasonable grounds to believe defendant committed healthcare negligence must accompany complaint, except that no affidavit of merit required for complaints alleging: (1) Foreign object unintentionally left in patient following surgery; (2) substance used in treatment caught fire; or (3) surgery performed on wrong organ, limb or body part of patient. (18 Del. Code Ann. 6853[a][1], [b], [e]).

Affidavits of Defense.

In all actions in Superior Court upon bills, notes, bonds, or other written instruments for payment of money, or for recovery of book accounts, on foreign judgments, actions of scire facias on recognizances, judgments or mortgages, plaintiff may require defendant to answer allegations of complaint by affidavit setting forth specific nature and character of defense and factual basis therefor by specific notation on face of complaint that those allegations must be answered by affidavit, provided plaintiff shall have filed with its complaint copy of written instrument that is subject of action, etc. (10 Del. Code Ann. 3901[a], [c]). If plaintiff complies with above and defendant fails to respond to designated allegations by affidavit filed with answer, designated allegations will be deemed admitted and default judgment may be entered. (10 Del. Code Ann. 3901[d]). Upon judgment for plaintiff in accordance with above, defendant may have stay of execution for six months upon giving proper security. (10 Del. Code Ann. 3901[e]). Judgment in default may be opened for trial upon giving of security and showing cause. (10 Del. Code Ann. 3901[f]).

Bill of Particulars.

No longer in use. When a pleading is too vague or ambiguous to respond to, opposing party may move for a more definite statement before pleading. (Ch. Ct. Rule 12[e]; Super. Ct. Civ. Rule 12[e]).

Verification.

Not required generally. (Ch. Ct. Rule 11[a]; Super. Ct. Civ. Rule 11[a]).

Service.

Rule providing service on attorney modeled on Federal Rule. (Ch. Ct. Rule 5[b]; Super. Ct. Civ. Rule 5[b]).

Filing and Delivery.

A copy of any pleading must be filed with Court and delivered or mailed to adverse party or adverse party's attorney. (Ch. Ct. Rule 5[b], [d]; Super. Ct. Civ. Rule 5[b], [d]). Adverse party is required to plead, answer or reply within 20 days after being served. (Ch. Ct. Rule 12[a]; Super. Ct. Civ. Rule 12[a]). This does not apply in Superior Court actions of certiorari, ditch returns, mechanics liens, and appeals under Rule 3(c). (Ch. Ct. Rule 12[a]; Super. Ct. Civ. Rule 12[aa1], [aa2], [aa3]).

Time.

Superior Court and Chancery Court rules based on Federal Rules of Civil Procedure. (Ch. Ct. Rule 6; Super. Ct. Civ. Rule 6).

Small Claims.

See category 6 Courts and Legislature, topic 6.01 Courts.

Proof of Corporate Existence.

Plaintiff may require defendant to deny allegation of incorporation by affidavit filed with answer, by specific notation of need for denial by affidavit within paragraph alleging corporate existence. Such affidavit may be made by president, secretary, treasurer or any director of any corporate defendant. Where plaintiff complies with above, failure of defendant to file affidavit with answer will be deemed admission of corporate existence. Any defendant denying existence of corporation shall state to best of defendant's knowledge whether there is any corporation which is related to subject matter of complaint. (10 Del. Code Ann. 3915).

Proof of Partnership.

Plaintiff may require defendant to deny allegation of partnership by affidavit filed with answer, by specific notation of need for denial by affidavit within paragraph alleging partnership and stating to best of defendant's knowledge and belief whether there is any partnership in relation to subject matter of action and who are partners therein. Where plaintiff complies with above, failure of defendant to file affidavit with answer will be admission of partnership existence. (10 Del. Code Ann. 3914).

Denial of Signature.

Plaintiff may require defendant to deny allegation that defendant's signature appears on written instrument at issue, which is filed with plaintiff's complaint, by affidavit filed with answer by specific notation of need for denial by affidavit within paragraph alleging such. Where plaintiff complies with above, failure of defendant to file affidavit with answer will be admission of signature. (10 Del. Code Ann. 3917).

5.19 PRACTICE:

No code of civil practice. Practice governed generally by Court Rules based upon Federal Rules. Local deviations from Federal Rules are too numerous to mention but are largely minor. Equity and law courts are separate and distinct, but appeal lies to the Supreme Court from the Court of Chancery as well as Superior Court. See category 6 Courts and Legislature, topic 6.01 Courts. (Del. Const., art. IV, §§ 7-11).

Discovery.

Rules resemble Federal Rules in both law and equity courts, but omit: Rules 27 and 37(b)(1) (Ch. Ct. and Super. Ct.); Rules 26(f), 37(e) and (f) (Ch. Ct. only); and Rule 32(c) (Super. Ct. only). (Ch. Ct. Rules; Super. Ct. Civ. Rules).

Demand for Admission of Facts.

Rule resembles Federal Rule (Ch. Ct. Rule 36; Super. Ct. Civ. Rule 36).

Direct Actions Against Insurer.

See category 23 Transportation, topic 23.01 Motor Vehicles, subhead Direct Actions.

Small Claims.

See category 6 Courts and Legislature, topic 6.01 Courts.

See also topics 5.02 Actions, 5.03 Appeal and Error, 5.11 Depositions and Discovery, 5.14 Injunctions, 5.15 Judgments, 5.18 Pleading, 5.20 Process; category 8 Debtor and Creditor, topics 8.02 Attachment, 8.05 Executions, 8.09 Garnishment.

5.20 PROCESS:

Civil action is commenced by filing complaint and, in Superior Court, a praecipe directing issuance of writ by Prothonotary. (Ch. Ct. Rule 3; Super. Ct. Civ. Rule 3).

General Requisites.

Bears date of day issued (Super. Ct. Civ. Rule 4[c]) and is returnable within 20 days (Ch. Ct. Rule 4[g]; Super. Ct. Civ. Rule 4[g]).

By Whom Issued.

Issued by Prothonotary in Superior Court or Register in Chancery. (Super. Ct. Civ. Rule 4[a]; Ch. Ct. R. 4[a]).

Who May Serve.

Service of process made to sheriff to whom writ is directed, by deputy or by person specially appointed by Court. (Super. Ct. Civ. Rule 4[d]). For Chancery, by any person who is not party and at least 18 years of age or by sheriff if directed by Court. (Ch. Ct. Rule 4[c]). For justice of peace, by any constable, sheriff, deputy sheriff, special process server or any other person authorized by statute. (J.P. Civ. Rule 4[d]).

Personal service on individual is effective if made on defendant personally or left at his usual place of abode with a person of suitable age and discretion residing therein or to agent appointed for service of process. (Super. Ct. Civ. Rule 4[f][1][I]; Ch. Ct. Rule 4[d][1]). In case of justices of peace, if service is not made, it is returnable on fourth day preceding date of appearance. (J.P. Civ. Rule 4[g]).

Personal Service on Infant.

For persons under age of 18 service at law is on guardian of individual in this state; if no such guardian, service is upon adult with whom infant resides or who provides infant's place of abode. (Super. Ct. Civ. Rule 4[f][1][II][b]; Ch. Ct. Rule 4[d][2]).

Personal Service on Incompetent Persons.

Service at law of incompetent person is on that person's trustee or guardian in same manner as upon individual; if there is no guardian or trustee, service is upon adult with whom incompetent person resides or who provides incompetent person's place of abode. (Ch. Ct. Rule 4[d][3]; Super. Ct. Civ. Rule 4[f][II][c]).

Personal Service on Partnership or Association.

Partnership or unincorporated association subject to suit under common name may be served by delivering copy of process to any officer or agent authorized to receive service. (Super. Ct. Civ. Rule 4[f][1][III]).

Personal Service on Domestic Corporation.

Service on domestic corporation made by delivering copy personally to any officer or director in state or to registered agent of corporation in this State or by leaving it at dwelling house or usual place of abode in this State of any officer, director or registered agent or at registered office or other place of business in this State. If registered agent is corporation, service may be made on its president, vice-president, secretary, assistant secretary or any director. Service by leaving copy must be delivered at least six days before return date in presence of adult person and officer serving process must state manner of service in his return. If after due diligence, service cannot be made as above provided, it may be made on Secretary of State; plaintiff must pay to Secretary of State $50 costs. (8 Del. Code Ann. 321[a], [b]).

Service may also be made in accordance with 10 Del. Code Ann. 3111 on president or head officer if residing in state and if not, on any officer, director or manager. (8 Del. Code Ann. 321[c]; 10 Del. Code Ann. 3111[a]).

Personal Service on Foreign Corporations.

When a cause of action arises in the state against any corporation incorporated outside of this state, and there is no president or head officer of such corporation or any officer, director or manager thereof resident in this state, nor any certified agent for the service of process resident in this state, process against such corporation may be served upon any agent of such corporation then being in the state. (10 Del. Code Ann. 3111[a]).

Service of process on foreign corporation qualified to do business in state may be made on registered agent or, if there is none, on any officer, director or other agent then in state, or if process cannot be so served by due diligence, then upon Secretary of State to whom plaintiff shall pay $50 fee. (8 Del. Code Ann. 376). If any foreign corporation transacts business in state without qualifying to do so, service of process may be made on Secretary of State; plaintiff must pay to Secretary of State $50 costs. (8 Del. Code Ann. 382[a], [c]).

Service on foreign insurance company, see category 16 Insurance, topic 16.01 Insurance Companies.

Personal Jurisdiction by Acts of Nonresidents.

Courts may exercise personal jurisdiction over nonresident or his personal representative as to cause of action arising from: Transaction of business in state; contract to supply services or things in state; tortious injury in state caused by act or omission in state; tortious injury in or outside state caused by act or omission in state, where defendant regularly does or solicits business in state; interest in, use or possession of real property in state; or contract to insure or act as surety for, or on, any person, property, risk, contract, obligation or agreement located, executed or to be performed within state at time contract is made, unless parties otherwise provide in writing. (10 Del. Code Ann. 3104[b], [c]).

Service of legal process may be made upon Secretary of State: 1) By personal delivery in manner prescribed for service within state; 2) by manner prescribed by law of place in which service is made; 3) by any form of mail addressed to person and accompanied by signed receipt; or 4) as directed by court. (10 Del. Code Ann. 3104[d]; 10 Del. Code Ann. 3114[c]).

Service by Mail.

Service by registered mail is permitted on defendants in divorce actions where no personal service is had if publication is combined with service to address petitioner avers is most likely where respondent will receive mail (13 Del. Code Ann. 1508[d]); on unauthorized insurers doing business in state if mailed by Commissioner (18 Del. Code Ann. 2104; 18 Del. Code Ann. 2105[a]); and on nonresident directors if mailed by Prothonotary or Register in Chancery of court where proceeding is pending. (10 Del. Code Ann. 3114[c]).

Substituted Service.

Court may in special cases direct another or additional mode of service. (Ch. Ct. Rule 4[d][7]; Super. Ct. Civ. Rule 4[f][VI]).

Service on nonresident executor or administrator may be made on the Register of Wills. (12 Del. Code Ann. 1506).

Service by publication in Chancery may be by order of Chancellor, provided it appears not less than once a week for three consecutive weeks, upon application and affidavit that defendant is out of state or cannot be served and is intentionally avoiding such service. (10 Del. Code Ann. 365).

In any suit against corporation whose officers reside out of state, process may be served by publishing substance thereof in newspaper of this state and of state where head officer resides, 20 days before return thereof. (10 Del. Code Ann. 3111[b]). In divorce suit against resident or nonresident defendant, where it is unlikely that jurisdiction can be acquired over defendant other than by publication, Clerk of Family Court shall cause summons to be published once in newspaper of general circulation in county where action is pending. Service shall also be sent by registered mail to last known address of defendant. (13 Del. Code Ann. 1508[b], [c], [d]).

Long Arm Statute.

See subheads Service by Mail, Personal Jurisdiction by Acts of Nonresidents, and Service by Publication, supra.

Proof of Service.

If service is not made by officer or his deputy such person's return shall be verified. (Ch. Ct. Rule 4[g]; Super. Ct. Civ. Rule 4[g])). Further pleading may not be filed unless receipt of service of a copy is endorsed thereon by parties served or an affidavit of service is filed. (Ch. Ct. Rule 5[f]; Super. Ct. Civ. Rule 5[f]).

Nonresident Motorist.

See category 23 Transportation, topic 23.01 Motor Vehicles.

Service on Nonresident Directors of Delaware Corporation.

Acceptance of election or appointment, by nonresident after Sept. 1, 1977 or by resident who thereafter removes his residence from state, as director, trustee or member of governing body of Delaware corporation, and serves as such after June 30, 1978, is deemed to have consented to appointment of registered agent of corporation, or, if none, Secretary of State, as agent upon whom process may be served in all civil actions brought in state, by or on behalf of or against corporation, in which such director is necessary or proper party, or in any action for violation of his duty in such capacity, whether or not person continues to so serve. In addition to service of process on registered agent or Secretary of State, Prothonotary or Register in Chancery of court in which action is pending must mail process within seven days of such service to such director at corporation's principal place of business and at his residence or last known address. Time within which such director must respond computed from date of such mailing. (10 Del. Code Ann. 3114[a], [c], [d]).

5.21 REPLEVIN:

Action of replevin is founded on general or special property of plaintiff and his immediate right of possession of property. It lies only for goods and chattels which may be subject of property and only where party has right of immediate and exclusive possession. (26 Del. 84, 80 A. 975). It also lies to recover goods and chattels seized by virtue of any process of execution, or attachment, with damages and costs for taking and detention thereof, against officer seizing same, security being given, as in other cases by plaintiff in replevin, before delivery to him of goods and chattels replevied. Plaintiff in such case must not have been defendant in execution or attachment. (10 Del. Code Ann. 3906). Goods or chattels unlawfully detained from owner, or person entitled to possession thereof, such owner or person may have remedy to recover same by civil action. (10 Del. Code Ann. 3905).

Proceedings.

Except when rule to show cause is required by statute, any matter shall be initiated by motion following complaint or petition. (Super. Ct. Civ. Rule 64.1[a]). Affidavit of demand not necessary; bringing of action is sufficient demand. (10 Del. Code Ann. 3907).

Repossession.

Defendant may give return bond within a reasonable time and retain the goods. (3 Del. 113).

Claims of Third Persons.

After complaint is filed, before answer is filed, by suggestion to be filed of record, defendant may disclaim ownership of subject of action, and offer to bring same into court, or to pay or dispose thereof as court orders. If under oath, right of ownership is attributed to named third person not party to action, who has sued or is expected to sue for same. Court may then order plaintiff to interplead with such third person making such person a party to action. (10 Del. Code Ann. 3910).

Judgment or Order.

Judgment includes any order from which writ of error or appeal lies. (Super. Ct. Civ. Rule 54[a]).

5.22 SEQUESTRATION:

Sequestration available in Court of Chancery to compel appearance of resident defendant who avoids personal service. (10 Del. Code Ann. 365). Sequestration available for nonresident defendants, subject to minimum contact requirements. (10 Del. Code Ann. 366). See topic 5.20 Process.

Property subject to sequestration includes legal and equitable interests in both real and personal property. (28 Del. Ch. 1, 35 A.2d 831).

Situs of ownership of capital stock of Delaware corporation is Delaware except for taxation purposes. (8 Del. Code Ann. 169). Provision for attachment of stock. (8 Del. Code Ann. 324; 10 Del. Code Ann. 3501 to 3513). See category 8 Debtor and Creditor, topic 8.02 Attachment.

Uniform Commercial Code adopted. See category 3 Business Regulation and Commerce, topic 3.09 Commercial Code.

5.23 SERVICE:

See topic 5.20 Process.

5.24 STAY OF EXECUTION:

See topic 5.03 Appeal and Error; category 8 Debtor and Creditor, topic 8.05 Executions.

5.25 SUBMISSION OF CONTROVERSY:

Any persons willing to become parties to amicable action may enter into agreement in writing for that purpose. On filing such agreement with Prothonotary, Prothonotary shall docket action in Superior Court and action shall be treated thereafter as if defendant had appeared to summons issued against him or her by plaintiff. (10 Del. Code Ann. 3109).

5.26 VENUE:

Change of Venue.

Criminal defendant may request transfer to another county where prejudice would prevent fair trial. (Super. Ct. Crim. Rule 21[a]).

6 COURTS AND LEGISLATURE

6.01 COURTS:

United States District Court.

Clerk's office: 844 N. King St., Wilmington, Delaware 19801.

Filing fee of $350 is required in all civil actions. http://www.ded.uscourts.gov/index.htm. Court sits at Wilmington.

Supreme Court.

Consists of five justices. Quorum of justices is three. (Supr. Ct. Rule 2[a]). If quorum is unavailable Chief Justice or next in rank by seniority shall designate lower court judge to temporarily fill vacancy. No judge shall be designated to sit in any cause on which he sat below. (Const., art. IV, § 12).

Filing fee of $450 when notice of appeal or cross-appeal filed. (Supr. Ct. Rule 20[a]). Court sits in Kent County, at Dover.

Jurisdiction.

Has appellate jurisdiction over criminal causes where penalty is death or exceeds one month imprisonment or $100 fine. (Const., art. IV, § 11[1][b]). Has jurisdiction over appeals by state where accused has been granted new trial after verdict, or other post-conviction relief, or in any action collaterally attacking criminal judgment, or order declaring any act of General Assembly unconstitutional. (Const., art. IV, § 11[1][c]; 10 Del. Code Ann. 9902[d-f]). Has jurisdiction of appeals by state in criminal cases where order below based on invalidity or construction of statute on which indictment founded or on lack of jurisdiction of court below (10 Del. Code Ann. 9902[a]); or in its discretion where there is substantial question of law or procedure (10 Del. Code Ann. 9903). Has jurisdiction of appeals in civil cases as to final judgments, certain interlocutory decrees and other proceedings of Court of Chancery and Superior Court. (Const., art. IV, § 11). Has jurisdiction of appeals from Family Court for adoption proceedings (13 Del. Code Ann. 917) and proceedings to terminate parental rights (13 Del. Code Ann. 1110).

Court of Chancery.

Jurisdiction.

Court has jurisdiction of all cases in equity (10 Del. Code Ann. 341), and may not determine any matter where sufficient remedy may be had by common law or statute before any other Delaware Court (10 Del. Code Ann. 342). Jurisdiction of appeals of Orphans' Court and Register of Wills transferred to Court of Chancery pursuant to Const. art. IV, § 32 (384 A.2d 627), except adoptions and terminations of parental rights (13 Del. Code Ann. 917; 13 Del. Code Ann. 1110).

Filing fees vary. Charges not covered by Ch. Ct. Rule 3 fixed by Order of Court. Court sits in New Castle County, at Wilmington; in Kent County, at Dover; in Sussex County, at Georgetown. Register in Chanery's Office: Kent County Courthouse, 38 The Green, Dover 19901.

Special sessions may be held in chambers at discretion of Chancellor.

Superior Court.

One judge constitutes quorum (Const., art. IV, § 5); quorum is two in election law violation cases in Superior Court (Const., art. V, § 6).

Civil action filing fees vary. (Super. Ct. Civ. Rule 77[h]). Criminal action fees generally $100. (Super. Ct. Crim. Rule 58). Court sits in New Castle County, at Wilmington; in Kent County, at Dover; in Sussex County, at Georgetown.

Jurisdiction.

Superior Court has jurisdiction of real, personal and mixed civil causes at common law (Const., art. IV, § 7), and has original and concurrent jurisdiction over all crimes, except where jurisdiction is exclusively vested in another court (11 Del. Code Ann. 2701[c]). Superior Court has jurisdiction of appeals from Common Pleas in civil cases (10 Del. Code Ann. 1326[a]), and criminal cases (11 Del. Code Ann. 5301[c]; 10 Del. Code Ann. 9902). Court also entertains civil (10 Del. Code Ann. 1326) and defendants' criminal appeals (10 Del. Code Ann. 9505) from Justice of Peace Courts. Same rules governing State appeals to Supreme Court (see subhead Supreme Court, catchline Jurisdiction, supra) also apply to State appeals to Superior Court. (10 Del. Code Ann. 9902).

Jurisdiction—Medical Malpractice.

All health care malpractice claims must be brought in Superior Court. (18 Del. Code Ann. 6802[a]). Any party to malpractice suit has right to convene malpractice review panel (18 Del. Code Ann. 6802[b]), which may receive evidence (18 Del. Code Ann. 6807), conduct hearing (18 Del. Code Ann. 6808) and give opinion, which is prima facie evidence before Superior Court (18 Del. Code Ann. 6811[c]); but Superior Court will review opinion and evidence at behest of party aggrieved by it (18 Del. Code Ann. 6811[d]), who may call witnesses who appeared before panel to appear in Court (18 Del. Code Ann. 6812). See also subhead Medical Malpractice under categories Civil Actions and Procedure, topics Damages, Limitation of Actions; Insurance, topic Insurance Companies.

Courts of Common Pleas.

Jurisdiction.

Court of Common Pleas has jurisdiction over all civil actions at law, where amount in controversy, exclusive of interest does not exceed $50,000 but there is no limitation of jurisdiction of any amount sought by way of counterclaim, crossclaim or third party claim (10 Del. Code Ann. 1322); and has original jurisdiction over offenses committed within city of Wilmington, all misdemeanors including those over which justice of peace has jurisdiction, jurisdiction of Court of Common Pleas being concurrent with that of justice of peace except those over which another court has exclusive jurisdiction (11 Del. Code Ann. 2701[b]); and has jurisdiction over appeals from convictions before Alderman or Mayor except where sentence was imprisonment not exceeding one month, or fine not exceeding $100. (11 Del. Code Ann. 4503[a]). No jury trial in civil action (10 Del. Code Ann. 1327), but party other than one bringing suit may demand jury trial on issue for which there is jury trial right, in which case action will be removed to Superior Court (10 Del. Code Ann. 1328). Except as otherwise provided, defendant has jury trial right in criminal cases, Court can take guilty pleas and similar actions as in Superior Court. (11 Del. Code Ann. 5301[a], [b]). Court has same power as Superior Court to make rules, issue and endorse writs and processes, compel attendance of witnesses, require security for costs from nonresident plaintiffs, and require production of all necessary evidence. (10 Del. Code Ann. 1324). Court of Common Pleas also entertains some civil appeals from Justice of Peace Courts. (10 Del. Code Ann. 9570).

Family Court has exclusive original civil jurisdiction in proceedings concerning: dependent, neglected or delinquent children; any child charged with violation of any Delaware law except first or second degree murder, first or second degree rape, first degree kidnapping, first degree assault, first degree robbery where there is use of deadly weapon, serious physical injury to victim, and where child has already committed one felony, unlawful sexual intercourse in first degree, or any attempt to commit such crimes; enforcement of any Delaware law for protection of children and education of children or handicapped; any child aged 16 years or older charged with violation of Title 21; divorce and annulment; child support liens. Delinquency based on alleged violation of Titles 11, 16 or 21 which would otherwise be within original jurisdiction of Family Court shall be within criminal jurisdiction of Superior Court if charges are joined with felony pending against same child in Superior Court. Proceedings relative to parental notice of abortion under Subchapter VIII, c. 17, Title 24. (10 Del. Code Ann. 921). Court has exclusive original criminal jurisdiction in any proceeding concerning: mistreatment of child; offenses or crimes, except felonies, by one member of family against another; offenses, except felonies, committed against peace officer during family altercation; criminal non-support, aiding child escaping from DSC, sexual assault or contact with child; violation of child labor laws; desertion or failure to support, interference with custody, incest, exposing children to gambling, violation of protective order and sale of alcohol, tobacco or weapons to children. If offenses may be properly joined with felony, they are within jurisdiction of Superior Court. Court has concurrent criminal jurisdiction with Justice of the Peace Courts in curfew violation proceedings. (10 Del. Code Ann. 922).

Registers' (or Probate) Courts.

Each Register of Wills holds Register's Court. (Del. Const. art. IV, § 31). Jurisdiction of appeals was transferred to Court of Chancery. (384 A.2d 627).

Justices of the Peace Courts.

Justices of peace severally have jurisdiction, throughout State, of all causes of action arising from actions in contract, express or implied, actions in tort for damage, destruction, or taking of personal property, for injury to real property, and for trespass on land; distress for rent actions; truancy, or warranty, or contract, or for any action in Summary Possession as provided in Ch. 57, Title 25; or for any penalty, or forfeiture, incurred under provisions of any statute, or of any by-law, or ordinance, authorized by statute; where matter in demand does not exceed $15,000, which sum excludes any penalty arising in any obligation, or contract, or interest due on any cause of action within this jurisdiction. (10 Del. Code Ann. 9301). Justices of peace have original jurisdiction of certain misdemeanors and any attempt, conspiracy, or solicitation to commit such misdemeanors (11 Del. Code Ann. 2702) and may act as committing magistrates (11 Del. Code Ann. 5911). Except in Newark, accused may have case originally before mayor or alderman or justice of peace transferred to Court of Common Pleas where there is possibility of incarceration or maximum fine is greater than $15. (11 Del. Code Ann. 5303; 11 Del. Code Ann. 5901).

Municipal Court abolished effective on May 1, 1998.

Small Claims Courts.

See subheads Courts of Common Pleas, and Justices of the Peace Courts, supra.

6.02 LEGISLATURE:

Annual sessions: from 2d Tues. in Jan. but not beyond last day in June; session may begin at a different time or extend beyond last day of June by call of Governor or of presiding officers of both Houses. (Del. Const. art. II, § 4).

Special or extraordinary sessions may be called by the Governor or presiding officers of both Houses. (Del. Const. art. II, § 4).

Initiative and Referendum.

No provision for, except that voters of each district of State decide by referendum whether bingo and lotteries are to be legal within district. (Del. Const. art. II, § 17).

Lobbyists.

Every lobbyist must register with State Public Integrity Commission. (29 Del. Code Ann. 5832). Every employer of lobbyist must furnish to lobbyist written and signed authorization to act which must be filed with Commission at time of registration. (29 Del. Code Ann. 5833). No lobbyist shall be employed pursuant to compensation agreement that permits more than half of compensation to be contingent upon outcome of legislative or administrative action. (29 Del. Code Ann. 5834). Lobbyists must file, on or before 20th day of month following each calendar quarter, written report containing certain required information. (29 Del. Code Ann. 5835). Knowing violation of lobbyist registration provisions is misdemeanor. (29 Del. Code Ann. 5837).

6.03 REPORTS:

Delaware law reports consist of: Harrington's reports, 5 vols. 1832, 1855; Houston's reports, 9 vols. 1855, 1893, Marvel's reports; 2 vols. 1893, 1897; Pennewill's reports, 7 vols. 1897, 1909; Boyce's reports, 7 vols. 1909, 1920; W. W. Harrington's reports, 9 vols. 1919, 1939; Terry's reports, 11 vols. 1939, 1958; Storey's reports, 9 vols. 1958, 1966; Houston's criminal reports, 1 vol. 1856, 1879; Bates' chancery reports, 4 vols. 1814, 1873; Chancery reports consist of vols. 1 43, 1892, 1968. Delaware Decisions are also reported in Atlantic Reporter. As of Jan. 1, 1969, above Delaware reports were discontinued and Delaware official reporter is Delaware Reporter which is captioned as and cited as appropriate volume of Atlantic Reporter.

Digests.

Delaware digests consist of: Ridgely's Digest, covering Harrington's reports I to V inclusive, Del. Chancery I to V. Houston's reports I to VI inclusive, Houston's Criminal Cases Vol. I; and Marvel's Delaware Corporations and Receiverships, 6th Ed., covering all cases under Delaware corporation law as amended through 1939, and all decisions relating to receiverships of Delaware corporations; Wooley on Delaware Practice, 2 vols. (1906). Delaware and Atlantic Digest, with pocket parts supplement, covers reported Delaware cases.

6.04 STATUTES:

Delaware Code is a compilation of revised statutes up to 1974.

Uniform Acts adopted are: Adult Guardianship and Protective Proceedings Jurisdiction (2007, adopted 2009) (12 Del. Code Ann. 39A-101 to 39A-402); Aeronautics (1922, adopted 1923) (2 Del. Code Ann. 301 to 311); Anatomical Gift (1968, adopted 1970, trans. 1990) (16 Del. Code Ann. 2710-2719); Arbitration (1956, adopted 1972) (10 Del. Code Ann. 5701 to 5725); Athlete Agents (2000, adopted 2002) (24 Del. Code Ann. 5401 to 5420); Child Custody Jurisdiction and Enforcement (1997, adopted 2002) (13 Del. Code Ann. 1901 to 1943); Commercial Code (1962 - rev. of Art. 8 [1977] & Art. 9 [2000], adopted 1967) (6 Del. Code Ann. 1-101 et seq.); Commercial Driver License (1986, adopted 1990) (21 Del. Code Ann. 2601 to 2625); Common Interest Ownership (2008, effective Sept. 30, 2009) (25 Del. Code Ann. 81-101 et seq.); Contribution Among Tortfeasors (1939, adopted 1949) (10 Del. Code Ann. 6301 to 6308); Controlled Substances (1970, adopted 1972) (16 Del. Code Ann. 4701 to 4796); Criminal Extradition (1936, adopted 1937) (11 Del. Code Ann. 2501 to 2530); Debt Management Services (2005, adopted 2006) (6 Del. Code Ann. 2401 to 2439); Deceptive Trade Practices (1964, adopted 1965) (6 Del. Code Ann. 2531 to 2536); Declaratory Judgments (1922, adopted 1981) (10 Del. Code Ann. 6501 to 6513); Determination of Death (1980, adopted 1986) (24 Del. Code Ann. 1760); Disclaimer of Property Interests (1978, adopted in 2006) (12 Del. Code Ann. 601 to 608); Disclaimer of Transfers by Will, Intestacy, or Appointment (1978, adopted 1982) (12 Del. Code Ann. 601 to 608); Disclaimer of Transfers Under Nontestamentary Instruments (1978, adopted 1982) (12 Del. Code Ann. 601 to 608); Durable Power of Attorney (1979, adopted 1982) (12 Del. Code Ann. 4901 to 4905); Electronic Transactions (1999, adopted 2000) (6 Del. Code Ann. 12A-101 to 12A-117); Enforcement of Foreign Judgments (1948 rev. 1964, adopted 1986) (10 Del. Code Ann. 4781 to 4787); Environmental Covenants (2003, adopted 2005) (7 Del. Code Ann. 7907 to 7920); Facsimile Signatures of Public Officials (adopted 1971) (29 Del. Code Ann. 5401 to 5406); Federal Lien Registration (1978, adopted 1996) (25 Del. Code Ann. 3101 to 3105); Foreign-Money Claims (1989, adopted 1998) (10 Del. Code Ann. 5201 to 5215); Foreign Money-Judgments Recognition (1962, adopted 1997) (10 Del. Code Ann. 4801 to 4808); Fraudulent Transfer (1984, adopted 1996) (6 Del. Code Ann. 1301 to 1311); Health-Care Decisions (1993, adopted 1996) (16 Del. Code Ann. 2501 to 2517); Insurers Liquidation (1939, adopted 1968) (18 Del. Code Ann. 5901[2] to [13], 5902, 5903, 5913 to 5920); International Wills (1977, adopted 1997) (12 Del. Code Ann. 251 to 259); Interstate Arbitration of Death Taxes

(1943, adopted 1953) (30 Del. Code Ann. 1701 to 1706); Interstate Compromise of Death Taxes (1943, adopted 1953) (30 Del. Code Ann. 1701 to 1706); Interstate Enforcement of Domestic-Violence Protection Orders (2002, adopted 2002) (10 Del. Code Ann. 1049 to 1049F); Interstate Family Support (2001, adopted 2005) (13 Del. Code Ann. 6-101 to 6-903); Limited Partnership (1973, adopted 1976) (6 Del. Code Ann. 17-101 to 17-1111); Notarial Acts (adopted 1984) (29 Del. Code Ann. 4321 to 4328); Parentage (2000, adopted 2003) (13 Del. Code Ann. 8-101 to 8-904); Partnership (1914, adopted 1947) (6 Del. Code Ann. 15-101 to 15-1210); Premarital Agreement (1983, adopted 1996) (13 Del. Code Ann. 321 to 328); Principal and Income (2003, adopted 2009) (12 Del. Code Ann. 61-101 et seq.); Prudent Management of Institutional Funds (2006, adopted 2007) (12 Del. Code Ann. 4701 to 4710); Real Property Electronic Recording (2004, adopted 2005) (25 Del. Code Ann. 180 to 184); Rules of Evidence (1974, adopted 1980) (D.R.E. 101 to 1103); Securities (1956, adopted 1973) (6 Del. Code Ann. 7301 to 7330); Secure the Attendance of Witnesses from Without a State in Criminal Proceedings (1936, adopted 1937) (11 Del. Code Ann. 3521 to 3526); Simplification of Fiduciary Security Transfers (1958, adopted 1963) (12 Del. Code Ann. 4301 to 4311); Simultaneous Death (1940, adopted 1945) (12 Del. Code Ann. 701 to 707); State Antitrust (adopted 1979) (6 Del. Code Ann. 2101 to 2114); Testamentary Additions to Trusts (1991, adopted 1997) (12 Del. Code Ann. 211); TOD Security Registration (1989, adopted 1996) (12 Del. Code Ann. 801 to 812); Trade Secrets (1979, adopted 1982) (6 Del. Code Ann. 2001 to 2009); Transfer on Death Security Registration (1989, adopted 1996) (12 Del. Code Ann. 801 to 812); Transfers to Minors (1983, adopted 1996) (12 Del. Code Ann. 4501 to 4523); Unauthorized Insurers Process (1955, adopted 1968) (18 Del. Code Ann. 2103 to 2108); Unincorporated Nonprofit Association (1996, adopted 1997) (6 Del. Code Ann. 1901 to 1916).

Uniform Commercial Code adopted. See category 3 Business Regulation and Commerce, topic 3.09 Commercial Code.

For text of Uniform Acts falling within the scope of the Martindale-Hubbell Law Digests see Uniform and Model Acts section.

†Adopted with significant variations or modifications. See appropriate topics.

6.05 UNIFORM LAWS:

For list of Uniform Acts in force in this state see topic 6.04 Statutes. For text of Uniform Acts within the scope of the Martindale-Hubbell Law Digests see Uniform and Model Acts section.

7 CRIMINAL LAW

7.00A BAIL:

See topic 7.01 Criminal Law.

7.01 CRIMINAL LAW:

For general provisions concerning crimes of criminal procedures see 11 Del. Code Ann. 201 to 284. For jurisdiction and procedure of Family Court, see 10 Del. Code Ann. 901 to 1077.

Indictment or Information.

No person may, for any indictable offense, be proceeded against criminally by information except in cases arising in land or naval forces or in militia while in actual service. (Del. Const. art. I, § 8). Proceedings may be instituted by indictment, by complaint, when lawful, by information or by arrest or summons without warrant or complaint. (Super. Ct. Crim. Rule 3[a]). Capital offense may be prosecuted only by indictment, and except as otherwise provided by State Constitution, other offenses within exclusive jurisdiction of Superior Court must be prosecuted by indictment, unless defendant waives indictment, in which event case may proceed by information.

(Super. Ct. Crim. Rule 7[a][b]).

Prosecution of adults in Family Court is by either information or complaint. (10 Del. Code Ann. 1021).

Bail.

Person arrested and charged with any crime, other than capital crime, shall be released (a) upon his own recognizance, or (b) upon unsecured personal appearance bond, or (c) upon secured bond, as determined by court. (11 Del. Code Ann. 2104[a]). If accused furnishes surety, court may impose any of conditions under 11 Del. Code Ann. 2108, including specific consideration for safety of victim and community. (11 Del. Code Ann. 2104[b]). Superior Court will immediately revoke bail and incarcerate any person convicted of felony which carries mandatory jail sentence. (11 Del. Code Ann. 2104[c]). Family Court Master or Judge may restrict freedom of person released on bail. (10 Del. Code Ann. 1021). Capital crimes are not bailable, unless defendant discharges burden of proving that there is good ground to doubt truth of accusation. (11 Del. Code Ann. 2103). Purpose of bail system is to assure appearance and protect safety of community. (11 Del. Code Ann. 2101). Court may restrict person released on bail from having contact with victim. (11 Del. Code Ann. 2108[a][5]). Persons violating bail provisions are subject to separate criminal penalties. (11 Del. Code Ann. 2113[c]). Excessive bail prohibited. (Del. Const. art. I, § 11).

Uniform Criminal Extradition Act adopted. (1936, adopted 1937) (11 Del. Code Ann. 2501–2530).

Interstate Compact For Supervision of Adult Offenders adopted. (11 Del. Code Ann. 4358–4359).

Uniform Agreement on Detainers, as proposed by Council of State Governments, adopted. (11 Del. Code Ann. 2540–2550).

8 DEBTOR AND CREDITOR

8.01 ASSIGNMENTS:

All bonds, specialties, and notes in writing, payable to any person, or order, or assigns, may be assigned, or indorsed, and the assignee, or indorsee, his executors, administrators, or assigns, may again assign, or indorse the same, as often as may be desired, subject to provisions of Uniform Commercial Code. (6 Del. Code Ann. 2702; 6 Del. Code Ann. 2703). See category 3 Business Regulation and Commerce, topic 3.09 Commercial Code.

Recording required for mortgage assignments (9 Del. Code Ann. 9608), subject to provisions of Uniform Commercial Code.

Notice of assignment in office of recorder of deeds constitutes constructive notice of such assignment as against all persons. (633 A.2d 356).

Instruments Transferring Title.

Deeds may be proved by acknowledgment or in court by one or more subscribing witnesses. (25 Del. Code Ann. 122).

Effect.

Assignors, or indorsers, or their executors, or administrators cannot release or discharge any sum due by such bonds, specialties, or notes, after date of such assignment. (6 Del. Code Ann. 2702[b]).

Assignment of Wages.

Excluded from secured transaction requirements under Uniform Commercial Code. (6 Del. Code Ann. 9-109[d][3]).

Action by Assignee.

Person to whom contract, express or implied, has been transferred or assigned, either in accordance with statute or with common law, may sue thereon in his own name. (10 Del. Code Ann. 3902). Assignability of unperfected mechanics' lien is not authorized under existing law and may not be permitted. (435 A.2d 730).

Assignment of Worker's Compensation.

Prohibited, except for attachments pursuant to child support orders entered under cc. 4, 5 or 6 of Title 13. (19 Del. Code Ann. 2355).

Uniform Commercial Code adopted. (1962 - rev. Art. 8 [1977] & Art. 9 [2000], adopted 1967, 2001) (6 Del. Code Ann. 1-101 to 11-109). See category 3 Business Regulation and Commerce, topic 3.09 Commercial Code.

8.02 ATTACHMENT:

Actions in Which Allowed.

In both foreign and domestic attachment actions the writ will issue in contract or in tort.

Courts Which May Issue Writ.

In foreign and domestic attachment, Superior Court has jurisdiction in any amount exceeding $50 (10 Del. Code Ann. 3501; 10 Del. Code Ann. 3506; 10 Del. Code Ann. 3507) and justices of peace up to $15,000 (10 Del. Code Ann. 9583). Court of Common Pleas has jurisdiction similar to Superior Court. (10 Del. Code Ann. 1324).

In Whose Favor Writ May Issue.

Any plaintiff may secure attachment where proper grounds therefor are shown (10 Del. Code Ann. 3501–3507), even if writ is to be issued against nonresidents or foreign corporations (10 Del. Code Ann. 3506–3507). Provision is made for attachment of shares of corporate stock or any interest therein. (8 Del. Code Ann. 324).

Against Whom Writ May Issue.

Domestic writs may be issued against residents of Delaware (10 Del. Code Ann. 3501) and corporations doing business in Delaware (10 Del. Code Ann. 3502[a]). Foreign writs may be issued against nonresidents (10 Del. Code Ann. 3506) or foreign corporations (10 Del. Code Ann. 3507). Banks, trust companies, savings institutions and loan associations, except only as to wage attachment against wages of employee and when garnishment is for tax, interest, penalty or other amount owed to State revenue department, and building and loan associations doing business in state are exempt. (10 Del. Code Ann. 3502[b]; 30 Del. Code Ann. 556; 5 Del. Code Ann. 1708). Insurance companies are liable only as to amounts claimed or payable under policy or against wages of employee of insurance company. (10 Del. Code Ann. 3502[c]).

Unincorporated association including partnership is liable to attachment in any action in its common name. (10 Del. Code Ann. 3504[a]).

Claims on Which Writ May Not Issue.

Property title to which has not yet passed to judgment debtor not subject to attachment (158 A.2d 809); lessee's interest in personal property cannot be attached, unless lease is security agreement. (367 A.2d 658).

Grounds.

Writs of both domestic attachment against resident or domestic corporation and writs of foreign attachment against nonresident or foreign corporation may issue by order of court, on proof satisfactory to court. Affidavit is satisfactory for this purpose. (Super. Ct. Civ. Rule 4[b]).

Domestic writs may issue against resident or domestic corporation, except banks, trust companies, savings institutions and loan associations unless garnishment of employee's wages or for tax, interest, penalty or other amount owed to State revenue department, upon proof satisfactory to court that defendant cannot be found or that defendant is justly indebted to plaintiff in amount over $50, and that he has absconded, is about to leave state, or has left state, with intent to defraud creditors or elude process. (10 Del. Code Ann. 3501–3502; 30 Del. Code Ann. 556).

Foreign writs may issue against nonresident upon proof satisfactory to court that defendant cannot be found, that plaintiff has good cause of action against defendant in amount exceeding $50, and that defendant resides out of state. (10 Del. Code Ann. 3506). Foreign writs may issue against foreign corporation upon proof satisfactory to court that defendant is corporation not created by, or existing under laws of Delaware, and that plaintiff has good cause of action against defendant in amount exceeding $50. (10 Del. Code Ann. 3507).

Procedure to Obtain.

Affidavit filed in Superior Court with complaint setting forth statutory grounds and other facts required by court rules. (Super. Ct. Civ. Rule 4[b][1]).

Attachment Bond.

No mesne writ of attachment will be issued until plaintiff gives bond conditioned that if suit is not prosecuted with effect, or if judgment rendered therein is in favor of defendant, plaintiff will pay any and all costs which may be awarded to defendant, together with any and all damages, not exceeding amount of bond, which defendant in suit may have sustained by reason of such attachment. Amount and surety discretionary with Superior Court. (Super. Ct. Civ. Rule 4[b][2]).

Levy is to cover both real and personal property. (10 Del. Code Ann. 3508). Lessee's interest in personal property cannot be levied on in satisfaction of judgment against lessee, unless lease is security agreement. (367 A.2d 658).

Indemnity.

Statute gives Superior Court power to issue orders concerning indemnity. (10 Del. Code Ann. 3512). See subhead Attachment Bond, supra.

Lien.

Writ is lien on goods and chattels actually levied on from time of levy. (276 F. 724).

Priorities.

Writs of attachments are to be executed by sheriff in order in which received by him. If several against same defendant are received together, priority is assigned according to their respective numbers. (10 Del. Code Ann. 5082; 10 Del. Code Ann. 5084).

Release of Property.

Writ may be discharged by furnishing security to amount of value of attached property or amount claimed in suit, whichever is lesser. (Super. Ct. Civ. Rule 4[b][3][B]). If nonresident enters general appearance and moves to release property, court must so order unless plaintiff shows other circumstances which threaten satisfaction of any judgment obtained and unless plaintiff gives bond in amount at least equal to current value of property. (Super. Ct. Civ. Rule 4[b][3][A]).

Sale.

If attached property is perishable, court may order attaching officer to sell same. No sale without court order. (Super. Ct. Civ. Rule 4[b][9]).

Third Party Claim.

See category 5 Civil Actions and Procedure, topic 5.02 Actions, subhead Third Party Practice.

Vacation or Modification.

Nonresident may generally get property released on general appearance; property in any event will be released on furnishing security. (Super. Ct. Civ. Rule 4[b][3]).

8.03 [RESERVED]

8.04 CREDITORS’ SUITS:

Court of Chancery has jurisdiction of creditors’ bills for equitable relief. There is no special legislation regulating these suits. See topic 8.05 Executions; also topic 8.08 Fraudulent Sales and Conveyances.

8.05 EXECUTIONS:

Kinds of Execution.

Governed generally by statute and Court Rules based upon Federal Rules. Execution fieri facias is usual selling writ for personalty, and is seizing writ for realty. Venditioni exponas is issued for sale of goods and chattels, lands, and tenements taken in execution by writ of fieri facias. (10 Del. Code Ann. 4951). Writ of levari facias is used to seize and sell unimproved lands and lands yielding no yearly profits (with or without writ of venditioni exponas). (10 Del. Code Ann. 4961).

Personal property must be exhausted before real property can be seized and real estate is subject to execution and sale where no sufficient personal estate can be found. (10 Del. Code Ann. 4901).

Exemptions.

See topic 8.06 Exemptions.

Time for Issuance.

If judgment in civil action is final and has not been satisfied, and if there is no stay of execution, execution may issue at any time within five years after judgment is rendered or becomes due. (10 Del. Code Ann. 5072[a]).

Stay of Execution.

Upon judgment before court against freeholder for sum exceeding $5 besides costs, there may be stay of execution for six months, if defendant makes application within five days after judgment and unless creditor in judgment or other credible person files affidavit before justice "that he has good ground to apprehend and does verily believe that if the stay of execution be allowed, the sum due by the judgment will be lost." (10 Del. Code Ann. 9544[a]). Plaintiff may file transcript of his judgment in Superior Court and judgment so transferred will become lien upon any real estate of defendant in same manner as judgments obtained in Superior Court. (10 Del. Code Ann. 9546). Execution on judgment for more than $5, besides costs, will also be stayed for nine months if security with approved surety is given that judgment will be satisfied at expiration of this time. (10 Del. Code Ann. 9545).

In all cases where judgment by default for want of affidavit of defense is taken, stay for six months will be granted if security is given to pay judgment, interest and costs. (10 Del. Code Ann. 3901[e]).

Lien.

Execution of lien binds all goods and chattels within bailiwick, which are levied upon within 60 days. No levy upon goods and chattels, made by virtue of execution process, is of any force or effect as against subsequent execution levied upon same goods and chattels for longer period than three years from making of such first-mentioned levy. (10 Del. Code Ann. 5081).

Levy.

Valid levy necessitates seizure, actual or constructive. Inventory and appraisal constitute constructive seizure of personalty. Constructive seizure of realty is effected by filing description of lands with writ and making return. Constructively seized personalty may be left with debtor up to three years. (42 Del. 510, 39 A.2d 17).

Return.

In court of record, every fieri facias shall be returned before rising of court on second day after return day mentioned in writ. (10 Del. Code Ann. 5041).

In a court of a justice of the peace (10 Del. Code Ann. 9547[a]), execution is returnable on day certain, not more than 60 nor less than 30 days after date of issue, but return of nulla bona or "no goods" may be made after two days from date of issue. (10 Del. Code Ann. 9547[b]).

Priorities.

If several executions against same defendant are delivered same day, first delivered has priority. If several executions against same defendant are delivered together, they have priority according to respective numbers. (10 Del. Code Ann. 5082).

Claims of Third Party.

If real property of third party is sold under execution and deed granted purchaser, such deed is on trust or any person having right may be otherwise relieved. (10 Del. Code Ann. 4980).

Satisfaction.

(See category 5 Civil Actions and Procedure, topic 5.15 Judgments, subhead Satisfaction of Judgment.) No judgment is deemed paid or satisfied, in whole or in part, merely on evidence of levy. (10 Del. Code Ann. 5072[b]).

Sale.

Sales by order of court are at public auction, to highest and best bidder, and subject to confirmation. (10 Del. Code Ann. 4971–10-4976).

Public notice of sale of goods and chattels by sheriff or coroner, under execution process, and of day, hour, and place thereof, shall be given by advertisements posted, at least ten days before day of sale, in five, or more, public and suitable places in county, two in hundred of defendant's residence, if he resides in county; and one must at least ten days before day of sale, be delivered to defendant, and one to each plaintiff in execution, and to each plaintiff in any other execution, at time in hands of sheriff or coroner, or left at usual place of abode of such defendant and plaintiffs respectively; and if any plaintiff in any such execution resides out of county such advertisement must be delivered to attorney of such plaintiff, and one advertisement must be transmitted to such plaintiff by mail, at post office nearest his place of abode; and advertisement must, at least ten days before day of sale, be delivered to defendant's landlord, or his agent, if there be such residing in county. This section and § 4971 do not apply to execution issued by justices of peace or Court of Common Pleas. (10 Del. Code Ann. 4972).

Time of Sale.

Goods and chattels, taken in execution by sheriff, or coroner, shall not be sold until expiration of 30 days after levy thereon and notice thereof to defendant; goods of perishable nature, or those that will create charge by keeping, may by order of court be sold sooner. (10 Del. Code Ann. 4971).

Public notice of sale of lands and tenements under execution process must be given by advertisements posted, at least ten days before day of sale, in ten of most public places of county, where premises are situated, setting forth day, hour and place of sale, and what lands and tenements are to be sold, and where they lie. One of said advertisements must be posted in hundred in which premises are located, and one, in each of hundreds which immediately adjoin said hundred; like advertisement must be delivered ten days before day of sale to defendant, or left at his usual place of abode, if he has known place of abode in county; if defendant does not reside in county, notice is served on tenant, or if there is no tenant, it is left at mansion house or other public place on premises. Same provisions apply to land as to chattels in respect of notices to each plaintiff in execution. Notices of sale must be published for two weeks previous to sale in (1) newspaper of county wherein land lies, and (2) newspaper published nearest to property with not more than three insertions per week in any one newspaper. (10 Del. Code Ann. 4973[a]).

Redemption.

There is no statutory provision for redemption under Delaware law.

Supplementary Proceedings.

Discovery by deposition, interrogatories and requests for production available to judgment creditor in aid of judgment or execution under rule of court. (Super. Ct. Civ. Rule 69[aa]).

Body Execution.

No writ of capias ad satisfaciendum may be issued upon any judgment in civil action against any person in this State, until writ of fieri facias on said judgment has issued, and it appears by return thereon that defendant has no property within county sufficient to pay debt or damages, or there is affidavit to same effect; nor may it issue until plaintiff files affidavit of fraud. Affidavit must also allege debt of more than $50. (10 Del. Code Ann. 5051[a]; 10 Del. Code Ann. 5052[a]). Person arrested may move for investigation of specifications on issue of fraud. (10 Del. Code Ann. 5053).

8.06 EXEMPTIONS:

Every person residing within this state shall have exemption from execution or attachment process, or distress for rent, following articles of personal property: family Bible, school books, family library, family pictures, seat or pew in any church or place of public worship, lot in any burial ground, all wearing apparel of debtor and his family, and shall have exempt tools, implements and fixtures necessary for carrying on his or her trade or business, not exceeding in value $75 in New Castle and Sussex Counties, and $50 in Kent County. All sewing machines owned and used by seamstresses or private families are exempt but this provision does not apply to persons who keep sewing machines for sale or hire. All pianos, piano playing attachments and organs leased or hired by any person residing in this state are exempt, but owner is to give notice of hiring or leasing of piano or organ to landlord, or his agent. (10 Del. Code Ann. 4902).

Head of family exemption provided for in 10 Del. Code Ann. 4903 declared unconstitutional. (380 A.2d 985). Replaced by uniform $500 head of household exemption for non-business related property. (10 Del. Code Ann. 4903).

Benefits paid by any benefit society are exempt from attachment, garnishment and other process and cannot be taken in any way to pay any debt or liability of any member or beneficiary. (18 Del. Code Ann. 6218).

Substitution.

No provision.

Debts Against Which Exemptions Not Allowed.

Personal property is not exempt from taxation or sale for taxes. (10 Del. Code Ann. 4910). See also supra, second introductory paragraph of this topic.

Necessity of Claiming Exemption.

Exemptions allowed to head of family may be claimed by husband and wife jointly or by either with written consent of other, or half may be claimed by each spouse. (10 Del. Code Ann. 4904).

Waiver of Exemptions.

Personal property exemption may be waived by husband and wife jointly. (10 Del. Code Ann. 4912).

Earnings.

85% of any Delaware resident’s wages for labor or services are exempt from mesne or execution attachment, except when process is for fine, costs or taxes owed to State. Only one attachment may be made on any amount of wages due, and creditor causing attachment to be made has priority until judgment for which attachment was made has been fully paid, except when garnishment is for tax, interest, penalty or other amount owed to State revenue department. Wages includes salaries, commissions, and any other remuneration employer pays employee, but does not include payments made for services of person who is self-employed. (10 Del. Code Ann. 4913; 30 Del. Code Ann. 556). Attachments for support of spouse and minor children are not subject to limitations of 10 Del. Code Ann. 4913. (460 A.2d 525).

Exemption of wages cannot be waived. See also topics 8.09 Garnishment, 8.02 Attachment.

8.07 FORECLOSURE:

See topic 8.13 Liens; categories 3 Business Regulation and Commerce, topic 3.09 Commercial Code; 20 Mortgages, topic 20.04 Mortgages of Real Property.

8.08 FRAUDULENT SALES AND CONVEYANCES:

Uniform Commercial Code adopted. (1962 - rev. Art. 8 [1977] & Art. 9 [2000], adopted 1967, 2001) (6 Del. Code Ann. 1-101–6-11-109). See category 3 Business Regulation and Commerce, topic 3.09 Commercial Code.

Uniform Fraudulent Transfer Act has been adopted. (1984, adopted 1996) (6 Del. Code Ann. 1301–6-1311).

Remedies.

Under this chapter, cause of action for fraudulent transfer or obligation is extinguished unless action is brought (a) under § 1304(a)(1) within four years after transfer or obligation occurred, or, if later, within one year after transfer or obligation was or could reasonably have been discovered; (b) under §§ 1304(a)(2) or 1305(a) within four years after transfer was made or obligation incurred; or (c) under § 1305(b), within one year after transfer was made or obligation incurred. (6 Del. Code Ann. 1309).

Bulk Sales.

Uniform Commercial Code bulk transfers provision repealed. (70 Del. L. 439, § 1).

8.09 GARNISHMENT:

On any judgment of court of record, in addition to any other execution, writ of attachment may be issued containing order for summoning as garnishees any persons indebted to, or holding property of judgment debtor. Perishable goods or goods creating charge by keeping seized under writ may be sold by order of court. (10 Del. Code Ann. 5031).

In attachment, individuals or corporations (except banks, trust companies, savings institutions and loan associations for attachment other than wage attachment of employee) may be summoned as garnishees and proceedings had thereafter to subject property held by them belonging to debtor, or debts owed by them to debtor, to writ except when garnishment is for tax, interest, penalty, or other amount owed to State's revenue department. Insurance companies are not liable to attachment except as to moneys due in consequence of happening of risk provided in insurance policy or wage attachments of employees. (10 Del. Code Ann. 3502; 30 Del. Code Ann. 556). Banks and trust companies are exempt from equitable order restraining disbursement of funds. (517 A.2d 259). Unlawful for employer to dismiss employee because employer summoned as his garnishee. (10 Del. Code Ann. 3509).

Property Which May Be Reached.

Goods, chattels, rights, credits, moneys, effects, lands and tenements may be attached under this chapter. (10 Del. Code Ann. 3508). See also topic 8.06 Exemptions.

Jurisdiction.

In Superior Court, Court of Common Pleas, Justice of Peace or Family Court. (10 Del. Code Ann. 3513).

Proceedings to Obtain.

Same as foreign attachment. (10 Del. Code Ann. 5031).

Answer of Garnishee.

Garnishee must serve answer within 20 days of service of process specifying what goods, chattels, rights, credits, money or effects of defendant, if any, he has in his possession or custody. (Super. Ct. Civ. Rule 5[aa][2]). Answer of garnishee in execution attachment, at option of plaintiff, may be taken by affidavit before anyone authorized to administer oaths, and when so taken, it is docketed in same manner, and has same effect, as if taken in open court. (10 Del. Code Ann. 5032).

Practice.

Follows foreign attachment practice. (10 Del. Code Ann. 5031).

Adverse Claims.

No statutory provision.

Judgment is pleadable in bar by garnishee in action by defendant in execution attachment against him. (10 Del. Code Ann. 5031).

Earnings.

Wages of employee of state or any county, district or municipality thereof are subject to garnishment. (10 Del. Code Ann. 3503[a]). Any officer of State, or any county, district or municipality may be summoned to appear and answer as garnishee. (10 Del. Code Ann. 3503[a]). Employee includes any person performing any form of work for State, county, district or municipality for compensation. (10 Del. Code Ann. 3503[b]).

As to wages generally, see topic 8.06 Exemptions.

8.10 HOMESTEADS:

No legislation.

8.11 JUDGMENT NOTES:

See category 5 Civil Actions and Procedure, topic 5.15 Judgments, subhead Judgment by Confession.

8.12 LEVY:

See topics 8.02 Attachment, 8.05 Executions.

8.13 LIENS:

Uniform Commercial Code adopted. (1962 - rev. Art. 8 [1977] & Art. 9 [2000], adopted 1967, 2001) (6 Del. Code Ann. 1-101 et seq.). See category 3 Business Regulation and Commerce, topic 3.09 Commercial Code.

Garage Keeper.

Hotelkeeper, innkeeper, garage owner, auction service or other person who for price has custody or care of any vehicle, who makes repairs on or who provides services, supplies or materials for same, has lien on vehicle to secure payment of price. (25 Del. Code Ann. 3901[a]). If price remains unpaid, in whole or in part, 30 days after it became due lienor may apply to Justice of Peace Court for authorization of sale. Court will notify owner, who may request hearing. (25 Del. Code Ann. 3903). Owner may file action in replevin at any time, in accordance with 10-c.95. (25 Del. Code Ann. 3908).

Mechanics' Liens.

Law contained in 25-c.27. Any person or persons having performed or furnished labor or material, or both, to amount exceeding $25 in or for erection, alteration, or repair of any structure, in pursuance of any contract, express or implied, with owners of such structure, or with agent of such owner, or with any contractor or subcontractor who has contracted for erection, alteration or repair of same, and for furnishing of whole or any part of materials therefor, may obtain lien upon such building, and upon ground upon which same is situated. (25 Del. Code Ann. 2702[a]). No lien shall be obtained on land or structure which is used solely as residence of owner, when said owner has made full or final payment in good faith to contractor with whom he contracted for construction or repair. (25 Del. Code Ann. 2707). Unperfected lien not assignable. (435 A.2d 730).

Statement of Claim.

Every person entitled to benefits conferred by 25-c.27, and desiring to avail himself of lien provided for, must, within time specified, file statement of claim in office of Prothonotary of Superior Court in and for county wherein such structure is situated. (25 Del. Code Ann. 2712[a]).

Any contractor who has contracted directly with owner or reputed owner of any structure and has furnished both labor and material shall file his statement within 180 days after completion of structure (as defined in this section). (25 Del. Code Ann. 2711[a][1]). All other persons embraced within provisions of this chapter and entitled to avail themselves of liens, must file statement of their respective claims within 120 days from completion of labor performed or from last delivery of materials furnished by them respectively (as defined in this section). (25 Del. Code Ann. 2711[b]).

Statement must set forth: Names of plaintiff or claimant, owner or reputed owner of structure, and contractor; name of contractor and whether contract of claimant was made with such owner or his agent or with such contractor; amount claimed to be due and, if amount not fixed by contract, statement of nature and kind of labor done or materials furnished with bill of particulars annexed; time when said labor or furnishing of said materials was commenced and finished except that, (i) with respect to claims on behalf of contractors covered by 2711(a), date of completion of structure, and, (ii) with respect to claims on behalf of other persons covered by 2711(b), date of completion of labor performed or last delivery of materials furnished or both; location and description of structure; that said labor was done, or said materials were furnished on credit of said structure; amount of claim (which must exceed $25), and that neither amount nor any part thereof has been paid to claimant; amount plaintiff claims due to him on each structure; time of recording of first mortgage, or conveyance in nature of first mortgage, upon such structure which is granted to secure existing indebtedness or future advances provided at least 50% of loan proceeds are used for payment of labor or materials, or both, for such structure. Claimant must make affidavit to truth and correctness of claim and of facts stated therein. (25 Del. Code Ann. 2712[b]-[c]).

Discharge.

Lien may be discharged during proceedings by deposit with court of cash or approved security. (25 Del. Code Ann. 2729).

Judgment obtained upon such claim becomes lien upon such building, house or structure, and upon ground upon which same is situated, and relates back to day upon which labor was begun or furnishing of said material was commenced or time immediately following recording of first mortgage or conveyance in nature of first mortgage and takes priority accordingly. (25 Del. Code Ann. 2718[a]).

Proceedings to recover amount of any claim are by writ of scire facias, in form prescribed by Superior Court. (25 Del. Code Ann. 2714).

Execution of judgments for mechanics lien is by writ of levari facias. (25 Del. Code Ann. 2719).

Lien on Vessels.

Mechanics' liens may be placed for labor or materials furnished in construction or alteration of vessel within this State; affidavit and bill of particulars must be filed within one year after such repairs. (25 Del. Code Ann. 2726).

If proceeds of sale are not sufficient to pay all liens in full, proceeds are divided ratably without priority or preference. (25 Del. Code Ann. 2720).

Personal action against owner, contractor, or other contracting parties may be maintained before, after, or at time of mechanics' lien proceedings and judgment on one does not bar judgment on other. But monies paid on one such judgment may be ordered by court to be credited on other. (25 Del. Code Ann. 2721; 25 Del. Code Ann. 2725[b]).

Public Works.

Simultaneous with execution of formal contract successful bidder shall execute bond to state in sum equal to 10% of contract price. (29 Del. Code Ann. 6927[a]). In event of default, money from bond will become property of state for benefit of agency. (29 Del. Code Ann. 6927[b]). Agency may reduce or waive bond if stated in bid specifications. (29 Del. Code Ann. 6927[h]).

For other liens mentioned or discussed elsewhere in this digest, see topics 8.02 Attachment, Executions, Exemptions, Homesteads; categories 3 Business Regulation and Commerce, topics 3.08 Carriers, 3.09 Commercial Code; 5 Civil Actions and Procedure, topic 5.15 Judgments; 20 Mortgages, topic 20.04 Mortgages of Real Property; 20 Property, topic 20.10 Landlord and Tenant; 22 Taxation, topic 22.16 Property Taxes, subhead Liens.

Redemption.

There is no statutory right of redemption of property sold in foreclosure of liens thereon.

8.14 MECHANICS' LIENS:

See topic 8.13 Liens.

8.15 PLEDGES:

Uniform Commercial Code. (1962 - rev. Art. 8 [1997] & Art. 9 [2000], adopted 1967, 2001) (6 Del. Code Ann. 1-101 et seq.). See category 3 Business Regulation and Commerce, topic 3.09 Commercial Code.

8.16 RECEIVERS:

Jurisdiction.

Court of Chancery has jurisdiction as at common law respecting receivers in general. This jurisdiction has been broadened to include receivers for corporations. (Ch. Ct. Rules 148).

Proceedings.

Upon bill filed, chancellor may appoint receiver pendente lite and issue rule requiring defendant to show cause why receiver should not be appointed or continue. (Ch. Ct. Rule 149).

Eligibility and Competency.

No person may be appointed sole receiver who does not at time of appointment reside in State of Delaware. (Ch. Ct. Rule 150).

Upon dissolution of any corporation, Court of Chancery, upon application of any creditor, stockholder, director of corporation, or other person, who, in court's discretion, shows good cause therefor, may either appoint one or more of directors thereof as trustees, or appoint one or more persons as receivers. (8 Del. Code Ann. 279).

Qualification.

Receiver must give bond with surety to be approved by court. (Ch. Ct. Rule 149).

Powers and Duties.

In general, are at discretion of chancellor. (Ch. Ct. Rule 148). Receiver appointed by chancellor for any Delaware corporation is vested by operation of law without act or deed, with title to all corporate property, real, personal or mixed, except real estate situate outside state. (8 Del. Code Ann. 292[a]).

Compensation is fixed by chancellor after notice to creditors. (Ch. Ct. Rule 164; Ch. Ct. Rule 165).

Discharge is effected by chancellor upon petition of receiver after final distribution. (Ch. Ct. Rule 168).

8.17 REDEMPTION:

See topics 8.05 Executions, 8.13 Liens; categories 20.04 Mortgages, topic Mortgages of Real Property; 22 Taxation, topic 2.16 Property Taxes, subhead Redemption.

8.18 SUPPLEMENTARY PROCEEDINGS:

No provision for.

8.19 TRUSTEE PROCESS:

See topic 8.09 Garnishment.

8.20 USURY:

See category 3 Business Regulation and Commerce, topic 3.17 Interest.

9 DISPUTE RESOLUTION

9.01 ALTERNATIVE DISPUTE RESOLUTION:

Mandatory Dispute Resolution.

Compulsory Dispute Arbitration.

Pretrial alternative dispute resolution required for all civil cases filed in Superior Court or Court of Common Pleas. (Super. Ct. Civ. Rule 16[b][4]; C.P. Ct. Civ. Rule 16[b][1][iv]). Unless ordered by court, compulsory dispute resolution does not apply to matters involving Superior Court Rules 23 and 81[a], replevin, foreign or domestic attachment, statutory penalty and mortgage foreclosure actions, and *in forma pauperis* actions. (Super. Ct. Civ. Rule 16[b][4][e]; C.P. Ct. Civ. Rule 16[b][5]). Additionally, alternative dispute resolution not available in Court of Common Pleas when parties not represented by counsel or for *de novo* appeals from Magistrate's Court. (C.P. Ct. Civ. Rule 16[b][5]).

Procedure.

Judge enters scheduling order that establishes or limits time for alternative dispute resolution. (Super. Ct. Civ. Rule 16[b]; C.P. Ct. Civ. Rule 16[b]). Parties decide whether alternative dispute resolution is binding. (Super. Ct. Civ. Rule 16[b][4]; C.P. Ct. Civ. Rule 16[b][1][iv]). Parties decide format for dispute resolution. (Super. Ct. Civ. Rule 16[b][4]; C.P. Ct. Civ. Rule 16[b][1][iv]). If parties cannot agree, default is mediation. (Super. Ct. Civ. Rule 16[b]; C.P. Ct. Civ. Rule 16[b][1][iv]). If parties cannot agree on alternative dispute resolution Practitioner, they shall file joint motion 30 days after issuance of scheduling order requesting that court appoint Practitioner. (Super. Ct. Civ. Rule 16[b][4][a]; C.P. Ct. Civ. Rule 16[b][1][v]). If case cannot be resolved by alternative dispute resolution, parties may take case to trial.

Sanctions.

Parties must act in good faith when scheduling alternative dispute resolution. (Super. Ct. Civ. Rule 16[b][4][a]; C.P. Ct. Civ. Rule 16[b][1][v]). Court may impose sanctions if parties have not attempted to agree upon Practitioner in good faith. (Super. Ct. Civ. Rule 16[b][4][a]; C.P. Ct. Civ. Rule 16[b][1][v]). Practitioner may apply to Court for sanctions if parties fail to comply with engagement. (Super. Ct. Civ. Rule 16[b][4][b]; C.P. Ct. Civ. Rule 16[b][4]). Sanctions may include dismissal or default judgment. (Super. Ct. Civ. Rule 16[b][4][b]; C.P. Ct. Civ. Rule 16[b][4]).

Fees.

Parties shall pay Practitioner in accordance with amount established by Practitioner and agreed to by parties or ordered by court. (Super. Ct. Civ. Rule 16[b][4][b]; C.P. Ct. Civ. Rule 16[b][4]).

Role of Practitioner.

Practitioner may not be called as witness unless ordered by court. (Super. Ct. Civ. Rule 16[b][4][c]; C.P. Ct. Civ. Rule 16[b][6]). Practitioner shall be immune from civil liability for acts or omissions done while engaging in alternative dispute resolution, unless act or omission is done in bad faith, with malicious intent, or in manner exhibiting willful, wanton disregard of rights, safety, or property. (Super. Ct. Civ. Rule 16[b][4][c]; C.P. Ct. Civ. Rule 16[b][6]). Practitioner is bound by any confidentiality agreement signed by parties. (Super. Ct. Civ. Rule 16[b][4][c]; C.P. Ct. Civ. Rule 16[b][6]).

Family Court Mediation.

In all proceedings requesting relief in form of support and all proceedings involving custody and visitation, mediation conference with parties shall be held by court staff mediator to identify specific areas at issue to attempt amicable settlement of all unresolved issues or to limit those issues which must be submitted to court for determination. (Fam. Ct. Civ. Rule 16[a][1] & [b][1]). No trial for either custody or support shall be scheduled prior to completion of mediation process unless court, upon application of either party, court staff mediator, or own motion, orders proceeding referred to judicial scheduling. (Fam. Ct. Civ. Rule 16[a][1] & [b][1]).

Procedure.

Prior to mediation conference, each party may be required to complete written report in form approved by court. (Fam. Ct. Civ. Rule 16[a][3] & [b][3]). For support cases, Rule 16(a) financial report is required. (Fam. Ct. Civ. Rule 16[a][3]). For custody or visitation cases, court will inform each party whether written report is required. (Fam. Ct. Civ. Rule 16[b][3]). If matter is not resolved at mediation conference, interim order will be entered. (Fam. Ct. Civ. Rule 16[a][4] & [b][4]).

Hearing.

If matter is not resolved, interim order will immediately issue in support cases. (Fam. Ct. Civ. Rule 16[a][4]). Requirement may be waived if trial before master of action is to be held within ten days of mediation conference. (Fam. Ct. Civ. Rule 16[a][4]). For visitation cases, if agreement cannot be reached, mediator shall recommend interim contact schedule. (Fam. Ct. Civ. Rule 16[b][4]). Recommendation will be reviewed by judge and, if approved, will become interim order of contact without prejudice to either party pending full hearing. (Fam. Ct. Civ. Rule 16[b][4]). If recommendation is not approved, hearing before judge shall be scheduled on expedited basis. (Fam. Ct. Civ. Rule 16[b][4]). Failure of either party to comply with requirements of mediation conference may result in imposition of appropriate sanctions. (Fam. Ct. Civ. Rule 16[a][7]).

Voluntary Dispute Resolution.

Uniform Arbitration Act adopted. (10 Del. Code Ann. 5701–10-5725). See topic 9.02 Arbitration and Award.

Family Court Voluntary Arbitration.

Voluntary binding arbitration available in all matters involving property division, spousal support, and alimony. (Fam. Ct. Civ. Rule 16.1). Arbitration not available in protection from abuse, custody and/or visitation proceedings. (Fam. Ct. Civ. Rule 16.1[a]). Election to pursue arbitration by both parties constitutes waiver of right to trial on all matters subject to arbitration stipulation. (Fam. Ct. Civ. Rule 16.1[b]). Parties can select arbitrator, or judge will do so, from list of attorneys who have significant and current experience in Family Court, if parties have not done so. (Fam. Ct. Civ. Rule 16.1[c] & [d]). Arbitrator to be compensated $100 per hour, not to exceed $1,000 unless parties agree otherwise. (Fam. Ct. Civ. Rule 16.1[e]). Arbitration to be held within 40 days of appointment of arbitrator. (Fam. Ct. Civ. Rule 16.1[f]). Rules of Family Court apply to compel attendance of witnesses and production of documents. (Fam. Ct. Civ. Rule 16.1[i]). Unless waived by parties, testimony is under oath or affirmation. (Fam. Ct. Civ. Rule 16.1[j]). Arbitrator to issue decision within ten days of conclusion of hearings. (Fam. Ct. Civ. Rule 16.1[n]).

Interim Rule 16.2 Voluntary Mediation.

Superior Court Rule 16.2, pertaining to voluntary mediation, was deleted by order of court effective July 1, 2002.

Summary Proceedings.

To be eligible for Summary Proceedings, there must be at least $100,000 in controversy as to one party, although upon application of parties, court may agree to apply summary proceedings rules to actions involving lesser amounts. (Super. Ct. Civ. Rule 124[b] & [c]). One party must be Delaware citizen, corporation, or other business entity. (Super. Ct. Civ. Rule 124[b]). Personal injury claims may not be brought as summary proceedings. (Super. Ct. Civ. Rule 124[b]). All parties to summary proceeding must agree to matter being tried as such. (Super. Ct. Civ. Rule 124[b]). Agreement may be written or by stipulation. (Super. Ct. Civ. Rule 124[b]).

Procedure.

Summary proceedings can be initiated in one of two ways. (Super. Ct. Civ. Rule 125[a] & [b]). First, where all parties agree prior to filing of complaint to treatment of litigation as summary proceeding, action may be filed as such. (Super. Ct. Civ. Rule 125[a]). Complaint must state that summary proceedings requested, amount in controversy, that one party is Delaware citizen, corporation, or other business entity, and that defendant agrees to summary proceedings. (Super. Ct. Civ. Rule 125[a][3]). In alternative, action pending in Superior Court or in any other court may be converted into summary proceeding if action initially could have been brought as summary proceeding and court and parties consent. (Super. Ct. Civ. Rule 125[b][1]). Expedited pleading schedule used in summary proceedings. (Super. Ct. Civ. Rule 126). Within 55 days after service of complaint, briefing on motion to dismiss will be completed. (Super. Ct. Civ. Rule 126[c]). Expedited discovery schedule is also used. (Super. Ct. Civ. Rule 127). Each party limited to ten interrogatories and ten requests for admissions, including subparts. (Super. Ct. Civ. Rule 127[b] & [e]). Depositions are limited to opposing party's identified witnesses and affiants and four other persons. (Super. Ct. Civ. Rule 127[d]). Litigants are also required to identify documents they intend to rely upon at trial and witnesses they intend to call at trial, and plaintiffs must identify all persons consulted in preparation of complaint or answer to counterclaim at early stage in discovery. (Super. Ct. Civ. Rule 127[a]). All depositions must be completed within 120 days of filing of last answer, and all fact discovery must be completed within 180 days of filing of last answer. (Super. Ct. Civ. Rule 127[d] & [h]). There is no motion for summary judgment in summary proceeding. (Super. Ct. Civ. Rule 128).

Contractual Provisions.

Agreement in contract to use Summary Proceedings to resolve any disagreements about contract will be upheld if requisite amount is in controversy.

Hearing.

Parties have option to submit matter without using witnesses. (Super. Ct. Civ. Rule 129[a]). Under this option, expedited briefing schedule is used; all briefing is completed within 75 days of close of discovery. (Super. Ct. Civ. Rule 129[a]). When live witnesses are used at trial, trial will commence within 30 to 60 days after close of discovery and trial should be completed in five days. (Super. Ct. Civ. Rule 130[b]). Parties then file simultaneous post-trial briefs limited to 50 pages within ten days after trial. (Super. Ct. Civ. Rule 130[b]). Court's decision is rendered 30 days after filing of final brief or 30 days after oral argument. (Super. Ct. Civ. Rule 130[c]). Goal is to have final decisions rendered from ten months to one year from filing of complaint.

Appeal.

Cases treated as summary proceedings may be appealed directly to Delaware Supreme Court. No interlocutory appeals may be taken in case treated as summary proceeding. Appeals from cases tried as summary proceedings also expedited.

Voluntary Alternative Dispute Resolution.

(6 Del. Code Ann. 7701 to 7721). Dispute must involve at least $100,000 and not be subject to summary proceedings under 8 Del. Code Ann. 211, 215, 220, or 225. (6 Del. Code Ann. 7702[3]). Initiation of ADR under this statute tolls statute of limitations applicable to proceedings until 14 days after conclusion of ADR. (6 Del. Code Ann. 7720). Statute ceases to have any effect if litigation is commenced concerning dispute. (6 Del. Code Ann. 7721).

Procedure.

Any person can file certificate with Secretary of State accompanied by filing fee of $1,000 or in case of business entity organized in Delaware, filing fee is $100. (6 Del. Code Ann. 7703 to 7706). Certificate must include name and address of person filing certificate and agreement of each person filing to follow provisions of statute. (6 Del. Code Ann. 7704[a]). In addition, persons who have not filed certificate can agree to be bound to Voluntary Alternative Dispute Resolution Act if other party has filed certificate and agreement or contract incorporates (by reference or otherwise) ADR requirements. (6 Del. Code Ann. 7703[b]). ADR may be revoked by filing certificate stating such intent accompanied by appropriate filing fee. (6 Del. Code Ann. 7707).

Panel of three ADR Specialists are chosen by party initiating proceedings if proceeding is conducted in Delaware. (6 Del. Code Ann. 7709[a]). Party receiving notice of ADR shall either select one of members of panel or advise party that none are acceptable. (6 Del. Code Ann. 7709[c] to 7709[f]). If none are acceptable, Specialist shall be selected in accord with rules of Court. (6 Del. Code Ann. 7709[f]). If dispute is not submitted for resolution in Delaware, then ADR Specialist is chosen by one of two ways. If there are only two parties to dispute, ADR Specialist is chosen from panel, selected by party who initiated proceedings, of three qualified persons who reside or have office in state of incorporation or domicile of other party or jurisdiction where other party resides according to other party's ADR certificate. (6 Del. Code Ann. 7709[b][1]). If there are more than two parties, party who initiated proceedings chooses panel of three ADR Specialists where greatest number of other parties either are incorporated or domiciled or reside as before. (6 Del. Code Ann. 7709[b][2]). This list of ADR specialists is distributed with notice to other parties required by 6 Del. Code Ann. 7710. (6 Del. Code Ann. 7709[c]). Within 14 days of receiving notice, party chooses acceptable ADR Specialist from list or advises initiating party no panel members are acceptable. In dispute with more than two parties, ADR Specialist chosen by greatest number of parties is selected. (6 Del. Code Ann. 7709[d]).

ADR proceedings are started by sending written notice to other parties who filed ADR certificate or who agreed to be bound by ADR requirements. (6 Del. Code Ann. 7710). Failure to send notice to person with interest in dispute shall not prevent ADR proceedings from going forward between parties that did receive notice. (6 Del. Code Ann. 7710). Other parties who have not filed certificate with Secretary of State or signed agreement to be bound by Delaware Voluntary Dispute Resolution Act may be bound by proceedings by participating in process of selecting ADR Specialist. (6 Del. Code Ann. 7711).

Hearing.

Parties can agree to adopt different rules, but statute provides for following rules. (6 Del. Code Ann. 7714). No later than seven days prior to ADR, each party must submit statement of position (limited to 25 pages) and supporting documents to ADR Specialist and other parties. (6 Del. Code Ann. 7714[a]). At ADR, each party has one hour to present position. (6 Del. Code Ann. 7714[b]). Other party can have up to one hour to question presenting party. (6 Del. Code Ann. 7714[b]). After presentation, ADR Specialist will attempt to resolve dispute by meeting with parties either together or separately until close of regular business hours. (6 Del. Code Ann. 7714[c]). Parties can agree to continue discussion after this time until settlement or impasse is reached. (6 Del. Code Ann. 7714[d]). If settlement is reached, it must be reduced to writing as soon as possible and will be valid and binding on both parties. (6 Del. Code Ann. 7715). If no settlement is reached or impasse is declared, ADR Specialist will declare ADR concluded. (6 Del. Code Ann. 7715).

All ADR proceedings are confidential and any statements made or materials produced at ADR are not subject to discovery nor subject to waiver of any applicable privilege. (6 Del. Code Ann. 7716). But documents which otherwise would have been discoverable are still treated as discoverable despite their introduction at ADR. (6 Del. Code Ann. 7716).

Enforcement of ADR Rights.

Right to ADR may be enforced by any court with jurisdiction over parties. (6 Del. Code Ann. 7719[a]). Filing of certificate with Secretary of State is consent to have Chancery Court enforce this right. (6 Del. Code Ann. 7719[a]). Party forced to enforce its right to ADR may recover reasonable attorneys' fees. (6 Del. Code Ann. 7719[b]). Party failing to pay fees for ADR Specialist is subject to suit for three times fees and expenses, plus attorneys' fees and other costs incurred in such litigation. (6 Del. Code Ann. 7719[c]).

9.02 ARBITRATION AND AWARD:

Uniform Arbitration Act adopted. (10 Del. Code Ann. 5701–10-5725). Act does not apply to labor contracts negotiated by or covering employees represented by any labor organization or collective bargaining agent or representative. (10 Del. Code Ann. 5725).

Form and Requisites of Submission.

Appointment of arbitrator by method provided by agreement; if no method provided or method fails, court will appoint arbitrators upon application of party. (10 Del. Code Ann. 5704). Notice of intent to arbitrate must be served on other party, specifying agreement under which arbitration is sought, serving notice of 20 days to apply to enjoin arbitration. (10 Del. Code Ann.

5703[c]).

Contracts to Arbitrate Future Disputes.

Written agreements are valid. (10 Del. Code Ann. 5701).

Rescission.

No statutory provision.

Powers of Arbitrators.

Powers of arbitrators exercised by majority. (10 Del. Code Ann. 5705). Arbitrators may compel attendance of witnesses, production of documents and evidence and administer oaths; arbitrator or attorney may issue subpoena. (10 Del. Code Ann. 5708). Arbitrators shall appoint time and place for hearing and cause notification to be served not less than five days before hearing. (10 Del. Code Ann. 5706[1]). All arbitrators are to conduct hearing, but majority may determine any question and render final award. (10 Del. Code Ann. 5706[3]).

Mandatory Arbitration.

No statutory provision.

Award and Enforcement Thereof.

Court of Chancery enforces agreements and enters judgment on awards with two exceptions. (10 Del. Code Ann. 5702[a]). Award of money damages becomes judgment enforced by Superior Court and constitutes lien on realty in county where award made. (10 Del. Code Ann. 5718[b]). If action arises from arbitration agreement relating to contract to provide consumer credit, Court of Common Pleas enforces agreement and enters judgment on award. (10 Del. Code Ann. 5702[d]). Award by confession available for money due at any time before award otherwise made. (10 Del. Code Ann. 5710[a]). Award by confession available for money due at any time before award otherwise made. (10 Del. Code Ann. 5710[a]). Basis for award is written statement verified by each party authorizing award. (10 Del. Code Ann. 5710[a]). Award must be made within three months of verification and served upon arbitrators or agency or persons named to designate arbitrators. (10 Del. Code Ann. 5710[b]). Award may be made and entered on judgment roll by arbitrators or agency or persons named to designate arbitrators. (10 Del. Code Ann. 5710[c]). Court of Chancery must confirm award within one year unless grounds urged for modifying, vacating or correcting award. (10 Del. Code Ann. 5713).

Death or Incompetency of Party.

Where party to written agreement to submit dies, proceedings may be begun or continued upon proper notice to administrator, executor, or, in case of real estate, devisee or distributee. (10 Del. Code Ann. 5722).

State and municipal governments may enter into and be bound by written arbitration agreements. (10 Del. Code Ann. 5724).

Statute of Limitations.

Claim barred from arbitration where it would be barred by limitation of time if submitted to state court. (10 Del. Code Ann. 5702[c]).

10 DOCUMENTS AND RECORDS

10.01 ACKNOWLEDGMENTS:

Uniform Law on Notarial Acts adopted. (29 Del. Code Ann. 4321–29-4328).

Within State.

Acknowledgment or proof of deed may be made in Superior Court, or before any judge in State, notary public, two justices of peace for same county, or, for 75¢, Mayor of City of Wilmington. (25 Del. Code Ann. 122; 25 Del. Code Ann. 128). Acknowledgment may be made in Superior Court by attorney by virtue of power in or separate from instrument, if power be first proved. (25 Del. Code Ann. 122).

Outside State but Within United States.

Acknowledgment or proof of deed may be made before any U.S. circuit or district judge, any judge of court of record of any state, territory or country, mayor or chief officer of any city or borough, any commissioner of deeds, or any notary public of any state or territory or of District of Columbia by certificate indorsed upon or annexed to deed; or by certificate of clerk, or other officer of court. If certified by judge, seal of her court may be affixed to her certificate or certificate of attestation of clerk or keeper of seal. (25 Del. Code Ann. 129).

Outside the United States.

Acknowledgment or proof of deed may be made before any U.S. consul general, consul, vice-consul, consular agent or commercial agent of U.S. at places of their official residences. (25 Del. Code Ann. 129[a]).

Persons in or with U. S. Armed Forces.

Acknowledgment by member of U.S. Armed Forces or of merchant seaman outside U.S., or person on war duty outside U.S. may be taken before or by any commissioned officer in active service of rank of second lieutenant or higher in Army, Marine Corps, or Air Force or ensign or higher in Navy or Coast Guard. (25 Del. Code Ann. 130[a]). Such officer must sign certificate of acknowledgment and state his or her rank and branch of service. (25 Del. Code Ann. 130[d]). See topic 10.03 Notaries Public.

General Requirement as to Taking.

Notarial officer taking acknowledgment must determine from personal knowledge or satisfactory evidence that person appearing before officer and making acknowledgment is person whose true signature is on instrument. (29 Del. Code Ann. 4322[a]). Such officer has satisfactory evidence if person is personally known to officer, is identified on basis of identification documents, is identified by oath or affirmation of either: 1) one credible witness personally known to officer or 2) two credible witnesses with identification documents. (29 Del. Code Ann. 4321 [21]; 29 Del. Code Ann. 4322[a]).

General Requirements of Certificate of Notarial Acts.

Date of expiration of commission, if any, is necessary if notarial officer is notary public, but omission may be subsequently corrected. Notarial act must be evidenced by certificate physically or electronically signed and dated by notarial officer. (29 Del. Code Ann. 4327[a]). Certificate must also include identification of jurisdiction in which notarial act performed, title of office of notarial officer, and may include official stamp or seal of office. (29 Del. Code Ann. 4327[a]). Certificate of notarial act sufficient if it meets requirements of 29 Del. Code Ann. 4327(a) and in form set forth in 29 Del. Code Ann. 4328, in form otherwise prescribed by law of State or by-laws or regulations applicable in place in which notarial act performed, or sets forth actions of notarial officer which are sufficient to meet requirements of designated notarial act. (29 Del. Code Ann. 4327[b]). Near signature, must affix permanent, photographically reproducible image of physical or electronic seal. (29 Del. Code Ann. 4327[b]).

Married Women.

Deed of married woman, executed during coverture, concerning lands or tenements, must be acknowledged by her. (25 Del. Code Ann. 102). Deed binds her, her heirs, and all claiming by or under her to special warranty deed. (25 Del. Code Ann. 102). If married woman abandoned without just cause any judge certifying must so state. (25 Del. Code Ann. 124).

Attorneys in Fact.

Uniform Durable Power of Attorney Act adopted. (12 Del. Code Ann. 4901–12-4905).

Corporations.

Corporate acknowledgment for corporate deed or instrument may be by president or other presiding officer, or vice-president or assistant vice-president duly authorized by resolution of directors, trustees, or other managers, or by legally constituted attorney before any state judge, federal district or circuit court judge, notary public or two justices of peace for same county. (25 Del. Code Ann. 127).

Foreign Acknowledgments.

See subheads Outside State but Within United States, and Outside the United States, supra.

Effect of Acknowledgment.

Duly certified acknowledgment of deed or letter of attorney does not constitute instrument evidence without recording, unless deed is one taken and certified upon private examination of married woman. (25 Del. Code Ann. 155).

Proof by Subscribing Witness.

Deed may be acknowledged by any party to deed in Superior Court or before any judge in State, notary public, two justices of peace for same county, or Mayor of City of Wilmington. (25 Del. Code Ann. 122). Deed can also be acknowledged in Superior Court by attorney, by virtue of power in or separate from it, if power is first proven in court. Deed may be proved in Superior Court by one or more of subscribing witnesses. (25 Del. Code Ann. 122).

Certification of acknowledgment is made by clerk, or Prothonotary, judge, notary public, or justices of peace before whom proof is taken. (25 Del. Code Ann. 123).

Alternative to Acknowledgment or Proof.

No statutory provision.

Forms.

Following short form certificates of notarial acts (29 Del. Code Ann. 4328) are sufficient for purposes indicated, if completed with information required by 29 Del. Code Ann. 4327(a):

Form

For an acknowledgment in an individual capacity:

State of . . . .

County of . . . .

This instrument was acknowledged before me on . . (date) . . by . . (name(s) of person(s)).

. . . .

(signature of notarial officer)

(Seal, if any)

. . . .

(title and rank)

(my commission expires: . . .)

Form

For an acknowledgment in a representative capacity:

State of . . . .

County of . . . .

This instrument was acknowledged before me on . . (date) . . by . . (name(s) of person(s)) as ...... (type of authority, e.g., officer, trustee, etc.) of . . (name of party on behalf of whom instrument was executed).

. . . .

(signature of notarial officer)

(Seal, if any)

. . . .

(title and rank)

(my commission expires: . . .)

Form

For verification upon oath or affirmation:

State of . . . .

County of . . . .

Signed and sworn to (or affirmed) before me on . . (date) . . by . . (name(s) of person(s) making statement).

. . . .

(signature of notarial officer)

(Seal, if any)

. . . .

(title and rank)

(my commission expires: . . .)

Form

For witnessing or attesting a signature:

State of . . . .

County of . . . .

Signed and attested before me on . . (date) . . by . . (name(s) of person(s)).

. . . .

(signature of notarial officer)

(Seal, if any)

. . . .

(title and rank)

(my commission expires: . . .)

Form

For attestation of a copy of a document:

State of . . . .

County of . . . .

I certify that this is a true and correct copy of a document in the possession of . . . .

. . . .

(signature of notarial officer)

(Seal, if any)

. . . .

(title and rank)

(my commission expires: . . .)

Secretary of State.

If instrument to be filed with Secretary of State under Tit. 8 must be acknowledged, person or one of persons signing must acknowledge, before person authorized by law of place of execution to take acknowledgments, that it is, as case may be, his or corporation's deed and act and that facts stated therein are true. (8 Del. Code Ann. 103[b]). If person taking acknowledgment has seal of office, it shall be affixed to instrument. (8 Del. Code Ann. 103[b][1]).

Validating Acts.

Defective acknowledgment does not affect validity. (25 Del. Code Ann. 132).

10.02 AFFIDAVITS:

Any judge, justice of peace, or notary public has authority, in any case in which oath or affirmation is necessary or proper, to administer such oath or affirmation. (10 Del. Code Ann. 5301). Officer of Armed Forces may take affidavits for military personnel. (25 Del. Code Ann. 130). See topic 10.01 Acknowledgments.

General Requirements as to Administration.

No statutory requirement concerning knowledge of identity by person taking oath.

General Requirements of Jurat.

Official seal must be affixed but certificate of authority not required.

Use of Affidavit.

Miscellaneous statutory uses. Use in motion for summary judgment as in federal rules. See Rule 56.

Alternative to Affidavit.

No statutory provision.

Form

State of . . . . County of . . . . SS: Be it remembered that on this . . . . day of . . . . A.D. 20. ., personally came before me, the Subscriber, a Notary Public for the State and County aforesaid, ... being duly sworn, did depose and say:

. . . .

Sworn to and subscribed before me the day and year aforesaid.

. . . .

Notary Public

10.03 NOTARIES PUBLIC:

Qualification.

Must be at least 18 years of age and provide evidence of: good character and reputation; reasonable need for notary commission; and legal residence in Delaware. (29 Del. Code Ann. 4301[b]). Appointment revocable for cause by Governor or Secretary of State. (29 Del. Code Ann. 4301[d]).

Authentication.

See topic 10.01 Acknowledgments.

Seal must show notary's name, must include "My Commission Expires on" and Commission expiration date, and words "Notary Public" and "State of Delaware". (29 Del. Code Ann. 4310[a]).

Powers and Duties.

Usual duties of office include power to take acknowledgments. Must ensure identity of person whose signature he is certifying by requiring satisfactory evidence of identity. (29 Del. Code Ann. 4309[a]).

Territorial Extent of Powers.

Statewide. (29 Del. Code Ann. 4323).

Term of Office.

Two year commission (fee $60), two year renewal (fee $60), four year renewal (fee $90). (29 Del. Code Ann. 4307[a]). In addition there is $3 fee per term for use of Great Seal which is affixed to Notary Public Commission from Governor.

Fees.

Maximum fee of any paper notarial act is $5. (29 Del. Code Ann. 4311[a]). Fees may be waived by Notary. (29 Del. Code Ann. 4311[d]).

Commissioners of deeds in any other jurisdiction may take acknowledgment and proof of deed. (25 Del. Code Ann. 129[b]).

Officers of U.S. Armed Forces.

Notarial acts for member of U.S. Armed Forces or merchant seaman outside U.S. or person on war duty outside U.S. may be performed by officer in active service of rank of second lieutenant or higher in Air Force, Army or Marine Corps, or ensign or higher in Navy or Coast Guard. (25 Del. Code Ann. 130[a]). Such officer must sign certificate as to oath, etc., and state his rank and branch of service. (25 Del. Code Ann. 130[d]).

10.035 ELECTRONIC NOTARIES PUBLIC:

Qualification.

Must be at least 18 years of age and provide evidence of good character and reputation; reasonable need for notary commission; and legal residence including street address in Delaware. (29 Del. Code Ann. 4302[b]). Non-resident electronic notaries must demonstrate good character and reputation; reasonable need for notary commission; office or regular employment in Delaware; good standing as attorney licensed in any state; or current employment with banking, trust, or insurance company organized under laws of United States or any state. Non-resident notaries not employed in Delaware must designate in state agent to receive service. (29 Del. Code Ann. 4302[c]).

Authentication.

Electronic seal must show notary's name, words "My Commission expires on", commission expiration date, and words "Notary Public" and "State of Delaware". (29 Del. Code Ann. 4310[c]).

Powers and Duties.

Usual duties of office include power to take acknowledgments. Must ensure identity of person whose signature he is certifying by requiring satisfactory evidence of identity. (29 Del. Code Ann. 4309[a]).

Territorial Extent of Powers.

Statewide. (29 Del. Code Ann. 4323).

Term of Office.

Two-year commission (fee $60). Secretary of State may establish other fees, including maximum $10 fee per notarial act or service. (29 Del. Code Ann. 4307[b], [c]).

Fees.

Maximum fee for electronic notarial act is $25. (29 Del. Code Ann. 4311[b]). May waive any fee other than electronic notarial act or services pursuant to 29 Del. Code Ann. 4307(c). (29 Del. Code Ann. 4311[d]).

10.04 RECORDS:

There is Recorder of Deeds in each county. *For list of Counties and County Seats see first page for this state in Volume containing Practice Profiles Section.*

Uniform Commercial Code adopted. See category 3 Business Regulation and Commerce, topic 3.09 Commercial Code.

Recordable Instruments.

It is duty of each county recorder to record, within reasonable time, deeds, indentures, letters of attorney relating to land, mortgages, releases of lien of mortgages, leases, releases, assignments, conditional sales and leases of railroad and railway equipment and rolling stock, oaths of office, plots and descriptions, appointments of deputy registers of wills, certificates of commissioners and agreements of owners bounding and marking lands, petitions and orders for sheriff’s deeds, all instruments authorized or directed by law to be recorded or lodged by recorder of deeds. County recorder must not record military service discharge documents. (9 Del. Code Ann. 9605[a], [j]).

Place of Recording.

Deed or letter of attorney concerning lands or tenements shall, with certificate of acknowledgment or proof and all indorsements and annexations, be recorded in recorder’s office for county wherein such lands or tenements or any parts thereof are situated. (25 Del. Code Ann. 151).

Requisites for Recording.

No deed or other instrument conveying land may be recorded without words “prepared by” followed by name and address of person who drafted or prepared deed or other instrument for recording; information required by this subsection shall appear on first page of instrument to be recorded. (9 Del. Code Ann. 9605[h]). Recorder of Deeds for Kent County shall not accept for recording until received payment of all state and municipal realty transfer tax due on transfer, with exception of City of Dover realty transfer tax, provided that any municipality which imposed realty transfer tax may continue to impose tax upon written notification to recorder. (9 Del. Code Ann. 9605[i]). Deed or instrument concerning land has no effect on lands other than those mentioned in document located in county where document is recorded. (25 Del. Code Ann. 152). Faulty acknowledgment will not invalidate properly recorded instrument. (25 Del. Code Ann. 132).

Recording Fees.

Fees in each county are established by ordinance. (9 Del. Code Ann. 9617–9-9619).

Filing under Uniform Commercial Code.

If local law governs perfection of security interest, then filing should be made in same place mortgage on property is filed when collateral is as-extracted collateral or timber to be cut, or goods which are or are to become fixtures. (6 Del. Code Ann. 9-501[a][1]). In all other cases, filing should be in office of Secretary of State. (6 Del. Code Ann. 9-501[a][2]). Except for public-finance or manufactured-home transactions, filing fee is amount not to exceed $100 for four pages, plus $2 per extra page, for written statements; amount not to exceed $50 for statements filed via Internet or similar medium; plus $25 for each name required to be indexed, if more than two. (6 Del. Code Ann. 9-525[a] & 525[c]). Except for recording and satisfaction fees, no fee required with respect to record of mortgage effective as financing statement filed as fixture filing or as financing statement covering as-extracted collateral or timber to be cut under 6 Del. Code Ann. 9-502(c); 6 Del. Code Ann. 9-525(e).

Foreign Conveyances or Encumbrances.

See category 21 Property, topic 21.16 Real Property.

Effect of Not Recording.

Deed concerning lands or tenements has priority from time of recording, without respect to time it was signed, sealed or delivered. (25 Del. Code Ann. 153). Failure to record within 15 days of execution of any writing transferring title or possessory interest, renders document unenforceable in Delaware courts. (25 Del. Code Ann. 158). Upon recordation and payment of any and all taxes, penalties and other charges hereto, document rendered unenforceable by statute shall be renewed and reviewed with same force and effect as if it had never been unenforceable. (25 Del. Code Ann. 158).

Torrens system of land registration has not been adopted.

Transfer of decedent’s title to real estate to his heir or devisee sufficiently shown by probate record of will or administration.

Vital Statistics.

Reports of births, deaths, and marriages must be filed in Office of Vital Statistics or as otherwise directed by State Registrar. (16 Del. Code Ann. 3121; 16 Del. Code Ann. 3123; 16 Del. Code Ann. 3125). Reports of adoption must be filed with State Registrar. (16 Del. Code Ann. 3126[a]). Fee for searches of records and issuance of certificates must reflect cost of doing such work, but must not exceed $25. (16 Del. Code Ann. 3132[a]).

Establishing Records.

State Registrar of Vital Statistics may register any unrecorded birth, marriage, death, divorce or fetal death, on production of evidence thereof satisfactory to him. (16 Del. Code Ann. 3129).

10.05 SEALS:

Distinction between sealed and unsealed instruments at common law is recognized. (24 Del. Ch. 436, 15 A.2d 177). No statutory requirement for seals on private instruments; deed valid regardless of grantor’s seal. (25 Del. Code Ann. 131).

“L. S.” or “seal,” written, printed or typed, is sufficient seal.

Uniform Commercial Code adopted. (6 Del. Code Ann. 1-101 et seq.).

Corporate Seals.

Corporation may have corporate seal. (8 Del. Code Ann. 122[3]).

Effect of Seal.

Failure of consideration is defense to action on sealed contract, but lack of consideration is not. (262 A.2d 648).

10.06 TORRENS ACT:

Not adopted.

10.07 VITAL STATISTICS:

See topic 10.04 Records.

11 EMPLOYMENT

11.01 EMPLOYER AND EMPLOYEE:

See topic 11.02 Labor Relations.

11.02 LABOR RELATIONS:

Department of Labor is charged generally with administering labor laws of state, directing attention of Attorney General to violation of such laws, investigating labor conditions generally, collect fees for research activities conducted pursuant to this section, proposing rules to Industrial Accident Board, promoting voluntary arbitration, mediation and conciliation of labor disputes, promoting voluntary apprenticeship through cooperation with U.S. Department of Labor, and making regulations for internal administration of Department. (19 Del. Code Ann. 105[a]).

Hours of Labor.

Children under 16 will not be allowed to work before 7:00 a.m. or after 7:00 p.m. (9:00 p.m. from June 1 through Labor Day), nor more than four hours on any day when school is in session, eight hours on any day when school is not in session, 18 hours in any week when school is in session for five days, 40 hours in any week when school is not in session and six days in any week. (19 Del. Code Ann. 506[d], [e]). Children under 18 shall not spend more than 12 hours in combination of school and work hours per day, shall have at least eight consecutive hours of nonwork, nonschool time each 24-hour day and shall not work more than five hours continuously without nonworking period of at least one-half hour. (19 Del. Code Ann. 507[c], [d], [e]).

Wages.

Employer must not knowingly pay any warrant or order due any person for borrowed money where more than lawful interest has been received or charged. (19 Del. Code Ann. 701[a]). Employer can be fined $1,000-$5,000 for each violation. (19 Del. Code Ann. 701[b]). Railroads must pay employees biweekly except executives, administrators and professionals. (19 Del. Code Ann. 702[a]).

Minimum wage law adopted. (19-c. 9). Minimum wage shall be $6.65/hr. effective Jan. 1, 2007 and be increased to $7.15/hr. effective Jan. 1, 2008 (19 Del. Code Ann. 902[a]), except those receiving gratuities of more than $30 per month, in which case gratuities may constitute amount equal to tip credit percentage, as set by federal government (19 Del. Code Ann. 902[b], [c]), but in no event shall minimum rate in such case be less than $2.23 per hour (19 Del. Code Ann. 902[b]). Dept. of Labor may set lower rate for aged or handicapped workers (19 Del. Code Ann. 905) and learners or apprentices (19 Del. Code Ann. 906). Should federal minimum wage exceed state minimum wage, state shall increase its minimum wage to match federal rate. (19 Del. Code Ann. 902[a]).

Employer must pay wages by cash or check on regular paydays at least once each month (19 Del. Code Ann. 1102[a]) and at next scheduled payday after discharge, resignation or suspension for labor dispute (19 Del. Code Ann. 1103[a]). If employer, without reasonable grounds, fails to pay wages, employer can be held liable for liquidated damages in amount of 10% of wages not paid in addition to wages already owed. (19 Del. Code Ann. 1103[b]). Provisions for liability of contractors for wages (19 Del. Code Ann. 1105); payment of wages due to family of deceased employee (19 Del. Code Ann. 1106); withholding of wages generally prohibited except as provided (19 Del. Code Ann. 1107); differential rate of pay based on sex prohibited (19 Del. Code Ann. 1107A); duty of employer to notify employee of rate, time and place of payment and maintenance of wage and hour records (19 Del. Code Ann. 1108); and payment or providing of benefits and wage supplements (19 Del. Code Ann. 1109). Statutory rules governing payment of wages and benefits cannot be waived by private agreement. (19 Del. Code Ann. 1110).

Liens.

In New Castle County all claims that may become due or growing due for labor or services rendered by any mechanic, laborer, clerk or other employee of any person or persons, chartered company or association employing laborers, clerks or mechanics in any manner whatsoever, shall be a first lien on all real and personal property of such employer or employers, and shall be first to be satisfied out of proceeds of sale of such property, whether made by an officer or an assignee of such employer or employers or otherwise, for sum equal to wages of one month but not to exceed $50. (10 Del. Code Ann. 4931[a]).

Where a domestic or foreign corporation doing business in Delaware becomes insolvent, employees, not including officers, doing labor or service in regular employ of such corporation, have lien upon assets thereof for amount of wages due to them not exceeding two months which shall be paid prior to any other debt or debts of said corporation. (8 Del. Code Ann. 300).

Child Labor.

Children under 14 forbidden to be employed or to work (19 Del. Code Ann. 505); children under 16 forbidden to be employed or to work during prescribed school days or in dangerous occupations (19 Del. Code Ann. 506[a]). Hours and occupations are restricted for children under 18. (19 Del. Code Ann. 507). Special permits available for children under 16 to work as models, performers or entertainers. (19 Del. Code Ann. 508). See also subhead Hours of Labor, supra.

Female Labor.

Provisions on female labor repealed.

Discrimination by employer, employment agency, or labor organization on basis of race, marital status, genetic information, color, age, religion, sex or national origin prohibited. (19 Del. Code Ann. 711). Jurisdiction of violations with Department of Labor. (19 Del. Code Ann. 712). It shall be unlawful to discriminate against individual who has sought to enforce provisions of 19 Del. Code Ann. 720 through 19 Del. Code Ann. 728.

Conditions of Workplace.

“Right to know” legislation enacted, granting employees exposed to hazardous chemicals in workplace right to know what chemicals they are exposed to. (16 Del. Code Ann. 2415[a]). Standards mirror OSHA regulations. Employers required to provide training for employees on how to protect themselves from chemical hazards in workplace at least annually and upon new information (16 Del. Code Ann. 2410; 16 Del. Code Ann. 2415[a]), and required to provide appropriate personal protective equipment (16 Del. Code Ann. 2415[a]). Penalties for violation not to exceed $500 per violation. (16 Del. Code Ann. 2413[c]).

Labor Unions.

Employees have right to bargain collectively with employers through representatives of their own choosing in order to change wages or other conditions of work. (19 Del. Code Ann. 913). Public employees have right to organize (19 Del. Code Ann. 1303), but not to strike (19 Del. Code Ann. 1316). No “right to work” law.

Labor Disputes.

It is unlawful for any person, firm or corporation, not directly involved in a labor strike or lockout, to recruit any person for employment, or to secure or offer to secure for any person employment, when the purpose of such action is to have such person take place in employment of employees in industry where labor strike or lockout involving recognized labor organizations exists. (19 Del. Code Ann. 703[a]). Does not apply to Delaware State Employment Service or United States Employment Service or to any person, firm or corporation engaged in production, handling or processing of agricultural commodities. (19 Del. Code Ann. 703[a]). Penalty for each violation $1,000-$5,000 fine. (19 Del. Code Ann. 703[b]).

Employment Records.

Employees have right to inspect personnel files, including performance evaluations. (19 Del. Code Ann. 732). Inspection to take place during regular business hours. (19 Del. Code Ann. 732). Employer may require employee to file written request to inspect files. (19 Del. Code Ann. 732). Employee may not copy files, but may take notes. (19 Del. Code Ann. 733). Inspection may be limited to once every calendar year. (19 Del. Code Ann. 733). Employer may be fined $1,000-$5,000 for each violation of statute. (19 Del. Code Ann. 735[a]).

Workers’ Compensation Act.

Industrial Accident Board has jurisdiction of cases arising under Workers’ Compensation Act. (19 Del. Code Ann. 2301A[i]). Appeals heard by Superior Court. (19 Del. Code Ann. 2350[a]).

Permanent injury to hearing, vision loss, surgical, medical and hospital services, medicines and supplies, and funeral benefits shall be paid from first day of injury. (19 Del. Code Ann. 2321). On fourth day, all other compensation legally due shall be paid. (19 Del. Code Ann. 2321). If incapacity extends seven or more days including day injured, compensation shall be paid from first day. (19 Del. Code Ann. 2321). Employer must pay for medical services during period of disability. (19 Del. Code Ann. 2322[a]). Compensable occupational diseases are covered. (19 Del. Code Ann. 2301[4]).

If employer and injured employee, or dependents in case of death, reach agreement as to benefits, memorandum of such agreement, if signed by parties and filed and approved by Board, shall be binding. (19 Del. Code Ann. 2344[a]). Award by Accident Board shall be conclusive in absence of fraud, except that Board may, not more than once in six months, review any agreement or award where it is alleged that incapacity of injured employee has changed, and except that either party shall have right to appeal to Superior Court within 30 days of notice sent. (19 Del. Code Ann. 2347; 19 Del. Code Ann. 2349). Neither Board nor any member of Board shall be named as party to appeal. (19 Del. Code Ann. 2349). Claims are barred after two years unless there is compensation agreement or petition to Board. (19 Del. Code Ann. 2361[a]). Where payments made under agreement approved by Board or by award of Board, no statute of limitation shall take effect until five years after last receipted payment made. (19 Del. Code Ann. 2361[b]).

Provisions for total or partial disability from work and schedules for permanent disability, disfigurement and death benefits are contained in Act. (19 Del. Code Ann. 2324 et seq.). Reasonable attorneys' fees for employee awarded compensation, in amount of 30% of award or ten times average weekly wage in Delaware as announced by Secretary of Labor at time of award, whichever is smaller. (19 Del. Code Ann. 2320[10]).

Act applies to employer and employee in any employment where one or more employees engaged, except as otherwise indicated. (19 Del. Code Ann. 2306[a]). Act does not apply to domestic servants who earn less than $750 in cash in any three month period, and only applies to farm workers if employer carries insurance to pay for benefits. (19 Del. Code Ann. 2307). Act does not apply to State or its subdivisions unless government unit in question elects to be covered. (19 Del. Code Ann. 2309). Volunteer fire and ambulance companies may elect to be bound. (19 Del. Code Ann. 2312[b], [d]). Act does not apply to employees injured or killed while engaged in interstate or foreign commerce if covered by federal law. (19 Del. Code Ann. 2310).

Every employer must be insured by approved corporation or furnish proof of ability to pay direct compensation, and must periodically present such evidence to Department. (19 Del. Code Ann. 2372[a]; 19 Del. Code Ann. 2374[a]).

Occupational Diseases.

Claims for compensation for occupational disease must be filed with Department within one year of time employee realized that disability might have resulted from employment (19 Del. Code Ann. 2361[c]), and within five years of last compensation payment (19 Del. Code Ann. 2361[b]). See subhead Workers' Compensation Act, supra.

Employers' Liability Act.

Employer and employee are bound by Act to pay and accept compensation, regardless of negligence, and to exclusion of other remedies. (19 Del. Code Ann. 2304-19-205).

Unemployment Compensation.

Administered by Department pursuant to 19-cc. 31, 33. Generally, unemployed individual eligible if: (1) registered to work at employment office; (2) made claim for benefits; (3) able to work, available for work, and actively seeking work; (4) participates in reemployment services; and (5) during base period, been paid wages equal to not less than 36 times weekly benefit amount. Benefits are based on service in employment. (19 Del. Code Ann. 3315, other details there appearing). Disqualifications for benefits include voluntary termination of employment by employee without good cause attributable to such work, discharge for just cause, refusal to accept work for which reasonably fitted, or has refused to accept referral to job opportunity when directed to do so by local employment office, strikes, receipt of unemployment benefits from another governmental entity, fraudulent statements to Department, incarceration, physical inability to work, temporary break in athletic employment, illegal alien status. (19 Del. Code Ann. 3314). Delaware Unemployment Compensation Law is in conformity with federal law.

For claims establishing benefit year beginning Jan. 1, 2002, individual's weekly benefit amount is determined in accordance with subsection (c) or (d) of 19 Del. Code Ann. 3313 as determined by balance in Unemployment Insurance Trust Fund. Minimum and maximum weekly benefit amount determined based on balance of Fund as of preceding Sept. 30. (19 Del. Code Ann. 3313[j], other details there appearing). Computations for increase in maximum weekly benefit amount shall commence with new claims filed to establish benefit year commencing after effective date of increase. (19 Del. Code Ann. 3313[b][5]). Computation of benefits is determined by balance in Unemployment Insurance Trust Fund. (19 Del. Code Ann. 3313[e], [g]). For claims establishing benefit year beginning Jan. 1, 2004 and thereafter, individual's weekly benefit amount shall be amount equal to 1/46th of individual's total wages for employment by employers paid during the two quarters of individual's base period in which such wages were highest.

Amount shall not be less than $20 or more than $330. (19 Del. Code Ann. 3313[k]). For any calendar year beginning Jan. 1, 2004, and thereafter, each employer's new employee rate or basic assessment rate, whichever shall be applicable to such employer, shall be increased by supplemental assessment rate of 0.2%. (19 Del. Code Ann. 3350[9][m]). Individual filing new claim for unemployment compensation shall, at time of filing, disclose whether or not he or she owes child support obligations (19 Del. Code Ann. 3313[q][1]) and disclose whether or not he or she owes uncollected over issuance of food stamps. Department will notify state food stamp agency of individual owing on food stamp obligation. (19 Del. Code Ann. 3313[r][1]). Department shall deduct or withhold from any unemployment compensation payable to individual who owes uncollected overissuance of food stamp coupons. (19 Del. Code Ann. 3313[r]). Contribution employer must pay to Unemployment Compensation Fund is average industry contribution rate in that employer's standard industrial classification category or 5.4% of wages paid during year. (19 Del. Code Ann. 3348[a], [b] & [h]). No employer assigned assessment rate shall have rate less than 1%. (19 Del. Code Ann. 3348[i]).

11.03 WORKERS' COMPENSATION LAW:

See topic 11.02 Labor Relations.

12 ENVIRONMENT

12.01 ENVIRONMENTAL REGULATION:

General Supervision.

Department of Natural Resources and Environmental Control, 89 Kings Highway, Dover, DE 19901, has responsibility for managing use of air, land, water and underwater resources. (7 Del. Code Ann. 6001[b][2]). Division of Air and Waste Management and Division of Water Resources; and Council on Environmental Control are agencies thereof. (29 Del. Code Ann. 8014–29-8015). Environmental Appeals Board decides all appeals from any order of Secretary of Department. (7 Del. Code Ann. 6008).

Prohibited Acts of Pollution.

Any of following activities undertaken without permit from Department Secretary is prohibited: causing or contributing to discharge of air contaminant, or of pollutant into surface or ground water; causing or contributing to withdrawal of ground or surface water; collecting, transporting, storing, processing or disposing of solid wastes; constructing, maintaining or operating pipeline or appurtenance; constructing any water facility; planning or constructing any highway which may contribute to air or water pollution; constructing, installing, replacing, modifying, or using any equipment intended to prevent or control air or water pollution, or to withdraw ground or surface water for treatment and supply, or which is for disposal of solid waste. No issuance of building, placement, storage or occupancy permit until owner obtains permit for underground discharge of wastewater and withdrawal of groundwater. (7 Del. Code Ann. 6003).

Enforcement.

Secretary may order person violating any rule, regulation, order, permit condition, or provision of 7-c. 60 to cease, but such order expires after 30 days and may be suspended by injunction or withdrawn by Secretary. (7 Del. Code Ann. 6018). Public hearing on violation held at least 20 days after notice to violator by registered mail and publication. Alleged violator may appear either personally or by counsel and produce evidence on his behalf. Secretary or his designee may administer oaths, examine witnesses and issue notices of hearings and subpoenas requiring testimony of witnesses and production of documents. Subpoenas are also issued at request of violator. If subpoena or notice of hearing is disobeyed, Secretary may apply to Superior Court for order requiring appearance and testimony at hearing to be taken. Secretary to make findings of fact and give order, with reasons. (7 Del. Code Ann. 6006). Secretary's decision may be appealed within 20 days to Environmental Appeals Board. (7 Del. Code Ann. 6008[a]). Board decision may in turn be appealed to Superior Court within 30 days. (7 Del. Code Ann. 6009[a]).

Penalties.

Civil.

If violation completed, civil penalty imposed by Superior Court of $1,000 to $10,000 for each completed violation; each day of continued violation considered separate violation. If violation completed and substantial likelihood it will reoccur, Secretary may seek permanent or preliminary injunction or temporary restraining order in Court of Chancery. (7 Del. Code Ann. 6005[b][1]). After written notice to violator and opportunity for public hearing, Secretary may impose administrative penalty of maximum of $10,000 for each day of violation. (7 Del. Code Ann. 6005[b][3]). Person violating chapter or order liable for Department expenses of abatement, control, restoration and cleanup, including legal expenses. (7 Del. Code Ann. 6005[c]). Any fines by this Section may be tripled with respect to any person or entity that was designated chronic violator pursuant to § 7904 of this title at time that act leading to fine occurred. (7 Del. Code Ann. 6005[e]).

Criminal.

Willful or negligent violation of statute, permit condition or regulation results in fines of $2,500 to $25,000 for each day of violation. Intentional, knowing, or reckless false statement, $500 to $10,000 and/or maximum of six months imprisonment; Superior Court has jurisdiction. Any person committing such act that causes serious harm to another person or environment will be sentenced by guidelines of Class D felonies. (7 Del. Code Ann. 6013).

Permits.

No permit granted unless county or municipality having jurisdiction first approves by zoning procedures. (7 Del. Code Ann. 6003[c][1]). Incinerator permits granted under conditions further stipulated at 7 Del. Code Ann. 6003(c) and 6003(i). Must apply for permit; public hearing if request meritorious, to be held within reasonable time. (7 Del. Code Ann. 6004).

Land Use Planning.

Quality of Life Act of 1988 adopted to encourage most appropriate use of land, water and resources. Land development must conform to comprehensive land use plans to be adopted by each county. (9-cc. 26, 49, 69). See category 21 Property, topic 21.16 Real Property, subhead Land Use Planning.

13 ESTATES AND TRUSTS

13.01 ADMINISTRATION:

See topic 13.10 Executors and Administrators.

13.02 ADVANCEMENTS:

See topic 13.07 Descent and Distribution.

13.03 ALLOWANCES:

See topic 13.10 Executors and Administrators.

13.04 CLAIMS:

See topic 13.10 Executors and Administrators.

13.05 DEATH:

Presumption of death arises from seven consecutive years absence not accounted for. (12 Del. Code Ann. 1105).

Right to Terminate Treatment.

See topic 13.16 Wills, subhead Living Wills.

Death With Dignity.

See topic 13.16 Wills, subhead Living Wills.

Living Wills.

See topic 13.16 Wills, subhead Living Wills.

Right to Die.

See topic 13.16 Wills, subhead Living Wills.

Survivorship.

Uniform Simultaneous Death Act has been adopted in pre-1953 form. (12 Del. Code Ann. 701 et seq.).

Uniform Survival and Death Act.

Not adopted.

Actions for Death.

Survival of Actions.

Action for damages for negligence or default survives death of plaintiff, and may be continued by plaintiff’s personal representative. (10 Del. Code Ann. 3704[a]). All causes of action survive except defamation, malicious prosecution, and actions upon penal statutes to and against person to or against whom accrued. (10 Del. Code Ann. 3701).

Wrongful Death.

Where death is caused by wrongful act of another, person injured as result of that death may institute action for damages not limited to pecuniary losses. (10 Del. Code Ann. 3721 to 3725). Two year limitation applies for wrongful death and damage to personal property. (10 Del. Code Ann. 8107). No statutory limitation on amount which may be recovered.

See also topic 13.08 Executors and Administrators, subhead Actions.

Death Certificate.

See category 10 Documents and Records, topic 10.04 Records, subhead Vital Statistics.

Uniform Anatomical Gift Act (1968, adopted 1970, trans. 1990). (16 Del. Code Ann. 2710-2719). See topic 13.16 Wills.

13.06 DECEDENTS’ ESTATES:

See topics 13.07 Descent and Distribution, 13.10 Executors and Administrators, 13.16

Wills.

13.07 DESCENT AND DISTRIBUTION:

Uniform Probate Code.

Not adopted.

Entire intestate estate if there be no surviving spouse, or excess over share of such spouse, descends and is distributed: (a) To issue of decedent, per stirpes; (b) if there is no surviving issue, to decedent's parent or parents equally; (c) if there is no surviving issue or parent, to brothers and sisters and issue of each deceased brother or sister, per stirpes; (d) if there is no surviving issue, parent or issue of a parent, then to next of kin of decedent, and to issue of deceased next of kin, per stirpes; (e) property passes to two or more such persons as tenants in common. (12 Del. Code Ann. 503).

Surviving Spouse.

Intestate share of surviving spouse is: (1) If there is no surviving issue or parents of decedent, entire intestate estate; (2) if there is no surviving issue but decedent is survived by parent or parents, first $50,000 of intestate personal estate, plus one-half of balance of intestate personal estate, plus life estate in intestate real estate; (3) if there are surviving issue all of whom are issue of surviving spouse also, first $50,000 of intestate personal estate, plus one-half of balance of intestate personal estate, plus life estate in intestate real estate; (4) if there are surviving issue, one or more of whom are not issue of surviving spouse, one-half of intestate personal estate, plus life estate in intestate real estate. (12 Del. Code Ann. 502).

Half Blood.

Relatives of half blood inherit same share as they would if of whole blood. (12 Del. Code Ann. 506).

Posthumous children, if born alive, take as if living at time of death of parent. (12 Del. Code Ann. 505).

Illegitimate children or their issue share real and personal estate of mother in same manner as legitimate children or their issue. (13 Del. Code Ann. 1303). Property of intestate illegitimate without lawful issue passes to mother, if living, or to her heirs. (13 Del. Code Ann. 1302).

Adopted Children.

See category 14 Family, topic 14.01 Adoption.

Determination of Heirship.

No special proceedings provided. Action at law for legacy or distributive share authorized. (12 Del. Code Ann. 3101). Action at law shall not lie for legacy which is either directly or by implication subject of trust. (12 Del. Code Ann. 3101[b]). Chancery Court given jurisdiction to make decree of distribution on application. (12 Del. Code Ann. 2331).

Advancements.

If person dies intestate as to all his estate, property given in his lifetime to heir is treated as advancement against latter's share of estate only if declared in contemporaneous writing by decedent or acknowledged in writing by heir to be advancement. For this purpose, property advanced valued as of time heir came into possession or enjoyment of property or as of time of death of decedent, whichever first occurs. If recipient fails to survive decedent, property is not taken into account in computing intestate share to be received by recipient's issue, unless declaration or acknowledgment provides otherwise. (12 Del. Code Ann. 509). For treatment of advancement upon partition, see 25 Del. Code Ann. 738.

Election.

Surviving spouse has right of election to take elective share of amount equal to 1/3 share of elective estate, less amount of all transfers to spouse by decedent. Elective share may be satisfied in cash or in kind, and is valued at date of distribution. (12 Del. Code Ann. 901).

Renunciation.

Legatee may renounce (315 A.2d 625, aff'd, 328 A.2d 141), but beneficiary of spendthrift trust may not be able to renounce (43 Del. Ch. 124, 219 A.2d 576).

Escheat.

If intestate leaves neither heirs nor any known kindred who can inherit, entire estate, both real and personal, escheats. (12 Del. Code Ann. 1101). See also topic 13.08 Executors and Administrators.

13.07A ESTATES: (in property)

See category 21 Property, topic 21.16 Real Property.

13.0813.09 [RESERVED]

13.10 EXECUTORS AND ADMINISTRATORS:

Whether matter is litigated in Chancery or Superior Court depends on whether action is at law or in equity. But almost all suits relating to decedents' estates are brought in Chancery which has exclusive jurisdiction to determine same. Register of Wills' function is mostly clerical. Specific statutory grants of authority to Chancery or to Register of Wills are mentioned under appropriate subheads.

Preferences in Right to Administer.

Administration is granted in following order: spouse of decedent, children of decedent, parents of decedent, siblings of whole and half blood of decedent; if no person in previously listed classes is living and competent, or if no petition for grant of letters is filed within 60 days from date of death, qualified person will be determined by Register of Wills. (12 Del. Code Ann. 1505).

Eligibility and Competency.

Letters testamentary, or of administration, are not granted to minor, one who is mentally incapacitated, or one convicted of crime disqualifying from taking oath. (12 Del. Code Ann. 1508).

No statutory prohibition of appointment of nonresidents.

Married woman may be executrix or administratrix and has same power as femme sole. Her husband has no right to participate in administration and is not liable for her acts or defaults unless he is party to her bond and then only as such party. (13 Del. Code Ann. 313).

Personal representative of deceased executor or administrator shall not represent (unless expressly appointed) and shall have no personal liability or responsibility with respect to estate being executed or administered by decedent, other than to notify Register of Wills of death of decedent’s executor or administrator. (12 Del. Code Ann. 1507[b]). See also subhead Foreign Executors or Administrators, infra.

Qualification.

No bond is required of personal representative prior to receiving letters unless expressly required by will or ordered by Court of Chancery. (12 Del. Code Ann. 1522). Persons receiving letters of administration or letters testamentary must give bond. (12 Del. Code Ann. 1521).

Personal representative must take oath to perform duties of office with fidelity. (12 Del. Code Ann. 1509).

Issuance of Letters.

No one may act as executor or administrator of domiciliary decedent’s estate without letters testamentary or letters of administration. (12 Del. Code Ann. 1501). Register of Wills normally grants both types of letters. (12 Del. Code Ann. 1502; 12 Del. Code Ann. 1504). When parties cannot agree on administrator, Chancery Court may pick one. (12 Del. Code Ann. 1505[c]).

Removal.

Chancery Court may remove executor or administrator neglecting his duties. (12 Del. Code Ann. 1541). Upon removal or resignation from office, or death or incapacity of sole executor or administrator, or if there are more than one, all of them, administration shall be granted to successor administrator or administrators as though it were original administration. (12 Del. Code Ann. 1507[a]).

Whenever executor or administrator is removed, or dies before closing estate of deceased, co-executor, co-administrator, or successor, is entitled to receive all unadministered effects, including books and papers which, at time of removal or death are in executor’s or administrator’s hands. (12 Del. Code Ann. 1543).

Special Kinds of Administration.

Upon removal or resignation, or death or incapacity of sole executor or administrator, administration will be granted to successor under same regulations as original administration. (12 Del. Code Ann. 1507[a]).

If several are named as executors and any are dead, fail to give necessary bond, renounce or are incapacitated, administration with will annexed must be granted in accordance with 12 Del. Code Ann. 1503 to 1505. (12 Del. Code Ann. 1502[b]).

Ancillary Administration.

Same rules governing administration generally also apply to local administration of estate of nonresident decedent, both in respect to procedures followed and rights of parties. (12 Del. Code Ann. 1568).

Public Administrators.

No provision.

Inventory and Appraisal.

Must be filed within three months after the grant of letters testamentary or of administration, with Register of Wills. (12 Del. Code Ann. 1905[a]). Personal representative may employ one or more qualified and disinterested appraisers to assist. (12 Del. Code Ann. 1904).

General Powers and Duties.

Executor acquires title to personal property of deceased, and it is his duty to collect everything due estate, pay debts and distribute residue under directions of will. (30 Del. Ch. 592, 65 A.2d 484).

Notice of Appointment.

Notice of grant of letters given by Register of Wills. Same requirements as for notice to creditors, below.

Notice to Creditors.

Within 40 days from grant of letters, notice to creditors to present their claims must be given. Notice is by advertisement posted in the county court house and by publication at least once a week for three successive weeks in one or more designated newspapers; except register may in his discretion give notice by posting only where gross personal estate does not exceed $30,000 and gross real and personal estate does not in aggregate exceed $35,000. (12 Del. Code Ann. 2101).

Presentation of Claims.

All claims against estate arising before decedent’s death are barred unless presented pursuant to 12 Del. Code Ann. 2104 within eight months of decedent’s death, whether or not notice under 12 Del. Code Ann. 2101 was given. (12 Del. Code Ann. 2102[a]). All claims against estate arising at or after decedent’s death are barred within six months after they arise, unless presented pursuant to 12 Del. Code Ann. 2104, except that claims based on contract with personal representative are barred unless presented within six months after performance by personal representative is due. (12 Del. Code Ann. 2102[b]). Claim based on bond secured by mortgage on real estate is barred unless claim has been presented to executor or administrator within eight months of decedent’s death. (12 Del. Code Ann. 2102[e]).

Above limitations, except that for claim based on secured bond, do not apply to claims for legacies or shares of decedent’s estate; and none of above limitations apply to proceedings to establish liability of decedent or of personal representative to extent of liability insurance coverage (12 Del. Code Ann. 2102[d], [f]), to matters claimed in proceedings pending against decedent at time of death (12 Del. Code Ann. 2104), or to debts of which executor or administrator is deemed to have notice, namely, mortgages and such judgments as would be liens against real estate at date of death of decedent, which are recorded in county where letters were granted (12 Del. Code Ann. 2103).

Proof of Claims.

Claim against decedent’s estate may be presented by: (1) Sending written statement of claim to personal representative; (2) filing statement of claim with Register of Wills; or (3) beginning proceeding against personal representative in any court where he is subject to jurisdiction. (12 Del. Code Ann. 2104).

If no letters granted for ten years after death, all claims barred except mortgages and judgments which shall be controlled by applicable law. (12 Del. Code Ann. 2109).

Form for Proof of Claim.

STATEMENT OF CLAIM **(Ct. Ch. R. 191)**

1. Name of deceased . . . .

2. Name and address of claimant . . . .

3. Amount of claim . . . .

4. Statement as to basis of claim . . . .

5. Copy of any written obligation signed by decedent, if available . . . .

6. Statement as to whether debt is due or not yet due. If not yet due, date when debt is due. . . . .

7. If obligation is contingent or unliquidated, so state and explain . . . .

8. State whether claim is secured or unsecured and, if secured, describe security . . . .

9. Statement that claim is being filed within time set forth in 12 Del. Code Ann. 2102 . . . .

. . . .

Approval or Rejection of Claims.

Representative may reject claims. Rejected claims are barred unless action is begun within three months of written notice of rejection and delivered in person or sent to last known address of claimant. In case of unliquidated or contingent claim, or claim not presently due, executor or administrator may consent to, or Chancery Court may order, extension of three-month period, but not beyond statute of limitations. (12 Del. Code Ann. 2102[c]).

Three-month limitation does not apply to claims for legacies or shares of decedent's estate, or to proceedings to establish liability of decedent or of personal representative to extent of liability insurance coverage. (12 Del. Code Ann. 2102[d], [f]).

Payment of Claims.

Executor or administrator has one year from date of letters for settling decedent's estate except where circumstances justify longer period. Until expiration of that time, executor or administrator shall not be required to make distribution or be chargeable with interest on assets but if any parts of estate carry interest or be productive, executor or administrator shall account for interest or produce. (12 Del. Code Ann. 2311). If person files petition claiming interest in estate and if it appears that portion of estate may be distributed to that person, Chancery Court may reserve part for contingent liability against estate. (12 Del. Code Ann. 2335).

Priorities.

After all administration expenses, fees and commissions have been paid, claims are paid in following order: Surviving spouse's allowance; funeral expenses; child support arrears or retroactive support due as of date of death; reasonable bills for medicine and medical attendance during last sickness; wages for up to one year of servants employed in household or farm; state taxes; rent not exceeding one year; judgments against deceased; recognizances, mortgages, and other obligations of record for payment of money; obligations and contracts under seal; contracts under hand for payment of money or delivery of goods, wares or merchandise; and lastly other demands. (12 Del. Code Ann. 2105[a]). See also subhead Sales, catchline Application of Proceeds; Order of Payment of Debts, infra.

Whenever executor or administrator is unable to determine between two or more creditors order of preference to be given to their respective demands, he may, upon petition to

Chancery Court, have parties in interest summoned to appear. Upon hearing duly had, Court of Chancery determines order of preference to be given to respective demands; upon compliance with such determination petitioner and his sureties are discharged from all further liability in respect to said preferences. (12 Del. Code Ann. 2106).

Sales.

When personal estate is insufficient to pay debts administrator may petition Court of Chancery of county wherein real estate is situated for order for its sale. Specific procedure provided when land situated in more than one county. (12 Del. Code Ann. 2701[a], [c]). There must be ten days written notice of petition to parties interested. If party does not reside in State, publication or service of notice shall be prescribed by Court of Chancery. (12 Del. Code Ann. 2701[b]).

Compelled Sale.

Creditor may apply to Chancery Court of county where letters were granted for citation of executor or administrator to show cause why creditor should not petition for order of sale under 12 Del. Code Ann. 2701. If it appears that creditor will be remediless without sale of real estate, court may order executor or administrator to file petition for sale. (12 Del. Code Ann. 2702). Chancery Court may also order executor or administrator to sell real estate where it appears generally that there is not enough personalty to pay decedent’s debts. (12 Del. Code Ann. 2704).

Manner of Sale.

Sale must be by public auction, or by private sale approved by Chancery Court. Where sale is by public auction, executor or administrator is to give notice of it by advertisements made by clerk, describing land to be sold, and time and place of sale. Advertisements are to be posted at least ten days before sale at places specified by court. Court may also order other forms of notice. (12 Del. Code Ann. 2706).

Return of Sale.

Executor or administrator returns proceedings to Chancery Court after order of sale has been made or renewed, and if return is approved he makes deed to buyer. Court will not order deed made until purchase money has been paid. (12 Del. Code Ann. 2708[a], [e]).

Application of Proceeds; Order of Payment of Debts.

Money from sale, after charges allowed by Chancery Court have been deducted, is applied to debts of decedent in following order. First Class: Judgments against decedent which, before sale, were liens on premises sold, and recognizances and mortgages decedent executed for payment of money or interest, not dependent on contingency, and which, before sale, were liens on premises sold. Preference among judgments, mortgages and recognizances of this class is according to legal priority of lien. Where recognizance, obligation or mortgage has been executed by decedent other than for absolute payment of money or interest, and is by its own force lien on premises sold, and in proceeding on such recognizance, obligation or mortgage, sum has been assessed as payable by virtue of recognizance, obligation or mortgage, and judgment has been given at time of sale, then sum assessed also is within first class, and stands in priority, and is preferred in payment, according to date of obligation or recognizance, or of depositing of mortgage. Second Class: All other debts against decedent, priority being determined by 12 Del. Code Ann. 2105. (See subhead Priorities, supra.) (12 Del. Code Ann. 2710).

Where will devises real estate to be sold without authorizing anyone to make sale, or if named executor authorized by will to make sale becomes unavailable, then person having execution of will may sell real estate. (12 Del. Code Ann. 2719[b], [d]).

Private Sale.

Administrator can sell personalty at private sale if price is reasonable. (16 Del. Ch. 445, 143 A. 489).

Actions:

By and Against Representative.

All causes of action except defamation, malicious prosecution or actions on penal statutes, survive to and against executors or administrators of person to, or against whom, cause of action accrued. (10 Del. Code Ann. 3701). No suit abates by death of party, where cause of action survives; executor or administrator of dead plaintiff may prosecute suit, and executor or administrator of dead defendant may be made party to suit through service of scire facias. (Const., art. IV, § 23). See also topic 13.05 Death, subhead Actions for Death; category 5 Civil Actions and Procedure, topic 5.02 Actions, subhead Abatement and Revival.

Presentation of claim against estate in accordance with 12 Del. Code Ann. 2104 is condition precedent to action thereon against executor or administrator. (12 Del. Code Ann. 3121). Otherwise there is no suspension of right to sue. For time limits, see subhead Presentation of Claims, supra.

Interruption of Statute of Limitations.

If statute of limitations on action against estate had not expired during decedent's lifetime, period of limitations is extended to six months from date of death. If claim is filed within proper time, and suit is brought within three months of notice of rejection of claim by executor, or administrator, statute of limitations is no defense. (10 Del. Code Ann. 8113).

Allowances.—Executor or administrator must pay to surviving spouse, upon demand made within six months from granting of letters, or nine months from date of death, whichever occurs first, cash up to $7,500. This allowance is considered debt of estate and property may be sold to pay allowance in same manner as other debts. (12 Del. Code Ann. 2308). Allowance has priority over other debts, including funeral expenses and expenses of last illness, and taxes. (12 Del. Code Ann. 2105).

Widow's Quarantine.

No provision.

Accounting and Settlement.

Executor or administrator must account each year to Court of Chancery until estate is closed. (12 Del. Code Ann. 2301[a]). Except where circumstances justify longer period, executor or administrator has one year from date of his letters for settling estate; until expiration of that time he is not required to make distribution or be chargeable with interest on assets in his hands. But if any part of estate carries interest or is productive, he must account for interest or produce. (12 Del. Code Ann. 2311).

Consent Settlements.

No statutory provision.

Disclaimers.

Person or fiduciary may disclaim interest, in whole or in part, according to provisions of 12 Del. Code Ann. 601 et seq., so long as interest has not been accepted, assigned, conveyed, encumbered, transferred, or sold. (12 Del. Code Ann. 601 et seq.; 12 Del. Code Ann. 614).

Distribution.

Executor, administrator, or one claiming an interest in the estate may, after account filed, petition Chancery Court for decree of distribution. After due notice and hearing, court may enter decree of distribution binding on executor, administrator and persons claiming interests in the estate. (12 Del. Code Ann. 2332 to 2335).

Distribution to Infant or Beneficiary Abroad.

Where person entitled to distributive share of personal estate cannot receive it because infant or absent from state, then money due may be deposited in bank to credit of person entitled and executor or administrator shall take from cashier certificate of deposit, and deliver same to Register of Wills for county where deposit is made, to be recorded in accordance with 12 Del. Code Ann. 2320. (12 Del. Code Ann. 2315). If residue of intestate personal estate, distributive share, or trust fund cannot be paid because, absent from state, unknown, or incompetent, then upon petition Court of Chancery may order money to be paid into court (12 Del. Code Ann. 2316). Register of Wills may appoint conservator to take charge of estate of which missing or captured serviceman is beneficiary and has not provided adequate power of attorney authorizing another to act on their behalf. (12 Del. Code Ann. 4101).

Compensation of Representatives.

Provided by Rule 192 of Court of Chancery. (12 Del. Code Ann. 2305).

When Administration Unnecessary.

If value of entire personal estate, not including exempt or jointly owned property, does not exceed $30,000, decedent's spouse, grandparent, relative who is lineal descendant of grandparent of decedent, personal representative of any of foregoing who is deceased, or guardian or trustee of any of foregoing who is incapacitated or trustee of trust created by decedent, or funeral director licensed in state, shall be entitled to receive personal estate for purposes of distribution without appointment of representative, provided that 30 days have elapsed since death, no petition for appointment of representative is pending or has been granted, all known debts have been provided for, decedent did not own solely owned real estate located in Delaware, surviving spouse's allowance has been paid, provided for, waived, or has expired by lapse of time and affidavit showing compliance with these conditions is furnished. (12 Del. Code Ann. 2306).

Small Estates.

See subhead When Administration Unnecessary, supra.

Foreign Executors or Administrators.

Domiciliary foreign personal representative only has power if there is no administration or pending application therefor in Delaware. (12 Del. Code Ann. 1567). In this case, at any time after 60 days from death of nonresident decedent, person holding property of decedent or owing debt to him may pay debt or deliver property to domiciliary foreign personal representative, if representative presents proof of his appointment and specified affidavit (12 Del. Code Ann. 1562) and such tender releases tenderor to same extent as if made to local representative (12 Del. Code Ann. 1563). Where there is no local ancillary administration or pending application therefor, domiciliary foreign personal representative may file with Register of Wills in county in which property of decedent is located, exemplified copies of his appointment and of any official bond he has given. (12 Del. Code Ann. 1565). Representative may thus exercise as to assets in Delaware all powers of local personal representative, provided that he complies with Delaware law governing notice to creditors and filing of inventory and appraisal (12 Del. Code Ann. 1566). However, application for local administration ends power of foreign personal representative under 12 Del. Code Ann. 1566, except that Court of Chancery may allow foreign representative to keep limited powers to preserve estate. (12 Del. Code Ann. 1567).

Nondomiciliary, or foreign corporation, may only be granted letters testamentary or of administration if it files with Register of Wills irrevocable power of attorney designating Register as agent upon whom process may be served. (12 Del. Code Ann. 1506). See also topic 13.16 Wills, subhead Foreign Probated Wills.

Uniform Fiduciaries Act not adopted.

Uniform Principal and Income Act adopted with minor modifications. (12 Del. Code Ann. 61-101 et seq.).

Uniform Simplification of Fiduciary Security Transfers Act (1958, adopted 1963). (12 Del. Code Ann. 4301 et seq.).

Uniform Anatomical Gift Act (1968, adopted 1970, trans. 1990). (16 Del. Code Ann. 2710 et seq.).

13.11 FIDUCIARIES:

See topics 13.10 Executors and Administrators, Trusts; category 14 Family, topic 14.08 Guardian and Ward.

Delaware Uniform Simplification of Fiduciary Security Transfers Act relieves transfer agents from duty to inquire into authority of fiduciary. (12 Del. Code Ann. 4302).

13.12 INTESTACY:

See topic 13.07 Descent and Distribution.

13.13 [RESERVED]

13.14 PROOF OF CLAIMS:

See topic 13.10 Executors and Administrators.

13.15 TRUSTS:

Rules of common law as of 1776 generally apply.

Kinds.

All kinds including any lawful business or activity, whether for profit or not, formed as business trusts or statutory trust are recognized. (12 Del. Code Ann. 3801[g]).

Spendthrift trusts recognized and certain limited assignments therefrom are authorized. (12 Del. Code Ann. 3536). Settler-beneficiary of life estate in trust containing prohibition against assignment may, nevertheless, assign interest.

Creation.

Trusts are created by will, deed or operation of law.

Business Trusts.

See category 2 Business Organizations, topic 2.05 Joint Stock Companies. (12 Del. Code Ann. 3801 et seq.).

Appointment of Trustee.

Trust will never fail because of lack of trustee. Court of Chancery will name trustee when necessary. (12 Del. Code Ann. 3501 et seq.).

Eligibility and Competency.

Court of Chancery has general supervisory jurisdiction. (12 Del. Code Ann. 3501 et seq.). No prohibition of foreign trustees.

Qualification.

Court determines amount and type of surety for court appointed trustee, unless waived by will creating trust or by Court. (Ch. Ct. Rule 109). Court may waive surety on bond in case of trust companies unless otherwise stipulated in instrument making appointment or required by court having jurisdiction in premises. (5 Del. Code Ann. 917).

Removal of trustee is matter within discretion of Chancery Court. (27 Del. Ch. 8, 29 A.2d 591).

Sales.

Upon petition of trustee having legal title to any property, Court of Chancery may in his discretion authorize sale of trust property unless expressly prohibited by instrument creating trust. (12 Del. Code Ann. 3533).

Investments by fiduciaries are regulated by 12 Del. Code Ann. 3302 under so-called “prudent investor” rule. Bank or trust company acting as trustee may retain its own stock unless expressly forbidden by trust instrument. (12 Del. Code Ann. 3305). Bank or trust company may use fiduciary funds to purchase from its commercial or banking department mortgages acquired within preceding year, earmarked for trust investment at acquisition, and appraised within ten days prior to purchase by trust department; provided interest and taxes are current at time of purchase. (12 Del. Code Ann. 3308). Trustee, banks or trust companies acting in fiduciary capacity may invest trust assets in common trust funds created and managed by such trustee. (12 Del. Code Ann. 3307).

Securities in Name of Nominee.

Trustee, other than bank trustee or trust company, must hold securities in fiduciary name unless provided otherwise in governing instrument. Bank or trust company may hold securities in name of nominee unless objected to by cofiduciary or person for whom it acts as agent. (12 Del. Code Ann. 3309).

Transfers to Minors.

See category 14 Family, topic 14.10 Infants. (12 Del. Code Ann. 4501 et seq.).

Bequests and Devises to Inter Vivos Trusts.

See topic 13.16 Wills, subhead Bequests and Devises to Inter Vivos Trusts.

Uniform Simplification of Fiduciary Security Transfers Act (1958, adopted 1963). (12 Del. Code Ann. 4301 et seq.).

Accounting.

Trustees appointed by Chancellor and testamentary trustees must submit accounting showing all receipts or disbursements with respect to assets to Court for approval. First accounting shall be filed within one year from appointment of trustee and further accountings must be filed at least every two years or at any other time Court deems appropriate. (Ch. Ct. Rule 114). Trustee's failure to dispute incorrect amounts of money and timely file accountings required by Court of Chancery Rule 114 constitutes breach of fiduciary duty. (12 Del. Code Ann. 3521; 753 A.2d 443). Trustees of inter vivos trust receiving property by will must account only if required by Court of Chancery. (12 Del. Code Ann. 3521).

Compensation is set by Ch. Ct. Rule 132 subject to modification by Chancery Court.

Uniform Principal and Income Act adopted with minor modifications. (12 Del. Code Ann. 61-101 et seq.).

Uniform Fiduciaries Act not adopted.

Uniform Common Trust Fund Act.

Not adopted, but see subhead Investments, supra.

Accumulations.

No statutory limitation, as such; but see 12 Del. Code Ann. 3521–3528 on accounting and distribution of trust funds.

Perpetuities.

See category 21 Property, topic 21.13 Perpetuities.

Pour Over Trusts.

See topic 13.16 Wills, subhead Bequests and Devises to Inter Vivos Trusts.

Renunciation.

Beneficiary of spendthrift trust having elected to accept its benefits, may not be able to renounce, unless so provided by trust instrument. (43 Del. Ch. 124, 219 A.2d 576).

13.16 WILLS:

Any person aged 18 years or more and of sound and disposing mind and memory may make will of real and personal estate. (12 Del. Code Ann. 201).

Testamentary disposition is not limited; testator may be arbitrary if he wishes. (34 Del. Ch. 133, 99 A.2d 764).

Execution.

The will, whether of personal or real estate, if in writing and signed by testator, or by some person subscribing testator's name in his presence and by his express direction, and attested and subscribed in testator's presence by two or more credible witnesses, is valid, or if signed will is in compliance with law at time and place of execution or at time and place of testator's domicile at execution or death. (12 Del. Code Ann. 202; 12 Del. Code Ann. 1306). Will need not be signed in presence of witnesses. (295 A.2d 755).

Form of Attestation Clause

Signed, sealed, published and declared by . . . . . . the testator as and for his last will and testament in the presence of us who at his request, in his presence and in the presence of each other, have hereunto subscribed our names as witnesses.

Holographic wills must meet requirements of all wills. (12 Del. Code Ann. 202).

Nuncupative Wills.

Not authorized.

Revocation.

Last wills and testaments shall not be altered or revoked except by cancelling by testator, or by some other person in his presence and by his express direction, or by subsequent valid will, or by writing signed by testator, or by some person subscribing testator's name in his presence and by his express direction, and attested and subscribed in his presence by two or more credible witnesses. This does not preclude implied revocation. (12 Del. Code Ann. 208). If after executing will, testator is divorced or his marriage annulled, divorce or annulment revokes any disposition or appointment of property made by will to former spouse, any provision conferring general or special power of appointment in former spouse, and any nomination of former spouse as executor, trustee, guardian or other fiduciary unless will expressly provides otherwise. Property thus prevented from passing passes as though spouse failed to survive deceased. (12 Del. Code Ann. 209).

Testamentary Gifts to Subscribing Witnesses.

Such gifts are valid. (28 Del. 450, 94 A. 760).

Testamentary Guardian.

See category 14 Family, topic 14.08 Guardian and Ward, subhead Selection of Guardian.

Probate.

Custodian of a will must deliver it to Register of Wills for county in which he resides within ten days from time he receives information of death of testator and if in willful default thereof, is liable for damages sustained by failure. (12 Del. Code Ann. 1301).

Will shall be proved before Register of Wills of county in which testator was domiciled at time of his death. If testator was not domiciled in this state, it may be proved before Register of any county in this state wherein there are any goods, chattels, rights, credits, or lands of deceased. To be effective to prove transfer of any property or to nominate executor, will must be declared to be valid by admission to probate. (12 Del. Code Ann. 1302).

Estate Tax Returns.

If return required under c. 15 of Title 30, Director of Revenue must file certificate with Register of Wills in counties where decedent owned real property when taxes are paid. If no return is required, then personal representative (as defined in § 1501 of Title 30) must file affidavit. (12 Del. Code Ann. 2304).

Self-proved Wills.

Attested will may be self-proved by acknowledgment thereof by testator and affidavits of witnesses made before officer authorized to administer oaths under laws of Delaware and evidenced by that officer's certificate. (12 Del. Code Ann. 1305).

Contest.

Caveat may be received by Court of Chancery at any time before proof of instrument. Court can appoint time of hearing, determine costs thereof, and order payment of costs. (12 Del. Code Ann. 1308). After proof, review within six months is available before Court of Chancery to anyone who did not appear and was not cited. (12 Del. Code Ann. 1309).

Bequests and Devises to Inter Vivos Trusts.

Will may validly devise or bequeath property to trustee of trust established during testator's lifetime or at testator's death. Devise or bequest not invalid because trust is amendable or revocable or because trust was amended after execution of will or testator's death. Act is known as Uniform Testamentary Additions to Trusts Act. (12 Del. Code Ann. 211).

Legacies must be paid within one year of first appointment of personal representative if no time for payment is fixed by will (12 Del. Code Ann. 2312) and legatee may maintain suit to compel payment of his legacy if sufficient assets exist. (12 Del. Code Ann. 3101).

Except as provided in connection with elective share of surviving spouse who elects to take elective share, shares of distributees abate, with personal property to be abated prior to real property within each class, in following order: (1) property not disposed of by will; (2) residuary bequests and devises; (3) general bequests and devises; (4) specific bequests and devises; unless will expresses order of abatement or purposes of testator require different order of abatement. (12 Del. Code Ann. 2317).

Unclaimed Legacies.

Estate of intestate dying without heirs or known kindred escheats to State under 12 Del. Code Ann. 1101 to 1116. Where legatee unknown or cannot be found legacy paid into Court of Chancery. (12 Del. Code Ann. 2316[a]). Any such property unclaimed after five years shall, subject to court's discretion, be considered abandoned, and two months after publication of that fact, will escheat to State. (12 Del. Code Ann. 1160 to 1163). See also topic 13.10 Executors and Administrators, subhead Distribution to Infant or Beneficiary Abroad; category 21 Property, topic 21.01 Absentees.

Lapse.

Unless will provides otherwise, if devisee or legatee who is grandparent or lineal descendant of grandparent of testator is dead at time of execution of will, fails to survive testator or is treated as if he predeceased testator, issue of deceased devisee or legatee who survived testator by 120 hours take in place of deceased devisee or legatee, per stirpes. This does not apply to devisees or legatees under class gift or to wills that direct otherwise. (12 Del. Code Ann. 2313). Lapsed devise or bequest falls into residue. (31 Del. Ch. 247, 70 A.2d 1). Unless will provides otherwise, if residue is given to two or more beneficiaries and beneficiary's share lapses, such share will pass to other beneficiary or beneficiaries pro rata. (12 Del. Code Ann. 2313A).

Children.

After-born children for whom no will provision is made shall take intestate portion that child would have been entitled to if no will had been made unless will directs otherwise. (12 Del. Code Ann. 301).

Election.

Surviving spouse has right of election to take an elective share of amount equal to 1/3 of elective estate, less amount of all transfers to surviving spouse by decedent and less certain debts. (12 Del. Code Ann. 901 to 903; 12 Del. Code Ann. 908). Right of election of surviving spouse may be exercised by him only during his lifetime. (12 Del. Code Ann. 904). Surviving spouse who elects to take his elective share must file petition for elective share in Court of Chancery within six months after grant of letters testamentary or administration. (12 Del. Code Ann. 906).

Contribution.

In case of birth of child after execution of will or election of widow to take against the will, legatees and devisees contribute proportionately if residue of the estate is insufficient. (12 Del. Code Ann. 302; 12 Del. Code Ann. 908).

Foreign Probated Wills.

Will of person domiciled outside this state at time of death, concerning real estate or property located in this state, may be admitted to probate and recorded in this state. If such will was admitted to probate where testator domiciled, admission and recording in this state shall be accomplished by filing as provided in 12 Del. Code Ann. 1307. If such will was not admitted to probate in jurisdiction of testator's domicile and if not rejected from probate there for cause which would be valid grounds under laws of this state, admission and recording in this state shall be accomplished by proving such will in accordance with §§ 1302 to 1305 of Chapter 12. In either case, such will shall then have same force and effect as if originally proved and allowed in this state. Copy must be properly verified and recorded in office of Register of Wills of any county where real or personal property of testator is located. (12 Del. Code Ann. 1307). See also topic 13.10 Executors and Administrators, subhead Foreign Executors and Administrators.

Renunciation.

Legatee may renounce. (315 A.2d 625, aff'd, 328 A.2d 141).

Construction.

A devise of real estate, without words of limitation, is construed to pass fee simple, or other whole estate or interest, which testator could lawfully devise in such real estate, unless contrary intention appears by will. (12 Del. Code Ann. 205).

After-acquired land passes as if possessed at making of will, unless contrary intention appears by will. (12 Del. Code Ann. 206).

Living Wills.

Competent adults are entitled to refuse medical treatment, including artificial nutrition and hydration, if death is imminent or they are in state of permanent unconsciousness. Such refusal may be by means of dated, written advance health-care directive. Such competent adult may also appoint agent to make health-care decisions. Directive must be signed by declarant, or by another person in declarant's presence, and at declarant's expressed direction and witnessed by two or more adults. No witness may (i) be related to declarant by blood, marriage, or adoption; (ii) be entitled to any portion of declarant's estate by will or intestacy; (iii) have present or inchoate claim against estate of declarant; (iv) have direct financial responsibility for declarant's medical care; or (v) be employee of, or have controlling interest in, hospital or health care facility in which declarant is patient. Each witness must state in writing that he is not disqualified for any of above reasons. Directive effective upon determination declarant lacks capacity. If withdrawing life-sustaining procedure, must determine declarant lacks capacity and has qualifying condition. Directive ceases effect upon recovered capacity. Directive can be revoked in whole or in part by competent adult. Agent shall make health care decision after consulting with attending physician. Agent's decision shall conform with declarant's instructions, and if not known, should conform as closely as possible under circumstances or in best interest of declarant. Agent's decision should take into account: declarant's values, likelihood of recovered capacity or death, burden and benefit of treatment to declarant, and oral or written statements previously made by declarant. Agent's decision is effective without judicial approval. Directive may include declarant's nomination of guardian. Life sustaining procedure may not be withdrawn or withheld from patient known to be pregnant, so long as it is probable that fetus will reach viability if life-sustaining procedure is continued. Revocation of directive must be made by signed writing or in manner which communicates intent to revoke. Intention must be memorialized in writing, signed and dated. Any person informed of revocation must communicate same to declarant's supervising healthcare provider. Decree of annulment, divorce or dissolution of marriage revokes spouse designation as agent. Earlier directive is revoked to extent of conflicts with subsequent directives. Initiation of emergency treatment presumed to represent suspension of directive. (16 Del. Code Ann. 2501 et seq.).

Uniform Anatomical Gift Act (1968, adopted 1970, trans. 1990). (16 Del. Code Ann. 2710–2719).

Simultaneous Death.

See topic 13.05 Death, subhead Survivorship.

Testamentary Trusts.

See topic 13.15 Trusts.

14 FAMILY

14.01 ADOPTION:

Unmarried person or husband and wife jointly, who are not legally separated or who are not living apart from each other, or divorced or legally separated person, being resident in Delaware, and being over 21, may petition Family Court for order authorizing adoption of minor child or children; statutorily eligible gay life partner of adoptive parent has standing to seek to adopt partner's children. (13 Del. Code Ann. 903; 806 A.2d 1179). Placement made with regard to religion if specified by either natural parent in notarized statement made prior to placement. Placement made without regard to religion if religion not known, or there is no religion, or natural parents declare indifference. (13 Del. Code Ann. 911[a]). If proposed adoptive parent is stepparent or blood relative, no restriction regarding religious affiliation. (13 Del. Code Ann. 911[b]). If restriction in 13 Del. Code Ann. 911(a) will create hardship in obtaining placement, it may be waived by court. (13 Del. Code Ann. 911[c]). Except where petitioner is stepparent, blood relative, or guardian for at least six months, no petition shall be presented unless child has been placed for adoption by Department of Services for Children, Youth and Their Families or agency licensed by it. (13 Del. Code Ann. 904[a]). Placement shall not be made until preplacement evaluation complying with Delaware Requirements for Child Placing Agencies completed by Department or licensed agency. (13 Del. Code Ann. 904[e]).

No nonresident child may be brought into state for adoption or placement without approval of Department of Services for Children, Youth and Their Families. (13 Del. Code Ann. 926; 31 Del. Code Ann. 307; 31 Del. Code Ann. § 381).

Conditions Precedent.

Generally, petition for adoption may be filed only after continued residence of six months of adoptee with adopter under supervision of Department of Services for Children, Youth and Their Families or licensed agency. (13 Del. Code Ann. 913).

Consent Required.

Written consent, notarized and attached to petition, must be given by Department of Services for Children, Youth and Their Families or licensed or authorized agency in which parental rights exist. (13 Del. Code Ann. 907[a]; 13 Del. Code Ann. 908). If adoption by stepparent or blood relative, consent of natural parents required, but consent of alleged natural father need not contain admission of paternity. (13 Del. Code Ann. 908[b]). Consent by child required if 14 years or older (may be waived by court). (13 Del. Code Ann. 907[b]). Consent may be withdrawn by petition within 60 days of date of filing of adoption petition containing consent. (13 Del. Code Ann. 909). Courts shall resolve all questions of interpretation with best interest of child in mind. (13 Del. Code Ann. 932).

Jurisdiction of adoption proceedings rests in Family Court. (13 Del. Code Ann. 902[a]).

Venue is in the county wherein petitioner resides or placing agency is located. (13 Del. Code Ann. 902[b]).

Petition must state: Name, address and marital status of petitioners; sex and birthdate of child; relationship of petitioners to child; name of person or organization required to consent and basis of right; date of placement in adoptive home or, if adoption by stepparent, date of marriage of natural parent to adopting stepparent; name to be assumed. If, in adoption by stepparent or blood relative, there has not been prior legal termination of parental rights, petition must state: name and residence of natural parents of child; marital status of mother at child's conception and birth; and if not married or her husband is not natural father, affidavit by mother, including name and last known address of natural father, or statement that mother knows natural father's name but is unwilling to disclose it, or that she does not know natural father's name, or name of natural father and statement that mother has never known his address. (13 Del. Code Ann. 906).

Exchange of identifying information before finalization of adoption is permitted by consent of birth parent(s), adoptive parent(s), and Department of Services for Children, Youth and Their Families when in best interest of child. (13 Del. Code Ann. 929[a]). Adoptee over 14 must consent. (13 Del. Code Ann. 929[a][3]). After finalization, Department of Services for Children, Youth and Their Families may exchange identifying information only with consent of all parties required under 13 Del. Code Ann. 961-65 or court order. (13 Del. Code Ann. 929[b]).

Confidentiality of information regarding any adoption is governed by 13 Del. Code Ann. 923–13-925.

Proceedings.

Family Court must order investigation and report by Department of Services for Children, Youth and Their Families, licensed or authorized agency, and render decision on petition within 60 days from receipt of report. If decision is favorable, final decree of adoption is entered; if unfavorable, hearing must be ordered if requested by any petitioner. (13 Del. Code Ann. 912; 13 Del. Code Ann. 915[a]). Court may order further investigation. (13 Del. Code Ann. 912[d]).

Decree must state child's original name, name by which child is to be known, sex and age of child. (13 Del. Code Ann. 915[c]).

Name.

Name to be assumed by child upon adoption must be included in petition. (13 Del. Code Ann. 906[6]).

Effect of Adoption.

Decree of adoption terminates rights and duties between natural parents and child, and creates between adoptive parents and adoptee all rights and duties of parent-child relationship. (13 Del. Code Ann. 919). Upon entry of decree, adoptee and natural parents and relatives lose rights of inheritance running to and from each other; adoptee and adoptive parents and their relatives acquire rights of inheritance running to and from each other. (13 Del. Code Ann. 920[a], [b]). Adoption after will gives adoptee rights of after-born child. (13 Del. Code Ann. 920[c]).

Setting Aside Adoption.

Irregularities in proceedings deemed cured after expiration of six months from entry of decree, and validity of decree not subject to attack thereafter. (13 Del. Code Ann. 918).

Adoption of Persons 18 or Older.

Effectual by decree entered upon signed petition of adopters to Family Court in county where petitioner or adoptee resides and after appearance and consent of adoptee. (13 Del. Code Ann. 951–13-953).

Termination of parental rights effected upon petition to Family Court by mother, father or presumed father, both parents, blood relative of child, licensed agency, Department of Services for Children, Youth and Their Families, or guardian or permanent guardian. (13 Del. Code Ann. 1104 to 1108).

14.02 ALIMONY:

See topic 14.06 Divorce.

14.03 COMMUNITY PROPERTY:

System does not obtain in Delaware.

14.04 DESERTION:

See topic 14.09 Husband and Wife.

14.05 DISSOLUTION OF MARRIAGE:

See topic 14.06 Divorce.

14.06 DIVORCE:

Grounds.

Court to grant divorce when marriage is irretrievably broken and reconciliation is improbable, which is deemed to occur when there is: (1) voluntary separation; (2) separation caused by respondent’s misconduct, including but not limited to adultery, bigamy, conviction of serious crime, physical or oral abuse of petitioning spouse or children, desertion, homosexuality, refusal to perform marriage obligations, contracting venereal disease, and habitual alcoholism or drug abuse; (3) separation caused by respondent’s mental illness; (4) separation caused by incompatibility. (13 Del. Code Ann. 1503; 13 Del. Code Ann. 1505).

Grounds for Legal Separation.

No statutory grounds for legal separation. Separation for divorce purposes defined as living apart for six or more months immediately preceding ruling upon petition for decree of divorce. Separation may occur while under same roof, provided parties occupy separate bedrooms and do not have sexual relations with each other. (13 Del. Code Ann. 1503[7]).

Residence.

Action may be brought for divorce where either party has been resident of state continuously for six or more months immediately preceding commencement of action. (13 Del. Code Ann. 1504).

Jurisdiction.

Exclusively in Family Court. (13 Del. Code Ann. 1504).

Venue.

County of either party’s residence. (13 Del. Code Ann. 1507[c]).

Process.

Service may be made by Sheriff upon respondent personally or respondent’s agent by (1) delivery or (2) appearance of respondent or (3) appearance of counsel for respondent. If petition avers jurisdiction over respondent can only be acquired through mailing and publication, copy of summons must be sent by registered or certified mail, return receipt required, or if by publication, notice must be published once in newspaper of general circulation. (13 Del. Code Ann. 1508[a]-[d]).

Pleading.

(a) If petitioner avers marriage irretrievably broken and respondent does not deny it, such fact is presumed, and court shall so find, after hearing at which only petitioner need testify. Court can make findings without hearing after petitioners submit request for finalization and affidavit reaffirming petition and verifying service of process. Court can deny petition if controverted by evidence. (13 Del. Code Ann. 1517[a]). If contested, court may order voluntary counseling to determine if marriage is irretrievably broken. (13 Del. Code Ann. 1517[b]).

(b) Petition must set forth, among other things, that residency requirements for jurisdiction have been met; whether there have been any previous matrimonial proceedings between parties; that marriage is irretrievably broken, and how it is to be characterized; and relief prayed for. (13 Del. Code Ann. 1507[b]).

Respondent may file counterclaim for divorce or annulment, and may seek interim relief, alimony, disposition of property, attorney’s fees, resumption of former name or any other relief available to petitioner. If there are living children, respondent shall submit affidavit regarding children’s rights. (13 Del. Code Ann. 1511).

Practice.

All hearings and trials are held before court without jury, or by commissioner, privately, unless for reasons appearing sufficient to court. (13 Del. Code Ann. 1516). Parties must be separated not less than six months prior to date of hearing to grant divorce decree. (13 Del. Code Ann. 1507[e]). No record or evidence in any case shall be impounded or access thereto refused. (13 Del. Code Ann. 1516[d]). Court has discretion to appoint disinterested attorney, with fee taxed as part of court costs. (13 Del. Code Ann. 1516[c]).

Judgment or Decree.

Decree granting or denying petition for divorce or annulment is final when entered, subject to right of appeal. (13 Del. Code Ann. 1518[a]).

Temporary Alimony.

Either party may file motion, along with or after petition for divorce, for temporary alimony. (13 Del. Code Ann. 1509[b][1]). Also available in action for annulment. (13 Del. Code Ann. 1509[b][1]; 13 Del. Code Ann. 1512[a]).

Allowance for Prosecution of Suit.

Court may order party to pay part or all costs to other party of maintaining or defending suit. (13 Del. Code Ann. 1515).

Permanent Alimony.

Court may award interim alimony to dependent party if evidence shows dependence of party, lack of sufficient property, or inability of party to provide self-support. Party is eligible for alimony up to period of 50% of term of marriage, except for parties married 20 years or longer, for whom there is no time limit. Party awarded alimony has continuing affirmative obligation to seek vocational training and employment. Death, remarriage or cohabitation of party receiving alimony extinguishes alimony rights, unless parties otherwise agree. Party may waive right to alimony. (13 Del. Code Ann. 1512).

Division of Property of Spouses.

See subhead Division of Marital Property, infra.

Division of Marital Property.

Upon request of either party in divorce or annulment proceeding, court shall divide equitably all marital property without regard to marital misconduct as it deems just. (13 Del. Code Ann. 1513).

Change of Wife's Name.

Upon request of party court may issue order permitting such party to resume her maiden or former name. (13 Del. Code Ann. 1514).

Custody of Children.

Family court has discretionary power concerning custody of children, during and after divorce, and may revise orders from time to time. (13 Del. Code Ann. 721–13-732). Delaware has adopted The Child Protection From Domestic Violence Act. (13 Del. Code Ann. 701A—13-711A).

Allowance for Support of Children.

Duty to support child under 18 rests primarily upon parents. (13 Del. Code Ann. 501). Family Court, which has exclusive original jurisdiction relating to support and maintenance actions involving children (13 Del. Code Ann. 507), may order defendant to make support payments into Division of Child Support Enforcement, directly to dependent, or to guardian, custodian or trustee (13 Del. Code Ann. 513[a]). Award governed by special formula. (13 Del. Code Ann. 514; 747 A.2d 128).

Uniform Child Custody Jurisdiction and Enforcement Act (1997).

Adopted (2002). (13 Del.C. §§ 1901 to 1943).

Uniform Parentage Act (2000).

Adopted (2003). (13 Del.C. §§ 8-101 to 8-904).

Uniform Reciprocal Enforcement of Support Act.

Repealed and replaced by Uniform Interstate Family Support Act. (13 Del. Code Ann. 6-101 to 6-903).

Uniform Interstate Family Support Act (2001).

Adopted (2005). (13 Del. Code Ann. 6-101 to 6-903). *Note:* Replaced Uniform Reciprocal Enforcement of Support Act.

Remarriage.

No restriction on remarriage after decree of divorce has become final and appeal is pending only with respect to relief, other matters incidental or collateral. (13 Del. Code Ann. 1518[a]).

Foreign Divorces.

Full faith and credit shall be given to decree of annulment or divorce by court of competent jurisdiction in another state, territory or possession of U.S. (13 Del. Code Ann. 1521).

Separation Agreements.

Agreements between husband and wife relating to support or adjustment of property rights will be upheld, though in contemplation of divorce, if not directly conducive to procurement of divorce and free of collusion. Law prefers private settlement of marital obligations at time of separation. (287 A.2d 413, aff'd, 336 A.2d 216). Family Court has jurisdiction over such agreements. (13 Del. Code Ann. 507[a]).

14.07 [RESERVED]

14.08 GUARDIAN AND WARD:

Jurisdiction to appoint and remove guardians for disabled person in Court of Chancery. (12 Del. Code Ann. 3901; 12 Del. Code Ann. 3908). Jurisdiction exists where: (1) Ward was present for six consecutive months prior to filing of petition for guardianship, (2) Delaware is state where ward has more than mere physical presence and evidence pertaining to ward's condition is available and (A) ward lacks state where he or she was present for six consecutive months or such state declines to exercise jurisdiction or (B) ward has such state but no order is before that state's court, and no objection to jurisdiction is filed, (3) states with jurisdiction have declined to exercise it because Delaware is more appropriate forum or (4) appointment is emergency not exceeding 30 days. (12 Del. Code Ann. 39A-101; 12 Del. Code Ann. 39A-201; 12 Del. Code Ann. 39A-202). Superior Court and Court of Common Pleas have jurisdiction to approve settlement in connection with single transaction matter arising out of tort claim for disabled person. Upon entry of order appointing guardian and approving settlement, jurisdiction is transferred to Chancery. (12 Del. Code Ann. 3901[k]).

Uniform Adult Guardianship and Protective Proceedings Jurisdiction Act adopted. (12 Del. Code Ann. 39A-101 to 39A-402).

Selection of Guardian.

In its discretion Chancery Court may appoint two or more persons, one or more to have care of disabled person and other(s) to have possession and management of property; or court may appoint one guardian for both person and property. When guardian of person is sought, ward entitled to representation by counsel. (12 Del. Code Ann. 3901[a], [c]; 12 Del. Code Ann. 3903).

Sole surviving parent may by written declaration or last will name guardian of person, property or both of child, who shall be appointed if there be no just cause to contrary. (12 Del. Code Ann. 3902[b]). In practice nonresidents are not appointed guardians of property.

Minor over 14 years of age, whose parents have not otherwise effectively provided for guardianship, may choose guardian and court shall appoint person so chosen if there be no just cause to contrary. But court may appoint guardian according to its discretion if there is just cause to contrary, or when minor is under age 14, neglects to choose guardian, or is resident out of state. (12 Del. Code Ann. 3902[c]-[d]).

No one has any authority to act as guardian unless he has been appointed by Chancery Court or admitted by court of law or equity as guardian ad litem. (12 Del. Code Ann. 3902[a]).

Eligibility and Competency.

No statutory provision.

Appointment of Guardian.

Chancery Court may appoint guardian for any disabled person upon filing of proper petition. (12 Del. Code Ann. 3901).

Public Guardian.

Court of Chancery may, at its discretion, appoint public guardian for persons disabled for reasons other than minority. (12 Del. Code Ann. 3992).

Qualification.

Every person appointed guardian shall, unless requirement is waived by court, become bound, with surety, to disabled person in penal sum to be fixed by court. (12 Del. Code Ann. 3905[a]). Where petitioner is public agency, court may order that guardian need not give bond either with or without surety. (12 Del. Code Ann. 3905[d]).

Inventory by guardian or trustee is required within 30 days of appointment. Inventory shall include personal knowledge of fair market value. (Ch. Ct. Rule 110). Court may order appraisal if unsatisfied with inventory. (Ch. Ct. Rule 111). Supplemental inventory is required for property received after initial inventory. (Ch. Ct. Rule 110). Upon terminating guardianship (Ch. Ct. Rule 180-C) or upon request of interested party court may require full accounting (Ch. Ct. Rule 115).

Powers.

Guardian of person may exercise powers, rights and duties of parent to care for ward. (12 Del. Code Ann. 3922). Guardian of property has power to: collect, hold and retain assets; receive additions to estate; invest estate assets; deposit estate funds in bank; sell or exercise stock rights; vote stock; insure assets; pay taxes; make payment for ordinary repairs to disabled person's dwelling; allocate items of income or expenses to either estate income or principal; prosecute or defend actions; execute instruments; and hold securities. (12 Del. Code Ann. 3923[d]).

Investments.

12 Del. Code Ann. 3971 governs Chancery Court's power to invest funds for minors; 12 Del. Code Ann. 3923 governs guardian's power to invest. For investment by fiduciaries generally, see category 13 Estates and Trusts, topic 13.15 Trusts, subhead Investments.

Securities in Name of Nominee.

See category 13 Estates and Trusts, topic 13.15 Trusts, subhead Securities in Name of Nominee.

Real Estate.

Guardian can sell ward's real estate only on order of court and after appraisal by court appointed licensed appraiser. (12 Del. Code Ann. 3951). Court may permit sale to be partially or wholly on credit. (12 Del. Code Ann. 3953).

Liabilities of Guardian.

If guardian does not render true accounts of his guardianship, or if, upon termination of guardianship, he does not deliver to ward all property in his possession due ward, or if he does not faithfully perform his duties as guardian, then he forfeits bond. (12 Del. Code Ann. 3905[a]).

Accounts.

Guardian of property must fully account for all money, effects and property of disabled person that have come into his possession; guardian of person has no duty to account. (12 Del. Code Ann. 3941[a]). Accounts are filed, adjusted and settled in Chancery Court. (12 Del. Code Ann. 3942). Guardian must render account of his guardianship at end of one year from his appointment and afterwards as Chancery Court shall require, but no more than once in two years unless there is special occasion. (12 Del. Code Ann. 3943).

Termination of guardianship if guardianship based on age, occurs when ward turns 18. (12 Del. Code Ann. 3909[a]). Court of Chancery may remove guardian for any sufficient cause, and guardian may be allowed to resign if Chancery deems proper. (12 Del. Code Ann. 3908).

Gifts to Minors.

No guardian-specific statutory provision.

Insane Persons.

Appointment of guardian for persons disabled by mental incapacity is by Court of Chancery except as noted above; all provisions concerning disabled persons in cc. 39 and 39A of Title 12 of Delaware Code apply. (12 Del. Code Ann. 3901[a]).

Foreign Guardians.

Foreign or alien guardian duly appointed in another state, whose nonresident minor ward has property in Delaware or has been brought into Delaware for care and maintenance, has all rights and power of guardian appointed by Chancery Court upon his recording with Register in Chancery certificate of appointment from other jurisdiction. Foreign guardian may petition court for additional powers upon giving such security as court directs. (12 Del. Code Ann. 3904).

Uniform Fiduciaries Act not adopted.

Uniform Act for Simplification of Fiduciary Security Transfers Act adopted (12 Del. Code Ann. 4301 to 4311) and not repealed by Uniform Commercial Code (6 Del. Code Ann. 10-101 to 10[103]).

Uniform Adult Guardianship and Protective Proceedings Jurisdiction Act adopted. (12 Del. Code Ann. 39A-101 to 39A-402).

14.09 HUSBAND AND WIFE:

Disabilities of Married Women.

None by statute.

Separate Property.

Married woman holds all her property as separate estate and may sell, convey, assign, transfer, devise, bequeath, encumber or otherwise dispose of same. (13 Del. Code Ann. 311).

Contracts.

Married woman may enter into contracts with any person, sue, or be sued, or make a will. (13 Del. Code Ann. 311).

Actions.

Husband and wife can sue each other at law (630 A.2d 1096), and equity will entertain jurisdiction of such actions in proper cases (149 A.2d 320). See also subhead Contracts, supra.

Conveyance or Encumbrance of Property.

Deed of lands or tenements that woman executes while married is valid as if she were sole, if she acknowledges having executed deed. (25 Del. Code Ann. 102).

Married woman who has been abandoned by her husband without just cause may sell, or otherwise dispose of her real property as though single, provided that conveyance, or other instrument, be acknowledged before chancellor, or Superior Court judge. In such case, in addition to usual certificate of acknowledgment, it must be certified that it has satisfactorily appeared to judge who took acknowledgment that person who executed instrument had been abandoned without just cause. (25 Del. Code Ann. 107; 25 Del. Code Ann. 124).

See also subheads Contracts, Separate Property, supra; and category Property, topic Curtesy.

Desertion and Nonsupport.

Duty to support spouse rests upon other spouse. (13 Del. Code Ann. 502). Spouse is bound by support order during pendancy of divorce appeal, since divorce decree appealed on its merits is not final until affirmed. (476 A.2d 1096). Duty to support child under 18, and child under 19 who is high school student, whether born in or out of wedlock, rests primarily with parents, and equally upon each. (13 Del. Code Ann. 501[c]-[d]; 403 A.2d 1121). Where parents unable to provide minor child's minimum needs, stepparent or person who cohabits in relationship of husband and wife with parent of minor child is under duty to supply these needs, but only during cohabitation and while child makes residence with such stepparent. (13 Del. Code Ann. 501[b]). Family Court has exclusive original jurisdiction. (13 Del. Code Ann. 507[a]). If Court, after notice to defendant and hearing to show cause, concludes defendant violated terms of support order for spouse or child, it may punish defendant for contempt and may attach wages. (13 Del. Code Ann. 516[a]). If attachment of wages is impractical, court shall require defendant to enter into bond to Court. (13 Del. Code Ann. 516[e]). Order terminates by operation of law when child reaches 18 years of age, or at 19 if still in high school; however obligation for payment of past due support shall not terminate until paid. (13 Del. Code Ann. 517). For court order of support payments, see topic 14.06 Divorce, subhead Allowance for Support of Children.

Uniform Interstate Family Support Act (2001) adopted (2005). (13 Del. Code Ann. 6-101 et seq.).

Uniform Parentage Act (2000) adopted (2003). (13 Del. Code Ann. 8-101 to 8-904). On request of party and good cause shown, court may order that name of child be changed. (13 Del. Code Ann. 8-636[e]).

14.10 INFANTS:

Minor or infant is person under 18, and adult is person 18 or older. (1 Del. Code Ann. 302). See also subhead Disabilities, infra.

Emancipation.

Person reaching age of 18 is deemed to be of full legal age. (1 Del. Code Ann. 701). Competent person 18 or older may prosecute, defend, settle or dismiss any action at law or in equity, without guardian or other legal representative, and may himself be appointed guardian ad litem or other legal representative for person under 18 (10 Del. Code Ann. 3923); has full capacity to contract and is responsible for his contracts unless declared legally incompetent for reason other than age (6 Del. Code Ann. 2705); and may make any conveyance of or transaction relating to real estate without interference of guardian (25 Del. Code Ann. 312).

Disabilities.

Persons under 21 may not buy alcoholic beverages. (4 Del. Code Ann. 904). Persons under 18 may not marry except by order of Family Court Judge upon petition by parent, legal guardian, or next friend of minor seeking to marry. (13 Del. Code Ann. 123). Operator's license for motor vehicle not issued to persons under 16. (21 Del. Code Ann. 2707[a]). Certificate of title for motor vehicle not issued to person under 18 without consent of parent or guardian. (21 Del. Code Ann. 2306[d]). Minor may not change name without consent of parent or guardian. (10 Del. Code Ann. 5902). Persons under 17 may not have access to material defined as harmful to minors (11 Del. Code Ann. 1365), and those under 18 may not buy or be given tobacco by anyone but their parent or guardian (11 Del. Code Ann. 1116). Persons intoxicated or under 21 may not buy deadly weapons made for defense of one's person. (24 Del. Code Ann. 903). Minors are incapable of making wills of real or personal estate. (12 Del. Code Ann. 201). Child under 14 may not be employed. (19 Del. Code Ann. 505). Children between 14 and 15 are restricted as to time of day and number of hours per week they can work, and certain work is restricted to those over 16. (19 Del. Code Ann. 504–19-508). See category 11 Employment, topic 11.02 Labor Relations, subhead Child Labor.

Adoption.

See topic 14.01 Adoption.

Contracts.

Uniform Commercial Code adopted. See category 3 Business Regulation and Commerce, topic 3.09 Commercial Code.

Ratification of Contracts.

Common law principles apply. (177 A. 303).

Bank Deposits.

Any banking institution may receive money on deposit from or in name of minor. (5 Del. Code Ann. 920[a]). Such deposit is held for benefit of depositor as though adult (5 Del. Code Ann. 920[a]) and in all transactions with banking institution, minor is subject to same obligations, equities, and defenses as adult (5 Del. Code Ann. 920[c]). Similar provision for investment by minor in building and loan association. (5 Del. Code Ann. 1917).

Actions.

In Chancery Court no proceeding is deferred because of infancy of party unless court otherwise orders. Disinterested guardian or trustee appears for infant; otherwise, appearance is by guardian ad litem. (Ch. Ct. Rule 17 [c]). In Superior Court, representative sues or defends on behalf of infant; if there is no duly-appointed representative, infant may sue by next friend or guardian ad litem. (Super. Ct. Rule 17 [c]).

Suit for collection of county taxes on real and personal estate may be brought against guardian or trustee of infant owner or guardian ad litem or trustee ad litem. (9 Del. Code Ann. 8702). Parent, guardian or next friend of minor who has claim for labor or services rendered, as per 10 Del. Code Ann. 4931, may bring action on claim. (10 Del. Code Ann. 4934).

Support of Minor.

Duty to support minor rests primarily and equally with parents. (13 Del. Code Ann. 501[a], [c]). Where parents unable to support minor child's minimum needs, duty to support resident minor rests with stepparent or person cohabiting with parent in relationship of husband and wife but only during cohabitation and while child resides with stepparent or person. (13 Del. Code Ann. 501[b]). Duty to support child over 18 who is high school student and likely to graduate continues until child is 19 or graduates, whichever first occurs. (13 Del. Code Ann. 501[d]). Family Court has broad power to require support where duty to support found. (13 Del. Code Ann. 513).

Uniform Interstate Family Support Act (2001).

Wholly adopted in all relevant aspects (2005). (13 Del. Code Ann. 6-101 et seq.).

Interstate Compact on Juveniles is adopted. (31 Del. Code Ann. 5201 et seq.).

Uniform Transfers to Minors Act (1983, adopted 1996). (12 Del. Code Ann. 4501 et seq.). Age of majority for purpose of Act is 21. (12 Del. Code Ann. 4501[1], [11]). Transfer made under Delaware Act if one or more of transferor, minor or custodian is Delaware resident or if custodial property located in Delaware. (12 Del. Code Ann. 4502[a]).

Uniform Parentage Act (2000, adopted 2003). (13 Del. Code Ann. 8-101 et seq.).

Uniform Securities Ownership by Minors Act not adopted.

Parental Responsibility.

Parents are liable (up to $10,000) for property intentionally or recklessly destroyed or damaged by their children under 18 who live with them. (10 Del. Code Ann. 3922). Negligent driving by minor imputed to person who signed license application on behalf of minor, unless signer was Division of Family Services case worker on behalf of child in Family Services custody. (21 Del. Code Ann. 6104). Negligent operation of automobile by minor imputed to owner of automobile. (21 Del. Code Ann. 6105). See topic 14.01 Adoption, subhead Termination of Parental Rights.

14.11 MARRIAGE:

Minimum Ages.

See topic 14.10 Infants, subhead Disabilities.

Consent Required.

Where marriage applicant under 18, Judge of Family Court must sign order allowing marriage. (13 Del. Code Ann. 123[b]). Parent, legal guardian or next friend must petition Family Court for order allowing minor applicant to marry. (13 Del. Code Ann. 123[c]).

Medical Examination.

None required.

License is required and must be obtained from the county clerk of peace for $10 fee. (13 Del. Code Ann. 107 to 108). Both applicants must appear in person together except in case of critical illness, in which case doctor may appear as proxy. (13 Del. Code Ann. 120). License becomes void if ceremony is not performed within 30 days from date of its issuance. (13 Del. Code Ann. 107[c]). False answer by applicant is perjury. (13 Del. Code Ann. 127). Divorced applicant must file with clerk of peace certified copy of decree or certificate of divorce. (13 Del. Code Ann. 101[b][6]).

Waiting Period.

License must be obtained at least 24 hours before ceremony. (13 Del. Code Ann. 107[a]). Clerk of Peace may shorten or lengthen time for good cause. (13 Del. Code Ann. 107[d][1]). If lengthening, not to exceed 180 days. (13 Del. Code Ann. 107[d][2]).

Serological Tests.

None required.

Ceremonial marriages must be solemnized in presence of two reputable witnesses by clergyperson or minister of any recognized religion, current or former members of State Supreme Court, Superior Court, Family Court, Court of Chancery, Court of Common Pleas, and Justice of the Peace Court, federal judges, federal magistrates, clerks of peace, chief deputy or deputy (if there is no chief deputy), current and former judges from foreign jurisdictions with written authorization by Clerk of Peace, or, if at least one of parties is Delaware resident, by Mayor of Wilmington. They may be solemnized according to forms and usages of any religious society. (13 Del. Code Ann. 106).

Reports of Marriages.

Marriage Record Book kept by issuing officer is open for public inspection and must be admitted as evidence in any court of record. (13 Del. Code Ann. 119).

Record.

See category 10 Documents and Records, topic 10.04 Records, subhead Vital Statistics.

Common law marriages in Delaware are not valid (31 Del. 303, 114 A. 215), but common law marriage of nonresidents, contracted outside of Delaware and valid where contracted, will be recognized (299 F. Supp. 192).

Proxy Marriages.

Marriage by written contract valid if supported by duly issued marriage license. (2007 Del. Ch. LEXIS 146).

Marriages by Written Contract.

See subhead Proxy Marriages, supra.

Prohibited Marriages.

Between: Persons and their ancestors, descendants, brothers, sisters, uncles, aunts, nieces, nephews, first cousins or persons of same gender (13 Del. Code Ann. 101[a]); parties to marriage contracted or solemnized outside of Delaware will be punished in same manner as those parties who contracted their marriage within Delaware, when legal residence of either party is in Delaware, and parties thereto live and cohabit as husband and wife within Delaware (13 Del. Code Ann. 104).

Annulment.

Court shall enter annulment of marriage entered into under any of following circumstances: (1) Party lacked capacity to consent to marriage at time marriage was solemnized, either because of mental incapacity or infirmity, or because of influence of alcohol, drugs or other incapacitating substances; (2) party lacked physical capacity to consummate marriage by sexual intercourse and other party did not, at time marriage was solemnized, know of incapacity; (3) party was less than legal age and did not have consent of his parents or guardian or judicial approval as provided by law; (4) one party entered into marriage in reliance upon fraudulent act or representation of other party, which fraudulent act or representation goes to essence of marriage; (5) one or both parties entered into marriage under duress exercised by other party, or a third party, whether or not such other party knew of such exercise of duress; (6) one or both parties entered into marriage as a jest or dare; or (7) marriage is prohibited and void or voidable as provided in 13 Del. Code Ann. 101. (13 Del. Code Ann. 1506[a]).

Decree of annulment may be sought by any of following persons, and petition filed within times specified, but in no event may decree of annulment be sought after death of either party to marriage, except as provided: (1) For paragraphs (1), (4), (5) or (6), supra, by either party to marriage who was aggrieved by condition or conditions, or by legal representative of party who lacked capacity to consent, no later than 90 days after petitioner obtained knowledge of described condition; (2) for paragraph (2), supra, by either party no later than one year after petitioner obtained knowledge of described condition; (3) for paragraph (3), supra, by underaged party, his parent, or guardian, no later than one year after date marriage entered into; (4) decree of annulment for reason set forth in paragraph (7), supra, may be sought by either party, by legal spouse in case of bigamous, polygamous or incestuous marriages, by appropriate state official, or by child of either party at any time prior to death of either party or prior to final settlement of estate of either party and discharge of personal representative, executor, or administrator of estate, or prior to six months after order of distribution is made under 12 Del. Code Ann. 2301 et seq. (13 Del. Code Ann. 1506[b]).

Children born of an annulled marriage are legitimate. Marriages annulled so declared as of date of marriage. (13 Del. Code Ann. 1506[c]).

Provisions relating to property rights of spouses are applicable to annulment. (13 Del. Code Ann. 1506[d]).

Separation as defined in 13 Del. Code Ann. 1503(7) not applicable to annulment proceedings. (13 Del. Code Ann. 1506[e]).

If living children, petitioner must submit affidavit that petitioner has read or been advised of children’s rights. (13 Del. Code Ann. 1507[g]).

Family Court has jurisdiction over all divorce and annulment proceedings. Party must have resided in State for six consecutive months immediately preceding commencement of action. (13 Del. Code Ann. 1504).

Voidable Marriages.

Voidable at instance of innocent party, subject to judicial approval, where either party was: divorced and lacking necessary certificate or copy of decree, or on probation or parole and lacking necessary consent. (13 Del. Code Ann. 101[b]).

14.12 MARRIED WOMEN:

See topics 14.09 Husband and Wife, Marriage; categories 5 Civil Actions and Procedure, topic 15.13 Evidence, subhead Witnesses; 10 Documents and Records, topic 10.01 Acknowledgments; 13 Estates and Trusts, topics 13.10 Executors and Administrators, 13.16 Wills; 21 Property, topic 21.08 Dower.

16 INSURANCE

16.01 INSURANCE COMPANIES:

Regulated by Title 18 of Code.

Supervised by Insurance Commissioner, Dover, DE. (18 Del. Code Ann. 301 et seq.). Powers and duties of Commissioner include promulgation of regulations (18 Del. Code Ann. 311[b]) acting as hearing officer (18 Del. Code Ann. 325), subject to Administrative Procedures Law (29 Del. Code Ann. 101 et seq.), and conducting examinations of every insurer licensed in State at least every five years (18 Del. Code Ann. 318[a]).

Rates.

Rates for casualty insurance, including workers' compensation; all forms of motor vehicle insurance; surety insurance; fire, marine and inland marine insurance on risks located in Delaware; health, group health, blanket health, and Medicare supplement insurance and health service corporations and title insurance regulated by 18-c. 25. (18 Del. Code Ann. 2502). Insurers must file with Commissioner every manual, minimum, class rate, rating schedule and rating rule (except as to inland marine risks which are customarily excluded) (18 Del. Code Ann. 2504), or join licensed rating organization which makes such filings (18 Del. Code Ann. 2510). Rates must not be excessive, inadequate, or unfairly discriminatory. (18 Del. Code Ann. 2501, 2503[a][2]). Insurer may file and use rates, but if Commissioner finds that filing does not meet requirement, he must specify reasons and grant hearing within 20 days after written request of insurer or rating organization. (18 Del. Code Ann. 2507). Must file rates 30 days prior to proposed effective date, and such filings are deemed effective unless disapproved by Commissioner within 30 days of receipt of filing. (18 Del. Code Ann. 2506[c], effective on Nov. 1, 2009). Commissioner may also suspend or modify requirement of filing as to any kind of insurance, rates for which cannot practicably be filed before they are used. (18 Del. Code Ann. 2505). Contracts must be in accord with filings or in accord with 18 Del. Code Ann. 2505 (exemptions) or 18 Del. Code Ann. 2509 (excess rates). See generally 18-c. 25.

Annual statements of financial condition, transactions and affairs must be filed with Commissioner by Mar. 1, in each year for preceding year ending Dec. 31. Statements must be verified by two principal officers; if reciprocal insurer, by oath of attorney- in -fact or like officer if corporation. (18 Del. Code Ann. 526[a]). Annual statement must follow form and requirements of National Association of Insurance Commissioners. (18 Del. Code Ann. 526[a]). Statement of alien insurer must be verified by its U.S. manager or other officer duly authorized. (18 Del. Code Ann. 526[b]). See also subhead Medical Malpractice, infra.

Policies are regulated as follows: Life insurance and annuity contracts, 18-c. 29; group life insurance, 18-c. 31; health insurance contracts, 18-c. 33; group and blanket health insurance, 18-c. 35; consumer credit insurance, 18-c. 37; casualty insurance contracts, 18-c. 39; motor vehicles, no-fault insurance, 21 Del. Code Ann. 2118; property insurance contracts, 18-c. 41; surety insurance contracts, suretyship contracts, 18-c. 43, 77.

Trade practices are regulated in 18-c. 23 by defining and prohibiting unfair competition and unfair or deceptive acts. Unfair discrimination in value of insurance policies and premiums based upon race, color, religion, sexual orientation or national origin is prohibited. (18 Del. Code Ann. 2304[22]).

Rebates.

Rebates in any form prohibited unless expressly authorized by law. (18 Del. Code Ann. 2304[14], [15]).

Liens.

Property owner who fails to furnish demanded proof of fire insurance to lienholders after 30 days notice forfeits right to insure to lienholder who may obtain necessary insurance and charge premium paid to principal amount of indebtedness. (25 Del. Code Ann. 4701, 4702).

Agents and Brokers.

In order to do business in state, must be licensed. (18 Del. Code Ann. 1703, 1704). Unless specifically exempted (18 Del. Code Ann. 1709) written examination is required (18 Del. Code Ann. 1705[a]). Where nonresident agent's state imposes stricter requirements on Delaware agent than Delaware law would otherwise impose on out-of-state agent, Delaware applies that state's own requirements against its agent in Delaware. (18 Del. Code Ann. 532).

Process Agent.

Every insurer must appoint Commissioner as its attorney to receive process before Commissioner authorizes it to do business in state. (18 Del. Code Ann. 524[a]). Service of process on foreign insurance companies must be made on Commissioner. (18 Del. Code Ann. 524[c]).

Investments.

Insurer's investments are regulated. (18-c. 13).

Foreign Insurer.

Insurer formed under Delaware law or located in this state must have certificate of authority from Commissioner to solicit or transact insurance in foreign jurisdiction. (18 Del. Code Ann. 505[b]). Insurer must be incorporated stock or mutual insurer or reciprocal insurer of same general type as domestic insurers; must maintain reserves as required by 18-c. 11; must not transact business on assessment plan, stipulated premium plan or any similar plan; must not transact workers' compensation insurance unless approved by Dept. of Labor; must not transact a kind of insurance in this State unless authorized to transact such insurance in state or country of domicile. (18 Del. Code Ann. 507). May not be owned or controlled by any government or governmental agency. (18 Del. Code Ann. 508). Foreign insurance companies may make investments as permitted by laws of domicile if of a quality substantially equal to that required under 18-c. 13 for similar funds of like domestic insurers. (18 Del. Code Ann. 1329).

For deposit requirements see 18 Del. Code Ann. 513. For application for certificate of authority see 18 Del. Code Ann. 515.

See this topic generally.

Retaliatory Laws.

Taxes, licenses, fees, fines, penalties, deposit requirements or other requirements, obligations, prohibitions or restrictions imposed on Delaware insurers seeking to do business in any state or foreign country which are more onerous than Delaware requirements for insurers of such other state or country shall be imposed upon insurers of such other state or country seeking to do business in Delaware. (18 Del. Code Ann. 532).

Premium Tax.

Each insurer must file with Commissioner by Mar. 1 report showing, except for wet marine and transportation insurance, gross direct premium income, including policy, membership and other fees, assessments and all other considerations for insurance, received during next preceding calendar year on account of insurance contracts, other than workers' compensation and employer's liability, covering property, subjects or risks located in this State (with proper proportionate allocation of premiums as to such subjects in this State insured under policies covering subjects in more than one state), after deducting: (1) amount of returned premiums on cancelled policies (but not including return of cash surrender value of life insurance policies); and (2) unabsorbed portion of any deposit premium, and amount returned to policyholders as dividends and similar returns. Report must be verified by president, secretary or other responsible officer. Considerations received for annuity contracts not to be included in gross direct premium income and not to be subject to premium taxes. (18 Del. Code Ann. 702[a]).

Domestic insurers must include, excepting wet marine and transportation insurance, gross amount of premiums and other considerations for direct insurance from mail solicitations of business in a state or province of Canada, in which insurer is not admitted to transact insurance, covering persons, property, subjects or risks located in such state or province, on which no premium tax is paid and no surplus line tax is payable to such other state or province, and shall make similar deductions as above. (18 Del. Code Ann. 702[b]).

Amount of tax is 1.75% of net premiums. (18 Del. Code Ann. 702[c]). 50% of estimated tax liability for current year must be paid each Apr. 15, 20% on June 15, 20% on Sept. 15, and 10% on Dec. 15, with remaining balance paid on Mar. 1 of following year. (18 Del. Code Ann. 702[d]). Certain wet marine and transportation insurers must file report with Commissioner and pay 5% of taxes shown on report. Report due on June 1. (18 Del. Code Ann. 702[e]).

Gross Premium Tax.

Every insurer transacting insurance in state other than workers' compensation and wet marine and transportation insurance must on Mar. 1 each year pay tax of 0.25% on gross premiums received and assessments collected from insurance of every kind upon persons, property or risks located within state. (18 Del. Code Ann. 707). Tax on wet marine and transportation insurance underwriting profits shall be 5% of taxable profit ascertained as provided in 18 Del. Code Ann. 702(e).

Privilege Tax.

Domestic insurers, other than mutual insurer doing business on assessment premium plan must pay tax of up to $95,000 per year based on gross receipts, due and payable at same time as premium tax and estimated payments as provided in 18 Del. Code Ann. 702. (18 Del. Code Ann. 703). Against this may be credited $1,500 for each $100,000 gross compensation paid by domestic insurer in Delaware. Any insurer which writes 50% or more of total premiums on property or persons in state is exempt from privilege tax. (18 Del. Code Ann. 703[c]).

Political Contributions.

No insurer shall directly or indirectly pay or use, or offer, any money or property to aid any candidate for Insurance Commissioner, or for nomination for such office, or for reimbursement or indemnification of any person for money so used. Any officer, director, agent or stockholder who aids, abets, or consents to any contributions and also any person who knowingly solicits or receives such contribution subject to fine of up to $1,000 and imprisonment of up to one year. (18 Del. Code Ann. 2304[6]).

Direct Actions Against Insurer.

See category 23 Transportation, topic 23.01 Motor Vehicles, subhead Direct Actions.

Uniform Insurers Liquidation Act (1939).

Adopted 1968. (18 Del. Code Ann. 5920).

No-Fault Insurance.

See category 23 Transportation, topic 23.01 Motor Vehicles, subhead No-Fault Insurance.

Unfair Practices.

Governed by 18-c. 23. Discrimination between insureds of equal risk prohibited. (18 Del. Code Ann. 2304[13], [15]). Discrimination in medical policies, not reflective of available government subsidies, against insureds over 65 prohibited. (18 Del. Code Ann. 2315). Refusal to issue accident or health policy on basis of blindness or deafness prohibited. (18 Del. Code Ann. 2316). Tying arrangements prohibited to bank and trust companies engaged in selling of insurance products under 5 Del. Code Ann. 761(a)(14). (18 Del. Code Ann. 2304[23]).

Health Service Corporations.

Health service corporations subject to supervision of Commissioner. (18-c. 63).

Medical Malpractice.

Temporary Joint Underwriting Association, for purpose of issuing medical malpractice insurance on self-supporting basis without subsidy from its members, is established by Delaware Malpractice Law. Membership consists of two categories, Delaware casualty insurers, and Delaware health insurers and certain health service corporations, second category only having liabilities to association when association's aggregate losses reach certain point. Insurers within statutory definitions must be members of association as condition of continued authority to sell insurance in Delaware. (18 Del. Code Ann. 6830). However, association only begins underwriting each category of health care provider upon Insurance Commissioner's finding that health care malpractice insurance is not reasonably available in voluntary market for that type of health care provider. (18 Del. Code Ann. 6830[f]). If Commissioner determines that malpractice insurance can be made reasonably available in voluntary market, Association must cease its underwriting operations with respect to that type of health care provider. (18 Del. Code Ann. 6830[g]). Authorization of association to underwrite given category does not exclude others from issuing same coverage. (18 Del. Code Ann. 6830[f]). Association's grant is limited to providing insurance for two years after it begins underwriting operations. (18 Del. Code Ann. 6830[e]). Association is nonprofit; final premium for all its policy-holders being set to equal administrative expenses, loss and loss adjustment expenses, and taxes, and reasonable allowance for contingencies and servicing. (18 Del. Code Ann. 6832[d]). All licensed health care providers are entitled to apply for coverage from Association. (18 Del. Code Ann. 6834[a]). Maximum authorized coverage is $1,000,000 for each claimant under one policy and $3,000,000 for all claimants under one policy in one year. (18 Del. Code Ann. 6830[h]). Rates and rating plans of association are subject to 18-c. 25 (18 Del. Code Ann. 6832[c]), and Association must file annual statement on or before Mar. 1 with Insurance Commissioner (18 Del. Code Ann. 6838).

16.02 SURETY AND GUARANTY COMPANIES:

Organization.

Surety companies must receive certificate of authority from Insurance Commissioner as provided in 18 Del. Code Ann. 505 to transact surety insurance in State. (18 Del. Code Ann. 7701). Certain capital funds required in cash or cash equivalent. (18 Del. Code Ann. 511[a]).

Reports.

Annual statements and supplemental reports required to conform with National Association of Insurance Commissioners' Annual Statement requirements, unless prescribed or permitted by this title or Commissioner. (18 Del. Code Ann. 526[a]). See topic 16.01 Insurance Companies, subhead Annual Statements.

Rights and Powers.

Scope of surety insurance defined at 18 Del. Code Ann. 905(a). Transaction of surety insurance does not confer power on insurer to guarantee titles to real estate. (18 Del. Code Ann. 905[b]).

Foreign Companies.

See topic 16.01 Insurance Companies, subhead Foreign Insurer.

Taxation.

See topic 16.01 Insurance Companies. No special taxes imposed on surety and guaranty companies as such.

17 INTELLECTUAL PROPERTY

17.01 TRADEMARKS AND TRADENAMES:

What May Be Used.

Any mark not: deceptive; defamatory of any persons, national symbols, institutions or beliefs; immoral; containing flag or coat of arms of government or political subdivision; primarily descriptive or deceptively misdescriptive of goods or services; primarily geographically descriptive; primarily merely surname, or referring to or picturing any living individual without his written consent; or resembling mark registered or used in State of Delaware. (6 Del. Code Ann. 3303).

Registration.

Applicant may fill out form setting forth name and business address, state of incorporation, goods or services in connection with which mark will be used, manner in which mark will be used, class in which goods or services will fall, dates when mark first used anywhere and first used in Delaware, statement that owner has clear right to mark. Form shall be signed, verified and filed with Secretary of State accompanied with facsimile of mark in duplicate and filing fee of $25. (6 Del. Code Ann. 3304). Secretary shall issue certificate of registration upon receipt of $10 fee. (6 Del. Code Ann. 3305[c]).

Duration.

Term of ten years, renewable with $25 fee. May be renewed indefinitely. (6 Del. Code Ann. 3306).

Assignment.

Instrument of assignment may be filed with $25 fee. Assignment must be recorded with Secretary of State within three months following date of assignment in order to be considered valid as against any subsequent purchaser. (6 Del. Code Ann. 3307).

Protection Afforded.

Injunction, destruction of counterfeits, disgorgement of profits and damages. (6 Del. Code Ann. 3314).

Infringement.

Any usage or copying without consent. (6 Del. Code Ann. 3312).

Resale Price Agreements.

Repealed by 60 Del. L. 470.

Tradenames.

Partnership or person using tradename or title which does not include Christian name and surname of each partner or person using such tradename, must file certificate in office of

Prothonotary of each county where business is carried on. Certificate must show tradename or title and Christian name and surname of each partner or person using such tradename, and date of organization of firm, with attached affidavit of one of partners or person using tradename to effect that facts stated are true. (6 Del. Code Ann. 3101). Filing fee, $5. (6 Del. Code Ann. 3103). Change of membership in partnership or firm must be registered in like manner within ten days after change. (6 Del. Code Ann. 3102).

17.02 TRADE SECRETS:

Uniform Trade Secrets Act adopted. (6 Del. Code Ann. 2001 et seq.) (1979, adopted 1982).

Complaints must be brought no later than three years after misappropriation of trade secret has been or should have been discovered. (6 Del. Code Ann. 2006). Court may enjoin actual or threatened misappropriation, and may require royalty payments or compel affirmative acts to protect trade secrets. Injunction may be extended for additional reasonable period of time in order to eliminate commercial advantage that otherwise would be derived from misappropriation. (6 Del. Code Ann. 2002). Complainants also may seek damages for actual loss and unjust enrichment. (6 Del. Code Ann. 2003[a]). Exemplary damages of no more than double amount of actual damages under 2003(a) are available for willful and malicious misappropriations. (6 Del. Code Ann. 2003[b]). Court may award attorney’s fees for willful and malicious misappropriations, or in cases where either party has made claims or defenses in bad faith. (6 Del. Code Ann. 2004). In any proceedings, court must take reasonable precautions to protect trade secrets. (6 Del. Code Ann. 2005; 505 A.2d 30).

18 LEGAL PROFESSION

18.01 ATTORNEYS AND COUNSELORS:

State bar is not integrated.

Jurisdiction over Admission.

Admission to bar is by Supreme Court on recommendation of board consisting of such number of members of Bar as Court shall determine, who are appointed by court. (Supr. Ct. Rules 51, 52).

Eligibility.

21 or older, of good moral character, vouched for by preceptor, baccalaureate degree or equivalent from accredited college or passed Board approved examination, graduate of ABA approved law school, passed Multistate Professional Responsibility Examination, passed bar examination prescribed by Board, completed five-month clerkship in Delaware and attended preadmission instruction session. (Supr. Ct. Rule 52).

Registration As Law Student.

No requirement.

Educational Requirements.

Baccalaureate degree or equivalent from accredited college or university, or law school’s statement of reasons for admission to law school. Juris doctor degree or equivalent from ABA approved law school. (Supr. Ct. Rule 52[a][4], [5]).

Petition for Admission.

Formal application for admission to bar must be made in open court before Supreme

Court or in Chambers of any Justice of Court. (Supr. Ct. Rule 54). Procedures prior to formal court application governed by Rules of Board of Bar Examiners and include written application. (Supr. Ct. Rule 52).

Examination.

Applicants for admission must take examination prepared by Board of Bar Examiners. (Supr. Ct. Rule 52[a][7]). This examination is given each year on days designated by Board. (Board of Bar Examiners Rule BR-11). Examination includes Multistate Bar Exam, two Multistate Performance Test questions, Multistate Professional Responsibility Examination and essay questions from following subjects as selected by examiners: agency, constitutional law, contracts, corporations, criminal law (including Delaware Criminal Code), equity, evidence, partnerships, procedure, property, torts, trusts, uniform commercial code, wills. (BR-8, 12).

Admission Without Examination.

No longer permitted. (Supr. Ct. Rule 53).

Admission Pro Hac Vice.

Permitted. (Supr. Ct. Rule 71).

Clerkship.

Five months in Delaware with five-year member of bar, or with judge of listed courts, or in offices listed, or in office otherwise approved by Board. (Supr. Ct. Rule 52[a][8]).

Licenses.

$75 annual general service fee. (30 Del. Code Ann. 2301[b]).

Privileges.

Attorney-client privilege recognized. (DRE 502).

Attorney Ethics.

ABA Model Rules of Professional Conduct adopted. (Del. Rule Prof. Conduct). Most Ethics 2000 changes to Model Rules adopted, effective July 1, 2003. Material deviations relating to division of fees and advance payment of fees (Del. Rule Prof. Conduct 1.5[e]-[f]); imputation of conflict of interest upon lawyer joining firm (Del. Rule Prof. Conduct 1.10[c]); and prohibition of undignified or discourteous conduct degrading to tribunal (Del. Rule Prof. Conduct 3.5[d]).

Disabilities.

No attorney or other officer of court shall be taken as special bail or surety in any case, but he or she may be principal. (Supr. Ct. Rule 83).

Liabilities.

See category 5 Civil Actions and Procedure, topic 5.08 Costs.

Compensation.

Attorney must not accept compensation for representing client from one other than client, unless client consents after consultation and there is no interference with attorney's independence of judgment or with client-attorney relationship, and information relating to representation of client is protected as required by Rule 1.6. (Del. Rul. Prof. Cond. 1.8[f]).

Disbarment or Suspension.

Administered by Supreme Court in proceedings instituted by court appointed Board on Professional Responsibility. (Supr. Ct. Rules 62, 63).

Unauthorized Practice.

Punishable as contempt. (386 A.2d 652).

Mandatory Continuing Legal Education.

Members of bar and judiciary must complete minimum of 24 hours of actual instruction in approved legal education during each two- year period, of which four hours must be in ethics. (Del. Rul. Mand. Cont. Leg. Educ. Rule 4[A]). Recently admitted attorneys must attend two-day Bridge-The-Gap Pre-Admission Conference held prior to admission. (Del. Rul. Mand. Cont. Leg. Educ. Rule 4[B]).

Specialty Certification Requirements.

No requirements.

Professional Association (or Corporation).

See category 2 Business Organizations, topic 2.03 Corporations, subhead Professional Corporations.

19 MINERAL, WATER AND FISHING RIGHTS

19.01 MINES AND MINERALS:

Governor and Department of Natural Resources and Environmental Control have authority to lease public lands for mining and exploration, and Department has regulatory power. (7 Del. Code Ann. 4510, 4511).

Submerged and Tide Lands.

Secretary of Department of Natural Resources and Environmental Control, and Governor, empowered to lease such lands for exploitation. (7 Del. Code Ann. 6102). Permits required for surveys. (7 Del. Code Ann. 6103, 6104). Pertinent records of lessee and permittee must be available to Secretary and State Geologist upon request. (7 Del. Code Ann. 6105). Public hearing required before lease of tide and submerged lands. (7 Del. Code Ann. 6107). Lease (7 Del. Code Ann. 6111) shall be for not more than six sq. miles or 3,840 acres (7 Del. Code Ann. 6109). Royalty not less than 12.5% of gross production (7 Del. Code Ann. 6112); not less than $1 per long ton sulphur (7 Del. Code Ann. 6135). Annual rent not less than 25¢ per acre. (7 Del. Code Ann. 6114). Performance and compliance bonds required. (7 Del. Code Ann. 6115). Lease not assignable without Secretary's prior written consent. (7 Del. Code Ann. 6123). Secretary may cancel lease for failure to exploit. (7 Del. Code Ann. 6126). Lessees shall exercise high duty of care to prevent avoidable pollution and contamination. (7 Del. Code Ann. 6119). Secretary may offer to lease, has discretion to accept or reject bids. (7 Del. Code Ann. 6128). Secretary's permission and lessee's consent required for joint exploration. (7 Del. Code Ann. 6134). Secretary may promulgate rules, regulations and orders (7 Del. Code Ann. 6138); civil and criminal penalties can be imposed for violations. (7 Del. Code Ann. 6142).

Operation of Mines.

No statutory provisions.

Safeguarding of Employees.

No statutory provisions.

Inspection of Mines.

No statutory provisions.

Taxes.

No special taxes.

20 MORTGAGES

20.01 CHATTEL MORTGAGES:

Uniform Commercial Code adopted. (6, Art. 9).

Filing.

Uniform Commercial Code adopted (6 Del. Code Ann. 9-101), requirements not applicable for liens on motor vehicles filed under 21 Del. Code Ann. 2331-2341 (21 Del. Code Ann. 2333).

Taxation.

No statutory provision.

Motor Vehicles.

Liens on motor vehicles must be noted on certificate of title. (21 Del. Code Ann. 2332). No additional filing required under Uniform Commercial Code (21 Del. Code Ann. 2333) unless motor vehicle held by debtor as inventory held for sale (21 Del. Code Ann. 2334).

Forms.

Since each security agreement is unique there is no general security form in use. Out-of-state forms accepted. Officially recognized forms are as set forth at end of this Digest.

20.02 [RESERVED]

20.03 MORTGAGES OF PERSONAL PROPERTY:

See topic 20.01 Chattel Mortgages; category 3 Business Regulation and Commerce, topic 3.09 Commercial Code.

20.04 MORTGAGES OF REAL PROPERTY:

Mortgage, although in form of conveyance, does not vest legal title in mortgagee, but is merely security for debt. (5 Del. Ch. 200). Usual practice is to have mortgage secure bond or note, which may have warrant of attorney for confession of judgment.

Married woman may validly execute bond or mortgage without husband’s consent, and husband not liable thereon unless party thereto. (25 Del. Code Ann. 2104).

Execution of bond or mortgage by person at least 18 years old is valid. (25 Del. Code Ann. 2102).

Mortgages are considered as personal property. (42 Del. Ch. 394, 213 A.2d 57).

Execution.

Should be signed, acknowledged and attested by one witness (25 Del. Code Ann. 2101), as a matter of proof. Must be under seal to form basis for action scire facias sur mortgage or to be recognized in court of law, although court of equity will disregard technical defect in determining rights between debtor and creditor. (457 A.2d 734).

Recording.

Mortgages should be filed with Recorder of Deeds in county wherein property is located. Mortgage duly executed and acknowledged operates as valid lien from time of recording. (25 Del. Code Ann. 2106).

Taxes.

No tax on mortgages or recording thereof. See subhead Recording Fees, infra.

Recording fees depend on length. For each document filed, $5 surcharge for Housing Development Fund and $25 fee for Delaware Cultural Access Fund. (9 Del. Code Ann. 9607).

Trust Deeds.

No statutory provision.

Future Advances.

If expressly stated therein, mortgage may secure not only existing debt but also any obligatory or optional future advances except those governed by 25 Del. Code Ann. 2901. (25 Del. Code Ann. 2118[a]). Mortgage has priority as to such advances over any lien subsequent in time to recording of mortgage. (25 Del. Code Ann. 2118[a]). Total debt secured by mortgage at any one time must not exceed maximum principal amount which must be specified in mortgage or other such recorded instrument. (25 Del. Code Ann. 2118[a]). Mortgage or other instrument given for purpose of creating lien on real property may secure disbursements and other advances thereunder for payment of taxes, assessments, maintenance charges, or insurance. (25 Del. Code Ann. 2118[b]).

Priorities.

Except for purchase money mortgages, mortgage has priority from time of proper recording. (25 Del. Code Ann. 2106; 25 Del. Code Ann. 2108). If two or more mortgages, or conveyances in nature of mortgages, of same premises, are lodged in and recorded in same office at same time, they shall stand in priority in relation to each other, according to their respective dates. (25 Del. Code Ann. 2107).

Purchase money mortgages on same land have priority according to times of record in proper office. If recorded at same time no priority between them. (25 Del. Code Ann. 2108).

Purchase money mortgage recorded within five days after recording of deed of conveyance has priority over prior judgments and other liens against mortgagor. (25 Del. Code Ann. 2108).

Subordination Agreements.

Commonly used; no applicable statutory provision.

Assignment must be attested by one witness. (25 Del. Code Ann. 2109).

Release.

Release by mortgagee or his assigns of part of mortgaged premises is not release or discharge of any other part of land included in mortgage. Such release must be under hand and seal of releasor, acknowledged like deed, and becomes effective upon date of filing in recorder's office of county where lands lie. (25 Del. Code Ann. 2110).

Partial Payments.

Repealed by 72 Del. L. c. 29, § 1.

Satisfaction.

Satisfied mortgages must be so entered forthwith on record. Fine up to $1,000 for willful failure to satisfy mortgage (25 Del. Code Ann. 2111[e]); liability for civil damages up to $500 or larger if special damages are alleged and proved (25 Del. Code Ann. 2114). On application (properly sworn to) to Superior Court, rule may be obtained ordering mortgagee or obligee or their executors, administrators or assigns to appear on day fixed by court, and show cause, if any, why such mortgage or judgment shall not be marked satisfied of record. (25 Del. Code Ann. 2115[a]). Upon return of rule, court may direct recorder to mark mortgage satisfied. (25 Del. Code Ann. 2115[b]). In New Castle and Sussex Counties, fees for satisfaction of mortgage shall be established by ordinance. (9 Del. Code Ann. 9617). Same for Kent County. (9 Del. Code Ann. 9619). Recorder of Deeds of each county shall collect surcharge of $5 for each document filed for Housing Development Fund and $25 fee for Delaware Cultural Access Fund. (9 Del. Code Ann. 9607[b]).

Discharge.

No statutory provision.

Foreclosure.

Ordinary method of foreclosure is to sue out writ of scire facias in Superior Court of county wherein mortgaged property is located. (10 Del. Code Ann. 5061[a]). Upon issuance of writ, it shall be served and returned in same manner as original summons. (10 Del. Code Ann. 3105). If defendant fails to appear on proper date, judgment entered that plaintiff shall have execution by levari facias directed to proper officer. (10 Del. Code Ann. 5063).

Sales.

Under a levari facias, mortgaged premises taken in execution and, following notice given, are exposed to public sale. (10 Del. Code Ann. 5065). Upon confirmation of such sale, premises conveyed by deed to purchaser. (10 Del. Code Ann. 5065). Any surplus from proceeds of sale after satisfying mortgage, with interest and costs, returned to mortgagor. (10 Del. Code Ann. 5067). If no sale for want of bidders, return made accordingly, and a liberari facias may issue and be executed. (10 Del. Code Ann. 5065).

Deficiency Judgments.

No specific provision. Any deficiency must be recovered by independent proceeding on debt instrument which was secured by mortgage. Where bond or note contains warrant of attorney to confess judgment, mortgagee may proceed on bond or note by applying to Prothonotary to enter judgment by confession, following written notice to obligor. (10 Del. Code Ann. 2306).

Redemption.

No equity or redemption after foreclosure sale confirmed by court. (10 Del. Code Ann. 5066).

Mortgage may be in the following form:

This Mortgage, Made this . . . . . . day of . . . . . . in the year of Our Lord two thousand . . . . . ., Between . . . . . .

Whereas, the said . . . . . . in and by . . . . certain Obligation . . . . . . duly executed, bearing even date herewith, stand . . . . . . bound unto the said party . . . . of the second part, in the sum of . . . . . . current lawful money of the United States of America, payable . . . . . . together with costs and counsel fees, under the terms and conditions therein expressed.

Now this Mortgage Witnesseth, That the said party. . . . of the first part, for and in consideration of the aforesaid debt of . . . . . . dollars and for the better securing payment of the same, with interest as aforesaid and costs and counsel fees, do. . . . hereby grant and convey unto the said party. . . . of the second part, All . . . . . . [description of the premises][Recital]

And it is hereby expressly provided and agreed, that if any action, suit, matter or proceeding be brought for the enforcement of this mortgage or the accompanying bond, and if the plaintiff or lien holder in said action, suit or proceeding shall recover judgment in any sum, such plaintiff or lien holder shall also recover as reasonable counsel fees . . . . . . per centum of the amount decreed for principal and interest, which said counsel fees shall be entered, allowed and paid as a part of the decree or judgment in said action, suit or proceeding.

Provided Always, nevertheless, that if the said party of the first part . . . . . . or his Assigns, shall and do well and truly pay, or cause to be paid, unto the said party of the second part . . . . . . or his Executors, Administrators or Assigns the aforesaid debt of . . . . . . dollars on the day and time hereinbefore mentioned and appointed for the payment thereof, with interest, then and from thenceforth, as well this present indenture, and the estate hereby granted, as the said recited Obligation shall cease, determine, and become void and of no effect, anything hereinbefore contained to the contrary thereof, in anywise notwithstanding.

In witness whereof, etc.

Sealed and delivered in presence of:

. . . .(Seal).

(Acknowledgment).

Assignment may be in the following form: Know all men by these presents, that . . . . . . Mortgagee named in the Indenture of Mortgage hereinafter mentioned, for and in consideration of the sum of . . . . . . to . . . . . ., in hand, paid by . . . . . . at and before the time of the execution hereof, the receipt whereof is hereby acknowledged, ha. . . . granted, bargained, sold, assigned, transferred, and set over, and by these presents do. . . . grant, bargain, sell, assign, transfer, and set over unto the said . . . . . . Heirs, Executors, Administrators and Assigns, a certain Indenture of Mortgage, bearing date the . . . . . . day of . . . . . . A.D. 20. . . . executed by . . . . . . unto the said . . . . . . and Recorded in the office for Recording of Deeds, &c., in and for . . . . . . County, and State of Delaware, in Mortgage Record . . . . . . Vol. . . . . . ., Page . . . . . . &c., ... also the Bond in said mortgage recited, and all moneys, principal and interest, due or to become due thereon and thereby secured, or intended so to be as aforesaid, and all . . . . . . therein mentioned and described.

Together with the rights, members and appurtenances thereto belonging, and all . . . . . . Estate, Right, Title and Interest therein. To Have and To Hold all and singular the premises hereby granted and assigned, or mentioned or intended so to be unto the said . . . . . .

Heirs, Executors, Administrators, and Assigns, forever . . . . . .

Subject nevertheless to the right and equity of redemption (if any there be) of the said Mortgagor . . . . . . Heirs and Assigns in the same.

In Witness Whereof, the said . . . . . . ha. . . . hereunto set . . . . . . hand and affixed . . . . . . seal the . . . . . . day of . . . . . . in the year of Our Lord two thousand . . . . . .

. . . .(Seal).

Sealed and delivered in the presence of:

. . . .

(Acknowledgment).

Release of part of property may be in following form: Know All Men by these Presents, ... that the said . . . favoring the request of the said . . . . and for and in consideration of the sum of . . . Dollars, to . . . in hand, paid by the said . . . the receipt whereof is hereby acknowledged hath and by these presents, both for . . . and assigns, remise, release, and forever quit claim, unto the said . . . and assigns, all that portion of the above mentioned and described property, bounded and described as follows, to wit: And the said . . . for . . . and assigns, both hereby covenant and agree, that . . . or they shall not and will not at any time hereafter, proceed against the said portion of the above mentioned and described property, by legal process or otherwise, nor look to the same or any part thereof for the payment of any part of the principal or interest of the sum of money secured by the said Indenture of Mortgage, nor disturb, molest, or put to charge or damage, the present or future owner or owners, occupier or occupiers of the said hereby released portion of the aforesaid property, for or by reason of the said Indenture of Mortgage, or anything connected with it.

Provided, nevertheless, that nothing herein contained shall effect the said Indenture of Mortgage, or its legal validity, or the other remaining portion of the said above mentioned and described property, not expressly hereby released therefrom.

In Witness Whereof, The said . . . hath caused its corporate name by . . . its . . . President to be hereunto set, and the common or corporate seal of the said corporation to be hereunto affixed, duly attested by its Secretary, the . . . day of . . . A.D. 20 . . . .

Sealed and Delivered in the Presence of:

. . . .(Seal).

(Attested)

Power of Attorney to Satisfy Mortgage may be in following form: Know all men by these presents that I, ..., of the City of . . . . . ., ... County and State of . . . . . ., have made, constituted and appointed, and by these presents do make, constitute and appoint . . . . . ., of . . . . . ., my true and lawful attorney, for me and in my name, place and stead, to enter satisfaction upon the record of a certain mortgage executed by . . . . . . unto me for a real debt of . . . . . . Dollars, said mortgage bearing date . . . . . ., and recorded in the office of the recording of deeds, etc., at . . . . . ., in and for . . . . . . County, State of . . . . . ., in Mortgage Record . . . . . . Volume . . . . . . Page . . . . . .; giving and granting unto my said attorney full power and authority to do and perform all and every act and thing whatsoever requisite and necessary to be done in and about the premises, as fully, to all intents and purposes, as I might or could do if personally present, with full power of substitution and revocation; hereby ratifying and confirming all that may said attorney or substitute shall lawfully do, or cause to be done, by virtue hereof.

In witness whereof, I have hereunto set my hand and seal, this . . . . . . day of . . . . . ., 20. . . . .

. . . .(Seal).

Chattel Mortgages.

See topic 20.01 Chattel Mortgages.

21 PROPERTY

21.01 ABSENTEES:

Common law rules govern. See also category 13 Estates and Trusts, topic 13.05 Death.

Care of Property.

No statutory procedure.

Process Agent.

No statutory procedure.

Escheat.

Estate of intestate dying without heirs escheats to state. (12 Del. Code Ann. 1101). Escheat of certain abandoned property such as bank deposits that have remained unclaimed for over five years (12 Del. Code Ann. 1170), postal savings system accounts (12 Del. Code Ann. 1220), funds from life insurance company doing business in state and owed to person or corporation residing in state (12 Del. Code Ann. 1180), certain court funds on unclaimed property (12 Del. Code Ann. 1160), and other unclaimed property (12 Del. Code Ann. 1197),. Reporting of property deemed abandoned must take place on or before Mar. 1 of each year. (12 Del. Code Ann. 1199). Remittance or delivery must take place on or before date required for filing of report. (12 Del. Code Ann. 1201). State Escheator examines records of people, business associations, and organizations for compliance. State Bank Commissioner examines banks. (12 Del. Code Ann. 1155). See categories 2 Business Organizations, topic Corporations, subhead Unclaimed Dividends; Estates and Trusts, topic Wills, subhead Unclaimed Legacies.

21.02 ADVERSE POSSESSION:

Character of Possession.

No fixed rule; common law standards of adversity, exclusivity, hostility, openness, notoriety, and continuity apply. (16 Del. Ch. 410, 147 A. 165).

Duration of Possession.

Actions for recovery of real property must be brought within 20 years of their accrual. (10 Del. Code Ann. 7901).

Easements.

Continuous adverse use of a way over another’s land for 20 years establishes an easement by prescription. (26 Del. Ch. 94, 22 A.2d 519). There is no prescriptive right to light and air. (24 Del. Ch. 86, 6 A.2d 614).

Disabilities.

Person under disability when the right accrues may have further time up to ten years after removal of disability. Disabilities are infancy, mental illness and imprisonment. (10 Del. Code Ann. 7903).

State Property.

Title or interest in real property belonging to state cannot be acquired by adverse possession. (7 Del. Code Ann. 4519). Former statute which permitted such adverse possession except in case of state owned salt marsh, beach or shore has been repealed. (400 A.2d 299).

21.03 [RESERVED]

21.04 CONVEYANCES:

See topic 21.06 Deeds.

21.05 CURTESY:

Estate of curtesy abolished. (12 Del. Code Ann. 511).

21.06 DEEDS:

Words “grant and convey,” in any deed, unless specifically limited operate as special warranty against grantor and his heirs and all persons claiming under him. This also applies to short form of deed and mortgage, valid by statute, unless words are specifically restricted. (25 Del. Code Ann. 121[b]). See topic Real Property for types of estates.

Execution.

Deed may be acknowledged by any party to it in Superior Court or before any Delaware judge, or notary public, or before two justices of peace from same county, or before Mayor of Wilmington or may be acknowledged in Superior Court by attorney or proved in court by one or more of subscribing witnesses. (25 Del. Code Ann. 122). Legal instrument which may be recorded, and which has been duly executed, but which has not been properly acknowledged, is nevertheless valid. (25 Del. Code Ann. 132). Instrument conveying or alienating lands, signed by persons or corporations who at time were owners of lands, properly acknowledged, but not under seal or including certain key language, is nevertheless valid. (25 Del. Code Ann. 131).

For circumstances in which spouse must join, see category 14 Family, topic 14.09 Husband and Wife, subhead Conveyance or Encumbrance of Property. See also topics 21.08 Dower, 21.05 Curtesy; category 14 Family, topic 14.12 Married Women.

Deed of corporation may be executed and acknowledged before any Delaware or federal judge, notary, two justices of peace of same county, by president or other presiding officer, or vice-president or assistant vice-president, duly authorized by resolution of directors, trustees or other managers, or by legally constituted attorney of corporation. (25 Del. Code Ann. 127).

Recording not necessary to validity as between parties. (28 Del. 497, 94 A. 903). Deed has priority from time of recording in office of recorder of county in which land is situated. (25 Del. Code Ann. 151; 25 Del. Code Ann. 153). Acknowledgment or proof is prerequisite to recording. (25 Del. Code Ann. 151). See also category 10 Documents and Records, topic 10.04 Records.

Recording Fee.

Depends on length of instrument. Fee in New Castle, Kent and Sussex Counties established by ordinance. (9 Del. Code Ann. 9617; 9 Del. Code Ann. 9619).

Electronic Recording.

If law requires document to be original, be on paper or other tangible medium, or be in writing, electronic document satisfying standards adopted by electronic recording commission satisfy law. (25 Del. Code Ann. 182[a]). If law requires that document be signed, electronic signature satisfies law. (25 Del. Code Ann. 182[b]).

Operation and Effect.

Lands, tenements and hereditaments may be aliened and possession transferred by deed without livery of seisin; and legal estate will accompany use and pass with it. (25 Del. Code Ann. 101). See also introductory paragraph under this topic.

Taxes.

Realty transfer tax of 2% of value of property represented by document, payable at time of making, execution, delivery, acceptance or presenting for recording of document, except when actual value of property transferred is less than $100 or county or municipality where property is located has enacted 1½% realty tax, in which case state transfer tax is 1½%. (30 Del. Code Ann. 5402[a][b][d]). Exceptions for will; nonresidential leases; residential leases not more than five years; mortgages; conveyance between corporation operating Slum Clearance and Redevelopment Authority Law project and shareholders thereof; conveyance to nonprofit industrial development agency and between such agency and industrial corporation; conveyance between spouses, or between former spouses after divorce of property acquired before divorce, or between parent and child or child’s spouse; conveyance to trustee, nominee or straw party for grantor as beneficial owner, or for beneficial ownership of another where exception from tax would be applicable if such beneficiary were grantee, or from trustee, nominee or straw party to beneficial owner; conveyance without consideration between parent corporation and wholly owned subsidiary; correctional deed without actual consideration; conveyance to or from State, U.S., or any of their instrumentalities, agencies or political subdivisions and University of Delaware; conveyance to or from corporation where grantor or grantee owns stock or interest in same proportion to interest in real estate conveyed provided that conveyance does not result from liquidation of corporation unless stock of corporation being liquidated has been held by grantor or grantee for more than three years; conveyance to or from partnership, where grantor or grantee owns interest in same proportion to interest in real estate conveyed provided that partnership can only convey to partner who has held interest in partnership for more than three years; trade, between homeowner and builder, of old residence as part consideration for new; conveyance from purchase money mortgagor to lender holding such mortgage, which is genuinely in default, by sheriff’s sale or in lieu thereof; conveyance to religious organization of real estate not to be used for commercial purposes, provided, that only portion of tax paid by religious organization holding title to real estate is exempt; conveyance to or from volunteer fire company, provided that only that portion of tax payable by fire company is exempt; bona fide pledge of stock or limited liability membership interest, or partnership interests as loan collateral or any transfer of publicly traded stock, publicly traded limited liability company member interest or publicly traded partnership interest; conveyances where owners of real property own 80% or more of beneficial interest in real estate or where owners own less than 80% of beneficial interest and transfer not sale of real property under regulations promulgated by Secretary of Finance; conveyance of mobile home provided taxes have been paid; conveyance without consideration to federal tax-exempt organization; conveyance to nonprofit conservation organization when property for open space preservation; conveyance to or from organization exempt from tax when purpose is to provide owner-occupied housing to low and moderate income households by rehabilitating residential properties and reselling said properties without profit; any conveyance between siblings, half-siblings, or step-siblings. (30 Del. Code Ann. 5401). Tax credit is given to licensed real estate broker for transfer of residential property transferred to him within preceding year as part consideration for purchase of other residential property. (30 Del. Code Ann. 5403). Similar 1½% on transfer of all real property in City of Wilmington, in addition to State tax. (Wilm. City Code §§ 44-81 to 44 Del. Code Ann. 82). Other municipalities may have, and some do have, additional transfer tax of up to 1½%. (30 Del. Code Ann. 5402). Realty transfer tax of 1% of amounts exceeding $10,000 of cost of construction on land must be paid as prerequisite to obtaining building permit for land when contract for construction on land is entered into within one year of land transfer. (30 Del. Code Ann. 5402[f]).

Form.

Long form valid; short form authorized by 25 Del. Code Ann. 121 as follows:

Form

This Deed made this . . . . . . day of . . . . . ., A.D. . . . . Between A.B., of . . . ., party of the first part and C.D. of . . . . . ., party of the second part.

Witnesseth, that the said party of the first part for and in consideration of the sum of . . . ., the receipt whereof is hereby acknowledged, hereby grants and conveys unto the said party of the second part.

In witness whereof, the said party of the first part hath hereunto set his hand and seal.

. . . .(Seal).

Sealed and Delivered in The Presence of

. . . .

. . . .

21.07 DEEDS OF TRUST:

See category 20 Mortgages, topic 20.04 Mortgages of Real Property.

21.08 DOWER:

Estate of dower abolished. (12 Del. Code Ann. 511).

21.09 ESCHEAT:

See topic 21.01 Absentees, subhead Escheat; category 13 Estates and Trusts, topics 13.07 Descent and Distribution, subhead Escheat, 13.16 Wills, subhead Unclaimed Legacies.

21.10 LANDLORD AND TENANT:

Kinds of Tenancy.

Normal common law tenancies.

Leases.

Rental agreement includes all agreements, written or oral, establishing or modifying terms, conditions, rules, regulations, or other provisions concerning use and occupancy of rental unit. (25 Del. Code Ann. 5141[22]). Rental agreements not in writing or not signed by landlord and tenant effective by statute for no longer than one year. (25 Del. Code Ann. 5106[a]; 25 Del. Code Ann. 5110). If no term specified, it is month-to-month. (25 Del. Code Ann. 5106[b]). Where landlord accepts rent without reservation and without signing written rental agreement tenant has signed and tendered to him, or where tenant takes possession and pays rent without reservation, without signing rental agreement landlord has signed and tendered to him, rental agreement has same effect as if signed by both parties. (25 Del. Code Ann. 5110[a], [b]). Rental agreements cannot waive or require any indemnification for any landlord liability arising under law. (25 Del. Code Ann. 5301[a][3]). Retaliatory evictions and retaliatory rent increases are generally prohibited. (25 Del. Code Ann. 5516). Confession of judgment provisions authorizing person other than tenant to confess are void. (25 Del. Code Ann. 5301[a][2]). Landlord must supply and maintain fit rental unit. (25 Del. Code Ann. 5305[a]).

See also category 22 Taxation, topic 22.16 Property Taxes, subhead Lease Tax.

Security Deposit.

If rental agreement requires deposit, security deposit may not exceed one month's rent on lease of or tenancy that has lasted one year or longer. (25 Del. Code Ann. 5514[a][2]). Failure to return security deposit with itemized list of damages within 20 days is waiver of claim for damages and entitles tenant to return of double amount of deposit. (25 Del. Code Ann. 5514[f], [g]). Landlord must supply tenant with receipt for money paid as application fee not exceeding greater of 10% of monthly rent or $50 and maintain appropriate record for at least two years. (25 Del. Code Ann. 5514[d]). Tenant must allow landlord reasonable access to unit for inspection, upkeep, and exhibition of premises and tenant may install new lock at own cost as long as tenant notifies landlord in writing and supplies landlord with key, new lock fits into system already in place and tenant does not damage door. (25 Del. Code Ann. 5509[a]).

Rent.

Except for purposes of payment, rent uniformly apportioned on daily basis. (25 Del. Code Ann. 5501[c]). Landlord must give minimum 60 day written notice of rent increase and effective date thereof. (25 Del. Code Ann. 5107[a]). Tenant is deemed to have accepted increase if has not responded within 45 days of end of term. (25 Del. Code Ann. 5107[b]). Tenants may petition for receivership, after at least five days notice to landlord if there exists lack of heat, running water, light or electricity, sewage facilities or other condition imminently dangerous to health and if such duty is imposed by rental agreement and/or governmental authority. (25 Del. Code Ann. 5901; see also 25 Del. Code Ann. 5902 to 25 Del. Code Ann. 5907).

Recording.

See category 10 Documents and Records, topic 10.04 Records.

Lien.

No lien on behalf of landlord in personal property of tenant is enforceable, except under Self-Service Storage Facility Act (25 Del. Code Ann. 4903; 25 Del. Code Ann. 5120) or against commercial tenant pursuant to rental agreement (25 Del. Code Ann. 6301[a]).

Termination of Tenancy.

Where no term is provided, term is month-to-month. (25 Del. Code Ann. 5106[b]). Rental agreement, other than month-to-month agreements, may be terminated by either party upon minimum of 60 days written notice prior to end of term. (25 Del. Code Ann. 5106[c]). Tenant may terminate upon 30 days written notice where tenant is required to move because of employment, active duty in U.S. military, admission to senior citizen housing facility or subsidized rental unit, death or serious illness of tenant or member of immediate family residing with tenant requiring permanent change, or domestic violence, sexual offenses or stalking. (25 Del. Code Ann. 5314[b]).

Holding Over.

If there is rental agreement for term of one or more years and landlord does not give tenant written notice of intention to terminate 60 days or more before end of term, or tenant does not give like notice to landlord 45 days or more before end of term, such rental agreement becomes lease by month and all terms of rental agreement continue in force but this provision does not apply to leases of farm lands. (25 Del. Code Ann. 5108). Tenant remaining in rental unit beyond term of rental agreement or after landlord exercises right of termination must pay landlord sum not exceeding twice monthly rental under previous agreement, computed and prorated on daily basis, for each day he remains in possession as well as other losses incurred by landlord as determined by hearing before any court of competent jurisdiction. (25 Del. Code Ann. 5515[b]).

Notice required to be served personally or by leaving copy in presence of adult person at either landlord's or tenant's abode, or with landlord's agent. (25 Del. Code Ann. 5113[a]).

In lieu of personal service, notice may also be sent by registered, certified or 1st-class mail as evidenced by certificate of mailing. Return receipt whether signed, refused or unclaimed is prima facie evidence of service. (25 Del. Code Ann. 5113[b]).

Dispossession.

Should tenant breach any rule or covenant material to rental agreement except late payment of rent and not comply with landlord's written notice to remedy it within seven days or breach constitutes material breach of code, ordinance or statute, landlord may bring proceeding for summary possession (25 Del. Code Ann. 5513[a]) in court which handles civil cases. Summary proceeding to recover possession shall be maintained in nearest Justice of the Peace Court in same county (25 Del. Code Ann. 5701) where, inter alia: tenant illegally continues in possession after expiration of lease; tenant wrongfully fails to pay agreed rent; tenant wrongfully deducted money from agreed rent; tenant has breached lawful obligation relating to use of premises; tenant wrongfully ousted petitioner who is rightful tenant of unit; tenant holds over for more than five days after property sold upon foreclosure and title perfected; tenant, employee, servant or agent of landlord holds over for more than 15 days after dismissal when housing is supplied by landlord as part of compensation for labor or services; tenant is convicted of class A misdemeanor or felony during term of tenancy which caused or threatened to cause irreparable harm to any person or property; tenant refuses to yield possession after unit rendered partially or wholly unusable by fire or casualty and landlord requires possession to effect repairs; or rental agreement for commercial rental unit provides for such action or if it pertains to manufactured home lot, for any grounds set forth in Manufactured Home Owners and Community Owners Act (25 Del. Code Ann. 5702).

Distress.

Landlord right of distress only pursuant to rental agreement for commercial unit; and must be action at law. (25 Del. Code Ann. 6301[a]). No distress shall remain in force for more than 60 days; goods not sold within that period shall be discharged from distress levy. (25 Del. Code Ann. 6303[e]). Written rental agreement authorizing person other than tenant to confess judgment against tenant void and unenforceable. (25 Del. Code Ann. 6104). Landlord's remedy for tenant's failure to pay rent is action for possession or for rent alone following demand and notice in writing. (25 Del. Code Ann. 5502[a][b]).

Uniform Residential Landlord and Tenant Act.

Not adopted.

21.11 LEASES:

Uniform Commercial Code adopted. (6, Art.2A). See category 3 Business Regulation and Commerce, topic 3.09 Commercial Code.

Leases of Real Property.

See topic 21.10 Landlord and Tenant.

21.12 [RESERVED]

21.13 PERPETUITIES:

No interest created in real property held in trust shall be void by reason of common law rule against perpetuities and no interest created in personal property held in trust shall be void by any rule against perpetuities. (25 Del. Code Ann. 503[a]). Rule against perpetuities is otherwise in force. (25 Del. Code Ann. 503[b]; 28 Del. Ch. 303, 42 A.2d 784). At expiration of 110 years from later of date on which real property or interest therein is held by trust or trust becoming irrevocable, rule against perpetuities requires real property interest to be distributed according to terms of trust as if trust terminated. Some trusts exempt from application of this rule. (25 Del. Code Ann. 503[b]). Charitable uses are not within rule. (2 Del. Ch. 392, aff'd, 2 Del. Ch. 421).

For purpose of rule against perpetuities all powers of appointment are deemed to have been created at time of exercise of such power and not at time of creation thereof; and no estate or interest is void under rule unless void if created at date of exercise of power of appointment. (25 Del. Code Ann. 501). Unless expressly against intent of donor, donee of power of appointment may appoint in further trust for objects of power and may create further powers of appointment. (25 Del. Code Ann. 505).

Accumulations.

No provision directing or authorizing accumulation of trust income is invalid. (25 Del. Code Ann. 506). See category 13 Estates and Trusts, topic 13.15 Trusts, subhead Accumulations.

21.14 PERSONAL PROPERTY:

Tenancy by entirety authorized by common law. (32 Del. Ch. 381, 88 A.2d 126).

21.15 POWERS OF ATTORNEY:

Common law rules govern, except where changed by particular provisions of UCC (6 Del. Code Ann. 1-103), and as changed by durable power of attorney authorized in 12-c. 49. Power of attorney given in writing shall be exercisable notwithstanding principal's subsequent disability or incapacity. (12 Del. Code Ann. 4901).

Attorneys in fact can be empowered to sell and otherwise dispose of real estate if power is acknowledged or proved. (25 Del. Code Ann. 171).

Formalities.

Acknowledgment of deed by attorney may be made before any Delaware judge, notary public or two justices of peace for same county when letter of attorney is acknowledged or proved, and acknowledgment or proof is certified and recorded, provided, letter authorizes such acknowledgment or grants authority to sell or dispose of premises. (25 Del. Code Ann. 172).

Revocation.

Disability or incapacity of principal does not terminate agency of anyone acting under durable power of attorney. (12 Del. Code Ann. 4902). Death of principal does not terminate agency of attorney-in-fact or other person who, without actual knowledge of such death, acts in good faith under written power of attorney, durable or otherwise. (12 Del. Code Ann. 4904[a]).

Persons in Military Service.

Agency created by power of attorney in writing by principal who is or becomes member of armed forces, merchant seaman outside U. S. or person on war duty abroad shall not be revoked by death of principal until actual knowledge or notice of death received by agent or one dealing with agent. (25 Del. Code Ann. 174[a]).

21.16 REAL PROPERTY:

Person holding estate in fee tail may convey in fee simple by duly acknowledged deed. (25 Del. Code Ann. 302).

Permanent leasehold estates, renewable forever, are regarded as fee simple estates and subject to same modes of alienation, power of devise, and same rules of descent and distribution if grantor of leasehold interest has released all his rights to rent charged upon leasehold. (25 Del. Code Ann. 304).

Real estate may be conveyed to create either joint tenancy with right of survivorship or tenancy in common. (25 Del. Code Ann. 311). Statutory presumption in favor of tenancies in common, except with regard to executors and trustees; joint tenancy created only through express statement. (25 Del. Code Ann. 701).

A grant, conveyance or devise to husband and wife gives them an estate by the entirety at common law. (8 Del. Ch. 404, 68 A. 450).

See also topics 21.05 Curtesy, 21.06 Deeds, 21.08 Dower, 21.10 Landlord and Tenant; categories 5 Civil Actions and Procedure, topic 5.16A Partition; 14 Family, topic 14.09 Husband and Wife; 20 Mortgages, topic 20.04 Mortgages of Real Property.

Rule in Shelley's Case is recognized. (25 Del. Ch. 404, 22 A.2d 380).

Foreign Conveyances or Encumbrances.

Deed, concerning lands, may be acknowledged or proved, or may be taken out of state. (25 Del. Code Ann. 129). See category 10 Documents and Records, topic 10.01 Acknowledgments.

Condominiums.

A Unit Property Act has been adopted relating to division of real property into units (25 Del. Code Ann. 2201 et seq.). Unit, together with its proportionate undivided interest in common elements, is for all purposes real property, and ownership of same is for all purposes ownership of real property. (25 Del. Code Ann. 2204). Owner may not exempt self from liability for common expenses, and no partition or division of common elements is permitted except as provided in 25 Del. Code Ann. 2239. (25 Del. Code Ann. 2205).

Land Use Planning.

Quality of Life Act of 1988 adopted to establish and implement comprehensive land use planning programs to guide and control land development. (9 Del. Code Ann. 2651[a]; 9 Del. Code Ann. 4951[a]; 9 Del. Code Ann. 6951[a]). Each county must adopt or revise comprehensive land use plan and regulations to implement plan. (9 Del. Code Ann. 2653; 9 Del. Code Ann. 4953; 9 Del. Code Ann. 6953). No land development permitted unless in conformity with comprehensive land use plan. (9 Del. Code Ann. 2651[b]; 9 Del. Code Ann. 4951[b]; 9 Del. Code Ann. 6951[b]). Each county must adopt capital improvements plan to provide for construction and expansion of public facilities. (9 Del. Code Ann. 2656[c]; 9 Del. Code Ann. 4956[c]; 9 Del. Code Ann. 6956[c]). Each county must report to State every year on success or failure of plan. (9 Del. Code Ann.

2658[c][d]; 9 Del. Code Ann. 4958[c][d]; 9 Del. Code Ann. 6958[c][d]). See category 12 Environment, topic 12.01 Environmental Regulation, subhead Land Use Planning.

Judicial Review of Land Use Application.

Person or association which opposes land use application through means of judicial review is not liable to any party to such review as result of seeking such review except as for costs expressly provided for by court rules. (9 Del. Code Ann. 2699; 9 Del. Code Ann. 4999; 9 Del. Code Ann. 6999). See category 5 Civil Actions and Procedure, topic 5.02 Actions, subhead Prohibited Actions.

21.17 TRUST DEEDS:

See category 20 Mortgages, topic 20.04 Mortgages of Real Property.

22 TAXATION

22.01 ADMINISTRATION:

Contractors License.

Contractors must obtain annual license ($75 fee) and remit gross receipts tax of 0.624%, payable monthly on or before 20th of each month. $80,000 deduction allowed on monthly aggregate gross receipts. If gross receipts not in excess of $750,000 during lookback period, $240,000 deduction allowed on quarterly aggregate gross receipts. If competitive bid contract in excess of $50,000 person shall initiate license application prior to, or in conjunction with, submission of bid. (30 Del. Code Ann. 2502; 76 Del. Laws, c. 282, § 2).

Wilmington Wage Tax.

Individual residing in Wilmington or there employed is taxed on earned income at rate of 1.25% of income earned per year. (Wilm. City Code § 44-107).

Nonresident Bonds.

Nonresident person or firm doing business in state must file surety bond with Dept. of Finance payable to state to guarantee payment of income taxes, occupational or business licenses, unemployment compensation contributions and income taxes withheld from wages of employees, together with any penalties and interest thereon. (30 Del. Code Ann. 375[a]). Secretary of Finance may waive bond. (30 Del. Code Ann. 375[a][3]). Penalty not more than $10,000 per occurrence for failure to comply with bond requirement. (30 Del. Code Ann. 375[c]). Knowing or willful failure to file surety bond is misdemeanor offense and punishable by maximum fine of $3,000 and/or maximum imprisonment of six months. (30 Del. Code Ann. 375[d]).

Penalties.

See topics detailing various taxes.

22.02 ALCOHOL, BEVERAGES AND TOBACCO TAXES:

Tobacco Products Tax.

80.0 mills per cigarette; tobacco products other than moist snuff and cigarettes 15% of wholesale price. (30 Del. Code Ann. 5305[a][b]). Tax applies to tobacco sales over telephone, mail, or Internet. (30 Del. Code Ann. 5361[3], 30 Del. Code Ann. 5367).

22.03 BUSINESS TAXES:

Affiliated (Captive) Finance Company Tax.

Affiliated Finance Company (corporation substantially all of whose activity within Delaware is limited to issuance of commercial paper or other debt obligations and use of proceeds to make loans to or to purchase receivables from one or more of its affiliated corporations) (30 Del. Code Ann. 6301), is taxed through annual license fee issued by Secretary of Finance (30 Del. Code Ann. 6302).

Rates.

Fee is based on capital base. If base is $0-$99,999,999.99, fee is $10,000; if base is $100,000,000-$224,999,999.99, fee is $15,000; if base is $225,000,000- $749,999,999.99, fee is $25,000; if base exceeds $750,000,000, fee is $50,000. (30 Del. Code Ann. 6303).

Payment.

Tax is due on or before Apr. 30 each year, or as soon thereafter as corporation commences operations. (30 Del. Code Ann. 6304).

Banks.

In lieu of Delaware corporate income tax, banking organizations and trust companies and any subsidiary corporation of banking organization is liable for Delaware franchise tax on taxable income. For this purpose, “taxable income” is defined as 56/100 of net operating income before taxes, with certain modifications. (5 Del. Code Ann. 1101[a]). Maximum rate is 8.7% of taxable income not in excess of $20 million, and minimum rate is 2.7% of taxable income in excess of $30 million with 1.7% surtax on income in excess of $650,000,000. (5 Del. Code Ann. 1105[a]). See category 3 Business Regulation and Commerce, topic 3.01 Banks and Banking, subhead Taxation.

Franchise Taxes.

See category 2 Business Organizations, topic 2.03 Corporations, subhead Franchise Tax. Corporation incorporated in Delaware, if not exempt, is required to pay annual franchise tax. (8 Del. Code Ann. 501). Delaware law provides that number of classes of corporations are exempt from franchise tax. More significant exemptions are for banking corporations, savings banks and building and loan associations. (8 Del. Code Ann. 501). In no case will franchise tax for full taxable year be more than $180,000 nor less than $350. (8 Del. Code Ann. 503[c], effective on Jan. 1, 2010).

Insurance Companies.

In lieu of Delaware corporate income tax, insurer doing business in Delaware, other than workmen’s compensation insurer or wet marine and transportation insurer, is liable for basic tax of 1.75% on net premiums received, (18 Del. Code Ann. 702[c][1]), less allowable deductions, and additional tax of 0.25% on gross premiums received (18 Del. Code Ann. 707[a]), less allowable deductions. In lieu of basic tax, premiums from employer-owned and trust-owned life insurance policies subject to tax ranging from 2% on first $10 million to 1% for premiums in excess of $100 million. (18 Del. Code Ann. 702[c][2]). Insurers chartered under Delaware law (other than certain mutual insurers) having annual gross receipts of $1 million or more are also required to pay annual Delaware “privilege taxes” ranging from minimum of $10,000 to maximum of $95,000. (18 Del. Code Ann. 703).

Underwriting profits from wet marine and transportation insurance subject to 5% tax. (18 Del. Code Ann. 702[e]). Workers’ compensation insurer subject to 2% tax on premiums received less credits. (18 Del. Code Ann. 704).

See category 16 Insurance, topic 16.01 Insurance Companies.

Taxation of Banks.

See subhead Banks, supra; category Business Regulation and Commerce, topic Banks and Banking, subhead Taxation.

Taxes on Insurance Companies.

See subhead Insurance Companies, supra and category Insurance, topic Insurance Companies.

License Fees.

Manufacturers Tax.

Annual license fee for manufacturers doing business in state of $75 for each place of business, plus 0.144% of gross receipts payable monthly on preceding month's receipts ($1,000,000 deduction allowed). If taxable gross receipts during lookback period defined in 30 Del. Code Ann. 2122 do not exceed $300,000, fee is payable quarterly ($3,000,000 deduction allowed). (30 Del. Code Ann. 2702). Manufacturers of steam, gas or electricity for heat, light or power and producers of farm products are exempt. (30 Del. Code Ann. 2704). Manufacturers also entitled to exemption for cost of manufacturing intermediate products in any new or expanded facility. (30 Del. Code Ann. 2705).

Mercantile Tax.

Annual license fee of $75 plus: (1) For wholesalers, monthly tax of 0.4147% of aggregate gross receipts over $80,000 from goods sold within state, plus 0.192% of taxable gross receipts from sale of petroleum products, plus $75 for each additional place of business, plus additional tax as provided in 7 Del. Code Ann. 9114 (30 Del. Code Ann. 2902); (2) for food processors, 0.2074% of aggregate gross receipts over $80,000 from goods sold within state, plus $75 for each additional place of business (30 Del. Code Ann. 2903, effective on Jan. 1, 2010); (3) for commercial feed dealers, 0.1037% of aggregate gross receipts over $80,000 from goods sold within state, plus $75 for each additional place of business (30 Del. Code Ann. 2904, effective on Jan. 1, 2010); (4) for retailers, 0.7776% of aggregate gross receipts over $80,000 from sales and services within state, plus $25 for each separate branch or business location, plus additional tax as provided in 7 Del. Code Ann. 9114 (30 Del. Code Ann. 2905, effective on Jan. 1, 2010); (5) for restaurant retailers, 0.6739% of aggregate gross receipts over $80,000 from goods sold within state, plus $25 for each separate branch or location (30 Del. Code Ann. 2906, effective on Jan. 1, 2010); (6) for farm machinery retailers, 0.1037% of aggregate gross receipts over $80,000 from goods sold within state, plus $75 for each additional place of business (30 Del. Code Ann. 2907, effective on Jan. 1, 2010); (7) for grocery supermarket retailers, 0.3402% of first $2 million per month and 0.6372% thereafter of aggregate gross receipts from sales within state allowing deduction of $80,000, plus $25 for each separate branch or location (30 Del. Code Ann. 2908, effective on Jan. 1, 2010). Sale of unprocessed agricultural products exempt; sale of motor vehicle by dealer to user exempt; sale of aircraft with takeoff weight 12,500 pounds or more exempt; retail sale of off premises consumption of alcohol exempt; goods delivered outside of state by retailer on which out-of-state retail sales tax paid exempt; commercial crabbers exempt; activities related to conduct of horse racing meetings exempt; nonprofit organizations exempt from federal income tax exempt from §§ 2905, 2906. Some artists, craft persons, and elderly handicapped peddlers also exempt. (30 Del. Code Ann. 2909).

Occupational Licenses and Fees.

Various annual occupational license taxes (30 Del. Code Ann. 2301[a], [b]), plus .4147% of aggregate gross receipts in excess of $80,000 monthly (30 Del. Code Ann. 2301[d][1], effective on Jan. 1, 2010). Number of occupations and businesses are specifically exempt from payment of general occupational and services gross receipts tax, including most notably Delaware investment companies, banks, insurance companies, public utilities, savings and loan and building and loan associations, nonprofit organizations exempt from federal income tax, real estate mortgage investment conduits and Delaware business trusts registered as investment companies under Investment Company Act of 1940. (30 Del. Code Ann. 2301).

22.04 [RESERVED]

22.05 EMPLOYMENT TAXES:

Unemployment Compensation Tax.

Every employer of one or more employees must contribute to State Unemployment Compensation Fund at average contribution rate for each industrial classification established by Federal Secretary of Labor (5.4% for unclassified employers from 1985 and beyond). (19 Del. Code Ann. 3348). No payment by employees. Employers may not deduct assessment from employee's wages. (19 Del. Code Ann. 3346). Following are excluded from benefits of Act and employers thereof not liable for contributions with respect to such employments: Some agricultural laborers; students employed by university in which they are enrolled and which they regularly attend; minor in employ of parent or individual in employ of child or spouse; individual employed by any government or political subdivision of Delaware; individual employed by charitable organization; employees of carriers engaged in interstate commerce; service by officer of building and loan association, labor union, political or social club, etc. when service is part-time and remuneration is less than $75 in calendar quarter; insurance or real estate agent paid only by commission; any full-time student employed in instructional work program; any patient employed in hospital; anyone employed so as to be eligible for unemployment compensation program set up by Act of Congress; elected, appointed or fee-compensated officials; direct sellers as defined by § 3508 of Internal Revenue Code; employees leased from professional employment organization. (19 Del. Code Ann. 3302). Fund is to be administered by State Treasurer as custodian under direction of Dept. of Labor. (19 Del. Code Ann. 3162). Contributions are payable at times prescribed by Dept. of Labor. (19 Del. Code Ann. 3345).

22.06 [RESERVED]

22.07 ESTATE TAX:

There is estate tax imposed on estate of every decedent who at time of death was resident of Delaware. (30 Del. Code Ann. 1502[a]). Amount of estate tax for decedents dying before July 1, 2009 is amount of credit allowable under provisions of federal estate tax laws for estate, inheritance, legacy and succession taxes paid to any state, less aggregate amount of all estate, inheritance, legacy and succession taxes actually paid to any other state. (30 Del. Code Ann. 1502[b], 1503). Amount of estate tax for decedents dying after June 30, 2009 is amount of credit allowable by § 2011 of Internal Revenue Code (26 U.S.C. § 2011) in effect as of Jan. 1, 2001, less aggregate amount of all estate, inheritance, legacy and succession taxes actually paid to any other state. (30 Del. Code Ann. 1502[c], 1503). Estate tax would only apply to decedents having estates large enough to require filing federal estate tax return under provisions of Internal Revenue Code in effect as of Jan. 1, 2001. (30 Del. Code Ann. 1505[a]).

Apportionment.

In absence of testamentary or other direction estate taxes are apportioned among beneficiaries. (12 Del. Code Ann. 2901).

Time of Payment.

Tax payable on or before date fixed for filing estate tax return. (30 Del. Code Ann. 1505[c]).

Apportionment Against Inter Vivos Dispositions.

State and Federal estate taxes apportioned on pro rata basis among persons interested in estate to whom property is or may be transferred unless decedent has directed otherwise. Persons interested in estate include all persons who have received or may be entitled to receive any property or interest required to be included in gross estate or any benefit in such property received by will, intestacy, transfer, trust, estate, interest, right, power or relinquishment of power. (12 Del. Code Ann. 2901).

Interstate Co-operation.

Delaware has statutory procedure for compromising or arbitrating taxes in cases where there is dispute with other state over domicile of decedent at time of death. (30 Del. Code Ann. 1704).

22.07A EXCISE TAXES:

Public Accommodations Tax.

Excise tax imposed at rate of 8% on rental of hotel, motel or tourist home rooms. (30 Del. Code Ann. 6102[a]).

Payment.

Operators must pay tax collected to Dept. of Finance not later than 15th day of month following month of collection. (30 Del. Code Ann. 6104).

Penalties.

Interest at rate of 1% per month charged on payments made after prescribed due date. (30 Del. Code Ann. 6104).

22.08 GASOLINE AND SPECIAL FUELS TAXES:

Gasoline Tax.

23¢ per gallon. (30 Del. Code Ann. 5110). Certain sales are exempt. (30 Del. Code Ann. 5111).

22.09 GIFT TAX:

Repealed with respect to gifts made on or after Jan. 1, 1998. (71 Del. Laws, c. 130, § 1).

22.10 [RESERVED]

22.11 INCOME TAX:

(Contained in 30-c. 11 and c. 19.) Levied on entire taxable income of individual residents and nonresidents of state. (30 Del. Code Ann. 1102; 30 Del. Code Ann. 1121).

Taxable Income.

Taxable federal adjusted gross income modified as herein set forth, less deductions and exemptions hereinafter set forth. (30 Del. Code Ann. 1105; 30 Del. Code Ann. 1121). Modifications: add (1) interest qualifying under 26 U.S.C. § 103, (2) dividends paid by regulated investment company qualifying under 26 U.S.C. § 852(b)(5), (3) amount of any depletion allowance taken under 26 U.S.C. § 611 as determined under 26 U.S.C. § 613, and (4) deduction in excess of $30,000, for net operating loss carryback under 26 U.S.C. § 172; subtract (1) interest on obligations of U.S., its territories and possessions, and its instrumentalities exempt from state income tax under federal law, and dividends paid by regulated investment company under 26 U.S.C. § 851, to extent such dividends are attributable to interest paid on exempt obligations, (2) amounts, not to exceed $2,000 for separate return, $4,000 for joint return, provided certain conditions of age or disability and maximum income are met, (3) amounts received as pensions not to exceed $2,000 received by persons under age 60 from employers, U.S. or State, or amounts received as pensions not to exceed $12,500 received by persons age 60 or over from employers, U.S. or State or as “eligible retirement income,” as defined therein, (4) social security benefits paid by federal government and all payments received under Railroad Retirement Act, to extent included in federal adjusted gross income, (5) amount of wages paid or incurred which is disallowed as deduction by IRS under 26 U.S.C. § 280C, (6) federally-taxed benefits from participation in travelink program, (7) deductions consistent with 26 U.S.C. § 172, (8) distributions received from certain retirement or compensation plans, to extent they are applied to books, tuition or fees at institution of higher learning attended by person or dependents under age 26, so long as amounts have been included in federal adjusted gross income, (9) amount of any refund of Delaware State income taxes imposed, to extent included in federal adjusted gross income; add or subtract from federal adjusted gross income any share of fiduciary adjustments applicable under 30 Del. Code Ann. 1134. (30 Del. Code Ann. 1106).

Deductions.

Residents may deduct standard deduction unless election to itemize. (30 Del. Code Ann. 1107). For taxable periods beginning after Dec. 31, 1999, standard deduction of resident individual is $3,250. Standard deduction of resident spouses filing jointly is $6,500. $2,500 is added to standard deduction in certain circumstances. (30 Del. Code Ann. 1108). Itemized deductions equal sum of itemized deductions allowable on federal return minus: (1) amount thereof representing Delaware income taxes; (2) income taxes paid to other states or their subdivisions if taxpayer credits such amounts under 30 Del. Code Ann. 1111(a); plus (i) portion of state employee automobile reimbursement allowance allowed as charitable deduction for federal tax purposes; (ii) amount paid for health insurance by self-employed person, less amount allowed as deduction pursuant to 26 U.S.C. § 162(1); (iii) 12% of itemized deductions. (30 Del. Code Ann. 1109[a]). Husband and wife may itemize only if both do so. (30 Del. Code Ann. 1109[b]). Amount of itemized deductions representing income taxes imposed by Delaware, another state, or District of Columbia equals amount of such taxes reduced by amount of such taxes multiplied by percentage determined under § 68(a) of Internal Revenue Code. (30 Del. Code Ann. 1109[c]). Delaware adjusted gross income of individual means such individual’s federal adjusted gross income with modifications under 30 Del. Code Ann. 1106. (30 Del. Code Ann. 1123).

Exemptions.

Residents allowed personal credit of $110 for each personal exemption entitled for federal income tax and additional $110 allowed for residents over age 60. (30 Del. Code Ann. 1110). Part-time resident taxpayers have election to (1) report tax as resident for taxable year, or (2) report tax as nonresident for taxable year. (30 Del. Code Ann. 1125).

Credits.

Resident taxpayer allowed credit for income taxes paid to any other state on income earned therein which is also taxable in Delaware subject to limitation. (30 Del. Code Ann. 1111). Credit of $400 for members of volunteer firefighting, ambulance, and rescue service companies. (30 Del. Code Ann. 1113).

Members of Armed Forces.

Compensation paid nonresident by U.S. for military service not Delaware source income. (30 Del. Code Ann. 1124[g]).

Rates.

For years beginning after Dec. 31, 2009, rates are as follows: 2.2% of taxable income in excess of $2,000 but not in excess of $5,000; 3.9% of taxable income in excess of $5,000 but not in excess of $10,000; 4.8% of taxable income in excess of $10,000 but not in excess of $20,000; 5.2% of taxable income in excess of $20,000 but not in excess of $25,000; 5.55% of taxable income in excess of $25,000 but not in excess of $60,000; and 6.95% of taxable income in excess of $60,000. (30 Del. Code Ann. 1102[a][12], effective Jan. 1, 2010).

There is additional tax on lump sum distributions as that term is defined under 26 U.S.C. § 402(e)(4). (30 Del. Code Ann. 1102[b]).

Returns and Payment.

Returns and payment must be made to Dept. of Finance on or before 30th day of fourth month following close of taxpayer’s year. (30 Del. Code Ann. 1168).

Extensions for Filing Returns.

Director of Division of Revenue may grant reasonable extension of time for payment of income tax or estimated tax, or for filing any return, declaration, statement or other required document. (30 Del. Code Ann. 511[a]).

Estimated Tax.

Resident and nonresident individual or trust must declare estimated tax where Delaware estimated tax can reasonably be expected to exceed $400. (30 Del. Code Ann. 1169). Payment or filing of estimated tax required on or before same dates as for federal estimated tax except that State Tax Commissioner may establish other dates. (30 Del. Code Ann. 1170[a]). Director’s Ruling 72 requires first payment by date of Delaware Personal Income Tax Return (Apr. 30 unless it falls on Sat., Sun. or legal holiday).

Refunds.

Taxpayer may apply in writing, stating specific grounds, to State Tax Commissioner, Tax Appeal Board and Superior Court, in order named, as provided, for refund under certain conditions, within three years from date return was filed or within two years from time tax is paid unless, at any time, taxpayer is “financially disabled”. (30 Del. Code Ann. 539; 30 Del. Code Ann. 544; 30 Del. Code Ann. 331).

Penalties and Interest.

Interest accrues at 0.5% per month (30 Del. Code Ann. 533[a]); penalty for failure to file return of 5% of tax due multiplied by number of months return has not been timely filed; penalty for failure to pay tax (in whole or in part) is 1% of tax due multiplied by number of months tax has not been paid, not to exceed 25%; penalty for failure to file partnership returns or to furnish information required on such return is $25 times number of partners in tax year, limited to maximum of five months or $10,000 (30 Del. Code Ann. 534); penalty for underpayment of estimated tax 1.5% per month (30 Del. Code Ann. 535[b]-[c]); negligence penalty of 20% of deficiency, 40% in case of gross valuation misstatements (30 Del. Code Ann. 536[a]); fraud penalty of additional 75% of deficiency due to fraud (30 Del. Code Ann. 535[a]). Willful failure to pay tax, to collect or account for taxes, or make, sign or certify return or supply required information, penalty of not more than $3,000, in addition to any other amounts prescribed (30 Del.

Code Ann. 535[f]); additional $500 penalty for any false statement for which there was no reasonable basis. (30 Del. Code Ann. 535[g]). Interest at 0.5% per month computed on tax from last date prescribed for payment (without regard to any extension of time) until date of payment; on penalties in addition to tax only from date of notice and demand, none if payment made within ten days of notice and demand. (30 Del. Code Ann. 533[a], [b], [d], [e]).

Withholding of Income Tax.

Willful failure to furnish, civil penalty equal to total amount of tax evaded plus penalty of not more than $3,000, in addition to other amounts prescribed. (30 Del. Code Ann. 535[f]). $500 penalty for false statement for which there was no reasonable basis. (30 Del. Code Ann. 535[g]). Penalty for failure to pay amount shown as tax on any withholding return filed, unless due to reasonable cause, 1% per month, not to exceed 25%. (30 Del. Code Ann. 534[b]). Negligence penalty for failure to pay, 20% of deficiency (40% for gross valuation misstatements). (30 Del. Code Ann. 536[a], [b]).

Corporations.

Unless specifically exempted, foreign and domestic corporations are subject to 8.7% tax on income from business and property within state. (30 Del. Code Ann. 1902[a]). Exemptions include those corporations whose activities within Delaware are confined to maintenance and management of their intangible investments or intangible investments of trusts registered as investment companies under 15 U.S.C. § 80a-1 et seq. and collection and distribution of income from such investments or from tangible property physically located outside Delaware. (30 Del. Code Ann. 1902[b][8]). S corporations are also exempt. (30 Del. Code Ann. 1902[b][9]). Every corporation, not exempt, must file return, regardless of amount. (30 Del. Code Ann. 1904[e]). Tax deduction of 50% of amount invested in neighborhood assistance in impoverished areas, up to $100,000. (30 Del. Code Ann. 2004; 30 Del. Code Ann. 2005). Tax credit and license fee reduction allowed for taxpayers establishing new business facility that is qualified investment of $200,000 or more and employing five or more qualified employees. (30 Del. Code Ann. 2011[a]; 30 Del. Code Ann. 2012[a]).

Penalties and Interest Re Corporation Income Tax.

Interest on amount unpaid at date prescribed for payment, 0.5% per month. (30 Del. Code Ann. 533[a]). Penalty for underpayment of tentative tax or installment of estimated tax, 1.5% per month. (30 Del. Code Ann. 535[b]). Penalty for failure to file return, unless due to reasonable cause, 5% per month. (30 Del. Code Ann. 534[a]). Penalty for failure to pay amount on timely filed return, 1% per month, not to exceed 25%. (30 Del. Code Ann. 534[b]). Negligence penalty of 20% of deficiency in addition to deficiency. (30 Del. Code Ann. 536[a], [b]). Fraud penalty of 75% of deficiency on portion attributable to fraud in addition to deficiency. (30 Del. Code Ann. 535[a]). Fine of not more than $3,000 plus any criminal penalties for willful failure, neglect or refusal to file return. (30 Del. Code Ann. 535[f]). In addition, $500 penalty will be assessed for any false statement for which there was no reasonable basis. (30 Del. Code Ann. 535[g]). Willful refusal to file tax return or make available any books, papers, records or memoranda for examination, Director may apply to Superior Court for order requiring return to be filed. Refusal to obey order may be held in contempt of court. (30 Del. Code Ann. 559).

22.12 INHERITANCE TAX:

Inheritance tax repealed. Effective for decedents dying after Dec. 31, 1998. (71 Del. Laws c. 353, § 10).

22.1322.15 [RESERVED]

22.16 PROPERTY TAXES:

All taxes shall be uniform upon same class of subjects within territorial limits of authority levying tax and shall be levied and collected under general laws passed by general assembly. County Councils of New Castle and Sussex Counties and levy court of Kent County may exempt real property within their respective counties as in their opinion will best promote public welfare; incorporated municipalities may do likewise within said municipalities. Agricultural property shall be given limited tax exemption. (Const., art. VIII, § 1).

Taxable Property.

All real property, liable to taxation and assessment by counties at same tax rate, defined to include land, buildings, improvements and special betterments. (9 Del. Code Ann. 8101; Const., art. VIII, § 1).

Personal property, whether tangible or intangible, is not taxable by counties or other political subdivisions. (9 Del. Code Ann. 8103). However, certain transfers of real property are taxable by counties. (9 Del. Code Ann. 8102).

Exemptions.

Real property belonging to state, or U.S., or any county of state, or any municipality thereof and held for public use, or any church or religious society, and not held as investment, or any college or school and used for educational or school purposes, shall not be liable for state and local taxes except as otherwise provided. Any corporation created for charitable purposes and not held by way of investment is exempt from taxation, by local state governments. (9 Del. Code Ann. 8105; Const., art. VIII, § 1).

Any person, resident of state, age 65 or over, having income not in excess of $3,000 per year and residing in dwelling house owned by him, has real property tax exemption for such property up to $5,000 assessed value. No such exemption shall be in addition to any other exemption to which person entitled. Exemption not applicable where person’s spouse lives on property and has income in excess of $3,000 per year. (9 Del. Code Ann. 8132[a]). Mobile home owners meeting foregoing criteria may be entitled to exemption as determined by County Council. (9 Del. Code Ann. 8363).

No individual real property tax for certain organizations unless property held by way of investment. (9 Del. Code Ann. 8106[a]).

Land and improvements held by church, religious society, charitable corporation, or nonprofit organization, devoted to housing elderly pursuant to § 231 National Housing Act, not taxable by any county or political subdivision provided that at least 75% of dwelling units on property are rented and occupied by elderly at all times, and entire property operated on nonprofit basis. (9 Del. Code Ann. 8151). Special assessment payable in lieu of taxes of not less than 10% of gross rentals less utilities and social services. (9 Del. Code Ann. 8156).

Assessment.

Real property is assessed at its true value in money. (9 Del. Code Ann. 8301; 9 Del. Code Ann. 8306[a]).

Methods of assessment and collection vary in different counties but in general taxes are levied for county, poor, school, and if property is situated in municipality, municipal purposes.

Review of Assessment.

Each county has board of assessment which makes and revises assessments and hears appeals from existing assessments. (9 Del. Code Ann. 8311).

Payment.

Due on July 1 in New Castle County; June 1 in Kent County; May 1 in Sussex County. (9 Del. Code Ann. 8601). Penalty of 6% for failure to pay by Sept. 1st in New Castle County; additional penalty of 1% per month after Sept. 30. (9 Del. Code Ann. 8604[a][1]). Penalty of 1.5% per month in Kent and Sussex Counties after Sept. 30th. (9 Del. Code Ann. 8604[a][2]).

Collection.

Real estate taxes are collected by receiver of taxes and county treasurer for Kent County (9 Del. Code Ann. 8401; 9 Del. Code Ann. 8421); Department of Finance for Sussex County (9 Del. Code Ann. 7004); and Department of Land Use for New Castle County (9 Del. Code Ann. 1301).

Liens.

All state, county and municipal taxes; all charges for water, sewer, garbage or other services and assessments for installation of sewer lines, water mains, sidewalks and curbing constitute lien upon all real estate of taxable person in county in which taxes and/or charges imposed; fines imposed by any court for local building, housing or sanitation code violation are assessed and are prior to all other liens. (25 Del. Code Ann. 2901).

In Kent and Sussex Counties, lien for county and state taxes remains lien for period of two years from first day of July of year in which tax is imposed; school taxes for two years from 10th of Aug. of year in which tax is imposed; town or municipal taxes for two years from date prescribed by charter for delivery of duplicate to collector. In New Castle County, tax liens on real estate endure for ten years from first day of July of year for which tax is levied or until tax is collected so long as real estate remains property of person who was owner at time tax was assessed. (25 Del. Code Ann. 2903).

Sales.

Procedure as to sales varies in different counties; sales in Kent and Sussex Counties are generally governed by 9 Del. Code Ann. 8771 to 8779. In New Castle County, Office of Finance may institute by motion proceedings or proceed by attachment. (9 Del. Code Ann. 8741-8757).

Redemption.

No sale for taxes in Kent and Sussex Counties shall be approved by court, and no deed shall be made until expiration of one year from time of sale within which time owner, his heirs, executors or administrators, shall have power to redeem land on payment to purchaser of amount of purchase money, 20% interest and cost of deeds to Receiver of Taxes and County Treasurer or Director of Finance. (9 Del. Code Ann. 8776).

In New Castle County owner at any time within 60 days after sale is confirmed by Superior Court, if action has begun by attachment, may pay to purchaser amount of purchase price plus 15% to redeem real estate. (9 Del. Code Ann. 8758).

Penalties.

Failure of any person owning or having care, management or control of real property liable to assessment, to deliver to Board of Assessment within 30 days after time limited to do so, particular account of such property shall be fined not more than $100. Prosecution may be stayed by filing return and paying sum of not more than $10 plus costs. (9 Del. Code Ann. 8319[a], [c], [d]). Persons swearing to false returns are guilty of perjury. (9 Del. Code Ann. 8323). Any violation of provisions for valuation and assessment for which no other penalty provided, punishable by fine of $100 and/or imprisonment for not more than one year. (9 Del. Code Ann. 8326).

Lease Tax.

On lessee, tax of 2.0736% of rent under lease of motor vehicle and rent under lease of tangible personal property is required, except household property, hospital property, any medical or remedial equipment leased by or to elderly, ill, injured or handicapped persons and manufacturing equipment under leveraged leases in which rental payments guaranteed in whole or part by Economic Development Administration. This section does not apply to leases used in agricultural production. (30 Del. Code Ann. 4302, effective Jan. 1, 2010). Any lessor who is not also retailer licensed under 30 Del. Code Ann. 2905 must pay $75 license fee plus $25 for each additional place of business, renewable yearly. Lessor must also pay license tax of .7776% of gross yield of leases in excess of $240,000 if paid quarterly, $80,000 if paid monthly. (30 Del. Code Ann. 2905, effective Jan. 1, 2010). Surtax of 0.9% for initial sellers of petroleum products. (7 Del. Code Ann. 9114).

Realty Transfer Tax.

Imposed on value of property upon transfer of real property. Certain transfers are excluded. At state level it is generally 2% but will not exceed 1.5% if municipality or county where such property is located imposes transfer tax of 1.5%. (30 Del. Code Ann. 5402). See category 21 Property, topic 21.06 Deeds.

22.17 SALES AND USE TAXES:

No general sales or use tax.

22.18 STAMP AND SEAL TAXES:

Stamp Tax.

No stamp tax on corporate stock. Stamp tax on realty transfers, see category 21 Property, topic 21.06 Deeds.

23 TRANSPORTATION

23.01 MOTOR VEHICLES:

General supervision in Department of Transportation and/or Department of Safety and Homeland Security. (21 Del. Code Ann. 301 et seq.). Department of Safety and Homeland Security is responsible for performance of all powers, duties and functions vested by law in Motor Vehicle Division of State Highway Department and Motor Vehicle Commissioner. (29 Del. Code Ann. 8215).

Vehicle License.

No unregistered vehicle may be operated, except for temporary operation while registration application pending or vehicle being towed with one end hoisted. (21 Del. Code Ann. 2101[a]-[b]). Registration is issued by Department of Public Transportation and Department of Safety and Homeland Security. (21 Del. Code Ann. 301). Vehicles are registered for 24 months, 12 months or six months and effective date of registration must be date vehicle is titled, except that trailer or semi-trailer not under fleet account may obtain license for period of from one to 12 months. (21 Del. Code Ann. 2109[a]-[b]). Effective date for issuance of vehicle registration will be date vehicle is titled. (21 Del. Code Ann. 2109[a]-[b]). Any newly manufactured current model motor vehicle or trailer with gross registered weight of 10,000 lbs. or less, not previously registered, may be registered for five years or less—effective date being date when vehicle is titled. Newly manufactured, previous model year motor vehicles or trailers having above criteria may initially be registered for four years or less. (21 Del. Code Ann. 2109[c]). Any used vehicle not more than five model years old may be renewed for up to 48 months based on model year and mileage formula established by Division of Motor Vehicles. (21 Del. Code Ann. 2110[a]). Fees must be calculated by using rates in effect during prorated or extended registration. (21 Del. Code Ann. 2109[d]). Registration of commercial vehicles, trailers or farm trucks may be renewed for three months, six months, one year or two years; where annual safety inspection waived, registration of trailer with gross registered weight of 4,000 lbs. or less may be renewed for three years. (21 Del. Code Ann. 2110[a], [d]). Registration expires on transfer (21 Del. Code Ann. 2501) but such registration may be transferred upon payment of $25 fee (21 Del. Code Ann. 2503[a]; 21 Del. Code Ann. 2508). Transferee must make application for new certificate of title within 30 days of purchase of vehicle (21 Del. Code Ann. 2503[a]) or be subject to $25 penalty fee (21 Del. Code Ann. 2508). Effective Jan. 1, 2001 through Dec. 31, 2009, registered weight for any vehicle at gross weight of 26,000 pounds or more and farm trucks applying for registration renewal must not exceed 36,000 pounds for two axle truck and 65,000 pounds for three axle truck, however, farm trucks may weigh as much as 70,000 pounds with agricultural products upon payment of fee. (21 Del. Code Ann. 2105[i]). After July 1, 2011, all motor vehicles registered exceeding 26,000 must comply with 21 Del. Code Ann. 2105. (21 Del. Code Ann. 2105[j]). Vehicles and fire apparatus which were manufactured prior to Jan. 1, 1993 that are owned or used by organized fire company within Delaware are not subject to this provision. (21 Del. Code Ann. 2105[k]). Number plate, which must be at least 12 inches from ground, must be attached to rear of motor vehicle except on tractor trailers or semi-trailers, which must display them on front. (21 Del. Code Ann. 2126[a]-[b]). It is illegal to purposely sell, offer to sell, transfer, possess or use any device, product, plate cover, or object, including any image altering device or spray, to hinder, inhibit, impede, impair, or prevent photographing, recording or imaging of license plate in connection with enforcement of motor vehicle code or traffic laws. First violation imposes fine of not less than $50 but not more than $1,000. Subsequent violations within three years from original violation impose fine of not less than $200 but not more than $2,000. (21 Del. Code Ann. 2126[e]). Certain disabled veterans exempt from registration fee. This exemption is limited to one vehicle at any one time. (21 Del. Code Ann. 2164). No statutory exemption for members of Armed Forces.

Operator's license required (21 Del. Code Ann. 2701); renewable every five years with fee of $25 and late fee of $1.15 (21 Del. Code Ann. 2715[a], [c]). Licenses issued by Division of Motor Vehicles. (21 Del. Code Ann. 2702). Operator of motorcycle or motorbike, two-wheeled motor-driven vehicle, or three-wheeled vehicle having less than three-foot distance between adjacent wheels, must be licensed and pass special examination. Those persons who possess valid Class D operator's license or CDL license may operate three-wheeled motor vehicle without special endorsements or examinations under § 2713 provided there is minimum three-foot distance between adjacent wheels. (21 Del. Code Ann. 2703[a]). Endorsement fee for two-wheeled motor driven vehicles (including motorcycles and motorbikes) is $8. (21 Del. Code Ann. 2703[b]). Upon application and fee of $35, person licensed for three consecutive years may, upon Secretary's discretion, get permanent license which is good until revoked, cancelled or suspended. (21 Del. Code Ann. 2716[a]). Examinations required of all applicants, except Department may waive examination for renewal applicants. (21 Del. Code Ann. 2713[a], [b]). Level 1 Learner's Permits to learn to drive are required for 12 months, and granted to persons at least 16 years old but less than 18. Applicant for permit must have completed approved course in driver's education or received license and completed approved instruction in another state, passed written test and road skills test, and be certified by driver education teacher as qualified for licensing. (21 Del. Code Ann. 2710). Members of Armed Forces serving on active duty and having valid license from state of domicile are excepted. (21 Del. Code Ann. 2705[2]). Persons operating farm machinery exempt from requirements. (21 Del. Code Ann. 2705[1]). Uniform Commercial Driver License Act in effect. (21-c. 26).

Age Limits.

No license issued to any person under age 16. (21 Del. Code Ann. 2707). Those who are subject to loss of consciousness due to disease of central nervous system are to provide annual medical certificate not later than last day of motor vehicle license holder's birth month and not earlier than 45 days before said date. (21 Del. Code Ann. 2707[b][6]). Application for Class D temporary instruction permits is for persons 18 or older. (21 Del. Code Ann. 2712[a]). If applicant is under 18, he must have completed approved driver education course; if course was in another state, he must have been licensed in said state. (21 Del. Code Ann. 2707[b][7]). For CDL Class A, CDL Class B or CDL Class C license, applicant must be at least 18. (21 Del. Code Ann. 2707[a][1]). Same standard applies for school bus driver with one year of driving experience. (21 Del. Code Ann. 2708[b][1]).

License must be suspended for period of at least one year for refusal to submit to chemical test if motorist is stopped for suspicion of driving under influence of alcohol or other drugs. (21 Del. Code Ann. 2741[a]). Road blocks permitted to be used by police as stop checks.

Titles.

Vehicle owner must obtain from Department a certificate of title showing any liens or encumbrances; certificate good for life of motor vehicle so long as it is owned or held by original holder of such certificate. (21 Del. Code Ann. 2301, 2331, 2307). Within 30 days of final payment on any lien, certificate must be signed and lien register shall be amended to reflect that lien has been satisfied. (21 Del. Code Ann. 2339).

Sales.

On sale or transfer, owner of motor vehicle must endorse assignment and warranty of title upon certificate of title, with warranty of title and further statement of liens or encumbrances. Transferee must then present such certificate endorsed and assigned to Department, accompanied by transfer fee of $25, and make application for new certificate of title. (21 Del. Code Ann. 2510[a]-[c]).

Liens.

Every application for certificate of title must contain section where applicant must disclose any and all liens on vehicle to be titled. (21 Del. Code Ann. 2331). Certificate must state owner’s title and all liens and encumbrances on vehicle. (21 Del. Code Ann. 2332). If any claim of any kind is sought to be secured upon any motor vehicle for which certificate, at time, is outstanding and valid, and is not assigned or transferred, certificate of title must be returned to Department together with application for placing and recording any new lien or encumbrance upon motor vehicle; must be made upon appropriate form furnished and approved by Department and accompanied by $10 fee; upon filing of application and entering of claim, certificate of title will be returned. (21 Del. Code Ann. 2335[a]). Such liens and encumbrances entered upon certificate of title and recorded in lien register shall be notice to all creditors. (21 Del. Code Ann. 2337).

Identification Marks.

Misdemeanor to remove or falsify vehicle’s, bicycle’s, or engine’s identification number. (21 Del. Code Ann. 6705[a]). Felony to remove or falsify identification number willfully and with intent to conceal or misrepresent identity of vehicle, bicycle or engine. (21 Del. Code Ann. 6705[b]). Misdemeanor to knowingly buy, sell, receive, possess or dispose of vehicle or engine with false or removed identification number. (21 Del. Code Ann. 6705[c]). Felony to knowingly buy, sell, receive, possess or dispose of vehicle, bicycle or engine knowing that identification number of vehicle or engine has been removed or falsified and with intent to conceal or misrepresent identity of engine or vehicle. (21 Del. Code Ann. 6705[d]). Class E felony to be in possession of certain motor vehicle documents unaccompanied by 75% of vehicle described. (21 Del. Code Ann. 6710). Class E felony to remove or alter warranty, certification sticker, vehicle identification plate or confidential vehicle identification number. (21 Del. Code Ann. 6709). Class E felony to alter, forge or falsify Division of Motor Vehicle documents or identification plate, or to knowingly hold or use such altered, forged or falsified documents or identification plate. (21 Del. Code Ann. 2316).

Odometer Alteration.

Except for lawful service, repair or replacement pursuant to 21 Del. Code Ann. 6406, no person shall disconnect, reset or alter odometer of any motor vehicle, or disconnect, reset or alter odometer with intent to change number of miles. (21 Del. Code Ann. 6404).

Operation Prohibited.

Operator's license not issued to persons whose license currently suspended; persons whose license is revoked until expiration of one year after revocation; persons determined to be habitual drunkards or addicted to narcotics; persons whose mental or physical disability makes them incapable of exercising control over motor vehicle; persons who are unable to read and understand road signs; persons subject to loss of consciousness due to disease of central nervous system, unless person's attending physician licensed in State certifies infirmity controlled; persons not yet 18, unless they have completed course in driver education or have been licensed to operate motor vehicles in another state and have completed course in driver education in another state; delinquents; or persons subject of outstanding capias or bench warrant from Family Court for child support delinquency or failure to appear at any paternity or child support proceeding; persons expelled from public school; or person deemed not eligible by Family Court judge because of entry into juvenile drug court program. (21 Del. Code Ann. 2707[b]).

Size and Weight Limits.

Regulated by 21-c. 45.

Equipment Required.

Regulated by 21-c. 43.

Lights Required.

Regulated by 21 Del. Code Ann. 4316, 4331 and 4358.

Inspection is required for purpose of determining that a vehicle is safe and in fit condition for operation. (21 Del. Code Ann. 2142). Inspection is held at one or more places in each county. (21 Del. Code Ann. 2141).

Traffic Regulations.

Rules of the Road. (21-c. 41).

Accidents.

Driver must stop and give name, address, registration number and exhibit driver's license number to driver or occupants of motor vehicle where property damage or injury results. (21 Del. Code Ann. 4201). Driver to render reasonable assistance to injured. (21 Del. Code Ann. 4202). Driver involved in accident involving injury or death, on public highway with property damage of $500 or more, or where other driver appears to be under influence of drugs or alcohol, report accident to police agency with primary jurisdictional responsibility at once. (21 Del. Code Ann. 4203). Nonresident involved in accident involving damage to property or person may not remove vehicle from state without posting security for double estimated damages sustained by any person, firm or corporation involved with any Justice of the Peace in State, damages to be determined by reputable repair person. (21 Del. Code Ann. 2927).

Liability of Owner.

Owner engaged in business of renting vehicles who does not carry proper insurance policy insuring renter shall be jointly and severally liable with renter for damages caused by renter's negligence in operating vehicle. (21 Del. Code Ann. 6101[a]). This provision creates no right of action by any passenger in rented vehicle against owner. (21 Del. Code Ann. 6101[b]). Any person who has signed license application for person under 18 shall be jointly and severally liable for damages arising out of such person's negligent operation of vehicle. (21 Del. Code Ann. 6104[a]). Owner who knowingly permits person under 18 to operate vehicle shall be jointly and severally liable for damages caused by latter's negligence. (21 Del. Code Ann. 6105).

Guests.

Guest Statute repealed by 64 Del. Laws, c. 59, § 1.

Financial Responsibility.

See subhead No-Fault Insurance, infra. See also supra, subhead Accidents.

Insurance.

See subhead No-Fault Insurance, infra.

No Fault Insurance.

Persons eligible for benefits under paragraphs (2) and (3) of 21 Del. Code Ann. 2118(a) precluded from pleading or introducing into evidence, in any suit against tortfeasor, damages compensable under paragraph (2) or (3) of 21 Del. Code Ann. 2118(a). (21 Del. Code Ann. 2118[h]).

Requirement of Insurance.

No owner of vehicle required to be registered in State, other than self-insurer, may operate or authorize to be operated such vehicle unless owner has following minimum insurance coverage: (1) Indemnity from legal liability for property damage, bodily injury, or death arising out of ownership, use or maintenance of vehicle, to limit, exclusive of interest and costs of Delaware Financial Responsibility Law; (2) $15,000 for one person, $30,000 for all persons injured in accident to cover general medical expenses, funeral expenses, loss of earnings, and substituted services. Funeral expenses not to exceed $5,000 per person. Coverage in § 2 is applicable to occupants of owner's vehicle, pedestrians, and named insureds and members of their households, but not to occupants of other motor vehicles; (3) minimum limit of $10,000 for damage to property other than motor vehicle; (4) damage to insured motor vehicle, including loss of use, not to exceed actual cash value of vehicle and $10/day up to $300 for loss of use. (21 Del. Code Ann. 2118[a]). No owner of vehicle operated in State shall operate or authorize operation of vehicle unless owner has insurance equal to minimum required by State or jurisdiction where vehicle is registered. (21 Del. Code Ann. 2118[b]).

Only insurance policies issued by State-authorized companies must satisfy requirements set forth above. (21 Del. Code Ann. 2118[c]). Coverage may be more extensive than minimums set forth above. (21 Del. Code Ann. 2118[d]). Insurer required to arbitrate claim upon request of party claiming damages. Request must be made in writing and mailed to Insurance Commissioner. Losing party has right, where procedures followed, to appeal de novo in Superior Court. (21 Del. Code Ann. 2118[j]). Director may adopt rules and regulations. (21 Del. Code Ann. 2118[z]).

Foreign vehicles duly registered in home state or country and displaying proper license plates may be operated in Delaware without local registration or payment of any fees (21 Del. Code Ann. 2112[a]), but if owner takes up Delaware residence, registration must be obtained within 60 days (21 Del. Code Ann. 2102[a]). Use of state highway without restriction, tax or fee for vehicle owned by citizen of foreign nation only if that nation grants reciprocal privilege to U.S. citizens. (21 Del. Code Ann. 2112[b]). Privilege does not apply to vehicle used by nonresident for transportation of persons or property for compensation or of merchandise within this State unless home State grants reciprocal privilege to Delaware residents. (21 Del. Code Ann. 2112[c], [d]).

Nonresident over age of 16 having home state or county operator's license may drive in Delaware without examination or license. (21 Del. Code Ann. 2706[a]). If home state requires no license, he must obtain Delaware license, except that he may operate his own vehicle for period up to 30 days in any one year if it is registered in his home state. Driver must display home state license plate on vehicle and have in his possession registration card. (21 Del. Code Ann. 2706[b]). Driver's License Compact adopted. (21-c. 81).

Action against nonresident or his executor or administrator arising out of operation of motor vehicle may be commenced by service of process on Secretary of State with $2 fee, provided that defendant is sent or has actual notice and other procedures complied with. (10 Del. Code Ann. 3104). Provisions apply to resident who departs State subsequent to accident and remains absent for 30 days. (10 Del. Code Ann. 3113).

Direct Actions.

No provision permitting direct action by injured person against insurer. See also supra, subhead No-Fault Insurance.

Motor Vehicle Carriers.

Supervision of operation is by Public Service Commission as to rates. (See category 3 Business Regulation and Commerce, topic 3.08 Carriers.)

Motor Vehicle Taxes.

Real property tax on mobile homes. See category 22 Taxation, topic 22.16 Property Taxes, subhead Taxable Property.

Motor vehicle document fee on sale, transfer or registration in State of any new or used motor vehicle, truck tractor, trailer or motorcycle. (30 Del. Code Ann. 3002[a]). If purchase price less than $400, then uniform rate of $8. If $400 to $500, fee $13.75. Fee increased by $2.75 per additional $100 of purchase price or fraction thereof above $500. (30 Del. Code Ann. 3002[c]). No document fee for renewal registration in name of same owner; for sales or transfers for purpose of resale; for delivery of trailer outside State to nonresident where sales tax paid; for registration in State of vehicles bought and registered out of State if sales tax was paid in other State not more than 90 days prior to registration in Delaware; for fleet registration of truck tractors and trailers obtained outside State; for vehicles used by State, its agencies and departments, any state political subdivision, American Legion, Veterans of Foreign Wars, any volunteer fire company or Delaware Civil Air Patrol, American Red Cross, and Salvation Army; or for vehicle meeting requirements of school bus and under contract to public school district or State Board of Education. (30 Del. Code Ann. 3002[a]). Purchase price evidenced by notarized bill of sale. (30 Del. Code Ann. 3002[b]).

Gasoline Tax.

See category 22 Taxation, topic 22.08 Gasoline and Special Fuels Taxes.

Motor carriers fuel tax imposed on liquid fuel consumed, calculated on amount of fuel used on Delaware highways. (30 Del. Code Ann. 5203). Computed as ratio of miles driven in Delaware over total miles driven by motor carrier. (30 Del. Code Ann. 5207).

23.02 RAILROADS:

See category 3 Business Regulation and Commerce, topic 3.08 Carriers.

23.02A UNIFORM COMMERCIAL CODE FORMS:

Secretary of State provides complete list of Commercial Code Forms for Financing Statements in electronic form found at http://www.state.de.us/corp/uccform.shtml.

24 Forms

Commercial Code Forms

1
DISTRICT OF COLUMBIA LAW DIGEST

—Scope —

Revised for 2010 edition by

Venable LLP, of District of Columbia.

(Citations herein, unless otherwise indicated, refer to sections of the Code of the District of Columbia, 2001 edition. Citations to the 2001 edition are in ( ). D.C. Super. Ct. R. Civ. P. refers to Rules of Civil Procedure for the District of Columbia Superior Court. DCMR refers to District of Columbia Municipal Regulations, and DCRR refers to District of Columbia Rules and Regulations. DCMR is gradually replacing DCRR. DCR refers to District of Columbia Register. D.C. Sup. Ct. Cr. R. refers to Rules of Criminal Procedure for D.C. Superior Court. Parallel citations to the Federal Reporter begin with 49 App. D.C. D.C. Ct. App. R. refers to Rules of the District of Columbia Court of Appeals).

Note: This revision reflects 2009 enacted legislation published in DCR through Sept. 1, 2009.

1 INTRODUCTION

1.01 GOVERNMENT AND LEGAL SYSTEM:

The District of Columbia is a special district created by the U.S. Congress, which retains ultimate legislative authority over its legal system. For more information on the courts and legislature of the District of Columbia, see category 6 Courts and Legislature. For further discussion of the U.S. federal system, see Introduction to the Federal Government of the United States at the beginning of this volume. A great many laws are promulgated by the federal government of the United States and are not reflected in the topics below. See the Introduction to this volume for references to the federal law topics covered.

1.0 [RESERVED]

1.03 HOLIDAYS:

Legal holidays are: Jan. 1, 3d Mon. in Jan., 3d Mon. in Feb., Apr. 16, last Mon. in May, July 4, 1st Mon. in Sept., 2d Mon. in Oct., Nov. 11, 4th Thurs. in Nov., Dec. 25, any day of inauguration of President in every 4th year any day appointed by President of U.S. as day of public feasting or thanksgiving. (5 U.S.C. § 6103; D.C. Code §§ 1-612.02; 28-2701). All day Sat.

is holiday for banking institutions having office in District and building associations organized and operating under laws of District and having office in District. (D.C. Code § 28-2701).

Holiday Falling on Sun. or Sat.

Whenever any legal holiday falls on Sun., next succeeding day is holiday. Whenever any legal holiday falls on Sat., other than day of inauguration of President, next preceding day is holiday. (D.C. Code § 28-2701).

Legality of Transactions on Holiday.

There is no statute or judicial decision declaring illegal or void transactions made on a Saturday, Sunday or legal holiday.

1.04 OFFICE HOURS AND TIME ZONE:

The District of Columbia is in the Eastern Standard (GMT -05:00) time zone. Office hours are generally from 9 a.m. to 5 p.m.

2 BUSINESS ORGANIZATIONS

2.01 AGENCY:

Common law rules govern.

2.02 ASSOCIATIONS:

See topic 2.03 Corporations, subhead Professional Corporations.

Uniform Unincorporated Nonprofit Association Act adopted, effective Apr. 3, 2001.

2.03 CORPORATIONS:

Governing statutes are D.C. Code §§ 29-101.01-1105 of Code, District of Columbia Business Corporation Act of 1901 (D.C. Code §§ 29-201.01-241.08), District of Columbia Business Corporation Act of June 8, 1954, as am'd (D.C. Code §§ 29-101.01-101.70) and District of Columbia Nonprofit Corporation Act of Aug. 6, 1962 (D.C. Code §§ 29-301.01-321.01).

Act of June 8, 1954, is patterned after the Model Business Corporation Act (see Uniform and Model Acts section) prepared by Committee on Corporate Laws of Section of Corporation, Banking and Business Law of American Bar Association in 1946. It does not repeal any existing statutes or special acts of Congress under which corporations have been created in past. Effective Dec. 5, 1954, corporations for profit must be organized under Act of June 8, 1954. Corporations formed before effective date of 1954 Act may continue to function under Business Corporation Act of 1901, but are required to (1) maintain registered office in D.C., (2) appoint registered agent, and (3) file two-year reports with Mayor. (D.C. Code §§ 29-101.98, 29-201.14). Corporations for profit organized prior to July 1, 1978, may be incorporated or reincorporated under said Act. (D.C. Code § 29-101.141).

Legislative Formation.

Corporation may be formed by special Act of Congress. Any person other than a Senator or Representative who intends to present to Congress a bill for an act of incorporation or amendment of charter must give notice by publishing copy of bill at least once a week for four successive weeks in District newspaper approved by Council of District of Columbia, last publication to be made at least 14 days prior to presentation of bill. (D.C. Code § 29-1102).

Statutory Formation.

Separate statutory provisions govern corporations for profit (D.C. Code §§ 29-101.01-241.08), nonprofit corporations (D.C. Code §§ 29-301.01-321.01), religious societies (D.C. Code §§ 29-701-743), insurance companies (D.C. Code §§ 31-101-121), trust, loan, mortgage, safe deposit and title corporations (D.C. Code §§ 26-1301-1336), fraternal benefit associations (D.C. Code §§ 31-5301-5335), cooperative associations (D.C. Code §§ 29-901-947), and professional corporations (D.C. Code §§ 29-401-421).

General Supervision.

Mayor of District of Columbia and District of Columbia Council are charged with administration and enforcement of Act of June 8, 1954 (D.C. Code § 29-101.120) and of Act of Aug. 6, 1962 (D.C. Code § 29-301.93). Functions of Mayor and Council under both Acts have been delegated to Department of Consumer and Regulatory Affairs, for administration by Corporations Division of Department, 941 North Capitol Street, N.E., Washington, D.C. 20002.

Purposes.

Corporations for profit may be organized under Act of June 8, 1954, for any lawful purpose or purposes, except banking, life insurance, acceptance and execution of trusts, railroads, or building and loan associations. (D.C. Code § 29-101.03). Other kinds of corporations may be organized for purposes and under statutes indicated under subhead Statutory Formation, above.

Corporate name must contain word “corporation,” “company,” “incorporated,” or “limited,” or abbreviation thereof. Must not contain any word or phrase indicating that it is organized for any purpose other than a purpose contained in the articles; must not be the same or similar to the name of any domestic corporation or of any foreign corporation authorized to do business in District; must not indicate or state that it is organized under act of Congress. (D.C. Code § 29-101.08). Name may be reserved for 60 days by filing application. No procedures specified for initial clearance of name. Reserved name may be transferred to another person or corporation by filing notice of transfer. (D.C. Code §§ 29-101.08, 101.09).

Term of corporate existence may be perpetual. (D.C. Code § 29-101.04).

Incorporators.

Corporations for profit, one or more persons (D.C. Code § 29-101.46); nonprofit corporations, three or more persons (D.C. Code § 29-301.29); religious societies, not more than ten trustees (D.C. Code § 29-702); trust, loan, mortgage, safe deposit and title corporations, 25 or more U.S. citizens (D.C. Code § 26-1301); insurance companies, seven or more persons (D.C. Code § 31-4401); fraternal benefit societies, seven or more persons, majority of whom are residents of District (D.C. Code § 31-5307).

Articles of Incorporation.

In case of corporations for profit, articles of incorporation must be signed and filed by incorporator(s), and must state name of corporation, period of its duration, its purpose or purposes, aggregate number of shares and number of shares and any par value thereof in each class, preferences and rights of each class of shares, minimum amount of capital for starting business (not less than $1,000), statement of variations between any different series of same class of shares, statement of any authority of board of directors to establish series and fix preferences and rights, and any provision regarding preemptive rights, any provision for regulation of internal affairs, address of initial registered office and name of initial registered agent, number and names and addresses of directors, and name and address of each incorporator. (D.C. Code §§ 29-101.46, 101.47). Separate but similar provisions are made for nonprofit corporations (D.C. Code §§ 29-301.29, 301.30) and for professional corporations (D.C. Code § 29-406). Certificate of incorporation, in case of other corporations, must be signed and acknowledged by incorporators.

In case of trust, loan, mortgage, safe deposit and title corporations must state name, purposes, term (not to exceed 50 years), number of directors, names and residences of officers, amount of capital stock and subdivision into shares. (D.C. Code § 26-1304).

Filing of Articles or Certificate.

Articles of incorporation must be delivered in duplicate original to Mayor, who retains one original and issues certificate of incorporation to which is affixed the other duplicate original. Said certificate is delivered to incorporators or their representatives. (D.C. Code § 29-101.48).

Incorporation Fees.

Corporations for profit organized under Act of June 8, 1954, must pay as an initial license fee, upon filing of articles, $.03 per each of first 10,000 authorized shares, $.02 per each of next 50,000 authorized shares, and $.01 per remaining authorized shares. (D.C. Code § 29-101.121[c]). In case of stock with par value other than $100, number of shares is determined by dividing aggregate par value by 100. Minimum initial license is $35. (D.C. Code § 29-101.121[c][1]). In event of increase of authorized capital additional license fee is charged equal to difference between license fee computed on total number of shares including increase and license fee computed on total number of shares excluding increase, but in no case less than $10. (D.C. Code § 29-101.121[c][2]).

Filing Fees.

Corporations for profit: Articles of incorporation, merger or consolidation (D.C. Code § 29-101.121[b][3]), domestication (D.C. Code § 29-101.121[b][4]), reincorporation (D.C. Code § 29-101.121[b][6]), $150; amended or restated articles, $150 (D.C. Code § 29-101.121[b][2]); intent to dissolve, $35 (D.C. Code § 29-101.121[b][5]); articles of dissolution, $75 (D.C. Code § 29-101.121[b][7]); certificate of authority for foreign corporation, $200 (D.C. Code § 29-101.121[b][10]); reservation of corporate name, $35 (D.C. Code § 29-101.121[b][11]); certificate of reinstatement of domestic or foreign corporation, $250 (D.C. Code § 29-101.121[b][16]). Certified copy of any document, $35 (D.C. Code § 29-101.121[b][17]); certificate as to status of corporation, $15 (D.C. Code § 29-101.121[b][19]); change of address, change of registered agent, $35 (D.C. Code § 29-101.121[b][8]).

Nonprofit corporations organized under Act of Aug. 6, 1962: Articles, $40 (D.C. Code § 29-301.92[a][1]); amendment to articles, $35 (D.C. Code § 29-301.92[a][2]); election to accept act, $40 (D.C. Code § 29-301.92[a][8]); application for reservation of name, $35 (D.C. Code § 29-301.92[a][6]); for indexing each document, $30 (D.C. Code § 29-301.92[a][16]); certificate of good standing, $30 (D.C. Code § 29-301.92[a][20]); filing amended report, $75 (D.C. Code § 29-301.92[a][21]). Nonprofit two-year report fee is $75 (D.C. Code § 29-301.92[a][19]); penalty for failure to file is $40 (D.C. Code § 29-301.91).

Each domestic corporation and each foreign corporation authorized to do business in District of Columbia will pay two-year report fee of $750. (D.C. Code § 29-101.121[d]). Corporation which fails to file two-year report within time prescribed is subject to penalty of $35, foreign corporation, to penalty of $75. (D.C. Code § 29-101.128).

Organization.

With respect to corporations for profit organized under Act of June 8, 1954, corporate existence begins upon issuance of certificate of incorporation; and organization meeting of the board of directors must be held at call of majority of directors, on five days notice by mail, for purpose of adopting by-laws, electing officers and transacting any other proper business. (D.C. Code §§ 29-101.49, 101.51).

Paid-in Capital Requirements.

Minimum amount of capital with which corporation may commence business must not be less than $1,000. (D.C. Code §§ 29-101.47[a][6]-101.50).

Amendment of articles of incorporation, including increase or decrease of authorized shares or par value thereof, may be accomplished (1) prior to acceptance of subscriptions by directors, by filing amendment in duplicate signed by all original incorporators, and (2) after acceptance of such subscriptions by (a) resolution of directors directing amendment to be submitted to meeting of stockholders, (b) written notice of not less than ten nor more than 50 days, of such meeting to shareholders, and (c) affirmative vote of holders of at least two-thirds of outstanding shares entitled to vote, unless articles of incorporation provide for vote of less than two-thirds, in which case, effective vote cannot be less than simple majority. (D.C. Code §§ 29-101.26;-101.52-101.55). Filing fee for amendment, $150. (D.C. Code §§ 29-101.121).

By-Laws.

Power to make, alter, amend, or repeal is vested in board of directors unless reserved to shareholders by the articles. (D.C. Code § 29-101.24).

Shares may be divided into one or more classes with or without par value, with such designations, preferences, voting powers, special or relative rights, limitations, restrictions or qualifications as shall be stated in the articles. (D.C. Code § 29-101.13[a]).

Certificates representing shares must be signed by the president or a vice-president; must state all limitations and restrictions upon transferability or that corporation will furnish a statement thereof without charge; must state all designations, preferences, limitations, and relative rights of each authorized class of shares or that corporation will furnish a statement thereof without charge; must state par value or that without par value; that corporation is organized under laws of District of Columbia; name of person to whom issued; number and class of shares of which represented. By resolution of board of directors, some or all classes or series of stock may be uncertificated. Rights and obligations of holders of uncertificated shares are identical to holders of certificated shares, unless otherwise provided by law. Corporation must send to registered owner of uncertificated shares written notice of information required to be stated on certificates or statement that corporation will furnish information without charge. (D.C. Code § 29-101.20).

Issuance of Shares.

Shares may be issued for such consideration, not less than par value, as fixed by directors. (D.C. Code § 29-101.16). Consideration may be money, other property, labor or services actually performed for corporation. Promissory notes or future services are not payment. (D.C. Code § 29-101.17).

Transfer of Shares.

In order to determine shareholders, directors may close books for not more than 50 days and for at least ten days immediately preceding shareholders meeting. (D.C. Code § 29-101.28). Transfer generally governed by Uniform Commercial Code. See category 3 Business Regulation and Commerce, topic 3.09 Commercial Code. Art. 8 of Code deals with investment securities, and replaces Uniform Stock Transfer Act.

Uniform Simplification of Fiduciary Security Transfers Act (D.C. Code §§ 28-2901-2909) remains in force.

Stock Transfer Tax.

None.

Shareholders owning an aggregate of at least 5% of all outstanding shares may (1) examine, in person or by agent, at any reasonable time, for any proper purpose, corporation's record of shareholders and make extracts therefrom, and (2) inspect sworn statement by corporate officer of corporation's affairs within 30 days after written request for such sworn statement stating purpose thereof. Any shareholder may inspect and copy such sworn statement. (D.C. Code § 29-101.45).

Shareholder Actions.

Shareholder may bring derivative action to enforce right of corporation by filing complaint which alleges that (a) plaintiff was shareholder at time of transaction complained of, (b) action not collusive to confer jurisdiction, and (c) particular efforts plaintiff made to obtain action from directors. (D.C. Super. Ct. R. Civ. P. 23.1).

Shareholders' Liability.

A holder of or subscriber to shares has no obligation to corporation or its creditors, other than to pay corporation full consideration for shares owned. Assignee of shares in good faith, having no notice that full consideration has not been paid, is not personally liable to corporation or its creditors for any unpaid portion of consideration. (D.C. Code § 29-101.22).

Shareholders' Meetings.

Shareholder meetings may be held within or without District, as may be provided in by-laws. Annual meeting must be held for election of directors. Written or printed notice stating place, day and hour of meeting, and, in case of special meeting, the purpose, must be delivered personally or by mail not less than 10 nor more than 50 days prior to meeting, unless by-laws specify different period. Each outstanding share entitled to one vote on each matter submitted to vote. Shareholder may vote by proxy executed in writing. Proxy valid for 11 months unless otherwise provided and revocable by shareholder. Articles may provide for cumulative voting. (D.C. Code §§ 29-101.25, 101.26, 101.27, 101.33).

Voting trusts may be created for period not to exceed ten years. Counterpart of agreement must be deposited with corporation at its registered office and is subject to examination by shareholders. (D.C. Code § 29-101.30).

Directors.

Number of directors, which may be one or more, is fixed by by-laws except first board which is fixed by articles. Directors are chosen annually, and need not be shareholders, unless articles or by-laws so provide. Vacancies by reason of increase may be filled by annual or special meeting of shareholders; other vacancies are filled by majority of remaining directors. (D.C. Code §§ 29-101.32, 101.33, 101.35).

Classes.—By-laws may provide for two or three classes of directors who shall have staggered terms. (D.C. Code § 29-101.34).

Directors' Meetings.

Directors' meetings may be held within or without District as may be provided by by-laws or directors' resolution, or by means of telephone conference, and upon such notice as may be provided in by-laws. (D.C. Code §§ 29-101.38-101.39). Majority of directors is quorum unless greater number required by articles or by-laws. (D.C. Code § 29-101.36)

Powers and Duties of Directors.

Manage the business and affairs of corporation, declare dividends and establish reasonable compensation for directors and officers. (D.C. Code §§ 29-101.32, 101.40).

Liabilities of Directors and Officers.

Directors who vote for dividend or distribution of assets contrary to Act of June 8, 1954, or contrary to articles, or which would render corporation insolvent or reduce net assets below stated capital, or during liquidation without adequate provision for payment of all obligations of corporation, are jointly and severally liable to corporation for amount of such dividend or assets in excess of that which could have been paid without violation of Act of June 8, 1954 or articles, or to extent that corporation is rendered insolvent, its net assets reduced below stated capital or obligations of corporation not paid. Directors who vote for loan to officer or director of corporation are jointly and severally liable to corporation for amount of such loan until repaid. (D.C. Code § 29-101.42). No statute authorizing articles of incorporation to limit liability of directors or officers. However, Nonprofit Corporation Act provides that if nonprofit corporation (a) is exempt from Federal taxation under § 501(c)(3) of Internal Revenue Code and has total annual expenses of less than $100,000 or (b) maintains liability insurance with coverage limits of not less than $200,000 per individual claim and $500,000 per total claims from same occurrence, officers, directors and trustees of nonprofit corporation who are not compensated are immune from civil liability for acts or omissions occurring on or after Mar. 17, 1993, except where injury results from willful misconduct, commission of crime, receipt of improper personal benefit, or act or omission not in good faith and beyond scope of authority of corporation. This provision does not exempt nonprofit corporation from liability for conduct of volunteer, but corporation's liability is limited to applicable limit of insurance coverage. (D.C. Code § 29-301.113). Personal liability of employees of nonprofit corporations for acts and omissions occurring on or after Mar. 17, 1993 is limited to amount of total compensation received by employee during 12 months immediately preceding act or omission for which liability is imposed, except where injury or damage results from willful misconduct, commission of crime, receipt of improper personal benefit, or act or omission not in good faith and beyond scope of authority of corporation. This limitation of liability does not apply to licensed professional employees operating in professional capacity and does not exempt corporation from liability, but nonprofit corporation's liability is limited to extent of applicable limit of insurance coverage. (D.C. Code § 29-301.114).

Statute of limitations on actions against directors for liability under District of Columbia Business Corporation Act is three years. (D.C. Code § 29-101.42).

Officers.

There must be a president, and such other officers, if any, as prescribed in by-laws, and as may be elected by board of directors or chosen in such manner as prescribed by by-laws. (D.C. Code § 29-101.43).

Indemnification of Directors and Officers.

Corporation may indemnify present or former directors and officers against expenses actually and necessarily incurred in connection with defense of any action, suit, or proceeding in which they are made party by reason of being or having been directors or officers, except in matters in which they are adjudged liable for negligence or misconduct in performance of duty. (D.C. Code § 29-101.04[16]).

Registered office must be maintained in District of Columbia. Need not be corporation's place of business. (D.C. Code § 29-101.10).

Registered agent must be maintained in District. May be individual resident in District, whose business office is identical with registered office, or corporation authorized by articles to act as such agent and authorized to transact business in District having business office identical with the registered office. Registered agent's consent to appointment must be demonstrated either by written statement of agent or by written certification of incorporator(s) that agent has consented. (D.C. Code § 29-101.10). Registered agent is agent for service of process. (D.C. Code § 29-101.12).

General Powers of Corporation.

Corporation may sue and be sued, have a seal, purchase or acquire and own real or personal property, sell or mortgage or otherwise dispose of property, lend money to employees other than to its officers and directors, own shares or obligations of other corporations, make contracts and incur liabilities, conduct its business in United States or any foreign country, invest its surplus funds, acquire its own shares, make charitable contributions, have all powers necessary and convenient to effect corporate purpose. (D.C. Code §§ 29-101.04-101.05). Defense of ultra vires limited to proceedings by shareholder against corporation to enjoin doing of act or transfer of property by or to corporation, by corporation against incumbent or former officers or directors, or by Mayor to dissolve corporation or to enjoin transaction of unauthorized business. (D.C. Code § 29-101.07).

Dividends may be declared by directors except: (a) No dividend when corporation is or would then be insolvent or net assets are or would then be less than stated capital, (b) dividends are payable from paid-in surplus or surplus arising from surrender of any of its shares only upon shares having a preferential right to receive dividends, and (c) upon payment of stock dividend, surplus equal to par value or stated value thereof must be transferred to stated capital. (D.C. Code § 29-101.40).

Unclaimed Dividends.

Dividends are presumed abandoned if unclaimed, or if no communication, etc. within three years. (D.C. Code § 41-109). See category 21 Property, topic 21.01 Absentees, subhead Escheat.

Sale or Transfer of Corporate Assets.

Disposition of substantially all corporate assets, if made in usual and regular course of business, may be upon such terms as authorized by directors. If disposition of substantially all assets of corporation not in usual and regular course of business, must be recommended by directors and authorized by two-thirds of outstanding shares of each class entitled to vote, unless articles of incorporation provide for vote of less than two-thirds, in which case, effective vote cannot be less than simple majority. (D.C. Code §§ 29-101.74, 101.75).

Books and Records.

Corporation must keep correct and complete books and records of account and minutes of proceedings of its shareholders and board of directors; must keep record of its shareholders at its registered office or place of business or at office of its transfer agent or registrar. (D.C. Code § 29-101.45).

Reports.

Corporation must file with Mayor on prescribed forms, on or before Apr. 15 of every 2d year from date of incorporation, if there has been no change in material facts, two-year report stating: (1) Name, address of registered office and name of its registered agent, (2) address of principal office in District if other than its registered office, (3) names and addresses of directors and officers, (4) brief statement of character of business, (5) statement of aggregate number of authorized shares, itemized by classes, and (6) statement of aggregate number of issued shares, itemized by classes. (D.C. Code § 29-101.98). Two-year report fee of $750 payable at same time. (D.C. Code § 29-101.121[d]).

Nonprofit corporation must file on or before Jan. 15 of each second year from date of incorporation. (D.C. Code § 29-301.83).

Merger and Consolidation.

Any two or more domestic corporations may merge into one of such corporations or consolidate into new corporation. Plan must be approved by majority of board of directors and by two-thirds of outstanding shares of each class of each corporation, unless articles of incorporation provide for vote of less than two-thirds; in which case, effective vote cannot be less than simple majority. (D.C. Code §§ 29-101.66-101.67). Articles of merger or of consolidation in duplicate must then be executed by president or vice-president of each corporation and delivered to Mayor, who issues certificate of merger or of consolidation with duplicate original articles attached and delivers same to surviving or new corporation or its representatives. (D.C. Code § 29-101.68). Foreign and domestic corporations may merge or consolidate if permitted by laws of state in which foreign corporation is organized; each corporation must comply with laws of place in which organized; and surviving or new corporation is, in general, treated as foreign or domestic corporation depending upon jurisdiction by whose laws it is to be governed. (D.C. Code § 29-101.71). Domestic corporation(s) and domestic partnership(s), domestic limited partnership(s) or domestic limited liability companies (LLCs) may merge or consolidate, and domestic corporation(s) and domestic partnership(s), limited partnership(s) or LLC(s) of any state of U.S. may merge or consolidate if not prohibited by laws of that state. (D.C. Code §§ 29-101.72-101.72[c]). No member of domestic LLC that is party to merger will become personally liable for liabilities of any other person or entity unless member approves agreement of merger or otherwise consents to becoming personally liable. (D.C. Code § 29-101.72[b]). Dissenting shareholders are entitled to be paid fair value of shares. (D.C. Code § 29-101.73). Filing fee for articles, $150. (D.C. Code § 29-121[b][1]). If surviving or new corporation is domestic, license fee computed on number of authorized shares is payable. (D.C. Code § 29-101.121[c][3]).

Dissolution.

Corporation may be voluntarily dissolved (1) by its incorporators within year after issuance of certificate of incorporation if it has not commenced business nor issued shares, or (2) by resolution of board of directors and two-thirds of outstanding shares entitled to vote, unless articles of incorporation provide for vote of less than two-thirds, in which case, effective vote cannot be less than simple majority, or (3) by written consent of all shareholders. If by incorporators, articles of dissolution are filed with Mayor, who issues certificate of dissolution. If by corporation or shareholder consent, statement of intent to dissolve is filed with Mayor, and after liquidation of affairs of corporation, articles of dissolution are filed with Mayor, who issues certificate of dissolution. (D.C. Code §§ 29-101.76-101.87).

Corporation may be dissolved involuntarily by court of equity in action instituted by Mayor if: (a) Franchise was procured through fraud, (b) corporation has exceeded or abused authority, (c) corporation has failed for 30 days to appoint and maintain registered agent, or (d) corporation has failed for 30 days after change of registered office or registered agent to file with Mayor statement of such change. (D.C. Code § 29-101.88).

Insolvency and Receivers.

Court has full power to liquidate assets and business of corporation in dissolution proceedings, and issue injunctions and appoint receivers in connection therewith. (D.C. Code §§ 29-101.90, 101.91).

Appraisal.

Shareholders dissenting from merger or consolidation of corporation are entitled to payment of fair value of shares upon compliance with statutory procedures. (D.C. Code § 29-101.73).

Close Corporations.

Close corporation is corporation organized under Business Corporation Act of 1954, as amended, which elects to become close corporation and thereby becomes subject to D.C. Code §§ 29-101.155-101.170 of Act. Articles of incorporation must contain heading stating that it is close corporation, and must provide (1) corporation's stock shall be represented by certificates, and shall be held by no more than 35 persons; (2) all stock shall be subject to one or more of restrictions on transfer permitted under D.C. Code § 29-101.20 of Act; (3) corporation shall make no public offering of its stock. (D.C. Code § 29-101.156-101.157). Existing corporation may become close corporation upon amending its articles of incorporation, by vote of at least two-thirds of each class of stock, to comply with statutory requirements. (D.C. Code § 29-101.58).

Corporation may voluntarily terminate its status as close corporation by amending its articles of incorporation by two-thirds vote of each class of stock of its shareholders to delete provisions required to become close corporation; however, articles may require vote greater than two-thirds to terminate status as close corporation. Any such provision may not be amended except by vote not less than that required to terminate status as close corporation. (D.C. Code § 29-101.160). Corporation may involuntarily lose its status as close corporation if it breaches any statutory conditions which are not remedied within 30 days in accordance with statutory procedures. (D.C. Code § 29-101.162).

If stock of close corporation is issued or transferred in breach of qualifying conditions, corporation may refuse to register transfer of stock into name of transferee. (D.C. Code § 29-101.161).

Agreement among shareholders holding majority of outstanding stock is not invalid on grounds that it may restrict discretion of directors. Effect will be to shift liability for acts and omissions from directors to majority shareholders to extent power of board is controlled or limited by agreement. Articles of incorporation may provide that business of corporation may be managed by shareholders rather than by board of directors. (D.C. Code § 29-101.165).

Court may, in certain circumstances, appoint receiver, custodian or provisional director of close corporation. (D.C. Code §§ 29-101.166, 101.167).

Foreign corporations must obtain certificates of authority from Mayor before transacting business in District. No foreign corporation is entitled to procure such certificate to transact business of banking, insurance, acceptance and execution of trusts, operation of railroads, or building and loan association, such corporations being admitted to do business in District pursuant to laws relating to such business. (D.C. Code §§ 29-101.99-101.100). Application for such certificate is made in duplicate to Mayor on forms supplied by Mayor, and must set forth (a) Name and state of organization, (b) if necessary, one of words "corporation," "company," "incorporated" or "limited" or abbreviation thereof, for use in District, (c) date of incorporation and period of duration, (d) address of principal office in state of organization, (e) address of proposed registered office in District and name of proposed registered agent, (f) statement of business it proposes to transact in District, (g) names and addresses of directors and officers, (h) any additional pertinent information. Certified copy of articles of incorporation and all amendments must be attached. (D.C. Code §§ 29-101.103-101.104). Filing fee is $150. (D.C. Code § 29-101.121). Foreign corporation which has received certificate enjoys same rights and privileges as domestic corporation, except as specifically set forth in this chapter. (D.C. Code §§ 29-101.100).

Foreign corporations, other than those that limit their activities to investing in loans secured by real estate, which transacts business in District without certificate of authority may not sue in District of Columbia courts until certificate is obtained, are deemed to have appointed Mayor their agent for service of process, shall be guilty of misdemeanor, shall be liable for all fees and charges they should have paid plus penalty not in excess of $500, and may be liable for civil fines, penalties, and fees. (D.C. Code § 29-101.99). Report on forms supplied by Mayor must be delivered to Mayor on or before Apr. 15 of year after incorporation, and on or before Apr. 15 of each second year thereafter. (D.C. Code § 29-101.112). Report fee of $750 must accompany filing of report. (D.C. Code § 29-101.121). To surrender authority to do business, foreign corporation must file application on prescribed forms for withdrawal with Mayor, and receive certificate of withdrawal (fee, $35). (D.C. Code §§ 29-101.113-101.114;-101.121). Foreign corporation which transacts business without certificate of authority cannot bring lawsuit in D.C. until certificate is acquired. (D.C. Code § 29-101.119).

Foreign corporation may become domestic corporation by filing articles of domestication with Mayor. (D.C. Code § 29-101.153). Foreign corporation with name confusingly similar to name of corporation already conducting business in D.C. may qualify to do business under fictitious name unless it engages in same type of business as similarly named corporation. (D.C. Code § 29-101.101).

Taxation.

See category 22 Taxation.

Professional corporations may be formed by persons rendering professional personal service pursuant to license including services performed by certified public accountants, attorneys, architects, practitioners of healing arts, dentists, optometrists, podiatrists and professional engineers. (D.C. Code §§ 29-401-420). Professional corporation may merge with another domestic professional corporation or domestic limited liability company (LLC) if both are organized to render same professional services, or which, if not same, could otherwise be rendered by single professional corporation or LLC. No member of domestic LLC that is party to merger will become personally liable for liabilities of any other person or entity unless member approves agreement of merger or otherwise consents to becoming personally liable. (D.C. Code § 29-413).

Deeds.

See category 21 Property, topic 21.06 Deeds.

Model Non-Profit Corporation Act.

Adopted, with modifications. (D.C. Code §§ 29-301.01-301.114).

2.04 [RESERVED]

2.05 JOINT STOCK COMPANIES:

No statute.

As to professional corporations, see topic 2.03 Corporations, subhead Professional Corporations.

2.06 LIMITED LIABILITY COMPANIES:

District of Columbia Limited Liability Company Act of 1994 became effective July 23, 1994, amended, effective Sept. 8, 1995.

Formation.

One or more persons may form limited liability company (LLC) by signing articles of organization and filing with Mayor (Department of Consumer and Regulatory Affairs, Business Regulation Administration, Corporations Division). (D.C. Code § 29-1002).

Powers.

LLC may exercise all powers necessary to effect purposes. May also, subject to any restrictions in articles of organization or operating agreement, indemnify any member, agent, manager, or employee against any claims except willful misconduct or recklessness. (D.C. Code § 29-1003).

Name must contain words “limited liability company” or abbreviation “L.L.C.” Professional limited liability company shall contain words “professional limited liability company” or abbreviation “P.L.L.C.” Name must not be deceptively similar to names of other companies or partnerships, domestic or foreign, transacting business in District. Fictitious name may be adopted by filing statement with Mayor, provided that foreign LLC may not adopt fictitious name for use in transacting business in District if that foreign LLC has name that is same as, or deceptively similar to, company or partnership already engaged in District in same business as foreign LLC. (D.C. Code § 29-1004). Exclusive use of LLC name may be reserved for 60 day period, and may be renewed for successive 60 day periods, by applying to Mayor. (D.C. Code § 29-1005).

Articles of organization must contain following matters: (1) Name of LLC; (2) address of LLC’s registered office, name of registered agent, and evidence of registered agent’s consent. Articles must be executed and filed with Mayor, along with filing fees. LLC is formed as of later of (1) time established in articles of organization, or (2) when articles are delivered to Mayor for filing. If articles do not conform to act and are not brought into conformance within 20 days after notification of nonconformance has been given, LLC deemed never to have been formed. (D.C. Code § 29-1006). Articles may be amended, unless otherwise provided by articles or by operating agreement, by those members with voting rights holding at least majority of interest in profits of LLC. Articles of amendment must be executed and filed with Mayor, and must set forth (1) name of LLC; (2) text of each amendment adopted; (3) date of each amendment’s adoption; and (4) statement that amendment was adopted by vote of members in accordance with LLC’s articles of organization and applicable law. (D.C. Code § 29-1007).

Registered Office and Registered Agent.

LLC must maintain registered office and registered agent in District. (D.C. Code § 29-1009). Registered office and registered agent may be changed. Registered agent’s written consent must be filed with Mayor. Resignation, which must be in writing and filed with Mayor, is effective 30 days after receipt of notice by Mayor, or upon appointment of successor agent, whichever occurs first. (D.C. Code §§ 29-1009-1011).

Partnership Conversion to LLC.

Conversion of general or limited partnership to LLC must be approved by (1) all general partners and, in case of limited partnership, by majority in interest of limited partners, or (2) by number or percentage of partners specified for conversion in applicable partnership agreement. General partner who becomes member of LLC as result of conversion remains liable as general partner for any liability incurred by general partnership or limited partnership before conversion took effect. Limited partner remains liable for obligations incurred prior to conversion by limited partnership to extent provided by law of state in which limited partnership was organized. After conversion, title to real estate and other property remains vested in converted entity without reversion or impairment, liabilities continue as liabilities of converted entity, and any pending proceeding may be continued as if conversion had not occurred. (D.C. Code § 29-1013).

Liability to Third Parties.

Except as act or articles of organization specifically provide otherwise, no member, manager, employee or agent of LLC is personally liable for debts, obligations or liabilities of LLC. Member of Professional Limited Liability Company (PLLC) is personally liable only for negligent or wrongful act or misconduct committed by such member, or by any individual working under such member's supervision and control. (D.C. Code § 29-1014). Member of LLC is not proper party to proceeding by or against LLC except for enforcement of member's rights against or liability to LLC, or as part of derivative action on behalf of LLC. (D.C. Code §§ 29-1014-1015, 1043-1046).

Property.

LLC may acquire, hold and convey real or personal property. (D.C. Code § 29-1016).

Management is vested in members, except to extent that articles of organization provide for management of LLC by manager or managers. Articles or operating agreement may provide for classes or groups of members with relative rights, powers and duties, and may provide for taking of action, including amending articles of organization or operating agreement, without vote or approval of any member or class or group of members. Articles or operating agreement may grant right to vote separately or with class on any matter to all or certain identified members of class. Voting may be on per capita, number, financial interest, class, group, or other basis. If not otherwise provided in articles or operating agreement, (1) members shall vote in proportion to respective interests in LLC profits; (2) decisions must be approved by members with voting rights holding at least majority of interests in profits of LLC. Articles or operating agreements which provide voting rights may set forth provisions relating to such rights, such as notice, waiver of notice, action by consent without meeting, establishment of record date, quorum requirements, voting in person or by proxy, or any other matter related to exercise of right to vote. (D.C. Code § 29-1017). Articles or operating agreement may delegate full or partial responsibility to one or more managers, who need not be residents of District or members of LLC. Managers shall be selected and removed by members. Vacancies shall be filled by members with voting rights holding at least majority of interests in profits of LLC. Similarly, managers can be removed with or without cause by voting members with majority of interests. Unless otherwise provided in articles or operating agreement, any action permitted to be taken by managers of LLC may be taken upon majority vote of managers. (D.C. Code § 29-1019).

Operating Agreement is not mandatory but normally regulates affairs of LLC, conduct of its business and relations of its members. May contain any provisions not inconsistent with laws of District or articles of organization. May provide for penalties or specified consequences for members or managers for nonperformance of obligations or noncompliance with terms of operating agreement. Initial agreement must be agreed to by all current members. Unless otherwise provided in articles or operating agreement, members with voting rights holding majority of interest in profits must approve any amendment. (D.C. Code § 29-1018).

Limitation of Liability.

Liability of manager in any proceeding brought by or in right of LLC or brought by or on behalf of members of LLC, may be limited in articles of organization or operating agreement, except if manager or member engaged in willful misconduct. (D.C. Code § 29-1020).

Business Transactions with Members.

Member or manager may transact business with LLC, and, subject to other applicable law, has same rights and obligations as person who is not member or manager, unless otherwise provided in articles or operating agreement. (D.C. Code § 29-1021).

Records.

LLC must keep at principal office names and addresses of members, copies of articles of organization and operating agreement, copies of federal, state and local tax returns for three years, and, unless contained in operating agreement, description of contributions of members, times or events which may trigger additional contributions, right to any distributions, and events which would trigger dissolution. Subject to reasonable standards as may be set forth in articles or operating agreement, member has right to inspect and copy, at own expense, LLC records required to be maintained by this section. (D.C. Code § 29-1022).

Contributions, Profits and Losses.

Contributions may consist of anything of value. Profits and losses are allocated among members in manner provided in articles of organization or operating agreement. In absence of operating agreement or applicable provision therein, profits and losses shall be allocated on basis of value of member's contribution, to extent received by LLC and not returned. (D.C. Code § 29-1024).

Distributions.

Unless otherwise provided in articles or operating agreement, distributions shall be made on basis of value of member's contribution. (D.C. Code § 29-1025). Upon resignation, unless otherwise provided in articles or operating agreement, member is entitled to receive fair value of interest as of date of resignation. Any damages caused by member's breach of operating agreement or by wrongful conduct may be set off by LLC against amount otherwise distributable. (D.C. Code § 29-1027). Member has no right to demand nor any obligation to accept distribution in any form other than cash, unless otherwise provided in articles or operating agreement. (D.C. Code § 29-1028). LLC cannot make distribution if it cannot pay debts as they come due. (D.C. Code § 29-1029). After two years from date of wrongful distribution, member who receives such distribution shall have no liability to LLC. (D.C. Code § 29-1030). Member entitled to receive distribution has status of and is entitled to all remedies available to creditor of LLC with respect to such distributions. (D.C. Code § 29-1031).

Transferability of Interests.

LLC interest is considered personal property (D.C. Code § 29-1033), and as such is assignable in whole or in part. Full membership interest is transferred by assigning both governance rights and financial rights. Financial rights assignable unless restricted as provided in D.C. Code § 29-1037. Governance rights may be assigned from one member to another member without consent of any other member, unless restricted by articles or operating agreement. (D.C. Code § 29-1036). Governance rights may be assigned to non-member unless members with voting rights holding at least majority of interests in profits do not consent, or unless further restricted by articles or operating agreement. (D.C. Code § 29-1036). Assignment of financial rights does not dissolve LLC, and does not entitle or empower assignee to become member, to exercise any governance rights, to receive any notices from LLC, or to cause dissolution. (D.C. Code § 29-1035). Written restriction on assignment of financial or governance rights, unless noted conspicuously in records of LLC, is ineffective against person without knowledge of restriction. (D.C. Code § 29-1037). Deceased member's executor may exercise all rights of member for purpose of settling such member's estate or administering such member's property. (D.C. Code § 29-1039).

Merger.

Domestic LLC may merge with or into one or more domestic LLC's or other business entities. Unless otherwise provided in articles or operating agreement, approval of merger by members holding majority of interests in profits required; if surviving entity does not afford limited liability, unanimous approval of voting and nonvoting members required. Interests in LLC that is constituent part to merger may be exchanged for or converted into cash, property, interests in surviving entity or any other entity. (D.C. Code § 29-1040). Articles of merger, agreement of merger and effect of merger addressed. (D.C. Code §§ 29-1041-1042).

In any merger of partnership with LLC, no member of domestic LLC that is party to merger will become personally liable for liabilities of any other person or entity unless member approves agreement of merger or otherwise consents to becoming personally liable. (D.C. Code

§ 33-202.08).

Dissolution.

LLC dissolved by: (i) Judicial decree; (ii) events specified in articles or operating agreement; (iii) unanimous consent of members with voting rights; or (iv) except as provided in operating agreement, when LLC has had no members for 90 consecutive days. (D.C. Code § 29-1047). Member may apply to Superior Court of District for decree of dissolution if not reasonably practicable to carry on business in conformity with articles or operating agreement. (D.C. Code § 29-1048). Articles of dissolution (D.C. Code § 29-1049), winding-up (D.C. Code § 29-1050) and distribution of assets addressed. (D.C. Code § 29-1051).

Foreign LLC must register with Mayor prior to transacting business in District. (D.C. Code § 29-1053). Foreign LLC may not be denied registration because of differences between laws of state of formation and District laws. (D.C. Code § 29-1052). Subject to District law, formation, internal affairs, and liability of members of foreign LLC are governed by laws of state of formation. (D.C. Code § 29-1052). By doing business in District, foreign LLC assents to laws of District. (D.C. Code § 29-1061). Procedure of registration, cancellation of registration, transaction of business without registration, transactions not constituting doing business, merger, and related matters addressed. (D.C. Code §§ 29-1053-1062).

Fees.

Payable to Mayor as follows: Registration of foreign LLC, $200; filing articles of organization, merger, amendment, correction, dissolution, cancellation, certificate of correction, document effecting merger, petition for reinstatement, $150; filing change of registered agent or registered office, application to reserve or renew reservation of name, notice of transfer of name reserved, statement of fictitious name, $35. (D.C. Code § 29-1063[a]).

Annual Reports and Annual Registration Fees.

Foreign and domestic LLC must file report with Mayor on or before June 16th of year of organization and on or before June 16 of each second year thereafter on forms prescribed and furnished by Mayor. (D.C. Code § 29-1064). Two year registration fee of $150 must be paid at time of filing two-year report. (D.C. Code § 29-1065). Failure to file report or pay fee for two consecutive years results in articles of organization being declared void for domestic LLC and certificate of registration being revoked for foreign LLC. (D.C. Code § 29-1066). Procedures for carrying out such penalties, fines for doing business after revocation of authority, procedures for reinstatement, and other related matters addressed. (D.C. Code §§ 29-1067-1072).

Transaction of Business Outside District.

Intent of Council that LLC formed under act be recognized outside of District, and, subject to reasonable registration requirements, be granted protection of full faith and credit under § 1 of Art. IV of U.S. Constitution. (D.C. Code § 29-1073).

Taxation.

LLC shall be classified as partnership unless classified otherwise for federal income tax purposes, in which case LLC shall be classified in same manner as classified for federal income tax purposes. Member shall be classified as either resident or nonresident partner unless classified otherwise for federal income tax purposes, in which case shall have same status as for federal income tax purposes. (D.C. Code § 29-1074).

Regulation of Professionals.

Except for D.C. Code § 29-1014 (relating to liability to third parties), act not intended to restrict authority of any regulatory body to license individuals rendering professional services within District or to regulate practice of any profession. (D.C. Code § 29-1075).

2.07 [RESERVED]

2.08 PARTNERSHIPS:

Uniform Partnership Act of 1996 (D.C. Code §§ 33-101.01-112.04) in effect Apr. 9, 1997 for partnerships formed after that date, or for partnerships that elect to be governed by act. After Jan. 1, 1998, act governs all partnerships. (D.C. Code § 33-112.04). Uniform Partnership Act of 1962 is repealed, effective Jan. 1, 1998. (D.C. Code §§ 33-401-448).

Limited Liability Partnership and Foreign Limited Liability Partnership.

Governed by D.C. Code §§ 33-110.01-111.06 of Uniform Partnership Act.

Limited Partnership.

Uniform Limited Partnership Act of 1987 in effect. (D.C. Code §§ 33-201.01-211.07). In any case not provided for in this act, provisions of Uniform Partnership Act of 1996, effective Apr. 9, 1997, shall govern. (D.C. Code § 33-201.08).

3 BUSINESS REGULATION AND COMMERCE

3.01 BANKS AND BANKING:

Uniform Commercial Code adopted. Article 4A—Funds Transfers (1989 text), adopted effective Apr., 1992. Article 2A—Leasing adopted effective July 22, 1992. Revised Article 3—Negotiable Instruments, and revised Article 4—Bank Deposits and Collections, adopted effective Mar. 23, 1995. See topic 3.09 Commercial Code.

Except for national banking association organized under laws of U.S., only corporation may conduct business of bank of deposit and such corporation (unless in business prior to Mar. 4, 1933) must be organized under provisions of D.C. Code. (D.C. Code § 26-103).

Supervision.

All banks (except national banks), savings banks, savings companies, and trust companies and other financial institutions in D.C., including regional and nonregional interstate bank holding companies doing or seeking to do business in D.C. are under supervision of Commissioner of Insurance, Securities, and Banking. (D.C. Code §§ 26-702.01, 26-551.03). Nonnational D.C. banks are not subject to examination by Comptroller of Currency, or compelled to comply with Federal Reserve System regulations. (D.C. Code § 26-102[d]).

Universal Bank.

Financial institution may apply to be certified as universal bank by filing written application with Commissioner. (D.C. Code § 26-1401.03). Universal banks may be authorized by Commissioner to exercise any power exercised by any state bank, state or federally chartered savings bank, state or federally chartered savings and loan association, or federally chartered national bank. Universal bank may only exercise its authority through subsidiary. (D.C. Code § 26-1401.08). Subject to approval of Commissioner, and in compliance with applicable laws, universal bank may, inter alia, accept deposits, deal in loans and credit, underwrite securities, invest in housing projects, buy and sell securities as broker, buy and sell real estate as broker, sell insurance and annuities, buy and sell commodities, and securitize its assets for sale to public. (D.C. Code § 26-1401.09).

Deposits.

Deposits in names of two or more persons, including spouses or domestic partners, are payable to either survivor(s), may be paid to either whether others be living or not; and receipt of person to whom deposit is paid is complete release and discharge of bank. (D.C. Code § 26-801).

Notice to bank of adverse claim to deposit is not effectual to cause bank to recognize adverse claimant unless adverse claimant either: (1) Procures restraining order or other court process or (2) executes bond to indemnify bank from all liability, loss, damage, costs and expenses on account of payment of adverse claim. Notice to bank of adverse claimant is effectual, however, where person to whose credit deposit stands is fiduciary for adverse claimant, and adverse claimant's affidavit shows reasonable cause to believe that fiduciary is about to misappropriate said deposit. (D.C. Code § 26-803).

On death of trustee bank may, in absence of further notice as to terms of trust, pay trust deposit to trust beneficiary or his legal representative. (D.C. Code § 26-804).

Unclaimed Deposits.

Any demand, savings, or matured time deposit with District bank, and any sum payable on certified check, draft, money order or like instrument is presumed abandoned if no communication, or recorded activity with regard to property, etc. from owner within three years. (D.C. Code § 41-106). Any sum payable on traveler's check issued by bank or financial organization in District is presumed abandoned if no communication, etc. from owner within 15 years. (D.C. Code § 41-106). See category 21 Property, activity, etc. topic 21.01 Absentees, subhead Escheat.

Collections.

Uniform Commercial Code adopted. See topic 3.09 Commercial Code.

Safety deposit boxes in names of two or more persons, including spouses or domestic partners, with right of access to either or survivor, may be opened and contents removed by any of such persons whether others be living or not; and in case of such removal banking institution is exempt from liability. (D.C. Code § 26-802).

Trust companies are organized under the provisions of D.C. Code §§ 26-1301-1336 of Code, subject to approval of D.C. Council (D.C. Code § 26-1305) and supervision of Superintendent of Banking and Financial Institutions (D.C. Code § 26-1308).

Uniform Common Trust Fund Act adopted. (D.C. Code §§ 26-401-404).

International Banking Facilities.

No international banking facility may be established in District of Columbia without consent of Comptroller of Currency. (D.C. Code § 26-103[h]). International banking corporations with offices in D.C. are subject to all pertinent provisions of D.C. banking code, and have same but no greater rights and privileges than D.C. bank. (D.C. Code § 26-633). International banking governed generally by D.C. Code §§ 26-631-643.

Interstate Banking.

Regional Interstate Banking Act of 1985 allows for reciprocal banking activities among District of Columbia and 11 Southeastern states. Amendment to Interstate Banking Act clarifies that local law applies equally to acquisition of D.C. bank holding company or D.C. bank by regional bank holding company or by D.C. bank holding company, so long as conditions of D.C. Code § 26-702(a) are met. (D.C. Code § 26-702). Amendments allow nonregional bank holding companies to acquire D.C. banks or D.C. bank holding companies, subject to approval of Superintendent of Banking and Financial Institutions. (D.C. Code § 26-706.01). Nonregional bank holding companies seeking such approval must commit to make loans and lines of credit available to low-to-moderate income D.C. residents in amount equal to greater of 0.0625% of total assets (three years following acquisition) or $50,000,000, with maximum required commitment of $100,000,000. Other economic development commitments also required. Letter of credit to D.C. government to secure obligations also required. (D.C. Code § 26-706.01). Banking and Branching Act of 1996 permits interstate banking, branching and consolidation, and conversion of banks pursuant to federal Riegle-Neal Interstate Banking and Branching Efficiency Act of 1994. District has opted in to interstate banking schemata provided by Act. (D.C. Code § 26-731).

D.C. Savings and Loan Acquisition Amendment Act of 1988 permits regional associations or holding companies to acquire D.C. associations (D.C. Code § 26-1202) or establish D.C. branches (D.C. Code § 26-1203) on approval of Superintendent and if certain requirements are met. Economic development commitments required. (D.C. Code § 26-1204). Nonregional associations or holding companies seeking such approval must commit to make loans and extend credit to residents and small businesses in low-to-moderate-income areas in amount equal to or greater than .0625% of total assets (within three years following acquisition), in addition to other economic development and service commitments. Letter of credit or other financial instrument in favor of D.C. government to secure obligations also required. (D.C. Code § 26-1205).

Merchant Banks.

Merchant bank must obtain charter from Commissioner. (D.C. Code §§ 26-831.03-831.04). Articles of incorporation or other organizational documents must state: “This [corporation/limited liability company/limited partnership/limited liability partnership] is subject to the requirements of the District of Columbia Banking Code and does not have the power to solicit, receive or accept money or its equivalent on deposit.” (D.C. Code § 26-831.09). Merchant bank must use, as part of its name, word “bank” or “banker”, “banking”, or abbreviation of any of those words.

Community Development Obligation.

To ensure compliance with continuing obligation to meet credit needs of local communities, including low-income and moderate-income areas and designated development areas, financial institution must submit annual community development plan for meeting such needs. (D.C. Code § 26-431.04). Commissioner will monitor performance and issue annual report on each institution’s compliance, rating performance as outstanding, highly satisfactory, satisfactory, needs improvement or substantial noncompliance. (D.C. Code §§ 26-431.05-431.06).

Insurance Requirements.

Bank or trust company established pursuant to Amendments to Interstate Banking Act of 1985 required to insure with FDIC. Savings & Loan Associations established pursuant to Amendments to Interstate Banking Act of 1985 required to insure with FSLIC. (D.C. Code § 26-707.01).

Automated Teller Machines.

All ATMs must be registered with Commissioner. Operator of ATM must pay annual fee of $500 for first ATM and $50 for each additional ATM. (D.C. Code § 26-131.10). Records of daily activity must be maintained for at least 90 days and made available to Commissioner. (D.C. Code § 26-131.11). Surcharge for use must not be imposed on customer unless clearly disclosed electronically or on ATM. Person must be permitted to cancel after disclosure without incurring fee. (D.C. Code § 26-131.05). Regulations governing automated teller machines are found at 26A

DCMR c. 18, § 1800 et seq.

Registered Agent.

Regional and nonregional bank holding companies seeking to acquire D.C. bank or bank holding company required to designate registered agent; D.C. Mayor acts in absence of registered agent. (D.C. Code § 26-707[b]).

Taxation.

Financial institutions are, as of July 1, 1981, subject to tax on certain personal property held on that date and each succeeding July 1, at rate of 10% per annum. (D.C. Code §§ 47-2510, 1522, 1807.22).

In addition, financial institutions are subject to franchise tax, as are corporations. (D.C. Code § 47-1807.1). See category 22 Taxation, topic 22.10 Income Tax, subhead Corporations and Financial Institutions.

Foregoing is in lieu of all other taxes except on real estate.

3.02 BILLS AND NOTES:

Uniform Commercial Code adopted. See topic 3.09 Commercial Code.

Days of grace not provided for.

Bad Checks.

It is a misdemeanor to make or utter, with intent to defraud, check or draft in an amount less than $100 with knowledge at time of making, drawing, uttering or delivering that maker or drawer has not sufficient funds in or credit with bank on which drawn for payment in full on presentation. Offense is punishable by imprisonment for not more than 180 days, fine of not more than $1,000, or both. Offense is felony, punishable by imprisonment of one to three years, fine of not more than $3,000 or both, if amount of instrument is $100 or more. (D.C. Code § 22-1510). Making drawing, uttering, or delivery of such check or draft, payment of which is refused by drawee on account of insufficient funds is prima facie evidence of drawer's knowledge of insufficiency and intent to defraud, unless he pays holder full amount due on check, etc., within five days after notice of nonpayment. (D.C. Code § 22-1510).

Attorney fee clauses are enforceable as indemnity for a reasonable fee. (31 A.2d 673).

3.03 BILLS OF LADING:

See topic 3.08 Carriers.

3.04 BILLS OF SALE:

See topic 3.23 Sales; category 20 Mortgages, topic Chattel Mortgages.

3.05 BLUE SKY LAW:

See topic 3.24 Securities.

3.06 BROKERS:

Real estate brokers and salesmen must be licensed. (D.C. Code § 47-2853.04). Certain exemptions are granted to fiduciaries acting under court order if not regularly engaged in real estate practice, public officers, attorneys; owners or lessors of real estate acting in regular course of managing their investments; employees of brokers engaged in clerical functions only; as well as trustees or auctioneers acting under authority of power of sale in mortgage or similar instrument; and banks, trust companies, building and loan or savings and loan associations or insurance companies (but not title companies) engaged in transaction of business as fiduciary. (D.C. Code § 47-2853.181). Duties of brokers, salespersons, and property managers, including duty to disclose brokerage relationship, are set forth in D.C. Code §§ 47-2853.161-2853.198. See subhead Licenses, infra.

Mortgages brokers and lenders must also be licensed. Mortgage Broker and Lender Act of 1996. (D.C. Code §§ 26-1101-1114). License issued pursuant to D.C. Code § 26-1103 is Class A Financial Services endorsement to master business license (D.C. Code §§ 47-2851.02, 47-2851.03 a[e][1-2]). Exempted entities or individuals include, inter alia, chartered or incorporated banks, trust companies, savings bank, savings and loan associations, and credit unions, as well as insurance companies authorized to do business in District, any corporate instrumentality or agency of U.S. government, and persons not in business of making or brokering mortgage loans. (D.C. Code § 26-1102). Licensed mortgage brokers and lenders are exempt from requirements of Act to regulate loaning money on security (D.C. Code § 26-910), if activity involves making or brokering mortgage.

Broker-dealers and agents for purchase and sale of securities must be licensed by Commissioner of Department of Insurance, Securities, and Banking. (D.C. Code § 31-5602.01).

Licenses.

Applicants for real estate license must be able to read, write and understand English, high school graduate or holder of high school equivalency certificate, have furnished Real Estate Board with certificate of completion of course of study prescribed by Board, and have passed examination required by Board. Continuing education courses are required. (17 DCMR § 2600 et seq.). No license may be issued to one whose application has been rejected in District or elsewhere for reasons other than failure to pass required examination within one year, or whose license in District or elsewhere is suspended at time application is filed, or whose license has been revoked within three years. (D.C. Code § 47-2853.172). Licenses issued to individuals may not be transferred to others. (D.C. Code § 47-2853.182). Licenses will not be issued to firms or corporations unless applicant is organized pursuant to applicable laws, every person member, partner, trustee, or officer who is engaged in real estate activities is licensed every individual engaged in broker activities is licensed and every branch office is managed by licensed broker. (D.C. Code § 47-2853.183). Licenses may be revoked for substantial misrepresentations, false promises, false advertising, incompetence, fraud, commingling of escrow funds, and other acts. (D.C. Code §§ 47-2853.197, 2853.17).

Applicant for mortgage broker or lender license must satisfy Commissioner of Department of Insurance, Securities, and Banking that its members, officers, directors and principals are of good moral character and have sufficient financial responsibility, experience and fitness to engage in business as mortgage lender or broker, must warrant that business will be conducted lawfully, honestly, fairly and efficiently, and must meet minimum liquidity and capital requirements as prescribed by Commissioner. (D.C. Code § 26-1103). Applicant must file surety bond and pay investigation, application and license fees. (D.C. Code § 26-1103).

Applicant for insurance broker's license must be at least 18 years old, have completed pre-licensing course, pay prescribed fee by Commissioner and pass written examination. (D.C. Code § 31-1131.06).

Broker-dealer or agent may be required by Commissioner of Insurance, Securities, and Banking to have minimum net capital, and may require broker-dealer or agent who has discretionary authority over client funds or securities to post surety bond or equivalent form of security. (D.C. Code § 31-5602.03).

3.07 BULK SALES:

See category 8 Debtor and Creditor, topic 8.08 Fraudulent Sales and Conveyances.

3.08 CARRIERS:

Persons.

Washington Metropolitan Area Transit Commission, created by compact of District, Md. and Va., regulates the transportation of persons, for hire, in the metropolitan Washington area and the carriers performing such service. Commission may prescribe or suspend rates, regulations or practices of the carriers. Certificates of public convenience and necessity are required. Rates must be just, reasonable and nondiscriminatory. Tariffs showing rates and, if required by Commission, regulations and practices of the carriers must be filed with Commission and kept open to public inspection. Commission's authority does not extend to transportation of persons by water, air, or rail; by federal government or signatories; of school children or teachers; transportation by regular route primarily outside metropolitan Washington area; or by certain carriers subject to I.C.C. Appeal from orders of Commission lies to U.S. Court of Appeals for Fourth Circuit or District. (D.C. Code § 9-1103.01 et seq.).

Washington Metropolitan Area Transit Authority, created by amendment of Washington metropolitan area transit regulation compact of District, Md. and Va., has responsibility to plan, develop, finance, and cause to be operated by private companies or persons mass transit facilities (including rail rapid transit) in National Capital region, and to coordinate operation of public and privately owned or controlled transit facilities and serve other regional purposes. Authority has sole jurisdiction over service, rates and fares of transit facilities which it owns or controls, but has no jurisdiction over functions of Washington Metropolitan Area Transit Commission. U.S. District Courts and courts of Md. and Va. have concurrent original jurisdiction of all actions by or against Authority.

Other.

Public Service Commission of D.C., appointed by Mayor with advice and consent of City Council (D.C. Code § 34-801 et seq.), supervises street railroads, transportation of freight or property from one point to another within District of Columbia and any common carrier performing such service (D.C. Code §§ 34-216, 203, 101, 807, 1103, 902; D.C. Code § 35-201). Commission has promulgated application requirements and procedures for parties desiring to obtain certification to provide local exchange telecommunications services. (15 DCMR § 2500 et seq.). Appeal lies to D.C. Court of Appeals from any order or decision of Commission. (D.C. Code § 34-605).

Rates must be reasonable, just and non-discriminatory; certification required. (D.C. Code § 1-204.93, 34-1101). Schedule of rates, tolls and charges must be filed with P.S.C., and must remain in force until set aside by P.S.C. (D.C. Code § 34-1123). Copy of schedule must be available for public inspection at every station and office of carrier (D.C. Code § 34-1125), with new schedules made available ten days prior to effective date (D.C. Code § 34-1128). Changes in rates may be made on written application therefor after hearing and investigation with reasonable notice thereof to all interested persons. (D.C. Code § 34-901).

Bills of Lading.

Are governed by Federal Bill of Lading Act (49 U.S.C. §§ 80101 et seq.) (D.C. Code §§ 28:7-301 et seq.), which is in effect local law in District. Uniform Commercial Code is in effect. See topic 3.09 Commercial Code.

Liens.

After failure for six months to claim or to pay charges on baggage or other property transported by or deposited with a common carrier, carrier may sell such baggage or other property at public auction after giving three weeks notice of time and place, once a week for three successive weeks, in a newspaper published in the District. (D.C. Code § 35-101). On application verified by affidavit that residence of owner or consignee is unknown or that such baggage or other property is perishable or showing other cause rendering delay impracticable, Superior Court may authorize sale on such terms as it deems desirable. (D.C. Code § 35-102).

Liability to Employees.

A carrier is liable to an employee, or in case of his death, to his representative for benefit of widow or next of kin for any damage which may result by reason of negligence. (D.C. Code § 35-301). Contributory negligence or insurance contracts of employee no bar to recovery. (D.C. Code §§ 35-302, 303). One year statute of limitations applies. (D.C. Code § 35-304).

Conduct of Public.

Conduct of passengers and occupants aboard public passenger vehicles regulated by D.C. Code § 35-251 et seq.

Motor Vehicle Carriers.

See category 23 Transportation, topic 23.01 Motor Vehicles.

3.09 COMMERCIAL CODE:

Uniform Commercial Code (1962 text) has been adopted, effective Jan. 1, 1965, and 1977 Official Amendments (Article 8), effective Mar. 16, 1993. Code appears as Subtitle I of Title 28 of the District of Columbia Code. Article 4A—Funds Transfers (1989 text), adopted effective Apr., 1992. Article 2A—Leasing, adopted effective July 22, 1992. Revised Article 3—Negotiable Instruments, and revised Article 4—Bank Deposits and Collections, adopted effective Mar. 23, 1995. Revised Article 5—Letters of Credit, adopted effective Apr. 9, 1997. Revised Article 6—Bulk Sales, adopted effective Apr. 9, 1997. Revised Article 8—Investment Securities, adopted effective Apr. 9, 1997. Revised Article 9—Secured Transactions, adopted effective July 1, 2001. Citation follows that of Official Text of U.C.C. prefixed by 28; *e.g.,* Art. 1, § 1 of U.C.C., cited in U.C.C. as "1-101," is cited: "D.C. Code 28:1-101."

Material Variations.

Material variations from the 1962 and 1972 Official Texts are:

§ 1-103, U.C.C.—Age of capacity to contract is 18 years.

§ 1-201(14a), U.C.C.—"District" means District of Columbia, and "state" includes District.

§ 2-316, U.C.C. regarding exclusion or modification of warranties does not apply to sale of consumer goods or services. (D.C. Code §§ 28-2-316.01). Any modification by seller of any implied warranties of merchantability or fitness for particular purpose is unenforceable. Particular defects and limitations, however, are excluded from this section if noted conspicuously in writing. Manufacturer of consumer goods cannot limit consumer's remedies for breach of express warranties unless manufacturer provides reasonable and expeditious means of performing warranty obligations.

§ 3-302, U.C.C.—Modified by D.C. Code § 32-404(j)(2), which provides that promissory notes executed under employment agency agreements not held in due course beyond 120 days.

Optional Provisions.

Following options and alternatives have been elected:

§ 2-318, U.C.C.—Alternative A elected.

§ 4-106, U.C.C.—Alternative A elected.

§ 6-102, U.C.C.—Alternative B elected.

§ 7-204(4), U.C.C.—Omitted.

§ 7-403(1)(b), U.C.C.—Material in brackets omitted.

§ 9-201, U.C.C.—Special language.

§ 9-311, U.C.C.—Special language.

§ 9-501, U.C.C.—Special language.

§ 9-512(a), U.C.C.—Alternative A elected.

§ 9-518(b), U.C.C.—Alternative A elected.

§ 9-519(f), U.C.C.—Alternative A elected.

§ 9-522(a), U.C.C.—Alternative A elected.

§ 9-525, U.C.C.—Alternative A elected. Special language.

§ 10-104(2), U.C.C.—Substance of optional section adopted.

Permanent Editorial Board's Recommendations for Amendments.

§ 2-702.—1966 Official Amendment adopted effective Sept. 13, 1982.

§ 7-209.—1966 Official Amendment adopted effective Sept. 13, 1982.

Permanent Editorial Board's Recommendations for Optional Amendments.

§ 1-209.—1966 Official Optional Amendment not enacted.

§ 2-318.—1966 Official Optional Amendment not enacted.

1972 Official Amendments.

Adopted effective Sept. 13, 1982.

1973 Official Amendment.

Not adopted.

1977 Official Amendments.

Not adopted.

Secured Transactions under Code.

An official form of financing statement has been adopted. (D.C. Code § 28-9-521). Requirements are as in 1962 and 1972 Official Texts. For place of filing and fees, see D.C. Code

§§ 28-9-501, 525.

See also topics: Banks and Banking, Bills and Notes, Brokers, Carriers, Contracts, Factors, Frauds, Statute of, Sales, Securities, Warehousemen; categories Business Organizations, topic Corporations; Civil Actions and Procedure, topic Limitation of Actions; Debtor and Creditor, topics Assignments, Fraudulent Sales and Conveyances, Liens, Pledges; Documents and Records, topics Records, Seals; Mortgages.

3.10 CONDITIONAL SALES:

See topic 3.23 Sales.

3.11 CONSIGNMENTS:

See topic 3.14 Factors.

3.12 CONSUMER PROTECTION:

Revolving Credit Accounts.

Where seller or financial institution extends credit to buyer, pursuant to credit card or other specified credit arrangement, unpaid balances are debited to account, credit service charge is computed on outstanding unpaid balance, and buyer has privilege of paying balances in full or in installments, monthly credit service charge may not exceed 2% of outstanding balance. Changes in certain account terms require specified advance notice of change and must provide buyer option to repay existing debt under former account terms, unless buyer incurs additional debt after effective date of change. (D.C. Code §§ 28-3701, 28-3702).

Consumer Credit Sales and Installment Loans.

C. 38 of Tit. 28 of D.C. Code, applying to actions to enforce rights arising from consumer credit sales not exceeding $25,000 and to direct installment loans as used in D.C. Code § 28-3308 (not including loans secured on real estate or direct motor vehicle installment loans), provides various protections for debtors, including: (a) Prohibition of balloon payments, assignment of earnings, authorization to confess judgment, attorney fees for creditors in excess of 15%, and negotiable instruments in consumer credit sales; (b) subjecting assignee to all claims and defenses of consumer not exceeding amount owing at time of assignment; (c) subjecting lender who makes direct installment loan to consumer to all claims and defenses of consumer not exceeding amount of loan if lender acts at express request of seller and participates in preparation of loan documents or is controlled by or under common control with seller or gives compensation to seller for arranging loan; and (d) regulating cross-collateral arrangements, referral sales, creditor remedies, consumer remedies and debt collection practices. C. 33 of Tit. 28 provides additional debtor protection, including: (a) Right to request twice yearly statements of past payments and unpaid principal; (b) limiting late charges to 5% of late payment; (c) prohibiting misleading practices by lenders; (d) prohibiting hidden acceleration clauses and clauses waiving c. 33 rights (e.g., by advertising or offering services without intent to provide them, or by failing to state material fact); and (e) right of action for lender violations of c. 33, including right to seek punitive damages and reasonable attorney fees. (D.C. Code §§ 28-3310, 3312, 3314).

Lease-Purchase Agreements.

In lease-purchase agreement, lessor must disclose number, amount and timing of all lease payments, and must separately disclose all other charges, as well as other pertinent information regarding rights of consumer. (D.C. Code § 42-3671.04). Lease-purchase agreement must not contain (1) confession of judgment, (2) negotiable instrument, (3) security interest or any other interest in any goods except those goods delivered by lessor under lease-purchase agreement, (4) wage assignment, (5) waiver by consumer of claims or defenses, or (6) provision authorizing lessor to enter consumer's premises or commit breach of peace in repossession of goods. (D.C. Code § 42-3671.06). Noncomplying lessor is liable for greater of actual damages, or 25% of payments necessary to acquire ownership but not less than $100 or greater than $1,000, plus, in either case, costs and attorneys' fees. (D.C. Code § 42-3671.12). In class action, total recovery cannot be more than lesser of $500,000 or 1% of net worth of lessor, plus costs and attorneys' fees. (D.C. Code § 42-3671.12).

Home Solicitation Sales.

Where seller of service or goods, other than farm equipment, engages in personal solicitation of sale at or near residence of buyer, buyer has right to cancel home solicitation sale until midnight of third business day after day on which buyer signs agreement or offer to purchase. Buyer must be notified, in writing, of this right. Cancellation occurs when buyer gives written notice to seller at address stated in agreement, and such notice is given when properly deposited in mail. Except under specified conditions buyer must be informed of right of cancellation. Written waiver by buyer of right to cancel is effective where buyer has requested seller to provide goods or services without delay because of emergency, seller has commenced performance, and goods cannot be returned in substantially as good condition as when received. Within ten days of cancellation, seller must tender to buyer any payments or evidences of indebtedness from buyer, and no cancellation fee may be charged. Goods become property of buyer if seller does not demand their return within reasonable time after cancellation (section presumes 40 days to be reasonable time). (D.C. Code § 28-3811).

Telephone Automatic Dialing Sales Prohibited.

It is prohibited to solicit sales or survey information for purposes of sales by means of automatic dialing or push-button or tone activated address signaling telephone system with prerecorded message. Exemptions include: Government agencies using system for emergency purposes; or where there is preexisting business relationship between party calling and party called, and call concerns goods, services or real property previously purchased or ordered. Penalty of $1,000 for first violation; $5,000 for each subsequent violation. (D.C. Code § 34-1701).

Telephone Solicitors Must Register and Post Bond.

Person who calls consumer as part of plan to induce purchase of goods or services must obtain certificate of registration from Mayor and post surety bond of $50,000 or alternate form of security. Exemptions exist for nonprofit and religious institutions, licensed travel agents, licensed brokers and certain other individuals or entities. Deceptive or misleading telemarketing practices subject telephone solicitor to civil and criminal penalties. (D.C. Code §§ 22-3226.01-3226.15).

Prescription Drug, Hearing Aid and Health Spa Sales.

Pharmacies must conspicuously display poster, provided by Department of Consumer and Regulatory Affairs, and must conspicuously post price list of 100 most commonly used prescription drugs, and prices of pharmacy's professional and convenience services, and may dispense, under certain conditions, lowest priced therapeutically equivalent drug to any purchaser presenting prescription for brand name drug. (D.C. Code § 48-801.01-801.06). Hearing aid dealers must be registered with and approved by Department of Consumer and Regulatory Affairs and must post and make available for inspection retail price list of all hearing aids for sale. Hearing aid sales can be made only within three months following purchaser's medical clearance and hearing test examination, except that purchaser may waive examination under certain circumstances, and all such sales must be made with 30-day money-back written guarantee. Each hearing aid sale must also be accompanied by receipt that meets several minimum requirements. (D.C. Code § 28-4001 et seq.). Health spas must register with Department of Consumer and Regulatory Affairs, post with Department bond, irrevocable letter of credit, or cash of no less than $50,000, or, under certain circumstances, $25,000, and annually evidence to Department that bond or letter of credit remains in force. Health spa sales may be cancelled by purchaser within 15 days or after 15 days if due to death, illness, injury, or change of residence or change in location of spa. (D.C. Code § 28-3817).

Prompt Payment under Health Benefit Plans.

Health insurer must pay any health benefit claim that is accompanied by necessary documentation within 30 days. Failure to timely pay will result in monthly interest charges on health insurer. (D.C. Code § 31-3132). This does not apply if insurer notifies person submitting claim within 30 days that their claim is in dispute.

Privacy of Consumer Financial Information.

Treatment of nonpublic personal financial information about consumers and customers by insurers, insurance agents and brokers is regulated by 26 DCMR § 3600.1 et seq.

Data Breach Notification.

If computerized or electronic data is acquired without authorization, or if computer equipment with such information is obtained without authorization, notice must be provided to residents of District whose data was obtained without authorization. (D.C. Code §§ 28-3851-3853). Data covered by statute includes first name or initial and last name, or telephone number, address, and one or more of following: (1) Social Security Number; (2) driver's license number; or (3) credit or debit card number. Also includes any other number or code that allows access to individual's financial or credit account. (D.C. Code § 28-3853).

Privacy of Cable Subscribers.

Cable operator must not collect personally identifiable information concerning any subscriber, or disclose such information about subscriber without prior written or electronic consent, except as necessary to provide cable service, or to detect cable theft. (D.C. Code § 34-1260.02).

Lay Away Plans.

Sales of consumer goods pursuant to plan whereby three or more agreed payments must be made prior to transfer of such goods are subject to certain disclosure, cancellation, and fee provisions. Buyer may cancel and obtain full refund within two weeks after executing plan. After two weeks, cancellation fee of lesser of 8% of purchase price or $16 (whichever is less) may be charged. If seller defaults on delivery of goods, full refund in addition to amount equal to cancellation fee is due. If buyer fails to make timely payment, notice of delinquency must be sent, and, after 14 days, seller may deduct $1 from amount paid by buyer and refund balance. Acceleration of payments is prohibited. Disclosure of payment schedule, statement that goods will be retained by seller until final payment, statement of refund and exchange policies, and description of certain statutory provisions governing plan must precede execution of plan. Written receipt and description of goods identified in plan must accompany or, in certain circumstances, follow all payments. (D.C. Code § 28-3818).

Employment Services.

Person who for fee provides employment services to employers or job-seekers must register with, and obtain license from, Mayor of District of Columbia. Persons who receive fees from job-seekers must post bonds with Mayor as follows: Employment agencies and employment counselors ($100,000 or $50,000, depending on average fee and volume); job-listing services ($5,000). Employment agency and counselor contracts with job-seekers must be in writing and meet type-size, plain language and notice requirements. Job-seekers may cancel such contracts by written notification within three days of signing. (D.C. Code § 32-401 et seq.).

Rental Housing Locators.

Person who for fee provides information about rental units available for rent must, upon request, make records of listings available to Office of Consumer Protection and Metropolitan Police Dept. Locator must update information and may only provide information concerning units publicly held out as available for rent or where given permission to do so by unit owner/manager. Rental housing locator contracts must be in writing and in compliance with accuracy, notice, and refund requirements. (D.C. Code § 28-3819).

Prohibited Conditions for Accepting Check or Credit Card.

Seller may request but not require consumer to produce credit card as condition of accepting check, nor require address and telephone number of consumer as condition of accepting credit card. Seller may not imprint credit card information on face or back of check, nor record number of credit card as condition to accepting check. (D.C. Code §§ 47-3152-3153). Aggrieved party may institute suit for actual damages or $500, whichever is greater, plus attorneys' fees. Aggrieved party is also entitled to injunctive relief. However, this section cannot impose liability on agent of employer acting on direction of that employer. (D.C. Code § 47-3154).

Mental Health.

Mental health providers must treat consumers of mental health services, their family and representatives with consideration and respect for dignity, autonomy and privacy. Consumers must have access to mental health services and mental health supports free of discrimination based on race, color, religion, national origin, language, culture, sex, age, marital status, personal appearance, sexual orientation, familial status, family responsibilities, matriculation, political affiliation, disability, source of income and place of residence. Consumers must be free from physical, emotional, sexual or financial abuse, neglect, harassment, coercion, and exploitation. (D.C. Code § 7-1231-1204). Extensive further rights of consumers of mental health services are set forth in D.C. Code §§ 7-1231.04-1231.15.

Natural Disasters.

Restrictions on charging more than normal average retail prices of goods or services during period of declared natural disaster. Fine of up to $1,000 and revocation of license or permit for violation. (D.C. Code § 28-4101 et seq.).

Natural Gas Accounts.

Supplier of natural gas must not switch customer's account to another supplier without customer's consent. (D.C. Code § 34-1671.08).

Uniform Deceptive Trade Practices Act, adopted. (D.C. Code § 28-3904).

Department of Consumer and Regulatory Affairs has broad powers to receive and investigate complaints, issue summonses and subpoenas, hold hearings, take testimony under oath, issue cease and desist orders with respect to trade practices determined to be in violation of District law by Department and appoint private attorneys from D.C. bar to take action in name of Department. (D.C. Code §§ 28-3902 et seq.). Department also regulates street vendors. (24 DCMR § 500 et seq.).

Plain Language.

No universally applicable plain language statute.

See topics 3.23 Sales, subhead Retail Credit Sales, Interest, subheads Maximum Rate and Usury, Commercial Code, subhead Material Variations; categories 16 Insurance, topic Insurance Companies, subheads Policies and Rates; Transportation, topic Motor Vehicles, subheads Titles and Sales and Automobile Consumer Protection. See also category 14 Family, topic 14.10 Infants, subhead Student Athletes.

3.13 CONTRACTS:

Uniform Commercial Code adopted. See topic 3.09 Commercial Code; categories 10 Documents and Records, topic Seals; Family, topic Infants.

3.14 FACTORS:

Factor's liens are now regulated by Uniform Commercial Code. See topic 3.09 Commercial Code.

License Requirements.

Commission merchants dealing in food must obtain annual license. (D.C. Code § 47-2827).

3.15 FRANCHISES:

District of Columbia has not adopted Uniform Franchise and Business Opportunities Act.

No person or entity may operate cable television system within District without first obtaining franchise pursuant to Cable Television Reform Amendment Act of 2002. (D.C. Code § 34-1254.01).

3.16 FRAUDS, STATUTE OF:

No estate of inheritance or for life or for a longer term than one year in any real property in the District, and no declaration or limitation of uses in the same for any of such estates, may take effect except by deed signed and sealed by grantor, declarant or lessor, or by will. (D.C. Code § 42-306). Estate in real property attempted to be created for more than one year in manner other than by deed is estate by sufferance. (D.C. Code § 28-3501).

No action may be brought to charge executor or administrator upon special promise to answer for damages out of his own estate or to charge defendant upon any special promise to answer for debt, default, or miscarriage of another person, or to charge person upon agreement made in consideration of marriage, or upon contract or sale of real estate, or upon any agreement that is not to be performed within one year of making it, unless agreement upon which such action is brought is in writing, which need not state consideration, and is signed by party to be charged or person authorized by him. (D.C. Code § 28-3502).

Statute of frauds is applicable to contracts for sale of goods for $500 or more, with exceptions, as set forth in Uniform Commercial Code. (§ 28:2-201). See topic 3.09 Commercial Code.

Equitable doctrines of promissory estoppel, equitable estoppel, and waiver by admission are applied by local courts.

3.17 [RESERVED]

3.18 INFORMATION TECHNOLOGY, INTERNET AND NEW MEDIA:

E-Commerce.

Tax credits are available to "Qualified High Technology Company." To be considered Qualified High Technology Company, individual or entity organized for profit must have two or more employees and derive at least 51% of gross revenues from: internet-related services and sales; information and communication technologies equipment and systems; advanced materials and processing technologies to develop materials or methods to produce devices with improved performance characteristics; engineering, production, biotechnology and defense technologies involving knowledge-based control systems and architectures; or electronic and photonic devices and components for use in producing electronic equipment. (D.C. Code §§ 47-1817.01-1817.08). Clarifying regulations are found at 9 DCMR §§ 1101 et seq.

Uniform Electronic Transactions Act adopted. (D.C. Code §§ 28-4901-4918).

Electronic Filing.

D.C. Public Service Commission permits and encourages electronic filing of documents with Commission. (15 DCMR §§ 118-119). Office of Tax and Revenue provides rules for filing tax returns electronically in 9 DCMR § 105.10 et seq.

3.193.16 [RESERVED]

3.17 INTEREST:

In absence of agreement, legal rate is 6% per annum. (D.C. Code § 28-3302).

Maximum Rate.

D.C. Code sections cited in this paragraph are as amended by Interest Rate Ceiling Amendment Act of 1983 (D.C. Law 5-62), effective Mar. 14, 1984. By contract in writing, 24% per annum may be charged. (D.C. Code § 28-3301). Interest rate ceiling established by D.C. Code § 28-3301 is subject to, and in some cases, is preempted or rendered inapplicable by, D.C. Code §§ 501-529 of Depository Institutions Deregulation and Monetary Control Act of 1980. (12 U.S.C. §§ 86, 1730g, 1735f-7, 1785, and 1931d; 15 U.S.C. § 687). Any loans secured by deed of trust on residential real property or security interest in stock or membership certificate in cooperative housing or assignment by way of security of borrower's interest in proprietary lease lien or right of tenancy is subject to following requirements: (a) Loan may be prepaid by borrower at no penalty at any time following expiration of three years from execution of loan transaction, and within three years from execution of loan transaction no prepayment charge shall be contracted for or received which exceeds amount equal to two months advance interest on aggregate amount of all prepayments in excess of one-third of amount of original loan transaction made in any 12 month period, (b) any borrower who, on date of execution of loan transaction, has made down payment equaling 20% or more of total purchase price of property or who has equity interest in property equal to or greater than 20% of fair market value of property must not be required by term of loan to make advance payments of real estate taxes or casualty insurance premiums to enable lender to have funds on hand for disbursement of payment of such taxes or insurance premiums, and such borrower must be furnished with separate statement, in writing, which clearly and conspicuously set forth his right to pay such taxes and insurance premiums directly, and (c) prior to execution of loan transaction, lender must furnish borrower with separate statement, in writing, which complies with disclosure statements of Truth-in-Lending Act and regulations and interpretations thereunder, and, where applicable, separate statement, in writing, which complies with disclosure provisions of Alternative Mortgage Transaction Parity Act of 1982, and regulations and interpretations thereunder. (D.C. Code § 28-3301 [b], [c], [f]). However, any federally insured bank or savings and loan association doing business in District of Columbia may charge interest up to 24% per annum or finance charge which, if expressed as annual percentage rate, does not exceed 24% per annum on direct installment loan (other than loan directly secured on real estate) (D.C. Code § 28-3308); and such bank or association may charge interest up to 24% per annum or finance charge which, if expressed as annual percentage rate, does not exceed 21% per annum on direct motor vehicle installment loan (D.C. Code §§ 28-3601-3602).

Judgments.

Interest at rate of 4% is allowed on judgments against District of Columbia or its officers or employees acting within scope of their employment. Where judgment is not against District of Columbia or its officers or employees acting within scope of their employment, or where rate of interest is not fixed by contract, interest is 70% of rate of interest set by Secretary of Treasury pursuant to § 6621 of Internal Revenue Code of 1986 (26 U.S.C. § 6621) for underpayments and overpayments of tax to Internal Revenue Service, rounded to nearest full percent, or if exactly ½ of 1%, increased to nearest full percent; provided that court may lower such rate of interest for good cause shown or upon showing that judgment debtor in good faith is unable to pay judgment (D.C. Code § 28-3302).

Open Accounts.

While there are no statutes directly appertaining to the rate of interest on open account, where there is no rate of interest agreed upon between the parties, there are some decisions which hold that interest may be awarded, in the discretion of the jury, after the account is overdue, as part of the damages suffered, and where the suit is for a liquidated sum, interest may be awarded from the date the account becomes due.

Small Loans.

It is illegal to engage in the business of lending money at a rate of interest greater than 6% without procuring a license as a moneylender. With such a license, lawful rate, set by c. 33 of Tit. 28, may be charged, which must cover all fees and expenses except those attendant upon foreclosure; such interest may not be deducted from principal when the loan is made. (D.C. Code §§ 26-901-905). Exempted from requirements of c. 9 of Tit. 26 are loans: (1) To corporation unable to plead usury, (2) secured on real estate outside District, (3) to borrower residing, doing business or incorporated outside District, or (4) greater than $25,000. (D.C. Code § 26-912).

Usury.

In case of small loans, penalty for usury is loss of interest and fine of $300 and imprisonment for not less than 30 days or more than 90 days, and restitution of property illegally obtained; in other cases, forfeiture of interest. (D.C. Code §§ 26-905, 907; 28-3303). Usurious interest paid may be recovered. (D.C. Code § 28-3304).

Cooperative associations formed under D.C. Cooperative Association Act are exempt from D.C. laws regulating licenses for loans and interest rates, in loans for members in connection with utility operations (D.C. Code § 29-943); and D.C. Council is authorized to exempt any mortgage or loan insured or guaranteed under National Housing Act or c. 37 of Tit. 38, U.S. Code, interest rate of which is subject to regulation by officer or agency of Federal Government, from 6% interest limitation (D.C. Code § 28-3307). D.C. Council has granted such exemption. (D.C. Law 2-140).

Lenders are authorized to contract for or receive any rate of interest on loans in excess of $2,500 if borrower is not-for-profit corporation or religious society under c. 7 of Tit. 29 of D.C. Code, or if loan is made to individual or entity for purpose of acquiring or carrying on business or acquiring real or personal property as investment or carrying on investment activity. (D.C. Code § 28-3301[d], as am'd by Interest Rate Ceiling Amendment Act of 1983, effective Mar. 14, 1984).

3.18 [RESERVED]

3.19 LICENSES, BUSINESS AND PROFESSIONAL:

Licenses and license fees are required of persons engaged in 37 non-health related professions listed at D.C. Code § 47-2853.04, as well as health professions (D.C. Code § 3-1205.01 et seq.), nurse staffing agencies (D.C. Code § 44-1051.01), marriage and family therapists (D.C. Code § 3-1201.01 et seq.), mortgage brokers and mortgage lenders (D.C. Code §§ 26-1103, 1104), insurance agents and brokers (D.C. Code §§ 31-1131.01-1131.19), money transmitters (D.C. Code § 26-1002), broker-dealers and agents for purchase and sale of securities (D.C. Code § 31-5602.01), investment advisers and investment adviser representatives (D.C. Code § 31-5602.02), check cashers (D.C. Code § 26-301-323), and street vendors (D.C. Code § 47-2834). Eligibility requirements for licenses in particular fields are set forth in subparts A-R, D.C. Code §§ 47-2853.41-2853.213. All businesses must obtain basic business license and any necessary endorsements from Business License Center of Department of Consumer and Regulatory Affairs. (D.C. Code §§ 47-2851.01-2851.03). Council has power by legislation to impose license fee sufficient to cover cost of inspection supervision, regulation, or other activity or expenditure on any occupation not specifically provided for (D.C. Code § 47-2842). License fees for hospitals and other health care facilities are set forth in 22 DCMR §§ 2013, 3114. Where special board, commission, or office has been set up, as in architecture, accountancy, barber and cosmetology, industrial trades, professional engineering, funeral directors, real estate appraisers, real estate (D.C. Code § 47-2853.06[a-h]), and health professions (D.C. Code § 3-1201.01 et seq.), application is made to appropriate board. See Title 17 DCMR (Business, Occupations and Professions).

With exception of licenses or permits required pursuant to Construction Code Approval and Amendments Act of 1976 (D.C. Code § 6-1401 et seq.), or any license or permit determined by Mayor to be necessary to remedy unsafe and hazardous condition that presents immediate threat to public health or safety, District government will not issue or reissue any license or permit to any applicant if applicant owes more than $100 in outstanding debt to District as result of fines, penalties or interest assessed pursuant to Litter Control Administration Act of 1985 (D.C. Code § 8-801 et seq.), Illegal Dumping Enforcement Act of 1994 (D.C. Code § 8-901 et seq.), or Department of Consumer and Regulatory Affairs Civil Infractions Act of 1985, or as result of past due taxes. Clean Hands Before Receiving a License or Permit Act of 1996. (D.C. Code § 47-2862). Mayor may also, upon 30 days notice, revoke or refuse to issue driver’s license or any professional or business license to parent more than 60 days behind in child support payments. If obligor is member of D.C. Bar, Clerk of Court shall send written notice to Board of Professional Responsibility so that appropriate action may be taken. Child Support Enforcement and Licensing Compliance Amendment Act of 1995. (D.C. Code § 46-225.01).

Day care facilities must be licensed. (D.C. Code § 7-2031 et seq.).

Collection Agencies.

See topic 3.12 Consumer Protection, subhead Consumer Credit Sales and Installment Loans.

3.20 MONOPOLIES, RESTRAINT OF TRADE AND COMPETITION:

The Sherman Anti-Trust Act and similar federal legislation apply in the District to intrastate as well as interstate transactions. (15 U.S.C. § 3; 286 U.S. 427).

District of Columbia Antitrust Act also became effective Mar. 5, 1981. (D.C. Code §§ 28-4501-4518). This Act parallels §§ 1 and 2 of Sherman Act (15 U.S.C. §§ 1, 2) prohibiting contracts, combinations or conspiracies in restraint of trade, and monopolization, conspiracy to monopolize, or attempt to monopolize. Federal court interpretations of comparable statutes can be used as guide in construing Act. Violation is misdemeanor, punishable by fine not exceeding $50,000 and/or imprisonment not exceeding one year. Individual directors, officers and agents who intentionally order, authorize or ratify violations are subject to criminal penalties. Private parties may bring treble damage actions and seek injunctions or other equitable relief. Indirect purchasers may recover damages, contrary to rule of 431 U. S. 720; and defendants may assert “pass-on defense,” contrary to rule of 392 U. S. 481. Corporation Counsel may bring action for damages on behalf of District government, seek injunctive or equitable relief, or bring parens patriae action on behalf of District residents. Act has four year statute of limitations for civil actions. Under District of Columbia Criminal Statute of Limitations Act of 1982 (D.C. Code § 23-113), three year statute of limitations applies to criminal actions. Corporation Counsel has authority to issue "civil investigative demand" similar to that authorized under Federal statute for Department of Justice. Act excludes certain organizations from coverage, including nonprofit labor, agricultural or horticultural organizations seeking to carry out their legitimate objectives; religious, charitable, literary, and educational organizations; and Washington Metropolitan Area Transit Authority. (D.C. Code § 28-4504). Nonprofit cooperative association does not violate D.C. Antitrust Act if its activities comply with D.C. Cooperative Association Act. (D.C. Code §§ 29-942).

D.C. Code § 48-804.02, relating to "Prescription Drug Price Information" treats as restraint of trade any interference with: (1) Disclosure of information relating to prescription drugs, including price information; (2) retail drug price-setting, substitution, or marketing policy or action; and (3) supply of prescription drugs to pharmacies, government agencies, health insurers, or other purchasers. Purchasers may bring treble damages actions for such interference.

Fair Trade Act.

See category 17 Intellectual Property, topic 17.01 Trademarks and Trade Names.

3.21 NEGOTIABLE INSTRUMENTS:

See topic 3.02 Bills and Notes.

3.22 RESTRAINT OF TRADE:

See topic 3.20 Monopolies, 3.22 Restraint of Trade and Competition.

3.23 SALES:

Uniform Commercial Code in effect. Art. 2 replaces Uniform Sales Act. See topic 3.09 Commercial Code.

Bills of Sale.

No statutory provisions as to form or necessity of bill of sale.

Retail Credit Sales.

If billing cycle is monthly, credit service charge not exceeding 2% per month may be charged by seller of goods or services or by financial institution pursuant to credit card or other arrangement between seller or financial institution and retail buyer. Seller or financial institution may impose or increase any credit service charge, change method of computing balance, or increase required minimum periodic payment, provided seller or financial institution: (1) Mails written notice of change to buyer at least 30 days prior to effective date of change; and (2) permits buyer to repay under existing terms any debt incurred prior to effective date of change. (D.C. Code §§ 28-3701, 3702). Requirements as to form of such written notice are specified in D.C. Code § 28-3702.

Consumer Protection.

See topic 3.12 Consumer Protection.

Conditional Sales are among the devices governed by Art. 9 of Uniform Commercial Code, dealing with secured transactions. See topic 3.09 Commercial Code.

Bulk Sales.

See category 8 Debtor and Creditor, topic 8.08 Fraudulent Sales and Conveyances.

Sales of Payment Instruments.

Persons engaged in issuance or sale of payment instruments or in business of receiving money for transmission or transmitting money within or without U.S. must be licensed by Commissioner of Insurance, Securities, and Banking. (D.C. Code §§ 26-1001-1002). Exempted from requirement are U.S. and D.C. departments and agencies, U.S. Post Office, and banks organized under state, U.S. or D.C. laws, provided they do not issue or sell payment instruments through authorized delegates who are not banks. Authorized delegates of licensees, acting within scope of written contract, do not need to obtain their own license. (D.C. Code § 26-1003).

Sales of Motor Vehicles.

See category 23 Transportation, topic 23.01 Motor Vehicles.

Sales of Cigarettes.

Under Cigarette Sales Below Cost Act of 1994, no individual or entity doing business in District of Columbia may, for purpose of injuring competitors or destroying competition, sell, offer for sale, or advertise for sale cigarettes for less than cost, either at retail or wholesale or give, offer to give, or advertise intent to give away any cigarettes for purpose of injuring competitors or destroying competition. (D.C. Code § 28-4521 et seq.). Sales of cigarettes not intended by manufacturer to be sold in U.S. (gray market cigarettes) are prohibited. (D.C. Law 13-225, 48 DCR 35).

International Sales of Goods.

See Part V of this volume, Selected International Conventions.

3.24 SECURITIES:

Federal Securities Act (15 U.S.C. § 77a) governs both intrastate and interstate transactions in the District.

Securities Act of 2000 (D.C. Code § 31-5601.01 et seq.), requires licensing of broker-dealer and agents (D.C. Code § 31-5602.01), investment advisers and investment adviser representatives (D.C. Code § 31-5602.02), regulates broker-dealers and others who sell or purchase securities (D.C. Code §§ 31-5602.03-5602.09), requires registration of certain securities purchased or sold in D.C. (D.C. Code § 31-5603.01), specifies content of registration statements (D.C. Code §§ 31-5603.01-5603.04), prohibits fraudulent or other wrongful conduct in purchase and sale of securities (D.C. Code §§ 31-5605.01-5605.05), and establishes both civil and criminal penalties for such conduct (D.C. Code §§ 31-5606.01-5606.05). Act authorizes Commissioner of Insurance and Securities Regulation to administer requirements and to investigate misconduct, initiate enforcement proceedings, issue orders, and promulgate rules. (D.C. Code §§ 31-5607.01-5607.08). Investment Advisers, broker-dealers and their agents or representatives must be licensed and must file financial reports as required by Commissioner. (D.C. Code §§ 31-5602.01-5602.04).

Regulations governing registrations of securities offerings are found at 17 DCMR §§ 1900.1 et seq.

Uniform Commercial Code in effect. (§ 28:1-101 et seq.). See topic 3.09 Commercial Code.

Uniform Simplification of Fiduciary Security Transfers Act adopted. (D.C. Code §§ 28-2901-2909). Act prevails over inconsistent provisions of Art. 8 of Uniform Commercial Code. (§ 28:10-104). See topic 3.09 Commercial Code.

Uniform Transfers to Minors Act in effect. (D.C. Code §§ 21-301-324). See category 14 Family, topic 14.10 Infants.

3.25 STATUTE OF FRAUDS:

See topic 3.16 Frauds, Statute of.

3.26 [RESERVED]

3.27 WAREHOUSEMEN:

Warehouse receipts and other documents of title and rights, duties and liabilities of warehousemen are governed by Uniform Commercial Code. Art. 7 of Code replaces Uniform Warehouse Receipts Act. See topic 3.09 Commercial Code.

4 CITIZENSHIP

4.01 ALIENS:

Property.

Restrictions on ownership of real property by aliens contained in 48 U.S.C. §§ 1501-07 are made expressly applicable to District of Columbia (D.C. Code 42-901); however, under 48 U.S.C. § 1502, as construed in 31 F.2d 635; 58 App. D.C. 391, there is no restriction on ownership of land by aliens in District of Columbia. Provisions of D.C. Code § 42-901 do not apply to ownership of embassies or residences of representatives of foreign governments. (D.C. Code § 42-902).

See also categories 11 Employment, topic Labor Relations; Estates and Trusts, topic Executors and Administrators, subhead Eligibility and Competency.

5 CIVIL ACTIONS AND PROCEDURE

5.01 ACCORD AND SATISFACTION:

By judicial construction, the tender of a sum in settlement of a disputed item or items and the acceptance by the creditor, even though the latter receives it only on account, operate as an accord and satisfaction. (291 A.2d 187; 32 App. D.C. 392).

Compromise.

Any one of several joint debtors when their debt is overdue may make separate composition or compromise with creditor. (D.C. Code § 16-2106).

Pleading.

Accord and satisfaction must be pleaded affirmatively if relied upon. (D.C. Super. Ct. R. Civ. P. 8[c]).

Uniform Commercial Code adopted. See category 3 Business Regulation and Commerce, topic 3.09 Commercial Code.

5.02 ACTIONS:

The Federal Rules of Civil Procedure (1938), as amended, govern all actions in the

District Court except as provided therein. (See Fed. R. Civ. P. 81).

D.C. Superior Court has adopted rules that are substantially identical to Federal Rules, and that abolish forms of action and distinction between law and equity, and permit joinder of any legal or equitable claims in one proceeding. (D.C. Code § 11-946; D.C. Super. Ct. R. Civ. P. 1-2, 18).

Condition Precedent.

No action may be maintained against District of Columbia for unliquidated damages to person or property unless notice thereof is given in writing to Mayor within six months of injury, reporting approximate time, place, cause, and circumstances thereof. Report by District police department is sufficient. (D.C. Code § 12-309).

Commencement.

Every civil action is commenced by filing complaint with court, whereupon clerk issues summons. See topic 5.17 Pleading; also topic 5.19 Practice.

Abatement and Revival.

On death of any person in whose favor or against whom right of action has accrued for any cause, right of action survives in favor of or against legal representative of deceased. (D.C. Code § 12-101). No pending action abates if right of action survives. Substitution of parties is governed by Federal Rules of Civil Procedure. (D.C. Code § 12-102).

Actions commenced against head of Dept. or Bureau and other U. S. or District of Columbia officers in official capacity, do not abate because of death of such officers, and successor in office is automatically substituted as defendant. (Fed. R. Civ. P. 25[d]).

Limitations of.

See topic 5.16 Limitation of Actions.

Small Claims.

See category 6 Courts and Legislature, topic 6.01 Courts.

Direct Actions Against Insurer.

No statutory provisions.

5.03 APPEAL AND ERROR:

From U.S. District Court.

Appeal lies from any final order, judgment, or decree and from certain interlocutory orders of U.S. District Court to U.S. Court of Appeals for District of Columbia Circuit or, in certain cases, to U.S. Court of Appeals for Federal Circuit, see 28 U.S.C. § 1295, as matter of right. (28 U.S.C. §§ 1291, 1292[a], 1294). Notice of appeal in civil cases must be filed within 30 days after entry of order, judgment, or decree. (28 U.S.C. § 2107[a][c]; Fed. R. App. P. 4[a][1][A]). If U.S. or officer or agency thereof is party, notice of appeal may be filed by any party within 60 days after such entry. (28 U.S.C. § 2107[b]; Fed. R. App. P. 4[a][1][B]). Notice of appeal in criminal cases shall be filed within ten days after entry of order or judgment or filing of government's notice of appeal. (Fed. R. App. P. 4[b][1]). Appeal also lies, but not as matter of right, in case of certain interlocutory orders of U.S. District Court certified to involve controlling question of law, but petition for permission to appeal must be filed within ten days after entry of order. (28 U.S.C. § 1292[b]; Fed. R. App. P. 5[d][1]). Appeal does not lie to U.S. Court of Appeals from decision or order of U.S. District Court which may be reviewed directly by U.S. Supreme Court. (28 U.S.C. § 1291).

Federal Rules of Appellate Procedure, as supplemented by local rules, regulate appeals from U.S. District Court to Court of Appeals. (Fed. R. App. P. 1). District Court may require appellant to file bond or provide other security in such form and amount as it finds necessary to ensure payment of costs on appeal in civil case. (Fed. R. App. P. 7). To obtain stay on appeal, supersedeas bond may be necessary. (Fed. R. App. P. 8).

From Superior Court.

Appeal lies from any final order and judgment and certain interlocutory orders of Superior Court of District of Columbia to District of Columbia Court of Appeals, as a matter of right, but notice of appeal must be filed within period specified below (D.C. Code § 11-721[a], [b]) except that judgments of Small Claims and Conciliation Branch of Superior Court and judgments in Criminal Division of Superior Court where penalty imposed is fine of less than $50 for offense punishable by imprisonment of one year or less, or by fine of not more than $1,000, or both, are reviewable only upon granting of application for allowance of appeal (D.C. Code § 11-721[c]). Appeal also lies, but not as matter of right, in case of certain rulings and orders certified by Superior Court to involve controlling question of law. (D.C. Code § 11-721[d]). Note that District of Columbia Court of Appeals also may answer questions of law certified to it by U.S. Supreme Court, any U.S. Court of Appeals or highest appellate court of any State, if there are involved in proceeding before certifying court questions of District of Columbia law which may be determinative of cause and as to which there appears to be no controlling precedent in decisions of District of Columbia Court of Appeals. (D.C. Code § 11-723[a]).

Appeals are governed by rules of District of Columbia Court of Appeals. (D.C. Ct. App. R. 1). Notice of appeal as of right in civil cases must be filed within 30 days after entry of judgment or order, and notice of appeal in criminal cases must be filed within 30 days after entry of order or judgment, except as otherwise specified by District of Columbia Code. (D.C. Ct. App. R. 4). Application for appeal when required pursuant to D.C. Code § 11-721(c) must be filed within three days from date of judgment or order. (D.C. Ct. App. R. 6[a][2]). Application for permission to appeal from ruling or order described in D.C. Code § 11-721(d) must be filed within ten days after entry of order. (D.C. Ct. App. R. 5[a][2]). To obtain stay on appeal, bond may be required. (D.C. Ct. App. R. 8[b][1]).

From District of Columbia Court of Appeals.

Final judgments and decrees of District of Columbia Court of Appeals in civil cases are reviewable by U.S. Supreme Court pursuant to 28 U.S.C. § 1257. (D.C. Code § 11-102).

From U.S. Court of Appeals.

Judgments of U.S. Court of Appeals for District of Columbia Circuit may be reviewed by U.S. Supreme Court pursuant to 28 U.S.C. § 1254.

5.04 BONDS:

A bond signifies an obligation in a certain sum or penalty, subject to condition, on breach of which is to become absolute and enforceable by action. (D.C. Code § 28-2501). An undertaking signifies an agreement entered into by a party to a proceeding upon which judgment in same suit may be entered against said party and his sureties. (D.C. Code § 28-2501). In all cases, except with respect to bond in attachment before judgment (276 F. 631, 51 App. D.C. 109), where a bond is required from a fiduciary or from any party to a cause in U.S. District Court or D.C. Superior Court such bond must be in form of an undertaking, under seal, in an amount fixed by court, conditioned as required by law, sureties therein submitting themselves to jurisdiction of court and undertaking to perform judgment or decree of court and that, upon default, damages may be ascertained in such manner as court may direct. (D.C. Code § 16-601).

Sureties.

Court bonds, except supersedeas and undertakings required by D.C. Code § 50-1301.07, may be approved by clerk of U.S. District Court and clerk of D.C. Superior Court by consent or where surety is a corporation holding Treasury authority to do business in District and having process agent therein. (D.C. Super. Ct. R. Civ. P. 77-II[a][3]). In all other cases, approval of Court is required, and two days written notice of application for approval must be served on all parties. (D.C. Super. Ct. R. Civ. P. 303[b]). No member of bar in active practice or other officer of court will be accepted as surety. (D.D.C. LCvR 65.1.1; D.C. Super. Ct. R. Civ. P. 303[c]).

Enforcement.

U.S. District Court and D.C. Superior Court are vested with jurisdiction to enter such judgments and orders against the principal and sureties, or any of them, upon an undertaking, as law and justice shall require, but any party having a cause of action under such an undertaking may elect to pursue his ordinary remedy by civil suit. (D.C. Code § 16-601). Counsel fee may be allowed in proceeding to recover damages on bond or undertaking for restraining order or injunction. (D.C. Code § 15-111). Damages recovered as against surety on penal bond may not exceed penalty of bond. (D.C. Code § 28-2502).

5.05 CERTIORARI:

U.S. Supreme Court and all courts established by Act of Congress may issue all writs (including certiorari) necessary or appropriate in aid of their respective jurisdictions. (28 U.S.C. § 1651[a]).

The Supreme Court of the United States may review any case in U.S. Court of Appeals for District of Columbia Circuit or D.C. Court of Appeals by writ of certiorari granted upon petition of any party to any civil or criminal case, as specified in 28 U.S.C. §§ 1254 and 1257.

5.06 CHARITABLE IMMUNITY:

See topic 5.09 Damages.

5.07 COMMISSIONS TO TAKE TESTIMONY:

See topic 5.11 Depositions and Discovery.

5.08 COSTS:

Except when express provision is made either in appropriate statute or in rule, costs are allowed as of course to prevailing party unless court directs otherwise. (D.C. Super. Ct. R. Civ. P. 54[d][1]). Costs allowable in U.S. District Court and procedure for filing bill of costs are governed by D.D.C. LCvR 54.1 and Fed. R. Civ. P. 54(d). Persons financially unable to pay costs may, with approval of court, file and prosecute cases without prepayment of fees and costs or security therefor. (D.C. Code §§ 15-712, 16-3903, D.C. Super. Ct. R. Civ. P. 54-II).

Security for Costs.

Nonresident plaintiff may be required to give security for costs or, by order of court, satisfactory deposit may be made with clerk in lieu of undertaking to pay costs. (D.C. Code §§ 15-711, 703).

5.09 DAMAGES:

Common law generally prevails, except as to actions of replevin. (D.C. Code §§ 16-3710, 3711).

Charitable Immunity.

Doctrine not defense against claim of strangers or beneficiaries to charity. (130 F.2d 810; 251 F. Supp. 614).

Comparative Negligence Rule.

Not adopted.

5.10 DECLARATORY JUDGMENTS:

See topic 5.15 Judgments.

5.11 DEPOSITIONS AND DISCOVERY:

Circumstances under which depositions in the U.S. District Court may be employed and procedure therein are governed by Fed. R. Civ. P. 26-32, 37.

Superior Court of District of Columbia has adopted rules pertaining to depositions substantially similar to those of Federal Rules of Civil Procedure. (D.C. Super. Ct. R. Civ. P. 26-32, 37).

Within District for Use Elsewhere.

Federal Rules of Civil Procedure govern for depositions to be used in U. S. District Courts. When commission is issued by any court of state for taking testimony of witnesses within District, such testimony may be taken by leave of judge of U.S. District Court or D.C. Superior Court in manner prescribed by rules applicable to court from which leave is obtained. (D.C. Code § 14-103; D.C. Super. Ct. R. Civ. P. 28-I[b]).

Without District for Use Therein.

Judge of U.S. District Court or of D.C. Superior Court may appoint person to take deposition of nonresident witnesses whose testimony is required in civil action pending in District of Columbia. (D.C. Code § 14-104; Fed. R. Civ. P. 28; D.C. Super. Ct. R. Civ. P. 28-I[a]).

Perpetuating Testimony.

Governed by D.C. Super. Ct. R. Civ. P. 27, which is virtually identical to Fed. R. Civ. P. 27.

Before Whom Taken.

Governed by D.C. Super. Ct. R. Civ. P. 28, which is virtually identical to Fed. R. Civ. P. 28.

Compelling Attendance of Witnesses.

Governed by D.C. Super. Ct. R. Civ. P. 45, which is virtually identical to Fed. R. Civ. P. 45. References to 100 mile limits in Fed. R. Civ. P. 45 have been changed to 25 mile limits in D.C. Super. Ct. R. Civ. P. 45(b)(2).

Examination of Witnesses.

Governed by D.C. Super. Ct. R. Civ. P. 30(c), which is virtually identical to Fed. R. Civ. P. 30(c).

5.12 EQUITY:

See topic 5.02 Actions.

5.13 EVIDENCE:

See topic 5.11 Depositions and Discovery.

Witnesses.

Parties may testify on their own behalf in both civil and criminal proceedings, except as hereinafter stated.

Officer of corporation party is competent. (13 F.2d 299, 56 App. D.C. 327). Persons convicted of crime are not thereby incompetent. (D.C. Code § 14-305[a]).

Privileged Communications.

Professional communications to attorney are privileged. (230 F.2d 222, 97 U.S. App. D.C. 254). Professional communications to physicians or surgeons or mental health professionals as defined in D.C. Code § 7-1201.01(11) or domestic violence counselor as defined in D.C. Code § 14-310(a)(2) are privileged except: (1) In grand jury, criminal, delinquency, family, or domestic violence proceeding where person is targeted for or charged with causing death of or injuring human being, or with attempting or threatening to kill or injure human being, or report has been filed with police pursuant to D.C. Code § 7-2601, and disclosure is required in interest of public justice; (2) as evidence relating to mental competence or sanity of accused in criminal trial where insanity defense is raised or in pre- or post-trial proceedings where issue arises; (3) as evidence relating to mental competence or sanity of child alleged to be delinquent, neglected, or in need of supervision in proceeding before Family Division of Superior Court; or (4) as evidence relating to alleged fraud with respect to services provided under District's medical assistance program. (D.C. Code § 14-307, am'd D.C. Act 18-181, § 208[a][1], 56 D.C. Reg. 6916 [Aug. 6, 2009]). Communications to ministers of religion made in professional capacity are privileged. (D.C. Code § 14-309).

Spouse or domestic partner are competent, but not compellable, to testify for or against each other in either civil or criminal cases, but are not competent to testify to confidential communications made by one to the other during marriage or domestic partnership. (D.C. Code § 14-306[a], [b]). However, spouse or domestic partner are competent and compellable to testify against each other in civil or criminal proceedings involving intimate partner violence (if spouse or domestic partner has previously refused to testify in proceeding against same spouse or domestic partner) or offense against child, minor, or vulnerable adult, in civil proceedings involving offense against child, minor, or vulnerable adult, in criminal delinquency proceedings involving joint crimes with spouse or domestic partner, and in criminal proceedings involving crimes that occurred prior to marriage or domestic partnership. (D.C. Act 18-181, § 206[a], 56 D.C. Reg. 6915-16 [Aug. 6, 2009]).

Children.

For child called as witness in delinquency proceeding, and ordered to testify despite claim of privilege against self-incrimination, no testimony or other information compelled under such order or derived from such testimony or other information may be used against witness except in proceeding for perjury, false statement, or failure to comply with order. (D.C. Code § 16-2339).

Communications or Transactions with Persons since Deceased or Incompetent.

In any civil action against person legally incapable of testifying or against committee, trustee, executor, administrator, heir, legatee, devisee, assignee, or other representative of deceased person or of person so incapable of testifying, no judgment will be rendered in favor of plaintiff founded on uncorroborated testimony of plaintiff or his agent as to any transaction with, declaration or admission of deceased or incapable person. (D.C. Code § 14-302[a]). In such action, if plaintiff or his agent testifies as to any such transaction, declaration or admission, no entry, memorandum or declaration by deceased or incapable person will be excluded as hearsay.

(D.C. Code § 14-302[b]).

Compelling Attendance.

U.S. District Court is a federal court and as such may compel attendance of witness from anywhere in U.S. in a criminal case and within 100 miles in civil case. (Fed. R. Civ. P. 45[b][2][B]; Fed. R. Crim. P. 17[e][1]). D.C. Superior Court may compel attendance of witnesses if found anywhere in District of Columbia, or if outside District, within 25 miles of place of hearing or trial. In criminal case in which felony is charged, Superior Court may compel attendance of witness from anywhere in U.S. (D.C. Code § 11-942[a]). Attendance of witnesses found within District in criminal proceeding in state court and attendance of witnesses found within state in criminal proceedings in District may be compelled under District of Columbia Uniform Act to Secure the Attendance of Witnesses from Without a State in Criminal Proceedings. (D.C. Code §§ 23-1501-1504).

5.14 INJUNCTIONS:

Fed. R. Civ. P. 65, D.D.C. LCvR 65.1, and Fed. R. App. P. 8 govern issuance of injunctions and temporary restraining orders in U.S. District Court and U.S. Court of Appeals for District of Columbia Circuit. D.C. Superior Court has jurisdiction to issue injunctions and temporary restraining orders in cases which may properly be filed in that court. (D.C. Super. Ct. R. Civ. P. 65).

5.15 JUDGMENTS:

Procedure with respect to judgments is controlled by Federal Rules of Civil Procedure which govern District Court for D.C. and to which D.C. Superior Court adheres closely.

Declaratory judgments may be had pursuant to provisions of 28 U.S.C. § 2201, Fed. R. Civ. P. 57, and D.C. Super. Ct. R. Civ. P. 57.

Lien.

Every final judgment or decree for payment of money of U.S. District Court or of D.C. Superior Court for 12 years from date of filing and recording in Office of Recorder of Deeds, and every recognizance taken by said District Court or Superior Court when entry or order of forfeiture is filed and recorded in Office of Recorder of Deeds, is a lien on all freehold and leasehold estates, legal and equitable, of defendants bound by such judgment, decree or recognizance, in any land, tenements or hereditaments in District, whether such estates be in possession or be reversions or remainders, vested or contingent. (D.C. Code §§ 15-101-102). Liens on equitable interest may only be enforced by action to foreclose. (D.C. Code § 15-102[a]). Lien continues as long as judgment, decree, or recognizance is in force or is satisfied or discharged. (D.C. Code § 15-102[b]). Section does not apply to property in which District has interest or ownership, either in whole or in part. (D.C. Code §§ 15-102[c]).

Effect and operation of a judgment or decree, including lien thereby created and all remedies for its enforcement, are extended for a period of 12 years from date of an order reviving said judgment or decree when said order is issued within 12 years after either rendition of the judgment or decree or after date of a previous revival order. (D.C. Code § 15-103).

Revival.

There is no provision for revival of dormant judgments.

Assignment.

In D.C. Superior Court, judgment or money decree may be assigned in writing. Upon filing of assignment in clerk’s office, assignee may maintain action or sue out execution on judgment in his own name. (D.C. Code § 28-2301).

Uniform Enforcement of Foreign Judgments Act adopted. (D.C. Code §§ 15-351-357).

Uniform Foreign-Money Judgments Recognition Act adopted. (D.C. Code §§ 15-381-388).

Uniform Foreign-Money Claims Act adopted. (D.C. Code §§ 15-901-914).

5.16 LIMITATION OF ACTIONS:

Actions must be brought within the following periods after the respective causes of action accrue:

Fifteen Years: For recovery of lands, tenements or hereditaments. (D.C. Code § 12-301[1]).

Twelve Years: On bonds, single bills, covenants or other instruments under seal. (D.C. Code § 12-301[6]).

Ten Years: To recover damages for personal injury, injury to real or personal property, wrongful death resulting from defective or unsafe condition of improvement to real property, and for contribution or indemnity brought as result of such injury or death. (D.C. Code § 12-310[a]). Limitation does not apply to any action based on contract or any action brought against owner or person in actual possession or control of such real property or any manufacturer or supplier of equipment or machinery installed upon real property, or any action brought by District of Columbia government. (D.C. Code § 12-310[b]).

Seven Years: For recovery of damages arising from sexual abuse that occurred while victim was minor, running from date victim attains age of 18, or three years from when victim knew or reasonably should have known of any act constituting abuse, whichever is later. (D.C. Code § 12-301[11]).

Five Years: On any executor's or administrator's bond. (D.C. Code § 12-301[6]). For recovery of damages for injury to real property from toxic substances including products containing asbestos, period runs from date injury is discovered or with reasonable diligence should have been discovered. (D.C. Code § 12-301[10]).

Four Years: Action for breach of any contract for sale of goods must be commenced within four years after cause of action accrues. Limitation period may be reduced to not less than one year by agreement. (D.C. Code § 28:2-725). Uniform Commercial Code in effect. See topic Commercial Code.

Three Years: On any simple contract, express or implied, for injury to any real or personal property, for recovery of personal property or damages for its unlawful detention. (D.C. Code § 12-301[2], [3], [7]).

One Year: For any statutory penalty or forfeiture, for libel, slander, assault, battery, mayhem, wounding, malicious prosecution, false arrest or false imprisonment, or violation of D.C. Mental Health Information Act (D.C. Code § 12-301[4], [5], [9]); for actions for injury, illness or wrongful death based upon exposure to asbestos, running from date of disability, death, or date knew or should have known that disability was caused by exposure (D.C. Code § 12-311); for death by wrongful act, neglect, or default occurring in District (D.C. Code § 16-2702); for usurpation of office (D.C. Code § 16-3548); against common carrier for injury or death of one of its employees (D.C. Code § 35-304); for collection of hospital lien from proceeds of accident case

(D.C. Code § 40-203). See also category 8 Debtor and Creditor, topic 8.13 Liens.

Six Months: Statutory notice in action against District for unliquidated damages to person or property. (D.C. Code § 12-309). See category 13 Estates and Trusts, topic 13.16 Wills, subhead Contest.

Actions Not Specifically Provided For.

No action, limitation of which is not otherwise specially provided for, must be brought more than three years from its accrual. (D.C. Code § 12-301[8]).

Actions by United States.

Limitations in D.C. Code §§ 12-301, 12-302, 12-305, and 12-307 do not apply to action in which U.S. is real plaintiff. (D.C. Code § 12-308).

Actions by D.C. Government.

Limitations in D.C. Code § 12-301 do not apply to actions brought by D.C. Government. (D.C. Code § 12-301).

Disabilities of Plaintiff.

When plaintiff is under 18 years old, non compos mentis, or imprisoned at time action accrues, period runs from date of removal of disability except in cases for recovery of lands, tenements or hereditaments or upon instruments under seal in which case period is extended to five years after removal of disability. (D.C. Code § 12-302). In actions to quiet title obtained by adverse possession, rights of infants or others with disabilities are saved for period of two years after removal of disabilities, with maximum saving period of 22 years over all. (D.C. Code § 16-3301[c]; 21 App. D.C. 295).

Absence or Concealment of Defendant.

If, when cause of action accrues against resident, he is out of District or has absconded or concealed himself, period limited for bringing of action must not begin to run until he comes into District or while he is so absconded or concealed. (D.C. Code § 12-303[a]). If after cause of action accrues he absconds or conceals himself, time of such absence or concealment must not be computed as part of period within which action must be brought. (D.C. Code § 12-303[b]).

Action against Decedent’s Estate.

In action against estate of deceased person, interval between such death and six months after date of first publication of notice of appointment of personal representative, not to exceed two years, is not counted. (D.C. Code § 12-305).

Interruption of Statutory Periods.

Where bringing suit has been stayed by court order or statutory prohibition, time of stay is not counted as part of time limited for commencement of action. (D.C. Code § 12-304). Upon payment of any part of principal or interest on debt past due, statute begins to run anew from date thereof. (1 App. D.C. 123).

Revival of Barred Claims.

In actions of debt or in case grounded upon any simple contract, no acknowledgment or promise by words only shall be deemed sufficient evidence of new or continued contract to extend statute of limitations or deprive any part of benefit thereof, unless such acknowledgment or promise is made or contained by or in some writing, to be signed by party chargeable thereby; this provision, however, not to lessen effect of payment of any principal or interest. Judgment may be recovered against one joint contractor, executor or administrator, even if action against co-obligor is barred by statute. Endorsements of payment upon promissory notes, bills of exchange, or other writings made by or on behalf of party to whom such payment shall purport to be made, will not be deemed sufficient proof of such payment so as to take case out of operation of statute of limitations. (D.C. Code § 28-3504). For estate of decedent, unless contrary intent is expressly indicated in will, no claim which was barred by any statute of limitations at time of decedent's death shall be allowed or paid. (D.C. Code § 20-902).

Foreign Causes of Action.

D.C. statute controls limitation on suit brought on foreign cause of action (82 F.2d 887, 65 App. D.C. 281) except statutory right of action (177 F.2d 654) and suit on foreign judgment is barred if barred where judgment was obtained (D.C. Code § 12-307).

Contractual limitations are permitted, except that action on policy of life insurance may not be limited to less than three years. (D.C. Code § 31-4723[1]).

Pleading.

Defense of Statute of Limitations must be pleaded (75 F.2d 650, 64 App. D.C. 131), except where action is brought on a statute conditioned on suit being brought within prescribed period (40 App. D.C. 391). See also Federal Rules of Civil Procedure.

5.16A PARTITION:

Jurisdiction.

D.C. Superior Court may decree partition of any lands on complaint of any tenant in common or joint tenant. (D.C. Code § 16-2901[a]).

Proceedings.

Any party may file complaint for partition. Infant acts by his guardian or next friend, and person non compos mentis by his committee. (D.C. Code § 16-2901[b]).

Partition in Kind or Sale.

If it appears that lands cannot be divided without loss or injury to parties interested, court may decree sale thereof and division of proceeds. (D.C. Code § 16-2901[a]).

Accounting for Rents and Profits.

In case of partition, any tenant in common who may have received rents and profits of property to his own use may be required to account to his cotenants, and any amounts found due on accounting may be charged against share of party owing same. (D.C. Code § 16-2901[c]).

5.17 [RESERVED]

5.18 PLEADING:

Pleading in U.S. District Court is governed by Federal Rules of Civil Procedure and, as to form, D.D.C. LCvR 5.1, 11.1, 11.2.

Pleading in Civil Division of D.C. Superior Court is governed by D.C. Superior Court Rules of Civil Procedure which are generally similar to Federal Rules of Civil Procedure on pleading.

Suits solely for recovery of money in amount of $5,000 or less are initiated in Small Claims and Conciliation Branch of D.C. Superior Court by filing brief Statement of Claim in prescribed form (D.C. Code § 11-1321; D.C. Super. Ct. Small Cl. R. 3). No answer or other pleading is required in this branch. (D.C. Super. Ct. Small Cl. R. 5).

Frivolous Claims.

Prohibited by court rule modeled on Fed. R. Civ. P. 11. (D.C. Super. Ct. R. Civ. P. 11).

Probate.

Pleadings in uncontested matters in Probate Division of D.C. Superior Court are governed by statute or rules of that Division, and in general resemble equity practice. Superior Court Rules of Civil Procedure, however, are applicable to contested matters in probate division, except where inconsistent with Probate Division Rules or traditionally uncontested and administrative proceedings therein. (D.C. Super. Ct. R. Prob. Div. 1[f]).

5.19 PRACTICE:

Federal Rules of Civil and Criminal Procedure govern all proceedings in U.S. District Court except certain statutory matters. Proceedings in D.C. Superior Court are governed by D.C. Superior Court Rules of Procedure for Civil, Criminal, Family, Mental Health and Mental Retardation, Tax and Probate Divisions of that court respectively.

See also topics 5.02 Actions, Appeal and Error, Depositions and Discovery, Injunctions, Judgments, Pleading, Process; category 8 Debtor and Creditor, topics 8.02 Attachment, 8.05 Executions, 8.09 Garnishment.

Small Claims.

See category 6 Courts and Legislature, topic 6.01 Courts.

Direct Actions Against Insurer.

See topic 5.02 Actions.

5.20 PROCESS:

All process is issued by clerk of court. In U.S. District Court for D.C., summons and complaint may be served by anyone who is not party to litigation and is not less than 18 years of age. (Fed. R. Civ. P. 4[c][2]). U.S. Marshal may be authorized to serve summons on behalf of indigent persons proceeding under 28 U.S.C. § 1915, seamen proceeding under 28 U.S.C. § 1916, on behalf of U.S. and in certain other circumstances pursuant to court order. (Fed. R. Civ. P. 4[c][3]). Additionally, service of summons and complaint must be made within 120 days after filing of complaint or Court may, sua sponte or upon motion, dismiss complaint. (Fed. R. Civ. P. 4[m]). Subpoena may be served by any person not less than 18 years of age and not party. (Fed. R. Civ. P. 45[b][1]). In D.C. Superior Court process other than summons and subpoena may be served by Marshal or by any competent person over 18 who is not party to suit. (D.C. Super. Ct. R. Civ. P. 4.1[a]). Summons may be served by U.S. Marshal on behalf of U.S. or pursuant to court order, or (except in case of infant, incompetent or out-of-state government) by certified or registered mail or by first-class mail accompanied by two copies of Form 1-A, Notice and Acknowledgment For Service by Mail, with self-addressed, postage-prepaid return envelope. (D.C. Super. Ct. R. Civ. P. 4[c]).

Who May Serve.

See introductory paragraph.

Time of Service.

All filings after complaint required to be served on party, other than those covered in D.C. Super. Ct. R. Civ. P. 12-I(e), must be filed with Court either before service or within five days after service. (D.C. Super. Ct. R. Civ. P. 5[d]). D.C. Super. Ct. R. Civ. P. 5(d) also permits waiver of filing of depositions upon oral examination, interrogatories, requests for admission, and other discovery materials upon order of Court.

Personal Service on Individual.

Service may be effected on individual in U.S. by serving him personally, or by leaving copies of summons, complaint, and initial order at his dwelling or usual place of abode with some person of suitable age and discretion residing therein, by serving agent authorized by appointment or by law to receive service of process or by serving him under law in state where district court is located or process is made. (D.C. Super. Ct. R. Civ. P. 4[e]).

Personal service on infant under the age of 16 must be made on infant, as well as person with whom he resides. (D.C. Code § 13-332[a]).

Personal service on incompetent person must be made on person non compos mentis and upon his committee, if he has committee in District. (D.C. Code § 13-333).

Personal Service on Foreign Corporations.

In actions against foreign corporations doing business in District all process may be served on agent of such corporation or person conducting its business or, in case he is absent and cannot be found, by leaving copy at principal place of business in District, or, if there is none, by leaving same at place of business or residence of such agent in District. (D.C. Code § 13-334[a]).

When foreign corporation transacts business in District, without having any place of business or resident agent therein, service may be made upon any officer or agent or employee of such corporation in District, as to suits on contracts entered into or to be performed, in whole or in part, in District or torts committed in District. (D.C. Code § 13-334[b]).

Service in District may be had on Mayor where foreign corporation fails to appoint or maintain a registered agent or transacts business without certificate of authority. (D.C. Code § 29-101.108[b], [c]).

Personal service on domestic corporation may be made in same manner in which individuals served. (D.C. Super. Ct. R. Civ. P. 4[h], identical to Fed. R. Civ. P. 4[h]).

Personal service on partnership, whether general or limited, had only by service on partners. (607 F. Supp. 220).

Service by Publication.

Publication may be substituted for personal service upon any defendant who cannot be found and who is shown by affidavit to be nonresident, or to have been absent from District for at least six months, or against unknown heirs or devisees of deceased persons, in suits for partition, divorce or annulment, child custody, attachment, foreclosure, enforcement of liens, establishment of title to real estate by possession, or proceedings in rem. (D.C. Code § 13-336). Other prescribed means of service include personal delivery in manner prescribed for service of process within District; in manner prescribed by law of place in which service of process is made; and by registered or certified mail, return receipt requested. (D.C. Code § 13-431[a]). In such cases, personal service outside District may be made by any person not party to or otherwise interested on nonresident defendant out of District of Columbia, which service has same effect as order of publication duly executed. (D.C. Code §§ 13-337[a], [b]). Return must be made under oath in District unless person making service is authorized to serve process where service is made, and such return must show time and place of such service and that defendant so served is nonresident of District. (D.C. Code § 13-337[b]). Cost and expense of such service of process out of District must be borne by party at whose instance made and not taxed as costs, but when made by some authorized officer under this section, actual and usual cost of such service may be taxed. (D.C. Code § 13-337[c]).

Long Arm Statute is modeled on Uniform Interstate and International Procedure Act and gives District courts personal jurisdiction over persons outside District, and permits personal service of process upon them outside District (D.C. Code § 13-424), if person or corporation is domiciled or organized in District maintains principal place of business in District as to any claim for relief (D.C. Code § 13-422), or as to claim for relief arising from person's transacting business in District (D.C. Code § 13-423[a][1]), contracting to supply services in District (D.C. Code § 13-423[a][2]), causing tortious injury in District (D.C. Code § 13-423[a][3], [4]), having interest in, using or possessing real property in District (D.C. Code § 13-423[a][5]), or insuring or acting as surety for any person, property or risk in District. (D.C. Code § 13-423[a][6]). Additionally, District courts have personal jurisdiction over persons involved in claims arising from marital relationship if plaintiff resides in District at time suit filed and District was matrimonial domicile immediately prior to separation or cause of action to pay spousal support arose in District (D.C. Code § 13-423[a][7][C]), and over persons involved in claims affecting parent child relationship if person is alleged parent of child conceived in District, child resides in District, or person has resided with child in District. (D.C. Code § 13-423[a][7][D]). District courts may exercise personal jurisdiction in claims affecting parent and child relationship if there is any basis consistent with U.S. Constitution. (D.C. Code § 13-423[a][7][E]).

Nonresident Motorist.

See category 23 Transportation, topic 23.01 Motor Vehicles.

5.21 REPLEVIN:

The common law rules determine the right to the writ.

Proceedings.

To institute action in replevin, plaintiff must file complaint (D.C. Code § 16-3702) accompanied by affidavit of plaintiff, his agent, or attorney stating that: Plaintiff is entitled to recover possession of chattels, defendant has seized and detains chattels and chattels were not taken upon writ of replevin between parties (D.C. Code § 16-3703). At time of filing complaint, plaintiff must enter into undertaking, with surety, to abide by and perform judgment of court. (D.C. Code § 16-3704).

Judge may authorize issuance and execution of writ of replevin: (1) At conclusion of hearing at which both parties are heard or (2) without prior adversary hearing when plaintiff can establish by affidavit of sworn testimony that there is immediate danger that defendant will destroy or conceal property in dispute. (D.C. Super. Ct. R. Civ. P. 64-II[d], [f]). Immediately upon issuance of writ of replevin by Civil Clerk's office, U.S. Marshal may take possession of property described in writ. (D.C. Code § 16-3708[a]). If writ is issued without prior adversary hearing, hearing shall take place on fifth court day after execution of writ. (D.C. Super. Ct. R. Civ. P. 64-II[f]).

Repossession.

After Marshal has taken possession, defendant may, on one day's notice to plaintiff or his attorney, move to have writ of replevin vacated and property returned to defendant's possession prior to final judgment in action. If motion is granted, court may require defendant to enter into undertaking, with surety, to abide by judgment of court. (D.C. Code § 16-3708[a]; D.C. Super. Ct. R. Civ. P. 64-II[f]).

Judgment or Order.

Where defendant has eloigned goods sued for, plaintiff's damages must be full value of goods taken (amount discharged if goods returned within ten days after judgment), and damages for detention. (D.C. Code §§ 16-3710, 3713). Court may instruct jury to assess such damages as may compel return of goods. (D.C. Code § 16-3712). If judgment is for defendant, goods, if delivered to plaintiff, shall be returned to defendant with damages for their detention. If goods are not returned, defendant shall recover for damages he has sustained. (D.C. Code § 16-3711).

Under Art. 2 of Uniform Commercial Code.

Where seller fails to deliver goods or repudiates contract, buyer has right of replevin for goods identified to contract if, after reasonable effort, he is unable to effect cover for such goods, or circumstances reasonably indicate that such effort will be unavailing. (D.C. Code §§ 28:2-711, 716). See category 3 Business Regulation and Commerce, topic 3.09 Commercial Code.

5.22 SEQUESTRATION:

U.S. District Court and D.C. Superior Court, for purposes of executing decree or compelling obedience thereto, may order immediate sequestration of real and personal estate of defendant, or such part thereof as may be necessary to satisfy decree and may order payment and satisfaction out of sequestered estate and effects, according to intent of decree. (D.C. Code § 15-320[a]).

Property of spouse or domestic partner failing to pay alimony is subject to sequestration by court and income from such property may be applied to payment of alimony. (D.C. Code § 16-911[a][3]). Probate court may order sequestration of real and personal property of person who has failed to appear to testify. (D.C. Code §§ 16-3103, 3104).

5.23 SERVICE:

See topic 5.20 Process.

5.24 STAY OF EXECUTION:

See topic 5.03 Appeal and Error; category 8 Debtor and Creditor, topic 8.05 Executions.

5.25 SUBMISSION OF CONTROVERSY:

There is no statutory provision but in practice, cases in which jury trials may be had, may be tried without the intervention of the jury, either upon a stipulation containing an agreed statement of facts or providing for the taking of testimony.

5.26 VENUE:

There is no provision for change of venue. Since there are no political or judicial subdivisions of District venue of all actions is otherwise in proper court in District. If one judge is disqualified, another judge of same court may hear matter.

6 COURTS AND LEGISLATURE

6.00A ADMINISTRATIVE HEARINGS:

Within executive branch of D.C. government, Office of Administrative Hearings is independent agency that provides administrative tribunal responsible for administrative adjudication of matters arising under D.C. laws. (D.C. Code §§ 2-1831.01-1831.17). Office is headed by Chief Administrative Law Judge, appointed by Mayor with advice and consent of Council, who serves six year term, and may be reappointed for maximum of two additional terms. (D.C. Code § 2-1831.04). Administrative Law Judges are appointed by Commission on Selection and Tenure of Administrative Law Judges for initial term of two years, after which Administrative Law Judges appointed prior to Dec. 6, 2005 are eligible for reappointment to ten-year term and may be reappointed for new six-year term, and Administrative Law Judges appointed after Dec. 6, 2005 are eligible for reappointment to new six-year term. At expiration of any six-year term, Administrative Law Judge shall be eligible for reappointment to new six-year term. (D.C. Code §§ 2-1831.06-1831.08).

Jurisdiction.

Office of Administrative Hearings has jurisdiction to review adjudicated cases under jurisdiction of following agencies: Dept. of Health; Dept. of Human Services; Board of Appeals and Review; Dept. of Consumer and Regulatory Affairs; certain cases of Child and Family Services Agency; certain cases involving Litter Control Administration; certain cases of Office of Tax and Revenue; certain cases of Dept. of Transportation; certain cases relating to Housing & Zoning; certain cases of Historic Preservation Office within Office of Planning; Dept. of Banking and Financial Institutions; Dept. of Employment Services, other than private workers' compensation function; and Taxicab Commission. (D.C. Code § 2-1831.03).

6.01 COURTS:

Preliminary Note: District of Columbia constitutes a separate Federal judicial circuit and district. U.S. Court of Appeals for this circuit and U.S. District Court for this district derive their Federal judicial power from Article III of Constitution and therefore parallel U.S. Courts of Appeals and U.S. District Courts for other Federal circuits and districts. They have traditionally had additional power derived from Art. 1 § 8, Clause 17 of Constitution, but this local jurisdiction was transferred to D.C. Court of Appeals and D.C. Superior Court by D.C. Court Reform and Criminal Procedure Act of 1970 (P. L. 91-358, 84 Stat. 475).

United States Court of Appeals for the District of Columbia Circuit.

Clerk's office: U.S. Court House, Washington, D.C. 20001.

Jurisdiction.

This Court as one of 13 U.S. Courts of Appeals has full appellate jurisdiction of such courts in cases, both civil and criminal, originating in U.S. District Court for District of Columbia. (28 U.S.C. § 1291). In addition, U.S. Court of Appeals for D.C. Circuit has jurisdiction in review by petition judgments of D.C. Court of Appeals which involve violations of criminal laws of U.S. not applicable exclusively to D.C. (D.C. Code § 11-301). Court of Appeals also has jurisdiction concurrently with other U.S. Courts of Appeals to review decisions of U.S. Tax Court (26 U.S.C. § 7482), and to review or enforce orders of several Federal commissions, boards, agencies and officers, such as Securities and Exchange Commission, Interstate Commerce Commission, National Labor Relations Board, Federal Trade Commission, Secretary of Treasury, Board of Governors of Federal Reserve System, Administrator of Wage and Hour Division of Department of Labor. (See list in Historical and Revision Notes to 28 U.S.C. § 1291.) Court has exclusive appellate jurisdiction to review orders of Federal Communications Commission in cases involving radio and television licenses. (47 U.S.C. § 402).

Court has jurisdiction to issue extraordinary writs of mandamus, prohibition and like, when necessary in aid of its appellate jurisdiction. (28 U.S.C. § 1651).

Review of case in Supreme Court, other than by appeal, is by petition for writ of certiorari or certification of question of law by Court of Appeals. (28 U.S.C. § 1254).

There are ten circuit judges and four senior circuit judges on Court. Court, pursuant to practice prescribed in 28 U.S.C. § 46 for all of U.S. Courts of Appeals, sits in panels of three judges, although Court may sit en banc if majority of circuit judges of circuit in active service so determine.

United States District Court for the District of Columbia.

Address: U.S. Court House, Washington, D.C. 20001, (202) 354-3000.

Jurisdiction.

This court has all original jurisdiction of U.S. District Courts in states. (D.C. Code § 11-501). This court also has criminal jurisdiction over local crimes joined in same indictment or information with any Federal offense. (D.C. Code § 11-502). It has jurisdiction in civil actions against foreign state (28 U.S.C. § 1332), and power to grant relief in nature of mandamus in original proceedings against cabinet officers and other Federal officials in their capacity as such, who may be considered officially present in District of Columbia (28 U.S.C. §§ 1361, 1391).

Divisions.

Cases are assigned randomly. See D.D.C. LCvR 40.3(a).

Fees.

Filing fee of $350 must be paid at commencement of all civil actions, except for application for writ of habeas corpus, where filing fee is $5. (28 U.S.C. § 1914). For filing fees in bankruptcy cases, see 28 U.S.C. § 1930.

District of Columbia Court of Appeals.

Address: 500 Indiana Avenue, N. W., Washington, D.C. 20001.

Jurisdiction.

This Court has jurisdiction over appeals from all divisions of D.C. Superior Court. Court also has jurisdiction to review decisions of agencies of D.C., D.C. Redevelopment Land Agency, and of D.C. Mayor and D.C. Council. (D.C. Code §§ 11-721, 722). Court also has jurisdiction to answer questions of law certified to it by U.S. Supreme Court, U.S. Court of Appeals, or highest appellate court of any State. (D.C. Code § 11-723).

District of Columbia Superior Court.

Address: 500 Indiana Avenue, N. W., Washington, D.C. 20001.

Jurisdiction.

This Court has jurisdiction of all civil actions not within exclusive jurisdiction of Federal court in D.C. or jurisdiction of U.S. District Court for D.C. under D.C. Code § 11-501. (D.C. Code § 11-921). Small Claims and Conciliation Branch of Civil Division of Superior Court has exclusive jurisdiction over cases within Superior Court jurisdiction which are for recovery of money only, not exceeding $5,000, except that cases affecting interest in real property may not be brought in Branch. (D.C. Code § 11-1321).

Family court of Superior Court has original jurisdiction over all actions for divorce, legal separation, annulment of marriage, support of spouse or minor children, custody of minor children, adoption, paternity, proceedings related to commitment of mentally ill or substantially retarded, matters involving delinquency, dependency and neglect of children under 18, and determinations and adjudications of property rights, both real and personal, in various domestic relations actions, irrespective of any jurisdictional limitation otherwise imposed upon Court. (D.C. Code § 11-1101). In addition, family court has jurisdiction in matters involving compulsory education law. (D.C. Code § 38-209).

Tax Division of Superior Court has exclusive jurisdiction to hear appeals from assessment of any tax imposed by D.C. (D.C. Code § 11-1201). In case of income tax, appeal may be made from additional assessment or disallowance of claim for refund, within six months of notice of assessment or disallowance. (D.C. Code § 47-1815.01). Except as provided in D.C. Code § 47-830, proposed assessed value or classification of real estate taxes may be appealed to Superior Court before Oct. 1 of next succeeding tax year provided owner has first appealed to Board. (D.C. Code § 47-825.01j-l). New owners filing certain petitions or appeals, may appeal to Superior Court before Oct. 1 of next two succeeding tax years. (D.C. Code § 47-825.01j-1). All other taxes may be appealed from within six months of assessment, provided taxpayer has first paid such tax, penalties and interest due. (D.C. Code § 47-3303).

Criminal Division has jurisdiction over cases involving violation of laws applicable exclusively to D.C. In cases in which U.S. District Court for D.C. has jurisdiction, Superior Court may act with respect to bail and pretrial detention. (D.C. Code § 11-923). See D.C. Sup. Ct. Crim. R. 40.

Clerk of Superior Court and such Deputy Clerks as may, in writing, be designated by Clerk of Court and approved by Chief Judge, are authorized to celebrate marriages in D.C. (D.C. Code § 46-406).

Superior Court administers Crime Victims Compensation Program, issuing necessary rules and regulations, and appointing 15 member Crime Victims Compensation Advisory Commission. (D.C. Code §§ 4-501-518).

Fees.

Filing fees differ depending upon whether action is in Civil Division, Small Claims and Conciliation Branch or Landlord and Tenant Branch. (D.C. Super. Ct. R. Civ. P. 202).

6.02 LEGISLATURE:

Congress retains ultimate legislative authority over District of Columbia pursuant to U.S. Const., art. I, § 8 but has delegated broad legislative powers to Council of District of Columbia (D.C. Code §§ 1-203.02, 204.04, 206.01) subject to several express limitations (D.C. Code §§ 1-206.01-.04). Council meets in legislative session on first Tues. of each month at 10:00 a.m. Thirteen members of Council are elected by registered qualified electors of District for four-year term, and vacancies are filled by special election. (D.C. Code § 1-204.01). Council may enact emergency legislation, which shall be effective for period not to exceed 90 days. (D.C. Code § 1-204.12[a]). Majority of Council members present and voting is required to pass legislation. (D.C. Code § 1-204.12[a]). Majority of Council constitutes quorum. (D.C. Code § 1-204.12[c]). D.C. Charter (Tit. IV of Act of Dec. 24, 1973, 87 Stat. 785, P.L. 93-198) may be amended by passage of act by Council with subsequent ratification by majority of qualified D.C. electors voting in referendum and submission of such act to both Houses of Congress unless Congress enacts into law joint resolution disapproving such amendment within prescribed 35-calendar-day period. (D.C. Code § 1-203.03). Initiative or referendum may be proposed by petition of 5% of registered electors of District of Columbia, provided that total signatures include 5% of registered electors in at least five wards. (D.C. Code §§ 1-204.101, 204.102). Council may also call special election to take advisory referendum vote on any proposition upon which Council desires to take action. (D.C. Code § 1-204.12[b]). Members of Council are immune from liability for any speech or debate made in course of their legislative duties. (D.C. Code § 1-301.42).

6.03 REPORTS:

Circuit Court (1801-1863): 1- 5 Cranch C. C., 1-2 Hayward & Hazelton. Supreme Court, General Term (1863-1893): 6-7 D.C. (by Mackey), 1-3 MacArthur (8-10 D.C.), MacArthur & Mackey (11 D.C.), 1-9 Mackey (12-20 D.C.), 21 D.C. (by Tucker & Clephane). Court of Appeals (1893 to date): Appeal Cases, D.C. (App. D.C.) Vols. 1-74, (U. S. App. D.C.) Vols. 75 et seq.: beginning with Vol. 49 App. D.C., also in Federal Reporter, Vols. 258-300, and Second Series, Vol 1 et seq. District Court decisions of Federal importance are reported in Federal Supplement beginning with Vol. 16. Decisions of the District of Columbia Court of Appeals are reported in the Atlantic Reporter, commencing with Vol. 31 A.2d. Other decisions or notes thereof are reported in Washington Law Reporter, which has quasi-official status.

Digests.

Cranch (1 to 5 Cranch); Maupin (1 Cranch to 14 App. D.C.); Torbert 1 vol. and 3 vol. supplement (1 App. D.C. to 59 App. D.C.); District of Columbia Digest (Washington Law Book Co.-West Pub. Co.), with pocket parts, 1658 to date, including Maryland decisions prior to 1801.

6.04 STATUTES:

The latest official compilation presently available is District of Columbia Code, 2001 edition as modified by various replacement volumes and subsequent pocket parts.

In addition, many acts of Congress contained in the U. S. Code or statutes at large are in effect local laws in the District, though not contained in the District Code. All statutes relating to procedure, to the extent in conflict therewith, have been superseded by the Federal Rules of Civil Procedure (1938) as amended.

Uniform Acts in force are: Anatomical Gift* (1968 Act) (1970); Arbitration* (1977); Attendance of Witnesses from Without a State in Criminal Proceedings (1952); Business Corporation (A.B.A.) (1954); Certification of Questions of Law* (1986); Child Custody Jurisdiction and Enforcement* (2000); Commercial Code* (1963); Common Trust Fund (1949); Conservation Easement (1986); Controlled Substances* (1981); Custodial Trust (2002); Determination of Death (1981); Disposition of Unclaimed Property (1966 Act) (1980); Durable Power of Attorney (1987); Electronic Transactions (2001); Enforcement of Foreign Judgments* (1990); Fiduciaries (1928); Firearms (1932); Foreign-Money Claims (1996); Foreign Money-Judgments Recognition (1996); Fraudulent Transfer (1996); Guardianship and Protective Proceedings (1988); International Wills (2001); Interstate and International Procedure* (1970); Interstate Enforcement of Domestic Violence Protection Orders (2003); Interstate Family Support* (1996, as am’d, 1998); Limited Partnership* (1976 Act) (1987); Management of Institutional Funds* (1977); Model State Administrative Procedure (1961 Act)* (1969); Nonprobate Transfers on Death (1991 Act) (2001); Non-Profit Corporation (A.B.A.) (1962); Notarial Acts* (1991); Partnership (1997); Premarital Agreement (1996); Principal and Income (1991 Act) (2001); Reciprocal Enforcement of Support (1950 Act)* (1957); Securities* (1964); Simplification of Fiduciary Security Transfers (1960); Simultaneous Death (1993 Act) (2001); Statutory Form Power of Attorney (1998); Statutory Rule Against Perpetuities (2001); Testamentary Additions to Trusts (1963); Trade Secrets* (1989); Transfers to Minors* (1986); Trust Act (2004); Unincorporated Nonprofit Association (2001).

* Indicates with modifications.

For text of Uniform Acts falling within scope of Martindale-Hubbell Law Digests, see Uniform and Model Acts section.

6.05 UNIFORM LAWS:

For list of Uniform Acts in force in the District see topic 6.04 Statutes. For text of Uniform Acts within the scope of the Martindale-Hubbell Law Digests, see Uniform and Model Acts section.

7 CRIMINAL LAW

7.00A BAIL:

See topic 7.01 Criminal Law.

7.01 CRIMINAL LAW:

Statutes as to criminal law are embraced in District Code (D.C. Code §§ 22-101-4517) and acts of Congress. Police or municipal regulations are made by District of Columbia Council. Common law offenses existing in Maryland on Feb. 27, 1801, not repealed or modified by statute, are applicable. (26 App. D.C. 382).

In the District Court the Federal Rules of Criminal Procedure apply. Separate rules, patterned after Federal Rules, apply in Superior Court. These other procedural provisions are in District Code. (D.C. Code §§ 23-101-1504, 24-101-1106).

District Court only has jurisdiction over offenses of laws applicable exclusively to District of Columbia if offense is joined in same information or indictment as any federal offense, unless case was begun before Aug. 1, 1972. (D.C. Code § 11-502).

Offenses, except by juveniles not prosecuted as adult offenders, punishable by imprisonment for more than one year are prosecuted upon indictment in Superior Court, unless defendant, after advised of charge and his rights, waives prosecution by indictment in open court. Any other offense may be prosecuted by indictment or by information in either court depending on crime charged. (D.C. Code §§ 11-502, 11-923, 23-301).

Prosecution of offenses of disorderly conduct or obscene acts are conducted in name of District of Columbia by Corporation Counsel. Prosecution for violation of police or municipal ordinances or regulations, or penal statutes in nature thereof, where punishment cannot exceed fine only, or imprisonment for not more than one year, are conducted in name of District of Columbia by Corporation Counsel. All other prosecutions are conducted in name of U.S. by U.S. Attorney. (D.C. Code § 23-101). As practical matter, serious misdemeanors are prosecuted by U.S. Attorney.

Bail.

D.C. Code §§ 23-1321-1333 replaces Federal Bail Reform Act in District of Columbia. Conditions of bail are fixed by a judicial officer in his discretion. Upon a proper showing pretrial detention may be ordered. Trial judge may modify or revoke pretrial bail. (459 A.2d 134).

Jury Trial.

Jury consists of 12 jurors unless parties and court agree to number less than 12. Valid verdict may be returned by 11 jurors, in extraordinary circumstances where court finds it necessary to excuse juror for just cause after jury has retired to consider verdict. (D.C. Code § 16-705[c]). Defendant charged with one offense and exposed to fine over $1,000 or imprisonment of over 180 days can demand jury. (D.C. Code § 16-705[b]). Defendant charged with more than one offense and exposed to cumulative maximum fine of over $4,000 or imprisonment of over two years can demand jury. [§ 16-705(b)]. If charged with more than one offense, and offenses include at least one jury demandable offense, trial for all offenses shall be by jury, unless expressly waived. [§ 16-705(b-1)].

DNA Testing.

Prior to trial or entry of plea to crime of violence, defendant must be informed in open court of physical evidence seized which may contain biological material and results of any DNA testing, and that he or she may request or waive independent DNA testing in certain circumstances. (D.C. Code § 22-4132). Unless defendant waived DNA testing prior to trial or entry of plea, convicted defendant may apply to court for DNA testing of biological material that was seized or recovered as evidence in investigation or prosecution in certain circumstances. (D.C. Code §§ 22-4132[c], 22-4133). Persons convicted of certain offenses in D.C. must provide DNA samples for analysis and inclusion in Combined DNA Index System of F.B.I. (DNA Sample Collection Act of 2001, D.C. Law 14-52; see also D.C. Code § 22-4151).

Terrorism.

Criminal acts of terrorism and penalties for such acts are defined in Anti-Terrorism Act of 2002, D.C. Code §§ 22-3151-3156.

Probation and Parole.

Imposition of sentence of probation in District Court governed by federal law. (18 U.S.C. §§ 3561-3562). Probation in Superior Court authorized by District Code. (D.C. Code § 16-710). Parole, probation, reduction of sentence, and good time credit procedures governed by District Code. (D.C. Code §§ 24-303-304,-401c,-403.01-409,-461 et seq.,-221.01-221.06, 6 DCMR §§ 600-608).

Sex Offender Registration.

Any person certified by D.C. Superior Court as sex offender must register with D.C. Court Services and Offender Supervision Agency for period of time prescribed by D.C. Code § 22-4002. (D.C. Code § 22-4003). Metropolitan Police Department has authority to make such information public. (D.C. Code § 22-4011). Guidelines issued for community notification by Metropolitan Police Department regarding sex offenders who reside, work or attend school in District. (6A DCMR §§ 416-419).

Crime victims' rights are set forth in D.C. Code §§ 23-1901-1906.

Criminal Abuse of Vulnerable Adults.

Vulnerable adults are persons 18 or older who are mentally or physically impaired and unable to provide for their own care or protection. Abuse or neglect of vulnerable adults subjects abuser to fines up to $100,000 or imprisonment of up to ten years or both, if serious bodily injury or severe mental distress is caused. Permanent bodily harm or death subjects abuser to fine of up to $250,000 or up to 20 years imprisonment or both. (D.C. Code § 22-931-936).

Extradition is governed by 18 U.S.C. §§ 3181-3196 and D.C. Code §§ 23-701-707. Chief Judge of Superior Court exercises executive authority in extradition matters. (D.C. Code § 23-704).

8 DEBTOR AND CREDITOR

8.01 ASSIGNMENTS:

In general, such rights of action as survive are assignable. See category 5 Civil Actions and Procedure, topic 5.02 Actions.

A judgment or money decree may be assigned in writing, and upon the assignment thereof being filed in the clerk's office the assignee may maintain action or sue out execution on said judgment in his own name, as original plaintiff might have done. (D.C. Code § 28-2301).

Any bond or obligation under seal for payment of money may be assigned in writing by obligee therein named, and assignee may maintain action thereon in his own name. (D.C.

Code § 28-2302).

All nonnegotiable written agreements for payment of money, including nonnegotiable bills of exchange and promissory notes, or for delivery of personal property, open accounts, debts, and demands of liquidated character, except claims against U.S. or salaries of public officers, may be assigned in writing, so as to vest in assignee right to sue in his own name. (D.C. Code § 28-2303).

Uniform Commercial Code adopted. See category 3 Business Regulation and Commerce, topic 3.09 Commercial Code.

Filing is unnecessary except in case of judgments. (See subhead A Judgment or Money Decree, supra.) Filing is required in connection with secured transactions. (See infra, subhead Secured Transactions.)

Recording is generally unnecessary. However, assignment of recorded lien on motor vehicles, if in writing and acknowledged, should be recorded with representative of Recorder of Deeds. (D.C. Code § 50-1208).

Notice is unnecessary between the parties, but may be necessary to preserve rights as against third parties. As to secured transactions, see infra, subhead Secured Transactions.

Wages or Salary.

A contract attempting to assign unearned salary or wages is unenforceable. Anyone who demands or receives such assignment or notifies employer he holds such assignment is subject to fine of not more than $200 or imprisonment up to 60 days. (D.C. Code § 28-2305).

Secured Transactions.

(1) Except as otherwise provided in § 28:9-109 on excluded transactions, this article applies to: (a) transaction, regardless of its form, that creates security interest in personal property or fixtures by contract; (b) agricultural lien; (c) sale of accounts, chattel paper, payment intangibles, or promissory notes; (d) consignment; (e) security interest arising under §§ 28:2-401, 2-505, 2-711(3), or 2A-508(5) as provided in § 28:9-110; or (f) security interest arising under §§ 28:4-210 or 5-118. (§ 28:9-109).

8.02 ATTACHMENT:

Attachments may be levied on the lands and tenements and personal chattels of defendant not exempt by law, whether in defendant's or a third person's possession, whether defendant's title is legal or equitable, and upon his credits in hands of third person whether due and payable or not, and upon his undivided interest in partnership. (D.C. Code § 16-507).

While attachment may be issued upon a judgment in aid of execution (D.C. Code § 16-542), the following pertains to attachment before judgment:

Actions in Which Allowed.

In any action for the recovery of specific personal property, or a debt, or damages for the breach of a contract, express or implied. (D.C. Code § 16-501).

Courts Which May Issue Writ.

District and Superior courts. (D.C. Code §§ 16-501, 533).

In Whose Favor Writ May Issue.

Any plaintiff.

Against Whom Writ May Issue.

Any defendant.

Claims on Which Writ May Issue.

On claims before judgment (D.C. Code §§ 16-501, 507) or claims where debt is not due and payable (D.C. Code § 16-503, 507[a]).

Grounds for attachment are that defendant (1) Is a foreign corporation or a nonresident or has been absent from District for at least six months; (2) evades service of ordinary process by concealing himself or temporarily withdrawing himself from District; (3) has removed, or is about to remove, some or all of his property from District so as to defeat just demands against him; (4) has conveyed, disposed of, assigned or secreted his property, or is about to do so, in fraud of creditors; or (5) fraudulently contracted debt or incurred obligation. (D.C. Code § 16-501[d]).

Proceedings to Obtain.

An affidavit must be filed by plaintiff showing grounds for his claim, his right to recover, and if action is to recover specific personal property, nature and value of such property and probable amount of damages; and, if action is for debt, amount thereof; and, if action is for damages on contract, showing in detail breach of contract and actual damage. (D.C. Code § 16-501).

If the debt is not yet due the affidavit of the plaintiff must be substantiated by testimony of one or more witnesses showing amount and justice of claim, time it will become due, and must also show either that defendant has removed, is removing or that he intends to remove a material part of his property from District to defraud creditors. Judgment may not be entered before debt matures. (D.C. Code § 16-503).

Attachment Bond.

Plaintiff must file a bond with security approved by clerk of court with penalty of twice amount of his claim or value of specified property to be levied upon, whichever lower. (D.C. Code § 16-501). Officer who serves writ, U. S. marshal, may require appraisal of specified property and refuse to execute writ when appraised value exceeds half of bond amount.

Levy.

An attachment is sufficiently levied on real estate by said real estate being described by the marshal in an endorsement on the writ of attachment to the following effect:

Levied on the following estate of the defendant, A. B., to wit: (here describe property) this . . . . day of . . . .

C. D. Marshal.

and by serving upon the person, if any, in possession of the property copy of writ bearing such endorsement and notice to defendant and person in possession of property to appear. (D.C. Code § 16-508).

An attachment is levied on personal chattels by the marshal taking the same into his possession and custody unless the defendant or person in possession gives an undertaking, in which event attachment is sufficiently levied by the taking of the undertaking. (D.C. Code § 16-509).

An attachment is levied on credits of defendant in hands of garnishee or upon undivided interest in partnership by serving garnishee or partner with copy of writ and interrogatories and a notice that any property or credits in his possession are attached. (D.C. Code § 16-511).

Lien.

Attachment is a lien on property from the date of delivery of the writ to the marshal. (D.C. Code § 16-507).

Priorities are according to the dates when the attachments were delivered to the marshal. (D.C. Code § 16-507).

Release of property or credits may be secured by defendant or person who had possession of property or credits, by furnishing an undertaking with security to be approved by the court to pay any judgment recovered against him. (D.C. Code § 16-510).

Sale.

After judgment of condemnation, specific property may be sold under writ of fieri facias to satisfy demand of plaintiff. (D.C. Code § 16-525). Prior to final decision, court may order sale of property if perishable or if for other reasons sale appears expedient. (D.C. Code § 16-518).

Third Party Claims.

Third party may file petition in cause claiming personalty attached, except where it is real property, and matter must be tried to determine ownership. (D.C. Code § 16-523).

Vacation or Modification.

Defendant (D.C. Code § 16-506), as well as a garnishee where attachment is based on fraudulent conveyance (D.C. Code § 16-529), may contest right of plaintiff to writ by filing affidavits traversing facts set forth in plaintiff's affidavits. Motion to quash writ may be heard on three days notice. (D.C. Code § 16-506). Also, defendant, any garnishee, or other claimant may plead to attachment, and raise issue to be tried by court. (D.C. Code § 16-520).

Interrogatories.

Garnishee may be required to answer interrogatories under oath concerning defendant's property in his possession or his indebtedness to defendant. In addition to answers to written interrogatories required of him, garnishee may, on motion, be required to appear in court and be examined orally, under oath, touching any property or credits of defendant in his hands. (D.C. Code § 16-521). Plaintiff may traverse such answers and have issue tried by court. (D.C. Code § 16-522).

Judgment.

If defendant has been served with process, final judgment may not be entered against garnishee until action against defendant is determined. (D.C. Code § 16-524[a]). Where plaintiff recovers judgment against defendant, plaintiff may have judgment of condemnation of property attached or of proceeds from sale of property (D.C. Code §§ 16-524, 525) or judgment of condemnation against garnishee for amount of defendant's credits in his hands or where undertaking has been provided judgment of condemnation of property and against garnishee and his sureties (D.C. Code §§ 16-526, 527). If judgment is rendered for defendant, garnishee may be discharged and recover costs. (D.C. Code § 16-524[b]).

Payment of salary or earnings before due for the purpose of preventing or avoiding an attachment or garnishment against them is void as to an attaching creditor. After the service of a writ of attachment or garnishment on a judgment against an employer, any advance payment of salary or earnings made within a period of six months after the service of the writ or before an earlier satisfaction of the judgment is, as to an attaching creditor, presumed to be for the purpose of avoiding the attachment. (D.C. Code § 16-513).

Wage Attachment.

See topic 8.09 Garnishment.

8.03 [RESERVED]

8.04 CREDITORS' SUITS:

Creditor's bill is necessary to reach debtor's equity in real estate, except to extent that new combined or supplementary procedures may be available under Federal Rules of Civil Procedure. Judgment of U.S. District Court or Superior Court is lien on judgment debtor's interest in real estate from date such judgment is filed and recorded in office of Recorder of Deeds. (D.C. Code § 15-102). Enforcement of judgment against equitable interests may be had by civil action. (D.C. Code §§ 15-102, 16-532). See also topics 8.05 Executions, and 8.08 Fraudulent Sales and Conveyances.

8.05 EXECUTIONS:

Every final judgment for payment of money by District Court and by Superior Court may be enforced by execution, provided that execution on judgment may be levied on real estate only after judgment is filed and recorded in Office of Recorder of Deeds. (D.C. Code §§ 15-101, 311).

Kinds of Execution.

The ordinary writ of execution is the writ of fieri facias. (D.C. Code § 15-311).

Exemptions.

See topic 8.06 Exemptions.

Time for Issuance.

In civil action, execution may issue after ten days and within three years after entry of judgment (D.C. Code § 15-302; Fed. R. Civ. P. 62; D.C. Super. Ct. R. Civ. P. 62), but execution on judgment may be levied on real estate only after judgment filed and recorded in Office of Recorder of Deeds (D.C. Code § 15-311).

Stay.

In District Court, stay of execution is governed by Federal Rules of Civil Procedure. Superior Court stay of execution is governed by Rules of Court.

Lien.

Writ of fieri facias issued by District Court or Superior Court, upon delivery to marshal, becomes lien on personal property of judgment defendant, not exempt by law, and his equitable interest in chattels in his possession. (D.C. Code § 15-307).

Levy.

Execution is levied on personal property by the marshal taking the same into his possession and custody unless the defendant or person in possession gives an undertaking, in which event the execution is sufficiently levied by taking the undertaking. (D.C. Code § 16-509).

Levy on real property is made by an endorsement on the writ to the following effect:

Levied on the following estate of the defendant, A. B., to wit: (here describe the property) this . . . . . . day of . . . .

C. D., Marshal.

and by serving a copy of the writ bearing such endorsement and notice to defendant to appear, upon person, if any, in possession of property. (D.C. Code § 16-508).

Real property or rent may not be seized for debt if present goods and chattels of debtor are sufficient to pay debt and debtor stands ready to satisfy it. (D.C. Code § 15-323).

Levy or judicial lien is invalid on property in possession of bailee where negotiable document of title is outstanding without surrender thereof or injunction against its negotiation (D.C. Code § 28:7-602) or upon security or any share or other interest evidenced thereby without seizure of certificate except at source when certificate surrendered to issuer (D.C. Code § 28:8-112).

Return.

Writs are returnable by the marshal on or before 60 days after its date. (D.C. Code § 15-302).

Priorities between different executions are determined according to the times when the liens thereof attach.

Claims of Third Persons.

As to personalty, claims of third persons may be determined by suit against marshal for false levy (D.C. Code § 15-317, 521) or replevin (D.C. Code § 15-524); as to realty, affidavit will stay issuance of writ of habere facias possessionem and title may be settled in action for ejectment (D.C. Code § 15-318).

Sales.

Writ of fieri facias may be levied on nonexempt property or legal interest or estate of judgment debtor. (D.C. Code § 15-311). After appraisal, property levied on, except money, is sold at public auction upon notice by advertisement; ten days notice being requisite as to personalty, as to realty notice must be as provided in 28 U.S.C. § 2002. (D.C. Code § 15-314). The equitable interest in chattels may be levied upon and lien so obtained may be enforced by civil action. (D.C. Code § 15-313). See topic 8.03 Creditors' Suits.

Redemption.

No right of redemption of property sold under execution. (D.C. Code § 15-316).

Supplementary Proceedings.

Writs of attachment and garnishment may be issued (D.C. Code §§ 16-542, 544) and other proceedings authorized by the Federal Rules of Civil Procedure may be employed.

8.06 EXEMPTIONS:

Resident householder or nonresident householder or head of family earning major portion of his livelihood in District is entitled to hold exempt from attachment, distraint, levy, or seizure and sale on execution or decree number of designated articles of personal property, in some instances limited as to value. (D.C. Code § 15-501[a]).

Debts Against Which Exemptions Not Allowed.

No exemption (except as to wearing apparel, beds, bedding and household furniture for debtor and his family) extends to attachments or executions for debts due for wages of servants, common laborers or clerks. (D.C. Code § 15-501[b]).

Waiver of Exemption.

By judicial decision, debtors cannot waive exemption by agreement. (1 Mackey 303).

Necessity of Claiming Exemption.

Notice of claim or motion to quash process may be filed in the cause by debtor or spouse or domestic partner or garnishee; and after due notice court must promptly pass on matter. (D.C. Code § 15-503[d]).

Earnings other than wages, insurance, annuities, or pension or retirement payments, not otherwise exempted, not to exceed $200 each month, of a resident, or nonresident earning major portion of livelihood in the District, who provides the principal support of a family, for two months next preceding the issuance of any writ or process against him, from any court or officer of and in the District, are exempt from attachment, levy, seizure, or sale upon such process. Where husband and wife are living together, the aggregate of such earnings, insurance, etc., of the husband and wife determine the exemption of either in cases arising ex contractu. This exemption is $60 a month for persons not providing support of a family; also wearing apparel of such persons not exceeding $300 in value and mechanic's tools not exceeding $200 in value are exempt. (D.C. Code § 15-503). Wages, salary, earnings and other income of prisoner participating in D.C. work release program are not subject to garnishment or attachment while in hands of employer or Mayor. (D.C. Code § 24-241.06). See also topic 8.09 Garnishment.

Wages of nonresidents, who do not earn major portion of such wages in District, in any case arising out of contract or transaction entered outside of District, shall be exempt to same extent as provided by law of states wherein such persons reside. (D.C. Code § 15-503[c]).

Insurance.

Proceeds of disability and group life insurance policies are exempt. (D.C. Code §§ 31-4716.01-4717). Proceeds of life insurance policies are exempt in hands of beneficiary or assignee except as to premiums paid in fraud of creditors. (D.C. Code § 31-4716).

Public assistance (D.C. Code § 4-215.01) and unemployment compensation (D.C. Code § 51-118[b][1]) benefits (so long as not commingled with other funds of recipient) are exempt from attachment or execution. No exemption for unemployment compensation benefits used to pay debts for necessaries furnished to recipient, his spouse or dependents during time when recipient was unemployed. (D.C. Code § 51-118[b][1]).

Retirement Accounts.

Certain qualified retirement accounts are exempted from bankruptcy, forfeiture, distraint, attachment, levy or seizure and sale on execution or decree. (D.C. Code § 15-501[a][9]).

Encumbrances.

No deed of trust, assignment for benefit of creditors, bill of sale, or mortgage upon any exempted articles, is binding or valid unless signed by spouse of debtor, who is married and living with his or her spouse or domestic partner. (D.C. Code § 15-502).

8.07 FORECLOSURE:

See topic 8.13 Liens; category 20 Mortgages, topic 20.04 Mortgages of Real Property.

8.08 FRAUDULENT SALES AND CONVEYANCES:

Uniform Fraudulent Transfer Act adopted. (D.C. Code §§ 28-3101-3111). Transfer is fraudulent as to present or future creditor if transfer made or obligation incurred with intent to hinder, delay, or defraud any creditor, or without receiving reasonably equivalent value and debtor (A) was engaged or about to engage in transaction for which remaining assets of debtor were unreasonably small in relation to transaction or (B) intended to incur debts beyond debtor’s ability to pay as they became due. Statute provides number of factors to be considered in determining debtor’s actual intent. (D.C. Code § 28-3104).

Transfer is fraudulent as to creditor whose claim arose before transfer was made if debtor made transfer without receiving reasonably equivalent value and debtor was insolvent or became insolvent as result of transfer. Transfer fraudulent as to creditor whose claim arose before transfer was made if transfer made to insider for antecedent debt, debtor was insolvent, and insider had reasonable cause to believe debtor was insolvent. (D.C. Code § 28-3105).

Various remedies available to creditors include avoidance of transfer to extent necessary to satisfy creditor’s claim, attachment, injunction, appointment of receiver, or other necessary remedy. (D.C. Code § 28-3107). Transfer generally not voidable against person who took in good faith and for reasonably equivalent value, or against any subsequent transferee. (D.C. Code § 28-3108).

Bulk Sales.

Uniform Commercial Code—Bulk Sales, Art. 6, governs. (D.C. Code § 28:6-101 et seq.). See category 3 Business Regulation and Commerce, topic 3.09 Commercial Code.

8.09 GARNISHMENT:

Property of a debtor in possession of third person may be levied upon by a writ of attachment either before or after judgment. (D.C. Code §§ 16-542, 501). For practice and procedure before judgment see topic 8.02 Attachment.

Property Which May Be Reached.

After judgment the writ may be levied upon the debtor’s goods, chattels and credits. (D.C. Code § 16-544).

Jurisdiction.

Both District Court and Superior Court may issue writ. (D.C. Code §§ 16-501, 533).

Proceedings to Obtain.

Attachment may be issued upon judgment either before or after or at same time with fieri facias. (D.C. Code § 16-542). Plaintiff may submit interrogatories in writing, in such form as may be allowed by rules or special order of court, to be served upon any garnishee, asking about property of defendant in his possession or charge, or indebtedness of his to defendant. (D.C. Code § 16-552).

Answer of Garnishee.

Garnishee must answer interrogatories within ten days of service. (D.C. Code § 16-552).

Practice.

In addition to the answers to the interrogatories, the garnishee may be required, on motion, to appear in court for oral examination. (D.C. Code § 16-552). Where the garnishee answers that he has no property or credits of the defendant in his possession or less than the amount of plaintiff's judgment, the plaintiff may traverse the answer and the issue may be tried. A jury trial will be granted if demanded. (D.C. Code §§ 16-521, 522, 551-553). Losing plaintiff shall be required to pay garnishee's costs and attorney fee. (D.C. Code § 16-553).

Adverse Claims.

Any garnishee or stranger who may make claim to attached property may file answer defending against attachment, or any person may file motion and affidavit in cause setting forth his claim, interest or lien and trial will be had on issues raised, by jury if demanded. (D.C. Code § 16-551, 554).

Judgment.

If a garnishee admits credits or if the same are found after trial, judgment will be entered against him for the amounts admitted or found not exceeding plaintiff's judgment and costs. If the garnishee fails to answer the interrogatories or fails to appear and show cause why a judgment of condemnation should not be entered, judgment will be entered against him for the whole amount of plaintiff's judgment and costs. (D.C. Code § 16-556).

Wage Attachment.

Attachment after judgment on wages becomes a lien and remains a continuing levy upon gross wages due or to become due to extent of (1) 25% of disposable wages that week, or (2) amount by which disposable wages for that week exceed 30 times Federal minimum hourly wage prescribed by § 6(a) of Fair Labor Standards Act of 1938 (29 U.S.C. 206), whichever is less. In case of wages for any pay period other than a week, Mayor shall by regulation prescribe equivalent multiple. Only one attachment on wages may be satisfied at a time. Attachments have priority in order delivered to marshal. (D.C. Code § 16-572).

In case of judgment for alimony or maintenance, however, limitation is 50% of all gross wages due or to become due to any such person for pay period or periods ending in any calendar month. Execution upon such judgment shall, in discretion of court, have priority over other attachments. (D.C. Code § 16-577).

No attachment or garnishment on wages may be made before judgment except as otherwise provided in District of Columbia Child Support Enforcement Amendment Act of 1985 or as provided in D.C. Code § 16-916 dealing with alimony. (D.C. Code § 16-583).

No employer shall discharge employee for reason that creditor of employee has subjected or attempted to subject unpaid earnings of employee to garnishment (D.C. Code § 16-584), but holder served with notice of withholding may deduct additional $2 for expenses (D.C. Code § 16-583).

Employer-garnishee must withhold and pay to judgment creditor, within 15 days after employee-debtor's last pay period in each calendar month, amount represented by his lien during such calendar month (D.C. Code § 16-573), and judgment creditor must file with court: (1) Receipt every three months showing amount received and balance due on judgment and (2) final receipt, with copy to employee-garnishee, and (3) must obtain vacation of attachment within 20 days after payment in full (D.C. Code § 16-574). Judgment for amount of lien may be entered against any employer-garnishee who fails to make any required payment. (D.C. Code § 16-575). Attachment lapses if defendant-employee resigns or is dismissed unless reinstated or re-employed within 90 days. (D.C. Code § 16-576). On written notice of court proceeding attacking attachment or judgment, employer must stop all payments except child support payments, which require judicial termination order. (D.C. Code § 16-573[b]).

Earnings in excess of the statutory exemption (see topic 8.06 Exemptions) are subject to garnishment.

8.10 HOMESTEADS:

No homestead law.

8.11 JUDGMENT NOTES:

See category 3 Business Regulation and Commerce, topic 3.02 Bills and Notes.

8.12 LEVY:

See topics 8.02 Attachment, 8.05 Executions, 8.09 Garnishment.

8.13 LIENS:

Uniform Commercial Code is in effect. See category 3 Business Regulation and Commerce, topic 3.09 Commercial Code.

Mechanics and artisans have possessory lien on personal property for work done thereon and materials furnished therefor. (D.C. Code § 40-307.01).

Liverymen have a lien on animals left in their charge until all charges for care, keep and board are paid; notice of intention to detain such animals being first delivered to the owner. (D.C. Code § 40-101).

Garage keepers have lien similar to that of livery stable keepers. (D.C. Code § 40-102).

Self-storage operators have lien on personal property stored within each leased space, but rental agreement must contain conspicuous statement advising occupant of existence of lien. (D.C. Code § 40-403).

Hotels, motels, innkeepers, etc. have lien upon, and may retain possession of, any personal property belonging to guests for amount due up to $1,000. If guest fails to pay within 30 days, establishment may sell property at public sale after proper notification and newspaper advertisement, and proceeds shall be used to cover expenses of storage and sale, and discharge of lien. If motor vehicle is retained, notification must be sent to any person with recorded security interest lien, or other claim on vehicle. (D.C. Code § 30-102).

Hospitals are permitted to enforce liens for services on recoveries in accident cases (D.C. Code § 40-201), by filing written notice thereof in Office of Recorder of Deeds and mailing copy of such notice to person alleged to be liable and his insurance carrier (D.C. Code § 40-202). Such liens are not valid against anyone suffering injuries under District’s Employee’s Compensation Act or Workmen’s Compensation Act. (D.C. Code § 40-201).

District of Columbia has lien on tort recovery by injured police and firemen to or for whom District has paid benefits as result of injury for which tort recovery is had. (D.C. Code § 5-604).

For other liens see topics 8.02 Attachment, Executions; categories 3 Business Regulation and Commerce, topics Carriers, Commercial Code; Civil Actions and Procedure, topic Judgments; Legal Profession, topic Attorneys and Counselors; Mortgages, topic Mortgages of Real Property; Property, topic Landlord and Tenant; Taxation, topic Property Taxes, subheads Liens and Sale; Transportation, topic Motor Vehicles.

Enforcement.

In case of liverymen and garage keepers, articles may be sold at public auction after newspaper notice (D.C. Code § 40-103); and in case of mechanics or artisans, if value of articles retained is not more than $50 same may be sold at public auction after demand for payment and newspaper advertisement (D.C. Code § 40-307.02); but if value exceeds $50, procedure to enforce lien must be by civil action in nature of petition in equity (D.C. Code § 40-307.03). In case of hotels, motels, innkeepers, etc., personal property may be sold at public sale after demand for payment and newspaper advertisement. (D.C. Code § 30-102). Similarly, self-storage operators may sell stored property at public sale held at self-service storage facility after demand for payment and newspaper advertisement. (D.C. Code § 40-404).

Mechanics' Liens.

Mechanics' liens upon buildings and the lot of ground on which the same may stand will lie in favor of contractors, subcontractors, material men, and laborers, who file in the Office of the Recorder of Deeds, during construction, or within 90 days after completion of such building, any improvement or addition thereto, or placing therein, or in connection therewith, of any engine, machinery, or other thing, so as to become fixture, notice of their intention to hold lien on property declared liable to such lien. Notice of intention to hold lien on property must include following: Copy of work agreement signed by all parties; valid residential home improvement contractor's license issued by D.C. Dept. of Consumer and Regulatory Affairs; certificate of good standing issued by D.C. Dept. of Consumer and Regulatory Affairs within past two years, if applicable; certificate of good standing from DC Office of Tax and Revenue, including contractor's federal and local tax identification numbers; name and address of contractor; name and address of property owner; nature of work done or material furnished; name of party against whose interest lien is claimed and amount claimed, less any credit; and legal description of property to be charged. (D.C. Code § 40-301.02). If person claiming lien is subcontractor or person claiming under original contractor, he must file similar notice with Recorder of Deeds and also serve notice upon owner of property on which lien is claimed, by leaving copy thereof with him or his agent, or if neither can be found, by posting same on premises, and on his failure to do so, or until he shall do so, owner may make payments to his contractors according to terms of his contract, and to extent of such payments, lien of principal contractors will be discharged, and amount for which property is chargeable reduced. (D.C. Code §§ 40-303.01-303.06).

Mechanics' liens have priority over all mortgages, judgments, deeds of trust, liens and encumbrances attaching subsequent to the commencement of the work, except that purchase money mortgages will have priority, if recorded within ten days from the date of acknowledgment. (D.C. Code § 40-303.07).

Mechanics' liens are enforced by suit under D.C. Code § 40-303.08 at anytime within 180 days of after date that notice of intent is recorded in land records; and recording, within ten days of filing suit, notice of pendency of action in accordance with D.C. Code § 42-1207(b) in land records. Failure to file suit within 180-day period or to file timely notice of pendency of action will terminate lien. (D.C. Code § 40-303.13).

Those claiming under a subcontractor are not entitled to a mechanics' lien. (128 F.2d 29).

Public Works.

Any contractor for construction, alteration, or repair of any public building or public work of District, where contract for same exceeds $25,000, must furnish: (1) Performance bond, and (2) payment bond for protection of all persons supplying labor and material. Every person who has furnished labor or material and not been paid in full within 90 days has right to sue on payment bond for unpaid amount and to prosecute said action to final judgment for amount due. Any person having direct contractual relationship with subcontractor only shall have said right of action on payment bond upon written notice to contractor. Every suit shall be brought in name of District in Superior Court, but no such suit shall be commenced after one year from last day labor or material was furnished. (D.C. Code § 2-201.01-2-201.02).

Those furnishing labor or material for federal public works may come within protection of 40 U.S.C. (§ 3131).

Redemption.

There is no right of redemption of property sold in satisfaction of a lien.

Wage Lien.

See topic 8.09 Garnishment.

8.14 MECHANICS' LIENS:

See topic 8.13 Liens.

8.15 PLEDGES:

Pledges are among the devices governed by Art. 9 of Uniform Commercial Code. See category 3 Business Regulation and Commerce, topic 3.09 Commercial Code.

There is a statute known as the "Loan Shark Act" regulating loans on personal property and the like. (D.C. Code §§ 26-901-912).

8.16 RECEIVERS:

This subject is governed by statutory and general equitable principles. Receiver may sue to set aside fraudulent transaction. (D.C. Code §§ 28-3103-3107).

Pursuant to D.C. statute, receiver may be appointed to take possession of property which has been attached (D.C. Code § 16-518); of assets of bank that has discontinued operations for 60 days or is in liquidation (D.C. Code § 26-103); of assets on dissolution of corporations (D.C. Code §§ 29-101.91-101.97); and of rents for master-metered apartment building when utility payments are delinquent (D.C. Code § 42-3303). Receiver may also be appointed under certain conditions to operate nursing home or other similar facility in order to safeguard rights of its residents. (D.C. Code §§ 44-1002.01-1002.10). Action wherein receiver has been appointed shall not be dismissed except by order of court. (Fed. R. Civ. P. 66; D.C. Super. Ct. R. Civ. P. 66).

8.17 REDEMPTION:

See topics 8.05 Executions, Liens; categories 20 Mortgages, topic Mortgages of Real Property; Taxation, topic Property Taxes, subhead Redemption.

8.18 SUPPLEMENTARY PROCEEDINGS:

See topic 8.05 Executions.

8.19 TRUSTEE PROCESS:

See topic 8.09 Garnishment.

8.20 USURY:

See category 3 Business Regulation and Commerce, topic 3.19 Interest.

9 DISPUTE RESOLUTION

9.01 ALTERNATIVE DISPUTE RESOLUTION:

Voluntary (Alternative) Dispute Resolution.

Both mediation and arbitration are available to parties in District of Columbia Superior Court. Parties may self-refer to mediation for family, small claims, landlord-tenant, probate, consumer complaints, medical malpractice, and general civil disputes. Parties may also elect binding or non-binding arbitration. Where parties choose binding arbitration, arbitrator's award is converted into judgment of Court; where parties chose non-binding arbitration, arbitrator's award is converted into judgment of Court unless parties file timely request for trial de novo. (http://www.dccourts.gov/dccourts/superior/multi/index.jsp).

U.S. District Court offers voluntary mediation. In mediation, neutral third party helps opposing parties reach settlement. Mediators are trained in problem solving techniques, and serve on pro bono basis. (D.D.C. LCvR 84). Cases in which one of parties is proceeding pro se are generally ineligible for mediation. Local Rule 16.3 requires counsel to meet within 21 days after defendant enters appearance to discuss whether mediation is appropriate. Counsel must submit report to Court within 14 days thereafter. (D.D.C. LCvR 16.3). Judges may refer cases to mediation under Local Rule 84.4. Programs are administered by Office of Circuit Executive of U.S. Courts for District of Columbia Circuit, which also administers companion program at appellate level.

See also topic 9.02 Arbitration and Award.

9.02 ARBITRATION AND AWARD:

The U.S. Arbitration Act covers all contracts or written provisions made subsequent to 1925 involving maritime transactions or "commerce" in District of Columbia and containing written provision to settle controversy by arbitration. (9 U.S.C. §§ 1-16).

Probate court has power, with consent in writing of both parties, to arbitrate, or to refer dispute to arbitrator, between personal representative and third persons; if reserved by parties, exceptions as to matters of law may be filed to award; said award when confirmed by court is conclusive between parties. (D.C. Code § 16-3111).

Superior Court.

Small Claims and Conciliation Branch has authority with consent of all parties to settle cases by arbitration and conciliation. (D.C. Code § 11-1322). Judges may also act as arbitrators either alone or in conjunction with other persons under D.C. Code § 11-1322 or under U.S. Arbitration Act (9 U.S.C. §§ 1-16).

Uniform Arbitration Act Adoption/Deviation.

Revised Uniform Arbitration Act (D.C. Code §§ 16-4401-4432) is effective as of Feb. 27, 2008. As of July 1, 2009, Revised Uniform Arbitration Act applies to all agreements made, whenever they were made. (D.C. Code §§ 16-4403[e]). Prior to July 1, 2009, agreements made before Feb. 27, 2008, were governed by Uniform Arbitration Act. (D.C. Code §§ 16-4401-4419). Prior to July 1, 2009, agreements made from Feb. 27, 2008 to July 1, 2009 were governed by Revised Uniform Arbitration Act, unless parties to arbitration agreement agreed in record that Revised Uniform Arbitration Act applied. (D.C. Code §§ 16-4403).

10 DOCUMENTS AND RECORDS

10.01 ACKNOWLEDGMENTS:

Uniform Law on Notarial Acts adopted. (D.C. Code §§ 42-141-148). May be taken by following officers:

Within District: Judge of District of Columbia Court of Appeals and Superior Court, employee of any local court designated by chief judge, notary public. (D.C. Code §§ 1-1210; 11-742, 945). Fee, $2 for each signature required for seal and writing of certificate. (D.C. Code § 1-1213). Acknowledgment may be taken by notary public, judge, clerk, or deputy clerk of any D.C. court, or any other person authorized by law. (D.C. Code § 42-143[a]).

Outside District but within United States: Notary public, judge, clerk, or deputy clerk, or any other person authorized by law. (D.C. Code § 42-144[a]). In Puerto Rico and Philippine Islands, deeds and other instruments affecting land in D.C. may be acknowledged by notary public or any officer having ex officio powers of notary public, but acknowledgment must be accompanied by certificate of Executive Secretary of Puerto Rico or Governor, or Attorney General of Philippine Islands that notary is such. (D.C. Code § 42-112). In Guam, Samoa and Canal Zone, deeds and other instruments affecting land in D.C. may be acknowledged by judge, notary public or any officer having ex officio powers of notary public, but acknowledgment must be accompanied by certificate of Governor or Acting Governor that notary is such. (D.C. Code § 42-111).

Outside United States: Notarial act made outside U.S. valid if performed by notary public or notary, judge, clerk or deputy clerk of court of record or other person properly authorized in foreign jurisdiction. “Apostille” or certificate by U.S. foreign service or consular official conclusively establishes validity of foreign notarial act. (D.C. Code § 42-146).

In Philippine Islands acknowledgment may be taken by notary public or any officer having ex officio powers of notary public, but acknowledgment must be accompanied by certificate of Governor or Attorney General that notary is such. (D.C. Code § 42-112).

Person in Armed Forces.

As to notarial powers of officers, see topic 10.03 Notaries Public.

General Requirements as to Taking.

Officer must have personal knowledge of identity of acknowledger, or same must be proved by oath or affirmation of credible witnesses or on basis of identification documents. (D.C. Code § 42-142[a][d]). Attorney cannot execute or acknowledge deed of conveyance by individual. (D.C. Code § 42-101). No notary may take acknowledgment in connection with matter in which he is employed as counsel, attorney or agent, or in which he is interested. (D.C. Code § 1-1201[a]).

General Requirements of Certificate.

All requirements for certificates found in Uniform Law on Notarial Acts adopted. (D.C. Code § 42-147).

Proof by Subscribing Witness.

There is no statutory provision of proof of such instrument by affidavit of subscribing witness.

Authentication.

Signature and title of person performing notarial act are prima facie evidence that signature is genuine and person holds designated title. (D.C. Code § 42-143[a]).

Notary Licenses and Authentication (Rm. 230, 717 14th Street, N.W. 20005) is proper office to authenticate certificates of acknowledgment taken by notaries public in District for use elsewhere. Fee $5 for certificate to be used in U.S.A.; $6 for certificate to be used outside U.S.A. Checks payable to “District of Columbia Treasurer”.

Form.

Acknowledgment in individual capacity shall be sufficient if completed with information required by D.C. Code § 42-147(a) in following form (D.C. Code § 42-148):

Form

State of . . . .

(County) of . . . .

This instrument was acknowledged before me on (date) by (name(s) of person(s))

. . . .

(Signature of notarial officer)

(Seal, if any)

. . . .

Title (and Rank)

[My commission expires: . . . .]

Acknowledgment in representative capacity shall be sufficient if completed with information required by D.C. Code § 42-147(a) in following form (D.C. Code § 42-148):

Form

State of . . . .

(County) of . . . .

This instrument was acknowledged before me on (date) by (name(s) of person(s)) as (type of authority, e.g., officer, trustee, etc.) of (name of party on behalf of whom instrument was executed.)

. . . .

(Signature of notarial officer)

(Seal, if any)

. . . .

Title (and Rank)

[My commission expires: . . . .]

Verification upon oath or affirmation shall be sufficient if completed with information required by D.C. Code § 42-147(a) in following form (D.C. Code § 42-148):

Form

District of Columbia

Signed and sworn to (or affirmed) before me on (date) by (name(s) of person(s) making statement)

____

(Signature of notarial officer)

(Seal, if any)

____

(Title and rank)

(My commission expires: ___________)

Witnessing or attesting signature shall be sufficient if completed with information required by D.C. Code § 42-147(a) in following form (D.C. Code § 42-148):

Form

District of Columbia

Signed or attested before me on (date) by (name(s) of person(s))

____

(Signature of notarial officer)

(Seal, if any)

____

(Title and rank)

(My commission expires: ___________)

Alternative to Acknowledgment.

No statutory provision.

10.02 AFFIDAVITS:

May be taken by the following officers:

Within District: May be taken before a United States Magistrate (28 U.S.C. § 636), notary public (D.C. Code § 1-1210), any judge of any court of District (28 U.S.C. § 459), or any employee of any court authorized by chief judge of District of Columbia Court of Appeals (D.C. Code § 11-742). Each judge and employee of Superior Court authorized by chief judge may administer oaths and affirmations and take acknowledgments. (D.C. Code § 11-945). (Note that any Clerk of U.S. court and his deputies may take acknowledgments or administer oaths and affirmations. (28 U.S.C. § 953).

Outside District: May be taken before U.S. Magistrate (28 U.S.C. § 636), any federal judge (28 U.S.C. § 459), clerk of any U.S. court (28 U.S.C. § 953), or any U.S. consular officer or secretary of embassy or legation secretary within their limits (22 U.S.C. §§ 4215, 4221).

Persons in U. S. Armed Forces.

As to notarial powers of officers, see topic 10.03 Notaries Public.

General Requirements as to Administration.

Notary public is disqualified to administer oath in connection with matter in which he is employed as counsel, attorney or agent, or in which he is interested before any U.S. government department. (D.C. Code § 1-1201[a]).

Use of Affidavit.

No statutory provision permitting use of affidavits in evidence, but rules of court (see, e.g. Superior Court, Criminal Procedure, Rule 45[d]) or Federal Rules of Civil Procedure require or permit their use in many preliminary or interlocutory matters. Corporations generally may execute affidavits by officer, agent or attorney.

Form

Usual form of jurat: Subscribed and sworn to before me this . . . . . . day of . . . . . ., 20. . . . . Notary Public, D.C. (Seal).

Alternative To Affidavit.

No statutory provision.

Affidavits to be used in a court proceeding should bear the titles of the court and of the cause.

10.03 NOTARIES PUBLIC:

Appointment is made by Mayor. (D.C. Code § 1-1201).

Eligibility.

A notary must be a resident of the District of Columbia or have his sole place of business or employment there. (D.C. Code § 1-1201).

Qualification.

A notary must take oath and give bond of $2,000. (D.C. Code § 1-1203).

Seal.

Notary must provide a seal to authenticate official acts. (D.C. Code § 1-1204).

Powers.

He may take depositions, acknowledgments, affidavits to be used before any court, judge or officer within District, administer oaths, certify papers (D.C. Code § 1-1210), protest negotiable instruments (D.C. Code §§ 1-1207-1208), etc.

Fees.

$2 for any notarial act including administering oath, taking affidavit including jurat and seal, and each signature required in taking acknowledgment of proof of deed or other instrument including seal and writing of certificate. (D.C. Code § 1-1213).

Authentication.

See same subhead under Acknowledgments.

Persons in or with U. S. Armed Forces.

Following persons on active duty or performing inactive-duty training are authorized to administer oaths for purposes of military administration: all judge advocates, summary courts-martial, adjutants, assistant adjutants, acting adjutants, personnel adjutants, commanding officers of the Navy, Marine Corps, and Coast Guard, staff judge advocates and legal officers, acting or assistant staff judge advocates and legal officers, and all other persons designated by regulations of the Armed Forces or by statute. (10 U.S.C. § 936).

10.04 RECORDS:

Recorder of deeds shall accept for filing any notice of federal tax lien on any other document affecting such lien. (D.C. Code § 42-1215).

Record plats and subdivisions of all private property in District with Office of the Surveyor, 941 North Capitol Street NE, Suite 2700, Washington, D.C. 20002. (D.C. Code § 1-1305).

Record corporation and partnership documents with Department of Consumer & Regulatory Affairs, Corporations Division, 941 North Capitol Street NE, Suite 1100, Washington, D.C. 20002. (D.C. Code §§ 33-202.01, 202.06).

Mayor must make available to public through Internet, by category, list of all documents generated by government agencies or by independent contractors for government, within 30 days of transmission from agency or contractor to Library of Governmental Information. (D.C. Code § 2-1704[a]).

Filing Under Commercial Code.

Filing officer under Art. 9 of Uniform Commercial Code is Recorder of Deeds if collateral is as-extracted collateral or timber to be cut or financing statement is filed as fixture filing and collateral is goods that are or are to become fixtures; in all other cases financing statement should be filed in Mayor's Office. (D.C. Code § 28:9-501[1]). See category 3 Business Regulation and Commerce, topic 3.09 Commercial Code.

Requisites for Filing or Recording.

Except for instruments (including financing statements) filed pursuant to Art. 9 of Uniform Commercial Code, or c. 12 of tit. 50 of D.C. Code, no instrument affecting title or ownership of real or personal property may be recorded unless executed, acknowledged and recorded in same manner as absolute deed. (D.C. Code § 42-801). Instruments under Art. 9 are not recorded, but filed and indexed (D.C. Code § 28: 9-501), and, like instruments relating to motor vehicle liens under c. 12 of tit. 50, require neither acknowledgment nor certification. (§ 28:9-501). Deed conveying fee simple interest in real property may not be recorded until all delinquent real property taxes and interest and penalties related to real property have been paid. (D.C. Code § 42-407). Does not apply to real property under Distressed Properties Improvement Act. (D.C. Code § 42-3508.04). Notice of pendency of action (lis pendens) affecting title or asserting mortgage, lien, security interest or other interest in D.C. real property does not constitute notice unless it is filed for recordation. (D.C. Code § 42-1207). All parties with interest in particular real property must notify Recorder of Deeds if change of name or address occurs. Penalty of up to $300 for noncompliance. (D.C. Code § 42-405).

Recorder's Fees.

Real Property Documents.

For recording any deed of trust affecting real property, $15 for first three pages, and $5 for each additional page or fraction thereof; for recording other real property documents including deeds, releases, leases, agreements, security agreements (land), condominium agreements, covenants, covenants not to encumber, or foreclosures (real property and condominium), $15 for first two pages, and $5 for each additional page or fraction thereof. (9 DCMR § 336.2). Surcharge of $5 must be paid before any document is accepted for recordation at Recorder of Deeds. (D.C. Code § 42-1211). For recording plat of subdivision when survey performed by private surveyor, $75 per sheet; for recording condominium plat and plans when survey performed by private surveyor, $300 flat fee plus $15 per sheet. (10 DCMR § 2901.2).

Corporation and Partnership Documents.

See category 2 Business Organizations, topic 2.03 Corporations, subhead Filing Fees.

General Documents.

For recording mechanic's lien, mechanic's lien release, mechanic's lien undertaking, hospital lien, U.S. tax lien, U.S. tax lien release, judgment, judgment release, bill of sale (chattels), security agreement (chattels), terminations, affidavits, or powers of attorney, $15 for first two pages, and $5 for each additional page or fraction thereof. (9 DCMR § 336.2).

Search, Reproduction, and Certification.

Certificate reproduction, $2.25 per page; for certified copies add $2.25 for certificate and seal. (9 DCMR § 336.2).

Real Estate Transfer and Recordation Taxes.

See category 22 Taxation, topic 22.13 Property Taxes, subhead Real Estate Conveyance Tax.

Effect of recording or filing is to affect third persons with constructive notice of instrument. See categories 20 Mortgages, topic Mortgages of Real Property; Property, topics Deeds, Landlord and Tenant.

Torrens Act has not been adopted for the District.

Transfer of Decedent's Title.

For decedents who die on or after Jan. 1, 1981—Upon request of distributee, personal representative of decedent must execute instrument of distribution as evidence of distributee's title. Distribution of real property may be effected by quit claim deed. Deed must be indexed in grantor index under decedent's name and personal representative must pay all costs of recordation as cost of administration of estate. (D.C. Code § 20-1103). See category 13 Estates and Trusts, topic 13.08 Executors and Administrators, subhead Foreign Executors or Administrators.

Vital Statistics.

Birth and death certificates must be filed with Department of Health, Vital Records Division, 825 North Capitol Street NE, First Floor, Washington, D.C. 20002. (D.C. Code §§ 7-205, 211), where certified copies thereof may be obtained (D.C. Code § 7-220). Fees for certified copies of vital records are as follows (29 DCMR § 2880):

Fees

Archival Birth Certificate $ 23.00

Commemorative Birth Certificate 30.00

Delayed Birth Record 23.00

Death Certificate 18.00

Legal Change of Name 23.00

Adoption 28.00

Marriage Record 18.00

Divorce Record 18.00

Certificate of Search 18.00 (for each three years searched, according to current practice)

Adjudgment of parentage 23.00

Correcting birth or death records. 23.00

Establishing Birth Record.

In case of persons having no recorded birth certificate, a delayed birth certificate may be obtained upon filing with Registrar of Vital Records application on official form with supporting documents. If delayed certificate is rejected, person can bring court action to establish date and place of birth. (D.C. Code §§ 7-207, 208).

Marriage records are kept by Marriage Bureau of Superior Court, 500 Indiana Ave., N.W., Rm. 4485, Washington, D.C. 20001. Fee for certified copy of marriage license, $10. (D.C. Code § 46-414; D.C. Sup. Ct. General Family R. C).

Divorce records are kept by family court of Superior Court, 500 Indiana Ave., N.W., Rm. 4335A, Washington, D.C. 20001. Fee for certified copy of divorce decree, 50¢ per page and $5 for certified seal. (D.C. Code § 11-1101; Sup. Ct. General Family R. C).

10.05 SEALS:

Necessity, sufficiency and effect of seal are governed by common law. Seals are contained in all forms given by the Code. The symbol “L.S.” or the word “Seal” written, printed or typed is a sufficient seal on any instrument.

Uniform Commercial Code in effect. See category 3 Business Regulation and Commerce, topic 3.09 Commercial Code.

10.06 TORRENS ACT:

Not adopted.

10.07 VITAL STATISTICS:

See topic 10.04 Records.

11 EMPLOYMENT

11.01 EMPLOYER AND EMPLOYEE:

See topic 11.02 Labor Relations.

11.02 LABOR RELATIONS:

Labor relations are governed by the National Labor Relations Act, which applies in the District to intrastate as well as interstate commerce. (29 U.S.C. §§ 141-187). Federal anti-injunction act controls District Court in labor disputes. (29 U.S.C. §§ 101-115).

Hours of Labor.

No statute regulating hours of labor.

Payment of wages must be made in money or check payable on demand, at least twice a month on regular paydays designated in advance, except that employer, by contract or custom, may continue to pay wages at least once a month. (D.C. Code § 32-1302). Unless otherwise specified in collective agreement with bona fide union (a) employer must pay to discharged employee wages earned not later than next working day, but employer allowed four days where employee responsible for employer's moneys, (b) employer must pay quitting employee his wages due upon earlier of next regular payday or within seven days, (c) employer must pay suspended employee wages earned not later than next regular payday, (d) upon failure to pay such wages, employer is liable to employee for an additional 10% of unpaid wages for each working day in default not to exceed unpaid wages. (D.C. Code § 32-1303). Where amount of wage in dispute, employer must pay wages conceded to be due. (D.C. Code § 32-1304). Collection of unpaid wages is supervised by Minimum Wage and Industrial Safety Board. Employer with more than ten employees must pay full-time employees usual compensation, less any fees received by employee, for jury service of five days or less. (D.C. Code § 15-718).

Employee Trusts.

See category 21 Property, topic 21.12 Perpetuities.

Child Labor.

Minors under 14 may not be employed in gainful occupation, except in home or on farm, and except minors ten or over distributing newspapers outside school hours. (D.C. Code § 32-201). Except as previously noted, persons under 18 may not be gainfully employed more than six days or 48 hours per week or more than eight hours per day. Minors 16 or 17 may not be employed between 10 P.M. and 6 A.M. Minors under 16 cannot be employed between 7 P.M. and 7 A.M. except that during summer evening hour is 9 P.M. (D.C. Code § 32-202). Minors under 18 must obtain work permits from Board of Education to engage in gainful employment. (D.C. Code §§ 32-206-211). Employment of minors in dangerous occupations (D.C. Code § 32-203), and in certain specific occupations (D.C. Code §§ 32-204, 205) is prohibited.

Minimum Wages.

District of Columbia Minimum Wage Act applies to all employers in District of Columbia, with exception of United States or District of Columbia, and provides that minimum wage shall be greater of $6.60 or minimum wage set by U.S. government from time to time, plus $1. It also provides for time and one half regular rate for all hours in excess of 40 hours per week. Minimum wage and overtime provisions are not applicable to employee employed in executive, administrative or professional capacity, or in capacity of outside salesperson, as such terms are defined under Fair Labor Standards Act; or to newspaper delivery boy; and overtime provisions do not apply to seafarer, railroad employee, or any salesperson, partsperson or mechanic primarily engaged in selling or servicing automobiles or trucks, car wash employee, any parking lot attendant or airline employee who voluntarily exchanges work days with another employee to utilize air travel benefits. (D.C. Code §§ 32-1002, 1003, 1004). Workers with disabilities are covered, with some exceptions. (D.C. Code § 32-1003[d]).

Special rules apply to employees who receive gratuities or commissions. (D.C. Code §

32-1003[e-g]).

Mayor is authorized to make and revise regulations, investigate, require production of information and attendance and testimony of witnesses for public hearing. (D.C. Code §§ 32-1005, 1006, 1007).

Every employer subject to Act or any regulation or order issued thereunder must make and keep for not less than three years a record of (1) Name, address and occupation of each employee; (2) record of date of birth of any employee under 19; (3) rate of pay and amount paid each pay period; (4) hours worked each day and each work week by each employee; and (5) such other information as prescribed by Mayor. Every employer is required to furnish each employee at time of each payment of wages an itemized statement showing date of wage payment, gross wages paid, deductions from and additions to wages, net wages paid, hours worked during pay period, and any other information prescribed by Mayor. (D.C. Code § 32-1008).

Any person willfully violating Act is subject to criminal prosecution and upon conviction to fine of not more than $10,000 or imprisonment for not more than six months, or both, provided no person shall be imprisoned except for conviction of second offense. (D.C. Code § 32-1011). In addition, administrative penalties of up to maximum of $300 for first violation and $500 for second violation will be assessed. (D.C. Code § 32-1011[d]).

Any employee may sue on his own behalf and/or for other employees similarly situated for any unpaid wages provided for under Act and additional amount as liquidated damages. Employer who shows that his omission to pay required wages was in good faith may in discretion of court escape payment of liquidated damages. Court in employee's action shall allow reasonable attorney fees and costs to prevailing employee. City likewise may sue to recover any unpaid wages on behalf of employee upon written request by employee and assignment of his wage claim. Statute of limitations shall be three years after accrual of claim. (D.C. Code §§ 32-1012-1013).

Public Works.

Employees of contractors erecting public works or buildings for District or U.S. must be paid at rate of wages prevailing in District for similar work, as determined by Secretary of Labor. (40 U.S.C. § 3142). Wages are to be computed on basis of 40 hour week, with hours in excess of either being compensated at not less than one and one-half times basic rate of pay. (40 U.S.C. § 3702).

Family and Medical Leave.

Employee is entitled to family leave in certain cases involving birth, adoption, or serious health condition and to medical leave in certain cases involving serious health condition. (D.C. Code §§ 32-501-517). Employee who is parent is entitled to up to 24 hours unpaid leave during any 12 month period to attend school related event for his or her child. Employee should, if possible, give employer ten days advance notice of need to attend. (D.C. Code §§ 32-1201-1202).

Unemployment Compensation.

An insured worker who has been paid within base period (first four of last five completed calendar quarters preceding first day of individual's benefit year, or alternatively, last four completed calendar quarters, if insufficient wages during first four quarters [§ 51-101]) wages of at least $1,300 in one quarter, $1,950 in at least two quarters and total wages for base period equal to 1½ times highest wages in any quarter during period is eligible to receive benefits if he: (1) Is able and available for work, (2) has registered and inquires for work at employment office, (3) has been unemployed for at least one week, (4) has made minimum of two contacts for new work in such week and (5) files claim for benefits. (D.C. Code §§ 51-107, 109). Eligibility of pregnant or recently pregnant women is governed by same standards as others and that pregnancy creates no presumption of inability to work. (D.C. Code § 51-110[h]). Benefits are unavailable to aliens who are not lawfully admitted for permanent residence at time services upon which benefits are to be received were performed. (D.C. Code § 51-109[9][A]). Individual who fails without good cause to attend training or retraining course, or participate in job counseling or other reemployment services ineligible for benefits. (7 DCMR § 314). "Additional Benefits Program" consisting of two five-week phases of benefits is available to individual who: (1) Has received all requested benefits available under D.C. Code § 51-107; (2) has satisfied requirements of D.C. Code § 51-107 for eligibility; (3) provides (during Phase 1) tangible evidence of systematic and sustained effort to obtain work by making contact with at least three new employers on at least three days; and (4) provides (during Phase 2) tangible evidence of systematic and sustained effort to obtain work by making contact with at least five new employers. (D.C. Code § 51-107[h]). Individual judged by cooperating employer not to be job ready shall be referred to job counseling, training, or retraining. (D.C. Code § 51-107[h][2][E]). Individual who is unemployed, has exhausted all regular unemployment benefits, and who is enrolled and making satisfactory progress in District-approved job training program may be eligible for extension of training benefits. (D.C. Code § 51-107[j]]).

Workers' Compensation.

Compensation for disability or death resulting from injury to employees is governed by District of Columbia Workers' Compensation Act of 1979. (D.C. Code §§ 32-1501-1545). Licensed real estate sales persons and brokers under written contract as independent contractors are not covered by this Act under certain circumstances. (D.C. Code § 32-1501). Administration of workers' compensation is shifted to District government. This act parallels provisions of Longshoremen and Harbor Worker's Compensation Act (33 U.S.C. §§ 901-950) but differs from it in major respects: (1) Disability is defined solely in terms of physical or mental incapacity resulting in loss of wages; (2) maximum permissible compensation is equal to District's average weekly wage of insured District employees or $396.78, whichever is greater; (3) cost of living increases in benefits are limited to 5%; (4) compensation rates for disability are altered; (5) method of determining employee's average weekly wage is changed; (6) no compensation awards for disability can be made after death of injured employee; (7) employer or insurer is no longer required to provide substantial evidence of employee's lack of entitlement to compensation; (8) modified award is effective from date of modification, not date of injury; and (9) fund is established to cover costs of administering Act. (D.C. Code §§ 32-1501-1545).

Worker's Compensation Amendment Act of 1998 (D.C. Law 12-229) covers professional athletes (D.C. Code §§ 32-1501[17B], [17C]); defines safe workplace programs (D.C. Code § 32-1501[17D]); grants 5% discount in premiums for voluntary workplace safety program (D.C. Code § 32-1538); places 500 week cap on payment of disability benefits, with possibility of petition within 60 days for extension of up to 167 weeks (D.C. Code § 32-1505); reduces length of scheduled permanent partial disability compensation periods by 25% (D.C. Code § 32-1508), provides that for wages fixed by day or hour, average weekly wage shall be computed by dividing by 26 total wages earned in 26 weeks preceding injury (D.C. Code § 32-1511).

Occupational Safety and Health.

Employers shall furnish employees with places and conditions of employment that are free from recognized hazards likely to cause death, serious physical harm or illness, and shall comply with all promulgated occupational safety and health rules and orders. (D.C. Code §§ 32-1101-1124).

Health Coverage.

Terminated employee who is not eligible for continued coverage of health benefits under federal Consolidated Omnibus Budget Reconciliation Act (COBRA), has right under D.C. law to continue coverage under employer's health benefits plan for period of three months. (D.C. Code § 32-731 et seq.).

Employers' Liability Act.

See category 3 Business Regulation and Commerce, topic 3.08 Carriers.

Discrimination.

Employers, employment agencies and labor unions prohibited from discrimination in matters relating to employment on basis of actual or perceived: race, color, religion, national origin, sex, age, marital status, personal appearance, sexual orientation, gender identity or expression, familial status, source of income, status as victim of intrafamily offense, place of residence or business, family responsibilities, disability, matriculation, genetic information, or political affiliation, under Human Rights Act of 1977, as amended. (D.C. Code § 2-1401.01 et seq.). Harassment engaged in for discriminatory reasons constitutes unlawful discriminatory practice. (D.C. Code § 2-1401.02[31]). Mandatory mediation process precedes formal investigation of complaint by Office of Human Rights. (D.C. Code § 2-1403.04). If complaint not resolved, and Office finds probable cause after investigation, it will permit 60 days for conciliation. If no conciliation, Office will certify case to Commission for public hearing. (D.C. Code § 2-1403.06). Private cause of action must be filed in court within one year of unlawful discriminatory practice, or discovery thereof. Timely filing with Office tolls running of one year statute of limitation during period complaint is pending before Office. (D.C. Code § 2-1403.16). Rules governing complaints of discrimination in District of Columbia are set forth at 4 DCMR § 100 et seq., as amended, Dec. 1996. No person may discriminate against employee or applicant on basis of use by employee or applicant of tobacco or tobacco products; however, enforcement of workplace smoking restrictions permitted or required by law is not precluded by this section. (D.C. Code § 7-1703.03). District government agencies must submit to Mayor and Council, affirmative action hiring plans. (D.C. Code § 1-521.02).

Prevailing plaintiff in employment discrimination suit may exclude from gross income certain amounts awarded and can income average for back pay and front pay awards. (D.C. Code §§ 47-1803.02, 1806.10).

D.C. Procurement Practices Act of 1985, as amended, prohibits (a) employer interference with employee disclosure of false claims, and (b) retaliation against employee who disclosed information to government or law enforcement agency. (D.C. Code § 2-308.16).

Whistleblower Protection.

Any District instrumentality, District government contractor, or a person who or entity that employs security officers is protected from retaliation for disclosing information which employee reasonably believes evidences gross mismanagement, abuse of authority, violation of law or contract or substantial danger to public health or safety. (D.C. Code §§ 1-615.51-615.59, 2-223.01-2-223.07, 2-302.08[f-4]).

11.03 WORKERS' COMPENSATION LAW:

See topic 11.02 Labor Relations.

12 ENVIRONMENT

12.01 ENVIRONMENTAL REGULATION:

(References to DCMR are to District of Columbia Municipal Regulations.)

General Supervision.

District of Columbia Council and Mayor of District of Columbia have delegated administrative control over environment to Department of Consumer and Regulatory Affairs; Department of Public Works; and Department of Environmental Services. (D.C. Register, Vol. 18, No. 3, pp. 91-93, Aug. 9, 1971). These Departments administer regulations issued by District of Columbia Council and Mayor pursuant to District of Columbia Air Pollution Control Act of 1984 (D.C. Code § 8-101.04 et seq.), pursuant to statutory provisions of District of Columbia Code relating to solid waste disposal (D.C. Code §§ 8-701-711), pursuant to District of Columbia Phosphate Soaps and Detergent Restriction Act of 1985 (D.C. Code § 8-107.01 et seq.) and pursuant to District of Columbia Noise Control Act (20 DCMR D.C. Code §§ 2700-2999). Department of Public Works also administers Hazardous Waste Management Act of 1977 as amended by D.C. Law 8-66 (D.C. Code §§ 8-1301-1314); Solid Waste Management and Multi-Material Recycling Act (D.C. Code § 8-1001 et seq.) and Litter Control Administration Regulations (24 DCMR § 1380 et seq.). Regulations concerning water pollution are issued pursuant to federal statutes made specifically applicable to District of Columbia (33 U.S.C. § 1251 et seq.), pursuant to Water Pollution Control Act of 1984 (D.C. Code § 8-103.01 et seq.), pursuant to Wastewater System Regulation Amendment Act of 1985, as amended by D.C. Law 12-106 (D.C. Code § 8-105.01 et seq.), and pursuant to provisions of District of Columbia Code relating to control and use of harbor facilities (D.C. Code § 22-4401) and protection of life, health, and property (D.C. Code § 1-303.03). District of Columbia also regulates transportation of hazardous materials (D.C. Code §§ 8-1401-1405) and, through Department of Public Works, recycling procedures (D.C. Code §§ 8-1001-1023). District of Columbia also subscribes to Potomac River Basin Compact (D.C. Code §§ 8-1601-1602), interstate agreement to coordinate resource planning and action among Maryland, Pennsylvania, Virginia, West Virginia, and District of Columbia; except that Congress has refused to consent to § (F)(2) of art. II of amended compact, dealing with establishment of certain water quality standards (D.C. Code § 8-1602[a]). District of Columbia also maintains the Soil and Water Conservation District to conduct, inter alia, surveys, investigations and research. (D.C. Code §§ 8-1701-1714; 8-1721). District of Columbia also requires preparation of Environmental Impact Statements pursuant to Environmental Policy Act of 1989. (D.C. Code § 8-109.01 et seq.).

Prohibited Acts of Pollution.

Air Pollution.

Air Pollution Control Act of 1984 amended in 1993 to establish standards complying with National Ambient Air Quality Standards. Use of certain fuel oils and coal (20 DCMR §§ 801-802); discharge of nitrogen oxides over permitted levels (20 DCMR § 804); improper transfer, discharge and storage in improper containers of volatile organic compounds, petroleum products and other designated substances and activities (20 DCMR §§ 700-713); particulate emission above permitted levels (20 DCMR § 600); blowing soot from fuel-burning equipment fired by solid fuels (20 DCMR § 600); use of unapproved incinerators (20 DCMR § 602); visible and particulate emissions above permitted levels (20 DCMR §§ 603, 606); open-burning (20 DCMR § 604); permitting fugitive dust into outdoor atmosphere (20 DCMR § 605); automobile exhaust emissions above permitted levels (18 DCMR §§ 750-753); emission of odorous pollutants (20 DCMR § 903); smoking in places frequented by public (D.C. Code §§ 7-1703-1703.01); failing to post no smoking signs in such places (D.C. Code § 7-1704); use of rotary cup burner (20 DCMR § 601); discharge into atmosphere of sulfur oxides above permitted levels (20 DCMR § 803); engine idling (20 DCMR § 900); escape of visible fumes or smoke from motor vehicle for more than permitted time (20 DCMR § 901); sale of gasoline with excessive amount of lead (20 DCMR § 902). Act amended in 1999 to prohibit idling of engine of gasoline or diesel powered motor vehicle for more than three minutes, with some exceptions. (20 DCMR § 900.1; 18 DCMR § 2418.3).

Alternative Fuels Technology Act of 1990 and c.9 of Title 20 of DCMR amended in 1994 by Clean Fuel Fleet Vehicle Program and Alternative Fuels Incentives Amendment Act of 1994, to conform district law and regulations to requirements of Title II of Clean Air Act. (D.C. Law 10-

201).

Noise Pollution.

Emission of sound above maximum permissible levels, said levels varying with time, place and source of occurrence (D.C. Code § 1-303.01, 20 DCMR § 2701.1); emitting sound determined by Mayor to constitute noise disturbance (20 DCMR § 2700); offering for sale new motor vehicle that exceeds maximum noise limits (20 DCMR § 2810.1); alteration of vehicle's exhaust system to increase noise emitted above permissible limits, or operation of such vehicle (20 DCMR § 2812); failure to comply with Act's notice of violation provisions (20 DCMR § 2710); failure to comply with emergency order of mayor to reduce or discontinue act creating sound level likely to be injurious to public health, welfare and enjoyment of life and property (20 DCMR § 2711.2); interference with sound measurement authorized by statute (20 DCMR § 2712); keeping or owning dog that disturbs neighborhood or any person (24 DCMR § 900.1); and operation of refuse collection vehicle within 300 feet of residential, special purpose or water front zone at nighttime (20 DCMR § 2806.2).

Water Pollution.

Throwing or depositing matter in Potomac River (D.C. Code § 22-4402); depositing deleterious matter in Rock Creek or Potomac River (D.C. Code § 22-4403); maliciously making water supply impure (D.C. Code § 22-3118); engaging in land disturbing activity without approved erosion and sedimentation control plan (21 DCMR § 502.1); discharge of petroleum or waste in D.C. waters from vessel (21 DCMR § 1199 et seq.); discharge of waste from vessels berthed at marina, dock or basin (21 DCMR § 540.1); throwing gravel, etc. into canal (24 DCMR § 1000); discharging pollutants into District waters except as provided under D.C. Code § 8-103.06 (D.C. Code § 8-103.02); discharging sanitary sewage, wash or process water, oil laden bilge water, refuse or litter from watercraft (D.C. Code § 8-103.06[m]); discharging harmful material into sanitary or combined sewer (D.C. Code § 8-103.07[c]); discharging hazardous substances, pollutants, or nuisance materials into public spaces (D.C. Code § 8-103.07[d]); discharging of used motor oil to any sewer (D.C. Code § 8-103.07[e]); storing pollutant or hazardous substance before approval of spill prevention and cleanup plan (D.C. Code § 8-103.10); not testing underground storage tank containing oil, gasoline or other pollutants for leaks (D.C. Code § 8-103.10); tampering and misuse of wastewater system (D.C. Code § 8-105.05); discharging certain substances into wastewater system (D.C. Code § 8-105.05, 21 DCMR 1501.1); installing septic tanks (D.C. Code § 8-105.06[g]); and installing or using earth pit privies (D.C. Code § 8-105.06[g]). Solid waste disposal regulations also prohibit disposal of solid waste in Potomac River or other waters of District of Columbia. (21 DCMR § 700.4).

Hazardous Waste.

Construction, alteration, or operation of hazardous waste treatment or disposal facilities, or generation, storage, transportation, treatment or disposal of hazardous waste without permit or in violation of regulations (D.C. Code § 8-1303); hazardous waste reduction priority (D.C. Code § 8-1301); identification of major hazardous waste generators (D.C. Code §§ 8-1316-1317); fees for generation of hazardous wastes (D.C. Code § 8-1319); waiver of fees upon certain conditions (D.C. Code § 8-1320). District of Columbia has adopted 40 C.F.R. Parts 260-265, 270, and 124 (Subpart A) with appropriate amendments (16 DCMR § 3652); and instituted procedures governing transportation of hazardous materials (D.C. Code § 8-1401 et seq.).

Lead-Based Paint.

Under Lead-Hazard Prevention and Elimination Act of 2008 (D.C. Code §§ 8-231.01 et seq.), dwelling units, common areas of multifamily properties, and child-occupied facilities constructed prior to Mar. 1, 1978, shall be maintained free of lead-based paint hazards (D.C. Code § 8-231.02[a]). No person shall apply lead-based paint or glaze to any surface, including interior and exterior surfaces, of any residential, public, or commercial building, bridge, or other structure or superstructure, or on any paved surface. (D.C. Code § 8-231.02[b]). Whenever child under age six with elevated concentration of lead in sample of whole blood resides in, or regularly visits dwelling unit or child-occupied facility, or upon reasonable belief that any other property located in District may have contributed to child's lead exposure, Mayor shall conduct risk assessment of such properties. (D.C. Code § 8-231.03[a]). On reasonable belief that risk of lead-based paint hazard exists in dwelling unit, accessible common area, or child-occupied facility constructed before Mar. 1, 1978, Mayor has discretion to perform risk assessment, clearance examination, or visual examination of property. (D.C. Code § 8-231.03[b]). Mayor has right of entry to conduct risk assessment or inspection for compliance. (D.C. Code § 8-231.05).

Beginning Jan. 1, 2010, owners of residential properties constructed before Mar. 1, 1978, shall disclose to tenants information reasonably known to owner about presence of lead-based paint, lead-based paint hazards, and pending actions for elimination or abatement of lead-based paint hazards. (D.C. Code § 8-231.04). On receipt of order from Mayor, owner of property shall: perform measures required by Mayor to eliminate lead-based hazards and underlying conditions; obtain permit for abatement; ensure that any individual working to eliminate lead hazards abides by prescribed work practice standards and is trained in lead-safe work practices; make temporary and comparable alternative arrangements for relocation of any tenant residing at property, as ordered by Mayor; reimburse Mayor for costs associated with conducting risk assessment. (D.C. Code § 8-231.03[d]).

Criminal penalties include fine of not more than $25,000 for each day of each violation, imprisonment for not more than one year, or both. (D.C. Code § 8-231.16). Civil penalties include fine of not more than $25,000 for each day of each violation. (D.C. Code § 8-231.15).

Low-level Radioactive Waste.

Generators of low-level radioactive waste must annually register with D.C. and pay fees to reimburse D.C. for costs associated with disposal of such waste. (D.C. Code § 8-1501 et seq., 22 DCMR § 6700 et seq.). Citizen suits provision to enforce (D.C. Code § 8-1505); failure to register (D.C. Code § 8-1503).

Solid Waste.

Disposal of waste in a manner not designated in regulations (D.C. Code §§ 8-707, 708, 902, 21 DCMR D.C. Code §§ 700-799); failure to obtain, or violation of, permits or licenses required by regulations (D.C. Code § 8-701, 21 DCMR § 700); failure to follow appropriate recycling procedures (D.C. Code § 8-1017).

No person may operate open solid waste facility (i.e. where solid waste is stored or processed outside fully enclosed building or structure). No person may construct or operate solid waste facility except in accordance with permit issued by Mayor. Fee for initial permit is $10,000. Permit valid for three years. Renewal fee is $9,000. In addition, solid waste facility charge imposed at rate of $4 per ton, except for construction and demolition wastes which are $2 per ton. Periodic reports required. Fines up to $25,000, as well as possibility of suspension or revocation of permit for failure to submit reports. Mayor has right to inspection of operations and records, and to establish rules and regulations to implement act. (D.C. Code §§ 8-1052-1058). Each solid waste facility shall develop inspection, monitoring, and control plan to detect and prevent handling of hazardous wastes, infectious wastes or radioactive wastes, and shall submit plan to Dept. of Health. (D.C. Code § 8-1055). Full Environmental Impact Statement is required for construction of any new solid waste facility or substantial modification of existing structure. (D.C. Code § 8-109.11).

Phosphate Cleaners.

Sale, use, or furnishing of cleaning agent with more than trace quantity of phosphorous compound except for enumerated uses (D.C. Code § 8-107.02); sale, use or furnishing of cleaning agent exceeding 8.7% of elemental phosphorous by weight (D.C. Code § 8-107.02).

Asbestos.

To qualify for asbestos abatement permit or license, person or business entity must comply with Asbestos Licensing and Control Act of 1990 (D.C. Code § 8-111.01 et seq.), as amended, and rules set forth in 20 DCMR §§ 800, 899.

Environmental Impact.

District of Columbia Environmental Policy Act of 1989 (D.C. Code §§ 8-109.01 et seq.) requires preparation of environmental impact statement for actions likely to have significant effect on environment.

Enforcement.

Air Pollution.

Mayor may inspect premises and records of operation. (20 DCMR § 101.1). Mayor may issue orders for compliance. (20 DCMR § 102). Criminal penalties are available. (20 DCMR § 105). Mayor may modify, revoke, or terminate permits. (20 DCMR § 202). Persons aggrieved by administrative decisions may seek review in District of Columbia Court of Appeals. (D.C. Code § 11-722). Restrictions on smoking in public places may be enforced by citizen suits for injunctive relief (D.C. Code § 7-1705) or by civil and criminal penalties (D.C. Code § 7-1706).

Noise Regulations.

Mayor may issue notices of violation (20 DCMR § 2710) and emergency orders (20 DCMR § 2711) requiring violators to reduce sound emissions to permissible levels. Any aggrieved person may complain to Metropolitan Police Department which shall enforce Act. (20 DCMR § 2713). D.C. may seek civil penalties ($300 fine) or criminal penalties (imprisonment not to exceed ten days) for violation of noise pollution statute (20 DCMR § 2713.3); citizens may bring civil actions to enjoin noise pollution or enforce noise regulations against violators or to require Mayor to perform non-discretionary acts (20 DCMR § 2714).

Water Pollution.

Under Water Pollution Control Act of 1984, Mayor may monitor and inspect facilities (D.C. Code § 8-103.15); may issue compliance orders and assess civil penalties (D.C. Code § 8-103.17); may institute civil action for injunctive relief and civil penalties (D.C. Code § 8-103.18); and may seek criminal penalties. Under Water Quality Monitoring Regulations, Department of Consumer and Regulatory Affairs may impose self-monitoring of water quality conducted in accordance with quality assurance manual to be organized in specific format. (21 DCMR D.C. Code §§ 1901-04, 1999). Citizens may institute civil actions as well. (D.C. Code § 8-103.19). Under Wastewater System Regulation Amendment Act of 1985, District of Columbia Water and Sewer Authority (“WASA”) and Mayor may enter to inspect (D.C. Code § 8-105.08); WASA may issue Notice of Infraction and Proposed Order, directing user to eliminate violation and pay fines (D.C. Code § 8-105.10[b][1]); WASA may revoke permits (D.C. Code § 8-105.10[b][3], 21 DCMR § 1509); conduct hearings (D.C. Code § 8-105.10[b][5]); issue regulations (D.C. Code § 8-105.10[c]); and suspend water service in event of actual or threatened discharge (D.C. Code § 8-105.12). Mayor may seek injunctive relief (D.C. Code § 8-105.11) and WASA may set and collect charges or fees (D.C. Code § 8-105.07). Civil and criminal fines may be imposed of up to $10,000 for each day violation continues as well as criminal imprisonment of up to one year for each day violation continues. (D.C. Code § 8-105.14). District of Columbia may seek criminal penalties for violations of statutes prohibiting dumping in Potomac River. (D.C. Code §§ 22-4402-4404). Dept. of Consumer and Regulatory Affairs may issue orders to correct current erosion and to compel compliance with permits. (21 DCMR §§ 504-505). Enforcement procedures are set forth in 21

DCMR §§ 2200.1-2206.9.

Solid Waste.

District of Columbia may seek civil or criminal penalties for violators of solid waste laws and regulations, including seizure and forfeiture of motor vehicle used in violating act. (D.C. Code §§ 8-708, 8-604, 8-802, 8-902, 8-1017). Any solid waste facility not in compliance with requirements is public nuisance which may be enjoined by Superior Court in action by Corporation Counsel. (D.C. Code § 8-1060). If Mayor determines after investigation that facility presents danger to public health, Mayor shall close and seal facility. (D.C. Code § 8-1060[d]). Mayor enforces litter control. (D.C. Code § 8-802).

Recycling.

After Jan. 1, 1994, sellers or distributors of paper products must sell or distribute paper products composed of minimum percentage of recycled content. (D.C. Code §§ 8-1003-1023). Newspaper recycling mandatory. (D.C. Code § 8-1007).

Hazardous Wastes.

Mayor may enter and inspect hazardous waste facilities, take samples, and inspect records. (D.C. Code § 8-1307). If violations are found, violator's permit may be suspended or revoked (D.C. Code § 8-1309); orders may be issued requiring corrective measures (D.C. Code § 8-1311); injunctive relief and civil or criminal penalties may be sought (D.C. Code §§ 8-1310-1311). Financial guarantor of violator may be liable if violator is bankrupt or beyond court jurisdiction. (D.C. Code § 8-1314). Mayor may also seek civil or criminal penalties for illegal dumping of hazardous wastes and violation of procedures relating to transportation of hazardous materials. (D.C. Code §§ 8-902, 8-1404). Mayor may waive hazardous waste and toxic chemical fee if business has successfully implemented source reduction techniques. (D.C. Code § 8-1320).

Phosphate Restrictions.

Mayor may seek criminal penalties. (D.C. Code § 8-107.04).

Underground Storage Tanks.

Owner of underground tank shall notify Mayor of its existence. (D.C. Code § 8-113.02). Any person knowing of leak must notify Mayor. (D.C. Code § 8-113.03). Until new rules issued, installation of new underground storage tanks prohibited absent certain exceptions. (D.C. Code § 8-113.04). Underground storage tank trust fund created to undertake corrective action. (D.C. Code § 8-113.05). Businesses or individuals installing, removing or testing tanks must be licensed. (D.C. Code § 8-113.06). Right of entry, inspection, analyses, and corrective action. (D.C. Code § 8-113.08). Underground storage tank regulations issued. (20 DCMR cc. 55-67, 70).

Penalties.

Violators of Air Quality Regulations (20 DCMR D.C. Code §§ 100-199) are subject to a fine not to exceed $10,000 or imprisonment for term not to exceed 90 days or both (20 DCMR § 105); each day of continuing violation is separate offense. Violators of prohibition against smoking in certain public places are subject to fine not to exceed $50 for first offense; violators of obligation to post no smoking signs are subject to fine of up to $300 for each day of violation. Violators of noise pollution statute are subject to fine of not more than $300 or imprisonment for not more than ten days or both, each day of violation constituting separate offense. (20 DCMR § 2713). Violators of water pollution statute are subject to civil penalties of up to $50,000 per violation and up to $250,000 for willful violations. Each violation constitutes separate offense. (D.C. Code § 8-103.18). Violators are also subject to fine of not less than $2,500 nor more than $25,000 for each day of violation or imprisonment for not more than one year or both for first conviction; more severe penalties may be imposed for repeat convictions. Violators of wastewater statute are subject to civil penalties of up to $10,000 or imprisonment up to one year or both for intentional, willful, or reckless violation. Each day of violation constitutes separate offense and penalties apply to each separate offense. (D.C. Code § 8-105.14). Violators of (D.C. Code § 22-4402), relating to deposit of matter in Potomac River, are subject to fine not to exceed $100 or imprisonment not exceeding six months, or both. Violators of (D.C. Code § 22-4403), relating to depositing deleterious matters in Rock Creek or Potomac River, are subject to fine of $300 or imprisonment not to exceed 90 days, or both. (D.C. Code § 22-4404). Violators of (D.C. Code § 22-3318), relating to making water impure, are subject to fine of not less than $500 nor more than $1,000 or imprisonment for not less than one year nor more than three years. Violators of regulations governing soil erosion (see supra under subhead Prohibited Acts of Pollution) are subject to fine of not more than $300 or imprisonment of not more than ten days. (21 DCMR § 515.1). Each day of continuing violation is separate offense. Violators of D.C. Code §§ 8-705 to 8-710 concerning construction and use of incinerators are subject to fine of not more than $100 or imprisonment of not more than 60 days or both. (D.C. Code § 8-708). Violators of certain provisions of Litter Control Act are subject to fines set forth in 21 DCMR §§ 700 et seq., and 24 DCMR 101 et seq. Violators of hazardous waste statute and regulations are subject to civil penalties of up to $25,000 with each day of violation constituting separate offense. Knowing violators are subject to up to $25,000 fine or up to one year in prison or both for each violation. (D.C. Code § 8-1311). Person who knowingly disposes of hazardous or medical waste in violation of (D.C. Code § 8-902[a]) is guilty of felony, and subject to fine for each offense of up to $40,000, and up to five years in prison. (D.C. Code § 8-902[b][3]). Violations of solid waste disposal are subject to fine not to exceed $5,000 for first offense or $10,000 for subsequent offense or imprisonment not to exceed 90 days or both. Person who disposes of solid waste for commercial purpose is guilty of felony and subject to fine for each offense of up to $40,000, or up to five years in prison or both. (D.C. Code § 8-902[b][2]). Each day of continuing violation is separate offense. (21 DCMR §§ 700.6-700.7). Person who knowingly disposes of medical waste in violation of (D.C. Code § 8-902[a]) is guilty of felony and subject to fine for each offense of up to $40,000, and up to five years in prison. (D.C. Code § 8-902[b][4]). Violators of restrictions on transportation of hazardous materials may be subject to fine of $100 to $10,000, up to one year imprisonment, or both. Violators may also be subject to permit suspension. Each day of continuing violation is separate offense. (D.C. Code § 8-1404). Violators of recycling provisions are subject to fines and denial of issuance or renewal of license to engage in collection of solid wastes; Mayor may also refuse to collect or dispose of wastes not treated as required. (D.C. Code § 8-1017). Violators of anti-litter regulations (14 DCMR D.C. Code §§ 800-803; 21 DCMR §§ 700, 701) may be referred to D.C. Environmental Health School for remedial education (Org. Action No. 73-73). Violators of restrictions on phosphate cleaners are subject to fine of up to $15 for using prohibited cleaning agent and fine of up to $500 for first offense, $1,000 for subsequent offenses, for selling at retail or furnishing prohibited cleaning agent. (D.C. Code § 8-107.04). Violators of D.C. Underground Storage Tank Act of 1990 (D.C. Code § 8-113.01 et seq.) subject to cease and desist order; fines of up to $25,000 per day (D.C. Code § 8-113.09), suspension of licenses (D.C. Code § 8-113.10) and citizen suit (D.C. Code § 8-113.11).

Permits.

District of Columbia, before issuing permits for building, demolition or construction activities must ensure that appropriate erosion prevention measures have been taken. (21 DCMR § 503). Approval must be obtained before installing incinerators and other disposal systems (21 DCMR § 713); permit is required for installation of privies other than water closets connected with sewer (D.C. Code § 8-602); permit is required to modify existing stationary sources of air pollution, to construct new sources, and to operate such sources (20 DCMR §§ 200-299); licenses are required for commercial collection and transportation of solid wastes by vehicle (21 DCMR § 710); permit is required to discharge hazardous substance or pollutant from point source (D.C. Code § 8-103.06); permit is required for dredging and filling activities on underwater land (D.C. Code § 8-103.06); permit is required for real estate construction to control pollution from nonpoint sources (D.C. Code § 8-103.06); permit is required for construction and operation of water treatment facilities (D.C. Code §§ 8-103.13-103.14); permit is required for significant industrial users to discharge into wastewater system (21 DCMR § 1502); permit is required to construct, alter or operate hazardous waste treatment or disposal facility or to generate, store, transport, treat or dispose of hazardous wastes (D.C. Code § 8-1303); and (under temporary authority) District of Columbia may impose fees and charges for issuance of wastewater pretreatment permits (D.C. Code § 8-105.07). Variances from air pollution control act statute may be obtained upon application to Mayor (20 DCMR § 103); variances and temporary exemptions from noise control statute may be obtained upon application to Mayor (20 DCMR §§ 2705-2706); variances from solid waste disposal requirements may be obtained from Director of Dept. of Public Works (21 DCMR § 718); and exemptions from phosphate cleaner restrictions may be obtained from application to Mayor (D.C. Code § 8-107.02[e]). No person or non-governmental entity may cut down, top, girdle, break or destroy any tree having circumference of 55 inches or more without tree removal permit issued by Mayor. (D.C. Law 14-309; D.C. Code § 8-651.01 et seq.; 49 DCMR 888).

Generally, business entities engaged in abatement of asbestos must be licensed and permitted, and employees engaged in abatement projects must be licensed. (D.C. Code § 8-111.04). In cases of emergency and under certain conditions involving removal of resilient floor covering materials, licenses and permits are not required. (D.C. Code § 8-111.04[c]).

13 ESTATES AND TRUSTS

13.01 ADMINISTRATION:

See topic 13.10 Executors and Administrators.

13.02 ADVANCEMENTS:

See topic 13.07 Descent and Distribution.

13.03 ALLOWANCES:

See topic 13.10 Executors and Administrators.

13.04 CLAIMS:

See topic 13.10 Executors and Administrators.

13.05 DEATH:

A rebuttable presumption of death arises from unexplained absence for seven years. (D.C. Code § 14-701).

Survivorship.

Uniform Simultaneous Death Act (1993 Act) is in force. (D.C. Code §§ 19-501 et seq.).

Action for Death.

Executor or administrator of person whose death was caused by wrongful act, neglect, or default of another, occurring in District, may bring action against wrongdoer for damages, provided action is brought within one year of death. Damages recovered (except amount specified by verdict or judgment for reasonable expenses of last illness and burial) do not form part of estate or become subject to debts of deceased, but inure to benefit of surviving spouse or surviving domestic partner and next of kin according to allocation made in verdict or judgment or, in absence of such allocation, according to District statute of distribution, and are assessed only with reference to injury caused by such death to persons entitled to distribution. (D.C. Code §§ 16-2701-2703).

For survival of action on death, see category 5 Civil Actions and Procedure, topic 5.02 Actions, subhead Abatement and Revival.

Certified Copies of Death Certificates.

See category 10 Documents and Records, topic 10.04 Records, subhead Vital Statistics.

Uniform Nonprobate Transfers on Death Act (1991 Act) adopted. (D.C. Code §§ 19-601.01 et seq.).

Revised Uniform Anatomical Gift Act adopted. (D.C. Code §§ 7-1521.01 et seq.).

Living Wills.

See topic 13.16 Wills, subhead Living Wills.

Uniform International Wills Act adopted. (D.C. Code §§ 18-701-710).

13.06 DECEDENTS' ESTATES:

See topics 13.10 Descent and Distribution, 13.08 Executors and Administrators, 13.16 Wills.

13.07 DESCENT AND DISTRIBUTION:

Homestead Allowance.

Decedent's surviving spouse or surviving domestic partner entitled to homestead allowance of $15,000. Allowance has priority over all claims against estate except court costs, publication costs, bond premiums, funeral expenses not exceeding $1,500, and fiduciary and attorney's fees not exceeding $1,000. (D.C. Code §§ 19-101.02, 20-906[a]). If no surviving spouse or surviving domestic partner, $15,000 is to be divided equally among surviving minor and dependent children. (D.C. Code § 19-101.02). These rights are in addition to any benefit under decedent's will, unless otherwise provided by intestate succession or elective share. (D.C. Code § 19-101.02).

Exempt Property.

Decedent's surviving spouse or surviving domestic partner entitled to value not exceeding $10,000 in excess of any security interest therein, in household furniture, automobiles, furnishings, appliances, and personal effects. If no surviving spouse or surviving domestic partner, surviving children are entitled jointly to same value. Rights to exempt property have priority over all claims against estate except court costs, publication costs, bond premiums, funeral expenses not exceeding $1,500, fiduciary and attorney's fees not exceeding $1,000, and homestead allowance and family allowance. (D.C. Code §§ 19-101.03, 20-906[a]). These rights are in addition to any benefit under decedent's will, unless otherwise provided by intestate succession or elective share. (D.C. Code § 19-101.03).

Family Allowance.

In addition to homestead allowance and exempt property, decedent's surviving spouse and dependent children are entitled to reasonable allowance out of estate for maintenance during administration. In absence of surviving spouse or surviving domestic partner, allowance may be made to dependent or minor children or their guardians. If dependent or minor children are not living with surviving spouse or surviving domestic partner, allowance will be divided as appropriate. (D.C. Code §§ 19-101.04-101.05). Family allowance has priority over all claims except homestead allowance. (D.C. Code §§ 19-101.04, 20-906[a]).

Real Estate.

Real property of intestate descends to those persons entitled on intestacy to surplus of personal estate, and such persons take as tenants in common and in same proportions as for surplus of personal estate. (D.C. Code § 19-301 et seq.).

Share of Spouse.

Surviving spouse's or surviving domestic partner's intestate share, if there are no descendants or parents who survive decedent, is entire intestate estate; if surviving descendants are also descendants of surviving spouse or surviving domestic partner, and there is no other descendant of surviving spouse or surviving domestic partner, two-thirds; if parent only survives decedent, three-fourths; if surviving descendants are also descendents of surviving spouse or surviving domestic partner, and surviving spouse or surviving domestic partner has one or more surviving descendants who are not descendants of decedent, one-half; if one or more of decedent's surviving descendants are not descendants of surviving spouse or surviving domestic partner, one-half. (D.C. Code §§ 19-302).

The surplus after distribution to surviving spouse, or if no surviving spouse or surviving domestic partner, all personal property subject to distribution, passes as follows, each class of which member is living taking to exclusion of subsequent classes: (1) To children, and descendants of deceased children by representation; (2) to parents equally or their survivor; (3) to brothers and sisters, and descendants of deceased brothers and sisters by representation; (4) to collateral relatives in equal degree, per capita; (5) to grandparents, or such of them as survive, equally. (D.C. Code §§ 19-305-312).

Surviving Spouse.

See subheads Homestead Allowance, Exempt Property, Family Allowance, Real Estate, and Share of Spouse, supra.

Half Blood.

There is no distinction between "kindred of" whole and half blood. (D.C. Code § 19-315).

Posthumous Children or Other Issue.

Any child or descendant of intestate born after death of intestate has same right of inheritance as if born before his death. (D.C. Code § 19-314).

Children born out of wedlock and their heirs take both real and personal estate from mother or from their father if parenthood has been established, or from each other, or from heirs of each other in same shares as if born in wedlock; and mother and father, if parenthood has been established, and their respective heirs, are capable of inheriting from such children. (D.C. Code § 19-316). Ante nuptial children of parents who marry, and which children are acknowledged by man, are legitimated and capable of inheriting and transmitting property. (D.C. Code § 19-318).

Adopted Children.

See category 14 Family, topic 14.01 Adoption.

Advancements to a child or other descendant are taken into account. If advancement is equal to or greater than distributive share, child or descendant is excluded from any further share but is not liable to refund any amount advanced. Where advancement is less than share, descendant inherits only so much as to make equal share. Surviving spouse can take no advantage by advancements being brought into reckoning. (D.C. Code § 19-319).

Escheat.

In absence of surviving spouse or surviving domestic partner, and relatives within fifth degree, counting from common ancestor to more remote, real and personal property subject to distribution escheats to District for benefit of poor. (D.C. Code § 19-701).

See also topic 13.10 Executors and Administrators.

Uniform Statutory Rule Against Perpetuities Act adopted. (D.C. Code §§ 19-901-907).

13.07A ESTATES: (in property)

See category 21 Property, topic 21.16 Real Property.

13.0813.09 [RESERVED]

13.10 EXECUTORS AND ADMINISTRATORS:

Probate Division of the District of Columbia Superior Court has jurisdiction of administration of estates of decedents.

Code citations refer to Tit. 20 of Code of District of Columbia 1981 edition. Tit. 20 of Code was completely rewritten by District of Columbia Probate Reform Act of 1980 (D.C. Law 3-72), and extensively amended by Probate Reform Act of 1994, (D.C. Law 10-241), which amendments apply to estates of decedents opened on or after July 1, 1995. For questions pertaining to estates of decedents opened prior to this date, refer to Title 20 of Code as it existed prior to D.C. Law 10-241.

Preferences in Right to Administer.

Order of priority in appointment of personal representative, successor personal representative and special administrator is: Personal representative named in will; surviving spouse or surviving domestic partner or children of intestate decedent or surviving spouse or surviving domestic partner of testate decedent; residuary legatees; children of testate decedent; grandchildren; parents; brothers and sisters; next of kin; other relations; largest creditor who applies for administration; any other person. (D.C. Code § 20-303[a]). Whole blood is preferred to half blood in equal degree, and descending to ascending. (D.C. Code §§ 20-303[a][2][A], [B]).

Eligibility and Competency.

Letters will not be granted to any person who has filed renunciation of right to administer, or is under 18, or has mental illness, or is under conservatorship, or has been convicted of felony, or is alien not lawfully admitted for permanent residence, or is judge of any court established under laws of U.S., or is employee of any District of Columbia Court unless such judge or employee is surviving spouse or surviving domestic partner or is related within third degree. (D.C. Code § 20-303[b]). Nonresidents having trust powers may act provided they file with Register of Wills power of attorney designating Register as agent for service of process and notices. (D.C. Code § 20-303[b][7]).

Supervised and Unsupervised Probate.

Under District of Columbia Probate Reform Act of 1994, all probate is unsupervised unless decedent's will directs supervised probate or court finds good cause for supervised probate. (D.C. Code §§ 20-312, 401-406). During unsupervised administration, any interested person or personal representative may petition court for supervised administration, or court itself may initiate such action for good cause. (D.C. Code § 20-403b). During supervised administration, filing of signed waivers by all interested persons shall be treated as change to unsupervised administration. Filing of subsequent demand for filing of inventories and accounts by any such interested person is treated as change back to supervised administration. (D.C. Code §§ 20-403[a], 731).

Supervised personal representatives have unrestricted powers unless letters of appointment enumerate constraints. (D.C. Code § 20-404). Supervised administration is terminated when final account approved, or when personal representative obtains order from court. (D.C. Code §§ 20-405, 1301[a]). Unsupervised personal representatives do not file inventories or accounts, are exempt from requirements for supervised representatives, and are subject to court only after good cause shown for court intervention. (D.C. Code § 20-401[b]). Unsupervised administration terminates when Certificate of Completion filed with court by personal representative (D.C. Code § 20-735[a]), or automatically three years after appointment, unless extended. (D.C. Code § 20-1301[c]).

Qualification.

Each personal representative, whether in supervised or unsupervised administration, is required to file: (a) Statement of acceptance of duties of office, (b) any required bond, and (c) written consent to personal jurisdiction in any action brought in District of Columbia, and, in case of nonresident personal representative, irrevocable power of attorney designating Register of Wills as person upon whom notices and process may be served. (D.C. Code §§ 20-501, 303[b][7]).

Each personal representative must give bond, except domestic banks, trust companies and national banks, unless excused by decedent's will or written waiver of all interested persons, for benefit of all interested persons and creditors. Where so excused or waived, by one or more interested persons, no bond shall be given, except upon written demand by interested person or creditor having interest or claim in excess of $1,000 for bond in amount of such interest or claim. (D.C. Code §§ 20-502[a], [b]).

Issuance of Letters.

Letters must be issued to personal representative by Register of Wills, and must contain: (a) Name and address of court, (b) name of decedent and personal representative, (c) date of appointment of personal representative, (d) date will was admitted to probate, (e) signature of Register and seal of court, (f) date letters were issued, and (g) whether administration is supervised or unsupervised, and, if supervised, any limitations on powers of personal representative. (D.C. Code § 20-503).

Form

LETTERS OF ADMINISTRATION

To all persons who may be interested in the estate of . . . ., deceased:

Administration of the estate of the deceased has been granted on . . . . to . . . . (and the will of the deceased was probated on . . . .).

This administration (is) (is not) (strike inapplicable language) subject to continuing supervision of the court. The powers of the personal representative (are not limited) (are limited as follows: . . .)

The appointment is in full force and effect as of this date.

(SEAL)

Witness: . . . .

Dated: . . . .

Register of Wills.

(D.C. Code § 20-504).

Removal.

Personal representative may be removed for misrepresentation of material facts in proceedings for appointment, willful disregard of court order, inability to discharge duties and powers effectively, mismanagement of property, and failure without reasonable excuse to perform any material duty. (D.C. Code § 20-526[a]).

Special Kinds of Administration.

Provision is made for appointment of special administrator when necessary to protect property, or upon termination of appointment of personal representative and prior to appointment of successor. (D.C. Code § 20-531[a]).

Public Administrators.

No provision.

Inventory and Appraisal.

Personal representative must file, within three months of appointment, inventory of real and personal property owned by decedent at time of death. (D.C. Code § 20-711[a]). Following articles are not included in inventory: Wearing apparel other than furs and jewelry, food for consumption by family, family pictures, family Bibles. All property must be appraised. Personal representative must use standing appraisers, or for good cause shown, special appraisers. However, personal representative may appraise debts, bank accounts and corporate stocks listed on any national and regional exchange or sold on over-the-counter market. (D.C. Code §§ 20-711, 712).

General Powers and Duties.

Personal representative has duty and all powers necessary to collect, manage and preserve property, to pay debts, and to settle and distribute estate in accordance with will or laws relating to intestacy or administration. (D.C. Code §§ 20-701, 702, 741).

Notice of Appointment to Heirs, Legatees and Creditors.

Within 20 days after appointment, personal representative must publish notice of appointment once a week for three successive weeks in newspaper of general circulation in District of Columbia and any other publication court may order. (D.C. Code § 20-704).

Form

" 'To all persons interested in the estate of . . . .

" 'This is to give notice that the undersigned, ... whose address is . . . . was, on . . . . . . appointed personal representative of the estate of . . . . who died on . . . . . ., (with) (without) a will, and that the personal representative will serve in (supervised) (unsupervised) administration.

" 'All persons having any objection to such appointment (or to the probate of the decedent's will) shall file an objection with the Register of Wills on or before . . . . . . (6 months from the date of the first publication of notice under this section).

" 'All persons having claims against the decedent shall present their claims to the undersigned or file their claims with the Register of Wills on or before 6 months from the date of the first publication of this notice.

" 'Any claim not so filed on or before such date, shall be unenforceable thereafter.

" 'Any person who is related to the decedent and who does not receive notice of this appointment by mail within 25 days shall so inform the Register of Wills including such person's name, address, and relationship to the decedent.

. . . .

" 'Personal representative.

" 'Date of first publication:' "

. . . . . .

(D.C. Code § 20-704[a]).

Within 20 days after appointment, personal representative must send by registered or certified mail to heirs and legatees, and creditors who are reasonably identifiable, text of first newspaper notice of appointment and certain general information in form prepared by Court (D.C. Code § 20-704[b]). Within 90 days after appointment personal representative (supervised or unsupervised) must certify to Register that required notices have been given (D.C. Code § 20-704[b-2]).

Presentation of Claims.

Except as provided by statute with respect to claims of U.S. and District of Columbia, all claims against decedent's estate, whether due or to become due, absolute or contingent, liquidated or unliquidated, founded on contract or other basis, are barred unless presented within six months after date of first publication of notice of appointment; and all claims against estate based on conduct of or contract with personal representative are barred unless action is commenced against estate within six months of date claim arose. (D.C. Code § 20-903[a]).

Proof of Claims.

Claimant must present claim against decedent's estate by delivering or mailing, return receipt requested, verified written statement of claim to personal representative with copy to Register of Wills or to Register with copy to personal representative. (D.C. Code § 20-905[a]).

Form.

Statement of claim must state: (1) Name and address of claimant, (2) basis of claim, (3) amount claimed, (4) if not yet due, when due, (5) if contingent, nature of contingency, and (6) if secured, description of security. (D.C. Code § 20-905[b]).

Approval or Rejection of Claims.

For claims duly presented within time limit of six months, personal representative must notify claimant: (1) That claim has been allowed in stated amount, (2) that claim has been disallowed in whole or in part and advising claimant of procedures and time limitations for contesting such disallowance, or (3) that personal representative will petition Court to determine whether claim should be allowed. Claim is forever barred to extent of disallowance unless claimant files verified complaint within 60 days after mailing of notice of disallowance. If no action by personal representative, claimant may file verified complaint. (D.C. Code § 20-908[a], [b]).

Payment of Claims.

Personal representative must within eight months from date of first publication of notice of appointment, unless Court extends time, pay claims allowed against estate. (D.C. Code § 20-909[a]). If unsecured proven claim is not yet due, or contingent or unliquidated claim becomes due or certain before distribution of estate, and claim has been established by proceeding, it is paid in same manner as presently due claims of same class. (D.C. Code § 20-911[a]). Provision made for other cases of unsecured claims or secured future claims. (D.C. Code § 20-911[b]-[c]). Secured creditor who surrenders security must be paid full amount. (D.C. Code § 20-912[a]). Secured creditor who does not surrender security must be paid full amount of claim less amount realized from security or value of security. (D.C. Code § 20-912[b]).

Priorities.

If assets of estate are insufficient to pay all claims in full, personal representative must make payment in following order: (1) Court costs, publication costs, and bond premiums, (2) funeral expenses not exceeding $1,500, (3) fiduciary and attorney's fees not exceeding $1,000, (4) homestead allowance and family allowance, (5) exempt property, (6) hospital and medical expenses of decedent's last illness, (7) claims for rent in arrears for which attachment might be levied by law, (8) judgments and decrees of courts in District of Columbia, (9) all other just claims. (D.C. Code § 20-906).

Sales.

Personal representative is empowered to sell real and personal property without court order. (D.C. Code § 20-741[6]). Any interested person may move Court to have priority placed on sale of any real or personal property; and upon filing of such motion, no sale shall take place until all interested persons have been given notice and Court after hearing has made appropriate order. (D.C. Code § 20-703).

Actions by Representative.

Personal representative may prosecute or submit to arbitration actions, claims or proceedings in any appropriate jurisdiction for benefit of estate, including commencement of any personal action that decedent might have commenced. (D.C. Code § 20-741[18]).

Actions against Representative.

Personal representative may defend or submit to arbitration actions, claims or proceedings in any appropriate jurisdiction for benefit of estate. (D.C. Code § 20-741[18]). No proceeding to enforce claim against estate may be revived or commenced before appointment of personal representative. After appointment, and until estate is closed, procedures described under subheads Presentation of Claims, Proof of Claims, Approval or Rejection of Claims, and Payment of Claims must be followed. After estate has been closed, creditor whose claim has not been barred may recover directly from persons to whom property has been distributed up to amount of distribution or from personal representative individually, provided that any such claim is barred one year from date of distribution, or 30 or 60 days from date of receipt of notice and copy of final account (D.C. Code §§ 20-726, 736; D.C. Code §§ 20-901, 1302, 1303). No execution upon or levy against any property of estate under any judgment against decedent or personal representative is permitted. (D.C. Code § 20-914).

Intermediate Accountings.

Supervised personal representative must file his first account within one year and one day of first publication of notice of appointment, and must file subsequent accounts thereafter every nine months until final account. (D.C. Code § 20-724[a]).

Final Accounting and Settlement.

No time limit specified.

Consent Settlement.

Supervised personal representative is excused from filing inventories and accounts if each heir or legatee signs written waiver filed with Register of Wills. (D.C. Code § 20-731[a]).

Distribution.

Subject to will and needs of administration, personal representative must distribute in kind subject to following: (a) Specific legatee must receive object of legacy, (b) family allowance may be satisfied by value in kind if person entitled has not demanded payment in cash, property distributed in kind is fair market value as of date of distribution, and residuary legatee does not object, and (c) residuary estate must be distributed in kind if no objection and it is practicable to distribute undivided interests. (D.C. Code § 20-1102). For intestate property, see topic 13.07 Descent and Distribution; for legacies, see topic 13.16 Wills.

Liabilities.

Personal representative, whether supervised or unsupervised, is fiduciary who, in addition to specific duties expressed in Tit. 20 of D.C. Code, is under general duty to settle and distribute estate in accordance with will or laws relating to intestacy as would prudent person in such matters. (D.C. Code § 20-701[a]). Supervised personal representative must distribute all assets in his possession or control within 30 days of approval of final account (D.C. Code § 20-701.01[b]).

Compensation.

Personal representative is entitled to reasonable compensation. (D.C. Code § 20-751). Courts will not review compensation of personal representatives, attorneys or agents unless heir or legatee complains. Upon notice and hearing, court may review reasonableness of compensation. (D.C. Code § 20-753[a]). If court determines fees were excessive, and orders refund, that alone cannot be basis for finding misappropriation of funds or violation of ethics or disciplinary rules. (D.C. Code § 20-753[c]). Factors court considers include: (1) Reasonable relationship of proposed compensation to work, (2) estimate of costs and any change in costs, (3) reasonableness of time spent including hours and usual hourly compensation, (4) nature and complexity, and results achieved, and (5) whether time limitations have been met, or reasons for any delay. (D.C. Code § 20-753[b]).

When Administration Unnecessary.

When only assets consist of not more than two motor vehicles and all debts and taxes are paid, title may be transferred without administration. (D.C. Code §§ 20-357, 50-1501.02[e][6]). Also, see subhead Small Estates, infra.

Small Estates.

Small estates consisting of property not in excess of $40,000 may be administered under simplified procedures. Personal representative is not required to be represented by attorney or to give bond, and is not entitled to receive commission. (D.C. Code §§ 20-351-354[a]).

Foreign Executors or Administrators.

Foreign personal representative of nondomiciliary is not required to obtain letters in District of Columbia for any purpose. (D.C. Code § 20-341[a]). If estate has property in District of Columbia, foreign personal representative must file with Register of Wills copy of his appointment and copy of will (D.C. Code § 20-341[b]), and publish notice of appointment once a week for three consecutive weeks (D.C. Code § 20-343[a]). Foreign personal representative may exercise powers of office and may sue and be sued in District. (D.C. Code § 20-342).

Uniform Fiduciaries Act adopted. (D.C. Code §§ 21-1701-1712).

Uniform Principal and Income Act (1997 Act) adopted. (D.C. Code §§ 28-4801.01-4806.02).

Uniform Act for Simplification of Fiduciary Security Transfers Act adopted. (D.C. Code §§ 28-2901-2909). Act prevails over inconsistent provisions of Art. 8 of Uniform Commercial Code. (D.C. Code § 28:10-103). See category 3 Business Regulation and Commerce, topic 3.09 Commercial Code.

13.11 FIDUCIARIES:

See topics 13.08 Executors and Administrators, Trusts; category 14 Family, topic 14.08 Guardian and Ward.

13.12 INTESTACY:

See topic 13.07 Descent and Distribution.

13.13 [RESERVED]

13.14 PROOF OF CLAIMS:

See topic 13.10 Executors and Administrators; category 5 Civil Actions and Procedure, topic 5.18 Pleading.

13.15 TRUSTS:

Equitable principles governing trusts under common law are generally applied, absent statute on subject. (D.C. Code § 19-1301.06).

Uniform Trust Act adopted. (D.C. Code §§ 19-1301.01-1311.11).

Eligibility and Competency.

Domestic business corporations not organized as trust companies under D.C. Code § 26-1301 may not accept trusts. (D.C. Code § 29-101.03). Foreign corporations may not accept trusts unless they comply with requirements applicable to domestic trust companies. (D.C. Code § 26-1335).

Bequests and Devises to Inter Vivos Trusts.

See topic 13.16 Wills, subhead Bequests and Devises to Trusts.

Uniform Common Trust Fund Act adopted. (D.C. Code §§ 26-401-404).

Uniform Principal and Income Act adopted. (D.C. Code §§ 28-4801.01-4806.02).

Gifts to Minors.

See category 14 Family, topic 14.10 Infants.

Uniform Fiduciaries Act adopted. (D.C. Code §§ 21-1701-1712).

Uniform Simplification of Fiduciary Security Transfers Act adopted. (D.C. Code §§ 28-2901-2909). Act prevails over inconsistent provision of Art. 8 of Uniform Commercial Code. (§ 28:10-103). See category 3 Business Regulation and Commerce, topic 3.09 Commercial Code.

Uniform Custodial Trust Act adopted. (D.C. Code §§ 19-1101-1120).

Perpetuities.

See category 21 Property, topic 21.13 Perpetuities.

Pour Over Trusts.

See topic 13.16 Wills, subhead Bequests and Devises to Trusts.

13.16 WILLS:

Any person at least 18 years of age may make valid will and testament or codicil if at time of its execution or acknowledgment he or she was of sound and disposing mind and capable of executing valid deed or contract. (D.C. Code § 18-102).

Testamentary Disposition.

All real and personal property that might pass by deed or gift, or that would descend to decedent’s heir or other representatives in case of intestacy, are subject to disposal by will, testament or codicil. (D.C. Code § 18-301). No statutory restrictions on devises to religious or charitable institutions.

Will executed after Jan. 1, 1902 which, by words of general import, devises all of testator’s estate or property operates as valid devise of real property acquired by testator after execution of will, unless contrary intention appears therefrom. (D.C. Code § 18-305[b]).

Execution.

All wills and testaments (other than valid nuncupative wills [D.C. Code § 18-107]) must be in writing and signed by testator or by some other person in his presence and by his express direction and must be attested and subscribed in presence of testator by at least two credible witnesses, or else they are void. (D.C. Code § 18-103).

Attestation Clause.

Wills are invalid unless they are (a) in writing and signed by testator or in testator’s presence and at testator’s express direction and (b) attested and subscribed in presence of testator, by two credible witnesses, at minimum. (D.C. Code § 18-103).

Nuncupative wills are void, except that soldiers in active service and mariners at sea may dispose of personal property by such will during their last sickness, if oral will proved by two witnesses asked to act as such by testator and reduced to writing within ten days. (D.C. Code § 18-107).

Revocation.

No will or codicil, or any part thereof, may be revoked, except by later will or codicil or other writing declaring such revocation; by burning, cancelling, tearing, or obliterating such will or codicil with intent to revoke by testator or in his presence and by his direction and consent; or by implication of law. (D.C. Code § 18-109).

However, the common law rule that marriage and the birth of a child capable of inheriting revoke a prior will, if both occurred after the execution thereof, is in force in the District. (147 F.2d 880). Divorce with property settlement presumptively revokes will in favor of former spouse. (435 A.2d 379).

Revival.

No will, codicil, or any part thereof, once in any manner revoked, can be revived, other than by reexecution or by a codicil. (D.C. Code § 18-109[b]).

Testamentary gifts to attesting witnesses are void, but such witnesses are competent to prove will. Such witnesses may take portion of testamentary gift entitled to in case of intestacy. (D.C. Code § 18-104).

Bequests and Devises to Trusts.

"Pour Over" trusts permitted. Bequests and devises may be made to inter vivos trust or testamentary trust. Unless will or codicil provides otherwise, inter vivos trust may be amended subsequent to testator's will; termination of trust by its terms will not invalidate bequest; and revocation of inter vivos trust prior to death of testator will invalidate bequest. (D.C. Code § 18-306).

Testamentary Guardian.

See category 14 Family, topic 14.08 Guardian and Ward, subhead Selection of Guardians.

Probate.

See topic 13.10 Executors and Administrators. Custodian of will or codicil must file instrument with Register of Wills or Probate Court or deliver to executor named in instrument within 90 days following death of testator or be fined not more than $500. (D.C. Code § 18-111).

Probate proceedings shall include: Information specified in D.C. Code § 20-304 (for standard or abbreviated proceeding) or D.C. Code § 20-352 (for small estate proceeding) and original of will, or copy if original previously filed.

Supervised and Unsupervised Probate.

See topic 13.10 Executors and Administrators.

Standard Probate Proceeding.

Petitioner must give notice to all known interested persons and shall publish notice each week for two successive weeks in newspaper of general circulation in District of Columbia, in form prescribed by Rules of Probate Division of Superior Court. (D.C. Code § 20-323). Unless Court orders otherwise, proof of execution will be made by affidavits of witnesses in form provided in D.C. Code § 20-324(3). Following proof of execution, Court will enter order admitting will to probate and appointing one or more personal representatives, or determining that decedent died intestate. Court may order that administration will be supervised as provided in D.C. Code § 20-402. (D.C. Code § 20-324[1], [2]).

Abbreviated Probate Proceeding.

Proceeding may be conducted without prior notice required for Standard Probate, and due execution of will will be presumed, and will may be admitted to probate either: (a) If will appears to have been duly executed and contains recital by attesting witnesses of facts establishing due execution; or (b) upon verified statement of such facts by any person having personal knowledge of circumstances of execution, whether or not such person was attesting witness. (D.C. Code §§ 20-311, 312[b]).

Small Estate Proceeding.

If property of decedent subject to administration in District has value of $40,000 or less, property may be administered as small estate. (D.C. Code § 20-351). Petition must be verified and must be filed by person eligible for appointment as personal representative of estate. (D.C. Code § 20-352). If Court determines that petition (and any other information required to be filed) is accurate, Court will appoint personal representative, direct payment of allowable funeral expenses and family allowance, direct such sales of property as may be necessary to pay funeral expenses and family allowance, and, if any property remains, admit will to probate, and direct issuance of notice. (D.C. Code § 20-353). Personal representative must report to Court immediately any property of decedent discovered after petition. (D.C. Code § 20-355).

Creditors filing claims in excess of $500 constitute interested persons. (D.C. Code § 20-101[d][1][E]). All creditors known or reasonably identifiable must be sent notice by personal representative within 20 days of appointment. (D.C. Code § 20-704[b]). Any interested person or creditor having interest or claim in excess of $1,000 may make written demand that personal representative give bond in amount of person's or creditor's interest or claim. (D.C. Code § 20-502[a-1]).

Fraud.

Person injured by fraud may obtain appropriate relief from any person who benefitted from fraud, other than bona fide purchaser. Proceeding must be commenced within two years after discovery of fraud, but no later than five years after commission of fraud as against non-perpetrator of fraud. Person convicted of fraud in probate proceeding is subject to penalties under District of Columbia Theft and White Collar Crimes Act of 1982. (D.C. Code § 20-108.01).

Self-proved Wills.

See subhead Probate, topic Abbreviated Probate Proceeding, supra.

Living Wills.

Any person 18 years or older may execute declaration, in form and with witnesses specified by statute, directing withholding or withdrawal of life-sustaining procedures in event of terminal illness. (D.C. Code §§ 7-621-622). Likewise, any adult may execute enforceable durable power of attorney for health care. (D.C. Code §§ 21-2205). Unless durable power of attorney for health care provides otherwise, dissolution, annulment or termination of marriage in accordance with D.C. Code § 32-702(d) automatically revokes designation of former spouse or domestic partner as attorney in fact to make health care decisions for principal (D.C. Law 17-231 amending § 21-2208[e]).

Contest.

Except with respect to small estates (for which 30-day period may become applicable under D.C. Code § 20-353[b]), any person may contest validity of will by filing verified complaint within six months of publication of notice of appointment or reappointment of personal representative. Any person filing such complaint must give notice to all other interested persons. (D.C. Code § 20-305).

Legacies may be distributed during administration and must be distributed within 30 days of approval of final account, unless time extended by Court. (D.C. Code §§ 20-701.01[b], 20-741[22]). If specifically bequeathed item not part of estate, legacy generally fails, unless testator clearly evidenced intent that proceeds of sale of item during lifetime would stand in its place. (439 A.2d 516).

Unclaimed Legacies.

All intangible personal property held in fiduciary capacity for benefit of another person is presumed abandoned if no communication etc. from owner within three years after it becomes payable. (D.C. Code § 41-111[a]). See category 21 Property, topic 21.01 Absentees, subhead Escheat.

Lapse.

If legatee or devisee predeceases testator, leaving issue surviving at testator's death, such issue take their ancestor's bequest or devise, unless will evidences contrary intent. If there are no issue of deceased legatee or devisee, lapsed legacy or devise included in any residuary devise or bequest, unless will evidences contrary intent. (D.C. Code § 18-308).

Children.

Surviving minor or dependent children not living with surviving spouse or surviving domestic partner, are entitled to appropriate share of family allowance. (D.C. Code § 19-101.04[a]). See topic 13.07 Descent and Distribution, subhead Family Allowance, supra. Each surviving minor or dependent child, in absence of surviving spouse or surviving domestic partner, is entitled to proportionate share of homestead allowance of $15,000, and such children are also entitled jointly to value not exceeding $10,000 in household furniture, automobiles, furnishings, appliances and personal effects. (D.C. Code §§ 19-101.02-101.03). See topic 13.07 Descent and Distribution, subheads Homestead Allowance and Exempt Property. These rights are in addition to any benefit under decedent's will, unless otherwise provided by intestate succession or elective share. (D.C. Code § 19-101.02-101.04). For doctrine of implied revocation of will in event of birth of child after execution of will, see subhead Revocation, supra.

Election.

A devise or bequest to a surviving spouse or surviving domestic partner bars his or her share (other than intestate share of any property not disposed of by decedent's will) in decedent's estate (including dower rights, if any) unless it be otherwise expressed in will (D.C. Code § 19-112) or unless he or she files written renunciation in probate court within six months after will is probated (D.C. Code § 19-113). By so renouncing, surviving spouse or surviving domestic partner becomes entitled to share of decedent's estate to which he or she would have been entitled had decedent died intestate, but not in excess of more than one half of net estate bequeathed and devised or not more than one half of net personal estate bequeathed in real estate devised. (D.C. Code § 19-113[e]). If decedent has made no devise or bequest to surviving spouse or surviving domestic partner or if nothing passes by such devise or bequest, surviving spouse or surviving domestic partner is entitled to take legal share without filing written renunciation. (D.C. Code § 19-113[d]). If surviving spouse or surviving domestic partner does not renounce, he or she is entitled to receive benefit of all provisions in his or her favor in will of deceased spouse and takes intestate share in any estate of decedent not disposed of by will. (D.C. Code § 19-114).

Foreign Executed Wills.

Will must be valid as regards form, irrespective of place where it is made, of location of assets, and of nationality, domicile, or residence of testator, if it is made in form of international will. (D.C. Code § 18-702). Such requirements include that will be in writing and that testator declare that will is his or her will in presence of two witnesses and of person authorized to act in connection with international wills. (D.C. Code § 18-703). Person authorized to act in connection with international will is person admitted to practice law before courts of District of Columbia and person in good standing as active law practitioners. (D.C. Code § 18-709).

Foreign Probated Wills.

See topic 13.10 Executors and Administrators, subhead Foreign Executors or Administrators.

Foreign executed or foreign probated will must comply with District statute in order to pass title to real estate in the District. However, filing of certified foreign probated will in office of Register of Wills is sufficient to pass title to such real estate. (D.C. Code § 14-504). (See category 10 Documents and Records, topic 10.04 Records.)

Simultaneous Death.

See topic 13.05 Death, subhead Survivorship.

Testamentary Trusts.

See topic 13.15 Trusts.

Uniform Anatomical Gift Act (1968) adopted. (D.C. Code §§ 7-1521.01-1521.11).

Uniform International Wills Act adopted. (D.C. Code §§ 18-701-710).

14 FAMILY

14.01 ADOPTION:

Adoption is governed by Tit. 16, D.C. Code §§ 301-316.

Any person, provided spouse (if any) joins in petition or (if spouse is natural parent of adoptee) consents thereto, may petition Superior Court for adoption of any minor or adult. If marital status of petitioner changes after time of filing petition and before time of decree of adoption is final, petition must be amended accordingly. (D.C. Code §§ 16-302-303).

Consents Required.

If adoptee is over 18 years old, only consent required is that of adoptee. (D.C. Code § 16-304[f]).

If adoptee is minor, consent required of adoptee (if 14 or over), and also: (a) Both parents, if both are alive; or (b) living parent of adoptee, if one parent is dead; or (c) court appointed guardian of adoptee; or (d) licensed child-placing agency or Mayor in cases where parental rights have been terminated by court of competent jurisdiction or by release of parental rights to Mayor or licensed child-placing agency in accordance with consents obtained pursuant to (a) through (c) above and adoptee has been lawfully placed under care and custody of such agency or Mayor; or (e) from Mayor in any situation not provided for above. (D.C. Code § 16-304[b]).

Status of natural parent as minor is not bar to parent’s consent to adoption. (D.C. Code § 16-304[c]).

Consent is not required (a) when parent who has been properly notified cannot be located or has abandoned prospective adoptee and voluntarily failed to contribute for period of at least six months before filing of petition or (b) if court, after hearing, finds that withholding required consent is in best interest of child. (D.C. Code § 16-304[d]-[e]).

Conditions Precedent.

See infra, subhead Decree.

Jurisdiction is conferred on Superior Court (Family Division) if petitioner is legal resident of, or has actually resided at least one year prior to filing of petition in District, or if adoptee is in legal care, custody or control of Mayor or D.C. licensed child-placing agency. (D.C. Code § 11-1101[9]; D.C. Code § 16-301).

Petition must state name, sex, date and place of birth of adoptee; names, addresses and residences of natural parents (if known) except that information regarding natural parents need not be set forth in adoption proceeding which is consented to by Mayor or licensed child-placing agency; name, address, age, business or employment of petitioner, and name of employer (if any) of petitioner; relationship (if any) of adoptee to petitioner; race and religion of adoptee, or natural parents or parent; race and religion of petitioner; date that adoptee commenced residing with petitioner; and any change of name which may be desired. If any facts are unknown to petitioner, petitioner shall state this fact. (D.C. Code § 16-305). Petition need not contain information concerning race and religion if petitioner is spouse of natural parent of adoptee and natural parent joins in petition or consents thereto. (D.C. Code § 16-308).

Proceedings.

Immediately upon filing of petition, notice of adoption proceedings by summons, by registered letter, or otherwise as court may direct, must be given to persons whose consent is necessary, except that persons who have formally consented, shall be held to have waived requirement of notice. (D.C. Code § 16-306). Upon filing of petition, Court shall direct licensed child-placing agency, if there is one supervising case, otherwise Mayor, to investigate and report findings with recommendations within 90 days or such other time as extended by Court. (D.C. Code §§ 16-307, 309[a]). Whenever adoptee is adult or petitioner is spouse of natural parent and natural parent consents or joins in petition, court may dispense with investigation, report, and interlocutory decree. (D.C. Code § 16-308).

Decree.

Court may enter final or interlocutory decree of adoption when it is satisfied that adoptee is suitable for adoption by petitioner, petitioner is fit and able to give adoptee proper home and education, adoption is in best interest of adoptee, and adoption form has been completed by petitioner pursuant to § 10 of Vital Records Act of 1981. (D.C. Code § 16-309[b]). Final decree of adoption may not be entered until adoptee has lived with adopting parents for six months. (D.C. Code § 16-309[c]). Court may enter interlocutory decree which automatically becomes final on date specified (not less than six months nor more than one year from entry of interlocutory decree) unless set aside for cause shown. (D.C. Code § 16-309[d]). Court may revoke interlocutory decree at any time before it becomes final on its own motion or motion by party to adoption, with notice prior to revocation given to all parties who were given notice of original adoption, with opportunity to be heard. (D.C. Code § 16-309[e]). All adoption proceedings are confidential. (D.C. Code § 16-309[f]).

Finality of Decree.

Attempt to invalidate final adoption decree by reason of jurisdiction or procedural defect, must be filed within one year following effective date of final decree. (D.C. Code § 16-310).

Name.

Family name of adoptee must be changed to that of adopter unless decree provides otherwise, and the given name of adoptee may be fixed or changed at same time. (D.C. Code § 16-312[c]).

Effect of Adoption.

Adoption establishes relation of natural parent and natural child between adopter and adoptee for all purposes, including mutual rights of inheritance and succession. All rights and duties between adoptee, natural parents, their issue, collateral relatives, etc., are cut off, except when natural parent is spouse of adopting parent. (D.C. Code § 16-312[a]).

Sealing of Papers.

Records and papers from filing of petition are sealed and may not be inspected by any person, including parties to proceeding, except upon order of court, and then only when court is satisfied that welfare of child will be promoted or protected. (D.C. Code § 16-311).

Setting Aside Adoption.

See subhead Finality of Decree, supra.

Birth Certificates.

Unless otherwise requested in petition, upon issuance of final adoption decree, Registrar must make new record of birth in new name with names of adopters and seal original birth certificate and order of Court. (D.C. Code § 16-314).

Surrogate parenting contracts are prohibited and unenforceable. Violators are subject to civil penalty not in excess of $10,000, and/or imprisonment of not more than one year. (D.C. Code §§ 16-401-402).

14.02 ALIMONY:

See topic 14.06 Divorce.

14.03 COMMUNITY PROPERTY:

System not in effect.

14.04 DESERTION:

See topics 14.06 Divorce, 14.09 Husband and Wife.

14.05 DISSOLUTION OF MARRIAGE:

See topic 14.06 Divorce.

14.06 DIVORCE:

This subject is governed by Tit. 16, D.C. Code §§ 901-925 of 2001 Edition of D.C. Code, as amended.

Grounds for Absolute Divorce.

(1) Both parties to marriage have mutually and voluntarily lived separate and apart without cohabitation for six months next preceding commencement of action; (2) both parties have lived separate and apart without cohabitation for one year next preceding commencement of action. (D.C. Code § 16-904[a]). For purposes of (1) and (2), parties who have pursued separate lives, sharing neither bed nor board, shall be deemed to have lived separate and apart from one another even though they reside under same roof or separation is pursuant to court order. (D.C. Code § 16-904[c]). Upon application of party who has been granted decree of legal separation, court may enlarge decree to absolute divorce if it finds (based on affidavits) that no reconciliation has taken place or is probable, and separation has continued voluntarily and without interruption for six-month period, or without interruption for one year. (D.C. Code § 16-905[b]).

Grounds for Legal Separation.

(1) Both parties have mutually and voluntarily lived separate and apart without cohabitation; (2) both parties have lived separate and apart without cohabitation for period of one year next preceding commencement of action. (D.C. Code § 16-904[b]). For purposes of (1) and (2), parties who have pursued separate lives, sharing neither bed nor board, shall be deemed to have lived separate and apart from one another even though they reside under same roof or separation is pursuant to court order. (D.C. Code § 16-904[c]).

Citizenship Requirements.

No statutory provisions.

Residence Requirements.

No action for divorce or legal separation shall be maintainable unless one of parties to marriage has been bona fide resident of District for at least six months next preceding commencement of action. Member of U.S. Armed Forces residing in District for period of six continuous months during period of service shall be deemed District resident for purposes of this section only. (D.C. Code § 16-902).

Jurisdiction is vested in Family Division of Superior Court. (D.C. Code § 11-1101; D.C. Code § 16-901). Court has jurisdiction over person for claims relating to marital or parent/child relationship if: (a) Plaintiff resides in District when suit is filed; (b) person is personally served with process; and (c) in cases related to marital relationship, parties were domiciled in District immediately prior to separation, or cause of action for spousal support arose under District law or agreement executed in District; or (d) in cases relating to parent/child relationship, child was conceived in District and person is parent or alleged parent, or child resides in District as result of act, directive or approval of person, or person has resided with child in District. (D.C. Code § 13-423[a][7]).

Process.

By personal service within or without jurisdiction or by publication if defendant cannot be found and if it appears by affidavit that defendant is nonresident or has been absent from District for six months. (D.C. Code §§ 13-336-337).

Pleading.

Governed by Superior Court Rules of Family Division. (D.C. Code § 16-917; “co-respondents as defendants” has been repealed).

Practice.

Proceedings same as in other civil action causes except that no decree for divorce, or decree annulling marriage, will be rendered on default without proof, and no admission in answer will be taken as proof of grounds charged in complaint, which must be proved by other evidence. (D.C. Code § 16-919). Practice also requires that determination be made by court whether to appoint attorney for absent defendant prior to entry of decree by default. Where court deems necessary, disinterested attorney may be appointed to defend, his compensation to be determined by court and assessed to parties as court directs. In child custody case, court may appoint disinterested attorney to appear for child and represent his best interest. (D.C. Code § 16-918).

Judgment or Decree.

Decree or judgment annulling or dissolving marriage or granting absolute divorce is effective 30 days after docketing of decree of judgment, unless either party applies for stay pending appeal. Parties may obtain immediate finality by filing joint waiver of right to appeal. (D.C. Code § 16-920).

Temporary Alimony.

Court may require payment of alimony during pendency of suit for maintenance of spouse or domestic partner and minor children. (D.C. Code § 16-911[a][1]).

Allowance for Prosecution of Suit.

Money for conduct of case, including counsel fees, may be granted to spouse or domestic partner during pendency of suit. (D.C. Code § 16-911[a][1]).

Permanent Alimony.

Court may require payment of alimony. (D.C. Code § 16-913). Jurisdiction of cause is retained to enter further orders where alimony has been granted. (D.C. Code § 16-914.01). Award of alimony may be retroactive to date of filing of pleading requesting alimony. (D.C. Code § 16-913[c]). Modification of alimony may not be retroactive. (D.C. Code § 46-204[c]). There is no statutory provision for termination of alimony upon remarriage. If spouse obtains foreign ex parte decree of divorce, then, upon personal service of that spouse in D.C., other spouse may obtain court decree for maintenance and suit money. (D.C. Code § 16-916[b]).

Division of Property of Spouses.

See subhead Property of Spouses, infra.

Property of Spouses.

In absence of valid ante nuptial or postnuptial agreement or decree of legal separation disposing property of spouses, upon entry of final decree of divorce, each party is assigned his sole and separate property acquired prior to marriage and his sole and separate property acquired during marriage by gift, bequest, devise or descent; and all other property accumulated during marriage is distributed regardless of whether title is held individually or in form of joint tenancy or tenancy by entirety. This property shall be distributed in equitable, just and reasonable manner after considering such factors as: duration of marriage, age, health, occupation, amount and sources of income, vocational skills, employability, contribution as homemaker, contribution to other party's education, assets, debts, provisions for custody of minor children, etc. (D.C. Code § 16-910). During pendency of action for divorce, Court may sequestrate property and apply income if spouse fails or refuses to pay alimony or suit money (D.C. Code § 16-911[a][3]), enjoin disposition of spouse's property to avoid collection of allowances so required (D.C. Code § 16-911[a][2]), and, if party under court order to make payments is in arrears, Court may order party to make assignment of part of salary, wages, earnings or income to person entitled to receive payments (D.C. Code § 16-911[a][4]).

Change of Wife's Name.

In granting decree of absolute divorce, court may, upon party's request, restore party's birth-given or other previous name. (D.C. Code § 16-915).

Custody of Children.

Court may determine who shall have care and custody of infant children either during or after proceeding and will retain jurisdiction of cause for future orders relative thereto. (D.C. Code § 16-914.01). In determining care and custody of infant children, best interest of child shall be primary consideration. (D.C. Code § 16-914[a][1][A]). Court may determine, in accordance with D.C. Code § 16-914, case and custody of minor child pending final determination of those issues. (D.C. Code § 16-911[a][5]). In any custody proceeding, court may order each parent to submit detailed parenting plan. (D.C. Code § 16-914[c]).

Allowance for Support of Children.

Court may order payment by father or mother of sufficient funds for support of minor children (including health insurance or unreimbursed medical expenses of child) either before or after entry of final decree. (D.C. Code §§ 16-911[a][1], 16-916[c-1]). Guidelines set forth presumptive guidelines for payment of support; establish Guideline Commission. (D.C. Code §§ 16-916.01-916.02). Where duty of support exists, expedited hearing will be held and temporary support may be ordered. (D.C. Code § 16-924). Court may require bond, security or other guarantee to secure overdue support obligations. (D.C. Code § 16-916[e][1]). Child support payments are withheld from earnings unless court approves written agreement to alternative method of payment. (D.C. Code § 46-207, 205). Spousal support paid by either parent to other parent subject to support order is deducted from gross income of paying party before computing child support obligation. (D.C. Code § 16-916.01[d][3]). Parent more than 60 days behind in child support payments is subject to revocation or nonrenewal of drivers' license, car registration, or any professional or business license upon 30 days notice from Mayor. (D.C. Code § 46-225.01). Court will retain jurisdiction of cause for entry of future orders concerning support. (D.C. Code § 16-914.01). Modification of child support may not be retroactive. (D.C. Code § 46-204[c]). Parent who willfully fails to obey order of child support may be held in criminal contempt and committed to jail for no more than 180 days. (D.C. Code § 46-225.02[b][1][A]). Uniform Interstate Family Support Act is in force. (D.C. Code §§ 46-301.01 et seq.). See category 6 Courts and Legislature, topic 6.05 Uniform Laws.

Legitimacy of Issue.

Child's relationship to its mother is established by its birth to her. Child's relationship to its father is established by providing by preponderance of evidence that he is father. Statute establishes presumptions as to relationship of child to its father. (D.C. Code § 16-909).

Remarriage.

There is no prohibition of remarriage after decree has become absolute.

Foreign Divorces.

No statutory provisions.

Separation agreements to settle financial affairs of spouses who are not able to maintain harmonious marriage relationship are encouraged and will be enforced in absence of fraud, duress, concealment, or overreaching. (App. D.C., 317 A.2d 521).

Annulment of Marriage.

See topic 14.11 Marriage.

Ante Nuptial Contracts.

See topic 14.09 Husband and Wife.

14.07 DOMESTIC PARTNERS:

Two unmarried individuals may register as "domestic partnership" and obtain certain benefits otherwise reserved to married persons. (D.C. Code § 32-701 et seq.). Rules establishing procedures and fees for registering domestic partners are found at D.C. Code § 49-5419. Health benefits for domestic partners of persons who work for D.C. government, and their dependent children, are found at D.C. Personnel Manual, C. 21B.

Domestic partners and close friends are among persons authorized to make health care decisions for incapacitated persons. (D.C. Code §§ 21-2202-2210).

14.07A DOMESTIC VIOLENCE:

Uniform Interstate Enforcement of Domestic Violence Protection Orders Act adopted. (D.C. Code §§ 16-1041-1048).

14.08 GUARDIAN AND WARD:

Superior Court (Probate Division) has exclusive jurisdiction to appoint guardians of infants' estates. (D.C. Code §§ 11-921; 21-103-105).

Selection of Guardians.

Father and mother are natural guardians of person of minor children, and on death or incapacity of either, natural guardianship of person devolves upon survivor, provided that either may, by deed or last will, appoint guardian of property subject to approval of proper court of District; guardianship of person and of property are each subject to power of court of competent jurisdiction to appoint some other person guardian when welfare of children requires it. (D.C. Code §§ 21-101-105).

Testamentary Guardian.

Every father or mother, whether of full age or not, when other parent is dead, may, by last will and testament, appoint guardian of person to have care, custody, and tuition of his or her infant child, other than married infant; and if person so appointed shall refuse trust, Probate Court may appoint another person in his place. (D.C. Code § 21-102). Nonresident may act as testamentary guardian. (D.C. Code § 21-110).

Selection by Court.

If an infant has neither natural nor testamentary guardian, a guardian of the person may be appointed by the probate court in its own discretion or on the application of a next friend of such infant. (D.C. Code § 21-103).

When infant under 18 becomes entitled to or acquires real or personal property, Probate Court may appoint guardian of his estate, who may be either guardian of his person or different person. (D.C. Code § 21-106). If infant is under 14, father or mother, or spouse if infant is married to person 18 years or older, is entitled to preference, if deemed suitable by court. (D.C. Code § 21-107).

Selection by Infant.

If infant is over age of 14, he is entitled to select his guardian, and if one had been appointed before he attained age of 14 he may select new guardian, subject, in both cases, to approval of court. Such guardian is under same obligations as if selected by court. When infant marries, he or she may select his or her spouse as guardian of his or her estate, with approval of court. (D.C. Code §§ 21-108-109).

Eligibility and Competency.

The only direct statutory limitation is a prohibition against any person, except trust companies, acting as guardian of the person of more than five infants at one time, unless such infants are members of the same family, or as guardian of the estates of more than five infants unless such infants are entitled to share in same estate. (D.C. Code §§ 21-103[b]-106[c]).

Appointment of Guardian.

Except in the cases of natural and testamentary guardians of the person, appointment of guardians is made by the proper court as stated above.

Qualification.

Every guardian appointed by court, except corporations authorized to act as guardians and testamentary guardians, unless otherwise directed by appointing will, before entering upon or taking possession of or interfering with estate of infant, must execute bond in such penalty, and with such surety or sureties, as court shall approve. (D.C. Code § 21-115). At any time court may require additional bond and revoke appointment of guardian refusing to give such bond. (D.C. Code § 21-117).

Inventory.

Every guardian, within three months after the execution and approval of his bond, is required to return to the court, under oath, an inventory of the real and personal estate of his ward and probable annual income thereof. (D.C. Code § 21-142).

Powers and Duties.

Guardians of the persons have the care, custody and tuition of their wards. (D.C. Code § 21-102). Guardians of the estate have control of the property of their wards, subject to direction and approval of Probate Court. (D.C. Code §§ 21-141-143).

Investments.

Probate Court may order personal representative to bring into court funds received by him, or to invest such funds in securities. (D.C. Code § 16-3108).

Securities in Name of Nominee.

See category 13 Estates and Trusts, topic 13.15 Trusts.

Real Estate.

Whenever it appears that sale of principal of infant’s estate is necessary for maintenance or education of ward, probate court may decree sale. (D.C. Code § 21-147). Whenever it appears that interests of ward will be promoted by sale, exchange or lease of realty, court may authorize such action by decree. (D.C. Code §§ 21-148-156). Likewise, where it appears to court that it is to infant’s benefit to raise money by mortgage for his maintenance, for improvements or to discharge encumbrances, court may authorize such action. (D.C. Code § 21-157).

Liabilities of Guardian.

There is no statutory provision summarizing or limiting the possible liability of guardians.

Accounts.

It is the duty of a guardian to manage the estate for the best interests of the ward, and once in each year, or more often if required, to settle an account of his trust, under oath. He must account for all profits or increase of ward’s estate and annual value thereof. His commission cannot exceed 5% of amounts collected, if and when disbursed. (D.C. Code § 21-143).

On arrival of any ward at age of 18 years, guardian must exhibit final account of his trust to court, and must deliver up to ward, agreeably to court’s order, all property of said ward in his hands, and on his failure so to do his bond may be sued upon for use of party interested, and he may be attached. (D.C. Code § 21-158).

Standby Guardianship.

Parent, legal guardian, or legal custodian who is terminally ill or occasionally debilitated can designate standby guardian to assume duties of legal custodian in event of debilitation, incapacity, or in event of death, without terminating or limiting individual's parental or custodial rights during period of debilitation or incapacity. (D.C. Code § 16-4801 et seq.).

Termination of Guardianship.

Natural or appointive guardianships of person cease when person reaches 18 years of age or marries. (D.C. Code § 21-104). Guardianships of estates of infants cease when wards reach 18. (D.C. Code § 21-158).

Mentally Ill or Incapacitated Persons.

Guardianship, protective proceedings and durable power of attorney governed by D.C. Code §§ 21-2001-2085.

Foreign Guardians.

Guardian of nonresident infant, appointed by court of another state, may obtain ancillary letters by petition to probate court, proof of authority and posting of same security required from resident, whereupon he may collect assets or institute court proceedings in District. (D.C. Code §§ 21-111-112).

Foster Children's Guardianship.

Permanent guardians may be appointed for children who have been adjudicated neglected and removed from custody of their parent. (D.C. Code § 16-2381 et seq.). Entry of guardianship order does not terminate parent-child relationship. (D.C. Code § 16-2389[c]).

Gifts to Minors.

See topic 14.10 Infants.

Uniform Fiduciaries Act adopted. (D.C. Code §§ 21-1701-1712).

Uniform Simplification of Fiduciary Security Transfers Act adopted. (D.C. Code §§ 28-2901-2909).

14.09 HUSBAND AND WIFE:

The rights, duties and powers of married persons as between themselves and with respect to other persons remain as at common law except to the extent modified by statute.

Disabilities of Married Persons.

Married minor is subject to same disabilities as other minors respecting property or contractual matters affecting minor. (D.C. Code § 46-601). Otherwise, disabilities have generally been removed.

Separate Property.

Each spouse may hold property separately of other and dispose and convey it as if unmarried. No spouse shall be liable because of any contract or tort in which spouse has not directly or indirectly participated, except for debts incurred for necessaries for either of them or their dependent children. D.C. Code § 46-601).

For dower and curtesy rights, see category 21 Property, topic 21.08 Dower.

Contracts.

Fact that person is married shall not impair such person's ability to contract or engage in any trade occupation, or business. (D.C. Code § 46-601).

Ante Nuptial Contracts.

Uniform Premarital Agreement Act adopted. (D.C. Code § 46-501 et seq.). Premarital agreement must be in writing and signed by both parties. It is enforceable without consideration, and becomes effective upon marriage (D.C. Code §§ 46-502-504) or upon registration of domestic partnership under § 32-702. (D.C. Code § 46-504).

Actions.

Fact that person is married shall not impair such person's ability to engage in civil litigation of any sort (whether tort, contract or otherwise) with or against anyone, including such person's spouse, to same extent as unmarried person. (D.C. Code § 46-601).

Agency.

Husband and wife relationship, in and of itself, does not establish principal-agent relationship, but neither does it prevent such relationship. (158 A.2d 681).

Conveyance or Encumbrance of Property.

Fact that person is married shall not impair such person's ability to acquire from anyone, and to hold and dispose of in any manner, as his or hers, property of any kind, to same extent as unmarried person. (D.C. Code § 46-601).

Uniform Interstate Family Support Act is in force. (D.C. Code § 46-301.01 et seq.).

Community Property.

System does not obtain in District of Columbia.

14.10 INFANTS:

Infants, including minor married women, become of age at 18. (D.C. Code § 46-101). Person of 18 may make will. (D.C. Code § 18-102). Person under 21 may not purchase, attempt to purchase, possess, or drink any alcoholic beverage in D.C. (D.C. Code § 25-1002[a]).

Emancipation.

There are no statutory provisions for emancipation. See topic Guardian and Ward as to cessation of guardianship. Minor parent may consent to health care for child (22 DCMR § 600.3), yet minor is liable for payment for services (22 DCMR § 601.1).

Disabilities.

Infants are subject to common law disabilities to contract except for health care.

Consent to Health Care.

Minors of any age may consent to health care for pregnancy or its lawful termination, substance abuse, mental or emotional condition, and sexually transmitted diseases. (22 DCMR § 600.7). Minors are liable for payment for such care if consented to by self. (22 DCMR § 601.1). Parent or legal guardian may convey authority necessary for another adult person to consent to medical treatment on behalf of minor. (D.C. Code § 16-4901).

Ratification of Contracts.

Person cannot be charged with ratification of debt incurred during infancy (except for necessaries) unless, after reaching full age, acknowledgment or promise to pay was made in writing signed by party to be charged. (D.C. Code § 28-3505). No time limit for ratification provided by statute.

Actions.

Infant may sue or defend by duly appointed representative. Where there is no representative, infant may sue by next friend or guardian ad litem appointed by Court or Court shall make whatever order it deems proper to protect infant. (D.C. Code § 13-332; D.C. Super. Ct. R. Civ. P. 17[c]).

Curfew.

Person under 17 cannot remain in public place or establishment during curfew hours. Curfew hours are from 11 p.m. - 6 a.m. Sun.-Thurs.; 12:01 a.m. - 6 a.m. Sat. and Sun.; except during July and Aug., when curfew hours are 12:01 a.m. - 6 a.m. every night. (D.C. Code §§ 2-1542,-1543[a]). No person under 18 with valid D.C. drivers license can drive between 11:00 p.m. on any Sun.-Thurs. until 6:00 a.m. during any month except July or Aug., and from 12:01 a.m. until 6:00 a.m. during July and Aug. and on any Sat. or Sun. rest of year, except as provided in D.C. Code § 2-1543. (D.C. Code § 50-1401.01).

Custody.

Uniform Child-Custody Jurisdiction and Enforcement Act. (D.C. Code § 16-4601).

Driving under Influence.

Individual under 21 must not operate vehicle if blood, breath or urine contains any measurable amount of alcohol. Penalties for first offense include fine of $300 and possible imprisonment of up to 90 days. Over .20% level of blood alcohol will result in mandatory minimum jail time of 5 days. Over .25% level of blood alcohol will result in mandatory minimum of ten days imprisonment. (D.C. Code § 50-2201.05). If convicted while transporting individual 17 or younger, additional fines of $500-1000 will be imposed, and community service required. Second and third offenses result in higher penalties. (D.C. Code § 50-2201.05).

Parental Responsibility.

Parents not responsible for injuries resulting from wrongful act of minor child unless parent is negligent in exercise of parental supervision and such negligence has specific relation to act complained of. (34 A.2d 257). Parent can be held responsible for permitting minor to remain in public place or establishment during curfew hours. (D.C. Code § 2-1543). Court may hold parents and guardians in contempt for not participating in court-ordered proceeding or program. (D.C. Code § 16-2325.01[b], [c]).

Surname of child can be surname of mother at time of birth, surname of father at time of birth, or both, recorded in any order or in hyphenated or unhyphenated form, or, if affidavit is provided, any surname to which either parent has familial connection. (D.C. Code § 7-205[e][5]).

Delinquency, Neglect, Supervision.

District may take custody if reasonable grounds exist to believe child neglected, delinquent, or in need of supervision. (D.C. Code §§ 16-2309,-2320,-2337). When child has been placed in secure detention prior to fact finding hearing pursuant to D.C. Code §§ 16-2310-2313, fact finding hearing shall commence not later than 30 days from date of detention, unless child is charged with murder, assault with intent to kill, first degree sexual abuse, burglary in first degree, or robbery while armed, in which case fact finding hearing shall commence not later than 45 days from date of detention. (D.C. Code § 16-2310[e][1]). When child has been placed in shelter care prior to fact-finding hearing pursuant to D.C. Code §§ 16-2310-2313, fact finding hearing must commence no later than 45 days from date child ordered to shelter care. (D.C. Code § 16-2310[e][1]). Any person under 21 who falsely misrepresents age for purpose of procuring alcohol shall be deemed guilty of misdemeanor, fined for each offense, and driving privileges suspended, and in default of payment of fine shall be imprisoned not exceeding 30 days. (D.C. Code § 25-1002). Health care professionals, law enforcement professionals, teachers, day care workers, etc., must notify Department of Human Services if reasonable cause to believe child is abused. (D.C. Code § 4-1321.02). Courts have discretionary authority to order medical, psychiatric, or other such treatment, parenting classes and family counseling for families of juveniles involved in neglect, delinquency, and person in need of supervision proceedings. (D.C. Code § 16-2320). Expulsion from District public schools for not less than one year required of any student who brings weapon into school, absent extenuating circumstances. (D.C. Code § 38-231). Child and Family Services Agency is responsible for safeguarding rights and protecting welfare of children whose parents, guardians or custodians are unable to do so. (D.C. Code § 4-1303.01a). Responsibilities include responding to reports of child abuse and neglect, and removing children from their homes, when necessary. (D.C. Code § 4-1303.03).

Uniform Transfers to Minors Act adopted. (D.C. Code §§ 21-301-324). Age of majority is 21. (D.C. Code § 21-309[d]).

Adoption.

See topic 14.01 Adoption.

Uniform Securities Ownership by Minors Act not adopted.

Student Athletes.

Except in limited circumstances, individual cannot act as agent for student athlete without holding certificate of registration. (D.C. Code § 47-2887.03). Agency contract must contain complete information concerning consideration to be paid to agent and any other party, and must contain conspicuous warning that student athlete may lose eligibility to participate as student athlete if she signs contract. Warning must also include notice that athletic director must be notified within 72 hours, and that student may cancel contract within 14 days of signing it. (D.C. Code § 47-2887.09). District has adopted Uniform Athlete Agents Act. (D.C. Code § 47-2881.01-2887.18).

Support of Minor.

See topic 14.06 Divorce, subhead Allowance for Support of Children; see also topic 14.09 Husband and Wife, subhead Uniform Interstate Family Support Act.

Termination of Parental Rights.

Parental rights may be terminated when in best interests of child. (D.C. Code § 16-2353). Motion for termination of parental rights may be filed by District or by child through child's legal representative where child has been adjudicated neglected for at least six months, abandoned, or if parents cannot be located for fact-finding hearing and during period from child's removal from home to fact-finding hearing. (D.C. Code § 16-2354). Court order terminates all rights and obligations except right of child to inherit from parent. (D.C. Code § 16-2361).

See also topic 14.06 Divorce and category 8 Debtor and Creditor, topic 8.09 Garnishment.

Establishment of Paternity.

Conclusive presumption of paternity is established (i) if father and mother acknowledge paternity in writing under oath, or (ii) upon genetic test result and affidavit from laboratory of genetic test of type generally acknowledged as reliable by accreditation bodies designated by

Secretary of U.S. Dept. of Health & Human Services, indicating 99% probability that putative father is child's father. (D.C. Code § 16-909.01). District must give full faith and credit to paternity determinations by other states. (D.C. Code § 16-909.02). Public and private birthing hospitals are required to operate hospital-based program that provides services to facilitate voluntary acknowledgment of paternity for child of unmarried woman. (D.C. Code § 16-909.03).

Surrogate Parenting Contracts.

See topic 14.01 Adoption.

14.11 MARRIAGE:

Marriage is governed by D.C. Code §§ 46-401-421.

Age of consent, males and females, 16. (D.C. Code § 46-403[4]).

Consent Required.

Consent of parent or guardian required where male or female under 18, unless previously married. Such consent may be given personally or by writing attested by witness and proved to satisfaction of clerk. (D.C. Code § 46-411).

Medical Examination.

License application must be accompanied by physician's (or other authorized person's) statement that applicant, within 30 days of application, has been found by standard blood test not to be infected with syphilis in such stage that disease can be transmitted to another. (D.C. Code § 46-417). If person is unable for financial reasons to obtain services of physician (or other authorized person) for blood test and required statement, any medical officer of D.C. Dept. of Human Services is authorized to conduct test and provide statement at no cost to such person. (D.C. Code § 46-419). Any information obtained from any laboratory blood test required under D.C. Code § 46-417 is confidential. (D.C. Code § 46-420). Note that although D.C. Code § 46-420 refers to § 46-417, § 46-417 was repealed in 2008. See also subhead License, infra.

License required. Issued by clerk of Superior Court, who must, before issuing same, examine applicant under oath as to relevant facts. (D.C. Code § 46-410). License may not be issued until three days have elapsed since date of application. (D.C. Code § 46-409) and must be addressed to individual who is to perform ceremony (D.C. Code § 46-412). Marriage License Fee is $35 and certified copy of license is $10. (D.C. Super. Ct. Fam. R. C.). Superior Court judge may waive three-day waiting period and medical examination requirement in case of public policy or emergency. (D.C. Code § 46-418).

Ceremonial Marriage.

Every marriage must be solemnized according to law.

Every minister of any religious society approved or ordained according to ceremonies of his religious society, whether his residence be in District or elsewhere in U.S., may be authorized by any judge of Superior Court to celebrate marriages. Marriages may also be celebrated by any judge or justice of any court of record or by clerk or approved deputy clerks of Superior Court. Marriages of members of any church or religious society which does not by its custom require intervention of a minister for celebration of marriages may be solemnized in manner prescribed and practiced in any such society. License in such case is issued to, and returns made, by a person appointed by such church or religious society for that purpose. (D.C. Code § 46-406).

Reports of Marriages.

Return must be within ten days to clerk's office of Superior Court by person solemnizing marriage (D.C. Code § 46-412); penalty of $50 may be imposed for failure to make return (D.C. Code § 46-413).

Record.

See category 10 Documents and Records, topic 10.04 Records, subhead Vital Statistics.

Common Law Marriages are recognized. (303 F.2d 408).

Proxy Marriages.

No provision.

Marriages by Written Contract.

No provision.

Prohibited Marriages.

The following marriages are prohibited and are absolutely void ab initio, without being so decreed, and their nullity may be shown in any collateral proceedings: (1) Marriage of person with person's grandparent, grandparent's spouse, spouse's grandparent, parent's sibling, parent, step-parent, spouse's parent, child, spouse's child, child's spouse, sibling, child's child, grandchild's spouse, spouse's grandchild, sibling's child; (2) marriage of person previously married and whose previous marriage has not been terminated by death or divorce. (D.C. Code § 46-401).

The following marriages are illegal, and are void from the time when their nullity is declared by decree: (1) Marriage of person unable by reason of mental incapacity to give valid consent to marriage; (2) any marriage the consent to which of either party has been procured by force or fraud; (3) when either of the parties is under the age of consent (16 years of age). (D.C. Code § 46-403).

Foreign Marriages.

Marriages prohibited in the District and entered into in another jurisdiction by persons domiciled in the District may be decreed to be void as if celebrated in the District. (D.C. Code § 46-405).

Annulment.

Decree annulling marriage as illegal and void may be rendered on any of grounds specified by §§ 46-401 and 46-403 as invalidating marriage. (D.C. Code § 16-903). Decrees of nullity will be entered if parties are within prohibited degree of relationship, if either party's previous marriage is still in effect, if either party was insane or under age of consent or physically incapable of entering into marriage state, or if marriage was procured by force or fraud. But marriage may not be annulled on ground that party was insane or under age of consent if there has been voluntary cohabitation after discovery of insanity or attainment of legal age. (D.C. Code §§ 16-903, 904[d]). Otherwise, there is no statutory limitation of time within which action to avoid marriage on ground of nonage must be brought.

A proceeding to declare the nullity of a marriage may be instituted, in the case of an infant under the age of consent, by such infant, through a next friend, or by the parent or guardian of such infant; and in the case of an idiot or lunatic, by next friend. But no such proceedings may be instituted by any person who, being fully capable of contracting marriage, has knowingly and willfully contracted any marriage declared illegal by foregoing sections. (D.C. Code § 46-404).

Final decree annulling a marriage is not effective until expiration of 30 days after docketing of decree, and, if notice of appeal entered, until final disposition of appeal. (D.C. Code

§ 16-920).

Practice in annulment actions is similar to that in actions for divorce or separation. See topic 14.06 Divorce.

No action for annulment of marriage performed outside District is maintainable unless at least one party is bona fide resident of District for at least six months preceding commencement of action. If marriage performed in District, residence of parties is not considered in determining whether action for annulment is maintainable. (D.C. Code § 16-902).

Child born in wedlock or born out of wedlock is legitimate child of its father and mother and is legitimate relative of its father's and mother's relatives by blood or adoption. (D.C. Code §§ 16-907-908).

Ante Nuptial Contracts.

See topic 14.09 Husband and Wife.

14.12 MARRIED WOMEN:

See topics 14.09 Husband and Wife, Marriage; categories 5 Civil Actions and Procedure, topic Evidence, subhead Witnesses; Documents and Records, topic Acknowledgments; Estates and Trusts, topics Executors and Administrators, Wills.

15 HEALTH

15.0115.04 [RESERVED]

15.05 FOOD, DRUGS, DEVICES AND COSMETICS:

Manufacture, production, licensure, regulation and enforcement are governed by D.C. Code § 48-101, which prohibits sale of adulterated articles.

Mayor is authorized to adopt U.S. Food and Drug Administration's Model Food Code. (D.C. Code § 48-104[b]). Mayor may, without prior notice, embargo and forbid sale of or cause to be destroyed any food that may be unsafe, adulterated, not honestly presented, or otherwise not in compliance with Food Regulation Act, and may revoke license of noncomplying food establishment. (D.C. Code § 48-108.01). Civil penalties for violations will not exceed $10,000 per violation. Each day of violation is separate violation. Willful violations subject person to fine of not more than $10,000 per day of violation, or imprisonment of not more than one year, or both. (D.C. Code § 48-109). Charitable and not-for-profit organizations and donors thereto shall not be liable except in cases of gross negligence or intentional misconduct.

15.0615.11 [RESERVED]

15.12 PUBLIC HEALTH:

Department of Mental Health is separate Cabinet-level agency, subordinate to Mayor, and is successor in interest to Commission on Mental Health Services. (D.C. Code §§ 7-1131.01-1131.12). Rights of persons admitted or committed for treatment of mental illness are set forth in D.C. Code §§ 21-561-565. Order of commitment is limited to one year (D.C. Code § 21-545), but may be renewed for one year in accordance with procedures set forth in D.C. Code § 21-545.01.

Health Maintenance Organizations regulated by D.C. Code § 31-3401 et seq.

Regulation and licensing of health professionals is provided in D.C. Code § 3-1201.01 et seq.

Assisted Living Residence Regulatory Act of 2000 sets minimum standards for licensure for community residence facilities. (D.C. Code § 44-101.01 et seq.).

Women's Health and Cancer Rights Federal Law Conformity Act of 2000 provides right for women to receive health plan benefits covering hormone replacement therapy when plan covers prescription drugs, and to receive benefits pertaining to breast reconstruction in connection with mastectomy when plan covers mastectomy. (D.C. Code §§ 31-3831-3837).

Health care facility must inform unlicensed person that it is required to do criminal background check prior to employment. Facility must not employ or contract with unlicensed person until criminal background check is completed. Conviction of certain offenses within seven years of background check will bar employment or prohibit contract. (D.C. Code § 44-552). Rules establishing procedures for compliance with requirement of criminal background check are found at 22 DCMR §§ 22-4700-4706.

Every individual and group health benefits plan issued or renewed in D.C. must provide coverage for colorectal cancer screening (D.C. Code § 31-2931), and prostate cancer screening in accordance with latest guidelines of American Cancer Society. (D.C. Code § 31-2952).

Health care providers or facilities are required to perform lead screening for children under age of six and record and report results of screening in order to reduce incidence of childhood lead poisoning. (D.C. Code § 7-871.01 et seq.).

Health Care Decisions.

Domestic partners and close friends are among persons authorized to make health care decisions for incapacitated persons. (D.C. Code §§ 21-2202-2210).

Durable power of attorney authorizes grantor to grant power which may continue to be exercised notwithstanding later disability, incapacity or incompetency of grantor. (D.C. Code §§ 21-2081-2085).

See category 21 Property, topic 21.15 Powers of Attorney.

Non-resuscitation orders and procedures governed by D.C. Code § 7-651.01 et seq.

Where there is probable cause to believe individual or group carry communicable disease, and freedom of movement by such persons is likely to cause death or seriously impair health of others, Mayor may direct removal or detention of such persons for purpose of isolation, quarantine, or treatment. (D.C. Code § 7-133). Persons may be detained for as long as necessary to protect public health. (D.C. Code § 7-135).

Prompt Payment under Health Benefit Plans.

Health insurer must pay any health benefit claim that is accompanied by necessary documentation within 30 days. Failure to timely pay will result in interest charges on health insurer. (D.C. Code § 31-3132).

16 INSURANCE

16.01 INSURANCE COMPANIES:

Regulated by Tit. 31. There are special requirements regarding stock, dividends, voting, directors, investments, capital surplus, merger or consolidation, etc. for life insurance companies. (D.C. Code §§ 31-4401-4452). Extensive regulatory system was enacted in 1993, establishing standards in many areas, for example, with respect to managing general agents (D.C. Code §§ 31-1501-1506), for identifying insurance companies deemed to be in hazardous financial condition (D.C. Code §§ 31-2101-2103), to prohibit deceptive sales or enrollment practices for long-term care insurance (D.C. Code §§ 31-3601-3612.), to regulate captive insurers (D.C. Code §§ 31-3931.01-3931.23, 31-3932.01-3932.15), to prohibit unfair trade practices including unfair methods of competition (§§ 31.2231.01-2231.25), to regulate investments of insurers, consistent with principles of prudent investment management, in order to preserve insurer assets (D.C. Code §§ 31-1371.01-1373.12), to authorize Commissioner of Department of Insurance, Securities, and Banking to bring proceedings in Superior Court to take over companies for protection of interests of insureds, claimants, creditors and general public (D.C. Code §§ 31-1301-1357), for reinsurance intermediaries to act, and duties of reinsurers utilizing services of reinsurance intermediary manager (D.C. Code §§ 31-1801-1810), for transacting business when insurance broker has controlling interest in insurer with which business is to be placed (D.C. Code §§ 31-401-408) and to regulate taxicab insurers and insurance (26 DCMR §§ 801 et seq.; 31 DCMR §§ 900.1-999). Legislation also regulates formation and operation of risk retention groups (D.C. Code §§ 31-4101-4112), provides for examining activities, operations, financial conditions and affairs of all persons transacting business of insurance and subject to its laws (D.C. Code §§ 31-1401-1407), and permits life insurance companies to offer modified guaranteed contracts (D.C. Code §§ 31-4442).

Conversion.

Mutual insurance companies provided opportunity to convert to stock company (D.C. Code §§ 31-901-915), and opportunity to reorganize by directly or indirectly forming insurance holding company based upon mutual plan, and continuing corporate existence of reorganized insurance company as stock insurance company subsidiary to holding company or to holding company's subsidiary. (D.C. Code §§ 31-731-738). Laws regulate conversion of fraternal benefit societies (orders or lodges without capital stock, whether incorporated or not, or incorporated societies operating for benefit of members and their beneficiaries) into mutual life insurance companies. (D.C. Code §§ 31-5301-5312). In addition, reciprocal insurance holding company can be converted into stock insurance company when it forms mutual insurance holding company that directly or indirectly owns insurance company. (D.C. Code §§ 31-751-760).

Supervision by Commissioner, Department of Insurance, Securities and Banking, 810 1st Street, NE, Suite 701, Washington, DC 20002. (D.C. Code §§ 31-101-108).

Annual Statements.

All insurance companies (except D.C. Insurance Guaranty Assn.), domestic, foreign and alien, stock, mutual, reciprocal, or fraternal, are required, under penalty, to obtain annual license (fee $100) issued by Commissioner of Insurance and Securities which shall date from first of month in which application is made, and expire on following Apr. 30. (D.C. Code §§ 47-2603, 2604). Every insurance company must provide in Jan. each year statement of its business in D.C. detailing net amount of premium receipts, losses paid, and expenses incurred during previous calendar year. (D.C. Code § 31-205). Each company is also required to file annual statement before Mar. 1 concerning its operations for previous year, to pay $50 filing fee (D.C. Code § 47-2606) and to contribute to Insurance Regulatory Trust Fund, amount assessed by Mayor (D.C. Code §§ 31-1201-1210). Payment must be made within 30 days of mailing date of Notice of Assessment. (D.C. Code § 31-1203[b]). Minimum annual assessment is $1,000. (D.C. Code § 31-1203[a]). Each company must also file report disclosing material acquisitions and dispositions of assets or material nonrenewals, cancellations or revisions of ceded reinsurance agreements within 15 days after end of month in which transaction occurred (D.C. Code § 31-1001), and must file annual financial statement substantially in form adopted by National Association of Insurance

Commissioners ("NAIC"), by Mar. 1st with Mayor and with NAIC (D.C. Code § 31-1901), and must file audited financial report by June 1. (D.C. Code §§ 31-302, 303). Each domestic insurer shall file report of its Risk-Based Capital ("RBC") levels as of end of calendar year just ended, in form required by RBC Instructions, with Commissioner, with National Association of Insurance Commissioners ("NAIC") and with Commissioner in any state in which insurer is authorized to do business, if requested to do so in writing by such Commissioner. (D.C. Code §§ 31-2001-2013). RBC reports must be filed by Mar. 1. (D.C. Code § 31-2002). Commissioner issues certificates of authority to life insurance companies that comply with statutory requirements (D.C. Code § 31-4304), and may revoke or suspend same for noncompliance with requirements. (D.C. Code § 31-4305). Each insurer and Health Maintenance Organization (HMO) must file annual anti-fraud report on Mar. 31 of each year. (D.C. Code § 22-3225.12).

Rates in general, must be adequate, not excessive, and not unfairly discriminatory. (D.C. Code § 31-2703). Rates generally must be submitted to Commissioner of Insurance and Securities Regulation. (D.C. Code §§ 31-5205, 2701-2710).

Policies.

Life (D.C. Code §§ 31-4201 et seq.); Fire & Casualty (D.C. Code §§ 31-2501.01 et seq.); Marine (D.C. Code §§ 31-2601.01 et seq.); Motor Vehicle (D.C. Code §§ 31-2401 et seq.); Health (D.C. Code §§ 31-2801 et seq.; 22 DCMR §§ 6000 et seq.; 26 DCMR §§ 3500 et seq., 8200 et seq., 8800 et seq.); and Property (D.C. Code §§ 31-5001 et seq.).

Standard provisions are specified for life, annuity and endowment, group life, and accident and health policies. (D.C. Code §§ 31-4703, 4705, 4711, 4712). Policy forms for life insurance delivered or issued for delivery in District after Mar. 14, 1987 must qualify under policy simplification standards. (D.C. Code §§ 31-4725-4730). Certain provisions are forbidden in life insurance policies, but policy of any company not organized in District may contain any provisions required by laws of state of organization. (D.C. Code §§ 31-4704, 4709). Copy of application for life insurance must be delivered with policy, in default of which no defense is allowed in respect of anything contained in or omitted from application. (D.C. Code § 31-5203). Wagering policies for marine insurance are illegal. (D.C. Code § 31-2601.01). Credit life insurance and credit accident and health insurance are subject to regulation. (D.C. Code §§ 31-5101-5112). Insurance premium finance companies are also regulated. (D.C. Code §§ 31-1103-1112; 26 DCMR §§ 205.1, 205.2). Certain health insurance policies and contracts must provide coverage for treatment of drug abuse, alcohol abuse and mental illness (D.C. Code §§ 31-3101-3112), diabetes (D.C. Code §§ 31-3001-3004), mammograms and cervical cytological screening (D.C. Code § 31-2902), colorectal cancer screening (D.C. Code § 31-2931), prostate cancer screening (D.C. Code § 31-2952), hormone replacement therapy (D.C. Code § 31-3834), and, if policy provides benefits for mastectomy, it must also provide coverage for breast reconstruction, if patient so elects. (D.C. Code § 31-3832). Mortality tables established for use in determining minimum standard valuation for annuity and pure endowment contracts. (26 DCMR § 1100 et seq.). Rules for valuation of life insurance policies. (26 DCMR § 3000 et seq.). Health benefit plan members bill of rights established. (22 DCMR § 6000 et seq.). Health Maintenance Organizations (HMOs) are also regulated. (26 DCMR §§ 3100 et seq., 3500 et seq.).

Industry Placement Facility must offer homeowner's coverage to owner-occupants of eligible real property in D.C. who cannot obtain such coverage in marketplace. (D.C. Code §§ 31-5001-5011).

As to exemption of proceeds, see category 8 Debtor and Creditor, topic 8.06 Exemptions.

Reserves, or reserve liabilities, for all outstanding life insurance policies and annuity and pure endowment contracts of every life insurance company doing business in District are valued annually by Commissioner of Department of Insurance, Securities and Banking, except that in case of alien insurance company such valuation is limited to its insurance transactions in U.S.

(D.C. Code § 31-4701). Every life insurance company must submit annually opinion of qualified actuary as to whether reserves are computed appropriately and comply with all applicable laws. (D.C. Code § 31-4901).

Discrimination.

Discrimination between individual risks of the same class or hazard is prohibited. (D.C. Code § 31-2502.29; § 31-2231.11[a], [b]). Insurer must not refuse to insure or limit coverage because of marital status, race, color, personal appearance, sexual orientation, matriculation or political affiliation. (D.C. Code § 31-2231.11[c]). Insurer must not terminate or modify coverage or refuse to insure life, health, annuity, or property and casualty policy solely based on mental or physical impairment. (D.C. Code § 31-2231.11[d]). Action must be based on sound actuarial principles. (D.C. Code § 31-2231.11). No insurer may deny coverage or withhold payments on grounds that subscriber or policyholder is eligible for Medicaid. (D.C. Code § 1-307.41[a]). No insurer may deny enrollment of child under health plan of parent on grounds that child (1) was born out of wedlock; (2) was not claimed as dependent on parent's federal tax return; or (3) was not residing with parent or in insurer's service area. (D.C. Code § 1-307.41[b]). On health, disability or life insurance policies, insurers may not discriminate based on factors used to predict development of acquired immune deficiency syndrome, nor may policies contain any limitation of benefits with respect to AIDS-related illness or death. (D.C. Code § 31-1603). Insured who tests positive for AIDS under testing protocol certified by Commissioner of Public Health may appeal test result to Commissioner of Insurance and Securities, who may order insurer to disregard positive result. (D.C. Code § 31-1604[b][1]).

Foreign Insurance Companies.

Laws provide means for foreign insurance company to become domestic insurer, and for domestic insurer to transfer domicile to another state (D.C. Code §§ 31-1701-1705), and permit U.S. Branch of non-U.S. insurer to use District as state of entry to transact insurance in U.S. (D.C. Code §§ 31-2201-2207). Non-U.S. insurer may domesticate its U.S. branch by entering into written domestication agreement with domestic or foreign insurer, in accordance with requirements of United States Branch Domestication Act of 2000. (D.C. Code §§ 31-2301-2307). Domicile of insurer organized or formally located in foreign country is insurer's principal place of business in U.S., except for Canadian insurers, whose domicile is Canadian province where insurer's headquarters are located. (D.C. Code § 47-2602). Foreign life companies generally are subject to same requirements as domestic companies doing same business. (D.C. Code § 31-4201). They are required to file certified copy of charter, certified copy of bylaws, copies of policies it is issuing and of applications, etc. (D.C. Code § 31-4501).

Retaliatory Laws - Foreign Insurance Companies.

Under certain conditions, Mayor may impose retaliatory taxes, fees, fines, deposits, obligations or restrictions against insurers of other states and foreign countries that impose similar burdens on District insurers. (D.C. Code § 47-2610[a]). However, this retaliatory authority does not apply to personal income taxes, ad valorem taxes on real and personal property and special assessments charged by state in connection with insurance, other than property insurance. (D.C. Code § 47-2610[b]).

Privacy of Consumer Financial Information.

Treatment of nonpublic personal financial information about consumers and customers by insurers, insurance agents and brokers is regulated by 26 DCMR §§ 3600 et seq.

Confidentiality of Self-Evaluative Audit Document.

Insurance compliance self-evaluative audit document is privileged information and is not admissible as evidence in any legal action in civil, criminal or administrative proceeding, except under certain conditions, or as determined by appropriate court. (D.C. Code § 31-853-31-855).

Insurance Producers.

No person will sell, solicit or negotiate insurance in D.C. for any class of insurance unless licensed by Commissioner as insurance producer. (D.C. Code § 31-1131.03). Officers, directors or employees of insurer or of insurance producer are not required to obtain license as insurance producer if they receive no commissions on policies written or sold to insure risks residing, located, or to be performed in D.C. and their responsibilities are only indirectly related to sale, solicitation or negotiation of insurance. (D.C. Code § 31-1131.04[b]).

Annual fees for fire, casualty and marine insurance licenses are $250 for registration and certification for Risk Retention and Purchasing Groups, and any other fees set by rules promulgated by Commissioner of Department of Insurance, Securities and Banking. (D.C. Code § 31-2502.41). License fees for life insurance: brokers and general agents, $100; agents and solicitors, $50, payable biennially. (D.C. Code § 31-4302).

Public Insurance Adjuster.

Person who, for compensation, aids insured individual in effecting settlement of claim against real or personal property of insured, covered by insurance contract, must be licensed by Commissioner of Department of Insurance, Securities and Banking to act as public insurance adjuster. (D.C. Code §§ 31-1631.01-1631.12).

Taxation.

In lieu of all other taxes except real estate taxes and insurance license fees, domestic and foreign insurance companies (except fraternal beneficiary associations) doing business in District must pay annually, before Mar. 1, a sum equal to 1.7% of net premium receipts and policy and membership fees from District risks. (D.C. Code §§ 31-205, 47-2608). Each company which had premium tax liability for preceding year of $1,000 or more must pre-pay before June 1 amount equal to one-half tax liability for preceding year (D.C. Code § 31-205[b][4]), paying remainder by Mar. 1 of following calendar year (D.C. Code § 47-2608[b][2]). Company's rate of tax is 1.7% of its policy and membership fees and net premium receipts on consideration received in calendar year on contracts in D.C. (D.C. Code § 47-2608[a][1]).

Penalties for Fraud.

Insurance fraud can subject wrongdoer to fine of not more than $50,000 or imprisonment for not more than 15 years or both. (D.C. Code § 22-3225.04[a]). Immunity provided to whistle blowers in certain circumstances. (D.C. Code § 22-3225.13). Each insurer and health maintenance organization must file annual anti-fraud report on Mar. 31 of each year with Commissioner of Department of Insurance, Securities and Banking. (D.C. Code § 22-3225.12).

Direct Actions Against Insurer.

See category 5 Civil Actions and Procedure, topic 5.02 Actions.

Uniform Insurers Liquidation Act not adopted. (D.C. Code §§ 31-1301-1357).

16.02 SURETY AND GUARANTY COMPANIES:

Surety and guaranty companies may be formed under corporation law by not less than 25 persons. Minimum of $1,000,000 capital is required. Certificate must be presented to District Council which has power and discretion to grant or refuse charter. (D.C. Code § 26-1301 et seq.). Annual reports must be filed by Jan. 21 to Superintendent of Banking and Financial Institutions stating amount of capital and of proportion actually paid, amount of debts, and gross earnings for previous calendar year. (D.C. Code § 26-1318).

The federal statutes under which surety companies may be authorized to do business are applicable here. (D.C. Code § 26-710).

Taxation.

Foreign and domestic surety and guaranty companies pay tax of 3% of gross receipts from District of Columbia sources in lieu of corporate income tax. (D.C. Code §§ 47-2502, 1802.01[26]).

17 INTELLECTUAL PROPERTY

17.01 TRADEMARKS AND TRADE NAMES:

Subject governed generally by federal trademark law. Local statute fixes misdemeanor criminal penalty for willful violation of trademark, punishable by no more than $500 or 180-days imprisonment. (D.C. Code § 22-1502). Trademark counterfeiting is punishable upon first conviction by fine not exceeding $1,000 or by imprisonment for not more than 180 days, or both. (D.C. Code § 22-902[b]). Subsequent convictions, offenses involving over 100 items, and offenses with total retail value greater than $1,000 carry greater penalties. (D.C. Code § 22-902[b]). Personal property used in connection with violation is subject to seizure and forfeiture. (D.C. Code § 22-902[e]). These penalties are cumulative to other civil and criminal remedies provided by law. (D.C. Code § 22-902[g]).

Special statutes govern voluntary registration, and protection of, trademarks and trade names on beverage bottles, milk or cream containers, containers for beverages composed principally of milk, and labor union labels. (D.C. Code §§ 36-101-102, 121-131, 151-157, 201-203). Cigarettes imported or reimported into U.S. for sale or distribution under trade name, trade dress, or trademark that is same as, or is confusingly similar to, trade name, trade dress, or trademark used for cigarettes manufactured in U.S. for sale or distribution in U.S. are presumed to have been purchased outside of ordinary channels of trade. (D.C. Code § 47-2424). There is also special statute requiring mandatory filing for trademarks associated with motor fuels or products. (D.C. Code §§ 36-301.01, 36-302.01, 36-303.01). Special rules also make it unlawful to knowingly or intentionally make, distribute, or possess any punch, die, plate, stone, etc, designed to print, imprint, or reproduce trademark upon any drug or container or labeling so as to render drug counterfeit substance. (D.C. Code § 48-904.03[a][5]). It is punishable by up to four years imprisonment or up to $50,000 fine, or both. (D.C. Code § 48-904.03[b]).

Resale Price Agreements.

No “Fair Trade Act” permitting resale price agreements with respect to trademarked commodities has been enacted with specific reference to the District of Columbia.

Trade Names.

Any person conducting or transacting business in District under trade name must register trade name with Department of Consumer and Regulatory Affairs. (D.C. Code § 47-2855.02[a]). Sole proprietorship or general partnership must register real names and addresses of each person involved, and name of general partnership, if applicable. (D.C. Code § 47-2855.02[a][1]). Limited partnership, limited liability company and corporation must register by setting forth partnership, company or corporate name. (D.C. Code § 47-2855.02[a][2]-[4]). If trade name not registered, person transacting business will not be entitled to maintain suit in courts of District until registration completed. (D.C. Code § 47-2855.03[d]). Failure to register will not impair validity of contract nor prevent person from defending suit brought in District. (D.C. Code § 47-2855.03[e]). Mayor will adopt rules as to forms and fees. (D.C. Code § 47-2855.04). Amended registration is required upon change in name of person or mailing address. (D.C. Code § 47-2855.03[a]). Cancellation and new registration is required upon change in name of person, mailing address, or addition, deletion, or change of persons conducting business under trade name. (D.C. Code § 47-2855.03[c]).

17.02 TRADE SECRETS:

Uniform Trade Secrets Act adopted effective Mar. 16, 1989; applies to misappropriations after that date. (D.C. Code §§ 36-401-410). Significant modification excepts out disclosures of trade secrets to D.C. government officials relating to pesticide use and violations of occupational health and safety regulations to D.C. government officials, private or public sector employees, or occupational safety and Health Commission. (D.C. Code § 36-410).

18 LEGAL PROFESSION

18.01 ATTORNEYS AND COUNSELORS:

Effective Apr. 1, 1972, Bar of District of Columbia became unified under rules of District of Columbia Court of Appeals, under authority of District of Columbia Court Reform and Criminal Procedure Act of 1970. (D.C. Code §§ 11-2501-2504).

Jurisdiction over Admission.

District of Columbia Court of Appeals has jurisdiction over admission to practice in District of Columbia and over censure, suspension and disbarment of members of District of Columbia bar. (D.C. Code §§ 11-2501-2504).

Eligibility.

Any applicant must demonstrate good moral character and general fitness to practice law. (D.C. Ct. App. R. 46[d],[c][3]).

Registration as Law Student.

Not required.

Educational Requirements.

Each applicant shall have graduated from an ABA approved law school or, in case of graduation from a nonapproved law school, have received credit for 26 semester hours of study at an approved law school in courses focusing on subjects on exam. (D.C. Ct. App. R. 46[b][3], [4]).

Petition for Admission.

Must be typewritten and addressed to Court on form to be prescribed by Bar Committee. (D.C. Ct. App. R. 46[b][2][i], [c][1]). Nonrefundable fees of $100 (plus separate specified amount payable to National Conference of Bar Examiners) for applicants for examination, and $400 (plus separate fee to National Conference of Bar Examiners) for admission without examination. (D.C. Ct. App. R. 46[b][2][ii], [c][2]).

Examination.

To be conducted by Bar Committee twice yearly (Feb. and July) at Washington, D.C. (D.C. Ct. App. R. 46[b][1]). Except for extensions granted for exceptional cause shown, applications for admission by examination must be filed by Dec. 15 for Feb. examination and May 3 for July examination. (D.C. Ct. App. R. 46[b][2][i]). Examination includes Multistate Bar Examination as well as essay examination on subjects including administrative law, contracts, agency, Uniform Commercial Code, equity, business associations, conflicts of law, evidence, torts, wills, trusts, administration of estates, family law, real and personal property, civil and criminal procedure, constitutional law, criminal law, legal ethics, and tax law. (D.C. Ct. App. R. 46[b][8]). Multistate Professional Responsibility Examination is required, and applicants must receive minimum grade as determined by Committee on Admissions. (D.C. Ct. App. R. 46[b][5]).

Multistate Bar Examination scores from other jurisdictions may be transferred under certain circumstances. (D.C. Ct. App. R. 46[b][8][i][A],[ii]). Prior essay score from D.C. Bar may also be accepted under certain circumstances. (D.C. Ct. App. R. 46[b][8][i][B], [ii]). Committee may in its discretion give notice of application by publication in newspaper or posting of public notice. (D.C. Ct. App. R. 46[d]).

Clerkship.

Not required.

Admission without Examination.

Any person may, upon proof of his or her good moral character as it relates to practice of law, be admitted without examination, provided that such person: (i) Has been member in good standing of bar of court of general jurisdiction in any state or territory of U.S. for period of five years immediately preceding filing of application; or (ii) (A) has been awarded J.D. or LL.B. degree by law school which, at time of awarding of degree, was approved by American Bar Association; (B) has been admitted to practice of law in any state or territory of U.S. upon successful completion of written bar examination and has received scaled score of 133 or more on Multistate Bar Examination which State or territory deems to have been taken as part of such examination; and (C) has passed Multistate Professional Responsibility Examination. (D.C. Ct. App. R. 46[c][3]).

Special Legal Consultant.

Court may, in its discretion, license to practice as Special Legal Consultant (SLC) applicant who has been in good standing as attorney or counselor at law (or equivalent of either) in foreign country, has good moral character, intends to maintain office to practice as SLC in District of Columbia, and is at least 26 years of age. (D.C. Ct. App. R. 46[c][4][A]). Unless court waives requirement, applicant for license must file with Bar Committee typewritten application fee of $450, certificate from highest authority over professional discipline in applicant's foreign country, letter of recommendation from executive body of such authority or from judge of foreign country's highest court, and summary of opportunities for attorneys to establish offices in foreign country. Authenticated translation required for non-English materials. Court may, in its discretion, waive or vary these provisions. (D.C. Ct. App. R. 46[c][4][B][1]). Bar Committee may investigate applicant or require report from National Conference of Bar Examiners concerning applicant's fitness. (D.C. Ct. App. R. 46[c][4][B][3]). Court may consider whether D.C. bar member would have practical opportunity to establish office to give legal advice in foreign country. (D.C. Ct. App. R. 46[c][4][C]).

Scope of Practice - Special Legal Consultant.

Licensed SLC may render legal services, but may not: Appear in court or before administrative agency (except upon admission pro hac vice) or prepare pleadings or other papers or issue subpoenas; prepare wills, trusts, or instruments relating to disposition of real property upon death, administration of estates, marital relations or child custody; render advice on laws of District of Columbia, U.S., or any state without advice of SLC's duly qualified counsel and identifying name of qualified counsel; hold self out as member of Bar, or use any title other than "Special Legal Consultant", title in foreign country or name of firm in foreign country, in each case only in conjunction with name of foreign country. (D.C. Ct. App. R. 46[c][4][D]). SLC is subject to ABA Code of Professional Responsibility and must file with court clerk written commitment to observe such Code, and to notify clerk of admission or resignation from practice, censure or suspension in foreign country, evidence of professional liability insurance, and designation of court clerk as agent for service of process. (D.C. Ct. App. R. 46[c][4][E][1]). Service of process made by delivering to clerk's office duplicate copies of process and $10, one copy to be delivered to SLC. (D.C. Ct. App. R. 46[c][4][E][2]). SLC not member of D.C. Bar but considered affiliate of D.C. Bar, subject to conditions applicable to active or inactive member, and shall upon being licensed take oath to demean self uprightly and according to law. (D.C. Ct. App. R. 46[c][4][F]).

Admission Pro Hac Vice.

Attorney not a member of D.C. Bar may request special permission to appear in a particular proceeding. (D.C. Ct. App. R. 49[c][7]; D.C. Super. Ct. R. Civ. P. 101[a][3]; D.C. Sup. Ct. Crim. R. 115). In Sup. Ct. such attorney (unless he is State Attorney General or his designee) must be joined of record by D.C. Bar member who must sign all papers and attend all proceedings (unless waived by judge). (D.C. Super. Ct. R. Civ. P. 101[a][3]-[5]). No more than five such applications in any calendar year are permitted except for exceptional cause shown to court. (D.C. Super. Ct. R. Civ. P. 101[a][3]; D.C. Ct. App. R. 49[c][7][i]).

Law Students’ Limited Practice Privileges.

Law student may, as part of a law school clinical program, engage in limited practice of law in Superior Court in connection with any civil case (including any family and/or juvenile proceeding) and any criminal case (not involving a felony), on behalf of any indigent person who has consented in writing to that appearance, provided that a supervising lawyer has approved such action. (D.C. Ct. App. R. 48[a]-[e], D.C. Super. Ct. R. Civ. P. 101[e], D.C. Sup. Ct. Crim. Rule 44-I[f]). Law students must be enrolled in law school approved by both ABA and Admissions Committee of Court of Appeals; successfully complete 41 semester hours of law school, including evidence and criminal and civil procedure; be certified by dean of law school as being of good character, adequately trained, and possessing competent legal ability; be certified by Admissions Committee of Court of Appeals as eligible; be registered with Unauthorized Practice of Law Committee of Court of Appeals; neither ask for nor receive fee of any kind for any services (except payment of regular salary to law student who is also employee of U.S. or District of Columbia or their agencies or Public Defender Service); certify in writing that student has read and is familiar with rules of court governing Bar of District of Columbia. (D.C. Ct. App. R. 48[b]). Any such eligible law student may also appear in any criminal case on behalf of the U.S. or District of Columbia with written approval of U.S. Attorney or Corporation Counsel and supervising attorney. (D.C. Ct. App. R. 48[a][2]). Such student may participate in oral argument in any appeal in presence of supervising attorney, provided appellant’s and supervising attorney’s written consents filed with clerk. (D.C. Ct. App. R. 48[d][2]).

Privileges.

No statutes exempting lawyers from arrest or service of process or as witnesses.

Disabilities.

Attorney in active practice may not be surety on bond. (D.C. Super. Ct. R. Civ. P. 303[c]).

Compensation.

Attorneys are not prohibited from charging their clients (other than government) reasonable compensation in addition to taxable costs. (D.C. Code § 15-701). Attorney for District of Columbia may not retain attorney fees taxed as costs in litigation in which D.C. is party. (D.C. Code § 15-702).

Basic Business License.

Master Business License has been replaced by Basic Business License. Lawyers and law firms are not required to obtain Basic Business License. (D.C. Code § 47-2851.03).

Liens.

Common law rule applies.

Attorney Ethics.

D.C. adopted new Rules of Professional Conduct effective Feb. 1, 2007. Significant variations from ABA Model Rules of Professional Conduct reflected in Rule 1.4 (specific requirement that client to be informed of settlement offer or proffered plea bargain); Rule 1.5 (written fee agreements mandatory; contingent fees permitted in domestic relations matters); Rule 1.6 (retains approach of Code of Professional Responsibility to confidentiality; permits lawyer to reveal client confidences and secrets under certain circumstances; defines government lawyer's client as employing agency; requires lawyers to exercise reasonable care to prevent employees, associates and others from revealing client confidences); Rule 1.7 (general rule on conflicts of interest, differs substantially from Model Rule); Rules 1.9 and 1.10 (conflicts of interest with former clients; imputed disqualification of lawyers who change law firms); Rule 1.15(d) (as of Jan. 1, 2000, provides that all prepaid fees or expenses made by clients to lawyers remain clients' property until earned or expended by lawyers); Rule 3.3(b) (deals differently with lawyer's duties in relation to false evidence and perjury); Rule 3.6 (trial publicity, different standard for prohibiting public comments); Rule 3.7 (lawyer as witness, exempts government lawyers from disqualification if other agency lawyers testify); Rule 3.8 (special responsibilities of prosecutor, differs substantially from Model Rule); Rule 4.2 (communication with opposing parties, includes specific provisions relating to communications with nonparty employees of organizations, including government); Rule 5.4(b) (permits partnership or other affiliation with nonlawyers under certain circumstances); Rule 7.1 (advertising, expands Rule 7.1 as compared to Model Rule; Model Rules 7.2, 7.3 and 7.4 omitted); and Rule 9.1 (not included in Model Rules, prohibits lawyers from discriminating in employment).

Disbarment or Suspension.

Disbarment proceedings are instituted and handled by Board on Professional Responsibility which makes recommendations to D.C. Court of Appeals. (D.C. Bar Rule XI). D.C. Court of Appeals, Federal courts of D.C. and Superior Court may censure, suspend or disbar member for cause. (D.C. Code §§ 11-2502-2504).

Unauthorized Practice.

No person must engage in practice of law in D.C. or in any manner hold himself out as authorized or qualified to practice law in D.C. unless he is enrolled as active member of D.C. Bar. (D.C. Ct. of App. Rule 49[a]). There are exceptions under certain circumstances for practice before federal courts, government agencies, commissions, executive departments, etc. if certain requirements are met. (D.C. Ct. App. R. 49[c]).

Professional Association or Corporation.

See category 2 Business Organizations, topic 2.03 Corporations, subhead Professional Corporations.

19 MINERAL, WATER AND FISHING RIGHTS

19.01 MINES AND MINERALS:

No statute.

20 MORTGAGES

20.01 [RESERVED]

20.02 COLLATERAL SECURITY:

This subject is governed by Art. 9 of Uniform Commercial Code.

20.03 MORTGAGES OF PERSONAL PROPERTY:

See category 3 Business Regulation and Commerce, topic 3.09 Commercial Code.

20.04 MORTGAGES OF REAL PROPERTY:

Execution.

Mortgages and deeds of trust are executed, acknowledged and recorded same as absolute deeds. (D.C. Code § 42-801).

Recording.

Mortgages or deeds of trust must be recorded with Recorder of Deeds within 30 days after execution. (D.C. Code § 47-1431). No deed or mortgage may be recorded unless taxes, assessment or charges have been paid. (D.C. Code § 42-407[2]).

Recording Fees.

See category 10 Documents and Records, topic 10.04 Records.

Prohibited Practices.

Certain practices in making, brokering, or servicing of home loans are prohibited, for example, making home loan when borrower will be unable to make all scheduled payments, mortgage insurance premiums and real estate taxes, imposing provision that increases interest rate upon default, charging for services not actually performed, and failing to send disclosure notice in form promulgated by Mayor. (D.C. Code §§ 26-1152.01-1152.23). Relief may include reformation of home loan, actual damages, injunctive relief, attorneys' fees, statutory damages. (D.C. Code § 26-1153.01).

Foreclosure.

No court proceedings are required to foreclose deed of trust. (D.C. Code § 42-815). Written notice by certified mail, return receipt requested, to owner of encumbered property, with copy to Mayor, is required at least 30 days prior to foreclosure sale under power of sale provided by security instrument. (D.C. Code § 42-815[b]). If length of notice and terms of sale are not prescribed by instrument or are not left therein to discretion of mortgagee or trustee, any person interested in sale may apply to court, before advertisement, to determine same. (D.C. Code § 42-815[a]). Residential mortgage debtor or anyone on his behalf, not more than once in any two consecutive calendar years, may cure his default and prevent foreclosure sale at any time after receipt of written notice up to five business days prior to commencement of bidding at sale. (D.C. Code § 42-815.01[b]).

Substitution of Trustee.

Trustee in deed of trust may be replaced by written agreement of grantor and secured party (or their successors) appointing substitute trustee. Agreement to be executed same as deed, and substitution becomes effective as to third persons when notice of appointment (signed, sealed and acknowledged by parties) is recorded. (D.C. Code § 42-814[b]).

21 PROPERTY

21.01 ABSENTEES:

Care of Property.

If one domiciled in District, obligated to support one domiciled in District, or having property in District is incapacitated, has disappeared, or is being detained or held hostage, and individual has property that will be wasted or dissipated unless management is provided or money is needed for support, care, and welfare of individual or those entitled to his/her support, individual to be protected or other interested person may file petition in Superior Court seeking appointment of conservator or other protective order. (D.C. Code §§ 21-2051, 2052, 2021). Court will set hearing date, and unless individual to be protected has chosen counsel, court will appoint attorney to represent individual. (D.C. Code § 21-2054). Individual to be protected must be present at hearing unless good cause is shown for absence. (D.C. Code § 21-2054[e]). After hearing, court may appoint conservator or make other appropriate orders, including authorization of any transaction necessary to achieve any security, service, or care arrangement meeting foreseeable needs of protected individual. (D.C. Code §§ 21-2054[g], 2056). Court may require conservator to furnish bond in amount of aggregate capital value of property of estate in conservator's control, plus one year's estimated income, and minus value of securities requiring court order for their removal and value of any land that fiduciary lacks power to sell or convey without court authorization. (D.C. Code § 21-2058). Court, directly or through conservator, has wide authority to manage property, including authority to convey or release interests in property, enter contracts and make gifts. (D.C. Code §§ 21-2051-2077).

Process Agent.

No statutory provisions regarding right or duty to appoint agent for service of process. However, court rules permit appointment of agent to receive service of process (F. R. C. P. 4; Sup. Ct. Civ. R. 4), and in certain cases, service may be by publication (D.C. Code §§ 13-336, 341, 16-3301[b]) or by personal service outside District (D.C. Code § 13-337). Special rules for service upon individuals in foreign country. (Sup. Ct. Civ. R. 4[e]).

Escheat.

Uniform Disposition of Unclaimed Property Act of 1980 (D.C. Code §§ 41-101 – 41-142) requires annual verified report of abandoned personal property, valued in aggregate of at least $50, by holder thereof (D.C. Code §§ 41-117). Such report as of prior June 30 must be filed with District of Columbia before Nov. 1, except for reports with respect to life insurance company made pursuant to § 41-107 or report of unclaimed insurance company demutualization proceeds made pursuant to § 41-107.01, which must be filed before May 1 as of prior Dec. 31 (D.C. Code § 41-117). Property must be delivered or paid to Mayor upon filing of report, except for property held in safe deposit box or other safekeeping depository, which must not be delivered to Mayor until 120 days after report is filed, or property that is automatically renewable deposit for which penalty or forfeiture in payment of interest would result, in which case time for compliance is extended until penalty or forfeiture would no longer result. (D.C. Code § 41-119). Holder of interest in any stock, other certificate of ownership, or other intangible ownership interest shall deliver duplicate certificate or other evidence of ownership to Mayor if holder does not issue certificates of ownership. (D.C. Code § 41-119).

See categories 2 Business Organizations, topic Corporations, subhead Unclaimed Dividends; Business Regulation and Commerce, topic Banks and Banking, subhead Unclaimed Deposits; and category 13 Estates and Trusts, topic Wills, subhead Unclaimed Legacies.

See category 13 Estates and Trusts, topic 13.07 Descent and Distribution, subhead Escheat.

21.02 ADVERSE POSSESSION:

Character of Possession.

Must be actual, continuous, adverse, and exclusive, attended with such manifest intention of holding and continuing the possession as will make that possession notorious to everyone interested in reclaiming the property to the rightful ownership. (13 App. D.C. 30). If action is to recover unimproved property, it is not necessary for defendant to show that premises had been enclosed, but it is sufficient to show equivalent of possession by actual enclosure that defendant has regularly paid taxes upon same and was only person exercising control thereof for 15 years before action was brought. (D.C. Code § 16-1113).

Duration of Possession.

No action may be brought for the recovery of lands, tenements or hereditaments after 15 years from the time the right to maintain such action accrued. (D.C. Code § 12-301).

Quieting Title.

When title to real estate has become vested in any person by adverse possession, holder thereof may file a complaint in Superior Court to have title perfected, in which complaint it is sufficient to allege that plaintiff holds title to such real estate and same has vested in him, or in himself and those under whom he claims, by adverse possession; and it is unnecessary to make parties defendants other than those persons appearing to have claim or title adverse to plaintiff. (D.C. Code § 16-3301). Upon showing of facts at trial establishing title by adverse possession, decree must be entered, copy of which may be recorded in office of recorder of deeds. (D.C. Code § 16-3301). If process is returned not to be found, subject to rights of those under legal disability, notice by publication may be substituted, and if it is unknown whether person who would be adverse party is living or dead, or in case of decedent, whether he died testate or left heirs or whose heirs or devisees are unknown, process may be had by publication. (D.C. Code §§ 16-3301[b], 13-341).

Disabilities.

The rights of those under legal disability are saved for a period of two years after the removal of their disability; but the entire period during which such rights shall be preserved may not exceed 22 years from the time such right accrued, either in plaintiff or in those under whom he claims. (D.C. Code § 16-3301[c]).

21.03 [RESERVED]

21.04 CONVEYANCES:

See topic 21.06 Deeds.

21.05 CURTESY:

Abolished. (D.C. Code § 19-102).

21.06 DEEDS:

See topic 21.16 Real Property for types of estates.

Execution.

Deed must be signed and sealed in person, by power of attorney, or by will, and must be delivered. (D.C. Code § 42-306[b]). Statute does not require signature of witness, but it is customary to have officer taking acknowledgment sign as witness. Deed properly sealed and delivered and certified is valid without acknowledgment; but acknowledgment is necessary to entitle deed to be recorded. (D.C. Code §§ 42-401, 42-407[1]).

See also category 14 Family, topic 14.09 Husband and Wife, subhead Conveyance or

Encumbrance of Property.

Corporations.

Deed of corporation must be executed and acknowledged by: (1) Attorney-in-fact appointed for that purpose or (2) if no attorney-in-fact appointed, by president or vice-president if also attested by secretary or assistant secretary of corporation. (D.C. Code § 42-602).

Recording.

Recording is not necessary to validity as between parties. (D.C. Code § 42-401). However, deed must be recorded within 30 days after execution. (D.C. Code § 47-1431[a]). Moreover, deeds must be recorded with recorder of deeds in order to take effect as to creditors and subsequent bona fide purchasers and mortgagees without notice. (D.C. Code § 42-401). Recorder may not accept for recording any deed not executed and acknowledged by grantor. (D.C. Code § 42-407[1]). Penalty of $25 per month up to $250 is imposed on dealer who negligently fails to record. Penalty for non-dealer who fails to record is $250 unless deed is security instrument. (D.C. Code § 47-1433[a], [c]). See also category 10 Documents and Records, topic 10.04 Records.

Recording Fees.

See category 10 Documents and Records, topic 10.04 Records.

Operation and Effect.

Any deed conveying real estate in the District or any interest therein or declaring or limiting any use or trust thereof, takes effect and passes title from the time of delivery, except as to creditors and subsequent purchasers and mortgagees without notice, as to whom it takes effect upon delivery to the recorder of deeds for the purpose of recordation. (D.C. Code § 42-401). When more than one deed of same property is made to bona fide purchasers for value without notice, deed first recorded is preferred. (D.C. Code § 42-406). Use of word “Covenant” binds covenantor, his heirs, devisees, and personal representatives with grantee or his lessee, his heirs, devisees, personal representatives, and assigns without so stating. (D.C. Code § 42-603).

No words of inheritance are necessary to create a fee simple, but every conveyance of real estate shall be construed to pass a fee simple or entire estate of grantor unless contrary intention appears by express terms or is necessarily implied. (D.C. Code § 42-701). Words “grant” and “bargain and sell” are construed to pass whole estate unless there are limitations showing different intent. (D.C. Code § 42-702).

Form.

The following is a form of deed in fee simple (D.C. Code § 42-601):

Form

This deed, made this . . . . . . day of . . . . . ., in the year . . . . . ., by me, ..., of . . . . . ., witnesseth, that in consideration of (here insert consideration), I, the said . . . . . ., do grant unto (here insert grantee’s name), of . . . . . ., all that (here describe the property).

Witness my hand and seal.

. . . .(Seal)

(Acknowledgment).

All contracts drawn for purpose of conveying real property in District must contain following information: (1) Characteristic of soil on property as described by Soil Conservation Service of United States Department of Agriculture in Soil Survey of District of Columbia published in 1976 and as shown on Soil Maps of District of Columbia at back of that publication; and (2) notation that for further information buyer can contact soil testing laboratory, District of Columbia Department of Environmental Services, or Soil Conservation Service of Department of Agriculture. (D.C. Code § 42-608[b]).

There is no statutory form of warranty deed, but the Code gives statutory effect to the following short phrases as if the longer common law form had been used: “that he will warrant generally the property hereby conveyed” (or, following granting words, “with general warranty”), “that he will warrant specially the property hereby conveyed” (or, following granting words, “with special warranty”), “that the said grantee shall quietly enjoy said land,” “that he has done no act to encumber said land,” and “that he will execute such further assurances of said land as may be requisite.” (D.C. Code §§ 42-604-608).

21.07 DEEDS OF TRUST:

See category 20 Mortgages, topic 20.04 Mortgages of Real Property.

21.08 DOWER:

Abolished. (D.C. Code § 19-102). See category 13 Estates and Trusts, topic 13.07 Descent and Distribution.

21.09 ESCHEAT:

See category 13 Estates and Trusts, topic 13.07 Descent and Distribution.

21.10 LANDLORD AND TENANT:

Except to extent modified by statute or agreement common law governs rights and liabilities growing out of the relation. D.C. Municipal Regulations also significantly regulate landlord and tenant transactions. (14 DCMR §§ 300-399).

Rent Control.

Rental Housing Act of 1985 (D.C. Code § 42-3501.01 et seq.) and D.C. Municipal Regulations (14 DCMR §§ 4200-4299) regulate rents of most residential units. Most lessors must file registration statements including base rent charged, determined by statute, and file amendments upon change in status as lessor or increase in rent. (D.C. Code §§ 42-3502.05[f], [g], 3502.06[b]; 14 DCMR §§ 4100-4199, 4201-4299). Most lessors must also pay annual fees. (14 DCMR § 4108.1-4108.7). Increase in rent must comply with specific percentage limits. (D.C. Code § 42-3502.06; 14 DCMR § 4200.8). D.C. Code § 42-3503.01 et seq. establishes tenant assistance program to fund rental housing of qualifying lessees. D.C. Code § 42-3505.01 et seq. and D.C. Municipal Regulations Tit. 14 § 4300.1 et seq. set conditions which must be met before eviction can occur, and D.C. Code § 42-3507.01 et seq. provides for relocation assistance under certain conditions funded by lessor. Finally, Act sets penalties for violation of any of its provisions (D.C. Code § 42-3509.01), including treble damages against lessor for specified violations (D.C. Code § 42-3509.01[a]) and recovery of attorneys fees (D.C. Code § 42-3509.02), and also authorizes civil actions for certain purposes (D.C. Code § 42-3502.18).

Kinds of Tenancy.

The following tenancies are permitted: estates for years (D.C. Code § 42-518); estates by sufferance (D.C. Code § 42-520); estates from month to month or from quarter to quarter (D.C. Code § 42-521); estates at will (D.C. Code § 42-522). Estates said to be from year to year are good for one year only. (D.C. Code § 42-519). Estates which at common law were construed to be from year to year, such as where a tenant for years holds over, and all verbal hirings by the month or at any specified rate per month are deemed estates by sufferance. (D.C. Code § 42-520).

Leases.

Estates for longer than one year must be created by deed signed and sealed and delivered by lessor or by will. (D.C. Code § 42-306). Execution, acknowledgment, delivery, and certification are necessary for validity of deed and for recording. (D.C. Code §§ 42-401, 407).

Recording or lack thereof does not affect validity of lease as between the parties (D.C. Code § 42-401) or as to persons having actual notice of its existence (46 App. D.C. 363). It is required for constructive notice. (D.C. Code § 42-401). For requirements as to form, acknowledgment and place for recording, see topic 21.06 Deeds.

Lien.

The landlord has a tacit lien upon such of the tenant's personal chattels on the premises as are subject to execution for debt, to commence with the tenancy and continue for three months after the rent is due, and until the termination of any action for such rent brought within said three months. (D.C. Code § 42-3213). This lien may be enforced by attachment issued upon affidavit that the rent is due and unpaid, or if not due, that the defendant is about to remove or sell all or some part of said chattels, or by judgment against the tenant and execution to be levied on said chattels, or any of them, or by action against any purchaser of said chattels with notice of lien, in which action the plaintiff may have judgment for the value of the chattels purchased by the defendant, not exceeding the rent in arrears. (D.C. Code §§ 42-3214).

Termination of Tenancy.

Tenancies from month to month, quarter to quarter, or at will are terminable by 30 days notice in writing to quit (landlord) or of intention to quit (tenant), with notice expiring on day of month from which tenancy commenced to run. (D.C. Code §§ 42-3202, 42-3203). Notice to tenant to quit must be served in both English and Spanish, delivered to tenant if he can be found, or to some person of proper age on premises if he cannot be found, or, if that is impossible, by posting on premises in conspicuous place and mailing to person known to be in possession of premises or occupant of premises within three days of posting. (D.C. Code § 42-3206). Tenancies by sufferance may be terminated at any time by notice in writing from landlord to tenant to quit, or by written notice from tenant to landlord of his intention to quit on 30th day after day of service of notice. (D.C. Code § 42-3204). If tenant's notice expires before any periodic installment of rent falls due, landlord is entitled to proportionate part of such installment to date fixed for quitting premises. (D.C. Code § 42-3204). Where estate is leased for term certain, no notice to quit or otherwise is required. (D.C. Code § 42-3201).

Rental Housing Act of 1985 requires 30-180 days notice, depending on reason, for eviction and permits eviction only for certain specified reasons, even after expiration of lease or rental agreement, if tenant continues to pay rent. (D.C. Code § 42-3505.01; 14 DCMR § 4300 et seq.). Specific language required in notice to vacate. (D.C. Code § 42-3505.01[a]; 14 DCMR § 4302 et seq.). Landlord must also provide copy of notice of eviction to District Rent Administrator within five days of service on tenant, and Office of Administrative Hearings may conduct hearing on validity of notice to vacate. (D.C. Code § 42-3505.01[a]; 2-1831.03(b-1); 14 DCMR § 4300.1, 4300.5). Act applies to most evictions, notwithstanding lesser notice requirements in D.C. Code §§ 42-3201-3206. Retaliatory action by landlord against tenant who exercises any right under rent control laws is prohibited. (D.C. Code § 42-3505.02; 14 DCMR § 4303 et seq.).

Holding Over.

Tenants holding over are treated as tenants at sufferance. (D.C. Code § 42-520). Even after expiration of lease, eviction permitted only for certain specified reasons if tenant continues to pay rent. (D.C. Code § 42-3505.01; 14 DCMR § 4300 et seq.). Notice of 30-180 day required. (D.C. Code § 42-3505.01; 14 DCMR § 4300 et seq.).

Dispossession.

Suit for possession may be brought on oath of person entitled to possession before Superior Court, and a summons served at least seven days, exclusive of Suns. and legal holidays, before date set for trial. (D.C. Code §§ 16-1501-1502). Summons must be served in both English and Spanish, delivered to tenant if he can be found, or to some person of proper age on premises if he cannot be found, or, if no one is in actual possession of premises, by posting on premises in conspicuous place and mailing to premises in name of person known to be in possession of premises or, if unknown, occupant of premises within three days of posting. (D.C. Code §§ 16-1501-1502).

Distress.

Common law right of distress is abolished. (135 A.2d 645). As substitute for right of distress, landlord has statutory lien on such of tenant's chattels on premises as are subject to execution for debt, to commence with tenancy and continue for three months after rent is due, and until termination of any action for such rent brought within said three months. (135 A.2d 645; 2 Mackey 209; D.C. Code § 42-3213).

See subhead Lien.

See also category 3 Business Regulation and Commerce, topic 3.12 Consumer Protection.

21.11 LEASES:

See topic 21.10 Landlord and Tenant.

21.12 [RESERVED]

21.13 PERPETUITIES:

Uniform Statutory Rule Against Perpetuities Act adopted Apr. 27, 2001. (D.C. Code §§ 19-901-907).

Provision for accumulations is valid. (123 F.2d 924).

Pension, profit sharing, stock bonus, annuity, disability, death benefit, or other employee trusts established by employers for distribution of income or principal or both do not violate laws against perpetuities, restraints on alienation, or accumulation of income. (D.C. Code § 19-904; 123 F.2d 924).

21.14 PERSONAL PROPERTY:

Hotels.

If hotel, motel, or similar establishment in District: (1) Provides suitable depository (other than checkroom) for safekeeping of personal property other than motor vehicle and (2) displays conspicuously in guest and public rooms printed copy of law or summary, that establishment is not liable for loss or destruction of, or damage to, any personal property of guest or patron not deposited for safekeeping, except with respect to liability for personal property retained by guest in his room if property is commonly kept in his room. (D.C. Code § 30-101). In case of personal property of guest or patron deposited in such depository for safekeeping, that establishment is liable for loss or destruction of, or damage to, that property for lesser of $1,000 or fair market value of property at time of its loss, destruction, or damage. (D.C. Code § 30-101). If hotel, motel, or similar establishment (1) maintains conspicuously-designated checkroom where guests and patrons may deposit personal property and (2) conspicuously posts printed copy of law or summary, that establishment shall be liable for loss or destruction of, or damage to, that property for lesser of $200 or fair market value of property at time of its loss, destruction, or damage unless destruction or damage is caused by its agent or servant. (D.C. Code § 30-101).

Hotel, motel, or similar establishment in District may sell at public auction any personal property that has been deposited for safekeeping, checked, or left unclaimed at that establishment for more than 90 days. (D.C. Code § 30-103). If owner of that property is known, establishment must send, by registered or certified mail, notice to owner at his last known address at least 15 days before that sale is held. (D.C. Code § 30-103). D.C. Code § 30-103 mandates content of notice and how proceeds of sale must be applied.

Secondhand Dealers.

D.C. Code § 47-2837 regulates dealers of secondhand personal property.

Tenancy by the entirety exists. (41 App. D.C. 525).

See topic 21.01 Absentees, subheads Care of Property and Escheat; topic 21.10 Landlord and Tenant, subhead Lien.

See category 17 Intellectual Property; topic 2.03 Corporations re stocks; topic 22.16 re taxation of personal property.

21.15 POWERS OF ATTORNEY:

As to conveyance by attorney, see topic 21.06 Deeds.

Uniform Durable Power of Attorney Act.

Adopted. (D.C. Code §§ 21-2081-2085).

21.16 REAL PROPERTY:

Estates in the District shall be of inheritance, for life, for years, at will and by sufferance. (D.C. Code § 42-501). Estate tail has been abolished. (D.C. Code § 42-502). All estates of inheritance shall be adjudged estates in fee simple. (D.C. Code § 42-502).

Every estate granted or devised to two or more persons in their own right, including estates granted or devised to spouses or domestic partners, is a tenancy in common, unless expressly declared to be a joint tenancy; but every estate vested in executors or trustees, as such, is a joint tenancy, unless otherwise expressed. (D.C. Code § 42-516). Estate in joint tenancy, by entireties, or tenancy in common may be created by conveyance in which one or more of grantors is also grantee. (D.C. Code § 42-516). Conveyance to husband and wife as joint tenants creates tenancy by entireties. (41 F. Supp. 634).

Real estate seller’s disclosure statement on form provided by Mayor mandated for all transfers of residential real property comprised of four or fewer dwelling units where purchaser expresses, in writing, intent to reside in property to be transferred. (D.C. Code §§ 42-1302, 1301). In case of sale, disclosure statement must be delivered to prospective transferee before or at time purchase agreement is executed by transferee. (D.C. Code § 42-1302[a]). In case of sale by installment sales contract where binding purchase agreement has not been executed, or in case of lease together with option to purchase, disclosure statement must be delivered to prospective transferee before or at time prospective transferee executes installment sales contract or lease. (D.C. Code § 42-1302[a]). Transferor must indicate compliance with disclosure on purchase agreement, installment sales contract, lease with option to purchase, or any addendum attached to purchase agreement, contract, or lease with option to purchase, or on separate document. (D.C. Code § 42-1302[b]). Failure to provide disclosure may result in transferee's right to terminate purchase agreement, installment sales contract, or lease with option to purchase. (D.C. Code § 42-1302[c]). Sales between spouses or domestic partners resulting from judgment of divorce or separate maintenance or from property settlement agreement incidental to such judgment; sales made to transferor's spouse, domestic partner, parent, grandparent, child, grandchild or sibling or any combination; sales from one cotenant to one or more other cotenants; sales of newly-constructed residential property that has not been inhabited are among sales exempted from requirement of disclosure statement. (D.C. Code § 42-1301[b]).

Condominium Ownership.

D.C. Code § 42-1901.01 et seq. regulates in detail creation and governance of condominiums. Conversion of rent-controlled property to condominiums and cooperatives is regulated extensively. (D.C. Code § 42-3401.01 et seq.; 14 DCMR §§ 4700-4799).

Rule in Shelley's Case has been abolished. (D.C. Code § 42-703).

Discrimination.

Denying sale or rental of residential property or requiring different terms for such transaction because of race, color, religion, national origin, sex, pregnancy, childbirth, related medical conditions, breastfeeding, age, marital status, personal appearance, sexual orientation, gender identity or expression, familial status, family responsibilities, disability, matriculation, political affiliation, source of income, status as victim of intrafamily offense, or place of residence or business of any individual is unlawful discriminatory practice. (D.C. Code §§ 2-1402.21, 1401.05; 4 DCMR § 1001.1). D.C. Municipal Regulations Tit. 4 §§ 1000-1099 regulate prohibited practices extensively. Business necessity exemption is inapplicable to complaints alleging unlawful discrimination in residential real estate transactions or violations of Fair Housing Act. (D.C. Code § 2-1401.03[a]).

Zoning.

D.C. Municipal Regulations Tit. 11 regulate zoning in detail. Residential district use regulations are significantly regulated by 11 DCMR §§ 200 et seq., 300 et seq. Zoning Commission has promulgated rules of practice and procedure. (11 DCMR § 3000 et seq.).

See also topics 21.10 Deeds, Landlord and Tenant; categories 3 Business Regulation and Commerce, topic Frauds, Statute of; Civil Actions and Procedure, topic Partition; Debtor and Creditor, topics Fraudulent Sales and Conveyances, Homesteads, Liens; 13 Estates and Trusts, topic 13.07 Descent and Distribution; 14 Family, topic 14.09 Husband and Wife; 20 Mortgages, topic 20.04 Mortgages of Real Property; Taxation, topic Taxes.

21.17 TRUST DEEDS:

See category 20 Mortgages, topic 20.04 Mortgages of Real Property.

22 TAXATION

22.01 ADMINISTRATION:

Most taxes are assessed, collected and otherwise administered by Department of Finance and Revenue and are uniform throughout District of Columbia. (Organization Order No.

3, Amendment No. 1, Order of Commissioner No. 67-24, Dec. 13, 1967, as am'd; Order of Commissioner No. 69-96, Mar. 7, 1969).

Economic Development Zones that are established are qualified for tax and other development incentives. (D.C. Code § 6-1501-02).

Penalties.

Income Tax.

Civil Penalties: Failure to File Return or to Pay Tax Within Time Prescribed by Law: Addition of 5% of tax if failure to pay tax is not more than one month, with additional 5% for each additional month or fraction thereof that failure continues, not to exceed 25% in aggregate, except if failure was due to reasonable cause. (D.C. Code § 47-4213).

Underpayment of Tax: Addition of 20% of portion of underpayment if attributable to negligence, substantial understatement of income tax, or substantial valuation misstatement; addition of 40% of portion of underpayment if attributable to gross valuation misstatement, except that no penalty is imposed for substantial valuation misstatement or gross valuation misstatement unless portion of underpayment exceeds $5,000 ($10,000 for corporation). (D.C. Code § 47-4211).

Underpayment Attributable to Fraud: Addition of 75% of portion of underpayment. (D.C. Code § 47-4212). Tax preparer must pay $50 for each unsigned return or claim for refund, unless it is shown that failure is due to reasonable cause, $250 for each return or claim for refund that understates taxpayer's liability, and $1,000 for willful or reckless understatement of taxpayer's liability. (D.C. Code § 47-4217). Officer or director of corporation, general partner of partnership, or principal of business is liable for penalty equal to tax, including interest and penalties, not collected or paid to DC for which business is liable under D.C. Code § 47-1812.08 or c. 20. (D.C. Code § 47-4491).

Interest on Underpayment: Interest on underpayment is 13% per year, simple interest, from Jan. 1, 2001 to Dec. 31, 2002, and 10% per year, compounded daily, beginning Jan. 1, 2003. (D.C. Code § 47-4201).

Interest on Overpayment: Interest on overpayment is 6% per year simple interest. (D.C. Code § 47-4202).

Frivolous Return: Penalty of $500 imposed on individual whose tax return contains inadequate information, or information that is substantially incorrect and is due to frivolous position or desire to delay or impede collection of tax. (D.C. Code § 47-4216).

Criminal Penalties: Willful attempts to evade or defeat tax payment of more than $10,000 constitutes felony, subjecting tax evader to fine of not more than $10,000 or three times amount of tax, which ever is greater, or imprisonment of not more than ten years, or both, plus costs of prosecution. Willful attempts to evade or defeat tax payment of less than $10,000 constitutes misdemeanor, subjecting tax evader to fine of not more than $5,000, or imprisonment of not more than 180 days, or both, plus costs of prosecution. (D.C. Code § 47-4101). Willful failure to pay tax, estimated tax, make return, keep records, or supply information is misdemeanor, punishable by fine of not more than $5,000, or imprisonment of 180 days or both, plus costs of prosecution. Failure to pay tax, estimated tax, make return, keep records, or supply information is misdemeanor, punishable by fine of not more than $3,000, or imprisonment of 180 days or both, plus costs of prosecution. (D.C. Code § 47-4103). Penalties of $3,000-$5,000 or imprisonment of 180 days or both are also imposed for fraudulent statements or documents, assisting in preparation of fraudulent statements or documents, fraudulent information or failure to supply information to employer, and for any attempt to interfere with administration of tax laws. (D.C. Code §§ 47-4104-4107).

Property Taxes.

Penalties and interest imposed by D.C. Code §§ 47-4211-4213, and 47-4201, discussed under topics Civil Penalties, and Interest, supra. Fine of $250 will be imposed on owner of property exempt under D.C. Code § 47-1002(5-20) who fails to timely file annual report showing purposes for which property was used during preceding calendar year. (D.C. Code § 47-1007). Failure to notify Mayor of termination of eligibility for homestead deduction subjects owner to penalty of delinquent property tax together with interest and penalty for late payment of real property tax. (D.C. Code § 47-850.02).

License Tax.

Penalties for violation of any provision of General License Law or regulations promulgated thereunder: fine of not more than $300 or imprisonment for not more than 90 days. Same penalty applies for failure to file any information required by the law, or any regulation promulgated thereunder, or for making any false or misleading statement in the filing of such information. (D.C. Code § 47-2846).

Annual Reports of Corporations.

For failure to pay two year report fee when due, interest is to be assessed at rate of 5% per month until paid (D.C. Code § 29-101.121[e]) and penalty of $35 may be assessed by Mayor. (D.C. Code § 29-101.128). Failure to pay fee or file report for two consecutive years: if domestic corporation, articles of incorporation shall be void; if foreign corporation, certificate of authority shall be revoked. (D.C. Code § 29-101.122). If corporation continues to operate after revocation, it shall be deemed guilty of misdemeanor punishable by fine not to exceed $500 and/or responsible persons may be imprisoned for not exceeding one year, or alternative civil fines, penalties and fees may be imposed. (D.C. Code § 29-101.124).

Alcoholic Beverage Taxes.

For violation of provisions of the law there is penalty of a fine of not more than $1,000 or imprisonment for not more than one year, or both. Additional penalty of not more than $5,000 or imprisonment for not more than three years, or both, for willful failure to file return or to perform any other required act within time prescribed. Alternative civil fines, penalties and fees may be imposed. (D.C. Code § 25-831).

Gasoline Tax.

Penalties and interest imposed by D.C. Code §§ 47-4211-4213, and 47-4201, discussed under subhead Penalties, topics Civil Penalties, and Interest. Also, if failure by importer of fuels to file monthly report or pay tax is not shown to be due to accident or justifiable oversight, license will be revoked. (D.C. Code § 47-2303[c]).

Cigarette Tax.

For violation of any provisions of Act, or regulations issued thereunder, license may be suspended or revoked. (D.C. Code § 47-2404[f]). For violation of provisions of D.C. Code § 47-2405, involving transportation of cigarettes, fine of up to $25 for each 200 contraband cigarettes or three years imprisonment, or both. (D.C. Code § 47-2405[c]). For violations involving counterfeiting, forging or altering tax stamps, fine of up to $10,000, or imprisonment for up to five years, or both. (D.C. Code § 47-2406[f]). Penalties and interest imposed by D.C. Code §§ 47-4211-4213, and 47-4201, discussed under topics Civil Penalties, and Interest, supra. Chapter also provides for seizure of contraband and associated personalty. (D.C. Code § 47-2409).

Deed Recordation Tax.

Criminal Penalties: Criminal penalties are provided for fraudulent use, removal or alteration of stamps, and a violator thereof is guilty of a felony and shall be fined not more than $5,000 or imprisoned not more than three years, or both. (D.C. Code § 42-1121).

Sales and Use Taxes.

Sales Tax: Penalties and interest imposed by D.C. Code §§ 47-4211-4213, and 47-4201, discussed under topics Civil Penalties, and Interest, supra. Failure to obtain registration certificate, fine of not more than $50 for each day. (D.C. Code § 47-2026). For advertisement of absorption of the tax or that tax will not be added to price or will be refunded, penalty provided is fine of not more than $500 or imprisonment for not more than six months, or both. (D.C. Code § 47-2014).

Use Tax: Penalties and interest imposed by D.C. Code §§ 47-4211-4213, and 47-4201, discussed under topics Civil Penalties, and Interest, supra. Certain sales tax provisions are made applicable to use taxes by D.C. Code §§ 47-2209 and 47-2213, including D.C. Code §§ 47-2014, 2019-2021, 2023, 2024, and 2027.

Taxes on Utilities.

Penalties and interest imposed by D.C. Code §§ 47-4211-4213, and 47-4201, discussed under topics Civil Penalties, and Interest, supra.

Insurance Companies.

For failure to pay a tax a penalty of 8% per month until paid. (D.C. Code § 47-2609).

Inheritance and Estate Taxes.

Penalty for failure to file return within prescribed time and for filing false or fraudulent return, and interest on additional taxes due, imposed by D.C. Code §§ 47-4211-4213, and 47-4201, discussed under topics Civil Penalties, and Interest, supra.

Unemployment Compensation.

Employer contributions, failure to pay when due: interest at rate of 1½% per month or fraction thereof from due date until paid. (D.C. Code § 51-104[c][1]). If contributions are not paid or wage reports are not filed by specified time, additional penalty of 25% of amount due, but such penalty shall not be less than $100, and may be waived for good cause shown. (D.C. Code § 51-104[c][2]). For failing to disclose material fact to avoid payment of any or all employer contributions required or for failure or refusal to pay contributions or other payment: Fine of not more than $1,000 or imprisonment of not more than six months, or both. (D.C. Code § 51-119[b]).

Personal Liability: Officer or director of corporation, general partner of partnership, or similar principal of business which is liable under D.C. Code § 47-1812.08 (Withholding of Tax) or c. 20 (Gross Sales Tax) is personally liable for penalty equal to unpaid tax, interest and penalties, in addition to other penalties provided by law. (D.C. Code § 47-4491).

Enforcement.

If person refuses or neglects to pay tax, amount becomes lien in favor of D.C. against all real and personal property of person, including after-acquired property. (D.C. Code § 47-4421). If person refuses or neglects to pay tax for ten days after notice and demand, Mayor may collect tax, interest and penalties by levy against property, by exercise of power of distraint and seizure by any means. (D.C. Code § 47-4471). After seizure, property may be sold after notice to owner and notice in daily newspaper of general circulation. (D.C. Code § 47-4472). Property may be redeemed if prior to sale owner pays amount due and expenses of proceeding, if any. Within 180 days after sale, owner may redeem property from purchaser for price paid by purchaser plus interest at rate of 18% per year. (D.C. Code § 47-4474).

22.02 ALCOHOL, BEVERAGES AND TOBACCO TAXES:

Alcoholic beverages tax imposed on wine, champagne, spirits, alcohol and beer. (D.C. Code §§ 25-901-902). Returns must be filed monthly by holders of manufacturer's license and twice yearly by holder of retailer's or wholesaler's license. (D.C. Code § 25-771).

Cigarette Taxes.

Cigarettes are taxed at rate of $.10 per cigarette. (D.C. Code § 47-2402[a]).

22.03 BUSINESS TAXES:

Bank Tax.

See category 3 Business Regulation and Commerce, topic 3.01 Banks and Banking.

Premium Tax.

See category 16 Insurance, topic 16.01 Insurance Companies.

22.04 [RESERVED]

22.05 EMPLOYMENT TAXES:

Unemployment Compensation Tax.

Employers of one or more persons for any period (D.C. Code § 51-103) must pay quarterly (D.C. Code § 51-104) contributions to D.C. Unemployment Compensation Fund at standard rate in effect for current year. (D.C. Code § 51-103). Rate is subject to adjustment based on experience. (D.C. Code § 51-103[c]). No tax on employees. (D.C. Code § 51-103[d]). Exemptions include: casual labor not in course of business, inter-family employment, charitable corporations, insurance agents on commission. (D.C. Code § 51-101[2]).

22.06 [RESERVED]

22.07 ESTATE TAX:

See topic 22.11A Inheritance and Estate Taxes.

22.08 GASOLINE AND SPECIAL FUELS TAXES:

Gasoline Taxes.

Tax at rate of $.20 per gallon. (D.C. Code § 47-2301). In addition to Federal tax, imposed on purchaser and collected by seller. (D.C. Code §§ 47-2301-2325).

22.09 GIFT TAX:

None.

22.10 [RESERVED]

22.11 INCOME TAX:

Income tax is imposed by the District of Columbia Income and Franchise Tax Act of 1947 (D.C. Code §§ 47-1801.01 et seq.) as amended.

Income for D.C. income tax purposes generally has same meaning as under Internal Revenue Code of 1986 (gross income defined under I.R.C. § 61; adjusted gross income defined under I.R.C. § 62, in case of individual, estate, or trust). (D.C. Code § 47-1803.02).

Electronic Payment: Mayor may accept payment of taxes by credit card or electronic funds transfer, and may require nonindividual taxpayers to pay electronically if amount due exceeds $25,000. (D.C. Code § 47-4402).

Individuals are taxable if they are residents of District. (D.C. Code § 47-1806.03). "Resident" means every individual domiciled within District at any time during taxable year, and every individual maintaining place of abode within District for aggregate of 183 days or more during taxable year, whether domiciled in District or not. Resident does not include any elective official of U.S. Govt. or any employee of elected official in legislative branch of U. S. Govt. if such employee is bona fide resident of state of residence of such elective official, or any officer of executive branch whose appointment was by President and confirmed by Senate and serving at pleasure of President or any Justice of U.S. Supreme Court, unless such officials or Justices are domiciled in District on last day of taxable year. In determining whether individual is resident, such individual's absence from District for temporary or transitory purposes shall not be viewed as changing his domicile or place of abode. (D.C. Code § 47-1801.04[17]).

Personal exemptions are allowed for dependents of residents: whose gross income is less than $1,675, increased annually, beginning Jan. 1, 2009, by cost-of-living adjustment; or who are children under age 19 or students. Taxpayers who qualify as head of household shall be allowed additional exemption. Likewise, additional exemption shall be allowed for taxpayer who is blind or has attained age of 65 at close of his or her taxable year, and additional exemption for spouse of taxpayer if spouse is blind or has attained age of 65 at close of taxable year of taxpayer and, if spouse, for calendar year in which taxable year of taxpayer begins, has no gross income and is not dependent of another taxpayer, except that if spouse dies during such taxable year determination regarding blindness shall be made as of time of death. (D.C. Code § 47-1806.02). Individual who is allowed earned income tax credit under § 32 of Internal Revenue Code 1986 is allowed tax credit equal to 40% of credit allowed under § 32, provided he has not elected to claim D.C. low-income tax credit. (D.C. Code § 47-1806.04[f][1]). College savings account owner may claim deduction not to exceed $4,000 for contributions made to account. (D.C. Code § 47-4509).

Individual who is a resident of D.C. for entire taxable year is taxable on his entire income (after deductions, exemptions and credits). Individual who becomes domiciled in D.C. during calendar year is taxable on amount of income received from and after date he becomes a resident of District. Individual who changes his domicile to a place outside D.C. on or before Dec. 31 is taxable as a resident for that portion of taxable year during which he is domiciled in District. In case of a change in resident status during taxable year, personal exemptions and credits are prorated according to number of months during which taxpayer resided in District, and only those deductions actually paid while a resident of District are allowed. (Instructions, Form D-40). Above rules relating to taxpayers who change their residency during taxable year have been promulgated as a result of U.S. Court of Appeals decision in 125 App. D.C. 311, 371 F.2d 964.

Following rates will only apply if certain fiscal standards are met for immediately preceding fiscal year as reflected in certification of Chief Financial Officer required by D.C. Code § 47-387.01. (D.C. Code § 47-1806.03).

For taxable years beginning after Dec. 31, 2003, income tax is determined as follows: For taxable income not over $10,000, 5% of taxable income; for taxable income over $10,000 but not over $30,000, $500, plus 7.5% of excess over $10,000; and for taxable income over $30,000, $2,000, plus 9% of excess over $30,000.

For taxable years beginning after Dec. 31, 2004, tax is determined as follows: For taxable income not over $10,000, 4.5% of taxable income; for taxable income over $10,000 but not over $40,000, $450, plus 7% of excess over $10,000; and for taxable income over $40,000, $2,550, plus 8.7% of excess over $40,000.

For taxable years beginning after Dec. 31, 2005, tax is determined as follows: For taxable income not over $10,000, 4% of taxable income; for taxable income over $10,000 but not over $40,000, $400, plus 6% of excess over $10,000; and for taxable income over $40,000, $2,200, plus 8.5% of excess over $40,000. (D.C. Code § 47-1806.03).

Method of determination of taxable income, deductions, and credits, is substantially same as under Internal Revenue Code of 1986, as amended.

Appeal to Superior Court (D.C. Code § 47-3303), from which, appeal lies to Court of Appeals (D.C. Code § 47-3304), may be made from deficiency assessment, after payment of assessed tax, interest and penalties, or from disallowance of claim for refund, within six months of assessment or disallowance (D.C. Code § 47-1815.01).

Estimated Tax: Persons with income not subject to withholding provisions, whose tax liability is more than $100, must pay estimated tax. (D.C. Code § 47-1812.08[i][1]). Amount of estimated tax for individuals is calculated according to method described in D.C. Code § 47-4214, and must be paid in four installments.

Multistate taxpayers' state and local income tax liability, including apportionment of tax bases and settlement of apportionment disputes, is determined under Multistate Tax Compact Act of 1981. (D.C. Code §§ 47-441-446).

Estates and trusts are “resident” if decedent at time of death or creator at time of creation was domiciled in D.C., (D.C. Code § 1809.01), and, if “resident,” are taxed at same rates as individuals. (D.C. Code § 1809.05). In lieu of exemption for trusts, there is credit against net income of $100. (D.C. Code §§ 47-1809.05).

Corporations and financial institutions, foreign or domestic, are subject to franchise tax for privilege of engaging in business within D.C., and of receiving income from sources within District (except as exempted under D.C. Code § 47-1802.01). For taxable years beginning after Dec. 31, 2002, tax shall be at rate of 9.5%, except that for taxable years beginning after Dec. 31, 2003, rate of tax shall be 9.975%. Surtax is 2.5% for any tax period beginning after Sept. 30, 1992, and additional surtax is 2.5% for any tax period beginning after Sept. 30, 1994. (D.C. Code § 47-1807.02). Following are not considered income derived from District sources: (a) Dividends (in case of any corporation) and interest (in case of corporation not engaged in trade or business in District) received from corporation subject to District income tax or from insurance company subject to District premium tax under D.C. Code §§ 47-2601 et seq., (b) in case of corporation organized under Bank Holding Company Act of 1956 as am’d 1970, dividends received from corporation subject to District income tax or from financial institutions and public utilities subject to taxation under D.C. Code § 47-2501, and interest (in case of any such bank holding company not engaged in trade or business in District) received from such financial institutions or public utilities (but all dividends received by financial institution from corporation not subject to District franchise tax and all interest received by financial institution are deemed business income, see D.C. Code § 47-1810.01), and (c) income derived from sale of tangible personal property by corporation or unincorporated business not doing business within District (except for certain sales to federal government). (D.C. Code § 47-1810.01). Dividends received from subsidiary corporation for whom parent provides services deemed to be business income subject to apportionment. (D.C. Code § 47-1810.01). Income derived by corporation, financial institution, or unincorporated business not carrying on trade or business within District (as defined in D.C. Code § 47-1801.04[6][A]), shall not be considered income from D.C. sources, with exception for income from sales to U.S. not excluded under D.C. Code § 47-1803.02(a)(2)(I).

Rules prescribed for allocation of income and deductions between District and foreign sources where income is derived from sources within and without D.C. (D.C. Code § 47-1810.02).

Corporations exempt include insurance companies, guaranty companies, and companies that furnish abstracts of title or insure titles to real estate, all of which pay gross taxes on gross earnings etc. under other provisions of D.C. laws. (D.C. Code § 47-1802.01[26]).

See also category 3 Business Regulation and Commerce, topic 3.01 Banks and Banking.

Unincorporated businesses, as defined in (D.C. Code § 47-1808.01), are subject to franchise tax for privilege of engaging in business within D.C., and of receiving income from sources within District except as exempted under D.C. Code § 47-1802.01. For taxable years beginning after Dec. 31, 2002, tax shall be at rate of 9.5%, except that for taxable years beginning after Dec. 31, 2003, rate of tax shall be 9.975%. Surtax is 2.5% for any tax period beginning after Sept. 30, 1992, and additional surtax is 2.5% for any tax period beginning after Sept. 30, 1994. (D.C. Code § 47-1808.03). Income derived from D.C. sources determined in same manner as corporate tax. Exemptions: $5,000. (D.C. Code § 47-1808.04). Tax not applicable to professional corporations incorporated under D.C. Professional Corporation Act (see D.C. Law 6-16, repealing D.C. Code § 29-621 [§ 29-421] after it was declared invalid in Bishop v. District of Columbia, 401 A.2d 955, aff'd 411 A.2d 997 [D.C. App. 1980]).

Exempt Organizations.

Organizations exempt from income and franchise tax are determined under D.C. Code § 47-1802.01.

Withholding at Source.

Employers making payment of wages to employees (except employees who are not considered as residents) are required to withhold taxes from such wages. (D.C. Code § 47-1812.08). Provision is also made for filing declarations of estimated tax by individuals (D.C. Code § 47-1812.08) and by corporations and unincorporated businesses (D.C. Code § 47-1812.14). District Council may, by rules and regulations, require any person subject to jurisdiction of District to withhold and pay to Mayor, amount not in excess of 5% of all income payable by such person to any foreign corporation or unincorporated business. Any excess over tax of such corporation, as finally determined, must be refunded. (D.C. Code § 47-1812.08[a]).

Returns and Payment.

Return must be filed with Mayor, by Apr. 15 following close of calendar year; and total amount of tax due must be paid to Mayor at time of filing return. (D.C. Code § 47-1812.07).

22.11A INHERITANCE AND ESTATE TAXES:

Inheritance and estate tax is imposed by D.C. Code §§ 47-3701 et seq.

Property Subject.

All real and tangible and intangible personal property having taxable situs in District is subject to inheritance and estate tax, whether decedent is resident or nonresident. (D.C. Code §§ 47-3702-3703).

Intangible property not used in trade or business has taxable situs only at domicile of owner. (D.C. Code §§ 47-3702-3703).

Valuation is based on value as determined for federal estate tax purposes under Internal Revenue Code of 1954. (D.C. Code § 47-3701[13]).

Tax on transfer of taxable estate of every resident (as defined in D.C. Code § 47-3701[10]) having its taxable situs in District is amount of "federal credit" (maximum amount of credit for state death taxes allowable by § 2011 of Internal Revenue Code). (D.C. Code §§ 47-3701[4], 3702[a]). If real or tangible personal property of resident is located outside District and subject to death tax imposed by another state for which credit is allowed under § 2011 of Internal Revenue Code, amount of tax due is credited with lesser of: (a) Amount of death tax paid other state that qualifies for credit against federal estate tax, or (b) amount computed by multiplying federal credit by fraction, numerator of which is value of part of gross estate over which other state has jurisdiction, and denominator of which is value of gross estate. (D.C. Code § 47-3702[b][1-2]).

Tax on transfer of taxable estate of every nonresident having its taxable situs in District is amount computed by multiplying federal credit by fraction described above. (D.C. Code § 47-3703[b]).

Returns and Payment.

Personal representatives of estate subject to tax must file with Mayor, within ten months after death of decedent: (a) Return for District inheritance and estate tax, and (b) copy of federal estate tax return. (D.C. Code § 47-3705[a]). No estate tax return is required to be filed if decedent's gross estate does not exceed $1,000,000. (D.C. Code § 47-3705[a][2]). Tax due must be paid by personal representative before distribution of estate and no later than date return must be filed. (D.C. Code §§ 47-3705[c], 3713). Personal representative personally liable for unpaid tax if he distributes property of estate without having paid or secured tax due. (D.C. Code § 47-3712). If personal representative is required to pay additional tax, or if deficiency is assessed, personal representative must pay additional tax together with interest in accordance with D.C. Code § 47-4201.01. (D.C. Code § 47-3708).

Compromise.

Where Mayor claims that decedent was domiciled in District at time of death and taxing authorities in other state(s) claim domicile in their state(s), Mayor may compromise inheritance and estate tax imposed by District tax act. (D.C. Code § 47-3704).

22.12 INHERITANCE TAX:

See topic 22.11A Inheritance and Estate Taxes.

22.1322.15 [RESERVED]

22.16 PROPERTY TAXES:

Taxable Property.

Taxes on real and personal property are imposed for tax year beginning Oct. 1 for real property and July 1 for personal property. (D.C. Code §§ 47-802[7], 47-1522[e]).

Tax on intangible personal property was repealed in 1939.

Tax on average stock in trade of merchants was repealed effective July 1, 1974. (D.C. Code § 47-1507 as am'd by D.C. Law 6-212, § 24).

Exemptions.

Real property of certain designated ownership and use is exempt. (D.C. Code § 47-1002). Transfers of real property which are exempt are listed in D.C. Code § 47-902. Homestead exemption is $64,000, increased annually, beginning Oct.1, 2008, by cost-of-living adjustment. (D.C. Code § 47-850.01[a]). Exempt personalty includes that of any corporation, and any community chest fund or foundation, organized exclusively for religious, scientific, charitable, or educational purposes, including hospitals, no part of net earnings of which inure to benefit of any private shareholder or individual, except that organization shall have first obtained certificate from Mayor stating that it is entitled to exemption. (D.C. Code § 47-1508). Exemptions also permitted for personal property of (a) company subject to gross receipts or distribution tax, (b) wireless telecommunications company, (c) certain digital radio satellite service companies, (d) qualified supermarkets, (e) Qualified High Technology Company (for ten years). (D.C. Code § 47-1508). Tax credits for Qualified High Technology Companies are permitted under D.C. Code §§ 47-1817.01 et seq.

Rates for real property are set each year for each class of property. (D.C. Code §§ 47-501, 812). For property tax years 2007 and thereafter Oct. 1, 2002, there are three classes of property: Class 1—improved residential real property that is occupied and used exclusively for non-transient dwelling purposes; Class 2—commercial real property that is improved and occupied; Class 3—all real property not in Class 1 or 2. (D.C. Code § 47-813[c-7]). Class 1 property owners, 65 years or older, whose annual household adjusted gross income is less than $100,000, are eligible for 50% decrease in property tax liability (D.C. Code § 47-863). Method of calculating owner-occupant residential tax credit is set forth in D.C. Code § 47-864.

Rate for tangible personal property is $3.40 for each $100 of assessed value in excess of $225,000 in value. (D.C. Code § 47-1522).

Tax Incentives.

Certain tax incentives, tax credits or tax abatements are available for qualified rehabilitation of affordable housing, and for owner-occupants, for rehabilitation of historic homes or homes in certain enterprise zones. (D.C. Code §§ 42-2851.01-2851-08; 47-864-865; 47-1803.02; 47-1806.09).

Assessment.

Assessment procedures are governed generally by D.C. Code §§ 47-820 et seq. Property to be assessed at least once every three years. (D.C. Code § 47-820). Mayor to appoint assessors, and to compile estimated assessment roll and to notify each taxpayer of his assessment not later than Mar. 1 of each year. (D.C. Code §§ 47-821-824). Owner may petition for administrative review of assessment, equalization, valuation or classification on or before Apr. 1 following date of notice of proposed assessment. (D.C. Code § 47-825.01[f-1][1][A]). Mayor has authority to change assessment or classification in accordance with final determination made on petition. Owner aggrieved by final determination may appeal to Board of Real Property Assessment and Appeals within 45 days of date of notice of final determination. (D.C. Code § 47-825.01[f-1][2A]). Board shall attempt to assure assessment at estimated market value, and to raise or lower assessment if it finds preliminary assessment deviates from estimated market value by more than 5%. (D.C. Code § 47-825.01[g]). Mayor has authority to make administrative or clerical corrections. (D.C. Code § 47.825.01[h-l]).

Public Advocate for Assessments and Taxation may appear before or intervene in proceedings before Board of Real Property Assessments and Appeals, Superior Court, and Court of Appeals on behalf of interest of public and taxpayers, or may demand hearing if it deems public interest involved. (D.C. Code § 47-825.02).

Assessment of tangible property, other than automobiles, is based on return prescribed by Mayor. Taxpayer shall not file return before July 1, but shall file return before Aug. 1. (D.C. Code § 47-1524). For failure to file timely return, for failure to pay tax within time required, or for filing fraudulent return, penalties and interest shall be added to tax in accordance with D.C. Code §§ 47-4201 et seq., discussed under topic Administration, subhead Penalties, topics Civil Penalties, and Interest.

Review of Assessment.

Review of most taxes imposed by District may be obtained by payment of tax in full together with penalties and interest, and appeal to D.C. Superior Court (D.C. Code § 47-3303), from which appeal lies to D.C. Court of Appeals (D.C. Code § 47-3304). Owner may appeal proposed assessed value or classification to D.C. Superior Court before Oct. 1 of next tax year provided that owner has first appealed to Board. (D.C. Code § 47-825.01[j-l]).

Payment.

All property taxes are payable to Treasury of United States to credit of District of Columbia, and are due in semiannual installments on or before Mar. 31 and Sept. 15 (in case of real property taxes) (D.C. Code § 47-811) and during month of July (in case of personal property taxes) of fiscal year for which they are imposed (D.C. Code § 47-1524). If any real property tax, or any installment thereof, is not paid within time prescribed, there shall be added to such tax or installment penalty of 10% of unpaid amount plus interest on unpaid amount at rate of 1½% per month or portion of month until real property tax or installment is paid. (D.C. Code § 47-811). Certain owners may defer payment of portion of real property tax increases. (D.C. Code § 47-845).

Liens.

If person refuses or neglects to pay tax after demand, amount of tax, interest, penalty and costs becomes lien in favor of District of Columbia upon person’s property, whether real or personal, and has same effect as lien created by judgment. (D.C. Code § 47-4421). Lien shall not be valid, however, against bona fide purchaser for value, holder of security interest, mechanic’s lienor or judgment lien creditor until lien has been filed with Recorder of Deeds. (D.C. Code § 47-4423[a]). Tax automatically becomes lien on real property on date tax was due and unpaid. (D.C. Code § 47-1331[a]). If tax owed is not paid within ten days after notice and demand, Mayor may collect tax, interest, penalties and expenses of levy by levy upon all property of person, or on property on which there is tax lien. (D.C. Code § 47-4471[a]). Written notice must be given before levy on salary, wages or other property. (D.C. Code § 47-4471[d][1]).

Sale.

List, prepared by Assessor of District, of all real property taxes in arrears on July 1 and Oct. 1, is published according to D.C. Council regulations, together with notice of sale, which is fixed by District Council to begin not less than three weeks after first publication. (D.C. Code § 47-1301). Persons bidding enough to cover delinquent taxes, penalties and costs receive tax certificate and not less than 6 months nor more than one year thereafter, if there has been no redemption, may request issuance of tax deed conveying absolute title to property. (D.C. Code § 47-1304[a]-[e]). If bids are insufficient, property must be bid in by District which may thereafter sell at public or private sale, issue tax certificate therefor on payment of taxes, costs and charges, or proceed to enforce tax lien by judicial proceeding in Superior Court, but minimum period of redemption under any such procedure is six months. (D.C. Code §§ 47-1304, 1312). Sales at public auction are governed by D.C. Code §§ 47-1342, 1346. District is also authorized to take deed in fee simple on property so bid off by it and not redeemed within six months, and under Council regulations may sell property to urban homesteaders. (D.C. Code §§ 47-847, 848). Certain properties also may be brought to tax sale under District's Homestead Housing Preservation Program. (D.C. Code §§ 42-2104 et seq.). Owner of real property with delinquent taxes may not bid on property at tax sale unless owner first pays all delinquent taxes, applicable penalties and costs assessed against property. (D.C. Code § 47-1320). At any time after six months, purchaser may file complaint to foreclose right of redemption. (D.C. Code § 47-1370). Notice must be given to relevant parties. (D.C. Code §§ 47-1372-75). Final judgment foreclosing right of redemption cannot be reopened except for lack of jurisdiction, or fraud in conduct of action to foreclose. (D.C. Code §§ 47-1378-1379). Regulations governing real property tax sales are found at 9 DCMR, c. 3, §§ 316 et seq.

Redemption.

Owner may redeem at any time within six months by payment of tax, penalties, costs and 1.5% per month interest. (D.C. Code § 47-1304, 1360). After six months, owner may redeem until foreclosure of right of redemption is final. (D.C. Code § 47-1360). Minors or persons under disability are allowed until one year after majority or removal of disability to redeem, on payment of purchase money and intervening taxes paid, with 8% interest added. (D.C. Code § 47-1304). Owner can also redeem at any time prior to sale when District takes judicial proceeding to enforce lien (D.C. Code § 47-1312[a]), or prior to issuance of deed in fee simple pursuant to D.C. Code § 47-847.

Real Estate Conveyance Tax.

Separate transfer and recordation taxes are imposed. Transfer tax: 1.1% of consideration for transfer. (D.C. Code § 47-903). Transfers exempt from tax are listed in D.C. Code § 47-902. Recordation tax: 1.1% of consideration paid when deeds are present for recording. If there is lease or ground rent for term (with renewals) that is at least 30 years, recordation tax shall be based upon average annual rent over term of lease, including renewals, capitalized, at rate of 10%, plus any additional consideration payable. (D.C. Code § 42-1103[a][1]). Deed evidencing transfer of economic interest in real property is taxed at 2.9%. (D.C. Code § 42-1103[a][2]). Security interest instrument is taxed at 1.1% of debt secured by real property. (D.C. Code § 42-1103[a][3]-1104). Exemptions include deeds securing debts, deeds of release, deeds to entities exempt from real property taxation, certain intra-family deeds and deeds evidencing economic interest in improved real property owned by cooperative housing association. (D.C. Code §§ 42-1102-1103). There is also exemption when partnership converts to limited liability company, so long as membership and allocation of profits and losses do not change for 12 months following conversion, other than by death of member or involuntary dissolution. (D.C. Code § 29-1013[k][3][C]).

22.17 SALES AND USE TAXES:

Sales Tax.

5.75% of gross receipts of any vendor from retail sale (including snack food and food sold from vending machines) or rental of tangible personal property (with certain exemptions) and of certain selected services, except that such tax is: (a) 12% with respect to parking or storage of motor vehicles; (b) 10.05% with respect to room charges by hotels, etc.; (c) 9% with respect to rental vehicles, spirituous or malt liquors, beers and wines consumed on premises where sold, and food prepared for immediate consumption whether or not consumed on premises where sold; (d) 9% with respect to spirituous or malt liquors, beer and wine sold for consumption off premises where sold; and (e) 12% with respect to tobacco products other than cigarettes. (D.C. Code § 47-2002). In addition to above listed taxes, there is imposed tax of 1% for rental vehicles, spirituous or malt liquors, beers and wines sold for consumption on premises, and 4.45% for accommodations furnished to transients by hotel, inn, or similar place of accommodation. (D.C. Code § 47-2002.02). There is no sales tax on sales of Internet access service. (D.C. Code § 47-2001[n][2][F]). Sale of electricity by electricity supplier for residential use in D.C. is exempt from sales tax. (D.C. Code § 47-2005[24][A]). Other exemptions are listed in D.C. Code § 47-2005.

Payment in Lieu of Sales Tax.

All street vendors will make payments of $375, on or before 20th of every Jan., Apr., July and Oct., in lieu of collecting and remitting sales tax for immediately preceding three months. (D.C. Code § 47-2002.01).

Use Tax.

In general, sale of certain selected services in District of Columbia, as well as all tangible personal property purchased from vendor or retailer, for storage, use or consumption in District, upon which sales tax has not been paid, are subject to use tax of 5.75%, unless exempted or specifically treated. (D.C. Code § 47-2202).

International Fuel Tax Agreement.

Mayor is authorized to become member of International Fuel Tax Association and to enter into International Fuel Tax Agreement (IFTA), which is interstate agreement on collecting and distributing fuel use taxes paid by motor carriers. (D.C. Code § 47-2351).

Utilities Gross Receipts.

Gas, telephone or telecommunications company including both toll telecommunications companies and wireless telecommunications companies, and deliverers of heating oil to end user must pay 11% of gross receipts from sale of public utility services or commodities to nonresidential customers and 10% for sales to residential customers. (D.C. Code §§ 47-2501, 3902-3903). Utility companies are also subject to real property, personal property and corporate income tax. (D.C. Code § 47-2501[c]).

Electric companies are exempted from gross receipts tax but must pay tax based on number of kilowatt-hours distributed to end-users in D.C. (D.C. Code § 47-2501).

Telecommunications companies must pay 11% of monthly gross charges to nonresidential customers, and 10% for sales to residential customers from sale of toll telecommunication service that originates or terminates in District and for which charge is made to service address located in District, regardless of where charge is billed or paid. Wireless telecommunications companies which provide commercial mobile service in District must pay 11% of monthly gross charges if sale is to customer whose place of primary use is in D.C., regardless of where mobile telecommunications services originate, terminate, or pass through. No charges are taxable if customer’s place of primary use is outside D.C. (D.C. Code §§ 47-3922; 47-3902[b][1]).

Employment.

Sales and use taxes imposed on procurement of job seeker for employer or procurement of employment for job seeker. (9 DCMR §§ 490-492.3).

As to tax on: Gross earnings of banks, see category 3 Business Regulation and Commerce, topic 3.01 Banks and Banking; premium receipts and membership fees of insurance companies, see category 16 Insurance, topic Insurance Companies; gross receipts of surety and guaranty companies, see category Insurance, topic Surety and Guaranty Companies.

22.18 STAMP AND SEAL TAXES:

Stamp Tax.

None, except on sale of cigarettes. (D.C. Code §§ 47-2401 et seq.).

22.19 USE TAXES:

See topic 22.17 Sales and 22.19 Use Taxes.

23 TRANSPORTATION

23.01 MOTOR VEHICLES:

Department of Transportation has general supervision. (D.C. Code §§ 50-921.01 et seq., 50-2201.03[b]).

Vehicle registration with Department of Transportation is required (D.C. Code § 50-1501.02[a]), and valid for period established by Mayor (D.C. Code § 50-1501.02[b]) or until sale or transfer of vehicle (D.C. Code § 50-1501.02[e]). Vehicles qualifying for International Registration Plan ("IRP") that list D.C. as established place of business must declare D.C. as base jurisdiction for IRP purposes and obtain base plate from D.C. (D.C. Code § 50-1507.03).

Operator's permit is required, and renewable every eight years. Persons under age 17 may not be licensed. (D.C. Code § 50-1401.01[a][1]). Learner's permit is available for persons age 16 who meet requirements, and provisional motor vehicle operator's permit is available for persons age 16½ who meet requirements. (D.C. Code § 50-1401.01[a][2], [2A]). Applicant seeking to register to vote may complete driver's permit or identification card form as application for voter registration, which Mayor will forward to Board of Elections and Ethics. (D.C. Code § 50-1401.01[a-l]). Special license is required for any person operating commercial motor vehicle. (D.C. Code §§ 50-401-409). Mayor may not print social security number on license unless requested by driver. (D.C. Code § 50-402[4][B]).

Titles and Sales.

Official certificate of title must be obtained from Mayor for $26 fee before vehicle registration will be issued. (D.C. Code § 50-2201.03[d]). Excise tax also imposed (certain vehicles exempt) from 6% to 8% (depending on weight) of fair market value of such vehicle or trailer at time such certificate is issued. (D.C. Code §§ 50-2201.03[j][1]-[3]).

Maximum finance charges for retail installment sales of motor vehicles where seller holds security interest are regulated by statute, which give D.C. Council authority to make regulations with respect to such sales including provisions governing form and substance of security instruments, requiring equal and regular installment payments, permitting prepayment with refund of unearned charges, and governing maximum charges, insurance, methods of sale of repossessed vehicles, and examination of books of seller. (D.C. Code §§ 50-602[e]). Department of Consumer and Regulatory Affairs supervises licensing and regulation of motor vehicle sales finance companies. (16 DCMR §§ 300 et seq.).

Automobile Consumer Protection.

If new motor vehicle does not conform to all warranties during first 18,000 miles of operation or first two years of use, whichever is earlier, manufacturer or dealer shall correct condition at no charge to consumer, unless condition does not significantly impair vehicle or is result of abuse, neglect, or unauthorized modifications. (D.C. Code § 50-502[a]). If manufacturer or dealer is unable to correct condition after reasonable number of attempts, consumer has option to receive exchange of comparable motor vehicle or refund of full purchase price. (D.C. Code § 50-502[b]). If vehicle is returned to manufacturer, Department of Public Works must be notified and will note return on certificate of title. (D.C. Code § 50-502[g]).

Claims for refund or replacement must be submitted to Board of Consumer Claims Arbitration within Department of Consumer and Regulatory Affairs. Arbitration decisions are subject to de novo review in D.C. Superior Court. (D.C. Code §§ 50-502[f], 503). Purchasers must receive written notification of consumer protection rights from manufacturer or dealer, and waiver or limitation of those rights is void. (D.C. Code § 50-504).

Used motor vehicle dealers must provide prospective purchasers with written notification of damage to or material defect in vehicle. Noncompliance provides purchaser with cause of action for any resulting damages or injuries first before Board of Consumer Claims Arbitration and then in D.C. Superior Court and subjects dealer to criminal or civil fines and revocation of license. (D.C. Code § 50-505).

Liens.

Except between parties, or as to persons with actual notice, liens not valid until entered on certificate of title (D.C. Code § 50-1202) by recorder of deeds (D.C. Code § 50-1203). See category 10 Documents and Records, topic 10.04 Records. Filing provisions of Uniform Commercial Code are not applicable for perfecting lien as to third parties. (D.C. Code §§ 28:9-311, 50-1202). Record holder of first unsatisfied lien is entitled to possession of certificate of title. (D.C. Code § 50-1210).

Traffic Offenses.

Minor infractions are subject to administrative adjudication, under supervision of Dept. of Motor Vehicles. (D.C. Code §§ 50-903, 2301.01-2305.02).

Operation Prohibited.

Operation of vehicle is prohibited by person under influence of liquor (assumed with blood alcohol content of .08% or urine content of .10% or if under 21 years of age, assumed if any measurable amount of alcohol) or any drug (D.C. Code § 50-2201.05), or by unlicensed individuals (D.C. Code § 50-1401.01) except nonresidents licensed in compliance with laws of their states for 30 days following entrance into District of Columbia, or driving vehicles registered under law of state not requiring operator's permit. (D.C. Code § 50-1401.02).

Impounded or Immobilized.

Any unattended motor vehicle found parked on public highway in D.C. against which there are two or more traffic violation notices may be impounded or immobilized. (D.C. Code § 50-2201.03[k]). Owner or other authorized person may repossess or secure release upon: (1) Paying booting fee and outstanding fines and penalties, (2) providing proof of entitlement to vehicle; and (3) paying towing fee and storage fee. (D.C. Code § 50-2421.09). Vehicle abandoned on private property and subject to impoundment may be towed if notice of violation is issued against vehicle and vehicle is towed to site within District. (D.C. Code §§ 50-2421.05, 2421.07). Abandoned vehicle not reclaimed can be sold at public auction. (D.C. Code § 50-2421.10).

Implied Consent Act.

Any operator of a motor vehicle in District is deemed to have given consent to two chemical tests of his blood, breath or urine, whichever arresting police officer or any other appropriate law enforcement officer shall elect. Operator can object to particular test only on valid religious or medical grounds. Refusal to submit means no test shall be given, but will result in revocation of license for 12 months. (D.C. Code §§ 50-1901 et seq.).

Size and Weight Limits.

Regulated by District of Columbia Municipal Regulations, Tit. 18, Ch. 25, Vehicles and Traffic (2005).

Equipment Required.

Regulated by District of Columbia Municipal Regulations, Tit. 18, Ch. 7, Vehicles and Traffic (2005).

Mandatory Seat Belts.

Driver and all passengers in motor vehicle must wear properly adjusted and fastened safety belt. (D.C. Code § 50-1802). Any child under 16 years old being transported in motor vehicle must be properly restrained in child restraint seat or safety belt. (D.C. Code § 50-1703). Children under eight years of age must be properly belted into installed infant, convertible (toddler) or booster child safety seat, and booster seat may only be used with both lap and shoulder belt. (D.C. Code § 50-1703).

Lights Required.

Regulated by District of Columbia Municipal Regulations, Tit. 18, Ch. 7, Vehicles and Traffic (2005). Whenever windshield wipers operated continuously for weather conditions, headlamps must be lighted. (18 DCMR § 703.10).

Inspection, for which fee is levied, is required prior to registration. (D.C. Code §§ 50-1101-1107). Motor vehicles and trailers will be inspected for safety and emissions biennially. (18 DCMR § 601.4). Owners of all motor vehicles subject to unresolved emissions recall notices issued after Nov. 1, 1998, in order to pass inspection must provide proof that necessary repairs were completed. (18 DCMR § 619.1).

Accidents.

Driver must stop and give name and address, and name and address of owner of vehicle, to someone at scene of accident, or if no one present, to police. Heavy fine, possible prison term, and loss of driver’s permit penalty for failure if accident involves personal injury or substantial property damage. (D.C. Code § 50-2201.05).

Mobile Telephones.

Drivers must not use mobile phones while driving unless device is equipped with hands-free accessory. (D.C. Code §§ 50-1731.04).

Liability of Owner.

Where motor vehicle is operated by any person other than the owner with the owner’s consent, the operator is deemed to be the agent of the owner and proof of ownership is prima facie evidence that vehicle was operated with consent of the owner. (D.C. Code § 50-1301.08).

Liability of District.

District is now precluded from asserting defense of governmental immunity in damage action where vehicle owned or controlled by District is driven by District employee acting within scope of employment. However, where emergency vehicle on emergency run is involved, District is liable only for gross negligence. (D.C. Code § 2-412).

No action against District employee is permitted unless District specifically denies liability on ground employee was not acting within scope of employee relationship. (D.C. Code § 2-415).

Claimant may not sue until six months after giving notice of claim in accordance with D.C.

Code § 12-309. (D.C. Code § 2-413).

Guests.

There is no statute restricting liability for injury to a gratuitous guest.

Proof of Financial Responsibility.

Persons who have been convicted of or forfeited bail for certain motor vehicle offenses or who have failed to pay judgments upon causes of action arising out of ownership, maintenance, or use of registrable vehicles are required to deposit proof of financial responsibility for future, i.e., proof that motor vehicle is insured under Compulsory/No-Fault Motor Vehicle Insurance Act of 1982. (D.C. Code §§ 31-2401 et seq., 50-1301.34 et seq.). In case of final conviction or forfeiture of bond for driving while intoxicated, homicide by means of motor vehicle, leaving scene of accident without giving assistance, reckless driving involving personal injury, any felony involving use of motor vehicle, or conviction of or forfeiture of bail for one of these offenses, license and registration of such person shall be suspended unless person has previously given or shall then give proof of financial responsibility for future with respect to such vehicles. (D.C. Code § 50-1301.37).

Foreign Vehicle.

Nonresident is not required to register. (D.C. Code § 50-1401.02).

No-Fault Insurance.

D.C. has adopted “No-Fault” insurance as to personal injury (D.C. Code § 31-2401 et seq.). All motorists must carry and all insurers selling motor vehicle insurance in District must offer property damage liability, uninsured motorist coverage, and third-party liability coverage for accidents occurring outside District. In addition, all insurers must offer motorists optional personal injury protection and underinsured motor vehicle coverage. (D.C. Code §§ 31-2403, 2404, 2406)

Optional personal injury coverage of three types available to motorists: (1) At least $50,000 and up to $100,000 per victim for medical expenses; (2) at least $12,000 and up to $24,000 for loss of work; and (3) $4,000 for funeral benefits. Such coverage, when obtained by motorist, shall be provided without regard to, and irrespective of, negligence, freedom from negligence, fault, or freedom from fault on part of any person. (D.C. Code § 31-2404).

Accident victim who seeks personal injury protection benefits must so notify insurer within 60 days of accident. Where accident victim elects to receive personal injury protection benefits, victim may then maintain civil action based on liability with respect to injury only if victim’s damages exceed available benefits, or if motor vehicle was operated in such way as to cause death or permanent or long-term impairment. (D.C. Code § 31-2405). Statute of limitations for recovery of personal injury protection benefits is three years from date of injury. (D.C. Code § 31-2411). Parties with insurance coverage dispute may opt to have dispute resolved by Board of Consumer Claims Arbitration for District of Columbia. (D.C. Code § 31-2405[h]). Disputed claims for automobile physical damage must be arbitrated in accordance with terms of Nationwide Intercompany Arbitration Agreement. (D.C. Code § 31-2405[i]).

No-fault insurance policy may be cancelled or suspended only for nonpayment of premium due or for suspension or revocation of insured’s license or registration. Written notice to insured of cancellation or nonrenewal is required at least 30 days before effective date unless cancellation is for failure to pay premium, in which case 15 day notice required. (D.C. Code § 31-2409).

Uninsured Motorist Fund consisting of monies assessed among all insurers must be administered by Mayor for purpose of awarding compensation to injured accident victim who would not otherwise be compensated for his or her loss. (D.C. Code § 31-2408.01).

Violations of chapter may result in fine of up to $500, license suspension for up to 30 days and/or imprisonment of up to 30 days for first offense, or fine of increase of 50% for second and each subsequent offense, and/or license suspension for up to 60 days and imprisonment of up to 90 days for each subsequent offense. (D.C. Code § 31-2413).

Bicycles.

Operators of bicycles have same rights and duties as do operators of other vehicles, except as otherwise expressly provided by DCMR and except for duties imposed on operators of vehicles by DCMR which could have no reasonable application to bicycle operator. (18 DCMR §§ 1200.3-1201.1). Children under age of 16 must wear helmets while riding bicycles. (D.C. Code § 50-1605).

Personal Mobility Device, or “PMD” means motorized propulsion device designed to transport one person or self-balancing, two non-tandem wheeled device, designed to transport only one person with electric propulsion system but excluding battery-operated wheelchair. (D.C. Code § 50-2201.02). PMD is generally excluded from definition of “motor vehicle”, e.g. D.C. Code §§ 50-1401.01(f). No person under age 16 may operate PMD in D.C. (D.C. Code § 50-2201.04a).

Nonresident operator, who has complied with laws of another state is not required to register for 30 days following entrance. (D.C. Code § 50-1401.02[a]). Thereafter nonresident drivers licensed under States having reciprocal motor vehicle relations with District may obtain reciprocity sticker for further 180-day period and are then required to register in accordance with general law. (D.C. Code § 50-1401.02[b][2]). Otherwise, nonresident is required to register at end of initial 30-day period. (D.C. Code §§ 50-1401.02[b][1], 1501.02).

Actions Against Nonresidents.

In action against nonresident arising out of any accident or collision in which said nonresident or his agent was involved while operating motor vehicle on public highway in District, process may be served by placing copy and fee of $2 in hands of Mayor, provided (1) plaintiff must first file in court undertaking for expense of defense, including reasonable attorney’s fee, to reimburse defendant on failure of plaintiff to prevail, and (2) notice of such service and copy of process must be sent forthwith by registered mail to defendant and return receipt appended to writ, or such notice be served by publication. (See category 5 Civil Actions and Procedure, topic 5.20 Process.) Defendant may be granted such continuances as may be necessary to afford reasonable opportunity to defend action and no default judgment may be granted until at least 20 days have elapsed after service and notice are completed. (D.C. Code § 50-1301.07).

Direct Actions Against Insurer.

See category 5 Civil Actions and Procedure, topic 5.02 Actions.

Motor Vehicle Carriers.

Taxicab rates within the District are subject to regulation by D.C. Taxicab Commission (D.C. Code §§ 50.317 et seq.) but meters may not be required. Taxicabs must carry liability insurance. (D.C. Code § 50-314). It is crime for taxicab passenger to avoid or attempt to avoid payment of lawful fare. (D.C. Code § 50-351). See category 3 Business Regulation and Commerce, topic 3.08 Carriers.

Gasoline Tax.

See category 22 Taxation, topic 22.08 Gasoline and Special Fuels Taxes, subhead Gasoline Taxes.

23.02 RAILROADS:

See category 3 Business Regulation and Commerce, topic 3.08 Carriers.

23.02A WATERCRAFT:

Operation of any vessel or watercraft, including, but not limited to, water skis, aquaplane, sailboard, personal watercraft or similar device is prohibited when person is under influence of intoxicating liquor or any controlled substance or person's blood alcohol concentrate is .08% or urine alcohol concentration of .10%, or if person is under 21 and their blood, breath or urine contains any measurable amount of alcohol. (D.C. Code § 25-1004). Penalties for first offense include fine not to exceed $500, imprisonment for not more than 90 days, or both. Higher penalties for subsequent offenses. (D.C. Code §§ 25-1007).

1
FLORIDA LAW DIGEST

—Scope —

Revised for 2010 edition by

LexisNexis

Citations refer to Florida Statutes. R. C. P. indicates Florida Rules of Civil Procedure. F. P. R. indicates Florida Probate Rules. F. L. R. P. indicates Florida Family Law Rules of Procedure. Session laws are cited by year and chapter number (e.g., 06-176). See also category 6 Courts and Legislature, topic 6.03 Reports.

Note: This revision incorporates statutes passed by legislature and approved by governor through July 2009.

1 INTRODUCTION

1.01 GOVERNMENT AND LEGAL SYSTEM:

The State of Florida is a constituent state of the United States of America. For further discussion of the U.S. federal system, see Introduction to the Federal Government of the United States at the beginning of this volume. A great many laws are promulgated by the federal government of the United States and are not reflected in the topics below. See the Introduction to this volume for references to the federal law topics covered.

Like all but one of the United States, Florida has a common law legal system, with roots in English common law. For information on the courts and legislature of Florida, see category 6 Courts and Legislature.

1.02 [RESERVED]

1.03 HOLIDAYS:

Legal holidays are: Sundays, Jan. 1, Jan. 15 (Birthday of Martin Luther King), Jan. 19 (Birthday of Robert E. Lee), Feb. 12 (Lincoln's Birthday), Feb. 15 (Susan B. Anthony's Birthday), 3d Mon. in Feb. (Washington's Birthday), Apr. 2 (Pascua Florida Day), Good Friday, Apr. 26 (Confederate Memorial Day), last Mon. in May (Memorial Day), June 3 (Birthday of Jefferson

Davis), June 14 (Flag Day), July 4 (Independence Day), 1st Mon. in Sept. (Labor Day), 2d Mon. in Oct. (Columbus Day and Farmer's Day), Nov. 11 (Veterans' Day), general election day, 4th Thurs. in Nov. (Thanksgiving Day), Dec. 25 (Christmas Day), Shrove Tuesday also known as “Mardi Gras” (in counties where carnival associations are organized for celebrating same). (Fla. Stat. 683.01). Chief judge of any judicial circuit is authorized to designate Rosh Hashana, Yom Kippur, and Good Friday as legal holidays for courts within judicial circuit. If holidays are so designated, courts in judicial circuit may remain closed on Rosh Hashana, Yom Kippur, and Good Friday and those days will be holidays for persons employed by courts. (Fla. Stat. 683.19).

1.04 OFFICE HOURS AND TIME ZONE:

Most of Florida is in Eastern (GMT -05:00) time zone; the western half of Florida Panhandle (northwestern Florida) is in Central (GMT -06:00) time zone. Office hours are generally from 9 a.m. to 5 p.m.

1.04A OTHER OBSERVANCES:

Arbor Day, 3d Fri. in Jan. (Fla. Stat. 683.04), Pan-American Day, Apr. 14 (Fla. Stat. 683.05), Pascua Florida Day, Apr. 2 (Fla. Stat. 683.06), Gasparilla Day, Legal Holiday in Hillsborough County (Fla. Stat. 683.08), DeSoto Day, legal holiday in Manatee County, last Friday of DeSoto Week (Fla. Stat. 683.09), Parade Day, Hillsborough County (Fla. Stat. 683.12), Law Enforcement Memorial Day, May 15 (Fla. Stat. 683.115), Patriots' Day, Apr. 19 (Fla. Stat. 683.14), Teacher's Day, 3d Fri. in May (Fla. Stat. 683.15), I Am An American Day, 3d Sun. in Oct. (Fla. Stat. 683.145), Juneteenth Day, June 19 (Fla. Stat. 683.21), Bill of Rights Day, Dec. 15 (Fla. Stat. 683.25), Ronald Reagan Day, Feb. 6 (Fla. Stat. 683.26), Homeless Person's Memorial Day, Dec. (Fla. Stat. 683.325), Three Kings Day, Jan. 6 (Fla. Stat. 683.33).

Holiday Falling on Sun.

When legal holiday falls on Sun., following Mon. is holiday. (Fla. Stat. 683.01[2]).

Legality of Transactions on Sat., Sun. or Holiday.

Service or execution on Sun. of any writ, process, warrant, order, or judgment is void, unless person liable to have any such service or execution upon him intends to withdraw himself from state in which case such service may be obtained upon affidavit of person requesting service or execution. (Fla. Stat. 48.20). Warrants for arrest may be lawfully served any day and at any time of day or night (Fla. Stat. 901.04; 1956 Op. Atty. Gen. 056-327), and search warrants may be lawfully served on Sun. if expressly authorized in warrants. (Fla. Stat. 933.101).

2 BUSINESS ORGANIZATIONS

2.01 AGENCY:

Common law governs. See category 21 Property, topic 21.15 Powers of Attorney.

2.02 ASSOCIATIONS:

Two or more persons may associate to transact business under declaration of trust, but not as a banking or security business. (Fla. Stat. 609.01).

Provisions exist for creation of Agricultural Cooperative Marketing Associations (c. 618), Limited Agricultural Associations (Fla. Stat. 604.10), for Nonprofit Cooperative Associations of three or more persons engaged in certain specified agricultural businesses (c. 619), Motor Vehicle Service Agreement Companies (Fla. Stat. 634.011-634.289), Condominium Associations (c. 718), Home Warranty Associations (Fla. Stat. 634.301-634.348), Florida Insurance Guaranty Association, Incorporated (Fla. Stat. 631.55), Capital Stock Associations (c. 665), Mobile Home

Owner Associations (Fla. Stat. 723.075-723.0791), Service Warranty Associations (Fla. Stat. 634.401-634.444), Fraternal Benefit Societies (Fla. Stat. 632.601-632.638). §634.041, provides that in order to qualify and hold license to issue motor vehicle service agreements, service agreement company must maintain, among other criteria, minimum net assets of $500,000.

Foreign unincorporated joint stock associations may, in lieu of filing authenticated copy of any charter, Certificate of Incorporation, or Articles of Incorporation, qualify to do business in state by filing authenticated copy of Articles of Association with Secretary of State and otherwise qualifying in same manner as foreign corporation, including payment of all fees, taxes, and other charges so prescribed, and appointment of resident agent. (c. 622)

Professional Corporations.

See topic 2.03 Corporations, subhead Professional Corporations.

2.03 CORPORATIONS:

Corporation Law of Florida was completely rewritten effective July 1, 1990. Model Business Corporation Act was basis for Florida Business Corporations Act. See Part VI. C. 608 reenacted effective Apr. 21, 1982 relating to limited liability companies. Corporations not for profit are governed by Florida Not For Profit Corporation Act, c. 617, which was substantially revised effective July 1, 1991.

General Supervision.

Vested in Department of State, division of corporations (Fla. Stat. 20.10, 607.0125, and 607.0130), P.O. Box 6327, Tallahassee, FL 32314. http://www.dos.state.fl.us/doc/

Purposes.

Corporation may be organized for any lawful purpose or purposes, except when in conflict with regulations and statutes controlling specific types of businesses. (Fla. Stat. 607.0301).

Name must include word “corporation,” “company” or “incorporated” or abbreviation, affix, prefix, suffix or word clearly indicating corporation and may not imply corporation is organized for other than permitted purpose or connected with state or federal government agency and must be distinguishable from all other filed or registered names. (Fla. Stat. 607.0401). Model Act also allows word “limited”. (§4.01). Name of business corporation may not include word “co-operative” unless it has complied with provisions of c. 618. (Fla. Stat. 618.27). Fictitious name of corporation actively organized or registered with Department of State not required to register name pursuant to Fictitious Name Act unless name under which business is conducted differs from name as registered, and not required to contain designation of type of legal entity. (Fla. Stat. 865.09). See category 17 Intellectual Property, topic 17.01 Trademarks and Tradenames, subhead Tradenames. No formal name clearance procedure. For fees, see subhead Filing Fee, infra.

Incorporators.

One or more persons, or domestic or foreign corporation, partnership, limited partnership or association, may act as incorporator or incorporators by signing and delivering to Secretary of State articles of incorporation. (Fla. Stat. 607.0201). There are no requirements that incorporator be citizen or resident of Florida.

Term of corporate existence is perpetual unless otherwise specified in articles of incorporation. (Fla. Stat. 607.0302).

Articles of incorporation and other documents for filing must be executed by directors, officers or incorporator(s) (Fla. Stat. 607.0120) and must include corporate name, street address of principal office, and, if different, mailing address of corporation; number of shares corporation is authorized to issue with provision for preemptive rights if granted; name and street address of initial registered agent and written acceptance required by §607.0501(3); and name and address of each incorporator. (Fla. Stat. 607.0202). Articles of incorporation must authorize one or more classes of shares that together have unlimited voting rights and that are together entitled to receive net assets of corporation on dissolution. (Fla. Stat. 607.0601). Any of following provisions, if applicable, must be included in articles: classes of stock, their par value, preferences, limitations and relative rights of each class (Fla. Stat. 607.0601); and shareholders' preemptive rights (Fla. Stat. 607.0202). Articles may also include names and addresses of initial directors and other lawful provisions relating to corporation's powers, conduct of its affairs, officers, and rights and duties of stockholders and directors; par value for authorized shares or classes of shares; and personal liability of shareholders for debts of corporation. (Fla. Stat. 607.0202).

Filing of Articles.

Articles of incorporation must be delivered to Department of State. (Fla. Stat. 607.0201). State may prescribe form which must be used (Fla. Stat. 602.0120[8]). Electronic transmittal is authorized. (Fla. Stat. 602.0120[4]). Corporate existence commences upon filing, unless articles designate date, which may be on subscription and acknowledgment date if articles filed within five business days of said date (excluding legal holidays), or articles may postpone commencement of existence for up to 90 days after filing. (Fla. Stat. 607.0123, 607.0203).

Correcting Filed Documents.

Documents filed with Department of State may be corrected within 30 days after filing if document contains inaccuracy, was defectively executed, attested, sealed, verified or acknowledged, or electronic transmission was defective, by filing articles of correction that describe document and its filing date and specifying inaccuracy or defect to be corrected and by correcting inaccuracy or defect. (Fla. Stat. 607.0124). Articles of correction are filed with Department of State and are effective on effective date of document they correct except as to persons who rely on uncorrected document and who are substantially and adversely affected by correction. (Fla. Stat. 607.0124[3]).

Filing fee for articles of incorporation is $35, filing fee for amendment to articles of incorporation is $35. Filing fee for articles of merger or share exchange is $35 for each party to merger or consolidation. Filing fee is $35 for application of foreign corporation for authority to transact business in state, filing amended application of foreign corporation for authority to transact business in state, filing application of foreign corporation for withdrawal, or articles of revocation of dissolution. Fee for certificate of domestication of foreign corporation is $50. Filing fee is $600 for application for reinstatement following administrative dissolution. Filing fee is $61.25 for filing annual report. Supplemental corporate fee in amount of $88.75 is imposed on corporations authorized to transact business and required to file annual report. Late charge of $400 is imposed if supplemental corporate fee is remitted after May 1 except in circumstances in which business entity did not receive uniform business report. (Fla. Stat. 607.193). Filing fee is $87.50 for filing application for, or renewal of, registered name. Filing fee is $35 for filing certificate designating registered agent, changing resident agent. Fee for agent's statement of resignation from inactive corporation is $35; for resignation from active corporation, $87.50. Fee for furnishing certified copy of any document, instrument, or paper relating to corporation, is $52.50. Fee for application for certificate of status is $8.75. Fee for serving as agent for substitute service of process is $87.50. Filing fee for any other corporate document, statement or report, $35. (Fla. Stat. 607.0122). Above fees are payable to Department of State.

License to Do Business.

Foreign corporation must apply for certificate of authority to transact business. (Fla. Stat.

607.1501).

Paid in Capital Requirements.

No minimum capital requirement established by statute.

Certificate Evidencing Filing.

Department of State's filing of articles of incorporation is conclusive proof incorporators complied with all conditions precedent and corporation incorporated under c. 607, except against state in proceeding to cancel or revoke certificate of incorporation or for involuntary dissolution of corporation. (Fla. Stat. 607.0203). Certificate attached to copy of document filed by Department of State is conclusive that original document is on file with Department. (Fla. Stat. 607.0127). Anyone may apply to Department of State for Certificate of Status which may be relied upon as conclusive evidence that domestic or foreign corporation is in existence or is authorized to transact business in Florida. (Fla. Stat. 607.0128).

Amendment to Articles of Incorporation.

Corporation may amend its articles, to add or change provision that is required or permitted in articles or to delete provision not required in articles. (Fla. Stat. 607.1001). Unless articles provide otherwise, Board of Directors may amend articles without shareholder vote to extend duration of corporation if it was incorporated at time when limited duration was required by law; delete names and addresses of initial directors or initial registered agent; delete any other information that is solely of historical interest; delete authorization of class or series of shares authorized pursuant to §607.0602, if no shares of such class have been issued; make certain changes to corporate name; change par value for class or series of shares; or provide that if corporation acquires its own shares, shares belong to corporation and constitute treasury shares until disposed of or canceled. (Fla. Stat. 607.1002). All other amendments must be recommended by Board, (unless Board determines that conflict of interest exists), submitted to vote at meeting of shareholders, and approved by affirmative vote of majority of shares entitled to vote thereon, unless greater vote is required, and by any special voting groups entitled to vote pursuant to §§607.0725 and 607.0726. Unless otherwise provided in articles, shareholders of corporation having 35 or fewer shareholders may amend without act of directors at meeting for which notice of changes to be made is given. (Fla. Stat. 607.1003).

Amendments adversely affecting one class of stockholders must be separately approved by such class. (Fla. Stat. 607.1004). Restated articles of incorporation may be adopted by board of directors without vote of stockholders. (Fla. Stat. 607.1020; Fla. Stat. 607.1007). If restatement includes one or more amendments to articles requiring shareholder approval it must be adopted pursuant to §607.1003 and contain information required under §607.1006. Additional technical requirements for amendments set forth in §607.1006.

Increase or decrease of authorized stock is accomplished by amending articles of incorporation upon vote by holders of outstanding shares. (Fla. Stat. 607.1004, 607.1002). See also subhead Filing Fee, supra.

By-Laws.

Power to adopt, alter, amend or repeal by-laws vested in board of directors, unless reserved to shareholders by articles of incorporation (Fla. Stat. 607.0206, 607.1020[1][a]) or by-law to be adopted, amended or repealed fixes greater quorum or voting requirement for shareholders (Fla. Stat. 607.1021[2]). Shareholders have right to amend or repeal by-laws in any event. (Fla. Stat. 607.1020). By-laws fixing greater shareholder quorum or voting requirements may be adopted, amended or repealed only upon such greater vote or quorum. (Fla. Stat. 607.0121[1]). By-laws fixing greater quorum or voting requirements of directors may be amended or repealed only by shareholders if initially adopted by shareholders, but if initially adopted by directors, then either shareholders or directors. (Fla. Stat. 607.1022). By-laws may contain any provisions for regulation and management of affairs of corporation not inconsistent with law or articles of incorporation. (Fla. Stat. 607.0206). Florida now permits directors to determine, if articles so provide, before issuance of any shares of class or series, preferences, limitations, and relative rights of such class or series of shares within limits of Fla. Stat. 607.0601. (Fla. Stat. 607.0602).

Emergency By-Laws.

Directors may adopt emergency by-laws, unless articles provide otherwise, to be effective if quorum of directors cannot readily be assembled because of catastrophic event. (Fla. Stat. 607.0207). Emergency by-laws may provide for procedures for calling directors' meeting, quorum requirements, designation of additional or substitute directors during such emergency. Emergency by-laws are subject to amendment or repeal by shareholders. Regular by-laws consistent with emergency by-laws remain in effect during emergency; emergency by-laws become ineffective after emergency ends. (Fla. Stat. 607.0207[3]). Corporate action taken in good faith in accordance with emergency by-laws binds corporation and may not be used to impose liability on corporate director, officer, employee or agent. (Fla. Stat. 607.0207[4]). Emergency powers of directors operating pursuant to emergency by-laws are set out at Fla. Stat. 607.0303.

Stock authorized may consist of one or more classes, and may have par value or no par value, with designations, preferences, limitations and relative rights as prescribed by articles of incorporation. (Fla. Stat. 607.0202, 607.0601). Corporations may issue fractional shares, and scrip in registered or bearer form. (Fla. Stat. 607.0604). Florida permits directors to determine, if articles so provide, relative rights of class or series of shares before issuance of any shares of class or series. (Fla. Stat. 607.0602).

Stock Certificates.

Shares may but need not be represented by certificates. (Fla. Stat. 607.0625[1]). Certificates must be signed manually or by facsimile by officers designated in by-laws or by board of directors and may bear corporate seal or its facsimile. (Fla. Stat. 607.0625[4]). Florida allows issuance of shares without certificates, as long as required information is communicated in writing. (Fla. Stat. 607.0626).

Information required to be provided includes name of issuing corporation and that corporation organized under laws of this state; name of person to whom issued; number and class of shares and designation of series, if any. Also, certificates representing shares issued by corporation authorized to issue shares of more than one class must set forth or summarize upon face or back of certificate, or state that corporation will furnish to shareholders upon request and without charge full statement of, designations, preferences, limitations and relative rights of such shares, and if corporation is authorized to issue any preferred or special class in series, variations in relative rights and preferences between such shares. (Fla. Stat. 607.0625). Certificates representing shares restricted as to sale, disposition or other transfer must state such restrictions conspicuously on front or back, or existence must be mentioned in information statement required by §607.0626(2); unless so noted, restriction not enforceable against person without knowledge. (Fla. Stat. 607.0627[2]).

Issuance of Stock.

Corporation may issue stock described in its articles of incorporation. (Fla. Stat. 607.0603). Board of Directors may authorize shares to be issued for consideration consisting of any tangible or intangible property or benefit. Prior to issuance of shares, Board of Directors must make conclusive determination as to adequacy of consideration relating to whether shares are validly issued, fully paid and nonassessable. (Fla. Stat. 607.0621).

Shareholders have no preemptive rights to unissued shares or treasury shares unless provided in articles of incorporation. (Fla. Stat. 607.0630). Shareholders of corporations in existence prior to Jan. 1, 1976 having preemptive rights, continue to have such preemptive rights unless certificate of incorporation is amended to alter or terminate those rights. (Fla. Stat. 607.0630). Model Act contains procedure relative to preemptive rights and reacquisition of shares.

See also category 22 Taxation, topic 22.18 Stamp and Seal Taxes, subhead Documents.

Transfer of Stock.

Uniform Commercial Code adopted. (cc. 670-680). See category 3 Business Regulation and Commerce, topic 3.09 Commercial Code. Stockholder agreements imposing reasonable restrictions on transfer are valid, but should be authorized by articles of incorporation. (76 So.2d 478).

See also category 22 Taxation, topic 22.18 Stamp and Seal Taxes, subhead Documents.

Uniform Simplification of Fiduciary Security Transfers Act repealed. (1998 Fl. ALS 11). Uniform Commercial Code adopted. (cc. 670-680). See category 3 Business Regulation and Commerce, topic 3.09 Commercial Code.

Stock Transfer Tax.

See category 22 Taxation, topic 22.18 Stamp and Seal Taxes, subhead Documents.

Uniform Transfers to Minors Act adopted. (c. 710).

Stockholders' Liabilities.

Holder of or subscriber for shares of corporation under no obligation to corporation or creditors to pay for shares other than obligation to pay corporation unpaid portion of consideration for which shares were issued. Pledgee or fiduciary holder of stock not personally liable as shareholder but pledgor or other person transferring such shares as collateral is considered holder thereof for purposes of liability under §607.0622. Ordinarily shareholders are not liable for debts of corporation. (Fla. Stat. 607.0622).

Stockholders' Meetings.

Notice stating place, day and hour of meeting, and in case of special meeting, purpose(s) for which meeting called, must be given to stockholders with right to vote not less than ten nor more than 60 days before meeting, which may be held within or without state. (Fla. Stat. 607.0705, 607.0701, 607.0702). If corporation has not held annual meeting for 13 month period (15 months, or six months after end of fiscal year under Model Act), or if corporation has failed to hold special meeting properly demanded by shareholder pursuant to §607.0702, any shareholder may apply to circuit court to order such meeting to be held. (Fla. Stat. 607.0703). Board of directors may authorize shareholders and proxy holders to participate, be deemed present, vote in annual meeting or special meeting by means of remote communication. (Fla. Stat. 607.0701[4]; Fla. Stat. 607.0702[4]). Unless otherwise provided in certificate of incorporation, action may be taken without meeting, notice or vote, if consent in writing setting forth action taken is signed by minimum number of votes necessary to authorize such action at meeting. (Fla. Stat. 607.0704). Actions without meeting are effective only upon delivery to corporate secretary or authorized custodian of corporate records of one or more written consents describing action taken, dated and signed by approving shareholders having requisite number of votes of each voting group entitled to vote thereon. Such corporate actions are effective only if taken within 60 days of earliest written consent delivered. (Fla. Stat. 607.0704[1]). Written consents may be revoked in writing prior to receipt by corporation of minimum number of consents necessary to authorize proposed action. Notice of such action taken must be given within ten days to shareholders who have not consented or who are not entitled to vote thereon. (Fla. Stat. 607.0704[3]).

Notice must be in writing, unless oral notice is expressly authorized by articles or by-laws and is reasonable under circumstances, and may be communicated by telephone, voice mail (where oral notice permitted), or other electronic means, or by mail or other method of delivery. Notice by electronic transmission is written notice. (Fla. Stat. 607.0141). Written notice by domestic or foreign corporation authorized to transact business in Florida to its shareholder is effective upon deposit into U.S. mail, if mailed postpaid and correctly addressed to shareholder's address or when electronically transmitted to shareholder in manner authorized by shareholder, and notice to such corporation may be addressed to its registered agent at its registered office, to its electronic mail address as authorized, or to its secretary at its principal office. (Fla. Stat. 607.0141). Single written notice to shareholders who share address is effective if shareholders consent; shareholder who fails to object in writing within 60 days of written notice of corporation's intent to use single notice deemed consent. (Fla. Stat. 607.0141[3]). All other notices are effective at earliest of: (i) Receipt, (ii) five days after deposit in U.S. mail, properly addressed and postpaid, (iii) date of return receipt if by registered or certified mail, (iv) time communicated, if oral notice, (v) time specified for particular circumstances under c. 607, or (vi) time specified in articles or by-laws if less stringent than required under c. 607.

Voting.

Unless articles of incorporation provide otherwise, voting for directors is not cumulative and each stockholder is entitled to one vote for each share standing in his name on books. (Fla. Stat. 607.0728, 607.0721[1]). Majority of shares constitutes quorum unless articles specify otherwise but not less than 1/3 of shares entitled to vote. (Fla. Stat. 607.0725). Majority of shares in series or class of voting as series or class constitutes quorum. (Fla. Stat. 607.0725[1]). Shares entitled to vote as group pursuant to §607.0725 may take action only if quorum is present at meeting; majority is quorum of such group unless otherwise provided in articles. Stockholders may vote by proxy appointed by written instrument or by electronic transmission and proxy is valid for 11 months unless otherwise provided therein. Stockholders may appoint proxy by signing appointment form or transmitting or authorizing electronic transmission. Proxy is revocable unless holder thereof falls within one of statutory classifications. Any copy, facsimile transmission, or other reliable reproduction of writing or electronic transmission which is complete reproduction of entire original may be used in lieu of original writing or electronic transmission. Corporation may adopt bylaws authorizing additional means or procedures for shareholders to use in exercising proxies. (Fla. Stat. 607.0722).

Control-Share Acquisition.

Florida has adopted control-share acquisition statute that was based and similar in form to Indiana control-share acquisition statute that was upheld by U.S. Supreme Court. (Fla. Stat. 607.0902). Statute limits ability of person or group of persons to vote stock of corporation, if person or group of persons have voting power to elect directors of corporation and person or group of persons control at least one-fifth of corporation's stock. Articles of incorporation and by-laws of corporation can exclude corporation and its shareholders from §607.0902's application. Additionally, several other exceptions to statute's requirements are set forth in §607.0902.

Voting trusts may be created by entering into written agreement, depositing copy with corporation, and transferring shares to trustee. (Fla. Stat. 607.0730).

Voting Agreements.

Two or more shareholders may provide for manner in which they will vote their shares by signing agreement for that purpose. Transferees of shares covered by such agreement are bound by the agreement if transferee takes shares subject to such agreement with notice thereof. (Fla. Stat. 607.0731).

Affiliated Transactions.

Unless requirements of §607.0901 are complied with, affiliated parties (as defined in quoted statute) are prohibited in certain situations from obtaining stock by sale, lease, exchange, mortgage, pledge or other disposition. A corporation may opt out of this provision.

Tender Offers.

See category 3 Business Regulation and Commerce, topic 3.25 Securities, subhead Tender Offers.

Stockholders' Derivative Actions.

Plaintiff must have been, or acquired shares from, shareholder at time of transaction complained of. Complaint must be verified and allege with particularity that demand on directors to obtain action was refused or ignored for period of at least 90 days from first demand unless, prior to expiration of 90 days, person was notified in writing that corporation rejected demand or irreparable injury to corporation would result by waiting. Court may dismiss derivative proceeding if one of specified groups makes good faith determination that derivative suit is not in corporation's best interest. If court finds action was commenced without reasonable cause it may assess costs, including reasonable attorneys fees, against plaintiff. (Fla. Stat. 607.07401).

Directors.

Corporation is managed by one or more directors (Fla. Stat. 607.0801; Fla. Stat. 607.0803) who need not be residents of state or shareholders of corporation unless otherwise provided in articles of incorporation. (Fla. Stat. 607.0802). Corporation having 100 or fewer shareholders may dispense with or limit authority of board of directors by agreement among shareholders. (Fla. Stat. 607.0732). Stockholders elect directors at annual meeting. (Fla. Stat. 607.0701). Directors may be divided into not more than three classes with number of directors in each class being as nearly equal as possible (Fla. Stat. 607.0806[1]), whose terms of office expire at different times. Corporations existing prior to July 1, 1990 may continue to have four classes of directors and continue to serve staggered terms pursuant to articles or by-laws. (Fla. Stat. 607.0806[2]). Vacancies are filled, until next election of directors, by affirmative vote of majority of remaining directors or by shareholders. (Fla. Stat. 607.0809).

Classes.

Articles of incorporation may confer upon holders of any voting group the right to elect one or more directors. Terms of office and voting powers of such directors elected may be greater than or less than those of any other director or class of directors. (Fla. Stat. 607.0804).

Executive Committee.

By resolution board may designate executive committee from among its members unless prohibited in articles of incorporation or by-laws. (Fla. Stat. 607.0825). Such committees exercise all authority of Board except approval or recommendation to shareholder of actions required to be approved by shareholders, filling board vacancies, adoption, amendment or repeal of by-laws, reacquisition of corporation shares, and issuance or contract for sale of shares or determination of rights of such shares, except within limits specifically prescribed by Board. (Fla. Stat. 607.0825).

Directors' meetings may be called by the chairman of the board or by the president and may be held within or without state. (Fla. Stat. 607.0820). Regular meeting may be held with or without notice as prescribed in by-laws. (Fla. Stat. 607.0822[1]). Special meeting requires at least two days notice unless otherwise provided in by-laws. (Fla. Stat. 607.0822[2]). Attendance of director at meeting constitutes waiver of notice thereof, unless attendance is for express purpose of objecting to manner in which meeting has been called. (Fla. Stat. 607.0823). Attendance may be by any means of communication by which all directors participating may simultaneously hear each other. (Fla. Stat. 607.0820[4]). Majority of numbers of directors prescribed by articles or by-laws constitutes quorum, unless articles of incorporation or by-laws provide otherwise, but in no event may number constituting quorum be less than 1/3 of number of directors. (Fla. Stat. 607.0824). Vote of majority of members present at meeting at which quorum is present constitutes action of board, unless otherwise provided. (Fla. Stat. 607.0824). Directors may act by unanimous written consent without meeting, unless otherwise provided in articles of incorporation or by-laws. (Fla. Stat. 607.0821).

Liabilities of Directors.

Director has no liability by reason of being director if director has discharged duties in good faith, in manner director reasonably believes to be in best interests of corporation and with that degree of diligence, care and skill which ordinarily prudent person would exercise under similar circumstances in like position. (Fla. Stat. 607.0830). In discharging such duties, director is entitled to rely on information, opinions, reports or statements, including financial statements and other financial data prepared by certain officers and employees of corporation, counsel, public accountants and certain other professionals, or committee of board on which director has not served as to matters within its designated authority. (Fla. Stat. 607.0830).

Unless director complies with above standard, director who votes for or assents to declaration of dividend or other distribution of assets to shareholders made in violation of §607.06401, is liable to corporation (Fla. Stat. 607.0834).

Director against whom claim for improper distribution is successfully asserted is entitled to contribution from other directors and shareholders who voted for, or concurred in, action upon which claim is asserted. (Fla. Stat. 607.0834[2]).

Transactions involving conflicts of interest governed by Fla. Stat. 607.0832.

Officers.

Corporation must have officers described in its by-laws or appointed by Board of Directors. (Fla. Stat. 607.08401). Two or more offices may be held by same person. Officer has such authority and performs such duties as may be provided in by-laws, or determined by resolution of board not inconsistent with by-laws. Officers serve at pleasure of Board of Directors. (Fla. Stat. 607.0842). Officers may be removed by Board of Directors at any time, with or without cause. (Fla. Stat. 607.0842).

Indemnification of Directors and Officers.

Florida provides for mandatory indemnification of reasonable expenses upon successfully defending action. Florida. (Fla. Stat. 607.0850[3]). This applies to foreign corporations acting under certificate of authority to transact business in 843 So. 2d 953). Indemnification is permissible if director, officer, employee, or agent acted in good faith and in manner he or she reasonably believed to be in, or not opposed to, best interests of corporation and, with respect to any criminal action or proceeding, had no reasonable cause to believe his or her conduct was unlawful. (Fla. Stat. 607.0850[1], [2]). Expenses incurred by officer or director in defending civil or criminal proceeding may be paid by corporation in advance of final disposition of such proceeding as limited by statute. Expenses incurred by other employees and agents may be paid in advance upon such terms or conditions that board of directors deems appropriate. (Fla. Stat. 607.0850[6]). Corporation may make further indemnification or advancement of expenses authorized under any bylaw, agreement, vote of shareholders or disinterested directors, or otherwise. Indemnification subject to numerous statutory restrictions. (Fla. Stat. 607.0850[1]-[3], [7], etc.). Unless corporation's articles of incorporation provide otherwise, notwithstanding failure of corporation to provide indemnification, application for indemnification or advancement of expenses may be made to appropriate court. See statute for details.

Corporation may purchase and maintain insurance on behalf of present or former directors, officers, employees, or agents of corporation. (Fla. Stat. 607.0850[12]).

Principal office (in or out of this state) is where principal executive offices of corporation are located as designated in initial filing, and thereafter as designated in annual report. (Fla. Stat. 607.01401[20]).

Registered Office and Registered Agent.

Every corporation must maintain registered office in this state and registered agent, which agent may be individual resident in this state whose business office is identical with such registered office or foreign or domestic corporation or not for profit corporation authorized to transact business or conduct its affairs in Florida having business office identical with such registered office. (Fla. Stat. 607.0501). Does not apply to corporations otherwise required to designate Chief Financial Officer as attorney for service of process, savings associations or savings and loan associations subject to c. 665, banks and trust companies subject to financial institutions code. (Fla. Stat. 607.0501[2]). Each registered agent and each successor registered agent appointed pursuant to §607.0502 on whom process may be served must file statement with Department of State accepting appointment simultaneously with being designated. Such acceptance must state that registered agent is familiar with and accepts obligations of that position. (Fla. Stat. 607.0501[3]). Corporation may not maintain any action in court of Florida until corporation complies with §607.0501 or §607.1507. (Fla. Stat. 607.0501[5]). Filing fee for certificate designating registered agent is $35. (Fla. Stat. 607.0122[5]).

General powers of corporations conferred by statute. (Fla. Stat. 607.0302).

Political contributions are not prohibited but limited in amount by c. 106.

Ultra vires no defense. (Fla. Stat. 607.0304). Lack of capacity may be asserted in proceeding by shareholder against corporation, or by corporation against incumbent or former officers and directors of corporation, or in proceeding by attorney general to enjoin corporation from transaction of unauthorized business or to dissolve corporation. (Fla. Stat. 607.0304[2]).

Dividends.

Board of directors may authorize and corporation may make distributions to its shareholders, subject to restrictions in articles, unless corporation would not be able to pay its debts as they become due in usual course of business or corporation's total assets would be less than sum of its total liabilities plus (unless articles permit otherwise) amount that would be needed to satisfy preferential rights of shareholders whose preferential rights are superior to those receiving distribution. (Fla. Stat. 607.06401). This applies to S corporation even though all income is taxed to shareholders. (911 So. 2d 1222). If distribution is based upon fair valuation of assets, distribution must be identified as distribution based upon current valuation of assets, and amount per share paid on basis of such valuation must be disclosed to shareholders. (Fla. Stat. 607.06401[5]).

Unclaimed Dividends.

See category 21 Property, topic 21.01 Absentees, subhead Escheat.

Sale, Lease or Exchange of all Assets.

Corporation may sell, lease, exchange or otherwise dispose of all, or substantially all of its property in ordinary course of business upon director approval unless articles require shareholder approval. (Fla. Stat. 607.1201). Dispositions otherwise than in ordinary course of business must be approved by directors and authorized by majority of shareholders and any voting group entitled to vote unless articles require greater vote. (Fla. Stat. 607.1202). Corporation must notify each shareholder of record and notice must specify rights of dissenting shareholders to be paid fair value for their shares and other specified information. (Fla. Stat. 607.1202). Dissenting stockholders may be entitled to appraisal rights. See subhead Appraisal, infra. Unless otherwise provided in articles of incorporation, directors may, without stockholder consent, mortgage or pledge any or all corporate property and assets to secure corporate obligations. (Fla. Stat. 607.1201). Transactions constituting distributions are governed by §607.06401 not by §607.1202.

Stock books and records, including minutes of proceedings of shareholders, board of directors, and executive committees, must be kept and made available for inspection by shareholders during regular business hours upon five business days written notice. (Fla. Stat. 607.1601 and Fla. Stat. 607.1602). Shareholder of corporation is entitled to inspect and copy during regular business hours excerpts from minutes of any meeting, accounting records of corporation, record of shareholders, and any other books or records upon fifteen business days written notice and if demand is made in good faith, she describes her purpose and records she desires to inspect, and records are directly connected with that purpose. (Fla. Stat. 607.1602[3], [4]). Corporation may deny any demand for inspection if demand was made for improper purpose or if demanding shareholder has, within two years preceding demand, sold or offered for sale any list of shareholders of corporation or any other corporation or improperly used any information secured through any prior examination of corporate records. (Fla. Stat. 607.1602[6]). Shareholder may not sell or otherwise distribute any information or records inspected, except to extent such use is for proper purpose. (Fla. Stat. 607.1602[7]). Persons violating foregoing provision are subject to civil penalty of $5,000. (Fla. Stat. 607.1602[7]). Unless modified by shareholder resolution, within 120 days of close of each fiscal year corporation must furnish its shareholders annual financial statements that include balance sheet, income statement and statement of cash flow for that year. (Fla. Stat. 607.1620). If corporation indemnifies or advances expenses to any director, officer, employee or agent under Fla. Stat. 607.0850 otherwise than by court order or action by shareholders or by insurance carrier, corporation must report indemnification or advance in writing to its shareholders. (Fla. Stat. 607.1621).

Annual Reports.

All domestic and foreign corporations authorized to do business in this state must file after Jan. 1 and before May 1 of each year annual report (Fla. Stat. 607.1622) and pay filing fee of $61.25 (Fla. Stat. 607.0122[17]) to Department of State. Corporation failing to file may not maintain or defend any action in any court in this state and may be subject to dissolution or cancellation of certificate of authority to do business. (Fla. Stat. 607.1622[8]). Department of State prescribes form of annual report and may substitute uniform business report. (Fla. Stat. 607.1622[9]).

Corporate Bonds or Mortgages.

Issuance by board of directors authorized. No need of shareholder approval unless required by articles of incorporation. (Fla. Stat. 607.1201).

Merger and Share Exchange.

Two or more Florida corporations may merge (Fla. Stat. 607.1101) or engage in share exchange (Fla. Stat. 607.1102). To effect merger or share exchange, board of each corporation must adopt and submit to stockholders plan of merger or plan of share exchange. (Fla. Stat. 607.1101, 607.1102 and 607.1103). Proposed plan of merger or plan of share exchange must be approved by vote of majority of stockholders unless otherwise provided. (Fla. Stat. 607.1103). Notwithstanding foregoing, unless required by articles of incorporation, vote of shareholders of surviving corporation on plan of merger is not required if plan does not amend articles of incorporation of surviving corporation; each share of stock of surviving corporation outstanding immediately before merger becomes identical share of surviving corporation. (Fla. Stat. 607.1103[7]).

Parent corporation owning at least 80% of outstanding shares of each class of subsidiary corporation may merge such subsidiary into itself, may merge itself into subsidiary, or such subsidiary into another subsidiary without approval of shareholders of any of corporations. (Fla. Stat. 607.1104). Directors may adopt plan of merger setting forth name of parent and subsidiary; manner and basis of converting shares of parent or subsidiary; provision for pro rata issuance of shares of subsidiary to holders of shares of parent corporation upon surrender of certificates therefor; clear and concise statement that shareholders of subsidiary who, except for provisions of §607.1104, would be entitled to vote and who dissent from merger pursuant to Fla. Stat. 607.1320, may be entitled to be paid fair value of their shares. (Fla. Stat. 607.1104).

Foreign and domestic corporations may merge or enter into share exchange if, in merger, merger is permitted by foreign jurisdiction and, in share exchange, corporation, shares of which will be acquired, is domestic corporation. (Fla. Stat. 607.1107). Where foreign or domestic corporation is surviving or acquiring corporation it must comply with Florida law with respect to filing articles of merger or share exchange (Fla. Stat. 607.1105), and, where merged corporation or corporation whose shares are acquired is domestic corporation, it must comply with applicable Florida law with respect to adoption of plans of merger and share exchange, shareholder notification and voting. (See generally §§607.1101-607.1104.)

Merger or share exchange becomes effective upon filing of articles with Department of State unless articles specify later date. (Fla. Stat. 607.1105[1]). Dissenting stockholders may be entitled to appraisal rights. See subhead Appraisal, infra.

Domestic corporation may merge with or into limited liability company, foreign corporation, not-for-profit corporation, business trust or association, real estate investment trust, common law trust, unincorporated business, general partnership, limited partnership, or any other entity formed pursuant to requirements of applicable law if domestic entity complies with applicable statutory provisions and merger is permitted by laws governing foreign entity. If surviving entity is partnership, no shareholder of domestic corporation that is party to merger may, as result of merger, become general partner of surviving entity, unless all such shareholders specifically consent in writing to becoming general partner. Surviving entity must deliver to Department of State articles of merger. (Fla. Stat. 607.1108-607.11101).

Conversion.

Corporation may convert to another business entity organized under laws of Florida or any other state. Business entity means limited liability company, business trust or association, real estate investment trust, general partnership including limited liability partnership, limited partnership including limited liability limited partnership, or any other entity organized under applicable law (but does not include corporation or any entity not organized for profit). (Fla. Stat. 607.1112). Plan of conversion must be adopted and approved by directors and shareholders in same manner as merger. (Fla. Stat. 607.1112[6]).

Dissolution.

Voluntary dissolution may be accomplished by incorporators or directors before commencement of business or issuance of shares (Fla. Stat. 607.1401), or by written consent of all shareholders at any time (Fla. Stat. 607.1402[6]), or by board of directors proposal approved by vote of majority of stockholders (Fla. Stat. 607.1402). In all cases, articles of dissolution must be prepared setting forth name of corporation, date dissolution was authorized, statement that number of shareholder votes cast was sufficient for dissolution, if applicable. (Fla. Stat.

607.1403). Corporation is dissolved upon effective date of its articles of dissolution. (Fla. Stat. 607.1403). Dissolved corporation continues its corporate existence but may not carry on any business, except that appropriate to wind up and liquidate its business and affairs. (Fla. Stat. 607.1405). Name of dissolved corporation is not available for assumption or use by another company until 120 days after effective date of dissolution. (Fla. Stat. 607.1405[4]). Corporation may revoke its dissolution any time prior to expiration of 120 days following effective date of articles of dissolution. (Fla. Stat. 607.1404).

Corporation may be dissolved involuntarily by decree of circuit court for county in which principal office or, if none, registered office of corporation is located in action filed by department of legal affairs when it is established that corporation procured its articles of incorporation through fraud, or corporation has exceeded authority conferred upon it by law (Fla. Stat. 607.1430, 607.1431); in proceeding by shareholder if directors are deadlocked and shareholders are unable to break deadlock and irreparable injury to corporation is threatened, or shareholders are deadlocked and have failed to elect successor directors, (Fla. Stat. 607.1430[2]), in proceeding by shareholder or group of shareholders in corporation having 35 or fewer shareholders if corporate assets are being misapplied or wasted causing material injury to corporation or directors or those in control have acted, are acting or are reasonably expected to act in manner that is illegal or fraudulent (Fla. Stat. 607.1430[3]), or in proceeding by creditor if creditor's claim is reduced to judgment which remains unsatisfied and corporation is insolvent or corporation has admitted in writing claim is due and owing and corporation is insolvent. (Fla. Stat. 607.1430[4]). Corporation may be dissolved administratively by order of Department of State if corporation has failed to timely file its annual report and pay annual report filing fee, has failed for 30 days to appoint and maintain registered agent in this state, has failed for 30 days after change of its registered office or registered agent to file statement of such change, has failed to answer truthfully and fully interrogatories propounded by Department of State or corporation's period of duration has expired. (Fla. Stat. 607.1420). Notice must be given 60 days before proposed administrative dissolution. (Fla. Stat. 607.1421). Corporation dissolved by Department of State may be reinstated by application and payment of fees. (Fla. Stat. 607.1422).

Dissolved corporation or successor entity may invoke three year statute of limitations barring known claims against shareholders and directors of dissolved corporation by following procedures set forth in Fla. Stat. 607.1406, or four year statute of limitations barring unknown claims by following procedures set forth in Fla. Stat. 607.1407.

Receiver or custodian may be appointed by circuit court in judicial proceeding to dissolve corporation. (See Fla. Stat. 607.1432, 607.1434.) Court may also appoint provisional director, order purchase of complaining shareholder's shares or grant other equitable relief as court in its discretion deems appropriate. (Fla. Stat. 607.1434, 607.1435, 607.1436).

Appraisal.

Shareholders dissatisfied with terms of fundamental corporate change usually are permitted to compel corporation to buy their shares at fair value by following statutory procedure. Following are entitled to appraisal: (i) any shareholder entitled to vote on plan of conversion or merger and shareholders of subsidiary in short form merger (Fla. Stat. 607.1302[1][a]); (ii) shareholders of corporation whose shares are being acquired in share exchange (Fla. Stat. 607.1302[1][b]); (iii) shareholder entitled to vote on disposition of all or substantially all corporation's property outside usual and regular course of business, unless sale is pursuant to court order or is cash sale in which net sale proceeds will be distributed to shareholders within one year of date of sale (Fla. Stat. 607.1302[1][c]); (iv) with regard to class of shares prescribed in articles of incorporation prior to Oct. 1, 2003, including any shares within that class subsequently authorized by amendment, shareholder whose rights are materially and adversely affected by amendment of articles (e.g., changes preferential redemption or preemptive rights, limits voting rights, or reduces shareholder's shares to fractional shares to be purchased by corporation), unless there is court order for reorganization (Fla. Stat. 607.1302[1][f]).

Exceptions.

Appraisal rights are not available for holders of any class or series of shares which: (i) is traded on national securities exchange; or (ii) has at least 2,000 shareholders when outstanding shares of that class or series has market value of at least $10 million (excluding value of shares held by subsidiaries, senior executives, directors, and beneficial shareholders owning more than 10% of such shares). (Fla. Stat. 607.1302[2][a]).

Regardless of limitations in Fla. Stat. 607.1302(2)(a), appraisal rights are available for holders of class or series of shares required to accept anything other than cash or shares for such shares, or any other proprietary interest of any other entity, that satisfies standards set forth in Fla. Stat. 607.1302(2)(a) at time corporate action becomes effective. (Fla. Stat. 607.1302[2][c]).

Regardless of limitations in Fla. Stat. 607.1302(2)(a), appraisal rights are available for holders of any class or series of shares if any of shares or assets of corporation are being acquired or converted by person who has, or at any time in one-year period preceding approval of corporation action had: (i) beneficial owner of 20% or more of voting power of corporation or (ii) power to cause appointment or election of 25% or more of directors. Appraisal rights also available for holders of any class or series of shares if any of shares or assets are being acquired or converted by person who is, or at any time in one-year period preceding approval of corporation action was, senior executive or director of corporation or senior executive of any affiliate thereof, and will receive financial benefit not generally available to other shareholders (other than certain benefits related to employment, consulting, and retirement). (Fla. Stat. 607.1302[2][d]).

Procedure.

If proposed corporate action is to be submitted to vote at shareholders' meeting, meeting notice must state that corporation has concluded that shareholders are, are not, or may be entitled to assert appraisal rights. If corporation concludes that appraisal rights are or may be available, copy of relevant statutes must accompany meeting notice. In merger, parent corporation must notify in writing all record shareholders of subsidiary who are entitled to assert appraisal rights that corporate action became effective; notice must be sent within ten days after corporate action became effective. If proposed corporate action is to be approved other than by shareholders' meeting, notice must be sent to all shareholders at time that consents are first solicited. (Fla. Stat. 607.1320). Shareholder who wishes to exercise appraisal rights must, before vote is taken, deliver written notice of intent to demand payment for shares if proposed action is taken and cannot vote in favor of proposed action. If action is to be taken without shareholder meeting, shareholder must deliver such written notice within 20 days after receiving notice of proposed action. (Fla. Stat. 607.1321). If proposed action is approved at shareholders' meeting, corporation must notify, within ten days after vote, all shareholders who filed intent to demand payment. Notice must state when and where shareholders must submit shares and state other terms of repurchase. Notice must also state corporation's estimate of fair value of shares and be accompanied by corporation's balance sheet, cash flow statement, latest available interim financial statements, if any, and income statement. Corporation cannot set time for receiving payment demands less than 40 or more than 60 days after date corporation's notice is delivered. (Fla. Stat. 607.1322). Shareholder must then demand payment in accordance with notice given by corporation. (Fla. Stat. 607.1323). When proposed action is taken, corporation must pay dissenters amount corporation estimates as fair value of shares within 90 days of receipt of shareholder's demand. Distributions may not be made under some circumstances. (Fla. Stat. 607.06401). If shareholder is dissatisfied with corporation's determination of value, shareholder must notify corporation of shareholder's estimate of fair value and demand payment of that estimate plus interest. (Fla. Stat. 607.1326). If corporation does not want to pay what shareholder demands, corporation must file action in court within 60 days after receiving shareholder's demand, requesting court to determine fair value of shares; if corporation does not commence proceeding within 60-day period, any shareholder who has made demand may commence proceeding in name of corporation. (Fla. Stat. 607.1330). Court may appoint appraiser to receive evidence and recommend decision on question of fair value. No right to jury trial. Corporation must pay each shareholder amount found to be due within ten days after final determination. (Fla. Stat. 607.1330).

Limited Liability Company.

See topic 2.06 Limited Liability Companies.

Close Corporations.

No separate provisions for close corporations.

Foreign Corporations.

Certificate of authority to do business in state is required. (Fla. Stat. 607.1501). To procure certificate of authority, corporation must file certificate of existence issued from authorized officer of jurisdiction of incorporation evidencing its incorporation, translated under oath if in foreign language. (Fla. Stat. 607.1503[2]). Application, must include name of corporation, jurisdiction, and date of incorporation, duration of corporation, street address of principal business office, address of registered office in state and name of resident agent, name and usual business addresses of its current directors and officers, and such other facts as may be required by Department of State. (Fla. Stat. 607.1503[1]). Authority to transact business continues until surrendered, suspended or revoked. (Fla. Stat. 607.1505, 607.1520). Name of foreign corporation must satisfy requirements of Fla. Stat. 607.0401 or otherwise satisfy requirements of Fla. Stat. 607.1506. (Fla. Stat. 607.1503; Fla. Stat. 607.1506). Foreign corporation doing business in Florida without certificate of authority cannot maintain any action in Florida courts until certificate obtained. (Fla. Stat. 607.1502). Failure to obtain authority to transact business does not impair validity of any contract, deed, mortgage, security interest or act of corporation and does not prevent such corporation from defending any proceeding in this state. (Fla. Stat. 607.1502[5]). Corporations transacting business without certificate are liable to state for all fees and taxes that would have been imposed had such corporations duly qualified and such corporations are liable to state for penalty of not less than $500 nor more than $1,000 for each year or part thereof during which they so transact business. (Fla. Stat. 607.1502[4]).

Foreign corporation may register its corporate name with additions, if any, required by §607.1506, if name is distinguishable from corporate names that are not available under §607.0401(4). (Fla. Stat. 607.0403[1]). Registration may be renewed from year to year by annually filing renewal application. (Fla. Stat. 607.0403[4]).

See subheads Annual Reports, and Filing Fee, supra.

See also category 21 Property, topic 21.16 Real Property.

Exceptions.

Following activities, among others, do not constitute transacting business within meaning of subsection Fla. Stat. 607.1501(1): (i) Maintaining bank accounts; (ii) selling through independent contractors; (iii) soliciting or obtaining orders, whether by mail or through employees, agents, or otherwise, if orders require acceptance outside this state before they become contracts; (iv) transacting business in interstate commerce; and (v) conducting isolated transaction that is completed within 30 days and that is not one in course of repeated transactions of like nature. (Fla. Stat. 607.1501[2]).

Surrender of Authority.

Withdrawal is effected by filing with Secretary of State application for certificate for withdrawal on forms provided by Secretary stating: Name of corporation, jurisdiction of incorporation, that corporation is not transacting business in state and surrenders authority to do so, revocation of authority of registered agent and naming Secretary of State as agent for service of process, mailing address for mailing copy of any process and commitment to notify Department of State of future change in mailing address. (Fla. Stat. 607.1520). Application must be accompanied by $35 fee. (Fla. Stat. 607.0122[16]).

Foreign Boycott.

Effective Oct. 1, 1977, Florida corporations and corporations doing business in state are prohibited from cooperating in various specified ways with foreign boycotts that discriminate on basis of person's sex, race, color, religion, ancestry, or national origin or on basis of person's lawful business associations. (Fla. Stat. 542.34).

Corporate privilege tax previously called capital stock tax was redesignated annual report filing fee as of Apr. 14, 1972. (See subhead Annual Reports, supra.)

Corporate Income Tax.

All references herein to Internal Revenue Code are to U.S. Internal Revenue Code of 1986, as amended and in effect on Jan. 1, 2006.

Corporation income tax of 5½% is imposed on all corporations. Taxpayers subject to alternative minimum tax liability under §55(b)(2) of Internal Revenue Code of 1986 subject to 3.3% state tax on alternative minimum taxable income less exemption amount, as computed under Internal Revenue Code of 1986. (Fla. Stat. 220.11[3], 220.13[2][k]). All domestic corporations and all foreign corporations qualified to do business in Florida or actually doing business in Florida are subject to income tax. Among those entities subject to tax are corporations not for profit (c. 617), agriculture cooperative marketing associations (c. 618), professional service corporations (c. 621), foreign unincorporated associations (c. 622), private school corporations (c. 623). Not included are state or public fairs or expositions (c. 616) and limited liability companies taxable as partnerships for federal income tax purposes (Fla. Stat. 220.03, 220.02[1]). Exemption allowed of $5,000 or lesser amount which will provide State with amount equal to maximum federal income tax credit. (Fla. Stat. 220.14). Taxable income for Subchapter S corporations (§1362 of Internal Revenue Code) is amounts subject to tax under §1374 of Internal Revenue Code or §1375 of Internal Revenue Code. (Fla. Stat. 220.13[2][i]). Income tax generally administered by Department of Revenue. (Fla. Stat. 220.51). Returns with certain exceptions required to be filed and tax paid at place designated by Department of Revenue on first day of fourth month after close of tax year or 15th day following due date for filing of related federal return. (Fla. Stat. 220.222). Return required by any taxpayer liable for Florida income tax or required to file Federal income tax return regardless of whether taxpayer is liable for Florida income tax. (Fla. Stat. 220.22). Florida partnership having partner subject to tax under c. 220 is required to file information return by first day of fifth month following close of tax year. (Fla. Stat. 220.22; Fla. Stat. 220.222). All taxpayers are required to notify Department of Revenue with respect to any deficiency or adjustment made on federal income tax return and file certified copy of such change. (Fla. Stat. 220.23[1]). Failure to notify Department of Revenue of any deficiency or adjustment and as required in §220.23 subjects taxpayer to penalty for late filing of returns described below. Returns for DISC (§6011[c][2] of Internal Revenue Code) are due by first day of tenth month following close of tax year. (Fla. Stat. 220.222). Penalties in regard to Florida corporate income tax are similar to federal penalties, i.e., penalty for late filing is 10% of tax due per month up to maximum of five months (Fla. Stat. 220.801). Interest accruing on taxes not paid at rate, determined semi-annually, which is based on average prime rate charged by commercial banks during certain six month period plus 4 percentage points, but never greater than 12%. (Fla. Stat. 220.807; Fla. Stat. 220.809). Interest in accordance with Fla. Stat. 220.807 due on amount of deficiency from date fixed for filing original return, without regard to any extension for filing, until date of payment of deficiency. (Fla. Stat. 220.23). Interest on overpayments of tax accrues from date taxpayer files written notice with Department of Revenue at same rate as interest on underpayments and is payable to taxpayer unless overpayment is refunded within three months after date upon which written notice is filed, in which case no interest is allowed. (Fla. Stat. 220.723). Criminal penalties provided for willful violation of Florida corporate income tax code. (Fla. Stat. 220.901; Fla. Stat. 220.903; Fla. Stat. 220.905). Penalty for incomplete return in amount of greater of $300 or 10% of tax due, up to $10,000. (Fla. Stat. 220.211).

Corporate income for purposes of state income tax is based on corporate income determined for federal income tax purposes. (Fla. Stat. 220.12). Business and nonbusiness income apportioned separately. Nonbusiness income is allocated based upon location, situs, or place of use of underlying assets. Business income is apportioned based upon formula described below. Statute provides for certain adjustments to income. For example, added back to income for Florida income tax purposes is federal deduction for state income tax and interest not subject to federal income tax under §103(a)(1) of Internal Revenue Code. (Fla. Stat. 220.13[1][a]). Subtracted from Federal income tax are certain deductions allowed for Federal income tax. (Fla. Stat. 220.13[1][b]). Special rules are provided for reporting installment sales which decrease taxable income from sales consummated in years prior to enactment of income tax statute. (Fla. Stat. 220.13[1][c]). Special rules are provided for life insurance companies (Fla. Stat. 220.13[2][a]); other insurance companies (Fla. Stat. 220.13[2][b]); regulated investment companies (Fla. Stat. 220.13[2][d]); corporations filing consolidated returns (Fla. Stat. 220.13[2][f], see also Fla. Stat. 220.131); cooperative corporations or associations (Fla. Stat. 220.13[2][g]); and organizations exempt under §501(a) of Internal Revenue Code (Fla. Stat. 220.13[2][h]). Because of limited space it is not possible to mention adjustments in any detail or all of adjustments; therefore, statute must be consulted. Apportionment formula is provided at §§220.15. Generally, apportionment of business income is based on formula to determine income subject to Florida income tax, arrived at by using 25% of ratio of real and personal property owned and rented in Florida to total of such property everywhere, 25% of ratio of compensation paid in Florida to total compensation everywhere, 50% of ratio of taxpayer's Florida sales to total sales everywhere. (Fla. Stat. 220.15). Apportionment methods for insurance companies and taxpayers furnishing transportation services are separately provided. (Fla. Stat. 220.151). Apportionment method under Fla. Stat. 220.15 rather than Fla. Stat. 220.151 applies to insurance companies and taxpayers furnishing transportation services if such taxpayers are members of affiliated group which has elected to file Florida consolidated return. (Fla. Stat. 220.131[5]). Special formulas are provided for when Fla. Stat. 220.15 and 220.151 do not fairly reflect Florida income. (Fla. Stat. 220.152).

Nonbusiness income allocated as follows: Net rents and royalties of Florida real property and capital gains and losses from sales of Florida real property allocable to Florida; net rents and royalties from tangible personal property are allocable to Florida if and to extent such property utilized in Florida or in their entirety if taxpayer's commercial domicile is Florida and taxpayer not organized under or taxable in state where such property utilized; capital gains and losses from sales of tangible personal property allocable to Florida if such property was located in Florida when sold or taxpayer's commercial domicile is Florida and taxpayer not taxable in state where such property was located; if taxpayer's commercial domicile is Florida, interest, dividends and capital gains and losses from sales of intangible property allocable to Florida. (Fla. Stat. 220.16). As in case of adjustments to income, apportionment statute must be consulted.

Tax credits are provided for enterprise zone jobs (Fla. Stat. 220.181), enterprise zone property (Fla. Stat. 220.182), community contribution (Fla. Stat. 220.183), hazardous waste facility (Fla. Stat. 220.184) and Florida alternative minimum tax (Fla. Stat. 220.186), contaminated site rehabilitation (Fla. Stat. 220.1845), contributions to nonprofit scholarship-funding organizations (Fla. Stat. 220.187), rural job and urban high crime area job programs (Fla. Stat. 220.1895), child care facility startup costs (Fla. Stat. 220.19), capital investment (Fla. Stat. 220.191), renewable energy technologies investment (Fla. Stat. 220.192), and renewable energy production (Fla. Stat. 220.193).

Declaration of estimated tax where estimated tax can reasonably be expected to exceed $2,500 must be filed. (Fla. Stat. 220.24). Number of installment payments depends upon when declaration of estimated tax is required to be filed. (Fla. Stat. 220.33). Extensions for filing and paying tax are provided for (Fla. Stat. 220.222[2]), but tentative tax based on estimation of tax due is required (Fla. Stat. 220.32).

Tax year and method of accounting are same as those for federal income tax purposes. (Fla. Stat. 220.42, 220.41). Taxpayer may elect to use percentage of completion (Treas. Reg. Fla. Stat. 1.451-3[b][1]) for reporting income if completed contract election in effect for federal income tax purposes (Fla. Stat. 220.42[3]).

Emergency excise tax (EET) of 2.2% of amount equal to 2.5 times remainder of 40% of deductions allowed under §168 of Internal Revenue Code, exclusive of deduction allowed under §168(B)(3), for assets placed in service after Dec. 31, 1980 and before Jan. 1, 1987. (Fla. Stat. 221.01[2]). Taxpayer must file estimated, tentative and final returns on combined corporate tax/emergency excise tax return and declaration forms as prescribed by Department of Revenue in order for corporate income tax administrative provisions relating to tentative and estimated taxes to apply to combined payments and tax liabilities. (Fla. Stat. 221.04).

Banking institutions are subject to state franchise tax. (Fla. Stat. 220.63). Under statute, franchise tax base is bank's adjusted federal income tax as defined in §220.13 less deduction allowed for eligible net income of international banking facility and $5,000. (Fla. Stat. 220.63[3]).

Taxation of Corporate Stock.

See category 22 Taxation, topics 22.15 Property Taxes, subhead Intangible Personal Property Tax; 22.18 Stamp and Seal Taxes, subhead Documents.

Franchise Tax.

See subhead Corporate Privilege Tax, supra.

Corporations not for profit may be organized for any lawful purpose not for pecuniary profit and not specifically prohibited to corporations under laws of Florida. (Fla. Stat. 617.0301). One or more persons, including corporations, partnerships and other entities, may act as incorporators by delivering articles of incorporation to Department of State for filing. (Fla. Stat. 617.02011). Articles must state name (including “corporation”, “incorporated”, “corp.” or “inc.”), purposes, address of principal office and mailing address, manner in which directors are to be elected or appointed, any provision which limits corporate powers authorized by act, address of initial registered office and name and written acceptance of initial registered agent, and name and address of each incorporator. (Fla. Stat. 617.0202). Fees for filing documents and issuing certificates are as provided in §607.0122. Foreign not for profit corporation may become domesticated in state by filing certificate of domestication and articles of incorporation. (Fla. Stat. 617.1803).

Professional Corporations.

Professional Service Corporation Act (c. 621) allows one or more individuals legally authorized to perform same professional services within state to incorporate for sole purpose of rendering same professional services (Fla. Stat. 621.05). Special provisions limit issuance and transfer of stock (Fla. Stat. 621.09); impose personal liability on officer, employee or agent for negligent or wrongful acts or misconduct committed by him or by person under his or her direct supervision and control (Fla. Stat. 621.07); and permit corporate name to contain names of some or all shareholders which may contain the last names of deceased former individual shareholders or of a predecessor corporation or partnership, and must contain designation “chartered,” “professional association,” or “P.A.,” provided that it may do business under corporate name without such designation if it is registered under fictitious name law (Fla. Stat. 621.12). Corporation organized for profit may convert to Professional Service Corporation. (Fla. Stat. 607.1805). Provisions of c. 607 govern when not in conflict with c. 621. (Fla. Stat. 621.13).

Deeds.

See category 21 Property, topic 21.06 Deeds.

Model Non-Profit Corporation Act not adopted.

2.04 FOREIGN CORPORATIONS:

See topic 2.03 Corporations, subhead Foreign Corporations.

2.05 JOINT STOCK COMPANIES:

No statutory provision for organization in Florida. Florida Statutes do expressly recognize validity of business trusts, however. See subhead Business Trusts, infra.

Business trusts may engage in any business except banking or security business. (Fla. Stat. 609.01).

Formation.

Business trusts are created by deed or declaration of trust, which is sworn to by chairman of board of trustees and filed with Department of State with $350 filing fee (Fla. Stat. 609.02), after which certificate of authority is issued (Fla. Stat. 609.03). Settlor of business trust transfers assets to trustees who then manage business for benefit and profit of beneficiaries, usually called shareholders, who hold certificates evidencing beneficial interests in trusts.

Continuity.

Perpetual existence unless otherwise provided in declaration of trust.

Sale of Shares.

It is unlawful to sell shares of business trust without certificate of authority. (Fla. Stat. 609.04). Before any person may offer security of business trust for sale, such person must procure permit from Office of Financial Regulation of Financial Services Commission. (Fla. Stat. 609.05).

Liability.

Declaration of trust may provide that shareholders who have not paid in full for each unit, share, certificate of beneficial ownership or interest, or other security are personally liable to trust, or its creditors for sum remaining unpaid. Shareholders not otherwise liable for any debt or obligation of trust. (Fla. Stat. 609.07).

Merger.

Upon filing corporate articles of merger with $350 filing fee, business trust can be merged with corporation which is wholly owned by trust. In such merger, corporation survives and trust disappears. Dissenting shareholders are not entitled to any appraisal rights unless provided in declaration of trust. (Fla. Stat. 609.08).

Taxation.

For state ad valorem tax purposes, shares of Florida business trust are treated as personal property, regardless of nature of trust assets. (Fla. Stat. 609.051).

Foreign unincorporated associations have option to qualify to transact business in Florida with Secretary of State. (Fla. Stat. 622.01-.07).

Professional Corporations.

See topic 2.03 Corporations, subhead Professional Corporations.

2.06 LIMITED LIABILITY COMPANIES:

General Supervision.

Vested in Department of State, division of corporation. (Fla. Stat. 20.10, c. 608).

Formation.

One or more persons may form limited liability company. (Fla. Stat. 608.405). Common law or business trust or association, real estate investment trust, general partnership, limited partnership, limited liability partnership, or any other domestic or foreign entity, provided such term does not include domestic limited liability company, may convert to domestic limited liability company. (Fla. Stat. 608.439).

Foreign limited liability company may apply for certificate of authority to transact business in state by delivering application to department. See statute for details. (Fla. Stat. 608.503).

Tax Exemption.

Limited liability company classified as partnership for federal income tax purposes, or single member limited liability company which is disregarded as entity separate from its owner for federal income tax purposes, and organized pursuant to 608 or qualified to do business in state as foreign limited liability company, is not “artificial entity” within purview of Fla. Stat. 220.02 and not subject to tax imposed under 220. Single-member limited liability companies that are disregarded for federal income tax purposes must be treated as separate legal entitles for all non-income tax purposes; may report and account for income, employment, and other taxes under taxpayer identification number of owner of single-member entity. (Fla. Stat. 608.471).

Purposes.

Limited liability company may be organized for any lawful purpose, but remains subject to statutes and regulations of state for regulating and controlling its business, which control when in conflict with c. 608. (Fla. Stat. 608.403).

General powers conferred by statute. (Fla. Stat. 608.404).

Name.

Effective until Jan. 1, 2008, name must contain words “limited liability company”, “L.L.C.”, “LLC”, “limited company”, “L.C.”, or “LC”. Word “limited” may be abbreviated as “Ltd.” and word “company” may be abbreviated “Co.” Omission of required designations in name of limited liability company renders any person who knowingly participates or acquiesces in omission liable for any indebtedness, damage, or liability caused by omission. Effective Jan. 1, 2008, name must end with words “limited liability company,” abbreviation “L.L.C.,” or designation “LLC.” Word “limited” may be abbreviated as “Ltd.,” and word “company” as “Co.” With regard to any limited liability company in existence prior to July 1, 2007 and registered with Division of Corporations, requirement that name of entity be distinguishable from names of other entities and filings does not apply except when limited liability company files documents on or after July 1, 2007 that would otherwise have affected its name. (Fla. Stat. 608.406).

Articles of organization must be executed and filed with Department of State. Effective Jan. 1, 2008, name of limited liability company must satisfy requirements of §608.406. (Fla. Stat. 608.407). See statute for details. (Fla. Stat. 608.4081). Loss suffered by reliance on false statement in articles may be recovered as damages from person who signed or caused another to sign knowing statement to be false. (Fla. Stat. 608.408[4]). In limited circumstances, may correct articles of organization within 30 business days after filing. See statute for procedure and details. (Fla. Stat. 608.4115).

Articles of organization are amended by filing articles of amendment with Department of State. Articles of amendment must state name, date of filing articles of organization, and amendment. (Fla. Stat. 608.411).

Filing Articles of Organization.

Existence begins at date and time when articles of organization filed, unless articles specify different time, no more than 5 business days prior to, nor more than 90 days after, filing. Department of State's filing of articles is conclusive proof that all conditions precedent to organization have been satisfied except in proceeding by state to cancel or revoke or administratively dissolve organization. Limited liability company cannot transact business or incur indebtedness, except that incidental to organization, until effective date and time of commencement of existence. (Fla. Stat. 608.409).

Registered office and registered agent must be maintained in this state. Registered agent may be individual who resides in this state or foreign or domestic entity authorized to transact business in this state having business office identical with registered office. Registered agent or successor must file writing with Department of State accepting appointment simultaneously with being designated. Limited liability company may not prosecute, maintain or defend any action in any court until it has registered office and registered agent and pays to Department of State penalty of $5 for each day it has failed to comply or $500, whichever is less, and pays any other amount required under c. 608. (Fla. Stat. 608.415). See statute for details governing change of registered office or agent and resignation of agent. (Fla. Stat. 608.416).

Annual Report.

All limited liability companies authorized to transact business in state must deliver to Department sworn annual report between Jan. 1 and May 1 of each year. Company failing to file annual report not permitted to prosecute, maintain, or defend any action in any court of this state until report filed and all fees, penalties, and taxes due are paid. (Fla. Stat. 608.4511).

Management.

Unless otherwise provided in articles of organization or operating agreement, company management is vested in members or elected managing members in proportion to then-current percentage or other interest of members in profits; decision of majority-in-interest of members or elected managing members is controlling. Each member is agent of limited liability company (Fla. Stat. 608.422) and acts of member apparently carrying on ordinary business bind company, unless member had no authority to act and person with whom member was dealing knew or had notice that member lacked authority. See statute for additional details. (Fla. Stat. 608.4235).

If articles of organization or operating agreement provide for vesting management in one or more managers, company is manager-managed company. Each manager has equal rights in management and conduct of business may be exclusively decided by majority of managers. Action of members or managers may be taken without meeting. Proxies permitted. (Fla. Stat. 608.422). Member not agent of manager-managed company solely by reason of being member. Each manager is agent of company, and act of manager apparently carrying on in ordinary course company's business binds company, unless manager had no authority to act and person with whom manager was dealing knew or had notice that manager lacked authority. (Fla. Stat. 608.4235). Further powers of manager set out in statute.

Each manager and managing member owes limited duty of loyalty and care. (Fla. Stat. 608.4225). Transactions between company and member or manager are not void or voidable if they are disclosed, ratified by majority of disinterested members or managers, and fair and reasonable to the company. (Fla. Stat. 608.4226). Unless otherwise provided in articles of organization or operating agreement, member or manager has power and authority to delegate rights and powers to manage and control business. (Fla. Stat. 608.4236).

For management procedure in case of assignment of interest, and rights and powers of assignee, see statute. (Fla. Stat. 608.432; Fla. Stat. 608.433).

Liability.

Neither members nor managers are liable, solely by reason of being member or serving as manager, under judgment, decree, or order of court, or in any other manner, for debt, obligation, or liability of limited liability company. Member or manager not liable to limited liability company or any other member or manager for good faith reliance on provisions of articles of organization or operating agreement. Manager or managing member not personally liable for monetary damages to limited liability company or any other person for any statement, vote, decision, or failure to act regarding management or policy decisions unless she breached or failed to perform duties and such breach or failure to perform: constituted violation of criminal law (unless had reasonable cause to believe conduct was lawful or no cause to believe conduct unlawful); resulted in improper personal benefit; resulted in a distribution in violation of Fla. Stat. 608.426; constituted conscious disregard of best interest of limited liability company or willful misconduct in proceeding by limited liability company to procure judgment in its favor or by or in right of member or in proceeding by or in right of someone other than limited liability company or member; or constituted recklessness or act or omission that was committed in bad faith or with malicious purpose or in manner exhibiting wanton and willful disregard of human rights, safety, or property. (Fla. Stat. 608.4228). All persons purporting to act as limited liability company, having actual knowledge that there was no organization under 608, are jointly and severally liable for all liabilities created while so acting except for liability to any person who had actual knowledge that there was no organization. (Fla. Stat. 608.4238).

Merger.

May merge with or into other domestic or foreign limited liability company or business entity. (Fla. Stat. 608.438). Unless articles of organization or operating agreement require greater than majority vote, plan of merger must be approved by majority of managers who are members. If no manager is member, plan of merger must be approved by majority-in-interest of members. If more than one class or group of members, merger must be approved by majority-in-interest of members of each class or group. If surviving entity is partnership or limited partnership, no member can become general partner of surviving entity as result of merger unless member specifically consents in writing and such written consent is obtained from each member. Surviving entity must deliver certificate of merger to Department of State for filing (Fla. Stat. 608.4382[1]); copy may be filed in any county in which any party to merger holds interest in real property. (Fla. Stat. 608.4382[2]).

Conversion.

Limited liability company may convert to another business entity with requisite approval by members. (Fla. Stat. 608.4401-608.4404).

Appraisal.

Member entitled to appraisal rights similar to those available to shareholders of corporation. (Fla. Stat. 608.4352-608.43595).

Withdrawal.

Unless otherwise provided in articles of organization or operating agreement, or with written consent of all members, membership terminates if member makes assignment for benefit of creditors, files voluntary petition in bankruptcy, is adjudged bankrupt or insolvent, files petition or answer seeking reorganization, liquidation, dissolution or similar relief, or acquiesces in appointment of trustee or receiver, or liquidating of all or substantial part of member's properties. (Fla. Stat. 608.4237).

Member may withdraw only at time or upon occurrence of event specified in articles of organization or operating agreement. Unless otherwise provided, member may not resign from company prior to dissolution and winding up. Articles of organization or operating agreement may provide that member's interest may not be assigned prior to dissolution and winding up.

Dissolution.

Limited liability company can be dissolved as specified in articles of organization or operating agreement, upon written consent of all members unless otherwise provided in articles of organization or operating agreement, at any time there are no members, or upon entry of order of dissolution by circuit court. Circuit court may order dissolution if it is established by preponderance of evidence that it is not reasonably practicable to carry on business. Subject to statutory prerequisites, Department of Legal Affairs, managers or members, or creditors may petition circuit court for dissolution. (Fla. Stat. 608.449). Department of State may administratively dissolve company for failure to file annual report or pay annual report filing fee, to maintain registered agent or office, to notify Department that registered agent or office has changed, to answer truthfully and fully interrogatories propounded by Department, or expiration of company's period of duration. (Fla. Stat. 608.448). See statute for further details. (Fla. Stat. 608.441; Fla. Stat. 608.4481).

If assets properly distributed upon dissolution, member not liable for any claim against company in excess of member's pro rata share of claim or amount distributed to member, whichever is less. Not liable for any claim brought after three years following dissolution.

Filing fees codified at Fla. Stat. 608.452.

2.07 [RESERVED]

2.08 PARTNERSHIPS:

Florida has adopted 1997 Revised Uniform Partnership Act, with minor modifications. (Fla. Stat. 620.81001-.9902).

Formation.

Requirements for filing partnership registration and other statements set forth by statute. (Fla. Stat. 620.8105). Fees of Department of State codified at Fla. Stat. 620.81055.

Rights and Liabilities of Partners.

Partner who dissociates may bind partnership and may be liable for partnership transactions for one year after dissociation. (Fla. Stat. 620.8702; Fla. Stat. 620.8703).

Conversion or Merger.

Partnerships or limited partnership may be converted or merged in any other manner provided by law. (Fla. Stat. 620.8911-620.8923).

Annual report must be filed between Jan. 1 and May 1 of each year. (Fla. Stat. 620.9003).

Service of process on one co-partner binds all. (Fla. Stat. 48.061). Under certain circumstances of departure of partners from state, or concealment by nonresident partners, service may be made on Secretary of State. (Fla. Stat. 48.181).

See category 17 Intellectual Property, topic 17.01 Trademarks and Tradenames, subhead Tradenames.

Limited Partnership.

Effective Jan. 1, 2006, Revised Uniform Limited Partnership Act 2001 adopted with certain modifications. (Fla. Stat. 620.1102-620.2205).

Application to Existing Relationships.

Before Jan. 1, 2007, Act governs only limited partnership formed on or after Jan. 1, 2006 or limited partnership formed before Jan. 1, 2006 that elects to be subject to Act. On and after Jan. 1, 2007, Act governs all limited partnerships, with certain exceptions. (Fla. Stat. 620.2204).

Limited Liability Partnership.

Limited liability partnerships ("LLPs") authorized. (Fla. Stat. 620.1102[10], 620.1104[1], 620.1108, 620.1201[1][d]).

Liability of Limited Liability Partner.

Obligation of partnership incurred while partnership is limited liability partnership, whether arising in contract, tort, or otherwise, is solely obligation of partnership. Partner is not personally liable, directly or indirectly, by way of contribution or otherwise, for such obligation solely by reason of being or so acting as partner. (Fla. Stat. 620.8306).

Registration.

LLP must file statement of qualification with Department of State. (Fla. Stat. 620.8105). Fee of $25 must accompany filing. (Fla. Stat. 620.81055).

Name.

Name of limited liability partnership must end with "Registered Limited Liability Partnership", "Limited Liability Partnership", "R.L.L.P.", "L.L.P.", "RLLP", or "LLP". (Fla. Stat. 620.9002).

Foreign LLP may apply for authorization to do business in Florida. Provisions similar to those for foreign corporations apply. (Fla. Stat. 620.9102).

Limited Liability Limited Partnership.

Limited liability limited partnerships authorized. (Fla. Stat. 620.1404[3]).

Out-of-State Partnerships.

Foreign limited partnership must apply for certificate of authority to transact business. (Fla. Stat. 620.1902). If name does not comply with Fla. Stat. 620.1108, may not obtain certificate of authority until complying alternate name adopted. (Fla. Stat. 620.1905).

Foreign limited liability partnership must comply with Fla. Stat. 620.8105 and file statement of foreign qualification before transacting business. (Fla. Stat. 620.9102).

3 BUSINESS REGULATION AND COMMERCE

3.01 BANKS AND BANKING:

Uniform Commercial Code adopted. (cc. 670-680). See also subhead Deposits, infra, concerning stop payment orders. See topic 3.09 Commercial Code.

Uniform Electronic Transactions Act adopted. (Fla. Stat. 668.50). See topic E-Commerce.

Florida Banking Code, cc. 658-663 provides for organization, consolidation, merger, conversion, dissolution, reorganization, liquidation, and powers of banks and trust companies.

Regulated by.

Application for and operation as bank, trust company, or international banking corporation in Florida is subject to approval of Office of Financial Regulation (Fla. Stat. 658.19) and must be coordinated with appropriate federal regulatory agencies (Fla. Stat. 658.22). Application may be returned to applicant, on one-time basis, for correction of substantial deficiencies and may be resubmitted without payment of additional fee if resubmission takes place within 60 days after office returns application. (Fla. Stat. 658.19[3]). Finally, within three months after needed approvals, duly executed articles of incorporation and filing fee for Department of State must be submitted to Office of Financial Regulation, which will subsequently file articles of incorporation with Department of State if it approves application for and operation as bank, trust company or international banking corporation. (Fla. Stat. 658.23). Any bank or trust company incorporated pursuant to this chapter must have one main office located within State. (Fla. Stat. 658.26). State banks and trust companies are permitted to establish branch within Florida or merge with any other banks or trusts with approval of Office of Financial Regulation. (Fla. Stat. 658.26[2][a]).

Deposits.

May be accepted only by Florida chartered bank or national bank authorized to do business in Florida. (Fla. Stat. 655.005; Fla. Stat. 655.922). Deposits may be made or withdrawn by minors. (Fla. Stat. 655.77). Unless otherwise expressly provided in contract, agreement, or signature card executed in connection with opening of account, account in name of two or more persons may be paid to or on order of any of such persons. (Fla. Stat. 655.78). It is presumed that joint account proceeds are to be paid to survivor or, in event of incompetency, to guardian of such survivor. (Fla. Stat. 655.79). Agents may be designated to withdraw funds from convenience accounts. (Fla. Stat. 655.80).

Beneficiary in account having pay-on-death designation has no right to sums on deposit during lifetime of any party. On death of one of two or more parties, sums on deposit in account belong to surviving party or parties. On death of sole party or last survivor of two or more parties, sums on deposit belong to surviving beneficiary or beneficiaries. If two or more beneficiaries survive, sums on deposit belong to them in equal and undivided shares, and, unless otherwise provided in depository agreement written between Dec. 31, 1994 and July 1, 2001, there is no right of survivorship in event of death of beneficiary thereafter. If no beneficiary survives, sums on deposit belong to estate of last surviving party. Pay-on-death designation in multiple-party account without right of survivorship is ineffective. (Fla. Stat. 655.82). Deposits in trust are accounts with pay-on-death designation and are governed by Fla. Stat. 655.82. References to Fla. Stat. 655.81 (repealed effective July 1, 2001) in any depository agreement are interpreted after July 1, 2001 as references to Fla. Stat. 655.82.

Customer or any person authorized to draw on account may stop payment of item drawn on account by written order to bank. Stop payment order effective for six months, and may be renewed for additional six month periods by writing. (Fla. Stat. 674.403).

Presumption in Favor of Tenancy by Entireties.

As between debtor and third-party creditor (other than financial institution into which deposits have been made), if signature card does not expressly disclaim tenancy by entireties form of ownership, presumption arises that bank account titled in names of both spouses is held as tenancy by entireties. Statement that account titled in name of husband and wife is held as joint tenancy with right of survivorship does not alone constitute express disclaimer that account is not held as tenancy by entireties. (780 So.2d 45).

Under Florida Control of Money Laundering in Financial Institutions Act, financial institutions must keep record of each financial transaction occurring in this state known to it to involve currency or other monetary instrument of value in excess of $10,000, to involve proceeds of specified unlawful activity, or to be designed to evade reporting requirements of Fla. Stat. 655.50, c. 896, or any similar state or federal law. Multiple financial transactions treated as single transaction if financial institution has knowledge that they are made by or on behalf of any person and result in either cash in or cash out totaling more than $10,000 during any business day. See statute for additional recordkeeping requirements and enforcement provisions. (Fla. Stat. 655.50).

Remote Financial Service Units.

Banks, savings and loan associations and credit unions authorized to do business in Florida or having principal place of business in Florida may use facilities of such number of remote financial service units at such locations as such institution may determine. Owner of remote financial service units may share use of any remote service terminal with other financial institutions. Any bank not having its principal place of business and office in Florida may not utilize any remote financial service unit unless such bank does not take deposits by use of remote unit; such bank does not hold title to remote service unit; and remote service unit has as its owner, among other requirements, one or more banks each of which has its principal office or place of business in Florida, or is accessible by such bank or its customers only through computer or similar electronic systems used by, and use of which is controlled by, among other requirements, one or more banks each of which has its principal office or place of business in Florida. (Fla. Stat. 658.65).

Unclaimed Deposits.

See category 21 Property, topic 21.01 Absentees, subhead Escheat.

Deposits and Collections.

Uniform Commercial Code adopted. (Fla. Stat. 674.201-216).

Geographic Expansion.

With approval of Florida Office of Financial Regulation, any state bank may establish branches or relocate offices within or outside state. With approval of office, any bank incorporated pursuant to c. 658 may establish branches by merger with any other bank. Financial institution operating in safe and sound manner may establish or relocate office by filing written notice with office at least 30 days before opening or relocating that office, without filing application or paying application fee. Relocation of main office to location outside state must be by application only. If bank is ineligible for branch notification, application to establish branch must be in writing and supported by such information as commission or office may require; filing fee is nonrefundable; main office may not be moved outside state unless move is expressly authorized by financial institutions code or by federal law; financial institution in operation for less than 24 months must provide evidence that criteria of §658.21(1) will be met. (Fla. Stat. 658.26).

Florida Reciprocal Banking.

Florida revised Regional Reciprocal Banking Act of 1984, in 1994. New act, entitled Florida Interstate Banking Act, provides that entry into Florida by out-of-state bank holding company can be only by acquisition of Florida bank or Florida bank holding company. Entry by interstate branching or by any other means is expressly prohibited. Out-of-state bank holding company is authorized to acquire Florida bank or Florida bank holding company upon approval by Office of Financial Regulation. Approval requires determination by Office that laws of state in which out-of-state bank holding company making acquisition has its principal place of business permit Florida bank holding companies to acquire banks and bank holding companies in that state and also requires determination by Office that Florida bank to be acquired has been in existence and continuously operating for more than two years. Office is authorized to subject acquisition to any conditions, restrictions, requirements, or other limitations that would apply to acquisition by Florida bank holding company of bank or bank holding company in state where out-of-state bank holding company making acquisition has its principal place of business. Prior to authorizing acquisition, Office must ensure that notice of intent to acquire has been published in newspaper of general circulation in counties in which bank to be acquired is located or that notice of intent to acquire has been mailed via certified mail to each person owning stock in bank to be acquired. (Fla. Stat. 658.295).

Fiduciary Powers.

No corporation except bank, association (as defined in Fla. Stat. 665.012[1]), or trust company having Florida or federal charter or resulting from interstate merger transaction with Florida bank authorized to conduct trust business and located in Florida and except national banking associations or federal associations located in Florida and authorized to conduct trust business is permitted to act as: (a) Personal representative of decedent; (b) receiver or trustee under appointment of any court; (c) assignee, receiver or trustee of insolvent person or corporation; or (d) fiscal agent, transfer agent, or registrar of any municipal or private corporation under certain circumstances. (Fla. Stat. 660.41[1-4]).

See also subhead Remote Financial Service Units, supra.

Nonbank Banks.

Bank holding company prohibited from controlling institution in Florida that accepts federally insured deposits unless that institution is bank as defined by Bank Holding Company Act, 12 U.S.C. §1841(c) (i.e. accepts demand deposits and makes commercial loans). (Fla. Stat. 658.296). No “company” as defined in Bank Holding Act that is not bank holding company as defined by Bank Holding Act may control bank. (Fla. Stat. 658.296). Law “grandfathers” any “bank holding company” or other “company” as defined in Bank Holding Company Act from controlling institution in Florida that accepts federally insured deposits if bank holding company or other company controlled such bank on June 30, 1983.

Credit Card Banks.

Any domestic lender may organize credit card bank if certain requirements set forth in §658.995 are met. (Fla. Stat. 658.995). Credit card bank is subject to supervision, regulation and examination of Office of Financial Regulation. Credit Card Bank is not considered “bank” for purposes of §§658.27-658.296. Subject to provisions of §658.995, any domestic lender, foreign lender or business organization may own credit card bank provided that, if credit card bank is to be organized under laws of this state, such bank must be organized as provided in c. 658; applicant pays to Office fees required in §658.73; shares of bank are owned solely by domestic lender, foreign lender, or business organization; credit card bank accepts deposits only at single location in state; credit card bank maintains capital stock and paid in surplus in amount not less than $4,000,000; bank engages only in business of soliciting, processing, and making loans pursuant to credit card accounts; bank does not accept demand deposits or deposits that depositor has ability to withdraw by check or similar means for payment to third parties; credit card bank may accept savings or time deposits of only $100,000 or more; bank must obtain insurance of its deposits by FDIC; and bank does not engage in business of making commercial loans. (Fla. Stat. 658.995[3]).

International Banking.

International banking corporations organized under laws of foreign countries are authorized, upon approval of Florida Office of Financial Regulation, to establish in Florida international administrative office, international bank agency or representative office. (Fla. Stat. 663.06). General powers of international administrative offices, international bank agencies and representative offices are set forth in §§663.063, Fla. Stat. 663.061 and 663.062. International bank agency may, if authorized by rule of Florida Office of Financial Regulation, exercise powers of federal agency under federal law. (Fla. Stat. 663.061[3]). International banking corporation is authorized to transact only such limited business as is clearly related to, and is usual in, international or foreign business and financing international commerce. (Fla. Stat. 663.06). International bank agency is permitted to act as custodian and furnish investment management services to nonresident entities or persons and to resident entities or persons but only with respect to international or foreign investments. (Fla. Stat. 663.061). Agency may not receive deposits unless such deposits are from: (i) Nonresident entities or persons whose principal places of business or domicile are outside U.S.; (ii) interbank deposits; or (iii) international banking facility deposits as defined in §655.071. (Fla. Stat. 663.061).

International Development Banks.

Corporations organized, upon approval of Office of Financial Regulation, for purpose of promoting development in foreign countries by directly or indirectly making funding available to foreign business enterprises and foreign governments. (Fla. Stat. 663.301). Such international development banks may make loans, extend credit or otherwise finance foreign business enterprises and foreign governments but may not: (a) Take deposits (except from foreign foundations, certain tax-exempt entities and foreign business enterprises), (b) offer deposit accounts other than those permitted to be offered by international banking agency; (c) exercise trust or fiduciary powers, (d) offer credit cards, (e) establish or use remote financial service units or (f) serve as depository of public moneys or serve as financial agent of state (Fla. Stat. 663.309). Name of all such international development banks must include words “Development Bank”. Words “National”, “Federal”, “United States”, “Insured” or “Guaranteed” may not be used, unless authorized by federal law. (Fla. Stat. 663.307).

Trust Companies.

General rules applicable to trust business, whether undertaken by trust companies or trust divisions of banks or state or federal associations, are found at §§660.25—660.48. Bank, state or federal association conducting activities of fiduciary is not “finance company”, but may conduct fiduciary activities, upon approval, through “trust department.” (Fla. Stat. 660.33). General powers of trust companies and departments enumerated in §660.34. Trust companies or departments may act as agents or advisors to other trust companies or departments. (Fla. Stat. 660.36). Special provision for substitution of fiduciaries. (Fla. Stat. 660.46).

Upon approval of Office of Financial Regulation and stockholders, members and/or directors, as may be applicable, trust companies or trust departments may establish trust service office. (Fla. Stat. 660.33).

Uniform Common Trust Fund Act adopted. (c. 660).

Fees and Assessments.

Application and examination fees for banking activities are detailed in §658.73.

3.02 BILLS AND NOTES:

Uniform Commercial Code adopted. (cc. 670-680). See topic 3.09 Commercial Code.

Judgment Notes.

Not recognized, except to extent that nonrecognition violates full faith and credit clause. See 442 So.2d 182, finding Fla. Stat. 55.05 unconstitutional to extent it prohibits enforcement of foreign confessed judgment. Provision for entry of judgment appears severable, not invalidating note. (Fla. Stat. 55.05).

Attorney Fee Clause.

Provision for payment of attorney's fee to holder of note in event of default is enforceable to extent required to indemnify holder as to attorney's fee he has paid or becomes obligated to pay. Reasonableness of fee is to be determined by the court unless specific sum not to exceed 10% of principal is stipulated. (135 So. 521; Fla. Stat. 687.06).

3.03 BILLS OF LADING:

See topic 3.08 Carriers.

3.04 BILLS OF SALE:

See topic 3.24 Sales.

3.05 BLUE SKY LAW:

See topic 3.25 Securities.

3.06 BROKERS:

Uniform Commercial Code adopted. (cc. 670-680). See topic 3.09 Commercial Code.

Licenses.

Real estate brokers and sales associates are registered, examined, and licensed by Florida Real Estate Commission of Department of Professional Regulation. (Fla. Stat. 475.04, .15, .161, .181). Mortgage brokers and solicitors are licensed and regulated by Department of Banking and Finance. (Fla. Stat. 494.003-494.0043). Insurance agents: See category 16 Insurance, topic 16.01 Insurance Companies. Securities dealers and brokers: See topic 3.25 Securities. For procedures regarding securities brokers who have pleaded guilty or nolo contendere to fraud, see §215.684. Commission merchants: See topic 3.14 Factors.

Real Estate Brokers and Sales Associates.

Parties acting as real estate brokers or salespersons must be licensed. (Fla. Stat. 475.001). Definition of broker includes any person who is general partner, officer, or director of partnership or corporation which acts as broker and includes anyone, unless exempt under §475.011 or §721.20, who lists or sells one or more time-share periods per year in one or more time-share plans. (Fla. Stat. 475.01[1][a]). Such brokers must have valid broker's license and must disclose all material aspects of transactions. Qualifications of applicants for licensure are set forth in §§475.17 and 475.180. Sales associates and brokers must fulfill post-licensure education requirements consisting of Commission-approved courses. (Fla. Stat. 475.182). Brokers are subject to discipline for failure to deposit certain money in appropriate escrow account. (Fla. Stat. 475.25). Brokers are subject to discipline for failing to give notice and obtain consent regarding representation. (Fla. Stat. 475.25). Brokers are subject to discipline for failing to direct, control or manage broker associate or sales associate employed by broker. (Fla. Stat. 475.25). Brokers are subject to discipline for violating Uniform Standards of Professional Appraisal Practice. (Fla. Stat. 475.25; Fla. Stat. 475.611). No contract for commission or compensation is valid unless broker or sales associate is licensed. (Fla. Stat. 475.41). Statute provides for civil and criminal liability for prohibited activities. (Fla. Stat. 475.42). Broker and sales associates render professional service and are professionals for purposes of §95.11(4)(a). (Fla. Stat. 475.01).

Mortgage Brokerage.

Parties acting as mortgage brokers or operating mortgage brokerage business must be licensed. (Fla. Stat. 494.0033; Fla. Stat. 494.0031). Individual mortgage broker must be associate of mortgage brokerage business. (Fla. Stat. 494.0033). "Act as a mortgage broker" means, for compensation or gain, accepting application for mortgage loan, soliciting mortgage loan for borrower or negotiating mortgage loan for lender, or offering to do any of above. (Fla. Stat. 494.001[3]). To license mortgage brokerage business, business must have qualified principal broker. (Fla. Stat. 494.0035). No person may receive fee for acting as mortgage brokerage business except pursuant to written agreement between business and borrower. (Fla. Stat. 494.0038). Certain restrictions on advertisements set forth in Fla. Stat. 494.00165. Unlawful to pay fee or commission in mortgage loan transaction to any person or entity other than mortgage brokerage business, mortgage lender, or correspondent mortgage lender, operating under active license, or person exempt from licensure under c. 494. (Fla. Stat. 494.0025[8]). Law provides penalties for violating provisions of Act. (Fla. Stat. 494.0041). Must complete at least 14 hours of professional education programs covering primary and subordinate mortgage financing transactions and provisions of c. 494 each biennial license period. (Fla. Stat. 494.00295).

Yacht and Ship Brokers.

Governed by c. 326. Issuance of license requires bond or letter of credit in sum of $25,000. (Fla. Stat. 326.004). Provides that broker who intentionally fails to comply with provisions concerning establishment of, deposit into, or withdrawal from trust accounts commits third degree felony. Failure to establish trust account or to place funds therein constitutes prima facie evidence of intentional and purposeful violation (Fla. Stat. 326.005). §326.006 gives to Division of Florida Land Sales, Condominiums, and Mobile Homes power to enforce c. 326.

3.07 BULK SALES:

See topic 3.09 Commercial Code and category 8 Debtor and Creditor, topic 8.08 Fraudulent Sales and Conveyances. Art. 6 (Bulk Sales) of Uniform Commercial Code repealed.

3.08 CARRIERS:

Uniform Commercial Code adopted. (cc. 670-680). See topic Commercial Code for deviations from uniform text.

Florida Public Service Commission (Fla. Stat. 350.011) has jurisdiction over intrastate rail rates and practices in accordance with standards and procedures of 49 U.S.C. §11501 et seq. It is responsibility of Department of Transportation to promote further development and improvement of transportation systems. (Fla. Stat. 20.23).

Regional transportation authorities may be formed by any two or more political subdivisions to provide or contract for transportation facilities. (Fla. Stat. 163.565 et seq.).

Semiannual fee upon railroad companies measured by gross operating revenues derived from intrastate business during preceding six month period is payable to Florida Public Service Regulatory Trust Fund within 30 days of end of each six month period. (Fla. Stat. 350.113).

3.09 COMMERCIAL CODE:

Uniform Commercial Code (as reproduced in Part VI) was enacted by 1965 legislature, effective Jan. 1, 1967. (cc. 670-680). 1966 amendments not adopted except 2-702(3). 1972 Official Text (Art. IX-Secured Transactions and Related Sections) adopted. 1977 Amendments (Investment Securities) adopted, effective Oct. 1, 1987. 1987 Official Text (Art. IIA-Leases) enacted, effective Jan. 1, 1991. (cc. 680, former provisions of cc. 680 either repealed or transferred to Part III of c. 671). 1990 Official Amendments (Art. IIA-Leases) enacted, effective Oct. 1, 1998. 1989 Official Text (Art. IVA-Fund Transfers) enacted, effective Jan. 1, 1992. (c. 670). 1990 Amendments (Art. III-Negotiable Instruments and Art. IV-Bank Deposits and Collections) enacted, effective Jan. 1, 1993. Art. VI-Bulk Transfers repealed, effective July 1, 1993. 1994 Official Text (Art. VIII-Investment Securities) and Official Amendments (Art. IX) enacted, effective Oct. 1, 1998. 1995 Official Text (Art. V-Letters of Credit) and Conforming Amendments enacted, effective July 1, 1999. 2000 Official Text (Art. IX-Secured Transactions) enacted, effective Jan. 1, 2002. Section numbering corresponds generally with official text, but each U.C.C. article assigned in addition separate chapter number designation, thus: 7-308 becomes Fla. Stat. 677.308. Art. II A is c. 680; Art. IV A is c. 670, thus 2A-201 becomes Fla. Stat. 680.201 and 4A-108 becomes Fla. Stat. 670.108.

Deviations from Official 1962 Text, Arts. I-VIII; Optional Provisions.

1-105, 1972 Official Text enacted. 1987 and 1989 Official Amendments adopted. Amended to conform to repeal of Art. IV; amended to conform to adoption of Rev. Art. IX.

1-201, 1972 Official Text enacted. 1977 Official Amendments not adopted. 1987 Official Amendments to 1-201(37) and 1990 Official Amendments to 1-201(20), (24), (43), (44) adopted.

1-209, 1966 Official Optional Amendment not adopted. 1972 Official Amendments to Article IX and Related Section not adopted in total.

2-207, 1972 Official Text enacted.

2-316 amended to exclude from transactions constituting “Sales” the “procurement, processing, storage, distribution, or use of whole blood, plasma, blood products and blood derivatives, for the purpose of injecting or transfusing the same into the human body for any purpose . . . . . .” and “The procurement, processing, testing, storing, or providing of human tissues and organs . . . .” No implied warranty that cattle or hogs are free from sickness or disease except not available where seller has knowledge.

2-318, 1966 Official Optional Amendment Alternative A enacted, but with words “or who is an employee, servant or agent of his buyer” inserted after “in his home.”

2-702, 1966 Official Amendment enacted.

3-309, amended subsection (a)(1) to read: “The person seeking to enforce the instrument was entitled to enforce the instrument when loss of possession occurred, or has directly or indirectly acquired ownership of the instrument from a person who was entitled to enforce the instrument when loss of possession occurred”.

4-106, Alternative B selected.

4-403(a), insert “written” before “order”; omit “reasonable” before “certainty”; insert “by an officer of the bank during a banking day” after “received”.

4-403(b), delete reference to oral stop payment orders.

4-403(c), insert new beginning sentence “The bank may be liable to its customer for the actual loss incurred by the customer resulting from the wrongful payment of an item contrary to a valid and binding stop-payment order or order to close an account.”

5-103(1)(a), substitute, for second sentence, “A credit shall clearly state whether it is revocable or irrevocable and in the absence of such statement shall be presumed to be irrevocable.”

5-114, optional subsections (4) and (5) omitted.

5-116, 1972 Official Text enacted.

7-209(3)(b), 1966 Official Amendment not enacted.

7-403(1)(b), optional portion enacted in cases “when value of such damage, delay, loss or destruction exceeds $10,000.”

8-101 et seq., 1977 Revision adopted, effective Oct. 1, 1987. (Laws, c. 87-275).

Deviations from 1987 Official Text, Art. IIA; Optional Provisions—2A-101 et seq. enacted, numbered at c. 680. F.S., former provisions of Art. X—either repealed or transferred to Part III of c. 671. (Laws, c. 90-278).

2A-101, et seq., 1990 Official Amendments.

2A-104, subsection (1)(a) inserts are “chapter 319 or chapter 328”.

Subsection (1)(b) insert is “(Fla. Stat. 680.1051)”.

2A-106, in subsection (1), inserts “or in which the lease is executed by the lessee” following “to be used.” (Fla. Stat. 680.1061).

2A-108, deleted subsections (2) and (4); and amended subsection (3) to read: “before making a finding of unconscionability under subsection (1) the court, on its own motion or that of a party, shall afford the parties a reasonable opportunity to present evidence as to the setting, purpose and effect of the lease contract or clause thereof.” (Fla. Stat. 680.1081).

2A-201, amended subsection (1)(a) to read “In a lease contract that is not a consumer lease, the total payments to be made under the lease contract, excluding payments for options to renew or buy, are less than $1,000.00; or”. (Fla. Stat. 680.201).

2A-209, added subsection (4) of amended version 2A-209 in conformity with 1990 amendment, but 1990 official amendments not made to subsections (1), (2) and (3). (Fla. Stat. 680.209).

2A-216, 1987 official alternative A enacted. (Fla. Stat. 680.216).

2A-219, in subsection (1), inserts “, unless the loss resulted from the lessee's negligence” following “pass to the lessee.” (Fla. Stat. 680.219).

2A-221, deleted phrase “that is not a consumer lease” appearing after phrase “except in a finance lease.” (Fla. Stat. 680.221).

2A-308, in subsection (1), insert “or voids the lease contract” following “fraudulent” and “and does not void the lease contract” at end thereof. Amended subsection (2) to read: “nothing in this chapter impairs the rights of creditors of a lessor if the lease contract is made under circumstances which under any statute or rule of law apart from this chapter would constitute the transaction, a fraudulent transfer or voidable preference." (Fla. Stat. 680.308).

2A-309, in subsection (4)(a), substitutes "a fixture filing covering the fixtures is filed or recorded" for "the interest of the lessor is perfected by a fixture filing."

2A-311, becomes Fla. Stat. 680.32.

2A-406, deleted phrase "is not a consumer lease" from subsection (1)(b). (Fla. Stat. 680.406).

2A-407, adopted addition of subsection (3) in conformity with 1990 official amendment. (Fla. Stat. 680.407).

2A-501, omits reference to 1-106(1) in subsection 4. (Fla. Stat. 680.501).

2A-506, amended subsection (1) to refer to limitations period in c. 95, subject to right of parties to lease that is not consumer lease to reduce period of limitation to not less than one year. (Fla. Stat. 680.506).

2A-514, insert at beginning of text of each subsection (a) and (b), "To justify rejection or to establish default".

2A-516, deleted phrase "except in the case of a consumer lease" from subsection (3)(b). Added subsection (6) as follows: "subsection (3) shall not apply to a consumer lease." (Fla. Stat. 680.516).

2A-517, omits subsections (2) and (3). (Fla. Stat. 680.517).

2A-518, amends subsection (3) to read: "if a lessee's cover is by lease agreement that qualifies for treatment under subsection (2) the lessee may elect to proceed under subsection (2) or section Fla. Stat. 680.519. If a lessee's cover is by lease agreement that for any reason does not qualify for treatment under subsection (2) or is by purchase or otherwise, the lessee may recover from lessor as if the lessee had elected not to cover."

2A-519, subsection (1) reads: "(1) Except as otherwise provided with respect to damages liquidated in the lease agreement (§680.504) or otherwise determined by agreement of the parties (§§671.102[3] and 680.503), if a lessee elects not to cover or a lessee elects to cover and the cover is by lease agreement, whether or not the lease agreement qualified for treatment under §680.518(2), or is by purchase or otherwise, the measure of damages for nondelivery or repudiation by the lessor or for rejection or revocation of acceptance by the lessee, is the present value as of the date of the default of the then market rent minus the present value as of the same date of the original rent, computed for the remaining lease term of the original lease agreement together with incidental and consequential damages, less expenses saved in consequence of the lessor's default."

2A-527, in subsection (2)(b) inserts "of the commencement of the term of the new lease agreement." following "the present value as of the same date".

Subsection (3) reads: "(3) If the lessor's disposition is by lease agreement that qualifies for treatment under subsection (2), the lessor may elect to proceed under subsection (2) or §680.528. If the lessor's disposition is by lease contract that for any reason does not qualify for treatment under subsection (2), or is by sale or otherwise, the lessor may recover from the lessee under §680.528 as if the lessor had elected not to dispose of the goods." (Fla. Stat. 680.527).

2A-528 omits word “for” between “damages” and “default” near end of first paragraph of subsection (1).

2A-529, subsection (1)(a) reads:

“(a) For goods accepted by the lessee and not repossessed by or effectively tendered back to the lessor and for conforming goods lost or damaged after risk of loss passes to the lessee (§680.219):”

Subsection (4) reads:

(4) “Payment of the judgment for damages obtained pursuant to subsection (1) entitles the lessee to the use and possession of the goods not then disposed of for the remaining lease term in accordance with the lease agreement, provided that the lessee complies with all other terms and conditions of the lease agreement.”

At end of subsection (5) “or” has been changed to “and.”

2A-532, omits “or other law”. (Fla. Stat. 680.532).

Deviations from 1989 Official Text Art. IVA; Optional Provisions.

4A-101, et seq., enacted and numbered at c. 670.

Deviations from 1990 Official Text Arts. III and IV; Optional Provisions.

Adopted revision of Art. 3 and amendments to Art. 4, effective Jan. 1, 1993. All Art. 3 provisions and several Art. 4 are codified with additional “1” at end to distinguish them from former sections which were repealed when revision and amendments were adopted, e.g., 3-302 becomes Fla. Stat. 673.3021 rather than Fla. Stat. 673.302. Florida subsections are (1), (2), (3), etc. and sub-sections are (a), (b), (c), etc., e.g., 3-310(c)(1) becomes Fla. Stat. 673.3101(3)(a).

3-104, add new subsection “(11) A warrant of this state is not a negotiable instrument governed by this chapter.” Revise introduction to section to read “Except as provided in subsections (3), (4), and (11),”.

3-118, official text deleted and reference is made to general statute of limitations in c. 95.

3-415(a), 1993 amendment not adopted.

4-101 et seq., amendments to conform Art. 4 to revised Art. 3 were adopted. If Art. 4 section was amended, it kept same number; if old section was replaced, new section number has added “1” to distinguish it from repealed section, e.g., 4-106 now becomes Fla. Stat. 674.1061 but 4-105 remains Fla. Stat. 674.105.

4-106, Alternative B adopted.

4-111, official text deleted and reference is made to general statute of limitations in c. 95.

4-403, first sentence of subsection (a) is significantly amended to read: “A customer or any person authorized to draw on the account if there is more than one person may stop payment of any item drawn of the customer's account or close the account by a written order to the bank describing the item or account with certainty received by an officer of the bank during a banking day and at a time and in a manner that affords the bank a reasonable opportunity to act on it before any action by the bank with respect to the item described in §674.303." First sentence of subsection (b) reads; "A stop-payment order is effective for 6 months." Insert following as first sentence in subsection (c): "The bank may be liable to its customer for the actual loss incurred by the customer resulting from the wrongful payment of an item contrary to a valid and binding stop-payment order or order to close an account."

4-406, amended subsection (b) to provide that items or capacity to furnish legible copies of items must be retained for five years rather than seven.

4-406, amended subsection (f) to provide that customer must discover and report unauthorized signature or alteration within 180 days after statement or items made available rather than one year; amended to provide that customer must discover and report unauthorized endorsement within one year.

Forms.

See Part VI, Uniform and Model Acts, Commercial Code Amendments, National Forms.

See also topics: Banks and Banking, Bills and Notes, Brokers, Carriers, Contracts, Factors, Frauds, Statute of, Sales, Securities, Warehousemen; categories Business Organizations, topic Corporations; Civil Actions and Procedure, topic Limitation of Actions; Debtor and Creditor, topics Assignments, Fraudulent Sales and Conveyances, Liens, Pledges; Documents and Records, topic Records; Mortgages, topic Chattel Mortgages.

Deviations from 2000 Official Text, Art. IX enacted, numbered at c. 679, F.S. (Laws, c. 01-198).

9-102(a)(55), add "which interest was created or derived from an instrument described in s. Fla. Stat. 697.01" at end. (Fla. Stat. 679.1021[1][ccc]).

9-102(a)(67), definition of "public finance transaction," not adopted.

9-102(a)(79)(A), between "file number" and "the initial financing statement" insert "or if a fixture filing, by the official records book and page number,". (Fla. Stat. 679.1021[1][zzz]).

9-103(e), delete "In a transaction other than a consumer-goods transaction,". (Fla. Stat. 679.1031[5]).

9-103(f), delete "In a transaction other than a consumer-goods transaction,". (Fla. Stat. 679.1031[6]).

9-103(g), delete "In a transaction other than a consumer-goods transaction,". (679-1031[7]).

9-103(h), not adopted.

9-108(a), between "provided" and "subsections (c)" insert "herein and"; insert following at end: "A description of real estate in a record filed to perfect a security interest in crops growing or to be grown or goods which are or are to become fixtures shall be sufficient only if the filing or recording of the same constitutes constructive notice under the laws of this state, other than this chapter, which are applicable to the filing or recording of a record of a mortgage, and a mailing or street address alone shall not be sufficient." (Fla. Stat. 679.1081[1]).

9-108(c), insert "for purposes of the security agreement" at end. (Fla. Stat. 679.1081[3]).

9-108(e), insert “or an account consisting of a right to payment of a monetary obligation for the sale of real property that is the debtor's homestead under the laws of this state.” (Fla. Stat. 679.1081[5][c]).

9-109(c)(2)-(3) not adopted; after 9-109(c)(1) insert: “or the rights of a transferee beneficiary or nominated person under a letter of credit are independent and superior under s. Fla. Stat. 675.114.” (Fla. Stat. 679.1091[3][b]).

9-109(13), between “account” and “in a consumer transaction” insert: “, other than a non-negotiable certificate of deposit,”. (Fla. Stat. 679.1091[4][m]). After 9-109(13) insert: “or, any transfer by a government or governmental unit.” (Fla. Stat. 679.1091[4][n]).

9-201(b)-(d) amended to read: “Nothing in this chapter validates any charge or practice illegal under any statute or regulation thereunder governing usury, small loans, retail installment sales, or the like, or extends the application of any such statute or regulation to any transaction not otherwise subject thereto. A transaction, although subject to this chapter, is also subject to chapters 516 and 520, and in the case of conflict between the provisions of this chapter and any such statute, the provisions of such statute shall control. Failure to comply with any applicable statute has only the effect which is specified therein.” (Fla. Stat. 679.2011[2]).

9-203, insert at end: “A security interest in an account consisting of a right to payment of a monetary obligation for the sale of real property that is the debtor's homestead under the laws of this state is not enforceable unless: (a) The description of the account in the security agreement conspicuously states that the collateral includes the debtor's right to payment of a monetary obligation for the sale of real property; (b) The description of the account in the security agreement includes a legal description of the real property; (c) The description of the account in the security agreement conspicuously states that the real property is the debtor's homestead; and (d) The security agreement is also authenticated by the debtor's spouse, if the debtor is married; if the debtor's spouse is incompetent, then the method of authentication by the debtor's spouse is the same as provided by the laws of this state, other than this chapter, which apply to the alienation or encumbrance of homestead property by an incompetent person.” (Fla. Stat. 679.2031[10]).

9-210(a), after (4), insert definitions of “reasonably identifying the transaction or relationship” and “person.” (Fla. Stat. 679.210[1][e]-[f]).

9-210(f), delete “under this section” and insert “for an accounting or a request regarding a statement of account for each secured obligation”. After “six-month period.” insert: “A debtor in a consumer transaction is entitled to a single response to a request regarding a list of collateral, without charge during any 6-month period.” After “additional response” insert: “to a request for an accounting, a request regarding a statement of account, or a request regarding a list of collateral for a consumer transaction. To the extent provided in an authenticated record, the secured party may require the payment of reasonable expenses, including attorney's fees, reasonably incurred in providing a response to a request regarding a list of collateral for a transaction other than a consumer transaction under this section; otherwise, the secured party may not charge more than $25 for each request regarding a list of collateral. Excluding a request related to a proposed satisfaction of the secured obligation, a secured party is not required to respond to more than 12 of each of the permitted requests in any 12-month period.” (Fla. Stat. 679.210[6]).

9-301, prior to “Sections 9-303 through 9-306” insert “679.1091”. (Fla. Stat. 679.3011).

9-331(b), between “a” and “claim” insert: “adverse”. (Fla. Stat. 679.331[2]).

9-334(c)-(h) not adopted. Insert Fla. Stat. 679.334(3)-(5): “(3) A security interest in goods which are or become fixtures is invalid against any person with an interest in the real property at the time the security interest in the goods is perfected or at the time the goods are affixed to the real property, whichever occurs later, unless such person has consented to the security interest or disclaimed an interest in the goods and fixtures. (4) A security interest in goods which are or become fixtures perfected with a financing statement that is filed as a fixture filing takes priority as to the goods over the conflicting interest of an encumbrancer or owner of the related real property arising subsequent to the perfection of such security interest or the affixing of the goods to the real property, whichever occurs later. A security interest in goods which are or become fixtures perfected only with a financing statement that is not filed as a fixture filing is subject to the rights of an encumbrancer or owner of the related real property under Fla. Stat. 679.3171(6) and to the rights of a lien creditor under Fla. Stat. 679.3171(1)(b), but takes priority as to the goods over the rights of a lien creditor who does not meet the requirements of Fla. Stat. 679.3171(1)(b). (5) A perfected security interest in fixtures has priority over a conflicting interest of an encumbrancer or owner of the real property if the security interest is: (a) Created in a manufactured home in a manufactured-home transaction; and (b) Perfected pursuant to a statute described in s. Fla. Stat. 679.3111(1)(b)."

9-406(h), insert at end: "Subsections (4) and (6) do not apply to the creation, attachment, perfection, or enforcement of a security interest in: (a) A claim or right to receive compensation for injuries or sickness as described in 26 U.S.C. subsection 104(a)(1) or (2). (b) A claim or right to receive benefits under a special needs trust as described in 42 U.S.C. subsection 1396p(d)(4). (c) The interest of a debtor who is a natural person in unemployment, alimony, disability, pension, or retirement benefits or victim compensation funds. (d) The interest of a debtor who is a natural person in other benefits which are designated solely for his or her maintenance, support, or education, the assignability of which is expressly prohibited or restricted by statute. (9) Subsections (4), (6), and (8) apply only to a security interest created after January 1, 2002." (Fla. Stat. 679.4061[8]-[9]).

9-408, after (e) insert: "(6) Subsections (1) and (3) do not apply to the creation, attachment, perfection, or enforcement of a security interest in: (a) A claim or right to receive compensation for injuries or sickness as described in 26 U.S.C. subsection 1396p(d)(4). (b) A claim or right to receive benefits under a special needs trust as described in 42 U.S.C. subsection 1396p(d)(4). (c) The interest of a debtor who is a natural person in other benefits which are designated solely for his or her maintenance, support, or education, the assignability of which is expressly prohibited or restricted by statute. (7) Subsections (1), (3), and (6) apply only to a security interest created after January 1, 2002." (Fla. Stat. 679.4081[6]-[7]).

9-501(a)(1), substitute "The office of the clerk of the circuit court, if:" (Fla. Stat. 679.5011[1][a]).

9-501(a)(2), substitute "The Florida Secured Transaction Registry, in accordance with ss. Fla. Stat. 679.3011-679.3071, in all other cases including cases in which the collateral is goods that are or are to become fixtures and the financing statement is not filed as a fixture filing." (Fla. Stat. 679.5011[1][b]).

9-501(b), insert "the Secretary of State, or the filing office authorized by s. Fla. Stat. 697.527 to accept filings for the Florida Secured Transaction Registry" in blank.

9-502(b)(2)-(3), material in brackets not adopted.

9-502(c), between "mortgage" and "is effective" insert: "satisfying the requirements of chapter 697". (Fla. Stat. 679.5021[3]).

9-502(c)(1), between "record" and "indicates" insert: "of a mortgage." (Fla. Stat. 679.5021[3][a]).

9-502(c)(2), between “record” and “or the collateral” insert: “of a mortgage”; substitute “described in the mortgage” for “described in the record.” (Fla. Stat. 679.5021[3][b]).

9-502(c)(3), between “record” and “satisfies” insert “of a mortgage”; substitute “complies” for “satisfies”. (Fla. Stat. 679.5021[3][c]).

9-502(c)(4), add “as required by chapter 697” at end. (Fla. Stat. 679.5021[3][d]).

9-503(a)(3)(A), between “name” and “specified” insert: “if any”. (Fla. Stat. 679.5031[1][c]1.).

9-504(2), substitute “An indication that the financing statement covers all assets or all personal property.” (Fla. Stat. 679.5041[2]).

9-506(a), substitute “complying with” for “satisfying”. (Fla. Stat. 679.5061[1]).

9-507(b), between “under” and “Section” insert “the standard set forth in”. (679-5071[2]).

9-507(c), between “under” and “Section” insert “the standard set forth in”. (Fla. Stat. 679.5071[3]).

9-508(b), between “under” and “section” insert “the standard set forth in”. (Fla. Stat. 679.5081[2]).

9-509(c), delete subsection.

9-510(a), insert “Subject to subsection (3)” at beginning. (Fla. Stat. 679.510[1]).

9-512(a), Alternative A adopted with changes. 9-512(a)(1) between “its” and “file” insert “correct”; between “number” and “the initial” insert “, if any,”; after “relates” insert “, and the name of the debtor and the secured party of record”. (Fla. Stat. 679.512[1][a]).

9-512(a)(2), after “9-502(b)” insert “, the official records book and page number of the initial financing statement to which the amendment relates, and the name of the debtor and secured party of record.” (Fla. Stat. 679.512[1][b]).

9-513(d), delete “and 9-523(c)”. (Fla. Stat. 679.513[4]).

9-514(b)(1), between “its” and “file” insert “correct”; between “number” and “the initial” insert “and the secured party of record”. (Fla. Stat. 679.514[2][a]).

9-514(b)(2), after “assignor” insert “and debtor”. (Fla. Stat. 679.514[2][b]).

9-514(c), substitute “real property” in place of “record of a”. (Fla. Stat. 679.514[3]).

9-515(b), delete “public-finance transaction”. (Fla. Stat. 679.515[2]).

9-515(c), substitute “without filing” in place of “otherwise”. (Fla. Stat. 679.515[3]).

9-515(g), between “mortgage” and “that” insert “satisfying the requirement of chapter 697”. (Fla. Stat. 679.515[7]).

9-516(a), delete “and”; substitute “processing fee” in place of “filing fee”. (Fla. Stat.

679.516[1]).

9-516(b)(3)(A), delete “name for the debtor” and insert “an organization's name or, if an individual, the individual's last name and first name or initial”. (Fla. Stat. 679.516[2][c]1.).

9-516(b)(3)(C), after “debtor's last name” insert “and first name or initial”. (Fla. Stat. 679.516[2][c]3.).

9-516(b)(4), delete “name” and insert “organization's name or, if an individual, the individual's last name and first name or initial”. (Fla. Stat. 679.516[2][d]).

9-516(b)(6), delete “name” and insert “an organization's name or, if an individual, the individual's last name and first name or initial”. (Fla. Stat. 679.516[2][f]). After 9-516(b)(7), insert: “In the case of an initial financing statement or an amendment, which amendment requires the inclusion of a collateral statement but the record does not provide any, the record does not provide a statement of collateral. The record does not include the notation required by s. Fla. Stat. 201.22 indicating that the excise tax required by chapter 201 had been paid or is not required.” (Fla. Stat. 679.516[2][h], [i]).

9-518(b), Alternative A adopted with minor changes: (b)(1), between “statement” and “to which the record relates” insert “, the debtor, and the secured party of record”. (Fla. Stat. 679.518[2][a]).

9-519(b), at beginning insert “Except as otherwise provided in subsection (9)”. (Fla. Stat. 679.519[2]).

9-519(d)(2), delete “record of a”. (Fla. Stat. 679.519[4][b]).

9-519(e)(2), insert “real property” prior to “record”. (Fla. Stat. 679.519[5][b]).

9-519(f), Alternative A adopted.

9-519(h), at beginning insert “Except as otherwise provided in subsection (9)”; substitute “3 business days” in place of “two business days”; insert “if practical” at end. (Fla. Stat. 679.519[8]).

9-520(b), substitute “3 business days” in place of “two business days”; insert “if practical” at end. (Fla. Stat. 679.520[2]).

9-521 not adopted. Fla. Stat. 679.521 provides: “The Secretary of State shall develop or approve acceptable forms for use in filing under this chapter. Such forms must be in accord with the requirements of Florida law, including s. Fla. Stat. 201.22. The secretary may, if he or she finds that such forms meet these requirements, approve the use of a standard national form for this purpose.”

9-522(a), alternative A adopted with minor change: between “file number” and “assigned” insert “, or official records book and page number if a fixture filing,”. (Fla. Stat. 679.522[1]).

9-522(b), substitute “chapter 119” in place of “a statute”. (Fla. Stat. 679.522[2]).

9-523(a), does not provide for noting time of filing on copy and sending copy. Must also make image of record available on database. (Fla. Stat. 679.523[1]).

9-523(b), between “office” and “shall” insert “described in s. Fla. Stat. 679.5011(1)(b)”;

substitute “may communicate” in place of “shall communicate”. (Fla. Stat. 679.523[2]).

9-523(c) not adopted.

9-523(e), substitute “3 business days” in place of “two business days”. (Fla. Stat. 679.523[3]).

9-523(f) not adopted.

9-526(a) insert “Department of State” in blank; 9-526(a)(2) insert “Administrative Procedure Act” in blank. (Fla. Stat. 679.526).

9-526(b) not adopted.

9-527 not adopted. See Fla. Stat. 679.527 regarding Florida Secured Transaction Registry.

9-604(c), add at end: “The secured party shall give reasonable notification of its intent to remove the collateral to all persons entitled to reimbursement under subsection (4).” (Fla. Stat. 679.604[3]).

9-604(d), add at end: “This subsection does not prohibit a secured party and the person entitled to reimbursement from entering into an authenticated record providing for the removal of fixtures and reimbursement for any damage caused thereby.” (Fla. Stat. 679.604[4]).

9-607(b) and (b)(2)(B), after “nonjudicially” insert “outside this state.” (Fla. Stat. 679.607[2]).

After 9-607(e), insert: “(6) Nothing in subsection (2) is intended to create a right of nonjudicial foreclosure in this state.”

9-608(a)(2), after “reasonable time” insert: “and agree to indemnify the secured party on reasonable terms acceptable to the secured party for damages, including reasonable attorney's fees and costs, incurred or suffered by the secured party if the subordinate holder did not have the right to receive the amounts to be paid to it”. (Fla. Stat. 679.608[1][b]).

After 9-608(b), add Fla. Stat. 679.608(3) - secured party may commence interpleader action with respect to remaining proceeds in excess of $2,500; if authorized in authenticated record, interpleading secured party entitled to be paid from remaining proceeds actual costs of filing fee and attorney's fee in amount of $250 incurred in filing interpleader action. Debtor in consumer transaction may not be assessed attorney's fees and costs incurred in interpleader action by holders of subordinate security interests or other liens based on disputes among said holders, and may only recover fees and costs to extent provided in authenticated record.

After 9-611(e), add Fla. Stat. 679.611(6) - if collateral is other than consumer goods, secured party may send authenticated notification to debtor at address in financing statement, unless secured party has received authenticated record from debtor notifying secured party of different address for such notification or secured party has actual knowledge of address of debtor's chief executive office or principal residence; may send notice to any secondary obligor at address in authenticated agreement, unless secured party has received authenticated record from secondary obligor notifying secured party of different address for notification purposes of secured party has actual knowledge of address of secondary obligor's chief executive office or principal residence; may send notice to person described in Fla. Stat. 679.111(3)(c)1. at address stated in notification, to person described in Fla. Stat. 679.611(3)(c)2. at address stated in financing statement, and to person described in Fla. Stat. 679.311(3)(c)3. at address stated in official records of recording or registration agency. (Fla. Stat. 679.611[6]).

9-612(b), delete “In a transaction other than a consumer transaction,”. (Fla. Stat. 679.612[2]).

9-615(b), after “within a reasonable time” insert: “after receipt of the request and agree to indemnify the secured party on reasonable terms acceptable to the secured party for damages, including reasonable attorney's fees and costs, incurred or suffered by the secured party if the subordinate holder did not have the right to receive the amounts to be paid to it”. (Fla. Stat. 679.615[2]).

After 9-615(g), insert Fla. Stat. 679.615(8) regarding interpleader. {rpata} 9-620(c)(2)(B), after “obligation it secures” insert: “, and, in a consumer transaction, provides notice that the proposal will be deemed accepted if it is not objected to by an authenticated notice within 30 days after the date the proposal is sent by the secured party”. (Fla. Stat. 679.620[3][b]2.).

9-620(c)(2)(C), substitute “30 days” in place of “20 days”. (Fla. Stat. 679.620[3][b]3.).

9-621, at end add: “A secured party shall send its proposal under s. Fla. Stat. 679.621(1) or (2) to the affected party at the address prescribed in s. Fla. Stat. 679.611(6).” (Fla. Stat. 679.621[3]).

9-625(a), add: “This subsection shall not preclude a debtor other than a consumer and a secured party, or two or more secured parties in other than a consumer transaction, from agreeing in an authenticated record that the debtor or secured party must first provide to the alleged offending secured party notice of a violation of this chapter and opportunity to cure before commencing any legal proceeding under this section.” (Fla. Stat. 679.625[1]).

Fee for filing initial financing statement, $25 for first page, which includes cost of filing termination statement. Fee for filing amendment, $12 for first page. Fee for indexing by additional debtor, secured party, or assignee, $3 per additional name indexed. Fee for use of nonapproved form, $5. Fee for each additional page attached to record, $3. Fee for certified copy of financing statement and any associated amendments, $30. Fee for photocopy of filed record, $1 per page. (Fla. Stat. 679.525). Except as provided in Fla. Stat. 679.525(3), fee for filing and indexing initial financial statement of kind described in Fla. Stat. 679.5021(3) is amount specified in c. 28. See also category 20 Mortgages, topic 20.01 Chattel Mortgages, subhead Forms.

Financing statement not to be accepted for filing or recording “unless there appears thereon the notation that the [documentary] taxes required by [c. 201] have been paid on the promissory instruments secured by said financing statement and will be paid on any additional promissory instruments, advances or similar instrument that may be secured by said financing statement.” (Fla. Stat. 201.22). See category 22 Taxation, topic 22.18 Stamp and Seal Taxes, subhead Documents.

See also category 10 Documents and Records, topic 10.04 Records, subhead Filing Under Commercial Code.

3.10 CONDITIONAL SALES:

Uniform Commercial Code adopted. (cc. 670-680). See topics 3.09 Commercial Code, Sales; category 20 Mortgages, topic 20.01 Chattel Mortgages.

3.11 CONSIGNMENTS:

Uniform Commercial Code adopted. (cc. 670-680). See topics 3.09 Commercial Code, Factors; category 20 Mortgages, topic 20.01 Chattel Mortgages.

3.12 CONSUMER PROTECTION:

Consumer Protection Generally.

(c. 501). Prohibits delivery by mail, or other means, of unsolicited credit cards (Fla. Stat. 501.011), prohibits certain restrictions on service station credit cards (Fla. Stat. 501.0115), regulates “health studios” (Fla. Stat. 501.012), restricts certain telephonic sales calls to consumers, and provides certain requirements for enforceability of contracts made pursuant to telephonic sales call (Fla. Stat. 501.059), controls use of nonionizing radiations and lasers (Fla. Stat. 501.122), regulates consumer unit pricing (Fla. Stat. 501.135), regulates placement in escrow of deposits received for purchase of residential dwelling units (Fla. Stat. 501.1375), indicates standards for advertising of movie previews or trailers (Fla. Stat. 501.138), posting of signs by retail establishments indicating no-refund policy (Fla. Stat. 501.142), requires labeling of bedding that contains used materials (Fla. Stat. 501.145), and regulates home solicitation sales. Creates penalties for tampering with, or attempting or conspiring to tamper with, consumer product. (Fla. Stat. 501.001). Telephone subscribers, including cell phones and pagers, may sign up on "no sales solicitation calls" list for an initial fee of $10 and annual renewal fee of $5. (Fla. Stat. 501.059[3]). Deceptive and unfair trade practices Act (Fla. Stat. 501.201 et seq.) makes unfair or deceptive acts or practices unlawful in broadly defined group of consumer transactions. Act to be interpreted and administered consistently with Federal Trade Commission Act as of July 1, 2001. (Fla. Stat. 501.204, 501.205). State Governor and cabinet have power to adopt rules implementing Act. (Fla. Stat. 501.205). Civil penalty of not more than $10,000 imposed for each violation committed with actual or implied knowledge, in actions brought by Department of Legal Affairs or state attorney. Penalty may be waived if full restitution or reimbursement made or actual damages paid to injured consumers. (Fla. Stat. 501.2075). Retailer not liable to injured person for claims made by manufacturer not known by retailer to violate Act. (Fla. Stat. 501.211[2]). Act does not apply to personal injury claims and other specified matters. (Fla. Stat. 501.212). Department of Agriculture and Consumer Services may investigate complaints and bring actions for violation of certain provisions of c. 501. (Fla. Stat. 501.911). See also topic 3.21 Monopolies, Restraint of Trade and Competition, subhead Fraudulent Practices.

Home solicitation sales, leases, and rentals of consumer goods or services with purchase price in excess of $25 are regulated and permits are required from clerk of the circuit court for the county in which applicants intend to conduct home solicitation sales. (Fla. Stat. 501.022). Counties and municipalities may also require such permits. (1986 Op. Atty Gen. Fla. 219). With limited exceptions for insurance and farm equipment, contract of sale must be written and contain statutory notice of buyer's right to cancel. Buyer has right to cancel until midnight of third business day after day buyer signs agreement or offer to purchase. Buyer's cancellation may be evidenced by written notice, telegram or mail to seller. Certain duties are placed on businesses conducting home solicitation sales and various practices are prohibited. (Fla. Stat. 501.021-.055).

Bingo.

Provides for conditions for conduct, limitations of use, and permitted uses of proceeds. (Fla. Stat. 849.0931).

Game promotions are regulated comprehensively by Department of State. (Fla. Stat. 849.094).

Credit Cards.

Fraudulent factoring of credit card transactions is unfair or deceptive trade practice under c. 501, Part II. (Fla. Stat. 817.62). Use of scanning device or re-encoder to access, read or store information encoded on magnetic strip of payment card or place information encoded on magnetic strip of payment card onto magnetic strip of different card, with intent to defraud authorized user, is third degree felony. (Fla. Stat. 817.625).

Confidential Personal Information.

Any person who conducts business in state and maintains computerized data in system that includes personal information must provide notice of breach of security system, within 45 days following the determination of such breach, to any Florida resident whose unencrypted personal information was, or is reasonably believed to have been, acquired by unauthorized person. (Fla. Stat. 817.5681).

Consumer Report Security Freeze.

Consumer may place security freeze on his consumer report by: (i) Making request in writing by certified mail to consumer reporting agency; (ii) including information that properly identifies consumer; and (iii) paying authorized fee not to exceed $10. (Fla. Stat. 501.005[2]). Security freeze means notice placed in consumer report that prohibits consumer reporting agency from releasing consumer report, credit score, or any information contained with consumer report to third party without express authorization of consumer. Consumer reporting agency not prevented from advising third party that security freeze is in effect with respect to consumer report. (Fla. Stat. 501.005[1]). No fee for: (i) Consumer 65 years of age or older for initial placement or removal of security freeze, or (ii) victim of identity theft who has submitted copy of valid investigative report or complaint with law enforcement agency. Consumer reporting agency must temporarily lift or remove security freeze: (i) Upon consumer request, or (ii) if consumer report was frozen due to material misrepresentation of fact by consumer. (Fla. Stat. 501.005[8]). Security freeze not applicable to use of consumer report by certain persons, entities or institutions, such as person to whom consumer owes financial obligation, state or local law enforcement agency investigating crime or conducting criminal background check, or insurance company for use in setting or adjusting rate or claim. (Fla. Stat. 501.005[12]). Security freeze not available for some types of consumer information entities. (Fla. Stat. 501.005[15]). Person aggrieved by violation may bring civil action. (Fla. Stat. 501.005[16]).

Dance Studio Act.

Provides for registration and other regulations as to dance studios. (Fla. Stat. 501.143).

Solicitation of Contributions Act.

Governs solicitation of public contributions and is regulated extensively by Division of Consumer Services of Department of Agriculture and Consumer Services. (Fla. Stat. 496.401 et seq.). Charitable organization, unless exempted by Fla. Stat. 496.406, which intends to solicit contributions in Florida by any means must, prior to engaging in any such solicitation, file registration statement with Division of Consumer Services (Fla. Stat. 496.405). Fee must be paid with such registration in amount specified in Fla. Stat. 496.405(4). Charitable organization or sponsor cannot knowingly allow any officer, director, trustee or employee to solicit contributions if such person has been convicted of, found guilty of, or pled guilty or nolo contendere to, or has been incarcerated within last ten years due to any felony or any crime involving fraud, theft, larceny, fraudulent conversion, misappropriation of property, or any crime arising from conduct of solicitation for charitable organization or sponsor, or has been enjoined from violating any law relating to charitable solicitation. (Fla. Stat. 496.405[8]). Charitable organization that is required to register must file annual report for immediately preceding fiscal year, such report to include information specified in Fla. Stat. 496.407. Registration and duties of professional solicitors is governed by Fla. Stat. 496.410 through Fla. Stat. 496.412. Any person who willfully and knowingly violates provisions of Solicitation of Contributions Act commits felony of third degree, and for any subsequent conviction, commits felony of second degree. (Fla. Stat. 496.417). In addition to other remedies provided by law, Department of Legal Affairs may bring civil action to enforce provisions of Fla. Stat. 496.401 et seq.

Each charitable organization or sponsor that is required to register under §496.405 must conspicuously display following information on every printed solicitation, written confirmation, receipt, or reminder of contribution: organization's or sponsor's registration number issued by department; percentage, if any, of each contribution that is retained by any professional solicitor that has contracted with organization or sponsor; percentage of each contribution that is received by organization or sponsor. (Fla. Stat. 496.411[6]).

False Advertising.

There are criminal penalties for misleading and false advertising. (Fla. Stat. 817.45).

Print Advertisement.

May not misrepresent geographic location of supplier of service or product by listing fictitious business name or assumed business name in print advertisement, if name and overall context misrepresent that supplier maintains established place of business within state when in fact supplier has no such business, and calls to local telephone number are routinely forwarded or otherwise transferred to business location outside state. Business such as newspaper publisher, magazine, telephone director, radio or television station, that publishes or broadcasts advertisement in good faith without actual knowledge of its false, deceptive or misleading character is immune from liability for publishing (unless advertiser is same person as supplier of services or products who has committed prohibited acts). (Fla. Stat. 501.97).

False Claims of Academic Degree.

There are criminal penalties for making false claims of academic degree or title. (Fla. Stat. 817.567).

Certain health studios which sell contracts for health studio services must maintain bond of $50,000 and file it with Department of Agriculture and Consumer Services. In lieu of maintaining bond, health studio may furnish to department irrevocable letter of credit from any bank in amount of $50,000, or guaranty agreement which is secured by certificate of deposit in amount of $50,000. Health studio which collects payments for services monthly is exempt from bond. In addition, bond may be reduced if health studio proves that aggregate dollar amount of all current outstanding contracts is less than $5,000. (Fla. Stat. 501.016).

Contractors.

Municipality or county may require bond not to exceed $5,000 for construction contractors (Fla. Stat. 489.131[3]) and electrical contractors (Fla. Stat. 489.537[3]). Design, construction, erection, alteration, modification, repair and demolition of all public and private buildings and public and private health care facilities governed by Florida Building Code and Florida Fire Prevention Code, which are to be enforced by local jurisdictions or local enforcement districts unless specifically exempted as provided in §553.80. (Fla. Stat. 255.31; Fla. Stat. 395.0163; Fla. Stat. 400.232).

Any portion of any agreement, contract or guarantee for any construction, alteration, repair, or demolition of building, including moving and excavating, between owner of real property and architect, engineer, general or subcontractor, or materialman wherein any party promises to indemnify or hold harmless another party for liability for damages caused in whole or in part by indemnitee is void unless contract contains monetary limitation on indemnification that bears reasonable commercial relationship to contract and is part of project specifications or bid documents, if any. See statute for additional details. (Fla. Stat. 725.06).

Building Construction Standards-Plumbing.

Counties may elect to require any person who desires to engage in plumbing activities within county to file with Clerk of Circuit Court $5,000 bond conditioned upon said person complying with minimum requirements of State Plumbing Code. (Fla. Stat. 489.131).

Home improvement finance seller who enters into two or more home improvement contracts which include all labor, materials, and services to be furnished with contract price paid in installments over period of time greater than 90 days, for $500 or more each, in any calendar year, must obtain license from office. Certain persons and institutions not required to obtain license. (Fla. Stat. 520.63; Fla. Stat. 520.68). Owner must be furnished copy of contract. (Fla. Stat. 520.71). Either party to contract may cancel by exercise of right to rescind until midnight of third business day following execution by giving notice to other party by either certified mail or registered mail. Rescinding party is not liable to other for any damages incurred by cancellation. (Fla. Stat. 520.72). See statutory provisions for contract requirements and prohibitions. (Fla. Stat. 520.73-.79).

State Lottery.

Governed by Department of Lottery. (Fla. Stat. 24.101 et seq.).

Unsolicited Merchandise.

Recipient has no obligation to return or accept delivery and may dispose of same as if they were gifts. (Fla. Stat. 570.545).

Deceptive and Unfair Trade Practices Act.

Purpose is to make state regulation of consumer sales practices consistent with established policies of federal law relating to consumer protection. (Fla. Stat. 501.201 et seq.).

Bottled Water.

Operation of bottled water plants, and transportation and sale of bottled water regulated by Department of Agriculture and Consumer Services. (Fla. Stat. 500.12). Any person operating bottled water plant or transporting water into or within state without permit subject to fine of up to $10,000 per violation. (Fla. Stat. 500.121).

Water Vending Machine Protection Act.

Provides licensing procedures and establishes standards for water vending machines. (Fla. Stat. 500.459). Any person seeking to operate water vending machine must first obtain operator's permit for fee not to exceed $200. (Fla. Stat. 500.459[4]). Any person who operates water vending machine without permit is guilty of second degree misdemeanor. (Fla. Stat. 500.459[7]).

Florida Motor Vehicle Repair Act.

Requires written repair estimates, unless waived by customer; repair shops must prepare and maintain bills and repair records in prescribed form and make replaced parts available for customer inspection. (Fla. Stat. 559.901 et seq.).

Motor Vehicle Sales Warranties (Lemon Law).

Manufacturer has duty to conform new motor vehicle with all applicable express warranties. (Fla. Stat. 681.101 and 681.103). Dispute-settlement procedure established for consumers to file claims when vehicle does not conform with express warranties. (Fla. Stat. 681.104 and 681.108). If consumer resorts to manufacturer's certified dispute-settlement procedure and decision is not rendered or performed within 40 days, consumer may apply to division to have dispute removed to board for arbitration. (Fla. Stat. 681.109, 681.1095). Consumer has option of filing action to recover damages, costs, and attorney's fees. (Fla. Stat. 681.112). It is contrary to public policy to attempt to disclaim or limit rights of consumer under act.

(Fla. Stat. 681.115). Violation by manufacturer of this chapter is unfair or deceptive trade practice as defined in part II of c. 501. (Fla. Stat. 681.111).

Motor Vehicle Sales Practices.

It is unfair or deceptive act to (i) falsely represent that motor vehicle is factory executive vehicle as defined by statute; (ii) falsely represent that vehicle is demonstrator as defined by statute; (iii) represent previous usage or status of vehicle to be something that it was not; (iv) falsely represent quality of care, regularity of servicing, or general condition of vehicle; (v) represent that vehicle has not sustained structural or substantial skin damage unless statement made in good faith; (vi) sell vehicle without fully and conspicuously disclosing in writing any warranty or guarantee terms, obligations, or conditions that dealer or manufacturer has given to buyer; (vii) provide express or implied warranty and fail to honor same; (viii) misrepresent warranty coverage, application period, or any warranty transfer cost or conditions; (ix) obtain customer signatures on incomplete contracts; (x) require or accept deposit prior to entering into contract for sale of vehicle unless customer given written receipt including information as required by statute; (xi) add to vehicle price any fee or charge other than those provided in Fla. Stat. 520.02(2) and Rule 3D-50.001; (xii) alter or change odometer mileage; (xiii) sell vehicle without disclosing actual year and model; (xiv) file lien against new vehicle purchased with check unless fully disclosed that lien will be filed and buyer's cost to regain title; (xv) increase price of vehicle after accepting order of purchase or contract, except as provided by statute or rule; (xvi) advertise price unless vehicle identified by year, make, model and include all fees or charges other than state and local taxes and fees; (xvii) charge customer for pre-delivery service required by manufacturer, distributor, or importer for which dealer is reimbursed; (xviii) charge customer for pre-delivery service without having printed notice of what charge represents; (xix) fail to disclose damage to new motor vehicle of which dealer had actual knowledge, if cost of repairs exceeds statutorily determined threshold amounts. (Fla. Stat. 501.976).

Credit Agreement.

Subject to numerous exceptions contracts for payment of interest at rate higher than 18% per annum simple interest on sums of $500,000 or less are usurious. (Fla. Stat. 687.02). See topic 3.19 Interest.

Florida Fair Lending Act.

High-cost home loan, as defined in 15 U.S.C. §1602(aa), regulated by Office of Financial Regulation of the Financial Services Commission. (Fla. Stat. 494.0079). High-cost home loan may not contain terms that require borrower to pay prepayment penalty, with limited exceptions (Fla. Stat. 494.00791[1][a] and [b]), may not provide for higher interest rate after default (Fla. Stat. 494.00791[2]) and may not contain terms under which outstanding principal balance will increase over course of loan because regular periodic payments do not cover full amount of interest due. (Fla. Stat. 494.00791[4]). Lender making high-cost home loan may not engage in pattern or practice of extending loans to borrowers based on collateral without regard to ability to pay (Fla. Stat. 494.00791[6]). High-cost home loan may not contain provision that permits lender, in its sole discretion, to call or accelerate indebtedness (Fla. Stat. 494.00791[8]). Lender may not refinance any high-cost home loan to same borrower within first 18 months of loan when refinancing does not have reasonable benefit to borrower. (Fla. Stat. 494.00791[9]). See statute for additional restrictions.

Florida Title Loan Act.

Prior to doing business in Florida, person who engages in business of making or servicing title loans must obtain license from Office of Financial Regulations. Applicant for license must file bond in amount of $100,000 for each license with qualified surety company, not to exceed $1 million (or file certificate of deposit or irrevocable letter of credit in lieu of bond). Applicant must also submit application fee of $1,200, investigation fee of $200, and complete set of fingerprints. License renewed biennially for fee of $1,200. License may be denied, suspended, or revoked for violation of Act. If applicant is other than natural person, eligibility requirements apply to each direct or ultimate equitable owner of 10% or more of outstanding equity interest of each entity and to each director, general partner, and executive officer. Any loan made without license is void, and maker of loan forfeits right to collect any money, including principal and interest, and must return loan property to borrower. Title loan agreement must contain certain information set forth by statute. (Fla. Stat. 537.004-537.008). For authorized finance charges, see topic 3.19 Interest, subhead Consumer Finance Loans. If title loan agreement extended, interest rate in extension may not exceed that charged in initial agreement. (Fla. Stat. 537.011). If borrower fails to timely reply, title loan lender may take possession of titled property only through agent licensed to repossess motor vehicles and only after offering borrower opportunity to make property available to lender at convenient time and place. (Fla. Stat. 537.012).

Residential Foreclosure Proceedings.

Any person, other than financial institution as defined in §655.005, who willfully uses method or practice which victimizes or attempts to victimize homeowners during course of residential foreclosure proceeding, and knew or should have known that conduct was unfair or deceptive, is liable for civil penalty of not more than $15,000 for each violation. (Fla. Stat. 501.2078).

Credit Counseling Services.

Unlawful for any person, while engaging in debt management services or credit counseling services, to charge fee greater than $50 for initial setup or consultation; person subsequently may not charge fee greater than $120 per year for additional consultations or, if debt management services are provided, person may charge greater of 7.5% of amount paid monthly by debtor to person or $35 per month. (Fla. Stat. 817.801-817.806).

Public Lodging Telephone Surcharges.

Public lodging establishments which impose surcharge for any telephone calls must post notice in conspicuous place by each telephone from which call which is subject to surcharge may originate. Any public lodging establishment not posting such notice may be fined or have its license suspended or revoked. (Fla. Stat. 509.2015).

Motor Vehicle Registration.

Tax collectors in counties of state, as authorized agents of Department of Highway Safety and Motor Vehicles, issue registration certificates to applicants in accordance with rules of Department. Any person or entity representing itself to be authorized agent of Department of Highway Safety and Motor Vehicles for registration purposes is guilty of unfair and deceptive trade practice as defined in c. 501, Part II. (Fla. Stat. 320.03).

Household Moving Services.

Movers operating in state must maintain current valid liability insurance coverage of at least $10,000 for loss or damage of household goods resulting from negligence of mover or its employees or agents. (Fla. Stat. 507.04[1]). Failure to maintain insurance may result in suspension of mover's registration and civil penalty not to exceed $5,000 plus court costs. Mover that operates two or fewer vehicles, in lieu of liability insurance, may maintain performance bond of $25,000 or certificate of deposit in amount of $25,000. (Fla. Stat. 507.04[1]). Mover may not limit its liability for loss or damage of household goods to valuation rate that is less than 60¢ per pound per article. If mover limits its liability for shipper's goods, mover must disclose limitation, including valuation rate, to shipper in writing at time estimate and contract for services are executed and before any moving or accessorial services are provided. (Fla. Stat. 507.04[4]).

Plain Language.

No plain language statute.

Sale of Dogs and Cats.

There are requirements for administering tests, vaccines and anthelmintics to dogs and cats offered for sale within state, or transported into state for sale. Certificate of veterinary inspection must accompany each such dog and cat offered for sale, and must list all vaccines and deworming medications administered to each such dog or cat. Certain remedies are available to consumer if dog or cat is later found by licensed veterinarian to have been unfit for purchase due to illness, disease, congenital disorder, or breed, sex or health of animal was misrepresented to consumer. Requires pet dealers to provide consumers with written notice of their rights at time of sale. (Fla. Stat. 828.29).

Third degree felony to kill cat or dog with intent of selling pelt. First degree misdemeanor to possess, import, or buy pelt of dog or cat. Third degree felony for common carrier to knowingly transport cat or dog pelts. First degree misdemeanor to knowingly sell or offer for sale clothing or apparel made, in whole or in part, from fur of any dog or cat. (Fla. Stat. 828.123; Fla. Stat. 828.1231).

Agriculture regulated by Department of Agriculture and Consumer Services. Authorizes Division of Consumer Services to seek injunctions and other relief on behalf of consumer when violations of state consumer protection laws have occurred, or when public health, safety or welfare is endangered by any consumer product or service. Hearing must be held within three days after commencement of such proceedings by Division. (Fla. Stat. 570.07[37]). Nurserymen, stockdealers, agents and plant brokers must obtain certificate or registration before selling or distributing any nursery stock in this state. (Fla. Stat. 581.131). Maximum annual registration fee is $460. (Fla. Stat. 581.131[6]). Department of Agriculture and Consumer Services may enter, inspect, and test any premises and animals where such animals exist, which are suspected of harboring biological or chemical residues, where such residues present likelihood that resultant meat and poultry products would be adulterated. (Fla. Stat. 585.68).

Senior Citizens and Handicapped Persons.

Civil penalty of up to $15,000 can be imposed upon any person who engages in activities that victimize senior citizens or handicapped persons. (Fla. Stat. 501.2077).

White Collar Crime Victim Protection Act.

Person who commits aggravated white collar crime, victimizing ten or more elderly persons or 20 or more persons or any state agency or political subdivision and obtains or attempts to obtain $50,000 or more, may be fined $500,000 or double pecuniary gain or loss, whichever is greater and must also pay restitution to each victim of crime. White collar crime is felony offense that: (1) is committed with intent to or involves conspiracy to defraud; (2) is committed with intent or is conspiracy to deprive person of property; (3) involves or results in commission of or conspiracy to commit fraud or deceit upon person. White collar crime also includes statutorily enumerated offenses, such as abuse and exploitation of elderly persons and disabled adults, and offenses related to financial transactions, or as specified in Money Transmitters' Code. (Fla. Stat. 775.0844).

Assistive Technology Devices.

Manufacturer who sells new assistive technology device to consumer must furnish consumer with express warranty for at least one year after first delivery of device to consumer. Manufacturer must make necessary repairs to conform device to warranty during warranty period at no cost to consumer. (Fla. Stat. 427.803).

If, after reasonable attempt, nonconformity not repaired, manufacturer must either (i) accept return of device and replace with comparable new device; (ii) accept return of device and refund full purchase price plus any finance charge; (iii) accept return of device, refund current value of written lease, and refund amount paid under lease. Customer also entitled to any collateral costs. (Fla. Stat. 427.804). Person may not enforce lease against consumer after consumer receives refund. Returned device may not be sold or leased again in this state unless full disclosure is made to any prospective buyer or lessee.

Public Accommodations.

All persons entitled to full and equal enjoyment of goods, services, facilities, and accommodations of any place of public accommodation, without discrimination or segregation on the ground of race, color, national origin, sex, handicap, familial status, or religion. (Fla. Stat. 760.08).

Credit Scores by Insurers.

Insurer must inform applicant that credit report or score is being requested for underwriting or rating purposes. Insurer that makes adverse decision based in whole or in part on credit report must provide copy of credit report to applicant at no charge or provide applicant with name, address, and phone number of consumer reporting agency. Insurer may not request credit report or score for discriminatory reason. See statute for details. (Fla. Stat. 626.9741).

Florida Telemarketing Act.

(Fla. Stat. 501.601 et seq.). Prior to doing business in Florida, person who engages in commercial telephone solicitation must obtain license from Department of Agriculture and Consumer Services (Fla. Stat. 501.605), for fee not to exceed $1,500 (Fla. Stat. 501.605[5][b]). Contract made pursuant to commercial telephone solicitation is not valid and enforceable against purchaser, unless in writing and contains description of goods or services,, name, address, telephone number, and registration number of commercial telephone seller, total price of contract, detailed description of goods or services being sold, and specified disclaimer. It may not exclude any oral or written representations made by commercial telephone seller, and must comply with all other applicable laws. (Fla. Stat. 501.615[1]). Purchaser may give notice of cancellation to commercial telephone seller in writing within three business days after receipt of written confirmation of sale from seller. (Fla. Stat. 501.615[3] & [4]). Unlawful to make commercial telephone solicitation phone calls before 8:00 a.m. or after 9:00 p.m. local time at called person's location. Unlawful to intentionally prevent transmission of solicitor's name or telephone number to party called when solicitor's equipment or service capable of creating and transmitting such. (Fla. Stat. 501.616). Any person who engages in any act that is violative of Florida Telemarketing Act is liable for civil penalty of not more than $10,000 for each violation (Fla. Stat. 501.619), and various criminal penalties may be imposed as provided in Fla. Stat. 501.623.

Unlawful for person making telephonic sales call not to transmit seller's telephone number and, when made available by telephone solicitor's carrier, name of telephone solicitor to any caller identification service in use by recipient of telephone sales call. May substitute name of seller on behalf of which telephone sales call is placed and seller's customer service telephone number, which is answered during regular business hours. (Fla. Stat. 501.059[7][c]). Unlawful for any person who makes telephonic sales call to intentionally alter voice of caller in attempt to disguise or conceal identity of caller in order to defraud, confuse, or financially or otherwise injure recipient of call or to obtain personal information from recipient which may be used in fraudulent or unlawful manner. (Fla. Stat. 501.059[7][d]).

See also topic 3.24 Sales.

Commercial Weight-Loss Practices Act.

Sets forth standards for conduct of weight-loss programs for profit and warnings that must be given to participants. (Fla. Stat. 501.057—501.0583).

Servicemembers.

See special provisions for military servicemembers (including National Guard and Reserve) regarding termination of telecommunications service contract (Fla. Stat. 364.195), termination of retail installment contract for leasing motor vehicle (Fla. Stat. 520.14), cancellation of insurance contract (Fla. Stat. 627.7283[5]), termination of agreement to purchase real property. (Fla. Stat. 689.27).

3.13 CONTRACTS:

See categories 10 Documents and Records, topic Seals; Family, topic Infants.

Uniform Commercial Code adopted. (cc. 670-680). See topic 3.09 Commercial Code.

3.14 FACTORS:

Uniform Commercial Code adopted. (cc. 670-680). See topic 3.09 Commercial Code.

Persons selling (except at retail) produce or other articles (except lumber, naval stores, or any consignment sold in less quantities than original packages) as factors or commission merchants must send sales account and check to consignor within seven days of sale, and should sale be unsatisfactory to party furnishing produce or articles, then upon request commission house must furnish, within five days, names and residences of purchaser of produce or article; and consignor also generally allowed access to factor's books and records. (Fla. Stat. 522.06).

Artists and Art Dealers.

Specific statutory provisions govern relationship between artist and art dealer (Fla. Stat. 686.501 et seq.), and provide for required written contract provisions and priority for artist notwithstanding other provisions of Uniform Commercial Code (Fla. Stat. 686.503). Violation is punishable as second degree misdemeanor. (Fla. Stat. 686.506).

Liens.

See topic 3.09 Commercial Code.

Consignment Agreements.

Generally treated as secured transactions governed by Uniform Commercial Code. (See Fla. Stat. 679.319.) See topic 3.09 Commercial Code.

Miscellaneous.

False representations as to prevailing market price, etc., to obtain consignment of Florida produce is punishable by fine and imprisonment. (Fla. Stat. 817.14).

3.15 FRANCHISES:

Uniform Franchise and Business Opportunities Act has not been adopted.

Business Opportunity.

Sale of Business Opportunities Act adopted in 1979. (Fla. Stat. 559.80-559.815). Act requires seller of business opportunities to file disclosure statement with Division of Consumer Services (Fla. Stat. 559.805[1]); prominently display advertisement identification number (if required) in all written advertisements, promotional material, and contracts (Fla. Stat. 559.805[3]); annual filing fee of $300 (Fla. Stat. 559.805[5]). Defined as sale or lease of any products, equipment, supplies, or services to enable purchaser to start business for which purchaser is required to pay $500 or more to seller, where seller represents he will provide locations for use of vending machines or the like; ; or purchase products made by purchaser; or guarantee in writing that purchaser will derive income from opportunity exceeding price paid; or provide sales program or marketing program, for fee, from which purchaser will derive income. (Fla. Stat. 559.801[1][a]). Business opportunity does not include sale of ongoing business where owner intends to sell business opportunities “no more than five in number” nor does it include not-for-profit sale of sales demonstration equipment for $500 or less, or sales training course for $500 or less, or sale and lease of laundry and dry cleaning equipment. (Fla. Stat. 559.801[1][b]).

Bond/Trust Requirement.

Seller of business opportunity representing that seller will derive guaranteed income or that seller will refund all or part of purchase price or repurchase products if buyer is unsatisfied (Fla. Stat. 559.801[1][a]3) required to obtain surety bond, certificate of deposit or guaranteed letter of credit of not less than $50,000 in favor of Division of Consumer Services (Fla. Stat. 559.807).

Prohibited Acts.

Seller of business opportunity may not, among other things, misrepresent prospect of success of proposed business activity, misrepresent known required business investment, misrepresent amount of profits buyer can expect or assign “exclusive territory” encompassing same area to more than one purchaser. (Fla. Stat. 559.809).

Remedies.

Failure to comply with provisions of Act regarding proper disclosures or delivery of equipment or supplies within 45 days of delivery date or if contract content does not comply with statutory requirements, Act allows purchaser to rescind contract within one year of execution date. (Fla. Stat. 559.813). Private right of action for damages created for purchaser injured by seller's breach of contract or violations under Act including attorney's fees (Fla. Stat. 559.813[3]), as well as injunction or other relief by state action (Fla. Stat. 559.813[5]).

Fraudulent Practices.

C. 817 makes unlawful, when selling or establishing franchise or distributorship, misrepresentations regarding prospects of success of proposed or existing franchise, known required total investment or efforts to sell or establish more franchises or distributorships than is reasonable for market to sustain. (Fla. Stat. 817.416). Violations of chapter permit investors to recoup moneys invested in such franchises or distributorships, attorney's fees and reasonable costs. (Fla. Stat. 817.416[3]).

Specific Products.

Certain products and markets given separate substantive treatment, among them beer sales and distribution (Fla. Stat. 563.022), and motor vehicle franchise agreements (Fla. Stat. 320.6405).

Specific Situations.

Equipment or Repair Parts.

If equipment or repair parts dealer enters into franchise agreement with manufacturer, manufacturer must repurchase inventory if franchise terminated or if dealer dies or becomes incapacitated. (Fla. Stat. 686.407-.409). Manufacturer, distributor, or wholesaler that intends to establish new dealership or to relocate current dealership for particular product line or make of equipment within relevant market area of existing dealership of same product line or make of equipment must give written notice of such intent by certified mail or overnight delivery, return receipt requested, to existing dealership; notice must be delivered at least 180 days prior to establish of new dealership or relocation of current dealership. (Fla. Stat. 686.407). If manufacturer, distributor, or wholesaler makes direct sale or lease of equipment, must pay to dealer located within relevant market area commission of not less than 7% of sale or lease price of equipment. (Fla. Stat. 686.407). Manufacturer must indemnify dealer against any losses, including costs and attorney's fees, arising out of action relating to manufacturer or design, parts, or other functions by manufacturer beyond control of dealer. (Fla. Stat. 686.41).

3.16 FRAUDS, STATUTE OF:

No action can be brought in following cases, unless agreement or promise, or some note or memorandum thereof, be in writing and signed by party to be charged or someone by him lawfully authorized: (1) To charge executor or administrator upon any special promise to answer for or pay any debt or damages out of his own estate; (2) or to charge defendant on any special promise to answer for debt, default or miscarriage of another; (3) or on agreement made upon consideration of marriage; (4) or on any contract for sale of lands, tenements and hereditaments or of any uncertain interest therein or concerning them or for any lease thereof for more than one year; (5) or upon any agreement not to be performed within one year from making; (6) or to charge any health care provider upon any guarantee, warranty or assurance as to results of any medical, surgical or diagnostic procedure performed by any licensed physician, osteopath, chiropractor, podiatrist, or dentist. (Fla. Stat. 725.01).

Uniform Electronic Transactions Act adopted. See topic E-Commerce, subhead Electronic Transactions.

Contracts for sale of lands, tenements or hereditaments, or of any uncertain interest in or concerning these must be in writing and signed by party to be charged therewith. (Fla. Stat. 725.01).

Contract for Sale of Personalty.

See topic 3.09 Commercial Code.

Uniform Commercial Code adopted. (cc. 670-680). See topic 3.09 Commercial Code.

Part Performance.

Equitable doctrine of part performance of oral agreements within the statute of frauds is recognized but not for personal service contracts. (315 So.2d 518).

Credit agreement must be in writing, express consideration, set forth relevant terms and conditions and be signed by creditor and debtor in order to be enforceable by debtor. (Fla. Stat. 687.0304).

Subscriptions for Periodicals.

No person is liable to pay for any newspaper, or other periodical unless he subscribes for or orders same in writing. (Fla. Stat. 725.03).

3.17 [RESERVED]

3.18 INFORMATION TECHNOLOGY, INTERNET AND NEW MEDIA:

Computer, Information and Communication Technology.

Computer-Related Crimes.

Willful, knowing, and unauthorized modification or destruction of data, programs, or supporting documentation, existing internal or external to computer, computer system, or computer network, is offense against intellectual property. (Fla. Stat. 815.04[1]-[2]). Data, programs, or supporting documentation that is trade secret that exists internal or external to computer, computer system, or computer network which is held by agency as defined in c. 119 is confidential and exempt from provisions of §§119.07(1) and 24(a), Art. 1 of Florida Constitution. Willful, knowing, and unauthorized disclosure or taking of data, programs, or supporting documentation that is trade secret or is confidential as provided by law existing internal or external to computer, computer system, or computer network is offense against intellectual property. (Fla. Stat. 815.04[3]). Such offenses punishable as third degree felony. However, if offense committed for purpose of devising or executing scheme or artifice to defraud or obtain property, punishable as second degree felony. (Fla. Stat. 815.04[4]). Whoever willfully, knowingly, and without authorization: (i) Accesses or causes to be accessed any computer; (ii) disrupts or denies or causes denial of computer system services to authorized user; (iii) destroys, injures, or damages any computer, computer equipment or supplies; (iv) introduces any computer contamination to any computer, commits offense against computer users. Offense punishable as third degree felony. However, if the offense is committed for the purpose of devising or executing any scheme or artifice to defraud or to obtain any property, it is a second degree felony. (Fla. Stat. 815.04[4][b]). Also, if person (i) damages computer or supplies resulting in loss of $5,000 or greater, (ii) commits offense for purpose of devising or executing scheme to defraud or obtain property, or (iii) interrupts or impairs governmental operation or public communication, transportation, or supply of water, gas, or other public services, offense is second degree felony. If person endangers human life, offense is first degree felony. (Fla. Stat. 815.06[1]-[2]). Unauthorized, willful, and knowing modification of equipment or supplies used or intended to be used in computer is first degree misdemeanor. (Fla. Stat. 815.06[3]). Owner or lessee of computer may bring civil action for compensatory damages and court may award reasonable attorney's fees to prevailing party. (Fla. Stat. 815.06[4]). Any computer, computer system, computer network, computer software, or computer data owned by defendant used in commission of violation of Fla. Stat. 815.06 subject to forfeiture. (Fla. Stat. 815.06[5]). For purposes of civil or criminal action under Fla. Stat. 815.06, person who causes, by any means, access to computer in one jurisdiction from another jurisdiction is deemed to have personally accessed computer in both jurisdictions. (Fla. Stat. 815.06[7]).

Person who intentionally engages in certain sexual activities live over computer on-line service, Internet service, or local bulletin board service and knows or should know that transmission is viewed by victim less than 16 years of age, commits offense of lewd or lascivious exhibition. (Fla. Stat. 800.04). Criminal offense to knowingly make, print, transmit, buy, sell, exchange by use of computer any statement or notice, or information about minor, for purposes of facilitating, encouraging, offering, or soliciting sexual conduct of or with minor, or visual depiction of such conduct. (Fla. Stat. 847.0135). Criminal offense to transmit child pornography to another in this state or in another jurisdiction or to transmit image, information, or data harmful to minors. (Fla. Stat. 847.0137; Fla. Stat. 847.0138).

Electronic Mail Communications Act.

Person may not initiate or assist in transmission of unsolicited commercial electronic mail messages from computer located in this state or to electronic mail address held by resident of this state which: (i) Uses third party's Internet domain name without permission of third party; (ii) contains falsified or missing routing information or otherwise misrepresents, falsifies, or obscures any information in identifying point of origin or transmission path of unsolicited commercial electronic mail message; (iii) contains false or misleading information in subject line; or (iv) contains false or deceptive information in body of message designed to cause damage to receiving device of addressee or of another recipient of message. (Fla. Stat. 668.603). Person may not distribute software or any other system designed to falsify missing routing information identifying point of origin or transmission path of commercial electronic mail message. (Fla. Stat. 668.603). Department of Legal Affairs may bring action for damages or for declaratory or injunctive relief or impose civil penalty for violation. Cause of action also available to interactive computer service, telephone company, or cable provider for violation of §668.603. Violation of §668.603 is first degree misdemeanor. However, punishable as third-degree felony if volume of commercial electronic mail messages transmitted or revenue generated exceeds certain levels. (Fla. Stat. 668.608). Violation of §668.603 also deemed unfair and deceptive trade practice within meaning of part of c. 501. (Fla. Stat. 668.6075).

Anti-Phishing Act.

Person may not intentionally engage in conduct involving fraudulent use or possession of another person's identifying information through use of web page or Internet domain name to induce, request, or solicit resident of state to provide identifying information. Person may not intentionally engage in conduct involving fraudulent use or possession of identifying information to send or cause to be sent to electronic mail address held by resident of state electronic mail message that is falsely represented as being sent by another person, in which message refers or links recipient of message to web page and induces, requests, or solicits recipient to provide identifying information. (Fla. Stat. 668.703). Civil action for violation may be brought by adversely affected: (i) Person engaged in providing Internet access service to public, (ii) financial institution, or (iii) owner of web page, trademark, or service mark. Civil action may also be brought by Attorney General. Prevailing plaintiff entitled to recover actual damages or $5,000 for each violation, plus attorney's fees, court costs and, if violations constitute a pattern or practice, treble damages. (Fla. Stat. 668.704). Act does not apply to telecommunication provider's or Internet service provider's good faith transmission or routing of, or intermediate temporary storing or caching of, identifying information. Provider of interactive computer service not liable under laws of state for removing or disabling access to content that resides on Internet website or other online location controlled or operated if provider believes in good faith that content is used to engage in violation of Act. (Fla. Stat. 668.705).

Electronic Filing Process.

Clerks of court must implement an electronic filing process, beginning no later than October 1, 2009 (Fla. Stat. 28.22205).

Electronic Commerce.

Unless otherwise provided by law, electronic signature may be used to sign writing and has same force and effect as written signature. (Fla. Stat. 668.004). Uniform Electronic Transaction Act adopted. (Fla. Stat. 668.50).

Public Records.

No later than Jan. 1, 2002, county recorder in each county must provide current index of documents recorded in official records of county for period beginning no later than Jan. 1, 1990, on publicly available Internet website, which will also contain document requisition point for obtaining images or copies of documents reflected in index and which has capability of electronically providing index data to central statewide search site. By Jan. 1, 2006, each county record must provide for electronic retrieval, at minimum, of images of documents referenced as index required to be maintained on county's official records website by §28.2221. (Fla. Stat. 28.2221). Unless otherwise provided by law, no information retrieved electronically pursuant to Fla. Stat. 28.2221 is admissible in court as authenticated document. (Fla. Stat. 28.2221[4]). No images or copies of military discharge, death certificate, or court file, record, or paper relating to matters or cases governed by Fla. Rules of Family Law, Fla. Rules of Juvenile Procedure, or Fla. Probate Rules may be placed on publicly available Internet website and notice of right of any affected party to request removal of such records placed on website must be clearly displayed on the publicly available Internet website on which public records are placed.

Telecommunications Companies.

Regulated under c. 364.

Electronic Transactions.

Uniform Electronic Transactions Act applies, when parties to transactions agree to conduct transactions by electronic means, to any electronic record or electronic signature created, generated, sent, communicated, received, or stored on or after July 1, 2000. (Fla. Stat. 668.50[4]).

Legal Recognition.

Record, signature, or contract may not be denied legal effect or enforceability solely because record or signature is in electronic form or electronic record was used in formation of contract. If provision of law requires record to be in writing, electronic record satisfies such provision. If provision of law requires signature, electronic signature satisfies such provision. (Fla. Stat. 668.50[7]).

Provision of Information and Presentation of Records.

If parties have agreed to conduct transaction by electronic means and provision of law requires person to provide, send, or deliver information in writing to another person, requirement is satisfied if information provided, sent or delivered in electronic record capable of retention by recipient at time of receipt. (Fla. Stat. 668.50[8]). See statute for requirements if provision of law requires record to be posted or displayed in certain manner; to be sent, communicated, or transmitted by specified method; or to contain information formatted in certain manner. See Fla. Stat. 668.50(10) for effect of change or error.

Notarization and Acknowledgment.

If law requires signature or record to be notarized, acknowledged, verified, or made under oath, requirement satisfied if electronic signature of person authorized by applicable law to perform those acts, together with all other information required to be included by other applicable law, attached to or logically associated with signature or record. Neither rubber stamp nor impression type seal required for electronic notarization. (Fla. Stat. 668.50[11]).

Admissibility in Evidence.

In proceeding, evidence of record or signature may not be excluded solely because record or signature is in electronic form. (Fla. Stat. 668.50[13]).

Exclusions.

Act does not apply to transaction to extent transaction governed by: (1) provision of law governing creation and execution of wills, codicils, or testamentary trusts; (2) Uniform Commercial Code other than Fla. Stat. 671.107, cc. 672, and 680; (3) Uniform Computer Information Transactions Act; or (4) rules relating to judicial procedure. (Fla. Stat. 668.50[3]).

3.19 INTEREST:

Where interest accrues without special contract, rate is set by Chief Financial Officer of State (Fla. Stat. 687.01), (Fla. Stat. 55.03); permitted by contract in writing, any rate up to and including 18% per annum simple interest (Fla. Stat. 687.02); if loan or contract exceeds $500,000 in amount or value, then not in excess of 25% rate prescribed by §687.071 (Fla. Stat. 687.02).

Consumer Finance Loans.

Person, copartnerships or corporations (excluding banks, savings banks, trust companies, building and loan associations, credit unions or industrial loan and investment companies and bona fide pawnbrokers) specifically licensed to engage in business of making consumer finance loans of $25,000 or less may charge 30% on first $2,000; 24% on amount over $2,000 and not exceeding $3,000; 18% on amount exceeding $3,000 and not exceeding $25,000. (Fla. Stat. 516.031[1]). Such licensees may also offer lines of credit subject to same requirements as are applicable to loans in respect of interest rates and charges, but may not issue credit cards. (Fla. Stat. 516.02[3]). Annual percentage rate of any loan under this chapter may equal but not exceed rate required by Federal Truth in Lending Act and Regulation Z of Board of Governors of Federal Reserve System to be disclosed. When loan is subject to two or more interest rates, licensee may charge single annual percentage rate applied to each periodic principal balance by actuarial method producing at maturity same total amount of interest otherwise permitted. (Fla. Stat. 516.031[1]). No security interest on land for any loan less than $1,000. Except for those charges enumerated in §516.031(3)(a) and bad check charges provided for in Fla. Stat. 516.031(3) (b), no other charges are allowed. (Fla. Stat. 516.031[3]). If all or part of new loan is unpaid principal of prior loan, then new principal may not include more than 60 days unpaid interest which has accrued on prior loan. (Fla. Stat. 516.031[5]). Splitting loans to obtain greater finance charges is not permitted (Fla. Stat. 516.031[4]). Interest on defaulted loans may be in amounts as provided in §516.031(1) for 12 months and thereafter interest not to exceed 18% per annum. (Fla. Stat. 516.035). No licensee can charge interest greater than 18% for loans of more than $25,000 in the aggregate to same borrower or other person who may be jointly or severally liable to licensee for more than $25,000. If loan of $25,000 or less used to discharge preexisting debt for goods or services to provider of goods or services, licensee may charge such person 18% interest on guaranty of such loan. Acceptance of one or more such guarantees does not affect rights of licensee to charge primary borrower charges authorized by §516.031. (Fla. Stat. 516.21[1]).

Interest on sale of motor vehicles regulated by Motor Vehicle Sales Finance Act. (Fla. Stat. 520.01 et seq.).

Judgments and decrees entered after Oct. 1, 1981, bear interest at rate set by Chief Financial Officer (Fla. Stat. 55.03[1]), unless rate of interest was established by written contract or obligation (Fla. Stat. 55.03[1]). Judgments not indicating rate of interest, or referencing statutory rate of interest (Fla. Stat. 55.03[1]), will not be docketed or collected by county sheriffs (Fla. Stat. 55.03[4]). Judgments and decrees on evidences of indebtedness of county or special road and bridge districts or incorporated city or town or taxing district bear interest at 5% or at lower rate if provided for in such evidence of indebtedness. (Fla. Stat. 55.04).

Municipal Bonds.

Interest on same not to exceed 7½% per annum. (Fla. Stat. 159.08[1]).

Requirement of Receipt.

On receiving payment lender, other than bank, trust company, savings and loan association or insurance company, must give receipt, dated same day as payment, stating amount paid and whether principal or interest, and signed by person receiving payment. Entire interest forfeited by refusal to give such receipt. In lieu of providing such receipt, lender may furnish to borrower annual statement showing interest paid on loan during previous year as well as balance of loan, unless payment is made in cash or request of receipt made in writing. (Fla. Stat. 687.08, 687.10).

Purchase of Assignment of Wages.

Where payment of $25,000 or less for any assignment of wages or compensation is less than amount of wages or compensation assigned, payment is deemed loan and excess is deemed interest until date when such compensation is payable and subject to laws relating to interest rates and usury. (Fla. Stat. 516.26). Wage assignments to secure consumer finance loans are prohibited. (Fla. Stat. 516.17).

Usury.

Charge of more than 18% per annum interest to individual or corporation unlawful, and if loan exceeds $500,000 in amount or value, then charge of more than 25% prescribed by §687.071 is unlawful (Fla. Stat. 687.01-.03) but provision not applicable to sales of bonds in excess of $100 and mortgages securing same or money loaned on bonds, or on certain loans for which commitment to insure or guarantee is given by FHA, VA, and other federal agencies. (Fla. Stat. 687.03) Provision inapplicable to alien borrowers in connection with international or foreign business. (Fla. Stat. 687.13). Where usurious interest charged, all interest is forfeited and where such interest is collected, double such collected interest forfeited. Penalty provision inapplicable to holder in due course of negotiable paper unless holder had actual notice before purchase or usury appears on face of instrument, or if prior to action or filing of defense by borrower or receipt by lender of notice that usury has been charged or collected, lender notifies borrower of usurious overcharge and refunds same plus interest on overcharge. (Fla. Stat. 687.04). Person or company which lends money, extends credit, sells or leases goods may pursuant to contract charge on delinquency up to 5% on each installment which is in default for at least ten days. Charge not deemed interest or finance charge and may not be included when determining limits on charges. (Fla. Stat. 687.03[2][c]).

Criminal Usury.

Extension of credit at annual rate of 25%-45% is second degree misdemeanor, punishable by imprisonment (60 days) and/or fine ($500). (Fla. Stat. 687.071[2], 775.082[4], 775.083[1]). Extension of credit at annual rate in excess of 45% is third degree felony, punishable by imprisonment (five years) and/or fine ($5,000). (Fla. Stat. 687.071[3], 775.082[3], 775.083[1]). Keeping of books and records for loans at annual rate of 25% or more is separate crime (first degree misdemeanor, one year and/or fine $1,000). (Fla. Stat. 687.071[5], 775.082[4], 775.083[1]). If loan or forbearance is criminal, debt is not enforceable. (Fla. Stat. 687.071[7]).

3.20 LICENSES, BUSINESS AND PROFESSIONAL:

Regulation and Licensing by Department of Professional Regulation.

(c. 455 et seq.). These professions include hypnosis (c. 485), acupuncture (c. 457), medical practice (c. 458), osteopathy (c. 459), chiropractic (c. 460), podiatry (c. 461), naturopathy (c. 462), optometry (c. 463), nursing (c. 464), pharmacy (c. 465), dentistry (c. 466), midwifery (c. 467), miscellaneous professions including speech-language pathology, nursing home administration, occupational therapy, radiologic technology, respiratory therapy, auctioneers, talent agencies, community association management, athlete agents, dietetics and nutrition practice, employee leasing companies, water and wastewater operators and building code administrators and inspectors (c. 468), asbestos abatement (c. 469), funeral directing, embalming and direct disposition (c. 497, regulated by Department of Financial Services), engineering (c. 471), land surveying (c. 472), public accountancy (c. 473), veterinary medical practice (c. 474), real estate brokers, salespersons and appraisers (c. 475), barbering (c. 476), cosmetology (c. 477), electrolysis (c. 478), outdoor advertising (c. 479), massage practice (c. 480), architecture and interior design and landscape architecture (c. 481), pest control (c. 482), health testing services (c. 483), dispensing optical devices and hearing aids (c. 484), physical therapy practice (c. 486), pesticides (c. 487), commercial driving schools (c. 488), contracting (c. 489), psychological services (c. 490), clinical counseling and psychotherapy services (c. 491), geology (c. 492), home medical equipment providers (c. 400, regulated by Department of Elderly Affairs), and private investigators, private security and repossession services (c. 493). Licenses are also required for yacht and ship brokers (c. 326), motor vehicles (c. 320), operators of motor vehicles (c. 322) and sale of alcoholic beverages (c. 561). Department may adopt rules to implement regulatory requirements of any profession within department's jurisdiction which does not have statutorily authorized regulatory board. (Fla. Stat. 455.2035).

Department of Business and Professional Regulation authorized under Management Privatization Act to contract with nonprofit corporations to provide administrative, examination, licensing, investigative and prosecutorial services to any board created within department. (Fla. Stat. 455.32).

Practically all business and professional pursuits are required to pay local business tax. This tax is imposed in addition to permit, etc. or other regulatory fees. (Fla. Stat. 205.013 et seq.). Upon payment, local business tax receipt is issued for only one year, is due and payable on or before Sept. 30 of each year and expires on Sept. 30 of succeeding year. “Receipt” means document issued by local governing authority which bears words “Local Business Tax Receipt” and evidences that person in whose name document is issued has complied with provisions of c. 205 relating to business tax. (Fla. Stat. 205.022[2]). If Sept. 30 falls on weekend or holiday, tax is due and payable on or before first working day following Sept. 30. (Fla. Stat. 205.053). Receipt may be transferred upon payment of transfer fee of up to 10% of annual license tax but not less than $3 nor more than $25. (Fla. Stat. 205.033). Receipts are issued by local county or municipality, and receipt must be procured from them. (Fla. Stat. 205.032, 205.043).

Receipts not renewed when due and payable are subject to delinquency penalty of 10% for month of Oct. plus 5% penalty for each succeeding month until paid. Total penalty not to exceed 25% of fee. (Fla. Stat. 205.053).

Transfer of license for sale of alcoholic beverages issued after Oct. 1, 2000, requires transfer fee of 15 times annual license fee; such license not otherwise transferable in any manner, directly or indirectly (including change in stock, partnership shares, or other form of ownership of any entity holding license), except by probate or guardianship proceedings. (Fla. Stat. 561.32).

Regulation and Licensing by Department of Agriculture and Consumer Services.

Distributor of fertilizer (c. 576) and warehouseman selling flue-cured tobacco (c. 574) licensed by and regulated by department. Other agriculture businesses, such as seed (c. 578), beekeeping (c. 586), and shellfish aquaculture (c. 597) required to register with department rather than obtain license.

Regulation and Licensing by Financial Services Commission.

Title loan lender (c. 537), pawnbrokers (c. 539), mortgage brokers (c. 494).

Commercial Travelers.

There is no license tax against commercial travelers as such, but agents of certain businesses must pay a license fee.

Collection Agencies.

No license, but must register. (Fla. Stat. 559.544, 559.553).

Health and Medical Licenses.

See category 15 Health, topic 15.05 Licensure and Certification.

3.21 MONOPOLIES, RESTRAINT OF TRADE AND COMPETITION:

Florida Antitrust Act of 1980 (Fla. Stat. 542.15 et seq.) prohibits every contract, combination, or conspiracy in restraint of trade or commerce (Fla. Stat. 542.18) and monopolization, attempts to monopolize, and conspiracies or combinations to monopolize (Fla. Stat. 542.19). Language similar to §§1, 2 of Sherman Act (construed in pari materia with federal antitrust law—542.32).

Combinations affecting price or sale of meat (c. 544), and motor vehicle financing (c. 545) are prohibited or regulated by special provisions.

Penalties.

Knowing violation of §§542.18 or Fla. Stat. 542.19 is felony. Knowing violation includes one who knowingly aids in or advises such violation. (Fla. Stat. 542.21[2]). Alternative civil penalty is provided. (Fla. Stat. 542.21[1]). Private actions for treble damages are authorized. (Fla. Stat. 542.22[1]).

Contracts in Restraint of Trade.

All contracts in restraint of trade are void except for following: (1) Person selling goodwill of business or any shareholder selling or otherwise disposing of all his shares in corporation may agree with buyer, and employee, independent contractor or agent may agree with employer not to carry on similar business or solicit employer's old customers within reasonably limited time and area and for so long as buyer or employer continues like business therein; (2) partners may agree on dissolution of partnership that all or some will not carry on similar business within reasonably limited time and area; (3) licensee, or any person deriving title from licensee, of use of trademark or service mark and business format or system identified by that trademark or service mark may agree with licensor to refrain from carrying on or engaging in similar business and from soliciting old customers of licensor within reasonably limited time and area, so long as licensor or any person deriving title from licensor continues to carry on like business. (Fla. Stat. 542.33). Such agreements may be enforced by injunction except where injunction would be contrary to public health, safety or welfare or in any case where injunction would enforce unreasonable covenant not to compete or where there is no showing of irreparable injury. (Fla. Stat. 542.33[2][a]).

Unfair Discrimination and Competition.

Any person doing business in state, and engaged in production, manufacture, sale or distribution of any commodity in general use, who, for purpose of destroying competitor's business in any locality, discriminates between different sections, communities, or cities of state by selling at lower rate in one than in another, after allowing for differences in grade, quality and transportation costs, is guilty of unfair discrimination, unless such discrimination is made in good faith to meet competition. (Fla. Stat. 540.01[1]). Unfair discrimination is punishable as misdemeanor. (Fla. Stat. 540.06).

Fraudulent Practices.

Certain actions are labeled fraudulent or deceptive and penalties for their violation are provided. (c. 817; c. 501, Part II). These include false pretenses, unauthorized subleasing of automobiles, misrepresentations of academic standing or association with any postsecondary educational institution, and credit card crimes. (c. 817). Use of telephone and other communications, media and devices in scheme to defraud is prohibited. (Fla. Stat. 817.034).

Misbranded and adulterated foods, drugs, cosmetics prohibited. (cc. 499; 500).

Posting different gasoline prices at same retail service station for same grade of gasoline is unlawful. (Fla. Stat. 526.121[1]). Price differential permitted if one pump self-service and other attendant operated or between cash and credit sales. (Fla. Stat. 526.121[2]).

Unfair competition and deceptive trade practices, as defined by administrative regulations, which must not be inconsistent with provisions of §5(a)(i) of 15 U.S.C. §45(a)(1) as incorporated by federal courts, or inconsistent with rules, regulations and decisions of Federal Trade Commission as of July 1, 2001, are proscribed. Civil and criminal penalties provided for violation. (Fla. Stat. 501.201-.213). See also topic 3.12 Consumer Protection.

Resale Price Agreements.

Florida Fair Trade Law (Fla. Stat. 541.001-.09), repealed by c. 75-15. Now covered by Florida Antitrust Act of 1980, §§542.18-.19 (construed in pari materia with federal antitrust law-542.32).

3.22 NEGOTIABLE INSTRUMENTS:

Uniform Commercial Code adopted. (cc. 670-680). See topic 3.09 Commercial Code.

3.23 RESTRAINT OF TRADE:

See topic 3.21 Monopolies, Restraint of Trade and Competition.

3.24 SALES:

Uniform Commercial Code adopted. (cc. 670-680). See topic 3.09 Commercial Code.

Contracts of Sale.

See topic 3.16 Frauds, Statute of. See also topic E-Commerce, subhead Electronic Transactions.

Bills of Sale.

Seals and acknowledgments not required. (See category 10 Documents and Records, topic 10.05 Seals.) A bill of sale intended to secure payment of money is deemed to be a mortgage. (Fla. Stat. 697.01). Bills of sale may be recorded in the office of clerk of circuit court. (Fla. Stat. 28.222). See category 10 Documents and Records, topic 10.04 Records.

Product Liability.

Privity not required. In action against manufacturer based on defective design, finder of fact must consider state of art of scientific and technical knowledge and other circumstances that existed at time of manufacture, not at time of loss or injury. (Fla. Stat. 768.1257). Rebuttable presumption that product not defective or unreasonably dangerous, and manufacturer or seller not liable if product complied with relevant federal or state codes or regulations. Rebuttable presumption that product is defective or unreasonably dangerous, and manufacturer or seller liable if manufacturer or seller did not comply with such codes or regulations. (Fla. Stat. 768.1256).

Statute of Repose.

No action for product liability for harm caused by product with useful life of ten years or less, if harm caused by product more than 12 years after delivery to first purchaser or lessee who was not selling or leasing product or using it as component in manufacture. No action may be brought more than 20 years after delivery of product to first purchaser or lessor for actions involving aircraft used in commercial or contract carrying of passengers or freight, vessels of more than 100 gross tons, railroad equipment used in commercial or contract carrying of passengers or freight, unless manufacturer specifically warranted that product has expected useful life exceeding 20 years (in which case repose period is time period warranted). Improvements to real property, including elevators and escalators, not subject to this statute of repose. All other products conclusively presumed to have expected useful life of ten years or less.

No action for products liability may be brought after later of expected useful life of product or more than 12 years after delivery of product to first purchaser or lessee unless manufacturer specifically warranted as having expected useful life exceeding ten years. (Fla. Stat. 95.031).

Retail Installment, Motor Vehicle and Home Improvement Sales.

Content of contracts, effective interest rate, solicitation of, collections on account of, etc., regulated by The Retail Installment Sales Act. (Fla. Stat. 520.30-.42). Biennial license fee and maintenance of agent in Florida for service of process are required. Somewhat similar provisions with respect to sales of motor vehicles and home improvements are in Motor Vehicle Sales Finance Act (Fla. Stat. 520.01-.13) and Home Improvement Sales and Finance Act (Fla. Stat. 520.60-.992). All foregoing laws conform with federal truth in lending legislation, but with certain additional purely local requirements.

Consumer Protection.

See topic 3.12 Consumer Protection.

Home Solicitation Sales.

See topic 3.12 Consumer Protection.

Game promotions are regulated comprehensively by Department of Agriculture and Consumer Services or Department of Legal Affairs. (Fla. Stat. 849.094).

Unsolicited Merchandise.

Recipient has no obligation to return or accept delivery and may dispose of same as if they were gifts. (Fla. Stat. 570.545).

Bulk Sales.

U.C.C. Art. 6 repealed.

Resale Price Agreements.

See topic 3.21 Monopolies, Restraint of Trade and Competition.

Sales of art including consignment sales and required warranties, regulated by statute. (Fla. Stat. 686.501 et seq.).

Sales of Motor Vehicles.

See category 23 Transportation, topic 23.01 Motor Vehicles.

International Sales of Goods.

See Part V this volume, Selected International Conventions.

See also topic 3.12 Consumer Protection; category 8 Debtor and Creditor, topic 8.08 Fraudulent Sales and Conveyances.

3.25 SECURITIES:

Uniform Securities Act has not been adopted, but Florida Securities and Investor Protection Act is in effect (c. 517) and takes precedence over any inconsistent provision of Uniform Commercial Code (Fla. Stat. 671.304[2]). See topic 3.09 Commercial Code. See also “Sale or Lease of Business Opportunities Act”. (§§559.80-559.815).

Supervision is by Financial Services Commission, Office of Financial Regulation, 200 E. Gaines St., Tallahassee, FL 32399-0300. (Fla. Stat. 517.03); http://www.flofr.com/.

Regulatory Powers of Supervising Authority.

Office has rule making power and power to enforce statute in courts and administratively. (Fla. Stat. 517.03). Office of Financial Regulation may revoke or suspend security's registration or may deny application if it appears that issuer or control person of issuer is insolvent, has violated any provision of which issuer has notice, has engaged or is about to engage in fraudulent transactions, has been found guilty of fraudulent act in connection with sale of securities, has demonstrated any evidence of unworthiness, is subject to injunction or administrative stop order prohibiting sale of security, issuer's application under §517.081 exhibits inequitable terms, or issuer failed to timely complete application for registration. (Fla. Stat. 517.111).

Prerequisites to Sales or Offerings.

Securities may not be sold or offered for sale within Florida, unless of class exempt under §517.051 or sold in exempt transaction under §517.061 all of which exemptions are self-executing and do not require registration under §517.07, or are federal covered securities or are registered pursuant to this subsection. (Fla. Stat. 517.07). Provisions regarding fraud and concealment (Fla. Stat. 517.301), false representations (Fla. Stat. 517.311) and boiler rooms and prohibited practices (Fla. Stat. 517.312) do apply to exempt transactions under Fla. Stat. 517.061 and 517.051. (Fla. Stat. 517.312).

Securities and Investments to which Act Applies.

Security defined to include notes, stock, treasury stock, bonds, debentures, evidences of indebtedness, certificates of interest or participation, whiskey or commodity warehouse receipts, certificates of interest or participation in profit sharing agreements or oil, gas, petroleum, mineral or mining titles or leases, collateral trust certificates, reorganization certificates, investment contracts, certificate of deposits, certificate of deposit for security, preorganization subscription, any transferable share, investment contract, or beneficial interest in title to property, profits, or earnings, interests in or under profit sharing or participation agreement or scheme, any option contract which entitles holder to buy or sell amount of underlying security at fixed price within specified period of time, and all rights to subscribe to or purchase any securities. (Fla. Stat. 517.021[21]).

For purpose of false representations and other prohibited practices, investment means any commitment of money or property, not otherwise security, in expectation of receiving economic benefit, but excluding certain sales. (Fla. Stat. 517.301[2]).

Exempt Securities.

Registration provisions of Act do not apply to: Securities issued by U.S., any State, territory, possession or political subdivision, or by most foreign nations and political subdivisions thereof, or by national banks and certain other banks and associations and corporations created by U.S.; nor to certain securities issued or guaranteed by railroads and other regulated public utilities; nor to securities issued by religious, educational, charitable and other similar corporations, provided that offers or sales of such securities may be made only by offering circular containing full and fair disclosure of all material information in accordance with statutory and regulatory provisions; nor to any security issued or guaranteed by bank, trust company, savings institution or building or savings and loan association, international development bank or credit union when said entity is subject to examination, supervision or control of State of Florida or Federal Deposit Insurance Corporation or National Credit Union Association. (Fla. Stat. 517.051). Initial subscriptions for equity securities of bank, trust company, saving institution or building or savings and loan association will be exempt if such institution is subject to examination, supervision or control of State of Florida; nor to securities (other than common stock) outstanding for at least five years without default in payment of fixed return; nor to securities issued by nonprofit Florida agricultural cooperatives when sold to persons principally engaged in production or sale of agricultural products; nor to any insurance or endowment policy or annuity contract or optional annuity contract, or self-insurance agreement issued by corporation, insurance company, reciprocal insurer, or risk retention group subject to supervision of insurance commissioner, bank commissioner or any agency or officer performing functions, of any state or territory of U.S., or District of Columbia. (Fla. Stat. 517.051).

Exempt Transactions.

Following are generally exempt (Fla. Stat. 517.061) but may be subject to statutory notice, escrow and other conditions: Sales by trustee in bankruptcy and judicial sales; sales by certain fiduciaries, by pledgees and mortgagees; isolated sales neither by nor for issuer or underwriter; distributions by unincorporated and incorporated issuers of securities to existing security holders as stock dividend or other distribution out of earnings or surplus; issuance of securities by unincorporated and incorporated issuers to security holders or creditors in reorganization proceedings; any transaction involving distribution of securities of issuer exclusively among its own security holders where no commission paid; sales to banks, trusts, trust companies, brokers and dealers, investment companies as defined by Investment Company Act of 1940; or pension or profit sharing trust or qualified institutional buyer, whether any of such entities is acting in its individual or fiduciary capacity; sale of securities from one corporation to another, which securities have sales price over $50,000, when buyer and seller corporations have assets in excess of $500,000; sales or exchanges with other corporations or their security holders in connection with mergers; issuance of notes or bonds in connection with acquisition of real property or renewals thereof, if such notes or bonds are issued to sellers of, and are secured by all or part of, real property acquired; exchanges pursuant to conversion rights; sale by issuer of its own securities to not more than 35 persons in state within any consecutive 12 month period if certain conditions met; sales by Florida and national banks whose profit therefrom does not exceed 2%; transactions by registered dealers at or near current market price if issuer registered under §13 or §15(d) of Securities Exchange Act of 1934 if securities are dealt in on any stock exchange registered under Securities Exchange Act of 1934; cooperative apartments; unsolicited purchases or sales by registered dealers; sale of securities under employer-sponsored pension or profit-sharing plan when offered only to employees of sponsoring organization, or to employees of controlled subsidiaries; sale by or through registered dealer of certain securities options; and certain sales for purpose of constructing rental housing. (Fla. Stat. 517.061).

Registration of Securities.

Registration is by qualification on Commission's prescribed forms, and payment of filing fee of $1,000 (Fla. Stat. 517.081) or by notification (Fla. Stat. 517.082) ($1,000 filing fee) upon request of issuer or any registered dealer. Registration by notification is not available for securities offering price of which was $5 per share or less, unless listed on registered stock exchange or through NASDAQ, or unless such securities are of same issuer and of senior or substantially equal rank to securities so listed. (Fla. Stat. 517.082[3]). If issue found not to be fraudulent, terms of sale fair, just and equitable, and issuer's business not based on unsound business principles, securities may be sold (Fla. Stat. 517.081[7]), but Commission may regulate commissions (Fla. Stat. 517.081[5]), require escrow of promotional stock (Fla. Stat. 517.181) and otherwise condition registrations.

Registration of Dealers, Salesmen, Investment Advisers and Branch Offices.

No person may engage in such business unless application is first filed with and approved by Office. (Fla. Stat. 517.12). With few exceptions, every dealer must be registered with SEC. (Fla. Stat. 517.12[16]). Federally regulated advisors must file with Office copy of documents required to be filed with Securities Exchange Commission, along with consent to service of process and $200 filing fee, per year, expiring on Dec. 31 unless renewed. (Fla. Stat. 517.1201). Any branch office from which such business is conducted must be registered with Office. (Fla.

Stat. 517.12[5]). Commission or Office may require examination. (Fla. Stat. 517.12[8]). Registrations may be refused, suspended, restricted or revoked for stated causes after notice and hearing. (Fla. Stat. 517.161). Registration of associated persons is specific to dealer or investment advisor identified at time registration is approved and previously registered associated persons are required to file new application for registration when that person seeks to be associated with new securities dealer or investment advisor. (Fla. Stat. 517.1205). Application fee for dealer or investment advisor $200, associated person $50, plus cost of fingerprint card if current card not on file with NASD. (Fla. Stat. 517.12[10]). Dealers and investment advisors to pay $100 fee for each office in Florida, except principal office. (Fla. Stat. 517.12[10]). Each dealer, investment adviser and branch office required to keep record of currency transactions in excess of $10,000. (Fla. Stat. 517.12[14]). Registration requirements do not apply to any general lines insurance agent or life insurance agent licensed under c. 626 for sale of security if individual is directly authorized by issuer to offer or sell security on behalf of issuer and issuer is federally chartered savings bank.

Liabilities and Remedies.

Federal statutory civil remedies for purchasers or sellers made applicable. (Fla. Stat. 517.241[3]). Purchaser of securities sold in violation of Act (except violations relating to renewal of branch office registration or filing change of address amendment) may void same and recover price of security or investment, interest and attorney's fees from seller and all officers and agents who participated or aided in sale (Fla. Stat. 517.211), but such rights generally conditional on prior tender back to seller. See category 5 Civil Actions and Procedure, topic 5.16 Limitation of Actions. Purchaser may be entitled to relief from Securities Guaranty Fund. (Fla. Stat. 517.131). §517.241(2), which preserves person's statutory and common law right to bring court action for any act involving sale of securities, found invalid under supremacy clause (453 So.2d 858) because of conflict with Federal Arbitration Act 9 U.S.C. §§1 to 14 (1976). Ability to bring action to court subject to Federal Arbitration Act 9 U.S.C. §§1 to 14 (1976).

Violation of Act is third degree felony or first degree felony, depending on size of damages. Violator may be assessed fine equal to triple damages caused or profit gained. (Fla. Stat. 517.302).

Tender Offers.

No specific provisions.

Subdivision Offerings.

Mobile Home Park subdivisions regulated by c. 723. Model Land Sales Practices Act adopted with substantial modifications. (c. 498).

Franchising, Pyramid Sales, Etc.

“Pyramid sales scheme”, which is any marketing plan or operation whereby person pays or invests in excess of $100 and acquires opportunity to receive benefit not primarily contingent on volume or quantity of services or property sold to consumers, but is related to inducement of additional persons to participate in same marketing plan or operation, is lottery. Whoever participates in any such lottery commits misdemeanor of first degree, punishable as provided in Fla. Stat. 775.082 or Fla. Stat. 775.083. See statute for additional details. (Fla. Stat. 849.091).

Florida Uniform Land Sales Practices Law adopted with significant modifications including major revisions in 1988. (c. 498).

Uniform Simplification of Fiduciary Security Transfers Act repealed. (1998 Fl. ALS 11).

Uniform Securities Ownership by Minors Act not adopted.

Uniform Commercial Code adopted. (cc. 670-680). See topic 3.09 Commercial Code.

3.26 STATUTE OF FRAUDS:

See topic 3.16 Frauds, Statute of.

3.27 TRUST RECEIPT SECURITY:

Uniform Commercial Code adopted. (cc. 670-680). See topic 3.09 Commercial Code.

3.28 WAREHOUSEMEN:

Uniform Commercial Code adopted. (cc. 670-680). See topic 3.09 Commercial Code.

Bonds.

No provisions with respect to bonds of warehousemen.

Licenses.

Operator of warehouse for sale of flue-cured tobacco must, on or before July 1 of each year, obtain from Department of Agriculture and Consumer Services state flue-cured tobacco warehouse license. As prerequisite, each applicant must furnish evidence to Department of standard fire and extended coverage insurance policy for full market value of maximum amount of tobacco contained in warehouse at any one time. (Fla. Stat. 574.03).

4 CITIZENSHIP

4.01 ALIENS:

Generally aliens may not vote (Fla. Stat. 97.041), hold certain public offices (Const., art. 4, §5; art. 3, §§2, 15), or serve on juries (Fla. Stat. 40.01).

Alien may not be disqualified from practicing occupation or profession regulated by state solely because of alien status. (Fla. Stat. 455.10).

Unauthorized Employment.

It is unlawful for any person knowingly to employ, hire, recruit or refer for private or public employment within state, alien who is not duly authorized to work by immigration laws or U.S. Attorney General. (Fla. Stat. 448.09[1]). First violation for unauthorized employment is punishable by civil fine of not more than $500, regardless of number of aliens with respect to whom violation occurred. (Fla. Stat. 448.09[2]). Person who subsequently violates statutes will be guilty of second degree misdemeanor, and each subsequent violation will constitute separate offense. (Fla. Stat. 448.09[3]). (*Note:* This statute must be considered in relation to Federal Immigration Reform and Control Act of 1986, which provides comprehensive scheme of employer sanctions for unauthorized employment of illegal aliens.)

Property.

Aliens eligible to become citizens of U.S. have same rights as to ownership, inheritance and disposition of property as citizens. (Const. art. 1, §2).

Personal representative of nonresident alien decedent whose gross estate included property located in state must file executed copy of federal estate tax return with Department of Revenue. (Fla. Stat. 198.13).

Proceedings.

In any proceeding affecting property, special rules apply to notice or service of process upon person, firm or corporation located in any territory under control of any country which is at war with U.S. Copy of notice or service of process must be sent by registered or certified mail to Alien Property Custodian, Washington, D. C., but failure to send such copy does not invalidate proceedings. (Fla. Stat. 48.131).

Arrest.

Failure to provide consular notification under Vienna Convention on Consular Relations or other bilateral consular conventions is not defense in any criminal proceeding against any foreign national and is not cause for foreign national's discharge from custody. (Fla. Stat. 901.26).

Convicted Offenders.

Governor or his designee is authorized to consent to transfer of convicted alien offender to country of which offender is national when treaty is in effect between U.S. and foreign country providing for such transfer. (Fla. Stat. 944.596).

Felony Records.

Clerk of court must furnish copy of complaint, information, or indictment and judgment and sentence and any other record pertaining to case of any alien to U.S. immigration officer in which alien is convicted of felony or misdemeanor or enters plea of guilty or nolo contendere. (Fla. Stat. 943.0535).

5 CIVIL ACTIONS AND PROCEDURE

5.01 ACCORD AND SATISFACTION:

Common law rules govern.

Compromise.

Offers of settlement governed by Fla. Stat. 45.061 (for causes of action accruing prior to July 1, 1987), Fla. Stat. 768.79 and R.C.P. 1.442. Rebuttable presumption that plaintiff's offer was unreasonably rejected by defendant if judgment entered is at least 25% greater than offer rejected, and rebuttable presumption that defendant's offer was unreasonably rejected by plaintiff if judgment entered is at least 25% less than offer rejected. If, upon motion by offeror within 30 days after entry of judgment, court determines that offer was rejected unreasonably, resulting in unnecessary delay and needless increase in costs, it may impose appropriate sanction. (Fla. Stat. 768.79). In calculating “judgment obtained” for purposes of determining whether party who made offer is entitled to attorneys' fees, court must determine total net judgment, which includes plaintiff's taxable costs up to date of offer and, where applicable, plaintiff's attorney's fees up to date of offer. (816 So.2d 546).

Class Actions.

After claim or defense is determined to be maintainable on behalf of class, claim or defense cannot be voluntarily withdrawn, dismissed, or compromised without approval of court after notice and hearing. Notice of any proposed voluntary withdrawal, dismissal, or compromise must be given to all members of class as court directs. (R.C.P. 1.220[e]).

Pleading.

Accord and satisfaction must be affirmatively pleaded. (R. C. P. 1.110[d]). Avoidance of accord and satisfaction must also be pleaded. (R. C. P. 1.100[a], R. C. P. 1.110[d]).

Uniform Commercial Code adopted. See category 3 Business Regulation and Commerce, topic 3.09 Commercial Code.

5.02 ACTIONS:

Rules of Civil Procedure are similar to Federal Rules of Civil Procedure.

Forms of Pleadings.

Forms of action and technical forms for seeking relief and of pleas, pleadings, or motions are abolished. (R.C.P. 1.110[a]).

Conditions Precedent.

Generally there are no conditions precedent to institution of actions. However as to some causes of action or actions against certain parties there are such conditions. (See, e.g., nursing homes, Fla. Stat. 400.0233; construction liens, Fla. Stat. 713.06; medical malpractice, c. 766; tort claims against state and its agencies and subdivisions, Fla. Stat. 768.28[6][b]; libel and slander actions against news media, Fla. Stat. 770.01). In pleading performance or occurrence of conditions precedent, it is sufficient to aver generally that all conditions precedent have been performed or have occurred. (R.C.P. 1.120[c]). Action may not be instituted against state, state agency or subdivision unless claim is first presented in writing to both appropriate agency and Department of Financial Services within three years from when claim accrues. Claimants against municipalities and Spaceport Florida Authority need not notify Department of Financial Services. (Fla. Stat. 768.28[6][a]).

Vexatious Litigant.

Court in any judicial circuit may enter prefiling order prohibiting vexatious litigant from commencing, pro se, any new action without first obtaining leave of administrative judge of that circuit. (Fla. Stat. 68.093). See subhead Parties, catchline Vexatious Litigant.

Commencement.

See topics 5.20 Process, 5.18 Pleading. (R.C.P. 1.050).

Parties.

Every action may be prosecuted in name of real party in interest and all persons having an interest in subject of the action or relief demanded may join as plaintiffs, and any person may be made a defendant who has or claims an interest adverse to plaintiff. (R.C.P. 1.210[a]). Personal representative, administrator, guardian, trustee of express trust, party with whom or in whose name contract has been made for benefit of another or party expressly authorized by statute may sue in own name without joining party for whose benefit action is brought. (R.C.P. 1.210[a]). Any person may at any time be made party if his presence is necessary or proper to complete determination of cause. (R.C.P. 1.210[a]). Misjoinder of parties is not ground for dismissal of action. (R.C.P. 1.250 [a]). Any claim against party may be severed and proceeded with separately. (R.C.P. 1.250 [a]). Parties may be dropped or added by court on motion or of its own initiative at any stage of action on such terms as are just. (R.C.P. 1.250[b]). See also c. 46; R.C.P. 1.230 (interventions); R.C.P. 1.240 (interpleader); R.C.P. 1.260 (survivor and substitution of parties).

Vexatious litigant is one who in immediately preceding five-year period has commenced, pro se, five or more civil actions in any court in state (except action governed by Florida Small Claims Rules) which actions have been finally and adversely determined against such person or entity, or any person or entity previously found to be vexatious litigant. (Fla. Stat. 68.093). See topic 5.02 Actions, subhead Conditions Precedent. See also topic 5.04 Bonds.

Class Actions.

One party may maintain any claim or defense on behalf of all members of class when: (1) Class members are so numerous that separate joinder of each member is impractical; (2) questions of law or fact raised by representative party are common to those of each class member; (3) claim or defense of representative party is typical of those of each class member; and (4) representative party can fairly and adequately protect and represent interest of each class member. (R.C.P. 1.220[a]).

After control of condominium association is obtained by owners other than developer, association may represent unit owners in matters of common interest. (R.C.P. 1.221).

Florida Residency.

By statute (Fla. Stat. 768.734[1]), effective July 1, 2006, membership in any class action filed in Florida state courts is limited to Florida residents. Court may permit expansion to include nonresident claimants: (i) Whose claim is recognized within their state of residence; (ii) whose claim is not time barred; and (iii) who cannot assert their rights because their state of residence lacks personal jurisdiction over defendant. In addition, class may include nonresidents if conduct giving rise to claim occurred in or emanated from Florida.

Limitations.

By statute, effective July 1, 2006, in order to maintain class action seeking statutory penalties under laws regarding motor vehicle licenses (c. 320), consumer protection (c. 501), retail installment sales (c. 520), and motor vehicle lease disclosure (c. 521), class action claimants must allege and prove actual damages (including appropriate nonmonetary relief such as injunction or declaratory relief). (Fla. Stat. 768.734[2]). This provision does not affect any class action lawsuits involving federal or state civil rights laws. (Fla. Stat. 768.734[3]).

See topic 5.09 Damages, subhead Punitive Damages.

Uniform Class Action Act not adopted.

Interventions.

Anyone claiming interest in pending litigation may at any time be permitted to assert right by intervention, but intervention is in subordination to, and in recognition of, propriety of main proceeding, unless ordered by court. (R.C.P. 1.230).

Interpleader.

Persons having claims against plaintiff may be joined as defendants and required to interplead when their claims are such that plaintiff is or may be exposed to double or multiple liability. (R.C.P. 1.240). Defendant exposed to similar liability may obtain interpleader by crossclaim or counterclaim. (R.C.P. 1.240). No objection to joinder that claims do not have common origin or that plaintiff denies liability to any or all claimants. (R.C.P. 1.240).

Third Party Practice.

Similar to Federal Rules. Defendant may also assert any other claim against third party that arises out of transaction or occurrence that is subject matter of plaintiff's claim. (R.C.P. 1.180). Defendant need not obtain leave of court if he files third party complaint not later than 20 days after his answer is originally served. (R.C.P. 1.180). Otherwise, defendant must obtain leave on motion and notice to all parties to action. (R.C.P. 1.180).

Joinder of Causes of Action.

Causes of action, of whatever kind, by and against same parties in same right, may be joined in same suit. (R. C. P. 1.110[g]). Several causes of action may be joined and claims aggregated to confer jurisdiction only if such claims are related. (86 Fla. 376, 98 So. 140; 100 Fla. 489, 129 So. 816).

Consolidation and Severance.

When actions involving common question of law or fact are pending before court, it may order joint hearing or trial of any or all matters at issue or consolidation of all actions. (R.C.P. 1.270[a]). Court may also order separate trial of any claim, cross-claim, counter-claim or third party claim or of any separate issue or of any number of claims or issues to further convenience or avoid prejudice. (R.C.P. 1.270[b]; see also R.C.P. 1.170[i]).

Stay of Proceedings.

No general provisions governing stays. Court may grant stay of execution or other process based on final judgment for good cause on motion and notice to all adverse parties. (R.C.P. 1.550[b]). See also topic 5.03 Appeal and Error.

Abatement and Revival.

All actions survive death of party and may be commenced, prosecuted or defended in name of person prescribed by law. (Fla. Stat. 46.021; see also R.C.P. 1.260[a]). If party dies and claim is not thereby extinguished, court may order substitution of proper parties. Unless motion for substitution made within 90 days after death is suggested upon record by service of statement of fact of death, action must be dismissed as to deceased party. Where action survives to surviving plaintiff, or against surviving defendant, if there be two or more plaintiffs, or defendants, one or more of whom dies, action does not abate, but upon suggestion of death, it proceeds in favor of or against surviving parties. (R.C.P. 1.260[a]). Claim must be filed with estate pursuant to Fla. Stat. 733.702(3). Generally, actions which have not been prosecuted for period of one year will be dismissed by court on its own motion or on motion of any interested person, whether party to action or not, after notice to parties unless stipulation staying action is approved by court or stay order has been filed or party shows good cause in writing at least five days before hearing on motion seeking dismissal. (R.C.P. 1.420[e]). Marriage of woman does not cause action to abate. (Fla. Stat. 708.08).

Limitation of.

See topic 5.16 Limitation of Actions.

Small Claims.

See category 6 Courts and Legislature, topic 6.01 Courts.

Termination of Actions.

Voluntary Dismissal.

Except in actions in which property seized or in custody of court, action may be dismissed by plaintiff without order of court (i) before trial upon notice of dismissal any time before hearing on motion for summary judgment, or if none is served or motion denied, before retirement of jury in case tried before jury or before submission of nonjury case to court for decision, or (ii) by filing stipulation of dismissal signed by all parties who have appeared in action. Dismissal is without prejudice, except that notice of dismissal operates as adjudication on merits when served by plaintiff who has once dismissed in any court action based on or including same claim. If counterclaim has been served by defendant prior to service of plaintiff's notice of dismissal, action must not be dismissed against defendant's objections unless counterclaim can remain pending for independent adjudication by court. (R.C.P. 1.420[a]).

Involuntary Dismissal.

Any party may move for dismissal of action or any claim for failure of adverse party to comply with Rules of Civil Procedure or any order of court. Any party may move for dismissal on ground that party seeking affirmative relief has shown no right to relief, without waiving right to offer evidence if motion not granted. Unless otherwise specified in order, such dismissal (other than dismissal for lack of jurisdiction, improper venue, or lack of indispensable party) operates as adjudication on merits. (R.C.P. 1.420[b]).

Effect on Lis Pendens.

Notice of lis pendens filed in connection with claim that is dismissed under R.C.P. 1.420 is automatically dissolved at same time. Notice, stipulation, or order of dismissal must be recorded. (R.C.P. 1.420[e]).

Summary Judgment.

Party may move for summary judgment in that party's favor upon all or any part of claim. (R.C.P. 1.510).

Prohibited Actions.

Actions for breach of contract to marry, alienation of affections, seduction or criminal conversation, are abolished. (Fla. Stat. 771.01).

Estate Administration.

See category 13 Estates and Trusts, topic 13.09 Executors and Administrators.

Direct Actions Against Insurer.

See category 23 Transportation, topic 23.01 Motor Vehicles.

5.03 APPEAL AND ERROR:

Appellate jurisdiction of Supreme Court, district courts of appeal, and circuit courts set forth in Florida constitution, Art. 5. Rules governing appeals in such courts are prescribed by Supreme Court in Florida Appellate Rules.

To Supreme Court.

Appeals from trial courts may be taken directly to Supreme Court, as matter of right, only from judgments imposing death penalty and decisions of district courts of appeal declaring invalid state statute or provision of state constitution, and when provided by general law, from final orders in proceedings for validation of bonds or certificates of indebtedness and actions of statewide agencies relating to rates or service of utilities providing electric, gas, or telephone service. (Fla. R. App. P. 9.030). See topic 5.05 Certiorari.

To District Courts of Appeal.

Appeals may be taken of right to district courts of appeal from final orders of trial courts not directly reviewable by supreme court or circuit court, including county court final orders declaring invalid state statute or provision of state constitution, and nonfinal orders of circuit courts which concern venue or which grant, continue, modify, deny or dissolve or refuse to modify or dissolve injunctions, or which determine jurisdiction of person, right to immediate possession of property, right to immediate monetary relief or child custody in domestic relations matters, of issue of liability in favor of party seeking affirmative relief, that party is not entitled to workers' compensation immunity, that class should be certified, that party is not entitled to absolute or qualified immunity in civil rights case arising under federal law, that governmental entity has taken action that inordinately burdens real property, that grant or deny appointment of receiver and terminate or refuse to terminate receivership, or whether party is entitled to arbitration and administrative action when provided by general law. (Fla. R. App. P. 9.030). See topic 5.05 Certiorari.

Certain questions certified to District Court of Appeal as being of great public importance may be accepted by district court. (Fla. R. App. P.. 9.030[b][4][A] and [B]).

To Circuit Courts.

Circuit courts have appellate jurisdiction over final orders of lower tribunals as provided by general law, nonfinal orders of lower tribunals which concern venue or which grant, continue, modify, deny, or dissolve or refuse to modify or dissolve injunctions, or which determine jurisdiction of person, right to immediate possession of property, right to immediate monetary relief or child custody in domestic relations matters, issue of liability in favor of party seeking affirmative relief, that party is not entitled to workers' compensation immunity, that class should be certified, that party is not entitled to absolute or qualified immunity in civil rights case arising under federal law, that grant or deny appointment of receiver and terminate or refuse to terminate receivership, or whether party is entitled to arbitration and administrative action when provided by law. (Fla. R. App. P.. 9.030). See topic 5.05 Certiorari.

Extent of Review.

Extends to both law and fact.

Character of Hearing.

Generally, questions of fact and discretionary decisions subject to deferential review, questions of law subject to review de novo.

Limitations.

Appeals from final decisions, orders, judgments or decrees must be commenced within 30 days from rendition of final decision, order, or judgment appealed from. (Fla. R. App. P. 9.110). Appeals from partial final judgments may be taken immediately or after final judgment entered. Appeal must be taken when partial final judgment disposes of entire case as to any party within 30 days of rendition. (Fla. R. App. P. 9.110[k]). Filing of timely motion for new trial or rehearing, clarification, certification, to alter or amend, for judgment in accordance with prior motion for directed verdict, n.o.v., in arrest of judgment, or challenge to verdict, tolls time for filing notice of appeal and notice of appeal filed within 30 days of denial of motion is timely. (Fla. R. App. P. 9.020[h]).

Bonds.

A bond is not required in an appeal except to make the appeal operate as a supersedeas. (Fla. Stat. 59.13; Fla. R. App. P. 9.310). State or political subdivision need not give bond unless required by order of court. (Fla. R. App. P. 9.310). Except for certified class actions subject to §768.733, amount of supersedeas bond in any civil action necessary to obtain automatic stay of execution of judgment granting any type of relief during entire course of all appeals or discretionary reviews, may not exceed $50 million for each appellant, regardless of amount of judgment appealed. $50 million amount adjusted annually to reflect changes in Consumer Price Index compiled by U.S. Dept. of Labor. Party seeking stay of execution may move court to reduce amount of supersedeas bond required to obtain stay. Court, in interest of justice and for good cause, may reduce supersedeas bond or set other conditions for stay with or without bond. Court may not reduce supersedeas bond if appellant has insurance or indemnification policy applicable to case. If appellant has posted supersedeas bond for amount less than that which would be required for automatic stay pursuant to Fla. R. App. P. 9.310(b)(a), appellee may engage in discovery for limited purpose of determining whether appellant has dissipated or diverted assets outside course of its ordinary business. If court determines appellant has dissipated or diverted assets, court may enter orders necessary to protect appellee, require appellant to post supersedeas bond in amount up to, but not more than, amount that would be required for automatic stay pursuant to Fla. R. App. P. 9.310(b)(a). (Fla. Stat. 45.045[4]).

Stays.

Appeal operates as supersedeas if appellant applies to trial court for stay. Court may require bond, other conditions, or both. If appeal is from money judgment or decree, stay is automatic on posting bond conditioned to satisfy judgment or decree or any modification thereof not increasing its amount, including costs, interest, fees, and damages for delay equal to principal amount of judgment plus twice statutory rate of interest on judgments on total amount upon which party has obligation to pay interest. (Fla. R. App. P. 9.310).

Notice of Appeal.

Two copies of notice are filed with clerk of lower tribunal within 30 days of rendition of order together with filing fee prescribed by law except in appeal of administrative action where appellant must pay fee and file second copy of notice with court. (Fla. R. App. P. 9.110[b], [c], [d]).

5.04 BONDS:

In all statutes about practice and procedure, “bond with surety” means bond with two good and sufficient sureties, each with unencumbered property not subject to any exemption afforded by law equal in value to penal sum of bond or bond with licensed surety company as surety or cash deposit conditioned as for bond. (Fla. Stat. 45.011). When any rule or statute requires or permits giving of bond by party in judicial proceeding, surety on bond submits to jurisdiction of court when bond is approved. Liability of surety may be enforced by motion without necessity of independent action. (R.C.P. 1.625).

Amendment of Bonds.

When any required or authorized bond is defective, party may give new bond. Amendment relates back and affords protection from commencement of an action. (Fla. Stat. 45.041).

Executions.

If defendant in execution wants to retake possession of property levied on, he may do so by executing bond with surety in sum double value of property retaken as fixed by officer holding execution and conditioned that property will be forthcoming on day of sale stated in bond. (Fla. Stat. 56.12). Should execution remain unpaid, and parties to bond fail to produce property by specified day, bond returned as forfeited to court from which execution issued. Clerk, or court if it has no clerk, enters judgment against sureties for value of property so bonded, or if value of property exceeds amount of execution, for amount of execution, and execution issues therefor. Such proceedings do not affect liability of principal upon original judgment. (Fla. Stat. 56.13). Third person may obtain possession of property by filing affidavit that property claimed belongs to him and by furnishing bond with surety in double value of goods claimed and conditioned to deliver property on demand if it is adjudged to be property of defendant in execution and to pay plaintiff all damages if it appears claim was interposed for purpose of delay. (Fla. Stat. 56.16). If any execution issues illegally, defendant in execution may obtain stay by making and delivering affidavit, stating illegality and whether any part of execution is due, with bond with surety payable in double amount of execution or part of which stay is sought conditioned to pay execution or part claimed to be illegal and any damages for delay if affidavit is not well founded. On receipt of such affidavit and bond, officer must stay proceedings on execution and return bond and affidavit to court from which execution issued. (Fla. Stat. 56.15).

Constitutional officers of state, boards of county commissioners, and county school boards not required to furnish any bond or other security for procurement of or to render effective any restraining order, injunction, or other order, writ or judgment in cases of original jurisdiction in Supreme Court of Florida. (Fla. Stat. 69.011).

Vexatious Litigant.

If court finds vexatious litigant not reasonably likely to prevail on merits, court must order plaintiff to furnish appropriate security to defendant. (Fla. Stat. 68.093). See topic 5.02 Actions, subhead Parties, catchline Vexatious Litigant.

Class Actions.

See topic 5.09 Damages, subhead Punitive Damages.

5.05 CERTIORARI:

Jurisdiction.

District courts and circuit courts may issue writs of certiorari except for those cases in which direct appeal of non-final orders is permitted; see topic 5.03 Appeal and Error. (Fla. R. App. P. 9.030).

Supreme Court may, in its discretion, review certain matters, under Const. art. 5, §3 and Fla. R. App. P. 9.030, although such review is not technically by certiorari. Supreme Court does not have certiorari jurisdiction. Such discretionary jurisdiction may be sought to review decisions of district courts that: expressly declare state statute valid; expressly construe provision of state or federal constitution; expressly affect class of constitutional or state officers; expressly and directly conflict with decision of another district court or Supreme Court on same point of law; pass upon question certified to be of great public importance or in direct conflict with decisions of other district courts. Discretionary jurisdiction also to review orders and judgments of trial courts certified by district courts to require immediate resolution by Supreme Court and of great public importance or to have great effect on proper administration of justice. Supreme Court also may review questions of law certified by U.S. Supreme Court or court of appeals that are determinative of case and for which there is no controlling precedent of Supreme Court of Florida. (Const. art. 5, §3; Fla. R. App. P. 9.030).

Grounds.

To obtain writ of certiorari, petitioner must establish departure from essential requirements of law, resulting in material injury for remainder of case, which cannot be corrected on postjudgment appeal.

Proceedings.

Application for writ of certiorari must be made within 30 days of decision sought to be reviewed; procedure is governed by Florida appellate rules. (Fla. R. App. P. 9.100).

Review.

Appellate review determines whether lower court afforded procedural due process and applied correct law.

5.06 CHARITABLE IMMUNITY:

See topic 5.09 Damages.

5.07 COMMISSIONS TO TAKE TESTIMONY:

See topic 5.11 Depositions and Discovery.

5.08 COSTS:

Indigent person who is party or intervenor in judicial or administrative agency receives services of courts, sheriffs, and clerks despite inability to pay. (Fla. Stat. 57.081). Person seeking appointment of private attorney in civil case eligible for court-appointed counsel, or seeking relief from paying fees or prepaying costs under Fla. Stat. 57.081, based on inability to pay must apply to clerk of court for determination of civil indigent status using form developed by Florida Clerks of Court Operations Corporation.(Fla. Stat. 57.082).

Any party seeking judgment taxing costs, attorneys' fees, or both must serve motion within 30 days after filing of judgment, including judgment of dismissal, or service of notice of voluntary dismissal. (R.C.P. 1.525). Party seeking costs must also plead them in complaint or answer. (573 So. 2d 835). Costs in cases at law generally are recovered by prevailing party; they are included in judgment. (Fla. Stat. 57.041). Premiums on bonds or other security are allowed as part of costs along with necessary costs for court reporting services and any sales or use tax due on legal services provided to such party. Except in proceedings under Fam.L.R.P., expert witness fees may not be awarded as taxable costs unless party retaining expert furnishes each opposing party with written report signed by expert, which summarizes opinions and factual basis of opinions, including documentary evidence and authorities relied on, at least five days prior to deposition of expert or at least 20 days prior to discovery cutoff, whichever sooner. (Fla. Stat. 57.071). However, court may exercise discretion in awarding costs in equity matters. Costs on appeal are recoverable by prevailing party. (Fla. R. App. P. 9.400).

At any time in civil proceeding in which moving party proves by preponderance of evidence that any action taken by opposing party (including filing of any pleading or part thereof, assertion of response to discovery demand, assertion of any claim or defense, or response to request by any other party) was taken primarily for purpose of unreasonable delay, court must award damages to moving party for its reasonable expenses incurred in obtaining order, which may include attorney's fees, and other loss resulting from improper delay. (Fla. Stat. 57.105[3]). Motion by party seeking such sanctions must be served but may not be filed with court unless , the challenged paper, claim, defense, contention, allegation, or denial is not withdrawn or appropriately corrected within 21 days after service of the motion. (Fla. Stat. 57.105[4]).

Security for Costs.

Nonresident plaintiff or resident plaintiff who removes himself or his effects from state must, after suit is instituted, file bond with surety of $100 conditioned for payment of all costs and charges which may be adjudged against him in court in which suit is brought. (Fla. Stat. 57.011).

Liability of Attorney.

Failure to file nonresident cost bond within 30 days of commencement of suit or removal from state gives defendant right, after 20 days notice to plaintiff (within which time bond may be filed), to dismiss suit or hold plaintiff's attorney liable for all plaintiff's costs and charges. (Fla. Stat. 57.011).

Attorney's Fees.

Upon court's initiation or motion of any party, court must award reasonable attorney's fee to be paid to prevailing party in equal amounts by losing party and losing party's attorney on any claim or defense at any time during civil proceeding if court finds that losing party or losing party's attorney knew or should have known that claim or defense when initially presented to court or at any time before trial was not supported by material facts or by application of then-existing law (unless presented as good faith argument for extension, modification, or reversal of existing law or establishment of new law with reasonable expectation of success). Losing party's attorney not personally responsible if acted in good faith, based on representations of client as to existence of those material facts. (Fla. Stat. 57.105[1]). If contract contains provision allowing attorney fees to party when he is required to take action to enforce contract, court may also allow reasonable attorney fees to other party when that party prevails in any action with respect to contract. (Fla. Stat. 57.105[7]). Same provisions applicable in administrative proceedings. (Fla. Stat. 57.105[5]).

See also In Re Statewide Uniform Guidelines for Taxation of Costs in Civil Actions, Florida Supreme Court Administrative Order (Oct. 28, 1981).

In certain instances, fees and costs can be recovered by prevailing entities in action initiated by a state agency to enforce an agency order (Fla. Stat. 120.69[7]) and by small business parties in other administrative actions (Fla. Stat. 57.111). Maximum award of attorney's fees and costs against a state agency is $ 50,000. (Fla. Stat. 57.111[4][d][2]).

In actions by state against persons for failure to comply with professional licensing requirements, prevailing party may recover fees and costs, and state, if it prevails, may also obtain reasonable costs of investigation. (Fla. Stat. 455.228). In addition, state may impose administrative penalty not to exceed $5,000 per incident. If state is required to seek enforcement of department cease and desist order, it is entitled to collect its attorneys' fees and costs, together with any costs of collection. (Fla. Stat. 455.228).

Person who suffers pecuniary loss or is otherwise affected adversely by failure of motor vehicle manufacturer, distributor, importer or dealer to comply with statutory licensing requirements may recover costs and attorney fees. (Fla. Stat. 320.697).

Costs and fees may be recovered by party seeking access to public records that have been improperly withheld. (Fla. Stat. 119.12).

In any civil litigation involving violation of telephone solicitation statute, prevailing party, receives his reasonable attorneys' fees and costs from non-prevailing party. For any civil litigation initiated by Department of Legal Affairs, involving violation of telephone solicitation statute, court may award to prevailing party reasonable attorneys fees and costs if court finds that there was complete absence of justiciable issue of either law or fact raised by losing party or if court finds bad faith on part of losing party. (Fla. Stat. 501.059[9]).

Prevailing party may be entitled to fees and costs resulting from consumer transaction involving violation of Florida Deceptive and Unfair Trade Practices Act. (Fla. Stat. 501.2105).

Condominium association entitled to fees and costs in unit foreclosure action for unpaid assessments where notice of foreclosure given to unit owner at least 30 days prior to filing of foreclosure action. (Fla. Stat. 718.116[3]). Fees and costs not recoverable where unit owner pays all unpaid assessments prior to entry of final judgment of foreclosure. (Fla. Stat. 718.116[6][b]).

Failure of tractor or farm equipment manufacturer, distributor, or wholesaler to repurchase inventory from dealer upon termination of franchise agreement, entitles dealer to fees and costs in maintaining action on repurchase obligation. (Fla. Stat. 686.407[5]). Similar remedies available to sales representatives (Fla. Stat. 686.201[3][b]), automotive repair parts dealers (Fla. Stat. 686.30[3]), and outdoor power equipment dealers. (Fla. Stat. 686.613[1]).

Prevailing party in action brought to enforce terms and conditions of prepaid health clinic contract is entitled to recover fees and costs. (Fla. Stat. 641.454).

Attorney's and expert witness fees and costs may be recovered by any person who brings action for injury caused by discharge or other condition of pollution into or upon any waters or lands of State. (Fla. Stat. 376.313[6]).

Fees and costs may be awarded in action premised on unreasonable refusal to comply with statutory way of necessity. (Fla. Stat. 704.04).

Trial court has inherent authority to award attorneys' fees for bad faith conduct against party even though no statute authorized award. Trial court also possesses inherent authority to impose attorneys' fees against attorney for bad faith conduct. Amount of award must be directly related to attorneys' fees and costs that opposing party has incurred as result of specific bad faith conduct of attorney. Moreover, such sanction is appropriate only after notice and opportunity to be heard. If specific statute or rule applies, trial court should rely on applicable rule or statute rather than on inherent authority. (826 So.2d 221).

5.09 DAMAGES:

Just compensation is hallmark for legal damages under Florida common law. (464 F.2d 267). Exemplary or punitive damages may be imposed where private injuries partake of public wrongs. (340 So.2d 922). See subhead Punitive Damages, infra.

Misleading Advertising.

Prevailing party in civil action for misleading advertising must be awarded costs including reasonable attorney's fees and may be awarded punitive damages in addition to actual damages proven. (Fla. Stat. 817.41[6]).

Collateral Source of Indemnity.

Damages awarded to claimant must be reduced by total amounts paid for benefit of claimant from collateral sources such as: insurance (except life), or disability, from either public or private sources except when subrogation or reimbursement right exists. Reductions must be offset by amounts paid by claimant or his family to secure any collateral source benefit. (Fla. Stat. 768.76). Governmental and charitable benefits available to general public admissible for jury consideration when determining future care costs. (452 So.2d 514).

Comparative Fault.

Judgment against each party liable in action must be based on party's percentage of fault, and not on basis of joint and several liability. (Fla. Stat. 768.81[3]).

Nonparty.

To allocate any or all fault to nonparty, defendant must affirmatively plead fault of nonparty and, absent showing of good cause, identify nonparty if known or describe nonparty as specifically as practicable. In order to include nonparty on verdict form for purposes of apportioning damages, defendant must prove at trial by preponderance of evidence fault of nonparty. (Fla. Stat. 768.81). This section does not apply to pollution or intentional tort cases or certain actions for which joint and several liability specifically provided by statute. (Fla. Stat. 768.81[4]).

Comparative Negligence Rule.

Adopted effective July 10, 1973. (280 So.2d 431; Fla. Stat. 768.81[2]).

Contribution Among Tortfeasors.

Uniform Act adopted. Effective June 12, 1975, contribution among tortfeasors provided in all causes of action then pending and thereafter filed. (Fla. Stat. 768.31[7]).

Charitable Immunity.

Doctrine abrogated. (145 Fla. 360, 199 So. 344).

Agriculture and Forestry.

Various damages may be recovered by buyer for deficiencies or shortages in commercial fertilizer. (Fla. Stat. 576.061). Damages may be recovered from fertilizer manufacturer by purchaser of mixed plant fertilizer for deficiencies in primary, secondary or micro plant nutrients where actual amount of nutrients falls significantly below level guaranteed by manufacturer. Where plant nutrient deficiency is found, purchaser may recover three times commercial value of deficiency. (Fla. Stat. 576.061[2][b]).

Libel and Slander.

Only actual damages can be recovered against newspaper, periodical or broadcast station if newspaper or periodical prints fair and equally conspicuous correction, apology and retraction within certain specified times after receipt of notice of alleged false and defamatory statements or against broadcast station if correction, apology, or retraction is broadcast at comparable time so long as libelous article or slanderous broadcast was published in good faith, its falsity was due to honest mistake, and reasonable grounds existed for believing statement true. (Fla. Stat. 770.02).

Equal Rights.

Any person who discriminates on basis of sex, marital status, or race in areas of lending money, granting credit, or equal pay for equal services performed is liable for compensatory and punitive damages, plus reasonable attorney's fees. (Fla. Stat. 725.07).

Medical Malpractice.

Noneconomic damages for negligence of both practitioners and nonpractitioners is limited. (Fla. Stat. 766.118).

Noneconomic Damages for Negligence of Practitioners.

Noneconomic damages, regardless of number of practitioner defendants, may not exceed $500,000 per claimant. If negligence, however, resulted in permanent vegetative state or death, total noneconomic damages may not exceed $1 million. In cases that do not involve death or permanent vegetative state, claimant may recover noneconomic damages not to exceed $1 million if: (i) trial judge determines that manifest injustice would occur unless increased noneconomic damages are awarded based on finding that noneconomic harm sustained was particularly severe; and (ii) trier of fact determines that negligence caused catastrophic injury to patient. (Fla. Stat. 766.118[2]).

Noneconomic Damages for Negligence of Nonpractitioners.

Noneconomic damages, regardless of number of nonpractitioner defendants, may generally not exceed $750,000 per claimant. If negligence resulted in permanent vegetative state or death, total noneconomic damages may not exceed $1.5 million. In cases that do not involve death or permanent vegetative state, claimant may recover noneconomic damages not to exceed $1.5 million if: (i) trial judge determines that manifest injustice would occur unless increased noneconomic damages are awarded based on finding that noneconomic harm sustained was particularly severe; and (ii) trier of fact determines that negligence caused catastrophic injury to patient. (Fla. Stat. 766.118[3]).

Noneconomic Damages for Negligence of Practitioners Providing Emergency Services and Care.

Noneconomic damages, regardless of number of such practitioner defendants, may not exceed $150,000 per claimant. Additionally, total noneconomic damages recoverable by all claimants from such practitioners may not exceed $300,000. (Fla. Stat. 766.118[4]).

Noneconomic Damages for Negligence of Nonpractitioners Providing Emergency Services and Care.

Noneconomic damages, regardless of number of such nonpractitioner defendants, may not exceed $750,000 per claimant. Additionally, total noneconomic damages recoverable from all such nonpractitioner defendants may not exceed $1.5 million. Nonpractitioner defendants may receive full setoff for payments made by practitioner defendants. (Fla. Stat. 766.118[5]).

In addition, claimant may recover attorneys' fees and costs of up to 25% of award. However, claimant's award is reduced by any damages received from arbitrating co-defendants. (Fla. Stat. 766.309[3][a]).

Note that above provisions do not apply to actions governed by sovereign immunity law. (Fla. Stat. 766.118[7]).

Motor Vehicles.

Person who suffers pecuniary loss or is otherwise affected adversely by failure of motor vehicle manufacturer, distributor, importer or dealer to comply with statutory licensing requirements may recover treble damages and reasonable attorney's fees. (Fla. Stat. 320.697).

Minors.

Parents may be held liable for actual damages and taxable court costs, for malicious or willful destruction or theft of property by minors under age 18 living with parents. (Fla. Stat. 741.24).

Open Pits or Holes.

Double actual damages recoverable from individual or company leaving unenclosed pits or holes. (Fla. Stat. 768.11).

Payment Methods.

In any action in which court determines that award includes future economic losses which exceed $250,000, court may order that it be made by lump-sum payment reduced to present value or with periodic payments secured by bond. (Fla. Stat. 768.78).

Pollution.

Persons polluting air or water which results in damage to animal or plant life or air or water are jointly and severally liable to State for such damage and costs of investigating same and for costs of restoration plus civil penalty up to $10,000 per offense, except where damage is divisible and attributable to particular violator, or caused by use of state-approved chemicals for control of aquatic weeds or algae performed in accordance with state standards, permits and label instructions and not done negligently. (Fla. Stat. 403.141). Each day during any portion of which such violation occurs constitutes separate offense.

Punitive Damages.

Pleading of claim for punitive damages not permitted in civil action unless there is reasonable showing by evidence in record or proffered by claimant which would provide reasonable basis for recovery of such damages. Defendant may be held liable for punitive damages only if trier of fact, based on clear and convincing evidence, finds defendant personally guilty of intentional misconduct or gross negligence. (Fla. Stat. 768.72). Award for punitive damages in civil action not to exceed greater of three times amount of compensatory damages awarded to each claimant or $500,000. If factfinder determines conduct motivated solely by unreasonable financial gain and that unreasonably dangerous nature of conduct, together with high likelihood of resulting injury, were actually known by managing agent, director, officer, or other person responsible for making policy decisions on behalf of defendant, award of punitive damages may not exceed greater of four times amount of compensatory damages awarded to each claimant or $2,000,000. Where factfinder determines defendant had specific intent to harm claimant and did in fact harm claimant, no cap on punitive damages. (Fla. Stat. 768.73).

Alcohol or Drugs.

Limitations on award of punitive damages do not apply to any defendant who, at time of conduct, was under influence of alcoholic beverage or drug to extent that normal faculties were impaired, or who had blood or breath alcohol level of 0.08% or higher. (Fla. Stat. 768.736).

For Acts of Employee or Agent.

Employer, principal, corporation or other legal entity may be liable for punitive damages only if conduct of employee or agent guilty of intentional misconduct or gross negligence and employer or principal actively and knowingly participated in conduct, knowingly condoned, ratified or consented to conduct, or engaged in conduct that constituted gross negligence and that contributed to loss, damages, or injury suffered by claimant. (Fla. Stat. 768.72[3]).

Subsequent Actions.

Punitive damages may not be awarded if defendant establishes, before trial, that punitive damages previously awarded against defendant in any action alleging harm from same act or single course of conduct unless court determines by clear and convincing evidence that amount of prior punitive damages awarded insufficient to punish defendant's behavior. (Fla. Stat. 768.73[2]).

Exceptions.

Punitive damages in actions based on child abuse, abuse of elderly under c. 415, or abuse of developmentally disabled governed by applicable statutes and controlling judicial precedent. In such actions, punitive damages may not exceed three times amount of compensatory damages awarded to each person, and any award that exceeds limitation presumed excessive unless claimant demonstrates by clear and convincing evidence that award not excessive in light of facts and circumstances. (Fla. Stat. 768.73[1][a]). Jury not to be informed as to provisions of statute. (Fla. Stat. 768.73[4]).

Bonds in Class Actions.

In any civil action brought as certified class action, trial court must stay any execution of judgment entered on account of punitive damages pending completion of appellate review if bond or equivalent surety posted. Required bond or surety is lower of: (i) amount of punitive damages judgment, plus twice statutory rate of interest; or (ii) 10% of net worth of defendant, not to exceed $100 million, regardless of amount of punitive damages. If court finds that defendant who has posted bond or surety is purposefully moving assets with intent to avoid punitive damages judgment, court must increase bond or surety to amount of punitive damages judgment, plus twice statutory rate of interest. If additional bond required by court not posted, stay must be revoked. (Fla. Stat. 768.733).

Replevin.

See topic 5.21 Replevin.

Solicitation of Orders.

Treble damages may be assessed for solicitations by statement or invoice, without appropriate warning, of payments for goods not yet ordered or services not yet performed. (Fla. Stat. 817.061[2]).

Dishonored Checks.

If check, draft, or other order of payment is dishonored because of lack of funds, credit, or account, and if drawer fails to pay within 30 days of written demand on form prescribed by statute (Fla. Stat. 68.065[3]), damages are amount of item plus triple amount of item but in no event less than $50. Drawer also liable for court costs and reasonable attorney fees. (Fla. Stat. 68.065[1]).

Stolen Property.

Person injured by any person who knowingly obtains or uses property of another with intent to either temporarily or permanently deprive other person of right to property or appropriate property to his own use is entitled to threefold damages sustained if proved by clear and convincing evidence. In addition, attorney's fees and court costs in trial and appellate courts are recoverable. Punitive damages are not recoverable and claimant must make written demand for damages prior to filing suit. Defendant may recover attorney's fees and court costs upon finding that claim was without substantial fact or legal support. (Fla. Stat. 772.11).

Strict Liability in Tort.

Doctrine as expounded in ALI Restatement 2d of Torts §402A is adopted. (336 So.2d 80).

Obstruction of Drainage Canals.

Person willfully obstructing drainage canal or damaging drainage facility is liable to injured party for actual damages, and to state drainage district for double cost of removing obstruction or repairing facility. (Fla. Stat. 298.66[1]).

Life Care Contracts.

Act authorizes any purchaser or nominee of, or subscriber to continuing care agreement, injured by violation of Act to bring action for recovery of damages plus reasonable attorneys fees. (Fla. Stat. 651.13).

No-Fault Insurance.

See category 23 Transportation, topic 23.01 Motor Vehicles, subhead No-Fault Insurance.

See also category 13 Estates and Trusts, topic 13.05 Death, subhead Actions for Death.

Sovereign Immunity.

State, or subdivision thereof waives sovereign immunity up to $100,000 per person and $200,000 per incident or occurrence. (Fla. Stat. 768.28[5]). Sovereign immunity is waived only where employee is acting within scope and course of his employment and not acting in bad faith or with malicious purpose. (Fla. Stat. 768.28; 417 So.2d 658). State's waiver of sovereign immunity extends to claims for contribution. Notice requirements of Fla. Stat. 768.28 are condition precedent to maintaining action against state, its agencies and subdivisions or employee of state, its agencies and subdivisions.

No-Fault Insurance.

See category 23 Transportation, topic 23.01 Motor Vehicles, subhead No-Fault Insurance.

Uniform Contribution Among Tortfeasors Act adopted. (Fla. Stat. 768.31).

5.10 DECLARATORY JUDGMENTS:

See topic 5.15 Judgments.

5.11 DEPOSITIONS AND DISCOVERY:

Taking and use of depositions are regulated by Florida Rules of Civil Procedure which are patterned after Federal Rules of Civil Procedure.

Deposition Pending Action.

Any party to suit of civil nature has right at any time after commencement of action to take deposition of any person, including a party for purpose of discovery and use as evidence, except that leave of court must be obtained if notice of taking is served by plaintiff within 30 days after such commencement or if person to be deposed is in prison. (R.C.P. 1.310). Deposition of expert expected to testify at trial allowed without motion or order of court. (R.C.P. 1.280[b][4][A][ii]). Deposition of expert not expected to testify only upon showing of exceptional circumstances under which it is impracticable for party seeking discovery to obtain facts or opinions by other means. (R.C.P. 1.280[b][4][B]).

Use of Depositions.

May be used at trial or upon hearing of motion or interlocutory proceeding so far as admissible under rules of evidence against any party present or represented at taking of deposition or who had notice thereof or an officer, director or managing agent authorized to testify. May also be used against a witness for impeachment or for any purpose if witness is unavailable to testify. (R.C.P. 1.330). Deposition of expert witness may be used regardless of availability. (See R.C.P. 1.390[b].)

Depositions by Telephone.

Upon motion court may order that testimony at deposition may be taken by telephone. (R.C.P. 1.310[b][7]). Witness deposed by telephone must be sworn by person in witness's presence and who is qualified in that location to administer oath. (R.C.P. 1.310[c]).

Perpetuating Testimony.

Deposition of any person regarding any matter that may be cognizable in any court of this state may be taken by any person after filing of verified petition upon court order granting petition. (R.C.P. 1.290[a]).

Deposition Pending Appeal.

Upon motion and leave of court, may be taken to perpetuate testimony for subsequent proceedings if appeal has been taken or if time for taking appeal has not expired. (R.C.P. 1.290).

Before Whom Taken.

Depositions may be taken before any notary public, judicial officer or other officer authorized to take acknowledgments or proof of executions of deeds or by any person appointed by court in which action is pending. (R.C.P. 1.300).

By Stipulation.

Before any person, at any time or place by written stipulation. (R.C.P. 1.300).

Persons Disqualified.

Unless by stipulation, no deposition may be taken by a relative, employee, attorney, counsel of any party, or relative or employee of such counsel, or one financially interested in action. (R.C.P. 1.300).

Videotaping.

Any deposition taken upon oral examination may be recorded on videotape without leave of court. Party intending to videotape deposition must state his intention in his notice and give name and address of video operator. Videotaped depositions must also be recorded stenographically unless otherwise agreed by parties. Counsel for videotaping party must permit viewing of tape by opposing party and provide copy of tape at expense of any requesting party. (R.C.P. 1.310[b][4]).

Within State for Use Outside State.

When a person authorized to administer oaths by Florida law is appointed by a court of record of another state, jurisdiction or government as a commissioner to take testimony of a named witness in this state, such witness may be compelled to attend and testify by a witness subpoena issued by clerk of circuit court. (R.C.P. 1.410[g]).

Uniform Foreign Depositions Act adopted. (Fla. Stat. 92.251).

Outside State for Use Within State.

Upon parties' stipulation, depositions may be taken before any person at any time or place upon any notice and in any manner, and may be used like other depositions. (R.C.P. 1.300[c]). In foreign country depositions may be taken: (1) on notice before person authorized to administer oaths in place of examination, (2) before person commissioned by court, or (3) pursuant to letter rogatory. (R.C.P. 1.300[b]). Depositions taken outside Florida for use in Florida should conform to procedural and formal requirements of Rules 1.290(a)(2), 1.300, and 1.310, R.C.P.

Compelling Attendance of Witnesses.

Attendance of witnesses may be compelled by subpoenas as provided in R.C.P. 1.410. (R.C.P. 1.310). Clerk of court in which deposition to be taken or attorney of record in action may subpoena witnesses. Failure of witness to obey subpoena may be deemed a contempt of the court. (R.C.P. 1.410). Disinterested witnesses must be reimbursed for costs incurred in producing documents pursuant to subpoena. (Fla. Stat. 92.153).

Examination of Witnesses.

Examination and cross-examination of witnesses may proceed as permitted at trial. Officer before whom deposition is to be taken must put witness on oath and record testimony of witness, except that when deposition being taken by telephone, witness must be sworn by person present with witness who is qualified to administer oath in that location. All objections made at time of examination to qualifications of officer taking deposition, manner of taking it, evidence presented, or conduct of any party, and any other objection to proceedings must be noted by officer upon deposition. Objection during deposition must be stated concisely and in nonargumentative and non-suggestive manner. Party may instruct deponent not to answer only when necessary to preserve privilege, enforce limitation on evidence directed by court, or to present motion to terminate or limit examination. Otherwise, evidence objected to must be taken subject to objections.

At any time during taking of deposition, on motion of party or deponent and upon showing that examination is being conducted in bad faith or in such manner as unreasonably to annoy, embarrass, or oppress deponent or party, or that objection and instruction to deponent not to answer are being made in violation of R.C.P. 1.310(c), court may order officer conducting examination to cease forthwith from taking deposition or may limit scope and manner of taking of deposition. If order terminates examination, it will resume only upon order of court. Upon demand of any party or deponent, taking of deposition is suspended for time necessary to make motion for order.

If testimony is transcribed, transcript must be furnished to witness for examination and be read to or by witness unless examination and reading are waived by witness and by parties. Any changes in form or substance that witness wants to make must be listed in writing by officer with statement of reasons given by witness for making changes. (R.C.P. 1.310).

Discovery.

Parties may obtain discovery regarding any matter, not privileged, that is relevant to subject matter of pending action, whether it relates to claim or defense of party seeking discovery or claim or defense of any other party, including existence, description, nature, custody, condition, and location of any books, documents, or other tangible things and identity and location of persons having knowledge of any discoverable matter. Not ground for objection that information sought will be inadmissible at trial if information sought appears reasonably calculated to lead to discovery of admissible evidence. (R.C.P. 1.280[b][1]). Party who has responded to request for discovery with response that was complete when made is under no duty to supplement response to include information thereafter acquired. (R.C.P. 1.280[e]).

Party may obtain discovery of documents and tangible things prepared in anticipation of litigation or for trial by or for another party or by or for that party's representative, including that party's attorney, consultant, surety, indemnitor, insurer, or agent, only upon showing that party seeking discovery has need of materials in preparation of case and is unable without undue hardship to obtain substantial equivalent of materials by other means. Court must protect against disclosure of mental impressions, conclusions, opinions, or legal theories of attorney or other representative of party concerning litigation. Party or nonparty may obtain copy of statement concerning action or its subject matter previously made without showing undue hardship. (R.C.P. 1.280[b][3]).

Demand for Admission of Facts.

Party may serve on any other party written request for admission of truth of any matters within scope of Fla. Stat. 1.280(b) regarding scope of discovery that relates to statements or opinions of fact or of application of law to fact, including genuineness of any documents. Requests for admission may not exceed 30 requests, including all subparts, unless court permits larger number on motion and notice and for good cause, or parties stipulate to larger number. Matter is admitted unless party to whom request is directed serves written answer or objection within 30 days or such shorter or longer time as court may allow, but not before expiration of 45 days after service of process and initial pleading. If objection made, reasons must be stated. Answer must specifically deny matter or set forth in detail reasons why party cannot truthfully admit or deny matter. Denial must fairly meet substance of requested admission. Answering party may not give lack of information or knowledge as reason for failure to admit or deny unless party states that party has made reasonable inquiry and that information known or readily obtainable is insufficient to enable party to admit or deny. Party who considers that matter of which admission has been requested presents genuine issue for trial may not object to request on that ground alone. (R.C.P. 1.370[a]).

Any matter admitted is conclusively established unless court on motion permits withdrawal or amendment of admission. Admission by party is for purpose of pending action only and is not admission for any other purpose and may not be used against that party in any other proceeding. (R.C.P. 1.370[b]).

Interrogatories to Parties.

Without leave of court, interrogatories may be served on plaintiff after commencement of action and on any other party with or after service of process and initial pleading upon that party. Form interrogatories are required where they have been adopted by Supreme Court. (R.C.P. 1.340[a]). Interrogatories are limited to 30 absent leave of court. (R.C.P. 1.340[a]). Each interrogatory is answered separately and fully in writing under oath, unless objected to in which event reasons for objection are stated instead of answer. Answers must be signed by person making them and objections signed by attorney making them. Party to whom interrogatories were directed serves copy of answer and any objections within 30 days after service of interrogatories, except that defendant may serve answers or objections within 45 days after service of process and initial pleading upon that defendant. Court may allow shorter or longer time. Party submitting interrogatories may move for order under R.C.P. 1.380(a) with respect to any objection to or other failure to answer interrogatory. (R.C.P. 1.340).

Interrogatories may relate to any matter that can be inquired into under R.C.P. 1.280(b), and answers may be used to extent permitted by rules of evidence except as otherwise provided in R.C.P. 1.340(b). Interrogatory otherwise proper is not objectionable merely because answer to interrogatory involves opinion or contention that relates to fact, calls for conclusion or asks for information not within personal knowledge of party. Party responds to such interrogatory by giving information he has and source on which information is based. Such qualified answer may not be used as direct evidence for or impeachment against party giving answer unless court finds it otherwise admissible under rules of evidence. If party introduces answer to interrogatory, any other party may require him to introduce any other interrogatory and answer that in fairness ought to be considered with it. (R.C.P. 1.340[b]).

When answer to an interrogatory may be derived or ascertained from records of party to whom interrogatory has been directed or from examination, audit or inspection of records, or from a compilation, abstract or summary based on records and burden of deriving or ascertaining answer is substantially same for party serving interrogatory as for party to whom it is directed, answer to interrogatory may specify records from which answer may be derived or ascertained and offer to party serving interrogatory reasonable opportunity to examine, audit or inspect records and to make copies, compilations, abstracts or summaries. (R.C.P. 1.340[c]).

Answers made by a party are not binding on a co-party. (R.C.P. 1.340[d]).

Interrogatories are so arranged that a blank space is provided after each separately numbered interrogatory. Space is reasonably calculated to enable answering party to insert answer within space. If sufficient space is not provided, answering party may attach additional papers with answers and refer to them in space provided in interrogatories. Original of interrogatories is served on party to whom interrogatories are directed and copies are served on all other parties. Notice that interrogatories have been served, stating date of service and name of party to whom directed, must be filed with court. Completed interrogatories are served upon party originally propounding interrogatories and copy is served upon all parties. Original or copy of answers may be filed by any party, or court may order copy filed, when court should consider answers in determining any matter before it. (R.C.P. 1.340[e]).

Depositions Upon Written Questions.

After commencement of action any party may take testimony of any person by deposition upon written questions. (R.C.P. 1.320[a]).

Discovery in Aid of Execution.

In addition to other discovery available to judgment creditor, court must order debtor to complete Fla. R. Civ. P. Form 1.977, fact information sheet. (R.C.P. 1.560).

5.12 EQUITY:

See topic 5.02 Actions.

5.13 EVIDENCE:

Evidence questions governed by Florida Evidence Code (c. 90), applicable to criminal proceedings related to crimes committed after July 1, 1979, and to civil actions and all other proceedings pending on or brought after Oct. 1, 1981. Florida Evidence Code based on Federal Evidence code.

Witnesses.

Evidence Code adopted, based on Federal Rules of Evidence, applicable to criminal proceedings related to crimes committed after Oct. 1, 1981, to civil actions, and all other proceedings pending on or brought after Oct. 1, 1981. Witness is disqualified to testify if court determines person is incapable of expressing himself or herself in such manner as to be understood (directly or through interpretation by one who can understand him or her), or incapable of understanding duty to tell truth. (Fla. Stat. 90.603).

Privileged Communications.

Confidential communications between husband and wife, lawyer and client, clergy and penitent, psychotherapist and patient, sexual assault counselor or trained volunteer and victim, domestic violence advocate and victim, and accountant and client recognized (Fla. Stat. 90.502-.5055); journalist's privilege (Fla. Stat. 90.5015) and privilege with respect to trade secrets also recognized (Fla. Stat. 90.506). Privilege can be waived by voluntary disclosure (Fla. Stat. 90.507), but not when compelled erroneously by Court or made without opportunity to claim privilege (Fla. Stat. 90.508).

Statement by Deceased or Ill Declarant.

In action brought against personal representative, heir at law, assignee, legatee, devisee, or survivor of deceased person, or against trustee of trust created by deceased person, or against assignee, committee, or guardian of mentally incompetent person, when declarant is unavailable, written or oral statement made regarding same subject matter as another statement made by declarant that has previously been offered by adverse party and admitted in evidence is not excluded. (Fla. Stat. 90.804[2][e]).

Expert testimony may be taken by deposition at any time before trial and may be used at trial, regardless of place of residence of witness or whether he is within 100 miles from place of trial or hearing, or is out of state. (R.C.P. 1.390, but see R.C.P. 1.280[b][4], regarding limitations on discovery of expert testimony.) See Fla. Stat. 766.102 for limitations on expert testimony by certain health care providers in medical negligence actions.

Self-incrimination.

No person may be compelled in any criminal matter to be a witness against himself. (Const. art. 1, §9). Persons are not excused from testifying or producing evidence in certain prosecutions on self-incrimination grounds, but no testimony so given or evidence so produced may be received against person upon any criminal investigation or proceeding unless related to perjury. (Fla. Stat. 914.04).

Compelling Attendance.

On application, clerk of court will issue subpoena directed to witness compelling attendance and testimony. Attorney of record may also issue subpoena. (R.C.P. 1.410[a]). Method of service of criminal trial witness subpoena upon federal, state or municipal employee closely controlled. (Fla. Stat. 48.031[4]).

5.14 INJUNCTIONS:

See also topics 5.18 Pleading, 5.19 Practice.

Injunctions may be issued to prevent irreparable injury, where no adequate remedy at law exists, to abate nuisances, to stay proceedings at law, to prevent waste, to prevent multiplicity of suits and for other usual purposes.

Jurisdiction.

Circuit courts have jurisdiction to issue temporary and permanent injunctions. (Fla. Stat. 26.012[3]).

Temporary injunctions may be granted without notice only if: (a) It appears from specific facts shown by affidavit or verified pleading that immediate and irreparable injury, loss or damage will result to movant before adverse party can be heard; (b) movant's attorney certifies in writing any efforts that have been made to give notice; and (c) affidavit states reasons why notice should not be required. (R.C.P. 1.610[a][1]). No evidence other than affidavit or verified pleading is used to support application unless adverse party appears or has received reasonable notice of hearing. (R.C.P. 1.610[a][2]). Every temporary injunction granted without notice must be endorsed with date and hour of entry, be filed forthwith in clerk's office, define injury, state findings by court why injury may be irreparable, and give reasons why order was granted without notice if none was given. (R.C.P. 1.610[a][2]). Temporary injunction remains in effect until further order of court. (R.C.P. 1.610[a][2]).

Bond.

No temporary injunction can be entered unless bond is given by movant in amount court deems proper, conditioned for payment of costs and damages sustained by adverse party if adverse party wrongfully is enjoined. (R.C.P. 1.610[b]). When injunction is issued on pleadings of municipality, state or any officer, agency or political subdivision thereof, court may dispense with bond. (R.C.P. 1.610[b]). No bond required for issuance of temporary injunction issued solely to prevent physical injury or abuse of natural person. (R.C.P. 1.610[b]; Fla. Stat. 741.30[2][b] [dealing specifically with protection against domestic violence]).

Dissolution.

Party against whom temporary injunction has been granted may move to dissolve or modify at any time. Motion to dissolve or modify must be heard within five days after movant applies for hearing on motion. (R.C.P. 1.610[d]).

Consolidation With Trial on Merits.

Court may consolidate hearing on temporary injunction with trial of action, pursuant to R.C.P. 1.270(a), which governs consolidation of pending actions involving common questions of law or fact.

Form and Scope.

Every injunction must: (1) Specify reasons for entry, (2) describe in reasonable detail act(s) restrained without reference to pleading or another document, and (3) be binding on parties, their officers, agents, servants, employees and attorneys and on those persons in active concert or participation with them who receive actual notice of injunction. (R.C.P. 1.610[c]).

See category 14 Family, topic 14.09 Husband and Wife, subhead Domestic Violence.

5.15 JUDGMENTS:

Final judgment determines rights of parties and disposes of cause on its merits leaving nothing more remaining to be done in cause. (48 Fla. 226, 37 So. 722). Interlocutory order or judgment leaves other issues in cause open for further judicial determination and does not finally determine or complete action. (138 Fla. 841, 190 So. 885; 153 Fla. 501, 15 So.2d 175).

Federal Rules of Civil Procedure in large part have formed basis of Fla. Rules of Civil Procedure relating to motions for new trials and rehearing; amendments of judgments (R.C.P. 1.530); relief from judgments (R.C.P. 1.540); discovery in aid of execution of judgments (R.C.P. 1.560); defaults and final judgments thereon (R.C.P. 1.500); dismissal of actions (R.C.P. 1.420).

Judgments by Confession.

Warrant of attorney to confess judgment executed after action brought is proper. (106 Fla. 582, 143 So. 633; 17 B.R. 858, 1982 Bankr. LEXIS 4710). Power of attorney to confess judgment executed within or without state prior to institution of action is invalid, void. (Fla. Stat. 55.05). Foreign judgment by confession, if valid where rendered, enforceable in Florida courts. (164 So.2d 893; see 405 U.S. 174).

Judgments by Consent.

Judgment by consent of parties valid (126 Fla. 339, 171 So. 674); however, jurisdiction of subject matter cannot be conferred by consent.

Judgments on Pleadings.

After pleadings are closed, but within such time as not to delay trial, any party may move for judgment on pleadings. (R.C.P. 1.140[c]).

Summary Judgments.

Party asserting claim may move for summary judgment upon all or part of claim with or without supporting affidavits at any time after 20 days from commencement of action or after service of motion for summary judgment by adverse party. (R.C.P. 1.510[a]). Party against whom claim asserted may move for summary judgment at any time. (R.C.P. 1.510[b]).

Motion must be served at least 20 days prior to time fixed for hearing; 25 days if mailed. Motion must state with particularity grounds on which it is based and substantial matters of law to be argued. Adverse party may serve opposing affidavits by mailing five days or delivering two days prior to day of hearing. Judgment rendered if pleadings, depositions, answers to interrogatories, admissions on file and affidavits, if any, show that there is no genuine issue of material fact and moving party is entitled to judgment as matter of law. Summary judgment, interlocutory in character, may be rendered on issue of liability alone although there is genuine issue as to amount of damages. (R.C.P. 1.510[c]).

Summary judgment may be awarded to nonmoving party. (70 So.2d 573). Summary judgment not favored in action based upon fraud. (139 So.2d 163).

Declaratory judgments may be entered by circuit courts under act following substantially the Uniform Declaratory Judgments Act. (Fla. Stat. 86.011-86.111).

Default Judgments.

Party seeking relief may have clerk enter default against party failing to file or serve any papers in action and may have court enter default against party failing to plead or defend as provided by rules. (R.C.P. 1.500[a] and [b]). Party may plead or otherwise defend at any time before default is entered. (R.C.P. 1.500[c]).

Final judgment after default may be entered by court at any time, but no judgment may be entered against infant or incompetent unless represented by guardian or representative who has appeared therein. Court may receive affidavits, make references, or conduct hearings as necessary and accord trial by jury when required by law. (R.C.P. 1.500[e]).

Offer of Judgment.

Provisions of §45.061 govern causes of action accruing prior to Oct. 1, 1990. (608 So.2d 1). Provisions of §768.79 govern causes of action accruing after Oct. 1, 1990. (608 So.2d 1). Attorney's fees recoverable against party who fails to obtain judgment at least 25% less than refused statutory offer, or by party who obtains judgment for at least 25% greater than refused statutory offer. (Fla. Stat. 768.79). Procedure for filing offer of judgment set forth in R.C.P. 1.442.

Docketing.

Orders of dismissal and final judgments of courts in civil actions are recorded in official records. (Fla. Stat. 28.29). Failure to record order or judgment does not affect its validity. (Fla. Stat. 28.29).

Vacation or Modification.

Clerical mistakes in judgment may be corrected by court on its own initiative or motion of party. (R.C.P. 1.540[a]).

Court may, on motion made within reasonable time, not exceeding one year since judgment was entered, relieve party from judgment for following reasons: Mistake, inadvertence, surprise, or excusable neglect; newly discovered evidence which could not have been timely discovered and presented; fraud, misrepresentation, or other misconduct of adverse party. No time limit for motions based on fraudulent affidavits in marital cases. Court may, on motion made within reasonable time, relieve party from judgment for following reasons: Judgment is void; judgment has been satisfied, released, or discharged, or prior judgment on which it was based has been reversed or vacated or it is no longer equitable to give it prospective application. Independent action to relieve party from judgment is also permitted. (R.C.P. 1.540[b]).

Liens.

Judgment, order or decree becomes lien on real estate in any county where certified copy of it is recorded in official records or judgment lien record of county, whichever is maintained at time of recordation. If certified copy first recorded between July 1, 1987 and June 30, 1994, judgment, order or decree is lien for initial period of seven years from date of recording. If certified copy first recorded on or after July 1, 1994, judgment, order or decree is lien for initial period of ten years from date of recording. Name and address of person who has lien must be included in record. (Fla. Stat. 55.10). Lien may be extended for additional period of ten years by rerecording certified copy of judgment, order, or decree within 90-day period preceding expiration of lien. One additional period of ten years is effective from date judgment, order, or decree is rerecorded. In no event may lien upon real property created by this subsection be extended beyond 20 years or beyond point at which lien is satisfied, whichever occurs first. (Fla. Stat. 55.081). Any judgment, order, or decree recorded prior to July 1, 1987, remains lien on real property until period provided in §55.081 expires or until lien is satisfied, whichever occurs first.

Any such lien may be transferred to other security by following certain prescribed steps. (Fla. Stat. 55.10[5]).

Judgment lien may be acquired on judgment debtor's interest in all personal property in this state subject to execution under §56.061, other than fixtures, money, negotiable instruments, and mortgages. Effective date of such judgment lien is date, including time of day, of filing. Although no lien attaches to property, and creditor does not become lien creditor as to liens under c. 679, until debtor acquires interest in property, priority among competing judgment liens is determined in order of filing date and time. (Fla. Stat. 55.202-.209).

No money judgment or decree against municipal corporation is lien on its property, and no execution or writ in nature of execution may be issued or levied. (Fla. Stat. 55.11).

Local government may sue to recover money judgment for amount of lien resulting from order imposing fines or repair costs. (Fla. Stat. 162.09).

Revival and Limitations.

Action on judgment of Florida court of record may be commenced at any time within 20 years. (Fla. Stat. 95.11[1]). Action on judgment of Florida court not of record, or of federal court, or of court of foreign state or foreign country, may be commenced at any time within five years. (Fla. Stat. 95.11[2][a]). Bankrupt or debtor discharged from debts under federal bankruptcy laws may employ special procedure to cancel and discharge prior judgments as matter of record. (Fla. Stat. 55.145).

Stays.

No execution or other final process can issue until judgment has been recorded nor within time for serving motion for new trial or rehearing, and if motion for new trial or rehearing timely served, until determined; provided execution may be issued upon special order of court. (R.C.P. 1.550[a]). Court before which execution or other process based on final judgment is returnable may stay execution or process and suspend proceedings thereon for good cause on motion and notice to all adverse parties. (R.C.P. 1.550[b]). In certified civil class action, trial court, upon posting of bond or equivalent surety, must stay execution of any judgment or portion of judgment entered on account of punitive damages pending completion of any appellate review of judgment. (Fla. Stat. 768.733).

Assignment of a judgment carries with it cause of action on which it is based, together with all beneficial interests of assignor and its incidents. Assignee may use every remedy, lien, or security which assignor might have used to enforce judgment. Purchaser of a judgment with notice from a purchaser without notice, takes a good title. (56 Fla. 279, 47 So. 797). Consideration for assignment is ordinarily necessary. (47 Fla. 147, 35 So. 986). Clerk of Circuit Court is county recorder and is required to record all assignments of judgments entered by any Florida court or federal court having jurisdiction in Florida upon presentation of assignment and payment of service charge. (Fla. Stat. 28.222).

Satisfaction.

Whenever judgment amount is fully paid, party to whom payment is made must execute and record written instrument acknowledging satisfaction and send recorded satisfaction to payer within 60 days or be liable for any attorneys fees and costs arising from failure to do so. (Fla. Stat. 701.04). Officer or agent of title insurer may, on behalf of mortgagor, execute and record certificate of release if satisfaction of mortgage has not been recorded after date payment in full of loan secured by mortgage was made in accordance with payoff statement furnished by mortgagee. Properly executed and recorded certificate of release operates as release of mortgage, but does not relieve mortgagor from any personal liability on loan. (Fla. Stat. 701.041).

Judgment may be satisfied by paying into registry of court total amount due with interest and costs of issuance of execution thereon. (Fla. Stat. 55.141).

Judgments of U. S. Courts.

Judgments and decrees of the United States district courts of Florida, and certified copies thereof, are prima facie evidence, in state courts, of the entry and validity thereof. (Fla. Stat. 92.06). Clerks of circuit courts must record certified copies of such judgments and decrees upon presentation of such copies and payment of service charge. (Fla. Stat. 28.222[3][c]).

Foreign Judgments.

Uniform Enforcement of Foreign Judgments Act adopted (Fla. Stat. 55.501-509), except that Florida act does not alter, modify, or extend limitation period applicable for enforcement of foreign judgments (Fla. Stat. 55.502[4]). Foreign state judgments duly recorded with clerk has same effect and is subject to same defenses as Florida judgment provided procedures set out in this chapter are followed. Nothing in Act prevents judgment creditor from bringing action to enforce judgment instead of proceeding under this Act. (Fla. Stat. 55.502; Fla. Stat. 55.503). At time of recording foreign judgment, affidavit must be recorded setting forth name, social security number, if known, and last known address of judgment debtor and judgment creditor. (Fla. Stat. 55.505[1]). Clerk mails notice of recording to judgment debtor. Judgment creditor may mail notice, by registered mail return receipt, and record proof of mailing and if done, clerk's failure to mail notice of recording does not affect enforcement proceedings. (Fla. Stat. 55.505[2]). No enforcement of judgment or lien issues until 30 days after mailing or if action to stay is filed. (Fla. Stat. 55.505[3]; Fla. Stat. 55.507). Court stays enforcement if judgment debtor files action contesting jurisdiction or validity of judgment within 30 days after judgment was recorded and records lis pendens directed towards foreign judgment. (Fla. Stat. 55.509[1]). Grounds to stay enforcement of Florida judgment may be asserted to stay enforcement of foreign judgment provided same security for satisfaction is also required. (Fla. Stat. 55.509[2]).

Revised Uniform Enforcement of Foreign Judgments Act not adopted.

Judgment Notes.

See category 3 Business Regulation and Commerce, topic 3.02 Bills and Notes.

5.16 LIMITATION OF ACTIONS:

Uniform Commercial Code adopted. (cc. 670-680). Uniform Commercial Code statutes of limitation included in §95.11. See category 3 Business Regulation and Commerce, topic 3.09 Commercial Code.

All actions except for recovery of realty must be commenced in following periods. (Fla. Stat. 95.11).

Twenty Years: On judgment or decree of a court of record in this state. (Fla. Stat. 95.11[1]).

Six Years: On action for violation of False Claims Act (Fla. Stat. 68.081 et seq.), or no more than three years after material facts were or should have been known, but in no event more than ten years (Fla. Stat. 68.089).

Five Years: (1) On judgment or decree of any court, not of record, of this state or any court of U.S. or of any other state or territory in U.S. or of foreign country; (2) on legal or equitable action on obligation, contract or liability founded on written instrument, except for action to enforce claim against payment bond governed by applicable provisions of §§255.05(10) and 713.23(1)(e); (3) on action to foreclose mortgage (Fla. Stat. 95.11[2][c]); and (4) on action alleging willful violation of Florida Minimum Wage Act (Fla. Stat. 448.110).

Four Years: (1) Action founded on negligence; (2) relating to determinations of paternity with time running from date child reaches age of majority; (3) founded on design, planning or construction of real property improvement, with time running from date of actual possession by owner, issuance of certificate of occupancy, abandonment of construction if not completed, or date of completion or termination of contract between professional engineer, architect or licensed contractor and his employer (where latent defect is involved time runs from time defect is or should have been discovered but in any event within 10 years from issuance of certificate of occupancy, date of completion, abandonment if not completed, termination of contract to build, design or engineer improvement, whichever is latest—caveat: similar predecessor statute held unconstitutional [369 So.2d 572]); (4) to recover public money or property held by present or former public officer or employee and obtained during, or as result of, such office or employment; (5) for injury to person founded on design, manufacture, distribution or sale of personal property not permanently incorporated in improvement to realty including fixtures; (6) founded on statutory liability; (7) for trespass to realty; (8) for taking, detaining or injuring personal property; (9) to recover specific personal property; (10) legal or equitable action founded on fraud; (11) legal or equitable action on contract, obligation or liability not founded on written instrument, including action on sale and delivery of goods, wares and merchandise and store accounts; (12) to rescind contract; (13) for money paid to governmental authority by mistake; (14) for statutory penalty or forfeiture; (15) for assault, battery, false arrest, malicious prosecution, malicious interference, false imprisonment or any intentional tort except as provided under §95.11(4), (5), (7); (16) for violation, other than willful violation, of Florida Minimum Wage Act (Fla. Stat. 448.110); and for any action not specifically provided for by statute (Fla. Stat. 95.11[3]).

Two Years: (1) Action for professional malpractice founded on tort or contract (period runs from time cause is or should have been discovered); limited to persons in privity with professional; (2) for wages or overtime, or damages, or penalties concerning wages or overtime; (3) for wrongful death; (4) special section for medical malpractice; (5) actions arising under Florida Securities Act (period runs from time facts giving rise to cause are or should have been discovered but not more than five years from date such violation occurred); (6) for personal injury caused by phenoxy herbicides while serving Armed Forces of U.S. from Jan. 1, 1962 to May 7, 1975 (period runs from time cause is or should have been discovered); (7) libel; (8) slander (Fla. Stat. 95.11[4]); (9) disparagement of agricultural food products (Fla. Stat. 865.065[4]). See category 14 Family, topic 14.09 Husband and Wife, subhead Actions. All claims against decedent or estate must be made within two years of decedent's death. (Fla. Stat. 733.710). See also subhead Probate, infra.

One Year: (1) For specific performance of a contract; (2) to enforce equitable lien arising from furnishing of labor, services or material for improvement of realty; (3) action against guaranty association and its insured with period running from date of deadline for filing claims in order of liquidation; and (4) action to enforce claim on payment bond on which principal is contractor, subcontractor or sub-subcontractor as defined in §713.01, for private and public work, from last furnishing of labor, services or materials or from last furnishing of labor services or materials by contractor if contractor is principal on bond on same project, whichever is later. (Fla. Stat. 95.11[5]).

For Municipal Tort Claims.

Statute (Fla. Stat. 95.241) dispensing with notice of claim requirements before suing municipalities repealed. Local notice requirements should be checked before commencing suit.

For Tort Claims Based on Abuse.

Action founded on intentional torts based on abuse may be commenced at any time within seven years after age of majority, within four years after injured person leaves dependency of abuser, or within four years of discovery of injury and causal relationship between injury and abuse, whichever occurs later. (Fla. Stat. 95.11[7]).

Claims Against State.

Actions against state or one of its agencies must be commenced within three years after action accrues and preceded by notice in writing to agency and Department of Financial Services, provided that if claim is for contribution, it must be presented within six months after judgment against tortfeasor seeking contribution has become final or, if no judgment has been rendered, within six months after tortfeasor seeking contribution has discharged or agreed to discharge common liability. (Fla. Stat. 768.28[6]).

Real Property.

No action to recover real property or its possession may be maintained unless person seeking recovery, his ancestor, predecessor or grantor, was seized or possessed thereof within seven years before commencement of action. (Fla. Stat. 95.12). Same period of limitation applies to actions or defenses to an action founded on title to real property or rents, or service from it, but where title was derived from U.S. or State of Florida, limitation will not begin to run until title passed therefrom. (Fla. Stat. 95.14).

After 20 years from recording of deed or probate of will purporting to convey real property, no person may assert claim to such property against claimants under such deed or will or their successors in title. (Fla. Stat. 95.231[2]).

After seven years from recording of conveyance executed by persons as heirs or devisees of decedent, no person, other than those whose names appear of record as devisees under will or as heirs in probate proceedings, may claim or recover property conveyed. (Fla. Stat. 95.22).

After five years from recording of deed or probate of will purporting to convey real property where it appears person owning it attempted to convey it or devise it, absent fraud, adverse possession, or pending litigation; deed or will held to authorize conveyance or devise, or to convey or devise fee title, or any interest of person so signing instrument despite lack of seals, witnesses, defects in acknowledgment, release of dower. Instrument admissible in evidence. (Fla. Stat. 95.231[1]).

Encumbrances, e.g., Mortgages.

If maturity ascertainable, lien terminates five years after maturity; if not ascertainable, lien terminates 20 years after date of instrument unless further recording states maturity, in which case five years after stated maturity. (Fla. Stat. 95.281[1][a], [b]). For all obligations including taxes paid by mortgagee, five years. (Fla. Stat. 95.281[1][c]). For mortgage extensions, five years after maturity; if maturity date not ascertainable then 20 years from date of mortgage. (Fla. Stat. 95.281[2]).

Foreign Causes of Action.

No action may be maintained on a cause of action which arose outside of the state and is barred by limitations in the jurisdiction in which it arose. (Fla. Stat. 95.10). Florida's statute of limitations not used to bar causes of action which arose outside of state when other state or territory has more significant relationships to cause of action, and action not barred in foreign state. (737 So.2d 540).

Guardianships.

If person is declared incapacitated before expiration of limitations period and cause of action survives, action may be commenced by guardian of property after such expiration and within one year after appointment or time otherwise limited by law, whichever is longer. (Fla. Stat. 744.394).

Computation of Time.

Generally, time within which action must be begun runs from time cause accrues. Cause accrues when last element constituting cause occurs. For limitation purposes, last element constituting cause of obligation founded on note payable on demand or after date with no specific maturity date specified on note, and last element constituting cause against any person secondarily liable on any such obligation founded on such note, is first written demand for payment. (Fla. Stat. 95.031[1]). On oral obligation to pay debt, cause accrues upon demand by creditor for payment and failure by debtor to pay. (Fla. Stat. 95.031[1]; 483 So.2d 832). Limitations run from time cause of action accrues. In actions for products liability, or fraud, period runs from time facts giving rise to cause of action were discovered or should have been discovered in exercise of due diligence. Negligence/malpractice cause of action accrues when client incurs damages at conclusion of related or underlying judicial proceedings or, if there are no related or underlying judicial proceedings, when client's right to sue in related or underlying proceeding expires. If negligence/malpractice action is prematurely filed, defense can move for abatement or stay of claim on ground that negligence/malpractice action has not yet accrued. (790 So.2d 1051).

Statute of limitations begins to run in legal malpractice action when timely filed appeal to, or petition for review by, supreme court is resolved. (783 So.2d 224).

Action for fraud is barred if not commenced within 12 years after date of commission of alleged fraud, regardless of date fraud was or should have been discovered. (Fla. Stat. 95.031[2]). Claimant may not commence action for products liability, including wrongful death action or other claim arising from personal injury or property damage caused by product, to recover for harm allegedly caused by product with expected useful life of ten years or less, if harm was caused by exposure to or use of product more than 12 years after delivery of product to first purchaser or lessee. All products, except as noted below, are conclusively presumed to have expected useful life of ten years or less. With respect to commercial aircraft, commercial railroad equipment and vessels of more than 100 gross tons, no action for products liability may be brought more than 20 years after delivery of product to first purchaser or lessor unless manufacturer specifically warranted that product has expected useful life exceeding 20 years. Products which manufacturer specifically warranted as having expected useful life exceeding ten years have expected useful life commensurate with time period indicated by warranty, but no action for products liability may be brought after expected useful life of product or more than 12 years after delivery of product to first purchaser or lessee. Improvements to real property (including elevators and escalators) not subject to statute of repose. (Fla. Stat. 95.031[2]). Repose period tolled for any period during which manufacturer through officers, directors, partners, or managing agents had actual knowledge that product was defective in manner alleged by claimant and took affirmative steps to conceal defect. (Fla. Stat. 95.031[2][d]).

When Limitations Tolled.

In general by: (1) Absence from state of person to be sued; (2) use by person to be sued of false name that is unknown to person entitled to sue so that process cannot be served on him; (3) concealment in state of person to be sued such as to prevent service of process; (4) adjudicated incapacity of person entitled to sue before cause of action accrued—must in any case be commenced within seven years from act or event giving rise to cause of action; (5) voluntary payments by alleged father of child in paternity suit; (6) payment of any part of principal or interest of any obligation or liability founded on written instrument; (7) pendency of any arbitral proceeding pertaining to dispute that is subject of action; (8) minority or adjudicated incapacity of person entitled to sue, during such time as no effective guardian exists, not to exceed seven years and not to apply to medical malpractice.

(1)—(3) above do not apply if service of process or service by publication can be made in manner sufficient to confer jurisdiction to grant relief sought. No disability other than above or as conferred in §95.091, probate code or guardianship law tolls statute. (Fla. Stat. 95.051).

Revival.

A barred debt may be revived by acknowledgment or promise to pay in writing and signed by person to be charged. (Fla. Stat. 95.04).

Contractual provisions which shorten limitations period are void. (Fla. Stat. 95.03).

Pleading.

The defense of the statute of limitations must be pleaded affirmatively. (R. C. P. 1.110[d]). Where cause of action set forth in amended pleading is new, different, and distinct from that originally set up, new pleading is equivalent to bringing of new action, and statute of limitations runs against new cause of action to time it is introduced into pleading. (63 Fla. 213, 58 So. 186).

Trade Secrets.

Action for misappropriation of trade secret under Uniform Trade Secrets Act must be brought within three years after misappropriation is or should have been discovered. (Fla. Stat. 688.007).

Probate.

No claim arising before death against decedent's estate is binding on estate, personal representative or beneficiary unless presented before date that is (1) three months after first publication of notice to creditors or (2) 30 days of service of copy of notice to creditors. (Fla. Stat. 733.702). Effective until Jan. 1, 2009, State Department of Revenue can file claim 30 days after service of inventory or estate tax return. (Fla. Stat. 733.702[5]).

Trustees.

Action against trustee for breach of trust by beneficiary who has received account or statement must be commenced within six months of receipt of account or statement; otherwise, within time provided in c. 95 generally.

Taxes.

Special provisions for expiration of tax liens are contained in Fla. Stat. 95.091.

5.17 NEGLIGENCE:

See topic 5.09 Damages.

5.17A PARTITION:

Partition proceedings are regulated by statute. (Fla. Stat. 64.011-64.091).

Actions for partition are entertained in circuit courts. (Fla. Stat. 26.012[2][c], see also Fla. Stat. 64.011). Laws applicable to partition of real property also applicable to personal property insofar as nature of property permits. (Fla. Stat. 64.091).

Jurisdiction and Venue.

Suit must be brought in any county in which land or any part thereof lies. (Fla. Stat. 64.022).

Scope.

Action may be filed by any one or more of several joint tenants, tenants in common, or coparceners against their cotenants, coparceners or others interested in lands to be divided. (Fla. Stat. 64.031). Requirements of complaint prescribed in §64.041. Estate by entireties is not subject to partition during joint lives of husband and wife, so long as they remain married. (132 So.2d 623).

Partition in Kind or Sale.

If property cannot be divided without prejudice, it may be sold at public auction and proceeds divided. (Fla. Stat. 64.071).

5.18 PLEADING:

Pleadings Permitted.

Rules of pleading are prescribed by Florida Rules of Civil Procedure which are patterned on Federal Rules of Civil Procedure. Allowed pleadings are: (1) complaint or petition, (2) answer, (3) counterclaim, (4) cross-claim, (5) answer to counterclaim, (6) answer to cross-claim, (7) third-party complaint, (8) third-party answer, (9) reply to affirmative defense. (R.C.P. 1.100, 1.110, 1.170, 1.180). Every pleading, motion, order or judgment or other paper must have caption containing name of court, file number, name of first party on each side with indication of other parties, designation identifying party filing it and nature of paper. (R.C.P. 1.100[c][1]). All papers filed in action must be styled as to indicate clearly subject matter of paper and party requesting or obtaining relief. (R.C.P. 1.100[c][1]). All averments of pleading must be made in consecutively numbered paragraphs. (R.C.P. 1.110[f]). Each claim or defense founded upon separate transaction or occurrence should be set forth in separate count or as separate defense. (R.C.P. 1.110[f]). Any person who prepares or files document to be recorded in official records by county recorder may not include person's social security number or complete bank account, debit, charge, or credit card number in document unless otherwise expressly required by law. Until Jan. 1, 2011, if such number is or has been included in document for recording, number may be made available as part of official record available for public inspection and copying. Any person may request that county recorder remove such number from image or copy of official record publicly available on Internet website or otherwise electronically available outside county recorder's office to general public and may request redaction of such numbers from court record available for public inspection and copying. On Jan. 1, 2011 and thereafter, clerk of court and county recorder must keep such numbers confidential and exempt. (Fla. Stat. 119.0714[2][e] and [3][b][2]).

Complaint.

Claim for relief, whether original complaint, counterclaim, third party claim or cross-claim must set forth brief statement of grounds for jurisdiction, short and plain statement of ultimate facts showing entitlement to relief, and demand for relief. (R.C.P. 1.110[b]). Relief in alternative or of different types may be demanded. (R.C.P. 1.110[b]). Party may state legal or equitable claims as well as inconsistent claims. (R.C.P. 1.110[g]). Every complaint is considered to pray for general relief. (R. C. P. 1.110[b]). Instrument upon which action is brought, or copy thereof, must be attached to or incorporated in complaint, and any exhibit so attached becomes part of complaint for all purposes. (R. C. P. 1.130). Conditions precedent may be averred generally, but denial of performance or occurrence must be specific (R.C.P. 1.120[c]). Circumstances constituting fraud or mistake must be stated with particularity, but malice, knowledge or intent may be averred generally. (R. C. P. 1.120[b]). Averments of time and place are material and claims for special damages should be specifically stated. (R.C.P. 1.120[f] & [g]). It is unnecessary to specifically allege capacity or authority of party to sue or be sued or legal existence of party; rather, when such issue exists, it should be pled by specific negative averment. (R.C.P. 1.120[a]). In pleading official document or Act, it is sufficient to state document was issued or act done in compliance with law and in pleading judgment or decree it is sufficient to simply refer to judgment. (R.C.P. 1.120[d] & [e]).

Civil cover sheet (Fla. R. Civ. P. Form 1.997) must be filed with clerk at time initial complaint or petition is filed by party instituting action. (R.C.P. 1.100[c][2]). If civil cover sheet is not filed clerk will accept complaint for filing; but further proceedings abate until civil cover sheet is filed. (R.C.P. 1.100[c][2]). Clerk completes civil cover sheet for party appearing pro se. (R.C.P. 1.100[c][2]).

Final disposition form (Fla. R. Civ. P. Form 1.998) must be filed with clerk by prevailing party at time of filing of order or judgment which disposes of action. (R.C.P. 1.100[c][3]). Clerk completes this form for pro se party or if action is dismissed for lack of prosecution under R.C.P. 1.420(e). (R.C.P. 1.100[c][3]).

Answer.

The answer must state in short and plain terms defenses to each claim asserted, and admit or deny each of averments of complaint. (R. C. P. 1.110[c]). If pleader is without knowledge as to any averment of complaint, pleader may so state and such statement acts as denial. (R.C.P. 1.110[c]). If only part of averment is denied, pleader must specify what is true and deny remainder. (R.C.P. 1.110[c]). Answer or other response to claim for relief and any reply must be served within 20 days after service of document to which answer, response or reply is directed. (R.C.P. 1.140[a]).

Failure to deny, except averments as to amount of damages, when response is required, is to admit. (R.C.P. 1.110[e]). Answer may be general denial if pleader intends to deny all averments of complaint. (R.C.P. 1.110[c]). Affirmative defenses must be set forth in answer, or, if apparent on face of pleading to which motion is directed may be asserted as grounds for motion. (R.C.P. 1.110[d]). Inconsistent or alternative defenses may be filed. (R. C. P. 1.110[g]).

Counterclaim.

Counterclaims are allowed. (R. C. P. 1.170). Counterclaim arising out of transaction or occurrence that is subject matter of action is compulsory counterclaim and must be pleaded or is barred. (R.C.P. 1.170[a]). Any other counterclaim is permissive. (R. C. P. 1.170[b]). If counterclaim matures after original claim is filed, counterclaim should be presented with court approval by supplemental pleading; if counterclaim was inadvertently omitted, it should be presented with leave of court by amendment to pleading. (R.C.P. 1.170[e] & [f]).

Cross-claim or Third Party Practice.

Party may assert claim against co-party or against third party who might be properly brought into action if claim arises out of transaction or occurrence that is subject matter of original action or counterclaim or relating to any property that is subject of original action. (R.C.P. 1.170[g] and 1.180[a]). Cross-claim or third party claim may include claim that party is or may be liable for all or part of claim asserted in action against cross-claimant. (R.C.P. 1.170[g] and 1.180[a]). Party cannot bring third party claim more than 20 days after serving answer except by leave of court on motion with notice to all parties. (R. C. P. 1.180). Service of cross-claim on party who has appeared in action is made pursuant to R.C.P. 1.080(b). Service of cross-claim against party who has not appeared in action is made in manner provided for service of summons. (R.C.P. 1.170[g]). Third party defendant may assert defenses to plaintiff's main claim and may assert any claims against plaintiff that arise out of transaction or occurrence sued on by plaintiff. (R.C.P. 1.180[a]). Plaintiff may sue third party defendant for any claim arising out of same transaction or occurrence of his main claim. (R.C.P. 1.180[a]).

Defenses.

Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross-claim, or third party complaint must be asserted in responsive pleading thereto if one is required; except that following defenses may at option of pleader be made by motion: (1) Lack of jurisdiction over subject matter; (2) lack of jurisdiction over person; (3) improper venue; (4) insufficiency of process; (5) insufficiency of service of process; (6) failure to state cause of action; (7) failure to join indispensable parties. (R.C.P. 1.140[b]). Motion making any of these defenses must be made before pleading if further pleading is permitted and grounds for such defenses must be stated with particularity. (R. C. P. 1.140[b]). Party waives right to raise these defenses by motion unless service of motion is made under R.C.P. 1.140, except motion for lack of jurisdiction over subject matter. Motion under R.C.P. 1.140, except motion for judgment on pleadings or motion to strike pleading containing redundant, immaterial, impertinent or scandalous matter, alters time periods for filing answer. See subhead Service, infra. If court denies motion or postpones disposition until trial, responsive pleading must be served within ten days after notice of court's action, or if court grants motion for more definite statement, pleader must serve within ten days after service of more definite statement unless court fixes different time. (R.C.P. 1.140[a][2]). If court permits or requires amended or responsive pleading or more definite statement, pleading or statements must be served within ten days after notice of court's action and responses to pleadings or statements must be served with ten days of service of pleadings or statements. (R.C.P. 1.140[a][3]).

Reply.

If answer or third party answer contains affirmative defense and opposing party seeks to avoid it, opposing party must file reply containing avoidance. (R. C. P. 1.100[a]). Averments in pleading to which responsive pleading is required, other than those to amount of damages, are admitted when not denied in responsive pleading. (R.C.P. 1.110[e]). Averments in pleading to which no responsive pleading is required or permitted must be taken as denied or avoided. (R. C. P. 1.110[e]). Verified motion to strike is appropriate for any part of sham pleading and may be filed before cause is set for trial. (R.C.P. 1.150).

If pleading to which responsive pleadings is permitted is vague or ambiguous preventing responsive pleading, motion for more definite statement may be filed. (R.C.P. 1.140[e]). After pleadings are closed, party may move for judgment on pleadings. (R.C.P. 1.140[c]).

Amendments.

A party may amend once as a matter of course before a responsive pleading is served or, if no responsive pleading is permitted and action is not on trial calendar, amendment may be made at any time within 20 days after it is served. (R.C.P. 1.190[a]). Otherwise, leave of court or written consent of adverse party, must be obtained for amendments. (R.C.P. 1.190[a]). If party files motion to amend, party must attach proposed amended pleading to motion. (R.C.P. 1.190[a]). Motion for leave to amend pleading to assert claim for punitive damages must make reasonable showing, by evidence in record or to be proffered by claimant, that provides reasonable basis for recovery of such damages; motion can be filed separately and before supporting evidence or proffer, but must be served on all parties at least 20 days before hearing. (R.C.P. 1.190[f]). Pleading in response to amended pleading must be within ten days of service thereof unless court otherwise orders. (R.C.P. 1.190[a]). Court may permit amendments at any time. (R. C. P. 1.190[e]). If amendment relates to same conduct, transaction, or occurrence set forth in original pleading, amendment relates back to date of original pleading. (R.C.P. 1.190[c]). Upon motion and reasonable notice, court may permit party to serve supplemental pleading setting forth matters that occur after original pleading and court may permit adverse party to file response. (R.C.P. 1.190[d]). When motion for leave to amend with attached proposed amended complaint is filed, 120-day period for service of amended complaints on new party or parties begins upon entry of order granting leave to amend. (R.C.P. 1.070[j]).

Verification.

Except when specifically provided by rules or applicable statute, every written pleading or other paper of party represented by attorney need not be verified or accompanied by affidavit. (R.C.P. 1.030). Motion to strike sham pleadings must be verified. (R.C.P. 1.150).

Service.

Copies of all pleadings must be served on each party or party's attorney. (R.C.P. 1.080[b]). If service of initial process and initial pleading is not made upon defendant within 120 days after filing of initial pleading directed to that defendant, court, on its own initiative after notice or on motion, may direct that service be effected within specified time or dismiss action without prejudice or drop that defendant. If plaintiff shows good cause for failure, court may extend time for service for appropriate period. When motion for leave to amend with attached proposed amended complaint is filed, 120-day period for service of amended complaints on new party or parties begins upon entry of order granting leave to amend. (R.C.P. 1.070[j]). Answer, answer to counterclaims and cross-claims, and reply must be served within 20 days of service of pleading to which they are directed. (R. C. P. 1.140[a][1]).

Filing.

All original papers must be filed with court prior to or immediately after service. (R.C.P. 1.080[d]).

An electronic filing process shall be implemented by each clerk of court. (Fla. Stat. 28.22205).

Proof of Claims.

Copies of notes, contracts, book entries and other documents which are basic to claim may be incorporated in or attached to pleading. (R.C.P. 1.130[a]). See also topic 5.15 Judgments.

Small Claims.

See category 6 Courts and Legislature, topic 6.01 Courts.

Frivolous Claims.

Losing party and losing party's attorney must pay reasonable attorneys' fee to prevailing party as sanction for raising unsupported claims or defenses. See topic 5.09 Damages. (Fla. Stat. 57.105[1]). However, losing party's attorney is not personally responsible if he or she has acted in good faith. See also Fla. Bar R. Professional Conduct, Rule 4-3.1. If defense fails to raise justiciable issue of law or fact, prejudgment interest also awarded. (Fla. Stat. 57.105[1]).

5.19 PRACTICE:

Code.

Practice and procedure in all courts is governed by rules adopted by Supreme Court. (Const. art. 5, §2). In absence of applicable statute or rule, practice is based upon common law. The Florida Rules, while quite similar to the Federal Rules, require complaint to state cause of action and ultimate facts rather than grounds for relief. (R. C. P. 1.110[b]).

Equity.

There is one form of action known as “civil action.” (R. C. P. 1.040).

Discovery.

Fla. Rules of Civil Procedure providing for discovery are very similar to and adopted from Fed. Rules for discovery prior to their amendment in 1970. (R. C. P. 1.280-1.390). Five days are added after service by mail. (R.C.P. 1.090[e]).

Direct Actions Against Insurer.

See category 23 Transportation, topic 23.01 Motor Vehicles, subhead Direct Actions.

Small Claims.

See category 6 Courts and Legislature, topic 6.01 Courts.

See also topics 5.02 Actions, Appeal and Error, Depositions and Discovery, Injunctions, Judgments, Pleading, Process; category 8 Debtor and Creditor, topics 8.02 Attachment, 8.05 Executions, 8.09 Garnishment.

5.20 PROCESS:

Upon commencement of an action, clerk or judge issues an original summons. (R. C. P. 1.070[a]). In civil actions, process runs throughout state. (Fla. Stat. 48.011). Defendant must respond with answer or proper motion within 20 days. (R. C. P. 1.140), except that the state has 40 days, unless the state is sued under Fla. Stat. 768.28, in which case state has 30 days.

If summons is returned unexecuted or improperly executed as to any defendant, plaintiff is entitled to such additional summons as may be required to effect service. (R.C.P. 1.070[b]). Where there is more than one defendant, clerk must issue as many writs of summons against several defendants as directed by plaintiff. (R. C. P. 1.070[c]). Failure to make required proof of service does not affect validity of service. (R. C. P. 1.070[b]). Plaintiff must supply all necessary copies of documents to be served. (R. C. P. 1.070[e]).

Who May Serve.

All process must be served by sheriff or by special process server appointed by sheriff of county where person to be served is found, or by certified process server as provided in §§48.25-48.31. Sheriff of each county may, in his or her discretion, establish approved list of natural persons designated as special process servers. (Fla. Stat. 48.021; R. C. P. 1.070[b]).

Personal Service on an Individual.

In general, service of an original writ of summons is effected on the person to be served by delivering to him or her copy thereof together with copy of complaint or other initial pleading, or by leaving such copies at his or her usual place of abode with any person residing therein 15 years of age, or older, and informing such person of their contents. (Fla. Stat. 48.031). “Usual place of abode” means place where defendant is actually living at time of service. Where defendant had been incarcerated for at least nine months prior to time substituted service was effected, he was actually living in prison at time of service. Service at residence where he had lived with his wife before incarceration was not usual place of abode. (795 So.2d 952).

Witness subpoenas are to be served as above except, in criminal traffic cases and cases involving only misdemeanors or second or third degree felonies, service may be made by U.S. mail to last known address of witness at least seven days prior to date of appearance. Failure of witness to appear in response to subpoena served by mail that is not certified may not be ground for finding witness in contempt of court. (Fla. Stat. 48.031[3]). Criminal witness subpoena may be posted by authorized person at residence of witness if three attempts to serve subpoena, at different times of day or night on different dates have failed; must be posted at least five days prior to date of required appearance by witness. (Fla. Stat. 48.031[3][b]).

Service of criminal witness subpoena on law enforcement officer for testimony in official capacity in criminal case may be made as provided in Fla. Stat. 48.031(1) or to designated supervisor if witness is still employed or is scheduled to work prior to date witness is required to appear. Service may also be made as provided in Fla. Stat. 48.031(3). (Fla. Stat. 48.031[4][a], [b]).

If only address for person to be served discoverable through public records is private mailbox, substitute service may be made by leaving copy of process with person in charge of private mailbox, but only if process server determines that person to be served maintains mailbox at that location. (Fla. Stat. 48.031[6]).

Service on Minors.

By serving parent, guardian or other person appointed by court to represent minor as provided in §48.031. Service not necessary if guardian ad litem appears voluntarily or court orders appearance without service. (Fla. Stat. 48.041). Minors who are or have been married may be served as provided in Fla. Stat. 48.031(1).

Service on Incompetents.

By serving two copies of process to person who has care or custody of incompetent, serving legal guardian as provided in Fla. Stat. 48.031 or by serving guardian ad litem if one appointed. Service not necessary on guardian ad litem if he/she appears voluntarily or is ordered to appear without service. (Fla. Stat. 48.042).

Service on State Prisoners.

Process against state prisoner must be served on prisoner. (Fla. Stat. 48.051).

Personal Service on Partnership.

In action against partnership service on one partner binds the others. (Fla. Stat. 48.061). Judgment enforceable against partnership assets and individual assets of partner served. Service of process on one partner gives court jurisdiction over partnership and authorizes it to render judgment binding on partner served and partnership assets. Service on designated employee authorizes judgment binding against partnership assets, but not individual partner's assets. (Fla. Stat. 48.061). For service of process on domestic or foreign limited partnerships, see Fla. Stat. 48.061(2) and (3).

Personal Service on Association.

In cases of nonresidents associated together in any type of association, including foreign corporations, transacting business in state or having office or agency in state, service of process concerning matters arising out of said business or agency may be had on resident agent, or if none, on Secretary of State. (Fla. Stat. 48.181).

Personal Service on Nonresidents.

Service of process may be had in certain circumstances upon all nonresident persons or business organizations doing business in Florida (Fla. Stat. 48.181); and process may be had in certain circumstances upon nonresidents who commit wrongful acts outside Florida, which cause injury within Florida (Fla. Stat. 48.193-.194).

Service of Process for Possession of Premises.

In actions for possession of residential premises, if tenant cannot be found in county or there is no person 15 years of age or older residing at tenant's usual place of abode in county of residence, after at least two attempts to obtain service, summons may be served by attaching copy to conspicuous place on property described in complaint or summons; minimum time delay between two attempts must be six hours. (Fla. Stat. 48.183[1]). If landlord causes or anticipates causing service solely by attaching process to conspicuous place on property, then landlord must provide clerk with additional copy of complaint and pre-stamped envelope addressed to defendant at premises. Clerk mails copy of summons, notes fact of mailing in docket, and files certificate of same within court file. Service effective on date of posting or mailing, whichever occurs later, and judgment for final removal of defendant may not be entered until at least five days from date of service. (Fla. Stat. 48.183[2]).

Service on Nonresident Operator of Water Craft or Aircraft.

Service of process may be made on nonresident operator of water craft or aircraft in suit resulting from accident arising out of such operation within state by service on Secretary of State. (Fla. Stat. 48.19).

Personal Service on Corporations Except Insurance Companies.

Process against domestic or foreign private corporation may be served: (a) On president, vice-president or other head of corporation; (b) in absence of any person described in paragraph (a), on cashier, treasurer, secretary or general manager; and in absence of all above; (c) on any director; and in absence of all above; (d) on any officer or business agent residing in Florida. (Fla. Stat. 48.081). If foreign corporation has none of foregoing officers or agents in this state, service may be upon any agent transacting business in state. (Fla. Stat. 48.081). As alternative, process may also be served on designated agent under Fla. Stat. 48.091. If service of process cannot be made on registered agent because of failure to comply with Fla. Stat. 48.091, service of process permitted on any employee at corporation's principal place of business or on any employee of registered agent. If address provided for registered agent, officer, director, or principal place of business is residence or private mailbox, service on corporation may be made by serving registered agent, officer, or director in accordance with §48.031. (Fla. Stat. 48.081). When corporation engages in substantial and not isolated activities within state, or has business office within state and is actually engaged in transaction of business therefrom, service upon any officer or business agent may personally be made pursuant to Fla. Stat. 48.081, and it is not necessary that action, suit, or proceeding against corporation arise out of any transaction or operation connected with or incidental to business being transacted within state. (Fla. Stat. 48.081).

Service on any director of any corporation which was dissolved before July 1, 1990, as trustee, binds all directors. (Fla. Stat. 48.101). Service on any other dissolved corporation must be in accordance with §48.081, relating to service on private corporations.

Method of Substituted Service on Nonresident.

By leaving or mailing by certified mail copy of process and $8.75 fee with public officer designated by law and sending notice of process and copy thereof forthwith to defendant or attorney, by registered or certified mail. Plaintiff must file return receipt and affidavit of compliance with court on or before return date or within such further time as court may allow. (Fla. Stat. 48.161). For service on nonresident motor vehicle owners, service may be upon Secretary of State. (Fla. Stat. 48.171).

Service on State.

When state has consented to suit, service is on state attorney or assistant state attorney for judicial circuit where action is brought and by sending two copies of process by registered or certified mail to Attorney General. (Fla. Stat. 48.121).

Service on Alien Property Custodian.

Where proceeding before any court or administrative board involves property or interest therein and where service or notice is required to be made upon entity in country or territory with which U.S. is at war, copy of notice or process must also be sent by registered or certified mail to alien property custodian, addressed to him or her at Washington, D.C. Failure to mail such notice does not invalidate action or proceeding. (Fla. Stat. 48.131).

Service on Labor Unions.

Process against labor organizations must be served on president, officer, business agent, manager or person in charge of business of organization. (Fla. Stat. 48.141).

Personal Service on Municipal Corporations.

Process against any municipal corporation, agency, board, or commission, department or subdivision of state or county which has governing board, council, or commission or which is body corporate, may be served: (a) on president, mayor, chair, or other head, (b) and in his absence: on vice president, vice mayor, vice chair, (c) or in absence of all above: any member of governing board, council or commission. Process against such entities not corporate or having no governing board or commission is served on public officer being sued or chief executive officer of entity. In suit in which Department of Revenue is party, process must be served upon executive director of Department. (Fla. Stat. 48.111).

Absent Defendants.

No provision is made for the service of personal process in actions at law upon defendants temporarily absent from this state. For a person concealing his or her whereabouts, see §§48.161; Fla. Stat. 48.181.

Service by publication is regulated by c. 49 under which such service may be had in enumerated proceedings in any state court unless personal service is required by constitution or statute of this state or U.S. Constitution. (Fla. Stat. 49.011).

Defendants who may be served by publication are: (A) Natural persons and unknown persons claiming by, through, under or against them. (B) Any corporation or other legal entity whose domicile be domestic, foreign or unknown, and whether dissolved or existing or not known whether dissolved or existing, and unknown assigns, successors in interest, trustees or other parties claiming under them. (C) Any group, firm, entity or persons doing business or who have done business in Florida under name or title indicating or tending to indicate that same may be corporation or other legal entity. (D) All claimants under any such parties. (Fla. Stat. 49.021).

Conditions Precedent.

To entitle plaintiff to such process, a sworn statement must be made in the original pleading or by supplementary affidavit by the plaintiff, his or her agent or attorney setting forth facts as to various classes of defendants as follows. (Fla. Stat. 49.031).

(1) Natural person as defendant: (A) That diligent search and inquiry have been made to discover name and residence of defendant and that the same is set forth as particularly as is known. (B) Whether such person is over or under 18 years of age or that age is unknown. (C) That residence of such person is (a) unknown to affiant or (b) in state or country other than Florida, stating residence if known, or (c) in Florida, but that defendant has been absent from state for more than 60 days or conceals himself or herself so process cannot be served. (D) That affiant believes there is no person on whom Florida service of process would be binding. (Fla. Stat. 49.041).

(2) Corporation as defendant: (A) That diligent search and inquiry have been made to discover true name, domicile, principal place of business and whether domestic, foreign or dissolved, and to discover true names and whereabouts of all persons upon whom service of process would bind corporation and that same is specified as particularly as known to affiant. (B) Whether or not corporation has ever qualified to do business in Florida unless it is shown to be Florida corporation. (C) That all officers, directors, general managers, cashiers, resident agents and business agents of corporation are (a) absent from state, (b) cannot be found within state, (c) conceal themselves so process cannot be served so as to bind corporation, (d) their whereabouts

are unknown, or (e) that officers, etc., of corporation are unknown to affiant. (Fla. Stat. 49.051).

(3) Parties doing business under a corporate name: (A) Name under which said parties have done business. (B) That after diligent search and inquiry affiant is unable to ascertain whether or not the organization was a corporation, either domestic or foreign. (C) Names and places of residence, if known, of all persons known to have been interested in such organization and whether or not other or unknown persons have been interested therein; or that after diligent search and inquiry all persons interested in such organization are unknown. (D) As to known persons that (a) they are absent from this state, or (b) cannot be found within this state, or (c) conceal themselves so process cannot be personally served or (d) their whereabouts are unknown. (Fla. Stat. 49.061).

(4) Unknown parties as defendants: (A) That affiant believes there are persons who are or who may be interested in the subject matter of the suit, whose names after diligent search and inquiry are unknown. (B) Whether unknown parties claim as heirs, devisees, grantees, assignees, lienors, creditors, trustees or other claimants (a) by, through, against or under known person who is dead or not known to be either dead or alive, (b) by, through, against or under some corporation, domestic or foreign, that has been dissolved or which is not known to be existing or dissolved, (c) by, through, against or under some organization which did business under name indicating corporation, or (d) otherwise as case may be. In any case alleged against named defendant alleged to be dead or alive, dissolved or existing, any judgment, decree or order rendered against such defendant is as good, valid and effectual as if it had not been so stated. (Fla. Stat. 49.071).

Notice of Suit.

On compliance with aforementioned requirements notice of suit must be issued by clerk or judge not later than 60 days after filing sworn statement, which notice must set forth: (A) Names of known natural defendants; names, status and description of corporate defendants; description of all unknown defendants claiming, by, through, against or under known defendants and other unknown defendants. (B) Nature of suit or proceeding. (C) Name of court where pending and abbreviated title of case. (D) Description of real property, if any, proceeded against. (Fla. Stat. 49.08).

Return day: Notice must require defendant to file answer and serve copy upon plaintiff or his or her attorney on day fixed by notice, not less than 28 nor more than 60 days from date of publication of such notice; within 30 days in foreclosure actions.. (Fla. Stat. 49.09).

Publication: Generally, notice must be published once each week for four consecutive weeks in newspaper published in county where court is located and meeting statutory requirements. Notice of action in foreclosure proceedings published once each week for two consecutive weeks. Proof of publication is made by affidavit of owner, officer or employee of newspaper having knowledge of publication, which affidavit must set forth or have attached copy of notice and must state date of each publication. (Fla. Stat. 49.10).

Posting in lieu of publication: If there be no newspaper published in the county, three copies of the notice must be posted at least 28 days prior to return day in three different conspicuous places in county, one of which must be front door of courthouse, and proof of posting must be made by affidavit of person posting, which affidavit must include a copy of notice and state date and places of posting. (Fla. Stat. 49.11).

Mailing notice: If residence of party to be served is stated with more particularity than state or country, clerk or judge must mail a copy by U.S. mail, postage prepaid, to defendant within ten days after making or posting notice, and date of mailing must be noted on docket with copy of pleading for which notice was issued. (Fla. Stat. 49.12).

Proof of Service.

Each person who effects service of process must note on return-of-service form date and time received, date and time served, manner of service, name of person served and position he holds if served in representative capacity. Failure to so note invalidates service, except that amendment may be allowed, after which service is effective as though originally valid. Person effecting service failing to state all facts in return subject to fine not exceeding $10, in court's discretion. (Fla. Stat. 48.21).

Long Arm Statute.

See subhead Personal Service on Nonresidents, supra.

Termination of parental rights requires personal service of notice of date, time, and place of advisory hearing for petition to terminate parental rights and copy of petition on parents (if living; otherwise on living relative), prospective parents, legal custodian, grandparent, person who has physical custody, and guardian ad litem. (Fla. Stat. 39.801).

5.21 REPLEVIN:

Replevin is a statutory possessory action to recover possession of personal property wrongfully detained. (c. 78).

Any person whose personal property is wrongfully detained by another may have writ of replevin to recover property and damages sustained by reason of wrongful taking or detention. Notice of lis pendens may be filed and recorded as in other actions. (Fla. Stat. 78.01).

Complaint.

Actions for replevin may be brought in any county in which property located, where contract was signed, where defendant resides or where cause of action accrued and in court which has jurisdiction of value of property sought to be replevied. (Fla. Stat. 78.032). In order to obtain prejudgment writ of replevin, complaint must contain allegations: (1) Of description, value and location of property, (2) of ownership or right to possession of property, (3) of defendant's wrongful detention, means by which defendant came into possession thereof, and cause of such detention according to best knowledge, information and belief of plaintiff, (4) that property was not taken for tax, assessment or fine pursuant to law, and (5) that property was not taken under execution or attachment of plaintiff's property, or if so, that it is exempt. (Fla. Stat. 78.055).

Without Prior Notice or Hearing.

Prejudgment writ of replevin without notice and hearing may be issued and property delivered forthwith if plaintiff clearly shows by specific facts in affidavit or verified petition nature and amount of claim and grounds for issuance of writ. From this, court must find that defendant is engaging in, or about to engage in, conduct placing property in danger of destruction, concealment, waste, removal from state or jurisdiction of court, or transfer to innocent purchaser or that defendant has failed to make payment as agreed. Petitioner must post bond in amount of lesser of twice value of goods subject to writ or twice balance remaining due. Defendant may obtain release of property by posting bond in amount of 1¼ amount due within five days after serving of writ, or by defendant's motion within ten days after serving writ unless petitioner proves grounds of writ. (Fla. Stat. 78.068).

With Prior Notice and Hearing.

Unless waived under §78.075, notice by show cause order and hearing must be provided. If defendant waives notice and hearing in accordance with §78.075 court orders clerk to issue writ. (Fla. Stat. 78.065[1]). Otherwise, court promptly issues order to show cause why property should not be replevied. (Fla. Stat. 78.065[2]). Order sets hearing no sooner than five days from service and contains other items set forth in §78.065(2) (a)-(f). If defendant waives hearing court may order clerk to issue writ. (Fla. Stat. 78.067[1]). Otherwise, if upon affidavits and showings of parties court determines underlying claim probably valid, court orders clerk to issue writ for possession pending final adjudication. However, writ stayed if defendant files satisfactory bond equal to value of property. (Fla. Stat. 78.067[2]). No bond is required of petitioner if this method of obtaining writ is utilized.

Officer executing writ must deliver property to plaintiff forthwith unless writ directs otherwise. Defendant may obtain release of property within five days after seizure by posting 125% of amount due and owing with clerk, conditioned to have property forthcoming to abide by result of action, or on agreement for satisfaction of adverse judgment. (Fla. Stat. 78.13).

Judgment or Order.

If judgment is rendered for the plaintiff, and the goods have been delivered to him, the judgment is for damages and costs for wrongful taking or detention. (Fla. Stat. 78.18).

If for the plaintiff, and goods have been redelivered to defendant, the judgment is for the property itself and against the defendant and the sureties on his bond for the value thereof, such judgment to be satisfied by the recovery of the property, or of the amount adjudged against the defendant and his sureties. (Fla. Stat. 78.19[1]).

If for defendant, and goods have been redelivered to him, judgment is against plaintiff for damages for taking, attorney fees, and costs. These remedies do not preclude any other remedies available under other laws. (Fla. Stat. 78.20).

If for defendant, and goods have not been redelivered to him, judgment is for possession of property, for costs and against plaintiff for value of property and costs in same manner as provided in Fla. Stat. 78.19 for judgment in favor of plaintiff. Value of each article of goods replevied determined as directed in §78.19. (Fla. Stat. 78.21).

Forms.

See R.C.P. Form Fla. Stat. 1.995 for several model forms for Final Judgment of Replevin.

Execution.

Executing sheriff may break into home, building or enclosure where property concealed, if not delivered upon public demand by sheriff and if sheriff has reasonable grounds to believe property concealed therein. If sheriff has no reasonable grounds, plaintiff may petition court for “break order” directing sheriff to physically enter home, building or enclosure. Break order issues upon plaintiff showing probable cause. (Fla. Stat. 78.10). If property in possession of defendant at issuance passes into possession of third person before execution, officer serves writ on both and amendments may be made later. (Fla. Stat. 78.11). If property removed from jurisdiction before execution, officer delivers writ to proper officer in new jurisdiction who executes and deliver property to plaintiff. (Fla. Stat. 78.12).

5.22 SEQUESTRATION:

Sequestration is of relatively small importance in Florida, but is specifically available to enforce judgments. (R.C.P. 1.570[c][1]-[3]). Sequestration is specifically available to preserve property in an equitable action where defendant is residing out of state or cannot be found at his usual residence. (Fla. Stat. 68.03). Court requires plaintiffs to give bond with surety, to abide by future orders made for restoring property to absent defendant upon his appearance in action. If plaintiff does not furnish bond, property remains under direction of Court or in hands of receiver or otherwise until property is disposed of as Court sees fit. (Fla. Stat. 68.03[2]). Sequestration also available to enforce judgments against corporations if writ of execution cannot be satisfied out of property of corporation. (Fla. Stat. 56.10). Although statute does not explicitly require hearing on creditor's affidavit, hearing is probably constitutionally required. (416 U.S. 600).

5.23 SERVICE:

See topic 5.20 Process.

5.24 STAY OF EXECUTION:

See topic 5.03 Appeal and Error; category 8 Debtor and Creditor, topic 8.05 Executions.

5.25 SUBMISSION OF CONTROVERSY:

No statutory provisions.

5.26 VENUE:

Suits except against nonresidents must be initiated in county where defendant resides, where cause of action accrued, or where property in litigation is located. (Fla. Stat. 47.011). Suits against two or more defendants residing in different counties may be brought in any county in which any defendant resides. (Fla. Stat. 47.021). Suits upon several causes of action may be brought in any county where one of causes of action arose, but court may order separate trials if expedient. (Fla. Stat. 47.041).

Venue of Receiverships.

Application for receiver of property must be made to circuit court of circuit in which principal place of business, residence or office of defendant is located. If property is located in more than one judicial circuit, court appointing receiver has jurisdiction over entire property for purposes of that action. (Fla. Stat. 47.031).

Actions on Promissory Notes.

Action on unsecured promissory notes can be brought only in county in which note was signed by maker or one of makers, or in which maker or one of makers resides. When note was signed by makers in more than one county, action may be brought in any such county where signed. (Fla. Stat. 47.061).

Contractors of Public Buildings.

In addition to provisions of c. 47, actions brought after 5/17/77 by materialmen, etc. pursuant to §255.05 may be brought in any county where public work is being constructed or repaired. (Fla. Stat. 255.05[5]).

Corporations.

Suits against domestic corporations must be commenced in county where corporation has or usually has an office for transaction of its customary business or where cause of action accrued, or where property in litigation is located. (Fla. Stat. 47.051).

In the case of a foreign corporation doing business in this state, suit must be begun in a county wherein such company has an agent or other representative, where property in litigation is situated, or where cause of action accrued. (Fla. Stat. 47.051).

Navigable Waters.

Courts having territorial jurisdiction extending to one bank of any navigable water have jurisdiction from shore to shore; and where different courts have territorial jurisdiction extending to opposite banks of any navigable water, such courts have concurrent jurisdiction across same from shore to shore. (Fla. Stat. 47.071).

Trust Proceedings.

Actions and proceedings concerning trusts may be brought in any county where venue is proper under c. 47 or where beneficiary suing or being sued resides or has his principal place of business or in any county where trust has its principal place of administration. (Fla. Stat. 736.0204).

Replevin Actions.

See topic 5.21 Replevin.

Change of Venue.

All courts have power to grant changes of venue. (Fla. Stat. 47.091). Party desiring change of venue must file verified motion not less than ten days after action is at issue unless good cause is shown for failure to so file. Motion must set forth facts and be supported by affidavits of at least two reputable citizens of county not kin to defendant or attorney. Statutory grounds include inability to receive fair trial because: (a) Adverse party has undue influence over minds of inhabitants of county; (b) movant is odious to inhabitants of county. (Fla. Stat. 47.101).

If adverse party denies allegations of motion, court must hear evidence. (Fla. Stat. 47.111). Change of venue must be granted if it appears impracticable to obtain qualified jury in particular county. (Fla. Stat. 47.121). For convenience of parties or witnesses or in interest of justice, any court of record may transfer any civil action to any other court of record in which it might have been brought. (Fla. Stat. 47.122; but see 223 So.2d 94). Second change of venue may be granted but not back to original county. (Fla. Stat. 47.131). Order granting change transfers cause to another court of same jurisdiction. If judge of such court is disqualified, some other court must be selected. (Fla. Stat. 47.141).

Transfer Fees.

Party requesting change of venue must pay required transfer fee. However, when action was initially filed in improper venue, initially filing party must pay filing fee required to file new action in court to which action is moved. Payment of such filing fee is considered transfer fee. (Fla. Stat. 47.091).

Contract Provisions.

Generally, contract provisions for venue are valid and enforceable. (196 So. 2d 22). Venue provisions in contract for improvement to real property which requires legal action involving resident contractor, subcontractor, sub-subcontractor or materialman to be brought outside state void as matter of public policy. (Fla. Stat. 47.025). To extent venue provision is void under Fla. Stat. 47.025, venue is in county where defendant resides, where cause of action accrued, or where property in litigation is located unless, after dispute arises, parties stipulate to another venue. (Fla. Stat. 47.025).

Forum Non Conveniens.

Action may be dismissed on ground that satisfactory remedy may be more conveniently sought in jurisdiction other than Florida when trial court: (1) finds that adequate alternate forum exists; (2) finds that all relevant factors favor alternate forum, with strong presumption against disturbing plaintiffs' initial forum choice; (3) if there is balance of private interests, finds that factors of public interest favor trial in alternate forum; and (4) ensures that plaintiffs can reinstate their suit in alternate forum without undue inconvenience or prejudice. Parties may stipulate to conditions upon which forum non conveniens dismissal is based, subject to approval by trial court. Trial court does not abuse its discretion if it dismisses action on forum non conveniens grounds even though entire dispute could not be litigated in single alternative forum. (R.C.P. 1.061; 845 So. 2d 33).

Statute of Limitations.

In moving for forum non conveniens dismissal, defendants deemed to automatically stipulate that action will be treated in new forum as though it had been filed in that forum on date filed in Florida, with service of process accepted as of that date. When action dismissed for forum non conveniens, plaintiffs automatically deemed to stipulate that they will lose benefit of all stipulations made by defendant if plaintiffs fail to file action in new forum within 120 days of Florida dismissal. Motion to dismiss based on forum non conveniens must be served not later than 60 days after service of process on moving party. (R.C.P. 1.061[c]).

5.27 WITNESSES:

See topic 5.13 Evidence, subhead Witnesses.

6 COURTS AND LEGISLATURE

6.01 COURTS:

United States District Courts.

Florida is divided into three judicial districts. (28 U.S.C.S. §89).

Northern District.

Clerk's telephone: Tallahassee (850) 521-3501; Pensacola (850) 435-8440; Gainesville (352) 380-2400; Panama City (850) 769-4556. http://www.flnd.uscourts.gov/

Court located at U.S. Courthouse, 111 N. Adams St., Tallahassee, Florida, 32301-7730; U.S. Courthouse, 1 North Palafox St., Pensacola, Florida 32502; U.S. Courthouse, 401 SE First Ave. Rm. 243, Gainesville, Florida 32601; U.S. Courthouse, 30 W. Government St., Panama City, Florida 32401.

Comprises counties of Alachua, Bay, Calhoun, Dixie, Escambia, Franklin, Gadsden, Gilchrist, Gulf, Holmes, Jackson, Jefferson, Lafayette, Leon, Levy, Liberty, Madison, Okaloosa, Santa Rosa, Taylor, Wakulla, Walton, and Washington. Court must be held at Gainesville, Marianna, Panama City, Pensacola, and Tallahassee. (28 U.S.C.S. §89[a]).

District divided into four divisions: Counties of Escambia, Santa Rosa, Okaloosa and Walton compose Pensacola Division. Counties of Jackson, Holmes, Washington, Bay, Calhoun, and Gulf compose Panama City Division. Counties of Leon, Gadsden, Liberty, Franklin, Wakulla, Jefferson, Taylor and Madison compose Tallahassee Division. Counties of Alachua, Lafayette, Dixie, Gilchrist, and Levy compose Gainesville Division. All civil cases in which venue properly lies in division of district, and all criminal cases in which offense was committed in division, must be filed in that division and remain pending there until final disposition unless transferred to another division by order of court. Regardless of division in which case is pending, all papers submitted after filing of initial paper in case are submitted to, and physical file and docket is maintained in, division where judicial officer to whom case is assigned maintains his or her principal office. (N.D. Fla. Loc. R. 3.1[A]).

Middle District.

Clerk's office: U.S. Courthouse, 401 West Central Boulevard, Suite 1200, Orlando, Florida 32801-0120; U.S. Courthouse, 300 Borth Hogan St., Jacksonville 32202; Golden-Collum Memorial Federal Building & U.S. Courthouse, 207 N. W. Second St., Ocala, Florida 34475; Sam M. Gibbons U.S. Courthouse, 801 North Florida Ave., Tampa 33602; U.S. Courthouse & Federal Building, 2110 First Street, Ft. Myers 33901. Telephone: Orlando (407) 835-4200; Jacksonville (904) 549-1900; Ocala (352) 369-4860; Tampa (813) 301-5400; Ft. Myers (239) 461-2000. http://www.flmd.uscourts.gov/

Comprises counties of Baker, Bradford, Brevard, Charlotte, Citrus, Clay, Collier, Columbia, De Soto, Duval, Flagler, Glades, Hamilton, Hardee, Hendry, Hernando, Hillsborough, Lake, Lee, Manatee, Marion, Nassau, Orange, Osceola, Pasco, Pinellas, Polk, Putnam, Saint Johns, Sarasota, Seminole, Sumter, Suwannee, Union, and Volusia. Court must be held at Fernandina, Fort Myers, Jacksonville, Live Oak, Ocala, Orlando, Saint Petersburg, and Tampa. (28 U.S.C.S. §89[b]).

District divided into five divisions: Jacksonville Division consists of counties of Baker, Bradford, Clay, Columbia, Duval, Flagler, Hamilton, Nassau, Putnam, St. Johns, Suwannee and Union; court must be held in Jacksonville. Ocala Division consists of counties of Citrus, Lake, Marion and Sumter; court must be held in Ocala. Orlando Division consists of counties of Brevard, Orange, Osceola, Seminole and Volusia; court must be held at Orlando. Tampa Division consists of counties of Hardee, Hernando, Hillsborough, Manatee, Pasco, Pinellas, Polk and Sarasota; court must be held in Tampa. Fort Myers Division consists of counties of Charlotte, Collier, DeSoto, Glades, Hendry and Lee; court must be held at Fort Myers. (M.D. Fla. Loc. R. 1.02[b]).

All civil proceedings must be instituted in division encompassing county or counties having greatest nexus with cause, giving due regard to place where claim arose and residence or principal place of business of parties. (M.D. Fla. Loc. R. 1.02[c]). All criminal proceedings must be docketed and tried in division encompassing county or counties in which alleged offense or offenses were committed, provided, however, indictment returned in any division is valid regardless of county or counties in which alleged offense or offenses were committed. (M.D. Fla. Loc. R. 1.02[d]). Court may, within its discretion, or upon good cause shown by any interested party, order that any case, civil or criminal, be transferred from one division to another for trial, or from one place of holding court to another place of holding court in same Division. (M.D. Fla. Loc. R. 1.02[e]).

Southern District.

Clerk's office: 301 North Miami Avenue, Room 150, Miami 33128; 301 Simonton Street, Key West 33040; 299 E. Broward Boulevard, Room 108, Ft. Lauderdale 33301; 701 Clematis Street, Room 402, West Palm Beach 33401; 300 South Sixth St., 2nd Floor, Ft. Pierce 34950. Telephone: Miami (305) 523-5100; Key West (305) 295-8100; West Palm Beach (561) 803-3400; Fort Lauderdale (954) 769-5400; Fort Pierce (772) 467-2300. http://www.flsd.uscourts.gov/

Comprises counties of Broward, Dade, Highlands, Indian River, Martin, Monroe, Okeechobee, Palm Beach, and Saint Lucie. Court for Southern District be held at Fort Lauderdale, Fort Pierce, Key West, Miami, and West Palm Beach. (28 U.S.C.S. §89[c]).

District divided into five divisions: Fort Pierce Division (Highlands, Indian River, Martin, Okeechobee and St. Lucie Counties); West Palm Beach Division (Palm Beach County); Fort Lauderdale Division (Broward County); Miami Division (Miami-Dade County); and Key West Division (Monroe County). Cases assigned by Automated Case Assignment System to provide for blind, random assignment of cases and to equitably distribute case load. (S.D. Fla. Loc. R. 3.4[D]).

Miami-Dade County actions and proceedings must be tried at Miami; Monroe County actions and proceedings at Key West; Broward County actions and proceedings at Fort

Lauderdale; Palm Beach County actions and proceedings at West Palm Beach; and Highlands, Indian River, Martin, Okeechobee and St. Lucie County actions and proceedings at Fort Pierce. Any civil or criminal proceeding or trial may be conducted at any jury division within district. (S.D. Fla. Loc. R. 3.1).

Fees.

For filing complaint, $350; for petition for writ of habeas corpus, $5. (28 U.S.C.S. §1914[a]). Clerk must collect from parties only such additional fees as are prescribed by Judicial Conference of United States. (28 U.S.C.S. §1914[b]). For removing cause from state court, $350; fee for notice of appeal and cross-appeal, $455; for registration of foreign or state court judgment, $39.

Note.—Divisions in Florida are not statutory but are created by rule of court and hence federal statutes relative to divisions are not always applicable to divisions in Florida. District Court is open at all times for admiralty and maritime cases.

State Courts.

Supreme Court hears appeals from final judgments of trial courts imposing death penalty and from decisions of district courts of appeal declaring invalid state statute or provision of state constitution.

Supreme Court may, through discretionary review, review any decision of district court of appeal that expressly affects class of constitutional or state officers, that passes upon question certified by district court of appeal to be of great public importance, or that is in direct and express conflict with decision of another district court of appeal, or of Supreme Court, questions of law certified by U.S. Supreme Court or U.S. Court of Appeals determinative of cause of action without controlling Florida Supreme Court precedent, any decision of district court of appeal that expressly declares valid state statute or expressly construes provision of state or federal constitution, and any order or judgment of trial court certified by district court of appeal in which appeal is pending to be of great public importance, or to have great effect on proper administration of justice throughout state, and certified to require immediate resolution by Supreme Court.

When provided by general law, Supreme Court must hear appeals from final judgments entered in proceedings for validation of bonds or certificates of indebtedness and must review actions of statewide agencies relating to rates or service of utilities providing electric, gas or telephone service.

Supreme Court may issue writs of mandamus and quo warranto to state officers and state agencies, writs of prohibition to courts, writs of habeas corpus, and all writs necessary for complete exercise of its jurisdiction. Supreme Court must, when requested by attorney general pursuant to provisions of Fla. Const. Art. IV, §10, render advisory opinion addressing issues as provided by general law. (Fla. Const., Art. 5, §3).

Fees.

$300 fee for each case docketed for filing of certified copy of notice of appeal or petition. (Fla. Stat. 25.241). $100 fee from each attorney appearing pro hac vice. (Fla. Stat. 25.241).

Clerk's Office.

Florida Supreme Court, Attn: Clerk's Office, 500 South Duval Street, Tallahassee, Florida, 32399-1927. Telephone (850) 488-0125. http://www.floridasupremecourt.org/

District Court of Appeal.

State divided into five appellate districts. (Fla. Stat. 35.01). First Appellate District composed of First, Second, Third, Fourth, Eighth, and Fourteenth Judicial Circuits (Fla. Stat. 35.02); Second Appellate District composed of Sixth, Tenth, Twelfth, Thirteenth, and Twentieth Judicial Circuits (Fla. Stat. 35.03); Third Appellate District composed of Eleventh and Sixteenth Judicial Circuits (Fla. Stat. 35.04); Fourth Appellate District is composed of Fifteenth, Seventeenth, and Nineteenth Judicial Circuits (Fla. Stat. 35.042); Fifth Appellate District composed of Fifth, Seventh, Ninth, and Eighteenth Judicial Circuits (Fla. Stat. 35.043).

Each district court of appeal must consist of at least three judges. Three judges must consider each case; concurrence of two necessary to decision.

Appeals in each appellate district may be taken to court of appeals of such district as matter of right from all final judgments or orders of trial courts (excepting cases directly appealable to Supreme Court or circuit courts), and district courts have such powers of direct review of administrative action as may be provided by law. May consider certain certified questions from county courts. (See subhead Circuit Courts, infra.) May review interlocutory orders to extent permitted by rules adopted by Supreme Court.

District Courts of Appeal or any judge thereof may issue writs of habeas corpus. District Courts of Appeal may issue writs of mandamus, certiorari, prohibition, and quo warranto, and all writs necessary to complete exercise of jurisdiction. (Const., art. 5, §4).

Fees.

$300 fee for each case docketed for filing of certified copy of notice of appeal or petition. (Fla. Stat. 35.22[3]). $100 fee from each attorney appearing pro hac vice.

Clerk's Office.

First District Court of Appeal: 301 S. Martin Luther King Jr. Blvd., Tallahassee, FL 32399-1850; telephone: (850) 488-6151. Second District Court of Appeal: Lawton M. Chiles, Jr. Courthouse, 1005 East Memorial Blvd., Lakeland, Florida 33801; telephone: (863) 499-2290. Third District Court of Appeal: 2001 S.W. 117 Ave., Miami, Florida 33175; telephone: (305) 229-3200. Fourth District Court of Appeal: 1525 Palm Beach Lakes Blvd., West Palm Beach, Florida 33401-2399; telephone: (561) 242-2000. Fifth District Court of Appeal: 300 South Beach Street, Daytona Beach, Florida 32114; telephone: (386) 255-8600. http://www.flcourts.org/courts/dca/dca.shtml

Circuit courts have exclusive original jurisdiction in all cases in equity including juvenile matters, in all cases at law not cognizable by county courts (Const., art. 5, §5) and in all probate matters, of all felonies and of all misdemeanors arising out of same circumstances as felony which is also charged, in all cases involving legality of any tax assessment or toll (except as provided in Fla. Stat. 72.011), in ejectment actions, and in all actions involving title, right of possession, or boundaries of real property (Const., art. 5, §20[c][3]; Fla. Stat. 26.012[2]). Any traffic offense punishable as felony is within jurisdiction of circuit court. (Fla. Stat. 316.635[1]). Circuit court has exclusive original jurisdiction of proceedings in which child is alleged to have committed delinquent act or violation of law. (Fla. Stat. 985.0301[1]). Circuit courts have appellate jurisdiction of appeals from county courts and municipal courts except appeals declaring invalid state statute or provision of state constitution, except orders and judgments of county court certified by county court to district court of appeal to be of great public importance and accepted by district court of appeals. Circuit courts have jurisdiction of appeals from final administrative orders of local government code enforcement boards. (Fla. Stat. 26.012[1]). Chief judge in each Circuit exercises administrative supervision over all trial courts in that Circuit. (Fla. Stat. 43.26).

Fees.

Party instituting any civil action must pay filing fee of up to $395 in cases in which there are not more than five defendants and additional filing fee of up to $2.50 for each defendant in excess of five. Additional filing fee of $4 paid to clerk for court and clerk education funds. Additional fee of up to $18 paid by party seeking each severance that is granted. Clerk may impose additional fee of up to $85 for proceedings of garnishment, attachment, replevin and distress. (Fla. Stat. 28.241[1][a]). In addition to filing charges in §28.241, clerk must collect charges totaling $97.50 when party petitions for dissolution of marriage. (Fla. Stat. 28.101). Postal charges incurred by clerk in making service by certified or registered mail must be paid by party at whose instance service is made. (Fla. Stat. 28.241[1][a]). $100 fee from each attorney appearing pro hac vice. (Fla. Stat. 28.241[6]). Filing fee may not be imposed upon party for responding by pleading, motion, or other paper to civil or criminal action, suit, proceeding, or appeal in circuit court. (Fla. Stat. 28.241[3]).

Fee for instituting appeal from lower court may not exceed $250. In addition to filing fee required under §25.241 or §35.22, filing fee of up to $100 paid to circuit court for filing notice of appeal from circuit court to district court of appeal or supreme court. (Fla. Stat. 28.241[2]).

Clerk's Office.

Clerk of circuit court must keep his or her office at county seat. Branch offices may be located at other places in county if needed. (Fla. Stat. 28.07). http://www.flcourts.org/courts/circuit/circuit.shtml

County courts have original jurisdiction in all misdemeanor cases not cognizable in circuit courts, of all violations of municipal and county ordinances, of all actions at law where amount in controversy does not exceed $15,000, exclusive of interest, costs and attorney's fees, except those within exclusive jurisdiction of circuit courts, of all disputes occurring in homeowners' associations; county court judges may hear matters involving dissolution of marriage under simplified dissolution procedure or may issue final order for dissolution in cases where matter is uncontested; judges may hear all matters in equity involved in any case within jurisdictional amount of county court except as otherwise restricted by State Constitution or laws of Florida (Fla. Stat. 34.01), as well as concurrent jurisdiction with circuit court in landlord/tenant cases which are within its jurisdictional limits, and jurisdiction of cases relating to right of possession of real property and forcible or unlawful detention of lands and tenements, except that circuit court also has jurisdiction if amount in controversy exceeds jurisdictional limits of county court or circuit court otherwise has jurisdiction as provided in §26.012 (Fla. Stat. 34.011). http://www.flcourts.org/courts/county/county.shtml

Fees.

Filing fee varies based on amount of claim. Charge or fee may not be imposed upon party for responding by pleading, motion, or other paper to civil or criminal action, suit, or proceeding in county court or to appeal to circuit court. $100 fee from each attorney appearing pro hac vice. (Fla. Stat. 34.041).

Probate Courts.

Probate jurisdiction is exercised by circuit courts. (Fla. Stat. 26.012[2][b]).

Fees.

Additional service charge of $4 on petitions seeking summary administration, formal administration, ancillary administration, guardianship, curatorship, and conservatorship, paid to clerk for deposit into Court Education Trust Fund or transfer to Department of Revenue for deposit into Department of Financial Services' Administrative Trust Fund. (Fla. Stat. 28.2401[3]).

Juvenile Courts.

Juvenile jurisdiction is exercised by circuit courts. (Fla. Stat. 26.012).

Municipal Courts.

Abolished Jan. 3, 1977. (Const. art. 5, §20).

Small Claims Courts.

Jurisdiction is exercised by county courts. (Fla. Stat. 34.01). Small Claims Rules (S.C.R.) applicable to all actions of civil nature in county courts in which demand or value of property does not exceed $5,000 exclusive of costs, interest and attorneys' fees. (S.C.R. 7.010).

Commencement.

Actions commenced by filing statement of claim in concise form, which informs defendant of basis and amount of claim. If claim based on written document, copy or material part thereof must be attached to statement of claim. See Rule for additional requirements. (S.C.R. 7.050[a]).

Process and Venue.

Notice to Appear stating time and place of hearing must be served on defendant and inform defendant in manner provided in Rule of defendant's right of venue. (S.C.R. 7.060[a]).

Copy of statement of claim must be served with Notice to Appear. (S.C.R. 7.060[b]). Service of process to be effected as provided by law or as provided by R.C.P. 1.070(a)-(h). Defendant may accept service of process by mail. (R.C.P. 1.070[i]). Constructive service or substituted service of process may be effected as provided by law. Service of process on Florida residents only may also be effected by certified mail. (S.C.R. 7.070). Service of pleadings and papers subsequent to Notice to Appear, except for witness subpoenas and orders and judgments entered in open court, must be served on each party. One against whom default has been entered entitled to be served only with pleadings asserting new or additional claims. (S.C.R. 7.080).

Appearance; Defensive Pleadings.

On date and time appointed in Notice to Appear, plaintiff and defendant must appear personally or by counsel. Initial appearance for pretrial conference must be set by clerk not more than 50 days from date of filing of action.

Unless required by order of court, written pretrial motions and defensive pleadings are not necessary. Filing of motion or defensive pleading does not excuse personal appearance of party or attorney on initial appearance date. See Rule for additional requirements and detail. (S.C.R. 7.090).

Discovery.

Any party represented by attorney is subject to discovery pursuant to R.C.P. 1.280-1.380 directed at said party, without order of court. If party proceeding without attorney directs discovery to party represented by attorney, represented party may also use discovery pursuant to above rules without leave of court. When party is unrepresented and has not initiated discovery pursuant to above rules, opposing party not entitled to initiate such discovery without leave of court. (S.C.R. 7.020).

Counterclaims.

Any claim of defendant against plaintiff arising out of same transaction or occurrence which is subject matter of plaintiff's claim must be filed not less than five days prior to appearance date or within such time as court designates or it is deemed to be abandoned. Any claim or setoff of defendant against plaintiff not arising out of transaction or occurrence which is subject matter of plaintiff's claim may be filed not less than five days before appearance date or within such time as court designates, and tried, provided such permissive claim is within jurisdiction of court. When counterclaim or setoff exceeds jurisdiction of court, it must be filed in writing before or at hearing, and action will then be transferred to court having jurisdiction. See Rule for additional detail. (S.C.R. 7.100).

Third-party Complaints.

Defendant may cause statement of claim to be served on person not party to action who is or may be liable to defendant for all or part of plaintiff's claim against defendant. See Rule for additional requirements and detail. (S.C.R. 7.100[e])

Voluntary Dismissal.

See category 5 Civil Actions and Procedure, topic Termination of Actions.

Involuntary Dismissal.

See category 5 Civil Actions and Procedure, topic Termination of Actions.

Trial.

Court assists any party not represented by attorney on courtroom decorum and order of presentation of material evidence. Court may not instruct any party not represented by attorney on accepted rules of law nor act as advocate for party. Trial may be conducted informally but with decorum befitting court of justice. For additional requirements and detail see Rule. (S.C.R. 7.140). If both parties fail to appear, judge may continue action or dismiss it. (S.C.R. 7.160). If defendant does not appear, plaintiff entitled to default entered by either judge or clerk. After default entered, judge receives evidence establishing damages and enter judgment in accordance with evidence and law. (S.C.R. 7.170).

Motion for Attorneys' Fees and Costs.

Any party seeking judgment taxing costs or attorneys' fees, or both, must serve motion no later than 30 days after filing of judgment, including judgment of dismissal, or service of notice of voluntary dismissal. In event of default judgment, no further motions are needed if costs or attorneys' fees, or both, were sought in statement of claim. (S.C.R. 7.175).

Stay of Judgment and Execution.

When judgment to be entered against party, judge may inquire and permit inquiry about earnings and financial status of party and has discretionary power to stay entry of judgment or, if entered, to stay execution or levy on such terms as are just. (S.C.R. 7.210). For additional details relating to enforcement of judgments and levy of execution see S.C.R. 7.210, 7.220, 7.221.

Forms.

S.C.R. provide forms for Notice to Appear, Statement of Claims (various types of actions), Final Judgment, Execution, Motion for Hearing in Aid of Execution, Stipulation for Installment Settlement and Stay and Order Approving Stipulation, and Corporate Authorization to Allow Employee to Represent Corporation at Any Stage of Lawsuit.

6.02 LEGISLATURE:

Regular Sessions.

Held on 1st Tues. after 1st Mon. in Mar. of each year, unless some other date fixed by law for each even-numbered year; session not more than 60 consecutive days or such other date as may be fixed by law. (Const. art. 3, §3[b] & [d]).

Organization Sessions.

Held on 14th day following each general election for exclusive purpose of organization and selection of officers. (Const. art. 3, §3[a]).

Special sessions may be called by proclamation of governor for limited purpose stated in proclamation or other executive communication, or for such purpose as is agreed to by two-thirds membership of each house; session not to exceed 20 consecutive days unless extended by three-fifths vote of each house. (Const. art. 3, §3[c] & [d]).

Referendum required for: Amending state constitution (Const. art. 11, §5); calling convention to revise entire constitution (Const. art. 11, §4); consolidation (Const. art. 8, §3); transfer of local powers (Const. art. 8, §4); imposing or repealing prohibition of the sale of intoxicating liquors, wines or beers in counties (Const. art. 8, §5). Referendum required by statute for, among other things, issuance of bonds by county, district, or municipality where approval required. (Fla. Stat. 100.201).

Lobbyists.

Regulated by c. 11 relating to legislative organization, procedures and staffing (Fla. Stat. 11.045-.062) and c. 112 relating to code of ethics for public officers and employees (Fla. Stat. 112.3213-.3217).

6.03 REPORTS:

Decisions of Florida Supreme Court and Florida district courts of appeal are published in Southern Reporter, which, beginning with 37 So.2d 692, is official publication. Florida Reports, vols. 1-160, is official report prior to 37 So.2d 692, and covers most cases through Dec. 21, 1948. Decisions of circuit courts are published in Florida Supplement.

“FLW” refers to Florida Law Weekly, an advance sheet.

“FLW-Fed” refers to Florida Law Weekly Federal, advance sheet for Florida federal district court, appellate court and United States Supreme Court cases.

Digests.

West Publishing Co., Southern Digest and Florida Digest cover Florida decisions.

6.04 STATUTES:

Permanent statutory revision plan implemented and maintained under supervision of Office of Legislative Services. (Fla. Stat. 11.241). Office of Legislative Services must bring general acts of Legislature within revision system as promptly as possible after adjournment of legislative session. (Fla. Stat. 11.243[1]). Florida Statutes 2009 adopted and enacted as official statute law of state to take effect immediately upon publication. (Fla. Stat. 11.2421).

Repeal of Prior Statutes.

All statutes of general or permanent nature enacted at or prior to 2008 regular legislative session, and every part of such statute, not included in Florida Statutes 2009, as adopted by §11.2421, as amended are repealed (Fla. Stat. 11.2422), unless recognized and continued in force by reference therein or in Fla. Stat. 11.2423 and 11.2424, as amended. Such repeal does not affect any rights accruing before such repeal or any civil remedy where suit is pending. (Fla. Stat. 11.2425).

Session Laws.

Laws take effect on 60th day after adjournment sine die of session of legislature in which enacted or as otherwise provided therein. (Const. Art. III, §9).

Unofficial Compilation.

Florida Statutes Annotated uses text of official Florida Statutes together with annotations, kept up to date by revised volumes, periodic pamphlets, and cumulative annual pocket parts, published by The Harrison Company, Atlanta, and by West Publishing Company.

Uniform Acts.

Act to Secure the Attendance of Witnesses From Without a State in Criminal Proceedings (1941); Anatomical Gift (1969); Arbitration (1992); Child Custody Jurisdiction and Enforcement (2002); Commercial Code (1967); Common Trust Fund (1941); Contribution Among Tortfeasors (1975); Declaratory Judgments (1943); Disclaimer of Property Interests (2005); Disposition of Unclaimed Property (1961); Electronic Transactions (2000); Federal Lien Registration (1992); Foreign Depositions (1959); Fraudulent Transfer (1988); Insurers Rehabilitation and Liquidation (1959); Interstate Family Support (1996); Land Sales Practices (1963); Limited Partnership, Revised (2005); Management of Institutional Funds (1990); Out-of-country Foreign Money-Judgment Recognition (1994); Partnership, Revised (1996); Principal and Income, Revised (1975); †Probate Code (1976); Real Property Electronic Recording (2007); †Reciprocal Transfer Tax (1931); Simultaneous Death (1941); Statutory Rule Against Perpetuities (1988); Testamentary Additions to Trusts (1961); Trade Secrets (1988); Transfers to Minors (1985); †Principal and Income (2002); †Trust Code (2006). Florida Enforcement of Foreign Judgments Act is very similar to Uniform Act—some sections are identical.

† Adopted with significant variations or modifications. See relevant topics for discussion of Florida statutes.

Uniform Commercial Code enacted, effective Jan. 1, 1967. See category 3 Business Regulation and Commerce, topic 3.09 Commercial Code.

For text of Uniform Acts falling within the scope of the Martindale-Hubbell Law Digests see Uniform and Model Acts section.

6.05 UNIFORM LAWS:

For list of Uniform Acts in force in this state see topic 6.04 Statutes. For text of Uniform Acts within the scope of the Martindale-Hubbell Law Digests see Uniform and Model Acts section.

7 CRIMINAL LAW

7.00A BAIL:

See topic 7.01 Criminal Law.

7.01 CRIMINAL LAW:

Crimes generally: c. 775 - c. 896.

Criminal procedure generally: c. 900 - c. 942; Fla. Rules Crim. Pro. 3.010-3.853.

Corrections generally: c. 944 — c. 985

Indictment or Information.

Capital offenses must be tried on indictment by a grand jury; other offenses (with exceptions for juveniles' crimes) and persons on active duty in military may be tried on either indictment or information by prosecuting attorney under oath. (Const. Art. 1, §15[a]).

Bail.

All crimes are bailable by sufficient sureties except capital or life imprisonment offenses where proof of guilt is evident or presumption great. If no conditions of release can protect community from risk of physical harm to persons, assure presence of accused at trial, or assure integrity of judicial process, accused may be detained. (Const. art. I, §14; Fla. Rule Crim. Pro. 3.131[a]). Bail must be revoked for commission and conviction of separate felony while free on appeal. (Fla. Stat. 903.131). No bail permitted on appeal from felony unless defendant establishes that appeal is taken in good faith, on grounds fairly debatable, and not frivolous. (Fla. Stat. 903.132[1]). Provided also that bail not granted if such person had been previously convicted of felony committed prior to felony in question, and such person's civil rights have not been restored; or, if other felony charges are pending for which probable cause has been found at time request for bail is made. Court may order pretrial detention if substantial probability that defendant committed DUI manslaughter, poses threat of harm to community; threat of harm to community demonstrated by prior conviction of any crime under §316.193, defendant was driving with suspended license when crime occurred, or defendant previously found guilty for driving while license suspended or revoked. (Fla. Stat. 907.041[4][c]). In no case may original appearance bond be continued for appeal. (Fla. Stat. 903.132[1]; Fla. Stat. 903.132[3]). Because of increased risk and longer time considerations, new undertaking of bond for appeal is required. (Fla. Stat. 903.132[3]). Denial of bail because of pending first degree felony charges for which probable cause has been found is appealable. (Fla. Stat. 903.132[2]). Notwithstanding conditions for granting appellate review in bail matters, no person adjudged guilty of first degree felony of murder in violation of §§782.04(2) or (3), kidnapping in violation of §787.01, sexual battery in violation of § 794.011(4), arson in violation of §806.01, selling, purchasing, manufacturing, delivering, or possessing with intent to sell, purchase, manufacture or deliver controlled substance in violation of §893.13, drug trafficking in violation of §893.135, or adjudged guilty of sexual battery in violation of §§794.011(2) or (3), can be admitted to bail pending review either by post-trial motion or appeal. (Fla. Stat. 903.133).

Interstate Compact for Supervision of Parolees and Probationers in effect. (Fla. Stat. 949.07-.08).

Amended Uniform Criminal Extradition Act in effect. (Fla. Stat. 941.01-.30).

Uniform Law on Fresh Pursuit in effect. (Fla. Stat. 941.31-35).

Uniform Act to Secure the Attendance of Witnesses from Without a State in Criminal Proceedings in effect. (Fla. Stat. 942.01-06).

Registration of Felons.

Persons convicted of a felony, in any federal or state court or foreign state or country, except one who has had his civil rights restored, received full pardon, or has been released from incarceration, or other sentence or supervision for felony conviction for more than five years prior to such time for registration, must register with sheriff within 48 hours after entering any county of this state. (Fla. Stat. 775.13[2], [3] & [5]). This law does not apply to parolee or probationer under supervision of U.S. Parole Commission or any federal probation officer who consents to presence of such person in Florida, nor to probationer under supervision of any federal probation officer in state, nor to one who is lawfully discharged from such parole or probation. (Fla. Stat. 775.13[5][d]). This law does not apply to one who is sexual predator and has registered as required under Fla. Stat. 775.21, who is sexual offender and has registered as required in Fla. Stat. 943.0435 and 944.607, or who is career offender who has registered as required in Fla. Stat. 775.261 or Fla. Stat. 944.609. (Fla. Stat. 775.13[5][e], [f] & [g]). See Fla. Stat. 944.293, initiation of restoration of civil rights.

Failure of convicted felon to register constitutes second degree misdemeanor. (Fla. Stat. 775.13[6]).

8 DEBTOR AND CREDITOR

8.01 ASSIGNMENTS:

Uniform Commercial Code adopted. (cc. 670-680). See category 3 Business Regulation and Commerce, topic 3.09 Commercial Code.

Contractual rights are generally assignable unless restricted by public policy, statute or when contract involves personal trust and confidence of assignor or is prohibited by provision in contract. Civil actions by real parties in interest are authorized except as to assignment of chose in action not arising out of contract. It is not necessary for assignee in any suit upon an instrument assignable by law to set forth in declaration consideration upon which instrument was given or to prove such consideration or execution unless same is impeached by defendant under oath. Executor or administrator may, however, deny execution or consideration by plea not under oath. (Fla. Stat. 68.06).

Mortgages may be assigned. (Fla. Stat. 701.01). Assignment of mortgage on real property not effectual against creditors or subsequent purchasers, for valuable consideration, and without notice, unless assignment is contained in document which indicates assignment of mortgage in title and assignment is recorded. (Fla. Stat. 701.02). C. 670-680 of Uniform Commercial Code govern attachment and perfection of security interest in mortgage on real property and in promissory note or other right to payment or performance secured by that mortgage; assignment of such mortgage need not be recorded under Fla. Stat. 701.02 for purposes of attachment or perfection of security interest in mortgage under UCC. (Fla. Stat. 701.02[4]).

Liens, except those of laborers, may be assigned by lienor at any time before discharge. Assignment may be recorded in Clerk's Office. (Fla. Stat. 713.19).

Statutory Retirement Benefits Not Assignable.

Most, if not all, statutory retirement benefits are not assignable, including those for firefighters (Fla. Stat. 175.241), municipal police officers (Fla. Stat. 185.25), state and county employees (Fla. Stat. 122.15) and teachers (Fla. Stat. 238.15). See 580 So.2d 151 regarding garnishment of such benefits for child support purposes under §61.1301.

Assignment of Wages.

No assignment of wages to secure consumer finance loan is valid. (Fla. Stat. 516.17).

Instrument Transferring Title.

See category 3 Business Regulation and Commerce, topic 3.16 Frauds, Statute of.

Notice to debtor of assignment of debt or chose in action necessary to impose duty to pay assignee. If debtor pays assignor or subsequent assignee before receiving notice of initial assignment, debtor discharged.

Assignment for Benefit of Creditors.

Procedures for equitable administration of assets of insolvent debtors, full reporting to creditors, and orderly distribution of assets provided for in c. 727. For details, see statute.

8.02 ATTACHMENT:

Caution: Prejudgment attachment and garnishment remedies in other states having provisions similar to those in Florida have been declared unconstitutional. (419 U.S. 601).

Actions in Which Allowed.

Attachment lies before or after judgment in actions ex contractu in nature. (Fla. Stat. 76.01 et seq.). Attachment not available in tort actions except those arising from navigation, direction or management of boats, vessels, etc. (Fla. Stat. 76.32).

Courts Which May Issue Writ.

Attachments are required to be issued by judge of court which has jurisdiction of amount claimed by creditor, unless property to be attached is being actually removed from state and creditor is unable to obtain process from proper court in time to prevent such removal, in which case any judge may issue writ, making same returnable to circuit or county court having jurisdiction of amount claimed. (Fla. Stat. 76.03).

In Whose Favor and Against Whom Writ May Issue.

Any creditor may have an attachment against goods, lands and tenements of his debtor in a proper case. (Fla. Stat. 76.01). No restrictions on foreign corporations or nonresidents.

Claims on Which Writ May Issue.

See subhead, Actions in Which Allowed, supra.

Grounds.

Attachment may be procured upon filing motion therefor, when grounds relied upon clearly appear from specific facts shown by verified complaint or separate affidavit and requirements of Fla. Stat. 76.09-.11 are met. (Fla. Stat. 76.08). When debt is due, motion must state amount of debt that is actually due, and that movant has reason to believe that defendant will fraudulently part with his property before judgment, is actually removing his property out of State of Florida, is about to remove his property, resides out of state, is actually moving himself beyond limits of state, is about to move himself out of state, is absconding, is concealing himself, or is secreting or fraudulently disposing of his property, is actually removing himself beyond limits of judicial circuit in which he resides, or is about to so remove himself out of limits of such judicial circuit. (Fla. Stat. 76.09; Fla. Stat. 76.04).

When Debt Not Due.

Motion must state amount of debt or demand; that it is existing debt; and must state specifically at least one of following special grounds: that debtor is actually removing his property beyond limits of state, that he is fraudulently disposing of property for purpose of avoiding payment of just debts or demands or fraudulently secreting property for such purpose. (Fla. Stat. 76.10; Fla. Stat. 76.05). In addition, plaintiff must produce before officer granting attachment proof, by affidavit (other than his own) or otherwise, satisfactory to such officer, of existence of such special ground. (Fla. Stat. 76.10).

When Attachment in Aid of Foreclosure of Mortgage on Personal Property.

Motion must describe property on which mortgage exists, and state that complaint has been filed to foreclose mortgage, amount of debt secured by mortgage, that it is actually due, and that movant has reason to believe that property or part of same: (1) will be concealed or disposed of so that it will not be forthcoming to answer judgment or decree of foreclosure; (2) will be removed beyond jurisdiction of court; (3) is perishable and is being used and consumed; or (4) has been disposed of without consent of holder and owner of mortgage, stating who has property, if known, or that affiant does not know who has same. (Fla. Stat. 76.11; Fla. Stat. 76.07). Where attachment is based on ground (4) and holder of property is unknown, attachment bond must be payable to state. (Fla. Stat. 76.12). See also, Commercial Code c. 679, pt. 5.

Proceedings to Obtain.

Practice in suits commenced by attachments are same as other suits at law. See R.C.P. 1.010.

Attachment Bond.

No attachment may issue until person applying for same, his agent or attorney, has entered into bond, with surety, payable to defendant, in at least double debt or sum demanded, conditioned to pay all costs and damages which defendant may sustain in consequence of improperly suing out attachment. (Fla. Stat. 76.12). See subhead When Attachment in Aid of Foreclosure of Mortgage on Personal Property, supra, regarding need for bond payable to state in certain foreclosure circumstances. (Fla. Stat. 76.12).

Levy, Lien, Priorities.

Levy of a writ of attachment does not operate to dispossess tenant of any lands or tenements, but levy upon real or personal property binds property attached, except against preexisting liens. Levies upon same property under successive attachments have precedence as liens in order in which they are made. Levy binds real estate as against subsequent creditors or purchasers only from time of record by clerk of circuit court in lien book of notice of levy and description of property levied upon. (Fla. Stat. 76.14).

Upon statement in motion that defendant has property in a county other than that in which suit is instituted, a writ of attachment may issue directed to sheriff or other proper officer of county where said property is, and said officer must execute writ and hold and dispose of property as in other cases. (Fla. Stat. 76.16).

Release of Property.

Property attached may be restored to defendant or other person for him at any time after execution of writ upon giving of surety bond to officer levying attachment, payable to plaintiff in amount which exceeds by one-fourth value of property, determined by court, or which exceeds by one-fourth amount of claim, whichever is less (Fla. Stat. 76.18), or upon defendant giving bond, with surety approved by officer, conditioned for payment to plaintiff of debt and all costs of action when such debt and costs are adjudicated payable to plaintiff (Fla. Stat. 76.19).

Vacation or Modification.

Defendant may by motion obtain dissolution of writ and if any allegation in plaintiff's affidavit which is denied under oath in writing by defendant is not sustained and proved to be true at an immediate hearing, such court will dissolve attachment. Issue joined upon such denial may be tried by jury, upon demand of either party. (Fla. Stat. 76.24).

Third Party Claims.

Attached property claimed by third persons may be replevied, or a claim interposed therefor by filing with officer levying attachment an affidavit made by claimant, his agent or attorney, that property claimed by him is his property, and by giving of a bond, payable to plaintiff, with surety to be approved by such officer in double value of goods claimed. (Fla. Stat. 76.21; Fla. Stat. 56.16).

Sale.

When property attached is perishable or liable to great deterioration in value or costs of keeping it are greatly disproportionate to its value, court may order sale of property after such notice as is expedient, and proceeds of sale paid into court and abide judgment. (Fla. Stat. 76.22).

8.03 [RESERVED]

8.04 CREDITORS' SUITS:

Creditors' bills may be filed in chancery before creditors' claims have been reduced to judgment, but no such action is entertained unless plaintiff has first instituted separate action at law for collection of claims, and no final judgment will be entered until such claims have been reduced to judgment. (Fla. Stat. 68.05).

See also proceedings supplementary to execution intended to give as full relief as creditors' suit. (Fla. Stat. 56.29; 47 So.2d 769). See also R. C. P. 1.560 providing for discovery concerning assets in aid of judgment, decree or execution. See topic 8.05 Executions.

8.05 EXECUTIONS:

Exemptions.

See topic 8.06 Exemptions.

Issuance.

When issued, execution is valid and effective during life of judgment or decree on which it is issued. (Fla. Stat. 56.021). When fully paid, officer executing it must make his return and file it in court which issued execution. (Fla. Stat. 56.021). If execution is lost or destroyed, party entitled thereto may have alias, pluries or other copies on making proof of such loss or destruction by affidavit and filing it in court issuing execution. (Fla. Stat. 56.021).

Stay.

Upon affidavit showing illegality of issuance of an execution, and whether anything be due thereon, and filing of a bond with surety payable to plaintiff in double amount of execution or part of which stay is sought, enforcement thereof may be stayed. (Fla. Stat. 56.15).

Lien.

Execution is lien on personal property effective from time of delivery of writ to sheriff. (73 Fla. 819, 75 So. 30). As general rule, lien binds all property, real or personal, which is subject of levy and sale. (80 Fla. 84, 85 So. 659; Fla. Stat. 56.061).

Levy.

All lands and tenements, goods and chattels, equities of redemption in real and personal property, interest in personal property in possession of vendee under retained title or conditional sales contract, and stock in corporations are subject to levy and sale under execution. (Fla. Stat. 56.061). Mandamus lies to compel levy and sale. (Fla. Stat. 56.26). See topic 8.06 Exemptions.

Return.

Execution is returnable when satisfied. (Fla. Stat. 56.041[1]). Unsatisfied executions may be returned 20 years after final judgment. (Fla. Stat. 56.041[2]).

Claims of Third Persons.

Same as in Attachments, q.v.

Satisfaction.

Final judgments may be satisfied at any time prior to actual levy of execution by payment of full amount of judgment, with interest, plus costs of issuance of execution. Upon payment, clerk executes and records satisfaction of judgment provided by judgment holder. (Fla. Stat. 55.141).

Sale.

All sales of property under legal process must take place any day of week except Sat. and Sun., and continue from day to day until such property is disposed of. (Fla. Stat. 56.22). Property not effectively disposed of at initial sheriff's sale may be readvertised upon receipt of additional deposit to cover costs incurred in connection with maintenance of property under legal process. (Fla. Stat. 56.22). If no additional deposit is received by sheriff, property may be returned to defendant, or if defendant refuses to accept property, it may be returned to third party, such as lienholder, upon presentation of proper court order so directing, or if none of above can be accomplished, such property may be disposed of as unclaimed or abandoned. (Fla. Stat. 56.22). Notice of all such sales is given by advertisement, once each week for four successive weeks, in newspaper published in county in which sale is to take place, time of such notice may be shortened by court upon affidavit that property is subject to decay and will not sell for its full value if held until date of sale. (Fla. Stat. 56.21). Copy of notice must be furnished to debtor or debtor's attorney by certified mail on or before date of first publication or of posting. Notice must be made in same manner upon owner of record of real property being levied upon. (Fla. Stat. 56.21). On or before date of first publication or posting of notice of sale, copy of notice must be furnished by certified mail to attorney of record of judgment debtor or to judgment debtor at his last known address if he does not have attorney of record. Such notice is required even though default judgment was entered. When levying upon real property, notice of levy and execution sale must be made to property owner of record in same manner as notice to any judgment debtor. (Fla. Stat. 56.21). When selling real or personal property, sale date must not be earlier than 30 days after date of first advertisement. (Fla. Stat. 56.21).

Redemption.

There is no right of redemption of property sold under execution.

Supplementary Proceedings.

After execution returned unsatisfied, proceedings supplementary to execution are provided whereby execution creditor may examine judgment debtor, under oath, as to his property, business, or financial interests. Examination is before judge of court issuing execution or before master appointed by court. Burden is on debtor to prove bona fides of any transfer of personal property within one year to his wife, any relative or person in confidential relation. Judge may order any property of judgment debtor not exempt from execution, in hands of either himself or any other person or due judgment debtor, to be applied toward satisfaction of judgment debt. Reasonable attorney's fees may be taxed against debtor. (Fla. Stat. 56.29). Circuit court has broad discretionary power in supplemental proceedings to enforce execution of judgment against defendant's property as substitute for creditor's bill in equity. (Fla. Stat. 56.29[9]; 47 So.2d 769). See also R. C. P. 1.560, providing for discovery in aid of execution.

Body Execution.

Capias ad satisfaciendum abolished. (Fla. Stat. 56.011).

8.06 EXEMPTIONS:

Generally exempt from legal process are: Damages for injuries or death in certain hazardous occupations (Fla. Stat. 769.05), proceeds and cash surrender value of life insurance and proceeds of annuity contracts (Fla. Stat. 222.13, 222.14), disability insurance benefits (Fla. Stat. 222.18) (unless policy or contract was effected for benefit of creditors), money paid into or out of, assets of, and income of: any qualified tuition program authorized by §529 of Internal Revenue Code (including Florida Prepaid College Trust Fund advance payment contracts and Florida Prepaid College Trust Fund participation agreements); health savings account or medical savings account authorized under §§220 and 223 of Internal Revenue Code; any Coverdell education savings account (educational IRA) established in accordance with §530 of Internal Revenue Code; any hurricane savings account established by insurance policyholder for residential property (equal to twice deductible sum of such insurance) (Fla. Stat. 222.22); firemen's pensions (Fla. Stat. 175.241), subsidy payments made to participants in municipal police officers' retiree health insurance subsidy program (Fla. Stat. 185.25), and certain pensions and funds of state and county employees (Fla. Stat. 122.15) and teachers (Fla. Stat. 238.15). (See also topic 8.09 Garnishment.)

All property in this state of judgment debtor where judgment is in favor of any state for failure to pay that state's income tax on benefits received from pension or other retirement plan is exempt. (Fla. Stat. 55.146).

Personal property to value of $1,000 exempt from forced sale or execution. This exemption inures to surviving spouse or heirs of owner of property. (Art. X, §4).

Debtor's interest in any professionally prescribed health aids for debtor or dependent of debtor exempt. Also exempt are $1,000 in value of a single automobile, up to $4,000 in other personal property if debtor does not claim homestead exemption, and debtor's interest in refund or credit received or to be received or traceable deposits in financial institution of debtors' interest in refund or credit pursuant to §32 of Internal Revenue Code, unless debt owed for child support or spousal support. (Fla. Stat. 222.25).

Debts Against Which Exemptions Not Allowed.

No property is exempt from sale for taxes or assessments or for the payment of obligations contracted for the purchase of said property.

Waiver of Exemption.

There may be no general waiver of exemption, but specific liens may be created, against which exemption may not be claimed. (c. 713).

Wages owed to resident head of family including wages which are deposited in bank accounts and which can be traced and identified as wages are generally exempt from all legal process (Fla. Stat. 222.11), but courts may remove or limit exemptions for payment of alimony or child support (Fla. Stat. 61.12). “Head of family” includes any unmarried, divorced, legally separated or widowed person who is providing more than one-half of support for child or other dependent. (Fla. Stat. 222.11). Exemption may be claimed by affidavit filed before issuing officer or notary public and by serving notice of same on creditor, who may deny same within two business days in which case issue is tried. (Fla. Stat. 222.12). Wage assignments to secure certain loans are not valid. (Fla. Stat. 516.17). See also topic 8.09 Garnishment.

8.07 FORECLOSURE:

See topic 8.13 Liens; category 20 Mortgages, topic 20.04 Mortgages of Real Property.

8.08 FRAUDULENT SALES AND CONVEYANCES:

Uniform Commercial Code adopted. (cc. 670-680). Bulk Sales Law repealed. See category 3 Business Regulation and Commerce, topic 3.09 Commercial Code.

Uniform Fraudulent Conveyance Act not adopted.

Uniform Fraudulent Transfer Act adopted and became effective on Jan. 1, 1988. (Fla. Stat. 726.101 et seq.). Transfer of property is fraudulent as to present or future creditor if made: (1) With actual intent to delay or defraud or (2) without receiving reasonably equivalent value in exchange and debtor making transfer was engaged in business for which remaining assets were unreasonably small or intended to incur debts beyond ability to pay as they became due. (Fla. Stat. 726.105). Transfer of property is fraudulent as to present creditor if made without receiving reasonably equivalent value in exchange for transfer and debtor making transfer was either insolvent at time or became insolvent as result of transfer. (Fla. Stat. 726.106). Transfer of property also fraudulent as to present creditor if made to insider for antecedent debt, debtor was insolvent at that time, and insider had reasonable cause to believe that debtor was insolvent. (Fla. Stat. 726.106).

Remedies.

Relief under Uniform Fraudulent Transfer Act includes: (1) Avoidance of transfer to extent necessary to satisfy creditor's claim; (2) attachment against asset transferred or other property of transferee; (3) injunction against further disposition of asset transferred or other property; (4) appointment of receiver to take charge of asset transferred or of other property of transferee; or (5) any other relief circumstances may require. (Fla. Stat. 726.108). Under common law, creditors of transferor may: (1) Place demand in judgment and levy on property allegedly fraudulently conveyed; (2) bring bill in equity to remove allegedly fraudulent conveyance as obstructing enforcement of judgment lien and have it set aside; or (3) bring action in nature of creditors bill to reach equitable assets. (106 Fla. 567, 143 So. 433).

Execution of Judgment.

When defendant in execution is on confidential terms with transferee of personal property, burden is on defendant to establish that transfer within one year prior to service of process was not done for purpose of hindering or defrauding creditors. (Fla. Stat. 56.29[6][a]).

Bulk Sales.

Uniform Commercial Code article on bulk sales repealed effective July 1, 1993.

Fraudulent Sale of Franchises.

Any sale of franchise wherein seller intentionally misrepresents chances for success, total investment, or efforts to sell more franchises than is reasonable to expect market area to sustain is unlawful. If violation is proven, violator subject to punishment for second degree misdemeanor. Prevailing party in civil action is entitled to all monies invested in franchise or distributorship and in court's discretion, attorneys' fees. Dept. of Legal Affairs and Dept. of Agriculture and Consumer Services may sue for injunctive relief against franchise plans in violation of this section. (Fla. Stat. 817.416).

False Pretenses and Frauds.

Fraudulent practices may be felony or misdemeanor and subject to injunction. (Fla. Stat. 817.02-817.567). Deceptive and Unfair Trade Practices Act prohibits unfair methods of competition, unconscionable acts and unfair or deceptive practices in conduct of trade or business. (Fla. Stat. 501.201-501.213). Persons who counterfeit, forge, alter or possess any ticket, token or paper designed for admission to any sports, amusements, concert or other facility offering services to public with intent to defraud may be guilty of first degree misdemeanor. (Fla. Stat. 817.355). Game promotions and contests conducted in connection with sale of consumer goods or services are strictly regulated by statute. (Fla. Stat. 849.094).

Credit Cards.

Person who knowingly makes false statement for purpose of procuring credit card, takes credit card from another without consent, retains possession of lost, mislaid or mistakenly delivered credit card, forges or alters credit card, or uses credit card for any fraudulent purpose is in violation of State Credit Card Crime Act (Fla. Stat. 817.57-817.685) and may be guilty of first degree misdemeanor or third degree felony.

Fraudulent Advertising.

Any advertising or other offer of “free” goods must contain clear and conspicuous, complete disclosure of any condition or restriction on acceptance of gift. Commissioner of Agriculture or Attorney General may sue for injunctive relief. (Fla. Stat. 817.415).

8.09 GARNISHMENT:

Garnishment is creditor's remedy whereby debtor's property, money or credits in possession or control of, or owing by another, garnishee, is applied to payment of debt pursuant to statutory process against debtor and garnishee. (Fla. Stat. 77.01). Writ of garnishment is available whenever suit brought to recover debt or judgment is recovered. Writ covers any debt due defendant by third person or any debt not evidenced by negotiable instrument that will become due absolutely through passage of time only to defendant by third person, and any tangible or intangible personal property of defendant in possession or control of third person. (Fla. Stat. 77.01). Disposable earnings of head of family are exempt from garnishment if less than $500 week; if greater than $500 per week then exempt unless garnishee agreed otherwise in writing. Where wages are garnished, continuing writ of garnishment must be issued to debtor's employer; employer entitled to collect $5 for first deduction and $2 each deduction thereafter for administrative costs. (Fla. Stat. 222.11; Fla. Stat. 77.0305). Federal law preempts conflicting provisions to extent maximum allowed to be garnished exceeds lesser of 25% of person's disposable weekly earnings or amount of such weekly earnings exceeding 30 times federal minimum hourly wage. (297 So.2d 6; 15 U.S.C. §1673; 29 C.F.R. §§870.1-.57). Method of applicable exemptions to personal property set forth in Fla. Stat. 222.061. Other exceptions set forth in c. 222. Garnishment not available in tort action prior to judgment. (Fla. Stat. 77.02).

Before judgment against defendant, writ of garnishment may be issued only by court or by clerk on order of court. To obtain writ, plaintiff, his agent or attorney must file in court where action is pending verified motion or affidavit alleging by specific facts: (1) Nature of cause of action, (2) amount of debt, (3) that debt is just, due and unpaid, (4) garnishment is not sought to injure either defendant or garnishee, and (5) belief that after execution is issued defendant will not have in his possession in county where action pending sufficient tangible or intangible personal property on which levy can be made to satisfy plaintiff's claim. Motion or pleading need not negative any exemptions of defendant. (Fla. Stat. 77.031[4]). Upon issuance, clerk mails defendant copy of writ which includes notice of defendant's right to immediate hearing for dissolution of such writ pursuant to §77.07. Except where attachment has issued, no prejudgment garnishment issues until plaintiff gives satisfactory bond of double debt and payable to defendant conditioned to pay defendant all costs, damages and attorneys' fees from improper garnishment. Informality of garnishment bond does not void bond or cause obligors to be discharged, even though garnishment is dissolved because of its informality. (Fla. Stat. 77.031).

After Judgment.

Before writ will issue after judgment, plaintiff, his agent or attorney must file motion (not verified nor negativing defendant's exemptions) stating amount thereof. Motion may be filed and writ issued either before or after return of execution. (Fla. Stat. 77.03).

Answer.

Garnishee must serve answer to issued writ on plaintiff within 20 days after service, stating whether garnishee is indebted at time of answer or service of writ, plus sufficient time not to exceed one business day for garnishee to act expeditiously on writ, or at any time between such times, and in what sum and what tangible or intangible personal property of defendant is in garnishee's possession or control at time of answer or service of writ, or at any time between such times, and whether garnishee knows of any other person indebted to defendant, or who may possess or control any property of defendant. Writ must also state amount in plaintiff's motion. (Fla. Stat. 77.04; Fla. Stat. 77.06[2]). On failure to answer as required, default is entered against garnishee. (Fla. Stat. 77.081[1]; R.C.P. 1.500[e]). Issued writ also requires garnishee to report in its answer and retain, subject to provisions of §77.19, any deposit, account, or tangible or intangible property in its possession or control. Answer of garnishee must state name and address of such others appearing to have ownership interest in property. (Fla. Stat. 77.06[2]). If garnishee doubts in good faith whether property or indebtedness is to be included in answer, garnishee may include same without liability. (Fla. Stat. 77.06[3]). Service of writ renders garnishee liable in any fiduciary or representative capacity held by him if specified in suit. (Fla. Stat. 77.06[4]).

Notice.

Within five days after service of garnishee's answer on plaintiff, or after time period for garnishee's answer has expired, plaintiff must serve copies of writ and answer on defendant and on any person disclosed in garnishee's answer to have any ownership interest in deposit, account or property controlled by garnishee. Plaintiff must also file and serve certificate of service and notice that recipients must move to dissolve writ within applicable time period in §77.07(2) or be defaulted and that there may be exemptions available as defense. (Fla. Stat. 77.055).

Dissolution of Writ.

By motion filed and served within 20 days after date indicated in certificate of service, defendant or any party with ownership interest in property may obtain dissolution of writ, unless plaintiff proves grounds upon which writ was issued and, unless, if prejudgment writ, there is reasonable probability that plaintiff will receive final judgment in underlying action. If motion to dissolve is not timely filed and served, court strikes motion. Court sets such motion for immediate hearing and if writ is dissolved action proceeds as if no writ had been issued. (Fla. Stat. 77.07). If plaintiff fails to file dismissal or motion for final judgment within six months after filing writ of garnishment, writ automatically dissolves and garnishee is discharged from further liability under writ. Plaintiff has right to extend writ for additional six months by serving garnishee and defendant notice of extension and filing certification of such service. (Fla. Stat. 77.07[5]).

Deposit Required.

Before issuance of writ of garnishment, party applying for it must deposit $100 in registry of court which must be paid to garnishee on its demand at any time after service of writ for payment or part payment of attorney's fee. On rendering final judgment court determines and taxes as costs garnishee's costs and expenses, including reasonable attorney's fee. Plaintiff may recover in this manner sums advanced and paid into registry of court, and if amount allowed by court is greater than amount of deposit, together with any offset, judgment for garnishee is entered against party against whom costs are taxed for deficiency. (Fla. Stat. 77.28). Garnishee may claim pay of a witness out of debt or property, or if none, from plaintiff. (Fla. Stat. 77.17).

Adverse Claims.

If any person other than defendant claims that debt due by garnishee is due to that person and not to defendant, or that property in hands or possession of any garnishee is that person's property and makes affidavit to that effect, court impanels jury to determine right of property between claimant and plaintiff unless jury is waived. If claim is interposed after levy on property, officer making levy returns execution with officer's levy thereon and affidavit of claimant to court from which execution issued, and proceedings held as in other cases of claims made to property taken on execution. (Fla. Stat. 77.16).

Discharge of Garnishment.

At any time before judgment, defendant may secure release of property by giving bond to be approved by clerk or by court if no clerk, lesser of double amount claimed plus interest and costs or double value of property, conditioned to pay up to value of property, any judgment recovered against defendant plus interest and costs. If garnishee admits indebtedness in excess of plaintiff's claim, garnishee may after motion with notice to plaintiff be released from responsibility for any indebtedness except sum deemed by court to be sufficient to satisfy plaintiff's claim plus interest and costs. (Fla. Stat. 77.24).

If plaintiff not satisfied with garnishee's answer, plaintiff may serve reply within 20 days thereafter denying allegations of answer. On failure of plaintiff to file reply, answer is taken as true, and on proper disposition of any assets disclosed garnishee is entitled to discharge from further liability on writ. (Fla. Stat. 77.061).

If no reply is served garnishee may surrender goods, chattels or effects of defendant in garnishee's possession to sheriff and may pay any money or debt into registry of court. In such event or if garnishee prevails in trial of any reply and after proper disposition of property disclosed by answer, court discharges garnishee from further liability under writ. (Fla. Stat. 77.082).

Judgment against garnishee on answer or after trial must be entered for amount of garnishee's liability determined by answer or trial, but not to exceed amount remaining unpaid on final judgment against defendant. (Fla. Stat. 77.083). After garnishee's default, on entry of judgment for plaintiff, final judgment is entered against garnishee for full amount of plaintiff's claim against defendant with interest and costs. No final judgment against garnishee can be entered before entry of, or in excess of, final judgment against original defendant with interest and costs. If claim of plaintiff is dismissed or judgment is entered against plaintiff, default against garnishee must be vacated and judgment for garnishee's costs entered. (Fla. Stat. 77.081[2]). Court may subpoena garnishee to inquire about garnishee's liability to or possession of property of defendant. (Fla. Stat. 77.083).

Earnings.

See topic 8.06 Exemptions.

8.10 HOMESTEADS:

Homestead owned by natural person is entitled to exemption from forced sale under process and no judgment, decree or execution is a lien thereon. (Const. art. 10, §4[a]; Fla. Stat. 196.031). Dependent spouse or dependent heirs are not necessary for homestead to apply. (531 So.2d 946). See category 21 Property, topic 21.16 Real Property.

Limitation of Value.

Only $1,000 of personal property is exempt. (Const. art. 10, §4[a][2]). See topic 8.06 Exemptions. No limitation on value of real property plus improvements.

Limitation of Area.

One hundred sixty acres of contiguous land if not in a municipality or one-half acre of contiguous land if in a municipality, but no homestead may be reduced in area, without owner's consent, by reason of subsequent inclusion in a municipality. (Const. art. 10, §4[a][1]).

Improvements on real property are within exemption except that exemption in a city or town does not extend to more improvements or buildings than the residence of owner or his family. (Const. art. 10, §4[a][1]).

Debts or Liabilities Against Which Exemption not Available.

Exemption does not extend to sale for taxes or assessments thereon or payment of obligations contracted for purchase, improvement or repair of property desired to be exempted, or obligations contracted for house, field or other labor performed on realty. (Const. art. 10, §4[a]). Exemption does not protect a property owner from a federal tax lien. (2003 U.S. Dist. LEXIS 3815).

Designation of homestead before levy is accomplished by recording in office of clerk of circuit court written statement, signed by person making statement designating property therein described as homestead. (Fla. Stat. 222.01[1]). When certified copy of judgment has been filed in public records pursuant to c. 55, person entitled to benefit of homestead exemption who has contract to sell or commitment from lender for mortgage on homestead may file notice of homestead in public records. (Fla. Stat. 222.01[2]).

Claim of exemption after levy and before day of sale is made by written notice under oath to officer making levy describing therein homestead property, and remainder only will be subject to sale. (Fla. Stat. 222.02).

Waiver or loss of exemption is possible only by abandonment (Fla. Stat. 196.061), alienation (Const., art. 10, §4) or annulment (Fla. Stat. 222.10), and waiver in promissory note or mortgage is unenforceable (89 So.2d 28). Debtor does not waive exemption by converting non-exempt assets into exempt homestead with intent to hinder, delay, or defraud creditors. (790 So. 2d 1018). Rental of homestead constitutes abandonment. (Fla. Stat. 196.061). See also category 22 Taxation, topic 22.15 Property Taxes.

Alienation.

Owner of homestead real estate, joined by spouse if married, may alienate homestead by mortgage, sale or gift, and, if married, may by deed transfer title to an estate by the entirety with spouse. (Const. art. 10, §4[c]).

Proceeds of sale are exempt to extent intended to be reinvested in another homestead within a reasonable time. (137 So.2d 201).

Rights of Surviving Spouse and Family.

Homestead exemption inures to benefit of surviving spouse or heirs of owner. (Const. art. 10 §4[b]). Homestead descends as intestate property and may not be devised if owner is survived by spouse or minor child, except that homestead may be devised to spouse of owner if there is no minor child (Fla. Stat. 732.4015); however, if non-owner spouse and lineal descendants survive, surviving spouse takes life estate with vested remainder to lineal descendants in being at death of decedent (Fla. Stat. 732.401). Homestead is not included in property subject to elective share. (Fla. Stat. 732.2105).

Exemption from Taxation.

See category 22 Taxation, topic 22.15 Property Taxes, subhead Exemptions.

Dower.

See category 13 Estates and Trusts, topic 13.07 Descent and Distribution.

Disclaimer.

See category 13 Estates and Trusts, topic 13.07 Descent and Distribution, subhead Disclaimer.

8.11 JUDGMENT NOTES:

See category 3 Business Regulation and Commerce, topic 3.02 Bills and Notes.

8.12 LEVY:

See topics 8.02 Attachment, 8.05 Executions.

8.13 LIENS:

Uniform Commercial Code adopted. (cc. 670-680). See categories 3 Business Regulation and Commerce, topic Commercial Code; Mortgages, topic Chattel Mortgages.

Waiver, Loss or Extinguishment.

Liens may be waived expressly or by operation of law. Possessory liens are extinguished by loss of possession. (131 Fla. 277, 179 So. 882). Presumption is against waiver unless intent is clear. (104 Fla. 93, 139 So. 209). Failure to bring action on statutory lien within time provided by law extinguishes it. (99 Fla. 1151, 128 So. 801). Lien may be released by filing bond in accordance with §713.76.

Statutory liens are provided as follows and are not governed by Uniform Commercial Code except for certain priority questions. (Fla. Stat. 679.333, .334).

Authorized marina may dispose of boat or vessel to satisfy possessory lien for storage fees, dockage fees, repairs, improvements, or other work-related storage charges by nonjudicial sale pursuant to provision in written lease where charges unpaid 120 days after notice and compliance with certain notice provisions. (Fla. Stat. 328.17).

For labor or services on personalty of another, on such personalty or that which is used in business, occupation or employment in which the labor or services are performed. (Fla. Stat. 713.58). Procedures provided for enforcement of lien created under Fla. Stat. 713.58 for services on aircraft (Fla. Stat. 329.51) and on motor vehicle (Fla. Stat. 713.585).

For labor on machines, newspaper or printing material and work in hotels, on such machines, newspaper or printing material, and on furniture, furnishings and belongings of such hotels. (Fla. Stat. 713.56).

For labor on logs and timber, on such logs and timber, and any article manufactured therefrom. (Fla. Stat. 713.57).

For labor on crops, on those cultivated or harvested. (Fla. Stat. 713.59).

For labor or services in ginning cotton. (Fla. Stat. 713.595).

For work in manufacturing or fabricating molds. (Fla. Stat. 713.596).

For labor on or for vessel, including masters, mates and members of the crew and stevedores, on such vessel or water craft. (Fla. Stat. 713.60). For materials or supplies furnished for construction of vessel or water craft, on such vessel or water craft. (Fla. Stat. 713.60).

For care and maintenance of horses and other animals, on such animals. (Fla. Stat. 713.65).

For rendering professional services to animal by veterinarian on such animals. (Fla. Stat. 713.655).

For materials furnished by ship chandler or storekeeper to ship, vessel, steamboat or water craft, on the same. (Fla. Stat. 713.64).

For manufacturing, altering or repairing anything of value, on such article or thing. (Fla. Stat. 713.61).

For furnishing logs, lumber, clay and other material for use in manufactory to be manufactured into articles of value, on such articles and those manufactured therefrom. (Fla. Stat. 713.62).

For furnishing locomotives or other engines, machines or parts to any railroad, telegraph or telephone line, mill, distillery, or other manufactory, on articles furnished. (Fla. Stat. 713.63).

For recovering, towing, or storing vehicles mounted on wheels, whether motorized or not, and vessels, in favor of person regularly engaged in such business, on such vehicle or vessel, provided that detailed notice provisions are complied with. (Fla. Stat. 713.78).

For recovering, towing, or storing mobile homes. (Fla. Stat. 713.785).

For interior design services. (Fla. Stat. 713.79).

For services of stallion and other breeding animals, upon the animal served and its get. (Fla. Stat. 713.70).

For loans or advances of money or property by factor, merchant or other person to aid in planting, farming, timber getting or other business, upon the products, provided consent to lien is executed by borrower and filed for record in county where farming, etc. business is conducted. (Fla. Stat. 713.71). See category 10 Documents and Records, topic 10.04 Records.

In favor of mobile home and recreational vehicle parks for rent due or advances of money or property, upon the personal property of the occupant. This lien may also be enforced by ejectment. (Fla. Stat. 713.77).

In favor of keepers of hotels, apartment houses, rooming houses and boarding houses, for board and lodging and for money advanced to guests or tenants, upon goods belonging to such guest or tenant. (Fla. Stat. 713.67-.691; held unconstitutional, 399 F. Supp. 1138 [1975]).

In favor of furnisher of feedstuffs and bedding to owner of racehorses, racing dogs or polo ponies, for price of such supplies for one year, on all animals consuming them, which lien is superior to all other liens, recorded or unrecorded. (Fla. Stat. 713.66).

For furnishing pest control, upon the real or personal property thereby improved. (Fla. Stat. 713.665).

In favor of Florida Board of Forestry, U. S. Government or other governmental authority, on lands covered by agreement between owner and such authority for prevention and control of fires and other forestry work, to extent of amount expended on behalf of, and not paid by, such owner. (Fla. Stat. 589.13-.17).

For labor performed or material furnished in connection with drilling or operating of any oil or gas well or pipeline. (Fla. Stat. 713.801-.825).

In favor of governing body of publicly owned airport, on aircraft landing there, for landing fees and other charges. (Fla. Stat. 329.40).

Factor's Liens.

See category 3 Business Regulation and Commerce, topic 3.09 Commercial Code.

Foreign Judgments.

Foreign judgment does not operate as lien until 30 days after mailing of notice by clerk. Applicability of any automatic stay is restricted. (Fla. Stat. 55.507).

RICO Lien.

During any civil proceeding under Florida RICO Act, investigative agency may file in any county RICO lien notice against any person, which creates lien in favor of state against any real property or beneficial interest then or thereafter owned by person in county where filed. (Fla. Stat. 895.07). RICO lien lasts six years unless renewed or terminated. (Fla. Stat. 895.08).

Department of Legal Affairs may apply ex parte to Circuit Court for order authorizing RICO lien against real property in certain instances. (Fla. Stat. 895.05[12]).

Acquisition of Statutory Lien.

Persons in privity with owner: As to owner, lien is acquired by performance of work or furnishing materials. (Fla. Stat. 713.74). No lien is acquired on personalty against purchaser or creditor without notice unless lienor has possession of property, but even then lien continues for only three months. (Fla. Stat. 713.74).

Persons not in privity with owner: Written notice must be delivered to owner stating indebtedness or cautionary notice may be given, thereafter same provisions apply as for persons in privity. (Fla. Stat. 713.75).

Enforcement of foregoing statutory liens may be by retention of possession of property not exceeding three months, or by suit in equity, ordinary suit at law, special proceeding at law or summary proceeding. (Fla. Stat. 85.011-.051). Proceedings to enforce must be commenced within 12 months from record of lien or performance of work or furnishing materials if lien exists without recording. (Fla. Stat. 85.051). Priority of such liens depends on time notice creating each was given or recorded, if recording is required. (Fla. Stat. 713.73). Lien for performing labor or services on motor vehicle (Fla. Stat. 713.58) may be enforced by sale of such vehicle, following compliance with detailed notice and hearing provisions (Fla. Stat. 713.585).

Satisfaction.

Clerk of Circuit Court is county recorder and is required to record notices or claims of liens, including federal liens. (Fla. Stat. 28.222). Whenever lien amount is fully paid, party to whom payment is made must execute and record written instrument acknowledging satisfaction and send recorded satisfaction to payer within 60 days, or be liable for any attorneys' fees and costs resulting from failure to do so. (Fla. Stat. 701.04).

Mechanics' Construction Liens.

Who may Acquire.

Architects, landscape architects, interior designers, engineers, or surveyors and mappers on real property improved by their services rendered in accordance with their contracts (Fla. Stat. 713.03); materialmen, laborers, contractors in privity with owner of real property have liens to extent of contract (Fla. Stat. 713.05); laborers, materialmen, subcontractors, “sub-subcontractors” not in privity who perfect their liens have liens to extent of contractor's contract with owner if lienor follows procedure of c. 713 (Fla. Stat. 713.06). (See also catchline Whether or not Lien Limited to Amount Due Principal Contractor, infra.)

Subdivision Improvements.

Any lienor who performs services of furnishing materials to real property, making it suitable as site for improvements, is entitled to lien on the real property. If activity is on dedicated or to be dedicated property, e.g., streets, lien is on abutting property and distributed pro rata among lots benefited. (Fla. Stat. 713.04).

Property Subject.

Improvement, for direct contract price of $2,500 or less, subjects owner only to liens of contractor or of materialman or laborer in privity with him. (Fla. Stat. 713.02[5]).

Lessor is not subject to liens for improvements contracted by lessee when lease or short form thereof that prohibits same is recorded, or where all of leases entered into by lessor on parcel of land prohibit such liability and notice meeting certain requirements is recorded. (Fla. Stat. 713.10).

Contract made by one spouse for property owned by other or by both is deemed to be made for both or other spouse unless objection is recorded within ten days after objecting spouse learns of contract. (Fla. Stat. 713.12).

In contract made by one without an interest in real property, lien attaches only to improvements which may be removed. (Fla. Stat. 713.11).

Except as provided above, liens extend only to right, title, and interest of person who contracts for improvement. (Fla. Stat. 713.10).

Notice of Commencement.

Owner or authorized agent, before actually commencing to improve real property or before recommencing an improvement after default or abandonment, must record notice of commencement and either post certified copy or notarized statement that notice of commencement has been filed along with copy thereof in protected conspicuous place on front of site. (Fla. Stat. 713.13[1]).

Notice must give adequate description of real property (including legal description and street address), general description of improvement, name and address of owner (also of fee simple title holder if different), name and address of contractor, name and address of surety on payment bond and amount of bond, (if obtained), name and address of any person making loan for construction of improvements, (if applicable), and name and address within State of person other than himself who may be designated by owner as person upon whom notices or other documents may be secured (service upon person so designated constitutes service upon owner). Owner has option to designate additional person to receive copies of lienor's notices and if owner does so, name and address of such person must be included in notice of commencement. (Fla. Stat. 713.13[1]).

If contract between owner and contractor named in notice of commencement expresses period of time for completion of construction greater than one year, notice of commencement must state that it is effective for period of one year plus any additional period of time. Any payments made by owner after expiration of notice of commencement are considered improper payments. Form for notices of commencement is set forth in statute. Copy of any bond must be attached at time of recordation of notice of commencement. Failure to attach copy of bond negates exemption provided in §713.02(6). However, if such bond exists but is not recorded, bond may be used to transfer any recorded lien except that of contractor by recordation and service of notice of bond pursuant to §713.23(2). (Fla. Stat. 713.13[1]). Giving of notice of commencement is effective upon filing in clerk's office. Owner must sign notice and no one else may be permitted to sign in his stead. (Fla. Stat. 713.13[1]).

Improvement described in notice of commencement must be commenced within 90 days after recording or notice is void. (Fla. Stat. 713.13[2]).

Recording of notice of commencement does not constitute lien, cloud or encumbrance on real property, but gives constructive notice that claims of lien under statute may be recorded and may take priority as provided in §713.07. Posting of copy does not constitute lien, cloud, or encumbrance on real property nor actual or constructive notice of any of them. (Fla. Stat. 713.13[3]).

Unless otherwise provided in notice of commencement, notice of commencement is not effectual in law or equity against conveyance, transfer, or mortgage of or lien on real property described in notice, or against creditors or subsequent purchasers for valuable consideration, after one year after date of recording. (Fla. Stat. 713.13[6]).

Lender must, prior to disbursement of any construction funds to contractor, record notice of commencement in clerk's office; however, lender is not required to post certified copy of notice at construction site. Posting of notice at construction site remains owner's obligation. Failure of lender to record notice of commencement renders lender liable to owner for all damages sustained by owner as result of failure. Whenever lender is required to record notice of commencement, lender must designate lender, in addition to others, to receive copies of notices to owner. Owner is given claim or right of action against lender for failure to record notice of commencement. (Fla. Stat. 713.13[7]).

Notice of commencement must be given before owner can properly pay any money on account of direct contract to lienors not in privity with owner. If description of property in notice is incorrect and error (except for clerical errors when description listed covers property where improvements are) adversely affects any lienor, payments made on direct contract are improperly paid as to that lienor. (Fla. Stat. 713.06[3][a]).

Authority issuing building permits must provide applicant with printed statement detailing notice requirement, construction lien law, and copies of form of notice of commencement. No liability of authority for failure to so provide. Reasonable fee may be assessed. (Fla. Stat. 713.135). In addition to any other information required by issuing authority, all building permit applications contain name and address of owner, name and address of contractor, description sufficient to identify real property to be improved, and number assigned to building permit by issuing authority. Issuing authority must verify that information in certified copy of notice of commencement consistent with information in building permit application. (Fla. Stat. 713.135). Issuing authority must verify that either certified copy of recorded notice of commencement or notarized statement that notice of commencement has been filed for recording, along with copy thereof, has been posted in accordance with Fla. Stat. 713.13. In absence of such verification, issuing authority must not approve inspection. (Fla. Stat. 713.135).

When Attach, Priority.

Liens for professional services (Fla. Stat. 713.03) and for subdivision improvements (Fla. Stat. 713.04) attach and take priority as of time of recordation of claim of lien (Fla. Stat. 713.07[1]).

All other permissible liens attach and take priority as of time of recordation of notice of commencement. If notice of commencement is not filed, liens attach and take priority as of time claim of lien is recorded. (Fla. Stat. 713.07[2]).

Any conveyance, mortgage, or demand recorded prior to time lien attaches, and any proceeds of any such mortgage (regardless of when disbursed), is prior to any lien. Any other conveyance, encumbrance or demand is inferior. (Fla. Stat. 713.07[3]).

Priorities among lien claimants are: (a) Laborers, (b) persons other than contractor, (c) contractor. (Fla. Stat. 713.06[4]). Each class must be satisfied in full in order. If funds are not sufficient to satisfy class, they are apportioned pro rata. (Fla. Stat. 713.06[4][b]). Any person required to serve notice under Fla. Stat. 713.06(2)(a) who fails to do so in required time has no lien and may only seek payments from and be paid by party with whom he contracts.

Notice of Termination.

Owner may terminate period of effectiveness of notice of commencement by executing, swearing to, and recording notice of termination containing: (a) same information as notice of commencement; (b) recording reference for and date of notice of commencement; (c) date as of which notice of commencement is terminated (may not be earlier than 30 days after notice of termination is recorded); (d) statement specifying that notice applies to all of real property subject to notice of commencement or specifying portion of property to which it applies; and (e) statement that all lienors have been paid in full. Owner may rely on contractor's affidavit given under §713.06(3)(d) (except with respect to lienors who have already given notice) in connection with recording notice of termination, but notice of termination must be accompanied by contractor's affidavit. Owner may not record notice of termination except after completion of construction, or after construction ceases before completion and all lienors have been paid in full or pro rata in accordance with §713.06(4). If owner or contractor, by fraud or collusion, knowingly makes any fraudulent statement or affidavit, they are liable to any lienor who suffers damages as result of filing of fraudulent notice of termination. Notice of termination is effective at later of 30 days after recording or date stated in notice of termination provided notice is served pursuant to §713.132(1)(f) on contractor and each lienor who has given notice. (Fla. Stat. 713.132).

Proceedings to Perfect Lien.

(1) All lienors not in privity, except laborers, as prerequisite to perfecting and recording lien must serve notice to owner giving: (a) lienor's name and address, (b) adequate description of real property, (c) nature of services or materials furnished or to be furnished. Sub-subcontractors and materialmen to subcontractors must serve copy of notice to owner on contractor as prerequisite to perfecting and recording lien. Materialmen to sub-subcontractors must serve copy of notice to owner on contractor and subcontractor of sub-subcontractor as prerequisite to perfecting and recording claim of lien. Materialman to sub-subcontractor must serve notice to owner on subcontractor if materialman knows name and address of subcontractor. Notice must be served not later than 45 days after commencing to furnish services or materials but, in any case, before date of owner's disbursement of final payment after contractor's affidavit has been furnished to owner. This notice is distinct from requirement for claim of lien, infra. (Fla. Stat. 713.06[2][a]).

(2) All lienors, including laborers and persons in privity with owner must record a sworn claim of lien which shows: (a) Name and address, (b) name of person with whom he contracted or by whom employed, (c) labor, services, materials furnished and contract price or value, (d) description of real property, (e) name of owner, (f) dates first and last item furnished, (g) amount unpaid. If claim is by person not in privity with owner, date and method of service of notice to owner must be shown in claim (Fla. Stat. 713.08[l]); (if claim is by person not in privity with contractor or subcontractor, date and method of service on contractor or subcontractor must be shown). Claim may be recorded any time during work or not later than 90 days after final furnishing of labor or materials or services by lienor. Time period for recording measured from last day of furnishing labor, services, or materials by lienor and not measured by other standards, such as issuance of certificate of occupancy or certificate of substantial completion. Claim must be recorded in clerk's office in each county in which real property affected is situated. (Fla. Stat. 713.08[5]).

Claim must be served on owner or authorized agent within 15 days after recording, or is voidable to extent delay is prejudicial. (Fla. Stat. 713.08[4][c]).

Service may be either in manner provided by law for service of process or by certain special methods. (Fla. Stat. 713.18).

Whether or not Lien Limited to Amount Due Principal Contractor.

(1) After notice has been given to owner, when any payment becomes due on direct contract except final payment, owner must see to payment of all claimants giving notice. If amount due under contract is less than total amount of claims, lienors properly giving notice under Fla. Stat. 713.06(2)(a) are to be paid pro rata (see catchline When Attach, Priority, supra). (Fla. Stat. 713.06[3][c]).

(2) Before final payment, contractor must give affidavit to owner stating that all lienors have been paid or showing amounts due lienors. See statute for form of affidavit. Owner must retain only “the final payment due under the direct contract” until contractor furnishes this affidavit. Owner must apply this fund first to make full payment to remaining unpaid lienors who have properly served notice and then to those unpaid lienors who are disclosed by affidavit and whose time for serving notice has not expired, all such payments to extent of unpaid sums under direct contract either in full or pro rata. Proper disbursement limits contractor's liability to amount of direct contract. (Fla. Stat. 713.06[3][d]).

Payment Bond.

Owner may require contractor to furnish payment bond (form described in Fla. Stat. 713.23), with copy of bond to be posted at construction site and recorded in county public records. Failure to record bond voids exemption from mechanics' liens. Copy of payment bond must be attached to notice of commencement when it is recorded. Upon receipt, owner is exempt from liabilities under c. 713 (construction/mechanics' and miscellaneous liens), and c. 85 (statutory liens) except for posting notice of commencement, and lien of contractor. (Fla. Stat. 713.02[6]). Owner is only exempt from provisions of c. 713 Part I (Construction/Mechanics' Liens) as to that direct contract under which bond is furnished. Lienors, except laborers, not in privity with contractor must serve notice on contractor within 45 days from commencing work, or 45 days from written notice of existence of fund by way of its inclusion in notice of commencement or otherwise, that he will look to bond for protection on his work. Any lienor not in privity with contractor must serve notice on contractor, if he has not been paid, not later than 90 days after final furnishing of labor, services or materials by lienor. Unless both notices served, no action against contractor may be maintained. Waiver and release of lien pursuant to Fla. Stat. 713.20 constitutes waiver and release in like amount of lienor's right to make claim against payment bond. (Fla. Stat. 713.23[5]).

Conditional Payment Bond.

If contractor's written contractual obligation to pay lienors is expressly conditioned upon and limited to payments made by owner to contractor, duty of surety to pay lienors will be coextensive with duty of contractor to pay, if (i) bond is listed in notice of commencement for project as conditional payment bond and is recorded together with notice of commencement for project prior to commencement of project and (ii) words “conditional payment bond” are contained in title of bond at top of front page, and bond contains legend specified in §713.245 on front page. (Fla. Stat. 713.245[1]). No action may be brought against contractor or surety after one year from date lien is transferred to bond. (Fla. Stat. 713.245[2]). Owner's property not exempt from liens filed under this section, and lienors must fulfill requirements contained in section in order to preserve and perfect lien rights. (Fla. Stat. 713.245[3]). Within 90 days after claim of lien is recorded for labor, services, or materials for which contractor has been paid, owner or contractor may record notice of bond as specified in §713.23(2), together with copy of bond, and sworn statement entitled “Certificate of Payment to the Contractor” in form set forth in §713.245(4). Any notice of bond recorded more than 90 days after recording of claim of lien has no effect as to that lien unless owner, contractor and surety all sign notice of bond. (Fla. Stat. 713.245[4]). Clerk serves copy of notice, bond and certificate on contractor, surety and lienor, certifies to service, records notice, bond and certificate, and collects fee. (Fla. Stat. 713.245[5]). Contractor may join in certificate of payment to contractor at any time by recording sworn statement entitled “Joinder in Certificate of Payment” in form specified in §713.245(6). Clerk serves joinder in certificate of payment on owner, surety and lienor, certifies to service, records joinder, and collects fee. (Fla. Stat. 713.245[7]). If contractor disputes certificate of payment to contractor, contractor must record, not later than 15 days after date clerk certifies service of certificate, sworn statement entitled “Notice of Contest of Payment” in form set forth in §713.245(8). Clerk serves copy of notice to contest payment on owner, lienor and surety, certifies service, records notice, and collects fee. (Fla. Stat. 713.245[9]). If contractor has signed certificate of payment to contractor or joinder in certificate, or contractor fails to record notice of contest of payment within 15 days after clerk certifies service of certificate of payment to contractor signed by owner, lien transfers to bond to extent of payment specified in certificate of payment to contractor. Surety may assert all claims or defenses of owner regarding validity of claim of lien or of contractor regarding amount due lienor. (Fla. Stat. 713.245[10]). If notice of contest of payment specifies that contractor has been paid portion of amount due lienor, lien transfers to bond to extent of payment specified in notice of contest of payment. Surety may assert all claims or defenses of owner regarding validity of claim of lien or of contractor regarding amount due lienor. (Fla. Stat. 713.245[11]). If there are any material misstatements of fact made by owner or contractor in any certificate of payment to contractor, or by contractor in any notice of contest of payment, person making material misstatement is guilty of felony of third degree. Penalties apply individually and to business entity if false certificate is signed in representative capacity. (Fla. Stat. 713.245[12]). Certificate of payment to contractor and notice of contest of payment must be signed by owner or contractor individually if he is natural person, by general partner if owner or contractor is limited partnership, by partner if owner or contractor is general partnership, by president or vice-president if owner or contractor is corporation, or by any authorized agent if owner or contractor is any other type of business entity. (Fla. Stat. 713.245[13]). In action to enforce lien, owner not to be considered prevailing party solely because lien is transferred to conditional payment bond after action to enforce lien is brought. (Fla. Stat. 713.245[14]).

Single claim is sufficient for most improvements to multiple units that are part of single project. (Fla. Stat. 713.09).

Duration.

Lien continues for one year from recordation of claim, unless within that time action to enforce lien is commenced in court of competent jurisdiction. Owner can shorten to 60 days by filing notice of contest of lien. (Fla. Stat. 713.22).

Waiver and Release.

Acceptance of unsecured note is not waiver unless expressly so stated in writing. Release may be in whole or in part of lien or whole or part of real property covered. Right to claim lien may not be waived in advance and may be waived only to extent of services furnished. This section also includes form for partial release of lien. (Fla. Stat. 713.20[2][4]).

Discharge may be by properly executed and recorded: (1) Satisfaction of lien, (2) failure to bring action to enforce lien within one year, (3) recording in clerk's office original or certified copy of judgment or final decree, (4) order of circuit court requiring lienor to sue on lien within 20 days. (Fla. Stat. 713.21).

Enforcement is in equity in circuit court by foreclosure and sale. Any venue provision in contract for improvement to real property which requires legal action involving resident contractor, subcontractor, sub-subcontractor or materialman to be brought outside state is void as matter of law. (Fla. Stat. 47.025). Deficiency decree can be obtained. (Fla. Stat. 713.28[3]). Claim of lien can be transferred from real property to other satisfactory security deposited with clerk. (Fla. Stat. 713.24). Relief is cumulative to action at law or other existing remedies. (Fla. Stat. 713.30). Prevailing party in action to enforce mechanic's lien is entitled to reasonable attorney's fees. (Fla. Stat. 713.29). Time period for service of notice of nonpayment, bringing action against contractor or surety, recording claim of lien measured from last day of furnishing labor, services, or materials by lienor and not measured by other standards such as issuance of certificate of occupancy or issuance of certificate of substantial completion. (Fla. Stat. 255.05, 713.08, 713.23).

Misapplication of Funds.

Person receiving payment on account of improving real property must apply such portion of payment to payment of all amounts due and owing for services, labor or materials which were furnished for improvement prior to receipt of payment (however payment may be withheld if in accordance with terms of contract or pursuant to bona fide dispute regarding amount due for services, labor or materials). Any person knowingly and intentionally failing to comply with this requirement is guilty of misapplication of construction funds, punishable as felony, degree of felony depending upon amount of payments misapplied. Permissive inference that person knowingly and intentionally misapplied construction funds created when valid lien recorded against property; person who ordered labor, services, or materials has received sufficient funds to pay; and person has failed to remit payment for at least 45 days from receipt of funds. This section does not apply to mortgage bankers or their agents, servants or employees for their acts in usual course of business of lending or disbursing mortgage funds. (Fla. Stat. 713.345). Person willfully making or furnishing affidavit, waiver or release of lien, or other document containing false statement, relied upon, commits perjury. (Fla. Stat. 713.35).

Public Works.

Contractor for public building or other public work must give bond for prompt payment of all persons supplying labor, material or supplies used in prosecution of work. Bond must state name and principal address of both principal and surety and must contain description of project sufficient to identify it. Bond must be in amount equal to awarded contract price and supplied by authorized surety company; except where contract price is $25,000 or less, $25,000 security may be in other forms. No bond required if work for state and contract $100,000 or less; bond at Department of Management Services' option if $100,000-$200,000. Claimant, except laborer, not in privity with contractor and who has not received payment for labor, materials or supplies, must have, in order to bring action against contractor or surety, furnished contractor with notice before commencing or not later than 45 days after commencing to furnish labor, materials or supplies that he intends to look to bond for protection, and must deliver to contractor and surety within 90 days after performance of labor or after complete delivery of materials or supplies, written notice of such performance or delivery and of nonpayment. Notice of nonpayment may be served at any time during progress of work or thereafter but not before 45 days after first furnishing of labor, services, or materials, and not later than 90 days after final furnishing of labor, services, or materials by claimant; with respect to rental equipment, not later than 90 days after date that equipment was last on job site available for use. Action must be brought within one year from performance of labor or completion of delivery of materials or supplies. Claimant may not waive in advance his right to bring action under bond against surety. (Fla. Stat. 255.05; Fla. Stat. 337.18). Suits at law and equity may be brought against public authority on any contract claim arising from breach of express provision or implied covenant of written agreement or written directive issued by public authority pursuant to written agreement; no liability based on oral modification of written contract or written directive.

Special Situations.

Mechanics' Construction Lien Law deals with numerous special situations, including notice of delivery requirements for assignment of lien, abandonment and recommencement of project, priority of claims in unused materials, and running accounts. (Fla. Stat. 713.01-713.37).

Attachment Lien.

See topic 8.02 Attachment.

Attorney's Lien.

See category 18 Legal Profession, topic 18.01 Attorneys and Counselors.

Collateral Security.

See topic 8.15 Pledges.

Execution Lien.

See topic 8.05 Executions.

Judgment Lien.

See category 5 Civil Actions and Procedure, topic 5.15 Judgments.

Landlord's Lien.

See category 21 Property, topic 21.10 Landlord and Tenant.

Liens on Exempt Property.

See topic 8.06 Exemptions.

Liens on Homestead.

See topic 8.10 Homesteads.

Real Estate Mortgage Lien.

See category 20 Mortgages, topic 20.04 Mortgages of Real Property.

Tax Lien.

See category 22 Taxation, topic 22.15 Property Taxes, subhead Liens.

8.14 MECHANICS' LIENS:

See topic 8.13 Liens.

8.15 PLEDGES:

Uniform Commercial Code adopted. (cc. 670-680). See category 3 Business Regulation and Commerce, topic 3.09 Commercial Code.

Collateral Security.

Person selling collateral security before debt becomes due and without authority of depositor is punishable by fine or imprisonment. (Fla. Stat. 818.04).

8.16 RECEIVERS:

Receivers may be appointed to take custody of property or funds in dispute for purpose of preserving, managing, and/or properly disposing of such property at direction of court. (See e.g. Fla. Stat. 658.79.)

Jurisdiction.

Where property is located in more than one judicial circuit, application for receiver must be made in circuit court in which principal place of business, residence or office of defendant is located. (Fla. Stat. 47.031). Thereafter, court appointing receiver has jurisdiction over entire property for purposes of that action. (Fla. Stat. 47.031).

Proceedings.

Receiver appointed in accordance with rules R.C.P. 1.610 and 1.620, relating to injunctions and receivers, respectively.

Qualification.

Bonds of receivers may be required by chancellor under his general equity jurisdiction. See R.C.P. 1.620; R.C.P. 1.620(c).

Eligibility and Competency.

Receiver must be indifferent as between parties to dispute, as unbiased as court for whom he acts. (49 So. 502). Short of special circumstances or agreement between parties, party to cause will not normally be appointed receiver.

Powers and Duties.

Must file, in clerk's office, inventory under oath, of property under receiver's control within 20 days of appointment. Must file, unless court orders otherwise, every three months, inventory and accounting. (R.C.P. 1.620[b]). If receiver fails to so file, court must order filing and require receiver to pay expenses of order and proceeding from own funds. (R.C.P. 1.620[b]).

Compensation.

Duly authorized expenses and reasonable compensation are otherwise awarded by court from corpus of or income from property in question. (56 So. 699). Such costs and expenses have preference even over secured claims.

Discharge.

Upon completion of duties or upon showing of good cause, receiver is discharged by court.

Liquidators.

Financial Services Commission Office of Financial Regulation may appoint liquidator of state bank or trust company. (Fla. Stat. 658.79). See category 3 Business Regulation and Commerce, topic 3.01 Banks and Banking.

Insurance Companies.

Under “Insurer's Rehabilitation and Liquidation Act”, Dept. of Insurance is appointed receiver for insolvent insurer, upon application of Dept. (Fla. Stat. 631.061).

8.17 REDEMPTION:

See topic 8.05 Executions; categories 20 Mortgages, topic Mortgages of Real Property; Taxation, topic Taxes.

8.18 SUPPLEMENTARY PROCEEDINGS:

See topic 8.05 Executions.

8.19 TRUSTEE PROCESS:

See topic 8.09 Garnishment.

8.20 USURY:

See category 3 Business Regulation and Commerce, topic 3.19 Interest.

9 DISPUTE RESOLUTION

9.01 ALTERNATIVE DISPUTE RESOLUTION:

Mandatory (Alternative) Dispute Resolution.

Referral by Presiding Judge.

Presiding judge must, upon request of one party, refer to mediation (process whereby neutral third party facilitates resolution of dispute [Fla. Stat. 44.1011(2)]) any filed action for monetary damages, providing requesting party is willing and able to pay costs of mediation or costs can be equitably divided between parties, unless action is landlord and tenant dispute that does not include claim for personal injury, action is filed to collect debt, action is claim of medical malpractice, action is governed by Florida Small Claims Rules, court determines action is proper for referral to nonbinding arbitration, parties have agreed to binding arbitration, expedited trail, or voluntary trial resolution (Fla. Stat. 44.102). Bond estreatures (time during which case is held in abeyance pending forfeiture of bond), habeas corpus and extraordinary writs, bond validations, civil or criminal contempt or other matters specified by administrative order of chief judge in circuit may not be referred to mediation or arbitration. (R.C.P. 1.710[b]; R.C.P. 1.800). Judge may refer to arbitration (process whereby neutral third person or panel considers facts and arguments and renders decision which may be binding or nonbinding) any matter for which mediation not required under Fla. Stat. 44.102.

United States District Courts in Florida have also established court annexed mediation and arbitration processes. 16.2, General Rules of the United States District Court for the Southern District of Florida; cc. 8 and 9, Rules of the United States District Court for the Middle District of Florida; Civil Justice Expense and Delay Reduction Plan of the United States District Court for the Northern District of Florida.

Voluntary (Alternative) Dispute Resolution.

Stipulation.

Two or more opposing parties to any contested civil matter may file written stipulation to mediate or submit to voluntary binding arbitration or voluntary trial resolution of any issue between them, except for constitutional issues, at any time. (R.C.P. 1.700[a]; Fla. Stat. 44.104[1]). Court must incorporate stipulation into its order of referral. Filing application for binding arbitration or voluntary trial resolution tolls running of applicable statute of limitations. (Fla. Stat. 44.104[6]).

Two or more parties may agree in writing to submit to arbitration any controversy existing at time of agreement or include in written contract provision for settlement by arbitration any future controversy relating to contract. (Fla. Stat. 682.02).

Mediation.

See subhead Mandatory (Alternative) Dispute Resolution, supra and R.C.P. 1.700-1.750 and 44.102.

Voluntary Binding Arbitration and Voluntary Trial Resolution.

Application for voluntary binding arbitration or voluntary trial resolution filed with and fees paid to clerk of court. (Fla. Stat. 44.104[5]). Within ten days of request for binding arbitration or voluntary trial resolution, court provides for appointment of arbitrator(s) or trial resolution judge. Court appoints arbitrator(s) and resolution judge as prescribed in stipulation providing for method of appointment, however, in absence of agreement or agreed method fails, court appoints arbitrator(s) or resolution judge. (Fla. Stat. 44.104[2] & [4]). Arbitrators and resolution judge set time and place for hearing (Fla. Stat. 44.104[4]), and Chief Arbitrator or resolution judge has power to administer oaths, conduct proceedings and issue subpoenas for witnesses and production of documents (Fla. Stat. 44.104[7]). Florida Rules of Evidence apply to proceedings. (Fla. Stat. 44.104[9]). Hearing procedures are as agreed by parties before arbitration; in absence of agreement, as established by Court. (R.C.P. 1.830[a]). Record and transcript may be made and used in subsequent proceedings. (R.C.P. 1.830[b]). Compensation is as set forth in agreement or as set by court in absence of agreement. (Fla. Stat. 44.104[3]; R.C.P. 1.830[a]). Majority of arbitrators conducting hearing may decide any question and render decision. (Fla. Stat. 44.104[8]). Arbitrator(s) render majority decision and notify parties in writing of decision within ten days of final adjournment of hearing. (R.C.P. 1.830[c]). Trial resolution judge conducts hearing and may determine any question and render final decision. Voluntary binding arbitration or voluntary trial resolution not applicable to child custody, visitation or support disputes or to rights of third party not party to arbitration or voluntary trial resolution when third party would be indispensable party if dispute were resolved in court or when third party notifies chief arbitrator or trial resolution judge that third party would be proper party if dispute were resolved in court, that third party intends to intervene in action in court, and that third party does not agree to proceed under Fla. Stat. 44.104. (Fla. Stat. 44.104[14]).

Alternative Dispute Resolution Jurisdictional Bodies/Commissions.

Mediators regulated by mediator qualifications board pursuant to Florida Rules for Certified and Court Appointed Mediators, Fla. R. Certified & Ct. App'ted Med. 10.200, with right of review by Florida Supreme Court pursuant to Fla. R. Certified & Ct. App'ted Med. 10.290.

9.02 ARBITRATION AND AWARD:

Forms and Requisites of Submission.

Party to agreement for arbitration subject to Florida Arbitration Code claiming neglect or refusal of another party to comply therewith may apply to court for order directing parties to proceed with arbitration. (Fla. Stat. 682.03[1]). Code does not apply to agreement or arbitration or award thereunder in which it is stipulated Code does not apply. (Fla. Stat. 682.02).

Judgment on Award.

Upon granting of order confirming, modifying or correcting award, judgment or decree is entered and is enforced as any other judgment or decree. (Fla. Stat. 682.15).

Enforcement.

Appeal of voluntary binding arbitration decision must be taken to circuit court within 30 days after service upon parties and is limited to review of record of: (a) arbitrator(s) alleged failure to comply with applicable rules of procedure or evidence; (b) arbitrator(s) alleged partiality or misconduct prejudicing right of any party; or (c) whether result is contrary to Florida or U.S. Constitutions. Harmless error doctrine applies and no further appeal permitted unless constitutional issued presented. (Fla. Stat. 44.104[10]; R.C.P. 1.830[c]).

Any party may enforce final decision rendered in voluntary trial resolution by filing petition in circuit court. Upon entry of final judgment by circuit court, any party may appeal to appropriate appellate court. Factual findings determined in voluntary trial not subject to appeal. (Fla. Stat. 44.104[11]). If no appeal is taken, decision referred to judge who may enter all orders and judgments required to conform to terms of decision. (Fla. Stat. 44.104[13]; R.C.P. 1.830[c]).

Mandatory Arbitration.

Court-ordered, nonbinding arbitration must be conducted in accordance with rules of practice and procedure. (Fla. Stat. 44.103[1]). In absence of agreement of parties, court determines number of arbitrators and designates them within 15 days of order of referral. (R.C.P. 1.810[a]). Cases assigned to arbitration assigned to arbitrator or to panel of three arbitrators from list of qualified persons maintained by Chief Judge of circuit. (R.C.P. 1.810[a]; Fla. Stat. 44.103[3]). Chief Judge of circuit sets procedures for determining time and place of hearing and other procedures. (R.C.P. 1.820[a]). Chief Arbitrator has authority to commence and adjourn arbitration hearing and carry out other duties prescribed by law, and may issue instructions for conduct of hearing which may be enforced by court order, administer oaths, conduct proceedings and issue subpoenas for witnesses and production of documents. (R.C.P. 1.820[a]; Fla. Stat. 44.103). R.C.P. 1.820 and administrative orders provide for conduct of arbitration hearing, presentation of evidence.

Powers of Arbitrators.

Chief arbitrators or trial resolution judge may conduct proceedings, issue subpoenas for witnesses and for production of books, records, documents and other evidence; administer oaths; and permit depositions. (Fla. Stat. 682.08; Fla. Stat. 44.104[7]).

Completion of Arbitration.

Arbitration must be completed within 30 days of first arbitration hearing unless extended by court order, but no extension exceeding 60 days from first hearing date. (R.C.P. 1.820[g]). Arbitrator(s) render majority decision upon completion and notify parties in writing of decision within ten days of final adjournment of hearing. (R.C.P. 1.820[g]). Decision and original of any hearing transcripts sealed and filed with clerk of court. (R.C.P. 1.820[g]). Arbitration decision final unless party files de novo motion for new trial within 20 days of service of decision on parties. (Fla. Stat. 44.103[5]; R.C.P. 1.820[h]). Arbitration decision not made known to judge if motion for trial is filed. (Fla. Stat. 44.103[5]). If motion for trial not timely made, decision referred to judge who may enter all orders and judgments required to conform to terms of decision. Orders are enforceable pursuant to contempt powers of court. (Fla. Stat. 44.103[5]). Upon motion made by either party within 30 days after entry of judgment, if trial de novo is not favorable to party who filed, that party may be assessed arbitration costs, court costs, other reasonable costs including attorney's fees, investigation, testimony and expert expenses incurred after arbitration hearing. (Fla. Stat. 44.103[6]).

Sanctions for Failure to Appear at Arbitration.

When party fails to appear for arbitration hearing, hearing may commence and decision based upon facts and circumstances presented may be rendered. (R.C.P. 1.820[e]).

Rescission.

Arbitration agreement complying with statute is valid, enforceable and irrevocable. (Fla. Stat. 682.02).

Florida International Arbitration Act governs arbitration between two or more persons at least one of whom is nonresident of U.S. or two or more residents if dispute involves contract, property or investment outside U.S. or bears some other relation to foreign country. (c.

684).

Uniform Arbitration Act Adoption/Deviation.

Uniform Arbitration Act adopted. (Florida Arbitration Code, Fla. Stat. 682.01-.22).

Jurisdictional Arbitration Acts.

Arbitrators serve at pleasure of Chief Judge, who is responsible for enforcing rules of conduct of arbitrators appointed pursuant to c. 44. (Fla. R. Ct. App'ted Arb. 11.130).

Credentials of/Qualifications of/Standards for Arbitrators.

Arbitrators must be members of The Florida Bar, except where otherwise agreed by parties. Chief Arbitrator must have been member of The Florida Bar for at least five years. Individuals who are not members of The Florida Bar may serve as arbitrators only on arbitration panel and then only upon written agreement of all parties. Florida Rules for Court-Appointed Arbitrators, 11.010. All arbitrators must attend four hours of training in program approved by Florida Supreme Court (but parties not precluded from agreeing to use services of arbitrator who has not completed required training). Any former Florida trial judge is exempt from training requirements upon submission of documentation of such experience to Chief Judge. Supreme court or chief justice may grant waiver of training requirement to any group possessing special qualifications which obviate necessity of such training. (Fla. R. Ct. App'ted Arb. 11.020).

Upon court's determination, cases assigned to arbitration assigned to arbitrator panel of three arbitrators from list of qualified persons maintained by Chief Judge of circuit. (R.C.P. 1.810[a]). Court determines number of arbitrators and designate them within 15 days after service of order of referral in absence of agreement by parties. Arbitrators compensated in accordance with rules adopted by Supreme Court. Arbitrators compensated by parties may be compensated partially or fully from state funds upon finding by court that party is indigent. Prior to approving use of state funds to reimburse arbitrator, court must ensure that party reimburses portion of total cost that party is immediately able to pay and agrees to payment plan that will fully reimburse state for balance. (Fla. Stat. 44.103[3]).

Trial resolution judge must be member in good standing of The Florida Bar for more than five years.

9.02A MEDIATION:

Jurisdictional Mediation Acts.

Mediation Procedures.

Court-ordered mediation must be conducted in accordance with rules of practice and procedure. (§44.102[1]). Parties must agree upon certified or qualified mediator within ten days of order of referral (R.C.P. 1.720[f][1]) and if agreement is not reached, within ten days of expiration of selection period, plaintiff must file notice of non-agreement and court appoints certified mediator. (R.C.P. 1.720[f][2]; Fla. Stat. 44.102[4]). R.C.P. 1.720(f)(3) provides for appointment of substitute mediators in same manner. §44.102(5), R.C.P. 1.720(g) and administrative rules of court govern compensation of mediators. Mediator controls mediation and procedures to be followed. (R.C.P. 1.720[d]). Unless otherwise ordered, first mediation conference or arbitration hearing held within 60 days of order of referral. (R.C.P. 1.700[a][1]). Notice of conference date, time and place must be provided within 15 days after designation of mediator or arbitrator, unless order of referral specifies such information. (R.C.P. 1.700[a][2]). Mediation must be completed within 45 days of first mediation conference unless extended by court order or parties' stipulation. (R.C.P. 1.710[a]). However, mediator may adjourn conference at any time and may set times for reconvening notwithstanding above rule. (R.C.P. 1.720[c]). Time for completing mediation is tolled during any period in which mediation is interrupted pending resolution of party's motion for interim or emergency relief during mediation, which motion may be filed at any time. (R.C.P.1.720[a]). Absent court order or decision of mediator, mediation continues pending disposition of motion. (R.C.P. 1.720[a]).

Dispensing With Mediation.

Within 15 days of order of referral, party may move to dispense with mediation or arbitration if: same parties have previously mediated or arbitrated same issue pursuant to Florida law; issue presents question of law only; order of referral violates rules relating to issues excluded from mediation (R.C.P. 1.700[b]) or arbitration (R.C.P. 1.800) or for other good cause shown (R.C.P. 1.700[b]).

Deferring Mediation.

Within 15 days of order of referral, party may move to defer mediation or arbitration. Motion must set forth in detail facts and circumstances supporting deferral and be set for hearing prior to conference date. Mediation or arbitration is tolled until disposition of motion. (R.C.P. 1.700[c]).

Sanctions for Failure to Appear at Mediation.

Upon motion, sanctions against party failing to appear for duly noticed mediation conference, including award of mediator and attorneys' fees and other costs, may be imposed. (R.C.P. 1.720[b]). Party is deemed to appear upon presence of party or its representative with full settlement authority; party's counsel of record; representative or insurance carrier for any insured party with full authority to settle up to lesser of amount of plaintiff's last demand or policy limits. (R.C.P. 1.720[b]). R.C.P. 1.720(b) also defines presence of public entity of state.

Communication With Parties at Mediation.

Mediator may consult privately with any party or its counsel. (R.C.P. 1.720[e]). Party may communicate privately with its counsel. (R.C.P. 1.720[d]). All written communications in mediation proceeding, other than executed settlement agreement, are exempt from requirements of c. 119.

Completion of Mediation.

If agreement is reached, it must be written and signed by all parties and their counsel, if any. Agreement may be filed and if required by law must be filed. Where agreement is not filed, stipulation of dismissal is filed. (R.C.P. 1.730[b]). Where no agreement is reached, mediator reports lack of agreement to court without comment or recommendation. With parties' consent, report may indicate other pending matters. (R.C.P. 1.730[a]). Sanctions may be imposed in event of breach or failure to perform under agreement. (R.C.P. 1.730[c]). §44.102(5) provides for tolling of certain deadlines relating to offers of settlement and demands for judgment during mediation.

County Court Mediation.

Small claims cases pending in Florida county courts are governed by R.C.P. 1.750 and control over conflicting provisions in R.C.P. 1.700-1.730.

Family Mediation.

Issues in marriage dissolution and post-dissolution proceedings and in domestic proceedings between unmarried parents governed by F.L.R.P. 12.740.

Credential of/Qualifications of/Standards for Mediators.

Mediators must adhere to highest standards of integrity, impartiality, and professional competence. Mediator must not accept any engagement which would compromise mediator's integrity. Mediator must maintain professional competence in mediation skills including staying informed of and abiding by all statutes, rules and administrative orders, continuing to meet certification requirements if certified, and regularly engaging in education activities promoting professional growth. Mediator must decline appointment when case is beyond mediator's competence. (Fla. R. Certified & Ct. App'ted Med. 10.300-10.680).

Education and training requirements for county court mediators, family mediators, circuit court mediators, and dependency mediators set forth in Fla. R. Certified & Ct. App'ted Med. 10.100.

10 DOCUMENTS AND RECORDS

10.01 ACKNOWLEDGMENTS:

Uniform Acknowledgments Act not adopted, but provisions are similar to Uniform Acknowledgments Act.

To entitle any instrument concerning real property to be recorded, except secured transactions under Uniform Commercial Code, execution must be acknowledged by party executing it, proved by subscribing witness to it, or legalized or authenticated by civil-law notary or notary public who affixes his official seal. (Fla. Stat. 695.03, 695.032). Acknowledgment may be taken by following officers (Fla. Stat. 695.03):

Within State.

Generally: Judge, clerk or deputy clerk of any court; U.S. Commissioner or Magistrate; notary public or civil law notary. (Fla. Stat. 92.50[1], 695.03[1]).

Outside State but Within U.S.

Generally: Judge or clerk of any U.S. state, territory or district court of record where taken, having seal; notary public or justice of peace with seal authorized by such state, territory or district to take acknowledgments. (Fla. Stat. 92.50[2], 695.03[2]). For instruments concerning real property: Above list excepting deputy clerk; and adding U.S. Commissioner or Magistrate, master in chancery, registrar or recorder of deeds of state, territory or district where taken, having seal; civil law notary; commissioner of deeds. If before notary public who does not affix seal, it is sufficient for notary to type, print or write on instrument, “I am a Notary Public of the State of (state) and my commission expires on (date).” (Fla. Stat. 695.03[2]).

In Foreign Countries.

Generally: Judge or justice of court of last resort, notary public of country where taken; U.S. minister, consul general, chargé d'affaires, or consul resident in country where taken. Signature and seal of such individual required. (Fla. Stat. 92.50[3], 695.03[3]). For instruments concerning real property: Above list excepting judge or justice of court of last resort; and adding commissioner of deeds appointed by Governor of Florida to act in foreign country or before any civil law notary or notary public having official seal, U.S. ambassador, envoy extraordinary, minister plenipotentiary, commissioner, vice consul, consular agent, or any other diplomatic or consular officer appointed to reside in country where taken; U.S. military or naval officer authorized by Laws or Articles of War of U.S. to perform duties of notary public. All acknowledgments require seal of acknowledging officer. (Fla. Stat. 695.03[3]).

Person in or with U.S. Armed Forces, their spouses and persons whose duties require presence with such forces, wherever located, may acknowledge before any commissioned officer in active service with U.S. Armed Forces holding rank of Second Lieutenant, Ensign or higher. Certificate need not state place where taken and no seal or authentication is required if signature, rank and branch of service of such officer appears on instrument. (Fla. Stat. 695.031, 92.51).

General Requirements as to Taking.

Officer taking acknowledgment must know, or have satisfactory proof, that the person making the acknowledgment is the individual described in and who executed such instrument, or that the person offering to make proof is one of the subscribing witnesses to such instrument. (Fla. Stat. 695.09).

Married Women.

No special requirements.

Authentication.

Authenticated by signature and official seal of such officer or person taking or administering same. When taken or administered by or before any judge, clerk, or deputy clerk of court of record, seal of such court may be affixed as seal of such officer or person. (Fla. Stat. 92.50).

General Requirements of Certificate.

Officer's certificate must contain and set forth substantially the matter required to be done or proved to make such acknowledgment effectual. (Fla. Stat. 695.04).

Seals.

To entitle any instrument concerning real property to be recorded, whether the acknowledgment or proof is taken within or without this state, or outside the United States, the certificate must be under the seal of the court or officer before whom the acknowledgment or proof is taken. (Fla. Stat. 695.03). Florida notary seal may be of rubber stamp or impression-type, but rubber stamp seal is official seal for use on paper document and impression-type may not be substituted therefor. (Fla. Stat. 117.05). Armed Forces acknowledgment (Fla. Stat. 695.031) and out-of-state U.S. notaries without seal (Fla. Stat. 695.03) are only exceptions.

Proof by Subscribing Witness.

Instruments concerning real property may be recorded only on acknowledgment of executing party or on certificate of proof by subscribing witness before any officer authorized to take acknowledgments. (Fla. Stat. 695.03).

Where the grantors and witnesses of any instrument which may be recorded are dead, or cannot be had, the judge of the circuit court, or the county judge for the county wherein the real property is situated, may take the examination of any competent witness or witnesses, on oath, to prove the handwriting of the witness or witnesses, or, where such proof cannot be had, then to prove the handwriting of the grantor or grantors, which may be certified by the judge, and the instrument being thus proved may be recorded. (Fla. Stat. 695.10).

Effect of acknowledgment is to conform to statutory requirement or to entitle instrument concerning real property to be recorded. (Fla. Stat. 695.03).

Forms of Certificates.

Error in stating venue in acknowledgment to any deed or other instrument relating to real estate does not invalidate acknowledgment. (Fla. Stat. 695.06). Notary must show expiration date of his commission, and Florida notary seal must include words “Notary Public—State of Florida”, name of notary public, date of expiration of commission of notary public, and commission number. (Fla. Stat. 117.05). Forms are as follows:

Forms

Acknowledgment by Person in Military Service:

On this . . . . . . day of . . . . . ., (year) . . . . ., before me . . . . . ., the undersigned officer, personally appeared . . . . . ., known to me (or satisfactorily proven) to be serving in or with, or whose duties require his presence with, the Armed Forces of the United States, and to be the person whose name is subscribed to the within instrument, and acknowledged that he executed the same for the purposes therein contained, and the undersigned does further certify that he is at the date of this certificate a commissioned officer of the rank stated below, and is in the active service of the Armed Forces of the United States.

(Signature and rank of commissioned officer and command or branch of service to which attached.) (Fla. Stat. 695.031[2]).

Short Forms

(All short forms must be followed by signature of person taking acknowledgment, name of acknowledger typed, printed or stamped, his title or rank, and his serial number, if any.) (Fla. Stat. 695.25).

By Individual Acting in Own Right:

State of

County of

The foregoing instrument was acknowledged before me this (date) by (name of person acknowledging) who is personally known to me or who has produced (type of identification) as identification. (Fla. Stat. 695.25[1]).

For Corporation:

State of

County of

The foregoing instrument was acknowledged before me this (date) by (name of officer or agent, title of officer or agent) of (name of corporation acknowledging) a (state or place of incorporation) corporation, on behalf of the corporation. He/She is personally known to me or has produced (type of identification) as identification. (Fla. Stat. 695.25[2]).

For Partnership:

State of

County of

The foregoing instrument was acknowledged before me this (date) by (name of acknowledging partner or agent), partner (or agent) on behalf of (name of partnership), a partnership. He/She is personally known to me or has produced (type of identification) as identification. (Fla. Stat. 695.25[3]).

For Individual Acting as Principal by Attorney in Fact:

State of

County of

The foregoing instrument was acknowledged before me this (date) by (name of attorney in fact) as attorney in fact, who is personally known to me or who has produced (type of identification) as identification. (Fla. Stat. 695.25[4]).

By Public Officer, Trustee, Personal Representative:

State of

County of

The foregoing instrument was acknowledged before me this (date) by (name and title of position), who is personally known to me or who has produced (type of identification) as identification. (Fla. Stat. 695.25[5]).

Acknowledgment of Will.

See category 13 Estates and Trusts, topic 13.16 Wills.

Alternative to Acknowledgment or Proof.

No statutory provision.

Validating Acts.

There are curative acts as to certain defective acknowledgments under previous statutory requirements. (Fla. Stat. 694.01-.15).

10.02 AFFIDAVITS:

Within State.

Judges, clerks or deputy clerks of any court of record in the state, including federal courts, U.S. commissioners and notaries public of this state, are authorized to take or administer oaths and affidavits which by law are required to be administered, except oaths to jurors and witnesses in court and such other oaths, affidavits and acknowledgments as are required by law to be taken or administered by or before particular officers. (Fla. Stat. 92.50[1]).

Outside State but Within the United States.

In other states, territories and districts, oaths and affidavits may be taken or administered before any judge, clerk or deputy clerk or any court of record having seal or before any notary or justice of peace having seal provided such officer is authorized under laws of such state. (Fla. Stat. 92.50[2]).

Outside the United States.

In foreign countries oaths and affidavits may be taken or administered by any judge of a court of last resort, or by a notary public of such foreign country, or by any minister, consul general, chargé d'affaires, or consul of U.S. residing in such country. Seal of officer or court must be affixed. (Fla. Stat. 92.50[3]).

Persons in U.S. Armed Forces, their spouses, and persons whose duties require presence with such forces, may have oath taken or administered by any commissioned officer in active service of U.S. Armed Forces with rank of second lieutenant, ensign or higher, within or without U.S. Certificate showing date of oath and stating in substance that person appearing before officer made or signed instrument under oath is sufficient. Place need not be stated. No authentication is required if signature, rank, and branch of service or subdivision thereof of such officer appears on instrument, and such officer's action is prima facie evidence that person making oath or affidavit is within purview of act. (Fla. Stat. 92.51).

General Requirements of Jurat.

Jurat must be authenticated by signature and official seal (except in case of Armed Forces officer) of officer or person taking or administering same, however judges and clerks may use seal of court. (Fla. Stat. 92.50). Jurat must indicate affiant swore (or affirmed) affidavit before administering officer. (416 So.2d 1240, 1241 n.2). Authentication of officer's authority is not required. See topic 10.01 Acknowledgments, subhead Authentication.

Use of Affidavit.

Affidavits may be used to verify pleadings, prove service of summons, notice or other process, obtain provisional remedy and support or oppose motions for summary judgment. (R.C.P. 1.510).

Form.

There is no prescribed form of certificate. The following is in general use:

Form

State of . . . . . .

County of . . . . . .

On this day personally appeared before me, an officer duly authorized to administer oaths, ..., who being first duly sworn by me, states:

. . . .

Sworn to and subscribed before me this . . . . . . day of . . . . . ., A.D. . . . . . .

(Seal of officer).

Signature of Notary Public, or other authorized officer. My commission expires . . . . . . (for notaries only).

Alternative to Affidavit.

No statutory provision.

Verification.

When document required by law, rule of administrative agency, or order of court to be verified, verification may be accomplished: (1) under oath or affirmation taken or administered before officer authorized under Fla. Stat. 92.50 to administer oaths; or (2) by signing of written declaration. Written declaration means following statement: “Under penalties of perjury, I declare that I have read the foregoing [document] and that the facts stated in it are true,” followed by signature of person making declaration. If verification on information or belief permitted by law, words “to the best of my knowledge and belief” may be added. Written declaration must be printed or typed at end of or immediately below document being verified and above signature of person making declaration. (Fla. Stat. 92.525).

10.03 NOTARIES PUBLIC:

Qualification.

Appointed by Governor for term of four years upon application prescribed by statute. Must be at least 18 years of age and legal Florida resident throughout term of appointment. Must give bond for $7,500, pay fee of $25, together with $4 surcharge to be used to educate notaries public, and take oath of office. No person may be automatically reappointed as notary public without recompleting full application process. (Fla. Stat. 117.01).

Authentication.

See topic 10.01 Acknowledgments.

Powers and Duties.

May administer oath when necessary to execution of document to be attested, protested or published under official seal. (Fla. Stat. 117.03). May solemnize marriages and take acknowledgments of written instruments for record. (Fla. Stat. 117.045). May attest to trueness of photocopy of original document. (Fla. Stat. 117.05[12]).

Territorial Extent of Powers.

May act anywhere within boundaries of state. (Fla. Stat. 117.01).

Seals.

Notary seal is required to be affixed to all documents notarized. Seal must be of rubber stamp type and include words “Notary Public—State of Florida”, name, date of expiration of commission of notary public and commission number. (Fla. Stat. 117.05). See topic 10.01 Acknowledgments, subhead Seals.

Fees.

Notary public fee may not exceed $10 for any one act, except with marriages for which fee may not exceed those provided by law to clerks of circuit court for same services. (Fla. Stat. 117.05).

Commissioner of Deeds.

Governor may appoint commissioners of deeds to take acknowledgments, proofs of execution, or oaths in any foreign country or any possession, territory, or commonwealth of U.S. outside 50 states. Term of office is four years. Commissioners of deeds have authority to take acknowledgments, proofs of execution, and oaths in connection with execution of any deed, mortgage, deed of trust, contract, power of attorney, or any other writing to be used or recorded in connection with timeshare estate, personal property timeshare interest, timeshare license, any property subject to timeshare plan, or operation of timeshare plan located within this state; provided such instrument or writing is executed outside U.S. (Fla. Stat. 721.97).

Officers of U.S. Armed Forces holding at least rank of second lieutenant (or equivalent) may take or administer oaths, affidavits, and acknowledgments when person involved is member of Armed Forces, spouse of member, or person whose duties require his presence with Armed Forces. (Fla. Stat. 92.51).

Advertising.

Words “Notary Public” may not be translated literally in another language for advertisements, and if notary public is not attorney, any advertising for notarial services by notary public must disclaim ability to give legal advice and accept fees for giving legal advice. (Fla. Stat. 117.05).

10.04 RECORDS:

Uniform Commercial Code adopted. (cc. 670-680). See categories 3 Business Regulation and Commerce, topics Commercial Code, Sales; Debtor and Creditor, topic Liens, subheads Statutory Liens and Mechanics' Construction Liens; Mortgages, topic Chattel Mortgages; Property, topic Deeds.

Recordable Instruments.

Following may be recorded upon presentation to clerk of Circuit Court: Instruments relating to ownership, transfer, encumbrances on or claims against real or personal property; notices of lis pendens; judgments of Florida courts or federal courts having jurisdiction in state; notices of federal tax liens and other liens in favor of U.S.; petitions, decrees of adjudication, and orders approving trustees' bonds in federal bankruptcy proceedings; that portion of certificates of discharge or separation from armed forces which indicates character of service, discharge or separation; any other document required or authorized by law to be recorded. (Fla. Stat. 28.222[3]). Recordation is not necessary to make conveyances or judgments valid (Fla. Stat. 695.01), but see subhead Effect of Record, infra. All instruments recorded in official records are open to public for inspection. (Fla. Stat. 28.226[6]). Register of official records must be available at each office where official records may be filed. No later than Jan. 1, 2002, clerk of circuit court in each county must provide current index of documents recorded in official records of county for period beginning no later than Jan. 1, 1990, on publicly available Internet website. (Fla. Stat. 28.2221). Index limited to grantor and grantee names, party names, date, book and page number, comments, and type of record. (Fla. Stat. 28.2221[2]).

Person purchasing burial right, belowground crypt, grave space, mausoleum, columbarium, ossuary, or scattering garden for interment, entombment or other disposition of human remains may permanently record purchase of right with clerk of court in county where right is located; this recordation is for purpose of public notification and establishing permanent record in official records of county and does not create any priority of interest or ownership. (Fla. Stat. 497.2765).

Place of recording is county where affected property is situated (Fla. Stat. 28.222, 695.01-.015), except for certain commercial code filings (see subhead Filing Under Commercial Code, infra). Documents affecting property, including probate records, are filed with clerk of circuit court. (Fla. Stat. 28.222-.223). *For list of Counties and County Seats see first page of this state in Volume containing Practice Profiles Section.*

Requisites of Recording.

To entitle any instrument concerning real property to be recorded, execution must be acknowledged by party making same and proved by subscribing witness or authenticated by civil law notary or notary public in order to be entitled to record. (Fla. Stat. 695.03). Instruments purporting to contain agreement to purchase or sell real estate must be acknowledged by vendor in order to be entitled to record. (Fla. Stat. 696.01). Assignment of contract of sale may not be recorded unless original contract entitled to record. (Fla. Stat. 696.02). Any instrument affecting interest in or lien upon real estate (except instrument executed before July 1, 1991, court orders, plats, instruments prepared or executed by any public officer excluding notaries public, and instruments executed, proved, or acknowledged outside Florida) must contain name of each person who executed such instrument legibly printed, typewritten, or stamped on instrument immediately beneath that person's signature, post office address of each such person, legibly printed, typewritten, or stamped on instrument, name and post office address of natural person who prepared document or under whose supervision it was prepared, legibly printed, typewritten, or stamped on document, name of each witness to document legibly printed, typewritten, or stamped on document immediately beneath signature of such witness, name of any notary public or other officer authorized to take acknowledgments or proofs whose signature appears on document, legibly printed, typewritten, or stamped on document immediately beneath signature of such notary public or other officer authorized to take acknowledgment or proofs, three inch square at top right-hand corner for use by clerk of court, and on any instrument, other than mortgage conveying or purporting to convey any interest in real property, name and post office address of each grantee, legibly printed, typewritten, or stamped on document. (Fla. Stat. 695.26). Failure of the clerk to comply with this section does not impair validity of recordation or of constructive notice imparted by recordation. (Fla. Stat. 695.26[4]). Contract for sale of real property executed by agent or attorney may not be recorded until authority or power of attorney is recorded. (Fla. Stat. 696.03).

Documentary tax stamps must be placed on instruments requiring same prior to recording. (Fla. Stat. 201.01). See category 22 Taxation, topic 22.18 Stamp and Seal Taxes, subhead Documents, for rates and instruments affected.

Foreign conveyance, encumbrance or other instrument to be recorded, must be acknowledged by party making same or proved by subscribing witness. If notary public of another state signing acknowledgment certificate does not affix seal, it is sufficient for notary public to type, print, or write by hand on instrument, “I am a Notary Public of the State of (state) and my commission expires on (date).” (Fla. Stat. 695.03[2]). Certificates of acknowledgment or proof made in foreign countries must be under seal of authority taking acknowledgment or proof. (Fla. Stat. 695.03[3]). See topic Acknowledgments for form and officers authorized to take same.

Effect of Record.

In order to create lien on real property certified copy of judgment must be recorded. (Fla. Stat. 55.10[1]). Conveyances, transfers or mortgages of real property or of any interest therein and leases for term of one year or longer, in order to be good and effectual in law or equity against creditors or subsequent purchasers for valuable consideration and without notice, must be recorded (Fla. Stat. 695.01), and in order for any such instrument made or executed by virtue of any power of attorney to be good and effectual in law or equity against creditors or subsequent purchasers for valuable consideration and without notice such power of attorney must also be recorded before accruing of right of such creditor or subsequent purchaser. (Fla. Stat. 695.01). In general, owner of any interest in or lien upon real property who is not in actual possession must file statutory notice within 30 years after recording to assure that interest or lien is not extinguished by Marketable Record Title Act. (Fla. Stat. 712.05).

All instruments which are authorized or required to be recorded in Official Records Book of Clerk of Circuit Court are deemed recorded from time official whose duty it is to record same affixes thereon consecutive official register number and are notice to all persons. Sequence of such official numbers determines priority of recordation. (Fla. Stat. 695.11). As to personal property, financing statements filed and recorded pursuant to Uniform Commercial Code on or after Jan. 1, 1967 and prior to Jan. 1, 1980, which have not lapsed remain effective for period provided in Fla. Stat. 671.304, but not less than five years from date of filing. (Fla. Stat. 679.515, 671.301).

Recording fees for deeds, contracts, mortgages and other instruments are $5 first page and $4 for each additional page and additional service charge of $1 first page and 50¢ each additional page, to be paid to clerk. (Fla. Stat. 28.24[12]).

There are other service charges prescribed by statute for copying, indexing, mailing, and other services. (Fla. Stat. 28.24).

Additional service charge of $4 per page paid to clerk of circuit court for each instrument listed in §28.222, except judgments received from courts and notices of lis pendens, recorded in official records.

Properly authenticated or certified copies of public records are admissible in evidence like originals. (Fla. Stat. 90.955).

Federal tax lien notices and notices of other liens in favor of U.S. are to be filed in office of clerk of circuit court. (Fla. Stat. 28.222[3][e]).

Lis Pendens.

In order for an action in state or federal courts to operate as a lis pendens, notice containing names of parties, date of institution of suit, date of clerk's electronic receipt, or case number, name of court, a description of the property, and a statement of relief sought must have been recorded in the official records of the county where property is situated. (Fla. Stat. 48.23).

Torrens Act has not been adopted in Florida.

Transfer of decedent's title to distributee is shown by instrument transferring asset from personal representative. (Fla. Stat. 733.811). Title to Florida property owned by nonresident established by ancillary administration. (Fla. Stat. 734.101-.102).

Vital Statistics.

Reports of births, including still births, deaths, marriages and divorces must be filed with Bureau of Vital Statistics. (Fla. Stat. 382.008, -.013, -.015, -.017, -.018, -.019, -.021). Records of last known names and addresses of natural parents, adoptive parents and adoptee must be maintained. Conditions for disclosure prescribed by statute. (Fla. Stat. 63.162). Birth certificate may be filed when Florida residents adopt alien child. (Fla. Stat. 382.017).

Copies of certificates of birth, death, marriage and dissolution of marriage for all counties may be obtained from Bureau of Vital Statistics, Florida Department of Health, P.O. Box 210, Jacksonville, Florida 32231 (Tel: 904-359-6900). http://www.doh.state.fl.us/planning_eval/vital_statistics/index.html Fee of $9 for each certified copy of birth certificate and $5 each for certified death, marriage, and dissolution of marriage certificates. Complete name and date are required; place is helpful. Searches are not less than $3 nor more than $5 for first calendar year, plus not more than $2 for each additional calendar year, up to maximum of $50 and entitle applicant to one certified copy without additional charge. (Fla. Stat. 382.025). Marriage and dissolution certificates are available from June 6, 1927, to present. Prior to this date marriage certificates must be obtained from county judge and divorce decrees from clerk of court or county in which marriage or divorce occurred. Birth certificates are confidential and are available only to individual, his parents or any government agency for official purpose (Fla. Stat. 382.025[4]); however, original certificate to adopted individual only upon court order (Fla. Stat. 63.162); however, short form certificate of birth or birth card stating name, date and place but not parentage is available to other than individual or his parents (Fla. Stat. 382.025). Birth certificates are confidential and exempt from provisions of §119.07(1). This exemption is subject to Open Government Sunset Review Act in accordance with §119.14. (Fla. Stat. 382.025).

Delayed Birth Certificates.

Registration after one year is delayed registration. Department may register delayed certificate if department does not already have certificate of birth, death or fetal death on file, upon receipt of application and fee and proof as required by this section. (Fla. Stat. 382.019[1]). Registrar may require supporting documents and other proofs and further regulate registration. (Fla. Stat. 382.019[2]). Any person born in state may file petition in circuit court in county of residence or in alleged county of birth for delayed birth certificate. (Fla. Stat. 382.0195).

Amended Birth Certificates.

Upon receipt of fee and appropriate documentary evidence, certificate of live birth may be amended. (Fla. Stat. 382.016). For child born in Florida whose paternity is established in another state, department must amend birth certificate to include name of father upon receipt of: (i) Certified copy of acknowledgment of paternity, final judgment, or judicial or administrative order from other state that determines child's paternity; or (ii) noncertified copy of acknowledgment of paternity, final judgment or judicial administrative order from other state that determines child's paternity when provided with affidavit or written declaration from Department of Revenue that states document was obtained from another state's Title IV-D program. Department may not amend birth certificate to include name of father if paternity established by adoption and father is not eligible to adopt under state law. (Fla. Stat. 382.016[1][d]).

Termination of Pregnancy.

Physician, or director of any medical facility in which pregnancy is terminated, must submit monthly report containing number of procedures, reason for same and period of gestation at time of procedure to Department of Health. Reports submitted pursuant to this section are confidential and exempt from provisions of §119.07(1).

Filing Under Commercial Code.

Financing statements, agriculture liens and statements as to continuation, termination, release and assignment are filed with Florida Secured Transaction Registry, Department of State, Tallahassee, FL (Fla. Stat. 679.5011), except as follows: If collateral is as-extracted collateral or timber to be cut or is goods that are or are to become fixtures in this state (in which case financing statement must be filed as fixture filing) by recording in office of Clerk of Circuit Court in county of debtor's place of business, if he has one, in county of chief executive officer if has more than one place of business, otherwise in county of residence or, if debtor not resident of state, by recording in office of Clerk of Circuit Court in county where foregoing collateral located. Generally, security interest in collateral of transmitting utility filed with office of Department of State. (Fla. Stat. 679.5011). If collateral is motor vehicle or motor home for which certificate of title has been issued in this state, lien must be noted on certificate of title by Department of Highway Safety and Motor Vehicles. (Fla. Stat. 319.27). If no Florida title has been issued, notice of lien can be filed with Department or county tax collector. See also category 23 Transportation, topic 23.01 Motor Vehicles.

Filed financing statement is effective for five years unless continuation statement filed within six months prior to lapse of original. Continuation statement will be effective for additional five years. (Fla. Stat. 679.515). Assignment of security interest must be filed in place where original was filed. (Fla. Stat. 679.514).

Certain fees relating to Commercial Code are as follows:

Recordation of UCC-1 with Secretary of State (Fla. Stat. 15.091):

$25.00 for 1 debtor/1 secured party; cost includes cost of termination statement

$3.00 for each additional debtor, each additional secured party and each attached page

$5.00 additional charge for non-approved form

Recordation of UCC-3 with Secretary of State (Fla. Stat. 15.091):

$12.00 for one debtor/one secured party

$3.00 for each additional debtor, each additional secured party, and each attached page

UCC-11 with Secretary of State (Fla. Stat. 15.091):

Certified Copy: $10.00 for first ten file numbers; $10.00 each additional group of ten.

$24 for original or duplicate certificate of title plus $2 to note lien on title certificate (includes services for subsequent issue of corrected certificate on cancellation of lien when satisfied) for motor vehicle filing. (Fla. Stat. 319.32).

$3 for assignment of lien by motor vehicle lienholder. (Fla. Stat. 319.32[1]).

For recording fees of Clerk of Circuit Court, see §28.24.

See also category 3 Business Regulation and Commerce, topic 3.09 Commercial Code.

10.05 SEALS:

All bonds, notes, covenants, deeds, bills of exchange and other written instruments not under seal have same force and effect (so far as rules of pleading and evidence are concerned) as bonds and instruments under seal. (Fla. Stat. 68.06). No seal is necessary to convey real property (Fla. Stat. 689.01), or trust estates (Fla. Stat. 689.06).

Uniform Commercial Code adopted. (cc. 670-680). See category 3 Business Regulation and Commerce, topic 3.09 Commercial Code.

Sufficiency of Seal.

A scrawl or scroll printed or written, affixed as seal to any written instrument is as effectual as seal. (Fla. Stat. 695.07). “LS” can be a seal. (42 So. 457).

Effect of Seal.

Seal “imports” consideration (98 So.2d 791, 98 So. 2d 791), but lack of consideration makes sealed contract unenforceable (4 Fla. 359; 6 Fla. 359).

Counties and Municipalities.

Governing body may adopt official seal; penalties provided for unauthorized use of official seal. (Fla. Stat. 165.043).

Corporate Seal.

Unless articles provide otherwise, every corporation has perpetual duration in its corporate name and all powers necessary to conduct business, including to have corporate seal, alterable at will. (Fla. Stat. 607.0302[2]).

10.06 TORRENS ACT:

Not adopted.

10.07 VITAL STATISTICS:

See topic 10.04 Records.

11 EMPLOYMENT

11.01 EMPLOYER AND EMPLOYEE:

See topic 11.02 Labor Relations.

11.02 LABOR RELATIONS:

Several different state departments and agencies are charged with enforcement of labor laws.

Hours of Labor.

Department of Business and Professional Regulation enforces child labor laws. (Fla. Stat. 450.121).

No minor 15 years of age or younger may work before 7:00 A.M. or after 7:00 P.M. when school is scheduled for next day. Nor may child under 15 work more than three hours on day when school is in session unless there is no session of school on following day. (Fla. Stat. 450.081[1][a]). During holidays and vacations minors 15 and under not to be employed before 7:00 A.M. or after 9:00 P.M., for more than eight hours in any one day or for more than 40 hours in any one week. (Fla. Stat. 450.081[1][b]). Minors 16 and 17 years of age not to be employed before 6:30 A.M. or after 11:00 P.M. or for more than eight hours on any one day when school is scheduled for following day. (Fla. Stat. 450.081[2]). When school is in session, minors 16 or 17 years of age may not work more than 30 hours in any one week. (Fla. Stat. 450.081[2]). On any school day, minors 16 and 17 years of age, who are not enrolled in vocational educational program, may not be employed during school hours. (Fla. Stat. 450.081[2]). No minor 17 years or younger may be employed for more than six consecutive days in any one week. (Fla. Stat. 450.081[3]). Minors 17 years or younger not to be employed for more than four continuous hours without interval of at least 30 minutes. (Fla. Stat. 450.081[4]). Provisions do not apply to child 16 years old or older who has graduated from high school, or child who holds valid certificate of exemption issued by school superintendent or his/her designee pursuant to §232.06, or child who qualifies for hardship exemption to be determined by school superintendent or his/her designee. (Fla. Stat. 450.081[5][b] & [c]). Provisions do not apply to minors in domestic service in private home or farm work or pages in Florida Legislature. (Fla. Stat. 450.081[5][d]). Special statutory provisions exist for employment of children by motion picture and television studios. (Fla. Stat. 450.132). (Definitions contained in Fla. Stat. 450.012).

Wages, unemployment compensation, and traveling expenses due at time of death are not subject to administration of estate and may be paid to specified parties. (Fla. Stat. 222.15, .16).

Payment of wages may be made by check, draft, note or other acknowledgment of indebtedness. Instrument must be negotiable and payable in cash, on demand, without discount. (Fla. Stat. 532.01).

Any person who issues coupons, tickets, tokens, or other devices in lieu of cash as payment for labor whether redeemable in goods or merchandise who on demand fails to pay same in current U.S. money on or after 30 days from issue is liable to pay full amount, with legal interest and 10% as attorneys' fees. (Fla. Stat. 532.02). Direct deposit of wages or salary can be made to account of payee of wages or salary in any financial institution if authorized in writing by payee, however payee cannot be fired for refusing to sign such authorization for direct deposit. (Fla. Stat. 532.04).

Minimum wage $6.15 in 2005; adjusted each Sept. 30 for rate of inflation using consumer price index for urban wage earners and clerical workers or successor index. (Art. X,

§24).

Children.

Employment of children under 13 prohibited with certain exceptions. (Fla. Stat. 450.021[1] & [3]). Children of age of ten years or younger are prohibited from selling or distributing newspapers, magazines and periodicals. (Fla. Stat. 450.021[2]). Persons under 18 may not be employed in any establishment which retails alcoholic beverages, with certain exceptions. (Fla. Stat. 450.021[4]). Persons under 18 may not be employed for any obscene, indecent or immoral purpose or for production of or depiction in any obscene materials. (Fla. Stat. 450.151). Children under 16 cannot work in “hazardous occupations,” as enumerated (Fla. Stat. 450.061); unless employed as student learner 16 to 18 years old, enrolled in youth vocational program and employed under specified written agreement (Fla. Stat. 450.161).

Farm Labor.

Department of Labor and Employment Security has authority to administer Federal Migrant and Seasonal Agricultural Worker Protection Act of 1983 and Florida Labor Registration Law, which extensively regulate farm labor and provide for civil and criminal penalties for violations. (c. 450).

Discrimination.

Florida Civil Rights Act prohibits discrimination in employment on basis of race, color, religion, sex, national origin, age, handicap, or marital status. (Fla. Stat. 760.01). Act does not prohibit religious organizations from limiting employment opportunities within its organization to members of its religion or persons who subscribe to its beliefs. (Fla. Stat. 760.10[9]). Act creates remedial procedures (Fla. Stat. 760.11), and creates Commission on Human Relations (Fla. Stat. 760.11). Commission has power to provide relief to persons discriminated against by employer and to award attorneys fees analogous to that available in suits brought under Tit. VII of Civil Rights Act of 1964, as am'd, 42 U.S.C. §2000e et seq. (Fla. Stat. 760.11). Discrimination in wage rate based upon sex is prohibited. (Fla. Stat. 448.07).

HIV.

No person may require individual to take Human Immunodeficiency Virus (HIV)-related test as condition of hiring, promotion, or continued employment, unless absence of HIV infection is bona fide occupational qualification for job in question. (Fla. Stat. 760.50[3][a]). No person may fail or refuse to hire or discharge any individual, segregate or classify any individual in any way which would deprive or tend to deprive that individual of employment opportunities or adversely affect his status as employee, or otherwise discriminate against any individual with respect to compensation, terms or conditions or privileges of employment on basis of knowledge or belief that individual has taken human immunodeficiency virus test or results or perceived results of such test unless absence of HIV infection is bona fide occupational qualification of job in question. (Fla. Stat. 760.50[3][b]). Person asserting that bona fide occupational qualification exists for HIV-related testing bears burden of proving that test is necessary to ascertain whether employee is able to perform duties of particular job in reasonable manner or whether employee will present significant risk of transmitting HIV infection to other persons in course of normal work activities, and there exists no means of reasonable accommodation short of requiring individual be free of human immunodeficiency virus infection. (Fla. Stat. 760.50[3][c]). Every employer who provides or administers health or life insurance benefits must develop and implement procedures to protect confidentiality of records relating to medical condition or status of employees receiving such insurance benefits or be liable for damages. (Fla. Stat. 760.50[5]). Penalties for violation of this section are greater of $1,000 or actual damages; greater of $5,000 or actual damage for intentional or reckless violation; and reasonable attorneys' fees. (Fla. Stat. 760.50[6]).

Labor Unions.

Employees have right to self-organization, and to engage in concerted activities for purpose of collective bargaining or other mutual aid or protection. (Fla. Stat. 447.03).

Labor organizations may sue or be sued in their commonly used name. (Fla. Stat. 447.11).

Public employees rights to organize and bargain collectively are governed by special provisions. (Fla. Stat. 447.201-.609). Public Employees Relations Commission (PERC) established to handle all labor disputes between public employers and public employees having to do with organization and collective bargaining. (Fla. Stat. 447.205). Legislature retains right to approve, rescind or amend rules promulgated by PERC. (Fla. Stat. 447.607). PERC was given powers analogous to those of NLRB and analogous procedures were established for perfecting rights of public employers and employees. (Fla. Stat. 447.201-.609). However, public employees are prohibited from striking and are subject to severe penalties for violating no strike statute. (Fla. Stat. 447.505, .507). Strikes by public employees are also prohibited by Florida Constitution. (art. 1, §6).

Right to Work.

Right of persons to work cannot be denied on account of membership or nonmembership in any labor union. Right of employees to bargain collectively by and through a labor organization may not be denied. (Const., art. I, §6). Agency shop is outlawed as violating the right to work provision. (141 So.2d 269, aff'd 375 U.S. 96).

Worker's Compensation Law (Fla. Stat. 440.01-.60) is overseen by Department of Financial Services (Fla. Stat. 440.02[12]) and applies to employment by state and all political subdivisions, to all public and quasi-public corporations and to all private employments in which four or more employees are employed by same employer, or, with respect to construction industry, all private employment in which one or more employees are employed by same employer. See statutory provisions for when out-of-state employers must obtain Florida policy or endorsement. (Fla. Stat. 440.10). Does not apply to domestic servants in private homes, agricultural farm labor, performed for farmer who employs five or fewer regular employees and fewer than 12 seasonal employees, labor under sentence of court to perform community services as provided in §316.193, and professional athletes. (Fla. Stat. 440.02[17][c]). Term “employees” means every person engaged in any employment under any colorable form of contract, including officer of corporation remunerated in any fashion except those requesting exemption and volunteers other than those working for state or local governmental entity. (Fla. Stat. 440.02[15]). However, volunteer fire fighters, who are responding to or assisting with fire or medical emergencies are considered employees. (Fla. Stat. 440.02[17][b][3]). Term employees includes partner or sole proprietors who are not engaged in construction industry. (Fla. Stat. 440.02[15][c]). Independent contractor who meets criteria specified in §440.02(15)(d)(1) is not considered employee. Employers having employees excluded from Law and corporate officer previously exempted may waive exclusion by proper notice thereof. (Fla. Stat. 440.04-.05). No compensation is payable in respect of disability or death of employee covered by Federal Employer's Liability Act, Longshoremen's and Harbor Worker's Compensation Act, Defense Base Act, or Jones Act. (Fla. Stat. 440.09[2]). Act is applicable to occupational diseases. (Fla. Stat. 440.151).

If employer with less than four employees chooses not to secure payments of compensation, employer must annually file affidavit stating that he has not secured payment of compensation under this statute and he must provide clear written notice to all employees of their lack of entitlement to benefits. (Fla. Stat. 440.055).

All self-insurers, other than public utilities, and government entities, must join Florida Self-Insurers Guaranty Association, Inc. (Fla. Stat. 440.385). Funds to cover costs of claims and administration are raised by assessment of members. Amount of assessments determined by

Department of Financial Services. (Fla. Stat. 440.385[3][c]). Any sums acquired by member by refund, dividend or otherwise from Association are payable within 30 days of receipt to Department of Revenue for deposit with Chief Financial Officer to credit General Revenue Fund. (Fla. Stat. 440.385[13]). Self-Insurers Guaranty Association manages insolvency fund for member employers. (Fla. Stat. 440.385[4]). Department of Financial Services has power to revoke power to self-insurer for failure to pay assessment or failing to comply with plan of operation. (Fla. Stat. 440.385[6]).

Compensation for disability is minimum of $20 per week unless weekly wage is less than $20. Maximum not to exceed amount equal to 100% of statewide average weekly wage for injuries occurring after July 31, 1979 or two-thirds of statewide average for injuries incurred before that date, figures adjusted to nearest dollar. (Fla. Stat. 440.12, .14). Employer must furnish medical services and supplies. (Fla. Stat. 440.13). No compensation, except payment for medical services and supplies, is allowed for first seven days of disability if total period of disability is 21 days or less. (Fla. Stat. 440.12, .13, .20, .25). Subject to above limitation formula, compensation depends on variety of factors including severity and type of injury and activities of employee. (See Fla. Stat. 440.15.) Temporary total disability includes period necessary for training in use of artificial members and appliances. Compensation may be paid for temporary partial disability. (Fla. Stat. 440.15[2]). If employee is eligible for social security benefits, worker's compensation benefits are secondary;, sum of two benefits should not exceed amount of benefits which would otherwise be payable. (Fla. Stat. 440.15[9]). Injured worker requesting benefits for any period of unemployment has duty to make good faith efforts to obtain employment. (Fla. Stat. 440.15[1]).

If death results from accident within one year thereafter or follows continuous disability and results from accident within five years thereafter, there are allowed actual funeral expenses not to exceed $7,500 and, following percentage of average weekly wages to following persons in following order of precedence: (1) To spouse if there is no child, 50% of average weekly wage until death; (2) to spouse, if there is one child or children, in addition, 162/3% on account for child or children; in case of death of surviving spouse, 331/3% for each child and judge of compensation claims may provide payment as it appears just and may pay entire amount to children; upon remarriage of surviving spouse, spouse is entitled to lump sum payment equal to 26 weeks of compensation at rate of 50% of average weekly wage (as provided in §440.12[2]) unless $150,000 limit has been exceeded, in which case surviving spouse receives lump sum payment equal to remaining available benefits in lieu of any further indemnity benefits. (Fla. Stat. 440.16[1][b]). Surviving spouse's acceptance of lump sum payment does not affect payment of death benefits to other dependents (Fla. Stat. 440.16[1][b]); (3) to child or children, if there is no spouse, 331/3% for each child; (4) to parents, 25% to each during dependency; (5) to brothers, sisters, and grandchildren, 15% to each. (Fla. Stat. 440.16[1][b]). Dependence of child, unless incapacitated from earning livelihood, terminates on attainment of age 18 or marriage or age 22 if full-time student in accredited educational institution. (Fla. Stat. 440.16[2]). Payments in case of death cannot exceed 662/3% of employee's weekly wages nor $150,000 and provision is made for allocation of payments among beneficiaries where full amounts stated in this paragraph are not payable. Surviving spouse also entitled to receive payment of postsecondary student fees for up to 1,800 classroom hours at career center, or student fees at any area community college for up to 80 semester hours. (Fla. Stat. 440.16). If during period of disability employer continues to provide considerations such as board, rent, housing or lodging, value of same is deducted when calculating average weekly wage. (Fla. Stat. 440.14[2]).

If employer has reason to believe injury was drug or alcohol induced he may require employee to submit to testing. (Fla. Stat. 440.09[7][a]).

Notice of injury or death must be given to carrier or self-insured employer within 30 days after date of same, and notice of injury resulting in death must be given by employer to Division by telephone or telegraph within 24 hours of actual knowledge of injury. Employer must notify carrier of injury to employee within seven days of actual knowledge of injury. (Fla. Stat.

440.185). Within three days of receipt of notice of injury of employee which results in employee losing more than seven days of work, carrier must provide information brochure to employee setting out employee rights and benefits under law. (Fla. Stat. 440.185[4]).

Claim for disability or death must be filed within two years after time of injury or death, except that where compensation is paid or remedial treatment furnished without an award, claim may be filed within two years after date of last payment or remedial treatment. (Fla. Stat. 440.19). Claim must contain name and address of employee, name and address of employer, statement of time/date, place, nature and cause of injury or equivalent information to put division and employer on notice of identity of parties and nature of claim. (Fla. Stat. 440.19).

Claimant injured by third party, or claimant's dependents, may accept compensation and sue third party. Amount recovered by claimant or dependents from third-party tortfeasor either by judgment or settlement before or after filing of suit, before claimant has accepted compensation or filed written claim for benefits, must be setoff against any compensation benefits other than for remedial care, treatment and attendance as well as rehabilitative services. Amount offset must be reduced by amount of court costs expended in prosecution of third-party suit, including reasonable attorney's fees. Employer or insurer who pays compensation is subrogated to employee's rights against third party to extent of amount paid. (Fla. Stat. 440.39). 100% subrogation is constitutional. (402 So.2d 1273). If injured employee or his dependents fail to sue within one year, employer or insurer may sue. If employer or insurer does not bring suit within two years after cause arises, action reverts to employee. (Fla. Stat. 440.39). Settlement by employee or dependents without notice to employer or insurer to participate affects only employee's claim. (190 So. 2d 426). Settlement by employer or insurer cannot be made without agreement of employee or dependents. (Fla. Stat. 440.39). §440.20(12)(a) prohibition against release of employer-carrier's liability for future medical expenses in exchange for lump sum payment, unless judge of compensation claims approves, is constitutional. (402 So.2d 518).

Act is administered by Division of Workers' Compensation of Department of Labor and Employment Security. Hearings and investigations are conducted by judges of compensation claims who have summary process power, with right of review by Industrial Relations Commission. (See Fla. Stat. 440.271, .29, .33, .44, .45.) Appeals must be filed in accordance with rules of procedure prescribed by Supreme Court for review of all orders. Division must be given notice of every such proceeding and has right to intervene regarding indigency or the Special Disability Trust Fund. (Fla. Stat. 440.271). Actions by judges of compensation claims are not subject to review pursuant to Administrative Procedures Act (c. 120). (Fla. Stat. 440.021). Judges of compensation claims can assess costs and can set attorney's fees and expert witness fees based upon circumstances of action. (Fla. Stat. 440.31, .34). Act makes it misdemeanor to render services in processing of application for fee not approved by judge of compensation claims. (Fla. Stat. 440.105[3][c]). Legislative delegation of power to Division of Worker's Compensation to establish schedule for determining existence and degree of permanent impairment constitutional. (415 So. 2d 1277). Provision is made for public or private mediation conference. (Fla. Stat. 440.25).

Employer, carrier, and employee may seek consent from judge of compensation claims to enter into binding claim arbitration in lieu of any other remedy provided in c. 440.

Occupational Diseases.

If employer and employee are subject to provisions of Act, death or disablement of employee which results from occupational disease is treated as industrial accident, with compensation to be provided according to Act. (Fla. Stat. 440.151). However, employer is liable only where disease results from nature of employment in which employee was engaged, in that there was in that employment particular hazard of such disease or that incidence of such disease was substantially higher than in usual run of occupations and among population in general. Nature of employment must be major contributing cause of disease. No compensation is payable where employee falsely represents himself in writing as never having been previously disabled in any manner by the disease. Compensation must be reduced proportionately where compensable disease is aggravated or in anywise contributed to by noncompensable disease. Only afterborn children of marriage existing at beginning of compensable disability may be compensated where death of employee leaves as survivor one whose relationship to deceased began after onset of first compensable disability. Occupational disease means disease solely due to peculiar characteristics of employee's trade, and disablement means partial or total incapacity to perform that trade. Employer in whose employment employee was last injuriously exposed to hazards of occupational disease, and insurance carrier bearing risk are liable for compensation, without right to contribution. (Fla. Stat. 440.151[5]). In case of occupational diseases, time of notice of injury or death provided in §440.185(1) extended to 90 days. (Fla. Stat. 440.151[6]).

Unemployment Compensation.

Unemployed individuals entitled to benefits upon compliance with statutes. (c. 443). Penalties provided for noncompliance or fraud. (Fla. Stat. 443.071). There are many exemptions such as agricultural labor, domestic service, casual labor, service in employ of school by student, service on vessel, service in employ of certain familial relations, service in employ of foreign government, service solely for commission (real estate and insurance salesman, barber). (Fla. Stat. 443.1216). Weekly benefit amounts to 1/26 of total wages for insured work paid during quarter of base period in which total wages paid were highest, but not less than $32 nor more than $275. (Fla. Stat. 443.111[3]). Weekly benefits are rounded down to nearest full dollar amount. (Id.). State will deduct child support payment obligations from unemployment benefits and forward to appropriate state or local child support agency. (Fla. Stat. 443.051[3]).

Hazardous Occupations.

(c. 769). Employers engaged in following hazardous occupations: Railroading, operating street railways, generating and selling electricity, telephone and telegraph business, express business, blasting or dynamiting, operating automobiles for public use, boating when propelled by steam, gas or electricity, are liable in damages for injuries to and death of their agents and employees caused by negligence of such employers, their agents and servants unless it is made to appear that ordinary and reasonable care and diligence have been exercised, presumption being against employer. (Fla. Stat. 769.02).

As to such hazardous occupations, if both employee and employer or the agents and employees of the latter are both at fault, there may be a recovery, but the damages are assessed in proportion to the fault of each. Damages are not recoverable by an employee injured in part through his own negligence, and partly through the negligence of another employee, such employees being fellow servants, when both are jointly engaged in performing the act causing the injury and the employer is guilty of no negligence. Where the injury or death is caused by the consent of the employee, or by his own negligence, there is no liability against the employer. (Fla. Stat. 769.03).

Where the injury or death is attributable to the negligence of the employer engaged in such hazardous occupations, employer's agents or servants, doctrine of assumption of risk does not apply. (Fla. Stat. 769.04). Damages for injuries arising under such hazardous occupations are exempt from garnishment, execution and other processes. (Fla. Stat. 769.05). Contracts limiting liability imposed by this law are invalid. (Fla. Stat. 769.06).

Railroads.

Where railroad company employee is injured by equipment of railroad and injury is caused by negligence of another employee, without fault of injured employee, such employment is no bar to recovery. No contract restricting such liability is legal or binding. (Fla. Stat. 768.07).

11.03 WORKERS' COMPENSATION LAW:

See topic 11.02 Labor Relations.

12 ENVIRONMENT

12.01 ENVIRONMENTAL REGULATION:

General Supervision.

Department of Environmental Protection ("DEP"). (Fla. Stat. 403.061). Duties and responsibilities previously with Department of Environmental Regulation and Department of Natural Resources were transferred to DEP in 1993, and statutory provisions revised to reflect these changes pursuant to 94-356. Supervision extends to underground water, lakes, drinking water, rivers, streams, canals, ditches, wetlands, and coastal waters (Fla. Stat. 403.062), as well as atmosphere (Fla. Stat. 403.061). Provision is made for local pollution control programs (Fla. Stat. 403.182) and their compliance with U.S. Environmental Protection Act Standards and Clean Air Act (Fla. Stat. 403.061). Regulatory power regarding beaches and shores, preservation, restoration, and erosion, rests with Division of Beaches and Shores. (c. 161).

Pollution resulting from oil and other spillage from storage tanks and piping facilities between vessels, between onshore facilities and vessels, and between offshore facilities and vessels is dealt with in a separate chapter. (c. 376). State Underground Petroleum Environmental Response Act of 1986 requires registration of persons who cause taxable pollutants to be imported into Florida and imposes certain excise taxes. DEP empowered to administer Florida Petroleum Liability and Restoration Insurance Program which was created to provide restoration funding assistance to facilities regulated by and in compliance with DEP's petroleum storage tank rules. (Fla. Stat. 376.3072[1]). Requirements for insurance are provided. (Fla. Stat. 376.3072[2]).

Department of Environmental Protection regulates small pollution from above ground crude oil storage tanks, drilling for and production of oil, gas and other petroleum products and requires fees and bonds or other securities equitably allocated among interested parties for certain geophysical permits. (c. 377). Oil and mineral severance taxes fund Conservation and Recreation Lands Trust Fund within Department of Environmental Protection for acquisition of public lands. Department of Environmental Protection regulates building in coastal zones. (cc. 161, 163, 186, 380).

Environmental Land and Water Management Act of 1972 provides for comprehensive statewide land management and development and water quality control measures adopted. (c. 380). Counties are also authorized to setup "land authorities" to acquire land interests. (Fla. Stat. 380.0666). Counties now able to provide alternative water supplies. (cc. 125, 153, 170, 180).

Disposition of lands now authorized by Florida Preservation 2000 Act in certain situations. (Fla. Stat. 259.101).

Development designated as "Florida quality development" exempt from certain regional impact requirements imposed upon projects with regional impact. (Fla. Stat. 380.061).

Southern Interstate Low Level Radioactive Waste Management Compact in effect. (Fla. Stat. 404.30). Model Energy Efficiency Code and rating system in effect and provides for statewide conservation of energy by efficient design and use of buildings. (Fla. Stat. 553.901, 553.992). Inland Protection Trust Fund created to pay for costs associated with field and laboratory testing and toxicological risk assessment of ground water contamination sites. (Fla. Stat. 376.3071). Due to increasing backlog of reimbursement applications, legislature now prohibits reimbursement for rehabilitation work conducted after Mar. 29, 1995 unless person receives prior written approval from department. (Fla. Stat. 376.30711). Early Detection Incentive Program enacted to facilitate reporting and cleanup of tainted sites.

Greenways Coordinating Council to promote greenway (protected open areas for benefit of land and wildlife) support throughout Florida. (Fla. Stat. 260.0142).

Outdoor recreation and conservation is responsibility of DEP (Fla. Stat. 375.021).

DEP promulgates rules for siting electrical power plants, for environmental precautions in operation thereof (Fla. Stat. 403.501 et seq.), magnetic and electrical fields (Fla. Stat. 403.061[30]), and inspection of pollutant storage tanks (Fla. Stat. 376.303).

Permits are required for construction, dredging, and filling on wetlands.

Department of Agriculture and Consumer Services researches, monitors and enforces pesticide and certain other hazardous substance regulations. (c. 487).

DEP governs issuance of permits for sanitary sewage systems. (Fla. Stat. 403.087).

Coral Reef Protection Act permits the department to recover damages from parties whose vessels have run aground, struck, or otherwise damaged coral reefs (Fla. Stat. 403.93345).

Prohibited Acts of Pollution.

Florida Air and Water Pollution Control Act forbids pollution (including noise) of air or waters in violation of rules or regulations adopted by Department of Pollution Control, or to violate or fail to comply with any order of Department. (Fla. Stat. 403.161, 403.151). Local pollution control programs authorized if in compliance with Act. (Fla. Stat. 403.182). Department is also authorized to develop standards for deep water commercial navigation, including water quality and dredging requirements. Pollution defined as presence in outdoor atmosphere or waters of state of any substances, contaminants, noise, or man-made or man-induced alteration of chemical, physical, biological, or radiological integrity of air or water in quantities or levels which are or may be potentially harmful or injurious to human health or welfare, animal or plant life, or property, or unreasonably interfere with enjoyment of life or property, including outdoor recreation. (Fla. Stat. 403.031).

The Natural Gas Transmission Pipeline Siting Act forbids construction of natural gas transmission after Oct. 1, 1992 without first obtaining certification under statute. (Fla. Stat. 403.9401 et seq.).

Pollution resulting from drilling for or producing oil, gas, or other petroleum products is prohibited. (Fla. Stat. 377.371). Bond required to drill. (Fla. Stat. 377.22[2][f]). Rules, conditions, and permits are imposed including prohibition on erection of structure for drilling or production within one mile seaward of coastline of state. (Fla. Stat. 377.24).

Enforcement.

By Department of Environmental Protection in accordance with procedures outlined in Fla. Stat. 403.121.

Department of legal affairs, political subdivision or municipality, or private citizen may maintain action for injunctive relief to prohibit violation of pollution laws or to compel governmental authorities to enforce such laws. (Fla. Stat. 403.412).

Penalties.

Anyone who commits a violation of c. 403 may be fined up to $10,000 for each offense, in addition to civil liability to state for damages to air, waters, or property, including animal, plant, and aquatic life. Each day of violation constitutes a separate offense. (Fla. Stat. 403.141).

Civil penalty for drilling or producing oil and gas in violation of c. 377 up to $10,000 per offense; each day during which violation occurs constitutes separate offense. (Fla. Stat. 377.37). Civil liability imposed for damages, costs of tracing source and clean-up costs. Negligence need not be shown in action by State. (Fla. Stat. 377.37).

Up to $500 per day and up to 60 days in jail penalty imposed on persons violating regulations on well construction and use. (Fla. Stat. 373.336, 775.082, 775.083).

Variances.

May be granted for certain enumerated reasons and upon compliance with procedure for application therefor. (Fla. Stat. 403.201).

12.02 WATER LAW:

Supervision of Department of Environmental Protection (DEP) extends to underground water, lakes, drinking water, rivers, streams, canals, ditches, wetlands and coastal waters, as well as atmosphere. (Fla. Stat. 403.061).

Permits are required. (c. 373). Permit not required for temporary construction, operation, or maintenance of water supply backpumping facilities for storage of surplus water if water emergency declared. (Fla. Stat. 373.086). Soil and Water Conservation District advises Department of Agriculture and Consumer Services on soil and water conservation matters. (Fla. Stat. 582.10). Governing board of any water management district and any officer of district may enforce Water Resources Act. (Fla. Stat. 373.129).

DEP empowered to establish rules for categorizing bodies of water as Outstanding Florida Waters worthy of special protection. (Fla. Stat. 403.061[27]).

Saltwater fisheries and products protected and regulated. (c. 370).

Surface Water Improvement and Management Act (Fla. Stat. 373.451) provides for development of water improvement and management plans and regulation of construction at beach and water areas.

12.03 WILDLIFE AND ENDANGERED SPECIES:

It is unlawful for person to intentionally kill or wound any fish or wildlife of species designated by Fish and Wildlife Conservation Commission as endangered, threatened, or of special concern, or to intentionally destroy eggs or nest of any such fish or wildlife, except as provided for in rules of commission. Any person who violates this provision with regard to endangered or threatened species is guilty of felony of third degree, punishable as provided in Fla. Stat. 775.082, 775.083, or 775.084. (Fla. Stat. 372.0725).

Alligators and Crocodiles.

Unlawful to intentionally kill, injure, possess, or capture, or attempt to kill, injure, possess, or capture, alligator or other crocodilian, or eggs of alligator or other crocodilian, unless authorized by rules of Fish and Wildlife Conservation Commission. Violation is third-degree felony, punishable as provided in Fla. Stat. 775.082, 775.083, or 775.084, in addition to such other punishment as may be provided by law. Any equipment, including but not limited to weapons, vehicles, boats, and lines, used by person in commission of violation is, upon conviction, confiscated by Fish and Wildlife Conservation Commission. (Fla. Stat. 372.663). Unlawful to sell any stuffed baby alligator or other baby crocodilia; unlawful to sell any alligator product manufactured from species which has been declared endangered by United States Fish and Wildlife Service or Fish and Wildlife Conservation Commission. (Fla. Stat. 372.6645).

Panthers.

Unlawful to kill member of Florida endangered or threatened species, as defined in Fla. Stat. 372.072(3), including Florida panther (Felis concolor coryi) and any member of species of panther (Felis concolor) occurring in wild. (Fla. Stat. 372.671). Violation is third-degree felony, punishable as provided in Fla. Stat. 775.082, 775.083, or 775.084.

Wildlife Violators Compact Act.

Entered into with all other jurisdictions legally joining therein, effective July 1, 2006. (Fla. Stat. 372.831).

13 ESTATES AND TRUSTS

13.01 ADMINISTRATION:

See topic 13.09 Executors and Administrators.

13.02 ADVANCEMENTS:

See topic 13.07 Descent and Distribution.

13.03 ALLOWANCES:

See topic 13.09 Executors and Administrators.

13.04 CLAIMS:

See topic 13.09 Executors and Administrators; category 5 Civil Actions and Procedure, topic 5.18 Pleading.

13.05 DEATH:

Authenticated copy of death certificate issued by official or agency of place where death purportedly occurred is prima facie evidence of fact, place, date, and time of death and identity of decedent. Copy of any record or report of governmental agency, domestic or foreign, that person is alive, missing, detained, or presumed dead is prima facie evidence of status and of dates, circumstances, and places disclosed by record or report. Person absent from place of last known domicile for continuous period of five years and whose absence is not satisfactorily explained after diligent search and inquiry is presumed dead; death presumed to have occurred at end of period unless evidence establishes death prior to expiration of five year time period. (Fla. Stat. 731.103).

Proceedings Concerning Trusts.

A trust may be modified after a settlor's death by unanimous agreement of the trustee and all qualified beneficiaries despite a spendthrift clause or a provision in the trust instrument that prohibits amendment or revocation of the trust. (Fla. Stat. 736.0412). Such modification does not apply if all beneficial interests in the trust must vest or terminate within the period prescribed by the rule against perpetuities, unless the terms of the trust expressly authorize nonjudicial modification. (Fla. Stat. 736.0412[4][b]). Such modification also does not apply to any trust for which a charitable deduction is allowed or allowable under the Internal Revenue Code until the termination of all charitable interests in the trust. (Fla. Stat. 736.0412[4][c]).

Upon the death of a settlor of a revocable trust, the trustee must file a notice of trust with the court of the county of the settlor's domicile and the court having jurisdiction of the settlor's estate. (Fla. Stat. 736.05055). Action contesting the validity of such a trust is barred if not commenced within six months after the trustee sent the person a copy of the trust instrument and a notice informing the person of the trust's existence, of the trustee's name and address, and of the time allowed for commencing a proceeding. (Fla. Stat. 736.0604).

Uniform Simultaneous Death Act has been adopted with some modifications. (Fla. Stat. 732.601).

Actions for Death.

Survival of Actions.

Wherever the act causing death is such as would, if death had not ensued, have entitled the injured party to recover damages therefor, then the person or persons who would have been liable in damages if death had not ensued, will be liable notwithstanding the death of the person injured. (Fla. Stat. 768.19). Includes both ex contractu and ex delicto actions.

Wrongful Death.

Action maintained by decedent's personal representative for decedent's survivors and estate. (Fla. Stat. 768.20). Recovery may include lost support and services, loss of companionship, mental pain and suffering of certain family members of decedent, and medical and funeral expenses plus certain other damages. (Fla. Stat. 768.21).

Action for wrongful death must be commenced within two years from time of death of injured party. (Fla. Stat. 95.11[4][d]).

Judgment for personal injuries rendered in favor of injured party while living bars subsequent wrongful death action based on same tortious conduct. (445 So.2d 1010).

Death Certificate.

See category 10 Documents and Records, topic 10.04 Records, subhead Vital Statistics.

Living Wills.

Competent adult may, at any time, make written declaration or living will directing withholding or withdrawal of life-prolonging procedures in event person suffers from terminal condition, end stage condition, or is in persistent vegetative state. Declaration must be signed in presence of two subscribing witnesses, one of whom is neither spouse nor blood relative of declarant. If declarant physically unable to sign living will, one of witnesses must subscribe declarant's signature in declarant's presence and at principal's direction. (Fla. Stat. 765.302[1]). See also 568 So.2d 4. Florida also allows person to designate healthcare surrogate or attorney in fact under durable power of attorney to make such decisions. (Fla. Stat. 765.202; Fla. Stat. 765.204[5]; Fla. Stat. 709.08). If durable power of attorney and health care advance directive conflict, directive controls unless durable power of attorney is later executed and expressly states otherwise. (Fla. Stat. 709.08[3][c]3).

Uniform Anatomical Gift Act.

See topic 13.16 Wills.

Right to Die.

See subhead Life-Prolonging Procedures, supra and topic Wills, subhead Life Prolonging.

13.06 DECEDENTS' ESTATES:

See topics 13.07 Descent and Distribution, Executors and Administrators, Wills; category 8 Debtor and Creditor, topic 8.10 Homesteads.

13.07 DESCENT AND DISTRIBUTION:

Uniform Probate Code adopted with significant variations. (cc. 731, 732).

Real (other than homestead) and personal property of intestate descends and is distributed as follows: (1) In absence of lineal descendants, to surviving spouse, (2) if all surviving lineal descendants are lineal descendants of surviving spouse, first $60,000 plus one-half of balance of estate to surviving spouse and other one-half of balance to lineal descendants, (3) if any of surviving lineal descendants is not lineal descendant of surviving spouse, one-half to surviving spouse and one-half to lineal descendants, (4) if no surviving spouse, entire estate to lineal descendants, or if none, (5) to father and mother equally, or survivor of them, or if none, (6) to brothers and sisters and descendants of deceased brothers and sisters, (7) if none of foregoing, one-half each to paternal and maternal kindred in following course: (a) Grandfather and grandmother equally, or survivor, (b) uncles and aunts and descendants of those deceased uncles and aunts, (c) if either no paternal or no maternal kindred, to such of kindred as survive in order aforesaid, (8) if no kindred of either part, then to kindred of last deceased spouse as if said spouse survived decedent and then died intestate entitled to estate. In proceedings filed before Jan. 1, 2005, if none of foregoing, and if any of descendants of decedent's great-grandparents were holocaust victims (including victims in countries cooperating with discriminatory policies of Nazi Germany) then to lineal descendants of great-grandparents; court must allow any such descendant to meet reasonable, not unduly restrictive, standard of proof to substantiate lineage. (Fla. Stat. 732.101-103). See category 8 Debtor and Creditor, topic 8.10 Homesteads.

Descent is always per stirpes. (Fla. Stat. 732.104).

Half Blood.

Half blood, collateral kindred of intestate inherit only half as much as those of whole blood; but if all are half blood they take whole parts. (Fla. Stat. 732.105).

Out of Wedlock Children.

For purposes of intestate succession, person born out of wedlock is descendant of mother and is one of natural kindred of all members of mother's family. He or she is descendant of father and one of natural kindred of all members of father's family if (i) natural parents participated in marriage ceremony before or after his or her birth even though attempted marriage is void, (ii) paternity is established by adjudication before or after death of father or (iii) paternity is acknowledged in writing by father. (Fla. Stat. 732.108).

Adopted Children.

For purposes of intestate succession, adopted person is descendant of adopting parent and is natural kindred of all members of adopting parent's family. Adopted person is not descendant of natural parent nor kindred of natural parent's family except (i) adoption of child by spouse of natural parent has no effect on relationship between child and natural parent or natural parent's family, (ii) adoption of child by natural parent's spouse who married the natural parent after death of other natural parent has no effect on relationship between child and family of deceased natural parent, or (iii) adoption of child by certain close relatives has no effect on relationship between child and families of deceased natural parents. (Fla. Stat. 732.108).

Posthumous Children.

Heirs of decedent conceived before his or her death, but born thereafter, inherit intestate property as if they had been born in decedent's lifetime. (Fla. Stat. 732.106). When testator omits to provide in will for any children born or adopted after making will and child has not received part of testator's property equivalent to child's part by way of advancement, child receives share of estate equal in value to that child would have received if testator had died intestate, unless: (i) it appears from will that omission was intentional; or (ii) testator had one or more children when will was executed and devised substantially all estate to other parent of pretermitted child and that other parent survived testator and is entitled to take under will. (Fla. Stat. 732.302).

Surviving Spouse.

Dower has been abolished. (Fla. Stat. 732.111).

Right to Elective Share.

Surviving spouse, attorney in fact, or guardian of property of surviving spouse, has right to elect elective share of deceased spouse. (Fla. Stat. 732.2125).

Elective share is amount equal to 30% of elective estate. (Fla. Stat. 732.2065). Elective estate includes such property as decedent's probate estate; decedent's fractional interest in property held by decedent in joint tenancy with right of survivorship or in tenancy by entirety; decedent's beneficial interest in net cash surrender value immediately before death of any policy of insurance on decedent's life; and property transferred in satisfaction of elective share. For complete list, see statute. (Fla. Stat. 732.2035). Examples of what is not included in elective estate: any transfer of property by decedent to extent transfer is irrevocable prior to Oct. 1, 1999 or after that date but before the date of the decedent's marriage to the surviving spouse; any transfer of property to extent decedent received adequate consideration for transfer; any transfer of property made with written consent of decedent's spouse; proceeds of any policy of insurance on decedent's life in excess of net cash surrender value of policy; property which constitutes protected homestead of decedent whether held by decedent or by trust at decedent's death. For complete list, see statute. (Fla. Stat. 732.2045). Fla. Stat. 732.2055 governs valuation of elective estate. See also Fla. Stat. 732.2095.

Unless otherwise provided by will or trust, statute sets forth list of types of property applied first to satisfy elective share. (Fla. Stat. 732.2075).

If elective share not fully satisfied, unsatisfied balance apportioned among direct recipients of remaining elective estate in designated order of priority. (Fla. Stat. 732.2075[2]). Only direct recipients of property included in elective estate and beneficiaries of decedent's probate estate, or of any trust that is direct recipient, are liable to contribute toward satisfaction of elective share. See Fla. Stat. 732.2145 for order of contribution.

Elective share is in addition to homestead, exempt property, and allowances. (Fla. Stat. 732.2105).

Election must be filed on or before earlier of six months after date of service of copy of notice of administration or two years after date of decedent's death. (Fla. Stat. 732.2135). Certain parties may petition court for extension of time for making election. Election may be withdrawn at any time within eight months of decedent's death and before court's order of contribution. If election made in bad faith, court may assess attorney's fees and costs against surviving spouse or surviving spouse's estate. (Fla. Stat. 732.2135).

Waiver of elective share rights before Oct. 1, 1999 is waiver of all rights under new provisions.

Advancements.

Property given to heir by total intestate prior to death is advancement against heir's share only if declared as such in contemporaneous writing by decedent or acknowledged in writing by heir. If recipient does not survive decedent, such property is not taken into account in computing share to be received by recipient's descendants unless declaration or acknowledgment provides otherwise. (Fla. Stat. 733.806).

Escheat.

If person dies and is not survived by any person entitled to his estate, his property escheats to state and proceeds of estate are paid to State Chief Financial Officer. In this event or in case of uncertainty, personal representative may petition court for determination of beneficiaries within one year after issuance of letters of administration. Any person claiming to be entitled to estate may reopen administration within ten years after issuance of letters of administration. (Fla. Stat. 732.107). See category 21 Property, topic 21.01 Absentees, subhead Escheat.

Unclaimed probate assets held by personal representative also escheat to state if funds deposited with state go unclaimed for ten years. (Fla. Stat. 733.816). Claims by persons entitled to these assets must be made within ten years from date of deposit with State Chief Financial Officer. (Fla. Stat. 733.816).

See also topic 13.09 Executors and Administrators.

Uniform Disclaimer of Property Interests Act adopted (c. 739), with Florida revisions, effective July, 2005. Under act, “jointly held property” does not include property held as tenants by entirety. (Fla. Stat. 739.102[9]). Fla. Stat. 739.203 specifically provides method to disclaim interest in property held as tenancy by entirety. Disclaimer may be made at any time unless barred under Fla. Stat. 739.402. (Fla. Stat. 739.401). Disclaimer is barred by written waiver of right to disclaim. Disclaimer is barred if any of following events occur before disclaimer becomes effective: (i) disclaimant accepts interest; (ii) disclaimant voluntarily assigns, encumbers, or transfers interest; (iii) interest is sold pursuant to judicial sale; or (iv) disclaimant is insolvent when disclaimer becomes irrevocable. (Fla. Stat. 739.402). Except as otherwise provided in Fla. Stat. 739.402, interest in or power over property existing on July 1, 2005, as to which time for delivering or filing disclaimer under laws superseded by c. 739 has not expired, may be disclaimed after July 1, 2005. (Fla. Stat. 739.701).

13.08 ELECTION:

See topic 13.16 Wills.

13.08A ESTATES: (in property)

See category 21 Property, topic 21.16 Real Property.

13.09 [RESERVED]

13.10 EXECUTORS AND ADMINISTRATORS:

(See also topics 13.16 Wills, and 13.07 Descent and Distribution.)

Uniform Probate Code adopted with significant variations. (cc. 731, 732).

Probate jurisdiction is in circuit court.

Venue of probate of wills and granting letters of administration is: (a) In county where decedent had his domicile; (b) if decedent had no domicile in state, any county in which he was possessed of property; (c) if decedent had no domicile, and possessed no property in State, then in county where any debtor of decedent may reside. (Fla. Stat. 733.101[1]). Married woman whose husband is alien or nonresident of Florida may establish or designate separate domicile in

Florida. (Fla. Stat. 733.101[2]).

Ancillary Administration.

Upon death of nonresident leaving assets in state, personal representative designated in will to administer Florida property, or domiciliary personal representative, may have ancillary letters issued to him, if qualified to act. After payment of administration expenses and claims, circuit court may order remaining property held by ancillary personal representative transferred to domiciliary personal representative or distributed to heirs or devisees. (Fla. Stat. 734.102).

If assets in state do not exceed $50,000, domiciliary personal representative of nonresident decedent who died testate may determine question of claims in this state by filing with circuit court where property located authenticated transcript of so much of foreign proceedings as will show will and beneficiaries of estate. Court then admits will to probate if it complies with §732.502(1), (2), or (3). (Fla. Stat. 734.1025[1]). Personal representative must cause notice to be served and published according to §731.111. (Fla. Stat. 734.1025[2]). If no claims, court will enter order that notice was duly given and all claims are satisfied. (Fla. Stat. 734.102[4]). If claim filed, court notifies domiciliary personal representative and sets hearing to appoint ancillary personal representative. (Fla. Stat. 734.102[5]).

Preference in appointment as personal representative is given in testate estates to: (a) Personal representative or successor nominated by will or pursuant to power in will; (b) person selected by majority in interest of persons entitled to estate; (c) devisee under will and if more than one applies, court may select one best qualified; and in intestate estates to: (a) Surviving spouse; (b) person selected by majority in interest of heirs; (c) heir nearest in degree, and if more than one applies, court may select one best qualified. Guardian of property of ward who if competent would be entitled to appointment or to select representative may exercise right to select personal representative. If no application is made by persons named above, court appoints capable person. (Fla. Stat. 733.301).

Qualification, Eligibility and Competency.

Any person sui juris who is resident of Florida at time of death of person whose estate he seeks to administer is qualified to act as personal representative, unless convicted of felony, mentally or physically unable to perform duties, or under age 18. (Fla. Stat. 733.302, .303).

Nonresidents.

Person not domiciled in Florida cannot qualify as personal representative unless legally adopted child or adoptive parent, related by lineal consanguinity, or spouse, brother, sister, uncle, aunt, nephew, or niece of decedent or someone related by lineal consanguinity to any such person or spouse of person otherwise qualified. (Fla. Stat. 733.304). Constitutionality of §733.304 upheld by Supreme Court of Florida. (390 So. 2d 40; appeal dismissed 450 U.S. 961; Contra, 463 F. Supp. 661).

Removal of domicile from Florida, not being qualified under above exceptions, is cause for removal of personal representative. (Fla. Stat. 733.504[11]).

Trust companies incorporated under laws of Florida, state banking corporations, state savings associations and national banking associations and federal savings and loan associations authorized and qualified to exercise fiduciary powers in Florida may act as personal representatives and curators. (Fla. Stat. 733.305[1]).

See, however, category Business Regulation and Commerce, topic Banks and Banking.

Formal Administration.

Verified petition for administration may be filed by any interested person. (Fla. Stat. 733.202). See other subheads re formal administration of estates, infra.

Summary Administration.

Summary administration of decedent's estate may be had when value of entire estate subject to administration in Florida, less exempt property, does not exceed $75,000, or decedent has been dead for more than two years, provided that testate estate decedent's will does not direct formal administration under c. 733 (Fla. Stat. 735.201). Estate may be administered in same manner as administration of any other estate or it may be administered by summary administration. (Fla. Stat. 735.202). After filing of petition showing assets, estate is not indebted or that provision for payment of debts has been made, and proposed distribution to those entitled as surviving spouse, beneficiaries or creditors, and after court admits any will, order of summary administration may be entered allowing immediate distribution to persons entitled. Petitioners for order are personally liable for pro rata share of all lawful claims against estate to extent of assets received by each petitioner, exclusive of exempt property. (Fla. Stat. 735.203, .206). Petitioners may publish and serve notice to creditors according to §733.2121. (Fla. Stat. 735.2063). Any rightful heir not included in order of summary administration may enforce his rights to share against those who procured order. (Fla. Stat. 735.206).

Disposition of Personal Property without Administration.

No administration is required for estate of decedent leaving only personal property entire value of which does not exceed exempt property, preferred funeral expenses and reasonable and necessary medical and hospital expenses of last 60 days of last illness. Upon informal application by interested party, court if satisfied that requirements are met, may by letter or other writing under seal of court authorize payment, transfer or disposition of personal property to those persons entitled, and person, firm or corporation paying, delivering or transferring property under authorization is discharged from liability thereon. (Fla. Stat. 735.301).

Curators.

Circuit court, when necessary, may appoint curator to take charge of estate after formal notice to person apparently entitled to letters; notice may be dispensed with if there is danger of property being wasted or destroyed during delay. (Fla. Stat. 733.501).

Public Administrator.

No provision for such.

Bonds.

Before letters of administration are issued, bond with surety must be filed. No bond is required where testator waived such requirement. Bond is in sum set by circuit court, payable to Governor and his successors, and conditioned to perform all duties as personal representative according to law. (Fla. Stat. 733.402). Curators must give bond as court deems necessary. (Fla. Stat. 733.501[2]). No bond is required of bank or trust company authorized to act in Florida. (Fla. Stat. 733.402[3]). Court may waive requirement of filing bond, require personal representative or curator to give bond, increase or decrease bond, or require additional surety. (Fla. Stat. 733.402[4]). Bond of others may be reduced or dispensed with under court order providing for deposit of part of or all personal assets of estate with bank or trust company doing business in Florida. (Fla. Stat. 69.031).

Person Presumed Dead.

Where person has been absent and unheard from for five years, administration of person's estate may be granted after petition for administration request, and entry of order declaring death. (Fla. Stat. 731.103, 733.209). See topic 13.05 Death.

Inventory and Appraisal.

Unless inventory has been previously filed, personal representative must prepare and file verified inventory, including estimated fair market value of each listed item at decedent's death. Copy must be served on surviving spouse, each heir at law in intestate estate, each residuary beneficiary in testate estate, any other interested person who requests it and Department of Revenue, and file proof of service. If personal representative learns of any property not included in original inventory or that estimated value or description indicated in original inventory for any item is erroneous or misleading, he must prepare and file amended or supplemental inventory and serve copy on each person on whom copy of original inventory was served, and file proof of service. Any original, amended or supplemental inventory filed is subject to inspection only upon order of court upon good cause shown. (Fla. Stat. 733.604). Initial opening of safe-deposit box of decedent and inventory of contents must be conducted in presence of any two of following: employee of institution where box is located, personal representative, or personal representative's attorney of record. Both must verify contents by signing copy of inventory. Personal representative must file inventory with court within ten days after box is opened. (Fla. Stat. 733.6065).

Waiver and Consent.

Interested party, including fiduciaries, may waive, to extent of that person's interest, any right or notice or filing of any document, exhibit, or schedule required to be filed, and may consent to any action or proceeding which may be required or permitted by code. (Fla. Stat. 731.302).

Notice of Administration.

Personal representative must promptly serve copy of notice of administration on surviving spouse and all beneficiaries known to him in manner provided for formal notice unless served under §733.2123, and, trustee of any trust described in §733.707(3), and each beneficiary of trust as defined in Fla. Stat. 736.0103(14) if each trustee is also personal representative of estate, and persons who may be entitled to exempt property. Personal representative must also promptly make diligent search to determine names and addresses of creditors of decedent who are reasonably ascertainable and must serve on those creditors copy of notice within three months after first publication, unless creditor has already filed claim, creditor has been paid in full, or creditor's claim is listed in timely Personal Representative's Proof of Claim if personal representative notified creditor of that listing. Publication must be once a week for two consecutive weeks. Notice must require all interested persons to file (a) all claims before later of date that is three months following first publication or, as to any creditor required to be served with notice, 30 days after date of service of notice; notwithstanding foregoing, within two years after date of decedent's death, and (b) any objection by interested person that challenges validity of will, qualifications of personal representative, venue or jurisdiction of court within later of three months of first publication or 30 days after service of notice. (Fla. Stat. 733.212; Fla. Stat. 733.2121). Notice must contain name of decedent, file number of estate, designation and address of court, name and address of personal representative and his attorney, and must state date of first publication. (Fla. Stat. 733.212). Objections to will, personal representative, venue or jurisdiction by interested parties to whom notice was mailed that are not filed within three months after date of service of copy of notice are barred. (Fla. Stat. 733.212). Claims are barred as set forth under subheads Presentation and Statement of Claims, and Notice to Present Claims, infra. (Fla. Stat. 733.702). Fla. Stat. 733.702 is statute of limitations that cannot be waived in probate proceeding by failure to object to claim on timeliness grounds; Fla. Stat. 733.710 is jurisdictional statute of nonclaim that is not subject to waiver or extension in probate proceeding. (771 So.2d 1143).

Sales.

Sale made under specific power in will to sell real property or general power in will to sell any asset is valid without authorization or confirmation of court. Real property of estate or any interest therein may be sold for cash or credit or for part cash and part credit, and without security for unpaid balances. Sale need not be justified by showing of necessity when made pursuant to power in will. (Fla. Stat. 733.613[1]). General power cannot be exercised arbitrarily and if power is limited, it can be exercised only as provided for or contemplated by will. (183 So.2d 849; 200 So.2d 547; 318 So.2d 509). Where no power of sale is given in will or decedent died intestate, petition for authorization or confirmation must be filed by personal representative setting forth reasons for sale, description of property, and price and terms of sale. (Fla. Stat. 733.613[2]).

In sale or mortgage which occurs under specific power to sell or mortgage real property, or under court order authorizing or confirming that act, purchaser or lender takes title free of claims of creditors of estate and entitlements of estate beneficiaries, except existing mortgages or other liens against real property are not affected. (Fla. Stat. 733.613[3]).

Notice to Present Claims.

See subhead Notice of Administration, supra. (Fla. Stat. 733.212). Unless creditors' claims are barred by statute of limitations (Fla. Stat. 733.710), notice of administration must be published and served under §733.2121. (Fla. Stat. 733.701).

Presentation and Statement of Claims.

All claims must be in writing, with statement indicating basis, name and address of creditor, his agent or attorney and amount claimed; if claim is not yet due, date when it becomes due; if claim is contingent or unliquidated, nature of uncertainty; if claim is secured, description of security. Claim must be verified. Creditor must deliver original and copy of claim to clerk of court who serves copy on personal representative. (F.P.R. 5.490). Claim is presented when filed. (Fla. Stat. 733.703). Claims on judgments against decedent must be filed in same manner as other claims. However, provisions for claims are not to be construed to prevent enforcement of mortgages, security interests, or liens encumbering specific property. (Fla. Stat. 733.706).

Approval or Rejection of Claims.

Claim not objected to by personal representative or other interested person within four months of first publication of notice to creditors within 30 days from timely filing or amendment of claim, whichever occurs later, is deemed allowed but court may extend time for filing of objections by order entered in estate administration proceeding upon showing of good cause. If objection filed, person filing must serve copy of same on claimant or attorney for claimant, and personal representative. Claimant then limited to 30 days from such service within which to bring appropriate proceedings. (Fla. Stat. 733.705). Personal representative cannot be compelled to pay any claim before five months after first publication of notice of administration and if any suit is brought within five months upon any claim not objected to, plaintiff although obtaining decree or judgment, receives no costs or attorney's fees. (Fla. Stat. 733.705).

Disclaimer.

See topic 13.07 Descent and Distribution, subhead Disclaimer.

Compromise or settlement of claims is permitted. (Fla. Stat. 733.708).

Order of payment of expenses of administration and obligations of estate are: (1) Costs, expenses of administration, compensation of personal representatives and their attorneys' fees and attorneys fees awarded under §733.106(3); (2) reasonable funeral expenses, not to exceed $6,000; (3) debts and taxes with preference under federal law and claims pursuant to Fla. Stat. 409.9101 and 414.28; (4) medical and hospital expenses of last 60 days illness; (5) family allowance; (6) arrearage from court ordered child support; (7) debts after death by continuation of business, to extent of business assets; (8) all other claims including judgments before death and excess over sums for (2) and (4). If, after paying any preceding class, assets are insufficient to

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pay next succeeding class, such latter claimants are paid pro rata. (Fla. Stat. 733.707). Assets held in any trust created by decedent over which decedent held power to revoke as of time of death are liable for payment to decedent's creditors and for payment of estate administration expenses. (Fla. Stat. 733.707[3]).

Limitations.

After two years from decedent's death, neither decedent's estate nor are beneficiaries liable for any obligation or on any cause of action against decedent whether or not letters have been issued, but this does not apply to creditor who has filed claim or whose claim has been paid within said two years and does not affect lien of duly recorded mortgage or of person in possession of personalty or impair right to foreclose and enforce such mortgage or lien. (Fla. Stat. 733.710).

Beneficiaries.

No legacy may be required to be paid or specific property surrendered until five months after grant of letters. No personal representative may be compelled to pay over or deliver or surrender property before final settlement of his accounts except on petition filed, showing that property or money claimed will not be required for expenses or prior claims, which petition may be filed by any beneficiary, and circuit court may require refunding bond if distribution is made before final settlement. (Fla. Stat. 733.801, .802).

Unless otherwise provided in will, personal representative must pay as expense of administration reasonable expenses of storage, insurance, packing, and delivery of tangible personal property to beneficiary.

Unless general power of sale is conferred or contrary intention is indicated by will or assets are otherwise disposed of by statute, distributable assets of estate must be distributed in kind through application of specified provisions. (Fla. Stat. 733.810). Whenever under any will or trust instrument executor or trustee is required to, or has option to, satisfy bequest, devise or transfer in trust to or for benefit of surviving spouse of decedent by transfer of assets in kind at values finally determined for federal estate tax purposes, such bequest, devise or transfer in trust must be satisfied, in absence of contrary provisions in will or trust instrument, by distribution of assets, including cash, fairly representative of appreciation or depreciation in value of all property available for distribution in satisfaction of such bequest, devise or transfer. (Fla. Stat. 733.810).

Interested persons may agree among themselves to alter interests, shares or amounts to which they are entitled, in written agreement executed by all who are affected, subject to rights of creditors and taxing authorities and rights of beneficiaries not parties to agreement. Trustees of testamentary trust are beneficiaries for purposes of this section which does not relieve trustees of duties to trust beneficiaries. (Fla. Stat. 733.815).

As to prorating estate taxes, see category 22 Taxation, topic 22.07 Estate Tax, subheads Tax Upon Estates of Resident Decedents, Tax Upon Estates of Nonresident Decedents, Tax Upon Estates of Alien Decedents.

Where doubt exists as to rights or interests of beneficiaries, a petition may be filed to determine the same. (Fla. Stat. 733.105).

Right of possession of decedent's real estate (except homestead) passes to personal representative. (Fla. Stat. 733.607). If property that reasonably appears to personal representative to be protected homestead is not in possession of person who appears to have interest in property, personal representative is authorized (but not required) to take possession of property for limited purpose of preserving, insuring, and protecting it for heir or devisee, pending determination of its homestead status. If personal representative takes possession of property, any rents and revenues may be collected for account of heir or devisee, but personal representative does not have duty to rent or otherwise make property productive.

Specific devisee of encumbered real property entitled to have encumbrance paid from residue only when will shows intent. General direction in will to pay debts does not show such intent. (Fla. Stat. 733.803).

Investments.

See topic 13.15 Trusts.

Vendor Contracts.

Personal representative may fulfill contracts of decedent for sale, conveyance, or lease of real property in this state or personal property. (Fla. Stat. 733.612[2]).

Allowances.

Surviving spouse, or, if none, minor children are entitled to, subject to perfected security interests, household furniture, furnishings and appliances in decedent's usual place of abode up to net value of $20,000, and personal effects up to net value of $1,000 (§4, Art. X of Florida Const.), qualified tuition programs, and automobiles, in addition to homestead property and family allowance. Such rights are in addition to any benefit or share passing to spouse or minor children by will unless will otherwise provides, or by intestate succession or elective share. Property determined as exempt excluded from value of estate before residuary, intestate, or pretermitted or elective shares are determined. Persons entitled to exempt property deemed to have waived their rights unless petition for determination of exempt property is filed within four months after first publication of notice of administration, or within 40 days after termination of proceedings involving construction, validity or admission of will to probate. (Fla. Stat. 732.402). Surviving spouse and lineal heirs decedent was obligated to support or did support, including lineal ascendants and descendants, are entitled to reasonable family allowance not to exceed $18,000, to be paid to surviving spouse, if living, for use of spouse and lineal heirs, or if not, to lineal heirs or person having custody. (Fla. Stat. 732.403).

Accounts.

Accountings are confidential and exempt from inspection and copying. (Fla. Stat. 733.604). Removed personal representative must file accounting after removal. (Fla. Stat. 733.508). Personal representative who resigns must make an accounting before being discharged. (Fla. Stat. 733.5036).

Distributions.

If testator makes provision by will, or designates funds or property to be used, for payment of debts, estate and inheritance taxes, family allowance, exempt property, elective share charges, expenses of administration, and devises, they must be paid out of funds or from property or proceeds as provided by will so far as sufficient. If no provision made or fund designated, or if insufficient, property of estate must be used for such purposes. Statute sets forth in detail order in which decedent's property is to be devoted to these purposes. (Fla. Stat. 733.805).

Distribution if Abroad.

No specific provision.

Liabilities.

Unless otherwise provided in contract, personal representative not individually liable on contract, except contract for attorney's fee, properly entered into in fiduciary capacity in administration of estate unless personal representative fails to reveal representative capacity and identify estate in contract. Personal representative is individually liable for obligations arising from ownership or control of estate or for torts committed in course of administration of estate only if personally at fault. Claims based on contracts, except contract for attorney's fee, entered into by personal representative in fiduciary capacity, on obligations arising from ownership or control of estate, or on torts committed in course of estate administration, may be asserted against estate by proceeding against personal representative as fiduciary, whether or not personal representative is individually liable therefor. Issues of liability between estate and personal representative individually may be determined in proceeding for accounting, surcharge, or indemnification, or other appropriate proceeding. (Fla. Stat. 733.619).

Actions.

There is no suspension of right to sue on claims against estate, but if action is brought within five months on claim to which no objection has been filed, no costs or attorneys' fees are allowed. Action on claim objected to must be brought within 30 days from date claimant is served with such objection. (Fla. Stat. 733.705[1]).

Closing Estate.

Upon receipt of evidence of proper distribution and payment or disposition of claims, court enters order discharging personal representative and releasing surety on any bond. (Fla. Stat. 733.901).

Compensation.

Personal representatives, attorneys, accountants and other agents employed by personal representative are entitled to reasonable compensation. Testamentary provision for direct or conditional compensation of personal representative may be renounced by personal representative entitling him to reasonable compensation, unless there is contract with decedent regarding compensation. If personal representative is member of Florida Bar and has rendered legal services in connection with official duties, he is allowed reasonable compensation for same. (Fla. Stat. 733.617). Compensation of personal representative may be increased or decreased by order of court upon petition of any interested party. (Fla. Stat. 733.617[7]). Attorney's compensation presumed to be reasonable under sliding scale formula based upon size of decedent's estate for ordinary services. (Fla. Stat. 733.6171[3]). In addition, attorney may be further compensated for extraordinary services rendered to or on behalf of estate including probate litigation, auditing, tax advice, post mortem estate planning, and preparation of federal estate tax return. (Fla. Stat. 733.6171[4]).

Removal.

Personal representative may be removed and letters revoked for: (1) adjudication that personal representative is incapacitated; (2) physical or mental incapacity; (3) failure to comply with order of court not superseded on appeal; (4) failure to account for sale of property or to produce and exhibit assets when required; (5) wasting or maladministration of estate; (6) failure to give bond or security; (7) conviction of felony; (8) insolvency or appointment of receiver or liquidator for corporate personal representative; (9) conflicting or adverse interests held or acquired (not applicable to claim of elective share or family allowance and exemptions by surviving spouse); (10) revocation of probate of will designating personal representative; (11) removal of domicile from Florida if domicile was a requirement; (12) personal representative would not now be entitled to appointment. (Fla. Stat. 733.504).

Foreign executor or administrator who produces probate of will or letters of administration duly obtained in any state or territory of U.S., properly authenticated may maintain actions in courts of this state. Personal representatives appointed in any state or country may be sued in this state with reference to property in this state and may defend actions brought in Florida. (Fla. Stat. 734.101).

Debtors residing in Florida, or whose property in Florida is subject to a lien or mortgage held by a nonresident decedent, may make payment to foreign personal representatives and persons holding possession of personalty may deliver it, provided no notice or demand has been given by locally appointed representative for 90 days after appointment of foreign representative. (Fla. Stat. 734.101).

See also category 3 Business Regulation and Commerce, topic 3.01 Banks and Banking, subhead International Banking.

Uniform Fiduciaries Act not adopted.

Revised Uniform Principal and Income Act (Fla. Stat. 690.01-.15) replaced by Florida Uniform Principal and Income Act effective Jan. 1, 2003 (Fla. Stat. 738.101-738.804).

Uniform Simplification of Fiduciary Security Transfers Act repealed. (98–11).

Uniform Anatomical Gift Act adopted. (Fla. Stat. 765.510-.522).

13.11 FIDUCIARIES:

See topics 13.09 Executors and Administrators, Trusts; category 14 Family, topic 14.07 Guardian and Ward.

13.12 INTESTACY:

See topic 13.07 Descent and Distribution.

13.13 LIVING WILLS:

See topic 13.16 Wills.

13.14 PROOF OF CLAIMS:

See topic 13.09 Executors and Administrators; category 5 Civil Actions and Procedure, topic 5.18 Pleading.

13.15 TRUSTS:

Provisions adopted governing probate and trust administration provisions effective Jan. 1, 1976. (cc. 731-738). Florida Trust Code enacted. (06-217). Effective July 1, 2007, Code applies to all trusts created before, on or after that date. (Fla. Stat. 736.1303).

Kinds.

Inter vivos trusts, testamentary trusts, business trusts (Fla. Stat. 609.01), resulting trusts (89 Fla. 457, 105 So. 106), constructive trusts (132 So.2d 198), Totten trusts (85 So.2d 726), life insurance trusts (Fla. Stat. 733.808[1][a]), Illinois type land trusts (Fla. Stat. 689.071; but see 351 So. 2d 1094), including inter vivos trusts in which certain powers are retained by settlor either singly or jointly with another (Fla. Stat. 689.075), are recognized.

Creation and Appointment of Trustee.

For trusts created under instrument executed on or after July 1, 2007, settler may revoke or amend trust unless terms of trust expressly provide that trust is irrevocable. (Fla. Stat. 736.0602). All grants, conveyances, or assignments of trust or confidence in any lands, or of any interest therein, must be: (1) By deed signed and delivered in presence of two subscribing witnesses by grantor, conveyor, or assignor, or by his attorney or lawfully authorized agent; or (2) by last will and testament, or same will be void. (Fla. Stat. 736.0403; Fla. Stat. 689.06).

Declaration of trusts in lands must be proved by some writing, signed by the party authorized by law to declare or create same, or by last will and testament. Implied and constructive trusts arising or resulting from conveyance of lands are not required to be in writing. (Fla. Stat. 689.05). Valid trust in personalty may be created by deed, or may rest entirely in parol, or may be partly in writing and partly in parol. (73 Fla. 1120, 75 So. 860).

Testamentary aspects of trust are invalid unless trust instrument is executed by settlor with formalities for execution of will. (Fla. Stat. 736.0403[2]). Testamentary aspects of trust created by nonresident are not invalid because trust does not meet requirements of this section, if trust is valid under laws of state or country where settlor was at time of execution. (Fla. Stat. 736.0403[1]).

As to exercise of trust functions by corporation, see topic 13.09 Executors and Administrators.

Eligibility and Competency.

Unless otherwise doing business in this state, local qualification by foreign trustee is not required for trustee to receive distribution from local estate. (Fla. Stat. 736.0112).

Trust Registration.

Repealed. (77-344).

Uniform Common Trust Fund Act adopted. See category 3 Business Regulation and Commerce, topic 3.01 Banks and Banking.

Eligibility of Foreign Trust Companies.

See category 3 Business Regulation and Commerce, topic 3.01 Banks and Banking, subhead International Banking.

Removal of Trustee.

Court has jurisdiction over administration and distribution of trusts, including, but not limited to, appointment or removal of trustee, review of trustee fees, review and settlement of interim or final accounts, ascertainment of beneficiaries, construction of trust instruments, and determination of existence or nonexistence of any immunity, power, privilege, duty or right. (Fla. Stat. 736.0201).

Resignation of Trustee.

Trustee may resign: (i) Upon at least 30 days' written notice to settler if living, all co-trustees, and qualified beneficiaries; or (ii) with approval of court. (Fla. Stat. 736.0705). Unless co-trustee remains in office or court orders otherwise and until trust property is delivered to successor trustee or other person entitled to property, trustee who has resigned or been removed has duties of trustee and powers necessary to protect trust property. (Fla. Stat. 736.0707).

Trustee Compensation.

If terms do not specify compensation, trustee is entitled to compensation that is reasonable under circumstances. If terms specify compensation, trustee entitled to compensation as specified but court may allow more or less compensation if duties are substantially different than contemplated when trust was created or compensation specified would be unreasonably low or high. If trustee renders other services in connection with administration of trustee, trustee will also be allowed reasonable compensation for other services rendered. (Fla. Stat. 736.0708). Trustee also entitled to reimbursement from trust property, with interest as appropriate, for reasonable expenses properly incurred in administration of trust. Advance by trustee of money for protection of trust gives rise to lien against trust property to secure reimbursement. (Fla. Stat. 736.0709).

Beneficiaries.

Every deed, conveyance, mortgage, or transfer of interest in real estate in which words “trustee” or “as trustee” are added to name of grantee, transferee, assignee or mortgagee, and in which no beneficiaries are named, nature and purpose of trust, if any, are not set forth, and trust is not identified by title or date, is declared to grant fee simple estate, or to transfer interest of transferor, or full ownership in mortgage, unless contrary intention appears in instrument, and unless declaration of trust by grantee, transferee, assignee or mortgagee is recorded. (Fla. Stat. 689.07).

For all trusts, except those that were irrevocable before July 1, 2007, future interest under terms of trust is contingent on beneficiary surviving distribution date. Unless contrary intent appears in trust, if beneficiary of future interest fails to survive distribution date and deceased beneficiary leaves surviving descendants, substitute gift is created in beneficiary's surviving descendants; they take per stirpes property to which beneficiary would have been entitled if beneficiary had survived distribution date. Words of survivorship attached to future interest are sufficient indication of contrary intent.

Liability for Improper Payment.

Distributee paid improperly must return assets or funds received and income from those assets or interest on funds since distribution or payment, unless distribution or payment cannot be questioned because of adjudication, estoppel or limitations. If distributee does not have property, value at date of disposition, income thereon, and gain received must be returned. (Fla. Stat. 736.1018).

Land Trusts.

See category 21 Property, topic 21.06 Deeds, subhead Land Trusts. See also §689.071.

Powers, Duties and Liabilities of Trustee.

From time of creation of trust until final distribution of trust assets, trustee has power to perform any act prudent trustee would perform for purposes of trust, without court authorization. Unless otherwise provided in trust instrument, trustee may perform but is not limited to, following activities: (a) To collect, hold, and retain trust assets until time for disposition even though they include assets in which trustee is personally interested; (b) to hold without liability any property received from settlor or property lawfully substituted therefor (except cash for reinvestment purposes), including power to exchange bank stock for holding company stock, whether or not permissible for investment of funds of particular trusts; (c) to receive additions to assets of trust and invest and reinvest trust assets in accordance with trust provisions or as provided by law; (d) to continue or participate in operation of any business or other enterprise and to effect any reorganization or liquidation of business or enterprise; (e) to acquire undivided interest in trust asset in which trustee holds undivided interest in any trust capacity; (f) to invest and reinvest trust assets in accordance with provisions of trust as provided by law; (g) if bank, to deposit trust funds in another department of same entity or in bank that is affiliated with trustee bank; (h) to acquire or dispose of asset for cash or on credit at public or private sale; to manage, develop, improve exchange, partition, change character of, or abandon trust asset or any interest in it; and to encumber, mortgage, or pledge trust asset for term within or extending beyond term trust in connection with exercise of any power vested in trustee; (i) to make ordinary or extraordinary repairs or alterations in buildings; (j) acquire or dispose of asset, manage, develop, or abandon trust asset, encumber, mortgage or pledge trust asset for term within or extending beyond term of trust; (k) subdivide, develop, or dedicate land to public use, make or obtain vacation of plats and adjust boundaries, adjust differences in valuation on exchange or partition, dedicate easements to public use without consideration; (l) to enter into lease for any purpose; (m) to enter into arrangement for exploration and removal of minerals or other natural resources; (n) to grant or obtain options concerning disposition or acquisition of any asset; (o) to vote or not vote security, pay calls, assessments, and other sums chargeable with respect to securities; (p) to sell or exercise stock rights, to participate in reorganization, consolidation, merger, dissolution, or liquidation; (q) to hold securities in name of nominee, but trustee is liable for any act of nominee; (r) to insure assets of trust and trustee; (s) to borrow and advance money in connection with administration of trust; (t) to pay, contest, settle, or release any claim; (u) to pay taxes, assessments, compensation of trustee, and other trust administration expenses; (v) to allocate items of income or expense to either trust income or principal, as provided by law; (w) to pay any sum distributable to beneficiary under legal disability, by paying beneficiary, legal representative or relative, or in case of minor, expending it for his benefit; (x) to effect distribution of property and money in divided or undivided interest and to adjust resulting differences in valuation; (y) to hire and pay agents, even though they are trustee or associated with trustee, to advise and assist in administrative duties and to act without independent investigation upon their recommendations; (z) to prosecute or defend legal claims and actions; (aa) to execute and deliver all instruments that will accomplish or facilitate exercise of powers vested in trustee; (bb) to make distributions in divided or undivided interests, allocate particular assets in proportionate or disproportionate shares, value the trust property for those purposes, and adjust for resulting differences in valuation. (Fla. Stat. 736.0816).

From creation of trust until final distribution of assets from trust, unless otherwise provided in trust instrument, trustee has power, acting reasonably and for benefit of beneficiaries: (a) to inspect or investigate property held by trustee for purpose of determining compliance with environmental law affecting that property; (b) to take any action necessary to prevent, abate, or otherwise remedy actual or potential violation of environmental law affecting property held by trustee; (c) to refuse to accept property in trust if trustee determines that any property to be donated or conveyed to trustee either is contaminated with hazardous substance or is being used for activity involving hazardous substance; (d) to settle or compromise any claim against trust or trustee which involved alleged violation of environmental law; (e) to disclaim any power granted by any document, statute, or rule of law which may cause trustee or trust to incur liability under any environmental law; (f) to decline to serve or resign as trustee, if trustee believes conflict of interest exists; and (g) to charge against income and principal of trust costs associated with contaminated asset. (Fla. Stat. 736.08163).

Trustee has duty to pay expenses and obligations of settlor's estate. (Fla. Stat. 736.05053).

Trustee must file notice of trust with court of county of settlor's domicile and court having jurisdiction of settlor's estate. (Fla. Stat. 736.05055[1]).

Cotrustees unable to reach unanimous decision may act by majority decision. Dissenting trustee not joining in exercise of power, or dissenting trustee who joins in exercise of power but expresses dissent in writing at or before time of joinder, is not liable for result. (Fla. Stat. 736.0703).

Except as otherwise provided by trust instrument, trustee must meet standard that would be observed by prudent trustee dealing with property of another unless trustee has or is represented to have special skills, which skills trustee is under duty to use. (Fla. Stat. 736.0806).

Trustee need not provide bond to secure performance unless required by trust instrument, or if the court finds that a bond is needed to protect the interests of the beneficiaries. (Fla. Stat. 736.0702).

Unless otherwise provided, trustees are not personally liable on contracts properly entered into unless trustee fails to reveal representative capacity and identify trust estate in contract. If personally at fault trustee is personally liable for torts and obligations arising out of ownership or control of trust property. Contractual claims may be asserted against trust by proceeding against trustee in trustee's fiduciary capacity whether trustee is personally liable or not. Issues of liability between trust estate and trustee may be determined in accounting, surcharge, indemnification or other appropriate proceeding. (Fla. Stat. 736.1013).

Successor trustee not personally liable for any action taken or entitled to be taken by any prior trustee, has no duty to institute action against such prior trustee, and has no duty to file claim against any such prior trustee's estate, under number of circumstances detailed in statute. (Fla. Stat. 736.08125).

Conflict of Interest of Trustee.

Transaction affected by conflict between trustee's fiduciary and personal interests is voidable by beneficiary affected by transaction unless: (i) transaction was authorized by terms of trust; (ii) transaction was approved by court; (iii) beneficiary did not commence judicial proceeding within time allowed by Fla. Stat. 736.1008; (iv) beneficiary consented to trustee's conduct, ratified transaction, or released trustee in compliance with Fla. Stat. 736.1012; (v) transaction involves contract entered into or claim acquired by trustee when that person had not become or contemplated becoming trustee; (vi) transaction consented to in writing by settler while trust was revocable; or (vii) transaction is one by corporate trustee that involves money market mutual fund, or common trust fund described in Fla. Stat. 736.0816(3). (Fla. Stat. 736.0802). Transaction presumed to be affected by conflict between personal and fiduciary interests if entered into by trustee with: (i) trustee's spouse; (ii) trustee's descendants, siblings, parents, or their spouses; (iii) officer, director, employee, agent, or attorney of trustee; or (iv) corporation or other person or enterprise in which trustee, or person that owns significant interest in trustee, has interest that might affect trustee's best judgment. (Fla. Stat. 736.0802[3]). Transaction not concerning trust property in which trustee engages in trustee's individual capacity involves conflict between personal and fiduciary interests if transaction concerns opportunity properly belonging to trust. (Fla. Stat. 736.0802[4]). Investment by trustee authorized to engage in trust business under Fla. Stat. 658.12(20), in investment instruments under Fla. Stat. 660.25(6), that are owned or controlled by trustee or its affiliate, or from which trustee or affiliate receives compensation for providing services in capacity other than as trustee, not presumed to be affected by conflict provided investment otherwise complies with c. 518 and c. 660 and trustee complies with requirements of this section. (Fla. Stat. 736.0802[5]). If fair to beneficiaries, following transactions are not precluded: (1) Agreement between trustee and beneficiary relating to appointment or compensation of trustee; (2) payment of reasonable compensation to trustee; (3) transaction between trust and another trust, decedent's estate, or guardian of property which trustee is fiduciary or in which beneficiary has interest; (4) deposit of trust money in regulated financial service institution operated by trustee; or (5) advance by trustee of money for protection of trust. (Fla. Stat. 736.0802[7]). Court may appoint special fiduciary to act with respect to any proposed transaction that might violate this section if entered into by trustee. (Fla. Stat. 736.0802[9]).

Modification.

In addition to rights under common law to modify, amend, or revoke trusts, statutory modification permitted in certain circumstances for trusts that are “not then revocable”. For purposes of statutory provisions, trust is revocable if revocable by settlor alone without consent of trustee or person holding adverse interest. (Fla. Stat. 736.0103[15]; Fla. Stat. 736.04113; Fla. Stat. 736.04115[1]; Fla. Stat. 736.0412).

Judicial Modification.

If purposes of trust have been fulfilled or become illegal or impossible to fulfill or, because of circumstances not known to or anticipated by settlor, compliance with terms of trust would defeat or substantially impair accomplishment of material purpose or, if material purpose of trust no longer exists, court may at any time modify trust which is not then revocable to: (1) Amend or change terms; (2) terminate in whole or in part; (3) direct or permit trustee to do acts not authorized or that are prohibited by terms; (4) prohibit trustee from performing acts permitted or required by terms. (Fla. Stat. 736.04113[2]).

Trust which is not then revocable may be modified at any time by court if compliance with terms of trust not in best interest of persons having beneficial interest in trust, but such judicial modification not applicable to trust created after Dec. 31, 2000 if: (1) All beneficial interests in trust must vest or terminate no later than 21 years after death of individual then living or within 90 years after creation, or (2) terms of trust expressly prohibit judicial modification. (Fla. Stat. 736.04115). Person with beneficial interest in trust who is unborn or unascertained or who is minor or under legal disability represented by person's legal guardian; if none, by guardian ad litem appointed by court. (Fla. Stat. 736.0303; Fla. Stat. 736.0305). Court must consider spendthrift provisions as factor in making decision whether to modify trust, but not precluded from exercising authority to modify because trust contains spendthrift provisions. (Fla. Stat. 736.04113; Fla. Stat. 736.04115).

Nonjudicial Modification.

Trust created after Dec. 31, 2000 which is not revocable may be modified any time after settlor's death, upon unanimous agreement of trustee and all qualified beneficiaries to: (1) Amend or change terms; (2) terminate in whole or in part; (3) direct or permit trustee to do acts not authorized or that are prohibited; (4) prohibit trustee from performing acts permitted or required. (Fla. Stat. 736.0412). Modification not prohibited by spendthrift clause or by provision in trust instrument that prohibits amendment or revocation. (Fla. Stat. 736.0412[2]). Fla. Stat. 736.0412 not applicable to trust created after Dec. 31, 2000 if all beneficial interest in trust must vest or terminate no later than 21 years after death of individual then living or within 90 years after its creation. (Fla. Stat. 736.0412[4][a], [b]). Agreement to modify is binding on person with beneficial interest in trust who is unborn or unascertained, whose identity is not then known for any reason, or who is minor under legal disability, to extent interest is represented by another beneficiary having same or greater quality of beneficial interest, but only to extent there is no conflict of interest; otherwise, such interests must be represented by person's legal guardian if there is one or, if not, by guardian ad litem appointed by court. (Fla. Stat. 736.0412[3]). Fla. Stat. 736.0412 not applicable to trust for which charitable deduction allowed or allowable under Internal Revenue Code until termination of all charitable interests in trust. (Fla. Stat. 736.0412[4][c]).

Uneconomic Trust Termination.

If market value of trust is less than $50,000, trustee may terminate trust without court approval if value of trust insufficient to justify costs of administering trust. Upon application of trustee or qualified beneficiary, court may modify or terminate trust or remove trustee and appoint different trustee if court determines value of trust insufficient to justify cost of administration. Termination not prohibited by spendthrift provision unless trust expressly provides that trustee may not terminate trust pursuant to this section. Trustee is to comply with intent of settlor as near as possible and may enter into any agreement necessary to that end or to protect beneficiaries and trustee. (Fla. Stat. 736.0414).

Investment of fiduciary funds regulated by §§518.01-.16. Fiduciary includes executor, administrator, trustee, guardian, etc., who has responsibility for money or property of another. (Fla. Stat. 518.10). Prudent man rule used as standard for fiduciary conduct. (Fla. Stat. 518.11). Court may permit fiduciary to deviate from will, etc. (Fla. Stat. 518.13). Certain trustees may invest in money market mutual funds, mutual funds, and common trust funds.

In determining qualification of guardian's investments of funds received from Veterans' Administration, published statements of corporations or statements of reliable companies engaged in business of furnishing statistical information on bonds may be used. (Fla. Stat. 518.01).

Disclaimer.

See topic 13.07 Descent and Distribution, subhead Disclaimer.

Uniform Trusts Administration Law repealed by Laws 1974 c. 74-106. Similar provisions in c. 736.

Uniform Principal and Income Act, Revised, adopted with Florida revisions. (c. 738).

Uniform Fiduciaries Act not adopted.

Gifts to Minors.

See category 14 Family, topic 14.10 Infants.

Accounting.

Trust accounting law provisions incorporated in c. 736.

Uniform Simplification of Fiduciary Security Transfers Act repealed. (98–11).

Attorney's Fees.

Costs and attorney's fees for services rendered in trust proceedings may be awarded as in chancery actions. (Fla. Stat. 736.1004). Attorney who has rendered services to trust may apply to court for order awarding attorney's fees and, after notice and service upon trustee and all beneficiaries entitled to accounting, court will enter order on fee application. When costs and attorney's fees to be paid out of trust, court may direct from what part of trust they are to be paid.

Except when trustee's interest may be adverse in particular matter, attorney must give reasonable notice in writing to trustee of attorney's retention by interested person and attorney's entitlement to fees. Court may reduce or exclude fee award if notice to trustee not timely. (Fla. Stat. 736.1005).

Accumulations.

See category 21 Property, topic 21.13 Perpetuities.

Perpetuities.

As to any trust created after Dec. 31, 2000, non-vested property interest or power of appointment contained in trust must vest (1) no later than 21 years after death of individual then living, or (2) within 360 years after its creation, unless terms of trust require that all beneficial interests in trust vest or terminate within lesser period. (Fla. Stat. 689.225[2]). See category 21 Property, topic 21.13 Perpetuities.

Pour Over Trusts.

See topic 13.16 Wills, subhead Devise to Trustee.

Charitable Trust.

Provisions adopted governing administration of charitable trusts. (Fla. Stat. 736.0405; Fla. Stat. 736.1201-.1210).

Limitation of Action Against Trustee.

Six month limitation period applies for bringing claims against trustee for breach of trust for beneficiary who has received final, annual or periodic account or other statement fully disclosing matter. Absent full disclosure, as provided in c. 95. (Fla. Stat. 736.1008).

Surcharge.

Trustees may be held individually liable for money damages due to breach of fiduciary duty in paying attorney's fees for personal defense out of trust fund. (462 So.2d 1122).

13.16 WILLS:

Uniform Probate Code adopted with significant variations.

See also topic 13.09 Executors and Administrators.

Any person over 18 or emancipated minor who is of sound mind may make will. (Fla. Stat. 732.501).

Agreements to make will or devise, or not revoke will or devise, or not to make will or devise must be in writing and signed by agreeing party in presence of two attesting witnesses. Such agreement executed by nonresident of Florida is valid in this state if valid when executed under laws of state or country where agreement was executed, whether or not agreeing party is Florida resident at time of death. (Fla. Stat. 732.701).

Execution.

Every will must be in writing, and testator must sign his signature at end, or some other person in testator's presence and by his direction must subscribe testator's name to it, and execution or acknowledgment must be in presence of at least two attesting witnesses who must sign in presence of each other and in presence of testator. (Fla. Stat. 732.502). Codicil must be executed with same formalities as will. (Fla. Stat. 732.502[5]). No particular form or words required (Fla. Stat. 732.502[4]); suggested form of attestation clause is as follows:

Form

Attestation Clause.

The foregoing instrument, was signed by . . . . . ., the testator, as his last will and testament, in our presence, and we, in his presence and in the presence of each other have hereunto subscribed our names as witnesses, this . . . . . . day of . . . . . . 20. . . .

. . . . residing
at . . . .

. . . . residing
at . . . .

Holographic Wills.

Not recognized. Properly executed will in testator's handwriting not considered holographic will. (Fla. Stat. 732.502[2]).

Nuncupative Wills.

Not recognized. (Fla. Stat. 732.502[1]).

Military Testamentary Instrument.

Any will executed as military testamentary instrument in accordance with §1044d of Title 10 United States Code, c. 53, by person who is eligible for military legal assistance, is valid. (Fla. Stat. 732.502[3]).

Revocation.

Will or codicil or any part of either may be revoked by subsequent inconsistent will or codicil, or by other writing declaring revocation and executed with same formalities required for execution of wills, or by burning, tearing, canceling, defacing, obliterating, or destroying it with intent and for purpose of revoking it. (Fla. Stat. 732.505-.506). Revocation of will also revokes all codicils thereto. (Fla. Stat. 732.509).

Revival of Revoked Will.

Revocation of will revoking former will does not revive former will. Revocation of codicil to will does not revoke will, and in absence of evidence to contrary it is presumed that in revoking codicil testator intended to reinstate provisions of will that were changed or revoked. (Fla. Stat. 732.508).

Devise to Subscribing Witness.

Will or codicil, or any part of either, is not invalid because will or codicil is signed by interested witness. (Fla. Stat. 732.504[2]).

Devise to trustee is valid if made to trustee of written trust in existence at time of making of will or by written trust subscribed concurrently with making of will, provided that such written trust is identified in will. Such devise is not invalid for any or all of following reasons: (1) Trust is amendable or revocable or both by any person; (2) trust has been amended or revoked in part after execution of will or codicil thereto; (3) only trust res is possible expectancy of receiving devise under will or death benefits (as defined in Fla. Stat. 733.808) as named beneficiary, even though testator or other person has reserved all rights of ownership in such death benefits, including right to change beneficiary; (4) because of provisions of Fla. Stat. 689.075. (Fla. Stat. 732.513).

Devises to Inter Vivos Trusts.

See subhead Devise to Trustee, supra.

Probate.

Circuit court has jurisdiction of probate of wills. (Const., art. 5, §5; Fla. Stat. 26.012). Any will may be proved upon oath of any attesting witness, or if they are incapacitated or their testimony cannot be obtained within reasonable time, by oath of personal representative nominated by will, whether or not he is interested, or by any other person who is disinterested, by oath that he believes writing exhibited to be true last will of deceased. (Fla. Stat. 733.201).

As to probate venue, see topic 13.09 Executors and Administrators.

Will is ineffective to prove title to, or right to possession of, property of testator until admitted to probate in Florida or in state where decedent was domiciled. (Fla. Stat. 733.103[1]).

If original will of Florida resident has, through inadvertence, error, or omission, been admitted to foreign probate, Florida proceedings may be based on authenticated copies of foreign proceedings in lieu of original will, if original could have been admitted to probate in this state. (Fla. Stat. 733.206).

In any collateral action or proceeding relating to devised property, probate of will in Florida is conclusive of its due execution, absence of fraud, duress, mistake or undue influence, competency of testator and fact that will was unrevoked on testator's death. (Fla. Stat. 733.103[2]).

Self-proved Wills.

Will or codicil executed in conformity with Fla. Stat. 732.502 may be made self-proved at time of execution or at any subsequent date by acknowledgment of it by testator and affidavits of witnesses, each made before officer authorized to administer oaths and evidenced by officer's certificate attached to or following will, in substantially following form (Fla. Stat. 732.503):

Form

STATE OF FLORIDA

COUNTY OF . . . .

I, ____________, declare to the officer taking my acknowledgment of this instrument, and to the subscribing witnesses, that I signed this instrument as my will.

____

Testator

We, ____________and, ____________have been sworn by the officer signing below, and declare to that officer on our oaths that the testator declared the instrument to be the testator's will and signed it in our presence and that we each signed the instrument as a witness in the presence of the testator and of each other.

____

Witness

____

Witness

Acknowledged and subscribed before me by the testator, (type or print testator's name), who is personally known to me or who has produced (state type of identification — see S. Fla. Stat. 117.05(5)(b)2.) as identification, and sworn to and subscribed before me by the witnesses, (type or print name of first witness) who is personally known to me or who has produced (state type of identification — see s. Fla. Stat. 117.05(5)(b)2.) as identification and (type or print name of second witness) who is personally known to me or who has produced (state type of identification — see s. Fla. Stat. 117.05(5)(b)2.) as identification, and subscribed by me in the presence of the testator and the subscribing witnesses, all on (date).

(Signature of Officer)

. . . . (Print, type, or stamp commissioned name and affix official seal) . . . .

Contest.

Any creditor or interested person who is apprehensive that will may be admitted to probate without her knowledge may file caveat in circuit court. (Fla. Stat. 731.110[1]). After filing of caveat by creditor, clerk notices caveator upon issuance of letters of administration. (F.P.R. 5.260[e]). After filing of caveat by interested person other than creditor, no will may be admitted to probate without service of notice on caveator or designated agent. (F.P.R. 5.260[f]). Persons to whom notice of administration was served under §733.212 must file objections before later of date that is three months following first publication of notice or, as to any person required to be served with copy of notice, 30 days after date of service. (Fla. Stat. 733.212, 733.702). Persons on whom formal notice of petition for administration is served by petitioner prior to issuance of letters and persons who have waived notice may not challenge validity of will, testacy of decedent, qualifications of personal representative, venue or jurisdiction of court, except in connection with proceedings before issuance of letters. (Fla. Stat. 733.2123). Any interested person including beneficiary under prior will, except those barred under §733.212 or §733.2123, may, before final discharge of personal representative, petition court in which will was admitted to probate, for revocation of probate. (Fla. Stat. 733.109).

Legacies.

See topic 13.09 Executors and Administrators, subhead Beneficiaries.

Unclaimed Legacies.

See category 21 Property, topic 21.01 Absentees, subhead Escheat; and topic Executors and Administrators.

Testamentary Guardian.

See category 14 Family, topic 14.07 Guardian and Ward.

Lapse.

Unless contrary intent appears in will, if devisee or appointee who is grandparent or descendant of grandparent of testator: (i) Is dead at time of execution of will; (ii) fails to survive testator; or (iii) is required by will or operation of law to be treated as having predeceased testator, then substitute gift is created in devisee's surviving descendants who take per stirpes property to which devisee would have been entitled had devisee survived testator. (Fla. Stat. 732.603[1]). When power of appointment exercised by will, unless contrary intent appears in document creating power of appointment or in testator's will, if appointee who is grandparent or descendant of grandparent of donor of power: (i) Is dead at time of execution of will or creation of power; (ii) fails to survive testator; or (iii) is required by will, document creating power, or operation of law to be treated as having predeceased testator, then substitute gift is created in appointee's surviving descendants who take per stirpes power to which appointee would have been entitled had appointee survived testator. (Fla. Stat. 732.603[2]). Fla. Stat. 732.603 applies only to outright devises and appointments; devises and appointments in trust, including to testamentary trust, are subject to §736.1106. (Fla. Stat. 732.603[4]).

Where devise lapses voiding entire will, estate will be distributed according to laws of intestacy. (445 So.2d 622).

Pretermitted Heirs.

A will is not revoked by subsequent marriage of testator but in such case the surviving spouse is entitled to share as in case of intestacy unless will discloses a contrary intent or provision for spouse is made by will or marriage contract in contemplation of marriage. (Fla. Stat. 732.507, 732.301, 418 So.2d 256). Child born or adopted after execution of will shares as in case of intestacy unless will shows contrary intent or testator had one or more children when will was executed and devised substantially all his estate to other parent of pretermitted child and that other parent survived testator and is entitled to take under will. (Fla. Stat. 732.301, 732.302, 732.507[1]).

Effect of Dissolution of Marriage.

Wills made by husband or wife whose marriage to each other has been dissolved subsequent to date of said will are made void by means of said dissolution of marriage insofar as said will affects surviving spouse whose marriage to testator has been dissolved. (Fla. Stat. 732.507[2]).

Election between Elective Share and Testamentary Provision.

Surviving spouse has right to share of elective estate of deceased spouse. (Fla. Stat. 732.201).

Foreign Executed Wills.

Will other than holographic or nuncupative will, executed by nonresident of Florida, is valid as will in Florida if valid under laws of state or country where testator was at time of execution. (Fla. Stat. 732.502[2]).

Foreign probated will of Florida resident may be admitted to probate in circuit court having jurisdiction, with same force and effect as though original had been probated in this state. Authenticated copies of will and foreign proof of will and order of probate, and of letters, if any, issued thereon, are filed in circuit court in lieu of original will, and same are prima facie evidence of execution thereof and its admission to foreign probate. (Fla. Stat. 733.206[2]). In case of death of nonresident and probate in foreign state, domiciliary personal representative may, if qualified to act, be appointed ancillary personal representative in Florida. (Fla. Stat. 734.102).

Foreign probated will of nonresident that devises real property in state or right, title, or interest to real property may be admitted to record in county where property is located, any time after two years from decedent's death or any time after domiciliary personal representative has been discharged, if no proceeding to administer estate in this state, provided will was executed as required by c. 732 and will properly admitted in proper court of any state, territory, or country. Authenticated copy of foreign will, petition for probate, and order admitting will to probate must accompany petition to admit foreign will to record. When admitted to record, foreign will is valid and effectual to pass title to real property or right or interest in property as if will admitted to probate in this state. (Fla. Stat. 734.104).

Health care advance directives adopted. (Fla. Stat. 765.101-.404).

Simultaneous Death.

See topic 13.05 Death.

Testamentary Trusts.

See topic 13.15 Trusts.

Disclaimer.

See topic 13.07 Descent and Distribution, subhead Disclaimer.

Life Prolonging Advance Directive.

See category 15 Health, topic 15.04A Health Insurance.

Uniform Anatomical Gift Act.

See category 15 Health, topic 15.04A Health Insurance.

14 FAMILY

14.01 ADOPTION:

(c. 63).

Any adult or unmarried minor birth parent except homosexuals may adopt minor or adult, but married person must be joined by other spouse in petition unless other spouse is parent and consents or failure to join or consent is excused. (Fla. Stat. 63.042). Adoptive parent(s) generally must be Florida resident(s). (Fla. Stat. 63.207). Legislative intent to maintain sibling groups, whenever possible. (Fla. Stat. 63.022[3]).

Jurisdiction and Venue.

Petition for adoption or for declaratory statement as to adoption contract is filed in circuit court of county where petition for termination of parental rights pursuant to c. 63 was granted unless court changes venue to county where person applying for adoption resides or in which child resides or in which child-placing agency having custody of child is located. (Fla. Stat. 63.102[2]).

If minor becomes available for adoption after parental rights terminated pursuant to c. 39, petition for adoption may not be filed until judgment terminating parental rights becomes final and petition filed in circuit court which entered judgment terminating parental rights unless motion for change of venue granted. (Fla. Stat. 39.812[5]). If parental rights terminated pursuant to c. 63, petition may not be filed not later than 60 days after date of entry of judgment terminating parental rights. (Fla. Stat. 63.102).

Consent Required.

Mother, minor if more than 12 years of age, any person lawfully entitled to custody of minor if required by court, court if person with custody of minor does not have authority to consent, and father, if: (1) Minor conceived or born while father was married to mother; (2) minor is his child by adoption; (3) minor is established as his child by court proceedings; (4) he filed affidavit of paternity pursuant to Fla. Stat. 382.013(2)(c), or (5) he is unmarried biological father who has timely acknowledged paternity. Any person who is party in any pending proceeding in which paternity, custody, or termination of parental rights regarding minor is at issuer, must consent in writing unless consent is excused by court. (Fla. Stat. 63.062). Any person whose consent is required may execute prior to birth of child irrevocable affidavit of non-paternity in lieu of consent, and by doing so waives notice to all subsequent court proceedings. Good faith, diligent efforts must be made to notify, and obtain written consent. (Fla. Stat. 63.062[6]). If intermediary is involved in placement, he must provide those persons consenting written disclosure regarding adoption under Florida law and provide written acknowledgment to that effect signed by those persons consenting to be adoptive parents. (Fla. Stat. 63.085).

Petition must be verified and state: (1) Date, birthplace, name to be given, date petitioner acquired custody, name of person placing minor; (2) name, age, place, duration of residence of petitioner, marital status, date and place of marriages, divorces and facilities, and statement that petitioner is able to provide for material needs of child; (3) value of property of person to be adopted; (4) facts concerning those of which consent is required but outstanding and facts or circumstances that excuse lack of consent; (5) reasons for adoption. Following documents must be filed and attached to petition: Required consents, favorable preliminary home study, and surrender document. (Fla. Stat. 63.112).

If minor becomes available for adoption after parental rights terminated pursuant to c. 39, petition for adoption must include form provided by DCF which details social and medical history of child and each parent and includes social security number and date of birth for each parent, if such information is available.

Preliminary study must be made after report of intention to place minor. Favorable report may lead to placement of minor pending judgment. Unfavorable report may lead to petition for court determination. (Fla. Stat. 63.092[3]). Preliminary home study must be performed by licensed child-placing agency, licensed professional, or agency described in Fla. Stat. 61.20(2). (Fla. Stat. 63.092[3]).

If minor placed in prospective adoptive home before parental rights of minor's parents are terminated, placement is at-risk and prospective adoptive parents must acknowledge in writing that minor is subject to removal by adoption entity or by court order. (Fla. Stat. 63.092[2]).

Order of Adoption.

Hearing on petition to adopt minor may not be held sooner than 30 days after date judgment terminating parental rights was entered or sooner than 90 days after date minor was placed in physical custody of petitioner except when good cause is shown or when petitioner is spouse of natural parent, hearing may be held immediately on filing petition. (Fla. Stat. 63.122). Petitioners and person to be adopted, if 12 years or over, required to attend hearing in person or, with permission of court, telephonically before person authorized to administer oath, unless court upon showing of good cause excuses attendance of either. No interlocutory period. (Fla. Stat. 63.142).

Effect of Adoption.

Effect of adoption is to make adopted child legal heir of adopting parents, entitled to all rights and privileges, and subject to all obligations, of child born in lawful wedlock. Adopted children regarded as natural brother or sister of natural children and other adopted children of adopting parents for inheritance purposes. All relationships terminated with natural parents, except natural parent who is petitioner or married to petitioner. (Fla. Stat. 63.172). New birth certificate issued after entry of adoption judgment. (Fla. Stat. 63.022(4)[h]). Where child is adopted by spouse of only living natural parent, or if both natural parents have died and child's brother, sister, grandparent, aunt or uncle adopts child, child's right of inheritance from deceased parent(s) and relationship with family of deceased natural parent is unaffected. (Fla. Stat. 63.172). Adoption by natural parent's spouse does not terminate grandparental rights of visitation. (c. 752). Note that statutory provisions regarding award of grandparental rights of visitation have been held unconstitutional. (678 So.2d 1271; 866 So.2d 28; 753 So.2d 26).

Setting Aside Adoption.

Action to vacate, set aside, or otherwise nullify judgment of adoption or underlying judgment of termination of parental rights on any ground (including duress) may not be filed more than one year after judgment terminating parental rights. (Fla. Stat. 63.182). Except for specific persons expressly entitled to notice of adoption, interest that entitles person to notice must be direct, financial, and immediate, and person must show he will gain or lose by direct legal operation and effect of judgment. Showing of indirect, inconsequential, or contingent interest inadequate and person with this indirect interest lacks standing to set aside judgment of adoption. (Fla. Stat. 63.182[2]).

Confidentiality.

All hearings held in closed court. Except by order of court for good cause shown, no disclosure of names is permitted absent written release by natural parent, adoptive parent (authorizing release of his name), adoptee 18 years or older, or if adoptee is less than 18 years, adoptive parent. No specific names or identifying information given in family medical history. All available nonidentifying information regarding adoptee and natural parents given to adopting parents prior or subsequent to finalization of adoption and to adoptee, upon request, after majority. (Fla. Stat. 63.162).

Preplanned Adoption.

Contract for adoption of unborn child in return for any valuable consideration is illegal and void. (Fla. Stat. 63.212[1][h]). Preplanned adoption is permissible if it is based on agreement which specifies certain terms. (Fla. Stat. 63.213). Volunteer mother has absolute right to withdraw her consent for 48 hours following child's birth. (Fla. Stat. 63.213).

State Registrar to maintain registry with last known names and addresses of parents whose consent was required under Fla. Stat. 63.062, adoptive parents, and adoptee and any other identifying information which parents whose consent was required under Fla. Stat. 63.062, adoptive parents or adoptee may wish to include in registry. Person entering information required to indicate to whom information may be released, which is limited to birth mother and father whose consent was required under Fla. Stat. 63.062, adoptive mother and father, adoptee, natural siblings, and maternal or paternal natural grandparents. (Fla. Stat. 63.165). Except as provided in this section, registry information is confidential and exempt from §119.07(1). Consent to release information may be made on behalf of minor adoptee by adoptive parents or by court after good cause shown. Any person may withdraw, limit, or otherwise restrict consent to release information at any time by notifying Department in writing. (Fla. Stat. 63.165[1]). Department may charge reasonable fees. Department must make counseling available for fee to all seeking to use registry. (Fla. Stat. 63.165[2]).

Subsidized Adoption Program.

Subsidy for prospective adoptive parents of children whose permanent custody has been awarded to Department of Children and Family Services or to licensed child-placing agency and who have emotional ties with foster parents or who are unlikely to be adopted. Subsidies determined through agreement between adoptive parents and Department, and may be readjusted periodically depending upon changed circumstances. (Fla. Stat. 409.166). Department authorized to reimburse, retroactive to 1/1/87, adoptive parents who participate in subsidized adoption program for children with special needs. Reimbursement for up to $1,000 in nonrecurring expenses relating to adoption. (Fla. Stat. 409.166[7]). Adoption fees may be waived in certain cases. (Fla. Stat. 409.166[6]). Employee of state or water management district who adopted child was eligible for $5,000 monetary benefit, $2,000 of which paid in equal monthly installments over two-year period; if special needs child adopted, eligible for $10,000, which is paid in equal monthly installments over one-year period. (Fla. Stat. 110.152, repealed by §3, c. 2007-119, effective July 1, 2007).

Interstate Compact on Adoption and Medical Assistance adopted, effective July 1, 2002. (Fla. Stat. 409.406-409.407).

Statewide Adoption Exchange.

To be maintained with photo listing, updated monthly to recruit adoptive families for children legally freed for adoption and permanently placed with Department of Health or to licensed child-placing agency. Child must be referred to adoption exchange within 30 days of permanent placement unless district determines otherwise, in which case child must be referred to adoption exchange within three months of permanent placement. (Fla. Stat. 409.167).

Abandoned Newborn.

Parent who leaves newborn at hospital or fire station presumed to consent to termination of parental rights and has right to remain anonymous except where there is actual or suspected child abuse or neglect. (Fla. Stat. 383.50).

14.02 ALIMONY:

See topic 14.05 Dissolution of Marriage.

14.03 COMMUNITY PROPERTY:

System not adopted in Florida. In Florida, property acquired by husband and wife or either is classified as "marital property" when it is not received as "individual property". On dissolution of marriage all "marital property" is to be "equitably distributed". (Fla. Stat. 61.075).

14.04 DESERTION:

See topics 14.05 Dissolution of Marriage, 14.09 Husband and Wife.

14.05 DISSOLUTION OF MARRIAGE:

(c. 61).

Residence.

One of parties to marriage must have resided in state for six months before filing petition to obtain dissolution of marriage. (Fla. Stat. 61.021). Actions may be brought against persons residing out of state. (Fla. Stat. 61.061). No dissolution of marriage is from bed and board, but is from bonds of matrimony. (Fla. Stat. 61.031). Term "residence" connotes domicile. (156 Fla. 104, 22 So.2d 580). Service of process on nonresidents may be obtained by publication. See category 5 Civil Actions and Procedure, topic 5.20 Process. However, service will not result in Court securing personal jurisdiction over nonresident. Because marriage is considered a separable subject matter, Court will dissolve marriage without adjudicating any support or property rights where personal jurisdiction has not been obtained over nonresident. See also topic 14.09 Husband and Wife.

Grounds for dissolution of marriage are: (1) Marriage is irretrievably broken; or (2) mental incapacity of party if adjudged incapacitated for preceding period of at least three years in accordance with provisions of §744.331. (Fla. Stat. 61.052[1]).

Venue.

Proceeding may be brought in county where property in dispute located, county in which grounds for dissolution accrued, or where respondent resides. (Fla. Stat. 47.011). If respondent is nonresident, proceeding may be brought in any county in state. (322 So.2d 53).

Pleading.

Defenses of condonation, collusion, recrimination and laches abolished. (Fla. Stat. 61.044). Supreme court approved petitions available at Self-Help Center at http://www.flcourts.org. (Fam. Law R. Form 12.900–12.994).

Practice.

Evidence need not be corroborated except to establish residency. Evidence of residency may be corroborated by affidavit of third party or by valid Florida driver's license, Florida identification card, or voters registration card. (Fla. Stat. 61.052[2]).

Mediation.

In any proceeding in which issues of parental responsibility, primary residence, visitation, or support of child are contested, court may refer parties to mediation in accordance with rules promulgated by Supreme Court. (Fla. Stat. 61.183).

Parenting Class.

All parties to dissolution of marriage proceeding with minor children or modification of final judgment action involving shared parental responsibilities, custody, or visitation will be required to complete parenting course approved by Department of Children and Family Services prior to entry of final judgment or order modifying final judgment, unless excused for good cause. (Fla. Stat. 61.21).

Decree.

Final decree of dissolution of marriage is entered on determination of court that dissolution of marriage should be granted. There is no interlocutory decree.

No final decree of dissolution of marriage may be entered until at least 20 days after petition is filed, except when court is shown that injustice will result from delay. (Fla. Stat. 61.19).

Temporary Orders.

During pendency of proceeding, court may make appropriate order for support and alimony of parties, preservation of their property, attorney's fees, and primary residence, custody, rotating custody, support, maintenance and education of minor children. Any protective injunction arising out of dissolution must be issued as separate order in compliance with c. 741 and not included in dissolution decree. (Fla. Stat. 61.052[6]). Upon good cause shown, court may modify, vacate, or set aside temporary support order before or upon entering final order in proceeding without showing substantial change of circumstances; modification of temporary support order may be retroactive to date of initial entry of temporary support order, to date of filing of initial petition for dissolution of marriage, initial petition for support, initial petition determining paternity, or supplemental petition for modification. (Fla. Stat. 61.14[9]).

Alimony and suit money pendente lite may be allowed any party on petition or by motion. (Fla. Stat. 61.071). Alimony may be granted to either party, either rehabilitative or permanent in nature. Payments may be periodic or lump sum or both. (Fla. Stat. 61.08[1]). Court may issue income deduction order to employer providing income to person obligated to pay alimony or child support. (Fla. Stat. 61.1301). Court may order any party required to pay alimony to purchase or maintain life insurance policy or bond. (Fla. Stat. 61.08[3]). Adultery of spouse may be considered. Court must include findings of fact relative to enumerated factors in any award or denial of alimony. (Fla. Stat. 61.08[1]). Amount of alimony, maintenance or separate support may be increased or decreased by order of court when circumstances or financial ability of either party significantly changes. (Fla. Stat. 61.08[4][b]).

Court may reduce or terminate alimony upon finding that since award of alimony supportive relationship has existed between obligee and person not related by consanguinity or affinity with whom obligee resides. Court must consider circumstances including: extent to which obligee and other person held themselves out as married couple; extent to which obligee and other person have pooled assets or income or otherwise exhibited financial interdependence; extent to which obligee or other person has supported other or children of one another; whether obligee and other person have jointly contributed to purchase of real or personal property. (Fla. Stat. 61.14[1][b]).

Division of Property of Spouses.

Equitable division of assets and liabilities by court, after considering relevant factors, including specified points. (Fla. Stat. 61.075[6]). Cut-off date for determining whether assets and liabilities are marital or nonmarital is earliest of date parties enter into valid separation agreement, such other date as may be expressly established by such agreement, or date of filing petition for dissolution of marriage. Valuation date of marital assets and liabilities determined by judge based on circumstances. Different assets may be valued as of different dates. If court awards cash payment for purpose of equitable distribution of assets, full amount awarded vests when judgment is awarded and award will not terminate upon remarriage or death of either party, unless otherwise agreed to by parties, but must be treated as debt owed from obligor or obligor's estate to obligee or obligee's estate, unless otherwise agreed to by parties. (Fla. Stat. 61.075[2]). Terms of valid property settlement agreement generally may not be modified by courts. (339 So.2d 681). In any contested dissolution of marriage action, wherein stipulation and agreement has not been entered and filed, any distribution of marital assets or marital liabilities must be supported by factual findings in judgment or order based on competent substantial evidence with reference to specified factors. (Fla. Stat. 61.075[3]). Court may enforce antenuptial agreement to arbitrate dispute. (Fla. Stat. 61.052[5]).

Effect on Will.

Any provisions of will executed by married person, which provision affects spouse of that person, becomes void upon dissolution or annulment of marriage. After dissolution or annulment, any such will must be administered and construed as if former spouse had died at time of dissolution or annulment of marriage, unless will or dissolution or judgment expressly provides otherwise. (Fla. Stat. 732.507[2]).

Payment and Enforcement System.

Central Depository.

State Disbursement Unit, operated by Department of Revenue, responsible for collecting and disbursing payments for child support cases enforced by department pursuant to Title IV-D of Social Security Act and all child support cases in which initial support order was issued on or after Jan. 1, 1994 where obligation is being paid by income deduction. (Fla. Stat. 61.1824[1]). State Disbursement Unit responsible for disbursing all receipts from intercepts, including Internal Revenue Service, unemployment compensation, and lottery. (Fla. Stat. 61.1824[3][a]). Office of clerk of court operates depository for payments not required to be processed through State Disbursement Unit. Fee must be charged for receiving, recording, reporting, disbursing, monitoring or handling alimony or child support payments. Certified copies of payment records maintained by depository, without further proof, are admitted into evidence in any legal proceeding in this state. (Fla. Stat. 61.181).

Support.

If person having ability to contribute to maintenance of his or her spouse and support of his or her minor children fails to do so, spouse who is not receiving support or who has custody of children may petition court for alimony and support for minor children without petitioning for dissolution of marriage and court will enter such order as it deems just and proper. (Fla. Stat. 61.09). Supreme court approved petitions available at Self-Help Center at http://www.flcourts.org. (Fam. Law R. Form Fla. Stat. 12.904). Reasonable amount for attorney's fees, suit money and costs may be ordered. (Fla. Stat. 61.16). Payment of child support on or after Jan. 1, 1985 normally made through appropriate depository as provided for in Fla. Stat. 61.181, unless court orders otherwise. (Fla. Stat. 61.13[1][d]). Each order for child support must provide full name and date of birth of each minor child who is subject of order. (Fla. Stat. 61.13[1][d]1). Each order for child support must contain provision for health insurance for minor child when it is reasonable in cost and accessible to the child. (Fla. Stat. 61.13[1][b]). If obligor fails to enroll child, payer of insurance must be notified, enroll minor child as beneficiary in health plan and withhold any required premium from obligor's income. (Fla. Stat. 61.13[1][b]). Court may order any party required to pay child support to purchase or maintain life insurance policy or bond. Agreements for support, maintenance or alimony are subject to modification by court if circumstances or financial ability of either party changes. Except as provided in Fla. Stat. 61.30(11)(c), court may modify order of support, maintenance, or alimony retroactively to date of filing of action or supplemental action for modification as equity requires, giving due regard to changed circumstances of financial ability of parties or child. (Fla. Stat. 61.14[1][a]). Allowance for children before and after decree in discretion of court. Amount may be changed. (Fla. Stat. 61.13, .14; Fla.

Stat. 61.30[12]). Unless otherwise court ordered or agreed to by parties, obligation to pay current child support is terminated when child reaches 18 years of age or disability of nonage is removed. Termination of current child support obligation does not otherwise terminate obligation to pay arrearage, retroactive support, delinquency, or costs owed by obligor. (Fla. Stat. 61.14[9]). Orders and judgments of court may be enforced and satisfied by attachment or garnishment for amounts due with respect to certain dissolution, alimony or child support proceedings. (Fla. Stat. 61.12[1]). Disciplinary action against employee by employer to whom writ is issued solely because such writ is in effect constitutes contempt of court. (Fla. Stat. 61.12[2]). Professional licenses for certain occupations may be denied or suspended when licensee is delinquent in making child support payments. (Fla. Stat. 61.13015; Fla. Stat. 409.2598). *Note:* Florida follows Uniform Interstate Family Support Act. (Fla. Stat. 88.0011). See also topic 14.09 Husband and Wife, subhead Desertion and Nonsupport.

Child Support Guidelines.

Presumptively establishes amount of child support. Court may order amount different from guidelines upon written or specified finding explaining why departure is just or appropriate. For support orders reviewed by department as required by Fla. Stat. 409.2564(11), if amount of support award under order differs by at least 15% but not less than $50 from amount that would be awarded under Fla. Stat. 61.30[6], department must seek to have order modified and modification will be made without requirement for proof or showing of change in circumstances. (Fla. Stat. 61.30[1][c]).

Noncustodial parent's failure to regularly exercise court-ordered or agreed visitation not caused by custodial parent which resulted in adjustment of child support pursuant to Fla. Stat. 61.30(1)(a) is substantial change of circumstances for purposes of modifying child support award, and modification on this basis is retroactive to date noncustodial parent first failed to regularly exercise court-ordered or agreed visitation. (Fla. Stat. 61.30).

Remarriage.

Both parties may remarry.

Children.

All matters relating to custody of minor children decided in accordance with Uniform Child Custody Jurisdiction and Enforcement Act and best interest of child. (Fla. Stat. 61.501-61.542). Court required to order parental responsibility of minor to be shared by both parties unless detrimental to child. Court must consider evidence that parent has been convicted of felony of third degree or higher involving domestic violence as rebuttable presumption of detriment to child. If presumption not rebutted, shared parental responsibility must not be granted to convicted parent. Court must consider evidence of domestic violence or child abuse as evidence of detriment to child. If court determines that shared parental responsibility would be detrimental to child, sole parental responsibility may be ordered and arrangements for time-sharing as specified in parenting plan as will best protect child or abused spouse from further harm may be made. No presumption for or against father or mother in creating or modifying parenting plan. Both parents retain rights of access to medical, dental and school records, and right to in-person communication with medical, dental, and education providers. (Fla. Stat. 61.13[2][c]).

Where custody of minor child is at issue, court may request Department of Children and Family Services to make investigation and social study concerning all pertinent details relating to child and each parent and submit written report. (Fla. Stat. 61.20[3]).

In action for dissolution of marriage, modification, parental responsibility, custody or visitation, court may appoint Guardian ad Litem. (Fla. Stat. 61.401).

Relocation.

Parents and every other person entitled to access or time-sharing with child may agree to relocation of child's principal residence by signing written agreement that reflects consent, defines visitation rights for nonrelocating parent, and describes any transportation arrangements necessary related to access or time-sharing. In the absence of an agreement, a petition to relocate must be filed and served upon the other parent and other persons entitled to access or time-sharing with the child. If nonrelocating parent or any other person entitled to access or time-sharing with the child fails to timely file objection, presumed that relocation is in best interest of child and relocation will be allowed. No presumption arises in favor of or against request to relocate when move will materially affect current schedule of contact, access, and time-sharing with nonrelocating parent or other person. Factors court must consider are provided. (Fla. Stat. 61.13001).

If there is risk that one party may violate court's order of visitation or custody by removing child from state or country or concealing whereabouts of child, court may order that parent not remove child from state or country without notarized permission of both parents or court order, not take child to country that has not ratified Hague Convention on Civil Aspects of International Child Abduction, surrender passport of child, post bond or other security. (Fla. Stat. 61.45).

Paternity.

Department of Revenue may commence paternity or child support proceeding if: (i) Child's paternity has not been established; (ii) no one is named as father on birth certificate or person named as father is putative father named in affidavit or written declaration; (iii) child's mother was unmarried when child was conceived and born; and (iv) department is providing services under Title IV-D. (Fla. Stat. 409.256[2][a]). If department receives request from another state to assist in establishment of paternity, department may serve order to appear for genetic testing and transmit test results to other state without commencing paternity proceeding in state. (Fla. Stat. 409.256[2][b]). If more than one putative father named, department may proceed against single putative father or simultaneously against more than one. (Fla. Stat. 409.256[3]).

Man may file petition in circuit court to disestablish paternity or terminate child support obligation when he is not biological father of child. If relief is granted, previous status as father continues to be in existence until order granting relief is rendered and relief does not create cause of action to recover previously paid child support. Petition must include: (i) Affidavit that newly discovered evidence relating to paternity of child has come to his knowledge since initial paternity determination or establishment of child support obligation; (ii) results of scientific tests which indicate that man cannot be father of child for whom support is required, or affidavit stating he did not have access to child to have such testing performed. Court may not set aside paternity determination or child support order if man engaged in following conduct after learning that he is not biological father: (i) Married mother while known as reputed father, and voluntarily assumed parental obligation and duty to pay child support; (ii) acknowledged paternity in sworn statement; (iii) consented to be named biological father on child's birth certificate; (iv) voluntarily promised in writing to support child and was required to support child based on that promise; (v) disregarded any written notice from state agency or court directing him to submit to scientific testing; or (vi) signed voluntary acknowledged of paternity. (Fla. Stat. 742.18).

Annulment of Marriage.

See topic 14.11 Marriage.

Divorce A Mensa Et Thoro.

Florida courts are not authorized to enter decree of separation from bed and board, rather all divorces are absolute. (Fla. Stat. 61.031).

Antenuptial Contracts.

See topic 14.09 Husband and Wife.

14.06 DIVORCE:

See topic 14.05 Dissolution of Marriage.

14.07 [RESERVED]

14.08 GUARDIAN AND WARD:

Guardianship governed by c. 744, Florida Guardianship Law, and “Veteran's Guardianship Law” (Fla. Stat. 744.602). It is modified version of Uniform Veterans' Guardianship Act.

Term “guardian” means person who has been appointed by court to act on behalf of ward's person or property, or both; and term “incapacitated person” means person who has been judicially determined to lack capacity to manage at least some of property or to meet at least some of essential health and safety requirements of such person. (Fla. Stat. 744.102[9], [12]).

Jurisdiction and Venue.

Circuit court has exclusive jurisdiction of guardianship proceedings. (Fla. Stat. 26.012[2][b]). Domicile of resident ward is county where ward resides. (Fla. Stat. 744.201). Venue for appointment of guardian is: (1) County where incapacitated person resides; or (2) if nonresident, in any county in this state where incapacitated person owns property; or (3) if neither, where any debtor of incapacitated person resides; (4) if incapacitated person is found in county other than county of residence, venue for appointment of guardian may be county where incapacitated person is found. Upon transfer of incapacitated person to county of residence, guardian may have venue of guardianship changed to county of residence and successor guardian may be appointed. If incapacitated person's residence changes to another county, venue may be changed. (Fla. Stat. 744.202).

Types of Guardianship.

Guardian ad litem may be appointed by court to represent interests of ward or ward's estate (Fla. Stat. 744.102[10]; F.P.R. 5.120), of abused child (Fla. Stat. 61.401), or in dependent child proceedings (c. 39). Father and mother, jointly or survivor, are natural guardians of their own and adopted children during minority and may without court appointment collect, receive, manage and dispose of real or personal property from estate, trust or life insurance not exceeding in any instance $15,000. (Fla. Stat. 744.301). Court may appoint guardian ad litem to represent minor's interest before approving settlement of minor's portion of claim in any case in which minor has claim for personal injury, property damage, wrongful death, or other cause of action in which gross settlement of claim exceeds $15,000. Court must appoint guardian ad litem before approving settlement of minor's claim if gross settlement involving minor equals or exceeds $50,000. (Fla. Stat. 744.3025). Parent, brother, sister, next of kin, or other person interested in welfare of minor, may petition court to appoint guardian. (Fla. Stat. 744.3021). Resident guardian of property of nonresident may be appointed on petition of foreign guardian, next of kin or creditor. (Fla. Stat. 744.308). Standby guardian of minor may be appointed by court upon petition or consent of both parents, natural or adoptive, if living, or of surviving parent, to assume duties of guardianship or limited guardianship upon death or adjudication of incapacity of last surviving natural or adoptive parent of minor. Currently serving guardian may petition court to appoint standby guardian of incapacitated person. (Fla. Stat. 744.304). Foreign guardian is one appointed in another state or country and upon appointment may maintain or defend any action in this state as representative of his ward and can manage property of nonresident ward. (Fla. Stat. 744.102[8], -.306, -.307). Voluntary guardian is one appointed upon petition of resident or nonresident person who is unable by reason of age or physical infirmity to manage his property.

(Fla. Stat. 744.341). If petitioned for, court can order that only part of ward's property will be included in guardianship estate. (Fla. Stat. 744.341[2]). Veteran's guardian is one appointed before payment of veterans' benefits to incompetent veteran or minor ward. (Fla. Stat. 744.602, 744.613). Corporate guardian means corporation authorized to exercise fiduciary of guardianship powers in this state, including nonprofit corporate guardian. (Fla. Stat. 744.102[4]). Pre-need guardian may be named by written declaration by competent adult to serve in event of declarant's incapacity. (Fla. Stat. 744.3045). Pre-need guardian may be nominated for minor by written declaration by birth or adoptive parents. (Fla. Stat. 744.3046). Rebuttable presumption that nominated pre-need guardian is entitled to serve. (Fla. Stat. 744,3045[4], 744.3046[4]). Guardian advocate is one appointed to represent person with developmental disabilities, without adjudication of incapacity, when person lacks capacity to do some, but not all, tasks necessary to care for his or her person, property or estate, or if person has voluntarily petitioned for appointment of guardian advocate. (Fla. Stat. 744.3085).

Eligibility and Competency.

Any resident of this state who is 18 years of age or older is qualified to act as guardian of ward unless convicted of felony or who, from any incapacity or illness, is incapable of discharging duties of guardian, or who is otherwise unsuitable to perform duties of guardian. (Fla. Stat. 744.309). No person judicially determined to have committed abuse, abandonment or neglect against child or found guilty of, regardless of adjudication, or entered plea of nolo contendere or guilty to, any offense prohibited under Fla. Stat. 435.03 or similar statute may be appointed to act as guardian. (Fla. Stat. 744.309[3]). Professional guardian must register with Statewide Public Guardianship Office and pay annual registration fee not to exceed $100; trust company, banking corporation or association, or savings and loan association authorized and qualified to exercise fiduciary powers in state not required to register. (Fla. Stat. 744.1083). Judge may not act as guardian of resident ward unless related to ward by blood, marriage, or adoption, or has maintained close relationship with ward or ward's family, and serves without compensation. (Fla. Stat. 744.309[1][b]). Nonresident of state may serve as guardian of resident ward if related by lineal consanguinity; is legally adopted child or adoptive parent of ward; is spouse, sibling, uncle, aunt, niece or nephew of ward, or blood relative or spouse of person otherwise qualified. (Fla. Stat. 744.309[2]). Trust company, state banking corporation or state savings association authorized and qualified to exercise fiduciary powers in this state, or national banking association or federal savings and loan associations authorized and qualified to exercise fiduciary powers in this state, may act as guardian of property of ward. (Fla. Stat. 744.309[4]). Nonprofit corporation organized for religious or charitable purposes and existing under laws of this state may be appointed guardian for ward. (Fla. Stat. 744.309[5]). See also category 3 Business Regulation and Commerce, topic 3.01 Banks and Banking, subhead International Banking.

Proceedings for Appointment.

Petition for appointment verified by petitioner, must be filed showing name, age, residence and post office address of incapacitated person or minor; nature of incapacity, if any; extent of guardianship desired, either plenary or limited; residence and post office address of petitioner; names and addresses of next of kin of incapacitated person, or minor, if known to petitioner; name of proposed guardian; and previous relationship of proposed guardian to ward; and nature and value of property subject to guardianship; reasons why this person should be appointed guardian. If willing and qualified guardian cannot be located, petition must so state. (Fla. Stat. 744.334). Court may appoint any person who is fit and proper and qualified to act as guardian, whether related to ward or not. Court gives preference to appointment of person who (1) is related by blood or marriage to ward; (2) has educational, professional, or business experience relevant to nature of services sought to be provided; (3) has capacity to manage financial resources involved; or (4) has ability to meet requirements of law and unique needs of individual case. (Fla. Stat. 744.312[2]). Court also considers wishes expressed by incapacitated person as to who is appointed guardian; consider preference of minor who is age 14 or over; consider any person designated as guardian in will in which ward is beneficiary. (Fla. Stat.

744.312[3]). Upon petition, court may appoint guardian for minor without appointing examining committee or conducting adjudicatory hearing pursuant to Fla. Stat. 744.331. (Fla. Stat. 744.342).

Qualification.

Oath must be filed and bond given with surety (except in case of corporate guardians) in amount fixed by court and not less than full value of cash and bearer securities, which may be reduced by Court for good cause. Court may waive bond if petitioner presents compelling reasons or court can require use of designated financial institution. (Fla. Stat. 744.347, .351).

Professional guardian must allow investigation of credit history of guardian and guardian's employees. *Note:* After July 1, 2005, each professional guardian must demonstrate competency by taking approved exam. Exam requirement will be waived upon proof of five years or more experience and circuit judge before whom professional guardian practiced at least one year states in writing that professional guardian demonstrated competency. (Fla. Stat. 744.1085). These requirements are not applicable when guardian is trust company, state banking corporation, or authorized state or national savings association.

Powers and Duties.

Guardian of incapacitated person may exercise only those rights that have been removed from ward and delegated to guardian. Guardian of minor exercises powers of plenary guardian. (Fla. Stat. 744.361[1], .362). Guardian must file initial guardianship report within 60 days after letters of guardianship are signed and guardianship report annually. (Fla. Stat. 744.361[2]-[3]). Guardian must implement guardianship plan. (Fla. Stat. 744.361[4]). Unless court requires filing on calendar-year basis, guardian must file with court, annual guardianship report within 90 days after last day of anniversary month of guardian's appointment. (Fla. Stat. 744.367). Guardian of property must take possession, file inventory and manage and invest assets for best interest of ward (Fla. Stat. 744.361), and under order may compromise and settle claims by or against guardian of property of ward (Fla. Stat. 744.387). Property of ward is held primarily for support, maintenance and education of ward but court may authorize use for dependents of ward. Any dependent of ward may petition court for order directing guardian to contribute to dependent's support from property of ward. (Fla. Stat. 744.421). If ward is minor and parents are able to support, maintain and educate ward, guardian must not so use ward's funds unless directed by court. (Fla. Stat. 744.397). After obtaining approval of court pursuant to petition for authorization to act, plenary guardian, or limited guardian within powers designated by court order may prosecute or defend claims or proceedings. (Fla. Stat. 744.441). Court may authorize voluntary guardian to take possession of less than all of ward's property. (Fla. Stat. 744.341).

Investments.

In making investments guardian must observe standards of prudent man dealing with property of another and if he has special skills or so represented, is under duty to use skills. (Fla. Stat. 744.361[7]).

Custodian of Minors.

Custodians of minors do not have standing as interested parties to question settlement agreement entered into on behalf of minors by guardian of property. (474 So.2d 292).

Securities in Name of Nominee.

Without obtaining court approval, plenary guardian, or limited guardian within powers granted by order appointing guardian or by approved annual or amended guardianship report, may hold security in name of nominee or in other form without disclosing interest of ward, but guardian is liable for any act of nominee in connection with security so held. (Fla. Stat. 744.444[15]). Guardian may redeem or sell liquid assets to pay for reasonable living expenses of ward. (Fla. Stat. 744.444[10]).

Encumbering Property.

Where expedient or necessary the court may authorize guardian to borrow with or without security or on pledge or mortgage of ward's property. (Fla. Stat. 744.441).

Sales.

Sale may be made upon court authorization based upon petition and hearing. Notice is not required for sale of perishable or deteriorating property. (Fla. Stat. 744.441-.451).

Power of Election or Appointment.

After petitioning court for approval, plenary guardian, or limited guardian within powers granted by order appointing guardian or by approved annual or amended guardianship report, may execute power of appointment or other power, if best interests of ward requires such execution. (Fla. Stat. 744.441[2]).

Annual Reports.

Each guardian of person must file with court annual guardianship plan within 90 days after last day of anniversary month of guardian's appointment unless court requires filing on calendar-year basis. Annual guardianship report of guardian of person must consist of annual guardianship plan. Each guardian of property must file with court annual guardianship report on or before Apr. 1 of each year, unless court requires or authorizes filing on fiscal year basis. Report of guardian of property must consist of annual accounting. Unless otherwise directed, guardian of property may file first annual accounting on either fiscal year or calendar year basis and must notify court as to filing intentions within 30 days from date guardian issued letter of guardianship. All subsequent annual accountings must be filed for same period as first. Annual report must be served on ward unless ward is minor under 14 or totally incapacitated and attorney for ward, if any. Guardian must provide copy to any other person as court may direct. Within 30 days after annual report has been filed, any interested person, including ward, may file written objections to any element of report, specifying nature of objection. (Fla. Stat. 744.367). If guardian fails to file guardianship report, court will order guardian to file report within 15 days after service of order or show cause why guardian should not be compelled to do so. (Fla. Stat. 744.3685). Court reviews initial report within 60 days and annual report within 30 days. Court may appoint general or special magistrates to assist in review functions and may require master to conduct random field audits. (Fla. Stat. 744.369).

Annual Accounting.

Each guardian of property must file annual accounting with court. Such accounting must contain full and correct account of receipts and disbursements, statement of ward's property on hand at end of accounting period and copy of annual or year's-end statement of all of ward's cash accounts from each of institutions where cash is deposited. (Fla. Stat. 744.3678). Substantiating papers need not be filed but must be available for inspection at court's order and must be preserved for three years after discharge. (Fla. Stat. 744.3678). §744.3678 does not apply if court determines that ward receives income only from Social Security benefits and guardian is ward's representative payee for benefits. (Fla. Stat. 744.3678[5]). Court may require production of evidence of property for inspection of any creditor or interested person. (Fla. Stat. 744.373).

Resignation or Removal.

Upon petition and approval of court, guardian may resign after giving notice to surety and such other notice as court may require, but before being relieved guardian must file final reports and deliver assets to successor and acceptance of resignation does not relieve guardian or surety of liability previously incurred. Guardian of person must deliver to successor guardian copies of all medical and personal care records. (Fla. Stat. 744.467). Guardian may be removed for: (1) fraud in appointment; (2) failure to discharge duties; (3) abuse of powers; (4) incapacity or illness, including substance abuse, which renders guardian incapable of discharging duties; (5) failure to comply with order; (6) failure to return schedules or produce assets; (7) waste, embezzlement or mismanagement; (8) failure to give bond or security as required; (9) conviction of felony; (10) appointment of receiver trustee in bankruptcy or liquidator for corporate guardian; (11) development of conflict of interest between ward and guardian; (12) finding of probable cause made by Department of Health that guardian has abused, neglected or exploited ward; (13) material failure to comply with guardianship report by guardian; (14) failure to comply with rules for timely filing initial and annual guardianship reports; (15) failure to fulfill guardianship education requirements; (16) improper management of ward's assets; (17) material change in ward's financial circumstances such that guardian is no longer qualified to manage finances of ward, or previous degree of management is no longer required; (18) becoming disqualified after appointment; or (19) showing by one who did not receive notice of petition for adjudication of incapacity, when notice required, and who is related to ward within specified relationships for nonresident relatives, or who has not been previously rejected by court as guardian, that current guardian is not family member, and removal is in ward's best interest. Removal may be by circuit court on own motion or by petition of surety or other interested person or by ward. (Fla. Stat. 744.474-.477). In determining whether guardian related by blood or marriage to ward is to be removed, there is rebuttable presumption that guardian is acting in best interests of ward. (Fla. Stat. 744.474[20]). Removed guardian must, within 20 days, file final reports with court, successor guardian and ward and surrender assets to successor upon demand and may be subject to contempt for defaults. (Fla. Stat. 744.511-.517).

Termination of Guardianship and Discharge.

When ward becomes sui juris or ward dies or is restored to capacity, or guardian has been unable to locate ward through diligent search, or for guardian of property, when property has been exhausted, guardian must file final report and receive discharge. If ward has died, guardian must file final report no later than 45 days after being served with letters of administration or letters of curatorship. (Fla. Stat. 744.521). If no objections are filed and it appears guardian has made full distribution and faithfully discharged duties, order of discharge and release are granted. If objections are filed, hearing is held. (Fla. Stat. 744.527). With prior court approval, guardian may file final report and close guardianship in this state upon change of domicile of resident ward under conditions of §744.2025. (Fla. Stat. 744.524). Guardian of person is discharged without further proceeding upon filing of certified copy of ward's death certificate. (Fla. Stat. 744.521). Voluntary guardianship may be terminated by ward by filing notice with court. (Fla. Stat. 744.341).

Appeals from final orders and decrees of circuit courts pertaining to guardianship matters may be taken to District Court of Appeal (Const., art. 5, §4[b]) pursuant to Fla. R. App. P. 9.110.

Insane Persons.

See subhead Proceedings for Appointment, supra. Upon death of incapacitated person, guardianship terminates and estate is settled as estate of any other decedent. See subhead Powers and Duties, supra. See also category 13 Estates and Trusts, topics 13.16 Wills, 13.07 Descent and Distribution, and 13.09 Executors and Administrators.

Foreign guardian producing authenticated orders of appointment may maintain or defend any action in this state as representative of ward; debtors may pay foreign guardian or deliver property to guardian after 60 days from appointment if no demand be made by guardian appointed in this state within such time (Fla. Stat. 744.306); management of property of nonresident ward may be permitted by court following filing of petition showing appointment, sufficiency of security for protection of ward, and designation of resident agent (Fla. Stat. 744.307). See category 3 Business Regulation and Commerce, topic 3.01 Banks and Banking, subhead International Banking.

Veteran's Guardianship.

Guardians appointed under Veteran's Guardianship Law are not required to comply with annual reporting provisions of §744.367. (Fla. Stat. 744.653).

Dependents of ward may petition for support from guardian. (Fla. Stat. 744.625[1]). Benefits may be exempt from claims of creditors. (Fla. Stat. 744.625).

Public Guardianship.

Where there is no willing and responsible person available to serve as guardian to incapacitated person and where private guardian cannot be afforded, public guardian will be provided. (Fla. Stat. 744.702).

Appointment of Public Guardian.

Executive Director of Statewide Public Guardianship Office appoints public guardian. Public guardian must have knowledge of legal process and knowledge of social services available to meet needs of incapacitated persons. Public guardian is appointed for term of four years. (Fla. Stat. 744.703).

Powers and Duties of Public Guardian.

Public guardian may serve if there is no person willing or qualified to serve as guardian. Public guardian primarily serves persons of limited financial means, as defined by contract or rule of Department of Elderly Affairs; may serve incapacitated persons of greater financial means to extent Department determines appropriate. Public guardian is vested with all same powers as guardian under this chapter. Ward may not be committed to mental health treatment facility by public guardian without involuntary placement proceeding. (Fla. Stat. 744.704[7]). Ward's personal and medical records must not be disclosed. Within six months of public guardian being appointed to ward, public guardian must submit report on efforts to locate appropriate person to act as guardian of ward and on ward's potential to be restored to capacity. Public guardian must insure that each ward is seen by professional staff person at least once each calendar quarter. Ratio for professional staff to wards is one to 40 which Statewide Public Guardianship Office may enlarge or reduce for good cause. (Fla. Stat. 744.708). Upon taking office, public guardian must file bond as prescribed in §45.011. (Fla. Stat. 744.709). Public guardians not required to file any other bonds. (Fla. Stat. 744.351[5]).

Disposition of Unclaimed Funds Held by Guardian.

Where guardianship has been terminated due to ward's death and property cannot be distributed because no estate proceeding has been instituted, then guardian of property may institute such proceeding. Where there has been termination of guardianship pursuant to §744.521 and guardian of property has been unable to locate ward through diligent search, court will order guardian to sell property and deposit proceeds and cash already on hand with clerk of court. Clerk deposits funds in registry of court to be disposed of after posting statutory notice. After six months clerk deposits funds with Chief Financial Officer who then deposits funds to credit of public guardianship. Within five years from date of deposit, upon written petition to court and notice to department of legal affairs, any person entitled to funds, after proof of such entitlement, may obtain court order directing payment of funds to him. Funds deposited and not claimed within five years from date of deposit escheat to state for benefit of public guardianship. After depositing funds with clerk guardian of property may proceed with discharge. (Fla. Stat. 744.534).

Gifts to Minors.

See topic 14.10 Infants.

Uniform Fiduciaries Act not adopted.

Uniform Simplification of Fiduciary Security Transfers Act repealed. (98–11).

See also category 21 Property, topic 21.15 Powers of Attorney.

14.09 HUSBAND AND WIFE:

Real or personal property may be held in name of either husband or wife or in names of both.

Disabilities of Married Women.

All disabilities removed. (Const., art. 10, §5).

Separate Property.

Married woman is empowered to manage and control her separate property without joinder or consent of husband. (Fla. Stat. 708.08[1]).

Contracts; Conveyances.

Married woman is empowered to contract, sell, convey, transfer, mortgage, use and pledge her real and personal property and exercise all rights and power with respect thereto without joinder or consent of husband (Fla. Stat. 708.08[1]) except homestead property (Const. art. 10, §4). Both spouses must join in sale, gift or mortgage of homestead property. Conveyance of real property, including homestead, by one spouse to the other conveys legal title as if parties not married and grantee need not execute conveyance (Fla. Stat. 689.11[1]). Estate by entirety may be created by one spouse: (1) conveying to other by deed in which purpose to create estate is stated or (2) conveying to both spouses. (Fla. Stat. 689.11[1]).

As to incompetent married persons, see topic 14.07 Guardian and Ward.

Antenuptial Contracts.

Prenuptial contracts are enforceable by court. (Fla. Stat. 61.052). Right of election of surviving spouse, rights of spouse as intestate successor or as pretermitted spouse, and rights of spouse to homestead, exempt property, waivable in prenuptial contract. (Fla. Stat. 732.702[1]).

Actions.

Married woman is empowered to sue and be sued without joinder or consent of husband. (Fla. Stat. 708.08). In action brought by man and wife for injury done to wife in respect to which she is necessarily joined as co-plaintiff, husband may join thereto claims of any nature in his own right. (Fla. Stat. 46.031). Husband is not liable for torts of wife. (Fla. Stat. 741.23). Doctrine of interspousal tort immunity is abrogated. (Fla. Stat. 741.235). Each spouse may recover for loss of consortium if due to negligence of another. (248 So.2d 648). Married woman who conveyed or mortgaged her separate real property without joinder of husband before effective date of 1968 State Constitution had until June 2, 1985 to file notice of lis pendens and bring action based on nonjoinder of husband to contest validity of conveyance or mortgage. (Fla. Stat. 708.08[2]).

Agency.

Either spouse may give power of attorney to other, may enter into contracts with other, and may become partner of other. (Fla. Stat. 708.09).

Community Property.

This system does not exist in Florida.

Domestic Violence.

Injunction for protection against domestic violence is available between spouses, former spouses, persons related by blood or marriage, persons who are presently residing together as if family or who have resided together in past as if family, persons who have child in common regardless of whether they have been married or have resided together at any time and persons who have or had continuing and significant romantic or intimate relationship.

Ex parte temporary injunction effective for fixed period not to exceed 15 days. Full hearing must be set for date no later than date when temporary injunction ceases to be effective. Any injunction must be extended if necessary to remain in full force and effect during any period of continuance. (Fla. Stat. 741.30[5][c]).

Willful violation of injunction for protection against domestic violence under certain circumstances may be considered misdemeanor of first degree. (Fla. Stat. 741.28-741.31). Person adjudicated guilty of domestic violence who intentionally caused bodily harm to another must serve minimum of five days in county jail as part of sentence, unless sentenced to nonsuspended period of incarceration in state correctional facility. (Fla. Stat. 741.283).

Desertion and Nonsupport.

It is a felony for a man to desert his wife or children or to willfully withhold support, and upon conviction thereof, he is punishable by imprisonment not exceeding five years subject to extended term if deemed habitual felony offender or by fine not exceeding $5,000 or both. (Fla. Stat. 856.04[1], 775.082, 775.083, 775.084). Husband may not be prosecuted for such desertion or nonsupport when there exist grounds for dissolution of marriage and husband has provided for support of children. (Fla. Stat. 856.04). See topic 14.05 Dissolution of Marriage. Spouse may petition for alimony and support for children without petitioning for dissolution of marriage. (Fla. Stat. 61.09). Spouse residing in state apart from spouse and minor children, whether at fault or not, may obtain adjudication of his financial obligations to his spouse and children and his custody or visitation rights. (Fla. Stat. 61.10). Person previously adjudged in contempt for failure to comply with support order who willfully fails to provide support which he or she has ability to provide to child or spouse commits misdemeanor which may be punished by fine or imprisonment. (Fla. Stat. 827.06[2]). Fourth or subsequent violation is a third degree felony. (Fla. Stat. 827.06[3]).

Uniform Interstate Family Support Act (Fla. Stat. 88.0011-88.9031) replaced Revised Uniform Reciprocal Enforcement of Support Act. Enacted to minimize multiple order problem by providing means for one controlling support order at any time. Continuing exclusive jurisdiction. (Fla. Stat. 88.2051). Recognition of controlling child support orders. (Fla. Stat. 88.2071). Procedure when responding state has not enacted similar law. (Fla. Stat. 88.3041[2]). Employer must comply with income-withholding order of another state. (Fla. Stat. 88.50211). Recognition of order modified in another state. (Fla. Stat. 88.6121). Jurisdiction to modify child support order of another state when parties reside in this state. (Fla. Stat. 88.6131). Notice to issuing tribunal of modifications. (Fla. Stat. 88.6141).

14.10 INFANTS:

Disability of nonage removed for all persons of 18 years of age or older. (Fla. Stat. 743.07[1]). Drinking age is 21. (Fla. Stat. 562.11[1][a]). Student who is at least 18 years of age may be served alcoholic beverage as part of student's required curriculum at post-secondary educational institution accredited by U.S. Dept. of Education. (Fla. Stat. 562.11[4]).

Removal of Disabilities.

Marriage of minor removes disabilities, notwithstanding subsequent divorce or death of spouse. (Fla. Stat. 743.01).

Disabilities are removed to permit participation in benefits of Home, Farm and Business Loans Act. (Fla. Stat. 743.04). Disabilities are removed for minors 16 or older for purposes of borrowing money for own higher education. (Fla. Stat. 743.05).

Contracts.

See subhead Removal of Disabilities, supra.

Actions.

Infant may sue through representative or by next friend if unrepresented or guardian appointed by court. (R.C.P. 1.210[b]). All civil suits may be prosecuted in name of guardian. (R.C.P. 1.210[a]). Person who, through negligence, causes significant permanent injury to natural or adoptive parent of unmarried dependent resulting in permanent total disability is liable to dependent for damages, including for permanent loss of services, comfort, and companionship and society for acts of negligence occurring on or after Oct. 1, 1988. (Fla. Stat. 768.0415).

Child Support.

Comprehensive child support and income deduction regulations and requirements. Fla. Stat. 61.10; Fla. Stat. 61.12; Fla. Stat. 61.1301; Fla. Stat. 61.13015; Fla. Stat. 61.14 et seq.).

Bicycles and Mopeds.

Riders/operators under age of 16 required to wear helmets. (Fla. Stat. 316.2065[3][d], 316.211[4]).

Motorcycles.

Motorcycle registered to person under 21 years of age must display license plate unique in design and color. (Fla. Stat. 316.211[6]).

Parental Responsibility.

Parent is liable for torts of minor committed while in parent's custody, whether or not minor is personally liable. (Fla. Stat. 710.119).

Adoption.

See topic 14.01 Adoption.

Gifts to Minors.

Florida Uniform Transfers to Minors Act adopted to replace Uniform Gifts to Minors Act. (c. 710).

Uniform Securities Ownership by Minors Act not adopted.

Child Abuse and Neglect.

C. 827 provides for criminal penalties for aggravated child abuse, child abuse, negligent treatment of children, persistent nonsupport, misuse of child support money, and sexual performance by child. (Fla. Stat. 827.01 et seq.). Criminal penalties for possession of photographs, motion pictures, exhibitions, shows or other presentations including sexual conduct by child. (Fla. Stat. 827.071).

Child abuse, neglect and harm defined in Fla. Stat. 39.01; does not include a parent or legal custodian who, by reason of the legitimate practice of religious beliefs, does not provide specified medical treatment for a child. (Fla. Stat. 39.01[32][f]). Corporal discipline of a child by a parent or legal custodian for disciplinary purposes does not in itself constitute abuse when it does not result in harm to the child. (Fla. Stat. 39.01[2]). Comprehensive regulations as to placement of child in shelter. (Fla. Stat. 39.402[1], [2], [4], [5], [6], [8], [9], [10], [11], [12], [15], [16], [17]).

Comprehensive child care regulation by state and local governments.

14.11 MARRIAGE:

Minimum Age for Marriage.

License cannot be granted without written parental (or guardian) consent unless both parties are at least 18, or unless party under 18 has been previously married, or both parents are dead or they have or are expecting child. (Fla. Stat. 741.04, 741.0405). License cannot be granted to any persons under 16 without judicial permission unless they are parents or expectant parents. (Fla. Stat. 741.0405).

Consent Required.

If either party is under 18, written and properly acknowledged consent of parents (or guardian) is required, unless both parents dead or party previously married, or they have or are expecting child. (Fla. Stat. 741.04; Fla. Stat. 741.0405). Florida law removed disability of nonage from all persons 18 or older. (Fla. Stat. 743.07).

Medical Examination.

None.

License and waiting period is required; issued by any county court judge or clerk of circuit court (Fla. Stat. 741.01). If a couple has submitted valid certificates of completion of a premarital preparation course, there is no waiting period for the license. (Fla. Stat. 741.04[3]).

In order to obtain license, affidavit signed by both parties reciting their true and correct ages required. (Fla. Stat. 741.04[1]). No license may be issued unless both parties filed written statement specifying whether premarital preparation course was completed and that both have read otherwise accessed information in Family Law Handbook. Failure to submit valid certification will delay effective date of marriage license for three days from application date (exceptions granted for nonresidents and hardships). (Fla. Stat. 741.04[2], [3]).

Ceremony may be performed by ordained clergy or elders in communion with some church, any judicial officer, clerk of circuit court, or notary public. Within ten days after ceremony, person performing same must make certificate of same and transmit to office of county court or clerk of circuit court. Quaker marriages valid. (Fla. Stat. 741.07-.08).

Artificial Insemination.

Any child born within wedlock who has been conceived by means of artificial or in vitro insemination is irrebuttably presumed to be child of husband and wife, provided that both husband and wife have consented in writing to artificial or in vitro insemination. (Fla. Stat. 742.11).

Records of licenses issued and marriages performed must be kept by county court judge, or clerk of circuit court with whom original license and certificate must be filed. (Fla. Stat. 741.09). After recordation, county court judge or clerk of circuit court must forward license to vital statistics office of Department of Health. (Fla. Stat. 382.021). In absence of certificate, affidavit of two witnesses who were present that marriage was performed may be filed and recorded with same effect as certificate. (Fla. Stat. 741.10).

See also category 10 Documents and Records, topic 10.04 Records.

Common law marriages entered into after Jan. 1, 1968 are invalid. (Fla. Stat. 741.211).

Proxy Marriages.

Not recognized.

Prohibited Marriages.

Man may not marry woman to whom he is related by lineal consanguinity or his sister, aunt or niece. Corresponding prohibitions as to woman. (Fla. Stat. 741.21).

Foreign Marriages.

No statutory provisions.

Annulment.

There are no statutory provisions as to annulment of marriage. The circuit court in chancery has jurisdiction where annulment is sought for nonage, incapacity, fraud, duress or other recognized legal cause. (77 Fla. 95, 80 So. 739; 83 Fla. 7, 90 So. 622; 120 Fla. 607, 163 So. 35).

Antenuptial Contracts.

See topic 14.09 Husband and Wife.

14.12 MARRIED WOMEN:

See topics 14.09 Husband and Wife, Marriage; categories 5 Civil Actions and Procedure, topic Evidence, subhead Witnesses; Debtor and Creditor, topic Homesteads; Documents and Records, topic Acknowledgments; Estates and Trusts, topics Descent and Distribution, Executors and Administrators, Wills; Property, topic Powers of Attorney.

15 HEALTH

15.01 ABORTIONS:

Must be performed by physician with voluntary and informed written consent of pregnant woman or, in case of mental incompetent, voluntary and informed written consent of court-appointed guardian. If medical emergency prevents informed consent, physician may terminate pregnancy if he or she has obtained at least one corroborative medical opinion attesting to medical necessity and that continuation of pregnancy would threaten life of pregnant woman; if no second physician is available, physician may proceed but must document reasons for medical necessity. (Fla. Stat. 390.0111). No termination of pregnancy in third trimester of pregnancy unless: (i) Two physicians certify in writing that termination of pregnancy is necessary to save life or preserve health of pregnant woman, or (ii) physician certifies in writing to medical necessity for legitimate emergency medical procedures and another physician is not available for consultation. (Fla. Stat. 390.0111). Abortion referral or counseling agency, before referral or assistance, must furnish full and detailed explanation of abortion, including its effect and alternatives. (Fla. Stat. 390.025).

Parental notification required before terminating pregnancy of minor. (Fla. Stat. 390.01114). Parental notice may be waived in some circumstances. (Fla. Stat. 390.01114[3]-[4]). Prior parental notification requirements in Fla. Stat. 390.01115 (repealed by §1, c. 2005-52, effective July 1, 2005) declared unconstitutional. (866 So.2d 612).

15.02 [RESERVED]

15.03 DISEASES:

Reporting Requirements.

Diagnosis of sexually transmittable disease, HIV or AIDS must be reported to Department of Health. (Fla. Stat. 384.25). Physician or laboratory must report any newborn or infant up to 18 months old who has been exposed to HIV. (Fla. Stat. 384.25). Diagnosis of tuberculosis must be reported. (Fla. Stat. 392.53). Such information may not be made public. (Fla. Stat. 384.29; Fla. Stat. 392.65).

Occupational Diseases.

See category 11 Employment, topic 11.02 Labor Relations, subheads Occupational Diseases and 11.03 Workers' Compensation Law.

15.04 [RESERVED]

15.05 FOOD, DRUGS, DEVICES AND COSMETICS:

Drugs and Cosmetics.

Regulated generally by c. 499 under authority of Department of Health. Chapter covers fraud, adulteration, misbranding, or false advertising in preparation, manufacture, repackaging, or distribution of drugs, devices, and cosmetics. (Fla. Stat. 499.004).

Food.

Regulated generally by c. 500 under authority of Department of Agriculture and Consumer Services. Chapter covers fraud, harm, adulteration, misbranding, or false advertising in preparation, manufacture or sale of articles of food. Department also charged with enforcing provisions relating to production, manufacture, transportation, and sale of food, as well as articles used as ingredients in preparation of food. (Fla. Stat. 500.032). See also Fla. Stat. 501.001, Florida Anti-Tampering Act, which prohibits tampering with any consumer product or labeling of or container for any consumer product.

15.0615.03

15.04 DURABLE POWER OF ATTORNEY:

See category 21 Property, topic 21.15 Powers of Attorney.

15.04A HEALTH INSURANCE:

Bill of Rights.

Enacted for adult family-care home residents (Fla. Stat. 429.85), assisted living facility residents (Fla. Stat. 429.28), continuing care facility residents (Fla. Stat. 651.083), developmentally disabled persons (Fla. Stat. 393.13), medical patients (Fla. Stat. 381.026; Fla.

Stat. 381.0261), nursing home residents (Fla. Stat. 400.022), and weight-loss consumers (Fla. Stat. 501.0573; Fla. Stat. 501.0575).

Children's Medical Services.

Regulated by c. 391 under authority of Department of Health. Provides certain health services to eligible high-risk pregnant females and children with special health care needs. Florida Kidcare program provides certain health benefits to uninsured, low-income children through variety of benefits coverage options. (Fla. Stat. 409.810).

Florida Health Insurance Plan.

Any resident of state is eligible for coverage under plan if: evidence is provided that person received notices of rejection or refusal to issue substantially similar coverage for health reasons from at least two health insurers or HMOs; person is enrolled in Florida Comprehensive Health Association as of date plan is implemented. Each resident dependent of person who is eligible for coverage under plan is also eligible for such coverage. Purpose of plan is to make coverage available to individuals who have no other option or similar coverage, at premium that is commensurate with risk and benefits provided. (Fla. Stat. 627.64872).

Health Care Surrogate.

May be designated to make health care decisions for principal. (Fla. Stat. 765.202). Suggested form of designation at §765.203. Competent adult may make living will or written declaration to withhold or withdraw life-prolonging procedures. (Fla. Stat. 765.302). Suggested form of living will at Fla. Stat. 765.303. If patient has not executed advance directive, or designated surrogate to execute advance directive, or designated surrogate no longer available, health care decisions made for patient by individuals in order of priority set forth in Fla. Stat. 765.401.

Health Maintenance Organization Act.

Regulates establishment and operation of Health Maintenance Organizations. (c. 641).

Discount Medical Plan Organizations.

Authorized organizations may offer business arrangement or contract in which person, in exchange for charge, provides access for plan members to providers of medical services and right to receive medical services from those providers at discount. (Fla. Stat. 636.202-636.244).

Medicaid-Related Mandates.

Regulated by Fla. Stat. 409.901-.953. Provides for state's right to third party payments. (Fla. Stat. 409.910).

Florida Consumer-Directed Care Act.

Provides for consumer choice and control in delivery of long-term care needs. (Fla. Stat. 409.221).

Health Flex Plans.

Enrollment limited to state residents 64 years of age or younger with family income equal to or less than 200% of federal poverty level. (Fla. Stat. 408.909).

Prepaid Health Clinic Act.

Regulates establishment and operation of Prepaid Health Clinics. (c. 641).

Life Prolonging.

Advance Directive, defined as witnessed written document or oral statement in which instructions are given by principal or in which principal's desires are expressed concerning any aspect of principal's health care, may instruct principal's physician to provide, withhold or withdraw life-prolonging procedures, or to designate another to make treatment decision for him in event that such person should be found to be in terminal condition, end state condition, or persistent vegetative state. (Fla. Stat. 765.101[1], 765.102[3]). Advance Directive includes, but is not limited to, designation of health care surrogate, living will, or orders not to resuscitate issued pursuant to §401.45. (Fla. Stat. 765.101[1]). Statute contains form for designation of health care surrogate (Fla. Stat. 765.203), living will (Fla. Stat. 765.303) and requirements for orders not to resuscitate (Fla. Stat. 401.45[3][a]).

15.0515.07

15.08 LICENSURE AND CERTIFICATION:

Health Care Facilities.

Regulated by Agency for Health Care Administration. (Fla. Stat. 395.002[2]; Fla. Stat. 397.403; Fla. Stat. 400.062; Fla. Stat. 429.07).

Managed Care Organizations.

Prepaid Limited Health Service Organizations, Discount Medical Plan Organizations, Health Maintenance Organizations, Prepaid Health Clinics authorized. Must maintain certificate of authority from Office of Insurance Regulation of the Financial Services Commission and comply with relevant statutory requirements for services provided. (cc. 636, 641).

Nonresident Pharmacy.

Any pharmacy which is located outside this state and which ships, mails, or delivers, in any manner, dispensed medicinal drug into this state is considered nonresident pharmacy, and must be registered with Board. (Fla. Stat. 465.0156[1]). Unlawful for any nonresident pharmacy which is not registered to advertise its services in this state, or for any Florida resident to advertise pharmacy services of nonresident pharmacy which has not registered, with knowledge that advertisement will or is likely to induce members of public in this state to use pharmacy to fill prescriptions. (Fla. Stat. 465.0156[6]).

Internet Pharmacy.

Term “internet pharmacy” includes locations not otherwise licensed or issued permit under this c. 465, within or outside this state, which use Internet to communicate with or obtain information from consumers in this state and use such communication or information to fill or refill prescriptions or to dispense, distribute, or otherwise engage in practice of pharmacy in this state. (Fla. Stat. 465.003[11]). Any person desiring permit to operate Internet pharmacy must apply to Department of Health for Internet pharmacy permit. No permit will be issued unless licensed pharmacist is designated as prescription department manager for dispensing medicinal drugs to persons in this state. (Fla. Stat. 465.0197). Internet pharmacy that distributes medicinal drug to any person in this state without being permitted commits felony of second degree, punishable as provided in §§775.082, Fla. Stat. 775.083, or Fla. Stat. 775.084. (Fla. Stat. 465.0161).

15.09 LIVING WILLS:

See category 13 Estates and Trusts, topic 13.05 Death, subhead Living Wills.

15.10 ORGAN DONATIONS:

Uniform Anatomical Gift Act (Fla. Stat. 765.510-.522) is in effect.

Anatomical gift may be made: (1) By will; or (2) by separate document signed and witnessed by two others. (Fla. Stat. 765.514). Delivery of document is not necessary for gift to be valid. (Fla. Stat. 765.514[2][a], 765.515). Gift is subject to amendment or revocation. (Fla. Stat. 765.516). Donations may be made as part of driver license or identification card process. (Fla. Stat. 765.521). If decedent has not executed agreement or designated surrogate concerning anatomical gift, member of one of classes of persons designated, in absence of actual notice of contrary indications by decedent or opposition by member of same or prior class, may make donation. (Fla. Stat. 765.512). Family member, guardian, representative ad litem, or health care surrogate of adult donor may not modify, deny or prevent donor's wish or intent to make anatomical gift from being made after donor's death. (Fla. Stat. 765.512[1]).

See also category 5 Civil Actions and Procedure, topic 5.16 Limitation of Actions.

15.10A PATIENT'S RIGHTS:

Every licensed health care practitioner must inform each patient, or individual identified in Fla. Stat. 765.401(1), in person about adverse incidents that result in serious harm to patient. (Fla. Stat. 456.0575). Patients have right to have access to any records made or received in course of business by health care facility or provider relating to any adverse medical incident. (Fla. Stat. 381.028). Department of Health required to maintain profile, for practitioners licensed under cc. 458 or 459, containing information about recent disciplinary action taken against practitioners and information regarding liability actions which has been reported under Fla. Stat. 456.049 and 627.912 within previous ten years for any claim paid that exceeds $100,000. (Fla. Stat. 456.041). To obtain and maintain license, must demonstrate financial responsibility by means of escrow account, professional liability insurance, or unexpired irrevocable letter of credit. (Fla. Stat. 458.320). Department will suspend license of any physician against whom has been entered final judgment, arbitration award, or other order or who has entered into settlement agreement to pay damages arising out of medical malpractice, if all appellate remedies have been exhausted and payment up to amounts required in Fla. Stat. 458.320 not made within 30 days after entering of such judgment award, or order or settlement agreement, until Department receives proof of payment or physician and claimant agree upon payment schedule. (Fla. Stat. 458.320[8]). Medical doctor found to have committed repeated medical malpractice may not receive or continue to maintain license. (Fla. Stat. 456.50[2]; Fla. Const. Art. X, § 26). Repeated medical malpractice means three or more incidents of medical malpractice occurring on or after Nov. 2, 2004. (Fla. Stat. 456.50[1][h]).

15.1115.12

15.13 SMOKING REGULATIONS:

Firefighters.

Any person applying for employment as firefighter must be nonuser of tobacco or tobacco products for at least one year immediately preceding application. (Fla. Stat. 633.34).

Minors.

Unlawful for any person under 18 years of age to smoke in, on, or within 1,000 feet of school between hours of 6 a.m. and midnight, unless within moving vehicle or private residence. (Fla. Stat. 386.212). Unlawful for person under age of 18 to possess tobacco products, and violation punishable by community service, fine, or withholding issuance of or suspension or revocation of driver's license. (Fla. Stat. 569.11). Sale of tobacco products from vending machine permissible only from machine equipped with operational lockout device under control of dealer or dealer's agent or employee who directly regulates sale of items through machine by triggering lockout device to allow dispensing of one tobacco product, unless machine in establishment that prohibits persons under age of 18 on licensed premises. (Fla. Stat. 569.007). Sale of tobacco product to person under age of 18 is second degree misdemeanor for first offense, first degree misdemeanor for second or subsequent offense within one year of first violation. (Fla. Stat. 569.101). Any dealer selling tobacco products must post clear and conspicuous sign stating sale to persons under age of 18 is against Florida law and proof of age required for purchase. (Fla. Stat. 569.14).

Smoking in Public Places.

Person may not smoke in enclosed indoor workplace, except as provided in Fla. Stat. 386.2045. Smoking may be permitted in retail tobacco shop; private residence when not used for child care, adult care or health care; designated smoking guest room; stand-alone bar; smoking-cessation program; customs smoking room. (Fla. Stat. 386.204, 386.2045). Smoking in elevator is second degree misdemeanor. (Fla. Stat. 823.12).

16 INSURANCE

16.01 INSURANCE COMPANIES:

Regulated by Insurance Code (cc. 624-632, 634-636, 641-642, 648, 651) and by general corporation laws (see category 2 Business Organizations, topic 2.03 Corporations) except where Code conflicts (Fla. Stat. 628.041); incorporation of insurers subject to special requirements of Fla. Stat. 628.011 et seq. and as to fraternal benefit societies, Fla. Stat. 632.601 et seq. Proposed insurer must have permit to incorporate from Office of Insurance Regulation of the Financial Services Commission. (Fla. Stat. 628.051–.071). Articles of incorporation and amendments must be approved by Office prior to formation of corporation or amendment, respectively. (Fla. Stat. 628.091; Fla. Stat. 628.101). Capital requirements for insurers, c. Fla. Stat. 624.407 et seq. Special types of regulated insurers: (1) Fraternal benefit societies (c. 632); (2) motor vehicle service agreement companies and home warranty and service warranty associations (c. 634); (3) mortgage guaranty insurers (c. 635); (4) prepaid ambulance service plan offered by political subdivision exempt from insurance code (Fla. Stat. 624.127); (5) health care service plans (c. 641); (6) continuing care contractors (c. 651); (7) legal expense insurers (c. 642); (8) nonprofit multiple employer welfare arrangements (Fla. Stat. 624.436, 624.446); (9) commercial self-insurance fund (Fla. Stat. 624.488); (10) bail bondsmen and runners (c. 648); (11) state fire marshal (c. 633). Exclusions from Florida Insurance Code regarding specific business entities. (Fla. Stat. 624.01 et seq.). See Tort Reform & Insurance Act of 1986. (Fla. Stat. 768.71-.81).

Supervision by Office of Insurance Regulation of the Financial Services Commission.

Certificate of Authority.

Regulated by §624.401 et seq. Proposed insurer must first obtain a certificate of authority from Office. (Fla. Stat. 624.401). Any person who engages in insurance activities without certificate commits felony of third degree; minimum terms of imprisonment mandated by statute. (Fla. Stat. 624.401[4]). Capital funds requirements (Fla. Stat. 624.407), policyholders surplus requirements (Fla. Stat. 624.408) and deposit of securities requirements (Fla. Stat. 624.411) must be met. Application for certificate must be filed as in §624.413. Office may suspend or revoke certificates for violation of code and other reasons. (Fla. Stat. 624.418). Insurer, other than life insurer, desiring to surrender certificate, withdraw from state, or discontinue writing of certain kinds of lines of insurance must give 90 days notice to Office. (Fla. Stat. 624.430).

Rates and rating organizations relating to property, casualty, and surety insurance are regulated by c. Fla. Stat. 627.011 et seq. C. 627 does not apply to reinsurance, except joint reinsurance (Fla. Stat. 627.311); insurance against loss of or damage to aircraft, their hulls, accessories or equipment or against liability, other than workers' compensation and employer's liability, arising out of ownership, maintenance, or use of aircraft; insurance of vessels or craft and their cargoes, marine builders' risks, marine protection and indemnity, or other risks commonly insured under marine, as distinguished from inland marine, insurance policies, surplus lines insurance under §§626.913-.937. (Fla. Stat. 627.021[2]). See §627.570 re: premium rates for group life insurance contracts. See §627.782-.783 re: title insurance rates.

Annual statements and other reports required must be filed with Office on or before Mar. 1. Quarterly statements covering periods ending on Mar. 31, June 30, and Sept. 30 must be filed within 45 days after each such date. (Fla. Stat. 624.424).

Policies.

Regulated by §§627.401-.429 and as follows for specific kinds of insurance: Life and annuities (Fla. Stat. 627.451 et seq.); industrial life (Fla. Stat. 627.501 et seq.); group life (Fla. Stat. 627.551 et seq.); health insurance (Fla. Stat. 627.601); group, blanket and franchise health insurance (Fla. Stat. 627.651 et seq.); Medicare supplement policies (Fla. Stat. 627.671 et seq.); credit life and disability (Fla. Stat. 627.676 et seq.); property (Fla. Stat. 627.701 et seq.); casualty and automobile liability (Fla. Stat. 627.7261 et seq.); surety (Fla. Stat. 627.751 et seq.); title (Fla. Stat. 627.7711 et seq.); variable annuities (Fla. Stat. 627.801 et seq.); premium finance agreements (Fla. Stat. 627.826 et seq.); long term care insurance (Fla. Stat. 627.9401 et seq.); financial guaranty insurance (Fla. Stat. 627.971 et seq.).

Discrimination and Rebates.

Insurers may not unfairly discriminate (Fla. Stat. 626.9541[1][g]), make rebates or give special benefits (Fla. Stat. 626.9541[1][h]). Excepted from definition of discrimination and rebates are following practices: Paying bonuses to annuity and life insurance policy-holders; issuing life or disability insurance policies at reduced rates where payment is by preauthorized check or payroll deduction plan; readjustment of group insurance rates based on experience; issuing life or annuity insurance policies at rates less than usual rates of premiums for contracts such as group or employee insurance; making allowance for life insurance policies issued on industrial debt plan. (Fla. Stat. 626.9541[1][h][2]). Certain discriminatory practices with respect to AIDS in life and health insurance prohibited. (Fla. Stat. 627.429, 627.411[1][g], 627.6646). Payments of attorney's fees and agent's commission for services in connection with issuing title insurance specifically allowed. (Fla. Stat. 626.9541[1][h][3][b]).

Insolvent and Defaulting Companies.

Liquidation, rehabilitation and priorities governed generally by c. 631. Florida Insurance Guaranty Association Act provides mechanism for payment of covered claims under certain policies when insurer becomes insolvent. (Fla. Stat. 631.50, et seq.). Florida Health Maintenance Organization Consumer Assistance Plan provides for subscriber protection from insolvent HMOs. (Fla. Stat. 631.811, et seq.).

Liens.

Cash surrender value of life insurance and annuity contracts generally exempt from legal process in favor of any creditor unless policy is effected to benefit creditor. (Fla. Stat. 222.14).

Agents, solicitors, adjusters, service or customer representatives, administrators, and service companies must be licensed or appointed in accordance with provisions of §§626.011-.899.

Written examination is required, with several exemptions (Fla. Stat. 626.221); Office may investigate character, background and fitness (Fla. Stat. 626.201). Investigation must include submission of applicant's fingerprints to Florida Department of Law Enforcement and Federal Bureau of Investigation and consideration of any local, state or federal criminal records obtained from agencies. (Fla. Stat. 626.201). Life insurance solicitation regulated. (Fla. Stat. 626.99). General lines agent licenses regulated. (Fla. Stat. 626.726 et seq.). Administrators regulated. (Fla. Stat. 626.88-.899). Life agent and health agent not licensed as to other forms of insurance of same insurer must be 18 years of age, Florida resident and U.S. citizen or legal alien who possesses work authorization from U.S. Bureau of Citizenship and Immigration Services. (Fla. Stat. 626.785; Fla. Stat. 626.831). Nonresidents may be licensed as life agents and health agents if licensed as life or health agent in other state or province of Canada and other state or province of Canada accords same privilege to Florida residents, but nonresident agent must not have place of business, be officer, director, stockholder or partner of corporation or partnership doing business in Florida as life or health insurance agency. (Fla. Stat. 626.792; Fla. Stat. 626.835). Different classes of adjusters provided for and varying qualifications specified. (Fla. Stat. 626.851-.878). Nonresident may be licensed as general lines agent if nonresident's domicile extends reciprocal treatment. (Fla. Stat. 626.741). Employees of Veterans Administration may not be life or health insurance agents. (Fla. Stat. 626.788; Fla. Stat. 626.833).

Service of Process.

Each licensed insurer is deemed to have appointed Chief Financial Officer as its attorney to receive service for all legal process issued against it in any civil proceeding. (Fla. Stat. 624.422). Service of process fee is $15. (Fla. Stat. 624.502). Process statutes relating to various nonresident insurance agents are as follows: General lines (Fla. Stat. 626.742) and health (Fla. Stat. 626.836). Process statutes relating to various insurers are as follows: (1) Unauthorized foreign or alien insurers doing business by mail (Fla. Stat. 626.906-907); (2) unauthorized insurers (Fla. Stat. 626.937); (3) motor vehicle service agreement companies (Fla. Stat. 634.151; Fla. Stat. 634.161); (5) home warranty associations (Fla. Stat. 634.315). See also §48.151(3).

Investments regulated. (Fla. Stat. 625.301-.340). See also §§518.15, Fla. Stat. 518.151; Fla. Stat. 518.152.

Standard valuation regulated. (Fla. Stat. 625.121).

Foreign insurance companies must secure certificate of authority from Office (Fla. Stat. 624.401), and meet special requirements (Fla. Stat. 624.404). Application, including one certified copy of its charter, copy of its power of attorney, financial statement and by-laws, report of most recent examination within three years preceding date of application, certificate of compliance from insurance supervisory official of domiciliary state, and certificate of officer having custody of deposit maintained by insurer in another state must be filed. (Fla. Stat. 624.413). Deposit requirements are set forth in §624.411. Other relevant statutes: (1) Definition (Fla. Stat. 624.06[2]); (2) investment requirements (Fla. Stat. 625.340 et seq.); (3) deposits of foreign insurers not taxed (Fla. Stat. 625.53[3]); (4) commissioner as receiver to conserve assets (Fla. Stat. 631.071). Foreign mutual insurance holding company may merge with domestic mutual insurance company. (Fla. Stat. 628.715).

Retaliatory Laws.

Obligations or prohibitions imposed by another state on Florida insurers and agents doing business in such other state are imposed on insurers and agents of such other state doing business in Florida. (Fla. Stat. 624.5091). Retaliation on nonresident agents (other than life and health agents). (Fla. Stat. 626.711). Retaliation on general lines agents. (Fla. Stat. 626.743). Domestic insurers are allowed certain credit against taxes under Fla. Stat. 624.509.

Local Agent Required.

Generally unlawful to issue life, annuity, property, casualty, or surety insurance except through local producing agent, properly licensed. (Fla. Stat. 624.425-624.428).

Premium Tax.

Each insurer, except as to wet marine and transportation insurance taxed under §624.510, must pay premium tax by Mar. 1 for preceding calendar year based on 1% of gross receipts on local annuities and 1.75% of gross receipts on all other policies insuring Florida risks and residents except reinsurance. (Fla. Stat. 624.509). Tax of ¾ of 1% on gross underwriting profit is imposed on wet marine and transportation insurance. (Fla. Stat. 624.510). Home Warranty Associations are subject to premium tax of 2% of gross premiums. (Fla. Stat. 634.313).

Motor Vehicle Service Agreement Companies and Service Warranty Associations are not subject to premium tax but are subject to sales tax imposed by c. 212. (Fla. Stat. 634.131, 634.415).

Fraternal benefit societies enjoy general exemption from taxes on insurance companies. (Fla. Stat. 632.626).

Fire insurance premiums are subject to additional regulatory assessment of 1% of gross amount of premiums collected on fire insurance policies covering Florida property. (Fla. Stat. 624.515-624.516).

License tax must be paid by each insurer annually, together with other fees and state and county license taxes for agents and solicitors. (Fla. Stat. 624.501 et seq.). Fraternal benefit society, with membership restricted to physically disabled, insuring less than 200 members in Florida pays $25 annual license tax. (Fla. Stat. 624.501[3]). Municipal corporations may impose taxes on agents and solicitors not to exceed 50% of state tax. (Fla. Stat. 624.507).

Uniform Insurers Rehabilitation and Liquidation Act.

Adopted. (c. 631).

No-Fault Insurance.

See category 23 Transportation, topic 23.01 Motor Vehicles.

Payment of Claims.

Submission of claims for payment and time for acknowledgment of receipt of claim and payment of claim regulated for health insurance contracts. (Fla. Stat. 627.6131; Fla. Stat. 641.3155).

Civil remedy provided for persons damaged by insurer's violations of various provisions of Insurance Code. (Fla. Stat. 624.155). Requires 60 days prior notice to Department of Financial Services and authorized insurance company. (Fla. Stat. 624.155[3]).

Plain Language.

See category 3 Business Regulation and Commerce, topic 3.12 Consumer Protection.

16.02 SURETY AND GUARANTY COMPANIES:

For requirements to obtain certificate of authority to do business in state, see topic 16.01 Insurance Companies.

Organization.

See topic 16.01 Insurance Companies.

Rights and Powers.

Any surety company with currently effective certificate of authority to do business in state may be accepted on bond of any person or corporation required by laws of state to give bond, but additional surety may be required by official authorized to approve bond. (Fla. Stat. 627.751-.759). Attorney's fees recoverable against surety in suits for breach of building or construction contract. (Fla. Stat. 627.756, 627.428).

As to agents and solicitors, see topic 16.01 Insurance Companies.

Foreign Companies.

See topic 16.01 Insurance Companies; category 2 Business Organizations, topic 2.03 Corporations.

Taxation.

See topic 16.01 Insurance Companies.

17 INTELLECTUAL PROPERTY

17.00A FICTITIOUS NAMES:

See topic 17.01 Trademarks and Tradenames, subhead Tradenames.

17.01 TRADEMARKS AND TRADENAMES:

What May Be Used.

Common law rights in marks are preserved. (Fla. Stat. 495.161). Registration Statute provides for registration of word, name, symbol, character, design, drawing or device or combination used for goods made or sold or services rendered or offered as, where applicable, trademark, service mark, certification mark, collective mark, or trade name. (Fla. Stat. 495.021, 495.011). Certain exceptions are specified in §495.021.

Registration.

Any individual, firm, partnership, corporation, association, union or other organization who uses mark may register same by filing verified application with Department of State on its form accompanied by specimen in triplicate and filing fee of $87.50 for each class of goods or services listed in Fla. Stat. 495.111 for which mark is used. (Fla. Stat. 495.031, 495.191). Registration effective for five years and may be renewed for successive like terms for $87.50 fee per class six months prior to expiration of each term. (Fla. Stat. 495.071, 494.191).

Assignment.

Registered marks are assignable in connection with sale of business by instrument in writing, and assignments are recordable with Department of State. Assignments are void against subsequent bona fide purchasers without notice of prior assignment unless recorded within three months after assignment or prior to subsequent purchase. (Fla. Stat. 495.081). $50 filing fee with Department of State is required. (Fla. Stat. 495.081, 495.191).

Special statutory provisions exist for marks used in connection with fruit and produce containers (Fla. Stat. 506.19 et seq.), shopping and laundry carts, dairy cases, egg baskets, bakery containers, and poultry boxes (Fla. Stat. 506.503).

Protection Afforded.

Common law rights preserved (Fla. Stat. 495.161) but statutory rights to injunctions, damages and other remedies provided for in §495.141. Court may order seizure of all counterfeit goods upon motion or ex parte application upon showing that goods are likely to be destroyed, sold or removed from court's jurisdiction and probability of success on merits upon posting of undertaking and may waive requirement of notice for ex parte proceedings. Persons causing seizure of goods which are not counterfeit are liable for damages, costs, punitive damages, if warranted, and, upon showing of bad faith, attorney's fees. Injunctive relief, damages, attorney's fees for prevailing party also available under Florida Deceptive and Unfair Trade Practices Act. (Fla. Stat. 501.211). State may also enforce provisions of Florida Deceptive and Unfair Trade Practices Act. (Fla. Stat. 501.201 et seq.). See, also, Regulations issued pursuant to §501.205.

Infringement.

Any person who uses, without registrant's consent, any reproduction, counterfeit, copy, or imitation of registered mark on any goods for sale, distribution, or advertising, will be civilly liable to registrant. If a person copies, reproduces or imitates a registered mark without consent, the registrant cannot recover profits or damages unless acts committed with knowledge such mark intended to cause confusion or mistake, or to deceive. (Fla. Stat. 495.131). Registrant may sue to enjoin manufacture, use, display, or sale of counterfeits. Court may grant injunction and require defendant to pay registrant all profits derived from and/or all damages suffered by reason of such wrongful use and costs. Court may also order counterfeits under defendant's control to be delivered to court officer or complainant to be destroyed. In assessing profits, complainant required to prove only defendant's sales; defendant must prove costs and deductions claimed. Court may assess up to three times actual damages. Court may also award reasonable attorney's fees to prevailing party. (Fla. Stat. 495.141).

Dilution.

Owner of mark that is famous in state is entitled, subject to principles of equity and upon terms deemed reasonable by court, to injunction and other relief against another's commercial use of mark or trade name if such use begins after mark has become famous and is likely to cause dilution of distinctive quality of famous mark. (Fla. Stat. 495.151[1]). Owner of famous mark entitled only to injunctive relief unless person against whom relief is sought willfully intended to trade on owner's reputation or cause dilution of famous mark. If willful intent proven and mark is registered in Florida, owner also entitled to all remedies set forth in c. 495. (Fla. Stat. 495.151[2]). Following are not actionable: (i) Fair use of famous mark by another in comparative commercial advertising or promotion to identify competing goods or services; (ii) noncommercial use of mark; (iii) all forms of news reporting and news commentary. (Fla. Stat. 495.151[3]).

Tradenames.

Persons natural or artificial including corporations doing business under tradenames must comply with Fictitious Name Statute (Fla. Stat. 865.09) which requires registering the name with the division. (Fla. Stat. 865.09[3]). Noncompliance prohibits maintenance of suit in Florida courts and is misdemeanor. (Fla. Stat. 865.09[9]). Processing fee is required. (Fla. Stat. 865.09[12]).

Deceptive Trade Practices, Misbranding of Foods.

See category 3 Business Regulation and Commerce, topic 3.21 Monopolies, Restraint of Trade and Competition.

Florida Deceptive and Unfair Trade Practices Act.

(Fla. Stat. 501.201-501.213). Unfair methods of competition, unconscionable acts or practices, and unfair or deceptive acts or practices in conduct of any trade or commerce are unlawful. (Fla. Stat. 501.204). Great weight and due consideration given to interpretations of Federal Trade Commission and federal court interpretations of §5(a)(1) of Federal Trade Commission Act as of July, 2001. Department of Legal Affairs may promulgate rules (Fla. Stat.

501.205) and issue cease and desist orders after notice, complaint and hearing (Fla. Stat. 501.208). State Attorney and Department have investigative powers (Fla. Stat. 501.206, 501.203[2]) and may bring declaratory judgment actions and/or seek injunctions and damages on behalf of consumer(s) or governmental entities against one whose act or practice violates statute (Fla. Stat. 501.207). Civil penalties for willful violations of act (Fla. Stat. 501.2075) and increased penalties for violations involving senior citizens or handicapped persons (Fla. Stat. 501.2077). Prevailing party may receive attorneys' fees. (Fla. Stat. 501.2105). In addition, any individual harmed by violation may bring action and seek injunctive relief, damages, fees and costs. (Fla. Stat. 501.211). All remedies are in addition to other remedies provided by law. (Fla. Stat. 501.213). Exceptions provided for certain retailers (Fla. Stat. 501.207, 501.211) and others (Fla. Stat. 501.212).

17.02 TRADE SECRETS:

Records of Department of Agriculture, Division of Consumer Services.

Records are public except trade secrets are confidential and exempt from §119.07(1). (Fla. Stat. 570.544[7]).

Public Service Commission.

If commission undertakes formal proceeding, any matter determined to be trade secret coming into its possession pursuant to inquiry is considered confidential and exempt from §119.07(1). (Fla. Stat. 350.121).

Wireless 911 Board.

All proprietary confidential business information submitted by provider of wireless 911 services to board or State Technology Office, including customer lists, customer numbers, technology descriptions, technical information, trade secrets, and actual or developmental costs of E911 systems developed, produced, or received internally, are exempt from §119.07(1) and Const., art. 1, §24(a). (Fla. Stat. 365.174).

Department of Health.

Records, reports and information obtained by any person under c. 381, unless otherwise provided by law, is available to public unless person providing such records, reports, or information can show to Department's satisfaction such material contains trade secrets. Such trade secrets are confidential and exempt from §119.07(1) and Const., art. 1, §24(a). (Fla. Stat. 381.83).

Uniform Trade Secrets Act adopted. (c. 688).

18 LEGAL PROFESSION

18.01 ATTORNEYS AND COUNSELORS:

Name.

Official name is The Florida Bar. (Fla. Bar Reg. R. 1–3.1). http://www.floridabar.org/

Admission to practice is under exclusive jurisdiction of Supreme Court. (Const. art. V §15). Supreme Court by rule created Florida Board of Bar Examiners, which conducts character, fitness and general qualifications investigation and preparation and grading of written examination and recommends qualified candidates to the Supreme Court for admission. Applicant must be age 18 or older. Every applicant must show that he: (1) Has received academic Bachelor's

Degree from college accredited by one of specified regional accrediting associations, and has graduated with LL.B. or J.D. from any law school approved (including provisionally) by American Bar Association or which is member of Association of American Law Schools; or (2) has practiced law ten years or longer in District of Columbia or some other state, and is member of some other bar, in which event he must furnish abstract of scope and character of his previous experience and practice, academic and legal training. (Fla. Sup. Ct. Adm. Bar Rule 1, 2 & 3). Rules governing admission, information and applications may be obtained from Florida Board of Bar Examiners, Tallahassee. http://www.floridabarexam.org/

Every person admitted must comply with basic skills course requirement, which includes in-person attendance at one-day Practicing with Professionalism program and three elective, basic, substantive continuing legal education programs. (Fla. Bar Reg. R. 6-12).

Law students are encouraged to register with the board within the first year of law school. Early registration discounts in amount of registration fee are available. (Fla. Sup. Ct. Adm. Bar Rule 2).

Examination.

State bar examination includes Multistate Bar Exam, but scores from exams taken in other states are not accepted in Florida. Examination includes Florida essay and multiple choice questions. Successful completion of Multistate Professional Responsibility Examination also required. (Fla. Sup. Ct. Adm. Bar Rule 4).

Fees.

Fee to take the exam is $275 if paid by 15th of second month before exam; $525 if paid later. Fla. Sup. Ct. Adm. Bar Rule 4–43.

Admission Pro Hac Vice.

Practicing attorney of another state, in good standing, who has professional business in a court of record may upon motion be permitted to practice for such business only. (Fla. Bar Reg. R. 1-3.10). Clerk of circuit court must collect $100 fee from each attorney appearing pro hac vice. (Fla. Stat. 28.241[6]; Fla. Stat. 34.041[8]).

Multijurisdictional Practice of Law.

Lawyer admitted to practice in another jurisdiction may provide legal services on temporary basis in Florida in certain limited circumstances. (Fla. Bar Reg. R. 4-5.5).

Probationary Matters.

Persons with prior histories of drug, alcohol or psychological problems may be admitted to membership in The Florida Bar upon appropriate conditions imposed by Supreme Court. Probationary period will be no longer than five years or for such indefinite period of time as Court may deem appropriate by conditions in its order. Probationary conditions may include, but are not limited to: participation in rehabilitation program, periodic blood and urine analysis, periodic psychological examinations or supervision by another member of The Florida Bar. (Fla. Bar Reg. R. 1-3.2[b]).

Unauthorized Practice.

Only active members of The Florida Bar in good standing may practice law, except as stated above. (Fla. Bar Reg. R. 1-3.2[a]).

Mandatory Continuing Legal Education.

Each member must complete minimum of 30 credit hours of approved continuing legal education every three years. Five hours must be in area of legal ethics or professionalism, including approved substance abuse programs. Exemptions from mandatory continuing legal education requirements provided for active military service, undue hardship, certain nonresident members, certain full-time members of federal judiciary, state judges and other judicial officers and employees as designated by Florida Supreme Court, and inactive members. (Fla. Bar Reg. R. 6-10.3).

Specialty certification requirements administered pursuant to Fla. Bar Reg. R. 6-3. Specialty Certification provided for Board Certified Civil Trial, Tax, Marital and Family, Wills, Trusts and Estates, Criminal, and Real Estate Lawyer.

Compensation.

Attorney may not charge or collect illegal, prohibited, or clearly excessive fee or fee generated by employment obtained through advertising or solicitation not in compliance with rules. Contracts or agreements for attorney's fees ordinarily enforceable, unless obtained through improper advertising or solicitation, or clearly excessive. When lawyer has not regularly represented client, basis or rate of fee must be communicated to client, preferably in writing, before or within reasonable time after commencing representation. (Fla. Bar Reg. R. 4-1.5).

Contingency fee agreement must be in writing, signed by client and lawyer, and state method by which fee determined. Upon conclusion of matter, lawyer must provide client with written statement stating outcome and, if there is recovery, showing remittance to client and method of its determination. Contingency fee agreements prohibited in specified domestic relations matters and for representing defendant in criminal case. Contingency fee agreement must contain statement of client rights. Contingency fees that exceed standards set forth at Fla. Bar Reg. R. 4-1.5(f) presumed to be clearly excessive, unless rebutted.

Authorized House Counsel, as employee of business organization, may provide legal services in Florida to business limited to: (i) giving of legal advice to directors, officers, employees, and agents of business organization with respect to its business and affairs; (ii) negotiating and documenting all matters for business organization; and (iii) representation of business organization in its dealings with any administrative agency or commission, but is not permitted to make appearances as counsel in any court, administrative tribunal, agency, or commission in Florida unless such court's or body's rules otherwise authorize, or attorney is specially admitted by such court or body. (Fla. Bar Reg. R. 17-1.3).

Professional Corporations.

See category 2 Business Organizations, topic 2.03 Corporations, subhead Professional Corporations.

License.

Every attorney must be member of The Florida Bar and pay annual dues. (Fla. Bar Reg. R. 1-7.3).

Liens.

There is no statute giving liens in favor of attorneys at law. Those created by common law, whether merely possessory or not, may be enforced in chancery.

Suretyship.

Attorney cannot be surety on official bond of state, county or city official or on bond of client in judicial proceedings. (Fla. Stat. 454.20).

Discipline of attorneys is under exclusive jurisdiction of Florida Supreme Court. This responsibility is delegated to The Florida Bar subject to court's review. Bar board of governors appoints one or more grievance committees in each circuit to investigate misconduct. Procedure leading to judgment of disbarment, suspension, public reprimand, probation or other discipline is set forth in Rules Regulating The Florida Bar, c. 3.

Attorney ethics are governed by “Rules of Professional Conduct”, c. 4 of Rules Regulating The Florida Bar. These ethical rules are derived from American Bar Association Model Rules of Professional Conduct with some modifications.

19 MINERAL, WATER AND FISHING RIGHTS

19.01 MINES AND MINERALS:

Department of Environmental Protection is required to assess and report on state's energy resources, including availability of commercially developable and imported fuels. (Fla. Stat. 377.703[3][e]4). Governor and cabinet, as Board of Trustees of Internal Improvement Trust Fund, may sell or lease, by competitive bidding, any mineral located in, on, or under state land. (Fla. Stat. 253.45).

Operation of Mines.

Permit issued by Division of Resource Management of Department of Environmental Protection required prior to exploration for, or extraction of, minerals pursuant to grant of oil, gas or mineral rights. (Fla. Stat. 377.24, 377.2408, 377.243, 377.244). Persons engaging in mining any mineral or subterranean product are required to provide necessary places of deposit for waste and debris, and must prevent escape of such waste and debris into streams and rivers. (c. 376).

Safeguarding of Employees.

Duly authorized representative of Department of Environmental Protection may conduct inspection of any property, premises or place, except building, on which reclamation operation is or will be conducted. (Fla. Stat. 378.205, 378.405, 378.411).

Inspection of Mines.

Duly authorized representative of Department of Environmental Protection may conduct inspection of any property, premises or place, except building, on which reclamation operation is or will be conducted. (Fla. Stat. 378.205, 378.405).

Oil and Gas.

Division of Resources Management administers provisions of c. 377 relating to oil and gas conservation. Department of Environmental Protection is authorized to adopt rules and regulations governing all phases of exploration, drilling and production. (Fla. Stat. 377.22). Criteria and conditions for Department's granting permits for drilling, exploring, or extracting through well holes, for surface exploration or extraction of oil, gas and minerals, and for conducting any other geophysical activity on privately owned or state owned lands are prescribed in §§377.241-.244. Governor authorized to join with other states in interstate compact to conserve oil and gas. (Fla. Stat. 377.01). Department of Environmental Protection can order cycling, pooling or unitization of oil and gas fields to conserve resources. (Fla. Stat. 377.28). Board of Trustees of Internal Improvement Trust Fund authorized to negotiate, sell and convey leasehold estates in and to such lands for purpose of development thereof and production therefrom, of oil and gas. (Fla. Stat. 253.51). All leases made are upon sealed bids (Fla. Stat. 253.53) after publication of notice that lease will be offered for sale (Fla. Stat. 253.52).

Taxes.

Excise tax is levied on oil, gas and sulfur production. (Fla. Stat. 211.01-.25). Mineral, oil and gas and other subsurface rights, when owned separately from surface, must be returned for separate assessment and tax on basis of just valuation. (Fla. Stat. 193.481). Each producer of oil, gas or sulfur must file tax return on or before last day prescribed for payment of excise tax. (Fla. Stat. 211.075). Criminal and civil penalties and interest charges are incurred on failure to pay tax or file return. (Fla. Stat. 211.076, 211.25). Excise tax on severance of solid minerals, collected and distributed as provided in §§211.30-.34. Refund provided for restoration and reclamation. (Fla. Stat. 211.32). Excise tax on severance of phosphate rock, its collection and distribution is separately addressed in §211.3103.

Termination of Easements.

Easements except those running to state, reserved in any instrument for purpose of mining, drilling, exploring or developing for oil, gas, minerals or fissionable materials may be extinguished by marketable record title pursuant to §712.04 unless excepted or not affected by §§712.03 and 712.04. (508 So.2d 510). May be protected from extinguishment by following procedures set forth in §§712.05 and 712.06. Statute intended to act retrospectively. (Fla. Stat. 704.05).

20 MORTGAGES

20.01 CHATTEL MORTGAGES:

Uniform Commercial Code adopted and governs all transactions on and after effective date of Jan. 1, 1967. (cc. 670-680). See category 3 Business Regulation and Commerce, topic Commercial Code for deviations from Official Text, optional provisions adopted, filing fees.

Forms.

For UCC-1, UCC-3 and UCC-11 forms, see end of this Digest.

Filing Fees.

See category 10 Documents and Records, topic 10.04 Records.

20.02 COLLATERAL SECURITY:

See category 8 Debtor and Creditor, topic 8.15 Pledges.

20.03 MORTGAGES OF PERSONAL PROPERTY:

See topic 20.01 Chattel Mortgages; category 3 Business Regulation and Commerce, topic 3.09 Commercial Code.

20.04 MORTGAGES OF REAL PROPERTY:

Any indebtedness, howsoever evidenced, may be secured by mortgage. Mortgage is specific lien and not conveyance of legal title or right of possession. (Fla. Stat. 697.02). Written instrument selling or conveying realty to secure payment of money, whether to creditor or to third person in trust for creditor, is deemed mortgage provided no such conveyance may be deemed mortgage against bona fide purchaser or mortgagee for value without notice, holding under grantee. (Fla. Stat. 697.01).

Execution.

Notwithstanding certain exceptions, safe procedure and general practice are that all mortgages be signed in presence of two subscribing witnesses and acknowledged. But see 356 So.2d 785 (mortgage of homestead realty need not be signed in presence of witnesses). Mortgage should recite marital status and when mortgagor is married, spouse should join. Spouse must join in mortgage of homestead realty. (Fla. Stat. 689.111).

Recording.

Mortgages of real property, although valid as between parties, in order to be valid and effectual against creditors or subsequent purchasers for valuable consideration and without notice, must be recorded in county in which property is situated. (Fla. Stat. 695.01). In order to entitle mortgage to be recorded, execution thereof must be acknowledged by persons executing same (Fla. Stat. 695.03), name and address of natural person who prepared instrument or under whose supervision it was prepared must appear on its face (unless instrument executed or acknowledged outside of Florida) (Fla. Stat. 695.26), and intangible tax on mortgage must be paid to recording officer (Fla. Stat. 199.135). Effective July 1, 1991, no mortgage will be recorded by clerk of circuit court unless name of each person who executed mortgage is legibly printed, typewritten or stamped immediately beneath signature of such person and post office address of each such person appears on mortgage. Also, name of each witness and notary public or other officer who acknowledged signature of instrument must be legibly printed, typewritten or stamped immediately below signature of such witness, notary public or other officer, and 3 inch square must be reserved for use by clerk of court at top right hand corner of instrument. (Fla. Stat. 695.26). These requirements do not apply to instrument executed, acknowledged or proved outside Florida. (Fla. Stat. 695.26[3][c]). Mortgagee must file statutory notice to assure that lien is not extinguished 30 years after recording by operation of Marketable Record Title Act. (Fla. Stat. 712.01-.10).

Documentary stamp taxes must be paid on all recordable instruments requiring documentary stamp tax prior to recordation. Notation should be made on note that tax has been paid on mortgage. (Fla. Stat. 201.01). Effective Aug. 1, 1992, tax on mortgages is 35¢ on each $100 or fraction thereof of indebtedness or obligation secured by mortgage. Tax on such document not to exceed $2,450. (Fla. Stat. 201.08). See category 22 Taxation, topic 22.18 Stamp and Seal Taxes, subhead Documents, for rates and other information.

Recording Fees.

See category 10 Documents and Records, topic 10.04 Records.

Taxes.

Indebtedness secured by mortgage is taxed 2 mills on the dollar of just valuation payable one time at time instrument is recorded, in addition to stamp taxes. (Fla. Stat. 199.133). See also category 22 Taxation, topic 22.15 Property Taxes, subhead Nonrecurring Tax Levy.

Trust deeds may be used to secure debt. As in case of mortgage, trust deed creates only lien, and legal title to property covered thereby does not pass. (c. 697).

Future Advances.

Mortgage may be given to secure future advances, when expressed therein, whether obligatory or otherwise, provided such advances are made within 20 years from date of such mortgage. (Fla. Stat. 697.04[1][a]). Total amount of indebtedness may increase or decrease from time to time, but total unpaid balance at any one time may not exceed a maximum principal amount which must be specified in such mortgage, plus interest and any disbursements made for taxes, levies or insurance. (Fla. Stat. 697.04[1][b]). Mortgagor may impose subsequent limitation on additional principal amounts by recorded instrument. (Fla. Stat. 697.04[1][b]).

Assignment of Rents.

Mortgage or other instrument may provide for assignment of rents, and if such assignment is made, it is absolute upon mortgagor's default; and is operative upon written demand by mortgagee; mortgagee may apply to court to have all rents paid into court registry after payment of expenses necessary to protect, preserve and operate property including payment of real estate taxes and insurance pending adjudication of mortgagee's rights to such rents. (Fla. Stat. 697.07).

Balloon Mortgages.

With exception of mortgages in transactions covered by Federal Truth-in-Lending Act in which mortgagor has received satisfactory disclosure statement, mortgage by purchaser to seller of real property pursuant to written agreement that provides that final payment will exceed periodic payments on mortgage debt, first mortgages, mortgages in effect prior to Jan. 1, 1960, mortgages periodic payments on which consist of interest only with entire original principal payable on maturity, mortgages created for term of five years or more, and mortgages securing extension of credit in excess of $500,000, every mortgage in which final payment or principal balance due and payable upon maturity is greater than twice amount of regular monthly or periodic payment is deemed balloon mortgage, and must have printed or clearly stamped thereon legend in substantially following form: THIS IS A BALLOON MORTGAGE AND THE FINAL PRINCIPAL PAYMENT OR THE PRINCIPAL BALANCE DUE UPON MATURITY IS $. . . . ., TOGETHER WITH ACCRUED INTEREST, IF ANY, AND ALL ADVANCEMENTS MADE BY THE MORTGAGEE UNDER THE TERMS OF THIS MORTGAGE. This legend, including principal balance due upon maturity must be conspicuously printed or stamped at top of first page or face sheet of mortgage and also immediately above place for signature of mortgagor. Reference should be made to statute (Fla. Stat. 697.05[3]) for penalties for failure to comply and for separate legend required for variable, adjustable or renegotiable balloon mortgages (Fla. Stat. 697.05[2][a]; Fla. Stat. 697.05[2][a]2c).

Priorities.

The priority between mortgages is generally based upon priority of time of filing. This priority may be varied by operation of the recording act. Subsequent mortgagees or bona fide purchasers without actual notice who rely on the record title may acquire superior rights to prior mortgagee. (Fla. Stat. 695.01[1]). If mortgage executed by power of attorney, that document must also be filed.

Subordination Agreements.

No special form required. Common law rules govern.

Assignment.

Assignments of mortgages are permitted (Fla. Stat. 701.01), but as against creditors or subsequent purchasers for a valuable consideration and without notice they must be recorded and assignment document must indicate in its title that it is Assignment of Mortgage. (Fla. Stat. 701.02). C. 670-680 govern attachment and perfection of security interest in mortgage on real property and promissory note or other right to payment or performance secured by mortgage; assignment of such mortgage need not be recorded under Fla. Stat. 701.02 for purposes of attachment or perfection of security interest in mortgage under UCC. (Fla. Stat. 701.02[4]). Assignment of mortgage does not assign debt, unless mortgage note is also assigned. (4 Fla. 283). Assignment of debt ipso facto carries with it security. (80 Fla. 84, 85 So. 659).

Limitations.

Special statute of limitations applies to encumbrances on real property. (Fla. Stat. 95.281). See also category 5 Civil Actions and Procedure, topic 5.16 Limitation of Actions.

Extension.

No special form required, but it is advisable to have joinder therein by junior lienors and parties secondarily liable.

To Husband and Wife.

Any mortgage, or assignment of mortgage, to two persons who are husband and wife creates estate by entirety in mortgage and underlying obligation unless contrary intention appears in instrument. (Fla. Stat. 689.115).

Satisfaction and Release.

Satisfaction or release of a mortgage must be in writing and acknowledged in manner provided for acknowledgment of deeds, and recorded by clerk of circuit court in official record book. No satisfaction or release by an assignee may be entered until an assignment has also been entered. (Fla. Stat. 28.222; Fla. Stat. 701.04). Recorded satisfaction to be sent to person paying within 60 days of payment. Provision made for attorneys' fees. (Fla. Stat. 701.04).

Officer or agent of title insurer may, on behalf of mortgagor or person who acquired title from mortgagor, execute certificate of release to be recorded in real property records of county where mortgage is recorded if satisfaction or release of mortgage not executed and recorded after day payment in full was made. Certificate of release must be executed, sworn to or affirmed under penalty of perjury before notary public, and recorded. (Fla. Stat. 701.041). Certificate of release operates as release of mortgage. Recording of certificate of release does not relieve mortgagor from personal liability on loan or other obligations secured by mortgage. (Fla. Stat. 701.041[5]). Title insurer liable to holder of obligation secured by mortgage for actual damage sustained due to recording certificate of release. (Fla. Stat. 701.041[6]).

Foreclosure must be in equity without jury. Court must sever for separate trial all counterclaims against foreclosing mortgagee. (Fla. Stat. 702.01). Suit must be commenced within five years from maturity date, or 20 years from date of mortgage if maturity date is unascertainable from record unless within said 20 years mortgagee rerecords mortgage with obligation indicating maturity date or records copy of obligation secured by mortgage indicating maturity date with affidavit identifying mortgage by official recording data (limitations not applicable to railroad or public utilities mortgagors). (Fla. Stat. 95.281).

Judge may appoint committee of three for protection of holders of bonds or units or certificates of beneficial interest in pending cause for foreclosure of mortgage or trust deed securing bonds where owners of bonds or beneficiaries of trust exceed ten, and no committee not appointed by judge may be heard. (Fla. Stat. 69.021).

In mortgage foreclosure proceeding, when default judgment has been entered against mortgagor and note or mortgage provides for award of reasonable attorney's fees, it is unnecessary for court to hold hearing or adjudge requested attorney's fees to be reasonable if fees do not exceed 3% of principal amount owed on note or mortgage at time of filing, even if note or mortgage does not specify percentage of original amount that would be paid as liquidated damages. (Fla. Stat. 702.065).

Deficiency decree is within discretion of court, but complainant may also have right to sue at common law for deficiency. (Fla. Stat. 702.06).

Sales.

All sales of property under legal process must take place at time, date and place advertised in required notice of sale (Fla. Stat. 56.21) on any day of week except Sat. and Sun. (Fla. Stat. 56.22). See statute for additional details. Reference should also be made to judicial sales procedure described in §45.031. Purchaser at foreclosure sale gets only such title as parties to suit had. (41 Fla. 241, 25 So. 678). Where holder of legal title is not made party in foreclosure proceedings, he is not deprived of his rights by sale of property. (61 Fla. 513, 55 So. 273). If amount bid at sale is inadequate and inequitably less than real value of property, sale should not be confirmed, but judge may order resale. (77 Fla. 825, 82 So. 292).

Redemption.

At any time before later of filing of certificate of sale by clerk of court or time specified in judgment, order, or decree of foreclosure, mortgagor or holder of any subordinate interest may cure mortgagor's indebtedness and prevent foreclosure sale by paying amount of monies specified in judgment, order, or decree of foreclosure, or if no judgment, order, or decree of foreclosure has been rendered, by tendering performance due under security agreement, including any amounts due because of exercise of right to accelerate, plus reasonable expenses of proceeding to foreclose incurred to time of tender, including reasonable attorneys' fees of creditor. Otherwise, there is no right of redemption. (Fla. Stat. 45.0315).

Low-Income Emergency Home Repair Program (Fla. Stat. 420.36-420.37) and Community Care for the Elderly Act (Fla. Stat. 430.201–430.207) were adopted to assist eligible people especially elderly or physically disabled homeowners to make emergency repairs to their homes so they may continue living in their homes and to improve same through use of deferred loans from local governments.

Forms.

Following are forms of mortgage and assignment, partial release and satisfaction thereof by individuals and corporations, owner's claim for mortgage foreclosure surplus (compliance with “Scrivener's Act” may be required, see subhead Recording, supra):

Mortgage for Execution by Individual.

The Mortgagors . . . ., in consideration of the principal sum specified in the promissory note hereafter described, received from . . . . ., the Mortgagee, hereby, on this . . . . ., mortgage to the Mortgagee the real property in . . . . . County, Florida, described as: . . . . as security for the payment of the promissory note of which the following is a copy: . . . . [copy note, indenting, conforming signatures] . . . . . and agree:

1. To make all payments required by that note and this mortgage promptly when due.

2. To pay all taxes, assessments, liens and encumbrances on that property promptly when due. If they are not promptly paid the Mortgagee may pay them without waiving the option to foreclose, and such payments, with interest thereon from the date of payment at the same rate as specified in that note, shall also be secured by this mortgage.

3. To keep all buildings now or hereafter on that land insured against damage by fire and lightning in the sum secured by this mortgage, by an insurer satisfactory to the Mortgagee, the insurance policy to be held by and payable to the Mortgagee. If the Mortgagor shall not do so, the Mortgagee may do so without waiving the option to foreclose, and the cost thereof, with interest thereon from the date of payment at the same rate as specified in that note, shall also be secured by this mortgage. If any sum becomes payable under such policy, the Mortgagee may apply it to the indebtedness secured by this mortgage, or may permit the Mortgagor to use it for other purposes, without impairing the lien of this mortgage.

4. To commit, permit, or suffer no waste, impairment, or deterioration of the mortgaged property.

5. To pay all expenses reasonably incurred by the Mortgagee because of failure of the Mortgagor to comply with the agreements in that note or this mortgage, including reasonable

attorneys' fees. The cost thereof, with interest thereon from the date of payment at the same rate as specified in that note, shall also be secured by this mortgage.

6. If any payment provided for in that note is not paid within thirty days after it becomes due, or if any agreement in this mortgage other than the agreement to make the payments is breached, the entire unpaid principal balance of that note shall immediately become due at the option of the Mortgagee, and the Mortgagee may foreclose this mortgage in the manner provided by law, and have the mortgaged property sold to satisfy or apply on the indebtedness hereby secured.

7. The rents and profits of the mortgaged property are also hereby mortgaged, and if proceedings to foreclose this mortgage shall be instituted, the court having jurisdiction thereof should appoint a receiver of the mortgaged property, and apply those rents and profits to the indebtedness hereby secured, regardless of the solvency of the Mortgagor or the adequacy of the security.

Signed in the presence of:

. . . .

(Witness)

Print Name: . . . .

. . . .

(Witness)

Print Name: . . . .

. . . .(Seal)

[As many lines for signature as there are mortgagors, with name and address of each typed under line for his signature]

State of . . . .

County of . . . .

(See category 10 Documents and Records, topic Acknowledgments for individual form of acknowledgment.)

Mortgage for Execution by Corporation.

. . . ., a corporation organized and existing under the laws of the State of . . . . ., the Mortgagor, in consideration of the principal sum specified in the promissory note hereafter described, received from . . . . . ., the Mortgagee, hereby, on this . . . . . ., mortgages to the Mortgagee the real property in . . . . . . County, Florida, described as: . . . . as security for the payment of the promissory note of which the following is a copy: . . . . [copy note, indenting, conforming signatures] . . . . and agrees:

1. To make all payments required by that note and this mortgage promptly when due.

2. To pay all taxes, assessments, liens and encumbrances on that property promptly when due. If they are not promptly paid the Mortgagee may pay them without waiving the option

to foreclose, and such payments, with interest thereon from the date of payment at the same rate as specified in that note, shall also be secured by this mortgage.

3. To keep all buildings now or hereafter on that land insured against damage by fire and lightning in the sum secured by this mortgage, by an insurer satisfactory to the Mortgagee, the insurance policy to be held by and payable to the Mortgagee. If the Mortgagor shall not do so, the Mortgagee may do so without waiving the option to foreclose, and the cost thereof, with interest thereon from the date of payment at the same rate as specified in that note, shall also be secured by this mortgage. If any sum becomes payable under such policy, the Mortgagee may apply it to the indebtedness secured by this mortgage, or may permit the Mortgagor to use it for other purposes, without impairing the lien of this mortgage.

4. To commit, permit, or suffer no waste, impairment, or deterioration of the mortgaged property.

5. To pay all expenses reasonably incurred by the Mortgagee because of failure of the Mortgagor to comply with the agreements in that note or this mortgage, including appellate costs and reasonable attorneys' fees. The cost thereof, with interest thereon from the date of payment at the same rate as specified in that note, shall also be secured by this mortgage.

6. If any payment provided for in that note is not paid within thirty days after it becomes due, or if any agreement in this mortgage other than the agreement to make the payments is breached, the entire unpaid principal balance of that note shall immediately become due at the option of the Mortgagee, and the Mortgagee may foreclose this mortgage in the manner provided by law, and have the mortgaged property sold to satisfy or apply on the indebtedness hereby secured.

7. The rents and profits of the mortgaged property are also hereby mortgaged, and if proceedings to foreclose this mortgage shall be instituted, the court having jurisdiction thereof should appoint a receiver of the mortgaged property, and apply those rents and profits to the indebtedness hereby secured, regardless of the solvency of the Mortgagor or the adequacy of the security.

(Name of Corporation)

By: . . . .

Print Name:

Its . . . . President, Vice-President, or Chief Executive Officer

Address:

[Corporate Seal]

State of . . . .

County of . . . .

(See category 10 Documents and Records, topic Acknowledgments for corporate form of Acknowledgment.)

Assignment by Individual.

. . . . ., the holder of the mortgage executed by . . . . . to . . . . ., dated . . . . . and recorded in . . . . ., public records of . . . . . County, Florida, in consideration of the sum of . . . . . . received from . . . . ., hereby, on this . . . . ., assigns that mortgage and the note and debt described therein to . . . . . .

. . . .

[As many lines for signature as there are holders, with name and address of each typed under line for his signature]

State of . . . .

County of . . . .

(See category 10 Documents and Records, topic Acknowledgments for individual form of Acknowledgement.)

Assignment by Corporation.

. . . . ., a corporation organized and existing under the laws of the State of . . . . ., the holder of the mortgage executed by . . . . . to . . . . ., dated . . . . . and recorded in . . . . ., public records of . . . . . County, Florida, in consideration of the sum of . . . . . received from . . . . ., hereby, on this . . . . ., assigns that mortgage and the note and debt described therein to . . . . . .

(Name of Corporation)

By: . . . .

Print Name:

Its . . . . President, Vice-President, or Chief Executive Officer

Address:

[Corporate Seal]

State of . . . .

County of . . . .

(See category 10 Documents and Records, topic Acknowledgments for corporate form of Acknowledgment.)

Partial Release by Individual.

. . . . ., the holder of the mortgage executed by . . . . . to . . . . ., dated . . . . . and recorded in . . . . ., public records of . . . . . County, Florida, in consideration of . . . . ., hereby, on this . . . . ., releases from the lien of that mortgage the real property in that county described as:. . . . . . without impairing the lien of that mortgage on the remaining part of the property described in that mortgage.

. . . .

[As many lines for signature as there are holders, with name and address of each typed under line for his signature]

State of . . . .

County of . . . .

(See category 10 Documents and Records, topic Acknowledgments for individual form of Acknowledgment.)

Partial Release by Corporation.

. . . . ., a corporation organized and existing under the laws of the State of . . . . ., the holder of the mortgage executed by . . . . . to . . . . ., dated . . . . . and recorded in . . . . ., public records of . . . . . County, Florida, in consideration of . . . . ., hereby, on this . . . . ., releases from the lien of that mortgage the real property in that county described as: . . . . without impairing the lien of that mortgage on the remaining part of the property described in that mortgage.

(Name of Corporation)

By . . . .

Print Name:

Its . . . . President, Vice-President, or Chief Executive Officer

Address:

[Corporate Seal]

State of . . . .

County of . . . .

(See category 10 Documents and Records, topic Acknowledgments for corporate form of Acknowledgment.)

Satisfaction Executed by Individual.

. . . . ., the holder of the mortgage executed by . . . . . to . . . . ., dated . . . . . and recorded in . . . . ., public records of . . . .. County, Florida, hereby, on this . . . . ., acknowledges full payment and satisfaction of that mortgage.

. . . .

[As many lines for signature as there are holders, with name and address of each typed under line for his signature]

State of . . . .

County of . . . .

(See category 10 Documents and Records, topic Acknowledgments for individual form of Acknowledgment.)

Satisfaction Executed by Corporation.

. . . . ., a corporation organized and existing under the laws of the State of . . . . ., the holder of the mortgage executed by . . . . . to . . . .., and recorded in . . . . ., public records of . . . . . County, Florida, hereby, on this . . . . ., acknowledges full payment and satisfaction of that mortgage.

(Name of Corporation)

By: . . . .

Print Name:

Its . . . . President, Vice-President, or Chief Executive Officer

Address:

[Corporate Seal]

State of . . . .

County of . . . .

(See category 10 Documents and Records, topic Acknowledgments for corporate form of Acknowledgment.)

Owner's Claim for Mortgage Foreclosure Surplus.

State of . . .

County of . . .

Under penalty of perjury, I (we) hereby certify that:

1. I was (we were) the owner of the following described real property in . . . . County, Florida, prior to the foreclosure sale and as of the date of the filing of the lis pendens:

(Legal description of real property)

2. I (we) do not owe any money on any mortgage on the property that was foreclosed other than the one that was paid off by the foreclosure.

3. I (we) do not owe any money that is the subject of an unpaid judgment, condominium lien, cooperative lien, or homeowners' association.

4. I am (we are) not currently in bankruptcy.

5. I (we) have not sold or assigned my (our) right to the mortgage surplus.

6. My (our) new address is: . . . . .

7. If there is more than one owner entitled to the surplus, we have agreed that the surplus should be paid . . . . jointly, or to: . . . ., at the following address: . . . . .

8. I (WE) UNDERSTAND THAT I (WE) AM (ARE) NOT REQUIRED TO HAVE A LAWYER OR ANY OTHER REPRESENTATION AND I (WE) DO NOT HAVE TO ASSIGN MY (OUR) RIGHTS TO ANYONE ELSE IN ORDER TO CLAIM ANY MONEY TO WHICH I (WE) MAY BE ENTITLED.

9. I (WE) UNDERSTAND THAT THIS STATEMENT IS GIVEN UNDER OATH, AND IF ANY STATEMENTS ARE UNTRUE THAT I (WE) MAY BE PROSECUTED CRIMINALLY FOR PERJURY.

. . . (Signatures) . . .

Sworn to (or affirmed) and subscribed before me this . . . . day of . . . .,

. . . (year) . . ., by . . . (name of person making statement) . . . .

. . . (Signature of Notary Public - State of Florida) . . .

. . . (Print, Type, or Stamp Commissioned Name of Notary Public) . . .

Personally Known . . . . OR Produced Identification . . . .

Type of Identification Produced . . . .

Chattel Mortgages.

See topic 20.01 Chattel Mortgages.

21 PROPERTY

21.01 ABSENTEES:

Any person serving in or with Armed Forces, Red Cross, Merchant Marine or otherwise, during any period of time when state of hostilities exists between U.S. and any other power and for one year thereafter, who has been reported or listed as missing in action, interned in neutral country, beleaguered, besieged or captured by enemy is “absentee,” as is any resident of Florida, or any person owning property in Florida, who disappears under circumstances indicating that he may have died, or may have disappeared as result of mental causes. (Fla. Stat. 747.01).

Conservator of Absentee's Property.

Upon petition to circuit court by any person who would have interest in absentee's property or estate or who is dependent upon absentee for maintenance or support, notice will be given to all persons named in petition of hearing to determine absentee status. (Fla. Stat. 747.03, 747.031). If court is satisfied that absentee status is appropriate, court has jurisdiction to appoint conservator where court finds conservator necessary. (Fla. Stat. 747.02, 747.032). Conservator will have same powers and duties as guardian, and may be required by court to post bond. (Fla. Stat. 747.035, 747.034 [744.38 and 744.39 referred to in Fla. Stat. 747.034 are repealed]).

Homestead Property.

Absentee considered incompetent for purposes of homestead exemption and restrictions on alienation. (Fla. Stat. 747.011). See category 8 Debtor and Creditor, topic 8.10 Homesteads.

Summary Procedure.

Permits wife or next of kin if absentee has no wife to sell or transfer any of absentee's property which has gross value less than $5,000, or perform acts requiring absentee's consent in matters involving absentee's children or in any other matter in which gross value of subject matter is less than $5,000, to apply to circuit court for approval to sell, transfer, or perform. These acts may be done without full conservatorship; application may be made without attorney; and order may be entered without notice or hearing. Statutory pleading form provided. (Fla. Stat. 747.051).

Nonconservator Procedure.

Where gross value of absentee's property is greater than $5,000, or in any other matter in which gross value of subject matter is greater than $5,000, spouse, or next of kin if no spouse, may petition circuit court for order authorizing action. Court may appoint guardian ad litem for absentee; hearing is required. Court may authorize action without having full conservatorship. (Fla. Stat. 747.052).

Escheat.

Uniform Disposition of Unclaimed Property Act adopted. (c. 717). Department of Financial Services administers and provides for enforcement of c. 717. (Fla. Stat. 717.138). Unless filing date postponed after written request, all persons holding funds of $50 or more or other property must file verified reports before May 1 of each year as of Dec. 31 next preceding. Holders of inactive accounts must use due diligence to locate apparent owners. (Fla. Stat. 717.117).

C. 716 provides for escheat of all funds or other property having situs in state or belonging to resident, provides procedures for state to recover such funds or other property which are held by U.S. government. Provision is made for recovery by claimants within five years from receipt by state.

See also category 13 Estates and Trusts, topic 13.07 Descent and Distribution, subhead Escheat.

21.02 ADVERSE POSSESSION:

Character of Possession.

Under color of title continued possession for seven years is required. For purpose of constituting adverse possession by any person claiming title founded upon written recorded instrument, or judgment or decree, land is deemed to have been possessed, where it has been usually cultivated or improved, or protected by substantial enclosure, or where it has been used for supply of fuel, or fencing timber for purpose of husbandry, or for ordinary use of occupant, or when known lot or single farm has been partly improved, portion of such farm or lot which may have been left not cleared or not enclosed according to usual course and custom of country, is deemed to have been occupied for same length of time as part improved or cultivated. However, if the property is divided into lots, the possession of one lot is not a possession of any other lot of the same tract. Adverse possession commencing after Dec. 31, 1945 is not deemed adverse possession under color of title until instrument upon which claim of title is founded is recorded. (Fla. Stat. 95.16).

Without color of title actual continued occupation for seven years is required. For purpose of constituting adverse possession by any person claiming title not founded upon written instrument, judgment or decree, land is deemed to have been occupied where it has been protected by substantial enclosure or where it has been usually cultivated or improved. To acquire title by adverse possession without color of title, claimant must make return of property for taxation within one year after his entry into possession and must pay all taxes and special improvement liens thereon before such taxes become delinquent. (Fla. Stat. 95.18).

Duration of Possession.

Actual continued occupation without color of title or continued occupation and possession under color of title for seven years is necessary to confer title. (Fla. Stat. 95.16; Fla. Stat. 95.18). However, 20 years after deed is recorded or will purporting to convey property is probated, no person can assert claim to property against claimants under deed or will or their successors in title, in the absence of fraud, adverse possession, or pending litigation. (Fla. Stat. 95.231).

Easements may be created by prescription if there is continuous, open and visible use, under adverse claim of right, for 20 years. (100 So.2d 57).

Disabilities.

Rights of persons under disabilities are subject to being barred by Marketable Record Title Act. (Fla. Stat. 712.04). See topic 21.16 Real Property.

21.03 CONDOMINIUMS:

See topic 21.16 Real Property.

21.04 CONVEYANCES:

See topic 21.06 Deeds.

21.05 CURTESY:

Curtesy abolished. (Fla. Stat. 732.111). See category 13 Estates and Trusts, topic 13.07 Descent and Distribution, subhead Right to Elective Share.

21.06 DEEDS:

See topic Real Property for types of estates.

No estate or interest of freehold, or for a term of more than one year, in land may be created, assigned or released except by written instrument or will or by act and operation of law. (Fla. Stat. 689.01).

Execution.

Deeds must be in writing, signed in presence of at least two witnesses, who attest the same by signing their names. (Fla. Stat. 689.01). Seal is not necessary for execution of deed. (Fla. Stat. 689.01).

Acknowledgment is not necessary to validity of deed. (Fla. Stat. 689.01). However, to entitle any deed to be recorded execution must be acknowledged, proved by subscribing witness or legalized or authenticated by civil law notary or notary public who affixes official seal. (Fla. Stat. 695.03). Deeds must contain name and address of each signatory legibly printed, typewritten or stamped beneath signature, name and address of natural person who prepared deed or under whose supervision it was prepared legibly printed, typewritten or stamped, name of each witness and notary public legibly printed, typewritten or stamped below signature, 3 inch square at top right-hand corner on first page and 1" by 3" space at top right-hand corner on each subsequent page for use by clerk, and name and address of each grantee legibly printed, typewritten or stamped. (Fla. Stat. 695.26[1]). These requirements do not apply to instrument executed before July 1, 1991, decree, order, judgment or writ of any court, instrument executed outside of state, will, plat, and instrument prepared or executed by any public officer other than notary public. (Fla. Stat. 695.26[3]). For circumstances in which spouse must join, see category 14 Family, topic Husband and Wife; also category 8 Debtor and Creditor, topic 8.10 Homesteads.

Recording.

Deeds must be recorded in the county where the land conveyed is situated in order to be effective as against creditors and subsequent purchasers for a valuable consideration without notice. (Fla. Stat. 695.01[1]). Grantees by quitclaim are deemed bona fide purchasers. (Fla. Stat. 695.01[2]).

No return required for real property the ownership of which is reflected in instruments recorded in the public records of the county in which the property is located. (Fla. Stat. 193.052).

Person purchasing burial right, belowground crypt, grave space, mausoleum, columbarium, ossuary, or scattering garden for interment, entombment or other disposition of human remains may permanently record purchase of right with clerk of court in county where right is located; this recordation is for purpose of public notification and establishing permanent record in official records of county and does not create any priority of interest or ownership. (Fla. Stat. 497.2765).

Recording Fees.

For recording fee, see category 10 Documents and Records, topic 10.04 Records.

Operation and Effect.

Deed without words of limitation, such as heirs or successors, vests fee simple title or other whole estate or interest which grantor had power to dispose of when deed made unless contrary intention appears in deed. (Fla. Stat. 689.10). Every deed or conveyance in which words “trustee” or “as trustee” are added to name of grantee, and in which no beneficiaries are named, nature and purposes of trust, if any, are not set forth, and trust is not identified by title or date, grants fee simple estate to grantee unless contrary intention appears in deed or conveyance; provided, that there does not appear in public records of county in which real property is situated at time of recording such deed or conveyance, declaration of trust by grantee declaring purposes of such trust, if any, declaring that real estate is held other than for benefit of grantee. (Fla. Stat. 689.07).

For effect of addition of words “trustee” or “as trustee” to name of grantee, see category 13 Estates and Trusts, topic 13.15 Trusts, subhead Beneficiaries.

Land trusts are recognized if the recorded instrument confers upon a trustee power to manage and dispose of realty. Permits persons to deal without inquiry of trustee's authority or provisions of unrecorded agreement. If interest transferred is within trustee's power as contained in recorded instrument, such interest is free of beneficiaries' claims and claims of dower. (Fla. Stat. 689.07; Fla. Stat. 689.071).

Conveyance, deed, mortgage, lease assignment, or other recorded instrument that transfers interest in real property, including leasehold or mortgage interest, to person qualified to act as custodian or trustee for individual retirement account under 26 U.S.C. §408(a)(2), in which transferee is designated “custodian,” “as custodian,” “trustee,” or “as trustee” and account owner or beneficiary of custodianship in individual retirement account is named, creates custodial property and transfers title to custodian or trustee when interest in real property is recorded in name of custodian or trustee, followed by words “as custodian or trustee for the benefit of (name of individual retirement account owner or beneficiary) individual retirement account.” (Fla. Stat. 689.072). Permits persons to deal without inquiry of custodian's or trustee's authority or provisions of recorded instrument. Person dealing with custodian or trustee under recorded instrument takes any interest transferred by custodian or trustee, within authority provided under §689.072, free of claims of named owner, plan participant, or beneficiary of individual retirement account or qualified plan or of anyone claiming by, through or under such person. (Fla. Stat. 689.072).

Corporation may convey lands by deed sealed with the corporate or common seal and signed in its name by its president, vice-president or chief executive officer. (Fla. Stat. 692.01). Corporations may also convey lands in same manner as individuals; that is with two witnesses and without necessity of seal. (Fla. Stat. 689.01). Person signing must acknowledge in official capacity.

Tax.

There is excise tax on deeds at rate of 70¢ on each $100 of consideration (except in Dade County where tax is 60¢). Consideration includes money paid or agreed to be paid, discharge of obligation, and amount of any mortgage or other encumbrance whether or not indebtedness is assumed. (Fla. Stat. 201.02). Taxes imposed by Fla. Stat. 201.02 do not apply to contract to sell residence of employee relocating at employer's direction or to documents related to contract between employee and employer or employee and person in business of providing employee relocation services. (Fla. Stat. 201.02[8]). Required stamps must be placed on deed prior to recording, unless provisions of §§201.132 and 201.133 apply. See category 22 Taxation, topic 22.18 Stamp and Seal Taxes, subhead Stamp Tax. In addition, charter counties have been authorized by Florida legislature to levy discretionary surtax on certain documents. Reference should be made to applicable county clerk's office of county where recording is to occur to determine whether surtax has been levied and if so, in what amount.

Curative acts have been passed validating certain defectively executed, acknowledged, or witnessed deeds and powers of attorney. (Fla. Stat. 692.02; Fla. Stat. 694.01-.15; Fla. Stat. 695.03; Fla. Stat. 695.05-.06, 95.231).

Forms.

Warranty deed may be in following form:

Form

This indenture, made this ________ day of _________, A.D. _________ between _________ of the county of _________ in the state of __________, party of the first part, whose post office address is _________, and ____________, of the county of ____________, in the state of ____________, party of the second part, whose post office address is _______, and whose Social Security Number is _______ witnesseth: that the said party of the first part, for and in consideration of the sum of _________ dollars, to him in hand paid by the said party of the second part, the receipt whereof is hereby acknowledged, has granted, bargained and sold to the said party of the second part, his heirs and assigns forever, the following described land, to-wit Parcel Identification Number ____________________.

And the said party of the first part does hereby fully warrant the title to said land, and will defend the same against the lawful claims of all persons whomsoever. (Fla. Stat. 689.02; Fla. Stat. 695.26).

. . . .

Print Name: . . . .

. . . .

Print Name: . . . .

. . . .

Print Name: . . . .

. . . .

State of . . . .

County of . . . .

(See category 10 Documents and Records, topic Acknowledgments for proper form of acknowledgment.)

This instrument was prepared by (name of natural person), (address).

All warranty deeds must include blank space for property appraiser's parcel identification number, which number, if available, must be entered on deed before it is recorded and blank spaces for social security numbers of grantees named in deed, if available, which numbers may be entered on deed before it is recorded. Failure to include such blank spaces, or parcel identification number, or any social security number, or inclusion of incorrect parcel identification number or social security number, does not affect validity of conveyance or recordability of deed. Parcel identification number does not constitute part of legal description of property. Social security number does not serve as designation of grantee. (Fla. Stat. 689.02[2]).

Deeds executed substantially in this form are held to be warranty deeds with full common law covenants. (Fla. Stat. 689.03).

Quitclaim deed may be in substantially same form except to substitute “remise, release and quitclaim” in place of words of grant and eliminate warranty clause.

21.07 DEEDS OF TRUST:

See category 20 Mortgages, topic 20.04 Mortgages of Real Property.

21.08 DOWER:

Dower and curtesy are abolished in Florida. (Fla. Stat. 732.111).

See category 13 Estates and Trusts, topic 13.07 Descent and Distribution, subhead Surviving Spouse and Right to Elective Share.

21.09 ESCHEAT:

See topic 21.01 Absentees, subhead Escheat; also category 13 Estates and Trusts, topic 13.07 Descent and Distribution, subhead Escheat.

21.10 LANDLORD AND TENANT:

Statutes governing rights and liabilities of landlords and tenants divided into three parts. (c. 83). Part I governs nonresidential tenancies, Part II governs residential tenancies and Part III governs self service storage space. Part I applies to all rentals for business and commercial purposes. Part II applies to all residential landlord-tenant relationships (excluding transient occupancies) including those for rental of structure that is furnished, with or without rent, as incident to employment for use as home, residence or sleeping place by one or more persons, structure for use as home, residence or sleeping place by one or more persons who maintain common household, and mobile home. (Fla. Stat. 83.42-.43). Part II is patterned after Uniform Residential Landlord and Tenant Act.

Under Part II landlord is required to maintain residential premises in accordance with all building, housing and health codes and, if none applies, in good repair and safe condition. (Fla. Stat. 83.51[1]). Landlord is additionally required to comply with certain statutory obligations of maintenance including extermination of certain rodents and insects, lock and keys, clean and safe condition of common areas, garbage removal and functioning facilities for heat during winter and hot and running water (Fla. Stat. 83.51[2]), unless otherwise agreed in writing. (Fla. Stat.

83.51[2][a]). Unless otherwise agreed in writing, at commencement of tenancy of single-family home or duplex, landlord must install working smoke detection device. (Fla. Stat. 83.51[2][b]). Landlord may not prohibit tenant from displaying U.S. flag, not larger than 4½ by 6 feet, in respectful manner so long as flag does not infringe on space rented by any other tenant; landlord not liable for damages caused by U.S. flag displayed by tenant. (Fla. Stat. 83.67[4]). Unconscionable provisions in rental agreement are unenforceable. (Fla. Stat. 83.45). Duties are also placed by Act on tenants to comply with housing codes and to keep premises clean and sanitary. (Fla. Stat. 83.52). Tenants can raise any defense, other than payment, they may have to action for possession based upon nonpayment of rent but before such defenses can be raised they must deposit in registry of court rent claimed to be owed and rent which accrues during pendency of suit. Defense of material noncompliance of duty to maintain may only be raised by tenant if seven days have elapsed after written notice to landlord. (Fla. Stat. 83.60).

Common law rules generally govern relationships with respect to nonresidential premises.

Kinds of Tenancies.

Tenancy at will is created unless there is a written lease signed by lessor in nonresidential tenancy. (Fla. Stat. 83.01). If tenancy has been created by writing from period to period and term is unlimited, it is a tenancy at will. (Fla. Stat. 83.02). In residential tenancy, if rental agreement contains no provision as to duration of tenancy, duration is determined by periods for which rental is payable. (Fla. Stat. 83.46[2]). Such tenancy runs from year to year, month to month or week to week, depending on period for which rent is payable. (As to nonresidential property, Fla. Stat. 83.01; as to residential property, Fla. Stat. 83.46). If, however, dwelling unit is furnished without rent as incident to employment and there is no agreement as to duration of tenancy, duration is determined by periods for which wages are payable. (Fla. Stat. 83.46[3]).

Tenancy for fixed term is created by written agreement signed by lessor and, if for more than one year, lease must be witnessed by at least two subscribing witnesses. (Fla. Stat. 689.01).

Tenancy at sufferance is created when any tenancy of written limited term expires and tenant holds over without renewing in writing. (Fla. Stat. 83.04).

Leases.

See subheads Kinds of Tenancies, Recording, Rent, Security Deposits.

Recording.

Lease for one year or longer, to be effectual against creditors and subsequent purchasers for valuable consideration and without notice, must be recorded. (Fla. Stat. 695.01). However, tenant's possession puts purchaser on inquiry as to his rights. (53 Fla. 1076, 43 So. 771).

Rent.

When a tenant refuses to surrender possession of premises at end of term of lease, landlord may demand double rent for duration of wrongful possession. (As to nonresidential property, Fla. Stat. 83.06; as to residential property, Fla. Stat. 83.58.) If tenant fails to pay rent when due, landlord has right to obtain possession. (As to nonresidential property, Fla. Stat. 83.05; as to residential property, Fla. Stat. 83.625.)

Security Deposits.

When residential lease deposit for advance rent or security is held by landlord, landlord must deposit in separate interest bearing or non-interest bearing account or post surety bond. If deposit is held in interest bearing account tenant collects interest of either 75% of annualized average interest rate payable on account or 5% per annum, simple interest, at landlord's option. If landlord posts surety bond, he must pay to tenant simple interest of 5% per annum. Landlord must give notice within 30 days to tenant of manner in which deposit is being held. Upon termination of lease, landlord, within 15 days, must return deposit plus interest if landlord does not intend to impose claim; otherwise, landlord has 30 days to notify tenant as to claim against deposit. If landlord fails to comply with statutory notice requirements for imposing claim upon tenant's security deposit, landlord forfeits right to impose said claim. Provisions do not apply to transient rentals by hotels or motels as defined by Florida law or in certain instances governed by federal law. Prevailing party in suit over security deposits entitled to costs and reasonable attorney's fees. (Fla. Stat. 83.49).

Liens.

Landlords of business property have a lien for unpaid rent: (1) Upon agricultural products raised on the land; (2) upon all other property of lessee, his sublessee or assigns, usually kept on premises; (3) upon all other property of defendant. First class of liens are superior to all others; second class are superior to any others acquired subsequent to bringing of property on premises; third class dates from levying of distress warrant. (Fla. Stat. 83.08).

Landlords of residential property have lien on all personal property of tenant located on premises. This lien is in addition to all other liens upon such property which landlord may acquire by law. (Fla. Stat. 713.691[1]).

Termination of Tenancy.

Where tenancy is from year to year, it may be terminated by not less than three months for business premises or 60 days for residential premises notice prior to end of any annual period; tenancy from quarter to quarter, by not less than 45 days for business premises or 30 days for residential premises notice prior to end of any quarter; tenancy from month to month, by not less than 15 days notice for both business and residential premises prior to end of any monthly period; tenancy from week to week by not less than seven days notice for both business and residential premises prior to end of any weekly period. (Fla. Stat. 83.03 & Fla. Stat. 83.57). Rental agreement with specific duration may contain provision requiring tenant to notify landlord before vacating at end of rental agreement, and that tenant will be liable for liquidated damages for failure to comply if landlord provides written notice to tenant specifying tenant's obligations under provision and date rental agreement is terminated; landlord must provide such written notice within 15 days before start of notification period contained in lease and written notice must list all fees, penalties, and other charges applicable to tenant. (Fla. Stat. 83.575).

As to residential premises, landlord or tenant may terminate tenancy upon one or more of various grounds applicable to each, set forth in Fla. Stat. 83.56. Tenant is given statutory right to cure with respect to certain of tenant's defaults. (Fla. Stat. 83.56). With respect to residential tenancies, landlord may terminate lease due to nonpayment of rent by tenant only if default continues for three days after written notice of intention to terminate is given by landlord to tenant. (Fla. Stat. 83.56[3]). Tenant may not raise defense of noncompliance with Fla. Stat. 83.51 in an action for possession on termination of rental agreement. (Fla. Stat. 83.51[2][c]). However, tenant may raise that defense, along with retaliatory conduct (Fla. Stat. 83.64) or other defenses tenant may have in an action for possession based on unpaid rent. (Fla. Stat. 83.60[1]). If tenant raises defense other than payment, tenant must pay the accrued rent into the registry of the court. (Fla. Stat. 83.60[2]).

Servicemember may terminate rental agreement by providing landlord with written notice to be effective at least 30 days after landlord's receipt of notice if any of following criteria met: (i) required to move pursuant to permanent change of station orders to depart 35 miles or more from location of rental premises; (ii) prematurely or involuntarily discharged or released from active duty; (iii) released from active duty after leasing premises while on active duty and rental premises is 35 miles or more from home of record; (iv) received military orders requiring move into government quarters or becomes eligible to live in and opts to move into government quarters; (v) received temporary duty orders, temporary change of station orders, or state active duty orders to area 35 miles or more from rental premises and orders are for period exceeding 60 days; or (vi) received change of orders to area 35 miles or more from rental premises prior to taking possession of rental premises. Notice must include copy of official military orders or written verification signed by servicemember's commanding officer. If servicemember dies during active duty, adult member of immediate family may terminate rental agreement. These provisions may not be waived or modified by agreement of parties under any circumstances. (Fla. Stat. 83.682).

Holding Over.

As to business premises, where tenant holds over in possession without renewal in writing, after term of written lease has expired, such holding over is deemed to be tenancy at sufferance and mere payment or acceptance of rent will not be construed to be renewal; but if such holding over is with written consent of lessor, it will be deemed tenancy at will. (Fla. Stat. 83.04).

As to a residential premises, if tenant holds over and continues in possession after expiration of rental agreement without permission of landlord, landlord may recover possession of dwelling unit in manner provided for in Fla. Stat. 83.59, which includes right to a summary proceeding. (Fla. Stat. 83.58). Landlord's agent is not permitted to take any action other than initial filing of complaint, unless landlord's agent is attorney. (Fla. Stat. 83.59[2]).

Dispossession.

As to business premises, summary proceeding is provided by which landlord may obtain judgment for possession against tenant and writ directing sheriff to put landlord in possession. (Fla. Stat. 83.21-.251).

As to residential premises after entry of judgment in favor of landlord for possession, clerk will issue writ commanding sheriff to put landlord in possession 24 hours after sheriff posts notice on premises (Fla. Stat. 83.62) and landlord may not resort to self-help (Fla. Stat. 83.59[3]).

Distress.

Not available to a landlord of residential property (Fla. Stat. 713.691[3]) but can be resorted to by landlord of business property (Fla. Stat. 83.11-.19). Defendant may have property restored by posting bond. (Fla. Stat. 83.14). After judgment for plaintiff, property not restored to defendant may be sold after two advertisements, first being at least ten days before sale. (Fla. Stat. 83.19).

Unlawful Entry, Forcible Entry and Unlawful Detainer.

These remedies are available to landlord of business premises (Fla. Stat. 82.01-.101) but not to landlord of residential premises (Fla. Stat. 82.02[2], 82.04[2], 82.081[2]).

Mobile Home Park Leases.

Florida Mobile Home Act (c. 723), which governs residential leases of mobile home lots where ten or more lots are available for rent. When fewer than ten lots, governed by Part II c. 83. (Fla. Stat. 723.002[1]).

Mobile home owners have right to peaceably assemble in common areas, to canvas other owners regarding matters relevant to park association, to communicate among themselves and to invite public officers and candidates to speak before them. (Fla. Stat. 723.054, 723.055). Mobile home owner or owner of lot in mobile home subdivision has right to sell home within park.

(Fla. Stat. 723.058). Purchaser, if otherwise qualified, has right to assume seller's rental agreement and become tenant subject to reasonable approval of park owner. Rent to purchaser may be increased after term of assumed rental agreement if increase was disclosed before purchaser's occupancy. Lifetime leases are non-assumable unless so provided in rental agreement or transferee is lessee's spouse. (Fla. Stat. 723.059). Mobile home owner must comply with building codes and park rules and regulations and keep lot clean. (Fla. Stat. 723.023). Park owner must comply with building codes, maintain common areas and utility connections, provide access to common areas and enforce rules. (Fla. Stat. 723.022).

Mobile Home Owners' Association.

If mobile home park owner offers his park for sale, officers of homeowners' association must be notified of offer, stating price and terms and conditions of sale. Tenants, through mobile home owner's association, have right to purchase park if they meet park owner's offer by executing contract within 45 days of mailing of notice. If contract is not executed and owner thereafter offers park at lower price than specified in notice, tenants have additional ten days to meet offer by executing contract. If owner receives bona fide offer to purchase park that he intends to consider or make counter offer to, he must notify officers of homeowners' association of offer and disclose price and material terms and conditions and consider any offer made by tenants. (Fla. Stat. 723.071). Park owner may record affidavit attesting to his compliance with statute on which title examiners may rely. (Fla. Stat. 723.072). Certain transfers, such as those to park owner's heirs, gifts, devises, transfers to affiliated corporations or from partnership to its partners, transfers in connection with financing park, and where park is exchanged for other real property, are exempted from provisions of this statute. (Fla. Stat. 723.071). Similarly, owner of recreational facilities exclusively serving mobile home subdivision may not sell facilities without first giving right to homeowners' association. (Fla. Stat. 723.074).

In order to exercise their purchase rights, mobile home park tenants must form mobile home owners' association, as a for profit or not for profit corporation, in which written consent to be shareholders or members has been given in writing by at least two-thirds of mobile homes. (Fla. Stat. 723.075). Statute provides content of association's articles of incorporation. (Fla. Stat. 723.077). By-laws of association must provide for administration by board of directors and for meetings of board and of members. (Fla. Stat. 723.078). Statute provides further details for operation of association. (Fla. Stat. 723.079). Any nonprofit association may conduct bingo games as provided in §849.0931. (Fla. Stat. 723.079[8]).

Rental Agreements.

Agreement must be for at least one year and must contain lot rental amount and services included and all security payments held for more than three months must be handled pursuant to §83.49 (see subhead Security Deposits, supra). Lot rental amount may be increased only in accordance with §723.031(5). (Fla. Stat. 723.031). Statute provides that court may refuse to enforce or limit any rental agreement, rental amount, rent increase or change found unreasonable. (Fla. Stat. 723.033). Lot rental amount in excess of market rent as defined in §723.033(4) is considered unreasonable. (Fla. Stat. 723.033[3]). Park owner must give mobile home owners 90 days' notice of rental increase, reduction in services or change in regulations. Procedure is established for meeting with owner to discuss proposed change, and for mediation if majority of mobile home owners state in writing that change is unreasonable. (Fla. Stat. 723.037). Provision for dispute settlement provides for rules to be established to govern proceedings. (Fla. Stat. 723.038). Any party may initiate action to enforce agreement arising from mediation which has been reduced to writing. (Fla. Stat. 723.038[6]).

Eviction.

Park owner may evict mobile home owner, tenant or occupant only for nonpayment of rent for five days after written demand, conviction for violation of law deemed detrimental to health, safety or welfare of other residents, violation of park rule or rental agreement, change in land use (upon at least one year notice) or failure to qualify as tenant. Procedure established for park owner to file complaint in county where lot is situated to evict mobile home owner. Notice must be posted on premises and sent by certified or registered mail, return receipt requested, addressed to mobile home owner at last known address. (Fla. Stat. 723.061). In action based on nonpayment of rent, mobile home owner may raise defense of noncompliance with statute. Statute provides procedure for payment of rent into court registry and for disbursement of funds to park owner. Failure to pay rent into court registry constitutes waiver of all defenses except payment, entitling park owner to default. (Fla. Stat. 723.063). May also evict based on change in use of land comprising mobile home park or portion thereof, provided tenants affected are given at least six months' notice. (Fla. Stat. 723.061). Mobile home owner required to move due to change in use of land who complies with requirements of Fla. Stat. 723.0612 entitled to payment from Florida Mobile Home Relocation Corporation of certain moving expenses.

Disclosure.

Mobile home park owner of park with 26 or more lots must file prospectus with Division of Florida Land Sales, Condominiums, and Mobile Homes before entering into enforceable rental agreement. Park owner must deliver copy of prospectus or offering circular to prospective lessee prior to entering into enforceable rental agreement. Upon delivery of prospectus, rental agreement is voidable by lessee for 15 days. (Fla. Stat. 723.011). Statute prescribes information about park and park owner that must be in prospectus or offering circular. (Fla. Stat. 723.012). Any person who relies upon false or misleading statement in advertising materials may rescind contract for purchase of mobile home or placement of mobile home in lot or collect damages. (Fla. Stat. 723.017). Park owner cannot require mobile home owner to purchase equipment from him (Fla. Stat. 723.043), to make improvements without disclosure prior to occupancy (Fla. Stat. 723.042) or to pay more for utilities sold by park owner than was charged park owner (Fla. Stat. 723.045) and cannot collect fees and assessments other than those which were previously disclosed (Fla. Stat. 723.041). No exit fees may be charged. (Fla. Stat. 723.041[2]). No entrance fees may be charged to the purchaser of a mobile home offered for sale by a current resident of the park. (Fla. Stat. 723.041[3]).

Enforcement.

Division of Florida Land Sales, Condominiums and Mobile Homes has power to enforce statute. (Fla. Stat. 723.005). Division may impose civil penalty against park owner or home owners' association for violation of law. (Fla. Stat. 723.006). Any amounts collected will be credited to The Division's Trust Fund, created to defray Division costs of administering statute. (Fla. Stat. 723.009).

Self Service Storage Space.

Lease of space for storage in building to tenants who have access to store and remove personal property is covered in Part III of c. 83, “Self-Storage Facility Act”. (Fla. Stat. 83.801-.809). Remedies for nonpayment of rent, and for post-judgment remedies, including lien and sale of stored property, are provided for. (Fla. Stat. 83.805-.806).

21.11 LEASES:

See topic 21.10 Landlord and Tenant.

21.12 PARTITION:

Action for partition may be filed by one or more joint tenants, tenants in common, or coparceners, against cotenants, coparceners, or others interested in land. (Fla. Stat. 64.031).

Jurisdiction and Venue.

Actions for partition are in chancery. (Fla. Stat. 64.011). Venue lies in any county where land lies. (Fla. Stat. 64.022).

Proceedings.

When judgment of partition made, court appoints three commissioners to make partition. Any party may file objections to report of commissioners within ten days after service. (Fla. Stat. 64.061).

Partition in Kind or Sale.

If commissioners report land cannot be partitioned, court may order land sold at public auction. (Fla. Stat. 64.071).

21.13 PERPETUITIES:

Nonvested property interest in real or personal property is invalid unless, when interest is created, it is certain to vest or terminate no later than 21 years after death of individual then alive, or interest either vests or terminates within 90 years after its creation. (Fla. Stat. 689.225[2][a]).

General power of appointment not presently exercisable because of condition precedent is invalid unless when power is created, condition precedent is certain to be satisfied or become impossible to satisfy no later than 21 years after death of individual then alive or condition precedent is satisfied or becomes impossible to satisfy within 90 years after its creation. (Fla. Stat. 689.225[2][b]).

As to any trust created after Dec. 31, 2000, property interest or power of appointment contained in trust must vest or terminate no later than 21 years after death of individual then alive or within 360 years after its creation, unless terms of trust require that all beneficial interests in trust vest or terminate within lesser period. (Fla. Stat. 689.225[2][f]).

Rule is inapplicable to: Any interest which does not violate or is exempt by statute from common law rule; certain powers of fiduciaries and trustees; and certain retirement benefits held in trust. (Fla. Stat. 689.225[5]).

With respect to any matter relating to validity of interest within rule against perpetuities, unless contrary intent appears, it is presumed that transferor of interest intended that interest be valid. (Fla. Stat. 689.225[7]).

Statute applies to nonvested property interest or power of appointment that is created on or after Oct. 1, 1988 and power of appointment that was created before Oct. 1, 1988 but only to extent that it remains unexercised on Oct. 1, 1988. Nonvested property interest or power of appointment created by exercise of power of appointment is created when power is irrevocably exercised or when revocable exercise becomes irrevocable. (Fla. Stat. 689.225[6]).

Upon petition of interested person, if certain conditions are met, court can reform disposition in manner that closely approximates transferor's manifested plan of distribution. (Fla. Stat. 689.225[4]).

21.14 PERSONAL PROPERTY:

Uniform Commercial Code adopted. (cc. 670-680). See category 3 Business Regulation and Commerce, topic 3.09 Commercial Code.

Personal property may be held by husband and wife as tenants by entirety. (Fla. Stat. 689.15).

21.15 POWERS OF ATTORNEY:

Power of Attorney.

Conveyance may be made under recordable power of attorney, which must be recorded in order that conveyance will be given full effect. See topic Records.

Unknown death of grantor does not invalidate act by holder of power of attorney. (Fla. Stat. 709.01).

Formalities of execution and acknowledgment are same as those for deed when real property is involved. See topic 21.06 Deeds.

Durable Family Power of Attorney.

Principal may create durable power of attorney designating person as his attorney in fact by executing power of attorney. Power of attorney must be in writing, must be executed with same formalities required for conveyance of real property by Florida law, state relationship of parties, if any, and include words “This durable power of attorney is not affected by subsequent incapacity of the principal except as provided by statute” or similar words clearly showing principal's intent that power conferred is exercisable from date specified in instrument, notwithstanding later disability or incapacity of principal, unless otherwise provided by statute. Not-for-profit corporation organized for charitable or religious purposes in this state which has qualified as court-appointed guardian prior to Jan. 1, 1996, and which is tax-exempt under 26 U.S.C. §501(c)(3), may also act as attorney in fact. (Fla. Stat. 709.08[2]). Power of attorney is exercisable as of date of execution. Power of attorney may include authority for attorney-in-fact to arrange for and consent to medical, therapeutical, and surgical procedures for principal, including administration of drugs. All acts done by attorney in fact pursuant to power conferred during any period of disability or incompetence have same effect, and inure to benefit of and bind principal or his heirs, devisees, and personal representatives, as if principal were competent and not disabled. (Fla. Stat. 709.08[7]).

Durable power of attorney is nondelegable (except to transfer agent or similar person with authority to register any stocks, bonds or other securities), is valid until time principal dies, revokes power or is adjudged incompetent, unless court determines otherwise. (Fla. Stat. 709.08[3]). Durable power of attorney is temporarily suspended when petition to determine competence of or to appoint guardian for principal has been filed. Whenever emergency arises between time petition is filed and adjudication, attorney-in-fact may petition court for permission to exercise power. (Fla. Stat. 709.08[3][c]). Property subject to durable power of attorney includes all real and personal property owned by principal, principal's interest in all property held in joint tenancy, principal's interest in all non-homestead property held in tenancy by entirety, and all property over which principal holds power of appointment. Attorney-in-fact is not permitted, when principal is married, to mortgage or convey homestead property without joinder of spouse or spouse's legal guardian, but joinder may be accomplished through exercise of power of attorney. (Fla. Stat. 709.08[6]).

Any third party may rely upon authority granted in durable power of attorney that is not conditioned on principal's lack of capacity to manage property until third party has received notice as provided under Fla. Stat. 709.08(5). Third party may request affidavit from attorney-in-fact. Third party may rely on authority granted in durable power of attorney conditioned on principal's lack of capacity to manage property only after receiving affidavits provided in Fla. Stat. 709.08(4)(c) and (d), and such reliance ends when third party receives notice as provided in Fla. Stat. 709.08(5). Affidavit executed by attorney in fact must state where principal is domiciled, that principal is not deceased, and that there has been no revocation by adjudication of incapacity or by occurrence of event referenced in durable power of attorney, or suspension by initiation of proceedings to determine incapacity or to appoint guardian at time power of attorney is exercised.

(Fla. Stat. 709.08[4]). Determination that principal lacks capacity to manage property must be made and evidenced by affidavit of physician licensed to practice medicine pursuant to cc. 458 and 569. Such physician must be primary physician who has responsibility for treatment and care of principal. Third party may not rely on authority granted in durable power of attorney conditioned on principal's lack of capacity to manage property when any affidavit presented has been executed more than six months prior to first presentation of durable power of attorney to third party.

Generally, attorney-in-fact has full authority to perform, without prior court approval, every act authorized and specifically enumerated in durable power of attorney. (Fla. Stat. 709.08[7]).

Deployment-Contingent Power of Attorney, which may be signed in advance and go into effect upon deployment of principal, are afforded full force and effect by Florida courts. (Fla. Stat. 709.11).

Members of Armed Forces.

Terms “missing” or “missing in action” applied to grantors of powers in connection with any activity pertaining to hostilities in which U.S. is engaged, do not constitute actual knowledge or actual notice of death of principal and do not constitute revocation of agency. (Fla. Stat. 709.01).

21.16 REAL PROPERTY:

All interests in real estate which were recognized by the common law are recognized in Florida, except that no real estate may be entailed. (Fla. Stat. 689.14). The doctrine of survivorship as to joint tenancies has been abolished, unless the instrument expressly provides for it, but where property is conveyed to both husband and wife they are presumed to be seized of estate by entirety with resulting survivorship (66 Fla. 427, 63 So. 822) and in case of divorce former spouses become tenants in common and remain so even though they subsequently remarry (Fla. Stat. 689.15).

Rule in Shelley's Case.

Abolished in Florida. (Fla. Stat. 689.17).

Doctrine of Worthier Title.

Doctrine of worthier title is abolished as rule of law and as rule of construction. Language in governing instrument describing beneficiaries of disposition as transferor's “heirs,” “heirs at law,” “next of kin,” “distributees,” “relatives,” or “family,” or language of similar import, does not create or presumptively create reversionary interest in transferor. (Fla. Stat. 689.175).

Conveyance of Property Taken by Eminent Domain.

Real property acquired by petition of condemnation under power of eminent domain may not be conveyed by condemning authority or any other entity to natural person or private entity, by lease or otherwise, except: (i) For use in providing common carrier services or systems; (ii) for use as road and other right of way open to public for transportation; (iii) for use in transportation-related services on toll roads; (iv) to public or private entity for use in providing electricity, gas, water and wastewater, sewer or telephone services; (v) for use in providing public infrastructure; (vi) to person or entity that occupies pursuant to lease incidental part of public property for purpose of providing goods or services to public. However, if less than ten years have elapsed since acquired by condemning authority, property may be conveyed without restriction after public notice and competitive bidding if: (i) Governmental entity documents that property is no longer needed for purpose for which it was acquired by condemning authority, and (ii) owner from whom property was taken is given opportunity to repurchase at price he received from condemning authority. If at least ten years have elapsed since acquired by condemning authority, property can be conveyed after public notice and competitive bidding. (Fla. Stat. 73.013).

Foreign conveyances or encumbrances when affecting Florida property, must be in conformity with laws of Florida, both as to validity of instrument and as to acknowledgment entitling instrument to record. (Fla. Stat. 689.01, 695.03).

Condominium Act recognizes condominium form of real property ownership, prescribes rights and obligations of developers, rights and obligations of condominium association, phase condominiums, mixed-use condominiums, regulation and disclosure prior to sale of residential condominium, conversions to condominiums and method of creation, and rights and liabilities with respect thereto. (Fla. Stat. 718.101-.312).

Cooperative Act.

Residential cooperatives recognized as form of real property ownership in which legal title vests in corporation and beneficial use is evidenced by ownership interests in association. (c. 719).

Homeowner's Association.

Certain types of homeowner's associations are regulated. (Fla. Stat. 720.301-.312). Disputes between association and parcel owner regarding use of or changes to parcel or common areas and other covenant enforcement disputes must be filed with Department of Business and Professional Regulation for mandatory mediation before dispute is filed in court. (Fla. Stat. 720.311).

Preservation of Residential Communities.

Parcel owners in community that was previously subject to declaration of covenants that has ceased to govern one or more parcels in community may revive declaration and homeowners' association for community upon approval by parcel owners. Purpose is to preserve existing residential communities, promote available and affordable housing, protect aesthetic elements of residential communities, and maintain easements and recreational areas. (Fla. Stat. 720.401-.407).

Liability for Improper Legal Description.

In any action relating to real property, court may award costs, attorneys' fees and actual damages to prevailing party that has been impaired by inaccurate or improper legal description in instrument prepared by another party. (Fla. Stat. 697.10).

Marketable Record Title is defined by statute, as title held by any person having legal capacity to own land in Florida who alone, or with predecessors in title has been vested with any estate in land of record for more than 30 years. Person has marketable record title to such land free and clear of all claims except for exceptions defined in §712.03. (Fla. Stat. 712.02). In general, owner of any interest in or lien upon land who is not in actual possession must file statutory notice every 30 years to assure that interest or lien is not extinguished. (c. 712). See categories 10 Documents and Records, topic Records; Mortgages, topic Mortgages of Real Property.

Model Land Sales Practices Act adopted with substantial modifications including major revisions in 1988. (c. 498).

Bert J. Harris, Jr. Private Property Rights Protection Act adopted to provide relief for real property owners from certain government actions. (c. 70; Fla. Stat. 163.3181[4]; Fla. Stat. 163.3184[10]).

Foreign corporations and alien business organizations that own real property or mortgages on real property in Florida, whether or not they transact business in Florida, must maintain registered office and registered agent in Florida and file notice of same with Secretary of State. (Fla. Stat. 607.0505). Reference should be made to §607.0505(1)(b) for penalties for failure to comply.

Time-Share Facilities.

Sales and operation of vacation plan, vacation club and time-share properties are regulated. (cc. 721, 475).

Local Strategic Plans.

There is to be state review and approval of local plans regarding land use that apply to areas of critical state concern (Fla. Stat. 380.05) and of plans for developments of regional impact (Fla. Stat. 380.06).

Deeds.

See topic 21.06 Deeds.

Rule Against Perpetuities.

Florida Uniform Statutory Rule Against Perpetuities enacted in 1988. (Fla. Stat. 689.225).

See topic 21.06 Deeds; categories 8 Debtor and Creditor, topic Homesteads; Estates and Trusts, topic Descent and Distribution; Family, topic Husband and Wife.

21.17 TRUST DEEDS:

See category 20 Mortgages, topic 20.04 Mortgages of Real Property.

22 TAXATION

22.01 ADMINISTRATION:

State Taxes.

See topics 22.02 Alcohol, Beverages and Tobacco Taxes, 22.07 Estate Tax, 22.08 Gasoline and Special Fuels Taxes, 22.10 Income Tax, 22.12A Mines, Minerals and Fisheries Taxes, subheads Oil and Gas Production Tax, Mineral Severance Tax, 22.06 Environmental Taxes, subhead Pollution Abatement Authority Tax, 22.07A Gambling and Entertainment Taxes, subhead Race Tracks and Jai Alai Frontons Taxes, 22.17 Sales and 22.19 Use Taxes, 22.18 Stamp and Seal Taxes, subhead Stamp Tax, and 22.05 Employment Taxes, subhead Unemployment Compensation Tax.

County, School and Municipal Taxes.

See topics 22.03 Business Taxes, subhead Occupational License Tax, 22.15 Property Taxes, and 22.17 Sales and 22.19 Use Taxes, subhead Discretionary County Sales and Use Surtax.

Exemptions.

See individual topics.

Penalties.

See individual topics.

Interstate and Intergovernmental Cooperation.

Department of Revenue is authorized to make information available, for official purposes, to proper officer of U.S. or any state to comply with any formal agreement for mutual exchange of state information, to Bankruptcy Trustees, to law enforcement and prosecutorial agencies, and to others as provided by statute. All information sharing is subject to statutory confidentiality restrictions. (Fla. Stat. 213.053).

Taxpayer Bill of Rights.

Guarantees that rights, privacy, and property of taxpayers are adequately safeguarded and protected during tax assessment, collection, and enforcement processes. For details, see statute. (Fla. Stat. 213.015).

22.02 ALCOHOL, BEVERAGES AND TOBACCO TAXES:

Alcoholic Beverage Taxes.

State excise tax on malt beverages, wines, and other alcoholic beverages paid by consumer and collected by manufacturer or distributor. Tax ranges from 48¢ per gallon of bulk beer to $9.53 per gallon of liquor containing over 55.780% alcohol. (cc. 563–565). Until July 1, 2008, State also imposes surcharge of 3.34¢ on each ounce of liquor and on each four ounces of wine, 2¢ on each 12 ounces of cider, and 1.34¢ on each 12 ounces of beer sold at retail for consumption on premises. Surcharges not paid on such beverages when sold by organization licensed as alcoholic beverage vendor that is determined by Internal Revenue Service to be currently exempt from federal income tax under 501(c). (Fla. Stat. 561.501 [repealed effective July 1, 2008]).

Cigarette Tax.

Imposed at varying rates dependent upon weight and length of cigarette and packaging. (Fla. Stat. 210.02). In addition to taxation of cigarettes, a surcharge is levied upon the sale, receipt, purchase, possession, consumption, handling, distribution, and use of cigarettes. (Fla. Stat. 210.011). Any person who possesses or transports unstamped packages of cigarettes for purpose of sale, or sells or offers to sell cigarettes in violation of Fla. Stat. 210.01-210.22, or willfully attempts to avoid or evade tax is guilty of misdemeanor of first degree. Alteration or forgery of stamps is felony of third degree. (Fla. Stat. 210.18). Fla. Stat. 210.185 prohibits sale of cigarettes labeled not for sale in U.S., not labeled according to law, or imported in violation of law. For details and additional restrictions, see statute.

Tobacco Product Tax.

Imposed upon all tobacco products in this state and upon any person engaged in business as distributor thereof at rate of 25% of wholesale sales price of such tobacco products. (Fla. Stat. 210.30). A surcharge is also levied upon all tobacco products in this state, upon any person engaged in business as a distributor of tobacco products, and upon the use or storage by consumers of tobacco products. (Fla. Stat. 210.276). “Tobacco products” means loose tobacco suitable for smoking; snuff; plug and twist tobacco; fine cuts and other chewing tobacco; shorts; refuse scraps; clippings, cuttings, and sweepings of tobacco, and other kinds and forms of tobacco prepared in such manner as to be suitable for chewing, but “tobacco products” does not include cigarettes, as defined by §210.01(1), or cigars. (Fla. Stat. 210.25[11]).

22.03 BUSINESS TAXES:

Local Business Tax.

Annual local business taxes imposed by county and municipality on certain businesses, professions, and occupations subject to certain exemptions. (c. 205). Business tax receipt may be revoked for any individual or entity doing business with Cuba. (Fla. Stat. 205.0532). Tax deemed regulatory and in addition to, but not in lieu of, local business tax imposed under provisions of c. 205. (Fla. Stat. 205.022[5]). See Fla. Stat. 205.053 for provisions governing due dates and penalties for business tax receipts. Failure to obtain required business tax receipt punishable by fine of 25% of tax determined to be due, plus any other penalty provided by law or ordinance. (Fla. Stat. 205.053[2]). See also topic 22.07A Gambling and Entertainment Taxes, subheads Race Tracks and Jai Alai Frontons Taxes, Occupational Licenses of Racetrack Employees.

Provider Tax.

See topic 22.17 Sales and 22.19 Use Taxes.

22.03A CONTROLLED DANGEROUS SUBSTANCES TAX:

Marijuana and Controlled Substances Tax.

Florida does not have special tax for marijuana and other controlled substances.

22.04 CORPORATE TAXES:

Corporate Stock Tax.

See topics 22.15 Property Taxes, subhead Intangible Personal Property Tax and 22.18 Stamp and Seal Taxes, subhead Stamp Tax.

Corporate License Taxes.

See categories 2 Business Organizations, topic Corporations; Business Regulation and Commerce, topics Banks and Banking, Licenses, Business and Professional.

22.05 EMPLOYMENT TAXES:

Unemployment compensation tax is imposed on each employer or employing unit which has had in employment at least one individual for some portion of day in each of 20 different calendar weeks (whether or not consecutive), in current or preceding calendar year or has paid wages in any calendar quarter in excess of $1,500 in current or preceding calendar year. (Fla. Stat. 443.1215). See Fla. Stat. 443.1215 and 443.1216 for additional employers subject to tax. Initial rate of employer contribution is 2.7%, but experience rating of employer and size of compensation fund may reduce rate or increase it to maximum of 5.4%. (Fla. Stat. 443.131). Division of Unemployment Compensation of Department of Labor and Employment Security requires quarterly returns and payments. (Fla. Stat. 443.131). No contributions are exacted from employees. (Fla. Stat. 443.131). Nonprofit organizations subject to tax unless they elect to pay into Unemployment Compensation Trust Fund amounts equal to amount of benefits attributable to service in employ of nonprofit organization. (Fla. Stat. 443.1312). Indian tribes subject to tax unless they elect to pay into Unemployment Compensation Trust Fund amounts equal to amount of benefits attributable to service in employ of tribe. (Fla. Stat. 443.1315). Any employer who employed ten or more employees in any quarter, and any person who prepared and reported for 100 or more employers, in preceding state fiscal year must submit reports and remit taxes due by electronic means. (Fla. Stat. 443.163).

22.06 ENVIRONMENTAL TAXES:

Pollution Abatement Authority Tax.

No provision for specific taxes to fund any pollution abatement authority. No sales or use tax on pollution abatement equipment, devices or products. (Fla. Stat. 212.051). However, Inland Protection Trust Fund (Fla. Stat. 376.3071), Water Quality Assurance Trust (Fla. Stat. 376.307) and Coastal Protection Trust Fund (Fla. Stat. 376.11) are funded by tax on fuel and other pollutants. (Fla. Stat. 206.9935).

Fuel and Other Pollutants Tax.

C. 206, pt. IV.

Coastal Protection.

Tax of 2¢ per barrel of “pollutant”, other than petroleum products produced in or imported into this state until Coastal Protection Trust Fund (“Fund”) equals or exceeds $50 million. Special provision for petroleum products. (Fla. Stat. 206.9935[1]). Pollutants include any petroleum product; pesticides, ammonia, and chlorine; lead-acid batteries; and certain solvents. $50 million cap automatically increases to $100 million if offshore oil drilling approved. Tax ceases to be assessed when Fund reaches caps. If discharge of catastrophic proportions which could significantly reduce Fund, Secretary of Environmental Protection has authority to levy tax up to 10¢ per barrel to replenish and maintain Fund's balance. (Fla. Stat. 206.9935[1]).

Water Quality.

Tax of from 2¢ to 5.9¢ per gallon (depending on type of pollutant) if unobligated balance of Water Quality Assurance Trust Fund falls below $3 million, until unobligated balance in fund exceeds $5 million, at which time tax of from 1¢ to 2.36¢ per barrel (depending on type of pollutant). If unobligated balance of fund exceeds $12 million, levy of tax is discontinued until unobligated balance of fund falls below $5 million. Persons producing or importing liquid mixture, claiming it is not subject to taxation as pollutant, bear burden of proof. (Fla. Stat. 206.9935[2]).

Inland Protection.—Tax of 30¢ per barrel of pollutant produced or imported into state until Inland Protection Trust Fund (“Fund”) is between $100 million and $150 million. (Fla. Stat. 206.9935[3]). If Fund exceeds $150 million, tax discontinued until unobligated balance reaches $100 million. If Fund goes below $100 million but remains above $50 million, tax increases to 60¢ per barrel. If Fund is $50 million or less tax goes up to 80¢ per barrel. See Fla. Stat. 206.9941 for exemptions. (Fla. Stat. 206.9935[3]).

22.07 ESTATE TAX:

Gross and net estate determined under applicable federal revenue act. (Fla. Stat. 198.01). Where not otherwise provided for, rules of construction applicable to estate and inheritance tax laws of U.S. apply. (Fla. Stat. 198.35). Department may compromise or settle any penalty imposed (Fla. Stat. 198.18) and may sue to recover any tax, penalty or interest (Fla. Stat. 198.25).

Tax Upon Estates of Resident Decedents.

Sum equal to amount by which credit allowable under federal estate, inheritance, legacy and succession taxes exceeds aggregate of all constitutionally valid estate, inheritance, legacy and succession taxes actually paid to several states (other than Florida). (Const. arts. 7, 5; Fla. Stat. 198.02).

Tax Upon Estates of Nonresident Decedents.

Tax on all realty situate and tangible personalty having actual situs in this state, intangible personalty having business situs in Florida, and stocks, bonds, debentures, notes and other securities or obligations of corporations organized under Florida laws, is equal to proportion of credit allowable under federal revenue act for estate, inheritance, legacy, and succession taxes actually paid to the several states as value of property taxable in Florida bears to value of entire gross estate. (Fla. Stat. 198.03).

Tax Upon Estates of Alien Decedents.

Tax on all realty situate and tangible personalty having actual situs in, and intangible personalty physically present in this state is equal to proportion of credit allowable under applicable federal revenue act for estate, inheritance, legacy and succession taxes actually paid to several states as value of property taxable in Florida bears to value of estate taxable by U.S. Rules regarding situs detailed in statute. (Fla. Stat. 198.04).

Residence.

Decedent residing in Florida for greater part of 12 consecutive months of 24 months prior to death, presumed to have died Florida resident. (Fla. Stat. 198.015).

Generation-Skipping Transfer Tax.

If original transferor is resident of Florida, tax is amount by which credit allowable under federal generation-skipping transfer tax provisions for state legacy taxes exceeds aggregate of all constitutionally valid taxes actually paid on same transfer to other states. (Fla. Stat. 198.021). If original transferor not resident of Florida at time of original transfer, but property transferred includes real or personal property in Florida, tax is equal to amount of credit allowable for state legacy taxes under I.R.C., reduced by proportion of total credit as value of transferred property taxable by all states other than Florida bears to value of gross generation-skipping transfer. (Fla. Stat. 198.031). Person liable for payment of federal generation-skipping transfer tax is liable for Florida generation-skipping tax. Due upon taxable distribution or taxable termination as determined under federal provisions. Delinquent on day after last day allowed for filing return for generation-skipping transfer. If not paid before delinquent, interest is imposed at rate of 1% per month on unpaid portion. (Fla. Stat. 198.155).

Necessary Returns.

Personal representative of every estate required to file federal estate tax return, must file Florida return consisting of executed copy of federal return and any supplemental data necessary to determine correct Florida tax. Such return is made in case of every decedent who, at time of death, was not resident of U.S. and whose gross estate includes real property situated in Florida, tangible personal property having actual situs in Florida, and intangible personal property physically present within Florida. (Fla. Stat. 198.13[1]). Every person required to file federal return reporting generation-skipping must file return with Department, on or before last date prescribed for filing federal return, consisting of duplicate copy of federal return. (Fla. Stat. 198.13). When it is made to appear to Department that estate that has filed return owes no taxes, Department will issue to personal representative certificate in writing to that effect, which certificate is equivalent to receipt showing payment. Certificate is subject to record and admissible in evidence like receipt. Fee of $5 for each certificate issued. (Fla. Stat. 198.13[2]). Department of Revenue must allow extension of time for filing return if personal representative files copy of approved Federal extension request with Department within 30 days after receiving approved Federal extension. (Fla. Stat. 198.15). On failure to make return, or on making of false return, Department must make up return from its own knowledge and information, which will be prima facie good and sufficient for all legal purposes. (Fla. Stat. 198.15).

Payment or Collection.

Tax due and payable by personal representative on or before last date prescribed by law for paying federal estate tax pursuant to initial federal estate tax return. Tax receipt must be given on any payment of tax. (Fla. Stat. 198.19). Department of Revenue must extend time for payment of tax or any part of tax if time for paying Federal estate tax is extended, provided personal representative files with Department copy of approved Federal extension notice within 30 days after receiving such notice. (Fla. Stat. 198.15). No extension for more than one year and aggregate of extensions not to exceed ten years. (Fla. Stat. 198.15). If time for payment of tax is extended, interest accrues thereon at rate of 1% per month of amount due. (Fla. Stat. 198.15).

Deficiency in tax or any tax payment not received by Department as provided in Fla. Stat. 198.15, will, in addition to other penalties, bear interest at rate of 1% per month of amount due. (Fla. Stat. 198.16). Executor must file written notice with Department within 60 days after final determination of deficiency in federal estate tax. (Fla. Stat. 198.16). If deficiency is due to negligence or intentional disregard of law, with knowledge but without intent to defraud, penalty of 10% per annum, and if willfully made with intent to defraud, penalty is 100% of total deficiency.

Assessment.

Taxes must be determined and assessed within four years after return was filed or within 90 days after assessment of deficiency in federal estate tax may be made. (Fla. Stat. 198.28). In case of fraud or failure to file return, tax may be assessed at any time. (Fla. Stat. 198.28).

Refund by Department if tax paid in excess of amount due but no refund after four years from payment of tax, unless notice of final determination of federal tax is filed with Department within 60 days from such determination. (Fla. Stat. 198.29).

Notice to and Discharge of Executor or Administrator.

Department must notify executor or administrator filing completed return and making application for determination of tax and discharge from personal liability of amount of tax due within one year, and on payment thereof executor or administrator is discharged from any personal liability for any additional tax thereafter found due; entitled to receive written discharge from Department. (Fla. Stat. 198.19). Discharge does not release gross estate from lien of any additional tax while it remains in hands of executor or administrator, heirs, devisees, or distributees; but it does release estate after it has passed to bona fide purchaser for value. (Fla. Stat. 198.19). Final account of executor or administrator of estate will not be allowed unless such account shows all as paid. (Fla. Stat. 198.26).

Waiver of Lien.

Department may release all property from lien if tax liability, if any, has been fully discharged. (Fla. Stat. 198.22). Property of estate is discharged of liability for estate or inheritance taxes under this Act after ten years from date of filing estate tax return with Department, unless Department records notice of lien in office of clerk of circuit court in county where part of estate situated. (Fla. Stat. 198.33). No lien for estate and inheritance taxes under this chapter continues for more than 20 years from death of decedent. (Fla. Stat. 198.33).

Penalties.

Knowingly making false statement, in any notice, affidavit, or return required to be filed, first degree misdemeanor. (Fla. Stat. 198.39).

Failing to exhibit records, papers, etc. on request of Department or appointee, civil penalty not exceeding $500. (Fla. Stat. 198.36).

Willfully failing to make return, keep any records or supply any information, as required by law, for purposes of computation, assessment or collection of tax, will constitute first degree misdemeanor. (Fla. Stat. 198.37).

Failing to collect and truthfully account for and pay over tax, willfully attempting to evade or defeat tax or willfully aiding, assisting in, procuring, or advising preparation or presentation of false return, constitutes third degree felony. (Fla. Stat. 198.40).

Forms and instructions for representatives of nonresident decedents may be obtained from Distribution Center, Florida Department of Revenue, 168A Blountstown Hwy., Tallahassee, FL, 32304-2702, or at http://www.myflorida.com/dor/forms.

22.07A GAMBLING AND ENTERTAINMENT TAXES:

Race Tracks and Jai Alai Frontons Taxes.

Administration and Collection.

Division of Pari-mutuel Wagering of Department of Business and Professional Regulation is to collect taxes and require compliance with reporting requirements. (Fla. Stat. 550.0251).

Electronic Funds Transfers.

Permit holders may be required to remit taxes and fees by electronic funds transfers if taxes and fees amounted to $50,000 or more in prior reporting year. (Fla. Stat. 550.0251[8]).

Penalties.

Administrative fine of not more than $1,000 for each count, may be imposed for violation of c. 550. (Fla. Stat. 550.0251[10]). Civil penalty of up to $1,000 for each day payment not remitted. Failure to pay taxes or penalties may result in suspension or revocation of license or permit. (Fla. Stat. 550.0951[6]).

Payment of various taxes by permit holders to division is to be made weekly. Monthly reports are also required. Details set out in statute. (Fla. Stat. 550.0951[5]).

Daily License Fee.

Each permit holder, licensee or permittee conducting race meetings or jai alai games is to pay daily license fee on each live or simulcast pari-mutuel event of $100 for each horserace and $80 for each dog race and $40 for each jai alai game. (Fla. Stat. 550.0951[1][a]). See statutes for limits on amount of tax payable. (Fla. Stat. 550.0951[1]).

Admission tax equal to 15% of entrance admission charge or 10¢, whichever is greater, on each person attending event. No tax imposed on free passes. (Fla. Stat. 550.0951[2]).

Tax on handle (aggregate of contributions to pari-mutuel pools) is as follows: for quarter horse racing, 1.0% of handle; for dog racing, 5.5% of handle (but for live charity performances and intertrack wagering on such charity performances at guest greyhound track within market area of host, tax is 7.6% of handle); for jai alai, 7.1% of handle; for intertrack wagering, from 2.0% to 7.1% depending on type of host facility and whether rebroadcast. Tax on handle for intertrack wagering is 0.5% if host track and guest tract are thoroughbred permit holders or if guest track located outside market area of host track and within market area of thoroughbred permit holder currently conducting live race meet. (Fla. Stat. 550.0951[3]).

Breaks Tax.

Each permit holder conducting jai alai performances pays tax equal to breaks (portion of each pari-mutuel pool not distributed to contributors). (Fla. Stat. 550.0951[4]).

Limitations, Exemptions, Qualifications on Taxes.

Jai alai taxes are further qualified and limited by Fla. Stat. 550.09511.

Harness horse taxes are further qualified and limited by Fla. Stat. 550.09512. Any permit of harness horse permit holder who does not pay tax on handle for live performances for full schedule of live races during any two consecutive years is void and escheats to state to be reissued as initial permit to qualified applicant. (Fla. Stat. 550.09512[3]).

Greyhound dog racing taxes are further qualified and limited by Fla. Stat. 550.09514. Also see Fla. Stat. 550.1625 as to dog racing.

Thoroughbred horse taxes are further qualified and limited by Fla. Stat. 550.09515. Any permit of thoroughbred horse permit holder who does not pay tax on handle for live performances for full schedule of live races during any two consecutive years (excluding 2001-2002 fiscal year) is void and escheats to state to be reissued as initial permit to qualified applicant. (Fla. Stat. 550.09515[3]).

Non-wagering permits, issued only for horseracing meets, are exempt from daily license fees and admission tax. (Fla. Stat. 550.505).

Occupational Licenses of Racetrack Employees.

Each person connected with racetrack or jai alai fronton must purchase annual occupational license. Annual fee varies from $10 to $50 depending whether license is business, restricted, or unrestricted and whether restricted or unrestricted licenses are for professionals and managers or general employees. Certified public accountants and attorneys licensed to practice in this state are not required to have occupational license. See statute for details. (Fla. Stat. 550.105).

22.08 GASOLINE AND SPECIAL FUELS TAXES:

Motor Fuel (and diesel fuel) tax per gallon includes following: 2¢ (4¢ for diesel) “constitutional fuel tax”, 1¢ (gas) “county fuel tax”, 1¢ (gas) “municipal fuel tax”, 1¢ (gas & diesel) “ninth-cent fuel tax”, between 1¢ and 11¢ (gas) (6¢ diesel) “local option fuel tax” levied per Fla. Stat. 336.025, “State Comprehensive Enhanced Transportation System Tax” (gas & diesel) levied per Fla. Stat. 206.608, and “fuel sales tax” (gas & diesel) as determined annually by Department at not lower than 6.9¢. (Fla. Stat. 206.41[1], 206.87[1]).

Exemptions.

Exemptions from motor fuel taxes include fuel contained in fuel tanks to propel motor vehicle into Florida from another state and fuel supplied by vehicle manufacturer, contained in tanks of new and untitled motor vehicle (Fla. Stat. 206.41[3]), rocket fuel and certain aviation gasoline (Fla. Stat. 206.42), and that sold to U.S. (Fla. Stat. 206.62).

Exemptions from diesel fuel taxes are extensive and complex. See statutes, c. 206, pt. 2. (Fla. Stat. 206.85-206.97).

Refunds.

Upon timely application, refunds for part of tax on motor and diesel fuel used by mass public transportation system operating within city, town, municipality, county, or transit authority region, as distinguished from over-the-road or charter transportation; for agricultural, aquacultural, or commercial fishing purposes; for municipality or county vehicles, for public or private school buses. Rights to refunds not assignable. (Fla. Stat. 206.41[5][d]; Fla. Stat. 206.8745). Ethanol dealers entitled to refund of tax on purchases of motor fuel used for denaturing. (Fla. Stat. 206.626).

Detailed records open to inspection by Department, of each fuel purchase, must be kept by terminal supplier, importer, blender, exporter, or wholesaler. (Fla. Stat. 206.41[5][e], 206.91).

Liability for Tax Payment.

Persons liable for tax payment detailed in statute. (Fla. Stat. 206.413 & .414, 206.872).

Penalties for Willful Evasion of Payment of Motor Fuel Taxes.

$10 for every gallon of motor fuel involved or $1,000, whichever is greater, for first offense. Penalty increases with subsequent violations by multiplying penalty amount by number of prior violations. (Fla. Stat. 206.413[3]).

Penalties Regarding Diesel Fuel Taxes.

See statutes, c. 206, pt. 2. (Fla. Stat. 206.85-206.97).

Aviation fuel tax of 6.9¢ per gallon on aviation fuel (including kerosene not otherwise taxed or exempted) sold in this state, or brought into this state upon which tax has not been paid or lawfully assumed. Fuel taxed pursuant to this part is not subject to motor or diesel fuel taxes. (Fla. Stat. 206.9825). Additional rules for kerosene set out in statute. (Fla. Stat. 206.9825[2], [5]).

Liquefied Petroleum Gas or Compressed Natural Gas Decal Fees in Lieu of Tax.

Tax imposed by Fla. Stat. 206.87 not applicable to certain motor vehicles powered by alternative fuels for which decals are required and have been acquired. Decals transferable with change of ownership of vehicle and notice to Department. Sales of alternative fuel regulated. (Fla. Stat. 206.877).

Diesel and Motor Fuel Commercial Use Tax.

Privilege tax upon every motor carrier for operating commercial motor vehicle upon state highways of this state at rate which includes minimum rates provided in pts. I, II, and IV of c. 206 on each gallon of diesel fuel or motor fuel used for propulsion within state. (Fla. Stat. 207.003). Amount of fuel used within this state calculated using statutory formula. (Fla. Stat. 207.005[2]).

22.08A GENERATION SKIPPING TAX:

See topic 22.07 Estate Tax, subhead Generation-Skipping Transfer Tax.

22.09 GIFT TAX:

Florida has no gift tax.

22.10 [RESERVED]

22.11 INCOME TAX:

Income Taxed—Individuals.

Florida has no personal income tax.

Income Taxed—Corporations.

Florida's income tax is applicable to corporations only. See category 2 Business Organizations, topic 2.03 Corporations, subhead Corporate Income Tax.

22.12 INHERITANCE TAX:

See topic 22.07 Estate Tax.

22.12A MINES, MINERALS AND FISHERIES TAXES:

Coal Severance Tax.

See subhead Mineral Severance Tax.

Mineral Severance Tax.

Levy.

Tax is levied upon every person in business of severing solid minerals as defined in Fla. Stat. 211.30(1).

Tax rates are as follows:

Phosphate rock is taxed at base rate of $1.62 per ton severed. Base rate is adjusted annually and communicated to affected producers. (Fla. Stat. 211.3103[5], [6]).

Heavy minerals are taxed at base rate of $1.34 per ton severed for commercial use. Base rate is adjusted annually and communicated to affected producers. (Fla. Stat. 211.3106[2], [3]).

Other solid minerals are taxed at rate of 8% of value of identified solid minerals severed. (Fla. Stat. 211.31).

Exemptions.

Solid minerals sold to governmental agencies in this state or those extracted by owner of site of severance to improve site. (Fla. Stat. 211.3108[1], [3]).

Solid minerals except phosphate rock severed solely for direct application in agricultural uses. (Fla. Stat. 211.3108[4]).

Solid minerals except phosphate rock and heavy minerals upon which sales tax is ultimately paid to state. (Fla. Stat. 211.3108[2]).

Administration and Inspection of Records.

See statute for details. (Fla. Stat. 211.33).

Delinquency Penalties and Interest and Tax Crimes.

See statutes for details. (Fla. Stat. 211.33; Fla. Stat. 211.335).

Oil and Gas Production Tax.

Levy.

Tax is levied on every person who severs oil, gas, or sulfur in state for sale, transport, storage (not mentioned in gas section), profit, or commercial use. (Fla. Stat. 211.02; Fla. Stat. 211.025; Fla. Stat. 211.026).

Tax rates are as follows:

Oil is taxed on value of oil produced and saved or sold during month. Small well oil and tertiary oil is taxed at 5% of gross value; all other oil, 8% of gross value. (Fla. Stat. 211.02).

Gas is taxed on volume, in mcf (thousand cubic feet), on gas produced and sold or used by producer during month. Gas is taxed at base rate of $0.171 per mcf times base rate adjustment. Base rate adjustment is calculated annually and communicated to affected producers. (Fla. Stat. 211.025).

Sulfur is taxed on long tons of sulfur produced or recovered by producer during month from hydrogen sulfide gas contained in oil or gas production from well, measured in its molten, elemental state. Sulfur is taxed at base rate of $2.71 per long ton times base rate adjustment for fiscal year, calculated under Fla. Stat. 211.026(3). Base rate is adjusted annually and communicated to affected producers. (Fla. Stat. 211.026[1]).

Exemptions.

Oil or gas on shore production used for lease operations on lease or unit where produced. (Fla. Stat. 211.027[1]).

Oil or gas produced for period of 60 months from new field wells or for period of 48 months for new wells in existing fields, shut-in wells returned to service after 24 months, abandoned well or wellbore redrilled and recompleted, oil or gas produced from any horizontal well or having depth in excess of 15,000 feet. These exemptions will not be granted after June 30, 2002. (Fla. Stat. 211.027[4]–[7]).

Gas returned to horizon in field where produced. Unsold gas vented or flared directly into atmosphere. (Fla. Stat. 211.027[2], [3]).

Administration and Books and Records.

See statutes for details. (Fla. Stat. 211.075; Fla. Stat. 211.09; Fla. Stat. 211.125).

Delinquency Penalties and Interest and Tax Crimes.

See statutes for details. (Fla. Stat. 211.076; Fla. Stat. 211.25).

22.12B MOTOR CARRIER FUELS TAX:

See topic 22.08 Gasoline and Special Fuels Taxes.

22.13 [RESERVED]

22.14 MOTOR VEHICLE TAXES:

Motor Vehicle Usage Tax.

See topic 22.17 Sales and 22.19 Use Taxes.

22.15 [RESERVED]

22.16 PROPERTY TAXES:

Taxable Property.

Unless expressly exempted, all real and personal property in state, all personal property belonging to persons residing in state, and all leaseholds in governmental property are subject to taxation. (Fla. Stat. 196.001).

Exemptions.

Taxpayers claiming exemptions must still file tax return. (Fla. Stat. 196.193).

Application for Exemption.

With limited exceptions, claim for exemption must be filed with county property appraiser on or before Mar. 1 (Fla. Stat. 196.011[1]), provided any person who is unable to file claim for exemption by reason of service in Armed Forces of U.S. may file claim through next of kin or other person authorized in writing (Fla. Stat. 196.071). In lieu of annual application for exemption tax assessor may accept certified statement under oath that there has been no change in ownership or use of property since it was last determined to be fully exempt from tax for religious, literary, etc., purposes. (Fla. Stat. 196.011[4]).

Following are exempt from taxation:

Exempt Entities.

All property owned by exempt entity used exclusively for educational, literary, scientific, religious, charitable or government use, as defined in c. 196, is totally exempt. Property used predominately for such purposes is proportionately exempted. (Fla. Stat. 196.192). Certain irrevocable inter vivos trust holding title to land used exclusively for educational purposes may also be exempt. (Fla. Stat. 196.198).

Affordable Housing.

Property used to provide housing pursuant to state housing program for persons meeting income limits, if owned entirely by nonprofit entity qualified as charitable under §501(c)(3) of Internal Revenue Code, is considered owned by exempt entity and used for charitable purpose. (Fla. Stat. 196.1978).

Care Facilities.

With certain restrictions, property used by hospitals, nursing homes, homes for special services (Fla. Stat. 196.197), homes for aged (Fla. Stat. 196.1975) and child care facilities in enterprise zones (Fla. Stat. 196.095).

Disabled Persons.

Property of certain permanently and totally disabled veterans (Fla. Stat. 196.081), quadriplegics and other disabled persons who are required to use wheelchair or who are legally blind (Fla. Stat. 196.101).

Property to value of $500 of every widow, widower, blind person or totally and permanently disabled person who is bona fide resident of Florida. (Fla. Stat. 196.202).

Household goods and personal effects of persons residing and making permanent home in this state. Such property may be held individually, by entireties, jointly or in common with others. (Fla. Stat. 196.181).

Renewal Energy Source and Historic Property.

With limits, for improved real property upon which renewable energy source device installed and operated (Fla. Stat. 196.175) and for certain improvements made to historic properties (Fla. Stat. 196.1997).

Inventory is exempt from ad valorem taxation. (Fla. Stat. 196.185).

Goods in Transit.

Personal property manufactured or produced outside of Florida and brought into state for transshipment in interstate or foreign commerce is exempt. (Fla. Stat. 192.032[4][a]).

Leaseholds in Governmental Property.

With limits, for certain leasehold interests in governmental property taxable under intangible personal property tax. (Fla. Stat. 196.199).

Homestead property up to assessed tax valuation of $25,000 (except special assessments for benefits) of person who, on Jan. 1, has legal or beneficial title and makes it permanent residence or residence of others legally or naturally dependent upon such person; title to homestead may be held by entireties, jointly or in common with others and exemption may be apportioned among owners resident thereon as their interests appear; but no exemption in excess of $25,000 is allowed any one person or any one dwelling except that exemption up to $25,000 may be allowed on each owner-occupied apartment, mobile home, or condominium residential property. Exemptions allowed may not exceed proportionate assessed valuation of interest owned. Person who is receiving or claiming benefit of ad valorem exemption or tax credit in another state where permanent residency is required as basis for granting of that exemption or credit is not entitled to homestead exemption under Fla. Stat. 196.031 (but this does not apply to person who has legal or equitable title to real estate in Florida and maintains thereon permanent residence of another legally or naturally dependent on owner). (Fla. Stat. 196.031[5]).

In accordance with Const., art. VII, §6(f), board of county commissioners or governing authority of municipality may provide for additional exemption of up to $50,000 for resident owners who have attained age 65, and whose household income does not exceed $20,000, which as of 1/1/2001 adjusted annually based on cost-of-living index. (Fla. Stat. 196.075). If property appraiser determines that person within previous ten years was granted additional exemption without entitlement, notice of tax lien against any property owned by that person in county served on owner and any property owned by taxpayer in state is subject to taxes exempted plus penalty of 50% of unpaid taxes and interest at 15% per annum. No penalty and interest assessed if exemption improperly granted as result of clerical mistake or omission by property appraiser. (Fla. Stat. 196.075[9]). In accordance with Const., art. VII, 4(e), county may provide for reduction in assessed value of homestead property which results from construction or reconstruction of property for purpose of providing living quarters for one or more natural or adoptive parents or grandparents of owner or owner's spouse if at least one of parents or grandparents for whom living quarters are provided is at least 62 years of age. (Fla. Stat. 193.703).

Economic Development.

With respect to new business, defined by Fla. Stat. 196.012(15)(c), municipality assessing property on which business is situated may grant economic ad valorem tax exemption to expire upon expiration of exemption granted by county. (Fla. Stat. 196.1995).

Abandonment.

Except for member of Armed Forces of U.S., rental of entire dwelling previously claimed to be homestead is abandonment of homestead, but abandonment after Jan. 1 does not affect such exemption for that particular year. (Fla. Stat. 196.061).

Assessment.

Ad valorem taxes on real and tangible personal property are assessed by all counties. (Fla. Stat. 192.032). Each county has tax appraiser and tax collector that have responsibility for assessment of property and collection of taxes. (Fla. Stat. 192.001).

Assessment based on “just valuation”. Assessment on Jan. 1 of each year. Factors to be considered: (1) Present cash value; (2) highest and best use in immediate future and present use; (3) location; (4) quantity and size; (5) cost and present replacement value of any improvement thereon; (6) condition; (7) income from property; and (8) net proceeds of sale, after deduction of all usual and reasonable fees and costs of sale and expenses of financing. (Fla. Stat. 193.011). All assessments should be completed by July 1. (Fla. Stat. 193.023). Separate assessment roll prepared for real and tangible personal property. (Fla. Stat. 193.114). Separate rules for assessment of agricultural crops, nonbearing fruit trees and nursery stock (Fla. Stat. 193.451), agricultural lands (Fla. Stat. 193.461), oil, mineral and other subsurface rights (Fla. Stat. 193.481), outdoor recreational or park lands and environmentally-endangered land (Fla. Stat. 193.501), and pollution control devices (Fla. Stat. 193.621). Agricultural property consisting of residence and curtilage must be assessed separately. (Fla. Stat. 193.461[3][d]). All land against which state holds any tax sale certificate or other lien for delinquent taxes assessed for 1940 or prior years must be assessed as if no taxes were delinquent against such lands. (Fla. Stat. 193.102).

Review of Assessment.

Value adjustment board for each county hears petitions filed pursuant to Fla. Stat. 194.011(3), complaints relating to homestead exemptions (Fla. Stat. 196.151) or regarding exemption applications (Fla. Stat. 196.011), and appeals concerning ad valorem tax deferrals (Fla. Stat. 194.032). Petitioners may be represented by attorney and present testimony and other evidence. Hearings are to conform with c. 120. Circuit Court has jurisdiction over property taxation matters (Fla. Stat. 194.171) including de novo appellate review of findings of property appraisal adjustment board (Fla. Stat. 194.036[3]). Venue is Leon County regarding challenges to certain railroad property assessments. (Fla. Stat. 193.085[4][e]). To obtain jurisdiction of court, taxpayer must pay amount admitted for contested year and each year thereafter. Verbatim record of proceedings is made and documentary evidence is preserved and made available to Department of Revenue. (Fla. Stat. 194.034[1][c]). Procedures for property owner's challenge to assessment value are found at Fla. Stat. 194.011(3).

Refund.

Generally, department determines and orders refund of taxes assessed on county tax roll. If payment made in error by taxpayer because of error in tax notice, refund made directly by tax collector without approval by department (or amount applied to taxes for which taxpayer actually liable, at taxpayer's request). (Fla. Stat. 197.182).

Levy.

Counties, school districts, and municipalities can each levy ad valorem taxes on assessed value of real and tangible personal property of up to 10 mills; most special districts' millage is established by law upon vote of electors owning nonexempt freeholds. (Const., arts. 7, 9).

Collection.

Tax collector required to mail tax statement to each taxpayer appearing on assessment rolls whose post office address is known. (Fla. Stat. 197.322).

Payment.

All taxes except intangible personal property taxes are due on Nov. 1, or as soon as assessment roll available to tax collector. (Fla. Stat. 197.333).

Discounts for Early Payment.

4% in Nov. or within 30 days after mailing of original tax notice; 3% in Dec.; 2% in following Jan.; 1% in following Feb. (Fla. Stat. 197.162). Taxes delinquent Apr. 1 of year following year assessed or 60 days from date of mailing of original tax notice, whichever is later. (Fla. Stat. 197.333).

Property Tax Payment Deferral.

Persons qualifying for homestead exemption can defer portion of combined total of ad valorem taxes and certain non-ad valorem assessments tax which exceeds 5% of applicant's household income. (Fla. Stat. 197.252). Must file annual application for deferral on or before Jan. 31 following year taxes assessed. (Fla. Stat. 197.252[1]).

Liens.

Lien, superior to all others, exists on all real and personal property assessed for taxation. (Fla. Stat. 197.122).

Delinquent Taxes.

No tax certificate or warrant is issued for property if petition contesting valuation of such property has not received final action by property appraisal adjustment board. Tax roll may be extended and tax collector may correct errors without approval by department. (Fla. Stat. 197.323).

Tangible personal property upon which taxes are delinquent may be levied upon, seized, and sold by tax collector. Procedures and timelines for issuance of warrants for, levy upon, and seizure and sale of property are described in Fla. Stat. 197.413–197.417.

Delinquent Real Property Taxes.

Tax collector may sell tax certificates on lands on which taxes have not been paid. Procedure for sale of tax certificates is described in Fla. Stat. 197.432.

Redemption.

Tax certificates may be redeemed, or county held certificates purchased, at any time after issuance and before tax deed is issued or property is put on sale list. (Fla. Stat. 197.472[1]). Procedure for redemption or purchase is described at Fla. Stat. 197.472. Procedures for issuance of tax deed described at Fla. Stat. 197.502—197.562.

Intangible Personal Property Tax.

Taxable Property.

Intangible personal property tax repealed. (06-312).

Nonrecurring Tax Levy.

One-time assessment of 2 mills imposed upon just valuation of notes, bonds, and other obligations for payment to extent secured by mortgage, deed of trust, or other lien upon real property situated in Florida. Apportionment if taxable obligations also secured by out-of-state real property or personal property. (Fla. Stat. 199.133).

Future Advances.

If mortgage, deed of trust, or other lien secures future advances, nonrecurring tax must be paid on initial obligations. As additional future advance made, additional nonrecurring tax must be paid. Taxation of certain increases in indebtedness caused by interest occurring under adjustable interest rate limited. (Fla. Stat. 199.143[1]). If mortgage, deed of trust, or other lien secures line of credit, nonrecurring tax must be paid on full amount of line, except as limited by Fla. Stat. 199.133, with no further tax due upon borrowing under line. (Fla. Stat. 199.143[3]).

Assignment, replacement, assumption, or refinancing of obligation or mortgage, deed of trust, or other lien usually does not give rise to additional nonrecurring tax if obligation remains same (or less) and mortgage, deed of trust, or other lien, covers identical real property. (Fla. Stat. 199.145).

Exemptions from Annual or Nonrecurring Tax.

Following intangible property, with certain limitations is exempt from taxation. See statutes for details.

Governmental property owned by Florida, any political subdivision or municipality. (Fla. Stat. 199.183[1]).

Nonprofit Institutions.

Property owned by narrowly defined religious, educational, or charitable institutions. (Fla. Stat. 199.183[2]).

Payment of Nonrecurring Tax.

Due and payable when instrument presented for recordation. If not written or not presented for recording within 30 days of creation of obligation, then due and payable at end of that 30 days. Taxpayer solely liable for tax but may pass it on to borrower or mortgagor. Procedures spelled out in statute. (Fla. Stat. 199.135).

Refunds.

Claim for refund may be filed within three years from date right to refund has accrued. (Fla. Stat. 199.2325). Claims to be filed by taxpayer or taxpayer's heirs, personal representatives, successors, or assigns, and include such information as Department may require. (Fla. Stat. 199.2325).

Interest.

If nonrecurring tax is not paid, without regard to any extensions, interest on unpaid amount of 12% per year from due date of payment required. (Fla. Stat. 199.282[2]).

Penalties.

Delinquency penalty of 10% of delinquent tax per month from due date until paid, up to limit of 50% of total tax if any nonrecurring tax is not paid. (Fla. Stat. 199.282[3]).

Not to be Enforced or Permitted to be Recorded.

Mortgages, deeds of trust, or other liens on Florida real property are not enforceable or eligible for recording until nonrecurring tax has been paid and clerk has noted its payments. (Fla. Stat. 199.282[4]).

Penalties for willful violation or failure to comply with taxing provisions constitute felony of third degree punishable as provided in Fla. Stat. 775.082, 775.083, or Fla. Stat. 775.084. (Fla. Stat. 199.282[1]). Any officer or director of corporation who willfully directs employee to fail to file or to pay tax or to evade, defeat or improperly account for tax, is liable for penalty equal to amount of tax not paid. (Fla. Stat. 199.282[7]). Failure or refusal to make records available for inspection constitutes misdemeanor of first degree. (Fla. Stat. 199.282[6]).

Real Estate Conveyance Tax.

See topic 22.18 Stamp and Seal Taxes, subhead Stamp Tax.

22.17 SALES AND USE TAXES:

Sales Tax.

6% on sales at retail and leases of tangible property (Fla. Stat. 212.05); leases for storage, parking or docking spaces for motor vehicles and boats and transient rentals of residence as described in Fla. Stat. 212.02 (Fla. Stat. 212.03); lease or rental of or license in real property subject to numerous statutory exceptions and regulations (Fla. Stat. 212.031) and amusement admissions with certain exemptions and limitations (Fla. Stat. 212.04). Executive director of Department of Revenue authorized to enter into Streamlined Sales and Use Tax Agreement provided agreement contains certain requirements. (Fla. Stat. 213.256).

Self-propelled or power drawn farm equipment used exclusively by farmer, tax on sales and leases repealed, effective July 1, 2005. (05–197).

Vending Machines.

Sales from machines and sales to vending machine owners merit special provisions. (Fla. Stat. 212.0515).

Convention Development Tax for revenue to promote tourism and use of hotel facilities by facilitating improvement and construction of convention centers. Each such tax is individually enacted, specifying types of local governments authorized to levy, rate or rates, maximum length of time of imposition, required procedure to secure voter approval, limitations of expenditures of collections, and other legislative requirements. (Fla. Stat. 212.0305).

Tourist Development Tax may be imposed by any county on certain rentals or leases of accommodations. Tax revenues may be used for specified purposes such as acquisition or maintenance of certain convention centers, sports stadiums, or museums; promotion of tourism; financing beach park facilities or restoration. Additional purposes permitted for counties with populations less than 750,000. (Fla. Stat. 125.0104). Must be adopted by referendum.

Communications Services Tax levied at rate of 6.8% on sales price of communications services which originate and terminate in this state or originate and terminate in this state and charged to service address in this state when sold at retail. Tax levied at rate of 10.8% on retail sales price of direct-to-home satellite service received in this state. Tax levied at rate of 6.8% on sales price of private communications services provided in this state and on sales price of all mobile communications services deemed provided to customer by home service provider if customer's service address is within this state. This tax is in addition to gross receipts tax imposed by c. 203. (Fla. Stat. 202.12). Person who purchases communications services otherwise taxable under Fla. Stat. 202.12 and 202.19 at retail from seller in another state, territory, or foreign country must report and remit to department taxes imposed by c. 212, as if such services purchased from dealer in state. (Fla. Stat. 202.151).

Collections.

Sales tax revenues collected from all retail dealers. (Fla. Stat. 212.06[1]). No title, registration, or license will be issued for motor vehicle until sales tax paid when old title certificate is presented for new one. (Fla. Stat. 212.06[10]).

Out-of-state dealer, e.g., catalogs, with requisite minimum contacts with state must collect tax when property is sold to purchaser in state. (Fla. Stat. 212.0596).

Prepaid Telephone Calling Cards.

Tax on charges for prepaid calling arrangements are collected at time of sale by dealer. See statute for details. (Fla. Stat. 212.05[1][e]).

Electronic Returns and Payments.

Department may require taxpayer to file returns and remit payments by electronic means when tax paid in prior fiscal year is $20,000 or more. Beginning Jan. 1, 2003, consolidated filers must file returns and remit taxes by electronic means. (Fla. Stat. 213.755).

Exemptions.

Following are examples only. For full range of exemptions, see Fla. Stat. 212.08.

Foods (including water) for human consumption (excluding candy) except when sold for immediate consumption on or off premises.

Feed for poultry, ostriches, racehorses, dairy cows, and other livestock.

Fuel used in home heating, used by railroads and ships when engaged in interstate commerce, used in generation of electric power or energy, or used for certain agricultural, aquacultural, or commercial fishing.

Purchases of machinery and equipment used to increase productive output (including machinery and equipment purchased to comply with federal procurement regulations) used in production of electrical or steam energy, used for processing recyclable materials, used in silicon technology production.

Medical, Etc.

Medicine, prosthetic and orthopedic appliances, guide dogs for blind.

School books and lunches and most other purchases by educational institutions, public and private.

Religious Materials.

Bibles, hymn books, prayer books, other religious publications, and sales to or by religious institutions.

Isolated or occasional transactions by one not engaged in business. This exemption does not apply to motor vehicles or certain boats or aircraft or mobile homes. (Fla. Stat. 212.022).

Skyboxes.

Rental, lease, sublease or license of real property for use as skybox, luxury box, or other box seats for use during high school or college football game exempt when charge is imposed by nonprofit sponsoring organization qualified as nonprofit pursuant to §501(c)(3) of Internal Revenue Code. (Fla. Stat. 212.031[9]).

Child Care Facilities.

Educational materials purchased by qualified child care facilities exempt.

Community Contribution.

May receive credit for contributions of cash or other liquid assets, real property, goods or inventory, or other physical resources to eligible sponsors, which include community action program, local housing authority, historic preservation district agency or organization, or units of local or state government. (Fla. Stat. 212.08[5][p]).

Farm Equipment.

Power farm equipment used exclusively on farm or in forest in agricultural production of crops or products.

Use Tax.

6% on tangible personal property used, consumed, distributed, or stored for use or consumption, but not sold in state. (Fla. Stat. 212.05[1][b]).

Exemptions include electric power or other energy self-generated for direct use in manufacturing or processing tangible personal property for sale (Fla. Stat. 212.06[1][b]) and certain vessels used by vessel manufacturers and dealers solely for demonstration, sales promotion, or testing (Fla. Stat. 212.06[1][d]).

Discretionary County Sales and Use Surtax.

(Fla. Stat. 212.054, 212.055). When legislatively authorized, county governing bodies may levy surtax on transactions subject to sales, use, services, rentals, admissions, etc. imposed by c. 212, pt. I and communications services as defined for purposes of c. 202. Tangible property sales amounts above $5,000 not subject to surtax but prepaid calling arrangements subject to surtax. All legislative authorizations of surtax must be published in Fla. Stat. 212.055. Most surtaxes must be approved by local referendum.

Local Option Food and Beverage Tax.

Any county may impose following additional taxes: 2% on food, beverage, or alcoholic beverage sales in hotels and motels; 1% on food, beverage, or alcoholic beverage sales by licensees for sale of alcoholic beverages for consumption on premises. See statute for exemptions and other details. (Fla. Stat. 212.0306).

Utility and Communications Services Gross Receipts Tax.

Tax is imposed on gross receipts from utility services delivered to retail consumers. Rate is 2.5% for utility services, 2.37% for communications services. (Fla. Stat. 203.01[1][b]).

Exclusions.

Gross receipts do not include payments for natural gas or manufactured gas sold to public or private utilities for resale or use in generation of electricity, for sale of electricity to utility for resale within Florida or pursuant to electrical interchange agreement. (Fla. Stat. 203.01[3]).

Tax May Be Billed as Line Item to Customer.

Customer fully liable for tax whether separately stated as line item or component of total bill. (Fla. Stat. 203.01[5]).

Penalties.

Provider failing to remit tax imposed in this part, liable for tax and guilty of misdemeanor of first degree. (Fla. Stat. 203.01[6]). Person who willfully violates provisions of c. 203, guilty of misdemeanor of first degree. In addition, penalty of 10% of unpaid tax for failure to timely report and pay tax if failure less than 31 days, plus additional 10% of unpaid tax for each additional 30 days; penalty may not be less than $10 or exceed total of 50% of any unpaid tax. If failure due to fraud, penalty is 100% of tax due and second degree misdemeanor. (Fla. Stat. 203.01[2][b]). Interest on delinquent payments is 1% per month accruing from date due until paid. (Fla. Stat. 203.06).

Municipality Public Service Tax.

Municipality may levy tax on certain purchases of electricity, natural gas, liquified petroleum gas, and water service. Tax levied only on purchases within municipality not exceeding 10% of payments received by seller of taxable item. (Fla. Stat. 166.231). Tax levy must be adopted by ordinance, and effective date of every levy or repeal thereof must be subsequent to Jan. 1, Apr. 1, July 1, or Oct. 1. (Fla. Stat. 166.233).

Franchise or License Taxes.

See categories 2 Business Organizations, topic Corporations; Business Regulation and Commerce, topics Banks and Banking, Licenses, Business and Professional.

Tax on Deeds and Mortgages.

See topic 22.18 Stamp and Seal Taxes, subhead Stamp Tax.

Excise Tax on Gas and Oil.

See topic 22.08 Gasoline and Special Fuels Taxes, subheads Motor Fuel (and Diesel Fuel) Tax and Aviation Fuel Tax.

Hospital and Health Care Entity Tax.

Annual assessment (based on operating revenues for most recently completed fiscal year) against certain hospitals and health care entities equal to 1.0% of annual net operating revenues for outpatient services and 1.5% for inpatient services to be paid to Agency for Health Care Administration. (Fla. Stat. 395.701[2]). Net operating revenue is gross revenue less deductions resulting from bad debts; contractual adjustments; administrative, courtesy, and policy discounts and adjustments; and offsets for restricted donations and grants for indigent care. Hospital defined in Fla. Stat. 395.002(11). Health care entities include ambulatory surgical centers licensed under Fla. Stat. 395.003, certain clinical laboratories including those licensed under Fla. Stat. 483.091, certain freestanding radiation therapy centers, and certain diagnostic imaging centers that are freestanding outpatient facilities. Within six months after end of entity's fiscal year, Agency must certify amount of assessment to entity. Assessment is payable to and collected by Agency in equal quarterly amounts on or before first day of each calendar quarter. (Fla. Stat. 395.701, 395.7015).

22.17A SPECIAL FUELS TAX:

See topic 22.08 Gasoline and Special Fuels Taxes.

22.18 STAMP AND SEAL TAXES:

Stamp Tax.

Documents.

Tax on documents levied, collected and paid as follows (Fla. Stat. 201.01–.24):

Deeds, instruments, or other writings whereby any real property or any interest therein is transferred (even if interest designated as personal property), 70¢ on each $100 of consideration therefor. Tax applies to document granting tenant-stockholder of condominium right to occupy apartment, to certain conveyances of real property to partner from partnership, and to documents conveying beneficial interest in lands pursuant to Fla. Stat. 689.071. (Fla. Stat. 201.02). Taxes imposed by Fla. Stat. 201.02 do not apply to contract to sell residence of employee relocating at employer's direction or to documents related to contract between employee and employer or employee and person in business of providing employee relocation services. (Fla. Stat. 201.02[8]). Certificate of title issued by clerk of court under Fla. Stat. 45.031(4) in judicial sale of real property under order or final judgment issued pursuant to foreclosure proceeding is subject to tax, but amount of tax computed solely on amount of highest and best bid at foreclosure sale. (Fla. Stat. 201.02[9]). See also category 21 Property, topic 21.06 Deeds, subhead Tax.

Bonds, debentures, or certificates of indebtedness issued by any person, and instruments and documents, however termed, issued by any corporation with interest coupons or in registered form, 35¢ on each $100 of face value thereof. When secured and only part of security is located in Florida, tax is proportionate. (Fla. Stat. 201.07).

Promissory notes, nonnegotiable notes, written obligations to pay, including mortgages not securing separate notes or in connection with certain nonsecured retail sales, assignment of wages or other compensation, executed, sold, transferred or assigned in this state, and on renewals thereof, 35¢ per $100 of obligation not to exceed $2,450. (Fla. Stat. 201.08).

Filed or recorded mortgages, trust deeds, security agreements, or other evidences of indebtedness and for each renewal of same, 35¢ on each $100 of indebtedness or obligation evidenced thereby. See statute for rules dealing with future advances and multiple parties. If mortgage, trust deed, security agreement, or other evidence of indebtedness upon which tax was paid pursuant to Fla. Stat. 201.08(1)(a) or (2)(a) is subsequently filed or recorded in this state, tax is paid on amount of indebtedness or obligation which exceeds amount upon which tax was previously paid. (Fla. Stat. 201.08). Required taxes must be paid, prior to recordation. For mortgages or trust deeds that do not incorporate certificate of indebtedness, notation is to be made on note or certificate that tax has been paid on mortgage or trust deed. (Fla. Stat. 201.01).

Renewal note for existing promissory note, which extends or continues identical contractual obligations without enlargement, not subject to tax if renewal note has attached to it original promissory note with notation required by Fla. Stat. 201.133. Renewal note term which increases unpaid balance but which otherwise meets exemption criteria, taxable only on face amount of increase. Renewal note for revolving obligation which increases original face amount but which otherwise meets exemption criteria of this section is taxable only on increase. (Fla. Stat. 201.09[1]). Note given in renewal of adjustable rate note or mortgage which has initial interest rate adjustment interval of not less than six months taxed only to extent of accrued interest upon which taxes have not been paid. (Fla. Stat. 201.09[3]).

Financing statements under c. 679 of Uniform Commercial Code not accepted for filing unless notation thereon that taxes have been paid on promissory instruments secured by financing statement. (Fla. Stat. 201.22).

Exemptions include receipts or other transaction record of use of credit card, charge card, or debit card and promissory notes executed for certain student financial aid (Fla. Stat. 201.08); certificates of deposit issued by any bank, banking association, or trust company (Fla. Stat. 201.10); certain foreign notes and other written obligations; drafts or bills of exchange arising out of certain transactions involving importation, exportation or foreign storage of goods, or for dollar exchange; documents, notes, financing statements, drafts, bills of exchange, or other taxable items used in conduct of banking transaction (Fla. Stat. 201.23); obligations to pay money issued by municipality, political subdivision, or agency of state (Fla. Stat. 201.24); assignment, transfer, or other disposition, or any document, which arises out of rental, lease, or lease-purchase or real property agreement within §1013.15(2) or (4). (Fla. Stat. 201.24[2]). No tax on transfer of marital home between spouses or former spouses pursuant to marriage dissolution action. (Fla. Stat. 201.02[7]). If promissory note not subject to taxation pursuant to Fla. Stat. 201.09(1), then mortgage, trust deed, etc. not subject to taxation. (Fla. Stat. 201.09[2]).

Discretionary county surtax on taxable documents may be levied except for document involving single-family residence. (Fla. Stat. 201.031).

Penalties.

Failure to pay tax or otherwise illegally avoiding tax constitutes first degree misdemeanor. (Fla. Stat. 201.17, 201.20).

Payment of Insufficient Amount of Tax or Improper Reporting.

Must pay tax not paid, penalty of up to 50% of tax not paid unless fraud in which case penalty equals 200% of deficiency, and interest accruing from date of recordation until paid at rate of 1% per month, based on tax not paid. Department may settle or compromise any interest or penalties. (Fla. Stat. 201.17).

Illegal use of stamps constitutes felony of third degree. (Fla. Stat. 201.18).

22.18A TAX LIENS:

Uniform Federal Lien Registration Act.

Adopted without substantive amendment. Removed gender-specific references applicable to human beings, effective July 1, 1997. (Fla. Stat. 713.901).

Effective Oct. 1, 2001, amended to permit filing officer recording notices of liens, certificates, and other notices affecting federal tax liens or other federal liens to use filing system consisting of paper, electronic or magnetic medium, or some combination thereof and to permit federal officials to file notices of liens upon real or personal property for obligations payable to U.S., and certificates and notices affecting those liens, under filing system being maintained by Secretary of State or filing officer.

22.19 USE TAXES:

See topic 22.17 Sales and 22.19 Use Taxes.

23 TRANSPORTATION

23.01 MOTOR VEHICLES:

Department of Highway Safety and Motor Vehicles exercises general supervisory power in this area. Mailing address: Department of Highway Safety and Motor Vehicles, Kirkman Building, 2900 Apalachee Parkway, Tallahassee, Florida 32399–0500. http://www.flhsmv.gov/index.html

Vehicle License.

Owners of motor vehicles as defined in §320.01 must register such vehicles with Department of Highway Safety and Motor Vehicles (Fla. Stat. 320.02), and renew such registration annually (Fla. Stat. 320.07), except certain business vehicles may be registered semiannually (Fla. Stat. 320.0705). Registration may be withheld from owners whose license is suspended under cc. 318 or 322. (Fla. Stat. 322.059). Registration may be suspended for failure to comply with order relating to paternity or support proceedings. (Fla. Stat. 61.13016). Registration plates are issued to owner or lessee, one for each vehicle, for a ten year period. (Fla. Stat. 320.06[b]). Replacement fees are $28, paid $2.80 each year in advance. (Fla. Stat. 320.06). Validation sticker must be placed in the upper right corner of the plate. (Fla. Stat. 320.06). Registration valid for not more than 12 months and expires midnight of last day of registration period. (Fla. Stat. 320.06). Registration period begins first day of birth month of person whose name first appears on registration and ends last day of month preceding such birth month in succeeding year. (Fla. Stat. 320.055). Renewal period is 30-day period ending at midnight on owner's date of birth. (Fla. Stat. 320.055). Owner whose vehicle registration is expired for six months or less is subject to civil penalty and if more than six months, guilty of second degree misdemeanor. (Fla. Stat. 320.07[3]). Validation stickers issued annually. (Fla. Stat. 320.06). Advance renewal provided when absence anticipated. (Fla. Stat. 320.071). License fees must be paid upon registration or reregistration in accordance with license plates available for certain vehicles in classification and weight of vehicle (Fla. Stat. 320.08) and service charge of $5.00 must be paid (Fla. Stat. 320.04). Personalized license plates are available for certain vehicles. (Fla. Stat. 320.0805). Mobile homes, as defined in §320.01(2), require annual license fee based upon length of vehicle which is in lieu of ad valorem taxes and special rates based on net weight are designated for certain recreational vehicle-type units, other than mobile homes as defined in §320.01(1)(b) (see Fla. Stat. 320.08[11]); payment evidenced by suitable license plate. (Fla. Stat. 320.08, .081, .0815; Const. Art. 7, §1). Florida manufacturers of mobile homes must display certificate showing compliance with the appropriate code. (Fla. Stat. 320.827). Trust fund exists from which judgments against recreational vehicle dealers may be satisfied. (Fla. Stat. 320.781). Special license plates may be obtained by holders of amateur radio licenses (Fla. Stat. 320.083), active or retired members of Florida National Guard (Fla. Stat. 320.089), active or retired members of any branch of U.S. Armed Forces Reserve (Fla. Stat. 320.089), former prisoners of war (Fla. Stat. 320.089), survivors of Pearl Harbor (Fla. Stat. 320.089), Purple Heart medal recipients (Fla. Stat. 320.089), Congressional Medal of Honor winners (Fla. Stat. 320.0893), certified emergency medical technicians (Fla. Stat. 320.0898), certified paramedics (Fla. Stat. 320.0898), firefighters (Fla. Stat. 320.0898), law enforcement officers (Fla. Stat. 320.0898), handicapped persons (Fla. Stat. 320.0843), disabled veterans (Fla. Stat. 320.084), members of Seminole and Miccosukee Indian Tribes (Fla. Stat. 320.0841), veterans who are confined to wheelchairs (Fla. Stat. 320.0842), and owners of ancient vehicles (Fla. Stat. 320.086) and antique trucks (Fla. Stat. 320.08[3]). In addition, licenses commemorating Challenger and Columbia space shuttles, veterans, manatees, panthers, United States Olympic Committee, Boy Scouts, colleges in state and other causes and organizations are available for special additional fees. (Fla. Stat. 320.08058). Motor vehicles owned or exclusively operated for benefit of certain organizations are exempt from licensing tax. (Fla. Stat. 320.10). Port vehicles and equipment (Fla. Stat. 320.525) as well as golf carts (Fla. Stat. 320.105) exempt from certain registration and license requirements.

Driver's License.

Drivers must have license (Fla. Stat. 322.03), except persons operating road and farm machinery, U.S. Government employees operating vehicles leased or owned by U.S. Government, certain nonresidents with valid noncommercial licenses for operation of noncommercial (Class D, E) vehicles, and persons driving golf carts on certain roads (Fla. Stat. 322.04). Drivers of commercial motor vehicles required to obtain commercial driver's license. (Fla. Stat. 322.03[3]). Licenses issued by Department of Highway Safety and Motor Vehicles (Fla. Stat. 322.14) for six year periods (Fla. Stat. 322.18[2]). “Safe drivers” may renew for six years; others renewed for four years. (Fla. Stat. 322.18[2]). All renewal driver's licenses issued only if applicant eligible. (Fla. Stat. 322.18[5]). Licensee over age of 79 must pass vision test at license office or submit by mail results of vision test administered by optometrist to renew. (Fla. Stat. 322.18[5]). Application for commercial license includes tests of eyesight, hearing, road signs, knowledge of state traffic laws, and demonstration of ability to exercise ordinary and reasonable control while operating a motor vehicle. (Fla. Stat. 322.12[3]). Commercial driver's license fee of $75 (Class A, B, D) includes fee for driver education; $48 for noncommercial license (Class E). (Fla. Stat. 322.21). Hazardous-materials endorsement required by Fla. Stat. 322.57(1)(e) set by Department by rule and must reflect cost of required criminal history check; fee may not exceed $100. (Fla. Stat. 322.21[1][h]). Driver's licenses not issued to persons under 18 (Fla. Stat. 322.05) unless driver is 16 years of age and enrolled in public or private school or other equivalent program (Fla. Stat. 322.091). Person at least 16 years of age but under 18 years of age must hold valid learner's license for 12 months before applying for license; if traffic citations within 12 month period, must attend traffic driving school. Person at least 16 years of age but under 18 years of age must have parent, guardian, or other responsible adult certify that he or she (or other licensed driver 21 years of age or older) has accompanied applicant for not less than 50 hours' behind wheel experience, at least ten hours at night. (Fla. Stat. 322.05). Department must require any male U.S. citizen or immigrant who is at least 18 years of age but less than 26 years of age to comply with federal Selective Service System requirements when applying to receive license. (Fla. Stat. 322.0515). Eligibility for driver's license may be delayed due to conviction of certain drug offenses. (Fla. Stat. 322.055). Restricted licenses may be issued to persons at least 15 years of age and meet school attendance requirements unless otherwise ineligible due to conviction of certain offenses. (Fla. Stat. 322.05, 322.056, 322.16). All licenses issued to person under 21 have distinguishing markings or color from all other licenses issued. (Fla. Stat. 322.141[1]). Applicants who have insulin dependent diabetes may have their licenses so designated. (Fla. Stat. 322.141[2]). Applicants for licenses must be examined unless otherwise qualified (Fla. Stat. 322.12) and restrictions may be imposed on licenses (Fla. Stat. 322.16). All applicants who have never been issued license in any jurisdiction must complete approved traffic law and substance abuse education program. (Fla. Stat. 322.08[5]). Re-examination required of all licensees every three years for eyesight and hearing. Those with convictions in past three years also are tested for ability to read and understand highway signs and pavement markings regulating, warning and directing traffic. (Fla. Stat. 322.121). Department of Highway Safety and Motor Vehicles may require licensed drivers to submit to examination or re-examination if believed to be incompetent or not qualified to be licensed, or upon recommendation for such re-examination by proper court, law enforcement agency, or physician; licensee may be required to submit medical reports about his physical or mental condition. (Fla. Stat. 322.221). Drivers must sign licenses (Fla. Stat. 322.14[1][a]) and have licenses in their immediate possession when operating vehicle, and they must be displayed to authorized officer or representative upon demand; provided licensee cannot be convicted for failure to do so if he produces in court or to clerk of court valid license existing at time of arrest (Fla. Stat. 322.15[3], 322.03[5]). Driver failing to produce license must allow fingerprint imprint on citation. Licenses are revoked upon driver's conviction of certain offenses and may be suspended upon certain grounds based on point system or multiple convictions of certain offenses. (Fla. Stat. 322.26, .27 and 322.2615). Attendance at driver improvement course may be mandated upon occurrence of certain accidents. (Fla. Stat. 322.0261). Licenses may be restored to habitual offenders as defined in Fla. Stat. 322.264 upon petition after investigation of qualifications and fitness to drive. (Fla. Stat. 322.331). Penalties are provided for driving while license suspended, revoked, cancelled or disqualified. (Fla. Stat. 322.34). Motor vehicle driven by person under influence of alcohol or drugs in violation of Fla. Stat. 316.193 is subject to seizure and forfeiture and is subject to liens for recovering, towing or storing vehicle if, at time of offense, person's driver's license is suspended, revoked, or canceled as result of prior conviction for driving under the influence. (Fla. Stat. 316.193[6]). Department may suspend or revoke license upon receiving notification that licensee was convicted in another state of an offense that would be grounds for suspension or revocation in Florida. (Fla. Stat. 322.24). Implied consent to intoxication test; license may be suspended and operator of commercial vehicle may be disqualified if refusal to submit to such tests. (Fla. Stat. 316.1932, 322.2615, 322.64). Before issuing license, department must require placement of ignition interlock device for person convicted of driving under influence. (Fla. Stat. 322.2715). No exemptions for members of Armed Forces. See, however, subhead Vehicle License, supra, as to members of Florida National Guard. License may be suspended for failure to comply with court order relating to paternity or support proceedings. (Fla. Stat. 61.13016).

Low Speed Vehicle.

Any person operating low-speed vehicle must have in his or her possession valid driver's license. (Fla. Stat. 316.2122). Golf cart may not be operated on public roads or streets by any person under age of 14. Local government may enact ordinance regarding golf cart operation by unlicensed drivers which is more restrictive than state regulation. (Fla. Stat. 316.212).

Electronic personal assistive mobility device is any self-balancing, two-nontandem-wheeled device, designed to transport only one person, with electric propulsion system with average power of 750 watts and maximum speed of less than 20 miles per hour. Such device may be operated on marked bicycle path, any street where bicycles permitted, on street where posted speed limit is 25 mph or less, on sidewalk if operator yields right-of-way to pedestrians and gives audible signal before passing pedestrian. Driver's license is not required for operation. Device not required to be registered and insured in accordance with Fla. Stat. 320.02. Person under age of 16 must wear bicycle helmet. County, municipality, or Dept. of Transportation may prohibit operation of device on any street or bicycle path under its jurisdiction. (Fla. Stat. 316.2068).

Identification cards may be issued to anyone over the age of 5, or anyone with a disability regardless of age who applies for a disabled parking permit, upon application and payment of fee. (Fla. Stat. 322.051).

Titles and Sales.

Certificate of title must be obtained by every owner except for mopeds, trailer or semitrailer with net weight less than 2,000 pounds, and motorized disability access vehicles from Department of Highway Safety and Motor Vehicles. (Fla. Stat. 319.20; Fla. Stat. 319.21). Applicant must show that all sales or use taxes due on transfer are paid; current motor vehicle registration, if any required under Fla. Stat. 320.02, has been obtained; and where “RP” (real property) sticker issued, that applicant has informed property appraiser of county where mobile home to be situated. (Fla. Stat. 319.23[7]). On sale or transfer, vendor must indorse on back of certificate of title assignment thereof with warranty and statement of all liens and incumbrances. (Fla. Stat. 319.22; Fla. Stat. 319.27). Purchaser must immediately notify Department and arrange for transfer of registration. (Fla. Stat. 319.22). Seller may notify Department of transfer of title to avoid civil liability arising from operation by another prior to surrender of certificate and reissue to purchaser. Seller's price and odometer disclosure statement must be indicated upon each certificate of title issued or transferred in order to be accepted by any officer of State. (Fla. Stat. 319.22, 319.225). Illegal to transfer title to motor vehicle when purchaser's name does not appear on title. (Fla. Stat. 319.22[5]). Criminal penalties relating to fraudulent dealings and improper use of title certificates, registrations and failure to complete or acknowledge odometer disclosure statement and other indicia of ownership are provided. (Fla. Stat. 319.33, 319.225). Department must make available on Internet database of title transactions searchable by vehicle identification number. (Fla. Stat. 319.41). It is unlawful, with certain exceptions, to tamper with, adjust, alter, change, set back, disconnect or fail to connect odometer of motor vehicle to reflect lower than actual mileage or to provide false information on odometer readings or to knowingly possess, sell, or offer for sale, conceal or dispose of motor vehicle with odometer that has been tampered with. (Fla. Stat. 319.35).

When legal title is not transferred, but possession is transferred pursuant to conditional sales contract or lease and conditions are not satisfied and vehicle is returned to motor vehicle dealer, motor vehicle may be resold by motor vehicle dealer as new motor vehicle, provided selling motor vehicle dealer gives following written notice to purchaser: “THIS VEHICLE WAS DELIVERED TO A PREVIOUS PURCHASER.” Purchaser must sign acknowledgment, and seller must keep copy on file. (Fla. Stat. 320.60[10]).

License tags must be removed upon sale and delivery of second-hand motor vehicle. (Fla. Stat. 320.271). Car dealers must obtain license to operate from Department of Highway Safety and Motor Vehicles as prescribed. (Fla. Stat. 320.27).

Nonresident dealers not having permanent place of business in Florida must register all used motor vehicles, recreational vehicles or mobile homes brought into state for sale and must apply for certificate of title for vehicle at least ten days prior to offering for sale, advertising for sale or selling vehicle. (Fla. Stat. 320.28).

Taxicabs, lease vehicles no longer in lease service after 4/29/1990, police vehicles, rebuilt vehicles, unless proper application certificate of title for rebuilt vehicle and Department inspection have been made, and the like, cannot be knowingly offered for sale, sold or exchanged until Department has stamped on registration certificate and certificate of title words stating such previous use. (Fla. Stat. 319.14[1]).

Liens on vehicles are not enforceable against creditors or subsequent purchasers without notice unless sworn notice of lien is filed in office of Department of Highway Safety and Motor Vehicles, but there are certain exceptions to this rule. (Fla. Stat. 319.27). Certificate of title is delivered to owner, or if lien exists, to first lienholder unless first lienholder directs otherwise. Motor vehicle dealers who purchase motor vehicle must satisfy outstanding lien within ten days of purchase; lienholder must deliver certificate of title indicating lien satisfaction or notify person satisfying lien that title not available within ten days of receipt of payment. (Fla. Stat. 319.24[5][a]). If official towing or storage fees remain unpaid after three days if vehicle is more than three years of age or after 50 days if vehicle is three years of age or less, garage owner may auction car to satisfy lien. Registered owner of vehicle may not be issued license plate or revalidation sticker for any vehicle based on lien if amount of lien does not exceed charges for recovery, towing and storage of vehicle for seven days. Lien expires five years after filing. (Fla. Stat. 713.585; Fla. Stat. 713.78). Liens for labor and services on personal property may be enforced by sale with proper notice after 60 days from completion of repair work. (Fla. Stat. 713.585, 713.78).

Identification Marks.

Unlawful to knowingly buy, sell, receive, dispose of, conceal or possess any motor vehicle or major component part thereof, from which manufacturer's serial number or other number or identification mark has been removed, defaced, covered, altered or destroyed for purpose of concealment or misrepresenting identity of same. (Fla. Stat. 319.30, 319.33).

Odometer Alteration.

Unlawful to tamper, alter, disconnect, or fail to connect odometer of motor vehicle, so as to reflect lower mileage than motor vehicle has actually been driven, or to supply any written odometer statement knowing such statement to be false or based on mileage figures reflected by odometer that has been tampered with or altered. Unlawful for any person to: (1) knowingly bring into this state motor vehicle which has odometer that has been illegally altered; (2) knowingly possess, sell, or offer for sale, conceal, or dispose of in this state motor vehicle with odometer that has been tampered with so as to reflect lower mileage than vehicle actually been driven (Fla. Stat. 319.35); or (3) knowingly operate on streets and highways of state vehicle with odometer that has been tampered with so as to reflect lower mileage than actually driven unless certificate of title and registration certificate have been conspicuously stamped to indicate inaccuracy and written notice has been placed on vehicle. Vehicles with altered odometer may in some situations be considered contraband and subject to seizure and forfeiture. See statute for details. Any person who intentionally violates provisions of this section is guilty of felony of third degree, punishable as provided in §§775.082, Fla. Stat. 775.083, or Fla. Stat. 775.084.

Operation Prohibited.

No person, unless expressly exempted, can operate a vehicle unless he has a valid license. (Fla. Stat. 322.03). See subhead Driver's License, supra. It is unlawful for any person who has blood alcohol level of 0.08% or above or who is under influence of alcoholic beverages, any chemical substance set forth in §877.11 or any substance controlled under c. 893 to extent that his normal faculties are impaired to drive or be in actual physical control of vehicle within this state. (Fla. Stat. 316.193[1]). Unlawful for person under age of 21 who has breath alcohol level of 0.02% or higher to drive or be in actual physical control of vehicle. (Fla. Stat. 322.2616). Department must approve and monitor traffic law and substance abuse education course (Fla. Stat. 322.095[1]) that must be completed by all license applicants who have never been issued license in any jurisdiction (Fla. Stat. 322.08[5]). Persons convicted of multiple violations of §316.193 or similar violations in other states must complete substance abuse course. (Fla. Stat. 322.03[2]). No person, except law enforcement officer, may operate motor vehicle while wearing headset, headphone or other listening device other than hearing aid or other instrument to improve defective hearing, cellular telephone which provides sound in one ear, and operator of motorcycle headset approved by Department of Highway Safety and Motor Vehicles for purpose of communication with passenger or communication with persons in other vehicles by radio. (Fla. Stat. 316.304). No person may operate motor vehicle on street or highway while any sound making device, other than warning device, is above certain audible level except where sound making device is used for law enforcement, political or business purposes.

Size and Weight Limits.

Regulated by Chapter 316, Florida Uniform Traffic Control Law.

Equipment Required.

Regulated by Chapter 316, Florida Uniform Traffic Control Law. With certain exceptions, it is unlawful for any person to operate motor vehicle unless operator and all passengers under age 18 are restrained by safety belt or child restraint device or front seat passengers 18 or older are restrained by safety belt. (Fla. Stat. 316.614[4], [5]).

School Bus Safety Restraints.

Each school bus purchased after 12/31/00 used to transport students in grades pre-K through 12 must be equipped with safety belts or with other restraint system approved by Federal government. (Fla. Stat. 316.6145).

Protective Headgear.

Person over 21 years of age may operate or ride on motorcycle without protective headgear if covered by insurance policy with at least $10,000 in medical benefits for injuries incurred as result of motorcycle crash. (Fla. Stat. 316.211[3][b]).

Lights Required.

Regulated by Chapter 316, Florida Uniform Traffic Control Law.

Accidents.

Operator of vehicle involved in an accident resulting in injury or death of any person or damage to a vehicle must immediately stop and give his name, address, registration number of the vehicle he is driving, and upon request exhibit his license to person injured or person attending any vehicle collided with, and render reasonable assistance to person injured in accident. (Fla. Stat. 316.062[1]). If vehicle collided with is unattended operator of colliding vehicle must stop and locate operator or owner of other vehicle and give him above information or leave same in conspicuous place and without unnecessary delay notify police. (Fla. Stat. 316.063[1]). Accidents resulting in injury or death of any person or property damage to any vehicle or other property exceeding $500 must be immediately reported to local police department, county sheriff, or Florida Highway Patrol. (Fla. Stat. 316.065[1]). Where a crash results in bodily injury or death or damage exceeding $500 to any vehicle or other property, operator of vehicle must forward written report to Department of Highway Safety and Motor Vehicles or traffic-records center within ten days unless investigating officer has made written report. (Fla. Stat. 316.066[1]). Accident reports made by person involved in accident and statements made to complete such reports are not to be used as evidence in any trial. (Fla. Stat. 316.066[7] and 324.051[1][b]). However, certain statements and test results are not confidential. (Fla. Stat. 316.066[7]).

Liability of Owner.

Owner who is natural person and loans motor vehicle to any permissive user is liable for operation of vehicle or acts of operator only up to $100,000 per person and up to $300,000 per incident for bodily injury and up to $50,000 for property damage. If permissive user is uninsured or has insurance with limits less than $500,000 combined property damage and bodily injury liability, owner will be liable for up to additional $500,000 in economic damages arising out of use of motor vehicle. (Fla. Stat. 324.021[9][b]). Lessor, under agreement to rent or lease motor vehicle for period less than one year, is deemed owner of vehicle for purpose of determining liability for operation of vehicle or acts of operator up to $100,000 per person and up to $300,000 per incident for bodily injury and up to $50,000 for property damage. If lessee or operator is uninsured or has insurance with limits less than $500,000 combined property damage and bodily injury liability, lessor is liable for up to additional $500,000 in economic damages arising out of use of vehicle. Lessor of vehicle for term of one year or longer may not be deemed owner provided lessor requires lessee to maintain $100,000/$300,000 bodily injury and $50,000 property damage liability insurance or not less than $500,000 combined property damage and bodily injury liability. Required insurance may be obtained by lessor or lessee but if by lessee, combined coverage for bodily injury and property damage liability must contain limits of at least $1,000,000 and may be provided by lessor's blanket policy. (Fla. Stat. 324.021[9][b]). Limits on liability do not apply to owner of motor vehicles that are used for commercial activity in owner's ordinary course of business, other than rental company that rents or leases motor vehicles. With respect to commercial motor vehicles, limits on liability do not apply if, at time of incident, commercial motor vehicle is being used in transportation of materials found to be hazardous for purposes of Hazardous Materials Transportation Authorization Act of 1994. See statute for exceptions.

Responsibility for Acts of Minors.

Negligence or willful misconduct of minor under 18 years of age is imputed to person who signs such minor's application for license and that person and minor are jointly and severally liable for any damages caused by conduct. Foster parent of minor under age of 18 who signs minor's application for learner's driver's license does not become liable for any damages caused by negligence or willful misconduct of minor by reason of having signed application. (Fla. Stat. 322.09[2]).

Guests.

Guest statute repealed. (72-1).

Proof of Financial Responsibility.

Law enforcement officer who investigates accident must, within ten days of investigation, file written report of accident to Department of Highway Safety and Motor Vehicles, unless investigation will take more than ten days in which case preliminary copy of accident report must be forwarded to Department within ten days of occurrence, with final report to follow within ten days of completion of investigation. (Fla. Stat. 324.051[1]). Department must suspend, after hearing, licenses of operators and registrations of owners of vehicles involved in accident resulting in bodily injury or death or damage of $500 or more to property, or nonresident's operating privilege, within 30 days from receipt of notice of accident; however, owner or operator will be exempt if vehicle was legally parked, vehicle owned by U.S., this State or political subdivision or Florida municipality, there has been adjudication of no civil liability by court, owner or operator has deposited with Department security in accordance with Fla. Stat. 324.061 and has complied with Fla. Stat. 324.031, concerning financial ability to respond to damages caused by accident or owner or operator had automobile liability policy in effect at time of accident or traffic conviction. (Fla. Stat. 324.051[2][a] & [b]; Fla. Stat. 324.031; Fla. Stat. 324.061). Proof of ability to respond may be shown by automobile liability policy, surety bond, deposit of cash or securities, or by qualifying as self-insurer. (Fla. Stat. 324.031). “For Hire” passenger transportation vehicles must show automobile liability policy. (Fla. Stat. 324.031). Proof of personal injury protection insurance and property damage liability (and combination bodily injury and property damage liability for certain commercial vehicles) must be furnished upon registration and must be in possession of owner or registrant of vehicle when vehicle is in operation. (Fla. Stat. 316.646, 320.02). For purposes of financial responsibility requirements, lessor of vehicle for term of one year or longer may not be deemed owner provided lessor requires lessee to maintain $100,000/$300,000 bodily injury and $50,000 property damage liability insurance or not less than $500,000 combined property damage and bodily injury liability. Required insurance may be obtained by lessor or lessee but if by lessee, combined coverage for bodily injury and property damage liability must contain at least $1,000,000 and may be provided by lessor's blanket policy. (Fla. Stat. 324.021[9][b]).

Insurance.

See subheads Proof of Financial Responsibility, supra and No-Fault Insurance, infra.

No-Fault Insurance.

Florida Motor Vehicle No-Fault Law (Fla. Stat. 627.730-627.7405) was repealed effective October 1, 2007. However, it was revived and reenacted effective January 1, 2008. Certain first party benefits in liability policies are required and limits on third-party claims exist.

Person injured may recover from own insurer to a limit of $10,000 without necessity of establishing negligence on part of anyone for 80% of all reasonable and necessary medical expenses, 60% of loss of gross income and death benefits to limit of $5,000 per individual. (Fla. Stat. 627.736[1]). Section 627.736(1) held constitutional. (415 So.2d 12). Insurers may enter into contracts with “preferred providers” and may provide option to insured to elect use of such providers. (Fla. Stat. 627.736[9]).

Recovery for pain, suffering, mental anguish, and inconvenience is allowed from insured third party where injury results in significant and permanent loss of bodily function, permanent injury, significant permanent scarring or disfigurement, or death. (Fla. Stat. 627.737[2]). Requirement of permanent injury before tort claim for pain and suffering may be brought held constitutional. (415 So.2d 12).

Foreign vehicle whose owner has complied with law of his residence and on which home registration number is conspicuously displayed may be operated without registration. (Fla. Stat. 320.37[1]). This does not apply to foreign corporation doing business in state or to motor vehicle operated for hire, recreational vehicles or mobile homes located in state for at least six consecutive months, and commercial vehicles defined in Fla. Stat. 316.003(66). However, motor vehicle duly registered in another state or foreign country operated or proposed to be operated in this state by nonresident, except nonresident migrant farm worker as defined in Fla. Stat. 316.003(61), must be registered here within ten days after such nonresident accepts employment, engages in any trade, profession or occupation here or enters children to be educated in public schools here. (Fla. Stat. 320.37, 320.38). Special rules apply for nonresident college or university students. (Fla. Stat. 320.38).

Nonresident Operators.

State Department of Highway Safety and Motor Vehicles, Department of Transportation and Public Service Commission may negotiate and consummate with proper authorities of other states reciprocal agreements whereby residents of such other states, properly licensed there, may enjoy privileges and exemptions in operation of their motor vehicles in this state. (Fla. Stat.

320.39). Every nonresident, spouse or dependent children, except nonresident migrant or seasonal farm worker defined in Fla. Stat. 316.003(61), employed in any trade, profession or occupation in this state or who enters his children in public schools of this state must obtain drivers license within 30 days thereafter if he operates motor vehicle on this state's highways. (Fla. Stat. 322.031[1]). Nonresident at least 16 years old having operator's license in his home state or at least 18 years old having chauffeur's license in his home state exempt from obtaining operator's license. (Fla. Stat. 322.04[1][c] & [d]). No other nonresident, except for employee of U.S. Government while driving vehicle owned by U.S. Government on official business, any person operating road equipment or golf cart, is exempt from licensure requirements. (Fla. Stat. 322.04).

Actions Against Nonresidents.

In a civil action against a nonresident operator or owner of a motor vehicle, or, if dead, against his personal representative, arising out of accident or collision in the state, in which such vehicle is involved, substituted process may be served by leaving or mailing copy certified mail for fee of $8.75, with or to Secretary of State; provided notice of such service and copy of process are forthwith sent by plaintiff or his attorney to defendant by registered or certified mail and defendant's return receipt and affidavit of plaintiff or his attorney of compliance with statute are filed in office of clerk of court in which action is pending. (Fla. Stat. 48.171; Fla. Stat. 48.161). Like service may be had against resident removed or removing from State. (Fla. Stat. 48.161; Fla. Stat. 48.171).

Notice of Service and copy of process also may be served on nonresident by sheriff where defendant found (and officer files return of service) or if defendant found in state by any qualified officer. (Fla. Stat. 48.161; Fla. Stat. 48.171).

Motor Carriers.

Department of Transportation authorized to promulgate and enforce weight and safety regulations applicable to interstate motor carriers. (c. 316).

Fuel Conveyance.

Unlawful to possess any vehicle equipped with fuel tanks, bladders, drums, or other containers that do not conform to 49 C.F.R. or have not been approved by U.S. Dept. of Transportation for purpose of hauling motor or diesel fuel over any public highway. (Fla. Stat. 316.80).

Motor Vehicle Taxes.

Motor vehicles, as property, subject only to license tax which is in lieu of all ad valorem taxes. (Const., Art. 7, §1). Certain vehicles of specified owners exempt from license tax but plates showing exempt status must be displayed. (Fla. Stat. 320.10).

Gasoline Tax.

See category 22 Taxation, topic 22.08 Gasoline and Special Fuels Taxes, subhead Motor Fuel (and Diesel Fuel) Tax.

Lemon Law.

See category 3 Business Regulation and Commerce, topic 3.12 Consumer Protection, subhead Motor Vehicle Sales Warranties (Lemon Law).

23.02 RAILROADS:

See category 3 Business Regulation and Commerce, topic 3.08 Carriers.

High Speed Ground Transportation System.

To reduce traffic congestion and provide alternatives to traveling public, state to develop high-speed ground transportation system consisting of monorail, fixed guideway or magnetic levitation system, capable of speeds in excess of 120 miles per hour that will link five largest urban areas of state as determined by Legislature and provide for access to existing air and ground transportation facilities and services. Initial segments to operate between St. Petersburg, Tampa, and Orlando, with future service to Miami. $4,500,000 appropriated to Florida High-Speed Rail Authority for development of preliminary assessment of system. (Fla. Stat. 341.822). Florida High-Speed Rail Authority Act enacted effective July 1, 2002, to implement Art. X §19. (Fla. Stat. 341.8201-341.842). State constitutional provision which directed legislature, cabinet and governor to develop high speed transportation system was repealed effective Jan. 4, 2005. (Art X. §19).

23.02A COMMERCIAL CODE FORMS:

See categories 3 Business Regulation and Commerce, topic Commercial Code; Mortgages, topic Chattel Mortgages.

Note: Revised Article 9 of the Uniform Commercial Code (UCC) was passed by the 2001 Legislature with an effective date of January 1, 2002. National Uniform and Florida UCC forms will be accepted. Other state's forms will be accepted with a $5 additional charge. For updated information, see www.dos.state.fl.us/doc/.

1
GEORGIA LAW DIGEST

—Scope —

Prepared for 2010 edition by **LexisNexis**(R).

(References, unless otherwise indicated, are to Official Code of Georgia Annotated, including Annual Pocket Parts, for Code of 1981, effective Nov. 1, 1982. For explanation of mode of citation see category 6 Courts and Legislature, topic 6.04 Statutes. Session laws are cited by year and page number. Parallel citations to the South Eastern Reporter begin with 77 Ga. and 1 Ga. App.)

Note: This revision incorporates legislation through October 2009.

1 INTRODUCTION

1.00A ADMINISTRATIVE PROCEDURE:

Open Meetings.

All meetings of state, county and municipal departments, agencies, boards and other political subdivisions, school districts and certain nonprofit organizations receiving funds from tax revenues must be made public. (O.C.G.A. 50-14-1[b]). Any official action taken at meeting not opened to public as required not binding. (O.C.G.A. 50-14-1[b]). Open Meetings Act may apply to nonprofit organizations to which governing authority of any agency appropriates tax funds but not to such nonprofit organizations' sub-agencies or affiliates. Act does not cover hospitals, nursing homes, pharmaceutical dispensers or other organizations, persons or firms that furnish medical or health services to citizens and receive reimbursement from state. (O.C.G.A. 50-14-1[a][1][E]).

Press Access.

Visual and sound recording during open meetings permitted. (O.C.G.A. 50-14-1[c]).

Exemption.

Open meeting rule does not apply to staff meetings held for investigative purposes (O.C.G.A. 50-14-3[1]); deliberation and voting of State Board of Pardons and Paroles (O.C.G.A. 50-14-3[2]); meetings of Georgia Bureau of Investigation or any other law enforcement agency (O.C.G.A. 50-14-3[3]); meetings where agency discusses future acquisition of real estate (O.C.G.A. 50-14-3[4]); meetings where hospital authority discusses staff privileges or granting of abortions (O.C.G.A. 50-14-3[5]); meetings where agency discusses or deliberates on employment of, or disciplinary action against, public officer or employee (unless receiving evidence or hearing argument on charges filed to determine disciplinary action) (O.C.G.A. 50-14-3[6]); adoption proceedings (O.C.G.A. 50-14-3[7]); meetings where board of trustees or investment committee of public retirement system discusses investment securities trading or portfolio positions (O.C.G.A. 50-14-3[8]); or meetings where records are discussed that involve security against sabotage, criminal or terrorist acts and nondisclosure of which is necessary for protection of life, safety or public property. (O.C.G.A. 50-14-3[9], 50-18-72[a][15]).

Jurisdiction.

Superior courts have jurisdiction to enforce compliance. (O.C.G.A. 50-14-5).

Methods of Meeting.

Unless otherwise specifically prohibited, meetings may be conducted by teleconference or similar means. (O.C.G.A. 50-1-5[a]).

1.01 GOVERNMENT AND LEGAL SYSTEM:

The State of Georgia is a constituent state of the United States of America. For further discussion of the U.S. federal system, see Introduction to the Federal Government of the United States at the beginning of this volume. A great many laws are promulgated by the federal government of the United States and are not reflected in the topics below. See the Introduction to this volume for references to the federal law topics covered.

Like all but one of the United States, Georgia has a common law legal system, with roots in English common law. For information on courts and legislature of Georgia, see category 6 Courts and Legislature. For general information on Georgia state government online, see http://www.georgia.gov.

1.02 COMMON LAW:

Act that adopted common laws of England as they existed on May 14, 1776, not repealed. (O.C.G.A. 1-1-10). General principles of common law apply to financial institutions unless expressly or impliedly displaced. (O.C.G.A. 7-1-8). Common law actions for deceptive trade practices (O.C.G.A. 10-1-372) and rights in marks (O.C.G.A. 10-1-452) not affected. Common law authority of judge having jurisdiction with regard to bail not abrogated or repealed. (O.C.G.A. 17-6-15). No common law marriage after Jan. 1, 1997, but otherwise valid common law marriages before that date must be recognized. (O.C.G.A. 19-3-1.1). Georgia Land Sales Act neither affects common law right of state to punish persons for violating laws (O.C.G.A. 44-3-7) nor limits common law right of any person to bring court action for acts involving sale of land (O.C.G.A. 44-3-8). Principles of common law governing trusts remain law insofar as not modified by statute. (O.C.G.A. 53-12-7).

1.03 HOLIDAYS:

Legal Holidays.

All public holidays designated by federal government and others designated by Governor. (O.C.G.A. 1-4-1). State offices closed 12 days per year.

Following holidays are generally observed: New Year's Day (Jan. 1); Robert E. Lee's Birthday (normally observed on day after Thanksgiving); King Holiday (3d Mon. in Jan.); Washington's Birthday (normally added to Christmas observance); Confederate Memorial Day (Apr. 26 or suitable date); National Memorial Day (last Mon. in May); Independence Day (July 4); Labor Day (1st Mon. in Sept.); Columbus Day (2d Mon. in Oct.); Veterans' Day (Nov. 11); Thanksgiving Day (4th Thurs. in Nov.); and Christmas Day (Dec. 25). Holidays falling on Sat. are usually observed on preceding Fri.; those falling on Sun. are usually observed following Mon. State offices generally closed day after Thanksgiving.

Religious Holidays.

Sun. only religious holidays. (O.C.G.A. 1-4-2).

Legality of Transactions on Holidays.

Statute declaring certain acts and deeds occurring on religious holidays void, repealed. Sun. business activity regulated. (O.C.G.A. 7-1-294).

Bank Holidays.

No statutory provision.

1.04 OFFICE HOURS AND TIME ZONE:

Georgia is in the Eastern (GMT -05:00) time zone. Office hours are generally from 9 a.m. to 5 p.m.

2 BUSINESS ORGANIZATIONS

2.01 AGENCY:

Common law rules apply generally, as codified in tit. 10, c. 6.

Contract entered into by purported agent purporting to bind principal only is void where purported principal does not exist, and purported agent is individually liable to anyone misled thereby. (O.C.G.A. 10-6-89).

Agent of nonresident, who returns property of agent's principal for taxation, is liable for tax. (O.C.G.A. 48-5-14).

In sales by auction, auctioneer is agent for both parties so far as to dispense with further memorandum other than auctioneer's own entries. (O.C.G.A. 11-2-328). Not applicable to real property sales. (849 F. Supp. 793 [N.D. Ga.]).

2.02 ASSOCIATIONS:

Formation.

Governed by specific provisions relating to type association contemplated.

Liabilities.

Unincorporated association may sue in its own name (O.C.G.A. 9-2-24) and may be sued upon any claim which plaintiff may maintain against its members. (O.C.G.A. 9-2-25[a]). But individual property of members not subject unless member participated in transaction. (O.C.G.A. 9-2-25[d]). Volunteers for nonprofit associations' sports or safety programs not liable if acting in good faith within scope of duties and unless conduct amounts to willful and wanton misconduct or gross negligence. (O.C.G.A. 51-1-20.1).

Actions.

May be maintained by and against association in name of association. (O.C.G.A. 9-2-24 to -25). Process must be served on officer or agent of association designated in filing with Secretary of State. If no designation filed, then must be served on any officer or official member of association. Action maintainable in any county in which association does business or has in existence branch or local organization. (O.C.G.A. 9-2-25[c]).

Professional Associations.

May be formed under O.C.G.A. 14-10-1 et seq. for purpose of rendering any type of professional service which may legally be performed only pursuant to state license. (O.C.G.A. 14-10-2).

Professional association means unincorporated association as distinguished from partnership. (O.C.G.A. 14-10-2[1]).

Formation is by any two or more licensed professionals who desire to associate for purpose of rendering one particular type of professional service and dividing gains therefrom. (O.C.G.A. 14-10-3).

Articles of association must be executed and recorded with clerk of superior court in county in which association's principal office located. (O.C.G.A. 14-10-4[a][1]). Recording fee is $20. (O.C.G.A. 14-10-4[a][2]; O.C.G.A. 15-6-77[g][17][A]). No other notice or publication required. (O.C.G.A. 14-10-4[a][2]). Articles may be amended or dissolved at any time by agreement of two-thirds of members at regular or special meeting and upon filing amendment or instrument of dissolution in same place articles filed. (O.C.G.A. 14-10-4[a][3]).

Name for association is at discretion of persons forming association but must have suffix, “Professional Association,” or “P.A.” (O.C.G.A. 14-10-4[b]).

Rights and Powers.

Association may render only one specific kind of professional service and cannot engage in any other business. Association may own real or personal property appropriate for rendering its professional service and may invest its funds in real estate, mortgages, stocks, bonds, or any other type investment. (O.C.G.A. 14-10-5). May render its services only through duly licensed officers, agents or employees. (O.C.G.A. 14-10-6). May contract in its own name, take, hold and sell real and personal property in its own name and likewise sue and be sued. Conveyance in name of association executed by president and attested by secretary is conclusive against association, board of governors and members. (O.C.G.A. 14-10-16).

Ownership.

Articles of association may provide for stock-type or non-stock organization. Membership, if nonstock, or stock or certificate of membership, if stock-type, is freely transferable except as restricted in articles of association. (O.C.G.A. 14-10-10). See catchline Membership, infra.

Membership may be sold or transferred only to licensed professional. (O.C.G.A. 14-10-14). Member, shareholder, agent or employee who becomes legally disqualified to render professional services must sever all interest in or employment with association. Failure to do so subjects association to involuntary dissolution. (O.C.G.A. 14-10-11). Stock purchase or membership limited to persons duly licensed to render same professional services; estate of member or shareholder may continue ownership during period of administration of estate. (O.C.G.A. 14-10-10).

Management by board of governors elected by members or shareholders. Board elects officers, including president, vice-president, secretary and treasurer. President must be member of board. Board members and officers need not be professionals, but nonprofessionals may not participate in decisions constituting practice of profession. Members may promulgate bylaws or delegate that power to board in articles. Voting by members as provided in articles. (O.C.G.A. 14-10-8).

Existence continued as separate entity independent of members or stockholders for period of time provided in articles or until dissolved by two-thirds vote, notwithstanding happening of events (death, incompetency, etc.) that would dissolve partnership. (O.C.G.A. 14-10-9).

Liabilities.

Members or shareholders, including lawyers who practice as shareholders in professional corporations (see 266 Ga. 844, 471 S.E.2d 885), not individually liable for debts or claims against association unless such individual has personally participated in transaction giving rise to debt or claim. (O.C.G.A. 14-10-7). Association assets not liable to attachment for individual debts of members or shareholders. (O.C.G.A. 14-10-16).

Laws applicable to relationship between person furnishing professional service and person receiving such service, including liability arising out of such professional service and laws governing confidential relationships, are not modified. (O.C.G.A. 14-10-7). Where applicable and not in conflict, laws governing corporations, not partnerships, apply. (O.C.G.A. 14-10-18).

Taxation.

Taxed as corporations under income tax act. See category 22 Taxation, topic 22.11 Income Tax.

Registered Office and Registered Agent.

Association must maintain registered office and registered agent. (O.C.G.A. 14-10-18, 14-2-501). See topic 2.03 Corporations, subhead Registered Office and Registered Agent.

Dissolution.

Assets of stock-type association applied first to payment of debts of association, secondly to shareholders. Assets of non-stock-type association distributed, or sold, and net proceeds distributed first to payment of association debts and, secondly, to members. (O.C.G.A. 14-10-15).

See also topic 2.03 Corporations, subhead Professional Corporations; category 13 Estates and Trusts, topic 13.15 Trusts, subhead Business Trust.

2.03 CORPORATIONS:

Georgia Business Corporation Code (O.C.G.A.tit. 14) ("Code") is based primarily upon Revised Model Business Corporation Act (ABA, 1984), copy of which is printed in Uniform and Model Acts section.

Digest below does not apply to nonprofit corporations or to special category of corporations, including cooperatives chartered by Secretary of State, banking, trust, insurance, railroad, canal, navigation, express and telegraph companies (O.C.G.A. 14-2-1701) or multi-level distribution companies (O.C.G.A. 10-1-15), with nonprofit and special category corporations subject to statutory changes effective July 1, 1989.

General Supervision.

Power to grant incorporation for normal business corporations and close corporations is vested in Secretary of State. (Corporations Division, 2 Martin Luther King, Jr. Drive, Suite 315, West Tower, Atlanta, Georgia 30334; website: http://sos.georgia.gov/Corporations/). Secretary of State also grants charters for banking, trust, insurance, railroad, canal, navigation, express and telegraph companies.

Purposes.

Every corporation incorporated has purpose of engaging in any lawful business unless more limited purpose specified in articles of incorporation. (O.C.G.A. 14-2-301).

Name.

Corporate name must include word corporation, company, incorporated, or limited or abbreviation corp., co., inc., or ltd., or words or abbreviations of like import in another language. Name must not contain any language implying organization for purpose not permitted by Code and articles of incorporation. Name must not be obscene. Name must not exceed 80 characters. (O.C.G.A. 14-2-401[a]). Name must be distinguishable upon records of Secretary of State from names of other corporations incorporated or authorized to transact business in state, corporate names reserved pursuant to Code, fictitious names adopted by foreign corporations authorized to transact business in state, corporate names of nonprofit corporations incorporated or authorized to transact business in state, names of limited partnerships or professional associations filed with Secretary of State, or names of limited liability corporations formed or authorized to do business in state. (O.C.G.A. 14-2-401[b]).Corporation may apply to Secretary of State for authorization to use name that is not distinguishable upon records of Secretary of State from other names of record. Secretary of State must authorize use of nondistinguishable name applied for if other corporation consents to use of name in writing and files with Secretary of State amendment to articles of incorporation changing its name to name that is distinguishable. (O.C.G.A. 14-2-401[c]).Corporation may use name (including fictitious name) of another domestic or foreign corporation that is used in state if other corporation is incorporated or authorized to transact business in state and proposed user has merged with other corporation, or proposed user has been formed by reorganization of other corporation, or other domestic or foreign corporation has taken steps required by Code to change its name to name that is distinguishable of record. (O.C.G.A. 14-2-401[d]).Issuance of name means that name is distinguishable for filing purposes or records of Secretary of State; it does not affect commercial availability of name. (O.C.G.A. 14-2-401[e]).

Reservation of Name.

Person may apply to reserve use of corporate name, including fictitious name for foreign corporation whose name is not available, (O.C.G.A. 14-2-401[b][3], 14-2-402), upon payment of $25 application fee (O.C.G.A. 14-2-122[6]). If name available, name is reserved for applicant's use for 30-day period or until articles of incorporation filed, whichever is sooner. Reservation may be renewed upon payment of application fee for one 30-day period. If name requested is unavailable, one may request new name within ten days of rejection notice without payment of additional fee. (O.C.G.A. 14-2-402). Person who has in effect name reservation may transfer reservation by notice to Secretary of State. (O.C.G.A. 14-2-402). Name reservation can be made by letter or online at www.sos.state.ga.us/corporations.

Term of Corporate Existence.

Corporations are granted perpetual duration and succession in their corporate names unless articles of incorporation or amendment thereto adopted on or after Apr. 1, 1969 provide otherwise. (O.C.G.A. 14-2-302).

Incorporators.

One or more persons may act as incorporator or incorporators of corporation by filing articles of incorporation with Secretary of State. (O.C.G.A. 14-2-201).

Articles of Incorporation.

Original and one exact or conformed copy required. (O.C.G.A. 14-2-120). Articles of incorporation signed by incorporator(s) or by Chairman of Board of Directors, if any, must set forth: (1) authorized name; (2) number of shares authorized; (3) street address and county of corporation's initial registered office and name of initial registered agent at that office; (4) name and address of each incorporator; and (5) mailing address of initial principal office. Articles of incorporation may set forth: (1) names and addresses of initial directors; (2) provisions not inconsistent with law regarding (a) purpose(s) for which corporation is organized, (b) management of business and regulation of affairs of corporation, (c) definition, limitation, and regulation of powers of corporation, its board of directors, and shareholders, (d) par value for authorized shares or classes of shares, and (e) imposition and extent of shareholder personal liability for debts of corporation upon specified conditions; (3) any provision under Code required or permitted to be set forth in bylaws; (4) provision eliminating or limiting personal liability of director to corporation or its shareholders for monetary damages for any action taken, or any failure to take any action, as director, except liability for any appropriation, in violation of duty, of any business opportunity of corporation, for acts or omissions which involve intentional misconduct or knowing violation of law, for unlawful distributions (O.C.G.A. 14-2-832), for improper personal benefit after date such provision becomes effective; and (5) provision permitting board of directors and individual directors, in addition to considering effects of any action on corporation or its shareholders, to consider interests of employees, customers, suppliers, and creditors of corporation, communities in which it is located and other factors such directors consider important, provided that such factors are discretionary to them and shall not be deemed to provide to any constituency any right to be considered. (O.C.G.A. 14-2-202). Articles of incorporation need not set forth general powers (O.C.G.A. 14-2-302) or emergency powers (O.C.G.A. 14-2-303, 14-2-202). See subhead General Powers of Corporations, infra.

Filing of Articles of Incorporation.

No later than next business day after filing articles of incorporation, incorporator must deliver notice of incorporation in prescribed form, along with $40 publication fee, to publisher of newspaper that is official organ of, or newspaper of general circulation (not less than 60% paid circulation) in, county where initial registered office of corporation is to be located. (O.C.G.A. 14-2-201.1). Notice must be published once a week for two consecutive weeks beginning within ten days of receipt of notice by newspaper. Failure to publish requisite notice does not invalidate incorporation of corporation or filing of articles of incorporation. (O.C.G.A. 14-2-201.1). To file articles of incorporation, incorporator must deliver to Secretary of State: (1) completed Secretary of State Form BR-227; (2) undertaking to publish notice of filing of articles of incorporation as required by O.C.G.A. 14-2-201.1(b) (O.C.G.A. 14-2-201.1); (3) one original and one exact or conformed copy of articles of incorporation signed by incorporator(s) (O.C.G.A. 14-2-120); and (4) filing fee of $100 (O.C.G.A. 14-2-122). Electronic filing permitted at http://corp.sos.state.ga.us/business/. (O.C.G.A. 14-2-120[i[). Unless delayed effective date is specified, corporate existence begins when articles of incorporation are filed. Secretary of State's filing of articles of incorporation is conclusive proof that incorporators satisfied all conditions precedent to incorporation except in proceeding by state to cancel or revoke incorporation or involuntarily dissolve corporation. (O.C.G.A. 14-2-203).

Correcting Filed Document.

Articles of correction may be filed with Secretary of State if filed documents contain incorrect statements or if documents were defectively executed, attested, sealed, verified or acknowledged. Articles of correction must: (1) describe document to be corrected or contain copy of document to be corrected; (2) specify incorrect statement and explain why it is incorrect or state reason execution was defective; and (3) correct incorrect statement or defective execution. Articles of correction are effective on effective date of document they correct except as to persons relying on uncorrected document and adversely affected by correction. (O.C.G.A. 14-2-124).

Incorporation Fee.

None. See subhead Filing Fees, infra.

Filing Fees.

Fees for documents filed with Secretary of State or penalties: (1) articles of incorporation, $100; (2) application for certificate of authority for foreign corporation to transact business, $225; (3) annual registration, $30; (4) penalty for late filing of annual registration, $25; (5) agent's statement of resignation, no fee; (6) certificate of judicial dissolution, no fee; (7) articles of dissolution or intent to dissolve, no fee; (8) application of withdrawal, no fee; (9) application for reservation of corporate name, $25; (10) civil penalty for each year or part thereof during which foreign corporation transacts business in state without certificate of authority, $500; (11) statement of change of address of registered agent, $5 per corporation but not less than $20; (12) application for reinstatement, $100; (13) certificate of conversion, $95 and (14) any other document required or permitted to be filed under Code, $20. (O.C.G.A. 14-2-122).

License To Do Business.

Corporate existence begins when articles of incorporation are filed unless delayed effective date is specified. (O.C.G.A. 14-2-203). For authority to transact business for foreign corporations, see subhead Foreign Corporations, infra.

Organization.

If articles of incorporation name initial directors, initial directors must hold organizational meeting at call of majority of initial directors to complete organization of corporation by appointing officers, adopting bylaws, and carrying on any other business brought. If articles of incorporation do not name initial directors, incorporator(s) shall hold organizational meeting at call of majority of incorporator(s) to elect directors and complete organization of corporation or to elect board of directors who shall have responsibility for completing organization of corporation. Any of organizational tasks required or permitted to be taken by incorporators at organizational meeting may be taken by written consents describing action taken and signed by incorporators. (O.C.G.A. 14-2-205). Organizational meeting may be held in or out of state. (O.C.G.A. 14-2-205).

Paid-in Capital Requirements.

None. Code no longer requires receipt of $500 for issuance of shares prior to beginning business. Requirements related to par value, stated capital and capital surplus upon issuance of shares have been deleted.

Amendment of Articles of Incorporation.

Unless articles of incorporation require otherwise, board of directors may amend articles of incorporation without shareholder action: (1) to extend duration of corporation; (2) to delete names and addresses of initial directors; (3) to delete name and address of initial registered agent or registered office if annual registration form is on file with Secretary of State; (4) to delete name and address of incorporator(s); (5) to delete mailing address of initial principal office if annual registration on file; (6) to change each issued or each issued and unissued authorized share of outstanding class into greater number of whole shares if corporation has only shares of that class outstanding; (7) to change or eliminate par value of each issued and unissued share of outstanding class of stock if corporation has only shares of that class outstanding; (8) to change corporate name; or (9) to make any change expressly permitted by Code to be made without shareholder action. (O.C.G.A. 14-2-1002).

Majority vote of shareholders generally required for amendment, unless greater vote or vote by voting groups required by articles of incorporation, board of directors, or Code. (O.C.G.A. 14-2-1003). Shareholders of class are entitled to vote as separate voting group on proposed amendment to articles of incorporation if amendment would: (1) increase or decrease aggregate number of authorized shares of class (unless articles specifically authorize increase or decrease without shareholder vote); (2) effect exchange or reclassification of all or part of shares of class into shares of another class; (3) effect exchange or reclassification or create right of exchange of all or part of shares of another class into shares of class; (4) change designation, rights, preferences, or limitations of all or part of shares of class; (5) change shares of all or part of class into different number of shares of same class; (6) create new class of shares having rights or preferences to distributions or to dissolution that are prior, superior, or substantially equal to shares of class; (7) increase rights, preferences, or number of authorized shares of any class that, after giving effect to amendment, would have rights or preferences with respect to distributions or dissolution that are prior, superior, or substantially equal to shares of class; (8) limit or deny existing preemptive right of all or part of shares of class; (9) cancel or otherwise affect rights to distributions or dividends that have accumulated but not yet declared on all or part of shares of class; or (10) cancel, redeem, or purchase all or part of shares of class. (O.C.G.A. 14-2-1004).

Amendment accomplished by filing articles of amendment with Secretary of State setting forth: (1) name of corporation; (2) amendment; (3) provisions for implementing amendment if amendment provides for exchange, reclassification or cancellation of issued shares; (4) date of each amendment's adoption; (5) statement that shareholder action was not required, or that amendment was duly approved by shareholders in accordance with O.C.G.A. 14-2-1003. (O.C.G.A. 14-2-1006).

Restatement of Articles of Incorporation.

Corporation may restate articles of incorporation by action of board of directors with or without shareholder approval. Restatement may include one or more amendments to articles, but if restatement includes amendment requiring shareholder approval, it must be adopted as provided in O.C.G.A. 14-2-1003. Restatement accomplished by filing articles of restatement with Secretary of State setting forth name of corporation and text of restated articles of incorporation including, or accompanied by certificate setting forth, following information: (1) whether restatement contains amendment to articles requiring shareholder approval, and, if it does not, that board of directors adopted restatement; or (2) information required by O.C.G.A. 14-2-1006 if restatement contains amendment to articles requiring shareholder approval. (O.C.G.A. 14-2-1007).

Increase or Decrease of Authorized Capital Stock.

If authorized capital stock to be increased and corporation has only one class of outstanding stock, increase in authorized shares may be accomplished by amendment by action of board of directors. (O.C.G.A. 14-2-1002). Other amendment to articles of incorporation must be approved by shareholders. (O.C.G.A. 14-2-1003).

Bylaws.

May contain any provision for regulation and management of corporation not inconsistent with law or articles of incorporation. Incorporators or directors must adopt initial bylaws for corporation. (O.C.G.A. 14-2-206). Bylaws adopted by incorporators or board of directors prior to or contemporaneously with issuance of corporation's shares constitute bylaws adopted by shareholders. (O.C.G.A. 14-2-206[a]). Bylaws adopted by incorporators or board of directors prior to issuance of corporation's shares may be amended by incorporators or board of directors prior to issuance of corporation's shares. (O.C.G.A. 14-2-1020[d]). Thereafter, directors may amend or repeal bylaws or adopt new bylaws unless such power is reserved to shareholders in articles of incorporation or in Code or unless shareholders, in amending or repealing particular bylaw, provide expressly that directors may not amend or repeal that bylaw. Shareholders may amend or repeal bylaws or adopt new bylaws. Bylaw limiting authority of directors or establishing staggered terms for directors may be adopted, amended, or repealed only by shareholders. (O.C.G.A. 14-2-1020[d]). Bylaws may also be amended to increase quorum or voting requirements for shareholders or for directors. (O.C.G.A. 14-2-1021, -1022).

Shares of Stock.

Corporation may issue one or more classes of shares. If more than one class of shares is authorized, articles of incorporation must prescribe distinguishing designation for each class and, prior to issuance of shares of class, preferences, limitations, and relative rights of that class must be described in articles of incorporation. (O.C.G.A. 14-2-601). All shares within class must have identical preferences, limitations, and relative rights except as varied among series. (O.C.G.A. 14-2-602). Articles of incorporation must authorize one or more classes of shares that together have unlimited voting rights and must authorize one or more classes of shares that together are entitled to receive net assets of corporation upon dissolution. Voting rights and rights upon dissolution need not be vested in same class. Classes of shares may also have following characteristics: (1) conditional or limited voting rights (except to extent limited by Code); (2) redeemable, exchangeable or convertible (as specified in articles of incorporation) either at option of corporation, shareholder, another person, or upon designated event; (3) rights to distributions or dividends; or (4) preferences with respect to distributions upon grant of dividends or upon dissolution. (O.C.G.A. 14-2-601).

Articles of incorporation may empower directors to determine, in whole or in part, preferences, limitations and relative rights (including voting rights) of any class of shares before issuance of any shares of that class or one or more series within class, and may designate number of shares within that series before issuance of any shares of that series. (O.C.G.A. 14-2-602). Before issuing any shares of class or series designated by directors, corporation must file amendment with Secretary of State, effective without shareholder action, setting forth: (1) name of corporation; (2) text of amendment determining terms of class or series of shares; (3) date amendment was adopted; and (4) statement that amendment was duly adopted by directors. (O.C.G.A. 14-2-602).

Corporation may issue number of shares of each class or series authorized by articles of incorporation. Reacquisition, redemption, or conversion of outstanding shares is subject to limitations on distributions generally. (O.C.G.A. 14-2-603). See subhead Distributions, infra. If at time corporation issues shares or other securities that are redeemable or exchangeable or convertible into shares of another class, corporation does not have authorized and unissued shares sufficient to satisfy rights, granting of rights is not invalid solely by reason of lack of sufficient authorized but unissued shares to honor exercise of rights. (O.C.G.A. 14-2-601).

Corporation may issue rights, options, or warrants with respect to shares of corporation whether or not in connection with issuance and sale of its shares or other securities. Directors shall determine terms upon which rights, options, or warrants are issued, their form and content, and consideration for issuance, and terms relating to exercise, including timing, conditions precedent and price for exercise. (O.C.G.A. 14-2-624). Granting of such rights is not invalid solely by reason of lack of sufficient authorized but unissued shares to honor exercise of such rights. (O.C.G.A. 14-2-624).

Stock Certificates.

If share is represented by certificate, certificate must state on its face: (1) name of issuing corporation and that it is organized under state law; (2) name of person to whom issued; and (3) number and class of shares and designation of series, if any. (O.C.G.A. 14-2-625[b]). Shares may

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be authorized without certificates. (O.C.G.A. 14-2-626).

If corporation is authorized to issue different classes of shares or different series within class, reference on certificate to state of incorporation is treated as reference to articles of incorporation and its provisions governing designations, relative rights, preferences and limitations applicable to each class and variations in rights, preferences, and limitations determined for each series and authority of directors to determine variations for future series. Certificates may, however, describe designations, relative rights, preferences, and limitations or certificate may state that corporation will furnish shareholder this information upon request. Certificates must contain either original signature or signature by facsimile of one or more officers designated in bylaws or by directors. (O.C.G.A. 14-2-625).

If shares are issued without certificates, corporation, within reasonable time after issue or transfer of shares without certificates, must send shareholder written statement containing information required on certificates by O.C.G.A. 14-2-625 and, if applicable, O.C.G.A. 14-2-627. (O.C.G.A. 14-2-626). If articles of incorporation, bylaws, agreement among shareholders, or agreement between shareholders and corporation restrict transfer or registration of transfer of shares of corporation, restriction on transfer must be conspicuously noted on face of certificate or on face of information statement for shares issued without certificates in order to be enforceable against person without knowledge of restriction. Authorized restriction not noted on face of certificate or information statement is enforceable against person with knowledge of restriction. (O.C.G.A. 14-2-627).

Issuance of Stock.

Directors have power, unless power is reserved to shareholders in articles of incorporation, to fix consideration for shares. Consideration for shares may consist of any tangible or intangible property or benefit to corporation including cash, promissory notes, services performed, contracts for services to be performed, or other securities of corporation. Prior to issuance of shares, directors must determine that consideration received or to be received for shares to be issued is adequate. Once corporation receives consideration set by directors, shares issued therefor are fully paid and nonassessable. (O.C.G.A. 14-2-621). If corporation issues shares in exchange for contract for future services or benefits or promissory note, corporation may place such shares in escrow or make other arrangements to restrict transfer of such shares. If services are not performed, note is not paid, or benefits are not received, shares escrowed or restricted and distributions credited may be canceled in whole or in part. (O.C.G.A. 14-2-621[e]).

Transfer of Stock.

Uniform Commercial Code generally governs. Restrictions on transfer of stock may be accomplished through articles of incorporation, bylaws, agreement among shareholders, or agreement between shareholders and corporation. Restriction on transfer or registration does not affect shares issued before restriction was adopted unless holders of shares are parties to restriction agreement or voted in favor of restriction. (O.C.G.A. 14-2-627[a]). Further, restrictions on transfer or registration of shares are valid and enforceable against holders or transferees if restriction is authorized by Code and its existence is noted conspicuously on front or back of certificate or is contained in information statement for shares issued without certificate. (O.C.G.A. 14-2-627[b]). Authorized restriction on transfer or registration of shares is one designed to: (1) maintain corporation's status when it is dependent on number or identity of its shareholders; (2) preserve exemptions under federal or state securities law; or (3) accomplish any other reasonable purpose. (O.C.G.A. 14-2-627[c]).

Restriction on transfer or registration of transferred shares may: (1) obligate shareholder to offer first to corporation or other persons opportunity to acquire restricted shares; (2) obligate corporation or other persons to acquire restricted shares; (3) require corporation, holders of any class of its shares, or another person to approve transfer of restricted shares; or

(4) prohibit transfer of restricted shares to designated persons or classes of persons. Restrictions on transfer of shares or registration of transfer of shares also applies to securities convertible into, or carrying right to subscribe for or acquire shares. (O.C.G.A. 14-2-627[d]).

Corporation Reacquisition of Stock.

Corporation may acquire its own shares which then constitute authorized but unissued shares, unless articles of incorporation provide that reacquired shares become treasury shares or prohibit reissuance. Board of directors may amend articles of incorporation without shareholder action to provide that reacquired shares become treasury shares or to reduce amount of authorized shares for reacquired shares. (O.C.G.A. 14-2-631).

Uniform Securities Ownership by Minors Act not adopted.

Uniform Simplification of Fiduciary Security Transfers Act adopted (O.C.G.A. 53-12-320—53-12-330), and expressly stated to govern in case of inconsistency with Uniform Commercial Code (O.C.G.A. 11-10-105).

Stock Transfer Tax.

None.

Preemptive Rights.

Shareholders of corporations (other than corporations described in following sentence), do not have preemptive rights to acquire corporation's unissued or treasury shares, if any, except to extent expressly provided in articles of incorporation. Shareholders of following corporations have preemptive rights unless their articles of incorporation expressly provide otherwise: (1) corporations electing statutory close corporation status and (2) corporations in existence on July 1, 1989, whose shareholders had such rights as of that date or whose articles of incorporation have been restated or amended on or after that date with notice to shareholders that such restatement or amendment would create preemptive rights. (O.C.G.A. 14-2-630). O.C.G.A. 14-2-630 outlines basic preemptive rights of shareholders. Preemptive rights accompany all securities that are convertible into, or carry right to acquire, shares subject to preemptive rights. (O.C.G.A. 14-2-630). Shares issued in violation of preemptive rights which are otherwise validly issued and outstanding are not subject to cancellation by reason of preemptive rights violation. (O.C.G.A. 14-2-630). Statute of limitations for enforcing any liability for violation of preemptive rights is three years from discovery or notice of violation, but in no event more than five years after issuance giving rise to violation. (O.C.G.A. 14-2-630).

Shareholders' Actions.

Derivative actions permitted in accordance with O.C.G.A. 14-2-740 to -747. In order to bring derivative action, shareholder must: (1) have been shareholder of corporation at time of act or omission complained of or have become shareholder through transfer by operation of law from one who was shareholder at that time; and (2) fairly and adequately represent interests of corporation in enforcing right of corporation. (O.C.G.A. 14-2-741). Actions expressly authorized against directors for violation of duties or unlawful transactions. (O.C.G.A. 14-2-831). Shareholder may maintain direct action if shareholder has been injured in way which is different from other shareholders or independently of corporation. (264 Ga. 817, 450 S.E.2d 814).

Shareholders' Liabilities.

Purchaser of corporation's shares shall have no obligation to corporation or its creditors other than obligation to pay consideration for which shares were authorized to be issued or as specified in subscription agreement. Unless otherwise provided in articles of incorporation, shareholder of corporation is not personally liable for acts or debts of corporation except by reason of shareholder's own acts or conduct. (O.C.G.A. 14-2-622).

Shareholders' Meetings.

May be held within or without state as provided in accordance with bylaws. If no location specified in accordance with bylaws, meetings must be held at corporation's principal office. Annual meeting required, but failure to hold annual meeting in accordance with bylaws does not affect validity of any corporate action. (O.C.G.A. 14-2-701). Special meetings shall be held at call or demand of one of following: (1) directors or person or persons authorized to do so by articles of incorporation or bylaws; (2) holders of at least 25% of votes entitled to be cast on issue proposed to be considered at special meeting, or greater or lesser percentage as provided by articles of incorporation or bylaws; or (3) in case of corporation having 100 or fewer shareholders of record, 25% of shareholders or such lesser percentage as may be provided in articles of incorporation or bylaws, who are entitled to vote on any issue at proposed special meeting. (O.C.G.A. 14-2-702). Demand for special meeting may be revoked if revocation received in writing by corporation before call of special meeting. (O.C.G.A. 14-2-702). Notice of meetings stating date, time, and place must be given not less than ten and no more than 60 days before meeting to each shareholder entitled to vote at meeting unless waived in writing by shareholder. (O.C.G.A. 14-2-705; O.C.G.A. 14-2-706). Any shareholder may waive notice either before or after meeting and shareholder's attendance at meeting is generally waiver to any objection regarding lack of notice or defective notice of meeting unless shareholder objects to holding meeting. (O.C.G.A. 14-2-706). Notice of annual meeting need not disclose purpose(s) of meeting, unless Code or articles of incorporation require otherwise. Notice of special meetings, however, must include description of purpose(s) for meeting. (O.C.G.A. 14-2-705[c]).

Proxies permitted, but expire after 11 months unless otherwise provided in proxy. Execution of proxy may be accomplished by any reasonable means, including facsimile. Appointment of proxy is revocable by shareholder unless appointment form conspicuously states that it is irrevocable and appointment is coupled with interest. Appointments coupled with interest include appointment of: (1) pledgee; (2) person who purchased or agreed to purchase shares; (3) creditor of corporation who extended credit under terms requiring appointment; (4) employee of corporation whose contract requires appointment; or (5) party to voting agreement created under O.C.G.A. 14-2-731. (O.C.G.A. 14-2-722). Appointment made irrevocable when coupled with interest (O.C.G.A. 14-2-722[d]) is revoked when interest with which appointment is coupled is extinguished. Death or incapacity of shareholder appointing proxy does not affect right of corporation to accept proxy's authority unless notice of death or incapacity is received before proxy exercises authority. Transferee for value of shares subject to irrevocable appointment may revoke appointment if transferee did not know of its existence when it acquired shares and existence of irrevocable appointment was not noted conspicuously on certificate representing shares or on information statement for shares issued without certificates. (O.C.G.A. 14-2-722).

Each outstanding share, regardless of class, is entitled to one vote on each matter voted on at shareholders' meeting except as provided in Code or except as provided by articles of incorporation. (O.C.G.A. 14-2-721[a]). No cumulative voting unless expressly provided in articles of incorporation. Directors are elected by plurality of votes cast by shares entitled to vote (when quorum present) unless articles of incorporation provide otherwise. (O.C.G.A. 14-2-728[a]).

Certain shareholder action may be taken without meeting by unanimous written consent of all shareholders entitled to vote or, if permitted by articles of incorporation, by written consent of number of shares otherwise necessary to authorize or take action at meeting. (O.C.G.A. 14-2-704[a]). No written consent is valid unless consenting shareholder has been furnished same material that, under Code, would have been required to be sent in notice of meeting including notice of any applicable dissenter's rights of appraisal or written consent contains express waiver of right to receive material otherwise required to be furnished. (O.C.G.A. 14-2-704[b]). If articles of incorporation provide for cumulative voting, action with respect to any election of directors may be taken without meeting only by unanimous written consent signed by all shareholders entitled to vote on election of directors. (O.C.G.A. 14-2-704[c]). Written consent action of shareholders has effect of shareholder vote taken at meeting of shareholders and may be described as such in any document. (O.C.G.A. 14-2-704[e]). Notice of nonunanimous action must be given to shareholders who did not participate in written consent within ten days after action taken without meeting. (O.C.G.A. 14-2-704[f]). Written consents must bear date of each shareholder's signature. (O.C.G.A. 14-2-704[a]). No written consent shall be effective unless corporation receives sufficient number of consents to take action within 60 days of earliest date appearing on any of such consents. (O.C.G.A. 14-2-704[d]). Written consent may be revoked by writing to that effect received by corporation prior to its receipt of unrevoked written consents sufficient in number to take corporate action. (O.C.G.A. 14-2-704[d]). Consent delivered to corporation shall become effective on date of delivery of last consent required to take action or such later date as it may provide. (O.C.G.A. 14-2-704[e]). If Code requires notice of action by shareholders be given to shareholders not eligible to vote and action is taken without meeting, corporation must give its shareholders not eligible to vote written notice of action within ten days of taking action without meeting. Notice to such nonvoting shareholders as to shareholder consent actions must contain or be accompanied by same material that would have been required to be sent to nonvoting shareholders in notice of meeting at which proposed action would have been submitted to shareholders for action. (O.C.G.A. 14-2-704[g]). Shareholder consent, demand, or notice by electronic transmission is deemed written, signed, and dated for purposes of chapter O.C.G.A. 14-2, provided that corporation can determine both that electronic transmission was sent by such shareholder and date on which transmission was sent, which is then deemed to be date on which such consent, request, demand, or notice was signed. (O.C.G.A. 14-2-704[h]).

After fixing record date for meeting, corporation shall prepare alphabetical list of names of all its shareholders who are entitled to notice of shareholders' meeting. Shareholder list must be available for inspection by any shareholder, his or her agent, or his or her attorney at time and place of meeting. (O.C.G.A. 14-2-720). Corporation may establish procedure (subject to O.C.G.A. 14-2-723) by which beneficial owners of shares that are registered in name of nominee are recognized by corporation as shareholders. (O.C.G.A. 14-2-723).

For quorum purposes, share is deemed present at meeting and for adjournments of that meeting (unless new record date is set or must be set for adjourned meeting), once share is represented for any purpose at meeting other than purpose of objecting to holding meeting or transacting business at meeting. Unless Code or articles of incorporation provide otherwise, majority of shares entitled to be cast on matter by voting group constitutes quorum of that voting group for action on that matter. Shares entitled to vote as separate voting group may take action on matter at meeting only if quorum of those shares exist with respect to that matter. If quorum exists, action on matter by voting group, as general rule, is approved if votes cast within voting group favoring action exceed votes cast opposing action, unless articles of incorporation, bylaw adopted by shareholders or Code require greater number of affirmative votes. (O.C.G.A. 14-2-725). Election of directors governed by O.C.G.A. 14-2-728. If Code or articles of incorporation provide for voting by single voting group on matter, action on that matter is taken when voted upon by particular voting group. If Code or articles of incorporation provide for voting by two or more voting groups on matter, action on that matter is taken only when voted upon by each of those groups counted separately. Action may be taken by one voting group on matter even though no action is taken by another voting group entitled to vote on matter. (O.C.G.A. 14-2-726). Articles of incorporation or bylaw adopted under O.C.G.A. 14-2-1021 may provide for greater or lesser quorum (not less than one-third) or greater voting requirement for shareholders (or voting groups of shareholders) than is provided by Code. Amendment to articles of incorporation or bylaws that changes or deletes greater quorum or voting requirement must meet same quorum requirements and must be adopted by same vote and voting groups required to take action under quorum and voting requirements prescribed in provision being amended. (O.C.G.A. 14-2-727). Holders of majority of voting shares represented at meeting, whether or not quorum is present, may adjourn such meeting from time to time. (O.C.G.A. 14-2-729).

Directors are elected by plurality of votes cast by shares entitled to vote in election at meeting at which quorum is present, unless otherwise provided for in articles of incorporation. No cumulative voting unless articles of incorporation provide otherwise. Shares otherwise entitled to be voted cumulatively at particular meeting may not be voted cumulatively unless meeting notice or proxy statement accompanying notice states that cumulative voting will be in effect or unless shareholder who has right to cumulate votes gives notice to corporation of intent to cumulate votes during meeting. (O.C.G.A. 14-2-728).

Voting Trusts.

One or more shareholders may create voting trust by signing agreement setting out provisions of trust and transferring their shares to trustee. Once voting trust agreement is signed, trustee must prepare list of names and addresses of all owners of beneficial interests in trust together with number and class of shares each transferred to trust; trustee must deliver copy of list and agreement to corporation's principal office. Voting trusts are valid for no more than ten years, but may be extended. (O.C.G.A. 14-2-730).

Shareholders' Agreements.

Two or more shareholders may agree to exercise their voting rights in accordance with written and signed agreement. Duration of agreement may not exceed 20 years. Agreements are renewable for periods not in excess of 20 years. Voting agreements are specifically enforceable. (O.C.G.A. 14-2-731). Voting agreements created under O.C.G.A. 14-2-731 are not subject to provisions applicable to voting trusts. (O.C.G.A. 14-2-730). Shareholder agreement must be set forth in articles of incorporation or in written agreement approved by all shareholders. Existence of shareholder agreement shall be noted conspicuously upon front or back of each share certificate or on information statement required by O.C.G.A. 14-2-626(b). If corporation has shares outstanding represented by certificates, corporation shall recall such certificates and issue substitute certificates that comply with Code. Failure to give notice shall not affect validity of shareholder agreement or actions taken pursuant to it. Purchaser deemed to have notice if Code is followed. Remedy for purchaser who takes without notice is right to rescind purchase within 90 days of discovery of agreement or two years after purchase. (O.C.G.A. 14-2-732). To extent that discretion or power of directors is controlled by any such shareholder agreement, directors are relieved from liability for managerial acts or omissions imposed on directors by law and liability is imposed upon person or persons in whom discretion or power is vested by agreement. (O.C.G.A. 14-2-732). Amending shareholder voting agreement requires approval of all shareholders unless agreement provides otherwise. Unless shares of corporation are listed on national securities exchange or regularly quoted in markets maintained by securities dealers or brokers, no written agreement by all shareholders which relates to any phase of affairs of corporation shall be invalid as among shareholders on ground that it eliminates directors, authorizes director proxies or weighted voting rights for directors, restricts discretion or powers of board of directors in its management of corporation and is not contrary to public policy, or requires dissolution of corporation at request of shareholder or happening of specified event or contingency. (O.C.G.A. 14-2-732).

Directors.

Minimum number of directors is one individual. Articles of incorporation or bylaws may authorize shareholders or directors to fix or change number of directors or may establish variable range for size of board of directors. After initial election or appointment of directors, directors are elected at each annual shareholders' meeting unless their terms are staggered pursuant to O.C.G.A. 14-2-806. If corporation has cumulative voting, any amendment of bylaws decreasing number or minimum number of directors must be adopted by shareholders, and no amendment of either articles of incorporation or bylaws decreasing number or minimum number of directors shall be effective when number of shares voting against proposal for decrease would be sufficient to elect director if voted cumulatively at annual election. (O.C.G.A. 14-2-803). Articles of incorporation or bylaws may set minimum qualifications for directors, but Code only requires that directors be natural persons who are 18 years of age or older. (O.C.G.A. 14-2-802). Directors are not required to be residents of State of Georgia. (O.C.G.A. 14-2-802). Term of initial director expires at first shareholders' meeting at which directors are elected. Unless terms of directors are staggered pursuant to O.C.G.A. 14-2-806, terms of all directors expire at next annual shareholders' meeting. Interim directors shall be elected for unexpired term of their predecessors in office. Despite expiration of director's term, director serves until successor is elected and qualifies or until there is decrease in number of directors. (O.C.G.A. 14-2-805).

Corporation may establish staggered board of directors through articles of incorporation or through bylaw adopted by shareholders. Staggered board may consist of two or three groups with each group containing one-half or one-third of total of directors. (O.C.G.A. 14-2-806). When staggered board of directors is first implemented, terms of directors in first group expire at first annual shareholders' meeting after their election, terms of second group expire at second annual shareholders' meeting after their election, and terms of third group, if any, expire at third annual shareholders' meeting after their election. Thereafter, directors are chosen for term of two or three years depending on number of groups of directors. (O.C.G.A. 14-2-806). Unless articles of incorporation or bylaw approved by shareholders provides otherwise, vacancy on board of directors may be filled by: (1) shareholders; (2) or board of directors; or (3) majority of board of directors if number of remaining directors is less than quorum. If vacant office on board was held by director elected by voting group, only that voting group or remaining directors elected by that voting group are entitled to fill vacancy. (O.C.G.A. 14-2-810[b]).

Directors may create one or more committees and appoint members of board of directors to serve on those committees unless articles of incorporation or bylaws provide otherwise. Each committee may consist of one or more board members who serve at pleasure of board of directors. Board of director meetings and committee meetings governed by O.C.G.A. 14-2-820 to -824. Committee of board of directors may not: (1) approve or propose to shareholders action that Code requires shareholders to approve; (2) fill vacancies on board of directors or on any of its committees; (3) amend articles of incorporation; (4) adopt, amend, or repeal bylaws; or (5) approve plan of merger not requiring shareholder approval. (O.C.G.A. 14-2-825).

Directors' Meetings.

Regular or special meetings may be held within or without state. Unless provided otherwise by articles of incorporation or bylaws, board of directors or committees may conduct regular or special meeting through use of any means of communication by which all directors may hear one another simultaneously; any director participating in such meeting is deemed present in person at meeting. (O.C.G.A. 14-2-820). Regular meetings may be held with or without notice except as provided in bylaws or articles of incorporation. Unless articles of incorporation or bylaws provide longer or shorter period, special meetings of board of directors must be preceded by at least two days' notice of date, time, and place of meeting, but notice need not describe purpose unless required by articles of incorporation or bylaws. (O.C.G.A. 14-2-822). Quorum of board of directors consists of majority of fixed number of directors if corporation has fixed board size or majority of number of directors prescribed or if no number is prescribed, majority of number in office immediately before meeting begins if corporation has variable-range size board; however, Code, articles of incorporation, or bylaws may require greater number for quorum of directors. Articles of incorporation or bylaws may provide lower quorum but not less than one-third of fixed or prescribed number of directors. (O.C.G.A. 14-2-824). Written agreement meeting requirements of O.C.G.A. 14-2-731 may provide director with more or less than one vote, and, if so provided, references in Code to majority or other proportion shall refer to votes and not membership. (O.C.G.A. 14-2-824). Directors may waive any required notice before or after date and time stated in notice. Waiver must be in writing, signed, and delivered to corporation for inclusion in minutes or filing with corporate records. Director's attendance at or participation in meeting waives required notice to him unless director, at beginning of meeting, raises objection to lack of notice and does not thereafter vote at meeting. (O.C.G.A. 14-2-823). Unless articles of incorporation or bylaws provide otherwise, board action required or permitted by Code may be taken by unanimous written consent of directors and such consent action shall have effect of meeting and may be described as such in any document. (O.C.G.A. 14-2-821).

Powers and Duties of Directors.

Business and affairs of corporation are managed by directors, subject to provisions of articles of incorporation, bylaws, or shareholders' agreements. Each corporation must have board of directors except as provided in provisions governing statutory close corporations (O.C.G.A. 14-2-901 to -943) or as provided in written agreement pursuant to O.C.G.A. 14-2-732 (O.C.G.A. 14-2-801).

Liabilities of Directors.

Directors must discharge their duties as director or as member of committee: (1) in good faith belief in best interest of corporation; and (2) with care ordinary prudent person in like position would exercise under similar circumstances. In discharging duties, director may rely on information, opinions, reports, or statements, including financial statements and other financial data if prepared or presented by: (1) one or more officers or employees of corporation whom director reasonably believes to be reliable and competent in matters presented; (2) legal counsel, public accountants, investment bankers, or other persons as to matters director reasonably believes are within person's professional or expert competence; or (3) committee of board of directors of which director is not member if director reasonably believes committee merits confidence. Director may not rely upon information if director has knowledge concerning matter in question that makes reliance unwarranted. If director performs duties of his or her office in compliance with above, director is not liable to corporation or to shareholders for any action taken as director or any failure to take action. (O.C.G.A. 14-2-830).

Derivative proceeding may be brought within four years from time cause of action accrued by shareholder against one or more directors or officers of corporation: (1) to account for neglect or failure or other violation of his or her duties in management of corporation or disposition, acquisition, transfer or waste of corporate assets or misappropriation of corporate opportunity; or (2) to enjoin or set aside unlawful conveyance, assignment or transfer of corporate assets. (O.C.G.A. 14-2-831).

Within certain limitations, corporation may limit or eliminate personal liability of director to corporation or shareholders by provision in articles of incorporation. See subhead Articles of Incorporation (O.C.G.A. 14-2-202), supra.

Director may be personally liable for deceit for false statements in corporate documents made or authorized by director. (130 Ga. App. 407, 203 S.E.2d 597). Director who votes for or assents to distribution made in violation of O.C.G.A. 14-2-640 or articles of incorporation is personally liable to corporation for amount of illegal distribution in excess of amount allowed if it is established that director did not perform duties in compliance with O.C.G.A. 14-2-830. (O.C.G.A. 14-2-832). Director who is held liable for unlawful distribution is entitled to contribution from every other director who could otherwise be held liable under O.C.G.A. 14-2-832 and from each shareholder for amount shareholder accepted knowing distribution was made in violation of O.C.G.A. 14-2-640 or in violation of articles of incorporation. Statute of limitations for challenging unlawful distribution is two years from date on which effect of distribution was measured. (O.C.G.A. 14-2-832).

Officers.

Corporation has officers described in bylaws or appointed by directors in accordance with bylaws. Specific officer titles are not required. (O.C.G.A. 14-2-840). Duties of each officer are set in bylaws or prescribed by directors or by direction of officer authorized by directors to prescribe duties of other officers. (O.C.G.A. 14-2-841). Unless otherwise provided by articles of incorporation, bylaws or resolution of board of directors, chief executive officer (or president if no chief executive officer) of corporation has authority to conduct all ordinary business on behalf of corporation and execute any contract for which Code does not require board or shareholder approval. (O.C.G.A. 14-2-841). Same individual may simultaneously hold more than one office in corporation. (O.C.G.A. 14-2-840). Bylaws or directors must delegate to one of officers responsibility for preparing minutes of directors' and shareholders' meetings and for authenticating records of corporation. Duly appointed officer may appoint one or more officers or assistant officers if authorized by bylaws or directors. (O.C.G.A. 14-2-840). Appointment of officer does not itself create contract right. (O.C.G.A. 14-2-844). Directors may remove any officer at any time with or without cause. (O.C.G.A. 14-2-843). Unless bylaws provide otherwise, any officer or assistant officer appointed by officer pursuant to O.C.G.A. 14-2-840(b) may be removed at any time with or without cause by any officer having authority to appoint such officer or assistant officer. (O.C.G.A. 14-2-843).

Liabilities of Officers.

Officer with discretionary authority must discharge duties: (1) in manner believed in good faith to be in best interests of corporation; and (2) with care ordinary prudent person in like position would exercise under similar circumstances. When discharging duties as officer, officer is entitled to rely on information, opinions, reports, or statements, including financial statements and other financial data if prepared or presented by: (1) one or more officers or employees of corporation whom officer reasonably believes to be reliable and competent in matters presented; or (2) legal counsel, public accountants, investment bankers, or other persons as to matters officer reasonably believes are within person's professional or expert competence. Officer may not rely upon information if officer has knowledge concerning matter which would make reliance unwarranted. If officer performs duties in compliance with O.C.G.A. 14-2-842, officer is not liable to corporation or to shareholders for any action taken as officer. (O.C.G.A. 14-2-842). Officer may be personally liable for deceit for false statement in corporate document made or authorized by officer. (130 Ga. App. 407, 203 S.E.2d 597).

Indemnification.

Directors.

Corporation may generally indemnify director against liability incurred in legal proceeding if director conducted self in good faith and reasonably believed conduct in official capacity was in best interests of corporation or, if conduct not in official capacity, not opposed to best interests of corporation, and, in case of criminal proceeding, had no reasonable cause to believe conduct unlawful. (O.C.G.A. 14-2-851). Corporation may not indemnify director in connection with proceeding by or in right of corporation in which director was adjudged liable to corporation or in connection with any other proceeding in which director was adjudged liable on basis that personal benefit was improperly received by director, except for reasonable expenses incurred if standard of conduct met. (O.C.G.A. 14-2-851). Mandatory indemnification against reasonable expenses incurred is available to one who is or was director of corporation for situations in which director or former director was successful on merits or otherwise successful in defense of any proceeding to which director was party because he or she is or was director. (O.C.G.A. 14-2-852). If authorized by articles of incorporation, bylaw, contract, resolution approved by shareholders by majority of votes entitled to be cast by persons other than interested directors, corporation may indemnify or obligate itself to indemnify director made party to proceeding, including proceeding brought by or in right of corporation, without regard to other limitations in Code, except that corporation may not indemnify director for any liability incurred in proceeding in which director is adjudged liable to corporation or is subjected to injunctive relief in favor of corporation for any of following situations: (1) for any appropriation, in violation of his or her duties, of any business opportunity of corporation; (2) for acts or omissions which involve intentional conduct or knowing violation of law; (3) for types of liability set forth in O.C.G.A. 14-2-832 (unlawful distributions) or (4) for any transaction from which director received improper personal benefit. (O.C.G.A. 14-2-856). Code also permits corporation before final disposition of proceeding to advance expenses to directors who are parties to proceedings because he or she is director if: (1) director affirms in writing that director believes, in good faith, that he or she has met relevant standard of conduct in O.C.G.A. 14-2-851 or that proceeding involves conduct for which liability has been eliminated under articles of incorporation as authorized by O.C.G.A. 14-2-202; and (2) director undertakes, in writing, to repay any advances if it is ultimately determined that director is not entitled to indemnification. (O.C.G.A. 14-2-853, 856).

Director of corporation who is party to proceeding because he or she is director may apply for indemnification or advance of expenses to court conducting proceeding or to another court of competent jurisdiction, and court shall order indemnification or advance of expenses if: (1) director is entitled to indemnification under Code; or (2) in view of relevant circumstances it is fair and reasonable to indemnify director or advance expenses to director. (O.C.G.A. 14-2-854).

Corporation may not indemnify director pursuant to O.C.G.A. 14-2-851 unless corporation is authorized to make such indemnification and corporation has made determination in specific case that indemnification of director is permissible under circumstances because director has met relevant standard of conduct set forth in O.C.G.A. 14-2-851. Determination of whether corporation may indemnify director may be made: (1) if there are two or more disinterested directors, by majority vote of disinterested directors or committee of two or more disinterested directors appointed by majority of disinterested directors; or (2) by special legal counsel appointed in manner prescribed by statute; or (3) by holders of shares not owned by or voted under control of interested director. (O.C.G.A. 14-2-855).

Officers, Employees and Agents.

Corporation may indemnify and advance expenses to officer who is party to proceeding to same extent as director and, if officer is not director or officer is party to proceeding on basis of act or omission committed solely as officer, to such further extent as may be provided by articles of incorporation, bylaws, resolution of board of directors or contract except for liability arising out of conduct described in statute. (O.C.G.A. 14-2-857). Officer of corporation is entitled to mandatory indemnification under O.C.G.A. 14-2-852 and may apply to court to procure indemnification under O.C.G.A. 14-2-854 to same extent as director. (O.C.G.A. 14-2-857). See subhead Directors, supra. Corporation may also indemnify and advance expenses to employee or agent who is not director to extent provided for by articles of incorporation, bylaws, general or specific action of directors or contract and not inconsistent with public policy. (O.C.G.A. 14-2-857). Regardless of whether corporation would have power to indemnify officer, director, employee, or agent, corporation may purchase and maintain insurance on behalf of individual who is or was director, officer, employee, or agent of corporation. (O.C.G.A. 14-2-858).

Directors' Conflicting Interest Transactions.

Part 6 of Art. 8 of Code regulates transactions between directors and corporation and subsidiaries of corporation. Director's conflicting interest transaction may not be enjoined, set aside, or give rise to award of damages or other sanctions in action by shareholder or by or in right of corporation, on ground of director's interest in transaction if: (1) director's action respecting transaction was at any time taken in compliance with O.C.G.A. 14-2-862 (transaction approved by majority vote of qualified directors on board or committee thereof after either required disclosure to board or committee or director with conflicting interest discloses to qualified directors existence and nature of conflicting interest, informs them of character and limitations imposed by any duty of confidentiality, and plays no part directly or indirectly in deliberations of committee on transaction); (2) shareholders' action respecting transaction was at any time taken in compliance with O.C.G.A. 14-2-863 (majority of votes entitled to be cast by holders of qualified shares cast in favor of transaction after receiving notice describing director's conflicting interest transaction, disclosing certain information including number and identity of persons holding or controlling vote, revealing which shares are, to knowledge of director, beneficially owned by director or related person of director); or (3) transaction, judged in circumstances at time of commitment, is established to have been fair to corporation. (O.C.G.A. 14-2-861).

Registered Office and Registered Agent.

Corporation must continuously maintain in state: (1) registered office, which need not be its place of business; and (2) registered agent which may be individual who resides in state and whose business office is identical with registered office, domestic corporation or nonprofit domestic corporation whose business office is identical with registered office, or foreign corporation or nonprofit foreign corporation authorized to transact business in state whose registered office is identical with registered office. (O.C.G.A. 14-2-501). Corporation may change its registered office or registered agent by filing with Secretary of State amendment to its annual registration that sets forth name of corporation, street address of its current registered office, street address of new registered office, name of current registered agent, name of new registered agent, and statement that after change(s) are made, street addresses of registered office and business office of registered agent will be identical. If registered agent changes street address of its business address, it may change street address of registered office of any corporation for which it is registered agent by notifying corporation in writing and by filing statement with Secretary of State setting forth change. (O.C.G.A. 14-2-502).

General Powers of Corporations.

Unless articles of incorporation provide otherwise, every corporation has perpetual duration and has same powers as individual to do all things necessary or convenient to carry out business and affairs, including, without limitation, power: (1) to sue, be sued, complain and defend in corporate name; (2) to have corporate seal which may be altered at will and to use it, or facsimile of it, by impressing or affixing it or in any other manner reproducing it; (3) to make and amend bylaws, consistent with its articles of incorporation and with laws of state, for management and regulation of corporation; (4) to purchase, receive, lease, or otherwise acquire, hold, improve, use and otherwise deal with real or personal property or any legal or equitable interest in property, wherever located; (5) to sell, convey, mortgage, pledge, lease, exchange and otherwise dispose of all or any part of its property; (6) to purchase, receive, subscribe for or otherwise acquire, hold, vote, use, sell, mortgage, lend or otherwise dispose of and deal in and with shares or other interests in or obligations of, any other entity; (7) to make contracts and guarantees, incur liabilities, borrow money, issue its notes, bonds, and other obligations (which may convert into or include option to purchase other securities of corporation), and secure any of its obligations by mortgage, or pledge of any of its property, franchises or income; (8) to lend money, invest and reinvest its funds, and receive and hold real and personal property as security for repayment; (9) to be promoter, partner, member, associate or manager of any partnership, joint venture, trust or other entity; (10) to conduct its business, locate offices, and exercise powers granted by Code within or without state; (11) to elect directors and appoint officers, employees and agents of corporation, define their duties, fix their compensation, and lend them money and credit; (12) to pay pensions and establish pension plans, pension trusts, profit sharing plans, share bonus plans, share option plans and benefit or incentive plans for any or all of its current or former directors, officers, employees and agents; (13) to make donations for public welfare or for charitable, scientific or educational purposes; (14) to transact any lawful business that will aid governmental policies; (15) to provide insurance for its benefit on life or physical or mental ability of any person whose death or physical or mental disability might cause financial loss to corporation, or pursuant to contract concerning reacquisition of shares, or pursuant to contract as part of compensation arrangements or concerning principal obligor or guarantor; and (16) to make payments or donations or any other act not inconsistent with law that furthers business affairs of corporation. (O.C.G.A. 14-2-302).

Unless restricted by articles of incorporation, corporation may exercise all above enumerated powers regardless of whether they are expressly permitted by articles of incorporation. (O.C.G.A. 14-2-302).

Distributions.

Directors may authorize and corporation may make distributions to its shareholders subject to restrictions in corporation's articles of incorporation and certain restrictions imposed by O.C.G.A. 14-2-640. Corporation may not make proposed distribution if, after making distribution: (1) corporation would not be able to pay its debts as they come due in usual course of business or (2) corporation's total assets would be less than sum of its total liabilities together with (unless articles of incorporation permit otherwise) amount that would be needed, if corporation were to be dissolved at time of distribution, to satisfy rights of shareholders whose preferential rights are superior to those receiving distribution. Effect of distribution is measured depending on type of distribution. Directors may base determination that distribution is not prohibited by Code either on financial statements prepared on basis of accounting practices and principles reasonable in circumstances or on fair valuation or other method reasonable in circumstances. If directors do not fix record date then date of board authorization becomes record date. (O.C.G.A. 14-2-640).

Unclaimed distributions are subject to Uniform Disposition of Unclaimed Property Act, as enacted in state. (O.C.G.A. 44-12-190 et seq.).

Sale or Transfer of Corporate Assets.

Corporation may sell, lease, exchange or otherwise dispose of all or substantially all of its property on terms and conditions and for consideration determined by directors only if directors propose, and its shareholders approve, proposed transaction. Unless articles of incorporation, bylaws, or directors conditioning its submission of transaction require greater vote or voting by groups, transaction must be approved by majority of all votes entitled to be cast on transaction. (O.C.G.A. 14-2-1202). Unless articles of incorporation require, no shareholder approval is required for following transactions if carried out under terms and conditions fixed by directors: (1) sale, lease, exchange or other disposition of all or substantially all of property of corporation if (a) corporation is insolvent and sale for cash or its equivalent is deemed advisable by board to meet liabilities of corporation or (b) corporation was incorporated for purpose of liquidating such property and assets; (2) mortgage, pledge, dedication to payment of indebtedness, whether with or without recourse, or encumbrance of any or all of corporation's property whether or not in usual or regular course of business; (3) transfer of any or all of corporation's property to wholly-owned subsidiary corporation; or (4) sale, lease, exchange or other disposal of less than all or substantially all of corporation's property (statutory presumption is that assets deemed to be less than substantially all of corporation's property if fair value of assets as of date of most recent available financial information does not exceed two-thirds of fair value of all assets of corporation, and annual revenues for most recent fiscal year for which such financial information is available represented or produced by such assets do not exceed two-thirds of total revenues of corporation). (O.C.G.A. 14-2-1201).

Fair Price Requirements.

Found in Part 2 of Art. 11 of Code. Fair price provisions are designed to assure that shareholders will receive fair and equitable treatment in event of business combination between corporation and significant shareholder and are aimed at preventing inequities of two-tiered or front-end loaded takeover transactions.

Applicability.

If provided in bylaws, fair price provisions apply to any business combination. Fair price bylaw may be adopted at any time and in normal manner for adopting bylaws and shall apply to any business combination approved or recommended by directors after date of bylaw's adoption. Fair price bylaw revocable only by affirmative vote of two-thirds of continuing directors and majority of votes entitled to be cast by voting shares of corporation, other than interested shareholder and affiliates. Once repealed, corporation may not readopt fair price bylaw. No cause of action against directors for adoption or failure to adopt fair price bylaw. Fair pricing provisions inapplicable if, during three-year period immediately preceding consummation of business combination, interested shareholder has always been interested shareholder or has not increased percentage of ownership of any class or series of stock by more than 1% in any 12-month period.

(O.C.G.A. 14-2-1110 to -1113).

Requirements.

Business combination (as defined below) must be either: (1) unanimously approved by continuing directors, provided there are at least three (O.C.G.A. 14-2-1111); (2) recommended by at least two-thirds continuing directors and approved by majority of votes entitled to be cast by holders of voting shares, other than shares held by interested shareholder and affiliates (O.C.G.A. 14-2-1111); or (3) for fair price (O.C.G.A. 14-2-1112). Fair price paid if four requirements met: (1) fair market value of consideration five days prior to consummation at least equal to highest of: (i) highest per share price (including brokerage commissions, transfer taxes, and soliciting dealers' fees) paid by interested shareholder in previous two years or in transaction in which it became interested shareholder, (ii) fair market value per share of stock, or (iii) if not common stock, highest preferential amount per share payable upon liquidation or dissolution; (2) consideration received is cash or same form as interested shareholder previously paid for largest number of shares; (3) after becoming interested shareholder and prior to consummation, unless approved by majority of continuing directors, corporation does not (i) fail to declare and to pay on regular date full dividend on preferred stock, (ii) reduce annual rate of dividends on common stock, (iii) fail to increase annual rate of dividends to reflect reclassification, recapitalization or reorganization, and (iv) increase interested shareholder's percentage ownership of any class or series of shares by more than 1% in any 12-month period; and (4) interested shareholder has not received disproportionate financial assistance or tax advantages from corporation or subsidiary relating to business combination or otherwise. (O.C.G.A. 14-2-1112).

Scope.

Business combination is: (1) merger of corporation or any subsidiary with interested shareholder or other corporation which is or after merger would be affiliate of interested shareholder; (2) any share exchange with any interested shareholder or any corporation which is or after share exchange would be affiliate of interested shareholder; (3) any sale, lease, transfer, or other disposition not in ordinary course of business in one or more transactions in any 12-month period to any interested shareholder or any affiliate of any interested shareholder of at least 10% of corporation's or its subsidiary's net assets; (4) issuance or transfer by corporation or subsidiary to interested shareholder or affiliate in one or more transactions in 12-month period of equity securities with at least 5% of market value of all issued stock, except in exercise of rights offered pro rata to all shareholders; (5) adoption of any plan or proposal for liquidation or dissolution of corporation if interested shareholder or affiliate would receive anything other than cash; or (6) any reclassification of securities, recapitalization of corporation or merger or share exchange with subsidiary in one or more transactions in 12-month period which has effect of increasing by at least 5% proportionate amount of any class or series of stock of corporation or subsidiary owned by interested shareholder or affiliate. (O.C.G.A. 14-2-1110). Interested shareholder is any person, other than corporation or its subsidiaries, that is beneficial owner of 10% or more of voting power of outstanding voting shares of corporation, or is affiliate of corporation and, at any time within two-year period immediately prior to date in question, was beneficial owner of 10% or more of voting power of then outstanding voting shares of corporation. (O.C.G.A. 14-2-1110). To determine whether person is interested shareholder, voting shares deemed outstanding does not include issuable but unissued voting shares. (O.C.G.A. 14-2-1110). For purpose of statutory fair price requirements, affiliate is person that directly or indirectly controls or is controlled by or is under common control with specified person. (O.C.G.A. 14-2-1110).

Business Combinations with Interested Shareholders.

Resident domestic corporation may not engage in business combination with any interested shareholder for period of five years following time that such shareholder became interested shareholder unless: (1) prior to such time, directors approve business combination or transaction which resulted in shareholder becoming interested shareholder, (2) in transaction which resulted in shareholder becoming interested shareholder, interested shareholder became beneficial owner of at least 90% of voting stock (excluding shares owned by directors, officers and their affiliates and associates; subsidiaries; and certain employee stock plans); or (3) subsequent to becoming interested shareholder, such shareholder became beneficial owner of 90% of outstanding voting stock (excluding shares owned by corporation's directors, officers, and their affiliates and associates; corporation's subsidiaries; and certain employee stock plans) and business combination was approved by holders of majority of corporation's voting stock entitled to vote, excluding from such vote (for purposes of fair pricing provisions only) stock held by interested shareholder or (i) directors, officers, and their affiliates and associates, (ii) corporation's subsidiaries, and (iii) certain employee stock plans maintained by corporation. (O.C.G.A. 14-2-1132).

Except as set forth in O.C.G.A. 14-2-1131, definitions (including definition of interest shareholder) applicable to fair pricing provisions apply to provisions relating to business combinations involving interested shareholders of resident domestic corporations. (O.C.G.A. 14-2-1131). Definition of business combination in O.C.G.A. 14-2-1131 substantially similar to definition in O.C.G.A. 14-2-1110 (summarized above).

Resident domestic corporation is corporation that is organized under laws of state and has at least 100 beneficial owners in state and either has: (1) its principal office located in state; (2) has at least 10% of its outstanding voting shares beneficially owned by residents of state; (3) has at least 10% of holders of its outstanding voting shares beneficially owned by residents of state; (4) owns or controls assets which represent lesser of (i) substantially all of its assets, or (ii) $25 million. (O.C.G.A. 14-2-1131). For purpose of O.C.G.A. 14-2-1131, substantially all of corporate assets includes either one-half of value of corporation's assets or corporate assets located within state that generate more than one-half of total revenues of corporation on consolidated basis. (O.C.G.A. 14-2-1131).

Limitation on ability of resident domestic corporations to engage in business combination with interested shareholder only applies if domestic resident corporation has incorporated such limitation in bylaws. (O.C.G.A. 14-2-1133). Restrictions shall not apply if shareholder: (1) becomes interested shareholder inadvertently; (2) as soon as practicable divests sufficient shares; and (3) would not, at any time within five-year period immediately prior to business combination between resident domestic corporation and such shareholder, have been interested shareholder but for inadvertent acquisition. (O.C.G.A. 14-2-1132[b]).

Books and Records.

Corporation must keep: (1) permanent records of all meetings of shareholders and directors; (2) executed consents evidencing all actions taken by shareholders or directors without meeting; (3) record of all actions taken by committee of directors in place of board on behalf of corporation; (4) waivers of notice of all meetings of board of directors and its committees; (5) appropriate accounting records; and (6) record of shareholders in form that permits preparation of list of names and addresses of all shareholders in alphabetical order by class of shares showing number and class of shares held by each. Corporation's records must be maintained in written form or in other form capable of conversion into written form within reasonable time. (O.C.G.A. 14-2-1601). Corporation must keep copy of following records: (1) articles or restated articles of incorporation and all amendments in force; (2) bylaws or restated bylaws and all amendments in force; (3) resolutions adopted by either shareholders or directors increasing or decreasing number of directors, classification of directors and names and addresses of all directors; (4) resolutions adopted by directors creating one or more classes or series of shares, and fixing relative rights, preferences, and limitations; (5) minutes of all shareholders' meetings, executed waivers of notice of meetings, and executed written consents evidencing all action taken by shareholders without meeting, for past three years; (6) all written communications to shareholders within past three years including financial statements; (7) list of names and business addresses of current directors and officer; and (8) most recent annual registration filed with Secretary of State.

(O.C.G.A. 14-2-1602). If shareholder gives corporation written notice of demand to inspect and copy records, shareholder may inspect and copy above records of corporation. Additional inspection rights may be available to shareholder who meets test of proper purpose reasonably relevant to legitimate interest as shareholder. Articles of incorporation or bylaws may limit additional right to inspection of records to only those shareholders owning 2% or more of shares outstanding. (O.C.G.A. 14-2-1602). Scope of inspection rights is set forth in O.C.G.A. 14-2-1603. This section does not, however, affect right of shareholder to inspect records under O.C.G.A. 14-2-720 or power of court to compel production of corporate records for examination. (O.C.G.A. 14-2-1602). If corporation improperly refuses to permit shareholder to inspect records, shareholder may invoke power of court to open records for inspection. (O.C.G.A. 14-2-1604).

Reports.

Annual registration required of domestic corporations and foreign corporations authorized to transact business in state. Annual registration must show: (1) name of corporation, employer identification number issued by federal government, and state or country of incorporation; (2) street address and county of registered office and name of registered agent at that office in state; (3) mailing address of principal office; and (4) names and respective addresses of chief executive officer, chief financial officer, and secretary, or individuals holding similar positions. Each annual registration must be filed with Secretary of State between Jan. 1 and Apr. 1 (subject to change by Secretary of State). Initial annual registration of domestic corporation must be filed within 90 days after its articles of incorporation are delivered to Secretary of State for filing, unless articles are delivered for filing subsequent to Oct. 1, in which case initial annual registration must be filed between Jan. 1 and Apr. 1 of year following year in which corporation's certificate of incorporation is issued by Secretary of State. (O.C.G.A. 14-2-1622[f][2]).

Corporation must prepare balance sheet and profit and loss statement showing results of operations during its fiscal year not later than four months after close of each fiscal year and in any case prior to annual meeting of shareholders. (O.C.G.A. 14-2-1620). Such report must be available to shareholders of record upon written request. If financial statements prepared for other purposes, corporation must also furnish upon written request statement of sources and applications of funds and statement of changes in shareholders' equity for fiscal year. Financial statements must also include statement of basis upon which they were prepared. If public accountant reports on annual financial statements, such report must accompany financial statements. If financial statements are not reported upon by public accountant, statements must be accompanied by statement of president or person responsible for corporation's records stating reasonable belief that statements were prepared on basis of generally accepted accounting principles or other basis of preparation and describing any respects in which statements were not prepared on basis of accounting consistent with statements prepared for preceding year. (O.C.G.A. 14-2-1620). If corporation indemnifies or advances expenses to director pursuant to O.C.G.A. 14-2-851 to -854, corporation must report indemnification or advance in writing to shareholders with or before notice of next shareholders' meeting. (O.C.G.A. 14-2-1621).

Corporate Bonds or Mortgages.

Corporations are expressly empowered to issue bonds and to secure any obligations by mortgages. (O.C.G.A. 14-2-302[7]). See subhead General Powers of Corporations, supra. Shareholder approval not required to transfer all or part of assets as security for indebtedness. (O.C.G.A. 14-2-1201[4]).

Mergers and Share Exchanges.

Merger.

One or more corporations may merge into another corporation if directors of each corporation adopt and its shareholders approve plan of merger. Plan of merger must set forth: (1)

Name of each corporation planning to merge and name of surviving corporation into which each other corporation plans to merge; (2) terms and conditions of merger; and (3) manner and basis of converting shares of each corporation into shares or other securities, obligations, rights to acquire shares or other securities, cash, other property, or any combination of foregoing, and if any shares of any holder of class or series of shares are to be converted in manner or basis different from any other holder of shares of such class or series, manner or basis applicable to each such holder. Plan of merger may also set forth amendments to articles of incorporation of surviving corporation and other provisions relating to merger up to time of merger; however, if plan of merger requires or permits shareholder vote, subsequent to such shareholder vote, no amendment permitted regarding amount or kind of shares or other securities, obligations, rights to acquire shares or other securities, cash, other property, if amendment would adversely affect such shareholders. (O.C.G.A. 14-2-1101). Shareholder approval of plan of merger by shareholders of surviving corporation or by shareholders of acquiring corporation in share exchange, however, is not necessary if: (1) Articles of incorporation of surviving or acquiring corporation will not change; (2) each shareholder of surviving or acquiring corporation whose shares are outstanding immediately before effective date of merger will hold same number of shares, with identical designations, preferences, limitations, and relative rights immediately after merger or share exchange; and (3) number and kind of shares outstanding immediately after merger or share exchange plus any shares issuable as result of merger or share exchange will not exceed total number and kind of shares of surviving corporation authorized by its articles of incorporation immediately before merger or share exchange. (O.C.G.A. 14-2-1103). Similarly, no shareholder approval required for parent to merge with 90% owned subsidiary (O.C.G.A. 14-2-1104). Directors of parent must adopt plan of merger for merging subsidiary into parent which sets forth names of parent and subsidiary and manner and basis of converting shares of subsidiary into shares of parent or into other consideration. Within ten days after corporate action parent must mail copy or summary of plan of merger to each shareholder of subsidiary that has not waived mailing requirement in writing. Articles of merger or certificate of merger pursuant to O.C.G.A. 14-2-1104 relating to merger of subsidiary into parent may not contain amendments to articles of incorporation of parent. (O.C.G.A. 14-2-1104).

Share Exchange.

Corporation may acquire all of outstanding shares of one or more classes or series of another corporation through share exchange if directors of each corporation adopt and its shareholders approve share exchange. Plan of share exchange must set forth: (1) name of corporation whose shares will be acquired and name of acquiring corporation; (2) terms and conditions of share exchange; and (3) manner and basis of exchanging shares. (O.C.G.A. 14-2-1102).

Action on Plan.

Once directors adopt plan of merger or share exchange, directors of each corporation to transaction must submit plan for approval by shareholders. Directors must recommend plan to shareholders unless directors elect, because of conflict of interest or other circumstances, to make no recommendation and communicate basis for their election to shareholders with plan; and shareholders entitled to vote must approve plan. (O.C.G.A. 14-2-1103). Corporation must notify each voting shareholder of proposed shareholders' meeting and notice must also set forth purpose(s) of meeting and must contain or be accompanied by copy or summary of plan. (O.C.G.A. 14-2-1103[d]). Unless Code, articles of incorporation, bylaws, or directors require greater vote or vote by voting groups, plan of merger or share exchange must be authorized by approval of: (1) majority of all votes entitled to be cast on plan by all shares entitled to vote on plan, voting as single group; and (2) majority of all votes entitled to be cast by holders of shares in each voting group entitled to vote separately on plan as voting group by articles of incorporation. (O.C.G.A. 14-2-1103[e]). Shares of class or series not otherwise entitled to vote on merger are entitled to vote on plan of merger if plan contains provision that would require action by class as separate voting group under O.C.G.A. 14-2-1004. (O.C.G.A. 14-2-1103[f]). Shares of class or series included in share exchange, but not otherwise entitled to vote on plan of share exchange are entitled to vote with each class or series constituting separate voting group. After merger or share exchange is authorized, and at any time before articles of merger or certificate of merger or share exchange is filed, plan of merger or share exchange may be abandoned without further shareholder action in accordance with procedures set forth in plan of merger or share exchange or, if none is set forth, in manner determined by directors. (O.C.G.A. 14-2-1103).

Once plan of merger or share exchange is properly approved, surviving or acquiring corporation must file with Secretary of State articles of merger or share exchange setting forth plan of merger or share exchange and statement regarding shareholder approval. In lieu of filing articles of merger or share exchange that set forth plan of merger or share exchange, surviving or acquiring corporation may file certificate of merger or share exchange which sets forth: (1) name and state of incorporation of each corporation which is merging or engaging in share exchange and name of surviving corporation; (2) in case of merger, any amendments to articles of incorporation of surviving corporation; (3) statement that executed plan of merger or share exchange is on file at principal place of business of surviving or exchanging corporation and stating address thereof; (4) statement that copy of plan of merger or share exchange will be furnished by surviving or exchanging corporation on request and without cost to any shareholder of any corporation that owns is party to merger or whose shares are involved in share exchange; (5) if shareholder approval was not required, statement to that effect; and (6) if shareholder approval was required, statement that merger or exchange was duly approved by shareholders. Merger or share exchange takes effect when articles or certificate of merger or share exchange is filed, unless delayed effective date is specified. (O.C.G.A. 14-2-1105). When filing articles or certificate of merger or share exchange, surviving or acquiring corporation must deliver to Secretary of State statement that request for publication of notice of filing of articles or certificate of merger or share exchange, and payment therefore, will be made. No later than next business day after filing articles or certificate of merger or share exchange, surviving or acquiring corporation must deliver to publisher of newspaper which is official organ of or newspaper of general circulation (not less than 60% paid circulation) in county where registered office of surviving or acquiring corporation is to be located request to publish notice in prescribed form. Statute specifies form of notice required. Request for publication must include $40 payment of publication costs. Notice must be published weekly for two consecutive weeks commencing within ten days after receipt of notice by newspaper. Failure on part of surviving corporation to mail or deliver notice or payment therefor, or failure on part of newspaper to publish notice, will not invalidate merger or share exchange. (O.C.G.A. 14-2-1105.1).

Effect of Merger.

When merger takes effect: (1) all corporations merge into surviving corporation and their separate existences cease; (2) title to all property owned is vested in surviving corporation without reversion or impairment; (3) surviving corporation has all liabilities of each corporation party to merger; (4) proceedings pending against any merged corporation may be continued as if merger did not occur or surviving corporation may be substituted in lieu of extinguished corporation; (5) articles of incorporation of surviving corporation are amended to extent provided in plan of merger; and (6) shares of each corporation party to merger that are to be converted into shares, obligations, or securities of their survivor are converted and former holders of shares are entitled only to rights provided in plan of merger or to their dissenters' rights of appraisal. When share exchange takes effect, shares of each acquired corporation are exchanged as provided in plan and former holders of shares are entitled only to share exchange rights provided in articles of share exchange or to their dissenters' rights of appraisal. (O.C.G.A. 14-2-1106).

Merger or Share Exchange With Foreign Corporation.

Foreign corporations and domestic corporations may engage in merger or share exchange with domestic corporation if: (1) in merger, merger is permitted by law of state or country under which foreign corporation is incorporated and foreign corporation complies with such law in effecting merger; (2) in share exchange, corporation whose shares will be acquired is domestic corporation regardless of whether share exchange is permitted by law under which foreign corporation is incorporated; (3) foreign corporation complies with O.C.G.A. 14-2-1105 (filing of articles or certificate of merger or share exchange) if it is surviving corporation of merger or acquiring corporation of share exchange; and (4) each domestic corporation complies with O.C.G.A. 14-2-1101 to -1104 and if surviving or acquiring corporation of share exchange is domestic corporation, surviving or acquiring corporation complies with O.C.G.A. 14-2-1105 (filing of articles or certificate of merger or share exchange). (O.C.G.A. 14-2-1107). Upon merger or share exchange taking effect, surviving or acquiring foreign corporation is deemed to appoint Secretary of State as its agent for service of process and is deemed to agree to promptly pay dissenting shareholders according to their dissenters' rights of appraisal. (O.C.G.A. 14-2-1107).

Mergers with Other Entities.

Corporations may merge or engage in share exchanges with banking, insurance, railroad, trust, canal, navigation, express, and telegraph companies and other corporations whose charters have been granted by Secretary of State unless otherwise prohibited by law. (O.C.G.A. 14-2-1108). Each merging or exchanging corporation must comply with provisions of Code except to extent merger or share exchange is governed by provisions governing other entity. If surviving entity is corporation organized under Code, time and effect of merger shall be as provided in Code. If, however, surviving entity is not organized under Code, time of effect of merger shall be as provided in Code except as provided by laws governing surviving entity. (O.C.G.A. 14-2-1108).

Domestic corporations may merge with foreign or domestic nonprofit corporations, limited liability companies, joint-stock associations or limited partnerships pursuant to O.C.G.A. 14-2-1109 unless laws of foreign nonprofit corporation, limited liability company, association or partnership forbid merger with corporation. Approval of merger is as for domestic corporations. (O.C.G.A. 14-2-1109[f]). Corporations may convert to limited liability company or limited partnership. (O.C.G.A. 14-2-1109.1; -1109.2).

Dissolution.

Voluntary.

Corporation may be voluntarily dissolved by: (1) action by majority of incorporators or initial directors if corporation has not issued shares or has not commenced business (O.C.G.A. 14-2-1401[3]); or (2) majority vote of shareholders entitled to vote, unless articles of incorporation or directors (acting pursuant to O.C.G.A. 14-2-1402[c]) require otherwise (O.C.G.A. 14-2-1402). Once proposal for dissolution is approved by shareholders pursuant to O.C.G.A. 14-2-1402, corporation must begin dissolution by filing with Secretary of State notice of intent to dissolve setting forth: (1) name of corporation; (2) date that dissolution was authorized; and (3) statement that dissolution was duly approved by shareholders if shareholder approval was required. (O.C.G.A. 14-2-1403). Along with notice of intent to dissolve, corporation also must deliver to Secretary of State undertaking that request for publication of notice to dissolve and payment of fee therefor will be made. O.C.G.A. 14-2-1403.1 prescribes form for notice of intent to voluntarily dissolve. Request for publication must include payment of $40 publication fee. (O.C.G.A. 14-2-1403.1). After filing notice of intent to dissolve, corporation continues its corporate existence, but may not carry on any business except that business appropriate to winding up and liquidating its business and affairs. (O.C.G.A. 14-2-1405). O.C.G.A. 14-2-1406 and -1407 set forth procedure for disposing of claims against corporation.

If notice of intent to dissolve has not been revoked (revocation procedures outlined in O.C.G.A. 14-2-1404) and when all known debts, liabilities, and obligations of corporation have been paid and discharged, or adequate provision made therefor, corporation may dissolve by filing with Secretary of State articles of dissolution setting forth: (1) name of corporation; (2) date on which notice of intent to dissolve was filed and statement that it has not been revoked; (3)

statement that all known debts, liabilities, and obligations of corporation have been paid and discharged or that adequate provision has been made therefor; (4) statement that all remaining property and assets of corporation have been distributed among shareholders in accordance with their respective rights and interests or that adequate provision has been made therefor or that such property and assets have been deposited with Georgia Department of Administrative Services; and (5) statement that there are no actions pending against corporation in any court or that adequate provision has been made for satisfaction of any judgment, order, or decree. Once articles of dissolution are filed, corporation ceases to exist, except for limited purposes. (O.C.G.A. 14-2-1408).

Administrative.

Secretary of State may commence dissolution proceeding under O.C.G.A. 14-2-1421 to dissolve corporation if: (1) state Revenue Commissioner has certified that corporation has failed to file license or occupation tax return and that one year has expired since last day permitted for timely filing, but dissolution proceedings shall be stayed if corporation is contesting in good faith alleged grounds for dissolution; (2) corporation failed to deliver its annual registration to Secretary of State, together with all required fees and penalties within 60 days after report and penalties and fees are due; (3) corporation is without registered office or registered agent in state for 60 days or more; (4) corporation fails to notify Secretary of State within 60 days that its registered agent or registered office has been changed, that its registered agent has resigned, or that its registered office has been discontinued; (5) corporation pays fee to Secretary of State as required by Code by check or other form of payment which is dishonored and corporation or its incorporator or agent does not resubmit payment within 60 days of notice of nonpayment issued by Secretary of State; or (6) any notice which is required to be published has not been published. (O.C.G.A. 14-2-1420). O.C.G.A. 14-2-1422 provides procedure for corporation to apply for reinstatement following administrative dissolution.

Judicial.

Superior court has power to dissolve corporation: (1) in action by Attorney General if it is established that corporation obtained articles of incorporation through fraud, or corporation has continued to exceed or abuse authority conferred upon it by law; (2) in shareholder action if it is established directors are deadlocked in management of (i) corporate affairs and deadlock cannot be broken by shareholder action and irreparable injury to corporation is threatened, (ii) directors or those in control of corporation have acted, are acting, or will act in illegal or fraudulent manner in connection with operation or management of business and such action is initiated by holders of at least 20% of outstanding shares of corporation, (iii) shareholders are deadlocked in voting power and have failed for at least two consecutive annual meetings to elect successors to directors whose terms have expired or would have expired, or (iv) corporate assets are being misapplied or wasted; (3) in creditor action if creditor's claim has been reduced to judgment, and execution on judgment has been returned unsatisfied and corporation is insolvent, or if corporation has admitted in writing that creditor's claim is due and owing and corporation is insolvent; or (4) in proceeding by corporation to have its voluntary dissolution continued under court supervision. (O.C.G.A. 14-2-1430).

Receivership or Custodianship.

In judicial proceedings to dissolve corporation, court may appoint receivers to wind up and liquidate, or one or more custodians to manage, business and affairs of corporation. Court must hold hearing before appointing receiver or custodian. Powers and duties of receiver are ordered by appointing court. Receiver may dispose of all or part of corporate assets wherever located at public or private sale with court authorization, sue and defend in his or her own name as receiver, and exercise corporate powers through or in place of directors or officers to extent. (O.C.G.A. 14-2-1432).

Close Corporations.

Election of Close Corporation Status.

Corporation having 50 or fewer shareholders may elect close corporation status by amending articles of incorporation to include statement that corporation is statutory close corporation. Amendment electing close corporation status must be approved by holders of at least two-thirds of votes of each class or series of shares of corporation, voting as separate voting groups, whether or not otherwise entitled to vote on amendments. Shareholders voting against amendment for close corporation status are entitled to dissenters' rights of appraisal. (O.C.G.A. 14-2-902).

Applicability.

Provisions governing close corporations apply to corporations and professional corporations (organized under Georgia Professional Corporation Act) electing close corporation status. (O.C.G.A. 14-2-901).

Shares.

Each share or certificate issued by statutory close corporation must contain following legend:

“The rights of shareholders in a statutory close corporation may differ materially from the rights of shareholders in other corporations. Copies of the articles of incorporation and bylaws, shareholders' agreements, and other documents, any of which may restrict transfers and affect voting and other rights, may be obtained by a shareholder on written request to the corporation.”

If corporation issues shares without certificates, corporation must deliver notice to shareholders containing information in above legend. Corporation must provide, upon written request and without charge, copies of provisions that restrict transfer or affect voting or other rights of shareholders. (O.C.G.A. 14-2-910).

Unless and to extent permitted by articles of incorporation or O.C.G.A. 14-2-912, interest in shares of close corporation may not, as general rule, be transferred. General prohibition against transfer does not apply to following (unless and to extent articles of incorporation provide otherwise): (1) transfer to issuer corporation or to any other holder of same class or series of shares; (2) transfer to members of shareholder's immediate family; (3) transaction approved in writing by all holders of corporation's shares having general voting rights; (4) transfer to executor or administrator upon death of shareholder or to trustee or receiver as result of bankruptcy, insolvency, dissolution, or similar proceeding brought by or against shareholder; (5) transfer pursuant to merger or share exchange under Art. 11 of Code or exchange of existing shares for other shares of different class or series of corporation; (6) transfer pursuant to pledge as collateral for loan that does not grant pledgee any voting rights possessed by pledgor; or (7) transfer made after termination of close corporation status. (O.C.G.A. 14-2-911). Attempt to transfer shares in violation of prohibition against transfer binding on transferee is ineffective. (O.C.G.A. 14-2-913). Attempt to transfer shares in violation of prohibition against transfer which is not binding on transferee gives corporation option to purchase shares from transferee for same price and on same terms that transferee purchased them. (O.C.G.A. 14-2-913).

14-2-912 provides procedure by which shareholder may transfer shares to eligible third party. Shareholder must first be offered shares to corporation by obtaining written offer to purchase shares for cash from eligible third party purchaser. (Eligible third party purchaser is one who is eligible to become qualified shareholder under any federal or state tax statute applicable to corporation, one who agrees in writing not to terminate tax qualification without approval of remaining shareholders, and one whose purchase of shares will not impose personal holding company tax or similar federal or state tax or penalty on corporation.) Selling shareholder must deliver offer to corporation giving corporation opportunity to buy shares on same terms as eligible third party purchaser. Within 20 days after receipt of offer, corporation must call special shareholders' meeting to be held within 40 days to decide whether corporation should purchase all (but not less than all) or none of offered shares. To accept offer, affirmative vote of majority of shares entitled to vote (excluding votes in respect of shares covered by offer) is required. Corporation must deliver notice of acceptance to shareholder in writing within 75 days after receiving offer or else offer is rejected. If corporation makes counteroffers, shareholder must deliver to corporation written notice of acceptance within 15 days of receipt of counteroffer or otherwise counteroffer is rejected. Once offer or counteroffer is accepted, shares must be delivered within 20 days after effective date of notice of acceptance. Corporation accepting offer to purchase shares may allocate some or all of shares pro rata to those of its shareholders who desire to purchase shares unless all shareholders who desire to purchase approve different allocation of shareholders or to other persons. If corporation has more than one class or series of shares remaining, holders of class or series being purchased are entitled to first option to purchase shares, pro rata, which are not purchased by corporation. If offer to purchase shares is rejected, offering shareholder, for period of 120 days after corporation receives offer, is entitled to transfer to third person offeror all of offered shares in accordance with terms of offer. (O.C.G.A. 14-2-912).

Articles of incorporation may provide for mandatory purchase by corporation of shares from shareholder who dies. Adding or repealing compulsory purchase provision requires vote of two-thirds of shares of each class or series of shares, voting as separate groups. Shareholder who votes against compulsory purchase provision is entitled to dissenters' rights. (O.C.G.A. 14-2-914). O.C.G.A. 14-2-915 provides procedure for exercising mandatory purchase option. (O.C.G.A. 14-2-915). Superior court of county where corporation's registered office is located may compel mandatory purchase. (O.C.G.A. 14-2-916).

Governance.

Shareholders may agree in writing to regulate exercise of corporate powers, management of corporate business and affairs, and relationship among shareholders. Shareholders' agreement may: (1) eliminate board of directors; (2) restrict discretion or powers of board; (3) authorize director proxies or weighted voting rights; (4) provide that corporation be treated as partnership; or (5) create relationship among shareholders or between shareholders and corporation that would otherwise be appropriate only among partners. (O.C.G.A. 14-2-920). Articles of incorporation or by-laws of close corporation may provide that holders of class or series may elect one or more directors. (O.C.G.A. 14-2-921). Shareholders may also agree that certain directors shall have more or less than one vote. References to percentages of directors necessary to take action in Georgia corporation code shall take into account any such agreement. (O.C.G.A. 14-2-824). Close corporation may operate without board of directors if articles of incorporation, bylaws approved by shareholders, or agreements between shareholders that are otherwise lawful contain statement to that effect. While close corporation is operating without board of directors, corporate powers are exercised by or under authority of shareholders. (O.C.G.A. 14-2-922). Bylaws not necessary for close corporation if provisions required by law to be contained in bylaws are included in either articles of incorporation or agreement among shareholders. (O.C.G.A. 14-2-923). Unless articles of incorporation, bylaws, or authorized shareholder agreement provide otherwise, annual meeting date is first business day after 31st day of May. Close corporation does not have to hold annual meeting unless one or more shareholders delivers written notice to corporation requesting meeting at least 30 days prior to scheduled meeting date. (O.C.G.A. 14-2-924). Failure to observe usual corporate formalities or requirements relating to exercise of corporate powers or management of its business and affairs is not grounds for imposing personal liability on shareholders or liabilities of corporation. (O.C.G.A. 14-2-926).

Reorganization and Termination.

Plan of merger or share exchange that would terminate statutory close corporation status or plan of merger or share exchange that would result in close corporation being surviving or acquiring corporation requires approval of two-thirds of votes of each class or series of shares voting as separate voting groups regardless of whether holders are otherwise entitled to vote on plan. Sale, lease, exchange, or other disposition of all or substantially all property of close corporation or termination of close corporation status requires approval of shareholders by two-thirds majority vote of each class or series of shares voting as voting groups, whether or not holders are otherwise entitled to vote on transaction. (O.C.G.A. 14-2-930, -931). Terminating close corporation status requires amendment to articles of incorporation. Amendment terminating close corporation status requires approval of at least two-thirds of votes of each class or series of shares, voting as separate voting groups, whether or not holders are otherwise entitled to vote on amendments. Shareholders voting against termination of close corporation status are entitled to dissenters' rights. (O.C.G.A. 14-2-931). After termination, corporation is then subject to Code generally or Georgia Professional Corporation Act. Termination of close corporation status does not affect any right of shareholder or of corporation under agreement, articles of incorporation or by-laws unless otherwise invalidated by law. (O.C.G.A. 14-2-932).

Dissolution.

Articles of incorporation, bylaws adopted by shareholders, or agreement among all shareholders may authorize one or more shareholders, or holders of specified number or percentage of shares, to dissolve corporation at will or upon occurrence or specified event or contingency. Unless otherwise provided in articles, bylaws adopted by shareholders or shareholders agreement, any amendment to articles or by-laws altering right of specified shareholders to dissolve corporation must be approved by all shareholders of corporation. (O.C.G.A. 14-2-933).

Judicial Supervision.

Shareholder may petition superior court for relief of type described in O.C.G.A. 14-2-941 to -943 if: (1) directors or those in control have acted illegally, oppressively, fraudulently or prejudicially to petitioning shareholder in capacity as shareholder, director or officer; (2) directors or those in control are deadlocked in management of corporation's affairs, with shareholders are unable to break deadlock, and corporation is suffering or will suffer irreparable injury or business since affairs of corporation cannot be conducted to advantage of shareholders because of deadlock; or (3) ground for judicial dissolution exists. Shareholder may not pursue relief if shareholder previously agreed to forego judicial remedy or if shareholder pursued dissenters' rights. (O.C.G.A. 14-2-940). Court may order ordinary relief (O.C.G.A. 14-2-941), extraordinary relief such as share purchase (O.C.G.A. 14-2-942) or dissolution (O.C.G.A. 14-2-943). Court may also take specific remedial action such as cancellation of actions, alteration of provisions, removal or appointment of officers and directors or provisional directors, appointment of custodian, or payment of dividends or award damages to any aggrieved party. (O.C.G.A. 14-2-941).

Dissenters' Rights-Appraisal.

Remedy available to shareholder dissenting from: (1) consummation of plan of merger if corporation required to obtain shareholder approval and shareholder entitled to vote on merger or if corporation was subsidiary that was merged into its parent pursuant to O.C.G.A. 14-2-1004; (2) consummation of plan of share exchange to which corporation is party if shares of corporation will be acquired and if shareholder is entitled to vote on plan of share exchange; (3) consummation of sale or exchange of all or substantially all of property of corporation if shareholder vote is required on sale or exchange; (4) amendment to articles of incorporation that materially and adversely affects rights in respect of dissenters' shares; or (5) any corporate action taken pursuant to shareholder vote to extent that provisions governing close corporations, articles of incorporation, bylaws, or resolution of directors provides that voting or nonvoting shareholders are entitled to dissent and obtain payment for their shares. (O.C.G.A. 14-2-1302). Right to dissent governed by O.C.G.A. 14-2-1302; procedure for exercise of dissenters' rights governed by O.C.G.A. 14-2-1320 to -1332. Three year statute of limitations for actions by dissenters to enforce their dissenters' rights of appraisal. (O.C.G.A. 14-2-1332).

Foreign Corporations.

Before transacting business, foreign corporation must obtain certificate of authority from Secretary of State. Statute sets out non-exhaustive list of activities not considered transacting business for purposes of qualification. (O.C.G.A. 14-2-1501). Foreign corporation with certificate of authority has same rights and privileges under Code and is generally subject to same duties, liabilities and restrictions as domestic corporation. (O.C.G.A. 14-2-1505).

Qualification.

Foreign corporations authorized to transact business in state on July 1, 1989 are subject to revised Code, but are not required to obtain new certificate of authority to transact business. (O.C.G.A. 14-2-1702).

Foreign corporation must complete and file with Secretary of State application which sets forth: (1) name of foreign corporation or, if name is unavailable for use in state, corporate name that satisfies requirements of O.C.G.A. 14-2-1506; (2) name of state or country where incorporated; (3) date of incorporation and period of duration; (4) mailing address of corporation's principal office; (5) address of corporation's registered office in Georgia and name of corporation's registered agent at that address; and (6) names and usual business addresses of corporation's current officers. With application, foreign corporation must file duly authenticated certificate of existence (or document of similar import) from Secretary of State or other official having custody of corporate records in state or country where foreign corporation is incorporated. (O.C.G.A. 14-2-1503). Fee for filing, $225. (O.C.G.A. 14-2-122). $500 penalty for noncompliance. (O.C.G.A. 14-2-122). Failure to obtain certificate of authority renders corporation unable to maintain proceeding in any court in state until it obtains certificate of authority and may subject corporation or incorporators to civil penalties. Failure to obtain certificate of authority, however, does not impair validity of corporate acts or prevent corporation from defending any proceeding. (O.C.G.A. 14-2-1502). Foreign corporation authorized to transact business in state must obtain amended certificate of authority if foreign corporation changes corporate name, changes period of duration or changes state or country of incorporation. (O.C.G.A. 14-2-1504). Application filing fee to register foreign corporation's name is $25. (O.C.G.A. 14-2-122). Foreign corporation authorized to transact business in state must continuously maintain in state: (1) registered office; and (2) registered agent who may be individual resident or domestic or foreign corporation of state and whose business office is identical with registered office, domestic corporation or nonprofit domestic corporation whose business office is identical with registered office, or foreign corporation or nonprofit corporation authorized to transact business in state whose business office is identical to registered office. (O.C.G.A. 14-2-1507). Registered agent is corporation's agent for service of process, notice, or demand. Foreign corporation may be served by service upon Secretary of State together with service by registered or certified mail addressed to chief executive officer, chief financial officer or secretary of corporation (or person of comparable position) at its principal office if foreign corporation has no registered agent or registered agent cannot, with reasonable diligence, be served. (O.C.G.A. 14-2-1510).

Foreign corporations domesticated under prior law have same legal status as corporations qualifying under Code, and all rights are preserved. (O.C.G.A. 14-2-1540).

Withdrawal.

Foreign corporation may file application for certificate of withdrawal with Secretary of State: (1) setting forth name of foreign corporation and its state or country of incorporation; (2) stating that it is no longer transacting business in state and that it is surrendering its authority to transact business in state; (3) revoking authority of its registered agent to accept service on its behalf; and (4) appointing Secretary of State as its agent for service of process in any proceeding based on cause of action arising during time it was authorized to transact business in state by providing mailing address to which copy of any process served be mailed and committing to notify Secretary of State of future changes in its mailing address. Once foreign corporation has effectively withdrawn, service of process on Secretary of State constitutes service of process on foreign corporation provided that copy of process is mailed to foreign corporation's chief executive officer, chief financial officer, secretary or person holding comparable position. (O.C.G.A. 14-2-1520). Secretary of State may commence proceeding pursuant to O.C.G.A. 14-2-1530 to-1532 to revoke certificate of authority of foreign corporation under certain circumstances. (O.C.G.A. 14-2-1530).

Reports.

Foreign corporations subject to same reporting requirements and annual registration statement requirements as domestic corporations. (O.C.G.A. 14-2-1505). See subhead Reports, supra.

Taxation of Corporate Property.

Same as for taxation of property of individual. See category 22 Taxation, topic 22.16 Property Taxes, subhead Intangible Recording Tax, catchline Intangibles Personal Property Tax.

Taxation of Corporate Stock.

See category 22 Taxation, topic 22.16 Property Taxes, subhead Intangible Recording Tax, catchline Intangibles Personal Property Tax.

Income Tax.

See category 22 Taxation, topic 22.11 Income Tax.

License Tax.

Domestic and domesticated corporations organized for profit must pay annual license or occupation tax, amount of which is based on net worth, as follows (O.C.G.A. 48-13-72, -73):

			Tax
Corporations with Net Worth Including Issued Capital Stock, Paid-in Surplus and Earned Surplus Not Exceeding $10,000			$10
Over	$10,000 not exceeding	$25,000	20
Over	25,000 not exceeding	40,000	40
Over	40,000 not exceeding	60,000	60
Over	60,000 not exceeding	80,000	75
Over	80,000 not exceeding	100,000	100
Over	100,000 not exceeding	150,000	125
Over	150,000 not exceeding	200,000	150
Over	200,000 not exceeding	300,000	200
Over	300,000 not exceeding	500,000	250
Over	500,000 not exceeding	750,000	300
Over	750,000 not exceeding	1,000,000	500
Over	1,000,000 not exceeding	2,000,000	750
Over	2,000,000 not exceeding	4,000,000	1,000
Over	4,000,000 not exceeding	6,000,000	1,250
Over	6,000,000 not exceeding	8,000,000	1,500
Over	8,000,000 not exceeding	10,000,000	1,750
Over	10,000,000 not exceeding	12,000,000	2,000
Over	12,000,000 not exceeding	14,000,000	2,500
Over	14,000,000 not exceeding	16,000,000	3,000
Over	16,000,000 not exceeding	18,000,000	3,500
Over	18,000,000 not exceeding	20,000,000	4,000

Over	20,000,000 not exceeding	22,000,000	4,500
Over	22,000,000		5,000

If corporation does not return income taxes to Georgia, tax period begins Jan. 1 and ends Dec. 31. (O.C.G.A. 48-13-76). Otherwise, tax period same as that adopted for Georgia income tax purposes. Tax is computed on net worth as of first day of such period and tax is payable on same date. (O.C.G.A. 48-13-76). Failure to file return and pay tax by 15th day of third calendar month beginning with first calendar month of tax period subjects corporation to penalty of 10% of tax imposed plus interest at rate of 1% per month from date tax due until tax paid. (O.C.G.A. 48-13-78, -79; 48-2-40). First return of corporation coming into existence or otherwise becoming subject to tax shall be filed by 15th day of third calendar month beginning with first calendar month of tax period. (O.C.G.A. 48-13-76, -78). If return is for period of less than six months, license tax is 50% of tax for entire year. (O.C.G.A. 48-13-73). Payment of tax authorizes conduct of business in any county in Georgia. (O.C.G.A. 48-13-78).

Business Trusts.

See category 13 Estates and Trusts, topic 13.15 Trusts, subhead Business Trust.

Professional Associations.

See topic 2.02 Associations, subhead Professional Associations.

Professional Corporations.

Those licensed in professions of certified public accountancy, architecture, chiropractic, dentistry, professional engineering, land surveying, law, pharmacy, psychology, medicine and surgery, optometry, osteopathy, podiatry, veterinary medicine, registered professional nursing or harbor piloting may practice as professional corporation. (O.C.G.A. 14-7-1 et seq.). Member (i.e., shareholder) not individually liable for misdeeds of another member. (O.C.G.A. 14-7-3; 14-2-622[b]).

Limited Liability Companies.

See topic 2.06 Limited Liability Companies.

Deeds.

See category 21 Property, topic 21.06 Deeds.

Model Non-Profit Corporation Act.

Not adopted, but used as basis for Georgia Non-Profit Corporation Code. (O.C.G.A. 14-3-101 et seq.).

2.04 [RESERVED]

2.05 JOINT STOCK COMPANIES:

Not provided for by statute.

Professional Associations.

See topics 2.02 Associations, subhead Professional Associations; 2.03 Corporations.

2.06 LIMITED LIABILITY COMPANIES:

Georgia Limited Liability Company Act ("Act") adopted. (O.C.G.A. 14-11-100 et seq.).

Not a Corporation.

Limited liability company organized under Act is not corporation, but association closer in character and structure to limited partnership.

General Supervision.

Under Act, articles of organization and annual registration reports must be filed with Secretary of State. (O.C.G.A. 14-11-203,. 14-11-1103).

Purposes.

Limited liability company formed under Act has purpose of engaging in any lawful activity unless more limited purpose is set forth in articles of organization or written operating agreement. (O.C.G.A. 14-11-201[b]).

Powers.

Limited liability company has powers to do all things necessary to carry out its purpose, business and affairs. (O.C.G.A. 14-11-202).

Name.

Must contain words "limited liability company" or "limited company" (certain abbreviations are also permitted). (O.C.G.A. 14-11-207[a]). Name must be distinguishable on records of Secretary of State from name of any other corporation, limited liability company or limited partnership formed or authorized to transact business in state, from any nonprofit corporation, professional corporation, or professional association on file with Secretary of State, and from any name reserved or registered under Act. (O.C.G.A. 14-11-207[a][2]). Any person may apply to Secretary of State to reserve use of name for 30-day period (O.C.G.A. 14-11-208[a]), with option to reapply for another 30 days (O.C.G.A. 14-11-208[b]). Issuance of name means that name is distinguishable for filing purposes on records of Secretary of State and does not affect commercial availability of name. (O.C.G.A. 14-11-207[b]).

Formation.

One or more persons may act as organizer(s) of limited liability company by delivering articles of organization to Secretary of State for filing. (O.C.G.A. 14-11-203[a]). Organizer need not be member of limited liability company at time of formation or thereafter. (O.C.G.A. 14-11-203[b]). At delivery of articles of organization, organizer(s) must provide to Secretary of State: (i) name and address of each organizer; (ii) street address and county of limited liability company's initial registered office and name of its initial registered agent at that office; and (iii) mailing address of limited liability company's principal place of business. (O.C.G.A. 14-11-203[a][1]-[3]). If articles of organization conform to requirements of Act, existence of limited liability company commences at time of filing of articles of organization by Secretary of State or at time specified in articles, which time may not be later than 90th day following filing. (O.C.G.A. 14-11-203[c],. 14-11-206[e][1], 14-11-206[2][f]).

Articles of Organization.

Must provide the name of limited liability company. (O.C.G.A. 14-11-204[a]). Optionally, articles may state that management of limited liability company is vested in one or more managers and may include any other provisions not inconsistent with law. (O.C.G.A. 14-11-204[b]).

Filing of Articles.

Upon delivery of original and conformed copy of articles of organization and other required information, and payment of required filing fee ($100), Secretary of State files original articles, indicates such filing on copies, returns copies, and issues certificate evidencing that articles have been filed. (O.C.G.A. 14-11-206[a], [g]; 14-11-1101[a][1]). Secretary of State may authorize filing of documents by electronic transmission (O.C.G.A 14–11–206[h]).

Amendment to Articles of Organization.

Articles of organization may be amended by delivering for filing to Secretary of State articles of amendment including: (i) name of limited liability company; (ii) date of filing of articles of organization; (iii) amendment to articles of organization; and (iv) date of effectiveness of amendment if later than filing date. (O.C.G.A. 14-11-210[a], [b]). Filing fee for articles of amendment is $20. (O.C.G.A. 14-11-1101[a][2]).

Restated Articles of Organization.

Articles of organization may be restated by delivering restated articles of organization for filing to Secretary of State. (O.C.G.A. 14-11-210[c]). Filing fee for restated articles of organization is $100. (O.C.G.A. 14-11-1101[a][1]).

Registered Office and Registered Agent.

Must continuously maintain registered agent for service of process who must be individual resident of State of Georgia, Georgia corporation or foreign corporation authorized to transact business in Georgia. (O.C.G.A. 14-11-209[a], [b]). Must also continuously maintain registered office within State of Georgia which may, but need not, be its place of business. (O.C.G.A. 14-11-209[a][1]). Address of business office of registered agent must be same as address of registered office. (O.C.G.A. 14-11-209[a][2]). Registered office and agent may be changed by indicating such change on company's annual registration or by filing statement with Secretary of State (O.C.G.A. 14-11-209[c]).

Management.

Unless otherwise provided in articles of organization or written operating agreement, management is vested in members. (O.C.G.A. 14-11-304[a]). Members are agents of and can bind company unless management is vested in one or more managers, in which case manager is agent of and can bind company. (O.C.G.A. 14-11-301[a][b]). Unless otherwise provided in articles or operating agreement, managers need not be natural persons or members and are elected and removed by majority of members (O.C.G.A. 14-11-304[b]). Subject to provisions in articles or organization or operating agreement, managers have right and authority to manage affairs of limited ability company and to make all decisions with respect thereto. (O.C.G.A. 14-11-304[a]).

Members and managers must act in good faith in best interests of company with care which ordinarily prudent person in like position would exercise under similar circumstances, but are not liable to company, its members or managers for any action taken in managing company if performed in compliance with prescribed standard of duty and care. (O.C.G.A. 14-11-305[1]). Nonmanaging members have no duty to limited liability company or other members solely by reason of acting in his or her capacity as member. (O.C.G.A. 14-11-305[1]). Members and managers may rely on information prepared or presented by specified persons. (O.C.G.A. 14-11-305[2]).

Unless otherwise provided in articles of organization or operating agreement, managing members have one vote each and must take action by majority vote to decide any matter arising in connection with business and affairs of limited liability company. (O.C.G.A. 14-11-308[a][1]). Unless otherwise provided in articles of organization or operating agreement, dissolution, merger, transfer of all assets (or at least two-thirds of value thereof), admission of new members, amendment of articles of organization or operating agreement, reduction of capital contribution obligations, distributions and continuation of limited liability company require unanimous vote or consent of members. (O.C.G.A. 14-11-308[b]). Unless otherwise provided in articles or operating agreement, if management is vested in manager or managers, managers have one vote each and must decide every action by majority vote. (O.C.G.A. 14-11-308[a][2]).

Unless otherwise provided in articles of organization or written operating agreement, members or managers may take action by written consent without meeting, subject to specified requirements. (O.C.G.A. 14-11-309[1]).

Limited Liability.

Member, manager, agent or employee of limited liability company is not liable for debts, obligations or liability of company solely by reason of being member, manager, agent or employee of company. Member, manager or employee may be personally liable for tax liabilities and may agree to be personally liable for debts, obligations and liabilities.O.C.G.A. 14-11-303).

Exoneration of Liability and Indemnification.

Member or manager has no liability to limited liability company or any other member or manager if he or she has relied in good faith on provisions of written operating agreement. (O.C.G.A. 14-11-305[4][B]). Articles of organization or written operating agreement may eliminate or limit liability of member or manager except for intentional misconduct or knowing violation of law or for transaction in which member or manager received personal benefit in breach of written operating agreement. (O.C.G.A. 14-11-305[4][A]).

Subject to any standards and restrictions set forth in articles of organization or written operating agreement, limited liability company may indemnify any member, manager or other person from claims arising in connection with company, except for claims related to intentional misconduct or knowing violation of law, or transaction in which member or manager received personal benefit in breach of written operating agreement. (O.C.G.A. 14-11-306).

Application of Laws Imposing Liability.

Act does not alter any law with respect to disregarding legal entities, nor does it alter any law with respect to liability arising out of rendering of professional services. (O.C.G.A. 14-11-314).

Interested Transactions.

Unless articles or written operating agreement provide that statutory provisions applying to conflicting interest transactions do not apply to company, conflicting interest transaction may not be enjoined, set aside, or give rise to award of damages or other sanctions if transaction was disclosed to members or managers voting on transaction, or transaction was established to have been fair to company. (O.C.G.A. 14-11-307[c], [d], [e]).

Records.

Limited liability company must keep specified records and member may, at his or her expense, inspect and copy such records upon reasonable demand and obtain certain other information regarding business, affairs and financial condition of company. (O.C.G.A. 14-11-313).

Contributions to Capital.

Contributions to capital may be in cash, tangible or intangible property, services rendered, promissory note or other obligation to contribute cash or property, or to render services. (O.C.G.A. 14-11-401). Promise to make contribution to capital is not enforceable unless it is set out in articles of organization or written operating agreement that is binding on promisor or in another writing signed by promisor. (O.C.G.A. 14-11-402[a]). Unless otherwise provided in articles of organization or written operating agreement, obligation to contribute to capital may be reduced or eliminated only with unanimous consent of members. (O.C.G.A. 14-11-402[b]).

Allocations and Distributions.

Unless articles of organization or written operating agreement provide for manner of allocation of profits and losses to members, they are allocated equally among members. (O.C.G.A. 14-11-403).

Unless articles of organization or written operating agreement provide for manner of allocation of distributions to members, distributions prior to and after dissolution of company are shared equally among members (O.C.G.A. 14-11-404), may be made in cash only (O.C.G.A. 14-11-406) and are subject to specified solvency requirements (O.C.G.A. 14-11-407). Distributions prior to dissolution of company require approval of all members unless otherwise provided for in articles of organization or written operating agreement. (O.C.G.A. 14-11-404). Member or manager who votes for or expressly consents to distribution made in violation of articles of organization, written operating agreement, or O.C.G.A. 14-11-407 is personally liable to company for amount of distribution that exceeds lawful distribution, subject to contribution entitlement from specified persons. (O.C.G.A. 14-11-408). Statute of limitations for unlawful or excessive distributions is two years. (O.C.G.A. 14-11-408[c]).

Transfers.

Interest in limited liability company is personal property, may be evidenced by certificate and, unless otherwise provided in articles of organization or written operating agreement, is assignable in whole or in part. (O.C.G.A. 14-11-501, -502[1]). Assignment does not by itself dissolve company. (O.C.G.A. 14-11-502[3]). Although membership interest may be freely assigned, assignee has no right to participate in management and affairs of company or exercise rights as member, unless other members unanimously consent or unless otherwise provided in articles of organization or written operating agreement. (O.C.G.A. 14-11-502[3], 14-11-503[1]). Assignee is entitled to share in distributions and allocations of profit and loss allocable to which assignor was entitled, to extent assigned. (O.C.G.A. 14-11-502[2]).

Dissolution.

Limited liability company is dissolved and must be wound up upon first to occur of following: (1) arrival of time specified in articles or written operating agreement; (2) happening of events specified in articles or written operating agreement; (3) arrival of time approved by all members; (4) subject to contrary provision in articles or written operating agreement, 90 days after any event of member dissociation (O.C.G.A. 14-11-601) unless limited liability company is continued by consent of all remaining members or as provided in articles or written operating agreement; or (5) entry of decree of judicial dissolution upon application by member under O.C.G.A. 14-11-603. (O.C.G.A. 14-11-602). Member is entitled to receive fair value of his or her interest in company upon dissociation unless dissociation results in dissolution of company, is otherwise provided in articles of organization or written operating agreement, or is prohibited by other enumerated restrictions. (O.C.G.A. 14-11-405).

Upon dissolution, statement of commencement of winding up may be delivered for filing with Secretary of State. (O.C.G.A. 14-11-606). Company may then dispose of known claims against it by notifying its known claimants in writing of winding up proceedings and request that claimant submit his or her claim within stipulated deadline or be barred. (O.C.G.A. 14-11-607). Dissolved company that has filed statement may publish request that persons holding claims against company present them to company. (O.C.G.A. 14-11-608, -609).

Dissolved limited liability company may deliver to Secretary of State for filing certificate of termination stating name of company, that all known debts, liabilities and obligations have been paid, discharged, or barred, or that adequate provision has been made therefor, and that there are no actions pending against company in any court, or that adequate provision has been made for satisfaction of any pending claim(s). (O.C.G.A. 14-11-610). Deeds or other instruments requiring execution after filing of certificate of termination may be signed by any person who had authority to wind up dissolved company. (O.C.G.A. 14-11-611).

Derivative Action.

Member may bring action on behalf of company only if: (1) member is unable to cause company to sue on its own behalf; (2) member has demanded in writing that members or managers having authority cause company to sue on its own behalf; (3) 90 days have expired from date demand was made unless demand has been rejected earlier or unless irreparable injury would result to company by waiting for expiration of 90 days; (4) plaintiff is member at time of bringing action and was member at time of alleged wrong, or is assignee of member who was; and (5) plaintiff fairly and adequately represents interests of company in enforcing right of company. (O.C.G.A. 14-11-801).

Conversion into Limited Liability Company.

Any corporation, limited partnership, or general partnership may elect to become limited liability company by delivering certificate of election to Secretary of State for filing setting forth statutorily required information. (O.C.G.A. 14-2-1109.1; -1109.2; 14-11-212).

Merger.

Limited liability company may merge with or into one or more business entities pursuant to written agreement. (O.C.G.A. 14-11-901[a]). If merger involves foreign entity, merger is permitted if law of jurisdiction under which foreign entity is organized also permits merger. (O.C.G.A. 14-11-901[b]). Each constituent entity must adopt written plan of merger setting forth statutorily required information. (O.C.G.A. 14-11-902). Unless articles of organization or written operating agreement provide otherwise, all members of limited liability company must authorize and approve plan of merger. (O.C.G.A. 14-11-903[a]). Surviving entity must deliver to Secretary of State for filing articles of merger setting forth statutorily required information. (O.C.G.A. 14-11-904).

Dissenters' Rights.

Unless otherwise provided by articles of organization or written operating agreement, record member of limited liability company may dissent from and obtain payment of fair value of his or her interest in company in event of following: (1) consummation of plan of merger if approval of less than all members is required and member is entitled to vote thereon; (2) consummation of transfer of all or substantially all of company's assets if approval of less than all members is required and member is entitled to vote thereon; (3) amendment of articles of organization that materially and adversely affects rights in respect of dissenter's membership in company; or (4) any company action taken pursuant to member vote to extent that articles of organization or written operating agreement provide that voting or nonvoting members are entitled to dissent and obtain payment for their membership interests. (O.C.G.A. 14-11-1002[a]). Member entitled to dissent may not challenge company action creating his or her entitlement to dissent unless company action fails to comply with specified procedural requirements. (O.C.G.A. 14-11-1002[b]). Statute of limitations applicable to enforcement of dissenter's rights is three years from date company action was taken. (O.C.G.A. 14-11-1013).

Treatment of Foreign Limited Liability Companies.

Laws of the jurisdiction under which foreign limited liability company is organized govern its organization and internal affairs and liability of its managers, members, and other owners, regardless of whether foreign limited liability company procured or should have procured certificate of authority in State of Georgia. (O.C.G.A. 14-11-701[a]). Must procure and receive certificate of authority from Secretary of State to transact business in State of Georgia (O.C.G.A. 14-11-702[a]) and must maintain registered office and registered agent for service or process who must be either individual resident of State of Georgia, domestic corporation, or foreign corporation authorized to transact business in State of Georgia. (O.C.G.A. 14-11-703[a], [b]). Once foreign limited liability company receives certificate of authority, it possesses substantially same rights and privileges and is subject to same duties, restrictions, penalties and liabilities as domestic limited liability company. Act provides non-exhaustive list of activities deemed not to constitute transacting business in State of Georgia. (O.C.G.A. 14-11-702[b]). Failure to procure certificate of authority does not impair validity of contracts of foreign limited liability company and does not prevent it from defending in Georgia court, but prohibits it from maintaining action, suit or proceeding in Georgia court until company is authorized to transact business in State of Georgia. (O.C.G.A. 14-11-711).

2.07 [RESERVED]

2.08 PARTNERSHIPS:

Uniform Partnership Act.

"UPA" adopted with certain modifications. (O.C.G.A. 14-8-1 et seq.). Rules for determining whether property is considered partnership property differ from standard UPA. (O.C.G.A. 14-8-8, -25). Section added authorizing filing of statement of partnership with clerk of superior court of any county. (O.C.G.A. 14-8-10.1). Partnership may be sued in its common name. (O.C.G.A. 14-8-15.1). Partnership terminates upon incorporation and commencement of business under corporation form. (O.C.G.A. 14-8-31[a]). See 224 Ga. App. 88, 479 S.E.2d 474.

Revised Uniform Limited Partnership Act.

("RULPA") adopted with some variation; Georgia's Act is known as Georgia Revised Uniform Limited Partnership Act ("Act"). (O.C.G.A. 14-9-100 et seq.). Act applies to all domestic limited partnerships formed on or after July 1, 1988, to previously existing domestic limited partnerships that so elect pursuant to Act, and to all foreign limited partnerships transacting business in state after July 1, 1988. (O.C.G.A. 14-9-1201). In order to form limited partnership under Act, certificate of limited partnership setting forth certain information required by Act must be executed and filed with Secretary of State. (O.C.G.A. 14-9-201). Corporation, limited liability company or general partnership may elect to become limited partnership by delivering to Secretary of State certificate of election, certificate of limited partnership and related statement setting forth information required by statute. (O.C.G.A. 14-9-206.2). Domestic limited partnerships and foreign limited partnerships authorized to transact business in state must file annual registration with Secretary of State. (O.C.G.A. 14-9-206.5). Instruments executed by domestic or foreign limited partnership conveying interest in real property located in state, when signed on behalf of such limited partnership by person purporting to be general partner thereof, are presumed to have been duly authorized by and binding upon limited partnership unless contrary limitations on authority of general partner are set forth in partnership's certificate of limited partnership and copy of such certificate certified by Secretary of State is properly filed and recorded in office of clerk of superior court of county where real property is located. (O.C.G.A. 14-9-106[c]). Subject to any limitations contained in partnership agreement, limited partnerships may indemnify any partner or any other person against any claims and demands except those arising from such person's intentional misconduct or knowing violation of law or from transaction in which such person received personal benefit in violation of partnership agreement. (O.C.G.A. 14-9-108). Limited partner's right to inspect partnership records is subject to reasonable procedural standards in partnership agreement or as otherwise established by general partners, and such right may be exercised only for purposes reasonably related to limited partner's interest as limited partner. (O.C.G.A. 14-9-305). Act permits, and provides framework for, mergers between domestic limited partnerships, and domestic or foreign limited partnerships, corporations and limited liability companies. (O.C.G.A. 14-9-206.1). Limited partners who participate in management or control of limited partnership do not thereby become liable for partnership obligations. (O.C.G.A. 14-9-303). General partner who ceases being limited partnership's general partner remains personally liable to any creditor who extended credit to partnership prior to time proper notice of such cessation is filed with Secretary of State. (O.C.G.A. 14-9-602[d]). General partner is not personally liable as general partner for partnership debts incurred after such filing unless relevant creditor had, at time partnership debt was incurred, reasonable basis, as defined by Act, for believing that partner remained general partner. (O.C.G.A. 14-9-602[e]). Promise to make contribution to capital of limited partnership is not enforceable unless made in writing. (O.C.G.A. 14-9-502). Act supplements RULPA's provisions regarding withdrawal of general partners. (O.C.G.A. 14-9-602). Limited partner may withdraw from partnership at time or upon occurrence of events specified in partnership agreement. (O.C.G.A. 14-9-603). Assignee of partnership interest may become limited partner if and to extent partnership agreement so provides or all other partners so consent. (O.C.G.A. 14-9-702, -704).

Out-of-State Partnerships.

No special requirements for out-of-state partnerships. Foreign limited liability partnerships and limited partnerships transacting business in state required to procure from Secretary of State certificate of authority. (O.C.G.A. 14-8-45[a]; 14-9-902[a]). Certain activities which, in and of themselves, do not constitute “transacting business in Georgia” for purposes of Act are listed. (O.C.G.A. 14-8-45[b]; 14-9-902[b]). Foreign limited liability partnerships and limited partnerships that are required to obtain certificate of authority to do business in state must continuously maintain in state agent for service of process. (O.C.G.A. 14-8-46[a], 14-9-902.1). Amendment to certificate of authority must be obtained from Secretary of State if partnership changes name or state of organization. (O.C.G.A. 14-8-49, 14-9-905). Failure of foreign limited liability partnerships or limited partnerships transacting business in state to obtain certificate of authority does not impair validity of any contract or act of such foreign limited liability partnerships and limited partnerships or prevent such partnerships from defending any action, suit or proceeding in any state court, but such foreign limited liability partnerships and limited partnerships may not maintain action, suit or proceeding in state court and are subject to annual fine of $500. (O.C.G.A. 14-8-54, 14-9-907).

Limited Liability Partnerships.

To become limited liability partnership, partnership must record limited liability partnership election containing certain information with clerk of superior court of any county in which partnership has office. (O.C.G.A. 14-8-62). Partner in limited liability partnership is not liable either directly or indirectly for any debts, obligations or liabilities of or chargeable to partnership or any other partner solely by reason of being partner in such partnership. (O.C.G.A. 14-8-15). Partner in limited liability partnership is not proper party to action against such partnership solely by reason of being partner in such partnership. (O.C.G.A. 14-8-15).

2.08A PROFESSIONAL ASSOCIATIONS:

See topic 2.02 Associations, subhead Professional Associations.

3 BUSINESS REGULATION AND COMMERCE

3.01 BANKS AND BANKING:

Uniform Commercial Code adopted. (O.C.G.A.tit. 11). See topic 3.09 Commercial Code.

Supervision and Regulation.

Regulated by O.C.G.A. 7-1-1 et seq. Law relating to financial institutions enforced and administered by Dept. of Banking and Finance. (O.C.G.A. 7-1-60). General information available at http://www.ganet.org/dbf. Governor has power to declare banking holiday because of bank emergency. (O.C.G.A. 7-1-111). Department may order financial institutions to restrict all or part of business during any financial emergency proclaimed by Governor. (O.C.G.A. 7-1-112).

Transactions by Bank—Limitations On.

Limitations on bank loans: loan to single borrower not to exceed 15% of statutory capital base or 25% with good security (O.C.G.A. 7-1-285); however, bank may petition department for approval to use limits applicable to national banks (O.C.G.A. 7-1-285[d]) or regulations may prescribe less restrictive limitations (O.C.G.A. 7–1–285[e]); loans secured by improved or unimproved real estate subject to Part 365 of Federal Deposit Insurance Corporation's rules and regulations, including 12 C.F.R. 365.1, 365.2 and Interagency Guidelines for Real Estate Lending Policies in Appendix A and 12 C.F.R. 208.51, and guidelines contained in 12 C.F.R. Part 208 for Federal Reserve member banks; such loans also subject to department rules (with certain exceptions) (O.C.G.A. 7-1-286); loans to directors or officers not permitted unless requirements of O.C.G.A. 7-1-491 are met and security is adequate. Limitations placed on holding of corporate securities by banks. (O.C.G.A. 7-1-288). Purposes for which banks can hold real estate limited. (O.C.G.A. 7-1-262, -263). Reserves to be fixed by regulation but not in excess of: 5% of total deposits for non-Federal Reserve savings bank, and 15% of demand deposits plus 5% of other deposits for non-Federal Reserve commercial bank; reserves for members of Federal Reserve System determined by Federal law; some reserves can be invested in certain approved obligations. (O.C.G.A. 7-1-371).

Bank may not receive a pledge or other security interest in its own stock or securities. (O.C.G.A. 7-1-288).

Shareholders' Liability.

Limited to amount constituting full consideration for shares or subscription. (O.C.G.A. 7-1-430).

Qualifications of Directors.

75% must be U.S. citizens. Majority must reside in Georgia or within 40 miles of banking location in Georgia offering complete banking or trust service. (O.C.G.A. 7-1-480). Residency requirements not applicable to banks having branches in states other than Georgia. (O.C.G.A. 7-1-480[c]).

Share Certificates.

No certificate delivered until share or shares represented thereby are fully paid. (O.C.G.A. 7-1-417).

Deposits in trust payable by bank on order of depositor without liability if before service of suit to enjoin. (O.C.G.A. 7-1-352).

Deposit of Decedent.

Upon death of depositor intestate having deposit of not more than $10,000, financial institution is, subject to certain limitations, authorized to pay proceeds of such deposit to: (1) surviving spouse; (2) if no surviving spouse, to children pro rata; (3) if no children or surviving spouse, to father and mother pro rata; (4) if none of above, to brothers and sisters of decedent pro rata. (O.C.G.A. 7-1-239). If no claim is made under above within 90 days, financial institution may pay up to $10,000 in payment of funeral expenses and expenses of last illness of deceased. Payment pursuant to O.C.G.A. 7-1-239 will operate as complete acquittal of financial institution's liability to any future claim related to decedent's deposits. (O.C.G.A. 7-1-239). Upon death of depositor of building and loan association or savings and loan association, such association may pay amount of deposit or any portion thereof to executor or administrator, or other fiduciary

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appointed and qualified pursuant to last will of depositor or by any court of competent jurisdiction. (O.C.G.A. 7-1-791). If no payment made under above within 90 days, association may pay up to $1,000 to undertaker for funeral expenses upon receipt of statement of expenses and appropriate affidavits. (O.C.G.A. 7-1-792). Safe deposit box of deceased or incompetent person may be opened by court order. (O.C.G.A. 7-1-356).

Multi-Party Accounts.

Regulated by O.C.G.A. 7-1-810 et seq.

Unclaimed Deposits.

Governed by Uniform Disposition of Unclaimed Property Act (Revised). (O.C.G.A. 44-12-190). Unlawful to charge fee or to solicit other compensation to conduct search for document, abandoned or unclaimed deposit accounts or other abandoned properties, with certain exceptions. (O.C.G.A. 7-1-359). See category 21 Property, topic 21.01 Absentees, subhead Escheat.

Deposit Collections.

Regulated by O.C.G.A. 11-4-101 et seq. Every bank must maintain deposit insurance. Six month period of grace allowed at discretion of Department of Banking and Finance to banks which had deposit insurance withdrawn or canceled. (O.C.G.A. 7-1-244).

Stop Payment Orders.

Oral orders binding for 14 days unless confirmed in writing. Written orders binding for six months unless renewed in writing. (O.C.G.A. 11-4-403).

Forged and Unauthorized Signatures and Endorsements.

Without regard to care or lack of care of customer or bank, customer who fails to report unauthorized signature or any alteration on face of item within 60 days after receiving bank statement is precluded from asserting such unauthorized signature or alteration against bank. Alterations on back of item and unauthorized endorsements must be reported within one year. (O.C.G.A. 11-4-406). Bank not liable for payment of unauthorized checks to unintended payee drawn by employee, regardless of bank's negligence in cashing such checks, and loss borne by employer. (184 Ga. App. 326, 361 S.E.2d 531; O.C.G.A. 11-3-405). Checks containing only one of two required signatures are “unauthorized” checks. (228 Ga. App. 893, 495 S.E.2d 296).

Trust Companies.

May be organized only incident to transfer of trust operations from affiliated banks or trust company. (O.C.G.A. 7-1-394, 7-1-320 et seq.). Many organizational requirements same as for banks. (O.C.G.A. 7-1-390 et seq.).

Powers of trust company are general corporate powers (O.C.G.A. 7-1-260) and certain powers also accorded banks (O.C.G.A. 7-1-261). Also, power to act as fiduciary; investment advisor; custodian of property; agent or attorney-in-fact; registrar or transfer agent of securities; fiscal agent of U.S., state or public body thereof, corporation, or person; treasurer of public body or of nonprofit corporation. (O.C.G.A. 7-1-310). Banks, building and loan associations and credit unions, with permission of Department of Banking and Finance, may exercise same powers. (O.C.G.A. 7-1-310).

Uniform Common Trust Fund Act.

Not adopted.

Collective Investment Funds.

Provided for. (O.C.G.A. 7-1-313).

Foreign Banks.

Bank holding companies located in defined region are permitted to acquire Georgia-based banks or bank holding companies under certain conditions. (O.C.G.A. 7-1-620 to -626).

Banks or other institutions chartered under laws of states other than Georgia, or nationally chartered institutions located outside of Georgia, are not permitted to conduct banking business in Georgia except as provided for in O.C.G.A. 7-1-620 to -628.15 and in other limited circumstances. Out-of-state bank with lawful Georgia branch may establish de novo Georgia branch. (O.C.G.A. 7-1-628.8). Various limited exceptions are available for representative offices, foreign bank agencies and certain other businesses. (O.C.G.A. 7-1-241, -590, -713). Banks and bank holding companies, regardless of location, are permitted to establish limited purpose credit card banks in Georgia. (O.C.G.A. 7-5-3). However, banks located in states bordering on Georgia may act as fiduciaries in Georgia merely on registration with Secretary of State, appointment of Secretary as process agent, and proof that they are authorized to act in similar fiduciary capacity in states in which they are incorporated or, if they are national banking associations, in states in which they have their principal places of business. (O.C.G.A. 53-12-390 et seq.). Acting as fiduciary without more does not constitute doing business in Georgia. (O.C.G.A. 53-12-392). See category 13 Estates and Trusts, topic 13.10 Executors and Administrators.

Merger and Consolidation—State Banks and Trust Companies.

One or more banks or trust companies may merge or consolidate if, among other things, parties adopt (majority of directors and two-thirds of eligible shareholders) specified plan of merger or consolidation; articles of merger or consolidation are duly executed and filed with Department of Banking and Finance; Department of Banking and Finance approves articles of merger or consolidation and any appropriate federal agency is properly notified of such merger or consolidation. (O.C.G.A. 7-1-530 to -535). Institution exercising trust powers alone may merge or consolidate only with another such trust company. (O.C.G.A. 7-1-530). When merger or consolidation becomes effective, each party to plan, except resulting bank or trust company, shall cease to exist as separate entity but shall continue in, and parties to plan shall be, single corporation which shall have without further act or deed, all property, rights, powers, trusts, duties and obligations of each party to plan. (O.C.G.A. 7-1-536).

Conversions, Mergers and Consolidations—National Banks.

Regulated by O.C.G.A. 7-1-550 to -590.

Bank holding companies and branch banks limited. (O.C.G.A. 7-1-600 to -612). Banks may establish and operate automated teller machines, cash dispensing machines and point-of-sale terminals throughout Georgia. (O.C.G.A. 7-1-603).

Fiduciary Investment Company.

May be incorporated as medium for investment of funds held by trust companies in fiduciary capacity. (O.C.G.A. 7-1-330 to -338).

Credit Card Banks.

Authorized and regulated. (O.C.G.A. 7-5-1 et seq.).

Credit Union Deposit Insurance Corporation.

Authorized to insure deposits of participating financial institutions. (O.C.G.A. 7-2-1 et seq.).

Credit Unions.

Regulated by O.C.G.A. 7-1-630 to -670.

See also category 22 Taxation, topic 22.03 Business Taxes, subhead Banks and Savings & Loan Association.

Interstate Acquisitions of Banks.

Bank holding companies having banking subsidiaries with offices located outside of Georgia may, subject to certain requirements, acquire bank or bank holding company with offices located in Georgia. Similarly, bank holding companies having banking subsidiaries with offices located in Georgia may, subject to certain requirements, acquire bank or bank holding company with offices located outside of Georgia. (O.C.G.A. 7-1-620 to -628.15).

3.02 BILLS AND NOTES:

Uniform Commercial Code.

Adopted. (tit. 11). No major variations in Georgia. See topic 3.09 Commercial Code.

Days of Grace.

Governed by Commercial Code.

Special Requirements.

None.

Judgment Notes.

Not recognized.

Attorney's Fees.

Clause for, enforceable up to 15% of principal and interest provided ten days written notice is given. (O.C.G.A. 13-1-11).

3.03 BILLS OF LADING:

See topic 3.08 Carriers.

3.04 BILLS OF SALE:

See topic 3.23 Sales.

3.05 BLUE SKY LAW:

See topic 3.24 Securities.

3.06 BROKERS:

Uniform Commercial Code adopted. (O.C.G.A. tit. 11).

Real Estate Brokers.

Governed by O.C.G.A. 43-40-1 et seq. License from Real Estate Commission necessary for brokers, associate brokers, community association managers, and sales people. (O.C.G.A. 43-40-30). Broker must: (1) be at least 21 years old; (2) be Georgia resident or fully comply with O.C.G.A. 43-40-9; (3) be high school graduate (or equivalent); (4) have complied with requirements of O.C.G.A. 43-40-15(b) regarding any criminal convictions; (5) have served actively as licensee for three years; (6) have completed 60 hours in approved broker's course; and (7) pass real estate broker's examination after completion of 60 hour course and after two years of active licensure. (O.C.G.A. 43-40-8[c]). Salesperson must: (1) be at least 18 years old; (2) be Georgia resident or fully comply with O.C.G.A. 43-40-9; (3) be high school graduate (or equivalent); (4) have complied with requirements of O.C.G.A. 43-40-15(b) regarding any criminal convictions; (5) have completed 75 hours in approved salesperson's course; and (6) pass real estate examination. (O.C.G.A. 43-40-8[b]). Salesperson is any person other than associate broker, who acts on behalf of broker in performing any act authorized by law to be performed by broker. (O.C.G.A. 43-40-1[10]). Within one year of obtaining original license, salesperson must take 25 additional hours of approved study. (O.C.G.A. 43-40-8[d]). License renewal for all persons requires completion of six hours approved continuing education course for each year of renewal period. (O.C.G.A. 43-40-8[e]). Commission has power to refuse license, censure licensee or revoke or suspend license for engaging in unfair practices or for list of enumerated offenses. (O.C.G.A. 43-40-14, -15, -25, -27). Licensee must immediately notify Commission of conviction of enumerated offenses. License automatically revoked unless notice is given and hearing requested within 60 days of conviction. (O.C.G.A. 43-40-15[i]). Broker accepting trust funds in brokerage transaction required to maintain separate trust or escrow account in federally insured bank. (O.C.G.A. 43-40-20[a]). Broker not accepting trust funds in brokerage transaction and not maintaining trust account must open trust account within one business day of receipt of any trust funds. (O.C.G.A. 43-40-20[a]). Commission may require written reports concerning status of accounts and may examine during each renewal period or any time for reasonable cause. (O.C.G.A. 43-40-20). Broker required to notify commission in writing within 30 days of change of business address. (O.C.G.A. 43-40-19). Nonresident who is not licensed in this state may be licensed as broker in Georgia upon meeting age, education, and examination requirements in O.C.G.A. 43-40-8. (O.C.G.A. 43-40-9[b]). Nonresidents who are licensed in another state may be licensed in Georgia by (1) proving current out of state licensure; (2) paying fees; (3) signing statement that nonresident has read, and will abide by statute and its rules and regulations; (4) affiliating with broker if nonresident is salesperson, community association manager or associate broker; (5) providing certification of current licensure and copies of records; (6) filing designation in writing appointing Real Estate Commissioner as agent; and (7) agreeing in writing to cooperate with any Real Estate Commission investigation. (O.C.G.A. 43-40-9[c]). Licensed broker of another state may enter into written agreement with Georgia broker to conduct real estate brokerage business in Georgia without first obtaining Georgia license. (O.C.G.A. 43-40-9[e]). Georgia broker shall be responsible for all real estate brokerage acts performed by out-of-state broker under such written agreement and for determining that out-of-state broker has and maintains active license in out-of-state broker's place of residence. (O.C.G.A. 43-40-9[e]). Licensed Georgia broker and licensed broker of another state must enter into separate agreement for each transaction in which they become involved and Georgia broker shall maintain such agreement for at least three years. (O.C.G.A. 43-40-9[e]). Each agreement shall provide (i) for procedures to be followed in event out-of-state broker performs any acts of broker on Georgia real property; (ii) how brokers will divide commissions; (iii) that any listing or property management agreement for Georgia real property be in name of Georgia broker; (iv) that out-of-state broker shall conduct negotiations with any client of Georgia broker only with express permission of Georgia broker; (v) that any advertisement by any means of Georgia real property shall identify listing Georgia broker; (vi) that any contracts, agreements or offers on Georgia real property shall clearly identify Georgia broker and out-of-state broker with statement that out-of-state broker is not licensed by Georgia Real Estate Commission and that said contract, agreement, or offer shall be construed under Georgia Law and that Georgia superior courts shall have jurisdiction over any action brought under such contract, agreement or offer; (vii) that any trust funds obtained involving any Georgia real property shall be held in trust account of Georgia broker; and (viii) such other matters as Commission may require by rule and regulation. (O.C.G.A. 43-40-9[e]). Certain enumerated groups specifically excluded from licensing requirements of statute. (O.C.G.A. 43-40-29). Establishment of real estate recovery fund and procedure for aggrieved person to recover therefrom. (O.C.G.A. 43-40-22). Requirement for fidelity bond by broker providing community association management services. (O.C.G.A. 43-40-22.1).

Real estate brokerage activities of each firm shall be under direct management and supervision of broker or qualifying broker. (O.C.G.A. 43-40-18[c]). Broker shall be responsible for establishing, implementing, and continuing procedures for certain specifically described actions. (O.C.G.A. 43-40-18[c]).

Duties to Clients.

Real estate broker's relationship with and duties to client and required disclaimer are codified. (10-6A). Statutorily defined limited agency relationship created between brokers and sellers, buyers, landlords and tenants whom they represent, subject to written agreements between parties. Statute lists duties of broker to client prior to, during and after termination of relationship, as well as services broker may provide to non-clients without breaching duties to client. (O.C.G.A. 10-6A-4—9). Prior to entering into brokerage relationship, broker must disclose (i) type of brokerage relationships available through broker, (ii) any known conflicts, and (iii) broker's compensation and sharing arrangements (O.C.G.A. 10-6A-10). Written consent and certain disclosures required for broker to act as dual agent. (O.C.G.A. 10-6A-12).

Commission earned when, during agency, agent finds purchaser ready, able and willing, and who actually offers to buy on terms stipulated by owner. (O.C.G.A. 10-6-32; 27 Ga. App. 448, 108 S.E. 815). No right to maintain any action for collection of compensation without alleging and proving he was licensed broker or salesperson when cause of action arose. (O.C.G.A. 43-40-24). Fact that property is placed in hands of broker to sell does not prevent owner from selling, unless otherwise agreed. (O.C.G.A. 10-6-32).

Brokers' Lien.

Real estate broker who is not employee or independent contractor of another real estate broker shall have lien upon commercial real property in amount of agreed compensation between broker and landlord, seller, client or customer, in transaction arising out of any of following: Written agreement for management, sale or lease of commercial real property; written agreement signed by property owner for procurement of purchaser, tenant or other party to accept transfer of interest in real property; or written agreement with buyer or tenant provided that written notice has been provided to owner of property to be liened. Lien shall attach upon recording of notice of lien with Clerk of Court in county where property is located. Claim for lien must be filed within 90 days of date payment was due. (O.C.G.A. 44-14-602).

Not unauthorized practice of law for licensee to complete listing, sales contracts or leases on form prepared by attorney. (O.C.G.A. 43-40-25.1).

3.07 BULK SALES:

See topic 3.09 Commercial Code.

3.08 CARRIERS:

Uniform Commercial Code adopted. (tit. 11). See topic 3.09 Commercial Code.

Railroads and all public service corporations or utilities subject to regulation by Public Service Commission (O.C.G.A. 46-2-51, -93; 46-4-21; 46-8-22, -382), which has power to fix rates and tariffs and make regulations to prevent unjust discrimination in railroad transportation of freight and passengers. (O.C.G.A. 46-8-20).

Directors.

Railroad companies must have at least three directors, each of whom must be natural person of at least 18 years, but need not be resident of Georgia or shareholder. Charter or bylaws may prescribe additional qualifications. (O.C.G.A. 46-8-46).

Georgia Rail Passenger Authority created for financing construction, operation and development of public transportation projects within and without state of Georgia. (O.C.G.A. 46-9-270, et seq.). Georgia Rail Passenger Authority Overview Committee created to review authority operations. (O.C.G.A. 28-10-1, et seq.).

Bills of Lading.

Uniform Commercial Code adopted. (O.C.G.A. tit. 11).

Lien.

Governed by Uniform Commercial Code. (O.C.G.A. 11-7-307, -308). Carrier has lien on goods for freight, but it may be waived by special contract or actual delivery of goods. Lien exists pro rata where goods delivered at intermediate point with consent of consignee. (O.C.G.A. 46-9-46, -191). Lien also exists on passenger's baggage for passenger's fare. (O.C.G.A. 46-9-190).

Whenever carrier of passengers transports baggage to destination and it is uncalled for or refused for six months after arrival at destination, carrier may sell at public auction to highest bidder provided certain published notices given. (O.C.G.A. 46-9-190).

Limiting Liability.

Common carrier may limit his liability by express contract, but not by publication on tickets or receipts. (46–9–2).

See also category 23 Transportation, topic 23.01 Motor Vehicles.

3.09 COMMERCIAL CODE:

Uniform Commercial Code.

Adopted. (O.C.G.A.tit. 11). See Uniform and Model Acts section.

Following amendments and options in Permanent Editorial Board's 1966 Official Recommendations not enacted: §2-318; §2-702; §3-501; §7-209. For offices for filing and fees under Art. 9, see category 10 Documents and Records, topic 10.04 Records, subhead Filing Under Uniform Commercial Code: Place; Fees.

1972 Official Amendments.

Partially adopted.

1973 Official Amendment.

Adopted.

1977 Official Amendments.

Adopted.

1987 Official Amendments.

Adopted.

1989 Official Amendments.

Partially adopted.

1990 Official Amendments.

Adopted.

2000 Official Amendments.

Partially adopted (replaced 1972 Official Amendments).

Intentional differences between Georgia Code and 1962 Official Text, 1977 Official Text of Article VIII and conforming amendments to Articles I, V, and IX, 1987 Official Text of Article IIA and conforming amendments to Articles I and IX, 1989 Official Text of Article IVA, and 1990 Official Text of Articles III and IV, and 2000 Official Text of Article IX are following, typographical and technical deviations and corrections omitted. (O.C.G.A. tit, 11 omitted before section numbers.)

§1-105(2) omits last two sentences and adds to end: “Law governing perfection, effect of perfection or nonperfection, and priority of security interests and agricultural liens. O.C.G.A. 11-9-301 to -307. Governing law in this article on funds transfers. (Article 4A of this title). O.C.G.A. 11-4A-507.”

§1-201 (4) adds to end:

“Wherever the word ‘branch’ is used in this title, with reference to a bank, it shall mean not only ‘branch bank’, but also ‘bank office’ and ‘bank facility’ as those terms are defined in O.C.G.A. 7-1-600.”

§1-201(20) reads:

“ ‘Holder,’ with respect to a negotiable instrument, means the person in possession if the instrument is payable to bearer or, in the case of an instrument payable to an identified person, if the identified person is in possession. Holder with respect to a document of title means the person in possession if the goods are deliverable to bearer or to the order of the person in possession.”

§1-201(24) omits phrase “as a part of its currency” and adds to end: “and includes a monetary unit of account established by an intergovernmental organization or by agreement between two or more nations.”

§1-201 omits last two sentences in subsection (27); and adds new subsection (31.1):

“ ‘Public sale’ means a sale:

(A) Held at a place reasonably available to persons who might desire to attend and submit bids; and

(B) At which those attending shall be given the opportunity to bid on a competitive basis; and

(C) At which the sale, if made, shall be made to the highest and best bidder; and

(D) Except as otherwise provided in this title for advertising or dispensing with the advertising of public sales, of which notice is given by advertisement once a week for two weeks in the newspaper in which the sheriff's advertisements are published in the county where the sale is to be held, and which notice shall state the day and hour, between 10:00 A.M. and 4:00 P.M., and the place of sale and shall briefly identify the goods to be sold. The provisions of this paragraph shall not be in derogation of any additional requirements relating to notice of and conduct of any such public sale as may be contained in other provisions of this title but shall be supplementary thereto."

§1-201(43) omits phrase "or indorsement".

§1-207 adds to beginning "(1)" and adds to end new subsection (2): "Subsection (1) of this Code section does not apply to an accord and satisfaction."

§2-107(1) includes "timber"; and reference to "timber" deleted in §2-107(2).

§2-316(3) adds new subsection (d):

"With respect to the sale of cattle, hogs and sheep by a licensed auction company or by an agent, there shall be no implied warranty by said auction company or agent that the cattle, hogs, and sheep are free from disease; provided, however, that the provisions of this paragraph shall not be applicable to brucellosis reactor cattle detected at an official state laboratory within 30 days following the date of sale."

§2-316 adds new subsection (5):

"The implied warranty of merchantability under Code Section O.C.G.A. 11-2-314 and the implied warranty of fitness for a particular purpose under Code Section O.C.G.A. 11-2-315 shall not be applicable to the procurement, processing, storage, distribution or use of whole human blood, blood plasma, blood products, blood derivatives or other human tissue or organs for the purpose of injecting, transfusing, incorporating or transplanting any of them into the human body. The injection, transfusion or other transfer of blood, blood plasma, blood products or blood derivatives and the transplanting or other transfer of any tissue, bones or organs into or unto the human body shall not be considered, for the purpose of this Article, commodities subject to sale or barter, but shall be considered as medical services."

§2-328 adds to end of subsection (2): "In sales by auction the auctioneer shall be considered agent of both parties so far as to dispense with any further memorandum in writing than his own entries."

§2A-103(1)(e) omits phrase "if the total payments to be made under the lease contract, excluding payments for options to renew, or buy, do not exceed $."

§2A-208 renumbers subsections (3) and (4) as subsections (4) and (5) and adds new subsection (3): "The requirements of the statute of frauds section of this article (O.C.G.A. 11-2A-201) must be satisfied if the contract as modified is within its provisions."

§2A-303 adds to end of subsection (3):

"For purposes of this subsection: (a) a party's 'performance' includes its rights as well as its duties; and (b) a party creating or enforcing (or seeking to create or enforce) a security interest that the lease contract prohibits or makes an event of default has the burden of proving that such a transfer does not involve an actual delegation of material performance."

§2A-303 adds to end of subsection 5(b): "For purposes of clause (b)(2), the transferor has the burden of proving that any of the damages caused by the transfer could reasonably be or have been prevented by the party not making the transfer, and of proving the extent that they could reasonably be or have been so prevented."

§2A-306 adds to end: “or (iii) with regard to the rights of a creditor of the lessor or lessee, a different priority would result by application of Code Section O.C.G.A. 11-9-310.”

§2A-506(2) reads:

“A cause of action accrues when the default occurs, regardless of the aggrieved party's lack of knowledge of the default. A breach of warranty occurs when tender of delivery is made, except that where a warranty explicitly extends to future performance of the goods and discovery of the breach must await the time of such performance the cause of action accrues when the breach is or should have been discovered.”

§2A-508(2)(b) reads: “In a proper case, pursue those rights contained in Code Section O.C.G.A. 11-2A-521.”

§3-415(a), in opening phrase, reads: “Subject to subsections (b), (c), (d) and (e) of this Code section and to subsection (d) of Code Section O.C.G.A. 11-3-419”.

§3-602 adds new subsection (c):

“Notwithstanding any other provision of this article, with respect to a note which is a negotiable instrument within the meaning of this article and which is to be paid off in installment payments or in more than one payment, the maker or drawer is authorized to pay the assignor until the assignee or its authorized agent sends a registered or certified letter to the maker or drawer at the maker's or drawer's last known address notifying the maker or drawer that the amount due or to become due has been assigned and that payment is to be made to the assignee. A notification that does not reasonably identify the rights assigned is ineffective. If requested by the drawer or maker, the assignee must furnish reasonable proof that the assignment has been made and, unless the assignee does so, the maker or drawer may pay the assignor.”

§4-406(f), in its first sentence, reads: “Without regard to care or lack of care of either the customer or the bank, a customer who does not within 60 days after the statement or items are made available to the customer (subsection (a) of this Code section) discover and report the customer's unauthorized signature on or any alteration on the face of the item or who does not within one year from that time discover and report any unauthorized indorsement or alteration on the back of the item is precluded from asserting against the bank the unauthorized signature, indorsement or alteration.”

§6-103 omits:

“Public notice under subsection (6) or subsection (7) may be given by publishing once a week for two consecutive weeks in a newspaper of general circulation where the transferor had its principal place of business in this state an advertisement including the names and addresses of the transferor and transferee and the effective date of the transfer.” This section is not printed at last sentence of §6-103 as it appears in 1962 Official Text.

§6-104(2) omits:

“If the transferor is the obligor of an outstanding issue of bonds, debentures or the like as to which there is an indenture trustee, the list of creditors need include only the name and address of the indenture trustee and the aggregate outstanding principal amount of the issue.”

§6-106 reads:

“Definition of public notice.—Public notice under Code Section O.C.G.A. 11-6-103 shall be given as follows: by advertising the transfer, giving the name of the transferor, the transferee, and the effective date thereof, once a week for two weeks in the newspaper in which sheriffs' advertisements are published in the county where the former business enterprise taken over had its principal place of business in this state."

§6-111 increases six month period to twelve months.

§7-210(2)(b) omits: "or certified."

§8-102(1)(b) adds subsection (iv): "Not a partnership interest in a limited partnership, unless the partnership interest is listed on a national securities exchange registered under the federal securities laws or quoted in the automated quotation system of a national securities association registered under the federal securities laws."

§8-106 adds:

"With respect to securities issued by a municipal corporation, county or other political subdivision, authority or other similar public corporation, governmental agency or unit of this state, the negotiability thereof is governed by the law (including the conflict of laws rules) of this state; the provisions of the following Code sections of this article shall not apply: Code Sections O.C.G.A. 11-8-104, 11-8-202(1) and (2), 11-8-203, 11-8-305, and 11-8-405, and the validity of any security issued by any such issuer and all rights arising in connection with any such issuance shall continue to be determined by the provisions for the validation of bonds by counties, municipalities or other political subdivisions in Part 1 of Article 2 of Chapter 82 of Title 36 and with respect to revenue obligations issued by any municipal corporation, county or other political subdivision, authority, governmental agency, unit or other public corporation of this state shall be determined by the provisions for validation in Article 3 of Chapter 82 of Title 36, the 'Revenue Bond Law,' as amended."

§8-320(1)(a)(ii) reads: "Is in bearer form or indorsed in blank by an appropriate person or registered in the name of the clearing corporation, another clearing corporation, a custodian bank, or a nominee of any of them; or".

§9-102(8) reads:

" 'Authority' means the Georgia Superior Court Clerk's Cooperative Authority." Thereafter, subsections 9-102(9) through (52) conform to Revised Art. 9 subsections 9-102(8) through (52).

§9-102(53) of Revised Art. 9 defining "manufactured home" omitted.

§9-102(54) of Revised Art. 9 defining "manufactured-home transaction" omitted. Thereafter, subsections 9-102(54) through (79) conform to Revised Art. 9 subsections 9-102(55) through (80).

§9-109(14) excludes assignments of Georgia lottery prizes from scope of Art. 9.

§9-109(15) excludes certain assignments of worker's compensation and structured settlement payments from scope of Art. 9.

§9-109(16) reads:

"A security interest created by or affecting property of this state or any governmental unit of this state in any public finance transaction, other than a security interest created by: (A) An authority activated under Chapter 62 of Title 36, the 'Development Authorities Law'; or (B) A local authority having as its principal function the stimulation of industrial growth and the reduction of unemployment."

§9-111 reads:

"The creation of a security interest is not a bulk transfer under Article 6 of this title."

§9-322.1 reads:

"A perfected security interest in crops for new value given to enable the debtor to produce the crops during the production season and given not more than three months before the crops become growing crops by planting or otherwise takes priority over an earlier perfected security interest to the extent that such earlier interest secures obligations incurred more than six months before the crops became growing crops by planting or otherwise, even though the person giving new value had knowledge of the earlier security interest."

§9-323 omits subsection (b) of Revised Art. 9 relating to rights of lien creditor.

§9-333 reads:

"(a) *Year's support; property taxes; other state taxes; other taxes or judgments.* Except as is expressly provided to the contrary elsewhere in this article and in subsection (b) of this Code Section, a perfected security interest in collateral takes priority over each and all of the liens, claims, and rights described in Code Section O.C.G.A. 44-14-320, relating to the establishment of certain liens, as now or hereafter amended, and Code Section O.C.G.A. 53-7-91 of the 'Pre-1998 Probate Code,' if applicable, or Code Section O.C.G.A. 53-7-40 of the 'Revised Probate Code of 1998,' relating to the priority of debts against the estate of a decedent, as now or hereafter amended, provided, nevertheless, that: (1) Year's support to the family, duly set apart in the collateral prior to the perfection of the subject security interest, takes priority over such security interest; (2) A lien for property taxes duly assessed upon the subject collateral, either prior or subsequent to the perfection of the subject security interest, takes priority over security interest; (3) A lien for all other state taxes takes priority over such security interest, except where such security interest is perfected by filing a financing statement relative thereto prior to such time as the execution for such state taxes shall be entered on the execution docket in the place and in the manner provided by law; provided, nevertheless, that, with respect to priority rights between such tax liens and security interests where under this article the same are perfected other than by filing a financing statement, the same shall be determined as provided by law prior to January 1, 1964; and (4) A lien for other unpaid taxes or a duly rendered judgment of a court having jurisdiction shall have the same priority with regard to a security interest as it would have if the tax lien or judgment were a conflicting security interest within the meaning of Code Section O.C.G.A. 11-9-322 or an encumbrance within the meaning of O.C.G.A. 11-9-334, which conflicting security interest was perfected by filing or which encumbrance arose at the time the tax lien or judgment was duly recorded in the place designated by statute applicable thereto. (b) *Mechanics' liens on farm machinery.* A mechanics' lien on farm machinery or equipment arising on or after July 1, 1985, shall have priority over any perfected security interest in such farm machinery or equipment unless a financing statement has been filed as provided in O.C.G.A. 11-9-501 and unless the financing statement describes the particular piece of farm machinery or equipment to which the perfected security interest applies. Such description may include the make, model, and serial number of the piece of farm machinery or equipment. However, such description shall be described and a mistake in such description shall not invalidate the description if it provides a key to identifying the farm machinery or equipment."

§9-408(c) adds to beginning of first sentence: "Except as otherwise provided in Code Section O.C.G.A. 53-12-28,".

§9-501(a)(2) reads:

"The office of the clerk of superior court of any county of this state, in all other cases, including a case in which the collateral is goods that are or are to become fixtures and the financing statement is not filed as a fixture filing."

§9-502(a) adds subsection (4) which reads:

"Where both (A) the collateral described consists only of consumer goods as defined in paragraph (24) of subsection (a) of Code Section O.C.G.A. 11-9-102 and (B) the secured obligation is originally $5,000.00 or less, gives the maturity date of the secured obligation or specifies that such obligation is not subject to a maturity date."

§9-502(c) reads:

"Real estate mortgages as fixture filings. A real estate mortgage may not be filed as a fixture filing, but one filed prior to January 1, 1995, which was effective as a fixture filing when filed, remains effective as a fixture filing until the mortgage is released or satisfied of record or its effectiveness otherwise terminates as to the real estate."

§9-515 reads:

"(a) *Five year effectiveness.* Except as otherwise provided in subsection (d) of this Code section, a filed financing statement is effective for a period of five years after the date of filing or until the twentieth day after any earlier maturity date required to be specified on the filed financing statement. (b) *Lapse and continuation of financing statement.* The effectiveness of a filed financing statement lapses on the expiration of the period of its effectiveness unless before the lapse a continuation statement is filed pursuant to subsection (c) of this Code section. Upon lapse, a financing statement ceases to be effective and any security interest or agricultural lien that was perfected by the financing statement becomes unperfected, unless the security interest is perfected otherwise. If the security interest or agricultural lien becomes unperfected upon lapse, it is deemed never to have been perfected as against a purchaser of the collateral for value. (c) *When continuation statement may be filed.* A continuation statement may be filed only within six months before the expiration of the five-year period specified in subsection (a) of this Code section or the occurrence of any earlier maturity date required to be specified on a filed financing statement. (d) *Effect of filing continuation statement.* Except as otherwise provided in O.C.G.A. 11-9-510, upon timely filing of a continuation statement, the effectiveness of the initial financing statement continues for a period of five years commencing on the day on which the financing statement would have become ineffective in the absence of the filing or, where both (1) the collateral described consists only of consumer goods as defined in paragraph (24) of subsection (a) of Code Section O.C.G.A. 11-9-102 and (2) the secured obligation is originally $5,000.00 or less, any earlier maturity date of the secured obligation specified on such continuation statement. Upon the expiration of the five-year period or the earlier occurrence of a required specified maturity date, the financing statement lapses in the same manner as provided in subsection (b) of this Code section, unless, before the lapse, another continuation statement is filed pursuant to subsection (c) of this Code section. Succeeding continuation statements may be filed in the same manner to continue the effectiveness of the initial financing statement."

§10-101 sets the effective date of Act as 12:01 A.M. on Jan. 1, 1964.

§10-102 reads:

"Provision for transition.—Transactions validly entered into before the effective date specified in Code Section O.C.G.A. 11-10-101 and the rights, duties, and interests flowing from them remain valid thereafter and may be terminated, completed, consummated or enforced as required or permitted by any statute or other law amended or repealed by this title as though such repeal or amendment had not occurred."

§10-103 is specific repealer section, §10-104 retains certain statutory remedies.

§§11-101, 11-102 adopted.

§11-103 reads as follows:

"(1) Transactions validly entered into before July 1, 1978 and the rights, duties and interests flowing from them remain valid thereafter; and, except as provided in subsection (2) of this Code section, may be terminated, completed, consummated or enforced as required or permitted by old Article 9 of this title and other statute or other law amended or repealed by this Act as though such repeal or amendment had not occurred.

(2) Continuation statements with respect to security interests perfected under the old Article 9 of this title shall, after December 31, 1977, be filed in the manner and place specified in the revised Article 9 of this title."

§11-104 amends §11-108 as follows:

"Presumption that rule of law continues unchanged.

Unless a change in law has clearly been made, the provisions of the revised Article 9 of this title shall be deemed declaratory of the meaning of the old Article 9 of this title."

§11-105 not adopted.

§11-106 not adopted.

§11-107 not adopted.

§11-108 adopted as §11-104.

Article 12 sets July 1, 1994, as effective date for amendments to Article 9 relating to filing financing statement and related documents and provides for transition to new provisions.

§12-102 reads:

"(1) A financing statement or continuation statement filed prior to January 1, 1995, which has not lapsed prior to January 1, 1995, shall remain effective for the period provided in Code Section O.C.G.A. 11-9-403 as in effect immediately prior to January 1, 1995.

"(2) The effectiveness of any financing statement or continuation statement filed prior to January 1, 1995, may be continued only by the filing of a continuation statement, in the form prescribed by the Georgia Superior Court Clerks' Cooperative Authority, signed by either the debtor or the secured party with the filing officer of the county where the original financing statement was filed or, if the financing statement has previously been continued, where the currently effective continuation statement was filed. If the original financing statement or currently effective continuation statement was filed in multiple counties, then such continuation statement may be filed in any of such multiple counties, except where the original financing statement or currently effective continuation statement covers crops growing or to be grown, or minerals or the like, including oil and gas, or accounts subject to subsection (5) of Code Section O.C.G.A. 11-9-103, or was filed as a fixture filing (Code Section O.C.G.A. 11-9-313), then such continuation statement must be filed in each of such counties where any of the related real estate is located.

This continuation statement must contain the information required by the first sentence of subsection (1) of Code Section O.C.G.A. 1-9-402, other than a statement indicating the types, or describing the items, of collateral and the social security number or Internal Revenue Service taxpayer identification number of the debtor, and must further identify the original financing statement or currently effective continuation statement, the office where such financing statement or continuation statement was filed, and the filing number and date of filing or other recording information, and further state that the original financing statement is still effective. Except as specified in this subsection, the provisions of subsection (3) of Code Section O.C.G.A. 11-9-403 for continuation statements apply to such a statement.

"(3) Statements of amendment, assignment, release, or termination affecting original financing statements filed prior to January 1, 1995, ('transitional filings') shall be filed on the forms prescribed by the Georgia Superior Court Clerks' Cooperative Authority with the filing officer of the county where the original financing statement was filed, or if the original financing statement had previously been continued, where the currently effective continuation statement was filed. If the original financing statement or currently effective continuation statement was filed in multiple counties, then such statement of amendment, assignment, release, or termination may be filed in any one of such multiple counties, except where the original financing statement or currently effective continuation statement covers crops growing or to be grown, or minerals or the like, including oil and gas, or accounts subject to subsection (5) of Code Section O.C.G.A. 11-9-103, or was filed as a fixture filing (Code Section O.C.G.A. 11-9-313), in which event such statement of amendment, assignment, release, or termination must be filed in each of such counties where any of the related real estate is located. Each transitional filing shall identify the original financing statement or currently effective continuation statement, the office where such financing statement or continuation statement was filed, the filing number or other recording information, and identify each named debtor and secured party. Notwithstanding the requirements of subsection (2) of Code Section O.C.G.A. 11-9-405 or Code Section O.C.G.A. 11-9-406, no social security number or Internal Revenue Service taxpayer identification number of the debtor shall be required to be included in any such transitional filings. The Georgia Superior Court Clerks' Cooperative Authority shall prescribe rules and regulations, as appropriate, to govern the presentation of such transitional filings.

"(4) A filing which was made in good faith in an improper place or not in all of the places required by Code Section O.C.G.A. 11-9-401 as in effect prior to January 1, 1995, is nevertheless effective with regard to any collateral as to which the filing complied with the requirements of this article and is also effective with regard to collateral covered by the financing statement against any person who has knowledge of the contents of such financing statement.

"(5) A filing which was made in the proper place in this state pursuant to Code Section O.C.G.A. 11-9-401 as in effect prior to January 1, 1995, continues effective even though the debtor's residence or place of business or the location of the collateral or its use, whichever controlled the original filing, is thereafter changed.

"(6) A continuation statement that was timely filed pursuant to subsection (8) of Code Section O.C.G.A. 11-9-403 as in effect prior to January 1, 1995, and that remains in effect as of January 1, 1995, shall continue the effectiveness of the original financing statement for the period specified in subsection (8) of Code Section O.C.G.A. 11-9-403 as in effect on January 1, 1995, provided that such continuation statement may thereafter be further continued by the filing of a subsequent continuation statement within six months prior to the expiration of the five-year period specified in subsection (8) of Code Section O.C.G.A. 11-9-403 as in effect prior to January 1, 1995, or, if such five-year period is determined to have a different duration, within six months prior to the expiration of the five-year period specified in subsection (8) of Code Section O.C.G.A. 11-9-403 as in effect on January 1, 1995."

Following options and alternatives in 1962 Official Text, 1972 Official Text of Article

IX, and 1987 Official Text of Article IIA have been exercised:

§2-107(1): Optional phrase adopted;

§2A–216: Alternative A adopted;

§3-121: Alternative B adopted;

§4-106: Optional phrase omitted;

§4-202(1)(b): Optional phrase omitted;

§4-212: Optional subsection (2) adopted;

§5-112(1): Optional phrase adopted;

§5-114: Optional subsections (4) and (5) adopted;

§6-104(1)(c) adds following optional language:

"in the office of the clerk of the superior court as follows: When the seller is a resident individual, in the county where he resides, or when the seller is a nonresident individual, or is a partnership, corporation or other business entity, in the county of the seller's principal place of business in this state."

§6-106: Optional Section omitted, see subhead Intentional Differences, supra;

§6-107(2): Optional subparagraph (e) omitted;

§6-108(3): Optional subparagraph (c) omitted;

§6-109: Optional subsection (2) omitted;

§7-204: Optional subsection (4) omitted;

§7-403(1)(b): Optional clause omitted;

Supervision of Records.

Georgia Superior Court Clerks' Cooperative Authority provides for development, acquisition and distribution of records management systems. Information, services, supplies and materials for superior court clerks, etc. (O.C.G.A. 15-6-94). Internet access to information and records available at http://www.gsccca.org.

Forms.

National forms used. See also Uniform and Model Acts of the Law Digest, Commercial Code Amendments, for National Forms in print.

See also topics: Banks and Banking, Bills and Notes, Brokers, Carriers, Contracts, Factors, Frauds, Statute of, Sales, Securities, Warehousemen; categories Business Organizations, topic Corporations; Civil Actions and Procedure, topic Limitation of Actions; Debtor and Creditor, topics Assignments, Fraudulent Sales and Conveyances, Liens, Pledges; Documents and Records, topics Records, Seals; Mortgages, topic Chattel Mortgages; Transportation, topic Motor Vehicles.

3.09A COMMERCIAL REAL ESTATE BROKERS:

See topic 3.06 Brokers.

3.10 CONDITIONAL SALES:

See topic 3.23 Sales.

3.11 CONSIGNMENTS:

See topic 3.14 Factors.

3.12 CONSUMER PROTECTION:

Uniform Commercial Code.

Adopted. (O.C.G.A.tit. 11). See topics 3.17 Interest, 3.23 Sales.

Uniform Deceptive Trade Practices Act.

Adopted. (O.C.G.A. 10-1-370 to -375).

Assistive Technology Warranty Act.

Approved. (O.C.G.A. 10-1-870). Manufacturer that sells assistive technology device to consumer must provide consumer with express written warranty of at least one year.

Fair Business Practices.

Under Fair Business Practices Act (O.C.G.A. 10-1-390 to -407), unfair or deceptive acts in conduct of consumer transactions declared unlawful. Examples of unfair or deceptive acts listed in O.C.G.A. 10-1-393 to -393.6. Governor appoints Administrator and Consumer Advisory Board. Administrator, with consent of Attorney General, may adopt regulations, and bring actions in name of State to enjoin present, past, or anticipated unfair or deceptive methods, acts, or practices. (O.C.G.A. 10-1-404). Strict rules regulate farm equipment manufacturers. (O.C.G.A. 13-8-11).

Actions.

Administrator may, subject to requirement of subsequent notice and opportunity for hearing, issue cease and desist order or obtain civil penalty of up to $2,000 per violation, or may obtain from superior court of competent jurisdiction varying relief, including temporary restraining order, civil penalty of up to $5,000 per violation or restitution to injured parties. (O.C.G.A. 10-1-397, -398). Appeals from any order of Administrator appealable to Superior Court of Fulton County. (O.C.G.A. 10-1-398.1). Administrator may, with consent of Attorney General, issue investigative demands with respect to suspected violations. (O.C.G.A. 10-1-403). Administrator forwards criminal offense conduct to prosecuting attorney. (O.C.G.A. 10-1-406). Private party who suffers injury or damage or whose business or property was damaged as result of violations of Fair Business Practices Act may bring action for injunctive relief and general and exemplary damages (exemplary if violation intentional). Prospective claimant must present written demand for relief identifying claimant and describing alleged violation to prospective respondent at least 30 days prior to filing action. Respondent's rejected written tender of settlement will limit recovery if court finds tender reasonable in relation to injury. Demand requirements do not apply if prospective respondent has no place of business or assets in State or in specified cases where temporary restraining orders are permitted. Respondent may make written settlement offer and pay rejected tender into court after receiving notice of suit. (O.C.G.A. 10-1-399). To be subject to direct suit under Act, alleged offender must have committed volitional act to avail self of channels of consumer commerce. (145 Ga. App. 8, 244 S.E.2d 15).

Statute of Limitations.

No action may be brought under Act more than two years after claimant knew or should have known of violation, or more than two years after termination of proceeding or action by State. (O.C.G.A. 10-1-401).

Penalties and Damages.

Treble damages imposed for intentional violation of Act. Attorneys' fees awarded to claimant unless incurred after rejection of reasonable written offer of settlement. If claimant continues action in bad faith or for harassment after rejection of respondent's reasonable offer of settlement, attorneys' fees may be awarded to respondent. Manufacturer or supplier whose conduct is basis for action under Act liable for damages assessed against or suffered by retailer. (O.C.G.A. 10-1-399). Recovery limited to actual damages if violation is result of bona fide error notwithstanding non-negligent maintenance of procedures to avoid errors. (O.C.G.A. 10-1-400).

Penalty for violation of injunction issued under Act in action brought by Administrator is fine of not more than $25,000. Each day separate violation for continuing offense. Corporate officers, directors, partners, employees, and agents with knowledge of and who authorized violative acts liable for intentional violations if judgment against corporation is not satisfied within 30 days. (O.C.G.A. 10-1-405).

Exemptions.

Transactions exempt from Act include acts authorized by State or U.S. law. Publisher, owner, agent, or employee of newspaper, periodical, or radio or television station is exempt with respect to dissemination of unfair or deceptive advertisement if such person had no knowledge of false, misleading, or deceptive character of advertisement, did not prepare advertisement, and had no financial interest in sale or distribution of advertised product or service. (O.C.G.A. 10-1-396).

Unsolicited Merchandise.

Offer of goods for sale employing practice of unsolicited sending of such goods prohibited. Receipt of unsolicited goods under such circumstances deemed unconditional gift. Recipient of such goods may bring action to enjoin sending of bills or requests for payment, and attorneys' fees and costs may be awarded to prevailing party. (O.C.G.A. 10-1-50).

Criminal Conduct.

Deceptive business practices punishable as misdemeanor. Deceptive business practices committed by knowingly in regular course of business: Using false weights, measures, or devices for determining or recording any quality or quantity of goods; selling, offering or delivering less than represented quality or quantity of commodity; or taking more than represented quantity when furnishing weight or measure. (O.C.G.A. 16-9-50). Improper solicitation of money punishable as misdemeanor, and damaged party entitled to damages of three times sum solicited. Improper solicitation of money committed by soliciting payment of money by statement or invoice, or writing so interpreted, for goods not yet ordered or services not yet performed and ordered, unless following language appears in 30-point bold face type on face of statement or invoice: “This is a solicitation for the order of goods or services and you are under no obligation to make payment unless you accept the offer contained herein.” (O.C.G.A. 16-9-52). Foreclosure fraud punishable as felony. Foreclosure fraud committed by knowingly or willfully representing that monies provided to or on behalf of debtor in connection with debtor's residence are loan if monies in fact used to purchase residence or debtor's interest therein. (O.C.G.A. 16-9-60). Misrepresenting origin or ownership of timber valued at over $500 is felony. (O.C.G.A. 16-9-61).

Sale of Business Opportunities.

Defined as sale or lease of products, supplies, or services with which to start business, where seller represents it will purchase products made or provide locations it does not control for certain vending operations, or make certain guarantees of income, or provide sales or marketing program; exempted from definition are sales of ongoing business and certain relationships. (O.C.G.A. 10-1-410). Detailed disclosures to prospective purchaser must be made at least 48 hours before contract signed or seller receives any consideration. (O.C.G.A. 10-1-411). Disclosure statement must be filed with Administrator of Fair Business Practices Act. (O.C.G.A. 10-1-413). Purchaser has one year to void contract if seller has not registered with Administrator of Act. (O.C.G.A. 10-1-417). Seller prohibited from making unsubstantiated claims of earning potential, using name or mark of business that neither controls seller nor accepts responsibility for seller's representations, or referring to its compliance with O.C.G.A. 10-1-410 to -416. (O.C.G.A. 10-1-414). Seller may be required to obtain surety bond in amount not less than $75,000. (O.C.G.A. 10-1-412). Contract must be in writing and contain required provisions. (O.C.G.A. 10-1-415). Remedies for violations available to purchaser. (O.C.G.A. 10-1-417).

Lemon Laws.

Motor Vehicle Warranty Rights Act (effective until Jan. 1, 2009) sets forth duties and responsibilities of motor vehicle dealers and manufacturers and provides procedures for dispute resolution. (O.C.G.A. 10-1-780 et seq.). 2008 Ga. L. 746, effective Jan. 1, 2009, repealed the former Code sections and enacted the current article, Georgia Lemon Law, O.C.G.A. 10-1-780 to 10-1-797. Farm Tractor Warranty Act sets forth duties and responsibilities of farm tractor dealers and manufacturers and provides procedures for dispute resolution. (O.C.G.A. 10-1-810 et seq.).

Plain Language.

No “Plain Language” statute.

Transient Merchant.

Transient Merchant Act regulates merchants without permanent place of business. (O.C.G.A. 43-46-1 et seq.). Must be licensed (O.C.G.A. 43-46-4), meet general requirements relating to corporations, and maintain registered agent (O.C.G.A. 43-46-5). Violators subject to civil and criminal penalties. (O.C.G.A. 43-46-7). See also topic 3.19 Licenses, Business and Professional.

Advertising.

Advertising for sale without intent to sell at price and on terms in advertisement prohibited. (O.C.G.A. 10-1-420). Relevant disclaimers may not be hidden or placed in selectively de-emphasized text. False or fraudulent advertising prohibited. (O.C.G.A. 10-1-421). Persons using term “Doctor” or “Dr.” in conjunction with name required to identify degree held. (O.C.G.A. 10-1-422). Unlawful to misrepresent nature of business by use of such terms as “manufacturer”, “wholesaler”, or “retailer” or to use term “wholesale” unless advertiser selling items advertised at wholesale. (O.C.G.A. 10-1-424). Unlawful to misrepresent or to fail to state name and address of owner in connection with liquidation sale, auction sale or going-out-of-business sale. (O.C.G.A. 10-1-425). See also O.C.G.A. 10-1-392(a)(5.2) and -393(b)(24) regarding “going out of business” sales. Violations are misdemeanors. (O.C.G.A. 10-1-426). Aggrieved person may sue for injunction. (O.C.G.A. 10-1-423). False, misleading, or fraudulent advertising of legal services prohibited. (O.C.G.A. 10-1-427). Deceptive or fraudulent telemarketing practices prohibited. (O.C.G.A. 10-5B-1, -4; 10-1-393.6).

Disaster Related Violations.

Whenever Administrator imposes penalty for any violation under Uniform Deceptive Trade Practices Act or Fair Business Practices Act or for false advertising and violation is disaster related violation, in addition to any other applicable penalty, additional civil penalty not to exceed $10,000 may be imposed for each transaction. Any person suffering damage or injury as result of disaster related violation has cause of action to recover actual damages, punitive damages, if appropriate, and reasonable attorneys' fees. Amounts recovered in such action have priority over civil penalty imposed under such Code section. (O.C.G.A. 10-1-438).

Credit Cards.

Lender Credit Card Act repealed 1987. Credit Card and Credit Card Banking Act (O.C.G.A. 7-5-1 et seq.) adopted, providing for establishment of limited credit card banks to engage in credit card account business in State. Domestic lender or credit card bank authorized to impose interest, fees, and charges as agreed upon between lender or bank and debtor, subject to requirements for fair disclosure and criminal usury. See topic 3.17 Interest.

Computer Systems.

Georgia Computer Systems Protection Act makes it unlawful to knowingly transmit misleading data through computer or telephone network for purpose of setting up and operating electronic mailbox or home page, if such data uses individual name, tradename, trademark or copyrighted symbol to falsely identify person or organization transmitting data. (O.C.G.A. 16-9-93.1 et seq.).

Retail Installment and Home Solicitation Sales.

Retail Installment and Home Solicitation Sales Act (O.C.G.A. 10-1-1 et seq.) requires retail installment contracts to be in writing and completed before execution. Motor vehicles excluded from Act. Contracts must be in at least six-point type and carry prescribed notice and provisions. Time price differential limited to 13% per annum. Seller must give completed copy of contract to buyer upon execution and deliver, within 30 days after execution of contract, any policies or certificates of insurance purchased in connection with contract. Buyer entitled to receipt for payments upon request. Buyer may prepay balance on contract and receive refund calculated by sum-of-the-digits method. (O.C.G.A. 10-1-3).

Revolving Account.

Must be in writing (printed material in at least six-point type) and completed prior to execution. Must contain prescribed notice and provisions. Time price differential restricted to 1.75% per month. (O.C.G.A. 10-1-4).

Mail Order and Telephone Sales.

Retail installment contracts negotiated and entered into by mail or telephone without personal solicitation by representative of seller subject to Act. Where catalog or other printed solicitation generally available to public clearly sets forth cash price and sales terms of seller and is provided to buyer, sale may be made subject to requirements of Act, except that seller not required to deliver copy of contract to buyer and seller may complete contract by inserting appropriate price and sales terms set out in current catalog or printed solicitation. If seller inserts terms in contract, seller must deliver to buyer statement of items inserted. (O.C.G.A. 10-1-5).

Right to Cancel Home Solicitation Sale.

Buyer may cancel home solicitation sale agreement by notice of cancellation given to seller at address in agreement by certified mail or statutory overnight delivery (O.C.G.A. 9-10-12[b]), return receipt requested, posted not later than midnight of third business day after buyer signs agreement. Seller must refund all deposits and down payments and redeliver all property traded in within ten days after cancellation. Seller may charge liquidated damages of lesser of $25 or 5% of gross sales price. Buyer must return any merchandise unused and in same condition as when received. Seller must pick up merchandise at point of sale within reasonable time after cancellation and may charge lesser of $5 or actual cost of pick up. Notice of cancellation need not be in particular form and is effective if expresses buyer's intention not to be bound by home solicitation sale. (O.C.G.A. 10-1-6).

Permissible Charges.

Retail installment contract or revolving account may provide for delinquency charge not to exceed $25 on installment not paid within ten days of when due. Seller may collect court costs and reasonable attorneys' fees if referred for collection to attorney who is not salaried employee of retail seller. If buyer fails to make good on dishonored check after ten days notice, seller may charge fee not to exceed greater of $30 or 5% of dishonored check. (O.C.G.A. 10-1-7[b], 16-9-20[j]).

No Security Interest in Certain Goods.

No security interest may be taken in clothing, software and other nondurable items. Payments on revolving account applied first to finance charge or time price differential, then to goods in order of their purchase (if goods purchased on same day, then to lowest priced goods first). Parties may agree in writing for payments to be otherwise applied. (O.C.G.A. 10-1-8).

Transfer of Contracts or Accounts.

Seller may assign, pledge, hypothecate, or transfer retail installment contract or revolving account on agreed terms and price. Unless buyer has notice of assignment, payment to last known owner of contract or account is binding on all subsequent owners. Assignment does not bar action against seller or preclude defense against assignee in action for finance or other charges. (O.C.G.A. 10-1-9).

Rights After Repossession.

After repossession, seller may not recover deficiency unless within ten days after repossession seller gives notice to buyer by registered or certified mail of intention to pursue deficiency claim. Notice must advise buyer of right of redemption and right to demand public sale. Buyer's demand of public sale must be given by registered or certified mail within ten days after posting of seller's notice. (O.C.G.A. 10-1-10).

Penalties.

Willful and intentional violation of Act is misdemeanor. Contracting for or receiving excessive finance charge on retail installment contract bars recovery of all finance and other charges on contract. Charging or receiving excessive time price differential on revolving account bars recovery of all finance and other charges stated on or collected in connection with statement in which violation occurred. In case of willful violation, buyer may recover from seller or set-off or counterclaim lesser of (a) $100 or (b) double time price differential and delinquency charge and attorneys' fees and court costs charged and paid, but seller may recover cash price of goods or services and cost of any insurance. (O.C.G.A. 10-1-15).

Statute of Limitations.

No action may be brought more than four years after claimant knew or should have known of violation. (O.C.G.A. 10-1-14).

No Waiver.

Provisions of Act may not be waived. (O.C.G.A. 10-1-13).

“Georgia Fair Lending Act.”

Effective Oct. 1, 2002; revision effective Mar. 7, 2003. Act regulates “predatory lending” practices, including late fees, interest, “flipping” and total cost to consumer, on certain loans that are secured by residential real estate. (O.C.G.A. 7-6A-1 et seq.). *Note:* U.S. Office of Comptroller of Currency has exempted banks with national charters from provisions of Georgia Fair Lending Act. See Federal Register, Vol. 68, No. 150, p. 46264, Aug. 5, 2003. In addition, U.S. Office of

Thrift Supervision also applied federal supremacy analysis to exempt thrifts from Act. See P-2003-1 issued Jan. 21, 2003. Finally, due to federal exemptions, Georgia state-chartered banks are exempt as well. (O.C.G.A. 7-6A-12). “Home loan” defined as loan in which principal balance does not exceed conforming loan size limit for single-family dwelling established by Federal National Mortgage Association (Fannie Mae). (O.C.G.A. 7-6A-2[8]). “High cost loan” defined as one in which annual percentage rate equals or exceeds that set out in §152 of Home Ownership and Equity Protection Act of 1994, 15 U.S.C. §1602 (aa), and regulations adopted pursuant thereto by Federal Reserve Board, including 12 C.F.R. 226.32 or total points and fees payable in connection with loan, excluding not more than two bona fide discount points, exceed 5% of total loan amount if total loan amount is $20,000 or more, or lesser of 8% of total loan amount or $1,000, if total loan amount is less than $20,000. (O.C.G.A. 7-6A-2[17][A]). Practices prohibited in every home loan include no financing of single premium credit life insurance or credit accident insurance, lender cannot encourage borrower to default on existing loan, late charges limited to five percentage points of late payment past due ten days or more, cannot charge fee for requested payoff information unless sent by facsimile (facsimile fee limited to $10). (O.C.G.A. 7-6A-3). Additional prohibited practices include prohibition on “flipping”. (O.C.G.A. 7-6A-4). Additional prohibited practices for “high cost home loan” include prepayment penalties that cannot exceed two percentage points of amount prepaid during first 12 months of loan and one percentage point of amount prepaid during second 12 months; prepayment penalties prohibited entirely after 24 months; no balloon payments permitted; no negative amortization permitted; increased interest rate upon default not permitted; loan cannot provide terms allowing two or more periodic payments to be consolidated and paid in advance from loan proceeds; mandatory arbitration clause barred; high cost loan cannot be made unless consumer has received counseling from third-party nonprofit organization approved by HUD or Georgia Housing and Finance Authority on advisability of taking loan; and high cost home loan cannot be made unless reasonable creditor would believe that borrower could make scheduled payments. (O.C.G.A. 7-6A-5). Borrower has private right of action for violation of Act that includes actual damages, statutory damages in amount equal to two times interest already paid, punitive damages and attorneys fees. (O.C.G.A. 7-6A-7).

3.13 CONTRACTS:

Uniform Commercial Code.

Adopted. (O.C.G.A. tit. 11). Rule for interpretation of contracts is contained in separate provision. (O.C.G.A. 13-2-2). See topic 3.09 Commercial Code; category 10 Documents and Records, topic 10.05 Seals; category 14 Family, topic 14.10 Infants.

In 1994, Georgia Supreme Court held that pre-litigation contractual waivers of right to trial by jury are not enforceable in cases tried under laws of Georgia. (264 Ga. 339, 444 S.E.2d 799).

Upon the ratification of amendment to Constitution of Georgia at the 2010 general election statutory provisions allowing for enforcement of restrictive covenants in contracts restricting competition so long as restrictions are reasonable in time, geographic area and prohibited activities will become effective (O.C.G.A. 13–8–50 et seq.).

3.14 FACTORS:

Factor must exercise ordinary care and diligence in keeping and protecting articles entrusted to him. (O.C.G.A. 44-12-71). In absence of instructions factor may exercise discretion according to general usages of trade but greater and more skillful diligence and most active good faith are thereby required. (O.C.G.A. 44-12-75). Statutory provisions do not apply to accounts receivable factor; such relationships will be governed by contract and Uniform Commercial Code. (250 Ga. 832, 301 S.E.2d 262). Factor contracting on his or her own credit has right of action on contracts made for principal. (O.C.G.A. 10-6-82).

Uniform Commercial Code.

Adopted. (O.C.G.A. tit. 11).

License Requirements.

See topic 3.19 Licenses, Business and Professional.

Liens.

Factor's lien extends to all balances on general account and attaches to proceeds as well as goods themselves. (O.C.G.A. 44-14-404). Liens satisfied by sale as established by local usage. (O.C.G.A. 44-14-405). Factor's liens inferior to liens for taxes, recorded liens or ones of which factor had notice, special liens for rent, liens of laborers, judgment liens, and other general liens reduced to execution and levied upon. (O.C.G.A. 44-14-400). Factor's liens regulated by O.C.G.A. 11-9-101 et seq. See topic 3.09 Commercial Code.

3.15 FRANCHISES:

No statute currently exists that specifically regulates offer and sale of franchises in Georgia. However, persons engaged in franchising should be aware of Georgia Business Opportunity Sales Law, which governs offer and sale of business opportunities and multi-level distribution programs. (O.C.G.A. 10-1-410 to -417). Definition of term “business opportunity” may cover certain franchise programs, subjecting them to requirements of Business Opportunity Sales Law. Such requirements include bond, trust account, escrow requirements, presale disclosure requirements, specific contractual provisions to be inserted in business opportunity agreement and certain prohibited acts in offer or sale of business opportunity. Laws also exist relating to motor vehicle franchise practices (O.C.G.A. 10-1-620 to -668) and farm equipment distributorships and dealerships (O.C.G.A. 13-8-12 to -45).

3.16 FRAUDS, STATUTE OF:

Following obligations not binding unless promise in writing, signed by party to be charged or some person by him lawfully authorized: (1) promise by executor, administrator, guardian, or trustee to answer damages out of his or her own estate; (2) promise to answer for debt, default or miscarriage of another; (3) agreement made on consideration of marriage, except marriage articles; (4) contract for sale of land or any interest in or concerning same; (5) agreement not to be performed within one year; (6) promise to revive debt barred by statute of limitations; (7) commitment to lend money (O.C.G.A. 13-5-30); (8) contract for sale of goods for price of $500 or more (O.C.G.A. 11-2-201); (9) contract creating landlord-tenant relationship exceeding one year and not tenancy at will (O.C.G.A. 44-7-2).

Uniform Commercial Code.

Adopted. (O.C.G.A. tit. 11). See in particular: O.C.G.A. 11-1-206 (contracts for sale of personal property not otherwise covered by other U.C.C. provisions); O.C.G.A. 11-2-201 (contracts for sale of goods); O.C.G.A. 11-3-416 (guarantees written on negotiable instruments); O.C.G.A. 11-5-104 (letters of credit); O.C.G.A. 11-8-319 (contracts for sale of securities); O.C.G.A. 11-9-203 (security agreements).

Contracts of Sale.

Governed by Uniform Commercial Code. (O.C.G.A. tit. 11).

Statute is inapplicable where: (1) Contract fully performed; (2) performance on one side accepted by other in accordance with contract; (3) such part performance that non-enforcement of contract would work fraud (O.C.G.A. 13-5-31); contract of purchaser at judicial sale (O.C.G.A. 9-13-169); statute applicable to sale under power conferred by mortgage or security deed (116 Ga. 285, 42 S.E.2d 518).

3.17 INTEREST:

Legal rate 7% per year simple interest where rate not established by written contract. (O.C.G.A. 7-4-2). See, however, subhead Maximum Rate for maximum lawful rate.

Maximum Rate.

Any rate higher than 7% must be in writing; maximum is 16% per annum simple interest where principal amount involved is $3,000 or less. Subject to criminal usury limit of 5% per month (not applicable to licensed pawnbrokers) (O.C.G.A. 7-4-18), no limit on interest rate that may be agreed upon where principal exceeds $3,000; however, if above $3,000 but below $250,000, must be expressed in simple interest terms in written contract. No prohibition is thereby created on variable rate or other basis for interest. Foregoing is inapplicable to matters governed by specified statutes. (O.C.G.A. 7-4-2).

Bar to using defense of usury is applied to endorsers of loan. (124 Ga. App. 511, 184 S.E.2d 226).

Advertisements of Interest Rates for Consumer Credit Transactions.

Must comply with Federal Truth in Lending Act, 15 U.S.C.S. §§57(a) and 1602 et seq. (O.C.G.A. 7-4-4).

Judgments bear interest at rate equal to prime rate as published by Board of Governors of Federal Reserve System, as published in statistical release H. 15 or any publication that may supersede it, on day of judgment plus 3% per annum on principal amount recovered unless rendered on written contract or obligation providing for interest at specified rate, in which case judgment bears interest at rate specified in contract or obligation. Such post-judgment interest accrues automatically, whether or not such judgment specifically reflects entitlement to such interest. (O.C.G.A. 7-4-12). In actions ex delicto, claimant is entitled to receive interest equal to prime rate as published by Board of Governors of Federal Reserve System, as published in statistical release H. 15 or any publication that may supersede it, on 30th day following delivery of statutory notice plus 3% per annum on claims of unliquidated damages from 30 days after statutory notice, provided judgment is for amount not less than sum claimed. (O.C.G.A. 51-12-14).

Liquidated demands bear legal rate from time when due, or if payable on demand, then from date of demand. (O.C.G.A. 7-4-15).

Unliquidated demands bear pre-judgment interest at legal rate in certain circumstances. (255 Ga. 117, 335 S.E.2d 547).

Commercial Accounts.

Due and payable on date statement rendered to obligor unless obligor agrees otherwise. Maximum charge of 1.5% per month interest on portion due and payable for 30 days or more. (O.C.G.A. 7-4-16).

Small Industrial Loans.

On loans of $3,000 or less for period of 36½ months or less, made by lenders other than banks, savings and loan, trust companies, insurance companies, mortgage companies, etc., maximum charge is 10% annual interest computed on face amount even if repayable in installments, plus loan fee not exceeding 8% of first $600 plus 4% of excess. In addition to loan fee, maintenance charge of $3 per month may be charged for each contract. One-time late fees of $10 or amount equal to 5¢ for each $1 of any installment five days overdue permitted.

(O.C.G.A. 7-3-14). Statutory prepayment privilege, with proportionate refund of interest. (O.C.G.A. 7-3-17). When interest charge is excessive, licensed lender shall be liable to borrower for twice interest and loan fees charged to borrower (not less than $100). (O.C.G.A. 7-3-29).

Other specific statutes regulate allowable interest rates or finance charge limitations on retail installment sales, motor vehicle and manufactured home sales, loans by credit unions, insurance premium financing loans, pawnbroker loans, etc.

Revolving loan account interest restrictions repealed; replaced by provisions of Credit Card and Credit Card Bank Act. (O.C.G.A. 7-5-1 et seq.). Credit card interest may be agreed upon by lender and debtor, subject to 5% per month misdemeanor provisions described below. (O.C.G.A. 7-5-4). See topic 3.12 Consumer Protection.

Usury.

Any higher rate than those above specified or failure to disclose interest rates in simple interest per annum terms where principal amount of loan is greater than $3,000 but less than $250,000 (O.C.G.A. 7-4-1) results in forfeiture of entire interest but no further penalty (O.C.G.A. 7-4-10), except in case of small industrial loans (see subhead Small Industrial Loans, supra) or loans on which interest exceeds 5% per month, for which violations constitute misdemeanor (not applicable to licensed pawnbrokers) (O.C.G.A. 7-4-18). Definition of “interest” under criminal usury statute (O.C.G.A. 7-4-18) is different from definition setting legal rate of interest (O.C.G.A. 7-4-2; 260 Ga. 271, 392 S.E.2d 242). Usurious interest paid may be recovered by suit brought within one year of payment. (O.C.G.A. 7-4-10). While plea of usury is personal, creditor cannot collect usurious interest from insolvent debtor to prejudice of other creditors. (O.C.G.A. 7-4-11). Except for small industrial loans, loan not rendered usurious by brokers fees paid to persons other than lender. (O.C.G.A. 7-4-8, 7-3-5). To prove usury, must show intent to charge usurious interest rate at time of making loan. (160 Ga. App. 359, 287 S.E.2d 75).

Bonds issued by housing authority may bear interest pursuant to terms of resolution, trust indenture or mortgage of such authority. (O.C.G.A. 8-3-73). Bonds, notes and certificates of county, municipality, authority or public corporation (other than general obligation bonds) not governed by state usury laws. (O.C.G.A. 36-82-120).

Revenue bonds and certificates may bear interest not exceeding 9% per year. (O.C.G.A. 36-82-64).

See also category 20 Mortgages, topic 20.04 Mortgages of Real Property.

3.18 INFORMATION TECHNOLOGY, INTERNET AND NEW MEDIA

Georgia has enacted Uniform Electronic Transactions Act which governs electronic records and signatures in business, commercial and governmental affairs (O.C.G.A. 10–2–1 to 10–2–20). Under Uniform Real Property Electronic Recording Act electronic documents treated as original, electronic signatures acceptable. (O.C.G.A. 44–2–35 to 44–2–39.2)

3.19 LICENSES, BUSINESS AND PROFESSIONAL:

Practically all businesses and occupations require licenses (O.C.G.A. tit 43); counties, municipalities are authorized to provide by local ordinance or resolution for levy, assessment, and collection of occupation tax, regulatory fees for businesses and professionals within county (O.C.G.A. 48-13-5 to -28).

Occupational Licenses.

State licensing authority shall suspend or revoke licenses upon licensee's conviction of criminal offense involving controlled substance or marijuana. (O.C.G.A. 16-13-110 to -114).

Licenses for certain trades, businesses, professions and occupations can be suspended for failure to pay child support (O.C.G.A. 19-6-28), or failure to repay any federal educational loan or conditional scholarship (O.C.G.A. 43-1-29).

Commercial Travelers.

O.C.G.A. tit. 48, c. 13, art. 1 governs municipal and county occupation taxes for following: traveling salespersons engaged in taking orders for sale of goods when no delivery of goods is made at time of taking order; merchant or dealer, site of whose business is outside taxing jurisdiction, who delivers goods previously ordered; and employees of merchant or dealer who are engaged in delivery of goods to customers. (O.C.G.A. 48-5-354). See also topic 3.12 Consumer Protection.

Disabled Veterans and Blind Person.

Any disabled war veteran with 10% disability, disabled peacetime veteran with 25% service-connected disability or blind person may peddle, conduct business or practice profession or semi-profession in any city or county without payment of business, occupation or professional license taxes if resident of Georgia and not liable for payment of state income taxes. (O.C.G.A. 43-12-2). Proof of such disability must be established by written certification of two physicians, or by letter or other written evidence from United States Department of Veterans' Affairs, or by evidence from branch of armed forces of U.S. in which veteran served. (O.C.G.A. 43-12-1, 2). Certificate from any probate judge is prima facie proof of disability. (O.C.G.A. 43-12-35). Certain businesses are exempted from this law. (O.C.G.A. 43-12-8). Privileges granted hereunder are not transferable. (O.C.G.A. 43-12-9).

Corporation License Tax.

See category 2 Business Organizations, topic 2.03 Corporations.

Collection Agencies.

Bond required for certain agents. (O.C.G.A. 10-6-100, -101).

Athlete Agents.

Registration required for agents of certain university athletes (O.C.G.A. 43-4A-4), bond required (O.C.G.A. 43-4A-13), and activities restricted (O.C.G.A. 43-4A-16).

3.20 MONOPOLIES, RESTRAINT OF TRADE AND COMPETITION:

See subhead Contracts in Partial Restraint of Trade, infra.

Contracts in general restraint of trade are void. (O.C.G.A. 13-8-2[a]). Agreements which may have effect or intended to have effect to defeat or lessen competition or to encourage monopoly are void and legislature cannot authorize such. (Const., Art. III, §VI, Paragraph V). Any person who enters into contract, combination or conspiracy in restraint of trade or in restraint of free and open competition in any transaction with state, agency thereof or political subdivision, shall, upon conviction, be punished by imprisonment of not less than one nor more than five years. (O.C.G.A. 16-10-22).

Unfair Trade Practices.

Unfair or deceptive acts or practices in conduct of consumer transactions in trade or commerce are unlawful. (O.C.G.A. 10-1-393[a]). Specific unfair or deceptive acts or practices, essentially identical to those set forth in Revised Uniform Deceptive Trade Practices Act §2(a) (see Uniform and Model Acts section), are listed for illustrative purposes (O.C.G.A. 10-1-393[b]). Administrator may adopt as substantive rules prohibiting specific acts or practices and regulations interpreting FTC Act §5(a)(1). (O.C.G.A. 10-1-394[a]). Administrator may pursue actions for equitable relief, civil penalties or restitution to adversely affected persons. (O.C.G.A. 10-1-397). Person injured as result of violation of Act may, upon compliance with 30-day demand letter procedures, sue for injunctive relief, damages, reasonable attorneys' fees and expenses, but may not sue as class representative. (O.C.G.A. 10-1-399). Treble damages awarded for intentional violations. (O.C.G.A. 10-1-399[c]). Plaintiff's rejection of written settlement offer made within 30 days of demand letter and later found by court to have been reasonable offer may limit plaintiff's recovery to amount of offer, preclude award of attorneys' fees and expenses incurred subsequent to offer, and, if litigation pursued in bad faith, result in award of attorneys' fees and expenses to defendant. (O.C.G.A. 10-1-399[d]). Act does not apply to: (1) actions specifically authorized under laws administered by or rules and regulations promulgated by any Federal or Georgia regulatory agency; and (2) acts done by media in publishing or disseminating advertisements of others if media did not prepare or did not have knowledge of deceptive nature of advertisement or did not have direct financial interest in sale or distribution of advertised product or service. (O.C.G.A. 10-1-396). See category 17 Intellectual Property, topic 17.01 Trademarks and Tradenames.

Uniform Deceptive Trade Practices Act adopted. (O.C.G.A. 10-1-370). See Uniform and Model Acts section.

Multilevel distribution companies (defined as persons or business entities that sell, distribute or supply for valuable consideration, goods or services through independent agents, contractors or distributors, at different levels wherein such participants may recruit other participants, and wherein commissions, cross-commissions, bonuses, refunds, discounts, dividends or other considerations in program are or may be paid as result of sale of such goods or services or recruitment, actions or performances of additional participants) (O.C.G.A. 10-1-410) having any Georgia residents among their participants must abide by prohibitions and requirements of statute, which are designed to protect actual and potential participants.

Resale Price Agreements.

Fair Trade Act repealed, effective July 1, 1976.

Gasoline Marketing Practices Act.

Regulates contractual and marketing relationships between dealers and distributors, creating cause of action in favor of dealer and defenses in favor of distributor. (O.C.G.A. 10-1-230 et seq.). Gasoline industry is not affected with public interest; therefore, O.C.G.A. 10-1-234 regulating prices and O.C.G.A. 10-1-254 proscribing below-cost sales are unconstitutional. (255 Ga. 480, 340 S.E.2d 16; 256 Ga. 669, 353 S.E.2d 17).

Contracts in Partial Restraint of Trade.

See topic 3.13 Contracts; category 11 Employment, topic 11.02 Labor Relations.

In 1990, Georgia legislature passed Restrictive Covenant Act (O.C.G.A. 13-8-2.1) to make it easier to enforce restrictive covenants, but that Act was declared unconstitutional (261 Ga. 371, 405 S.E.2d 253). Accordingly, from and after June 27, 1991, law on restrictive covenants as it existed prior to enactment of O.C.G.A. 13-8-2.1 will apply to all restrictive covenants. This statutory provision is repealed following ratification at general election in 2010 of amendment to Constitution of Georgia providing for enforcement of covenants in commercial contracts entered into on and after such date (O.C.G.A.13–8–2.1) However, following ratification of constitutional amendment at the 2010 general election statutory provisions allowing enforcement of restrictive covenants in employment and commercial contracts restricting competition so long as restrictions are reasonable in time, geographic area and scope of prohibited activities becomes effective (O.C.G.A. 13–8–50 et seq.).

3.21 NEGOTIABLE INSTRUMENTS:

See topic 3.02 Bills and Notes.

3.22 RESTRAINT OF TRADE:

See topic 3.20 Monopolies.

3.23 SALES:

Uniform Commercial Code.

Adopted. (O.C.G.A.tit. 11). See topic 3.09 Commercial Code.

See topic 3.12 Consumer Protection.

Contracts of Sale.

See topic 3.09 Commercial Code. (11-2). See topic 3.12 Consumer Protection.

Bills of Sale.

See category 21 Property, topic 21.06 Deeds, subhead Deed to Personalty.

Conditions or Warranties.

See topic 3.09 Commercial Code. (11-2).

Product Liability.

See topic 3.09 Commercial Code. (O.C.G.A. 11-2-318). No privity requirement in action against manufacturer by natural person. (O.C.G.A. 51-1-11; 234 Ga. 868, 218 S.E.2d 580).

Transfer of Title.

See topic 3.09 Commercial Code. (11-2).

Delivery.

See topic 3.09 Commercial Code. (11-2).

Stoppage in Transit.

See topic 3.09 Commercial Code. (11-2).

Remedies of Seller.

See topic 3.09 Commercial Code. (11-2).

Remedies of Buyer.

See topic 3.09 Commercial Code. (11-2).

Conditional Sales.

See topic 3.09 Commercial Code. (11-2). All retail installment sales contracts and home solicitation sales subject to extremely detailed requirements as to form and content. (O.C.G.A. 10-1-1 et seq.).

Retail Credit Sales.

See subhead Conditional Sales, supra, and topic Interest.

Bulk Sales.

See topic 3.09 Commercial Code; category 8 Debtor and Creditor, topic 8.08 Fraudulent Sales and Conveyances, subhead Bulk Sales.

Sales of Motor Vehicles.

See category 23 Transportation, topic 23.01 Motor Vehicles, subheads Titles and Sales.

Consumer Protection.

See topic 3.12 Consumer Protection.

3.24 SECURITIES:

Georgia Securities Act of 1973 (O.C.G.A. 10-5-1 et seq.; effective until July 1, 2009) regulates offer, sale and regulation of securities and registration of dealers, salespersons and investment advisers. Act has been amended to conform to federal National Securities Market Improvement Act of 1996. Effective on July 1, 2009, Chapter 5 of tit. 10 is repealed and replaced with Georgia Uniform Securities Act of 2008, O.C.G.A. 10-5-1 et seq. (2008 Ga. Laws 381, §1).

Uniform Commercial Code.

Adopted. See topic 3.09 Commercial Code.

Supervision.

Secretary of State (2 Martin Luther King Jr. Drive, Suite 802-West Tower, Atlanta, GA 30334; telephone, (404) 656-3920, or fax, (404) 657-8410) has administrative authority and is designated Commissioner of Securities. (O.C.G.A. 10-5-10[a]). Internet access and information available at http://sos.georgia.gov/securities/.

Regulatory Powers of Supervising Authority.

Commissioner has power to make rules and regulations as deemed necessary. (O.C.G.A. 10-5-10[d], effective until July 1, 2009).

Prerequisites to Sales or Offers.

It is unlawful to offer for sale or to sell any security to any person in Georgia (i) unless security is subject to effective registration statement, (ii) security or transaction is exempt under O.C.G.A. 10-5-8 or O.C.G.A. 10-5-9, or (iii) security is federal covered security. (O.C.G.A. 10-5-5[a], effective until July 1, 2009). Any securities transaction subject to effective federal registration statement under Securities Act of 1933 or exempt from registration requirements may be sold in exempt transactions provided that certain notice and filing fee of $250 has been provided to commissioner. (O.C.G.A. 10-5-9[5], effective until July 1, 2009). See subhead Exempt Transactions, infra. Four kinds of Georgia registration are: registration by qualification (O.C.G.A. 10-5-5[b], effective until July 1, 2009), registration by notification (O.C.G.A. 10-5-5[d], effective until July 1, 2009), small issue registration (O.C.G.A. 10-5-5[e], effective until July 1, 2009), and nonprofit issuer registration (O.C.G.A. 10-5-5[f]). Filing fee for first three types of Georgia registration is 1/20 of 1% of maximum aggregate offering price of securities to be offered in Georgia, but minimum fee is $250. (O.C.G.A. 10-5-6[a], effective until July 1, 2009). There is no filing fee for nonprofit issuer registration. (O.C.G.A. 10-5-6[a], effective until July 1, 2009). Registration by qualification is effective when commissioner orders (O.C.G.A. 10-5-5[b][5], effective until July 1, 2009); registration by notification, and nonprofit issuer registration effective at 3:00 p.m. on fifth full business day after filing of registration statement, if no stop order has been entered. (O.C.G.A. 10-5-5[d][3]; 10-5-5[f][6], effective until July 1, 2009). Small issue registrations effective at 3:00 p.m. on tenth full business day after filing of registration statement, if no stop order has been entered. (O.C.G.A. 10-5-5[e][5], effective until July 1, 2009). All registrations effective for 12 months following effective date and may be renewed upon updating information and payment of $100 renewal fee. (O.C.G.A. 10-5-6[i], effective until July 1, 2009). Issuer seeking registration of securities by qualification must file $25,000 bond as precondition to registration. However, issuer need not file such bond if registered securities will be sold in Georgia only through dealers and limited dealers registered under Act. No applicant need file such bond if he or she deposits with commissioner certificate of deposit with certain financial institutions or irrevocable letter of credit from certain banks or certain federal or Georgia obligations having market value of at least $25,000. (O.C.G.A. 10-5-6[b][1], [2], effective until July 1, 2009).

Securities to Which Act Applicable.

Act applies to any note, stock, treasury stock, bond, debenture, evidence of indebtedness, certificate of indebtedness, investment certificate, certificate of interest or participation in any profit-sharing agreement, certificate of interest in oil, gas or other mineral rights, collateral trust certificate, pre-organization certificate or subscription, transferable share, investment contract, voting-trust certificate, limited partnership interest, or beneficial interest in profits or earnings, or any other instrument commonly known as a security, including any certificate of interest or participation in, temporary or interim certificate for, receipt for, guaranty of or warrant or right to subscribe to or purchase, any of foregoing. (O.C.G.A. 10-5-2[a][26], effective until July 1, 2009). For transaction to constitute securities transaction there must be investment, reasonable expectation of profits and reliance on management of another party to bring about profits. (246 Ga. 583, 272 S.E.2d 314). Investment contract shall include investment which holds possibility of return on risk capital even though investor's efforts necessary to receive such return under certain circumstances; Act is not applicable to insurance or endowment policy, or to any fixed or variable annuity contract issued by licensed insurance company, nor is it applicable to interest in residential unit and rental management arrangement relating to such unit if owner does not participate directly in income derived from rental of units owned by others. (O.C.G.A. 10-5-2[a][26], effective until July 1, 2009).

Exempt Securities.

Following securities are exempt from registration under Act: (a) securities issued or guaranteed by U.S., any state, any political subdivision of a state, or any agency or instrumentality of foregoing; (b) securities issued or guaranteed by Canada or a province thereof or an agency or instrumentality thereof or by any government with which U.S. has diplomatic relations; (c) any security issued or guaranteed by any federal or state bank, savings institution, or trust company including any interest in any common trust fund maintained by bank exclusively for collective investment of assets contributed thereto by such bank in its capacity as trustee, executor, administrator, or guardian; (d) securities issued by and representing interest in or debt of, or guaranteed by federal savings and loan associations or by state building and loan associations or similar organizations authorized to do business in Georgia; (e) securities issued by farmers' cooperative associations as defined by §521 of Internal Revenue Code; (f) securities issued or guaranteed by federal credit unions or any other credit unions, industrial loan associations or similar associations organized and supervised under laws of Georgia; (g) securities issued or guaranteed by railroads, common carriers, public utilities or holding companies subject to certain governmental regulatory agencies and regulations; (h) securities listed or approved for listing upon notice of issuance on New York, American, Midwest, Pacific Coast, PBW Stock Exchanges or other exchanges approved by commissioner, and all securities senior or substantially equal in rank to any securities so listed, any security represented by subscription rights which have been so listed or approved or any warrant or right to purchase or subscribe to any of foregoing; (i) securities designated or approved for designation upon issuance as a national market system security by NASD, any other security of same issuer which is of senior or substantially equal rank, a security called for by subscription right or warrant so designated, or a warrant or a right to purchase or subscribe to any of the foregoing; (j) note, draft, bill of exchange, or banker's acceptance which arises out of current transaction, and which has maturity period at time of issuance not exceeding nine months; (k) notes issued to seller in connection with purchase of real or personal property or secured by all or part of such property; (1) securities meeting following conditions: (l) if issuer not organized in U.S., has appointed duly authorized agent in U.S. for service of process and agent's name and address listed in prospectus, (2) class of issuer's securities is and has been registered under §12 of Sec. Exchange Act of 1934 for three years prior to offering date, (3) neither issuer nor significant subsidiary has had material default in last seven years or during issuer's existence if less than seven years in payment of principal, interest, dividend or sinking fund installment on preferred stock or indebtedness for borrowed money or rentals under leases with terms of three years or more, (4) issuer had consolidated net income of at least $1,000,000 in four of its last five years (including its last fiscal year) and, if interest-bearing securities offered, specified interest expense coverage, (5) if offering is of stocks or shares, other than preferred, securities have voting rights, and (6) if offering is of stocks or shares, other than preferred, securities owned within six months of offering by at least 1,200 persons with at least 750,000 such shares outstanding with aggregate market value of $3,750,000 on day of offering; and, (m) viatical investments. (O.C.G.A. 10-5-8, effective until July 1, 2009).

Exempt Transactions.

Following transactions are exempt from registration under Act: (a) transactions by executor, administrator or guardian if not affiliate of issuer or by sheriff, marshal, conservator, receiver or trustee in bankruptcy; (b) transactions executed by bona fide pledgee provided such pledgee is not issuer or underwriter of securities or affiliate of such issuer; (c) transactions in securities not involving issuer, underwriter, or affiliate of issuer; (d) transactions in securities by affiliate of issuer, provided that affiliate does not act as underwriter, that securities are sold through registered dealer acting as affiliate's agent, that neither dealer nor affiliate solicit any orders to purchase such securities, that dealer does no more than execute orders to sell and receives no more than customary commissions and that affiliate makes no payments in connection with sale other than customary commissions; (e) transactions in securities pursuant to effective registration statement under Federal Securities Act of 1933 or pursuant to certain exemptions under §3(b) or §3(c) of such Act (principally Regulation A offering but excluding Regulation D, which is provided for under different exemption), provided that Notice of Intention to Sell containing name and address of applicant and issuer and title of securities has been filed with commissioner and that there have been filed with commissioner fee of $250, copy of initial registration statement or notification and offering circular, and copy of consent to service of process, but if transaction takes place after 14 months from date commissioner certifies availability of exemption, issuer must pay additional $100 fee and must file current prospectus for each 14-month period during which exemption will be utilized (see also O.C.G.A. 590-4-5-.02); (f) issuance and delivery of securities by issuer to its security holders pursuant to dividend or other distribution (whether person distributing dividend or other distribution is issuer of securities or not), split of securities or recapitalization for which recipient pays no consideration or surrenders no right to cash or property distribution other than such securities and sale of fractional interests resulting from such dividend, split, recapitalization or distribution; (g) sales of securities to bank, savings institution, trust company, insurance company, investment company, real estate investment trust, small business investment corporation, pension or profit-sharing plan or trust, other financial institution or dealer whether purchaser acts for self or as fiduciary; (h) certain transactions pursuant to exchange offers exclusively made to existing security holders of issuer or subsidiary, if no commissions paid in connection therewith; (i) certain transactions involving employee stock purchase plans, stock bonus plans, pension or profit-sharing plans, certain retirement plans, certain individual retirement accounts, and certain stock option plans; (j) offers of securities subject to registration statement which has been filed under Federal Securities Act of 1933; (k) transactions incident to certain judicially approved reorganizations; (l) certain transactions in securities of issuer by issuer or its subsidiary to corporation or its shareholders, to business or real estate investment trust or holders of beneficial interest thereof, or to partnership or limited partnership or partners thereof in connection with merger, share exchange, consolidation, reclassification of securities, or sale or transfer of corporate trust, or partnership assets in consideration of issuance or transfer, where transaction must be approved by holders of at least majority of voting shares or interests pursuant to articles, charter, trust instrument, partnership agreement or applicable corporation, trust or partnership statute; (m) transactions involving issuance or sale of securities of issuer by or on behalf of issuer or its affiliates to not more than 15 persons in Georgia during 12-month period ending on date of sale or issuance, provided that no advertisements are used, that certificates representing securities issued pursuant to exemption bear appropriate legend for period of one year from issuance and that purchasers represent that they are purchasing securities for investment, not for distribution (securities presumed to have been purchased for investment if held for at least one year); (n) any issuance of securities of majority-owned subsidiary to its parent or affiliated majority-owned subsidiary, or upon organization if, after such issuance, issuer is majority-owned subsidiary of such parent; (o) certain issuances of securities by certain pooled income funds qualified to receive tax-deductible charitable contributions; (p) viatical investments, defined in O.C.G.A. 10-5-2(32) as “contractual right to receive any portion of the death benefit or ownership of a life insurance policy or certificate for consideration that is less than the expected death benefit of the life insurance policy or certificate”; and (q) any limited offering transaction exempted by Rule 590-4-5-.01, version of uniform limited offering exemption (ULOE). (O.C.G.A. 10-5-9, effective until July 1, 2009). To take advantage of ULOE exemption, offering must be conducted in compliance with rules 501, 502, 503, 505, and 506 of SEC Regulation D and must meet additional conditions; commissions payable only to licensed salesmen or dealers, no exemption available if issuer or affiliates violate enumerated “bad boy” rules, and issuer must file with commissioner notice on SEC Form D prior to first sale in reliance of ULOE in Georgia, accompanied by consent to service of process, copy of written offering material (if sales to be made to any unaccredited investors), and filing fee of $250.

Registration of Securities.

Securities which are subject to effective registration statement under federal Securities Act of 1933 or which are exempt pursuant to Regulation A or certain other exemptions under §3(b) of such Act (other than Regulation D) may be sold in exempt “SEC coordinated filing” transaction if certain prerequisites are met. See subhead Exempt Transactions, supra.

There are four types of registration: registration by qualification, small issue registration, registration by notification, and nonprofit issuer registration. (O.C.G.A. 10-5-5, effective until July 1, 2009).

Qualification may be accomplished by filing registration statement signed by issuer, its chief executive, principal financial and principal accounting officers and by majority of board of directors or similar group (O.C.G.A. 10-5-5[b][1], effective until July 1, 2009) and must be accompanied by: (a) filing fee, (b) consent to service for first-time filers (O.C.G.A. 10-5-6[c]), (c) $25,000 bond, unless exempt (see subhead Prerequisites to Sales or Offers, supra), (d) prospectus containing information similar to that required in Schedule A to federal Securities Act of 1933, (e) consent of any professional named in registration statement as having certified any part of registration statement, (f) copy of any notice or sales literature to be used in connection with registration statement, (g) specimen copy of security to be registered, (h) copies of issuer's constituent documents, (i) signed opinion of legal counsel for issuer regarding status of security when sold, (j) copy of underwriting agreement, (k) copies of all material contracts, (l) signed copies of professional opinions, reports or certifications mentioned in prospectus, (m) copies of all literature concerning issuer or offering to be distributed to persons included in sales, and (n) written consents of all directors who have not signed registration statement. (O.C.G.A. 10-5-5[b] and [c], 10-5-6, effective until July 1, 2009). All sales of securities registered by qualification may be rescinded within 72 hours of their sale. (O.C.G.A. 10-5-5[b][4], effective until July 1, 2009).

Notification is available if issuer or its predecessors have been in continuous operation for at least five years, have had no default during current fiscal year or within preceding three fiscal years, and, during past three fiscal years have had average net earnings equal to at least

5% of aggregate value, as determined by higher of offering or market price or, if not readily ascertainable offering or market price, book value, of all securities of issuer outstanding without fixed maturity, interest or dividend, or if issuer and its predecessors have not had any such securities for three full fiscal years, at least 5% of aggregate value, as determined by offering price, of such securities which are proposed to be outstanding. (O.C.G.A. 10-5-5[d][1], effective until July 1, 2009). Registration statement must be signed by issuer, by person on whose behalf offering is made, by registered or limited dealer or by authorized agent and shall be accompanied by registration fee and consent to service of process. Registration statement must contain a statement demonstrating eligibility for registration by notification, issuer's name, address and form of organization, state and date of its organization, general character and location of its business, capitalization statement and description of securities which are outstanding and which are to be registered, statement of amount and kind of consideration received for securities of issuer issued within past two years, any prospectus proposed to be used in offering securities, and a copy of any underwriting agreement. (O.C.G.A. 10-5-5[d][2], effective until July 1, 2009).

In case of offering to be made by person other than issuer, registration statement must contain name and address of person on whose behalf securities are to be sold and statement of amount of securities of issuer held by such person as of date of filing of registration statement. (O.C.G.A. 10-5-5[d][2], effective until July 1, 2009).

Small issue registration is available for sales of any amount of securities to no more than 50 persons in Georgia by issuer or its affiliates during any 12-month period and for sales where aggregate amount of total offering does not exceed $1 million less aggregate offering price for all securities sold within 12 months prior to and during offering of securities under small issue registration, sold in reliance on transaction (a) under subhead Exempt Transactions, or sold in violation of registration requirements. (O.C.G.A. 10-5-5[e], effective until July 1, 2009. Issuer may not combine exempt transaction for sales to 15 persons in 12 month period with sales to 50 persons under small issue registration. Registration statement must be filed with commissioner; must be signed by issuer, chief executive, principal financial and accounting officers and by majority of board of directors or comparable group; and must contain copy of prospectus, applicable professional consents and if issuer not corporation registered with Secretary of State, copy of issuer's articles of incorporation and bylaws or their substantial equivalents and copy of any indenture relating to security. (O.C.G.A. 10-5-5[e][2], effective until July 1, 2009). Prospectus, which must be delivered to purchasers simultaneously with or prior to earliest of payment, execution of purchase agreement, or delivery of confirmation of sale, must contain: (1) brief description of issuer and type and location of its business, (2) unaudited balance sheet as of date within 90 days of filing, unaudited profit and loss statement for each of two fiscal years preceding date of balance sheet filed and for interim between end of latest fiscal year and date of balance sheet and for corresponding period of preceding year, (3) description of securities, of any underwriting arrangements, of selling expenses and of plan of distribution, (4) estimate of net proceeds and description of use of such proceeds, (5) statements and forms regarding purchaser's right to rescind purchase within 72 hours of purchase, (6) disclosure of securities of issuer owned by directors, officers and affiliates and of any material transactions between issuer and such persons which are expected to occur or which occurred within past three years, and (7) any additional information necessary in order to make statements made not misleading. (O.C.G.A. 10-5-5[e][3], effective until July 1, 2009). Certificates representing securities sold pursuant to this registration and subject to numerical limitation on number of investors, must be legended for period of one year to indicate such registration and that they may not be sold or transferred except in transaction which is exempt under Act, which is registered or which otherwise complies with Act and executed with statement that securities purchased for investment and for purchase account. (O.C.G.A. 10-5-5[e][1][B], effective until July 1, 2009). Negotiations for sale of security to be registered upon small issue registration will not be offer unless consideration is given, contract is entered or security is sold before effective date. (O.C.G.A. 10-5-5[e][6], effective until July 1, 2009).

Nonprofit issuer registration is available for any amount of securities issued by issuer that is not organized and operated for private profit and if no part of its net earnings inure to benefit of any person, private stockholder or individual. (O.C.G.A. 10-5-5[f], effective until July 1, 2009). Registration statement to be filed with commissioner, must be signed by chief executive, financial and accounting officers and by majority of board of directors or comparable group; must be accompanied by consent to service of process, and must contain: (a) prospectus containing information described below, (b) consent of any professional named in registration statement as having certified any part of registration statement, (c) copy of any notice or sales literature to be used in connection with registration statement, (d) specimen copy of security to be registered, (e) copies of issuer's constituent documents, (f) if securities to be registered are debt securities, trust indenture containing provisions described below, (g) if securities to be registered are secured by interest in real property, opinion of counsel that such interest is as described in prospectus and has been filed of record, (h) copy of underwriting agreement, (i) copies of all material contracts, (j) copies of all literature concerning issuer or offering to be distributed to persons involved in sales, (k) signed copies of professional opinions mentioned in prospectus and (l) written consents of all directors who have not signed registration statement. (O.C.G.A. 10-5-5[f][2]-[4], effective until July 1, 2009). Trust indenture governs disbursement of proceeds of sale, collecting and disbursing principal and interest payments, and rights and duties of trustee and holders with respect to collateral. (O.C.G.A. 10-5-5[f][3][a], effective until July 1, 2009). Trustee must be independent attorney or corporation qualified in Georgia which has corporate trust powers and which is subject to governmental regulation. (O.C.G.A. 10-5-5[f][3][B], effective until July 1, 2009). Prospectus must contain: (a) basic information about issuer, (b) unaudited balance sheet as of date within 90 days of filing and unaudited statement of source and application of funds for each of two fiscal years preceding balance sheet, and for interim between end of latest fiscal year and date of balance sheet and for corresponding period of previous year, (c) summary of special risk factors, (d) description of underwriter compensation, arrangements and affiliations, (e) description of material terms of security and indenture, (f) description of securities, of any underwriting arrangements, of selling expenses and of plan of distribution, (g) estimate of net proceeds and description of use thereof, (h) statement and forms regarding purchaser's right to rescind purchase within 72 hours of purchase and (i) any additional information necessary in order to make statements made not misleading. (O.C.G.A. 10-5-5[f][4], effective until July 1, 2009).

Registration of Dealers and Salespersons.

Persons who come within Act's definitions of dealer, limited dealer, salesperson or limited salesperson must register as such to offer for sale or sell any securities within or from Georgia unless their activities as such are solely in certain exempt transactions. (O.C.G.A. 10-5-3, effective until July 1, 2009). Initial fee for dealers and limited dealers is $250. Renewal fees for both are $100. Initial fee for salespersons and limited salespersons is $50 and renewal fees for both are $40. (O.C.G.A. 10-5-3[j], effective until July 1, 2009). Each principal of each dealer or limited dealer and each salesperson or limited salesperson must pass examinations given by commissioner or NASD. (O.C.G.A. 10-5-3[c][d], effective until July 1, 2009). If dealer or limited dealer succeeds to and continues business of another, predecessor's registration remains effective as registration of successor for 75 days, provided successor files for registration within 30 days after succession. (O.C.G.A. 10-5-3[n], effective until July 1, 2009). Persons who come within Act's definitions of designated dealer and designated salesperson are also extensively regulated. (O.C.G.A. 10-5-1 et seq., effective until July 1, 2009).

Bonds.

Applicants who are to be registered as dealers and limited dealers must file $25,000 bond with commissioner and each salesperson or limited salesperson must file $2,500 bond as prerequisite to registration, unless dealer or limited dealer, by whom applicant is employed or is to be employed is not subject to bond requirements. (O.C.G.A. 10-5-3[k][1], effective until July 1, 2009). No applicant for dealer or limited dealer is required to file bond if: (1) such applicant is registered under Securities Exchange Act of 1934; or (2) as of dates of most recent certified balance sheet and any subsequent noncertified balance sheets, such applicant had minimum net worth of not less than $250,000. (O.C.G.A. 10-5-3[k][2], effective until July 1, 2009). No applicant for dealer or limited dealer is required to file bond if such applicant has deposited in trust with commissioner (1) certificate of deposit with certain financial institutions in amount of $25,000, (2) irrevocable letter of credit in amount of $25,000 issued by certain federal banks, and (3) obligations of U.S., or agency thereof, or of State of Georgia which mature in two years or less and which have market value of at least $25,000. (O.C.G.A. 10-5-3[k][3], effective until July 1, 2009).

Advertisements.

It is unlawful to offer or sell any security which is registered under Act other than by those methods authorized by Act. (O.C.G.A. 10-5-12, effective until July 1, 2009). (See subhead Registration of Securities, supra.) Note: Securities registered under federal Securities Act of 1933 or exempt from such registration by virtue of Regulation A and certain other exemptions may be sold in exempt transaction and need not be registered. (See subhead Exempt Transactions, supra.) Act defines prospectus to include any advertisement or sales literature which offers any security for sale or is used in connection with any offer (O.C.G.A. 10-5-2[a][23], effective until July 1, 2009); therefore no advertisement or sales literature may be used unless it meets requirements of prospectus or unless it comes within one of exceptions described below. Exceptions to definition of prospectus are: (a) post-effective date confirmations of sale that are accompanied or preceded by prospectus that meets requirements of Act and (b) communications that do nothing but state from whom prospectus may be obtained, identify security and its price, state by whom orders will be executed (O.C.G.A. 10-5-2[a][23][A] and [B], effective until July 1, 2009), and contain description of issuer's business if such description has been filed with commissioner (Ga. Comp. R. & Regs. R. O.C.G.A. 590-4-3-.02). Regulations also exempt certain communications regarding preemptive rights, exempt quarterly, annual and other periodic reports to security holders, and set forth guidelines for determining whether advertisements for products and services might be deemed prospectus. (Ga. Comp. R. & Regs. R. O.C.G.A. 590-4-3-.02).

Liabilities.

It is unlawful for any person: (1) to offer or sell security unless it is registered, exempt, or offered and sold in exempt transaction; (2) in connection with offer or sale of security, to employ any device, scheme, or artifice to defraud, to make untrue statement of material fact or omit to state material fact necessary to make statements made not misleading, or to engage in any act, practice or course of business which operates or would operate as fraud or deceit upon person; (3) to offer or sell any security registered under Act other than by notification except by means of prospectus which meets Act's requirements, but securities registered under federal Securities Act of 1933 or exempt under such Act by virtue of Regulation A (provided certain conditions are met) need not be registered and may be sold in exempt transactions; (4) in connection with sale of securities registered under Act, to make any representation of future sales of security by issuer at higher offering price or to make any representation as to future existence of public market; (5) to represent that filing or effectiveness of registration statement, registration of any security under Act or existence of any exemption means that commissioner has approved security or transaction or has passed on truth, accuracy or completeness of such registration statement or merits of security; (6) to knowingly cause to be made, in any document filed with commissioner or in any proceeding under Act, any statement which is false or misleading; or (7) to employ deceptive or fraudulent device, scheme or artifice to manipulate market in security. (O.C.G.A. 10-5-12, effective until July 1, 2009).

It is unlawful for any dealer, limited dealer, salesperson, limited salesperson, investment advisor, federal covered securities advisor or investment advisor representative, any person making notice filing or filing application for registration as one of above, issuer who has filed registration statement or notice filing or is as affiliate of any of above persons to knowingly cause any statement which is, at time it is made and in light of circumstances under which it is made, false or misleading in any material respect. (O.C.G.A. 10-5-12[c], effective until July 1, 2009).

Basic remedy for purchaser is action for rescission. (O.C.G.A. 10-5-14, effective until July 1, 2009). Control persons, general partners, executive officers, directors and persons holding similar positions as well as each dealer, limited dealer, salesman or limited salesman who participates in any material way in sale are jointly and severally liable with person primarily liable unless person secondarily liable proves he or she did not know and, in exercise of reasonable care, could not have known of existence of facts by reason of which liability is alleged to exist. (O.C.G.A. 10-5-14[c], effective until July 1, 2009). There is contribution among several persons so liable. (O.C.G.A. 10-5-14[c], effective until July 1, 2009). Statute of limitations under Act is two years from contract of sale (or sale, if there is no contract). (O.C.G.A. 10-5-14[d], effective until July 1, 2009). Suits not permitted if certain rescission offers prior to filing of suit have been refused by damaged person. (O.C.G.A. 10-5-14[d], effective until July 1, 2009).

Persons who violate Act may also be enjoined, censured, fined or prosecuted criminally if violation is willful. (O.C.G.A. 10-5-13, effective until July 1, 2009).

Commodities.

Soliciting offers, or offering, to purchase or sell commodities under commodity contract or option, when made or accepted in state as specified, is forbidden, except in accordance with O.C.G.A. 10-5A-1 et seq. Transaction involving certain persons registered in specified capacities with CFTC or SEC or under state law are exempt, as are certain other specified transactions. (O.C.G.A. 10-5A-3, -4). Commissioner of securities may issue rules or orders prescribing terms and conditions of all transactions and contracts covered by law not within exclusive jurisdiction of CFTC. (O.C.G.A. 10-5A-4[b]).

Investment Advisers.

Any person who, for compensation, engages in business of advising others, either directly or through publications or writings, as to value of securities or as to advisability of investing in, purchasing, or selling securities or who, for compensation and as part of regular business issues or promulgates reports or analysis of securities, or holds self out as investment adviser or financial planner (subject to enumerated exceptions similar to Federal Investment Advisers Act of 1940) is required to register as investment adviser unless otherwise exempt. (O.C.G.A. 10-5-2[a][14],; -3[a]; -3[e],effective until July 1, 2009). Advisers whose only clients are insurance companies or who, during last 12 months, had fewer than 15 clients, none of whom are registered investment companies, and who do not hold self out as investment advisors to public are exempt from registration as investment advisors. (O.C.G.A. 10-5-3[b], effective until July 1, 2009). Written examination required to register. Initial registration fee is $250 and renewal fee is $100 for investment adviser and $50 and $40, respectively, for investment adviser representative. (O.C.G.A. 10-5-3[i], effective until July 1, 2009). Contracts of investment adviser in violation of chapter void. (O.C.G.A. 10-5-14[b]). Advisory client may sue to recover consideration paid under contract plus interest. (O.C.G.A. 10-5-14[a]). Same statute of limitations as for other securities violations. (O.C.G.A. 10-5-14[d], effective until July 1, 2009). Activities of certified public accountants are regulated with respect to their status as investment advisers. (O.C.G.A. 10-5-2, 10-5-12, 10-5-14, effective until July 1, 2009).

Tender Offers.

See category 2 Business Organizations, topic 2.03 Corporations.

Subdivision Offerings.

See category 21 Property, topic 21.16 Real Property, subhead Subdivided Land Sales. See also Georgia Land Sales Act of 1982. (O.C.G.A. 44-3-1 et seq.).

Regulations.

Commissioner has adopted extensive regulations under Act.

Uniform Simplification of Fiduciary Security Transfers Act.

Adopted. (O.C.G.A. 53-12-320 to -330). See category 2 Business Organizations, topic 2.03 Corporations, subhead Uniform Simplification of Fiduciary Security Transfers Act.

Uniform Gifts to Minors Act.

Not adopted. Georgia has adopted "The Georgia Transfer to Minors Act". See category 14 Family, topic 14.10 Infants, subhead Gifts to Minors. (44–5–110 et seq.).

3.25 STATUTE OF FRAUDS:

See topic 3.16 Frauds, Statute of.

3.26 TRUST RECEIPT SECURITY:

No statute. See category 8 Debtor and Creditor, topic 8.15 Pledges.

3.27 WAREHOUSEMEN:

Uniform Commercial Code.

Adopted. (O.C.G.A. tit. 11). General regulations of business are governed by O.C.G.A. tit. 11, c. 7 of Act. See topic 3.09 Commercial Code. Caveat: O.C.G.A. 11-7 does not repeal or modify any law prescribing form or contents of documents of title or services or facilities to be afforded by bailees or regulating bailee's business in respects not dealt with specifically. (O.C.G.A. 11-7-103). Fact that such laws are violated does not affect status of document of title that otherwise complies with definition of document of title. Warehouseman must insure goods stored. (O.C.G.A. 10-4-25).

Agricultural warehouses are regulated under O.C.G.A. 10-4-1, -32.

Licenses.

Must be a license for each warehouse operated, issued by Commissioner of Agriculture to responsible person meeting requirements. (O.C.G.A. 10-4-10). Warehousemen must be bonded. (O.C.G.A. 10-4-12).

Warehouse Receipts.

Governed by Uniform Commercial Code.

Tobacco Warehousemen.

Must report weekly to Commissioner of Agriculture number of pounds of tobacco stored and sold. (O.C.G.A. 10-4-108). Record of such reports to be kept open to public. Commissions on gross sales of leaf tobacco in warehouses not to exceed 3.5%. (O.C.G.A. 10-4-106).

State Warehouse Department.

Established to study handling of cotton and tobacco crops. May acquire property, foster building of warehouses, receive cotton for storage and regulate grading of cotton. (O.C.G.A. 10-4-50 to -60, 70-76).

Lien.

Uniform Commercial Code governs. (O.C.G.A. tit, 11).

4 CITIZENSHIP

4.01 ALIENS:

Aliens generally enjoy all privileges of citizens of state, except right of franchise and right to hold office, and are entitled to same protection. (O.C.G.A. 1-2-9, -10, -11). Alien corporation desiring to own real property must file annual report, pay filing fee and maintain registered office and agent in Georgia. (O.C.G.A. 16-14-15). Local governments are prohibited from enacting immigration sanctuary policies (O.C.G.A. 36–80–23).

5 CIVIL ACTIONS AND PROCEDURE

5.01 ACCORD AND SATISFACTION:

Accord and satisfaction is where parties to agreement, by subsequent agreement have satisfied former one and latter agreement is executed. (O.C.G.A. 13-4-101). (See also category 3 Business Regulation and Commerce, topic 3.09 Commercial Code.) If payment of less than debt is agreed to, it must be actually paid or some new consideration given to constitute accord and satisfaction. (O.C.G.A. 13-4-103[a]). Endorsement of check reciting “payment in full” accord and satisfaction notwithstanding protest of obliteration. (153 Ga. App. 383, 265 S.E.2d 325; O.C.G.A. 13-4-103[b]). Accord and satisfaction must be of some advantage to creditor. (O.C.G.A. 13-4-102).

Pleading.

Defendant relying on accord and satisfaction must plead facts sufficient to put plaintiff on notice as to exact terms, and where and with whom executed. (93 Ga. App. 215, 91 S.E.2d 308). Proponent has burden to prove accord and satisfaction. (188 Ga. App. 852, 374 S.E.2d 792).

Torts.

Claim arising out of tort may be settled but if tort is also crime, only civil wrong may be settled. (O.C.G.A. 51-11-20). Certain settlements with injured persons prohibited. (O.C.G.A. 51-1-35). Only those parties named in release will be discharged by release. (262 Ga. 185, 415 S.E.2d 902).

5.02 ACTIONS:

Bills in equity and all distinctions of actions into real, personal and mixed are abolished. (O.C.G.A. 9-11-2).

Equity.

Jurisdiction is vested in superior courts. (O.C.G.A. 23-1-1). Equity provides no relief where adequate and complete remedy at law. (O.C.G.A. 23-1-4).

Federal Rules of Civil Procedure form basis of Civil Practice Act. (171 Ga. App. 897, 321 S.E.2d 383). See topic 5.19 Practice.

Commencement.

See topics 5.18 Pleading, Process.

Parties.

Compulsory (O.C.G.A. 9-11-19) and permissive (O.C.G.A. 9-11-20) joinder of parties.

Misjoinder not ground for dismissal. (O.C.G.A. 9-11-21).

Action on contract must be brought in name of party with legal interest and against party who made contract. (O.C.G.A. 9-2-20[a]). Beneficiary may maintain action against promisor. (O.C.G.A. 9-2-20[b]). Action for tort must generally be brought in name of person whose legal rights have been affected or of person with legal interest in injured property. (O.C.G.A. 9-2-21[a]). Action for tort must be brought against party who committed injury. (O.C.G.A. 9-2-21[b]).

Class Actions.

Rule based on Federal Rule (Fed. R. Civ. P. 23), as amended in 1966, 1987, and 1998. (O.C.G.A. 9-11-23). Provisions for certification orders and notice (O.C.G.A. 9-11-23[c]) and settlement, voluntary dismissal or compromise (O.C.G.A. 9-11-23[e]) differ. In connection with shareholder's derivative actions, see also O.C.G.A. 14-2-831. Uniform Class Actions Act not adopted. Absent showing of good cause, court shall stay all discovery directed solely to merits of claims or defenses until it has issued written decision regarding class certification. (O.C.G.A. 9-11-23[f][2]). Order granting or denying certification is appealable in same manner as final order, appellate courts are to expedite their resolution of those appeals, during which action in trial court is stayed. (O.C.G.A. 9-11-23[g]).

Intervention.

Federal rules substantially in effect, except that Georgia makes no provision for permissive intervention of governmental officer or agency. (O.C.G.A. 9-11-24).

Forms provided. (O.C.G.A. 9-11-123).

Forms

Motion to Intervene.

IN THE ____________ COURT OF ____________ COUNTYSTATE OF GEORGIA

A.B.,)

Plaintiff)

v.) Civil action

C.D.,) File no.

Defendant)

E.F.,)

Applicant for Intervention)

MOTION TO INTERVENE AS A DEFENDANT

E.F. moves for leave to intervene as a defendant in this action, in order to assert the defenses set forth in his proposed answer, of which a copy is hereto attached, on the ground that _______________ .

____

Attorney for E.F., applicantfor intervention

____

Address

NOTICE OF MOTION(Contents the same as in Code Section O.C.G.A. 9-11-119)

IN THE ____________ COURT OF ____________ COUNTYSTATE OF GEORGIA

A.B.,)

Plaintiff)

v.) Civil action

C.D.,) File no.

Defendant)

E.F.,)

Intervenor)

Answer of Intervenor.

INTERVENOR'S ANSWER

First Defense

Intervenor admits the allegations stated in paragraphs 1 and 4 of the complaint, denies the allegations in paragraph 3, and denies the allegations in paragraph 2 insofar as they assert the ________________ .

Second Defense

(Set forth defenses)

____

Attorney for E.F., intervenor

____

Address

(Like form if intervention is as plaintiff).

Interpleader.

Similar to federal rule. (O.C.G.A. 9-11-22). Also, equitable interpleader permitted. (O.C.G.A. 23-3-90). Elements for equitable interpleader more stringent.

Third Party Practice.

Similar to federal rule (O.C.G.A. 9-11-14); however, copies of original complaint and all prior pleadings must be attached as exhibits to third party complaint. (O.C.G.A. 9-11-14[c]). Action against third-party defendant may be tried in county where claim is pending even though third-party defendant not resident of that county. (O.C.G.A. 9-10-34[b]). Venue over third-party defendant is dependent on venue over original defendant; if venue lost over original defendant, venue likewise lost over third-party defendant. (O.C.G.A. 9-10-34[c]).

Joinder of Claims and Parties.

Similar to federal rules for joinder of claims and remedies (O.C.G.A. 9-11-18), joinder of persons needed for just adjudication (O.C.G.A. 9-11-19), and permissive joinder (O.C.G.A. 9-11-20). See also subhead Parties, supra.

Consolidation and Separate Trials.

Fed. R. Civ. P. 42 substantially in effect except that consolidation expressly conditioned on consent of parties. (O.C.G.A. 9-11-42).

Joinder and Consolidation.

Federal rules generally effective.

Abatement or Survival.

Action does not abate by death of either party if cause of action survives. (O.C.G.A. 9-2-40). Death of party does cause immediate suspension of action as to decedent until substitute named. (236 Ga. 903, 225 S.E.2d 890). Action for death, personal injury, property injury, or any tort from which wrongdoer derived benefit survives death of either party, and if wrongdoer dies before action commenced his personal representative may be sued. (O.C.G.A. 9-2-41). Action on note, bill, bond or other written obligation survives death of obligor, but if one of several obligors dies plaintiff may (but is not obliged to) join representative in action against other obligors. (O.C.G.A. 9-2-27).

See also category 13 Estates and Trusts, topic 13.05 Death.

Limitation Of.

See topic 5.16 Limitation of Actions.

Small Claims.

See category 6 Courts and Legislature, topic 6.01 Courts.

Termination of Actions.

Action may generally be dismissed by plaintiff, without order of court, by filing written notice of dismissal at any time before first witness is sworn. First such dismissal is without prejudice. (O.C.G.A. 9-11-41[a]). (Compare Fed. R. Civ. P. 41[a], authorizing plaintiff's voluntary unilateral dismissal only before opponent's service of answer or summary judgment motion.) Other voluntary dismissals by plaintiff must be by court order upon conditions. Where defendant has counterclaimed, no voluntary dismissal over defendant's objection unless counterclaim can be independently tried. (O.C.G.A. 9-11-41[a]). Although voluntary dismissal of entire complaint is allowed, voluntary unilateral dismissal of party's claim against some, but not all of parties, requires court approval (223 Ga. App. 139, 476 S.E.3d 889). Action automatically dismissed after five years if no order taken. (O.C.G.A. 9-11-41[e]). Continuance is deemed to be order. Filing of third notice of dismissal operates as adjudication of merits. (O.C.G.A. 9-11-41[a]).

Administration.

See category 13 Estates and Trusts, topic 13.10 Executors and Administrators.

Direct Actions Against Insurer.

See category 23 Transportation, topic 23.01 Motor Vehicles, subhead Direct Actions.

See also topics 5.19 Practice, 5.18 Pleading.

5.03 APPEAL AND ERROR:

Interlocutory Appeals.

Appeal where trial judge certifies within ten days of entry of non-appealable order that immediate review should be had (O.C.G.A. 5-6-34[b]), and orders granting or refusing interlocutory injunctions (O.C.G.A. 5-6-34[a][4]), and from orders granting summary judgment (O.C.G.A. 9-11-56[h]), and from certain other matters (O.C.G.A. 5-6-34). Petition for appeal must be filed with clerk of supreme court or court of appeals, with copy served on opposing party, within ten days after trial judge's certificate granted; opposing party has ten days from date petition filed to respond; supreme court or court of appeals has 45 days thereafter to grant or deny appeal; appellant has ten days after order granting appeal to file notice of appeal and thereafter same procedure as appeal from final judgment. (O.C.G.A. 5-6-34[b]).

Appeal to Superior or State Court.

Appeals from magistrate court to superior court or state court must be tried without jury, unless either party files demand for jury trial within 30 days or jury trial ordered. (O.C.G.A. 5-3-30).

Appeal from Probate Court.

Appeal to superior court lies from any decision except from appointment of temporary administrator. (O.C.G.A. 5-3-2[a]). Right of involuntarily committed patient to appeal order of probate court does not deny right of Department of Human Resources to appeal. (O.C.G.A. 37-3-150).

Appeal from Final Judgments of Superior, State or Constitutional City Courts.

Appeal lies from final judgments. (O.C.G.A. 5-6-34[a]). Application required for certain appeals. (O.C.G.A. 5-6-35). Application required for appeal of zoning matters. (275 Ga. 207, 563 S.E.2d 860). Application required for appeal of superior court review of administrative agency decision. (265 Ga. 62, 453 S.E.2d 725; O.C.G.A. 5-6-35[a][1]). No appeal permitted from voluntary dismissal. (217 Ga. App. 1, 456 S.E.2d 71).

Appeal from Matters Heard in Chambers.

Either party in any civil case and defendant in any criminal proceeding may appeal from judgment or decree of superior, state, or city courts of any matter heard in chambers. Section is unclear but probably requires judgments otherwise appealable. (O.C.G.A. 5-6-33[a][1]). In civil cases, either party may appeal judgment, decision or decree of probate court if matter heard in chambers. (O.C.G.A. 5-6-33[a][2]).

Jurisdiction of Appellate Courts.

Supreme court has exclusive appellate jurisdiction over cases involving: construction of Georgia or U.S. Constitutions and treaties between U.S. and foreign governments; constitutionality of any Georgia or U.S. law; ordinance or constitutional provision; and election contests (Const. Art. VI, §VI, Paragraph II) and general appellate jurisdiction over cases involving title to land; equity; wills; habeas corpus; extraordinary remedies; divorce and alimony;

certification to it by court of appeals; and death sentences. (Const., Art. VI, §VI, Paragraphs II and III). Court of appeals has jurisdiction in all cases in which jurisdiction not reserved to supreme court or conferred on other courts by law. (Const., Art. VI, §V, Paragraph III). Court of appeals has jurisdiction over appeals involving revenues of state. (265 Ga. 37, 456 S.E.2d 50). See also category 6 Courts and Legislature, topic 6.01 Courts.

Manner Taken.

Notice of appeal should be filed with clerk of court wherein case was determined. (O.C.G.A. 5-6-37). All parties at trial must be served notice either personally or by mail, unless waived or acknowledged. (O.C.G.A. 5-6-37). If party is represented by attorney, service must be made upon attorney unless court orders otherwise. (O.C.G.A. 5-6-32). For preparation of record see O.C.G.A. 5-6-41 to -43. Appellant and cross-appellant must file enumeration of errors with clerk of appellate court under its rules, which may permit enumeration in brief. (O.C.G.A. 5-6-40). Bills of exception, exceptions pendente lite, assignments of error and rules relating thereto are abolished. (O.C.G.A. 5-6-49). Joint appeals permitted without regard to presence of joint interest, and parties may file separate enumeration of errors. (O.C.G.A. 5-6-44).

Time Allowed.

30 days after entry of judgment; or in event that motion for new trial, in arrest of judgment, or for judgment notwithstanding verdict is filed, then 30 days after entry of order ruling on said motion; cross-appeal within 15 days of service of notice of appeal by appellant. (O.C.G.A. 5-6-38). Filing with clerk of signed judgment constitutes entry of judgment. (O.C.G.A. 5-6-31). Either trial or appellate judge can grant one extension for filing of notice of appeal or cross-appeal for period not greater than originally allowed. (O.C.G.A. 5-6-39). Superior court's entry of order granting motion to stay judgment in order to reopen evidence will extend date for filing of notice of appeal. (248 Ga. 775, 285 S.E.2d 542 [overrules Wilson v. McQueen, 224 Ga. 420, 162 S.E.2d 313]). Application for extension must be within period originally prescribed. (O.C.G.A. 5-6-39[d]). No extension for motions for new trial or judgment n.o.v. (O.C.G.A. 5-6-39[b]) or for motions to reinstate (180 Ga. App. 732, 350 S.E.2d 317).

Stay of Proceedings, Costs and Bond.

Notice of appeal serves as supersedeas upon appellant's paying all costs in trial court or filing pauper's affidavit. (O.C.G.A. 5-6-46 to -47). (See topic 5.08 Costs.) $80 cost of appeal must be paid by applicant or appellant at time application for appeal or, for direct appeals, by appellant or cross-appellant at time original brief is filed. (O.C.G.A. 5-6-4). Appeal suspends but does not vacate judgment. (O.C.G.A. 5-3-7). Supersedeas bond is not necessary; but on motion of appellee, trial court shall require that supersedeas bond be given. Total supersedeas bond may not exceed $25,000,000 (O.C.G.A. 5-6-46[b]), but that limitation shall not apply if appellee proves by preponderance of evidence that appellant is purposefully dissipating or secreting assets (O.C.G.A. 5-6-46[f]). Enforcement of foreign judgments must be stayed if judgment debtor makes required showing. (O.C.G.A. 9-12-134[b]). Superior courts have power to grant supersedeas (O.C.G.A. 15-6-9), and if trial court refuses to grant supersedeas, appellate courts may, in emergencies, do so to preserve jurisdiction or to prevent issue from becoming moot. (Ga. Ct. App. R. 40[b]).

Dismissal of Appeals.

Appeals can be dismissed: (1) for failure to file notice of appeal within time prescribed; (2) where decision of judgment is not appealable; or (3) where issue has become moot. Trial court may dismiss where there is unreasonable and inexcusable delay in filing of transcript or transmission of record to appellate court. Dismissal of appeal does not affect cross-appeal, if notice has been filed and appellee still stands to benefit. No dismissal because of failure to specify judgment or errors appealed, where intent apparent. Failure to perfect service of notice will not result in dismissal. (O.C.G.A. 5-6-48).

Extent of Review.

Appellate courts must review all judgments or orders rendered in case raised on appeal which may affect proceedings below. (O.C.G.A. 5-6-34[d]).

Personal Representative.

If defeated party dies after judgment and before time for appeal expired, personal representative may take appeal within 30 days after qualifying. (O.C.G.A. 5-6-16).

Character of Hearing on Appeal to Superior Court.

Appeal to superior court in any case where not otherwise provided by law is de novo investigation, and each party is entitled to be heard on merits of case. (O.C.G.A. 5-3-29).

See also topic 5.19 Practice.

5.04 BONDS:

Where bond required by law, undertaking in writing, without seal sufficient. If obligor's name subscribed, though it does not appear in bond, he or she is bound. (O.C.G.A. 1-3-1[d][1]). Requirement may also be discharged by depositing cash in amount of bond with appropriate person or depository. (O.C.G.A. 9-10-10[a]).

Sureties.

Insurance companies may be accepted as surety upon bond of any person, company, or corporation required by law to execute bonds. (O.C.G.A. 33-24-48). Surety bond may be required by court as prerequisite to issuance of temporary restraining order or interlocutory injunction. (O.C.G.A. 9-11-65[c]).

Judgment.

It is lawful to enter judgment against principal and sureties at same time, as in cases of appeal, in all cases in law or equitable proceedings when bond has been given by losing party conditioned to pay eventual condemnation money in action. Not necessary to bring action on bond. (O.C.G.A. 10-7-29).

Actual damage only and not penalties may be recovered on bond; penalty is not liquidated damages. (O.C.G.A. 13-6-3, 9-12-13).

5.05 CERTIORARI:

Certiorari generally available to superior courts from inferior judicatories and from court of appeals to supreme court.

Certiorari from Superior Court.

Lies for correction of errors of law committed by any inferior judiciary, or any person exercising judicial powers, including judge of probate court, except in cases touching probate of wills, granting letters testamentary and of administration. (O.C.G.A. 5-4-1).

5.06 CHARITABLE IMMUNITY:

See topic 5.09 Damages.

5.07 COMMISSIONS TO TAKE TESTIMONY:

See topic 5.11 Depositions and Discovery.

5.08 COSTS:

Party who is unsuccessful or who discontinues action is liable for costs. (O.C.G.A. 9-15-1). Costs must be awarded in judgment to prevailing party as matter of course, unless court directs otherwise but may not be imposed against state and its officers, agencies and political subdivisions except to extent permitted by law. (O.C.G.A. 9-11-54).

Security for Costs.

Where party and his attorney are nonresidents, proper officers may demand full costs in advance. (O.C.G.A. 9-15-6). In magistrate court plaintiff must pay filing deposit not to exceed $20. (O.C.G.A. 15-10-80). In superior court cases advance costs required. (O.C.G.A. 9-15-4, 15-6-77). Costs vary depending on case, court and county. In supreme court and court of appeals $80 advance costs required for all applications for writ of certiorari to supreme court, every application for appeal to supreme court or court of appeals, and all direct appeals to courts. No additional costs when writ of certiorari or application granted. (O.C.G.A. 5-6-4).

Affidavit of indigence may be taken in lieu of above deposits and costs. (O.C.G.A. 5-3-22, 9-15-2, 9-15-4[a], 5-6-4; Sup. Ct. Rule 5; Ct. App. Rule 5).

Where execution returned by levying officer “no property to be found,” fi. fa. may issue against plaintiff for costs. (O.C.G.A. 9-15-12).

Liability of Attorney.

Attorney who institutes action for any person who resides outside of state liable to pay costs if action dismissed or plaintiff cast. (O.C.G.A. 9-15-6[a]). Attorney liable for costs assessed against his client because of attorney's willful neglect or misconduct and for costs where client resides outside state and client's execution returned by levying officer “no property to be found”. (O.C.G.A. 9-15-7, -12).

Costs of Transcript.

Where trial judge requires reporting of proceedings and evidence, costs are to be borne equally by all parties. Appellant drawing in question transcript of evidence and proceedings bears cost. (O.C.G.A. 5-6-41). If appellee alone designates inclusion of transcript in record, appellee bears this expense. (O.C.G.A. 5-6-42). Generally, cost of transcript is expense of appeal but not a recoverable cost. (232 Ga. 92, 205 S.E.2d 293).

5.09 DAMAGES:

Common law generally prevails.

Comparative Negligence Rule.

If plaintiff responsible to some degree for injury, trier of fact determines percentage of plaintiff's fault and reduces amount of damages proportionally. (O.C.G.A. 51-12-33[a]). Where negligence of plaintiff equals or exceeds that of defendant (O.C.G.A. 51-12-33[g]), or where plaintiff by ordinary care could have avoided consequences caused by defendant's negligence (O.C.G.A. 51-11-7), there can be no recovery. Damages may be apportioned among several defendants where plaintiff also is at fault; such liability is not joint liability and is not subject to contribution. Negligence or fault of nonparty shall be considered if plaintiff entered into settlement agreement with nonparty or if defendant gives notice not later than 120 days prior to trial that nonparty was wholly or partially at fault. Findings of fault against nonparty shall not subject nonparty to liability nor be used as evidence of liability in any action. (O.C.G.A. 51-12-33).

Uniform Comparative Fault Act.

Not adopted.

Charitable Immunities.

Doctrine prevails. (O.C.G.A. 51-1-20, 51-1-29.1; 118 Ga. 647, 45 S.E. 483; 27 Ga. App. 560, 109 S.E. 544).

Sovereign Immunity.

Common law sovereign immunity has constitutional status. (Const., Art. I, § II, Par. IX; 233 Ga. 487, 212 S.E.2d 627). Waived as to actions ex contractu for breach of written contract entered into by state. (Const., Art. I, §2, Par. IX[c]). Neither implied contract nor claim couched in contract but sounding in tort will support waiver of sovereign immunity. (226 Ga. App. 191, 486 S.E.2d 66). Georgia Tort Claims Act waives state's sovereign immunity defense in specific circumstances listed therein. Local government's sovereign immunity defense waived for negligent use of motor vehicle only to extent of statutory maximum (O.C.G.A. 36-92-2) plus liability insurance purchased (O.C.G.A. 33-24-51).

No-Fault Insurance.

See category 23 Transportation, topic 23.01 Motor Vehicles, subhead No-Fault Insurance.

Uniform Contribution Among Tortfeasors Act (Revised).

Not adopted.

See category 13 Estates and Trusts, topic 13.05 Death, subhead Actions for Death.

Attorney's Fees.

Damages and expenses of litigation, including attorney's fees, are recoverable for frivolous claims and defenses. (O.C.G.A. 9-15-14, 9-11-68[e]); stubborn litigiousness or bad faith by defendant (O.C.G.A. 13-6-11); abusive litigation (O.C.G.A. 51-7-80 to -85); or if provision made as part of note or other evidence of indebtedness (O.C.G.A. 13-1-11).

Punitive Damages.

Specific prayer for punitive damages is required. (O.C.G.A. 51-12-5.1). Punitive damages prohibited where entire injury is to peace, happiness or feelings of plaintiff. (O.C.G.A. 51-12-6). Amount of punitive damages limited to $250,000 in cases which do not involve (1) product liability, (2) specific intent to cause harm, or (3) defendant acting under influence of drugs or alcohol. (O.C.G.A. 51-12-5.1). To avoid $250,000 cap, there must be jury charge on, and separate finding by jury of, specific intent to cause harm. (269 Ga. 262, 497 S.E.2d 786). Determination of amount of punitive damages is question for jury and will only be disturbed on appeal if blatantly egregious. (166 Ga. App. 119, 303 S.E.2d 475). In product liability cases, 75% of punitive damages awarded are paid to state. (O.C.G.A. 51-12-5.1[e][2]).

Collateral Sources.

Collateral source rule prospectively abolished. (258 Ga. 54, 365 S.E.2d 273). Evidence of collateral benefits admissible. (O.C.G.A. 51-12-1[b]).

New Trial.

Court can order new trial as to damages where they are clearly inadequate or excessive. (O.C.G.A. 51-12-12). Court can condition grant of new trial on plaintiff's acceptance of decreased award if award is clearly excessive or, on defendant's acceptance of increased award, if award is clearly inadequate. (265 Ga. 861, 463 S.E.2d 108; O.C.G.A. 15-12-12[b]).

5.10 DECLARATORY JUDGMENTS:

See topic 5.15 Judgments.

5.11 DEPOSITIONS AND DISCOVERY:

Deposition procedure governed by Ga. Civil Practice Act, which closely follows Federal Rules. See topic 5.19 Practice.

Uniform Foreign Depositions Act.

Adopted without changes. (O.C.G.A. 24-10-110 to -112).

Within State for Use Within State.

Federal Rules effective, except that in Georgia, deposition can be used for any purpose if court finds: (1) witness is dead; (2) witness is out of county; (3) witness is unable to attend or testify because of age, illness, infirmity imprisonment; (4) party offering deposition has been unable to procure attendance of witness by subpoena; (5) that, because of nature of business or occupation of witness it is not possible to secure witness' personal attendance without manifest inconvenience to public or third persons; (6) witness is member of General Assembly which is in conflicting session; or (7) in discretion of trial judge, that deposition should be allowed. (O.C.G.A. 9-11-32).

Compelled Physical and Mental Examinations.

When mental or physical condition of party in controversy, court may order party to submit to mental examination by physician or licensed psychologist, or physical examination by physician, on motion for good cause shown. Party examined entitled to report, and court may exclude trial testimony of examiner who fails or refuses to make report. (O.C.G.A. 9-11-35).

Within State for Use Elsewhere.

Same as for use within Georgia. Uniform Foreign Depositions Act in force. (O.C.G.A. 24-10-110 to -112).

Outside of State for Use Within State.

No distinction is made from depositions taken within Georgia.

See also category 13 Estates and Trusts, topic 13.16 Wills, subhead Testimony of Witnesses.

Perpetuating Testimony.

Similar to federal rules except that subsequent use must involve same parties. (O.C.G.A. 9-11-27). Also, still possible to bring equitable action to perpetuate testimony. (O.C.G.A. 24-10-150).

Before Whom Taken.

Within U.S.

Similar to federal rule; additionally, depositions within State may be taken before certificated court reporter or as provided by rules of Board of Court Reporting. (O.C.G.A. 9-11-28[a]).

Also, Georgia rule substitutes term “court reporter” for “person” in §C of rule, which deals with disqualification for interest. (O.C.G.A. 9-11-28).

In Foreign Countries.

Taken either on notice before secretary of embassy or legation, consul general, consul, vice-consul, or consular agent of U.S., or before someone appointed by commission or under letters rogatory. (O.C.G.A. 9-11-28).

Compelling Attendance of Witnesses.

Clerk of superior court or clerk of any court of record in county where deposition to be taken may issue subpoena upon request. (O.C.G.A. 9-11-45[a][1][A]). Attorney may issue and sign subpoena pursuant to agreement of parties. (O.C.G.A. 9-11-45[a][1][B]). Deponent may be required to attend examination only in county where deponent resides, is employed, transacts his business personally, or at any place not more than 30 miles from county seat of such county or in county where deponent is served with subpoena. (O.C.G.A. 9-11-45[b]). However, geographic limitations in O.C.G.A. 9-11-45 do not necessarily apply to parties to lawsuits. (261 Ga. 853, 413 S.E.2d 195). Uniform Act to Secure Attendance of Witnesses from without State adopted. (O.C.G.A. 24-10-90 to -97).

Examination of Witnesses.

Federal Rules followed. (O.C.G.A. 9-11-30).

Return.

Similar to federal rules except that there is no statutory requirement that notice be given by party taking deposition of its filing in court. (O.C.G.A. 9-11-30[f]).

Interrogatories.

Party must limit interrogatories to total of 50. (O.C.G.A. 9-11-33[a][1]; 220 Ga. App. 43, 467 S.E.2d 362). Copy of answers must be served within 30 days following service, except that defendant may serve answers and objections up to 45 days after service of summons or complaint; shorter or longer time may be allowed by court. (O.C.G.A. 9-11-33[a][2]).

Request for Production of Documents.

Written response within 30 days of service or request, except that defendant may serve answers and objections up to 45 days after service of summons or complaint upon him or her; shorter or longer time may be allowed by court. (O.C.G.A. 9-11-34[b][2]). Detailed provision regarding applicability to nonparties. (O.C.G.A. 9-11-34[c]). Confidentiality protections not repealed with respect to records of mental illness, mental retardation, or alcohol and drug treatment or information concerning acquired immunodeficiency syndrome. (O.C.G.A. 9-11-34[d]). Form provided for motion for production of documents. (O.C.G.A. 9-11-124).

Form

IN THE ____________ COURT OF ____________ COUNTYSTATE OF GEORGIA

A.B.,)

Plaintiff)

)

v.) Civil action

) File No.

C.D.,)

Defendant)

MOTION FOR PRODUCTION OF DOCUMENTS

Plaintiff A.B. moves the court for an order requiring defendant C.D.:

1. To produce and to permit plaintiff to inspect and to copy each of the following documents: (Here list the documents and describe each of them).

____

____

2. To produce and to permit plaintiff to inspect and to photograph each of the following objects: (Here list the objects and describe each of them).

____

____

3. To permit plaintiff to enter (here describe property to be entered) and to inspect and to photograph (here describe the portion of the real property and the objects to be inspected and photographed).

____

____

Defendant C.D. has the possession, custody, or control of each of the foregoing documents and objects and of the above-mentioned real estate. Each of them constitutes or contains evidence relevant and material to a matter involved in this action, as is more fully shown in Exhibit A hereto attached.

____

Attorney for plaintiff

____

Address

NOTICE OF MOTION(Contents the same as in Code Section O.C.G.A. 9-11-119)

EXHIBIT A

AFFIDAVIT

State of ,

County of

A.B., being first duly sworn says:

1. (Here set forth all that plaintiff knows which shows that defendant has the papers or objects in his possession or control.)

____

____

2. (Here set forth all that plaintiff knows which shows that each of the above-mentioned items is relevant to some issue in the action.)

____

____

Sworn to and subscribed before me this day of , .

____

A.B.,

____

Address

Requests for Admission.

Similar to federal rule. (O.C.G.A. 9-11-36). Defendant may not be required to serve answers or objections before expiration of 45 days after service of summons and complaint upon him or her. (O.C.G.A. 9-11-36[a][2]). Form provided for request for admissions. (O.C.G.A. 9-11-125).

Form

IN THE ____________ COURT OF ____________ COUNTYSTATE OF GEORGIA

A.B.,)

Plaintiff)

)

v.) Civil action

) File no.

C.D.,)

Defendant)

REQUEST FOR ADMISSION OF FACTS ANDGENUINENESS OF DOCUMENTS

Plaintiff A.B. requests defendant C.D. within days after service of this request to make the following admissions for the purpose of this action only and subject to all pertinent objections to admissibility which may be interposed at the trial:

1. That each of the following documents exhibited with this request is genuine: (Here

list the documents and describe each document).

____

____

2. That each of the following statements is true: (Here list the statements).

____

____

____

Attorney for plaintiff

____

Address

STAY OF DISCOVERY

Discovery stayed for 90 days if party files motion to dismiss before or at time of filing answer (O.C.G.A. 9–11–12[j]).

5.12 EQUITY:

See topic 5.02 Actions.

5.13 EVIDENCE:

See topic 5.11 Depositions and Discovery.

Witnesses.

Persons presumed competent to testify (240 Ga. 460, 241 S.E.2d 217) and generally may not be excluded from giving evidence (O.C.G.A. 24-9-1). Persons who do not have use of reason and children who do not understand nature of oath (O.C.G.A. 24-9-5[a]), and drunken persons (O.C.G.A. 24-9-6) not competent but child may be competent to testify in criminal cases (O.C.G.A. 24-9-5[b]). Witness with mental disease not necessarily incompetent. (206 Ga. App. 709; 426 S.E.2d 224).

See also topic 5.11 Depositions and Discovery; category 13 Estates and Trusts, topic 13.16 Wills.

Privileged Communications.

Attorney cannot testify as to confidential communication from client or knowledge acquired through relation. (O.C.G.A. 24-9-25). However, attorney may testify regarding matters that occurred in presence of opposing party because such communications were not intended to be confidential. (264 Ga. App. 282, 590 S.E.2d 245). Client's identity not covered by attorney-client privilege. (273 Ga. 206, 538 S.E.2d 441).

Communications between husband and wife; attorney and client; grand jurors; psychiatrist and patient; licensed psychologist and patient; patient and licensed clinical social worker, clinical nurse specialist in psychiatric/mental health, licensed marriage and family therapist, or licensed professional counselor during psychotherapeutic relationship; and certain mental health care providers regarding patient's privileged communications privileged. (O.C.G.A.

24-9-21).

Licensed physician, pharmacist, hospital or health care facility not required to release medical information concerning patient without authorization or waiver by patient or on appropriate court order or subpoena. (O.C.G.A. 24-9-40). Veterinarian need not disclose information concerning animal care without authorization or waiver by client or appropriate court order or subpoena. (O.C.G.A. 24-9-29).

Nonparty engaged in gathering and disseminating news need not disclose information unless privilege waived or information sought material and relevant, cannot be obtained by other means and necessary to preparation or presentation of case of party seeking information. (O.C.G.A. 24-9-30).

Confidential acquired immunodeficiency syndrome (AIDS) information disclosed within patient-physician relationship must remain confidential. (O.C.G.A. 24-9-40.1). Other restrictions apply to disclosure of AIDS information. (O.C.G.A. 24-9-47). Confidentially of raw research data protected. (O.C.G.A. 24-9-40.2).

Husbands or wives are competent to testify as to adultery of spouse and are competent to testify to his or her own innocence of adultery. (O.C.G.A. 24-9-2). Husband and wife are competent but cannot be compelled to give evidence in criminal proceeding against each other. (O.C.G.A. 24-9-23[a]). Husband or wife may be compelled to testify against spouse where spouse charged with crime against minor child but only with respect to specific act for which spouse is charged. (O.C.G.A. 24-9-23[b]).

Communications or Transactions with Persons Since Deceased or Incompetent.

Dead Man's Statute amended but still applicable to transactions or occurrences taking place prior to July 1, 1979. (O.C.G.A. 24-9-1[b]; 253 Ga. 84, 316 S.E.2d 752).

Expert Witnesses.

In civil cases, expert witnesses and opinions limited in specific cases, particularly medical malpractice cases, where expert witness must have practiced or taught in specialty at issue for at least three of past five years. Legislature specifically enacts Daubert (509 U.S. 579) standards for experts and states that, in civil cases, Georgia courts are not open to expert evidence that would not be admissible in other states. (O.C.G.A. 24-9-67.1). In criminal cases, these restrictions do not apply. (O.C.G.A. 24-9-67). Expert opinion testimony on ultimate jury issue admissible where conclusion by expert is one which jurors would not ordinarily be able to draw unassisted for themselves. (247 Ga. 612, 277 S.E.2d 678). Regarding medical bills, expert testimony that charges were reasonable and necessary not required. (O.C.G.A. 24-7-9).

Self-Incrimination.

Constitutional (Const. art. I, §I, para. XVI) and statutory (O.C.G.A. 24-9-27[a]) privileges against self-incrimination. No blanket Fifth Amendment right to refuse to answer questions in civil proceedings; witness must specifically claim privilege on particular question. (278 Ga. App. 814, 630 S.E.2d 77).

Compelling Attendance.

Uniform Act to Secure the Attendance of Witnesses from Without the State in Criminal Proceedings adopted with minor variations. (O.C.G.A. 24-10-90,-97). See also topic 5.11 Depositions and Discovery.

5.14 INJUNCTIONS:

Remedy exists to restrain proceedings in another or in same court, a threatened or existing tort, or any other act of an individual or corporation which is illegal or contrary to equity and good conscience, and for which there is no adequate remedy at law. (O.C.G.A. 9-5-1).

Injunction procedure governed by Ga. Civil Practice Act, which closely follows Federal Rules of Civil Procedure. See topic 5.19 Practice.

Jurisdiction.

Superior court (O.C.G.A. 15-6-8, -9) of county where one defendant resides (O.C.G.A. 9-10-30).

Prerequisites.

No temporary restraining order granted without notice to adverse party unless irreparable damage will result and applicant's attorney certifies what efforts, if any, have been made to give notice and why no notice should be required. (O.C.G.A. 9-11-65[b]). No interlocutory injunction issued without notice to adverse party. (O.C.G.A. 9-11-65[a][1]). No notice required in divorce, alimony, separate maintenance or child custody suits. (O.C.G.A. 9-11-65[e]).

Procedure.

Order issues on motion to judge of superior court O.C.G.A. 9-11-7[b]), and rests in discretion of court (O.C.G.A. 9-5-8).

Bond.

Judge may require bond in amount court deems proper. (O.C.G.A. 9-11-65[c]).

Temporary Injunction.

Temporary restraining order, for period not to exceed 30 days, will be granted without notice to adverse party if irreparable damage will result, and applicant's attorney has given proper certification. When no notice to adverse party, hearing for interlocutory injunction must be set for earliest possible time. Adverse party may move for dissolution or modification of temporary restraining order on two days notice, or shorter time if court allows. (O.C.G.A. 9-11-65[b]). Although hearing is adversary proceeding, it need not follow all formalities of procedure, since it is not determinative of rights. (227 Ga. 676, 182 S.E.2d 464).

5.15 JUDGMENTS:

State court procedure governed by Ga. Civil Practice Act (tit. 9), which closely follows Federal Rules of Civil Procedure. See topic 5.19 Practice.

Judgment final if it disposes of entire controversy; effect of judicial act, and not trial court's characterization of it, determines whether final judgment. (275 Ga. App. 143, 619 S.E.2d 814).

All judgments of state courts are of equal dignity. (O.C.G.A. 9-12-80). Judgments at same term are of equal date. (O.C.G.A. 9-12-87[a]). Judgment affirmed on appeal loses no lien or priority due to appellate proceeding. (O.C.G.A. 9-12-89).

Judgment may be amended (even after execution issued) to conform to verdict. (O.C.G.A. 9-12-14).

Interest on Judgments.

Judgments in all civil actions filed on or after July 1, 2003, bear annual interest on principal amount at rate equal to Federal Reserve System's prime rate plus 3%, except for judgments on written contracts or obligations providing for interest, which shall be enforced according to their terms. (O.C.G.A. 7-4-12).

Judgments by Consent.

Court may render judgment based upon consent of parties. (O.C.G.A. 9-12-23). If court had jurisdiction, binding in absence of fraud, accident or mistake. (206 Ga. 542, 57 S.E.2d 593).

Judgments on Pleadings.

Federal Rules effective. (O.C.G.A. 9-11-12).

Summary Judgments.

Similar to federal rules. (O.C.G.A. 9-11-56). Motion for summary judgment permissible after 30 days from commencement of action or after service of motion for summary judgment by adverse party. Motion and supporting affidavits served at least 30 days before hearing. (O.C.G.A. 9-11-56).

Declaratory Judgments.

In cases of actual controversy, respective superior courts have power, upon petition or other appropriate pleading, to declare rights and other legal relations of any interested party petitioning, whether or not further relief is or could be prayed. Declaration to have form and effect of final judgment or decree and be reviewable as such. Further relief, injunction, interlocutory extraordinary relief, etc., may be granted in same suit in order to maintain status or preserve equitable rights pending adjudication of the questions. Relief available even if plaintiff has adequate remedy at law. (O.C.G.A. 9-4-2).

Default Judgments.

Any case not answered on or before time required by Civil Practice Act automatically becomes in default unless time for filing answer has been extended as provided by law. Default may be opened as matter of right by filing of defensive pleadings within 15 days of day of default, upon payment of costs. If not opened within 15 days, plaintiff entitled to verdict and judgment by default except where action is ex delicto or involves unliquidated damages, in which plaintiff must establish amount of damages before court without jury, unless defendant has placed damages in issue by filing pleading raising such issue, in which event either party is entitled to jury trial as to damages upon demand. (O.C.G.A. 9-11-55[a]). Judgment shall not be different in kind or exceed amount prayed for. (125 Ga. App. 707; 188 S.E.2d 908). Court may also, in its discretion, allow default to be opened for providential cause preventing filing of pleadings or for excusable neglect on terms fixed by court. Defaulting party must make showing under oath, set up defense, offer to plead instanter, and announce ready to proceed with trial. (O.C.G.A. 9-11-55[b]).

Judgment Notwithstanding the Verdict.

Party who has moved for directed verdict has 30 days after entry of judgment on verdict to have verdict set aside and judgment entered in accordance with motion for directed verdict. If no verdict returned, party has 30 days after discharge of jury to move for judgment in accordance with motion for directed verdict. (O.C.G.A. 9-11-50[b]). Motion for judgment notwithstanding verdict need not be filed to preserve jurisdiction of trial court to rule on motion for directed verdict after verdict itself returned. (O.C.G.A. 9-11-50[b]; 242 Ga. 419, 249 S.E.2d 224; 182 Ga. App. 470, 356 S.E.2d 69).

Docketing.

See subhead Lien. Filing with clerk of judgment, signed by judge, constitutes entry of judgment. No judgment effective until entry. (O.C.G.A. 9-11-58[b]). Clerk of superior court must maintain docket. (Unif. Super. Ct. Rule 39.1). Requirements differ for civil (Unif. Super. Ct. Rule 39.2), criminal (Unif. Super. Ct. Rule 39.3), lis pendens (Unif. Super. Ct. Rule 39.4), general execution (Unif. Super. Ct. Rule 39.5), and adoption (Unif. Super. Ct. Rule 39.6) dockets. Requirements for general execution docket for state courts similar to those for superior courts. (Unif. St. Ct. Rule 39.5). Dockets for courts or appeals close on fifteenth day of Dec., Apr. and Aug. but may be opened when expedient for docketing of case or cases. (Ct. App. Rule 12).

Vacation or Modification.

All proceedings to set aside judgments (other than motion for new trial) must be brought within three years from entry of judgment, except that judgment void because of lack of jurisdiction of person or subject matter may be attacked at any time. (O.C.G.A. 9-11-60[f]). Trial court can on its own motion modify judgment during term judgment rendered. (209 Ga. 596, 74 S.E.2d 850). Rule against modification of judgment after expiration of term, judgment entered not applicable to interlocutory rulings so long as case continues. (179 Ga. App. 521, 347 S.E.2d 257). Judgment may be attacked by motion to set aside or motion for new trial only in court of rendition. (O.C.G.A. 9-11-60[b]). Use of complaint in equity to set aside judgment prohibited. (O.C.G.A. 9-11-60[e]). Trial court may not modify judgment which is on appeal. (227 Ga. 485, 181 S.E.2d 495).

Motion for New Trial.

Must be predicated upon defect not appearing on face of record or pleadings. (O.C.G.A. 9-11-60[c]).

Motion to Set Aside.

Judgment void for non-amendable defect on face of record. (172 Ga. App. 426, 323 S.E.2d 286). If non-amendable defect appears on face of pleadings, it is not sufficient to show that pleadings fail to state claim upon which relief can be granted; rather, pleadings must show that no claim in fact existed. Motion to set aside shall lie to attack judgment based upon lack of jurisdiction over subject matter (O.C.G.A. 9-11-60[d]) filed in court where judgment entered or by complaint in equity in county of defendant's residency (171 Ga. App. 9, 318 S.E.2d 687). Motion to set aside may be brought to set aside judgment based upon fraud, accident or mistake, or acts of adverse party unmixed with negligence or fault of movant, or non-amendable defect on face of record. (O.C.G.A. 9-11-60[d]).

Clerical Mistakes.

May be corrected at any time by court or on motion of any party. (O.C.G.A. 9-11-60[g]).

Lien.

Money judgment, without entry on general execution docket, is not lien against the defendant's property with respect to third parties without notice. (O.C.G.A. 9-12-81). Judgment liens rank as of date of entry and bind all property of defendant, real and personal except as otherwise provided by code. (O.C.G.A. 9-12-80). Liens of all judgments obtained in damage actions growing out of common disaster or occurrence are equal in rank or priority regardless of date of verdict or judgment, provided suit was filed within 12 months from date of disaster. (O.C.G.A. 9-12-90). Liens from judgment where suit filed over 12 months after accident take priority as to date of judgment. (234 Ga. 186, 215 S.E.2d 240). Judgment lien attaches only to property of debtor as capable of seizure and sale under execution. (262 Ga. App. 339, 585 S.E.2d 681).

Judgments, decrees, orders, and related writs of fieri facias may not become liens on real property until recorded in office of clerk of superior court of county in which property located and also entered in indexes to applicable records. (O.C.G.A. 9-12-86[b]). With respect to bona fide purchasers for value without actual notice or other third parties acting in good faith and without notice who have obtained transfer or lien, no money judgment outside county of defendant's residence may create lien against property of defendant in any county other than where obtained, unless execution has been entered on execution docket of county of residence within 30 days from date of judgment; date of entry governs if execution entered on docket more than 30 days after judgment date. (O.C.G.A. 9-12-82). As to third parties acting in good faith and without notice who have acquired transfer or lien binding defendant's property, no money judgment may create lien on any land in county other than that in which judgment was obtained unless execution was recorded in county in which land located at time of acquisition or transfer (O.C.G.A. 9-12-83); with respect to such third parties, no money judgment against nonresident may create lien upon nonresident's real estate unless execution entered upon general execution docket of county in which real estate situated. (O.C.G.A. 9-12-84). After person has purchased real or personal property and been in possession of former for four years or of latter for two years, such property discharged from lien of any judgment against person from whom purchase was made or any predecessor in title. (O.C.G.A. 9-12-93). Promissory note in hands of defendant not affected by judgment lien. (O.C.G.A. 9-12-91).

Judgment debtor cannot alienate his property pending appeal. (O.C.G.A. 9-12-88).

Executions and Judicial Sales.

Authorization and procedure detailed in O.C.G.A. tit. 9, c. 13. Damages limited as follows in actions by purchasers at judicial or nonjudicial sales rescinded by seller within 30 days of sale but before deed delivered to purchaser if: (1) rescission due to automatic bankruptcy stay, limit amount of bid funds tendered at sale; and (2) if rescission due to nonfulfillment of statutory requirements of sale, or default with cure prior to sale, or prior agreement to cancel sale based on defendant in execution's enforceable promise to cure default, limit amount of bid funds tendered at sale plus 18% annual interest. (O.C.G.A. 9-13-172.1).

Revival.

Judgment becomes dormant after seven years from date of entry on execution docket, or from date of last entry of execution by proper officer (O.C.G.A. 9-12-60), but may be renewed within three years from time it becomes dormant by action or scire facias at option of plaintiff (O.C.G.A. 9-12-61). Georgia provision for revival of dormant judgment is applicable to revive dormant federal judgment. (218 Ga. App. 429, 461 S.E.2d 553). Action on judgment must be brought in county of defendant's residence (O.C.G.A. 9-12-66); scire facias in court of county where original judgment was obtained. (O.C.G.A. 9-12-63).

Assignment.

Judgments are transferable by written assignment for valuable consideration. (O.C.G.A. 9-12-21).

Forms

Partial Payment.

A partial payment of the within judgment has been made and the clerk of said court is authorized to enter the amount of such payment upon the execution, to wit: $. . . . . This the . . . . . . day of . . . ., 20. . . . .

. . . .

Attorney for Plaintiff

Full Satisfaction.

The within judgment and all interest, fees and costs have been fully paid and the clerk of said court is hereby authorized and directed to cancel the within execution and mark said judgment satisfied. This the . . . . . . day of . . . ., 20. . . . .

. . . .

Attorney for Plaintiff

Actions.

Action on judgment is action of debt. (96 Ga. App. 592, 101 S.E.2d 113). Dormant judgment evidence of debt, and action can be sustained upon it. (8 Ga. 351). Creditors or bona fide purchasers may, either in law or equity, attack judgment that interferes with their rights for any defect that appears on face of record or pleadings or for fraud or collusion. (O.C.G.A. 9-12-17).

See subhead Vacation or Modification, supra; and category Debtor and Creditor, topic Executions.

Foreign Judgments.

Action on foreign judgment, except judgments for child or spousal support, must be brought within five years after rendition. (O.C.G.A. 9-3-20). Judgment conclusive as to matters at issue between parties and their privies. (O.C.G.A. 9-12-40). Records and judicial proceedings, or copies thereof, of courts of any state, territory, or possession proved or admitted based upon attestation of clerk with annexed court seal, if one exists, and certificate of judge that attestation in proper form. (O.C.G.A. 24-7-24[a][1]). Properly authenticated records accorded full faith and credit. (O.C.G.A. 24-7-24[a][2]). Records and judicial proceedings of any court, tribunal, or quasi-judicial agency of any state, territory, or possession may also be given full faith and credit if certified under hand and seal of judge, clerk, or other official of entity in question. (O.C.G.A. 24-7-24[b]). Official certificate of justice of peace of another state to any judgment and preliminary proceedings before him, with official certificate of clerk of court of record, under seal of such court, within county in which justice of peace resides, stating that he or she is justice of peace of that county, and that signature to his or her certificate is genuine, is prima facie evidence of such proceedings and judgment. (O.C.G.A. 24-7-26). Where justice of peace has gone out of office, similar certificate of successor has like effect. (O.C.G.A. 24-7-26).

Georgia Foreign Money Judgments Recognition Act.

Except as otherwise provided, foreign judgment that is final, conclusive, and enforceable in jurisdiction where rendered (even though appeal is pending) is conclusive between parties to extent it grants or denies recovery of sum of money. (O.C.G.A. 9-12-113). Grounds for non-recognition are listed. (O.C.G.A. 9-12-114). Foreign judgment is not refused recognition for lack of personal jurisdiction if certain conditions are met. (O.C.G.A. 9-12-115). Judgment debtor who persuades court that he is entitled to appeal or has appealed is eligible for stay of proceedings until expiration of time to or determination of appeal. (O.C.G.A. 9-12-116).

Uniform Enforcement of Foreign Judgments Act.

Foreign judgment is treated in same manner as judgment of court in which it is filed. Filed foreign judgment has same effect and is subject to same procedures, defenses and proceedings as judgment of court in which it was filed and may be enforced or satisfied in like manner. (O.C.G.A. 9-12-132). At time foreign judgment is filed, affidavit showing name and last known address of judgment debtor and judgment creditor must be filed. (O.C.G.A. 9-12-133). If judgment debtor shows that appeal from foreign judgment pending, or will be taken, or that stay of execution has been granted and required security furnished, court must stay enforcement. (O.C.G.A. 9-12-134[a]). Enforcement of foreign judgment must also be stayed if judgment debtor shows court any ground on which enforcement of judgment of court within state would be stayed. (O.C.G.A. 9-12-134[b]). However, Act does not permit judgment debtor to file counterclaim to foreign judgment. (203 Ga. App. 243, 416 S.E.2d 824). Motion to set aside under O.C.G.A. 9-11-60(d) proper method for attacking foreign judgment for which domestication has been sought pursuant to Act. (268 Ga. App. 464, 602 S.E.2d 231).

5.16 LIMITATION OF ACTIONS:

Uniform Commercial Code.

Adopted. See category 3 Business Regulation and Commerce, topic 3.09 Commercial Code.

Actions must be brought within following periods:

Twenty Years.

Actions on bond, note or other instrument under seal (O.C.G.A. 9-3-23); or security deed (234 Ga. 297, 216 S.E.2d 79); to enforce right accruing to individual under statute or act of incorporation or by operation of law but not under laws regarding payment of wages and overtime (O.C.G.A. 9-3-22). See category 11 Employment, topic 11.02 Labor Relations, subhead Wages.

Ten Years.

Actions against executors, administrators or guardians (O.C.G.A. 9-3-27); from date of first sale of new personal property to active user for action against manufacturer for injury to person or property (O.C.G.A. 51-1-11). See subhead Two Years. Causes of action for damages to dwelling due to manufacture of or negligent design or installation of synthetic exterior siding, accrue at earlier discovery of damage to dwelling or date damage should have been discovered with reasonable diligence (O.C.G.A. 9-3-30[b][1]), but provision applies only to causes of action that had not expired under former law before Mar. 28, 2000 (O.C.G.A. 9-3-30[b][2]). See subhead Eight Years.

Eight Years.

Actions for damages and injuries resulting from deficient planning, supervision, or construction of improvements to real property including indemnification claims (O.C.G.A. 9-3-51[a]), unless injury occurs during seventh or eighth year after substantial completion, in which case action may be brought up to two years from date of injury but not more than ten years after substantial completion (O.C.G.A. 9-3-51[b]). Time period may also apply to causes of action for damages to dwelling due to manufacture of or negligent design or installation of synthetic exterior siding, which accrue at earlier discovery of damage to dwelling or date damage should have been discovered with reasonable diligence. (O.C.G.A. 9-3-30[b][1]). See subhead Ten Years.

Seven Years.

Issuance and entry of execution on general execution document to prevent dormancy of judgment (O.C.G.A. 9-12-60[a][1]); recovery of dividends or distributions (O.C.G.A. 7-1-460).

Six Years.

Actions on simple contract in writing, except negotiable instruments and contracts for sale of goods, after it becomes due and payable; actions for breach of contract for sale of goods excluded. (O.C.G.A. 9-3-24). Claims against trustee for breach of trust barred, unless proceeding asserted within six years of receipt of report in which existence of claim disclosed or, if no report received, six years after beneficiary discovered, or reasonably should have discovered, claim's existence. (O.C.G.A. 53-12-198[a]). Six-year limitation also applies to successor trustee's claim against predecessor, beginning when successor takes office (O.C.G.A. 53-12-198[b]), and trustee's claim against co-trustee, beginning when cause of action arises (O.C.G.A. 53-12-198[c]). Actions against persons engaged in land surveying to recover damages for faulty surveys or plats accrue when services rendered and barred if not instituted within six years. (O.C.G.A. 9-3-30.2[b]).

Five Years.

Actions on foreign judgment except judgments for child and/or spousal support (O.C.G.A. 9-3-20); however, fraudulent concealment can estop raising defense (186 Ga. App. 354; 367 S.E.2d 128). Action arising out of childhood sexual abuse must be commenced within five years after plaintiff attains age of majority. (O.C.G.A. 9-3-33.1).

Four Years.

Actions on open account or for breach of contract not in writing or on any implied promise or undertaking (O.C.G.A. 9-3-25); for trespass on or damage to realty (O.C.G.A. 9-3-30[a]) with exception of damages to dwelling due to manufacture, design or installation of synthetic exterior siding (O.C.G.A. 9-3-30[b][1]); for injury to personalty (O.C.G.A. 9-3-31), including tortious interference with business (166 Ga.App. 387, 304 S.E.2d 510 and common law fraud (202 Ga. App. 770, 415 S.E.2d 510); to recover possession of personalty (O.C.G.A. 9-3-32); action ex contractu for which no other period prescribed (O.C.G.A. 9-3-26); under some provisions of Uniform Fraudulent Transfers Act (O.C.G.A. 18-2-79); on contract of sale under Uniform Commercial Code, for which parties may reduce time period to not less than one year by agreement (O.C.G.A. 11-2-725[1]); for loss of consortium (O.C.G.A. 9-3-33); and for breach of covenant restricting land use that accrues as result of failure to pay assessments or fees (O.C.G.A. 9-3-29[b]). See also category 3 Business Regulation and Commerce, topic 3.12 Consumer Protection, subhead Retail Installment and Home Solicitation Sales.

Three Years.

Actions for shareholders to assert dissenter's rights. (O.C.G.A. 14-2-1332).

Two Years.

Actions on medical malpractice from date of injury or death (O.C.G.A. 9-3-71[a]), with exception for discovery of foreign object malpractice (O.C.G.A. 9-3-72), but no more than five years after date of negligent or wrongful act or omission (O.C.G.A. 9-3-71[b]); for injury to person, except those to reputation, and wrongful death (O.C.G.A. 9-3-33; 283 Ga. App. 613, 642 S.E.2d 232), including product liability involving injury to person (254 Ga. 111, 327 S.E.2d 221); for service of tort complaint against uninsured motorist carrier (177 Ga. App. 460, 340 S.E.2d 26); for medical malpractice from date injury occurred including action for foreign objects left in body (260 Ga. 502, 397 S.E.2d 117; O.C.G.A. 9-3-71); for breach of covenant restricting land use, including violators of building set-back lines (except those which accrue as result of failure to pay assessments or fees) (O.C.G.A. 9-3-29); for injury from unfair or deceptive acts in conduct of consumer transactions under Fair Business Practices Act (O.C.G.A. 10-1-401); for malicious prosecution action (225 Ga. App. 119, 483 S.E.2d 133); for filing notice of claims against state with Claims Advisory Board (O.C.G.A. 28-5-86); for wages and lost earning capacity (138 Ga. App. 761, 227 S.E.2d 397) (see category 11 Employment, topic 11.02 Labor Relations); for wrongful death (231 Ga. 852, 204 S.E.2d 747); for disparagement of perishable agricultural or aquacultural food products or commodities (O.C.G.A. 2-16-4). See also subhead Five Years.

One Year.

Actions for injury to reputation (O.C.G.A. 9-3-33); for presentation of claims against counties (O.C.G.A. 36-11-1) under bulk transfers under Uniform Commercial Code (O.C.G.A. 11-6-111); for medical malpractice for foreign object left in body to run from discovery of negligence (O.C.G.A. 9-3-72); arising out of certain transfers without reasonably equivalent value or to insiders under Uniform Fraudulent Transfers Act (O.C.G.A. 18-2-79).

Actions Not Specifically Provided For.

No general limitation on actions not provided for.

Measuring Timely Commencement.

If plaintiff timely files complaint but fails to serve defendant within five-day statutory grace period under O.C.G.A. 9-11-4(c), plaintiff bears burden of showing that due diligence was exercised in perfecting service or service will not relate back to date of filing. (234 Ga. App. 543, 507 S.E.2d 798). If plaintiff fails to act reasonably and diligently, service will not relate back to date of filing; trial court's determination of diligence will not be reversed on appeal absent abuse of discretion. (215 Ga. App. 224, 450 S.E.2d 253). See subhead Renewal Actions.

Tolling of Limitations for Fraud of Defendant.

If defendant fraudulently defers or debars plaintiff from bringing action, action accrues upon plaintiff's discovery of fraud. (O.C.G.A. 9-3-96). If gravamen of action actual fraud, statute of limitations tolled until fraud discovered or should have been discovered through reasonable diligence. (213 Ga. App. 226, 444 S.E.2d 91).

Discovery Rule.

Rule confined to cases of bodily injury which develop only over extended period of time. (258 Ga. 365, 368 S.E.2d 732). Limitations period runs from time nature of injury and causal connection between injury and negligent conduct known or should have been known. (160 Ga. App. 318; 287 S.E.2d 252). Rule not applicable to property damage claims. (208 Ga. App. 190, 430 S.E.2d 82). Rule not applicable to medical malpractice (178 Ga. App. 608, 344 S.E.2d 446) except in foreign object cases (O.C.G.A. 9-3-72). Rule not applicable to contract claims. (171 Ga. App. 462, 320 S.E.2d 255) or wrongful death actions (261 Ga. 726, 410 S.E.2d 290).

Dismissal for Want of Prosecution.

Any suit in which no written order is taken for five years stands automatically dismissed with costs taxed against party plaintiff. (O.C.G.A. 9-2-60).

Renewal Actions.

May be brought, subject to payment of costs in original action, within statute of limitations or within six months of voluntary dismissal or discontinuance (or dismissal or discontinuance without prejudice for lack of subject matter jurisdiction), whichever is later; provided, however, that this privilege of renewal may be exercised only once if dismissal or discontinuance occurs after expiration of applicable period of limitation. (O.C.G.A. 9-2-61[a],. 9-11-41[d]). Renewal privilege generally not available to plaintiff who failed to file affidavit alleging professional malpractice. (O.C.G.A. 9-11-9.1[c]). “Costs” that must be paid to renew include attorney's fees and litigation expenses awarded under O.C.G.A. 9-15-14 in prior action between same parties. (O.C.G.A. 9-15-14[g]). Diligence in perfecting service of renewed action measured with respect to period following refiled, not original action. Compare subhead Measuring Timely Commencement, supra. Original action is void and nonrenewable if service of original complaint never perfected after complaint filed, or if first action dismissed by judicial order. But if service in original action merely too late to constitute timely commencement of action filed within limitations period, and original action voluntarily dismissed before judicial ruling, defect is merely voidable and delay in service not available as defense in renewal action. (264 Ga. 359, 444 S.E.2d 322; 240 Ga. App.

512, 522 S.E.2d 737; 231 Ga. App. 820, 499 S.E.2d 69; 231 Ga. App. 438, 499 S.E.2d 164). Privilege of renewal shall not apply to contracts for sale of goods. (O.C.G.A. 9-2-61[b]). When original action is in federal court, six-month time limit runs upon final decision of federal appeals court, not upon denial of certiorari by United Stated Supreme Court, unless stay procured. (222 Ga. App. 563, 474 S.E.2d 740).

Foreign Causes of Action.

Georgia limitation governs action brought in Georgia courts. (97 Ga. 587, 25 S.E. 335; 119 Ga. 139, 45 S.E. 979).

Disabilities of Plaintiff.

Minors and legally incompetent persons if disability existed when cause of action accrued, are allowed periods stated above after disability removed (O.C.G.A. 9-3-90; 150 Ga. App. 234, 257 S.E.2d 209), except that in action for medical malpractice, once minor attains age of five years, two-year period of limitation applies, and after age ten, action for negligent act that occurred before fifth birthday is barred (O.C.G.A. 9-3-73). If disability occurred after cause of action accrued, and was not voluntarily caused or undertaken by person claiming benefit thereof, limitation period suspended during disability. (O.C.G.A. 9-3-91). With respect to causes of action that accrued prior to July 1, 1984, persons imprisoned no longer among groups of people whom tolling provision protects. (O.C.G.A. 9-3-90[b]; 210 Ga. App. 439, 436 S.E.2d 567). In case of fraud deterring plaintiff from suing, limitation period runs from discovery of fraud. (O.C.G.A. 9-3-96). For crimes designated in O.C.G.A. 17-3-2.1, infancy shall toll statute of limitations until victim is 16 years of age or until violation is reported to law enforcement authorities, whichever is sooner. (O.C.G.A. 17-3-2.1; 213 Ga. App. 579, 445 S.E.2d 566).

Absence or Concealment of Defendant.

Where defendant removes from state, period of absence excluded from limitation period. (O.C.G.A. 9-3-94). Tolling provision applies only if removal from state makes it impossible to perfect service of process even under long-arm statute. (227 Ga. App. 32, 488 S.E.2d 116).

Interruption of Statutory Period.

New written promise fixes new point from which limitation runs on actions not yet barred. (O.C.G.A. 9-3-110). Limitation period tolled in favor of creditors for up to five years during time between death of person and commencement of representation of his or her estate or between termination of one administration and commencement of another. (O.C.G.A. 9-3-93). Dead person's unrepresented estate benefits from like tolling period of up to five years. (O.C.G.A. 9-3-92).

Revival of Barred Claim.

Debt barred by limitations may be revived by new promise, which must be in writing. (O.C.G.A. 9-3-110). Written acknowledgment must, in legal effect, be made to creditor and must also sufficiently identify debt or afford means by which it may be identified with reasonable certainty. (193 Ga. 764, 20 S.E.2d 10). After discharge in bankruptcy, no promise to pay discharged debt will be binding unless in writing and signed by debtor or someone with debtor's authorization. (O.C.G.A. 9-3-111). Partner or joint contractor can revive claim only against himself or herself and not against others liable with him or her. (O.C.G.A. 9-3-114, -115).

Contractual Limitations.

Period shorter than statutory period may be fixed by agreement, provided such shorter period is not so unreasonable as to raise presumption of imposition or undue advantage. (190 Ga. App. 89, 378 S.E.2d 169). Contract for sale may reduce to not less than one year but cannot extend period of limitation. (O.C.G.A. 11-2-725).

Pleading.

Limitations must be specially pleaded. (O.C.G.A. 9-11-8). Statute of limitation affirmative defense that must be set forth in response to preceding pleading (246 Ga. 290, 271 S.E.2d 196), but it may be raised by motion in limited circumstances (154 Ga. App. 350, 268 S.E.2d 403).

See also category 2 Business Organizations, topic 2.03 Corporations, subheads Liabilities of Directors, Liabilities of Officers, and Unclaimed Distributions.

5.16A OFFER OF JUDGMENT OR AGREEMENT TO DISMISS:

Either party may make offer to allow judgment to be entered or to enter into agreement to settle tort claims for money more than 30 days after summons and complaint served and 30 or more days before trial. (O.C.G.A. 9-11-68[a]). If judgment obtained by plaintiff who rejected offer is less than 75% of defendant's last such offer, plaintiff is liable for defendant's reasonable attorney's fees and costs incurred after rejection of that offer. (O.C.G.A. 9-11-68[b][1]). If defendant rejects plaintiff's offer and plaintiff obtains judgment equal to or exceeding 125% of defendant's last such offer, defendant is liable for plaintiff's reasonable attorney's fees and costs incurred after rejection of that offer. (O.C.G.A. 9-11-68[b][2]). Court has discretion to disallow award upon determining that offer not made in good faith. (O.C.G.A. 9-11-68[d][2]).

5.16B PARTITION:

At least four available methods: (1) arbitration (O.C.G.A. 9-9-2, -4, -18); (2) distribution in kind by proceeding in probate court (O.C.G.A. 53-4-11 [prior to Jan. 1, 1998], 53-2-30 [effective Jan. 1, 1998]); (3) statutory partition (O.C.G.A. 44-6-160); and (4) equitable partition (O.C.G.A. 44-6-140). Where there are tenants in common and no provision is made, by will or otherwise, as to how realty is to be divided, any one of owners of undivided interest (including owner of equitable interest or holder of security deed thereto) may apply to superior court of county in which realty situated, by petition for writ of partition, stating facts of case, describing premises, and defining interest of each party. (O.C.G.A. 44-6-160).

Jurisdiction and Venue.

Only superior court has jurisdiction in partition action. (20 Ga. App. 590, 93 S.E. 297). Equity has jurisdiction where remedy at law insufficient or peculiar circumstances render proceedings in equity more suitable and just (O.C.G.A. 44-6-140); decree passes title without conveyances by parties (O.C.G.A. 44-6-142). County where land situated venue for statutory partition action. (229 Ga. 240, 190 S.E.2d 517).

Proceedings.

Twenty days notice must be given to other parties concerned. (O.C.G.A. 44-6-162). Partitioners have power to select surveyor, and must give all parties, if possible, eight days notice of time of executing writ. (O.C.G.A. 44-6-164). Partitioners must make just and equal division and make return to court within three months after issuance. (O.C.G.A. 44-6-164). Proceedings may be contested both before writ issued and after return of partitioners, and issue must be tried by jury. (O.C.G.A. 44-6-165).

Partition by Appraisal.

Where fair and equitable division of property cannot be made by means of metes and bounds because of improvements, value for mining or erection of mills or machinery, or depreciation, court will appoint three qualified persons to make appraisals. Average of appraisals will constitute appraisal price and each petitioner may receive his or her respective share of total value of property. (O.C.G.A. 44-6-166.1).

Partition in Kind or Sale.

If lands and tenements sought to be partitioned are not sold pursuant to O.C.G.A. 44-6-166.1, court will order public sale of land. (O.C.G.A. 44-6-167).

Personalty may be partitioned the same as real estate. (O.C.G.A. 44-12-1).

Life tenant of undivided interest in real estate may compel partition under usual procedure where property capable of fair and equitable partition, but no sale of property allowed. (O.C.G.A. 44-6-172).

Guardian ad litem can be appointed by court to represent all unborn remaindermen or reversioners as well as other interested and unrepresented minors. (O.C.G.A. 44-6-173).

5.17 [RESERVED]

5.18 PLEADING:

Court procedure for courts of record governed by Ga. Civil Practice Act (O.C.G.A. 9-11-1 et seq.) which closely follows Federal Rules of Civil Procedure. See topics 5.11 Depositions and Discovery, 5.15 Judgments, 5.19 Practice, and Process. Petitions for extraordinary equitable relief such as restraining order, injunction or receiver must be verified by petitioner or supported by other satisfactory proofs. (O.C.G.A. 9-10-110).

Pleadings Permitted.

Similar to federal rules. (O.C.G.A. 9-11-7). Reply to counterclaim or cross-claim is permitted but not required since allegations in counterclaims or cross-claims are automatically deemed denied. (O.C.G.A. 9-11-7[a], 9-11-12[a]).

Complaint.

Provisions regarding defenses and form of denials (O.C.G.A. 9-11-8[b]), affirmative defenses (O.C.G.A. 9-11-8[c]), effect of failure to deny (O.C.G.A. 9-11-8[d]), averments and alternative claims and defenses (O.C.G.A. 9-11-8[e]), and construction of pleadings (O.C.G.A. 9-11-8[f]) similar to federal rules. No subject matter jurisdictional allegation required: basis of venue must be stated in original complaint. (O.C.G.A. 9-11-8). Demand for judgment for relief in medical malpractice actions subject to special rules. (O.C.G.A. 9-11-8[a]). Professional malpractice damages complaint against member of any of 26 professions listed in statute or against licensed health care facility must be accompanied by affidavit of expert competent to testify that sets forth specifically at least one negligent act or omission and factual basis for each claim. (O.C.G.A. 9-11-9.1[a]). 45-day grace period for filing expert affidavit after complaint alleging professional malpractice is filed (O.C.G.A. 9-11-9.1[b]) is limited to claims filed within applicable statute of limitation or repose (274 Ga. App. 449, 617 S.E.2d 563). Expert affidavit requirement also applies to counterclaims for professional malpractice. (203 Ga. App. 519, 417 S.E.2d 338). Professional malpractice affidavit not required for strict liability claims. (223 Ga. App. 712, 479 S.E.2d 103). Affidavit that incorporates by reference other documents which set forth requisite averrals is not sufficient. (206 Ga. App. 105, 424 S.E.2d 54). Facsimile of original affidavit sufficient when original exists and can be acquired by plaintiff. (217 Ga. App. 156, 456 S.E.2d 718). If defendant moves to dismiss before close of discovery on basis that affidavit is defective, court may dismiss for failure to state claim, with plaintiff able to cure defect by amendment only for 30 days after service of motion unless court, in its discretion, extends time for filing amendment or response to motion. (O.C.G.A. 9-11-9.1[b]). If plaintiff fails to file affidavit, and defendant moves to dismiss on that ground when it serves its responsive pleading, complaint is not eligible to be renewed under O.C.G.A. 9-2-61 after expiration of applicable limitations period, unless court determines plaintiff in fact had requisite affidavit when required by this section and failed to file it by mistake. (O.C.G.A. 9-11-9.1[b]). However, pro se plaintiff failing to file requisite expert affidavit with malpractice complaint may be given leeway by court. (201 Ga. App. 480, 411 S.E.2d 322). Complaint alleging professional medical malpractice is also subject to dismissal if not accompanied by form providing that defense counsel is authorized to obtain and disclose nonprivileged health information in medical records pertaining to plaintiff or plaintiff's decedent. (O.C.G.A. 9-11-9.2).

Sanction of Petition.

Court may strike improper portion of demand for judgment and impose appropriate sanctions for failure to meet statutory requirements, particularly those for medical malpractice actions. (O.C.G.A. 9-11-8[a][3]). No specific provision for sanctions as under federal rules. (O.C.G.A. 9-11-11).

Defensive Pleadings.

Similar to federal rules, with modifications. (O.C.G.A. 9-11-8, -12, -13). Assumption of risk, comparative negligence and other defenses not listed in statute need not (as Federal Rules require) be pleaded separately as affirmative defenses. (O.C.G.A. 9-11-8[c]).

Answer.

Similar to federal rules. (O.C.G.A. 9-11-8[b] through [f], -12). Cross-claim or counterclaim does not require answer unless required by order of court, and stands automatically denied. (O.C.G.A. 9-11-12[a]). *Note:* Service of motion under this section does not alter time requirement. (O.C.G.A. 9-11-12). Verified petition requires verified answer. (O.C.G.A. 9-10-111).

Time.

Mere filing of motion under O.C.G.A. 9-11-12 does not extend time for filing answer; but trial court may not grant motion for default before ruling on motion to strike entire complaint. (250 Ga. 24, 295 S.E.2d 527). Unless otherwise provided by statute, answer must be served within 30 days after service of summons and complaint on defendant. (O.C.G.A. 9-11-12[a]). Filing of motion to transfer does not toll time within which to answer complaint in transfer or court. (199 Ga. App. 237, 404 S.E.2d 618). Court may order any insufficient defense or redundant, immaterial, impertinent or scandalous matter stricken from any pleading upon motion made by a party within 30 days after service of pleading upon him or her or upon court's own initiative at any time. (O.C.G.A. 9-11-12[f]). If motion for definite statement is granted, order of court must be obeyed within 15 days after notice of order. (O.C.G.A. 9-11-12[e]). If party elects to make motion in writing, rather than in responsive pleading, on defense of lack of jurisdiction over subject matter or person, improper venue, insufficiency of process or service of process, failure to state a claim upon which relief can be granted, or failure to join an indispensable party, motion must be made before or at time of pleading if a further pleading is permitted. (O.C.G.A. 9-11-12[b]). Motions for judgment on pleadings must be filed after pleadings closed but soon enough not to delay trial. (O.C.G.A. 9-11-12[b]).

Counterclaims and cross-claims may be filed up to and including filing date for answer or other defensive pleadings if final date allowed by applicable time limitations for commencement of such actions has not expired prior to filing of main action. (O.C.G.A. 9-3-97).

Counterclaim or Set-Off.

Counterclaims are not compulsory if: (1) at time action commenced, claim was subject of another pending action; or (2) opposing party brought action by attachment or other process by which court did not acquire personal jurisdiction and pleader does not state counterclaim; or (3) counterclaim not within jurisdiction of court. (O.C.G.A. 9-11-13[a]). Unless parties agree otherwise, permissive counterclaims are separated for purposes of trial. (O.C.G.A. 9-11-13[b]). Parties required for granting of complete relief in counterclaim or cross-claim, shall be brought in by order of court if subject to court's jurisdiction. (O.C.G.A. 9-11-13[h]).

Amended or Supplemental Pleadings.

Similar to federal rules, with modifications. (O.C.G.A. 9-11-15). Party may amend pleading as matter of course at any time before entry of pretrial order (not just before service of responsive pleading, if any, or within 20 days of serving original pleading); thereafter, only by leave of court or consent of adverse party. Party may move in response to amended pleading and shall plead within 15 days after service of amended pleading when court requires. (O.C.G.A. 9-11-15[a]).

Filing of Pleadings and Service of Notices.

All papers required to be served upon parties subsequent to complaint must be filed with court. (O.C.G.A. 9-11-5[d]). Filing with court generally means filing with clerk but judge may permit filing with him (O.C.G.A. 9–11–5[e]). Pleadings subsequent to original complaint and every order required by its terms to be served shall be served upon each party. Written motions, other than ex parte ones, and written notices, appearances, demands, offers of judgment, and similar papers also must be served upon each party; party who fails to file pleadings waives his right to service of any papers, except pleadings asserting new or additional claims, and to all notices, including notice of decision on motions, notice of trial and notice of entry of judgment. (O.C.G.A. 9-11-5[a]). Service must be made by delivery of copy to person to be served, mail, leaving copy with clerk or electronic service (O.C.G.A. 9–11–5[b][e]).

Verification.

Pleadings need not be verified or accompanied by affidavit unless statute or rule specifically provides otherwise. (O.C.G.A. 9-11-11[b]). Answer need not be verified unless petition is verified (O.C.G.A. 9-10-111), such as in action on open account (O.C.G.A. 9-10-112).

Verification specifically required for deposition to perpetuate testimony (O.C.G.A. 9-11-27[a][1]) and for temporary restraining order granted without notice to adverse party (O.C.G.A. 9-11-65[b][1], 9-10-110); and, if other satisfactory proofs not provided, injunction, receiver, or other extraordinary equitable relief (O.C.G.A. 9-10-110). See topic 5.14 Injunctions.

Claims.

Attestation of notary public to affidavit and bond that was purportedly executed in another state was insufficient authentication for levying officer to receive claim of person who was not party to execution of judgment. (56 Ga. 612). Plaintiff in execution has burden of proof in all cases in which defendant in execution does not have possession of property at time of levy. (O.C.G.A. 9-13-102). Possession of property after date of judgment, however, shifts burden of proof to claimant. (61 Ga. 300).

See topic 5.15 Judgments; category 8 Debtor and Creditor, topic 8.05 Executions.

Small Claims.

See category 6 Courts and Legislature, topic 6.01 Courts.

Frivolous Claims.

In civil action any court of record shall award reasonable and necessary attorney's fees and expenses of litigation to any party against whom is asserted claim, defense, or other position with respect to which there existed such complete absence of justifiable issue of law or fact that it could not reasonably be believed that court would accept asserted claim, defense or other position. (O.C.G.A. 9-15-14[a]). Motion for attorneys' fees and expenses may be filed at any time during course of action but not later than 45 days after final disposition. (O.C.G.A. 9-15-14[e]). Final disposition means entry of judgment by trial court, not disposition on appeal (263 Ga. 792, 440 S.E.2d 464), but attorney's fees incurred in ancillary proceedings to enforce consent judgment may also be recovered (234 Ga. App. 459, 507 S.E.2d 772). Does not apply to claims or defenses determined by court to be asserted in good faith attempt to establish new theory of law if based on some recognized precedent or persuasive authority. (O.C.G.A. 9-15-14[c]). Tort liability may arise for abusive litigation. (O.C.G.A. 51-7-81; 201 Ga. App. 562, 411 S.E.2d 731). Attorney's fees incurred in connection with appellate proceedings not recoverable under O.C.G.A. 9-15-14.

5.19 PRACTICE:

State practice governed by Ga. Civil Practice Act (O.C.G.A. 9-11-1 et seq.), which largely follows Federal Rules of Civil Procedure. See topics 5.02 Actions, 5.18 Pleading, 5.15 Judgments, Process.

No separate courts for equity causes, but superior court has both law and equity jurisdiction. (Const. art. VI, §IV, para. I; O.C.G.A. 15-6-8).

Discovery.

Federal Rules closely followed. (O.C.G.A. 9-11-26 to -37). In order to utilize superior courts to compel discovery, parties must commence and complete discovery within six months of filing answer (Unif. Super. Ct. Rule 5.1), but discovery does not necessarily have to be completed within that time (257 Ga. 181, 357 S.E.2d 62). Time limit to use compulsory process to compel discovery in probate court may be six months or two months depending upon population of county. (Unif. Prob. Ct. Rule 5).

Pretrial order issued following pretrial conference controls subsequent trial proceedings unless modified upon showing of manifest injustice. But court has discretion to permit expert testimony from witness not named in pretrial order. (O.C.G.A. 9-11-16[b]). Pretrial procedures mandatory, and failure to obey statutory mandate error. (121 Ga. App. 704, 175 S.E.2d 28).

Demand for Admission of Facts.

Federal Rules closely followed. (O.C.G.A. 9-11-36).

Direct Action Against Insurer.

See category 23 Transportation, topic 23.01 Motor Vehicles, subhead Direct Actions.

Small Claims.

See category 6 Courts and Legislature, topic 6.01 Courts.

Attachment.

See topic Process, subhead Service by Publication.

See also topics 5.02 Actions, 5.03 Appeal and Error, 5.11 Depositions and Discovery, 5.14 Injunctions, 5.15 Judgments, 5.18 Pleading, and Process. See also category 8 Debtor and Creditor, topics 8.02 Attachment, 8.05 Executions, and 8.09 Garnishment.

5.19A PROCESS, PERSONAL JURISDICTION, AND FORUM NON CONVENIENS:

Process procedure governed primarily by Ga. Civil Practice Act. See topic 5.16 Limitation of Actions, subhead Measuring Timely Commencement. Methods authorized by O.C.G.A. 9-11-4 may be used as alternative methods in probate courts. (O.C.G.A. 9-11-4[k]).

Suit Begun.

Suit in Magistrate Court begun by issuing statement of claim. (O.C.G.A. 15-10-43). Civil action commenced by filing complaint. (O.C.G.A. 9-11-3). Service, if accomplished within reasonable time, will relate back to original date of filing complaint. (239 Ga. 282, 236 S.E.2d 629).

General Requisites.

Clerk must issue summons and deliver it for service upon filing of complaint. (O.C.G.A. 9-11-4[a]). Summons must be signed by clerk; directed to defendant; contain names of court, county and parties; state name and address of plaintiff's attorney, if any, or plaintiff's address; inform defendant of time within which appearance required and defensive pleadings must be filed; and advise of possibility of default judgment. (O.C.G.A. 9-11-4[b]).

Service of process inside state must be made within five days by sheriff of county where action brought or defendant found, marshal of court, deputy, or any other U.S. citizen appointed by court for that purpose or by person over 18 and not party and who has been appointed as permanent process server by court. Outside U.S., service may be made by any U.S. citizen or resident of such country appointed by court, after order of publication. (O.C.G.A. 9-11-4[c]). Rule nisi approved as process in lieu of summons where defendant is required to appear at time other than within 30 days after service. (233 Ga. 734, 213 S.E.2d 633). Process and service may be waived in writing. (O.C.G.A. 9-10-73). Special requirements exist in condemnation cases (O.C.G.A. 32-3-8, -9), but substantial compliance must be deemed sufficient (O.C.G.A. 32-3-10). See subhead Waiver of Service.

Waiver of Service.

Detailed procedure for waiver service, similar to Federal Rule of Civil Procedure 4(d), set out in O.C.G.A. 9-11-4(d) with accompanying forms included as part of O.C.G.A. 9-11-4(1). Defendant who timely waives granted additional time to respond to complaint and defendant who unjustifiably refuses timely to waive incurs liability for costs of subsequent service method. Prior authority required defendant to serve answer within 30 days of acknowledging service of complaint, even if plaintiff had not filed return of service. (239 Ga. App. 791, 522 S.E.2d 246).

Forms

Waiver Request.

NOTICE OF LAWSUIT AND REQUEST FORWAIVER OF SERVICE OF SUMMONS

TO: (Name of individual defendant or name of officer or agent of corporate defendant) as (title, or other relationship of individual to corporate defendant) of (name of corporate defendant to be served, if any)

A lawsuit has been commenced against you (or the entity on whose behalf you are addressed). A copy of the complaint is attached to this notice. The complaint has been filed in the (court named on the complaint) for the State of Georgia in and for the County of (county) and has been assigned (case number of action).

This is not a formal summons or notification from the court, but rather my request pursuant to Code Section O.C.G.A. 9-11-4 of the Official Code of Georgia Annotated that you sign and return the enclosed Waiver of Service in order to save the cost of serving you with a judicial summons and an additional copy of the complaint. The cost of service will be avoided if I receive a signed copy of the waiver within 30 days (or 60 days if located outside any judicial district of the United States) after the date designated below as the date on which this Notice of Lawsuit and Request for Waiver of Service of Summons is sent. I enclose a stamped and addressed envelope (or other means of cost-free return) for your use. An extra copy of the Waiver of Service is also attached for your records. YOU ARE ENTITLED TO CONSULT WITH YOUR ATTORNEY REGARDING THIS MATTER.

If you comply with this request and return the signed Waiver of Service, the waiver will be filed with the court and no summons will be served on you. The action will then proceed as if you had been served on the date the waiver is filed except that you will not be obligated to answer or otherwise respond to the complaint within 60 days from the date designated below as the date on which this notice is sent (or within 90 days from that date if your address is not in any judicial district of the United States).

If you do not return the signed waiver within the time indicated, I will take appropriate steps to effect formal service in a manner authorized by the Georgia Rules of Civil Procedure and then, to the extent authorized by those rules, I will ask the court to require you (or the party on whose behalf you are addressed) to pay the full cost of such service. In that connection, please read the statement concerning the duty of parties to avoid unnecessary costs of service of summons, which is set forth on the Notice of Duty to Avoid Unnecessary Costs of Service of Summons enclosed herein.

I affirm that this Notice of Lawsuit and Request for Waiver of Service of Summons is being sent to you on behalf of the Plaintiff on this   day of   .

____

Signature of plaintiff's attorney

or

____

Unrepresented plaintiff

WAIVER OF SERVICE OF SUMMONS

To: (Name of plaintiff's attorney or unrepresented plaintiff)

I acknowledge receipt of your request that I waive service of a summons in the action of (caption of action), which is case number (docket number) in the (name of court) of the State of Georgia in and for the County of (county). I have also received a copy of the complaint in the action, two copies of this instrument, and a means by which I can return the signed waiver to you without cost to me. I understand that I am entitled to consult with my own attorney regarding the consequences of my signing this waiver.

I agree to save the cost of service of a summons and an additional copy of the complaint in this lawsuit by not requiring that I (or the entity on whose behalf I am acting) be served with judicial process in the manner provided by the Georgia Rules of Civil Procedure.

I (or the entity on whose behalf I am acting) will retain all defenses or objections to the lawsuit or to the jurisdiction or venue of the court except for objections based on a defect in the summons or in the service of the summons.

I understand that a judgment may be entered against me (or the entity on whose behalf I am acting) if an answer is not served upon you within 60 days after the date this waiver was sent, or within 90 days after that date if the request for the waiver was sent outside the United States.

This day of , .

____

(Signed)

____

(Printed or typed name of defendant)

____

as (title)

____

of (name of corporate defendant, if any)

NOTICE OF DUTY TO AVOID UNNECESSARYCOSTS OF SERVICE OF SUMMONS

Subsection (d) of Code Section O.C.G.A. 9-11-4 of the Official Code of Georgia Annotated requires certain parties to cooperate in saving unnecessary costs of service of summons and pleading. Defendant located in United States who, after being notified of action and asked by plaintiff to waive service of summons, fails to do so will be required to bear cost of such service unless good cause shown for defendant's failure to sign and return the waiver.

Not good cause for failure to waive service where party believes complaint unfounded, or that the action has been brought in improper place or in a court lacking jurisdiction. Party who waives service of the summons retains all defenses and objections (except any relating to the summons or to the service of the summons), and may later object to jurisdiction of court or to place where action brought.

Defendant who waives service must, within time specified on waiver form, serve on plaintiff's attorney (or unrepresented plaintiff) response to complaint and must file signed copy of response with court. If answer not timely served, default judgment may be taken against defendant. By waiving service, defendant allowed more time to answer than if summons actually served when request for waiver of service was received.

Who May Serve.

See subhead General Requisites, supra.

Personal Service on Individual.

Summons and complaint may be handed to defendant, left at his or her usual place of abode with person of suitable age and discretion residing therein, or delivered to agent authorized by appointment or law to receive service. (O.C.G.A. 9-11-4[e][7]). Substantial compliance insufficient; person receiving service at defendant's usual place of abode must reside there. (259 Ga. 418, 383 S.E.2d 108). Service on nonresident individuals or partnerships doing business and having managing or other agent, cashier, or secretary in state may be made upon such individual or on agent designated for service. (O.C.G.A. 9-11-4[e][2]). In Magistrate Court, copy of verified statement of claim must be personally served, or by leaving copy at usual place of abode with person of suitable age and discretion, or by delivering copy to authorized agent for service. (O.C.G.A. 15-10-43[b]). See also category 23 Transportation, topic 23.01 Motor Vehicles, subhead Actions Against Nonresidents.

Service After Complaint.

Pleadings subsequent to written complaint, written motions except those to be heard ex parte, and written notices, appearances, demands, offers of judgment and similar papers served on parties by service to party's attorney, unless ordered otherwise by court. Service on attorney or party accomplished by delivery, mail to last known address or electronic service. If address unknown, to clerk of court. Service by mail complete upon mailing. Proof of service by certificate of attorney, affidavit, written admission, or other proof satisfactory to court. (O.C.G.A. 9-11-5).

Personal Service on Minor.

Personal service on minor, and, unless minor is married, also on father, mother, guardian, or guardian ad litem. (O.C.G.A. 9-11-4[e][3]). Service upon minor 14 years or older who is legal resident of forum county but temporarily resides or sojourns outside state or U.S. may be served by statutory overnight delivery compliant with O.C.G.A. 9-10-12 or by registered or certified mail. (O.C.G.A. 9-10-70).

Personal Service on Incompetent.

To person and appointed guardian for person judicially declared of unsound mind or on guardian ad litem if no guardian. (O.C.G.A. 9-11-4[e][4]).

Personal Service on Domestic Corporation.

By delivering copy of summons and complaint to registered agent. (O.C.G.A. 14-2-504[a]). If no registered agent or agent cannot be served with reasonable diligence, to secretary of corporation at its principal office by registered or certified mail or statutory overnight delivery, return receipt requested; service perfected at earliest of date corporation receives mail, date on return receipt if signed on behalf of corporation, or five days after postmark, if postage prepaid and correctly addressed. (O.C.G.A. 14-2-504[b]). Other means may also be used (O.C.G.A. 14-2-504[c]) but not service by publication (214 Ga. App. 492, 448 S.E.2d 374). For example, service on corporations incorporated or domesticated under state's law may be made on president or other officer, cashier, managing or other agent or, if service on such person cannot be made, on Secretary of State. (O.C.G.A. 9-11-4[e][1]).

Personal Service on Unincorporated Association.

Service on any officer or official member of organization or upon any officer, or member of any branch or local of such organization or association unless association files with Secretary of State designated officer or agent for service. If designation is properly filed, service only on such person, if found within State. (O.C.G.A. 9-2-25).

Personal Service on Joint Stock Company.

No special provision, except service on nonresident joint-stock company doing business and having managing or other agent in state may be made by service on such individual or on agent, cashier or secretary of agent designated for service. (O.C.G.A. 9-11-4[e][2]).

Personal Service on Foreign Corporations.

Registered agent of foreign corporation is agent for purpose of service of process or notice or demand upon corporation. (O.C.G.A. 14-2-1510[a]). Process on foreign corporation cannot be perfected via service on registered agent of wholly-owned domestic subsidiary if subsidiary not otherwise agent for service of process for parent. (232 Ga. App. 212, 500 S.E.2d 647). If corporation has no registered agent or agent cannot be served, then by registered or certified mail, return receipt requested, address to corporate officer at principal office shown in application for certificate of authority of most recent annual registration; copy of process must also be served on Secretary of State with payment of $10 filing fee. (O.C.G.A. 14-2-1510[b]). Service perfected at earliest of date corporation receives mail, date shown on return receipt if signed on behalf of corporation, or five days after postmark, if postage prepaid and correctly addressed. (O.C.G.A. 14-2-1510[c]). Other means may be used to serve foreign corporations. (O.C.G.A. 14-2-1510[d]). For Secretary of State as agent for service, see O.C.G.A. 45-13-26. Service on foreign corporations authorized to transact business in state may be made on president or other officer, secretary, cashier, managing or other agent or, if service on such person cannot be made, on Secretary of State. (O.C.G.A. 9-11-4[e][1]). Service on foreign corporations doing business and having managing or other agent, cashier or secretary within state may be made upon such individual or to agent designated for service of process. (O.C.G.A. 9-11-4[e][2]).

Proof of Service.

Proof of service of process made by affidavit or certificate of sheriff, marshal or deputy. If by other person, by affidavit only. Service other than by publication, certificate or affidavit must state date, place and manner of service. If by publication, by certificate of clerk of court certifying publication and mailing. Defendant may acknowledge service in writing. Failure to make proof of service does not affect validity of service. (O.C.G.A. 9-11-4[h]).

Service by Publication.

General.

Court may grant order for service by publication where it appears, by affidavit or verified complaint, on file, that claim exists against defendant and defendant is necessary or proper party, when fact appears by affidavit that person to be served resides outside state, or has departed state, or cannot be found within state, or conceals himself or herself to avoid service of summons. (O.C.G.A. 9-11-4[f][1]).

Service by publication must be reasonably calculated to give defendant actual notice of suit. (242 Ga. 400, 249 S.E.2d 82.)

When affidavit is based on fact that party to be served resides outside state and present address is unknown, it is sufficient to show due diligence to state that at previous time person resided outside state in certain place; that such place is last residence of party to knowledge of affiant; that party no longer resides at such place; that affiant does not know where such party can be found; and that affiant has no reason to believe that party now resides in this state. (O.C.G.A. 9-11-4[f][1][A]).

Actions Involving Property.

When action involves real or personal property in state in which defendant claims interest, or in which relief demanded is wholly or in part exclusion of defendant from interest therein, and defendant resides out of state or has departed state, or cannot after due diligence be found within state, or conceals himself to avoid service, judge or clerk may order service by publication. (O.C.G.A. 9-11-4[f][1][B]). Service may also be made by publication on nonresident or unknown persons who claim interests in real or personal property affected by certain types of proceedings.

In condemnation proceedings publication is required where personal service has been perfected (O.C.G.A. 32-3-8[f]) and copy of petition and declaration must be served on county or city tax collecting authority (O.C.G.A. 32-3-8[e]), but substantial compliance sufficient (O.C.G.A. 32-3-10[a]).

Nonresident Motorist.

Service by publication not available (120 Ga. App. 307, 170 S.E.2d 318) but see subhead Long Arm Statute, infra.

Method of Publication.

Publication made in paper in which sheriff's advertisements are printed four times within ensuing 60 days, at least seven days apart. Notice contains name of plaintiff and defendant, court, character of action, name of judge, date action was filed, date of order for service by publication, and notice to party to be served commanding that answer be filed within 60 days of date of order for service by publication. Where abode of absent or nonresident is known, party obtaining order advises clerk thereof. Within 15 days after date of order, clerk must send duplicate or copy of said notice, along with copies of complaint (if any) and order, to party named in order at his or her last known address. When publication is ordered, personal service outside state of copy of summons, complaint and order of publication is equivalent to publication and mailing when proved to satisfaction of court. (O.C.G.A. 9-11-4[f][1][C]).

Special additional requirements exist in condemnation cases. (O.C.G.A. 32-3-8, -9).

Personal Service Outside State.

Personal service upon natural person may be made outside state in any action where person served is resident of this state or in any proceeding in rem without regard to residence of person served. Court may order personal service outside state where such facts are shown by affidavit and where it appears, by affidavit or verified complaint on file, that claim is asserted against person to be served and person is necessary or proper party. Service made by delivering copies of process and complaint in person to persons served. (O.C.G.A. 9-11-4[f][2]).

Service Upon Persons in Foreign Country.

Service upon adult competent persons in foreign country may be made when waiver obtained and filed or by internationally agreed means like those authorized in Hague Convention; or, in absence of internationally agreed method, as prescribed by foreign country's means for service in its courts of general jurisdiction, or as foreign authority directs in response to letter rogatory; or, if not prescribed by foreign country's law, by personal delivery of summons and complaint, or mail requiring signed receipt or other means directed by court and not prohibited by international agreement. (O.C.G.A. 9-11-4[f][3]).

Nonresident Motorist.

As to action arising out of motor vehicle accident, see category 23 Transportation, topic 23.01 Motor Vehicles, subhead Actions Against Nonresidents.

Long Arm Statute.

Court may exercise jurisdiction over nonresident who transacts business within state; commits tort within state; commits tortious injury in state if tortfeasor regularly does or solicits business, engages in persistent course of conduct, or derives substantial revenue from goods used or services rendered in state; owns, uses or possesses real property in state; or, for alimony, child support, division of property in connection with divorce, or support of dependents' proceedings, who maintains matrimonial domicile in state when action commenced or resided in state preceding commencement of action. Statute authorizes personal jurisdiction only over claims that arise from or relate to those enumerated contacts with state, except designated domestic relations claims depend solely on nonresident's pre-commencement residence or maintenance of matrimonial domicile at commencement of action. (O.C.G.A. 9-10-91). Service may be made beyond territorial limits of state when statute so provides. (O.C.G.A. 9-11-4[g]). Under “long arm” statute, service beyond state made in same manner as within state by any person qualified to make service under laws of foreign jurisdiction, or by any duly-qualified attorney, solicitor, or equivalent in such jurisdiction. (O.C.G.A. 9-10-94; 213 Ga. App. 812, 446 S.E.2d 230). Nonresident, to be subject to process must purposefully avail of privilege of doing some act or consummating some transaction with or in forum. (160 Ga. App. 295, 287 S.E.2d

301). Courts of state have authority to exercise personal jurisdiction over any nonresident who transacts any business in state to maximum extent permitted by procedural due process. (279 Ga. 672, 620 S.E.2d 352). Georgia's statute does not confer jurisdiction over defamation or for divorce as such. (O.C.G.A. 9-10-91[2], [5]). Divorce jurisdiction turns on six-month prior state residence by plaintiff or defendant. (O.C.G.A. 19-5-2). See category 14 Family, topic 14.06 Divorce. Full personal jurisdiction, and hence satisfaction of long-arm statute, not prerequisite to grant of divorce, only to alimony or attorney fees. (267 Ga. 815). See subheads Personal Service on Foreign Corporations, Personal Service Outside the State, and Nonresident Motorist, supra.

Forum Non Conveniens.

If court finds on motion that claim or action would, in interest of justice and for convenience of parties, more properly be heard in different county of proper venue within state, or in forum outside state, court shall decline to adjudicate. Court shall then transfer venue to county within state, or dismiss action more properly heard out of state. In determining whether to transfer or dismiss based on forum non conveniens, court shall consider relative ease of access to proof; availability and cost of process to compel attendance of unwilling witnesses; possibility of view of premises; unnecessary expense or trouble to defendant not necessary to plaintiff's right to pursue remedy; judicial administrative difficulties; interest in having case decided locally; and traditional deference to plaintiff's choice of forum. (O.C.G.A. 9-10-31.1[a]). Dismissal conditioned on filing by defendant of written stipulation waiving statute of limitations defense in other states where claim timely when filed in Georgia, with foreign limitations period tolled during period action pending in Georgia. (O.C.G.A. 9-10-31.1[b]). As applied to suits against co-defendants residing in different Georgia counties, code section subject to challenge as inconsistent with state constitutional provision, Const. art. VI, §II, para. IV, stating that such suits may be tried in county where either resides. Preexisting code section authorizes courts having personal jurisdiction to decline to exercise it in civil actions brought by nonresident plaintiffs that accrue outside state, provided trial can more appropriately be held in another forum also having jurisdiction over parties. Relative appropriateness of alternative forum turns on at least following factors: place of accrual of cause of action, location of witnesses, residences of parties, and whether litigant attempting to circumvent another state's statute of limitations. (O.C.G.A. 50-2-21[b]). Dismissal under this section without prejudice to re-filing in appropriate alternative forum, and may be ordered on just conditions (e.g., that defendant not plead lack of personal jurisdiction or statute of limitations defense there). (O.C.G.A. 50-2-21[c]). Courts may also dismiss on forum non conveniens grounds actions filed by nonresident aliens for injuries suffered outside United States, although doctrine of forum non conveniens generally controlled by statutory provisions (280 Ga. 333, 626 S.E.2d 482), but not actions for injuries suffered within United States (279 Ga. 230, 610 S.E.2d 527).

Uniform Child Custody Jurisdiction Act.

Act permits service by certified mail and by other means reasonably calculated to give actual notice for certain child custody determinations. (O.C.G.A. 19-9-40 et seq.).

5.20 [RESERVED]

5.21 REPLEVIN:

Any person holding security interest on personal property under UCC transaction may foreclose on security interest. (O.C.G.A. 44-14-230[a]). See category 20 Mortgages, topic 20.01 Chattel Mortgages. Owner may also obtain writ of possession to regain possession of leased or rented property. (O.C.G.A. 44-14-230[b]). Petitioner for writ of possession must make statement of facts under oath and be made pursuant to statutory requirements for verifications under O.C.G.A. 9-10-113 and forwarded to appropriate judge, magistrate, or clerk in county where debtor resides or where secured property located. Writ commands sheriff to sell secured property to satisfy debt and costs of proceedings. (O.C.G.A. 44-14-230[a]). Petition and summons served by sheriff, deputy, or marshal through personal delivery to defendant or to appropriate resident of premises, or, if necessary, by tacking copy of summons and petition on door of premises and mailing copy of same to defendant's last known address. (O.C.G.A. 44-14-232). Defendant must answer either orally or in writing within seven days after service of summons (O.C.G.A. 44-14-232), but may reopen default by answering within seven days after date of default (O.C.G.A. 44-14-233). Defendant must provide bond for full amount of value of property or amount of alleged remaining balance if defendant desires to transfer, remove, or convey secured property after service of summons and opportunity to answer. (O.C.G.A. 44-14-234, -237).

5.22 SEQUESTRATION:

No statute, but see category 8 Debtor and Creditor, topics 8.02 Attachment, 8.05 Executions, 8.09 Garnishment, and 8.16 Receivers.

5.23 SERVICE:

See topic 5.19A Process.

5.24 STAY OF EXECUTION:

See topic 5.03 Appeal and Error; and category 8 Debtor and Creditor, topic 8.05 Executions.

5.25 SUBMISSION OF CONTROVERSY:

No statutory provision.

5.26 VENUE:

Unless otherwise provided, action must be brought in county where defendant resides. (Const. Art. VI, §II, Para. VI). Resident joint obligors, tortfeasors, promisors, copartners, or trespassers residing in different counties may be tried in county of residence of either. (Const. Art. VI, §II, Para. IV). Legislature has construed this to mean that resident defendants may be sued outside their county of residence only when they are joint tortfeasors, obligors, promisors, co-partners, or trespassers (O.C.G.A. 9-10-31[b]), and subject to court's authority to transfer to another county pursuant to O.C.G.A. 9-10-31.1 under doctrine of forum non conveniens (O.C.G.A. 9-10-31[b]). Legislature has also revived version of unique Georgia doctrine of “vanishing venue”: if all defendants residing in forum county are discharged from liability before or on return of verdict (or, in bench trial, by trial court), nonresident defendant may require that case be transferred to (perhaps to be retried in) county in which venue is otherwise proper. (O.C.G.A. 9-10-31[d]). Related code section providing that defendant in any action involving medical malpractice may require transfer of case to that defendant's county of residence if underlying tortious act occurred in that county (O.C.G.A. 9-10-31[c]) violates Georgia Constitution, Art. VI, §II, Par. IV that authorizes venue in county where either joint tortfeasor resides (280 Ga. 333, 626 S.E.2d 482). Georgia Supreme Court had interpreted Art. VI, §II, Par. IV of state constitution to give plaintiffs right to select forum county. (See 243 Ga. 479, 254 S.E.2d 857).

Department or agency of state government can be considered joint tortfeasor with other resident defendants for venue purposes. (208 Ga. App. 134, 430 S.E.2d 63). Maker and endorser of promissory note may be sued in county where maker resides. (Const. Art. VI, §II, Para. V; O.C.G.A. 9-10-32). Nonresident may be sued in any county where he or she may be found at time action brought. (O.C.G.A. 9-10-33). Venue against nonresident subject to personal jurisdiction under long-arm statute lies in county where substantial part of business transacted, tortious act, omission or injury occurred, or real property located. Such nonresident may be sued in county of resident codefendant involved in same transaction or occurrence. If resident codefendant dismissed before commencement of trial, action against nonresident transferred to county having venue over nonresident. In event of verdict or judgment for resident codefendant at trial, venue in that defendant's county still lies as to nonresident. (O.C.G.A. 9-10-93). Venue selection clauses involving contracts between citizens of more than one state and stipulating venue outside Georgia are prima facie valid provided no Georgia law specifically mandates local venue, unless party resisting enforcement shows clause obtained through fraud or overreaching or is otherwise unreasonable. (225 Ga. App. 1, 482 S.E.2d 509; 220 Ga. App. 638, 469 S.E.2d 537). Claim against third-party defendant may be tried in county where claim against defending party is pending. (O.C.G.A. 9-10-34). Action respecting title to land must be tried in county where land lies; if single tract lies in two counties action may be tried in either (Const., Art. VI, §II, Para. II). Equity cases are tried in county where defendant against whom substantial relief is prayed resides. (Const. Art. III, §II, Para III). Petition for injunction to stay pending proceedings may be filed in county where proceedings pending. (O.C.G.A. 9-10-30). Contracts may not limit intrastate venue against insurers in contradiction to O.C.G.A. 33-4-1, which provides for multiple venues. (209 Ga. App. 585, 434 S.E.2d 778; 125 Ga. App. 829, 189 S.E.2d 130).

Nonresidents Doing Business in State.

May be sued in any county where business transacted, act occurred, or real property located. (O.C.G.A. 9-10-93). Nonresident not subject to venue under joint obligor venue provisions in Georgia Constitution; venue proper only where authorized by long-arm statute. (197 Ga. App. 718, 399 S.E.2d 241).

Unincorporated Association.

May be sued in any county where such organization does business or has a branch or local organization. (O.C.G.A. 9-2-25).

Corporations.

In conjunction with above-mentioned rules, in civil proceedings generally, domestic corporations and foreign corporations authorized to transact business in Georgia are deemed to reside in county of registered office, and if none, in last named registered or principal office with Secretary of State. (O.C.G.A. 14-2-510). In actions based on contracts, venue shall be deemed to lie in county in state where contract was made or is to be performed, provided corporation has office and transacts business therein. (O.C.G.A. 14-2-510[b][2]). Alternative venue lies in tort action in county where cause of action originated, provided corporation has office and transacts business therein (O.C.G.A. 14-2-510[b][3]); even if corporation lacks office and does not transact business in that county, tort venue lies subject to defendant's right to remove action to county, if any, where defendant maintains its principal place of business, subject in turn to plaintiff's motion to remand if removal improper. (O.C.G.A. 14-2-510[b][4]). In garnishment proceedings, venue lies in county where corporation employs defendant whose wages are garnished. (O.C.G.A. 14-2-510[5]). In libel action against corporate publisher, venue proper in any county in which publication is circulated if defendant has office and transacts business there. (281 Ga. App. 563, 636 S.E.2d 740).

Change of Venue.

Superior courts have power to change venue and may do so in manner provided by law. (Const. art. VI, §II, para. VIII). Where impartial jury cannot be obtained in county where action pending, judge may transfer case to another county to be agreed on by parties or their counsel (O.C.G.A. 9-10-50[a]) or, if they cannot agree, to be selected by judge (O.C.G.A. 9-10-50[b]). Decision to change venue in civil case committed to sound discretion of trial court. (157 Ga. App. 561, 278 S.E.2d 143).

6 COURTS AND LEGISLATURE

6.01 COURTS:

United States District Courts.

Northern District.

Clerk's office: 75 Spring Street SW, Atlanta, GA 30335. Internet address: http://www.gand.uscourts.gov.

Deposit of $350 required on filing of civil action. Habeas corpus $5.

Attorneys required to file all documents electronically, absent good cause shown and permission of court. (Standing Order 04-01, Local Rule 5.1[A]). All papers presented for filing and correspondence must have complete civil case number and three-initial suffix indicating judge, without which filing not accepted. (Local Rule 5.1[J]).

Atlanta Division.

Atlanta. Counties: Cherokee, Clayton, Cobb, DeKalb, Douglas, Fulton, Gwinnett, Henry, Newton and Rockdale.

Newnan Division.

Newnan. Counties: Carroll, Coweta, Fayette, Haralson, Heard, Meriwether, Pike, Spalding and Troup.

Rome Division.

Rome. Counties: Bartow, Catoosa, Chattooga, Dade, Floyd, Gordon, Murray, Paulding, Polk, Walker and Whitfield.

Gainesville Division.

Gainesville. Counties: Banks, Barrow, Dawson, Fannin, Forsyth, Gilmer, Habersham, Hall, Jackson, Lumpkin, Pickens, Rabun, Stephens, Towns, Union and White.

Middle District.

Clerk's office: 475 Mulberry St., Macon, GA 31202. Internet address: http://www.gamd.uscourts.gov.

Deposit of $350 is required on filing of action.

Attorneys of record required to file all documents electronically.

Macon Division.

Macon. Counties: Baldwin, Bibb, Bleckley, Butts, Crawford, Dooly, Hancock, Houston, Jasper, Jones, Lamar, Macon, Monroe, Peach, Pulaski, Putnam, Twiggs, Upson, Washington, Wilcox and Wilkinson.

Athens Division.

Athens. Counties: Clarke, Elbert, Franklin, Greene, Hart, Madison, Morgan, Oconee, Oglethorpe and Walton.

Columbus Division.

Columbus. Counties: Chattahoochee, Clay, Harris, Marion, Muscogee, Quitman, Randolph, Stewart, Talbot and Taylor.

Albany Division.

Albany. Counties: Baker, Ben Hill, Calhoun, Crisp, Dougherty, Early, Lee, Miller, Mitchell, Schley, Sumter, Terrell, Turner, Webster and Worth.

Valdosta Division.

Valdosta. Counties: Berrien, Clinch, Cook, Echols, Irwin, Lanier, Lowndes and Tift.

Thomasville Division.

Thomasville. Counties: Brooks, Colquitt, Decatur, Grady, Seminole and Thomas.

Southern District.

Clerk's office: 125 Bull St., Savannah, GA 31401. Internet address: http://www.gasd.uscourts.gov.

Filing fee of $350 is required on filing of action.

Savannah Division.

Savannah. Counties: Bryan, Chatham, Effingham, and Liberty.

Augusta Division.

Augusta. Counties: Burke, Columbia, Glascock, Jefferson, Lincoln, McDuffie, Richmond, Taliaferro, Warren and Wilkes.

Brunswick Division.

Brunswick. Counties: Appling, Camden, Glynn, Jeff Davis, Long, McIntosh and Wayne.

Dublin Division.

Dublin. Counties: Dodge, Johnson, Laurens, Montgomery, Telfair, Treutlen and Wheeler.

Waycross Division.

Waycross. Counties: Atkinson, Bacon, Brantley, Charlton, Coffee, Pierce and Ware.

Statesboro Division.

Statesboro. Counties: Bulloch, Candler, Emanuel, Evans, Jenkins, Screven, Tattnall and Toombs.

Supreme Court.

Clerk's office: 244 Washington St., Rm. 572, Atlanta, GA 30334. Internet address: http://www.gasupreme.us/. Supreme court has no original jurisdiction, but is court alone for trial and correction of errors from superior courts, juvenile courts, and other courts of original jurisdiction, in all cases that involve construction of Constitution of State of Georgia or U.S., or of treaties made by latter; in all cases in which constitutionality of any law of Georgia or of U.S. is called in question; in cases respecting titles to land, in equity cases; in cases involving validity or construction of wills; in cases of conviction of capital felony; in habeas corpus cases; in all cases involving extraordinary remedies; in divorce and alimony cases; in cases involving contested election; in cases involving validity of legislative enactment of municipalities; and in all cases certified to it by court of appeals. It may also require, by certiorari or otherwise, cases to be certified to it from court of appeals, for review and determination. (Const., Art. VI, §VI, Paragraphs II, III). Applicants may file motion for reconsideration with court of appeals but are not required to do so in order to pursue application for writ of certiorari. (Ga. Ct. App. Rule 38[a]). Notice of intention to apply for certiorari must be filed with court of appeals within ten days after judgment or order overruling motion for reconsideration, if one is filed. (Ga. Sup. Ct. Rule 38[1]). Petition must be filed with Supreme Court within 20 days after judgment or order overruling motion for reconsideration, if one is filed. (Ga. Sup. Ct. R. 38[2]). Review by certiorari is not matter of right and ordinarily will be granted only in cases involving issues of gravity and importance. (Ga. Sup. Ct. Rule 40).

Court consists of seven justices. (O.C.G.A. 15-2-1.1). Sits in body. Majority constitutes quorum. (Const., Art. VI, §VI, Paragraph I).

Court sits at State Judicial Building in Atlanta, Georgia.

Court of Appeals.

Clerk's office: 47 Trinity Avenue, Suite 501, Atlanta, GA 30334. Internet address: http://www.gaappeals.us. This court has jurisdiction for trial and correction of errors in law from superior courts, juvenile courts, and other courts of original jurisdiction in all cases in which jurisdiction is not conferred on supreme court. (Const., Art. VI, §V, Paragraph III). It may certify to Supreme Court any question of law as to which it may desire instruction. (Const., Art. VI, §V, Paragraph IV). Court consists of 12 judges who shall elect one of their number as chief judge. (O.C.G.A. 15-3-1).

Court is composed of four divisions. Civil and Criminal cases heard by all four divisions. Seven judges constitute quorum when entire court seated. (O.C.G.A. 15-3-1).

Superior Courts.

Superior courts combine powers of courts at law and courts of equity. Under Civil Practice Act of 1966, practice is made same in both classes of causes. Superior courts have original and concurrent jurisdiction in all civil and criminal causes, with exception of certain matters relating to administration of estates and other matters of similar nature, of which probate courts have exclusive jurisdiction. (See subhead Probate Courts, infra.) They have exclusive jurisdiction in all felony criminal cases, other than certain cases involving juvenile offenders, in equity cases, divorce cases and cases involving titles to real estate. Superior courts have exclusive jurisdiction in certain adoption cases. (See subhead Juvenile Courts, infra.) They have appellate jurisdiction as provided by law in O.C.G.A. 15-6-8. (Const., Art. VI, §IV, Paragraph I).

Judges of superior courts have authority to grant all writs, original or remedial, either in law or equity that may be necessary to exercise their jurisdiction, which are not expressly prohibited.

State is divided into 49 judicial circuits. (O.C.G.A. 15-6-1).

Probate Courts.

There is popularly-elected probate judge for each county who exercises original, exclusive and general jurisdiction over, among other things, probate of wills; granting letters testamentary, or of administration, and revocation of same; controversies relating to right of executorship or administration; distribution of estates of deceased persons; appointment and removal of guardians and conservators and controversies relating to guardianship and conservatorship. (O.C.G.A. 15-9-30).Probate judge may appoint one or more persons to serve as associate judges of probate court (O.C.G.A. 15–9–2.1). Council of Probate Court Judges of Georgia created for further improvement of probate courts. (O.C.G.A. 15-9-15). Judgments of probate court in counties having population of 96,000 persons or fewer are carried to superior court for correction of errors, either by certiorari or appeal, except order appointing temporary administrator. (O.C.G.A. 5-3-2,. 15-9-120). Judgments of probate court in counties having population of more than 96,000 persons are carried to Supreme Court or Court of Appeals as provided by c. 6 of Tit. 5 of Official Code of Georgia. (O.C.G.A. 15-9-120, 15-9-123).

Juvenile Courts.

Juvenile court in every county. (O.C.G.A. 15-11-18). Council of Juvenile Court Judges created for further improvement of court. (O.C.G.A. 15-11-19).

Exclusive jurisdiction over juvenile matters and sole court for initiating action concerning child alleged: (1) to be delinquent, unruly or deprived; (2) to be in need of treatment or commitment as mentally ill or mentally retarded; (3) to have committed juvenile traffic offense or who has been placed under supervision of or on probation to juvenile court. (O.C.G.A. 15-11-28). Sole court for initiating action involving proceedings: (1) to obtain judicial consent to marriage, employment, or enlistment of juvenile; (2) under Interstate Compact on Juveniles or other comparable laws enacted in Georgia (see category 7 Criminal Law, topic 7.01 Criminal Law, subhead Interstate Corrections Compact); (3) for termination of parent-child relationship, except that in certain adoption proceedings, Superior Courts have exclusive jurisdiction to terminate legal parent-child relationship and rights of biological father who is not legal father of child (O.C.G.A. 15-11-28); (4) relating to prior notice to guardian relative to unemancipated minor's decision to seek abortion (O.C.G.A. 15-11-28). As court of record, authorized to grant new trial on legal grounds. (265 Ga. 106, 454 S.E.2d 134).

Concurrent jurisdiction with superior court, over child charged with act which in superior court would be crime punishable by loss of life or life imprisonment; also jurisdiction in custody proceedings when properly transferred to juvenile court by superior court. (O.C.G.A. 15-11-28).

In this title, child means under 17 years, or under 21 and having committed act of delinquency before 17 and under supervision of court, or on probation to court, or under 18 if deprived. (O.C.G.A. 15-11-2).

Other Courts.

Georgia does not have uniform system of inferior courts. Each county has its own system of courts, and certain municipalities have court systems. Inferior courts may be created either by general or special act of legislature or, in some cases, by recommendation of county grand jury. Most frequently encountered categories of inferior courts are the following:

(a) State Courts.

General Assembly may create state court. (O.C.G.A. 15-7-2). Where state court exists, it is trial court of most general jurisdiction other than superior court. (O.C.G.A. 15-7-4). State Courts and equivalent courts have jurisdiction concurrent with that of Superior Courts over non-felony criminal cases, all civil actions except those in which superior court has exclusive jurisdiction, and in matters involving issuing arrest and search warrants. (O.C.G.A. 15-7-4).

(b) City, Municipal and County Courts.

City courts may be created by special act of General Assembly. (O.C.G.A. 15-8-1). Jurisdiction of courts bearing these designations varies widely from county to county. Some are in effect small claims courts. Others are courts of broad original jurisdiction similar to state courts.

(c) Small Claims Courts.

These courts have been created by special legislation in many counties but vary greatly across state. In counties where small claims courts have not been specially created, other existing courts may have special small claims procedures. Small claims courts existing before July 1, 1983 became magistrate courts. (Const. art. VI, §X, para. I; O.C.G.A. 15-10-120).

(d) Magistrate's Courts.

These have been created in all counties (O.C.G.A. 15-10-1) with jurisdiction as provided by O.C.G.A. 15-10-2, 15-10-2.1 and 15-10-120. No jury trials in magistrate court. (O.C.G.A. 15-10-41). Civil claims may not exceed $15,000. Proceedings are not subject to Georgia Civil Practice Act. (O.C.G.A. 15-10-42).

6.02 LEGISLATURE:

Regular sessions limited to 40 days are held annually beginning in Jan. (Const., Art. III, §IV, Paragraph I).

Special or Extraordinary Sessions.

Governor may call extra sessions, and must do so on certification by three-fifths of members of both House and Senate that emergency exists. (Const., Art. V, §II, Paragraph VII).

Initiative and Referendum.

Not provided for with respect to State Government, except in case of Amendments to Constitution.

Lobbyists.

Defined as any natural person who, for compensation, either individually or as employee of another, promotes or opposes passage of any legislation by General Assembly or promotes or opposes approval or veto of legislation by Governor; or who promotes or opposes passage of any ordinance or resolution by public officer, or who spends more than $250 in any calendar year, not including personal travel, food, lodging expenses or informational material to promote or oppose passage, approval or veto of legislation, ordinance, or resolution; or who is employee of executive or judicial branch of state government and who promotes or opposes passage, approval or veto of any legislation, ordinance, or resolution. (O.C.G.A. 21-5-70). Lobbyists must register with State Ethics Commission (O.C.G.A. 21-5-71) and pay registration fee of $200, identification card fee of $5 and miscellaneous fees for filing reports, supplemental registration and late penalties (O.C.G.A. 21-5-71). Registration expires Dec. 31 of each year. (O.C.G.A. 21-5-71). Civil penalty of up to $2,000 per violation for failure to comply with registration, conduct or disclosure requirements of O.C.G.A. 21-5-71. (O.C.G.A. 21-5-72). Any lobbyist who discusses pending measures on floor of General Assembly while General Assembly in session is guilty of misdemeanor. (O.C.G.A. 28-7-4, 5). Lawyers or agents may not accept contingent compensation for aiding or opposing legislation. (O.C.G.A. 28-7-3).

Ethics in Government Act applies to members of Georgia House of Representatives and Georgia Senate and certain other public officials. (O.C.G.A. 21-5-1 et seq.).

6.03 REPORTS:

Supreme Court and Court of Appeals Reports are published by and at expense of state. (O.C.G.A. 50-18-20 et seq.). Both Supreme Court and Court of Appeals reports numbered consecutively beginning with 1.

Unofficial Reports.

Georgia decisions are reported in Southeastern Reporter from 1887 to present.

Digests.

Georgia Digest and Southeastern Digest (both West Pub. Co.) with pocket parts cover all Georgia cases. Others are: Michie's Encyclopedia Digest of Georgia Reports with Supplements; Steven's Index-Digest of Georgia Reports; Digestive Index of Decisions of Georgia Supreme

Court and Court of Appeals.

6.04 STATUTES:

Official Code of Georgia Annotated (O.C.G.A.) is current compilation. This Code includes Code of 1981, effective Nov. 1, 1982, and all subsequent statutes, codified under proper sections. Code is kept up to date by annual pocket parts, thus statute laws of each session of Georgia Legislature are codified at end of year.

The Code is cited by combined numbers referred to by the compilers of the Code as section numbers although each number actually indicates title and chapter as well as section. For example, O.C.G.A. 36-3-9, while referred to as section number, actually indicates title 36, chapter 3, section 9.

Uniform Acts adopted are: Act to Secure the Attendance of Witnesses from without State in Criminal Proceedings (1976); Alcoholism and Intoxication Treatment (1974, Revised 1978); Athlete Agents Act (2003); Anatomical Gift (1969); Certification of Questions of Law (1977); Child Custody Jurisdiction and Enforcement (2001) (repealed Child Custody Jurisdiction [1978]); †Commercial Code (effective 1964; Art. 2A [1993]; Art. 9 1999 revisions [2001]); Conservation and Easement (1976); Controlled Substances (1974); Criminal Extradition (1951); Deceptive Trade Practices (1968); Declaratory Judgments (1945); Determination of Death (1982); †Disposition of Unclaimed Property (Revised) (1990); Enforcement of Foreign Judgments (1986); †Federal Tax Lien Registration, Revised (1968); Foreign Depositions (1959); Fraudulent Transfers (1984); †Insurers Liquidation (1949); Interstate Family Support (1982); Juvenile Court (1971); †Land Registration (1917); Management of Institutional Funds (1984); †Motor-Vehicle Certificate of Title (1961); †Partnership (Effective 1985); †Principal and Income (1991); †Reciprocal Enforcement of Support (1956, revised 1984); Reciprocal Transfer Tax (Effective 1980); Rendition of Prisoners as Witnesses in Criminal Proceedings (1976); †Revised Limited Partnership (1988); Rules of the Road (1974); Simplification of Fiduciary Security Transfers (1991); Simultaneous Death (1966); State Administrative Procedure (Model) (1964); Statutory Rule Against Perpetuities (1990); Testamentary Additions to Trusts (1991); Transfer on Death (TOD) Security Registration (1999); Transfers to Minors (1990); Unclaimed Property (1990).

Note: Uniform Commercial Code repealed the following Uniform Acts: Negotiable Instruments; Stock Transfer; Warehouse Receipts.

Other Uniform Acts.

Relocation Assistance and Land Acquisition Policy (1973).

†Adopted with significant variations or modifications. See appropriate topics as to Acts within scope of Digest volume.

For text of Uniform Acts falling within the scope of the Martindale-Hubbell Law Digests see Uniform and Model Acts section.

6.05 UNIFORM LAWS:

For list of Uniform Acts in force in this state see topic 6.04 Statutes.

7 CRIMINAL LAW

7.00A BAIL:

See topic 7.01 Criminal Law.

7.01 CRIMINAL LAW:

Crimes and criminal procedure are regulated by Titles 16 and 17 of Code, respectively.

Indictment or Information.

Felony cases may proceed by indictment or presentment of grand jury, or, in noncapital cases, by accusation preferred by prosecuting officer of superior court if accused waives indictment in writing or if felony is enumerated in statute. (223 Ga. App. 573; O.C.G.A. 17-7-70.1). In misdemeanor cases, indictment by grand jury not required, and defendant may be tried on accusation preferred by district attorney. (O.C.G.A. 17-7-54, 51, 70, 71). Traffic related misdemeanors may be tried on uniform traffic citation and complaint of c. 40–13. (O.C.G.A. 17-7-71). No authority for commitment hearing after indictment. (237 Ga. 112, 227 S.E.2d 20). Although no general rule that indictment can be returned wholly on hearsay evidence, testimony of law enforcement official as to statements made by criminal suspect, although hearsay, is sufficiently reliable to form basis for return of indictment. (242 Ga. 542, 250 S.E.2d 376).

Bail.

Offenses of treason, murder, rape, aggravated sodomy, armed robbery, aircraft or motor vehicle hijacking, aggravated child molestation, aggravated sexual battery, aggravated stalking, manufacturing, dealing or trafficking in Schedule I or II controlled substance, cocaine or marijuana, kidnapping, arson, aggravated assault, or burglary, had previously been convicted of, was on probation or parole with respect to or on bail regarding charges of above offenses, bailable only before judge of superior court after hearing and determination that accused poses no significant risk of fleeing jurisdiction, of failing to appear, threat or danger to any person, community or property, committing any felony pending trial, or of intimidating witnesses or otherwise obstructing justice. However, if person is charged with serious violent felony and has previously been convicted of serious violent felony, there shall be rebuttable presumption that no condition or combination of conditions will reasonably assure appearance of person as required or assure safety of any other person or community. Person charged with misdemeanor cannot be refused bail, except bail for misdemeanor DUI offense given to discretion of court. (O.C.G.A. 17-6-1, 40-6-391). Superior court judge may delegate authority to set bail by written order, except in cases in which life imprisonment or death penalty may be imposed. (O.C.G.A. 17-6-1). In capital cases, if defendant meets burden of production establishing no significant risk of flight, threat to community, committing another crime, or intimidating witness, burden shifts to State to prove by preponderance of evidence that defendant not entitled to pretrial release. (262 Ga. 704, 425 S.E.2d 282). Presiding judicial officer shall notify superior court in writing within 48 hours that arrested person being held without bail and superior court shall notify district attorney and set date for hearing on issue of bail within 30 days after notice. (O.C.G.A. 17-6-1). Judge of court of inquiry may establish schedule of bails, bail may be increased if offense involves acts of family violence. (O.C.G.A. 17-6-1). Any accused can be released upon his or her own recognizance in discretion of court having jurisdiction over him or her. (O.C.G.A. 17-6-12). Driver's license may be deposited in lieu of bail for certain traffic offenses (O.C.G.A. 17-6-11), and if sheriff of county wherein offense occurred so chooses, for certain misdemeanors if arrested person has been incarcerated for at least five days. (O.C.G.A. 17-6-2). Defendant may be released from custody pending trial on condition defendant comply with terms and condtions of electronic pretrial release and monitoring program (O.C.G.A. 17–6–1.1). IABA Standards, Criminal Appeals §2.5(a) and (b) (1974) adopted as to bail pending appeal, except bail denied where appeal taken frivolously or for delay. (238 Ga. 88, 230 S.E.2d 895). No appeal bond granted to any person sentenced to more than five years' incarceration for murder, rape, aggravated sodomy, armed robbery, aggravated child molestation, kidnapping, trafficking in cocaine or marijuana, aggravated stalking or aircraft hijacking. (O.C.G.A. 17-6-1). Bail, bond or recognizance forfeited by failure to appear at arraignment. (O.C.G.A. 17-6-17). Judgment may be entered at execution hearing held between 120 and 150 days from defendant's failure to appear and after notice to surety. (O.C.G.A. 17-6-71).

Legal Representation.

Courts must provide legal representation for indigent persons in criminal proceedings where there is threat of incarceration (O.C.G.A. 17-12-2, 4) at every stage of criminal proceedings including appeal. No constitutional right to counsel at pre-indictment lineup (170 Ga. App. 88, 316 N.E.2d 481) or at first appearance hearings (250 Ga. 92, 390 S.E.2d 43). Georgia Indigent Defense Act adopted to establish Georgia Public Defender Standards Council to help provide counsel to all citizens in criminal actions. (O.C.G.A. 17-12-1 et seq.).

Witness Immunity.

Immunity is available upon request of District Attorney or Attorney General if request is approved by Superior Court judge. (O.C.G.A. 24-9-28).

Uniform Criminal Extradition Act.

In effect. (O.C.G.A. 17-13-20 et seq.).

Interstate Corrections Compact adopted to provide for cooperation among contracting states with regard to sharing of correctional facilities. (O.C.G.A. 42-11-1, 2).

Georgia Youthful Offender Act adopted to provide for special correctional treatment and conditions of release for offenders between 17 and 25. (O.C.G.A. 42-7-1 et seq.).

Interstate Agreement on Detainers adopted to encourage expeditious and orderly disposition of detainers and charges outstanding against prisoners based on untried indictments, informations or complaints. (O.C.G.A. 42-6-20).

Compensation of Victims.

Victims and other claimants sustaining economic loss because of injury to or death of such victim as result of crime occurring on or after July 1, 2002, may receive award from state of up to $25,000 in the aggregate upon approval by Georgia Crime Victims Compensation Board. (O.C.G.A. 17-15-1, 17-15-8). Convicted offenders, adult or juvenile, may be ordered to make restitution to victims. (O.C.G.A. 17-14-1 to -17).

Crime Victims' Bill of Rights.

Victims of crimes are accorded certain basic rights including but not limited to right of notification of accused's arrest, release, scheduled court proceedings and parole. (O.C.G.A. 17-17-1 et seq.; 42-1-11 et seq.).

Parole.

Restrictions.

Inmates convicted of misdemeanor cannot be released on parole without serving six months or one-third of sentence, whichever is greater. Inmates convicted of felony cannot be released on parole without serving nine months imprisonment or one-third of prison sentence, whichever is greater. (O.C.G.A. 42-9-45). Inmates committing offense involving family violence cannot be released on parole without completing Family Violence Counseling Program. (O.C.G.A. 42-9-45). “Serious violent felony” is defined as murder, felony murder, armed robbery, kidnapping, rape, aggravated child molestation, aggravated sodomy or aggravated sexual battery. (O.C.G.A. 17-10-6.1). Inmates convicted of “serious violent felony” of kidnapping in which victim was over age of 14 or armed robbery must be sentenced to minimum term of ten years. Inmates convicted of “serious violent felony” of kidnapping in which victim was under age of 14, rape, aggravated child molestation, aggravated sodomy or aggravated sexual battery, if not given life sentence, must be given minimum sentence of 25 years. Inmates convicted of “serious violent felony” and sentenced to life imprisonment cannot be paroled without serving 25 years of sentence. Inmates convicted of “serious violent felony” who receive commuted death sentence cannot be paroled without serving 30 years of sentence. Any sentence, other than life, life without parole or death, imposed for first conviction of “serious violent felony” must be served in its entirety. (O.C.G.A. 17-10-6.1). Inmates convicted of “sexual offense” defined as aggravated assault with intent to rape, false imprisonment in which victim is under 14 and not child of defendant, sodomy, statutory rape, child molestation, enticing child for indecent purposes, sexual assault against persons in custody, incest, second or subsequent conviction for sexual battery and sexual exploitation of children, must be sentenced to minimum term of imprisonment specified in Code applicable to offense and that term may not be reduced by parole or probation. (O.C.G.A. 17-10-6.2). Inmates convicted of “serious violent felony”, who have previously been convicted of “serious violent felony” in any state, must be sentenced to life imprisonment without parole. (O.C.G.A. 17-10-7).

Notice to Victim.

Victim of crime must receive notice of decision to parole inmate. (O.C.G.A. 42-9-47).

Information on Felony Parolees.

Whereabouts of felony parolees located in Georgia available from Board of Pardons and Paroles. (O.C.G.A. 42-9-20.1).

Sexual Offenders.

Must be registered with state as precondition to release from prison, parole or probation and must provide information regarding home address, work address or where attending school. Information maintained by Georgia Bureau of Investigation and is available to public. Georgia Sex Offender Registry website: http://gbi.georgia.gov/00/channel_modifieddate/0,2096,67862954_87983024,00.html. “Sexual offender” defined broadly as anyone convicted of crime against minor or “dangerous sexual offense”. (O.C.G.A. 42-1-12).

Search and Seizure.

Exclusionary rule created by statute. (O.C.G.A. 17-5-30). There is no “good faith” exception to exclusionary rule. (262 Ga. 573, 422 S.E.2d 426).

7.01A DRUGS:

Persons contracting with state agency must provide drug-free workplace for employees as condition of contracting with state agency. (O.C.G.A. 50-24-1 et seq.).

Possession Near School or Certain Other Facilities.

Criminal offense to manufacture, possess or distribute controlled substances or marijuana within 1,000 feet of secondary or elementary school (O.C.G.A. 16-13-32.4), park, playground, recreation center or publicly operated housing project (O.C.G.A. 16-13-32.5).

Destruction of Seized Property.

State may destroy all instruments, devices or objects of drug activity within 90 days after making seizure. (O.C.G.A. 16-13-32).

8 DEBTOR AND CREDITOR

8.01 ASSIGNMENTS:

Uniform Commercial Code.

Adopted. (O.C.G.A. tit. 11).

Choses in action arising on contract may be assigned, but assignee (except holder in due course of negotiable paper) takes subject to equities existing between assignor and debtor at time of assignment and until notice of assignment given to debtor. (O.C.G.A. 44-12-22). But see category 3 Business Regulation and Commerce, topic 3.09 Commercial Code. (O.C.G.A. 11-1-206, 11-2-210, 11-9-318). Terms of executory contract may validly preclude assignment. (133 Ga. App. 27, 209 S.E.2d 661). But see category 3 Business Regulation and Commerce, topic 3.09 Commercial Code. (O.C.G.A. 11-2-210, 11-9-318).

Right of action for personal torts or for injuries arising from fraud is not assignable. (O.C.G.A. 44-12-24).

Fund may be assigned in writing. (O.C.G.A. 44-12-23). But see category 3 Business Regulation and Commerce, topic 3.09 Commercial Code. (O.C.G.A. 11-2-210, 11-3-409, 11-3-410).

Recording.

See category 3 Business Regulation and Commerce, topic 3.09 Commercial Code. (O.C.G.A. 11-9-102). If significant part of accounts or contract rights assigned, financing statement must be filed in order to perfect. (O.C.G.A. 11-9-309). Filing to be at office of clerk of superior court in any county of state. (O.C.G.A. 11-9-501).

Effect.

Written assignment transfers legal interest and assignee may sue at law; oral assignment recognized and protected in equity. Otherwise may sue only in name of assignor for use of assignee. (156 Ga. 109, 118 S.E. 691).

8.02 ATTACHMENT:

Actions in Which Allowed.

Attachment may issue in all cases of money demands, whether contract or tort, if statutory grounds exist. (O.C.G.A. 18-3-1,18-3-2). Attachment proceedings are strictly construed. (14 Ga. 230).

In Whose Favor Writ May Issue.

Attachment may issue on behalf of any plaintiff, including a nonresident or foreign corporation. (O.C.G.A. 18-3-1; 48 Ga. App. 469, 172 S.E. 847). Surety may have attachment against his or her principal, but if surety has not paid obligation, money raised on attachment must be paid to obligee. (O.C.G.A. 18-3-8).

Court Which May Issue Writ.

Any court of record in county of defendant's residence if known, or in county where property is located otherwise, other than probate court, may issue writ. (O.C.G.A. 18-3-9).

Against Whom Writ May Issue.

Attachment may issue against nonresident corporation transacting business in state (O.C.G.A. 18-3-7); joint contractors and partners (O.C.G.A. 18-3-6); administrator or executor of estate (O.C.G.A. 18-3-5); or against any person or corporation if statutory grounds exist (O.C.G.A. 18-3-1, 18-3-2).

Claims on Which Writ May Issue.

Attachment may issue in all cases of money demand. (O.C.G.A. 18-3-2). Attachment may issue for money not yet due, but execution is stayed until maturity of debt. (O.C.G.A. 18-3-3).

Time for Issuance.

An attachment may issue at any time prior to or during pendency of suit (O.C.G.A. 18-3-4) on any day of week including Sun. (O.C.G.A. 18-3-16).

Grounds.

General grounds are that debtor: (1) is nonresident; (2) moves or is about to move domicile outside county; (3) absconds; (4) conceals himself or herself; (5) resists legal arrest; or (6) is causing his or her property to be removed outside state. (O.C.G.A. 18-3-1).

Proceedings to Obtain.

Creditor, his or her agent, attorney, partner or joint creditors (O.C.G.A. 18-3-11), must make affidavit before judge of any court of record, except probate court, in county in which defendant or property is located. (O.C.G.A. 18-3-9). Judge must inquire into facts alleged. (O.C.G.A. 18-3-9). Defendant must be given notice of attachment after issued. (O.C.G.A. 18-3-14). Defendant entitled to post-attachment hearing. (O.C.G.A. 18-3-15).

Attachment Bond.

Creditor must file bond in not less than double amount of debt conditioned to pay damages and costs if attachment not successful. (O.C.G.A. 18-3-10). Agent or attorney making affidavit may sign bond for his or her principal. (O.C.G.A. 18-3-11). Attorney cannot be surety, nor can nonresident unless he or she owns real estate in county. (O.C.G.A. 18-3-12).

Forms.

For all cases of attachment, O.C.G.A. 18-3-19 provides forms of affidavit, bond, attachment and order authorizing issuance of attachment.

Levy.

Attachment may be levied on real or personal property of defendant anywhere in state (O.C.G.A. 18-3-30), including investment securities where actually seized (O.C.G.A. 11-8-112); goods covered by negotiable document of title where document is not outstanding (O.C.G.A. 11-7-602); and debtor's rights in collateral (O.C.G.A. 11-9-311). See category 3 Business Regulation and Commerce, topic 3.09 Commercial Code. Defendant to be notified by one of stated methods (O.C.G.A. 18-3-14) and has right to post-seizure hearing (O.C.G.A. 18-3-15). If plaintiff wishes to levy in different county, judge must make and certify copies of original attachment, bond and affidavit. Officer of county where property located must levy and return property to court where original attachment filed. (O.C.G.A. 18-3-32).

Lien.

Between attachments, lien created by levy, not judgment. Between attachment and ordinary judgment, judgment fixes lien, not levy; but lien of attachment prior to ordinary judgment obtained on suit filed after levy has priority. Lien on real property effective from levy if recorded within five days from date of recording if recorded after five days. (O.C.G.A. 18-3-74, 18-3-75).

Priorities.

Between attachments, attachment first levied has priority. (O.C.G.A. 18-3-74, 18-3-75). Officer must levy attachments in order received. (O.C.G.A. 18-3-31). Attachment on real property must be recorded. (O.C.G.A. 18-3-31).

Indemnity.

No statutory provision.

Service and Notification to Defendant.

Notice of attachment may be given by any one of following: (1) pursuant to Civil Practice Act (O.C.G.A. 9-11-4); (2) within three days of levy on attachment by written notice to defendant at last known address, by registered or certified mail or statutory overnight delivery (O.C.G.A. 9-10-12[b]), return receipt requested; return receipt must be filed with court clerk; (3) by written notice personally delivered to defendant; person making delivery must file certificate with court clerk; (4) within three days after levy upon defendant's property by written notice to defendant, if address is known, by ordinary mail; certification of same must be filed with court clerk; (5) upon defendants living outside state or who cannot be found within state, by special means provided in statute. “Written notice” consists of copy of affidavit and bond, or document naming plaintiff and defendant, amount claimed in affidavit and court where filed. (O.C.G.A. 18-3-14).

Return.

Attachments returnable to court where filed and governed by same rules of procedure and practice governing all civil actions. (O.C.G.A. 18-3-17).

Release of Property.

Defendant may replevy property attached by giving bond with security payable to plaintiff for not less than double amount claimed or twice value of property. (O.C.G.A. 18-3-33).

Sale.

No statutory provision.

Third party claims may be asserted before or after judgment in attachment suit. (O.C.G.A. 18-3-55). Officer must return claim to court issuing attachment except that claim involving land always returnable to superior court. (O.C.G.A. 18-3-50). Claimant may replevy property by giving forthcoming bond to levying officer. (O.C.G.A. 18-3-51). If claimant unsuccessful and property does not bring enough to satisfy judgment, plaintiff may sue claimant on bond for use and hire of property and deterioration in value, but may not recover more than enough to satisfy unpaid portion of debt. (O.C.G.A. 18-3-54).

Defendant's Post Seizure Hearing.

Defendant may traverse sufficiency or veracity of affidavit any time after writ of attachment issues and hearing shall be held within ten days of filing of traverse. (O.C.G.A. 18-3-15).

Vacation or Modification.

Judgment in attachment may be set aside for fraud or want of consideration. (O.C.G.A. 18-3-71).

Proceedings After Attachment.

Governed by Ga. Civil Practice Act, O.C.G.A. 9-10-1 et seq. (O.C.G.A. 18-3-18). See also category 5 Civil Actions and Procedure, topic 5.18 Pleading.

8.03 [RESERVED]

8.04 CREDITORS' SUITS:

Creditor petition may be filed at instance of any creditor, privilege being extended to all to appear and become parties in reasonable time. (O.C.G.A. 23-2-95). Equitable assets may be reached by a creditor where he or she shows that there is danger of not being satisfied out of legal assets. (O.C.G.A. 23-2-96). Equitable assets are distributed according to equitable rules; legal assets according to legal liens and priorities. (O.C.G.A. 23-2-90).

See also topics 8.05 Executions, 8.08 Fraudulent Sales and Conveyances.

8.05 EXECUTIONS:

See also topic 5.19 Practice.

Form.

Execution is by writ of fieri facias, which must follow judgment (O.C.G.A. 9-13-3); but any judge of superior court may frame execution to carry into effect any lawful judgment or decree rendered by court (O.C.G.A. 9-13-4).

Process to enforce judgment for payment of money shall be writ of execution, unless court directs otherwise. (O.C.G.A. 9-11-69).

The writ is issued by the clerk of the court in which judgment was obtained, is attested in the name of the judge of such court, is directed “to all and singular sheriffs of this state and their lawful deputies” and dates from time of issuance. (O.C.G.A. 9-13-10).

Exemptions.

See topic 8.06 Exemptions.

Time for Issuance.

Execution must be issued within seven years after judgment or entry made on execution docket every seven years, or else judgment becomes dormant; may be revived within three years from time it becomes dormant. (O.C.G.A. 9-12-60, 61).

No execution issues upon judgment nor may proceedings be taken for enforcement of judgment in court of record until ten days after entry except execution may issue immediately after default judgment, or upon written agreement between all parties being filed with clerk of court. (O.C.G.A. 9-11-62). Motion for new trial or for judgment notwithstanding verdict acts as supersedeas unless court orders otherwise, but court may require bond. (O.C.G.A. 9-11-62).

Stay.

Execution may be stayed by party against whom judgment entered giving (within four days after adjournment of court) bond with good security for payment of amount due and costs within 60 days. (O.C.G.A. 9-13-70). At expiration of 60 days, if judgment not paid execution issues against security and party without further proceedings. (O.C.G.A. 9-13-70). In attachment suit on debt not due execution stayed until debt due. (O.C.G.A. 18-3-3). Supersedeas stays execution. (O.C.G.A. 5-6-46, 47).

Recording and Lien.

Execution must be recorded in execution docket in office of clerk of superior court in order that lien may be created; lien dates from entry on execution docket. (O.C.G.A. 9-12-81). Fee for filing fieri facias, $4.50 first page, $2 per page after first. (O.C.G.A. 15-6-77).

Levy.

Execution may be levied on all estate, real and personal, of defendant subject to levy and sale. (O.C.G.A. 9-13-10).

Levy of execution from magistrate court, from county, city and superior courts and court of ordinary by sheriff. Defendant in fi. fa. may point out property to be levied on first. (O.C.G.A. 9-13-50). Officer making levy must enter on process plain description of property levied on and amount of interest of defendant therein. (O.C.G.A. 9-13-12). Constable cannot levy on real estate, unless he or she first makes entry of no personal property sufficient to satisfy judgment, or defendant points out real estate. (O.C.G.A. 9-13-53). Levy on real estate by constable returned to sheriff, who proceeds as though he or she made levy himself. (O.C.G.A. 9-13-53). Officer levying must within five days, give notice of levy to tenant in possession, or mail such notice to owner if address be known. (O.C.G.A. 9-13-13). When levying on land, written notice must be personally delivered or sent by certified mail or by statutory overnight delivery (O.C.G.A. 9-10-12[b]) to possessor and to defendant (if not same person). (O.C.G.A. 9-13-13[a]). Procedure for levy on stock of bank or other corporation is governed by O.C.G.A. 11-8-317. See category 3 Business Regulation and Commerce, topic 3.09 Commercial Code.

Return.

Execution is returnable to next term of court after issuance. (O.C.G.A. 9-13-9).

Priorities.

No preference in case of judgments at same term of court because of first placement with levying officer. (O.C.G.A. 9-12-87).

Claims of Third Persons.

Where third person claims property, enforcement of execution thereon may be postponed by making oath to claim and filing bond, payable to plaintiff in not more than double amount of execution or double value of property if property worth less than amount of execution on property, conditioned to pay plaintiff all damages assessed if claim found to be filed for delay only. (O.C.G.A. 9-13-90, 91, 93). Third person may obtain possession of property by filing forthcoming bond with levying officer. (O.C.G.A. 9-13-94). Claim may be made in forma pauperis. (O.C.G.A. 9-13-92). Claim so interposed tried by jury in court issuing execution. (O.C.G.A. 9-13-98, 100). If jury finds claim was for delay only, minimum damage award of 10% of value of property if property worth less than execution, or 10% of execution if property worth more than amount due on execution. (O.C.G.A. 9-13-101, 105).

Satisfaction.

If plaintiff, for consideration, releases property subject to execution, it is satisfaction of execution to extent of value of released property. (O.C.G.A. 9-13-72). If senior execution creditor allows fund in possession of sheriff to be applied to junior fi. fa., pro tanto extinguishment of senior creditor's lien as to third persons. (O.C.G.A. 9-13-73). Contract not to enforce judgment or execution, supported by consideration, releases same. (O.C.G.A. 9-13-74). Security or joint debtor who pays more than his or her proportion of execution, has control of execution. (O.C.G.A. 9-13-77, 78). Plaintiff or his or her attorney must direct clerk of court issuing execution to mark any partial satisfactions. (O.C.G.A. 9-13-79). Upon full satisfaction of judgment by judgment debtor, plaintiff or his or her attorney shall timely direct clerk to cancel execution and mark judgment satisfied. (O.C.G.A. 9-13-80[a]). Judgment debtor has right of action as against plaintiff if clerk not directed timely to cancel execution and mark judgment satisfied upon satisfaction of judgment. Failure to direct cancellation and satisfaction within 60 days of judgment satisfaction is prima facie evidence of untimeliness. (O.C.G.A. 9-13-80[b]).

Forthcoming Bond.

When execution levied on personal property, and claim of illegality filed, person filing claim of illegality may give bond to levying officer in double value of property, conditioned for delivery of property at time and place of sale, if legality upheld. (O.C.G.A. 9-13-126).

Sale.

Under execution from superior court made by sheriff or coroner at courthouse door of county where levy was made (or elsewhere in county by general order of presiding judge of superior court; O.C.G.A. 9-13-161) on 1st Tues. in each month (1st Wed. of month if 1st Tues. of month falls on New Year's Day or Independence Day), between 10 A. M. and 4 P. M. and at public outcry. Articles difficult and expensive to transport may, by proper advertisement, be sold without exposure at courthouse door. (O.C.G.A. 9-13-161). Advertisement must be once a week for four weeks preceding sale day in newspaper published in county, or if no newspaper published therein, in paper having largest general circulation in county. (O.C.G.A. 9-13-140). Perishable property may be sold on quick order from judge of superior court or, in his or her absence, judge of probate court. (O.C.G.A. 9-13-163).

Redemption.

Not provided for except where sale under tax execution. (O.C.G.A. 48-4-40 et seq.). See category 22 Taxation, topic 22.16 Property Taxes, subhead Redemption.

Supplementary Proceedings.

Judgment creditor may examine any person, including judgment debtor, in manner provided for taking depositions or interrogatories. (O.C.G.A. 9-11-69). See category 5 Civil Actions and Procedure, topic 5.11 Depositions and Discovery.

8.06 EXEMPTIONS:

Constitutional Homestead.

Any debtor is entitled to hold real or personal property or both, up to $5,000 in value, exempt from levy and sale except for taxes, purchase money, labor done or material furnished therefor or for removal of incumbrances thereon. (O.C.G.A. 44-13-1). No exemption for cash; must be invested in personalty. (O.C.G.A. 44-13-15). Application is made by petition to probate judge of county of beneficiary's residence, showing qualifications for exemption. (O.C.G.A. 44-13-4). Petition must be accompanied by list of creditors and by schedule describing all real and personal property of applicant and indicating property to be exempted. (O.C.G.A. 44-13-4). Notice to creditors of application and of date of hearing required. (O.C.G.A. 44-13-8, 9). Property so set aside is exempt during disability of beneficiaries in whose favor exemption allowed. In order to procure levy for debt to which exemption is not applicable, affidavit must be made specifying to which of classes named above debt belongs. (O.C.G.A. 44-13-60).

Statutory or Short Homestead.

There is also what is known as statutory or short homestead. (O.C.G.A. 44-13-100). Individual is compelled to elect between $5,000 constitutional exemption and statutory homestead, and cannot supplement one with other, unless homestead and exempted property lost by virtue of sale under outstanding claim, in which event election shall not bar application for homestead and exemption not liable to outstanding claim. (O.C.G.A. 44-13-21). Statutory homestead is exempt from levy and sale except for purchase money and taxes. (O.C.G.A. 44-13-107).

Waiver of statutory or short homestead and constitutional homestead possible, except that no waiver is effective as to wearing apparel and $300 of household and kitchen furniture and provisions (O.C.G.A. 44-13-40) to be selected by debtor and his family (O.C.G.A. 44-13-41).

Rights of Wife and Minor Children.

Should debtor refuse to apply for exemption, debtor's spouse, or any person acting on behalf of dependents of debtor may apply for exemption. (O.C.G.A. 44-13-2).

Sale for Reinvestment.

Exempted property may be sold for reinvestment on application to judge of superior court of county where debtor resides or where property located. (O.C.G.A. 44-13-17).

Exemption of Wages.

See topic 8.09 Garnishment.

Temporary Alternative Bankruptcy Exemption.

Georgia bankrupts may elect alternative exemptions but with smaller dollar amounts. Election of federal exemptions (11 U.S.C.S. §522) prohibited. Major Georgia exemptions different from federal: $10,000 real or personal property used as residence ($20,000 if debtor married), with remainder of that amount plus $600 in any property; $3,500 in all motor vehicles; $200 in any particular item of household goods, furnishings, clothing and the like, subject to $3,500 maximum for all such household items; $500 in jewelry; $1,500 in implements, professional books, or tools of trade; certain alimony and pension payments; certain social security, veterans' disability and similar benefits. (O.C.G.A. 44-13-100).

8.07 FORECLOSURE:

See topic 8.13 Liens; category 20 Mortgages, topics 20.01 Chattel Mortgages, 20.04 Mortgages of Real Property.

8.08 FRAUDULENT SALES AND CONVEYANCES:

Uniform Commercial Code adopted. (tit. 11).

Uniform Fraudulent Transfer Act adopted. (tit. 18, c. 2, art. 4).

Bulk Sales.

Governed by Uniform Commercial Code. (11-6 et seq.). Following sections of Uniform Commercial Code not adopted: §6-106, §6-107(2)(e), §6-108(3)(c); §6-109(2). Twelve months substituted for six months in §6-111. (O.C.G.A. 11-6-111). Public notice by advertising once a week for two weeks in newspaper in county where acquired business had place of business. (O.C.G.A. 11-6-106). No personal liability imposed on purchaser. (125 Ga. App. 408, 187 S.E.2d 922).

8.09 GARNISHMENT:

Where money judgment obtained, judgment creditor may obtain summons of garnishment on person believed to be indebted to or to have property or effects of defendant, requiring garnishee to appear not sooner than 30 days and not later than 45 days after service to answer as to such indebtedness or property. (O.C.G.A. 18-4-60, 18-4-62). Garnishment not available if based on judgment obtained in other than Georgia state or federal court. (O.C.G.A. 18-4-60). Prior to judgment, garnishment may issue only in following cases: (a) when defendant resides without state; (b) when defendant is actually removing, or about to remove, without limits of county; (c) when defendant is causing his or her property to be removed beyond limits of state; (d) when defendant has transferred, or has threatened to transfer, or is about to transfer property to defraud or delay his or her creditors; or (e) when defendant is insolvent. (O.C.G.A. 18-4-40).

Property Which May Be Reached.

All debts owed by garnishee to defendant and all property, money or effects of defendant in possession or control of garnishee at date of summons or coming into possession or control of garnishee up to date of answer, except exempted property, may be garnished. (O.C.G.A. 18-4-20). Partnership interests may be garnished. (O.C.G.A. 14-8-28). Relation of garnishee and debtor immaterial. (154 Ga. App. 211, 267 S.E.2d 849). Salaries due officials or employees of state government and of its political subdivisions are subject to garnishment. In such cases, summons shall be issued by court located in county where warrant on government treasury drawn or check to defendant issued, and shall be directed to political entity and served upon person authorized to draw warrant or to issue check or upon chief administrative officer of political subdivision. (O.C.G.A. 18-4-21).

Portions of disposable earnings of individual and pensions paid to retired employees are partially exempt (see subhead Earnings and Pensions, infra). Collateral securities in hands of creditor are exempt. (O.C.G.A. 18-4-20[c]). Garnishment may not issue against receiver. (O.C.G.A. 9-8-12). Creditor barred by existing, though unrecorded, set-offs and other claims in favor of garnishee. (154 Ga. App. 211, 267 S.E.2d 849). Wages of government employees exempt where liability incurred in scope of employment while responding to emergency. (O.C.G.A. 18-4-21). Individual Retirement Accounts exempt from garnishment in non-bankruptcy situations. (173 Ga. App. 511, 326 S.E.2d 861; O.C.G.A. 18-4-22).

Bank Accounts.

Joint checking account not subject to garnishment for debt of one holder alone since one holder alone could not get funds from bank. (National Bank of Georgia v. 1616 Reminic Ltd. Partnership, No. C84-151, slip op. [N.D. Ga. Apr. 10, 1986]). Garnishee/bank must take whatever steps necessary to ensure that they can comply with garnishment laws of this state. Uncertainty as to what accounts are subject to garnishment should be filed as part of garnishee's answer stating such. (219 Ga. App. 299, 464 S.E.2d 903). See subhead Earnings and Pensions, infra.

Jurisdiction; Proceedings to Obtain.

Prejudgment garnishment is available where action is pending against defendant and is begun by making application under oath to judge of any court of record, other than probate courts, in county of residence of garnishee and having jurisdiction over garnishee. Application must set forth specific facts showing grounds for garnishment (see Introduction and subhead Property Which May Be Reached, supra) as well as name of court where suit pending, case number of suit, and amount claimed in suit. (O.C.G.A. 18-4-41). Applicant must present bond with good security conditioned to pay defendant all costs and damages in event that amount claimed due was not due or that no lawful ground for issuance of such garnishment existed or that property sought was not subject to garnishment. Bond must be approved by clerk of court where application made and must be in twice amount claimed due (O.C.G.A. 18-4-43); except that bond or deposit with court not required for action to collect fines, costs, restitution and separation ordered as condition of probation (O.C.G.A. 42-8-34.2[c]). Upon approval of application, judge enters order and clerk issues summons. (O.C.G.A. 18-4-42). Copy of summons must be served on defendant. (O.C.G.A. 18-4-44).

Postjudgment garnishment begun by filing affidavit with clerk of any court having jurisdiction over garnishee. Affidavit must set forth existence of judgment against named defendant, amount claimed to be due, name of court which rendered judgment and case number. Plaintiff must make affidavit in one of five ways: (1) make affidavit before and obtain approval of judge of court where garnishment proceeding is filed; (2) make affidavit before and obtain approval of judge of court that rendered judgment on which garnishment based; (3) make affidavit before and obtain approval of judge of any court of record; (4) make affidavit before any officer authorized to administer oaths, including notary, submit by mail or in person to any judge described above and obtain his or her approval; or (5) make affidavit before clerk or deputy clerk of court in which garnishment filed or before any officer described above and obtain approval by clerk or deputy clerk under court rules of supervision, if provided. Filing of approved affidavit entitles plaintiff to issuance by clerk of summons of garnishment. (O.C.G.A. 18-4-61). Summons of garnishment may set forth defendant's social security number if known. (O.C.G.A. 18-4-20[h]). Summons of garnishment upon financial institution must state following information if reasonably available: name of defendant, all known nicknames, aliases, former or maiden names and trade names, service and current addresses, social security number or tax i.d. number and account numbers. (O.C.G.A. 18-4-20[i]). If no summons issued within two years, garnishment proceeding based on that affidavit automatically dismissed. (O.C.G.A. 18-4-63[b]). Posting of bond no longer required.

Notice must be given to defendant of filing of first summons, and of issuance of any additional summons where no notice given within 90 days immediately preceding issuance of additional summons. (O.C.G.A. 18-4-64[a]). Notice effected by one of eight methods: (1) notice served with copy of summons as soon as reasonably practicable after filing of garnishment through office of sheriff or marshal, proceedings for such service to be initiated by plaintiff at time garnishment filed; (2) written notice sent to defendant's last known address by certified mail or statutory overnight delivery (O.C.G.A. 9-10-12[b]), return receipt requested, after issuance of summons and not more than three business days after service to garnishee, return receipt or affirmed notice of failure to accept delivery to be filed with clerk of garnishment court, either to be deemed notice to defendant; (3) service by personal delivery of written notice within time period described in (2) by plaintiff or his or her attorney or agent, certificate of service to be filed with clerk; (4) when judge or clerk is satisfied by affidavit that defendant resides out of state or cannot be located by diligent search, levy and attachment of lien of garnishment is sufficient notice, except where plaintiff has actual knowledge of defendant's address, or address at which defendant was served in suit creating judgment in which case plaintiff to mail written notice to that address within period described in (2) and file certificate of mailing with clerk; (5) where defendant is not resident of state or cannot be located by diligent search, has departed state, or concealed his or her residence, two publications of written notice in paper carrying sheriff's advertisements in each county where summons served shall be sufficient notice, where publications are at least six days apart, and are not more than 21 days after service on garnishee, where certification of publications filed with clerk, unless plaintiff has actual knowledge of defendant's address, in which case plaintiff to mail notice within period described in (2) and file certificate of mailing with clerk; (6) where garnishment proceeding begun within 60 days after judgment, written notice by ordinary mail to address at which defendant served in suit creating judgment is sufficient where certificate of mailing filed with clerk; (7) where defendant's address is known, notice is sufficient where plaintiff sends written notice by ordinary mail and files certificate of mailing with clerk (O.C.G.A. 18-4-64[a]); or (8) receipt by defendant of actual timely notice of summons of garnishment to constitute notice (O.C.G.A. 18-4-64[b]). With corporations, service upon agent in charge of office or other place of business where defendant is employed is preferred; if such service cannot be made, then service of either registered office or principal place of business of corporation is sufficient. (O.C.G.A. 18-4-23). Notice consists of copy of summons or document including names of plaintiff and defendant, amount claimed in affidavit of garnishment, statement that garnishment has been or will be served on garnishee, and name of court issuing summons. (O.C.G.A. 18-4-64[c]). Methods of notification cumulative, can be used in any sequence or combination. Time limit for subsequent method tolled while reasonable and diligent good faith attempt to use another method first is in progress. (O.C.G.A. 18-4-64[d]). No money or other property to be distributed or judgment rendered against garnishee until after ten days from date of compliance with at least one method of notification. (O.C.G.A. 18-4-64[e]).

Answer of Garnishee.

Garnishee must file answer describing property subject to garnishment not sooner than 30 days and not later than 45 days after service of summons. (O.C.G.A. 18-4-62). Garnishee has common law right of set-off, but must exercise same prior to filing answer or it is forfeited. (187 Ga. App. 530, 370 S.E.2d 751). Garnishee must deliver to court any money or property admitted in answer to be subject to garnishment, and must hold contents of safe-deposit box containing property admitted in answer to be subject to garnishment. (O.C.G.A. 18-4-84). If garnishee/bank is unsure as to what account is subject to garnishment, garnishee/bank must include that in its answer. (219 Ga. App. 299, 464 S.E.2d 903).Copy of answer must be served on plaintiff or attorney if name and address of plaintiff or attorney appear on face of summons. (O.C.G.A. 18-4-83). Plaintiff or other claimant may traverse answer within 15 days after it is served. (O.C.G.A. 18-4-85). If garnishee fails to serve answer, traverse may be filed within 15 days after actual notice of answer received. (O.C.G.A. 18-4-83). Garnishee's answer may be filed in unverified form if it complies with format in O.C.G.A. 18-4-66(4). (170 Ga. App. 668, 317 S.E.2d 897). Garnishee may deduct $25 or 10% of amount paid into court, whichever is greater, not to exceed $50 as reasonable attorney's fees or expenses. (O.C.G.A. 18-4-97[a]).

Release of Summons.

Clerk of court must issue release of garnishment if: (1) plaintiff or plaintiff's attorney so requests in writing; (2) amount claimed due together with costs paid into court; (3) dissolution bond filed by defendant and approved by clerk; (4) release ordered by any judge after hearing; or (5) garnishment is dismissed. (O.C.G.A. 18-4-6). Release relieves garnishee of duty to file answer and authorizes delivery of property to defendant. (O.C.G.A. 18-4-80).

Practice and Procedure.

Except as specifically otherwise provided, procedure, including discovery, shall be same as provided for other civil actions in Georgia Civil Practice Act. (O.C.G.A. 18-4-1, -2).

Adverse Claims.

At any time before judgment rendered on garnishee's answer or before money or other property subject to garnishment distributed, defendant or other claimant may become party to garnishment. Defendant may file traverse to plaintiff's affidavit and must have hearing not more than ten days from date traverse filed. (O.C.G.A. 18-4-93). Before judgment entered on garnishee's answer, other claimant may become party by filing claim under oath averring a superior claim to that of plaintiff to money or property in hands of garnishee. (O.C.G.A. 18-4-95).

Judgment.

If garnishee fails to answer by 45th day after service of summons, he or she will be in default. Default may be opened as matter of right by filing answer and paying costs within 15 days of default. After 15 days following default, judgment may be entered against garnishee for amount claimed due on judgment against defendant. (O.C.G.A. 18-4-90). On motion filed not later than 60 days from actual notice to garnishee of entry of judgment against him or her, he or she may have judgment modified upon payment of all accrued costs of court to reduce liability to greater of $50 or $50 plus amount garnishee was indebted to defendant from time of service of summons through last day for timely answer, less lawful exemptions. (O.C.G.A. 18-4-91).

Continuing Garnishment.

Where money judgment obtained in state or federal court, plaintiff entitled to continuing garnishment against employer of defendant. (O.C.G.A. 18-4-110). Debt owed at time summons served plus debts accruing through 179th day thereafter are subject. (O.C.G.A. 18-4-111). Procedures generally similar to those for other garnishments. (O.C.G.A. 18-4-20, -22[b]). First answer to summons must be filed no later than 45 days after service of summons; subsequent answers must be filed no later than 45 days after previous answer date; last required answer must be filed within 195 days after service of summons. (O.C.G.A. 18-4-113). Filing of traverse by defendant to answer of summons does not relieve garnishee of filing additional answers or continuing to withhold funds and deliver funds to court. (O.C.G.A. 18-4-116). Employer not subject to garnishment after termination of employee. (O.C.G.A. 18-4-117).

Discharge of Garnished Employee.

No employer may discharge employee by reason of garnishment of earnings for any one indebtedness, even though more than one summons served with respect to such indebtedness. (O.C.G.A. 18-4-7).

Earnings and Pensions.

Personal earnings of defendant not subject to garnishment prior to judgment. (O.C.G.A. 18-4-46). Maximum amount of disposable earnings subject to garnishment after judgment may not exceed lesser of: (1) 25% of that week's disposable earnings; or (2) amount by which that week's disposable earnings exceeds 30 times federal minimum hourly wage. (O.C.G.A. 18-4-20[d][1]). Pension or retirement funds or benefits from program defined in 29 U.S.C.S. § 1002(2)(A) or individual retirement account (IRA) as defined in I.R.C. 408 or 408A are exempt until paid or otherwise transferred and then limited in amount as above; where garnishment of pension or retirement fund based on alimony or child support, 50% of weekly disposable earnings subject to garnishment. (O.C.G.A. 18-4-22). IRA is retirement program exempt from garnishment under O.C.G.A. 18-4-22 until paid, unless based on alimony or child support. (National Bank of Georgia v. 1616 Reminic Ltd. Partnership, No. C84-151, slip op. [N.D. Ga. Apr. 10, 1986]). Where summons gives proper notice that it is based on judgment for alimony or child support, 50% of weekly disposable earnings subject to garnishment. (O.C.G.A. 18-4-20; -22[b]). Wages due deceased employee of corporation doing business in state, up to $2,500 exempt from garnishment and may be paid to widow or minor children. (O.C.G.A. 34-7-4).

8.10 HOMESTEADS:

See topic 8.06 Exemptions; category 22 Taxation, topic 22.16 Property Taxes, subhead Exemptions from Property Taxation.

8.11 JUDGMENT NOTES:

Not recognized.

8.12 LEVY:

See topics 8.02 Attachment, 8.05 Executions.

8.13 LIENS:

Uniform Commercial Code.

Adopted. (11-9). See category 3 Business Regulation and Commerce, topic 3.09 Commercial Code.

Established in favor of: State of Georgia; counties and municipalities; creditors by judgment or decree; laborers; landlords; contractors, mortgagees, materialmen, subcontractors and materialmen and laborers furnishing material or labor to subcontractors, machinists and manufacturers of machinery; certain creditors against steam boats and other water craft; proprietors of saw mills, planing mills and other similar establishments; innkeepers, boarding house keepers, livery stable keepers, bailees, acceptors, carriers, pawnbrokers, factors, depositories and attorneys at law; owners of stallions, jacks, boars and bulls; railroad employees; owners of stock killed; persons furnishing supplies to railroads; jewelers (O.C.G.A. 44-14-320, -361); and persons engaged in business of laundering, cleaning, tailoring, altering, repairing or dyeing clothing, goods, wearing apparel, shoes, carpets, rugs, or other similar articles (O.C.G.A. 44-14-450). See also subhead Miscellaneous Liens, infra.

Artisans' Liens.

Mechanics of every sort, who have furnished labor or material in manufacturing or repairing personal property, and for storage of such property after its manufacture or repair, have a special lien thereon, which is superior to all other liens except tax liens, mechanic's liens on farm machinery or equipment arising after July 1, 1985, and liens of which mechanic had actual notice. Lien may be asserted by retaining property and mechanic not required to surrender property to holder of subordinate interests or lien. If property is surrendered, claim for lien must be filed within 90 days after completion of work (or within 180 days from repairs on aircraft or farm machinery) with clerk of superior court. (O.C.G.A. 44-14-363). If property is surrendered to debtor and lien is not filed, other personal property of debtor in possession of mechanic may be seized, if not consumer goods used for personal, family or household purposes. (O.C.G.A. 44-14-363).

Depositories.

Involuntary, gratuitous or naked depositories have a lien on property in their possession for any expense incurred in caring for the property or in locating the owner thereof. (O.C.G.A. 44-14-410). After two months property can be sold by depository after publishing notice, containing description of property, for two successive weeks prior thereto in newspaper of general circulation. (O.C.G.A. 44-14-411). Proceeds of sale after deducting all expenses of depository are payable to owner provided he or she makes claim within one year from date of sale. (O.C.G.A. 44-14-412).

Factor's Lien.

Factor's liens governed by Commercial Code. (11-9). See category 3 Business Regulation and Commerce, topics 3.14 Factors, 3.09 Commercial Code.

Mechanics' Liens.

Mechanics of every sort who have taken no personal security for work done or material furnished, including architects, contractors, materialmen, registered land surveyors, registered professional engineers, registered foresters, subcontractors, laborers, machinists and manufacturers of machinery, who have done work or furnished material in building, repairing or improving real estate, have special lien on such real estate for amount of work done or materials furnished, which attaches unless owner can show that lien has been waived in writing or can produce sworn statement of contractor or other person at whose instance work was done or material furnished that agreed price has been paid. (O.C.G.A. 44-14-361, -361.2). Payment defense of O.C.G.A. 44-14-361.1(a)(4) only applicable where owner can prove that payments were made to contractor and disbursed to materialmen in proper order under statute, and is not applicable where pre-lien payments to contractor are disbursed post-lien to interior-ranked lien claims. (267 Ga. 72; 475 S.E.2d 576). But supplier of supplier of materials not entitled to claim of lien under O.C.G.A. 44-14-360, -361. (126 Ga. App. 191; 190 S.E.2d 131). In no event may aggregate amount of liens exceed contract price. (O.C.G.A. 44-14-361.1). Payee of check for merchandise delivered, or services rendered on merchandise delivered, on which payor stops payment has mechanic's lien for face amount of check where payment stopped within five days after delivery of merchandise. (O.C.G.A. 44-14-516).

Contractor may file Notice of Commencement in county in which project is located, not later than 15 days after contractor commences work on property. (O.C.G.A. 44-14-361.5).

In order to have and enforce such lien, lien claimant: (1) must have substantially complied with his or her contract; (2) must have filed for record his or her claim of lien, describing property, and stating amount claimed in office of clerk of superior court where property is located within three months after completion of work or furnishing of materials; (3) must, at time of filing his or her record claim of lien, send copy of lien registered or certified mail to owner of property or contractor, as agent of owner; and (4) must commence (a) his or her action against person with whom he or she contracted for recovery of his or her claim within 12 months after same became due, (b) his or her action of foreclosure against owner within same period and (c) file notice of such action with clerk of superior court of county where lien filed within 14 days after filing action.

(O.C.G.A. 44-14-361.1[a], effective until Mar. 31, 2009). Effective Mar. 31, 2009, in order to have enforceable lien, lien claimant required to (1) substantially comply with applicable contract; (2) file claim of lien in clerk's office of superior court of county where property is located within 90 days of completion of work or furnishing of services or materials; (3) no later than two business days after claim of lien is filed of record, lien claimant must send copy of lien claim by registered or certified mail or statutory overnight delivery to property owner or contractor, as owner's agent; and, (4) lien claimant must commence action for recovery of his or her claim within 365 days from the date of filing claim of lien; (5) within 30 days after commencing such lien action, lien claimant must file notice of the lien action with clerk of superior court of county wherein subject lien was filed. (O.C.G.A. 44-14-361.1[a], effective Mar. 31, 2009, 2008 Ga. L. 1063, §2). As between themselves, mechanics' liens rank according to filing dates, but all such liens given same date when declared and filed within three months after work is done or before that time. (O.C.G.A. 44-14-361.1[b], effective until Mar. 31, 2009). Effective Mr. 31, 2009, as between themselves, mechanics' liens rank according to filing dates, but all such liens given same date when declared and filed within 90 days after work is done or before that time. (O.C.G.A. 44-14-361.1[b], effective Mar. 31, 2009, 2008 Ga. L. 1063, §2). Mechanic's lien is inferior to: liens for taxes; general and special liens of laborers; general lien of landlord for rent when distress warrant is issued out and levied; claims for purchase money due to persons who have only given bonds for titles; and other general liens when actual notice of such liens was communicated before work was done or materials furnished. (O.C.G.A. 44-14-361.1[c]). Effective Jan. 1, 1994, any person having right to lien (provides labor, services or materials for improvement of property) who does not have privity of contract with contractor must give Notice to Contractor to owner or agent of owner and contractor stating (a) name, address, phone number of person providing labor, services or materials, (b) name and address of each person such labor, services or materials are being furnished to, (c) name and location of project, and (d) description of labor, services or materials being provided and contract price or anticipated value. Notice to Contractor must be given within 30 days from filing of Notice of Commencement or 30 days following first delivery of labor, services or materials, whichever is later. (O.C.G.A. 44-14-361.5, effective until Mar. 31, 2009). 2008 amendment, effective Mar. 31, 2009, provides that such Notice to Contractor must be sent by registered or certified mail or statutory overnight delivery to owner or owner's agent and to contractor at addresses set forth in the notice of commencement. (O.C.G.A. 44-14-361.5, effective Mar. 31, 2009).

If contractor or subcontractor procuring material, labor or supplies for repairing or improving real estate, buildings or structures absconds from state, dies, removes from state so personal jurisdiction cannot be obtained or is adjudicated bankrupt, persons furnishing material, labor or supplies need not file suit or obtain judgment against contractor or subcontractor as prerequisite to enforcing lien against property if suit filed within 12 months from time amount due. (O.C.G.A. 44-14-361.1, effective until Mar. 31, 2009). Filing by materialman of claim in contractor's bankruptcy proceeding within 12 months from time amount became due satisfies requirement of commencement of action for recovery of amount of lien claim. (241 Ga. 589, 247 S.E.2d 76). In action to enforce lien, only judgment in rem may be rendered, and to avoid judgment against property, owner may either pay amount due or prove that he or she made payments to contractor which were properly applied. (O.C.G.A. 44-14-361.1, effective until Mar. 31, 2009). Owner may discharge lien by filing bond. (O.C.G.A. 44-14-364).

Preliminary notice of lien rights can be filed 30 days after potential claimant has provided materials or services. Notice should state name, address and telephone number of lien claimant, real estate owner, person who requested materials or services; and should include identifying description of materials, services and real estate against which lien can be claimed. Party filing must send copy of Notice to Contractor or property owner within seven days. (O.C.G.A. 44-14-361.3). Party receiving preliminary notice may demand filing of lien claim by potential claimant within ten days of demand.

Form.

Demand statement should include all information in preliminary notice plus this statement:

"This demand was mailed to you on ___ pursuant to Code Section O.C.G.A. 44-14-361.4. You are notified that unless you file a claim of lien with respect to this claim on or before the tenth day after said date of mailing, your right to claim a lien will be dissolved." (O.C.G.A. 44-14-361.4).

Within ten days after claimant receives final payment for services and materials, he or she must cancel preliminary notice of lien rights or be liable to owner for all damages.

Form.

Cancellation form states:

"Clerk, Superior Court

of ________ County

You are authorized and directed to cancel of record the preliminary notice of lien rights which we filed on the property owned by (state name of owner) on (give date) and recorded by you in Book __, Page __, of preliminary notices kept by you.

This ___ day of _______, 20___.

____

Lien Claimant or Attorney"

(O.C.G.A. 44-14-362).

Form.

Substance of filing for record claim of lien shall be as follows:

"A.B., a mechanic, contractor, subcontractor, materialman, machinist, manufacturer, registered architect, registered land surveyor, registered forester, registered professional engineer, or other person (as the case may be) claims a lien in the amount of (specify the amount claimed) on the house, factory, mill, machinery, or railroad (as the case may be), and the premises or real estate on which it is erected, or built, of C. D. (describing the houses, premises, real estate, or railroad), for satisfaction of a claim which became due on (specify the date the claim was due) for building, repairing, improving, or furnishing material (or whatever the claim may be)." (O.C.G.A. 44-14-361.1).

Waiver, Loss or Extinguishment.

Pawnees, factors, bailees, acceptors, and depositaries lose liens by surrendering property to debtor (O.C.G.A. 44-14-401), as do persons retaining possession of articles laundered, cleaned, tailored, altered, repaired or dyed by them. (O.C.G.A. 44-14-451). Lien for freight waived by contract or delivery. (O.C.G.A. 46-9-191). Lien on real estate not lost by delivery of possession. (O.C.G.A. 44-14-530). Supplier waives his or her lien by failing to inquire to what account payment is to be applied. (126 Ga. App. 119; 190 S.E.2d 104).

Right to claim lien or claim upon bond may not be waived prior to furnishing of labor, services or materials. For binding waiver or release of claim of lien: (1) instrument of waiver or release must be executed by claimant; (2) claimant must receive payment for claim; (3) waiver or release must follow substantially form of Unconditional Waiver and Release Upon Payment or, in event of retention, form of Interim Waiver and Release Upon Payment; and (4) will be binding against claimant, subject only to payment in full of amount specified in release or waiver. (O.C.G.A. 44-14-366, effective until Mar. 31, 2009).

Form.

Substance of unconditional waiver and release upon final payment shall be as follows:

"STATE OF GEORGIA

COUNTY OF __________

The undersigned mechanic and/or materialman has been employed by ___________ (name of contractor) to furnish _________ (describe materials and/or labor) for the construction of improvements known as _________ (title of the project or building) which is located in the City of _________, County of _________, and is owned by _______________ (name of owner) and more particularly described as follows: _________________ (describe the property upon which the improvements were made by using either a metes and bounds description, the land lot, district, block and lot number, or street address of the project).

Upon the receipt of the sum of $_______, the mechanic and/or materialman waives and releases any and all liens or claims of liens or any right against any labor and/or material bond it has upon the foregoing described property.

Given under hand and seal this ____ day of _______, 20____.

____________(SEAL)

____

____

(Witness)

Address:

____

_____________"

NOTICE: this document waives rights unconditionally and states that you have been paid for giving up those rights. This document is enforceable against you if you sign it, even if you have not been paid. If you have not yet been paid, use a conditional release form.

Form.—Substance of interim waiver and release upon payment shall be as follows:

"STATE OF GEORGIA

COUNTY OF __________

The undersigned mechanic and/or materialman has been employed by __________ (name of contractor) to furnish __________ (describe materials and/or labor) for the construction of improvements known as _________ (title of the project or building) which is located in the City of _________, County of _________, and is owned by _______________ (name of owner) and more particularly described as follows: _________________ (describe the property upon which the improvements were made by using either a metes and bounds description, the land lot, district, block and lot number, or street address of the project).

Upon the receipt of the sum of $_______, the mechanic and/or materialman waives and releases any and all liens or claims of liens it has upon the foregoing described property through the date of ________ (date) and excepting those rights and liens that the mechanic and/or materialman might have in any retained amounts, on account of labor or materials, or both, furnished by the undersigned to or on account of said contractor for said building or premises.

Given under hand and seal this ____ day of _______, 20____.

____________(SEAL)

____

____

(Witness)

Address:

____

_____________"

Form.—Affidavit of nonpayment under O.C.G.A. §44-14-366 shall be as follows:

"STATE OF GEORGIA

COUNTY OF __________

The undersigned mechanic and/or materialman has been employed by __________ (name of contractor) to furnish _________ (describe materials and/or labor) for the construction of improvements known as _________ (title of the project or building) which is located in the City of _________, County of _________, and is owned by ________________ (name of owner) and more particularly described as follows: _________________ (describe the property upon which the improvements were made by using either a metes and bounds description, the land lot, district, block and lot number, or street address of the project).

Pursuant to O.C.G.A. §44-14-366 the undersigned executed a lien waiver and release with respect to this property dated ________, 20____. The amount set forth in said waiver and release ($_______) has not been paid, and the undersigned hereby gives notice of such nonpayment.

The above facts are sworn true and correct by the undersigned, this ____ day of ________, 20__.

____

____________(SEAL)

Claimant's Signature

Sworn to and executed

in the presence of:

____

Witness

____

Address:

____

______________"

Notary Public"

(O.C.G.A. 44-14-366).

Enforcement.

Lien on real estate foreclosed by petition to competent court within 12 months after claim became due, showing proper record of lien and notice of suit, describing property and showing compliance with statutory requirements. (O.C.G.A. 44-14-360, am'd effective Mar. 31, 2009, 2008 Ga. L. 1063, § 1; 44-14-361, 44-14-530). Judgment against person with whom lienor contracted is prerequisite to enforcement of lien (116 Ga. App. 128, 157 S.E.2d 68) except where such person absconds, becomes bankrupt, etc. (O.C.G.A. 44-14-361.1).

For foreclosure of security interests in personal property, see category 20 Mortgages, topic 20.01 Chattel Mortgages, subhead Foreclosure.

Redemption.

There is no right of redemption of property sold under foreclosure of any of the aforementioned liens, except lien for taxes. (O.C.G.A. 48-4-40). See category 22 Taxation, topic 22.16 Property Taxes, subhead Redemption.

Repairman.

Persons, firms or corporations that repair or service bicycles, motor scooters, mopeds, motorcycles, lawnmowers, garden equipment or other related equipment have possessory lien upon such items until charges have been paid. (O.C.G.A. 44-14-460). Lien lost if item returned without first collecting repair charges. (O.C.G.A. 44-14-461). If services or repairs are made and charges are not paid, repairman may sell item after 60 days after taking possession as long as repairman has given ten days' notice by certified mail or statutory overnight delivery (O.C.G.A. 9-10-12[b]) to last known address of item's owner or person who delivered item, including in such notice (i) name of owner or person who delivered item, (ii) description of item, (iii) time and place of intended sale, (iv) amount of charges underlying sale, and (v) name of person, firm or corporation having possession of item and proposing to make sale. (O.C.G.A. 44-14-463, 464). If charges are not paid within ten days after such notice is mailed, repairman may sell item. (O.C.G.A. 44-14-464). If there is any residue from sale, it must be paid on demand to item owner. (O.C.G.A. 44-14-465).

Satisfaction.

When lien satisfied, cancellation is by direction to clerk of superior court where lien recorded to mark same satisfied, dated and signed by lien holder. Clerk enters same of record.

Veterinarians.

Every licensed veterinarian and operator of facility for boarding animals or pets has lien on such animal or pet for payment of charges for treatment, board or care of such animal (O.C.G.A. 44-14-490) and has power to dispose of animal if charges not paid within ten days of demand (O.C.G.A. 44-14-491).

Assignment.

All liens may be assigned in writing. (O.C.G.A. 44-14-324).

Attachment Lien.

See topic 8.02 Attachment.

Attorney's Lien.

See category 18 Legal Profession, topic 18.01 Attorneys and Counselors.

Carrier's Lien.

See category 3 Business Regulation and Commerce, topic 3.08 Carriers.

Collateral Security.

See topic 8.15 Pledges.

Commercial Real Estate Brokers.

See category 3 Business Regulation and Commerce, topic 3.06 Brokers.

Execution Lien.

See topic 8.05 Executions.

Foreclosure on Security Interests.

See category 20 Mortgages, topic 20.01 Chattel Mortgages, subhead Foreclosure.

Judgment Lien.

See category 5 Civil Actions and Procedure, topic 5.15 Judgments.

Landlord's Lien.

See category 21 Property, topic 21.10 Landlord and Tenant.

Liens on Exempt Property.

See topic 8.06 Exemptions.

Motor Vehicle Liens.

See category 23 Transportation, topic 23.01 Motor Vehicles, subhead Liens.

Real Estate Mortgage Lien.

See category 20 Mortgages, topic 20.04 Mortgages of Real Property.

Tax Lien.

See category 22 Taxation.

Miscellaneous Liens.

On boats and watercraft (O.C.G.A. 44-14-510); on offspring of stallions, jacks, boars and bulls (O.C.G.A. 44-14-511); for hauling lumber, stock or logs (O.C.G.A. 44-14-512); in favor of planing mills (O.C.G.A. 44-14-513); for laborers at mills (O.C.G.A. 44-14-514); for articles furnished to sawmills (O.C.G.A. 44-14-515); in favor of hospitals upon causes of action accruing to persons for injuries treated (O.C.G.A. 44-14-470); for servicing or furnishing supplies for aircraft (O.C.G.A. 44-14-518) on personal property in self-service storage facilities (O.C.G.A. 10-4-212).

8.14 MECHANICS' LIENS:

See topic 8.13 Liens.

8.15 PLEDGES:

Uniform Commercial Code.

Adopted. (O.C.G.A. tit. 11). See category 3 Business Regulation and Commerce, topic 3.09 Commercial Code.

General powers of corporations include power “[t]o sell, convey, mortgage, pledge, . . . or otherwise dispose of all or any part of its property.” (O.C.G.A. 14-2-302[5]). Unless articles of incorporation require it, approval by shareholders of transaction described in subsection (b) of this code section is not required. (O.C.G.A. 14-2-1201[c]).

Remedies of Pledgee.

See category 3 Business Regulation and Commerce, topic 3.09 Commercial Code.

8.16 RECEIVERS:

Receiver may be appointed when any fund or property in litigation and parties' rights cannot otherwise be fully protected; or when there is fund or property with no one to manage it (O.C.G.A. 9-8-1); or when there is trust or joint property and danger of destruction or loss requires it (O.C.G.A. 9-8-2).

Judge of Superior Court having jurisdiction may appoint receiver. (O.C.G.A. 9-8-1).

Proceedings.

Petition must be verified by petitioner or supported by proof. (O.C.G.A. 9-10-110). Action wherein receiver has been appointed may not be dismissed except by order of court. (O.C.G.A. 9-11-66).

Qualification.

Receiver may at judge's discretion be required to give bond conditioned for faithful discharge of duties. (O.C.G.A. 9-8-10).

Powers and duties are placed upon receivers by judicial order or decree; receivers are officers and servants of appointing court and are at all times subject to orders of court appointing them, and may be brought to account or removed at pleasure of court. (O.C.G.A. 9-8-8). Terms on which receiver is appointed are in discretion of court. (O.C.G.A. 9-8-3). Investment of funds in receivership subject to discretion and orders of judge. (O.C.G.A. 9-8-7). Receiver is responsible for moneys placed in certain uninsured banks or trust companies which fail. (O.C.G.A. 9-8-11).

Compensation is awarded by the court; not more than 8% of the first $1,000, 4% of the excess up to $5,000, 3% of the amount above $5,000 and not exceeding $10,000, and 2% of all sums over $10,000; provided that where receiver continues the business of an insolvent person, firm or corporation, a reasonable sum may be allowed for services in lieu of commissions; provided further that receivers and their attorneys may be allowed such compensation as their services are reasonably worth. (O.C.G.A. 9-8-13[b], [c]).

8.17 REDEMPTION:

See topics 8.05 Executions, Liens; categories 20 Mortgages, topic Mortgages of Real Property; Taxation, topic Property Tax, subhead Redemption.

8.18 SUPPLEMENTARY PROCEEDINGS:

See topic 8.05 Executions.

8.19 TRUSTEE PROCESS:

See topic 8.09 Garnishment.

8.20 USURY:

See category 3 Business Regulation and Commerce, topic 3.17 Interest.

9 DISPUTE RESOLUTION

9.01 ALTERNATIVE DISPUTE RESOLUTION:

Mandatory (Alternative) Dispute Resolution.

Selected jurisdictions mandate resort to nonbinding arbitration for cases in particular categories or with maximum amount in controversy, with some opt-out provisions. See Rule 16.2, U.S. Dist. Court for Middle District of Georgia and Fulton County Superior Court Rule 1000. Other jurisdictions mandate participation in mediation of selected cases, particularly domestic relations. Court-annexed or court-referred dispute resolution has state-wide authorization under Uniform Rules for Dispute Resolution Programs that Supreme Court of Georgia adopted in 1993. These rules govern programs conducted by those state courts that have elected to use mediation, nonbinding arbitration, case evaluation or early neutral evaluation, summary jury trial, or mini-trial. (Georgia Supreme Court Alternative Dispute Resolution Rules, Appendix A, Uniform Rules for Dispute Resolution Programs). Uniform rules have been adopted for use by Georgia superior, state, probate, juvenile and magistrate courts. Check local court to determine if uniform rules have been implemented. Funding and structure of these programs for courts electing to participate are specified in O.C.G.A. tit. 15, c. 23.

Referral To Alternative Dispute Resolution.

Any party to dispute may petition court to refer case to ADR process. (Uniform ADR Rule 2.5). Any contested civil, criminal or juvenile case may be referred to mediation by judge to whom case is assigned. Any contested civil case may be referred to nonbinding arbitration, case evaluation or early neutral evaluation or multi-door program by judge to whom case is assigned. (Uniform ADR Rule 2.1). Any party to dispute may petition court to have case removed from ADR process or to refer case to different ADR process. (Uniform ADR Rules 3.1 and 3.2).

Procedures for Alternative Dispute Resolution.

Appearance at ADR conference or hearing is required and failure to appear may subject party to citation for contempt and to imposition of sanctions. (Uniform ADR Rules 4.1 and 4.2). Attorneys are not required to attend mediation conferences. (Uniform ADR Rule 4.3). All neutrals in court-annexed or court-referred ADR program must be registered by Georgia Office of Dispute Resolution. (Uniform ADR Rule 5.1). All parties in court-annexed or court-referred ADR process are entitled to confidentiality to extent described by Georgia Supreme Court and neutrals acting in court-annexed or court-referred ADR process are entitled to immunity to extent described by Georgia Supreme Court. (Uniform ADR Rules 6.1 and 6.2). Agreements reached as result of court-connected ADR process are enforceable to same extent as any other agreements. (Uniform ADR Rule 8). Neutrals in court-annexed or court-referred ADR process will be chosen from neutrals registered by Georgia Office of Dispute Resolution. (Uniform ADR Rule 9.1). If parties referred by court to ADR process are unable to agree upon neutral within reasonable time, neutral will be selected by court. (Uniform ADR Rule 9.2). Appendix B to ADR Rules provides requirements for qualification and training of neutrals, which include requirement of at least 20 hours of classroom training for mediators (40 hours for mediators in divorce and custody cases) but in rare cases permits grandfathering of experienced mediators. (Uniform ADR Rules, Appendix B). Mediators need not be lawyers, but those serving in divorce and custody cases must have four-year college degree. Neutrals in arbitration and case evaluation or early neutral evaluation are required to be lawyers. (Uniform ADR Rules, Appendix B).

Ethical Considerations.

Lawyer has duty to advise client as to various forms of dispute resolution and has duty to inform client of forms of dispute resolution which might constitute reasonable alternatives to litigation. (Georgia Code of Professional Responsibility, Rule 3-107, Ethical Consideration 7-5). Ethical standards for neutrals provide detailed criteria for voluntariness of process, confidentiality, impartiality, process fairness, and diligence and fair practice in business dealings. (Uniform ADR Rules, Appendix C, c. 1). Separate procedures govern resolution of inquiries into neutral's character or allegedly unethical conduct. (Uniform ADR Rules, Appendix C, c. 2).

Education re Divorce.

Uniform superior court rule provides for establishment by any superior court circuit program designed to educate parties to domestic relations actions in regard to effects of divorce on minor children of marriage. (Uniform Superior Court Rule 24.8).

See also topic 9.02 Arbitration and Award.

Voluntary (Alternative) Dispute Resolution.

Supreme Court's Uniform Rules govern court-annexed or -referred programs but do not limit or establish conditions or criteria on purely voluntary ADR processes agreed to by all parties before or during litigation. Uniform ADR Rules do authorize any party to litigated dispute to petition court to refer pending case to mediation, case or early neutral evaluation, or nonbinding arbitration, and court may order other parties to attend. But no party need accept agreement proposed or award issued in any such process. (See Uniform ADR Rules 2.5, 2.6.) If parties, before filing suit, have voluntarily submitted matter to any of processes approved by Uniform Rules, court will not refer to duplicative process. (Uniform ADR Rule 2.7).

Alternative Dispute Resolution Jurisdictional Bodies/Commissions.

Georgia Commission on Dispute Resolution established by Georgia Supreme Court's Uniform Alternative Dispute Resolution Rules, above. Commission administers statewide comprehensive ADR program and oversees development and ensures quality of all court-annexed or court-referred programs.

Georgia Office of Dispute Resolution, also established by Uniform Supreme Court ADR Rules, implements Commission's policies, registers and removes neutrals, develops training capability, and otherwise provides technical and logistical support to court-annexed or -referred programs.

Alternative Dispute Resolution Acts.

O.C.G.A. tit. 15, c. 23, provides for funding of court-annexed and -referred programs conducted under Supreme Court's Uniform ADR Rules.

9.02 ARBITRATION AND AWARD:

Forms and Requisites of Submission.

No local statutory requirements governing submissions, but arbitration demand must contain preclusion notice informing recipient it must seek stay within 30 days of service to contest validity of agreement or assert timeliness bar in court. (O.C.G.A. 9-9-6[c]).

Judgment on Award.

Applications to enforce, vacate or modify award are made by motion in superior court in county provided for by agreement, in which arbitration held, where any party to agreement resides or does business, or in court hearing pending action, with initial motions to be served in same manner as complaint in civil action. (O.C.G.A. 9-9-4[a], [b], [c][2]).

Enforcement.

Within one year of delivery of award, party may seek confirmation of award by having it made judgment of court. (O.C.G.A. 9-9-12). Entry of judgment must include arbitration agreement, award, copy of order confirming, modifying or correcting award, and copy of judgment. Terms of judgment must conform to and not expand award. See 186 Ga. App. 660, 368 S.E.2d 178. Application to vacate or modify must be made within three months of delivery of award. (O.C.G.A. 9-9-13, 9-9-14). Party who participated or was served with demand may vacate award on grounds of corruption, fraud, or misconduct in procuring award; arbitrator's partiality, exceeding authority, or failure to issue final and definite award; or procedural failure unless waived, or arbitrator's manifest disregard of law. (O.C.G.A. 9-9-13[b]). Party not participating or served with demand may vacate if rights prejudiced by defect that would authorize vacatur by party, or if agreement to arbitrate violated, or if arbitrated claim time barred. (O.C.G.A. 9-9-13[c]). Statute provides exclusive grounds for vacating award. (266 Ga. 592, 468 N.E.2d 348). Reviewing court not to reweigh evidence or reverse on ground of insufficient or no evidence to support award. (266 Ga. 592, 468 S.E.2d 350). Unclear if award may be vacated if court deems it completely irrational, or contrary to public policy. Compare 236 Ga. App. 760, 513 S.E.2d 507 with 236 Ga. App. 386, 512 S.E.2d 300. In cases arising under specific laws, particularly federal statutory employment discrimination disputes, arbitrator may be bound to follow law absent valid, legal agreement to contrary. (128 F.3d 1456).

Mandatory Arbitration.

See topic 9.01 Alternative Dispute Resolution, subhead Mandatory (Alternative) Dispute Resolution.

Arbitrators.

Absent agreement by parties, arbitrators are appointed by court. (O.C.G.A. 9-9-7).

Procedures.

Arbitrators appoint time and place of meeting and must give ten days notice to parties. (O.C.G.A. 9-9-8). Parties are entitled to present pleadings, documents, testimony and to cross-examine witnesses. (O.C.G.A. 9-9-8). Parties have right to obtain list of witnesses and to examine copy of documents relevant to arbitration. (O.C.G.A. 9-9-9). Arbitrator has power to issue subpoenas. (O.C.G.A. 9-9-9).

Court Supervision.

Court has authority to stay arbitration or compel arbitration in certain circumstances. (O.C.G.A. 9-9-6). Parties may seek injunctive relief or attachment to preserve rights pending arbitration. (O.C.G.A. 9-9-4). Court order may be obtained to enforce subpoenas issued by arbitrator. (O.C.G.A. 9-9-9).

Attorney's Fees.

There is no statutory prohibition on right to contract for recovery of attorney's fees in arbitration proceedings. (205 Ga. App. 561, 422 S.E.2d 918; O.C.G.A. 9-9-17). Punitive damages not restricted under Georgia Arbitration Code, and therefore available under federal law unless agreement expressly states otherwise. (514 U.S. 52, 115 S.Ct. 1212, 131 L.Ed.2d 76; 229 Ga. App. 485, 495 S.E.2d 287).

Interest.

Arbitrator has inherent power to award prejudgment and post-judgment interest in absence of contrary provision in arbitration agreement. (231 Ga. App. 596, 499 S.E.2d 693).

Award.

Upon application of party within one year after award received, court must confirm arbitration award. (O.C.G.A. 9-9-12). Application to vacate or modify must be made within three months of delivery of award. (O.C.G.A. 9-9-13, -14). Statute provides exclusive grounds for vacating award. (266 Ga. 592, 468 S.E.2d 350; O.C.G.A. 9-9-13[b]). Award must be in writing, signed by all arbitrators and, unless parties agree or court orders otherwise, must be issued within 30 days after hearing. (O.C.G.A. 9-9-10, 9-9-11).

Rescission.

No special provisions in Georgia Arbitration Code.

9.02A MEDIATION:

Jurisdictional Mediation Acts.

See O.C.G.A. tit. 15, c. 23, authorizing funding for court-annexed and referred mediation under Georgia Supreme Court Uniform ADR Rules, in Mandatory (Alternative) Dispute Resolution.

Credentials of/Qualifications of/Standards for Mediators.

In court-annexed or -referred programs, mediators must be approved by and registered with Georgia Office of Dispute Resolution. (Supreme Court Uniform ADR Rules, Appendix B).

Uniform Arbitration Act Adoption/Deviation.

Uniform Arbitration Act not adopted.

Jurisdictional Arbitration Acts.

Georgia Arbitration Code (“GAC”) applies to all disputes in which parties agree, after July 1, 1988, in writing to arbitrate. (O.C.G.A. 9-9-2). §9-9-80 (as it existed prior to July 1, 1988) applies to construction contracts made between July 1, 1978 and July 1, 1988. (O.C.G.A. 9-9-2[b]). Code does not enforce agreements to arbitrate based on: (1) collective bargaining agreements between employers and labor unions; (2) insurance contracts; (3) other subject matters currently covered by arbitration statute; (4) loans or consumer financing for amounts of less than $25,000; (5) contracts for purchase of consumer goods or involving consumer acts or practices; (6) certain residential real estate sales or loan agreements unless arbitration provision initialed by all signatories; (7) employment agreements unless arbitration provision initialed by all signatories; (8) agreement to arbitrate future claims arising out of personal injury. (O.C.G.A. 9-9-2[c]).

Medical Malpractice.

Parties to medical malpractice claims may agree to arbitration only after dispute arises, upon written submission, and must petition superior court for appointment of referee to conduct proceeding; agreements to arbitrate future medical malpractice claims unenforceable. (O.C.G.A. 9-9-61, 9-9-62).

International Transactions.

Parties to international transactions may agree to submit claim to arbitration. (O.C.G.A. 9-9-30 et seq.).

Contracts to Arbitrate Future Disputes.

Arbitration void under state law only if agreement to arbitrate all questions which may arise in execution of contract, both as to liability and loss. (193 Ga. App. 723, 389 S.E.2d 251). Enforceable if provision clear and limited to certain questions. (133 Ga. App. 83, 210 S.E.2d 34). *Note:* Federal Arbitration Act ("FAA"), 9 U.S.C.S. §2, preempting state provisions denying enforcement to agreements to arbitrate disputes "involving" interstate commerce, read broadly to reach all transactions "affecting" commerce; states may deny or limit enforceability only under generally applicable contract law principles, e.g., condemning fraud, duress or unconscionability. (513 U.S. 265, 115 S.Ct. 834, 130 L.Ed.2d 753). Enumerated Georgia exceptions to enforceability and limitations on enforcement of agreements to arbitrate medical malpractice claims therefore presumptively ineffective. But see 218 Ga. App. 51, 459 S.E.2d 422 (1995) and 236 Ga. App. 427, 512 S.E.2d 323. On other hand, to extent that FAA, despite GAC, permits enforcement of agreements to arbitrate contained in collective bargaining agreements, federal statutory policies may deny enforcement where dispute concerns federal statutory discrimination claim. (415 U.S. 36, 94 S.Ct. 1011, 39 L.Ed.2d 147; 117 F.3d 519). Federal law may also deny enforcement of agreements to arbitrate federal statutory discrimination claims made by individual job applicants as condition of employment, notwithstanding GAC. (134 F.3d 1054; 105 F.3d 1465).

Credentials of/Qualifications of/Standards for Arbitrators.

In court-annexed or -referred programs, arbitrators must be approved by and registered with Georgia Office of Dispute Resolution. (Supreme Court Uniform ADR Rules, Appendix B).

10 DOCUMENTS AND RECORDS

10.01 ACKNOWLEDGMENTS:

Acknowledgments not required for real estate instruments (see topic 10.04 Records, subhead Requisites for Recording), which are to be attested by two witnesses, one of whom must be attesting officer who affixes seal. When used, acknowledgments may be taken by following officers:

Within state: Judge of court of record (including municipal court), notary public, and, (within their own counties), magistrate, clerk or deputy clerk of superior court or of city court created by General Assembly. (O.C.G.A. 44-2-15, -16). Statutory fee, $2. (O.C.G.A. 45-17-11).

Outside state but within U.S.: Judge of court of record with genuine signature certified by clerk under seal of court, clerk of court of record under seal of court, or notary public or justice of peace with seal of office attached. If notary or justice of peace has no seal, his or her position must be certified by clerk of any court of record in county or city of his or her residence. No other authentication necessary. (O.C.G.A. 44-2-21).

Outside United States: consul or vice-consul of U.S. (O.C.G.A. 44-2-21).

Persons in or with U. S. Armed Forces.

As to notarial powers of officers in U. S. Armed Forces, see topic 10.03 Notaries Public.

Disqualification.

Persons having personal or pecuniary interest in instrument are disqualified. (138 Ga. 258, 75 S.E. 248). However, bank employees, stockholders, directors, and officers who are notaries may sign as official witness or take acknowledgments of instruments to which bank is party if notary is not party to instrument or bank representative with respect thereto. (O.C.G.A. 45-17-12).

General Requirement as to Taking: Not settled whether attesting witnesses must actually be present at time of execution. Best practice is to assure attesting witnesses' presence at time of execution. (87 Ga. 217, 13 S.E. 509; 132 Ga. 648, 64 S.E. 800).

General Requirements of Certificate.

No particular style or form required. Attestation or acknowledgment by consul or vice-consul of U.S., or judge of court of record, notary public, magistrate or clerks of court must have seal affixed. (O.C.G.A. 44-2-21). Notarial seal must be affixed (by embossment or rubber or other type of stamp) showing notary's name, state and county of appointment and words “Notary Public.” (O.C.G.A. 45-17-6). Date of notarial act required, except for real estate instruments. (O.C.G.A. 45-17-8.1). Best practice is to require seal, statement of jurisdiction and date of expiration of commission.

Effect of Acknowledgment.

Acknowledgment or attestation is required for deeds, mortgages and certain other instruments to be recorded (O.C.G.A. 44-2-14,. 44-2-15; see topic 10.04 Records), and deed to realty must be attested by two witnesses before it can be recorded (O.C.G.A. 44-5-30, 44-2-21). Instrument conclusively presumed executed in state and county where acknowledging officer is authorized to act. (O.C.G.A. 44-2-17,. 44-2-21). Acknowledgment or attestation not conclusive of facts certified therein. May be rebutted. (87 Ga. 217, 13 S.E. 509).

Proof by Subscribing Witnesses.

Where deed is signed by two witnesses, neither of whom is authorized officer, it may be proved for record by affidavit of either of such witnesses, before officer authorized to attest or take acknowledgment of such deed pursuant to O.C.G.A. 44-2-15. (O.C.G.A. 44-2-18).

If both subscribing witnesses are dead or insane, or have moved from state, or are otherwise incapacitated to make affidavit, affidavit of third person as to such incapacity and genuineness of handwriting of subscribing witnesses is sufficient to admit deed to record. (O.C.G.A. 44-2-19).

Alternative to Acknowledgment or Proof.

No statutory provision.

Authentication.

Except as indicated above, no authentication is needed with respect to acknowledgment designed for use within state. For authentication of acts, Georgia notaries public must have seal of office. (O.C.G.A. 45-17-6). Acknowledgment for use outside state may be authenticated by certificate of authority from appointing clerk of superior court or Georgia Superior Court Clerk's Cooperative Authority. Fee: $2. (O.C.G.A. 45-17-19[a])

Forms.

No forms are prescribed. The following may be used:

Forms

Attestation: Signed, sealed and delivered in the presence of (Official signature of officer) . . . . (L. S.)

Acknowledgment:

State of Georgia, County of . . . . ss.

I, A. B., a (state officer) residing in the county and state aforesaid, do certify that C. D., who is personally to me known, this day appeared before me personally and did acknowledge that he or she did sign, seal and deliver the foregoing deed (or instrument) of his or her own free will and accord, for the purposes therein named and expressed.

In witness whereof, I have hereunto set my hand and official seal, this . . . . day of . . . . 20. . . . .

Proof by Witness:

State of . . . ., County of . . . . ss.

Before me (name and title) personally came C. D., to me known to be the individual whose signature affixed to the foregoing deed as one of the witnesses thereto, who, being sworn, says that he (or she) was present at the time when said deed was executed; that he (or she) saw the same signed, sealed and delivered by A. B., whose signature is thereto affixed as grantor; that E. F., the other subscribing witness thereto, was likewise present at said time and witnessed said execution of said deed, and that he (or she), the said C. D., and the said E. F. then and there signed the same as attesting witnesses.

(Signed) C. D.

Sworn to and subscribed before me this . . . . day of . . . ., 20. . . . .

. . . . (Signature and title of officer).

Validating Acts.

If, subsequent to its execution, any recordable instrument is acknowledged before authorized officer, that fact certified on deed by such officer shall entitle it to be recorded. (O.C.G.A. 44-2-16).

10.02 AFFIDAVITS:

May be made before following officers:

Within state: a notary public, magistrate, judge of court of law, or any other attesting officer of state or county where oath is made who is authorized by law to administer oaths. Official attestation of officer before whom oath or affidavit made prima facie evidence of proper authentication. (O.C.G.A. 9-10-113). Oath cannot be administered telephonically. (218 Ga. App. 477, 462 S.E.2d 172).

Without state: notary public, magistrate, judge of court, or any officer authorized to administer oaths in state or county where made. Official attestation is prima facie evidence of proper authentication. (O.C.G.A. 9-10-113).

Outside United States.

See topic 10.01 Acknowledgments.

Persons in or with U.S. Armed Forces.

See topic 10.03 Notaries Public.

Disqualification.

See topic 10.01 Acknowledgments.

General Requirements of Jurat.

See topic 10.01 Acknowledgments.

Authentication.

Notary's seal is sufficient authentication. (136 Ga. 241, 71 S.E. 162). Official character of other attesting officers must be authenticated by proper certificate. (121 Ga. 421, 49 S.E. 297).

Recordation of affidavit reciting facts of conveyance of land—see topic 10.04 Records.

Use of Affidavit.

See category 5 Civil Actions and Procedure, topic 5.18 Pleading.

Alternative to Affidavit.

No statutory provision.

Form of Jurat.

Form

Sworn to and subscribed before me this the . . . . . day of . . . . . ., 20. . .

. . . ., Notary

10.03 NOTARIES PUBLIC:

Qualification.

Notaries public are appointed by clerks of the Superior Court. (O.C.G.A. 45-17-1.1). Oath, but no bond required. (O.C.G.A. 45-17-3). Applicant must be at least 18 and able to read and write English. (O.C.G.A. 45-17-2). Except for special provisions for persons resident in bordering state with business or employment in Georgia (O.C.G.A. 45-17-7), applicant must also be resident of state and county from which appointed (O.C.G.A. 45-17-2). Statute specifies application information (O.C.G.A. 45-17-2.1), and grounds for denial (O.C.G.A. 45-17-2.3).

Authentication.

See topic 10.01 Acknowledgments.

Seal.

Must provide seal for authentication of notarial acts (scrawl not sufficient). (O.C.G.A. 45-17-6).

Powers and Duties.

Witness or attest signature or execution of deeds and other written instruments, take acknowledgments, administer oaths and affirmations in all matters incident to their commercial duties and other oaths and affirmations not required to be administered by other particular officers, witness affidavits upon oath or affirmation, take verifications upon oath or affirmation, make certified copies of original documents which are neither public documents nor publicly recorded documents for which certified copies are available from official source, and perform other acts authorized to perform by other laws of State of Georgia. (O.C.G.A. 45-17-8).

Not lawful for notary public to issue attachments or garnishments or approve bonds for purpose of issuing attachments or garnishments or issue summons in dispossessory case, but may attest affidavit in attachment, garnishment or dispossessory action. (O.C.G.A. 45-17-10).

Not obligated to perform notarial act for transaction known or suspected to be illegal, false or deceptive, for person being coerced or whose demeanor causes compelling doubts regarding person's knowledge of consequences of transaction, or in situation which compromises notary's impartiality, such as where disqualified. (O.C.G.A. 45-17-8[b]). Notary disqualified when signer of document to be notarized or party to document or transaction. (O.C.G.A. 45-17-8[c]). Must not execute notarial certificate containing statement known by notary to be false nor act with intent to deceive or defraud. (O.C.G.A. 45-17-8[d]). Must confirm identity of signer, oath taker or affirmant based on personal knowledge or satisfactory evidence. (O.C.G.A. 45-17-8[e]). Signature or certification by notary not evidence that notary had knowledge of contents of document. (O.C.G.A. 45-17-8[f]).

Expiration of Commissions.

Date of expiration of commission need not be stated.

Territorial Extent of Powers.

Notary public may perform notarial acts in any county of state. (O.C.G.A. 45-17-9).

Fees.

Regulated by statute. (O.C.G.A. 45-17-11).

Commissioners of Deeds.

No provision.

Officers of U.S. Armed Forces are given powers to perform notarial acts for members of U.S. Armed Forces, and merchant seamen and certain other persons outside U.S. (O.C.G.A. 45-17-31).

10.04 RECORDS:

Uniform Commercial Code.

Adopted. (O.C.G.A. tit. 11).

Clerk of superior court has charge of all records relating to property.

Recordable Instruments and Place of Recording.

Deeds, options to purchase land (O.C.G.A. 44-2-2), plats and maps (O.C.G.A. 15-6-67), affidavits showing facts affecting title to land (O.C.G.A. 44-2-20), mortgages, deeds to secure debt, trust deeds (O.C.G.A. 44-14-35), bills of sale, conditional bills of sale, bonds for title, chattel mortgages, leases, usufructs (O.C.G.A. 44-2-9), petitions in bankruptcy with schedules omitted, decrees of adjudication, orders approving trustee's bond (O.C.G.A. 44-14-590), Federal tax liens (O.C.G.A. 44-14-571), notice of settlement which conveys legal or equitable title to real estate (O.C.G.A. 44-2-30) and all lien claims should be filed for record with clerk of superior court; in case of realty in county where land situated (see categories 20 Mortgages, topic Mortgages of Real Property; Property, topic Deeds); in case of personalty, in county of owner's or mortgagor's residence, or in county where personalty located (see category Mortgages, topic Chattel Mortgages). *For list of Counties and County Seats see first page for this state in Volume containing Practice Profiles Section.* Clerk required to keep docket for such filing, showing day and hour instruments filed. (O.C.G.A. 44-2-2). Under Uniform Real Property Electronic Recording Act electronic documents treated as original, electronic signatures acceptable (O.C.G.A. 44–2–35 to 44–2–39.2).

Liens and security interests on motor vehicles governed by special rules. See category 23 Transportation, topic 23.01 Motor Vehicles, subheads Liens and Security Interests. Official records of same are maintained by Revenue Commissioner. (O.C.G.A. 40-3-1 et seq.).

No judgment, decree or order or any writ of fieri facias of any court affects or becomes lien on property until recorded in office of clerk of superior court of county where property is located, and is entered in indexes of applicable records. (O.C.G.A. 9-12-86).

Requisites for Recording.

Attestation or acknowledgment required for any deed to realty or personalty, or any mortgage, security deed, bond for title or other recordable instrument. (O.C.G.A. 44-2-14). Instruments conveying real property interest require two witnesses. See category 21 Property, topic 21.06 Deeds, subhead Recording.

Filing Under Uniform Commercial Code: Place; Fees.

Proper place to file in order to perfect security interest under Art. 9 of Commercial Code with clerk of superior court of any county of state, unless collateral is as-extracted collateral, crops or timber to be cut or financing statement is fixture filing, in which case filing is in office designated for filing of record of mortgage on related real property. (O.C.G.A. 11-9-501).

Uniform fee for filing, indexing and furnishing filing data for original, amendment, partial release continuation or termination statement is $10 first page, $2 per page after first; for uncertified copy of any financing statement or assignment, 25¢ per page provided no assistance is required from clerk's office; if assistance is required then uncertified copies cost $1 per page. (O.C.G.A. 11-9-525; (O.C.G.A. 15-6-77). For current fee schedule see http://www.gaclerks.org/Association/Clerks/Default.aspx?CountyID=60 . In counties having population of 350,000 or more in unincorporated areas, fee for filing and indexing original financing or continuation statement is $5 first page, 50¢ per page after first. (O.C.G.A. 15-6-77.3).

Recording Fees.

Fee for recording deeds, affidavits, notices, releases and deed cancellations pertaining to real estate is usually $9.50 first page, $2 per page thereafter. (O.C.G.A. 15-6-77, 47-14-51). Fee for recording notices of liens affecting real estate and personal property, including notice filings for Uniform Commercial Code related real estate, tax liens, writs of fieri facias, notices of lis pendens and cancellation of liens is usually $4.50 first page, $2 per page thereafter. (O.C.G.A. 15-6-77, 47-14-51). For current fee schedule see http://www.gaclerks.org/Association/Clerks/Default.aspx?CountyID=60 .

Foreign Conveyances or Encumbrances.

To authorize recording of deed to realty executed out of state, it must be attested by or acknowledged before one of named officials, and attested to by two witnesses. (O.C.G.A. 44-2-21). Mortgages executed out of state may be acknowledged and attested in same manner as deeds. (O.C.G.A. 44-14-34).

Effect of Record.

Recording of instruments mentioned is necessary to charge persons other than parties thereto with notice thereof, except that mere possession of land is notice of occupants' rights (O.C.G.A. 44-5-169) other than exceptional rights not ordinarily implied from possession (30 Ga. App. 216, 117 S.E. 264).

Duration of Notice by Record.

The notice given by the filing for record of any mortgage, bill of sale to secure debt, retention of title contract or other security instrument creating a lien on, retaining title to, or conveying an interest in, personal property only, expires at the end of seven years from date of filing thereof for record. (O.C.G.A. 44-14-140). Record notice of deed to realty to secure debt expires after seven years from date of last payment stated in deed or from date of instrument if no maturity date stated, except when deed establishes perpetual or indefinite security interest, then record notice expires at later of (1) seven years after last payment stated in deed or (2) 20 years after date of instrument. (O.C.G.A. 44-14-80). Caveat, Uniform Commercial Code adopted.

Torrens Act.

A “Land Registration Act” for registering land titles is in force. Superior courts of counties in which land located have exclusive original jurisdiction of petitions and proceedings, which must conform to statutory requirements. (O.C.G.A. 44-2-60-84).

Transfer of decedent's title to real estate to his or her devisees or heirs may be evidenced as follows:

(a) In the case of a resident testator, the original will, together with the probate proceedings thereunder, and the qualification of the executor must be filed and recorded in the office of the ordinary of the county of testator's residence, and an executor's deed assenting to the vesting of the devise must be filed and recorded in office of clerk of superior court of county where land is located.

(b) In the case of a nonresident testator, copies of the will, probate thereof and the qualification of the executor, certified according to the Acts of Congress, and an executor's deed assenting to the vesting of the devise must be filed and recorded in office of clerk of the superior court of county where land is located.

(c) In the case of an intestate resident, administration proceedings must be had in the court of ordinary in the county of said intestate's residence, and deeds only under said administration are required to be recorded in the office of the clerk of the superior court of the county where the land lies.

(d) In case of an intestate nonresident, copies of all administration proceedings, certified according to the Acts of Congress, must be filed, and recorded in the office of the clerk of the superior court in the county where the land is located, together with any deeds executed in connection with said administration.

Change of name by individuals is permitted. Procedure is by verified petition to superior court of county of residence, publication, and hearing. (O.C.G.A. 19-12-1-4).

Vital Statistics.

Reports of births and deaths are filed with local registrar and state registrar of Department of Human Resources; reports of marriages, divorces and annulments are filed with State Registrar. (O.C.G.A. 31-10-1 et seq.). Certified copies of certificates or records available from state registrar or local custodian of vital records. (O.C.G.A. 31-10-26). Fee for each search or service and fee for each certified copy set by State Office of Vital Records or County Board. (O.C.G.A. 31-10-27). For fees and other information, contact Vital Records, Georgia Dept. of Human Resources, 2600 Skyland Dr. NE Atlanta, GA 30319; telephone: (404) 679-4702; email: phvitalrecords@ gdph.state.ga.us; website: http://health.state.ga.us/programs/vitalrecords/index.asp .

Establishing Birth Records.

Forms and instructions for obtaining delayed birth certificates may be obtained from local registrar. No charge for filing. Order of superior or probate court required to correct delayed birth certificate, to change year of birth, or to remove name of father from birth certificate on file. (O.C.G.A. 31-10-23).

10.05 SEALS:

Seal includes impression on paper itself, as well as impression on wax or wafer. With exception of official seal, scrawl or any mark intended as seal held as such. (O.C.G.A. 1-3-3).

Uniform Commercial Code.

Adopted. (O.C.G.A. tit. 11). See category 3 Business Regulation and Commerce, topic 3.09 Commercial Code.

Effect of Seal.

Seal imports consideration. (13 Ga. 502, 1853 Ga. LEXIS 119). But law with respect to sealed instruments does not apply to contract or offer relating to purchase or sale of goods. (O.C.G.A. 11-2-203). Effect of corporate seal. (O.C.G.A. 14-2-151).

10.06 TORRENS ACT:

See topic 10.04 Records.

10.07 VITAL STATISTICS:

See topic 10.04 Records.

11 EMPLOYMENT

11.01 EMPLOYER AND EMPLOYEE:

See topic 11.02 Labor Relations.

11.02 LABOR RELATIONS:

Employment contract exempting employer from liability for negligence void as against public policy. (O.C.G.A. 34-7-22).

Assumption of risk rule in force. (O.C.G.A. 34-7-23). Fellow servant rule also in force (O.C.G.A. 34-7-21), except that it is abolished in suits against railroad companies (O.C.G.A. 34-7-21).

Employer liable for tort of employee in course of employment (O.C.G.A. 51-2-2), unless employee exercises independent business judgment not subject to immediate direction and control of employer (O.C.G.A. 51-2-4). Employer liable for negligence of independent contractor where: (1) work inherently wrongful or such as to cause nuisance; (2) work inherently dangerous to others; (3) wrongful act is violation of duty imposed on employer by express contract; (4) wrongful act is violation of duty imposed by statute; (5) employer retained right to direct or control work or interfered and assumed control so that injury traceable to his or her interference; (6) employer ratifies unauthorized wrong of contractor. (O.C.G.A. 51-2-5).

Following ratification of amendment to Constitution of Georgia at 2010 general election statutory provisions allowing for enforcement of restrictive covenants in employment and commercial contracts restricting competition so long as restrictions are reasonable in time, geographic area and scope of prohibited activities becomes effective (O.C.G.A. 13–8–50 et seq.)

Commissioner of Labor supervises Department of Labor. (O.C.G.A. 34-2-3).

Hours of Labor.

No child under 16 years of age shall be permitted to work between 9 P.M. and 6 A.M. (or 5 A.M. in selling or delivering newspapers). (O.C.G.A. 39-2-3, -5, -6). No child under 16 may be employed for more than four hours on any day in which school attended by minor is in session, or more than eight hours on non-school days or more than 40 hours in any week, and such child may not be employed at all during hours school is in session, unless he or she has been excused from attendance or completed senior high school. (O.C.G.A. 39-2-4, -7). Restrictions do not apply to employment of minors in motion pictures, theatrical productions or other entertainment performances where consent of Labor Commissioner obtained. (O.C.G.A. 39-2-18).

Wages.

Must be paid in lawful U.S. money or checks, or by employee-authorized credit transfer to employee's bank account. Dates of payment may be determined by employer but must be so fixed as to divide month into at least two equal periods and each payment must be of full amount due for period for which such payment is made. Statute does not apply to farming, sawmill or turpentine industries, nor does it apply to officials, superintendents or other heads or subheads of departments who may be employed by month or year at stipulated salaries. (O.C.G.A. 34-7-2).

Under provisions of Georgia Minimum Wage Law, minimum wage of not less than $5.15 per hour must be paid by every employer except farm owner, sharecropper or land renter, employers with annual sales of $40,000 or less, or with five employees or less, or of domestic employees, or who are subject to federal minimum wage provisions. Nor do minimum wage provisions apply to employees whose compensation consists wholly or partially of gratuities; who are high school or college students; who are employed as newspaper carriers; or who are resident employees of nonprofit child-caring institutions, or long-term care facility serving children or mentally disabled adults, and who receive free board and lodging and annual cash basis compensation of at least $10,000. (O.C.G.A. 34-4-3). State minimum wage provisions of tit. 34, c. 4 also inapplicable to any employer subject to minimum wage provisions of any act of Congress that provides for a minimum wage greater than that provided for in O.C.G.A. 34-4-3. (O.C.G.A. 34-4-3[c]).

Suit for recovery of wages, overtime, damages and/or penalties accruing under laws respecting payment of wages and overtime must be commenced within two years after accrual of cause of action. (O.C.G.A. 9-3-22).

Where married employee is involuntarily hospitalized, spouse presently living with employee may demand employer pay all wages due directly to spouse and such wages paid are not subject to garnishment. (O.C.G.A. 29-5-12). Wages owing deceased employee up to $2,500 must be paid surviving spouse or minor children without administration and not subject to garnishment. (O.C.G.A. 34-7-4). (See also category 8 Debtor and Creditor, topic 8.09 Garnishment.) Employer must not discriminate on basis of sex by paying different wages for work requiring equal skill, effort and responsibility, and performed under similar working conditions except where payment made under: (1) seniority system; (2) merit system; (3) system based on quantity or quality of production; or (4) system creating wage differential on basis other than sex. (O.C.G.A. 34-5-3). Liability for violation limited to unpaid wages, reasonable attorney's fees not to exceed 25% of recovered wages, and court costs. (O.C.G.A. 34-5-5). Dispute under Title 34 subject to arbitration by employer-employee agreement. (O.C.G.A. 34-5-6). Civil action to recover wages must be brought within one year after cause of action arises. (O.C.G.A. 34-5-5).

Lien.

Laborers have general lien on all property of employer, and special lien on products of labor. These rank higher than any other lien except tax lien and special landlords lien on yearly crops; but are not valid against bona fide purchasers for value without notice until reduced to execution and levied. (O.C.G.A. 44-14-380, -382).

Discrimination.

Unlawful for private employer to discriminate on basis of sex (O.C.G.A. 34-5-1 et seq.), age between 40 and 70 (O.C.G.A. 34-1-2), handicap (O.C.G.A. 34-6A-1 et seq.) or for attendance at judicial proceeding in response to court order or process except where employee charged with crime (O.C.G.A. 34-1-3). Employer may require notice by employee of expected absence or delay. (O.C.G.A. 34-1-3[c]).

Child Labor.

No child under age of 12 may be employed or permitted to work in any gainful occupation at any time, except work in agriculture, domestic service in homes or employment by parent or in any other specific category described later in Act. (O.C.G.A. 39-2-9). Age restrictions do not apply to employment of minors in entertainment industry where consent of Labor Commissioner obtained. (O.C.G.A. 39-2-18). Minors 14 or older may work during school vacations for lawn care if covered by accident plan or worker's compensation and if possess certificate from school administrator. (O.C.G.A. 39-2-11.1).

Hazardous Work.

No child under age of 16 may be employed to work in or about any mill, factory, laundry, manufacturing establishment or workshop; in certain specified occupations designated as hazardous; or with certain machines and processes designated as hazardous. (O.C.G.A. 39-2-1, 2).

Employment Certificate.

No child between 12 and 16 years of age may be employed unless certificate showing that child is not less than 12 years of age and is physically fit to follow employment sought is issued by superintendent of schools in county or city where child resides or by private school administrator. (O.C.G.A. 39-2-11 to -14). Certificate shall not issue until child submits to superintendent certified copy of birth certificate and statement from employer that child could be employed immediately. Upon termination of employment of child between 12 and 16 years of age, employer, knowing of same, or if child fails to appear at work for 30 days, must, within five days, return employment certificate to authority issuing same, and thereafter new certificate must be issued prior to child's again being employed. (O.C.G.A. 39-2-13).

Penalty.

It is misdemeanor for any agent of firm or corporation or parent or guardian to violate state statutes on employment of minors. (O.C.G.A. 39-2-20). Superior court of any county in which violator does business may enjoin violator from employing minor. (O.C.G.A. 39-2-21).

Labor Unions.

Recognized by O.C.G.A. 34-6-20 to -27.

Agency Shop, Closed Shop, Union Shop.

Prohibited. (O.C.G.A. 34-6-21 to -24).

Check Off.

Employer cannot, without consent of employees, deduct from their pay fees or assessments owed by them to labor union. (O.C.G.A. 34-6-25 to -26). Injured person has remedy by injunction. (O.C.G.A. 34-6-27).

Labor Disputes.

Strikes are regulated and prohibited except after certain written notices. (34-6 et seq.). Strikes by state employees prohibited. (O.C.G.A. 45-19-2).

Picketing by one or more persons is illegal if accompanied by threats, obstruction of entrances, intimidation, force or interference with person, immediate family or physical property or by any threatened or actual interference with pursuit of lawful employment, in attempt to compel any person to strike or not strike. (O.C.G.A. 34-6-2, -6). Also unlawful for one or more by force, intimidation or threats to prevent or attempt to prevent any employer from lawfully engaging or continuing to engage in any proper business activity, from utilizing his or her property, or from buying, selling and/or transporting goods. (O.C.G.A. 34-6-4). Mass picketing prohibited. (O.C.G.A. 34-6-5). Superior courts are given jurisdiction to issue temporary restraining orders and injunctions requested by employers to prohibit unlawful violence or violent threats directed at employees at workplace. (O.C.G.A. 34-1-7).

Workers' Compensation Act.

O.C.G.A. tit. 34-9.

Act applies to employees of state, but does not apply to common carriers by railroad engaged in intrastate commerce, to employees whose employment is not in usual course of trade, business, occupation or profession of employer or not incidental thereto, to farm laborers or domestic servants or their employees (except employees of Department of Corrections who are engaged in farm and livestock operations [34-9-2(c)]); or to any person who buys and resells product, receiving no other compensation, under written contract of employment as independent contractor (O.C.G.A. 34-9-2); or to certain independent contract carriers who transport, assemble, deliver, or distribute printed materials and maintain incidental facilities or equipment for employer who publishes or distributes printed materials (O.C.G.A. 34-9-2); or to any person performing services as licensed real estate salesperson or associate broker who has written contract of employment providing that he or she shall perform all services as independent contractor, or to owner-operators of motor vehicles leased pursuant to O.C.G.A. 40-2-87 (O.C.G.A. 34-9-1[2]); or to any person, firm or private corporation, including any public service corporation, that has regularly in service less than three employees in same business within this state, unless such employees and their employers voluntarily elect to be bound (O.C.G.A. 34-9-2). Firefighters, law enforcement personnel, emergency medical and management personnel, civil defense agencies and rescue services covered by Act. (O.C.G.A. 34-9-1). President or others in management of corporation not employee for purposes of three employee test (154 Ga. App. 742, 269 S.E.2d

890), but corporate officers must elect to be exempt to avoid being counted for purposes of three employee test (178 Ga. App. 548, 343 S.E.2d 786). Corporate officers or members of limited liability company may elect to be exempt. (O.C.G.A. 34-9-1). Corporate officers or members of limited liability company who have elected exemption may revoke exemption. (O.C.G.A. 34-9-2.1). Sole proprietor or partner of business whose employees are eligible may elect to be included (O.C.G.A. 34-9-2.2), or may be covered by another employer (223 Ga. App. 133, 476 S.E.2d 772). Although co-employee tort immunity exists, immunity does not apply to company physicians sued for alleged tortious breach of conduct applicable to employee's profession. (O.C.G.A. 34-9-11; 184 Ga. App. 560, 362 S.E.2d 97). Compensation shall not be allowed for injury or death due to willful misconduct, including acts taken under influence of controlled substances; certain exceptions may be applicable. (O.C.G.A. 34-9-17). False representation defense is recognized. (259 Ga. 155, 378 S.E.2d 111).

Act provides for exclusive remedy to employees and excludes all other rights and remedies of employee, his or her personal representative, parents, dependents or next of kin on account of injury, loss of service, or death arising out of and in course of employment (O.C.G.A. 34-9-11); provides exclusive remedy for medical surgical hospital care for injured covered employees (O.C.G.A. 34-9-200 to -204); provides circumstances under which employer is responsible for modifications to employee's dwelling (O.C.G.A. 34-9-200.1; 223 Ga. App. 751, 478 S.E.2d 139); establishes rates of compensation for specified injuries and method of insuring payment of such compensation (O.C.G.A. 34-9-120 et seq.); creates and prescribes powers of State Board of Workmen's Compensation within Department of Labor for administration of law (O.C.G.A. 34-9-40 et seq.) and sets forth procedures for appeal from decision of Board to superior court (O.C.G.A. 34-9-105). Employer immunity provided under this code section extends to businesses using services of temporary help contracting firms or employee leasing companies when benefits required by this chapter are provided by either temporary help contracting firm, employee leasing company, or business using services of such firm or company. (O.C.G.A. 34-9-11). Employee of subcontractor cannot collect workmen's compensation from general contractor and also maintain tort action against same general contractor for same injury. Two prong test applied to determine if owner of property is statutory employer entitled to tort immunity under exclusive remedy provision of Act. (183 Ga. App. 632, 359 S.E.2d 700). Where employee recovers damages in lawsuit against person other than employer, and employer has compensated employee under this statute, employer is subrogated to employee's recovery to extent of compensation paid, but only if employer has compensated employee in full. (O.C.G.A. 34-9-11.1). Compensation laws of state where worker elects recovery control worker's rights against third parties. (209 Ga. App. 171, 433 S.E.2d 325). Where employee not covered by Act, statute of limitations for common law claims (O.C.G.A. 9-3-33) tolled during period employee submits to worker's compensation proceedings (196 Ga. App. 98, 395 S.E.2d 277).

Notice of accident must be given in person by employee or employee's representative, or in writing, as soon after accident as practicable, to employer, employer's agent, representative, foreman or employee's immediate superior. Employee is not entitled to any physicians' fees or compensation which accrued prior to giving of notice. No compensation is payable unless such notice is given within 30 days after accident, or within 30 days after death resulting from accident, unless employee was prevented from notifying by physical or mental incapacity or by fraud or deceit, or unless employer, employer's agent, representative, foreman or immediate superior has knowledge of the accident, or unless there is some other reasonable excuse and employer has not been prejudiced by delay. (O.C.G.A. 34-9-80). Actual knowledge of injury by accident arising out of and in course of employment satisfies notice requirement even though formal notice not given. (128 Ga. App. 352, 196 S.E.2d 693). Board shall publish notice of rights, benefits and obligations and distribute notice to employers and employees. (O.C.G.A. 34-9-81.1).

Filing of Claim.

Right to compensation is barred unless claim is filed with State Board of Workmen's Compensation within one year after accident, or if death results, within one year after death

(O.C.G.A. 34-9-82), except that if proceeding is against corporation whose charter has expired, but which is still doing business, one year limit does not apply in proceeding against persons operating under corporate name. Filing complete on receipt by Board and not on deposit in mail. (O.C.G.A. 34-9-86). In hearing before administrative law judge or other proceedings, employer that is nonresident at time of or after employee injury or death deemed to have appointed executive director of Board as agent for service of notice or process; notice by ordinary mail to nonresident's last known address suffices. (O.C.G.A. 34-9-102[j]). No limitation of time for giving notice or filing claim runs against person who is mentally incompetent or minor dependent, as long as he or she has no guardian or trustee. (O.C.G.A. 34-9-86). Claim based on asbestosis or asbestos exposure must be filed within one year from diagnosis or death of employee, whichever earlier. (O.C.G.A. 34-9-281). Board may assess penalty, payable to medical provider, of up to 20% of reasonable medical charges not paid within 30 days from date employer or carrier receives charges and Board-required reports in proper form.

Basis of Compensation.

(O.C.G.A. 34-9-203[c]). Compensation is computed on basis of average wage received by employee on date of accident, or if no such average wage of employee, on basis of wages of employees of same class. (O.C.G.A. 34-9-260). Compensation for total incapacity is 662/3% of average wage, not to exceed $500 nor be less than $50 per week. If employee's wages are less than $50, weekly benefit must equal average weekly wage. Period for which compensation must be paid cannot exceed 400 weeks, except in case of catastrophic injury for which compensation must be paid until there is change of condition for better. (O.C.G.A. 34-9-261). For temporary partial incapacity, compensation is 662/3% of difference between former and present wages, not to exceed $334 per week for maximum of 350 weeks. (O.C.G.A. 34-9-262). Certain specific injuries to body members resulting in permanent partial disability, compensated additionally according to American Medical Association's Guides to the Evaluation of Permanent Impairment. (O.C.G.A. 34-9-263). For death with no dependents, compensation is reasonable expenses of burial not to exceed $7,500. For death with dependents wholly dependent on employee for support, compensation is amount equal to compensation provided for total disability under O.C.G.A. 34-9-261. (O.C.G.A. 34-9-265). Yet total maximum compensation payable to surviving spouse who is sole dependent at time of and for one year after death of employee is $150,000. (O.C.G.A. 34-9-265[d]). For death resulting from intentional act of employer with specific intent to cause such injury, 20% penalty added to weekly benefits paid to dependents with maximum of $20,000. (O.C.G.A. 34-9-265[e]). All persons must show dependency to benefit under law. (246 Ga. 269, 271 S.E.2d 178). Spouses are conclusively presumed next of kin wholly dependent upon deceased employee, except if spouses were living separately for 90 or more days immediately before accident that resulted in deceased employee's death, in which case presumption is rebuttable. (O.C.G.A. 34-9-13[b][1]). Injury not previously accepted as catastrophic by employer and authorized treating physician is rebuttably presumed non-catastrophic for 130 weeks from date of injury, if treating physician has released employee to return to work with restrictions. (O.C.G.A. 34-9-200.1[g][6][A]). Employee with designated catastrophic injury, upon reaching eligible retirement (but not early retirement) age defined in 42 U.S.C.S. §416(1), subject to rebuttable presumption that injury no longer catastrophic. (O.C.G.A. 34-9-200.1[g][6][B]). Hearing will be held for all claims for compensation for injury or death. (O.C.G.A. 34-9-100). Claimant's refusal while receiving compensation to submit to medical examination requested and provided by employer, or obstruction of examination, authorizes Board to suspend compensation and forfeits compensation for period of refusal unless in Board's opinion circumstances justified refusal or obstruction. (O.C.G.A. 34-9-200[c]). Failure of employee or health care provider to include documents required by Board defense for employer or insurer failure to pay submitted charges within 30 days. (O.C.G.A. 34-9-203[c]). Employee refusing suitable employment forfeits all compensation except respecting injuries to body members resulting in permanent partial disability, as specified by O.C.G.A. 34-9-263. (O.C.G.A. 34-9-240[a]). Penalties and interest for failure timely to pay provider's charges when due, or timely to reimburse employee for those or mileage charges, are: 31-60 days after due: 10%; 61-90 days: 20%; and thereafter 20% plus 12% interest on sum of charges and penalties. (O.C.G.A. 34-9-

203[c][3]). Provider waives right to collect charges not submitted to employer or its insurer within year of date of service. (O.C.G.A. 34-9-203[c][4]). For compensation for economic change in condition, claimant must show that condition changed for worse; because of change claimant unable to locate suitable work with any employer; because of inability to work claimant has partial or total loss of income; inability to work proximately caused by injury. (141 Ga. App. 819, 234 S.E.2d 552). Upon Board ruling that claimant has had change in condition for better and resumed employment, claimant may be liable for repayment of compensation received after date of change. (146 Ga. App. 893, 247 S.E.2d 607). But parties may enter into compromise lump-sum settlement prorated over life expectancy of injured party at rate not to exceed maximum statutory weekly rate. Board lacks authority to amend, modify or review stipulated settlement, retaining authority solely to enforce any agreement resolving claim. (O.C.G.A. 34-9-15[c] and [b]).

Occupational Diseases.

Compensation is granted for certain occupational diseases. A medical board passes on medical questions pertaining to claims on account growing out of death or disability on account of such diseases. (O.C.G.A. 34-9-310 et seq.). Occupational disease defined. (O.C.G.A. 34-9-280 et seq.).

Attorney's Fees.

Board approval required for fees exceeding $100, and fees capped at maximum of 25% of claimant's award of weekly benefits or settlement. Costs and fees may be awarded against party that has prosecuted or defended proceeding without reasonable grounds. (O.C.G.A. 34-9-108).

Group Self-Insurance Funds.

Such funds are exempt from state and local premium taxes. (O.C.G.A. 34-9-171).

Rate of Insurance.

Insurer's basic rate for policies must not exceed Insurance Commissioner's approved rates. (O.C.G.A. 34-9-130.1). Insured certified by State Board of Workers' Compensation to have drug-free workplace program must be granted 7.5% reduction in premium for as long as insured maintains certificate of drug-free workplace. (O.C.G.A. 33-9-40.2, 34-9-413).

Employer's Liability Insurance.

Employer who accepts compensation provisions must insure compensation payments to his or her employees (O.C.G.A. 34-9-14, -120 to -134), except where employer provides proof of ability to pay employee directly (O.C.G.A. 34-9-121). If employer fails to insure and is insolvent, employee may sue for value of award notwithstanding exclusive remedy provision. (247 Ga. 71, 274 S.E.2d 327).

Employer's Liability Act.

See subhead Workers' Compensation Act, supra.

Unemployment Compensation.

Employment Security is governed by O.C.G.A. 34-8–1 et seq. Weekly benefit amount where total wages in yearly base period equal or exceed 150% of two highest quarter's wages, is sum of two highest base quarters divided by 42. Weekly benefit amount where 150% requirement not met is highest single quarter of base period wages divided by 21. Minimum weekly amount for benefit years beginning July 1, 2005 is $42, provided computed amount exceeds $26. Minimum weekly amount for benefit years beginning July 1, 2007 is $44, provided computed amount exceeds $26. Maximum weekly amount for claims filed on or after July 1, 2005, but before July 1, 2006 is $310; for claims filed on or after July 1, 2006, but before July 1, 2008, the maximum weekly benefit amount is $320; for claims filed on or after July 1, 2008, the maximum weekly benefit amount is $330. . Eligible individuals receive weekly benefit amount less gross earnings in excess of $50 payable for week for which benefits are claimed. (O.C.G.A. 34-8-21, 34-8-30, 34-8-193). Claimant refusing comparable but intermittent or temporary assignment without good cause not deemed unemployed, but may be deemed unemployed when no assignment or work is offered, except that employee of temporary help contracting firm, employee leasing company or professional employer organization who does not contact firm, company, or organization seeking reassignment upon completing assignment presumed to have voluntarily left employment without good cause, if employee has been advised in writing of that obligation. (O.C.G.A. 34-8-195).

Basic rates and tables for computing employer contributions subject to State-wide Reserve Ratio for funding unemployment compensation are found in O.C.G.A. 34-8-151, 34-8-155 and 34-8-156. Increases in employer's rate, specified in O.C.G.A. 34-8-156(d)(4)(B), are suspended during 2006 through 2009 unless State-wide Reserve Ratio is less than 1.25%, in which case Commissioner of Labor may increase overall rate up to 35%. (O.C.G.A. 34-8-156[d][4][B]).

Drug Free Public Work Force Act of 1990.

Act provides for suspension and/or termination of state employees upon conviction of drug offense. (O.C.G.A. 45-23-1 et seq.).

Random Drug Testing of State Employees.

None. Statute requiring such testing unconstitutional. (749 F. Supp. 1110). Statute requires agency heads to designate positions under their supervision for which drug testing is warranted. All applicants for such positions are to be tested thereafter. (Constitutionality of statute has not been addressed by courts.) (O.C.G.A. 45-20-110, -111).

Separation of State Employees.

Officers and employees covered by retirement benefits provisions of O.C.G.A. 47-2-123 may only be involuntarily separated pursuant to procedures set forth in O.C.G.A. 45-24-1 et seq.

11.03 WORKERS' COMPENSATION LAW:

See topic 11.02 Labor Relations.

12 ENVIRONMENT

12.01 ENVIRONMENTAL REGULATION:

Supervision of environmental matters including water pollution, air pollution, solid waste management, quality of public water supplies, ground water use, management of regulated substances stored in underground tanks, oil and gas drilling, and surface mining vested in Environmental Protection Division of Department of Natural Resources (2 Martin Luther King Jr. Drive, Suite 1152 East Tower, Atlanta, GA 30334; Internet address: http://www.dnr.state.ga/us/ or http://www.gaepd.org/). Protection of coastal marshlands is duty of Coastal Marshlands Protection Committee and Coastal Resources Division of Department of Natural Resources. Commissioner of Agriculture regulates pesticide use and application. (O.C.G.A. 2-7-93). Interstate Environment Compact (O.C.G.A. 12-10-40), Atlantic States Marine Fisheries Compact (O.C.G.A. 27-4-210) and Southeast Interstate Low-Level Radioactive Waste Management Compact (O.C.G.A. 12-8-120) adopted. Coastal Marshlands Protection Act (O.C.G.A. 12-5-280 et seq.), and Metropolitan River Protection Act (O.C.G.A. 12-5-440 et seq.) adopted. Georgia Hazardous Waste Management Act adopted concerning design, construction, operation and management of hazardous waste facilities in Georgia. (O.C.G.A. 12-8-60 et seq.). Georgia

Fertilizer Act of 1997 repealed Georgia Plant Food Act of 1989 and provides standards, requirements and fees for manufacturers and distributors of fertilizers and plant foods. (See O.C.G.A. 2-12-1 et seq.) Georgia Hazardous Site Response Act (O.C.G.A. 12-8-90 et seq.) requiring reporting and remediation of hazardous substance releases and requiring notations on deeds of affected properties adopted. Georgia Voluntary Remediation Program enacted to encourage voluntary remediation of properties where there has been releases of regulated substances into environment (O.C.G.A. 12–8–100 et seq.). Pollution Prevention Assistance Division created to provide voluntary guidelines for disposal and reduction of hazardous waste in Georgia. (O.C.G.A. 12-8-180 et seq.). Georgia Environmental Facilities Authority assists local governments in constructing, maintaining and financing environmental facilities. (O.C.G.A. 50-23-1 et seq.). Hazardous Site Reuse and Development Act limits liability of certain persons who purchase and return to usefulness property contaminated by release of hazardous substance. (O.C.G.A. 12-8-200 et seq.).

Prohibited Acts of Pollution.

It is unlawful to use any state waters for disposal of sewage, industrial waste, or other waste except in compliance with rules, regulations, orders and permits issued by Environmental Protection Division. (O.C.G.A. 12-5-29). Operation of public water supply system without permit is unlawful. (O.C.G.A. 12-5-191). Owners or operators of combined sewer overflows must obtain permit, and, upon request, submit plan to Environmental Protection Division to meet water purity standards. (O.C.G.A. 12-5-29.1 to -30.2). Unlawful to place, dump or dispose of contents of septic tank, waste water holding tank, grease trap or other such container into public storm or sanitary sewer pipeline without first obtaining written permission of owner of said storm or sewer pipeline. (O.C.G.A. 12-8-2). Unlawful for operator of public water supply systems to fail to comply with regulations concerning quality of public water supply; unlawful for operator to fail to notify public health agency, Environmental Protection Division, and local media if operator: (1) does not comply with water quality standards, (2) fails to perform required monitoring of system, (3) is subject to variance issued by Division, (4) is subject to exemption, or (5) fails to comply with requirements of variance or exemption. (O.C.G.A. 12-5-191, -184, -178). No person shall withdraw or use groundwater in excess of 100,000 gallons per day without permit from Division. With exception for solely agricultural water usage, permit application requires submission of water conservation plan approved by director. (O.C.G.A. 12-5-96). No person shall withdraw, divert, or impound state surface water in excess of 100,000 gallons per day (monthly average) without permit from Division, subject to these exceptions: (1) diversion for construction for transportation purposes of which does not reduce flow by more than 150,000 gallons per day (monthly average); (2) withdrawal or diversion for farm use upon timely submission of permit application; (3) construction impoundment, farm ponds or farm impoundments for sole purpose of fish, wildlife, or recreation; and (4) diversion that does not reduce flow of surface water at point where watercourse leaves person's property by more than 100,000 gallons per day (monthly average). (O.C.G.A. 12-5-31). Permit must be obtained for construction of dams (O.C.G.A. 12-5-376) and for construction or excavation of any type within designated major stream corridors in designated metropolitan areas (O.C.G.A. 12-5-444). Air Quality Control Act specifies powers and duties of Environmental Protection Division concerning regulation of air pollution. (O.C.G.A. 12-9-6). Except for limited exemptions (O.C.G.A. 12-8-30.10), handling of solid waste, except in conformity with all rules, regulations and orders of Environmental Protection Division is unlawful (O.C.G.A. 12-8-30.8). Persons owning or having control over oil or hazardous material who have knowledge of spill or release must notify Division immediately. (O.C.G.A. 12-14-3). Surface mining, except in accordance with rules, regulations, orders, and permits issued by Division of Environmental Protection, is unlawful. (O.C.G.A. 12-4-70 et seq.). No person may install underground storage tank for purposes of storing regulated substance unless tank meets performing standard established by Division. (O.C.G.A. 12-13-6). Certain restrictions have been imposed on transportation of waste by any person, firm, corporation, etc. pursuant to contract across county or state lines. (O.C.G.A. 36-1-16).

Unlawful acts under Georgia Pesticide Use and Application Act are specified in

O.C.G.A. 2-7-102; farmers, veterinarians, experimental research and persons subject to Structural Pest Control Act (O.C.G.A. 43-45-1) are exempt from Georgia Pesticide Use and Application Act (O.C.G.A. 2-7-112).

Enforcement.

Environmental Protection Division (O.C.G.A. 12-2-2) and Coastal Marshlands Protection Committee (O.C.G.A. 12-5-291) has authority to investigate any apparent violation of environmental acts under its supervision. Under Water Quality Control Act and Air Quality Control Act, Division has power to require owners of facilities discharging or emitting water or air pollutants to monitor, record and report discharge levels to authorities. (O.C.G.A. 12-5-27, 12-9-5). Upon determination that any person is violating its rules, regulations, orders or permits, Division or Coastal Marshlands Protection Committee may issue order to bring about compliance; public water supply quality control (O.C.G.A. 12-5-185); air quality (O.C.G.A. 12-9-12); solid waste (O.C.G.A. 12-8-30); surface mining (O.C.G.A. 12-4-73); groundwater (O.C.G.A. 12-5-99). In emergency cases, Division may, without notice or hearing, issue emergency order requiring immediate compliance: water quality (O.C.G.A. 12-5-47); public water supply quality control (O.C.G.A. 12-5-187); solid waste (O.C.G.A. 12-8-30.1); groundwater (O.C.G.A. 12-5-102). Final orders of Division not appealed or affirmed on appeal may be filed with appropriate superior court that will render judgment in accordance therewith with same effect as any other judgment: water quality (O.C.G.A. 12-5-45); public water supply quality control (O.C.G.A. 12-5-189); air quality (O.C.G.A. 12-9-16); solid waste (O.C.G.A. 12-8-30.3); surface mining (O.C.G.A. 12-4-81); groundwater (O.C.G.A. 12-5-100). Division may obtain injunctive relief for: water quality violations (O.C.G.A. 12-5-48); groundwater use violations (O.C.G.A. 12-5-101); air quality violations (O.C.G.A. 12-9-12); solid waste disposal violations (O.C.G.A. 12-8-30.4); surface mining violations (O.C.G.A. 12-4-79); and hazardous waste violations (O.C.G.A. 12-8-72, -75). To prevent immediate public health hazard to public or community water supply, Division may obtain injunctive relief. (O.C.G.A. 12-5-188). Division may issue unilateral order to parties who have contributed to release of hazardous substances requiring cleanup. (O.C.G.A. 12-8-96). Division may expend funds from hazardous waste trust fund for remediation of site and seek recovery plus punitive damages against certain persons who contributed to release of substances. (O.C.G.A. 12-8-95, -96.1). Expenditure by division shall constitute debt to state giving rise to lien on said property. (O.C.G.A. 12-8-96). Commissioner of Agriculture may obtain injunctive relief for pesticide use or application violation. (O.C.G.A. 2-7-107). To insure safe collection of ionizing radiation, Director of Division may require posting of bond. (O.C.G.A. 31-13-7). Division has right to enter upon and inspect premises to determine compliance with Underground Storage Tank Act. (O.C.G.A. 12-13-8). Any person who owns underground storage tank governed by Underground Storage Tank Act must notify Division of current and/or prior use of tank, as well as when tank is taken out of operation. (O.C.G.A. 12-13-13). Common law rights of individuals and state to bring action under theory of nuisance are not altered by Water Quality Control Act (O.C.G.A. 12-5-46), or Air Quality Control Act (226 Ga. 480, 175 S.E.2d 847).

When any area of state is suffering from emergency period of water shortage, Director of Division of Environmental Protection may, after notice and hearing, order change, restriction, or outright suspension of permit for withdrawal, diversion, or impoundment of state's surface water. (O.C.G.A. 12-5-31).

Civil Penalties and Damages.

Civil penalties not to exceed $50,000 per day for each day violation continues may be imposed for violation of Water Quality Control Act (O.C.G.A. 12-5-52[a]) and no more than $100,000 per day for subsequent violation within 12 months, and not to exceed $25,000 per day under Air Quality Control Act (O.C.G.A. 12-9-23) and Hazardous Waste Management Act (O.C.G.A. 12-8-81). Civil penalties not to exceed $1,000 per violation and $500 per day of continued violation invoked by Surface Mining Act (O.C.G.A. 12-4-83), and Groundwater Use Act (O.C.G.A. 12-5-106). Georgia Comprehensive Solid Waste Management Act (O.C.G.A. 12-8-

30.6), imposes civil penalties not to exceed $1,000 per violation and $500 per day of continued violation committed by public authority or city or county government and civil penalties not to exceed $25,000 per day of continued violation committed by any other entity. Negligent violation or violation of permit under any provision of Safe Drinking Water Act makes available penalties of $1,000 per violation (maximum) plus $500 per day if violation continues for system serving less than 10,000 individuals, and not to exceed $1,000 per day for service of 10,000 or more. Penalties for willful violation of Act may not exceed $5,000 per day. (O.C.G.A. 12-5-192). Negligent or willful violation of Water Quality Control Act renders offender liable in damages to state and any political subdivision for all expenses and injuries occasioned by pollution. (O.C.G.A. 12-5-51). Failure to report spill or release of oil or hazardous materials can result in civil penalty of not more than $1,000 per day. (O.C.G.A. 12-14-4). Liens created pursuant to federal superfund legislation must be filed in office of clerk of superior court of county in which real property located. (O.C.G.A. 44-14-517). Director of Environmental Protection Division may issue order requiring compliance with Underground Storage Tank Act. (O.C.G.A. 12-13-14). Continued noncompliance with provisions of Underground Storage Tank Act can result in civil penalty of not more than $25,000 for each day of continued noncompliance. (O.C.G.A. 12-13-19[a]). Any person who fails to notify or submits false information to Division shall be subject to civil penalty not to exceed $10,000 for each tank for which notification not given or false information submitted. (O.C.G.A. 12-13-19[b]).

Criminal Sanctions.

Violation of Water Quality Control Act, failure to comply with court order issued thereunder, violation of requirements imposed in pre-treatment programs, or introduction into sewer systems or publicly-owned treatment works any pollutant or hazardous substance that causes or may cause personal damage or property damage or that causes such treatment works to violate any effluent limitation or permitted condition is misdemeanor punishable by fine of not less than $2,500 nor more than $25,000 per day of continued violation, or one years imprisonment, or both, or for subsequent violations fine of not more than $50,000 per day of continued violation or up to two years imprisonment, or both. (O.C.G.A. 12-5-53[a]). Falsification of statements and certification required by Water Quality Control Act or tampering with monitoring devices is felony punishable by fine of not more than $10,000 or imprisonment for not more than two years, or both, or for subsequent violations, fine of not more than $20,000 per day of violation or imprisonment for not more than four years or both. (O.C.G.A. 12-5-53[b]). Knowing violation of Water Quality Control Act, failure to comply with court order issued thereunder, violation of requirements imposed in pre-treatment programs, or introduction into sewer system or publicly owned treatment works of any pollutant or hazardous substance which causes or may reasonably be anticipated to cause personal injury or property damage or which causes treatment works to violate any effluent limitation or permit condition is felony punishable by fine of not less than $5,000 per day, not more than $50,000 per day of violation, or by imprisonment for not more than two years, or both, or, for subsequent violations fine of not more than $100,000 per day of violation or imprisonment for not more than four years or both. (O.C.G.A. 12-5-53[c]). Knowing violation of Water Quality Control Act or knowing failure to comply with court order issued thereunder, coupled with knowledge that at time another person is thereby placed in imminent danger of death or serious bodily injury is felony, punishable by fine of not more than $250,000, or imprisonment of not more than 15 years or both. Organizations, other than government entities, upon conviction of violation of this section, are subject to fine of not more than $1,000,000. (O.C.G.A. 12-5-53[d]). Determination of whether individual defendant knew conduct placed another in imminent danger of death or serious bodily injury turns on defendant's actual awareness or actual belief, and knowledge of another will not be attributed to defendant but circumstantial evidence may be used. (O.C.G.A. 12-5-53[d][1]). It is affirmative defense that conduct charged was consented to by person endangered and that danger and conduct charged were reasonably foreseeable hazards of occupation, business, profession, medical treatment, or medical or scientific experimentation conducted by professionally approved methods and that person endangered had been made aware of risks involved prior to giving consent. Such defense must be established by preponderance of evidence. (O.C.G.A. 12-5-53[d][2]). Serious bodily injury means bodily injury which involves substantial risk of death, unconsciousness, extreme physical pain, protracted and obvious disfigurement, or protracted loss or impairment of function of bodily member, organ, or mental faculty. (O.C.G.A. 12-5-53[d][4]). It is affirmative defense to subsections (a) and (c) that introduction of any pollutant or hazardous substance into sewer system or publicly-owned treatment was in compliance with all applicable federal, state, and local requirements which govern introduction of pollutant or hazardous substance into sewer or publicly-owned treatment works. (O.C.G.A. 12-5-53[e]). Violation of Air Quality Act (O.C.G.A. 12-9-24) subject to same fines and similar affirmative defenses. Violations of Surface Mining Act are misdemeanors punishable by fines of not less than $100 nor more than $1,000 per offense, each day of noncompliance after notice constituting separate offense. (O.C.G.A. 12-4-84). Violations of Groundwater Use Act (O.C.G.A. 12-5-107), Safe Drinking Water Act (O.C.G.A. 12-5-193), and Georgia Pesticide Use and Application Act (O.C.G.A. 2-7-114), are punishable as misdemeanors. Violations of Georgia Hazardous Waste Management Act are punishable by fine of not more than $50,000 for each day of violation or imprisonment not to exceed three years or both. For second violation, punishment is doubled. (O.C.G.A. 12-8-82). Knowing violation of Hazardous Waste Management Act with knowledge that another person is placed in imminent danger of death or serious bodily injury punishable by fine of not more than $250,000 or imprisonment for not less than one nor more than 15 years, or both. Organization convicted under Act is subject to fine of not more than $1,000,000. (O.C.G.A. 12-8-82). Violation of Solid Waste Management Act punishable by fine of not more than $50,000 for each day in violation or imprisonment for one to two years, or both. For second violation, maximum punishment is doubled. (O.C.G.A. 12-8-30.8).

Permits.

Environmental Protection Division has authority over issuance of permits for discharges into state waters (O.C.G.A. 12-5-29, 30), air emissions (O.C.G.A. 12-9-7), solid waste handling or disposal (O.C.G.A. 12-8-24), subsurface mining (O.C.G.A. 12-4-75), public water supply (O.C.G.A. 12-5-179), withdrawal, diversion, or impoundment of state surface waters (O.C.G.A. 12-5-31), and groundwater use (O.C.G.A. 12-5-96). Commissioner of Agriculture issues pesticide contractor's licenses and certified pesticide applicator and dealer licenses for “restricted use pesticides.” (O.C.G.A. 2-7-57, -99). Certificates for land-disturbing activity in designated major metropolitan stream corridors issued by local governing authority. (O.C.G.A. 12-5-444).

13 ESTATES AND TRUSTS

13.01 ADMINISTRATION:

See topic 13.10 Executors and Administrators.

13.02 ADVANCEMENTS:

See topic 13.07 Descent and Distribution.

13.03 ALLOWANCES:

See topic 13.10 Executors and Administrators.

13.04 [RESERVED]

13.05 DEATH:

Rebuttable presumption of death arises after four years. (O.C.G.A. 53-9-1[a]). When any domiciliary of state has been exposed to specific peril or tragedy resulting in probable death, death may be proved by clear and convincing evidence at any time after such exposure. (O.C.G.A. 53-9-1[d]). See category 21 Property, topic 21.01 Absentees.

Government Reports, etc.

Certain written findings or official written reports or records, or duly certified copies thereof by certain government officials that a person is dead, missing, missing in action, interned, captured or is alive must be received in any court or office as evidence of such. If in certain form, signature and authority of signor shall be prima facie evidence. (O.C.G.A. 24-4-47).

Certificate.

Official death certificates are obtainable from Division of Vital Statistics, Dept. Public Health, 2600 Skyland Dr., N.E., Atlanta, Georgia 30319, or from local custodians. Also available online at http://health.state.ga.us/programs/vitalrecords/death.asp. Fee $10 plus search fee which cannot exceed $10. Certificate to be filed with local registrar for each death which occurs in state. (O.C.G.A. 31-10-15, -17, -27).

Determination of Death.

Person may be pronounced dead if it is determined that such person has suffered either irreversible cessation of circulatory and respiratory functions, or irreversible cessation of brain function. This criterion is cumulative and does not prohibit use of other medically recognized criterion for determining death. No civil or criminal liability for good faith act in accordance with this provision. (O.C.G.A. 31-10-16).

Survivorship.

Uniform Simultaneous Death Act adopted. (O.C.G.A. 53-10-1 et seq.). Where there is insufficient evidence that death was not simultaneous, property of each person will be disposed of as if such person had survived. (O.C.G.A. 53-10-2). Beneficiary whose interest is contingent on surviving third person is deemed not to have survived where there is insufficient evidence of order of death. If there are two or more deceased persons who would have been entitled to property on surviving others, property is divided into shares. (O.C.G.A. 53-10-3). Similar rules apply to property held jointly with right of survivorship. (O.C.G.A. 53-10-4).

Actions for Death.

Surviving spouse or if no surviving spouse, children may recover for death of spouse or parent. (O.C.G.A. 51-4-2). Recovery by surviving spouse subject to law of descents. (O.C.G.A. 51-4-2). Under certain circumstances, minor child may bring wrongful death action even though there is surviving spouse, if surviving spouse abandons or otherwise leaves minor without adequate remedy at law. (207 Ga. App. 808, 429 S.E.2d 307). Parents, including those divorced, separated, or living apart, may recover for death of child leaving no spouse or child; illegitimacy does not bar recovery. (O.C.G.A. 19-7-1). In case of death of person entitled to sue, action survives to others entitled. (O.C.G.A. 51-4-2). Recovery measured by full value of decedent's life. (O.C.G.A. 51-4-2, 3). If no person entitled to recover, executor or administrator may recover for benefit of next of kin. (O.C.G.A. 51-4-5). In case of death of railroad employee action must be brought by executor or administrator if one appointed, for benefit of persons mentioned above. If no executor or administrator, persons mentioned above may sue. (O.C.G.A. 34-7-41). Action for death of husband, wife, parent or child must be brought within two years. (O.C.G.A. 9-3-33). Right of action under wrongful death statute accrues at time of victim's death, not at time injuries inflicted. (232 Ga. 747, 208 S.E.2d 838). There is no statutory limitation of amount which may be awarded.

Where death results from a crime or from criminal or other negligence, the personal representative of the deceased may recover for funeral, medical, and other necessary expenses resulting from the injury and death of the deceased. (O.C.G.A. 51-4-5).

Survival of Tort Actions.

Federal Rules effective. (O.C.G.A. 9-11-25, et seq.). Motion for substitution must be made within 180 days after death is suggested on record.

Uniform Anatomical Gift Act.

Adopted. (O.C.G.A. 44-5-140 et seq.).

See topic 13.16 Wills, subhead Living Wills.

13.06 DECEDENTS' ESTATES:

See topics 13.07 Descent and Distribution, Executors and Administrators, Wills; category 8 Debtor and Creditor, topic 8.06 Exemptions.

13.07 DESCENT AND DISTRIBUTION:

See also topic 13.10 Executors and Administrators.

Note: O.C.G.A. tit. 53 has been amended effective Jan. 1, 1998, regardless of whether decedent dies before or after that date provided that no vested rights of title, year's support, succession or inheritance shall be impaired. This section reflects those changes. Earlier digests should be consulted regarding prior law.

Subject to rights of surviving spouse (see subhead Surviving Spouse, infra), realty descends and personalty is distributed according to same rules of inheritance, which are as follows: (1) Children stand in first degree from decedent and inherit equally, accounting for advancements. Issue of deceased children stand in place of their parents and take per stirpes; (2) parents stand next in degree and share equally; (3) siblings stand next in degree and share equally, with descendants of any deceased sibling taking per stirpes, except that if there are no siblings, nieces and nephews share equally and their descendants take per stirpes; (4) grandmothers and grandfathers stand next in degree; (5) uncles and aunts stand next in degree with children of deceased uncle or aunt inheriting in place of their parent except that if there are no aunts or uncles, first cousins share equally; (6) more remote degrees of kinship shall be determined by counting steps from claimant to closest common ancestor and from said ancestor to intestate, sum of two chains being degree of kinship. (O.C.G.A. 53-2-1).

Uniform Probate Code.

Not adopted, but has influenced new Probate Code.

Year's Support.

Only award resembling dower, curtesy, or elective share in Georgia. Awarded to spouse and minor children under age 18 at time of application, who must be alive and unmarried at time of application, which must be filed within 24 months of date of decedent's death. Separate awards may be made. If separate awards are not made, spouse has equivalent of life estate with power to include corpus for support, remainder to children, in property awarded. Tax benefits are available. (O.C.G.A. 53-3-1 to -13).

Surviving spouse is sole heir if no children or descendants of children are left. Where there are surviving children or representatives of deceased children, surviving spouse shall take equally with children, with descendants of deceased child taking that child's share, per stirpes, except that spouse's portion shall not be less than one-third share. (O.C.G.A. 53-2-1[b][1]).

Half-blood (on both paternal and maternal sides) inherit equally with whole blood. (O.C.G.A. 53-2-1[a][2]).

Posthumous children inherit as though born in decedent's lifetime, provided they were conceived during decedent's life, were born within ten months after decedent's death and survived more than 120 hours after birth. (O.C.G.A. 53-2-1[b][1]).

Illegitimates inherit from and through mother, brothers and sisters by same mother, and other maternal kin. They may also inherit from and through father or paternal kin if paternity is established by court order, certain actions of father, or genetic testing. (O.C.G.A. 53-2-3). Maternal and paternal kin may inherit from and through illegitimate under similar circumstances. (O.C.G.A. 53-2-4).

Adopted Children.

See category 14 Family, topic 14.01 Adoption.

Determination of Heirship.

Any person interested in estate as distributor or possible heir may file petition in probate court or superior court of county in which administration is taking or would take place. After personal service on residents or publication on nonresidents and unknown parties, Court finds identity and quantity of interest of distributees. After time for appeal distribution in accordance with order may be made. (O.C.G.A. 53-2-20 to -26). If kinship of any party in interest to decedent is in controversy, Superior Court may order DNA testing and can order disinterment of decedent for purposes of such testing. (O.C.G.A. 53-2-27).

Advancements.

Money or property advanced to child must be accounted for in distribution of estate of parent. Gift to child during parent's lifetime is not advancement unless declared to be so by transferor within 30 days or by recipient at any time. (O.C.G.A. 53-1-10). See also topic 13.16 Wills, subhead Legacies.

Renunciation.

Beneficiary under will may renounce succession to property or interest by filing written instrument within nine months after date of transfer or, if later, date on which renouncing person reaches age 21. Instrument also may be filed in probate court when proceedings are pending or could be commenced, or in real estate records of county where real property is located. (O.C.G.A. 53-1-20).

Escheat.

On failure of heirs, property escheats with proceeds going to county educational fund. (O.C.G.A. 53-2-50, -51). If no heir appears within four years, personal representative petitions for determination that escheat has occurred. Notice to heirs is given by publication and persons claiming to be heirs have opportunity to appear.

Inheritance Denial.

Where individual feloniously and intentionally kills decedent or causes decedent to be killed, such individual may not take property interest from decedent and may not serve as fiduciary of decedent's estate or any trust created by decedent. (O.C.G.A. 53-1-5). Similar rule applies to life insurance proceeds. (O.C.G.A. 33-25-13). Amount forfeited passes as if killer had predeceased, and anti-lapse statute does not apply unless killer's descendants are also decedent's descendants. Also, intestate share of killer's descendants cannot exceed killer's forfeited share.

13.07A ESTATES: (in property)

See category 21 Property, topic 21.16 Real Property.

13.10 EXECUTORS AND ADMINISTRATORS:

Note: O.C.G.A. tit. 53 of Georgia Code has been amended effective Jan. 1, 1998, provided that no vested rights of title, year's support, succession or inheritance shall be impaired. This section reflects those changes. Earlier digests should be consulted regarding prior law.

Jurisdiction over administration is in probate court of county of decedent's residence, or of county where estate of nonresident decedent, or some portion thereof, is found. (O.C.G.A. 53-5-1, 53-6-21). Uniform Probate Code not adopted.

Preferences in Right to Administer.

Letters of administration generally: surviving spouse regardless of age, unless involved in action for divorce or separate maintenance with decedent at time of death; next of kin; if several next of kin of equal degree, then person selected in writing by majority in interest. Probate judge may use discretion if no choice made by next of kin. If surviving spouse or next of kin does not apply, creditor may be appointed. Persons entitled to serve or select may select disinterested person. (O.C.G.A. 53-6-24; 208 Ga. App. 411, 430 S.E.2d 794). Letters of administration with will annexed: person selected by all beneficiaries (other than spouse involved in action for divorce or separate maintenance at time of testator's death). Otherwise probate judge uses discretion, giving preference first to beneficiaries and then to those persons who could serve as administrator of intestate estate. (O.C.G.A. 53-6-14).

Eligibility and Competency.

Any individual may serve, regardless of citizenship or residency, as may banks and other persons qualified to act as fiduciary in Georgia. (O.C.G.A. 53-6-1). Certain foreign corporations may act, see category 3 Business Regulation and Commerce, topic 3.01 Banks and Banking, subhead Foreign Banks.

Appointment of Administrator.

Made after notice to heirs. Executor is issued letters testamentary when will has been admitted to probate. See topic 13.16 Wills, subhead Probate.

No formal words in will necessary for nomination of executor, but any expression of confidence and desire that person named carry out testator's wishes sufficient. (O.C.G.A. 53-6-20).

Bond is not required except for intestate administrators and temporary administrators. Heirs may consent to relieve intestate administrator from bond requirements. (O.C.G.A. 53-6-50). Probate judge has discretion to require bond in any particular case. (O.C.G.A. 53-6-53).

Removal.

Executor or administrator may be removed for breach of fiduciary duty (O.C.G.A. 53-7-54) or other good cause (O.C.G.A. 53-7-55).

Temporary Administration.

On unrepresented estate may be granted by probate judge at any time, for purpose of collecting and taking care of estate until permanent letters granted. No appeal from such order. (O.C.G.A. 53-6-30). Temporary administrator may sue to collect debts or personal property, and may collect and preserve estate assets and expend funds therefore with court approval after notice (O.C.G.A. 53-6-31), but may not disburse funds (82 Ga. 202, 8 S.E. 76). Temporary letters may be issued pending determination of validity of will unless letters testamentary have already been issued (i.e., because will was admitted to probate in “common form” as opposed to “solemn form”). See topic 13.16 Wills, subhead Probate. (O.C.G.A. 53-7-4).

Administration C. T. A. (with Will Annexed).

Granted where no executor nominated or none appears to qualify and execute will, and also temporarily where named executor is minor. (O.C.G.A. 53-6-13).

County Administrator.

Appointed by probate judge in each county to take charge of estates unrepresented and not likely to be represented. (O.C.G.A. 53-6-35).

Inventory and Appraisal.

Inventory must be returned within six months after qualification of representative. (O.C.G.A. 53-7-30). Annual returns are required. (O.C.G.A. 53-7-67). Testator by will may relieve executor from making inventory or returns if creditors and other persons (other than legatees) not injured thereby. (O.C.G.A. 53-7-33, -69). Heirs or beneficiaries may do same. (O.C.G.A. 53-7-32, -68).

General Powers and Duties.

Broad fiduciary powers may be incorporated into wills, trusts, or other instruments in writing by reference. (O.C.G.A. 53-12-232). Same powers may be granted to administrator if all heirs or beneficiaries consent, but in such case, citation and publication may not be waived. (O.C.G.A. 53-7-1).

Notice of Appointment.

See subhead Appointment of Administrators, supra. See also topic 13.16 Wills, subhead Probate.

Notice to Creditors.

Within 60 days from date of qualification, personal representative must give four weeks notice by advertisement in official newspaper of county where administration was granted, for creditors of estate to render account of their claims. (O.C.G.A. 53-7-41).

Presentation of Claims.

Claims not presented to representative within three months from date of publication of last notice lose right to equal participation with claims of equal dignity paid before representative has notice of such unpresented claims, nor can such creditors hold administrator liable for misappropriation, but do have a claim on funds remaining with administrator, so long as no debts of higher dignity remain unpaid. (O.C.G.A. 53-7-41). Unmatured claims, secured claims and claims on which actions were pending when decedent died must be presented like other claims.

Proof of Claims.

No particular form is necessary. Verification is not required, but is advisable.

Illustrative Form (not official).—

Form

STATE OF . . . .

COUNTY OF . . . .

CLAIM OF . . . .,

A CREDITOR, AGAINST THE ESTATE OF . . . .

. . . .

(name of claimant)

The . . . . hereby files formal claim with the personal representative of the Estate of . . . . .for the amount of . . . ., said amount being the amount of principal and earned interest due on a certain promissory note which was executed by (decedent) . . . . , Deceased, payable to (claimant) . . . . ,dated . . . .

. . . .

By . . . .

. . . ., being duly sworn, says that he (or she) is an officer of . . . ., the Claimant in the above entitled claim, that he (or she) has read the foregoing Claim, and that the same is true of his own knowledge, except as to those matters and things herein stated upon information and belief, and as to those he (or she) verily believes them to be true.

. . . .

By . . . .

Sworn to and subscribed before me

this. . . . . day of . . . .

. . . .

Notary Public

Approval or Rejection of Claims.

Personal representative may compromise doubtful claims for or against estate or may assign to creditor, heir, or beneficiary for prosecution on behalf of estate. (O.C.G.A. 53-7-45).

Payment of Claims.

Debts should be paid, wholly or in part, at end of six months from appointment of representative. (O.C.G.A. 53-7-41). Statutes of limitation do not run during this six-month period, or during period from death until appointment of personal representative, not to exceed five years. (O.C.G.A. 9-3-93; 250 Ga. 157, 296 S.E.2d 49; 229 Ga. 771, 195 S.E.2d 15). See subhead Actions Against Representative, infra. If only partial payment made, payments required to be pro rated among all debts of equal dignity. (O.C.G.A. 53-7-42). Unmatured claims are dealt with like matured claims and unliquidated, doubtful or contested claims may be compromised. (O.C.G.A. 53-7-45). If secured claims exceed security, creditor shares pro rata with other creditors as to excess.

Priorities.

Debts of a decedent are paid in following order of priority: (1) year's support for decedent's family; (2) funeral expenses; (3) necessary administration expenses; (4) expenses of last illness; (5) taxes or other debts due to state or U.S.; (6) judgments, mortgages and other liens created during decedent's lifetime, according to their priority of lien, but mortgages and liens on specific property are preferred only to extent of such property; and (7) all other claims. (O.C.G.A. 53-7-40). Priority of federal claims under this statute subject to federal law.

Sales.

Personal representative has broad powers of sale but many sales require court approval. (O.C.G.A. 53-8-10 to -15). Rules do not apply if private sales or sales of realty are authorized in will, including by reference to O.C.G.A. 53-12-232, or when personal representative has been granted powers described in O.C.G.A. 53-12-232 with consent of all heirs or beneficiaries. (O.C.G.A. 53-7-1).

Investments Regulated.

(O.C.G.A. 53-8-2 to -8). In managing property for benefit of another, personal representative must exercise judgment and care, under circumstances then prevailing, that prudent persons exercise in management of their own affairs, considering probable income as well as safety of corpus. Personal representative is authorized to acquire and retain every kind of property and investment. Within limitations of such standard, personal representative may retain property properly acquired, without limitation as to time and without regard to its suitability for original purchase. (O.C.G.A. 53-8-1).

Corporate fiduciary may retain property which decedent owned at death including stock or other security of its own issue (O.C.G.A. 53-8-5) and any securities held may be registered in name of nominee without mention of fiduciary relationship in instrument evidencing such securities or on books of issuer. (O.C.G.A. 53-12-300).

Actions Against Representative.

May not be brought for six months after qualification. (O.C.G.A. 53-7-42). Where action against decedent was pending at time of death, representative may be substituted and proceedings suspended for the six-month period. (O.C.G.A. 9-2-40). See also subhead Payment of Claims, supra.

Allowances.

See topic 13.07 Descent and Distribution, subhead Year's Support.

Division of Property in Kind.

Intestate estate may distribute property in kind but if not pro rata consent of heirs or order of probate court is required. (O.C.G.A. 53-2-30). Such distribution may also be authorized by will, including by reference to O.C.G.A. 53-12-232, or when administrator has been granted powers in O.C.G.A. 53-12-232 with consent of all heirs.

Accounting and Settlement.

Governed generally by O.C.G.A. 53-7-60 et seq. Any interested distributee or legatee may compel administrator or executor to submit to accounting before probate judge after six months following grant of administration, or administrator or executor may cite all distributees to be present at settlement of accounts by judge. Judge may grant additional time to settle estate. Such settlement conclusive on administrator or executor and on all distributees who receive notice of hearing. (O.C.G.A. 53-7-62). Action for settlement available even if administrator or executor not required to give bond or make inventory or returns. Discharge obtainable by petition on which citation must be published one time in newspaper in which county advertisements are published. (O.C.G.A. 53-7-50).

Consent Settlement.

No provision for such settlements.

Distribution.

After payment of debts and expenses, balance distributed according to law. See topics 13.07 Descent and Distribution; 13.16 Wills, subhead Legacies.

Distribution if Distributee Abroad.

No special provisions except for “missing persons”. (O.C.G.A. 53-9-10).

Compensation.

Executors and administrators allowed commissions of 2½% on money received and 2½% on money paid out. Whenever any portion of dividends, interest or rents payable to an administrator or executor are required by law of the United States or other governmental unit to be withheld by person paying same for income tax purposes, amounts so withheld are deemed to have been collected by administrator or executor. For wills executed and administration begun on or after Mar. 28, 1988, unless otherwise specifically provided by will, executor or administrator is entitled to receive commissions on debts, legacies, and distributive shares paid to himself or herself in same manner as commissions to which he or she would be entitled under terms of will or applicable law on such items paid to others. If more than one executor or administrator, division of commissions allowed them shall be according to services rendered by each. On property delivered in kind, probate judge may allow reasonable fee not exceeding 3% of value. Executors and administrators are also allowed extra compensation for extraordinary services and reasonable expenses of intercounty travel, surety bond premium, and necessary agents. (O.C.G.A. 53-6-60).

Testator and executor may agree by contract in writing on executor's compensation which shall be binding upon estate and executor. (O.C.G.A. 53-6-60).

Foreign and Ancillary Administration.

See topic 13.16 Wills, subheads Foreign Probated Wills and Foreign Executed Wills.

See also category 10 Documents and Records, topic 10.04 Records, subhead Transfer of Decedent's Title.

When Administration Unnecessary.

When person owning real or personal property located in state dies intestate, and no administrator has been appointed, any heir may file petition in probate court of county where real property is located if decedent was nonresident, or in county of residence, if decedent was resident. Procedure not available if any creditor objects unless objection is withdrawn. (O.C.G.A. 53-2-40 to -42).

Probate judge publishes notice to creditors and, in absence of written objection by creditors, if probate judge finds that all heirs are sui juris and estate owes no debts, judge shall enter order of no administration necessary.

No administration is necessary if only asset of estate is federal or state tax refund if not over $2,500. (O.C.G.A. 53-1-6). Other property that may be transferred without formal probate or administration includes automobiles, bank accounts, and wages. (O.C.G.A. 40-3-34, 7-1-239, 7-1-230.1, 34-7-1).

Small Estates.

See subhead When Administration Unnecessary, supra.

Uniform Fiduciaries Act.

Not adopted.

Uniform Principal and Income Act.

Adopted with substantial revision. (O.C.G.A. 53-12-210 to -219).

Uniform Simplification of Fiduciary Security Transfers Act adopted but later repealed. (formerly at O.C.G.A. 53-12-320 to -330). See category 2 Business Organizations, topic 2.03 Corporations, subhead Uniform Simplification of Fiduciary Security Transfers Act.

Uniform Anatomical Gift Act.

Adopted. (O.C.G.A. 44-5-140 to -148).

See category 3 Business Regulation and Commerce, topic 3.01 Banks and Banking.

13.11 FIDUCIARIES:

See topics 13.10 Executors and Administrators, Trusts; category 14 Family, topic 14.08 Guardian and Ward.

13.12 INTESTACY:

See topic 13.07 Descent and Distribution.

13.13 [RESERVED]

13.14 PROOF OF CLAIMS:

See topic 13.10 Executors and Administrators; category 5 Civil Actions and Procedure, topic 5.18 Pleading.

13.15 TRUSTS:

Kinds.

Express trusts (O.C.G.A. 53-12-2[2]); implied trusts (O.C.G.A. 53-12-2[3]); resulting trusts (O.C.G.A. 53-12-91); purchase money resulting trusts (O.C.G.A. 53-12-92); constructive trusts (O.C.G.A. 53-12-93); and charitable trusts (O.C.G.A. 53-12-111).

Business trust may be created by owners of property in Georgia or persons desiring to acquire beneficial ownership of such property. (O.C.G.A. 53-12-51).

Creation is by written instrument termed deed which must name and specify active duty for trustee or successors and provide for improvement, development and acquisition of property. Proper execution and recording of deed creates estate in such property, improvements thereon, and property to be acquired, for benefit of creators and others (whether or not sui juris) who contribute to improvement, development or acquisition, their assigns or transferees. Creation vests trustee and successors with legal title to original and subsequently acquired property and all other powers enumerated in deed, for duration of trust estate. (O.C.G.A. 53-12-51).

Duration of estate created is determined by which of permissible alternative procedures provided in deed, i.e., 25 year existence with permissible option to renew for additional 25 years; or, any period specified not extending beyond any number of lives in being and 21 years. (O.C.G.A. 53-12-51). Upon termination legal title to all property undisposed of vests in persons then beneficiaries in shares corresponding to their interest. (O.C.G.A. 53-12-58).

Certificates of beneficial interest issued to present and future beneficiaries by trustee and such certificates transferable as personalty in same manner as corporate stock. (O.C.G.A. 53-12-54). Deed may authorize trustee to repurchase or redeem outstanding certificates from corpus, income or both. (O.C.G.A. 53-12-56).

Recording of deed with clerk of superior court of county in which principal office of trust located required within 30 days of execution. For recording fees, see topic Records, subhead Recording Fees. Clerk returns two certified copies which, together with $5 fee, must be delivered to Secretary of State who attaches statutory certificate. Amendments to deed recorded in same manner for same fees. Annual return such as is required of corporation must be filed with Secretary of State. (O.C.G.A. 53-12-52, 57).

Business or tradename for estate may be established in deed and affairs of trust conducted under such name; may include word "trust" but not "trust company". (O.C.G.A. 53-12-53).

Powers and duties of trustee include sole and exclusive management of corpus with power to lease, encumber and sell same in accordance with deed provisions. (O.C.G.A. 53-12-55).

Death, resignation or removal of trustee does not terminate estate. Successor may be appointed as provided in deed and assumes full powers of original trustee over corpus. (O.C.G.A. 53-12-55).

Legal investments by trustee are property, as defined in O.C.G.A. 53-12-50 to -59, and any other investment authorized to trustee under law. Deed may further limit or expand powers of trustee with regard to investments including power to invest in property outside State. (O.C.G.A. 53-12-56).

Liabilities.

Trust estate subject to suit in same manner as corporation by serving trustee or, if trustee nonresident, by publication. Neither trustee nor beneficiaries personally or individually liable except insofar as officers and stockholders of private corporation can incur liability. Certificates subject to levy and sale under attachment or execution or other process as are shares of corporate stock and trustee must reveal beneficial ownership upon demand of levying officer. (O.C.G.A. 53-12-54).

Merger into Corporations.

Business trust may be merged into domestic corporation. (O.C.G.A. 53-12-59).

Taxation.

Net income of trusts and estates taxed. (O.C.G.A. 48-7-20). In lieu of personal exemption, estate may deduct $2,700, trust may deduct $1,350. (O.C.G.A. 48-7-26).

Creation.

No formal words necessary to create trust estate, only manifest intention that person other than grantee shall have benefit of property. (O.C.G.A. 53-12-21). Express trusts must be in writing. (O.C.G.A. 53-12-20). Implied trust is either resulting trust or constructive trust. (O.C.G.A. 53-12-90). Precatory or recommendatory words may create trust if they are sufficiently imperative to show intent to create trust. (O.C.G.A. 53-12-21).

Appointment of Trustee.

By grantor or by beneficiaries, if grantor confers power. (O.C.G.A. 53-12-170). Trust will not fail for want of trustee. (O.C.G.A. 53-12-6). Superior courts may appoint and remove trustees and successors. (O.C.G.A. 53-12-176).

Eligibility and Competency.

Trustee must accept trust by acts or words before appointment effective. (O.C.G.A. 53-12-171). Foreign bank or other corporation or national banking association in certain bordering states (Florida, Alabama, Tennessee, North Carolina, or South Carolina) may act as trustee (O.C.G.A. 53-12-390, 391) in Georgia without qualifying to do business in Georgia.

Qualification.

Bond not required unless trust instrument requires it or court orders it. (O.C.G.A. 53-12-174). Court may waive bond even if trust instrument requires it; court may require bond even if trust instrument waives it. If required to give bond, trustee may give bond in amount equal to value of estate (without regard to value of realty), if bond secured by licensed commercial surety authorized to do business in Ga. (O.C.G.A. 53-7-34, -35). Otherwise, bond of greater amount may be required.

Removal of Trustee.

Superior court judge has power to remove on petition by interested party. (O.C.G.A. 53-12-176).

General Powers and Duties of Trustees.

Trust instrument controls. (O.C.G.A. 53-12-190). Principal and income allocated as provided in trust or if no provision then under O.C.G.A. 53-12-210, 219.

Sales of trust property, unless expressly authorized by trust instrument, require court order after full notice to all interested parties. (O.C.G.A. 53-12-257). Where trustee transfers property improperly, purchaser takes subject to rights of beneficiary. (234 Ga. 320, 216 S.E.2d 83).

Net income of trust must be distributed at least as frequently as annually if instrument is silent as to time and frequency of distribution. (O.C.G.A. 53-12-190). Whenever trust income is used for benefit of a person whose support is the legal obligation of another, the legal obligation of the other person is reduced to the extent such income is actually used for such person's support. (O.C.G.A. 53-1-4).

Investments.

Certain enumerated investments are permissible even when trust instrument silent, but broader investment discretion is usually authorized in trust instrument. (O.C.G.A. 53-12-280 to -286). In managing property for benefit of another, trustee must exercise judgment and care, under circumstances then prevailing, that prudent person acting in like capacity and familiar with such matters will use to attain purposes of account. In making investment decisions, trustee may consider general economic conditions, anticipated tax consequences of investment, anticipated duration of account, and needs of its beneficiaries. Trustee is authorized to acquire and retain every kind of property and investment. Propriety of investment decision is to be determined by what trustee knew or should have known at time of decision about inherent nature and expected performance of investments, attributes of portfolio, general economy, and needs and objectives of beneficiaries of account as they existed at time of decision. Any determination of liability for investment performance shall consider not only performance of particular investment, but also performance of individual's portfolio as a whole. Within limitations of such standard, trustee may retain property properly acquired, without limitation as to time and without regard to its suitability for original purchase. (O.C.G.A. 53-12-287).

Securities in Name of Nominee.

Fiduciaries allowed to hold securities in name of nominee. (O.C.G.A. 53-12-300).

Bequests and Devises to Inter Vivos Trusts.

See topic 13.16 Wills.

Accounting.

Uniform Trustees' Accounting Act not adopted. Unless trust instrument provides otherwise, trustee accounts to beneficiaries at least annually, or court may order accounting. (O.C.G.A. 53-12-190).

Compensation.

Trustee entitled to receive compensation specified in trust instrument or separate fee agreement, if any, or if none, then same compensation as conservators receive for similar services. (O.C.G.A. 53-12-173).

Discharge.

Trustee may resign as trustee if provided by trust instrument or allowed by court. (O.C.G.A. 53-12-175).

Foreign Trustees as to Georgia Lands.

Such foreign trustees must designate Georgia agent for service concerning such trust, in absence of which designation Secretary of State is legal agent for service. (O.C.G.A. 53-12-370). Venue is county where subject lands lie. (O.C.G.A. 53-12-372).

Uniform Principal and Income Act.

Adopted with substantial revisions. (O.C.G.A. 53-12-210 to -219).

Accumulations.

See supra subhead Net Income; and topic Perpetuities.

Perpetuities.

See category 21 Property, topic 21.13 Perpetuities.

Gifts to Minors.

See category 14 Family, topic 14.10 Infants.

Uniform Fiduciaries Act.

Not adopted.

Uniform Simplification of Fiduciary Security Transfers Act adopted but later repealed. (formerly at O.C.G.A. 53-12-320-330). See subhead Uniform Simplification of Fiduciary

Security Transfers under topic Corporations.

Pour Over Trusts.

See topic 13.16 Wills, subhead Bequests and Devises to Inter Vivos Trusts.

13.16 WILLS:

Note: Title 53 of Georgia Code has been amended effective Jan. 1, 1998, provided that no vested rights of title, year's support, succession or inheritance shall be impaired. This section reflects those changes. Earlier digests should be consulted regarding prior law.

Testamentary Capacity.

Any person age 14 or over may make will unless laboring under some legal disability arising from lack of capacity or perfect liberty of action. (O.C.G.A. 53-4-10). People convicted of crime may make will.

Intellect necessary to constitute testamentary capacity that necessary to enable decided, rational desire as to disposition. (O.C.G.A. 53-4-11). Incapacity to contract may coexist with capacity to make will.

Testamentary Dispositions.

Testator may make any disposition of his or her property not inconsistent with law or contrary to public policy. May give entire estate to strangers to exclusion of spouse and children. (O.C.G.A. 53-4-1). See also topic 13.07 Descent and Distribution, subhead Year's Support; category 21 Property, topic 21.08 Dower. Contracts to make will must be express, in writing, and signed by obligor, and “joint” or “mutual” wills are no exception. (O.C.G.A. 53-4-30 to -33). Divorce decree may operate as contract to make will in favor of spouse. (266 Ga. 640, 468 S.E.2d 745). Cy pres doctrine applied in case of gift to charitable use. (O.C.G.A. 53-4-62). Cy pres inapplicable if there is reversionary clause or valid gift over. (238 Ga. 343, 232 S.E.2d 835).

Form.

No particular form is necessary; test is intention to convey interest accruing and having effect only after death. (O.C.G.A. 53-4-3).

Execution.

Will must be in writing, signed by testator or some one for him or her acting under his or her express directions and in his or her presence, and must be subscribed and attested in testator's presence by two or more competent witnesses. Testator must sign or acknowledge signature in presence of two witnesses. Witness may attest by mark provided he or she can swear to same, but one witness may not subscribe name of other, even in his or her presence and by his or her direction. (O.C.G.A. 53-4-20). Testator and witnesses do not need to sign on same page for will to be properly executed. (264 Ga. 84, 441 S.E.2d 248).

Filing.

Will may be filed in probate judge's office while maker in life. Fee $10. Will docketed publicly but filed in confidence except to person making it or attorney who also may withdraw it. Filed will may be revoked without withdrawal. (O.C.G.A. 15-9-37, -38, -60).

Holographic Wills.

Holographic will may constitute valid will, but not given any special consideration because of holographic nature.

Nuncupative Wills.

Not recognized. (Consult earlier digests for prior law.)

Mutual Wills.

Do not receive special treatment. Do not (without more) create contracts to make wills, and may be revoked like any other will. Revocation of one does not revoke other. Contract not to make or not to revoke will must be in writing. (O.C.G.A. 53-4-30 to -33).

Revocation.

Will is revoked in toto by subsequent marriage or birth of child unless will contains provision in contemplation of such event. (O.C.G.A. 53-4-48). In case of divorce, will is not revoked but spouse is treated as predeceased, and other special rules apply. (O.C.G.A. 53-4-49). Revocation by destruction accomplished only by concurrence of both intent to revoke and effective destruction. (213 Ga. 613; 100 S.E.2d 450). Obliteration or cancellation of material portion of will creates rebuttable presumption of intent to revoke. (O.C.G.A. 53-4-44). Destruction of one of several executed copies of will with requisite intent revokes will. (215 Ga. 345, 110 S.E.2d 772). Original of will must be carefully safeguarded because of presumed intent to revoke by destruction if original cannot be found. (O.C.G.A. 53-4-46). Will executed pursuant to valid contract may be revoked by subsequent will, but contract remains binding upon parties. (231 Ga. 145, 200 S.E.2d 725).

Revival.

Revocation of revoking will revives earlier, revoked will under some circumstances. Earlier will may also be republished. (O.C.G.A. 53-4-45).

Testamentary Gifts to Subscribing Witnesses.

Beneficiary may be competent witness to will, but devise or legacy to him or her is void unless there are at least two other subscribing witnesses who are not beneficiaries.

However, a testamentary gift to spouse of subscribing witness is valid, fact going only to credibility of witness. (O.C.G.A. 53-4-23).

Bequests and Devises to Inter Vivos Trusts.

Bequest or devise may be made to trustee of trust, if identified in will and terms set forth in instrument executed before or concurrent with execution of testator's will (including will of person predeceasing testator). Not invalid because trust is amendable or revocable, or because was amended after execution of will or after death of testator. Property bequeathed or devised becomes part of trust to which given, and is administered in accordance with its terms. Devise or bequest will lapse if trust terminated or revoked before testator's death but trust instrument as in effect when will executed may be incorporated by reference to protect against disallowed pourover. (O.C.G.A. 53-12-71). Trustee's duties and responsibilities limited in regard to such bequests or devises. (O.C.G.A. 53-12-72).

Testamentary Guardians.

See category 14 Family, topic 14.08 Guardian and Ward.

Probate.

Will is probated in probate court of county of testator's domicile at time of death. Rebuttable presumption that person living in nursing home at time of death is resident of county in which he or she resided immediately before entering home. (O.C.G.A. 53-5-1). Person having possession of will must file same with probate judge of proper county with reasonable promptness. (O.C.G.A. 53-5-5). Executor has right to offer will for probate and should do so with reasonable promptness; otherwise, any interested person may offer will for probate. (O.C.G.A. 53-5-2). Will must be offered within five years after petition for appointment of personal representative, order of year's support, or order of no administration necessary. (O.C.G.A. 53-5-3).

Probate is in either common or solemn form.

Probate in common form is on testimony of single subscribing witness and without notice. (O.C.G.A. 53-5-17). It is not immediately conclusive on any person interested in estate adversely to will, and if set aside, does not protect executor in any act except payment of debts—bona fide purchasers without notice from executor are protected if sale legally made. (O.C.G.A. 53-5-18). Application must give same information required for solemn form. (O.C.G.A. 53-5-17). Order to probate will in common form may be granted by probate court at any time. (O.C.G.A. 53-5-18). Such probate becomes conclusive after four years (seven years for will probated before July 1, 1984, but no later than July 1, 1988) on all parties except minor heirs who interpose caveat within four years after attaining majority, and can be set aside only so far as to let in rights of such minors as in case of intestacy. (O.C.G.A. 53-5-19).

Probate in solemn form is proof of will, after due notice to all heirs at law and propounders and beneficiaries under any other purported will of testator as to which probate proceedings are pending in Georgia upon testimony of all witnesses living and within state, or by proof of signatures of testator and of dead or unavailable witnesses. Only one witness required to prove will for probate in solemn form if no caveat is filed. (O.C.G.A. 53-5-21). Sole issue on application for probate in solemn form is validity of paper as last will and testament. (235 Ga. 607, 221 S.E.2d 31). Parties interested and residing in state must have at least ten days notice by personal service before term of court at which probate sought, unless waived in writing, and other heirs are served by publication or mail. (O.C.G.A. 53-11-1 et seq.). Such probate is conclusive on all parties notified and all devisees and legatees, and is conclusive as to heirs at law not effectively notified as if probate had been in common form. (O.C.G.A. 53-5-20). Probate court has jurisdiction to vacate order probating will in solemn form if will obtained through fraud or misrepresentation. (242 Ga. 479, 249 S.E.2d 263).

Self-proved Wills.

Will may be self-proved with acknowledgment by testator and affidavits by witnesses. (O.C.G.A. 53-4-24).

Contest.

Any interested person may contest by caveat at probate. (125 Ga. 122, 53 S.E. 583). No contest clause is void unless there is direction as to disposition of contesting beneficiary's share. (O.C.G.A. 53-4-68).

Testimony of Witnesses.

Testimony may be taken outside Georgia or outside county of probate in person, by written interrogatories, or by deposition or any other discovery procedure available in civil cases. (O.C.G.A. 53-5-23).

Legacies.

May be specific, general, demonstrative or residuary. General and demonstrative legacies receive interest at legal rate after one year, specific gifts receive income from specific property, and residuary gifts share in probate income. Residuary gifts abate first, then general legacies, then demonstrative legacies. Specific gifts are adeemed if property not owned at death. (O.C.G.A. 53-4-59 to -66). See also subhead Lapses, infra. If anti-lapse statute does not apply, local gift goes to residue or to other residuary beneficiaries. (O.C.G.A. 53-4-65).

Unclaimed Legacies.

See topic 13.10 Executors and Administrators, subhead Distribution if Distributee Abroad. See also topic 13.07 Descent and Distribution, subhead Escheat.

Lapses.

If legatee dies before testator, or is dead when will is executed, but dies leaving descendants living at time of death of testator, such legacy, if absolute, vests in descendants of deceased legatee as if inherited directly from legatee. If legatee is treated as predeceased by reason of divorce or killing, rule only applies to descendants of testator. (O.C.G.A. 53-4-64).

Children.

Testator may bequeath entire estate to strangers, to exclusion of spouse and children. (O.C.G.A. 53-4-1). See also subhead Revocation, supra.

Classes.

Members of class are to be ascertained as of date of testator's death unless express intent to determine class at future date or upon occurrence of subsequent event is manifested. (231 Ga. 49, 200 S.E.2d 110).

Election.

Testator may by will make provision for spouse in lieu of year's support, in which case surviving spouse must make election. (O.C.G.A. 53-3-3).

Legatee having claim adverse to the will must elect whether to claim under will or against it, but legatee who is also creditor need not elect. (O.C.G.A. 53-4-69).

Renunciation.

See topic 13.07 Descent and Distribution, subhead Renunciation.

Inheritance Denial.

See topic 13.07 Descent and Distribution, subhead Inheritance Denial.

Foreign Probated Wills.

Any foreign will, which has been admitted to probate in state of U.S. where testator resided, may be admitted to probate in Georgia in solemn form upon production of probate proceedings certified according to provisions of O.C.G.A. 24-7-24, subject to right of parties interested to resist probate on any proper grounds. (O.C.G.A. 53-5-33).

Foreign Executed Wills.

Will probated in another state is effective as muniment of title for transfer of real property in Georgia and may be admitted in evidence as such muniment without being probated in Georgia when accompanied by properly certified exemplification of record admitting it to probate and when said exemplified will is recorded in office of clerk of superior court of county in which land is situated. (O.C.G.A. 53-5-35).

If admitted to ancillary probate, validity and construction are governed by law of domicile. If admitted to original probate, must be valid under Georgia law. (O.C.G.A. 53-5-34). No provision for recognition of will executed according to law of domicile at time of execution. See also category 10 Documents and Records, topic 10.04 Records, subhead Transfer of Decedent's Title.

Simultaneous Death.

See topic 13.05 Death, subhead Survivorship.

Testamentary Trusts.

See topic 13.15 Trusts.

Uniform Anatomical Gift Act.

Adopted. (O.C.G.A. 44-5-140, -148, as modified by O.C.G.A. 44-5-145[b]).

Living Wills.

Georgia permits competent adult to make written directive instructing physician to withhold or withdraw life sustaining procedures in event of terminal condition, coma, or persistent vegetative state. (O.C.G.A. 31-32-1). Georgia recognizes right of patients or other authorized persons to instruct physicians and other health care personnel to refrain from cardiopulmonary resuscitation. (O.C.G.A. 31-39-1).

Powers of Attorney for Health Care.

Now known as “Georgia Advance Directive for Health Care Act”. Principal may appoint agent to make decisions on broad range of health-related issues, including withholding or withdrawal of life sustaining procedures. (O.C.G.A. 31-32-1 to -13).

14 FAMILY

14.01 ADOPTION:

Any adult may petition for leave to adopt if adult is at least 25 years of age or married and living with spouse, at least ten years older than child, has been bona fide resident of Georgia for six months and is financially, physically, and morally fit and mentally able to have permanent custody. (O.C.G.A. 19-8-3). If person seeking to adopt child is married, petition must be filed in name of both spouses, unless person seeking to adopt child's step-parent. Adults may be adopted with written consent and shall be legally as child to parent. (O.C.G.A. 19-8-21). Embryo recipient intended parents may petition superior court for expedited order of adoption or parentage and written contract between legal embyro custodian and recipient intended parents relinquishing custodian's rights and responsibilities is acceptable in lieu of surrender of rights (O.C.G.A. 19–8–40 to 19–8–43). Adoption records may be disclosed to adopted person under certain circumstances. (O.C.G.A. 19-8-23).

Consent Required.

Child 14 or over must consent in writing in presence of court. (O.C.G.A. 19-8-4). No adoption unless living parent(s) or guardian(s) formally consent to surrender and termination of all parental rights voluntarily and in writing, except where parent(s) or guardian(s): (1) has rights terminated by superior court of county where child resides placing child for adoption (O.C.G.A. 19-8-11); (2) has abandoned child (O.C.G.A. 19-8-10); (3) is incompetent (O.C.G.A. 19-8-10); (4) cannot be located after diligent search (O.C.G.A. 19-8-10); (5) has failed significantly (without justifiable cause) to make bona fide attempt to communicate with child in meaningful, supportive, parental manner; or (6) has failed to provide care for child as required by law for one year or longer immediately prior to filing of petition. (O.C.G.A. 19-8-10). Best interests of child will govern whether adoption will occur. (160 Ga. App. 446, 287 S.E.2d 365; O.C.G.A. 19-8-10). Notice must be given to parent(s) or guardian(s) whenever nonapplicability of consent affidavit requirement is alleged. (O.C.G.A. 19-8-10). If identity and location of biological father known or reasonably ascertainable or if biological father has registered with putative father registry or has performed certain acts (e.g., lived with child), notice must be given of mother's consent; biological father has 30 days to file legitimation petition or loses all rights to child. (O.C.G.A. 19-8-12). Consent may be withdrawn by parent or guardian for ten days after execution. (O.C.G.A. 19-8-9). Validity of surrender may be challenged after ten days on grounds of fraud, duress, incapacity, or other grounds which address voluntariness of consent. (224 Ga. App. 124, 479 S.E.2d 439).

Jurisdiction for adoption is in superior court, except as may be granted to juvenile court. (O.C.G.A. 19-8-2). Juvenile court is not party competent to contract for disposition of child and therefore cannot be party to virtual adoption. (265 Ga. 89, 453 S.E.2d 445). Juvenile Court has jurisdiction over any matter involving termination of legal parent-child relationship brought outside adoption proceedings. (O.C.G.A. 15-11-28). If termination is in connection with adoption, superior court and juvenile court have concurrent jurisdiction. (O.C.G.A. 15-11-28).

Uniform Child Custody Jurisdiction and Enforcement Act.

Does not apply to adoption proceedings. (O.C.G.A. 19-9-42; 185 Ga. App. 427, 364 S.E.2d 279).

Venue.

Petition must be brought in county of adopting parent or, on good cause being shown, may at court's discretion be brought at child's domicile or in county where child placing agency is located. (O.C.G.A. 19-8-2).

Petition.

Verified petition and one conformed copy filed with clerk of superior court setting forth name, age, marital status and place of residence of petitioners; name by which child is to be known after adoption; date of birth, and sex of child; date and circumstances of placement with petitioners; description of any property of child; whether parents are alive; whether child has guardian. Attached to petition must be affidavits and applicable forms of consent from parents, guardians, or Department of Human Resources, or allegations of non-applicability of consent requirement; allegation of compliance with requirements of notice to biological father, if applicable; certificate from putative father registry (O.C.G.A. 19-8-12); statement of reason for venue other than petitioner's residence; signed and verified report of all expenses incurred in connection with adoption (O.C.G.A. 19-8-13).

Proceedings.

Court must fix date not less than 45 days from filing for consideration of petition. Copy of petition and order setting date forwarded by clerk within 15 days of filing to Department of Human Resources with request for investigation and reports. (O.C.G.A. 19-8-14). Department of Human Resources must investigate entire matter and make written reports to court with findings and recommendations. If one parent has voluntarily and in writing surrendered all parental rights to spouse or other parent and other parent consents to adoption, or if parents have voluntarily and in writing surrendered all parental rights to close relative, investigation is authorized, but not required. (O.C.G.A. 19-8-16). Court may appoint guardian ad litem. (O.C.G.A. 19-8-17).

Objections to Adoption.

Objections may be filed by any blood relative of child if parents not living. Grandparents with visitation rights have right to object. (O.C.G.A. 19-8-15). Unwed father who has not abandoned his or her interest is entitled to oppose adoption of child by nonbiological parties and receive custody unless found unfit. (257 Ga. 292, 358 S.E.2d 459). Otherwise court looks to best interest of child. (257 Ga. 292, 358 S.E.2d 459).

Decree.

Where requirements are met and circumstances warrant, court shall enter decree of adoption, granting permanent custody to petitioners and declaring child to be adopted child of petitioners. (O.C.G.A. 19-8-18). Upon payment of fee, clerk of court to issue certificate of adoption giving full name of adopted child. (O.C.G.A. 19-8-20). Decree not subject to any judicial challenge filed more than six months after date of entry of such decree, or, as to decrees issued prior to July 1, 1995, filed more than six months after July 1, 1995, effective date of Act. (O.C.G.A. 19-8-18[e] & [f]).

Effect of Adoption.

Decree relieves nonadopting natural parents of parental rights and responsibilities and terminates legal relationships between adopted child and his or her relatives, including inheritance, construction of documents, statutes, or instruments, whether executed before or after adoption, unless individual expressly included by name or other particular designation. Decree creates relationship of parent and child between petitioners and adopted individual. Adoptee inherits as natural child under laws of descent and distribution in absence of will, and takes as natural child under provisions of any instrument of testamentary gift, bequest, devise or legacy, whether executed before or after decree, unless expressly excluded. Adoptee takes by inheritance from relatives of petitioners and as "child" of petitioners under class gift in will of third person. (O.C.G.A. 19-8-19). Decree terminates visitation rights of relatives. (242 Ga. 742, 251 S.E.2d 302). Adoption decree of foreign jurisdiction recognized as though issued by court of this state. (O.C.G.A. 19-8-22).

Advertisements offering to adopt children or otherwise inducing parents to part with children illegal unless by licensed child-placing agency. (O.C.G.A. 19-8-24).

See also topics 14.09 Husband and Wife, 14.08 Guardian and Ward.

For forms see O.C.G.A. 19-8-26.

14.02 ALIMONY:

See topic 14.06 Divorce.

14.03 COMMUNITY PROPERTY:

System does not obtain.

14.04 DESERTION:

See topics 14.06 Divorce, 14.09 Husband and Wife.

14.05 DISSOLUTION OF MARRIAGE:

See topic 14.06 Divorce.

14.06 DIVORCE:

Governed by O.C.G.A. 19-5-1 to -17.

Georgia has not adopted Uniform Marriage and Divorce Act but supreme court has followed its provisions in deciding divorce, custody and alimony issues. (238 Ga. 328, 232 S.E.2d 921).

Partial Divorce.

Statutes repealed. (O.C.G.A. 19-5-1).

Grounds for Total Divorce.

(1) Relationship between parties such that marriage prohibited; (2) mental incapacity at time of marriage; (3) impotency at time of marriage; (4) force, menace, duress or fraud in obtaining marriage; (5) pregnancy by man other than husband at time of marriage, unknown to husband; (6) adultery by either party; (7) willful and continued desertion by either party for one year; (8) conviction of offense involving moral turpitude where penalty two years or more in penitentiary; (9) habitual intoxication; (10) cruel treatment, consisting of willful infliction of pain, bodily or mental, upon complaining party, such as reasonably justifies apprehension of danger to life, limb or health; (11) incurable mental illness determined by court of competent jurisdiction, or certified as such by two physicians, accompanied by confinement in institution and/or under continuous treatment for mentally ill for two years immediately preceding action, and statement under oath, by competent physician and chief executive officer of institution, that in his or her opinion such person evidences such incurable mental deficiencies as to prevent party from comprehending ramifications of marriage relationship; (12) habitual drug addiction; (13) irretrievably broken marriage. (O.C.G.A. 19-5-3). Irreconcilable differences, while not statutory ground, is amendable defect at trial court level sufficient for divorce. (234 Ga. 836, 218 S.E.2d 619). Court may determine that marriage is irretrievably broken even though one party claims it is not. (236 Ga. 633, 225 S.E.2d 682).

Residence Requirement.

Plaintiff or defendant must have resided in the state for six months before action brought. (O.C.G.A. 19-5-2).

Jurisdiction is in superior court. (O.C.G.A. 19-5-1). Prior to trial, judge can refer contested petitions for divorce or permanent alimony for alternative dispute resolution, regardless of whether county has established alternative dispute resolution program pursuant to c. 23 of Title 15, Georgia Court-annexed Alternative Dispute Resolution Act. (O.C.G.A. 19-5-1). Trial court can grant divorce even though child custody issues are pending in another jurisdiction. (267 Ga. 841, 483 S.E.2d 577).

Venue.

County of defendant's residence if defendant is Georgia resident, or of plaintiff's residence if defendant nonresident, or in any county adjacent to army post or military reservation in which party has resided for one year next preceding filing of petition. (Ga. Const., Art. VI, §II, para. 1). Contempt application normally must be filed in county where divorce and alimony decree entered, but if superior court other than one rendering original decree acquires jurisdiction and venue to modify original decree, it also has jurisdiction and venue to entertain counterclaim alleging plaintiff is in contempt of original decree. (251 Ga. 58, 302 S.E.2d 676).

Process.

Nonresident defendant may be served by publication. See category 5 Civil Actions and Procedure, topic Process.

Pleading.

Action for divorce must be brought by verified petition, which must show: (1) last known address of defendant; (2) that residency requirements are met; (3) dates of marriage and separation; (4) whether or not there are minor children and their ages; (5) statutory grounds for action; (6) if alimony or support or division of property is involved, property or earnings of parties, if known. (O.C.G.A. 19-5-5). Respondent may ask for divorce in his or her favor without counterclaim. (O.C.G.A. 19-5-6).

Practice.

Divorces triable after last day defensive pleadings required to be filed, provided parties shall be allowed reasonable discovery time. Divorce cases involving service by publication are triable 60 days after first publication. (O.C.G.A. 9-11-40).

Unless a defense is filed and a jury trial is demanded in writing by either party on or before call of case for trial, judge hears and determines all issues of law and facts in petition for divorce and permanent alimony. (O.C.G.A. 19-5-1).

Default judgment is not allowed, but allegations of petition must be established by evidence and court must be satisfied that legal grounds exist. (O.C.G.A. 19-5-8). In uncontested divorce proceedings, court, sua sponte, or by appointment of counsel, determines legality and sufficiency of grounds alleged in petition. (O.C.G.A. 19-5-10). Pleading and practice of civil actions followed in divorce. (O.C.G.A. 19-5-8). In contested actions involving alimony, child support, equitable division of property, modification of alimony or attorney's fees, parties must file affidavit specifying financial circumstances. (Rule 24.2, Uniform Superior Ct. R.).

Judgment authorizing grant of total divorce annuls marriage upon rendering. (O.C.G.A. 19-5-15). Judgment to pay child's support enforced under O.C.G.A. 19-6-28.

Temporary alimony for child support may be awarded to either spouse. (O.C.G.A. 19-6-14).

Permanent Alimony.

May be awarded in case of divorce or voluntary separation or where spouse, against his or her will, is abandoned or driven off by other spouse (O.C.G.A. 19-6-4), but adulterous spouse not precluded from obtaining equitable property division (248 Ga. 490, 283 S.E.2d 454). Where divorce is sought on ground of irretrievably broken marriage, misconduct of parties is relevant to question of amount of alimony. (243 Ga. 848, 257 S.E.2d 269). Finder of fact may grant permanent alimony to either party from corpus of estate or otherwise, and shall consider in determining amount of alimony: standard of living established during marriage; duration of marriage; age and physical and mental condition of both parties; financial resources of both parties; time necessary for either party to acquire training to enable him or her to find appropriate employment; contribution of each party to marriage; separate estate, earning capacity and fixed liabilities of parties; and other relevant factors. (O.C.G.A. 19-6-5). Obligations for permanent alimony, time for performance of which has not arrived, cease upon remarriage of party to whom obligation owed unless otherwise provided. (O.C.G.A. 19-6-5). Obligation to pay alimony terminates upon paying spouse's death, unless separation agreement incorporated into decree expressly states otherwise. (248 Ga. 439, 284 S.E.2d 254). Failure to pay alimony grounds for contempt proceedings. (234 Ga. 37, 214 S.E.2d 493). Parties may by contract waive right to alimony or future alimony adjustments. (234 Ga. 259, 214 S.E.2d 925). Amount of periodic payments of permanent alimony subject to revision upon petition filed by either spouse showing change in income and financial status of either spouse. (O.C.G.A. 19-6-18, -19, -20). When action pending, court may allow temporary modification of prior judgment. (O.C.G.A. 19-6-19). Voluntary cohabitation of former spouse in: (i) meretricious relationship (including that of having sexual intercourse or sharing living expenses) that is (ii) continuous and open is ground for modification of periodic payments. (258 Ga. 101, 365 S.E.2d 826). Former spouse's cohabitation with person of same sex is not ground for modification of payments. (262 Ga. 720, 425 S.E.2d 853). Parties to alimony agreement may obtain modification unless agreement expressly waives right of modification by referring specifically to that right. (242 Ga. 309, 248 S.E.2d 667). So long as child or children named in support order or any party action resides in state, modification of order issued by Georgia court may be obtained in Georgia court. (O.C.G.A. 19-6-26[c]). Georgia court may exercise jurisdiction over foreign support order. (O.C.G.A. 19-6-26[d]). Where resident's spouse obtains foreign divorce, resident may apply for alimony in superior court in county where spouse applying for alimony resides. (O.C.G.A. 19-6-27). Alimony judgments not subject to dormancy or revival statutes. (O.C.G.A. 9-12-60[d]). Court has power to incorporate alimony contract by parties into judgment though court could not make such agreement itself. (235 Ga. 659, 221 S.E.2d 561). Alimony is in personam issue and alimony adjudication thus requires personal service. (143 Ga. App. 709, 240 S.E.2d 119).

Division of Property of Spouses.

Property acquired by parties during marriage may be subject to equitable division. (246 Ga. 765, 273 S.E.2d 169). Property eligible for equitable division in divorce includes personal injury claim settlement for lost wages during marriage or medical expenses. (255 Ga. 461, 339 S.E.2d 591). Also eligible are interspousal gifts made during marriage. (256 Ga. 762, 353 S.E.2d 486). Obligation to pay vested retirement benefits to spouse will be considered part of division of marital property and not periodic alimony to be adjusted upon remarriage of one of parties. (265 Ga. 76, 453 S.E.2d 735 [overruling Fisher v. Frederickson, 262 Ga. 229 (1992)]).

Allowance for Support.

Where custody of children awarded to third party or to parent and decree does not set support payments, person to whom custody is given may thereafter sue parent without custody for support of children. (O.C.G.A. 19-6-17). Custodial parent cannot waive child's right to seek increase in child support payments; however, noncustodial parent can waive right to seek reduction in child support payments. (265 Ga. 441, 457 S.E.2d 669). Detailed guidelines for support obligations of noncustodial spouse are set specifically by statute and are rebuttable presumption of minimum required child support, but judge or jury may award child support to custodial spouse inconsistent with these guidelines upon findings expressly set forth in order or judgment establishing support obligation. (O.C.G.A. 19-6-15). Agreement to provide automatic increases in child support in excess of statutory guidelines enforceable. Custodial parent seeking extension of child support payments for child who has reached age of majority but who has not completed secondary education need not file modification action before child attains age 18. (267 Ga. 886, 485 S.E.2d 475). Final order of support must refer to amount, duration, and method of payment of child support, gross income of parents, and must have attached statutorily-required child support worksheet. If presumptive amount of child support is rebutted, award amount and basis of rebuttal must be included in final order. (O.C.G.A. 19-5-12). Parties may make enforceable agreement deviating from presumptive amount of child support required by statute, but court not authorized to make such agreement part of final decree unless parties comply with statutory requirements regarding findings of fact to justify deviation. (O.C.G.A. 19-5-12[c][5]). As part of order for support, court may order either, or both, parents to obtain and maintain life insurance. (O.C.G.A. 19-6-34). In case of permanent alimony for support of spouse or children, judge or jury can modify previous judgment in accordance with changed income and financial status of either former spouse or in accordance with needs of children. (O.C.G.A. 19-6-19, -20). Willful refusal to pay can result in civil and/or criminal contempt. (239 Ga. 860, 238 S.E.2d 920). Jury verdict attempting to set future child support at different rate than present rate illegal. (242 Ga. 598, 250 S.E.2d 465). Parent paying lump sum support for two or more children not entitled to pro rata reduction when one child no longer in custody of parent receiving support. (242 Ga. 386, 249 S.E.2d 69). Once order for award of child support is entered, court may enter immediately separate order for income deduction (garnishment) from payor's salary. (O.C.G.A. 19-6-31 to -33). Family support registry established pursuant to federal IV-D regulations. Garnishment to settle alimony or child support may be withheld if visitation rights denied contra to custody order. (160 Ga. App. 463, 287 S.E.2d 378). If court determines that noncustodial party has accumulated support arrears equal to or greater than current support due for 60 days and party is licensed to conduct certain trades, businesses, professions or occupations, licensed to drive motor vehicle, to hunt or to fish, owns motor vehicle registered in Georgia, or is applying for issuance or renewal of any such license or registration, court may order suspension of license or registration or deny application for such license. (O.C.G.A. 19-6-28.1[b]).

Uniform Reciprocal Enforcement of Support Act.

Adopted. (O.C.G.A. 19-11-40 et seq.). Applies only to proceedings pending prior to Jan.

1, 1998. (O.C.G.A. 19-11-40.1).

Uniform Interstate Family Support Act.

Adopted. (O.C.G.A. 19-11-100 et seq.). Applies to petitions filed or proceedings initiated on or after Jan. 1, 1998. (O.C.G.A. 19-11-40.1).

Attorneys' Fees.

Grant of attorneys' fees matter for court's discretion. (O.C.G.A. 19-6-2).

Property Rights.

After petition for divorce has been filed, no transfer of property by either party, except bona fide in payment of preexisting debt, passes title so as to defeat vesting according to verdict of jury in divorce action, except title to real estate not affected by filing of divorce unless notice of lis pendens is filed in clerk's office in superior court. (O.C.G.A. 19-5-7). After petition for divorce is filed, court may issue standing order prohibiting parties from transferring, selling, trading, contracting to sell, or encumbering property except in ordinary course of business. (O.C.G.A. 19-1-1[b][4]). Agreements in contemplation of divorce settling issues of alimony, property division, child custody, child support and visitation valid. (248 Ga. 376, 283 S.E.2d 461).

Change of Wife's Name.

Wife obtaining divorce may, by proper pleading, have her maiden name restored. (O.C.G.A. 19-5-16).

Children.

Party not in default is entitled to custody of minor children unless court, in its discretion, directs otherwise. (O.C.G.A. 19-9-1). Effective in 2008, judges may require parties seeking custody to submit parenting plan. Where court makes finding of family violence, court must consider safety of victim in determining custody. (O.C.G.A. 19-9-1). Court can award visitation by parent who committed family violence only if adequate safeguards made for safety of child/victim of family violence. (O.C.G.A. 19-9-7). After petition for divorce is filed, court may issue standing order prohibiting parties from unilaterally causing or permitting minor child to be removed from jurisdiction of court. (O.C.G.A. 19-1-1[b][2]). On death of parent with custody, other parent has prima facie right to custody. (234 Ga. 145, 214 S.E.2d 882). If child has reached age of 11, court to consider desire of child in determining custody, but is not bound by such desire. If child has reached age of 14, child has right to select parent with whom to live unless parent determined not to be fit and proper person to have custody. Where child has reached age of 11 years, court may issue order granting temporary custody to selected parent for trial period not to exceed six months where judge hearing case determines that such temporary order is appropriate. (O.C.G.A. 19-9-1). Absent change in circumstances, visitation rights subject to review and modification not more than once in each two year period. (O.C.G.A. 19-9-1). Where trial court determines both parents are fit and equally capable of caring for child, court must consider joint custody but is not required to enter such order unless it specifically finds it would be in child's best interest. (265 Ga. 465, 458 S.E.2d 126). Decision as to whether there is evidence warranting modification or suspension of custody/visitation privileges is responsibility of trial court and cannot be delegated to expert. (266 Ga. 493, 467 S.E.2d 578). Adverse emotional problems caused by sudden move are factors for consideration. (O.C.G.A. 19-9-1[a][1]). Change of custody determined based on change of conditions affecting child's welfare. (222 Ga. App. 301, 474 S.E.2d 12). Relocation alone can support finding change of condition, resulting in change of custody. (277 Ga. 445, 588 S.E.2d 728). Sexual orientation alone should not be grounds to place undue restrictions upon visitation rights of noncustodial parent. (220 Ga. App. 861, 471 S.E.2d 6). Except where provided by court, if parent changes residence, he or she must notify other parent, and if custodial parent changes residence, he or she must notify all persons with visitation rights. Notice must be given 30 days prior to change. (O.C.G.A. 19-9-1). Statute providing for grandparents visitation rights held unconstitutional. (265 Ga. 189, 454 S.E.2d 769). However, statute revised by General Assembly to meet constitutional issue raised. (O.C.G.A. 19-7-3). Custody of children may be awarded to third party where conditions of O.C.G.A. 19-7-4 are found or parent found unfit. (234 Ga. 348, 216 S.E.2d 103). Parent's fitness determined by reference to that parent alone and not by comparison to third party. (247 Ga. 94, 274 S.E.2d 471). Court may enforce custody decree by contempt power even if decree contains no express injunction or prohibition. (239 Ga. 244, 236 S.E.2d 599).

Remarriage.

Where divorce is granted, jury or judge, as case may be, determines rights and disabilities of parties. No person shall be placed under disability that would prevent remarriage. (O.C.G.A. 19-5-17). Remarriage does not affect property settlement. (236 Ga. 318, 223 S.E.2d 697). Remarriage terminates alimony obligations unless decree provides otherwise. (O.C.G.A. 19-6-5[b]). Decree must expressly exempt remarriage to prevent termination of alimony upon remarriage. (257 Ga. 71, 354 S.E.2d 828).

Annulment of Marriage.

See topic 14.11 Marriage.

Separation Agreements.

Between husband and wife living separately or in contemplation of separation valid and enforceable as to support, payments in lieu of alimony, etc. (65 Ga. App. 222, 15 S.E.2d 626).

14.07 [RESERVED]

14.08 GUARDIAN AND WARD:

Guardianship of property now called conservatorship; guardianship refers only to guardian of person. Jurisdiction and venue respecting guardianship of minors is in probate court of county of infant's domicile, or where minor is found unless interested party requests transfer to county of minor's domicile. (O.C.G.A. 15-9-30, 29-4-1). Jurisdiction and venue respecting guardianship of minors is in probate court of county in which minor is found or in which proposed permanent guardian is domiciled. In its discretion, probate court of county in which petition is filed may transfer case to any other county if such transfer would serve best interest of minor. (O.C.G.A. 29-2-14). In regard to guardianship of mentally incompetent persons, jurisdiction and venue are in probate court of county where incompetent person resides. (former O.C.G.A. 29-5-6; language of statute limited by 247 Ga. 9, 274 S.E.2d 314; now O.C.G.A. 29-4-10 for guardianship of minors and O.C.G.A. 29-5-10 for conservatorship of adults). Regarding guardianship or conservatorship for any incapacitated adult, including, but not limited to mentally incompetent persons, jurisdiction and venue are in probate court of county in which proposed ward is domiciled or is found, unless it is found that proposed ward was removed to county solely for purpose of filing petition for appointment of guardian or conservator. (O.C.G.A. 29-5-10). In any case involving creation of conservatorship over property where proposed ward has interest in real property, judge or clerk of probate court shall file certified copy of court's order granting such petition and, upon termination of such conservatorship during ward's lifetime, certified copy of order of termination of such conservatorship shall be filed with clerk of superior court of each county of this state in which real property is located within 30 days of date of such order. (O.C.G.A. 29-5-13[d] for adults; O.C.G.A. 29-3-10[d] for minors). For provisions regarding administrators and executors of estates, see category 13 Estates and Trusts, topic 13.10 Executors and Administrators.

Selection of Guardian.

Either parent, if both are alive, is natural guardian, but if one parent is dead or parents are separated or divorced, then parent in custody is natural guardian. (O.C.G.A. 29-2-3). Guardian may be required to give bond with good and sufficient security in such amount as court may determine from time to time. (O.C.G.A. 29-2-25). Conservators must give bond, but certain financial institutions need not give bond if combined capital, surplus, and undivided profits $3 million or more. (O.C.G.A. 29-3-40). Bond premium may be paid from ward's estate. (O.C.G.A. 29-3-44). Natural guardian may not receive personal property of minor without being named legally qualified conservator of minor when value of such personal property exceeds $15,000. (O.C.G.A. 29-3-1). Minor over 14 may select guardian subject to approval of probate judge. (O.C.G.A. 29-2-16). Nearest of kin by blood preferred, but probate judge has discretion, applying test of “best interest of minor”. (O.C.G.A. 29-2-16). Either surviving parent may appoint testamentary guardian of person and of such property as may be inherited from that parent. (O.C.G.A. 29-2-4). County administrators may act as guardian or conservator of minor or incapacitated adult if no other guardian or conservator has been appointed. (O.C.G.A. 29-8-1). Selection of guardians for incapacitated adults governed by O.C.G.A. 29-4-1 et seq. Selection of conservators for incapacitated adults governed by O.C.G.A. 29-5-1 et seq. Except in event public guardian of Department of Human Resources appointed, only individuals may serve as guardians of adults after July 1, 2005. (O.C.G.A. 29-4-2). If personal property due does not exceed $15,000 for minors, natural guardian may receive such property without being appointed conservator. (O.C.G.A. 29-3-1). If personal property due does not exceed $2,500, spouse or relative of incapacitated adult may receive such property without being appointed conservator. (O.C.G.A. 29-5-4). Probate judge has discretionary authority to appoint successor in event of death of duly appointed guardian. (O.C.G.A. 29-2-51 for guardians of minors and O.C.G.A. 29-4-51 for guardians of adults). Appointment of temporary guardian is governed by O.C.G.A. 29-2-5 for minors and O.C.G.A. 29-4-14 for adults.

Spouse as Guardian.

Spouse has preference in appointment as guardian, unless husband and wife are separated or another nominated by ward prior to incapacity. (O.C.G.A. 29-4-3).

Eligibility and Competency.

No general eligibility requirements. (O.C.G.A. 29-3-4 for conservator for minor; O.C.G.A. 29-5-2 for incapacitated adult).

Appointment of Guardian.

See subhead Selection of Guardian, supra.

Qualification.

Before receiving letters of appointment, guardian must take oath or affirmation to perform duty. (O.C.G.A. 29-2-24 for guardian of minor and O.C.G.A. 29-3-24 for conservator of property of minor; O.C.G.A. 29-4-25 for guardian of incapacitated adult and O.C.G.A. 29-5-25 for conservator of property of incapacitated adult). Probate judge may require bond in amount as judge may determine for guardian of minor (O.C.G.A. 29-2-25) and probate judge may require bond in amount as judge may determine for guardian of incapacitated adult (O.C.G.A. 29-4-30). Conservator must give bond payable to court for benefit of ward in double amount of supposed value of property of ward unless bond is secured by licensed commercial surety, in which case bond may equal value of estate. (O.C.G.A. 29-3-41). Value of estate is generally determined without regard to real property. If realty is converted to personalty, new bond is required. Bond may be reduced in judge of probate court's discretion if ward's estate is decreased. (O.C.G.A. 29-3-40 for minor and O.C.G.A. 29-4-30 for incapacitated adult.) Testamentary guardian need not give bond. (O.C.G.A. 29-2-4). National banks and Georgia banks and trust companies need not give bond unless capital and surplus are less than $3,000,000 or underlying instrument requires it. (O.C.G.A. 29-3-40 and O.C.G.A. 29-4-30). Judge of probate court may order guardian who is required to give bond to post such bond for period in excess of one year. (O.C.G.A. 29-3-40 for minor and O.C.G.A. 29-4-30 for incapacitated adult.)

Inventory.

Conservator of property must file inventory with probate court within two months of appointment. (O.C.G.A. 29-3-21 for minors; O.C.G.A. 29-5-22 for adults). See category 13 Estates and Trusts, topic 13.10 Executors and Administrators.

Powers and Duties.

Guardian of minor stands in loco parentis. (O.C.G.A. 29-2-21; 210 Ga. 273, 79 S.E.2d 804). Powers and duties of guardian of incapacitated adult. (O.C.G.A. 29-4-22).

Guardian of estate must make annual returns and final return when ward reaches majority, or when new guardian is appointed. (O.C.G.A. 29-3-60 [minor]; O.C.G.A. 29-5-60 [incapacitated adult]). Guardian allowed reasonable expenses of maintaining, supporting and educating ward and ward's dependents to extent of income and, on order of judge of probate court, may so use corpus. (O.C.G.A. 29-3-21 [minor]; O.C.G.A. 29-5-22 [incapacitated adult]). Guardian may, on order of judge of probate court, sell, lease, encumber or exchange realty or personalty to pay ward's debts, care, etc., and for reinvestment (O.C.G.A. 29-3-22 [minor], O.C.G.A. 29-5-23 [incapacitated adult]), enter into contracts for labor and services, improve realty (O.C.G.A. 29-2-11), continue to operate ward's farm or business (O.C.G.A. 29-2-12), and borrow for such purposes. (O.C.G.A. 29-2-20). (Effective July 1, 2005, all governed under O.C.G.A. 29-3-22 [minor], O.C.G.A. 29-5-23 [incapacitated adult]). See O.C.G.A. 29-3-1 to -22 regarding property of minor and O.C.G.A. 29-5-22-23 regarding property of incapacitated adult. On death of ward intestate during guardianship, guardian distributes estate as though administrator. (O.C.G.A. 29-2-23). Guardian entitled to compensation and reimbursement for expenses. (O.C.G.A. 29-3-50-54 and O.C.G.A. 29-5-50-54). May be found in contempt and imprisoned for failure to deliver property in hand to ward when so ordered by judge of probate court. (O.C.G.A. 29-2-80). May employ attorney. (O.C.G.A. 29-3-22 and O.C.G.A. 29-5-23). May sue. (O.C.G.A. 9-11-17). May compromise contested or doubtful claims as authorized by law. (O.C.G.A. 29-3-22 and O.C.G.A. 29-5-23).

Investments Regulated.

Unless fiduciary instrument provides otherwise, guardian may retain property received upon creation of guardianship, including securities issued by a corporate fiduciary. (O.C.G.A. 29-3-31, 29-5-31). See subhead Powers and Duties, supra. See category 13 Estates and Trusts, topics 13.10 Executors and Administrators, 13.15 Trusts.

Securities in Name of Nominee.

See category 13 Estates and Trusts, topic 13.15 Trusts, subhead Securities in Name of Nominee.

Real Estate.

Probate judge may authorize sale or lease of real estate. (O.C.G.A. 29-3-22, 29-5-23). See subhead Powers and Duties, supra.

Liabilities of Guardian.

Liabilities extend to failure to account with ward on coming of age. (O.C.G.A. 29-3-83). See subhead Powers and Duties, supra.

Accounts.

See subhead Powers and Duties, supra.

Termination of Guardianship.

Guardianship of minor terminates when minor reaches 18 or when adopted, emancipated or dead. (O.C.G.A. 29-2-30). Guardianship of adult terminates upon death of ward or upon proper showing that need for guardianship ended. (O.C.G.A. 29-4-42). Upon investigation at regular court term of alleged misconduct, probate judge may revoke letters, require guardian to submit to settlement of accounts and/or pass such other order as in his or her judgment is expedient under circumstances of each case. If judge of probate court receives return that indicates that any guardian may have wasted property of ward or failed in any manner to comply with applicable law, in lieu of citing guardian to answer charge, court in its discretion may order return recorded without being approved or disapproved, and wait until guardianship terminated, and then allow ward or his or her successors in interest to determine whether any action should be taken against former guardian or personal representative of such former guardian for any such waste or failure. (O.C.G.A. 29-5-92). Guardian ad litem for mentally ill appointed by court under 37-3 expires automatically after 90 days. (O.C.G.A. 37-3-147[h]).

Mentally Ill Persons.

Guardian for person mentally incompetent may be appointed by probate judge (O.C.G.A. 29-4-1) by detailed due process, including hearing, notice of hearing and right to counsel (O.C.G.A. 29-4-10-13). Upon death intestate of ward, guardian vested with all powers of administrator of estate. (2 Ga. App. 750, 59 S.E. 15). Upon petition of any interested person, including ward, or upon motion of probate court, guardianship of adult ward may be modified or terminated and personal and property rights restored. (O.C.G.A. 29-4-41-42). Emergency guardian may be appointed when necessary. (O.C.G.A. 29-4-14). Rights of mentally retarded, mentally ill, or alcoholics and drug abusers detailed. (O.C.G.A. 37-7-1 et seq.).

Foreign Guardians.

Georgia guardian may turn over property of nonresident ward to foreign guardian if foreign guardian files with probate judge petition showing appointment, bond in double amount value of property, and prayer for turning over, attaching to petition appropriate papers certified according to Act of Congress. (O.C.G.A. 29-4-95). Order of judge in county where property is situated must be obtained in order to sell real estate for reinvestment. (O.C.G.A. 29-7-9, 53-12-353).

Gifts to Minors.

See topic 14.10 Infants.

Uniform Child Custody Jurisdiction and Enforcement Act.

Adopted. (O.C.G.A. 19-9-42). Does not apply to adoption proceedings. (185 Ga. App. 427, 364 S.E.2d. 279).

Uniform Fiduciaries Act.

Not adopted.

Uniform Simplification of Fiduciary Security Transfers Act.

Adopted. (O.C.G.A. 53-12-320). See category 2 Business Organizations, topic 2.03 Corporations, subhead Uniform Simplification of Fiduciary Security Transfers Act.

14.09 HUSBAND AND WIFE:

Separate Property.

Property of each spouse at time of marriage remains his or her separate property. (O.C.G.A. 19-3-9).

Contracts.

Married persons may make contracts, but when transaction between husband and wife attacked as fraud on either's creditors, burden on husband and wife to show fair. (O.C.G.A. 19-3-10). Discrimination in extension of credit on basis of marital status prohibited. (O.C.G.A. 7-6-1). See topic 14.08 Guardian and Ward, subhead Spouse as Guardian.

Either spouse may sue other on contract or in tort where action relates to property rights, but not for personal torts. (183 Ga. 766, 189 S.E. 833). However, exception to general interspousal tort immunity exists in actions for wrongful death between spouses. (259 Ga. 49, 376 S.E.2d 674).

Actions.

Statute providing parent(s) with cause of action for seduction of daughter unconstitutional. (264 Ga. 302, 444 S.E.2d 778). Fact that alleged rape victim is wife of defendant is not defense to charge of rape (O.C.G.A. 16-6-1).

Agency.

Subject to aforementioned protective measures for wife, either spouse may act as attorney in fact for other (181 Ga. 787, 184 S.E. 604; 128 Ga. App. 387, 196 S.E.2d 674) and wife may engage in business with husband (98 Ga. 711, 25 S.E. 915).

Conveyance or Encumbrance of Property.

Either spouse may convey or encumber his or her real estate without joinder or consent of other (193 Ga. 758, 19 S.E.2d 919), except that wife must join in husband's conveyance of real property to which he holds record title in trust for her. However, bona fide purchaser without actual or constructive notice of wife's beneficial interest protected when taking conveyance from husband who holds record title. (149 Ga. 529, 101 S.E. 120). See also topic 14.10 Infants, subhead Disabilities.

Husband and wife liable to third persons for board, support, and all necessaries furnished to or for benefit of children. (O.C.G.A. 19-6-13). Party required to pay child support not liable to third persons for necessaries furnished children. (O.C.G.A. 19-6-14).

Provision is made for temporary and permanent alimony to either husband or wife (O.C.G.A. 19-6-1 et seq.), and is not unconstitutional (232 Ga. 352, 206 S.E.2d 458). See topic 14.06 Divorce.

Domicile of married person not presumed to be domicile of spouse. (O.C.G.A. 19-2-3).

Uniform Reciprocal Enforcement of Support Act (As Amended).

Adopted with modifications. (O.C.G.A. 19-11-40 et seq.). Applies only to proceedings pending prior to Jan. 1, 1998. (O.C.G.A. 19-11-40.1). Civil enforcement by superior courts of various counties. Differences from Uniform Act: (1) duty of support expanded to apply Georgia law to any dependents located in Georgia irrespective of residence of parent. Generally, parents severally liable for support of child under 18. (O.C.G.A. 19-11-43). Common-law marriage establishes legitimacy of child and makes support mandatory. (O.C.G.A. 19-11-43). Man liable to support his legally established bastard; (2) §6 of Uniform Act omitted and, in lieu thereof, provision adopted allowing obligor in Georgia to avoid extradition by voluntarily submitting to jurisdiction and order of support of superior court of county of his residence (O.C.G.A. 19-11-48); (3) §12 of Uniform Act modified in that district attorney authorized to represent plaintiff-obligee on public assistance or dependent child, and may, in his or her discretion, represent plaintiff-obligee spouse or former spouse of obligor (O.C.G.A. 19-11-53); (4) §14 of Uniform Act modified by addition of special provision authorizing Attorney General to declare Canadian province or territory reciprocating state (O.C.G.A. 19-11-44); (5) §19 of Uniform Act varied to place duty to investigate on court of responding state and local police (O.C.G.A. 19-11-60, 61); and (6) §§29 and 32 and Part IV of Uniform Act omitted. Employers required to withhold wages to furnish child support where there is support order, unless court finds there is not good cause, or parties agree. (O.C.G.A. 19-6-32 et seq.).

Uniform Interstate Family Support Act.

Adopted. (O.C.G.A. 19-11-100 et seq.). Applies to petitions filed or proceedings initiated on or after Jan. 1, 1998 (O.C.G.A. 19-11-40.1): circumstances under which Georgia court may exercise personal jurisdiction over nonresident in parentage proceeding (O.C.G.A. 19-11-110) or support order (O.C.G.A. 19-11-113). Circumstances in which Georgia court has exclusive jurisdiction over support order. (O.C.G.A. 19-11-114). Georgia court shall enforce multiple child support orders, even if one issued in foreign jurisdiction. (O.C.G.A. 19-11-117). Enforcement of support orders issued in foreign jurisdiction through income withholding. (O.C.G.A. 19-11-150 et seq.).

Community Property.

System does not obtain in Georgia.

Custody of Children.

Parents of minor child may submit agreement concerning any custody issue to court which shall be ratified unless court finds agreement not in best interest of child. (O.C.G.A. 19-9-5). When in dispute between parents, court will look to best interest of child. If child is 11, court can consider, but is not bound, by child's desire in making custodial decision. (O.C.G.A. 19-9-3). Child over 14 has right to select custodial parent unless that parent determined unfit. (O.C.G.A. 19-9-3). Court may enforce custody decree by contempt power even if decree contains no express injunction or prohibition. (239 Ga. 244, 236 S.E.2d 599). In action for change of child custody, court may in its discretion change terms of custody on temporary basis pending final judgment on issue. (O.C.G.A. 19-9-3). Uniform Child Custody Jurisdiction Act adopted. (O.C.G.A. 19-9-40 et seq.). Statutory procedure prescribed for changing legal custody. (O.C.G.A. 19-9-20-24). Court can award visitation by parent who committed family violence only if adequate provisions made for safety of child/victim of family violence. (O.C.G.A. 19-9-7). Third party is permitted to become party pursuant to O.C.G.A. 19-9-50 while that party has custody of child, but third party may not petition to terminate parental rights or challenge parent's fitness. (194 Ga. App. 365, 390 S.E.2d 859). For rights of unwed father in adoption, see topic 14.01 Adoption.

14.10 INFANTS:

Age of Majority.

18 both sexes. (O.C.G.A. 39-1-1). Exceptions to this age of majority: Drinking age, 21 (O.C.G.A. 3-3-23); capacity to commit crime, 13 (O.C.G.A. 16-3-1); capacity to commit tort, 13 (O.C.G.A. 51-11-6); capacity to make will, 14 (O.C.G.A. 53-2-22); capacity to make or receive certain gifts, 21 (O.C.G.A. 44-5-130); capacity for contributory negligence, subjective and depends on particular child's mental and physical capacity (237 Ga. 46, 226 S.E.2d 736 citing O.C.G.A. 51-1-5).

Determination of Paternity.

Upon motion by petitioner, respondent, or any other interested party, court may order mother, alleged father and child to submit to blood tests to prove parentage (O.C.G.A. 19-7-45), and such tests may be used as evidence at trial (O.C.G.A. 19-7-46). For purposes of establishing paternity, there is rebuttable presumption of paternity of child born out of wedlock if there has been performed scientifically credible parentage-determination genetic testing establishing 97% probability of paternity. (O.C.G.A. 19-7-45 et seq.). Procedures adopted for temporary child support orders where clear and convincing evidence of paternity. (O.C.G.A. 19-7-46.2).

Emancipation.

Emancipation of child is relinquishment of control and authority by parent, enabling child to earn own living and ending parents' duty to support child. Marriage, with or without parental consent, emancipates child. (237 Ga. 57, 226 S.E.2d 591).

Legitimacy.

Child born out of wedlock can be legitimized by: (i) Putative father marrying mother and recognizing child (O.C.G.A. 19-7-20[c]) or (ii) petition for legitimation (O.C.G.A. 19-7-22).

Custody.

See topics 14.09 Husband and Wife; 14.06 Divorce; 14.08 Guardian and Ward.

Uniform Child Custody Jurisdiction and Enforcement Act.

Adopted. (O.C.G.A. 19-9-42).

Adoption.

See topic 14.01 Adoption.

Guardianship.

See topic 14.08 Guardian and Ward.

Grandparent.

Grandparents may bring original action to seek visitation rights, or intervene in and seek visitation rights in any action concerning custody of minor child, divorce, termination of parental rights, or child visitation rights. Same rights apply with respect to children adopted by blood relative or by stepparent. Visitation rights not available where child's parents not separated and child is living with both parents. (O.C.G.A. 19-7-3). Grandparent with visitation rights may file objections to adoption where father and mother have no further rights to child. (O.C.G.A. 19-8-15).

Duties of Parents.

It is joint and several duty of each parent to provide maintenance, protection and education until child reaches 18, dies, marries, or becomes emancipated, whichever first occurs. (O.C.G.A. 19-7-2). Same for illegitimate children. (O.C.G.A. 19-7-24). Rule subject to two exceptions: (1) extent of duty may be defined by court order; and (2) in any temporary or final order for child support in proceeding for divorce, separate maintenance, legitimacy, or paternity entered after July 1, 1992, trier of fact has discretion to direct one or both parents to provide financial assistance to child enrolled in and attending secondary school and who has reached age of majority before completing secondary education provided child not previously married or emancipated, but no such support can be required after child becomes 20. (O.C.G.A. 19-7-2, 19-6-15[e]). First, but not second exception same for illegitimate children. (O.C.G.A. 19-7-24).

Cruelty to Children.

Parent or guardian commits crime of cruelty to children in first degree when parent willfully deprives child of necessary sustenance to extent child's well-being is jeopardized or when parent maliciously inflicts cruel or excessive mental or physical pain. Any person commits crime in first degree when such person maliciously causes child under 18 cruel or excessive physical or mental pain. Any person commits crime of cruelty to children in second degree if such person with criminal negligence causes child under 18 cruel or excessive physical or mental pain. Any person commits crime of cruelty to children in third degree when such person as primary aggressor intentionally allows child under 18 to witness forcible felony, battery, or family violence battery. (O.C.G.A. 16-5-70).

Reporting Child Abuse.

Persons having cause to believe that parent or caretaker physically injured, neglected, exploited or sexually assaulted minor child must report incident to child welfare agency with immunity from liability; medical and hospital, school, daycare and law enforcement personnel must report suspected child abuse. (O.C.G.A. 19-7-5).

Statutory Rape.

Person commits offense of statutory rape when he or she engages in sexual intercourse with any person under age of 16 who is not his or her spouse. If victim is 14 or 15 years of age and person convicted is 18 or younger and is no more than four years older than victim, crime is misdemeanor. (O.C.G.A. 16-6-3).

Child Molestation.

Person commits offense of child molestation when he or she does any immoral or indecent act to, or in presence of, any child under age of 16 or by electronic device transmits images of person engaging in, inducing or otherwise participating in any immoral or indecent act to child under age of 16 with intent to arouse or satisfy sexual desires of offender or child. If victim is 14 or 15 years of age and person convicted is 18 or younger and is no more than four years older than victim, crime is misdemeanor and shall not be subject to sentencing and punishment provisions of O.C.G.A. 17-10-6.2. Person commits offense of aggravated child molestation when person commits offense of child molestation that includes injury to child or sodomy. (O.C.G.A. 16-6-4).

Enticing Child.

Person commits offense of enticing child when person solicits, entices, or takes child under age of 16 to any place for purpose of child molestation or indecent acts. (O.C.G.A. 16-6-5).

Sexual Exploitation.

Person commits crime involving sexual exploitation when he or she knowingly employs, uses, persuades, induces, entices or coerces any person under age of 18 to engage in sexually explicit conduct for purpose of producing visual medium depicting such conduct; knowingly creates, reproduces, publishes, promotes, sells, distributes, exhibits or possesses with intent to sell any visual medium depicting minor engaged in sexually explicit conduct; knowingly advertising, selling, purchasing or exchanging any medium providing information as to where any visual medium depicting such conduct can be found or purchased; knowingly possessing or controlling any material depicting such conduct; penalties for parents and legal guardians allowing minors to engage in sexually explicit conduct for purpose of producing visual medium. (O.C.G.A. 16-12-100[b]).

Uniform Reciprocal Enforcement of Support Act.

Adopted. (O.C.G.A. 19-11-40 et seq.). applies only to proceedings pending prior to Jan. 1, 1998. (O.C.G.A. 19-11-40.5). See topic 14.09 Husband and Wife.

Uniform Interstate Family Support Act.

Adopted. (O.C.G.A. 19-11-100 et seq.). Applies to petitions filed or proceedings initiated on or after Jan. 1, 1998. (O.C.G.A. 19-11-40.5).

Child Support Recovery Act.

Payment of public assistance to or on behalf of child creates debt owed to State by parents; if court has ordered child support pursuant to final divorce decree or other final order for child support, debt equal to amount therein. (O.C.G.A. 19-11-5).

Rights of Parents.

Court may terminate parental rights if: (1) parent has abandoned child; (2) child is deprived and that by reason thereof child is suffering serious physical, mental, moral or emotional harm; (3) parent has given written consent before court; or (4) parent has fully and wantonly failed to comply with court order to support child. (O.C.G.A. 15-11-94). Order terminating parental rights of parent is without limit as to duration and terminates all parent's rights with respect to child and all child's rights and obligations to parent. (O.C.G.A. 15-11-93). Parents jointly entitled to services of child and proceeds of his or her labor; but if court awards custody to one parent, only that parent entitled to child's services. This right lost by: (1) voluntary contract releasing right to third person; (2) consent to adoption by another; (3) failure to provide necessaries or abandonment of child; (4) consent that child receive proceeds of his or her own labor, which consent is revocable; (5) consent to marriage of child; or (6) cruel treatment of child. (O.C.G.A. 19-7-1). Termination of parental rights does not occur if parent requests termination simply to abandon child. (180 Ga. App. 688, 350 S.E.2d 50).

Biological fathers entitled to notice of certain proceedings regarding termination of parental rights (O.C.G.A. 15-11-95, –96) or adoption (O.C.G.A. 19-8-12, -13), even if not child's legal father.

Child Labor.

See category 11 Employment, topic 11.02 Labor Relations.

Termination of Parental Rights.

See subhead Rights of Parents, supra.

Disabilities.

General rules of law as to contracts of and torts by and to minors are observed. Parents liable up to $10,000 plus court costs for willful or malicious acts of child under 18 resulting in reasonable medical expenses, property damage or both. (O.C.G.A. 51-2-3).

Minor under 13 is immune to tort liability. (O.C.G.A. 51-11-6, construed in 231 Ga. 446, 202 S.E.2d 44). Minor under 13 not subject to claim of negligence per se or contributory negligence per se but may be found contributorily negligent depending on minor's mental and physical capabilities. (218 Ga. App. 641, 462 S.E.2d 793). Due care standard for child of tender years depends upon child's mental and physical capacity as well as surrounding circumstances. (O.C.G.A. 51-1-5). Whether minor has mental and physical capability to be contributorily negligent is jury question. (237 Ga. 46, 226 S.E.2d 736).

Ratification of Contracts.

Generally, contract of minor voidable. If minor retains possession or continues to enjoy benefit of property or other valuable consideration after majority, contract is ratified. Contract of minor for necessaries is binding except that party furnishing must prove parent or guardian failed or refused to supply necessaries. (O.C.G.A. 13-3-20).

Consent for Medical Treatment.

Minor's consent to treatment for venereal disease is valid and binding. (O.C.G.A. 31-17-7). Female minor's consent is valid and binding in connection with pregnancy or childbirth. (O.C.G.A. 31-9-2). Generally, consent of person 18 or older to any recommended medical treatment is valid. (O.C.G.A. 31-9-2).

Abortion.

Unemancipated minor required to notify parent or guardian prior to abortion or petition juvenile court for waiver of notification requirement (O.C.G.A. 15-11-112); Georgia's notification statute withstands constitutional scrutiny (934 F.2d 1462).

Actions.

Where minor interested in litigation has no guardian or has interest adverse to guardian, court in which action pending may appoint guardian ad litem, who is responsible to such minor for his or her conduct in connection with such litigation. (O.C.G.A. 9-11-17). Suit commenced and prosecuted by infant alone not void; defect of wanting guardian or next friend is amendable before verdict and cured by verdict. (O.C.G.A. 9-2-28).

Gifts to Minors.

Georgia Transfer to Minors Act. (O.C.G.A. 44-5-110 et seq.). Prescribed form based on that of Model Act of Association of Stock Exchange Firms. Covers gifts of securities, money, insurance policies, annuity contracts and shares in federal savings and loan associations or building and loan associations. Minor defined as person who has not attained age of 21 at time of gift.

Juvenile Court.

Comprehensive Juvenile Justice Act of 1997 enacted. (O.C.G.A. 15-11-1 et seq.). Concept to treat erring juvenile as part of family. (135 Ga. App. 234, 217 S.E.2d 470).

Uniform Securities Ownership by Minors Act.

Not adopted.

See also topics 14.06 Divorce, 14.09 Husband and Wife.

14.11 MARRIAGE:

Age of eligibility 18. However, if parental consent provided as required by statute (O.C.G.A. 19-3-37), 16-year-old or 17-year-old person eligible (O.C.G.A. 19-3-2). Documentary evidence of proof of age in form of driver's license, baptismal certificate, birth certificate, certificate of birth registration, selective service card, court record, passport, immigration papers, alien papers, citizenship papers, armed forces discharge papers or identification card, hospital admission card containing full name and date of birth or affidavit of person applying to be married if such person appears to probate judge to be at least 25 years of age must be furnished at time of application for marriage license. (O.C.G.A. 19-3-2, -36). Dissolution of prior marriage must be affirmatively established. (O.C.G.A. 19-3-2). Same sex marriage prohibited. (Ga. Const., Art. 1, §4, Par. 1).

Consent.

Required of parents or guardians of applicants who have not reached age 18. (O.C.G.A. 19-3-2[b]). Consent must be in person unless physically impossible as established by affidavit of licensed physician. (O.C.G.A. 19-3-37).

Medical Tests.

Requirement for medical tests abolished. (Ga. L. 2003; Act 390). Department of Community Health information to recommend applicants for marriage license obtain blood test for sickle cell disease prior to obtaining license (O.C.G.A. 19–3–40).

License.

Required; issued by judge of probate court (or his or her clerk) in any county in this state if both applicants reside in Georgia; or if only one person resides in state, in county in which that person resides; or if neither person resides in state, in county in which ceremony to be performed. (O.C.G.A. 19-3-30). Application must be under oath (O.C.G.A. 19-3-33), and license must be returned for record within 30 days of marriage, but if not recorded fact of issue can be proved by affidavit of either spouse and fact of marriage ceremony can be proved by affidavit of two witnesses (O.C.G.A. 19-3-30). No license to be issued to persons of same sex. (O.C.G.A. 19-3-30). Application supplement marriage report also required, prepared in connection with license. (O.C.G.A. 19-3-33). Fees vary by county; fee may be waived if qualifying premarital education program completed. (O.C.G.A. 19-3-30.1).

Waiting Period.

No waiting period. (O.C.G.A. 19-3-35).

Ceremonial Marriage.

May be performed by judge of state or federal courts of record in Georgia, city recorder, magistrate or minister of Gospel or other religious society or sect (O.C.G.A. 19-3-30), but marriage entered into in good faith and otherwise valid not invalidated by want of authority of person performing ceremony (O.C.G.A. 19-3-42).

Reports of Marriage.

License returned by officer or minister solemnizing marriage to judge of probate court (O.C.G.A. 19-3-30) who forwards it to parties to marriage after it has been recorded (O.C.G.A. 19-3-44).

Record.

See category 10 Documents and Records, topic 10.04 Records, subhead Vital Statistics.

Common Law Marriages.

No common law marriages to be entered into subsequent to Jan. 1, 1997. Otherwise valid common law marriages entered into prior to this date shall continue to be recognized. (O.C.G.A. 19-3-1.1).

Proxy Marriages.

Not authorized.

Marriages by Written Contract.

Not authorized.

Void Marriages.

Marriage is void where either party was insane or had a living spouse under a prior undissolved marriage, or entered into the marriage involuntarily or through fraud, or where parties are within certain prohibited degrees of relationship. (O.C.G.A. 19-3-2, -5). Drunkenness brought about to induce consent is deemed fraud. (O.C.G.A. 19-3-4). Issue of void marriage prior to annulment is legitimate. (O.C.G.A. 19-3-5). Marriage is void where both persons are of same sex. (Ga. Const., Art. 1, §4, Par. 1; O.C.G.A. 19-3-3.1).

Foreign Marriages.

Marriage contracted outside of state has same legal consequences and effect as marriage within state. (O.C.G.A. 19-3-43). No recognition of foreign marriages between persons of same sex. (Ga. Const., Art. 1, §4, Par. 1; O.C.G.A. 19-3-3.1).

Annulment.

Marriage may be annulled, by petition in equity to superior court, where party was unable to contract to marry, due to being under minimum age of eligibility to marry or where one of parties at time of marriage had previous marriage undissolved or where there existed prohibited nearness of relationship between parties. Annulment cannot be granted on ground which is also ground for divorce or where there has been ratification of marriage after disability is removed. (O.C.G.A. 19-3-5; 198 Ga. 707, 32 S.E.2d 764; 195 Ga. 274, 24 S.E.2d 52; 57 Ga. App. 334, 195 S.E. 308). Annulment will not be granted where children are born or to be born as result of marriage. (O.C.G.A. 19-4-1).

Divorce.

See topic 14.06 Divorce.

See also topic 14.09 Husband and Wife.

14.12 MARRIED WOMEN:

See topics 14.09 Husband and Wife, Marriage; categories 5 Civil Actions and Procedure, topic Evidence, subhead Witnesses; Debtor and Creditor, topic Exemptions; Documents and Records, topic Acknowledgments; Estates and Trusts, topics Executors and Administrators, Wills; Property, topic Dower.

15 HEALTH

15.0115.04

15.05 FOOD, DRUGS, DEVICES AND COSMETICS:

Manufacturing, packaging, labeling and sale of drugs and cosmetics as defined by statute are regulated. (O.C.G.A. 26-3-1 et seq.). Georgia State Board of Pharmacy is empowered to grant licenses, investigate, inspect, issue regulations and conduct hearings with regard thereto. (O.C.G.A. 26-4-1 et seq.). Persons possessing or using controlled substances or dangerous drugs for research, analysis, animal training or drug education must register with state unless otherwise registered. (O.C.G.A. 26-4-49).Food processing centers, by rules and regulations, are subject to regular testing of samples or specimens of foods or ingredients and must submit written food safety plans (O.C.G.A 26–2–27.1).

Pharmacist has no duty to warn customer or notify physician that drug is being prescribed in dangerous amounts, that customer is being overmedicated, or that drugs in their prescribed quantities could cause adverse reactions to customer. (209 Ga. App. 517, 434 S.E.2d 63, cert. denied Oct. 29, 1993).

15.05A INSURANCE COMPANIES:

Health insurance companies regulated by Commissioner of Insurance under Georgia Insurance Code. (O.C.G.A. 33-1-1 et seq.).

15.05B NURSING:

Licensure, competency, training and discipline of registered nurses are governed by Georgia Board of Nursing and Georgia Registered Professional Nurse Practice Act. (O.C.G.A. 43-26-1 et seq.). Licensure, competency, training and discipline of practical nursing are governed by Georgia Board of Examiners of Licensed Practical Nurses and Georgia Practical Nurses Practice Act. (O.C.G.A. 43-26-30 et seq.).

15.0615.11

15.12 PUBLIC HEALTH:

"Georgia Advance Directive for Health Care Act" authorizes competent adult to appoint agent to make health care decisions on his or her behalf. It further provides standards and limitations with respect to such agency, responsibilities and duties of health care providers and agents. (O.C.G.A. 31-32-1 et seq.). Form provided. (O.C.G.A. 31-32-4).

Orders not to resuscitate, including identifying bracelets and necklaces, are governed by O.C.G.A. 31-39-1 et seq.

Health care corporations, health care plans, and health maintenance organizations are subject to documentary, filing, and financial requirements set forth in O.C.G.A. 33-20-1 et seq. and 33-21-1 et seq.

"Patient Protection Act of 1996" requires managed care plans, as condition of certification, to make certain statutory disclosures regarding plan benefits and rules to prospective enrollees. (O.C.G.A. 33-20A-1 et seq.).

"Consumers' Health Insurance Protection Act" prohibits insurers from discriminating on basis of race, color, national or ethnic origin in decision to insure or continue to insure individual. Act also provides standards and procedures for verification of benefits and precertifications by managed health care plans and also sets standards for continuity of care in certain cases for physicians having contracts with health care providers. (O.C.G.A. 33-20A-60-62).

Medical Assistance/Medicaid: "Georgia Public Assistance Act of 1965." (O.C.G.A. 49-4-1 et seq.; see also O.C.G.A. 31-8-160).

Uniform Health Care Decisions Act not adopted.

Uniform Anatomical Gift Act adopted. (O.C.G.A. 44-5-140).

Uniform Health-Care Information Act not adopted.

16 INSURANCE

16.01 INSURANCE COMPANIES:

Supervision.

Commissioner of Insurance (Two Martin Luther King, Jr. Drive, West Tower, Suite 704, Atlanta, GA 30334; www.inscomm.state.ga.us) has general supervision of insurance companies.

(O.C.G.A. 33-2-1). Consumer Services Division investigates policyholder complaints and responds to public inquiries from the public (2 Martin Luther King, Jr. Dr., West Tower, Suite 716 Atlanta, Georgia 30334; Main Telephone: 404-656-2070; http://www.gainsurance.org/ConsumerService/Home.aspx . Interstate Insurance Product Regulation Compact adopted. (O.C.G.A. 33-59A-1 et seq. [2006]).

Private Review Agents.

Statutory provisions govern certification of agents who review appropriateness and cost of health care services provided to Georgia residents. (O.C.G.A. 33-46-1 et seq.).

Rates.

Regulated under O.C.G.A. 33-9–1 et seq. Commissioner of Insurance can prohibit rates found to be improperly set but cannot order refunds. (235 Ga. 141, 218 S.E.2d 754). Consumers' Advocate of Insurance must be served with any request for rate hike and must be given opportunity to appear at any hearing, unless advocate affirmatively waives right in writing. (O.C.G.A. 33-57-5).

Annual Statements.

Must be filed with Commissioner of Insurance. (O.C.G.A. 33-3-16).

Policies.

Form of all policies and application therefor must be approved by Commissioner. (O.C.G.A. 33-24-9). After July 1, 1988, certain insurance policies, certificates, and coverage booklets must meet simplification standards set by Commissioner. (O.C.G.A. 33-3-25). Statutes regulating types: life, O.C.G.A. 33-25-1 et seq.; life settlement contracts, O.C.G.A. 33-59-1 et seq.; annuities and pure endowment, O.C.G.A. 33-28-1 et seq.; group life, O.C.G.A. 33-27-1 et seq.; industrial life, O.C.G.A. 33-26-1 et seq.; individual accident and sickness, O.C.G.A. 33-29-1 et seq., and O.C.G.A. 33-29A-1 et seq.; group and blanket accident and sickness, O.C.G.A. 33-30-1 et seq., and O.C.G.A. 33-24-20-26; Medicare supplemental insurance, O.C.G.A. 33-43-1 et seq.; property, O.C.G.A. 33-7-6; credit life and credit accident and sickness, O.C.G.A. 33-31-1 et seq.; vehicle policy, O.C.G.A. 33-7-9; motor vehicle accident reparations, O.C.G.A. 33-34-1 et seq.; prepaid legal services, O.C.G.A. 33-35-1 et seq.; automobile clubs, O.C.G.A. 33-61-1 and -2. Sales of variable life insurance authorized. (O.C.G.A. 33-11-36). Procedures for cancellation of policy by insurer and insured specified in O.C.G.A. 33-24-44 and O.C.G.A. 33-24-44.1. Notice of nonrenewal of certain policies required. (O.C.G.A. 33-24-46). Notice requirements upon issuance of life insurance policy specified in O.C.G.A. 33-24-6.

Unfair Discrimination.

Prohibited in rates. (O.C.G.A. 33-9-4).

Emergency Medical Treatment.

Private insurers, HMOs and health benefit plans are obligated to pay for certain emergency medical treatment. (O.C.G.A. 33-20A-9).

Liens.

Life insurer may lend to policy holder with policy as security any sum not exceeding reserve on policy. (O.C.G.A. 33-11-24).

Prerequisites to Issuance of Certificate of Authority.

Before Commissioner of Insurance may issue certificate of authority to insurance company (domestic or foreign) it must fully comply with all provisions of law and file statement showing specific information. (O.C.G.A. 33-3-13). Foreign or alien insurers also must file annual statement. (O.C.G.A. 33-3-13). Deposit and capital stock requirements must be met. (O.C.G.A. 33-3-6).

Lending institutions and bank holding companies and their subsidiaries and affiliates are prohibited from obtaining license to sell insurance in any municipality having population in excess of 5,000, except underwriting for credit life insurance and credit accident and sickness insurance. (O.C.G.A. 33-3-23).

Licensing or renewing of licenses or certificates of authority prohibited to companies owned or controlled by any state or foreign government or subdivision thereof unless owned and licensed before Jan. 1, 1957. (O.C.G.A. 33-3-3).

Certificate of authority expires on June 30 each year unless: (1) insurer files on preceding Mar. 1 copy of annual statement as of preceding Dec. 31; (2) insurer publishes on or before preceding Mar. 1 copy of annual statement in short form in newspaper of general circulation in state, all in form approved by Commissioner. (O.C.G.A. 33-3-16).

Agents and Solicitors.

All persons must procure licenses from Commissioner before soliciting business. (O.C.G.A. 33-23-4). Application and examination necessary for license in most instances (O.C.G.A. 33-23-3-18) and Commissioner sets qualifications (O.C.G.A. 33-23-3, -4). Only individuals may be licensed. (O.C.G.A. 33-23-41). Applicant must be resident of state for at least six months of every year. (O.C.G.A. 33-23-5). Commissioner must issue licenses to qualified persons, and upon request of licensee, must provide certificate of licensure suitable for display. (O.C.G.A. 33-23-11). Each insurer must also obtain certificate of authority for each agent, renewable annually before Jan. 1. Certified list of all agents must be filed with Commission. (O.C.G.A. 33-23-15, -16). Authorized issuer will be deemed to have obtained certificate of authority for its designated agent seven working days after mailing of request for such certificate (assuming use of first class mail). Effective July 1, 2002, issuer will be deemed to have obtained certificate of authority for its designated agent immediately upon submission of request to Commissioner. However, initial licensure is effective only upon granting by Commissioner. (O.C.G.A. 33-23-26). License may be refused, suspended or revoked by Commissioner under certain circumstances. (O.C.G.A. 33-23-21).

Process Agent.

Domestic insurers may be served in same manner as corporations generally. (O.C.G.A. 33-4-2). Foreign or alien insurers must appoint resident of state as well as Commissioner of Insurance to receive service of process. Commissioner may be served only if service cannot be effected on former. (O.C.G.A. 33-4-3).

Resident agent's signature required on all policies covering Georgia risks with certain exceptions. (O.C.G.A. 33-3-11).

Doing Business Without License.

Anyone issuing or delivering policy in violation of any provision of O.C.G.A. tit. 33 is guilty of misdemeanor. (O.C.G.A. 33-1-7). Unauthorized Insurers Process Act adopted. (O.C.G.A. 33-5-50 to -59). Sale of insurance securities by insurer prior to authorization is prohibited. (O.C.G.A. 33-14-10).

Investments regulated by O.C.G.A. 33-11-1 et seq. Investments in qualified investment pools permitted. (O.C.G.A. 33-11-80 to 33-11-89).

Deposit Requirements.

Domestic insurers must deposit $100,000 for first class of insurance and $25,000 for each additional class, total not to exceed $200,000. Foreign insurers may present in lieu of deposits required of domestic insurers, certificate from appropriate official of another state showing like deposit in such state plus amount between $10,000 and $100,000 with Commissioner of Insurance. (O.C.G.A. 33-3-8, 33-3-9). Insurers in unsound financial condition may be required to make additional special deposits. (O.C.G.A. 33-3-10).

Foreign Insurance Companies.

See subheads Deposit Requirements and Process Agent, supra. O.C.G.A. 14-2-293 providing for remedies against corporations after dissolution not applicable to foreign insurance companies. (235 Ga. 394, 219 S.E.2d 728). Foreign or alien insurer conducting direct response insurance must maintain Georgia office, accept collect calls from policyholders or provide toll-free telephone service to policyholders. (O.C.G.A. 33-24-52). Authorization and general requirements for transaction of insurance business provided. ((O.C.G.A. tit. 33, c. 3).

Retaliatory Laws.

With some exceptions, when another state imposes taxes, licenses, fees or obligations on Georgia insurers or agents in excess of those required in Georgia, same requirements will apply to insurers of such state in Georgia. (O.C.G.A. 33-3-26, 33-8-2).

Health Maintenance Organizations.

Regulated by O.C.G.A. 33-21-1 et seq.

Health Plan Purchasing Cooperatives.

Regulated by O.C.G.A. 33-30A-1 et seq.

Multiple Employer Self-Insurance Health Plans.

Regulated by O.C.G.A. 33-50-1 et seq.

Obstetrics and Gynecology.

No health benefit policies issued after July 1, 1996 may limit enrollees' choice of obstetricians or gynecologists to physicians within particular health benefit network. (O.C.G.A. 33-24-59).

Premium Financing.

No person shall engage in business of financing insurance premiums in State without license from Commissioner of Insurance. Requirements for obtaining license provided. (O.C.G.A. 33-22-3).

Premiums.

Burden on insurer to show that it complied with its duty to act reasonably and in good faith in setting retrospective premiums. (217 Ga. 331, 457 S.E.2d 566).

Premium Tax.

All foreign, alien and domestic insurance companies doing business in Georgia shall pay tax of 2¼% upon gross direct premiums upon persons, property or risks in Georgia, excluding annuity considerations,, payable in quarterly installments, unless company's annual premium taxes for preceding calendar year were less than $500. (O.C.G.A. 33-8-4 to -6). 10% penalty on amount unpaid. (O.C.G.A. 33-8-6). If 25% of total assets are invested in Georgia, tax is only 1¼ %; if 75% of total assets are so invested, tax is only ½ of 1%. (O.C.G.A. 33-8-5). Effective Jan. 1, 2009, insurers are exempt from otherwise applicable state premium taxes as provided for in O.C.G.A. 33-8-4(a) on premiums paid by Georgia residents for high deductible health plans sold or maintained in connection with health savings account under provisions of I.R.C. 223. (O.C.G.A. 33-8-4[c], effective Jan. 1, 2009). Since Jan. 1, 1966, life insurance companies may deduct from premium tax amount of all license fees and taxes paid to municipal corporations during preceding year. (O.C.G.A. 33-8-8). Certain domestic insurance companies may deduct retaliatory taxes paid to other states. (O.C.G.A. 33-8-7).

Other Taxes.

State license fees (O.C.G.A. 33-8-1, -3). Income tax exemption for insurance companies paying premium tax (O.C.G.A. 48-7-25).

Local Taxation of Insurance Companies.

Taxation for local purposes by counties, municipal corporations and other political subdivisions based on premiums received for policies insuring residents of taxing county, municipal corporation or political subdivision, maximum rate of 1% of premiums for each life insurance company (O.C.G.A. 33-8-8.1) and 2.5% of premiums for each nonlife insurance company (O.C.G.A. 33-8-8.2).

Direct Actions Against Insurer.

Provisions regarding actions against insurance companies, O.C.G.A. 33-4-1 to 33-4-7. See category 23 Transportation, topic 23.01 Motor Vehicles, subhead Direct Actions.

Declaratory Judgment on Coverage.

Insured may seek declaratory judgment regarding exclusion and/or amount of coverage. (258 Ga. 800, 375 S.E.2d 221). Insurer has no duty to investigate until insured apprises insurer of facts that would bring claim within policy's coverage.

Request Regarding Coverage by Claimant.

Requirements for requests by claimant of coverage information from insurer. (O.C.G.A. 3-3-28). No private cause of action exists for breach of O.C.G.A. 33-3-28 (229 Ga. App. 522, 494 S.E.2d 244).

No-Fault Insurance.

See category 23 Transportation, topic 23.01 Motor Vehicles, subhead No-Fault Insurance.

Uniform Insurers Liquidation Act.

Adopted. (O.C.G.A. 33-37-40 et seq.).

Insurers Insolvency Pool.

Created to provide remedy for claims under casualty and property policies (O.C.G.A. 33-36-2) and life and health policies (O.C.G.A. 33-38-1) to protect policy holders from insolvency of insurer or impairment of its obligations.

Unfair Trade Practice Regulations.

O.C.G.A. 33-6-1 to 33-6-37 defines, provides for determination of, and prohibits all practice in state which constitutes unfair methods of competition or unfair and deceptive practices or acts in business of insurance.

16.02 SURETY AND GUARANTY COMPANIES:

Organization and license to carry on business of surety insurance are according to statutory requirements relating to insurance companies. (See topic 16.01 Insurance Companies.) Surety insurance defined. (O.C.G.A. 33-7-7). May not include reinsurance. (See 316 F. Supp. 314.) Any company or corporation doing surety insurance business may, upon proof of solvency and credit, become surety on all bonds required by law to be taken, with all rights and subject to all liabilities of individual sureties. (O.C.G.A. 33-24-48). Deposit with State Treasurer $100,000 to transact any one class of insurance and $25,000 for each additional class of insurance, subject to limit of $200,000 total deposit. (O.C.G.A. 33-3-8). Common law, not provisions of Ga. Code, governs compensated sureties engaged in writing of surety bonds for profit (241 Ga. 460, 246 S.E.2d 316), but O.C.G.A. 10-7-24 requiring creditor to proceed against principal within three months notice by surety or surety is discharged applies to compensated and uncompensated sureties (254 Ga. 608, 331 S.E.2d 520).

17 INTELLECTUAL PROPERTY

17.01 TRADEMARKS AND TRADENAMES:

Registration.

Service marks and trademarks are words, names, symbols or devices adopted and used to identify services or goods (O.C.G.A. 10-1-440), and may be registered by filing application and specimen or facsimile of trademark or service mark with Secretary of State (O.C.G.A. 10-1-442) who issues certificate (O.C.G.A. 10-1-444) effective for ten years (O.C.G.A. 10-1-445). Fee for certificate is $15 (O.C.G.A. 10-1-442) and certificate is renewable for successive periods of ten years upon payment of additional $15 (O.C.G.A. 10-1-445).

Assignment.

Trademark or service mark assignable with goodwill. Upon payment of $15 fee new certificate issued for remainder of old term. (O.C.G.A. 10-1-446).

Protection Afforded.

Registrant protected against unauthorized use, reproduction or imitation of registered trademark or service mark. (O.C.G.A. 10-1-450). Rights in trademarks or service marks acquired in good faith at common law protected. (O.C.G.A. 10-1-452). Unfair use of trade name enjoined in equity. (236 Ga. 30, 222 S.E.2d 322).

Infringement.

Use, reproduction or imitation of registered trademark or service mark, without registrant's consent in connection with sale of goods and services which is likely to cause confusion renders violator civilly liable to registrant. (O.C.G.A. 10-1-450). Registrant may recover profits and damages. (O.C.G.A. 10-1-451). Infringement of trademark or service mark may be enjoined; forged or counterfeit service marks, trademarks, copyrighted or registered designs, and goods bearing same may be destroyed or seized. (O.C.G.A. 10-1-454). Forgery or counterfeiting of trademarks, service marks or copyrighted or registered designs, or sale, resale, or transportation of sale is subject to criminal penalty, including imprisonment and fines. (O.C.G.A. 10-1-454). Court may enjoin subsequent use of same or similar trademark or service mark if likelihood of injury to business reputation or of dilution of distinctive quality of trademark or service mark notwithstanding absence of competition between parties or confusion of goods or services. (O.C.G.A. 10-1-451). Unauthorized use with intent to deceive is misdemeanor. (O.C.G.A. 10-1-453).

Use of “Georgia”.

Misdemeanor to use “Georgia” in tradename, trademark, service mark or advertisement of meat not U.S. Grade “good” or better. (O.C.G.A. 26-2-115).

Tradenames.

Person, persons or partnership (other than corporation doing business under corporate name; limited partnership doing business under limited partnership name or limited liability company doing business under limited liability company name properly filed for record [10-1-492]) doing business under fictitious name must file with clerk of superior court, where business conducted, or domestic corporation using name other than its corporate name must file in county of its legal domicile, verified statement of names and addresses of those owning or carrying on business and of nature of business. (O.C.G.A. 10-1-490). Noncompliance is misdemeanor and noncomplying party to lawsuit may be cast with court costs but there is no other penalty. (O.C.G.A. 10-1-493). Filing fee: $8. (O.C.G.A. 15-6-77). In counties having population of 350,000 or more in unincorporated areas, filing fee is $25. (O.C.G.A. 15-6-77.3).

17.02 TRADE SECRETS:

Georgia Trade Secrets Act, which is similar to Uniform Trade Secrets Act, defines trade secret as information, without regard to form, including, but not limited to, technical or nontechnical data, formula, pattern, compilation, program, device, method, technique, drawing, process, financial data, financial plans, product plans or list of actual or potential, customers or suppliers which is not commonly known by or available to public and which information: (1) derives economic value, actual or potential, from not being generally known to and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use; and (2) is subject of efforts that are reasonable under circumstances to maintain its secrecy. (O.C.G.A. 10-1-761).

Actual or threatened misappropriation of trade secret may be enjoined. (O.C.G.A. 10-1-762[a]). In exceptional circumstances, court may allow use, conditioned upon payment of reasonable royalty. (O.C.G.A. 10-1-762[b]). In appropriate circumstances, affirmative acts to protect trade secret may also be compelled by court order. (O.C.G.A. 10-1-762[c]). Additionally, court may order payment of damages equal to actual loss or unjust enrichment occurring as result of misappropriation. (O.C.G.A. 10-1-763[a]). If willful and malicious misappropriation exist, court may award exemplary damages not exceeding twice amount of actual damages or unjust enrichment. (O.C.G.A. 10-1-763[b]). In no event shall contract be required in order to maintain action for injunctive relief or payment of damages for misappropriation of trade secret. (O.C.G.A. 10-1-762[d]).

If claim of misappropriation is made in bad faith, or if motion to terminate injunction is made or resisted in bad faith, or willful and malicious misappropriation exists, court may award reasonable attorney's fees to prevailing party. (O.C.G.A. 10-1-764).

Court may take appropriate measures to protect secrecy of any alleged trade secret by reasonable means including use of protective orders in connection with discovery, holding in-camera hearings, sealing court records and issuing gag orders. (O.C.G.A. 10-1-765).

Action for misappropriation must be brought within five years after misappropriation is discovered or by exercise of reasonable diligence should have been discovered. (O.C.G.A. 10-1-766).

Trade Secrets Act does not affect contractual duties or remedies whether or not based upon misappropriation of trade secrets, provided, that contractual duty to maintain trade secret or limit use of trade secret shall not be deemed void or unenforceable solely for lack of durational or geographical limitation. (O.C.G.A. 10-1-767[b][1]). Further, Trade Secrets Act does not affect civil remedies that are not based upon misappropriation of trade secrets or definition of trade secrets contained in Code §16-18-13 regarding criminal offenses involving theft of trade secret. (O.C.G.A. 10-1-767[b][2], [b][3]).

Intentional misappropriation of trade secret, value of which exceeds $100, is felony punishable by one to five years imprisonment and fine not less than $50,000. (O.C.G.A. 16-8-13). Intentional misappropriation of trade secret, value of which is less than $100, is punishable as misdemeanor. (O.C.G.A. 16-8-13).

18 LEGAL PROFESSION

18.01 ATTORNEYS AND COUNSELORS:

State Bar of Georgia is a Unified State Bar, composed of all lawyers admitted to practice in this state. (O.C.G.A. 15-19-30). No person (except nonresident attorneys who may appear in isolated cases in discretion of judge) shall practice law in this state unless he or she is active member. (State Bar Rules 1-203).

Membership consists of active and inactive members who must pay annual license fees of no more than $250 and $125, respectively. (State Bar Rules 1-502).

Government of State Bar is vested in Board of Governors composed of President, President-elect, immediate past President, Secretary, Treasurer, President of Younger Lawyers Section, President-elect of Younger Lawyers Section, Georgia Attorney General and number of active members from each Judicial Circuit equal to number of Superior Court Judges authorized for such Circuit. (State Bar Rules 1-301, 302).

Jurisdiction over Admissions.

Superior court has jurisdiction over admissions to bar regarding successful candidates passing bar examination. However, supervision of bar examination and certification of qualified candidates is responsibility of State Board of Bar Examiners (www.gabaradmissions.org) and Board to Determine Fitness of Bar Applicants pursuant to Rules adopted by Supreme Court. (O.C.G.A. 15-19-2, 15-19-3). In order to take examination, applicant must apply to State Board of Bar Examiners.

Eligibility.

Any person of good moral character who meets educational requirements and is certified by Board to Determine Fitness of Bar Applicants is eligible to take bar examination. No residency requirement.

Registration as Law Student.

No requirement that law students must register.

Educational Requirements.

Applicant must have three years of college and complete requirements of law school approved by American Bar Association, Association of American Law Schools or Georgia Board of Bar Examiners, requiring three years of classroom attendance (400 classroom hours each year).

Petition for Admission.

To superior court upon successful completion of examination, presentation of certificate to that effect to Clerk of Court, and taking oath provided by law. After swearing in to superior court, admission to supreme court and court of appeals is by application to each court and proof of good private and professional character, payment of fee of $30 and taking prescribed oath. (Rule 4, Rules of Supreme Court; Rule 9, Rules of Court of Appeals).

Application for Admission.

To Board to Determine Fitness of Bar Applicants for certification of moral fitness with variable fee ($300 to $800) (fees increase to $500 to $1,000 effective Oct. 15, 2008). (Ga. Sup. Ct. R. Gov'g Admis. Prac. L. pt. A , §§4, 5). After certification, to Office of Bar Admission with $90 fee to take bar examination. (Ga. Sup. Ct. R. Gov'g Admis. Prac. Law pt. B, §2). Application to Board to Determine Moral Fitness must be filed no later than first Wed. of July for consideration to take bar examination following Feb. and no later than first Wed. of Dec. for consideration to take bar examination following July. (Ga. Sup. Ct. R. Gov'g Admis. Prac. L. pt. A , §4). Applications for Certification of Fitness to Practice Law filed between first Wed. in July and first Wed. in Oct. for consideration for the bar examination given following Feb. and applications filed between the first Wed. in Dec. and the first Wed. in Mar. for consideration for the bar examination administered following July will be accepted if accompanied by non-refundable late fee of $ 200 (effective Oct. 15, 2008, late fee increases to $400). (Ga. Sup. Ct. R. Gov'g Admis. Prac. Law pt. A, § 4[b]).

Examination.

Bar examination administered by Board of Bar Examiners under supervision of Supreme Court. Held twice a year; dates determined by Supreme Court. (O.C.G.A. 15-19-3). Multi-State Bar Examination utilized; Georgia does not accept transfer of scores from other jurisdictions. Where certain eligibility requirements are satisfied, practicing attorneys may sit for essay portion of exam. Representative subjects covered by essay questions: agency; conflict of laws; constitutional law; contracts; corporations; creditors' rights and debtor relief; criminal law; damages; equity; evidence; family law; federal jurisdiction and procedure; Georgia practice and procedure; legal ethics; partnerships; personal property; real property; taxation (state and federal); torts; trusts; Uniform Commercial Code; wills and administration of estates.

Multi-State Professional Responsibility Examination utilized; may be taken in any jurisdiction. Passing grade required within two years (before or after) passing Georgia bar examination.

Clerkship.

No requirement of clerkship prior to admission.

Admission Without Examination.

Allowed for attorneys licensed in another U.S. jurisdiction, which has comity for bar admissions with Georgia, and if attorney holds JD or LL.B from law school approved by ABA at time graduate matriculated, is admitted to highest court of other U.S. jurisdiction, has never been denied certification of fitness to practice law in Georgia or in any other state, has never taken and failed Georgia bar examination, has been primarily engaged in active practice of law for five of seven years immediately preceding date upon which application filed, has at all times been in good professional standing in each jurisdiction in which applicant has been licensed, has never been subject of private or public professional discipline and has received Certification of Fitness to Practice Law in Georgia from Board to Determine Fitness of Bar Applicants. Applicant seeking admission without examination must submit Fee of $800 for Certification of Fitness To Practice Law in Georgia and $500 fee to Board of Bar Examiners. (See Rules Governing Admission to Practice Law In Georgia, Office of Bar Admissions, Part C.) Court has discretionary authority to permit nonresident attorney to practice in isolated cases. (234 Ga. 388, 216 S.E.2d 294).

Admission Pro Hac Vice.

No statutory provision. Permitted in specific action pursuant to Uniform Superior Court Rule 4.4 upon application to judge presiding over action and with association of local counsel who already is admitted to practice before that court.

Powers.

Attorney may bind client in any action or proceeding by agreement in relation to cause made in writing, and in signing judgments, entering appeals, etc., but cannot compromise client's claim without permission. (O.C.G.A. 15-19-5, -6).

Disabilities.

Attorney cannot sign as surety on bail or appeal bond (Rule 28, Rules of Superior Courts) or attachment or garnishment bond (O.C.G.A. 18-3-12).

Attorney Ethics.

With few exceptions, Code of Professional Responsibility adopted is same as ABA Model Code (247 Ga. 406, 276 S.E.2d 607). Ethics rules available at http://www.gabar.org.

Liabilities.

A client is entitled to redress from his or her attorney for unskillful advice. (O.C.G.A. 15-19-17).

When demand is made on attorney by client for money collected, and he or she refuses to turn over same, he or she is subject to rule and disbarment. (O.C.G.A. 15-19-16).

As to liability for costs, see category 5 Civil Actions and Procedure, topic 5.08 Costs.

Compensation.

Administrator or attorney employed by estate may obtain judgment fixing attorney's fees. (O.C.G.A. 53-7-10). Award of attorney's fees in eminent domain actions is not required under state constitution. (242 Ga. 707, 251 S.E.2d 243). Attorney may not recover damages under penalty clause when client exercises its right to terminate retainer contract. (264 Ga. 351, 444 S.E.2d 314).

Lien.

Attorney has lien on all money and all effects of client coming into his or her possession, on all real estate and personalty recovered, and on suits, judgments and decrees for money. Such lien is enforced as other liens and is second only to taxes and prior perfected liens. (O.C.G.A. 15-19-14, 15-19-15; O.C.G.A. 44-14-550; 136 Ga. App. 268, 220 S.E.2d 716). Attorney's lien rights inapplicable to divorce, alimony and child support claims. (235 Ga. 853, 221 S.E.2d 602; 185 Ga. App. 809, 366 S.E.2d 167).

Suspension and Disbarment.

The Supreme Court, court of appeals, or superior court may disbar or suspend an attorney. The superior court of the county of attorney's residence is required to disbar any attorney for cause.

Unauthorized Practice.

No nonlicensed corporation, voluntary association, or individual may practice law for another for compensation (O.C.G.A. 15-19-51), except that banks may give advice to customers incidental to banking and that title insurance companies may prepare certain documents (O.C.G.A. 15-19-50, -52).

Mandatory Continuing Legal Education.

Supreme Court of Georgia has adopted program establishing minimum requirements for continuing legal education. Attorneys who are active and non-exempt must complete 12 hours per year, one hour of which must be in area of legal ethics and one hour of which must be in area of professionalism. In addition, Georgia attorneys who appear as sole or lead counsel in superior or state courts of Georgia must complete three of their 12 hours in area of trial practice. In order to educate bar about benefits of alternative dispute resolution, all attorneys must also complete one-time mandatory three-hour CLE credit in dispute resolution. ADR requirement shall be completed before 12/30/95. Lawyers admitted to bar after 12/30/95 shall complete this requirement in year of admission or year following admission.

Professional Associations.

See category 2 Business Organizations, topics 2.02 Associations, subhead Professional Associations; 2.03 Corporations, subhead Professional Corporations.

19 MINERAL, WATER AND FISHING RIGHTS

19.01 MINES AND MINERALS:

Department of Natural Resources has general supervision over mineral resources, mining and drilling, wells and water resources. (O.C.G.A. 12-4-1, 12-2-4, 12-5-70 to -73).

Operation of Mines.

Mining company (or lessee of mine) may acquire rights of way across lands of others for: building railroads; turnpikes or common roads as necessities of business require; diverting water course from usual channel when necessary for its business; cutting ditches, canals or other aqueducts to connect water power with mines; building dams necessary to control water power and cutting ditches, etc., necessary to drain mines. (O.C.G.A. 44-9-70 to -76). Georgia Surface Mining Act prescribes statewide minimal regulations of surface mining but does not prevent counties from passing more stringent standards. (236 Ga. 545, 224 S.E.2d 394).

Safeguarding of Employees.

No special provisions.

Inspection of Mines.

No special provisions.

Oil and Gas.

Supervised by Board of Natural Resources. (O.C.G.A. 12-4-43). Oil and Gas and Deep Drilling Act of 1975 regulates all drilling for oil and gas in state. (O.C.G.A. 12-4-40 to -53).

Stream Use.

No right of public passage on stream unless “navigable”, as defined in O.C.G.A. 44-8-5(a) to transport boats with freight in regular course of trade. (268 Ga. 710, 493 S.E.2d 148).

Special Permits and Licenses.

Operators of surface mines must obtain special permit, submit land use plan and file surety bond unless exempted. (O.C.G.A. 12-4-75). Miners of phosphate deposits in navigable waters must obtain special license and pay $100 license fee plus $1 per ton removed. (O.C.G.A. 12-4-101).

Taxes.

No severance tax.

20 MORTGAGES

20.01 CHATTEL MORTGAGES:

Uniform Commercial Code.

Adopted in 1962. (O.C.G.A. tit. 11, c. 9).

What May Be Mortgaged.

Governed by Uniform Commercial Code. (O.C.G.A. 11-9-101 et seq.). See category 3 Business Regulation and Commerce, topic 3.09 Commercial Code.

After-Acquired Property.

Governed by Uniform Commercial Code. (O.C.G.A. 11-9-101 et seq.). See category 3 Business Regulation and Commerce, topic 3.09 Commercial Code.

Floating Stock.

Governed by Uniform Commercial Code. (O.C.G.A. 11-9-101 et seq.). See category 3 Business Regulation and Commerce, topic 3.09 Commercial Code.

Future Advances.

Governed by Uniform Commercial Code. (O.C.G.A. 11-9-101 et seq.). See category 3 Business Regulation and Commerce, topic 3.09 Commercial Code.

Requisites of Instrument.

Governed by Uniform Commercial Code. (O.C.G.A. 11-9-101 et seq.). See category 3 Business Regulation and Commerce, topic 3.09 Commercial Code.

Execution of Instrument.

Governed by Uniform Commercial Code. (O.C.G.A. 11-9-101 et seq.). See category 3 Business Regulation and Commerce, topic 3.09 Commercial Code.

Recording.

See category 10 Documents and Records, topic 10.04 Records, subhead Filing Under Uniform Commercial Code: Place; Fees.

Assignment.

Governed by Uniform Commercial Code. (O.C.G.A. 11-9-101 et seq.). See category 3 Business Regulation and Commerce, topic 3.09 Commercial Code.

Foreclosure.

Person holding security interest in personal property may, upon statement of facts under oath, petition court for writ of possession. (O.C.G.A. 44-14-231). Any owner of personal property leased or rented in consumer rental transaction may obtain writ of possession in same manner. (O.C.G.A. 44-14-230). Upon such petition court will issue summons, to be served by sheriff or other specified officer, for defendant to appear at hearing to be held not less than seven days from date summons is served. (O.C.G.A. 44-14-232). Defendant may answer in writing or orally at hearing. (O.C.G.A. 44-14-233). If defendant answers, trial of any issue requiring trial shall be had. (O.C.G.A. 44-14-233). If no determination of plaintiff's rights can be made at original hearing, defendant required to pay unaccelerated amounts due into registry of court. (O.C.G.A. 44-14-234). Writ of possession will issue when defendant fails to answer (O.C.G.A. 44-14-233) or having answered fails to comply with any provision of statute to detriment of plaintiff. (O.C.G.A. 44-14-234). Whenever writ of possession is granted levy may be made by sheriff. (O.C.G.A. 44-14-236). At option of plaintiff, sheriff or other specified officer may deliver property to plaintiff for retention or disposition in accordance with Uniform Commercial Code (11-9 et seq.) or may advertise and sell property (O.C.G.A. 44-14-236). Defendant who desires to move property after service of summons must post bond with court. (O.C.G.A. 44-14-237).

Person seeking to foreclose an interest in personal property arising out of commercial transaction (one which gives rise to obligation to pay for goods sold or leased, services rendered, or monies loaned, for use in conduct of business or profession and not for personal consumption) may seek immediate writ of possession by petition setting forth claim and sufficient grounds for issuance. (O.C.G.A. 44-14-261). For immediate writ, petitioner must show that defendant has power to conceal, waste, encumber, convert, convey or remove property from jurisdiction if writ is not issued, or that petitioner's post-judgment remedy would otherwise be inadequate. (O.C.G.A. 44-14-262). See category 8 Debtor and Creditor, topic Replevin. Petitioner seeking writ of immediate possession also must either attach written waiver, signed by defendant, of right to notice prior to seizure of property or furnish bond in amount of claim. (O.C.G.A. 44-14-263). Writ for immediate possession will issue if petitioner has complied with foregoing provisions (O.C.G.A. 44-14-264), and petition, affidavits, waiver or bond and order will be served on defendant (O.C.G.A. 44-14-265). Anytime prior to sale of property as provided under O.C.G.A. 44-14-236, but no later than 30 days after service, defendant may file any defense or counterclaim, with trial following (O.C.G.A. 44-14-267), or defendant may move for dissolution of writ, which shall be granted unless petitioner proves grounds on which it was issued, or defendant may either pay full amount of petitioner's claim into court or post bond for lesser of value of property or amount of petitioner's claim. (O.C.G.A. 44-14-268). If writ is dissolved, action proceeds on petitioner's claim as though no writ had originally issued. (O.C.G.A. 44-14-268). Default judgment will issue against defendant for failure to appear and answer. (O.C.G.A. 44-14-269).

Sale or Removal of Property by Mortgagor.

Sale or removal of mortgaged property with intent to defraud is punishable as misdemeanor. (O.C.G.A. 44-14-6). There are special penalties for sale or removal of motor vehicles, including imprisonment for not less than one year nor more than three years. (O.C.G.A. 44-14-7).

Satisfaction.

Governed by Uniform Commercial Code. (O.C.G.A. 11-9-101 et seq.). See category 3 Business Regulation and Commerce, topic 3.09 Commercial Code.

Redemption.

Governed by Uniform Commercial Code. (O.C.G.A. 11-9-101 et seq.). See category 3 Business Regulation and Commerce, topic 3.09 Commercial Code.

Forms.

National forms used. Following may be used.

Form

— SECURITY AGREEMENT

(CONSUMER GOODS OR EQUIPMENT)

FOR VALUE RECEIVED, the undersigned hereby conveys to . . . . (hereafter called the “Bank”), and hereby grants to the Bank security title to, and a security interest in, the following property and all accessories, parts and equipment now or hereafter affixed thereto or used in connection therewith (hereafter collectively called “Goods”): . . . .

. . . .

. . . .

. . . . .together with all proceeds thereof;

(Continued on Reverse Side Hereof)

to secure the payment of the principal of, interest on and all obligations under a promissory note (hereafter called the “Note”), dated on or about the date hereof, of the undersigned payable to the order of the Bank, in the amount of . . . . Dollars ($. . . . .), all obligations of the undersigned hereunder, and all other obligations of the undersigned to the Bank, its successors and assigns, however created, arising or evidenced, whether direct or indirect, absolute or contingent, or now or hereafter existing, or due or to become due. The Note and all other obligations secured hereby are herein collectively called the “Liabilities.”

Until Default (as defined herein), the undersigned may have possession of the Goods and use the same in any lawful manner not inconsistent with this Agreement or with any policy of insurance on any of the Goods.

The undersigned hereby warrants and agrees that: (1) to the extent, if any, it shall have advised the Bank that any of the Goods are being acquired with the proceeds of the Note, such proceeds may be disbursed by the Bank directly to the seller of such Goods; (2) the Goods (except any thereof which prior to the execution of this Agreement the undersigned shall have advised the Bank in writing consist of equipment normally used in more than one State) will be kept at its address shown below (or if any other location is shown with respect to any such Goods in the description thereof herein, then at such other location), unless the Bank shall otherwise consent in writing; (3) if any of the Goods shall consist of equipment of a type normally used in more than one State, whether or not actually so used, it will immediately give written notice to the Bank of any change in the chief place of business of the undersigned, and of any use of any of such Goods in any jurisdiction other than a State in which the undersigned shall have previously advised the Bank such Goods will be used, and such Goods will not, unless the Bank shall otherwise consent in writing, be used outside the territorial limits of the United States; (4) it has, or forthwith will acquire, full title to the Goods, and will at all times keep the Goods free of all liens and claims whatsoever, other than the security interest hereunder; (5) no financing statement covering any of the Goods is on file in any public office and it will from time to time, on request of the Bank, execute such financing statement and other documents (and pay the cost of filing or recording the same in all public offices deemed necessary by the Bank) and do such other acts and things, all as the Bank may request to establish and maintain a valid security title and interest in the Goods (free of all other liens and claims whatsoever) to secure the payment of the Liabilities, including, without limitation, deposit with the Bank of any certificate of title issuable with respect to any of the Goods and notation thereon of the security interest hereunder; (6) it will not sell, transfer, lease or otherwise dispose of any of the Goods or any interest therein except with the prior written consent of the Bank; (7) it will at all times keep the Goods in first class order and repair, excepting any loss, damage or destruction which is fully covered by proceeds of insurance; (8) it will at all times keep the Goods insured against loss, damage, theft and other risks, in such amounts and with such companies and under such policies and in such form, all as shall be satisfactory to the Bank, which policies shall provide that loss thereunder shall be payable to the Bank as its interest may appear (and the Bank may apply any proceeds of such insurance which may be received by it toward payment of the Liabilities, whether or not due, in such order of application as the Bank may determine) and such policies or certificates thereof shall, if the Bank so requests, be deposited with the Bank; (9) the Goods, whether affixed to the realty or not, shall remain personal property; and (10) the Bank may examine and inspect the Goods or any thereof, wherever located, at any reasonable time or times. The Bank may from time to time, at its option, perform any agreement of the undersigned hereunder which the undersigned shall fail to perform and take any other action which the Bank deems necessary for the maintenance or preservation of any of the Goods or its interest therein, and the undersigned agrees to forthwith reimburse the Bank for all expenses of the Bank in connection with the foregoing, together with interest thereon at the rate of 8% per annum from the date incurred until reimbursed by the undersigned.

If the Goods or any part of them be repossessed by Bank, undersigned agrees to send notice by registered or certified mail to Bank within 24 hours thereafter if undersigned claims that any article not constituting a part of the Goods was contained therein at the time of the repossession, and agrees that failure so to do shall be a waiver of and a bar to any subsequent claim therefor.

The occurrence of any of the following events shall constitute a Default (as such term is used herein): (1) non-payment, when due, of any amount payable on any of the Liabilities or failure to perform any agreement of the undersigned contained herein; (2) any statement, representation or warranty of the undersigned herein or in any other writing at any time furnished by the undersigned to the Bank is untrue in any material respect as of the date made; (3) any Obligor (which term, as used herein, shall mean the undersigned and each other party primarily or secondarily liable on any of the Liabilities) becomes insolvent or unable to pay debts as they mature or makes an assignment for the benefit of creditors, or any proceeding is instituted by or against any Obligor alleging that such Obligor is insolvent or unable to pay debts as they mature; (4) entry of any judgment against any Obligor; (5) death of any Obligor who is a natural person, or of any partner of any Obligor which is a partnership; (6) dissolution, merger or consolidation, or transfer of a substantial part of the property of any Obligor which is a corporation or a partnership; (7) appointment of a receiver for Goods or for any property in which undersigned has an interest; (8) seizure of Goods; or (9) the Bank feels insecure for any other reason whatsoever. Whenever a Default shall be existing, the Note and all other Liabilities may (notwithstanding any provisions thereof), at the option of Bank, and without demand or notice of any kind, be declared, and thereupon immediately shall become due and payable, and the Bank may exercise from time to time any rights and remedies available to it under applicable law. The undersigned agrees, in case of Default, to assemble, at its expense, all the Goods at a convenient place acceptable to the Bank and to pay all costs of the Bank of collection of the Note and all other Liabilities, and enforcement of rights hereunder, including reasonable attorney's fees and legal expenses and expenses of any repairs to any realty or other property to which any of the Goods may be affixed or be a part. If any notification of intended disposition of any of the Goods is required by law, such notification, if mailed, shall be deemed reasonably and properly given if mailed at least five days before such disposition, postage prepaid, addressed to the undersigned either at the address shown below, or at any other address of the undersigned appearing on the records of the Bank. Any proceeds of any disposition of any of the Goods may be applied by the Bank to the payment of expenses in connection with the Goods, including reasonable attorney's fees and legal expenses, and any balance of such proceeds may be applied by the Bank toward the payment of such of the Liabilities, and in such order of application, as the Bank may from time to time elect. No delay or failure on the part of the Bank in the exercise of any right or remedy shall operate as a waiver thereof, and no single or partial exercise by the Bank of any right or remedy shall preclude other or further exercise thereof of the exercise of any other right or remedy. Time is of the essence of this Agreement. If more than one party shall execute this Agreement, the term “undersigned” shall mean all parties signing this Agreement and each of them, and all such parties shall be jointly and severally obligated hereunder. The neuter pronoun, when used herein, shall include the masculine and feminine and also the plural. If this Agreement is not dated when executed by the undersigned, the Bank is authorized, without notice to the undersigned, to date this Agreement.

The additional provisions, if any, set forth or referred to on the reverse side hereof are hereby made a part of this Agreement.

This Agreement has been delivered in the State of Georgia and shall be construed in accordance with the laws of that State. Wherever possible each provision of this Agreement shall be interpreted in such manner as to be effective and valid under applicable law, but if any provision of this Agreement shall be prohibited by or invalid under applicable law, such provision shall be ineffective to the extent of such prohibition or invalidity, without invalidating the remainder of such provision or the remaining provisions of this Agreement.

The rights and privileges of the Bank hereunder shall inure to the benefit of its successors and assigns.

IN WITNESS WHEREOF, this Agreement has been duly executed as of the . . . . . . day of . . . . . ., 20. . . . . .

Address . . . .

. . . .(SEAL)

Address . . . .

. . . .(SEAL)

Address . . . .

. . . .(SEAL)

ADDITIONAL PROVISIONS OF AGREEMENT*

*If none, insert “None.”

— SECURITY AGREEMENT

(EQUIPMENT AND INVENTORY)

FOR VALUE RECEIVED, the undersigned hereby conveys to . . . . (hereafter called the “Bank”), and hereby grants to the Bank security title to, and a security interest in, the following property and all accessories, parts and equipment now or hereafter affixed thereto or used in connection therewith (hereafter collectively called “Goods”):

. . . .

. . . .

. . . .

(Continued on Reverse Side Hereof)

and also

all other goods and property which are held by undersigned for sale or lease or are furnished or are to be furnished by the undersigned under any contract of service or are held by the undersigned as raw materials, work in process or materials used or consumed in a business, together with the products and proceeds thereof (hereafter collectively called "Inventory") ("Goods" and "Inventory" are sometimes hereafter collectively called "Collateral") to secure the payment of the principal of, interest on and all obligations under a promissory note (hereafter called the "Note"), dated on or about the date hereof, of the undersigned payable to the order of the Bank, in the amount of . . . . Dollars ($. . . . . .), all obligations of the undersigned hereunder, and all other obligations of the undersigned to the Bank, its successors and assigns, however created, arising or evidenced, whether direct or indirect, absolute or contingent, or now or hereafter existing, or due or to become due. The Note and all other obligations secured hereby are herein collectively called the "Liabilities."

Until Default (as defined herein), the undersigned may have possession of the Goods and use the same in any lawful manner not inconsistent with this Agreement or with any policy of insurance on any of the Goods, and the undersigned may have possession of the Inventory, and may sell, lease or furnish under contract any thereof that is normally held by the undersigned for such purpose, and may use or consume in the ordinary course of the undersigned's business any raw materials, work in process or materials normally held by the undersigned for that purpose.

The undersigned hereby warrants and agrees that: (1) to the extent, if any, it shall have advised the Bank that any of the Collateral are being acquired with the proceeds of the Note, such proceeds may be disbursed by the Bank directly to the seller of such Collateral; (2) the Collateral (except any thereof which prior to the execution of this Agreement the undersigned shall have advised the Bank in writing consists of equipment normally used in more than one State) will be kept at its address shown below (or if any other location is shown with respect to any such Collateral in the description thereof herein, then at such other location), unless the Bank shall otherwise consent in writing; (3) if any of the Goods shall consist of equipment of a type normally used in more than one State, whether or not actually so used, it will immediately give written notice to the Bank of any change in the chief place of business of the undersigned, and of any use of any of such Goods in any jurisdiction other than a State in which the undersigned shall have previously advised the Bank such Goods will be used, and such Goods will not, unless the Bank shall otherwise consent in writing, be used outside the territorial limits of the United States; (4) it has, or forthwith will acquire, full title to the Collateral, and will at all times keep the Collateral free of all liens and claims whatsoever, other than the security interest hereunder; (5) no financing statement covering any of the Collateral is on file in any public office and it will from time to time, on request of the Bank, execute such financing statement and other documents (and pay the cost of filing or recording the same in all public offices deemed necessary by the Bank) and do such other acts and things, all as the Bank may request to establish and maintain a valid security title and interest in the Collateral (free of all other liens and claims whatsoever) to secure the payment of the Liabilities, including, without limitation, deposit with the Bank of any certificate of title issuable with respect to any of the Goods and notation thereon of the security interest hereunder; (6) it will not sell, transfer, lease or otherwise dispose of any of the Collateral or any interest therein except as expressly permitted herein with respect to Inventory or except with the prior written consent of the Bank; (7) it will at all times keep the Collateral in first class order and repair, excepting any loss, damage or destruction which is fully covered by proceeds of insurance; (8) it will at all times keep the Collateral insured against loss, damage, theft and other risks, in such amounts and with such companies and under such policies and in such form, all as shall be satisfactory to the Bank, which policies shall provide that loss thereunder shall be payable to the Bank as its interest may appear (and the Bank may apply any proceeds of such insurance which may be received by it toward payment of the Liabilities, whether or not due, in such order of application as the Bank may determine) and such policies or certificates thereof shall, if the Bank so requests, be deposited with the Bank; (9) it will at all times keep accurate and complete records reflecting the current status of the Inventory, permit the Bank to examine and extract from the same and furnish to Bank, on request, duly verified copies of summaries thereof in form and content satisfactory to Bank; (10) the Goods, whether affixed to the realty or not, shall remain personal property; and (11) the Bank may examine and inspect the Collateral or any thereof, wherever located, at any reasonable time or times. The Bank may from time to time, at its option, perform any agreement of the undersigned hereunder which the undersigned shall fail to perform and take any other action which the Bank deems necessary for the maintenance or preservation of any of the Collateral or its interest therein, and the undersigned agrees to forthwith reimburse the Bank for all expenses of the Bank in connection with the foregoing, together with interest thereon at the rate of 8% per annum from the date incurred until reimbursed by the undersigned.

The occurrence of any of the following events shall constitute a Default (as such term is used herein): (a) nonpayment, when due, of any amount payable on any of the Liabilities or failure to perform any agreement of the undersigned contained herein; (b) any statement, representation or warranty of the undersigned herein or in any other writing at any time furnished by the undersigned to the Bank is untrue in any material respect as of the date made; (c) any Obligor (which term, as used herein, shall mean the undersigned and each other party primarily or secondarily liable on any of the Liabilities) becomes insolvent or unable to pay debts as they mature or makes an assignment for the benefit of creditors, or any proceeding is instituted by or against any Obligor alleging that such Obligor is insolvent or unable to pay debts as they mature; (d) entry of any judgment against any Obligor; (e) death of any Obligor who is a natural person, or of any partner of any Obligor which is a partnership; (f) dissolution, merger or consolidation, or transfer of a substantial part of the property of any Obligor which is a corporation or a partnership; (g) appointment of a receiver for any of Collateral or for any property in which undersigned has an interest; (h) seizure of any of Collateral; or (i) the Bank feels insecure for any other reason whatsoever. Whenever a Default shall be existing, the Note and all other Liabilities may (notwithstanding any provisions thereof), at the option of Bank, and without demand or notice of any kind, be declared, and thereupon immediately shall become, due and payable, and the Bank may exercise from time to time any rights and remedies available to it under applicable law. The undersigned agrees, in case of Default, except with written consent of Bank, to cease the sale, lease or furnishing under contract of service of any Inventory and to cease use or consumption thereof in business, and to assemble, at its expense, all the Collateral at a convenient place acceptable to the Bank and to pay all costs of the Bank of collection of the Note and all other Liabilities, and enforcement of rights hereunder, including reasonable attorney's fees and legal expenses, and expenses of any repairs to any realty or other property to which any of the Goods may be affixed or be a part. If any notification of intended disposition of any of the Collateral is required by law, such notification, if mailed, shall be deemed reasonably and properly given if mailed at least five days before such disposition, postage prepaid, addressed to the undersigned either at the address shown below, or at any other address of the undersigned appearing on the records of the Bank. Any proceeds of any disposition of any of the Collateral may be applied by the Bank to the payment of expenses in connection with the Collateral, including reasonable attorney's fees and legal expenses, and any balance of such proceeds may be applied by the Bank toward the payment of such of the Liabilities, and in such order of application, as the Bank may from time to time elect.

No delay or failure on the part of the Bank in the exercise of any right or remedy shall operate as a waiver thereof, and no single or partial exercise by the Bank of any right or remedy shall preclude other or further exercise thereof or the exercise of any other right or remedy. Time is of the essence of this Agreement. If more than one party shall execute this Agreement, the term “undersigned” shall mean all parties signing this Agreement and each of them, and all such parties shall be jointly and severally obligated hereunder. The neuter pronoun, when used herein, shall include the masculine and feminine and also the plural. If this Agreement is not dated when executed by the undersigned, the Bank is authorized, without notice to the undersigned, to date this Agreement.

The additional provisions, if any, set forth or referred to on the reverse side hereof are hereby made a part of this Agreement.

This Agreement has been delivered in the State of Georgia and shall be construed in accordance with the laws of that State. Wherever possible each provision of this Agreement shall be interpreted in such manner as to be effective and valid under applicable law, but if any provision of this Agreement shall be prohibited by or invalid under applicable law, such provision shall be ineffective to the extent of such prohibition or invalidity, without invalidating the remainder of such provision or the remaining provisions of this Agreement.

The rights and privileges of the Bank hereunder shall inure to the benefit of its successors and assigns.

IN WITNESS WHEREOF, this Agreement has been duly executed as of the . . . . day of . . . ., 20 . . . .

Address . . . .

. . . .(SEAL)

Address . . . .

. . . .(SEAL)

Address . . . .

. . . .(SEAL)

ADDITIONAL PROVISIONS OF AGREEMENT*

*If none, insert “None.”

20.02 COLLATERAL SECURITY:

See category 8 Debtor and Creditor, topic 8.15 Pledges.

Release and Collateral.

Uniform Commercial Code adopted. (O.C.G.A. tit. 11). See category 3 Business Regulation and Commerce, topic 3.09 Commercial Code.

20.03 MORTGAGES OF PERSONAL PROPERTY:

See topic 20.01 Chattel Mortgages.

20.04 MORTGAGES OF REAL PROPERTY:

Both mortgages and deeds to secure debt (also referred to as security deeds or loan deeds) recognized in Georgia, although latter are used almost exclusively. Mortgage creates lien only; security deed is conveyance of title. (O.C.G.A. 44-14-30, -60). Persons transacting business in state as mortgage brokers, mortgage lenders or mortgage loan originators must be licensed pursuant to Code §7-1-1000 et seq.

Uniform Commercial Code.

Adopted. (O.C.G.A. tit. 11).

Execution.

Security deeds and mortgages of land must be executed in same form as deeds of bargain and sale, both as to validity between parties and requirements for recording. See category 21 Property, topic 21.06 Deeds, subhead Recording. (O.C.G.A. 44-14-33, 44-14-61).

Recording.

Unrecorded security deed or mortgage of land is valid between parties but not against other persons without notice of unrecorded instrument. (O.C.G.A. 44-14-35, -63). Same formality of execution as deed conveying real property required. (O.C.G.A. 44-14-33). See category 21 Property, topic 21.06 Deeds, subhead Recording. Mailing address of grantee also required. (O.C.G.A. 44-14-63).

Recording Fee.

See category 10 Documents and Records, topic 10.04 Records, subhead Recording Fees.

Trust Deeds.

Use recognized as device to secure debts by O.C.G.A. 44-14-120.

Future Advances.

Operation of “open end” clauses limited to debts arising ex contractu between original parties (O.C.G.A. 44-14-1), except that security deed so providing will secure advances to pay taxes, to pay insurance premiums, to pay superior liens, to repair, maintain or preserve property or to complete improvements on property, and will secure expenses of collection and foreclosure, regardless of whether such advances made by original grantee or whether property is still owned by original grantor. (O.C.G.A. 44-14-2[a]). Mortgage by person or corporation to trustee to secure issue of bonds may expressly include after acquired property of such person or corporation. (O.C.G.A. 44-14-35.1).

Priorities.

Effect of recording is same as for deeds of bargain and sale. See category 21 Property, topic 21.06 Deeds, subhead Recording. (O.C.G.A. 44-14-63).

Subordination Agreements.

Enforceable, whether in mortgage or security deed or separate agreement, if sufficiently specific as to amount, terms, time limitations and any other conditions. (171 Ga. 878, 156 S.E. 888; see also 233 Ga. 819, 213 S.E.2d 678).

Assignment.

Security deeds may be assigned by grantee. Rules that apply to deeds of bargain and sale as to execution, requirements for recording and effect of recording also apply to assignments. (O.C.G.A. 44-14-64). No recording of transfer of deed to secure debt necessary if by certain financial institutions and lenders provided specific requirements met. (O.C.G.A. 44-14-64[d], [e], [f]). Mailing address of transferee required. (O.C.G.A. 44-14-64[g]).

Releases.

Partial releases from mortgage or security deed are customarily made by quitclaim deed.

Satisfaction.

Payoff balance must be provided without charge upon written request which includes self-addressed stamped envelope. (O.C.G.A. 44-14-64[h]). When debt secured by recorded mortgage is paid off, original instrument may be presented with order of grantee or holder directing that such instrument be canceled, to clerk of superior court of county in which such instrument recorded, and clerk must index and record, in same manner as original mortgage is recorded, canceled mortgage and cancellation order of grantee and must write words “satisfied” and “canceled” across face of record of such instrument or page of said record, date of entry, and sign his name thereto officially. (O.C.G.A. 44-14-4). Clerk must also indicate in mortgage records where cancellation order is recorded. (O.C.G.A. 44-14-4). Grantee or transferee is required to furnish Clerk with sufficient satisfaction or cancellation of such instrument or other instrument within 60 days from date of payment in full of indebtedness secured by instrument and direct clerk to transmit to grantor original cancellation or satisfaction document at grantor's last known address as shown on records of grantor or holder. (O.C.G.A. 44-14-3). Grantor or holder is authorized to add to pay-off amount costs of recording cancellation or satisfaction. (O.C.G.A. 44-14-3). Damages for failure to transmit such satisfaction or cancellation are $500 plus any loss caused to grantor plus reasonable attorneys' fees, but grantee or holder is not liable if he demonstrates reasonable inability to comply, and no damages are due unless and until grantor makes written demand for transmittal of satisfaction or cancellation of such instrument; applies to security deeds as well as to mortgages. (O.C.G.A. 44-14-3). Clerk may be authorized to cancel security deed (in same manner as cancellation of mortgage) by cancellation upon original security deed, conveyance from record holder of security deed by quitclaim deed or other deed suitable for recording which refers to original security deed, or, if original security deed has been lost, stolen, or otherwise mislaid, by cancellation instrument as follows:

Form

____________ County, Georgia

The indebtedness referred to in that certain deed to secure debt from ___________ to ___________, dated ___________, and of record in Deed Book ______, Page ______, in the Office of the Clerk of the Superior Court of _________ County, Georgia, having been paid in full and the undersigned being the present owner of such secured interest, by virtue of being the original grantee or the heir, assign, transferee, or devisee of the original grantee, the clerk of such superior court is authorized and directed to cancel that deed of record as provided in Code Section O.C.G.A. 44-14-4 of the O.C.G.A. for other mortgage cancellations.

IN WITNESS WHEREOF, the undersigned, has set his hand and seal, this ______ day of ________, 20_____.

_________________ (SEAL)

Signature

Signed, sealed and

delivered on the

date above shown

____

Unofficial Witness

____

Notary Public

(SEAL)

My Commission Expires: ______________. (O.C.G.A. 44-14-67).

Foreclosure.

Customarily, foreclosure is pursuant to powers of sale provided in instrument, authorizing private, nonjudicial sale. However, judicial foreclosure may be used by petition to superior court describing debt and mortgage. Rule granted requiring payment before next term of court which is published twice a month for two months or served on mortgagor 30 days before return. (O.C.G.A. 44-14-180). Defenses may be filed at return term. (O.C.G.A. 44-14-184). If no defense or payment, rule made absolute and judgment given for amount due and costs. Sale is as in all judicial sales by sheriff. (O.C.G.A. 44-14-187).

Foreclosure may be had also in equity by petition to the superior court, which proceeds as in all other suits. (O.C.G.A. 44-14-49).

There is no moratorium on mortgage foreclosures.

Nonjudicial Foreclosure Sales.

Powers of sale in deeds of trust, security deeds, mortgages, and other instruments must be strictly construed and fairly exercised. (O.C.G.A. 23-2-114). Unless instrument creating such power specifically provides to contrary, personal representative, heir, legatee, devisee or successor of grantee in mortgage, deed of trust, loan, deed, bill of sale to secure debt or other like instrument, or assignee thereof, or his or her personal representative, heir, legatee, devisee or successor, may exercise any power therein contained, and such powers may be exercised by transferees. (O.C.G.A. 23-2-114). Power of sale not revocable by death of grantor or donor and may be exercised after his or her death in same manner and to same extent as though such grantor or donor were in life; and it is not necessary, in exercise of such power, to advertise or sell as property of estate of deceased, nor to make any mention of or reference to such death. (O.C.G.A. 23-2-114).

Under statutory procedure, sales of real estate under powers contained in mortgages, security deeds and other lien contracts must be preceded by advertisement once a week for four weeks immediately preceding day sale is to take place in newspaper in which sheriff's sales are advertised in county in which land lies. (O.C.G.A. 44-14-162, 9-13-140, 9-13-141). Sale shall be made at public outcry at courthouse on first Tues. of month between 10 A.M. and 4 P.M. E.S.T. or E.D.S.T., whichever is applicable; but if first Tues. of month should fall on New Year's Day or Independence Day, such sale must take place on immediately following Wed. (O.C.G.A. 9-13-160, -161). Notice must be given to debtor by certified mail or statutory overnight delivery (O.C.G.A. 9-10-12[b]) at least 15 days before sale if residential property. (O.C.G.A. 44-14-162.2). Actual receipt of properly addressed notice is immaterial. (261 Ga. 835, 411 S.E.2d 874). Power of sale must be created by contract. Statutory procedure merely limiting in effect and does not create power of sale by itself. Statutory procedure is constitutional, but contractual agreement containing power of sale is constitutionally enforceable only if voluntarily, intelligently and knowingly made. (230 Ga. 426, 197 S.E.2d 376). Statutory procedure does not involve necessary state action for claim of denial of due process rights. (261 Ga. 835).

Deficiency Judgment.

When secured realty is sold under power of sale and does not bring amount of debt secured, no deficiency judgment can be obtained unless petition for confirmation of sale is filed with superior court judge within 30 days after sale and court confirms sale. Confirmation not necessary in judicial foreclosure. (O.C.G.A. 44-14-161).

Redemption.

No statutory right of redemption exists in judicial foreclosure or power of sale foreclosure.

However, power of sale foreclosure may be enjoined or set aside. (170 Ga. 75, 152 S.E. 85). If mortgagee has possession of property, mortgagor may redeem within ten years of mortgagee's last recognition of right of redemption. (O.C.G.A. 44-14-42.1).

Form.

No statutory form. Usual form of loan deed with power of sale is as follows:

Form

DEED TO SECURE DEBT

STATE OF GEORGIA

COUNTY OF . . . .

THIS INDENTURE, made this . . . . . . day of . . . ., 20. . . . . ., between . . . . .of the State of . . . . .and County of . . . ., Grantor, and . . . . of the State of . . . . and County of . . . ., whose address is . . . ., Grantee,

WITNESSETH: That, WHEREAS, Grantor is justly indebted to Grantee in the sum of . . . . Dollars ($. . . . . . .), in lawful money of the United States, and has agreed to pay the same, with interest thereon, according to the terms of a certain note (the “Note”) given by Grantor to Grantee, bearing even date herewith, with final payment being due on . . . ., the Note, by reference, being made a part hereof;

NOW, THEREFORE, in consideration of the premises and of the sum hereinabove set forth, Grantor has granted, bargained, sold and conveyed, and by these presents does grant, bargain, sell and convey unto Grantee the following property, to-wit:

[insert property description]

TOGETHER WITH all the improvements now or hereafter erected on the property, and all easements, rights, appurtenances, rents, awards, royalties, mineral, oil and gas rights and profits, water, water rights, and water stock, and all fixtures now or hereafter attached to the property, all of which, including replacements and additions thereto, shall be deemed to be and remain a part of the property covered by this Deed;

TO HAVE AND TO HOLD the said premises hereby granted (all of which are collectively referred to herein as the “Premises”) with all and singular the rights, members and appurtenances thereto appertaining, to the use, benefit and behoof of the Grantee, forever, in FEE SIMPLE.

Grantor warrants that Grantor has good title to the Premises, and is lawfully seized and possessed of the Premises and every part thereof, and has the right to convey same; that the Premises are unencumbered except as may be herein expressly provided; and that Grantor will forever warrant and defend the title to the Premises unto Grantee against the claims of all persons whomsoever.

This instrument is a deed passing legal title pursuant to the laws of the State of Georgia governing loan or security deeds and is not a mortgage; and is made and intended to secure the payment of the indebtedness of Grantor to Grantee evidenced by the Note in accordance with the terms thereof, together with any and all other indebtedness now owing or which may hereafter be owing by Grantor to Grantee, however incurred (including advances to pay taxes, assessments and insurance premiums on the Premises, the costs of repairing, maintaining, and preserving the

Premises, and the cost of completing any improvements on the Premises), and all renewal or renewals and extension or extensions of the Note or other indebtedness, either in whole or in part (all of which are collectively referred to herein as the “Secured Indebtedness”).

AND GRANTOR FURTHER COVENANTS AND AGREES WITH GRANTEE as follows:

1. Grantor shall pay to Grantee the Secured Indebtedness with interest thereon as in the Note and this deed provided.

2. Grantor shall pay, when due and payable, (a) all taxes, assessments, general or special, and other charges levied on, or assessed, placed or made against the Premises, this instrument or the Secured Indebtedness or any interest of the Grantee in the Premises or the obligations secured hereby; (b) premiums on policies of fire and other hazard insurance covering the Premises, as required in Article 3 herein; and (c) all liens or encumbrances of any kind on the Premises having priority over this instrument. Grantor shall promptly deliver to Grantee receipts showing payment in full of all of the above items.

3. (a) Grantor shall keep the Premises insured for the benefit of Grantee against loss or damage by fire, lightning, windstorm, hail, explosion, riot, riot attending a strike, civil commotion, aircraft, vehicles and smoke and such other hazards as Grantee may from time to time require, all in amounts approved by Grantee not exceeding 100% of full insurable value (in no event shall the amounts of insurance be less than the amount of the Secured Indebtedness); all insurance herein provided for shall be in form and by companies approved by Grantee; and, regardless of the types or amounts of insurance required and approved by Grantee, Grantor shall assign and deliver to Grantee, as collateral and further security for the payment of the Secured Indebtedness, all policies of insurance which insure against any loss or damage to the Premises, with loss payable to Grantee, without contribution by Grantee, pursuant to the New York Standard or other mortgagee clause satisfactory to Grantee. If Grantee, by reason of such insurance, receives any money for loss or damage, such amount may, at the option of Grantee, be retained and applied by Grantee toward payment of the Secured Indebtedness, or be paid over, wholly or in part, to Grantor for the repair or replacement of the Premises or any part thereof, or for any other purpose or object satisfactory to Grantee, but Grantee shall not be obligated to see to the proper application of any amount paid over to Grantor.

(b) Not less than 30 days prior to the expiration date of each policy of insurance required of Grantor pursuant to this Article, and of each policy of insurance held as additional collateral to secure Secured Indebtedness, Grantor shall deliver to Grantee a renewal policy or policies marked “premium paid” or accompanied by other evidence of payment satisfactory to Grantee.

(c) In the event of a foreclosure of this deed, the purchaser of the Premises shall succeed to all rights of Grantor, including any right to unearned premiums, in and to all policies of insurance assigned and delivered to Grantee, with respect to all property conveyed and to be conveyed by this deed, pursuant to the provisions of this Article.

4. Grantor shall maintain the Premises in good condition and repair, shall not commit or suffer any waste to the Premises, shall complete any improvements on the Premises and shall comply with, or cause to be complied with, all statutes, ordinances and requirements of any governmental authority relating to the Premises or any part thereof. Grantor shall promptly repair, restore, replace or rebuild any part of the Premises, now or hereafter encumbered by this deed, which may be affected by any proceeding of the character referred to in Article 6 herein. No part of the Premises, including, but not limited to, any building, structure, parking lot, driveway, landscape scheme, timber or other ground improvement, or other property, now or hereafter conveyed as security by or pursuant to this deed, shall be removed, demolished or materially altered without the prior written consent of Grantee. Grantor shall complete, within a reasonable

time, and pay for any building, structure or other improvement at any time in the process of construction on the Premises. Grantee shall not initiate, join in or consent to any change in any private restrictive covenant, zoning ordinance or other public or private restrictions limiting or defining the uses which may be made of the Premises or any part thereof. Grantee and any persons authorized by Grantee shall have the right to enter and inspect the Premises at all reasonable times and access thereto shall be permitted for that purpose.

5. Grantee shall be subrogated to all right, title, lien, or equity of all persons to whom it may have paid moneys in settlement of liens, charges, or in acquisition of title of or for its benefit hereunder, or for the benefit and account of Grantor at the time of making the loan secured by this security deed, or subsequently under any of the provisions herein.

6. Notwithstanding any taking of all or any portion of the Premises by eminent domain, alteration of the grade of any street or other injury to, or decrease in value of, the Premises by any public or quasi public authority or corporation. Grantor shall continue to pay principal and interest on the Secured Indebtedness, and any reduction in the Secured Indebtedness resulting from the application by Grantee of any award or payment for such taking, alteration, injury or decrease in value of the Premises, as hereinafter set forth, shall be deemed to take effect only on the date of such receipt; and said award or payment may, at the option of Grantee, be retained and applied by Grantee toward payment of the Secured Indebtedness, or be paid over, wholly or in part, to Grantor for the purpose of altering, restoring, or rebuilding any part of the Premises which may have been altered, damaged or destroyed as a result of any such taking, alteration of grade, or other injury to the Premises, or for any other purpose or object satisfactory to Grantee, but Grantee shall not be obligated to see to the application of any amount paid over to Grantor. If, prior to the receipt by Grantee of such award or payment, the Premises shall have been sold on foreclosure of this deed, Grantee shall have the right to receive said award or payment to the extent of any deficiency found to be due upon such sale, with legal interest thereon, whether or not a deficiency judgment on this deed shall have been sought or recovered or denied, and the reasonable counsel fees, costs and disbursements incurred by Grantee in connection with the collection of such award or payment.

7. Upon the occurrence of any one of the following events (herein called an “event of default”):

(a) should Grantor fail to pay the Secured Indebtedness, or any part thereof, when and as the same shall become due and payable;

(b) should any warranty of Grantor herein contained, or contained in any instrument, transfer, conveyance, assignment or loan agreement given with respect to the Secured Indebtedness, prove untrue or misleading in any material aspect;

(c) should the Premises be subject to actual or threatened waste, or any part thereof be removed, demolished or materially altered so that the value of the Premises be diminished except as provided for in Article 6 herein;

(d) should any federal tax lien or claim of lien for labor or material be filed of record against Grantor or the Premises and not be removed by payment or bond within 30 days from date of recording;

(e) should any claim of priority to this deed by title, lien or otherwise be asserted in any legal or equitable proceeding;

(f) should Grantor make any assignment for the benefit of creditors, or should a receiver, liquidator or trustee of Grantor or of any of Grantor's property be appointed, or should any petition for the bankruptcy, reorganization or arrangement of Grantor, pursuant to the Federal

Bankruptcy Code or any similar statute, be filed, or should Grantor be adjudicated a bankrupt or insolvent, or should Grantor, if a corporation, be liquidated or dissolved or its charter expire or be revoked, or, if a partnership or business association, be dissolved or partitioned, or, if a trust, be terminated or expire; or

(g) should Grantor fail to keep, observe, perform, carry out and execute in every particular the covenants, agreements, obligations and conditions set out in this deed, or in the Note, or in any instrument, transfer, conveyance, assignment or loan agreement given with respect to the Secured Indebtedness; then and thereupon Grantee may do any one or more of the following:

(i) enter upon and take possession of the Premises without the appointment of a receiver, or an application therefor, employ a managing agent of the Premises and let the same, either in its own name, or in the name of Grantor, and receive the rents, incomes, issues and profits of the Premises and apply the same after payment of all necessary charges and expenses, on account of the Secured Indebtedness, and Grantor will transfer and assign to Grantee, in form satisfactory to Grantee, Grantor's lessor interest in any lease now or hereafter affecting the whole or any part of the premises;

(ii) pay any sums in any form or manner deemed expedient by Grantee to protect the security of this instrument or to cure any event of default other than payment of interest or principal on Secured Indebtedness (specifically including the payment of taxes, assessments and insurance premiums on the Premises, the costs of maintaining, repairing, and preserving the Premises, and the costs of completing any improvements on the Premises); make any payments hereby authorized to be made according to any bill, statement, or estimate furnished or procured from the appropriate public officer or the party claiming payment without inquiry into the accuracy or validity thereof, and the receipt of any such public officer or party in the hands of Grantee shall be conclusive evidence of the validity and amount of items so paid, in which event the amounts so paid, with interest thereon from the date of such payment at the rate of ___% per annum, shall be added to and become a part of the Secured Indebtedness and be immediately due and payable to Grantee; and Grantee shall be subrogated to any encumbrance, lien, claim or demand, and to all the rights and securities for the payment thereof, paid or discharged with the principal sum secured hereby or by Grantee under the provisions hereof, and any such subrogation rights shall be additional and cumulative security to this deed;

(iii) declare the entire Secured Indebtedness immediately due, payable and collectible, without notice to Grantor, regardless of maturity, and, in that event, the entire Secured Indebtedness shall become immediately due, payable and collectible; and thereupon, Grantee may sell and dispose of the Premises at public auction, at the usual place for conducting sales at the courthouse in the county where the Premises or any part thereof may be, to the highest bidder for cash, first advertising the time, terms and place of such sale by publishing a notice thereof once a week for four consecutive weeks in a newspaper in which sheriff's advertisements are published in said county, all other notice being hereby waived by Grantor; and Grantee may thereupon execute and deliver to the purchaser at said sale a sufficient conveyance of the Premises in fee simple, which conveyance may contain recitals as to the happening of the default upon which the execution of the power of sale, herein granted, depends, and said recitals shall be presumptive evidence that all preliminary acts prerequisite to said sale and deed were in all things duly complied with; and Grantee, its agents, representatives, successors or assigns, may bid and purchase at such sale; and Grantor hereby constitutes and appoints Grantee or its assigns or agents as attorney in fact to make such recitals, sale and conveyance, and all of the acts of such attorney in fact are hereby ratified, and Grantor agrees that such recitals shall be binding and conclusive upon Grantor and that the conveyance to be made by Grantee, or its assigns, (and in the event of a deed in lieu of foreclosure, then as to such conveyance) shall be effectual to bar all right, title and interest, equity of redemption, including all statutory redemption, homestead, dower, curtesy and all other exceptions of Grantor, or its successors in interest, in and to said Premises; and

Grantee, or its assigns, shall collect the proceeds of such sale, reserving therefrom all unpaid Secured Indebtedness with interest then due thereon, and all amounts together with all costs and charges for advertising, and commissions for selling the Premises, and 15% of the aggregate amount due, as attorney's fees, and pay over any surplus to Grantor (in the event of deficiency Grantor shall immediately on demand from Grantee pay over to Grantee, or its nominee, such deficiency); and Grantor agrees that possession of the Premises during the existence of the Secured Indebtedness by Grantor, or any person claiming under Grantor, shall be that of tenant under Grantee, or its assigns, and, in case of a sale, as herein provided, Grantor or any person in possession under Grantor shall then become and be tenants holding over, shall forthwith deliver possession to the purchaser at such sale, or be summarily dispossessed in accordance with the provisions of law applicable to tenants holding over; the power and agency hereby granted are coupled with an interest and are irrevocable by death or otherwise, and are in addition to any and all other remedies which Grantor may have at law or in equity.

Grantee, in any action to foreclose this deed, or upon any event of default, shall be at liberty to apply for the appointment of a receiver of the rents and profits or of the Premises or both without notice, and shall be entitled to the appointment of such a receiver as a matter of right, without consideration of the value of the Premises as security for the amounts due the Grantee, or the solvency of any person or corporation liable for the payment of such amounts.

In case of any sale under this deed by virtue of the exercise of the power herein granted, or pursuant to any order in any judicial proceedings or otherwise, the Premises or any part thereof may be sold in one parcel and as entirety, or in such parcels, manner or order as Grantee in its sole discretion may elect, and one or more exercises of the powers herein granted shall not extinguish or exhaust the power unless the entire Premises are sold or the Secured Indebtedness paid in full.

8. Grantor, for himself and family, hereby waives and renounces all homestead and exemption rights provided for by the Constitution and Laws of the United States or the State of Georgia, in and to the Premises as against the collection of the Secured Indebtedness, or any part thereof; and Grantor agrees that where, by the terms of the conveyance or the Note secured hereby, a day is named or a time fixed for the payment of any sum of money or the performance of any agreement, the time stated enters into the consideration and is of the essence of the whole contract.

9. Grantee shall have the right from time to time to sue for any sums, whether interest, principal or any installment of either or both, taxes, penalties, or any other sums required to be paid under the terms of this deed, as the same become due, without regard to whether or not all of the Secured Indebtedness shall be due on demand, and without prejudice to the right of Grantee thereafter to enforce any appropriate remedy against the Grantor, including an action of foreclosure or any other action, for a default or defaults by Grantor existing at the time such earlier action was commenced.

10. The rights of Grantee, granted and arising under the clauses and covenants contained in this deed and the Note, shall be separate, distinct and cumulative of other powers and rights herein granted and all other rights which Grantee may have in law or equity, and none of them shall be in exclusion of the others; and all of them are cumulative to the remedies for collection of indebtedness, enforcement of rights under security deeds, and preservation of security as provided at law. No act of Grantee shall be construed as an election to proceed under any one provision herein or under the Note to the exclusion of any other provision, or an election of remedies to the bar of any other remedy allowed at law or in equity, anything herein or otherwise to the contrary notwithstanding.

11. Every provision for notice and demand or request shall be deemed fulfilled by written notice and demand or request personally served on one or more of the persons who shall at the time hold the record title to the Premises, or on their heirs or successors, or mailed by depositing it in any post office station or letter box, enclosed in a postpaid envelope (a) addressed to such person or persons, or their heirs or successors, at his, their or its address last known to Grantee or (b) addressed to the street address of the Premises hereby conveyed.

12. Any indulgence or departure at any time by the Grantee from any of the provisions hereof, or of any obligation hereby secured, shall not modify the same or relate to the future or waive future compliance therewith by the Grantor. If more than one party shall execute this deed, the term “Grantor” shall mean all parties signing, and each of them, and each agreement, obligation and Secured Indebtedness of the Grantor shall be and mean the several as well as joint undertaking of each of them.

13. The words “Grantor” and “Grantee” whenever used herein shall include all individuals, corporations (and if a corporation, its officers, employees, agents or attorneys) and any and all other persons or entities, and the respective heirs, executors, administrators, legal representatives, successors and assigns of the parties hereto, and all those holding under either of them, and the pronouns used herein shall include, when appropriate, either gender and both singular and plural, and the word “Note” shall also include one or more notes and the grammatical construction of sentences shall conform thereto.

IN WITNESS WHEREOF, this deed has been duly executed and sealed by Grantor the day and year first above written.

Signed, sealed and

delivered in the

presence of:

. . . .

Unofficial Witness

. . . .(SEAL)

. . . .

Notary Public

. . . .(SEAL)

My commission expires:

[NOTARY SEAL]

Chattel Mortgages.

See topic 20.01 Chattel Mortgages.

21 PROPERTY

21.01 ABSENTEES:

Care of Property.

Estate of person missing for one year may be administered where preponderance of evidence indicates person is dead. (O.C.G.A. 53-9-1). When any domiciliary of state has been exposed to specific peril or tragedy resulting in probable death, death may be proved by clear and convincing evidence at any time after such exposure. (O.C.G.A. 53-9-1[d]). Petition for administration of estate of person missing for four years may be filed (O.C.G.A. 53-9-2), but presumption of death is rebuttable (O.C.G.A. 53-9-1).

Conservator for estate of any resident of Georgia who has been missing from his or her usual place of abode for 60 days, or who has been reported missing in action as result of hostilities existing between U.S. and other nations, or has been kidnapped or otherwise detained and thus is incapable of managing estate, may be appointed on application of heir, creditor, custodian of minors or anyone having an interest in estate of such person. (O.C.G.A. 53-9-10 et seq.). See also category 13 Estates and Trusts, topic 13.05 Death.

Process Agent.

No general requirement that nonresident individuals appoint agent in state for service of process. But see categories 16 Insurance, topic Insurance Companies; Taxation, topic Income Tax, subhead Income Taxed—Individuals, catchline Nonresident Contractors; Transportation, topic Motor Vehicles.

In condemnation proceedings, where known owners or interested persons are nonresidents, notice is served on person in possession and, if nonresident's address is known, sheriff or any lawful deputy of county where petition is filed mails copy of petition and order by registered or certified mail or statutory overnight delivery. (O.C.G.A. 9-10-12[b]). Where address is unknown, and so certified by condemnor and sheriff, sheriff posts notice at courthouse not less than five days before hearing and inserts notice in local newspaper in county where property is located four to seven days before hearing. Each such service is final and conclusive. (O.C.G.A. 22-2-107).

Where owners or interested persons are unknown, notice is served on person in possession and another notice delivered to judge of county's probate court, who must care for absentee's interest. On reappearance of unknown owner, reassessment may be had. (O.C.G.A. 22-2-24).

Service of Process.

See category 5 Civil Actions and Procedure, topic 5.19A Process.

In Partition Proceedings.

Party in interest absent from state during proceeding may object within 12 months from judgment and obtain retrial. (O.C.G.A. 44-6-171).

Escheat.

See category 13 Estates and Trusts, topic 13.07 Descent and Distribution.

Uniform Disposition of Unclaimed Property Act (Revised).

Adopted in 1990. (O.C.G.A. 44-12-190). Substantial variations are made from 1966 Official Revised Text. State Revenue Commissioner is substituted for State Treasurer throughout text.

21.02 ADVERSE POSSESSION:

Acquisition of title through possession of real estate inconsistent with title of another.

Character of Possession.

For possession to be foundation of prescriptive title, possession must be in right of possessor and not of another; must not have originated in fraud; must be public, continuous, exclusive, uninterrupted and peaceable; and must be accompanied by claim of right. Permissive possession cannot be basis for prescriptive title until adverse claim and actual notice to other party. (O.C.G.A. 44-5-161).

Duration of Possession.

Actual adverse possession of lands for 20 years, by itself, shall give good title by prescription against everyone, except state or persons laboring under certain disabilities. (O.C.G.A. 44-5-163). Under written evidence of title, adverse possession of land for seven years gives title by prescription against everyone except state, unless written title forged or fraudulent and claimant had actual notice of such forgery or fraud before or at time of commencement of possession. (O.C.G.A. 44-5-164).

Personalty.

Title to personalty may be acquired by four years adverse possession in accordance with O.C.G.A. 44-5-161 unless personalty concealed or removed out of state or otherwise not subject to reclamation. (O.C.G.A. 44-5-177).

Easements.

Easements may be acquired by prescription. (O.C.G.A. 44-5-175). Seven years uninterrupted use of improved land, or 20 years use of wild land passes title to easement. (O.C.G.A. 44-9-1).

Mineral Rights.

Mineral rights may be acquired by adverse possession by fee simple owner of property if owner of mineral rights has neither worked nor attempted to work mineral rights, nor paid any taxes due thereon, for seven years from date of conveyance and petition requesting relief. Attempting work means more than conducting research and picking up rock samples. (262 Ga. 861, 426 S.E.2d 883). To obtain absolute title to mineral rights, fee simple owner must file petition requesting relief in superior court for county where property lies. (O.C.G.A. 44-5-168).

Disabilities.

Prescription does not work against minors, prisoners, or insane or retarded persons as long as disability continues (O.C.G.A. 44-5-170); nor against unrepresented estates (for less than five years); nor against joint title which cannot be severally enforced or where any of joint owners under disability; nor against party who commences action in time but is dismissed with prejudice or dismisses for one time and recommences within six months (O.C.G.A. 44-5-173). Period for prescription must run from removal of disability to enable previously disabled to assert claim to property (O.C.G.A. 44-5-170), but tacking of prior and subsequent possession permitted (O.C.G.A. 44-5-171).

21.03 [RESERVED]

21.04 CONVEYANCES:

See topic 21.06 Deeds.

21.05 CURTESY:

No tenancy by curtesy. (O.C.G.A. 53-1-3).

21.06 DEEDS:

Execution.

Deed to land in state must be in writing, signed by maker, attested by at least two witnesses, delivered to purchaser and be for good or valuable consideration. (O.C.G.A. 44-5-30). Deed without attestation valid between parties. (213 Ga. 17, 96 S.E.2d 887). See category 14 Family, topic 14.09 Husband and Wife, subhead Conveyance or Encumbrance of Property for circumstances in which spouse must join. See also topic 21.16 Real Property; category 14 Family, topic 14.10 Infants.

Form.

No prescribed form is essential to validity of deeds to lands or personalty. If sufficient in itself to make known the transaction between the parties, no want of form will invalidate it. (O.C.G.A. 44-5-33). Must disclose if property used as commercial landfill. (O.C.G.A. 44-5-48). Types used are general warranty, limited warranty, and quitclaim.

Deed of Infant.

See category 14 Family, topic 14.10 Infants, subhead Disabilities.

Deed to Personalty.

Needs no attesting witnesses to make it valid; in other respects principles applicable to deeds to land govern. Generally, a deed is not necessary to convey title to personalty. (O.C.G.A. 44-5-31).

Title by Court Action.

Decree for specific performance or court judgment vesting title operates as a deed, effectively conveying title without action by original owner. (O.C.G.A. 9-11-70). See subhead Suits to Quiet Title, infra.

Recording.

Unrecorded deed is valid between parties but not against other persons without notice of unrecorded deed. Deeds conveying land must be recorded in superior court of county where land lies. (O.C.G.A. 44-2-1, -3). Deeds, deeds to secure debt, mortgages and other instruments affecting title to real property must include name and mailing address of natural person to whom instrument is to be returned at top of first page. (O.C.G.A. 44-2-14). Under Uniform Real Property Electronic Recording Act electronic documents treated as original, electronic signatures acceptable (O.C.G.A. 44–2–35 to 44–2–39.2).

Deed Executed in State.

To entitle deed executed in state to be recorded, it must be executed in presence of two witnesses, both of whom must sign as such, and one of whom must be attesting officer who affixes officer's seal. Such officer may be notary, judge of court of record, or if in county of their office, clerk or deputy clerk of superior court, or magistrate. (O.C.G.A. 44-2-14, -15). If not witnessed by such officer such deed must be acknowledged. (O.C.G.A. 44-2-16). If neither attested by, nor acknowledged before attesting officer, may be recorded upon affidavit of attesting officer as subscribing witness. (O.C.G.A. 44-2-18). See category 10 Documents and Records, topic 10.01 Acknowledgments.

Deed Executed Outside State.

To authorize recording of a deed executed outside of the state it must be subscribed by two witnesses, one of whom must be U. S. consul or vice-consul, judge of court of record of place where executed with certificate of clerk of such court as to genuineness of signature of judge, clerk of court of record under seal of court, or notary who affixes seal or justice of peace with his or her seal of office attached, or if he or she has no seal, certificate of his or her official character by clerk of any court of record in county, city or country of his or her residence. (O.C.G.A. 44-2-21).

Recording Fees.

See category 10 Documents and Records, topic 10.04 Records, subhead Recording Fees.

Effect of Record.

Voluntary conveyances recorded in superior court of county in which land lies operate as notice and have priority over subsequent deeds to same land. (O.C.G.A. 44-2-3). Certified copy of deed which has been properly recorded is admissible in evidence under same rule which would apply to original without having to account for original. (O.C.G.A. 24-5-27). Recording of deed prima facie evidence of delivery. (236 Ga. 346, 223 S.E.2d 708). Possession of land constitutes notice of rights or title of occupant. (O.C.G.A. 44-5-169).

Operation and Effect.

Grantee accepting deed but not signing it, bound by covenants in deed. (O.C.G.A. 44-5-39). Acceptance of deed by grantee prevents grantee, in absence of fraud, from challenging misrepresentations relating to title not covered by covenants of deed; deed considered complete relinquishment of all conflicting claims in preceding contract of sale. (235 Ga. 87, 218 S.E.2d 828).

Taxes.

Transfer tax imposed on absolute conveyances of real property where consideration exceeds $100 (O.C.G.A. 48-6-1), but not on conveyances to secure debt, leases and certain other transactions (O.C.G.A. 48-6-2) (see category 22 Taxation, topic 22.16 Property Taxes, subhead Real Estate Conveyance Tax). Tax based on amount of consideration for or value of property conveyed (exclusive of amount of any liens or encumbrances existing prior to sale and not paid off thereby) at rate of $1 for first $1,000 and 10¢ for each additional $100.

Suits to Quiet Title.

See topic 21.16 Real Property; category 10 Documents and Records, topic 10.04 Records.

Married Women.

Wife need not join in deed by her husband unless she has interest in property conveyed. See category 14 Family, topic 14.09 Husband and Wife.

Forms.

No statutory forms provided. No official forms. Following may be used:

Forms

Return to:

[NAME]

[ADDRESS]

Quit-Claim Deed.

STATE OF . . . .

COUNTY OF . . . .

THIS INDENTURE, made this . . . . . day of . . . . ., 20 . ., between . . . . , herein called the “Grantor”, and . . . . ., herein called the “Grantee”;

WITNESSETH that, in consideration of Ten Dollars ($10.00) in hand paid and other valuable consideration, the receipt and sufficiency of which are hereby acknowledged, Grantor does hereby bargain, sell, remise, release, transfer, convey and forever quit-claim unto Grantee all Grantor's right, title, interest, claim, or demand in and to the land described in Exhibit “A” attached hereto and made a part hereof, and together with all rights, members and appurtenances in any manner appertaining or belonging to said property;

TO HAVE AND TO HOLD said property unto Grantee, so that neither Grantor nor any person or persons claiming under Grantor shall at any time or by any means or ways, have, claim or demand any right or title to said property or appurtenances. Where the context requires or permits, “Grantor” and “Grantee” shall include their respective heirs, successors and assigns.

IN WITNESS WHEREOF, Grantor has executed this deed under seal on the date above written.

Signed, sealed and delivered

in the presence of:

. . . .

Unofficial Witness

. . . .(SEAL)

. . . .

Notary Public

My commission expires: ____________________

(NOTARY SEAL)

(NOTARY STAMP)

Return to:

[NAME]

[ADDRESS]

Warranty Deed (General and Limited).

STATE OF . . . .

COUNTY OF . . . .

THIS INDENTURE, made this . . . . . day of . . . . ., 20 . ., between . . . . ., herein called the “Grantor”, and . . . . ., herein called the “Grantee”;

WITNESSETH that, in consideration of Ten Dollars ($10.00) in hand paid and other valuable consideration, the receipt and sufficiency of which are hereby acknowledged, Grantor does hereby grant, bargain, sell, alien, convey, transfer and confirm unto Grantee all that tract or parcel of land described in Exhibit “A” attached hereto and made a part hereof, together with all buildings and other improvements located thereon, and together with all rights, members and appurtenances in any manner appertaining or belonging to said property;

TO HAVE AND TO HOLD said property, together with all and singular the rights, members and appurtenances thereof, to the same being, belonging or in anywise appertaining, to the only proper use, benefit and behoof of Grantee in fee simple absolute forever. Grantor shall warrant and forever defend the right, title and interest to said property unto Grantee against the claims of all persons whomsoever [Limited Warranty Deed: all persons claiming by, through or under Grantor], except for those matters set forth in Exhibit “B” attached hereto and made a part hereof. Where the context requires or permits, “Grantor” and “Grantee” shall include their respective heirs, successors and assigns.

IN WITNESS WHEREOF, Grantor has executed this deed under seal on the date above written.

Signed, sealed and delivered

in the presence of:

. . . .

Unofficial Witness

. . . .(SEAL)

. . . .

Notary Public

My commission expires: ____________________

(NOTARY SEAL)

(NOTARY STAMP)

21.07 DEEDS OF TRUST:

See category 20 Mortgages, topic 20.04 Mortgages of Real Property.

21.08 DOWER:

Right of dower completely abolished by Georgia Laws 1969, p. 123, which repealed

Title 31 of Code relating to dower. Spouse and children entitled to year's support.

See category 13 Estates and Trusts, topics 13.07 Descent and Distribution, subhead Year's Support, 13.16 Wills, subhead Election.

21.09 ESCHEAT:

See category 13 Estates and Trusts, topic 13.07 Descent and Distribution.

21.10 LANDLORD AND TENANT:

Landlord not liable for tenant's negligence or illegal use of premises, but liable for damages from defective construction or failure to repair. (O.C.G.A. 44-7-14). Landlord is required to turn property over to tenant in condition reasonably safe and in state of repair suited for use intended by tenant and known to landlord. (99 Ga. App. 110, 107 S.E.2d 684). Implied warranty that premises in good repair at commencement of lease cannot be avoided by exculpatory provision in lease. (154 Ga. App. 217, 267 S.E.2d 811). Landlord must keep premises in repair and is liable for repair of substantial improvements placed upon premises by consent. (O.C.G.A. 44-7-13). Landlord not liable in tort to third party for damages resulting from tenant's negligence after landlord parts with possession of premises. (265 Ga. 905, 463 S.E.2d 491). Landlord must give prospective residential tenant written notice of previous flooding of premises in certain circumstances. (O.C.G.A. 44-7-20).

Non-waivable Lease Provisions.

Landlord or tenant may not waive, transfer or otherwise avoid in any contract, lease, or similar agreement, oral or written, for use or rental of real property as dwelling place any rights, duties or remedies contained in following provisions of law: O.C.G.A. 36-61-11 relating to local ordinances concerning habitability, health and safety; O.C.G.A. 44-7-13 relating to duties of landlord as to repairs and improvements; O.C.G.A. 44-7-14 relating to liability of landlord for failure to repair; O.C.G.A. 44-7-50 to -58 relating to proceedings against tenants holding over; O.C.G.A. 44-7-70 to -82 relating to distress warrants; and O.C.G.A. 44-7-30 to -36 relating to security deposits. (O.C.G.A. 44-7-2).

Tenant's Rights and Duties.

Tenant only has right to use and enjoyment of leased premises. (O.C.G.A. 44-7-11). Must surrender possession at end of term. (O.C.G.A. 44-7-10). Estopped to deny landlord's title and cannot attorn to another if he or she takes any position inconsistent with position that landlord's title defective. (O.C.G.A. 44-7-9). No vested interest or constitutional right to continue possession of public housing. (158 Ga. App. 734, 282 S.E.2d 141). Tenant may remove trade fixtures erected by him or her during term; after term and possession are ended, trade fixtures are regarded as abandoned to landlord. (O.C.G.A. 44-7-12). Where usufruct, tenant's interest cannot be conveyed unless lease expressly so provides and is not subject to levy and sale. (O.C.G.A. 44-7-1).

Special interest in real estate may be leased. (O.C.G.A. 44-6-102).

Kinds of Tenancy.

Estate for years is interest in realty for definite and stated period and passes as realty. (O.C.G.A. 44-6-100). Usufruct is lesser right whereby landlord has granted merely right to possess and enjoy use of real estate and no estate passes out of landlord. (O.C.G.A. 44-7-1). Any tenancy for less than five years which does not purport by its own terms to create estate for years shall be held to pass only usufruct. (O.C.G.A. 44-7-1).

Leases.

Parol lease for term not exceeding one year valid (O.C.G.A. 44-7-2); if for longer time creates tenancy at will (151 Ga. App. 343, 259 S.E.2d 729). Transfers occasioned through leases not subject to real estate transfer tax. (O.C.G.A. 48-6-2).

Disclosure of Ownership.

Landlord shall disclose to tenant in writing name and address of: (1) record owner of premises or person to act for owner for purpose of service of process and receiving and receipting for demands and notice; and (2) person authorized to manage premises. Landlord shall advise tenants of changes of such names and addresses within 30 days after change. (O.C.G.A. 44-7-3).

Security Deposits.

Security deposits regulated. (O.C.G.A. 44-7-30 et seq.). Whenever security deposit is held by landlord with respect to residential lease, such deposit shall be deposited in escrow account used only for that purpose and held in trust for tenant and written notice given to tenant of account location. (O.C.G.A. 44-7-31). Alternatively, landlord may post and maintain surety bond with clerk of superior court in which dwelling unit is located. (O.C.G.A. 44-7-32). Procedures for inspection of premises and return of security deposit are provided in O.C.G.A. 44-7-33 to -35.

Recording.

Leases and usufructs may be recorded if witnessed like deeds and recorded in county where land lies. (O.C.G.A. 44-2-9). Possession of land constitutes notice of rights or title of occupant. (O.C.G.A. 44-5-169).

Rent.

Obligation to pay reasonable rent implied where possession under another's title. (O.C.G.A. 44-7-5). Rent bears interest from time due. (O.C.G.A. 44-7-16).

Destruction of premises by fire or loss of possession by casualty not caused by landlord and not resulting from defect in his or her title does not abate rent. (O.C.G.A. 44-7-15). Rent may be apportioned in equity when circumstances of case render common law remedy incomplete. (O.C.G.A. 23-2-72). For active duty military personnel who receive permanent change of station or temporary duty orders for period in excess of three months, liability for residential lease limited to (1) 30 days rent after written notice and proof of assignment given to landlord and (2) cost of repairing any damage to premises caused by tenant. (O.C.G.A. 44-7-37).

Residential rent control ordinances by counties and municipalities prohibited. (O.C.G.A. 44-7-19).

Lien for rent inferior to liens for taxes and general and special liens of laborers. (O.C.G.A. 44-14-342). Attaches from time affidavit is made in application for distress warrant but does not take precedence over pre-existing liens except as to crop raised on premises. (O.C.G.A. 44-7-80). Landlord has special lien for rent on crops grown on rented land; superior to all other liens except for taxes. (O.C.G.A. 44-14-341). Landlord has lien in crops for farming supplies furnished. (O.C.G.A. 44-14-340).

Term.

Where no time specified for termination of tenancy, construed to be tenancy at will. (O.C.G.A. 44-7-6).

Termination of Tenancy.

60 days' notice from landlord or 30 days' notice from tenant required to terminate tenancy at will. (O.C.G.A. 44-7-7).

Holding Over.

Landlord may collect rent for time tenant holds over against landlord's will. Tenant at will who occupies premises after expiration of lease holds premises subject to terms of lease except as modified by parties by agreement. (147 Ga. App. 493, 249 S.E.2d 310).

Dispossession.

If rent not paid when due, owner may demand possession and if possession refused, owner may institute proceeding against such tenant without first terminating lease. (O.C.G.A. 44-7-50; 247 Ga. 625, 278 S.E.2d 643). Affidavit is filed and summons is sent requiring tenant to appear on date within seven days after service. In action for nonpayment of rent, tenant may tender to landlord, within seven days of date tenant served with summons, all rents allegedly owed plus cost of dispossessory warrant and such tender shall be complete defense to action; provided landlord is required to accept such tender after issuance of dispossessory summons only once in any 12-month period. If no answer or appearance, then writ of possession issues. If answer, then civil trial is held on all issues with payments of rent into court and tenant remaining in possession until final outcome of litigation. (O.C.G.A. 44-7-50 to -59). Repair receipts may not be substituted for cash rent due. (144 Ga. App. 196, 240 S.E.2d 738).

Distress.

Landlord may distrain for rent as soon as same is due if tenant is seeking to remove his or her goods from premises. Affidavit for distress warrant is filed and summons is served requiring tenant to appear on date not more than seven nor less than five days after service. Tenant may tender to landlord, within seven days of day tenant was served with summons, all rents allegedly owed plus cost of distress warrant and such tender will be complete defense to action. If no answer or appearance, then distress warrant issues. If answer, then civil trial is held on all issues with payments of rent into court and tenant remaining in possession until final outcome of litigation. (O.C.G.A. 44-7-70 to -82).

Uniform Residential Landlord and Tenant Act.

Not adopted.

21.11 LEASES:

See topic 21.10 Landlord and Tenant. Lease-purchase agreements are regulated as trade practice. (O.C.G.A. 10-1-681 et seq.).

21.12 [RESERVED]

21.13 PERPETUITIES:

Uniform Statutory Rule Against Perpetuities, with alternative 90-year wait-and-see test, adopted. (O.C.G.A. 44-6-200 to -206). Perpetual lease or perpetual right to renew lease not forbidden perpetuity. (247 Ga. 361, 276 S.E.2d 841[2]).

Accumulations of Income.

Common law rules govern. (190 Ga. 23, 8 S.E.2d 23). Effect of Uniform Statutory Rule Against Perpetuities on accumulation of income not clear.

See also category 13 Estates and Trusts, topic 13.15 Trusts.

21.14 PERSONAL PROPERTY:

Uniform Disposition of Unclaimed Property Act (Revised).

Adopted in 1990. (O.C.G.A. 44-12-190). Substantial variations are made from 1966 Official Revised Text. State Revenue Commissioner is substituted for State Treasurer throughout text.

21.15 POWERS OF ATTORNEY:

Formalities.

Where exercise or performance of agency is by written instrument, agency must be created by written instrument; provided, however that, unless contrary intent is expressed, any written instrument creating agency shall be conclusively deemed to authorize execution of instruments with formalities necessary or appropriate to accomplish purposes of agency. Corporation may appoint agent in its usual mode of transacting business, without corporate seal. Deed or other instrument executed under seal pursuant to agency created by act not under seal is binding on principal and valid as unsealed instrument if not otherwise required to be under seal for its validity. (O.C.G.A. 10-6-2). Agent may not delegate authority unless specially empowered to do so. (O.C.G.A. 10-6-5). Conditional powers of attorney authorized. (O.C.G.A. 10-6-6).

Revocation.

Generally revocable at will of principal, unless coupled with interest. (O.C.G.A. 10-6-33).

Attorneys in Fact.

A conveyance or mortgage of real estate may be executed by an attorney in fact acting under power of attorney. (25 Ga. App. 91, 102 S.E. 647; 22 Ga. App. 740, 97 S.E. 200).

Members of Armed Forces.

Agency created by power of attorney in writing given by member of the Armed Forces, or merchant seamen and certain other persons serving outside the United States, is not revoked or terminated by principal's death not known to agent or other person who acted in good faith in reliance on power. Report or listing as “missing in action” does not constitute notice of death of principal and does not operate to revoke power. (O.C.G.A. 10-6-35).

Uniform Durable Power of Attorney Act.

Not enacted.

Financial Power of Attorney.

Non-exclusive form is provided for establishing financial power of attorney. (O.C.G.A. 10-6-142).

21.16 REAL PROPERTY:

Word “heirs” unnecessary to create fee simple estate; every properly executed conveyance creates fee unless lesser estate mentioned. (O.C.G.A. 44-6-21).

Fee tail estates abolished. (O.C.G.A. 44-6-24).

Estate for life of tenant may be created by devise, deed, express agreement of parties or operation of law. (O.C.G.A. 44-6-82).

Joint tenancy: Any conveyance to two or more persons must be construed to create tenancy in common without survivorship unless deed contains reference to “joint tenants”, taking "jointly with survivorship" or language of like import. Any such language shall create joint tenancy estate that may be severed as to any owner's interest by recording of instrument resulting in lifetime transfer of owner's interest; provided, however, if all joint tenant owners join in same recorded lifetime transfer, no severance occurs. (O.C.G.A. 44-6-190).

Tenancy by entirety not recognized. (O.C.G.A. 44-6-120, -190[a]).

Covenants running with land restricting land to certain uses are of limited duration (20 years) in municipalities and areas of counties adopting zoning law. Exception to limited duration for covenants or scenic easements held for benefit of public, which covenants are perpetual, and for covenants for planned subdivisions containing no fewer than 15 individual plots, which covenants are automatically renewed for unlimited 20 year periods unless terminated, as set forth in O.C.G.A. 44-5-60. Covenants prohibiting use or ownership of subdivision property may not discriminate based on race, creed, color, age, sex or national origin. (O.C.G.A. 44-5-60).

Rule in Shelley's Case.

Abolished. Deed to one and on his or her death to his or her heirs creates life estate with remainder in fee. (O.C.G.A. 44-6-23; 80 Ga. 374, 377, 7 S.E. 554).

Foreign Conveyances and Encumbrances.

See category 10 Documents and Records, topic 10.04 Records.

Condominiums.

Governed by Georgia Condominium Act. (O.C.G.A. 44-3-70 et seq.).

Subdivided Land Sales.

Sale and offer to sell certain subdivided lands extensively regulated. (O.C.G.A. 44-3-1 et seq.).

Real Estate Appraisers.

Licensing and certification governed by statute. (O.C.G.A. 43-39A-1 et seq.).

Time-Share Estates.

Governed by statute. (O.C.G.A. 44-3-160 et seq.).

Discrimination.

Unlawful to discriminate in sale of housing accommodations on basis of race, color, sex, religion or national origin. (O.C.G.A. 8-3-200).

See also topics 21.05 Curtesy, 21.06 Deeds, 21.08 Dower, 21.10 Landlord and Tenant; categories 5 Civil Actions and Procedure, topic 5.16B Partition; 10 Documents and Records, topic 10.04 Records; 14 Family, topic 14.09 Husband and Wife; 20 Mortgages, topic 20.04 Mortgages of Real Property.

21.17 TRUST DEEDS:

See category 20 Mortgages, topic 20.04 Mortgages of Real Property.

22 TAXATION

22.01 ADMINISTRATION:

Tax administration is under Department of Revenue, headed by State Revenue Commissioner ("Commissioner") 1800 Century Blvd. NE, Atlanta, GA 30345-3205; http://www.dor.ga.gov. (O.C.G.A. 48-2-1).

Taxes must be uniform and levied and collected under general laws. (Const., Art. VII, §I, Paragraph III).

Collection.

Suit by Commissioner. (O.C.G.A. 48-2-54). Income tax refund set-off procedure for collection of certain liabilities. (O.C.G.A. 48-7-160 et seq.). Nonresident who engages in acts in state giving rise to tax liability deemed to appoint Secretary of State process agent for suit to collect tax. (O.C.G.A. 48-8-65). Commissioner may use garnishment to collect any tax, fee, license, penalty, interest or collection costs. (O.C.G.A. 48-2-55[b][2]).

Levy and Sale.

Commissioner may levy and conduct judicial sales in same manner as provided for sales by sheriffs. (O.C.G.A. 48-2-55).

Appeals.

To appeal Commissioner's decision, taxpayer must pay all taxes admittedly due within 30 days of decision and must file surety bond or other security with superior court for additional amount owed. (O.C.G.A. 48-2-59).

Penalties.

Criminal.

See specific taxes.

Income Tax:

Late Filing or Failure to File.

If due to willful neglect, rather than reasonable cause, penalty in amount of 5% of tax per month late, to maximum of 25%. (O.C.G.A. 48-7-57).

Deficiencies.

Where fraudulent, penalty in amount of 50% of deficiency. If deficiency due to negligence but not intent to defraud, 5% of deficiency collected as if it were deficiency. For other deficiencies, penalty in amount of 0.5% of deficiency per month, to maximum of 25%. (O.C.G.A. 48-7-86).

Compromise.

Commissioner may compromise any penalty after verified statement has been filed with Commissioner setting forth facts and certifying that no previous settlement has been made, and that compromise is in opinion of Attorney General in best interest of state. (O.C.G.A. 48-2-60). Commissioner may refund within three years of payment date any penalty paid without suit if Commissioner determines circumstances giving rise to penalty were reasonably beyond control of taxpayer. (O.C.G.A. 48-2-60).

Interest.

Unless otherwise provided, interest upon deficiencies is collected at 1% per month from date prescribed for payment to date deficiency is paid. (O.C.G.A. 48-7-81, 48-2-40).

Commissioner may waive interest when delay in payment is attributed to action or inaction of Revenue Department. (O.C.G.A. 48-2-41).

Tax Return Preparers

Tax return preparers are assessed penalties for preparing returns with understatement of liaility, failure to sign returns, failure to furnish ID number and fraudulently endorsing checks made for taxes (O.C.G.A. 48–2–62)

Criminal Penalties.

It is misdemeanor to assist in filing false returns (O.C.G.A. 48-7-3), advise preparation of return intentionally disregarding regulations (O.C.G.A. 48-7-4), or fail to pay tax, fail to make return, fail to keep records, fail to supply information or exhibit records requested by Commissioner (O.C.G.A. 48-7-2).

Estate Tax:

Failure to File.

If report not made within time required for filing federal returns, including extensions, estate may be appraised by Commissioner who will determine tax due. (O.C.G.A. 48-12-5).

Failure to Pay.

If tax not paid on filing duplicate federal return or within 30 days after notice from Commissioner, then Commissioner shall issue execution against estate; which execution will bear interest of 1% per month until paid. Additional penalty of 10% of amount of tax for failure to file duplicate federal return or for failure to pay tax within 30 days after notice from Commissioner. (O.C.G.A. 48-12-6).

Sales and Use Taxes:

Failure to File and/or Pay.

Except when providential cause shown, dealer who fails to file return and pay tax is penalized 5% of tax due or $5, whichever is greater, for each 30 days of delinquency not to exceed 25% or $25, whichever is greater, in aggregate. (O.C.G.A. 48-8-66). Failure to pay tax on day due incurs interest at 1% per month until tax paid. (O.C.G.A. 48-2-40).

Chronic Delinquency or Default.

Commissioner may require chronically defaulting or delinquent dealer to file surety bond not less than $1,000 nor more than $10,000. (O.C.G.A. 48-8-57).

Failure to Collect.

Dealer who fails to collect sales tax is liable for it himself or herself and is guilty of misdemeanor. (O.C.G.A. 48-8-7).

Fraud.

Willful falsification or failure to file return renders dealer liable for penalty of 50%, of tax due (O.C.G.A. 48-8-66), and guilty of misdemeanor (O.C.G.A. 48-8-8, -9).

Real and Personal Property Taxes:

Failure to Pay.

If tax willfully not paid within 90 days of due date, penalty of 10% of amount due is assessed. This penalty does not apply to taxes of $500 or less on homestead property, and, in 1986 or future years, to any homestead property if property was acquired by new owner during tax year: (1) who did not receive tax bill for that year; (2) who immediately before acquiring property resided outside State of Georgia; and (3) if taxes are paid within one year of due date. (O.C.G.A. 48-2-44).

Interest.

Taxes unpaid as of Nov. 20 (Oct. 20 in some counties) bear interest at rate of 1% per month until paid. (O.C.G.A. 48-5-148). Governing authority of county may change due date to Nov. 15. (O.C.G.A. 48-5-150).

Failure to Return.

Assessed unreturned property subject to penalty of 10% of tax due in addition to current assessment. (O.C.G.A. 48-5-299).

22.02 [RESERVED]

22.03 BUSINESS TAXES:

Banks and Savings & Loan Associations.

Depository financial institutions subject to all forms of state and local taxation to same extent as other business corporations in state. (O.C.G.A. 48-6-90.1). Municipalities and counties may levy and collect business license tax from depository financial institutions having office located within their jurisdiction at rate not to exceed .25% of Georgia gross receipts. (O.C.G.A. 48-6-93). Special state occupation tax imposed on each depository financial institution that conducts business or owns property in Georgia at rate of .25% of Georgia gross receipts. (O.C.G.A. 48-6-95). Depository financial institutions get dollar-for-dollar credit against their state income tax liability equal to amount of business license and occupation tax paid. (O.C.G.A. 48-7-21).

Franchise Taxes.

See category 2 Business Organizations, topic 2.03 Corporations. Other types of franchises defined and taxed. (O.C.G.A. 48-5-420-425).

Licenses, Occupational and Professional.

Taxes allowed under O.C.G.A. 48-13-5 et seq.

22.04 CORPORATE TAXES:

Corporate Net Worth Tax.

Graduated tax imposed on Georgia corporations and corporations doing business or owning property in Georgia based on net worth; maximum tax is $5,000; returns and tax due on 15th day of third month of tax period. (O.C.G.A. 48-13-70 to -79).

Corporation Tax.

See category 2 Business Organizations, topic 2.03 Corporations, subheads Taxation of Corporate Property, License Tax.

22.05 EMPLOYMENT TAXES:

Unemployment Compensation Tax.

Imposed in form of “contributions” on all employers who employ at least one individual for some portion of a day in each of 20 different weeks within either current or proceeding calendar year or who in any calendar quarter in either current or preceding calendar year paid wages of $1,500 or more, with certain exceptions and additions. (O.C.G.A. 34-8-33 to -51, -150). Contributions are based on wages paid. (O.C.G.A. 34-8-151). For period before Apr. 1, 1987, and after Dec. 31, 2011, rate is based on actual benefit experience of employer, maximum 2.7%. (O.C.G.A. 34-8-151). Beginning Apr. 1, 1987, and ending Dec. 31, 1999, rate is based on actual benefit experience of employer, maximum 2.64%. (O.C.G.A. 34-8-151). Beginning Jan. 1, 2000 and ending Dec. 31, 2011, rate is based on actual benefit experience of employer, maximum 2.62%. Additional .06% tax is assessed on wages of most employees. (O.C.G.A. 34-8-180). Financing of benefits for employees of governmental entities and nonprofit organizations governed by different rules. (O.C.G.A. 34-8-158). Contributions are payable on or before last day of month next following end of calendar quarter to Employment Security Agency, Division of Department of Labor. If authorized by regulation, certain employers may pay contributions annually rather than quarterly. (O.C.G.A. 34-8-150). No contributions are required from employees. (O.C.G.A. 34-8-150). Contributions are personal debt of one required to file tax return. (O.C.G.A. 34-8-167). Commissioner of Labor may collect delinquent contributions by execution and levy. (O.C.G.A. 34-8-168). Commissioner empowered to direct one-time unemployment Tax Amnesty Program providing for waiver of certain civil and criminal penalties upon payment of delinquent unemployment taxes. (O.C.G.A. 34-8-270 et seq.). Nonresident contractor must post bond for payment of all taxes, see topic 22.11Income Tax, subhead Income Taxed—Individuals, catchline Nonresident Taxpayers.

22.06 [RESERVED]

22.07 ESTATE TAX:

Representative of every deceased resident of state, whose estate must file federal estate tax return must file with Department of Revenue, Estate Tax Unit, duplicate of federal estate tax return and pay to state tax equal to maximum credit for state death taxes under §2011 of Internal Revenue Code of 1986. Credit allowed for tax paid to another state on property outside state. Return due on same date federal return is filed. (O.C.G.A. 48-12-2).

Legal representative of deceased nonresident whose estate must file federal estate tax return, who owns or controls property located within state must file with Department of Revenue, Estate Tax Unit, duplicate of federal estate tax return. Tax is in proportion to amount of property in state as compared to total amount of property. (O.C.G.A. 48-12-3).

Valuation Date.

Same as Federal.

Apportionment Against Inter Vivos Dispositions.

Tax apportionment statute does not exist in state.

Interstate Co-operation.

No statutory procedure available for compromise of death taxes when decedent's domicile is disputed.

Consents or Waivers.

Not necessary for transfer of corporate stock of resident or nonresident decedent. If desired, waivers may be secured by writing Department of Revenue, Property and License Tax Unit, State Office Building, Atlanta.

22.07A EXCISE TAXES:

Excise Tax On Car Rentals.

Counties and municipalities may impose 3% excise tax on car rentals. (O.C.G.A. 48-13-90, -97).

22.08 GASOLINE AND SPECIAL FUELS TAXES:

Gasoline and Motor Fuel Tax.

Imposed by O.C.G.A. 48-9-1 to -19.

22.09 GIFT TAX:

None.

22.10 [RESERVED]

22.11 INCOME TAX:

Income tax is imposed on net income of every resident of state and on net income of nonresidents from property owned or any activity for financial gain in state. (O.C.G.A. 48-7-20). Taxable net income and other terms defined. (O.C.G.A. 48-7-26, -27). Taxable nonresident defined. (O.C.G.A. 48-7-1). Every resident required to file federal income tax return and every nonresident who has federal gross income from within state must file return. (O.C.G.A. 48-7-50). Every resident estate or trust required to file federal income tax return and every nonresident estate or trust with federal gross income from sources in state must file return unless otherwise provided in Income Tax Act of 1931. (O.C.G.A. 48-7-50). Nonresident individuals whose only contact with Georgia is limited partner interest in resident investment limited partnership do not need to file return. (O.C.G.A. 48-7-24). Late filing penalties of up to 25% of amount required to be shown as tax unless lateness due to reasonable cause or to extension of time to file by U.S. Internal Revenue Service. (O.C.G.A. 48-7-57). Interest on late payments at 1% per month from last date prescribed for payment. (O.C.G.A. 48-7-81, 48-2-40). Penalty of $1,000 can be imposed for frivolous position. (O.C.G.A. 48-7-57.1).

Six percent income tax is imposed on corporations' Georgia taxable income. (O.C.G.A. 48-7-21). Income tax does not apply to organizations described in §§401, 501(c), 501(d), 501(e), or 664 of Internal Revenue Code, but application for recognition of exemption must be filed with Commissioner. Also exempt are certain insurance companies, building and loan associations, cooperative banks, and bank and trust companies. Real estate investment trusts and regulated investment companies are not exempt. Exempt organizations' unrelated business income is subject to 6% tax. (O.C.G.A. 48-7-25).

Returns.

Must be made by: (1) every resident individual who is required to file federal income tax return for taxable year (O.C.G.A. 48-7-50); (2) every nonresident individual who has federal gross income from sources within state (O.C.G.A. 48-7-50); (3) every resident estate or trust that is required to file federal income tax return (O.C.G.A. 48-7-50); (4) every nonresident estate or trust that has federal gross income from sources within state (O.C.G.A. 48-7-50); (5) every partnership any individual member of which is subject to state income tax (O.C.G.A. 48-7-53); and (6) every corporation subject to state income tax (O.C.G.A. 48-7-51). Income of two or more corporations may not be included in single return except with express consent of Commissioner. (O.C.G.A. 48-7-51).

Returns for taxpayers other than corporations due by Apr. 15 or by 15th day of fourth month after close of fiscal year. (O.C.G.A. 48-7-56). Returns for corporations due by Mar. 15 or by 15th day of third month after close of fiscal year. (O.C.G.A. 48-7-56). Returns of domestic import sales corporations, former domestic import sales corporations and foreign sales corporations due by 15th day of ninth month following close of taxable year. (O.C.G.A. 48-7-56). Filed with Georgia Dept. of Revenue, Processing Center, P.O. Box 740380, Atlanta, GA 30374–0380. Forms and information available at http://www.etax.dor.ga.gov/inctax/individual_income_tax_forms.aspx.Tax return preparers are assessed penalties for certain misconduct (O.C.G.A. 48–2–62).

Payment.

Due by Apr. 15 or by 15th day of fourth month after close of fiscal year. (O.C.G.A. 48-7-80). Individuals receive credit for income tax withheld from wages (O.C.G.A. 48-7-112[a]) and individuals and corporations for amounts paid as estimated income tax (O.C.G.A. 48-7-121[a]).

Refunds.

State or federal income tax refunds not over $500 in favor of decedent are paid to surviving spouse without administration of decedent's estate. (O.C.G.A. 53-4-7).

Declarations of Estimated Tax.

Every resident individual, every nonresident individual and fiduciary subject to Georgia income tax, must file estimated income tax for current year if his or her gross income is expected (1) to include more than $1,000 from sources other than wages subject to withholding, and (2) to exceed $1,500 if single, or $3,000 if married, living with spouse, and will claim full marital exemption. Taxpayer must show estimate of current year's income tax less tax expected to be withheld from sources subject to withholding, and any other anticipated credits against tax, result being net estimated tax. (O.C.G.A. 48-7-114).

Estimated tax for individuals other than farmers or fishermen must be filed by Apr. 15 of taxable year, except that if above thresholds are met on or after Apr. 1 and before June 1 of taxable year, estimated tax must be filed by June 15 of taxable year; on or after June 1 and before Sept. 1 estimated tax must be filed by Sept. 15 of taxable year; on or after Sept. 1, estimated tax must be filed by Jan. 15 of succeeding year. (O.C.G.A. 48-7-115). Individual estimated tax must be paid quarterly in equal installments beginning with first quarter for which estimated tax is required to be filed. (O.C.G.A. 48-7-116).

All domestic and foreign corporations subject to income tax must pay estimated tax for taxable year if net income reasonably expected to exceed $25,000. Estimated tax must be paid quarterly in equal installments beginning with quarter in which $25,000 threshold is exceeded. (O.C.G.A. 48-7-117, -119).

Income Taxed—Individuals.

Rates.

Single Person: 1% on first $750 if net income not over $750; $7.50 plus 2% of amount over $750 for net income over $750 but not over $2,250; $37.50 plus 3% of amount over $2,250 for net income over $2,250 but not over $3,750; $82.50 plus 4% of amount over $3,750 for net income over $3,750 but not over $5,250; $142.50 plus 5% of amount over $5,250 for net income over $5,250 but not over $7,000; $230 plus 6% of amount over $7,000 for net income over $7,000.

Married Person Filing Separate Return: 1% on first $500 if taxable net income not over $500; $5 plus 2% of amount over $500 for net income over $500 but not over $1,500; $25 plus 3% of amount over $1,500 for net income over $1,500 but not over $2,500; $55 plus 4% of amount over $2,500 for net income over $2,500 but not over $3,500; $95 plus 5% of amount over $3,500 for net income over $3,500 but not over $5,000; $170 plus 6% of amount over $5,000 for net income over $5,000.

Head of Household and Married Persons Filing Joint Returns: 1% of first $1,000 for net income not over $1,000; $10 plus 2% of amount over $1,000 for net income over $1,000 but not over $3,000; $50 plus 3% of amount over $3,000 for net income over $3,000 but not over $5,000; $110 plus 4% of amount over $5,000 for net income over $5,000 but not over $7,000; $190 plus 5% of amount over $7,000 for net income over $7,000 but not over $10,000; $340 plus 6% of amount over $10,000 for net income over $10,000. (O.C.G.A. 48-7-20).

Capital Gains and Losses.

Separate provisions on determining basis, gain or loss, accelerated amortization repealed. Capital gains and losses taxed as reflected in federal adjusted gross income. (O.C.G.A. 48-7-27).

Foreign Tax Credit.

Credit against income tax is allowed to resident individuals with business or investment in another state in amount of tax paid upon net income of such business or investment in such other state, if such state levies tax upon net income. However, credit may not exceed tax that would have been paid in Georgia upon like amount of taxable income. (O.C.G.A. 48-7-28).

Deductions.

Georgia taxable net income of individual is federal adjusted gross income, as defined in Federal Internal Revenue Code of 1986, minus following deductions: (1) Standard deduction or sum of itemized nonbusiness deductions, whichever taxpayer elects in computing federal tax income; (2) exemptions outlined infra; (3) amount of salary and wage expenses eliminated in computing individual's federal adjusted gross income as condition to using federal jobs tax credit; (4) income received from certain public pension and retirement funds; (5) mortgage interest eliminated from federal itemized deductions in computing federal mortgage interest credit; (6) portion of qualified payments to minority subcontractors as provided in O.C.G.A. 48-7-38; (7) social security benefits and tier 1 railroad retirement benefits, to extent included in federal taxable income; (8) amount of dependent's unearned income included in parent's return; (9) for taxable years beginning on or after Jan. 1, 2007, amount of contributions to savings trust account established pursuant to O.C.G.A. tit. 20, c. 3, art. 11 on behalf of designated beneficiary, not exceeding $2,000 per beneficiary; (10) military income received by member of national guard or U.S. armed services reserve stationed in combat zone or in defense of U.S. borders pursuant to military orders; (11) amount expended for organ donation expenses, not exceeding $10,000 incurred in accordance with National Organ Procurement Act; (12) effective Jan. 1, 2009, amount equaling premium paid by taxpayer for high deductible health plans used with health savings account pursuant to I.R.C. 223, with restrictions; and (13) deductions allowed by I.R.C. 62(a)(2)(D) and 179 to extent these deductions were not included in federal adjusted gross income or itemized nonbusiness deductions. (O.C.G.A. 48-7-27[a]). Georgia taxable income shall include dividend or interest income on obligations of state other than Georgia and of non-Georgia political subdivisions to extent excluded from gross income under federal income tax; interest or dividends on U.S. obligations exempt from federal income tax but not exempt from state income taxes;

income consisting of lump sum distributions from annuity, pension plan, or similar source which were removed from federal adjusted gross income for special federal tax computations or treatment; and income taxes imposed by any jurisdiction other than Georgia to extent deducted under federal income tax. (O.C.G.A. 48-7-27[b]). No portion of any deductions or losses, including net operating losses, which occurred in year in which taxpayer was not subject to taxation in state may be deducted in any tax year. (O.C.G.A. 48-7-27[b][4]). If taxpayer claims tax credit provided for in O.C.G.A. 48-7-40.6(d) with respect to qualified child care property, Georgia taxable income shall be increased by any depreciation deductions attributable to such property to extent such deductions are used in determining federal taxable income. (O.C.G.A. 48-7-27[b][9]). Certain qualified withdrawals from savings trust account under O.C.G.A. tit. 20, c. 3, art. 11 not subject to state income tax. (O.C.G.A. 48-7-27[b][10]). Georgia taxable income is adjusted as provided in O.C.G.A. 48-7-28.3, and Georgia taxable income is increased by amount of payments, compensation, or other economic benefit disallowed by O.C.G.A. 48-7-21.1. (O.C.G.A. 48-7-27[b][11], [12]). Certain adjustments are permitted for shareholders of federal Subchapter S corporation that is not recognized for state tax purposes to avoid double taxation. (O.C.G.A. 48-7-27[d]). Certain self-employed individuals may deduct amounts paid for medical insurance for self, spouse and dependents, not otherwise deductible on federal return. (O.C.G.A. 48-7-27[a][10]. At taxpayer election, Georgia taxable net income is adjusted with respect to federal depreciation deductions as provided in O.C.G.A. 48-7-39. (O.C.G.A. 48-7-27[c]).

Exemptions and Additional Deductions (Over Itemized or Standard Deductions).

Taxpayer is allowed following personal exemptions from net income: $2,700 for himself or herself; $5,400 for taxpayer and spouse if joint return filed; and, $3,000 for each dependent. (O.C.G.A. 48-7-26). Standard deductions are: $2,300 for single taxpayer or head of household; $1,500 for married taxpayer filing separate return; and, $3,000 for married couple filing joint return. (O.C.G.A. 48-7-27[a][1]). Additional deductions include: $1,300 if taxpayer is 65 before close of tax year; $1,300 for spouse over 65 by end of tax year if joint return filed; $1,300 if taxpayer is blind at close of tax year; $1,300 if spouse is blind before close of taxpayer's tax year and joint return is filed by taxpayer and his or her spouse. (O.C.G.A. 48-7-27[a][1][d and e]). Military income earned by members of national guard or reserve component of armed forces of U.S. stationed in combat zone or in defense of U.S. borders pursuant to military orders excluded. (O.C.G.A. 48-7-27[a][12]).

Nonresident taxpayers may deduct allowable business expenses only to extent attributable to income from state, and allowable personal deductions (charitable contributions, alimony, medical expenses, optional standard deduction, personal exemptions, credits for dependents, etc.) only in ratio that taxpayer's Georgia gross income bears to his entire gross income. (O.C.G.A. 48-7-30).

Nonresident contractors performing contract in state exceeding $10,000 must register each such contract with Commissioner, appoint agent for service of process, and post bond equal to 10% of contract price for payment of all taxes due state, including unemployment insurance contributions. (O.C.G.A. 48-13-32). Secretary of State is appointed agent for service in any tax proceeding arising out of contract performed or to be performed in state. (O.C.G.A. 48-13-35). Violation of statute is misdemeanor and contractor denied use of state courts to recover payment for performance; also subject to injunction against further performance. (O.C.G.A. 48-13-38, -33, -37). Registration fee is $10 per contract. (O.C.G.A. 48-13-31).

Fiduciaries.

Tax applies to resident and nonresident fiduciaries receiving income from business done in state, having charge of funds or property in state, or having charge of funds or property for benefit of resident of state. (O.C.G.A. 48-7-22). Net income of trusts and estates taxed. (O.C.G.A. 48-7-20). Estate may deduct $2,700, trust $1,350, in lieu of personal exemption deduction. (O.C.G.A. 48-7-26). Every resident trust or estate that is required to file federal income tax return and every nonresident trust or estate that has federal gross income from sources within this state must file return. (O.C.G.A. 48-7-50).

Income Taxed—Corporations.

Domestic or foreign corporations (with certain exceptions) are taxed at rate of 6% of net income from property owned and/or business done in state. Net income generally determined by reference to federal taxable income determined under Internal Revenue Code of 1986 in effect as of Jan. 1, 1997, with adjustments to taxable income made for interest on certain government bonds, dividends on bank stock, taxes paid to jurisdictions other than Georgia, income exempt from federal tax, and certain elections made in federal returns. (O.C.G.A. 48-7-21). Federal Internal Revenue Code of 1986 followed generally as to corporate reorganizations and liquidations. Subchapter S elections apply only if all stockholders are subject to tax in state on their portion of corporate income. However, election will be allowed if nonresident stockholders file with Commissioner agreement to pay tax on their portion of corporate income. (O.C.G.A. 48-7-21).

Constitutional.

Income tax constitutional when applied to foreign corporation even though corporation's only contacts with state were that it maintained sales office in Atlanta with secretary who answered telephone there and salesman whose efforts were one-third directed to state and two-thirds to other states, and contracts were made in other states as to goods shipped to state pursuant to offers made by state customers. (358 U.S. 450, rev'g 213 Ga. 713, 101 S.E.2d 197). Accord, under state constitution where foreign corporation's only contacts with state were sales office in Atlanta with seven employees and from which three salesmen regularly solicited in Georgia and ten other states, all orders from Georgia customers being accepted outside state and shipped by common carrier f.o.b. its plant or warehouses, all outside state. (216 Ga. 316, 116 S.E.2d 293). Same holding in companion case (but without opinion) where per stipulated facts foreign corporation had no office in state, all its salesmen operating from their residences in state and orders accepted and shipment made in same manner as above. (216 Ga. 389, 116 S.E.2d 299). But see Public Law 86-272, which provides some legislative protection against imposition of state taxes measured by net income on marginal activities within taxing state, if these activities constitute only activities of foreign business within state.

Allocation and Apportionment of Income.

Corporations doing business both within and without state are taxed only on net income attributable to state, determined according to O.C.G.A. 48-7-31, quoted below:

"(a) The tax imposed by this chapter shall apply to the entire net income, as defined in this article, received by every foreign or domestic corporation owning property or doing business within this state, or deriving income from sources within this state to the extent permitted by the United States Constitution. A corporation shall be deemed to be doing business within this state if it engages within this state in any activities or transactions for the purpose of financial profit or gain whether or not:

(1) The corporation qualifies to do business in this state;

(2) The corporation maintains an office or place of doing business within this state; or

(3) Any such activity or transaction is connected with interstate or foreign commerce.

(b)(1) If the entire business income of the corporation is derived from property owned or business done in this state, the tax shall be imposed on the entire business income.

(2) If the business income of the corporation is derived in part from property owned or business done in this state and in part from property owned or business done outside this state, the tax shall be imposed only on that portion of the business income which is reasonably attributable to the property owned and business done within this state, such portion to be determined as provided in subsections (c) and (d) of this Code section.

(c)(1) Interest received on bonds held for investment and income received from other intangible property held for investment are not subject to apportionment. All expenses connected with such investment income shall be applied against the investment income. The net investment income from intangible property shall be allocated to this state if the situs of the corporation is in this state or if the intangible property was acquired as income from property held in this state or as a result of business done in this state.

(2) Rentals received from real estate held purely for investment purposes and not used in the operation of any business are not subject to apportionment. All expenses connected with such investment income shall be applied against the investment income. The net investment income from tangible property located in this state shall be allocated to this state.

(3) Gains from the sale of tangible or intangible property not held, owned, or used in connection with the trade or business of the corporation nor held for sale in the regular course of business shall be allocated to this state if the property sold is real or tangible personal property situated in this state or intangible property having an actual situs or a business situs within this state. Otherwise, the gains shall not be allocated to this state.

(d) Net income of the classes described in subsection (c) of this Code section having been separately allocated and deducted, the remainder of the net business income shall be apportioned as follows:

(1) Where the net business income of the corporation is derived principally from the manufacture, production, or sale of tangible personal property, the portion of the net income therefrom attributable to property owned or business done within this state shall be taken to be the portion arrived at by application of the following formula:

(A) Gross receipts factor;

(i) The gross receipts factor is a fraction, the numerator of which is the total gross receipts from business done within this state during the tax period and the denominator of which is the total gross receipts from business done everywhere during the tax period. For the purposes of this subparagraph, receipts shall be deemed to have been derived from business done within this state only if the receipts are received from products shipped to customers in this state, or from products delivered within this state to customers. In determining the gross receipts within this state, receipts from sales negotiated or effected through offices of the taxpayer outside this state and delivered from storage in this state to customers outside this state shall be excluded;

(ii) Where a taxpayer's gross receipts are also derived from activities described in paragraph (2) of this subsection, gross receipts shall also include the gross receipts from the activities described in paragraph (2) of this subsection and shall be attributed to Georgia based upon division (2)(A)(i) of this subsection;

(B) Apportionment formula. The net income of the corporation shall be apportioned to this state according to the gross receipts factor pursuant to subparagraph (A) of this paragraph;

(2) Except as otherwise provided in paragraph (2.1) or (2.2) of this subsection,

where the net business income is derived principally from business other than the manufacture, production, or sale of tangible personal property, the net business income of the corporation shall be arrived at by application of the following formula:

(A) Gross receipts factor.

(i) The gross receipts factor is a fraction, the numerator of which is the total gross receipts from business done within this state during the tax period and the denominator of which is the total gross receipts from business done everywhere during the tax period. For the purposes of this subparagraph, the term “gross receipts” means all gross receipts received from activities which constitute the taxpayer's regular trade or business. Gross receipts are in this state if the receipts are derived from customers within this state or if the receipts are otherwise attributable to this state's marketplace;

(ii) Where a taxpayer's gross receipts are also derived from activities described in paragraph (1) of this subsection, gross receipts shall also include the gross receipts from the activities described in paragraph (1) of this subsection and shall be attributed to Georgia based upon division (1)(A)(i) of this subsection;

(B) Apportionment formula. The net income of the corporation shall be apportioned to this state according to the gross receipts factor pursuant to subparagraph (A) of this paragraph;

(C) If the allocation and apportionment provisions provided for in this paragraph do not fairly represent the extent of the taxpayer's business activity in this state, the taxpayer may petition the commissioner for, with respect to all or any part of the taxpayer's business activity, if reasonable:

(i) Separate accounting;

(ii) The exclusion of any one or more of the factors;

(iii) The inclusion of one or more additional factors that will fairly represent the taxpayer's business activity within this state; or

(iv) The employment of any other method to effectuate an equitable allocation and apportionment of the taxpayer's income.

The denial of a petition under this paragraph shall be appealable pursuant to either Code Section O.C.G.A. 48-2-59 or O.C.G.A. 50-13-12;

(2.1)(A) Except as otherwise provided in this paragraph, all terms used in this paragraph shall have the same meaning as such terms are defined in 49 U.S.C. Section 1301 and the United States Department of Transportation's Uniform System of Accounts and Reports for Large Certificated Air Carriers, 14 C.F.R. Part 241, as now or hereafter amended.

(B) Where the net business income of the corporation is derived principally from transporting passengers or cargo in revenue flight, the portion of the net income therefrom attributable to property owned or business done within this state shall be taken to be the portion arrived at by application of the following three-factor formula:

(i) Revenue air miles factor. The revenue air miles factor is a fraction, the numerator of which shall be equal to the total, for each flight stage which originates or terminates in this state, of revenue passenger miles by aircraft type flown in this state and revenue cargo ton miles by aircraft type flown in this state and the denominator of which shall be equal to the total, for all flight stages flown everywhere, of total revenue passenger miles by aircraft type and total revenue cargo ton miles by aircraft type;

(ii) Tons handled factor. The tons handled factor is a fraction, the numerator of which shall be equal to the total of revenue passenger tons by aircraft type handled in this state and revenue cargo tons by aircraft type handled in this state and the denominator of which shall be equal to the total of revenue passenger tons by aircraft type flown everywhere and revenue cargo tons by aircraft type flown everywhere. For purposes of this division, the term ‘handled’ means the product of 60 percent multiplied by the revenue passenger tons flown on each flight stage which originates in this state or 60 percent multiplied by the revenue cargo tons flown on each flight stage which originates in this state;

(iii) Originating revenue factor. The originating revenue factor is a fraction, the numerator of which shall be equal to the total of passenger and cargo revenue by aircraft type which is attributable to this state and the denominator of which shall be the total of passenger and cargo revenue by aircraft type everywhere. For purposes of this division, passenger or cargo revenue which is attributable to this state shall be equal to the product of passenger or cargo revenue everywhere by aircraft type multiplied by the ratio of revenue passenger miles or revenue cargo ton miles in this state to total revenue passenger miles everywhere or total revenue cargo ton miles everywhere for each aircraft type as separately determined in division (i) of this subparagraph. The records of total passenger revenue everywhere by aircraft type or total cargo revenue everywhere by aircraft type are not maintained, then for purposes of this division, total passenger revenue everywhere for all aircraft types or total cargo revenue everywhere for all aircraft types shall be allocated to each aircraft type based on the ratio of total revenue passenger miles everywhere for that aircraft type to all aircraft types or total revenue cargo ton miles everywhere for that aircraft type to all aircraft types;

(iv) The revenue air miles factor, the tons handled factor, and the originating revenue factor shall be separately determined and an apportionment fraction shall be calculated using the following formula:

(I) The revenue air miles factor shall represent 25 percent of the fraction;

(II) The tons handled factor shall represent 25 percent of the fraction; and

(III) The originating revenue factor shall represent 50 percent of the fraction. The net income of the corporation shall be apportioned to this state according to such average fraction;

(2.2)(A) As used in this paragraph, the term:

(i) ‘Credit card data processing and related services’ shall include, but not be limited to, the provision of infrastructure services for bank credit card and private label card issuers, such as new account application processing, international and domestic clearing, statement preparation, point-of-sale authorization processing, card embossing, and other related processing services for managing cardholder accounts.

(ii) ‘Customer’ means the banks and institutions to whom credit card data processing and related services are provided.

(iii) ‘Gross receipts factor’ means a fraction the numerator of which is the total gross receipts from the taxpayer's customers during the tax period, if the principal office of the customer's credit card operation is in this state or if the principal office of the taxpayer's customer is in this state, and the denominator of which is the total gross receipts from all of the taxpayer's customers during the tax period.

(B) Where more than 60% of the total gross receipts of a corporation are derived from the provision of credit card processing and related services to banks and other institutions, the portion of the net income attributable to business done in this state shall be determined by multiplying the corporation's net income by the gross receipts factor in division (iii) of subparagraph (A) of this paragraph.

(3) For the purposes of this subsection, the term ‘sale’ shall include, but not be limited to, an exchange, and the term ‘manufacture’ shall include, but not be limited to, the extraction and recovery of natural resources and all processes of fabricating and curing.

(e) The net income of a domestic or foreign corporation which is a subsidiary of another corporation or which is closely affiliated with another corporation by stock ownership shall be determined by eliminating all payments to the parent corporation or affiliated corporation in excess of fair value and by including fair compensation to the domestic business corporation for its commodities sold to or services performed for the parent corporation or affiliated corporation. For the purposes of determining net income as provided in this subsection, the commissioner may equitably determine the net income by reasonable rules of apportionment of the combined income of the subsidiary, its parent, and affiliates, or any combination of the subsidiary, its parent, and any one or more of its affiliates.”

Conditions for Income Allocation by Agreement.

Corporation may enter into agreement with revenue commissioner for income allocation for limited period if: (1) Corporation is planning new facility in Georgia or expansion of existing facility; and (2) corporation submits proposed agreement as contract and states reasons therefore. Revenue commissioner must submit proposal to panel consisting of commissioner of community affairs, commissioner of economic development and director of office of planning and budget. Panel must certify that new facility will have significant beneficial economic effect on region for which it is planned (based upon criteria enumerated in O.C.G.A. 48-7-31.1[d][1] through [4]) and that benefits to public exceed costs to public. Both initial proposal and final contract for allocation will be subject to Open Records Act. (O.C.G.A. 48-7-31.1).

Alternative Method.

Corporation may allocate its income based on allocation of receipts and expenditures employed in its books of account if this method of allocation reflects Georgia income more clearly than process or formulas prescribed by state law. Application to Commissioner for permission to allocate income on basis of books of account must be made at least 60 days prior to due date of state return. (O.C.G.A. 48-7-34). Application may also be made to Commissioner for permission to base corporation's return on any other method which more clearly reflects Georgia income. (O.C.G.A. 48-7-35).

Tax Credits.

Jobs Credit.

Up to $3,500 credit allowed for each new full-time employee in designated less developed counties. (O.C.G.A. 48-7-40). Up to $1,250 credit allowed if increase port traffic of products by certain percentage on or after Jan. 1, 1998. (O.C.G.A. 48-7-40.15).

Telework Credit.

Up to $1,200 credit for each participating employee in qualified “telework agreement” allowed for expenses incurred by employer to allow telework to maximum amount of $2,000,000. Employer must submit application for tax credit to Commissioner between Sept. 1 and Oct. 31 of year preceding tax year for which credit sought. (O.C.G.A. 48-7-29.11).

Education Program Credit.

Up to one-third cost of education or $150, whichever is less, for each student-employee who successfully completes employer sponsored skills education program. (O.C.G.A. 48-7-41).

Retraining Program Credit.

Up to one-half cost of retraining or $500, whichever is less, for each student-employee who successfully completes employer sponsored retraining program. (O.C.G.A. 48-7-40.5).

Child Care Credit.

Up to 75% cost of employer sponsored or employer provided child care. (O.C.G.A. 48-7-40.6). Taxpayer allowed credit against income tax for qualified child and dependent care expenses. Credit determined by applying percentage to amount of credit provided for in §21 of Internal Revenue Code. Allowable credits are: (1) 10% for all taxable years beginning on Jan. 1, 2006 and ending on Jan. 1, 2007; (2) 20% for all taxable years beginning on Jan. 1, 2007 and ending on Jan. 1, 2008; and (3) 30% for all taxable years beginning on or after Jan. 1, 2008. (O.C.G.A. 48-7-29.10).

Low-Emission Vehicle Credit.

Credit of 10% of cost of new low-emission vehicle or $2,500, whichever is less and 20% of cost of new zero emission vehicle or $5,000, whichever is less; also, credit of up to $2,500 per vehicle for conversion of conventionally fueled vehicles. (O.C.G.A. 48-7-40.16).

Qualified Caregiving Expenses Credit.

Lesser of $150 or up to 10% of certain health and caregiving expenses for certain qualifying family members. (O.C.G.A. 40-7-29.2).

Retrofitting Single-family Home with Accessibility Features Credit.

$500 credit for purchase of new home meeting accessibility requirements or $125 or actual cost of retrofitting existing home, whichever is less. (O.C.G.A. 48-7-29.1).

Disaster Funds Received Credit.

$500 or actual amount of disaster funds received from Georgia Emergency Management Agency or Federal Emergency Management Agency, whichever is less. (O.C.G.A. 48-7-29.4).

Private Driver Education for Dependent Minors Credit.

$150 or actual cost of driver education course taken by dependent minor, whichever is less. (O.C.G.A. 48-7-29.5).

Depository Financial Institution Credit.

Dollar for dollar credit against state income tax for any taxes paid pursuant to O.C.G.A. 48-6-93, -95. (Effective Jan. 1, 2001.) (O.C.G.A. 48-7-29.7).

Rehabilitation of Historic Structures.

Credit of 10% of qualified rehabilitation expenditures as defined in code section for historic home, with additional 5% credit for historic home in defined target area, and 20% of qualified rehabilitation expenditures credit for other certified historic structure; credits not to exceed $5,000 in any 120 month period. (O.C.G.A. 48-7-29.8, effective until Jan. 1, 2009). Effective Jan. 1, 2009, credit of 25% of qualified rehabilitation expenditures as defined in code section for historic home, with additional 5% credit for historic home in defined target area, and 20% credit of qualified rehabilitation expenditures for other certified historic structure. (O.C.G.A.

48-7-29.8[b] am'd effective Jan. 1, 2009). Credits for historic home no to exceed $100,000 in any 120 month period and credits for certified structure not to exceed $300,000 in any 120 month period. (O.C.G.A. 48-7-29.8[c] am'd effective Jan. 1, 2009).

Water Conservation Credit.

Credit of between 5 and 10% for persons participating in qualified water conservation investment. (O.C.G.A. 48-7-4.10). Certain credits also available for taxpayers who switch from groundwater usage. (O.C.G.A. 48-7-40.11).

Investment Tax Credit.

Corporation or person operating manufacturing facility or manufacturing support facility in designated less developed county is allowed tax credit equal to between 1 and 10% of cost of all qualified investment property acquired for use in construction or expansion of manufacturing facility or manufacturing support facility. (O.C.G.A. 48-7-40.2, -40.3, -40.4, -40.7, -40.8, -40.9). Credit also allowed if increase port traffic of products by certain percentage after Jan. 1, 1998. (O.C.G.A. 48-7-40.15).

Rural Physician Credit.

Physicians who choose to practice in certain rural areas may be allowed income tax credit of up to $5,000. (O.C.G.A. 48-7-29).

Withholding.

Employer/Employee.

Every employer must withhold income tax from nonexempt wages of each employee. (O.C.G.A. 48-7-101). Employer includes any person for whom state resident performs any service, within or without state, or for whom nonresident individual performs any service within state, as employee; except that if person for whom services are performed does not have control of payment of wages, then term “employer” includes person with such control, and where person pays wages on behalf of nonresident individual, foreign partnership, or foreign corporation not doing business in state, term “employer” includes person paying wages. (O.C.G.A. 48-7-100[5]). Exemptions, rates and optional withholding tables set out in statute. (O.C.G.A. 48-7-101). Employer whose tax withheld is $200 or less must file and remit payment to Commissioner on or before last day of month following end of quarter, however, if monthly amount withheld exceeds $200, tax must be paid on or before 15th day of following month. (O.C.G.A. 48-7-103). Receipts must be given to employees by Jan. 31 of each year showing tax withheld during year (O.C.G.A. 48-7-105) and annual return of employer must be filed by Feb. 28 of succeeding year or by 30th day after date on which final payment of wages is made by employer who ceased to pay wages (O.C.G.A. 48-7-106). Employer failing to withhold required amount subject to penalty of $10 per quarter per employee. Employer failing to file return or pay tax liable for penalty to $25 for each failure, plus 5% of tax due for each month such failure continues, not to exceed $25 plus 25% of tax due. (O.C.G.A. 48-7-126). If employer delinquent in payment of tax, Commissioner may give notice to all persons having control or possession of personal property of employer and such persons may make no disposition of such property within 30 days of receiving such notice. (O.C.G.A. 48-7-108). Upon notice from Commissioner of employer's failure to withhold or pay over taxes as required, employer shall deduct and withhold tax required and employ special accounting procedures until Commissioner cancels notice requiring such procedures. (O.C.G.A. 48-7-109.1).

Sales Property.

Applying to any sale or transfer of real property occurring after Jan. 1, 1994, buyer required to withhold and remit to tax commissioner 3% of purchase price in sale of real property located in Georgia by nonresident seller. If net proceeds to seller are less than 3% of purchase price, only net proceeds must be withheld. No withholding required for sale of principal residence, sale by mortgagor in foreclosure or deed in lieu thereof with no additional consideration, or if seller is agency or authority of state or federal government or government or private mortgage insurance company. (O.C.G.A. 48-7-128). Resident under Code §48-7-128 must meet all of following criteria: (1) must have filed Georgia income tax returns for two preceding income tax years; (2) must continue to be in business in Georgia after sale; and (3) must report sale on Georgia income tax return for current year.

On Certain Distributions to Certain Nonresidents.

Partnerships, subchapter S corporations, and limited liability companies that own property or do business in Georgia must withhold tax from any distributions paid or credited to members who are not Georgia residents, at rate of 4%. (O.C.G.A. 48-7-129). Alternative to nonresident withholding is to file composite return on behalf of all nonresident members, reporting and remitting income tax due. (O.C.G.A. 48-7-129). Penalties for failure to withhold amounts required, admit nonresident status of member, and furnish nonresidents with correct withholding statements set out in statute. (O.C.G.A. 48-7-129).

Local Income Tax.

Although authorized by state law under certain circumstances (O.C.G.A. 48-7-140 to -149), no counties or municipalities in Georgia impose local income taxes.

22.12 INHERITANCE TAX:

None.

22.13 LOCAL AND MUNICIPAL TAXES:

Municipal Tax.

Municipality may levy tax for development not to exceed three mills per dollar on assessed property (O.C.G.A. 48-5-350) and may levy tax for benefits and costs of teacher retirement system (O.C.G.A. 48-5-351).

Municipal tax operating as precondition for practice of law unconstitutional regulation. (267 Ga. 571, 481 S.E.2d 818).

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22.16 PROPERTY TAXES:

Real and Personal Property Taxable.

All property taxable except that exempted. (O.C.G.A. 48-5-3). Any estate in property is taxable, except mere usufruct. See subhead Exemptions from Property Taxation, infra.

Exemptions from Property Taxation.

Public property, with certain exceptions; places of religious worship or burial and all property owned and operated exclusively as a church or similar or related association when such entity qualifies as exempt religious organization under §501(c)(3) of Internal Revenue Code of 1986 and used in manner consistent with such exemption; institutions of purely public charity; hospitals not operated for purpose of private or corporate profit and income, with exceptions;

buildings erected for and used as college, incorporated academy or other seminary of learning; all funds or property held as endowment by such colleges, nonprofit hospitals, incorporated academy or seminary of learning, provided same is not invested in real estate, and provided said institutions are open to general public and donors do not reserve right to receive or retain any part of income of property; real and personal property of public library, books, philosophical apparatus, paintings, and statuary of company or association kept in public hall; property of nonprofit home for aged or for mentally disabled used in connection with its operation, provided same has no stockholders and does not distribute income to private persons; certain property used to reduce water or air pollution; property used exclusively as headquarters, post home, or similar facility of veterans organization; property owned by historical fraternal benefit association which is used exclusively for charitable, fraternal, and benevolent purposes; provided in every case exempted property not used for profit (O.C.G.A. 48-5-41); farm products grown in state and remaining in hands of producer exempt for period not longer than year next after production; certain harvested agricultural products with planting-to-harvest cycle of 12 months or less; qualified farm products remaining in hands of family owned qualified farm products producer, still in natural condition, and not held for direct retail sale by someone other than original producer. (O.C.G.A. 48-5-41.1). Tax exempt status does not apply to special assessments for improvements. (235 Ga. 194, 219 S.E.2d 122).

Homestead or residence actually occupied by owner as residence is exempt from ad valorem taxation up to value of $2,000. (O.C.G.A. 48-5-44). Occupant or occupants of jointly owned residence each entitled to full exemption. (O.C.G.A. 48-5-44). Applications for exemption in all counties providing for collection and payment of ad valorem taxes must be filed on or before May 1 or such other date as established by local Act; in all other counties application must be filed on or before June 1. If exemption not filed in timely fashion, exemption is deemed waived for entire year. (O.C.G.A. 48-5-45). Homestead of person 62 years or older with annual income of $10,000 or less exempt up to maximum value of $10,000 from ad valorem taxes for educational purposes. (O.C.G.A. 48-5-52). Homestead of person 65 years or older with annual income of $10,000 or less exempt up to maximum value of $4,000 from all state and county ad valorem taxes. (O.C.G.A. 48-5-47). Homestead of person 62 years or older with annual income $30,000 or less exempt up to amount equal to amount of assessed value for taxes to pay interest on and to retire bonded indebtedness. (O.C.G.A. 48-5-47.1). Residence of disabled veteran exempt to value of $12,500. (Const., Art XI, §1, Paragraph IV).

Foreign merchandise in transit (any personal property imported into U.S. by water through any Georgia port) is exempt from property tax while stored in county in which port of original entry is located. (O.C.G.A. 48-5-5). Property that is owned by non-Georgia resident who does not maintain or operate business in Georgia, but who contracts with Georgia commercial printer for printing services in Georgia and provides property to Georgia based printer is exempt from ad valorem taxation. (O.C.G.A. 48-5-5). Imports not in transit but remaining in original packaging are constitutionally exempt from taxation. (233 Ga. 712, 214 S.E.2d 349, affirmed by U.S. Supreme Court, holding that nondiscriminatory property tax imposed on imported goods no longer in import transit is not prohibited by Import-Export Clause of U.S. Constitution, 423 U.S. 276).

Personal property consisting of clothing, furniture, and property used about home, etc., is exempt from all ad valorem taxation. Domestic animals and tools of trade of manual laborers are exempt to value of $300. (O.C.G.A. 48-5-42). All tangible personal property except motor vehicles, trailers and mobile homes exempt to value of $500. (O.C.G.A. 48-5-42.1).All personal property constituting inventory of business exempt from state ad valorem taxation (O.C.G.A. 48–5–41.2). Dealer-owned motor vehicles held for sale or resale are exempt from ad valorem taxation. (O.C.G.A. 48-5-472, 269 Ga. 202, 496 S.E.2d 727 [1998]).

In certain cases, compressed petroleum gas is exempt from motor fuel tax. (O.C.G.A. 48-9-3).

Deeds in certain types of transactions exempt from tax on documents transferring real property. (O.C.G.A. 48-6-2). See also subhead Real Estate Conveyance Tax, infra.

Returns.

Public utility corporations, insurance corporations, airline companies, foreign and domestic corporations holding special franchises from state must make returns to Department of Revenue on or before Mar. 1, as of Jan. 1 preceding. (O.C.G.A. 48-5-422, -511, -541; 48-1-2). All other corporations and all individuals must return to tax receiver of county of residence, between Jan. 1 and Apr. 1 (Mar. 1 in certain counties), all property owned by them, except real estate in other counties, and personalty used in business therein, which is returned in counties where situated. (O.C.G.A. 48-5-15, -16, -18). Property of nonresident must be returned in county where property is situated. (O.C.G.A. 48-5-12). If owner fails to return property which he or she returned in preceding year, it is automatically returned, at valuation of preceding year, and taxpayer deemed to have claimed same homestead and personal property exemptions as in preceding year. (O.C.G.A. 48-5-20). Property subject to tax must be returned at fair market value. (O.C.G.A. 48-5-6). Fair market value defined. (O.C.G.A. 48-5-2). Returns must be made annually for property held on Jan. 1, next preceding. (O.C.G.A. 48-5-10).

Assessment.

Actual and highest and best uses of property both factors in determining fair market value of property for assessment. (236 Ga. 88, 222 S.E.2d 371). Extent of holder's interest not factor. (155 Ga. App. 591, 271 S.E.2d 727). By Apr. 11 tax receiver must present tax returns of county to board of tax assessors (O.C.G.A. 48-5-301), who must inspect returns and determine value of property and equalize assessments (O.C.G.A. 48-5-299, -302). Members of county board of tax assessors or county property appraisal staff may examine property (outside buildings) to appraise fair market value. (O.C.G.A. 48-5-264.1). Tangible property must be assessed at 40% of fair market value. (O.C.G.A. 48-5-7). Certain tangible real property devoted to bona fide agricultural purposes assessed at 75% of value which other tangible real property is assessed. (O.C.G.A. 48-5-7, 48-5-7.1). Special method provided for valuing historic property. (O.C.G.A. 48-5-2, -7.2, -7.3). Bona fide conservation use property and bona fide residential transitional property assessed at 40% of current use value. (O.C.G.A. 48-5-2, -7). Current use value defined. (O.C.G.A. 48-5-2). Bona fide conservation use defined. (O.C.G.A. 48-5-7.4). Bona fide residential transitional property defined. (O.C.G.A. 48-5-7.4). Different methods of valuation of real and personal property allowed. (234 Ga. 234, 214 S.E.2d 923). Forest land conservation use property specially assessed (O.C.G.A. 48–5A-1 to 48–5A-4). Uniformity of taxation does not require that only one method be used in determining fair market value of tangible property. (236 Ga. 88, 222 S.E.2d 371). Property taxes are charged against owner of property if known, and against specific property itself if owner is not known. (O.C.G.A. 48-5-9). Taxing authorities are generally indifferent as to whom property actually belongs and usually proceed against property itself to collect unpaid taxes. Tax bill covering previously uncovered undervaluation of property is not reassessment or revaluation of property, but bill for default. (O.C.G.A. 48-5-306; 228 Ga. App. 94, 491 S.E.2d 173). In recognition of emergency situation and fiscal conditions moratorium placed on assessed value of property until January 10, 2011 (O.C.G.A. 48–5B-1).

Review of Assessment.

Disputed assessments must be appealed first to county board of tax assessors within 45 days (30 days for counties, municipal corporations that provide for collection and payment of taxes in installments), then to county board of equalization or to arbitrator or arbitrators within 45 days, and then to superior court within 30 days. Temporary tax bills are issued during pendency of appeal and interest may be recovered or paid by taxpayer depending on outcome of appeal. (O.C.G.A. 48-5-311). Period cannot be extended. (234 Ga. 155, 215 S.E.2d 3). For certain property, including property of public utilities, airline flight property, railroad rolling stock and certain property of common carriers, assessments may be appealed to Superior Court of Fulton

County within 30 days of receipt of notice of proposed assessment. (O.C.G.A. 48-2-18). Notice of intent to dispute assessment required within 20 days. (O.C.G.A. 48-2-18). Successful appeal by taxpayer is valid under most circumstances for two additional years unless board of assessors conducts new investigation and establishes new valuation. (O.C.G.A. 48-5-299).

Payment.

Taxes are payable to county in which returns made, except as above shown, on or before Oct. 15 of year in which returns must be made (penalty ranging between 5% and 10% of unpaid tax due accrues thereafter), and are first lien on property, not divested by judicial sale under any process. (O.C.G.A. 48-2-56 - 48-2-57; O.C.G.A. 48-5-24). Executions on delinquent taxes issue on Dec. 20 (O.C.G.A. 48-5-161) and bear interest at 12% (O.C.G.A. 48-3-8, 48-2-40). See also topic 22.01 Administration, subhead Penalties, catchline Real and Personal Property Taxes.

Counties and municipalities are authorized to collect ad valorem taxes on tangible personal property other than motor vehicles in installments, not to exceed two, provided such counties or municipalities have adopted resolution or ordinance by Dec. 31 of previous year (O.C.G.A. 48-5-23); and to enter into prepayment agreements with certain developers (O.C.G.A. 48-5-31).

Owner of any interest in property which has been returned or assessed with other property (or transferee who acquires title between lien date and payment date) may pay taxes assessed against any one or more pieces of property: (a) when listed separately by owner or assessor on return or digest, according to valuation; or (b) when not listed separately, by paying proportionate part of taxes represented by such property according to valuation. Such payment releases piece(s) of property from tax lien. Fee of 50¢ must be paid for receipt and release. (O.C.G.A. 48-5-25).

For tax years beginning on or after Jan. 1, 1982, taxpayers 62 years or older may defer portion of ad valorem taxes on homestead under certain conditions. (O.C.G.A. 48-5-72 et seq.). Deferred taxes constitute lien. (O.C.G.A. 48-5-76).

Taxpayer may recover prejudgment interest in action for refund of wrongfully collected taxes from date of demand for refund. (183 Ga. App. 891, 360 S.E.2d 425). Taxpayer may be entitled to action for refund even if appeal procedure under O.C.G.A. 48-5-311 is not utilized. (214 Ga. App. 248, 447 S.E.2d 679).

Lien.

Attaches at time of assessment and is superior to all other liens. (O.C.G.A. 48-2-56). Revised Uniform Federal Tax Lien Registration Act enacted, with modifications. (O.C.G.A. 44-14-571). When legality of assessment is being litigated, Commissioner may release all or part of property subject to state tax lien if owner gives security and Attorney General approves. (O.C.G.A. 48-2-58).

Tax commissioner or tax collector may commence in rem tax foreclosure to enforce lien for ad valorem taxes. (O.C.G.A. 48-4-76). Prior to such foreclosure tax commissioner or collector must: file petition with superior court of county in which property is located (O.C.G.A. 48-4-78); mail copies of petition by certified mail to all interested parties and occupants of property (O.C.G.A. 48-4-78); advertise notice of filing of petition on two separate dates within 30 days of filing of petition (O.C.G.A. 48-4-78); request that judicial hearing be held no earlier than 30 days following filing of petition (O.C.G.A. 48-4-79).

Sale.

Sales of property for taxes are made by sheriff, or by tax collector or commissioner (O.C.G.A. 48-5-137), and regulated by same rules governing judicial sales (O.C.G.A. 48-4-1).

Taxpayer must be provided with ten days written notice of sale (O.C.G.A. 48-4-1), and sale must be advertised once a week for four weeks prior to sale (O.C.G.A. 9-13-140, 141).

Redemption.

Real estate sold under tax execution may be redeemed by any person having interest therein within 12 months after sale, or at any time thereafter until right to redeem is foreclosed by giving defendant in tax execution notice of purchaser's intention to foreclose, by paying purchaser amount paid by him or her with 20% premium for first year or fraction thereof that has elapsed since sale and 10% premium for each year or fraction thereafter until redemption payment is made. (O.C.G.A. 48-4-40, 42). Cost of redemption includes taxes paid by purchaser. (O.C.G.A. 48-4-42).

Real estate to be sold as result of in rem foreclosure may be redeemed by payment of redemption amount (O.C.G.A. 48-4-77), at any point prior to moment of sale, by any interested party (O.C.G.A. 48-4-80). After moment of sale, property owner has exclusive right of redemption which exists for period of 60 days from date of sale. (O.C.G.A. 48-4-81).

Intangible Recording Tax.

Tax Imposed.

Long Term Notes Secured by Real Estate (any part of principal falling due more than three years from date of note or from date of instrument securing it) must be recorded within 90 days from date of instrument in county in which real estate conveyed or encumbered or upon which lien is created is situated. (O.C.G.A. 48-6-60, -61). Prior to filing such instrument for record there must be paid to clerk of superior court of such county tax, not greater than $25,000, of $1.50 per $500 of debt as evidenced in instrument to be filed for record. (O.C.G.A. 48-6-61). Collecting officer collects tax from holders of instrument. Holder may pass amount of tax to borrower or mortgagor but such amount shall not be considered part of any finance charge imposed by holder. Tax paid only once-prior to or at time instrument securing note if filed for record. Payment under protest may be made; such payment requires county official to record instrument and escrow tax paid until final determination; claim for refund must be made within 30 days of payment date. (O.C.G.A. 48-6-76).

Failure to Pay.

Unless Commissioner determines that tax is not payable (O.C.G.A. 48-6-71), failure to pay tax does not bar recorded instrument from constituting legal notice (O.C.G.A. 48-6-62), but it does bar collection of indebtedness secured by any instrument required to be recorded, by suit, foreclosure, exercise of any power of sale, or otherwise, whether such instrument held by original party thereto or transferee. However, such instrument, subject to bar, shall continue to secure indebtedness and shall continue to encumber collateral described therein. Failure to pay tax will not affect or discharge indebtedness secured by instrument or debtor's liability on account thereof. (O.C.G.A. 48-6-77). Bar may be removed by payment of tax required, plus interest from time tax due, plus penalty of 50% of amount of tax due. (O.C.G.A. 48-6-77, 48-2-40). Commissioner may waive 50% penalty if he or she determines that failure to pay tax was through “ignorance of the law or inadvertence, and not in bad faith.” (O.C.G.A. 48-6-77). Nonresident lenders conducting lending business in state are subject to this tax. (232 Ga. 344, 206 S.E.2d 424).

Exemptions.

Tax not applicable to instruments which are extensions, transfers, assignments, modifications or renewals of, or which only add additional security for, long-term notes on which tax has already been paid or portion of new long-term note which is refinancing by original lender of unpaid principal on previous long-term note, if tax paid on previous note and amount of refinancing shown. (O.C.G.A. 48-6-65).

Intangibles Personal Property Tax.

None.

Mortgage Tax.

See subhead Intangible Recording Tax, supra.

Real Estate Conveyance Tax.

Tax Imposed.

Tax on deeds by which realty is transferred (O.C.G.A. 48-6-1) does not apply to: (1) instruments given to secure debt; (2) deeds of gift; (3) deed to first transferee on foreclosure; certain deeds issued in lieu of foreclosure; (4) deed effecting division of real property among joint tenants or tenants in common if transaction involves no consideration other than division; (5) transfers by nonprofit public corporations; (6) transfer between husband and wife in connection with divorce; (7) leases; or (8) order for year's support under O.C.G.A. 53-5-11. (O.C.G.A. 48-6-2).

Rate.

$1 for first $1,000 or part thereof, and 10¢ for each additional $100 or part thereof, exclusive of value of any lien or encumbrance. (O.C.G.A. 48-6-1). Consideration or value of conveyance must exceed $100 before tax applies. (O.C.G.A. 48-6-1).

22.17 SALES AND USE TAXES:

Sales Tax.

4% state-wide sales tax is levied upon purchase or sale at retail or lease or rental within state, of tangible personal property, natural or artificial gas, oil, electricity, solid fuel, transportation, local telephone services, beverages and tobacco products when made for purposes other than resale, transient lodging furnished for less than 90 days, and admission charges to places of amusement, sports or entertainment. (O.C.G.A. 48-8-2, -30). Tax is 4% of sales price or gross lease or rental charge or gross charge for services. (O.C.G.A. 48-8-30). State motor fuel excise tax not element of sales price. (121 Ga. App. 454, 174 S.E.2d 224).

Sales tax is imposed on purchaser at retail, lessee, or rentee of tangible personal property or services in state and must be collected from such person by retailer, lessor, or rentor, who must remit tax to Commissioner. (O.C.G.A. 48-8-30, -32). Returns covering both sales and use taxes must be made on 20th day of each month for sales and purchases made during preceding month. (O.C.G.A. 48-8-49). Dealer must remit by 20th day of month 50% of “estimated tax liability” for such month where such liability exceeds $2,500. (O.C.G.A. 48-8-49). Credit on dealer's return allowed for tax collected on items returned by purchaser within 90 days. (O.C.G.A. 48-8-58). Dealers permitted to retain 3% of tax due as compensation for collecting tax. (O.C.G.A. 48-8-50).

Amounts charged for labor or service rendered in installing, applying or remodeling or repairing property sold, when billed separately to consumer, are not part of selling price of property for purpose of computing applicable tax. (Dept. of Revenue Reg. §560-12-2-.88).

Refunds available on purchase of solar energy equipment. (O.C.G.A. 48-8-3).

Local Taxes.

Additional sales and use tax of 1% imposed by Rapid Transit Tax Act on taxable transactions occurring within MARTA area. Additional local option sales and use tax up to 2% on taxable sales and uses of property within certain joint county and municipal special districts which have adopted local option tax. (O.C.G.A. 48-8-80 et seq.). Counties by referendum may otherwise impose special 1% sales and use tax for limited time period for certain purposes including to fund local homestead exemptions. (O.C.G.A. 48-8-100 et seq.).

Successor Liability.

Dealer liable for sales or use tax must make final return and payment within 15 days after date of selling business or stock of goods or equipment, or quitting business. Purchaser of business is required to withhold from purchase price sufficient funds to cover any tax, interest and penalties that may be due, until former owner produces receipt from Commissioner showing that all taxes have been paid. Otherwise purchaser will be personally liable for payment of any unpaid taxes, notwithstanding compliance with Art. 6 of Uniform Commercial Code. Personal liability will not exceed purchase price, but property is subject to full amount of tax lien. (O.C.G.A. 48-8-46; 233 Ga. 739, 213 S.E.2d 638). “Dealer” doesn't include any nonresident or non-domiciliary who doesn't engage in any business activity in Georgia, for printing services in Georgia simply because person distributes printed material from Georgia premises or has certain other contacts related to printing services in Georgia.

Sales tax not applicable to certain casual and isolated sales. (Dept. of Revenue Reg. §560-12-1-.07; 89 Ga. App. 755, 81 S.E.2d 222).

Use Tax.

4% use tax is levied upon use, consumption, distribution, or storage, within state, of tangible personal property purchased at retail, leased, or rented outside state. (O.C.G.A. 48-8-2, -30). 4% use tax is also imposed upon use, consumption, distribution or storage within state, of tangible personal property purchased at retail outside of state and used outside state for more than six months prior to first use in state. (O.C.G.A. 48-8-30). Exemption to tangible personal property bought outside of state and brought into state for first time by new domiciliaries of state. (O.C.G.A. 48-8-3). Tax is 4% of lesser of cost price or fair market value of property purchased and 4% of gross rental charge of property leased or rented. (O.C.G.A. 48-8-30). Credit is given for sales or use tax paid to another state, provided that state gives reciprocal credit. For some tangible personal property credit also given even though no reciprocity. (O.C.G.A. 48-8-42). Dealer who solicits or advertises or distributes catalogs and thereby sells to Georgia purchasers must collect and remit use tax. (O.C.G.A. 48-8-2[3][h], -32). “Dealer” doesn't include any nonresident or non-domiciliary who does not engage in any business activity in Georgia, for printing services in Georgia simply because person distributes printed material from Georgia premises or has certain other contacts related to printing services in Georgia.

Contractor who is furnished tangible personal property for use in connection with contract must pay use tax on such property if no sales or use tax has been paid at time of purchase. (O.C.G.A. 48-8-63).

Use tax not applicable to casual or isolated sale in state. (97 Ga. App. 431, 103 S.E.2d 123).

Exemptions From Sales and Use Taxes.

Exemptions include prescription drugs, hearing aids, sale of oxygen prescribed by licensed physician, prescription eyeglasses and contact lenses, federal excise tax if billed to consumer separately from selling price or from motor fuel taxes, industrial materials becoming component parts of article of tangible personal property produced for resale, labels, containers, etc., used solely for packaging articles for sale or shipment and constituting element of retail sale, insurance premiums and professional fees from service transactions which involve sale only as inconsequential elements for which no separate charges are made, services rendered by repairmen for which separate charge is made, seed, fertilizers, insecticides, etc., for growing crops, feed for livestock, fish, or poultry, sales to U.S., State of Georgia or any county or municipality of Georgia, sales of fuel and supplies for use on ocean-going ships, transportation and related charges for conveying tangible personal property, sales or exchanges of tangible personal property resulting from certain business reorganizations in which proportionate beneficial ownership interests in property remain unchanged, sales of water by political subdivisions or water associations, sales of products used to reduce water and air pollution, sales to certain educational institutions, sales to nonprofit nursing homes, general or mental hospitals and licensed in-patient hospices if tax exempt organization, sales of insulin and insulin syringes dispensed without prescription, sales of sugar used as food for honey bees, sales of cattle, hogs, sheep, horses, poultry and bees for breeding purposes, sales of food consumed on certain private school premises, sales of tangible property to certain private schools, sales of any parent-teacher organizations qualified as tax exempt, sales of certain machinery for new plant or farm or to expand productive capacity of existing plant or farm, including poultry, egg, dairy and livestock production, sales of liquified petroleum gas or other fuel used to heat structure in which broilers, pullets or other poultry are raised, property manufactured or assembled in state for export where delivery is taken outside state and for certain transportation equipment where delivery is taken in state, major components and repair parts for military craft, vehicles, and missiles, or transportation equipment used in interstate or foreign commerce. (O.C.G.A. 48-8-3). Sale or use of books recognized as being Holy Scripture exempted. (O.C.G.A. 48-8-3). Sales of any religious paper owned by religious institution or denomination and certain limited charitable fundraising sales by religious institutions or denominations exempted provided no profit of sales inures to benefit of private person. (O.C.G.A. 48-8-3). Sale or use of certain off-road equipment and related attachments used exclusively for purpose of growing and harvesting timber exempted. (O.C.G.A. 48-8-3). Certain electricity sales, manufacturing machinery sales and sales of primary material handling equipment exempted. (O.C.G.A. 48-8-3). Sales of machinery and equipment incorporated into telecommunications manufacturing facility and used for improving air quality in certain advanced technology clean rooms exempt. (O.C.G.A. 48-8-3). Sales of machinery and equipment incorporated into qualified water conservation facility and used for water conservation exempt. (O.C.G.A. 48-8-3). Use of certain cargo containers and related chassis used in intrastate commerce exempt. (O.C.G.A. 48-8-3). Sales of tangible personal property, concessions, or tickets for admission to school athletic event exempt if proceeds are used solely for benefit of school or students. (O.C.G.A. 48-8-3). Transportation charges incurred before consummation of sale are included in base price upon which tax is calculated. (133 Ga. App. 665, 211 S.E.2d 916). Sales or charges in operation of public transportation by municipalities, counties and public transit authorities exempt. (O.C.G.A. 48-8-3). Sale of vehicle to certain disabled veterans exempt from sales and use taxes. (O.C.G.A. 48-8-3). Sale of machinery and equipment for use to combat pollution exempt under certain conditions. (O.C.G.A. 48-8-3). Sale or use of certain solar energy machines exempt. (O.C.G.A. 48-8-3). Sale of motor fuels generally exempt with respect to 3% of tax. (O.C.G.A. 48-8-3). See also topic 22.08 Gasoline and Special Fuels Taxes. Sale of motor vehicles to nonresident purchasers for use in another state exempt. (O.C.G.A. 48-8-3). Contractor is consumer and must pay tax on purchase or rental of tangible property used in performing contract. Sales to certain hospital authorities exempt. (O.C.G.A. 48-8-3). Sales of objects of art, etc. to public museums exempt. (O.C.G.A. 48-8-3). Rentals of motion picture film exempt. (O.C.G.A. 48-8-3). Sale, use, storage or consumption of paper which is manufactured in state into catalogs intended to be delivered and used outside state exempt. (O.C.G.A. 48-8-3). Sales to licensed commercial fishermen of bait for taking crabs. (O.C.G.A. 48-8-3). Gross revenues generated from coin-operated amusements machines which require permit under c. 16 of Title 48 exempt. (O.C.G.A. 48-8-3). Sale of certain machinery and equipment used in remanufacture of aircraft engines or aircraft engine parts exempt. (O.C.G.A. 48-8-3). Sale of eligible food and beverages purchased for off-premises consumption (except with respect to certain local option taxes) exempt. (O.C.G.A. 48-8-3). Sales of certain tractors and attachments for farming and harvesting farm or onion crops exempt. (O.C.G.A. 48-8-3). Sales of Girl Scout Cookies exempt. (O.C.G.A. 48-8-3). Sales of food and beverages for fundraising by Boy Scouts exempt. (O.C.G.A.

48-8-3). Sale of blood glucose measuring strips exempt. (O.C.G.A. 48-8-3). Sale of grass sod in its original state of production exempt only if sold by sod producers or related entities. (O.C.G.A. 48-8-3). Sale or use of funeral merchandises, burial containers, and cemetery markers bought with funds from Georgia Crime Victims Emergency Fund exempt. (O.C.G.A. 48-8-3). Printed advertising inserts or advertising supplements exempt if distributed in Georgia in or as part of any newspaper for resale. (O.C.G.A. 48-8-3). Sale of blood measuring devices, other monitoring equipment or insulin delivery devices used exclusively by diabetics, insulin, insulin syringes and blood glucose level strips dispensed without prescription. (O.C.G.A. 48-8-3). Sale of gold, silver or platinum bullion. (O.C.G.A. 48-8-3). Sale or use of jet fuel to or by qualifying airline at qualifying airport during July 1, 2007, through June 30, 2009. (O.C.G.A. 48-8-3[33.1]). For period July 1, 2007 through June 30, 2009, the sale or use of engines, parts, equipment, and other tangible personal property used in the maintenance or repair of aircraft when such property is installed on aircraft repaired or maintained in this state so long as such aircraft is not registered in this state. (O.C.G.A. 48-8-3[86]). Effective Jan. 1, 2009, sales and use tax exemptions for sale of certain types of manufacturing machinery necessary for the manufacture of personal property (O.C.G.A. 48-8-3[34]); sale of primary material handling equipment used in warehouse or distribution facility in this state when part of $5 million or more expansion or new construction (O.C.G.A. 48-8-3[34.1]); sale or use of repair or replacement parts, machinery clothing or replacement machinery clothing, molds or replacement molds, dies or replacement dies, waxes, and tooling or replacement tooling for machinery necessary and integral to manufacture of tangible personal property in a manufacturing plant presently existing in this state (O.C.G.A. 48-8-3[34.3]); sale of machinery and equipment and any repair, or parts for machinery used for the primary purpose of reducing or eliminating air or water pollution (O.C.G.A. 48-8-3[36]). For period July 1, 2008, through December 31, 2010, the sale of natural or artificial gas, No. 2 fuel oil, No. 6 fuel oil, propane, petroleum coke, and coal used directly or indirectly in manufacture or processing, in manufacturing plant located in this state, of tangible personal property primarily for resale, and the fuel cost recovery component of retail electric rates used directly or indirectly in the manufacture or processing, in a manufacturing plant located in this state, of tangible personal property primarily for resale. (O.C.G.A. 48-8-3[70.1]). Sales occurring during July 1, 2007, through June 30, 2012 of tangible personal property to, or used in or for the construction of, alternative fuel facility. (O.C.G.A. 48-8-3[34.4].

22.18 STAMP AND SEAL TAXES:

Stamp Tax.

Tobacco tax payable through use of stamps. (O.C.G.A. 48-11-3).

23 TRANSPORTATION

23.01 MOTOR VEHICLES:

Powers and duties with respect to enforcement of motor vehicle law are vested in State Revenue Commissioner (website: http://dor.georgia.gov/01/home/0,2197,858509,00.html; address: 1800 Century Blvd. N.E., Atlanta, GA. 30345-3205; telephone: (404) 417-4477 or 1-877-602-8477; fax: (404) 417-4327) and Department of Driver Services (website: http://www.dds.ga.gov/index.aspx; address: Post Office Box 80447, Conyers, Georgia 30013; telephone: 1-877-835-5337). (O.C.G.A. 40-2-1, 40-16-2). Uniform Rules of Road Act adopted. (O.C.G.A. 40-6-1 et seq.). Motor Vehicle Safety Responsibility Act enacted, prescribing financial and civil responsibilities of drivers. (O.C.G.A. 40-9-1 et seq.).

Vehicle Registration.

Required annually. (O.C.G.A. 40-2-20). Issued by county tax collector, county tax commissioner or other agent of State Revenue Commissioner. (O.C.G.A. 40-2-22, -23). Purchasers or transferee owners of vehicles must register vehicles within initial registration period. Violators subject to fine of not more than $100. (O.C.G.A. 40-2-20). Numbered license plate must be displayed in rear. (O.C.G.A. 40-2-41). Current revalidation sticker must be affixed to license plate. (O.C.G.A. 40-2-8). New plates issued every fifth year; revalidation stickers issued in all other years. (O.C.G.A. 40-2-31). Special license plates available for certain political figures, sheriffs, diplomats, emergency medical technicians, amateur radio operators, members of National Guard, members of active reserve components of Armed Forces, commanders of certain veterans' organizations, disabled and retired veterans, Medal of Honor winners, former P.O.W.s, spouses of deceased former P.O.W.s, firefighters, owners of historic vehicles, dealers and owners of alternative fuel vehicles. (O.C.G.A. 40-2-60 et seq.). Special tags for disabled individuals. (O.C.G.A. 40-2-74). Personalized license tags available upon payment of additional fee. (O.C.G.A. 40-2-60). License tags commemorating certain colleges and universities available if certain conditions are met and additional fee paid. (O.C.G.A. 40-2-32). License tags available for veterans awarded Purple Heart (O.C.G.A. 40-2-84), veterans of Pearl Harbor (O.C.G.A. 40-2-85), and veterans of WWI and WWII, Korea, Vietnam and Operation Desert Storm (O.C.G.A. 40-2-85.1). No special provisions for other members of Armed Forces. Other commemorative tags available (O.C.G.A. 40-2-86 et seq.), including police officers wounded in line of duty (O.C.G.A. 40-2-86.10), licensed physicians (O.C.G.A. 40-2-86.14) and family with member serving in military (O.C.G.A. 40-2-86.16).

No vehicle shall be licensed unless proof of minimum insurance or approved self-insurance plan is provided. Misdemeanor to misrepresent insurance. (O.C.G.A. 33-34-10).

Operator's License.

Required and issued by Department of Driver Services. Licenses must be renewed every five years. (O.C.G.A. 40-5-1[7], -32). Special tests are required for operating motorcycles, buses and other carriers, trucks over 26,000 lbs. and tractor-trailers. (O.C.G.A. 40-5-23, -147). No person under 16 years of age may be licensed, except instruction permits are issued to those 15 years of age. Effective Jan. 1, 2002, specified driver's education or supervision required before 16-year-old may be issued license. (O.C.G.A. 40-5-22). Effective Jan. 1, 2002, 16-year-olds eligible only for Class D license, which prohibits driving between midnight and 6 A.M. and limits passengers of such drivers to three persons, if such passengers are less than 21 years of age and not members of 16-year-old driver's immediate family. No passenger other than member of 16-year-old driver's immediate family permitted during first six months after license issued. Person holding Class D license may apply for non-restrictive Class C license 12 months after issuance of Class D license, provided such Class D licensee has not been convicted of offense involving DUI (O.C.G.A. 40-6-391), hit and run or leaving scene of accident (O.C.G.A. 40-6-270), racing on highways or streets, attempting to flee from or elude police officer, reckless driving or any offense for which four or more points may be assessed pursuant to O.C.G.A. 40-5-57(c) during the 12 consecutive months immediately preceding application. (O.C.G.A. 40-5-24). Those 14 years of age with parent or guardian medically incapable of being licensed due to visual impairment may be issued instruction permit. (O.C.G.A. 40-5-22). License to be suspended for any driver not in compliance with order for child support. (O.C.G.A. 40-5-54.1). Drivers under 18 years of age must, as prerequisite to obtaining license, present certificate or other evidence satisfactory to highway department evidencing applicant's successful completion of alcohol and drug course. (O.C.G.A. 40-5-22). This requirement shall not be applicable to driver who becomes resident and has valid license obtained while he/she was resident in another state or county. (O.C.G.A. 40-5-22). Persons under age 18 cannot obtain instruction permit without proof of enrollment in postsecondary school, high school diploma, GED, certificate of high school completion, special diploma, permission of parent or legal guardian to withdraw from school or record of enrollment, not under suspension, from public or private school. (O.C.G.A. 40-5-22). Licenses issued to applicants under 21 years of age shall be so designed as to be readily distinguishable from all other licenses. After having obtained 21 years of age, holder of distinctive license may obtain new license which is not distinctive. (O.C.G.A. 40-5-26). Visual acuity of at least 20/60 in one eye (corrected) required. (O.C.G.A. 40-5-27).

Various exemptions from requirement of driver's license, including certain nonresident members of armed forces, federal government employees operating government vehicles, nonresidents with out of state licenses, certain agricultural workers and others. (O.C.G.A. 40-5-21).

Veterans, spouses of permanently disabled veterans who are unable to drive, surviving unmarried spouses of veterans and 20 year members of National Guard and reserve forces entitled to veteran's, honorary or distinctive licenses. (O.C.G.A. 40-5-36, O.C.G.A. 40-5-148.1).

Titles.

Uniform Motor-Vehicle Certificate of Title and Anti-Theft Act with legislative modifications became effective Mar. 1, 1962. (O.C.G.A. 40-3-1 et seq.). Certificate of title required for all 1963 and subsequent model vehicles. Direct inquiries to: Georgia Dept. of Revenue, Motor Vehicle Division, http://motor.etax.dor.ga.gov/motor/titles/index.aspx; address: 1800 Century Center Blvd., N.E. Atlanta 30345-3205. No certificate of title issued to motor vehicle not manufactured to comply with federal safety standards. (O.C.G.A. 40-3-30).

Sales.

Sale and financing of motor vehicles extensively regulated. (O.C.G.A. 10-1-30, -37). Used car dealerships also regulated. (O.C.G.A. 43-47-1 et seq.).

Security Interests.

In motor vehicles perfected by delivery to commissioner or county tag agent of county in which seller is located, in which sale took place, in which vehicle is delivered, or in which vehicle owner resides of existing certificate of title, if any, and application containing name and address of holder of security interest and fee. Security interest perfected at time of creation if delivery completed within 20 days thereafter; otherwise as of date of delivery to commissioner or tag agent. (O.C.G.A. 40-3-50, -52, -53).

Liens.

Lienholder, to perfect lien against vehicle, on form prescribed by Revenue Commissioner, executes title application and notice of lien stating type of lien and specific vehicle against which lien is claimed and forwards notice and title application, with applicable fee, either personally or by certified mail or statutory overnight delivery (O.C.G.A. 9-10-12[b]), return receipt requested, to person with current certificate of title at address shown on certificate of title. If that person not owner, copy of notice should also be sent to owner. Lien claimant should keep mail receipt to prove compliance. (O.C.G.A. 40-3-53).

After receipt of notice, ten days are given for lien satisfaction. If claimed lien contested, such to be noted on lien form and other interested parties notified. If lien not satisfied or if contested, certificate of title to be sent to commissioner so new certificate of title can be issued, reflecting lien on vehicle. Lien is perfected at time lien notice, application for title, fee, and current certificate of title received by commissioner.

If person who has current certificate of title fails to forward same to commissioner, new certificate of title can be issued and old one canceled. (O.C.G.A. 40-3-53).

Mechanic's Liens.

Mechanics have special lien for work performed on motor vehicles which is superior to all liens except for taxes and other liens and security interests of which mechanic had actual or constructive knowledge before work was done or material furnished. Lien may be asserted by retention of vehicle or by surrendering vehicle and foreclosing lien claim. Mechanic who surrenders vehicle must record his or her claim of lien. Lien may be foreclosed by filing affidavit with court of competent jurisdiction, after which clerk gives owner notice of right to hearing. Owner must seek hearing within five days of receipt of notice. If no hearing is sought, lien may be foreclosed. Proceeding to foreclose a mechanic's lien must be instituted within one year from time lien is recorded or asserted by retention. (O.C.G.A. 40-3-54).

Identification Numbers.

Required on new vehicles and components. (O.C.G.A. 40-4-3, -4). Sale or offer of sale, or shipment or manufacture for sale in Georgia of car, engine or transmission without required identification number is misdemeanor. (O.C.G.A. 40-4-7). If identification number removed or altered, such action is misdemeanor. If done with intent to convert or defraud, is felony. (O.C.G.A. 40-4-21).

Odometer.

Unlawful to alter in any fashion true and correct reading of odometer to reflect lower than actual mileage or sell or install any device which causes odometer to register less than actual mileage driven. Violation is misdemeanor. (O.C.G.A. 40-8-5).

Off-road vehicles defined and regulated. (O.C.G.A. 40-7-1 to -6).

Operation Prohibited.

No person (except certain persons having valid licenses issued by other governments) may drive any motor vehicle upon highway in state unless he or she has valid drivers license issued by state for type or class of vehicle being driven. (O.C.G.A. 40-5-20). Neither driver nor any passenger may possess open container of alcoholic beverage while motor vehicle is in roadway or on shoulder of any public highway. (O.C.G.A. 40-6-253). Operation prohibited by anyone under influence of alcohol, or of any drug, or of any combination of the two, to extent that it is less safe for person to drive, whether or not he or she is legally entitled to use such drug. (O.C.G.A. 40-6-391). Operation prohibited if alcohol concentration is .08 grams (or .02 grams if under 21) or more within three hours after driving from alcohol consumed before or while driving. (O.C.G.A. 40-6-391). Operation prohibited if there is any amount of marijuana or controlled substance in blood or urine, unless legally entitled to use such substance and capable of driving safely. Any person charged with violation of O.C.G.A. 40-6-391 shall surrender driver's license. (O.C.G.A. 40-5-67). Persons who are under influence of alcohol or drugs while operating motor vehicle or who have blood alcohol concentration of .08 grams or more within three hours after operating or who have any controlled substance, without prescription, in their blood or urine shall be deemed to have given consent to chemical test or test of blood, breath, urine or other bodily substances. (O.C.G.A. 40-5-55). Before administering chemical test, arresting officer must read person specified implied consent notice. (O.C.G.A. 40-5-67.1). If chemical test is refused, person's driver's license or right to drive is suspended for at least one year. (O.C.G.A. 40-5-67.1). If implied consent notice is read to person, results of any chemical test, or refusal to submit to test, shall be admitted into evidence at trial. (O.C.G.A. 40-5-67.1). If breath test is administered, two sequential breath tests must be performed. (O.C.G.A. 40-6-392). No person shall operate motor vehicle while wearing headset or headphones, unless for communication purposes while operating motorcycle. (O.C.G.A. 40-6-250).

Accidents.

Driver must stop, and if other vehicle driven or attended, must give name, address, automobile registration, operator's license and liability insurance information; and if any person injured must give reasonable assistance; if vehicle unattended must locate owner and give such information or leave in a conspicuous place a notice of name and address of the driver and owner of vehicle. (O.C.G.A. 40-6-270 to -272, 40-6-273.1). If accident results in injury, death, or property damage of more than $500, driver must immediately report it to local police, sheriff, or state patrol. (O.C.G.A. 40-6-273).

Size and Weight Limits.

Regulated by O.C.G.A. 40-8-3 and O.C.G.A. 32-6-20 to -31.

Equipment.

Regulated by O.C.G.A. 40-8-1 et seq. Each truck operated in Georgia of at least 43,000 lbs. must have name and principal domicile of registered owner or lessor clearly displayed on each side of truck or trailer. (O.C.G.A. 40-8-9). New passenger automobiles sold to general public must be equipped with two sets of safety belts for front seat. (O.C.G.A. 40-8-76). Front seat passengers must be restrained by approved safety belt, with exceptions. (O.C.G.A. 40-8-76.1). New private passenger automobiles to be warranted to meet Federal impact absorption guidelines. (O.C.G.A. 40-8-77). Parking brake requirements limited to 1966 and subsequent models. (O.C.G.A. 40-8-52 to -54). Every driver transporting children six years of age or younger must provide child-passenger restraining system approved by U.S. Department of Transportation. (O.C.G.A. 40-8-76). Violators punished by fine of not more than $50 for first conviction. Each subsequent violation punished by fine of not more than $100. (O.C.G.A. 40-8-76). Minors over six years of age must wear seat safety belt. It is unlawful for any person under 18 to ride in uncovered bed of pickup truck on interstate highway. (O.C.G.A. 40-8-79).

Lighted lamps required ½ hour after sunset and ½ hour before sunrise, when it is raining in driving zone, and when visibility is not clear for 500 feet ahead. (O.C.G.A. 40-8-20).

Lights.

Regulated by O.C.G.A. 40-8-20 to -34. Flashing blue lights restricted to law enforcement vehicles. (O.C.G.A. 40-8-90).

Traffic Regulations.

Uniform Rules of Road Act. (O.C.G.A. 40-6-1 et seq.). Provisions refer to operation of vehicles on highways, as well as private property and under certain circumstances to privately-owned residential and parking areas. (O.C.G.A. 40-6-3).

Liability of Owner.

Owner of car is liable for negligent operation of vehicle being used in prosecution of his business or for his or her benefit. (O.C.G.A. 51-2-2). Family car doctrine followed. (144 Ga. 275, 87 S.E. 10).

Guests.

Driver of car owes duty of ordinary care to passengers. (O.C.G.A. 51-1-36; 46 Ga. App. 248, 167 S.E. 533). Persons providing volunteer transportation for senior citizens, under certain circumstances, not liable for damages for injuries to such guests as result of transporting them, unless conduct amounts to willful and wanton misconduct. (O.C.G.A. 51-1-42).

Proof of Financial Responsibility.

No motor vehicle to be licensed by state until proof furnished showing minimum liability coverage as required in O.C.G.A. 33-34-1 et seq. or approved self-insurance plan in effect and coverage initially issued for minimum of six months (time period required of private passenger vehicles only). (O.C.G.A. 33-34-10). 30 days after accident report filed, Department of Driver Services must determine amount of security sufficient to satisfy any judgments which may be awarded against owner or operator. Unless security deposited within 30 days and owner or operator gives proof of financial responsibility for future, owner's and operator's licenses and vehicle registration will be suspended. (O.C.G.A. 40-9-32). No security required if, at time of accident, owner of vehicle had in effect automobile liability policy covering that vehicle, except operator will not be exempted if at time of accident owner had not given permission, express or implied, for vehicle to be driven. (O.C.G.A. 40-9-34). Public policy concerned with providing adequate resources to compensate accident victims. Liability policy other than owner's may cover accident. Public policy and "rule of election" do not conflict if vehicle operator covered under liability policy even if he expressly elects not to be covered by owner's policy. If operator has access to only one source of coverage, he or she cannot refuse coverage so as to defeat public policy. (260 Ga. 235, 392 S.E.2d 3). Policy must provide minimum liability coverage of $25,000 per person, $50,000 per accident for personal injury or death of two or more persons and $25,000 per accident for property damage. (O.C.G.A. 33-7-11, 40-9-2). If person is applying for, or operating motor vehicle with, probationary driver's license under O.C.G.A. 40-5-58 (habitual violators), proof of liability coverage must be provided in amounts of $25,000 per person, $50,000 per accident for personal injury or death of two or more persons and $25,000 per accident for property damage. (O.C.G.A. 40-9-2). Security may be furnished by surety bonds and real property bonds. (O.C.G.A. 40-9-38). One year suspension of license may occur upon failure to deposit security when required. (O.C.G.A. 40-9-33).

Insurance.

No owner of motor vehicle required to be registered in state or other person, other than persons having approved self-insurance plans, shall operate or authorize another to operate such vehicle unless owner has insurance on such vehicle providing minimum liability coverage of $25,000 per person, $50,000 per accident for personal injury or death of two or more persons and $25,000 per accident for property damage. (O.C.G.A. 33-34-4, 40-9-2). For newly acquired motor vehicles purchased within last 20 days, proof of insurance for previous vehicle which effectively covers newly acquired motor vehicle suffices if owner has proof that new vehicle was acquired within past 20 days. (O.C.G.A. 40-6-10). Owner or operator of motor vehicle will keep evidence of required minimum insurance coverage in vehicle at all times during operation of vehicle. Rental agreements are satisfactory proof. (O.C.G.A. 40-6-10). Same requirement applies to motorcycles. (O.C.G.A. 40-6-11). Requirements for approval as self-insurer set forth at O.C.G.A. 33-34-5.1.

Cancellation or nonrenewal of insurance policies extensively regulated at O.C.G.A. 33-24-45. If insured feels cancellation or nonrenewal violates Code, hearing may be requested before Commissioner, with penalties available if cancellation or nonrenewal deemed abusive. (O.C.G.A. 33-24-45). If insured does not give insurer required notice within 30 days of accident, injured third party with claim against insured as a result of accident can give notice via mail to insurer. (O.C.G.A. 33-34-3). Insurance Commissioner may approve assigned risk plan that all insurance companies subscribe to. (O.C.G.A. 40-9-100). Reduced premiums to be offered to drivers meeting certain requirements and completing certain courses. (O.C.G.A. 33-9-42). Reduced premiums offered to good students. (O.C.G.A. 33-9-43).

No-fault Insurance.

No longer in effect in Georgia, as of Oct. 1, 1991. Repeal of provision precluding tort damages for amount of basic no-fault benefits received is not retroactive in effect. (210 Ga. App. 139, 435 S.E.2d 621).

Vehicle owned by nonresident registered in home state or territory and displaying license plates required by laws of home state may be operated without license or registration for 30 days or such lesser period as home state extends to Georgia vehicles, unless hauling passengers. (O.C.G.A. 40-2-90 to -95). Vehicles owned by visitors may be operated for pleasure purposes only for period of 90 days without registration. (O.C.G.A. 40-2-90). Reciprocal agreements with other states are authorized. (O.C.G.A. 40-2-91).

Nonresident Operators.

Nonresidents, at least 16 years of age, or on active duty in Armed Forces or whose spouse or parent is on active duty in Armed Forces, and who has in his immediate possession valid license from home state or country, may operate vehicle on highways of this state. (O.C.G.A. 40-5-21).

Actions Against Nonresidents.

In action growing out of accident in which nonresident (at time of accident—199 Ga. App. 602, 405 S.E.2d 579) user of motor vehicle or his or her personal representative is involved by reason of operation of vehicle by or for him or her, or under his or her control or direction, within territorial limits of state, summons or other process may be served on Secretary of State with same effect as though personally served on defendant. Plaintiff or Secretary of State must, if defendant's address be known, send him or her, by registered mail, notice of such service and copy of process, and defendant's return receipt and plaintiff's affidavit of compliance must be appended to summons and filed in court. (O.C.G.A. 40-12-1, -2, -8). Court must continue action for sufficient time to afford defendant reasonable opportunity to defend. (O.C.G.A. 40-12-6).

Nonresident includes nonresident aliens as well as citizens of U.S.(131 Ga. App. 41, 205 S.E.2d 83).

Action against nonresident (at time of accident) must be brought in county in which accident occurred or cause of action originated, or in county of residence of plaintiff. (O.C.G.A. 40-12-3).

Direct Actions.

No provision for direct actions against insurer, except that surety or insurer of certain motor carriers may be joined in action against motor carrier. (O.C.G.A. 46-7-12[e]).

Separability of Actions.

Physical injury and property damage resulting from same motor vehicle collision give rise to separate and distinct causes of action. (O.C.G.A. 51-1-32).

Motor Vehicle Carriers.

Public Service Commission has power to regulate business of motor common carriers and motor contract carriers and must prescribe rates and time schedules and make other regulations in regard to service. (O.C.G.A. 46-7-2). Certificate of convenience and necessity not issued unless applicant shows financial ability to respond for damages resulting from operation, by maintaining bond with adequate security or policy of insurance with company authorized to do business in state or acting as self-insurer where financial ability warrants. (O.C.G.A. 46-7-12). Fee for up to five carriers $75; six to 15 carriers $150; and 16 or more $200; for transfer, $75. (O.C.G.A. 46-7-9). Commissioner vested with police power and authority to designate, deputize and delegate to employees of Commission powers to stop, inspect and arrest. (O.C.G.A. 46-7-28) Commissioner authorized to promulgate rules and regulations for safe operation of vehicle (O.C.G.A 46–7–26..

Nonresident carrier must file in office of State Revenue Commissioner designation of an agent to receive service of process in state before a certificate of authority is issued, failing in which Secretary of State is agent for this purpose and process fee is $10. (O.C.G.A. 46-7-17). Commission is authorized to enforce this provision through institution of mandamus action or proceeding for injunctive relief. (O.C.G.A. 46-7-30).

Secretary of State is process agent for nonresident for all actions and proceedings arising under Road Tax Act. (O.C.G.A. 48-9-42).

Registration card and identification marker must be obtained from State Revenue Commission for each vehicle to be operated in this state. Fee is $3 for each card. Temporary ten day permits may be obtained. (O.C.G.A. 48-9-38).

Load and Size Limitations.

Vehicles may not exceed following limits: Maximum width, 102 inches; maximum height, 13½ feet (automobile carrier, 14 feet); maximum length, 100 feet (maximum length dependent on type of tractor-trailer configuration); maximum total gross weight, 80,000 lbs. or 56,000 lbs. (23,000 lbs. per axle) on rural roads unless making pickup or delivery on such roads. (O.C.G.A. 32-6-22, -26). Annual permits to exceed weight, length, width, or height limits obtainable for fee. Vehicles may not exceed by more than 13% following limits: Maximum load, 16,000 lbs. axle load if high pressure tires or 18,000 lbs. if low pressure. Maximum load 34,000 lbs. per set of tandem axles for vehicles exceeding 55 ft. Driver not in violation if weight can be shifted to conform. Special single trip permit available for emergencies and loads in excess of 16 feet wide. (O.C.G.A. 32-6-28). Special single trip permit as well as annual permit for transport of poles and pilings may be obtained for movements where dimensional limits exceeded and load cannot be readily separated. Exemption from weight limitations for hauling forest products, live poultry, feed or granite from point of origin to processing plant in same or adjacent county, and for transporting cargo or containers within ten mile radius of port under jurisdiction of Georgia Ports Authority. Farming and forest management vehicles may exceed limits in local, daytime travel. (O.C.G.A. 32-6-20 to -29). Vehicles transporting such loads at night must be equipped with lights visible from not less than 300 feet from front and rear of vehicle. (O.C.G.A. 32-6-26). Commissioner of Transportation or official of Department of Transportation designated by him or her may issue, upon written request, permit to certain vehicles allowing deviation from load and size limitations. (O.C.G.A. 32-6-28).

Reciprocal Agreements.

Governor and, to limited extent, Public Service Commission, are authorized to negotiate reciprocal agreements with other states concerning operation and licensing of motor vehicles whereby residents of each state enjoy same privileges or exemptions. (O.C.G.A. 40-5-5, 46-7-90, 46-7-91).

Gasoline Tax.

See category 22 Taxation, topic Gasoline and Motor Fuels Taxes.

Motor Fuel Tax.

See category 22 Taxation, topic Gasoline and Motor Fuels Taxes.

23.02 RAILROADS:

See category 3 Business Regulation and Commerce, topic 3.08 Carriers.

23.02A COMMERCIAL CODE FORMS:

National forms used. See also Uniform and Model Acts of the Law Digest, Commercial Code Amendments, for National Forms in print.

1
HAWAII LAW DIGEST

—Scope —

Revised for 2010 edition by

CARLSMITH BALL LLP, of Honolulu.

(Citations, unless otherwise indicated, refer to chapters and sections of Hawaii Revised Statutes. Recent legislation is referred to by the year of the legislation and the act number (e.g., 1999, Act …). SS indicates Special Session. For abbreviations of various court rules, see category 5 Civil Actions and Procedure, topic 5.19 Practice, subhead Rules. Parallel citations to the Pacific Reporter begin with 44 Haw. Act 111 enacted in 1979 established Intermediate Appellate Court. See category 6 Courts and Legislature, topic 6.01 Courts.)

Note: 2009 legislation includes session laws through Act 198 passed by legislature and signed by Governor through July 14, 2009. Legislature meets annually.

1 INTRODUCTION

1.01 GOVERNMENT AND LEGAL SYSTEM:

The State of Hawaii is a constituent state of the United States of America. For further discussion of the U.S. federal system, see Introduction to the Federal Government of the United States at the beginning of this volume. A great many laws are promulgated by the federal government of the United States and are not reflected in the topics below. See the Introduction to this volume for references to the federal law topics covered.

Like all but one of the United States, Hawaii has a common law legal system, with roots in English common law. For information on the courts and legislature of Hawaii, see category 6 Courts and Legislature.

Common Law.

The Common Law of England, as ascertained by English and American decisions, is the common law of Hawaii, except as modified by U.S. Constitution or laws, the Hawaii Constitution, Hawaii laws, judicial precedent and usage. (HRS 1-1).

1.02 [RESERVED]

1.03 HOLIDAYS:

Jan. 1, 3d Mon. in Jan., 3d Mon. in Feb., Mar. 26, Good Friday, last Mon. in May, June 11, July 4, 3d Fri. in Aug., 1st Mon. in Sept., all election days except primary and special election days, Nov. 11, 4th Thurs. in Nov., Dec. 25, any day so proclaimed by Governor or President. (HRS 8-1). If holiday falls on Sun., it should be observed on following Mon.; if holiday falls on Sat., it is observed on preceding Fri. (HRS 8-2).

Banking holidays may be proclaimed by Governor when public emergency exists. (HRS 8-3) and it seems to Governor to be in public interest.

1.04 OFFICE HOURS AND TIME ZONE:

Hawaii is in the Hawaii (GMT -10:00) Time Zone. Hawaii does not switch to “daylight savings time” in the summer. Rather, Hawaii maintains “standard time” all year round. Office hours are generally from 8 a.m. to 4:30 p.m.

2 BUSINESS ORGANIZATIONS

2.01 AGENCY:

Common law rules apply generally. See also Uniform Probate Code. (HRS c. 560).

2.02 ASSOCIATIONS:

No general statute relating to duties and liabilities of unincorporated associations. Service of process on associations, as well as effect of judgments involving associations, discussed in HRS 634-30.

Agricultural Associations.

Authorized under HRS c. 421. Agricultural association has authority to perform only such acts necessary or proper to accomplish purposes set forth in its activity and which are not repugnant to law. (HRS 421-9[a]). Voluntary dissolution must be approved by at least two-thirds of voting power at duly called meeting held for purpose of dissolution. (HRS 421-21). General corporation law no longer applicable to merger and consolidation of agricultural associations. Replaced by procedures for adopting plan of merger and consolidation of agricultural associations in 1993. (HRS 421-21.6).

Condominium Associations.

See category 21 Property, topic 21.16 Real Property, subhead Condominium.

Consumer Cooperative Associations.

Authorized under HRS c. 421C. Voluntary dissolution under HRS 421-21 applies to consumer cooperative associations. (HRS 421C-30).

Cooperative Housing Corporations.

Authorized under HRS c. 421I. Hawaii Business Corporation Act applies. (HRS c. 414).

Building and Loan Associations and Savings and Loan Associations.

Savings and loan associations are regulated under Art. 7 of Code of Financial Institutions. (HRS 412:7-100 to HRS 7-408).

Insurance Guaranty Association.

See category 16 Insurance, topic 16.01 Insurance Companies.

Planned Community Associations.

Authorized under HRS c. 421. See HRS c. 421J.

Professional Corporations.

See HRS c. 415A. See topic 2.03 Corporations.

2.03 CORPORATIONS:

Note.

Hawaii Business Corporation Act incorporates Revised Model Business Corporations Act of 1984. (See Uniform and Model Acts section.) Provisions apply to all domestic corporations in existence on July 1, 2001 incorporated under any general statute of Hawaii providing for incorporation of corporations for profit if power to amend or repeal statute under which corporation was incorporated was reserved. (HRS 414-481). Foreign corporations authorized to transact business in Hawaii on July 1, 2001 are subject to Hawaii Business Corporation Act, but are not required to obtain new certificate of authority to transact business under Hawaii Business

Corporation Act. (HRS 414-482).

Applicability of certain provisions depends upon incorporation status before July 1, 1987.

Financial institutions are regulated by Code of Financial Institutions (HRS c. 412) and are subject to separate standards. See category 3 Business Regulation and Commerce, topic 3.01 Banks and Banking.

Hawaii Business Corporation Act.

See HRS c. 414.

General Supervision.

Director of Department of Commerce and Consumer Affairs of Hawaii, hereafter called "Director", 1010 Richards St., Honolulu, HI 96813. (HRS 414-6).

Purposes.

Any corporation incorporated under this chapter has purpose of engaging in any lawful business unless more limited purpose is set forth in articles of incorporation. Corporation engaging in business that is subject to regulation under another Hawaii statute may incorporate under this chapter only if permitted by, and subject to all limitations of, other statute. (HRS 414-41). Purposes of nonprofit corporation discussed in HRS 414D-51.

Registered Office and Agent.

Each corporation shall continuously maintain in Hawaii registered office that may be same as any of its places of business and registered agent. (HRS 414-61).

Name.

Substantially similar to § 4.01 of Revised Model Business Corporation Act (1984), hereafter called "RMBCA". Name must contain word "corporation", "incorporated", "limited", abbreviation "corp.", "inc.", or "ltd." Name must not contain language stating or implying that corporation is organized for purpose other than that permitted by § 414-41 and its articles of incorporation. Name must not be same as or substantially identical to: (1) Name of any entity registered or authorized to transact business or conduct affairs under laws of Hawaii; (2) name exclusive right to which is, at time, reserved in Hawaii; (3) fictitious name adopted by foreign corporation authorized to transact business in Hawaii because its real name is unavailable; and (4) any trade name, trademark, or service mark registered in Hawaii. (HRS 414-51). Administrative relief is available against entities who have registered or who are using name that is substantially identical to, or confusingly similar to, any domestic corporation in good standing or foreign corporation authorized to do business in Hawaii. (HRS 414-53).

Reserved Name.

Person may reserve exclusive use of corporate name by delivering application to Director for filing. (HRS 414-53).

Term of corporate existence may be perpetual unless limited period of duration stated in its articles of incorporation. (HRS 414-42).

Incorporators.

One or more individual(s) may act as incorporator(s) by signing and filing, with Director, articles of incorporation. (HRS 414-31).

Articles of Incorporation, hereafter "articles", shall set forth: (1) Corporation's name; (2) number of shares corporation is authorized to issue; (3) mailing address of corporation's initial principal office, street address of corporation's initial registered office and name of its initial registered agent at its initial registered office; and (4) name and address of each incorporator. (HRS 414-32[a]). See HRS 414-32(b) for additional, optional provisions.

Filing of Articles.

All articles must be typewritten or printed in English language. Corporate name need not be in English if written in English letters of Arabic or Roman numerals. Articles must be certified and executed: (1) By chairperson of board of directors of domestic or foreign corporation, its president, or another of its officer; (2) if directors have not been selected or corporation has not been formed, by incorporator; or (3) if corporation is in hands of receiver, trustee, or other court-appointed fiduciary, by that fiduciary. Person executing articles shall sign it and state beneath or opposite that person's signature person's name and capacity in which person signs. Articles must be delivered to Director for filing and must be accompanied by correct filing fee, and any penalty required. (HRS 414-11). Director shall file delivered articles if they satisfy requirements of § 414-11. Director files articles by stamping or otherwise endorsing document including date and time of receipt. After filing articles, Director shall deliver document copy to domestic or foreign corporation or its representative. (HRS 414-16). Document accepted for filing is effective at time of filing on date it is filed, as evidenced by Director's date and time endorsement on original document. (HRS 414-14).

Incorporation Tax or Fee.

(HRS 414-13).

Filing Fees.

Following fees shall be paid to Director upon filing of corporate documents: (1) Articles of incorporation, $100; (2) articles of amendment, $25; (3) restated articles of incorporation, $25; (4) articles of conversion or merger, $100; (5) articles of merger (subsidiary corporation), $50; (6) articles of dissolution, $25; (7) annual report of domestic and foreign corporations organized for profit, $25; (8) agent's statement of change of registered office, $25 for each affected domestic corporation or foreign corporation in excess of 200; (9) any other statement, report, certificate, application, or other corporate document, except annual report of domestic or foreign corporation, $25; (10) application for certificate of authority, $100; (11) application for certificate for withdrawal, $25; (12) reservation of corporate name, $10; (13) transfer of reservation of corporate name, $10; (14) good standing certificate, $5; (15) special handling fee for review of corporation documents, excluding articles of conversion or merger, $25; (16) special handling fee for review of articles of conversion or merger, $75; (17) special handling fee for certificates issued by department, $10 per certificate; and (18) special handling fee for certification of documents, $10. (HRS 414-13). Director shall adjust fees assessed under this section, as necessary from time to time, through rules adopted under HRS c. 91. (HRS 414-13). Director shall charge and collect: (1) For furnishing certified copy of any document, instrument, or paper relating to corporation, $10 for certificate and affixing seal thereto; and (2) at time of any service of process on Director as agent for service of process of corporation, $10, which may be recovered as taxable costs by party to suit or action causing service to be made if party prevails in suit or action. (HRS 414-13).

Filing Requirements.

Director may prescribe, and furnish on request, forms for: (1) Application for certificate of good standing; (2) foreign corporation's application for certificate of authority to transact business in Hawaii; (3) foreign corporation's application for certificate of withdrawal; and (4) annual report. If Director so requires, use of these forms is mandatory. (HRS 414-12). Director's duty to file documents under HRS 414-16 is ministerial and does not affect validity or invalidity of document, relate to correctness or incorrectness of information contained in document, and create presumption that document is valid or invalid or that information contained in document is correct or incorrect. (HRS 414-16).

Correcting Filed Document.

Domestic or foreign corporation may correct document filed by Director if document contains incorrect statement or was defectively executed, attested, sealed, verified, or acknowledged. Document is corrected by preparing articles of correction and delivering articles of correction to Director for filing. Articles of correction are effective on effective date of document they correct except as to persons relying on uncorrected document and adversely affected by correction. As to those persons, articles of correction are effective when filed. (HRS 414-15).

License to do Business.

Corporate existence begins when articles of incorporation are filed. Director's filing of articles of incorporation is conclusive proof that incorporators satisfied all conditions precedent to incorporation except in proceeding by State of Hawaii to cancel or revoke incorporation or involuntarily dissolve corporation. (HRS 414-33).

No other document evidencing right to do business required for domestic corporations. Gross income tax license required as condition precedent to doing business if corporation has gross income on which tax imposed. (HRS 237-9). See category 22 Taxation, topic 22.17 Sales and Use Taxes, subhead General Excise Tax.

Foreign corporation may not do business in Hawaii until it obtains certificate of authority from Director. (HRS 414-431). Foreign corporation may apply for certificate of authority to transact business in Hawaii by delivering application to Director for filing. (HRS 414-433).

Organization.

If initial directors are named in articles of incorporation, initial directors shall hold organizational meeting at call of majority of directors to complete organization of corporation. If initial directors are not named in articles, incorporator or incorporators shall hold organizational meeting at call of majority of incorporators to elect: (1) Directors and complete organization of corporation; or (2) board of directors who shall complete organization of corporation. Actions required or permitted to be taken by incorporators at organizational meeting may be taken without meeting if action taken is evidenced by one or more written consents describing action taken and signed by each incorporator. (HRS 414-35).

Paid in Capital Requirements.

No provision as to minimum of capital which must be paid in on organization or before commencing business.

Amendment of Certificates or Articles.

Similar to RMBCA §§ 10.01-10.03. (HRS 414-281 to HRS 414-283). However, corporation's board of directors is not authorized, without shareholder action, to: (1) Extend duration of corporation if it was incorporated at time when limited duration was required by law; (2) change each issued and unissued authorized share of outstanding class into greater number of whole shares if corporation has only shares of that class outstanding; and (3) change corporate name by substituting word "corporation", "incorporated", "company", "limited", or their abbreviations for similar word or abbreviation in name, or by adding, deleting, or changing geographical attribution for name. (HRS 414-282).

With respect to corporations incorporated on or after July 1, 1987, any amendment to articles must be adopted at meeting where shareholders entitled to vote thereon shall vote on proposed amendment. Proposed amendment will be adopted upon receiving affirmative vote of holders of majority shares entitled to vote, unless any class of shares is entitled to vote as class, in which event proposed amendment will be adopted upon receiving affirmative vote of majority of shareholders of each class of shares entitled to vote as a class and of the total shares entitled to vote thereon. (HRS 414-283).

Further, for corporations incorporated before July 1, 1987, vote of shareholders entitled to vote on proposed amendment will be taken at meeting. Proposed amendment will be adopted upon receiving affirmative vote of 2/3 of shares entitled to vote thereon. Articles of incorporation may be amended by such vote to provide for lesser proportion of shares, or any class or series thereof, than provided in preceding sentence, in which case articles of incorporation shall control, provided that lesser proportion shall not be less than that required for corporations incorporated on or after July 1, 1987. (HRS 414-283).

Voting on amendments by voting groups same as RMBCA § 10.04. (HRS 414-284).

Articles of amendment to be delivered to and filed by department director. (HRS 414-11).

Effect of Amendment.

Same as RMBCA § 10.09.

Increase or Decrease of Authorized Capital Stock.

See supra, subhead Amendment of Certificates or Articles.

Bylaws.

§ 2.06 of RMBCA adopted. (HRS 414-36).

Stock.

§ 6.01 of RMBCA adopted. (HRS 414-71). § 6.02 of RMBCA adopted, except add “Upon filing of the articles of amendment or resolution by the department director, it shall constitute an amendment of the articles of incorporation.” to end of section. (HRS 414-72). §§ 6.03 and 6.04 of RMBCA adopted. (HRS 414-73, HRS 414-74).

Stock Certificates.

§§ 6.25 and 6.26 of RMBCA adopted. (HRS 414-86, HRS 414-87).

Issuance of Stock.

§ 6.21 of RMBCA adopted. (HRS 414-82).

Transfer of Stock.

§ 6.27 of RMBCA adopted. (HRS 414-88).

Uniform Fiduciaries Act adopted in 1945. (HRS c. 556). § 189-3, Revised Laws of Hawaii 1955, pertaining to Uniform Fiduciaries Act repealed by adoption of Uniform Commercial Code. (HRS 490:10-102[1]). See category 3 Business Regulation and Commerce, topic 3.09 Commercial Code.

Stock Transfer Tax.

None adopted.

Stockholders.

Shareholders' preemptive rights substantially same as § 6.30 ofRMBCA except does not affect validity of any action taken prior to Apr. 21, 1953 by any corporation. (HRS 414-101).

Shareholder's Right to Elect Directors.

§ 8.04 of RMBCA adopted. (HRS 414-194).

Voting.

§ 7.28(a) of RMBCA adopted. (HRS 414-149[a]). Subsections (b) through (d) of § 7.28 are replaced with following: "If, not less than forty-eight hours prior to the time fixed for any annual meeting, any shareholder or shareholders deliver to any officer of the corporation, a request that the election of directors to be elected at the meeting be by cumulative voting, then the directors to be elected at the meeting shall be chosen as follows: (1) Each shareholder present in person or represented by proxy at the meeting shall have a number of votes equal to the number of shares of capital stock owned by the shareholder multiplied by the number of directors to be elected at the meeting; (2) each shareholder shall be entitled to cumulate the votes of the shareholder and to give all of the votes among any or all of the nominees; and (3) the nominees receiving the highest number of votes on the foregoing basis, up to the total number of directors to be elected at the meeting, shall be successful nominees. The right to have directors elected by cumulative voting as provided in this subsection shall exist notwithstanding that provision therefor is not included in the articles of incorporation or bylaws; provided that this right may be restricted, qualified, or eliminated by a provision of the articles of incorporation or bylaws of any corporation having a class of equity securities registered pursuant to the Securities Exchange Act of 1934, as amended, which are neither listed on a national securities exchange or traded over-the-counter on the National Market of the National Association of Securities Dealers, Inc. Automated Quotation system. This section shall not prevent the filling of vacancies in the board of directors, which vacancies may be filled in a manner that may be provided in the articles of incorporation or bylaws." (HRS 414-149[b]).

Proxies.

§ 7.22 of RMBCA substantially adopted except for addition to subsection (b) which provides that shareholders may authorize another person to act as proxy for shareholder by executing written authorization, or by electronically transmitting authorization to proxy holder. (HRS 414-143).

Voting Agreements and Trusts.

§§ 7.30 to 7.31 of RMBCA adopted. (HRS 414-161, HRS 414-162).

Inspection of Books and Records.

Corporations required to keep accurate and complete books and records. Corporation also must keep and maintain at its principal offices, minutes of shareholders' and directors' meetings. Such books and records must include accounts of corporation's assets, liabilities, receipts, disbursements, gains, and losses. Minutes of aforementioned meetings must reflect time and place of each meeting if any, whether it is special or regular, whether notice was given, and if so, how, names of those present at directors' meetings, number of shares present at each shareholders' meeting, and proceedings at each meeting. Board of directors of each corporation required to keep book for registering names of persons who are or will become shareholders, showing number of shares held by them, and time they became shareholders. Such book must be open at all reasonable times for inspection by shareholders. Person having charge of such book must provide certified transcript of anything contained in that book to any shareholder, provided shareholder pays reasonable charge. (HRS 414-470).

Stockholders' Actions.

Shareholder may not commence or maintain derivative proceeding unless shareholder was shareholder of corporation at time of act complained of or became shareholder through transfer by operation of law from one who was shareholder at that time and fairly and adequately represents interests of corporation in enforcing right of corporation. (HRS 414-172). Before bringing derivative proceeding, shareholder must wait until 90 days have expired after making written demand upon corporation to take suitable action unless shareholder has earlier been notified that demand has been rejected by corporation or unless irreparable injury would result to corporation by waiting for expiration of the 90 day period. (HRS 414-173). On termination of derivative proceeding, court may: (1) Order corporation to pay plaintiff's reasonable fees and expenses (including counsel fees) incurred in proceeding if it finds that proceeding has resulted in substantial benefit to corporation; (2) order plaintiff to pay any defendant's reasonable expenses (including counsel fees) incurred in defending proceeding if it finds that proceeding was commenced or maintained without reasonable cause or for improper purpose; or (3) order party to pay opposing party's reasonable expenses (including counsel fees) incurred because of pleading, motion, or other paper, if it finds that pleading, motion, or other paper was not well grounded in fact, after reasonable inquiry, or warranted by existing law or good faith argument for extension, modification, or reversal of existing law and was interposed for improper purpose, such as to harass or cause unnecessary delay or needless increase in cost of litigation. (HRS 414-177).

Shareholders' Meetings.

§§ 7.01 and 7.02 of RMBCA adopted. (HRS 414-121, HRS 414-122). § 7.03 of RMBCA substantially adopted except "The circuit court" replaces phrase beginning with "The [name or describe]" and ending with "its registered office)". (HRS 414-123). §§ 7.04 through 7.06 of RMBCA substantially adopted except "chapter" replaces "Act" throughout. (HRS 414-124 through HRS 414-126).

Voting Trusts.

See subhead Stockholders, supra.

Directors.

§ 8.01 of RMBCA substantially adopted except "Section HRS 414-163" replaces "subsection (c)" in subsection (a), and subsection (c) has been deleted. (HRS 414-191). §§ 8.02 through 8.08 of RMBCA adopted. (HRS 414-192 through HRS 414-198). § 8.09 of RMBCA substantially adopted except "The circuit court" replaces phrase beginning with "The [name or describe]" and ending with "its registered office)". (HRS 414-199). §§ 8.10 and 8.11 of RMBCA adopted. (HRS 414-200, HRS 414-201).

Directors' Meetings.

Quorum.

§ 8.24 of RMBCA adopted. (HRS 414-215).

Committees.

§ 8.25 of RMBCA adopted. (HRS 414-216).

Meetings.

§ 8.20 of RMBCA adopted. (HRS 414-211).

Powers and Duties of Directors.

See subhead Directors, supra.

Liabilities of Directors.

Corporation may eliminate or limit personal liability of its directors in any action brought by shareholders or corporation for monetary damages against any director of corporation for any action taken or any failure to take action. (HRS 414-222[a]). Corporation may not eliminate or limit personal liability of director for: (1) Amount of financial benefit received by director to which director is not entitled; (2) intentional infliction of harm on corporation or shareholders; (3) violation of § 414-233; or (4) intentional violation of criminal law. (HRS 414-222[b]). Director who votes for or assents to distribution made in violation of § 414-111 or articles of incorporation is personally liable to corporation for amount of distribution that exceeds what would have been distributed without violation, provided that proceeding is commenced within two years after date on which effect of distribution was measured and director did not comply with § 414-221. (HRS 414-223).

Officers.

§§ 8.40 through 8.42 of RMBCA adopted. (HRS 414-231 through HRS 414-233). § 8.43 of RMBCA substantially adopted, except subsection (b) provides that removal of officer is without prejudice to contract rights. (HRS 414-234). § 8.44 of RMBCA adopted. (HRS 414-235).

Liabilities of Officers.

See subhead Indemnification of Directors and Officers, infra.

Indemnification of Directors and Officers.

§§ 8.50 thru 8.56 of RMBCA adopted with substantial changes. (HRS 414-241, HRS 414-427).

Principal Office.

No statutory provision except that it must be provided for in annual report to Director. (HRS 414-472).

Resident Agent.

Each corporation must maintain continuously in Hawaii registered agent who may be: (1) Individual who resides in Hawaii and whose business office is identical with registered office; (2) domestic entity authorized to transact business or conduct affairs in Hawaii whose business office is identical with registered office; or (3) foreign entity authorized to transact business or conduct affairs in Hawaii whose business office is identical with registered office. (HRS 414-61). Any designation or change of registered office or registered agent must be made pursuant to provisions in HRS 414-62.

General Powers of Corporation.

§ 3.02 of RMBCA adopted. (HRS 414-42).

Dividends.

§ 6.23 of RMBCA adopted. (HRS 414-84).

Unclaimed Dividends.

See category 21 Property, topic 21.01 Absentees, subhead Escheat.

Sale or Transfer of Corporate Assets.

§ 12.01 of RMBCA adopted. (HRS 414-331). § 12.02 of RMBCA adopted in part except subsection (e) replaced with subsections (e) and (f) as follows: “(e) With respect to the corporations incorporated on or after July 1, 1987, at the meeting the shareholders may authorize the sale, lease, exchange or other disposition and may fix, any or all of the terms and conditions thereof and the consideration to be received by the corporation therefor. The authorization shall require the affirmative vote of the holders of a majority of the shares of the corporation entitled to vote thereon, unless any class of shares is entitled to vote thereon as a class, in which event the authorization shall require the affirmative vote of the holders of a majority of the shares of each class of shares entitled to vote as a class thereon and of the total shares entitled to vote thereon. (f) With respect to corporations incorporated before July 1, 1987, at the meeting the shareholders may authorize the sale, lease, exchange, or other disposition and may fix, or may authorize the board of directors to fix, any or all of the terms and conditions therefor. The authorization shall require the affirmative vote of the holders of 3/4 of the shares of the corporation entitled to vote as a class thereon and of the total shares entitled to vote thereon. The articles of incorporation may be amended by the vote set forth in the preceding sentence to provide for a lesser proportion of shares, or of any class or series thereof, than is provided in the preceding sentence, in which case the articles of incorporation shall control; provided that the lesser proportion shall not be less than the proportion set forth in subsection (e).” (HRS 414-332).

Books and Records.

Corporation required to keep accurate and complete books and records of account. Minutes of shareholders’ and board of directors’ meetings are to be maintained at its principal offices. Books of account must include accounts of assets, liabilities, receipts, disbursements, gains and losses. Minutes of meetings must show time and place of each meeting, whether regular or special, if notice was given and how, names of directors and shareholders present, and proceedings. Board of directors must maintain register of all shareholders, showing number of shares owned and when they became owners of shares. Book must be available for inspection by shareholders. Certified transcript is to be provided to shareholder who pays for its preparation. (HRS 414-470).

Reports.

Corporation required to file annual report with Director that sets forth: (1) Name of corporation and state or country under whose law it is incorporated; (2) mailing address of principal office, address of its registered office in this state and name of its registered agent at its registered office in Hawaii; (3) names and business addresses of its directors and officers; and (4) brief description of nature of its business. Domestic corporations shall also provide total number of authorized shares and total number of issued and outstanding shares.

Between Jan. 1, 2002 and through Dec. 31, 2002, filing of annual reports voluntary. Effective Jan. 1, 2003, if date of incorporation or registration is between: (a) Jan. 1 and Mar. 31, report shall be filed on or before Mar. 31 of each year, reflecting state of affairs as of Jan. 1; (b) Apr. 1 and June 30, report shall be filed on or before June 30 of each year, reflecting state of affairs as of Apr. 1; (c) July 1 and Sept. 30, report shall be filed on or before Sept. 30 of each year, reflecting state of affairs as of July 1; (d) Oct. 1 and Dec. 31, report shall be filed on or before Dec. 31, reflecting state of affairs as of Oct. 1. If domestic or foreign corporation is incorporated or registered in same year annual report is due, such corporation will not be required to file report for that year. (HRS 414-472).

Merger and Consolidation.

§ 11.01 of RMBCA substantially adopted with revisions to account for mergers involving foreign corporations and contents of plan of mergers. (HRS 414-311). § 11.02 substantially adopted with revisions to account for mergers involving foreign corporations. (HRS 414-312). § 11.03 adopted in part with following changes. For corporations incorporated on or after July 1, 1987, vote of shareholders shall be taken on any plan of merger. Plan shall be approved upon receiving affirmative vote of holders of majority of each class of shares entitled to vote as class and of total shares entitled to vote. Any class of shares of any such corporation shall be entitled to vote as class if plan contains provision that, if contained in proposed amendment to articles of incorporation, would entitle that class of shares to vote as class and, in case of exchange, if class is included in exchange. With respect to corporations incorporated before July 1, 1987, at such meeting, vote of shareholders shall be taken on proposed plan. Plan shall be approved upon receiving affirmative vote of holders of 3/4 of all issued and outstanding shares of stock having voting power even though their right to vote is otherwise restricted or denied by articles, bylaws, or resolutions. (HRS 414-313). HRS 414-313 also includes provisions regarding termination and amendment of plan of merger and time of effectiveness of merger or share exchange. (HRS 414-313). § 11.04 of RMBCA adopted with additional provisions regarding contents of Articles of Merger. (HRS 414-314). § 11.05 of RMBCA adopted with substitution of “department director” for “secretary of state”, revisions regarding contents of articles of merger or share exchange, revisions regarding time of effectiveness of articles of merger, and new provisions regarding articles of merger acting as amendment of corporation’s articles of incorporation and articles of dissolution or application for certificate of withdrawal for non-surviving corporation in certain circumstances. (HRS 414-315). § 11.06 of RMBCA amended to provide for service of process on surviving entity if such entity fails to appoint or maintain agent. (HRS 414-316). § 11.07 of RMBCA not adopted. (2002, Act 41, § 26 repealed HRS 414-317).

Control Share Acquisitions.

Applies to Hawaii corporation with at least 100 shareholders. (HRS 414E-1). “Control share acquisition” means acquisition of shares resulting in beneficial ownership by acquiring person of new range of voting power of 10% or more. (HRS 414E-2[c][4]). Person proposing control share acquisition must provide information required in HRS 414E-2(c). Within five days of receiving statement, special meeting of shareholders must be called to vote on proposed acquisition. (HRS 414E-2[d]). Control share acquisition may be consummated only if (1) holders of majority of voting power of all shares not beneficially owned by acquiring party approve acquisition, and (2) acquisition is carried out within 180 days of shareholder approval. (§ 414E-2[e]). If control shares are acquired without shareholder approval, acquiring person is denied voting rights for one year after acquisition, and company has option to redeem stock. (HRS 414E-2[b]).

Tender Offers.

Governed by HRS c. 417E. Applies only to target companies organized under Hawaii law or with at least 20% of equity securities beneficially held by Hawaii residents. (HRS 417E-1). Tender (take-over) offer defined as offer to acquire equity security of target company where offeror would be beneficial owner of more than 10% of any class of outstanding equity securities of target company, or beneficial ownership of equity securities by offeror would increase by more than 5%. (HRS 417E-1). No person shall make tender offer or acquire equity securities unless registration statement is filed with securities commissioner. (HRS 417E-2). Filing fee: $250. (HRS 417E-7). Defines fraudulent and deceptive practices (HRS 417E-4), and imposes limitations on offerors (HRS 417E-5). Acquisitions made within two years of tender offer must be made on terms substantially equivalent to earlier offer. (HRS 417E-5[g]).

See category 12 Environment, topic 12.01 Environmental Regulation, subhead Environmental Disclosure.

Dissolution.

§§ 14.01 through 14.40 of RMBCA substantially adopted with following changes. (HRS 414-381 through HRS 414-421). Substitute “department director” for “secretary of state” throughout. § 14.02 of RMBCA amended to provide that with respect to corporations incorporated on or after July 1, 1987, vote of shareholders shall be taken on resolution to dissolve corporation at shareholders’ meeting. Resolution shall be adopted upon receiving affirmative vote of holders of majority of shares of corporation entitled to vote thereon as class, in which event resolution shall be adopted upon receiving affirmative vote of holders of majority of shares of each class of shares entitled to vote as class and of total shares entitled to vote. With respect to corporations incorporated before July 1, 1987, vote of shareholders shall be taken on resolution to dissolve corporation at shareholders' meeting. Resolution shall be adopted upon receiving affirmative vote of holders of 3/4 of shares of corporation entitled to vote, unless any class of shares is entitled to vote as class, in which event resolution shall be adopted upon receiving affirmative vote of holders of 3/4 of shares of each class of shares entitled to vote. (HRS 414-382). § 14.20 of RMBCA amended to provide that Director may commence dissolution proceeding if: (1) Corporation has failed to file its annual report for period of two consecutive years; (2) corporation procured its articles of incorporation through fraud; (3) corporation has continued to exceed or abuse authority conferred upon it by law; or (4) corporation fails to file statement of change in name or business address of its agent. (HRS 414-401). § 14.21 of RMBCA is amended to provide that Director shall serve notice to corporation by mailing notice to corporation's last known address appearing in records of Director. Additionally, parties of interest may petition court of competent jurisdiction to appoint trustee to settle affairs of any corporation administratively dissolved. (HRS 414-402). Corporation, whose period of duration specified in its articles of incorporation has expired, may continue its corporate existence but may not carry on any business except as necessary to wind up and liquidate its business and affairs and notify claimants. (HRS 414-402). § 14.22(a) of RMBCA is amended to require that application for reinstatement must contain all reports due and unfiled and contain payment of all delinquent fees and penalties. § 14.22(b) is amended to provide that within applicable reinstatement period, should name of corporation, or name substantially identical thereto be registered or reserved by another corporation, partnership, limited liability company, or limited liability partnership, or should name or name substantially identical thereto be registered as trade name, trademark, or service mark, then reinstatement shall be allowed only upon registration of new name by involuntarily dissolved corporation pursuant to amendment provisions provided by statute. (HRS 414-403). § 14.30 of RMBCA is amended to provide circuit court with power to dissolve corporation. (HRS 414-411). § 14.31 of RMBCA amended by making circuit court venue for dissolution proceedings and adding subsection (d) which provides that within ten days after commencement of proceeding pursuant to § 414-411(c) against corporation that has no shares listed on national securities exchange or regularly traded in market maintained by one or more members of national or affiliated securities association, corporation must send to all shareholders, other than petitioner, notice stating that shareholders are entitled to avoid dissolution of corporation by electing to purchase petitioner's shares pursuant to § 414-415. (HRS 414-412). § 14.40 of RMBCA amended to provide that assets of dissolved corporation that should be transferred to creditor, claimant, or shareholder of corporation who cannot be found or is not competent to receive them shall be reduced to cash and deposited with Director for disposition in accordance with HRS c. 523A. (HRS 414-421).

Insolvency and Receivers.

See subhead Dissolution, supra.

Close Corporations.

No special statutory provisions. However, those owner-employees of family-owned private corporations owning 50% of stock shares issued by corporation, or more, may exempt themselves from unemployment compensation payments and benefits. (HRS 383-7[20]).

Appraisal.

§ 13.30 of RMBCA substantially adopted. Subsection (b) amended to provide that proceeding shall commence in circuit court.

Foreign Corporations.

§§ 15.01 through 15.32 of RMBCA substantially adopted. Significant changes include following. Any reference to “secretary of state” shall be deleted, with “department director” inserted. § 15.02(c) of RMBCA amended to provide that foreign corporation that transacts business in Hawaii without certificate of authority shall be liable for years or parts thereof during which it transacted business in Hawaii without certificate of authority, in amount equal to all fees that would have been imposed upon corporation had it duly applied for and received certificate of authority to transact business in Hawaii, plus all penalties imposed for failure to pay fees. (HRS 414-432). § 15.04 of RMBCA not adopted. § 414-434 provides that whenever name of foreign corporation authorized to transact business in Hawaii is changed by amendment of its articles of incorporation, within 60 days after amendment becomes effective, it shall deliver to Director certificate evidencing name change. (HRS 414-434). § 15.06 of RMBCA amended to provide that foreign corporation may use fictitious name to transact business in Hawaii if its real name is unavailable and it delivers to Director for filing copy of certificate of registration of trade name by that foreign corporation under which foreign corporation will transact business in Hawaii. Such fictitious name may not be same as, or substantially identical to, any other entity or holder of reserved or registered name. (HRS 414-436). Provisions of this chapter regarding rights and privileges, limitations, restrictions, liabilities and duties of foreign corporations shall apply to foreign corporations that are duly authorized to transact business in Hawaii prior to effective date of this chapter. (HRS 414-441). § 15.20 of RMBCA amended with addition of subsection (d) which provides that after filing of application of withdrawal, Director shall issue certificate of withdrawal effective as of date of filing of application, at which point authority of foreign corporation to transact business in Hawaii shall cease. (HRS 414-451). Service of process requirements for foreign corporations. (HRS 414-440).

Taxation of Corporate Property.

See category 22 Taxation, topic 22.13 Property Taxes, subhead Real and Personal Property Taxable.

Taxation of Corporate Stock.

No special tax.

Franchise Tax.

No franchise tax adopted, pursuant to RMBCA.

Professional Corporations.

Model Professional Corporation Act with certain amendments has been adopted effective July 1, 1987. (HRS c. 415A). Hawaii Revised Statutes (HRS) amended by adding new chapter entitled, “Hawaii Professional Corporation Act”. Provisions of Hawaii Revised Business Corporation Act, HRS c. 414, apply to professional corporations, domestic or foreign, except to extent such provisions inconsistent with HRS c. 415A. (HRS 415A-27). HRS c. 416 repealed in its entirety. Under prior law, professional corporations governed by and subject to HRS c. 416, except where such provisions were in conflict with or inconsistent with provisions found specifically in part VIII of HRS c. 416. Significant variations from Model Professional Corporation Supplement (1984), hereafter “MPCS”, include: (1) Any reference to “Secretary of State” to be changed to refer to Director of Department of Commerce and Consumer Affairs, hereafter called, “Director”; (2) all references to Business Corporation Act should be read to refer to Hawaii Revised Business Corporation Act, HRS c. 414; (3) in § 20 of MPCS, delete subsections (a)(2) and (a)(3). (HRS 415A-9); (4) add provision to § 22 of MPCS to effect that nothing (contained herein) prohibits transfer of shares of professional corporation by operation of law or court decree. Plus, add conditions under which shareholder may transfer shares to revocable living or inter vivos trust. (HRS 415A-9); (5) unlike § 10(b) of MPCS, offer to personal representative must be accompanied by balance sheet of not more than 12 months prior to making of offer; (6) in § 11 of MPCS, alternative (d) adopted. Also, minimum amount of professional responsibility security for professional corporation may be established for each profession by appropriate licensing authority (HRS 415A-11); (7) § 13 of MPCS adopted, except for bracketed material (HRS 415A-13); (8) § 14 of MPCS adopted. Plus, at least one director must be Hawaii resident (HRS 415A-14); (9) add HRS 415A-14.5 to 14.8; (10) HRS 415A-18 replaced § 42 of MPCS regarding involuntary dissolution and reinstatement; (11) HRS 415A-19 to 21 which corresponds to §§ 50 to 52 of MPCS repealed; (12) HRS 415A-23 which corresponds to § 61 of MPCS repealed; (13) add provision to § 65 of MPCS to effect that failure or refusal to answer interrogatories is class C felony; plus delete reference to fines being imposed. (HRS 415A-25); (14) HRS 415A-26 which corresponds to §§ 60, 63, 64 of MPCS repealed; (15) in § 28 of MPCS, add to subsection (c) that nothing in HRS c. 415A affects validity of any professional corporation's action or validity of any provision of articles of incorporation or bylaws adopted prior to July 1, 1987 (HRS 415A-28); (16) § 74 of MPCS not adopted; (17) registered office and registered agent requirements apply. (See HRS 415A-27.)

Model Nonprofit Corporation Act (2d edition) HRS c. 415B repealed. New Hawaii Nonprofit Corporations Act adopted, consistent with Model Nonprofit Corporations Act. (HRS 414D-1 to HRS 414D-324). Attorney general given expanded oversight over public benefit corporations. (HRS 414D-20, 211, 233).

Conversion of Nonprofit Organization to For-Profit Corporation.

Covered by HRS c. 432C.

2.04 [RESERVED]

2.05 JOINT STOCK COMPANIES:

See topic 2.03 Corporations.

Professional Associations (or Corporations).

See topics 2.02 Associations, subhead Professional Corporations; 2.03 Corporations, subhead Professional Corporations.

2.06 LIMITED LIABILITY COMPANIES:

Limited liability companies are governed by HRS c. 428.

General Supervision.

Director of Department of Commerce and Consumer Affairs of Hawaii, hereinafter referred to as "Director", 1010 Richards St., Honolulu, HI 96813.

Formation.

One or more persons may organize limited liability company consisting of one or more members by delivering articles of organization to office of director. (HRS 428-202[a]). There must be registered office and registered agent in Hawaii. (HRS 428-107).

Purposes.

Limited liability company may be organized for any lawful purpose, subject to any law of Hawaii governing or regulating business. (HRS 428-111).

Powers.

Limited liability company has same powers as individual to carry on its business. (HRS

428-111).

Name must contain words “limited liability company” or abbreviation “L.L.C.”, “LLC”. (HRS 428-105). “Limited” may be abbreviated as “Ltd.” and “company” may be abbreviated as “Co.” (HRS 428-105). Name must not be identical or substantially similar to name of any Hawaii partnership, limited partnership, limited liability partnership, corporation, or limited liability company. (HRS 428-105). Person may reserve name through filing application with director. (HRS 428-106). Administrative relief is available against other entities who have registered or are using name that is substantially identical or confusingly similar to LLC. (HRS 428-105.5).

Articles of Organization.

Required information of articles are set out in HRS 428-203 and rules of amending and restating articles of organization are found in HRS 428-204.5.

Filing Articles of Organization.

Articles must be filed in medium permitted by director and delivered to office of director. (HRS 428-206).

Registered Office and Registered Agent.

Limited liability companies authorized to do business in Hawaii must designate and continuously maintain in Hawaii office and agent for service of process. (HRS 428-107). Agent must be individual resident of Hawaii, domestic corporation, or another limited liability company. (HRS 428-107).

Management.

In member-managed limited liability company each member has equal rights in management of business and most matters relating to company’s business will be decided by majority of members. (HRS 428-404). In manager-managed limited liability company, manager or managers have exclusive rights to manage and conduct company’s business and any matter relating to business shall be decided by majority of managers. (HRS 428-404).

Dissolution and winding up of limited liability company’s business occurs when event specified in operating agreement occurs, when specified number of members consent, event that makes it unlawful for company to carry on business, or upon judicial decree set out in HRS 428-801(4), or judicial determination that it is equitable to wind up company’s business. (HRS 428-801).

Conversion of Business Entities.

Domestic LLC may adopt plan of conversion pursuant to HRS 428-902.5(c) and convert into foreign LLC or any other entity but limited to requirements of HRS 428-902.5(a). Articles of conversion are required to be executed. (HRS 428-902.6).

Filing fees.

Specified in HRS 428-1301.

2.06A LIMITED LIABILITY PARTNERSHIPS:

See topic 2.07 Partnerships.

2.07 [RESERVED]

2.08 PARTNERSHIPS:

Uniform Partnership Act has been replaced by Revised Uniform Partnership Act. (HRS 425-101 to 145).

Formation.

Partnership is association of two or more people carrying on as co-owners business for profit formed under § 425-109, predecessor law, or comparable law of another jurisdiction. (HRS 425-101).

Name.

Partnerships must register and file annual statement with director. (HRS 425-1). Registration statement must contain partnership's name. (HRS 425-1). Partnership's name shall not be substantially identical to another partnership, limited partnership, limited liability partnership, corporation, or limited liability company registered to do business in Hawaii. (HRS 425-6). Administrative relief is available if another entity has substantially similar name. (HRS 425-196).

Rights and Liabilities of Partners Amongst Themselves.

Each partner is agent of partnership for purpose of its business. (HRS 425-112). Partnership is liable for loss or injury caused to person, or for penalty incurred, as result of wrongful act or omission, or other actionable conduct, of partner acting in ordinary course of business of partnership or with authority of partnership. (HRS 425-116). All partners are liable jointly and severally for all obligations of partnership unless otherwise agreed by claimant or provided by law with few exceptions. (HRS 425-117).

Dissociation, Dissolution, and Winding Up of Partnership.

Partner is dissociated from partnership upon occurrence of certain events. (HRS 425-130). Partner has power to dissociate at any time, rightfully or wrongfully, by express will pursuant to HRS 425-130(1). (HRS 425-131). Events causing dissolution and winding up of partnership business are described in HRS 425-138. Partnership continues after dissolution only for purpose of winding up its business. Partnership is terminated when winding up of its business is completed. (HRS 425-139). In winding up partnership's business, assets of partnership are applied to discharge its obligations to creditors. Any surplus is applied to pay in cash net amount distributable to partners in accordance with their right to distribution. (HRS 425-144).

Administration of Partnership Property.

Absent agreement to contrary, partners share equally in profits of partnership, even if they contribute unequally to capital or services. (80 Haw. 274, 909 P.2d 602).

Limited Partnership.

Uniform Limited Partnership Act has been adopted, amended in part. (HRS 425D-101 to 1109). Hawaii version of Act is substantially similar to Uniform Act, with following material differences: (1) HRS 425D-203(b) provides for extension of term of expired partnership if partners take action to amend certificate to reflect extension within two years of such expiration; (2) HRS 425D-203.5 requires every limited partnership to file annual statement, or face cancellation of partnership's registration under HRS 425D-203.6; (3) HRS 425D-906.5 requires every foreign limited partnership to file annual statement, or face cancellation of partnership's registration under HRS 425D-906.6 between Jan. 1, 2002 through Dec. 31, 2002, filing of statements are voluntary; after Jan. 1, 2003, if date of registration in Hawaii is between: (a) Jan. 1 and Mar. 31, statement shall be filed on or before Mar. 31 of each year, reflecting state of affairs as of Jan. 1; (b) Apr. 1 and June 30, statement shall be filed on or before June 30 of each year, reflecting state of affairs as of Apr. 1; (c) July 1 and Sept. 30, statement shall be filed on or before Sept. 30 of each year, reflecting state of affairs as of July 1; (d) Oct. 1 and Dec. 31, statement shall be filed on or before Dec. 31 of each year, reflecting state of affairs as of Oct. 1 (HRS 425D-906.5); (4) HRS 425D-1108 provides for personal liability, jointly and severally, of all general partners who fail to comply with provisions of Act; (5) there must be registered office. (HRS 425D-104).

Excise tax on partnerships, see category 22 Taxation, topic 22.17 Sales and Use Taxes, subhead General Excise Tax. See also category 17 Intellectual Property, topic 17.01 Trademarks and Tradenames.

Fees for Recording.

Following fees shall be paid to director upon filing of general partnership documents: (1) Partnership registration statement, $25; (2) partnership change of name statement, $10; (3) partnership dissolution statement, $10; (4) foreign general partnership registration statement, $25; (5) statement of change, $10; (6) application for certificate of withdrawal, $5; (7) statement of correction, $10; (8) reservation of name, $10; (9) transfer of reservation of name, $10; (10) annual statement for domestic or foreign general partnership, $10; (11) good standing certificate, $5; (12) articles of conversion or merger, $100; (13) any other statement, certificate, or other document for domestic or foreign general partnership, $10; (14) special handling fee for review of any general partnership document, $25; (15) special handling fee for certificates issued by director, $10 per certificate; (16) special handling fee for certification of documents, $10; (17) special handling fee for review of articles of conversion or merger, $75; and (18) agent’s statement of change of address, $10 for each affected foreign general partnership; provided that if more than 200 simultaneous filings are made, fee shall be reduced to $1 for each affected foreign general partnership. Director shall charge and collect: (1) For furnishing certified copy of any document, instrument, or paper relating to general partnership, $10 for certificate and affixing seal thereto; and (2) at time of any service of process on director as agent for service of process of general partnership, $10, which amount may be recovered as taxable costs by party to suit or action causing service to be made if party prevails in suit or action.

Limited Liability Partnerships.

Effective July 1, 2000, subpart titled “Limited Liability Partnerships” added to part 4 of HRS c. 425 to bring Hawaii law into greater conformity with Revised Uniform Partnership Act. Hawaii Limited Liability Partnership Act (HRS 425-151 to 180) repealed and replaced with new HRS 425-151 to HRS 425-173. Partnership may become limited liability partnership if it: (1) Obtains partnership’s approval of terms and conditions upon which it shall become limited liability partnership; (2) files registration statement with Director of Commerce and Consumer Affairs under part I of HRS c. 425 either before or simultaneously with filing of statement of qualification; and (3) is in good standing pursuant to part I of HRS c. 425. (HRS 425-152). Partnership is required to file statement of qualification that establishes it has satisfied all conditions precedent to qualification as limited liability partnership; status of partnership as limited liability partnership is effective upon filing of statement of qualification. (HRS 425-152). Name of limited liability partnership must end with “Registered Limited Liability Partnership”, “Limited Liability Partnership”, “R.L.L.P.”, “L.L.P.”, “RLLP”, or “LLP”. (HRS 425-151). Every limited liability partnership and foreign limited liability partnership registered to do business in Hawaii must file annual report in office of director. (HRS 425-163). Foreign limited liability partnership must register under part I of HRS c. 425, and file statement of foreign qualification with director prior to transacting business in Hawaii, and submit certificate of good standing from state in which partnership was formed; provided that certificate shall be dated not earlier than 60 days prior to filing of application for such statement. If certificate is in foreign language, translation attested to under oath by translator must accompany certificate. Foreign limited liability partnership will not be denied statement of foreign qualification by reason of any difference between law under which partnership was formed and law of Hawaii. Law under which foreign limited liability partnership was formed shall govern relations among partners, between partners and partnership, and liability of partners for obligations of partnership. (HRS 425-156). All entities that were limited liability partnerships registered under law effective before July 1, 2000 shall be converted into and deemed partnerships that have registered under part I of HRS c. 425 and filed required statement of qualification of limited liability partnership. (HRS 425-173).

Foreign LLPs must register with DCCA before conducting business in Hawaii. (HRS 425-156). Organization, internal affairs and liability of foreign LLPs governed by laws of respective home state. (HRS 425-157).

Out-of-State Partnerships.

Upon filing registration statement as required in HRS 425-1, partnership formed pursuant to laws of any other jurisdiction shall be subject to same privilege and disabilities as Hawaii partnership, provided that partnership's purpose is not repugnant to Hawaii law. (HRS 425-3).

Conversion of Business Entities.

Corporations, partnerships, LLPs and LLCs may adopt plan of conversion and convert to another entity form if board of directors and shareholders approve plan of conversion, conversion is permissible and complies with laws of state or county in which entity was incorporated, each shareholder owns equity interest, shareholders are not personally liable for liabilities of converted entity, unless consented and shareholder consent and converted entity is incorporated, formed, or organized as part of or pursuant to plan of conversion. (HRS 415A-16.5).

3 BUSINESS REGULATION AND COMMERCE

3.01 BANKS AND BANKING:

No corporation, partnership, or individual may transact banking business except by means of corporation duly authorized for such purpose. (HRS 412:5-100 to 101).

Capital access program to be established by department of business economic development and tourism to assist participating financial institutions in making loans to businesses and nonprofit organizations that face barriers in accessing capital. Under capital access program, participating financial institution and eligible borrower pay up-front fee which is placed into reserve account. State matches fees with deposit into same account. Account is to be used as source of money financial institution may receive as reimbursement for losses attributable to loans in program. (HRS c. 211D).

Commissioner.

Supervision of all financial institutions is by Commissioner of Financial Institutions. Commissioner is appointed by Director of Commerce and Consumer Affairs, and approved by Governor. (HRS 412:2-100). Commissioner shall examine each financial institution in state at least once every two years. (HRS 412:2-200). Commissioner has power to grant emergency application to prevent insolvency or failure of existing institution. (HRS 412:2-110). Commissioner may subpoena persons or require production of documents deemed material to investigation. (HRS 412:2-111).

Classification of Financial Institutions.

Code recognizes and regulates following types of financial institutions: (1) Banks; (2) savings banks; (3) savings and loan associations; (4) trust companies; (5) depository and non-depository financial services loan companies; (6) credit unions; (7) foreign and intra-Pacific financial institutions; and (8) financial institution holding companies.

Organization of banks, savings banks, savings and loan associations, trust companies, and depository financial services loan companies is regulated by Art. 3, Part II of Code. (HRS 412:3-200). Application for Commissioner's preliminary approval to organize such institutions is required. Applicants must be three or more individuals (three of whom must be Hawaii residents) or company that seeks to be financial institution holding company. (HRS 412:3-201). Financial institutions organized by holding companies subject to different requirements than individuals. (HRS 412:3-202). After receiving preliminary approval, "applicant in organization" takes all steps necessary to complete organization and file application for charter or license. (HRS 412:3-206).

Every existing bank, savings bank, savings and loan association, trust company, and depository financial services loan company, and all applicants seeking to organize such institutions prior to filing application for charter, shall have paid-in capital and surplus of not less than $5,000,000 for banks, $3,000,000 for savings banks, $2,000,000 for savings and loan associations, $1,500,000 for trust companies, and $1,000,000 for depository financial services loan companies. (HRS 412:3-209).

Proposed financial institution has one year from date of incorporation to complete organization and obtain charter or license from Commissioner. (HRS 412:3-211).

Organization of non-depository financial services loan companies regulated by Art. 3, Part III (HRS 412:3-300 to 306) of Code. Application to Commissioner required to form non-depository financial services loan company. (HRS 412:3-301). Except to extent that provisions of Code are inconsistent, all other procedures for organization of non-depository financial services loan company are same as those under general corporation law. (HRS 412:3-401). Every non-depository financial services loan company organized under Hawaii law must at all times have paid-in capital and surplus of not less than $500,000. (HRS 412:3-306). All financial services loan companies licensed and actively engaged in business in state as of July 1, 1993, may continue to maintain minimum capital and surplus required before effective date of Code. However, new minimum amounts will be required should there be subsequent acquisition. (HRS 412:1-103).

Management and directors of financial institutions are regulated by Art. 3, Part I of Code. (HRS 412:3-100 to 115). With exception of non-depository financial services loan companies board of directors of every financial institution shall at all times consist of at least five directors, of whom at least three shall be residents of state at time of their election, and at all times while holding office. With exception of non-depository financial services loan companies, board of directors of financial institution that is wholly-owned subsidiary of holding company incorporated in another state shall consist of at least five directors, of whom at least one shall be Hawaii resident at time of election and while on board. (HRS 412:3-104). No residency requirements for directors of non-depository financial services loan companies.

Chief executive officer of every Hawaii financial institution, with exception of non-depository financial services loan companies, shall be resident of state. (HRS 412:3-106).

Management of Stock Institutions.

Management of stock financial institutions is regulated by Art. 3, Part IV (HRS 412:3-400 to 403) and, to extent that provisions are not inconsistent, general corporation law under HRS c. 415 (HRS 412:3-401). Mutual savings and loan associations cannot issue capital stock. (HRS 412:3-402).

Banks are regulated by Art. 5 of Code. (HRS 412:5-100 to 407). General and traditional powers of banks, such as power to make loans, and extend credit, and engage in those aspects of commerce traditional to banking are set forth in Part II. (HRS 412:5-200 to 206). Investment and lending standards are described in Part III. (HRS 412:5-300 to 306). Loans to insiders have certain restrictions, mirroring Federal Deposit Insurance Act, and Federal Reserve Act. (HRS 412:5-303). Intra-Pacific banks are regulated by Part IV. (HRS 412:5-400 to 407).

Banks organized in Hawaii may transact business of insurance upon receiving written approval from Commissioner. (HRS 412:5-205.5). New bank insurance powers will be phased in between 1996 and 2003. Prior to June 1, 2000, bank cannot underwrite insurance nor directly sell insurance except through subsidiary or affiliate. From June 1, 2000, banks may begin selling insurance at 25% of their Hawaii branches. This percentage will increase by 25% per year. After May 31, 2003, banks will be allowed to sell insurance at all their Hawaii branches. (HRS 412:5-205.6)

Commissioner directed to adopt rules to prevent bank engaged in insurance activities from draining assets to detriment of insurance operations, and adopt rules to obtain diverted assets from bank in case of insolvency of insurance operations. (HRS 431:13-104).

Savings banks are regulated by Art. 6 of Code. (HRS 412:6-100 to 307). Savings banks are recognized as entities that are distinguishable from commercial banks and savings and loans. (HRS 412:6-100 to 101). General powers of savings bank are set forth in Part II. (HRS 412:6-200 to 204). Lending and investments are subject to requirements in Part III (HRS 412:6-300 to 307).

Savings and loan associations are regulated by Art. 7 of Code. (HRS 412:7-100 to 307). Powers exercised by savings and loans are described in Part II. (HRS 412:7-200 to 204). Powers granted by Federal law are recognized, as well as membership in federal home loan bank. (HRS 412:7-201 to 202). Lending and investments are subject to requirements in Part III. (HRS 412:7-300 to 307).

Unclaimed Deposits.

See category 21 Property, topic 21.01 Absentees, subhead Escheat.

Collections.

Uniform Commercial Code adopted. See topic 3.09 Commercial Code.

Trust companies are regulated by Art. 8 of Code. (HRS 412:8-100 to 403). One cannot engage in business of trust company unless incorporated in state and chartered under Art. 8 specifically for that purpose, or through trust division of bank pursuant to Art. 5. (HRS 412:8-102).

General powers of trust company are described in Part II. (HRS 412:8-200 to 204). In addition to its general powers trust company also has fiduciary powers (HRS 412:8-201), and agency powers (HRS 412:8-202).

Investment of trust company assets are subject to standards set forth in Part III. (HRS 412:8-300 to 302). Generally, investment standards from banks have been adopted. (HRS 412:8-301).

Investment of fiduciary assets are subject to standards set forth in Part IV. (HRS 412:8-400 to 403).

Financial services loan companies both depository and non-depository, are regulated by Art. 9. (HRS 412:9-100 to 500). Depository financial services loan company is loan company that is authorized to accept deposits under Code, and is insured by Federal Deposit Insurance Corporation (FDIC). (HRS 412:9-100). Non-depository financial services loan company is loan company that is not authorized to accept deposits. (HRS 412:9-100).

General powers of financial services loan company are set forth in Part II. (HRS 412:9-

200 to 202).

Loans and extensions of credit are subject to standards in Part III. (HRS 412:9-300 to 309). Financial services loan company may charge interest on loans on precomputed basis or simple interest basis. (HRS 412:9-301). Interest rates charged for loans are subject to limitations. (HRS 412:9-302). Total amount of fees, charges, and expenses on consumer loans secured by interest in real property shall not exceed 1% of principal amount of loan. (HRS 412:9-304). Open-end consumer loans are allowed subject to special restrictions. (HRS 412:9-305). Penalties are set forth for charging excessive interest. (HRS 412:9-303).

General rules regulating depository financial services loan companies are set forth in Part IV. (HRS 412:9-400 to 410). Non-depository financial services loan companies are subject to restrictions. (HRS 412:9-500).

Non-depository financial services loan companies are not required to be incorporated in state. (HRS 412:9-101). Non-depository financial services loan companies not incorporated in Hawaii required to maintain books and records of Hawaii business at principal office in state. (HRS 412:3-111). Commissioner may approve certain records to be maintained outside state. Failure to provide Commissioner books and records upon request may lead to fine. (HRS 412:3-111).

Credit unions are regulated by Art. 10 of Code. (HRS 412:10-100 to 808). Defined as cooperative, nonprofit organization, chartered under Code for purpose of promoting thrift among its members, creating source of credit at fair and reasonable rate of interest, and providing opportunity for its members to use and control their own money to improve their economic and social conditions. (HRS 412:10-100). Credit union membership is subject to certain standards. (HRS 412:10-109). Any proposed change to credit union’s field of membership requires prior written approval of Commissioner. (HRS 412:10-109).

Powers of credit unions are set forth in Part II. (HRS 412:10-200 to 204). Powers granted credit union by federal law are recognized. (HRS 412:10-201). Credit union may invest its funds up to 1% of its own capital in service organizations which provide services supporting routine operations of credit union. (HRS 412:10-202). Credit union may also purchase or sell eligible obligations of its members. (HRS 412:10-203).

All credit union accounts are governed by Part III. (HRS 412:10-300 to 310). Loans, including interest rates, are subject to standards in Part IV. (HRS 412:10-400 to 413). Requirements for investments and permissible investments are generally treated under Part V. (HRS 412:10-500 to 503). Other member services are governed by Part VII. (HRS 412:10-700 to 704).

Corporate credit unions are regulated by Part VIII. (HRS 412:10-800 to 808).

Foreign Banks.

Defined as person (a) organized and authorized to conduct business under laws of its jurisdiction of origin but not Hawaii law, (b) whose operations are principally in Hawaii, (c) in business of accepting deposits or making loans or engaging in trust business. (HRS 412:1-109). Foreign financial institutions are allowed to conduct business only as allowed under Hawaii law except nothing shall restrict foreign institution’s distribution of cash through automatic teller machines (ATMs), operation as mortgage broker in state, or operation as real estate collection servicing agent. (HRS 412:3-502).

Intra-pacific banks may engage in business in Hawaii and are regulated by Art. 5, Part IV (HRS 412:5-400 to 407) of Code. Intra-pacific banks allowed to engage in business in Hawaii include banks from Guam, American Samoa, Federated States of Micronesia, Republic of Palau, Commonwealth of Northern Marianas, and Republic of Marshall Islands, as long as local economy is based on U.S. dollar. (HRS 412:5-400).

Interstate Branching and Bank Mergers.

Interstate branching by both Hawaii state banks and out-of-state banks allowed. (HRS 412:12-100 to 110). Prior foreign bank offices and agencies section of Art. 5A (HRS 412:5A, Part III) repealed. With prior approval of Commissioner, Hawaii state banks may establish and operate branches in states other than Hawaii. (HRS 412:12-102). Interstate branches of Hawaii banks in other states will be able to conduct all activities authorized by host state except to extent activities are expressly prohibited by laws of Hawaii. (HRS 412:12-107).

Out-of-state banks may establish interstate branches through merger, provided that acquired Hawaii state bank must have been in continuous operation for at least five years on date of acquisition. (HRS 412:12-104). Out-of-state bank that will be resulting bank following interstate merger with Hawaii state bank must file with Commissioner copy of interstate merger application submitted to responsible federal bank supervisory agency along with nonrefundable filing fee of $9,000 or greater amount to be established by Commissioner pursuant to HRS c. 91. (HRS 412:12-104). Out-of-state banks may create de novo interstate branch or acquire interstate branch. (HRS 412:12-105). Commissioner may waive federal statewide concentration limits. (HRS 412:12-106). Hawaii branches of out-of-state state banks will be able to conduct any activities that are authorized for Hawaii state chartered banks under HRS c. 412, Art. 5. (HRS 412:12-107).

Hawaii International Banking Act.

Foreign banks will be permitted to establish branches and agencies in Hawaii under Hawaii International Banking Act. (HRS 412:13-100 to 301). Act authorizes banking activity and operations under state licenses issued by Commissioner, consistent with federal International Banking Act, Banking Holding Company Act, Federal Deposit Insurance Act, and Interstate Banking and Branching Efficiency Act. (HRS 412:13-100).

Commissioner will approve, examine, and regulate foreign banking operations in Hawaii. (HRS 412:13-100, 200). Foreign banks must procure license to establish and operate Hawaii state branch or Hawaii state agency. Application for license must be submitted to Commissioner and include same information required by Board of Governors of Federal Reserve System for application to establish branch or agency in U.S., nonrefundable application fee of $9,000 or greater amount to be established by Commissioner by rule pursuant to HRS c. 91, identification of agent for purpose of receipt of service of process, and other information required by Commissioner. (HRS 412:13-202, 206).

Each foreign bank licensed to establish and maintain Hawaii state branch or Hawaii state agency shall keep on deposit $500,000 or any greater amount, as determined by Commissioner, with unaffiliated Hawaii banks selected by foreign bank and approved in writing by Commissioner. (HRS 412:13-213).

Financial institution holding companies are generally regulated by Art. 11 of Code. (HRS 412:11-100 to 106). Defined as holding company which controls Hawaii financial institution or which controls another financial institution holding company. (HRS 412:1-109). Following persons do not constitute holding company: (1) Registered dealer that acts as underwriter in public offering of voting securities of financial institution or financial institution holding company; (2) person who acts as proxy for sole purpose of voting at meeting of security holders of financial institution or holding company; (3) person who gains control of financial institution by devise or descent; and (4) pledgee of voting security of financial institution or holding company who does not have right to vote such security. (HRS 412:1-109).

Registration of financial institution holding company with Commissioner, and annual reporting is required. (HRS 412:11-101). Commissioner has power to make periodic examinations of financial institution holding companies that directly owns 25% or more of any class of voting securities of Hawaii financial institution. (HRS 412:11-102).

Branch banks may be opened or closed subject to certain restrictions. (HRS 412:3-503 to 509). Hawaii financial institutions may maintain branch outside of state subject to certain restrictions. (HRS 412:3-509). Branch bank is separate office for purpose of stop payment orders. (HRS 490:4-107). Opening new branch, or relocating is subject to approval of Commissioner. (HRS 412:3-503).

Acquisitions and Other Transactions.

Uniform standards for acquisitions, conversions, mergers, consolidations, assumptions, and voluntary dissolutions of financial institutions are regulated by Art. 3, Part VI. (HRS 412:3-600 to 618). All of above transactions are subject to approval of Commissioner. (HRS 412:3-601, 603). Certain transactions require coordination with Department of Commerce and Consumer Affairs under HRS c. 414. (HRS 412:3-606 to 609).

Deposits in financial institutions are regulated by Art. 4 (HRS 412:4-100 to 112) of Code. No bank, savings bank, savings and loan association, and depository financial services loan company which is Hawaii financial institution must accept deposits unless deposits are insured by Federal Deposit Insurance Corporation (FDIC), or if credit union, insured by National Credit Union Administration. (HRS 412:4-104). Minors may withdraw deposits in their own name. (HRS 412:4-107). Financial institution may refuse to pay any check if, in good faith, it has reason to believe that person indorsing instrument was intoxicated at time of signing it. (HRS 412:4-110).

Financial institutions required to provide written statements on check holding policies when checking account is opened or there is change in bank policy. (HRS 490:4-215).

Subject to restrictions, financial institution may open accounts in name of person as trustee or representative for one or more persons. (HRS 412:4-106).

Uniform Common Trust Fund Act not adopted. Trust companies are regulated by Art. 8 of Code. (HRS 412:8-100 to 403).

Financial Institutions—Enforcement Actions.

Commissioner of Financial Institutions is granted power to implement enforcement actions if necessary to discontinue any violation of law or any unsafe or unsound practice. (HRS 412:2-300). Enforcement actions include: (1) Cease and desist orders (HRS 412:2-302 to 305); (2) removal of any institution-affiliated party (HRS 412:2-306, 307); (3) suspension of institution-affiliated party (HRS 412:2-308); and (4) suspension or revocation of financial institution’s charter or license (HRS 412:2-311, 312). Commissioner shall notify financial institution to correct capital and surplus impairment when appropriate. (HRS 412:2-314).

Commissioner may also assess administrative penalties against financial institution or any institution-affiliated party. Penalties of not more than $1,000 per day assessed for material violation of: (1) Statute or rule that provides for penalty; (2) order issued by Commissioner; (3) condition imposed by Commissioner in connection with grant of any application or other request; and (4) any written agreement between financial institution and Commissioner. Penalties of not more than $5,000 per day assessed for financial institution that violates any of above acts, or engages in unsafe or unsound practice, or breaches any fiduciary duty to financial institution, and such violation(s) are part of pattern of misconduct, causes or will likely cause loss to institution, or result in pecuniary gain to any one individual. Financial institution or institution-affiliated party may be fined not more than $100,000 for each day of violation if institution or individual knowingly violates (1) to (4), supra, knowingly engages in any unsound practice, knowingly breaches fiduciary duty to institution, or knowingly or recklessly causes substantial loss to institution or substantial pecuniary gain by reason of violation of Code to such party or third person. Maximum administrative fine for person other than financial institution is $500,000. Maximum fine for financial institution is lesser of $1,000,000 or 1% of institution's total assets. (HRS 412:2-609). Commissioner may modify, compromise, or suspend any administrative penalty. When assessing administrative fine, Commissioner may consider financial resources and good faith of institution or individual charged, gravity of violation, history of previous violations, imposition of federal penalties, and other matters as justice may require. (HRS 412:2-610).

Insolvency.

Commissioner may appoint conservator or receiver to take control of financial institution if it is insolvent, or has failed to correct capital deficiency, not able to meet demands of its depositors, is in any unsafe or unsound condition, has or is likely to incur losses significantly affecting capital which is not likely to be replaced except by federal assistance, or has violated laws, rules or regulations or cease and desist order of Commissioner. (HRS 412:2-400). Commissioner, and with Commissioner's approval, any duly appointed conservator may, subject to limitations, reorganize Hawaii financial institution. (HRS 412:2-410). Commissioner has power to determine that financial institution is failing one. If Commissioner's determination is contested, matter is put before circuit court for closed hearing. (HRS 412:2-501). Once financial institution is deemed to be failing financial institution, Commissioner has power to solicit applications to merge with failing financial institution or with its holding company, to purchase all or part of assets, assume all or part of liabilities of failing financial institution, or purchase all of capital stock of failing financial institution. (HRS 412:2-502). Commissioner has power to waive statewide concentration limits if waiver is deemed necessary to institution. (HRS 412:2-505).

Uniform Commercial Code adopted. See topic 3.09 Commercial Code.

Stop Payment Orders.

See HRS 490:4-303, 403.

Forged or Altered Instruments.

See HRS 490:4-207, 401, 406.

Agreements to Extend Credit.

See topic 3.16 Frauds, Statute of.

Stale Checks.

Bank not obligated to customer having checking account to pay check, other than certified check, presented more than six months after date. (HRS 490:4-404).

Escheat of Inactive Accounts.

Uniform Unclaimed Property Act. (HRS c. 523A).

Bank Tax.

Franchise tax is imposed on all banks, building and loan associations and other financial corporations, measured by their taxable income with various changes and adjustments, at rate of 7.92%. (HRS 241-2 to 4). Special provisions apply for computation of taxes due from financial institution for initial and subsequent year of doing business and for taxes due upon merger, acquisition, consolidation, or termination of business. (HRS 241-1.5). In general, franchise tax applies in lieu of corporate income tax (HRS c. 235) and general excise tax (HRS c. 237);

however, certain provisions of income tax laws not inconsistent with franchise tax also apply (HRS 241-6). Limited general excise tax exemption for financial institutions. (HRS 237-24.8). Capital goods excise credit is available with respect to franchise tax as well as income tax after Dec. 31, 1987. (HRS 241-4.5). Energy conservation tax credit available to banks. (HRS 241-4.6). Low-income housing tax credit is available with respect to franchise tax. (HRS 241-4.7).

3.02 BILLS AND NOTES:

Uniform Commercial Code adopted. See topic Commercial Code (Alternative B adopted in HRS 490:4-106[b]).

Judgment notes are not recognized.

Attorneys' Fees.

Except for planned community associations, attorney fee clauses are enforceable up to 25% of judgment amount. (HRS 607-14). No limitation for planned community associations. (HRS 607-14). Maximum of 25% of unpaid principal is allowed to collection agencies. (HRS 443B-9).

Usury.

See topic 3.19 Interest.

Bills of Lading.

See topic 3.08 Carriers.

3.03 [RESERVED]

3.04 BILLS OF SALE:

See category 8 Debtor and Creditor, topic 8.08 Fraudulent Sales and Conveyances.

Blue Sky Law.

See topic 3.24 Securities.

3.05 [RESERVED]

3.06 BROKERS:

Mortgage Brokers.

Person who for compensation makes, negotiates, acquires or offers to make, negotiate or acquire mortgage loan is required to be licensed as mortgage broker. (HRS 454-1, 3). In general, financial institutions, bank operating subsidiaries, saving associations, trust companies and pension trusts are exempted, as well as person acting for own investment without intent to resell, institutional investor purchasing for its portfolio, for subsequent resale to other institutional investors, or for placement into pools or packaging these into mortgage-backed securities, lawyer or real estate broker rendering such services incidentally to his practice, and foreign lenders. (HRS 454-2).

Mortgage brokers regulated by Mortgage Commissioner, presently Director of Department of Commerce and Consumer Affairs. (HRS 454-1). To be licensed, individual must be at least 18 years of age, and legal entity must be licensed to do business in State. Broker must post bond of $15,000. Application is made to Commissioner on forms provided to show experience, financial integrity and competency. Denial of license is subject to administrative review. (HRS 454-3). Licensed mortgage broker must maintain principal place of business in State. (HRS 454-3).

License may be suspended for making false promises, misrepresentation, failing to deliver money in accordance with agreement or to account for property of others coming to broker or to place funds of others in trust or escrow account within reasonable time. License may be revoked by Commissioner for material misstatement in application, negligence or incompetence in performing act for which license is required, or more than one suspension. (HRS 454-4).

Commissioner has power to investigate licensees, inspect their books and records and initiate actions enjoining violations or acts in furtherance of violation of statute. (HRS 454-5). Commissioner may adopt regulations, including maximum fees, commissions and charges. (HRS 454-6, -7). Mortgage broker and mortgage solicitors (unlicensed individuals who perform any of functions of mortgage broker) must comply with all of provisions of Real Estate Settlement Procedures Act, Truth in Lending Act and Equal Credit Opportunity Act in any transaction with borrower. Written mortgage loan commitment letters issued by mortgage brokers or mortgage solicitors and accepted by borrower must be honored if borrower satisfies all of commitment conditions in timely manner. (HRS 454-3.1).

Licenses.

Following persons require real estate broker's license: Any person who for compensation sells, offers to sell, buys, offers to buy, negotiates purchase, sale or exchange of real estate or lists or solicits for prospective purchasers or who leases or offers to lease or rents or offers to rent any real estate or improvements thereon or who secures, receives, takes or accepts or sells, offers to sell any option on real estate without exercise by him of option for purpose of evading licensing statute (HRS 467-1; -7); managing agents of condominium projects (HRS 514A-95); sales or acquisition agents for time share project (HRS 514E-2.5).

Real Estate Brokers.

Real Estate Commission has authority to grant licenses to real estate brokers and real estate salesmen and to make, amend and repeal rules and regulations which, when approved by Governor and published, have force and effect of law. Commission is also authorized to revoke or suspend any license pursuant to such rules and regulations. (HRS 467-4). Notice and hearing required prior to refusal to grant license for causes enumerated in HRS 467-14. (HRS 467-15). Denial or refusal of license subject to appeal to Real Estate Commission within 60 days of date of denial or refusal. Appeal to circuit court may only be taken from Real Estate Commission's final order (HRS 91-13.1). Minimum education requirements in real estate principles must be met to obtain salesman's license and broker's license. (HRS 467-8). Written examination on real property law and law of agency must also be passed. (HRS 467-8). Must possess reputation for competency, honesty, truthfulness, financial integrity, and fair dealing. (HRS 467-8). Prerequisites to take written exam: over age of majority; satisfactory completion of commission-approved real estate course, U.S. citizen or alien authorized to work in U.S. (HRS 467-9.5). Ten hours of continuing education required during two year period prior to renewal. (HRS 467-11.5). If not satisfied, license put on inactive status until requirement is met. (HRS 467-11.5). Real estate brokers subject to discriminatory financial practices law. (HRS 515-5).

Recovery fund set up by Commission from which person who is damaged by an act, representation, transaction or conduct of licensed broker may be compensated. Action upon grounds of fraud, misrepresentation or deceit must be brought within two years from time cause of action accrued, and Commission must be notified of action in writing. Maximum recovery $25,000 (HRS 467-16); maximum liability to fund of any one licensee, $50,000. (HRS 467-24). "Damages sustained" does not include punitive damages but is limited to compensatory damages. (76 Haw. 39, 868 P.2d 457).

Uniform Land Sales Practices Act enacted. (HRS c. 484).

Uniform Commercial Code adopted. (HRS c. 490). See topic 3.09 Commercial Code.

3.07 BULK SALES:

See topic 3.09 Commercial Code; category 8 Debtor and Creditor, topic 8.08 Fraudulent Sales and Conveyances.

3.08 CARRIERS:

Public Utilities Commission has charge of general supervision. (HRS c. 269, 271, 271G). Commission approval required for public utilities rules which govern independent power producers and rules regarding recovery of costs and profits from nonutility generators by public utility. (HRS 269-16.2).

Uniform Commercial Code adopted. (HRS c. 490). See topic 3.09 Commercial Code.

Rates.

Rates of common carriers must be just and reasonable and must not be unjustly discriminatory. (HRS 269-16; HRS 271-20, HRS 271G-16).

Limiting Liability.

Any limitation of liability by common carriers transporting property between points in Hawaii is unlawful and void, except with regard to water carriers, baggage carried on passenger trains or boats, and property subject to rate schedule established by carriers expressly authorized by public utilities commission. Carriers may not require claims to be filed in less than four months, and actions in less than two years. (HRS 269-23).

Bills of Lading.

See topic 3.09 Commercial Code.

Liens.

U.C.C. provision governs. (HRS 490:7-307).

Nonresident Shipping Lines.

Process may be served by personal service, certified or registered mail or if defendant cannot be found in state then by publication. (HRS 634-36).

Surcharge Assessment in Emergency Situations.

Statewide rate increase surcharge may be applied for by any affected utility, (i) that sustains damage to its facilities due to state-declared emergency, (ii) that incurs costs for restoration and repair of facilities and (iii) that as result of damage and repairs, may need rate increase of more than 15% in damaged service territory. Surcharge outside damaged service territory is limited to 15% increase. (HRS 269-16.3).

Telephone Service.

Existing telecommunications provider must show PUC cause why alternative provider should not be granted license in area state has determined has less than adequate service. (HRS 269-16.9). PUC may consider transferring subsidies to alternative provider. (HRS 269-16.91).

Each telecommunications carrier upon request must provide services or information to entities seeking to provide intrastate telecommunications. (HRS 269-34).

Interisland Air Carrier Regulation.

Federal Airline Deregulation Act of 1978 preempted HRS c. 261C. New chapter established for state regulation of interisland air carriers, to extent permissible under Constitution and laws of United States. Effective upon enactment of federal legislation permitting implementation of new chapter. (2008 SS, Act 1).

3.09 COMMERCIAL CODE:

Uniform Commercial Code has been adopted in Hawaii effective Jan. 1, 1967. (HRS c. 490). (Code reproduced infra, Uniform and Model Acts section.)

Variations not reported in other topics:

Article 1.

Revised Art. 1 adopted, effective July 2, 2004. (HRS 490:1-101 to 310).

Article 2.

Right of action or defense arising out of a retail installment sale which buyer has against seller may not be cut off by assignment, and seller's assignee has recourse against seller, (HRS 476-19). § 2-318: 1966 Official Optional Amendment Alternative C enacted. § 2-702: 1966 Official Amendment not enacted. Conforming amendments (for revised Art. 1) adopted, effective July 2, 2004. (HRS 490:2-202). Conforming amendments (for revised Art. 7) adopted, effective July 2, 2004. (HRS 490:2-103 to 705).

Article 2A.

Leases of Goods. Adopted effective Jan. 1, 1992. (HRS 490:2A-101 to 532). Conforming amendments (for revised Art. 1) adopted, effective July 2, 2004. (HRS 490:2A-501 to 528). Conforming amendments (for revised Art. 7) adopted, effective July 2, 2004. (HRS 490:2A-103 to 526).

Article 3.

Revised Art. 3 adopted, effective Jan. 1, 1992. (HRS 490:3-101 to 605). Action for treble damages for dishonored checks reenacted July 1, 1992. (HRS 490:3-506). Procedures for claims involving lost, destroyed or stolen cashier's checks, teller's checks, and certified checks enacted. (HRS 490:3-312). Conforming amendments (for revised Art. 1) adopted, effective July 2, 2004. (HRS 490:3-103).

Article 4.

Conforming amendments (to revised Art. 3) adopted, effective Jan. 1, 1992. (HRS 490:4-101 to 504). Conforming amendments (for revised Art. 7) adopted, effective July 2, 2004. (HRS 490:4-104 to 210).

Article 4A.

Funds Transfers. Adopted, effective Jan. 1, 1992. (HRS 490:4A-101 to 507). Conforming amendments (for revised Art. 1) adopted, effective July 2, 2004. (HRS 490:4A-105 to 204).

Article 5.

Letters of Credit. 1995 Revisions to Art. 5 adopted, effective July 1, 1996. (1996, Act 39). Revised Art. 5 applies only to letters of credit issued on or after July 1, 1996. Letters of credit issued prior to July 1, 1996, are governed by statutes in force at time of issuance, including repealed Art. 5. (1996, Act 39, § 11). Conforming amendments (for revised Art. 1) adopted, effective July 2, 2004. (HRS 490:5-103).

Article 6.

Repealed. (1998, Act 209, § 3).

Article 7.

§ 7-209: 1966 Official Amendment not enacted. Revised Art. 7 adopted, including procedures for electronic forms of title, effective July 2, 2004. (HRS 490:7-101 to 702).

Article 8.

Adopts 1994 revisions proposed by National Conference of Commissioners on Uniform State Laws. (1997, Act 33, § 2).

Article 9.

Effective July 1, 2001, adopts Revised Article 9 proposed by National Conference of Commissioners on Uniform State Laws. HRS 9-109: Exemptions from Article for bond issuances and other government transactions, and workers' compensation and structured settlement payments added. Conforming amendments (for revised Art. 7) adopted, effective July 2, 2004. (HRS 490:9-102 to 601).

Article 10.

Adopted effective Jan. 1, 1967.

Article 11.

Adopted effective July 1, 1979.

1972 Official Amendments.

Adopted.

1973 Official Amendment.

Not adopted.

1977 Official Amendments.

Adopted.

Uniform Fiduciaries Act adopted in 1945. (HRS c. 556). § 189-3, Revised Laws of Hawaii 1955, pertaining to Uniform Fiduciaries Act repealed by adoption of Uniform Commercial Code. (HRS 490:10-102[1]).

Filing Fees.

See category 10 Documents and Records, topic 10.04 Records, subhead Filing Under Uniform Commercial Code.

Forms.

See Part III, Uniform and Model Acts, Commercial Code Amendments for National

Forms.

See also topics: Banks and Banking, Bills and Notes, Brokers, Carriers, Contracts, Factors, Frauds, Statute of, Sales, Securities, Warehousemen; categories Business Organizations, topic Corporations; Civil Actions and Procedure, topic Limitation of Actions; Debtor and Creditor, topics Assignments, Fraudulent Sales and Conveyances, Liens, Pledges; Documents and Records, topics Records, Seals; Mortgages, topic Chattel Mortgages.

3.10 CONDITIONAL SALES:

See topic 3.23 Sales.

3.11 CONSIGNMENTS:

Uniform Commercial Code adopted. See topic 3.09 Commercial Code, Arts. 7 and 9.

3.12 CONSUMER PROTECTION:

Office of Consumer Protection created to coordinate consumer laws, promote consumer education, recommend new legislation, promulgate rules defining unfair or deceptive trade practices, investigate violations of consumer laws and rules, and bring civil actions against violators. (HRS 487-5).

Agricultural Products.

Seal of Quality Program established. (HRS 148-61).

Automobiles.

Dealers and salesmen licensed and practices regulated. (HRS c. 437). Motor vehicle repairmen regulated. (HRS c. 437B). Used motor vehicle sales regulated. (HRS c. 481J). Vehicle protection product warrantors regulated. (HRS c. 481R).

Collection agencies must be registered (HRS 443B-3), unless they qualify as exempt out-of-state collection agencies (HRS 443B-3.5), and are prohibited from using harassing, abusive, threatening, or coercive collection techniques (HRS 443B-15, 16). Collecting without registration and furnishing of deceptive forms that could create belief in debtor that person who furnished forms is collection agency is prohibited. (HRS c. 443B). Collection agency disclosure requirements consistent with federal standards. (HRS 443B-18).

Consumer Credit Reporting Agencies.

Regulated in HRS 489P-3.

Credit Cards.

Regulated in HRS 478-11.5.

Credit Sales.

Assignment shall not cut off any rights of action or defense arising out of credit sale which buyer has against seller. Any assignee shall be subject to buyer’s defenses as if assignee is seller. (HRS 476-19).

Credit Service (Repair) Organizations.

Regulated in HRS 481B-12.

Discrimination in Public Accommodations.

Regulated in HRS c. 489.

Door-to-Door Sales.

Regulated in HRS c. 481C. Buyer may cancel any door-to-door sale during period of three business days from date of sale; failure to inform buyer of right of cancellation, at time of sale, or failure to supply buyer with prescribed “Notice of Cancellation” form (see topic 3.23 Sales), constitutes deceptive trade practice and subjects seller to fine of at least $500 and not more than $2,500. (HRS 481C-2, HRS 481C-4). Other deceptive trade practices in door-to-door sales (defined in HRS 481C-2) are subject to same fine. Door-to-door sales of hearing aids prohibited. (HRS 451A-14).

Enforcement.

Attorney General has jurisdiction to enforce criminal provisions and Attorney General and Director of Office have power to enforce civil provisions. Director may secure restitution to complainants. (HRS 480-20).

Funeral and Internment Services.

Regulated in HRS c. 441.

Gasoline Dealers.

Regulated in HRS c. 486H. Director of Department of Agriculture must promulgate rules requiring that if gasoline is sold by liter then price per U.S. gallon must also be posted. (HRS 486-52.5). Wholesale and retail gasoline price caps suspended. (2006, Act 78).

Gasoline Distributors.

Distributors must report to Department of Business, Economic Development and Tourism, distribution and availability of gasoline not containing ethanol. (2007, Act 130).

Gift Certificates.

Regulated in HRS 481B-13. Issuer must honor gift certificate for at least two years from date of issuance. Expiration date, if any, must be printed on face of certificate.

Going Out of Business Sales.

Regulated in HRS c. 481D.

Hawaii Made Products.

No product may be labeled “made in Hawaii” or use phrase “made in Hawaii” as advertising or media tool unless 51% of its wholesale value has been added by manufacture, assembly, or fabrication within state. (HRS 486-119). No perishable consumer commodity may be labeled “made in Hawaii” or “produced in Hawaii” or “processed in Hawaii” unless manufactured, processed or produced within state. (HRS 486-119). No product or jewelry made from seashells to use “Niihau” in description unless product is 100% comprised of harvested seashells from island of Niihau and manufactured entirely within State. Items consisting of at least 80% Niihau shells may be described, labeled, or identified using term “contains” followed by nearest whole number representing percentage of Niihau shells contained, followed by term “% Niihau shells”. (HRS 486-118.5). No milk product shall be labeled “Island Fresh” unless 90% produced in Hawaii. If 90% produced in Hawaii, it must be so labeled. (HRS 486-120). Labeling and packaging requirements including, but not limited to, Kona coffee, Hawaii-produced honey and Hawaii-grown macadamia nuts restricted by HRS 486-101 to 123.

Hotels.

Regulated in HRS c. 486K.

Health Clubs.

Regulated in HRS c. 486N. Every health club contract may be cancelled by buyer within five business days after date buyer signs contract. (HRS 486N-6). No contract shall exceed 36 months. No contract shall contain automatic renewal provision. (HRS 486N-8). Payment of contracts in excess of one year shall be by installment. (HRS 486N-8.5).

Inter-Island Air Carriers.

HRS c. 261 preempted by Federal Airline Deregulation Act of 1978. Air Carrier Commission established under new chapter to assist in regulation of interisland air carriers. (2008 SS, Act 1).

Koa Wood.

Items represented to be “koa” wood must contain acacia koa wood. (HRS 486-119.5).

Labeling and Packaging.

All labels of consumer goods must conform to Federal Fair Packaging and Labeling Act. (HRS 328-19.1). No commodity may be packaged to conceal quantity. (HRS 486-113). Nor may words that exaggerate quantity such as “giant” or “jumbo” be used. (HRS 486-111). Agricultural products must be packaged so that unexposed portion as good as exposed. (HRS 147-5).

Landlord-tenant relationship covered by Residential Landlord-Tenant Code. (HRS c. 521). Security deposits must be returned, or itemized notice of retention furnished, within 14 days after termination of rental agreement. Treble damages may be awarded for wrongful and willful retention of security deposit. (HRS 521-44).

Lemon Law.

Manufacturer or authorized dealer of motor vehicles must make any repairs as are necessary to conform vehicle to express warranties, notwithstanding fact that such repairs are made after expiration of term of such warranty. If vehicle cannot be made to conform to such warranties, manufacturer must replace vehicle or refund purchase price. Consumer must report defects, in writing, within term of express warranty, two years of delivery, or first 24,000 miles of operation, whichever occurs first. Law applies to “demonstrator” models but not to mopeds, motorcycles, scooters, or off-road vehicles. (HRS 481I-2, 3). Remedies for failure to correct defects or replacement of vehicle or refund of purchase price less reasonable offset for consumer’s use of vehicle. (HRS 481I-3).

Mail order buying clubs may not send goods without first providing an order form. Goods sent other than as specifically ordered by purchaser deemed unconditional gifts. (HRS 481B-1.5).

Money Transmitters.

Regulated in HRS c. 489D.

Motor Vehicle Rental Industry.

Regulated in HRS c. 437D. Each rental agreement shall disclose, in plain language, that collision damage waiver is optional and that lessee’s personal insurance may provide sufficient coverage. (HRS 437D-5). Lessors of rented vehicles are prohibited from paying or receiving commissions for selling collision damage waivers. (HRS 437D-8.5). Rental motor vehicles must display decal informing lessee of seat belt, child passenger restraint, and drunk driving laws.

(HRS 437D-13). Taxes and license and registration fees may be passed on to lessee. (HRS 437D-8.4).

Plain language required in all written agreements entered into on or after July 1, 1981, for: (1) Consumer transactions where sales agreement is for personal, family or household purposes in amount less than $25,000 or (2) residential lease agreements for term not exceeding five years. Creditor, seller or lessor in violation is liable for actual damages sustained by suing party, plus $50 penalty. Liability limited to $10,000 in class action. Right to sue in class action suspended on any written agreement executed before July 1, 1986. (HRS 487A-1).

Exempted from plain language requirements are: (1) Wills or trusts other than land trusts created under Land Trust Act, (2) any document, not itself written agreement subject to this law, by virtue of document being referred to or incorporated within written agreement subject to this chapter, provided that document has independent purpose, (3) legal description of real property, or (4) words or phrases or form of agreement required, authorized, or approved by state or federal law, rule, regulation, governmental agency, or instrumentality. (HRS 487A-1).

Precious Metals.

Sale, manufacture, importation, or exportation of falsely marked gold or silver articles is prohibited. (HRS 482D-2).

Promotions by “endless chain” schemes prohibited. (HRS 480-3.3).

Retail Installment Sales.

Regulated by HRS c. 476. Form and content of every credit sale contract specified in HRS 476-3 and HRS 476-4. Buyer has right to refinance “balloon payment” without penalty, with terms of such refinancing no less favorable to buyer than terms of original sale, if principal balance of original loan less than $10,000. (HRS 476-5). Buyer who has not received good ordered has right to cancel contract and receive immediate refund until copy of signed contract delivered to buyer (HRS 476-7), except in case of catalog mail order sale (HRS 476-11). Provision in contract by which seller may arbitrarily accelerate payments unenforceable. (HRS 476-14). Finance charges regulated by HRS 476-28. Advertising credit sales regulated by HRS 476-29.

Telemarketing.

Regulated by HRS c. 481P.

Ticket Brokers.

Fee charged for credit card purchase of tickets must first be disclosed. Ticket service fees charged for cancelled performance must be refunded. (HRS 481B-5.5).

Travel Agencies.

Regulated in HRS c. 468L. Registration required. (HRS 468L-2). Must maintain records for at least two years. (HRS 468L-5.5). Violation of law or rule relating to client trust account is prima facie fraud. (HRS 486L-5.6). Fine for violations up to $1,000 for each violation. (HRS 468L-5.6). Consumer rights specified. (HRS 468L-7). Prohibited Acts specified. (HRS 468L-7.5).

Unsolicited Goods.

Sending unsolicited goods prohibited, and goods so sent deemed unconditional gifts. (HRS 481B-1).

Usury.

See topic 3.19 Interest.

Uniform Commercial Code adopted (HRS c. 490); see topic 3.09 Commercial Code.

Employment Agencies.

Employment agency must obtain license and must be bonded. (HRS c. 373).

Uniform Deceptive Trade Practices Act adopted. (HRS c. 481A). See topic 3.23 Sales.

3.13 CONTRACTS:

Married person may make contracts, oral and written, sealed and unsealed, with his or her spouse, or any other person, in same manner as if he or she were sole. (HRS 572-22).

Common law applies.

See also topic 3.12 Consumer Protection; categories 10 Documents and Records, topic Seals; Family, topic Infants.

Uniform Commercial Code adopted. (HRS c. 490). See topic 3.09 Commercial Code.

3.14 FACTORS:

Goods or effects of a defendant in the hands of agent or factor may be attached by garnishment proceedings. No other statutory provision.

License Requirements.

Goods or effects if defendant in hands of agent or factor may be attached by garnishment proceedings. No other statutory provisions.

Uniform Commercial Code adopted. (HRS c. 490). See topic 3.09 Commercial Code.

3.15 FRANCHISES:

Seller of franchise must present prospective franchisee with offering circular at least seven days prior to sale of franchise as well as comply with other notice and related provisions. (HRS 482E-3). See also generally Franchise Investment Law. (HRS c. 482E).

$250 fee for filing or amending offering circular. (HRS 482E-11). Circular must be renewed annually. (HRS 482E-3[d]). Fee for renewal: $250. (HRS 482E-11).

3.16 FRAUDS, STATUTE OF:

No action shall be brought: (1) To charge personal representative upon special promise to answer damages out of his own estate; (2) to charge any person upon any special promise to answer for debt, default or misdoings of another; (3) to charge any person upon any agreement made in consideration of marriage; (4) upon any contract for sale of lands or any interest therein; (5) upon any agreement not to be performed within one year; (6) to charge any person on any agreement authorizing or employing agent to purchase or sell real estate for compensation or commission; (7) to charge estate of deceased person upon agreement which by its terms is not to be performed during lifetime of promisor, or, in case of agreements made prior to July 1, 1977, agreement to devise or bequeath any property, or to make provision for person by will; or (8) to charge financial institution upon agreement to lend money or extend credit of more than $50,000, unless promise, contract or agreement, or some memorandum thereof shall be in writing, and signed by person to be charged, or by some person thereunto by him in writing lawfully authorized. (HRS 656-1). Consideration need not be in writing, but may be proved by any other legal evidence. (HRS 656-2). No action may be brought for representations as to another's credit or character unless such representations are in writing and signed by party to be charged or by someone authorized to sign. (HRS 656-3).

Contracts of Sale.

Notwithstanding statute, contract for sale of land executed by agent of owner in his own name as vendor and by vendee in person may be enforced by specific performance by owner against vendee. (34 Haw. 651).

Part performance of an oral contract to convey real property has been held enforceable notwithstanding statute of frauds. (4 Haw. 593). Where plaintiff's reliance was such that injustice could only be avoided by enforcement of oral contract, contract enforceable notwithstanding statute of frauds. (66 Haw. 451, 666 P.2d 582). Oral contract to make will and its part performance must be established by clear and convincing evidence to take contract out of ambit of statute of frauds. (58 Haw. 4, 563 P.2d 391).

Uniform Commercial Code adopted. See topic 3.09 Commercial Code.

3.17 INFORMATION TECHNOLOGY, INTERNET AND NEW MEDIA:

Regulation of E-Commerce.

Private party may sue those who register, traffic in, or use domain name identical or confusingly similar to distinctive mark registered and used in Hawaii, or any person who in bad faith registers domain name which consists of or is substantially and confusingly similar to name of living person without consent. (HRS 481B-22). Persons liable are domain name registrant or registrant's authorized licensee. (HRS 481B-22). Burden of proof on claimant to prove bad faith intent and factors to consider, among others, include, without limitation: (1) defendant's prior use of domain name in connection with bona fide offering of goods or services; (2) defendant's bona fide noncommercial or fair use of mark in site accessible under domain name; (3) intent to divert users from mark's online location to site accessible under domain name and likelihood of confusion of source, sponsorship, affiliation or endorsement of site; (4) defendant's willingness to assign, transfer, or sell domain name for financial gain without having used domain name in bona fide offering of goods or services, or prior conduct indicating pattern of such conduct; (5) acquisition of other domain names defendant knew were identical or confusingly similar to other distinctive marks or names of living persons; and (6) attempt to obtain consent from rightful owner to register, traffic in, or use domain name. (HRS 481B-23). Good faith is exception. (HRS 481B-2). Penalties may include injunctive relief, equitable relief, compensatory damages, punitive damages, costs and reasonable attorney's fees. (HRS c. 481B-25). Claimant may elect in lieu of compensatory and punitive damages, statutory damages of at least $1,000 or threefold actual damages, whichever is greater, plus reasonable attorney's fees and costs. (HRS c. 481 B-25).

Regulation of Computer Crimes.

Amends Offenses Against Property Rights (HRS c. 708) to include crimes involving computers (HRS 708-890 to 895.7). Computer crimes include computer fraud, computer damage, use of computer in other crimes and unauthorized computer access. (HRS 708-891 to 893). Computer fraud includes unauthorized use of computer to defraud another out of property valued at more than $300 within one year's time, or unauthorized use of computer to obtain information. (HRS 708-891). Computer damages in first degree is defined as: (a) knowingly transmitting program, information, code or command which causes unauthorized damage to computer, computer system or computer network; or (b) knowingly accessing computer, computer system or computer network which causes unauthorized damages. (HRS 708-892). Damages must be in amount of at least $5,000, physical injury to person, threat to public health or safety, or impairment of administration of justice. (HRS 708-892). Use of computer in commission of another crime involves intentionally or knowingly using computer to commit following crimes: (a) custodial interference, (b) sexual assault, (c) promote child abuse, and (d) promote child pornography. (HRS 708-893). Unauthorized computer access includes intentionally and knowingly accessing computer, computer system or computer network without authorization and obtaining information used for financial gain or in furtherance of another crime. (HRS 708-895.5; 708-895.6). Property obtained or used in relating to computer crime may be forfeited subject to requirements of HRS c. 712A. (HRS 708-894). Statute of limitations for felony computer crimes is five years. (HRS 701-108). Extortion statute includes threats to computer, computer system or computer network. (HRS 707-764).

3.18 INTEREST:

If no express written contract fixing different rate of interest, legal rate is 10% per year for following non-state obligations: (a) Money due on bonds, bills, promissory notes, or other instruments in writing, or money lent, after it becomes due; (b) money due on settlement of accounts, from day on which balance is ascertained; (c) money received to use of another, from date of demand made; and (d) money upon open account after 60 days from date of last item or transaction. (HRS 478-2). For state obligations, interest is allowed at prime rate each quarter up to 10% per year. (HRS 478-2).

Judgments.

Interest at 10% a year allowed on any judgment in civil suit. (HRS 478-3).

Credit Unions.

State chartered credit unions may charge on loans interest rate not exceeding 18% per year on unpaid balance of loan. State commissioner of financial institutions may raise interest rate ceiling to exceed 18% per year for periods restricted to 18 months, when determined necessary for safety and soundness of credit unions. (HRS 412:10-403).

Financial services loan companies may collect advance on loans at maximum rate of advance interest of 14% a year for first 18 months, plus 10½% for next 12 months, plus 7% a year for next 12 months, and 4% a year for last six months. (HRS 412:9-302[b][1]).

Maximum term of precomputed loan where preceding rates are charged will be 48 months. If term of precomputed loan exceeds 48 months, financial services loan company may charge, contract for, and receive “finance charge” in any form or forms at “annual percentage rate” not to exceed 24% a year, together with any other charges that are excluded or excludable from determination of finance charge under Truth in Lending Act. (HRS 412:9-302[b][1]).

As alternative to advance interest, financial services loan company may receive simple interest computed at rate not exceeding 24% a year on principal balance remaining unpaid under contract whether interest rate under contract is fixed or variable rate. (HRS 412:9-302[b][2]). Upon maturity of loan, rate of interest on unpaid principal balance of loan shall be 24% a year, unless lesser rate is specified in contract as after-maturity interest rate. (HRS 412:9-302[c]).

If greater rate of interest than permitted by HRS c. 412 is contracted for, contract not void. If interest has been paid, judgment on such contract will be for principal less interest paid. (HRS 412:9-303).

Late charges on consumer loans cannot exceed 5% of delinquent installment. Late charges cannot be assessed on consumer loan after acceleration of maturity of contract or be collected more than once for same delinquent installment. (HRS 412:9-304[1]).

Insurance companies may not charge interest in excess of 8% per annum on life insurance policy loans. (HRS 431:10D-102).

Usury.

Rate of 1% per month or 12% per annum permitted with respect to any "consumer credit" transaction (credit extended to natural person primarily for personal, family, or household purpose, in which principal amount does not exceed $250,000 or is secured by borrower's principal residence) except credit card agreement, and any "home business loan" (credit transaction in which principal amount does not exceed $250,000, which is not consumer credit transaction, and which is secured by mortgagor's principal dwelling), unless creditor is financial institution regulated under HRS c. 412 (other than trust company or credit union), in which case rate of 2% per month or 24% per annum permitted. Rate of 1½% per month or 18% per annum permitted with respect to credit card agreement. (HRS 487-1, 4). Compound interest prohibited on consumer credit transactions and on credit card agreements. (HRS 478-7). Usury laws applicable only to consumer credit transactions, home business loans, and credit card agreements. (HRS 478-5). Mortgages secured by FHA, VA, Small Business Act, or Small Business Investment Act are exempt. (HRS 478-8[a]). Also exempt are indebtedness secured by first mortgage lien on real property, consumer credit agreements of sale made after May 30, 1980, indebtedness secured by purchase-money junior mortgage lien on real property incurred after June 18, 1982, any transaction for sale of goods or services by seller in business of selling such goods or services, if transaction is subject to HRS c. 476 or maximum interest rate does not exceed 18% per year, and loans made by employee benefit plan. (HRS 478-8[b], [c]).

Upon extension at maturity or renegotiation of any consumer credit agreement of sale made after July 1, 1985, maximum rate of interest charged thereafter shall not be more than greater rate of interest payable under agreement of sale immediately prior to such maturity or renegotiation or four percentage points above highest weekly average yield on U.S. Treasury Securities adjusted to constant maturity of three years. (HRS 478-8).

Penalty for violation of usury laws: creditor shall recover principal only; debtor shall recover costs; creditor fined not more than $250, or imprisoned not more than one year, or both. (HRS 478-5, 6).

(Title V, Part A, § 501[a][1] and Part B of Depository Institutions Deregulation and Monetary Control Act of 1980) declared inapplicable in Hawaii. (HRS 478-9).

3.19 LICENSES, BUSINESS AND PROFESSIONAL:

About 50 occupations are licensed, with varying fees. (HRS c. 436B to 471). Any person engaging in business regulated under Professional and Vocational Licensing Act (HRS c. 436B) without necessary license may receive citation and be subject to civil and criminal sanctions (HRS 436B-27).

Travel industry is heavily regulated. (HRS c. 468L).

Even after granting license, state may exercise police powers and place additional regulations on license holder. (82 Haw. 329, 922 P.2d 942).

Liquor Licenses.

Granting, renewal or transfer of liquor licenses is prohibited unless applicant or both parties to transfer certify that they owe no delinquent taxes, penalties or interest. (HRS 281-45). Applicants for certain classes of liquor licenses must present to liquor commission proof of liquor liability insurance coverage in amount of $1,000,000. (HRS 281-45). Licensing authority may allow licensee to place license on inactive status. (HRS 436 B-13.3).

Counties may restrict or deny liquor licenses to establishments within 500 ft. of school or playground and must deny licenses to establishments within 500 ft. of school or playground if 40% of registered voters or owners and lessees, within 500 ft. of premises for which license is asked, protest grant of license. (HRS 281-39.5). Liquor commission must deny licenses if majority of registered voters or owners and lessees, within 500 ft. of premises for which license is asked, protest grant of license. (HRS 281-59).

Licenses and restrictions for brewpubs and tour and cruise vessels. (HRS 281-31).

Licenses and restrictions for condominium hotel. (HRS 281-1, HRS 281-81, HRS 281-39, HRS 281-39.5, HRS 281-57).

Transfer of licenses. (HRS 281-41).

Public hearing notices for liquor license applications must be sent to at least two-thirds of residential units located within 500 feet or three-fourths of residential units located within 100 feet of prospective licensee. (HRS 281-57).

Direct wine shipper permit allows wineries to ship wine to Hawaii residents. (2006, Act 227).

Motor Vehicle Licenses.

See category 23 Transportation, topic 23.01 Motor Vehicles.

Collection Agencies.

Governed by HRS c. 443B. (HRS c. 443A repealed). Each collection agency must file and maintain with Director of Department of Commerce and Consumer Affairs ("Director") $25,000 bond for first office and $15,000 for each additional office. Bond must be conditioned that collection agency must faithfully account and pay within 30 days after calendar month net proceeds due on all collections made during calendar month. Bond must also be conditioned that collection agency will comply with HRS c. 443B and any other applicable laws. (HRS 443B-5). HRS c. 443B targeted towards those who collect claims or money due on accounts or other forms of indebtedness, rather than only "debts". (Flores v. Rawlings Co., LLC., 117 Hawaii 153, 160, 177 P.3d 341, 347 [Haw. 2008]).

3.20 MONOPOLIES, RESTRAINT OF TRADE AND COMPETITION:

Federal statutes substantially incorporated into Hawaii law: Sherman Act § 1 (HRS 480-4[a]), § 2 (HRS 480-9); Clayton Act § 3 (HRS 480-5), § 7 (HRS 480-7), §§ 8, 10 (HRS 480-8); FTC Act § 5(a)(1) (HRS 480-2). Construction of statutes according to judicial interpretation of similar federal statutes. (HRS 480-3). Lawsuits by indirect purchasers allowed. (HRS 480-3). Statutes construed liberally. (80 Haw. 54; 905 P.2d 29). Protection provided by antitrust statutes is intended for individual consumers rather than businesses. (HRS 480-2). Contracts in restraint of trade, price fixing of commodities, and monopolies are prohibited. (HRS 480-4). Exclusive dealing, tying agreements, mergers, acquisitions, and holdings of stock, interest or membership of other persons illegal if they may substantially lessen competition or tend to create monopoly. (HRS 480-5, 7). No person may refuse to deal with another to induce acts prohibited by HRS c. 480. (HRS 480-6). No person may be director of two or more competing entities if elimination of competition by agreement between them would violate HRS c. 480. (HRS 480-8[a]). No person may be director of two or more entities if any has net worth of more than $100,000 or if all have total net worth of more than $300,000, where effect of merger might substantially lessen competition or tend to create monopoly. (HRS 480-8[b]). Labor organizations are exempt from HRS c. 480 under HRS 480-10. Certain cooperative organizations, insurance transactions and approved mergers of federally regulated companies are also exempt from HRS c. 480. (HRS 480-11).

Remedies.

State and private party may sue for injunctive relief (HRS 480-13, 15), or for treble damages (HRS 480-13 to 14). Awards in private actions are greater of $1,000 or treble damages, attorneys fees, and costs. (HRS 480-13). Attorney general has broad investigative powers. (HRS 480-18). Certain violations are felonies; fine up to $100,000 and up to three years in prison or both for individuals; fine up to $1,000,000 for firms. (HRS 480-16). Violations of cease and desist orders punishable by maximum fine of $10,000. (HRS 480-15.1).

Unfair Trade Practices.

FTC Act § 5(a)(1) enacted as HRS 480-2 (violation can bring private suits for treble damages). Practice is "unfair" when it is immoral, unethical, oppressive, unscrupulous, or substantially injurious to consumers. (84 Haw. 162, 931 P.2d 604). Unlawful for any person, with intent to destroy competition of any regular dealer in commodity, to discriminate between different sections or communities, by selling such commodity at lower rate in one section or community than in another. Schemes of special rebates, collateral contracts or devices whereby discrimination is effected are forbidden. (HRS 481-1). Sales at less than cost are forbidden, except: (1) Closing out sales; (2) sales of damaged goods after public notice; (3) sales by officer of court; (4) sales in endeavor in good faith to meet legal prices of competitor in same trade area; (5) sales by government agency, post exchange or ships' service store. (HRS 481-3, 6). Injunctive relief may be obtained and treble damages may be recovered. (HRS 481-10). Civil penalties under HRS 480-2 up to $10,000 per violation. Each day counted as separate violation and penalties hereunder cumulative to all other remedies or penalties. (HRS 480-3.1). Class actions by private persons permitted. (HRS 480-13.3).

Contracts in violation of HRS c. 480 and HRS 481-1 to HRS 481-7 are void. (HRS 480-12; HRS 481-9).

Revised Uniform Deceptive Trade Practices Act adopted. (HRS c. 481A). See Part III of this volume; see also topic 3.12 Consumer Protection.

Resale Price Agreements.

See category 17 Intellectual Property, topic 17.01 Trademarks and Tradenames.

3.21 NEGOTIABLE INSTRUMENTS:

See topic 3.02 Bills and Notes.

3.22 RESTRAINT OF TRADE:

See topic 3.20 Monopolies, 3.22 Restraint of Trade and Competition.

3.23 SALES:

Uniform Vendor and Purchaser Risk Act has been adopted. (HRS c. 508).

Uniform Commercial Code adopted. (HRS c. 490). See topic 3.09 Commercial Code.

Conditional Sales.

Uniform Act was repealed and new provisions entitled Retail Installment Sales Act were adopted, effective Jan. 1, 1962, name later changed to Credit Sales Act in 1984. (HRS c. 476). Applies to any agreement for payment of purchase price of goods other than primarily for business, commercial or agricultural purpose, in four or more installments, not including down payment. (HRS 476-1). Every such contract must be in writing with certain information, signed by parties, and copy must be immediately delivered to buyer. (HRS 476-3, 7). Credit seller in credit sale contract which provides for extension of closed credit primarily for personal, family, or household purposes is required to disclose following: amount financed, which is principal less any prepaid finance charge; written itemization of amount financed or statement on buyer's right to receive such written itemization together with space for buyer to indicate if such is desired; finance charge; total payments; and total sale price. (HRS 476-4). Prior to delivery of such copy or delivery of goods, buyer may cancel contract. (HRS 476-7). Contract is unenforceable if incomplete in any necessary respect when signed. When contract is completed after signing, it is enforceable. (HRS 476-10). If sale is "door-to-door" buyer must be supplied with prescribed "Notice of Cancellation" form which buyer may use to cancel sale within three business days of date contract was signed. (HRS 481C-2). Failure to furnish completed form to buyer in door-to-door sale constitutes deceptive trade practice (HRS 481C-2) and subjects seller to fine of at least $500 and not more than $2,500. (HRS 481C-4). Other deceptive trade practices in door-to-door sales (defined HRS 481C-2) are subject to same fine. Insurance charges and attorney's or collector's charges are regulated. Delinquency and collection charge may not exceed $50 or 5% of each delinquent installment plus certain costs and fees. (HRS 476-9). Where additional sales have been consolidated into one contract, payments are to be applied to purchases first made, and security interests terminate as each purchase becomes paid in full. (HRS 476-24). If any balloon payment for personal purchases is more than two times average of earlier payments, buyer has right to refinance without penalty, and if principal balance of original loan is less than $10,000, refinancing terms must be no less favorable to buyer than original terms except that: (1) Payment schedule can be modified to amortize total amount refinanced over period of refinancing, which cannot be less than original term; and (2) no scheduled payment can be greater than amount of average scheduled payment under original contract. (HRS 476-5). Provisions are made for deferral payments and interest. (HRS 476-6). Catalog mail order sales regulated in HRS 476-11. Body of contract of credit sale must be at least 8 point in size and headings must be boldface and at least 10 point in size. Contract must contain title "CREDIT SALE CONTRACT" and term substantially similar to: "NOTICE TO THE BUYER: Do not sign this contract before you read it. When you sign this contract, you are entitled to a copy of it that is filled in, in every necessary respect. You should keep it. This contract is covered by Hawaii's credit sale law, and you have the rights of a buyer under that law. You also may have rights under other state and federal laws." (HRS 476-3). Buyer's rights may not be cut off by assignment. (HRS 476-19). Casual sales are excluded from coverage. (HRS 476-1).

Consumer Protection.

See topic 3.12 Consumer Protection.

Bulk Sales.

See topic 3.09 Commercial Code.

Product Liability.

Borrower from buyer may recover from retail seller (198 F.Supp. 78 which discusses Hawaii law on privity. Aff'd, 304 F.2d 149). Manufacturer liable for dangerous defective product. (52 Haw. 71, 470 P.2d 240). Discussions of strict products liability, proximate cause, precautions and safeguards, and occasional seller exception. (66 Haw. 237, 659 P.2d 734; 65 Haw. 447; 654 P.2d 343).

Retail Credit Sales.

See subhead Conditional Sales, supra.

Sales of franchises must be reported and are substantially regulated. (HRS 482E-1 to 12).

Sales of Motor Vehicles.

See category 23 Transportation, topic 23.01 Motor Vehicles.

Sale of Surplus Goods.

Governed by HRS c. 481, Part II.

Contracts of Sales.

See topics 3.16 Frauds, Statute of, 3.09 Commercial Code, 3.12 Consumer Protection.

International Sale of Goods.

See Part V this volume, Selected Conventions.

3.24 SECURITIES:

Uniform Securities Act (modified) HRS c. 485 repealed effective July 1, 2008. 2002 Uniform Securities Act adopted effective July 1, 2008. (HRS c. 485A).

Supervision.

Administration of HRS c. 485 is vested in Commissioner of Securities (“Commissioner”) to be appointed by Director of Commerce and Consumer Affairs (“Director”). Commissioner shall hold office at will of Director. (HRS 485A-601) Commissioner may adopt, amend, or repeal rules necessary to carry out purposes of this chapter. (HRS 485A-601).

Regulatory Powers of Supervising Authority.

Commissioner has broad powers similar to those set forth in Uniform Securities Act, hereafter “USA”, including power to: (1) Issue stop orders against any registration under certain circumstances (HRS 485A-305); (2) refuse, revoke or suspend registration of any applicant or registrant or limit or impose conditions on securities activities applicant or registrant may conduct under certain circumstances (HRS 485A-412); (3) conduct public or private investigations within or outside of Hawaii; (4) require or permit person to testify, file statement, or produce record under oath; (5) administer oaths and affirmations, subpoena witnesses, seek compulsion of attendance, take evidence, require filing of statements, and require production of any records that commissioner considers relevant or material to investigation (HRS 485A-602). Commissioner’s powers expanded to: (1) Issue cease and desist order to enforce compliance with HRS c. 485A; (2) bring suit for injunctive relief; (3) impose civil penalty up to $50,000 for single violation. (HRS 485A-603, 604).

Prerequisites to Sales or Offerings.

It is unlawful for any person to sell or offer to sell any security except of a class exempt under HRS 485A201 to 203 or unless sold or unless it is federal covered security, unless such security has been registered by notification or qualification in accordance with HRS c. 485A. (HRS 485A-301).

Securities to Which Act Applicable.

“Security” means any note, stock, treasury stock, bond, debenture, evidence of indebtedness, certificate of interest or participation in profit-sharing agreement, collateral-trust certificate, preorganization certificate or subscription, transferable share, investment contract, variable annuity contract, voting trust certificate, certificate of deposit for security, certificate of interest in oil, gas, or mining title or lease, option on commodity futures contracts or, in general, any interest or instrument commonly known as “security”, or any certificate of interest or participation in, temporary or interim certificate for, guarantee of, or warrant or right to subscribe to or purchase, any of foregoing. “Security” does not include any insurance or endowment policy or fixed annuity contract. (HRS 485A-102). Stock “characterization” test applies when determining whether instrument labeled “stock” is considered security. (116 Hawaii 187, 199, 172 P.3d. 499, 511).

Exempt Securities.

Exempt Securities § 201 of USA adopted via HRS 485A-201 with following significant differences: (1)HRS 485A-201(3) includes security guaranteed by any bank, savings institution or trust company organized and supervised under laws of any state or territory or any investment certificate issued by financial services loan company duly licensed under financial services loan law of State; any savings and loan association or any building and loan or similar association organized under laws of any state or territory and authorized to do business in Hawaii; any banking institution organized under laws of United States; (2) HRS 485A-201(6) includes security listed or approved for listing on any exchange registered or exempted under Securities Exchange Act of 1934 or on another securities market specified by rule under HRS 485A; (3)HRS 485A-201(8) excludes any cooperative association membership stock, membership certificates or shares, or membership capital, pursuant to section 421C-36 and HRS c. 421 and 421C; and (4) HRS 485A-201(10) exempts any securities for which registration statement has been filed under Securities Act of 1933; provided that no sale be made until registration statement has become effective.

Exempt Transactions.

§ 202 of USA adopted via HRS 485A-202. Significant variations includes: (1) Transaction in security in exchange for one or more bona fide outstanding securities, claims, or property interests, or partly in such exchange and partly for cash, not exempted under HRS 485A-202 even if terms and conditions of issuance and exchange or delivery and exchange and fairness of terms and conditions have been approved by commissioner; (2) HRS 485A-202(13) exempts any transaction pursuant to sale or offer to sell securities of issuer, if issuer reasonably believes that all purchasers are purchasing for investment purposes and not with view to, or for sales in connection with, distribution of security; (3) HRS 485A exempts transaction involving offer or sale of security by issuer to accredited investor that meets certain requirements under HRS 485A-202(15). Furthermore, three more transactions are exempt under HRS 485A. These include: (1) Any offer or sale by or through real estate broker or salesperson licensed in Hawaii, of security issued on or after July 1, 1961, by corporation organized in Hawaii, holder of which is entitled solely by reason of holder’s ownership thereof, to occupy for dwelling purposes house or apartment in building, owned or leased by such corporation; provided that issuer of security must apply for exemption to commissioner on such form and containing such information as commissioner may prescribe; (2) any offer or sale by or through real estate broker or salesperson licensed in Hawaii of apartment in condominium project, and rental management contract relating to apartment, including interest in partnership formed for purpose of managing rental of apartments if rental management contract or interest in partnership is offered at same time as apartment is offered; and (3) any transaction not involving public offering within meaning of Section 4(2) of Securities Act of 1933 (15 U.S.C. 77d), but not including any transaction specified in rules and regulations thereunder.

Uniform Transfer-On-Death Security Registration Act provides that individuals may designate non-testamentary beneficiary for transfer of registered securities. (HRS c. 539).

Registration of Offerers.

Offerers must be registered in Hawaii. (See category 2 Business Organizations, topic 2.03 Corporations.)

Registration of Securities.

Securities may be registered by notification or by qualification. Manifold differences between HRS c. 485 and USA. Hawaii statutes should be consulted. See: HRS 485A-304 as to general registration requirements, HRS 485A-302 as to registration by notification, and HRS 485A-303 as to registration by qualification. No registration by coordination discussed.

Registration of Dealers.

Broker-dealer must meet registration requirement set forth in HRS 485A-401. Investment adviser must meet registration requirement set forth in HRS 485A-403. Investment adviser representative must meet registration requirement set forth in HRS 485A-404.

Brokers and Agents.

Agent must meet registration requirement set forth in HRS 485A-402.

Liabilities.

Violator of any provision of HRS c. 485A shall be guilty of felony and shall forfeit to state any property acquired or enterprise operated in violation of HRS c. 485A. (HRS 485A-508). Violators of HRS c. 485A are also subject to civil penalties. (HRS 485A-509).

Tender Offers.

See category 2 Business Organizations, topic 2.03 Corporations, subhead Tender Offers.

Subdivision Offerings.

Uniform Land Sales Practices Act adopted. (HRS c. 484).

Franchising.

See topic 3.15 Franchises.

Pyramid Sales, Etc.

Operation of endless chain scheme unlawful (HRS 480-3.3), and punishable by fine of not less than $500 nor more than $10,000 per violation. (HRS 480-3.1). Penalties provided in this section are cumulative to remedies or penalties available under all other laws of this state. Each day that violation of HRS 480-2 occurs shall be separate violation. (HRS 480-3.1).

Uniform Fiduciaries Act adopted in 1945. (HRS c. 556). § 189-3, Revised Laws of Hawaii 1955, pertaining to Uniform Fiduciaries Act repealed by adoption of Uniform Commercial Code. (HRS 490:10-102[1]).

Uniform Securities Ownership by Minors Act has not been adopted.

Uniform Commercial Code adopted. (HRS c. 490). See topic 3.09 Commercial Code.

3.25 STATUTE OF FRAUDS:

See topic 3.16 Frauds, Statute of.

3.25A TOBACCO PRODUCTS:

Reports to Attorney General.

Any tobacco product manufacturer selling cigarettes to consumers within state shall file report with attorney general setting forth its name and trade name, address of its principal place of business, memorandum of copy of invoice covering each and every shipment of cigarettes made during previous calendar quarter into state, and other information as may be required by attorney general. Tobacco product manufacturer that is signatory to settlement agreement entered into on Nov. 23, 1998 by state and leading U.S. tobacco product manufacturer may file copies of reports tobacco product manufacturer submits to department of taxation in lieu of required report. Information which tends to identify customers of tobacco product manufacturers, terms of sale and non-aggregated sales volume data are excluded from disclosure. (HRS 486P-2).

Penalty.

Attorney general is empowered to bring civil action against any tobacco manufacturer that fails to file required reports. (HRS 486P-3).

3.26 TRUST RECEIPT SECURITY:

See category 8 Debtor and Creditor, topic 8.15 Pledges.

Uniform Commercial Code adopted. See topic 3.09 Commercial Code.

3.27 WAREHOUSEMEN:

Uniform Commercial Code adopted. (HRS c. 490). See topic 3.09 Commercial Code.

See category 8 Debtor and Creditor, topic 8.13 Liens.

4 CITIZENSHIP

4.01 ALIENS:

Property.

Aliens are not eligible for residential leases of public land. (HRS 171-74). Declarant aliens with five years residence in state may acquire land from Board of Land and Natural Resources. (HRS 206-9). Aliens may obtain land through private persons.

Occupational Restrictions.

Aliens cannot be commissioned or warrant officers of Army or Air National Guard. (HRS 121-14). See subhead State, County and Municipal Officers and Employees, infra; also category Employment, topic Labor Relations, subhead Public Employees.

State, County and Municipal Officers and Employees.

Elective officers must be U.S. citizens and Hawaii residents for three years preceding assumption of office. (HRS 78-1[a]). Appointed officers, if second deputies to department heads or higher level, must be U.S. citizens and Hawaii residents for one year preceding appointment; if lower level must be citizens, nationals or permanent residents of U.S. and residents of Hawaii at time of appointment (if nationals or permanent residents, must diligently seek citizenship upon becoming eligible). (HRS 78-1[b]). Other employees (except certain persons recruited by University of Hawaii) must be citizens, nationals or permanent residents of U.S. and residents of Hawaii at time of application for employment. (HRS 78-1[c]-[f]). U.S. citizenship required for positions involving state and national security. (HRS 78-1[e]).

Other Restrictions.

Aliens may not vote. (HRS 11-15[a][6]). Aliens disqualified from jury service. (HRS 612-4[a][1]). Aliens are not eligible for real estate broker licensing examination unless authorized to work in U.S. (HRS 467-9.5[1]). Aliens, except permanent residents or aliens otherwise lawfully present at time services performed, are not eligible for benefits under Employment Security Law.

(HRS 383-29[d]).

Firearms, Hunting and Fishing.

Accredited foreign officials and aliens commissioned as state law enforcement officers may obtain permit for firearms from chiefs of police, provided that any commissioned law enforcement officer who is alien shall transfer ownership of firearm within 48 hours after termination of employment from law enforcement agency. (HRS 134-2). Other aliens may obtain 90 day permits after procuring either valid Hawaii hunting license, written documentation indicating person has been invited to shoot on private land, or written notification from firing range or target shooting business indicating person will actually engage in such activities. (HRS 134-3). Aliens employed by U.S. or state may carry firearms when performance of duty (including going to and from their respective places of duty) requires. (HRS 134-11). Aliens not lawfully admitted to U.S. may not engage in taking marine life for commercial purposes in waters of State. (HRS 189-5).

Miscellaneous.

Aliens whose government accords similar right to Hawaii citizens may bring claim against state. (HRS 661-4). Permanent resident aliens who have resided in state for three years eligible for farm loans. (HRS 155-10[2]). In order to obtain workmen's compensation benefits, alien dependents not residing in U.S. must maintain annual proof of dependency. (HRS 386-42[c]). Official in charge of institutions confining alien may release him for return to his native land conditioned upon his remaining away from state. (HRS 336-5). Director of Health will arrange for deportation of all alien public charges in state hospitals. (HRS 336-1). Alien may serve as personal representative of probate estate if alien submits to jurisdiction of Hawaii courts. (HRS 560:3-602; Hawaii Probate Rule 87). Personal tax cannot be assessed against nonresident. Nonresident's property cannot be taxed unless it has actual situs within jurisdiction. However, any tangible personal property situated within jurisdiction may be taxed irrespective of owner's residence. (4 Haw. 172).

5 CIVIL ACTIONS AND PROCEDURE

5.01 ACCORD AND SATISFACTION:

Generally, common law rules govern. Uniform Commercial Code adopted. See category 3 Business Regulation and Commerce, topic 3.09 Commercial Code.

Compromise.

Apprenticeship disputes may be settled by Director of Labor and Industrial Relations. (HRS 372-5[7]).

Attorney must have client's written authority to compromise. (HRS 605-7).

Marriage settlements valid. (HRS 572-29).

Paternity proceedings may be compromised upon pretrial recommendation. (HRS 584-13).

Probate claims may be compromised by personal representative of estate (HRS 560:3-813) or by appointed guardian of property (HRS 560:5-424).

Tax claims may be compromised by director of taxation with governor's consent, where tax exceeds $50,000, and without governor's consent, where tax is $50,000 or less, exclusive of penalties or interest (eff. 6/4/03). (HRS 231-3[10]).

Tort claims against state may be compromised by attorney general. Compromise of claims exceeding $10,000 will be paid only after funds are specifically appropriated by legislature. (HRS 662-11).

Unemployment compensation disputes may be compromised by Department of Labor and Industrial Relations, but if referred to attorney general, then only with his consent. (HRS 383-75).

Workmens' compensation claims may be compromised by Director of Labor and Industrial Relations. (HRS 386-78).

Pleading.

Accord and satisfaction must be pleaded affirmatively. (HRCP 8[c]).

5.02 ACTIONS:

Civil actions in circuit courts, Hawaii's courts of general jurisdiction, closely follow federal rules as am'd, and rule numbers generally correspond. See topic 5.19 Practice. Comments in this topic refer to civil actions in circuit courts to which Hawaii Rules of Civil Procedure (HRCP) apply, unless otherwise indicated. HRCP do not apply to probate (HRS c. 560); guardianship (HRS c. 551); ex parte re: accounts of guardians and trustees (HRS c. 554); family court; applications to circuit court re: arbitration; writ to inferior court (HRS 603-21.7[b]). Consult relevant statute for instances when rules do not apply in following: land court (HRS c. 501); eminent domain (HRS c. 101); quiet title (HRS c. 669); quo warranto (HRS c. 659); escheat (HRS c. 665); forfeiture of property for violation of statute; quarantine (HRS c. 325); commitment hearings (HRS cc. 333, 334); tax collection; voter registration, elections; collective bargaining (HRS cc. 89, 380); land/water rights (HRS c. 664). Abuse of discretion to dismiss case for want of prosecution when plaintiff failed to institute selection of trial date under Rules of the Circuit Courts of the State of Hawaii RCCH 12(c); HRCP. (10 Haw. App. 388, 876 P.2d 1335). See topic 5.19 Practice.

Equity.

See subhead Forms of Action, infra.

Forms of Action.

There is one form of action, "civil action." (HRCP 1). There is no action in equity as distinguished from law, but equitable relief (injunction, specific performance, etc.) is granted in proper cases.

Conditions Precedent.

(a) All tort cases are automatically in court annexed arbitration program unless plaintiff certifies case value exceeds $150,000. Sanctions for attempting to remove case from program without good cause. Judicial Arbitration Commission has discretion to accept. (Hawaii Arbitration Rules, 1/9/90 [HAR]). Circuit judge from each circuit is appointed by Chief Justice to be Arbitration Judge. Arbitration Judge may impose sanctions, including costs, expert fees, and reasonable attorney's fees, for failure to participate in arbitration hearing in meaningful manner. (HAR 28, RCCH, Exhibit A). (b) Contractor Repair Act. (672E). (c) Medical Claims Conciliation Panel. Submission of medical torts claims to panel is mandatory prior to bringing case in court. Statute is tolled until 60 days after decision. (HRS 671-18). Panel issues advisory opinion of liability and damages. (HRS 671-15). Settlement is voluntary; nothing from panel hearings or findings may be used in subsequent litigation. (HRS 671-16). Parties may elect to bypass court annexed arbitration program. (HRS 671-16.5). (d) Uniform Arbitration Act. Agreement to submit to arbitration is valid, enforceable, and irrevocable except on ground that exists at law or equity for revocation of contract. (658A). Court shall order parties to arbitrate unless it finds there is no enforceable agreement to arbitrate. Under certain circumstances, court may consolidate multiple arbitrations which arise in substantial part from same transaction or series of related transactions. Arbitrator may issue subpoenas, permit discovery, resolve discovery disputes, issue protective orders, award punitive or other exemplary relief.

Commencement.

Filing complaint. (HRCP 3).

Parties.

(HRCP HRS 17-25).

Necessary Parties.

(HRCP 19).

Permissive Parties.

(HRCP 20).

Class Actions.

(HRCP 23).

Misjoinder.

Not ground for dismissal. (HRCP 21).

Intervention.

(HRCP 24).

Interpleader.

(HRCP 22).

Third Party Practice.

(HRCP 14).

Joinder of Causes of Action.

(HRCP 18). Joinder of claims is permissive.

Splitting Causes of Action.

Common law governs res judicata.

Consolidation of Actions.

(HRCP 42[a]).

Severance of Actions.

(HRCP 42[b]).

Stay of Proceedings.

No statute governs pending actions before judgment.

Abatement and Revival.

Survival of Actions.

(1) Tort: Right of action survives death of tortfeasor. (HRS 663-4). Cause of action in tort arising out of wrongful act, neglect, or default survives death of person injured except in actions for defamation and malicious prosecution. (HRS 663-7). (2) Other: common law applies. (3) Criminal injury compensation awards expire with death of claimant. (HRS 351-67).

Abatement.

Death of plaintiff or defendant does not cause an action to abate. Dissolution of a corporation does not cause an action to abate. (HRS 634-61). HRCP do not limit time within which court may order substitution but motion must be submitted within 120 days of date death is suggested upon record. (HRCP 25[a]).

Limitation of.

See topic 5.16 Limitation of Actions.

Small Claims.

See category 6 Courts and Legislature, topic 6.01 Courts.

Termination of Actions.

No specific statute.

Prohibited Actions.

No specific statute. Statutory remedies are merely cumulative and do not abolish common law remedies unless so declared in express terms or by necessary remedy. (67 Haw. 252, 686 P.2d 12).

Administration.

See category 13 Estates and Trusts, topic 13.09 Executors and Administrators.

Against State.

Based on state statute, executive department regulation, express or implied contracts, or as referred by legislature (HRS 661-1); see topic 5.09 Damages.

Direct Actions Against Insurer.

See category 23 Transportation, topic 23.01 Motor Vehicles, subhead Direct Actions Against Insurer.

5.03 APPEAL AND ERROR:

Hawaii Rules of Appellate Procedure (HRAP) adopted effective June 1, 1984. Govern procedures in appeals to Supreme Court and intermediate appellate court from circuit, district, family, land, and tax appeal courts, and from orders of administrative agencies. (HRAP 1). HRAP have force of law (Haw. Const. Art. VI, § 7; HRS 602-11) and supersede prior rules. HRAP generally parallel Federal Rules of Appellate Procedure and Rule numbers generally correspond. In an extension for time to file notice of appeal, if cause of delay is beyond movant’s control, motion may be granted on showing of good cause. If cause is within control of movant, motion may be granted only on showing of excusable neglect. (80 Haw. 345, 910 P.2d 116.)

Supreme Court has adopted Hawaii Appellate Conference Program Rules (eff. 3/15/95) to provide alternative means of resolving civil appeals by providing neutral place and process to resolve issues in pending cases or to resolve in toto. All civil appeals are included except: (1)

Petitions for extraordinary relief; (2) habeas corpus petitions; (3) petitions of incarcerated petitioner; (4) post-conviction proceedings of criminals under HRAP 40; (5) pro se appeals, and (6) questions of law reserved to Supreme Court. Participation mandatory for cases selected by court. Conferences will be conducted by neutral mediator selected by parties or appointed by court from among retired or semi-retired judges and counsel. Mediators will attempt to achieve consensus on each issue.

Appeal Bond.

Any court may require bond to ensure payment of costs on appeal. (HRAP 7).

Appeals.

Appeals may be allowed by circuit court from interlocutory judgments, orders or decrees, wherever court deems it advisable for speedy termination of litigation. (HRS 641-1).

Intermediate Court of Appeals.

Final judgments, orders and decrees of circuit and district courts are appealable as of right to intermediate appellate court, subject to HRS c. 602. (HRS 641-1). Intermediate appellate court has jurisdiction, subject to transfer to Hawaii Supreme Court (HRS 602-58) or review on application for writ of certiorari (HRS 602-59), to hear and determine appeals allowed by law and to make or issue any order or writ necessary to aid jurisdiction (HRS 602-57, am'd Haw. Sess. Laws Act 145).

Hawaii Supreme Court has jurisdiction to hear questions properly brought before it by application for writ certiorari following decision by Intermediate Court of Appeals (HRS 602-59, am'd 2006 Haw. Sess. Laws Act 149) or by application for transfer (HRS 602-58, am'd 2006 Haw. Sess. Laws Act 93).

Applications for writ of certiorari must be made within 90 days of judgment by intermediate appellate court; acceptance or rejection of application is discretionary upon Supreme Court. (HRS 602-59, am'd 2006 Haw. Sess. Laws Act 149). See also topic 5.05 Certiorari.

Applications for transfer to Supreme Court shall be granted when case involves issues of fundamental public importance, invalidation of amendment to state constitution, state statute, county ordinance or agency rule or sentence of life imprisonment without possibility of parole. (HRS 602-58, am'd 2006 Haw. Sess. Laws Act 93). Applications for transfer to Supreme Court may be granted when case involves question of first impression or there are inconsistencies in decisions of appellate or Supreme Court. (HRS 602-58, am'd 2006 Haw. Sess. Laws Act 93). Denial of application to transfer does not prejudice later application for writ of certiorari. (HRS 602-58, am'd 2006 Haw. Sess. Laws Act 93).

See also category 6 Courts and Legislature, topic 6.01 Courts.

Administrative Agencies.

Person aggrieved may have judicial review of final decision in contested case or of preliminary ruling where necessary for adequate relief (HRS 91-14[a]) by instituting proceedings in circuit court within 30 days after ruling or service of decision, in accordance with HRCP (HRS 91-14[b]; HRCP 72) except where direct appeal to Supreme Court authorized by statute (HRS 91-14[b]). Written notice of hearing of employment security appeal must be sent first class, non-registered, noncertified mail to claimant's last known address. (HRS 383-38). See also, topic Judgments, subhead Declaratory Judgments.

Arbitration.

Once there is final order confirming arbitration award, Hawaii Supreme Court has jurisdiction to review order denying motion to vacate award. Appeal from confirmation of award is restricted to grounds set forth in timely motion to vacate, modify or correct award. (113 Hawai'i 161, 150 P.3d 810).

Consolidated Cases.

Judgment or order in consolidated case, disposing of fewer than all claims among all parties, is not appealable in absence of 54(b) certification. (109 Hawaii 8, 122 P.3d 803).

Stay of Proceedings.

In civil matters no execution shall issue upon judgment nor shall proceedings be taken for enforcement until expiration of ten days after entry. Upon good cause shown, court may allow execution or other appropriate action within ten day period. Stay of proceedings may be obtained in discretion of court or where appeal is taken, appellant may give supersedeas bond. (HRS 641-3). Circuit judge's order for counsel's fee, suit money, temporary alimony, or similar provisional remedy will not be stayed from execution if appellee deposits sufficient indemnity bond (HRS 641-3), upon approval by court (HRAP 8; HRCP 62[d]). In criminal matters filing notice of appeal or giving oral notice of intent to appeal at time of sentence may operate as stay, in court's discretion, subject to conditions stated by court. (HRS 641-14).

Extent of Review.

By Circuit Court.

Where review or redetermination in circuit court is allowed by statute, person adversely affected by decision of district or government agency may appeal in accordance with HRCP 72.

From Contested Cases From Administrative Agencies.

Review of contested cases from administrative agencies is confined to record unless trial de novo allowed by law (HRS 91-14[f]), but review under HRS 91-14 does not preclude other lawful modes of judicial review (HRS 91-14[a]).

From Arbitration Awards.

Uniform Arbitration Act Court may only modify, correct or vacate arbitration award on grounds specified in arbitration statute. (HRS 658A-23 and HRS 658A-24).

By Supreme Court and Intermediate Appellate Court.

(a) From District Courts.

Review of questions of law or of mixed law and fact (HRS 602-5) confined to record (HRS 641-2). Findings of fact may not be set aside unless clearly erroneous. (HRCP 52[a]; 59 Haw. 491, 583 P.2d 971).

(b) From Circuit Court.

Review of questions of law or mixed law and fact (HRS 602-5) confined to record (HRS 641-2). Findings of fact by circuit court may not be set aside unless clearly erroneous. (HRCP 52[a]).

Character of Hearing.

In Circuit Court.

Where law permits trial by jury, trial is by court unless jury demanded in accordance with HRCP 38. (HRCP 72[g]).

In Supreme Court and Intermediate Appellate Court.

Limited to record. (HRS 641-2). Full court must hear oral argument unless dispensed with in court's discretion. (HRS 602-10).

Judgment or Order on Appeal.

Supreme Court (HRS 602-5[6]), intermediate appellate court (HRS 602-57), and circuit courts (HRS 603-21.9) may render all judgments or orders and do all acts necessary to carry their powers into effect.

Lower courts may not vacate, amend, and later reenter their own judgments merely to render late-filed appeal timely. (79 Haw. 26, 897 P.2d 953).

Appeals from Family Courts provided for by HRS 571-54 and governed by HRS c. 602. Legal records regarding certain juvenile offenders are open to public inspection unless otherwise decreed by family court judge. (HRS 571-84.6).

Appeals from Land Court provided for by HRS 501-63 and governed by HRS c. 602.

5.04 BONDS:

Hawaii closely follows Federal Rules of Civil Procedure on bonds submitted in civil actions.

Sureties.

Personal sureties required to justify, but not corporations organized and authorized as sureties. (HRS 78-20). Compensation is limited to one-time only fee of 5% to 15%, but not less than $50. (HRS 804-62).

Enforcement.

Surety liability enforceable on motion without necessity of independent action. (HRCP 65.1).

5.05 CERTIORARI:

Jurisdiction.

Generally, HRAP 31. Supreme Court may accept appeal from intermediate appellate court decision by application for writ (HRS 602-59[a]) filed within 90 days after filing of decision. (HRS 602-59[c], am'd 2006 Haw. Sess. Laws Act 149).

Grounds.

Grave errors of law or fact or obvious inconsistencies with decisions by Supreme Court, federal courts or intermediate appellate court. (HRS 602-59[b]). Court will accept no motion for reconsideration of acceptance or rejection. (HRAP 31[b][7]).

Proceedings.

Deadline for filing petition is 90 days after filing of intermediate appellate court decision. (HRS 602-59[c], am'd 2006 Haw. Sess. Laws Act 149). If not accepted within 30 days after filing, petition rejected. (HRS 602-59[c], am'd 2006 Haw. Sess. Laws Act 149). If writ issued, case transmitted to Supreme Court, supplemental briefs and oral argument allowed only upon request by Supreme Court. (HRS 602-59[d]; HRAP 31[b][4]).

Review.

No statute covers scope of review.

5.06 CHARITABLE IMMUNITY:

See topic 5.09 Damages.

5.07 COMMISSIONS TO TAKE TESTIMONY:

See topic 5.11 Depositions and Discovery.

5.08 COSTS:

Costs and fees are prescribed by statute. (HRS c. 607). Awards of costs against state are prohibited unless “authorized by law.” (HRAP 39). Under HRS 607-24, “costs” mean amounts paid to clerk prior to litigation while “actual disbursements” means amounts paid after litigation, of which states are not immune from paying. (110 Hawaii 269, 132 P.3d 378). Increased court fees are effective July 1, 1998, as described below. (HRS 607-5).

Civil court costs are $200 for civil complaints; $100 for probate cases, guardianship cases, and trust actions; and other fees are prescribed by schedule. (HRS 607-5b). Family court costs are $100. (HRS 607-5b). District court costs are $100 for regular claims (HRS 607-4) and $35 for small claims (HRS 633-29). Supreme Court costs are $100 (HRS 607-5) for filing appeal, other fees prescribed by schedule (HRS 607-6). Appeals to intermediate appellate court shall be filed with Supreme Court at same cost. (HRS 607-6). U.S. District Court costs are $60, other fees prescribed by schedule.

Court may charge additional Indigent Legal Services Surcharge. (HRS c. 607).

Judges have discretionary power to waive prepayment of costs or remit costs, where in special or extraordinary cases cost of suit is onerous. (HRS 607-3).

Courts have power to require either party, upon application, to give security for costs. (HRS 607-3.5).

Rule allowing award of costs after rejection of offer of settlement applies to favorable defense verdicts as well as verdicts favorable to plaintiffs. (HRAP 68, 110 Hawaii 204, 130 P.3d 1069).

Unlike its federal counterpart, statutory list of allowable costs is not exclusive list. (HRS 607-9). Court has discretion to determine what is reasonable. (89 Hawaii 292, 972 P.2d 295).

Judgment creditors may recover attorney’s fees, costs and expenses from judgment debtors. (HRS 607-14.7).

$50 fee assessed when cases remanded from circuit court back to district court after demand for jury trial requiring case’s transfer to circuit court waived. (HRS 607-5[c][22]).

$200 fee for demand for jury trial. (HRS 607-5[c]21).

Frivolous Claims.

Vexatious litigant (as defined in HRS 634J-1) may be required to post security or obtain permission of court prior to filing new litigation. (HRS c. HRS 634J-2).

5.09 DAMAGES:

Counsel may make formula arguments for damages in personal injury cases. (HRS 635-52). Ad damnum clauses prohibited in personal injury or wrongful death pleadings and amendment to such pleadings. (HRS 663-1.3). Statute affects amount of recovery for lost earnings and noneconomic damages (HRS 663-8.3; 8.5; 8.7); and abolishes claims for serious infliction of emotional distress arising solely from property damage unless distress results in physical injury or mental illness. (HRS 663-8.9). Hawaii recognizes: (1) Parents' right to recover for wrongful death of viable fetus (745 F.Supp. 1573); (2) cause of action for child's loss of consortium due to parent's nonfatal injury (781 F.Supp. 1487); and (3) dependents' claims for pecuniary injuries (75 Haw. 544, 867 P.2d 220). Hawaii does not require family members to be present or sustain physical injury as prerequisite to bringing cause of action for negligent infliction of severe emotional distress (77 Haw. 2, 881 P.2d 489), unless plaintiff is trying to bring independent rather than derivative NIED claim under Hawaii's No-Fault Law, 431:10C (108 Hawaii 380, 120 P.3d 1115). Hawaii allows for judgment of punitive damages against estate of deceased tortfeasor. (104 Haw. 241, 87 P.3d 910).

See also category 13 Estates and Trusts, topic 13.05 Death, subhead Action for Death.

Immunity.

Charitable immunity is uncertain. (31 Haw. 740). No immunity in favor of municipal corporations. (41 Haw. 527). Providers of shelter and substance to indigents in connection with project sponsored by nonprofit corporations are exempt from civil liability. (HRS 663-10.6). Volunteers to nonprofit or governmental entities have qualified immunity. (HRS 662D-2).

Immunity is granted to charitable, religious or nonprofit organizations that donate pharmaceuticals or supplies to needy. (HRS 328C-2).

Immunity is granted to health care providers who report blood test results to police. (HRS 663-1.9).

Immunity is granted to insurance commissioner and employees. (HRS 431:3-414).

Immunity is granted to any law enforcement officer acting in good faith in any action arising in connection with enforcement of valid foreign protective order or foreign protective order that appears authentic on its face. (HRS 586-25).

See also topic 5.02 Actions, subhead Conditions Precedent.

Comparative Negligence Rule.

Contributory negligence does not bar recovery if such negligence was not greater than negligence of person, (or in case of more than one person, aggregate negligence of such persons), against whom recovery sought; damages are diminished in proportion attributable to injured claimant. (HRS 663-31). Uniform Comparative Fault Act not adopted.

Uniform Contribution Among Tortfeasors Act adopted by statute (HRS 663-11 to 13; HRS 663-16 to 17) except that joint and several liability not abolished in some circumstances. Exceptions listed at HRS 663-10.9. Release given in good faith discharges party to whom given for any contribution to any other joint tortfeasor or co-obligor. Court determination that settlement was in good faith shall bar any further claims against settling party except those based on written indemnity agreement (HRS 663-15.5) (effective for non-contract claims; effective for contract claims made on or after Jan. 1, 2002).

Civil Defense.

State, political subdivisions, and persons engaged in civil defense per HRS c. 128 are not liable, except for willful misconduct, death, injury, or damages. Although recovery may not be had against state for damage sustained from operation of vehicle during civil defense emergency, injured persons may seek recovery against insurers if policies under HRS 41D-8 cover such risks. (HRS 128-18). Recovery of fair market value or fair rental value is allowed for requisitioned property, but prospective profits and punitive or other damages are not. (HRS 128-23). Persons voluntarily and without compensation permitting their property to be used to shelter others during actual, impending, or practice attack are not liable for negligent death, injury, or damage. (HRS 128-19).

Assumption of Risk.

Owners/operators of recreational activities are not liable for injuries to patrons from inherent risks if patrons voluntarily sign written waiver. (HRS 663-1.54).

Owners/operators of recreational activities do not have duty to specifically safeguard against inherent risks of activities, but do have duty not to increase risks above those inherent to activity. (110 Hawaii 367, 133 P.3d 796).

Primary assumption of risk is discrete and complete defense where defendant's injury-causing conduct is inherent risk of activity to which plaintiff voluntarily participates and is not intentional or reckless. (110 Hawaii 367, 133 P.3d 796).

Owner of land generally owes no duty of care to keep premises safe for use by others for recreational purposes, or to give any warning of dangerous conditions. (HRS 520-3). State as landowner has duty to warn of "extremely dangerous" conditions only in ocean waters adjacent to public beach parks. (1996 Haw. Sess. Laws Act 190, 109 Hawaii 198, 124 P.3d 943). Duty arises for non-occupier of land only if: (1) Affirmative action was taken to induce plaintiff to engage in harmful conduct on land; and (2) false appearance of safety was created and relied upon by plaintiff. (58 Haw. 502, 573 P.2d 107).

Persons injured on school grounds using school facilities assume risk of liability. (HRS 302A-1148.5).

Hotel keepers liable for personal property losses of guests under certain circumstances and up to certain limits. (HRS c. 486K). Hotel keepers may be held liable to guests for injury or loss on account of hazardous beach conditions only when caused by hotel keeper's failure to warn and when hazardous condition not known to or would not have been known to reasonably prudent guest. Hotel keeper owes no duty to non-guest for beach conditions not created by hotel. (HRS 486K-5.5). Signs warning of dangerous current are presumed to be legally adequate warning of dangerous condition. (HRS 663-10.5).

Informed Consent.

Physicians have obligation to obtain informed consent of patients prior to administering diagnostic, therapeutic, and treatment procedures. Rendering of professional medical services without informed consent is tort. (HRS 671-1[2]). Information provided must include: (1) Condition to be treated; (2) description of proposed treatment or procedure; (3) intended and anticipated results; (4) recognized alternative treatments or procedures, including non-treatment; (5) recognized serious possible risks, complications, and anticipated benefits involved in proposed treatment or procedure, as well as recognized alternative forms of treatment, including non-treatment. (HRS 671-3; 98 Haw. 470, 50 P.3d 946).

Aircraft.

Uniform Aeronautics Act adopted (as modified). (HRS c. 263). Owners and lessees of aircraft operated for commercial purposes are absolutely liable, jointly and severally, for injuries caused on land or water by ascent, descent, or flights, or objects falling therefrom unless injury caused in whole or part by negligence of person injured. Injured person has lien on aircraft causing damage. (HRS 263-5).

Condemnation.

Haw. Const. Art. I, § 20 on just compensation includes property damaged as well as property taken for public use. In fixing value of compensation, property will be assessed with improvements unless separately owned, in which case assessment and compensation will be separate. Severance damages accrue to portion of parcel not condemned, but only to extent in excess of special benefit of proposed improvement. In condemnation for widening or realigning existing roads, special benefits will be considered only as offset against severance damages and not against value of portion taken. (HRS 101-23).

Alcoholic Beverages.

Any person 21 years or older who sells, furnishes or provides alcoholic beverages to person under age of 21 years or owns, occupies, or controls premises on which alcoholic beverages are consumed by any person under 21 years of age, who knows of alcohol consumption by any person under 21 years of age, and who could reasonably have prevented such consumption shall be liable for all injuries or damages caused by such person under 21 years of age. (663A).

Cybersquatting Act.

Provides for civil action to recover against persons who, in bad faith, register domain names on Internet. (HRS 4818-22). Treble damages and attorneys' fees available. (HRS 4818-25).

False Claims Act.

Provides for qui tam (action to recover) actions to recover against persons who submit fraudulent claims for payment by state. (HRS 661-21 to HRS 661-29). Quitam (action to recover) actions to recover against persons who submit fraudulent claims for payment by county. (HRS 46-171).

No-Fault Insurance.

See category 23 Transportation, topic 23.01 Motor Vehicles.

Attorneys' Fees.

May be recoverable as damages where wrongful act of defendant has involved plaintiff in litigation with others or placed him in such relation with others as to make it necessary to incur expenses to protect his interest. (57 Haw. 102, 551 P.2d 171). May be recoverable as sanction against opposing party for abusive litigation practices upon showing of bad faith. (85 Haw. 238, 942 P.2d 502). Assumpsit statute (HRS 607-14); civil actions (HRS 607-14.5); tort actions (HRS 607-15.5); taxing costs on appeal (HRS 607-16); promissory notes (HRS 607-14); assistive technology warranty act (HRS 981-5[c]).

Drug Dealers.

Providing civil remedies for damages to persons in community injured as result of illegal drug use. Parents, employers, insurers, persons in utero at time of drug use, and government entities have standing to sue. Recovered drug users also have standing but are subject to Hawaii's comparative negligence regime (to recover, users responsibility may not be greater than dealers). Drug dealers are liable under Hawaii's modified market theory of product liability, which holds that plaintiff must prove dealer provided at least one product to plaintiff's area during period when plaintiff obtained product. Dealers are presumed to have provided 100% of product supplied to plaintiff's area unless they can prove otherwise. Dealers may implead additional dealers. (663E1-13). Hawaii has adopted Model Drug Dealer Liability Act (modified).

Sovereign Immunity.

State has waived immunity from torts of its employees and is liable therefor to the same extent as a private individual but is not liable for interest prior to judgment nor for punitive damages. (HRS 662-2). Attorney General may compromise or settle claims cognizable under HRS c. 662. (HRS 662-11). Attorney General may also defend civil actions brought against health care providers under contract with Department of Public Safety for acts or omissions within contract's scope of work. (HRS 662-16). Comptroller may compromise or settle tort claims involving state owned vehicles. (HRS 41D-3). District and circuits courts have jurisdiction and actions must be commenced within two years. (HRS 662-3, -4). Court may, with consent of all parties, order jury trial. (HRS 662-5). Court costs and attorneys' fees may be allowed to prevailing party. (HRS 662-9, 12).

State has also waived immunity for breach of trust or fiduciary duty relating to management and disposition of funds of Hawaiian home lands trust and native Hawaiian public trust. (HRS 673-1). Two-year statute of limitation tolled until July 1, 1990. (HRS 673-10). Court costs and attorneys' fees may be awarded to prevailing party. (HRS 673-5).

Sovereign immunity may not be invoked by State if suit against State is for prospective injunctive relief and State fails to carry its burden of proving that State treasury will be directly impacted. (110 Hawaii 338, 133 P.3d 767).

Joint and several liability is generally abolished against state entities, unless claim relates to maintenance and design of highways. (HRS 663-10.5, am'd 2006 Haw. Sess. Laws Act 112).

Any decision by State officials or entities regarding selection or application of flexibility in highway design does not give rise to cause of action. (HRS 264-20, am'd 2006 Haw. Sess. Laws Act 70).

Public land liability signs warning of dangerous natural conditions on improved public lands are conclusively presumed to be legally adequate warnings if state or county posts signs and design placement of them have been approved by Board of Land and Natural Resources. Neither state or county has duty to warn of natural conditions on unimproved public lands (663-…; 2003, Act 82 § 2, effective July 1, 2003 and repealed effective June 30, 2008).

State and county do have duty to warn of "extremely dangerous" natural ocean conditions, but only for those waters adjacent to public beach parks. (1996 Haw. Sess. Laws Act 190, 109 Hawaii 198, 124 P.3d 943).

5.10 DECLARATORY JUDGMENTS:

See topic 5.15 Judgments.

5.11 DEPOSITIONS AND DISCOVERY:

Hawaii generally follows Federal Rules, including revisions based on 2000 Amendments. See topic 5.19 Practice.

Within State for Use Within State.

Generally, HRCP 30. Perpetuation of testimony of witness before action may be obtained by verified petition to Circuit Court or by civil action. (HRS 624-41; HRCP 27 [a][1]; HRCP 27 [a]

[4] and [c]). Peer review activities of Health Maintenance Organizations, Preferred Provider Organizations and Preferred Provider Networks are protected from discovery. (HRS 624-25.5).

Outside of State for Use Within State.

Evidence of witnesses living in another state may be obtained on application to any court of record. (HRS 624-24.5). Commission issues to officer (usually notary public) who is to take deposition, under oath, either on oral deposition or written interrogatories as set forth in commission.

Compelling Attendance of Witnesses Within State.

Resident of state may be compelled to give his deposition only in county wherein he resides or is employed or transacts his business in person. Nonresident subpoenaed within state may be compelled to give his deposition only in county wherein he is served with subpoena. Residents and nonresidents may be compelled to give depositions at such other convenient place as fixed by order of court. (HRCP 45[d]). Circuit court may also compel witness within state to give his deposition upon commission to take testimony within state which has been issued by court of another state. (HRS 624-27).

Depositions to Be Used in Foreign Jurisdictions.

Testimony of witness and production of books and papers within state to be used in action outside of state may be taken when commission to take such testimony has been issued from foreign court, and notice has been given to take such testimony pursuant to laws of foreign jurisdiction. On presentation of verified petition, local court orders issuance of subpoena to witness to appear before commissioner named in commission at time and place specified in subpoena. If such witness fails to obey subpoena or refuses to testify, or to produce books or papers pursuant to subpoena or to subscribe to his deposition, court shall, if it is determined that contempt has been committed, prescribe punishment as in case of recalcitrant witness in court of record in territory and make other additional orders as would be proper in such case. (HRS 624-27). Officer or commissioner before whom witness appears, takes down his testimony in writing and annexes thereto copies of all books and papers produced and then certifies to correctness of statements and testimony and transmits it to court in which action is pending. (HRS 624-28).

Uniform Foreign Depositions Act has not been adopted.

Examination of Witnesses.

Rules of Court allow broad use prior to trial under rules relating to discovery. See topic 5.19 Practice.

5.12 EQUITY:

See topic 5.02 Actions.

5.13 EVIDENCE:

Hawaii Rules of Evidence (HRE) parallel Federal Rules of Evidence (FRE) with some distinctions. See topic 5.11 Depositions and Discovery; and subhead Witnesses, infra.

Witnesses.

See HRE, Art. VI, Rules HRS 601-616. (HRS c. 626). Parties and interested persons may testify. Every person generally competent to be witness where he has personal knowledge of matter. HRE modeled after FRE. Impeachment by evidence of conviction of crime differs markedly from FRE 609. (HRE 609). HRE 609 places greater restrictions than FRE609 on use of conviction to impeach.

Privileged Communications.

See HRE Art. V, Rules HRS 501-513. (HRS c. 626). HRE recognize lawyer-client privilege, physician-patient privilege, psychologist-client privilege, spousal privilege, political vote privilege, clergyman privilege, trade secret privilege, privilege against self-incrimination, informer privilege and victim-counselor privilege (defined, 505.5).

Physician/Patient and Psychologist/Patient Privilege.

There is no such privilege if services of physician or psychologist were sought to enable anyone to commit what client knew or reasonably should have known to be tort or crime; or to communication, effecting client's intent to commit tortious or criminal act that physician or psychologist reasonably believes is likely to lead to death or substantial bodily harm. (HRE 504[d][5] and [6]).

Husband and wife may testify against each other, but cannot be compelled to testify against each other in criminal case.

Communications or Transactions with Persons Since Deceased or Incompetent.

Everybody is competent to be witness. (HRE 601). In wrongful death actions, statement by deceased, offered against plaintiff in action for wrongful death of that deceased, is not excluded by hearsay rule. (HRE 803[a][3]). Statement made by declarant under belief of impending death is not excluded by hearsay rule if declarant is unavailable as witness. (HRE 804[b][2]).

Self-incrimination.

Privilege recognized against self-incrimination to extent granted by state (Haw. Const., Art. 1, § 10) or federal constitution (U.S. Const. amend. V; HRE 509).

Compelling Attendance.

See topic 5.11 Depositions and Discovery.

Victim/Witness Bill of Rights.

Relating to rights of victims and witnesses in criminal proceedings. (HRS c. 801D).

Authenticity.

Extrinsic evidence of authenticity as condition precedent to admissibility is not required for certified records of regularly conducted activity. (HRE 902 [HRS c. 626-1]).

Hearsay.

If declarant is unavailable as witness, hearsay rule does not bar admission of statement offered against party that has proved unavailability of declarant as witness. (HRE 902 [HRS c. 626-1]).

Expressions of Sympathy.

Statements or gestures expressing sympathy, commensurability, liability for any claim concerning event where declarant was participant. (HRE 902 [HRS c. 626-1]).

5.14 INJUNCTIONS:

Hawaii closely follows the Federal Rules. See topic 5.19 Practice.

Many statutes provide their own injunctive remedies. Check individual topic or statute consulted.

Jurisdiction.

Circuit courts have jurisdiction to issue temporary and permanent injunctions. (HRS 603-21.5; HRS 128-29). Injunction pending appeal is writ that appellate court may issue as necessary or appropriate in aid of its appellate jurisdiction. (HRS 602-5; HRCP Rule 62[g]).

Prerequisites.

No temporary restraining order granted without written or oral notice to adverse party or that party's attorney unless irreparable damage will result and applicant's attorney certifies what efforts, if any, have been made to give notice and why no notice should be required. (HRCP Rule 65[b]). No preliminary injunction issued without notice to adverse party. (HRCP Rule 65[a]).

Procedure.

Every temporary restraining order granted without notice shall be indorsed with date and hour of issuance; shall be filed forthwith in clerk's office and entered of record; shall define injury and state why it is irreparable and why order was granted without notice; and shall expire by its terms within such time after entry, not to exceed ten days, as court fixes, unless within time so fixed order, for good cause shown, is extended for like period or unless party against whom order is directed consents that it may be extended for longer period. Reasons for extension shall be entered of record. In case temporary restraining order is granted without notice, motion for preliminary injunction shall be set down for hearing at earliest possible time and shall take precedence over all matters except older matters of same character; when motion comes on for hearing, party who obtained temporary restraining order shall proceed with application for preliminary injunction and, if that party does not do so, court shall dissolve temporary restraining order. On two days' notice to party who obtained temporary restraining order, without notice or on such shorter notice to that party as court may prescribe, adverse party may appear and move its dissolution or modification and, in that event, court shall proceed to hear and determine such motion as expeditiously as ends of justice require. (HRCP Rule 65[b]).

Bond.

Court, on granting temporary restraining order or preliminary injunction or at any time thereafter, may require security or impose such other equitable terms as it deems proper. No such security shall be required of state or county, or officer or agency of state or county. (HRCP Rule 65[c]; Rule 65.1).

Temporary Injunction.

Test for temporary injunctive relief is three-fold: (1) Whether plaintiff is likely to prevail on merits; (2) whether balance of irreparable damage favors issuance of temporary injunction, and (3) whether public interest supports granting injunction. (59 Haw. 156, 577 P.2d 1116). Collateral consequences exception to mootness doctrine adopted for domestic violence TROs. (119 Hawaii 1, 193 P.3d 839).

5.15 JUDGMENTS:

Hawaii closely follows the Federal Rules. See topic 5.19 Practice.

Judgments by Confession.

Confession of judgment prohibited in certain instances. HRS 373-11(9), relating to employment agencies; HRS 425E-405, relating to powers of general partners; HRS 476-15, relating to credit sales; HRS 481C-2, relating to door-to-door sales; HRS 521-34, relating to residential rental agreements.

Judgment by Consent.

Final judgment entered before complaint has been filed in monopoly/restraint of trade action is prima facie evidence in any action brought by another party under HRS c. 480; excepted are consent judgments entered into before state files complaint. (HRS 480-22; see HRCP 81[b][12]).

Judgment on Pleadings.

(HRCP 12[c]).

Child Support Judgments.

There is presumption that child support judgments are discharged on child's 33rd birthday. (HRS 657-5.5).

Summary Judgments.

(HRCP 56). Absent local rule to contrary, party need not affirmatively oppose motion for summary judgment that fails to show that prima facie: (1) Facts foreclose genuine issues of material fact; (2) moving party is entitled to judgment as matter of law. (110 Hawaii 1, 129 P.3d 504). Failure to oppose motion for summary judgment does not constitute waiver of right to appeal court's ruling on motion. (110 Hawaii 1, 129 P.3d 504).

Declaratory Judgments.

In case of actual controversy or imminent and inevitable litigation, antagonistic claims may be adjudicated by circuit court even though general common law remedy or equitable, extraordinary legal, or other such remedy may be available. Exception to this where statute provides special form of remedy for specific type of case such that statutory remedy must be followed. Declaratory judgment will not be permitted in tax controversies or in cases of divorce or annulment. (HRS 632-1). Interested person may obtain judicial declaration of validity of administrative agency rule by action against agency in circuit court in which petitioner resides or has principal place of business. (HRS 91-7).

Default Judgments.

When party fails to plead or defend, clerk may enter default judgment for sum certain and costs; court may enter in all other instances. (HRCP 55). Upon application for judgment by default: (1) If taking of evidence is required or ordered and matter is one which would have been tried before jury had there been no default, court in its discretion may order trial without jury; (2) if defendant served by publication has not appeared, court shall require proof to be made of allegations in complaint. (HRS 636-15).

Offer of Judgment.

At any time more than ten days before trial begins, party may serve upon adverse party offer to allow judgment to be taken against him with costs then accrued. If offer is accepted within ten days after service, either party may then file offer and notice of acceptance together with proof of service thereof and thereupon clerk will enter judgment. If final judgment obtained by offeree is not more favorable than offer, offeree must pay costs incurred after making of offer. (HRCP 68).

Docketing.

Filing with clerk of judgment, signed by judge, constitutes entry of judgment. No judgment effective until entry. (HRCP 58).

Vacation or Modification.

Motion for new trial must be served within ten days after entry of judgment. (HRCP Rule 59[b]). Affidavits must be served if motion is based on affidavits. (HRCP Rule 59[c]). Court may order new trial on its own initiative within ten days after entry of judgment. (HRCP Rule 59[d]). Both grant or denial of motion is within court's discretion. (57 Haw. 378, 557 P.2d 788). New trial proper where issue not answered (4 Haw. 81), or where successful party tampered with jury (24 Haw. 193). Misconduct of opposing counsel is not ground for new trial unless party had objected to that conduct and brought it to court's attention. (7 Haw. App. 136, 748 P.2d 816). New trial based on newly discovered evidence can be granted if evidence (1) is previously undiscovered even with due diligence, (2) is admissible and credible, and (3) is of such nature as will probably change outcome. (5 Haw. App. 628, 706 P.2d 1311).

Motion to alter or amend judgment must be served within ten days after entry of judgment. (HRCP 59[e]).

Grounds for relief from judgment or order: (1) Mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for new trial; (3) fraud, misrepresentation or other misconduct of adverse party; (4) judgment is void; (5) judgment has been satisfied, released, or discharged; or (6) any other reason justifying relief. (HRCP 60[b]).

Judgment Liens.

Any money judgment or decree of a state court or U.S. District Court for District of Hawaii shall be a lien upon real property when certified copy thereof is recorded in bureau of conveyances. (HRS 636-3). Such liens do not continue beyond time period that underlying judgment, order or decree is in force. (HRS 636-3, am'd 2006 Haw. Sess. Laws Act 155). Any claim of nonconsensual common law lien against private party filed with land court and bureau of conveyances must be accompanied by certified order from court of competent jurisdiction authorizing filing of lien to be valid. (HRS 507D-5). Circuit court judgments quieting title to real property to be recorded. (HRS 669-8). When obligor for child support becomes delinquent through judicial or administrative process, lien arises on his/her real and personal property. (HRS 576D-10.5).

Revival.

Death of plaintiff or defendant or dissolution of corporate plaintiff or defendant shall not cause action to abate, but it may be continued upon substitution of proper parties. (HRS 634-61). Motion for substitution may be made by any party or by successors or representatives of deceased party. (HRCP 25[a]). Defamation action does not survive death of defendant. (1 Haw. App. 517, 620 P.2d 771).

Assignment.

Judgments are transferable by written assignment. (HRS 634-1). Partial assignment of judgment not allowed unless with assent from judgment debtor and such partial assignment does not change legal title to judgment. (27 Haw. 642).

Satisfaction.

When judgment is fully paid, creditor or his attorney shall execute, acknowledge, and deliver to debtor satisfaction thereof. Every satisfaction shall contain reference to book and page or document number of registration of original judgment. (HRS 636-3).

Form: Satisfaction of Judgment.

See end of this Digest.

Actions.

No action after ten years from date judgment or decree rendered. (HRS 657-5). Extension may be granted with notice and filing of non-hearing motion. (HRS 657-5). In any action brought on prior judgment, if complaint fails to credit prior payments on judgment, defendant entitled to offset against true balance due on judgment amount double amount of any such credit in addition to any other penalties by law unless plaintiff shows existence or amount of bona fide dispute or good faith mistake. (HRS 636-5).

Foreign Judgments.

Valid judgments of another state are entitled to full faith and credit in Hawaii. (7 Haw. App. 238, 752 P.2d 106). Copy of any exemplified foreign judgment may be filed in office of court clerk. Clerk shall treat foreign judgment in same manner as judgment of court of this State. Judgment so filed has same effect and is subject to same effect and is subject to same procedures, defenses, and proceedings for reopening, vacating, or staying as judgment of court of this State. (HRS 636C-3).

Uniform Enforcement of Foreign Judgments Act adopted in Hawaii. (HRS c. 636C). Copy of exemplified foreign judgment filed in office of clerk of appropriate court with $100 filing fee and affidavit setting forth name and last known post office address of judgment debtor and judgment creditor will have same effect as judgment of court of this state.

Post-Judgment Interest.

If judgment for money is affirmed on appeal, interest will generally accrue from date of original judgment. (HRAP 37). More specific statute allowing for interest from date of judgment on appeal prevails over general appellate rule. (HRS 662-8, 110 Hawaii 269, 132 P.3d 378).

5.16 LIMITATION OF ACTIONS:

Actions must be brought within the following periods after the respective causes of action accrue:

No Time Limit.

Prosecution for murder. (HRS 701-108[1]).

Twenty Years.

To recover possession of real property. (HRS 657-31).

Ten Years.

To recover on judgment of court of record. (HRS 657-5). Extension of judgment must be sought within ten years of “original” judgment. (120 Hawaii 123, 202 P.3d 584).

Six Years.

For recovery of debt founded on contract, obligation, or liability, except on judgment of domestic court of record; excepting further that actions for recovery of any debt founded upon any contract, obligation, or liability made pursuant to HRS c. 577A shall be governed by HRS c. 577A relating to legal capacity of minors regarding medical care; on judgments or decrees of foreign courts of record and domestic nonrecord courts; for taking, detaining, or injuring any goods or chattels, including replevin; personal actions of any nature whatsoever not specifically covered by laws of state (HRS 657-1) (judicially construed to include legal malpractice); on contract for compensation for loss, damage, deprivation of land, estate, or interest therein caused by fraud, error, omission, mistake, or misdescription in certificate of title to registered land or entry of memorandum covering registered land (HRS 501-217); prosecution for Class A felony (HRS 701-108[2][b]).

Five Years.

To prove will, computed from testator’s death. (HRS 560:3-108).

Four Years.

For breach of contract for sale of goods (HRS 490:2-725); for recovery of debt founded on contract, obligation, or liability arising in foreign jurisdiction, or on judgments or decrees rendered in foreign nonrecord courts (HRS 657-6); to collect delinquent contribution to unemployment compensation fund, computed from last day of last month of quarter when due (HRS 383-71); actions under antitrust act (HRS 480-24); actions under Drug Dealer Liability Act (tolled during pendency of criminal investigation). (HRS 663E-11).

Three Years.

Determination of paternity, computed from birth of child (HRS 584-6); prosecution for any felony other than Class A (HRS 701-108[2][c]). Offenses involving fraud or breach of fiduciary within three years after discovery of offense, but no more than six years from expiration of normal limitation period. (HRS 701-108[3][a]).

Two Years.

For libel or slander (HRS 657-4); for compensation of damages to person or property (HRS 657-7); for personal injury or damage to property resulting from improvements to real property (HRS 657-8); for wrongful death (HRS 663-3); to annul marriage for physical incapacity (HRS 580-28); for tort action against State of Hawaii (HRS 662-4) (judicially construed to include tort action against counties); for action against state founded on contract, state statute, regulation of state executive department, or any contract and all claims referred to courts by legislature (HRS 661-5); for claims against counties for injury or damages (HRS 46-72); for parking tickets or misdemeanor (HRS 701-108[2][d]); for action under horizontal property regime statute (HRS 514A-50); for recoveries authorized by federal statute which does not specify period in which suit must be brought (HRS 657-11).

Causes of action for negligent injury to person or property accrue when injured party knew or in exercise of reasonable care should have discovered that an actionable wrong has been committed. (50 Haw. 150, 433 P.2d 220; 50 Haw. 397, 441 P.2d 636).

Medical Malpractice.

Suits must be brought within two years after injured discovers injury or through reasonable diligence should have discovered injury, but not more than six years after date of alleged act. (HRS 657-7.3). Filing claim with medical claim conciliation panel tolls statute of limitations until 60 days after decision by panel is mailed, but tolling or alternative dispute resolution process cannot exceed 12 months. (HRS 671-18).

One Year.

To contest land registration decree (HRS 501-71); prosecution for petty misdemeanor (HRS 701-108[2][e]); to recover gifts received by legislator or legislative employee in violation of state code of ethics (HRS 84-19).

Six Months.

Claims against counties. (HRS 46-72).

Four Months.

Claims against decedent’s estate which arose before death of decedent (statute of limitations is 18 months if notice to creditor not given) (HRS 560:3-803); claims against decedent's estate which arose at or after death of decedent (including claims which are absolute, contingent, liquidated, or unliquidated, founded in tort or contract) (HRS 560:3-803).

Ninety Days.

Claims against employer under Whistle Blowers' Protection Act.

Uniform Commercial Code adopted. See category 3 Business Regulation and Commerce, topic 3.09 Commercial Code.

New Actions.

Claim asserted after statute of limitations has run will not be barred if it arose out of timely pleaded factual situation. (HRCP 15[c], 52 Haw. 563, 481 P.2d 310).

Foreign Causes of Action.

Action barred by laws of place where cause of action arose cannot be maintained, except in favor of a resident of Hawaii who has held the claim since it accrued. (HRS 657-9).

Disabilities of Plaintiff.

Persons who are insane, imprisoned under a sentence less than life, or minors when a cause of action accrued to them may, after disability is removed, bring an action within period specified for such action under HRS c. 657 pertaining to limitation of actions.

Death of Plaintiff.

Statute of limitation which was running on cause of action belonging to decedent, which was not barred as of date of death, will not bar action less than four months after death. (HRS 560:3-109).

Actions by or on Behalf of State.

No statute of limitations can bar any action by or on behalf of state and its agencies, unless state is specifically designated in those statutes as subject to limitation period. (HRS 657-1.5).

Absence, Concealment or Disability of Defendant.

If a cause of action accrues against a person who is absent from state or leaves after its accrual (HRS 657-18), or if suit on an accrued cause of action is stayed by injunction (HRS 657-19), period of absence or time injunction is effective is not deemed any part of time limited for commencement of an action.

If a wrongdoer fraudulently conceals a cause of action from knowledge of person entitled to it, action may be commenced within six years after cause of action is discovered. (HRS 657-20).

Death of Defendant.

If wrongdoer dies before wrongful death or survival action is brought against him, suit against his legal representative must be brought within two years after date of plaintiff's injury or death. (HRS 663-6).

Interruption of Statutory Period.

No statutory provision allows for circumstance, occurring before statutory period has run, to change date from which statute runs.

Revival of Barred Claims.

To remove bar of statute for debt, it is necessary to show either unconditional promise to pay debt, clear and unqualified acknowledgment of debt from which promise to pay is to be implied, or conditional promise to pay and fulfillment of condition. (23 Haw. 696). Effect of new promise is to revive remedy upon original obligation and to start statute of limitations anew. (57 Haw. 429, 558 P.2d 479). Burden is on plaintiff to prove, by preponderance of evidence, promise sufficient to revive debt otherwise barred by statute of limitations. (11 Haw. 706).

Contractual Limitations.

Parties to contract of sale may prescribe limitation period not less than one year but may not extend it beyond four years. (HRS 490:2-725). Parties to other contracts may stipulate time for action if reasonable. (23 Haw. 160).

Pleading.

Statute of limitations must be specially pleaded. (22 Haw. 655). Defense of statute of limitation is personal privilege which party may exercise or waive; court cannot exercise privilege for party. (22 Haw. 721).

5.16A PARTITION:

Jurisdiction and Venue.

Circuit courts have jurisdiction. (HRS 603-21.7).

Proceedings.

All persons interested must be made parties to suit. (HRS 668-2).

Partition in Kind or Sale.

Where partition in kind impracticable or greatly prejudicial, judge may order sale of premises and divide proceeds. (HRS 668-7).

5.17 [RESERVED]

5.18 PLEADING:

HRCP, substantially identical to FRCP, took effect on June 14, 1954. Rules have force and effect of law. (Haw. Const. Art. V, § 6). Hawaii Rules govern only the procedure in the circuit courts in all suits of civil nature, whether at law or in equity, except those set forth in HRCP 81. (HRCP 1). Distinction between law and equity has been abolished and the common law system of pleading no longer prevails. See topic 5.19 Practice. Hawaii Probate Rules adopted Mar. 1, 1995 give procedure before Circuit Courts in all probate, guardianship of property, trust, legal representation for no fault benefits, and determination of death proceedings.

Affirmative Defenses.

(HRCP 8[c]). Defense is not affirmative if it merely negates element of plaintiff's prima facie case and is therefore not waived by failure to plead it as such in defendant's answer. (109 Hawaii 198, 124 P.3d 943).

Proof of Claims.

Treated under Uniform Enforcement of Foreign Judgments Act, HRS c. 636C. “Foreign judgment" includes any judgment, decree, or order of court of U.S. or of other court entitled to full faith and credit. Copy of exemplified foreign judgment must be filed in office of clerk of appropriate Hawaii court. Judgment will have same effect and is subject to same procedures, defenses, and proceedings as judgment of court of Hawaii. (HRS 636C-3). At time of filing, judgment creditor or creditor's lawyer must file with clerk of court affidavit including name and last known addresses of judgment debtor and judgment creditor. Clerk must mail notice of filing to debtor and must note mailing in docket. Judgment creditor may mail notice of filing to debtor and may file proof of mailing with clerk. Failure by clerk to mail notice of filing will not affect enforcement if proof of mailing by creditor has been filed. (HRS 636C-4). Cost of filing foreign judgment is $100. Fees for docketing, transcription, or other enforcement proceedings will be provided by law for judgments of court of Hawaii. (HRS 636C-6). Right of judgment creditor to bring action to enforce judgment is independent of this chapter.

Note: New Hawaii Probate Rules took effect on Mar. 1, 1995. Hawaii Probate Rules govern procedure in state circuit courts for all Probate, Guardianship of Property, Trust, Determination of Death, and No Fault Legal Representative Proceedings. As of Mar. 1, 1995, RCCH no longer apply to cases within categories mentioned above, unless RCCH are specifically incorporated by reference in Hawaii Probate Rules.

Small Claims.

See category 6 Courts and Legislature, topic 6.01 Courts.

5.19 PRACTICE:

Rules.

Hawaii Court Rules cited herein as follows: Hawaii Rules of Civil Procedure (HRCP); Hawaii Rules of Penal Procedure (HRPP); Hawaii Rules of Evidence (HRS c. 626) (HRE); Hawaii Rules of Appellate Procedure (HRAP); Rules of the Supreme Court of the State of Hawaii (RSCH); Rules of the Intermediate Court of Appeals of the State of Hawaii (RICAH); Rules of the Tax Appeals Court of the State of Hawaii (RTACH); Rules of the Circuit Courts of the State of Hawaii (RCCH); Hawaii Probate Rules (HPR); District Court Rules of Civil Procedure (DCRCP); Rules of the District Courts of the State of Hawaii (RDCH); Hawaii Family Court Rules (HFCR); Rules of the Land Court (HLCR).

Common law system in force, except as altered by statute, Hawaiian judicial precedent or Hawaiian usage. (HRS 1-1). Distinction between law and equity abolished. Rules of court closely follow Federal Rules of Civil Procedure as amended. Note that rule making power of Supreme Court is constitutionally derived (Haw. Const. Art. V, § 6); any legislation in area of process, practice, procedure and appeals may be superseded by new court rules or by amendments to existing rules. (See, e.g., category Legal Profession, topic Attorneys and Counselors.) Right to jury trial attaches if: (1) Maximum authorized term of imprisonment exceeds six months; or (2) for individuals, maximum authorized monetary penalty exceeds $5,000. When organization is charged, maximum authorized penalty may be higher before jury trial right attaches. (77 Haw. 162, 883 P.2d 83).

Jury Verdicts.

Verdict sufficient if at least 5/6 of jurors agree. (HRS 635-20). Parties may stipulate that jury shall consist of any number less than 12 or that verdict or finding of stated majority of jurors shall be taken as verdict or finding of jury. (HRCP 48).

Direct Actions Against Insurer.

See category 23 Transportation, topic 23.01 Motor Vehicles, subhead Direct Actions Against Insurer.

Small Claims.

See category 6 Courts and Legislature, topic 6.01 Courts.

See also topics 5.02 Actions, Appeal and Error, Depositions and Discovery, Injunctions, Judgments, Pleading, Process; category 8 Debtor and Creditor, topics 8.02 Attachment, 8.05 Executions, 8.09 Garnishment.

5.20 PROCESS:

Civil action commenced by filing complaint with court. Hawaii closely follows Federal Rules, HRCP 3, 4. See topic 5.19 Practice.

General Requisites.

HRCP HRS 7-10 set out general requisites of complaint.

By Whom Issued.

Upon filing of complaint, clerk of court will issue summons. Plaintiff shall deliver it for service to person authorized to serve process. At request of plaintiff, separate or additional summons will be issued against any defendants. (HRCP 4[a]).

Who May Serve.

Within state, service of process issued by court of record must be made by sheriff or deputy, by other person specially appointed by court, investigator appointed by director of Commerce and Consumer Affairs, or by any person at least 18 years old who is not party to suit. Within particular county, chief of police or chief's authorized subordinate may serve. (HRS 634-21; HRCP 4). Service of process may be made by parties themselves in small claims matters. (HRS 633-28[a][1]). Service of process outside of state, see subhead Long Arm Statute, infra.

Personal Service on Individual.

Summons and complaint served together. Service may be made by delivering copy of summons and complaint to individual personally, or if party cannot be found, by leaving copies at home with some person of suitable age and discretion who resides there, or by delivering copies to agent authorized by appointment or law to receive service of process. (HRCP 4[d][1]).

Personal Service on Infant.

Service of process made by delivering copy of summons and complaint personally to: (A) Guardian of infant's property, or if service cannot be made to guardian, then as provided by court order; or (B) infant, if infant is at least 16 years old. (HRCP 4[d][2]).

Personal Service on Incompetent Person.

Service of process made by delivering copy of summons and complaint to: (A) Guardian of person's property, or if living in institution, then to director, or if service cannot be made to either, then as provided by court order, and (B) unless court otherwise orders, also to incompetent person. (HRCP 4[d][2]).

Personal Service on Partnership.

Service made by delivery of copy of summons and complaint to officer, managing or general agent, or to any other agent authorized by appointment or law to receive service of process and, when appropriate by statute, by mailing copy to defendant. (HRCP 4[d][3]). No statutory provision expressly addressing service of process upon partnership. See subhead Personal Service on Association, infra.

Personal Service on Domestic Corporation.

Service of process may be made upon registered agent, officer, or director of corporation found within jurisdiction of court, officer, or board; or if none listed above can be found, then upon manager or superintendent of corporation or any person found in charge of property, business, or office of corporation within jurisdiction. If no officer, director, manager, superintendent, or other person in charge of property, business, or office or corporation can be found within Hawaii, service may be made upon corporation by registered or certified mail, return receipt requested, addressed to secretary of corporation at its principal office. (HRS 415-64). See subhead Personal Service on Partnership, supra.

Personal Service on Association.

When two or more persons associate and act under common name, including labor or employer organizations, they may sue or be sued in common name and service of process may be made on officer, trustee, or agent of association, or if none can be found, upon one or more members. (HRS 634-30; HRCP 4[d][3]). Where association or its members are nonresidents, transaction of business within state subjects nonresident association and its members to state jurisdiction. Service may be made by registered mail to association at last known address and by filing affidavit with court or state agency where action is pending. Filing deemed service 20 days after filing. (HRS 634-35 to 36). See subheads Personal Service on Partnership, supra and Personal Service Outside State, infra.

Personal Service on Joint Stock Company.

No statutory provision expressly addressing service of process on joint stock company. See subhead Personal Service on Partnership, supra.

Personal Service on Foreign Corporation.

Generally same statutory provision governing service on domestic corporations controls foreign corporations. Where foreign corporation has not complied with law relating to registration, service may be made by registered or certified mail, return receipt requested, addressed to secretary of corporation at principal office. (HRS 415-14). See subhead Personal Service on Domestic Corporation, supra.

Personal Service Outside State.

Any person who personally, or through agent transacts any business within Hawaii or commits any tortious act within state (judicially construed as injury occurring within state as proximate consequence of tortious conduct in another state) (56 Haw. 306, 536 P.2d 568) or owns, uses, or possesses real property in Hawaii or contracts to insure any person, property, or risk within state may be personally served by service of certified copy of complaint out of Hawaii by authorized process server in state where service is made. (HRS 634-35, 36).

Service by Mail.

See subheads Personal Service on Domestic Corporation, Personal Service on Association, Personal Service on Foreign Corporation, supra and Long Arm Statute, infra.

Substituted Service.

In cases where writ of attachment is issued, if it appears by affidavit or otherwise to judge’s satisfaction that defendant in attachment was never resident of state, or has left state, or that defendant has secreted so that process cannot be personally served, judge may order service by publication or by registered or certified mail, return receipt requested. If defendant does not appear at trial, court may proceed to hearing and judgment, and may issue execution upon attached property. (HRS 634-27).

Service by publication may be made if defendant is unknown or does not reside within Hawaii or, after due diligence, service cannot be made within Hawaii. Above facts must appear by affidavit to satisfaction of court that service cannot be provided as specified in subheads Personal Service Outside of State, supra and Long Arm Statute, infra. Publication must be made in at least one newspaper published in Hawaii and having general circulation in circuit in which action or proceeding has been instituted for period of not less than once each week for four successive weeks. Last publication must not be less than 21 days before date fixed for trial. (HRS 634-23).

Long Arm Statute.

See subhead Personal Service Outside State, supra. Statute also allows for service of summons sent by certified, registered, or express mail, postage prepaid, return receipt requested. If defendant cannot be found to serve or mail summons, and facts appear by affidavit or otherwise to satisfaction of court, service by publication is permitted. (HRS 634-36). See subhead Service by Publication, supra.

Proof of Service.

In cases where service is made by officer of court, police, sheriff, or appointed investigator, record of service must be endorsed upon back of process in form specified by statute. When service is made by any person specially appointed by court, person must make affidavit of service. (HRS 634-22). Proof of service must be made to court promptly. (HRCP 4[g]). When service is made by mail, service must be evidenced by affidavit showing that required papers were sent by registered or certified mail, and by receipt signed by defendant. (HRS 634-24). When personal service is made out of state, return of court officer, or affidavit of any other person authorized or appointed by court will evidence service. (HRS 634-24).

Nonresident Motorist.

See category 23 Transportation, topic 23.01 Motor Vehicles.

5.21 REPLEVIN:

Proceedings.

Plaintiff in replevin may procure immediate delivery of property by filing with complaint affidavit alleging that he is entitled to possession of property, that property is unlawfully detained, that it has not been taken for taxes or under execution (or if so seized that it is exempt) and giving value and description. (HRS 654-1). Plaintiff must furnish bond to defendant in amount and with sureties approved by court. (HRS 654-2). Property will then be seized by sheriff and delivered to plaintiff pending trial. (HRS 654-3).

Repossession.

On filing redelivery bond by defendant property will be returned to him pending trial. (HRS 654-5).

Claims by Third Persons.

Person not plaintiff or defendant may procure delivery of property by complying with provisions applicable to plaintiff. (HRS 654-5).

Judgment or Order.

Judgment determines party entitled to possession and damages may be awarded for detention of property. (HRS 654-7).

Interpleader.

See category 8 Debtor and Creditor, topic 8.05 Executions.

5.22 SEQUESTRATION:

No general statutory provision. Circuit judge may sequester property of spouse against whom decree of divorce or annulment has been rendered to provide maintenance for wife and children. (HRS 580-12; HFCR 70).

For seizure of person or property to secure satisfaction of judgment, see HRCP 64.

Hawaii law provides for sequestration of real property. Notice must be given in newspaper suitable for advertising judicial proceedings, and premise must be posted by officer serving writ. (HRS 634-29).

In actions of desertion and willful neglect, court may order sequestration from third parties of money for support of spouse or child. (HRS 575-2).

5.23 SERVICE:

See topic 5.20 Process.

5.24 STAY OF EXECUTION:

See topic 5.03 Appeal and Error; also category 8 Debtor and Creditor, topic 8.05 Executions.

5.25 SUBMISSION OF CONTROVERSY:

Any bona fide controversy may be submitted to the Supreme Court for decision upon agreed statement of facts. Case may be assigned to either Supreme Court or Intermediate Appellate Court; or assigning judge may require submission to lower court, subject to subsequent appeal. (HRAP 14). See topic 5.03 Appeal and Error.

5.26 VENUE:

Except as noted, actions involving title or possession of real property must be brought in judicial circuit in which property is located, and other actions must be brought in judicial circuit in which claim for relief arose or where majority of defendants reside. (HRS 603-36; HRS 666-6).

Against Insurer Under Policy.

Venue is in judicial circuit in which aggrieved person resides or has his principal place of business if purchaser purchased policy within state. (HRS 431:10-241).

Change of Venue.

In circuit court, if court, after hearing, determines that fair and impartial trial cannot be had, or it is more fair and equitable to parties to change venue or all parties consent, venue may be changed as court orders. Court must, if venue is improper, either transfer it to court with proper venue or dismiss case. (HRS 603-37, 37.5).

Changes of venue in District Court may be ordered if, upon hearing, court determines that it will be more fair and equitable to parties to change venue or if all parties consent. (HRS 604-7.3). If venue is improper, court must transfer case or dismiss it. (HRS 604-7.4).

District Court.

Venue is in district in which majority of defendants reside or claim for relief arose. (HRS 604-7).

Forum Non Conveniens.

Generally applies only where court has both subject matter and personal jurisdiction and venue is proper. Therefore forum non conveniens is not defense of "improper venue" within meaning of 12(h)(1) and is not waived by failure to raise it in pleadings. (109 Hawaii 137, 123 P.3d 1232). For doctrine to apply, alternative forum must exist; requires that all defendants be amenable to service of process in foreign forum. (109 Hawaii 137, 123 P.3d 1232).

Paternity.

Venue is in county in which child, mother or putative father resides or is found or in which child is born, or if father is deceased, where his estate was or may be probated. (HRS 584-8).

Penalty or Forfeiture.

Venue is in judicial circuit in which penalty or forfeiture occurred. (HRS 603-36).

Probate.

Venue is in judicial circuit in which decedent had his domicile or owned real property at his death, or, if nondomicillary, in judicial circuit in which any property was located at death. (HRS 560:3-201). If proceedings are commenced in more than one court, court where proceedings were first brought hears matter of venue. Other courts hold in abeyance until question of venue is decided. (HRS 560:1-303).

Restraint of Trade, Monopolies.

Venue is in circuit in which defendant resides or engages in business or has agent. (HRS 480-21).

Small Claims.

Venue is in circuit in which claim arises or majority of defendants reside or in which all defendants may be served. (HRS 633-27[b]).

State Ferry System.

Venue is in first judicial circuit or circuit in which aggrieved person resides. (HRS 268-15).

Trusts.

Venue is in place of registration for registered trusts; for unregistered trusts venue is in any place trust could have been registered (principal place of administration, or if only land is in trust, place where land is located). (HRS 560:7-202, HRS 7-101).

Unauthorized Practice of Law.

Venue is in circuit in which alleged violation occurred. (HRS 605-15).

Writs to Courts, Quo Warranto.

Venue is in circuit in which occasion for relief arose. (HRS 603-36).

See also category 6 Courts and Legislature, topic 6.01 Courts.

5.27 WITNESSES:

See topic 5.13 Evidence, subhead Witnesses.

6 COURTS AND LEGISLATURE

6.01 COURTS:

United States District Court.

Clerk’s office: 300 Ala Moana Blvd., Rm. C-338, Honolulu, Hawaii 96850.

Fee of $150 for costs is required when action is commenced.

Court sits at Honolulu.

Supreme Court of Hawaii.

Supreme Court of Hawaii consists of five judges appointed by Governor for a term of ten years and confirmed by State Senate. (Haw. Const. Art. V1, §§ 2-3). Court sits in Honolulu.

Jurisdiction.

Prior to July 1, 2006, Supreme Court of Hawaii and intermediate appellate court had concurrent appellate jurisdiction to hear and determine any appeal allowed by law. Effective July 1, 2006, pursuant to HRS c. 202 (2004), Supreme Court now has appellate jurisdiction to hear and determine appeals only by application for writ of certiorari to intermediate appellate court or by transfer as set forth in HRS 602-58. (HRS 602-5[a][1]). Supreme Court has also retained original jurisdiction over limited number of writs. (HRS 602-5[a][3]-[5]).

Intermediate Appellate Court.

Intermediate appellate court (IAC) panel shall consist of chief judge and five associate judges. (HRS 602-51). IAC judges appointed by Governor for term of ten years and confirmed by State Senate. (Art. VI, § 3). Court sits in Honolulu.

Jurisdiction.

Intermediate appellate court has jurisdiction, subject to transfer to Hawaii Supreme Court (HRS 602-58) or review on application for writ of certiorari (HRS 602-59), to hear and determine appeals allowed by law and to make or issue any order or writ necessary to aid jurisdiction. (HRS 602-57.

Circuit Courts.

There are four circuit courts, numbered 1st, 2d, 3d and 5th. (HRS 603-1). In first circuit (Island of Oahu and all other islands not mentioned), there are 25 judges. (HRS 603-3). Effective July 1, 2002, second circuit (islands of Maui, Molokai, Lanai, Kahoolawe, and Molokini) shall consist of four judges, third circuit (island of Hawaii) shall consist of four judges and fifth circuit (islands of Kauai and Niihau) shall consist of two judges. (HRS 603-4). Judges are appointed by Governor for term of ten years and confirmed by State Senate. (Haw. Const. Art. VI, § 3).

Jurisdiction.

Circuit courts have jurisdiction over state law criminal offenses committed within their respective circuits; actions for penalties and forfeitures; civil actions; probate; nonjury cases listed in §§ 603-21.6, HRS 603-21.7 and HRS 603-21.8; impeachment actions against county officers. (HRS 603-21.5); appeals from district court where allowed by statute and from agencies. $5,000 minimum amount necessary for jury trial of civil controversy. (HRS 604-5[b]). Violations of municipal ordinances tried without jury. (51 Haw. 612, 466 P.2d 422). Circuit and district courts share jurisdiction over misdemeanors. They also share jurisdiction over civil cases involving less than $20,000 but greater than $10,000 when tried without jury. (HRS 604-5[a]). Family courts, district courts and circuit courts share concurrent jurisdiction for certain criminal offenses involving family members. (HRS 604-8[b]).

One of judges of 1st circuit court is annually assigned as judge of Land Court, which has jurisdiction to register title to land anywhere in state. (HRS 501-2).

Each of judicial circuits has district family court. Each circuit has family court division. (Senior Judge of family court of circuit may appoint referees in matters of neglected minors, adoptions, custody, crimes, medical treatment, consent to marriage, employment, enlistment, termination of parental rights, etc., over which family court has exclusive original jurisdiction.) (HRS c. 571).

Night Court.

First Circuit has night court that handles nonjury domestic abuse cases and prostitution related cases.

Tax Appeals Court has powers of a circuit court. Court has jurisdiction to hear all matters relating to assessment, levying and collection of property taxes. (HRS c. 232).

District Courts.

District court is established in each of judicial circuits of state with at least one full-time district judge appointed for each circuit; sessions are held as deemed necessary by respective district judges (HRS 604-1); civil jurisdiction extends to claims of up to $20,000 and is exclusive up to $10,000 for actions triable without jury or where right to jury trial is waived. (HRS 604-5[a]). District Court has concurrent jurisdiction with Small Claims Division of District Court hearing any security deposit dispute between landlord and tenant in residential landlord-tenant relationship. Transfer to circuit court may be had if party has right to jury trial and makes timely demand and amount in controversy exceeds $5,000. (HRS 604-5[b]). District courts have power to enjoin and temporarily restrain harassment. (HRS 604-10.5; HRS 604-7). District courts share concurrent jurisdiction with circuit courts over violations of ordinances and misdemeanors under state law. However district courts may not try real actions, nor actions wherein title to real property is in question, nor actions for libel, slander, defamation of character, malicious prosecution, false imprisonment, breach of promise of marriage, or seduction, nor may they appoint referees in any cause (HRS 604-5[d]); jurisdiction may be had in ejectment proceedings where title to real estate is not in question (HRS 604-6); HRS 604-7 sets out specific powers of district courts, including power to subpoena witnesses from any part of state and compel production of books, papers, documents or tangible things and issue garnishee summons throughout State; proper venue is generally determined according to residence of majority of defendants or where claim for relief arose (HRS 604-7[d]); but venue may be changed as provided in HRS 604-7.3 and HRS 604-7.4; district courts are courts of record (HRS 604-17) from which appeal may be had to Supreme Court or intermediate appellate court, subject to reassignment provisions set out in subsections HRS 602-5(8) and HRS 602-5(9) (HRS 641-1[a]). District court judges are appointed by Chief Justice of Supreme Court with approval of Senate.

Small Claims Division of District Court.

Small claims procedure may be elected where matter in controversy does not exceed $3,500 as well as cases involving landlord-tenant disagreements where equitable relief can be granted for orders to repair, replace, refund, reform and rescind. (HRS 633-27). Small Claims Division retains jurisdiction, however, if counterclaim is asserted placing amount in controversy beyond $3,500 limit. Class actions are prohibited. (HRS 633-27[d]). Actions in small claims division must be brought in circuit where majority of defendants reside or claim arose or may be brought in any circuit in which all defendants can be served if service on all cannot be made where venue would normally be proper. (HRS 633-27[b]). Service is by registered mail, certified mail with return receipt showing delivery within circuit, or as otherwise provided by law or rule of district court; with approval of court, any person may appear on behalf of another; there is no appeal from small claims division. (HRS 633-28). Service may be made by parties themselves. (HRS 633-28). Fee for issuing summons, and copies, trial, judgment and satisfaction, as prescribed by statute or rule of court; court may waive costs upon suitable showing; but if costs not paid despite ability to do so, court may deny right to file new case while costs unpaid and deny right to proceed in pending case. (HRS 633-29). If counterclaim exceeds $3,500 but is under district court limit ($20,000), jurisdiction is retained. (HRS 604-5). Where jury trial is of right and demand is made, case shall be transferred to circuit court and tried under procedure for jury trials. (HRS 633-31). Trials may be conducted as justice requires and judge is not bound by rules of evidence, whether statutory or not, except provisions relating to privileged communications. (HRS 633-32). Award of costs in discretion of court. (HRS 633-34).

Small Claims Courts.

See subhead District Courts, catchline Small Claims Division of District Court, supra.

6.02 LEGISLATURE:

Meets annually on third Wed. each Jan. limited to a period of 60 working days, which may be extended for not more than 15 days if approved by two-thirds of membership of each House or if extended by Governor. Special sessions, not to exceed 30 working days, may be called on vote of two-thirds of members of each House. Governor may call special sessions of both Houses or of Senate alone. Each regular session shall be recessed for not less than five days at some period between 20th and 40th days of regular session, as determined by concurrent resolution. (Haw. Const., Art. III, § 10).

Initiative and referendum not adopted.

Lobbying and lobbyists defined. (HRS 97-1).

Lobbyists must register with state ethics commission within five days of becoming lobbyist. (HRS 97-2). Renewal of registration required biennially within ten days of opening of each odd-numbered year's legislative regular session. (HRS 97-2.5).

6.03 REPORTS:

Reports of decisions of Supreme Court and intermediate appellate court are published biennially. Decisions beginning with 44 Hawaii also appear in Pacific Reporter. Reports of intermediate appellate court's decisions begin May 1980 and also appear in Pacific Reporter. Four volumes of reports of U.S. District Court of Hawaii have been published; but none since 1918. Current decisions appear in Federal Supplement.

Digest of all Hawaii cases (state and federal) from 1846-date is published.

Unofficial Reports.

There is Shepard's Citator of Hawaii Reports and Hawaii Appellate Reports.

6.04 STATUTES:

Latest official compilation is Hawaii Revised Statutes, 1993 Replacement Volume. Subsequent statutes and amendments will be published in cumulative pocket part supplements.

Uniform Acts promulgated by National Conference of Commissioners on Uniform State Laws which have been adopted are: Aeronautics (HRS c. 263) (1923); Acknowledgment

(HRS 502-41 to 101) (1909);Anatomical Gift Act, Revised (2008, Act 122); Arbitration (HRS c. 658A) (2002); Athlete Agents (2007, H.B. 275; effective July 1, 2008); Child Custody Jurisdiction (HRS c. 583) (1973); Commercial Code (HRS c. 490) (1967); Common Trust Fund (HRS 412:8-402) (1947); Contribution among Tortfeasers (HRS 663-11 to 17) (1941); Controlled Substances (HRS c. 329) (1990); Criminal Extradition (HRS c. 832) (1941); Custodial Trust (HRS c. 554B) (1989); Deceptive Trade Practices (HRS c. 481A) (1966); Disclaimer of Property Interests Act (2000); Disposition of Community Property Rights at Death (HRS 510-21 to 30) (1973); Division of Income for Tax Purposes (HRS 235-21 to 39) (1967); Durable Power of Attorney (HRS c. 551D) (1989); Electronic Transactions (HRS c. 498E) (2000); Enforcement of Foreign Judgments (HRS c. 636C) (1964); Estate Tax Apportionment (HRS c. 236A) (1964); Fiduciaries (HRS c. 556) (1945); Foreign-Money Claims (HRS c. 658B) (1990); Fraudulent Transfer (HRS c. 651C) (1985); Guardianship and Protective Proceedings (2004, Act 161); Information Practices (HRS c. 92F) (1988); Interstate Family Support (HRS c. 576B) (1997); Joint Obligations (HRS c. 483) (1941); Jury Selection and Service (HRS 612-1 to 27) (1970); Land Sales Practices (HRS c. 484) (1967); Limited Liability Company (HRS c. 428) (1995); Management of Institutional Funds (HRS c. 517D) (1972); Parentage (HRS c. 584) (1973); Partnership (HRS 425-101 to 143) (1914); Premarital Agreement (HRS c. 572D) (1987); Principal and Income Act (2000); Probate Code (HRS c. 560) (1977); Prudent Investor (HRS c. 554C) (1997); Rendition of Accused Persons (HRS c. 833) (1971); Residential Landlord and Tenant (HRS c. 521) (1972); Rules of Evidence (HRS 626-1 to 3) (1974); Securities (HRS c. 485) (1956); Simultaneous Death (HRS c. 534A) (1993); State Administrative Procedure (HRS c. 91) (1961); Status of Convicted Persons (HRS c. 831) (1969); Statutory Rule Against Perpetuities (HRS c. 525) (1992); Testamentary Additions to Trusts (HRS 560:2-511) (1991; repealed effective Jan. 1, 1997); To Secure Attendance of Witnesses From Without a State in Criminal Proceedings (HRS c. 836) (1936); Trade Secrets (HRS c. 482B) (1989); Transfer-On-Death Security Registration (HRS c. 539) (1998); Transfers to Minors (HRS c. 553A) (1985); Trustees Powers (HRS c. 554A) (1985); Unclaimed Property Act, Revised (2008, Act 55); Vendor and Purchaser Risk (HRS 508-1) (1941).

Uniform Commercial Code enacted, effective Jan. 1, 1967. See category 3 Business Regulation and Commerce, topic 3.09 Commercial Code.

For text of Uniform Acts falling within the scope of the Martindale-Hubbell Law Digests see Uniform and Model Acts section.

6.05 UNIFORM LAWS:

For list of Uniform Acts in force in this state see topic 6.04 Statutes. For text of Uniform Acts within the scope of the Martindale-Hubbell Law Digests see Uniform and Model Acts section.

7 CRIMINAL LAW

7.00A BAIL:

See topic 7.01 Criminal Law.

7.01 CRIMINAL LAW:

There are no common law crimes in Hawaii. All punishable offenses are defined by statute. (HRS 1-1). Penal code enacted in 1972. (HRS cc. 701-712).

Hate Crimes.

Defendant may be subjected to extended term of punishment if: (1) Defendant is convicted of crime under HRS cc. 707, 708, or 711, and (2) defendant intentionally selected victim, or in case of property, property that was object of crime, because of hostility toward actual or perceived race, religion, disability, ethnicity, national origin, gender identity or expression, or sexual orientation of any person. (HRS 706-662).

Computer Crimes.

Criminal penalties for computer fraud, computer damage, and unauthorized computer access. (HRS 708-890). Criminal penalty for threat to cause damage to computer system. (HRS 707-764[1]). Criminal penalty for electronic enticement of child. (HRS 707-757). Forfeiture of property used in computer crimes. (HRS 708-894). Jurisdiction over persons who commit computer crimes by using computer in another jurisdiction to access computer in Hawaii. (HRS 708-895). Five year statute of limitations.

Environmental Crimes.

Criminal penalties for knowing abandonment of hazardous waste or used oil. (HRS 342J-9).

Animal Cruelty.

Criminal penalty for confining pet or animal in cruel or inhumane manner in kennel or cage. (HRS § 711-1109[1][f], am'd 2009).

Hawaii Rules of Evidence are codified. (HRS c. 626.1).

Hawaii Rules of Criminal Procedure are codified. (HRS cc. 801-853).

Death Penalty.

None.

Indictment, Information or Complaint.

In all offenses against laws of Hawaii, accused shall be arraigned and prosecuted upon written information, complaint, or indictment by grand jury as soon as expedient. (HRS 806-6). Certain Class B and Class C felony charges may be instituted by written information establishing probable cause that crime was committed by accused. (HRS c. 806). In felony cases charged by complaint or indictment, defendant shall be furnished copy of charging document before arraignment. In felony cases charged by written information, defendant shall be furnished copy of information and attached exhibits at initial court appearance. (HRS c. 806-C).

Bail.

All criminal offenses bailable except where defendant poses serious risk of flight, obstruction of justice, or danger to any person or community. Serious risk presumed where defendant: (1) Is charged with crime punishable by life imprisonment, (2) has been convicted of violent crime within last ten years, or (3) is on bail, probation, or parole from felony charge for violent crime. (HRS 804-3). Certain mandatory conditions for bail exist. (HRS 804-4, 7.1-7.4). Amount and conditions of bail discretionary with judge. (HRS 804-5, 7.1, 9). Probable cause determination made by district court judge within 48 hours of arrest based on affidavits of arresting officer. Defendant provided copy of affidavits and attachments at commencement of hearing. (Hawaii Rules of Penal Procedure, Rule 5[a]).

Interstate Compact for the Supervision of Adult Offenders in effect. (HRS 353B).

Uniform Act on Status of Convicted Persons in effect. (HRS 831-1 to 7).

Uniform Act to Secure the Attendance of Witnesses from Without a State in Criminal Proceedings in effect. (HRS 836-1 to 6).

Uniform Criminal Extradition Act, Revised in effect. (HRS 832-1 to 27).

Uniform Rendition of Accused Persons Act in effect. (HRS 833-1 to 6).

National Crime Prevention and Privacy Compact in effect. (HRS 846-17).

Compensation for victims of criminal acts may be paid by state upon application by injured person or his personal representative to Criminal Injuries Compensation Commission within 18 months after date of injury, death or property damage. Victims eligible for compensation are: (1) Persons who are injured or killed by act or omission within state; (2) residents of state who are injured or killed by act or omission in another state; (3) residents of state who are injured or killed by act of terrorism outside U.S.; or (4) relatives of victim of mass casualty, witnesses of mass casualty, or individuals engaged in business or educational activities at scene of mass casualty. (HRS 351-31). 18-month period may be extended upon showing of good cause. (HRS 351-62[a]). Maximum award limited to $10,000; in case where medical expenses exceed $10,000, maximum award limited to lesser of $20,000 or amount of expenses. (HRS 351-62[b]). Compensation extends to pecuniary losses or expenses sustained of relatives or persons responsible for victim; eligible expenses are those incurred during treatment for injury sustained (HRS 351-62.5) including expenses incurred for mental health service in case of mass casualty incident (HRS 351-33). Requires payment of restitution to victim or family members of victim as precondition for release on parole of imprisoned person if person has ability to make complete or partial restitution. (HRS 801D-4).

Criminal Injuries Compensation Commission will be funded in part by fees imposed by court on every convicted defendant who is able to pay. (HRS 351-62.6).

Victims of crime may request court to enforce criminal restitution against convicted defendant in same manner as in civil judgment. (HRS 706-646).

Organized Crime.

(HRS c. 842).

Victim/Witness Bill of Rights.

Relating to rights of victims and witnesses in criminal proceedings. (HRS c. 801D). Upon request by victims of domestic violence, defendant's probation officer allowed to disclose information, i.e. location of defendant, relating to safety and welfare of victim. (HRS 801D-4). Upon request of sexually assaulted victim, defendant is required to be tested for human immunodeficiency virus (HIV). (HRS 325-16.5).

Criminal Forfeitures.

Relating to forfeiture of property used in commission of crimes. Law enforcement officer may seize: (1) Personal property on probable cause; (2) real property pursuant to warrant following pre-seizure hearing in circuit court. Property forfeited to state may, among other things, be sold at public sale. (HRS c. 712A). State has burden of showing that property is subject to forfeiture. Court is allowed to limit scope of forfeiture where it is grossly disproportionate to owner's conduct. (HRS 712A-5.5). Holder of immediate reversionary interest has first opportunity to acquire remaining leasehold interest and improvements on property before sale to public. (HRS 712A-16).

Registration of Sex Offenders.

Convicted Sex Offenders are required to register with attorney general and chief of police of county where sex offender resides. (HRS 846E-2). Sex offender must report to county chief of police every five years to have new photograph taken. (HRS 846E-2). Relevant information will be released upon request to public, law enforcement, and government agencies conducting background checks. (HRS 846E-3). Relevant information includes name, aliases, and other identifying information, current and future addresses and telephone numbers, current and future employers, current and future educational institutions with which sex offender is affiliated as faculty member, employee, or student, year, make, model, color, and license number of all vehicles owned or operated by sex offender, summary of criminal offenses against minors and sexually violent offenses, past or current psychological treatment, U.S. citizenship, and any other identifying information. (HRS 846E-2). State required to petition court for order permitting release of sex offender's relevant information to public. Burden of proof on state to show that sex offender is required to register. Criteria provided where duration of release of information shall be for life of sex offender. (HRS 846E-3). Sex offenders who are not registered with designated law enforcement agency must respond to address verification form by mail every 90 days. (HRS 846E-5).

Medical Use of Marijuana.

In accordance with HRS c. 329, does not violate HRS c. 712. Person using medical marijuana under HRS c. 329 shall not be subject to arrest, search or seizure. (HRS 329-125). No physician shall be subject to arrest for prescribing medical marijuana to patient with debilitating medical condition. (HRS 329-126).

Tort Liability of Criminals.

See category 5 Civil Actions and Procedure, topic 5.09 Damages, subhead Drug Dealers.

8 DEBTOR AND CREDITOR

8.01 ASSIGNMENTS:

Uniform Commercial Code adopted. (HRS c. 490). See category 3 Business Regulation and Commerce, topic 3.09 Commercial Code. Otherwise, common law applies except as noted below.

Assignability.

Following are not assignable under state law: tort claims that are personal in nature (HRS 634-1); rights under state and county employees' retirement system (pensions, annuities, returns of contributions, optional and death benefits, etc.) (HRS 88-91); public assistance payments and compensation to blind and disabled persons (HRS 346-33); workmen's compensation claims (HRS 386-57[a]); temporary disability insurance (HRS 392-29). Employees may assign wage and hour claims (HRS 387-12[c], HRS 388-11[b]) to Director of Labor and Industrial Relations for any action necessary for collection, including suit.

Insurance.

Assignability of insurance policies is governed by policy terms. If beneficiary of insurance policy may be changed by sole request of insured, assignment by insured alone may be delivered to insurer, whether pledgee or assignee, and insurer may deal with assignee as owner or pledgee according to terms of assignment until it has received contrary notice in writing at its home office. (HRS 431:10-228). Every insurer must pay dividends to assignee of record under written assignment (HRS 431:10-229), but that provision does not apply to group life insurance, group annuities, group disability insurance, or any policy specifying to whom dividend is to be paid. (*Id.*). Insured party may assign all or part of incidents of ownership conferred by policy. (HRS 431:10D-215).

Debts of state may be assigned if first approved by comptroller (or, in case of University of Hawaii and department of education, by their respective chief financial officers) who shall draw warrant payable to assignee. (HRS 40-58).

Debts to State.

Contractors who contract with state or its subdivision and who have outstanding taxes due to either State or Internal Revenue Service will have their progress payments assigned to either State or Internal Revenue Service to satisfy tax liability. (HRS 103-53). Any officer or employee of any governmental agency who intentionally or knowingly violates this provision shall be fined, imprisoned, or both. (*Id.*).

Limited Partnership.

See category 2 Business Organizations, topic 2.07 Partnerships, subhead Limited Partnership.

Instruments Transferring Title.

Commercial Code or common law governs.

Filing.

See category 3 Business Regulation and Commerce, topic 3.09 Commercial Code.

Recording.

See categories 3 Business Regulation and Commerce, topic Commercial Code; Documents and Records, topic Records.

Notice.

Commercial Code or common law governs.

Effect.

Commercial Code or common law governs.

Assignment of Wages.

Not valid unless in writing. (HRS 388-6; 11). See generally subhead Assignability, supra. Employment agencies may not receive assignment of wages unless approved by Director of Labor and Industrial Relations. (HRS 373-11[9]).

Credit Sales.

Assignment shall not cut off any rights of action or defense arising out of credit sale which buyer has against seller. Any assignee shall be subject to buyer’s defenses as if assignee is seller. (HRS 476-19).

8.02 ATTACHMENT:

Actions in Which Allowed.

Attachment of either real or personal property not exempt from execution may issue in any action on an express or implied contract, including actions by nonresident or foreign corporation except in action against state or when garnishment is authorized under HRS c. 652. (HRS 651-2).

Courts Which May Issue Writ.

Circuit and district courts may issue writ, except that district judge may not have writ served in circuit outside one in which that district is situated nor may judge issue writ for attachment of real property. (HRS 651-1).

In Whose Favor Writ May Issue.

Plaintiff in action, including nonresident or foreign corporation, may have property attached. (HRS 651-2).

Against Whom Writ May Issue.

Property of defendant, or any one or more of several defendants, may be attached, but not that of state or political subdivision. (HRS 651-2).

Claims on Which Writ May Issue.

Before writ will issue, plaintiff, or someone on plaintiff's behalf, must file affidavit with clerk that defendant is indebted to plaintiff, specifying amount of debt over and above just credits and offsets, and that action is not prosecuted to defraud, hinder, or delay any of defendant's creditors. (HRS 651-3). No statute or case in Hawaii as to whether creditor may attach on unmatured or contingent claim.

Grounds.

No statutory restriction.

Proceedings to Obtain.

At time of commencing action or any time afterward but before judgment, plaintiff may have defendant's property attached by applying to court in which action pending, upon filing required affidavit (see subhead Claims on Which Writ May Issue, supra), filing bond and additional security as required (see subhead Attachment Bond, infra) (HRS 651-4, 5), and upon approval of court (HRS 651-7). Writ is directed to any police officer. (*Id.*)

Attachment Bond.

Plaintiff must file bond in double amount of claim, but not less than $50 in district court or $300 in any other court, together with affidavit of sureties (see category 5 Civil Actions and Procedure, topic 5.04 Bonds). Bond is not required of state, municipalities, their officers or agents. (HRS 651-4). On plaintiff's motion, court may reduce bond to one and one-half times value of property of defendant proposed to be attached for claims exceeding $50,000 (HRS 651-4); or on defendant's motion require additional security (HRS 651-5).

Levy.

Police officer is to levy on sufficient property, giving preference to clearer title (HRS 651-7, 8), 20% greater in value than plaintiff's claim (HRS 651-8).

Real property attached by filing in bureau of conveyances true copy of writ with officer's certificate that officer has attached real estate or defendant's interest in it, and describing land with convenient certainty. (HRS 651-9[1]).

Personal property capable of manual delivery is attached by taking it into custody. (HRS 651-9[2]).

A security (see category 3 Business Regulation and Commerce, topic 3.09 Commercial Code) is attached by actual seizure thereof. (HRS 651-9[3]).

Court may allow compensation to police officer. (HRS 651-8). Court may appoint receiver (compensation to be out of that of police officer). (HRS 651-14).

Indemnity.

Police officer may require indemnification. (HRS 651-10).

Requirements of HRS 651-9 are strictly construed. (81 Haw. 270, 916 P.2d 680).

Lien.

No statutory provision.

Priorities.

Several attachments are executed in order received by police officer. (HRS 651-11). Leases, mortgages, sales, devises, etc. after attachment are void in law as against plaintiff in such cases. (51 Haw. 164, 454 P.2d 116).

Release of Property.

Writ is discharged if action is discontinued, dismissed, or if judgment is for defendant (HRS 651-16), by defendant filing a bond approved by officer having attachment or by clerk after return (HRS 651-17), or upon defendant's motion if writ improperly issued (HRS 651-18). Order of discharge on real property is to be recorded in same manner as writ and expenses of attachment must be paid by plaintiff. (HRS 651-19).

Sale.

Police officer may sell perishable property. If in interest of parties, court may, after hearing, order sale of property. Sales are in same manner as execution. (HRS 651-13).

Return.

Return is to be within same time as is allowed for return of summons. Return is to be accompanied with full inventory of property attached and certificate of proceedings indorsed on writ. (HRS 651-15).

Examination.

If on plaintiff's affidavit or on return of writ it appears that attachable property cannot be found, court may require attendance of defendant to give relevant information on oath. (HRS 651-12).

Third Party Claims.

No statutory provision.

Vacation or Modification.

See subhead Release of Property, supra.

8.03 CONSUMER CREDIT:

Uniform Commercial Credit Code provisions adopted with modifications regarding option to accelerate at will, unconscionability, and limitation on power of parties to choose applicable law. (HRS 490:2A-109; HRS 490:2A-108 and HRS 490:2A-106, respectively).

8.04 CREDITORS' SUITS:

No special statutes. They may be maintained as civil actions following general rules of pleading.

Creditor who has obtained judgment may apply to court for order that judgment debtor or anyone having knowledge be examined and for production of documents concerning property of debtor and debts owing to him. (HRS 636-4).

8.05 EXECUTIONS:

Hawaii closely follows Federal Rules of Civil Procedure. See topic 8.09 Garnishment; category 5 Civil Actions and Procedure, topic 5.19 Practice.

Kinds of Execution.

Execution and alias executions upon any judgment or decree of court of record, or judge thereof may be issued for payment of money. (HRS 651-31). Circuit court out of which execution was issued and is returned wholly or partially unsatisfied may issue alias execution to same circuit or some other circuit. (HRS 651-38). Writ of execution or other writ to enforce final order, judgment, or decree of circuit court is available against property of person writ was issued against in whatever circuit property is situated. (HRS 651-39).

Exemptions.

See topic 8.06 Exemptions.

Time for Issuance.

Executions issue at any time during life of judgment. (HRS 651-31).

Stay.

Where there is no appeal, judge of court of record may stay execution for equitable reasons upon defendant giving bond and security for payment with costs up to stay. (HRS 651-40).

Lien.

No statutory provision for lien of execution before levy.

Levy.

Levy is made by officer taking property into possession. (HRS 651-42). Officer shall make inventory of property levied thereon. (HRS 651-42). Security (see category 3 Business Regulation and Commerce, topic 3.09 Commercial Code) is levied on by actual seizure thereof. (HRS 651-47).

Return.

All executions and alias executions are returnable within 60 days from date. (HRS 651-34). Officer is to pay proceeds sufficient to satisfy judgment, if possible after deducting his costs, expenses, and commissions, to plaintiff or his attorney. (HRS 651-44).

Priorities.

Officer is to give priority according to order of time writs were received by him. (HRS 651-41).

Claims of Third Persons.

Only defendant’s interest is sold. Sale of property not belonging to defendant subjects officer to suit by purchaser deprived by real owner. (HRS 651-49). Pledged stock is sold subject to obligations secured. (HRS 651-47). Interpleader is provided for where conflicting claims are asserted to personal property seized on execution. (HRS 634-11; 12).

Sale.

Officer must advertise sale for 30 days by posting notice in three conspicuous places in district where property is situated, and if on Oahu, by publication in Honolulu newspaper at least three times. (HRS 651-43). Unless judgment, interests and costs, and fees and disbursements of officer are paid, officer will, on appointed day sell to highest bidder. (HRS 651-44). For cause, he may postpone sale, giving notice of adjournment. (HRS 651-45). Officer shall execute and deliver to purchaser whatever certificates of purchase or conveyance are necessary. (HRS 651-46). Officer may decline to levy or sell unless person beneficially interested tenders sufficient bond of indemnity. (HRS 651-51).

Supplementary Proceedings.

Judgment creditor may apply to court rendering judgment for order that judgment debtor, or anyone having knowledge, be examined and for production of documents concerning property of debtor and debts owing to him. (HRS 636-4). Such then may be executed upon in due course.

8.06 EXEMPTIONS:

Exemptions.

Real property located in State of Hawaii owned by person with fair market value of $20,000 or less, real property owned by head of family or by individual 65 years of age or older with fair market value of $30,000 or less (HRS 651-92), and large number of specified articles of personal property, in some instances limited as to value (HRS 651-121) are exempt from attachment, execution, distress and forced sale of every nature and description (HRS c. 651).

Proceeds of sale of exempt property are exempt to same extent allowed in HRS 651-92 for six months from date of their receipt. (HRS 651-96).

Debts Against Which Real Property Exemptions Not Allowed.

Mechanic’s liens, mortgage or other security instrument liens, tax or improvement district liens, and liens recorded prior to acquisition of interest in and commencement of residence. (HRS 651-92).

Debts Against Which Personal Property Exemptions Not Allowed.

Judgments for price of property, security instrument liens, taxes, fines or debts due state. (HRS 651-122).

Waiver of Exemption.

If judgment debtors were fully aware of their exemption right in circuit court, then subsequent failure to assert such right in court amounts to waiver. (61 Haw. 590, 607 P.2d 411).

Necessity and Manner of Claiming Exemption.

Claimant has right to select such property as is exempt and to advise levying officer. Levying officer shall demand in writing that defendant make such selection and failing such selection by defendant, officer’s selection on defendant’s behalf is conclusive. (HRS 651-61).

Earnings.

Wages and other compensation for personal services due debtor for personal services rendered during 31 days before date of proceeding exempt. (HRS 651-121). See topic 8.09 Garnishment.

Homestead Exemption.

See topic 8.10 Homesteads.

Surviving spouse or reciprocal beneficiary of decedent domiciled in this state entitled to value in kind from estate not exceeding $10,000 in excess of any security interests therein in household furniture, automobiles, furnishings, appliances, and personal effects. If no surviving spouse or reciprocal beneficiary, children jointly entitled to such property. (HRS 560:2-403).

Life insurance, endowment and annuity proceeds and cash values are exempt, except as to premiums paid in fraud of creditors. (HRS 431:10-232).

State pensions, retirement system benefits and unemployment relief benefits are exempt. (HRS 653-3, HRS 88-91 and HRS 383-163, respectively).

Other pensions, annuities, retirement or disability allowance, or other benefits accruing under retirement plans qualified under Internal Revenue Code shall be exempt, except as to claims arising under qualified domestic relations orders and as to contributions to certain retirement plans (i.e., IRAs, but not ERISA or 401k plans) made within three years before filing of bankruptcy or initiation of civil action against debtor. (HRS 651-124). Exception for ERISA and 401k plans under HRS 651-124 has been determined to be preempted by federal law. (90 Haw. 345, 978 P.2d 783).

8.07 FORECLOSURE:

See category 20 Mortgages, topic 20.04 Mortgages of Real Property.

8.08 FRAUDULENT SALES AND CONVEYANCES:

Uniform Fraudulent Transfer Act adopted. (HRS c. 651C).

Fraudulent Conveyance.

Due process provides transferee from judgment debtor opportunity to contest claim of fraudulent conveyance. (76 Haw. 32, 868 P.2d 450).

Uniform Commercial Code adopted. See category 3 Business Regulation and Commerce, topic 3.09 Commercial Code.

Fraud in sale of U.S. surplus goods declared unfair trade practice. (HRS 481-21).

Seller must report sale to Tax Commissioner within ten days, and purchaser must withhold payment of price until he receives certificate that taxes are fully paid. (HRS 237-43).

The law imposes no duty on the purchaser to see to the application of the purchase price to payment of the seller’s debts.

Uniform Deceptive Trade Practices Act adopted. (HRS c. 481A). See category 3 Business Regulation and Commerce, topic 3.12 Consumer Protection.

Remedies.

Subject to limitations enumerated in HRS 651C-8, creditors may obtain following: avoidance of transfer or obligation to extent necessary to satisfy creditor’s claim, attachment or other provisional remedy against asset transferred or other property of transferee in accordance with HRS c. 651, with injunction against further disposition by either or both debtor or transferee of asset transferred or of other property, appointment of receiver to take charge of asset transferred or of other property of transferee, and/or any other relief circumstances require. (HRS 651C-7).

If creditor obtains judgment against debtor, creditor may levy execution on asset transferred or its proceeds. (HRS 651C-7).

Bulk Sales.

Uniform Commercial Code Bulk Sales provisions repealed in 1998. (1998, Act 209).

8.09 GARNISHMENT:

Creditor, in action against his debtor, may include attorneys, agents, factors, or trustees possessing property of debtor, persons indebted to debtor, and persons holding debtor's money for safekeeping as garnishee. Employers can be reached in certain cases. (HRS 652-1). Employee may not be suspended or discharged solely on ground employer was summoned as garnishee for employee's debt. (HRS 378-32).

Property Which May Be Reached.

(a) Before judgment: (1) Goods and effects of debtor in possession of garnishee; (2) debts due to debtor by garnishee; (3) moneys of debtor in garnishee's possession for safekeeping. (b) After judgment: wages in amount of 5% of first $100 per month, 10% of next $100, and 20% of excess is to be withheld from debtor until judgment is paid. Wages may be garnished before judgment on order of court. (HRS 652-1).

Security in lieu of garnishment may be posted by debtor before judgment. (HRS 652-1).

Jurisdiction.

Circuit courts and district courts may order garnishment in actions between persons in debtor-creditor relationship. (HRS 652-15). Summons and direction are sufficient notice to enable plaintiff to bring action to trial unless defendant is inhabitant, has office, or was at some time resident of state, in which case copy must be personally served on him or left at his last usual abode. (HRS 652-1). If defendant lives outside district where process is issued, service may also be made by certified or registered mail. (HRS 652-2.5).

Proceedings to Obtain.

Before judgment, creditor may apply for garnishee process to issue. Court may grant application, after hearing with notice to debtor, if probable validity of creditor's claim shown and it appears that property in possession of garnishee not exempt from execution. Garnishee process may issue on verified ex parte motion if reasonable likelihood exists that debtor is not resident, is about to leave jurisdiction or has fraudulently concealed or disposed of property. (HRS 652-1.5). After judgment, creditor may summon garnishee to make full disclosure or, if action brought in district court, may, ten days after judgment, file certified copy of judgment and affidavit of amount due with employer. (HRS 652-1).

Answer of Garnishee.

Garnishee, on or before return day, may file return under oath containing full disclosure. Copy must be served on plaintiff or his attorney on or before return day. (HRS 652-1).

Practice.

After being served, garnishee must secure money or property concerned in his hands to pay whatever judgment plaintiff recovers. (HRS 652-1). Garnishee may defend principal. (HRS

652-2). After judgment in favor of plaintiff, garnishee fund is liable. Plaintiff is entitled to an order including garnishee fund in execution. If garnishee does not pay officer's demand, garnishee is liable for judgment. However, garnishee may deduct all his demands against defendant, whether or not due. (HRS 652-2). Garnishee may offset lender-debtor's effects "in garnishee's hands" when garnishment summons is issued, whether or not payment on debt is due at that time. (117 Haw. 44, 175 P.3d 154). As to debts not due until some time in future, judgment is a lien on debt until due and payable. (HRS 652-10). Court, on consent of plaintiff or motion of defendant or garnishee, may release that portion of garnishee fund which is excessive. (HRS 652-1). Garnishee will not be liable to anyone for nonpayment where in good faith he believes garnishment is involved. (HRS 652-2).

Adverse Claims.

Property or moneys may be paid into court on its order, less reasonable attorneys' fees and costs allowed by court, and garnishee will be discharged. Or, garnishee may apply for an interpleader order. (HRS 652-9).

Judgment.

See subhead Practice, supra.

Earnings.

See subhead Property Which May Be Reached, supra.

State, county and municipal wages, etc. may be garnished as provided in HRS c. 653 and HRS c. 78.

Exempt from garnishment are: unemployment relief benefits (HRS 383-163), state pensions (HRS 653-3) and retirement system benefits (HRS 88-91), and proceeds and cash values of life insurance, endowment and annuity contracts (HRS 431:10-232).

8.10 HOMESTEADS:

Limitation of Value.

Real property consisting of one piece of land located in State of Hawaii not to exceed one acre and dwellings thereon are exempt from levy and sale on execution as follows: (1) Such property of value not exceeding $30,000 owned by head of family or person 65 or older; (2) such property of value not exceeding $20,000 owned by any other person. (HRS 651-92).

Limitation on Area.

None.

Debts or Liabilities Against Which Exemption Not Available.

No exemption for prior existing lien of property, mechanic's lien, lien created by security instrument, federal or state tax lien, county or state district improvement lien. (HRS 651-92[b]).

Proceeds of Sale.

Priority of distribution of sale proceeds: Exemption amount to property owners, attorneys' fees and costs of sale, satisfaction of underlying lien, and subsequent liens, remainder to property owner. (HRS 651-95). Exempt proceeds protected for six months. (HRS 651-96).

Rights of Surviving Spouse and Family.

Surviving spouse or reciprocal beneficiary of decedent domiciled in this state entitled to homestead allowance of $15,000. If no surviving spouse or reciprocal beneficiary, minor and dependant children are entitled to equal shares of allowance. (HRS 560:2-402).

See also categories 14 Family, topic Husband and Wife; Property, topics Curtesy, Deeds, Dower, Real Property.

8.11 JUDGMENT NOTES:

Not recognized.

8.12 LEVY:

See topics 8.02 Attachment, 8.05 Executions.

8.13 LIENS:

Persons who have liens on property entrusted to their care for value of their services include: Warehousemen (HRS 507-62); common carriers (HRS 271-18); laundrymen (HRS 507-13); animal caretakers (HRS 507-1); innkeepers (HRS 486K-2); auto repairmen (HRS 437B-20).

Foreclosure in each case is by sale after publication of notice. (HRS c. 507). Uniform Commercial Code adopted in Hawaii. (HRS c. 490). See category 3 Business Regulation and Commerce, topic 3.09 Commercial Code.

Physicians, surgeons, dentists and hospitals rendering services to injured persons have lien for their charges on judgment recovered for such injuries. (HRS 507-4).

Persons making improvements, repairs or alterations upon personal property have lien thereon for their work, labor and material. Foreclosure is by suit as in case of mechanics' liens. (HRS 507-18, 19). But if lien does not exceed $150, lienholder may sell personal property under certain conditions. (HRS 507-23).

Bailees may sell personal property when lien has attached for 60 days and is unsatisfied. Four weeks notice by publication necessary. (HRS 507-5).

Department of Human Services may require lien on real property interests (HRS 346-29.5) or estate of recipient of public assistance (HRS 346-37).

Enforcement is by proceeding in pertinent circuit court by service of summons as in other cases. There is no priority among lienors who have properly filed; all intervene or are consolidated for trial and share pro rata, except laborers' claims up to $300 which have priority to that extent. (HRS 507-46, 47).

Equitable Liens.

Equitable lien not judicially recognized until judgment rendered declaring existence. (75 Haw. 480, 866 P.2d 951).

Mechanics' Liens.

Mechanics or material men have a lien, for agreed price of labor or material furnished, on both building and land. (HRS c. 507, Part II).

Unreasonable extension of credit to contractor by supplier is defense to lien. (HRS 507-49).

Application for lien and notice of claim of lien must be filed with clerk of circuit court within 45 days after completion, and suit to perfect and foreclose lien must be begun within three months after lien attaches; notice of completion must be published by owner or contractor twice, seven days apart, and date of filing of affidavit of publication by newspaper with clerk of pertinent circuit court constitutes “date of completion”; in absence of such publication and filing of affidavit, “date of completion” is one year after substantial physical completion. (HRS 507-43). Mortgages recorded prior to commencement of construction operations enjoy priority. Subsequent mortgages enjoy priority to extent that proceeds are used for construction, if mortgage recites that loan has been made in whole or in part to pay for improvements. (HRS 507-46).

Where the improvement is to property under lease or agreement of sale, the interest of the fee owner is subject to the lien if the lease, contract of sale, etc. (HRS 507-42).

Discharge of Lien.

Owner, lessee, principal contractor or intermediate subcontractor may discharge lien by filing with circuit court of county in which property is located or with land court (if registered land is affected) cash or bond for twice amount of claim under lien. (HRS 507-45).

Attachment Lien.

See topic 8.02 Attachment.

Attorney’s Lien.

See category 18 Legal Profession, topic 18.01 Attorneys and Counselors.

Child Support Enforcement Lien.

See category 14 Family, topics 14.06 Divorce and 14.10 Infants.

Collateral Security.

See topic 8.15 Pledges.

Execution Lien.

See topic 8.05 Executions.

Judgment Lien.

See category 5 Civil Actions and Procedure, topic 5.15 Judgments.

Landlord’s Lien.

See category 21 Property, topic 21.10 Landlord and Tenant.

Liens on Exempt Property.

See topic 8.06 Exemptions.

Liens on Homestead.

See topic 8.10 Homesteads.

Real Estate Mortgage Lien.

See category 20 Mortgages, topic 20.04 Mortgages of Real Property.

Tax Lien.

See category 22 Taxation, topic 22.13 Property Taxes, subhead Lien.

Public Works.

Contractor must give satisfactory bond conditioned for faithful performance of contract and prompt payment for all labor and materials furnished to him and used in the work. Such bond must be for 100% of contract price. Bond inures to benefit of any person entitled to file claim for labor or materials, and all such persons have a right of action on such bond. (HRS 103D-324).

Redemption.

There is no right of redemption of property sold under foreclosure of a lien, except in case of a tax lien. See category 22 Taxation, topic 22.13 Property Taxes, subhead Redemption.

Condominiums.

Rights of persons holding liens involving condominiums are regulated in detail. (HRS 514A-90). See category 5 Civil Actions and Procedure, topic 5.15 Judgments, subhead Judgment Liens.

8.14 MECHANICS' LIENS:

See topic 8.13 Liens.

8.15 PLEDGES:

Governed by HRS c. 486M (pawnbrokers and secondhand dealers). Minimum retention 15 calendar days in counties with population of less than 300,000 and 30 calendar days in counties with population of 300,000 or more. (HRS 486M-4). Pawnbrokers may not accept motor vehicles, boats, homes or allow customer's pawn account to exceed $10,000. (HRS 445-134.13).

Any goods not redeemed within last holding period may be forfeited and become property of pawnbroker. (HRS 445-134.15). Holding period means time period not less than 30-days after maturity date. (HRS 445-131).

Uniform Commercial Code adopted. (HRS c. 490). See category 3 Business Regulation and Commerce, topic 3.09 Commercial Code.

8.16 RECEIVERS:

Receivers may be appointed under certain circumstances in attachment (HRS 651-14) and divorce (HRS 580-13) cases.

8.17 REDEMPTION:

See topic 8.13 Liens; categories 20 Mortgages, topic Mortgages of Real Property; Taxation, topic Taxes.

8.18 SUPPLEMENTARY PROCEEDINGS:

See topic 8.05 Executions.

8.19 TRUSTEE PROCESS:

See topic 8.09 Garnishment.

8.20 USURY:

See category 3 Business Regulation and Commerce, topic 3.19 Interest.

9 DISPUTE RESOLUTION

9.01 ALTERNATIVE DISPUTE RESOLUTION:

See topic 9.02 Arbitration and Award.

Mandatory ADR.

At court's discretion, or upon motion, parties may be ordered to participate in ADR process subject to conditions imposed by court. (Rules of the Circuit Courts of the State of Hawaii [RCCH] 12.2, effective 1/1/97). Court is not authorized to order binding arbitration or deprive party of right to trial. Parties must confer in person regarding ADR options, and must state in pretrial statement ADR process to which they have agreed or identify objecting party and reasons for objection. (RCCH 12[b][6]; [7]). Pretrial statement must be filed within eight months after filing of complaint if no extension granted by court. (RCCH 12[b]). Additionally, ADR options will be discussed at status conference conducted by Civil Admin. Judge. (RCCH 12[c][i]). In complex cases, Judge may establish meeting deadlines for meeting with Judiciary Center for ADR. (RCCH 12[k][3][i][A]).

Judiciary Center for ADR.

Center established within judiciary to facilitate mediation, neutral fact-finding and negotiated consensus-building. Focus is on reducing costs of litigation over public issues, allocation of resources. (HRS c. 613). Evidence relating to mediation is inadmissible except as it pertains to criminal acts or fraud. (HRS 626-1; HRE 408).

9.02 ARBITRATION AND AWARD:

HRS c. 658A which adopts Revised Uniform Arbitration Act ("RUAA") governs agreement to arbitrate made on or after July 1, 2002. After June 30, 2004, HRS c. 658A governs agreement to arbitrate whenever made. HRS c. 658A governs agreement to arbitrate made before July 1, 2002 if all parties to agreement or to arbitration so agree. If such parties do not so agree, agreement to arbitrate made before July 1, 2002, shall be governed by law specified in agreement to arbitrate, or if none is specified, by HRS c. 658. Agreement contained in record to submit to arbitration any existing or subsequent controversy arising between parties to agreement is valid, enforceable, and irrevocable. In contract containing arbitration clause, where dispute arises from general allegations of fraud in inducement, contract still subject to arbitration. Unless there is claim made that there was fraud in inducement of arbitration clause, clause is valid and binding as remedy for general claim of fraud in inducement of contract as a whole. (81 Haw. 1, 911 P.2d 721-decided under prior law). If party makes motion to order arbitration, court on just terms shall stay any court proceeding involving claim alleged to be subject to arbitration pending outcome of arbitration. (HRS 658A-7; 81 Haw. 193, 914 P.2d 1386-decided under prior law).

Forms and Requisites of Submission.

Naming Arbitrators.

If no method is provided or there is lapse in naming arbitrator, then on application by either party, circuit court will name arbitrator or arbitrators. (HRS 658A-11).

Compelling Compliance.

Party aggrieved may apply to circuit court for order that arbitration proceed according to agreement. (HRS 658A-7).

Judgment on Award.

Agreement to arbitrate providing for arbitration in this state confers exclusive jurisdiction on court to enter judgment on award. (HRS 658A-26).

Entry.

Upon granting order confirming, vacating without directing rehearing, modifying or correcting award, court shall enter judgment in confirming therewith. (HRS 658A-25).

Effect is same as in civil action and may be enforced accordingly. (HRS 658A-25).

Appeal may be taken. (HRS 658A-28).

Enforcement.

Motion to vacate must be made within 90 days after movant receives notice of award or of modified or corrected award. (HRS 658A-23).

Confirming Award.

Party may make motion for order confirming award after it receives notice of award. (HRS 658A-22).

Vacating Award.

Upon application, court may vacate award if it was procured by corruption, fraud or undue means; if arbitrator was partial or corrupt; if arbitrator wrongfully refused to hear material evidence, failed to postpone hearings upon sufficient cause shown, committed acts prejudicial to party, exceeded his powers, there was no agreement to arbitrate, or party's rights were substantially prejudiced by improper notice of initiation of arbitration. (HRS 658A-23).

Modifying or Correcting Award.

Motion to modify or correct award must be made within 90 days after movant receives notice of award or of modified or corrected award. Grounds for modification generally restricted to math errors and errors in form of award. (HRS 658A-24).

Mandatory Arbitration.

Lease Rents—Mining Lease.

Person in possession of land for which mining lease is auctioned by Board of Land and Natural Resources may require that damage and lease rent be determined by arbitration. (HRS 182-3[b]).

Residential Leases.

Rents to be renegotiated under lease of two acres or less and having term of at least 20 years must be submitted to Housing and Community Development Corporation of Hawaii for arbitration if parties cannot agree on renegotiated rent. (HRS 519-2). Rents being renegotiated under subleases issued by housing corporation (cooperative) must be submitted to arbitration by Housing and Community Development Corporation of Hawaii if parties fail to reach agreement. (HRS 519-3). Effective July 1, 2006, HRS c. 514A is repealed. (2005, Act 93 and 2004, Act 164). Under Act 164, parts of replacement statute relating to definitions and general provisions, applicability and management were enacted. Under Act 93, parts of replacement statute relating to creation, termination and alteration of condominium, protection of condominium purchasers and amendments to Act 164 were enacted. Whenever any lease or sublease provides for periodic renegotiation of lease rent, association of apartment owners shall represent apartment owners in arbitration. (2004, Act 164, § 514B-162; 514A repealed). Rent renegotiation subject to mandatory arbitration. (HRS 516D-12).

Motor Vehicle Insurance.

Dispute relating to motor vehicle insurance policy may be submitted to arbitration by claimant or insurer by written request filed with clerk of circuit court. (HRS 431:10C-213). Arbitrator is appointed by administrative judge of circuit court. Proceedings are governed by HRS c. 658A. Award may be appealed to circuit court. Collection of any arbitration award is limited to applicable liability policy limit. Arbitration award is not binding on under insured motorist claim. (HRS 431:10C-213.5). Independent medical examinations should be performed by provider agreed upon by parties. If agreement cannot be reached, selection may be submitted to arbitration. (HRS 431:10C-308.5[e][2]).

Effective July 1, 2006, HRS c. 514A is repealed. (2005, Act 93 and 2004, Act 164). Under Act 164, parts of replacement statute relating to definitions and general provisions, applicability and management were enacted. Under Act 93, parts of replacement statute relating to creation, termination and alteration of condominium, protection of condominium purchasers and amendments to Act 164 were enacted.

Condominiums.

Dispute between condominium apartment owners or between owners and condominium association, its board of directors or managing agent may be submitted to arbitration by either party. (HRS § 514B-162). Award is enforceable by circuit court but is subject to trial de novo. (HRS § 514B-163). Subject matter must relate to interpretation, application or enforcement of HRS c. 514A or project declaration, bylaws or house rules. (HRS § 514B-162). Following matters are excluded from mandatory arbitration: Dispute involving real estate commissioner, mortgagee, developer, contractor or subcontractor of project, actions seeking equitable injunctive relief involving threatened property damage or health or safety of persons, collection of assessments, personal injury claims, claims in excess of $2,500 if insurance coverage would be invalidated, or claims determined by court to be unsuitable for arbitration. (HRS § 514B-162). Mediation is required of certain condominium disputes related to association of apartment owners' declaration, bylaws, or house rules, or state law if requested by owner or association. Courts may consider party's refusal to mediate when awarding costs and attorneys' fees. (HRS § 514B-161). See also category 5 Civil Actions and Procedure, topic 5.02 Actions, subhead Conditions Precedent. At request of any party, any dispute concerning one or more stockholders and limited equity housing corporation, its board of directors, managing agent or one or more other stockholders relating to interpretation or application of HRS § 421H-6 or corporation's charter of incorporation, bylaws, or administrative rules in accordance with its bylaws shall be submitted to arbitration. Arbitration should be conducted, unless otherwise agreed by parties, in accordance with HRS c. 658A and condominium property regime rules on arbitration of disputes of American Arbitration Association, provided that where any arbitration rule conflicts with HRS c. 658A, HRS c. 658A prevails. (HRS 421H-6).

Tort Cases.

All tort cases with probable jury award less than $150,000 filed in circuit court are subject to determination under court-annexed mandatory arbitration program. (HRS 601-20, HAR 6). HAR govern procedures and requirements for exemption and inclusion in program.

Powers of Arbitrators.

Arbitrator may issue subpoena for attendance of witness and for production records and other evidence and may administer oaths. Upon request of party or witness, arbitrator may permit depositions. Arbitrator may permit such discovery as is appropriate in circumstances. Arbitrator can take action against any party failing to comply with discovery procedures as in State Civil Court. (HRS 658A-17).

If all interested parties agree or upon request of one party if that party gives notice and other parties have reasonable opportunity to respond, arbitrator may decide request for summary disposition of issue or claim. (HRS 658A-15).

Arbitrator may award punitive damages, reasonable attorneys' fees, and any other just and appropriate remedies, even if could not be granted in court. (HRS 658A-21).

Power of arbitrator may be expanded or limited by parties through waiver of certain provisions of HRS c. 658A. (HRS 658A-4).

Rescission.

Neither contract nor submission is revocable except on grounds at law or in equity for revocation of any contract. (HRS 658A-6).

Stay of Other Suit.

If applicant is not in default, circuit court will, on application, stay trial of any action on issue referable to arbitration until after arbitration. (HRS 658A-7).

International Business.

Hawaii International Arbitration, Mediation, and Conciliation Act adopted to encourage use of arbitration to resolve disputes arising out of international relationships and to maximize private autonomy over such proceedings. (HRS c. 658D).

Contested Cases.

Agency may encourage parties to contested case hearing to participate in mediation prior to hearing subject to conditions imposed by agency. (HRS 91-8.5).

10 DOCUMENTS AND RECORDS

10.01 ACKNOWLEDGMENTS:

To entitle any conveyance or other instrument to be recorded, it must be acknowledged. (HRS 502-41).

Within State.

Acknowledgments may be taken before registrar of conveyances, his deputy, judge of court of record, or notaries public. (HRS 502-50).

Outside State But Within U.S.

Acknowledgment of instrument executed in another jurisdiction of U.S. for recording or to be read in evidence in Hawaii may be made before any officer of such jurisdiction who is there authorized to take acknowledgments, and certificate is sufficient if in form which would entitle instrument to be recorded in jurisdiction where acknowledged or in form provided by Hawaii statutes (see subhead Forms, infra). For reading into evidence, burden of proving due execution of instrument is on person relying thereon. (HRS 502-45). Burden can be met by attaching to acknowledgment certificate of Secretary of State where acknowledging officer resides, under seal of, or certificate of clerk of court of record where officer resides or where he took acknowledgment or certificate of executive officer or clerk of court of record of dependency of U.S., stating that officer who took acknowledgment was, at time of taking, duly authorized to take acknowledgments in jurisdiction, that certifying officer is well acquainted with handwriting of officer taking acknowledgment and that he believes signature to acknowledgment is genuine. (HRS 502-46).

Outside U.S.

Acknowledgment of instrument executed outside U.S. may be made by: (1) Any officer now authorized by laws of Hawaii; (2) any officer of U.S. diplomatic service, certified under his seal of office; and (3) any person authorized by law of his country to take acknowledgments, when accompanied by certificate of his authority and that acknowledgment complies with laws of his country. Such certificate may be made by diplomatic or consular officer of U.S. or by diplomatic or consular officer of such foreign country resident in Hawaii. (HRS 502-47[a]).

Officers of U.S. Armed Forces.

Acknowledgments of persons outside U.S. or in Armed Forces may be taken by officers of U.S. Armed Forces so authorized by Congress to exercise powers of notary public. (HRS 502-47[b]).

General Requirements as to Taking.

See subhead Forms, infra. (HRS 502-48).

Fee for taking acknowledgment is $5 for each party and $2.50 per signature for each duplicate original. (HRS 456-17).

General Requirements of Certificate.

Notary’s signature, typed or printed name of notary, and date of expiration of notary’s commission must be noted. Seal of notary must be affixed by engraved seal of office or rubber stamp facsimile. (HRS 456-3).

Changes, erasures or interlineations in the instrument acknowledged must be initialed by the notary. Such initialing is prima facie evidence of extent of the interlineations, etc., and of fact that they were made prior to acknowledgment of the instrument, but does not preclude proof to the contrary. (HRS 502-61).

Married women acknowledge in the same manner as other persons. (HRS 502-44).

Attorneys in Fact.

See subhead Forms, infra.

Corporations.

See subhead Forms, infra.

Foreign Acknowledgments.

See subheads Within Another U.S. Jurisdiction; Outside U.S., supra.

Effect of Acknowledgment.

Duly acknowledged instrument is entitled to be recorded (HRS 502-41; 47; 50) and is admissible in evidence without further proof (HRS 502-47; 81).

Proof by Subscribing Witness.

As substitute for acknowledgment, instrument may be recorded on proof of execution by subscribing witness (e.g., notary public) or of handwriting of execution person and subscribing witness before judge of circuit court. (HRS 502-50).

Alternative to Acknowledgment or Proof.

When any instrument required to be acknowledged or proved has been executed by person then permanently or temporarily resident at some place where acknowledgment or proof cannot be made, such instrument may be declared acceptable for recordation by order of judge issued upon such testimony and evidence as are sufficient in judgment of judge to establish genuineness and authenticity. (HRS 502-47[c]).

Authentication of certificate of notary in Hawaii for use elsewhere is by certificate of clerk of circuit court of judicial circuit in which he is commissioned. (HRS 456-4). Fee for filing copy of commission and for each certificate of authentication shall be specified by Supreme Court. (HRS 456-9). As to authentication of certificate taken elsewhere for use in Hawaii, see subhead Within Another U.S. Jurisdiction, supra.

Forms.

Acknowledgments must be in substantially following forms:

Forms

(1) *Natural person* acting in own right. State of Hawaii, County of . . . . . ., ss. On this . . . . . . day of . . . . . ., 20. . . ., before me personally appeared A.B.(or A.B. and C.D.), to me known to be the person (or persons) described in and who executed the foregoing instrument, and acknowledged that the person or persons (or they) executed the same as the person’s or persons’ free act and deed. (Signature, title and seal of officer). (HRS 502-41[1]).

(2) *Person not known to officer.* Use same form up to “A B” and continue as follows: “satisfactorily proved to me to be the person described in and who executed the within instrument, by the oath of C.D., a credible witness for that purpose, to me known and by me duly sworn, and the persons A.B., acknowledged that the person who executed the same freely and voluntarily for the uses and purposes therein set forth.” (HRS 502-43).

(3) *Acknowledgment by attorney in fact.* Use same form up to “foregoing instrument” and continue as follows: “in behalf of C.D. and acknowledged that the person who executed the same as the free act and deed of said C.D.” (HRS 502-41[2]).

(4) *Corporation or partnership.* “(Caption) On this . . . . day of . . . . . ., 20. . . ., before me appeared A.B., to me personally known, who, being by me duly sworn (or affirmed), did say that the person is the president (or other officer or agent of the corporation or partnership) of (describing the corporation or partnership) and that the instrument was signed and sealed in behalf of the corporation (or partnership) by authority of its board of directors (partners or trustees), and said A.B. acknowledged the instrument to be the free act and deed of the corporation (or partnership).” (HRS 502-41[3]).

(5) *Corporation acknowledging by individual as its attorney.* “(Caption) On this . . . . . . day of . . . . . ., 20. . . ., before me personally appeared A.B., to me personally known, who being by me duly sworn (or affirmed) did say that the person is the attorney in fact of C.D. (here name the corporation) duly appointed under power of attorney dated the . . . . . . day of . . . . . ., 20. . . ., recorded in book . . . . . ., at page . . . . . /as document no . . . . . .; and that the foregoing instrument was executed in the name and behalf of said C.D. by A.B. as its attorney in fact; and A.B. acknowledged the instrument to be the free act and deed of C.D.” (HRS 502-41[4]).

In case enabling power of attorney has not been recorded, omit reference to its place of record and insert in lieu thereof the words “which said power of attorney is now in full force and effect.” (HRS 502-41[4]).

(6) *Corporation acknowledging by another corporation as its attorney.* “(Caption) On this . . . . . . day of . . . . . ., 20. . . ., before me personally appeared A.B., to me personally

known, who being by me duly sworn (or affirmed), did say that he (or she) is the president (or other officer or agent of the corporation acting as attorney) of C.D, (here name the corporation) and that said C.D. is the attorney in fact of E.F. (here name the corporation in whose behalf the attorney is acting) duly appointed under power of attorney dated the . . . . . . day of . . . . . ., 20. . . ., recorded in book . . . . . . at page . . . . . . /as document no . . . . . .; that the foregoing instrument was executed in the name and behalf of E.F. by C.D. as its attorney-in-fact; that said instrument was so executed by C.D. by authority of its board of directors; and A.B. acknowledged the instrument to be the free act and deed of said E.F..” (HRS 502-41[5]).

In case the enabling power of attorney has not been recorded, omit reference to its place of record and insert in lieu thereof the words “which power of attorney is now in full force and effect.” (HRS 502-41[5]).

10.02 AFFIDAVITS:

Generally, notaries public may administer oaths. (HRS 456-13). Fee is $5 for administration of oath, including certificate of oath; $2.50 for affixing certificate of oath. (HRS 456-17). No statute governs affidavits, as such, executed outside state. See topic 10.01 Acknowledgments.

General Requirements as to Administration.

No statute governs affidavits as such. As matter of practice, they can be recorded (see topic 10.01 Acknowledgments), but will not be read in evidence if objected to.

General Requirements of Jurat.

Every notary public has seal of office which includes name, words, “notary public” and “State of Hawaii”. (HRS 456-3).

Form

State of Hawaii)

)

City and County of Honolulu) ss:

(or County of . . . .)

Comes now . . . ., being duly sworn, on oath deposes and says:

. . . .

Further, affiant says not.

. . . .

Subscribed and sworn to before me

this . . . . day of . . . ., 20 . . .

(seal) . . . .

Notary Public, ... Judicial Circuit,

State of Hawaii.

My commission expires: . . . .

Alternatives to Sworn Affidavits.

No statute governs alternatives to sworn affidavits, as such. In Circuit Court, in lieu of affidavit, unsworn declaration may be made by person, in writing, subscribed as true under penalty of law, and dated, in substantially following form: “I, (name of person), do declare under penalty of law that the foregoing is true and correct. Dated: (date),” (followed by signature of declarant). (RCCH 7[g]).

10.03 NOTARIES PUBLIC:

Qualification.

Appointee must be resident of state, possess qualifications required of public officers, and be at least 18 years old. Oath for faithful discharge of duties must be taken; oath must be filed in department of attorney general. (HRS 456-2). Each notary public must execute at own expense official surety bond in sum of $1,000 in Circuit Court. (HRS 456-5).

Authentication.

All appointed and commissioned notaries public must file literal or photostatic copy of person’s commission, impression of person’s seal, and specimen of person’s official signature with clerk of Circuit Court in which notary resides. Notary may file above documents with clerk of any other Circuit Court. (HRS 456-4). Notary public must authenticate all official acts with seal, signature, typed or printed name, and declaration of date of expiration of commission. (HRS 456-3). See topic 10.01 Acknowledgments.

Seal.

Notary must constantly keep engraved seal of office or rubber stamp facsimile with notary’s name, words “notary public” and “State of Hawaii”. Notary public must authenticate all official acts, attestations, certificates, and instruments with seal. Upon resignation, death, expiration of term without reappointment, or removal from or abandonment to office, notary public must immediately deliver seal to attorney general. (HRS 456-3).

Powers and duties of notaries are those usually appertaining to office. Notary shall record at length all acts, protests, depositions, and other things noted or done in official capacity. (HRS 456-15). Notary may sign for person physically unable to sign document, under certain conditions. (HRS 456-19). Powers and duties of notaries in government service are provided for in HRS 456-18.

Territorial Extent of Powers.

Official character and acts of any notary will be certified by clerk of any court in which such notary has filed commission, seal, and signature. (HRS 456-4).

Expiration of Commission.

Notaries public serve four year terms from date of commission, unless sooner removed by attorney general for cause after hearing. (HRS 456-1). Notary must add to stamped, embossed, or impressed seal notary’s official signature, typed or printed name of notary and statement showing date of expiration of commission. (HRS 456-3).

Fees for notarial acts vary from $2.50 to $5. (HRS 456-17).

Commissioners of Deeds.

No statutory provision.

Officers of U.S. Armed Forces.

No statutory provision.

10.04 RECORDS:

Registrar of Bureau of Conveyances in Department of Land and Natural Resources of State of Hawaii at Honolulu, Hawaii, has charge of records related to property. (HRS 502-1; 11). Registrar of Conveyances is assistant registrar of Land Court of State of Hawaii for land registered under Torrens system. (HRS 501-9). Department of land and natural resources may adopt rules pursuant to HRS c. 91 relating to bureau of conveyances and to repeal and establish fees. (HRS c. 502-4).

Judgments filed and recorded in land court or bureau of conveyances must contain social security number, general excise taxpayer identification number, or federal employer identification number of person against whom judgment is rendered. (HRS 501-151).

Deeds, mortgages, bills of sale, chattel mortgages, leases for more than one year, and the like must be recorded in office of Registrar of Conveyances in Honolulu, in order to constitute notice to bona fide purchasers. (HRS 502-83). They must be acknowledged or proved to be entitled to record. (HRS c. 502). See category 21 Property, topic 21.06 Deeds.

Uniform Commercial Code adopted. (HRS c. 490). See category 3 Business Regulation and Commerce, topic 3.09 Commercial Code.

Uniform Information Practices Act adopted with significant variations. (HRS c. 92F).

Recordable Instruments.

Every conveyance or instrument acknowledged or proved or certified may be recorded (HRS 502-81), including deeds, mortgages, leases, powers of attorney, bills of sale, assignments, grants of easements, maps or plats (if special requirements of HRS 502-17 are met), financing statements, affidavits, judgments, lien notices, notice of lis pendens, etc.

Effect of Not Recording.

All deeds, leases for more than one year, mortgages of any interest in real estate, or of other conveyances of real estate within the state not recorded are void as against any subsequent purchaser, lessee, or mortgagee, in good faith and for a valuable consideration, not having actual notice of the conveyance of the same real estate or any portion thereof or interest therein, whose conveyance is first duly recorded. (HRS 502-83).

Place of Recording.

Recording of instruments affecting real property, including filing of instruments affecting land registered under Torrens Act, are recorded or filed at Office of the Assistant Registrar of the Land Court of the State of Hawaii, 1151 Punchbowl Street, Rm. 122, Honolulu, Hawaii 96813; mailing address: P.O. Box 2867, Honolulu, Hawaii 96803.

Requisites of Recording.

Recording of document larger than 8½ × 11 inches may be refused. Top 3½ inches of first page of each document must be reserved for recording information. Following 1 inch shall be reserved for information showing to whom document should be returned beginning 1½ inches from left margin, and not exceeding 3½ inches per line. First page shall include, if possible, all names of grantors and all names and addresses of grantees, type of document, and tax map key number. When grantee is corporation or partnership, document must contain state where entity is registered and entity's address. (HRS 502-31). Marital status and address of grantee must be shown. (HRS 502-34). All names in instrument shall be typewritten, stamped or legibly printed by hand or by some other mechanical or electrical printing method beneath all signatures. (HRS 501-108[c]; HRS 502-31). Any instrument affecting mortgage, lien or lease must refer to book and page or document number where original mortgage, lien or lease is recorded. (HRS 506-4, HRS 502-33).

Fees.

Fixed by HRS 502-25 unless otherwise provided by rules adopted by Department of Land and Natural Resources, pursuant to HRS c. 91. Fees for Torrens documents are fixed by HRS 501-218 unless otherwise provided by rules adopted by Department of Land and Natural Resources, pursuant to HRS c. 91.

Tax Lien.

Recordation by Department of Taxation with Bureau of Conveyances of certificate setting forth taxpayer's name, address, and taxes due shall be sufficient to create lien on land registered in land court. (HRS 231-33).

Torrens Act.

Land Court registration is provided for by HRS c. 501. Documents purporting to convey or affect land registered with Land Court are not effective as conveyance and do not bind land until registered in Office of Assistant Registrar of Land Court in Honolulu. (HRS 501-101). See category 21 Property, topic 21.06 Deeds.

Transfer of Decedent's Title.

Uniform Probate Code, but not 1975 or 1977 Official Amendments, adopted (HRS c. 560), effective July 1, 1977. Certified copy of order of distribution must be recorded in bureau of conveyances or for registered land, filed with office and Assistant Registrar of Land Court.

Filing Under Uniform Commercial Code is with Office of the Registrar of Conveyances, Bureau of Conveyances, 1151 Punchbowl Street, Honolulu, Hawaii 96813. (HRS 490:9-501). Filing fees are listed in HRS 502-25 unless provided for by rules adopted by Department of Land and Natural Resources, pursuant to HRS c. 91.

Requisites of Filing Under Uniform Commercial Code.

Financing statement is sufficient only if it: (1) Provides name of debtor; (2) provides name of secured party or representative of secured party; and (3) indicates collateral covered by financing statement. Financing statement that covers as-extracted collateral or timber to be cut or collateral goods which are or are to become fixtures must additionally: (1) Indicate that it covers this type of collateral; (2) indicate that it is to be filed for record in real property records; (3) provide description of real property to which collateral is related; and (4) if debtor does not have interest of record in real property, provide name of record owner. (HRS 490:9-502). Any instrument relating to security investments filed under Uniform Commercial Code must refer to book and page or document number where original financing statement is filed or state that original instrument is unrecorded. (HRS 502-33). See category 3 Business Regulation and Commerce, topic 3.09 Commercial Code.

Vital Statistics.

Report of births, deaths, and marriages must be filed with Office of Health Statistics Monitoring, Dept. of Health, State of Hawaii, P.O. Box 3378, Honolulu, Hawaii 96801, Attn. Vital Records. (HRS c. 338). Fee of $10 is charged for first certified copy of each document requested, additional reports of same document requested at same time are $4. (HRS 338-14.5).

10.05 SEALS:

Seals in Hawaii are mere matters of form which never partake of essence and substance of agreement and are not necessary to validity of mortgages, deeds or bonds. (40 Haw. 92).

Notary public shall constantly keep engraved seal of office or rubber stamp facsimile seal. Notary public shall authenticate notary’s official acts, attestations, certificates and instruments therewith. (HRS 456-3).

Uniform Commercial Code adopted. (HRS c. 490). See category 3 Business Regulation and Commerce, topic 3.09 Commercial Code.

Corporate Seals.

Regulated by HRS 414-42(2).

Effect of Seal.

Seal on writing evidencing contract for sale of goods or offer to buy or sell goods does not constitute sealed instrument. (HRS 490:2-203).

10.06 TORRENS ACT:

See topic 10.04 Records; category 21 Property, topic 21.06 Deeds.

10.07 VITAL STATISTICS:

See topic 10.04 Records.

11 EMPLOYMENT

11.01 EMPLOYER AND EMPLOYEE:

See topic 11.02 Labor Relations.

11.02 LABOR RELATIONS:

Department of Labor and Industrial Relations administers all matters relating to employment law enforcement (HRS c. 371), including unemployment compensation (HRS cc. 383 and 385), wages and hours of labor (HRS c. 387), payment of wages and other compensation (HRS c. 388), child labor (HRS c. 390), workers’ compensation (HRS c. 386), temporary disability insurance (HRS c. 392), prepaid health care (HRS c. 393), manpower development and training (HRS c. 394), receipt of funds from self-insured employers, and determination of amount of special compensation fund assessment (HRS 386-154); and apprenticeship system (HRS c. 372). Department authorized to enter into reciprocal agreements with other states re collection of wage claims. (HRS 388-12).

Act relating to occupational safety and health adopted. (HRS c. 396).

Wages and Hours of Labor.

Minimum wages and maximum hour provisions in effect since 1941; minimum wages are $7.25 per hour. (HRS 387-2). Upon Director’s certification, full-time students, student-learners and disabled persons may be paid below minimum wage. (HRS 387-9). Overtime at 1½ times employer’s regular rate must be paid after 40 hours. (HRS 387-3[a]). All service charges for food and beverage services must be distributed to employees unless otherwise disclosed. (HRS 481B-14). Wage and hour law does not apply to employees with guaranteed compensation of $2,000 per month or more; other exemptions similar to federal law. (HRS 387-1). Overtime provisions do not apply to employees of air carriers, provided that any overtime hours are result of voluntary agreement between employees to exchange work time or days off. (HRS 387-3[g]). Employer prohibited from making certain deductions from compensation. (HRS 388-6). Employers who fail to pay wages as required by Hawaii Payment of Wages Law must pay wages due plus sum equal to amount of unpaid wages and interest at rate of 6% per year from date wages were due. (HRS 388-10). Wages and hours of persons employed by contractors on public works regulated. (HRS c. 104). Violations and penalties strengthened. (HRS 104-24). Department of Labor and Industrial Relations not required to pay employer's attorney's fees and costs in wage enforcement cases. (HRS 387-12). Contractor's failure to include prevailing wage provision in public works project not defense for noncompliance. (HRS 104-2[f]).

Occupational Safety and Health (HRS c. 396).

Administered by Department of Labor and Industrial Relations. (HRS 396-4). Penalties. (HRS 396-10). Definition of serious and willful violations. (HRS 396-3).

Prohibits retaliation for filing complaints. (HRS 396-8). Fees to be established for issuance of permits, licenses, certificates. (HRS 396-5.1).

OSHA appeals transferred to Hawaii Labor Relations Board. (HRS 396-3).

Employment-at-will is rule unless employment contract specifies definite period of time or employment relationship is covered by collective bargaining agreement. (703 F. Supp. 863). Public policy exception. (100 Haw. 149, 58 P.3d 1196). Implied-in-fact contract exception. (68 Haw. 594, 724 P.2d 110).

Child Labor.

Employment of children ages 14-18 outside school hours permitted in any gainful occupation with certain exceptions; employment of children under 14 very limited; hours of work for children under 16 restricted. (HRS 390-2). Certificates of employment and age required from Department. (HRS 390-3). Prohibition on minors under 18 from working in adult entertainment. (HRS 390-2[a]).

Employment Practices.

Employers who, in good faith, provide candid information about former employees to prospective employers, have qualified immunity from civil liability for disclosure. (HRS 663-1.95). Employer may make post-offer inquiries about applicant's conviction record (provided conviction is less than ten years old) if inquiry is rationally related to duties and responsibilities of position. (HRS 378-2.5). Employer can consider ten year period of applicant's conviction record, exclusive of period of incarceration. (HRS 378-2.5). Schools may consider criminal convictions in evaluating applicant's suitability to working near children. (HRS 378-3[8]). Financial institution may discharge or refuse to hire person convicted of crime involving dishonesty. (HRS 378-3[9]). Body fluid or tissue testing for HIV infection may not be done without prior written consent of subject to be tested. Exceptions for anatomical gifts and research when anonymity is ensured. Also exceptions for purposes of diagnosis or treatment, or for protection of health care workers, when person is unable to give consent. (HRS 325-16). Discrimination in employment due to genetic information prohibited. (HRS 378-1).

Employer of 50 or more employees must grant up to 30 days leave to employee who is victim or parent of victim of domestic or sexual violence. Employer of less than 50 employees must grant up to 5 days. (HRS 378-72).

Employers prohibited from discriminating on basis of gender by paying wages to employee at rate less than rate at which employer pays wages to employee of opposite sex for equal work, except if difference in wages based on seniority system, merit system, system that measures earnings by quantity or quality of production, bona fide occupational qualification, or other permissible factor. (HRS 378-2.3).

Unemployment Compensation.

Provisions adopted to conform to federal law. (HRS c. 383). Almost all employees covered, exceptions enumerated in HRS 383-7; companies that only employ family members who own at least 50% of corporation shares exempt (HRS 383-7[20]); master and servant relationship not required, see statutory test for coverage (HRS 383-6). After one week waiting period, eligible for benefits if able to and available for work. (HRS 383-29[a]). Individual eligible for benefits based on prior benefit year must have received wages equal to five times weekly benefit amount. (HRS 383-29). Alien receiving benefits must have been lawfully present for purposes of performing work in U.S. (HRS 383-29[d]). Disqualification from eligibility if terminated voluntarily, discharged for misconduct, failed to apply for work, participated in labor dispute and unemployment is due to stoppage of work, and other reasons. (HRS 383-30). Employee seeking unemployment benefits for constructive discharge has burden of showing voluntary termination of employment was with “good cause”, as defined in statute. (81 Haw. 84, 912 P.2d 581; HRS 383-30[3][A]). Benefits paid weekly in amount calculated by formula up to maximum statewide average weekly wage determined annually by department. (HRS 383-22). Benefits limited to 26 weeks (HRS 383-24); may be extended 13 weeks by Governor upon occurrence of disaster (HRS c. 385). Dislocated worker allowance available to supplement unemployment compensation for unemployed due to plant closure or layoff. (HRS 394B-10). Experience record of predecessor employer may be transferred to successor company, even when only portion of predecessor employer’s business has been acquired. (HRS 383-66). System of worker profiling has been adopted. (HRS 383-92.5).

Employer required to contribute up to 50% of cost of employment training program and subject to .01% tax. (HRS 383-128, HRS 383-129).

Parties may file appeals directly with Employment Security Appeals Referee’s Office. (HRS 383-38).

Public Employees.

U.S. citizen and state residency requirements for elected (three years) and appointed (one year) officers of state government or municipal subdivisions thereof; all other employees must be U.S. citizens, nationals or permanent resident aliens and shall become state residents within thirty days after beginning employment. (HRS 78-1). Exceptions for University of Hawaii and positions requiring highly specialized technical and scientific skill or knowledge. (HRS 78-1). Public employees permitted by Haw. Const. Art. XIII, § 2 to organize for collective bargaining as prescribed by law. HRS c. 87A establishes Hawaii Employer-Union Health Benefits Trust Fund. HRS c. 88 establishes State Pension and Retirement Systems. Reciprocal beneficiaries eligible for many of same benefits as spouses. (HRS 431:10A-601). Reciprocal beneficiary family coverage available to reciprocal beneficiaries to same extent family coverage available to non-reciprocal beneficiaries. (HRS 431:10A-601). HRS c. 89 prescribes methods of organizing and collective bargaining for state, county and municipal employees, including those employed by Board of Education and University of Hawaii. Negotiations may not include proposals which violate merit principles. (85 Haw. 61, 937 P.2d 397). Hawaii Labor Relations Board created. (HRS 89-5). Provision made for grievance procedures, impasse procedures, mediation, fact-finding and arbitration (HRS 89-11), compulsory arbitration required for institutional, health, and correctional workers (HRS 89-11), firemen and police officers (HRS 89-11), and strikes by public employees permitted after all such channels exhausted, but not if disputes submitted for binding arbitration (HRS 89-12). Exclusive representative must be given access to employee’s personal records which are relevant to investigation or processing of grievance. Exclusive representative cannot share or disclose specific information contained in personal records and must notify employee that access has been obtained. (HRS 89-16.5). Post-employment restrictions. (HRS 84-18). Furloughed state and county employees retain benefits and privileges. (HRS 121-43). Provides bonus to qualifying state and county retirees. (HRS 88-11).

Substitute teachers of Department of Education shall constitute appropriate bargaining unit. (HRS 89-6, HRS 89-11).

Public employees shall be terminated if convicted of felony for conduct related to public employee's duties. (HRS 78-1, HRS 831-2).

Paid leave up to 30 days to perform disaster relief for American Red Cross. (HRS 78-23.5).

Labor Disputes.

Unlawful to picket residence or dwelling place. (HRS 379A-1). Use of strikebreakers comprehensively regulated. (HRS c. 379). Little Norris-La Guardia Act in effect. (HRS 380-4). Stringent law passed in 1949 to curb and control strikes, lockouts, stoppages and slowdowns in stevedoring industry. (HRS c. 382). Labor disputes involving public utilities regulated in HRS c. 381. Employers not covered by NLRA prohibited from permanently replacing strikers or giving preference to applicants willing to work during strike. (HRS 377-6). Collective bargaining in public employment regulated. (HRS c. 89).

Labor Unions are recognized. Hawaii has no "right to work" law, and Employment Relations Act has been adopted, defining relative rights of employers and employees, providing for election and certification of collective bargaining representative, specifying what are unfair labor practices and how they should be prevented and controlled; little National Labor Relations Act in effect. (HRS c. 377).

Discrimination in Employment.

Civil Rights Commission established to enforce employment and housing antidiscrimination laws, and to be fully effective as of Jan. 1991. (HRS c. 368). Discrimination in employment based on race, sex, age, religion, color, ancestry, disability, known relationship with disabled person, marital status, sexual orientation, arrest or court record not having rational relationship to job credit history or credit report unless directly related to bona fide occupational qualification prohibited (HRS 378-2); discrimination in compensation and other terms and conditions of employment also prohibited (HRS 378-2, HRS 387-4). Discrimination against lactating employee who breastfeeds or expresses milk during meal period or other break period at workplace required by law or collective bargaining agreement prohibited. Employee may file civil action for sexual harassment or sexual assault in employment. (HRS 378-3). Employee may bring civil action of intentional infliction of emotional distress and invasion of privacy in addition to claim for sexual harassment or sexual assault. (HRS 378-3[10]). Compensatory and punitive damages are available remedies in employment discrimination cases. (85 Haw. 7, 936 P.2d 643). Laws placing age limits on state and county employees have been repealed. (HRS 378-3). Employee may not be suspended or discharged solely on ground employer was summoned as garnishee for employee's debt or because of work injury compensable under workers' compensation law. (HRS 378-32). Unlawful to require lie detector test as condition of employment and to discriminate against persons who refuse to submit thereto. (HRS 378-26.5).

Prepaid Health Care Law enacted requiring employer to provide coverage for every employee paid monthly wages of 86.67 times minimum hourly wage or more (HRS 393-11) under qualified prepaid health care plan (HRS 393-7); see statute for exemptions (HRS 393-3, -4, -5, -17, -22). Coverage must commence after four consecutive weeks employment and continue three months after employee not able to work due to disability. (HRS 393-14, -15). Employer must pay one-half of premium, with balance paid by employee to extent not greater than 1.5% of wages. (HRS 393-13). Different prepaid health care plan and cost allocation may be established through collective bargaining. (HRS 393-13). Policies must provide coverage for contraceptive services and supplies, except where contrary to religious employer's tenets (HRS 431:10A-116.6, -116.7); mammogram screening for women age 40 and over, and for women with history of breast cancer upon recommendation of physician (HRS 431:10A-116); hospice care (HRS 431:10A-119); medical foods and low-protein modified food products for treatment of inborn error of metabolism (HRS 431:10A-120); and outpatient diabetes self-management training, education, equipment, and supplies. (HRS 431:10A-121). All health insurance policies, contracts, plans and agreements, including workers' compensation coverage, must provide coverage and equitable reimbursement for services provided by advanced practice registered nurses. (HRS 431:10A-116[6]). Exemption for 25 or less repealed by 2000, Act 243. New criteria for use by Legislative Auditor to assess impact of proposed changes to mandatory health insurance coverage. (HRS 23-51).

Long-Term Care Insurance standards enacted which conform to provisions in 1998 Long-Term Care Insurance Model Act and Model Regulations of the National Association of Insurance Commissioners. Allows employers to offer group long-term care insurance policies, if they choose to do so. Appropriates funds for long-term care actuarial study on feasibility and advisability of establishing state-sponsored universal program of long-term care. (HRS 431:10H-101 et seq.).

Temporary Disability Law enacted entitling employee to weekly benefits for disability resulting from accident, sickness, pregnancy, or termination of pregnancy not connected with or resulting from employment (HRS 392-21, -22); exemptions enumerated at HRS 392-5. After seven day waiting period (HRS 392-23, -24) in amount computed by formula based on wages up to maximum under workers' compensation law (HRS 392-22); with certain exceptions, disabled employee not eligible if not under care of physician or other licensed practitioner who certifies disability (HRS 392-26). Eligibility for benefits based on the 52 weeks immediately preceding first day of disability. (HRS 392-25). Employer required to provide for benefits through insurance or other methods specified by statute. (HRS 392-41). Penalties for employers who fail to comply with these laws. (HRS 392-92). Each insurer must maintain complete claims service office or engage independent claims adjusting service in Hawaii. (HRS 392-42.5).

Substance Abuse Testing.

All substance abuse testing must be done in state licensed laboratory, except that employer is allowed to administer substance abuse on-site screening tests provided: (1) Test is administered according to package insert that accompanies substance abuse on-site screening test; (2) any indication of presence of drugs and alcohol shall not be used to deny or deprive person of employment or any benefit, or resulting in any adverse action against employee or prospective employee unless confirmatory test is conducted; (3) positive on-site test result must be followed within four hours by confirmatory test using licensed laboratory at employer's expense; (4) operator who administers test has been trained in use and administering of test by manufacturer of test; (5) any information concerning substance abuse on-site screening test shall be kept strictly confidential. (HRS 329B-5.5). Individual tested must receive written statement of specific substances to be tested for and medication disclosure form. Test results to be confidential. Third parties covered by federal drug testing regulation exempt.(HRS 329B-2.5).

Workers' Compensation.

Uniform Workmen's Compensation Act adopted with amendments. (HRS c. 386). Worker's Compensation Benefits Facilitator established to assist workers, employers, insurers and providers with filing and processing claims. (HRS 386-71.6). With exception of civil actions for sexual harassment or sexual assault (HRS 378-3), HRS 386-5 provides exclusive remedy for injuries arising out of and in course of employment, including alleged emotional distress injuries arising from termination. (899 F.2d 845). Claims for mental stress resulting solely from disciplinary action taken in good faith by employer are prohibited; provided that if collective bargaining agreement or other employment agreement specifies different standard for disciplinary actions, standards set in such agreements shall be applied in lieu of good faith standard. Injuries covered (HRS 386-3) include psychogenic disabilities (714 F.Supp. 1108). Employer may determine benefits and coverage through collective bargaining with appropriate bargaining unit. (HRS 386-3.5). Employer disclosure of premium information to employees mandated. (HRS 431:14-110.5). Ceiling on death or disability benefits is 312 times maximum weekly benefit. (HRS 386-43[b]). Ceiling on disfigurement is $30,000. (HRS 386-32). Ceiling for weekly benefit is 662/3% of state's annually determined average weekly wage. (HRS 386-31, -32). (Duration depends on nature of injury, or identity of dependent in case of death.). Director of Labor and Industrial Relations must approve claims for services. (HRS 386-94). Statutory presumption that claim is for covered work injury. (HRS 386-85). Adopted temporary disability insurance for many nonoccupational accidents and sickness. (HRS c. 392). "Odd-lot" factors such as age, limited education, and limited transferable skills cannot be considered impairments for purposes of rating preexisting permanent partial disability. (78 Haw. 275, 892 P.2d 468). Reimbursement of physical therapist assistants required. (HRS 386-1). Vocational rehabilitation unit established within Department, which allows injured employee under workers' compensation to select certified provider of rehabilitation services. (HRS 386-25). Filing requirements for out-of-state employers. (HRS 386-10). Director of Labor and Industrial Relations has original jurisdiction over controversies and disputes over employment and coverage under Workers' Compensation law. (HRS 386-73.5). Penalties for employers who fail to comply with these laws. (HRS 386-95; -97.5; HRS 392-92; HRS 393-33-34; HRS 386-92). Director decisions may be enforced by circuit court. (HRS 386-91). Fraudulent insurance acts subject to criminal penalties. (HRS 386-98). Hawaii Employer's Mutual Insurance Company established to provide workers' compensation coverage to employers; starting Jan. 1, 1997, applicable to Hawaii employers otherwise entitled to coverage but not able to or not electing to purchase in voluntary insurance market. (HRS c. 431:14A). Injuries occurring on employer's premises are covered by workers' compensation only insofar as they arise out of employment-related risk. (77 Haw. 100, 881 P.2d 1246). Disclosure of workers' compensation evidence may be appropriate where purpose relevant to trial. (79 Haw. 14, 897 P.2d 941). Employers have until Jan. 31 to file annual injury report. (HRS 386-95).

Medical redefined to include services provided by occupational therapist, certified occupational therapy assistant or licensed massage therapist. (HRS 386-1).

Business Closing or Relocation.

Dislocated Workers Act adopted. (HRS c. 394B). Employers with 50 or more employees must provide employees and Department of Labor and Industrial Relations with 60-day (HRS 394B-9) written notice of closing, divestiture, partial closing or relocation and must pay supplemental unemployment benefits for approximately four weeks (HRS 394B-9, B-10). Dislocated worker allowance available to supplement unemployment compensation for unemployed. (HRS 394B-10).

Whistleblower Protection.

Public and private employees who report suspected violations of law can invoke judicial recourse if retaliated against for such reports by employer. (HRS 378-63). Protection for employees who report or are about to report to employer or public body. (HRS 378-62). Statute of limitations increased to two years and maximum penalty to $5,000. (HRS 378-63, -65).

Family Leave.

Employees employed not less than six months by employer who employs 100 or more workers may take four weeks family leave upon birth of child, adoption, or to care for child, spouse or parent with serious health condition. (HRS c. 398). Employers of 100 or more workers who provide sick leave must allow employees to use up to ten days of accrued and available sick leave to care for child, spouse, parent or grandparent with serious health condition. (HRS 398-4). Paid leave of two hours for parent to attend scheduled education conference for minor child. (HRS 78-31).

Reciprocal beneficiaries receive identical benefits as spouses in many circumstances. (HRS c. 572C).

11.03 WORKERS' COMPENSATION LAW:

See topic 11.02 Labor Relations.

12 ENVIRONMENT

12.01 ENVIRONMENTAL REGULATION:

General Supervision.

Department of Health responsible for air, noise, and water pollution; solid and hazardous waste; and underground storage tanks.

State Emergency Response Commission administers Hawaii Emergency Planning and Community Right-to-Know Act (HEPCRA). (HRS c. 128E).

State Office of Environmental Quality Control evaluates environmental assessments and impact statements. (HRS c. 343). Board of Land and Natural Resources responsible for public lands (HRS c. 171), water (HRS c. 174) and coastal areas (HRS c. 200), forests (HRS c. 183), aquatic life (HRS cc. 187A-190), wildlife resources (HRS c. 183D), soil conservation (HRS c. 180), and historic preservation (HRS c. 6E). Commission of Water Resource Management administers Water Code. (HRS c. 174C). Office of Planning administers coastal zone management. (HRS c. 205A). Board of Agriculture regulates pesticides. (HRS c. 149A). All agency addresses, telephone numbers, and websites available at http://www.hawaii.gov/portal/government/agencies.html.

Prohibited Acts of Pollution.

See specific subheads. Most environmental statutes broadly prohibit violating any provision of statute or regulations promulgated thereunder. All administrative rules available by topic at http://www.hawaii.gov/ltgov/office/adminrules.

Air Pollution Control.

Permit required to cause any pollution and for construction, operation, and modification of most stationary sources. (HRS 342B-11, 22). Environmental Protection Agency has approved state's permit program, which implements requirements of Clean Air Act, 42 U.S.C. § 7401 et seq. Permit issued for term up to five years (HRS 342B-25) and not transferable (HAR 11-60.1-7). Civil penalties up to $25,000 per day and possible criminal penalties for violating HRS c. 342B. (HRS 342B-47). State citizen suits authorized. (HRS 342B-56). Open fires generally prohibited. (HAR 11-60.1-52). Fines up to $10,000 per day. (HRS 342B-47). Smoking prohibited in certain public places. (HRS c. 328J). No motor vehicle air conditioning equipment repair in violation of ozone protection requirements. (HRS 437B-12). Violations of any statute, rule or permit condition governing asbestos prohibited. (HRS 342P-40). Criminal penalties for knowing asbestos violations and false statements. (HRS 342P-24).

Water Quality Control.

No discharges in violation of water quality, effluent or treatment standards; standards of performance for specific areas and types of discharges; National Pollution Discharge Elimination System. (HRS 342D-5; HAR 11-54, 55). Non-point Source Pollution Control program (HRS c. 342E); and safe drinking water (HRS c. 340E) provisions. Violator must report unlawful pollution within 24 hours. (HRS 342D-51). Civil penalties up to $25,000 per day, and criminal penalties for negligent and knowing violations. (HRS 342D-30 to 35). Any new or renewed lease of water rights from state requires watershed management plan. (HRS 171-58). Causing nuisance by discharging noxious matter in stream or shore water prohibited. (HRS 181-3).

Noise Pollution.

"Excessive noise" in volume, quantity, or duration that endangers health, safety or property or unreasonably interferes with comfortable enjoyment of life and property prohibited. (HRS c. 342F). Penalties up to $10,000 per day. (HRS 342F-9, HAR 11-46-16).

Hazardous Materials.

No transport or release of hazardous materials in violation of rules. (HRS 286-223). Reporting hazardous materials incidents required. (HRS 286-225). Ownership, construction, or operation of hazardous waste management facility without permit prohibited, and treatment, storage, or disposal of hazardous waste at unpermitted facility prohibited. (HRS 342J-30). Required annual notifications of disposition of hazardous waste. (HRS 342J-6.5). Fines of up to $25,000 per day for violating HRS c. 342J, any permit, variance, or rule thereunder. Fines up to $10,000 per day for denying or obstructing authorized inspection or failing to provide certain required information. (HRS 342J-9). Asbestos and lead regulated. (HRS c. 342P).

Used oil transport, recycling and disposal regulated. (HRS c. 342J). Discharging or allowing oil to enter ground, sewers, drainage systems, surface or ground waters, or marine waters prohibited. (HRS 342J-52). Permit required to transport, market, or recycle used oil or used oil fuel. (HRS 342J-53). Fines of up to $25,000 per day for violating HRS c. 342J, any permit, variance, or rule thereunder. Fines up to $10,000 per day for denying or obstructing authorized inspection or failing to provide certain required information. (HRS 342J-9).

Underground Storage Tanks.

Various sections describe tank standards, notification requirements, prohibited acts, enforcement procedures, emergency procedures, petroleum releases, penalties, and permit requirements. (HRS c. 342L). Fines of up to $25,000 per day for violating HRS c. 342L, any permit, variance, or rule thereunder. Fines of up to $500 per day for denying or obstructing authorized inspection. (HRS 342L-10). Owner of leaking underground storage tank must restore environment to acceptable condition. (HRS 342L-35).

Lead Acid Batteries.

No disposal or discharge of electrolyte from used lead batteries onto ground or into sewers, drainage systems, surface or ground waters, or ocean waters. (HRS 342I-1.5). Lead acid battery wholesalers must accept used lead batteries. (HRS 342I-4). Fines up to $10,000 per day for violations, and criminal penalties for knowing violations. (HRS 342I-8).

Pesticides.

Unlawful acts include selling, transporting unlicensed pesticides, improperly labeled pesticides, pesticides containing prohibited ingredients; defacing pesticide label; selling restricted use pesticides without label (HRS 149A-11), using pesticide in manner inconsistent with its label or in manner which would have unreasonable adverse effects on environment (HRS 149A-31). Administrative penalties up to $5,000 for violating any statutory provision or rule, and criminal penalties for knowing violations. (HRS 149A-41).

Remediation.

Environmental Response Law (state “Superfund” law) (HRS c. 128D; HAR 11-451) patterned after Federal Comprehensive Environmental Response, Compensation and Liability Act (CERCLA). “Hazardous substance” includes oil and trichloropropane. (HRS 128D-1). Liability for release of heavy fuel oil from interisland tank barge limited to $700,000,000. (HRS 128D-6.5). Voluntary response program in effect. (HRS 128D-31). Uniform Environmental Covenants Act. (HRS c. 508C).

Solid Waste Management.

Standards for solid waste disposal facilities. (HRS cc. 342G, 342H; HAR 11-58.1). Dumping solid waste outside permitted solid waste management system punishable by loss of contractor’s or other license, and fines and criminal penalties. (HRS 342H-39). Dumping one cubic yard petty misdemeanor. (HRS 342H-39). Dumping ten cubic yards or more felony. (HRS 342H-37). Constructing, modifying, or operating solid waste disposal unit without permit prohibited. (HRS 342H-52). County responsibility for private sewage and wastewater treatment systems. (HRS 342G-61). Plastic containers must have labels showing type of plastic resin made of. (HRS 342H-42). Advance deposit on beverage containers to encourage recycling. (HRS 342G-102). Removal of recyclable materials from collection sites prohibited. (HRS 342H-21). Recycled glass sometimes required for pavement construction. (HRS 103D-407). Disposal of used tires only with tire seller or recycler. (HRS 342I-22). Littering prohibited. First littering offense punishable by four hours of picking up litter. (HRS 291C-132, 339-8).

Recycling.

See also Solid Waste Management and Lead Acid Batteries, supra.

Land Use Planning.

Land Use Commission’s classifications of all land in state limits permissible uses. (HRS c. 205). No unauthorized activities, in conservation districts (HRS c. 183C, HAR 13-5-22), in coastal zone management areas (HRS c. 205A), or agricultural districts (HRS 205-4.5).

Enforcement.

Department of Health and Board of Land and Natural Resources can conduct administrative inspections and obtain injunctive relief or administrative, civil, and criminal penalties for violations within their respective jurisdictions. Administrative hearing and judicial review of agency action available under HRS c. 91. Agency enforcement policies available through requests for public documents. (HRS c. 92F).

Environmental assessments and public review and comment required for proposed actions involving public lands or funds, projects in designated areas, and certain activities on private lands, including expansion in generating capacity of existing power-generating facility. (HRS 343-5, HAR 11-200-6). Environmental impact statement required if proposed action may have significant effect on environment. (HRS 343-5). Office of Environmental Quality Control Responsibility evaluates adequacy of environmental assessments and impact statements. (HRS 343-5, HAR 11-200-6).

Historic Preservation.

Injuring or altering historic property, artifact, or burial site prohibited. (HRS 6E-71).

Conservation.

Polluting or disturbing cave surfaces or resources prohibited. (HRS c. 6D). Fines for violations of HRS c. 6D and criminal penalties for knowing or reckless violations HRS c. 6D. (HRS

6D-11, 12). No importation from foreign countries or other states of substances or plants diseased or infected with insects or likely to assist in transmission of disease or infestation. (HRS c. HRS 141-2). Fines for violations of HRS c. 141. (§ 141-7). Strip mining or noxious matter in stream or shore water prohibited. (HRS 181-3). Fines and criminal penalties for violating HRS c. 181. (HRS 181-9). Natural Area Reserve System protects unique geological and volcanological features and marine and terrestrial plants and animals. (HRS 195-1). Fires, tent camping, and entry into lake or pond in natural area reserve prohibited. (HAR 13-209-4). Fine up to $2,500 for first offense. (HRS 195-8). No fires, unleashed pets, improper vehicle use in forest preserves. (HAR 13-104-7, HRS 13-104-11, HAR 13-104-12). Criminal and administrative penalties for violating forest reserve law. (HRS 183-18, 21). Vehicles prohibited in natural area reserve. (HRS c. 195-12). Conservation easements recognized. (HRS c. 198). Renewable energy and energy efficiency for state facilities, vehicles, and equipment. (HRS cc. 196, 46).

Marine and Aquatic Resources.

Taking certain aquatic life without license prohibited. (HRS c. 1874). Unlawful to use explosives, electrofishing devices or poisonous substances without permit. (HRS 188-23). Fishing in certain waters prohibited. (HRS 188-35). Taking marine life for commercial purpose without license prohibited. (HRS c. 189-2). All marine waters are marine life conservation area. Taking coral, sand or marine life without permit prohibited. (HRS 188-68, 190-1, 190-4; HAR 13-34-2). Fines and/or criminal penalties for violating HRS cc. 187A, 188, 189, and 190, or rules or permits thereunder. (HRS 187A-13, 188-70, 189-4, 190-5). Liability for damage by grounded vessels. (HRS 200-47.5).

Penalties.

Varying administrative, civil, and criminal penalties for specific prohibited acts. Enhanced penalties for repeat violations. See specific subheads.

Permits.

See specific subheads.

Coastal Zone Management.

Development in violation of shoreline setbacks or special management area restrictions prohibited. Penalties include civil fine up to $100,000, $10,000 per day, and costs of restoration of affected environment. (HRS 205A-32; HAR 15-150-32). Expanded definition of “coastal zone management area”. (HRS 205A-1).

12.02 WATER LAW:

No withdrawal or diversion of water in water management area without permit. (HRS 174C-48). No well construction without permit. (HRS 174C-84).

12.03 WILDLIFE AND ENDANGERED SPECIES:

Endangered or threatened species protected. (HRS 195D-4). Taking endangered or threatened species prohibited. (HAR 13-124-3). Citizen suits against governmental agencies to challenge habitat conservation plans and safe harbor agreements. (HRS 195D-32). No hunting of wildlife or possession of weapons or traps on public lands without permit or authorization. (HAR 13-121-3). Various penalties. (HAR 13-121-5). Prohibitions about game hunting and commercial shooting preserves, including kind of game (HAR 13-122-7), limited hunting hours (HAR 13-122-8) and methods (HAR 13-122-12). Invasive Species Council. (2006 Sess. Law Act 109).

13 ESTATES AND TRUSTS

13.01 ADMINISTRATION:

See topic 13.09 Executors and Administrators.

13.02 ADVANCEMENTS:

See topic 13.07 Descent and Distribution.

13.03 ALLOWANCES:

See topic 13.09 Executors and Administrators.

13.04 CLAIMS:

See topic 13.09 Executors and Administrators.

13.05 DEATH:

Presumption of death from absence of five year continuous period. (HRS 560:1-107[5]).

Certificate.

Obtained from Vital Records Section, Department of Health, State of Hawaii, Honolulu, Hawaii 96813. Fee $10 for first copy, $4 for each additional copy ordered at same time.

Survivorship.

Uniform Simultaneous Death Act (HRS c. 534A) repealed effective Jan. 1, 1997. (1996, Act 288, § 9). Arts. I through IV of 1993 Uniform Probate Code adopted as HRS 560:1-101 to HRS 560:4-401, with modifications (existing HRS 560:1-101 to HRS 560:4-401 repealed). See topic 13.07 Descent and Distribution.

See category 5 Civil Actions and Procedure, topic 5.02 Actions, subhead Abatement and Revival.

Action for Death.

Legal representative, surviving spouse, reciprocal beneficiary, children, father, mother, or dependent of one whose death was caused by wrongful act of another may maintain action for damages against person causing or responsible for death. Action must be brought within two years. No limitation of recovery. Damages may include loss of society, companionship, comfort, consortium, protection, marital care, attention, advice, counsel, loss of filial care, loss of parental care, training, guidance, education. (HRS 663-3).

Living Will.

Recognized in Uniform Health-Care Decisions Act (Modified), adopted with certain modifications for surrogate decision-making. (HRS c. 327E). See topic 13.16 Wills.

Death Certificate.

See category 10 Documents and Records, topic 10.04 Records, subhead Vital Statistics.

Uniform Anatomical Gift Act adopted. (HRS c. 327, Part I). Modified by allowing reciprocal beneficiary to have same right as spouse to make, revoke, or object to anatomical gifts. (HRS 327-3).

Determination of Death.

Death occurs when irreversible cessation of spontaneous respiratory and circulatory functions first coincide, or, when artificial life support systems utilized, when there is irreversible cessation of all brain and brain stem functions. (HRS 327C-1).

13.06 DECEDENTS' ESTATES:

See topics 13.09 Executors and Administrators, 13.07 Descent and Distribution, and 13.16 Wills.

13.07 DESCENT AND DISTRIBUTION:

Uniform Probate Code.

Arts. I through IV of 1993 Uniform Probate Code adopted as HRS 560:1-101 to HRS 560:4-401, with following modifications: Validity of letters testamentary and letters of administration limited to three years. (HRS 560:1-201). Excepting from jurisdiction family court's exclusive jurisdiction over guardianship of minor and concurrent jurisdiction over guardianship of incapacitated adults. (HRS 560.5-106). No change from 1992 law (formerly HRS 560:2-109); adopted child has right to inherit from natural parents if child adopted within extended family; definition of natural parent expanded to include prior adoptive parents. (HRS 560:2-114). Parent of minor decedent will be treated as if parent predeceased minor if parent abandoned or failed to support minor as defined in HRS 560:2-103. Surviving spouse or reciprocal beneficiary may choose partial elective share. (HRS 560:2-202). Raises to $20,000 aggregate amount of pre-death transfers by decedent to donee other than spouse or reciprocal beneficiary that are exempt from augmented estate. (HRS 560:2-205). Augmented estate property gifted to or held in trust for decedent when neither decedent nor surviving spouse or reciprocal beneficiary was responsible for creating property (continuing special status of this property under Hawaii family law); property must have been held segregated from other augmented estate assets. (HRS 560:2-208). Additional protection provided to descendants of first spouse or reciprocal beneficiary to die against election by guardian of incapacitated surviving spouse or reciprocal beneficiary. (HRS 560:2-212). Increased sanctions on person who knowingly and willfully "hides" will of decedent. (HRS 560:2-516). Instances where property can be substituted for specifically devised property are restricted. (HRS 560:2-606). Substitutes prior Hawaii law five year limit to submit will for probate. Informally probated will contest period expires 90 days after receiving notice, 12 months from date will informally admitted, or 30 days after order settling estate, whichever occurs first. (HRS 560:3-108; HRS 560:3-301[a][1][f]). Requires prior notice of application for informal probate of will to heirs and devisees if person making application is not professional fiduciary or close family member. (HRS 560:3-302; HRS 560:3-306). Beneficiaries and heirs must be notified that court is available to resolve disputes about attorney's fees. (HRS 560:3-306). Burden of proof in contested probate cases may shift as prescribed by rules of evidence. (HRS 560:3-407). Bonds in probate do not lapse because of personal representative's errors. (HRS 560:3-606). UPC scheme generally abandoning court confirmation of sales of realty retained, except that interested party may still request judicial intervention under HRS 531-28.5 and HRS 531-29. (HRS 560:3-715). Personal representatives have option to publish notice to creditors and provide vehicle for trustees of decedent's trust to publish notice compelling creditors to timely present their claims or have them time barred (if no publication, creditor's claims would be barred if not presented within 18 months after death). (HRS 560:3-801; HRS 560:3-803). New law also affects estates open before Jan. 1, 1997, but rules of construction relating to "per stirpes", "by representation", and "per capita at each generation" apply only to testamentary instruments executed after Jan. 1, 1997 (HRS 560:2-709). Consult 1996 Act 288, § 5 for other effective dates.

Afterborn heirs must survive at least 120 hours after birth. (HRS 560:2-108).

Half Blood.

Relatives of half blood inherit same as relatives of whole blood. (HRS 560:2-107).

Children Born to Parents Not Married to Each Other.

Individual is child of natural parents regardless of their marital status. (HRS 560:2-114). Parent-child relationship may be established under HRS c. 584.

Adopted Children.

See category 14 Family, topic 14.01 Adoption.

Determination of Heirship.

Judges of circuit court determines. (HRS 560:3-405).

Election.

Uniform Probate Code applies (HRS 560:2-201, et seq.), with modifications discussed supra.

Escheat.

Uniform Unclaimed Property Act. (HRS c. 523A). See category 21 Property, topic 21.01 Absentees, subhead Escheat.

See also topic 13.09 Executors and Administrators.

13.08 ELECTION:

See topic 13.16 Wills.

13.08A ESTATES: (in property)

See category 21 Property, topic 21.16 Real Property.

13.09 [RESERVED]

13.10 EXECUTORS AND ADMINISTRATORS:

Uniform Probate Code.

Effective Jan. 1, 1997, Arts. I through IV of 1993 Uniform Probate Code adopted as HRS 560:1-101 to HRS 560:4-401 with following modifications. Uniform Probate Code procedure applies, unless court decides, in interest of fairness, that it does not or former rules are applicable. (1996. Act 288, § 5[b][2], amending UPC, Art. III). All rights and priorities of spouse also apply to reciprocal beneficiary. (HRS 572C-1).

Exemption from Bond.

No bond is required of personal representative unless: special administrator appointed; will requires bond; bond is requested by interested party and court is satisfied it is desirable; court determines it is needed. (HRS 560:3-603).

Notice of Appointment.

State limits “no notice” ability to certain relations to decedent and corporate personal representatives. All others must give notice. (HRS 560:3-302 to 306).

Uniform Fiduciaries Act adopted in 1945. (HRS c. 556). § 189-3, Revised Laws of Hawaii 1955, pertaining to Uniform Fiduciaries Act repealed by adoption of Uniform Commercial Code. (HRS 490:10-102[1]).

Revised Uniform Principal and Income Act has been adopted, with modifications. (HRS c. 557A).

Uniform Transfer-On-Death (TOD) Security Registration Act adopted, enabling individuals to designate non-testamentary beneficiary for transfer of registered securities. (HRS c. 539).

13.11 FIDUCIARIES:

See topics 13.09 Executors and Administrators, Trusts; category 14 Family, topic 14.07 Guardian and Ward.

13.12 INTESTACY:

See topic 13.07 Descent and Distribution.

13.13 LIVING WILLS:

See topic 13.16 Wills.

13.14 PROOF OF CLAIMS:

See topic 13.09 Executors and Administrators; category 5 Civil Actions and Procedure, topic 5.17 Pleading.

13.15 TRUSTS:

Uniform Custodial Trust Act adopted (HRS c. 554B) with following modifications: Beneficiary treated as incapacitated where required by transferor in trust instrument; or custodial trustee makes such determination. (HRS 554B-10). Custodial trust terminates when trustee receives signed instruction from beneficiary, if not incapacitated, or beneficiary’s guardian; or upon beneficiary’s death. (HRS 554B-17).

Uniform Disclaimer of Property Act adopted. (HRS c. 526).

Uniform Probate Code.

Arts. I through IV of 1993 Uniform Probate Code adopted as HRS 560:1-101 to HRS 560:4-401 with modifications. See topic 13.07 Descent and Distribution. Art. VII of 1969 Uniform Probate Code (HRS c. 560), but not 1975 or 1977 Official Amendments, still applies with following modifications: Qualification of Foreign Trustees omitted from Hawaii statute. Claim against trustee for breach of trust may be brought by beneficiary within two years after receipt of final account or statement. (HRS 560:7-307).

Uniform Prudent Investor Act adopted. (HRS c. 544C).

Uniform Trustees’ Powers Act adopted. (HRS c. 554A). Applies to any trust with Hawaii situs. (HRS 554A-8). Revised to permit non-pro rata distribution (HRS 554A-3) and to permit trustee to divide trust for generation skipping transfer tax purposes (§ 554A-3[c][26]).

Generally, common law governs creation, administration, and termination. Statutes should be consulted regarding vesting of title of trust estate (HRS 554-1); nomination of trustees by beneficiaries (HRS 554-2); power of circuit court to authorize or direct trustee to lease or invest (HRS 554-3); annual accounts (HRS 554-4); restriction on investments (HRS 554-6); assignees for creditors (HRS 554-7); charitable trusts (HRS 554-8, 9, 10); land trusts (HRS c. 558). Parol trusts have been held valid. (2 Haw. 662[1863]).

Investments by trustees are restricted. (HRS 554-6). See category 3 Business Regulation and Commerce, topic 3.01 Banks and Banking, subhead Trust Companies.

Trustee must comply with Prudent Investor Rule. (HRS 554C-1).

Compensation.

Of all money and property received as trust income, trustee is allowed 7% commission for first $5,000 and 5% commission for all over $5,000 payable as income is received, but not more often than once a year. (HRS 607-18[a]). On principal, commissions are as follows: 1% on value at inception of trust, payable at such inception out of principal: 5/10 of 1% on value at end of each year, except to extent trustee employs outside clerical and bookkeeping services at expense of estate; 1% on value of all or any part of estate on final distribution thereof, payable at termination of trust out of principal; 2½% on cash principal received after inception of trust, payable at time of receipt out of principal; 2½% on final payment of any cash principal prior to termination of trust, payable at time of such final payment out of principal. Further allowance may be made by court for special services, but contract for higher compensation between trustee and beneficiary is void. (HRS 607-18[c]). Trustees of charitable trusts will receive reasonable compensation. (HRS 607-20).

Common Trust Funds.

See category 3 Business Regulation and Commerce, topic 3.01 Banks and Banking.

Employees trusts as part of plan for exclusive benefit of employees are lawful. (HRS c. 555).

Gifts to Minors.

See category 14 Family, topic 14.10 Infants.

Eligibility and Competency.

No corporation may act as trustee in Hawaii except a trust company (HRS 412:8-103), or bank authorized to engage in trust business (HRS 412:5-205). See category 3 Business Regulation and Commerce, topic 3.01 Banks and Banking.

Accounting.

Required unless statute, trust document or will provides to contrary. (HRS 554-4). Accounts usually filed annually but court can permit biennial or triennial filing. (HRS 554-4). Accounts may be referred to master (usually disinterested). Accounts of charitable trusts are referred to attorney general.

Uniform Fiduciaries Act adopted in 1945. (HRS c. 556). § 189-3, Revised Laws of Hawaii 1955, pertaining to Uniform Fiduciaries Act repealed by adoption of Uniform Commercial Code. (HRS 490:10-102[1]).

Uniform Trustees’ Accounting Act has not been adopted.

Uniform Common Trust Fund Act has been adopted, with modifications. (HRS 412:8-402).

Revised Uniform Principal and Income Act has been adopted, with modifications. (HRS c. 557A).

Securities in Name of Nominee.

Statute permits any trust company acting as fiduciary, and any fiduciary acting as co-fiduciary with a trust company to hold securities in the name of a nominee or nominees unless expressly otherwise provided by the instrument, decree or order creating the fiduciary relationship. (HRS 412:8-203).

Accumulations.

No statutory rule.

Perpetuities.

See category 21 Property, topic 21.11 Perpetuities.

13.16 WILLS:

Uniform Probate Code.

Effective Jan. 1, 1997, Arts. I through IV of 1993 Uniform Probate Code adopted as HRS 560:1-101 to HRS 560:4-401 with modifications. See topic 13.07 Descent and Distribution.

Simultaneous Death.

See topic 13.05 Death, subhead Survivorship.

Testamentary Trusts.

See topic 13.15 Trusts.

Unclaimed Legacies.

Uniform Unclaimed Property Act adopted in amended form. (HRS c. 523A). See category 21 Property, topic 21.01 Absentees, subhead Escheat.

Living wills recognized in Uniform Health-Care Decisions Act (Modified), adopted with certain modifications for surrogate decision-making. (HRS c. 327E). All interested persons shall reach consensus as to who should make health care decisions on behalf of patient. If there is no consensus, any interested person may seek guardianship. Surrogate who was not designated by patient may only decide to withhold artificial nutrition and hydration after primary physician and second independent physician determine that it is merely prolonging death and patient is not likely to have any neurological response. (HRS c. 327E-5). Durable power of attorney authorizes agent to make health care decisions. (HRS 551D-2.5). For form of health care power of attorney see subhead Form of Durable Power of Attorney, infra. See also topic 13.05 Death.

Optional Form of Durable Power of Attorney.

Power of attorney authorizing health care decisions. Durable power of attorney authorizes agent to make lawful health care decisions pursuant to HRS c. 327E. (HRS 551D-2.5). Uniform Health-Care Decisions Act Optional Form for Durable Power of Attorney for Health-Care Decisions (with modifications) adopted. (HRS 327E-16).

14 FAMILY

14.01 ADOPTION:

Any proper adult person, not married, or married to legal parent of minor, or husband and wife jointly, may petition family court of circuit wherein they reside, or individual to be adopted resides or was born, for leave to adopt, and for change of name of individual. (HRS 578-1). Decree may be set aside or modified within one year, for good cause. After one year, decree may be set aside only for fraud. (HRS 578-12).

Written consent must be given by: (1) Mother of child; (2) legal father as to whom child is legitimate child; (3) natural father adjudicated by court; (4) natural father as presumed by statute; (5) natural father who demonstrates concern and responsibility for child; (6) person or agency having legal custody; (7) court having jurisdiction if guardian or custodian not empowered to consent to adoption; (8) child if over ten years old. (HRS 578-2[1]-[8]). Petition to adopt adult niece, nephew or stepchild may be granted if written consent to adoption has been executed by adult and spouse, if adult is married. (HRS 578-2[b]). Consent not required of: (1) Parent who has deserted child without affording means of identification for period of 90 days; (2) parent who has voluntarily surrendered care and custody of child to another for period of two years; (3) parent of child in custody of another, if parent for period of at least one year has failed to communicate with child when able to do so; (4) parent of child in custody of another, if parent for period of at least one year has failed to provide for care and support of child when able to do so; (5) natural father who was not married to child's mother at time of child's conception or birth and who does not fall within provisions of subsection HRS c. 578-2(a)(3), (4), or (5); (6) parent whose parental rights have been judicially terminated under provisions of §§ 571-61 to 571-63, or under provisions of any other state or other law by court or other agency having jurisdiction to take action; (7) parent judicially declared mentally ill or mentally retarded and who is found by court to be incapacitated from giving consent to adoption of child; (8) any legal guardian or legal custodian of child sought to be adopted, other than parent, who has failed to respond in writing to request for consent for period of 60 days or who, after examination of person's written reasons for withholding consent, is found by court to be withholding person's consent unreasonably; (9) parent of child who has been in custody of petitioner under this chapter for period of at least one year and who entered U.S.A. as consequence of extraordinary circumstances in child's country of origin, by reason of which extraordinary circumstances existence, identity, or whereabouts of child's parents is not reasonably ascertainable or there is no reasonable means of obtaining suitable evidence of child's identity or availability for adoption; (10) any parent of individual to be adopted, if individual is adult eligible for adoption under subsection HRS 578-2(b); and (11) parent whose parental and custodial duties and rights have been divested by award of permanent custody pursuant to HRS 587-73. (HRS 578-2[c][1]). Court may dispense with consent of concerned father who has not filed petition to adopt, or whose petition to adopt has been denied, or of adjudicated, presumed, or concerned father who is not fit to give child proper home, or whose child has lived with his legal mother and petitioning stepfather for one year. (HRS 578-2[c][2]). Due notice, actual or constructive, must be given each parent who has not consented unless consent or notice waived by court as permitted by HRS 578-2. (HRS 578-2[e]).

Jurisdiction; Venue.

Family court of circuit in which adoptive parents reside or in which adoptee resides or was born or in which approved child placing organization is located. (HRS 578-1).

Petition shall be in such form and shall include such information and exhibits as may be required by family court. (HRS 578-1).

Proceedings.

Any person authorized by court may serve summons containing notice of time and place for adoption hearing. (HRS 578-4). Hearing must be held at which petitioner(s), any legal parent married to petitioner, any subject of adoption whose consent is required personally appear before court, unless expressly excused by court. (HRS 578-8[a]). Where child is adopted from foreign country, court has discretion to dispense with hearing if issues have received full consideration by foreign country and U.S. Immigration and Naturalization Service. (HRS 578-8[c]). Investigation will be made by Director of Human Services or nearest county administrator of Department of Human Services as to fitness of petitioners to adopt individual and as to whether best interests of individual to be adopted will be served by adoption; provided that court may waive investigation.

(HRS 578-8[b]). However, all foster and adoptive parents must complete child abuse and neglect clearance in accordance with Federal Law. (HRS 346-17, HRS 346-19.7).

Decree.

Court may enter decree of adoption if it is satisfied that individual is adoptable and physically, mentally and otherwise suitable for adoption by petitioners, that petitioners are fit and proper persons and financially able to provide proper home and education, and that adoption will be for best interests of individual. (HRS 578-8[a]).

Name.

First and last names of adopted child changed to any name stipulated by parents or in best interests of child (HRS 578-13) and birth certificate so amended (HRS 578-14). New birth certificate must include names of natural parents if requested by adoptive parents and consented to by natural parents. (HRS 578-14).

Effect of Adoption.

Adopted child becomes, in all respects, child of adoptive parents, and inherits from and through them; loses all rights incident to former status. (HRS 578-16). If adopted before age of majority by natural relation or spouse of natural relation, then under any will, trust, or other lifetime instrument, rights of adopted individual’s natural family not affected by adoption; adopted individuals included in determination of heirs or class members, unless specifically excluded. (HRS 560:2-114). Adopted individual designated in two or more classes, both by adoption or natural relation, entitled to benefit in class with largest share. (HRS 560:2-113). Adopting parents by earlier adoptions included in definition of “natural parent”. (HRS 560:2-114[d]).

Miscellaneous.

Provision is made for confidentiality of proceedings and records. (HRS 578-15). Medical information concerning natural parents of adopted child must be filed. Adoptive parents or adult adopted child entitled to access to medical information. (HRS 578-14.5[h]). Provision is made for petition by adopted children for access to adoption records sealed by court; court may release records based upon express or implied consent of natural parents; natural parents may file request that records remain sealed. (HRS 578-15). Provision is made for insurance coverage for newborn adopted children. (HRS 431:10A-116).

Hawaii is member of Interstate Compact on Placement of Children, effective 1985. See also, Child Protection Act (HRS c. 587).

14.02 ALIMONY:

See topic 14.06 Divorce.

14.03 COMMUNITY PROPERTY:

See topic 14.09 Husband and Wife.

14.04 [RESERVED]

14.05 DISSOLUTION OF MARRIAGE:

See topic 14.06 Divorce.

14.06 DIVORCE:

Generally, this subject is governed by HRS c. 580.

Grounds for Absolute Divorce.

Marriage is irretrievably broken; expiration of term in decree of separate bed and board without reconciliation having been effected; living separate and apart under decree of separate maintenance for period of two years or more and no reconciliation has been effected; voluntarily living separate and apart continuously for two years or more and there is no reasonable likelihood that cohabitation will be resumed, and court satisfied divorce would not be harsh or oppressive to defendant or contrary to public interest. (HRS 580-41).

Grounds for Legal Separation.

Family court may decree separation from bed and board for period not to exceed two years upon petition for separation when court finds marriage is temporarily disrupted. (HRS 580-71). Separation decree is not bar to divorce. (HRS 580-71.5). Upon decree of separation, court may further decree for support and maintenance of either spouse and minor children. (HRS 580-74).

Residence.

One party must be domiciled or physically present in state for continuous period of six months immediately before filing of complaint. Persons residing on military bases or present in state under military orders not prohibited from meeting residence requirement. (HRS 580-1).

Jurisdiction.

No divorce shall be granted unless either party to marriage has been domiciled or physically present in state for three months next preceding his or her application. (HRS 580-1).

Venue.

Action must be brought in circuit in which plaintiff has been domiciled or physically present for three months next preceding his or her application. (HRS 580-1).

Process.

Action commenced by filing complaint with circuit court and issuance of summons. (HRS 580-2). Personal service required if defendant is within state unless defendant enters appearance in person or in writing. Actual receipt by defendant or service by registered or certified mail is equivalent to personal service if defendant is outside circuit. If service is not feasible, inconvenient, or defendant is outside state, personal notice through court authorized person permissible and hearing held not less than 20 days thereafter. If defendant cannot be found after 15 days reasonable search either before or after filing complaint, published notice at least once a week for three successive weeks may be authorized by court and case heard at time specified, not less than 20 days after last publication. (HRS 580-3). If plaintiff, due to impoverishment, cannot publish notice, plaintiff may file affidavit attesting to impoverishment and that whereabouts of individual sought are unknown. Service can be made by forwarding certified copy of pleadings and process to individual at last known address by registered or certified mail, sending certified copy of pleadings and process to defendant's closest known relative, and posting copy of pleadings and process at courthouse where pleadings and process have been filed. (HRS 580-3[e]).

Pleading.

Action commenced by filing complaint and must allege (in general terms): Residency and domicile (see subhead Residence, supra), parties are lawfully married, number of children below 18 or above 18 but still dependent on parties, best interests re custody, awards of property, payment of debts, orders for child and spousal support and grounds. In actions involving minor children, plaintiff must attach exhibit pertaining to conciliation, child care and child custody proceedings. (HRS 583A-209; HFCR.90[b]). In all actions, matrimonial action information form must accompany complaint. (HFCR.90). Defendant may file cross-complaint. (HRS 580-4).

Practice.

Contested matters are placed on calendar by filing motion to set case for trial. (HFCR.94). Motion to set must be accompanied by asset and debt, income and expense statements of movant as well as position statement re all issues of divorce. Temporary orders re restraining orders (HRS 580-10), child custody or support (HRS 580-11) or alimony (HRS 580-9) may be issued.

Decree becomes final on date fixed therein but in no event later than one month from date of decree. (HRS 580-45).

Final decree not entered because of mistake, negligence or inadvertence may be entered subsequently and divorce is deemed to have become final at date decree could have been first entered. (HRS 580-46).

Personal Judgment.

Court may render personal judgment against party outside state and over whom jurisdiction is acquired by service of process (see above) and if party was domiciliary of state: (1) At time cause of action arose, or (2) at time of commencement of proceeding, or (3) at time of service. (HRS 580-3.5).

Alimony.

Both temporary (HRS 580-9; 44 Haw. 491, 355 P.2d 188) and permanent (HRS 580-47) may be awarded. Amount is in sound discretion of court; factors considered are financial resources of parties, ability of party seeking support to meet his or her needs independently, duration of marriage, standard of living established during marriage, age of parties (including regular and consistent monetary gifts), physical and emotional condition of parties, usual occupation of parties during marriage, vocational skills and employability of party seeking support, needs of parties, custodial and child support responsibilities, ability of paying party to meet his or her own needs, financial condition under which parties may be left, probable duration of need (HRS 580-47; 41 Haw. 345); and may be modified upward (39 Haw. 245) or downward (34 Haw. 237), even in cases where parties stipulated that support payments may not be modified (8 Haw. App. 391, 804 P.2d 891).

Division of Property of Spouses.

Court has discretion to divide and distribute real, personal or mixed estate of spouses, whether community, joint or separate. (HRS 580-47). Following entry of decree of divorce, spouses' rights in property are governed by HRS cc. 533 and 560 until entry of order dividing property. (HRS 580-56). Court will first divide marital estate into five categories of property: Category 1. Net market value (NMV), plus or minus, of all property separately owned by one spouse on date of marriage (DOM) but excluding NMV attributable to property that is subsequently legally gifted by owner to other spouse, to both spouses, or to third party; Category 2. Increase in NMV of all property whose NMV on DOM is included in category 1 and that owner separately owns continuously from DOM to DOCOEPOT (date of conclusion of evidentiary part of trial); Category 3. Date-of-acquisition NMV, plus or minus, of property separately acquired by gift or inheritance during marriage but excluding NMV attributable to property that is subsequently legally gifted by owner to other spouse, to both spouses, or to third party; Category 4. Increase in NMV of all property whose NMV on date of acquisition during marriage is included in category 3 and that owner separately owns continuously from date of acquisition to DOCOEPOT; Category

5. Difference between NMVs, plus or minus, of all property owned by one or both of spouses on DOCOEPOT minus NMVs, plus or minus, includable in categories 1, 2, 3, and 4. (76 Haw. 19, 868 P.2d 437). Absent agreement defining respective property interests, court is guided by partnership principles in governing division and distribution-each partner shall be repaid partner's contributions and share equally in profits and surplus. (76 Haw. 19, 868 P.2d 437). Finally, family court strives for certain degree of uniformity, stability, clarity or predictability in its decision making and thus are compelled to apply appropriate law to facts of each case and be guided by reason and conscience to attain just result. (76 Haw. 19, 868 P.2d 437).

Change of husband or wife's surname may be granted in decree.

Custody and visitation of children is matter for discretion of court. (HRS 580-47). Each parent has equal right to award of custody of minor child; neither parent has any preferred status for award of custody. Criteria and procedures in awarding custody are best interests of child, may be awarded to one or both parents or other parties, wishes of child of sufficient age, social study and investigation by court personnel, expert testimony; visitation may be awarded to parents or any person interested in welfare of child. (HRS 571-46; 56 Haw. 51, 527 P.2d 1275). Statute setting forth standard granting grandparents' visitation rights unconstitutional. (116 Haw. 323, 172 P.3d 1067). Court can award joint custody upon application of either parent. Court may order any party to attend counseling. (HRS 571-46.2). Prior to awarding visitation rights to parent who committed family violence, court must find that child's physical safety and psychological well-being will be protected, and that adequate provision can be made for safety of parent who is victim of family violence. Custody Order may be modified due to changed circumstances when modification is in best interests of child (HRS 571-46; 10 Haw. App. 111, 861 P.2d 754). (HRS 571-46). Uniform Child Custody Jurisdiction and Enforcement Act (583A) replaced Uniform Child Custody Jurisdiction Act. Sibling may file petition with court for order of reasonable visitation rights. (HRS 571-46[7]). Custody shall be awarded to assure frequent, continuing, and meaningful contact with both parents and encourages both parents to share responsibility of raising their child; requires submission of parenting plan with divorce complaint and answer. (HRS 571-46[a][1]).

Support of Children.

Complies with federal Personal Responsibility and Work Opportunity Reconciliation Act of 1996 ("Welfare Reform Act"). All support orders accompanied by wage assignment. (HRS 571-52). Child Support Enforcement Act (HRS c. 576D); Administrative Process for Child Support Enforcement (HRS c. 576E). Under HRS cc. 576D and 576E, party may petition court at any time to opt out of child support enforcement agency system and enter into alternative arrangement for direct payment of child support. Such petition will have priority to be heard by court. (HRS 580-47.5).

Remarriage.

There are no restrictions on remarriage of divorced persons, but on remarriage of party decree for alimony may be modified or terminated. (HRS 580-51).

Separation for period of not to exceed two years may be decreed in any matrimonial action upon petition for separation when court finds marriage is temporarily disrupted. (HRS 580-71). Decree of separation is not bar to petition for divorce; however, fact that parties have lived separate and apart under decree of separation may not be used as ground in support of such petition. (HRS 580-71.5).

Registration of divorces and annulments is not required.

Annulment of Marriage.

See topic 14.11 Marriage.

Effect of Divorce.

See category 13 Estates and Trusts, topic 13.16 Wills.

14.06A DOMESTIC VIOLENCE:

Department of Human Services must provide written report to court prior to hearing for protective order. (2007, Act 102, effecting HRS 586-10.5).

Domestic Violence and Sexual Assault Special Fund.

Moneys in Domestic Violence and Sexual Assault Special Fund are used by Department of Health for programs and grants, or purchases of service that support or provide domestic violence and sexual assault intervention or prevention. (HRS 235-102.5, HRS 321-1.3). Department of Health is required to annually report to legislature on expenses and improvements that can be made and on strategic plan to improve support services. (HRS 321-1.3).

14.07 [RESERVED]

14.08 GUARDIAN AND WARD:

Uniform Probate Code.

Uniform Probate Code adopted as HRS 560:1-101 to HRS 560:8-102. See category 13 Estates and Trusts, topic 13.07 Descent and Distribution. Art V of 1969 Uniform Probate Code (HRS c. HRS 560:5-101 to HRS 560:5-433), Guardianship of the Persons and Property of Minors and Incapacitated Persons, is replaced by Hawaii's adoption of Uniform Guardianship and Protective Proceedings Act (2004, Act 161), with some modifications.

Jurisdiction and Venue.

Family court has exclusive jurisdiction over guardianship proceedings concerning minors. (HRS 560:5-106). Circuit court has exclusive jurisdiction over conservatorship and protective order proceedings concerning adults and minors. (HRS 560:5-106). Concurrent jurisdiction exists over guardianship and related proceedings concerning adults. (HRS 560:5-106). Venue for guardianship proceedings for: (i) Minor, is in circuit in which such minor resides or is present when proceeding is commenced (HRS 560:5-108[a]); and (ii) incapacitated person, is in circuit where such respondent resides or is institutionalized pursuant to court order (HRS 560:5-108[b]). Venue for protective proceedings is in circuit where respondent resides. (HRS 560:5-108[b]).

Selection of Guardian.

Person becomes guardian of minor by parental appointment or by judicial appointment. (HRS 560:5-202). Parent may nominate guardian for minor by will or by other signed writing (HRS 560:5-202), which may be subject to objections raised by interested parties (HRS 560:5-203). Court shall approve appointment of qualified person seeking guardianship if interest of minor shall be best served by such appointment. (HRS 560:5-205). Person nominated to serve as guardian by minor who has attained at least 14 years of age shall be appointed unless best interest of minor shall not be served by such appointment. (HRS 560:5-206). Person becomes guardian of incapacitated person by appointment by parent, spouse, reciprocal beneficiary or court. (HRS 560:5-301). Parent, spouse or reciprocal beneficiary may nominate guardian for incapacitated person by will or by other signed writing (HRS 560:5-302), which may be subject to objections raised by interested parties (HRS 560:5-302[c]). Court may appoint limited or unlimited guardian only if it finds by clear and convincing evidence that respondent is incapacitated person whose needs cannot be satisfied by less restrictive means. (HRS 560:5-311). Selection of guardian requires court to consider following, in priority as presented: (1) Current guardian; (2) person nominated by respondent; (3) agent appointed by respondent under medical directive/healthcare power of attorney; (4) spouse or reciprocal beneficiary of respondent or person nominated by will or other writing executed by deceased spouse or reciprocal beneficiary; (5) adult child of respondent; (6) parent of respondent; or individual nominated by will or other signed writing of parent; and (7) adult with whom respondent has resided for more than six months before filing of petition. (HRS 560:5-310). Court may appoint emergency guardians (HRS 560:5-312) and temporary substitute guardians (HRS 560:5-313) as it may deem appropriate.

Selection of Conservator.

Person becomes limited or unlimited conservator of individual, including minor, by judicial appointment. (HRS 560:5-401). Selection of conservator requires court to consider following, in priority as presented: (1) Conservator, guardian of estate, or other like fiduciary appointed or recognized by appropriate court of any other jurisdiction in which protected person resides; (2) person nominated as conservator by respondent, including respondent's most recent nomination made in durable power of attorney, if respondent has attained 14 years of age and at time of nomination had sufficient capacity to express preference; (3) agent appointed by respondent to manage respondent's property under durable power of attorney; (4) spouse or reciprocal beneficiary of respondent; (5) adult child of respondent; (6) parent of respondent; and (7) adult with whom respondent has resided for more than six months before filing of petition. (HRS 560:5-413).

Eligibility and Competency.

Any competent and qualified individual and/or qualified organization may be appointed as guardian of person of minor (HRS 560:5-205), guardian of person for incompetent person (HRS 560:5-310), and/or conservator (HRS 560:5-413).

Qualification.

Court may require conservator to furnish bond conditioned upon faithful discharge of all duties of conservatorship according to law, with sureties as it may specify, all of which cost shall be charged to protected party's estate. (HRS 560:5-415).

Inventory.

Within 60 days after entry of order of appointment, conservator shall prepare and file with appointing court detailed inventory of estate subject to conservatorship, together with oath or affirmation that inventory is believed to be complete and accurate as far as information permits. (HRS 560:5-419).

Powers and Duties.

Except as limited by court, guardian of minor has duties and powers of parent as enumerated. (HRS 560:5-207 and 5:208, respectively). State law mandates that each child placed in foster care must be covered by comprehensive health care plan. (HRS 587-85). Except as otherwise limited by court, guardian of incapacitated person has duties and powers of parent as enumerated and any additional powers granted by law to trustee. (HRS 560:5-314 and HRS 5-315, respectively). Guardian of minor or incapacitated person may delegate to another person his/her/its power regarding care, custody or property of minor or ward, by execution of power of attorney, effective term of which cannot exceed one year. (HRS 560:5-106). Conservator has duty to act as fiduciary, and must observe standards of care applicable to trustee. (HRS 560:5-418). Other powers and duties include, but are not limited to, inventory, record keeping, accounting, holding title to all of protected person's property and enumerated statutory powers of administration, distribution, estate planning and claims payment. (HRS 560:5-418, HRS 5-419 and HRS 5-425).

Investments.

Conservator has power, without court authorization or confirmation, to invest and reinvest funds of estate as would trustee. (HRS 560:5-425[5]).

Securities in Name of Nominee.

See category 13 Estates and Trusts, topic 13.15 Trusts, subhead Securities in Name of Nominee.

Real Estate.

Conservator, acting reasonably and in effort to accomplish purpose of appointment, has power, without court authorization, to collect, hold and retain assets, including land in another state, until he judges disposition should be made; to acquire and dispose of assets, including land in another state, for cash or on credit, at public or private sales; to repair, alter, improve or demolish buildings and other structures; to subdivide, develop or dedicate land to public use, adjust boundaries, dedicate easements to use without consideration, to enter into leases; to grant and take options, and has other powers. (HRS 560:5-425). Power to sell, lease or mortgage Hawaii real property is subject to court confirmation. (HRS 531-28.5 and HRS 531-29).

For disclosure requirements in conveyance of real property made or taken in representative capacity, see category 21 Property, topic 21.06 Deeds.

Liabilities.

Guardians of minor and incompetent person are not: (i) Obligated to use own funds for ward’s expenses; (ii) liable to others in exercise of duties and powers of guardian; (iii) liable for acts of ward based solely by reason of guardian relationship; and (iv) liable for injury to ward caused by third party, if exercised reasonable care in selecting third party. (HRS 560:5-316).

Conservator is not personally liable: (i) On contract properly entered into in fiduciary capacity in course of administration of estate unless conservator fails to reveal in contract representative capacity and identify estate (HRS 560:5-431[a]); and (ii) environmental condition or injury resulting from environmental condition on land solely by reason of acquisition of title (HRS 560:5-430[e]). However, conservator is personally liable for obligations arising from ownership or control of property of estate or for other acts or omissions occurring in course of administration of estate if conservator is personally at fault. (HRS 560:5-430[b]).

Accounts.

Conservator must file petition for approval of accounts and report to court for administration of estate annually unless court otherwise directs, upon resignation or removal, upon termination of conservatorship, and at other times as court directs. Every conservator must account to court periodically as court may direct. (HRS 560:5-420).

Termination.

Guardianship terminates upon death, resignation, or removal of guardian, or in accordance with terms of appointment. (HRS 560:5-112). Guardianship of minor also terminates upon minor’s death, adoption, emancipation or attainment of majority or as ordered by court. (HRS 560:5-210). Guardianship of incapacitated person also terminates upon death of ward or upon order of court. (HRS 560:5-112). Conservatorship terminates upon death, resignation, or removal of conservator, or in accordance with terms of appointment. Resignation is considered effective when approved by applicable court. (HRS 560:5-112).

Incapacitated Persons.

“Incapacitated person” means individual who, for reasons other than being minor, is unable to receive and evaluate information or make or communicate decisions to such extent that individual lacks ability to meet essential requirements for physical health, safety, or self-care, even with appropriate and reasonably available technological assistance. (HRS 560:5-102).

Foreign Conservator.

If conservator has not been appointed in this state and petition in protective proceeding is not pending in this state, conservator appointed in state in which protected person resides may file in court of this state, in circuit in which property belonging to protected person is located, authenticated copies of letters of appointment and of any bond. Thereafter, conservator may exercise all powers of conservator appointed in this state as to property in this state and may maintain actions and proceedings in this state subject to any conditions otherwise imposed upon nonresident parties. (HRS 560:5-433).

Gifts to Minors.

See topic 14.10 Infants.

Uniform Fiduciaries Act adopted in 1945. (HRS c. 556). § 189-3, Revised Laws of Hawaii 1955, pertaining to Uniform Fiduciaries Act repealed by adoption of Uniform Commercial Code. (HRS 490:10-102[1]).

14.09 HUSBAND AND WIFE:

Governed generally by HRS chapters 321, 510, 572 and 560.

Married person may make contracts, oral and written, with persons other than her or his spouse, in same manner as if sole. (HRS 572-22). Spouses may contract with each other: (1) By deed or assignment; (2) by agreement setting respective rights in property owned by them, or either of them, when agreement made in contemplation of divorce or judicial separation; (3) by agreement providing for periodic payments for support and maintenance of one spouse by other or for children when made in contemplation of divorce or judicial separation provided that agreement will be subject to court approval; (4) by partnership agreements (HRS 572-22); and (5) may waive rights to election as surviving spouse, before or after marriage, of deceased spouse's homestead allowance, exempt property and family allowance (HRS 560:2-204). Prospective spouses may enter into premarital agreements. (HRS c. 572D).

Upon marriage both spouses shall declare their married middle and last names. Names may be his or her own, that of spouse, or combined and hyphenated with spouse's but names must have been legally used at some time by either spouse. (HRS 574-1).

Actions.

Spouses or reciprocal beneficiaries may sue other partner in tort. (HRS 572-28; HRS 663-1). Either spouse may maintain action in Family Court for nonfelonious offense by other spouse. (HRS 571-14). Domestic violence laws define “family or household members” to include persons having child in common. (HRS 709-906). Married person not liable for debts of spouse; nor is married person's property liable to be taken on execution or other process against that person's spouse. (HRS 572-23). Spouses bound to maintain, provide for, and support one another during marriage and shall be liable for all debts contracted by one another for necessaries of family during marriage. (HRS 572-24).

Agency.

Spouse may act as agent for other. (See 17 Haw. 481.)

Desertion.

Uniform Desertion and Non-Support Act has been adopted with modifications. (HRS c.

575).

Community Property.

Provisions establishing community property were effective from June, 1945 through June, 1949. Provisions controlling management and disposition of existing community property are in HRS c. 510.

Uniform Premarital Agreement Act adopted. (HRS c. 572D).

Uniform Disposition of Community Property Rights at Death Act adopted. (HRS c. 510).

Uniform Interstate Family Support Act replaces and repeals HRS c. 576, Uniform Reciprocal Enforcement of Support Act. (HRS c. 576B).

14.10 INFANTS:

Age of majority is 18 for both sexes. Parents are liable for support of their minor unmarried children, and have equal powers and duties with respect to them: they are jointly their natural guardians, are jointly and severally liable for their torts and are jointly and severally entitled to prosecute and defend suits in which they or their property are concerned. (HRS c. 577). Parents may sue children (51 Haw. 74, 450 P.2d 998) and vice versa (51 Haw. 484, 462 P.2d 1007). Uniform Parentage Act adopted. (HRS c. 584). Parents and guardian also accountable for child's compliance with student code of conduct. (HRS 302A-1133.5). Minor, who is a least 14 years of age, may consent to receiving medical care and services from practitioner who believes recipient to be at least 14 years of age and who is not under care, supervision, or control of parent, custodian, or legal guardian.

Administrative Enforcement for Child Support.

See generally HRS c. 576E. Office of Child Support Hearings established within Department of Attorney General. (HRS 576E-10).

Child Support Enforcement.

If child support payments are made through agency, agency must enforce support orders. (HRS 576D-3[b]). Parent locator services extend to both custodial and absent parent. (HRS 576D-6). Child support order shall be recorded in bureau of conveyances. Recordation of order shall procure lien on land registered in land court under HRS c. 501. (HRS 576D-10.5). Child support payments withheld from obligor's income are not to exceed maximum limits set under Consumer Credit Protection Act. (HRS 576E-16).

Provides authority for Child Support Enforcement Agency (CSEA) to provide services to noncustodial parents, allows disclosure of information in administrative proceedings, and issuance of income withholding orders HRS 576D-3, HRS 576D-14, HRS 576E-11 (2005, Act 26). Requires noncustodial parent to keep CSEA informed of medical insurance coverage, HRS 576E-17. Enables CSEA to notify employers of requirement to provide medical insurance coverage by regular mail or transmission by electronic means HRS c. 576E-3. CSEA imposes annual fee ($25) where no public assistance had been paid to custodial parent and collection for case exceeds $500. (HRS 576 D-5).

Proposed Administrative Findings and Order shall be issued by Child Support Enforcement Agency (CSEA). (108 Haw. 202, 118 P.3d 1145 [Intermediate Court of Appeals]). If either party objects to proposed Administrative Findings and Order and requests hearing, hearing is conducted by Office of Child Support Hearings (OCSH), which then issues actual, filed Administrative Findings and Order. (108 Haw. 202, 118 P.3d 1145 [Intermediate Court of

Appeals]).

Burden is on CSEA to seek proof from custodial parent or adult child. § 576E-14(f) and § 580-47(a) imposes burden of proving to CSEA adult child's continuing education. When case is being heard by OCSH, CSEA has burden of proving that it properly sought proof and response it did or did not receive. (108 Haw. 202, 118 P.3d 1145 [Intermediate Court of Appeals]).

Emancipation.

Minor who has legally married (HRS c. 572) is treated as having attained age of majority and has all rights, duties, privileges and responsibilities thereunder, with certain enumerated exceptions (HRS 577-25).

Disability.

Infants may bring personal actions within respective statutes of limitation after disability of infancy is removed, or at any time while it exists. (HRS 657-13). Infants or any one claiming under them may bring real action at any time within five years after disability is removed notwithstanding that 20 year statute of limitations has expired. (HRS 657-34). But if infant dies without recovering premises, no further time is permitted by reason of disability of his successor in claim. (HRS 657-36).

Disaffirmance of contract of minor must be made within reasonable time after reaching age of majority. (19 Haw. 474).

Actions.

Guardians ad litem may be appointed to represent minors whose interests are affected by litigation. (HRS 551-2).

Involuntary Termination of Parental Rights.

Family courts may terminate parental rights only when verified petition has been filed by some responsible adult on behalf of child in family court of circuit in which child resides or was born and court has conducted hearing of petition unless hearing waived if waiver permitted by statute. (HRS 571-61). In custody proceedings, past family violence committed by parent creates rebuttable presumption that it is not in best interest of child to be placed with that parent. (HRS 571-46[9]).

Parental Responsibility.

Parents liable for torts of unmarried minor children. (HRS 577-3, HRS 663-1).

Paternity/Parentage.

Voluntary admission of paternity admissible as evidence of parentage in any family court proceeding. (HRS 338-12). Must treat paternity determination in any state or U.S. territory as adjudication in this State. (HRS 584-8.5). Sets standard for genetic testing. (HRS 584-11). Presumed to be natural father if genetic testing results do not exclude possibility of paternity. Acknowledgment of paternity filed with department of health may establish support obligation. (HRS 584-4).

Support of Minor.

Family court has continuing jurisdiction to compel parents to provide for support, maintenance and education of minor children and adult children in some cases. (HRS 580-47).

Uniform Gifts to Minors Act (HRS c. 553) repealed and replaced by Uniform

Transfers to Minors Act (HRS c. 553A). Age of majority under Act is 21 years. (HRS 553A-1).

Uniform Securities Ownership by Minors Act has not been adopted.

Interstate Compact on Juveniles enacted. (HRS c. 582).

Child Protective Act.

(HRS c. 587).

Children’s Advocacy Program.

(HRS c. 588).

Adoption.

See topic 14.01 Adoption.

14.11 MARRIAGE:

In order to make valid marriage contract, that shall only be between man and woman, it is necessary: (1) That respective parties do not stand in relation to each other of ancestor and descendant of any degree whatsoever, brother and sister of whole or half blood, uncle and niece or aunt and nephew, whether relationship is result of issue of parents married, or not married, to each other, (2) that each of parties be at least 16 (or 15 with written approval of family court, but in no case less than 15); (3) that neither party has any lawful spouse living; (4) that consent of neither party has been obtained by force, duress or fraud; (5) that neither party be afflicted with any loathsome disease concealed from, and unknown to, other party; (6) man and woman to be married in State shall have duly obtained license for that purpose from agent appointed to grant marriage licenses; and (7) marriage ceremony be performed in State by person or society with valid license to solemnize marriages and man and woman to be married and person performing marriage ceremony be all physically present at same place and time for marriage ceremony. (HRS 572-1).

License.

It is not lawful for any persons to marry in the state without a license for that purpose duly obtained from the agent appointed to grant marriage licenses. (HRS 572-1 and -6). Both applicants for a license must appear in person before the agent and file an application in writing, accompanied by a statement signed and sworn to by each applicant setting forth full name, age, race, residence, relationship of applicants if any, full names of parents and date of death of last prior spouse or date and jurisdiction of dissolution of last prior marriage, if any. (HRS 572-6).

Marriage ceremony must be performed by validly licensed person or society. (HRS 572-1). License to solemnize marriage revoked for failure to comply with rules of department of health. (HRS 572-13.5). Ceremony may be performed any place in state provided man, woman and marriage officiant are all physically present at same place and time for ceremony. (HRS 572-1). Any person under 18 must have consent of parent, guardian or other person having care and government of such party. (HRS 572-2). Special licenses to solemnize marriages are required, and persons so licensed must deliver copy of certificate of marriage to all persons married by them (HRS 572-13) and report such marriage within three business days to department of health. (HRS 572-13[b]).

Record.

Names, ages, number times married, residence, birthplace, parents’ names, date and place of marriage, name of officiant required. (HRS 572-6). See also category 10 Documents and Records, topic 10.04 Records, subhead Vital Statistics.

Proxy marriages and marriage by written contract are not recognized.

Common law marriages are not recognized in Hawaii. (27 F.2d 582).

Local Recognition of Out of State Marriages.

Marriages legal in country where contracted are legal in courts of Hawaii (HRS 572-3), unless odious by common consent of civilized nations (3 Haw. 489; 12 Haw. 329). There is presumption of validity. (29 Haw. 716).

Annulment of marriage may be granted for the following causes: (1) That the parties stood in such relation to each other that they could not lawfully marry; (2) that one or both of the parties had not attained the legal age of marriage; (3) that either party had an undivorced spouse living; (4) that one of parties lacked mental capacity to consent to marriage; (5) that consent to marriage of party applying for annulment was obtained by force, duress or fraud, and there has been no subsequent cohabitation; (6) that one of parties was suffering from leprosy or afflicted with any loathsome disease and said fact was concealed from, and unknown to, party applying for annulment. (HRS 580-21).

Same-Sex Marriage.

Only male-female marriages are recognized. (HRS 572-1).

Foreign Marriages.

Marriages legal in country where contracted are legal in Hawaii. (HRS 572-3).

Uniform Premarital Agreement Act, adopted. (HRS c. 572D).

14.12 MARRIED WOMEN:

See topics 14.09 Husband and Wife, Marriage; categories 5 Civil Actions and Procedure, topic Evidence, subhead Witnesses; Debtor and Creditor, topic Homesteads; Documents and Records, topic Acknowledgments; Estates and Trusts, topics Executors and Administrators, Wills; Property, topic Dower.

14.12A NAMES:

It is unlawful to change any name except upon order of Lieutenant Governor, upon order from Family Court, by marriage, pursuant to HRS 338-21, or upon order granted by competent court of State changing name of person born in that State. (HRS 574-5).

See also topic 14.09 Husband and Wife.

14.12B RECIPROCAL BENEFICIARY:

Reciprocal beneficiary status extends certain rights to couples comprised of two adult individuals who are ineligible for marriage under HRS c. 572. (HRS 572C-1). Benefit areas include, but are not limited to, survivorship, inheritance, insurance and real property rights. Unless expressly provided, reciprocal beneficiaries shall not have same rights and obligations conferred through marriage under HRS c. 572. (HRS 572-6). *Caveat:* Provisions of Act are severable (1997, Haw. Sess. Laws, Act 383, § 75), and are subject to federal preemption and pending legislative and judicial decisions.

Qualification requirements for each applicant: minimum 18 years of age; sign Declaration of Reciprocal Beneficiary Relationship form issued by Director of Health; consent to relationship not obtained by force, duress, or fraud; prohibited from marrying one another under

HRS c. 572; neither party be married nor party to another reciprocal beneficiary relationship. (HRS 572C-4).

Termination.

Either party may terminate relationship by filing declaration of termination with Director. (HRS 572C-7). Termination automatic upon obtaining marriage license in Hawaii by either party, or upon legal marriage of either party. (HRS 572C-7).

15 HEALTH

15.00A CONTROLLED SUBSTANCES:

Adopted Uniform Controlled Substances Act. (HRS c. 329).

MEDICAL USE OF MARIJUANA:

Medical use of marijuana by qualified patient is permitted. (HRS 329-122). Patients must be registered with Department of Public Safety. (HRS 329-123).

15.01 ABORTIONS

15.02 ADMINISTRATION

Legislature established long term care policy goals for State of Hawaii, and long term care commission at University of Hawaii to expire Nov. 30, 2010. (Act 224, 2008).

15.03 DISEASES

15.04 DURABLE POWER OF ATTORNEY

15.05 FOOD, DRUGS, DEVICES AND COSMETICS:

Legislature has directed governor to enter into agreement to provide Hawaii residents access to I-SaveRx prescription drug reimportation program, which allows consumers to fill prescriptions from pharmacies in Canada and Europe. (Act 59, 2008).

15.06 [RESERVED]

15.07 HEALTH INSURANCE BENEFITS:

Prepaid Health Care Act.

Hawaii Prepaid Health Care Act (HRS c. 393) requires local employers to provide coverage for employees by prepaid group health care plan. Required health care benefits addressed in HRS 393-7. Mandatory coverage regulated by HRS c. 393, Part II. Administration and enforcement, including penalties, provided in HRS c. 393, Part III. Part IV of HRS c. 393 provides for governmental subsidies to cover certain health insurance premium costs.

State Health Insurance Program Act.

Regulated by HRS c. 431N. Establishes program within Dept. of Health to ensure basic health insurance coverage to Hawaii residents who are medically uninsured and who are defined as "gap group individuals". (HRS 431N-1).

Medicaid-Related Mandates.

Regulated by HRS c. 431L. Prohibition against employers taking Medicaid status into account when making payments for benefits. (HRS 431L-1). Provides for state's right to third party payments. (HRS 431L-2). Provides for coverage of children under Medicaid. (HRS 431L-3, 5, 6). Specifies employer obligations to provide health insurance coverage for certain children of employees if such coverage is pursuant to court or administrative order. (HRS 431L-4). Requires all future Medicaid health insurance procurement contracts only be awarded to entities that comply with specified program requirements. (HRS c. 103F).

Health Maintenance Organization Act.

Regulates establishment and operation of Health Maintenance Organizations. (HRS c. 432D).

Long-Term Care Financing Program.

Establishes long-term care services for qualifying individuals. (HRS c. 346C).

Informed Consent.

Physicians have obligation to obtain informed consent of patients prior to administering diagnostic, therapeutic, and treatment procedures. Rendering of professional medical services without informed consent is tort. (HRS 671-1[2]). Information provided must include: (1) Condition to be treated; (2) description of proposed treatment or procedure; (3) intended and anticipated results of proposed treatments or procedures; (4) recognized alternative treatments or procedures, including option of not providing these treatments or procedures; (5) recognized material risks of serious complications or mortality associated with: (a) Proposed treatment or procedure, (b) recognized alternative treatments or procedures, and (c) not undergoing any treatment or procedure; and (6) recognized benefits of recognized alternative treatments or procedures. (HRS 671-3; 98 Haw. 470, 50 P.3d 946).

15.08 LICENSURE AND CERTIFICATION:

Care Homes.

Adult residential care homes must be licensed. (HRS 321-15.6).

Pharmacists.

Commencing on Jan. 1, 2008, licensed pharmacists required to complete 30 hours of continuing education courses within two-year period preceding renewal date.

Mental Health Counselors.

Required to be licensed by department of commerce and consumer affairs. (HRS 453D-7).

Nurses.

Regulated by HRS c. 457. Persons practicing or offering to practice as advanced practice registered nurse, registered nurse, or licensed practical nurse for compensation must be recognized or licensed by state board of nursing. (HRS 457-1). Graduates with bachelors degree who complete pre-licensure portion of masters entry program in nursing may apply for license.

(HRS 457-7). Graduates of foreign practical nursing program must submit proof of eligibility. (HRS 457-8). License automatically forfeited if not timely renewed. (HRS 457-9). Nurses not actively practicing for more than five years may be required to submit proof of continued competency by re-taking and passing licensing examination. (HRS 457-9).

Board may grant prescriptive authority to qualified advanced practice registered nurses and must designate requirements. (HRS 457-8.6).

Special Treatment Facilities and Therapeutic Living Programs.

Required to be licensed. (HRS 321-16.5, HRS 321-16.6).

Developmental Disabilities.

Dept. of Health issues licenses for developmental disabilities domiciliary homes for persons with developmental disabilities who are unable to live independently and who require supervision or care, but do not require care by licensed nurses in domiciliary setting. (HRS 321-15.9).

15.09 LIVING WILLS

15.10 ORGAN DONATION

Regulated generally by HRS c. 327. Anatomical Gift Act repealed and replaced with Revised Uniform Anatomical Gift Act. (Act 122, 2008).

15.11 PATIENTS' BILL OF RIGHTS:

Generally.

Regulated by HRS c. 432E.

Pain.

Adopted Pain Patient's Bill of Rights. (HRS c. 327H). Provides that patient suffering from severe acute pain or severe chronic pain has option to request or reject use of pain relief modalities.

15.12 PUBLIC HEALTH

Department of Health is authorized to hire up to ten epidemiologists to investigate diseases and injuries which threaten public health and safety (HRS c. 321) and may take samples necessary for epidemiologic investigation. (2009, Act 95).

15.13 SMOKING REGULATIONS:

Smoking in Public Places and in Workplace.

Regulated by HRS 328J-1 to 17. Smoking prohibited in enclosed and partially enclosed areas owned and operated by State or counties, including buildings and vehicles; in enclosed or partially enclosed places open to public; in enclosed or partially enclosed places of employment; sports arenas, stadiums, and amphitheaters; and within presumptively reasonable minimum distance of 20 feet from entrances, exits, windows that open and ventilation intakes that serve enclosed or partially enclosed area where smoking is prohibited. (HRS c. 328J-1 to 6). Following areas are exempt: private residences not used as licensed child care, adult day care, or health care facility; designated smoking rooms in hotels and motels; retail tobacco stores; private and semiprivate rooms in nursing homes and long-term care facilities occupied by one or more persons, all of whom are smokers and have requested in writing to be placed in smoking room; outdoor areas of places of employment; all areas when smoking is part of production being filmed; and state correctional facilities. (HRS 328J-7). Owner, operator, manager, or other person in control of establishment, facility, or outdoor area may declare entire establishment, facility, or outdoor area or any part thereof as place where smoking is prohibited. (HRS 328J-8).

Distribution of Cigarettes and Tobacco Products.

Sale or distribution at no charge of cigarettes by following methods is prohibited: from vending machines unless in bar, cabaret, or establishment where minimum age of entry is 18; or from lunch wagons engaging in sales within 1,000 ft. of public or private elementary or secondary school grounds. (HRS 328J-17). Distribution of samples of or coupons redeemable for cigarette or tobacco products prohibited in or on any public street, sidewalk, or park, or within 1,000 ft. of any elementary, middle or intermediate, or high school. (HRS 328J-17). Distribution of cigarette or tobacco promotional materials or coupons redeemable for such promotional materials prohibited within 1,000 ft. of any elementary, middle or intermediate, or high school. (HRS 328J-17). Distribution prohibitions not applicable to private commercial establishments, such as stores and restaurants, where tobacco products are sold, as long as distribution not visible to public from outside establishment and to commercial establishments where access to premises by persons under 18 years is prohibited by law. (HRS 328J-17).

Permits must be obtained by retailers engaged in retail sale of tobacco. (HRS 245-2.5). Permit is renewable annually. (HRS 245-2.5[c]). (Effective until July 12, 2009).

16 INSURANCE

16.01 INSURANCE COMPANIES:

Regulated by complete and comprehensive code, adopted in 1955, and revised effective as of July 1, 1988, as in force and governs Hawaii insurance law. (HRS c. 431).

Supervision by Insurance Commissioner (hereafter “Commissioner”) (355 Merchant Street, Honolulu, Hawaii 96813) who serves at will of Director of Department of Commerce and Consumer Affairs. (HRS 431:2-102). Commissioner responsible for conducting market conduct examination for policyholder protection. (HRS 431:14).

Rates must not be excessive, inadequate or unfairly discriminatory. (HRS 431:14-103[a][1]). Every insurer shall file in triplicate with Commissioner, except as to specific marine risks and bail bonds issued under HRS 804-62, every manual of classifications, rules and rates, every rating plan, every other rating rule, and modification of any of foregoing it proposes to use. (HRS 431:14-104[a]). Each filing must be accompanied by $50 fee payable to Commissioner. (HRS 431:14-104[b]). Willfully withholding information from or knowingly giving false or misleading information which will affect rates or premiums chargeable under Art. 14 of HRS c. 431 is subject to penalties under HRS 431:14-117. (HRS 431:14-115). Insurance Rating Organization regulations contained in HRS 431:14-107 et seq. Health Insurance Rate Regulation contained in HRS 431:12 et seq. Commissioner may reduce or adjust rates annually for all types of insurance. (HRS 431:14-103.3). Disclosure of rating practices must conform to model long term care insurance model regulation. (2009, Act 49).

Annual Statements.

Authorized insurance companies must file annual audit of company’s financial condition by independent CPA or accounting firm. (HRS 431:3-302.5). Risk based capital formula for life and health insurers. Insurers must file annual and quarterly financial statements with National Association of Insurance Commissioners (NAIC). (HRS 431:3-302).

Policies.

Accident and Sickness Insurance Contracts. (HRS 431:10A). Insurance coverage for newborn adopted children provided. (HRS 431:10A-116[5]). Insurance coverage for out-patient diabetes self-management training is provided. (HRS 431:10A-121). Insurers must generally provide coverage for reciprocal beneficiaries to same extent that they provide coverage for spouses and families. (HRS 431:10A-601). Reciprocal beneficiary couples comprised of two adult individuals who are ineligible for marriage under HRS c. 572. (HRS 572C-4). See also category 14 Family, topic 14.12B Reciprocal Beneficiary. Code promotes availability of long term care insurance, sets policy standards and provides for coverage comparison. (HRS c. 431:10H). Discrimination based on genetic information is prohibited. (HRS 431:10A-118). Credit Life Insurance and Credit Disability Insurance. (HRS 431:10B). Motor Vehicle Insurance and No-Fault Insurance Law. (HRS 431:10C). Personal injury protection benefits insurance required. (HRS 431:10C-104). Life Insurance and Annuities. (HRS 431:10D). Sales of insurance to members of Armed Forces. (HRS 431:10H). Qualifying nonprofit organizations which enter into charitable gift annuity agreements with donors are excluded from regulation under Insurance Code. (HRS 431:1-204). Property Insurance. (HRS 431:10E). Surety Insurance. (HRS 431:10F). Motorcycle and Motor Scooter Insurance. (HRS 431:10G). Liability and medical payment coverage consistent with motor vehicle insurance laws amounts. (HRS 431:10G-301 and 120 Haw. 329, 205 P.3d 594). Insurance Holding Company System. (HRS 431:11). Limits acquisition of insurer authorized to do business in Hawaii. (HRS 431:11-104). Business Transacted with Producer Controlled Property/Casualty Insurer. (4 HRS 31:11A). Life settlements/viatical settlements. (2008, Act 177). Medical treatments specifically excluded from coverage are not provided, regardless of how medically necessary. (120 Hawai'i 446, 209 P.3d 1260 [Hawaii App.]).

Insurance contracts generally regulated by Art. 10.

Right to Return Policy.

Purchasers of individual life or disability insurance policies have right to return policies without obligation within ten days of receipt. This does not apply to single premium nonrenewable policies or travel accident policies. (HRS 431:10-214).

Disclosure of health care coverage and benefits required. (HRS 431:10-109).

Pooled insurance allowed. (HRS 431:10-222.5).

Discrimination prohibited as to terms or conditions of any insurance contract, or in rate or amount of premiums charged therefor, or in benefits payable or in any other right or privilege accruing thereunder, in favor of particular individuals or persons, or between insureds or subjects of insurance having substantially like insuring, risk, and exposure factors, or expense elements. (HRS 431:13-103[a][7]).

Rebates are prohibited except as otherwise expressly provided by law. (HRS 431:13-103[a][8]). Commissioner is authorized to investigate claims of unfair or deceptive acts or practices prohibited by HRS 431:13-102 and defined by HRS 431:13-103. (HRS 431:13-105). However, following practices will not be considered prohibited rebates: (1) Payment of bonuses (in case of any contract of life insurance or life annuity) out of surplus accumulated from nonparticipating insurance if payment is fair, equitable and in best interests of insurer and policyholders; (2) allowance to policyholders (in case of life insurance policies issued on industrial debit plan) who have continuously, for specified period, made premium payments directly to office of insurer in amount fairly representing saving in collection expense; (3) readjustment of premium rate for group insurance policy based on loss or expense thereunder, and (4) distribution of savings, earnings or surplus equitably among class of policyholders in case of any insurance contract. (HRS 431:13-103[9]).

Liens.

None.

Agents and Brokers.

Adjusters and independent bill reviewers must obtain license from State before soliciting business. (HRS 431:9-201[a]). Subject to exceptions, application and examination necessary for license. (HRS 431:9-206). HRS 431:8 provides instances allowing insurance business transactions by unauthorized insurers. HRS 431:9 and 431:9A regulate licensing, duties, examination and liabilities of managing general agents. Any title insurer or insurer that operates as escrow depository must be licensed pursuant to HRS c. 449. (HRS 431:20-106.5). Person may not act as provider or broker of life or viatical settlement with owner of life insurance without first having obtained license from insurance commissioner. (2008, Act 177).

Process Agent.

Captive insurance companies required to appoint resident agent to accept service of process. (HRS 431:19-102[b][4]). Attorney-in-fact for reciprocal insurer empowered to accept service of process and can authorize Commissioner to receive service of process in actions upon contracts exchanged. (HRS 431:4-406[b][2]). Every fraternal benefit society authorized to do business in Hawaii shall appoint in writing Commissioner and each successor to be its true and lawful attorney upon whom all lawful process in any action against it shall be served. (HRS 432:2-701[a]). Each authorized foreign or alien insurer shall appoint Commissioner as its attorney to receive service of, and upon whom may be served, all legal process issued against it in Hawaii upon claims arising within Hawaii. (HRS 431:2-205[a]). Any act of transacting insurance business in Hawaii by unauthorized insurer constitutes irrevocable appointment of Commissioner or successor to be true and lawful attorney of insurer upon whom may be served any notice, order, pleading or process in any proceeding before Commissioner and arising out of transacting insurance business in Hawaii. (HRS 431:8-207[a]). Each licensed nonresident agent or broker shall appoint Commissioner as agent’s or broker’s attorney to receive service of legal process upon claims arising within Hawaii. (HRS 431:9[a]-108.5).

Investments, as well as prohibitions and limitations thereon, discussed in Art. 6 of HRS c. 431. Investments of foreign or alien insurers as permitted by laws of domicile, but must be of quality substantially as high as those required for domestic insurers. (HRS 431:6-501). Related insurers allowed to acquire investments in investment pools. (HRS 431:6-601[b]). Investments by insurer in non-dividend paying stocks and in common trust funds, mutual funds and exchange traded funds must be no greater than 25 percent of its surplus. (2009, Act 077).

Foreign Insurance Companies.

Foreign insurance company must qualify for and can transact insurance in Hawaii only through certificate of authority from Commissioner. Foreign and alien insurers must either be licensed under laws of not less than three states designated by Commissioner from among states accredited by NAIC (HRS 431:3-201; HRS 431:3-203; HRS 431:3-203.5) or satisfy following criteria: (1) Be stock, mutual or reciprocal insurer or same general type as may be formed as domestic insurer under Art. 4 of HRS c. 431; (2) have capital funds as required by HRS c. 431; (3) transact or propose to transact insurances in Hawaii which are authorized by its charter and meet standards of HRS c. 431; (4) fully comply with provisions of HRS c. 431; (5) appoint general agent who qualifies under Art. 9 of HRS c. 431 (this requirement does not apply to foreign and alien reinsurers licensed to transact business in Hawaii that assume any portion of risk of another insurer); and (6) have continuously, actively and successfully transacted insurance business for at least five years immediately prior. Each foreign insurer must prepare annual statement in accordance with NAIC Practices and Procedures Manual. (HRS 431:3-301). Insurer who wishes to withdraw from State must do so in compliance with HRS 431:3-215.

See category 2 Business Organizations, topic 2.03 Corporations, subhead Foreign Corporations.

Captive Insurance Companies.

Insurance Code applies to certain captive insurance companies. (HRS 431:19-115). Insurance Commissioner appoints advisor to review captive insurance company applications. (HRS 431:19-102[f]). Commissioner with approval of Director of Commerce and Consumer Affairs authorized to appoint Deputy Commissioner. (HRS 431:19-101). All nonpublic financial information in captive insurance company's application for licensure, its business plan, or of, its parent, or parent's member organization, disclosed as result of application process shall be given confidential treatment. (HRS 431:19-101.2[a]). Commissioner may make public all or part of nonpublic information with written notice. (HRS 431:19-101.2[b]). Commissioner has authority to approve service providers to captive insurance companies. (HRS 431:19-101.4). Each pure captive insurance company licensed to do business in Hawaii must pay Director of Finance through Commissioner 0.25% on $0-$25,000,000, 0.15% on $25,000,000-$50,000,000, 0.05% on more than $50,000,000 and 0% on more than $250,000,000 tax on gross premiums received from all risks or property resident, situated, or located in Hawaii and on risks and property situated elsewhere upon which no premium tax is otherwise paid during year ending on preceding Dec. 31, less return premiums and less any reinsurance accepted and that annual maximum aggregate tax on gross premiums shall not exceed $200,000. (HRS 431:19-116). Each captive insurance company chartered in Hawaii as other than pure captive insurance company must pay 1% tax instead. (HRS 431:19-116). These taxes are due and payable on or before Mar. 1 of each year. When paid, these taxes shall be in settlement of and in lieu of all demands for all taxes except: (1) Taxes on real property and (2) taxes on purchase, use or ownership of tangible personal property. (HRS 431:19-116). All such taxes and fees are credited to captive insurance administration fund from which Commissioner may compensate captive insurance administrator who is responsible for implementation of rules concerning captive insurance companies and from which up to 10% of total moneys credited will be transferred to insurance regulation fund. (HRS 431:19-101.8).

Redomestication of authorized insurance companies addressed. (HRS c. 431, Arts. 3, 19). Requirements for foreign or alien captive insurance company to become Hawaii domestic captive insurance company. (HRS 431:19-102.3[a]).

Requirements for domestic captive insurance company to transfer to new domicile. (HRS 431:19-102.4).

Association and risk retention captives must file NAIC annual statement blank and audit with Insurance Division and NAIC. (HRS 431:19-107).

Requirement to possess and maintain unimpaired capital and surplus in amount established by Commissioner. (HRS 431:19-110).

Retaliatory Laws.

None.

Premium Tax.

Insurers pay 2.75% on gross life insurance premiums, 0.8775% on gross underwriting profit of marine insurance, and 4.265% on all other gross premiums. (HRS 431:7-202). Taxes shall be paid quarterly with quarterly tax statement, failure to do so subjects insurer to fine. (HRS 431:7-202). Low-income housing tax credit may be claimed against this tax. (HRS 431:7-208).

Privilege Tax.

Certificate of authority is $900 for first year and $600 for each subsequent year. Agents pay annual license fee of $75. Application fee of $1,500 and $150 for issuance of permit. Adjusters pay license fee of $75 first year and $45 annually thereafter. (HRS 431:7-101)

Uniform Insurers Liquidation Act.

Repealed HRS 431-661 to 431-668, which constituted substantial adoption of major provisions of Uniform Insurers Liquidation Act, and enacted in lieu thereof Art. 15 (HRS 431:15-101 to 431:15-411) entitled “Insurers Supervision, Rehabilitation and Liquidation”. New provisions cannot be considered substantial adoption of major provisions of Uniform Act, although they contain some similar provisions and have same general purpose.

Benefit societies addressed in HRS c. 432; mutual benefit societies (Art. 1) and fraternal benefit societies (Art. 2). Domestic mutual benefit societies required to file annual audits. (HRS 432:1-405). Separate chapter adopted in 1992 providing for stricter disclosure, review, reporting and financial examination requirements, consistent with National Association of Insurance Commissioners (NAIC) standards. Separate chapter adopted in 1976 to cover medical torts; includes provisions for establishment of medical claim conciliation panel. (HRS c. 671). Hawaii Medical Malpractice Underwriting Plan provides contingency plan to be instituted by Commissioner upon availability of medical malpractice insurance in Hawaii. (HRS c. 435C).

Insurer, self-insured employer or Special Fund can recover temporary disability benefits overpaid employee. (HRS 392-78).

Courts enforce objectively reasonable expectations of parties claiming coverage under insurance contracts, which are construed in accord with reasonable expectations of layperson. (72 Haw. 80, 807 P.2d 1256).

Credit for Reinsurance.

Domestic ceding insurer can credit on its financial statements, as asset or deduction from liability, risks ceded to group of incorporated underwriters and individual unincorporated underwriters. (HRS 431:4A-101). Any society that takes credit for reserves on risks ceded to reinsurer shall be subject to provisions of HRS c. 432. (HRS 432:1).

Unfair Trade Practice Regulations.

Art. 13 entitled Unfair Methods of Competition and Unfair or Deceptive Acts and Practices in Business of Insurance. Following defined as unfair methods of competition and unfair or deceptive acts or practices in insurance business: Misrepresentation and false advertising of insurance policies; false information and advertising generally; defamation; boycott, coercion and intimidation; false financial statements; stock operations and advisory board contracts; unfair discrimination; rebates except as otherwise expressly provided by law; unfair claim settlement practices; failure to maintain compliant handling procedures; misrepresentation in insurance applications to obtain fee; and failing to provide, or limiting, coverage available to individual because of third party claim for damages. (HRS 431:13-103). Market conduct law contained in HRS 432:1-102 et seq. Insurance fraud investigations branch will address fraud claims. (2009, Act 149).

Privacy of Consumer Financial Information.

Governs treatment of nonpublic personal financial information about individuals by all insurance licensees. Requires licensee notice to individuals about privacy policies, establishes conditions for disclosure of individual nonpublic personal financial information to affiliates and nonaffiliated third parties, and provides individuals with means to prevent disclosure of covered information. (HRS 431:3A).

Duty to Defend.

Duty rests on possibility, however remote, that coverage exists. (78 Haw. 174, 891 P.2d 261).

Breach of duty to defend does not result in irrebuttable presumption that insurer is obligated to indemnify insured; however, presumption is appropriate where coverage was first admitted and then later denied. (81 Haw. 235, 915 P.2d 1336).

Defense costs incurred before tender of notice to insurer are not covered. (76 Haw. 346, 876 P.2d 1314).

Direct Actions Against Insurers.

See category 23 Transportation, topic 23.01 Motor Vehicles, subhead Direct Action.

Hurricane Relief Fund.

Relief fund established to monitor availability of property insurance and to offer hurricane property insurance when such insurance is unavailable in private market. Special mortgage recording fee of 0.1% of mortgage is imposed to create hurricane trust fund. Use graduated percentages to determine post-hurricane assessment on servicing facilities. (HRS 431P-16). Other provisions of fund are discussed in HRS c. 431P.

Worker’s Compensation.

See category 11 Employment, topic 11.02 Labor Relations.

Guaranty Associations.

Guarantee payment on policies where insurer is unable to make payment. (HRS 431:16).

Hawaii Property Insurance Association.

Established to provide basic property insurance to owners and occupants of property in areas of high risk to natural disasters. (HRS 431:21-101).

Prepaid Health Care Law.

See category 11 Employment, topic 11.02 Labor Relations.

16.02 SURETY AND GUARANTY COMPANIES:

Such companies must register with Director of Department of Commerce and Consumer Affairs of the State, and foreign corporations must comply with laws relating to such corporations. (HRS 78-20). See category 2 Business Organizations, topic 2.03 Corporations.

If bond executed by a principal and by corporation authorized to do surety business, corporation may be accepted as sole surety on bond. (HRS 78-20).

17 INTELLECTUAL PROPERTY

17.01 TRADEMARKS AND TRADENAMES:

Model State Trademark Law (HRS 482-21 thru 37) was adopted on Apr. 19, 2001, and took effect on July 1, 2003.

Registration.

DCCA requires that all trademark registration applications be made on its appropriate forms. Forms and filing at: Department of Commerce and Consumer Affairs, Business Registration Division, 335 Merchant St., Rm. 201, Honolulu, Hawaii 96813. Telephone: (808) HRS 586-2727. (HAR HRS 16-36-4[4]). Filing fee is $50 for term of five years from date of filing, $20 for expedited service. (HRS 482-2, 3, 36). Registrations may be renewed for additional periods of five years from date of renewal by filing application for renewal and $50 fee. (HRS 482-3, 25). Application must be accompanied by one specimen showing mark as actually used. (HRS 482-22). See HRS 482-21 and HRS 482-22 for specific application requirements. See also Hawaii Administrative Rules (HAR) HRS 16-36-15. Fictitious firm names may be registered with DCCA by single proprietor, partnership, or corporation upon payment of fee of $50 provided name is not substantially identical to previously registered name. Renewal for additional five year periods. (HRS 482-2, 3). No statutory requirement that individual, partnership, or corporation file tradename; no civil or criminal penalties for failure to file. Limited partnerships are not required to file tradenames in Hawaii, although it is common practice to do so if limited partnership operates under assumed name. Forms available at: Department of Commerce and Consumer Affairs, Business Registration Division, 335 Merchant St., Room 201, Honolulu, HI 96813. Telephone: (808) HRS 586-2727.

Assignment.

Assignee of sole proprietor of trademark may register mark. (HRS 482-26). DCCA requires assignor to submit appropriate form, original and one true copy of mark, and $50 filing fee. (HRS 482-22).

Protection Afforded.

Unlawful to adopt or use trademark or service mark identical or confusingly similar with one previously registered. (HRS 482-4, 31). Counterfeiting of mark is class C felony for which forfeiture of property is authorized. (HRS 708-875). As civil penalty, infringement of validly registered mark gives rise to fine of not more that $1,000. (HRS 482-5). For violation of labor union’s or association of employees’ mark, attorney’s fees and costs incurred in enforcement of statute and damages may be imposed. (HRS 482-4). Uniform Deceptive Trade Practices Act adopted. (HRS c. 481A). Cyber-squatting prohibited; unlawful to, in bad faith, register, traffic in, or use Internet domain name identical or confusingly similar to distinctive mark registered and used in Hawaii. (HRS 481B-22).

PUBLICITY RIGHTS.

Person has property right in commercial use of his or her name, voice, signature, and likeness. (2009 Haw. 1st Spec. Sess. Act 28). Liability for infringement of publicity right is greater of $10,000 or actual damages and any profits attributable to infringement.

17.02 TRADE SECRETS:

Uniform Trade Secrets Act adopted, amended in part. (HRS c. 482B). Section provides relief for actual or threatened misappropriation of trade secret. (HRS 482B-3). Relief may include injunction, damages, attorney’s fees, or other affirmative acts as compelled by court order. (HRS 482B-3, 4, 5).

18 LEGAL PROFESSION

18.01 ATTORNEYS AND COUNSELORS:

State Bar is integrated.

Jurisdiction over Admissions.

Supreme Court is given power to regulate practice in state by Haw. Const. Art. VI, § 7. (See also 50 Haw. 107, 432 P.2d 887.) Supreme Court Rules prescribe procedures for admission to bar and for discipline. (Rules 1 and 2, respectively). Hawaii Board of Bar Examiners Rules of Procedure [HBBERP] also prescribe procedures for admission to bar. (Part 2).

Model Rules of Professional Conduct are adopted with slight modifications to govern members of bar. (Rules of the Supreme Court of the State of Hawaii [RSCH] 2.2). Disciplinary Board of Hawaii Supreme Court and Disciplinary Counsel consider and investigate any alleged grounds for discipline of attorneys. (RSCH 2.4, 2.6).

Eligibility.

Before any admission to bar, Supreme Court shall be satisfied of good moral character of applicant. Burden of proving good moral character is on applicant. (RSCH 1.3[c]). No applicant shall be allowed to sit for Hawaii Bar Examination or be admitted to Hawaii Bar during any period in which Hawaii's Child Support Enforcement Agency or like body in another jurisdiction has certified applicant is not in compliance with order of child support or is not in compliance with subpoena or warrant relating to paternity or child support proceeding. (RSCH 1.3[h]).

Registration as Law Student.

No requirement exists. See Supreme Court Rule 7 for rules governing supervised student practice of law. Students must apply to court clerk to become law student intern.

Educational Requirements.

Applicant must graduate from law school accredited by Council of American Bar Association on Legal Education and Admission to the Bar. (RSCH 1.3[b], HBBERP 2.2). If applicant is not graduate from accredited law school, applicant is eligible for admission if applicant has practiced law for five of six years before application and: (1) Is admitted to practice before highest court of another state, territory, or District of Columbia; or (2) is admitted to practice and is in good standing before highest court in foreign country where English common law forms basis of country's jurisprudence and English is language of instruction and practice. (RSCH 1.3[b]). Under this rule, service as judge of court of record is equivalent to active practice of law. (RSCH 1.3[b]).

Petition for Admission.

Applicants for bar must submit, in duplicate, verified application on form provided by Hawaii Board of Bar Examiners. (RSCH 1.3, HBBERP 2.1). Application must be accompanied by letters of recommendation from at least two attorneys licensed to practice in State, which must state circumstances under which attorney has known applicant and appraisal of applicant's moral character. Applicants for bar must submit verified application for Feb. examination on or before 20th day of Nov. preceding exam; for July examination on or before 20th day of Apr. preceding examination. (HBBERP 2.1). Fee for examination is $300 plus $175-$300 character report fee, and successful applicant must pay additional $10 for admission. Examinations begin on Tues. preceding last Wed. of Feb. and July each year. Latest information available from prerecorded message at Supreme Court; telephone (808) HRS 539-4907.

Examination.

Multistate Bar Examination, Multistate Essay Examination, Multistate Performance Test, and Multistate Professional Responsibility Examination used. Transfer of multi-state scores from other jurisdictions not accepted. Subjects tested on essay portion include business organizations, wills and trusts, civil procedure, Uniform Commercial Code (Arts. 2, 3 and 9), family law, and legal ethics.

Clerkship.

No requirement of clerkship prior to admission.

Admission without Examination.

A full-time member of faculty of University of Hawaii Law School who meets citizenship and educational requirements and is admitted to practice in another U.S. jurisdiction may be admitted to bar without examination for a three-year period. After satisfactory completion of three-year period, that faculty member may be granted admission without limitation of time. (RSCH 1.8).

Full-time active duty military officer serving Staff Judge Advocate who meets other requirements may apply for limited admission for four years; may be extended once. JA may receive no client fees in addition to ordinary military pay.

Admission Pro Hac Vice.

Attorneys from other states, on special order, may be associated with local counsel on specific cases. For each year order is effective, attorney allowed to appear pro hac vice shall pay annual Disciplinary Board fee to State Bar Association. Only one fee is required even if attorney appears in more than one case. (RSCH 1.9). Eligibility to appear pro hac vice in U.S. District Court of Hawaii and application process therefore are regulated by Local Rules of Practice for the United States District Court for the District of Hawaii. (LR 83.1[e]).

Licenses.

License issued by Supreme Court.

Membership in Bar Assn. mandatory. Annual fee structured in three classes for private practice: Active, less than five years in profession, $245; more than five years, $430; inactive, $100; call (808) HRS 537-1868 for latest information.

Privileges.

Lawyer-client privilege recognized. (H.R.E. 503).

Disabilities.

Attorney cannot act as surety on any bond or undertaking in any action or proceeding unless authorized by court. (Circuit Court Rule 26).

Liabilities.

See topic Costs.

Compensation.

Fees governed by Hawaii Rules of Professional Conduct (HRPC) Rule 1.5. Fee must be reasonable. (Rule 1.5[a]). Contingent fee agreement must be in writing and must state method by which fee is to be determined. (Rule 1.5[c]). Contingent fees not permitted in criminal cases, divorce, alimony or support, or property settlement proceedings. (Rule 1.5[d][1]&[2]).

Lien.

Hawaii recognizes right of discharged attorney to assert charging lien for costs advanced and reasonable attorney fees against former client’s recovery in case. (6 Haw. App. 296, 719 P.2d 1107). Attorney who has been discharged by client but is entitled to some fees may file lien where there is fund sub judice. (1 Haw. App. 560, 623 P.2d 450). Attorney who did not prove specific amount due on asserted fee lien acquired by assignment from former employer was not entitled to enforce lien. (6 Haw. App. 296, 719 P.2d 1107). Attorney has lien by law upon action, suit, and proceeding that results in judgment, decree, order, settlement, or award in client's favor and on proceeds paid in satisfaction of those judgments, decrees, orders, settlements, or awards in same action that attorney represented client. (HRS 507-81).

Disbarment or Suspension.

Supreme Court may publicly censure, suspend for up to five years, or disbar and may order restitution or payment of costs (except attorney's fees). Disciplinary Board may publicly or privately reprimand or informally admonish. Practicing law during period of suspension of license may result in disbarment. (See 79 Haw. 201, 900 P.2d 777.)

Unauthorized Practice.

Individuals, associations or corporations not admitted to bar prohibited from practice of law. (HRS 605-14 and HRPC). Attorney General or Bar Association (HRS 605-15.1) may prosecute violators in Circuit Court (HRS 605-15). Any person who commits violation is guilty of misdemeanor. (HRS 605-17).

Mandatory Continuing Legal Education.

Members of Hawaii State Bar are required to complete at least three credit hours per year of approved Mandatory Continuing Professional Education. Qualifying topics include Hawaii Rules of Professional Conduct, legal ethics, law office management, client trust account administration, bias awareness and prevention, access to justice, case and client management, and malpractice insurance and prevention. (RSCH 22). Failure to meet these requirements can result in suspension. (RSCH 17[d]).

Specialty Certification Requirements.

Lawyer not permitted publicly to represent or imply that (s)he is recognized, designated, or certified specialist, except: (1) Lawyer admitted to engage in patent practice before U. S. Patent and Trademark Office may use designation "Patent Attorney," or similar designation, and (2) lawyer engaged in admiralty practice may use designation "Admiralty," "Proctor in Admiralty," or similar designation. (HRPC 7.4[a]&[b]). However, lawyer may communicate that (s)he is certified as specialist in field of law by named organization provided that communication is not misleading, clearly states name of certifying organization and is accompanied by statement that "The Supreme Court of Hawaii grants Hawaii certification only to lawyers in good standing who have successfully completed a specialty program accredited by the American Bar Association." (HRPC 7.4[c]).

Professional Association (or Corporation).

Attorneys may associate to practice law as partners. Statute (415A) permits professionals (including attorneys) to incorporate in restricted form. Attorneys may form professional corporations, but attorneys of such corporations retain liability as though association were partnership. (RSCH 6[g]). Statute prohibiting attorneys from forming limited liability partnerships has been repealed. (2000, Act 218, § 8). See also category 2 Business Organizations, topic 2.03 Corporations.

Powers.

Attorneys have control of an action to judgment and execution, but have no power to compromise, arbitrate, or settle without written authority. (HRS 605-7).

Rules of Professional Conduct.

Hawaii has adopted HRPC fashioned after uniform model rules. See 81 Haw. 410, 917 P.2d 1284.

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19 MINERAL, WATER AND FISHING RIGHTS

19.00A FISHING:

Fishing Rights.

All fishing grounds appertaining to any government land or otherwise belonging to government, except ponds, are open for free and equal use by all persons; provided that for protection of these fishing grounds, Department of Land and Natural Resources may manage and regulate taking of aquatic life. (HRS 187A-21). There are administrative or civil penalties for violation of statutes regulating aquatic resources and wildlife. (HRS 187A-12.5, 13). License can be obtained for mullet, nehu, iao and other baitfish, and certain crustaceans. (HRS 188-44; 45; 57). No person shall knowingly harvest shark fins from State of Hawaii territorial waters, or land shark fins in state, unless fins were taken from shark landed whole in state. (HRS 188-40.5). Illegal to take or kill female ula, Kona crabs, or Samoan crabs. (HRS 188-58.5).

Permit required to pick Limu in Limu management area. (HRS 188-22.8).

Community subsistence fishing. (HRS 188-22.9).

Konohikis.

Private vested fishing right giving tenants ability to either: (1) Set aside right to take one type of aquatic species for exclusive use of konohiki; or (2) prohibit all taking of aquatic life during certain months of year; provided that during fishing season within private fishery, konohiki may exact up to one-third of aquatic life taken within private fishery from each fisher among tenants. (HRS 187A-23).

19.01 MINES AND MINERALS:

Strip Mining.

Regulated and controlled by State Board of Land and Natural Resources. (HRS c. 181). Permit required to engage in strip mining. (HRS 181-3). Permit application procedure governed by HRS 181-4; bond required. (HRS 181-5).

State Mineral Rights.

Reservation and disposition governed by HRS c. 182.

Geothermal Resources.

Production and utilization statutorily encouraged. State authorized to waive royalty payments from geothermal mining lessees to encourage initial or continued production of geothermal resources. (HRS 182-18). Surface owner has first right of refusal for mining lease. (HRS 182-5). Only areas designated as geothermal resource subzones may be utilized for geothermal development activities (development, or production of electrical energy from geothermal resources). (HRS 205-5.1[a]). Exploratory drilling is permitted outside of geothermal resource subzones. (HRS c. 205). State Board of Land and Natural Resources responsible for designation of geothermal resource subzones. (HRS 205-5.2). Use of area for geothermal development activities within geothermal resource subzone governed by county planning commissions, except where conservation district affected. (HRS 205-5.1[c]). Activities within conservation district subject to state regulation. (HRS 205-5.1[d]). Naturally heated fluids below 150 degrees Fahrenheit are not geothermal resources. (HRS 182-1). Thirty percent of all royalties received by state shall be paid to county in which mining operations are situated. (HRS 182-7[c][3]).

Mining of sand, dead coral, coral rubble, rocks, soil or other beach or marine deposits from shoreline area is prohibited (with exceptions). (HRS 205A-44).

19.01A WATER:

Water Use.

Use of surface and ground waters governed by State Water Code and Commission on Water Resource Management. (HRS c. 174C). The Public Trust Doctrine applies to all water resources in State, including surface and ground waters. (94 Haw. 97, 9 P.3d 409). Commission has jurisdiction to hear any dispute regarding water resource protection, water permits, constitutionally protected water interests, appurtenant water rights and competing needs for water. (HRS 174C-10). Jurisdiction to hear and determine appeals from Water Commission filed after July 1, 2006, is with Intermediate Court of Appeals, subject to review by Supreme Court by transfer or certiorari. (113 Haw. 52, 147 P.3d 836). Coastal waters governed by Hawaii Coastal Zone Management Law and special management area guidelines. (HRS c. 205A). Office of State Planning is responsible for management of coastal waters. (HRS c. 205A).

Declaration of Water Use.

Any person making use of water in any area of state must file declaration containing, among other things: information regarding quantity of water used, purpose or manner of use, time of taking water, and point of withdrawal or diversion of water. (HRS 174C-26). Upon determination by Water Commission that use is “reasonable-beneficial use,” certificate describing use shall be issued. (HRS 174C-27). “Reasonable-beneficial use” means use of water in such quantity as is necessary for economic and efficient utilization, for purpose, and in manner which is both reasonable and consistent with state and county land use plans and public interest. (HRS 174C-3).

Designated Water Management Areas.

When Water Commission determines that water resources of area are being threatened by existing or proposed withdrawals of water, Commission may, after public hearing, designate water management areas, subjecting both ground and surface water diversions to requirements of Water Code. (HRS 174C-41, 94 Haw. 97, 9 P.3d 409). Except for domestic consumption of water by individual users and uses of catchment systems to gather water, no person may make any withdrawal, diversion, impoundment or consumptive use of water in any designated water management area without first obtaining permit from Commission. (HRS 174C-48). Under public trust and Water Code, permit applicants have burden of justifying their proposed uses in light of protected public rights in resource, “reasonable-beneficial use” requirement and other criteria listed in HRS 174C-49. (94 Haw. 97, 9 P.3d 409). Commission may, as condition for issuing permits, require use of dual line water supply systems in new industrial and commercial developments in designated water management areas. (HRS 174C-51.5). Permits are generally valid until designation of water management area is rescinded unless revoked or modified. (HRS 174C-55). Every 20 years, Commission is to conduct comprehensive study of all permits issued under Code to determine whether conditions of such permits are being complied with. (HRS 174C-56). Permits may be transferred in whole or in part if conditions of use of permit remain same and Commission is informed of transfer within 90 days. (HRS 174C-59). Water Code does not modify Native Hawaiian Water Rights. (HRS 174C-101).

Private Agricultural Parks.

Owners of private agricultural park may engage in generation of electrical energy from fossil fuel or renewable energy sources. (2009, Act 122). Owners of private agricultural park may collect, sell, and distribute cold water to any member of park for agricultural products or air conditioning. (2009, Act 122). Owners of private agricultural park may collect, store, sell, and distribute nonpotable water for irrigation purposes to another member within agricultural park. (2009, Act 122).

20 MORTGAGES

20.01 CHATTEL MORTGAGES:

Uniform Commercial Code adopted. See category 3 Business Regulation and Commerce, topic 3.09 Commercial Code, especially for variations in connection with filing. Uniform Commercial Code has made use of chattel mortgages unnecessary.

Forms.

For UCC Forms, see end of this Digest.

20.02 [RESERVED]

20.03 MORTGAGES OF PERSONAL PROPERTY:

See topic 20.01 Chattel Mortgages.

20.04 MORTGAGES OF REAL PROPERTY:

Transfers of interests in real property or fixtures made as security for performance of another act or subject to defeasance on payment of an obligation, whether such transfers are in trust or otherwise, are deemed mortgages and create liens, but do not pass title. (HRS 506-1).

Property.

Subject to certain limitations (HRS c. 506, HRS 490:9-334, and HRS 490:9-604), if mortgage so provides, its lien may attach to additions, improvements, and purchases or substitutions made to supply place of any real property or fixtures disposed of and to all other after-acquired real property or fixtures referred to in mortgage when mortgagor acquires interest therein to extent of such interest, but subject to existing liens and lien of purchase money mortgage given by mortgagor of any such after-acquired real property or fixtures (HRS 506-2). Further, lien does not attach to after-acquired real property and fixtures not described in mortgage until, after acquisition, instrument or affidavit is recorded referring to book and page number or document numbers of mortgage and containing description of real property, fixtures, and real property to which fixtures attach. (HRS 506-3).

Execution.

The same formalities as to execution of mortgages are required as in the case of deeds. (q.v.).

Recording.

In order to constitute notice as against subsequent bona fide purchasers or encumbrancers, mortgage must be recorded in Bureau of Conveyances of State of Hawai'i, or if Torrens Act land, in Office of Assistant Registrar of Land Court of State of Hawai'i. For all recorded mortgages, copies must be single-sided, consecutively paginated, and not exceed 8½ × 11 inches. Top 3½ inches of first page of all documents must be left blank for use of recording officer. Following 1 inch space shall be reserved for information showing to whom document should be returned, beginning 1½ inches from left margin and not exceeding 3½ inches per line. First page shall include, if possible, all names of grantors and all names and addresses of grantees, type of document, and tax map key number (see example Commercial Code Form at end of this Digest). If there is more than one page, document should be stapled once in upper left corner. (HRS 502-31, HRS 501-108). Recording fee is $25 per document and additional $1 for every page over 20. (HAR 13-16-22). When grantee is corporation or partnership document must indicate state where entity is registered and entity's address. (HRS 501-105). If mortgage affects Torrens Act land, reference to number of certificate of title of affected land must be incorporated in body of mortgage tendered for registration. (HRS 501-108[a]). All names of all natural persons signing in their individual capacity in such mortgage must be typewritten, stamped, legibly printed by hand, or by mechanical or electrical printing method beneath all signatures. (HRS 501-108[c]).

See category 21 Property, topic 21.06 Deeds.

Recording Schedule of Fees set forth in HRS 501-218, as amended by Bureau of Conveyances, and HRS 502-25. Special mortgage recording fee for hurricane reserve trust fund set forth in HRS 431P-16.

Priorities.

Covered by HRS 506-1.

Taxes.

See category 22 Taxation, topic 22.13 Property Taxes, subhead Mortgage Recording Fee.

Release.

Covered by HRS 506-8. See subhead Satisfaction, infra.

Trust deeds are not commonly used, except to secure bond issues.

Future Advances.

Mortgage may secure past debts or future advances even though mortgagee is under no contractual duty to make such advances (HRS 506-1), but debts or advances must relate to same transaction or series of transactions for which mortgage is given or mortgage must specifically refer to it for advance to be secured (50 Haw. 304, 440 P.2d 262). Except with regard to security interests in fixtures (HRS 490:9-334 and HRS 490:9-604), advances up to maximum amount of mortgage shall be superior to any subsequently recorded mortgage, lien or encumbrance other than liens for real property taxes and for public improvements (HRS 506-1).

Satisfaction.

Mortgagee shall provide mortgagor with recordable release of mortgage upon full satisfaction of mortgage and discharge of any debt secured thereby. Title insurers and underwritten title companies authorized to execute release of mortgages of real property or fixtures on behalf of mortgagee under certain circumstances. (HRS 506-8).

Discharge.

See subhead Satisfaction, supra.

Foreclosure.

Mortgages may be foreclosed: (1) By usual action in court; (2) by sale under power contained in mortgage, after publication of notice in English language once in each of three successive weeks, last publication not less than 14 days before sale, affidavit showing all details of notice and sale to be recorded within 30 days after sale. (HRS c. 667). Any person who forecloses on property within planned community association, condominium or apartment in cooperative housing project must notify board of directors by registered or certified notice. (HRS 667-5.5). Condominium associations which have filed notice of lien against foreclosed property may recover delinquent maintenance fees in amount limited to amount of regular monthly common assessments unpaid during six months immediately preceding completion of foreclosure, with maximum recovery of $1,800, from (i) foreclosure purchaser if notice of lien is filed before foreclosure purchase is recorded; or (ii) subsequent purchaser if notice of lien is filed before subsequent purchaser's acquisition of title. (HRS 514B-146). Mortgage of time share interest may also be foreclosed by sale under power if power of sale is contained in such mortgage or loan document. (HRS 667-62). Mailed notice of senior mortgagee's intent to foreclose under power of sale may be obtained by junior mortgagees of premises from foreclosing mortgagee by submitting written request to him any time after junior mortgage is filed but before period of published notice of foreclosure has run. (HRS 667-6). Alternate, nonjudicial, power of sale foreclosure process established. (HRS 667-21 through HRS 667-42).

Sale.

See subhead Foreclosure, supra.

Redemption rights have been abolished.

Forms.

There are no statutory forms. The following forms may be used but not for loans under $25,000 (see category 3 Business Regulation and Commerce, topic 3.12 Consumer Protection):

Mortgage.

KNOW ALL MEN BY THESE PRESENTS:

That (name, marital status and address of mortgagor), Mortgagor, in consideration of . . . . . . DOLLARS ($. . . . . .) to . . . . . . loaned and advanced by (name and address of mortgagee), Mortgagee, the receipt of which is hereby acknowledged, and in order to secure the repayment thereof according to the promissory note . . . . hereinafter mentioned, and also the repayment of any and all other indebtedness now or as may hereinafter be or become owing by the Mortgagor to the Mortgagee, do . . . . hereby grant . . . . . unto said (name of mortgagee—and if two or more, specify whether as joint tenants, tenants in common, or as tenants by the entirety):

(description of property)

TOGETHER with all improvements now or hereafter constructed or placed thereon and all fixtures now or hereafter attached to or used in connection with the property hereinabove described, including, without limiting the generality of the foregoing, the following described household appliances, together with any replacements thereof or additions thereto, which are, and shall be deemed to be, fixtures, a part of the interest in said property and a portion of the security for the indebtedness secured hereby:

TO HAVE AND TO HOLD the same, with all improvements now or hereafter placed or constructed being thereon, and all rights, easements, privileges and appurtenances thereto belonging, and the rents, issues and profits thereof, unto the Mortgagee and the (successors, heirs) and assigns of said Mortgagee forever.

AND the Mortgagor hereby covenants with the Mortgagee as follows:

The Mortgagor is lawfully seised in fee simple (as joint tenants, etc.) of the granted property and has . . . . good right to grant and convey the same as aforesaid; that said property is free from all encumbrances (except as aforesaid); that the Mortgagee shall quietly enjoy and possess the same; and that the Mortgagor will and (its successors—or the executors and administrators of the survivor of them, etc.) shall warrant and defend the same unto the Mortgagee and the . . . . . . and assigns of the Mortgagee forever against the lawful claims and demands of all persons . . . . . .;

. . . . . . will pay unto the Mortgagee said sum of . . . . . . Dollars ($. . . . . .) with interest thereon, all according to the terms of the . . . . . . promissory note . . . . therefor of even date, made by the Mortgagor . . . . . . hereby secured; and will also pay all other indebtedness now or as may hereafter be or become owing by the Mortgagor to the Mortgagee on any and every account, together with interest thereon as may be specified with respect thereto;

Until such payment the Mortgagor will also pay all taxes, assessments and charges of every kind, to whomsoever assessed or chargeable, whether on the mortgaged property or any interest therein, or with respect to any improvements thereon, benefits thereto, income therefrom, or the indebtedness secured hereby, without any allowance or deduction whatsoever on account thereof from any indebtedness due under or secured by this mortgage; and will, upon request, deposit the receipts therefor with the Mortgagee;

The Mortgagor will, in the name and for the benefit of the Mortgagee, during the term of this mortgage, keep all improvements now or hereafter erected upon the mortgaged property insured against hazards of such type or types and in such amount or amounts and form of policy as the Mortgagee may from time to time require, and deposit the policy or policies with the Mortgagee (it being agreed and conditioned that in event of loss or damage the proceeds of insurance shall be applied by the Mortgagee, at the option of the Mortgagee, either to rebuilding or repair of damage or in reduction of any indebtedness secured hereby unless otherwise required by law); and if the Mortgagor shall procure any other insurance thereon, all such insurance shall likewise be made payable to and be claimable only by the Mortgagee, and whether so made payable or not it may be recovered by the Mortgagee by any appropriate proceeding and be similarly applied;

The Mortgagor will punctually pay the rent at all times and in the manner in said lease required, and otherwise observe and perform all of the covenants and conditions thereof on the part of the Lessee, and in all other respects keep the same in good standing and free from all liens and other encumbrances; (for leasehold only)

The Mortgagor will keep the mortgaged property in good condition and repair, and will permit the Mortgagee to enter and inspect the mortgaged property, and will comply with all laws, rules and regulations made by governmental authority and applicable thereto, and will not commit or suffer any strip, waste or any unlawful, improper or offensive use of said property, or any other act of negligence by which the same or any interest therein shall become liable under any lien or to seizure or attachment on mesne or final process of law, in bankruptcy or otherwise, or by which the security hereof shall be impaired or threatened;

Upon any failure of the Mortgagor to observe or perform any covenant or condition of this mortgage, or if any suit, proceeding or other contingency shall arise or be threatened relating to any of the mortgaged property, the Mortgagee may at the option of the Mortgagee, without notice or demand, make any advances or incur such expenses or otherwise act as may in the judgment of the Mortgagee seem advisable to protect the security of the Mortgagee hereunder or carry out the covenants of the Mortgagor herein, even though any tax, assessment, rate, encumbrance or charge paid in such behalf by the Mortgagee shall be invalid;

All advances, costs, expenses and attorney's fees which the Mortgagee may make, pay or incur under any provision of this instrument, for the protection of the security of the Mortgagee or any of the rights of the Mortgagee in connection with the mortgaged property, or in foreclosure proceedings commenced and subsequently abandoned, or in any dispute or litigation in which the Mortgagee or the holder of said note may become involved by reason of or arising out of this mortgage shall be paid by the Mortgagor to the Mortgagee upon demand and bear interest until paid at the rate of ten per cent per annum, all of which obligations shall be additional charges upon the mortgaged property and be equally secured hereby;

In case of condemnation of the mortgaged property or any part thereof by paramount authority, whether or not the mortgagor shall be in default hereunder at the time, any portion or all of any condemnation award to which the Mortgagor shall be entitled is hereby assigned to the Mortgagee and the Mortgagee is hereby irrevocably authorized to demand, sue for, collect, receive and receipt for the same and apply the net proceeds of the same toward the payment of the indebtedness secured hereby;

The Mortgagee shall have the right and is hereby expressly authorized to apply any payments received and any rents, issues and profits collected upon any indebtedness of the Mortgagor to the Mortgagee hereby secured and any such application shall in all respects be binding upon the Mortgagor;

PROVIDED, HOWEVER, that if the Mortgagor shall pay all indebtedness hereby secured, whether or not the same is mature, of which indebtedness the records of the Mortgagee shall be prima facie evidence, and otherwise well and faithfully perform and observe all of the covenants and conditions aforesaid, and pay the cost of release hereof, this mortgage shall become void; but all indebtedness hereafter owing by the Mortgagor to the Mortgagee shall be secured by this mortgage, whether or not at the time such indebtedness shall accrue there shall be then outstanding indebtedness owing by the Mortgagor to the Mortgagee, unless a release of this mortgage shall have been executed by the Mortgagee prior to the time such indebtedness shall accrue;

BUT UPON ANY DEFAULT in the performance or observance of any covenant or condition herein or in any promissory note contained or of the terms of any other indebtedness hereby secured, or if the Mortgagor (or any of them, if there be more than one) is adjudicated a bankrupt or insolvent, or shall file any petition or answer seeking relief as a debtor under any law for the relief or aid of debtors, or shall enter into any arrangement or composition with creditors, or if a receiver is appointed with respect to the property herein described, or if the mortgaged property, or any part thereof, shall be seized or levied upon under any legal process or under any claim of legal right, then, in each such event, the whole amount of all indebtedness owing by or chargeable to the Mortgagor under any provision of this mortgage, or intended to be secured hereby, on any and every account, shall at the option of the Mortgagee become at once due and payable without notice or demand, and with or without foreclosure the Mortgagee shall have the immediate right to receive and collect all rents and profits due or accrued or to become due, and said rents and profits are hereby assigned to the Mortgagee, and said Mortgagee is hereby irrevocably appointed the attorney in fact of the Mortgagor with power in the name of the Mortgagor or the Mortgagee to demand, sue for, collect, recover and receive all such rents and profits, to compromise and settle claims for rents or profits upon such terms and conditions as may seem proper, and to enter into, renew or terminate leases or tenancies, and the Mortgagee may foreclose this mortgage, by court proceeding (with the immediate right to a receivership with the aforesaid powers on ex parte order and without bond pending foreclosure), or, as now or then provided by law, either by entry and possession, or (with or without entry and possession) by advertisement and sale of the mortgaged property or any part or parts thereof at public auction in . . . . . ., State of Hawaii, and may in the name of the Mortgagee or as the attorney in fact of the Mortgagor, for such purpose hereby irrevocably appointed, effectually convey the property so sold to the purchaser or purchasers absolutely and forever; and any foreclosure shall forever bar the Mortgagor and all persons claiming under the Mortgagor from all right and interest in said property; and out of the proceeds of any foreclosure sale the Mortgagee may deduct all costs and expenses of foreclosure and/or suit, and retain or be awarded all sums then payable by or chargeable to the Mortgagor, rendering to the Mortgagor the surplus, if any. If such proceeds shall be insufficient to discharge the same in full, the Mortgagee may have any other legal recourse against the Mortgagor for the deficiency. The Mortgagee shall have the right to enforce one or more remedies hereunder or any other remedy the Mortgagee may have, successively or concurrently, including the right to foreclose this mortgage with respect to any portion of the mortgaged property without thereby impairing the lien of this mortgage on the remainder of the mortgaged property or affecting the remedies of the Mortgagee available with respect thereto.

If the property includes, or is under, covered, or affected by any leases, and the Mortgagor or anyone else with right to and/or obligations under any property leases, including, but not limited to lessors, lessees, sublessors, and sublessees, become a debtor in a voluntary or involuntary bankruptcy case, and an order for relief is issued pursuant to the bankruptcy laws, then Mortgagor will take the actions necessary to prevent the property lease(s) from being rejected by Mortgagor, any bankruptcy trustee or any other person pursuant to the bankruptcy laws, or from being terminated in any manner. Mortgagor will take such actions within five days from the date of filing of the order of relief. The bankruptcy laws include, but are not limited to, § 365 of Title 11 of the provisions of the United States Code, as it may be amended; (for leasehold only).

IT IS ALSO AGREED:

Upon the happening of any event entitling the Mortgagee to foreclose this mortgage, or if the Mortgagee shall be served with garnishee process in which the Mortgagor (or any of them, if there be more than one) shall be named as defendant, whether or not the Mortgagor shall be in default hereunder at the time, the Mortgagee may, but shall not be required to, set off any indebtedness owing by the Mortgagee to the Mortgagor (or any of them, if there be more than one) against any indebtedness secured hereby, without first resorting to the mortgaged property and without prejudice to any other rights or remedies of the Mortgagee or the lien of the Mortgagee on the mortgaged property;

In the event of a sale of said premises or any part or parts thereof under and by virtue of the provisions of this mortgage the purchaser or purchasers thereof shall have immediate and peaceable possession of the same and that if the Mortgagor shall remain in possession after the effective date of such sale such possession shall be construed as a tenancy at sufferance only, giving unto the purchaser all remedies, by way of summary possession or otherwise, conferred by law in such case.

The Mortgagor (and each of them, if there be more than one), and any successor in interest to the whole or any part of the mortgaged property, hereby waive diligence, presentment, demand and notice of dishonor, and consent to extensions of time, surrender or substitution of security, failure to apply deposit or other forbearance, without notice, with respect to any indebtedness hereby secured;

The Mortgagor will pay to Mortgagee, to the extent requested by the Mortgagee, on dates upon which interest payable, such amounts as the Mortgagee may from time to time estimate as necessary to create and maintain a reserve fund from which to pay before the same become due, all ground rentals (if any), taxes, assessments, liens and charges on or against the property hereby mortgaged, and premiums for insurance held or required by the Mortgagee. Payments from said reserve fund for said purposes may be made by the Mortgagee at its discretion even though subsequent owners of the property described herein may benefit thereby. In the event of any default under the terms of this mortgage, any part or all of said reserve fund may be applied to any part of the indebtedness hereby secured and in refunding any part of said reserve fund the Mortgagee may deal with whomever is represented to be the owner of said property at that time;

The Mortgagee or any person in behalf of the Mortgagee may purchase at any foreclosure sale, and no other purchaser shall be answerable for the application of the purchase money; and that until any default the Mortgagor may hold and enjoy the mortgaged property and receive the rents and profits thereof; that the terms “advances,” “costs” and “expenses” wherever herein used, shall include reasonable attorney’s fees whenever incurred; that the term “Mortgagor” shall include the plural and in such case shall bind the Mortgagors jointly and severally; that the term “indebtedness” shall mean and include, but shall not be limited to, all claims, demands, obligations and liabilities whatsoever, however, arising and whether owing by the Mortgagor (or any of them, if there be more than one) individually, or as partners, or as a partner or jointly or in common with any other or others, and whether absolute or contingent, as principal debtor or as accommodation maker or as endorser, liquidated or unliquidated, and whenever contracted, accrued or payable; and that these presents shall be equally binding upon and inure to the benefit of the legal representatives and successors in interest of the parties hereto respectively.

In the event of the existence at the date of this instrument or the adoption or amendment, after the date of this instrument, of any law of the United States, of the State of Hawaii, or any foreign country, or of any other taxing jurisdiction, which in any way shall impose a tax on mortgages or debts secured by mortgages to the end that directly or indirectly Mortgagee shall be required to pay on account of this mortgage, said promissory note or any other indebtedness secured hereby any tax other than a tax on, according to, or measured by net income, or any existing franchise tax applicable to Mortgagee, the holder of this mortgage may give at any time written notice to Mortgagor that the said holder elects to have the indebtedness secured by this mortgage become due and payable six months from the giving of such notice unless Mortgagor, within the said six months’ period, shall agree in writing to pay the amount of such taxes; and in the event Mortgagor within such six months’ period so agrees to pay the amount of such taxes, such agreement of Mortgagor shall be deemed to be a covenant and obligation of Mortgagor under this mortgage for all purposes and in the event Mortgagor fails within said six months’ period to so agree to pay such taxes, the indebtedness secured by this mortgage shall become due and payable upon the last day of the six months’ period. If at any time Mortgagor’s agreement to pay the amount of such taxes shall be prohibited by law or the payment of the same by Mortgagor would make the transaction usurious, then the indebtedness secured hereby shall become due and payable six months after the giving of written notice by the holder of this mortgage and the promissory note secured hereby that it elects to have the indebtedness secured hereby become due and payable.

If without prior written consent of the Mortgagee any of the property subject to this mortgage shall be conveyed, assigned, sold, encumbered, leased or transferred, including transfer by way of agreement of sale or as security, by the Mortgagor to any other party, other than by will or intestate succession, then and in any such event all of the indebtedness hereby secured shall at once become due and payable at the option of the Mortgagee (any provision or term thereof to the contrary notwithstanding), and delay or failure on the part of the Mortgagee to demand such payment shall not prejudice the Mortgagee’s rights thereto. If the Mortgagor then holding title to all or any part of the mortgaged property (or any of them if there be more than one) shall be a corporation, then as to such Mortgagor, any sale, assignment, transfer (other than by will or intestate succession) or exchange of any of the shares of the capital or common stock of the Mortgagor, or any issuance of any new shares of stock of any class of the Mortgagor, or any merger or consolidation of the Mortgagor with or into any other corporation whereby in any such event the shareholders of such Mortgagor immediately prior to such event (or their heirs or legatees) shall fail to own and control one hundred per cent (100%) of the voting stock of the Mortgagor shall be deemed a conveyance or assignment of the Mortgagor’s interest in the mortgaged property for purposes of this paragraph and shall require the prior written consent of the Mortgagee. The Provisions of this paragraph shall constitute a continuing covenant or condition, and any failure on the part of the Mortgagee to exercise its option to declare all indebtedness due and payable on the occurrence of any one event hereinabove mentioned shall not prejudice the right of the Mortgagee to declare the indebtedness hereby secured at once due and payable on the occurrence of any other event hereinabove mentioned.

Mortgagee and Mortgagor intend and agree that, although the Leasehold and the Fee, which is the reversionary interest in the Property upon termination of the Leasehold, are both owned by mortgagor, for purposes of this and any other mortgages of the Fee and/or the Leasehold, the Leasehold and Fee shall be treated as separate interests and shall not be deemed to have merged, the Leasehold having been mortgaged by mortgagor, and if applicable, the Fee also having been mortgaged by mortgagor under a mortgage or mortgages prior in lien to this Mortgage; (if applicable).

This mortgage is governed by and shall be construed in accordance with the laws of the State of Hawaii. In the event that the interest rate provided herein, or in said promissory note, or in any other instrument of indebtedness hereby secured, or the interest rate applicable to any other indebtedness hereby secured, together with any late charge, fees or other charges applicable thereto, shall be in excess of the permissible rate under any applicable usury statute or similar law governing maximum rates of interest, fees or charges, then such rate of interest and/or said late charges, fees or other charges shall be reduced to the maximum rate permitted by law, anything herein or in said promissory note or other instrument to the contrary notwithstanding.

(Signatures, acknowledgment, etc.)

Partial Release of Mortgage.

KNOW ALL MEN BY THESE PRESENTS:

That JOHN DOE and JANE DOE, husband and wife, of . . . . . ., State of . . . . . ., the Mortgagees named in that certain mortgage made by RICHARD ROE, husband of Ruth Roe, of Honolulu, City and County of Honolulu, State of Hawaii, Mortgagor, dated . . . . . ., and recorded in the Bureau of Conveyances of the State of Hawaii in Liber . . . . . ., page . . . .. . (or “and filed in the Office of the Assistant Registrar of the Land Court of the State of Hawaii as Document No. . . . . and noted on Transfer Certificate of Title No. . . . . issued to said Mortgagor,” if Torrens Act land), in consideration of One Dollar ($1) to them paid by the Mortgagor, the receipt of which is hereby acknowledged, do hereby release and discharge from said mortgage:

(insert description)

PROVIDED, HOWEVER, that this release shall not affect or impair the security of said mortgage with respect to the remaining premises therein described and not hereby or heretofore released.

IN WITNESS WHEREOF, said Joe Doe and Jane Doe have hereunto set their hands . this . . . . . day of . . . . . ., 20. . . . .

. . . .

. . . .

(Acknowledgment)

Chattel Mortgages.

See topic 20.01 Chattel Mortgages.

Reverse mortgage loans are permitted on condition that lender, prior to accepting any application for such loan, refers borrower to counseling from housing counseling organization that is approved by U.S. Department of Housing and Urban Development. Lender must receive certification from counselor indicating that borrower has received such counseling. Any lender that fails to comply with this requirement shall be deemed to have engaged in unfair or deceptive acts in conduct of trade within meaning of § 480-2. (HRS 506-10).

21 PROPERTY

21.01 ABSENTEES:

Care of Property.

Where heirs or legatees cannot be found, personal property to which they would be entitled may be deposited with clerk of court. (HRS 560:3-1212).

Other.

No other statutory provision.

Process Agent.

For nonresident motorists, see category 23 Transportation, topic 23.01 Motor Vehicles. For nonresident shipping lines see category 3 Business Regulation and Commerce, topic 3.08 Carriers. Otherwise see category 5 Civil Actions and Procedure, topic 5.20 Process.

Escheat.

Uniform Unclaimed Property Act. (2009, Act 55). All unclaimed property subject to delivery to state if last known address of owner is in state. (2009, Act 55). All unclaimed, intangible property, presumed abandoned after five years. (2009, Act 55). Interest in Kuleana lands shall pass to state if owner of such lands dies without heirs. (HRS 560:2-105.5). See also category 3 Business Regulation and Commerce, topic 3.01 Banks and Banking, subhead Escheat of Inactive Accounts.

Nonsupport by Husband or Parents.

Absence for three continuous months without support of spouse or children is prima facie evidence of desertion. (HRS 575-2, modifying Uniform Desertion and Nonsupport Act).

21.02 ADVERSE POSSESSION:

Acquisition of title through possession of real estate inconsistent with title of another.

Character of Possession.

Subject real property must be five acres or less, and claim may be asserted in good faith not more than once in 20 years. (HRS 657-31.5). However, does not include similar claims made before Nov. 7, 1978. (HRS 657-31.5). Adverse possession claim allowable for real property exceeding five acres, as long as person adversely possessed for not less than 20 years prior to Nov. 7, 1978, or for not less than earlier applicable time periods. (HRS 669-1[b]).

Must be in actual, open, hostile, notorious, continuous and exclusive possession of property for statutory period. (48 Haw. 17, 395 P.2d 273). Good faith must be shown, i.e. that reasonable person would believe that person has interest in title to property, and belief based upon inheritance, written instrument of conveyance or judgment of court of competent jurisdiction. (HRS 669-1[b]). No requirement taxes be paid throughout adverse period. (50 Haw. 125, 432 P.2d 890).

Plaintiff does not need to have perfect title to establish prima facie case, but must at least prove that he has substantial interest in property and that his title is superior to that of defendant. (76 Haw. 402, 879 P.2d 507).

Duration of Possession.

Adversely possess for 20 years or more unless one has possessed for ten years prior to May 1973. (HRS 657-31). There is no adverse possession against titles registered under Torrens Act (see category 10 Documents and Records, topic 10.04 Records). An action may be brought in circuit court in which property situated by any person against another person who claims or may claim adversely to plaintiff. Adverse possessor must have been in possession for period of 20 years to initiate action establishing title. (HRS 669-1).

Easements.

No different requirements.

Disabilities.

Persons under disability (minority, imprisonment, incompetency) have a further period of five years after removal of disability. (HRS 657-34). Death within 20 year period extends time to heirs, devisees, etc. for an additional five years after death. (HRS 657-35).

21.03 CONDOMINIUMS:

See topic 21.16 Real Property, subhead Condominium.

21.04 CONVEYANCES:

See topic 21.06 Deeds.

21.05 CURTESY:

Uniform Probate Code, but not 1975 or 1977 Official Amendments, adopted (HRS c. 560), effective July 1, 1977 U.P.C. section abolishing curtesy not adopted. For rights accruing prior to July 1, 1977, following is applicable:

Husband has life interest in one-third of lands owned by his wife in fee simple, freehold or in leasehold at date of her death, and absolute property in one-third of her remaining property after payment of her debts. During her life, he has no curtesy right, inchoate or otherwise. (HRS 533-16).

Bar.

Curtesy right is barred by one year’s desertion or nonsupport. (HRS 533-16).

21.06 DEEDS:

Execution.

Deeds must be acknowledged in order to be recorded unless executed on behalf of U.S. or State of Hawaii. (HRS 502-41). If acknowledgment cannot be obtained, proof of execution must be made before judge of Land Court or Circuit Court. (HRS 502-50). If executed by attorney-in-fact, power of attorney must be recorded. (HRS 502-84). If grantor is married man, wife may be required to join in order to bar her dower, see topic 21.08 Dower. (HRS 533-10). If grantor is married woman, no release of curtesy by husband is necessary (unless land was acquired by wife during HRS 1945-1949 period of Community Property Law and deed of acquisition was not acknowledged by husband as wife's separate property or if property was not acquired from her separate funds or by inheritance). If grantors are husband and wife as joint tenants or as tenants by entirety, no dower release is necessary. Husband may sign as attorney-in-fact for wife except as to release of dower in which case power must name some third party as attorney and must specifically refer to and cover her dower rights as being subject of power. Doctrine of merger of underlying contract for conveyance and deed applied. (75 Haw. 480, 866 P.2d 951).

See also topics 21.16 Real Property, Curtesy, Dower; category 8 Debtor and Creditor, topic 8.10 Homesteads; Family, topic Husband and Wife.

Recording.

All deeds, leases for term of more than one year, mortgages of any interest in real estate, or other conveyances must be recorded in office of registrar of conveyances in Honolulu; otherwise they are void as against any subsequent purchaser, lessee or mortgagee, in good faith and for valuable consideration, not having actual notice of such conveyance of same real estate, or any portion thereof, whose conveyance shall be first duly recorded. (HRS 502-83). Deeds must contain address of grantee. (HRS 502-34). For deeds or other conveyance instruments executed after July 1, 1989, all names of all natural persons signing in their individual capacity shall be typewritten, stamped, legibly printed by hand, or by mechanical or electrical printing method beneath all signatures. Electronic documents with electronic signature are acceptable for recording at Bureau of Conveyances. (2009, Act 102, HRS C.502A). Top 3½ inches of first page must be left blank for use of recording officer. Following 1 inch space shall be reserved for information showing to whom document should be returned beginning 1½ inches from left margin and not exceeding 3½ inches per line. First page shall include, if possible, all names of grantors and all names and addresses of grantees, type of document, and tax map key number. (HRS 502-31). When grantee is corporation or partnership, document must contain state where entity is registered and entity's address. (HRS 501-105). If more than one page, deed must be stapled once in upper left corner. Assistant registrar may refuse to record document longer than 8½ inches by 11 inches. (HRS 502-31).

Recording Fees.

Fee for recording deeds in Bureau of Conveyance is $30, and $1 per page for each page over 20 pages unless otherwise provided by rules adopted by Department of Land and Natural Resources pursuant to HRS c. 91. (Hawaii Administrative Rules [HAR] HRS 13-16-22). Fee for recording deeds in Land Court is $25 and $1 per page. See category 10 Documents and Records, topic 10.04 Records.

See category 22 Taxation, topic 22.13 Property Taxes, subhead Real Estate Conveyance Tax.

Operation and Effect.

Doctrine of merger disallows any recovery on covenant contracts once grantee accepts deed, so that deed's covenant control, rather than terms of prior sales contract. (76 Haw. 396, 879 P.2d 501).

Torrens Act.

Land Court registration is provided for by HRS c. 501. Deed purporting to convey or affect land registered with Land Court is not effective as conveyance and does not bind land until registered in Office of Assistant Registrar of Land Court in Honolulu. (HRS 501-101). Deed must contain full name, or names, address and marital status of grantee and, if married, full name of spouse. Deed conveying (1) one or more (but not all) lots, or (2) all interests in lot appurtenant to apartments in condominium property regime shall disclose easements, rights-of-way, and all other liens and encumbrances affecting lots or interests. (HRS 501-105). Deed must refer to number of certificate of title affected and if certificate reference is not current, endorsement of current certificate of title. (HRS 501-108). Top 3½ inches of all instruments to be filed and recorded shall be reserved for recording information. Following 1 inch space shall be reserved for information showing to whom document should be returned. (HRS 501-108). First page shall include all grantors' names and names and addresses of all grantees, document type, and tax key number. (HRS 501-108). When grantee is corporation or partnership, document must contain state where entity is registered and entity's address. (HRS 501-105). Each instrument shall be stapled once in upper left corner, shall not have cover or backer, and each page shall be single-sided sheets of written text numbered consecutively. All names of all natural persons signing in their individual capacity shall be typewritten, stamped, legibly printed by hand, or by mechanical or electrical printing method beneath all signatures. There shall be no discrepancy in any name as it appears in body, beneath signature or in notary acknowledgment. No instrument will be filed that will not reproduce legibly or which is larger than 8½ inches by 11 inches in size. (HRS 501-108). For most Torrens documents, filing fee is $25 and $1 per page for each page over 20 pages. If document is deed, fee of $25 for new certificate of title is also charged unless otherwise provided by rules adopted by Department of Land and Natural Resources, pursuant to HRS c. 91. (HAR HRS 13-16-22). Knowledge of unregistered encumbrance does not disqualify holder of certificate of title from protection under HRS 501-82. (75 Haw. 370, 862 P.2d 1048). Registered land subject to encumbrances noted on certificate of title; sufficiency of notation specified. (HRS 501-82).

There is no statutory form. The following may be used:

Form

KNOW ALL MEN BY THESE PRESENTS:

That JOHN DOE, husband of Jane Doe, of . . . . . . State of . . . . . ., Grantor, in consideration of the sum of Ten Dollars ($10) and other good and valuable consideration to him paid by RICHARD ROE and RUTH ROE, husband and wife, whose address is . . . . . . Street, Honolulu, City and County of Honolulu, State of Hawaii, Grantees, the receipt of which is hereby acknowledged, does hereby grant, bargain, sell and convey unto the Grantees, as tenants by the entirety with full rights of survivorship, and their assigns, and the heirs and assigns of the survivor of them: (insert description)

SUBJECT, HOWEVER, to the following: (insert encumbrances, if any)

TO HAVE AND TO HOLD the same, together with the improvements thereon and the rights, easements, privileges and appurtenances thereunto belonging or appertaining, unto the Grantees, as tenants by the entirety, and the survivor of them and their assigns and the heirs and assigns of the survivor of them, forever.

(Insert warranty clause and provision for pro-rating of current realty taxes, if desired.)

AND, for the consideration aforesaid, JANE DOE, wife of the Grantor, does hereby release and forever quitclaim unto the Grantees, as tenants by the entirety aforesaid, all her right, title and interest in and to the premises hereinabove granted, whether by way of dower, community property, elective share or otherwise.

IN WITNESS WHEREOF, the Grantor and said Jane Doe have hereunto set their hands this . . . . . . day of . . . . . . 20. . . . . .

. . . .

John Doe

Grantor

. . . .

Jane Doe

Dower

Note.

Refer to subhead Execution, supra for requirements for execution.

Taxes.

See category 22 Taxation, topic Real Estate Conveyance Tax.

21.07 DEEDS OF TRUST:

See category 20 Mortgages, topic 20.04 Mortgages of Real Property.

21.08 DOWER:

Note: HRS 533-1, dealing with dower rights, was repealed by 1997 Legislature (HRS c. 244), effective June 17, 1997. However, dower releases for conveyances of real property may still be required by title insurance companies in connection with dower rights that have vested prior to effective date of repeal.

21.09 ESCHEAT:

See topic 21.01 Absentees, subhead Escheat; categories 3 Business Regulation and Commerce, topic Banks and Banking, subhead Unclaimed Deposits; Estates and Trusts, topics Descent and Distribution, subhead Escheat, Wills, subhead Unclaimed Legacies.

21.09A HORIZONTAL PROPERTY REGIME:

See topic 21.16 Real Property, subhead Condominium.

21.10 LANDLORD AND TENANT:

Generally, common law governs rights and liabilities arising out of landlord-tenant relationship. Dwelling unit rentals also governed by comprehensive residential landlord-tenant code. (HRS c. 521). Additional statutory provisions governing long-term residential leases are found in HRS cc. 516 and 519 and other statutory provisions governing real property leases are found in HRS c. 666.

Uniform Commercial Code Art. 2A adopted.

Discrimination in Real Property Transactions.

Governed by HRS c. 515. Conforms to federal Fair Housing Amendments Act of 1988. Prohibits steering persons toward and away from real estate transaction and adds age as protected group. Gender identity, expression, and sexual orientation also impermissible grounds for discrimination, with narrow exception provide for religious institutions. (HRS 515-4). Age is exception to discrimination in real estate transaction law as it pertains to housing for elderly. (HRS 515-4).

Kinds of Tenancy.

Landlord and tenant may agree to any period as term of dwelling rental agreement. In absence of agreement tenancy shall be from month-to-month or, in case of boarders, week-to-week. (HRS 521-22). When other real property is rented for indefinite period, it is construed as tenancy from month-to-month, or for period-to-period on which rent is payable. (HRS 666-2).

Leases.

Contract for lease or sublease is within statute of frauds. (See HRS 656-1[4].) Lease must be acknowledged to be recorded. (HRS 502-50). Oral leases for period not exceeding one year are valid and enforceable as if in writing. (HRS 666-4).

Dwelling Unit Leases.

Leases of dwelling units are governed by Residential Landlord-Tenant Code. (HRS c. 521). “Dwelling unit” is structure or part of structure used as home, residence or sleeping place by one person or two or more persons maintaining common household to exclusion of all others. (HRS 521-8). Code does not apply to: Residence at institutions, student and faculty housing of University of Hawaii, including fraternity houses; occupancy under contract of sale with tenant as purchaser; day-to-day occupancy in hotel or motel; occupancy by employee or landlord whose occupancy is conditional on such employment or occupancy for period of up to four years subsequent thereto, pursuant to plan for transfer of dwelling unit or property of which it is part to occupant; lease of improved residential land for term of 15 years or more; occupancy by prospective purchaser after offer to purchase has been accepted and before owner’s rights have been transferred; occupancy in project for temporary or transitional housing for homeless persons if operated by nonprofit corporation that has filed copy of its rules and regulations with Director of Commerce and Consumer Affairs; residence or occupancy in public housing complex or shelter directly controlled, owned, or managed by Hawaii Public Housing Authority, or residence or occupancy in transitional facility for abused family or household members. (HRS 521-7).

Residential Leases.

Leases with terms in excess of 35 years, if in existence on June 24, 1976, or with terms exceeding 20 years after June 24, 1967, including options for renewal or extension of term, of parcel of land two acres in size or less, zoned for residential use and intended or permitted to be used or occupied as principal place of residence for single family are subject to regulation under HRS cc. 516 and 519.

State may exercise power of eminent domain to condemn underlying fee for resale to qualified holders of residential leases. (HRS 516-22 to 27). Resale restricted to lessee purchasers who do not own other lands in fee simple (including fee simple lands under trust agreement, whether as trustee, co-trustee or beneficiary) and who are both domiciled in State of Hawaii and bona fide residents of State of Hawaii, residing on property, and do not own fee simple lands suitable for residential purposes within county (HRS 516-33), intending to reside on lot within five years of purchase. (HRS 516-1).

Lease agreement for space to be occupied for residential purposes for term not exceeding five years, or lease for which aggregate rent over term is less than $25,000 must be written in plain language using words with common and everyday meanings. Lessor is subject to amount for actual damages plus $50 penalty for violation. Lease is not void or voidable for violation. (HRS 487A-1). See also category 3 Business Regulation and Commerce, topic 3.12 Consumer Protection, subhead Plain Language.

Security Deposits.

In lease of dwelling unit, landlord may not receive from tenant more than one month's rent as security deposit and first month's rent. If tenant is not in default, landlord must refund unearned rent and security deposit within 14 days after tenancy ends or notify tenant of any amount being retained for repairing damages, cleaning unit or as compensation for damages for wrongful quitting of unit, along with estimates of costs of remedying tenant defaults. Return of deposit is presumptively proven if mailed to tenant with acceptable proof of mailing within 14 days after termination or if there is acknowledgment of receipt by tenant within 14-day limit. Security deposit is not to be construed as last month's rent unless landlord and tenant agree in writing. (HRS 521-44).

Recording.

Leases of more than one year that are not recorded are void as against subsequent purchaser, in good faith and for valuable consideration, not having actual notice, whose conveyance is first duly recorded. (HRS 502-83). Leases of more than one year affecting land registered under Torrens system are only contract to lease until filed and noted on Certificate of Title. (HRS 501-101). Leases are filed or recorded in Office of Registrar of Conveyances in Honolulu, Hawaii. See category 10 Documents and Records, topic 10.04 Records. Actual possession of tenant constitutes notice. (See 26 Haw. 342.)

Rent.

Counties have power to regulate renting, subletting, and rental conditions of residential property by ordinance. (HRS 46-1.5). Renegotiation of rents for residential leases (defined above) or cooperative housing leases, if not agreed upon by parties, are subject to mandatory arbitration by Housing and Community Development Corporation of Hawaii and statutory procedures for valuation and limit on rate of return. (HRS 519-3). Person must be certified or licensed to practice as real estate appraiser and must comply with uniform standards of professional appraisal practice. (HRS 466K-4). For leases executed and effective after June 24, 1967. During first 20 years of residential lease, lessee may extend term for 55 years for purpose of obtaining mortgage financing if remaining term is less than 50 years. (HRS 516-65). Annual rent during term is set by statute and pursuant to mandatory arbitration. (HRS 516-66).

In leases of dwelling units, rents are payable monthly unless otherwise agreed and apportioned on daily basis. When tenancy is month-to-month, rent may be increased only on notice given 45 days prior to effective date of increase. (HRS 521-21). Tenancy for indefinite term with periodic rent reserved is deemed tenancy from period to period. (HRS 666-2). Tenant may withhold up to $500 in rent if landlord has been notified by state or county agency of health or safety violation on premises and repairs are not commenced within 12 days, or tenant has notified landlord that dwelling is not in compliance with applicable laws and ordinances, common areas are not in clean, sanitary and safe condition, premises are not habitable, electrical, plumbing or other facilities supplied by landlord are not in good working order, appropriate trash receptacles for normal use are not available, or running water is not provided and landlord fails to commence repairs within five days (12 days if notification comes from tenant) and provide tenant with reasonable tentative completion date, provided funds withheld are used to provide necessary repairs or facilities. (HRS 521-64).

Lien.

Landlord's lien not available. See category 3 Business Regulation and Commerce, topic 3.09 Commercial Code.

Termination of Tenancy.

Periodic tenancy is subject to forfeiture for act or creation of nuisance under HRS 712-

1270 if, after warning to abate of 24 hours, nuisance is not abated and five day notice of termination is given. (HRS 666-3). However, if lease is of dwelling unit, landlord must give tenant ten days to remedy noncompliance. (HRS 521-69). Periodic tenancy may be terminated by ten days notice, if parol lease (HRS 666-1) or by notice given 25 days prior to end of period otherwise (HRS 666-2). But if lease is of dwelling unit, 45 days written notice is required for month-to-month or longer term and ten days notice written for lease less than month to month. (HRS 521-71). If landlord provides notice of termination, tenant may vacate at any time within last 45 days of period between notification and termination date provided tenant notifies landlord of date tenant will vacate and pays prorated rent for period occupied. (HRS 521-71). If landlord contemplates voluntary demolition of dwelling or conversion to condominium property regime or to transient vacation rental, tenant must receive at least 120 days notice to terminate. Tenant may vacate at any time between notification and termination date, but tenant shall notify landlord of date tenant will vacate and pay prorated rent for that period of occupation. (HRS 521-38, 71).

Holding Over.

If tenant from month to month or period to period holds over, a valid, enforceable tenancy is created for additional period; if tenant fails to pay rent as agreed, landlord may terminate on five days notice. (HRS 666-2). If tenant holds over under lease of dwelling unit after expiration or termination without landlord's consent, during first month of holdover tenant may be liable, in court's discretion, to pay landlord twice monthly rent for preceding month; and monthly rent for second month of holdover, prorated on daily basis. Landlord may initiate summary possession action against tenant any time within first 60 days of holdover, except acceptance of rent during this period, in absence of agreement to contrary, creates month-to-month tenancy. Landlord's failure to commence possession action within first 60 days of holdover, in absence of rental agreement, creates month-to-month tenancy at previous rental rate beginning at end of first 60 days of holdover. (HRS 521-71).

Dispossession.

Landlord may have summary possession against tenant holding without right or holding by parol lease after ten days notice to quit. (HRS 666-1). Landlord may have summary possession against tenant for failure to pay rent by giving notice to vacate of five days. (HRS 666-2). But if lease is of dwelling unit, demand for payment within five business days must be made. Summary possession or other proper proceeding may be brought if tenant remains in default. (HRS 521-68). In any action for summary possession, plaintiff may join actions for rent, lodging, board, profits, damages and waste where these arise out of and refer to land or premises whose possession is sought. (HRS 666-7). Landlord who interrupts essential services to take possession engaged in unfair trade practice and is subject to penalties under HRS 480-2; minimum penalty of $1,000 or three times monthly rent, whichever is greater. (HRS 521-74.5). Tenant's failure to comply with record keeping requirements of percentage lease due to gross negligence or persistent or wilful misconduct on tenant's part grounds for dispossession under HRS c. 666. (10 Haw. App. 162, 862 P.2d 282).

Distress or Other Remedies.

Distress for payment of rent under common law is not available. Residential Landlord-Tenant Code provides landlord with right to bring action for summary possession to collect unpaid rent at any time after notice of intention to do so has been given (HRS 521-68), to terminate lease or remedy tenant's failure to comply with applicable laws or maintain premises in clean and safe condition or keep all appliances and furnishing supplied by landlord in good condition or to comply with restrictions necessary for preservation of property or protection of persons; or landlord may bring action for waste or breach of contract for tenant's willful or negligent failure to perform foregoing (HRS 521-70). Tenant is liable to landlord for unpaid future rents or damages if he wrongfully quits premises. (HRS 521-70).

Retaliatory eviction and rent increases are prohibited under lease of dwelling unit. (HRS

521-74).

Tenant under lease of dwelling unit may terminate lease on notice during first week if landlord fails to comply with rental agreement or fails to comply with applicable laws affecting premises. (HRS 521-62). Tenant may, if not at fault, terminate lease on one week's notice if landlord deprives tenant of substantial part of his benefit of his bargain under rental agreement. No notice is required if condition renders unit uninhabitable or poses imminent threat to health or safety. (HRS 521-63). Landlord is liable to tenant for $100 plus reasonable attorney's fees for failure to make required statutory disclosures. (HRS 521-67). Rental agreement may provide that reasonable attorney's fees and costs be awarded to prevailing party in suit arising under HRS c. 521, Residential Landlord-Tenant Code. (HRS 521-35).

Collection of Rent.

Landlord may, in action for summary possession, join actions for rent, lodging, board, profits, damages, and waste which arise out of land possession of which is sought. (HRS 666-7). Tenant may be required in any legal dispute over rent, to pay rent to special trust fund as it becomes due unless rent already paid to landowner or written agreement states otherwise. (HRS 521-78; HRS 666-21).

Residential Leases.

Fee interest under residential leaseholds (defined above), is subject to condemnation by State for benefit of lessees in development tract. (HRS c. 516). Person may not be denied right to become lessee of residential lot because of his race, religion, sex, ancestry or physical handicap. (HRS 516-62). Residential leases may be assigned without lessor's consent provided true or executed copy of assignment is provided to lessor and assignee undertakes to perform all obligations of lessee under lease. No such assignment shall release assignor from liability under lease unless lessor consents in writing to assignment. (HRS 516-63). Lessee's interest cannot be forfeited for failure to pay rent or perform his obligations without notice and at least 30 days to cure default. (HRS 516-64).

Seller of residential leasehold property must provide buyer copy of original lease and any amendments no later than ten calendar days from seller's acceptance of buyer's offer. (HRS 516-71). Seller must disclose that there are no current provisions nor assurances for future laws for mandatory conversion of leasehold condominiums, cooperatives, and residential leases. (HRS 516D-11). Buyer has five calendar days from receipt of lease documents to review, accept or reject terms of lease. Within five calendar days of acknowledged receipt of contract, buyer may cancel offer to purchase without loss of deposit. (HRS 516-71). Seller and buyer may, on standardized form, agree to reduce or extend periods for production and review of lease documents. (HRS 516-71). Civil penalty of $1,000 for violation and violator also liable for actual damages. (HRS 516-72).

Uniform Residential Landlord and Tenant Act adopted with substantial modifications. (HRS c. 521).

Partition.

Any one or more joint tenants or tenants in common, where one or more of them have estate in fee, or life estate in possession, may bring action in circuit court of circuit in which property or some part thereof is situated. (HRS 668-1). Notwithstanding nondiscretionary nature of partition action, right to partition may be waived by express or implied contracts. (3 Haw. App. 555, 655 P.2d 881).

See category 5 Civil Actions and Procedure, topic 5.16A Partition.

21.11–21.12 [RESERVED]

21.13 PERPETUITIES:

Uniform Statutory Rule Against Perpetuities.

Adopted, with 1990 amendments. Common law rules superseded by workable wait-and-see element. Generally allows vesting no later than 21 years after life in being or 90 years after it was created. (HRS 525-1).

Accumulations.

Governing board of institution or institutional fund may accumulate so much of annual net income of endowment fund as is prudent under standard established by § 517D-8, and may hold any or all of accumulated income in income reserve for subsequent expenditure for uses and purposes for which endowment fund is established or may add any or all of accumulated income to principle of endowment fund, as is prudent under this standard. (HRS 517D-4[b]). Restriction upon accumulation of income or addition to principal of income may not be implied from designation of gift as endowment, or from direction or authorization in applicable gift instrument to apply to uses and purposes of fund “income”, “interest”, “dividends”, “currently expendable income”, or “rent, issues, or profits” or direction which contains other words of similar import. (HRS 517D-5).

See category 13 Estates and Trusts, topic 13.15 Trusts, subhead Accumulations.

21.14 PERSONAL PROPERTY:

Common law rules prevail. Personal property may be held in tenancy by entirety, including leaseholds, shares of corporate stock and automobiles. Tenancy continues in proceeds of sale of property held in tenancy by entirety.

Motor vehicle registered in two or more names presumed owned in joint tenancy. (HRS 286-49).

21.15 POWERS OF ATTORNEY:

Attorneys in Fact.

Agent lacks authority to make gift of principle’s property, unless authority is expressly given in power of attorney. (83 Haw. 65, 924 P.2d 559). Fundamental rule in construing power of attorney is that intent of parties governs, as gleaned from entire context of instrument. (Id.).

Recording.

If power of attorney is recorded, following requirements must be met: Top 3½ inches of first page of all documents must be left blank for use of recording officer. Following 1 inch space shall be reserved for information showing to whom document should be returned, beginning 1½ inches from left margin and not exceeding 3½ inches per line. First page shall include, if possible, all names of grantors and all names and addresses of grantees and type of document. When grantee is corporation or partnership, document must contain state where entity is registered and entity’s address. (HRS 502-31). If more than one page, document should be stamped once in upper left corner.

Power of attorney authorizing transactions concerning real property must be recorded in Bureau of Conveyances. (HRS 502-84).

Form of General Power of Attorney.

There is no statutory form of General Power of Attorney. The following may be used:

KNOW ALL MEN BY THESE PRESENTS:

That I, ______[John Doe]______, a resident of _______[address]_______, have made, constituted and appointed and by these presents do make, constitute and appoint ______[Richard Doe]______, of _____[address]_____, my true and lawful attorney to act in, manage and conduct all my estate and all my affairs, and for that purpose for me and in my name, place and stead, and for my use and benefit, and as my act and deed, to do and execute or to concur with persons jointly interested with myself therein in the doing or executing of, all or any of the following acts, deeds and things, that is to say:

(1) To buy, receive, lease, accept or otherwise acquire; to sell, convey, mortgage, hypothecate, pledge, quitclaim, lease or otherwise encumber or dispose of; or to contract or agree for the acquisition, disposal or encumbrance of; any property whatsoever, real or personal, or any custody, possession, interest or right therein, upon such terms as my said attorney shall think proper;

(2) To take, hold, possess, invest, lease, let or otherwise manage any or all of my property, real or personal, or any interest therein; to eject, remove or relieve tenants or other persons from and recover possession of, such property by all lawful means; and to maintain, protect, preserve, insure, remove, store, transport, repair, rebuild, modify or improve the same or any part thereof;

(3) To make, do and transact all and every kind of business of whatever kind or nature, including the receipt, recovery, collection, payment, compromise, settlement and adjustment of all accounts, legacies, bequests, interest, dividends, annuities, demands, debts, taxes and obligations which may now or hereafter be due, owing or payable by me or to me;

(4) To make, indorse, accept, receive, sign, seal, execute, acknowledge and deliver deeds, leases, assignments, agreements, certificates, mortgages, releases of mortgages, hypothecations, checks, notes, bonds, vouchers, dividend warrants, receipts and such other instruments in writing of whatever kind and nature as may be necessary, convenient or proper in the premises;

(5) To deposit and withdraw for the purposes hereof or any other purpose, in either the name of my attorney or in my name, in or from any banking institution, or any account therein, any funds, negotiable paper or moneys which may come into my said attorney’s hands as such attorney or which I now or hereafter may have on deposit or be entitled to;

(6) To institute, prosecute, defend, compromise, arbitrate and dispose of legal, equitable or administrative hearings, actions, suits, attachments, arrests, distresses or other proceedings, or otherwise engage in litigation in connection with the premises;

(7) To act as my attorney or proxy with respect to any stocks, shares, bonds or other investments, rights or interests I may now or hereafter hold; and to appoint any other person or persons as my proxy or proxies;

(8) To engage and dismiss agents, counsel and employees, and to appoint and remove at pleasure any substitute for, or agent of my attorney, with respect to all or any of the matters or things herein mentioned and upon such terms as my attorney shall think fit;

(9) To execute vouchers in my behalf for any and all allowances and reimbursements payable to me by the United States, including but not restricted to allowances and reimbursement

for transportation of dependents or for shipment of household effects as authorized by law or Army or Navy regulations, and to receive, indorse and collect the proceeds of checks payable to the order of the undersigned drawn on the Treasurer of the United States;

(10) To prepare, execute and file income and other tax returns, claims for refunds and other governmental reports, applications, requests and documents; and to appear for me and represent me before the Treasury Department of the United States and the Tax Commissioner of any state or territory in connection with any matter involving federal, state, or territorial taxes for any year to which I am a party, giving my said attorney full power to do everything whatsoever requisite and necessary to be done in the premises, and to receive refund checks, to execute waivers of the statute of limitations and to execute closing agreements;

(11) To have access to, take possession and order the removal and shipment of any of my property from any post, warehouse, depot, dock, safety deposit box or other place of storage or safekeeping, governmental or private; and to execute and deliver any release, voucher, receipt, shipping ticket, certificate or other instrument necessary or convenient for such purpose;

(12) To borrow money and to obtain credit by letters of credit, overdrafts, notes or otherwise on such terms as my said attorney shall think proper and to execute any instruments binding me to the repayment thereof.

GIVING AND GRANTING unto my said attorney full power and authority to do and perform all and every act, deed, matter and thing whatsoever in and about my estate, property and affairs as fully and effectually to all intents and purposes as I might or could do in my own proper person if personally present, the above specially enumerated powers being in aid and exemplification of the full, complete and general power herein granted and not in limitation or definition thereof, hereby ratifying all that my said attorney shall lawfully do or cause to be done by virtue of these presents.

IN WITNESS WHEREOF I have hereunto set my hand this ___ day of ______, 20__.

Revocation.

To constitute revocation of power of attorney there must be something besides mere appointment of another attorney. (13 Haw. 471). Affidavit executed by attorney-in-fact under power of attorney stating that attorney-in-fact did not have at time of exercise of power actual knowledge of termination of power by revocation or of principal’s death, disability, or incapacity is conclusive proof of non-revocation or nontermination of power at that time. If exercise of power of attorney requires execution and delivery of any instrument that is recordable, affidavit when authenticated for record is likewise recordable. This section does not affect any provision in power of attorney for its termination by expiration of time or occurrence of event other than express revocation or change in principal’s capacity. (HRS 551D-5).

Uniform Durable Power of Attorney Act adopted. (HRS c. 551D).

21.16 REAL PROPERTY:

Estates in fee tail are not recognized, and will be held to create fee simple or life estate in grantee depending on construction of grant. (12 Haw. 375). Conveyances and devises to two or more persons are construed to create tenancies in common unless it shall “manifestly appear from the tenor of the instrument” that it was intended to create joint tenancy or tenancy by entirety. This does not apply to grants, conveyances, or devises to personal representatives or trustees. (HRS 509-1).

Conveyance tax adopted. (HRS c. 247). See category 22 Taxation, topic 22.13 Property Taxes, subhead Real Estate Conveyance Tax.

See also topics 21.05 Curtesy, Deeds, Dower; categories 8 Debtor and Creditor, topic Homesteads; Documents and Records, topic Records; Family, topic Husband and Wife.

Rule in Shelley's Case is not recognized. (12 Haw. 375).

Discrimination in Real Property Transactions.

Conforms to federal Fair Housing Amendments Act of 1988. Prohibits steering persons toward and away from real estate transaction and adds age as protected group. (HRS 515-2, 3). Gender identity or expression and sexual orientation also is protected category. Narrow exception is provided for accommodations provided by religious institutions. (HRS 515-4). Age is exception to discrimination in real estate transaction law as it pertains to housing for elderly. (HRS 515-4).

Recording decrees quieting title to real property provided in HRS 669-8.

Mandatory Disclosures in Residential Real Estate Transactions.

Sellers of residential real property must disclose any material fact, defect, or condition past or present, that would be expected to measurably affect value to reasonable person of residential real property being sold. (HRS 508D-1). Release from or waiver of liability or release from warranty by seller to any government agency, contractor, engineer, architect, land surveyor or landscape architect for any defect, mistake or omission in design or construction of any residential real property that measurably affects value of property is material fact. (HRS 508D-4.5). Seller must provide buyer with requisite disclosure statement no later than ten calendar days from acceptance of purchase offer. Buyer has 15 calendar days to rescind purchase offer. (HRS 508D-5). Any action to rescission must be commenced prior to recorded sale of real property (closing). (HRS 508D-16.5). Certain limited exemptions apply. (HRS 508D-3). In addition, sales contracts for new residential structures and contracts for construction on substantial remodeling of premises must contain required notice to owner of contractor's right to resolve alleged construction defects before claimant may commence litigation. (HRS 672E-11).

Foreign Conveyances.

If instrument would be valid and entitled to be recorded in state where executed, generally it may be recorded in Hawaii. But see category 10 Documents and Records, topic 10.01 Acknowledgments, subhead Changes, Erasures or Interlineations.

Condominium.

Applicable to condominiums created prior to July 1, 2006. (HRS HRS 514B-21). However HRS 514B, -4, -5, -35, -41(c), 46, 72 and Part VI of HRS c. 514B and HRS 514B-3 to extent applicable shall apply (HRS HRS 514B-22) to events and circumstances occurring on or after July 1, 2006, and shall not invalidate existing provisions of declaration, bylaws, condominium map or other construction documents if to do so would invalidate reserved rights of developer or be unreasonable impairment of contract. FHA model act, modified, has been adopted. (HRS c. 514A). Contents of declaration, master deed, apartment deeds, floor plans, and bylaws are regulated by HRS c. 514A. For mixed use condominiums, by vote of apartment owners, bylaws of association of apartment owners may be amended to provide that composition of board of directors be proportional with number of apartments for residential, commercial or other use. (HRS 514A-82.15). Each condominium project association must prepare and adopt annual operating budget and have adequate funding of maintenance replacement reserves. (HRS 514A-83.6). Emergency situation includes extraordinary expense necessary to respond to any legal or administrative proceeding brought against association not reasonably foreseen by board when preparing annual operating budget. (HRS 514A-83.6). Exemption provided for two-apartment condominium projects. (HRS c. 514A-Part III). Statute and bylaws govern operation, maintenance charges, etc. Each apartment owner must comply with bylaws and house rules. (HRS 514A-88).

Owners not liable for costs of reproduction of legal documents or other information for condominium association, unless prior notice of charge given by association, but no notice required for delinquent assessments or in connection to proceedings to enforce law or association's governing documents. (HRS 514A-92.5). Directors may use condominium funds for reasonable educational purposes. (HRS 514A-82). Board of Directors may authorize installation or abandonment of telecommunications equipment upon common elements of condominium project. (HRS 514A-13.4). No apartment owner may withhold assessment claimed by condominium association. Disputes among owners, boards of directors, and managing agents regarding interpretation of condominium statute or condominium's guaranty documents are subject to arbitration at request of party, subject to certain exceptions (HRS 514A-121; HRS c. 658A); provided that mediation is also available at request of party (HRS 514A-121.5). If dispute is not resolved by mediation, party may request administrative hearing. (HRS 514A-121.5[b]). Administrative hearings one part of two year pilot program to be repealed June 30, 2006. In arbitration proceeding, award of attorneys' fees and other costs is in sole discretion of arbitrator, but in mediation proceeding and administrative proceeding all parties bear their own costs unless otherwise agreed by parties or ordered by hearings officer. (HRS 514A-124, HRS 514A-121.5 and HRS 514A-121.5[b]). Purchasers have statutory rescission rights. (HRS 514A-69). Unless statutory exclusion available, condominium developer must publish announcement of its intent to sell residential units and indicating that at least 50% of residential units being sold shall be offered only to prospective owner-occupants.

Right of First Refusal for Condominiums and Cooperative Housing Corporations provided for in HRS c. 514C. For condominiums created prior to July 1, 2006, following provisions apply. Seller of residential leasehold property must provide buyer no later than ten calendar days from seller's acceptance of buyer's offer one of following documents which contains major provisions of lease: Current master lease, current apartment lease or, for initial buyers of condominiums, unexpired preliminary, final or supplemental condominium public report. (HRS 516D-11). Buyer has ten calendar days from receipt of contract to review, accept or reject terms of lease. (HRS 516D-11). Seller and buyer may, on standardized form, agree to extend or reduce time periods for production and review of lease documents. (HRS 516D-11). Buyer of leasehold property may cancel offer to purchase with no loss of deposit within ten calendar days of acknowledged receipt of contract. Every residential lease shall contain provision for mandatory arbitration of any rent renegotiation. (HRS 516D-12). Liens against common elements (HRS 514A-16) and blanket mortgages (HRS 514A-18) prohibited. Partition severely regulated. (HRS 514A-21). Home exemption laws are applicable to each apartment, and property taxes are assessed and collected with respect to apartments taken individually (HRS 514A-6). In general, Hawaii Condominium statute is patterned after FHA model act and New York modifications. Unless statutory exclusion available, condominium developer must publish announcement of its intent to sell residential units and indicate that at least 50% of residential units being sold shall be offered only to prospective owner-occupants. (HRS 514A-102). Commission has broad powers of investigation, imposition of penalties, injunction, etc. Owner of condominium unit may make improvements to his unit upon certain conditions. (HRS 514A-89). Any person who violates any provision of HRS c. 514A, or rules of real estate commission adopted pursuant thereto shall be subject to civil penalty not to exceed $10,000. (HRS 514A-107.5).

For condominiums created on or after July 1, 2006, following provisions apply. (HRS 514B-21). Condominium consists of real estate, portions of which are designated for separate ownership and remainder of which is designated for common ownership solely by owners of those portions. (HRS 514B-3). To create condominium property regime, all owners of fee simple interest in property shall execute and record declaration submitting land to condominium property regime and record master deed. (HRS 514B-31). Condominium property regime shall be subject to any interest existing when declaration is recorded if person holding such interest does not execute or join in declaration or otherwise subordinate such interest. (HRS 514B-31). Content of declaration, apartment deeds and leases, condominium map and bylaws are regulated by statute. (HRS 514B-108 and HRS 514B-32, HRS 514B-33, HRS 514B-34 and HRS 514B-44). For mixed use condominiums, by vote of apartment owners, bylaws may be amended to provide that composition of board of directors be proportional with number of apartments for residential, commercial or other use. (HRS 514B-110). Each condominium project association must adopt annual operating budget and have adequate funding of maintenance replacement reserves. (HRS 514B-144 and 148). Emergency situation includes extraordinary expense necessary to respond to any legal or administrative proceeding brought against association not reasonably foreseen by board when preparing annual operating budget. (HRS 514B-148). Exemption from registration requirements provided for dispositions of units exempted from public report requirements set forth in HRS 514B-81(b), projects in which all units are restricted to nonresidential use are to be sold for $1,000,000 or more, and sales of units in bulk. (HRS 514B-51). Statute and bylaws govern management of condominium, however, if so provided in declaration or bylaws, statute shall not apply to condominiums in which all units are restricted to nonresidential use or condominiums not subject to any continuing development rights, containing no more than five units. (HRS 514B-101). Each unit owner is subject to statute, declaration and bylaws and house rules. (HRS 514B-112). Compliance with certain provisions in declaration and bylaws specified in HRS 514B-111 may be excused by court if such provision unreasonably interferes with association's ability to manage common property, not necessary to protect legitimate interests of members or lenders holding security interests. (HRS 514B-111). Owners not liable for reasonable costs of reproduction of legal or other information for condominium association, unless prior notice of charge given by association, but no notice required for delinquent assessments or in connection with proceedings to enforce law or association's governing documents. (HRS 514B-105). Directors may use condominium funds for reasonable educational purposes. (HRS 514B-107). Board of Directors may authorize installation or abandonment of telecommunications equipment upon common elements of condominium project. (HRS 514B-140). No unit owner may withhold assessment claimed by association. (HRS 514B-146). Disputes among owners, boards of directors, and managing agents regarding interpretation of condominium statute or condominium's guaranty documents are subject to arbitration at request of party, subject to certain exceptions (HRS 514B-162; HRS c. 658A); provided that mediation is also available at request of party (HRS 514B-161). In arbitration proceeding, award of attorneys' fees and other costs is in sole discretion of arbitrator, but in mediation proceeding, all parties bear their own costs unless otherwise agreed by parties. (HRS 514B-161 and HRS 514B-162). Purchasers have statutory rescission rights. (HRS 514B-87).

Right of First Refusal for Condominiums and Cooperative Housing Corporations provided for in HRS c. 514C. For condominiums created on or after July 1, 2006, following provisions apply. Seller of residential leasehold property must provide buyer no later than ten calendar days from seller's acceptance of buyer's offer one of following documents which contains major provisions of lease: current master lease, current apartment lease or, for initial buyers of condominiums, unexpired preliminary, final or supplemental condominium public report. (HRS 516D-11). Buyer has ten calendar days from receipt of contract to review, accept or reject terms of lease. (HRS 516D-11). Seller and buyer may, on standardized form, agree to extend or reduce time periods for production and review of lease documents. (HRS 516D-11). Buyer of leasehold property may cancel offer to purchase with no loss of deposit within ten calendar days of acknowledged receipt of contract. Every residential lease shall contain provision for mandatory arbitration of any rent negotiation. (HRS 516D-12). Liens against common elements (HRS 514B-43) and blanket mortgages (HRS 514B-45) prohibited. Partition severely regulated. (HRS 514B-47). Home exemption laws are applicable to each apartment, and property taxes are assessed and collected with respect to apartments taken individually. (HRS 514B-4). In general, Hawaii Condominium statute is patterned after 1980 Uniform Condominium Act, with appropriate changes and 1994 Uniform Common Interest Ownership Act. Unless statutory exclusion available, condominium developer must publish announcement of its intent to sell residential units and indicate that at least 50% of residential units being sold shall be offered only to prospective owner-occupants. (HRS 514B-95.5). Commission has broad powers of investigation, imposition of penalties, injunction, etc. Owner of condominium unit may make improvements to his unit upon certain conditions. (HRS 514B-140). Any person who violates part IV, part V, HRS 514B-103, HRS 514B-132, HRS 514B-134, HRS 514B-149, HRS 514B-152 to HRS 514B-154, or rules of real estate commission adopted pursuant thereto shall be subject to civil penalty not to exceed $10,000. (HRS 514B-69).

If one or more existing buildings are being converted to condominium status, each residential unit must first be offered for sale to owner-occupant. (HRS 514B-95.5).

Time Share

Time sharing plans law enacted. (HRS c. 514E). Time-share owner's associations required to adopt annual budget, to require annual independent audit of association's financial accounts, and to extend regulation of time-sharing plans. (HRS 514E-10.3). Time-share owner's association may levy assessments which shall be lien on owner's time share interest. (HRS 514E-29). Director of Department of Commerce and Consumer Affairs authorized to investigate, enjoin, disapprove applications, impose fines up to $25,000 and suspend or revoke licenses. (HRS 514E-12). Prohibited practices provided for in HRS 514E-11. Maintenance fees paid to time share owner's associations are subject to State general excise tax. (1990, Act 181). Condominium apartments providing transient lodging for periods of less than 30 days must register with Commission on annual basis as "condominium hotel" subject to bonding requirements. (HRS 467-30). Initial sale of time share interests duly registered under current effective disclosure statement pursuant to HRS c. 514E exempt from Mandatory Seller Disclosures in Real Estate Transactions (HRS 508D-3) (see subhead Mandatory Disclosures in Residential Real Estate Transactions, supra). Leasehold time share interests must be registered with Bureau of Conveyances, and need not be recorded by Land Court. (HRS 501-241, 2009, Act 120). See topics 21.05 Curtesy, Deeds, Dower, Landlord and Tenant, subhead Partition; categories 8 Debtor and Creditor, topic Homesteads; Family, topic Husband and Wife; Mortgages, topic Mortgages of Real Property; and Business Regulation and Commerce, topic Securities. Exemption for time share use plans containing units in Hawaii and offered for sale outside U.S. from time share law as long as plan does not place blanket liens on its Hawaii units and complies with contractual resale restrictions and consumer disclosure. (HRS 514E-5.5).

Uniform Simplification of Land Transfers Act not adopted.

Cooperative Housing Corporations.

The Hawaii Business Corporation Act (HRS c. 414) applies except to extent that its provisions are inconsistent with 421I. (HRS 421I-11).

Uniform Land Sales Practices Act enacted. (HRS c. 484).

Boundaries Along Sea.

Previously established rule that private ownership of land along sea generally runs to highwater mark as defined by U.S. Coast and Geodetic Survey has been judicially overruled by Hawaii Supreme Court decisions in 50 Haw. 314, 440 P.2d 76 and 55 Haw. 176, 517 P.2d 57, which held that boundary of unregistered land and registered land altered by accretion or erosion was upper reaches of wash of waves as marked by line of vegetation, or in its absence by line of debris.

Nonresident Owners.

See category 22 Taxation, topic 22.10 Income Tax, subhead Withholding of Tax on Disposition of Real Estate, for Hawaii Real Property Tax Act (HARPTA).

Condemnation in Fee Simple of Lands Subject to Residential Leaseholds.

Hawaii Finance and Development Corporation may acquire by condemnation contiguous parcels of land which are in excess of five acres and which are or will be subdivided into residential lots of one acre or less if land is under lease for term of 35 years or more on June 24, 1967, or for term of 20 years or more thereafter. (HRS 516-21). Lessee of residential lot in condemned tract has option to purchase his lot from Authority under certain conditions. (HRS 516-30). Lessee purchasers must not own other lands in fee simple (including fee simple lands under trust agreement, whether as trustee, co-trustee or beneficiary) and must be both domiciled in State of Hawaii and intending to reside on lot within five years of purchase. (HRS 516-1). Financing up to 90% of purchase price is available in certain cases from Corporation. (HRS 516-34). Constitutionality of HRS c. 516 upheld. (467 U.S. 229). County ordinance allowing condemnation of lessor's leased fee interest in leasehold condominium developments, cooperative housing corporation developments, and planned unit developments upheld. (76 Haw. 46, 868 P.2d 1193). County ordinance allowing condemnation for lease-to-fee conversions did not violate RLUIPA because ordinance did not constitute "land use regulation". (110 Hawaii 39, 129 P.3d 542).

Displaced Person Compensation.

Persons lawfully occupying real property displaced by state or county action entitled to compensation under certain circumstances and, if displaced from commercial or industrial lease, right of first refusal of lease on other appropriate State land. (HRS c. 101; HRS 111-1). State can recover from person responsible for code violation that results in displacement costs of compensation. (HRS 111-8.5).

Developer Impact Fees.

Enactment of development impact fees (for public facility capital improvement costs) by counties authorized. Guidelines for assessing need for impact fees, imposition and collection, and refunding in event impact fee ordinance is repealed. Sets out specific requirements to ensure: (1) Fees are reasonably related to benefits accruing to development or its geographically limited benefit zone and (2) do not exceed proportionate share of costs incurred by county in accommodating development. (HRS 46-141 to 148).

Historic Sites.

Development of real property with historically significant sites must conform to historic preservation requirements of Hawaii Historic Preservation Act. (HRS c. 6E). Historic property includes any building, structure, site or area which is over 50 years old. (HRS 6E-2). Burial sites have special protections. (HRS 6E-43).

Time Required to Grant Permits.

State agencies and counties to enact ordinances to limit time required to review and grant plan and permit approvals and zoning changes for housing development. (1994, Act 261).

Hawaii Hurricane Relief Fund.

Establishes Hawaii Reinsurance Assistance Corporation as mechanism for providing homeowners' and hurricane reinsurance coverage to insurers, including county insurance trusts. Except as determined by board orders, mortgage recording fee is imposed on each mortgage and certain amendments to mortgage. Fees collected are deposited into hurricane reserve trust fund. (HRS 431P-16). Collection of special mortgage recording fee of 1/10 of 1% of principal amount of debt or increase in debt has been suspended as of July 1, 2001, and shall remain suspended until reactivated by Hawaii Hurricane Relief Fund's board of directors. (2001, Act 153, § 4).

Covenants.

Restrictive covenants strictly construed in favor of grantee and against grantor. Party seeking enforcement of restrictive covenant has burden to prove parties clear intention to create covenant running with land. In order to provide holder of transfer certificate of title full notice of encumbrance from face of certificate, encumbrance must be separately and clearly noted therein. (75 Haw. 370, 862 P.2d 1048). Private restrictions in conveyance on certain agricultural activities on lands classified agricultural, are voidable except if to protect environment or cultural resources. (HRS 205-4.6).

Enterprise Zones.

Upon county application, Department of Business, Economic Development and Tourism can declare area to be "enterprise zone". (HRS 209E-4). Enterprise zones are intended to stimulate business and industrial growth in areas which would result in neighborhood revitalization of those areas by means of regulatory flexibility and tax incentives. (HRS 209E-1). Enterprise zones must meet specific criteria. Certain businesses located within enterprise zones receive certain tax incentives. (HRS 209E-10, 11).

Seizure.

Property subject to forfeiture can only be seized pursuant to court order issued after pre-seizure hearing. (HRS 712A-6).

See topics 21.05 Curtesy, Deeds, Dower, Landlord and Tenant; categories 5 Civil Actions and Procedure, topic Partition; Debtor and Creditor, topic Homesteads; Documents and Records, topic Records; Family, topic Husband and Wife; Mortgages, topic Mortgages of Real Property; Taxation, topic Taxes.

Quieting Title.

In action to quiet title, burden is on plaintiff to prove title in and to land in dispute. Absent such proof, defendant need not make any showing. (114 Haw. 56, P.3d 482, 156).

21.17 TRUST DEEDS:

See category 20 Mortgages, topic 20.04 Mortgages of Real Property.

22 TAXATION

22.01 ADMINISTRATION:

Hawaii Department of Taxation, headed by Director of Taxation, is charged with administration and enforcement of State tax revenue laws and collection of State taxes. (HRS 26-10; HRS 231-3). Department has power to construe revenue laws, prescribe forms, make rules, including temporary rules, and regulations, compromise tax claims, remit delinquency penalties and interest except in fraud or willful violation cases, enter into final closing agreements relating to liability of taxpayer, conduct investigations, hold hearings, subpoena witnesses, require production of documents and records pertinent to such inquiries, and enforce payment by assumpsit action or by levy and distraint upon all property and rights to property. (HRS 231-3, 7, 25). Director of Taxation may compromise tax claims where tax is $50,000 or less (exclusive of penalties and interest). With consent of Governor, Director may compromise tax claims greater than $50,000 (exclusive of penalties and interest). (HRS 231-3). Director may appoint and commission one or more tax investigators with power of police officers, including power to arrest. (HRS 231-4.3). Special enforcement section established to investigate reported or suspected violations of tax laws for civil enforcement purposes, with stated priority of investigating cash-based businesses. (2009, Act 134). Tax returns and return information are confidential. (HRS 235-116, HRS 237-34, HRS 237D-13). Written opinions of Department are open to public inspection and copying. (HRS 231-19.5). For purposes of taxation, State is divided into four tax districts: (1) City and County of Honolulu; (2) Counties of Maui and Kalawao; (3) County of Hawaii; and (4) County of Kauai. (HRS 231-2). Taxes imposed by counties are administered by county officials (for City and County of Honolulu, Director of Finance).

Penalties and interest. Penalties may be assessed with respect to any taxpayer for: (1) Failure to file; (2) failure to pay; or (3) failure to pay within 60 days of filing timely return. (HRS 231-39). Civil fines provided for violation of provisions relating to cash economy. (2009, Act 134). Penalties may be imposed on tax preparers for substantial understatement of tax liability, promotion of abusive tax shelter. (2009, Act 166). Penalties may be imposed for excessive claim for refund or credit, substantial understatement of tax. (2009, Act 166). Criminal penalties may be imposed under HRS 231-34, HRS 231-35, and HRS 231-36 on (1) Any person who willfully attempts to evade or defeat tax imposed under title 14; (2) any person who willfully fails to file, supply information, or secure license; or (3) any person who willfully makes false and fraudulent statements, or willfully aids or assists in preparation of document required to be filed under title 14 which contains false or fraudulent statements. Criminal penalty for wilful failure to collect, account for or pay over any tax. (2009, Act 166). "Person" includes one or more individuals, company, corporation, partnership, association or any other type of legal entity, also includes certain individuals under duty to perform and who are principally responsible for performing act in question. (HRS 231-1). Prosecutions under HRS 231-34, HRS 231-35, or HRS 231-36 must be commenced within seven years after commission of crime. (HRS 231-41). Criminal penalty for violent interference with tax official. (2009, Act 166). Interest on unpaid tax accrues at 2/3 percent per month or fraction of month. (HRS 231-39[c]). Computation of interest is not affected by subsequent reduction in tax due because of net operating loss carry back until period following taxable year in which loss arises. (HRS 231-39). Interest does not accrue on additional fees imposed for costs or expense incurred by Department as result of any action taken to enforce collection of taxes administered under title 14. (HRS 231-25.5[b]). Interest on overpayments is 1/3 percent per month or fraction of month. (HRS 231-23[d]). No taxpayer is exempt from any penalty or interest by reason of having contested tax except to extent tax is adjudged excessive or contrary to law. (HRS 231-39). Additional penalty provisions exist as to specific taxes. See topics detailing particular taxes.

Collection. Director of Taxation responsible for collection of taxes imposed under Title 14. (HRS cc. 231-257). Director may charge added fee for costs or expenses incurred as result of any action taken to enforce collection of taxes administered under Title 14. (HRS 231-25.5). Director is authorized to require every person whose tax liability for one taxable year exceeds $100,000 to remit payment via electronic funds transfer. (HRS 231-9.9). Action in assumpsit may be brought in courts of State or by levy on property or rights to property not otherwise exempt under HRS 231-25(b)(5), which belongs to taxpayer or on which there is lien. (HRS 231-25). Execution may issue upon judgment and be satisfied out of any real or personal property of defendant. (HRS 231-25).

Review of Assessment. In general, dispute between taxpayer and assessor may be appealed by filing notice of appeal with board of review or tax appeal court. (HRS 232-15, 16). Other than for real property tax, payment of assessment must be made prior to appeal to tax appeal court. Payment of assessment not required for appeal to board of review. (HRS 235-114, HRS 237-42). Taxes may be paid under protest in writing signed by person making payment, setting forth grounds for protest. (HRS 40-35, HRS c. 232). Appeals of assessments of fuel tax (HRS c. 243), conveyance tax (HRS c. 247), or estate and transfer tax (HRS c. 236D), handled in same manner as income tax appeals (HRS 235-114, HRS 243-14.5, HRS 247-4.5, HRS 236D-15).

Appeals from Board of Review. May be made to tax appeal court by filing written notice of appeal in tax appeal court within 30 days after filing of decision of board of review and payment of costs fixed by HRS 232-22. (HRS 232-17).

Appeals from Tax Appeal Court. May be made to Hawaii Intermediate Court of Appeals from tax appeal court by filing written notice of appeal with tax appeal court and depositing costs of appeal within 30 days after filing of decision. (HRS 232-19).

22.02 ALCOHOL, BEVERAGES AND TOBACCO TAXES:

Alcoholic Beverage Taxes.

Liquor Tax - (HRS c. 244D).

Cigarette and Tobacco Tax - (HRS c. 245).

22.03 BUSINESS TAXES:

Franchise Tax.

See category 3 Business Regulation and Commerce, topic 3.01 Banks and Banking, subhead Franchise Tax.

Hotel Room Tax.

Transient Accommodations Tax. (HRS c. 237D). 8.25% tax on transient accommodations, including leases for less than 180 days. Rate increases to 9.25% beginning on July 1, 2010.

Insurance Company Tax.

See category 16 Insurance, topic 16.01 Insurance Companies.

Nursing Facility Tax.

Nursing Facility Tax - (HRS c. 346E).

22.04 [RESERVED]

22.05 EMPLOYMENT TAXES:

Unemployment Compensation Tax.

For purpose of providing unemployment benefits, every employer is required to pay into unemployment compensation fund, percentage of payroll based upon employer's benefit experience. (HRS 383-62, HRS 383-68).

See also category 2 Business Organizations, topic 2.03 Corporations, subheads Franchise Tax and Taxation of Corporate Stock.

22.06 [RESERVED]

22.07 ESTATE TAX:

Presently suspended due to absence of state death tax credit against federal estate tax under IRC § 2011. See generally HRS c. 236D.

Apportionment Against Inter Vivos Dispositions.

Apportionment controlled by Uniform Probate Code. (HRS 560:3-916).

Interstate Cooperation.

No statutory procedure available for compromise of death taxes where decedent's domicile is disputed.

22.08 GASOLINE AND SPECIAL FUELS TAXES:

Liquid Fuel Tax.

Imposed by HRS 243-4. Liquid fuel tax of 17¢ per gallon, to which county tax added as set from time to time by counties, except for liquid fuels otherwise specified. Gasoline or aviation fuel sold for use in or used for airplanes taxed at 2¢ per gallon. Diesel oil 2¢ per gallon, plus additional 15¢ per gallon plus county taxes if sold for use by highway motor vehicles. If liquid fuel used for agricultural equipment that does not operate on public highways, then tax is 1¢ per gallon. (HRS 243-4). Naptha sold for use in power-generating facility 2¢ per gallon. Alternative fuels used for operating vehicles on public highway taxed at fraction of regular tax rates. (HRS 243-4).

22.08A GENERATION SKIPPING TAX:

Generation Skipping Transfer Tax.

Presently suspended due to absence of state tax credit against federal generation skipping transfer tax. State death tax imposed is credit for state death taxes on federal return under IRC § 2011. (HRS 236D-3.5).

22.09 GIFT TAX:

None.

22.10 [RESERVED]

22.11 INCOME TAX:

State income tax provisions generally conform to Federal income tax provisions of Internal Revenue Code (IRC). (HRS 235-2.3). In general, subtitle A, c. 1 of Federal IRC, as amended as of Dec. 31, 2008, has been adopted as state law; consult HRS 235-2 to 235-4 for conforming and nonconforming provisions.

Persons Subject to Tax.

Tax is imposed on: (1) Resident Individuals: Tax applies to entire income computed without regard to source in State; (2) Nonresident Individuals: For nonresident individuals, tax applies to income received or derived from property owned, personal services performed, trade or business carried on, and any and every other source in State. (HRS 235-4). Standard deduction and personal exemption are prorated based on percentage of Hawaii adjusted gross income to total adjusted gross income. (HRS 235-5). For nonresident spouse filing joint return with resident spouse, tax applies to entire income of nonresident spouse computed without regard to source in State. (HRS 235-4[b]). Credit is given with certain restrictions for income tax paid to another jurisdiction on income derived or received therefrom (HRS 235-55); (3) Corporations: Foreign and domestic (Hawaii) corporations are taxed on income received or derived from property owned, trade or business carried on, and any and every other source in State. Domestic (Hawaii) corporations also taxed on income from sources outside State unless subject to income tax in another jurisdiction (HRS 235-4[d]); (4) Estates and Trusts: Income of resident estate or trust is computed without regard to source in State, except nonresident beneficiaries of resident trusts or estates are not subject to tax on their share of intangible income of trust. (HRS 235-4[e]; HRS 235-4.5[a]). Each estate or trust must include in its return all information necessary to determine taxability of income regardless of source. (HRS 235-4[e]); (5) Partnerships and S Corporations: Partnership as such is not taxable under HRS c. 235. Partners are liable for income tax only in their separate or individual capacities. (HRS 235-2.3). S Corporation tax conforms to Model S Corporation State Income Act. (HRS 235-121). Valid election under IRC is effective for Hawaii law purposes. (HRS 235-122). Qualified S Corporations are exempt from State corporations tax, except to extent they are subject to federal tax. (HRS 235-122). Income of S Corporation attributable to State that is subject to federal tax is taxed at highest marginal rate of tax imposed on net income of corporations. (HRS 235-122). S Corporations are required to obtain agreements from nonresident shareholders that they shall file and pay State tax on share of S Corporation's Hawaii income. (HRS 235-128); (6) Tax-Exempt Organizations: Tax-exempt organizations are subject to tax on unrelated business taxable income if subject to tax on such income under IRC (HRS 235-2.4[j]); and (7) Limited Liability Companies: tax classification under HRS c. 235 as disregarded entity, partnership or corporation follows corresponding classification for federal income tax purposes.

Persons Exempt.

Persons and organizations not taxable under HRS c. 235 include: banks, building and loan associations, financial services loan companies, financial corporations, small business investment companies, trust companies, mortgage loan companies, financial holding companies, subsidiaries of financial holding companies as defined in HRS c. 241, development companies taxable under HRS c. 241, insurance companies, agricultural cooperative associations, fish marketing associations exclusively taxable under other laws and persons engaged in business of motion picture and television film production. (HRS 235-9).

Personal exemptions available: (1) To individuals, $1,144 for each exemption allowable under IRC, provided exemption is zero if individual's exemption is allowable to another taxpayer; (2) to estate, $400; (3) to trust, $200 if trust is required to distribute all income currently, for all other trusts, exemption is $80; and (4) to blind, deaf, or totally disabled person, $7,000 in lieu of all other exemptions. (HRS 235-54).

Rates.

For individuals, estates and trusts, rates on taxable income range from 1.40% to 11% for taxable years beginning after Dec. 31, 2008. (HRS 235-51). For specific rates for individuals filing joint returns and for surviving spouses, see HRS 235-51(a); for heads of households, see HRS 235-51(b); for unmarried individuals (other than surviving spouse and head of household), and for married individual who does not make single return jointly with individual's spouse, see HRS 235-51(c); for estates and trusts, see HRS 235-51(d); for individuals who do not itemize deductions and do not reach ceiling amount, see HRS 235-53. For net capital gains of individuals, trusts, and estates, maximum tax rate is 7.25%. (HRS 235-51[f]). Net unearned income of child who has not reached age 14 at close of taxable year is taxed as if earned by parent where resulting tax is higher than if taxed at child's rate. (HRS 235-7.5).

Corporations are subject to tax on taxable income (other than capital gains) at rates ranging from 4.4% to 6.4%. (HRS 235-71). For corporations, regulated investment companies, and REITs with net capital gains, alternative tax under IRC § 1201 may be operative if alternative tax is less than regular corporation tax. Alternative tax is sum of regular tax computed on taxable income reduced by net capital gains plus 4% of net capital gain. (HRS 235-71.5).

Withholding of Tax on Disposition of Real Estate.

Under Hawaii Real Property Tax Act, transferee of real property located within State must withhold 5% of amount realized on transfer. (HRS 235-68[b]). Withholding tax is applied against underlying income tax liability of transferor; excess withholding is refundable. (HRS 235-68). Withholding tax must be remitted to State within 20 days following transfer. (HRS 235-68[c]). Transferor may apply for exemption certification from Department if no gain will be recognized from transfer, or if there are insufficient proceeds to pay withholding after payment of transaction costs and mortgage liens on property. (HRS 235-68[e]). Exception provided if seller used property as principal residence for year preceding transfer and gross proceeds do not exceed $300,000. (HRS 235-68[f]). Definition of resident includes Hawaii resident individuals, trusts, and estates; Hawaii corporations, partnerships, limited liability companies and limited liability partnerships; and non-Hawaii corporations, partnerships, limited liability companies and limited liability partnerships registered to do business in Hawaii. (HRS 235-68[a]). Department may enter into withholding agreements with taxpayers who engage in more than one real estate transaction a year. (HRS 235-68[g]).

Wage Withholding.

Every employer is required to deduct and withhold taxes on wages paid to employees. (HRS 235-61). Maximum withholding rate is 8%. (HRS 235-61[c]). For provisions on withholding taxes, see HRS 235-61 to HRS 235-69. Employers are required to make return with Department on or before 15th day of calendar month following month for which taxes have been withheld. (HRS 235-62). Employers whose annual liability for taxes withheld exceeds $40,000 annually must remit semi-weekly complete amount of withheld tax. (HRS 235-62). Employer is required to make statement to employee of taxes withheld from employee's wages by Jan. 31 of year following tax year for which taxes have been withheld. (HRS 235-63). Taxes withheld must be held in trust. (HRS 235-64).

Returns.

Returns are required by every individual doing business in State or having taxable gross income therefrom. (HRS 235-92). Return is required for estates with taxable income of $400 or more. Return is required for trust which, under its governing instrument, is required to distribute all of its income currently, and has taxable income of $200 or more. Return is required for all other trusts with taxable income of $80 or more. (HRS 235-54, HRS 235-92[3]). Affiliated groups of Hawaii corporations may file consolidated returns in manner consistent with IRC §§ 1501-1505 and 1552. (HRS 235-92). Returns for taxable year must be filed by 20th day of fourth month thereafter. (HRS 235-97[b]). Informational returns may be required by regulations. (HRS 235-96). Pay-as-you-go provisions requiring declarations of estimated tax and periodic estimated tax payments are similar to IRC. (HRS 235-97). Taxpayer must report (by filing amended return) any change in federal tax or return to Department of Taxation within 90 days thereof; Department may inspect or require filing of federal return. (HRS 235-101). Partnerships are required to file returns. (HRS 235-95). Declarations of estimated taxes are filed with Department. (HRS 235-97). Returns are confidential. (HRS 235-116). Department may exchange or provide information to IRS. (HRS 235-117).

Tax Credits.

For various tax credits available, see HRS 235-12, HRS 235-12.5, HRS 235-15 to HRS 235-17, HRS 235-55 to HRS 235-55.91, HRS 235-110 to HRS 235-110.93. Limitation on utilization and carryover of unused credits for investments made after May 1, 2009. (235-110.9). Temporary suspension of capital goods excise tax credit (235-110.7) from May 1, 2009 to Dec. 31, 2009.

Special Provisions.

Uniform Division of Income for Tax Purposes Act has been adopted. (HRS c. 235, Part II). Under Uniform Act, special rules apply to allocation of gain or loss from sale of partnership interest based on ratio of original cost of partnership's tangible property in state to original cost of all partnership tangible property. Special rules apply if more than 50% of partnership's assets are intangibles. (HRS 235-26). Other allocation rules apply to income not subject to Uniform Act. (HRS 235-5). Multistate Tax Compact has been adopted. (HRS c. 255). Tax incentives to promote knowledge-based industries enacted, including: (1) Tax credits (HRS 235-110.9, 235D);

(2) prohibition on discriminatory tax on electronic commerce or Internet access (HRS 231-8.6); (3) gross income exclusion for amounts received as royalties and other income from patents, copyrights and trade secrets associated with qualified high technology businesses and performing arts products (HRS 235-7.3); (4) gross income exclusion for stock options from qualified high technology businesses (HRS 235-9.5); (5) qualified high technology businesses may apply to Department of Taxation to sell unused net operating loss carryovers to another taxpayer (HRS 235-111.5); (6) 15 year capital loss carryforward period for qualified high technology businesses (HRS 235-2.45); and (7) college savings program established (HRS c. 256). Individual development accounts allowed to encourage saving for certain qualified expenditures, including costs associated with first home ownership, post-secondary education, vocational training, and small business capitalization (HRS c. 257), income derived from sale of net operating loss or qualified high technology business's exempted until Dec. 31, 2005 (HRS 237-29.75), income earned from stock options or stock of qualified high technology business by employee, officer, or director of qualified high technology business is excluded (HRS 235-9.5). Contributions into individual development accounts are excluded from gross income, and matching contributions are eligible for 50% tax credit. (HRS 257-9).

Penalties and interest prescribed by HRS 231-39 and are added to tax. (HRS 235-104). Failure to make timely return subjects taxpayer to assessment by Department. (HRS 235-107). (See topic 22.01 Administration, subhead Penalties and interest.) Interest imposed for underpayment of estimated tax owed is computed monthly. (HRS 235-97).

Audit and Assessment.

Director may audit taxpayers and employers with respect to wages and assess taxes not paid. Director must give taxpayer or employer notice of proposed assessment and taxpayer or employer has 30 days to confer with Department with respect thereto. After such 30 days, Department is to assess income it believes not theretofore assessed and give notice of tax, interest, and penalties. These must be paid within 20 days after date notice was mailed, properly addressed to taxpayer or employer at last known address or place of business. (HRS 235-108).

Statute of limitations for assessing deficiencies is three years, commencing from date of filing or due date whichever is later (HRS 235-111), or six years from date of filing if there is substantial omission of income (HRS c. 231) or no limit in case of fraud.

Appeal.

Any person aggrieved by assessment or liability imposed may appeal to board of review or tax appeal court. (HRS 235-114). Appeals before Tax Appeal Court are governed by Rules of the Tax Appeal Court and resort to Rules of the Circuit Courts or HRCP in matters not specifically provided in RTAC. First appeal to either district board of review or to Tax Appeal Court may be made without payment of tax assessment; however, if taxpayer appeals decision of board of review or Tax Appeal Court, taxpayer must pay tax plus interest. (HRS 235-114). Denial of tax refund may be appealed by filing notice of appeal within 30 days of denial of claims. (HRS 232-14.5). May appeal for review of merits of tax refund claim by filing notice of appeal within 180 days from date claim was filed, provided that department has not given notice of denial of claim. (HRS 232-14.5). For procedures for appeal to board of review or tax appeal court see topic 22.13 Property Taxes, subhead Review of Assessment.

Credits and Refunds.

Overpayments of installments are to be credited against unpaid installments, if any. (HRS 235-110). Overpayments of taxes are to be refunded. (HRS 235-110). Refund procedure does not apply to payments pursuant to assessments under HRS 235-107 or HRS 235-108(b). No refund or credit unless payment was due to tax being interpreted differently than with respect to taxpayers generally. With respect to all tax payments for which refund is not authorized, remedies under appeal or protest procedures are exclusive. (HRS 235-110). Refunds shall be made in accordance with HRS 231-23(c). (HRS 235-110).

Claim for credit or refund must be filed within later of three years from filing date or due date, or two years from date tax was paid. (HRS 235-111[b]). Statutory period for assessment of any deficiency or determination of refund attributable to amendment made to federal income tax return shall be one year from date Department is notified in writing of such amendment. (HRS 235-101[b]). Payments made before due date are deemed to have been paid on due date. (HRS 235-111[b]). Limitation for assessing deficiencies respecting gains realized on conversions subject to election under IRC § 1033(a)(3)(A) does not expire until three years after Department is notified of replacement or intention not to replace. (HRS 235-112).

22.12 INHERITANCE TAX:

None.

22.13–22.15 [RESERVED]

22.16 REAL AND PERSONAL PROPERTY TAXES:

Property Taxable.

No tax on personal property. All real property tax functions are exercised by respective counties, except for county of Kalawao. (HRS 246A-2). County ordinances should be consulted with respect to real property tax laws, including exemptions, assessment, appeals, payment, penalties, rates, and liens, in particular county.

Assessment.

Assessment of real property tax is made by county in which property is located, on annual basis. Tax year with respect to real property is July 1 to June 30. Tax is assessed as of specified date (Oct. 1 for City and County of Honolulu) preceding tax year. With certain exceptions, real property is assessed at 100% of fair market value. See specific county ordinances for details. Counties determine tax rates property classifications. Assessment of taxes administered by county directors of finance.

Exemptions.

For real property tax exemptions, see county ordinances.

Payment.

For real property tax, payment of tax for tax year July 1 to June 30 is due in two equal installments on Aug. 20 and Feb. 20.

Collection.

For real property tax, county official designated by ordinance is responsible for collection (Director of Finance for City and County of Honolulu). See ordinances as to specific collection proceedings. For other taxes, see applicable topics/subheads. Department of Taxation responsible for collection of taxes imposed under title 14 (HRS cc. 231-257), except those which by law are to be collected by county treasurers. Department may charge added fee for costs or expenses incurred as result of any action taken to enforce collection of taxes administered under title 14. (HRS 231-25.5). Director is authorized to require every person whose tax liability for one taxable year exceeds $100,000 to remit payment via electronic funds transfer. (HRS 231-9.9). Action in assumpsit may be brought in courts of State or by levy on property or rights to property not otherwise exempt under HRS 231-25(b)(5), which belongs to taxpayer or on which there is lien. (HRS 231-25). Execution may issue upon judgment and be satisfied out of any real or personal property of defendant. (HRS 231-25).

Credits and Refunds.

Except with respect to conveyance taxes (HRS c. 247) and taxes collected under chapter containing special provision for refund and credit of tax paid in excess of tax imposed, credit or refund may be claimed under procedures set forth in HRS 231-23. Taxpayer entitled to refund may elect to apply amount of refund as to overpayment credit to taxes subsequently accruing under same chapter. (HRS 231-23). Department is authorized to retain refunds due to overpayment of tax due for persons who owe debt to State; are delinquent in child support payment; who default on educational loans held by United Student Aid Funds; who owe federal income tax; or who receive medicaid overpayment subject to recovery. (HRS 231-51). Refunds or credits for reasons other than overpayment for estate and transfer taxes, general excise taxes, fuel taxes, conveyance taxes, and rental motor vehicle and tour vehicle surcharge taxes, may only be sought by appeal or by payment under protest pursuant to HRS 40-35. (HRS 231-23[a]).

Review of Assessment.

In general, dispute between taxpayer and assessor may be appealed by filing notice of appeal with board of review or tax appeal court.

Appeals from Board of Review.

May be made to tax appeal court by filing written notice of appeal in tax appeal court within 30 days after filing of decision of board of review and payment of costs fixed by HRS 232-22. (HRS 232-17).

Appeals from Tax Appeal Court.

May be made to Intermediate Court of Appeals from tax appeal court by filing written notice of appeal with tax appeal court and depositing costs of appeal within 30 days after filing of decision. (HRS 232-19).

Lien.

As provided by ordinance, real property taxes are paramount liens upon property assessed. Any State tax due and unpaid is debt due to State and constitutes lien in favor of State on all real and personal property belonging to any person liable for tax. (HRS 231-33). Lien for tax, including penalties and interest arises at earlier of: (1) time of assessment; (2) time return is filed; or (3) certificate provided for under HRS 231-33(f) is filed. (HRS 231-33[b]). Except as provided in HRS 231-33(c), (d), and (e), from time State tax lien arises, it is paramount lien on property and rights to property against all parties. (HRS 231-33[b]). Liens on tangible personal property held for purpose of sale to public in ordinary course of business are extinguished upon such sale for valuable consideration. (HRS 231-33[d]). Liens on securities, negotiable instruments, and money are extinguished upon transfer to person without notice for valuable consideration in money or money's worth, and lien is not valid against mortgagee or pledgee for adequate and full consideration in money or money's worth who is located outside State and takes possession of property if he is without notice or knowledge of existence of lien. (HRS 231-33[d]). Mere filing of certificates by Department does not constitute notice for this purpose. (HRS 231-33[d]). Lien does not apply if statute imposing particular tax contains specific provision for lien. (HRS 231-33[i]). If co-tenancy exists with respect to property subject to lien, co-tenant may pay noncontributing co-tenant's outstanding tax debt due to State for whom lien is imposed. (HRS 231-61). Upon proper recordation co-tenant shall acquire lien on nonpaying co-tenant's property interest. (HRS 231-61). Lien may be enforced by action in equity and has same priority as tax lien of State. (HRS 231-61). Notices of liens for State and federal taxes are kept by Director of Finance. (HRS 286-46). Liens are enforced by state tax collector in circuit court where property is located.

Sale.

In cases where Director has levied on property or rights to property of taxpayer, Director may seize and sell such property to satisfy taxes due and unpaid. (HRS 231-25). State tax collector may sell via foreclosure any property encumbered by state tax lien, and if any lien has existed thereon for three years, may sell at public auction to highest bidder after proper notice has been given. (HRS 231-63). Sale of property takes place within 30 days after seizure but may be postponed no later than 45 days after seizure. (HRS 231-25[b][6][c]). Director of taxation issues bill of sale to purchaser. (HRS 231-25). In addition, State may procure lien and enforce it by sale. (HRS 231-33[h]). Certain property is exempt from levy. (HRS 231-25).

Redemption.

As provided by ordinance, taxpayer may redeem real property sold in satisfaction of real property taxes by payment to purchaser at sale, within one year from date thereof, or if purchaser's deed is not recorded within 60 days of sale, within one year from such recordation. Taxpayer must reimburse expenses including 12% interest to purchaser.

Mortgage Recording Fee.

See categories 16 Insurance, topic Insurance Companies, subhead Hurricane Relief Fund; Mortgages, topic Mortgages of Real Property, subhead Recording Schedule of Fees.

Real Estate Conveyance Tax.

Any real property or interest therein, transferred or conveyed by deed, lease, sublease, assignment, transfer, or conveyance, or any other document not otherwise exempt under HRS 247-3, is subject to conveyance tax. (HRS 247-1). Tax imposed is 10¢ per $100 of actual and full consideration paid or to be paid for properties with value less than $600,000; 20¢ per $100 for values between $600,000 and $1,000,000; and 30¢ per $100 for values between $1,000,000 and $2,000,000; 50¢ per $100 for values between $2,000,000 and $4,000,000; 70¢ per $100 for values between $4,000,000 and $6,000,00; 90¢ per $100 for values between $6,000,000 and $10,000,00; and $1 per $100 for values $10,000,000 and greater, unless condominium or single family residence for which purchaser is ineligible for homeowners exemption, then tax is 15¢, 25¢, 40¢, 60¢, 85¢, $1, and $1.25 respectively. (HRS 247-2). In case of lease or sublease whose full unexpired term is for period of five years or more, tax imposed is based on cash value of lease rentals discounted to present day value, and capitalized at rate of 6% plus actual and full consideration paid or to be paid for any and all improvements. (HRS 247-2). Tax imposed for each transaction shall not be less than $1. (HRS 247-2). Certificate of conveyance declaring actual and full consideration of property transferred is required to be filed and recorded. (HRS 247-6). Exemptions from tax imposed under this section are found in HRS 247-3. Assessments, levies, or credits for overpayment must be made within three years from filing date. (HRS 247-6.5). Refund for taxes erroneously or unjustly paid is made in accordance with HRS 231-23. (HRS 247-8).

Tax Liability.

Party conveying real property (seller, lessor, etc.) is liable for tax imposed, except when U.S., state, or any agency thereof is conveyor, or tax liability is on purchaser (buyer, lessee, etc.). (HRS 247-4). Tax is to be paid not later than 90 days after transaction and in any event prior to imprinting of seals. (HRS 247-4).

Imprinting of Seals.

On document as evidence of tax payment, seal will be imprinted upon payment of tax and any penalties or interest and prior to recordation. (HRS 247-5).

22.17 SALES AND USE TAXES:

Sales Tax.

None, but see subhead General Excise Tax, infra.

General Excise Tax.

General excise tax is privilege tax assessed and collected against persons and entities on account of their business and other activities conducted in State. (HRS 237-13). Businesses are classified and taxed based on following categories: (1) manufacturers; (2) business of selling tangible personal property, producing; (3) contractors; (4) theaters, amusements, radio broadcasting stations, etc.; (5) sales representatives, etc.; (6) service business; (7) insurance producers; (8) professions; (9) receipts of sugar benefit payments; (10) business of leasing real property (HRS 237-16.5); and (11) other business. Tax is measured by application of rates against values of products, gross proceeds of sales or gross income. (HRS 237-13). Business includes all activities (personal, professional, or corporate), engaged in or caused to be engaged in with object of gain or economic benefit either direct or indirect, but does not include casual sales. (HRS 237-2). Tax imposed at entity level. Includes tax on interstate and foreign common carrier telecommunications services and mobile telecommunications services. (HRS 237-13[6][D] and [E]). Tax on gross proceeds from sale of electric power to public utility company for resale to public is taxed at same rate as tax on “producer” under HRS 237-13(2)(A). (HRS 237-13.5). As condition precedent to engaging in business in state, license must be obtained. One-time fee of $20 is assessed for license. (HRS 237-9). Director of taxation to develop system to determine when contractors from U.S. mainland work on federal construction projects, to enforce collection of general excise taxes. (HRS 231-9.3). Department of Taxation authorized to enter into streamlined sales and use tax agreement with one or more states to simplify and modernize sales and use tax administration. (HRS 255D-4).

Persons Exempt. HRS 237-23 exempts certain persons from tax imposed under HRS c. 237. Persons exempted generally include: public service companies (as defined in HRS 239-2), public utilities owned and operated by state, county or other political subdivision, fraternal benefit societies, religious, charitable, scientific or educational organizations or trusts, business leagues, hospitals, cooperative associations (including farmers coops exempt under IRC § 531), public Internet data center, and others exempted for special purposes. HRS 237-17, HRS 237-27, HRS 237-29.65, HRS 237-29.7, HRS 237-29.8, HRS 237-29.65. To obtain allowance of exemption, certain persons must register their federal exemption or application for recognition of exempt status. Other persons must file application for exemption in form of affidavit. (HRS 237-23). Limited exemption for financial institutions. (HRS 237-24.8).

Transactions Exempt. HRS 237-23.5, HRS 237-24 through HRS 237-29.75 provide exemptions for particular transactions or businesses.

Rates. depend on class of business engaged in. Most transactions taxed at 4%. Wholesalers, manufacturers, sugar processors, sales from disabled persons or their corporations, sellers of electric power generated from nonfossil fuels to public utilities for sale to public pay 0.5%; insurance solicitors pay 0.15%; and retailers, service businesses, professions and all others pay 4%. (HRS 237-13 to HRS 237-17). Tax on intermediate sales of services 0.5%. (HRS 237-13.3). County surcharge of 0.5% for City and County of Honolulu.

Payment. Tax is payable in monthly installments on or before 20th day of month following month in which it accrues, but approval for quarterly payment can be obtained where total tax liability for calendar year will not exceed $2,000, or semiannual payments where total tax liability for calendar year will not exceed $1,000. (HRS 237-30). Director may permit filing of fiscal year returns. (HRS 237-30).

Returns. Each taxpayer must make out monthly return, showing estimated tax liability and transmit same, with remittance of amount of tax, to appropriate tax official. (HRS 237-30[b]).

Quarterly or semiannual filings permitted depending on total tax liability for year. Annual reconciliation return under oath must also be made on or before 20th day of fourth month following close of taxable year, showing gross proceeds of sales or gross income for previous year. On this annual return amount of tax chargeable against taxpayer must be computed. Amount of monthly payments already made deducted and remittance of residue of tax made with return. (HRS 237-33). Amendment to federal tax return is required to be reported to Department pursuant to procedures in HRS 235-101. (HRS 237-33.5).

Collection. Department may collect taxes due and unpaid together with penalties and interest by action in assumpsit or other appropriate proceedings, injunction restraining further conduct of business in State may be obtained until payment of delinquent taxes, penalties and interest have been paid. (HRS 237-46). Contractor's license may be suspended for failure to pay delinquent general excise tax or to honor payment installment plan. Taxes imposed under HRS c. 237 shall be assessed or levied within three years after annual return is filed or within three years of due date prescribed for filing of return, whichever is later. (HRS 237-40). Six year statute of limitations if substantial omission of income. Claims for credit or refund must be made within three years of filing, payment of tax or due date. (HRS 237-40). Amendments to federal tax return required to be reported to Department under HRS 235-101 extend statutory period for assessment of deficiency or determination of refund for one year beginning date Department is notified in writing of such amendment. (HRS 237-33.5). Prosecution for violations under HRS 231-34, HRS 231-35 and HRS 231-36 must commence within seven years of commission of crime. (HRS 231-41).

Penalties and interest shall be added to and become part of tax where Department determines that general excise tax on any gross income or gross proceeds of sale have not been assessed. (HRS 237-32, 39). Penalties and interest may be assessed for refusing to file return required under HRS 237-33. Criminal penalties may also be imposed under HRS 231-34, HRS 231-35, and HRS 231-36. Advertisement that tax imposed under HRS c. 237 is not considered as element in price to purchaser is prohibited. (HRS 237-49).

Appeal from assessment of tax is available to board of review or tax appeal court. (HRS 237-42).

Credits and Refunds. Taxpayer entitled to credit where general excise tax is imposed upon transaction subject to sales, gross receipts, or use tax in another state or taxing jurisdiction. (HRS 237-22). Credit or refund for overpayment of tax available in manner provided in HRS 231-23(c). (HRS 237-37). Qualified improvement tax credit allowed on capitalized costs for construction of certain resort or general facilities. (HRS 235D-2).

Bulk Sales. Bulk sale or transfer of merchandise, fixtures or other assets of business, not in ordinary course of business, must be reported by seller not less than ten days after possession, title or control of property, or any part thereof, passes to purchaser. (HRS 237-43[a]). Purchaser must withhold payment of purchase price until he receives tax clearance certificate from Department to effect that all seller's State taxes have been paid. (HRS 237-43[b]). If purchaser does not obtain tax clearance certificate, purchaser becomes liable for seller's unpaid taxes and also for any other unpaid taxes, that are lien against items sold. (HRS 237-43[c]). Certificate will not be issued while Department investigates (including by audit) whether taxes have been levied or accrued against seller. (HRS 237-43[b]).

Use Tax.

Compensating Use Tax Law (HRS c. 238) imposes tax on tangible personal property and services (HRS 238-2) imported or purchased from unlicensed operator for consumption or use in Hawaii. No tax imposed if importer or purchaser is licensed under general excise tax and is wholesaler purchasing for resale or manufacturer incorporating imported item, which remains perceptible to senses, in his finished product, and it is sold at wholesale. (HRS 238-2). Tax of

0.5% is imposed on retailers and service businesses importing for resale, or manufacturers or contractors importing material to be incorporated into their finished product which is sold at retail. (HRS 238-2[2]). In all other cases, tax is 4%. (HRS 238-2[3]). Credit given for sales or use taxes paid by purchaser or importer to other states or its subdivisions on same transaction, but not to exceed amount of use tax which would be paid in Hawaii. (HRS 238-3[i]). Tax is not applied to certain property listed in HRS 238-3(e) to (h), (j), and (k). Proof of payment of use tax required to register motor vehicle imported into State. (HRS 238-9.5). Department of Taxation authorized to enter into streamlined sales and use tax agreement with one or more states to simplify and modernize sales and use tax administration. (HRS 255D-4).

22.18 STAMP AND SEAL TAXES:

Stamp Tax.

None.

22.18A TAX LIENS:

Uniform Federal Tax Lien Registration Act.

Adopted, with modifications. (HRS c. 505).

23 TRANSPORTATION

23.00A HIGHWAYS:

(HRS c. 264).

Highway Development.

Department of Transportation directed to establish new guidelines that take into account need for flexibility in highway design. Limited liability of State and counties in application of flexible highway design standards. (HRS 264-20). Department of Transportation must comply with county transportation related plans, to extent that compliance does not affect receipt of federal funds. (HRS 279A-2). Department of Transportation and county transportation departments must adopt complete street policy to accommodate convenient access and mobility for access of public highways. (HRS 286).

23.01 MOTOR VEHICLES:

County finance directors have supervision over registration of vehicles (HRS 286-42), county examiner of drivers over licensing of operators (HRS 286-236). County of Hawaii, Finance Department, 26 Aupuni Street, Hilo, Hawaii 96720; City and County of Honolulu, Motor Vehicle Licensing Division, 530 S. King Street, Rm. 208, Honolulu, Hawaii 96813, mailing address: P.O. Box 30330, Honolulu, Hawaii HRS 96820-0330; County of Kauai, Finance Department, 44 Rice Street, Lihue, Kauai, Hawaii 96766; County of Maui, Motor Vehicle Registration, 200 S. High Street, Wailuku, Maui, Hawaii 96793.

Vehicle License.

Numbered plates on front and rear, renewed annually for all vehicles except those publicly owned or owned by certain disabled veterans. (HRS 249-4, 6,7). No exemption to vehicles owned by members of armed forces. Penalty for nonpayment includes seizure and sale. (HRS 249-10). No person shall manufacture, sell, display, permit to be displayed, or possess any reproduction, imitation, or facsimile of license plate with similar design, shape, size, and color as license plates contracted for director of finance of city and county of Honolulu pursuant to HRS

249-9. (HRS 249-11[b]). Director of finance may revoke approval of organization's application for special number plates within three years of receiving approval, if organization's number of registered vehicles that obtained special number plates is less than 150. (HRS 249-9-3[6]).

Operator's License.

Required of all drivers unless specifically excluded by statute. (HRS 286-102, 105, 110, 236, 239). Parents or guardian of minor under 18 liable for minor's negligence. (HRS 286-112). Exemptions granted to certain federal and state employees. (HRS 286-105). Driver License Compact provides reciprocal recognition of driver's licenses from other states, District of Columbia and Commonwealth of Puerto Rico. (HRS 286C-1). Operation of mopeds. (HRS 291C-191 to 207).

Renewals.

License expires on licensee's fourth birthday after issuance of license except that license expires on licensee's 2nd birthday after issuance where licensee is 72 years of age or older, 24 years of age or younger, has received nine points or more for traffic violations under previous point system within two years, or has physical disabilities not overcome by doctor's certificate or special equipment on vehicle. (HRS 286-106). Driver licensing point system repealed in 1997. (HRS 286-128, am'd 1997, Act 60).

Provisional Driver Licensing Program.

Established for persons at least 16, but under age of 18; holding instruction permit for period of at least 180 days in good standing; satisfactorily completes all requirements. (HRS 286-108, 109). Any motor vehicle operated by provisional licensee, all occupants shall be restrained by safety belts or child passenger restraint system as required (HRS 291-11.5, 11.6); shall not transport more than one person under age of 18 without being accompanied by licensed driver who is provisional licensee's parent or guardian during hours of 11:00 p.m. and 5:00 a.m.; provisional licensee may drive between hours of 11:00 p.m. and 5:00 a.m. without licensed parent or guardian for purpose of employment with signed statement from employer verifying employment and work hours; or school-authorized activity with signed statement from parent or guardian verifying activity. Should provisional licensee violate of any requirements or be convicted of offense relating to operation of motor vehicle, shall have provisional license suspended or revoked by district court or family court judge. Driver's license may be issued to provisional licensee if provisional license is held for at least six months satisfactorily; at least 17 years of age; and all requirements have been complied. Fee for provisional license shall be determined by council of each county. (HRS 286-111). Provisional licenses shall not apply to emancipated minors and motorcycle or motor scooter drivers. (HRS 286-102.6).

Titles.

Issued upon initial registration. (HRS 286-47, 48, 52, 55). Vehicles may be junked by surrendering title to Director of Finance. (HRS 286-51.5). All non-repairable vehicles junked under this section will never be titled or registered again. (HRS 286-51.5).

Sales.

Vehicle must be registered by new owner, old certificate of ownership must be surrendered within 30 days of transfer, and new certificate of ownership must be issued or transfer deemed incomplete. (HRS 286-52). Notice to Dept. of Finance prior to issuance of new certificate of ownership relieves transferee of civil and criminal liability incurred after Notice, by transferor, because of his ownership of vehicle. (HRS 286-52). Where vehicle is deemed abandoned and certificate of ownership or registration is unavailable, bill of sale executed by authorized seller is satisfactory evidence authorizing transfer of title or interest by operation of law. (HRS 209-25).

Upon transfer by sale or otherwise of moped, person whose interest is to be transferred and transferee must write their signatures with ink upon certificate of registration issued for moped, together with address of transferee. Within 30 days, transferee must forward endorsed certificate of registration to Director of Finance. (HRS 249-14.2).

Liens.

For unpaid taxes. (HRS 231-33). Mechanics' lien for reasonable charges for work done and materials furnished, excluding storage charges, and may retain possession of property until charges are paid. (HRS 507-18, 19). See category 3 Business Regulation and Commerce, topic 3.09 Commercial Code, subhead Article 9.

Identification Marks.

Penalty for altering, fine up to $1,000, imprisonment up to one year, or both. (HRS 286-43, 61). Markings shall be readily visible during daylight hours, from distance of 50 feet (15.24 meters) while motor carrier vehicle is stationary. This ensures conformance with federal standards. (HRS 286-202.6).

Odometer systems regulated by HRS 486-71, 75, HRS 77-84, 87. No vehicle may be introduced into Hawaii unless odometer complies with regulations.

Operation Prohibited.

By persons whose term of suspension or revocation of operator's license has not expired, has been convicted within two years of driving while under influence of alcohol or drugs and unlicensed, has not passed examination, has not provided proof of financial responsibility, or has physical or mental disability which prevents safe operation. (HRS 286-104). Those whose license has been revoked for driving under influence of intoxicant may still be allowed by court to drive for limited work related purpose. (HRS291E-61).

Size and Weight Limits.

Regulated by HRS 291-34 to 37 inclusive.

Equipment Required.

Regulated by HRS 70-63, § 18 of Traffic Code of City and County of Honolulu and similar ordinances of other counties; General Safety Code of the State; regulations of State Public Utilities Commission.

Certain equipment may not be sold for use or actually used in vehicles without approval of director of transportation. (HRS 286-83). Such approval may be revoked by director of transportation after conducting appropriate hearings and determinating that equipment does not comply with requirements of HRS 286-83. (HRS 286-84).

Power output for mopeds regulated by HRS 291C-202.

Lights Required.

Regulated by HRS 291-25 to 32 inclusive.

Inspection.

Safety inspection required every two years except for certain vehicles which must be inspected every six or 12 months. (HRS 286-26).

Traffic Regulations.

Generally HRS cc. 291 and 291C. Term of imprisonment for operating vehicle under influence of intoxicant, shall not exceed maximum term provided in HRS 291E-61(b)(1), (b)(2) and (b)(3). (HRS 291E-61). Penalties for accidents involving damage to vehicle or property are provided for in c. HRS 291C-161. Repeal of penalties provided in HRS 291C-13 and HRS 291C-18. Driver of vehicle approaching marked crosswalk shall stop and yield right of way to allow pedestrians to cross, regardless of whether traffic-control signals are in place or in operation. (HRS 291C-72). Limits on time in which prior conviction may be basis for enhanced penalties for subsequent offenses as follows: three years for offenses involving child restraints; one year for offenses involving violations relating to motor vehicle lights; and five years for offenses involving motor vehicle alarms continuously going off for period of five minutes. (HRS 291-11.5). Subsequent violation of same provision within one year shall be subject to twice fine. (HRS 291-32). Infractions not resulting in criminal charge do not require court adjudication. (HRS 291D-3). Time for answering a notice of a traffic infraction is amended from 15 to 21 days. (HRS 291D-6). No penal sanction that includes imprisonment applies to traffic infraction. (HRS 291D-3). Person answering notice of traffic infraction shall request hearing if person wishes to personally appear before judge. (HRS 291D-6). Persons may make credit or debit card payments over Internet or by telephone for total amount stated on notice for admitted traffic infractions. (HRS 291D-6).

Accidents.

Good Samaritan Act adopted. (HRS 663-1.5). Duty to give information and render aid. (HRS 291C-14). Duty to report accidents when apparent extent of damages exceeds $3,000. (HRS 287-4). Police are required to disclose traffic accident reports to anyone directly involved in accident or having proper interest. (HRS 291C-20).

Liability of Owner.

No statutes covering liability of owner for negligence of others.

Guests.

No statutes covering liability for injury to guests.

Proof of Financial Responsibility.

Regulated by HRS c. 287.

Insurance.

Tort liability abolished with respect to accidental harm arising from accidents except where death, permanent disfigurement, or significant loss of body part or body function occurs, or where as result of injury, personal injury protection benefits incurred equal or exceed $5,000. (HRS 431:10C-306). Bodily injury and property damage insurance are mandatory for all registered vehicles. (HRS 431:10C). Minimum policy coverage of $20,000 for personal injury and $10,000 for property damage required. (HRS 431:10C-301). Insurer must offer insured opportunity to purchase coverage for damage by owners and operators of uninsured and underinsured vehicles and make available specified additional optional insurance coverage. (HRS 431:10C-301, 302). Insurer has burden of proving legally sufficient offer was made. (72 Haw. 314, 816 P.2d 968). Motor vehicle insurance requirement may be satisfied if vehicle owner provides bond and proof of qualification as self-insurer (HRS 431:10C-105), upon application to commissioner in format approved by commissioner pursuant to rules (HRS 431:10C-105[b]). Claimant or defendant will have option to elect arbitration to resolve claim in tort covered by motor vehicle liability insurance (HRS 431:10C-213-5), but amount of arbitration award shall not be binding on subsequent under insured motorist claim (HRS 431:10C-213.5[9]).

No-Fault Insurance.

Personal injury protection benefits replace no-fault benefits. (HRS 431:10C-304).

Foreign Vehicles.

Nonresidents must register vehicle within 30 days after commencing to operate vehicle or causing or permitting it to be operated within state. (HRS 286-54).

Nonresident Operators.

No statutes restricting operation by validly licensed nonresident operators.

Actions against Nonresidents.

Operation of motor vehicle by resident or nonresident on public highway in state subjects person to state's jurisdiction whether he is nonresident at time of or subsequent to accident. Service of process is of same legal force as upon resident. See category 5 Civil Actions and Procedure, topic 5.20 Process, subhead Nonresidents Generally.

Other matters governed by ordinances of the several islands, differing in their requirements.

Direct Action.

No statutory provisions regarding direct actions against insurers.

Motor Vehicle Carriers.

Economic regulation, safety, equipment, and inspection of commercial motor vehicles regulated by Public Utilities Commission. (HRS c. 271). Certificate or permit required before transporting persons or property for compensation (HRS 271-8, 13), and must carry such insurance protection as Commission requires (HRS 271-17). Motor carrier vehicles must exhibit identification and informational markings. (HRS 286-202.6).

Commercial Motor Vehicles.

Economic regulation, safety, equipment and inspection are regulated by Public Utilities Commission. (HRS c. 271). Certificate or permit required before transporting persons or property for compensation (HRS 271-8, 13), and must carry such insurance protection as Commission requires (HRS 271-17). Motor vehicle carriers shall obtain vehicle identification card by filing form with specified information with director of transportation. (2005, Act 134). Motor carrier vehicles shall operate with mudguards. Commercial motor vehicles are prohibited from being operated on public highways unless vehicle is equipped with fenders, covers, or other devices, including flaps or splash aprons, to minimize spray of water or mud to rear of vehicle. Violation subject to fine. (2005, Act 134).

Motor Vehicle Lease Disclosure Act establishes mandatory disclosures by retail lessor to consumer. (HRS c. 481L).

Seat Belt Requirements.

U.S. Dept. of Transportation approved child passenger restraint system required whenever transporting child under four years old. (HRS 291-11.5). For child four years or older, requirements do not apply if number of persons in vehicle exceeds greatest number of seat belt assemblies, all seat belts are in use, and unrestrained child is in back seat. (HRS 291-11.5). First conviction will result in fine of not more than $100, required attendance at safety class, and $50 driver education assessment. Subsequent convictions result in increased fines to $500. (HRS 291-11.5).

Motor Vehicle Taxes.

All motor vehicles are subject to annual tax according to net weight of each vehicle, except as otherwise provided. (HRS c. 249). Proof of payment of use tax required for registration of vehicles bought out of state. (HRS 286-41[d]).

Rental Motor and Tour Vehicle.

Surcharge Tax. (HRS 251-2). Other rental vehicle provisions. (2009, Act 148 and 2009, Act 47).

Abandoned Vehicles.

Counties may cause vehicles that have been abandoned to be taken into custody and disposed. Abandoned is defined by ordinance of county in which vehicle is located. Vehicle considered abandoned if left unattended for continuous period of more than 24 hours and it is unlawfully parked on easement, or right of way that is adjacent to or part of public highway. (HRS c. 290-1). Counties and housing and community development corporation of Hawaii (HCDCH) are authorized to dispose of abandoned vehicles. Owner, lien holder, or other person with interest in derelict or abandoned vehicle shall be given notice and opportunity to request post-custodial administrative hearing before disposition. (HRS 290-1[c]).

Gasoline Tax.

See category 22 Taxation, topic 22.08 Gasoline and Special Fuels Taxes, subhead Gasoline Tax.

Lemon Law.

See category 3 Business Regulation and Commerce, topic 3.12 Consumer Protection.

Energy Provisions.

Transportation energy initiatives, encouraging acquisition and use of electric cars, including designation of parking spaces for electric vehicles and charging units. (2009, Act 156).

24 Forms

Commercial Code Forms

1
IDAHO LAW DIGEST

—Scope —

Revised for 2010 edition by

MERRILL & MERRILL, CHARTERED of Pocatello.

(All references, unless otherwise indicated, are to Idaho Code, 1947, of which Volume 4 has been expanded to Volumes 4 and 4A, Volume 5 has been expanded to Volumes 5 part one, part two, 5A and 5B, Volume 6 has been expanded to Volumes 6 and 6A, Volume 7 has been expanded to Volumes 7, 7A, and 7B, Volume 8 has been expanded to Volumes 8 and 8A, Volume 9 has been expanded to Volumes 9 and 9A, Volume 10 has been expanded to Volumes 10 and 10A, Volume 11 has been expanded to 11 and 11A, and Volume 12 has been expanded to Volumes 12 and 13. For mode of citation of statutes see category 6 Courts and Legislature, topic 6.04 Statutes. I.R.C.P. indicates Idaho Rules of Civil Procedure. I.R.E. indicates Idaho Rules of Evidence. Session laws are cited by year and chapter number. Parallel citations to the Pacific Reporter begin with 2 Idaho).

Uniform Probate Code adopted, with modifications (15-1-101 to 15-7-401), and in effect. 1975 and 1977 Amendments not adopted. 1979 Amendments adopted.

Note: This Revision incorporates 2009 Acts passed by Legislature during its regular session concluding on *May 8, 2009. Legislature meets annually, commencing on second Mon. of Jan. of each year.*

1 INTRODUCTION

1.01 GOVERNMENT AND LEGAL SYSTEM:

The State of Idaho is a constituent state of the United States of America. For further discussion of the U.S. federal system, see Introduction to the Federal Government of the United States at the beginning of this volume. A great many laws are promulgated by the federal government of the United States and are not reflected in the topics below. See the Introduction to this volume for references to the federal law topics covered.

Like all but one of the United States, Idaho has a common law legal system, with roots in English common law. For information on the courts and legislature of Idaho, see category 6 Courts and Legislature.

1.02 [RESERVED]

1.03 HOLIDAYS:

Legal holidays are Sundays, Jan. 1, 3d Mon. in Jan., 3d Mon. in Feb., last Mon. in May, July 4, 1st Mon. in Sept., 2d Mon. in Oct., Nov. 11, 4th Thurs. in Nov., Dec. 25. (I.C. 73-108).

Mar. 31 designated Civilian Conservation Corps Recognition Day. (H.C.R. No. 26).

Apr. 28 designated as Equal Pay Day. (H.C.R. No. 23).

Sept. 17 designated Constitutional Commemorative Day. (I.C. 73-108B).

Holiday Falling on Sunday.

Where day fixed by law or contract for doing an act falls on holiday, performance on next business day is sufficient. When any legal holiday falls on Sun. following Mon. shall be holiday. (I.C. 73-108 to I.C. 73-110).

Holiday Falling on Saturday.

When any legal holiday falls on Sat. preceding Fri. shall be holiday. (I.C. 73-108).

Legality of Transaction on Saturday, Sunday or Holiday.

No statutory prohibition against making contracts or enforcing.

1.04 OFFICE HOURS AND TIME ZONE:

Idaho is in the Mountain Standard (GMT -07:00) time zone. Office hours are generally from 9 a.m. to 5 p.m.

2 BUSINESS ORGANIZATIONS

2.01 AGENCY:

In general, rules of common law apply to principals and agents, in absence of legislation. An agent fraudulently making false statements to a principal as to price, quantity or quality of property entrusted to him for sale is guilty of misdemeanor. (I.C. 18-3105).

2.02 ASSOCIATIONS:

Associations having or exercising any powers or privileges of corporations not possessed by individuals or partnerships are governed by Idaho Business Corporation Act. (30-1-101). Subject to provisions of anti-trust (I.C. 48-101 to I.C. 48-119) and blue sky (I.C. 30-1401) laws. Insurance Guaranty Association Act adopted to pay covered claims and avoid delay and financial loss due to insolvency of insurers. (I.C. 41-3601 to I.C. 41-3621). See category 16 Insurance, topic 16.01 Insurance Companies, subhead Supervision.

Professional Associations or Corporations.

See topic 2.03 Corporations, subhead Professional Associations or Corporations.

2.03 CORPORATIONS:

For unincorporated organizations, see topic 2.02 Associations; see also topic 2.04 Joint Stock Companies.

Model Business Corporation Act adopted, effective July 1, 1979. (30-1-1 to 30-1-152). Amendments proposed subsequent to Aug., 1977 not adopted, except as noted herein. Dec., 1979 amendments not adopted. Revised Model Business Corporation Act of 1984 adopted, effective July 1, 1997. Model Business Corporation Act, 3rd edition, adopted, effective Mar. 24, 2004. (30-1-101 to 30-1-1704). Following are changes and omissions to Model Act:

Idaho Business Corporation Act uses numbers for subsections instead of letters. Also replaces “Act” with “Chapter” throughout.

§ 1.02 In subsection (d) add “or, if electronically transmitted, it must be in a format that can be retrieved or reproduced in typewritten or printed form.” In subsection (g) delete: “(1) the corporate seal, (2) an attestation by the secretary or an assistant secretary, (3) an acknowledgment, verification, or proof.” and add “a corporate seal, attestation, acknowledgment or verification.” In subsection (i) delete “and must be accompanied by one exact or conformed copy (except as provided in sections 5.03 and 15.09), the correct filing fee, and any franchise tax, license fee, or penalty required by the Act or other law,” add “Delivery may be made by electronic transmission if and to the extent permitted by the Secretary of State. If it is filed in typewritten or printed form and transmitted electronically, the Secretary of State may require one (1) exact or conformed copy to be delivered with the document, except as provided in sections 30-1-503 and 30-1-1509, Idaho Code.” Add paragraph (10) which reads: “When the document is delivered to the office of the Secretary of State for filing, the correct filing fee, and any other fee or penalty required to be paid therewith by this chapter or other law must be paid or provision for payment made in a manner permitted by the Secretary of State.”

§ 1.20 Subsection (i) delete “and any franchise, tax, license fee” and insert “and any other fee”.

§ 1.21 In subsection (a) delete “may” and add “shall”. Delete subsections (a)(1) and (a)(2) and add “(a) A foreign corporations application for a certificate of authority, amended certificate, to transact business in this state;". In subsection (b) delete "may".

§ 1.22 After "Article of incorporation" insert "$100.00", after "Application for use of deceptively similar name" insert "$20.00", after "Application for reserved name" insert "$20.00", after "Notice of transfer of reserved name" insert "$20.00", after "Application for registered name" insert "$60.00", after "Application for renewal of registered name" insert "$60.00", after "Corporation's statement of change of registered agent or registered office of both" insert "No fee", after "Agent's statement of change of registered office for each affected corporation" delete "not to exceed a total of" and insert "No fee", after "Amendment of articles of incorporation" insert "$30.00", after "Restatement of articles of incorporation with amendment of articles" insert "$30.00", after "Articles of merger or share exchange" insert "$30.00", after "Articles of dissolution" insert "$30.00", after "Articles of revocation of dissolution" insert "$30.00", after "Application for reinstatement following administrative dissolution" insert "$30.00", after "Application for certificate of authority" insert "$100.00", after "Application for amended certificate of authority" insert "$30.00", after "Application for certificate of withdrawal" insert "$20.00", after "Annual report" insert "No fee", after "Articles of correction" insert "$30.00", delete "Application for" in subsection (25), after "certificate of existence or authorization" insert "$10.00", after "Any other document required or permitted to be filed by this Act" insert "$20.00", add "(aa) Any document when the filing party requires the certificate therefor to be returned within eight (8) working hours, a surcharge of $20.00; (bb) Any non-typed document which required a fee, a surcharge of $20.00", after "(b) The Secretary of State shall collect a fee of" insert "ten dollars ($10.00)", insert "twenty-five cents (25¢)" in subsection (c)(1), insert "ten dollars ($10.00)" in subsection (c)(2).

§ 1.23 delete subsection (1), add; "(a) At the date and time of filing, as evidenced by such means as the Secretary of State may use for the purpose of recording the date and time of filing; or".

§ 1.24 Replace "incorrect statement" with "inaccuracy" throughout section. Add: "(1)(c) The electronic transmission was defective," delete "specify the incorrect statement and the reason it is incorrect or the manner in which the execution was defective", add "specify the inaccuracy of defect to be corrected".

§ 1.25 Delete subsection (b), add "(2) The Secretary of State files a document by recording it as filed on the date and time of receipt. After filing a document, except as provided in section 30-1-503 and 30-1-1509, Idaho Code, the Secretary of State shall deliver to the domestic or foreign corporation or its representative a copy of the document with an acknowledgment of the date and time of filing".

§ 1.26 After "may appeal the refusal within 30 days after the return of the document," add "to the Fourth Judicial District Court of the County of Ada, State of Idaho".

§ 1.27 Delete this section, add "A certificate from the Secretary of State delivered with a copy of a document filed by the Secretary of State is prima facie evidence that the original document is on file with the Secretary of State."

§ 1.28 Delete "and the period of its duration if less than perpetual", delete subsections (3) through (5), replace "conclusive evidence" with "prima facie evidence".

§ 1.29 Insert "punishable by a fine of not to exceed five hundred dollars ($500)."

§ 1.40 After "(5) Deliver" add "or 'delivery' means any method of delivery used in conventional commercial practice, including delivery by hand, mail, commercial delivery and electronic transmission", in subsection (10) after "not-for-profit corporation" insert "limited liability company", in subsection (11) delete "for profit" after "." and ", but does not include 'federally chartered corporations' which are incorporated under the laws of the United States" add "(20)

Receipt of a document sent by first class mail, in the absence of evidence of earlier actual receipt by the addressee, means five (5) days after the document is mailed postpaid and correctly addressed." Add "(25) 'Sign' or 'Signature' includes any manual, facsimile, conformed or electronic signature." Add "(28) 'Treasury shares' means shares of a corporation which have been issued, have been subsequently acquired by and belong to the corporation and have not, either by reason of the acquisition or thereafter, been canceled or restored to the status of authorized by unissued shares. Treasury shares shall be deemed to be 'issued' shares, but not 'outstanding' shares."

§ 1.41 At end of subsection (a) add "Notice by electronic transmission is written notice." After "Notice may be communicated in person:" delete rest of sentence, add "by mail or other method of delivery; or by telephone, voice mail or other electronic means." After "is effective" in (c) delete rest of subsection and add "(a) Upon deposit in the United States mail, if mailed postpaid and correctly addressed to the shareholder's address shown in the corporation's current record of shareholders; or (b) When electronically transmitted to the shareholders in a manner authorized by the shareholders." In subsection (d), replace "principal office" with "correspondence address." Delete "as evidenced by the postmark" in subsection (e)(2).

Delete § 1.42.

§ 2.03 Replace "conclusive proof" with "prima facie proof".

§ 2.04 Delete "knowing, there was no incorporation" and add "when there was no corporation".

§ 4.01 After "in another language;" add "provided however that if the word 'company' or its abbreviation is used it shall not be immediately preceded by the word 'and' or by an abbreviation of or symbol representing the word 'and:', after subsection (b)(4) add "(e) the name of any limited partnership, limited liability partnership or limited liability company which is organized under the laws of this state or registered to do business in this state." Delete subsection (e) and add: "(5) This chapter does not control the use of assumed business names, governed by 'The Assumed Business Names Act of 1997.' Chapter 5, title 53, Idaho Code. (6) Nothing in this section shall abrogate or limit the law as to unfair competition or unfair practice in the use of trade names, nor derogate from common law, the principles of equity, or the statutes of this state or of the United States with respect to the right to acquire and protect trade name. (7) The assumption of a name in violation of this section shall not affect or vitiate the corporate existence, but the courts of this state, or of any person, unincorporated association, or corporation interested or affected, enjoin such corporation in violation from doing business under any name assumed in violation of this section."

§ 5.01 Add "or a domestic limited liability company" after "not-for-profit domestic corporation" in subsection (2)(11), add "or a foreign limited liability company" after "not-for-profit foreign corporation" in subsection (2)(iii).

§ 5.02 Add "(3) A corporation may also change its registered office or its registered agent, or both, by indicating such change in the appropriate space on the annual report required by section 30-1-1622, Idaho Code."

§ 6.20 Add "(6) A subscription for stock of a corporation, whether made before or after the formation of a corporation, shall not be enforceable against the subscriber or the corporation, unless in writing and signed by the party to be bound."

§ 6.21 Delete "or benefit to the corporation," and "contracts for services to be performed," in subsection (a), delete "a contract for future services or benefits" and "the services are performed,", "or the benefits are not received", "the services are not performed", "or the benefits are not received” from subsection (e).

§ 6.24 After “for which the shares are to be issued” add “, unless the power to make such determination is reserved to the shareholders by the articles of incorporation.”

§ 6.31 Add “(4) A corporation has authority to use, hold, acquire, cancel and dispose of treasury shares. (5) Unless the board of directors adopts an amendment to the corporation's articles of incorporation to reduce the number of authorized shares, treasury shares of the corporation that are canceled shall be treated as authorized by unissued shares.”

§ 7.03 Delete “within the earlier of 6 months after the end of the corporation's fiscal year or” in subsection (a)(1).

§ 7.20 Delete “beginning two business days after notice of the meeting is given” and add “at least ten (10) days before the meeting” in section (b).

§ 7.28 Delete subsection (d).

§ 7.40 Delete subsection (2).

§ 8.05 Delete “(d)” and add “(4) A director elected to fill a vacancy shall be elected for the unexpired term of his predecessor in office.”

§ 8.09 After “The” add “Idaho district court” in subsection (a).

§ 8.20 Delete “the board of directors may permit” in subsection (b).

§ 8.57 Add “provided that banks, savings and loan associations and credit unions chartered under the laws of the state of Idaho may provide indemnification only by insurance.”

§ 8.58 Add “Other than the rights to mandatory indemnification under section 30-1-852, Idaho Code and to court-ordered indemnification and advances for expenses under section 30-1-854, Idaho Code.” to end of subsection (c).

§ 9.01 Add subsection (2) “purports to change the domicile of an insurance company.”

§ 9.02 Delete “a domestic or”, “or eligible entity” and “or eligible entity” from subsection (a).

Add “the public utility commission or another governmental agency” after department of insurance in subsection (a). Delete subsection (b).

§ 9.20 Delete subsections (b), (c), (d) and (e).

Delete § 9.21.

Delete § 9.23.

§ 9.24 Delete subsection (b).

Delete §§ 9.30-9.56.

§ 10.04 Delete subsection (d).

§ 13.02 Delete subsections (a)(6), (a)(7) and (a)(8).

§ 14.01 After “May not contain language” under (1)(b) add “falsely”, and after “stating or implying” under (1)(b) add “government affiliation or stating or implying”.

§ 14.07 After “commenced within” delete “three years” add “two (2) years” in subsections (b)(3) and (c).

§ 14.20 After “The secretary of state may” delete “commence a proceeding under section 14.21 to” after “corporation” add “under section 30-1-1421, Idaho Code,”, delete (1), after “secretary of state” delete “within 60 days after it is due” and add “by the date on which it is due;”, delete (4) and add “(3) The secretary of state has credible information that the corporation has failed to notify the secretary of state within sixty (60) days after the occurrence that its registered agent or registered office has been changed, that its registered agent has resigned, or that its registered office has been discontinued;”.

§ 14.21 After “he shall” delete “serve the corporation with written notice of his determination under section 5.04” add “give notice of his determination to the corporation by first class mail addressed to its mailing address as indicated on its most recent annual report or, if the corporation has not yet filed an annual report, to its registered office.” Delete “after service of the notice is perfected under section 5.04” and add “after receipt of the notice of determination”, delete “by signing a certificate of dissolution that recites the ground or grounds for dissolution and its effective date. The secretary of state shall file the original of the certificate and serve a copy on the corporation under section 5.04.” Replace with “by noting the fact of dissolution and the effective date thereof in his records. The secretary of state shall give notice of dissolution to the corporation by first class mail addressed to its mailing address as indicated on its most recent annual report or, if the corporation has not yet filed an annual report, to its registered office.”

§ 14.22 Delete “within two years”, add “within ten (10) years”, delete (1)-(4), add “(a) Recite the name of the corporation and the date of its incorporation; (b) State that the corporation applies for reinstatement; (c) If the corporation's name or one deceptively similar thereto has been appropriated by another entity whose organizational documents are filed with the secretary of state, be accompanied either by consent to the use of a deceptively similar name executed by the other entity or by articles of amendment by which the corporation adopts a new name which complies with the requirements of section 30-1-4-1, Idaho Code; and (d) Be accompanied by a current annual report, appointment of registered agent or articles of amendment to extend the corporate existence, as appropriate to the reason for administrative dissolution.” Delete “certificate of”, delete “his determination and the effective date of reinstatement, file the original of the certificate, and serve a copy on the corporation under Section 5.04.”, add “the first and effective date of the reinstatement, file a copy thereof and return original to the corporation.”

§ 14.23 Delete “shall serve the corporation under section 5.04”, add “shall give the corporation written notice by first class mail.”

§ 14.30 Delete “or the business affairs of the corporation can no longer be conducted to the advantage of the shareholders generally”, after (2)(ii), add “and irreparable injury to the corporation is threatened or being suffered by reason thereof;”, delete “(iv) the corporate assets are being misapplied or wasted;”.

§ 14.34 After first sentence in subsection (a) add “In a proceeding under section 30-1-1430(2), Idaho Code, to dissolve a corporation that has shares listed on a national securities, exchange or regularly traded in a market maintained by one (1) or more members of a national or affiliated securities association, the corporation may elect to purchase all shares owned by the petitioning shareholder at the fair value of the shares.”

§ 14.40 Delete “treasure or other appropriate state official for safekeeping. When the creditor, claimant, or shareholder furnishes satisfactory proof of entitlement to the amount deposited, the state treasurer or other appropriate state official shall pay him or his representative that amount."

§ 15.02 Delete "(d)" and add "(4) A foreign corporation which transacts business in this state without a certificate of authority shall be liable to this state, for the years or parts thereof during which it transacted business in this state without a certificate of authority, in an amount equal to all fees which would have been imposed under this chapter upon such corporation had it duly applied for and received a certificate of authority to transact business in this state as required by this chapter and thereafter filed all reports required by this chapter, plus all penalties imposed under this chapter for failure to pay such fees. The attorney general may collect all penalties due under this section."

§ 15.04 Delete "(2) the period of its duration;".

§ 15.06 Delete "(b)(1)" and "(b)(2)" add "(a) The name of any corporation, limited liability company, limited partnership or limited liability partnership organized under the laws of this state or authorized to transact business in this state; (b) A reserved or registered name for a corporation, limited liability company or limited partnership;", delete "the fictitious name of another foreign corporation (authorized to transact business in this state)". Add "a name which is deceptively similar to the name of another corporation, limited liability company, limited partnership or limited liability partnership which is organized under the laws of this state or which is authorized to transact business in this state." Delete "and submits an undertaking in form satisfactory to the secretary of state to change its name to a name that is distinguishable upon the records of the secretary of state from the name of the applying corporation"; after "domestic or foreign corporation" add "or limited liability company", delete "(d)(1)", delete "corporation" in (d)(2), and add "entity".

§ 15.07 Add "domestic limited liability company" after "domestic corporation" in subsection (2)(ii), add "foreign limited liability company" after "not-for-profit foreign corporation" in subsection (2)(iii).

§ 15.08 After "(either on statement or attached to it)" add "or in the corporation's next annual report filed with the secretary of state,".

§ 15.10 After "application for a certificate of authority or" add "the correspondence address indicated".

§ 15.20 Delete "and appoints the secretary of state as its agent for service of process in any proceeding based on a cause of action arising during the time it was authorized to transact business in this state;" and add "agrees that service may be made on it by mailing copies of any process, notice or demand by registered or certified mail to the corporation and its officers at the addresses shown on the most current annual report filed with the secretary of state or as shown on any application for withdrawal of a corporation that has withdrawn from Idaho;", delete "(4)" and add "(d) A mailing address at which the service may be made under paragraph (c) of this subsection;", delete "on the secretary of state" in subsection (c), delete sentence beginning "Upon receipt of process" in subsection (c).

§ 15.30 Delete "within 60 days after its due" in subsection (1), add "by the date on which it is due;" delete "(2)", add "The secretary of state has credible information that" at beginning of (3) and (4).

§ 15.31 After "he shall" delete "serve the foreign corporation with written notice of his determination under section 15.10", add "give notice of his determination to the foreign corporation by first class mail addressed to its mailing address as indicated on its most recent annual report or, if the foreign corporation has not yet filed an annual report, to its registered office.” Delete “within 60 days after service of the notice is perfected under section 15.10,” and add “within sixty (60) days after receipt of notice of determination,”, delete “by signing a certificate of revocation that recites the ground or grounds for revocation and its effective date.” Delete sentence beginning “The secretary of state shall file”, add “by noting the fact of revocation and the effective date thereof in his records. The secretary of state shall give notice of the revocation to the foreign corporation by first class mail addressed to its mailing address as indicated on its most recent annual report, or if the foreign corporation has not yet filed an annual report, to its registered office.” Delete “certificate revoking” and add “notice of revocation”, delete “(d)”, add “(4) Service of process on a foreign corporation whose certificate of authority has been revoked may be made upon its registered agent, if any, or pursuant to section 30-1-1510, Idaho Code.”

§ 16.02 After “A shareholder may inspect and copy the records described in subsection (b) only if” add “(a) He has been a holder of record of shares or of voting trust certificates for at least six (6) months immediately preceding his demand or shall be the holder of record of, or the holder of record of voting trust certificates for, at least five percent (5%) of all the outstanding shares of the corporation;”.

§ 16.20 After “A corporation” add “upon written shareholder request”, after “annual financial statements” add “or, if annual financial statements are not available, other appropriate accounting records”, delete “(c)”.

§ 30-1-1621, Other Reports to Shareholders, is added. If corporation indemnifies or advances expenses to director or issues or authorizes shares for promissory notes, corporation will report such actions to shareholders.

§ 16.21 is § 30-1-1622. Delete subsection “(3)”, add “(c) The address to which correspondence to the corporation's officers may be mailed;” delete subsections “(5)”, “(6)” and “(7)”. Delete subsection “(c)”, add “(3) the annual report shall be executed by one of the persons identified in section 30-1-120, Idaho Code, or by another person who is authorized by the board of directors to execute the report. (4) No annual report need be filed during the first year after the corporation is incorporated or authorized to transact business in the state. The first, and all subsequent annual reports shall be delivered to the secretary of state each year before the end of the month during which a domestic corporation was initially incorporated or a foreign corporation was initially authorized to transact business.” Add following after subsection (d) “(6) The secretary of state may, in his discretion, develop an alternative electronic method for distributing annual report forms and accepting complete and correct annual reports online. Such electronic forms shall require the same information provided in subsection (1) of this section. In the absence of execution, authentication of the annual reports shall be accomplished in a manner within the discretion of the secretary of state.”

Income Tax.

See category 22 Taxation, topic 22.10 Income Tax.

Investment Trusts.

No statutory provision.

Professional Associations or Corporations.

One or more individuals licensed or otherwise legally authorized to render same professional services within state may organize and own stock in professional service corporation. Professions limited to practices of architecture, chiropractic, dentistry, engineering, landscape architecture, law, medicine, nursing, occupational therapy, optometry, physical therapy, podiatry, professional geology, psychology, certified or licensed accountancy, social work, surveying, and veterinary medicine. (I.C. 30-1303). May be simultaneously officer, etc., of only one professional corporation. (I.C. 30-1315). Business Corporation Act applies except as otherwise specifically provided. (I.C. 30-1301 to -1314).

Deeds.

See category 21 Property, topic 21.06 Deeds.

Model Non-Profit Corporation Act not adopted. Idaho Nonprofit Corporation Act allows nonprofit groups to incorporate for "any lawful purposes". (30-3-1 to 30-3-145).

Uniform Simplification of Fiduciary Security Transfers Act adopted. (I.C. 68-901 to I.C. 68-911).

Uniform Commercial Code adopted. (28-1-101 to I.C. 28-10-104). See category 3 Business Regulation and Commerce, topic 3.09 Commercial Code.

Nonprofit Corporation Act.

Extensive filing requirements, regulations, powers and limitations. (30-3-1 to 30-3-145).

Limited Liability Companies.

See topic 2.06 Limited Liability Companies.

Uniform Unincorporated Nonprofit Association Act adopted. (I.C. 53-701 to I.C. 53-717).

2.04 [RESERVED]

2.05 JOINT STOCK COMPANIES:

They are subject to provisions of state anti-trust and blue sky laws and to I.C. 53-501 to I.C. 53-507, relating to companies conducting business under name other than true name of person interested. See topic 2.02 Associations.

Professional Associations or Corporations.

See topic 2.03 Corporations, subhead Professional Associations or Corporations.

2.06 LIMITED LIABILITY COMPANIES:

Limited Liability Company Act.

Uniform Limited Liability Company Act adopted 2008. (I.C. 30-6-101 to I.C. 30-6-1104, see also I.C. 63-3006A).

2.07 [RESERVED]

2.08 PARTNERSHIPS:

Uniform Limited Partnership Act—Repealing Chapter 2 Title 53 Idaho Code and replacing it with new Chapter 2:

Adopting Uniform Limited Partnership Act with following exceptions:

§ 102—delete (d);

§ 108(d) insert “must not falsely imply government affiliation and” after “partnership” and before “must”;

§ 114 (a)(2) replace w/ “A registered agent who with reasonable diligence may be found at the address of the registered office for service of process”. Replace § 114 (b) with “a foreign limited partnership shall designate and continuously maintain in this state a registered agent at the street address of its registered office for service of process”. § 114 (c) A registered agent of a limited partnership or foreign limited partnership must be an individual who is a resident of this state or other person authorized to transact business in this state.

Replace § 115 as “Change of registered officer or registered agent.—(a) In order to change its registered agent or the address of its registered agent, a limited partnership or a foreign limited partnership may deliver to the secretary of state for filing a statement of change containing: (1) The name of the limited partnership or foreign limited partnership; (2) The street address of its current registered agent and office; (3) If the current registered office is to be changed, the new street address of the registered agent and office; and (4) If the current registered agent or an address of the registered agent is to be changed, the new information.” (b) remains the same.

§ 116 Renamed “Resignation of registered agent.” (a) delete “an agent of service for process” and replace “a registered agent” and insert “registered” between “the” and “agent” (b) replace “designated” with “principal” and insert a “.” after “foreign limited partnership” and delete the rest of the sentence.

§ 117 (a) replace “An agent for service of process” with “A registered agent” (b) insert “registered” between “the” and “agent” and delete “for service of process” and replace from “agent's address” to the end of sentence with “address of the registered office, the limited partnership or foreign limited partnership may be served by registered or certified mail, return receipt requested, addressed to any general partner at the principal address of the limited partnership.” delete (c) and (e). § 201(a)(2) replace “designated” with “principal” and insert “registered” between “initial” and “agent” replace “for service of process” with “at the registered office”.

§ 207 add “(d) No filing may be effective prior to the time it is received and filed by the secretary of state.”

§ 210 (a)(2) replace “designated” with “principal”, delete “and mailing”, insert “registered” between, “its” and “agent” and replace “for service of process” with “and registered office”. Delete (3) and add a new subsection stating “The name and mailing address of one (1) or more general partners.” § 210 replace (c) with “No annual report need be filed during the first year after a limited partnership is formed or authorized to transact business in this state. The first and all subsequent annual reports shall be delivered to the secretary of state each year before the end of the month during which a limited partnership was originally formed or a foreign limited partnership was initially authorized to transact business.” (e) replace “designated” with “registered” and replace “an agent for service of process” with “a registered agent”.

§ 406 delete (f). § 601(b)(1) add “, provided however, a limited partner dissociating under this section shall thereafter have the status of a mere transferee as provided in section 602(a)(3).” between “person” and “:”.

§ 801 Insert “The dissolution date, if any specified in the certificate of limited partnership, provided however, that the limited partnership's existence shall continue until the first to occur of the events described in subsections (2) through (6) of this section. If a dissolution date is specified in the certificate of limited partnership, and unless the limited partnership agreement provides otherwise, the certificate of limited partnership may be amended and the existence of the limited partnership may be extended by the vote of all the general partners and of all limited partners owning the rights to receive distributions as limited partners at the time consent is to be effective:" as a new (1). § 801 (2) insert "written" between "the" and "consent" and replace (3) with "After dissociation of the last remaining general partner, if by the ninetieth day following such dissociation, the limited partners have failed to vote to admit one (1) or more general partners:"

§ 809 delete (a)(1)(2)(b)(c) and replace with "(a) The secretary of state may dissolve a limited partnership administratively if: (1) The limited partnership does not deliver its annual report to the secretary of state within sixty (60) days of its due date: or (2) The limited partnership is without a registered agent or registered office in this state for sixty (60) days or more. (b) If the secretary of state determines that a ground exists for administratively dissolving a limited partnership, the secretary of state shall mail a notice of dissolution to the limited partnership. (c) If within sixty (60) days after service of the copy the limited partnership does not correct each ground for dissolution or demonstrate to the reasonable satisfaction of the secretary of state that each ground determined by the secretary of state does not exist, the secretary of state shall administratively dissolve the limited partnership by noting the fact of dissolution and the effective date thereof in his records. The secretary of state shall give notice of the dissolution to the limited partnership by first class mail addressed to its mailing address as indicated on its most recent annual report or, if the limited partnership has not yet filed an annual report, to its principal office."

§ 810 replace (a)(1)(2)(3)(b) with "A limited partnership administratively dissolved under section 53-2-809, Idaho Code, may apply to the secretary of state for reinstatement within ten (10) years after the effective date of dissolution. The application must: (1) Recite the name of the limited partnership at the time of its dissolution and the date of its organization; (2) State that the limited partnership applies for reinstatement; (3) State that the limited partnership's proposed name satisfies the requirements of section 53-2-108, Idaho Code; and (4) Be accompanied by a current annual report or appointment of registered agent, as appropriate to the reason for administrative dissolution. (b) If the secretary of state determines that the application contains the information required by subsection (1) of this section and that the information is correct, he shall cancel the dissolution and prepare a certificate of reinstatement that recites the fact and effective date of the reinstatement, file a copy thereof and return the original to the limited partnership."

Delete §§ 1204 1205.

§ 1206 (a)(1) insert "July 1, 2006," as effective and inclusive date.

Mining partnerships are provided for and regulated. (I.C. 53-401 to I.C. 53-412).

Out-of-State Partnerships.

Must register with secretary of state. Registration requires submission of application, signed and sworn by general partner setting forth name of foreign limited partnership, state and date of formation, general character of business, name and address of registered agent, principal office of foreign limited partnership, and list of names and addresses of partners. Application to be accompanied by copy of certificate of limited partnership certified by official where original is filed. (I.C. 53-249).

3 BUSINESS REGULATION AND COMMERCE

3.01 BANKS AND BANKING:

Governing statute is Title 26, cc. I.C. 1-16. (I.C. 26-101 to I.C. 26-2613).

Uniform Commercial Code adopted. (28-1-101 to I.C. 28-10-104). See topic 3.09

Commercial Code.

Uniform Consumer Credit Code adopted 1971, repealed Mar. 31, 1983. Idaho Credit Code adopted Apr. 1, 1983. (I.C. 28-41-101 to I.C. 28-49-107). See topic 3.11A Consumer Credit.

Stockholders' Liability.

No special provision for.

Lien.

A banker has a general lien on all property in his hands belonging to a customer for the balance due from such customer in the course of the business. (I.C. 45-808).

Collections.

See topic 3.09 Commercial Code.

Deposits.

Whenever minor, or other person under disability becomes depositor in his name, bank may pay on check or order of said individual without liability. (I.C. 26-718). Deposit in name of two or more payable to any of such persons or survivor, may be paid to any of said persons whether other be living or not. (15-6-109). Deposits in trust for another, in absence of further notice, may be paid to beneficiary upon proof of death of trustee. (15-6-111). Multi-party accounts designated as joint account, trust account, or P.O.D. account are authorized. P.O.D. account is account payable on request to one or more persons during his lifetime and on his death to one or more P.O.D. (pay on death) payees. (15-6-101). P.O.D. account belongs to original payee(s) during his lifetime and not to P.O.D. payee(s). Upon death of original payee(s) amounts on deposit belong to P.O.D. payee(s) or survivor of them. (15-6-104). Transfers resulting are nontestamentary for joint accounts, P.O.D. accounts and trust accounts. (15-6-106). Payment by bank upon authorized signature or to P.O.D. payee(s) upon proof of death of original payee(s) relieves bank of responsibility. (15-6-108 to 15-6-112).

Deposit of Trust Funds.

Funds held by any bank or trust company as trustee may be deposited in such bank or trust company in its name as trustee, in savings account or in time certificates of deposit provided that payment of deposit is insured by Federal Deposit Insurance Corporation. (I.C. 26-1312).

Uniform Common Trust Fund Act adopted (I.C. 68-701), without provision for court accounting.

Uniform Probate Code adopted, effective July 1, 1972, (15-1-101 to 15-7-401). See category 13 Estates and Trusts, topics 13.09 Executors and Administrators, 13.13 Trusts, 13.16 Wills.

Unclaimed Deposits.

Uniform Unclaimed Property Act (1981) adopted effective July 1, 1983. (I.C. 14-501 to I.C. 14-542). See category 21 Property, topic 21.01 Absentees, subhead Escheat.

Trust companies have authority to act as fiduciary, which means personal representative of decedent's estate, guardian or conservator of estate, receiver, trustee under appointment of any court or under authority of any law or one acting as trustee for any purpose permitted by law. Fiduciary responsibilities may be transferred to affiliated banks or trust companies unless prohibited by I.C. § 68-107. (I.C. §§ 26-1401 to I.C. 26-1404). Federal Home Loan Bank securities and mutual fund investments are permitted. (I.C. 68-404 and I.C. 68-404A).

State banks and trust companies can engage in trust business in Idaho. (I.C. 26-3202). Banks and other depository institutions, including foreign banks and trust companies, can engage in trust business on multi-state and international basis. (I.C. 26-3202). Idaho Trust Institutions Act adopted. (I.C. 26-3201 to I.C. 26-3609).

Guaranty title and trust companies organized under Tit. 30, c. 9 may furnish abstracts of title to real estate, guarantee title and make insurance pertaining thereto, act as assignee, receiver, guardian, executor, administrator, with president or secretary empowered to take necessary oaths, to act as fiscal or transfer agent of state, municipality, body politic or corporation, to take and hold real property as may have been or may hereafter be subject of insurance made by such company, and dispose of same, to act as escrow agent, to become security on writ of error, appeal or court proceedings. (I.C. 30-901 to -908). Any company organized under Tit. 30, c. 9, prior to 1951 amendment may retain old powers, which included banking and general trust business. (I.C. 30-901[8]). Capital deemed security. (I.C. 30-904). Securities and other valuables may be deposited in company by court, guardians, executors, administrators, trustees. (I.C. 30-906 to I.C. 30-907).

Foreign Banks.

No special provision for. See categories 13 Estates and Trusts, topic Executors and Administrators; Family, topic Guardian and Ward.

Confidential communications between financial institutions and department of finance are privileged from disclosure. (I.C. 26-1111 to I.C. 26-1112).

3.02 BILLS AND NOTES:

Uniform Commercial Code adopted. (28-1-101 to I.C. 28-10-104). See topic 3.09 Commercial Code.

Uniform Consumer Credit Code adopted 1971, repealed Mar. 31, 1983. Idaho Credit Code adopted Apr. 1, 1983. (I.C. 28-41-101 to I.C. 28-49-107). See topic 3.11A Consumer Credit.

Drawing checks without funds or without sufficient funds with intent to defraud is punishable: (a) Not to exceed three years in jail or $5,000 fine, or both if no funds whatsoever in bank; (b) if check is less than $50 and insufficient funds, county jail up to six months and/or $300 fine; for second conviction, county jail up to one year and/or fine up to $1,000; for subsequent conviction, up to three years and/or up to $5,000 fine; (c) if check is $50 or over and insufficient funds, up to three years and/or up to $5,000. Making, drawing, or delivering such check is prima facie evidence of intent and knowledge of no funds or insufficient funds. (I.C. 18-3106).

Checks dishonored and not paid 15 days after notice sent, drawer liable for 12% interest from date of dishonor, cost of collection up to $20 or amount of check, whichever is less, and, if court action, may secure attorney fee. (28-3-510A.B.C.). See topic Commercial Code for section discussion. Dishonored checks for lack of funds, credit, or no account, plaintiff may recover amount of check, draft, or order and, in addition thereto, greater of amount of one hundred dollars ($100) or three (3) times amount for which check, draft, or order is drawn; but recovery cannot exceed value of check by more than $500, provided written demand for check amount has been made not less than ten days prior to action. (I.C. 1-2301A). Successful plaintiffs may also recover service fee (not to exceed $25) and court filing fees. (I.C. 1-2304).

Judgment Notes.

No statutory provision.

Attorney fee clause, if judgment granted, allowable. (48 Idaho 419, 282 P. 862; 78 Idaho 298, 301 P.2d 1111). Attorney fees in collection action allowed by statute. (I.C. 12-120).

See also topic 3.20 Monopolies, 3.22 Restraint of Trade and Competition.

Special Defenses.

See topic 3.11A Consumer Credit.

3.03 BILLS OF LADING:

See topic 3.09 Commercial Code.

3.04 BILLS OF SALE:

See topic 3.23 Sales.

3.05 BLUE SKY LAW:

See topic 3.24 Securities.

3.06 BROKERS:

Uniform Commercial Code adopted. (28-1-101 to I.C. 28-10-104). See topic 3.09 Commercial Code.

Licenses.

$100 license fee and application required by person acting as commission merchant, dealer, broker, and $25 if agent dealing in farm produce. (I.C. 22-1303).

Bond.

Application for license to act as broker, dealer, or commission merchant dealing in farm produce must be accompanied by bond or certificate of deposit payable to director in approved form and in amount of $10,000. (I.C. 22-1304).

Real estate brokers must be licensed. (I.C. 54-2002). Real Estate Commission, appointed by governor (I.C. 54-2005), must examine applicants (I.C. 54-2014). Applicant for broker's license and salesperson's license, in addition to other requirements, must take examination and pay examination fee. For salesperson's license, applicant must have 90 correspondence hours. (I.C. 54-2022). Also, brokers license applicant must have been actively engaged as real estate salesperson for two years. (I.C. 54-2012). Annual license fee is $150. (I.C. 54-2020). Partnerships and corporations may hold license provided requirements of I.C. 54-2016 complied with. Errors and omissions insurance required for all real estate licenses. (I.C. 54-2013).

Idaho Code, I.C. 54-2017, providing for reciprocal licensing agreement with nonresident brokers and nonresident salespersons repealed Mar. 2005.

Splitting fee with nonlicensed person is unlawful. (I.C. 54-2054). Contracts for commissions for procuring purchasers for real property must be in writing setting out fixed amount to be paid (89 Idaho 107, 403 P.2d 585), signed by owner or his authorized agent (I.C. 9-508). No statutory provision for lien.

See topic 3.24 Securities.

3.07 BULK SALES:

See topic 3.09 Commercial Code; category 8 Debtor and Creditor, topic 8.08 Fraudulent Sales and Conveyances.

3.08 CARRIERS:

Intra-state carriers are subject to jurisdiction of Idaho Public Utilities Commission. Annual fees required, apportioned on gross operating revenue, to defray cost of regulating. (I.C. 61-1001 to -1009). Such carriers must file schedules of rates, make reports, carry liability and property damage insurance, etc. Commission may fix rates and assess fee for registrations of authority consistent with federal law. (I.C. 61-801 to I.C. 61-817). Commission may enter into reciprocal agreements with other states for regulation of carriers. (I.C. 61-815A).

Discrimination and preferences prohibited.

Uniform Commercial Code adopted. (28-1-101 to I.C. 28-10-104). See topic 3.09 Commercial Code.

Limiting Liability.

Uniform Commercial Code adopted (28-1-101 to I.C. 28-10-104), effective Dec. 31, 1967, midnight. See topic 3.09 Commercial Code.

Bills of Lading.

Uniform Commercial Code adopted (28-1-101 to I.C. 28-10-104), effective Dec. 31, 1967, midnight. See topic 3.09 Commercial Code.

Liens.

Uniform Commercial Code adopted (28-1-101 to I.C. 28-10-104), effective Dec. 31, 1967, midnight. See topic 3.09 Commercial Code.

Motor Vehicle Carriers.

See category 23 Transportation, topic 23.01 Motor Vehicles.

3.09 COMMERCIAL CODE:

Uniform Commercial Code adopted, effective Dec. 31, 1967, midnight. (28-1-101 to I.C. 28-10-104). Sections are identical with 1962 text of Uniform Commercial Code and subsequent amendments (see Uniform and Model Acts section). Idaho adopted Revised Article 9 in 2001. (28-9-101 et seq.). Idaho adopted revised Articles 1 and 7 in 2004.

Variations and alternate provisions adopted are:

Add expanded definition of “Holder” as follows: (20) “(c) the person in control of a negotiable electronic document of title.”

§ 1-301 is summarized as follows: If transaction relates to more than one state or nation, parties may agree upon law that will govern transaction. If no agreement is made, Idaho UCC will apply. In cases of rights of creditors against sold goods, fund transfers, bank deposits and collections, letters of credit, investment securities and perfection applicable provisions of Idaho UCC govern and contrary agreement is effective only to extent permitted by law.

§ 2-210—New subsection added to provide that security interest is not material change and to set forth rules for delegation. (28-2-210).

§ 2-318—1966 Official Optional Amendment Alternative A enacted. Use of blood declared not a sale but a service and excluded from implied warranties of merchantability and fitness. (1971, c. 24).

§ 2-326—Altered to remove provisions regarding consignment sales. (28-2-236).

§ 2-329—New section added: **“Voluntary and Unsolicited Sending of Goods.**—No person, firm, partnership, association or corporation, or agent or employee thereof, shall, in any manner, or by any means, offer for sale goods, wares, or merchandise, where the offer includes the voluntary and unsolicited sending of goods, wares, or merchandise not actually ordered or requested by the recipient, either orally or in writing. The receipt of any such unsolicited goods, wares, or merchandise shall for all purposes be deemed an unconditional gift to the recipient who may use or dispose of the same in any manner he sees fit without any obligation on his part to the sender.”

§ 2-502—Altered to include buyer's right to goods on seller's repudiation and failure to deliver. (28-2-502).

§ 2-702—1966 Official Amendment not enacted.

§ 2-716—Word “Replevin” changed to “Claim and Delivery.” This section also states that buyer's right of replevin vests upon acquisition of special property, even if seller had not then repudiated or failed to deliver. (28-2-716).

§ 3-121—Alternative B adopted.

§§ 3-101 to I.C. 3-501G repealed and replaced with new §§ 3-101 to I.C. 3-605.

See topic 3.02 Bills and Notes, subhead Drawing Checks without Funds.

§§ 4-101 to I.C. 4-504. Extensive technical corrections to language and citations.

§ 4-202(1)(b)—Optional language adopted.

§ 4-212(2)—Optional subsection adopted.

§§ 4-404A, B, C—New sections added: Requires notice (and form) to customer after honoring photocopy of lost or mutilated check, unless customer has elected to have bank hold checks.

§§ 4-601 to I.C. 4-638—New section added governing funds transfers. Provides that time of receipt of time payment is same as under 28-1-201(27). (28-4-606). Procedure for issue and acceptance of payment orders. (28-4-609 to 28-4-620). Regulations concerning execution of sender's payment order by receiving bank. (28-4-621 to 28-4-625). Establishment of payment, orders, senders' obligation to pay receiving bank, method of payment, obligation of notice from beneficiary's bank to beneficiary, payment by beneficiary's bank to beneficiary, payment by originator to beneficiary and discharge of underlying obligation. (28-4-626 to 28-4-631). Variations by agreement permitted and funds-transfer systems permitted even if in conflict with statute. (28-4-632). Effect of levy, attachment, garnishment, notice of lien, etc., on payment order. (28-4-633). Injunctions and restraining orders regarding payment orders. (28-4-634). Order in which payment orders may be changed, order of withdrawals. (28-4-634). Preclusion of objection to debit of customer's account. (28-4-636). Rate of interest on payment orders. (28-4-637). Choice of law. (28-4-638).

§§ 5-10 to I.C. 5-119—New section added governing “letters of credit” defined. (28-5-102[j]). Formal requirements. (28-5-104). Consideration not required. (28-5-105). Issuance, amendment, cancellation, and duration. (28-5-106). Confirmer, nominated person, and adviser. (28-5-107). Issuer's rights and obligations. (28-5-108). Fraud and forgery. (28-5-109). Warranties. (28-5-110). Remedies. (28-5-111). Transfer of Letter of Credit. (28-5-112). One year statute of limitations. (28-5-115).

§ 6-102(1)—Altered to read: “A ‘bulk transfer’ is any transfer in bulk and not in the ordinary course of the transferor's business of a major part in value of the materials, supplies, merchandise or other inventory (Section I.C. 9-109) of an enterprise subject to this Article.”

§ 6-102(3)—Coverage enlarged to “include, but not limited to the hotel, restaurant, barber shop or beauty salon business, whether or not said business is the sale of merchandise from stock.”

§ 6-104(1)(c)—Public office is designated as “County Recorder in the County wherein the property to be transferred is located.”

§ 6-106—Adopted, with subsection (4) omitted.

§ 6-107(2)(e)—Optional subsection adopted.

§ 6-108(3)(c)—Optional subsection adopted.

§ 6-109(2)—Optional subsection adopted.

Article 8—1977 Official Amendment repealed, 1995. New Section adopted as 28-8-101 to 28-8-511.

§ 8-106—New subsection provides that purchaser has “control” of security entitlement if another person has control of security entitlement on behalf of purchaser, or if it previously had control of security entitlement and acknowledges that such control was held on behalf of purchaser. (28-8-106).

§ 8-110—Change is made to clarify issue of jurisdiction by agreement between parties and in event that no agreement exists. (28-8-110).

§ 8-301—Altered to provide that securities intermediary acting on behalf of purchaser acquires possession of security certificate when it is (1) registered in name of purchaser, (2) made payable to purchaser, or (3) indorsed to purchaser and has not been indorsed to securities intermediary or in blank. (28-8-301).

§ 8-510—Altered to provide rank of priority of interest in security entitlement to include priority of time. (28-8-510).

§ 9-109—Added to “scope” provisions of newly adopted UCC Article 9 are claims or rights to receive compensation for certain damages as described under certain federal law and claim or right to receive benefits under special needs trust pursuant to federal law. (28-9-109).

Idaho has statutory provision for creation and perfection of government security interests. (I.C. 57-232).

§§ 28-11-101 to I.C. 28-11-106—Added; defines consignment relationship between artist and “fine arts” dealer and exempts relationship from U.C.C. provisions.

§§ 28-12-101 to I.C. 28-12-531—Added: adopting Uniform Commercial Code—Leases.

§ 12-303—Elimination of subsection (3) regarding security interests in lease agreements. (I.C. 28-12-303).

§ 12-307—Elimination of subsections (2)(b) and (c), (3), and (4) and new provision deferring to security interest regulations under 28-9-317, 28-9-321, and 28-9-323 and otherwise providing that lessee takes leasehold interest subject to security interest by creditor of lessor. (I.C. 28-12-307).

1972 Official Amendments.

Adopted in part, see subhead Variations, supra.

1977 Official Amendments adopted.

Forms.

See end of this Digest.

See also topics 3.01 Banks and Banking, Bills and Notes, Brokers, Carriers, Contracts, Factors, Frauds, Statute of, Sales, Securities, Warehousemen; categories 2 Business Organizations, topic Corporations; Civil Actions and Procedure, topic Limitation of Actions; Debtor and Creditor, topics Assignments, Fraudulent Sales and Conveyances, Liens, Pledges; Documents and Records, topics Records, Seals; Mortgages, topic Chattel Mortgages.

3.10 [RESERVED]

3.11 CONSIGNMENTS:

Consignment relationship between artist and dealer defined by statute. (I.C. 28-11-101 to I.C. 28-11-106). See topic 3.14 Factors.

3.11A CONSUMER CREDIT:

Uniform Consumer Credit Code adopted 1971, repealed Mar. 31, 1983. Idaho Credit Code adopted Apr. 1, 1983. (I.C. 28-41-101 to I.C. 28-49-107).

Idaho Credit Code adopted effective Apr., 1983. (I.C. 28-41-101 to I.C. 28-49-107). Act applicable to Idaho credit transactions primarily for personal, family or household purposes. (I.C. 28-41-204). Transaction may be subject to Act by agreement. (I.C. 28-41-108). Excluded for most purposes, transactions involving credit to government entities, sale of insurance by insurer, transactions by public utility or common carrier if regulated by state or federal agency, licensed pawn brokers (I.C. 28-41-202), or transactions for business purposes including agricultural, investment, debtor not natural person, and debts secured by first mortgage or deed of trust (I.C. 28-41-301[7]).

Maximum finance charge is that agreed to between parties. (I.C. 28-42-201). Charges on amounts within specified range when applied to lowest amount within range must not exceed by more than 8% disclosed rate. (I.C. 28-42-204[4]).

Delinquency or Deferral Charge. —On precomputed credit transactions, parties may agree to charge of 5% of unpaid amount of installment overdue more than ten days. (I.C. 28-42-301[1]). Non-precomputed loan secured by residence of debtor delinquency charge not more than 5% of amount overdue 15 days. (I.C. 28-42-301[2]). Delinquency charge collected only once on installment. (I.C. 28-42-301). Precomputed transaction may agree in writing to charge for deferral of unpaid installments. Delinquency charge may not be made if deferral charge collected. (I.C. 28-42-302).

Refinancing, consolidation and conversion to open-end account allowed subject to qualification. (I.C. 28-42-305).

Right to Prepay.

Debtor may prepay balance at any time without penalty. (I.C. 28-42-306). Parties may agree to prepayment penalty during first three years. (I.C. 28-42-306[2]). Prepayment penalty not to exceed amount equal to six months interest. (I.C. 28-42-306[2][a], [6]). Creditor upon prepayment must rebate unearned finance charge calculated pursuant to Act. Minimum charge allowed not to exceed finance charge contracted for or $5 if principal $75 or less, or $7.50 if principal more than $75. (I.C. 28-42-307).

Disclosures.

Made pursuant to Federal Consumer Credit Protection Act. (I.C. 28-43-201). Civil liability created by Federal Act adopted in state Act. (I.C. 28-45-203).

Receipt or periodic statement of account must be provided debtor for each payment made but not less than annually. (I.C. 28-43-204).

Collateral and Security.

Security may be taken in property sold, in goods upon which service has been performed or in which goods have been installed, or in land to which goods are affixed or which has been improved by sale of goods or services if debt secured by land is $1,000 or more or debt secured by goods is $100 or more. (I.C. 28-43-302, I.C. 28-43-309).

Cross-collateral allowed subject to release of property as debt paid and when consolidated terms are within statutory limitations. (I.C. 28-43-302, I.C. 28-43-303).

Assignment of Earnings.

No assignment of earnings may be taken for payment or security. (I.C. 28-43-304).

Limitations of Conditions.

Debtors cannot authorize any person to confess judgment on claim arising from regulated consumer credit transaction. (I.C. 28-43-305).

Negotiable Instrument.

Creditor may not take negotiable instrument other than ten day postdated check as evidence of obligation. (I.C. 28-43-306).

Balloon Payment.

Debtor may refinance any balloon payment twice as large as average scheduled payments at terms no less favorable than terms of original transaction, unless open-end credit, schedule payments adjusted to seasonal or irregular income, exempt under administrative rule, or debt secured by second deed of trust or mortgage on debtor occupied one to four family dwelling. (I.C. 28-43-307).

Aiding in Sale to Another.

No value may be given to induce sale for debtor giving names of prospective buyers, or otherwise aiding in sale to another, if contingent upon occurrence of event after time of agreement. (I.C. 28-43-308).

Maximum loan term if principal is $300 to $1,000 is 37 months; if principal is $300 or less term is not more than 25 months, unless adjusted to seasonal or irregular debtor income. (I.C. 28-43-310).

Attorney Fee.

Agreement may provide for debtor to pay reasonable attorney fee unless transaction is regulated consumer loan with principal $1,000 or less. (I.C. 28-43-311, 312).

Home Solicitation.

Upon written notice buyer may cancel home solicitation sale until midnight of third business day after agreement. (I.C. 28-43-402). Home solicitation form of agreement must include buyer's signature, date of transaction, name and address of seller, and statement of buyer's rights conforming with Federal Trade Commission regulation or include under conspicuous caption: “BUYER'S RIGHT TO CANCEL”, following: “If you decide you do not want the goods or services, you may cancel this agreement by mailing a notice to the seller. The notice must say that you do not want the goods or services and must be mailed before midnight of the third business day after you sign this agreement. The notice must be mailed to: ________________. (insert name and mailing address of seller)”. (I.C. 28-43-403). Buyer may cancel at any time until proper form of agreement has been given buyer. (I.C. 28-43-403[3]).

Insurance.

When creditor agrees to provide insurance it must be evidenced by individual policy, certificate, application or notice disclosed to debtor, and creditor shall promptly notify debtor of delay or failure to provide. (I.C. 28-44-105). Amount creditor receives for insurance may not exceed premium charged by insurer. (I.C. 28-44-107). Debtor may provide required insurance. (I.C. 28-44-109). Terms, amount and conditions of credit insurance defined. (I.C. 28-44-201 to I.C. 28-44-304). Liability or property insurance cannot be canceled without ten day (13 if mailed) notice to debtor. (I.C. 28-44-304). Cancellation of insurance pursuant to premium finance loan only allowed after compliance with statute. (I.C. 28-44-401).

Remedies and penalties are applicable to all credit transactions made before or after passage of Act. (I.C. 28-49-101).

Collateral Repossessed.

If collateral repossessed after sale for $1,000 or less, buyer is not personally liable for unpaid balance and seller is not obligated to resell collateral. (I.C. 28-45-103). Buyer liable for wrongful damage to collateral and for failure to make collateral available to seller. (I.C. 28-45-103). Seller may abandon collateral by direct action, but may not thereafter repossess or execute judgment against collateral. (I.C. 28-45-103). Self help repossession after default allowed if done without entry into dwelling and without use of force or breach of peace. (I.C. 28-45-108).

Garnishment limited to lesser of 25% of disposable weekly income or amount of disposable income which exceeds 40 times federal minimum wage. (I.C. 28-45-104). Employee may not be dismissed for garnishment. (I.C. 28-45-105).

Unconscionable agreements or parts of agreements are unenforceable. (I.C. 28-45-106).

Debtor default only enforceable when debtor fails to make payment or when prospect of payment, performance or realization of collateral is significantly impaired. (I.C. 28-45-107).

Debtor Remedies.

For creditor violation of debtor rights, debtor may recover actual damages and penalty of $100 to $1,000. Credit sales, loans or open-end credit actions must be brought within two years of violation. Other regulated transaction causes must be brought within one year after maturity. Debtors not obligated to pay excess charges and may recover any excess charge paid from creditor or creditor's assignee. Failure to refund amount owing to debtor within reasonable time (30 day presumption) after demand, creditor liable for penalty of $100 to $1,000. Creditor violation of Act does not impair rights on debt. Debtor may recover against creditor. (I.C. 28-45-201).

Assignment of Creditors.

Subject to debtor's claims and defenses. (I.C. 28-45-302).

Criminal Penalties.

Creditor willfully and knowingly making excess charges guilty of misdemeanor subject to not more than $500 fine or one year imprisonment or both. (I.C. 28-45-401). Person willfully or knowingly engaged in regulated credit transactions without license or proper statutory qualification guilty of misdemeanor and subject to same penalty. (I.C. 28-45-401). Person guilty of disclosure violations guilty of misdemeanor and subject to fine not more than $5,000 or one year imprisonment or both; penalty in lieu of criminal penalties under Federal Consumer Credit Protection Act. (I.C. 28-45-402).

Administration.

Director of Department of Finance administers Act, assures compliance, and promulgates rules and regulations. (I.C. 28-46-104). Administrator has power to supervise and investigate person engaged in conduct regulated by Act. (I.C. 28-46-105 to I.C. 28-46-106). Administrator may hold hearings and issue orders concerning violations of Act (I.C. 28-46-107 to I.C. 28-46-109), and may seek civil relief in courts (I.C. 28-46-110 to I.C. 28-46-116).

Notification and Fees.

Within 30 days of commencing business and before Jan. 31 each year thereafter, each person conducting business under Act must file notification with administrator stating name of person, business name, address of principal office, address of offices and stores where transactions will be entered in Idaho, address of agent for service in state, and whether consumer loans are made. Persons must pay annual fee not to exceed $10 for each $100,000 or part thereof of unpaid consumer credit transactions outstanding Dec. 31 of preceding year. (I.C. 28-46-203).

License.

Persons making or taking assignments of consumer regulated loans must obtain license. (I.C. 28-46-301). Mortgage lenders licensed under I.C. 26-3101 exempt from this licensing requirement as to mortgage lending activities. (I.C.28-46-301). License applicants must notify licensee in community to be served by newspaper publication. Application granted if financial responsibility, character, and fitness of applicant (officers and directors if corporation) such as to warrant honest and fair conduct of business under Act, and has at least $30,000 available for making loans. (I.C. 28-46-302). Administrator shall review applications, hold hearings and revoke or suspend licenses. (I.C. 28-46-302 and 303). All licensees will maintain adequate records with free access to administrator to show compliance with Act, and file annual composite report with director. (I.C. 28-46-304). Administrator may conduct periodic examination of records at licensee expense. (I.C. 28-46-305).

Persons engaging in business of payday loans must obtain license for each location from which payday loan business conducted unless they are exempt ``supervised financial organization'' as defined by 28-46-301(45) or unless they are authorized to make loans and receive deposits in another state and are supervised by officials of other state. (I.C. 28-46-402). Any payday loan made in Idaho in violation of licensing requirement is void, uncollectable and unenforceable. (I.C. 28-46-402).

Idaho Administrative Procedure Act I.C. 67-5201 et seq. is applicable to administrator action under Act. (I.C. 28-46-306).

Federal Preemption Override.

Act specifically exempts Idaho pursuant to federal option from application of Title V, Part A—Mortgage Usury Laws, Mortgages, § 502(a)(1) of Depository Institutions Deregulation and Monetary Control Act of 1980 (Public Law I.C. 96-221, 94 Stat. 132). (I.C. 28-49-105).

3.12 CONSUMER PROTECTION:

Assistive Technology Warranty Act adopted. (I.C. 48-1401 to I.C. 48-1407).

Uniform Consumer Credit Code adopted 1971, repealed Mar. 31, 1983. Idaho Credit Code adopted Apr. 1, 1983. (I.C. 28-41-101 to I.C. 28-49-107). See topic 3.11A Consumer Credit.

Consumer Protection Act adopted. (I.C. 48-601 to I.C. 48-619). Enhanced penalty for certain conduct perpetrated against elderly or disabled. (I.C. 48-608).

Chain or pyramid schemes, i.e., plan whereby person gives consideration for opportunity to receive consideration primarily for introduction of other persons into plan, are prohibited. Wilful or knowing promotion, etc., of such schemes felony. (I.C. 18-3101).

Uniform Electronic Transactions Act adopted. (I.C. 28-50-101 to I.C. 28-50-120).

Lease Purchase Agreement Act adopted. (I.C. 28-36-101 to I.C. 28-36-111).

Uniform Deceptive Trade Practices Act adopted with modification. I.C. 48-601 adds this purpose for Consumer Protection Act: “The purpose of this act is to protect both consumers and business against unfair methods of competition and unfair or deceptive acts or practices in the conduct of trade or commerce, and to provide efficient and economical procedures to secure such protection. It is the intention of the legislature that this chapter be remedial and be so construed.”

New section, I.C. 48-603C, added to define “unconscionable methods, acts or practices.” New subsection, I.C. 48-603(18) added to make unlawful any use of unconscionable methods, acts or practices in conduct of trade or commerce.

“Unsolicited goods” statute adopted. (28-2-329).

Unfair Sales Act.

Any retailer or direct seller who sells or offers for sale merchandise subject to the act at less than cost or who buys from wholesaler at less than wholesaler's cost, or any wholesaler who sells or offers for sale at less than cost, as costs are defined in the act, including any scheme of special rebates, collateral contracts or similar arrangements, is guilty of misdemeanor for each single offense. So too, a misdemeanor, limiting quantity of article or product sold or offered for sale to any one customer short of entire supply. Any person, municipal or other public corporation, or state may secure injunctive relief. Act does not apply to sales: Of perishable merchandise to forestall loss; of imperfect or damaged merchandise; on final liquidation; for charitable purposes; on contract to departments of government; by officers acting under order or direction of court. (I.C. 48-401 to -409).

Plain Language.

No “plain language” statute.

Telephone Solicitation Act.

Regulates telephone solicitation; requires registration with attorney general ten days before conducting business in Idaho; allows private cause of action; three day cancellation rule, criminal penalties. (I.C. 48-1001 to I.C. 48-1010).

Pay-Per-Telephone Call Act.

Requires preamble message; $2 exemption; private and criminal actions, two year limitation. (I.C. 48-1101 to I.C. 48-1107).

3.13 CONTRACTS:

Distinction between sealed and unsealed instruments abolished. (I.C. 29-108). Written instrument presumptive evidence of consideration (I.C. 29-103) which is construed to mean that one asserting want of consideration has burden of proof (17 Idaho 364, 106 P. 299; 101 Idaho 530, 617 P.2d 834).

Any agreement concerning compensation for personal injury entered into within 15 days of injury may be disavowed by injured person within one year after making agreement. (I.C. 29-113).

Any agreement in connection with a contract for construction of buildings, highways, etc., purporting to indemnify promisee against liability for damages arising from injury to person or property caused from sole negligence of promisee is void. (I.C. 29-114).

Uniform Commercial Code adopted. (28-1-101 to I.C. 28-10-104).

See also topics 3.09 Commercial Code, Consumer Credit; category 14 Family, topics 14.09 Husband and Wife, 14.10 Infants.

3.14 FACTORS:

Uniform Commercial Code adopted. (28-1-101 to I.C. 28-10-104). See topic 3.09 Commercial Code.

It is a misdemeanor for an agent, broker, factor or consignee to make a false statement as to price obtained, quality or quantity of goods entrusted to his custody for sale. (I.C. 18-3105).

Liens.

Factor has a general lien, dependent on possession, for all that is due to him as such, and upon all articles of commercial value that are entrusted to him by same principal. (I.C. 45-807).

License Requirements—Commodity Dealers.

Persons receiving on consignment, soliciting for sale on commission, accepting from producer or warehouseman for resale, selling or offering for sale on commission, or buying, loading or receiving loaded for shipment for sale, resale, storage, processing or reconditioning during any calendar year, at least $10,000 worth of any grain, dry peas, dry beans, leguminous or other small seeds are defined as “commodity dealers”. To engage in business of commodity dealer, person must obtain annual license from Department of Agriculture (I.C. 69-503), give surety bond in form and amount as Director of Department of Agriculture may prescribe (I.C. 69-506), provide financial statement prepared by independent certified public accountant or licensed public accountant, statement of current assets and liabilities, and statement of net worth to Department (I.C. 69-521), post license in conspicuous location at place of business (I.C. 69-509). License fee on original application $200 for class 1 license, $100 for class 2 license. Fee on renewal of license $40 for class 1, $20 for class 2. (I.C. 69-508). Commodity dealers who purchase agricultural products on contract pursuant to which sale price is to be paid at date subsequent to delivery of product to buyer must make provision in contract for: (1) Seller's name and address; (2) conditions of delivery; (3) amount and kind of agricultural products delivered; (4) price per unit or basis of value; (5) date payments to be made. Contract must be signed by all parties and executed in duplicate; one copy retained by commodity dealer, one delivered to seller. (I.C. 69-514). Licenses subject to suspension or revocation for failure to comply with statute. (I.C. 69-507).

Other Farm Produce Dealers.

Idaho Code Tit. 22, c. 13, relating to dealers in farm produce was repealed on Mar. 11, 2009. (S.B. No. 1052). Director of Department of Agriculture has duty to support market news service, to gather and diffuse timely information and statistics concerning supply, demand, prevailing prices and commercial movement of agricultural products in Idaho. (I.C. 22-103[11]).

3.15 [RESERVED]

3.16 FRAUDS, STATUTE OF:

Uniform Commercial Code adopted. (28-1-101 to I.C. 28-10-104). See topic 3.09 Commercial Code.

No estate or interest in real property, other than leases for a term of not exceeding one year, nor any trust or power over or concerning it, or in any manner relating thereto, can be created, granted, assigned, surrendered, or declared, otherwise than by operation of law, or a conveyance or other instrument in writing, subscribed by party creating, granting, assigning, surrendering or declaring same, or by his lawful agent thereunto authorized by writing. (I.C. 9-503).

The preceding section must not be construed to affect the power of a testator in the disposition of his real property by a last will and testament, nor to prevent any trust from arising or being extinguished by implication or operation of law, nor to abridge the power of any court to compel the specific performance of an agreement, in case of part performance thereof. (I.C. 9-504).

Agreements Which Must Be in Writing.

In the following cases, the agreement is invalid, unless the same or some note or memorandum thereof be in writing and subscribed by the party charged, or his agent: (1) Agreement that by its terms is not to be performed within a year from making thereof: (2) special promise to answer for debt, default or miscarriage of another, except in cases provided for in next section; (3) agreement made on consideration of marriage, other than mutual promise to marry; (4) agreement for leasing for longer than one year, or for sale of real property, or of an interest therein, and such agreement, if made by an agent of party sought to be charged, is invalid, unless authority of agent be in writing, subscribed by party sought to be charged. (5) agreement for sale of real estate on commission. (I.C. 9-505; I.C. 9-508; Commercial Code § 2-201). Loans of $50,000 or more must be in writing after June 30, 1995. (I.C. 29-116).

Signatures.

The decisions require signature of both parties to agreements within the statute. (22 Idaho 735, 127 P. 997).

Agreements Which Need Not Be in Writing.

A promise to answer for the obligation of another, in any of the following cases, is deemed an original obligation of promisor, and need not be in writing: (1) Where promise is made by one who has received property of another on an undertaking to apply it pursuant to such promise, or by one who has received a discharge from an obligation in whole or in part, in consideration of such promise; (2) where creditor parts with value, or enters into an obligation, in consideration of obligations in respect to which promise is made, in terms or under circumstances such as to render party making promise the principal debtor, and person in whose behalf it is made his surety; (3) where promise, being for an antecedent obligation of another, is made on consideration that party receiving it cancels the antecedent obligation, accepting new promise as substitute therefor, or on consideration that party receiving it releases property of another from a levy, or his person from imprisonment under execution on judgment obtained on the antecedent obligation, or on consideration beneficial to promisor, whether moving from either party to the antecedent obligation, or from another person; (4) where factor undertakes, for commission, to sell merchandise and guarantee sale; (5) where holder of instrument for payment of money, on which a third person is or may become liable to him, transfers it in payment of a precedent debt of his own, or for a new consideration and in connection with such transfer, enters into a promise respecting such instrument. (I.C. 9-506).

3.17 INTEREST:

Where no express contract, interest allowed at legal rate, which is adjusted annually on July 1. (I.C. 28-22-104).

Judgments.

Interest runs at legal rate of 5% plus base rate in effect at time of entry of judgment, determined by annual average yield on U.S. treasury securities as determined by Idaho State Treasurer. (I.C. 28-22-104).

Open Accounts.

Interest runs on accounts settled from date of settlement and on open accounts from three months after last item. (I.C. 28-22-104).

Uniform Consumer Credit Code adopted 1971, repealed Mar. 31, 1983. Idaho Credit Code adopted Apr. 1, 1983. (I.C. 28-41-101 to I.C. 28-49-107). See topic 3.11A Consumer Credit.

Securities brokers exemption on customer accounts granted, Mar. 31, 1975, repealed Mar. 31, 1987. (1987, c. 120, § 6).

Usury.

See topic 3.11A Consumer Credit, subhead Maximum Finance Charge.

3.18 INFORMATION TECHNOLOGY, INTERNET AND NEW MEDIA:

E-Commerce.

Electronic Mail.

(I.C. 48-603E).

Electronic Signatures and Filings.

(I.C. 67-2351 to I.C. 67-2357).

Electronic Supplier Stabilization Act.

(I.C. 61-332 to I.C. 61-333).

Uniform Electronic Transactions Act.

(I.C. 28-50-101 to I.C. 28-50-120).

3.19 LICENSES, BUSINESS AND PROFESSIONAL:

Licenses are required for a large number of occupations and businesses. Most licenses are issued by Department of Law Enforcement and fees vary.

Day Care Centers.

Licenses issued by Department of Health and Welfare. (I.C. 39-1103). Regulated to establish minimum statewide system for protection of children. (I.C. 39-1101 to 1118).

Collection agencies are governed by comprehensive regulations for examination, licensing, setting up qualifications, bond or certificate of deposit requirements, all administered by board. License renewable yearly. Act does not apply to attorneys authorized to practice in this state, regulated lender or trust companies authorized to do business in Idaho, any realtor licensed and engaged in regular practice of real estate business, abstract and title companies doing escrow business, or any court appointed trustee, receiver or conservator. Agents of permit holders licensed; fee not more than $20 annually. (I.C. 26-2222 to I.C. 26-2240).

Licensed Professional Counselors.

Governed by extensive licensing requirements. (I.C. 54-3401 et seq.).

Public Works Construction Managers.

Licenses issued by public works contractors state license board. (I.C. 54-4501-54-4514).

3.20 MONOPOLIES, RESTRAINT OF TRADE AND COMPETITION:

Contract, combination, or conspiracy between two or more persons in unreasonable restraint of Idaho commerce is unlawful. (I.C. 48-104). It is unlawful to monopolize, attempt to monopolize, or combine or conspire to monopolize any line of Idaho commerce. (I.C. 48-105). Acquisitions of stock, share capital, or other equity interest or whole or any part of assets of another, where effect of such acquisitions may substantially lessen competition or tend to create monopoly are unlawful. (I.C. 48-106[1]). Following activities are exempt from Idaho Competition Act (I.C. 48-101 to I.C. 48-118): activities that are exempt from operation of federal antitrust laws; activities required by Idaho or federal statute or regulatory authority; activities of municipality, its officers, or employees to extent authorized by state law; activities conducted not for profit; and activities of labor organization as permitted by Idaho and federal law. (I.C. 48-107[1]). Persons involved in agriculture may act together in associations and have marketing agencies in common so long as such associations conform with c. 26, title 22 of Idaho Code. (I.C. 48-107[2]). Idaho attorney general may investigate and/or bring criminal or civil action against any person he has reason to believe is engaging in, has engaged in, or is about to engage in any act or practice declared unlawful in Idaho Competition Act. (I.C. 48-108 to I.C. 48-109). Private persons may also bring civil actions for violations of this Act. (I.C. 48-113). Statute of limitations for actions under Idaho Competition Act is four years. (I.C. 48-115).

Price discriminations between different purchasers of commodities of like grade and quality, between different sections or cities or between different locations in sections or cities are forbidden where effect would be to prevent or lessen competition or create monopoly. But this does not forbid price differentials allowing only for difference in cost of manufacture, sale or delivery resulting from different methods or quantities in which commodities are sold or price changes in response to changing conditions affecting market; nor does it prevent persons engaged in commerce from selecting customers in bona fide transactions not in restraint of trade. Devices for evading the law are specifically prohibited. Violation may be restrained at suit of anyone injured and, either in connection with injunction or without injunctive relief, triple damages and costs, including attorneys' fees, may be recovered. (I.C. 48-202 to I.C. 48-205).

Resale price agreements with respect to trademarked commodities, see category 17 Intellectual Property, topic 17.01 Trademarks and Tradenames.

Fair Trade Act adopted. (I.C. 48-301 to I.C. 48-312). *Caveat:* See, however, P.L. I.C. 94-145, repealing exemption of state fair trade laws from Federal anti-trust law.

See also topic 3.12 Consumer Protection and category 23 Transportation, topic 23.01 Motor Vehicles, subhead Motor Vehicle Carriers.

3.21 NEGOTIABLE INSTRUMENTS:

See topics 3.02 Bills and Notes, 3.09 Commercial Code.

3.22 RESTRAINT OF TRADE:

See topic 3.20 Monopolies, 3.22 Restraint of Trade and Competition.

3.23 SALES:

Uniform Commercial Code adopted. (28-1-101 to I.C. 28-10-104). See topic 3.09 Commercial Code.

Uniform Consumer Credit Code adopted, 1971, repealed Mar. 31, 1983. Idaho Credit Code adopted Apr. 1, 1983. (I.C. 28-41-101 to I.C. 28-49-107). See topic 3.11A Consumer Credit.

Consumer Protection.

See topic 3.12 Consumer Protection.

Contracts of Sale.

Uniform Commercial Code governs.

Bills of Sale.

Uniform Commercial Code governs.

Product Liability.

Doctrine of strict liability in tort, as set forth in Restatement of Torts, 2d, § 402A, adopted in Idaho. (95 Idaho 674, 518 P.2d 857). Product Liability Reform Act adopted; provides length of time certain sellers are subject to liability, provides for comparative responsibility, sets forth individual rights and responsibilities of sellers other than manufacturers and provides guidelines for contents of complaint. (I.C. 6-1401 to I.C. 6-1410). Product liability for motor vehicles limited as between dealer and manufacturer. (I.C. 49-2423). Motor vehicle manufacturer required to indemnify dealer's losses arising from product related actions based on manufacturer's functions. (I.C. 49-2424).

Transfer of Title.

Uniform Commercial Code governs.

Conditional Sales.

Uniform Commercial Code governs.

Retail Credit Sales.

See topic 3.11A Consumer Credit.

Bulk Sales.

Uniform Commercial Code governs.

Deceptive Trade Practices.

See topic 3.20 Monopolies, 3.22 Restraint of Trade and Competition.

See also category 23 Transportation, topic 23.01 Motor Vehicles, subhead Titles, Sales and Liens.

Chain or pyramid schemes, i.e., plan whereby person gives consideration for opportunity to receive consideration primarily for introduction of other persons into plan, are prohibited. Wilful or knowing promotion, etc., of such schemes felony. (I.C. 18-3101).

Telephone Solicitation Act.

Regulates telephone solicitation; requires registration with attorney general ten days before conducting business in Idaho; allows private cause of action; three day cancellation rule, criminal penalties; establishes “do-not-call” list. (I.C. 48-1001 to I.C. 48-1010).

Telephone Solicitation.

Telephone solicitors may not intimidate or torment any person; refuse to hang up and free purchaser's line when requested to do so; misrepresent price, quality, or availability of goods, or fail to disclose material matters relating to goods; advertise, represent, or imply that they have any government endorsement or that they have registration number when they do not; block or mislead intended recipient of their identity on caller identification devise; or send unsolicited advertisement to telephone facsimile machine. (I.C. 48-1003).

3.24 SECURITIES:

Comprehensive act, entitled “Idaho Securities Act” adopted. (I.C. 30-14-101 to I.C. 30-14-703). This Act is substantially same as Uniform Securities Act 2002. Idaho Securities Act became effective on Sept. 1, 2004. (See Uniform and Model Acts section for text.)

Uniform Commercial Code adopted. (28-1-101 to I.C. 28-12-528). See topic 3.09 Commercial Code.

Supervision.

Director of Department of Finance has general supervision and control. (I.C. 30-14-102).

Regulatory Powers of Supervising Authority.

Registration of securities is mandatory, unless exempt. Commissioner may issue stop order denying effectiveness to or suspending or revoking effectiveness of any registration if requirements of Act are not met. (I.C. 30-14-303).

Prerequisites to Sales or Offering.

Unlawful for any person to sell or to offer to sell any security in Idaho, except securities exempt under this act or except securities sold in transactions exempt under this act, unless such security is registered. (I.C. 30-14-301). Unlawful for any person to transact business in Idaho as broker-dealer or salesman, investment adviser, or investment adviser representative, except in transactions exempt under Act, unless he is registered under this Act. (I.C. 30-14-401).

Securities to Which Act Applicable.

Means any note, stock, treasury stock, bond, debenture, evidence of indebtedness, certificate of interest or participation in any profit-sharing agreement, collateral-trust certificate, preorganization certificate or subscription, transferable share, investment contract, voting-trust certificate, certificate of deposit for a security, certificate of interest or participation in an oil, gas or mining title or lease or in payments out of production under such a title or lease, or, in general, any interest or instrument commonly known as a “security” or any certificate of interest or participation in, temporary or interim certificate for, receipt for, guarantee of, or warrant or right to subscribe to or purchase, any of the foregoing. (I.C. 30-14-102[28]).

Exempt Securities.

For exempt securities, see § 201 of Uniform Securities Act in Uniform and Model Acts section. In addition Idaho Act exempts security issued by domestic or foreign corporation, partnership, trust or association engaged in actual mining operations or exploration and development of mining properties in state.

Exempt Transactions.

For exempt transactions, see § 202 of Uniform Securities Act in Uniform and Model Acts section. This is identical to § 30-14-202 of Idaho Securities Act except: Subsection 14(a) replaces “25 purchasers” with “10 purchasers”.

Registration of Securities.

Provisions made for registration by notification, registration by coordination and registration by qualification, under various circumstances, following closely Uniform Securities Act. Space does not permit showing all variations in application forms. Act itself should be consulted. (I.C. 30-14-307). $300 filing fee for registration statement.

Registration of Brokers.

Unlawful to transact business as broker-dealer or salesman, or investment adviser unless registered. (I.C. 30-14-401). Provisions made for qualification, forms, etc. similar to Uniform Securities Act. Consult Idaho Act. Registration effective for one year, Jan. 1 to Dec. 31. Renewable yearly by filing. Fees shall not exceed: Registration, $500 for original and $500 per renewal for broker-dealer and investment adviser and $50 for original and $50 per renewal for agent. (I.C. 30-14-410).

Reporting Requirements.

See § 411 of Uniform Securities Act in Uniform and Model Acts Section. (I.C. 30-14-411[e]).

Bonds.

Bond, unless waived by director, for investment adviser in sum of $25,000.

Liabilities.

Criminal penalties and civil liabilities provided for. Three year statute of limitations. (I.C. 30-14-508 to I.C. 30-14-509).

Tender Offers.

Governed by Control Share Acquisition Act (I.C. 30-1601 to I.C. 30-1614) and by Business Combination Act (I.C. 30-1701 to I.C. 30-1710). Corporate directors must consider both long-term and short-term interests of corporation and shareholders. (I.C. 30-1602; I.C. 30-1702). Under Control Acquisition Act, acquiring person must provide information statement to target company's principal executive officer. (I.C. 30-1604).

Mining.

Certain mining issues exempt from registration. (I.C. 30-14-201).

Uniform Simplification of Fiduciary Security Transfers Act adopted (I.C. 68-901 to I.C. 68-911) and not repealed by Uniform Commercial Code (I.C. 28-10-104).

Uniform Security Ownership by Minors Act not adopted.

Chain or Pyramid Schemes.

See topic 3.12 Consumer Protection.

3.25 STATUTE OF FRAUDS:

See topic 3.15 Frauds, Statute of.

3.26 TRUST RECEIPT SECURITY:

See topic 3.09 Commercial Code.

3.27 WAREHOUSEMEN:

Uniform Commercial Code adopted. (28-1-101 to I.C. 28-10-104). See category 3 Business Regulation and Commerce, topic 3.09 Commercial Code. Regulation of public warehouses provided for. (I.C. 69-201 to I.C. 69-250).

Bonds.

Before obtaining license, warehouseman must execute and file bond, or in discretion of director annuity or irrevocable letter of credit with state department of agriculture to secure performance of obligations. (I.C. 69-208).

Licenses.

Must be procured from state department of agriculture. Any person who misrepresents, forges, alters or falsely represents license is guilty of felony.

Liens.

Creates lien benefiting agricultural commodity warehouseman. (28-7-209A).

4 CITIZENSHIP

4.01 ALIENS:

No person is disqualified to take as heir because he or person through whom he claims is or has been an alien. (15-2-112).

Property.

Any person, whether citizen or alien, may take, hold and dispose of property, real or personal. (I.C. 55-103).

5 CIVIL ACTIONS AND PROCEDURE

5.01 ACCORD AND SATISFACTION:

No statute. Common law governs.

Release for personal injury entered within 15 days of injury may be disavowed by injured party within one year of making. (I.C. 29-113).

Uniform Commercial Code adopted. (28-1-101 to I.C. 28-10-104). See category 3 Business Regulation and Commerce, topic 3.09 Commercial Code.

Pleading.

Accord and satisfaction must be affirmatively pleaded. (I.R.C.P. 8[c]).

5.02 ACTIONS:

Governed by Idaho Rules of Civil Procedure (I.R.C.P.), patterned after Federal Rules. See topic 5.19 Practice.

Equity.

Distinction between law and equity abolished. (Const. V, § 1).

Forms of Action.

One form of action known as civil action. (I.R.C.P. 2).

Commencement.

Action is commenced by filing written complaint (I.R.C.P. 3) and summons may issue within reasonable time (I.R.C.P. 4). See topics 5.17 Pleading, 5.20 Process. Service of process in child support matters may be made by certified mail. (I.C. 5-518).

Parties.

Every action must be prosecuted in name of the real party in interests (I.R.C.P. 17), but executor, administrator, guardian, trustee of express trust, party with whom or in whose name a contract has been made for benefit of another, or party authorized by statute may sue without joining beneficiary (I.R.C.P. 17).

Persons to be Joined if Feasible.

Person subject to service of process shall be joined as party in action if: (1) In his absence complete relief cannot be accorded among those already parties; or (2) he claims interest relating to subject of action and is so situated that disposition of action in his absence may (i) jeopardize ability to protect interest or (ii) leave any of other parties subject to substantial risk of multiple or inconsistent obligations by reason of his interest. (I.R.C.P. 19[a][1]).

Permissive Joinder.

All persons may join as plaintiffs if they assert right to relief, or as defendants if there is asserted against them a right to relief, jointly, severally, or in the alternative in respect of or arising out of the same transaction, occurrence, or series of transactions or occurrences and if any question of law or fact common to all will arise in the action. (I.R.C.P. 20).

Intervention.

As of right, intervention may be had upon timely application: (1) When statute confers an unconditional right to intervene, or (2) when applicant claims interest relating to property or transaction which is subject of action and he is so situated that disposition of action may impede his ability to protect that interest, unless applicant's interest adequately represented by existing parties. (I.R.C.P. 24a).

Permissive intervention may be had upon timely application (1) when statute confers a conditional right to intervene; or (2) when applicant's claim or defense and the main action have a question of law or fact in common. (I.R.C.P. 24b).

Interpleader.

Persons having claims against plaintiff may be joined as defendants and required to interplead when plaintiff may be exposed to double liability. Defendant exposed to similar liability may obtain interpleader by cross-claim or counterclaim. On motion of person possessing property claimed by two or more individuals, court may, on notice of claimants, order discharge of person possessing property from liability on condition property or its value delivered to court. Court may award attorney fees to person so delivering property. (I.R.C.P. 22; I.C. 5-321).

Class Actions.

One or more members of class may sue or be sued on behalf of entire class if: (1) Class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to class, (3) claims or defenses of representative parties are typical of claims or defenses of class, and (4) representative parties will adequately protect interests of class. (I.R.C.P. 23a). Requirements of I.R.C.P. 23b must also be met. Court will determine soon after commencement of action whether class action is maintainable. (I.R.C.P. 23c).

Third Party Practice.

Any time after commencement of action, defendant as third party plaintiff may bring action against person not party to action who is or may be liable to such third party plaintiff for all or part of plaintiff's claim against him. Leave of court required if defendant does not file third party complaint within ten days after serving his original answer. (I.R.C.P. 14a).

Joinder of Causes of Action.

Party asserting claim to relief as original claim, counterclaim, cross-claim, or third party claim, may join, either as independent or as alternate claims, as many claims, legal, equitable, or maritime, as he has against opposing party. (I.R.C.P. 18a).

Joinder of Remedies.

Whenever a claim is one heretofore cognizable only after another claim has been prosecuted to a conclusion, the two claims may be joined. (I.R.C.P. 18b).

Consolidation.

When actions involving a common question of law or fact are pending court may order (1) a joint hearing on any or all matters in issue; or (2) consolidation of all actions; or (3) may make such order as may tend to avoid unnecessary costs or delays. (I.R.C.P. 42a).

Severance of Actions.

The court in furtherance of convenience or to avoid prejudice may order a separate trial of any claims, cross-claims, counterclaims or third-party claims, or of any separate issue or of any number of claims, cross-claims, counterclaims, third party claims or issues. (I.R.C.P. 42b).

Substitution of Parties.

If party dies and claim is not thereby extinguished, court, upon application made within a reasonable time, may order substitution of the proper parties. If party becomes incompetent, the court, upon motion, may allow action to be continued by or against his representative. If there is a transfer of interest, action may continue against original parties, unless court, on motion, directs substitution or joinder with original party. (I.R.C.P. 25).

Abatement.

Actions do not abate by death, disability or transfer of interest if cause of action survives. (I.C. 5-319). In case of death, resignation, retirement or removal from office of officer sued in official capacity successor in office may be substituted. (I.C. 5-319).

Causes of action arising out of injury to a person or property, or death caused by wrongful act or negligence of another, except for libel and slander, do not abate upon death of wrongdoer, and each injured person or personal representative of each one meeting death as above stated, have a cause of action against personal representatives of wrongdoer; provided no punitive damages or penalties shall be awarded; provided that a judgment must be on satisfactory evidence corroborating testimony of said injured person regarding negligence and proximate cause. (I.C. 5-327). See also category 13 Estates and Trusts, topic 13.05 Death, subhead Actions for Death.

Cause of action for personal injuries to spouse survives death of that spouse from unrelated causes, with damages to surviving spouse limited to loss of earnings and pain and suffering to date of death and medical, surgical, and special damages. (93 Idaho 888, 477 P.2d 511).

Revival.

In case of death or disability, the court may allow an action to continue by or against the representative or successor in interest of the party. In case of other transfers of interest, the action may continue in the name of the original party, or the person to whom the transfer is made may be substituted. (I.C. 5-319).

Termination of Actions.

Voluntary dismissal may be had by plaintiff without order of court (1) by filing notice of dismissal before service by adverse party of answer or motion for summary judgment, or (2) filing stipulation of dismissal signed by all parties who have appeared. Unless otherwise stated in notice of dismissal or stipulation, dismissal is without prejudice, except notice of dismissal filed by plaintiff who has once dismissed an action on or including same claim. (I.R.C.P. 41a). Involuntary dismissal may be had (1) on motion of defendant for failure to prosecute; (2) after plaintiff has completed his evidence, defendant may, without waiving his right to present evidence, move for dismissal on ground that upon facts and laws plaintiff has shown no right to relief (I.R.C.P. 41b); or if no action taken for one year period (I.R.C.P. 40c).

Limitation of.

See topic 5.16 Limitation of Actions.

Small Claims.

See category 6 Courts and Legislature, topic 6.01 Courts.

Administration.

See category 13 Estates and Trusts, topic 13.09 Executors and Administrators.

Direct Actions Against Insurer.

See category 23 Transportation, topic 23.01 Motor Vehicles, subhead Direct Actions.

5.03 APPEAL AND ERROR:

Federal Rules of Civil Procedure are basis for Idaho Rules of Civil Procedure. See topic 5.19 Practice.

From District Courts.

Appeals may be taken from district courts to supreme court in civil actions in time and manner prescribed by rules of supreme court. (I.C. 13-201).

Appeal Bond.

No undertaking on appeal for costs required. (Rule 16, Idaho Appellate Rules).

Appeals from magistrate division of district court taken to district court, as prescribed by rule. Unless otherwise provided by law or rule, district court shall review on record and affirm, reverse, remand or modify; may remand for new trial or order case tried de novo before him. (I.C. 1-2213).

Stay of Proceedings.

On appeal of judgment or order of district court, supreme court may stay such order or judgment as provided by rule of supreme court. (I.C. 13-202; Rule 13 Idaho Appellate Rules).

Judgment or Order on Appeal.

Supreme court may reverse, affirm, or modify any order or judgment appealed from, and may direct proper judgment or order to be entered, or direct new trial or further proceedings to be had.

From Industrial Commission.

Appeals may be taken from Industrial Commission decisions in time and manner provided by rule of supreme court. (I.C. 72-724 to 725).

5.04 BONDS:

Sureties must justify by affidavit that they are residents and householders or freeholders within the state and that each is worth the sum specified in the undertaking over and above all just debts and liabilities, exclusive of property exempt from execution. (I.C. 12-614). The state and municipalities or subdivisions and their officers, when parties to an action are exempt from giving bond. (I.C. 12-615). Any bond required may be executed by surety company qualified to do business in state. (I.C. 41-2604).

Enforcement.

By action prosecuted by one for whose protection bond is given.

5.05 CERTIORARI:

Writ of review may be granted by any court, except magistrate's division of district court, when inferior tribunal, board or officer has exceeded its jurisdiction, and there is no appeal or other adequate remedy. (I.C. 7-202). Review upon this writ cannot be extended further than to determine whether inferior tribunal, board or officer has regularly pursued its authority. (I.C. 7-208).

5.06 CHARITABLE IMMUNITY:

See topic 5.09 Damages.

Charitable Solicitation Act.

Defines charitable organization and makes it unlawful to misrepresent charitable status. (I.C. 48-1201 to I.C. 48-1206).

5.07 COMMISSIONS TO TAKE TESTIMONY:

See topic 5.11 Depositions and Discovery.

5.08 COSTS:

Prevailing party recovers costs as of course unless court otherwise directs. (I.R.C.P. 54[d]).

5.09 DAMAGES:

Common law generally prevails as to compensatory damages. As to damages in tort against personal representative of deceased wrongdoer, see topic 5.02 Actions; as to damages in actions for imputed negligence of automobile owner, see category 23 Transportation, topic 23.01 Motor Vehicles.

Amounts sought for general damages shall not be disclosed in complaint or to jury. (I.C. 5-335, I.C. 10-111).

Noneconomic damages in personal injury or death action limited to maximum $250,000, or amount equal to three times compensatory damages in judgment (adjusted annually by industrial commission). (I.C. 6-1603).

Exemplary damages are only to be given in case of wanton or outrageous conduct, fraud, malice, gross negligence, or oppression. (I.C. 6-1604; 104 Idaho 897, 665 P.2d 661). Exemplary damages may be recovered under claim for damages generally. (69 Idaho 22, 202 P.2d 236). Claim for relief cannot include claim for punitive damages without leave of court. (I.C. 6-1604).

Punitive damage claims must be proven by clear and convincing evidence.

Contribution between joint-tortfeasors exists, but no money judgment available until joint-tortfeasor has discharged common liability or paid more than his pro-rata share. (I.C. 6-803). See subhead Joint and Several Liability, infra.

Parents of minor under 18 living at home liable for malicious or willful destruction of property, up to $2,500. (I.C. 6-210).

Double recovery prohibited by limiting judgment to amount exceeding recoveries from collateral sources. Collateral sources defined. (I.C. 6-1606).

Charitable Immunity.

Nonprofit organization and its unpaid volunteers immune from liability except in situations set forth by I.C. 6-1605.

Joint and Several Liability.

Limited to actions involving: (1) Parties acting in concert or as agents; (2) violations of toxic waste laws; or (3) manufacture of medical devices or pharmaceutical products. In all other actions judgment entered only to amount of party's proportionate share of damages determined by percentage of liability. (I.C. 6-803).

Comparative Negligence Rule.

Adopted. (I.C. 6-801 to I.C. 6-806).

Sovereign Immunity.

Abolished to extent of insurance or statutory amount of $500,000 per occurrence after Oct. 1, 1984.

No-Fault Insurance.

See category 23 Transportation, topic 23.01 Motor Vehicles, subhead No-Fault Insurance.

Uniform Contribution Among Tortfeasors Act.

Adopted. (I.C. 6-803 to I.C. 6-806).

Death.

See also category 13 Estates and Trusts, topic 13.05 Death, subhead Actions for Death.

5.10 DECLARATORY JUDGMENTS:

See topic 5.15 Judgments.

5.11 DEPOSITIONS AND DISCOVERY:

Governed by I.R.C.P. 26, patterned after Federal Rules. 1970 amendments to Federal Rules not adopted. See topic 5.19 Practice.

Any party may take the testimony of any person, including a party, by deposition upon oral examination or written interrogatories for purposes of discovery or use as evidence. (I.R.C.P. 26).

Uniform Interstate Depositions and Discovery Act adopted, with modifications (I.R.C.P. 45[i]), and in effect 2009.

Within State for Use Within State.

After commencement of action and service of process on any defendant, leave of court is not necessary but must be obtained if notice of taking is served by plaintiff within 30 days after such service of process. (I.R.C.P. 30[a]).

Within State for Use Elsewhere.

Any party may take deposition of any person within this state as if such action were pending within this state.

Outside of State for Use Within State.

Within U.S. and its territories or possessions, may be taken before person authorized to administer oaths by laws of Idaho, U.S., or place where taken. (I.R.C.P. 28[a]). In foreign countries, may be taken before (1) secretary of embassy or legation, consul, vice consul, or consular agent of U.S. or any officer authorized to administer oaths under laws of Idaho or U.S., or (2) before person appointed by Court. (I.R.C.P. 28[b]).

Perpetuating Testimony.

One who desires to perpetuate his testimony or that of another in any matter that may be cognizable in any district court may file a verified petition in district court in county of resident of expected adverse party. Petition must show (1) petitioner expects to be party but is presently unable to bring action; (2) subject matter of expected action and his interest therein; (3) facts he desires to establish and his reasons for desiring to perpetuate it; (4) names or description and addresses of persons he expects will be adverse party; (5) names and addresses of persons to be examined and substance of expected testimony; (6) request for order authorizing taking of deposition. Notice and copy of petition must be served on expected adverse party at least 20 days before hearing, which notice must state that petitioner will apply at stated time and place for order sought. (I.R.C.P. 27).

Pending Appeal.

If appeal has been taken, or if time has not expired, from judgment of district court, district court may allow perpetuation of testimony for use in event of further proceedings in the district court. Motion and notice as if action was pending in district court, except motion must show (1) names and addresses of persons to be examined and substance of testimony; (2) reasons for perpetuating testimony. (I.R.C.P. 27).

Before Whom Taken.

Within Idaho before person authorized by laws of Idaho to administer oaths or persons appointed by Court in which action is pending. (I.R.C.P. 28).

Within United States or territories, before person authorized to administer oaths by laws of Idaho, United States, or place where examination held or person appointed by court in which action is pending. (I.R.C.P. 28).

In foreign countries, on notice before (1) secretary of embassy or legation, consul, vice consul or consular agent of the United States, or any officer authorized to administer oaths under laws of Idaho or United States; or (2) before a person appointed by the court by commission. (I.R.C.P. 28).

Stipulation.

If parties so stipulate in writing, deposition may be taken before any person, any time, at any place or in any manner.

On Oral Examination.

Party desiring to take deposition must give reasonable notice to every other party stating time and place and names and addresses of persons to be examined. The court may on motion and for good cause shown, enlarge or shorten the time, may order that deposition be not taken, specify other time or place, limit examination to written interrogatories, exclude certain matters, limit the scope of examination, provide that examination must be held with no one present except parties and officers or counsel, that after being sealed, the deposition must be opened only on order of court, that secret process need not be disclosed, that parties must simultaneously file specified documents or information enclosed in sealed envelope to be opened as directed by court, and court may make other orders which justice requires to protect a party from annoyance, undue expense, embarrassment or oppression. (I.R.C.P. 30).

Compelling Attendance of Witnesses.

Proof of service of notice authorizes clerk to issue subpoena. Resident may be required to attend only in county wherein he resides, is employed, or transacts his business in person; nonresident may be required to attend in any county in the state wherein he is served with subpoena. (I.R.C.P. 45). Depositions and discovery conducted in Idaho in connection with civil lawsuit brought in another state is governed by Rule 45(i) of Idaho Rules of Civil Procedure. Only documents that need to be presented to clerk of court of Idaho are copy of subpoena issued in trial state and copy of draft subpoena for Idaho. Idaho subpoena must substantively conform to requirements of Rule 45(c) of Idaho Rules of Civil Procedure. (I.R.C.P. 45[i]).

Examination of Witnesses.

Unless otherwise ordered by the court, witness may be examined regarding any matter, not privileged, which is relevant to the subject matter involved in the action, including existence, description, nature, custody, condition, and location of any books, documents or other tangible things, and the identity and location of persons having knowledge of relevant facts. (I.R.C.P. 26).

Written Interrogatories.

A party desiring to take deposition on written interrogatories must serve them on every party with notice of name and address of person to answer, and name or description title of officer. Within ten days party served may serve cross interrogatories; within five days thereafter, re-direct interrogatories may be served; within three days thereafter re-cross interrogatories may be served. Copies of notice and all interrogatories must be delivered by party taking deposition to the officer who must promptly proceed as in case of oral examination to take deposition, prepare, certify, file or mail deposition to clerk for filing. Notice of filing must be given promptly to all parties by one taking deposition. After service of interrogatories and before taking deposition, the court where the action is pending, on prompt motion by a party or deponent, may order as in other cases which may be appropriate and just, or that deposition must not be taken before officer designated or that it must not be taken except upon oral examination. (I.R.C.P. 31).

Record of Examination.

The officer must put the witness on oath, testimony must be taken stenographically and transcribed unless the parties agree otherwise. All objections made at the time of the examination to qualifications of officer, manner of taking, evidence presented, conduct of any party, and any other objections to the proceedings must be noted by the officer. Objections to competency of witness, or competency, relevancy, or materiality of testimony, are not waived by failure to make them before or during the taking of deposition, unless ground of objection might have been obviated if presented at that time. Evidence objected to must be taken subject to objection. Parties served with notice may transmit written interrogatories to the officer who must propound them to the witness and record answers verbatim. (I.R.C.P. 30, 32).

Termination and Limiting Examination.

At any time during the taking, on motion of any party or deponent and upon showing that the examination is being conducted in bad faith or unreasonably annoys, embarrasses, or oppresses deponent or a party, the court where action is pending or if in action pending in another state, a district court in county where deposition is being taken, may order officer to cease forthwith or may limit scope and manner as stated above in case of oral examination. If so terminated, examination must be resumed only on order of court in which action is pending. (I.R.C.P. 30).

Signing and Certification.

Deposition must be read by or to witness (unless waived by witness and parties). Changes made must be entered with reasons therefor. Witness must sign before officer authorized to administer oaths, unless waived, or unless witness is ill, cannot be found or refuses to sign. If not signed by witness, officer must sign and state on the record the reason. Officer must certify on deposition that witness was duly sworn, and that deposition is true record of testimony. He must securely seal deposition, endorse with title of action, and mark thereon “Deposition of. . . . . .” and file or send it registered mail to clerk of court. (I.R.C.P. 30).

Use of Deposition.

At trial or hearing, any part or all of deposition, so far as is admissible under the rules of evidence, may be used against any party who was present or represented at the taking of the deposition, for (1) contradictory or impeaching testimony of deponent as witness, or other purpose under Idaho Rules of Evidence; (2) if deposition is of party or of an officer, director, or managing agent of corporation, association or partnership which is a party, for any purpose; (3) if court finds witness is dead or at greater distance than one hundred miles, or out of state, or unable to attend because of age, sickness, infirmity or imprisonment, or party offering has been unable to procure attendance by subpoena or in exceptional circumstances in interests of justice. (I.R.C.P. 32; I.R.E. I.C. 801-03).

Interrogatories to Parties.

May be served, without leave of court, on plaintiff after commencement of action and upon any other party with or after service of summons and complaint upon that party. Party upon whom served must serve copies of answers and objections within 15 days. (I.R.C.P. 33).

Discovery.

Upon motion, notice and good cause, court may order any party to produce and permit inspection or copies of designated documents, papers, books, accounts, letters, photographs, objects, tangible things constituting or containing evidence, or may order any party to permit entry upon land for inspection, etc. (I.R.C.P. 34).

Physical and Mental Examination.

If physical or mental condition of party is in controversy, court may order him to submit to examination by disinterested and impartial physician. (I.R.C.P. 35). Party being examined has right to have representative of party's choosing present at examination. (I.R.C.P. 35).

Forms.

The following may be used:

Forms

IN THE DISTRICT COURT OF THE. . . . . . JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF. . . . . .

JOHN DOE,

Plaintiff

vs.

RICHARD ROE,

Defendant } DEPOSITION OF..........

This cause came regularly on for hearing, pursuant to Notice of Taking Deposition, a copy of which is hereto annexed and made a part hereof, at. . . . . ., City of. . . . . ., State of Idaho, on. . . . . . day of. . . . . ., (year). . . ., at the hour of. . . . . .o'clock. . . .M., for the taking of the deposition of. . . . . . by the. . . . . .;. . . . . . appearing for and on behalf of the plaintiff and. . . . . . appearing for and on behalf of the defendant; said deposition being taken before. . . . . ., a Notary Public for the State of Idaho, residing at. . . . . ., and an Official Reporter of the District Court of the. . . . . . Judicial District of the State of Idaho,

Whereupon, the following proceedings were had, to wit:

Certificate attached is usually as follows:

STATE OF IDAHO..........

County of.................. } ss.

I,. . . . . ., a duly appointed and commissioned Notary Public for the State of Idaho, and also a duly appointed and qualified and acting Official Reporter of the District Court of the. . . . . . Judicial District of the State of Idaho, Do Hereby Certify that on the. . . . . . day of. . . . . ., (year). . . . ., pursuant to Notice To Take Deposition hereto annexed and made a part hereof, said witness. . . . . . personally appeared at the hour of. . . . . . o'clock. . . .M., on. . . . . . day of. . . . . ., (year). . . . . ., at my office in. . . . . .; the plaintiff appeared by counsel,. . . . . ., of. . . . . ., Idaho, and the defendant appeared by counsel,. . . . . ., of. . . . . ., Idaho;

The said witness. . . . . ., being by me first duly sworn to testify to the truth, the whole truth, and nothing but the truth, and being orally examined and cross-examined by counsel for the respective parties, deposed and testified as in the foregoing annexed deposition set out; and the said deposition is a true record of the testimony given by the said witness:

I further certify that the deposition was then and there taken stenographically, and later, the same day, by me reduced into longhand typewriting, and that the above and foregoing constitutes and is a full, true and correct transcript of said deposition, consisting of. . . . . . pages; that thereupon said deposition was read and corrected by said witness in every particular and thereupon subscribed by him in my presence (or reading examination and signing of said deposition by said deponent was waived by counsel for the respective parties by stipulation herein contained):

I further certify that I am not related to any of the parties to this action, or to any of their attorneys or counsel; that I am not employed by any of the parties, or by any of their attorneys or counsel, and that I have no financial interest in this action:

In WITNESS WHEREOF, I have hereunto set my hand, and affixed my Official Seal as Notary Public for the State of Idaho, this. . . . . . day of. . . . . ., (year). . . . . . .

....

Notary Public for Idaho

Residing at. . . . . therein.

(Seal)

5.12 EQUITY:

See topic 5.02 Actions.

5.13 EVIDENCE:

Idaho Rules of Evidence effective July 1, 1985 patterned with some modifications on Federal Rules of Evidence and control all evidentiary questions. (I.R.E. 1102).

Evidence of proceedings of or statements made before medical malpractice screening panels inadmissible in civil action. (I.R.E. 413).

Privileged communications specifically defined in rules are not subject to compulsory disclosure.

See topic 5.11 Depositions and Discovery.

Witnesses.

Evidentiary matters governed by Idaho Rules of Evidence, effective July 1, 1985, patterned after Federal Rules of Evidence with some modifications. See topic 5.11 Depositions and Discovery.

All persons competent as witness except: (1) Persons incapable of receiving just impressions of facts or relating them truly; (2) parties prosecuting action against decedent's estate as to non-written communication or agreement occurring before decedent's death; (3) presiding judge; (4) juror before jury on which he sits; or (5) others as precluded by Rules of Evidence. (I.R.E. 601).

Criminal penalties for intimidating, influencing, impeding, deterring, threatening, harassing, obstructing or preventing witnesses. (I.C. 18-2604).

Privileged communications as defined within following relationships not subject to compulsory disclosure: Lawyer-client (I.R.E. 502); physician, psychotherapist-patient (I.R.E. 503); husband-wife (I.R.E. 504); clergyman-communicant (I.R.E. 505); political vote (I.R.E. 506); governmental secrets (I.R.E. 508); identity of informer (I.R.E. 509); parent-child or guardian-ward (I.R.E. 514); accountant-client (I.R.E. 515); school counselor-student (I.R.E. 516); licensed counselor or social worker-client (I.R.E. 518); hospital, medical staff or society confidential opinion or conclusions re: proceeding for research, discipline, or medical study (I.R.E. 519); medical malpractice screening panel (I.R.E. 520). Also governed by I.C. 9-203.

Husband and Wife.

Private spousal communications not intended for disclosure to others if made during marriage subject to testimonial exclusion at other spouse's request. Exceptions: (1) Issues concerning well-being of child including issues of abuse, abandonment or neglect; (2) crime against (a) spouse, (b) person in household, or (c) third person if committed with crimes against (2)(a) or (2)(b); (3) proceedings under Reciprocal Enforcement of Support Act; (4) proceedings concerning spousal desertion or nonsupport; (5) commitment proceedings; (6) civil actions between spouses. (I.R.E. 504).

Child witness called in criminal matter supportive person (parent, counselor, friend, other) may remain in courtroom at court discretion. (I.C. 19-3023). Statements made by child under ten years describing sexual or physical abuse or crime committed with or upon child admissible under specific circumstances. In 2003, Idaho enacted Uniform Child Witness Testimony by Alternate Methods Act. (I.C. 9-1801 et seq.).

Self-Incrimination.

In criminal proceedings, if person refuses to testify on grounds it may incriminate him, he may then enter into agreement to testify voluntarily, with county prosecutor, who must request court approval. Court shall approve unless clearly contrary to public policy. Person shall not be prosecuted for evidence given accordingly, except for perjury. If evidence not given as agreed, witness may be compelled to appear and testify. If after testifying the evidence is privileged, he shall not be prosecuted, unless such prosecution is for perjury, false swearing, or contempt. (I.C. 19-1114, 1115, 1601).

Compelling Attendance.

See topic 5.11 Depositions and Discovery.

5.14 INJUNCTIONS:

Procedure patterned after Federal Rules. (I.R.C.P. 65).

Injunctions may be granted at the time of issuing the summons upon the complaint, and at any time before judgment on affidavits. (I.R.C.P. 65).

An injunction cannot be allowed after the defendant has answered, except upon notice or an order to show cause. (I.R.C.P. 65).

When Injunction Proper.

An injunction may be granted (1) when it appears by the complaint that plaintiff is entitled to the relief demanded and such relief, or a part thereof, consists in restraining the commission or continuance of the act complained of; (2) when it appears that the commission or continuance of some act during the litigation would produce waste or great and irreparable injury to plaintiff; (3) when it appears during the litigation that defendant is doing or threatening, or is about to do, or is procuring or suffering to be done some act in violation of plaintiff's rights respecting the subject of the action and tending to render the judgment ineffectual; (4) when it appears from the affidavit that defendant pending the action threatens, or is about to remove or dispose of his property with intent to defraud plaintiff. Injunction may also be granted on motion of defendant upon filing counterclaim upon any of grounds mentioned above. (I.R.C.P. 65).

In suits for divorce, annulment, alimony, child custody the court may make prohibitive or mandatory orders, with or without notice or bond, as may be just. (I.R.C.P. 65g).

Bond.

On granting an injunction the court must require a written undertaking to pay defendant all costs, damages and reasonable counsel fees, not exceeding a specified amount, that he may sustain if the court finally decides that plaintiff is not entitled to an injunction. This requirement is mandatory and applies also to temporary restraining orders. (29 Idaho 803, 162 P. 671; 95 Idaho 360, 509 P.2d 579). However, maintenance of liquor nuisance may be enjoined without bond under certain circumstances. (I.C. 23-706).

See also topic 5.19 Practice.

Labor Disputes.

Courts may not restrain peaceful and lawful pursuit of strike activities. (I.C. 44-701 to I.C. 44-712).

5.15 JUDGMENTS:

Procedure patterned after Federal Rules, and statute. See topic 5.19 Practice.

Court judgments are docketed forthwith upon rendition. (I.R.C.P. 58[a]). Certified abstract of judgment of any court of this state or federal district court, if rendered in this state, shall be recorded and from such recording becomes lien for five years upon all real property of judgment debtor in county where recorded, not exempt from execution, owned at time or afterwards acquired. (I.C. 10-1110). If decree of divorce or separation wherein periodic payments required for support or alimony, lien is only in amount of delinquent payments. (I.C. 10-1110).

Confession of Judgment.

No claim, controversy or dispute may be submitted to any court in state for determination or judgment without filing complaint or petition; and no judgment shall be entered by any court without service of process upon all parties affected by such judgment or decree. (I.R.C.P. 3[a]).

Default Judgment.

When party against whom affirmative relief is sought fails to plead or otherwise defend as provided by rules and that fact is made to appear by affidavit, court, or clerk thereof, will enter default. If plaintiff's claim is not for sum certain or sum which cannot by computation be made certain, plaintiff must apply to court for default judgment. Otherwise, court or clerk thereof, upon plaintiff's request, and upon filing of affidavit showing method of computation, together with original instrument evidencing claim, will enter judgment for amount due plus costs. (I.R.C.P. 55).

No judgment by default shall be entered against infant or incompetent person unless represented in action by general guardian. If person against whom default is sought has appeared in action, then such person must be given three days written notice of application for default judgment.

Default judgment may not exceed amount prayed for in demand for judgment. (I.C. 5-336). Hearing or reference required after entry of default in personal injury or death case to determine amount of damages.

Judgment on Pleadings.

Federal rule adopted.

Summary Judgment.

Federal rule adopted. (I.R.C.P. 56).

Declaratory Judgments.

Uniform Act adopted with construction of oral, as well as written, contracts authorized. § 11 of Uniform Act modified to allow attorney general right of intervention but need not serve as original party. (I.C. 10-1201 to I.C. 10-1216).

Offer of Judgment.

Federal rule adopted with slight modification.

Vacation or Modification.

Court may relieve party from final judgment, order, or proceeding for same reasons enumerated in Federal Rule 60(b). Motion for relief must be made within reasonable time and for reasons 1, 2, 3, and 6 not more than six months after judgment, order, or proceeding was entered or taken.

Lien.

Judgment will not operate as lien on property until abstract of judgment recorded. After recording it operates as lien on real property for five years. (I.C. 10-1110).

Enforcement.

In all cases other than for the recovery of money, a judgment may be enforced or carried into execution after the lapse of five years from the date of its entry, by leave of court, upon motion, or by judgment for that purpose founded upon supplemental proceedings. (I.C. 11-105; 20 Idaho 592, 119 P. 55). On death of judgment creditor after judgment, execution may be issued and enforced on application of his personal representative or successor in interest. In case of death of debtor after judgment, execution will issue if judgment was for recovery of real or personal property or for enforcement of lien thereon. (I.C. 11-106). Action on judgment may be commenced within six years. (I.C. 5-215). Any state resident may hold certain property exempt from judgment. (I.C. 11-601 to I.C. 11-609).

Action may be maintained to quiet title against a judgment the enforcement of which is barred by Statute of Limitations, without requiring proof said judgment has been paid. (I.C. 6-412).

Satisfaction.

Upon full payment of judgment, party in whose favor judgment was rendered is required to record satisfaction of judgment in every county where judgment or abstract of judgment is recorded and to file it in court of entry. Satisfaction of judgment may be signed by attorney of party in whose favor judgment was entered. (I.R.C.P. 58b). Satisfaction also accomplished by paying amount due to clerk of court who must thereupon release and satisfy judgment, amount to be paid over to judgment creditor. (I.C. 10-1115).

The following form of satisfaction may be used:

Form

Know all men by these presents: That in consideration of the sum of $. . . . to the undersigned in hand paid, the receipt of which is hereby acknowledged, a certain judgment in the (name court) in favor of. . . . and against. . . . for the sum of $. . . ., which judgment was docketed in. . . . county on the. . . . day of. . . .,. 20. . ., in judgment docket book. . . . at page. . . ., be, and the same is hereby, fully satisfied, released and discharged, and the clerk of the district court of the. . . . district of the state of Idaho in and for the county of. . . . is hereby authorized and directed to enter the satisfaction thereof upon his records. In witness whereof I have hereunto set my hand this. . . . day of. . . ., 20. . ..

....

(Acknowledgment).

Revised Uniform Enforcement of Foreign Judgments Act.

Adopted 1974. (I.C. 10-1301 to I.C. 10-1308).

Uniform Foreign Money-Judgments Recognition Act.

Adopted 1990. (I.C. 10-1401 to I.C. 10-1409).

5.16 LIMITATION OF ACTIONS:

Actions must be brought within the following periods (I.C. 5-202 to I.C. 5-224):

Six years: On judgment or decree of court of U. S. or any state or territory within U. S.; for mesne profits of real property. (I.C. 5-215).

Five years: To recover real estate (I.C. 5-203 to I.C. 5-213); to recover upon written obligation, sealed or unsealed, time running from maturity. Limitation as to written contracts does not apply to action in name of or for benefit of state. (I.C. 5-216). Foreclosure of real estate mortgage must be commenced within five years from date of maturity, as disclosed by public record, of obligation secured. Extension of time of maturity may be filed before expiration of this period. If public record does not disclose date of maturity, then date of execution of mortgage is deemed date of maturity. Extension may be made by affidavit or agreement filed in county where mortgage is recorded. (I.C. 5-214A). If five years expired before Sept. 1, 1951, mortgagee had until Sept. 1, 1951, within which to file extension. (I.C. 5-214A). Tort action in child abuse case must be commenced within five years from date child reaches 18 years of age. (I.C. 19-402). Overflow easement by dam owners. (I.C. 5-246).

Four years: On an obligation not in writing; on open account; on mutual accounts, time running from date of last item on either side; on judgment of a foreign court; actions on which no other limitation prescribed; breach of contract for sale. (I.C. 5-217, 222, 224; UCC § 2-725).

Three years: On statutory liability other than penalty or forfeiture; for injury to real or personal property; to recover possession of personal property; for relief on ground of fraud or mistake, time running from discovery thereof. (I.C. 5-218). All claims arising before death of decedent barred unless presented to estate within three years after death, whether or not notice to creditors published. (15-3-803[2][b]). To contest any tax assessment or proceeding upon which tax deed issued after property sold by taxing agency and purchaser has paid taxes for three years. (I.C. 63-1143). See category 3 Business Regulation and Commerce, topic 3.24 Securities, subhead Liabilities.

Two years: (1) Against ministerial officer for damages for breach of official duty; (2) action upon statute for penalty or forfeiture, unless otherwise provided; (3) damages for professional malpractice, or for personal injury, or wrongful death, including any such action arising from breach of implied warranty or implied covenant; provided that when action is for damages arising out of placement and accidental leaving of any foreign object in body of any person by reason of professional malpractice of hospital or physician or when fact of damage has been fraudulently concealed from injured party by alleged wrongdoer who at time of alleged act was in professional relationship with injured party then action accrues when injured party knows or is put on notice regarding condition complained of; but in all other actions, whether arising from professional malpractice or otherwise, action accrued as of time of act or omission complained of, provided further that action within foregoing foreign object or fraudulent concealment exceptions must be commenced within one year following accrual as aforesaid or two years following act or omission, whichever is later. Professional malpractice refers to wrongful acts or omissions in performance of professional services by any person, association, or corporation licensed by state to perform such service; (4) for libel, slander, assault, battery, false imprisonment, or seduction; (5) against officer for escape of prisoner arrested or imprisoned on civil process (I.C. 5-219); (6) against governmental entity, in tort actions two years after date claim arose or should have been discovered (I.C. 6-901 to I.C. 6-928); (7) for private actions under Consumer Protection Act (I.C. 48-619).

After two years from date of issue of policy of insurance no misstatements, except fraud, shall be used to deny claim. (I.C. 41-2106).

One year: Against tax collector to recover property seized or damages for seizure. (I.C. 5-220).

Six months: On claim against county, time running from date of rejection thereof but likely tort claims excluded from this statute by I.C. 6-901 to -928; under bulk sale provisions of Uniform Commercial Code. (I.C. 5-221; 28-6-111).

One hundred eighty days: Tort claims against governmental agencies or employees for tort must be filed. (I.C. 6-905 to I.C. 6-911). Minors not required to present claim until 120 days after majority or six years from time claim arose or should have been discovered. (I.C. 6-906A).

Sixty days: To recover tax paid under protest.

Action for ionizing radiation injury cannot be brought more than three years after injured person had knowledge or reasonably ought to have knowledge of injury and cause, but in no event more than 30 years from date of last occurrence to which injury is attributable. (I.C. 5-243).

Action for performing or furnishing design, plan, supervision or construction of improvements on real property, if action in tort, if not previously accrued, shall accrue and begin to run six years after completion, and if action in contract, action shall accrue and period begin to run at time of final completion. Times fixed shall not be asserted by way of defense by any person in actual possession or control at time of any deficiency which caused injury. (I.C. 5-241).

Criminal.

Murder, no limit (I.C. 19-401); crimes against children, five years after child reaches 18 (I.C. 19-402); felonies, five years (I.C. 19-402); misdemeanors, one year (I.C. 19-403).

Foreign Causes of Action.

Where cause of action which arose outside state is barred by law of the jurisdiction where it arose, action cannot be maintained in this state except in favor of citizen of this state who has held cause of action ever since it accrued. (I.C. 5-239; 15 Idaho 167, 96 P. 932).

Disabilities.

If, when cause of action accrues, other than for recovery of real property person entitled to sue is infant, insane, or imprisoned on criminal charge for term less than life, statutory period does not run until disability is removed, provided, however, that six years is maximum that time limit for commencement of action is tolled for any disability or reason except as provided in I.C. 5-213 in connection with recovery of real property. (I.C. 5-230).

In connection with recovery of real property disabilities include minority; insanity; imprisonment on criminal charge for term less than life; and married woman, where husband is necessary party with her in commencing action. Action must be commenced within five years after such disability ceases. (I.C. 5-213). Contract by minor may be disaffirmed by minor himself either before majority or within reasonable time after. (I.C. 32-103).

Absence of defendant from state prevents running of statute during continuance of such absence (I.C. 5-229), unless service of process could be obtained on defendant by reasonably diligent efforts under terms of long arm statute (96 Idaho 723, 536 P.2d 291).

Renewal or Revival.

Payment of principal or interest or an acknowledgment or new promise in writing signed by the party to be charged will continue or renew the obligation. (I.C. 5-238).

Contractual Limitations.

A provision of a contract limiting the time for action thereon is void. (I.C. 29-110).

Pleading.

The defense of the statute of limitations must be pleaded. (I.R.C.P. 8c).

Uniform Commercial Code adopted. (28-1-101 to I.C. 28-10-104). See category 3 Business Regulation and Commerce, topic 3.09 Commercial Code.

Tax Limitations.

Taxes must be collected within three years of return or six years of assessment. No limitation for fraudulent return or failure to file. Miscellaneous minor limitations. (I.C. 63-6068). No limitation on assessment and collection of sales tax by retailer, seller or other person who was to pay over such taxes. (I.C. 63-3633[d]).

5.16A PARTITION:

When several co-tenants hold and are in possession of real property as parceners, joint tenants or tenants in common, an action may be brought by one or more, for a partition thereof, according to the respective rights of the persons interested therein, and for a sale of such property, or a part thereof, if it appear that a partition cannot be made without great prejudice to the owners. (I.C. 6-501).

5.17 [RESERVED]

5.18 PLEADING:

Governed by I.R.C.P. 7, et seq., patterned after Federal Rules. 1970 amendments to Federal Rules not adopted. See also topics 5.02 Actions, 5.19 Practice.

All pleadings typed or printed letter quality on 8½ x 11 inch paper.

Pleadings Permitted.

There must be a complaint and answer; a reply to counterclaim denominated as such; an answer to cross claim, if applicable; third party claim, if leave is given; third party answer. (I.R.C.P. 7).

Complaint.

Pleadings seeking relief, whether original claim, counterclaim, cross claim, or third party claim, shall contain (if court be of limited jurisdiction), (1) a statement of grounds of court's jurisdiction; (2) short and plain statement of the claim showing pleader is entitled to relief; (3) demand for judgment to which deemed entitled. Alternative relief may be demanded. (I.R.C.P. 8). Claim for relief may not specify amount of damages sought in personal injury or death action. (I.C. 5-335). Cannot claim punitive damages without leave of court. (I.C. 6-1604).

Answer.

Parties shall state in short and plain terms, defenses to each claim and admit or deny the averments upon which adverse party relies. Denial on lack of information and knowledge upon which to form a belief has effect of a denial. In pleading to a preceding pleading, party must set forth affirmatively accord and satisfaction, arbitration and award, assumption of risk, contributory negligence, discharge in bankruptcy, duress, estoppel, failure of consideration, fraud, illegality, injury by fellow servant, laches, license, payment, release, res judicata, statute of frauds, statute of limitations, waiver, and any other matter of avoidance or affirmative defense. (I.R.C.P. 8).

Frivolous claims are penalized. (I.R.C.P. 11).

Every defense to a claim for relief must be asserted in a responsive pleading if one is required, except that the following may, at pleader's option, be made by motion: (1) lack of jurisdiction over subject matter; (2) lack of jurisdiction over person; (3) improper venue; (4) insufficiency of process; (5) insufficiency of service of process; (6) failure to state a claim upon which relief can be granted; (7) failure to join an indispensable party; (8) another action pending between same parties for same cause. (I.R.C.P. 12).

Counterclaim.

Pleading shall state as counterclaim any claim which at time of serving the pleading, pleader has against any opposing party if it arises out of transaction or occurrence that is subject of opposing parties claim and does not require presence of third parties of whom court cannot acquire jurisdiction, except such claim need not be stated if it is subject of another pending action. (I.R.C.P. 13). A pleading may state as counterclaim any claim against opposing party not arising out of the same transaction or occurrence. (I.R.C.P. 13).

Cross Claim.

A pleading may state as a cross claim any claim by one party against a co-party arising out of transaction or occurrence that is subject of original action or of a counterclaim, or relating to any property that is subject matter of original action. (I.R.C.P. 13).

Verification.

Unless specifically provided by rule or statute, pleadings need not be verified. Every pleading motion or other paper of party represented by attorney must be signed by at least one resident attorney of Idaho in his individual name. Signature of attorney constitutes certificate by him that he has read document, that after reasonable inquiry it is well grounded in fact and warranted by law or good faith argument for modification of law and not interposed for improper purpose. Sanctions against party or signing attorney available for violation of rule. (I.R.C.P. 11).

Amendment.

Any pleading may be amended once as of course before time for responsive pleading has expired. Further amendment allowed in discretion of court. (I.R.C.P. 15).

Service.

All pleadings are served on adverse party or attorney and filed with clerk of court. (I.R.C.P. 5).

Filing.

Made by filing with clerk of court, if such court has a clerk, otherwise with judge. (I.R.C.P. 5).

Time.

Defendant shall serve his answer, or motions, within 20 days after service of summons upon him. Answer to cross claim must be served within 20 days, reply to counterclaim within 20 days. Service of motion permitted under rules alters above time limits. If court denies motion, responsive pleading shall be served within ten days after notice of the court's action; if court grants motion for more definite statement, the responsive pleading must be served within 10 days after service of the more definite statement. (I.R.C.P. 12).

Accounts and Claims.

No proof of accounts required in first instance to maintain suit. (I.R.C.P. 12[e]). Upon trial, account or claim must be sustained by competent evidence, given orally or by deposition. Verified account will support default.

Small Claims.

See category 6 Courts and Legislature, topic 6.01 Courts.

5.19 PRACTICE:

Governed by provisions of code taken largely from California code, and Idaho Rules of

Civil Procedure, effective Nov. 1, 1958, patterned after Federal Rules for procedure in district courts, except where changed by particular rule. 1970 amendments to Federal Rules not adopted.

Evidentiary matters governed by Idaho Rules of Evidence, effective July 1, 1985, patterned after Federal Rules of Evidence with some modifications. See topic 5.13 Evidence, subhead Witnesses.

Special procedure before magistrate's division, district courts, is provided for collection of claims under $2,000. (I.C. 1-2208).

Supreme Court has power to make rules governing procedure in all courts. (I.C. 1-212).

Discovery.

Patterned after Federal Rules. See topic 5.11 Depositions and Discovery.

Demand for Admission of Facts.

Patterned after Federal Rules. Any party may serve on another party written request for admission of genuineness of any relevant documents described in and exhibited with request, or of truth of any relevant matters of fact set forth. Matter is admitted unless within 15 days party to whom service is directed serves written answer or objection thereto. (I.R.C.P. 36).

Direct Actions Against Insurer.

See category 23 Transportation, topic 23.01 Motor Vehicles, subhead Direct Actions.

Small Claims.

See category 6 Courts and Legislature, topic 6.01 Courts.

See also topics 5.02 Actions, Appeal and Error, Depositions and Discovery, Injunctions, Judgments, Pleading, Process; category 8 Debtor and Creditor, topics 8.02 Attachment, 8.05 Executions, 8.09 Garnishment.

5.20 PROCESS:

Rules of procedure patterned after Federal Rules.

Civil action is commenced by filing complaint with court. (I.R.C.P. 3). See also topic 5.02 Actions.

Summons.

Any time within one year after filing complaint, at request of plaintiff, clerk of court must issue summons and deliver it for service to an officer authorized by law to serve processes. (I.R.C.P. 4).

Who May Serve.

Made by officer authorized by law to serve processes (sheriff, deputy, constable, etc.) or any person over 18 years not party to action. (I.R.C.P. 4).

Personal Service on Individual.

By delivering copy of summons and complaint to him personally, within the state, or by leaving copy thereof at his home or usual place of abode within the state with some person over 18. (I.R.C.P. 4).

Personal Service on Infant.

Upon a minor less than 14 years, service within the state on guardian, if one is appointed, or if none, then upon father or mother, or if none, on person having care and custody of minor. (I.R.C.P. 4).

Personal Service on Incompetent Person.

Service within the state upon guardian, if appointed, or if none, then upon competent adult member of his family with whom he resides. If living in an institution, then upon the chief executive officer. If service cannot be had upon any of the above, then as provided by order of court. (I.R.C.P. 4).

Personal Service on Partnership.

Service on partnership or other unincorporated association, by delivering within the state, a copy of summons and complaint to a member or an officer or managing or general agent, or to other agent authorized by appointment or by statute. (I.R.C.P. 4).

Personal Service on Domestic or Foreign Corporation.

Service by delivering within state, copy of summons and complaint, to officer, managing or general agent, or agent authorized by appointment or by statute. (I.R.C.P. 4).

Personal Service Outside State.

Any person, firm or corporation who in person or by agent transacts business, commits tortious act or owns, uses or possesses real property in state, or contracts to insure person, property or risk within state at time of contracting, or maintaining matrimonial domicile in state, or engages in sexual intercourse giving rise to paternity cause of action, submits to jurisdiction of courts for any cause of action arising therefrom. Personal service outside state authorized. (I.C. 5-514 to 517).

See also category 14 Family, topic 14.06 Divorce, subhead Jurisdiction.

Child Support Matters.

Service may be by usual manner for civil actions or by certified mail with return receipt requested. Service must be by uninterested party over 18 years. Service by mail completed upon obligor's receipt, but attorney or party making service must file return certificate showing that statute was followed and attach obligor's signed receipt. (I.C. 5-518).

Nonresident Motorist.

See category 23 Transportation, topic 23.01 Motor Vehicles.

Long Arm Statute.

See subhead Personal Service Outside State, supra.

Proof of Service.

Service of process, if made by private party, must be proved by affidavit of the party serving same, stating the time, place, and manner of service. If by an officer, proof is made by his official certificate. (I.R.C.P. 5[f]).

Publication.

Service of summons may be made on nonresident, or person who has departed from state, or cannot with due diligence be found within state, by publication of summons at least once a week for four consecutive weeks. Where residence of nonresident is known, copy of summons and complaint must be deposited in Post Office within ten days after making of order of publication, directed to person to be served, at his place of residence. Service of summons is complete at expiration of period of publication. Order of publication is made by the clerk, and must be based on affidavit showing necessary facts requiring service by publication or service outside state. If address of defendant is known, clerk may order that personal service of summons may be made outside state, in lieu of publication. When personal service is made outside state, service is complete at time of service. (I.C. 5-508, 509).

Notices Affecting Real Property.

Published notices affecting real property must contain legal description and street address or information to locate property or name and phone number which may supply information regarding location. (I.C. 60-113).

Where summons has not been personally served on nonresident, court may, on such terms as may be just, allow him to answer to merits within one year from rendition of judgment. (I.R.C.P. 60[b]).

See also topic 5.19 Practice.

Service by Mail.

Service of summons may be made by sending summons and complaint along with form of answer and instructions to defendant by certified or registered mail, return receipt requested. Service is complete when return receipt, which must be signed by defendant, is filed with court. Date of service will be date on return receipt. (I.C. 1-2304).

Sheriff's Fees.

Board of county commissioners for each county has authority to set fees for their respective county. (I.C. 31-3203). In event that board of commissioners do not set fees for their respective county, sheriff may demand following default fees outlined by statute: Service of summons and complaint, $10; attachment, $10; keeper's receipt, $5; bond, $10; return of writ, $10; service of notice, writ or order, $10; posting notice, $3; subpoena, $10; commission on sales, 2% on first $1,000 plus 1% on amount over $1,000 but not to exceed $100 and only ½ of commission allowed if no money transferred because sale credited to debt; sheriff's deed, $10; certificate of sale, $5; criminal arrest, $5; commission on execution without levy or where levied goods are not sold, 1½% on first $1,000 and ½% on amounts over $1,000 but not to exceed $75; travel at 40¢ per mile on mileage over 25 miles for one way only and no charge for miles less than 25 traveled. (I.C. 31-3203).

5.21 REPLEVIN:

Designated as claim and delivery.

Action must be brought within three years from the time that the cause accrues. (I.C. 5-218).

Proceedings.

Plaintiff may claim delivery of property at time of issuance of summons or at any time before trial as provided in statute. (I.C. 8-301). Plaintiff by verified complaint or affidavit shall show: (a) Plaintiff is owner or entitled to possession and evidence of claim of title; (b) property is wrongfully detained and how defendant secured possession; (c) description of property and its location; (d) that property has not been seized pursuant to statute or execution. (I.C. 8-302[1]). Court shall issue order to show cause why property shall not be taken and shall set date of hearing, no sooner than five days. Defendant may file affidavits and appear or file an undertaking to stay delivery. (I.C. 8-302[2]). Court may issue writ of possession prior to hearing if probable cause appears that: (a) Defendant gained possession by larceny; (b) property consists of negotiable instruments or credit card; (c) perishable property, in danger of destruction or concealment. Defendant may request court to shorten time of hearing by notice to plaintiff of not less than 48 hours. (I.C. 8-302[3]). Court may issue temporary restraining orders in lieu of writ of possession, and upon hearing, court may make preliminary determination as to possession pending final adjudication.

Undertaking.

Plaintiff shall file written undertaking executed by two or more sureties in double amount of value. (I.C. 8-303).

Contents of Writ.

Direct to sheriff, describe contents, location, with copy of undertaking attached. Defendant may file exceptions to sureties or file written undertaking for redelivery. (I.C. 8-304 to I.C. 8-306). Claim and delivery action has precedence over other actions. (I.C. 8-312).

Claims of Third Persons.

If claimed by third party, he must file written, verified claim, stating grounds, title, and if claimed by reason of security interest, dollar amount. (I.C. 11-203; I.C. 8-309).

5.22 SEQUESTRATION:

No statutory provisions.

5.23 SERVICE:

See topic 5.20 Process.

5.24 STAY OF EXECUTION:

See topic 5.03 Appeal and Error; category 8 Debtor and Creditor, topic 8.05 Executions.

5.25 SUBMISSION OF CONTROVERSY:

No claim, controversy or dispute may be submitted to any court in state for determination or judgment without filing complaint or petition as provided in rules of civil procedure. (I.R.C.P. 3[a]).

5.26 VENUE:

Actions for recovery or partition of real property, for injury to real property, to determine any interest therein, or to foreclose a mortgage thereon must be brought in the county where the property is situated. (I.C. 5-401). Actions to recover penalties or forfeitures imposed by statute, and against public officers for acts done in virtue of their office, must be brought in county where cause of action arose. (I.C. 5-402). In all other cases action must be brought in county in which defendants or some of them reside. (I.C. 5-404). If none of them reside in state, or their residence is unknown, action may be brought in any county. All actions against life or fire insurance companies may be commenced and tried in county where death occurred or loss was sustained. Actions against domestic and foreign corporations (89 Idaho 506, 406 P.2d 802) shall be commenced and tried in any county of state where defendant has its principal place of business or in county in which cause of action arose (I.C. 5-401 to I.C. 5-404). Venue of action against newspaper for libel is in county in which newspaper was published. (60 Idaho 326, 91 P.2d 357).

Change of venue may be had on usual grounds. (I.R.C.P. 40[e]).

Contract Provisions.

Common law applies.

Criminal matters may be removed from court before which pending if fair and impartial trial cannot be had in original court or in alternative court may order impaneling of jury from county where venue would have been transferred and thereafter transporting jury to place of trial. (I.C. 19-1801 to I.C. 19-1816).

6 COURTS AND LEGISLATURE

6.01 COURTS:

United States District Court.

Clerk's office: Box 039, 550 West Fort Street, Boise, ID 83274.

State of Idaho constitutes a single judicial district. Regular trial terms are held at Coeur d'Alene, Moscow, Boise, and Pocatello.

Supreme Court.

Supreme Court has jurisdiction to review on appeal any decision of district courts or judges thereof. It has original jurisdiction to issue writs of mandamus, certiorari, prohibition and habeas corpus and all writs necessary to exercise of its appellate jurisdiction. It may hear claims against the state, but its decision is advisory only. Place of hearing an appeal depends upon county from which appeal is taken. (I.C. 1-202 to I.C. 1-209).

Court sits at Boise, at Pocatello, at Twin Falls, at Lewiston, and at Coeur d'Alene.

Court of Appeals has jurisdiction to hear and decide all cases assigned it by Idaho Supreme Court, but not cases involving Supreme Court's original jurisdiction nor appeals from imposition of sentences of capital punishment, nor appeals from industrial commission nor appeals from public utilities commission. Court of Appeals will sit in Boise, but also may sit in such other places as it considers convenient for conduct of its business. (I.C. 1-2401 to I.C. 1-2411).

District Courts.

District court has original jurisdiction in all cases, both at law and in equity. It has jurisdiction to review on appeal proceedings of magistrate division and boards of county commissioners.

Magistrate's Division.

All reference to probate courts and justice courts removed, with former duties assumed by magistrates. Proceeding to be assigned to magistrate by senior district judge. Magistrate jurisdiction, not to exceed $4,000 in civil proceeding, including action on contract, tort, damage to personal property, a reputation, taking or detaining personal property, fraud, rents, claims and delivery, proceedings in attachment and garnishment, actions arising under laws of incorporation of cities or counties, collection of taxes, proceedings in forcible entry and detainer, action to foreclose liens up to $4,000 on real or personal property. Criminal proceedings where fine does not exceed $1,000 or one year in county jail or both. Probate proceeding for probate of wills, administration of estates of decedents, minors and incompetents. Supreme Court by rule, I.R.C.P. 82, has specified additional matters assignable to magistrates, including domestic affairs and matters not in excess of $10,000 in controversy. (I.C. 1-2201 to I.C. 1-2219).

Small claims are in small claims department within magistrate's division of district court. Jurisdiction limited to claims for recovery of money not to exceed $4,000. Action commenced by plaintiff appearing and verifying claim, giving names, addresses, and nature and amount of claim. (I.C. 1-2303). Action must be brought in county where defendant resides or where cause of action arose. (I.C. 1-2301). Fee of $18. No attorney may appear, but any party may consult with attorney and receive legal advice outside of court. (I.C. 1-2307). No attachment or garnishment may issue (I.C. 1-2309), but after certificate of judgment is filed execution available (I.C. 1-2313). Either party may appeal within 30 days to lawyer magistrate, different from one rendering judgment, from county in which court is located (I.C. 1-2311), and prevailing party entitled to $25 attorney fee (I.C. 1-2311).

Districts.

State is divided into seven judicial districts, counties of which are as follows:

First District.—Boundary, Bonner, Kootenai, Benewah and Shoshone Counties.

Second District.—Latah, Nez Perce, Lewis, Clearwater and Idaho Counties.

Third District.—Adams, Washington, Payette, Gem, Canyon, and Owyhee Counties.

Fourth District.—Valley, Boise, Ada and Elmore Counties.

Fifth District.—Blaine, Camas, Gooding, Lincoln, Minidoka, Jerome, Twin Falls and Cassia Counties.

Sixth District.—Power, Bannock, Caribou, Oneida, Franklin and Bear Lake Counties.

Seventh District.—Lemhi, Custer, Butte, Clark, Fremont, Jefferson, Madison, Teton, Bingham and Bonneville Counties.

Counties, districts and places of holding court are as follows:

Ada County: Fourth District; court sits at Boise.

Adams County: Third District; court sits at Council.

Bannock County: Sixth District; court sits at Pocatello.

Bear Lake County: Sixth District; court sits at Paris.

Benewah County: First District; court sits at St. Maries.

Bingham County: Seventh District; court sits at Blackfoot.

Blaine County: Fifth District; court sits at Hailey.

Boise County: Fourth District; court sits at Idaho City.

Bonner County: First District; court sits at Sandpoint.

Bonneville County: Seventh District; court sits at Idaho Falls.

Boundary County: First District; court sits at Bonners Ferry.

Butte County: Seventh District; court sits at Arco.

Camas County: Fifth District; court sits at Fairfield.

Canyon County: Third District; court sits at Caldwell.

Caribou County: Sixth District; court sits at Soda Springs.

Cassia County: Fifth District; court sits at Burley.

Clark County: Seventh District; court sits at Dubois.

Clearwater County: Second District; court sits at Orofino.

Custer County: Seventh District; court sits at Challis.

Elmore County: Fourth District; court sits at Mountain Home.

Franklin County: Sixth District; court sits at Preston.

Fremont County: Seventh District; court sits at St. Anthony.

Gem County: Third District; court sits at Emmett.

Gooding County: Fifth District; court sits at Gooding.

Idaho County: Second District; court sits at Grangeville.

Jefferson County: Seventh District; court sits at Rigby.

Jerome County: Fifth District; court sits at Jerome.

Kootenai County: First District; court sits at Coeur d'Alene.

Latah County: Second District; court sits at Moscow.

Lemhi County: Seventh District; court sits at Salmon.

Lewis County: Second District; court sits at Nez Perce.

Lincoln County: Fifth District; court sits at Shoshone.

Madison County: Seventh District; court sits at Rexburg.

Minidoka County: Fifth District; court sits at Rupert.

Nez Perce County: Second District; court sits at Lewiston.

Oneida County: Sixth District; court sits at Malad.

Owyhee County: Third District; court sits at Murphy.

Payette County: Third District; court sits at Payette.

Power County: Sixth District; court sits at American Falls.

Shoshone County: First District; court sits at Wallace.

Teton County: Seventh District; court sits at Driggs.

Twin Falls County: Fifth District; court sits at Twin Falls.

Valley County: Fourth District; court sits at Cascade.

Washington County: Third District; court sits at Weiser.

Small Claims Courts.

See subhead District Courts, catchline Small Claims, supra.

Indigents.

District or magistrate courts may waive payment of fees, costs or appropriate security therefor upon party's affidavit that he is unable to pay. (I.C. 31-3220).

6.02 LEGISLATURE:

Meets annually, commencing on second Mon. of Jan. of each year. Governor may call special sessions. (Const., art. III, § 8).

Initiative and Referendum.

Both provided for in Idaho Constitution, Art. III, § 1.

Lobbyists.

Activities regulated through Secretary of State. (I.C. 67-6617 to I.C. 67-6628).

6.03 REPORTS:

Decisions of Supreme Court and Court of Appeals are contained in Idaho Reports and Pacific Reporter.

Unofficial reports of Supreme Court decisions published in Idaho Supreme Court Reports (ISCR). Reports of Court of Appeals decisions published in Idaho Court of Appeals Reports (ICAR).

Digests are Idaho Digest and Pacific Digest.

6.04 STATUTES:

Latest compilation is Idaho Code, 1947, adopted 1949, of which Volume 4 has been expanded to Volumes 4 and 4A, Volume 5 has been expanded to Volumes 5 (Part 1), 5 (Part 2), 5A and 5B, Volume 6 has been expanded to Volumes 6 and 6A, Volume 7 has been expanded to Volumes 7, 7A and 7B, Volume 8 has been expanded to Volumes 8 and 8A, Volume 9 has been expanded to Volumes 9 and 9A, Volume 10 has been expanded to Volumes 10 and 10A, Volume 11 has been expanded to Volumes 11 and 11A, and Volume 12 has been expanded to Volumes 12 and 13. Code is cited in this digest as follows: Number preceding hyphen indicates title; number following hyphen indicates chapter or, if it contains more than two digits, chapter and section. Thus: 7-1 indicates Title 7, Chapter 1; I.C. 7-101 indicates Title 7, Chapter 1, Section 1; I.C. 7-1011 indicates Title 7, Chapter 10, Section 11; I.C. 7-1101 indicates Title 7, Chapter 11, Section 1. I.R.C.P. indicates Idaho Rules of Civil Procedure.

Uniform Acts which have been adopted are: Agreement on Detainers (1971); Alcohol and Intoxication Treatment (1976); 1987 Anatomical Gift (1989); Arbitration (1975); †Business Corporation Act (1979); Business Records as Evidence (1939); Child Custody Jurisdiction and Enforcement (2000); Child Witness Testimony by Alternate Methods (2003); Commercial Code (1967); †Common Trust Fund (1949); Contribution Among Tortfeasors (1971); Controlled Substances (1971); Criminal Extradition (as am'd 1979, am'd again 2008); †Deceptive Trade Practices (1971); Declaratory Judgments (1933); Division of Income for Tax Purposes (1967); Durable Power of Attorney (1982); Electronic Transactions (2000); Revised Enforcement of Foreign Judgments (1974); Facsimile Signatures of Public Officials (1959); Federal Lien Registration (1967, 1979); Fiduciaries (1925); Foreign Money-Judgments Recognition (1990); Fraudulent Transfer (1987); Interstate Enforcement of Domestic-Violence Protection Orders (2002); Jury Selection and Service (1971); Limited Partnership, 1976 version (1982); Limited Liability Company (2008); Mediation (2008); Motor-Vehicle Registration (1927); Official Reports as Evidence (1939); Partnership (1919); Photographic Copies of Business and Public Records as Evidence (1951); Post-Conviction Procedure, as Revised (1979); Power of Attorney (2008); Principal and Income, Revised (am'd 2009); †Probate Code (1972); Prudent Investor (1997); Prudent Management of Institutional Funds (2007); Real Property Electronic Recording (2007); Reciprocal Enforcement of Support (1951), with uniform amendments (1953; 1959) Revised (1969); Reciprocal Transfer Tax (1929); Rendition of Accused Persons (1969); Rendition of Prisoners as Witnesses in Criminal Proceedings (1959); Securities (am'd 2008); Simplification of Fiduciary Security Transfers (1959); Simultaneous Death (1971); Single Publication (1953); Transfers to Minors Act (1984); Trustees' Powers Act (1965); Unclaimed Property Act 1981 version (1983).

†Adopted with significant variations.

See also category 3 Business Regulation and Commerce, topic 3.24 Securities.

For text of Uniform Acts falling within the scope of the Martindale-Hubbell Law Digests see Uniform and Model Acts section.

6.05 UNIFORM LAWS:

For list of Uniform Acts in force in this state see topic 6.04 Statutes. For text of Uniform Acts within the scope of the Martindale-Hubbell Law Digests see Uniform and Model Acts section.

7 CRIMINAL LAW

7.00A BAIL:

See topic 7.01 Criminal Law.

7.01 CRIMINAL LAW:

Crimes and criminal procedure are covered by I.C. 18-100 to I.C. 18-8105 and I.C. 19-101 to I.C. 19-5306. Crime victims compensation program established in I.C. 72-1001 to I.C. 72-1019. Idaho Telephone Solicitation Act regulates telephone solicitation and requires registration with attorney general; applies to out-of-state solicitors. (I.C. 48-1001 to I.C. 48-1010).

Indictment or Information.

An accused person is brought before court by indictment of grand jury or information filed by prosecuting attorney.

Bail.

Bail not permitted in capital cases where proof of guilt is evident or presumption thereof is great. (I.C. 19-2903). Bail unavailable during appeal when defendant sentenced to death, imprisonment greater than five years, or enhanced penalty for use of firearm. (I.C. 19-2905). In all other cases it is matter of right before conviction and matter of discretion thereafter. (I.C. 19-2901 to I.C. 19-2923).

Uniform Criminal Extradition Act adopted. (I.C. 19-4501 to I.C. 19-4527). Amended 1979. (1979, c. 228).

Uniform Rendition of Accused Persons Act adopted. (I.C. 19-4530 to I.C. 19-4534).

Uniform Disposition of Detainers Act adopted. (I.C. 19-5001 to I.C. 19-5008).

Interstate Compact for Supervision of Parolees and Probationers.

In effect, with Out-of-State Incarceration Amendment. (I.C. 20-301 and I.C. 20-302).

Uniform Post-Conviction Procedure Act, as Revised, adopted. (I.C. 19-4901 to I.C. 19-4911, am'd 1979, c. 143). Appeal must be within 42 days of judgment.

Uniform Rendition of Prisoners as Witnesses in Criminal Proceedings Act adopted. (I.C. 19-3013 to I.C. 19-3022).

8 DEBTOR AND CREDITOR

8.01 ASSIGNMENTS:

Choses in action may be assigned like other personal property. No particular form required. Acknowledgment not necessary. No requirement of or authority for recording. (I.C. 55-402).

Uniform Commercial Code adopted. (28-1-101 to I.C. 28-10-104). See category 3 Business Regulation and Commerce, topic 3.09 Commercial Code.

Idaho Consumer Credit Code adopted Apr. 1, 1983. (I.C. 28-41-101 to I.C. 28-49-107). See category 3 Business Regulation and Commerce, topic 3.11A Consumer Credit.

Assignment of Accounts Receivable.

See category 3 Business Regulation and Commerce, topic 3.09 Commercial Code.

Assignment of Wages.

Seller, lessor, or lender in consumer credit transaction may not take assignment of earnings as payment or as security for debt. Any such assignment is revocable by buyer, lessee, or borrower, although employee is not prohibited from authorizing deductions from earnings if authorization is revocable. (I.C. 28-43-304).

8.02 ATTACHMENT:

Attachment is ancillary to action and in accord with statute. (I.C. 8-501 to I.C. 8-540).

Actions in Which Allowed.

Attachment can issue only in action on judgment or express or implied contract for direct payment of money not secured by mortgage, deed of trust, lien, or security interest. (I.C. 8-501).

Courts Which May Issue Writ.

All district courts.

Claims on Which Writ May Issue.

Debt must be due, but it need not be payable in this state. (I.C. 8-501).

In Whose Favor Writ May Issue.

In proper case, any plaintiff, including nonresident or foreign corporation may obtain attachment.

Grounds for attachment are: (1) That contract or debt sued for arose on contract, express or implied, for direct payment of money, and has not been secured by mortgage, deed of trust, security interest, or lien, on real or personal property; or if so secured, that such security has become valueless, without any act of plaintiff or person to whom such security was originally given; or (2) if defendant is nonresident, then in action upon judgment, or upon contract, express or implied, or for collection of any penalty provided by any statute of this state. (I.C. 8-501). Foreign corporation is nonresident within latter provision. (26 Idaho 703, 146 P. 101).

Proceedings to Obtain.

Plaintiff shall file application for writ supported by affidavit. (I.C. 8-502). Court shall issue order to show cause why writ should not issue and for hearing date, no sooner than five days, and direct time within which service on defendant be made. (I.C. 8-502[b]).

Prior to hearing, court may, nevertheless, issue writ if (1) jurisdiction depends on attachment of defendant's property in state; (2) property is a negotiable instrument; (3) property is bank account subject to threat of immediate withdrawal, property is perishable, in danger of destruction, concealment or removal from state, or sale to innocent third person. (I.C. 8-502[c]).

On order to show cause hearing court makes preliminary determination, and if a reasonable probability that plaintiff's claim would prevail, requires undertaking for value of property and may issue writ which may be levied upon in amount adequate to secure judgment which may be obtained. (I.C. 8-502[e]).

If writ issued prior to hearing, defendant may request shortened time, with notice to plaintiff, of not less than 48 hours. (I.C. 8-502[c]).

If no appearance by defendant after service, writ may issue.

Court may, in addition, issue temporary restraining order, in lieu of writ of attachment. (I.C. 8-502[d]).

Affidavit for Attachment.

Plaintiff, or his agent or attorney must make and file an affidavit stating ground of attachment, that debt is due, amount due, and that attachment is not sought, or the action prosecuted, to hinder, delay, or defraud any creditor of defendant. (I.C. 8-502).

Attachment Bond.

No writ shall issue except by filing a written undertaking by plaintiff in amount set by court. (I.C. 8-503[a]).

Notice of Attachment.

Two days after issuing writ clerk of court must post at door of courthouse for ten days, and cause to be published in a newspaper (if a weekly, in three issues; if any other, six issues) a notice setting out title of case and fact of attachment. (I.C. 8-503[b]). Published notices affecting real property must contain legal description and (a) street address or other information to assist public to locate property or (b) name of person from whom additional information can be obtained. (I.C. 60-113).

Levy made on real property by filing notice of attachment describing property and copy of writ with county recorder; personal property incapable of manual delivery, by serving similar notice and copy of writ on party in possession; other personal property, by taking into custody. (I.C. 8-506). Securities must be attached by actual seizing by officer making levy or by legal process pursuant to § 28-8-317. Personal property subject to security interest, defendant's equity of redemption in personal property and defendant's interest in real estate mortgage or deed of trust or as secured party under security agreement may also be attached but only by methods listed in statute. (I.C. 8-506A). See category 5 Civil Actions and Procedure, topic 5.21 Replevin.

Indemnity.

Officer may not demand indemnity bond before making levy, but may do so after, if defendant claims exemption or third party claims property. (I.C. 11-203).

Lien of attachment merges in judgment for plaintiff when obtained. (I.C. 8-528). See subhead Vacation or Modification, infra.

Priorities.

Attaching creditor has priority over subsequent attachments and judgments, except that other creditors who file suit within 30 days after first publication and posting of notice of attachment and diligently pursue to judgment, are entitled to prorate. (I.C. 8-503[b]).

Sale after judgment is made as in case of execution, but perishable property may be sold before judgment and other property may also be sold before judgment under court order. (I.C. 8-525-6, 528).

Release of Property.

Attachment may be discharged by judgment for defendant in action, by defendant giving bond in an amount fixed by court for redelivery or payment of value, or may be vacated for irregularity on motion. (I.C. 8-531 to -538).

Claims of third persons to ownership of property levied on, or of debtor that such property is exempt, are governed by same rules as in case of execution. (I.C. 8-527). Third party claim by way of security interest must set forth dollar amount of claim. (I.C. 11-203). See topic 8.05 Executions.

Vacation or Modification.

Where lien on real estate has in any manner been lost or destroyed, issuing court, on application, may discharge lien. (I.C. 8-538). Levy is lien on real property for two years, unless sooner released, discharged, or discharged by dismissal of the action. Lien ceases after two years, unless on motion made not less than five or more than 60 days before expiration, court extends time, not to exceed two years. Lien may be so extended from time to time. (I.C. 8-539).

Debtor's Personal Property.

Attachment by possession (1) if parties with UCC perfected security interest consent in writing, then subject to their rights; (2) payment of perfected security interest holder, and obtaining possession by payment is subrogated to interest of such perfected security holder; (3) attachment of defendant's equity of redemption without possession, by sheriff serving and filing writ and notice. (I.C. 8-506A).

Mortgage and Trust Deed.

Interest of mortgagee and beneficiary to trust deed may be attached by sheriff recording and serving copy of writ and notice. (I.C. 8-506A).

Defendant's Security Interest.

Attached by sheriff filing and serving copy of writ and notice. (I.C. 8-506A).

8.03 [RESERVED]

8.04 CREDITORS' SUITS:

No statutory provisions. Doctrines of equity control. (7 Idaho 677, 65 P. 444). See topics 8.05 Executions, 8.08 Fraudulent Sales and Conveyances.

8.05 EXECUTIONS:

While rules patterned after Federal Rules have been adopted, executions still governed by statute. (I.R.C.P. 69).

May issue at any time after rendition and recording of appealable final judgment, within five years from entry of judgment. If five years have elapsed, and judgment is for recovery of specific property, court may, on motion, or judgment based on supplemental pleadings, grant leave to carry judgment into execution. Executions issue in name of state, under seal of court subscribed by clerk, are directed to sheriff of county to which they issue, and must briefly describe judgment, and state court in which judgment was rendered. (I.C. 11-101 to -105; I.R.C.P. 62).

Exemptions.

See topic 8.06 Exemptions.

Levy is made in case of real estate by filing notice of levy describing property and copy of writ with county recorder, in case of personal property incapable of manual delivery by serving similar notice and copy of writ on party in possession, and in case of other personal property by taking into custody. Property levied on is sold, except things in action collected, gold dust and money. (I.C. 8-506, I.C. 11-201, I.C. 11-301).

Indemnity.

If defendant serves a verified written statement setting forth his claim that property levied on is exempt, the sheriff is not bound to keep the property unless plaintiff gives an indemnity bond. (I.C. 11-203).

Lien.

Execution creates no lien until actual levy.

Return.

Execution is returnable within 60 days. (I.C. 11-103).

Sale under execution must be at public auction to highest bidder, between 9 A. M. and 5 P. M. When estate sold is less than leasehold of two years unexpired term, sale is absolute. In all other cases property is subject to redemption. (I.C. 11-302 to I.C. 11-310).

Redemption.

Real estate may be redeemed within one year after sale if real property consists of more than 20 acres, and within six months if 20 acres or less, by paying amount paid on sale with interest at 12% per annum from date of sale to date of redemption, together with amount of any assessments or taxes paid by purchaser since commencement of action and not included in judgment and interest at 12% on such amount, and if purchaser also holds prior lien to redemptioner other than judgment on which property was sold, amount of such prior lien with 12% interest thereon. Property may be redeemed by successive redemptioners within 60 days from last redemption and within one year from sale, by paying amount of last redemption with interest at 12% per annum from date of such last redemption, any taxes or assessments paid by last redemptioner and any prior lien held by him, together with interest at 12% per annum on each of said amounts. (I.C. 11-310, I.C. 11-401 to I.C. 11-407).

Claims of Third Persons.

Third person may serve on sheriff written claim to property levied on, verified under oath, showing their title, in which event sheriff is not bound to keep property unless plaintiff gives him indemnity bond. (I.C. 11-203).

Stay of Execution.

Court may stay execution of, or any proceeding to enforce, judgment pending disposition of motion for new trial or for relief from default judgment. (I.C. 11-101). As to stay pending appeal, see category 5 Civil Actions and Procedure, topic 5.03 Appeal and Error.

Supplementary Proceedings.

After return of execution unsatisfied in whole or in part, the defendant or any one of several joint defendants, may be required to attend before the judge of the court in which the judgment has been recovered, and compelled to testify concerning his estate and effects. Any debtor of the defendant may satisfy an execution against the defendant, and the receipt of the sheriff is a discharge of his obligation to the defendant to the extent of the amount so paid by him. The court may order the application of any property not exempt from execution, choses in action or effects that may appear to be in his hands or in the hands of any one for him, to the satisfaction of the judgment. (I.C. 11-501 to I.C. 11-508).

8.06 EXEMPTIONS:

Any actual resident of state may hold, exempt from attachment, execution or other process of law, large number of articles specifically enumerated in statutes, exemption being limited as to value in some cases and without limit in other cases. (I.C. 11-601 to I.C. 11-609). Some exemptions not applicable against child or spousal support claims. (I.C. 11-603[3] and I.C. 11-607[c]).

Substitution.

There is no provision authorizing a debtor who does not possess articles specifically exempted to hold money or other property exempt in lieu thereof.

Earnings subject to garnishment shall not exceed lesser of 25% of disposable earnings or amount disposable earnings exceed 30 times federal minimum hourly wages. Does not apply to court orders for support, bankruptcy court orders, debts for federal or state taxes. (I.C. 11-206 to I.C. 11-207). Garnishment on debt subject to Consumer Credit Code not more than amount disposable earnings exceed 30 times federal minimum wage. (I.C. 28-45-104). See category 3 Business Regulation and Commerce, topic 3.11A Consumer Credit.

Necessity of Claiming Exemption.

Must be claimed by verified claim. (I.C. 11-203).

Insurance.

All benefits accrued or accruing under life insurance policies, to extent reasonably necessary for support (I.C. 11-604), and proceeds from group insurance policies (I.C. 41-1835) are exempt.

Homestead Exemption.

See topic 8.10 Homesteads. See also topic 8.09 Garnishment.

8.07 FORECLOSURE:

See topic 8.13 Liens; category 20 Mortgages, topic 20.04 Mortgages of Real Property.

8.08 FRAUDULENT SALES AND CONVEYANCES:

Uniform Commercial Code adopted. (28-1-101 to I.C. 28-10-104). See category 3 Business Regulation and Commerce, topic 3.09 Commercial Code.

Bulk Sales.

See category 3 Business Regulation and Commerce, topic 3.09 Commercial Code.

Uniform Fraudulent Transfer Act adopted. (I.C. 55-910 to I.C. 55-921).

8.09 GARNISHMENT:

Property Which May Be Reached.

Credits or other personal property belonging to defendant and debts owing to him may be garnished, where writ of attachment has issued. (I.C. 8-507). See topic 8.02 Attachment; category 3 Business Regulation and Commerce, topic 3.11A Consumer Credit.

By proper pleading filed in garnishment, defendant may show property or debt is subject to exemption. (I.C. 8-519). See topic 8.06 Exemptions.

Jurisdiction.

Same as for attachments.

Proceedings to Obtain.

Same as for attachments.

Service of Writ and Notice.

The sheriff must serve upon the person or corporation, public or private, owing defendant or having his property, a copy of the writ of attachment, notice that such credits or other personal property are attached, notice of exemption, instructions to debtor and third parties for asserting claim of exemption. Forms are in I.C. 8-507C. (I.C. 8-507). Sheriff shall serve writ and other documents within two days but for banks within one day. (I.C. 8-507A). If garnishment on bank, garnishee shall mail or hand deliver copy to defendant and any co-owner within one day after service on bank. (I.C. 8-507B). Sheriff can serve by certified mail or in person. (I.C. 8-507D). Claims of exemption must be within 14 days of service and motion to determine must be brought within five days after claim of exemption served. (I.C. 11-203).

Liability of Garnishee.

The person or corporation so served is liable for the amount of such credits, property or debt until the attachment is discharged or any judgment recovered by the plaintiff is satisfied, unless the property be delivered up or transferred or such debt, or a portion thereof equal to the amount of plaintiff's claim, is paid to the sheriff. (I.C. 8-508).

Answer of Garnishee.

Garnishee must answer within five days from service and default judgment may be taken for failure to answer. (I.C. 8-512).

Plaintiff may except to answer for insufficiency or file denial within three days and if denied trial may be had on the issues so framed. If garnishee admits liability he may be allowed a reasonable sum for his expenses and trouble in answering. (I.C. 8-513 to I.C. 8-516).

Examination of Garnishee.

The garnishee may be required to attend before the court or judge or a referee for examination under oath. (I.C. 8-509). Written interrogatories may be served on the garnishee as to personal property of the defendant in his hands or debts owing from him to such defendant. (I.C. 8-511).

Judgment.

No final judgment can be rendered against garnishee until final judgment in the action. (I.C. 8-512).

Earnings.

Continuing garnishment for future moneys coming due may be had against employer of judgment debtor. (I.C. 8-509). If additional garnishments are issued, they cannot be effected until existing garnishment is satisfied or until amount taken by existing garnishment is less than maximum allowed. Additional garnishments must be executed in order presented. (I.C. 8-509). See topic 8.06 Exemptions, subhead Earnings.

Debts, moneys and credits due or owing by State of Idaho to any person except an elective state officer are subject to execution and garnishment after final judgment. (I.C. 11-202).

8.10 HOMESTEADS:

Homestead consisting of family dwelling and land on which it is situated is automatically protected by exemption by any person residing thereon and held exempt from execution or forced sale. (I.C. 55-1001).

Limitation of value which may be held exempt is $100,000, in excess of mortgage, trust deed or recorded liens, including improvements. (I.C. 55-1003).

Limitation of Area.

None other than confined to dwelling house and land on which situated.

Debts or Liabilities Against Which Exemption Not Available.

The exemption is not available against judgments: (a) which became liens before the homestead declaration was recorded or were rendered in actions in which attachments were levied on the premises before that time; (b) based on debts secured by mechanics', materialmen's, laborers' or vendors' liens; (c) based on debts secured by mortgages or deeds of trust executed and acknowledged by husband and wife or by unmarried claimant; (d) based on mortgages or deeds of trust executed and recorded before homestead declaration was recorded or properly executed thereafter. (I.C. 55-1004, I.C. 55-1005).

Designation of Homestead.

In order to secure the exemption, the claimant must execute, acknowledge and record in the office of the county recorder of the county where the land is situated a written declaration of homestead. (I.C. 55-1203 to I.C. 55-1205). Under certain conditions may presumably apply to mobile home, if connected to utilities, or leasehold interest, etc.

Waiver or Release.

The homestead right may be waived or released by an instrument which conveys no property. (I.C. 55-1007, I.C. 55-1008).

Abandonment.

The homestead can be abandoned only by a declaration of abandonment or a grant thereof duly executed and acknowledged. (I.C. 55-1007, I.C. 55-1008).

Alienation or Encumbrance.

A conveyance or mortgage of the homestead must be joined in and acknowledged by the husband or wife of the owner. (I.C. 55-1006).

Proceeds of Sale or Insurance.

Proceeds of voluntary sale and proceeds of insurance in event of loss are exempt. (I.C. 55-1001).

Rights of Surviving Spouse and Family.

If the selection was made by a married person from community property, the land vests in the survivor on the death of either spouse subject to no other liability than it would be in the event there had been no death. In other cases it passes to the heirs or devisees, subject to the power of court to assign same for limited period to family of decedent. (I.C. 55-1206).

See category 13 Estates and Trusts, topics 13.07 Descent and Distribution, 13.09 Executors and Administrators. (15-2-401).

8.11 JUDGMENT NOTES:

See category 3 Business Regulation and Commerce, topic 3.02 Bills and Notes.

8.12 LEVY:

See topics 8.02 Attachment, 8.05 Executions.

8.13 LIENS:

Persons performing labor upon saw-logs, cord wood or other timber, or in making same into lumber or furnishing supplies to parties engaged in such work, have lien on same, the claim for which must be filed within 90 days from the close of the rendition of the services or furnishing supplies. (I.C. 45-401 to I.C. 45-417). Farm laborers and any person furnishing seed have similar lien on crops which must be filed within 90 days. (I.C. 45-301 to I.C. 45-317). Suit must be brought in either case within six months. There is no right of redemption of personal property after foreclosure sale. (I.C. 45-301 to I.C. 45-417).

Uniform Commercial Code adopted. (28-1-101 to I.C. 28-10-104). See category 3 Business Regulation and Commerce, topic 3.09 Commercial Code.

Aircraft Improvement Lien.

(I.C. 45-1101 to I.C. 45-1107).

Agricultural Commodities.

Producers and dealers in grains, legumes, seeds and other agricultural commodities have lien on product or proceeds until sale price is paid in full. (I.C. 45-1802). Attaches later of day of delivery or date final payment is due and unpaid. (I.C. 45-1803). Liens for farm labor or for providing seed must be secured by filing notice of lien with secretary of state within 120 days from date labor was completed or final delivery of seed. (I.C. 45-308). Farm labor liens have 12 month duration, which may be extended for six additional months. (I.C. 45-310[1]). Seed liens have duration of 16 months, with limited possibility of six month extension. (I.C. 45-310[2]). Other agricultural commodity liens must be filed within 180 days and are effective for period of one year after date of attachment. (I.C. 45-1804). Form of notice requires statement of amount owing, minus credits and offsets, name of purchaser, description of product, statement that amount claimed is bona fide existing debt, and other information required by recorder, and by mailing (certified) copy of notice to persons who have filed liens on inventory and accounts of purchaser. (I.C. 45-1804). Lien has priority over other creditor liens of purchaser regardless of date of attachment. (I.C. 45-1805). Purchaser has right to have discharge filed after payment. (I.C. 45-1806, 07).

Federal Liens.

Federal tax or other federal liens are to be recorded in county where property is situated. (I.C. 45-202).

Homeowner's Association Liens.

Homeowner's Association may file lien on real property for unpaid association dues. (I.C. 45-810).

Hospital has lien for charges for care, treatment and maintenance of injured person, on cause of action for such injuries. To perfect lien, hospital must, within 90 days after discharge of patient, file with county recorder verified statement setting forth name of patient, amount of claim and name of person or corporation claimed to be liable for injury. No release of cause of action is effectual unless lienholder joins therein or executes release of lien. (I.C. 45-701 to I.C. 45-705).

Mechanics' Liens.

Every person, performing labor upon or furnishing materials to be used in construction, alteration or repair of any mining claim, building, ditch, railroad, or other structure, or who improves any land by grading, leveling, etc., or improving any lot in incorporated city or town, or professional engineer who renders professional services, has lien thereon for work done or material furnished. “Furnishing Materials” includes supplying, renting, or leasing equipment, materials, or fixtures. (I.C. 45-501).

The land upon which any building, improvement, or structure is constructed, together with a convenient space about the same, is also subject to the lien, if at the time of the commencement of the work, furnishing of materials, or renting, leasing, or otherwise supplying equipment, materials, or fixtures, it belonged to person who caused construction, alteration or repair to be done, including agent of owner; but if such person has less than fee simple estate in such land, then only interest of person or persons causing services or improvement therein is subject to such lien. (I.C. 45-505).

The term labor includes cost of Workmen's Compensation and occupational disease compensation security required by law, payment for which security has not been made. (I.C. 45-

517).

Filing.

Every original contractor must within 90 days from completion of work or furnishing of last item of materials, file for record with county recorder verified claim of lien, containing statement of his demand after deducting all just credits and offsets, with name of owner or reputed owner, name of person employing him, and description of property to be charged sufficient for identification. Within five business days of filing, copy of claim must be served upon or mailed (certified) to property owner. (I.C. 45-507). Debtor may obtain release of lien by posting surety bond. (I.C. 45-518 to I.C. 45-525).

Enforcement.

Lien must be enforced by suit within six months unless credit is given. Lien of final judgment obtained on mechanics' lien expires five years from date of final judgment. (I.C. 45-510). Property subject to redemption as in cases of sales under execution (I.C. 6-101) which generally is within six months if property is less than 20 acres; and within one year if property is greater than 20 acres (I.C. 11-402). Subsequent redemption also available to other redemptioners. (I.C. 11-403).

Medical Assistance Liens.

Medical assistance paid on behalf of individual 55 years of age or older when assistance received results in lien on estate of such individual, provided lien shall not attach while there is surviving spouse or child under age 21. (I.C. 56-216). Lien may also attach to real property of individual in nursing facility, during his lifetime, if such individual is not expected to return home. (I.C. 56-218A).

Motor Vehicles.

Lien is perfected at time of filing of properly completed application with department. (I.C. 49-510).

Physicians and nurses licensed in Idaho have lien for care of injured person on cause of action for injuries. Perfected, recorded and enforced as Hospital Lien, above. Court may allow attorney fee. (I.C. 45-704A; I.C. 45-704B).

Attachment Liens.

See topic 8.02 Attachment.

Attorney's Liens.

See category 18 Legal Profession, topic 18.01 Attorneys and Counselors.

Carrier's Liens.

See category 3 Business Regulation and Commerce, topic 3.08 Carriers.

Chattel Mortgage Lien.

See category 3 Business Regulation and Commerce, topic 3.09 Commercial Code.

Collateral Security.

See category 3 Business Regulation and Commerce, topic 3.09 Commercial Code.

Factor's Lien.

See category 3 Business Regulation and Commerce, topic 3.09 Commercial Code.

Judgment Lien.

See category 5 Civil Actions and Procedure, topic 5.15 Judgments.

Liens on Homestead.

See topic 8.10 Homesteads.

Real Estate Mortgage Lien.

See category 20 Mortgages, topic 20.04 Mortgages of Real Property.

Tax Lien.

See category 22 Taxation, topic 22.15 Property Taxes, subhead Lien.

8.14 MECHANICS' LIENS:

See topic 8.13 Liens.

8.15 PLEDGES:

Uniform Commercial Code adopted. (28-1-101 to I.C. 28-10-104). See category 3 Business Regulation and Commerce, topic 3.09 Commercial Code.

8.16 RECEIVERS:

A receiver may be appointed by the court in which an action is pending or has passed to judgment or by the judge thereof in the following cases: (1) In action by vendor to vacate fraudulent purchase, by creditor to subject property or fund to his claim, or by partners or other joint owners in property or fund, where it is shown that property or fund is in danger of being lost, removed or materially injured; (2) in mortgage foreclosures where it appears that mortgaged property is in danger of being lost, removed or materially injured, or that condition of mortgage has not been performed and that property probably is insufficient to discharge mortgage debt; (3) after judgment to carry judgment into effect; (4) after judgment to dispose of property according thereto or to preserve it pending an appeal or in proceedings in aid of execution; (5) where corporation has been dissolved or is insolvent or in imminent danger of insolvency, or has forfeited its corporate rights; (6) for irrigation district where there are no officers, or district has ceased to function, has been abandoned, is insolvent, or is grossly mismanaged; (7) in other cases where receivers are appointed by the usages of courts of equity. (I.C. 8-601). Additionally, trustee or beneficiary of deed of trust may request receiver if property is in jeopardy or if it is insufficient security for debt it secures. (I.C. 8-601A).

Party, attorney or person interested in an action cannot be appointed receiver therein, without the written consent of the parties, filed with the clerk. (I.C. 8-603).

Bonds.

If appointed on an ex parte application, the court may require the applicant to give an undertaking in an amount fixed by the court to pay defendant all damages he may sustain by reason of the appointment in case it was procured wrongfully, maliciously, or without sufficient cause. Receiver must also give oath that he will faithfully discharge his duties and obey orders of court therein. (I.C. 8-603 and I.C. 8-604).

Powers.

Receiver can bring and defend actions in his own name, take and keep possession of property, receive rents, collect debts, compound or compromise debts, make transfers, or any other act authorized by court. (I.C. 8-605).

8.17 REDEMPTION:

See topics 8.05 Executions, Liens; categories 20 Mortgages, topic Mortgages of Real Property; Taxation, topic Property (Ad Valorem) Taxes, subhead Redemption.

8.18 [RESERVED]

8.19 TRUSTEE PROCESS:

See topic 8.09 Garnishment.

8.20 USURY:

See category 3 Business Regulation and Commerce, topic 3.19 Interest.

9 DISPUTE RESOLUTION

9.01 ALTERNATIVE DISPUTE RESOLUTION:

Mandatory (Alternative) Dispute Resolution.

Uniform Arbitration Act adopted. (I.C. 7-901 to I.C. 7-922).

Arbitration is mandatory when any buyer claims to have been damaged by failure of tuber, plant, or plant part to perform as represented, or for failure of any seed to perform as represented by label. (I.C. 22-436).

Small Lawsuit Resolution Act.

Alternate civil procedure for claims under $25,000. (I.C. 7-1501 et seq.).

Trust and Estate Dispute Resolution Act.

Statutory provision for resolution of disputes and other matters involving trusts and estates by non-judicial methods. (15-8-101 to 15-8-305).

9.02 ARBITRATION AND AWARD:

Uniform Arbitration Act adopted. (I.C. 7-901 to I.C. 7-922).

9.02A MEDIATION:

Uniform Arbitration Act adopted. (I.C. 7-901 to I.C. 7-922).

10 DOCUMENTS AND RECORDS

10.01 ACKNOWLEDGMENTS:

May be taken by following officers:

Within state: Justice or clerk of Supreme Court; Secretary of State; U. S. Commissioner; judge or clerk of court of record; county recorder; notary public; justice of peace. (I.C. 55-701 and I.C. 55-702). Fee not to exceed $2. (I.C. 51-110).

Outside State but within United States: Justice, judge or clerk of court of record of United States or state or territory; commissioner appointed by Governor of Idaho for that purpose; notary public; any other officer of state or territory where taken authorized by its laws to take acknowledgments. (I.C. 55-703).

Outside United States: Minister, commissioner or chargé d'affaires of United States resident in and accredited to country where taken; consul or vice-consul of United States resident there; judge of court of record; commissioner appointed for such purpose by Governor of Idaho; notary public. (I.C. 55-704).

Deputies.

When any of the aforementioned officers is authorized to appoint a deputy, acknowledgments may be taken by deputy in name of principal. (I.C. 55-706).

Officers of U. S. Armed Forces.

As to notarial powers of officers in U. S. Armed Forces, see topic 10.03 Notaries Public.

Requirements.

Notary must require personal appearance of one whose acknowledgment is taken; administer oath when required; disqualify self if has beneficial interest. (I.C. 51-117). Officer must know identity of person acknowledging and if acknowledger acts in representative capacity, such capacity, or have it proved by credible source and state facts in his certificate; must affix his signature, his official seal, if required by law to have one, and if notary public in Idaho, designate his place of residence, and date of expiration of commission. (I.C. 51-106, I.C. 51-109, I.C. 55-707, I.C. 55-716).

Foreign Acknowledgments.

Acknowledgments taken outside state and in accordance with Idaho requirements or those of state or country where taken are sufficient. (I.C. 55-805).

Married women acknowledge in same manner as other persons. (I.C. 55-708).

Authentication.

No certificate authenticating signature and official character of officer is required, whether acknowledgment taken outside state or not, unless acknowledgment taken before justice of the peace for use outside county where taken, in which event it must be authenticated by certificate of recorder of county where justice resides. (I.C. 55-717). If required, district judge certifies clerk's authority and clerk certifies judge's signature.

Proof of unacknowledged instrument may be made by a subscribing witness or by proof of handwriting in certain cases before an officer or by action in district court, but judgment in such action is necessary to entitle unacknowledged instrument to record. (I.C. 55-718 to I.C. 55-727).

Effect.

Acknowledgment entitles instrument affecting title to or possession of real property to record. (I.C. 55-805).

Forms

Individual (I.C. 55-710): State of. . . ., County of. . . ., ss. On this. . . . day of. . . .

in the year. . . ., before me (here insert name and quality of officer), personally appeared. . . . known or identified to me (or proved to me on the oath of. . . .) to be the person whose name is subscribed to the within instrument, and acknowledged to me that he (or they) executed the same. In witness whereof I have hereunto set my hand and affixed my official seal the day and year in this certificate first above written.

....

Notary Public, residing at..........

My commission expires on..........,

20. . .

Corporation (I.C. 55-711): State of. . . ., County of. . . ., ss. On this. . . . day of. . . . in the year. . . ., before me (here insert name and quality of officer), personally appeared. . . . known or identified to me (or proved to me on the oath of. . . .) to be the president, or vice-president, or secretary or assistant secretary of the corporation that executed the above instrument or the person who executed the instrument on behalf of said corporation and acknowledged to me that such corporation executed the same. (Continue as in above form).

Attorney in fact: First portion and conclusion same as in above forms, balance as follows: "to be the person whose name is subscribed to the within instrument as attorney-in-fact of. . . . and acknowledged to me that he subscribed the name of. . . . thereto as principal and his own name as attorney-in-fact." (I.C. 55-712).

Oath or affirmation: State of. . . . ., ss, County of. . . . .; Subscribed and sworn (or affirmed) before me this. . . . . day of. . . . ., 20. . .

Additional forms are prescribed for acknowledgment by persons in official or representative capacities and acknowledgments in partnership names (I.C. 55-713 to I.C. 55-715), verbal oath or affirmation (I.C. 51-109[3]), verification of instrument (I.C. 51-109[4]), certify copy of public document (I.C. 51-109[5]).

Alternative to Acknowledgment or Proof.

No statutory provision.

10.02 AFFIDAVITS:

There is no statute or rule which sets out affidavit requirements to be applied generally in all situations, nor is there any specific rule or statute which lists all permissible uses of affidavits.

Oaths.

Every court, every judge or clerk of any court, every justice and every notary public, secretary of state, and every officer or person authorized to take testimony in any action or proceeding or to decide upon evidence, has power to administer oaths or affirmations. (I.C. 9-1401).

Form

No statutory form. Usual heading is:

State of. . . ., County of. . . ., ss. May be in first or third person. Usual jurat: Subscribed and sworn to before me this. . . . day of. . . ., 20. . . . .

....

(Title of officer).

Notary public must state date of expiration of his commission. (I.C. 51-109[6]).

Alternative to Affidavit.

No statutory provision.

10.03 NOTARIES PUBLIC:

Qualification.

Must be 18 years, U.S. citizen, Idaho resident, able to read and write English, and not have been convicted of serious crime or in jail. (I.C. 51-104, 105). May be removed for misconduct, or incapacity. (I.C. 51-112 to 115). Must take and file oath, and bond in sum of $10,000 in office of Secretary of State. (I.C. 51-104, -105).

Authentication and Forms.

See topic 10.01 Acknowledgments.

Seal.

Required to keep official seal (embosser or rubber stamp with serrated edge) with words “Notary Public”, notary's name, and “State of Idaho”, to authenticate all official acts with such seal. (I.C. 51-106).

Powers.

Take acknowledgments; administer oaths and affirmations; certify true copy of original document; certify affidavits, verifications or depositions; certify affixation of signature by mark on instrument; sign name of person physically unable to sign; and other acts as permitted by law. Powers may be exercised anywhere in Idaho or outside state if to be admitted for record in Idaho. (I.C. 51-107). Must not have disqualifying interest. (I.C. 51-108). Misconduct is misdemeanor. (I.C. 51-119).

Fees.

Not to exceed $2 per act plus travel expense. (I.C. 51-110). Notary liable for damages resulting from official misconduct or neglect. (I.C. 51-118).

Officers of U. S. Armed Forces.

Officers of any component of any branch of armed forces of U. S. have general powers of notaries public as to all notarial acts on behalf of persons in U. S. armed forces or subject to military or naval law, anywhere. (I.C. 55-705).

10.04 RECORDS:

Uniform Commercial Code adopted. (28-1-101 to I.C. 28-10-104). See category 3 Business Regulation and Commerce, topic 3.09 Commercial Code.

Recordable Instruments.

Any conveyance or other instrument or judgment affecting title to or possession of real property may be recorded. (I.C. 55-801). An instrument is deemed to be recorded when, being duly acknowledged, or proved and certified it is deposited in recorder's office with proper officer for record. (I.C. 55-809). Every conveyance of real property acknowledged or proved, and certified, and recorded as prescribed by law, from time it is filed with recorder for record, is constructive notice of contents thereof to subsequent purchasers and mortgagees. (I.C. 55-811). Term "conveyance" embraces every instrument in writing by which any estate or interest in real property is created, alienated, mortgaged or encumbered, or by which title to any real property may be affected, except wills. (I.C. 55-813). Summary of instrument affecting title may be recorded. (I.C. 55-818). See categories 20 Mortgages, topic Mortgages of Real Property, subhead Execution and Recording; Property, topic Deeds.

Place of Recording.

County recorder in county where real property is situated. (I.C. 55-808). *For list of Counties and County Seats see first page for this state in Volume containing Practice Profiles Section.*

Requisites for Recording.

Before instrument may be recorded it must be acknowledged by person executing it, or appropriate corporate officer, etc.; if executed in any other state or foreign country according to laws of that state or country, prima facie sufficient for recording. (I.C. 55-805).

Fees.

U.C.C. filing fee schedule available from Idaho Secretary of State at http://www.sos.idaho.gov/ucc/uccfee.htm. Reduced fees granted for online filing.

Foreign Conveyances or Encumbrances.

See subhead Requisites for Recording, supra.

Filing Under Commercial Code.

See category 3 Business Regulation and Commerce, topic 3.09 Commercial Code. Place to file for timber to be cut, minerals, accounts, fixtures is county recorder's office. (28-9-401). Special rules established for farm product filings. (See category 3 Business Regulation and Commerce, topic 3.09 Commercial Code, subhead Variations, § 9-307.) All other filings made with Secretary of State, Room 205, Statehouse, Boise, ID 83720. (28-9-401). U.C.C. filing fee schedule available from Idaho Secretary of State at http://www.sos.idaho.gov/ucc/uccfee.htm. Reduced fees granted for online filing.

Public Records.

Every person has right to inspect and copy public record, except records exempt from disclosure. (I.C. 9-303 to I.C. 9-350). State agencies are to adopt guidelines that identify subject matter of public records maintained by each state agency. (I.C. 9-347).

Torrens Act has not been adopted.

Transfer of Decedent's Title.

See category 13 Estates and Trusts, topic 13.09 Executors and Administrators. (I.C. 15-1-305A).

Vital Statistics.

Reports of births and deaths, certificates of adoption and certified copies of marriage registers and of decrees of divorce must be filed with register of local registration district, consisting of incorporated city or town or unincorporated portions of counties as designated by

Department of Health and Welfare. (I.C. 39-241 to I.C. 39-272). Copies for $6 (subject to change by regulation) obtainable from Vital Statistics Unit, Capitol Building, Boise, Idaho 83700. (I.C. 39-252).

Establishing Birth Records.

Certificate of birth must be recorded within 15 days of birth by person in charge of institution, attending person, father, mother or owner of premises. (I.C. 39-255). If that time has expired record shall be filed in accordance with minimum standards prescribed by national agency in charge of vital statistics. (I.C. 39-167).

10.05 SEALS:

All distinctions between sealed and unsealed instruments are abolished. (I.C. 29-108).

A private seal may be made by a stamp or impression on the paper or upon any substance attached to the paper which is capable of receiving a visible impression or by the scroll of a pen, or by writing the word “seal” opposite the signature of the writer. A scroll or other sign made in another state or territory or foreign country, and there recognized as a seal, must be so regarded in this state. (I.C. 9-401). A corporate or official seal may be affixed to an instrument by a mere impression upon the paper or other material on which said instrument is written. (I.C. 29-107).

Uniform Commercial Code adopted. (28-1-101 to I.C. 28-10-104). See category 3 Business Regulation and Commerce, topic 3.09 Commercial Code.

10.06 TORRENS ACT:

See topic 10.04 Records. Not adopted.

10.07 VITAL STATISTICS:

See topic 10.04 Records.

11 EMPLOYMENT

11.01 EMPLOYER AND EMPLOYEE:

See topic 11.02 Labor Relations.

11.02 LABOR RELATIONS:

Health insurance availability for small employers is promoted and regulated. (I.C. 41-4701 to I.C. 41-4716).

Department of Labor and Industrial Services has general supervisory powers. (I.C. 44-101 to I.C. 44-109).

It is unlawful for employers to exact agreements from employees not to become or continue members of labor unions. (I.C. 44-901).

Right to Work.

No person shall be required as condition of employment to join or resign membership in labor organizations. (I.C. 44-2001 to I.C. 44-2011).

Agricultural Labor Act defines terms, creates agricultural labor board separate from Department of Labor and Industrial Services, grants employees right to self-organization, to join labor organizations; grants employer right to manage own operations and hire from any source; lists unfair labor practices, allows collective bargaining; provides for petitions to board, hearings, orders, injunctive relief and damages. (I.C. 22-4101 to I.C. 22-4113). Employer liability for acts of employee explained. (I.C. 6-1607). See also, farm labor contractor licensing. (I.C. 44-1601 to I.C. 44-1618).

Public works contractors to employ Idaho residents. (I.C. 44-1001 to I.C. 44-1002).

Statement To Be Recorded and Published by Employers.

Persons and corporations engaged in working mines or the development of mining claims, running tunnels, or building or repairing other structures, or constructing canals, railroads, wagon roads, or aqueducts, where mechanics or laborers are employed must make, record and publish a statement under oath, setting forth following data: (1) Name or names of owner or owners of mine, mines, mining claim or premises, tunnel, building, canal, ditch, railroad, wagon road, aqueduct or other structure upon which work is being done or upon which it is intended to begin work; (2) name or names of person, persons, company or corporations engaged in, or who contemplate engaging in, work on any properties or structures mentioned; (3) conditions under which said person, persons, company or corporation is prosecuting said work, whether as owner, agent, lessee, contractor, subcontractor, contemplative purchaser or lien holder; (4) principal office of said person, persons, company or corporation, and, if a corporation, state or country where incorporated and agent in this state on whom service may be had; (5) day of week or month when payment of laborer, mechanics and material men will be made, and place where said payments will be made; (6) statement of all mortgages and liens against the property on which work is being done, with the amount of each of said encumbrances and whether or not same is due. Such statement must be filed for record in office of county recorder of county where labor is being performed and posted in conspicuous place in office or place where payment of wages is to be made. Failure to comply with Act is misdemeanor punishable by fine or imprisonment. (I.C. 44-501 to I.C. 44-503).

Children.

Employment of children under 14 in underground mines is prohibited. (Const., art. XIII, § 4). No child under 14 may be employed or permitted to work in connection with any mine, factory, work shop, mercantile establishment, store, telegraph or telephone office, laundry, restaurant, hotel, apartment house, or in the distribution or transmission of merchandise or messages, or in any employment before 6 a.m. or after 9 p.m., or during school hours, except that children over 12 may be employed in any such occupations during school vacations of two weeks or more. (I.C. 44-1301).

Hours of Labor.

Eight hour day prescribed for both men and women in mines and in smelters. (I.C. 44-1104 to I.C. 44-1105).

Portal to Portal Act, modeled on U. S. Act, adopted. (I.C. 44-1201 to I.C. 44-1203).

Wages and Liens.

Wages of employees for services rendered within 60 days are prior claims to extent of $500 for each person in case of assignment for benefit of creditors or death of employer; also in cases of execution and attachment without limitation on amount of employee's claim if work is done upon property levied upon. (I.C. 45-601 to I.C. 45-604). Employee discharged without payment has lien for wages and may charge and collect from employer wages for each day employer is in default up to 15 days. (I.C. 45-606 and I.C. 45-607). Minimum wage $4.75 per hour commencing Apr. 1, 1997 and $5.15 per hour commencing Sept. 1, 1997. (I.C. 44-1501 to I.C. 44-1509).

Secondary boycotts are illegal. (I.C. 44-801 to I.C. 44-802).

Discrimination.

Wage rates based upon sex prohibited. (I.C. 44-1701 to I.C. 44-1704). Generally, it is prohibited act to discriminate against person because of, or on basis of, race, color, religion, sex, national origin, age or handicap. (I.C. 67-5909).

Labor Unions.

Public policy is established favoring collective bargaining. (I.C. 44-701). Contracts between individual employee and employer for or against union membership are declared contrary to public policy and barred. (I.C. 44-702).

Worker's Compensation Act.

This act (I.C. 72-101 to I.C. 72-1434), applies to public employments generally and to all private employment, except domestic service, casual employment, agricultural, aviation, employment by charitable organizations, employment of outworkers and employment of members of employer's family dwelling in his home (I.C. 72-201 to I.C. 72-212), working member of partnership, associate real estate brokers and real estate salesmen, volunteer ski patrollers, officials of athletic contests involving secondary schools, and pilots of agricultural spraying planes when operating such planes if employer files proof of insurance coverage of $25,000 accidental death, $10,000 medical and $500 per month disability for 48 months. (I.C. 72-212). Government hospitals also exempted. (I.C. 72-928). As to excepted cases, employer may elect to come within act by carrying insurance and may revoke such election by cancellation of insurance or by notice filed with Industrial Commission (I.C. 72-213 to I.C. 72-214); or employer and employees may agree, in writing filed with Board, that act shall apply to such cases. Surety shall not plead that worker was independent contractor. (I.C. 72-229).

No proceedings under this law, except in cases of occupational diseases specially provided, can be maintained unless written notice of accident or of manifestation of occupational disease be given employer not later than 60 days after happening thereof, and unless compensation claim with respect thereto was made within one year after accident or manifestation date, or if death, then one year after death, whether or not compensation claim has been made by employee. (I.C. 72-701). Notice must describe time, place, nature and cause of injury or disease and be signed by employee, or representative, or in event of death, by dependent or his representative. (I.C. 72-702).

Right to compensation covers personal injuries from any accident arising out of and in course of employment, except those proximately caused by employee's willful intention to injure himself or another or by his intoxication. (I.C. 72-208). Rights and remedies under act are exclusive. (I.C. 72-211). Graduated scale of benefits for death, total disability and partial disability is provided. (I.C. 72-301 to I.C. 72-324). Effect of third party liability is provided. (I.C. 72-223). If death results from injury or occupational disease, income benefits are payable to dependent spouse and children. (I.C. 72-413; 1974, c. 30). Industrial Commission of three members is appointed by Governor. It requires reports, hears cases and makes awards. Appeals from awards, on questions of law, may be taken to Supreme Court within such times and manner prescribed by rule of Supreme Court. Modification due to change in condition within five years. (I.C. 72-719). Employers must secure compensation to their employees by insurance in state insurance fund or by depositing with Commission security satisfactory to Commission which may consist of surety bond or guaranty contract with any company authorized to do surety and guaranty business in state. (I.C. 72-301).

Occupational Diseases.

The act applies to occupational diseases. (I.C. 72-437 to I.C. 72-449).

Unemployment Compensation.

Covered employment includes work performed for wages, except for domestic service in private homes or college clubs, employment by U.S., other states or for public tax supported institutions, religious or charitable institutions, together with other technical or minor exemptions. (I.C. 72-1316; I.C. 72-1316A). Unemployment personal eligibility conditions set forth. (I.C. 72-1366). Benefit formula listed. (I.C. 72-1367, I.C. 72-1367A). Provision to collect overpayment of benefits by civil action. (I.C. 72-1369). Unemployment insurance coverage extended to cover employees of Indian Tribes and Tribal Units. (I.C. 72-1349C).

11.03 WORKERS' COMPENSATION LAW:

See topic 11.02 Labor Relations.

12 ENVIRONMENT

12.01 ENVIRONMENTAL REGULATION:

General Supervision.

Director of Department of Health and Welfare and Board of Health and Welfare formulate rules and regulations and otherwise administer and supervise enforcement of Idaho Environmental Protection Act to safeguard state environment. (I.C. 39-101 to I.C. 39-130).

Director of Department of Health and Welfare and Board of Health and Welfare administers authorized grants and loans of financial assistance to municipalities for sewer treatment works. (I.C. 39-3602 to I.C. 39-3604). Grant may not exceed 90% of estimated cost of project. (I.C. 39-3604). Loan may equal 100% of estimated cost of eligible project. (I.C. 39-3604). Concerned primarily with sewage disposal.

Director and board also formulate rules and regulations consistent with Federal Resource Conservation and Recovery Act of 1976 (as am'd) pursuant to Idaho Hazardous Waste Management Act for monitoring and controlling identification, transportation, storage and disposal of hazardous wastes. (I.C. 39-4401 to I.C. 39-4422).

Prohibited Acts of Pollution.

Provisions for hazardous waste spills and notice requirements. (I.C. 39-7101 to I.C. 39-7115).

Provisions for disposal of waste tires. (I.C. 39-6501 to I.C. 39-6507).

Solid Waste Facilities Act.

Sets standards for operation of all solid waste facilities. (I.C. 39-7401 to I.C. 39-7420).

Smoking prohibited in indoor public areas except in designated areas. (I.C. 39-5501 to 5510). I.C. 39-5510 prohibits smoking on any bus except charter bus.

Enforcement.

Environmental quality enforcement is duty of Director of Department of Health and Welfare. Required to adopt rules and regulations. Has independent power of investigation, initiate complaints, hold hearings and enter orders of abatement (I.C. 39-108); may secure injunctions in district court (I.C. 39-108).

Water pollution enforcement by hearing before Board of Health and Welfare. Director may commence civil action and attorney general may commence criminal action in courts. (I.C. 39-108, I.C. 39-109).

Director of Department of Health and Welfare may conduct investigations concerning hazardous waste management and upon finding noncompliance may commence administrative action against violator including post-hearing permit suspension or civil action in district court. (I.C. 39-4413).

Appeals from Board of Health and Welfare, after administrative remedies, to district court in county where hearing held. Appeal filed within 30 days of final agency order; appeal to Supreme Court from district court within 42 days of final district court order. (I.C. 39-107; I.C. 67-5215, I.C. 67-5216).

Penalties.

Violators subject to civil penalty not to exceed greater of $10,000 per violation or $1,000 per day for continuing violations, together with all expenses incurred by State enforcing Act. (I.C. 39-108[5][6]). Injunction obtainable for pollution of air or water. (I.C. 39-108[8]). For violation of public health laws, penalty is fine of not more than $300 or by six months imprisonment, or both. (I.C. 39-419). Violator of firework law guilty of misdemeanor. (I.C. 39-2630). Violator of radiation law guilty of misdemeanor and injunction may issue. (I.C. 39-3012, 3017).

Violators of Hazardous Waste Management Act subject to civil penalties not to exceed $10,000 per violation or per day of continuing violation, may also be liable for costs of enforcement and clean-up, for compensation of private damages, and be subject to other injunctive relief. (I.C. 39-4414). Hazardous waste violations also misdemeanor subject to $10,000 fine or one year imprisonment or both for each violation or day of continuing violation. (I.C. 39-4415). Actions for hazardous waste violations may be brought by any injured party in derogation of Director action. (I.C. 39-4416).

Permits.

Pollution source permits may be issued and permit fees charged by Director of Department of Health and Welfare. (I.C. 39-115, I.C. 39-4413[A][2]). Hazardous waste transportation permit and manifest required. (I.C. 49-2202). Department in compliance with statutory and regulatory requirements may issue and revoke permits to persons handling, transporting, storing, or disposing hazardous wastes. (I.C. 39-4409, I.C. 39-4413).

Pesticides.

Any pesticide distributed within state must be registered and re-registered annually. Pesticide applicator, operators, and dealers shall be licensed. (I.C. 22-3401 to 3425).

Petroleum.

Idaho Petroleum Clean Water Fund established to investigate and remedy any storage tank leak or release. (I.C. 41-4901 to I.C. 41-4948).

Water Law.

Department of Health and Welfare is primary agency for enforcement of Ground Water Quality Protection Act. (I.C. 39-120 to I.C. 39-127). Department of Agriculture is responsible for formulating rules and regulations pertaining to chemigation. (I.C. 22-1401 to I.C. 22-1411). Clean Lakes Act adopted. (I.C. 39-6401 to I.C. 39-6413).

See also category 19 Mineral, Water and Fishing Rights, topic 19.01 Mines and

Minerals.

13 ESTATES AND TRUSTS

13.01 ADMINISTRATION:

See topic 13.09 Executors and Administrators.

13.02 ADVANCEMENTS:

See topic 13.07 Descent and Distribution.

13.03 ALLOWANCES:

See topic 13.09 Executors and Administrators.

13.04 CLAIMS:

See topic 13.09 Executors and Administrators; category 5 Civil Actions and Procedure, topic 5.17 Pleading.

13.05 DEATH:

Presumed dead at end of continuous absence of five years without explanation and after search. (15-1-107[c]). District Court has authority, based on clear and convincing evidence to determine if absent person is or is not legally dead. (I.C. 10-1217).

Survivorship.

Person who fails to survive decedent by 120 hours is deemed to have predeceased decedent for purposes of homestead allowance, exempt property, and intestate succession. If time of death cannot be determined, person is deemed to have failed to survive. (15-2-104). Uniform Simultaneous Death Act (as am'd in 1953) adopted. (15-2-613).

Actions for Death.

Heirs or personal representatives may bring action within two years for death caused by wrongful act or negligence of another. Damages, no statutory limit, may be awarded as under circumstances may be just. Heirs—those defined in Uniform Probate Code (see topic 13.09 Executors and Administrators, subhead Material Variations from Official Text, § 1-201), and spouse, goodfaith “putative spouse”, children, stepchildren, parents, dependent blood relatives, dependent adoptive brothers and sisters, and illegitimate child of father who has recognized responsibility for support. (I.C. 5-219, I.C. 5-311). Action also available for injury or death or viable unborn fetus. (103 Idaho 570, 651 P.2d 11). See also category 5 Civil Actions and Procedure, topic 5.02 Actions, subhead Abatement.

Certificate.

See category 10 Documents and Records, topic 10.04 Records, subhead Vital Statistics.

Effect of Death on Written Instrument.

Any written instrument effective as contract, gift, or trust at death, or agreement between spouses to pass property to survivor at death, shall be deemed nontestamentary and money shall be paid or property shall pass in event of death. (15-6-201).

Uniform Anatomical Gift Act (1987) adopted 1989. (I.C. 39-3401 to I.C. 39-3425). If gift is eye, qualified eye enucleator required. (I.C. 39-3404). No transplantation unless there is medical certification that gift is from person tested for HIV antibodies or antigens. (I.C. 39-3402,

-3407).

Right to Die.

See topic 13.16 Wills, subhead Living Wills.

13.06 DECEDENTS' ESTATES:

See topics 13.07 Descent and Distribution, Executors and Administrators, Wills; category 8 Debtor and Creditor, topic 8.10 Homesteads.

13.07 DESCENT AND DISTRIBUTION:

See also topic 13.09 Executors and Administrators.

Uniform Probate Code adopted, effective July 1, 1972. (15-1-101 to 15-7-401). 1975 and 1977 Amendments not adopted. 1979 Amendments adopted.

Material Variations from Official Text.

Material modification of I.C. 2-102 through I.C. 2-404 of code (sections pertaining to intestate succession, elective share of surviving spouse, spouse and children unprovided for in will and exempt property and allowances) are:

§ 2-102. Alternative provision for Community Property States (15-2-102A) adopted as Idaho Code 15-2-102. Modified to eliminate first $50,000 to surviving spouse if decedent was survived by parent, but without surviving issue; if there are surviving issue of deceased spouse, surviving spouse no longer takes first $50,000, in both of these cases, surviving spouse simply takes ½ interest in deceased spouse's intestate estate.

§ 2-103. Substitute “a” for “1”, “b” for “2”, “c” for “3”, and “d” for “4”.

§ 2-105. After words “to the” add following: “state of Idaho, subject to administration by the public administrator. After deducting the expenses of administration and causing these to be paid to the county in which such administration occurred, the public administrator shall file the report of abandoned property required by section I.C. 14-517, Idaho Code, and proceed to dispose of the property in the manner set forth in the ‘unclaimed property act’, provided, however, that if such money is not claimed within eighteen hundred and twenty-seven (1827) days (approximately five (5) years) from the day upon which such property is paid to the state tax commission, it shall escheat to the state and be apportioned to the public school fund without regard to the provisions of said act.”

§ 2-109. Substitute “a” for “1”, “b” for “2”, “1” for “i”, and “2” for “ii”. After words “natural parent” add: “and adoption by spouse of natural parent has no effect on the relationship between child and a deceased, undivorced natural parent.”

§ 2-110. Add after word “otherwise” sentence, “If an advancement exceeds the share of the heir, no refund is required.”

§ 2-114. Person related to decedent through two lines of relationship is entitled to only single share based on relationship which would entitle him to larger share.

§§ 2-201 through I.C. 2-207. Delete in entirety and substitute following:

15-2-201. Quasi-community property.—(a) Upon death of a married person domiciled in this state, one-half (½) of the quasi-community property shall belong to the surviving spouse and the other one-half (½) of such property shall be subject to the testamentary disposition of the decedent and, if not devised by the decedent, goes to the surviving spouse.

(b) Quasi-community property is all personal property, wherever situated, and all real property situated in this state which has heretofore been acquired or is hereafter acquired by the decedent while domiciled elsewhere and which would have been the community property of the decedent and the surviving spouse had the decedent been domiciled in this state at the time of its acquisition plus all personal property, wherever situated, and all real property situated in this state, which has heretofore been acquired or is hereafter acquired in exchange for real or personal property, wherever situated, which would have been the community property of the decedent and the surviving spouse if the decedent had been domiciled in this state at the time the property so exchanged was acquired, provided that real property does not and personal property does include leasehold interests in real property, provided that quasi-community property shall include real property situated in another state and owned by a domiciliary of this state if the laws of such state permit descent and distribution of such property to be governed by the laws of this state.

(c) All quasi-community property is subject to the debts of decedent.

15-2-202. Augmented estate.—Whenever a married person domiciled in the state has made a transfer of quasi-community property to a person other than the surviving spouse without adequate consideration and without the consent of the surviving spouse, the surviving spouse may require the transferee to restore to the decedent's estate such property, if transferee retains such property and, if not, proceeds or, if none, its value at time of transfer, if:

(a) Decedent retained, at time of his death, possession or enjoyment of or right to income from property; or

(b) Decedent retained, at time of his death, a power, either alone or in conjunction with any other person, to revoke or to consume, invade or dispose of principal for his own benefit; or

(c) Decedent held property at time of his death with another with right of survivorship; or

(d) Decedent had transferred such property within two (2) years of his death to extent that aggregate transfers to any one (1) donee in either of years exceeded ten thousand dollars ($10,000) or amount of annual exclusion for federal gift tax set forth at 26 U.S.C. § 2503, whichever is greater.

15-2-203. Elective right to quasi-community property and augmented estate.—(a) The right of the surviving spouse in the augmented quasi-community property estate shall be elective and shall be limited to one-half (½) of the total augmented quasi-community property estate which will include, as a part of the property described in section 15-2-201 and section 15-2-202, of this code, property received from the decedent and owned by the surviving spouse at the decedent's death, plus the value of such property transferred by the surviving spouse at any time during marriage to any person other than the decedent which would have been in the surviving spouse's quasi-community property augmented estate if that spouse had predeceased the decedent to the extent that the owner's transferred property is derived from the decedent by any means other than testate or intestate succession without a full consideration in money or moneys worth. This shall not include any benefits derived from the federal social security system by reason of service performed or disability incurred by the decedent, and shall include property transferred from the decedent to the surviving spouse by virtue of joint ownership and through the exercise of a power of appointment also exercisable in favor of others than the surviving spouse and appointed to the surviving spouse.

(b) The elective share to the quasi-community estate thus computed shall be reduced by an allocable portion of general administration expenses, homestead allowance, family allowance, exempt property and enforceable claims.

(c) Property owned by the surviving spouse at the time of the decedent's death and property transferred by the surviving spouse is presumed to have been derived from the decedent except to the extent that the surviving spouse establishes that it was derived from another source.

15-2-204. Right of election personal.—The right of election of the surviving spouse may be exercised only during his lifetime by him. In the case of a protected person, the right of election may be exercised only by order of the court in which protective proceedings as to his property are pending, after finding that exercise is necessary to provide adequate support for the protected person during his probable life expectancy.

15-2-205. Proceeding for elective share—Time limit.—(a) The surviving spouse may elect to take his elective share in the augmented net estate by filing in the court and mailing or delivering to the personal representative a petition for the elective share within nine (9) months after death of decedent or six (6) months after date of filing of petition for probate, whichever is later. Court may extend time for election as it sees fit for cause shown by surviving spouse before time for election has expired.

(b) The surviving spouse shall give notice of the time and place set for hearing to persons interested in the estate and to the distributees and recipients of portions of the augmented net estate whose interests will be adversely affected by the taking of the elective share.

(c) The surviving spouse may withdraw his demand for an elective share at any time before entry of a final determination by the court.

(d) After notice and hearing, the court shall determine the amount of the elective share and shall order its payment from the assets of the augmented net estate or by contribution as appears appropriate under section 15-2-207 of this code. If it appears that a fund or property included in the augmented net estate has not come into the possession of the personal representative, or has been distributed by the personal representative, the court nevertheless shall fix the liability of any person who has any interest in the fund or property or who has possession thereof, whether as trustee or otherwise. The proceeding may be maintained against fewer than all persons against whom relief could be sought, but no person is subject to contribution in any greater amount than he would have been if relief had been secured against all persons subject to contribution.

(e) The order or judgment of the court may be enforced as necessary in suit for contribution or payment in other courts of this state or other jurisdictions.

15-2-206. Effect of election on benefits by will or statute.—(a) The surviving spouse's election of his elective share does not affect the share of the surviving spouse under the provisions of the decedent's will or intestate succession unless the surviving spouse also expressly renounces in the petition for an elective share the benefit of all or any of the provisions. If any provision is so renounced, the property or other benefit which would otherwise have passed to the surviving spouse thereunder is treated, subject to contribution under subsection 15-2-207(b), as if the surviving spouse had predeceased the testator.

(b) A surviving spouse is entitled to homestead allowance, exempt property and family allowance whether or not he elects to take an elective share and whether or not he renounces the benefits conferred upon him by the will except that, if it clearly appears from the will that a provision therein made for the surviving spouse was intended to be in lieu of these rights, he is not so entitled if he does not renounce the provision so made for him in the will.

15-2-207. Liability of others.—(a) In a proceeding for an elective share, property which passes or has passed to the surviving spouse by testate or intestate succession and property included in the augmented estate which has not been renounced is applied first to satisfy the elective share and to reduce the amount due from other recipients of portions of the augmented estate.

(b) The remaining amount of the elective share is equitably apportioned among beneficiaries of the will and transferees of the augmented estate in proportion to the value of their interest therein.

(c) Only original transferees from, or appointees of, the decedent and their donees, to the extent the donees have the property or its proceeds, are subject to the contribution to make up the elective share of the surviving spouse. A person liable to contribution may choose to give up the property transferred to him or to pay its value as of the time it is considered in computing the augmented estate.

15-2-208. Waiver.—The right of election of a surviving spouse and the rights of the surviving spouse to homestead allowance, exempt property and family allowance, or any of them, may be waived, wholly or partially, before or after marriage, by a written contract, agreement or waiver signed by the party waiving after fair disclosure. Unless it provides to the contrary, a waiver of “all rights” (or equivalent language) in the property or estate of a present or prospective spouse or a complete property settlement entered into after or in anticipation of separation or divorce is a waiver of all rights to elective share, homestead allowance, exempt property and family allowance by each spouse in the property of the other and a renunciation by each of all benefits which would otherwise pass to him from the other by intestate succession or by virtue of the provisions of any will executed before the waiver or property settlement.

15-2-209. Election of nondomiciliary.—Upon the death of any married person not domiciled in this state who dies leaving a valid will disposing of real property in this state which is not the community property of the decedent and the surviving spouse, the surviving spouse has the same right to elect to take a portion of or interest in such property against the will of the decedent as though the property was situated in the decedent's domicile at death.

15-2-401. New introduction to Homestead statutes, states applicable law.

15-2-401A. Not adopted.

15-2-402. (Formerly 15-2-401). Homestead sections have been altered. Allowances for surviving spouses are now determined by Idaho Code I.C. 55-1010.

15-2-403. (Formerly 15-2-402). Exempt property is increased from $3,500 to $10,000. Provision allows distribution according to decedent's will, if will exists, rather than to children jointly.

15-2-404. (Formerly 15-2-403).

15-2-405. (Formerly 15-2-404). Family allowance amount is increased from $6,000 to $18,000 for lump sum and from $500 to $1,000 for monthly installments.

Adopted Children.

See category 14 Family, topic 14.01 Adoption.

Determination of Heirship.

See topic 13.09 Executors and Administrators.

Advancements.

If person dies intestate, property given during lifetime to heir is advancement only if so declared in contemporaneous writing or so acknowledged in writing by heir. (15-2-110).

Escheat.

If heir cannot be found, personal representative shall distribute share to that heir's trustee, if any, otherwise file report and dispose of property as in Unclaimed Property Act. (I.C. 14-501 to I.C. 14-541). If not claimed within 1,827 days thereafter, property accrues to state general account. (15-3-914).

See also topic 13.09 Executors and Administrators; category 21 Property, topic 21.01 Absentees, subhead Escheat.

13.08 ELECTION:

See topic 13.16 Wills.

13.08A ESTATES: (in property)

See category 21 Property, topic 21.16 Real Property.

13.09 [RESERVED]

13.10 EXECUTORS AND ADMINISTRATORS:

See also topics 13.07 Descent and Distribution, 13.13 Trusts, 13.16 Wills.

Uniform Probate Code adopted, effective July 1, 1972. (15-1-101 to 15-7-401). 1975 and 1977 Amendments not adopted. 1979 Amendments adopted.

Code is given Idaho Code Annotated Title number 15, and section numbers contain said title citation followed by numerical part of Uniform Probate Code citation, e.g., 15-1-101.

Evidence of Death.

See topic 13.05 Death.

Jurisdiction and Venue.

District Court, Magistrate's Division pursuant to rules of that court, has jurisdiction. (I.C. 1-2208). Code applies to any proceedings commenced after July 1, 1972, regardless of date of death. Estate presently being probated may continue under former procedures upon leave of court. (See official comment to 15-1-101.)

Material Variations from Official Text.

Material Modifications of Article 1, definitional article, and articles 3 and 4, pertaining to administration of estates of decedents are:

§ 1-107. Substitute, “(a)” for “(1)”; “(b)” for “(2)”; “(c)” for “(3)”.

§ 1-201. Substitute “Chapters” for “Articles”. (As enacted by 1971, c. 111, Uniform Probate Code was divided into Articles and Chapters. In order to compile this law so as to make it compatible with remainder of Idaho Code, compiler, with approval of Idaho Commission, has changed designation of “Article” to “Chapter” and has changed designation “Chapter” to “Part”.) Add: “(2) ‘Augmented estate’ means the estate described in section 15-2-202 of this code.” (2) Substitute “3” for “2”. (3) Substitute “4” for “3”. (4) Substitute “5” for “4”. (5) Substitute “6” for “5”. After “decedent's” delete “.” and add “, minors, incapacitated and disabled persons.” Within brackets add “the district court.” (6) Substitute “7” for “6”. After “protected person” delete “.” and add “and includes limited conservators as described by section 15-5-420, Idaho Code.” Add: “(8) ‘Determination of heirship of community property’ shall mean that determination required by the provisions of section 15-3-303 of this code upon an application for informal probate not accompanied by presentation of a will.” Add: “(9) ‘Determination of heirship’ required by section 15-3-409 of this code upon a finding of intestacy.” (7) Substitute “10” for “7”. (8) Substitute “11” for “8”. (9) Substitute “12” for “9”. Add after word “by” words “subsection (b)(1) of”. (10) Substitute “13” for “10”. At end of paragraph add words “For the purpose of this provision ‘Testamentary Trustee’ includes a trustee to whom assets are transferred by will, to the extent of the devised assets.” Add: “(14) ‘Emancipated minor’ shall mean any male or female who has been married.” (11) Delete all of (11) and substitute “(15) ‘Estate’ means all property of the decedent, including community property of the surviving spouse subject to administration, property of trusts, and property of any other person whose affairs are subject to this code as it exists from time to time during administration.” (12) Substitute “16” for “12”. Add after “402” words “of this code.” (13) Substitute “17” for “13”. (14) Substitute “18” for “14”. (15) Substitute “19” for “15”. Delete “s” on “means”. (16) Substitute “20” for “16”. After “appointment” delete “,” and add “and includes limited guardians as described by section 15-5-304, Idaho Code,”. (17) Substitute “21” for “17”. (18) Substitute “22” for “18”. Add after “101”, words “of this code.” (19) Substitute “23” for “19”. (20) Substitute “24” for “20”. (21) Substitute “25” for “21”. (22) Substitute “26” for “22”. (23) Substitute “27” for “23”. (24) Substitute “28” for “24”. Substitute “eighteen (18)” for “[21]”. (25) Substitute “29” for “25”. (26) Substitute “30” for “26”. (27) Substitute “31” for “27”. (28) Substitute “32” for “28”. (29) Substitute “33” for “29”. (30) Substitute “34” for “30”. (31) Substitute “35” for “31”. (32) Substitute “36” for “32”. (33) Substitute “37” for “33”. (34) Substitute “38” for “34”. (35) Substitute “39” for “35”. Add after “101”, words “of this code.” Insert “(39A) ‘Quasi-community property’ is the property defined by section 15-2-201 of this code.” (36) Substitute “40” for “36”. Substitute “magistrates or judges of the district” for “official of” and add after “307” words “of this code.” (37) Substitute “41” for “37”. (38) Substitute “42” for “38”. (39) Substitute “43” for “39”. Add after “618” words “of this code.” (40) Substitute “44” for “40”. (41) Substitute “45” for “41”. (42) Substitute “46” for “42”. (43) Substitute “47” for “43”. (44) Substitute “48” for “44”. (45) Substitute “49” for “45”. Add within brackets following “pursuant to”, words “chapter 8, title 68, Idaho Code,”. (46) Substitute “50” for “46”. (47) Substitute “51” for “47”. Add after “101,” words “of this code.” (48) Substitute “52” for “48”. Add after “will”, words “is a testamentary instrument and”. (49) Substitute “53” for “49”. Add after “Separate property”, following: “includes all property of either the husband or the wife owned by him or her before marriage, and that acquired afterward either by gift, bequest, devise or descent, or that which either he or she acquires with proceeds of his or her separate property, by way of moneys or other property.” (50) Substitute “54” for “50”. Add after “Community property”, following: “includes all other property acquired after marriage by either husband or wife, including the rents and profits of the separate property of the husband or wife, unless, by the instrument by which any such property is acquired by the wife, it is provided that the rents and profits thereof be applied to her sole and separate use. Real property conveyed by one (1) spouse to the other shall be presumed to be the sole and separate estate of the grantee.”

§ 1-302. Not adopted.

§ 1-304. Not adopted.

§ 1-305. In first sentence delete word “record” and substitute words “single file”.

Add:

§ 15-1-305A. “Recording permitted—Effect.—Letters of personal representatives (foreign or domestic), a statement of informal probate, probated will, determination of heirship, order made in a testacy proceeding, or will otherwise admissible in evidence as provided in section 15-3-102 of this code; any deed, assignment, release or other instrument executed by an appointed personal representative of the decedent; an affidavit of a successor in interest to property of a decedent; and a decree in any testacy proceeding in another state, any of which affect title to real property, may be recorded in the office of the county recorder of the county in which the real property affected by any such letters, statement, determination, order, document or decree is located. From the time of filing the same for record, notice is imparted to all persons of the contents thereof.”

§ 1-306. Delete “(a)”. Delete all of paragraph “(b)”.

§ 1-307. After word “registrar”, delete remainder of sentence and substitute “will be performed by the magistrate or district judge.”

§ 1-308. Not adopted.

§ 1-309. Not adopted.

Add new section as follows:

“§ 1-311. Exercise of powers.—Powers under this act may be exercised by the court at any time, in chambers or in open court, as may be appropriate. Powers conferred upon the registrar of wills by this act may be exercised at any time.”

Add new section as follows:

“§ 1-312. Execution of deed.—Should any persons be entitled to a deed from a personal representative and such personal representative be discharged or disqualified or refuse to execute the same, such deed may be executed by the court authorizing such sale or distribution or the clerk of such court and shall entitle the buyer or distributee to his property.”

§ 1-402. After first sentence, add new sentence as follows: “The appearance in court of an interested party is a waiver of notice.”

§ 1-403. Substitute “a” for “1”, “b” for “2”, “1” for “i”, “2” for “ii”, “3” for “iii”, “c” for “3”, and “d” for “4”.

Add:

§ 2-616. “No estate, real or personal, shall be bequeathed or devised, either directly or indirectly, to any person who owns, operates or is employed at a nursing home or residential care home, whether or not licensed, in which the testator was a resident within one year of his death if the will was executed while the testator was a resident of the facility, except the same be done by will duly executed at least one year before the death of the testator. This section shall apply to all property passing by testate succession after July 1, 1983, regardless of when the will was written; provided, this section shall in no way limit or affect the rights of a beneficiary who is related to the testator, or who is a charitable or benevolent society or corporation; provided further that the foregoing limitation shall not apply to wills of persons whose death is caused by accidental means and whose wills are executed prior to the accident which results in death.”

§ 3-105. Delete entire third sentence.

§ 3-106. Delete entire article and substitute following:

"§ 3-106. Civil litigation—Notice.—Subject to general rules concerning the proper location of civil litigation and jurisdiction of persons, the court may herein determine any other controversy concerning a succession or to which an estate, through a personal representative, may be a party. Persons notified are bound though less than all interested persons may have been given notice."

Add new section as follows:

"§ 3-111. Joint probate on death of survivor of marriage dissolved by death.—In cases in which a marital community has been dissolved by the death of either spouse at any time, the survivor was then entitled to all of the property of the decedent by will, law, or both, and the survivor died before any proceeding had been commenced for the probate of the estate of the spouse whose death occurred first, the estates of both decedents may be joined for probate in a single proceeding in any court having jurisdiction of the estate of the spouse whose death occurred last. The initial application or petition filed in any such joint proceedings shall contain a statement of the facts upon which such joint proceeding is based, in addition to all other statements required by this code to be made therein."

§ 3-203. Add new subsection:

"(7) if a petition for appointment of a personal representative has been filed and sixty (60) days have elapsed during which no consent to act has been filed by any proper person, the public administrator shall act as personal representative unless and until a proper person consents to act.

Also in subpart (f)(1) delete "21" and substitute "18". Also add new subsection: "(i) a married woman shall have the right to serve as personal representative."

§ 3-301. (All outline letters and numbering follows (a)(1) et seq. instead of (1)(i) et seq. Add subsection (g), which reads: "By verifying an application for informal probate, or informal appointment, the applicant submits personally to the jurisdiction of the court in any proceeding for relief from fraud relating to the application, or for perjury, that may be instituted against him."

Add subsection (h), which reads: "Any statement entered upon an application for informal statement of intestacy where the estate is community and there is a surviving spouse shall contain a statement of heirship setting out the heirs of the decedent and shall have the same effect as entry of a statement of informal probate of a will and be subject to the limitation periods set out in section 15-3-108, Idaho Code, notwithstanding the exception provided in that section for determining heirs of an intestate."

§ 3-303. After word "will" in first sentence insert "or informal statement of intestacy where the estate is community and there is a surviving spouse."

Also add new subsection:

"(8) if the application is for a statement of intestacy of a community estate with a surviving spouse, on the basis of statements in the application and affidavit: 1. the decedent left no will, 2. the decedent's estate consists solely of community property of the decedent and the surviving spouse, and 3. the decedent left a surviving spouse. In addition to this, the registrar shall set out the name of the surviving spouse."

Add new section as follows:

"§ 3-303A. Notice required.—Upon issuance of a statement of informal probate if no letters are issued to a personal representative or determination of heirship of community property, the applicant must give notice to all heirs and devisees of the admission of the will to probate or the determination of heirship of community property. This information shall be sent by ordinary mail to each of the heirs and devisees whose address is reasonably available to the applicant. The applicant shall be responsible to any heir or devisee damaged by failure of the applicant to give proper notice under this section."

§ 3-308(a)(3). Delete "20" and substitute "24".

§ 3-401. At end of section add following sentence:

"By submitting a petition for formal probate the petitioner subjects himself to jurisdiction of the court in which such instrument is filed. Any action by a person damaged by him, including a creditor of the estate, shall be limited in amount to the assets of the estate less the obligations of the estate paid by him. Notice of any proceedings sought to be maintained against the petitioner pursuant to his submission to jurisdiction shall be delivered to him or mailed to him by ordinary first class mail at his address as it is known to the petitioner, or is listed on any application or petition in probate proceedings previously instituted in the court where the proceeding is brought."

§ 3-803. Replace "two" in subsection (a)(1) with "three".

Qualification.

See topic 13.16 Wills, subhead Material Variations from Official Text.

Exemption From Bond.

See topic 13.16 Wills, subhead Material Variations from Official Text.

Removal.

See topic 13.16 Wills, subhead Material Variations from Official Text.

Special Kinds of Administration.

See topic 13.16 Wills, subhead Material Variations from Official Text.

Public Administrators.

County treasurers of various counties declared ex officio public administrators. (I.C. 14-101 to I.C. 14-119).

Inventory and Appraisal.

See topic 13.16 Wills, subhead Material Variations from Official Text.

General Powers and Duties.

See topic 13.16 Wills, subhead Material Variations from Official Text.

Notice to Creditors.

See topic 13.16 Wills, subhead Material Variations from Official Text.

Presentation of Claims.

See topic 13.16 Wills, subhead Material Variations from Official Text.

Proof of Claims.

See topic 13.16 Wills, subhead Material Variations from Official Text.

Approval or Rejection of Claims.

See topic 13.16 Wills, subhead Material Variations from Official Text.

Payment of Claims.

See topic 13.16 Wills, subhead Material Variations from Official Text.

Priorities.

See topic 13.16 Wills, subhead Material Variations from Official Text.

Sales.

See topic 13.16 Wills, subhead Material Variations from Official Text.

Actions by Representative.

See topic 13.16 Wills, subhead Material Variations from Official Text.

Actions Against Representative.

See topic 13.16 Wills, subhead Material Variations from Official Text.

Allowances.

See topic 13.07 Descent and Distribution, subhead Material Variations from Official Text.

Final Accounting and Settlement.

See topic 13.16 Wills, subhead Material Variations from Official Text.

Consent Settlement.

See topic 13.16 Wills, subhead Material Variations from Official Text.

Distribution.

See topic 13.16 Wills, subhead Material Variations from Official Text.

Liabilities.

See topic 13.16 Wills, subhead Material Variations from Official Text.

Compensation of Representatives.

See topic 13.16 Wills, subhead Material Variations from Official Text.

Small Estates.

See topic 13.16 Wills, subhead Material Variations from Official Text.

Foreign Executors or Administrators.

See topic 13.16 Wills, subhead Material Variations from Official Text.

Summary proceedings with reference to community property on death of either spouse (15-2-102; 15-3-1205). See category 14 Family, topic 14.09 Husband and Wife.

Revised Uniform Principal and Income Act adopted. (I.C. 68-1001 to I.C. 68-1016).

Uniform Fiduciaries Act adopted. (I.C. 68-301 to I.C. 68-315). See topic 13.13 Trusts.

Uniform Simplification of Fiduciary Security Transfers Act adopted (I.C. 68-901 to I.C. 68-911) and not repealed by Uniform Commercial Code.

Uniform Anatomical Gift Act.

See topic 13.05 Death.

13.11 FIDUCIARIES:

See topics 13.09 Executors and Administrators, Trusts; category 14 Family, topic 14.07 Guardian and Ward.

13.12 INTESTACY:

See topic 13.07 Descent and Distribution.

13.1313.14

13.15 TRUSTS:

See also category 3 Business Regulation and Commerce, topic 3.01 Banks and Banking.

Uniform Probate Code adopted, effective July 1, 1972. 1975 and 1977 Amendments not adopted. See topics 13.09 Executors and Administrators, 13.07 Descent and Distribution, and 13.16 Wills.

Idaho Trust Institutions Act adopted. (I.C. 26-3201 to I.C. 26-3609).

Trustee's Powers.

Powers of trustees are set forth in Uniform Trustees' Powers Act. (15-7-401; I.C. 68-104 to 119).

Removal of trustee provided for. (15-7-308).

Uniform Fiduciaries Act adopted. (I.C. 68-301 to 315).

Investments by fiduciaries are regulated by Uniform Trustees' Powers Act. (I.C. 68-104 to 113; 15-7-401).

Gift to Minors.

Uniform Transfers to Minors Act adopted. (I.C. 68-801 to 825).

Securities in Name of Nominee.

Fiduciaries allowed to hold securities in name of a nominee. (I.C. 68-601 to 602).

Trust and Dispute Resolution Act.

(15-8-101 to 15-8-305). See category 9 Dispute Resolution, topic 9.01 Alternative Dispute Resolution.

Uniform Common Trust Fund Act adopted (I.C. 68-701, 702), without provision for court accounting. Expressly authorizes investment in common trust fund administered by investing bank or trust company.

Uniform Simplification of Fiduciary Security Transfers Act adopted (I.C. 68-901 to 911) and not repealed by Uniform Commercial Code or Uniform Probate Code.

Uniform Principal and Income Act adopted. (I.C. 68-10-101 to I.C. 68-10-605).

Uniform Prudent Investor Act adopted. (I.C. 68-501 to I.C. 68-514).

Uniform Testamentary Additions to Trusts Act repealed.

Accumulations.

See category 21 Property, topic 21.12 Perpetuities, subhead Accumulations.

Perpetuities.

See category 21 Property, topic 21.12 Perpetuities.

Pour Over Trusts.

See Testamentary Additions to Trusts statute under Uniform Probate Code.

Purpose Trusts.

Trust may be created for any charitable or non-charitable purpose. Non-charitable trust shall exist to serve stated purpose. (15-7-601).

Hospital Liability Trust.

Hospital trusts permitted to accumulate funds to insure against general public liability claims. (I.C. 41-3701 to I.C. 41-3729).

13.16 WILLS:

Uniform Probate Code adopted, effective July 1, 1972. (15-1-101 to 15-7-401). 1975 and 1977 Amendments not adopted. 1979 Amendments adopted. See topics 13.07 Descent and Distribution, 13.09 Executors and Administrators, and 13.13 Trusts.

Material Variations from Official Text.

§ 15-2-501. To first sentence add words, “Any emancipated minor or”, add to second sentence, “A married woman may dispose of her property whether separate or community, in the same manner as any other person subject to the restrictions imposed by this Code”.

Add new section:

§ 15-2-504. Self-Proved Will.—(a) Any will may be simultaneously executed, attested, and made self-proved, by the acknowledgment thereof by the testator and the affidavits of the witnesses, each made before an officer authorized to administer oaths under the laws of the state where execution occurs and evidenced by the officer's certificate, under official seal, in form and content substantially as follows:

I,. . . . ., the testator, sign my name to this instrument this. . . . . . day of. . . . ., 20. . . . ., and being first duly sworn, do hereby declare to the undersigned authority that I sign and execute this instrument as my last will and that I sign it willingly (or willingly direct another to sign for me), that I execute it as my free and voluntary act for the purposes therein expressed and that I am eighteen (18) years of age or older, of sound mind, and under no constraint or undue influence.

....

Testator

We,. . . . .,. . . . ., the witnesses, sign our names to this instrument, being first duly sworn, and do hereby declare to the undersigned authority that the testator signs and executes this instrument as his last will and that he signs it willingly (or willingly directs another to sign for him), and that each of us, in the presence and hearing of the testator, hereby signs this will as witness to the testator's signing, and that to the best of his knowledge the testator is eighteen (18) years of age or older, of sound mind, and under no constraint or undue influence.

....

Witness

....

Witness

The State of..........

County of..........

Subscribed, sworn to and acknowledged before me by. . . . ., the testator and subscribed and sworn to before me by. . . . ., and. . . . ., witnesses, this. . . . . day of..........

(Seal)

(Signed)

....

....

(Official capacity of officer)

(b) An attested will may at any time subsequent to its execution be made self-proved by the acknowledgment thereof by the testator and the affidavits of the witnesses, each made before an officer authorized to administer oaths under the laws of the state where the acknowledgment occurs and evidenced by the officer's certificate, under the official seal, attached or annexed to the will in form and content substantially as follows:

The State of..........

County of..........

We,. . . . .,. . . . ., and. . . . ., the testator and the witnesses, respectively, whose names are signed to the attached or foregoing instrument, being first duly sworn do hereby declare to the undersigned authority that the testator signed and executed the instrument as his last will and that he had signed willingly (or willingly directed another to sign for him), and that he executed it as his free and voluntary act for the purposes therein expressed, and that each of the witnesses, in the presence and hearing of the testator, signed the will as witness and that to the best of his knowledge the testator was at that time eighteen (18) years of age or older, of sound mind and under no constraint or undue influence.

....

Testator

....

Witness

....

Witness

Subscribed, sworn to and acknowledged before me by. . . . ., the testator, and subscribed and sworn to before me by. . . . .,
and. . . . ., witnesses, this. . . . . day of..........

(SEAL)

(Signed)..........

....

(Official capacity of officer)

(15-2-504).

§ 15-2-505. Insert after “person” words “eighteen (18) or more years of age.”

§ 15-2-507. Substitute “a” for “1”, “b” for “2”, and add new section: “(c) The revocation of a will executed in duplicate may be accomplished by revoking one (1) of the duplicates.”

§ 15-2-509. Add new section: “(c) Republication of a revoked will revives such will”.

§ 15-2-511. “TESTAMENTARY ADDITIONS TO TRUSTS.

(1)(a) A will may validly devise property to the trustee of a trust established or to be established:

(i) During the testator's lifetime by the testator or by the testator and some other person or by some other person, including a funded or unfunded life insurance trust, although the trustor has reserved any or all rights of ownership of the insurance contracts; or

(ii) At the testator's death by the testator's devise to the trustee if the trust is identified in the testator's will and its terms are set forth in a written instrument, other than a will, executed before or after the execution of the testator's will or in another individual's will if that other individual has predeceased the testator, regardless of the existence, size, or character of the corpus of the trust.

(b) The devise is not invalid because the trust is amendable or revocable, or because the trust was amended after the execution of the will or the testator's death.

(2) Unless the testator's will provides otherwise, property devised to a trust described in subsection (1) of this section is not held under a testamentary trust of the testator but it becomes a part of the trust to which it is devised and must be administered and disposed of in accordance with the provisions of the governing instrument setting forth the terms of the trust, including any amendments thereto made before or after the testator's death.

(3) Unless the testator's will provides otherwise a revocation or termination of the trust before the testator's death causes the devise to lapse."

§ 15-2-602. Insert following "contrary to the", words "provisions relating to the elective share described in 15-2-201 through 15-2-209, the provisions relating to exempt property and allowances described in 15-2-401 through 15-2-405 or any other."

Add new sections:

§ 15-2-608. Nonademption of specific devises in certain cases—unpaid proceeds of sale, condemnation or insurance—sale by conservator.—(a) A specified devisee has the right to the remaining specifically devised property and:

(1) any balance of the purchase price (together with any security interest) owing from a purchaser to the testator at death by reason of sale of the property;

(2) any amount of a condemnation award for the taking of the property unpaid at death;

(3) any proceeds unpaid at death on fire or casualty insurance on the property; and

(4) property owned by testator at his death as a result of foreclosure, or obtained in lieu of foreclosure, of the security for a specifically devised obligation.

(b) If specifically devised property is sold by a conservator, or if a condemnation award or insurance proceeds are paid to a conservator as a result of condemnation, fire, or casualty, the specific devisee has the right to a general pecuniary devise equal to the net sale price, the condemnation award, or the insurance proceeds. This subsection does not apply if subsequent to the sale, condemnation or casualty, it is adjudicated that the disability of the testator has ceased and the testator survives the adjudication by one (1) year. The right of the specific devisee, under this subsection is reduced by any right he has under subsection (a) of this section. (1978, c. 350).

§ 15-2-613. Simultaneous death—Disposition of property.—Subject to extension by the provisions of section 15-2-104 and section 15-2-601 of this code, where the title to property or the devolution thereof depends upon priority of death and there is no sufficient evidence that the persons have died otherwise than simultaneously, the property of each person shall be distributed as if he had survived, except as otherwise provided in this section.

(a) Where two (2) or more beneficiaries are designated to take successively by reason of survivorship under another person's distribution of property and there is no sufficient evidence that these beneficiaries have died otherwise than simultaneously, the property thus disposed of shall be divided into as many equal portions as there are successive beneficiaries and these portions shall be distributed respectively to those who would have taken in the event that each designated beneficiary had survived.

(b) Where there is no sufficient evidence that two (2) joint tenants have died otherwise than simultaneously, the property so held shall be distributed one-half (½) as if one had survived and one-half (½) as if the other had survived. If there are more than two (2) joint tenants and all of them have so died, the property thus distributed shall be in the proportion that one bears to the whole number of joint tenants.

(c) Where the insured and the beneficiary in a policy of life or accident insurance have died and there is no sufficient evidence that they have died otherwise than simultaneously, the proceeds of the policy shall be distributed as if the insured had survived the beneficiary.

(d) This section shall not apply in the case of wills, living trusts, deeds, or contracts of insurance, wherein provision has been made for distribution of property different from the provisions of the section.

(e) This section shall be so construed and interpreted as to effectuate its general purpose to make uniform the law in those states which enact it.

(f) This section may be cited as the "uniform simultaneous death act."

§ 15-2-614. Effect of devise.—Every devise in any will conveys all of the estate of the devisor therein which he could lawfully devise, unless it clearly appears by the will that he intended to convey a lesser estate.

§ 15-2-615. Restriction on charitable devises.—(a) No estate, real or personal, shall be bequeathed or devised to any charitable or benevolent society or corporation, or to any person or persons in trust for charitable uses, except the same be done by will duly executed at least one hundred twenty (120) days before the death of the testator; and if so made at least one hundred twenty (120) days prior to such death, such devise or legacy, and each of them, shall be valid; provided, however, that the foregoing limitation shall not apply to wills of persons whose death is caused by accidental means and whose wills are executed prior to the accident which results in death.

(b) This section shall in no way limit or affect the surviving spouse's election provided by sections 15-2-201 through 15-2-207 of this code.

§ 15-2-616. Restriction on devises to nursing home or shelter home operators. No estate, real or personal, shall be bequeathed or devised, either directly or indirectly, to any person who owns, operates or is employed at a nursing home or shelter home, whether or not licensed, in which the testator was a resident within one (1) year of his death if the will was executed while the testator was a resident of the facility, except the same be done by will duly executed at least one (1) year before the death of the testator. This section shall apply to all property passing by testate succession after the effective date of this section regardless of when the will was written; provided, this section shall in no way limit or affect the rights of a beneficiary who is related to the testator, or who is a charitable or benevolent society or corporation; provided further that the foregoing limitations shall not apply to wills of persons whose death is caused by accidental means and whose wills are executed prior to the accident which results in death.

§ 15-2-801. Repealed and new section adopted as follows:

"15-2-801. Renunciation. (a) (1) A person or the representative of an incapacitated or unascertained person who is an heir, devisee, person succeeding to a renounced interest, donee, beneficiary under a testamentary or nontestamentary instrument, donee of a power of appointment, grantee, surviving joint owner or surviving joint tenant, beneficiary of an insurance contract, person designated to take pursuant to a power of appointment exercised by a testamentary or nontestamentary instrument, or otherwise the recipient of any benefit under a testamentary or nontestamentary instrument, may renounce in whole or in part, powers, future interests, specific parts, fractional shares or assets thereof by filing a written instrument within the time and at the place hereinafter provided.

(2) The instrument shall (i) describe the property or interest renounced; (ii) be signed by the person renouncing; and (iii) declare the renunciation and the extent thereof.

(3) The appropriate court may direct or permit a trustee under a testamentary or nontestamentary instrument to renounce or to deviate from any power of administration, management or allocation of benefit upon finding that exercise of such power may defeat or impair the accomplishment of the purposes of the trust whether by the imposition of tax or the allocation of beneficial interest inconsistent with such purposes. Such authority shall be exercised after hearing and upon notice to all known persons beneficially interested in such trust or estate, in the manner provided by this act.

(b) The writing specified in (a) must be filed within nine (9) months after the transfer or the death of the decedent, or donee of the power, (whichever is the later) or, if the taker of the property is not then finally ascertained, not later than nine (9) months after the event that determines that the taker of the property or interest is finally ascertained or his interest indefeasibly vested. The writing must be filed in the court of the county where proceedings concerning the decedent's estate are pending, or where they would be pending if commenced. If an interest in real estate is renounced, a copy of the writing may also be recorded in the office of the recorder in the county in which said real estate lies. A copy of the writing also shall be delivered in person or mailed by registered or certified mail to the personal representative of the decedent, the trustee of any trust in which the interest renounced exists, and no such personal representative, trustee, or person shall be liable for any otherwise proper distribution or other disposition made without actual notice of the renunciation.

(c) Unless the decedent or donee of the power has otherwise indicated, the property or interest renounced passes as if the person renouncing had predeceased the decedent, or if the person renouncing is designated to take under a power of appointment as if the person renouncing had predeceased the donee of the power. A future interest that takes effect in possession or enjoyment after the termination of the estate or interest renounced takes effect as if the person renouncing had predeceased the decedent or the donee of the power. In every case the renunciation relates back for all purposes to the date of death of the decedent or the donee, as the case may be.

(d) The right to renounce property or an interest therein is barred by: (1) assignment, conveyance, encumbrance, pledge or transfer of property therein or any contract therefor; (2) written waiver of the right to renounce; or (3) sale or other disposition of property pursuant to judicial process, made before the renunciation is effective.

(e) The right to renounce granted by this section exists irrespective of any limitation on the interest of the person renouncing in the nature of a spendthrift provision or similar restriction.

(f) The renunciation or the written waiver of the right to renounce is binding upon the person renouncing or person waiving and all persons claiming through or under him.

(g) This section does not abridge the right of any person to assign, convey, release, or renounce any property or an interest therein arising under any other statute.

(h) An interest in property existing on the effective date of this act as to which, if a present interest, the time for filing a renunciation has not expired, or, if a future interest, the interest has not become indefeasibly vested or the taker finally ascertained may be renounced within nine (9) months after the effective date of this act.

§ 15-2-803. Not adopted. Substituted therefor are provisions defining a slayer; prohibiting such from acquiring property from person whose life was taken by slayer; and directing that decedent's property pass as though slayer predeceased decedent.

§ 15-2-901. Not adopted.

§ 15-3-101. After words “testamentary disposition,” delete words “to his heirs” and add “to the surviving spouse.”

§ 15-3-105. Delete last sentence of section.

§ 15-3-106. New section: “15-3-106. Civil litigation—Notice.—Subject to general rules concerning the proper location of civil litigation and jurisdiction of persons, the court may herein determine any other controversy concerning a succession or to which an estate, through a personal representative, may be a party. Persons notified are bound though less than all interested persons may have been given notice.”

§ 15-3-111. New Section: “15-3-111. Joint probate on death of survivor of marriage dissolved by death.—In cases in which a marital community has been dissolved by the death of either spouse at any time, the survivor was then entitled to all of the property of the decedent by will, law, or both, and the survivor died before any proceeding had been commenced for the probate of the estate of the spouse whose death occurred first, the estates of both decedents may be joined for probate in a single proceeding in any court having jurisdiction of the estate of the spouse whose death occurred last. The initial application or petition filed in any such joint proceeding shall contain a statement of the facts upon which such joint proceeding is based, in addition to all other statements required by this code to be made therein.”

§ 15-3-203. Add (7) to subsection (a), “(7) if a petition for appointment of a personal representative has been filed and sixty (60) days have elapsed during which no consent to act has been filed by any proper person, the public administrator shall act as personal representative unless and until a proper person consents to act.” In subsection (f), change 21 to 18. Add subsection (i) as follows: “(i) A married woman shall have the right to serve as personal representative.”

§ 15-3-301. In first paragraph, after words “informal probate” add “, informal statement of intestacy where the estate is community and there is a surviving spouse,”. Substitute “a” for “1”, “b” for “2”, etc. In (a) after words “of a will” add “informal statement of intestacy where the estate is community and there is a surviving spouse,”. Add to (a) “(6) a statement that an estimate of total assets of the estate has been sent to the state tax commission;”. Add to (a) “(7) If the application is for an informal statement of intestacy of a community estate where there is a surviving spouse, an affidavit of the surviving spouse or someone acting on behalf of the surviving spouse that there is no will, that the decedent's estate consists solely of community property of the decedent and surviving spouse, that he or she is the surviving spouse, and a request for a statement that there is no will, that all assets are community and that the surviving spouse is the sole heir;”. Add to (a) “(8) that the time limit for informal probate or appointment as provided in this article has not expired either because three (3) years or less have passed since the decedent's death, or, if more than three (3) years from death have passed, that the circumstances as described by section 15-3-108 of this code authorizing tardy probate appointment have occurred.” (1978, c. 350). Delete (4) of subsection (b). Add new subsection (g) as follows: “(g) By verifying an application for informal probate, or informal appointment, the applicant submits personally to the jurisdiction of the court in any proceeding for relief from fraud relating to the application, or for perjury, that may be instituted against him.” Add new subsection (h) as follows: “(h) Any statement entered upon an application for informal statement of intestacy where the estate is community and there is a surviving spouse shall contain a statement of heirship setting out the heirs of the decedent and shall have the same effect as entry of a statement of informal probate of a will and be subject to the limitation periods set out in section 15-3-108, Idaho Code, notwithstanding the exception provided in that section for determining heirs of an intestate."

§ 15-3-303. After words "probate of a will" in subsection (a), add "or informal statement of intestacy where the estate is community and there is a surviving spouse." Add (8) to subsection (a) as follows: "(8) if the application is for a statement of intestacy of a community estate with a surviving spouse, on the basis of statements in the application and affidavit: 1. the decedent left no will, 2. the decedent's estate consists solely of community property of the decedent and the surviving spouse, and 3. the decedent left a surviving spouse. In addition to this, the registrar shall set out the name of the surviving spouse."

§ 15-3-303A. New section: "15-3-303A. Notice required.—Upon issuance of a statement of informal probate if no letters are issued to a personal representative or determination of heirship of community property, the applicant must give notice to all heirs and devisees of the admission of the will to probate or the determination of heirship of community property. This information shall be sent by ordinary mail to each of the heirs and devisees whose address is reasonably available to the applicant. The applicant shall be responsible to any heir or devisee damaged by failure of the applicant to give proper notice under this section."

§ 15-3-401. Add a new paragraph at the end of section as follows: "By submitting a petition for formal probate the petitioner subjects himself to jurisdiction of the court in which such instrument is filed. Any action by a person damaged by him, including a creditor of the estate, shall be limited in amount to the assets of the estate less the obligations of the estate paid by him. Notice of any proceedings sought to be maintained against the petitioner pursuant to his submission to jurisdiction shall be delivered to him or mailed to him by ordinary first class mail at his address as it is known to the petitioner, or is listed on any application or petition in probate proceedings previously instituted in the court where the proceeding is brought."

§ 15-3-409. Add new sentence to end of section as follows. "When a lost will is established, the provisions thereof must be found by the court and the findings filed and recorded as other wills are filed and recorded."

§ 15-3-412. Substitute "a" for "1", "b" for "2", etc.

§ 15-3-601. After first sentence add "In his statement of acceptance, the personal representative shall subscribe an oath to the effect that he will perform the duties of his office according to the law."

§ 15-3-603. After last sentence add, "No bond will be required of any domestic bank or trust company."

§ 15-3-607. Add new subsection:

"(c). If any person is suspected of having concealed, embezzled, or smuggled, laid away or disposed of any money, goods, or chattels of the decedent or to have in his possession or subject to his knowledge, any deeds, conveyances, bonds, contracts, or other writings, or any personal estate, or any other claim or demand or any last will of the decedent, such person may be ordered to appear, examined on oath and held to account upon such matters.

§ 15-3-706. After words "inventory to" in second paragraph, add "heirs, devisees, the state tax commission, and to".

§ 15-3-708. After words "was filed" delete rest of language and add ", or send copies thereof to the state tax commission and to all interested persons to whom copies of the original inventory were sent pursuant to § 15-3-706."

§ 15-3-710. After last sentence add: "The personal representative is not required to institute such an action unless requested by creditors who must pay or secure the cost and expenses of litigation."

§ 15-3-714. After words "Section I.C. 3-504" add ", and without regard to the constructive notice provisions of § 15-1-305(A) of this Code,".

§ 15-3-715(3). Delete first sentence and substitute: "Exercise the same power as the decedent in performance, compromise or refusal to perform the decedent's contracts which continue as obligations of the decedent's estate."

§ 15-3-717. After words "concurrence of" add "a majority" and delete word "all."

§ 15-3-801. Add: "(b) A personal representative may give written notice by mail or other delivery to any creditor, notifying the creditor to present his claim within four (4) months after the published notice if given as provided in subsection (a) of this section or within sixty (60) days after the mailing or delivery of the notice, whichever is later, or be forever barred. Written notice must be the notice described in subsection (a) of this section or a similar notice.

(c) The personal representative is not liable to any creditor or to any successor of the decedent for giving or failing to give notice under this section.

§ 15-3-802(b). Changed as follows: "The running of statute of limitations measured from an event other than death or the giving of notice to creditors is suspended during the four (4) months following the decedent's death but resumes thereafter as to claims not barred pursuant to the sections which follow."

§ 15-3-803. "LIMITATIONS ON PRESENTATION OF CLAIMS. (a) All claims against a decedent's estate which arose before the death of the decedent, including claims of the state and any subdivision thereof, whether due or to become due, absolute or contingent, liquidated or unliquidated, founded on contract, tort, or other legal basis, if not barred earlier by another statute of limitations or nonclaim statute, are barred against the estate, the personal representative, and the heirs and devisees of the decedent, unless presented within the earlier of the following dates:

(1) two (2) years after the decedent's death; or

(2) within the time provided in section 15-3-801(b), Idaho Code, for creditors who are given actual notice, and within the time provided in section 15-3-801(a), Idaho Code, for all creditors barred by publication.

(b) All claims described in subsection (a) of this section barred by the nonclaim statute of the decedent's domicile before the giving of notice to creditors in this state are also barred in this state.

(c) All claims against a decedent's estate which arise at or after the death of the decedent, including claims of the state and any subdivision thereof, whether due or to become due, absolute or contingent, liquidated or unliquidated, founded on contract, tort, or other legal basis, are barred against the estate, the personal representative, and the heirs and devisees of the decedent, unless presented as follows:

(1) a claim based on a contract with the personal representative, within four (4) months after performance by the personal representative is due;

(2) any other claim, within the later of four (4) months after it arises, or the time specified in subsection (a)(1) of this section.

(d) Nothing in this section affects or prevents:

(1) any proceeding to enforce any mortgage, pledge, or other lien upon property of the estate;

(2) to the limits of the insurance protection only, any proceeding to establish liability of the decedent or the personal representative for which he is protected by liability insurance; or

(3) collection of compensation for services rendered and reimbursement for expenses advanced by the personal representative or by the attorney or accountant for the personal representative of the estate."

§ 15-3-804(a). Delete "may" and insert "shall" and delete "or may" and insert "and" in first sentence.

§ 15-3-805(2). Delete after "funeral expenses" remainder of subsection.

(3). Delete after "federal law" remainder of subsection. (4). Delete "all other claims" and substitute, "reasonable and necessary medical and hospital expenses of the last illness of the decedent, including compensation of persons attending him:" Add: "(5) Debts and taxes with preference under other laws of this state; (6) All other claims."

§ 15-807(a). Changed as follows: "PAYMENT OF CLAIMS. Upon the expiration of the earlier of the time limitations provided in section 15-3-803, Idaho Code, for the presentation of claims, the personal representative shall proceed to pay the claims allowed against the estate in the order of priority prescribed, after making provision for homestead, family and support allowances, for claims already presented that have not yet been allowed or whose allowance has been appealed, and for unbarred claims that may yet be presented, included costs and expenses of administration. By petition to the court in a proceeding for the purpose, or by appropriate motion if the administration is supervised, a claimant whose claim has been duly allowed but not paid may secure an order directing the personal representative to pay the claim to the extent funds of the estate are available to pay it."

§ 15-3-809. Substitute "a" for "1" and "b" for "2".

Add new section:

"§ 15-3-817. Community estates.—If a community estate is administered as if each decedent survived the other because of application of the simultaneous death act, section 15-2-104 and section 15-2-601 of this code, or the provisions of a will, community debts will be charged ratably to each half of the community estate and separate debts to the estate of the decedent by whom they were incurred."

§ 15-3-902(c). Designated "(d)".

Add new section (c):

"If an estate of a decedent consists partly of separate property and partly of community property, community debts shall be charged to community property and separate debts to separate property. Expenses of administration shall be apportioned and charged against the different kinds of property in proportion to the relative value thereof, except that none of such expenses shall be apportioned or charged to the survivor's share of the community property."

§ 15-3-906. Substitute “A” for “i”, “B” for “ii”, and “C” for “iii”.

Add new section as follows:

“§ 15-3-907A. Deceased beneficiary as heir.—(a) If the decedent has left a surviving child or children or issue of children among the persons who are by law entitled to succeed to his estate, and any of them, before the close of administration, has died before reaching the age of eighteen (18) and not having married, no administration of such deceased issue's estate is necessary, but all the estate which such deceased issue is entitled to receive by inheritance must, without administration, be distributed to the heirs at law of the deceased issue.

“(b) If any other heir, legatee, or devisee shall die after the decedent's death and before distribution, property to which he might be entitled shall be distributed to the representative of his estate or directly to his heirs, legatees or devisees or the persons entitled thereto.”

§ 15-3-914. After words “missing person” delete remainder of section and substitute, “to his trustee if one has been appointed; or, if no trustee has been appointed, shall file the report of abandoned property required by section I.C. 14-517, Idaho Code, and proceed to dispose of the property in the manner set forth in the ‘unclaimed property act’, provided, however, that in the event no person appears to claim such property within eighteen hundred and twenty seven (1827) days (approximately five [5] years) of the time such moneys or property is deposited with the state tax commission, the moneys or property so deposited shall accrue and be set over to the state building fund.” Delete subsection (b).

§ 15-3-916(a)(1). Delete after “estate tax;” remainder of sentence. (5). After “estate tax” delete “and the additional inheritance tax imposed by. . . . .”.

§ 15-3-1003(a)(1). Replace with: “(1) determined that the time limitation for presentation of creditors' claims has expired.”

§ 15-3-1004. After words “claimants for amounts” add words “received as exempt property, homestead or family allowances, or for amounts”.

§ 15-3-1006. After words “time of distribution thereof” add “, except if the claim is by a creditor of the decedent, it is forever barred two (2) years after the decedent's death.”

Add new section:

“§ 15-3-1009. Decree of distribution to attorney general.—Whenever any estate involves, or may involve a charitable trust, the court shall at the time of distribution of said estate forward to the attorney general of the state of Idaho a certified copy of said decree of distribution of the estate which involves or may involve said charitable trust.”

§ 15-3-1102. Substitute “a” for “1”, “b” for “2”, and “c” for “3”.

§ 15-3-1201. Collection of personal property by affidavit allows collection of property of decedent or collection of debt owed to decedent by affidavit if fair market value of entire estate does not exceed $75,000.

Add new section:

“§ 15-3-1205. Summary administration of estates in which a surviving spouse is the sole beneficiary.—(a) Upon the testate or intestate death of a person leaving a surviving spouse as the sole devisee or beneficiary, the surviving spouse (or any person claiming title to any property through or under such surviving spouse) may file a verified petition setting out marriage and the death of a person leaving a surviving spouse as the sole devisee or heir. If the decedent died testate, the petition must be accompanied by the original of the last will and testament of the decedent. Notice of hearing shall be given pursuant to the provisions of section 15-1-401, Idaho Code.

"(b) If it shall appear at such hearing that the decedent and the person claimed to be the surviving spouse were duly married and that the surviving spouse is the sole heir or devisee, a decree shall be made to that effect. This decree shall thereafter have the same effect as a formal decree approving or determining distribution. The petitioner, or the surviving spouse, or both, need not appear in person at such hearing, nor must an attorney for the petitioner spouse appear in person at such hearing. Petitioner or attorney for petitioner, or both, may either: (1) Upon proper motion made by petitioner, appear telephonically; or (2) submit one or more affidavits in advance of hearing certifying that notice of hearing was given as required by law and that no objection to entering of decree has been received by petitioner or attorney for petitioner.

"(c) In the event that the surviving spouse (or person claiming through or under the surviving spouse) shall elect to proceed under this section, the surviving spouse shall assume and be liable for any and all indebtedness that might be a claim against the estate of the decedent and there will be no administration of the estate of the decedent."

§ 15-4-101. Substitute "a" for "1", "b" for "2", and "c" for "3".

§ 15-4-201. Substitute "a" for "1", "b" for "2", and "c" for "3".

§ 15-4-301. Substitute "a" for "1", "b" for "2", and "c" for "3".

Living Wills.

Person at least 18 years of age and of sound mind may issue directive in form of living will or durable power of attorney to attending physician to withdraw artificial life sustaining procedures or equipment. (I.C. 39-4501 to I.C. 39-4514).

Simultaneous Death.

See topic 13.05 Death.

Testamentary Guardian.

See category 14 Family, topic 14.07 Guardian and Ward.

Testamentary Trusts.

See topic 13.13 Trusts.

Uniform Anatomical Gift Act adopted. (I.C. 39-3401 to I.C. 39-3411).

Will Registry.

Will registry is kept by secretary of state. Applicants may register their wills for $10 filing fee. (15-2-1001).

14 FAMILY

14.01 ADOPTION:

Interstate compact on adoption and medical assistance enacted Mar. 7, 1994. (I.C. 39-

7501).

Any minor child may be adopted by any adult residing in and having residence in Idaho, and who is either 15 years older than child or who is 25 years of age or older; spouse of natural parent may adopt without above age restriction. (I.C. 16-1501 and I.C. 16-1502). Persons not minors may be adopted by resident adult where person adopting has had relationship as parent for over one year. (I.C. 16-1501 and I.C. 16-1502). Adoptions shall not be denied solely on basis of disability by adoptive parent. Such disabled adoptive parent may show how adaptive equipment and/or support services allow adoptive parent to function as parent. Definitions of new terms provided. (I.C. 16-1501 and I.C. 16-1506). No married person can adopt without consent of spouse. (I.C. 16-1503). Rights of all parties to adoption must be considered and balanced. (I.C. 16-1501A).

Consent Required.

Consent to adoption is required from: adoptee (if over age 12 and with proper mental capacity); both parents or surviving parent (if adoptee was born within marriage and is under age 18); mother (if adoptee was born outside of marriage); any guardian or custodian of adoptee; any guardian or conservator of incapacitated adult or developmentally disabled adoptee; adoptee's spouse; adoptive father of illegitimate child being adopted by another. (I.C. 16-1504). Additionally, consent is required from unmarried biological father who: has been properly adjudicated; has filed voluntary acknowledgment of paternity with vital statistics unit of department of health and welfare (pursuant to I.C. 7-1106); or, if child was placed with adoptive parent more than six months after birth, has developed substantial relationship with child or has lived with child for six month period immediately prior to placement; or, if child was placed with adoptive parent when under six months of age, has manifested full commitment to his parental responsibilities. (I.C. 16-1504). Unmarried biological father whose consent is otherwise required, may lose his right to consent upon determination of court based on petition of party. (I.C. 16-1504[3]). If there is no showing that unmarried biological father has consented to or waived his rights regarding proposed adoption, petitioner shall file with court certificate from vital statistics department of department of health and welfare that shows search of registry of putative fathers and that no putative father in such proceedings has filed notice. (I.C. 16-1504[4]). Unmarried biological fathers from other states may contest adoption under circumstances listed in I.C. 16-1504(8). Minor parent may give consent and such consent may not be challenged when minor parent reaches age of majority. (I.C. 16-1504[6]).

Father of illegitimate child may preserve his rights by commencing proceedings to establish paternity and filing notice with vital statistics unit of department of health and welfare. (I.C. 16-1513). If such filing is not made prior to commencement of adoptive (or termination) proceeding, then, putative father is deemed to have waived his rights and is barred from filing action to establish paternity thereafter. (I.C. 16-1513). No consent necessary of any person whose relationship terminated or custody removed by proceeding under I.C. 16-1601 to I.C. 16-1629 and I.C. 16-2001 to I.C. 16-2015, for abandonment or abuse of child, or from like proceedings by court of competent jurisdiction in other states. (I.C. 16-1504). If voluntary child placement agency licensed by state in which it does business is authorized to place child for adoption and to give consent to adoption under laws of such state, such consent when given in adoption proceeding within this state is sufficient. (I.C. 16-1504). Consent of parent who is minor not voidable because of minority. (I.C. 16-1504). Consent of child, if over age of 12, is necessary. (I.C. 16-1505).

Jurisdiction and Venue.

District court of the county where the person adopting resides. (I.C. 16-1506). Person adopting must reside and maintain dwelling within Idaho for six consecutive months prior to initiating proceedings. (I.C. 16-1506).

Proceedings.

Commenced by filing petition together with copy thereof, initiated by person proposing to adopt, in district court of county in which person adopting resides and has residence. Petition must include name and address of petitioner, name of child to be adopted and name by which it will be known if adopted, degree of relationship of child, if any, names of any person or agency whose consent to adoption is necessary, and information as to alleged date and place of birth and parentage of child, along with source of all information. In adoption arising from child protective act case, petition shall be filed in court having jurisdiction over child protective act case unless that court relinquishes jurisdiction over adoption proceeding. (I.C. 16-1506). Notice must be served after commencement of proceeding, and no later than 20 days prior to final disposition hearing, upon following: any person or agency whose consent is required under I.C. 16-1504; any registered putative father; petitioner's spouse; any father listed on birth certificate; any person living with child at time mother granted consent who holds himself out to be child's father; and any person married to child's mother at time she granted consent. (I.C. 16-1505). Any person who receives notice has 20 days to file objection to adoption proceeding. (I.C. 16-1505[5]). Person adopting and child adopted, and spouse of adopting parent, if natural parent must appear; necessary consent is signed, and agreement executed by person adopting to effect that child shall be adopted and treated as his own lawful child should be treated. Any person required to consent shall execute consent in writing and shall acknowledge before officer authorized to acknowledge deeds. Acknowledged, written consent filed in court where application made shall be sufficient appearance for such person. Proceedings for termination of parent relation or custody and proceeding for adoption may be consolidated if compliance with I.C. 16-1501 to I.C. 16-1512 and I.C. 16-2001 to I.C. 16-2015. (I.C. 16-1506, I.C. 16-1513). If petition is by person unrelated to child or unmarried to natural parent of child, and at discretion of court upon filing of any other petition for adoption, copy of petition with statement of full names and permanent address of child and petitioners, shall be served by court, within five days, on Director of Department of Health and Welfare. (I.C. 16-1506). If adopting parent is member of armed forces and unable to attend, deposition constitutes appearance and testimony. (I.C. 16-1506).

Director must verify allegations of petition and make thorough investigation within 30 days and report to court. Department of Health & Welfare may require petitioner to pay all or part of costs of investigation. If report disapproves of adoption, motion may be made to court to dismiss petition. (I.C. 16-1506). But father may adopt his illegitimate child by public acknowledgment and receiving it into his family with consent of his wife and thereupon child is deemed legitimate from time of its birth. (I.C. 16-1510). Father of illegitimate child may assert parental rights by registering notice with vital statistics unit. (I.C. 16-1513). This provision is deemed enlargement not limitation of rights of illegitimate child. (I.C. 16-1510). Records of proceedings may be sealed by motion of petitioner or court, to be broken only upon motion of petitioner or person adopted. (I.C. 16-1511).

Order.

Court makes order declaring the child shall thenceforth be regarded and treated in all respects as child of person adopting. (I.C. 16-1507). If adopted person is foreign born, court makes finding of facts as to probable date and place of birth and parentage. (I.C. 16-1507).

Name.

Adopted child may take name of person adopting. (I.C. 16-1508).

Appeal may be made to district court from order granting or refusing adoption or from any other intermediate order, but must be commenced within six months from date adoption order became final. (I.C. 16-1512).

Effect of Adoption.

Person adopting and adopted child sustain legal relation of parent and child with all its rights and duties. (I.C. 16-1508). Natural parents of adopted child are relieved of all parental duties and responsibilities; rights of child through natural parent terminated except such parent may provide for adopted child by will. (I.C. 16-1509). Adopted child inherits from adopted parents and has all rights of child of whole blood to inherit from any person. (I.C. 16-1508).

Access to Adoption Records.

Adopted persons older than 18, natural birthparents, birth siblings, or relatives of deceased birthparents or adult adoptees may register with vital statistics unit and upon match limited disclosure of original birth record will be made. (I.C. 39-259A). Paternity decrees and lists of adoptees who have consented to release of records are confidential. (I.C. 39-257, I.C. 39-259A, I.C. 39-270).

Financial Assistance to Birth Parent.

Adoptive parents may provide certain financial assistance to birth parent. (I.C. 18-1511).

Advertisement of child available for adoption is prohibited. (I.C. 18-1512A).

14.02 ALIMONY:

See topic 14.06 Divorce.

14.03 COMMUNITY PROPERTY:

See topic 14.09 Husband and Wife.

14.04 DESERTION:

See topics 14.06 Divorce, 14.09 Husband and Wife.

14.05 DISSOLUTION OF MARRIAGE:

See topic 14.06 Divorce.

14.06 DIVORCE:

Grounds for divorce are: (1) Adultery; (2) extreme cruelty; (3) wilful desertion; (4) wilful neglect; (5) habitual intemperance; (6) conviction of felony; (7) permanent insanity, provided insane spouse has been confined in an insane asylum in any state or foreign country for at least three years prior to commencement of action and it appears to the court that such insanity is permanent (I.C. 32-603 to I.C. 32-608; I.C. 32-801 to I.C. 32-805); (8) that parties have continuously lived separate and apart without cohabitation for five years or more (I.C. 32-610; 69 Idaho 513, 210 P.2d 934; 76 Idaho 95, 278 P.2d 200; 89 Idaho 84); (9) irreconcilable differences, being determined by court as substantial reasons to dissolve marriage (I.C. 32-603[8]; I.C. 32-616).

Grounds for legal separation are not recited but suit may be maintained for separate maintenance under § 32-901. (I.C. 32-901; 33 Idaho 255, 193 P. 386; 49 Idaho 468, 289 P. 86; 61 Idaho 261, 100 P.2d 955).

Residence Requirements.

Plaintiff must have been a resident of the state for six full weeks before commencement of the action. (I.C. 32-701).

Jurisdiction.

Submitted to by maintenance of matrimonial domicile within state when conduct in state gives rise to cause of action for divorce or separate maintenance. (I.C. 5-514).

Permanent maintenance may be allowed for either spouse. (I.C. 32-705).

I.C.A. § 32-909, declaring earnings from wife's separate property after separation not to be community is unconstitutional inasmuch as husband's earnings from separate property after separation were community property and this statute denies equal protection. (97 Idaho 461, 546 P.2d 1169).

Caveat: Orr v. Orr held Alabama statutory scheme providing husbands, but not wives, may be required to pay alimony upon divorce, violative of equal protection. (440 U.S. 268, 99 S.Ct. 1102, 59 L.Ed.2d 306).

Final decree is entered immediately upon determination of issues; no interlocutory decree.

Temporary maintenance may be ordered by Court in amounts and on terms just and proper under circumstances.

Allowance for prosecution of suit may be ordered by Court after consideration of financial resources of both parties and other relevant factors.

Division of Property of Spouses.

See subhead Division of Community Property, infra.

Custody of Children.

Idaho Code §§ 32-717 and I.C. 32-1005 set forth factors court shall weigh to determine best interest of child. Those factors include: (1) wishes of child's parent(s); (2) wishes of child; (3) relationships of child with his/her parents and siblings; (4) child's adjustment to his/her home, school, and community; (5) character and circumstances of all individuals involved; (6) need to promote continuity and stability in life of child; and (7) domestic violence. (I.C. 32-717[1]). If parent has disability, parent can provide evidence of adaptive equipment or support services that will allow parent to carry out his/her parenting responsibilities. (I.C. 32-717[2]-[5]). Idaho has adopted informal custody trial procedure as alternative procedure for determining child custody and child support issues. (I.R.C.P. 16[p]). Informal procedure only available if agreed to by all parties, counsel and court. (I.R.C.P. 16[p]). Application of Idaho Rules of Evidence and normal question and answer manner are waived in this informal procedure. (I.R.C.P. 16[p]).

Uniform Child Custody Jurisdiction and Enforcement Act adopted. (I.C. 32-11-101 to I.C. 32-11-405).

Uniform Interstate Enforcement of Domestic-Violence Protection Orders Act adopted. (I.C. 39-6306A).

Uniform Interstate Family Support Act adopted. (I.C. 7-1001 to I.C. 7-1052) Amended 1997. (c. 198, 1997).

Child Support.

Subject to control of court, both during suit and thereafter, and either spouse may be required to pay for their support and education, payment to be made to clerk of court. (I.C. 32-717; I.C. 32-717B; I.C. 32-706). All child support decrees shall contain provision to collect arrearages by income withholding, obligor's social security number, statutory notice of right. (I.C. 32-1205). See category 5 Civil Actions and Procedure, topic 5.20 Process, subhead Child Support Matters. Court may require assignment of wages to clerk in decree for child support. (I.C. 8-704). Provision made for collection without notice of child support via continuing income withholding. (I.C. 32-1201 to I.C. 32-1214). Forms for income withholding order. (I.C. 32-1207). Provisions for enforcement of orders requiring health insurance for dependant children. (I.C. 32-1216). Action to collect child support arrearages must be commenced within five years of date child reaches majority or date child dies, whichever occurs first. (I.C. 5-245). Child support guidelines are found in I.C. 32-706. Child support guidelines adopted by Idaho Supreme Court are given presumptive effect. (I.C. 32-706A). However, court has authority to depart from guidelines if application of guidelines would be unjust or inappropriate to particular case. (I.C. 32-706[5]). Courts may also issue medical child support orders to ensure children have health care coverage. (I.C. 32-1214A-32-1214J). See also Idaho Health Insurance Access Card Act. (I.C. 56-236 to I.C. 56-242). See also subhead Custody of Children, supra.

Division of Community Property.

In case of divorce court divides community property as may be just. (I.C. 32-712). Agreements to pass property at death of surviving spouse are revoked by divorce. (15-6-201[c]). Separate and community property are defined in I.C. 32-906. See also subhead Military Retirement Benefits, supra.

Reconciliation.

Upon application of one party, court may require conference, and if there are minor children, may stay proceedings for 90 days to determine practicability of reconciliation. (I.C. 32-716).

Remarriage.

No restriction on remarriage after divorce.

Annulment of Marriage.

See topic 14.11 Marriage.

14.07 [RESERVED]

14.08 GUARDIAN AND WARD:

Uniform Probate Code adopted, effective July 1, 1972. (15-1-101 to 15-7-401; §§ 1, 2, 3, and 4). Code is given Idaho Code Annotated Title Number 15, and section numbers contain said title citation followed by numerical part of Uniform Probate Code Citation, e.g., 15-1-101. 1975 and 1977 Amendments not adopted. 1979 Amendments adopted.

Material Variations from Official Text are:

§ 15-5-101. Substitute “a” for “1”, “b” for “2”, “c” for “3”, and “d” for “4”. In subsection (a) delete “by reason of mental illness, mental deficiency, physical illness or disability, chronic use of drugs, chronic intoxication, or other cause”, delete “advanced age,” and delete “;” and add “, provided, that the term shall not refer to a developmentally disabled person as defined in section I.C. 66-402(4), Idaho Code, and provided further that (1) ‘Incapacity’ means a legal, not a medical disability and shall be measured by function limitations and it shall be construed to mean or refer to any person who has suffered, is suffering, or is likely to suffer, substantial harm due to an inability to provide for his personal needs for food, clothing, shelter, health care, or safety, or an inability to manage his or her property or financial affairs;

(2) Inability to provide for personal needs or to manage property shall be evidenced by acts or occurrences, or statements which strongly indicate imminent acts or occurrences; material evidence of inability must have occurred within twelve (12) months prior to the filing of the petition

for guardianship or conservatorship;

(3) Isolated instances of simple negligence or improvidence, lack of resources, or any act, occurrence, or statement, if that act, occurrence, or statement is the product of an informed judgment, shall not constitute evidence of inability to provide for personal needs or to manage property;

(4) 'Informed judgment' means a choice made by a person who has the ability to make such a choice, and who makes it voluntarily after all relevant information necessary to making the decision has been provided, and who understands that he is free to choose or refuse any alternative available and who clearly indicates or expresses the outcome of his choice;".

§ 15-5-102. Delete subsection (a).

$15-5-103. Amount payable by person under duty to pay or deliver money or personal property to minor is $10,000 per annum.

§ 15-5-104. Changed as follows: "A parent or a guardian of a minor or incapacitated person, by a properly executed power of attorney, may delegate to another person, for a period not exceeding six (6) months, or in the case of military personnel serving beyond the territorial limits of the United States for a period not exceeding twelve (12) months, any of the parent's or guardian's powers regarding care, custody, or property of the minor or ward including, but not limited to, powers for medical care and educational care of the minor or ward, except the parent's or guardian's power to consent to marriage or adoption of a minor or ward. The delegation for a minor to a grandparent of the minor, or to a sibling of the minor, or to a sibling of either parent of the minor, shall continue in effect until the time period, or date, or condition set forth in the power of attorney for automatic expiration of the power of attorney occurs. If the power of attorney does not provide a time period, or date, or condition for automatic expiration of the power, the power of attorney shall continue in effect for a period of three (3) years. The power of attorney may be revoked prior to the expiration of the three (3) year period, or prior to the time period, or date, or condition for automatic expiration, in a writing delivered to the grandparent or sibling by the delegating parent or guardian. The power of attorney does not need to be notarized or recorded to be valid. However, if the power is recorded, any revocation of the power by a writing must also be recorded before the revocation is effective."

Add new sections:

"§ 15-5-105. Evidence in proceedings involving veteran's benefits.—If benefits derived from the United States through the veteran's administration are involved in any proceeding under this chapter, a certificate of the administrator or his authorized representative shall be prima facie evidence of the necessity of appointment of a guardian or conservator or both if:

(a) It sets forth the age of the minor involved in the proceeding as shown by the records of the veterans administration and the fact that appointment is a condition precedent to payment of any moneys:

(b) It sets forth the fact that a purportedly incapacitated person involved in the proceeding has been rated incompetent by the veterans administration upon examination pursuant to the laws governing such administration and that appointment of a guardian is a condition precedent to payment of any moneys due such incapacitated person.

"§ 15-5-106. Copies of public records to be furnished.—When a copy of any public record is required by the veterans administration to be used in determining the eligibility of any persons to participate in benefits made available by the veterans administration, the official custodian of such public records shall without charge provide the applicant for such benefits or any person acting on his behalf or the authorized representative of the veterans administration with a certified copy of such record.

"§ 15-5-107. Wrongful appropriation.—Upon the petition of anyone interested in the welfare of the ward, anyone suspected of having concealed, embezzled or conveyed away any of the moneys, goods or effects belonging to the ward or his estate may be ordered by the court to appear and be examined on oath and held to account upon such matters and for such property."

§ 15-5-202. Add after last sentence: "Written notice of acceptance of the appointment must be given by the guardian to the minor and to the person having his care or to his nearest adult relative immediately upon acceptance of appointment."

§ 15-5-204. Conditions upon which and circumstances under which court may appoint guardian of minor. Section altered to provide that disability of potential guardian shall not in and of itself be used as criterion of suitability of guardian.

§ 15-5-207. Prior to (a), insert: "Proceedings for the appointment of a guardian may be initiated by any relative of the minor, the minor if he is fourteen (14) years of age, a de facto custodian of the minor, or any person interested in the welfare of the minor."

Alter subpart (d) to read: "The court shall appoint an attorney to represent the minor if the court determines that the minor possesses sufficient maturity to direct the attorney. If the court finds that the minor is not mature enough to direct an attorney, the court shall appoint a guardian ad litem for the minor. The court may decline to appoint an attorney or guardian ad litem if it finds in writing that such appointment is not necessary to serve the best interests of the minor or if the Idaho department of health and welfare has legal custody of the child."

Add new subsection:

"(e) Letters of guardianship must indicate whether the guardian was appointed by will or by court order."

§ 15-5-208. Delete last sentence.

Add new section:

"§ 15-5-212A. GUARDIANSHIPS ARISING IN CONNECTION WITH A PROCEEDING UNDER THE CHILD PROTECTIVE ACT. Where a minor is within the jurisdiction of a court under the child protective act, or where a guardianship proceeding arose in connection with a permanency plan for a minor who was the subject of a proceeding under the child protective act:

(1) The court having jurisdiction over the proceeding under the child protective act shall have exclusive jurisdiction and venue over any guardianship proceeding involving such minor unless, in furtherance of the permanency plan, the court declines to exercise such jurisdiction and venue, notwithstanding sections 15-5-205 and 15-5-211, Idaho Code.

(2) In any action connected to a guardianship governed by this section, in addition to notice or service upon interested parties pursuant to section 15-1-401, Idaho Code, notice of the following shall be served upon the department of health and welfare in the manner prescribed in Idaho rule of civil procedure 4(d)(5):

(a) Any petition for the appointment of a guardian of a minor;

(b) Any pleading filed in connection with such guardianship;

(c) Any proceeding of any nature in such guardianship; or

(d) The time and place of any hearing in connection with such guardianship.

(3) In any action governed by this section, the department of health and welfare shall have the right to appear and be heard at any hearing, and shall have the right to intervene at any stage of the action.

(4) A guardian appointed in an action governed by this section may not consent to the adoption of the minor without providing prior notice of the action of adoption to the department of health and welfare in a manner prescribed in section 15-1-401, Idaho Code.

(5) Any person who moves to terminate a guardianship governed by this section has the burden of proving, by clear and convincing evidence, that:

(a) There has been a substantial and material change in the circumstances of the parent or the minor since the establishment of the guardianship; and

(b) Termination of the guardianship would be in the best interests of the minor.

(6) In any action governed by this section, any person who moves to remove a guardian or modify a guardianship has the burden of proving, by clear and convincing evidence, that:

(a) There has been a substantial and material change in the circumstances of the parent or the minor since the establishment of the guardianship; and

(b) Removal of the guardian or modification of the guardianship would be in the best interests of the minor."

§ 15-5-213. Alter section to read: De facto custodian.—"(1) 'De facto custodian' means a person who has been the primary caregiver for, and primary financial support of, a child who, prior to the filing of a petition for guardianship, has resided with the person for a period of six (6) months or more if the child is under three (3) years of age and for a period of one (1) year or more if the child is three (3) years of age or older. (2) If a court determines by clear and convincing evidence that a person meets the definition of a de facto custodian, and that recognition of the de facto custodian is in the best interests of the child, the court shall give the person the same standing that is given to each parent in proceedings for appointment of a guardian of a minor. In determining whether recognition of a de facto custodian is in the child's best interests, the court shall consider: (a) Whether the child is currently residing with the person seeking recognition as a de facto custodian; and (b) If the child is not currently residing with the person seeking de facto custodian status, the length of time since the person served as the child's primary caregiver and primary financial supporter."

§ 15-5-303. Alter section to read: "Procedure for court appointment of guardian of an incapacitated person.—(a) The incapacitated person or any person interested in his welfare may petition for a finding of incapacity and appointment of a guardian, limited or general. It is desirable to make available the least restrictive form of guardianship to assist persons who are only partially incapable of caring for their own needs. Recognizing that every individual has unique needs and differing abilities, the public welfare should be promoted by establishing a guardianship that permits incapacitated persons to participate as fully as possible in all decisions affecting them; that assists such persons in meeting the essential requirements for their physical health and safety, in protecting their rights, in managing their financial resources, and in developing or regaining their abilities to the maximum extent possible; and that accomplishes these objectives through providing, in each case, the form of guardianship that least interferes with legal capacity of a person to act in his own behalf. The petition shall include a plan in reasonable detail for the proposed actions of the guardian regarding the affairs of the ward after appointment of the guardian, to the extent reasonably known to the petitioner at the time of filing of the petition. If the complete mental, physical and emotional status, and the health care needs and other needs of the ward are not reasonably known to the petitioner at the time the petition is filed, or if the petitioner is not the proposed guardian, then the guardian shall submit to the court, and to all interested persons, in writing, within thirty (30) days after appointment of the guardian, a reasonably detailed plan covering such matters. Such plan must also be given to any person who has filed a request for notice under section 15-5-406, Idaho Code, and to other persons as the court may direct. Such plan shall be given to all such persons in accordance with the methods set forth in section 15-1-401, Idaho Code. If the plan changes during any time period between the periodic reports of the guardian, the modified plan shall be filed with the next report as a part thereof."

(b) Upon the filing of a petition, the court shall set a date for hearing on the issues of incapacity and unless the allegedly incapacitated person has counsel of his own choice, it shall appoint an attorney to represent him in the proceeding, who shall have the powers and duties of a guardian ad litem. The person alleged to be incapacitated shall be examined by a physician or other qualified person appointed by the court who shall submit his report in writing to the court. The court may, in appropriate cases, appoint a mental health professional, defined as a psychiatrist, psychologist, gerontologist, licensed social worker, or licensed counselor, to examine the proposed ward and submit a written report to the court. The person alleged to be incapacitated also shall be interviewed by a visitor sent by the court. The visitor shall also interview the person who appears to have caused the petition to be filed and any person who is nominated to serve as guardian, and visit the present place of abode of the person alleged to be incapacitated and the place it is proposed that he will be detained or reside if the requested appointment is made and submit his report in writing to the court. Where possible without undue delay and expenses beyond the ability to pay of the allegedly incapacitated person, the court, in formulating the judgment, may utilize the service of any public or charitable agency that offers or is willing to evaluate the condition of the allegedly incapacitated person and make recommendations to the court regarding the most appropriate form of state intervention in his affairs.

(c) Unless excused by the court for good cause, the proposed guardian shall attend the hearing. The person alleged to be incapacitated is entitled to be present at the hearing in person, and to see or hear all evidence bearing upon his condition. He is entitled to be represented by counsel, to present evidence and subpoena witnesses and documents, to examine witnesses, including the court-appointed physician, mental health professional, or other person qualified to evaluate the alleged impairment, as well as the court-appointed visitor, and otherwise participate in the hearing. The hearing may be a closed hearing upon the request of the person alleged to be incapacitated or his counsel and a showing of good cause. After appointment, the guardian shall immediately provide written notice of any proposed change in the permanent address of the ward to the court and all interested parties."

§ 15-5-304. Alter section to read: "Findings—Order of Appointment.—(a) The court shall exercise the authority conferred in this part so as to encourage the development of maximum self-reliance and independence of the incapacitated person and make appointive and other orders only to the extent necessitated by the incapacitated person's actual mental and adaptive limitations or other conditions warranting the procedure.

(b) The court may appoint a guardian as requested if it is satisfied that the person for whom a guardian is sought is incapacitated and that the appointment is necessary or desirable as a means of providing continuing care and supervision of the person of the incapacitated person. The court, on appropriate findings may

(1) Treat the petition as one for a protective order under section 15-5-401, Idaho Code, and proceed accordingly;

(2) Enter any other appropriate order; or

(3) Dismiss the proceedings.

(c) The court may, at the time of appointment or later, on its own motion or on appropriate petition or motion of the incapacitated person or other interested person, limit the powers of a guardian otherwise conferred by this section and thereby create a limited guardianship. Any limitations on the statutory power of a guardian of an incapacitated person shall be endorsed on the guardian's letters, or in the case of a guardian by testamentary appointment, shall be reflected in letters that shall be issued at the time any limitation is imposed. Following the same procedure, a limitation may be removed and appropriate letters issued."

§ 15-5-306. Add new sentence to end of section: "Termination does not affect his liability for prior acts nor his obligation to account for funds and assets of his ward."

§ 15-5-307. Add new subsection:

"(d) Upon request, a jury may be summoned to hear factual issues as in other civil cases.

§ 15-5-308. Role and description of "visitor" in the guardianship proceedings defined. "A person who is trained in law, nursing, psychology, social work, or counseling or has other qualifications that make him suitable to perform the function and is an officer, employee, or special appointee of the court with no personal interest in the proceedings." The visitor's report is described and its required contents articulated. Add new sections: "(2) Any person appointed as a visitor shall be personally immune from any liability for acts, omissions or errors in the same manner as if such person were a volunteer or director under the provisions of section I.C. 6-1605, Idaho Code; (3) the visitor may not also be appointed as guardian ad litem for the person alleged to be incapacitated nor may the guardian ad litem for the person alleged to be incapacitated be appointed as visitor, nor may the visitor and the guardian ad litem for the person alleged to be incapacitated be members or employees of the same entity, including, but not limited to, being members of the same law firm."

§ 15-5-309. Alter section to read: "Notices in guardianship proceedings.—(a) In a proceeding for the appointment or removal of a guardian of an incapacitated person and, if notice is required in a proceeding for appointment of a temporary guardian, notice of hearing shall be given to each of the following:

(1) the ward or the person alleged to be incapacitated and his spouse, or, if none, his adult children or if none, his parents;

(2) any person who is serving as his guardian, conservator or who has his care and custody;

(3) in case no other person is notified under subsection (a)(1) of this section, at least one (1) of his closest adult relatives, if any can be found; and

(4) any person who has filed a request for notice under this section.

(b) Notice shall be served personally on the alleged incapacitated person. In all other cases, required notices shall be given as provided in section 15-1-401, Idaho Code. Waiver of notice by the person alleged to be incapacitated is not effective unless he attends the hearing or his waiver of notice is confirmed by visitor or guardian ad litem. Representation of the alleged incapacitated person by a guardian ad litem is not necessary.

(c) Any person desiring notice of any order or filing in a proceeding involving an alleged incapacitated person in whom he is interested may file a request for notice with the court stating his name, the name of the incapacitated person, the nature of the requesting person's interest, and address or that of his attorney. Upon payment of any fee required by statute or court rule, the clerk shall mail a copy of the request to the guardian if one has been appointed or to the petitioner if there is no guardian. A request is effective only as to matters occurring after its filing. Any governmental agency paying or planning to pay benefits to the alleged incapacitated person, or any public or charitable agency that regularly concerns itself with methods for preventing unnecessary and overly-intrusive court intervention in the affairs of persons for whom guardians may be sought and that seeks to participate in the proceedings, is an interested person in a guardianship proceeding."

§ 15-5-310. Temporary Guardians. (a) "If the court finds that a guardian is not properly performing the duties of guardian or an emergency exists such that the likely result will be substantial harm to an alleged incapacitated person's health, safety, or welfare, and that no other person appears to have authority and willingness to act in the circumstances, the court, on petition by a person interested in the alleged incapacitated person's welfare, may appoint an emergency guardian whose authority may not exceed ninety (90) days, unless extended for good cause upon application of the temporary guardian. The emergency guardianship must be limited to only those powers absolutely necessary, or the least restrictive to the proposed ward, for the immediate health and safety of the proposed ward until such time as a full hearing may be held in the matter and the emergency guardian may exercise only those powers specified in the order. Emergency letters of guardianship shall allow the temporary guardian only such access to the proposed ward's assets as is necessary to provide and pay for the proposed ward's necessities of life, including short and long-term health care, but shall expressly deny a temporary guardian the right to have the temporary guardian's name added to any assets of the proposed ward pending a hearing on the guardianship."

(b) "The court shall appoint a guardian ad litem to represent the proposed ward in all cases involving a petition for adjudication of the incapacity. The alleged incapacitated person may substitute his own attorney for the guardian ad litem appointed by the court. Any attorney representing an alleged incapacitated person may not serve as guardian of the proposed ward or as counsel for the petitioner for guardianship."

(c) "An emergency guardian may be appointed without notice to the alleged incapacitated person or his attorney only if the court finds from affidavit or other sworn testimony that the proposed ward will be substantially harmed before a hearing on the appointment can be held." If such appointment without notice is made, notice must be given within forty-eight (48) hours after appointment. If interested party requests, court shall hold hearing on appropriateness of appointment within five (5) days after appointment.

§ 15-5-311. Priority listing of who may be guardian.

§ 15-5-312. Alter first two sentences of subsection (a) to read: "A guardian of an incapacitated person has the powers and responsibilities of a parent who has not been deprived of custody of his unemancipated minor child except that a guardian is not legally obligated to provide from his own funds for the ward and is not liable to third persons for acts of the ward. In particular, and without qualifying the foregoing, a guardian has the following powers and duties, except as modified by order of the court when the guardianship is limited:". In subsection (a)(4) substitute "(A)" for "(i)" and "(B)" for "(ii)". Alter subsection (a)(5) to read: "A guardian shall be required to report as provided in section 15-5-419, Idaho Code." Add new subsection: "(c) A guardian may delegate certain of his responsibilities for decisions affecting the ward's well-being to the ward when reasonable under all of the circumstances.”

§ 15-5-313. At end of subsection (a) delete “.” and add “, including proceedings to limit the authority previously conferred on a guardian, or to remove limitations previously imposed.” After word “resignation” in subsection (b) add “, altering his authority”.

Add new section: “§ 15-5-315. Guardian ad litem—Duties.—Subject to the direction of the court, the guardian ad litem shall have the following duties, which shall continue until the resignation of the guardian ad litem or until the court removes the guardian ad litem or no longer has jurisdiction, whichever occurs first:

(1) To conduct an independent factual investigation of the circumstances of the ward including, without limitation, the circumstances described in the petition;

(2) To file with the court a written report stating the results of the investigation, the guardian ad litem's recommendations, and such other information as the court may require. The guardian ad litem's written report shall be delivered to the court, with copies to all parties to the case, at least five (5) days before the date set for the adjudicatory hearing;

(3) To act as an advocate for the ward for whom appointed at each stage of the proceedings under this chapter and to be charged with the general representation of the ward. To that end, the guardian ad litem shall participate fully in the proceedings to the degree necessary to adequately represent the ward, and shall be entitled to confer with the ward and the ward's immediate family including, but not limited to, spouse, parents, siblings, children and next of kin;

(4) To facilitate and negotiate to ensure that the court, the department of health and welfare, if applicable, and the ward's attorney, if any, each fulfill their obligations to the ward in a timely fashion;

(5) To monitor the circumstances of a ward, if the ward is found to be within the purview of this chapter, to assure compliance with the law, and to assure that the terms of the court's orders are being fulfilled and remain in the best interest of the ward;

(6) To meet any parent or other person having legal or physical custody of the ward, record the concerns of the parent, and report them to the court or, if no such meeting occurs, file an affidavit stating why no meeting occurred;

(7) To maintain all information regarding the case confidential and to not disclose such information except to the court or to other parties to the case;

(8) To determine whether existing powers, trusts, and other measures may adequately give the ward the legal protection otherwise provided by a guardian, or whether such powers, trusts or other measures could be reasonably created and, if so, to recommend that either no guardianship be granted or that only a suitably limited guardianship be granted; and

(9) To exercise such other and further duties as may be expressly imposed by court order.”

Add new section to read: “§ 15-5-316. Guardian ad litem—Rights and powers.—(1) The guardian ad litem has the rights and powers set forth in this section, which shall continue until the resignation of the guardian ad litem or until the court removes the guardian ad litem or no longer has jurisdiction, whichever occurs first.

(2) The guardian ad litem shall have the right and power to file pleadings, motions, memoranda and briefs on behalf of the ward, and to have all of the rights of the ward, whether

conferred by statute, rule of court, or otherwise.

(3) All parties to any proceeding under this chapter shall promptly notify the guardian ad litem, and the guardian's attorney, if any, of all hearings, staff hearings or meetings, investigations, depositions, and significant changes of circumstances of the ward.

(4) Except to the extent prohibited or regulated by federal law, upon presentation of a copy of the order appointing the guardian ad litem, any person or agency including, without limitation, any hospital, school organization, department of health and welfare, doctor, nurse or other health care provider, psychologist, psychiatrist, police department, or mental health clinic, shall permit the guardian ad litem to inspect and copy pertinent records relating to the ward necessary for the proceeding for which the guardian ad litem has been appointed.”

§ 15-5-401. Substitute “a” for “1” and “b” for “2”. Delete from subsection (b)(1) term “advanced age,”.

§ 15-5-402. Substitute “a” for “1”, “b” for “2”, and “c” for “3”.

§ 15-5-403. Substitute “a” for “1” and “b” for “2”.

§ 15-5-404. Add new subsection “(c)” to read: “The petition shall include a financial plan for the proposed actions of the conservator regarding the financial affairs of the protected person after appointment of the conservator, to the extent reasonably known to the petitioner at the time of filing of the petition. If the complete assets, income, expenses, debts and other financial concerns of the protected person are not reasonably known to the petitioner at the time the petition is filed, or if the petitioner is not the proposed conservator, then the conservator shall submit to the court, and to all interested persons, in writing, within the ninety (90) day inventory, as a part thereof, a financial plan covering all of the assets, income, expenses, debts and other financial concerns of the protected person. Such financial plan must also be given to any person who has filed a request for notice under section 15-5-406, Idaho Code, and to other persons as the court may direct. Such financial plan shall be given to all such persons in accordance with the methods set forth in section 15-1-401, Idaho Code. If the financial plan changes during any time period between the periodic reports of the conservator, the modified financial plan shall be filed with the next report as a part thereof.”

§ 15-5-405. Alter section to read “NOTICE. On a petition for appointment of a conservator or other protective order, notice shall be given in accordance with section 15-5-309, Idaho Code.”

§ 15-5-406. Alter section to read: “Protective proceedings—Request for notice—Interested person.—Any person desiring notice of any order or filing in a protective proceeding described in this part involving a person in whom he is interested may file a request for notice with the court stating his name, the name of the alleged disabled person, the nature of the requesting person's interest, and his address or that of his attorney. Upon payment of any fee required by statute or court rule, the clerk shall mail a copy of the request to the conservator if one has been appointed, or to the petitioner if there is no conservator. A request is effective only as to matters occurring after its filing.”

§ 15-5-407. In Subsection (c), change word “for” to “of”. Delete word “protective” after word “appropriate.”

§ 15-5-408. Alter section to read: “Permissible court orders.—(a) The court shall exercise the authority conferred in the part so as to encourage the development of maximum self-reliance and independence of the protected person and make protective orders only to the extent necessitated by the protected person's actual mental and adaptive limitations and other conditions warranting the procedure.

(b) The court has the following powers which may be exercised directly or through a conservator in respect to the estate and affairs of protected persons:". Subsections 1 through 5 remain the same.

Add new section:

"§ 15-5-409a. Compromise of disputed claim of minor—Procedure.—When a minor shall have a disputed claim for money against a third person, the father or mother or both with whom the minor resides and who has the care and custody of such minor shall have the right to compromise such claim, but before the compromise shall be valid or of any effect the same shall be approved by the court of the county where the minor resides upon a verified petition in writing, regularly filed with said court. If the court approves such compromise he may direct the money paid to the father or mother of said minor subject to the provisions of section 15-5-103, Idaho Code, or he, or any other court of competent jurisdiction, may direct the money be paid subject to the provisions of an appropriate protective order which he, or any other court of competent jurisdiction, may issue, or he may require that the money be paid to a conservator appointed pursuant to chapter 5, part 4, of this code. No filing fee shall be charged for the filing of any petition for leave to compromise as provided herein."

§ 15-5-410. Subsection (1) is (4) with the following words inserted after "fiduciary", "(but not a fiduciary serving only as a trustee)"; Subsection (2) is (1); (3) is (2); (4) is (3). In subsection (b) delete "1" and substitute "2". Subsection (c) precludes appointment of convicted felon as conservator except as specified.

§ 15-5-419. Add in front of first sentence: "Every conservator or guardian shall submit a written annual report to the court concerning the status of the ward and of the ward's estate that has been under the guardian's or conservator's control. The guardian or conservator shall also be required to provide copies of the report to all persons listed by the court as having an interest in receiving copies of the report. The court may order more frequent reports by its own ruling or pursuant to a petition of any person interested in the ward's welfare." Change "to the court for his administration of the trust" to "annually, or as otherwise directed by the court, and". Delete: ", and at other times as the court may direct." Change "may" to "shall" and change "or he may" to "and shall". 1999 amendment allows court to impose fines and fees or take other appropriate action when guardian or conservator makes substantial misstatement on annual report, for gross impropriety in handling property of ward, or for willfully not filing annual report after notice and two (2) month grace period. Alter subsections (b) and (c) to read: "(b) Except as otherwise provided in subsection (c) of this section, every report submitted by a conservator shall cover a specific time period, which period shall be stated explicitly in the report. The report shall cover all of the estate of the protected person which is under the control of the conservator. Supporting documentation for items in the report shall either accompany such report or, if such supporting documentation is voluminous, or expensive to provide, or contains sensitive or private information, or another good reason exists for not providing such supporting documentation with the report, the report shall state the reason that the supporting documentation is not provided and that the supporting documentation is held by, or is reasonably available to, the conservator and will be produced upon request. The report shall contain, to the extent reasonably available to the conservator, at least the following: (1) A reasonably detailed listing of the starting inventory of the estate of the protected person at the beginning of the time period for which the report is made. Every such inventory item shall be specifically identified; provided however, that items may be reported in categories, such as miscellaneous personal property, rather than individually, and valued by category, when reasonable. The fair market value of each such item or category shall be stated in such starting inventory and the method of determining such fair market value shall also be stated. In the case of an item or category which is secured by an encumbrance or debt of any nature, the encumbrance or debt shall be listed separately from the item or category and shall be specifically identified, including the items or category secured by the encumbrance or debt, the amount of the encumbrance or debt as of the date of the starting inventory, the holder of such debt or encumbrance, the family relationship of such holder to the protected person if actually known to the conservator, and any other reasonably relevant information; (2) A reasonably detailed listing, for the covered time period, of the receipts, of any nature, by the estate of the protected person; provided however, that the receipts may be reported in categories, such as interest income, social security payments or rental receipts, if reasonable. Such listing shall reasonably identify each such receipt or category, including the source of such receipt or category and the exact amount or fair market value thereof, and the method of determining such amount or fair market value; (3) A reasonably detailed listing, for the covered time period, of all payments or expenses, of any nature, by the estate of the protected person; provided however, that the payments or expenses may be reported in categories, such as rental or house payments, medical expenses or transportation expenses, if reasonable. Each such payment or category shall be set forth in reasonable detail, including the amount thereof, to whom the payment was made, the method or frequency of making such payment if not reasonably indicated by the item or category, the consideration for such payment if not reasonably indicated by the item or category, the family relationship of the receiver of such payment to the protected person if actually known to the conservator, the time period covered by such payment if relevant, and any other information reasonably relevant to such payment; (4) A reasonably detailed listing of the ending inventory of the estate of the protected person at the end of the time period for which the report is made, in the same manner as described above for the starting inventory; (5) If the report does not, on its face, balance exactly the starting and ending inventories with the receipts and payments of the estate of the protected person, a reasonably detailed analysis and statement of the reasons for such imbalance, and a reasonably detailed listing of the correcting entries necessary to balance such report, such as unrealized gains or losses on assets of the estate, shall be made as part of the report; and (6) Any other information, of any nature, which is reasonably relevant to the actions of the conservator during the time period covered by the report, which shall be submitted as part of the report or shall accompany such report. (c) Any report prepared by a federally or state chartered financial institution using a fiduciary accounting system that produces statements containing asset positions, receipts, and disbursements shall be deemed to satisfy the reporting requirements set forth in subsection (b) of this section. The court may order any such report filed by a federally or state chartered financial institution to be supplemented or may order that any information reasonably relevant to the report be produced."

§ 15-5-420. Alter section to read: "Conservators—Title by appointment.—(a) The appointment of a conservator vests in him title as trustee to all property of the protected person, presently held or thereafter acquired, including title to any property theretofore held for the protected person by custodians or attorneys in fact, or to the part thereof specified in the order. An order specifying that only a part of the property of the protected person vests in the conservator creates a limited conservatorship.

(b) The appointment of a conservator is not a transfer or alienation within the meaning of general provisions of any federal or state statute or regulation, insurance policy, pension plan, contract, will or trust instrument, imposing restrictions upon or penalties for transfer or alienation by the protected person of his rights or interest, but this section does not restrict the ability of persons to make specific provision by contract or dispositive instrument relating to a conservator."

"(c) Until termination of his appointment, a conservator has the same power over the title to property of the protected person's estate that an absolute owner would have, provided however, that such power is held in trust for the benefit of the protected person. This power may be exercised without notice, hearing, or order of the court."

§ 15-5-421. Alter section to read: "Recording of conservator's letters.—Letters of conservatorship are evidence of transfer of all assets, or the part thereof specified in the letters, of a protected person to the conservator. An order terminating a conservatorship is evidence of transfer of all assets of the estate subjected to the conservatorship from the conservator to the protected person, or his successors. Letters of conservatorship and orders terminating conservatorship may be recorded in the office of the county recorder in any county in which property affected by such letters or orders is located and, from the time of filing the same for record, notice is imparted to all persons of the contents of such letters or orders."

§ 15-5-425. Add new subsection (a)(5) to read: "(5) A conservator, in discharging the responsibilities conferred by court order and this part, shall implement the principles described in section 15-5-408(a) of this code."

§ 15-5-430. After words "has ceased" add following, "or that it would be in the best interests of the protected person to establish the conservatorship in another jurisdiction may terminate the conservatorship and, where appropriate, order initiation of proceedings in another jurisdiction or delivery of the assets to a foreign conservator."

§ 15-5-431. Substitute "a" for "1" and "b" for "2".

Add new section:

"§ 15-5-432. Powers of foreign conservator.—If no local conservator or guardian has been appointed and no petition for such appointment is pending in this state, a domiciliary foreign conservator may file with a court in this state in a county in which property belonging to the protected person is located authenticated copies of his appointment and of any official bond he has given. A domiciliary foreign conservator may then exercise as to assets in this state all powers of a local conservator and may maintain actions and proceedings in this state subject to any conditions imposed upon nonresident parties generally."

Add new section to read: "15-5-434. Guardian ad litem—Duties.—Subject to the direction of the court, the guardian ad litem shall have the following duties, which shall continue until the resignation of the guardian ad litem or until the court removes the guardian ad litem or no longer has jurisdiction, whichever occurs first:

(1) To conduct an independent factual investigation of the circumstances of the protected person including, without limitation, the circumstances described in the petition;

(2) To file with the court a written report stating the results of the investigation, the guardian ad litem's recommendations, and such other information as the court may require. The guardian ad litem's written report shall be delivered to the court, with copies to all parties to the case, at least five (5) days before the date set for the adjudicatory hearing;

(3) To act as an advocate for the protected person for whom appointed at each stage of the proceedings under this chapter and to be charged with the general representation of the protected person. To that end, the guardian ad litem shall participate fully in the proceedings to the degree necessary to adequately represent the protected person, and shall be entitled to confer with the protected person and the protected person's immediate family including, but not limited to, spouse, parents, siblings, children and next of kin;

(4) To facilitate and negotiate to ensure that the court, the department of health and welfare, if applicable, and the protected person's attorney, if any, each fulfill their obligations to the protected person in a timely fashion;

(5) To monitor the circumstances of a protected person, if the protected person is found to be within the purview of this chapter, to assure compliance with the law, and to assure that the terms of the court's orders are being fulfilled and remain in the best interest of the protected person;

(6) To meet any parent or other person having legal or physical custody of the protected person, record the concerns of the parent, and report them to the court or, if no such meeting occurs, file an affidavit stating why no meeting occurred;

(7) To maintain all information regarding the case confidential and to not disclose such information except to the court or to other parties to the case;

(8) To determine whether existing powers, trusts, and other measures may adequately give the protected person the legal protection otherwise provided by a conservator, or whether such powers, trusts or other measures could be reasonably created and, if so, to recommend that either no conservatorship be granted or that only a suitably limited conservatorship be granted; and

(9) To exercise such other and further duties as may be expressly imposed by court order."

Add new section to read: "15-5-435. Guardian ad litem—Rights and powers.—(1) The guardian ad litem has the rights and powers set forth in this section, which shall continue until the resignation of the guardian ad litem or until the court removes the guardian ad litem or no longer has jurisdiction, whichever occurs first.

(2) The guardian ad litem shall have the right and power to file pleadings, motions, memoranda and briefs on behalf of the protected person, and to have all of the rights of the protected person, whether conferred by statute, rule of court, or otherwise.

(3) All parties to any proceeding under this chapter shall promptly notify the guardian ad litem, and the conservator's attorney, if any, of all hearings, staff hearings or meetings, investigations, depositions, and significant changes of circumstances of the protected person.

(4) Except to the extent prohibited or regulated by federal law, upon presentation of a copy of the order appointing the guardian ad litem, any person or agency including, without limitation, any hospital, school organization, department of health and welfare, doctor, nurse or other health care provider, psychologist, psychiatrist, police department, or mental health clinic, shall permit the guardian ad litem to inspect and copy pertinent records relating to the protected person necessary for the proceeding for which the guardian ad litem has been appointed."

§ 15-5-501 through 15-5-502 repealed as of July 1, 1982. Uniform Durable Power of Attorney Act adopted and designated as 15-5-501 through 15-5-507.

Add new section:

"15-5-601. Designation of boards of community guardian.—(a) After making a determination that there exists a need within a county for a guardian for those persons in need of guardianship and for whom there is no person or corporation qualified and willing to act in such capacity, the board of county commissioners may create, within the county, a board of community guardian. The board of county commissioners of one or more counties within a judicial district may jointly create within a judicial district a board of community guardian."

Add new section:

"15-5-602. Board structure—Powers and duties.—(a) Any board of community guardian which is created within a county or counties in a judicial district shall operate under the laws of the state of Idaho, including the Idaho guardianship, conservatorship and trust laws.

(b) A board of community guardian shall consist of not fewer than seven (7) nor more than eleven (11) members who are representatives of community interests involving persons needing guardians or conservators as defined by chapter 5, title 15, Idaho Code.

(1) The terms of the members of the board shall be for two (2) years and shall be staggered. A number of members equaling or most closely exceeding one-half (½) shall initially be appointed for one (1) year. Any vacancy created by resignation or expiration of term shall be filled in the same manner as the original appointment;

(2) No person shall be appointed for more than four (4) successive terms or eight (8) successive years on the board;

(3) The board shall meet not less than once each quarter;

(4) No person shall be a member of a board who is also an employee of: the district court or the clerk of the district court;

(5) A board member having previously provided or currently providing services to a ward shall disclose such to the board and abstain from any decision or action taken concerning that particular ward;

(6) Board members and officers shall serve without pay;

(7) Each board shall elect its own chairman and other officers.

(c) A board, in those instances when a guardian and/or conservator is required and no qualified family member or other qualified person has volunteered to serve, may:

(1) Locate a qualified person to serve as guardian and/or conservator; or

(2) Petition the court to be appointed guardian and/or conservator.

(d) The board shall have all the powers and duties where applicable by court order, as provided under section 15-5-312 of this code and/or sections 15-5-408 and 15-5-424 of this code and in addition thereto shall:

(1) Locate and recommend to the court, where necessary, that a visitor be appointed as provided in section 15-5-503 of this code;

(2) Have access to all confidential records, including abuse registry reports that may be maintained by state or private agencies or institutions, which records concern a person for whom the board acts as guardian and/or conservator. The name of the person reporting the alleged abuse shall be subject to disclosure according to chapter 3, title 9, Idaho Code;

(3) Review and monitor the services provided by public and private agencies to any incapacitated person for whom the board acts as guardian and/or conservator and determine the continued need for those services;

(4) Assess a fee for services developed pursuant to this part;

(5) Have the power, subject to the approval of the board of county commissioners, to adopt such rules as are necessary to carry out the duties and responsibilities of the board.

(e) When a board serves as guardian or conservator, it shall be compensated as other guardians or conservators pursuant to Idaho law. If, at the time the board is appointed as guardian and/or conservator, the incapacitated person for whom the board is to act has no funds, the court may waive the payment of fees.

(f) When a board serves as guardian and/or conservator there is created, at the time of filing of the order of appointment, a lien in favor of the board against any real property owned by the ward or protected person, enforceable only upon the termination of the guardianship and/or conservatorship, for all fees which were incurred throughout the duration of the services and which were not paid prior to termination. All fees incurred throughout the duration of the services and which were not paid prior to the termination of services shall relate back to the effective date of the lien. The board must record a notice of said lien within thirty (30) days of filing of the order of appointment. Such liens shall be recorded in every county where property subject to the lien is located. The notice shall contain at least the following information: full court heading of the action in which the appointment was made; the effective date of the lien; the name and address of the board; and any limitations or terms regarding the fees covered by the lien contained in the order of appointment. The court may postpone or arrange for gradual repayment of the fees if the court finds that the immediate repayment would create a hardship on the person.

(g) No member of a board of community guardian, any employees, or any visitor appointed at the request of such board pursuant to section 15-5-303 of this code, shall be liable for civil damages by reason of authorizing medical treatment or surgery for the person for whom the board is appointed, if the board member, employee or visitor, after medical consultation with the person's physician, acts in good faith, is not negligent, and acts within the limits established for the guardian and/or conservator by the court. No such person shall be liable, by reason of his authorization, for injury to the person for whom the guardian and/or conservator has been appointed which injury results from the negligence or other acts of a third person, if the court has authorized the giving of medical consent by the board or the individual members of the board. No such person shall be liable in the performance of acts done in good faith within the scope of his authority as long as the act is not of a wanton or grossly negligent nature. The board of community guardian shall be deemed to be a governmental entity for the purposes of application of the Idaho tort claims act."

Add new section:

"§ 15-5-603. Annual report—(a) Each board shall report annually in writing to the board of county commissioners and, in the case of a multi-county board, to each participating county, its activities for the preceding year, which report shall contain:

(1) A fiscal report which adequately reflects the financial operation of the board;

(2) The number of volunteer guardians obtained by the board;

(3) The number of incapacitated persons for whom the board is acting as guardian;

(4) Recommendations for improving guardianship services in the circuit;

(5) Such other matters as may be determined advisable by the board, or the board of county commissioners.

The report shall be filed no later than April 1 of each year and shall cover the preceding calendar year.

(b) The board of county commissioners shall review each report and shall determine whether to dissolve or continue the board of community guardian in the county. Where there is a multi-county board of community guardian, the boards of county commissioners of all concerned counties must concur in a decision to dissolve the board of community guardian."

Securities in Name of Nominee.

See category 13 Estates and Trusts, topic 13.13 Trusts, subhead Securities in Name of Nominee.

Gifts to Minors.

See topic 14.10 Infants.

Uniform Fiduciaries Act adopted. (I.C. 68-301 to I.C. 68-315).

Uniform Simplification of Fiduciary Security Transfers Act adopted (I.C. 68-901 to I.C. 68-911) and not repealed by Uniform Commercial Code.

Revised Uniform Principal and Income Act adopted. (I.C. 68-1001 to I.C. 68-1016).

14.09 HUSBAND AND WIFE:

Married woman may contract with her husband as with a third person. She may sue with reference to her separate property or for her own personal injuries, without joining her husband, but in actions for her personal injuries he is a proper party and may be brought in on motion. She may be sued alone only with reference to her separate property. No statutory prohibition against either spouse suing other. She is liable on her contracts and may bind community property. (I.C. 32-912). Any community obligation incurred by husband or wife without consent in writing of other spouse shall not obligate separate property of nonconsenting spouse. (I.C. 32-912).

Separate Property.

All money or other property owned by either spouse before marriage or acquired afterwards by gift, devise, bequest or descent is separate property of such spouse, as is also anything acquired with the proceeds of separate property. (I.C. 32-903).

Spouses may by written agreement specifically provide that all or specified property shall be separate property of one of spouses.

Real property conveyed by one spouse to the other is presumed to be separate estate of grantee, and grantor spouse only need execute and acknowledge conveyance. (I.C. 32-906).

Quasi-Community Property.

All personal property, wherever situated, and all real property in Idaho which is acquired while domiciled elsewhere but which would have been community property if decedent and surviving spouse had been domiciled in Idaho at time of acquisition, plus personal and real property acquired in exchange for such property; shall also include real property in another state owned by domiciliary of Idaho if laws of such other state permit descent and distribution of such property to be governed by laws of this state. (15-2-201). This category of property presumably effective only upon death of a spouse for property succession.

Community Property.

All property acquired after marriage, including the rents, issues and profits of separate property of either spouse is community property, unless in the instrument by which such property is acquired by spouse it is provided that rents and profits thereof be applied to that spouse's sole and separate use. (I.C. 32-906). Husband and wife have joint management and control of community property. (I.C. 32-912). Real property conveyed to revocable trust retains its community property character. (I.C. 32-906A). Right of survivorship. (I.C. 15-6-401 to 15-6-402).

Disposition of Community or Quasi-Community Property on Death of Spouse.

See category 13 Estates and Trusts, topics 13.07 Descent and Distribution, 13.09 Executors and Administrators.

Antenuptial Contracts.

See subhead Marriage Settlements, infra.

Right of Election.

See category 13 Estates and Trusts, topics 13.09 Executors and Administrators, 13.07 Descent and Distribution.

Conveyance or Encumbrance of Property.

Neither husband nor wife may sell, convey, or encumber community real property unless other joins in executing and acknowledging deed or other instrument of conveyance. (I.C. 32-912).

Agency.

Husband or wife may by express power of attorney give to the other the complete power to sell, convey or encumber, community property, either real or personal. (I.C. 32-912).

Marriage settlements may be entered into prior to or during marriage. (I.C. 32-916). When properly executed and recorded, marriage settlements may vary property rights of husband and wife from those given by statute. Minors may execute valid marriage settlements. (I.C. 32-916 to I.C. 32-929).

Desertion and Nonsupport.

A parent deserting a child under 16, or a husband deserting or failing to support his wife when able to do so, is guilty of felony. In addition to fine, which may be paid to wife or guardian of child, court may order guilty party to pay certain amount weekly to wife or guardian of child, releasing defendant on probation on his giving bond. (I.C. 18-401 to I.C. 18-405).

Uniform Reciprocal Enforcement of Support Act (as Revised) adopted. (I.C. 7-1048 to I.C. 7-1089). Amended to conform with requirements of Title IV-D of federal social security act. All sections dealing with foreign support orders repealed.

14.10 INFANTS:

Age of majority: males 18; females 18. (I.C. 32-101).

Emancipation.

Any male or female who has been married is competent to enter into contract, mortgage, bill of sale or conveyance, and can sue and be sued thereon. (I.C. 32-101).

Contracts for Necessaries.

Minor cannot disaffirm contract, otherwise valid, to pay reasonable value of things necessary for support of himself or his family, entered into when not under care of parent or guardian able to provide for him. (I.C. 32-101, I.C. 32-104 to 05). Infant 15 years or over may enter into insurance contract and cannot disaffirm by reason of minority. (I.C. 41-1807). Infant 14 years or over may consent to treatment of infectious, contagious, or communicable disease without consent of parent or guardian. (I.C. 39-3801).

Actions.

If infant has guardian, conservator or like fiduciary, representative may sue or defend; if not, infant may sue by next friend or guardian ad litem, appointed by court. (I.R.C.P. 17). A guardian ad litem may be appointed on the application of an infant if he is above the age of 14, or if under 14 on application of relative or friend or party to action. (15-5-206 to 15-5-207). Statutory tort action in child abuse cases. (I.C. 6-1701 to I.C. 6-1705).

Parental Responsibility.

Parent is civilly liable for retail value of merchandise, plus damages of $100 but not more than $250, costs, and attorney fees, for minor who knowingly removes merchandise from merchant's premises without paying. (I.C. 48-701 to I.C. 48-705). Parent responsible for willful destruction of property up to $2,500, caused by child under 18, living with parents. (I.C. 6-210). Any payment of public assistance money to or for benefit of dependent child creates debt due Department of Health and Welfare by parents who are responsible for child's support in amount equal to public assistance money so paid subject to modification by District Court Order. (I.C. 56-203B). Owner of motor vehicle knowingly permitting minor to drive is liable for negligence of minor under 16. (I.C. 49-2416). Failure to supervise is made crime; penalties and restitution imposed. (I.C. 32-1301).

Adoption.

See topic 14.01 Adoption.

Revised Uniform Gifts to Minors Act adopted with 1966 amendments, repealed effective July 1, 1984, replaced by Uniform Transfers to Minors Act. (1984 c. 152, I.C. 68-801 to I.C. 68-825). Minor is any person who has not attained age 18. (I.C. 68-801).

Termination of Parental Rights.

Parental rights may be terminated upon specified grounds. (I.C. 16-2005). Act provides extensive criteria and procedures for termination of rights by court order following petition and investigation. (I.C. 16-2001 to I.C. 16-2015).

Uniform Securities Ownership by Minors Act not adopted. Uniform Transfers to Minors Act coverage includes securities. (I.C. 68-809).

Uniform Transfers to Minors Act applies to transfers if transferor, minor, or custodian is resident or property in state at time of transfer and transfer refers to act by conveying property to qualified custodian “as custodian for (minor's name) under the Idaho Uniform Transfers to Minors Act” or by instrument in following form (I.C. 68-809):

TRANSFER UNDER THE IDAHO UNIFORM

TRANSFERS TO MINORS ACT

I (transferor's name) hereby transfer to (custodian), as custodian for (minor) under the Idaho Uniform Transfers to Minors Act, the following: (describe property).

Dated:

(Signature)

(Name of custodian) acknowledges receipt of the property described above as custodian for the minor named above under the Idaho Uniform Transfers to Minors Act.

Dated:

(Signature Custodian)

Act also applies to transfers purportedly made under Uniform Gift Act to minors. (I.C. 68-820).

Nomination of custodian may be by will, trust, deed, instrument of appointment, or contractual designation of beneficiary forwarded to obligor. (I.C. 68-803). Transfer made for only one minor and to one custodian. (I.C. 68-810). Transfer irrevocable and vests property in minor with statutory control in custodian. (I.C. 68-811[2]). Third person without knowledge exempt from liability for transactions with custodian. (I.C. 68-818). Resignation, removal and substitution of custodian procedures set forth. (I.C. 68-818). Custodian must transfer property to minor or his estate when: (1) Minor is 21 years for transfers established by gift, appointment, will or trust, or (2) when minor is 18 years for all other custodial properties, or (3) at minor's death. (I.C. 68-820).

14.11 MARRIAGE:

Any unmarried male and female of 18 or older is capable of consenting to marriage. (I.C. 32-202).

License to marry may not be issued to a male or female under 16 except on written consent of parent and order of probate court after hearing. (I.C. 32-202).

Consent Required.

Male or female between 16 and 18 may not obtain license to marry except upon written consent, duly acknowledged, of his or her father, mother or guardian. Original or certified birth certificate or proof acceptable to county recorder required. (I.C. 32-202).

License is required; issued by county recorder of any county. (I.C. 32-401 to I.C. 32-411). Female applicants shall file certificate from licensed physician which reports results of approved rubella test; certain exceptions included. (I.C. 32-412). District judge may, however, waive medical examination on proof that emergency exists. (I.C. 32-414). Each applicant must receive AIDS educational pamphlet from county recorder and certify that he or she has read pamphlet before license can be issued. (I.C. 32-412A).

Record.

See category 10 Documents and Records, topic 10.04 Records, subhead Vital Statistics.

Ceremony.

No particular form of ceremony is necessary. Consent to and subsequent consummation of marriage may be manifested in any form, and may be proved under the same general rules of evidence as facts in other cases. (I.C. 32-201 to I.C. 32-203). No marriage otherwise valid, will be voided because solemnizing official did not have authority he professed as long as marriage is consummated while one or both of parties believes marriage to have been validly performed. (I.C. 32-308).

Common law marriages will no longer be authorized after Jan. 1, 1996. (I.C. 32-201). All marriages after that date shall be solemnized, authenticated and recorded as set forth in I.C. 32-301 to I.C. 32-302.

Foreign Marriages.

All marriages contracted outside this state, if valid where contracted, are valid here, unless they violate public policy of this state. (I.C. 32-209).

Proxy marriages are not authorized by any statute.

Prohibited Marriages.

Marriages between ancestors and descendants of every degree, brother and sister of the whole or half blood, uncle and niece, aunt and nephew or first cousins are incestuous and void. (I.C. 32-205, I.C. 32-206).

Annulment.

Marriage may be annulled for any of the following causes, existing at time of marriage:

(1) Person when married was not of age of legal consent, and such marriage was contracted without consent of his or her parents, or of person having charge of him or her, unless after attaining age of consent such party for any time freely lives and cohabits with other as husband or wife; (2) that former husband or wife of either party was living, and marriage with such former husband or wife was then in force; (3) that either party was of unsound mind, unless such party, after coming to reason, freely cohabits with other as husband or wife; (4) that consent of either party was obtained by fraud, unless such party afterward, with full knowledge of facts constituting fraud, freely cohabits with other as husband or wife; (5) that consent of either party was obtained by force, unless such party afterwards freely cohabits with other as husband or wife; (6) that either party was, at time of marriage, physically incapable of entering into married state, and such incapacity continues, and appears to be incurable. (I.C. 32-501).

Time for Commencing Action.

Time within which action for annulment may be commenced varies according to ground on which annulment is sought, as follows: On ground (1), by party to marriage, within four years after attaining majority, by parent or guardian any time prior to majority of minor; on grounds (2) and (3), at any time during the life of parties; on ground (4), within four years after discovery of fraud; on grounds (5) and (6), within four years after marriage. (I.C. 32-502).

Legitimacy of children not affected by annulment, except where annulment on grounds of fraud in that wife is pregnant with child of man other than husband. (I.C. 32-503).

Effect of Judgment.

A judgment of nullity of marriage is conclusive only as against the parties to the action, and those claiming under them. (I.C. 32-505).

Premarital Agreements.

See topic 14.09 Husband and Wife, subhead Marriage Settlements.

14.12 MARRIED WOMEN:

See topics 14.09 Husband and Wife, Marriage; categories 8 Debtor and Creditor, topic Homesteads; Documents and Records, topic Acknowledgments; Civil Actions and Procedure, topic Evidence, subhead Witnesses; Estates and Trusts, topics Executors and Administrators, Wills; Property, topic Dower.

15 HEALTH

15.0115.04

15.05 FOOD, DRUGS, DEVICES AND COSMETICS:

Regulated by I.C. 37-101 et seq.

15.05A INSURANCE:

Credit Life and Credit Disability Insurance.

(I.C. 41-2301 to I.C. 41-2316).

Disability Insurance.

(I.C. 41-1801 to I.C. 41-2223).

Life and Health Insurance Guaranty Associations.

(I.C. 41-4301 to I.C. 41-4318).

Managed Care Reform Act.

(I.C. 41-3901 to I.C. 41-3940).

Self Funded Health Care Plans.

(I.C. 41-4001 to I.C. 41-4026).

15.0615.12

15.13 SMOKING REGULATIONS:

Smoking in public places or public meetings is prohibited except in designated areas. (I.C. 39-5501 to I.C. 39-5510). Other areas where smoking is specifically prohibited include elevators (I.C. 39-5505) and buses (I.C. 39-5510). Violation of smoking regulations results in infraction, subject to fine of up to $50. (I.C. 39-5507).

16 INSURANCE

16.01 INSURANCE COMPANIES:

Comprehensive Insurance Code adopted. (I.C. 41-101 thru I.C. 41-4409).

Kinds of insurance defined. (I.C. 41-501 to I.C. 41-513).

Supervision.

Insurance companies are placed under supervision of Department of Insurance, headed by Director of Insurance. (I.C. 41-201 to I.C. 41-252). Idaho insurance guaranty association created to help prevent loss to policyholders of insolvent insurers and to detect and avoid insolvency of insurers. (I.C. 41-3601 to 3621; I.C. 41-4301 to 4319). Association is nonprofit unincorporated entity and all insurers must be members in order to transact business in state. (I.C. 41-3601).

Rates and rating organizations relating to property, inland marine, marine and transportation, casualty, surety, workmen's comp. are regulated. Appeal from Director's orders taken to district court, Ada County, within 30 days of service of order. (I.C. 41-1401 to I.C. 41-1435).

Annual statements required to be filed with Director by July 1, covering prior calendar year. Filing to be in accordance with National Association of Insurance Commissioners procedure manual. (I.C. 41-335 to I.C. 41-336B).

Policies.

Standard provisions and prohibited provisions are fixed for policies of life and annuity, group life, disability, group disability, credit life and credit disability, property, casualty, surety, and title insurance. Coverage of new born shall be effective from moment of birth. (I.C. 41-1801 to I.C. 41-2613). Policy must contain provision requiring insurer to give insured 30 days prior written notice of cancellation, nonrenewal or premium rate increase. (I.C. 41-1842). No insurer shall charge higher premium than would otherwise be charged, or cancel, nonrenew, or decline to issue property or casualty policy or coverage based primarily upon individual's credit rating or credit history. (I.C. 41-1843). Policy may not require insured to purchase prescription drugs from any particular mail order company or pharmacy. (I.C. 49-1844). Insurance contracts of any type which provide coverage for mastectomies must provide mammography examinations. (I.C. 41-2144, I.C. 41-2218, I.C. 41-3441, I.C. 41-3936, I.C. 41-4025). Mandatory coverage for newborns adopted within 60 days of birth. (I.C. 41-2140). If insurance policy provides maternity benefits and insured is pregnant at time of discontinuance of policy, and is not eligible for replacement policy within 60 days of discontinuance, then, policy must pay maternity benefits for up to one year. (I.C. 41-2214).

Agents, brokers and consultants must be licensed by Director. (I.C. 41-1020 to I.C. 41-1079). They must meet continuing education requirements established by Director. (I.C. 41-1046). Agents or brokers must be 18 years of age, citizen of U.S., bona fide resident of Idaho for not less than six months preceding license application, except that director may waive residency requirement under certain circumstances, of good character and reputation, and must pass written examination unless one of exceptions listed in § 41-1039 applies. Nonresident may obtain residents' license as agent or broker if he has nonresident's license pursuant to I.C. 41-1065 and maintains office in Idaho that is his principal place of business. For broker's license, must also have had special experience or training as deemed by director to be reasonably necessary for competence as broker. (I.C. 41-1034). Consultant must be 25 years of age. If individual, or if firm or corporation, license powers must be exercised only by individuals qualified for individual license as consultants. Must have special experience, education or training of sufficient content and duration and possess thorough knowledge of field of insurance covered by license, meet highest fiduciary standards, file $10,000 bond in favor of State of Idaho, and pass all written examinations required for license. (I.C. 41-1035). Special license available to nonresident agents and brokers. (I.C. 41-1065). Director of Insurance authorized to bring actions to enjoin violations of insurance code. (I.C. 41-213). One who collects charges or premiums or adjusts or settles claims on life and health insurance coverage or annuities is insurance administrator. (I.C. 41-901). Administrators must be licensed and have written agreement with insurer. (I.C. 41-901 to I.C. 41-915). Person cannot, for fee, sell, solicit, or negotiate insurance without license, subject to some listed exceptions. (I.C. 41-1004). Insurers required to have licensed managing general agent. (I.C. 41-1501 to I.C. 41-1507).

Broker Controlled Insurers.

Minimum standards for business transacted with. (I.C. 41-1701 to I.C. 41-1706).

Resident Agent Countersignature Required.

Resident agent or his full time salaried employee who is over 21 years and is grantee of agent's acknowledged power of attorney must process, sign and place facsimile of agent's signature on policies for indemnity, general or floating policy covering property located in state, liability in state, or undertakings to be performed in state. (I.C. 41-337). However, resident agent's countersignature is not required if nonresident agent resides in state that allows Idaho resident agent to sign policy in that state without countersignature. (I.C. 41-338).

Insurance Holding Companies.

Insurance holding company system shall consist of two or more affiliated persons. (I.C. 41-3801). No person other than an issuer shall tender an offer to exchange securities which would result in acquiring control unless (1) statement filed with Director setting forth background and identity, source of funds, fully audited financial information of acquiring party, plan to liquidate insurer, classes of stock, and (2) approval given by Director. (I.C. 41-3802). Registration required. (I.C. 41-3806).

Service of Process.

Director must be appointed agent for service of process on any qualified, foreign or alien insurer and domestic reciprocal insurer. (I.C. 41-333). Insurer granted 30 days from service on Director to plead. Service of duplicate required and copy forwarded by registered or certified mail by Director to insurer, along with fee not over $30. (I.C. 41-334). Unauthorized insurers subject to service of process. (I.C. 41-1204 to I.C. 41-1210). Contracts as to credit life insurance are subject to Consumer Credit Code. (I.C. 28-44-101 to I.C. 28-44-401). See category 3 Business Regulation and Commerce, topic 3.11A Consumer Credit.

Interest on Life Insurance Benefits.

If payment of life insurance benefits is not made within 30 days after satisfactory proof of death is made to insurer, interest on benefit shall accrue. (I.C. 41-1336).

Investments and allowable assets defined and regulated. (I.C. 41-601 to I.C. 41-813). Reduced tax rates on Idaho investments. (I.C. 41-403).

Consumer Credit Transactions.

Insurance provided in relation to consumer credit transactions governed by Consumer Credit Code. (I.C. 28-44-101 to I.C. 28-44-401). See category 3 Business Regulation and Commerce, topic 3.11A Consumer Credit.

Certificates of Authority.

Before any insurer may transact insurance business, it must obtain a certificate of authority from Director. (I.C. 41-305 to I.C. 41-308). To qualify, must be an incorporated stock insurer, mutual insurer, or reciprocal insurer; maintain required paid-in capital stock or unimpaired surplus from $100,000 to $650,000 depending on type, together with additional surplus of $100,000 to $650,000 depending on type; maintain required reserves depending on type. Special provision for presently qualified insurers. (I.C. 41-313).

Application for certificate together with fee must be filed in accordance with detailed requirements. (I.C. 41-319 to I.C. 41-320). Director may grant, deny, suspend or revoke certificate for violations, after hearing. Appeal rights available to district court. (I.C. 41-322 to I.C. 41-330).

New domestic insurers regulated as to articles of incorporation, organization, sale of securities, qualifications. (I.C. 41-2801 to I.C. 41-2871).

Hospital Insurance Trusts.

See category 13 Estates and Trusts, topic 13.13 Trusts.

Licensing.

Producer licensing qualifications and procedures. (I.C. 41-1001 to I.C. 41-1029).

Foreign insurance companies must secure certificate of authority from Director, but may make investments in state without certificate. (I.C. 41-307). Requirements of capital fund, additional surplus, reserves are same as for new domestic insurers. (I.C. 41-313). Exempt from compliance with foreign corporation laws of business corporations. (I.C. 41-332). Foreign insurer admitted to do business in Idaho may become domestic insurer by complying with requirements for organization and licensing of domestic insurer and by designating place in Idaho as its principal place of business. (I.C. 41-342 to I.C. 41-344).

Reporting Material Acquisitions and Dispositions.

Every insurer domiciled in Idaho shall file report with director disclosing material acquisitions and dispositions of assets or material nonrenewals, cancelations or revisions of ceded insurance agreements. (I.C. 41-345). Transaction is material if it involves 5% of reporting insurer's total admitted assets. (I.C. 41-346). Nonmaterial nonrenewals, cancelations or revisions of ceded reinsurance agreements defined. (I.C. 41-347).

Retaliatory Laws.

Obligations, prohibitions or restrictions placed on Idaho insurers or agents, doing business in other states, which are in excess of those imposed on similar insurers, are imposed on insurers of such other states doing business in Idaho. (I.C. 41-340).

Premium Tax.

If preceding year's premium tax more than $400 current year's tax must be prepaid based on preceding year's business and current year's rate as follows: 60% by June 15, 20% by Sept. 15, 15% by Dec. 15, balance due by Mar. 1. Rate: 3.0% of gross premiums in excess of premiums and cancellations returned, and premium credits or dividends paid to policyholders. Special provisions for life and annuity contracts. Title insurance rate is 1.5%. Any insurer having 25% or more of its assets or 75% gross direct premiums on in-state policies in listed investments and meeting notice requirements of I.C. 41-403A granted rate of 1.1%. (I.C. 41-402 to I.C. 41-406). Director may refund any overpayment of taxes, fines or penalties if written claim is filed within one year of overpayment. (I.C. 41-402A). Tax for dental care services is at rate of four cents (4¢) per contract per month. (I.C. 41-402[a]).

Refunds.

Refund of premium for canceled insurance must be paid to insured. (I.C. 41-1333).

Complaint Procedures.

Every authorized insurer required to maintain complete record of all complaints. (I.C. 41-1330).

Direct Actions Against Insurer.

See category 23 Transportation, topic 23.01 Motor Vehicles, subhead Direct Actions.

Unclaimed Funds.

Uniform Unclaimed Property Act (1981) adopted effective July 1, 1983. (I.C. 14-501 to I.C. 14-541). See category 21 Property, topic 21.01 Absentees, subhead Escheat.

Uniform Claims Processing.

Beginning July 1, 1995, all providers of health insurance in Idaho shall use uniform form claim form/format and uniform billing and claim codes promulgated by director of insurance. Beginning July 1, 1996, all insurers shall offer compatible systems of electronic billing approved by director.

Uniform Insurers Liquidation Act adopted. (I.C. 41-3301; I.C. 41-3304; I.C. 41-3305; I.C. 41-3312 to I.C. 41-3320).

Priority of distribution for insolvent insurers. (I.C. 41-3342).

No-Fault Insurance.

Not adopted. See category 23 Transportation, topic 23.01 Motor Vehicles, subhead No-Fault Insurance.

Mutual Benefit Associations.

Chapter regulating mutual benefit associations repealed. (1987, c. 78).

Risk Retention Groups.

Chapter regulating Idaho risk retention groups formed pursuant to Federal Liability Risk Retention Act of 1986. (I.C. 41-4801 to 4816). Such groups must be chartered and licensed as liability insurance companies. (I.C. 41-4804 to 4805). No counter signatures required. (I.C. 41-4807). Risk retention group's agent or broker must be licensed by director. (I.C. 41-4813). Director may promulgate rules and regulations governing such groups. (I.C. 41-4815).

Reinsurance Intermediary Act.

Regulates reinsurers and insurers utilizing reinsurance intermediaries and brokers. (I.C. 41-5101 to I.C. 41-5111).

Life Insurance Twenty Day Free Examination.

Life insurance and annuities contracts must include separate rider stating insured may return policy within 20 days for refund. (I.C. 41-1935).

National Association of Insurance Commissioners.

Regulations, rules, directives and standards may not be enforced against insurers unless authorized by statute.

16.02 SURETY AND GUARANTY COMPANIES:

See topic 16.01 Insurance Companies, generally. Also I.C. 41-2601.

Capital and Surplus Requirements.

Must have at least $550,000 in paid-up capital stock or basic surplus and additional surplus of $550,000 whether company is domestic or foreign. (I.C. 41-313).

Rights and Powers.

Bond, undertaking, obligation or guaranty when required or permitted by law to be made may be executed by surety insurer.

Foreign Companies.

See topic 16.01 Insurance Companies.

17 INTELLECTUAL PROPERTY

17.01 TRADEMARKS AND TRADENAMES:

What May Be Used.

Trademark means any word, name, symbol, or device, or combination thereof, adopted and used by person to identify goods made or sold by him and to distinguish them from others. Certification mark means any word, name, symbol or device used by person other than its owner or by one to whom owner has bona fide intent to allow its use. Service mark means mark used in sale or advertising of services to identify services of person and distinguish them from services of others. Collective mark means trademark or service mark used by members of cooperative, association, or other collective group or organization; or by such groups' bona fide intended use. Tradename means word, name, symbol, device or any combination thereof, used by person to identify his business, vocation or occupation and distinguish it from others. Person means any individual, firm, partnership, corporation, association, union or other organization. Trademark or service mark shall not be registered if it is immoral, deceptive or scandalous; disparages or falsely suggests connection with persons, living or dead, institutions, beliefs or national symbol, or brings them into contempt or disrepute; comprises flag, coat of arms or other insignia of any government entity; comprises name, signature or portrait of any living individual, except with his written consent; consists of mark which is merely descriptive or deceptively misdescriptive, geographically descriptive or deceptively misdescriptive, or merely surname; however, distinctive mark may be used (mark considered distinctive if used continuously for five years in Idaho or elsewhere); resembles mark registered in Idaho or mark or trade name previously used in Idaho and not abandoned. Terms of Act defined in accord with U.S. trademark law. (I.C. 48-501 to I.C. 48-518 and I.C. 44-603).

Registration.

Application is filed with Secretary of State on forms furnished, and must contain name, business address, and if applicable, state of incorporation; goods or services in connection with which mark is used and manner used; date first used anywhere and date first used in Idaho; statement of ownership and that no other has right to use. Application is to be signed and verified and contain specimen or facsimile of mark in triplicate. Filing fee is $30. (I.C. 48-503).

Assignment.

Registered mark is assignable by written instrument executed and recorded on form provided by Secretary of State who shall issue new certificate for remainder of registration term; assignment is void as to subsequent purchaser without notice, unless filed within three months, or prior to subsequent purchase. Filing fee $30. (I.C. 48-507).

Protections Afforded.

Certificate of registration is issued and this certificate, or certified copy thereof, is admissible in evidence as competent and sufficient proof of registration in any action or judicial proceeding in Idaho. (I.C. 48-505).

Duration of Registration.

Registration effective for ten years. Registration renewable for mark still used in Idaho for additional ten years upon application filed within six months prior to expiration. $30 renewal fee. Registration may be renewed for successive periods of ten years in like manner. Secretary of State required to notify registrants of necessity of renewal within year next preceding expiration date. Registrations cancelled on voluntary request of registrant or assignee; upon failure to renew; upon finding by court of competent jurisdiction that registered mark has been abandoned, improperly or fraudulently obtained, that registrant is not true owner of registered mark, that registered mark is similar to or likely to cause confusion with mark previously registered by another with U.S. Patent Office and never abandoned. (I.C. 48-506; I.C. 48-509).

Infringement.

Infringement renders one liable for any or all of following: injunctive relief; suit to enjoin manufacture, use, display or sale of any counterfeit or imitation with order requiring defendant to pay all profit derived from infringement and/or all damages suffered. Registrant may prosecute under penal law. All common law rights preserved. (I.C. 48-512; I.C. 48-514).

Resale Price Agreements.

Owners of trademarks, tradenames and brands are permitted to establish minimum resale prices for their products. (I.C. 48-301 to I.C. 48-312). Any person, public corporation, or state may seek injunctive relief and triple damages, if any damages accrue. Any person, whether as principal or as agent, who violates act is guilty of misdemeanor for each single violation. Governor of State of Idaho has responsibility for supervision and administration of Act. (I.C. 48-310). *Caveat:* See, however, P.L. I.C. 94-145, repealing exemption of state fair trade laws from Federal anti-trust law.

Tradenames.

All persons, partnerships, associations, etc., transacting business in state under assumed or fictitious name or designation other than true name or names of such person or persons, must file in office of county recorder of county or counties in which business is conducted a certificate setting forth business name and true full name of party or parties conducting business, together with their postoffice addresses, which certificate must be acknowledged as a deed. In case of failure to file such certificate, such person or persons may not maintain any suit in any state court, and such failure is prima facie evidence of fraud in securing credit. Conducting business without certificate is misdemeanor. Filing fee for certificate $2 per page. Act does not apply to corporations. (I.C. 53-501 to I.C. 53-507). But see category 2 Business Organizations, topic 2.03 Corporations.

Deceptive Trade Practices.

See category 3 Business Regulation and Commerce, topic 3.20 Monopolies, 3.22 Restraint of Trade and Competition.

18 LEGAL PROFESSION

18.01 ATTORNEYS AND COUNSELORS:

Idaho has an integrated bar and all persons admitted to practice before Supreme Court, who have not been disbarred or suspended, and who have paid their annual license fee, are members and entitled to practice law.

Attorney Ethics.

Idaho has adopted American Bar Association Model Rules of Professional Conduct. (I.C. 3-301).

Jurisdiction over Admissions.

Board of Commissioners of Idaho State Bar, consisting of five members, has power to determine by rules, subject to approval of Supreme Court, requirements for admission, to conduct examinations, and to certify to Supreme Court names of qualified applicants. Board has formulated rules which have been approved by Supreme Court. (I.C. 3-402, I.C. 3-408). Approval by court of persons whose names are so certified entitles them to practice law. Board formulates rules governing conduct of all persons admitted, passes upon all complaints concerning professional conduct and is empowered to take disciplinary measures, subject to review by Supreme Court. (I.C. 3-408). Annual license fee of $140, if admitted prior to July 1, or $90, if admitted after July 1, for calendar year of admission; $255 for next three calendar years; $340 a year thereafter until calendar year following 72d birthday when annual fee reduced to $55. (I.C. 3-409). Affiliate members pay annual fee of $120. (I.C. 3-409).

Eligibility.

Any individual age of majority, of good moral character, and who possesses necessary qualifications of learning and ability may, under such rules as Supreme Court may prescribe, be admitted as attorney and counselor in all state courts. (I.C. 3-101).

Registration As Law Student.

None.

Educational Requirements.

Applicant must show graduation from law school approved by American Bar Association. Attorney applicant meets requirements if admitted to highest court of another state and has actively practiced as principal occupation at least five out of last seven years before application.

Examinations.

Conducted by Board of Commissioners of Idaho State Bar, usually in Feb. and July of each year. Application must be filed 120 days for student applicants and 150 days for attorney applicants preceding examination. Examinations usually given in Boise and Moscow.

Idaho uses multi-state bar exam. Dates are correlated with other states giving multi-state exam.

Other subjects tested include civil procedure, conflicts of laws, constitutional law, contracts, business organizations, ethics, Arts. 1, 2, and 9, of U.C.C., domestic relations, criminal law, equitable remedies, real property and water law, torts, community property, wills, succession and trusts. Idaho accepts transfer of multi-state bar exam scores from another jurisdiction. All applicants must take essay portion. Attorney applicants licensed in other jurisdictions for more than five years need not take multi-state portion of exam.

Appearance by Nonresident Attorney.

Nonresident attorney permitted to appear only if he has associated with him attorney practicing law in Idaho and who is personally present at all stages of any proceeding.

Suretyship.

Disability of attorneys as sureties on bonds in proceedings in which they are professionally engaged is regulated by local court rules.

Liens.

From commencement of action or service of answer containing counterclaim, an attorney has a lien upon his client's cause of action or counterclaim which attaches to a verdict, report, decision or judgment in his client's favor and the proceeds thereof in whosoever hands they may come. This lien is not affected by any settlement between the parties before or after judgment. (I.C. 3-205).

Disbarment or Suspension.

Supreme Court or District Court may remove, suspend or disbar for stated causes. (I.C. 3-301).

Unauthorized Practice.

Practice of law by persons not admitted or by attorney whose right to practice terminated by disbarment, suspension, failure to pay license or otherwise, is illegal and punishable by fine and imprisonment. (I.C. 3-420).

Mandatory Continuing Legal Education.

All attorneys engaged in active practice must complete minimum of 30 credit hours of legal education accredited by Board of Commissioners every three years and must make written report of participation to Board.

Specialty Certification Requirements.

None.

Professional Associations or Corporations.

See category 2 Business Organizations, topic 2.03 Corporations, subhead Professional Associations or Corporations.

19 MINERAL, WATER AND FISHING RIGHTS

19.01 MINES AND MINERALS:

Principal regulations, under U.S. laws. For all mining claims, monuments must be established at all exterior angles of claim, and copy of location notice must be posted at discovery point at time of making of location. (I.C. 47-602). Must record notice of location within 90 days after location with county recorder of county where claim is located. Failure to record in 90 days constitutes abandonment. (I.C. 47-604). Location notice must contain name of locator, name of claim, date of discovery, dimensions, distance from some prominent natural or artificial object, name of mining district, county, and state. (I.C. 47-602). Revegetation required with penalties for failure. (I.C. 47-1510). Dredge mining prohibited in National Wild and Scenic Rivers System of federal government. (I.C. 47-1323).

Operation of Mines.

Dredge mining operators must secure permit and bond (I.C. 47-1317); operations supervised by State Board of Land Commissioners. Injunctive relief available for dredge or placer mining without permit or bond. Civil and criminal penalties provided for violations of Dredge and Placer Mining Act, I.C. 47-1301 to 1324. (I.C. 47-1324).

Oil and Gas.

Oil and gas conservation commission to prevent waste and to make investigations as it deems proper. (I.C. 47-306 to I.C. 47-330).

Mining partnerships are provided for and regulated by I.C. 53-401 through I.C. 53-412.

Mining Tax.

For privilege of mining and extracting ores there is imposed, in addition to all other taxes, license tax of 1% of net value of ores mined or extracted. (I.C. 47-1201 to I.C. 47-1208).

Small Mining Securities.

See category 3 Business Regulation and Commerce, topic 3.24 Securities.

20 MORTGAGES

20.01 CHATTEL MORTGAGES:

Uniform Commercial Code adopted. (28-1-101 to I.C. 28-10-104).

Uniform Consumer Credit Code adopted 1971, repealed Mar. 31, 1983. Idaho Credit Code adopted Apr. 1, 1983. (I.C. 28-41-101 to I.C. 28-49-107). See category 3 Business Regulation and Commerce, topic 3.11A Consumer Credit.

What May Be Mortgaged.

Uniform Commercial Code governs.

After-acquired Property.

Uniform Commercial Code governs.

Future Advances.

Uniform Commercial Code governs.

Requisites of Instruments.

Uniform Commercial Code governs. § 9-110, Sufficiency of Description, enlarged to require real property to be described by legal description. (28-9-110).

Execution of Instruments.

Uniform Commercial Code governs.

Filing.

Uniform Commercial Code governs. § 9-302—1972 official amendment adopted with § 9-302(2)(f) amended to exclude filing as to security interests in securities, and § 9-302(5) added as new section, changing filing requirements for security interests in personal property or fixtures of utility companies when included with real property security agreements. (28-9-302). § 9-401(1)(a) designates Office of County Recorder; § 9-401(1)(b) designates Office of Secretary of State; § 9-401(2) excepts financing statements for farm products. (28-9-401). See category 3 Business Regulation and Commerce, topic 3.09 Commercial Code, subhead Variations, § 9-401.

Fees.

See category 3 Business Regulation and Commerce, topic 3.09 Commercial Code.

Refiling or Extension.

Uniform Commercial Code governs. See category 3 Business Regulation and Commerce, topic 3.09 Commercial Code, subhead Variations, § 9-401A.

Removal of Property by Mortgagor.

Uniform Commercial Code governs.

Satisfaction or Release.

Uniform Commercial Code governs.

Foreclosure.

Uniform Commercial Code governs.

Redemption.

Uniform Commercial Code governs.

Foreign Mortgages.

Uniform Commercial Code governs.

Forms.

Following, may be used. For Financing Statement, Statements of Continuation, Release, Assignment, Termination, etc., and Request for Information and Copies forms, see end of this Digest.

Security Agreement.

SECURITY AGREEMENT COVERING CONSUMER GOODS, FIXTURES, OR EQUIPMENT INCLUDING FARM EQUIPMENT

(MAY BE USED FOR MOTOR VEHICLES)

....

(DATE)

1.............

(NAME)

....

(NO. AND STREET) (CITY)

....

(COUNTY) (STATE)

(hereinafter called "Debtor") hereby grants to. . . . . (hereinafter called "Secured Party"),. . . . . successors and assigns, a security interest in the following goods together with all replacements thereof and accessories, parts, additions and accessions now or hereafter affixed or used in connection therewith (hereinafter called the "Collateral"):

(Insert full description of Collateral, including identifying data such as year, make, model, serial and identification numbers.)

or as described on exhibits attached hereto.

2. The security interest granted hereby is to secure payment and performance of the liabilities and obligations of Debtor to Secured Party of every kind and description, direct or indirect, absolute or contingent, due or to become due, now existing or hereafter arising (all hereinafter called "Obligations").

3. DEBTOR HEREBY WARRANTS AND COVENANTS:

3. 01 TITLE. Debtor is now or, by using the proceeds of loans by the Secured Party, will become the owner of the Collateral free from any adverse lien, security interest or encumbrance.

3. 02 USE. The Collateral is bought or used primarily for

(Check one)

☐ Personal, family or household purposes

☐ Farming operations

☐ Business use

and if checked here ☐, is being acquired with the proceeds of loans by Secured Party to Debtor.

3. 03 LOCATION OF COLLATERAL: The Collateral will be located in. . . . . County, Idaho. Debtor will not remove the Collateral from said state without written consent of Secured Party.

3. 04 RESIDENCY. Debtor resides in the county set forth above, unless some other county is indicated here:

..........County, Idaho.

3. 05 FIXTURES. If checked here , the Collateral is to be or has been attached to real estate. Except as otherwise indicated, the parties intend that said Collateral shall always remain personal property. A legal description of the real estate is as follows:

or as described on exhibits attached hereto, and the name of the record owner is. . . . .

THE TERMS AND CONDITIONS APPEARING ON THE BACK HEREOF ARE PART OF THIS SECURITY AGREEMENT

Signed and delivered to Secured Party on the day and year first above written.

....

....

....

(SIGNATURE OF DEBTOR)

CERTIFICATE OF TRUE COPY

STATE OF..........

COUNTY OF........ } ss

I hereby certify that this is a true and correct copy of the original instrument.

. . . . Residing at ....

Notary Public

County, State of..........

Debtor will on demand of Secured Party furnish the latter with a disclaimer or disclaimers, signed by all persons having an interest in the real estate, of any interest in the Collateral which is prior to Secured Party's interest.

3. 06 PERFECTION OF SECURITY INTEREST. The Debtor agrees to execute and file financing statements and do whatever may be necessary under applicable law to perfect and continue the Secured Party's interest in the Collateral, all at Debtor's expense.

3. 07 SALE PROHIBITED. Debtor will not sell or offer to sell or otherwise transfer the Collateral or any interest therein without the written consent of Secured Party. By claiming proceeds or products of the collateral in any financing statement prepared in conjunction with this security agreement, the Secured Party shall not be deemed to have given Debtor an implied power to sell or otherwise transfer the Collateral or any interest therein.

3. 08 INSURANCE. Debtor will keep the Collateral continuously insured by an insurer approved by Secured Party against fire, theft and other hazards designated at any time by Secured Party, in an amount equal to the full insurable value thereof or to all sum secured hereby, with such form of loss payable clause as designated by and in favor of Secured Party, and will deliver the policies and receipts showing payment of premiums to the Secured Party. In the event of loss, Secured Party shall have full power to collect any and all insurance upon the Collateral and to apply the same at its option to any obligation secured hereby, whether or not matured, or to the restoration or repair of the property. Secured Party shall have no liability whatsoever for any loss that may occur by reason of the omission or lack of coverage of any such insurance.

3. 09 ADVERSE LIENS AND USE. Debtor will keep the Collateral free from any adverse lien, security interest or encumbrance. Debtor will not create nor permit the existence of any adverse lien, security interest or encumbrance other than that created hereby on the property without the written consent of Secured Party. Any certificate of title now or hereafter existing on any of the property will be delivered to Secured Party and will recite the interest of Secured Party. Debtor will keep the Collateral in good order and repair and will not waste or destroy the Collateral or any part thereof. Debtor will not use or permit anyone to use, the Collateral in violation of any statute, ordinance, or state or federal regulation; and Secured Party may examine and inspect the Collateral at any reasonable time, wherever located.

3. 10 TAXES AND ASSESSMENTS. Debtor will pay promptly when due all taxes and assessments upon the Collateral or for its use or operation or upon this agreement or upon any note or notes evidencing the obligations.

4. PURCHASE MONEY. To the extent the proceeds of any note shall be used to acquire said collateral, Secured Party shall have a purchase money security interest therein. Debtor hereby authorizes Secured Party to disburse said proceeds to the seller of the Collateral and/or to the insurance agent or broker, as shown on the records of the Secured Party.

5. SECURED PARTY'S RIGHT TO PAY TAXES, ETC.; DEBTOR'S RIGHT TO POSSESSION. The Secured Party is not required to, but may, at its option discharge taxes, liens or security interests or other encumbrances at any time levied or placed on the Collateral, pay for insurance on the Collateral, pay for the maintenance and preservation of the Collateral, pay any filing or recording fees, or any other charges payable by Debtor and any amount so paid, with interest thereon at the maximum rate permitted by law from date of payment until repaid shall be secured hereby and shall be repayable by Debtor on demand. The rights granted by this

paragraph are not a waiver of any other rights of Secured Party arising from breach of any of the covenants hereof by Debtor.

5. 1 Until default Debtor may have possession of the Collateral and use it in any lawful manner not inconsistent with this agreement and not inconsistent with any policy of insurance thereon.

6. DEFAULT. Time is of the essence of this Security Agreement, and Debtor shall be in default under this agreement upon the happening of any of the following events or conditions:

6. 01 Default in the payment or performance of any obligation, covenant or liability contained or referred to herein or in any note evidencing the same;

6. 02 Any warranty, representation or statement made or furnished to Secured Party by or on behalf of Debtor proves to have been false in any material respect when made or furnished;

6. 03 Any event which results in the acceleration of the maturity of the indebtedness of Debtor to others under any indenture agreement or undertaking;

6. 04 Loss, theft, damage, destruction, sale or encumbrance to or of any of the Collateral, or the making of any levy, seizure or attachment thereof or thereon;

6. 05 Death, dissolution, termination of existence, insolvency, business failure, appointment of a receiver of any part of the property of, assignment for the benefit of creditors by, or the commencement of any proceeding under any bankruptcy or insolvency laws by or against, Debtor or any guarantor or surety for Debtor, or entry of any judgment against them, or failure of any guarantor or surety for Debtor to provide Secured Party with financial information promptly when requested by Secured Party.

6. 06 The Secured Party deems itself insecure.

7. REMEDIES. Upon the occurrence of any default hereunder and at any time thereafter, the Secured Party may without notice or demand declare immediately due and payable all amounts secured hereby and shall have the remedies of a Secured Party under the Idaho Uniform Commercial Code or other applicable law; and without limiting the generality of the foregoing:

7. 01 Debtor agrees to put Secured Party in possession of the Collateral on demand; and

7. 02 Secured Party is authorized to enter any premises where the Collateral is situated and take possession of said property without notice or demand and without legal proceedings; and

7. 03 At the request of Secured Party, Debtor will assemble the Collateral and make it available to Secured Party at a place designated by Secured Party which is reasonably convenient to both parties; and

7. 04 Debtor agrees that a period of five (5) days from the time notice is sent, by first class mail or otherwise, shall be a reasonable period of notification of a sale or other disposition of the Collateral; and

7. 05 Debtor agrees that any notice or other communication by Secured Party to Debtor shall be sent to the mailing address of the Debtor stated herein; and

7. 06 Debtor agrees to pay on demand the amount of all expenses reasonably incurred

by Secured Party in protecting or realizing on the property. In the event that this Security Agreement or any obligation secured by it is referred to an attorney for protecting or defending the priority of Secured Party's interest or for collection or realization procedures, Debtor agrees to pay a reasonable attorney's fee, including fees incurred in both trial and appellate courts, or fees incurred without suit, and expenses of title search and all court costs and costs of public officials. The sums agreed to be paid in this subparagraph shall be secured hereby; and

7. 07 If Secured Party disposes of the property, Debtor agrees to pay any deficiency remaining after application of the net proceeds to any indebtedness secured hereby.

7. 08 Secured Party shall have the right immediately and without further action by it, to set off against the obligations of Debtor all money owed by Secured Party in any capacity to Debtor, whether or not due, and Secured Party shall be deemed to have exercised such right of setoff and to have made a charge against any such money immediately upon occurrence of such default even though such charge is made or entered on the books of Secured Party subsequent thereto.

8. GENERAL. This agreement constitutes the entire agreement between the parties and may not be altered or amended except by a writing signed by the Debtor, accepted by Secured Party and attached hereto. Any provision found to be invalid shall not invalidate the remainder hereof. Waiver of any default shall not constitute a waiver of any subsequent default. All Secured Party's rights and remedies, whether evidenced hereby or by any other writing shall be cumulative and may be exercised singularly or concurrently. Any demand upon or notice to Debtor that Secured Party may give shall be effective when addressed and mailed to Debtor's address at which Secured Party customarily communicates with Debtor. This agreement and all rights and liabilities hereunder and in and to any and all obligations secured hereby, and in and to all collateral described above, shall inure to the benefit of the Secured Party and its successors and assigns, and shall be binding upon the Debtor and its successors and assigns. Whenever there is no outstanding obligation and no commitment on the part of Secured Party under any agreement which might give rise to an obligation, Debtor may terminate this agreement upon written notice to Secured Party. Prior to such termination, this shall be a continuing agreement in every respect. This instrument is to be governed by the laws of the State of Idaho. If this instrument is signed by more than one Debtor, the obligations of Debtor shall be joint and several. All words used herein shall be construed to be of such gender and number as the circumstances require and all references to Debtor shall include all other persons primarily or secondarily liable hereunder. This agreement is intended to take effect when signed by Debtor and delivered to Secured Party. This agreement shall be binding upon the heirs, personal representatives, successors and assigns of the Debtor and shall inure to the benefit of the Secured Party, its successors and assigns.

20.02 [RESERVED]

20.03 MORTGAGES OF PERSONAL PROPERTY:

See topic 20.01 Chattel Mortgages; category 3 Business Regulation and Commerce, topic 3.09 Commercial Code.

20.04 MORTGAGES OF REAL PROPERTY:

Character of Mortgages.

Mortgage is a lien (I.C. 45-901, I.C. 45-906) and shall not be deemed conveyance whatever its terms, so as to allow owner of mortgage to recover possession without foreclosure sale (I.C. 6-104).

Every transfer of an interest in real property, other than in trust to secure performance of any obligation of trustor made only as security for the performance of another act is deemed to be a mortgage. (I.C. 45-904).

A deed absolute on its face may be shown to be a mortgage by parol, except as against subsequent purchasers without notice or trustee under trust deed. (I.C. 45-905).

Parties may make mortgage loan subject to Consumer Credit Code by agreement. (I.C. 28-41-108).

Execution and Recording.

Mortgages or deeds of trust must be in writing, and may be acknowledged and recorded in the same manner and with the same effect as deeds. (I.C. 45-902).

Recording of instruments providing master forms of mortgages and trust deeds allowed. (I.C. 45-1004).

Record of mortgage prior to July 1, 1945, does not constitute notice to subsequent purchasers or encumbrancers for more than ten years from date of maturity, except as date of maturity may be changed by extension agreement recorded before expiration of the ten-year period, or before Sept. 1, 1951, if the ten-year period from maturity expired before that date. (I.C. 55-817).

Summary instrument allowed to be recorded to create any interest in real property, if it contains parties' names, complete mailing address of grantee, title and date of instrument, description of interest, legal description of real property and acknowledgment of all parties. (I.C. 55-818).

Recording Fees.

See category 10 Documents and Records, topic 10.04 Records, subhead Fees.

Lien exists until debt secured by it is barred by limitations. Action may be maintained to quiet title against a mortgage, the collection and enforcement of which is barred by the Statute of Limitations, without proof that amount secured has been paid. (I.C. 6-411 to I.C. 6-413).

After-acquired title of mortgagor or grantor in trust deed inures to benefit of mortgagee. (I.C. 45-907).

Assignment of mortgage debt carries the security of mortgage with it. (I.C. 45-911). Assignment of mortgage may be recorded and is notice to subsequent purchasers (I.C. 45-909), but actual notice to mortgagor is necessary to invalidate payment made by him to mortgagee (I.C. 45-910; 10 Idaho 618, 81 P. 55).

Release.

A recorded mortgage or chattel mortgage may be discharged by an entry in the margin of the record thereof, signed by the mortgagee, or his personal representative or assignee, acknowledging the satisfaction of the mortgage, in the presence of the recorder who must certify to the acknowledgment. (I.C. 45-912). If not discharged by marginal release the same may be discharged by a certificate filed with the County Recorder for record and signed by the mortgagee, his personal representative, or assigns stating that the mortgage has been paid, satisfied or discharged. (I.C. 45-913). Such certificate must be acknowledged as in the case of a mortgage or deed to real estate and must be recorded at length and a minute of the discharge made by the recorder on the record of the mortgage. (I.C. 45-914). When any mortgage has been paid or satisfied the mortgagee or his assignee must immediately, on demand of the mortgagor, discharge the same as provided above, or deliver to the mortgagor such certificate of discharge. Refusal to do so renders the offending party liable to the mortgagor, his grantees or heirs for all damages, and also to a forfeit of the sum of $100. (I.C. 45-915).

Deed of Trust.

Use of deed of trust of estates in real property located in incorporated cities or not exceeding 20 acres regardless of location authorized to secure performance of obligation, with power of sale in trustee upon breach. (I.C. 45-1502[5]). Foreclosure by advertisement and sale or, as mortgage. (I.C. 45-1503). Beneficiary cannot initiate judicial action to enforce obligation against grantor or his successor unless trust deed has been foreclosed by advertisement and sale or beneficiary's interest in property is substantially valueless as defined in I.C. 45-1503(2). (I.C. 45-1503). Trustees must be member of bar, bank or savings and loan association, authorized trust institution or corporation authorized to conduct trust business, licensed title insurance agent or title insurance company. (I.C. 45-1504). Foreclosure by advertisement and sale if trust deed recorded in mortgage records of county and grantor is in default and notice of default containing nature of breach and election to sell is filed for record in county with copy to anyone requesting such notice. (I.C. 45-1505). One hundred and twenty days notice of time, place, and basis for sale required to be given to grantor or successor in interest of record, lessee or occupant and lien holder of record, and also published in county where property situated once a week for four successive weeks, last publication at least 30 days prior to sale. If property be vacant, notice to be posted on premises. Affidavit of compliance to be recorded at least 20 days before sale. Any person, including beneficiary may bid. Trustee to execute trustee's deed conveying interest of grantor. Purchaser entitled to possession on tenth day following sale. (I.C. 45-1506). Sale may be postponed if notice periods are interrupted by court order or bankruptcy stay. (I.C. 45-1506A, I.C. 45-1507B). 30 days notice of rescheduled sale must be given by registered or certified mail to all persons entitled to notice of original sale and to all persons properly requesting notice. (I.C. 45-1506A). Published notices affecting real property must contain legal description and street address or information to locate property or name and telephone number which may supply information regarding location. (I.C. 60-113).

Grantor or junior encumbrancer, within 115 days of recording of notice of default if power of sale exercised, or any time prior to entry of decree of foreclosure, may pay amount due plus costs, trustee's fee incurred, not exceeding $115 in case default is cured prior to last newspaper publication of sale and attorney's fees as provided in promissory note, whereupon all proceedings must be discontinued and deed of trust reinstated. (I.C. 45-1506).

Sale may be postponed at beneficiary's request by trustee announcing at time and place originally scheduled postponement to subsequent date and hour not more than 30 days after original date. Postponed sales may also be postponed in like manner. (I.C. 45-1506[8]).

Proceeds of sale applied to expense of sale including charge of trustee and reasonable attorney's fees, obligation, any person having inferior recorded lien, and surplus to grantor. Sale forecloses all interest of all persons to whom notice is given such persons have no right of redemption. (I.C. 45-1507, 1508).

Recorded trustee's deed prima facie evidence of truth of its recitals and of recorded affidavits regarding notice. These are conclusive in favor of purchasers in good faith for value. (I.C. 45-1510). Additional notification of notice of default and notice of sale required as to person making recorded request therefor before recording of notice of default. (I.C. 45-1511).

Money judgment may be sought within three months after sale for balance due, for amount that entire indebtedness exceeds fair market value at time of sale, with interest, as determined by court, but in no event for amount exceeding difference between amount for which property sold and entire amount of debt. (I.C. 45-1512).

Time limits for advertisement and sale or foreclosure governed by law for foreclosure of mortgage. (I.C. 45-1515).

Future Advances.

Mortgage may cover future advances. (I.C. 45-108).

Foreclosure.

Foreclosure can only be by decree of the district court, which directs the sale of the property by the sheriff. Practice is similar to that in other civil actions. (See category 5 Civil Actions and Procedure, topic 5.02 Actions.) Proceeds of sale are applied first to costs and expenses of sale and then to amount due plaintiff. If balance still remains due deficiency judgment may be docketed against the defendants personally liable. Mortgagee cannot obtain property without foreclosure sale. Unrecorded lien holder or mortgagee need not be made party but sale is conclusive against such person. (I.C. 6-101 to I.C. 6-107).

Redemption.

Property sold under mortgage foreclosure may be redeemed within one year from date of sale if land is more than 20 acres and six months if 20 acres or less, as in case of sale on execution. (I.C. 11-401, I.C. 11-402). Amount necessary to redeem does not include any sum for attorney's fees greater than fee actually paid by creditor, or which he has by written instrument become unconditionally obligated to pay, within six months after sheriff's certificate of sale. (I.C. 11-402).

Deficiency judgment may not be entered for any amount greater than the difference between the mortgage indebtedness as determined by the decree, plus costs of foreclosure and sale, and the reasonable value of the mortgaged property to be determined by the court in the decree. (I.C. 6-108).

The following is a form of mortgage in use.

Forms

This indenture, made this. . . . day of. . . . in the year of our Lord one thousand nine hundred and. . . . between. . . . of. . . ., County of. . . ., State of. . . ., the part. . . . of the first part, and. . . . of. . . ., County of. . . ., State of. . . ., the part. . . . of the second part.

Witnesseth, that the said part. . . . of the first part, for and in consideration of the sum of. . . . dollars,. . . . of the United States of America, to. . . . h. . . . in hand paid by the said part. . . . of the second part, the receipt whereof is hereby acknowledged, have granted, bargained, sold and conveyed, and by these presents do. . . . grant, bargain, sell and convey, unto the said part. . . . of the second part, and to. . . . . h. . . . heirs and assigns forever, all. . . . certain lot. . . ., piece. . . ., or parcel. . . . of land situate, lying and being in. . . ., County of. . . . and State of Idaho, and particularly described as follows:. . . ., together with all and singular the tenements, hereditaments, and appurtenances thereto belonging or in any wise appertaining.

This grant is intended as a mortgage to secure the payment of. . . . certain promissory note. . . . of even date herewith, executed and delivered by the said. . . . to the said part. . . . of the second part, which note. . . . in words and figures following, to wit: (note may be set forth in full or substance briefly stated).

And these presents shall be void if such payment. . . be made; but in case default shall be made in the payment of said principal sum. . . . of money or any part thereof as provided in said note. . . . or if the interest be not paid as therein specified, then and from thenceforth, it shall be optional with the said part. . . . of the second part,. . . . h. . . . executors, administrators or assigns to consider the whole of said principal sum. . . . expressed in said note. . . . as immediately due and payable, although the time expressed in said note. . . . for the payment thereof shall not have arrived and immediately to enter into and upon all and singular the above described premises, and to sell and dispose of the same according to law, and out of the money arising from such sale, to retain the principal and interest which shall then be due on said promissory note. . . . together with the costs and charges of foreclosure suit, including reasonable counsel fees, and also the amounts of all such payments of taxes, assessments, incumbrances, or insurance as may have been made by said part. . . . of the second part,. . . . h. . . . heirs, executors, administrators or assigns by reason of the permission hereinafter given, with the interest on the same hereinafter allowed, rendering the overplus of the purchase money (if any there shall be), unto the said. . . . part. . . . of the first part. . . . h. . . . heirs, executors, administrators, or assigns. And the said part. . . . of the first part. . . . do. . . . hereby further covenant, promise and agree, to and with the said part. . . . of the second part to pay and discharge at maturity, all such taxes or assessments, liens or other incumbrances, now subsisting or hereafter to be laid or imposed upon said premises, or which may be in effect a prior charge thereupon to these presents during the continuance hereof and in default thereof the said part. . . . of the second part may pay and discharge the same, and may, at his option, keep fully insured against all risks by fire the buildings which now or may be hereafter erected thereon, at the expense of the said part. . . . of the first part, and the sums so paid shall bear interest at the rate of. . . . per cent per. . . . until paid, and shall be considered as secured by these presents and be a lien upon said from the proceeds of the sale thereof, above mentioned, with interest as herein provided.

In witness whereof, the said part. . . . of the first part ha. . . . hereunto set. . . . h. . . . hand. . . . and seal. . . . the day and year first above written.

Signed, Sealed and Delivered in the presence of: (Acknowledgment).

Assignment: Know all men by these presents: That. . . ., the part. . . . of the first part, for and in consideration of the sum of $. . . ., lawful money of the United States of America, to. . . . in hand paid by. . . ., the part. . . . of the second part, the receipt whereof is hereby acknowledged, do. . . . by these presents grant, bargain, sell, assign, transfer and set over unto the said part. . . . of the second part a certain indenture of mortgage bearing date the. . . . day of. . . . (year). . . . made and executed by. . . . mortgagor. . . ., to. . . . mortgagee. . . ., recorded in Book. . . . of Mortgages, page. . . . in the records of the office of the County Recorder of the County of. . . ., together with the note. . . . therein described and the money due and to grow due thereon with interest.

(Witness clause and acknowledgment as in above form).

Satisfaction: Know all men by these presents: That. . . . do. . . . hereby certify and declare that a certain mortgage bearing date the. . . . day of. . . . A.D. (year). . . ., made and executed by. . . . the part. . . . of the first part therein to. . . . the part. . . . of the second part therein, recorded in the office of the County Recorder of the County of. . . ., State of Idaho, in Book. . . of Mortgages at page. . . ., on the. . . . day of. . . . A.D. (year). . . ., together with the debt thereby secured, is fully paid, satisfied and discharged.

(Witness clause and acknowledgment as in mortgage form above).

Form for partial release same except that it is usual to describe the property released and state that as to the remaining property included in the mortgage the same remains in full force and effect.

Mortgage Guaranty Insurance.

Mortgage Guaranty Insurance Act (I.C. 41-2650 to I.C. 41-2656) authorizes insurer of paid-in capital stock of not less than $1,000,000, and surplus of $1,000,000 to insure against loss by reason of nonpayment of indebtedness secured by mortgage or trust deed on real estate consisting of residences, industrial or commercial buildings. (I.C. 41-2653).

Chattel Mortgages.

See topic 20.01 Chattel Mortgages.

21 PROPERTY

21.01 ABSENTEES:

Process Agent.

No statutory provision. See, however, category Civil Actions and Procedure, topic Process, subhead Publication, and category Business Organizations, topic Corporations.

Escheat.

Uniform Unclaimed Property Act (1981) adopted effective July 1, 1983. (I.C. 14-501 to I.C. 14-541). Following are changes or omissions from 1981 draft: Intangible property defined to include judgment interest in favor of members of class. (I.C. 14-501[10][f]). Seven years must pass before presumption of abandonment arises under general rule (I.C. 14-502), for checks (I.C. 14-505), deposit accounts (I.C. 14-506), property held by fiduciaries (I.C. 14-512) and safe deposit boxes (I.C. 14-516). I.C. 14-542 allows county to assume responsibility for administration of unclaimed property in county hands.

Act enforced pursuant to Idaho Income Tax Act procedures and penalties. (I.C. 14-523, I.C. 14-533). § 34 of Uniform Act deleted.

21.02 ADVERSE POSSESSION:

To bar entry on or action to recover real property, adverse possession must be based on a claim of title exclusive of any other right and must be actual, continuous, visible and notorious for a period of five years prior to the commencement of the action and all taxes legally assessed against said land during such period must have been paid by claimant or his predecessors in interest. Where the claim of right is not founded on a written instrument, judgment or decree, the land must have been protected by a substantial inclosure or must have been cultivated or improved. (I.C. 5-210). If the claim of right is founded upon a written instrument, judgment or decree substantial enclosure, usual cultivation or improvement of all or portion of land or actual and ordinary use are necessary. (I.C. 5-208). Written notice may be recorded to denounce adverse possession for permitted use of property. (I.C. 15-208 and I.C. 15-210).

Easements.

Prescriptive easement must be established by open, notorious use of servient property with actual or imputed knowledge thereof by owner of servient tenement; use must be continuous for prescriptive period of five years and done under claim of right. (98 Idaho 326, 563 P.2d 50). Statutory provisions pertaining to acquisition of title to realty by adverse possession do not apply to action to establish easement by prescription. (83 Idaho 514, 365 P.2d 952).

Disabilities.

Persons under disability include those within age of majority, insane, imprisoned upon conviction of criminal offense for term less than life, or married woman where her husband is necessary party with her. During time of disability statute of limitations for recovery of real property and period of time available to person under disability to make entry or defense founded on title to real property is tolled. Person under disability may make such entry or defense at any time within five years after disability ceases. (I.C. 5-213).

21.03 [RESERVED]

21.04 CONVEYANCES:

See topic 21.06 Deeds.

21.05 CURTESY:

Abolished. (I.C. 32-914). See category 13 Estates and Trusts, topics 13.09 Executors and Administrators, 13.07 Descent and Distribution.

21.06 DEEDS:

See topic Real Property for types of estates.

Execution.

Conveyance of community real estate must be executed and acknowledged by husband and wife. (I.C. 32-912). Either may, by express power of attorney, give to the other the complete power to sell or convey said community property. (I.C. 32-912). See also categories 8 Debtor and Creditor, topic Homesteads, subhead Alienation or Encumbrance; Family, topic Husband and Wife.

Real estate is conveyed by instrument in writing subscribed by party or his authorized agent in writing. Name of grantee and his complete mailing address must appear. (I.C. 55-601). Seals and attesting witnesses are unnecessary, though often used. Deed must be acknowledged in order to be entitled to record. (I.C. 55-805). For circumstances in which spouses must join, see categories 8 Debtor and Creditor, topic Homesteads, subhead Alienation or Encumbrance; Family, topic Husband and Wife.

Recording in county where land is situated is necessary to afford protection against third persons; unrecorded deed is void against subsequent purchaser or encumbrancer for value without notice whose conveyance is first recorded. (I.C. 55-812). (See also category 10 Documents and Records, topic 10.04 Records.)

Recording Fees.

See category 10 Documents and Records, topic 10.04 Records, subhead Fees.

Summary Instrument.

55-818 allows recording of summary of any instrument creating interest in real property. Must contain parties' names, grantee's complete mailing address, title and date of instrument, description of interest, legal description of real property, signature and acknowledgment of all parties.

Taxes.

There is no recording tax.

Conveyance by Attorney.

See topic 21.15 Powers of Attorney.

Operation and Effect.

If the word “grant” is used in a conveyance of a fee simple or an inheritance, the following covenants, and none others, are implied, unless changed by express terms, on part of grantor (a) that grantor has not conveyed, previously, the same estate or any right, title, or interest therein, to any person other than grantee and (b) that such estate is free from encumbrances done, made or suffered by grantor or any person under him. Such covenants may be sued upon as if expressly inserted. (I.C. 55-612). An instrument purporting to grant real property to take effect upon condition precedent is merely an executory contract and does not pass the estate on performance of condition. (I.C. 55-609). After-acquired interest in property passes by bargain and sale, grant and warranty deeds. (I.C. 55-605). Every grant is conclusive against grantor and all who claim under him, except good faith purchaser or encumbrancer who acquires title or lien by instrument or valid judgment lien that is first duly recorded. (I.C. 55-606).

Forms in common use are as follows:

Forms

Warranty Deed: For Value Received. . . . . . the grantor. . . ., do. . . . hereby grant, bargain, sell and convey unto. . . . . ., whose current address is. . . . . ., the grantee. . . ., the following described premises, in. . . . . . County, Idaho, to wit:. . . . . . To have and to hold the said premises, with their appurtenances unto the said Grantee. . . .,. . . . . . heirs and assigns forever. And the said Grantor. . . . do. . . . hereby covenant to and with the said Grantee. . . ., that. . . . he. . . . . . the owner. . . . in fee simple of said premises; that they are free from all encumbrances. . . . . . and that. . . . he. . . . will warrant and defend the same from all lawful claims whatsoever. Dated:. . . . . . [Signature lines] [Acknowledgment].

Quitclaim Deed: For Value Received. . . . . . do hereby convey, release, remise and forever quit claim unto. . . . . ., whose current address is. . . . . ., the following described premises, to-wit:. . . . . ., together with their appurtenances. Dated:. . . . . . [Signature lines] [Acknowledgment]

21.07 DEEDS OF TRUST:

See category 20 Mortgages, topic 20.04 Mortgages of Real Property.

21.08 DOWER:

Does not exist. (I.C. 32-914). See category 13 Estates and Trusts, topics 13.09 Executors and Administrators, 13.07 Descent and Distribution.

21.09 ESCHEAT:

See topic 21.01 Absentees, subhead Escheat; category 13 Estates and Trusts, topic 13.07 Descent and Distribution, subhead Escheat.

21.10 LANDLORD AND TENANT:

Leases for more than one year must be in writing and acknowledged and recorded like deeds (I.C. 9-503), but tenant's possession under unrecorded lease is generally considered sufficient notice to put third persons on inquiry as to his rights although there is no statute or decision on the point.

Husband and wife must join in lease of community property. (I.C. 32-912; 35 Idaho 359, 206 P. 692).

Recording.

Void as against subsequent purchasers or mortgagees unless recorded. Recorded in recorder's office of county where land situated. (I.C. 55-812).

Termination of Tenancy.

A tenancy or other estate at will, however created, may be terminated by the landlord giving notice in writing to the tenant to remove from the premises within a period of not less than one month, to be specified in the notice; or by tenant giving written notice to landlord, specifying date by which tenant will be vacating premises, and which date shall not be less than one month from date of notice. (I.C. 55-208).

After such notice has been served and the period specified by such notice has expired, but not before, the landlord may reenter or proceed according to law to recover possession. (I.C. 55-209).

Holding Over.

Where tenant continues in possession of tract five acres or less, in person or by subtenant, after default in payment of rent, landlord, after a three days notice in writing requiring payment of rent or delivery of possession of premises served upon tenant, may bring an action in district court to recover possession. (I.C. 6-303). If included in notice attorney fees available in action. (I.C. 6-324).

Dispossession.

Failure to perform any of the conditions or covenants of the lease and three days notice served upon the tenant requiring the performance of such conditions or covenants or the delivery of possession of the premises, or, engagement by any person in unlawful delivery, production, or use of controlled substance on premises, entitles landlord to maintain action for restitution of leased premises. (I.C. 6-303).

In an action exclusively for possession of five acres or less for nonpayment of rent, or on grounds that landlord has reasonable grounds to believe that any person is, or has been, engaged in unlawful delivery, production, or use of controlled substance on leased premises, during lease term, complaint must state description, possession with defendant, and defendant in default of rent, all notices have been served on defendant, and plaintiff is entitled to possession. Court shall issue summons and schedule trial 12 days from filing complaint, but not less than five days from service on defendant. No continuance shall be granted without defendant giving an undertaking. After hearing court may grant judgment against defendant for restitution and costs. Plaintiff may still bring action for damages. Execution directed to sheriff directs defendant and goods to be removed and levy may be made for costs and disbursements on goods of defendant. Plaintiff may file action for restitution and damages but no hearing may be set for early trial. Damages occasioned by forcible entry shall be assessed, judgment shall be three times damages and rent found due. If tract of land is larger than five acres and lease has not expired, tenant may pay amount found due as rent, interest, damages and costs within five days and be restored to his estate. If payment not made in five days judgment may be enforced and possession returned to landlord. In all other cases judgment may be enforced immediately. (I.C. 6-310 to I.C. 6-316). If included in notice attorney fees available in action. (I.C. 6-324). Treble damages available. (I.C. 6-317).

Action by Tenant.

Tenant may file action for specific performance of lease or for damages for stated causes. If action for specific performance only, trial may be had within 12 days of filing complaint but not less than five days after service. Complaint must set forth relevant facts, description and any additional circumstances. Landlord must have three days written notice before filing. (I.C. 6-320). Treble damages available. (I.C. 6-317).

Security Deposits.

Any deposit other than rent is security deposit. Upon termination and surrender security deposit must be refunded except as per agreement. Landlord cannot retain deposit to cover normal wear and tear. (I.C. 6-321).

Fixtures.

A tenant may remove from the premises, during the continuance of his term, anything affixed thereto for the purpose of trade, manufacture, ornament or domestic use, if the removal can be effected without injury to the premises, unless the thing has by manner in which affixed become an integral part of premises. (I.C. 55-308).

Lien.

No statutory provision.

Uniform Residential Landlord and Tenant Act.

Not adopted.

21.11 LEASES:

Leases of more than ten head of livestock must be in writing, acknowledged like real property grants and recorded. (I.C. 25-2001).

See topic 21.10 Landlord and Tenant.

21.12 [RESERVED]

21.13 PERPETUITIES:

The absolute power of alienation of real property cannot be suspended by any limitation or condition for a longer period than during the continuance of the lives of persons in being at the creation of the limitation or condition and 25 years thereafter, except that a contingent remainder in fee may be created on a prior remainder in fee to take effect in the event that the persons to whom the first remainder is limited die under 21 years, or upon any other contingency by which the estate of such persons may be determined before majority. (I.C. 55-111, I.C. 55-202).

No rule against perpetuities on real or personal property; no prohibition of restraints on alienation of personal property; trusts, past or future, to be construed as to eliminate parts violating statute, and not to be declared void, no presumption that person capable of having children at any stage of adult life. (I.C. 55-111).

Common law rule against perpetuities not in force. (69 Idaho 84, 203 P.2d 380).

Accumulations.

No statutory restrictions. Common law rules presumably prevail.

See also category 13 Estates and Trusts, topic 13.13 Trusts.

21.14 PERSONAL PROPERTY:

Presumption that all property acquired during marriage is community property. Tenancy by entirety nonexistent concept.

21.15 POWERS OF ATTORNEY:

Attorneys in Fact.

Real property may be conveyed or mortgaged by an attorney in fact under power of attorney, who must subscribe the name of his principal as well as his own name. (I.C. 55-602).

An instrument so executed may not be recorded until the power of attorney, duly acknowledged, is filed for record in the same county office. (I.C. 55-806).

Revocation.

Power of attorney may not be revoked by instrument unless revoking instrument is recorded in same office original power was recorded. (I.C. 55-814).

Uniform Durable Power of Attorney Act adopted effective July 1, 1982. (15-5-501 to 15-5-507).

If power of attorney contains words “This power of attorney shall not be affected by the disability of the principal,” power is exercisable regardless of disability of principal or uncertainty as to whether principal is dead or alive. (15-5-501). Acts undertaken in good faith by agent prior to actual knowledge of death of principal are valid and binding. (15-5-504).

21.16 REAL PROPERTY:

Conveyance is presumed to pass fee simple estate. (I.C. 55-604). Grant or devise to two or more persons creates tenancy in common, unless expressly declared to create joint tenancy or unless property is acquired as partnership or community property. (I.C. 55-104, 508). Remainders and life estates are recognized. (I.C. 55-201). No tenancy by entirety recognized by case or statute.

Instruments affecting real estate in Idaho are not valid unless executed in substantial conformity with Idaho laws. Department of lands maintains integrated property records system in database that includes deeds of all fee simple property and encumbrances owned by state. (I.C. 58-330).

Rule in Shelley's Case has been abrogated. (I.C. 55-206).

Foreign Conveyances or Encumbrances.

See category 10 Documents and Records, topic 10.04 Records.

Condominiums permitted. (I.C. 55-1501 to I.C. 55-1527).

See also topics 21.05 Curtesy, Deeds, Dower, Landlord and Tenant; categories 3 Business Regulation and Commerce, topic Consumer Credit; Civil Actions and Procedure, topic Partition; Debtor and Creditor, topic Homesteads; Family, topic Husband and Wife; Mortgages, topic Mortgages of Real Property.

21.17 TRUST DEEDS:

See category 20 Mortgages, topic 20.04 Mortgages of Real Property.

22 TAXATION

22.01 ADMINISTRATION:

State Taxes.

State Tax Commission has general supervision over administration of tax laws. (I.C. 63-105).

County, School and Municipal Taxes.

See topic 22.15 Property Taxes.

Resort Tax.

Resort cities with population under 20,000 authorized to impose certain non-property resort taxes. (1978, c. 261). Resort counties authorized to impose sales or use tax. (I.C. 63-2603). Resort county defined. (I.C. 63-2602).

Assessment of Taxes.

See topic 22.15 Property Taxes, subhead Assessment.

Board of tax appeals established to provide appeal from final determination tax liability, including that from I.C. 63-501 (real and personal property assessment), I.C. 63-511, appeal may be concurrently to district court (property valuation by Board of Equalization), I.C. 63-3049 (income tax deficiency) and I.C. 63-3632 (sales tax liability). (I.C. 63-3811). See topics 22.15 Property Taxes, subhead Review of Assessment; 22.10 Income Tax.

Exemptions.

See topics 22.10 Income Tax, subhead Income Taxed—Individuals and 22.15 Property Taxes, subhead Exemptions.

Penalties.

Real and Personal Property Tax.

Real property tax delinquents are assessed 2% penalty and interest at 1% from Jan. 1 of following year, if on first instalment and Jan. 1 of same year if on second installment. (I.C. 63-903). Delinquency entry made one year after first Mon. in Jan.; and if property not redeemed by taxpayer within three years of delinquency entry, county treasurer makes tax deed to county. (I.C. 63-1005;-1007). Personal property tax becomes delinquent on 20th day of Dec. of taxing year, 2% penalty plus 1% interest assessed. If one-half instalment paid on tax by Dec. 20, remaining instalment becomes delinquent on June 20 of following year, 2% penalty plus 1% interest assessment. (I.C. 63-904). Delinquent taxes collectible by warrant of distraint. (I.C. 63-904;-1012).

Inheritance and Estate Tax.

Estate and transfer tax due on same date as federal estate tax. Interest upon deficiency is at 12% per year. (I.C. 14-406; I.C. 63-3045).

Income tax returns filed late bear 12% interest and any deficiency assessed bears 12% interest. (I.C. 63-3045). Any deficiency due to negligence without fraud is assessed 5%; if due to fraud 50%. If no required return is filed or in event return is filed but tax shown thereon to be due is not paid, penalty assessed of 5% of tax due for each month until penalty amounts to 25% of tax due. Additional 10% imposed on underpayment resulting from substantial understatement (as defined) of tax required. (I.C. 63-3046). Failure to pay tax or make return is misdemeanor with fine of not more than $300 or imprisonment for not more than six months or both; failure to collect, account for or pay over tax money is felony and subject to fine of not more than $10,000 or imprisonment for not more than five years or both; willful assisting, counseling or advising in preparation of false and fraudulent return is felony with fine of not more than $10,000 or imprisonment for not more than five years or both. (I.C. 63-3075).

Sales and Use Tax.

Engaging in retail business without permit is misdemeanor subject to fine of $100 per day; giving false resale exemption certificate for purpose of evading tax is misdemeanor subject to fine not to exceed $1,000 or imprisonment not to exceed one year or both. 12% interest charged on late payment. (I.C. 63-3621, I.C. 63-3622). Collector may require retailer to provide security for payment in amount of three times estimated average monthly payment or $10,000 whichever is less. (I.C. 63-3625). Penalties in case of deficiencies, failure to make return, failure to remit tax collected are same as under catchline Income Tax, supra, for similar offenses. (I.C. 63-3634). Use tax violation is misdemeanor, with fine not to exceed $100; each violation is separate offense. (I.C. 63-3621).

Motor Fuels (Gasoline Tax).

Violation is misdemeanor. (I.C. 63-2411, I.C. 63-2433).

Employment Taxes.

“Failure of a covered employer to pay amounts due under chapter 72 when due shall result in a penalty at the rate of four percent (4%) or twenty dollars ($20.00), whichever is larger, for each month or fraction thereof until paid. The penalty should not exceed the actual amounts due.” (I.C. 72-1354).

Interstate Co-operation.

No procedure provided.

Taxpayer Bill of Rights.

Governs location of information, communications by tax officials, harassment or abuse, false or misleading representations, unfair practices, multiple tax obligations, civil liability against revenue officers, etc. (I.C. 63-4001 to I.C. 63-4011).

22.02 ALCOHOL, BEVERAGES AND TOBACCO TAXES:

Cigarette Taxes.

Cigarette tax imposed by I.C. 63-2506. See generally, I.C. 63-2501 et seq.

22.03 BUSINESS TAXES:

Insurance Premium Tax.

See category 16 Insurance, topic 16.01 Insurance Companies.

22.04 CORPORATE TAXES:

Corporate License Taxes.

See topic 22.10 Income Tax, subhead Income Taxed—Corporations.

22.05 EMPLOYMENT TAXES:

Unemployment compensation tax (in guise of “contributions”) is imposed on every employer who, in any calendar quarter, becomes liable for wages of $300 or more, except for following exempt services: Those to U. S. government when exempted by constitution; services with respect to which unemployment compensation is payable under system established by Act of Congress; contractual services where free from control or direction and where contractor is customarily engaged in independently established trade, occupation, profession or business same as involved in contract; agricultural labor, unless employer pays at least $20,000 for agricultural labor in any one year or employs ten agricultural laborers at least one day during 20 different weeks of year; services in employ of spouse and services performed by person under age of 18 in employ of father or mother; service performed by individual under 22 enrolled as full time student at accredited nonprofit or public education institution for which credit is earned in program combining academic instruction with work experience; services of individual under 18 in delivery or distribution of newspapers or shopping news; domestic services in private home, local college club or local chapter of college fraternity or sorority unless person is paid wages exceeding $1,000; services as student nurse in employ of hospital or nurses' training school where regularly enrolled and approved by state law, and services performed as hospital intern by individual having completed medical course in medical school chartered or approved pursuant to law of Idaho; services in employ of convention or association organized and operated primarily for religious activities; services performed by elected official, member of legislative body or judiciary; member of national guard, employee serving on temporary basis during emergency; employee in position designated as major nontenured policymaking or advisory, or policymaking or advisory position performance of duties of which ordinarily does not require more than eight hours per week; inmate of custodial or penal institution; employee of educational institution devoted to preparing ministers; duly ordained or licensed minister; facilities conducted to provide remunerative work for physically or mentally handicapped; service performed by individual as part of unemployment work relief or work training program financed by any federal or state agency or political subdivision thereof; insurance agents or real estate brokers whose sole remuneration is commission; service performed by student at school where he is regularly enrolled; service performed at hospital by patient; “service performed by an individual who is paid less than fifty dollars ($50.00) per calendar quarter for performing work that is not in the course of the employer's trade or business, and who is not regularly employed by such employer to perform such service. A person is regularly employed by an employer during a calendar quarter only if (a) the individual performs service not in the course of the employer's trade or business for all or part of twenty-four (24) days in a quarter for such employer; or the individual performed such service for the employer in the preceding calendar quarter.”

Employers' contributions, levied as excise tax, are payable at rates set forth on table in I.C. 72-1350. Contribution rate based upon experience factor, set out in detail in statute. (I.C. 72-1351, I.C. 72-1351A). No contributions required from employees. Tax payable to Director for Employment Security Fund. (I.C. 72-1301 to I.C. 72-1380).

22.06 [RESERVED]

22.07 ESTATE TAX:

See topic 22.12 Inheritance Tax.

22.08 GASOLINE AND SPECIAL FUELS TAXES:

Motor Fuels Tax.

Imposed by I.C. 63-2401 et seq.

Special Fuels Tax.

Imposed by I.C. 49-1231.

International Fuel Tax Agreement (IFTA) License.

Imposed by I.C. 63-2438.

22.08A GENERATION SKIPPING TAX:

None.

22.09 GIFT TAX:

None; but inheritance tax applies to gifts in contemplation of donor's death, or to take effect after his death. See topic 22.12 Inheritance Tax.

22.10 [RESERVED]

22.11 INCOME TAX:

Provisions are identical, so far as possible, with Internal Revenue Code of 1986, as in effect on Jan. 1, 2008. (I.C. 63-3002, I.C. 63-3004).

Returns required by resident individual required to file federal return under § 6012(a)(1) of Internal Revenue Code (I.C. 63-3030[a][1]); corporations; estates if $600 gross income; trust with $100 gross income; qualified funeral trusts (I.C. 63-3015); partnerships; fiduciaries. Husband and wife, if both residents, may make joint return. Return due Apr. 15 following close of taxable year or 15th day of fourth month after close of fiscal year. (I.C. 63-3032). Tax payable in full. Employers, except farmers, required to withhold amount substantially equivalent to tax to be due from employee (pursuant to tables prepared by state tax commission), unless employee's wages are less than $5,000 a year. Employees receiving wages may, at their option, claim fewer withholding exemptions on their state income tax forms than they are allowed under Internal Revenue Code for federal income tax withholding purposes. (I.C. 63-3035). Payment and reporting to be monthly. (I.C. 63-3035, 36). Employers must register with State Tax Commission if they are required to withhold wages. (I.C. 63-3035). Farmer-employer to withhold 1% if wages paid exceed $150 a year. Corporations must pay estimated taxes if tax liability will exceed $500. (I.C. 63-3036A).

Income Taxed—Individuals.

Any taxpayer having income taxable both within and without state must allocate and apportion such income in accordance with rule set forth in § 63-3027. Business income apportioned to Idaho according to formula. Rents and royalties from real or tangible personal property, capital gains, interest, dividends, or patents or copyrights, to extent that they constitute nonbusiness income, are allocable to this state if they were derived from sources within state. (I.C. 63-3027). Net operating losses of corporation in year corporation had no business situs may not be subtracted. (I.C. 63-3022[d]).

Rate.

Graduated tax is imposed on taxable income of individuals, estates and trusts, at following rate:

For taxable year 2001:

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When taxable income is:           Rate is:
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Less than $1,000	1.6%
$1,000 to $1,999	$16 plus 3.6% of amount over $1,000
$2,000 to $2,999	$52 plus 4.1% of amount over $2,000
$3,000 to $3,999	$93 plus 5.1% of amount over $3,000
$4,000 to $4,999	$144 plus 6.1% of amount over $4,000
$5,000 to $7,499	$205 plus 7.1% of amount over $5,000
$7,500 to $19,999	$383 plus 7.4% of amount over $7,500
Over $20,000	$1,308 plus 7.8% of amount over $20,000

(I.C. 63-3024). Starting in 2000, income tax amounts shall be calculated by multiplying bracket amounts by percentage of consumer price index (average of consumer price index for prior calendar year) divided by consumer price index for calendar year 1988. (I.C. 63-3024[a]). Additional tax of $10 levied on every person—husband and wife filing joint return considered as single person—required to file income tax return. Tax payable at time of filing income tax return. (I.C. 63-3082).

Exemptions.

Taxable income, gross income, adjusted gross income are defined same as in Internal Revenue Code. Idaho taxable income means income as modified in I.C. 63-3001 to I.C. 63-3068. Also include state and local taxes, as defined in § 164 of Internal Revenue Code, paid or assessed during taxable years plus net operating loss deduction used in arriving at taxable income as defined in IRC. (I.C. 63-3022). Special definition for corporations and no deduction allowed for federal income tax paid. (I.C. 63-3027, I.C. 63-3021[a]). Compensation paid active servicemen by armed forces for services performed outside state is deducted. (I.C. 63-3022). Special individual deductions for certain retirement benefits (I.C. 63-3022[o], I.C. 63-3022A), insulation of residences (I.C. 63-3022B), alternative energy devices at residences (I.C. 63-3022C), household and dependent care services (I.C. 63-3022D), dependents 65 years of age or older living with taxpayer and developmentally disabled (I.C. 63-3022E), restoration of substantial amount held under claim of right (I.C. 63-3022F), certain capital gains (I.C. 63-3022H), amounts resulting from participation in residential energy conservation and weatherization programs (I.C. 63-3022F), and marriage penalty reduction allowing deduction of $150 where joint returns claim standard deduction (I.C. 63-3022N). Deduction of 50% of premiums paid for long term care insurance for self, dependent, or employee. (I.C. 63-3022O). Deduction allowed for property acquired after Sept. 10, 2001. (I.C. 63-30220). Deduction allowed for certain health insurance costs. (I.C. 63-3022Q). Deduction for interest earned on farm operating loans repealed effective Jan. 1, 1987. (1987, c. 290).

Tax Credits.

Resident individual allowed credit or refund equal to $20 or balance of his unused credit, whichever is greater, per personal exemption. (I.C. 63-3024A). Credit to individual taxpayers given for income taxes paid to another state in respect to income included in taxable income in Idaho, subject to qualifications. (I.C. 63-3029). Credit is given for certain charitable contributions. (I.C. 63-3029A, I.C. 63-3029C). Certain payments to retired civil service employees exempt. (I.C. 63-3022A). Special tax credit of $500 is allowed for new employees (with certain restrictions). (I.C. 63-3029F). Credit is allowed for tax credit carryovers for up to 14 succeeding taxable years. (I.C. 63-3029B). Credit is allowed for certain investments in broadband equipment and biofuel infrastructure (I.C. 63-3029I, I.C. 63-3029M); certain research activities (I.C. 63-3029G); incentive income tax credit (I.C. 63-3029J); and for new employees (I.C. 63-3029F).

Nonresidents.

Resident is individual who resided or domiciled in Idaho for full taxable year. Specific exceptions provided for absences from state (I.C. 63-3013); part-year resident is individual who is absent from state at least 445 days in first 15 months after leaving state, except for stated exceptions (I.C. 63-3013[b]). Nonresident defined as any individual who is not resident or part-year resident. (I.C. 63-3014). Special provisions for part-year residents and nonresidents. (I.C. 63-3027A).

Appeals.

Provision for redetermination or deficiency notice, with 63 days thereafter for taxpayer to protest to Tax Commission or seek review by complaint in District Court of Ada County or county of taxpayer's residence, upon payment of deficiency or posting bond. Redetermination by State Tax Commission may be reviewed in District Court for Ada County or in District Court in taxpayer's county by complaint filed within 91 days of receipt of decision of State Tax Commission, or within same 91 days, by filing appeal with Board of Tax Appeals. (I.C. 63-3045 to I.C. 63-3049). Final order of District Court subject to appeal to Supreme Court as provided under rules of appeal. See category 5 Civil Actions and Procedure, topic 5.03 Appeal and Error. Enforcement of collection by suit, certificate of lien, writ of distraint, jeopardy assessment as appropriate. (I.C. 63-3050 to I.C. 63-3065). Taxes to be assessed within three years, or if taxable income increased by federal audit and no adjustment reported to state, then within one year from notice of final determination to tax collector: assessments barred thereafter: if fraud, taxes to be assessed within three years after discovery of fraud, otherwise barred. (I.C. 63-3068, I.C. 63-3070).

Election Campaign Fund.

Every individual whose income tax liability is $1 or more may designate that $1 be paid into political party of his choice as designated on form or into general election campaign fund to be distributed according to statute. (I.C. 63-3088).

Income Taxed—Corporations.

Corporate rate 7.6% of all taxable income derived from sources within Idaho, but minimum tax is $20. (I.C. 63-3025). Franchise tax equal to 7.6% of all taxable income derived from sources within Idaho imposed on corporation exercising corporate franchise within Idaho; minimum franchise tax is $20. (I.C. 63-3025A). Corporation taxed under I.C. 63-3025A not taxed under I.C. 63-3025. (I.C. 63-3025).

Exemptions.

Exempt organizations are those in § 501 IRC plus (unless specifically denied by §§ 502, 503, 504 IRC) fraternal beneficiary societies of lodge type; farmers' or other mutual hail, cyclone, casualty or fire insurance companies or associations income of which is used or held only for payment of losses; certain cooperative farmers for fruit growers associations; federal land banks; national farm loan associations. (I.C. 63-3025B).

Forms, etc., may be obtained from State Tax Commissioner, Boise.

22.12 INHERITANCE TAX:

Governed by I.C. 14-401 to I.C. 14-412.

Taxable Estate.

Idaho uses definition found in §§ 2032A and 2051 of U.S. Internal Revenue Code, as amended. (I.C. 14-402[13], I.C. 14-402A).

Rates of Tax and Exemptions.

For residents, tax is in amount equal to federal credit and is imposed on transfer of taxable estate. Different tax imposed if resident's property is subject to death tax imposed by another state. (I.C. 14-403). Tax on nonresident's Idaho estate is computed by multiplying federal credit by fraction, numerator of which is Idaho property's value and denominator is decedent's gross estate's value. (I.C. 14-404).

Administration and Enforcement.

Subject to administration of State Tax Commission. (I.C. 14-412).

When Due.

Tax due and payable by personal representative on or before date return is required to be filed under I.C. 14-405. (I.C. 14-406).

Returns and Reports.

Personal representative of estate subject to Idaho Estate and Transfer Tax and who is required by U.S. law to file federal estate tax return must file state tax return and copy of federal tax return with commission on or before date that federal tax return must be filed. (I.C. 14-405).

Liability.

Any personal representative who fails to pay any required tax prior to distributing any portion of property is personally liable for tax and applicable interest and penalties. (I.C. 14-410).

Apportionment Against Inter Vivos Dispositions.

None.

22.12A MINES, MINERALS AND FISHERIES TAXES:

Mining Tax.

See category 19 Mineral, Water and Fishing Rights, topic 19.01 Mines and Minerals.

22.12B MOTOR CARRIER FUELS TAX:

See topic 22.08 Gasoline and Special Fuels Taxes.

22.13 [RESERVED]

22.14 MOTOR VEHICLE TAXES:

Caravaning Tax.

See category 23 Transportation, topic 23.01 Motor Vehicles, subhead Caravaning Tax.

22.15 [RESERVED]

22.16 PROPERTY TAXES:

All property not exempt is subject to assessment and taxation. (I.C. 63-203).

Exemptions.

Following property is exempt: Public property of U.S. (except where taxation authorized by Congress), state, county, city or school district; other exceptions to public property exemption are set forth (I.C. 63-602A); property of religious, fraternal, benevolent or charitable corporations or societies, or World War veteran organization buildings and memorials, to extent used for purposes of society or organization only, portion used for commercial purposes not being exempt (I.C. 63-602B, C); capital stock, bonds and other intangible personal property; deposits in banks and shares and accounts of savings and loan associations and credit unions (I.C. 63-602L); household goods and furniture, and wearing apparel, in actual use in private home or on person of owner (I.C. 63-602I); possessory right to public lands (I.C. 63-602F); mining claims not patented (I.C. 63-602F); irrigation canals, ditches with essential operating personal property of nonprofit canal company, and water rights (I.C. 63-602N); property used for generating and delivering electric power and natural gas energy to extent such property is used for furnishing power for pumping water for irrigation or drainage on Idaho land (I.C. 63-602O); hospitals, including outreach facilities, and real property owned, and personal property, including medical equipment owned or leased by hospital corporation or county hospital or hospital district which is operated as hospital and necessary ground therewith (I.C. 63-602D); bare ground held to be developed as hospital shall not be exempt, but improvements and construction thereon to be used as hospital shall be exempt (I.C. 63-602D); property used exclusively for school or educational purposes, including charter schools, from which no profit is derived (I.C. 63-602E); public cemeteries (I.C. 63-602F); cooperative telephone lines of 25 or fewer subscribers from which no profit is derived (I.C. 63-602Q); public libraries (I.C. 63-602F); motor vehicles properly registered and licensed under Idaho laws, including pleasure boats (not to include mobile homes [63-603]) (I.C. 63-602L); dues and credits secured by mortgage trust deeds or other liens (I.C. 63-602M); facilities, installations, machinery, installed and utilized in water or air pollution control (I.C. 63-602P); assessment on fruits and vegetables held for sale for human consumption, and any processed product thereof, or seed, in hands of farmers, producers or processors, or such items being held, transported, or held in storage in public or private warehouses (I.C. 63-602S), and assessments on personal property, manufactured or processed in state by persons having domicile or place of business in Idaho, being stored in public or private warehouses are canceled upon proof that goods were actually sold or shipped out of Idaho on or before Dec. 1 of current year of assessment (I.C. 63-602T); also exempt is personal property in transit, including personal property shipped into state and stored in public or private warehouse, not offered for sale in state and designated for reshipment outside of state, and exemption not lost if, while in storage, property is labeled, packaged, disassembled, divided, broken in bulk, repackaged, or held for reshipment for customers outside state (I.C. 63-602U, V); agricultural crops, while title remains with producer, fruit and nut bearing trees and grape vines, except as they enhance value of land, provided that this exemption does not include timber, forest land or forest products (I.C. 63-602R); some irrigation district property (I.C. 43-1510); business inventory (I.C. 63-602K); upon application lesser of first $75,000 or 50% of market value for assessment purposes of residential improvements on primary dwelling is exempt from ad valorem taxation (I.C. 63-602G); qualified equipment utilizing post-consumer waste or postindustrial wasted (I.C. 63-602cc); real or personal property owned or leased by nonprofit organization deferred (I.C. 63-202DD); certain tangible personal property (I.C. 63-602EE); low-income housing owned by nonprofit organizations (I.C. 63-602FF); significant capital investments (I.C. 63-602HH).

All property defined as business inventory is exempt from taxation. (I.C. 63-602W). Leased business inventory not exempt but shall return to its exempt status after any lease expires. (I.C. 63-602Y).

Hardship Situations.

Real and personal property exempt when payment of tax would create undue hardship on owner of property. Exemption exists for current tax year only. Two types of exemptions. (I.C. 63-602AA, I.C. 63-711).

Partial, Graduated Exemption.

Allowed person 65 or older; fatherless child under age 18; widow; blind person; service-connected disabled veteran of any war engaged in by U.S.; disabled person receiving disability benefits pursuant to 42 USCA 423, 45 USCA 228, 45 USCA 231 or 5 USCA 8337; prisoners of war. Claimant must have been domiciled in Idaho with family income from all sources not exceeding $8,750 and own homestead as defined in statute, evidenced by proof of taxes levied in Idaho during calendar year immediately preceding year of claim. (I.C. 63-701 to I.C. 63-710). Must claim between Jan. 1 and Apr. 15 of each year. (I.C. 63-706).

Members of Armed Forces.

No exemption for members of armed services presently in service, except they are exempt from occupational or professional licenses while in service. (I.C. 63-2620A).

Assessment.

Property must be assessed as of 12:01 a.m. of first day of year in year in which taxes are levied. (I.C. 63-205, I.C. 63-206[1]). All property is assessed by county assessor of county where located. (I.C. 63-219). Exceptions include operating property of public utilities and car companies which are assessed by State Tax Commission. (I.C. 63-401). Assessor may require resident property owner to furnish by Mar. 15, list of all taxable personal property owned by him or in his possession and situate in county from which list assessor will determine assessed valuation. (I.C. 63-302[1]). County assessors conduct and carry out county valuation programs. (I.C. 63-314).

Nonresident Property Owners.

Must forward to assessor by Mar. 15 list of all taxable real and personal property. Failure may result in penalty of $100 plus 2% of assessed value. (I.C. 63-302).

Transient Personal Property.

Subject to assessment and taxation in each of counties in which it is moved or kept during same year on pro rata basis. (I.C. 63-201[24] and I.C. 63-313).

Occupancy Tax.

(I.C. 63-317).

Review of Assessment.

Board of County Commissioners meets as Board of Equalization at least once each month up to fourth Mon. of June for purpose of equalizing assessment for real and personal property, and on fourth Mon. of June and from day to day thereafter as needed, to complete equalization. Equalization must be completed by second Mon. in July. (I.C. 63-501). Appeal to Board of Tax Appeals must be taken within 30 days after mailing of notice of decision, or oral pronouncement at hearing by Board of County Commissioners. (I.C. 63-511). Appeal from Board of Tax Appeals is to District Court in county of residence, or county in which property affected is located. Notice specifying grounds is filed with clerk of Board of Tax Appeals within 30 days after deposit in mail of decision by Board of Tax Appeals. Any record made and record of procedure filed by clerk with District Court heard by District Court without jury, de novo. Final order of District Court is subject to appeal to Supreme Court as provided by law. (I.C. 63-38 12). Decision of State Tax Commission assessing value of operating property may be appealed to District Court in which property located. (I.C. 63-409). See category 5 Civil Actions and Procedure, topic 5.03 Appeal and Error.

Payment.

All real property taxes payable on or before Dec. 20 without penalty and may be paid in two equal installments, Dec. 20 and June 20 of following year. No payments received between Dec. 21 and fourth Mon. in Jan. or June 21 and fourth Mon. in July. If Dec. 20 or June 20 falls on Sat., Sun., or holiday, payment required payable on next regular workday following Dec. 20 or

June 20. Not less than two nor more than five months before period of redemption expires county tax collector must give notice of pending issuance of tax deed. (I.C. 63-1005).

Except as hereinafter provided, all personal property taxes are payable to tax collector on demand and become delinquent if not paid on or before due date specified on demand notice. If no demand is made, taxes must be paid in two instalments; one-half becomes delinquent if not paid by Dec. 20 and second half becomes delinquent if not paid by June 20, together with penalty of 2% of instalment plus 1% per month dating back to Jan. 1. If first instalment not paid by Dec. 20, entire tax is due and payable together with penalty of 2% of tax plus 1% per month dating back to Jan. 1. Taxpayer may appeal to board of county commissioners for extension not to exceed four months. (I.C. 63-904).

All taxes and all other fees and amounts in excess of $100,000 must be paid by electronic funds transfer. (I.C. 67-2026, I.C. 67-2026A).

Migratory Property.

Personal property coming into state from without state after first day of Jan. and before Apr. 1 is assessed at full cash value; from Apr. 1 to July 1, three-fourths; from July 1 to Oct. 1, one-half; thereafter one-fourth. (I.C. 63-205[1], [2] and I.C. 63-311[3]).

Lien.

Taxes are lien from and after property becomes subject to assessment. (I.C. 63-205 and I.C. 63-206[21]).

Sales.

All property acquired by counties by tax deed must be offered for sale at least biennially. Notice is published for 30 days and property sold to highest bidder, and any property not sold can be sold later without further notice. (I.C. 31-808, 834-5).

Where purchaser from county has peaceably possessed property and paid taxes thereon for six years, no action can thereafter be maintained to contest tax deed or tax proceedings. (I.C. 63-1011[1], [2]). County may exchange real property not needed for other real property.

If any person refuses to pay tax levied on personal property, sheriff shall seize and sell enough personal property to satisfy tax. (I.C. 63-1101). Tax collector may purchase personal property in name of county if sum sufficient to defray tax and costs of sale has not been bid. (I.C. 63-1108).

Redemption.

May be made within three years from date of delinquency entry, and thereafter up to time contract of sale of property is entered into by county or property has been transferred by county deed, by paying all taxes with penalties and interest to date of redemption. (I.C. 63-1004, -1005 and -1007). Right to redemption expires one year after issuance of tax deed to county even if county never contracts for sale of property. (I.C. 63-1007).

Public Service Corporation Property Tax.

Operating property of any utility for transportation of commodities, wholly or partly within state, and operating in more than one county shall be assessed for state, county, city, town, village, school district and other purposes by State Tax Commission. Statement showing all taxable property to be submitted by owner. (I.C. 63-701).

Real Estate Conveyance Tax.

None.

22.17 SALES AND USE TAXES:

Sales tax on retail sales is 6% (I.C. 63-3619), including rentals, hotels, instalment and credit sales. Auditorium district may levy 5% sales tax on hotel-motel receipts. (I.C. 67-4917A, I.C. 46-4917B). Retailer must collect tax from purchaser, keeping records. Presumption is that all sales of personal property are taxable and retailer has burden of proof giving rise to claim for exemption from tax unless purchaser provides resale certificate to retailer. (I.C. 63-3620 to I.C. 63-3626). It is duty of purchaser to provide certificate of exemption for resale. Sale or purchase of prefabricated building is sale or purchase of real estate, not tangible personal property. (I.C. 63-3606A). Vending machine sales are presumed to be at price 117% of cost. Resort cities authorized to impose certain sales taxes related to dominant trade. (1978, c. 261). No time limitation on assessment and collection of sales tax from retailer, seller or other person who has failed to pay over such taxes to commission. (I.C. 63-3633[d]). Counties are allowed to charge sales/use tax in certain circumstances. (I.C. 63-2601 to I.C. 63-2605).

Use Tax.

Excise tax at rate of 6% on storage, use or consumption in Idaho of tangible personal property, unless retailer pays Idaho sales tax on transaction and collects tax from customer. (I.C. 63-3621). Certain exemptions detailed in statutes. (I.C. 63-3622A thru DD). Reciprocity granted for sales tax paid to other states which allow similar credit against use tax for purchases made in Idaho. (I.C. 63-3601 to I.C. 63-3638).

Exemptions from Sales and Use Taxes.

Exemptions include, among other things, sale for resale and personal property used or consumed primarily in production process. (I.C. 63-3622A thru RR). Specific exemption for property donated to nonprofit organization or to state or its subdivisions. (I.C. 63-3621). Limited exemption (1%) from sales tax and use tax is to be allowed on contracts entered into before May 1, 2003. (I.C. 63-3640).

Returns.

Retailers to remit on monthly basis; accounting procedures detailed in statutes. (I.C. 63-3601 to I.C. 63-3638).

Utility Taxes.

Special license tax of one-half mill per kilowatt hour is imposed on individuals, firms, partnerships, common law trusts, corporations, associations or other organizations manufacturing or producing electricity and electrical energy in state except that generated or sold for use in manufacturing, mining, milling, smelting, refining or processing. Persons liable for tax must file monthly statements with State Tax Commissioner on or before last of each month and pay tax at same time. (I.C. 63-2701).

22.17A SPECIAL FUELS TAX:

See topic 22.08 Gasoline and Special Fuels Taxes.

22.18 STAMP AND SEAL TAXES:

Stamp Tax.

No requirement of documentary stamps.

22.18A TAX LIENS:

Uniform Federal Lien Registration Act Amended.

Adopted. (I.C. 45-201 to I.C. 45-207 am'd 1979, c. 226).

22.19 USE TAXES:

See topic 22.17 Sales and 22.19 Use Taxes.

23 TRANSPORTATION

23.01 MOTOR VEHICLES:

Uniform Acts Adopted.

Motor Vehicle Anti-theft; Motor-Vehicle Registration with changes. (I.C. 49-441 to I.C. 49-456). Regulating Traffic on Highways, with changes. (I.C. 49-206 to -223; I.C. 49-601 to -673; I.C. 49-701 to -724; I.C. 49-801 to -810; I.C. 49-901 to -965; I.C. 49-1001 to -1013; I.C. 49-1301 to -1315; I.C. 49-1401 to -1430). Motor Vehicle Nonresident Violator Compact. (I.C. 49-2501).

Department of Transportation supervises registration and licensing of motor vehicles and motor vehicle manufacturers, dealers and chauffeurs. Department of Law Enforcement has general supervision over all penal and regulatory laws relating to motor vehicles, address Motor Vehicle Division Department of Law Enforcement, P.O. Box 34, Boise, Idaho 83731. (I.C. 49-201; I.C. 67-2901).

Vehicle registration required annually or biannually (I.C. 49-402B), excepting nonpay passenger vehicles, then by 12 month periods with plates issued no less than every five years with annual registration stickers. (I.C. 49-441; I.C. 49-443). Number plates must be displayed front and rear. Properly registered vehicles exempt from taxation. (I.C. 49-401). Applicant must display to county assessor current certificate of liability insurance before vehicle can be registered. (I.C. 49-1229).

Driver's license is required; expires on driver's 18th birthday if issued prior to that day; or on birthday of operator in fourth year for drivers under age 21 or age 63 or older; drivers ages 21 through 62 may, at their option, have their licenses expire on birthday of eighth year following date of issuance. (I.C. 49-319). May be extended under certain conditions for up to 12 months. (I.C. 49-319). No person may receive license until he surrenders all valid operator's licenses issued to him and in his possession from other states or any identification cards issued by any other jurisdiction within U.S. or executes affidavit that he does not possess driver's license or any identification cards. (I.C. 49-301). License required after 90 days continuous residence in Idaho. (I.C. 49-119[11]). Applicant for license must be examined by sheriff or deputy in any county most convenient to applicant. (I.C. 49-313). Minimum age limit for license is 16 years (limited license available if 15 and successfully completed approved driver training course [49-305]). (I.C. 49-303). Following are exempt: operators of vehicles in service of Armed Forces, operators of special mobile equipment and farm tractors, nonresidents at least 15 years old licensed in home state, nonresidents over 18 years whose home state does not require license, may operate for 90 days in each calendar year as operator, and perons under 16 years when operating ATV, UTV or motorbike on roads on state or federal land when supervised by licensed adult. (I.C. 49-302). Issued by Department of Transportation. List of persons who shall not be licensed is provided. (I.C. 49-303). Schedule of license fees is provided. (I.C. 49-306). Anatomical gifts in conjunction with drivers license application provided in §§ 39-3401 et seq. Disqualifications and penalties for commercial drivers licenses are provided for in I.C. 49-335. Motorcycle “M” endorsement required to drive on highways. (I.C. 49-304). “M” endorsement requirement include first passing approved driver training and safety test. (I.C. 49-304).

Titles, Sales and Liens.

Every sale or transfer of a motor vehicle must be registered with Department of Transportation on forms provided by it and certificate of title issued, which must evidence all liens on vehicle. (I.C. 49-503 to I.C. 49-510). Electronic (paperless) record of title is authorized. (I.C. 49-505).

Lien or encumbrance on a motor vehicle is not valid against creditors or subsequent purchasers or encumbrancers without notice until holder has filed with Department copy of conveyance documentation and application signed by purchaser (I.C. 49-510, I.C. 49-504), which must be accompanied by properly endorsed certificate of title. Fee is $1. Thereupon new certificate will be issued upon which facts concerning lien or encumbrance will be endorsed. (I.C. 49-510).

Conditional Sales Act does not apply to motor vehicles.

Transitional ownership documents are available to allow security interest to be perfected in timely manner when primary ownership document is not available. (I.C. 49-527 to I.C. 49-530).

Express Warranties.

Manufacturer of motor vehicle making express warranty must maintain service and repair facility reasonably close to all areas in which its motor vehicles are sold. (I.C. 48-901 to I.C. 48-909). Manufacturer's duty to repair. (I.C. 48-902). Manufacturer's duty to refund or replace. (I.C. 48-903).

Possessory Liens.

Persons performing labor upon, repairing, storing or caring for motor vehicles have lien thereon dependent on possession for their compensation. If not paid within two months, lienor may sell on ten days' published notice, paying any surplus over amount of lien and costs to owner. (I.C. 45-805).

Weight Limitations.

Regulated by I.C. 49-1001 to I.C. 49-1012.

Equipment Required.

Regulated by I.C. 49-619 and I.C. 49-901 to I.C. 49-965. Car safety seat required of resident parents when transporting child under four years or less than 40 lbs. Failure to comply infraction but not evidence of contributory negligence. (I.C. 49-672). With limited exceptions, seatbelts must be worn by all occupants in vehicle. (I.C. 49-673). Failure to comply is infraction but not evidence of contributory negligence.

Lights Required.

Regulated by I.C. 49-901 through I.C. 49-920.

Inspection.

State inspection not required.

Accidents.

Driver or another occupant if driver is unable, must stop, give reasonable assistance, and give name, address, name of insurance agent or company and registration number. (I.C. 18-8007, I.C. 49-1301 to I.C. 49-1315). Must also report accident to city police department, county sheriff's office or state police department in other cases where damage to person or property exceeds $1,500. (I.C. 49-1305). Failure to report is cause for suspension of license. Every investigating officer must make report. (I.C. 49-1306).

Owner's Liability.

Owner is responsible for negligent operation of motor vehicle by person using same with permission, expressed or implied, and negligence of such operator is imputed to owner for all purposes of civil damages. However, if operator of loaned vehicle was negligent and has insurance that would cover his negligence, operator will be primarily responsible; owner of vehicle will be secondarily liable. (I.C. 49-1212[11]). Liability for imputed negligence of owner, not arising through relationship of principal and agent or master and servant, is limited to amount of $25,000 for death or injury to one person in one accident, $50,000 with respect to death or injury to more than one person, and $15,000 for damage to property. Chattel mortgagee is not deemed owner. (I.C. 49-2417).

Injury to Guest.

Idaho statute declaring owner not liable for injury or loss to guest transported without payment, except in cases of intentional injury, intoxication or gross negligence (I.C. 49-2415) held unconstitutional. (96 Idaho 19, 523 P.2d 1365).

Financial Responsibility.

A Motor-Vehicle Safety Responsibility Act has been adopted. Owners and operators, resident and nonresident, of motor vehicles involved in motor vehicle accident in state, in which death, personal injury, or damage in excess of $100, result, must, within 60 days of report of such accident to Department of Transportation, provide security within defined limits for payment of any claims or damages arising from said accident. Failure so to do may result in suspension of driver's license and subject owner or operator to penalties provided in said act. Insurance policy of $25,000 for bodily injury to or death of one person, $50,000 for bodily injury to or death of two or more persons, and $15,000 for property damage, or proof of financial responsibility by deposit of $25,000 in cash or securities, may be submitted to Department. Operation of motor vehicle on highway by one having been involved in motor vehicle accident without compliance with said Act is infraction. (I.C. 49-1201 to I.C. 49-1232). Exempted vehicles are listed in I.C. 49-1233. Applicant must display to county assessor current certificate of liability insurance before vehicle can be registered. (I.C. 49-1230). No exemption granted for members of armed forces. (I.C. 49-441).

Insurance.

See subhead Financial Responsibility, supra.

Uninsured motorist coverage, $10,000/$20,000, mandatory in every policy, unless insured rejects it in writing. (I.C. 41-2502).

No-Fault Insurance.

Not adopted.

Foreign Vehicles.

All vehicles, trailers and semitrailers of nonresidents must pay same fee as resident, unless exempt by provisions of reciprocity. If nonresident's state grants temporary permit privileges to like vehicles from Idaho, nonresident vehicle may obtain temporary trip permit for not to exceed 120 hours for $60 for single vehicle; $120 for combination of vehicles; and $60 for fuel permit. (I.C. 49-432).

Nonresident operators duly licensed in their home states or whose home states do not require driver's licenses may operate in Idaho without local license if over 15. (I.C. 49-302). Adoption of Nonresident Violator Compact to allow jurisdiction of proceeding in motorists' home state rather than detention in Idaho. (I.C. 49-2501). Also requires reporting of violations among participating states. (I.C. 49-2501).

Actions Against Nonresidents.

Operation of motor vehicle by any person, either as principal or agent on any public way in state shall be deemed appointment of secretary of state to be person's lawful attorney for receipt of process in any action growing out of any accident in which he is involved while driving in Idaho. (I.C. 49-1602). Such service has same legal force and validity as personal service within the state, provided plaintiff serves a copy of the summons and complaint on defendant by registered mail and obtains registry return receipt, or personal service outside the state is made in accordance with general laws relating to service of process on nonresidents. (I.C. 49-2421).

Direct Actions.

Not authorized by injured person against insurer of other party.

Motor vehicle carriers must obtain permit from Public Utilities Commission. Must procure and maintain on file insurance or surety bond for each vehicle covering liability for personal injury and property damage as Commission sets by general order, except those which qualify as self-insurer with U. S. I.C.C. are exempt. Commission may fix rates. (I.C. 61-801 to I.C. 61-817). Multi-carrier agreements allowed and exempted from state anti-trust law. (I.C. 61-335). Foregoing does not apply to: school buses; taxicabs of not more than seven passengers; vehicles operated by or on behalf of hotels for patrons; farm trucks; newspaper distribution vehicles; transportation incidental to aircraft transportation; carriers operating exclusively within corporate limits or territory contiguous thereto as part of such service; vehicles of U.S. mail; transportation of agricultural products or livestock, products of forest or of mines to market; carriers engaged in transportation of sand, gravel and aggregate thereof; and carriers transporting household goods as defined by Interstate Commerce Commission. (I.C. 61-801).

Caravaning Tax.

License tax for use of highways of $12 per vehicle is imposed for transportation within, into, across or out of state of any motor vehicle operating on its own wheels, in tow, or in saddlemount fashion of another vehicle for purpose of selling or offering for sale such vehicle either within or without this state, unless said vehicle is licensed in Idaho or owned by duly licensed Idaho auto dealer. (I.C. 49-1101 to I.C. 49-1105).

Gasoline Tax.

See category 22 Taxation, topic 22.08 Gasoline and Special Fuels Taxes.

Service contracts for motor vehicles regulated. Required provisions for contracts. Reimbursement policy. Record keeping. Licensing. (I.C. 49-2801 to I.C. 49-2810).

24 Forms

Commercial Code Forms

(Click here to view)

1
ILLINOIS LAW DIGEST

—Scope —

Revised for 2010 edition by **LexisNexis**(R).

(Citations, unless otherwise indicated, are to chapters and paragraphs of Illinois Complied Statutes (ILCS) and Illinois Revised Statutes, 1991. Parallel citations to the North Eastern Reporter begin with 114 Ill., and 284 Ill. App.)

Note: This revision is current through October 2009. General Assembly convenes annually on second Wed. in Jan.

1 INTRODUCTION

1.01 GOVERNMENT AND LEGAL SYSTEM:

The State of Illinois is a constituent state of the United States of America. For further discussion of the U.S. federal system, see Introduction to the Federal Government of the United States at the beginning of this volume. A great many laws are promulgated by the federal government of the United States and are not reflected in the topics below. See the Introduction to this volume for references to the federal law topics covered.

Like all but one of the United States, Illinois has a common law legal system, with roots in English common law. For information on the courts and legislature of Illinois, see category 6 Courts and Legislature.

1.02 [RESERVED]

1.03 HOLIDAYS:

Legal holidays upon which bank may, but is not required to remain closed, are Jan. 1, 3d Mon. in Jan., Feb. 12, third Mon. in Feb., Good Friday, 1st Mon. in Mar., last Mon. in May, July 4, first Mon. in Sept., 2d Mon. in Oct., Nov. 11, 4th Thurs. in Nov., Dec. 25, any day of fast or thanksgiving recommended by Governor or President, and any day proclaimed by Governor. Legal holidays also include days of general elections for members of State House of Representatives. (10 ILCS 5/17-25, 205 ILCS 630/17). 12 noon to 12 midnight on Sat. is half holiday in cities of 200,000 or more. (205 ILCS 630/17). Commemorative holidays are at 105 ILCS 5/24-2. In addition to such holidays and half holidays, bank may select one day of week to remain closed on regular basis.

Holiday Falling on Sunday.

When holiday falls on Sun., following day is holiday. (205 ILCS 630/17).

Holiday Falling on Sat.

No postponement of holiday falling on Sat. (205 ILCS 630/17).

Legality of Transactions on Saturday, Sunday or Holiday.

When last day on which act provided by law must be performed is holiday or Sat. or Sun., such act may be performed on next business day. (5 ILCS 70/1.11).

Contract requiring performance on Sun. will be enforced according to its terms, and contract is not void because executed on that day. (107 Ill. 429). Payment, certification or acceptance of check or other negotiable instrument or any other transaction by bank is not void or voidable even if done on Sat., Sun., holiday or day selected by bank to remain closed or during any time other than regular banking hours. (205 ILCS 630/17).

With respect to presenting for payment or acceptance, maturity and protesting and giving notice of dishonor of bills of exchange, bank checks, promissory notes and other negotiable or commercial paper or instruments, each holiday, half-holiday and any day selected by bank to remain closed, as authorized, shall be deemed Sun. (205 ILCS 630/17).

All notes, bills, drafts, checks, or other evidences of indebtedness falling due on any holiday are deemed as due or maturing on following business day. (205 ILCS 630/17).

Teachers or other school employees are not required to teach on Sats. or legal school holidays, which are Jan. 1, 3d Mon. in Jan., Feb. 12, 1st Mon. in Mar., Good Friday, Federal Memorial Day, July 4, 1st Mon. in Sept., 2d Mon. in Oct., Nov. 11, Dec. 25, any day of fast or thanksgiving appointed by Governor or President. School boards may grant commemorative or special holidays whenever in their judgment such action is advisable. Commemorative holidays are regular school days devoted to commemoration of specified persons or occasions or on general election days for members of State House of Representatives. (105 ILCS 5/24-2).

1.04 OFFICE HOURS AND TIME ZONE:

Illinois is in Central (GMT -06:00) time zone. Office hours are generally from 9 a.m. to 5 p.m.

2 BUSINESS ORGANIZATIONS

2.01 AGENCY:

Agency law is governed by common law in Illinois. See category 21 Property, topic 21.15 Powers of Attorney.

2.02 ASSOCIATIONS:

Unincorporated association has been judicially defined as body of persons acting together without charter by methods and forms used by incorporated bodies for prosecution of some common enterprise. (389 Ill. 102, 58 N.E.2d 906). Specific forms of unincorporated associations (e.g., building and loan associations) are regulated by statute. Illinois law permits business trusts. (760 ILCS 5/2).

Formation.

Unincorporated associations are formed by agreement between (and among) parties thereto.

Rights and Powers.

Unincorporated association has power to adopt constitution and to enact by-laws, rules and regulations that are not illegal or contrary to public policy. Constitution, by-laws, rules and regulations of association become, in effect, contract between members governing their mutual rights and liabilities. (140 Ill. App.3d 127, 488 N.E.2d 623).

In absence of statutory authority unincorporated association cannot make contracts or take or hold title to property in its own name. However, where association contracts as legal entity, it may be estopped to deny its right to contract. (389 Ill. 102, 58 N.E.2d 906). Statutory provisions expressly authorize unincorporated association to take, hold, convey and defend interests in real property. (765 ILCS 115/1 to 115/3).

Liabilities.

In order to bind association or its members, acts of officer or agent of association must be done pursuant to authority duly vested in such officer or agent. (99 Ill. App. 290). There is no limited liability as to third persons but there is contribution among members. (65 Ill. 532).

Actions.

Voluntary unincorporated association may sue or be sued in own name. (735 ILCS 5/2-209.1).

Dissolution.

Meeting to dissolve unincorporated association must be preceded by reasonable notice of time, place and object of meeting to members. (318 Ill. App. 605, 48 N.E.2d 760).

Professional Associations.

Persons rendering any type of personal service to public requiring license permitted under specified conditions (805 ILCS 305/1 et seq.) to form professional association, Professional Service Corporation, Limited Liability Companies and Registered Limited Liability Partnerships, including practice of law (805 ILCS 305/1 et seq.; Ill. Sup. Ct. R. 721).

Professional Corporations.

See topic 2.03 Corporations, subhead Professional Service Corporations.

Unit Owners' Association.

See category 21 Property, topic 21.16 Real Property, subhead Condominium Property Act.

2.03 CORPORATIONS:

Business Corporation Act of 1983, which became effective July 1, 1984 (“Act”) (805 ILCS 5/1.01-5/17.05) governs generally. References in this topic are to sections of Act (c. 32), unless otherwise indicated.

Provisions of Act apply to all existing corporations, including public utility corporations, organized under any general law of Illinois providing for organization of corporations for purpose or purposes for which corporation might be organized under Act. (805 ILCS 5/1.70). Act does not generally apply to corporations organized for purpose of banking or insurance (805 ILCS 5/3.05) and only applies to corporations organized for purpose of operation of railroads to extent provided in 805 ILCS 5/1.70. Certain of provisions of Act may not be applicable to corporations formed prior to July 1, 1971. (See Roanoke Agency, Inc. v. Jim Edgar, 101 Ill.2d 315, 461 N.E.2d 1365.) Limited Liability Company Act (805 ILCS 180/1-1 to 180/60-1) effective Jan. 1, 1994 (see topic 2.06 Limited Liability Companies).

General Supervision.

Secretary of State has supervision of administration of Act. (805 ILCS 5/1.05). Address for Secretary of State is 213 State Capitol, Springfield, IL 62756.

Definitions.

“Paid-in capital” means sum of cash and other consideration received, less expenses, including commissions, paid or incurred by corporation in connection with issuance of shares, plus any cash and other consideration contributed to corporation by or on behalf of its shareholders or transferred to paid-in capital by action of board of directors or shareholders, plus amounts added pursuant to share dividend, share split, or otherwise, minus reductions as provided elsewhere in Act. Irrespective of manner of designation thereof by laws under which foreign corporation is or may be organized, paid-in capital of foreign corporation is determined on same basis and in same manner as paid-in capital of domestic corporation, for purpose of computing license fees, franchise taxes and other charges imposed by Act. (805 ILCS 5/1.80[j]). "Net assets", for purpose of determining right of corporation to purchase its own shares and of determining right of corporation to declare and pay dividends and make other distributions to shareholders is equal to difference between assets of corporation and liabilities of corporation. (805 ILCS 5/1.80[k]). "Insolvent" means that corporation is unable to pay debts as they become due in usual course of business. (805 ILCS 5/1.80[m]). "Common shares" means shares which have no preference over any other shares with respect to distribution of assets on liquidation or payment dividends. (805 ILCS 5/1.80[t]).

Purposes.

Corporations for profit may be organized under Act for any lawful purpose or purposes, except banking or insurance; corporations may be organized for buying, selling, or otherwise dealing in notes (not including discounting bills and notes or buying and selling bills of exchange), open accounts, and other similar evidences of debt, or for purpose of carrying on business of syndicate or limited syndicate permitted under Art. V 1/2 of Illinois Insurance Code. (805 ILCS 5/3.05). Organization of Medical Corporations and Professional Service Corporations is authorized. (805 ILCS 3.05). Corporation may have corporate seal but seal will not give instruments additional force or effect and use of corporate seal is not mandatory. C orporations may make contracts of guaranty and suretyship provided that corporation may not be organized for purposes of insurance. (805 ILCS 5/3.10). Articles may provide for general purpose clause stating that corporation is organized to transact any and all lawful business for which corporations may be organized under Act. (805 ILCS 5/2.10). Organization of corporation for such excepted purposes or of corporations not for pecuniary profit may be effected under other general statutes. Certain sections of Act relate to railroads, chiefly those sections relating to dissolution, annual reports and fees. (805 ILCS 5/1.70).

Name.

Corporate name: (a) Must contain, separate and apart from any other word or abbreviation in such name, word "corporation," "company," "incorporated," or "limited," or abbreviation of one of such words; (b) must not contain any word or phrase which indicates or implies that corporation (i) is authorized to conduct business of insurance, indemnity or acceptance of savings deposits or (ii) is authorized to conduct business of banking unless otherwise permitted by Commissioner of Banks and Real Estate; (c) must be distinguishable upon records in office of Secretary of State from corporate name or assumed name, of any domestic corporation existing under any Act of Illinois, or any foreign corporation authorized to transact business in Illinois, or name exclusive right to which is, at time, reserved in manner provided in Act; (d) must contain word "trust," if it be corporation organized for purpose of accepting and executing trusts, must contain word "pawners," if it be corporation organized as pawners' society, and must contain word "co-operative," if it be corporation organized as co-operative association for pecuniary profit; (e) must be name under which corporation will transact business in Illinois unless corporation also elects to adopt one or more assumed names as provided in Act, but corporation may use divisional designation or trade name along with its corporate name or assumed name as long as it clearly discloses its corporate name or assumed name; provided that identification by corporation of its business with trademark or service mark of which it is owner or licensed user does not constitute use of assumed name. (805 ILCS 5/4.05, 5/4.15). Exclusive right to use of corporate name may be reserved for 90 days or upon written cancellation by applicant, whichever is sooner, upon filing of application for name reservation. $25 fee. $25 fee to assign reserved name to another party. (805 ILCS 5/4.10, 5/15.10). Corporation may elect to adopt assumed name that is not same as or deceptively similar to corporate name or assumed name of any other domestic corporation existing under laws of

Illinois or of any foreign corporation authorized to transact business in this State, or same as or deceptively similar to any name registered or reserved under provisions of Act. Such election must be made by filing with Secretary of State application executed by officer of corporation, pursuant to resolution adopted by corporation, setting forth such assumed name and paying to Secretary of State filing fee ($150 for each year or part thereof ending in 0 or 5, $120 for each year or part thereof ending in 1 or 6, $90 for each year or part thereof ending in 2 or 7, $60 for each year or part thereof ending in 3 or 8, $30 for each year or part thereof ending in 4 or 9 between date of filing such application and date of renewal of assumed corporate name). Corporation may change assumed name for period remaining until renewal date of original assumed name, $25 fee. Right to assumed corporate name is effective from date of filing by Secretary of State until first day of anniversary month of corporation that falls within next calendar year evenly divisible by five, however, if application is filed within two months immediately preceding anniversary month of corporation that falls within calendar year evenly divisible by five, right to use assumed corporate name is effective until first day of anniversary month of corporation that falls within next succeeding calendar year evenly divisible by five. Renewal fee must be paid ($150). (805 ILCS 5/4.15, 5/15.10). Multiple assumed corporate names are allowed. If such assumed name complies with provisions of Act, Secretary of State issues certificate authorizing use of that name, but such certificate does not confer any right to use of that name as against any person having any prior right to use thereof. (805 ILCS 5/4.05).

Corporation Division of Office of Secretary of State in Springfield will informally answer inquiries by telephone or mail as to whether corporate name is available. No fee.

Term of Corporate Existence.

Duration of corporation is perpetual unless otherwise specified in articles of incorporation. (805 ILCS 5/2.10[d]).

Incorporators.

Corporation may be organized by one or more incorporators who need not be subscribers. Each incorporator must be corporation or natural person of 18 years or more. (805 ILCS 5/2.05). Unless otherwise provided in articles of incorporation, any action taken by incorporators under 805 ILCS 5/2.20, 805 ILCS 5/10.10 or 805 ILCS 5/12.05 may be taken without meeting if incorporators sign written consent of such action.

Articles of Incorporation.

Incorporators must sign and file in duplicate articles of incorporation (805 ILCS 5/2.10) setting forth: (a) Name of corporation; (b) purpose or purposes for which corporation is organized, which may be stated to be, or to include, transaction of any or all lawful businesses for which corporations may be incorporated under Act; (c) address of corporation's initial registered office in Illinois and name of its initial registered agent at that office; (d) name and address of each incorporator; (e) number of shares of each class corporation is authorized to issue; (f) number and class of shares which corporation proposes to issue without further report to Secretary of State, and consideration to be received, less expenses, including commissions, paid or incurred in connection with issuance of shares, by corporation therefor. If shares of more than one class are to be issued, consideration for shares of each class must be separately stated; (g) if shares are divided into classes, designation of each class and statement of designations, preferences, qualifications, limitations, restrictions, and special or relative rights with respect to shares of each class; and (h) if corporation may issue shares of any preferred or special class and series, then designation of each series and statement of variations and relative rights and preferences of different series, if same are fixed in articles of incorporation, or statement of authority vested in board of directors to establish series and determine variations and relative rights and preferences of different series. (805 ILCS 5/2.10[a]). Other specified information, including names and addresses of individuals that are to serve as initial directors, corporate management, rights, and duties, property estimates, and provisions limiting personal liability of directors for breach of fiduciary duty may, but it is not necessary to, be set forth in articles of incorporation. (805 ILCS 5/2.10[b]). It is not necessary to set forth in articles of incorporation any of corporate powers enumerated in Act. (805 ILCS 5/2.10[c]). Corporation may adopt special voting provisions in articles of incorporation for certain business combinations. (805 ILCS 5/7.85). See subhead Vote Required for Certain Business Combinations, infra. If no optional information is given in articles of incorporation with respect to amount of property owned by corporation to be located within Illinois, then franchise tax must be computed on basis of entire paid-in capital as set forth in articles of incorporation. (805 ILCS 5/2.10[e]).

License Fees of Domestic Corporation.

Domestic corporation must pay initial license fee and, in some cases, additional license fee. In each case fee is 1/20 of 1%. Basis for initial license fee is dollar value of entire consideration received by corporation for, or on account of, its issued shares reported to Secretary of State in its first report of issuance of shares. Basis for each additional license fee, except in case of statutory merger or consolidation, is dollar value of increase in paid-in capital over amount thereof last reported in any document, other than annual report, required by Act to be filed in Office of Secretary of State. (805 ILCS 5/15.20-5/15.30).

License fees are payable to Secretary of State.

As to license fees of foreign corporations, see infra, subhead Foreign Corporations.

Filing fees charged by Secretary of State for filing various papers are: (a) Articles of incorporation, $150; (b) articles of amendment, $50, unless amendment is restatement of articles of incorporation, in which case $150; (c) articles of merger or consolidation, $100, but if merger or consolidation involves more than two corporations, $50 for each additional corporation; (d) filing articles of share exchange, $100; (e) articles of dissolution, $5; (f) application to reserve corporate name, $25; (g) notice of transfer of reserved corporate name, $25; (h) statement of change of address of registered office or change of registered agent, or both, if other than on annual report, $25; (i) statement of establishment of series of shares, $25; (j) application of foreign corporation for certificate of authority to transact business in State, $150; (k) application of foreign corporation for amended certificate of authority to transact business in State, $25; (l) copy of amendment to articles of incorporation of foreign corporation holding authority to transact business in State, $50 (unless amendment is restatement of articles of incorporation, in which case fee is $150); (m) copy of articles of merger of foreign corporation holding certificate of authority to transact business in State, $100, but if merger involves more than two corporations, $50 for each additional corporation; (n) application for withdrawal and final report of foreign corporation, $25; (o) annual report of domestic or foreign corporation, $75; (p) application for reinstatement, $200; (q) filing application for use or change of assumed corporate name, $150 for each year or part thereof ending in 0 or 5, $120 for each year or part thereof ending in 1 or 6, $90 for each year of part thereof ending in 2 or 7, $60 for each year or part thereof ending in 3 or 8, $30 for each year of part thereof ending in 4 or 9 between date of filing such application and date of renewal of assumed corporate name; and renewal fee for each assumed corporate name, $150; (r) changing assumed corporate name until renewal date of original assumed name, $25; (s) filing application for cancellation of assumed corporate name, $5; (t) filing application to register corporate name of foreign corporation, $50; and annual renewal fee for such registered name, $50; (u) application for cancellation of registered name of foreign corporation, $25; (v) statement of correction, $50; (w) petition for reduction or refund, $5; (x) filing statement of election of extended filing month, $25; (y) filing any other statement or report, $5. (805 ILCS 5/15.10).

Articles of Incorporation and Filing Thereof.

Articles of incorporation must be filed in office of Secretary of State and must be made on forms prescribed and furnished by Secretary of State. Forms should be filed in duplicate. One copy will be returned to corporation with certificate, if any, affixed thereto and that copy should then be filed for record in office of recorder of county in which registered office of corporation is situated within 15 days after mailing thereof by Secretary of State. (805 ILCS 5/1.10).

Organization.

If no preincorporation subscribers and if initial directors not named in articles of incorporation, meeting of incorporators must be held at call of majority of incorporators for purpose of naming initial directors. If preincorporation subscribers and if initial directors not named in articles of incorporation, first meeting of shareholders must be held after issuance of certificate of incorporation at call of majority of incorporators for purpose of electing initial directors, adopting by-laws if articles of incorporation so require or shareholders so determine, and such other matters as are stated in notice of meeting. It is possible for shareholder action to be taken by consent, in lieu of meeting, in writing pursuant to Act. First meeting of initial directors must be held at call of majority of them for purpose of adopting by-laws if shareholders have not adopted them, electing officers, and transacting other business. At least three days written notice of organizational meeting must be given unless persons entitled to such notice waive same in writing, either before or after such meeting. Organizational meeting may be held either within or without Illinois. (805 ILCS 5/2.20). Unless otherwise provided in articles of incorporation, any action by incorporators to organize corporation, amend articles of incorporation before issuance of shares and voluntarily dissolve corporation may be taken without meeting upon unanimous written consent of incorporators. (805 ILCS 5/2.05).

Paid-In Capital Requirement.

There is no paid-in capital requirement. (805 ILCS 5/2.10, 5/2.15).

List of Corporations.

Secretary of State is required to publish daily list of all newly formed corporations, businesses and not for profits, chartered by him on that day, which will be available for inspection or copying. (805 ILCS 5/1.25).

Amendments to Articles.

Corporation may amend its articles of incorporation to add new provision or change or remove existing provision, provided that articles as amended contain only such provisions as are required or permitted in original articles of incorporation at time of amendment. Articles as amended must contain all provisions required by Act except that names and addresses of initial directors may be omitted and names of initial registered agent or address of initial registered office may be omitted if statement of change is filed. Corporation whose period of duration as provided in articles of corporation has expired may amend articles to revive its articles and extend period of corporation duration, including making duration perpetual, at any time within five years after date of expiration. (805 ILCS 5/10.05).

If corporation has not issued shares, amendment to articles may be adopted by majority of incorporators if initial directors not named in articles or have not been elected, or if initial directors named in articles or have been elected, amendment to articles may be adopted by majority of directors. (805 ILCS 5/10.10). Majority of whole board of directors of corporation may adopt one or more amendments to its articles without shareholder action if it is to: (a) Remove names and addresses of initial directors if such directors named in original articles; (b) remove name and address of initial registered agent or address of initial registered office, if statement of change is filed with Secretary of State; (c) increase, decrease, create or eliminate par value of shares as long as no class or series adversely affected; (d) split all of issued whole shares and unissued authorized shares by multiplying them by whole number, so long as no class or series of shares is adversely affected thereby; (e) to change corporate name by substituting word “corporation”, “incorporated”, “company”, “limited”, or abbreviation “corp.”, “inc.”, “co.”, “ltd.”, for similar word or abbreviation in name, or by adding geographical attribution to name; (f) to reduce authorized shares of any class pursuant to cancellation statement filed with respect to such shares after acquisition by corporation in circumstances in which articles prohibit reissuance of such shares after acquisition by corporation; or (g) to restate articles as currently amended; such restated articles supersede original articles and all amendments thereto. (805 ILCS 5/10.15). If it is necessary to secure shareholder approval for amendment, board of directors must adopt resolution setting forth proposed amendment and directing that it be submitted to vote at meeting of shareholders, which may be either annual or special meeting. Written notice setting forth proposed amendment or summary of changes to be effected thereby must be given to each shareholder of record within time and manner provided in Act for giving of notice of meetings of shareholders. If such meeting is annual meeting, proposed amendment or such summary may be included in notice of such annual meeting. If adoption of amendment would give any class or series of shares right to dissent, notice must also enclose copy of relevant section of Act or otherwise provide adequate notice of right to dissent and procedures therefor. At such meeting vote of shareholders entitled to vote on proposed amendment must be taken. Proposed amendment adopted upon receiving affirmative vote of holders of at least two-thirds of votes of shares entitled to vote on such amendment, unless any class or series of shares is entitled to vote as class in respect thereof, in which event proposed amendment adopted upon receiving affirmative votes of at least two-thirds of votes of shares of each class or series of shares entitled to vote as class in respect thereof and of total votes of shares entitled to vote on such amendment. Articles of incorporation may supersede two-thirds vote requirements by specifying any smaller or larger vote requirement not less than majority of outstanding shares entitled to vote on amendment and not less than majority of outstanding shares of each class or series of shares entitled to vote as class on amendment. Any number of amendments may be submitted to shareholders and voted upon by them at one meeting. (805 ILCS 5/10.20). Holders of outstanding shares of class are entitled to vote as class on proposed amendments in number of cases specified in Act. (805 ILCS 5/10.25). Corporation which adopts provision for higher voting requirements for certain business combinations requires higher vote to amend such provision. (805 ILCS 5/7.85). Articles of amendment must be signed and filed in duplicate (805 ILCS 5/10.30), and amendment becomes effective upon filing of articles of amendment by Secretary of State, or time established under articles of amendment, not to exceed 30 days after issuance of certificate of amendment by Secretary of State (805 ILCS 5/10.35). If amendment restates articles of incorporation, such restated articles of incorporation , upon such amendment becoming effective, supersede and stand in lieu of corporation's preexisting articles of incorporation. If amendment revised articles of incorporation and extends period of corporate duration, amendment becomes effective upon filing of articles of amendment by Secretary of State and corporate existence deemed to have continued without interruption from date of expiration of original period of duration. (805 ILCS 5/10.35).

Increase or Decrease of Authorized Capital Stock.

Majority of whole board of directors of corporation may amend its articles of incorporation without shareholder action to increase, decrease, create or eliminate the par value of shares of any class so long as no class or series of shares is adversely affected. (805 ILCS 5/10.15).

By-laws.

Unless power to make, alter, amend or repeal by-laws is reserved to shareholders by articles of incorporation, by-laws of corporation may be made, altered, amended or repealed by shareholders or board of directors, but no by-law adopted by shareholders may be altered, amended or repealed by board of directors if by-laws so provide. By-laws may contain any provisions for regulation and management of affairs of corporation not inconsistent with law or articles of incorporation. (805 ILCS 5/2.25).

Stock Certificates.

Corporation has power to create and issue number of shares stated in its articles. Such shares may be divided into one or more classes, including classes of common shares, any or all of which classes may consist of shares with such designations, preferences, qualifications, limitations, restrictions, and such special or relative rights as stated in articles, provided that common shares may not have preference with respect to distribution of assets upon liquidation or payment of dividends. Subject to voting restrictions in Act, articles may limit or deny voting rights of or provide special voting rights for shares of any and all classes or of any series of class. If authorized in articles, corporation may issue shares of preferred or special classes subject to one or more of following conditions: (a) Subject to right of corporation to redeem any of such shares at price not exceeding price fixed by articles for redemption thereof; (b) entitling holders thereof to dividends which are cumulative or partially cumulative, or which are noncumulative; (c) having preference over any other class or classes of shares as to payment of dividends; (d) having preference as to assets of corporation over any other class or classes of shares upon voluntary or involuntary liquidation of corporation; (e) convertible into shares of any other class, or into shares of any series of same or any other class. (805 ILCS 5/6.05).

If articles provide, shares of any preferred or special class may be divided and issued in series. If shares of any such class are to be issued in series, then each series must be so designated to distinguish shares thereof from shares of all other series in classes. Any or all of series of any such class and variations in relative rights and preferences as between different series may be determined by articles or by resolution of board of directors pursuant to authority granted in articles, subject to voting requirements of Act, provided all shares of same class must be identical except as to following relative rights and preferences, in respect of any or all of which there may be variations between different series: (1) Rate of dividend; (2) price at and terms and conditions on which shares may be redeemed; (3) amount payable upon shares in event of involuntary liquidation; (4) amount payable upon shares in event of voluntary liquidation; (5) sinking fund provisions for redemption or purchase of shares; (6) terms and conditions on which shares may be converted, if shares of any series are issued with privilege of conversion; (7) limitation or denial of voting rights, or grant of special voting rights. Corporation must file statement with Secretary of State. (805 ILCS 5/6.10). Corporation may issue fractional shares. (805 ILCS 5/6.15).

Issued shares of corporation are represented by certificates or shall be uncertificated shares. Every certificate representing shares issued by corporation which is authorized to issue shares of more than one class must set forth upon face or back of certificate full summary or statement of all designations, preferences, qualifications, limitations, restrictions, and special or relative rights of each class authorized to be issued, and, if corporation is authorized to issue any preferred or special class in series, variations in relative rights and preferences between shares of each such series so far as same have been fixed and determined and authority of board of directors to fix and determine relative rights and preferences of subsequent series. Such statement may be omitted from certificate if it is set forth upon face or back of certificate that such statement, in full, will be furnished by corporation to any shareholder upon request and without charge. Each certificate representing shares must also state that corporation is organized under laws of Illinois, name of person to whom issued, and number and class of shares, and designation of series, if any, which such certificate represents. Unless articles or by-laws provide otherwise, board of directors of corporation may provide by resolution that some or all of any or all classes and series of its shares be uncertificated shares, providing that such resolution does not apply to shares represented by certificate until such certificate is surrendered to corporation. After issuance or transfer of uncertificated shares, corporation must send to registered owner thereof written notice containing information required to be set forth or stated on certificates pursuant to Act. Except as otherwise expressly provided by law, rights and obligations of holders of uncertificated shares and rights and obligations of holders of certificates representing shares of same class and series must be identical. (805 ILCS 5/6.35).

Issuance of Stock.

Shares may be issued for such consideration as shall be authorized from time to time by board of directors through action which establishes price in cash or other consideration, or both, or minimum price or general formula or method by which price can be determined. Upon authorization by board of directors, corporation may issue its own shares in exchange for or in conversion of its outstanding shares, or may distribute its own shares pro rata to its shareholders or shareholders of one or more classes or series to effectuate dividends or splits, provided that value fixed by board of directors in connection with such dividend or split shall be transferred to paid-in capital of corporation, and provided, no such issuance of shares of any class or series shall be made to holders of shares of any other class or series unless it is either expressly provided for in articles or authorized by affirmative vote of holders of at least majority of outstanding shares of class or series in which distribution is to be made. (805 ILCS 5/6.25). Higher vote is required for certain issuance or transfer of securities of corporation which has class of registered equity securities or which adopts such voting requirement. (805 ILCS 5/7.85). See subhead Vote Required for Certain Business Combinations, infra.

Consideration for issuance of shares may be paid, in whole or in part, in money, and other property, tangible or intangible, or in labor or services actually performed for corporation. When payment of consideration for which shares are to be issued shall have been received by corporation, such shares shall be deemed to be full paid and nonassessable. In absence of actual fraud in transaction, and subject to provisions in Act regarding director conflict of interest, judgment of board of directors or shareholders, as case may be, as to value of consideration received for shares shall be conclusive. (805 ILCS 5/6.30). No certificate shall be issued for any share until such share is fully paid. (805 ILCS 5/6.35). Shareholders of corporation organized under Act on or after Jan. 1, 1982, shall have no preemptive rights to acquire unissued shares of corporation, or securities of corporation convertible into or carrying right to subscribe to or acquire shares, except if provided for in articles of incorporation. Preemptive right of shareholder to acquire additional shares, whether then or thereafter authorized, of corporation organized prior to Jan. 1, 1982 may be limited or denied to extent provided in articles of incorporation. Unless otherwise provided in articles, any such corporation may issue and sell its shares to its employees or to employees of any subsidiary corporation, without first offering same to its shareholders, for such consideration and upon such terms and conditions as shall be approved by holders of two-thirds of its shares entitled to vote with respect thereto or by its board of directors pursuant to like approval of shareholders. (805 ILCS 5/6.50).

Transfer of Stock.

Restriction on transfer or registration of securities of corporation may be imposed either by certificate of incorporation or by-laws or by agreement among the shareholders of corporation. (805 ILCS 5/6.66[b]. Uniform Simplification of Fiduciary Security Transfers Act not adopted. See Fiduciary Transfer of Securities Act . (760 ILCS 70./0.01 to 70/9). Art. 8 of Uniform Commercial Code governs transfers, except to extent of any inconsistency between it and Fiduciary Transfer of Securities Act.

Stock Transfer Tax.

No state stock transfer tax is imposed.

Stockholders' Rights.

Shareholders of corporations organized on or after January 1, 1982, have no preemptive rights to acquire unissued shares or securities of corporation convertible into or carrying right to subscribe to or acquire shares except to extent that such right is provided in articles of incorporation. Preemptive right of shareholder to acquire unissued or treasury shares of corporation organized prior to January 1, 1982, may be limited or denied to extent provided in articles of incorporation. (805 ILCS 5/6.50)

Redemption of Stock.

No redemption of shares may be made which will reduce remaining assets of corporation so that corporation would be insolvent, or which will reduce net assets below aggregate amount payable to holders of shares having prior or equal rights to assets on dissolution. (805 ILCS 5/9.10). If corporation acquires own shares, except when shares pledged for payment of purchase price, shares are cancelled and constitute authorized but unissued shares, and, if articles provide such shares shall not be reissued, number of authorized shares is reduced by number of shares acquired. If corporation acquires own shares, corporation shall file cumulative report of changes in paid-in capital with Secretary of State. Shares of corporation acquired by it may be pledged as security for payment of purchase price of shares and, until purchase price paid, such shares are not cancelled and do not constitute authorized, but unissued shares. (805 ILCS 5/9.05). Until cumulative report of changes in paid-in capital shall have been filed with Secretary of State, basis of annual franchise tax payable by corporation shall not be reduced, provided, however, in no event shall annual franchise tax for any taxable year be reduced if such report is not filed prior to first day of anniversary month of that taxable year and before payment of its annual franchise tax. (805 ILCS 5/9.05).

Shareholders Actions.

No action shall be brought in Illinois by shareholder in right of domestic or foreign corporation unless plaintiff was shareholder of record at time of complained of transaction or his shares or voting trust certificates thereafter devolved upon him by operation of law from person who was holder at such time; provided, however, that shareholder who does not meet such requirement may nevertheless be allowed in discretion of court to bring such action on preliminary showing to and determination by court, upon motion and after hearing at which court may consider such evidence by affidavit or testimony as it deems material, that plaintiff acquired shares before there was disclosure to public or to plaintiff of wrongdoing of which plaintiff complains. (805 ILCS 5/7.80[a]). Complaint in proceeding brought in right of corporation must allege with particularity the demand made, if any, to obtain action by directors and either why the complainant could not obtain action or why he or she did not make demand. (805 ILCS 5/7.80[b]). Shareholder action may not be discontinued or settled without the court's approval. (805 ILCS 5/7.80[c]).

Shareholders Liabilities.

Holder of or subscriber to shares of corporation is under no obligation to corporation or its creditors with respect to such shares other than to pay full consideration for such shares. No person holding shares as executor, administrator, conservator, guardian, trustee, assignee for benefit of creditors, or receiver is personally liable as shareholder; but beneficial owner thereof and estate and funds in such person's hands are liable. No pledgee or other holder of shares as collateral security is personally liable as shareholder. Any person becoming assignee or transferee of shares or of subscription in good faith and without knowledge or notice that full consideration therefor has not been paid is not personally liable to corporation or its creditors for any unpaid portion of such consideration. (805 ILCS 5/6.40). Shareholder may be liable to injured creditors if shareholder sells his stock to corporation at time when corporation is insolvent. (31 Ill.2d 297, 201 N.E.2d 444).

Meetings of shareholders may be held either within or without Illinois, as provided in by-laws. Special meetings may be called by president, directors, holders of not less than one-fifth of shares or by such officers or persons as may be provided in articles or by-laws. (805 ILCS 5/7.05). Unless prohibited by articles of incorporation or by-laws, shareholder participation may be by conference telephone or interactive technology and shall constitute attendance and presence at meeting of person participating. Shareholder entitled to vote at meeting shall be permitted to attend when space permits and subject to corporation's by-laws and rules governing conduct of meeting and power of chairman to regulate orderly conduct of meeting. Written or printed notice stating place, day and hour of meeting and, in case of special meeting, purpose or purposes, must be delivered to each shareholder, either personally or by mail, not less than ten nor more than 60 days, or in case of merger or consolidation not less than 20 nor more than 60 days, before date of meeting. (805 ILCS 5/7.15). Unless otherwise provided in articles, majority of votes of shares constitutes quorum; provided that in no event may quorum consist of less than one-third of votes of shares. If quorum is present, affirmative vote of majority of votes of shares represented is act of shareholders unless greater vote or voting by classes is required by Act, articles of incorporation or by-laws. (805 ILCS 5/7.60). Higher vote is required for certain business combinations by domestic corporation which has class of registered equity securities or which adopts such higher voting requirements. (805 ILCS 5/7.85). See subhead Vote Required for Certain Business Combinations, infra. Articles of incorporation may require any number or percent greater than majority of votes up to and including requirement of unanimity to constitute quorum. (805 ILCS 5/7.60).

Officer or agent having charge of transfer book must make, within 20 days after record date for meeting of shareholders or ten days before such meeting, whichever is earlier, complete list of shareholders in alphabetical order, with address of each and number of shares held by each, which list must be kept at registered office for ten days prior to meeting and kept open at meeting, for inspection by any shareholder. (805 ILCS 5/7.30).

Voting.

Each outstanding share, regardless of class, is entitled to one vote on each matter submitted. Shareholder may vote either in person or by written proxy, but no proxy is valid after 11 months from date of execution, unless otherwise provided in proxy. (805 ILCS 5/7.50). Method for appointing proxy includes signing proxy form by facsimile and transmission of authorization by telegram, cablegram or other electronic transmission. (805 ILCS 5/7.50). In election for directors every shareholder has right to cumulate his votes, provided that articles of incorporation for corporations organized after Dec. 31, 1981 may limit or eliminate cumulative voting rights as to any or all classes or series of stock. Corporation organized prior to Jan. 1, 1982 may amend its articles to eliminate cumulative voting. If articles of incorporation provide for more or less than one vote for any share on any matter, reference in statute to majority or other proportion greater than majority of shares shall refer to that majority or other proportion greater than majority of votes of shares. (805 ILCS 5/7.40). Shares held by corporation in fiduciary capacity may be voted. (805 ILCS 5/7.45). Shares standing in name of deceased person, minor ward or person under legal disability may be voted by administrator, executor, or court appointed guardian without transfer into name of such person. (805 ILCS 5/7.45).

Vote Required for Certain Business Combinations.

Higher votes are required for certain business combinations by domestic corporation which has class of equity securities registered under Securities Exchange Act of 1934 or which adopts this provision in articles of incorporation.

These enumerated business combinations require affirmative vote of 80% of outstanding voting shares and majority of outstanding voting shares held by disinterested shareholders. Business combinations subject to higher voting requirement include: (a) Merger, consolidation or share exchange involving interested shareholder, or other corporation which is or would become affiliate or associate of interested shareholder; (b) sale, lease, exchange, mortgage, pledge, transfer or other disposition of assets representing 10% or more of consolidated net worth to or with interested shareholder or affiliate or associate of interested shareholder; (c) issuance or transfer of securities of corporation or subsidiary to interested shareholder or affiliate or associate; (d) adoption of plan or proposal for liquidation or dissolution proposed by, or in which anything other than cash will be received by, interested shareholder, affiliate or associate; and (e) reclassification of securities, recapitalization or merger, consolidation, or share exchange involving subsidiary which has effect of increasing proportionate share of equity or convertible securities of corporation or subsidiary owned directly or indirectly by interested shareholder, affiliate or associate. Higher vote is also required when corporation adopting this provision amends, repeals, or adopts provision inconsistent with, provision in articles of incorporation which specifically adopts this section. Interested shareholder is defined as: (a) Beneficial owner of 10% or more of combined voting power of outstanding voting shares, or (b) affiliate or associate, as defined in Rule 12b-2 under Securities Exchange Act of 1934, of corporation who was beneficial owner of 10% or more of combined voting power of then outstanding voting shares at any time within two-year period.

Higher vote is not required for such business combinations if either: (a) Business combination is approved by two-thirds vote of disinterested directors, or (b) following conditions are met: (1) business combination must provide for consideration to all holders of all classes of shares, in exchange for shares, subject to certain price requirements; (2) consideration received by shareholders must be cash or same form interested shareholder or affiliate or associate previously paid to acquire shares of such class; (3) certain requirements regarding declaration, payment and rate of dividends must be met during specified period; (4) interested shareholder must not receive benefit of loans, advances, guarantees, pledges, other financial assistance, tax credits or tax advantages during specified period; and (5) proxy or information statement must be mailed to public shareholders at least 30 days prior to consummation of business combination. This section shall not relieve interested shareholder from fiduciary obligation imposed by law. Note statutory definitions of beneficial ownership, disinterested director and disinterested shareholder. (805 ILCS 5/7.85).

Inspectors.

At any meeting of shareholders, chairman of meeting may, or upon request of any shareholder must, appoint one or more persons as inspectors for such meeting, unless inspector has or inspectors have been previously appointed pursuant to by-laws of corporation. Inspector or inspectors must determine validity and effect of proxies and conduct election and voting at meeting and file written reports on results of voting thereat. (805 ILCS 5/7.35).

Action by Consent of Shareholders Without Meeting.

Unless otherwise provided in articles of incorporation and except for voluntary dissolution of corporation any action required by Act to be taken at any annual or special meeting of shareholders of corporation, or any other action which may be taken at meeting of shareholders, may be taken without meeting and without vote, if consent in writing, setting forth action so taken, shall be signed: (i) By holders of outstanding shares having no less than minimum number of votes that would be necessary to authorize or take such action at meeting at which all shares entitled to vote thereon were present and voting or (ii) by all shareholders entitled to vote with respect to subject matter thereof. If such consent is signed by less than all shareholders entitled to vote, then such consent shall become effective only if at least five days prior to execution of consent notice in writing is delivered to all shareholders entitled to vote with respect to subject matter thereof and, after effective date of consent, prompt notice of taking corporate action without meeting by less than unanimous written consent shall be delivered in writing to shareholders who have not consented in writing. (805 ILCS 5/7.10).

Voting Trusts.

One or more shareholders may create voting trusts for stated duration, perpetual as for fixed period or determined by occurrence of stated condition by entering into written voting trust agreement and by transferring subject shares to trustee or trustees. If agreement or amendment does not state duration, trust will terminate ten years after agreement first became effective. Such trust agreement does not become effective until counterpart of agreement is deposited at corporation's registered office. Such counterpart subject to same right of examination by shareholder or holder of voting trust certificate of corporation as are books and records of corporation. As to voting trust agreements entered into or amended after 1/1/00, rule against perpetuities does not apply and agreement is specifically enforceable in equity. (805 ILCS 5/7.65). Shareholders may provide for voting their shares by signing agreement for that purpose.

(805 ILCS 5/7.70).

Directors.

Except as provided in Art. 2A of this Act, business and affairs are managed by or under direction of board of directors, who need not be residents or shareholders unless articles of incorporation or by-laws so provide. (805 ILCS 5/8.05). No judge of any Illinois court may be director of any business corporation or other for-profit corporation. Unless otherwise provided in articles of incorporation or by-laws, board of directors, by affirmative majority vote, irrespective of personal interest, have authority to set reasonable compensation of all directors for services to corporation in any capacity. (805 ILCS 5/8.05). Board of directors of corporation shall consist of one or more members. Number of directors shall be fixed by by-laws, except number of initial directors shall be fixed by incorporators in articles or at organizational meeting. In absence of by-law fixing number of directors, number shall be same as that fixed in articles or at organizational meeting. Number may be changed by amendment to by-laws. Terms of all directors expire at next annual shareholders' meeting following their election unless their terms are staggered. If board of directors consists of six or more members, in lieu of electing membership of whole board of directors annually, articles or by-laws may provide that directors shall be divided into either two or three classes, each class to be as nearly equal in number as is possible. Term of office of directors of first class shall expire at first annual meeting of shareholders after their election, second class shall expire at second annual meeting after their election, and third class, if any, shall expire at third annual meeting after their election. At each annual meeting after such classification, number of directors equal to number of class whose terms expire at time of such meeting shall be elected to hold office until second succeeding annual meeting, if there be two classes, or until third succeeding annual meeting, if there be three classes. (805 ILCS 5/8.10). Variable range board of directors authorized. If articles authorized dividing shares into classes or series, articles may also authorize election of all or specified number or percentage of directors by holders of one or more authorized classes or series of shares. (805 ILCS 5/8.10). Vacancy among directors may be filled by election at annual meeting or at special meeting of shareholders called for that purpose; provided, however, by-laws may provide method for filling vacancies arising between meetings of shareholders by reason of increase in number of directors or otherwise, by director or shareholder action, and in absence of such provision, board of directors may fill vacancy. Director elected by shareholders to fill vacancy shall hold office for balance of term for which he or she was elected. Director appointed to fill vacancy shall serve until next meeting of shareholders at which directors are to be elected. (805 ILCS 5/8.30). One or more of directors may be removed, with or without cause, at meeting of shareholders by affirmative vote of holders of majority of outstanding shares then entitled to vote at election of directors, except that no director shall be removed at meeting of shareholders unless notice of such meeting shall state that purpose of meeting is to vote upon removal of one or more directors named in notice. Only named director or directors may be removed at such meeting. In case of corporation having cumulative voting, if less than entire board is to be removed, no director may be removed, with or without cause, if votes cast against his or her removal will be sufficient to elect him or her if then cumulatively voted at election of entire board of directors. If director is elected by class or series of shares, he or she may be removed only by shareholders of that class or series. Corporation whose board is classified may provide in its articles of incorporation that directors may be removed only for cause. (805 ILCS 5/8.35). Circuit Court of county in which corporation's registered office is located may remove director for cause. (805 ILCS 5/8.35).

Directors may remove officers or agents, but without prejudice to contract rights, if any, of person removed. Election or appointment of officer or agent does not of itself create contract rights. (805 ILCS 5/8.55).

In considering best interests of corporation, board of directors may consider effects of action on employees, suppliers and customers of corporation, communities in which establishments of corporation are located and all other pertinent factors. (805 ILCS 5/8.85).

Executive Committee.

If articles or by-laws so provide, majority of directors may create one or more committees and appoint members of board to serve on committee or committees. Each committee shall have one or more members, who serve at pleasure of board. Unless appointment by board of directors requires greater number, majority of any committee shall constitute quorum and majority of quorum is necessary for committee action. Committee may act by unanimous consent and writing without meeting and, subject to provisions of by-laws or action by board of directors, committee by majority vote of its members shall determine time and place of meetings and notice required therefor. There are certain restrictions on committees' powers. (805 ILCS 5/8.40).

In considering best interests of corporation, committees of board may consider effects of action on employees, suppliers and customers of corporation, communities in which establishments of corporation are located and all other pertinent factors. (805 ILCS 5/8.85).

Directors' meetings, regular or special, may be held within or without Illinois. (805 ILCS 5/8.20). Majority of number of directors fixed by by-laws or, if not fixed in by-laws, stated in articles constitutes quorum, unless greater number is required by articles or by-laws. Majority of quorum of board may transact corporate business unless greater number required by articles or by-laws. Unless prohibited by articles or by-laws, directors may participate in and act at any meeting through use of conference telephone or other communication equipment by means of which all persons participating can hear each other. (805 ILCS 5/8.15). Attendance at any meeting constitutes waiver of notice except where director attends for express purpose of objecting to transaction of any business because meeting not lawfully called or convened. Notice or waiver need not specify business to be transacted at, or purpose of, meeting. (805 ILCS 5/8.25).

Powers and Duties of Director

In discharging duties, board of directors, committees of the board, individual directors and individual officers may consider effects of any action including without limitation action that may involve or relate to a change or potential change in control of the corporation upon employees, suppliers, and customers of corporation or its subsidiaries, communities in which offices or other establishments of corporation or its subsidiaries are located, and all other pertinent factors. (805 ILCS 5/8.85).

Action by Consent of Directors and Committees Without Meeting.

Any action required or allowed by Act to be taken at meeting of board of directors or committees thereof, unless otherwise provided in articles or by-laws, may be taken without meeting if all directors, or members of committees, entitled to vote with respect to subject matter thereof consent in writing to such action. Consent has same force and effect as unanimous vote of directors or committees. (805 ILCS 5/8.45).

Liability of Directors.

Act imposes severe penalties on directors for improperly paying dividends or distributing assets, or not taking reasonable steps to cause notice of dissolution to be mailed to known creditors or carrying on active business after filing articles of dissolution in violation of Act. Directors may rely on balance sheet and profit and loss statement, under certain specified conditions, and may in good faith consider assets to be of their book value in authorizing dividends or distributions of assets. (805 ILCS 5/8.65). If transaction is fair to corporation at time it is authorized, approved, or ratified, fact that director of corporation is directly or indirectly party to transaction is not grounds for invalidating transaction or director's vote regarding transaction; however, in proceeding contesting validity of transaction, person asserting validity has burden of proving fairness with some exceptions. (805 ILCS 5/8.60).

Any corporate director or officer who commits commercial bribery or commercial bribe receiving as defined in Art. 29 of “Criminal Code of 1961” is liable to corporation for treble damages, based on aggregate amount given or received, plus attorneys' fees. Conviction in criminal proceeding is deemed prima facie evidence of convicted director's or officer's liability under Act. (805 ILCS 5/8.70).

Indemnification of Directors and Officers.

Corporation may indemnify any person who was or is party, or is threatened to be made party to any threatened, pending or completed action, suit or proceeding, whether civil, criminal, administrative or investigative (other than action by or in right of corporation) by reason of fact that he is or was director, officer, employee or agent of corporation, or serving at request of corporation as director, officer, employee or agent of another corporation, partnership, joint venture, trust or other enterprise, against expenses (including attorneys' fees), judgments, fines and amounts paid in settlement actually and reasonably incurred by him, if he acted in good faith and in manner he reasonably believed to be in or not opposed to best interests of corporation and, with respect to criminal action or proceeding, had no reasonable cause to believe his conduct unlawful. Lack of good faith not presumed from settlement or nolo contendere plea. Indemnification of expenses (including attorneys' fees) allowed in derivative actions except no indemnification in respect of any claim, issue or matter as to which any such person shall have been adjudged to be liable for negligence or misconduct in performance of duty to corporation unless court decides indemnification is proper. To extent any such person succeeds on merits or otherwise, he shall be indemnified against expenses (including attorneys' fees). Determination that person to be indemnified met applicable standard of conduct, if not made by court, is made by board of directors by majority vote of quorum consisting of directors not party to such action, suit or proceeding, or if quorum not obtainable or disinterested quorum so directs, by independent legal counsel or by stockholders. Expenses may be paid in advance upon receipt of undertaking to repay. Such indemnification not deemed exclusive and continues as to person who has ceased to be director, officer, employee or agent, and inures to benefit of heirs, executors and administrators of such person. Corporation may purchase indemnity insurance. (805 ILCS 5/8.75). Similar provisions are also contained in Not for Profit Corporation Act. (805 ILCS 105/101.01).

Loans.

Corporation has power to lend money to its directors, officers, employees and agents. (805 ILCS 5/3.10[f]).

Officers.

Corporation shall have such officers as shall be provided in by-laws, each of whom shall be elected by board of directors at such time and in such manner as may be prescribed by by-laws. Officers and assistant officers and agents as may be deemed necessary may be elected or appointed by board of directors or chosen in such other manner as may be prescribed by by-laws. If by-laws so provide, any two or more offices may be held by same person. One officer, in Act generally referred to as secretary, shall have authority to certify by-laws, resolutions of shareholders and board of directors and committees thereof, and other documents of corporation as true and correct copies thereof. (805 ILCS 5/8.50). No judge of any Illinois court may be officer of any business corporation or other for-profit corporation. (705–60/1).

In considering best interest of corporation, officers may consider effects of action on employees, suppliers and customers of corporation, communities in which establishments of corporation are located and all other pertinent factors. (805 ILCS 5/8.85).

Penalties Imposed on Officers and Directors.

Officer or director of corporation who fails or refuses to answer truthfully and fully interrogatories propounded to him by Secretary of State, or who signs any report or statement filed with Secretary of State which is known to such officer or director to be false in any material statement or representation, commits Class C misdemeanor. (805 ILCS 5/16.10).

Waiver of Notice.

Any notice required to be given under Act, or articles of incorporation or by-laws of corporation may be waived by written waiver signed by person or persons entitled to such notice, whether before or after time stated therein; such waiver shall be deemed equivalent to giving of such notice. (805 ILCS 5/7.20).

Registered Office and Agent.

Each corporation must have registered office in Illinois and registered agent, whose business office is identical with such registered office. (805 ILCS 5/5.05). Registered agent may resign (805 ILCS 5/5.15) or corporation may change registered agent or address of registered office by following statutory procedure (805 ILCS 5/5.10). Registered agent is agent of corporation for receipt of any process, notice, or demand required to be served upon corporation. (805 ILCS 5/5.25).

General Powers of Corporations.

In order to carry out purposes for which organized, corporation has general power, among others, to: acquire and otherwise deal in and with real or personal property or any interest therein; sell, mortgage and dispose of all or any part of its property and assets; acquire real property improved or unimproved, and lend money to its employees, acquire, sell, and otherwise use and deal in and with, shares or other interests in, or obligations of, other corporations, associations, partnerships, or individuals, and, subject to §§9.05 and 9.10 of Act, purchase, take, receive or otherwise acquire, hold, own, pledge, transfer or otherwise dispose of own shares. If corporation shall comply with applicable provisions of Illinois Bank Holding Company Act of 1957; borrow money for its corporate purposes without regard to any state usury law; invest surplus funds from time to time; lend money for corporate purposes and take and hold real and personal property as security for payment of funds so invested or lent; make donations for charitable, scientific, religious or educational purposes; establish deferred compensation plans, pension plans, profit sharing plans, share bonus plans, share option plans and other incentive plans for directors, officers and employees; indemnify directors, officers, employees or agents in accordance with 8.75. (805 ILCS 5/3.10). Unless otherwise provided by articles, corporation may sell its shares to its employees or to employees of any subsidiary, without first offering same to its shareholders, on terms approved by holders of two-thirds of its shares or by its directors pursuant to like approval of shareholders. (805 ILCS 5/6.50).

Except in specified instances, no limitation on business, purposes or powers expressed or implied in articles or implied by law may be asserted to defeat any action between corporation and third person or between shareholder and third person involving any contract to which corporation is party, or any right of property or any alleged liability of whatsoever nature. (805 ILCS 5/3.15).

Defense of ultra vires is looked upon by many courts with disfavor, and rule has been frequently announced that plea of ultra vires should not be allowed to prevail whether interposed for or against corporation when it will not advance justice but instead will accomplish legal wrong. (284 Ill. App. 1, 1 N.E.2d 861).

Dividends.

Board of directors of corporation may authorize and corporation may make distributions to its shareholders subject to any restriction in articles of incorporation. (805 ILCS 5/9.10). Additionally, no distribution may be made if after giving it effect corporation would be insolvent or net assets of corporation would be less than zero or less than maximum amount payable at time of distribution to shareholders having preferential rights in liquidation if corporation were then to be liquidated. (805 ILCS 5/9.10[c]).

Unclaimed Dividends.

See category 21 Property, topic 21.01 Absentees, subhead Escheat.

Disposition of Assets.

Sale, lease, exchange, mortgage, pledge, or other disposition of all, or substantially all, property and assets, when made in usual and regular course of business, may be made by directors; no authorization or consent of shareholders is required. (805 ILCS 5/11.55). Sale, lease, exchange, mortgage, pledge, or other disposition of all, or substantially all, property and assets, with or without good will, if not made in usual and regular course of business, may be made by following statutory procedure, which includes securing approval of holders of two-thirds of outstanding shares, by classes of shares, where applicable. (805 ILCS 5/11.60). Higher vote is required for certain sales, leases, exchanges, mortgages, pledges, transfers or other dispositions of assets representing 10% or more of consolidated net worth by domestic corporation which has class of registered securities or which adopts such higher voting requirements. (805 ILCS 5/7.85). See subhead Vote Required for Certain Business Combinations, supra. Dissenting shareholder has right to be paid fair value of his shares by following statutory procedure. (805 ILCS 5/11.65; 5/11.70).

Books and Records.

Corporation must keep at its registered office or principal place of business in Illinois, or at office of transfer agent or registrar in Illinois, record of its shareholders, giving names and addresses of all shareholders and number and class of shares held by each. Any person who is shareholder of record, has right to examine, for any proper purpose, its books and records of account, minutes, and record of shareholders, and to make extracts therefrom. In order to exercise this right, shareholder must make written demand upon corporation, stating with particularity records sought to be examined and purpose therefor. If corporation refuses examination, shareholder may file suit in Circuit Court of county in which either registered agent or principal office of corporation is located to compel by mandamus or otherwise such examination as may be proper. If shareholder seeks to examine books or records of accounts, burden of proof is upon shareholder to establish proper purpose. If purpose is to examine minutes or records of shareholders or voting trust agreement, burden of proof is upon corporation to establish that shareholder does not have proper purpose. Any officer or agent, or corporation, which refuses to allow any such shareholder, or such holder of voting trust certificate, or his agent or attorney, so to examine and make extracts, is liable to such shareholder, or holder of voting trust certificate, for penalty of up to 10% of value of his shares, in addition to any other damages or remedy afforded him by law. It shall be defense to any action for such penalties that person suing therefor within two years sold or offered for sale any list of shareholders of such corporation or any other corporation or aided or abetted any person in procuring any list of shareholders for any such purpose or has improperly used any information secured through any prior examination of books and records of account, or minutes, or records of shareholders of any corporation. (805 ILCS 5/7.75). Upon written request of shareholder, corporation must mail to such shareholder within 14 days after receipt of request balance sheet as of close of latest fiscal year and profit and loss statement for such fiscal year. (805 ILCS 5/7.75).

Reports of Domestic Corporations.

Each domestic corporation organized under any general law or special act of Illinois authorizing such corporation to issue shares, other than homestead associations, building and loan associations, banks and insurance companies, and each foreign corporation authorized to transact business in Illinois, must file annual report on forms prescribed and furnished by

Secretary of State (805 ILCS 5/14.05) within 60 days before first day of corporation's anniversary month (805 ILCS 5/14.10). Articles of incorporation are deemed to be first report of issuance of shares and, for purpose of determining initial license fee, initial franchise tax and assessment of annual franchise tax thereafter until basis therefor is changed, shares which articles state corporation proposes to issue without further report to Secretary of State are deemed to be issued at date of filing of such articles, and for such purpose only, consideration which such articles state is to be received by corporation therefor is deemed to have been received by corporation. (805 ILCS 5/14.15). Each domestic corporation must file with Secretary of State, cumulative report of changes in paid-in capital regarding following: (a) issuance of any shares not previously reported to Secretary of State as having been issued, or (b) increase in amount of its paid-in capital without issuance of shares, or (c) exchange or reclassification of shares resulting in increase in amount of its paid-in capital. Cumulative report must be filed (a) within 60 days for issuances or increases prior to either Jan. 1, 1991 or last day of third month immediately preceding corporation's anniversary month in 1991, or (b) at time of filing of corporation's annual report for issuances or increases after both Dec. 31, 1990 and last day of third month immediately preceding corporation's anniversary month in 1991. (805 ILCS 5/14.20).

As to reports of foreign corporations, see infra, subhead Foreign Corporations.

Penalties Imposed on Corporations.

Corporation which fails to file any annual report or report of cumulative changes in paid-in capital and pay any franchise tax within time prescribed shall pay penalty of 10% of any delinquent franchise tax due for such report. Corporation which fails to file report of issuance of shares or increase in stated capital and paid-in surplus subject to penalty, for each month or part of month that same is delinquent, of 1% of amount of license fees and franchise taxes. (805 ILCS 5/16.05).

Corporation which fails or refuses: (a) To file in office of recorder of deeds within time prescribed by Act any document required to be so filed, (b) to answer truthfully and fully interrogatories propounded by Secretary of State, or (c) to perform any other act required by Act to be performed by corporation, is guilty of Class C misdemeanor. (805 ILCS 5/16.05).

Corporation which fails or refuses to file articles of revocation of dissolution within time prescribed by Act is subject to penalty for each calendar month or part of month that it is delinquent in amount of $50. (805 ILCS 5/16.05).

No corporation is required to pay franchise tax, license fee or penalty under Act may maintain any civil action until all such franchise taxes, license fees and penalties are paid in full. (805 ILCS 5/15.85[c]).

Corporate Bonds or Mortgages.

Each corporation organized under Act has power to borrow money and otherwise incur indebtedness for any of the purposes of the corporation. Corporations have power to issue bonds, debentures, notes or other evidences of indebtedness, whether secured or unsecured, therefor; and to secure the same by mortgage, pledge, deed of trust or other lien on its property, franchises, rights and privileges of every kind and nature or any part thereof. (805 ILCS 35/17).

Merger or Consolidation.

Any two or more corporations may merge into one of such corporations or consolidate into new corporation. (805 ILCS 5/11.05).

Statutory procedure for merger or consolidation includes requirement of approval by each corporation by affirmative vote of at least two-thirds of votes of shares entitled to vote on plan at meeting held to obtain such approval. Where classes of shares are entitled to vote as class with respect to merger or consolidation, approval requires, in addition to approval by two-thirds of votes of shares entitled to vote, approval by two-thirds of votes of such class. Articles of corporation may supersede two-thirds vote requirement as to that corporation by specifying any smaller or larger vote requirement not less than majority of votes of shares entitled to vote on issue and not less than majority of votes of shares of each class or series of shares entitled to vote as class on issue. (805 ILCS 5/11.20). Higher vote is required for certain mergers, consolidations or share exchanges by corporation which has class of registered securities or which adopts such higher voting requirements. (805 ILCS 5/7.85). See subhead Vote Required for Certain Business Combinations, supra.

Dissenting shareholder has right to be paid fair value of his shares, by following statutory procedure. (805 ILCS 5/11.65; 11.70).

Any “parent” corporation owning at least 90% of outstanding shares of each class of shares of any other corporation may merge such subsidiary corporation into itself or another subsidiary if merged corporation is solvent without approval by vote of shareholders of either of corporations. Dissenting shareholder has right to be paid for his shares on following statutory procedure. (805 ILCS 5/11.30).

After effective date of merger or consolidation of corporations, surviving or new corporation must file with Secretary of State cumulative report of changes in paid-in capital. (805 ILCS 5/14.25).

One or more foreign corporations and one or more domestic corporations may be merged or consolidated or their shares exchanged provided such merger, consolidation or exchange is permitted by laws of state under which each such foreign corporation is organized (805 ILCS 5/11.35).

Domestic and Foreign Corporations may be merged with Domestic Not for Profit Corporations (805 ILCS 5/11.37).

Any one or more domestic corporations may merge with or into one or more limited liability companies of Illinois, any other state or states of United States, or District of Columbia if laws of other state or states or District of Columbia permit such merger. (805 ILCS 5/11.39).

Taxes and Fees.

See supra, subhead License Fees of Domestic Corporation and infra, subheads Franchise Taxes on Domestic Corporations; Franchise Taxes on Foreign Corporations.

Share Exchange or Acquisitions.

Upon authorization by board of directors, corporation may issue its own shares in exchange for or in conversion of its outstanding shares or may distribute its own shares pro rata to its shareholders or the shareholders of one or more classes or series to effectuate dividends or splits provided that the value fixed by the board of directors in connection with such dividend or split shall be transferred to paid-in capital of the corporation and; provided, that no such issuance of shares of any class or series shall be made to holders of shares of any other class or series unless it is either expressly provided for in articles of incorporation or authorized by affirmative vote of holders of at least a majority of outstanding shares of class or series in which distribution is to be made.

Tender Offers.

Effective Aug. 2, 1989, takeover of any Illinois corporation which (A) has any equity securities registered under §12 of Securities Exchange Act of 1934 or is subject to §15(d) of that Act; and (B) either (i) has its principal place of business or its principal executive office located in

Illinois, or (ii) owns or controls assets located within Illinois that have fair market value of at least $1,000,000; and (C) either (i) has more than 10% of its shareholders resident in Illinois, (ii) has more than 10% of its shares owned by Illinois, or (iii) has 2,000 shareholders resident in Illinois shall, with certain exceptions, be subject to Act. (805 ILCS 5/11.75).

Dissolution.

Corporation which has not commenced business and has not issued any shares may be voluntarily dissolved by its incorporators. (805 ILCS 5/12.05). Corporation may elect to dissolve voluntarily and wind up its affairs by written consent of holders of record of all outstanding shares (805 ILCS 5/12.10) or by act of corporation, with affirmative vote of holders of two-thirds of outstanding shares entitled to vote at meeting held to obtain such approval. Where classes of shares are entitled to vote as class with respect to dissolution, approval requires approval by two-thirds of class entitled to vote as well as by two-thirds of shares entitled to vote at meeting. Articles of incorporation may supersede two-thirds vote requirement as to that corporation by specifying any smaller or larger vote requirement not less than majority of votes of shares entitled to vote on dissolution and not less than majority of votes of shares or any class entitled to vote as class on dissolution. (805 ILCS 5/12.15). Higher vote is required for certain plans or proposals of dissolution or liquidation by corporation which has class of registered equity securities or which adopts such higher voting requirement. (805 ILCS 5/7.85). See subhead Vote Required for Certain Business Combinations, supra. Act sets forth in detail procedure to be followed, which includes cessation of active business upon effectiveness of dissolution and notice of such dissolution to each known creditor. (805 ILCS 5/12.30). By following statutory procedure, voluntary dissolution may be revoked within 60 days of its effective date if corporation has not begun to distribute its assets or has not commenced proceeding for court supervision of its winding up. (805 ILCS 5/12.25).

Corporation may be dissolved involuntarily by order of circuit court on complaint filed by Attorney General in certain cases. (805 ILCS 5/12.50). Corporation may be dissolved involuntarily in certain cases by act of Secretary of State. Corporation so dissolved may be reinstated following date of issuance of certificate of dissolution upon delivery of application for reinstatement containing prescribed information, and payment of all fees and filing of all reports then due. Certificate of reinstatement, and application therefor, are then returned to corporation and must be filed within 15 days of mailing thereof in office of recorder of county in which corporation's registered office is situated. (805 ILCS 5/12.45).

See also infra, subhead Liquidation.

Liquidation.

Circuit courts have full power to liquidate assets and business of corporation, in certain cases, on suit of shareholder or creditor, or on application by corporation or where action has been filed by Attorney General to dissolve corporation. (805 ILCS 5/12.50). Corporation may revoke dissolution within 60 days of its effective date if certain procedures followed under Act. (805 ILCS 5/12.25).

Dissolution or liquidation does not impair claims if suit thereon is commenced within five years. (805 ILCS 5/12.80).

Time for filing documents for record in county office of recorder is within 15 days after mailing thereof by Secretary of State to person or corporation charged with duty of filing, unless document cannot with reasonable diligence be filed within such time, in which case shall be filed as soon thereafter as is reasonably possible. (805 ILCS 5/1.10[e][3]).

Insolvency and Receivers.

Circuit Court may dissolve corporation in action by creditor if it is established that creditor's claim has been reduced to judgment, a copy of judgment has been returned unsatisfied, and corporation is insolvent or if corporation has admitted in writing that creditor's claim is due and owing and corporation is insolvent. (805 ILCS 5/12.50[a][2]). Appointment of receiver is proper exercise of chancellor's discretion where management is deadlocked over dissolution of corporation's assets. (39 Ill. App. 2d 401, 188 N.E.2d 773).

Forms for Corporate Documents.

All reports required by Act to be filed in Office of Secretary of State must be made on forms prescribed and furnished by Secretary of State. Forms for all other documents furnished on request, but use thereof, unless otherwise specifically prescribed in Act, not mandatory. (805 ILCS 5/1.10[a]).

Verification of Documents.

Whenever any document must be verified, such requirement is satisfied by either: (1) Formal acknowledgment by person or one of persons signing instrument that it is his act and deed or act and deed of corporation, as case may be, and that facts stated therein are true. Such acknowledgment shall be made before person who is authorized by law of place of execution to take acknowledgments of deeds and who, if he has seal of office, shall affix it to instrument; or (2) signature, without more, of person or persons signing instrument, in which case such signature or signatures shall constitute affirmation or acknowledgment of signatory, under penalties of perjury, that instrument is his act and deed or act and deed of corporation, as case may be, and that facts stated therein are true. (805 ILCS 5/1.10[d]).

Papers from Secretary of State's Office as Evidence.

Certificates issued by Secretary of State and copies of documents filed in his office when certified by him must be taken and received in all courts, public offices, and official bodies as prima facie evidence of facts therein stated. (805 ILCS 5/1.20).

Unauthorized Assumption of Corporate Powers.

Persons who assume to exercise corporate powers without authority so to do are jointly and severally liable for all debts and liabilities incurred or arising as result thereof. (805 ILCS 5/3.20).

Appraisal.

Shareholders dissenting from merger, consolidation or sale of all or substantially all assets not in usual course of business (805 ILCS 5/11.65) are entitled to fair value for shares upon proper objection. Court appraisal procedure is available in event parties fail to agree on value.

Close Corporations.

Close Corporations are regulated by Close Corporation Act. (805 ILCS 5/2A.05 to 2A.60). Provisions of Business Corporation Act are applicable to all close corporations except insofar as Close Corporation Act otherwise provides and to close corporation that has voluntarily or involuntarily terminated close corporation status except insofar as Close Corporation Act otherwise provides. Corporation not electing to become close corporation subject to Business Corporation Act.

Close corporation is defined as corporation organized under or electing to be subject to Close Corporation Act and articles of incorporation of which contain provisions required by 805 ILCS 5/1.01 through 5/17.05, inclusive, of Business Corporation Act of 1983 and provide that all issued shares of each class be subject to one or more restrictions on transfer permitted by 805 ILCS 5/6.55, such restrictions to be uniform within each class. Articles of incorporation may set forth qualification of shareholders. Close corporation formed in accordance with provisions of Business Corporation Act, except that articles to contain provisions required by 805 ILCS 5/2A.05 and heading stating name of corporation and that being organized as close corporation.

Corporation organized under Business Corporation Act may become close corporation by amending articles of incorporation to comply with 805 ILCS 5/2A.05. Heading of amendment must state it is reorganized as close corporation. Amendment must be approved unanimously in writing or by vote of holders of record of all outstanding shares of each class.

Corporation may voluntarily terminate status as close corporation by amending articles of incorporation to delete provisions required by 805 ILCS 5/2A.05. Amendment must be approved in writing or by vote of holders of record of two-thirds of outstanding shares of each class, unless articles provide for vote greater than two-thirds. Corporation's status as close corporation involuntarily terminated if any event occurs as result of which one or more of provisions or conditions required or permitted by 805 ILCS 5/1.80(s) are breached and neither corporation nor any of its shareholders proceeds under 805 ILCS 5/2A.30 to prevent such loss of status or to remedy such breach.

Following sections of Close Corporation Act govern certain aspects of close corporations, as indicated: 805 ILCS 5/2A.25 (issuance or transfer of shares in breach of qualifying conditions), 805 ILCS 5/2A.31 (corporate option where restriction on transfer held invalid), 805 ILCS 5/2A.40 (shareholders' agreement), 805 ILCS 5/2A.45 (management by shareholders), 805 ILCS 5/2A.50 (shareholders' option to dissolve corporation).

Foreign Corporations.

Except as provided in Art. V of Illinois Insurance Code, foreign corporation organized for profit, before it transacts business in Illinois, must procure authority to do so from Secretary of State; but no foreign corporation may obtain authority under Act to act as trustee, executor, administrator to collect, guardian, or in any other like fiduciary capacity in Illinois or to transact in Illinois business of banking, insurance, suretyship, or business of character of building and loan corporation. Foreign professional service corporation may secure authority to transact business upon (1) demonstrating compliance with act regulating professional services and (2) complying with requirement of Professional Services Corporation Act 805 ILCS 10/1, et seq. concerning ownership and control by specified licensed professionals who must be licensed in state of domicile or Illinois. (805 ILCS 5/13.05).

Except corporation, person or entity required to be chartered, licensed, certified, registered, regulated or supervised under state law other than Business Corporation Act of 1983, foreign corporation authorized by its charter to invest or loan money may without qualifying to transact business in Illinois, invest or loan money, purchase or contract to purchase notes or other evidences of indebtedness or interests therein, secured by any security instrument, including mortgages or trust deeds in nature of mortgages conveying real or personal property in Illinois. Such foreign corporation shall have same rights and powers for recovery, servicing, protection and enforcement, by foreclosure or otherwise, of such notes or other evidences of indebtedness subject to same penalties for usury, as private persons, citizens of Illinois and shall have power to acquire, hold, lease, mortgage, sell, contract with respect to, or otherwise protect or convey property in Illinois heretofore or hereafter assigned, transferred, mortgaged or conveyed to it as security for, or in whole or part satisfaction of indebtedness purchased or owned by it. When sale is made under any judgment, decree or power in mortgage or deed, such foreign corporation may purchase, in its corporate name, property offered for sale, and become vested with title wherever natural person might do so in like cases; provided, however, that in case such corporation shall not, within period of five years after acquiring such title, sell any real estate so acquired it is duty of State's Attorney to proceed by information, in name of People of Illinois, against such corporation, in Circuit Court of county within which such land is situated, and such court has jurisdiction to hear and determine fact, and to order sale of such land or real estate, at such time and place, subject to such rules as court shall establish. Any such acts by foreign corporation are not deemed as “doing business” in state. (815 ILCS 125/1).

Qualification.

Foreign corporation, in order to procure authority, must make application to Secretary of State, executed and filed in duplicate, on forms prescribed and furnished by Secretary of State and also deliver to Secretary of State copy of its articles of incorporation and all amendments thereto, duly authenticated by proper officer of state or country wherein it is incorporated. Thereupon application for authority to transact business in Illinois will be filed, copy of which must be recorded in office of recorder of county where registered office of corporation is located within time prescribed by Act. (805 ILCS 5/13.15, 5/1.10).

If articles of incorporation are amended, corporation must forthwith file in Office of Secretary of State copy of such amendment duly authenticated by proper officer of state or country under laws of which such corporation is organized. (805 ILCS 5/13.30).

License Fees of Foreign Corporations.

Foreign corporation must pay initial license fee and, in some cases, additional license fee. In each case fee is 1/20 of 1%. Basis for initial license fee is amount represented in Illinois of its paid-in capital. Basis for additional license fee, except in case of statutory merger, is increased amount represented in Illinois of sum of its paid-in capital as disclosed by annual report, by any report of issuance of additional shares, or of increase in paid-in capital, without issuance of shares, or of exchange or reclassification of shares. Amount represented in Illinois is that portion of sum of its paid-in capital which sum of: (1) Value of its property located in Illinois and (2) gross amount of business transacted by it at or from places of business in Illinois bears to sum of (1) value of all of its property, wherever located, and (2) gross amount of its business, wherever transacted. License fees are payable to Secretary of State. (805 ILCS 5/15.50, 15.55, 15.60).

Reports.

Foreign corporation must file with Secretary of State annual report on forms prescribed and furnished by Secretary of State within 60 days before first day of corporation's anniversary month. (805 ILCS 5/14.05, 5/14.10). Foreign corporation, within 60 days after: (a) Issuance of any shares not previously reported to Secretary of State as having been issued, (b) increase in paid-in capital, without issuance of shares or (c) exchange or reclassification of shares resulting in increase in paid-in capital, or (d) issuance of any shares of acquiring corporation in share exchange, must file report of such issuance or increase. (805 ILCS 5/14.20). Whenever foreign corporation: (a) Is party to statutory merger and is surviving corporation, or (b) effects acquisition and cancellation of its shares, or (c) effects reduction in its paid-in capital in connection with acquisition and cancellation of its shares, as permitted by Act, and such change is not reported to Secretary of State by any other report required by Act, it must, within 60 days after effective date of such change, file report of changes in paid-in capital. (805 ILCS 5/14.25).

Effect of Failure to Obtain Certificate of Authority.

No foreign corporation transacting business in Illinois without authority may maintain civil action in any court of Illinois, until it has obtained such certificate. However, failure to obtain authority does not impair validity of any contract or act of such corporation, nor prevent it from defending any action at law or suit in equity in any court of Illinois. Foreign corporation which transacts business in Illinois without obtaining authority within 60 days after it commences business in Illinois is liable, for years or parts thereof during which it so transacted business, in amount equal to all fees, franchise taxes, penalties and other charges which would have been imposed by Act on it if it had been duly qualified and had filed all required reports, plus penalty of either 10% of such filing fee, license fee and franchise taxes or $200 plus $5 for each month or fraction thereof in which it has continued to transact business in Illinois without authority therefor, whichever penalty is greater. (805 ILCS 5/13.70).

Revocation of Certificate.

Authority of foreign corporation may be revoked by Secretary of State for number of specified acts. (805–5/13.50).

Withdrawal.

Foreign corporation may withdraw from qualification in Illinois by following statutory procedure. (805 ILCS 5/13.45).

Foreign Insurance Companies.

See category 16 Insurance, topic 16.01 Insurance Companies.

Taxation of Corporate Property.

For purpose of property taxation, corporations are treated as persons. (35 ILCS 200/1-125). Properties of persons and corporations must pay tax in proportion to their respective values. (11 Ill. App. 3d 309, 296 N.E.2d 354). See category 22 Taxation, topic 22.16 Property Taxes.

Fees, Franchise Taxes, and Charges to be Collected by Secretary of State on Domestic Corporations.

Basis for initial franchise tax payable by domestic corporation is amount represented in Illinois of sum of its paid-in capital as disclosed by its first report of issuance of shares. Basis for additional franchise tax, except in case of statutory merger or consolidation, is increased amount represented in Illinois of sum of its paid-in capital as disclosed by any report of issuance of additional shares, or of increase in paid-in capital without issuance of shares, or of exchange or reclassification of shares. Basis for annual franchise tax is amount represented in Illinois of sum of its paid-in capital on last day of third month preceding anniversary month of corporation. Amount represented in Illinois is that proportion of sum of paid-in capital which sum of: (a) Value of its property located in Illinois and (b) gross amount of business transacted by it at or from places of business in Illinois bears to sum of (a) value of all of its property, wherever located, and (b) gross amount of business, wherever transacted, with certain exceptions prescribed by Act relating to election to pay on entire paid-in capital, failure to file annual report, and in case of statutory merger and consolidation. (805 ILCS 5/15.40). There is additional franchise tax in case of statutory merger or consolidation. (805 ILCS 5/15.35).

Franchise taxes are payable to Secretary of State. (805 ILCS 5/15.35).

Fees, Franchise Taxes, and Charges to be Collected by Secretary of State on Foreign Corporations.

For privilege of exercising authority to transact business in Illinois, each foreign corporation must pay certain franchise taxes. (805 ILCS 5/15.65). Foreign corporations are subject to initial, additional in some cases, and annual franchise taxes, at same rate and computed on same bases as franchise tax on domestic corporations. Initial tax based on amount represented in Illinois of paid-in capital as disclosed in application for authority. (805 ILCS 5/15.70). Basis for initial license fee payable by foreign corporation is amount represented in Illinois of its paid-in capital whenever application for authority indicates corporation commenced transacting business in Illinois prior to January 1, 1991. Basis for additional license fee payable by foreign corporation, except in case of statutory merger, is increased amount represented in Illinois of its paid-in capital as disclosed by annual report, by any report of issuance of additional shares, or of increase in paid-in capital without issuance of shares, or of an exchange or reclassification of shares, or of cumulative changes in paid-in capital. However, basis shall not include any increases in its paid-in capital represented in Illinois that occur after both December

31, 1990, and the last day of the third month immediately preceding its anniversary month in 1991.There is generallly additional franchise tax of foreign corporation in case of statutory merger or consolidation. (805 ILCS 5/15.35).

Franchise taxes are payable to Secretary of State. (805 ILCS 5/15.65).

Minimum Annual Franchise Taxes.

Minimum annual franchise tax payable by each domestic corporation is $25. (805 ILCS 5/15.45). Maximum annual franchise tax for domestic and foreign corporations is $ 2,000,000. (805 ILCS 5/15.45, 805 ILCS 5/15.75). Minimum annual franchise tax payable by each foreign corporation is $25. (805 ILCS 5/15.75).

Income Tax.

For taxable years beginning after June 30, 1989, all corporations are subject to 4.8% state income tax. (35 ILCS 5/201). Personal Property Replacement Income Tax, effective July 1, 1979, imposes additional tax on corporations (except S corporations) of 2.85% of net income, reduced to 2.5% of net income Jan. 1, 1981. See category 22 Taxation, topic 22.11 Income Tax.

Professional Service Corporations.

Illinois has adopted Act authorizing formation of professional service corporations. (805 ILCS 10/1 to 10/17). Medical Practice Act allows two or more corporations authorized under Medical Corporation Act to form partnership or joint venture.(805 ILCS 15/1 to 15/18). Professional corporation may only engage in the rendering of one category of professional service or related professional services and may render such professional service or related professional services only through shareholders, directors, officers, agents and employees who are themselves duly licensed in that category of professional service. (805 ILCS 10/15).

Professional Associations.

See topic 2.02 Associations, subhead Professional Associations.

Deeds.

See category 21 Property, topic 21.06 Deeds.

Political Contributions.

Campaign or other political contributions may not be made by organizations licensed to conduct horse race meeting or any concessionaire or officer, director or holder or controller of 5% or more legal or beneficial interest in any such organization or concession. (230 ILCS 5/24).

Not for Profit Corporation Act.

Illinois has enacted "General Not For Profit Corporation Act of 1986." (805 ILCS 105/101.01), which took effect Jan. 1, 1987.

Illinois Administrative Procedure Act.

This Act is incorporated into Business Corporation Act (805 ILCS 5/1.50) and Not for Profit Corporation Act (805 ILCS 105/101.01).2.04

Limited Liability Company Act.

See topic 2.06 Limited Liability Companies.

2.04 Foreign Corporations.

See topic 2.03 Corporations

2.05 JOINT STOCK COMPANIES:

There is no specific legislation dealing with joint stock companies or business trusts other than 765 ILCS 1025/1 to 1025/30, relating to disposition of unclaimed property by joint stock companies and business trusts; and 765 ILCS 1025/2, relating to licensing business trusts to engage in business of renting safety deposit boxes). State income tax defined to include joint stock companies. (35 ILCS 5/1501[a][4]). Purposes for which they may be formed, their rights, powers and liabilities, how they sue or are sued, when and how they may be dissolved, and rights and liabilities of members thereof are governed by case law. See topics 2.02 Associations and 2.03 Corporations.

2.06 LIMITED LIABILITY COMPANIES:

Limited Liability Company Act.

Generally (805 ILCS 180/1-180/60). Effective Jan. 1, 1994.

Formation.

Limited Liability Company can be formed by one or more persons, other than natural persons under 18 years of age, by executing and delivering articles of organization to the Secretary of State Organizers need not be members of limited liability company. Each organizer of limited liability company organized to engage in practice of medicine shall be a licensed physician of Illinois or attorney licensed to practice law in Illinois. (805 ILCS 180/5-1).

Powers.

Each limited liability company organized and existing in Illinois may do all of the following: (1) Sue and be sued, complain and defend, and participate in administrative or other proceedings, in its name. (2) Have seal, which may be altered at pleasure, and use same by causing it, or facsimile thereof, to be impressed or affixed or in any other manner reproduced, provided that affixing of seal to instrument shall not give instrument additional force or effect, or change construction thereof, and use of seal is not mandatory. (3) Purchase, take, receive, lease as lessee, take by gift, legacy, or otherwise acquire, own, hold, use, and otherwise deal in and with any real or personal property, or any interest therein, wherever situated. (4) Sell, convey, mortgage, pledge, lease as lessor, and otherwise dispose of all or any part of its property and assets. (5) Lend money to and otherwise assist its members and employees. (6) Purchase, take, receive, subscribe for or otherwise acquire, own, hold, vote, use, employ, sell, mortgage, loan, pledge, or otherwise dispose of, and otherwise use and deal in and with, shares or other interests in or obligations of other limited liability companies, domestic or foreign corporations, associations, general or limited partnerships, or individuals. (7) Incur liabilities, borrow money for its proper purposes at any rate of interest limited liability company may determine without regard to restrictions of any usury law of Illinois, issue notes, bonds, and other obligations, secure any of its obligations by mortgage or pledge or deed of trust of all or any part of its property, franchises, and income, and make contracts, including contracts of guaranty and suretyship. (8) Invest its surplus funds from time to time, lend money for its proper purposes, and take and hold real and personal property as security for payment of funds so loaned or invested. (9) Conduct its business, carry on its operations, have offices within and without Illinois, and exercise in any other state, territory, district, or possession of United States or in any foreign country powers granted. (10) Elect managers and appoint agents of limited liability company, define their duties, and fix their compensation. (11) Enter into or amend operating agreement, not inconsistent with laws of Illinois, for administration and regulation of affairs of limited liability company. (12) Make donations for public welfare or for charitable, scientific, religious, or educational purposes, lend money to government, and transact any lawful business in aid of United States. (13) Establish deferred compensation plans, pension plans, profit-sharing plans, bonus plans, option plans, and other incentive plans for its managers and employees and make payments provided for therein. (14) Become promoter, partner, member, associate, or manager of any general partnership, limited partnership, joint venture or similar association, any other limited liability company, or other enterprise. (15) Have and exercise all powers necessary or convenient to effect any or all of purposes for which limited liability company is organized. (805 ILCS 180/1-30).

Name.

Shall contain terms “Limited Liability Company”, “L.L.C.” or “LLC,” or, if organized as a low-profit limited liability company, shall contain the term L3C.. Shall not contain “corporation”, “Corp.”, “Incorporated”, “Inc.”, “Ltd.”, “Co.”, “Partnership” or “L.P.” (805 ILCS 180/1-10). Shall not contain any word or phrase indicating authorized or empowered to be in business of corporate fiduciary unless permitted by Commissioner of Office of Banks and Real Estate. May use word “trust”, “trustee” or “fiduciary” if complied with Corporate Fiduciary Act. Shall contain word “trust” if organized for purpose of accepting and executing trusts. (805 ILCS 180/1-10). Low-profit limited liability companies may be organized for limited charitable or educational purposes. (805 ILCS 180/1–26).

Purposes.

Any lawful purpose except banking exclusive of fiduciary organized for purpose of accepting and executing trusts; insurance unless Director of Insurance finds that it is member of group that meets requirements of subsection 3 of §56 of Illinois Insurance Code and limited liability company if insolvent is subject to liquidation by Director of Insurance under Art. XIII of Illinois Insurance Code; or practice of dentistry unless all dentists and managers are licensed under Illinois Dental Practice Act or practice of medicine unless all members and managers are licensed under Medical Practice Act of 1987 or members or managers are registered medical corporation or corporation organized pursuant to Medical Corporation Act; or member(s) are professional corporation organized pursuant to Professional Service Corporation Act; or member(s) are medical limited liability company or corporation. (805 ILCS 180/1-25).

Articles of Organization.

Articles must include: Name and address of LLC, purpose, name of registered agent, name(s) of manager(s) where applicable, names and addresses of the initial member or members if LLC is to be vested in the members under 805 ILCS 180/15-1, latest date if any of dissolution where applicable, name and address of each organizer and any other lawful provision members elect to include for regulation of internal affairs. (805 ILCS 180/5-5[a]).

Filing Articles of Organization.

Limited liability company is organized at time articles of organization are filed by Secretary of State or at any later time not more than 60 days after filing of articles of organization specified in articles of organization. (805 ILCS 180/5-5[b]). Articles of organization for organization of a limited liability company for purpose of accepting and executing trusts shall not be filed by Secretary of State until there is delivered to him or her a statement executed by Commissioner of the Office of Banks and Real Estate that the organizers of the limited liability company have made arrangements with Commissioner of the Office of Banks and Real Estate to comply with Corporate Fiduciary Act. (805 ILCS 180/5-5[c]). Articles of organization for organization of limited liability company as a bank or a savings bank must be filed with Commissioner of Banks and Real Estate or, if bank or savings bank will be organized under federal law, with appropriate federal banking regulator. (805 ILCS 180/5-5[c]).

Whenever any provision of Act requires limited liability company to file any document with Office of Secretary of State, requirement means that all conditions of 805 ILCS 180/5-55 must be met. (805 ILCS 180/5-55).

Registered Office and Registered Agent.

Each limited liability company and foreign limited liability company must continuously maintain in Illinois registered agent and registered office, which agent must be individual resident of Illinois, a domestic corporation, or a foreign corporation having a place of business in, and authorized to do business in, Illinois. If agent is corporation, then corporation must be authorized by its articles of incorporation to act as agent. (805 ILCS 180/1-35[a]).

Member and Manager Liability.

Member or manager is not personally liable for debt, obligation or liability of company solely by reason of being or acting as member or manager. (805 ILCS 180/10-10).

Management.

By member(s) or manager(s) elected by members in manner prescribed by operating agreement or articles. (805 ILCS 180/15-1). Only certain matters require consent of all members. (805 ILCS 180/15-1[C]).

Contribution.

May be cash, property, services rendered, promissory note or other obligation to contribute cash or property, or agreement to perform services. (805 ILCS 180/20-1).

Liability for Contribution.

Member's obligation to contribute money, property or other benefit or to perform services is not excused by member's death, disability or other inability to perform personally. Creditor of limited liability company who extends credit without notice of compromise under §15-1(c) may enforce original obligation. (805 ILCS 180/20-5).

Interest.

Member's interest is personal property. (805 ILCS 180/30-1). Interest transferable but no management or member status is given transferee unless in accordance with authority in operating agreement; unanimous consent of all other members required. (805 ILCS 180/30-10).

Dissolution.

(1) Time or events specified in operating agreement; (2) consent of number or percentage of members specified in operating agreement; (3) event making it unlawful for business to continue, but may be cured within 90 days; (4) upon entry of decree of judicial dissolution; (5) upon equitable judicial determination; or (6) upon administrative dissolution by Secretary of State under 805 ILCS 180/35-25. (805 ILCS 180/35-1).

Suit by Member.

Derivative suit, similar to corporation. (805 ILCS 180/40-1). Where member is successful court may award reasonable expenses to plaintiff and direct plaintiff to remit remainder of proceeds to LLC. (805 ILCS 180/40-15).

Fees.

Various fees charged and collected by Secretary of State: (a) filing articles: $500; (b) amendments: $150; (c) articles of dissolution: $100; (d) application to reserve name: $300; (e) registration of name: $300. (805 ILCS 180/50-10).

Foreign limited liability companies authorized to transact business within Illinois by application to Secretary of State (805 ILCS 180/45-5) and registration (805 ILCS 180/45-20).

Provisions as to transaction of business without admission. (805 ILCS 180/45-45).

2.07 Limited Partnership:

See topic 2.08 Partnerships

2.08 PARTNERSHIPS:

Uniform Partnership Act (805 ILCS 205/1 to 205/43), Uniform Limited Partnership Act prospectively repealed, generally effective Jan. 1, 1990, by Revised Uniform Limited Partnership Act (805 ILCS 210/110 to 210/1205) (repealed 1/1/08). Professional Associations Act (805 ILCS 305/1 to 305/10) adopted.

Revised Uniform Limited Partnership Act (805 ILCS 210/110 to 210/1205) ("Revised Act") shall govern all limited partnerships formed on or after July 1, 1987 (805 ILCS 210/1205). In addition, all foreign limited partnerships shall be governed by Revised Act from and after July 1, 1987. Except as otherwise provided in §1205 of Revised Act, all limited partnerships formed prior to July 1, 1987, under Uniform Limited Partnerships Act, shall continue to be governed by provisions of Uniform Act until Jan. 1, 1990, at which time such limited partnerships shall be governed by Revised Act, subject to certain exceptions. (805 ILCS 210/1205).

Formation.

Formation of partnership generally occurs by association of two or more persons to carry on as co-owners a business for profit whether or not persons intend to form partnership. (805 ILCS 206/202[a]).

Rights and Liabilities of Partners Inter Se.

Partner may maintain action against partnership or another partner for legal or equitable relief, with or without accounting as to partnership business, to enforce partner's rights under partnership agreement or enforce partner's rights created by statute. (805 ILCS 206/405[b]).

Rights and Liabilities of Partners as to Third Persons.

Partnership may be sued in names of partners as individuals doing business as partnership, or in firm name, or both. Unsatisfied judgment against partnership in firm name does not bar action to enforce individual liability of partner. (735 ILCS 5/2-411).

Name.

If persons conduct partnership business under assumed name, certificate setting forth assumed name, names of persons conducting business and business addresses must be filed with county clerk of county in which partnership transacts business and notice of filing published. (805 ILCS 405/1).

Dissolution.

Partnership is dissolved and its business must be wound up only upon occurrence of any of events listed in 805 ILCS 206/801. (805 ILCS 206/801).

Administration of Partnership Property.

In winding up partnership's business, assets of partnership must be applied to discharge its obligations to creditors including, to extent permitted by law, partners who are creditors. Any surplus must be applied to pay in cash net amount distributable to partners in accordance with their right to distributions. (805 ILCS 206/807).

Limited Liability Partnership.

Partnership may become limited liability partnership pursuant to 805 ILCS 206/1001. Terms and conditions on which partnership becomes limited liability partnership must be approved by vote necessary to amend partnership agreement except, in the case of partnership agreement that expressly considers obligations to contribute to partnership, vote necessary to amend those provisions. After such required approval, partnership may become limited liability partnership by filing a statement of qualification with Secretary of State. Statement must contain: (1) name of partnership; (2) street address of partnership's chief executive office and, if different, street address of office in Illinois, if any; (3) name and street address of partnership's agent for service of process; (4) number of partners; (5) brief statement of business in which partnership engages; (6) statement that partnership applies for qualification as limited liability partnership; and (7) deferred effective date, if any, of application for status as a limited liability partnership. (805 ILCS 206/1001).

Agent of limited liability partnership for service of process must be individual who is resident of Illinois or other person authorized to do business in Illinois. Status of partnership as limited liability partnership is effective on later of filing of statement or date specified in statement and receipt by Secretary of State of required fee. Status remains effective for one year after date statement of qualification is filed, regardless of changes in partnership, unless partnership voluntarily withdraws by filing statement of withdrawal, in which event status of partnership as limited liability partnership shall terminate on date such statement is filed or, if later, date specified on statement. (805 ILCS 206/1001).

Name of limited liability partnership must end with "Registered Limited Liability Partnership", "Limited Liability Partnership", "R.L.L.P.", "L.L.P.", "RLLP", or "LLP". (805 ILCS 206/1002).

3 BUSINESS REGULATION AND COMMERCE

3.01 BANKS AND BANKING:

Regulated By.

Banks and Banking are regulated by Illinois Banking Act and Commercial Code.

Uniform Commercial Code has been adopted in Illinois. (c. 810). See topic 3.09 Commercial Code.

Formation Of.

Banks may be formed for purpose of discount and deposit, buying and selling exchange, and doing general banking business, except issuing of bills to circulate as money. (205 ILCS 5/8 to 5/12). Charter must be obtained from state commissioner. (205 ILCS 5/6.1 to 5/12). Bank chartered pursuant to Act subsequent to Nov. 1, 1985 and out of state bank that merges with state bank and establishes or maintains branch in Illinois after May 31, 1997, shall obtain and maintain with Federal Deposit Insurance Corporation, or such other instrumentality or corporation chartered by U.S., deposit insurance as authorized under federal law. (205 ILCS 5/13). Unless otherwise expressly permitted by law, no person, firm, partnership, or corporation may use name similar to existing bank when marketing or soliciting business if similar name used in way causing reasonable person to believe marketing material or solicitation is from existing bank. (205 ILCS 5/46d.1.5).

Reports.

All state banks shall make and publish a full statement of their affairs at least one time during each calendar quarter according to directions from state commissioner. (205 ILCS 5/47).

Stockholder's Liability.

No provision for assessment of liability against stockholders.

Liabilities of Directors and Officers.

Directors or officers of any state bank violating or participating in, or assenting to, or permitting any officer or agent of bank to violate loan, marketable investment securities limitations, affiliate transactions and lease limitations set out in Illinois Banking Act (205 ILCS 5/32, 5/33, 5/34, 5/35.1 and 5/35.2) are personally and individually liable for all damages which bank, its stockholders or any other person sustains in consequence of violation (205 ILCS 5/39). Any state bank, and after May 31, 1997, branch of out of state bank subject to examination by Commissioner or officer, director or employee thereof who makes loan or grants gratuity to bank examiner is guilty of Class A misdemeanor. (205 ILCS 5/40). Any bank or officer shall not condition granting of any loan on borrower contracting with specific person or organization for insurance, legal or real estate services. Violation is business offense punishable by fine of up to $1,000. (205 ILCS 5/48.2). Directors, officers or agents are subject to civil penalties up to $10,000 for violating provision of Act, any order of Commissioner, or any other action which is Commission's discretion, is detriment or impediment to banking. Bank's quarterly statement required to be published within time specified by Commissioner and penalty of $100 per day for first instance of noncompliance may be imposed for noncompliance. (205 ILCS 5/48). See also subhead Confidential Financial Records, infra.

Deposits and Collections.

Deposits in trust by one person (as trustee) for another person (as beneficiary) are permitted, and upon death of depositor/trustee, beneficiary will be sole holder of account. (205 ILCS 625/3). Payable on Death accounts are permitted, and upon death of holder of account, person designated shall be sole owner of account. (205 ILCS 625/4). When deposit is made in names of two or more persons payable to them, such deposit may be paid to any one of said persons whether other or others be living or not, and when agreement permitting such payment is signed by all said persons, receipt or acquittance of person so paid shall be valid and sufficient discharge from all parties to bank for any payments so made. (765 ILCS 1005/2). Bank is liable for deposits made in outside depository from time deposit is made unless notice is provided to depositor in manner provided for in Act that bank's liability begins when deposit is recorded. “Outside depository” defined not to include automatic teller machine or point of sale terminal. (205 ILCS 5/5b). Banks may establish convenience accounts for depositors, which are governed by the Banking Convenience Account for Depositors Act (205 ILCS 720/1 et seq.). Deposits and collections governed by Art. 4 of Commercial Code.

Unclaimed Deposits.

Illinois has adopted Uniform Disposition of Unclaimed Property Act. (765-1025/.05 to 1025/30). Deposits presumed abandoned unless owner has, within five years, increased or decreased amount of deposit or presented passbook for crediting of interest, corresponded in writing with banking organization concerning deposit, or engaged in certain specific activity regarding other funds or loan accounts with bank, or otherwise indicated interest in deposit as evidenced by memorandum on file with bank. See category 21 Property, topic 21.01 Absentees, subhead Escheat. Deposits with definite maturity date not presumed abandoned less than five years after final maturity date and property in individual retirement account not presumed abandoned earlier than five years after owner attains age at which distributions are mandatory. (765 ILCS 1025/2[e]). Money of minor deposited pursuant to 755 ILCS 5/24 not presumed abandoned earlier than five years after minor attains legal age. (765 ILCS 1025/2[f]).

Confidential Financial Records.

No bank may disclose to any person, except customer or his agent, customer's financial records unless customer has authorized such disclosure or in response to lawful subpoena, summons, warrant or court order which has also been served upon customer. Service upon customer may be waived by court for good cause. Negligent violation by bank officer or employee or inducement of violation is business offense punishable by fine up to $1,000. Willful violation punishable by fine up to $100,000. Financial records may be examined by CPA during audit, by agent of specified governmental entities, by other enterprises or consumer reporting agency during regular exchange of credit information. Financial information may be used in tax returns and in published data (where information cannot be identified to particular customer or account), and information concerning dishonor of negotiable instrument permitted to be disclosed under Commercial Code may be furnished. Financial information may be furnished to law enforcement authorities if bank believes it has been victim of crime, and pursuant to Uniform Disposition of Unclaimed Property Act, Illinois Income Tax Act, Illinois Currency Reporting Act (205 ILCS 685/1 et seq.), Federal Currency and Foreign Transactions Reporting Act, Federal Personal Responsibility and Work Opportunity Reconciliation Act or any other statute which requires disclosure of financial records (205 ILCS 5/48.1). Bank may furnish information about existence of account of person to judgment creditor of that person who has made written request for such information.

Bank Holding Companies and Financial Holding Companies.

Bank Holding Companies include corporations, trusts, associations, partnerships, joint ventures, or like (205 ILCS 10/2), which directly or indirectly own or control, or have power to vote 25% or more of voting shares of any class of voting securities of bank or bank holding company; control in any manner election of majority of directors or trustees of bank or bank holding company; for benefit of whose shareholders, members or employees 25% or more of voting shares of bank or bank holding company is held by trustees; or directly or indirectly exercise controlling influence over management or policies of bank or bank holding company as determined by Board of Governors of Federal Reserve System (205 ILCS 10/2).

Change in control and becoming bank holding company restricted. (205 ILCS 10/3.02, 10/3.07). Bank holding company restricted in certain circumstances from acquiring ownership or control of any Illinois bank(s). (205 ILCS 10/3.02). Out-of-state bank holding company may acquire Illinois bank(s) or Illinois bank holding companies provided certain conditions are met. (205 ILCS 10/3.071 to 10/3.074).

Prohibition against acquiring directly or indirectly any voting shares of Illinois bank if, after such acquisition, acquiror will own or control more than 5% of voting securities of such bank. (205 ILCS 10/3.02). Under certain circumstances (including reciprocity), bank holding company which is “Out-of-state bank holding company” may acquire control of Illinois bank, and Illinois bank holding company may acquire control of “Out-of-state bank”. (205 ILCS 10/3.07).

Trust Companies.

Trust companies are governed by provisions of Corporate Fiduciary Act. (205 ILCS 620/1-1 et seq.). Corporation organized to accept and execute trusts shall contain word “trust” in corporate name. No corporation that is not corporate fiduciary shall be allowed to use word “trust”, “trustee” or “fiduciary”. (805 ILCS 5/4.05).

Foreign corporations, including banks, savings and loan associations, and national banking associations domiciled in other states also allowed to act in fiduciary capacity under stated conditions. All such trust companies and authorized foreign corporations empowered absent contractual prohibition to register securities held in fiduciary capacity in name of nominee without disclosing fiduciary capacity, may hold such securities in bulk, and deposit same with a clearing corporation, as defined in Commercial Code Art. 8-102. (810 ILCS 5/8-102; 760 ILCS 75/1 to 75/4).

Uniform Common Trust Fund Act.

Illinois has adopted Uniform Common Trust Act. (760 ILCS 45/1 to 45/7).

Currency exchanges.

Currency Exchanges and ambulatory currency exchanges may be organized to cash checks, drafts, etc., to pay utility and other bills, to issue money orders and travelers cheques and engage in distribution of food stamps. Director of Financial Institutions may authorize currency exchange to render additional services consistent with provisions of Act. License must be obtained from Director of Financial Institutions and bond must be posted. Maximum rate charged for check cashing and writing of money orders not to exceed schedule formulated by Director of Financial Institutions. (205 ILCS 405/19.3).

Predecessor statute 17-4838 held unconstitutional (74 Ill.2d 404, 385 N.E.2d 699]). No deposits may be accepted, exchanges may not act as bailee or agent to hold funds and exchanges may not issue tokens to be used in lieu of money. (205 ILCS 405/1 to 405/30).

Private Banking Prohibited.

No person, firm, partnership, or corporation that is not bank may transact business in manner that has substantial likelihood of misleading public by implying that it is bank or use word “bank,” “banking,” or “banker” in connection with his or its business. (205 ILCS 5/46). Violations are Class A misdemeanor and also subject to Commissioner's cease and desist order plus civil penalty of up to $10,000 for each violation. (205 ILCS 5/46[b]).

Branch Banking.

Banks may establish and maintain branches offering any services permitted at main premises subject to certain limitations as to number of branches (205 ILCS 5/5) and after May 31, 1997, establish and maintain branches in another state that may conduct any activity in that state that is authorized or permitted for any bank that has banking charter issued by that state (205 ILCS 5/5[15][b]). 1968 amendment to Banking Act deleted prohibition on branches in foreign countries. Bank may establish temporary service facility at any International Fair held in State which is approved by U.S. Dept. of Commerce for sole purpose of exchanging foreign currency. (205 ILCS 5/5). Special statutory procedure for adoption of branch banking prescribed by Constitution of 1970. (Art. XIII, §8). Foreign banking corporations permitted to establish single banking office in central business district of Chicago. (205 ILCS 645/1 to 645/19). Automatic teller machines and point of sale terminals, if established and maintained in accordance with Act, do not come under definitions of branch bank or branch office. (205 ILCS 5/5). Location of automatic teller machines is regulated by 205 ILCS 5/5.

Savings and loan associations are regulated by Illinois Savings and Loan Act (205 ILCS 105/1-1 et seq.) and Illinois Financial Institutions Banking Act (205 ILCS 110/1 to 205 ILCS 110/76). Commissioner has power to issue orders requiring correction of harmful conditions and suspending persons when necessary to protect savings and loan association or depositors.

Savings banks are regulated by Savings Bank Act. (205 ILCS 205/1001 to 205/11011, 205/8017).

Remittance agents, as defined, must obtain license from Secretary of State. As of July 1, 1970, subject matter is covered by Vehicle Code of 1969. (625 ILCS 5/2-122).

Financial planning and management services, with designated exceptions, must obtain license from Director of Financial Institutions who receives recommendation from Board of Financial Planning and Management Service Advisors. (205 ILCS 665/1 to 665/22).

Electronic Transfer of Funds.

Electronic Fund Transfer Act in effect to provide ability to complete certain financial transactions through electronic means. (205 ILCS 616/1 et seq.).

Merger.

State bank may, by vote of its board of directors and without vote of its stockholders, merge with another bank (within ten miles distance) in same or contiguous county if Commissioner of Banks, with concurrence of regional director of Federal Deposit Insurance Corporation, agrees that such merger is absolutely necessary for protection of depositors and creditors. (205 ILCS 5/31).

Foreign bank representative officers are authorized and regulated under Foreign Bank Representative Act. (205 ILCS 650/1 to 650/6). Nonresident financial institutions must provide information on nature and extent of activities and income earned in Illinois pursuant to Financial Institution Activity Reporting Act. (205 ILCS 680/1 et seq.).

Credit Agreements.

Nonconsumer debtor may not maintain action on or in any way related to agreement or commitment to lend money or extend credit unless such agreement or commitment is in writing, sets forth relevant terms and conditions, and is signed by creditor and debtor. (815 ILCS 160/2). 815 ILCS 160/3 lists specific actions of creditors that do not give rise to claims or defenses by debtor unless they comply with 815 ILCS 160/2.

Foreign Banks.

No out-of-state savings bank whose main banking premises is located in state other than Illinois may establish branch in Illinois unless: (1) laws of state in which such out-of-state savings bank has its main banking premises permit out-of-state savings bank to establish branch in Illinois; (2) out-of-state savings bank has its main banking premises in state that permits Illinois State savings bank to establish branch in that state pursuant to terms and conditions that are deemed to be reciprocal with provisions of Saving's Bank Act; and out-of-state savings bank obtains a certificate of authority from, or provides proper notice to, Commissioner. Determination of whether laws of state in which out-of-state savings bank has its main banking premises are reciprocal with provisions of this Saving's Bank Act must be made in writing by Commissioner. Commissioner shall not make finding of reciprocity unless Commissioner determines that laws of other state permit Illinois State savings bank to establish a branch in other state under terms and conditions that are substantially similar to provisions of 205 ILCS 205/1006.05. (205 ILCS 205/1006.05).

After out-of-state savings bank lawfully establishes branch in Illinois under 205 ILCS 205/1006.05, out-of-state savings bank may establish and maintain additional branches in Illinois to same extent as Illinois State savings bank. Out-of-state savings bank shall provide written notice to Commissioner of its intent to establish an additional branch or additional branches in Illinois within 30 days after receiving approval from its chartering authority or other appropriate regulatory agency to establish the branch or branches. (205 ILCS 205/1006.05).

3.02 BILLS AND NOTES:

Uniform Commercial Code (c. 810) became effective July 2, 1962; 1972 Official Text became effective July 1, 1973. See topic 3.09 Commercial Code. Article 3 of Code has replaced Uniform Negotiable Instruments Law. Local governments and school districts may issue interest-bearing commercial paper. (30 ILCS 365/1).

Attorney fee clauses are enforceable. (142 Ill. 589, 32 N.E. 495).

Judgment notes recognized (735 ILCS 5/2-1301) and under such note judgment may be entered at any time after its due date, without process, provided that after Sept. 24, 1979, power to confess judgment in any instrument used in “consumer transaction” is null and void. Execution of non-wage garnishment based on judgment by confession without such confirmation is unconstitutional. (343 F.Supp. 1272). Cannot seek deduction order in wage garnishment based upon judgment by confession without service of process unless such judgment confirmed after service of process by trial de novo. (See category 8 Debtor and Creditor, topic Garnishment, subhead Garnishment of Wages, and category 5 Civil Actions and Procedure, topic 5.15 Judgments, subhead Judgment by Confession. See also Prefatory Note to category Debtor and Creditor, topic Garnishment.) Confession clause does not affect negotiability. (810 ILCS 5/3-112).

Form of judgment note which is commonly used is as follows:

Form

. . . ., 20. . . . .

$. . . . .

. . . . after date, for value received . . . . promise to pay to the order of . . . . dollars, at . . . . with interest at . . . . .% per annum.

And to secure the payment of said sum . . . . authorize, irrevocably, any attorney of any court of record to appear for . . . . in said court, in term time or in vacation, at any time hereafter, and confess a judgment without process in favor of the holder of this note, for such amount as may appear to be unpaid thereon, with costs and 5% attorney's fees, and to waive and release all errors in any such proceedings and consent to immediate execution upon such judgment, hereby ratifying and confirming all that said attorney may do by virtue hereof.

. . . . (Signature).

3.03 BILLS OF LADING:

See topic 3.07 Carriers.

3.04 BILLS OF SALE:

See topic 3.23 Sales.

3.05 BLUE SKY LAW:

See topic 3.24 Securities.

3.06 BROKERS:

In General.

Illinois statutes specifically govern law regarding Loan Brokers (815 ILCS 175), Business Brokers (815 ILCS 307), and Real Estate Brokers (225 ILCS 454).

Licenses.

Loan Brokers are required to register in Illinois. (815 ILCS 175/15-10). Certificate of registration will be issued for loan brokers upon meeting statutory qualifications. (815 ILCS 175/15-15[c]).

Every person engaging in business brokering must be registered with Office of the Secretary of State. (815 ILCS 307/10-10).

Real Estate brokers must be properly licensed. (225 ILCS 454/5-15). See infra Real Estate Brokers.

Bond.

Loan broker who engages in any loan brokerage transactions where loan is subject to Truth-in-Lending Act (15 U.S.C.S. § 1601 et seq.) must maintain bond satisfactory to Secretary of State in amount of $ 25,000. (815 ILCS 175/15-15[b]).

Real Estate Brokers.

Real Estate License Act of 2000 (225 ILCS 454/1-1 et seq.) is subject to postponed repeal as of January 1, 2010. (5 ILCS 80/4.20).

Under Real Estate License Act of 2000 (225 ILCS 454/1-1 et seq.), bbroker means individual, partnership, limited liability company, corporation or registered limited liability partnership other than real estate salesperson or leasing agent who for another and for compensation or with intention or expectation of receiving compensation sells, exchanges, purchases, rents or leases real estate, or offers to perform any of these acts, or who negotiates, offers, attempts or agrees to negotiate any of these acts, or who lists, offers, attempts or agrees to list real estate for sale, lease or exchange, or who buys, sells, offers to buy or sell or otherwise deals in options on real estate or improvements thereon, or who supervises collection, offers, attempts or agrees to collect rent for use of real estate, or who advertises or represents himself as being engaged in business of buying, selling, exchanging, renting or leasing real estate, or who assists or directs in procuring or referring of prospects intended to result in sale, exchange, lease or rental of real estate, or who assists or directs in negotiation of any transaction intended to result in sale, exchange, lease or rental of real estate. Salesperson means individual, other than broker or leasing agent, who is employed by broker or associated by written agreement with broker as independent contractor and participates in activity described in definition of “broker”. (225 ILCS 454/1-10). However, Real Estate License Act of 2000 does not apply to persons, partnerships or corporations who as owners or lessors or through regular employees perform any of these acts with reference to property owned or leased by them, where such acts are performed in regular course of or as incident to management, sale or other disposition of such property and investment therein, provided said employees shall not perform any acts described in definition of “broker” in connection with vocation of selling or leasing any estate or improvements thereon not so owned or leased. (225 ILCS 454/5-20[1]). Act also does not apply to attorney in fact acting under duly executed, recorded power of attorney to convey real estate from owner or lessor, or attorney at law in rendering services as attorney at law, or receiver, trustee in bankruptcy, administrator, executor or guardian, or person acting under court order or authority of will or trust instrument, or resident manager for owner or any employee acting as resident manager for broker managing apartment building, duplex, apartment complex, when said manager resides on premises, premise is manager's primary residence, and is engaged in leasing property of which he/she is resident manager, or officer or employee of federal agency, state government or political subdivision performing official duties, or any multiple listing service or other information exchange engaged in collection and dissemination of information regarding real estate sale, lease or exchange, provided no other licensed activities provided and certain additional categories. (225 ILCS 454/5-20[2]-20[14]).

Leasing agent license is limited scope license and is required for those persons who engage in activities relating to leasing of residential real property, and only those activities. (225 ILCS 454/5-5).

Brokerage Relationships in Real Estate Transaction Law.

Governed by 225 ILCS 455/38.1 et seq.

Licensee considered to be representing consumer as designated agent for consumer unless (1) there is written agreement between sponsoring broker and consumer stating different relationship or (2) licensee is performing only ministerial acts. (225 ILCS 454/15-10).

Licensee shall (1) Perform terms of brokerage agreement, (2) promote best interest of client, (3) exercise reasonable skill and care in performing brokerage services, (4) keep confidential all confidential information received from client, (5) comply with all requirements of this Art. and all applicable statutes and regulations. (225 ILCS 454/15-15[a]).

Licensee shall also treat all customers honestly and shall not negligently or knowingly give them false information. When engaged by seller client shall timely disclose to customers who are prospective buyers all latent material adverse facts pertaining to physical condition of property that are actually known by licensee and could not be discovered by customer through reasonably diligent inspection of property. (225 ILCS 454/15-25[a]). Licensees are not responsible for providing false information to customer when such information was provided by client and licensee had no actual knowledge of falsity. (225 ILCS 454/15-25[a]). Broker can perform ministerial acts for customer. (225 ILCS 454/15-25[b]).

No later than entering into brokerage agreement with consumer broker shall: (1) advise of agency relationship that will exist unless written agreement provides otherwise, (2) advise consumer in writing of name(s) of designated agent(s), (3) advise as to broker's compensation and whether that will be shared with other parties to transaction. (225 ILCS 454/15-35[a]). Licensee shall disclose in writing to customer that licensee is not acting as agent for customer at time intended to prevent disclosure of confidential information. Disclosure shall take place no later than offer to purchase or lease real property. (225 ILCS 454/15-35[b]).

Licensee may act as dual agent only with informed written consent of all clients. (225 ILCS 454/15-45[a]). Disclosure form must be presented by licensee to client at time brokerage agreement is entered. (225 ILCS 454/15-45[b]). No cause of action shall arise on behalf of any person against dual agent for making disclosures allowed or required by this Art. Dual agent does not terminate any agency relationship by making allowed or required disclosures. (225 ILCS 454/15-45[d]). There shall be no imputation of knowledge or information among or between clients, brokers, or their affiliated licensees. (225 ILCS 454/15-45[e]). Broker is not considered subagent of client of another broker solely by reason of membership or other affiliation by broker in multiple listing service or other similar information source. (225 ILCS 454/15-55).

Consumer shall not be vicariously liable for acts or omissions of licensee in providing licensed services for or on behalf of consumer. (225 ILCS 454/15-60).

Licensing.

Persons, corporations, limited liability companies, registered limited liability partnership, or partnerships to whom Act applies may not act as brokers or salespersons or leasing agent or advertise or assume to act as such without properly issued sponsor card or license issued by Office of Banks and Real Estate. (225 ILCS 454/5-15[a]). No partnership, corporation, or limited liability company shall be granted license unless every general partner in partnership, every officer of corporation, or every managing member of limited liability company who actively participates in brokerage business holds broker's license and unless every employee who acts as salesperson for such partnership, corporation, or limited liability company holds salesperson's license. No partnership, corporation, or limited liability company will be licensed if salesperson(s) or leasing agent, or group of salespersons or leasing agents control(s) more than 49% of stock or interest. (225 ILCS 454/5-15). All applicants for licenses must be at least 21 years of age and have graduated from high school or equivalent. However, minimum age of 21 years shall be waived for person seeking license as real estate salesperson who has attained age 18 and can provide evidence of successful completion of at least four semesters past secondary school study as full-time student or equivalent, with major emphasis on real estate courses approved by Real

Estate Advisory Council. (225 ILCS 454/5-25[a]). Applicants for broker's license, except applicants admitted to practice law by Supreme Court of Illinois, shall give satisfactory evidence of having completed at least 120 classroom hours in real estate courses approved by Real Estate Education Advisory Council. (225 ILCS 454/5-30). Every person making application for original license as broker or salesperson must pass written examination. (225 ILCS 454/5-35[a]). Applicants for salesperson's license, except those admitted to practice law by Supreme Court of Illinois, must give satisfactory evidence of completion of at least 45 hours real estate courses approved by Real Estate Education Advisory Council, or correspondence course approved by Real Estate Education Advisory Council, and all applicants must pass written examination. (225 ILCS 454/5-35[a]). Expiration date and renewal period for license set by rule. (225 ILCS 454/5-50). Broker shall maintain definite office or place of business for real estate business within State and shall conspicuously display therein license and licenses of all associate brokers and salespersons employed by or associated at that location. (225 ILCS 454/5-45[d]). Completion of six hours of real estate continuing education courses required for renewal of broker or salesperson license. Additionally, broker must complete six hour broker management course approved by OBRE and achieve passing score on test. (225 ILCS 454/5-70[b]).

Refusal to Issue, Renew.

Office of Banks and Real Estate (OBRE) may refuse to issue or renew, may place on probation, may suspend or may revoke any license, or may censure, reprimand or impose civil penalty up to $25,000 upon any licensee for numerous specified causes including misrepresentation, untruthful advertising, failure to account for or to remit monies or documents, failure to maintain separate accounts for monies held for others, failure to properly maintain escrow accounts, various acts constituting “racial steering”, representing broker other than sponsoring broker, inducing party to break contract in lieu of new contract and all others listed in this section. (225 ILCS 454/20-20). Office of Banks and Real Estate conducts hearings on proceedings to suspend, revoke or refuse to issue or renew licenses. (225 ILCS 454/20-60[a]). OBRE final administrative decisions are subject to judicial review pursuant to provisions of Administrative Review Law. (225 ILCS 454/20-75). Criminal penalties are provided for certain conduct. (225 ILCS 454/20-80). Office of Banks and Real Estate has duty on behalf of People of State of Illinois to originate injunction proceedings. (225 ILCS 454/20-80).

Nonresident may be granted broker's license provided he has been actively practicing as broker in home state for at least two years prior to application. Nonresident salesperson employed by or associated with broker holding broker's license in this state may be granted nonresident salesperson's license without examination provided he/she resides in same state as broker with whom he/she is associated, maintains active license there and completes Illinois specific course and test on brokerage laws. (225 ILCS 454/5-60).

Compensation

Licensee must disclose to client sponsoring broker's compensation and policy with regard to cooperating with brokers who represent other parties in transaction. (225 ILCS 454/10-10[a]).

Compensation If Not Licensed.

No recovery for real estate broker or salesperson service unless claimant was duly licensed as broker or salesperson or leasing agent at time of such act or service that would give rise to cause of action for compensation. (225 ILCS 454/10-15).

Statute of Frauds.

There is no provision in Act or in Statute of Frauds (see topic 3.15 Frauds, Statute of) prohibiting recovery on oral listing agreement. However, General Rule VII of rules and regulations adopted by Department provides that all exclusive listing agreements should be written.

Preparation of Documents.

Real estate brokers may fill in blanks of forms of contracts customarily used in community and make appropriate deletions from such contracts to conform to facts. But subsequent preparation of deeds, mortgages and other legal instruments constitutes practice of law. (34 Ill.2d 116, 214 N.E.2d 771).

Real Estate Recovery Fund.

Persons aggrieved by act or omission, representation, transaction or conduct of real estate broker or salesperson who was at time of act or omission apparently acting in such capacity in violation of Act or Office of Banks and Real Estate regulations, or which constitute embezzlement, false pretenses, artifice, trickery or forgery, fraud, misrepresentation, discrimination or deceit and which result in actual cash loss (not merely market value loss) may receive by order of circuit court amounts up to $10,000, plus costs of suit and attorneys' fees not to exceed 15% of recovery order paid from fund. (225 ILCS 454/20-80). However, no person aggrieved by any act, representation or transaction which is in violation of Illinois Real Estate Time-Share Act or, Land Sales Act of 1989 may recover from Real Estate Recovery Fund. (225 ILCS 454/20-80). Failure to name as parties defendant to any action that may result in recovery from Fund any and all individual real estate brokers, real estate salespersons or real estate associate brokers, or their employees, alleged to have committed or be responsible for acts or omissions giving rise to right of recovery from Fund shall preclude recovery from Fund of any portion of judgment received in such action. (225 ILCS 454/20-90). No private right of action for damages exists under Act. (225 ILCS 454/20-125). Maximum liability of Fund arising from activities of any single broker may not exceed $50,000. (225 ILCS 454/20-85). Five year statute of limitations on recovery from Fund. (225 ILCS 454/20-115). License of broker involved is automatically terminated on court order authorizing payment from Fund and broker is not eligible for new license until he has repaid in full prescribed interest. (225 ILCS 454/20-90).

Investment Brokers.

See topic 3.24 Securities.

Insurance Brokers.

See category 16 Insurance, topic 16.01 Insurance Companies.

Warehouse Brokers.

No person is to hold himself out as warehouse broker or to do business as such without first being listed on license application of duly licensed personal property warehouseman; his services as broker are limited to those warehousemen who so list his name and address. (240 ILCS 10/2).

Real Estate Time-Share Brokers.

See 765 ILCS 100/1 et seq.

Commercial Code.

Uniform Commercial Code adopted. (c. 810).

3.07 Bulk Sales:

See topic 3.09 Commercial Code; also category Debtor and Creditor, topic Fraudulent Sales and Conveyances.

3.08 CARRIERS:

Illinois Commerce Commission has general supervision over common carriers of household goods (625 ILCS 5/18c-1104, 5/18c-1201, 5/18-1202), with power to regulate carriers' services, rates, and practices; establish systems of accounting, and reporting and record-keeping requirements; establish systems for classification of carriers, commodities, and services; regulate leasing and interchange of equipment among carriers; establish safety and insurance standards; regulate brokers; adjudicate disputes, complaints, or petitions for relief; and issue certificates (625 ILCS 5/18c-1202). Provision made for proceedings before Commission. (625 ILCS 5/18c-2102 et seq.).

Inquiries may be addressed to Illinois Commerce Commission, 527 East Capital Avenue, Springfield, Illinois 62701.

Local Transit Commission.

Local city transit is governed by local transit commissions, instead of Illinois Commerce Commission. (220 ILCS 5/14-101). One or more municipalities or one or more counties or combinations or portions thereof may also form Mass Transit Districts to operate public transportation systems as municipal corporations; Districts have power to issue revenue bonds, to annex contiguous territory and of eminent domain. (70 ILCS 3610/1 et seq.). Regional Transportation Authority created to provide coordinated mass transportation to six northeastern Illinois counties. (70 ILCS 3615/1.01 et seq.). Authority has power to issue revenue bonds, tax, regulate rates, exercise power of eminent domain and generally operate all modes of mass transit within its jurisdictional area.

Mass transportation in nonurbanized areas also governed by statute, e.g., Downstate Public Transportation Act (30 ILCS 740/1-1 to 740/2-18) and Nonurbanized Area Public Transportation Act (30 ILCS 740/3-1). If the board imposes a retailers' occupation or service occupation tax, it must file a report on funds received. (55 ILCS 5/6–34000).

Uniform Commercial Code adopted. (810 ILCS 5/1-101 et seq.). See topic 3.09 Commercial Code.

Rates.

See supra, subhead Illinois Commerce Commission.

Discrimination.

Discrimination in rates is prohibited (220 ILCS 5/9-241) and, in certain circumstances, unjust discrimination and extortion is punishable by fine (625 ILCS 5/18c-1101 et seq.).

Limiting Liability.

Common carrier may not limit its common law liability safely to deliver property received for transportation by stipulation or limitation in receipt given by it for such property (740 ILCS 25/1) or by any condition in its bill of lading (810 ILCS 5/7-309).

Bills of Lading.

Art. 7 of Uniform Commercial Code governs. (810 ILCS 5/7–101 to 5/7–704)..

Documents of Title

Art. 7 of the Uniform Commercial Code governs documents of title. (810 ILCS 5/7-101 to 5/7-704).

Liens.

Carrier may sell unclaimed articles when charges are unpaid for six months after arrival and owner or consignee cannot be found or when owner or consignee refuses to pay three months charges. Notice of time and place of sale must be given owner or consignee 15 days before sale by mail or publication. Carrier may retain sale proceeds sufficient to pay his charges. (770 ILCS 90/1). Other carriers' liens are covered by Uniform Commercial Code. (810 ILCS 5/7-307 & 5/7-308).

Hazardous Materials.

Transportation of hazardous materials is regulated for rail (625 ILCS 5/18c-7404) and motor carriers (430 ILCS 50/1 et seq., 430 ILCS 30/1 to 30/16).

Motor Vehicle Carriers.

See category 23 Transportation, topic 23.01 Motor Vehicles.

3.09 COMMERCIAL CODE:

Uniform Commercial Code adopted by Act effective 1962. Art. 2A adopted by Act effective 1992. Art. 6 and 9-111 have been repealed effective 1992. Adopted 2000 revision of Article 9, effective July 1, 2001. 1977 Official Text, subject to several amendments, in effect with following exceptions and additions:

(1) addition of 20 ILCS 205/40.23 (§1-104a) which provides that if any provision of Commercial Code conflicts with 20 ILCS 205/40-23 (statute granting priority lien on “grain assets” of warehouseman or grain dealer for benefit of persons holding written evidence of ownership indicating storage obligation), latter statute prevails;

(2) amendment to §2-316(3) to add (d), that implied warranties of merchantability and fitness for particular purpose do not apply to sale of livestock of their unborn offspring;

(3) addition of §3-806 that makes person liable for all costs and expenses, including reasonable attorney's fees, incurred in connection with collection of amount of check where drawer has no account with drawee or insufficient funds; however, no fee or charge may be assessed against anyone other than drawer because drawer does not have account with drawee or because there were insufficient funds at time of presentment unless party charged knew or should have known for reasons such a past history that instrument would not be honored; in addition, a fee or charge may be assessed against any bank or other depository institution or to any noncommercial checking account or other similar noncommercial account;

(4) amendments repealing 5/8-8-308 to 8-320;

(5) addition of §9-205.1, which allows secured party to require that debtor include as part of security agreement list of persons to whom debtor wishes to convey collateral. Conveyances to persons not on list require at least 7 days prior notice to secured party.

Code appears as Chapter 810 ILCS. Section numbers of Illinois Code correspond to those of 1977 Official Text with nine exceptions:

(1) inclusion of §8-403(3)(d);

(2) inclusion of §8-407;

(3) inclusion of §9-306.01.

(4) inclusion of §1-104a;

(5) inclusion of §3-806;

(6) inclusion of §8-320(6), (7);

(7) inclusion of §9-205.1;

(8) inclusion of §306.22i;

(9) inclusion of §3-505A.

None of last nine sections has counterpart in 1977 Official Text.

Following options and alternatives in Official Text have been exercised:

§2-318, Alternative A adopted;

§4-106, Optional phrase omitted;

Alternative A used for clause (b);

§4-212, Optional subsection (2) adopted;

§7-204, Option to refer to local statutes not exercised and optional subsection (4) omitted;

§7-403(1)(b) Optional clause omitted;

§§10-101 through 11-108, Statutory references and effective dates inserted.

For offices for filing and fees under Article 9, see category 10 Documents and Records, topic 10.04 Records, subhead Filing Under Commercial Code—Place; Fees.

Filing Fees.

Secretary of State provides list of filing fees and mailing addresses for UCC documents. See: http://www.cyberdriveillinois.com/departments/business_services/uniform_commercial_code/ucc_faq.html.

Forms.

See end of this Digest. See also: http://www.cyberdriveillinois.com/departments/business_services/uniform_commercial_code/home.html. Effective Oct. 1, 2001, all forms must be typewritten, all in caps and 12 point New Roman font; otherwise, form will be rejected.

See also topics: Banks and Banking, Bills and Notes, Brokers, Carriers, Contracts, Factors, Frauds, Statute of, Sales, Securities, Warehousemen; categories Business Organizations, topic Corporations; Civil Actions and Procedure, topics Accord and Satisfaction, Limitation of Actions; Debtor and Creditor, topics Assignments, Fraudulent Sales and Conveyances, Liens, Pledges; Documents and Records, topics Records, Seals; Mortgages, topic Chattel Mortgages.

3.09A COMMISSION MERCHANTS:

See topic 3.14 Factors.

3.10 CONDITIONAL SALES:

See topics 3.23 Sales and 3.09 Commercial Code.

3.11 CONSIGNMENTS:

See topics 3.14 Factors and 3.09 Commercial Code.

3.11A CONSUMER CREDIT:

Not enacted.

3.12 CONSUMER PROTECTION:

Advertising.

Deceptive Advertising Generally.

Any entity that, with intent to acquire or dispose of property or services, places before public advertisement which is untrue, misleading or deceptive, is guilty of Class A misdemeanor. (720 ILCS 295/1a). Any entity that advertises for sale goods or services with intent not to sell goods or services or not to sell them as advertised is guilty of Class A misdemeanor and may be enjoined from so advertising by state's attorney or attorney general. (720 ILCS 295/1b). Any entity that advertises sale, lease, or use of real estate located outside Illinois may be enjoined from so advertising and is guilty of Class A misdemeanor unless advertisement states proximity of real estate to public schools, public highways, fresh water supply, public sewers, electric power, stores and shops, and telephone service. (720 ILCS 295/1c).

Advertising specifically regulated in following areas: Going out of business and other special sales (815 ILCS 350/3); bankruptcy sales (815 ILCS 350/7); sale of second hand watches (815 ILCS 410/4); claims of availability of periodic payments (815 ILCS 505/2J); coupon sales of merchandise at less than regular price (815 ILCS 505/2J.1); use of automatic price look-up system (815 ILCS 505/2J.2); use of term “bank rates” or “bank financing” in credit advertising (815 ILCS 505/2K); advertising factory authorized services (815 ILCS 505/2M); ophthalmic materials (815 ILCS 385/1 to 385/8); promotion of consumer credit (815 ILCS 405/29.1); retail installment sales of motor vehicles (815 ILCS 375/21 to 375/22.1); sale of franchises (815 ILCS 705/30); gasoline prices (720 ILCS 305/1 to 305/2); cemeteries: advertising of perpetual care (760 ILCS 100/5); eye exams and glasses (815 ILCS 355/1); food products: eggs (410 ILCS 615/6 & 7), food and drugs (410 ILCS 620/2.11), kosher food (410 ILCS 645/1), meat and poultry (225 ILCS 650/13), refrigerated food (240 ILCS 35/9); free prizes, gifts, and gratuities (815 ILCS 505/2P); insurance (215 ILCS 5/148); loans: advertising regulations in connection with bankrupt borrowers (720 ILCS 330/1); mutual benefit associations (215 ILCS 5/335); retailers: prohibition of advertising Illinois sales and use tax discounts (35 ILCS 105/7); schools: advertising prohibitions for private schools (105 ILCS 425/4); serviced items: advertising provisions for items requiring service (720 ILCS 350/1 et seq.); union labeled items: unauthorized advertisement (815 ILCS 425/5); union workers on strike or locked out: advertising restrictions for replacements (820 ILCS 25/1); warehousemen (240 ILCS 10/12). Advertising of consumer loans under $10,000 (205 ILCS 670/18) also are specifically regulated to prevent deception.

Assignment of Wages.

See category 8 Debtor and Creditor, topic 8.01 Assignments.

Automatic Consumer Contract Renewal.

Any person, firm, partnership, association, or corporation that sells or offers to sell any products or services to consumer pursuant to contract where contract automatically renews unless consumer cancels contract must disclose automatic renewal clause clearly and conspicuously in contract including cancellation procedure. (815 ILCS 601/10[a]). Notice requirement is more stringent for contracts renewing for term of 12 months or more. (815 ILCS 601/10[a])

Barber, Cosmetology and Esthetic Act.

No barber, cosmetology or esthetic school shall make false and misleading statements to influence persons to enroll in school. No such school shall fail to make disclosures, refund fees and unearned tuition to student who cancels enrollment agreement or employ certified instructors as required by Act. Violation of these provisions of Act constitutes unlawful practice under Consumer Fraud and Deceptive Business Practice Act. (225 ILCS 410/3B-3).

Chain Referral Sales.

Sales unlawful wherein buyer receives promise of reduced price for supplying seller with names of other prospective buyers, with reduction in price contingent on seller's ability to sell like merchandise to named prospective buyers. (815 ILCS 505/2A).

Consumer Credit Reporting.

No local statutory regulation.

Consumer Fraud and Deceptive Business Practices Act (815 ILCS 505/1 et seq.).—Unfair methods of competition and unfair or deceptive acts including deception, fraud, misrepresentation, concealment, suppression or omission of material fact in conduct of any trade or commerce with intent that others rely thereon, is deemed unlawful practice, regardless of actual reliance or damage. (815 ILCS 505/2). Sale or attempted sale of right to participate in pyramid scheme expressly made unlawful. (815 ILCS 505/2A). When seller physically present at customer's residence sells merchandise involving $25 or more, consumer can avoid transaction by notifying person within three business days following sale and returning merchandise. Three day period does not begin to run until buyer furnished with written “Notice of Cancellation” in statutory form. (815 ILCS 505/2, 505/2B). Right of cancellation does not apply to transactions made pursuant to prior negotiations in visit of consumer to retail business establishment (815 ILCS 505/2B[a]); in which consumer initiated contract and goods or services were needed for personal emergency (815 ILCS 505/2B[b]); consummated entirely by mail or telephone without other contact between consumer and representative prior to delivery of goods (815 ILCS 505/2B[d]); pertaining to sale or rental of real property (815 ILCS 505/2B[e]); to sale of insurance or to sale of securities by broker (815 ILCS 505/2B[f]); or between consumer and residential mortgage loan broker when transaction involves mortgage loan and first contact initiated by consumer or its representative (815 ILCS 505/2B[g]).

If furnishing of merchandise is conditioned upon consumer's providing credit references acceptable to seller, and seller rejects credit application of buyer, seller must return to customer any down payment customer has made. (815 ILCS 505/2C).

If consumer in retail installment sales transaction gives seller negotiable instrument as payment, assignment or transfer of that negotiable instrument does not bar customer from asserting against assignee or transferee any defense he may have against seller unless contract contains notice in statutory form. (815 ILCS 505/2D).

Any person who is regularly engaged in business of providing or furnishing merchandise to consumers or making loans to consumers and who in any calendar year has committed three or more violations of Consumer Finance Act, Consumer Installment Loan Act, Retail Installment Sales Act, or certain other Acts, is guilty of unlawful practice. (815 ILCS 505/2E).

Any person who is held to have wilfully and materially violated any Illinois statute regulating extension of credit to borrowers is guilty of unlawful practice. (815 ILCS 505/2F).

Installment seller who willfully and materially resells goods he has repossessed from buyer in default to person who is not good faith purchaser for value, or with whom seller is in collusion or at price intended to increase amount of deficiency recoverable from defaulting buyer is guilty of unlawful practice. (815 ILCS 505/2G).

No person may make any attempt to collect obligation from spouse of obligor unless spouse cosigned instrument evidencing obligation, or unless obligation is in default at least 30 days, or unless goods or services furnished to obligor are necessities for which spouse would be liable under statute or common law. Person who violates section is guilty of Class C misdemeanor. (815 ILCS 505/2H).

No person may attempt to collect obligation by communicating in any way with employer unless there has been default of payment for at least 30 days and at least five days prior notice of intention to communicate with employer has been given to employee. Violation of section constitutes unlawful practice and violator liable for damages resulting from wrongful communication. (815 ILCS 505/2I).

Any retailer or motor vehicle dealer that issues coupons for purchase of merchandise at less than its regular price must state discount or fact that coupon featured price is “sale” price. (815 ILCS 505/2J.1).

Any retailer using automatic look-up system shall display price information in close proximity to any item which is not individually marked with selling price. (815 ILCS 505/2J.2).

No seller may include in any advertisement statement that goods may be purchased by periodic payments unless statement includes cash sale price (in immediate conjunction with total amount of periodic payments); down payment (if any); number, amount, and due dates or periods of scheduled payments; and rate of charge for credit expressed as annual percentage rate. Violation constitutes unlawful practice. Compliance with Federal Truth in Lending Act is deemed compliance with this section. (815 ILCS 505/2J).

No person engaged in making of loans to consumers or furnishing goods or services to consumers in credit transaction may advertise by using such terms as “bank rates,” “bank financing” or words of like import unless it is bank, banking association or trust company. (815 ILCS 505/2K). It is unlawful to promote or advertise business, product or utility service through use of prizes, gifts, or gratuities unless all material terms and conditions relating to offer are clearly and conspicuously disclosed at outset. (815 ILCS 505/2P). If offer by telemarketing of free goods or services and there is period fee for goods or services after trial period, telemarketer must send invoice to consumer to be used to pay periodic fee or indicate termination of goods/services after free trial period. (815 ILCS 505/2P.1).

Automobile dealers are liable to purchasing consumer for specified portions of cost of repair or replacement of power train components of automobiles for period of 30 days after date of delivery, unless such repairs have become necessary by abuse, negligence, or collision or unless vehicle is specifically sold with no warranty as to mechanical condition and statutory notice thereof is given. Executive's and officials' cars when so advertised must be used exclusively by executives and must not have been sold to public. (815 ILCS 505/2L). No person engaged in performing services on merchandise may advertise such services as factory authorized unless such services are performed by factory authorized personnel. (815 ILCS 505/2M).

Where retail transaction or negotiations thereto result in written contract, different statutory forms must be completed and signed by consumer and interpreter in non-English transaction on which translation by interpreter who is retailer or employee versus other than retailer or employee. Section not applicable to transaction made pursuant to credit card issued to buyer by seller or any third person. (815 ILCS 505/2N). Immigration assistance service is now regulated, including type of service, charging fees, advertising, and registering with Attorney General with proof of malpractice insurance surety bond violation constitutes misdemeanor for first offense and Attorney General has broad power to enforce. (815 ILCS 505/24). Attorney General and State's Attorney are given special powers to enforce Act (815 ILCS 505/3 to 505/7), including acceptance of assurances of voluntary compliance (815 ILCS 505/6.1) and consumer has private right of action (131 Ill.App.2d 434, 266 N.E.2d 183). In interpreting Act consideration should be given to Federal Trade Commission rulings and cases interpreting same. (815 ILCS 505/2). Attorney General and State's Attorney are empowered to investigate and to seek injunctive and other relief prohibiting such practices, restoring property and, in case of substantial and willful violations of consumer protection statutes, receivership, license revocation, and civil penalties up to $50,000 per violation. In case of receivership persons suffering damage may prove such, in which event they may participate with general creditors in distribution of assets to extent of out-of-pocket losses. Claims against persons acquiring property by means of unlawful practice may be filed, subject to court order, in cases of receivership. (815 ILCS 505/3 to 505/9).

Person is not obligated to return or pay for unsolicited goods except where they were misdirected. (815 ILCS 430/1).

Any person damaged by violation of Act can bring action for actual damages or injunctive relief. Proof of public injury, pattern, or effect on consumers is not required. (815 ILCS 505/10a). Court can award attorneys fees and costs to prevailing party. (815 ILCS 505/10a[c]). If party seeking relief against new or used car dealer rejects offer of settlement and court judgment is less than amount offered, court may not award court costs and attorney fees incurred after date of offer. (815 ILCS 505/10a[f]). Action must be filed within three years after cause of action accrued. (815 ILCS 505/10a[e]).

Person who issues check in violation of Criminal Code (720 ILCS 5/17-1) is liable for treble damages between $100-$500 and costs and attorneys' fees.

Consumer Installment Loan Act.

Regulates and licenses lenders of from $800 to $25,000. (205 ILCS 670/1 et seq.).

Credit Cards.

In deciding whether to grant application for credit card, issuer must not base decision solely on race, color, religion, national origin, ancestry, age, sex, marital status, handicap or unfavorable discharge from military service. (815 ILCS 140/1b). Credit card issuer must consider financial status either of individual married person, or of couple, as applicant requests (815 ILCS 140/4); and must furnish, on applicant's request, reasons for any rejection of application (815 ILCS 140/3). Maximum liability for unauthorized use of credit card is $25 if card has signature panel, and $50 if card does not have signature panel for property or services obtained prior to notification of card issuer. (815 ILCS 145/2). Criminal penalties are provided for various misuses of credit cards. (Unsolicited Credit Card Act, [815-150/1]). Credit card issuer must disclose annual interest rate, annual membership fees, grace period for payments and transaction fees and must advise cardholders that Illinois Commissioner of Banks and Real Estate has comparative information on rates, charges, fees and grace periods. (815 ILCS 140/6). Credit card issuer must file with Commissioner statement containing its rates, charges, fees, grace periods and any transaction fee. (815 ILCS 140/7). Violation of Act is Class A misdemeanor. (815 ILCS 140/8).

Credit Life Insurance.

Credit life insurance for loans of less than ten years must be limited to amount of indebtedness (215 ILCS 5/155.54) and to duration of loan plus an additional 15 days (215 ILCS

5/155.55); requires detailed disclosure to debtor (215 ILCS 5/155.56). Debtor must be allowed to substitute his own life insurance in lieu of credit policy suggested by creditor. (215 ILCS 5/155.61).

Debt Collection.

See topic 3.18 Licenses, Business and Professional, subhead Collection Agencies.

Door-to-Door Sales.

When merchandise having cash price of more than $25 is sold to consumer in connection with salesman's direct contact with or call on consumer without consumer's soliciting contact, consumer may avoid sale by notifying salesman and returning merchandise within three business days after receiving notice of right to cancel. (815 ILCS 505/2B). Salesman must provide consumer with contract stating in large letters that consumer has right to cancel contract within three days. Contract must include detachable notice of cancellation. (815 ILCS 505/2B).

Electronic Mail.

No individual or entity may initiate or cause to be initiated unsolicited electronic mail advertisement if electronic mail advertisement uses third party's Internet domain name without permission of third party, otherwise misrepresents any information in identifying point of origin or transmission path of electronic mail advertisement, or contains false or misleading information in subject line. (815 ILCS 511/10).

Garnishments/Wage Deduction Orders.

See category 8 Debtor and Creditor, topic 8.09 Garnishment.

Hearing Instrument Consumer Protection Act.

Hearing instrument sales regulated by Department of Public Health. Full-time graduate students in program of audiology in accredited college or university may dispense hearing instruments without license under supervision of licensed audiologist. (225 ILCS 50/11). Consumer has 30 business day return privilege. Receipt or contract provided to consumer shall state that consumer has right to return instrument for refund. If non-refundable dispensing or restocking fee, terms must be clearly stated on receipt or contract. Hearing instrument dispensers must conduct consumer education programs recommended by Board. (225 ILCS 50/1, 50/4, 50/7, 50/11-50/34). Anyone who knowingly violates provision of this act commits unlawful practice under Consumer Fraud and Deceptive Business Practices Act. (815 ILCS 505/20).

Home Repair and Remodeling Act.

Prior to initiating home repair or remodeling work for over $ 1,000, person engaged in business of home repair or remodeling shall furnish to customer for signature written contract or work order that states total cost including parts and materials listed with reasonable particularity and any charge for estimate. In addition, contract shall state business name and address of person engaged in business of home repair or remodeling. If person engaged in business of home repair or remodeling uses post office box or mail receiving service or agent to receive home repair or remodeling business correspondence, contract also must state residence address of the person engaged in business of home repair or remodeling. (815 ILCS 513/15).

Job Referral and Job Listing Services Consumer Protection Act.

Attorney General is empowered to enforce provisions of this Act which regulate job referrals and job listing services. (815 ILCS 630/5). Every service shall be required to make available to Attorney General various records pertaining to their services. (815 ILCS 630/5). Prior to acceptance of fee, service must provide job seeker with written contract (815 ILCS 630/6) and other documents listed in Act. Contract must contain refund provision in bold face type stating that job seeker is entitled to full refund if service fails to supply at least three employment opportunities within ten calendar days following payment of fee. (815 ILCS 630/8).

Act prohibits false and misleading advertising, representations or dissemination of information as well as listing of jobs requiring illegal acts. (815 ILCS 630/9[2][b]). Violation of any provision under Act constitutes unlawful practice under Consumer Fraud and Deceptive Business Practice Act. (815 ILCS 505/2Z).

Motor Vehicle Installment Sales.

See topic 3.23 Sales.

New Car Buyer Protection Act.

If seller unable to conform new car to express warranties after reasonable number of attempts, manufacturer must provide consumer with comparable car or refund full purchase price. Provision not applicable unless consumer first resorted to manufacturer's informal settlement procedure. Consumer includes one who leases new vehicle for period of at least one year for purpose of transporting self and others, as well as their personal property, for primarily personal, household or family purposes. (815 ILCS 380/1 et seq.). Person who converts, modifies, or alters warranty parts inconsistent with original design is liable for defective parts.

Plain Language.

No “Plain Language” statute.

Pre-Need Cemetery Sales Act.

Sale of pre-need cemetery merchandise, services, and interment is regulated by Pre-Need Cemetery Sales Act. (815 ILCS 390/1 to 390/27).

Rental-Purchase Agreements.

Agreements for lease of consumer merchandise which permit consumer to become owner of merchandise are regulated by “AN ACT relating to rental-purchase agreements”. (815 ILCS 655/1 et seq.). Agreements must be written in plain English and may not contain provisions which: Require confession of judgment; authorize breach of peace in repossession of merchandise; waive rights of consumer; require insurance from merchant; assess certain late charges; or require excessive end-charges for ownership. (815 ILCS 655/2). Agreements must disclose: Whether merchandise is new or used; amount and timing of payments; number of payments and total amount to acquire ownership; amount and purpose of any payment, charge or fee in addition to periodic payments; extent of consumer's liability for loss or damage to merchandise; that consumer does not acquire ownership unless terms of agreement are met; and cash price of merchandise. (815 ILCS 655/2). Advertising of agreements subject to regulated disclosures. (815 ILCS 655/3). Enhanced damages and attorney's fees awarded to consumer for violation of Act. (815 ILCS 655/4). Intentional violation of Act is petty offense. (815 ILCS 655/5).

Replevin.

See category 5 Civil Actions and Procedure, topic 5.21 Replevin.

Retail Installment Sales.

See topic 3.23 Sales.

Travel Promotion Consumer Protection Act.

(815 ILCS 420/1 et seq.). Travel promoter may not advertise air or sea transportation

prior to contracting with carrier for same. (815 ILCS 420/3). Certain disclosures must be made upon receipt of payment for transportation services. (815 ILCS 420/4). If transportation is cancelled through no fault of passenger, all money paid shall be refunded. (815 ILCS 420/5). Promoter must deposit 90% of funds received into insured trust account. (815 ILCS 420/6). Violation of Act is unlawful practice under Consumer Fraud and Deceptive Business Practices Act. See subhead Consumer Fraud and Deceptive Business Practices Act, supra. (815 ILCS 420/7).

Uniform Deceptive Trade Practices Act.

Adopted. (815 ILCS 510/1 et seq.). See topic 3.20 Monopolies, 3.22 Restraint of Trade and Competition.

Unsolicited Goods.

Recipient of unsolicited goods has right to refuse delivery and is not bound to return goods to sender. If goods are addressed to or intended for recipient they are deemed gift to recipient; recipient may dispose of goods in any manner without obligation to sender. (815 ILCS 430/1).

Usury.

See topic 3.19 Interest.

Additional Relevant Consumer Protection Provisions.

Electronic fund provisions (720 ILCS 250/2.14); Fairness in Lending Act provisions (815 ILCS 120/1 to 120/5); fraudulent sale of gold, silver, or coins (720 ILCS 290/1 et seq.); Home Repair Fraud Act (815 ILCS 515/1 et seq.); Motor Fuel Sales Act (815 ILCS 365/0.1 et seq.); ticket scalping (720 ILCS 375/1 et seq.); transient merchants (225 ILCS 465/1 et seq.); Video Movie Sales & Rental Act (720 ILCS 395/1 et seq.); Pay-Per-Call Services Consumer Protection Act (815 ILCS 520/1-520/15).

3.13 CONTRACTS:

Uniform Commercial Code (c. 810) and Uniform Vendor and Purchaser Risk Act (765 ILCS 65/1) adopted. See topics 3.09 Commercial Code, Frauds, Statute of; categories 10 Documents and Records, topic Seals; Family, topic Infants.

With respect to contracts made after Sept. 23, 1971 dealing with construction, agreements to indemnify person for that person's own negligence are void. (740 ILCS 35/1, 35/2). No contract made or sought to be enforced in Illinois is valid if it contains any provision which discriminates against any person on basis of race, color, creed, national ancestry, sex, ethnic or religious grounds or connection with any entity; such provisions are void. (775 ILCS 15/5). Contracts to represent persons in personal injury claims or fire damage claims are subject to provisions of 815 ILCS 640/1, 625/1, which provide that any person who makes agreement with any other person to represent him in his claim for settlement of personal injury claim within five days after occurrence which gave rise to claim may, within 10 day period after occurrence elect to avoid agreement by notifying other person in writing.

3.14 FACTORS:

Factor's liens are now regulated by UCC—Secured Transactions (810 ILCS 5/9-101 to 5/907). See especially 810 ILCS 5/9-109, 5/9-108, 5/9-201, 5/9-203, 5/9-207(2)(a), 5/9-301, 5/9-302(1), 5/9-303(1), 5/9-110, 5/9-401, 5/9-403, 5/9-408, 5/9-307, 5/9-310, 5/9-317, 5/9-205, 5/9-306(5), and 5/9-111. 1972 Official Text of Uniform Commercial Code became effective July 1, 1973. See topic 3.09 Commercial Code.

License Requirements.

Commission merchants must register pursuant to federal commodities law. 810 ILCS 5/9-102[a][17].

Liens.

Necessity of filing or recording notice of factor's liens covered by 810 ILCS 5/9-301 to 9-306.1. (Proper place to file and proper form, see 810 ILCS 5/9-401 to 9-407.)

Consignment Agreements.

Provisions for filing or recording to protect rights of consignor. (810 ILCS 5/2-403, 5/9-408). Consignments of works of fine art. (815 ILCS 320/1 to 320/8).

Prohibition.

Factors prohibited from forming nonprofit consumer credit corporation. (805 ILCS 140/7).

Excluded.

For excluded transactions see 810 ILCS 5/9-104.

3.15 Franchises:

Franchises and Franchising Transactions are governed by Franchise Disclosure Act of 1987 (815 ILCS 705/1 et seq.), which provides each prospective franchisee with information necessary to make intelligent decision regarding franchises being offered for sale and protects franchisee and franchisor by providing better understanding of business and legal relationship between franchisee and franchisor. (815 ILCS 705/2).

3.16 FRAUDS, STATUTE OF:

No action may be brought to charge any executor or administrator to answer any debt or damages out of his own estate, to charge one for the debt or default of another, or on any agreement made on consideration of marriage or not to be performed within one year from the making thereof, unless promise or agreement, or some memorandum thereof, is in writing and signed by person to be charged therewith, or by some authorized person. (740 ILCS 80/1). Consideration need not be expressed in writing, but may be proved by parol or other legal evidence. (740 ILCS 80/3).

Contracts for Sale of Lands.

No action may be brought on any contract for sale of any lands or any interest therein for a longer term than one year, unless such contract or some memorandum thereof is in writing and signed by the party to be charged therewith, or by some other person authorized in writing signed by such party. This does not apply to judicial sales. (740 ILCS 80/2). Contract for sale of land must include names of vendor and vendee, identification of property, price, and terms and conditions of sale, and be signed by parties to be charged, to be specifically enforceable. (404 Ill. 362, 89 N.E.2d 51).

Part Performance.

Part performance may remove realty from Statute of Frauds. (119 Ill. App. 2d 390, 256 N.E.2d 44).

Sales of or Contracts to Sell Personalty.

See Uniform Commercial Code. (810 ILCS 5/2-201, 810 ILCS 5/1-206, 810 ILCS 5/8-319).

See also topic 3.01 Banks and Banking, subhead Credit Agreements.

3.17 [RESERVED]

3.18 INFORMATION TECHNOLOGY, INTERNET AND NEW MEDIA:

In General.

Electronic Commerce Security Act (5 ILCS 175/1-101 through 175/99) focuses on documents in electronic form referred to as "electronic records" and signatures in electronic form, referred to as "electronic signatures." The Act: (1) expressly authorizes use of electronic records and electronic signatures; (2) creates new category of "secure electronic records" and "secure electronic signatures" that is intended to establish legal trust necessary to facilitate and promote electronic commerce; (3) specifies legal rules relating to special type of electronic signature known as a"digital signature;" and authorizes all state agencies to conduct their business electronically.

Digital Signatures.

Information records and signatures shall not be denied legal effect, validity, or enforceability solely on grounds that they are in electronic format. (5 ILCS 175/5-110). Rule of law requiring information to be “written” or “in writing” or providing for certain consequences if it is not, is satisfied by electronic record in most situations. (5 ILCS 175/5-115). Electronic signature can satisfy rule of law except as noted in section. (5 ILCS 175/5-120). Electronic signatures may be proved in any manner, including by showing that procedure existed by which party must of necessity have executed symbol or security procedure for purpose of verifying that electronic record is that of such party in order to proceed further with transaction. (5 ILCS 175/5-120[b]). Rule of law is satisfied as to “original form” in electronic record form if there is reasonable assurance as to integrity of information from time when it was first generated in its final form, as electronic record or otherwise. Criteria for assessing integrity and exceptions to rule are covered. (5 ILCS 175/5-125).

Electronic records can satisfy rule of law on record retention provided electronic record is accessible and useable for subsequent access, information is retained in original format or in format that accurately represents information originally generated or received and origin and destination, authenticity and integrity, and date and time sent or received is retained. (5 ILCS 175/5-135). Secure electronic records and signatures are possible. (5 ILCS 175/10-105). There is rebuttable presumption, in civil dispute, that electronic record has not been altered and is secure electronic signature of person to whom it correlates. (5 ILCS 175/10-120). Except as provided by another applicable rule of law, secure electronic signature is attributable to person to whom it correlates, whether or not authorized, if conditions of this section are met. (5 ILCS 175/10-130).

Computer Crime.

Certification authority may issue certificate to prospective subscriber for purpose of allowing third parties to verify digital signatures created by subscriber. (5 ILCS 175/15-310.) Fraudulent uses or creation of certificate is Class 4 felony. (5 ILCS 175/15-210). Misrepresentation of identity or authorization in requesting or accepting certificate is Class A misdemeanor. (5 ILCS 175/15-215). Certificates can be revoked pursuant to 5 ILCS 175/15-320. Revocation and notice to repositories are also covered. (5 ILCS 175/20-110). State agency use of electronic records and signatures. (5 ILCS 175/25-101, 25-105 and 25-115).

Evidentiary information in form of electronic record shall be given due evidentiary weight by trier of fact. In assessing evidential weight of electronic record or signature, trier of fact may consider manner in which signature was stored, generated or communicated. (5 ILCS 175/5-130).

Government Agencies.

Each State agency must determine if and the extent to which it will send and receive electronic records and electronic signatures to and from other persons and otherwise create, use, store, and rely upon electronic records and electronic signatures. (5 ILCS 175/25-101).

3.193.16

3.17 INTEREST:

Maximum Rate.

In absence of written contract on loan of money, goods, or things in action legal rate is 5% per annum. (815 ILCS 205/1; 76 Ill.2d 427, 394 N.E.2d 380). Statute provides that creditors may receive interest at rate of 5% per annum: (a) On any sum after due date on any bond, bill, promissory note or other instrument of writing, (b) on money lent or advanced for use of another, (c) on money due on settlement of account from day of liquidating accounts between parties and ascertaining of balance, (d) on money received to use of another and retained without owner's knowledge, and (e) on money withheld by unreasonable and vexatious delay of payment. In general, rate of 9% per annum is lawful. (815 ILCS 205/4).

No contract for installment purchase of residential real estate or note evidencing loan secured by residential real estate may provide for any change in contract rate of interest during its term, unless Congress or federal agency authorizes lenders to make such contracts or notes in which rate of interest may be changed during their term. (815 ILCS 205/4). Greater rates may be specified under terms of Consumer Installment Loan Act (205 ILCS 670/1 to 670/27); revolving credit rate is 1 1/2% per month or less except banks, branch of out-of-state bank as defined in 205 ILCS 5/2, savings and loans, credit unions and lenders licensed under Consumer Finance Act, Consumer Installment Loan Act or Sales Finance Agency Act (205 ILCS 660/1 to 660/17) may contract for and receive any rate agreed by parties to revolving credit arrangement (815 ILCS 205/4, 205 ILCS 670/1 to 670/27, 815 ILCS 205/4.1, 205/4.2); certain short-term loans (six months or less) may bear maximum charge of $15 in lieu of interest and certain other charges not deemed to be interest (815 ILCS 205/4.la). Any rate is permitted with respect to following: Written contracts, agreements or bonds for deed providing for installment purchase of real estate; loans secured by mortgage on real estate; where corporation is debtor; in case of demand loan of not less than $5,000 secured by warehouse receipts, bills of lading, certificates of stock, certificates of deposits, bills of exchange, bonds, or other negotiable instruments pledged as collateral for repayment; on any credit transaction between merchandise wholesaler and retailer; on certain business loans to business associations or to persons owning and operating businesses (with some limitations on collateral); on any loan made under 12 U.S.C. §1702 et seq.; on any mortgage loan guaranteed under provisions of Veteran's Benefits Act (38 U.S.C. §3710); on any loan insured under 12 U.S.C. §1701; for interest charged by registered broker or dealer of investment securities on debit balance in account for customer if such balance is payable at will without penalty and is secured by securities; loan by employee pension benefit plan, as defined by Employee Retirement Income Security Act of 1974; any loan made by participating bank as part of any loan guarantee program which provides for loans and for refinancing of such loans to medical students, interns, and residents and which are guaranteed by American Medical Association Education and Research Foundation; and any loan made, guaranteed, or insured in accordance with provisions of Housing Act of 1949 and Consolidated Farm and Rural Development Act. (815 ILCS 205/4). Except in case of loans described in third, fifth, sixth, seventh, eighth, and 12th phrases of preceding sentence, it is unlawful to provide for repayment penalty wherever rate of interest exceeds 8% per annum on any written contract for installment purchase of residential real estate or on any loan secured by mortgage on residential real estate. State bank may charge interest at any rate or rates agreed upon by bank and borrower. (815 ILCS 205/4).

On money loaned to or owing from any person (except for purchase of real estate which is secured by lien or retention of title) to amount not more than $25,000 (excluding interest) which is evidenced by written instrument providing for payment in two or more periodic installments over period of not more than 181 months from date of execution, it is lawful to contract to receive: (i) Interest in amount equivalent to interest computed at rate not exceeding 9% per annum on entire principal amount and to add that amount to principal, except no limit on rate of interest which may be received or contracted to be received by banks, after May 31, 1997, branch of bank, savings and loans or lenders licensed under Consumer Finance Act, Consumer Installment Loan Act or Sales Finance Agency Act, but debtor may satisfy such debt in full at any time before maturity in which case debtor is entitled to receive pro rata refund credit against total amount of interest added to principal, or (ii) interest accrued on principal balance from time to time unpaid at rate not exceeding annual percentage rate equivalent of rate permitted to be charged under clause (i) above, but debtor may at any time prepay principal balance in full or in part in which case interest shall cease to accrue on amount prepaid. (815 ILCS 205/4a).

On retail installment charge agreements executed after Sept. 25, 1991, there is no limit on finance charges which may be charged or received. Annual notification of finance charges is required. (815 ILCS 405/28.1). On contracts executed after Sept. 25, 1981 there is no limit on finance charges which may be charged or received on motor vehicle installment retail contracts. (815 ILCS 375/21). Other credit sales are not subject to interest regulation (111 Ill. App.3d 953; 444 N.E.2d 818) unless considered disguised loans (273 Ill. 332, 112 N.E. 988).

Disclosure Requirements.

Compliance with Federal Truth in Lending Act deemed compliance with disclosure requirements of general interest Act (815 ILCS 205/4.2), Consumer Installment Loan Act (205 ILCS 670/1), Motor Vehicle Retail Installment Sales Act (815 ILCS 375/5, 375/22.1), Consumer Fraud and Deceptive Business Practices Act (815 ILCS 505/2J), An Act relating to issuance and use of credit cards (815 ILCS 140/6), Financial Services Development Act (205 ILCS 675/1).

Judgments.

Interest rate of 9% per annum recoverable on every judgment from date of recovery of judgment to date of payment or 6% when judgment debtor is unit of local government or school district or community college district. However, judgment debtor, by tender of payment of judgment, costs and accrued interest to date of tender, can stop further accrual of interest on same notwithstanding prosecution of appeal or other action to reverse, vacate or modify judgment. (735 ILCS 5/2-1303).

Open Accounts.

Interest treated as per annum if no other time period is mentioned. (815 ILCS 205/9). Month is calendar month, and year consists of 12 calendar months. In computations for any number of days less than month, day is one thirtieth of month. (815 ILCS 205/10).

Pawnbrokers.

Pawnbrokers may charge 3% per month. (205 ILCS 510/2).

Consumer Installment Loans.

On loans not exceeding $40,000, licensees of Department of Financial Institutions may charge interest at any rate or rates agreed upon by licensee and borrower, subject to provisions of Act. Act does not apply to payday loans. (205 ILCS 670/15; 205 ILCS 670/21).

Home Improvement Loans.

No disbursement of funds pursuant to loan for improvement or repair of residential construction shall be made without receipt of completion certificate (815 ILCS 135/1). No funds may be disbursed in excess of amount of labor performed and materials delivered as certified in completion certificate (815 ILCS 135/4). Violation of act carries fine not to exceed $1,000. (815 ILCS 135/6). Home improvement retail installment contracts are subject to Retail Installment Sales Act rates. (815 ILCS 405/21 & 405/2.2).

Reverse Mortgage Loans.

Bank, association or credit union, in making reverse mortgage loan, may add deferred interest to principal or otherwise provide for charging of interest or premium on such deferred interest except extensions of credit secured by residential real estate subject to laws applicable thereto. (205 ILCS 105/1-6a; 205 ILCS 305/46).

Usury.

Usury subjects recipient to suit for twice the total of all interest, discount, and charges determined by the loan contract or paid by obligor, whichever is greater, plus attorneys fees and court costs. (815 ILCS 205/6). To constitute defense or partial defense to action for money loaned, usury must be pleaded. (815 ILCS 205/7). Savings and loan associations are not subject to usury claim or defense. (205 ILCS 105/6-10).

Statute on usury applies, on its face, to any written contract, wherever payable, made in Illinois or to which citizen or corporation of Illinois is a party or which is secured by mortgage or trust deed on land in Illinois and interest applied must not exceed lawful rate. (815 ILCS 205/8). Supreme Court of Illinois has held that foregoing provision cannot be constitutionally applied to contracts made outside Illinois unless foreign legal rate is less than Illinois rate. (250 Ill. 543, 95 N.E. 631).

3.18 [RESERVED]

3.19 LICENSES, BUSINESS AND PROFESSIONAL:

State licenses are required for numerous occupations, professions and activities. Corporate authorities of cities, villages and incorporated towns are empowered by statute to license numerous occupations and activities. (65 ILCS 5/11-42-1). No license is required of commercial travelers. Conduct of bingo games by certain nonprofit organizations is lawful, subject to licensing and upon payment of annual fee of $200. (230 ILCS 25/1). Hospital Licensing Act at 210 ILCS 85/1 to 210 ILCS 85/16. Riverboat gambling operations authorized subject to licensing. (230 ILCS 10/1).

Collection Agencies.

Activities of collection agencies governed by Collection Agency Act. (225 ILCS 425/1 et seq.). Statute set for repeal on Jan. 1, 2016. (5 ILCS 80/4.26). No collection agency may in any way do business in Illinois without first obtaining certificate of registration from Director of Department of Registration and Education unless agency's activities in this State limited to collecting debts from debtors by interstate communication including telephone, mail or facsimile from agency's location in another State if licensed in that State and reciprocal arrangement for Illinois agencies in that State. (225 ILCS 425/4). Engaging in collection of debts without valid certificate is Class A misdemeanor. (225 ILCS 425/14). Collection agency may qualify to obtain certificate or renewal certificate if officers are citizens of U.S. or lawfully admitted aliens over age of 18 years, have had at least one year experience working in credit field or related area, have not been convicted of crime involving moral turpitude, have acceptable credit rating, have no unsatisfied judgments, and have not been officers of former registrant under Act whose certificates were suspended or revoked without subsequent reinstatement. (225 ILCS 425/7). Registered collection agency must file surety bond in amount of $25,000. No action on bond may be commenced more than one year from date creditor obtains judgment against collection agency. (225 ILCS 425/8).

Collection agency may assign account for collection provided assignment is by written agreement specifically stating effective date of assignment and consideration for assignment, and consideration must be given prior to effective date of assignment and not be contingent upon settlement or outcome of litigation. Each licensed agency office shall maintain separate bank account in which all monies received on assigned claims must be deposited, referred to as “Trust Account”. (225 ILCS 425/8b-8c).

It is unlawful under Act, while collecting or attempting to collect debt, to communicate with debtor or any member of his or her family, without prior consent of debtor given directly to debt collector or express permission of court of competent jurisdiction, at any unusual time or place or time or place known or which should be known to be inconvenient to debtor. In absence of knowledge of circumstances to contrary, debt collector shall assume that convenient time for communicating with consumer is after eight o'clock a.m. and before nine o'clock p.m. local time at consumer's location. Also unlawful is threat of publication or publication of list of consumers who allegedly refuse to pay debts, except to consumer reporting agency, threat of advertisement or advertisement for sale of any debt to coerce payment of debt, and causing telephone to ring or engaging any person in telephone conversation repeatedly or continuously with intent to annoy, abuse, or harass any person at called number. Private right of action for damages may be founded upon violation of unlawful collection practices enumerated in Act. (74 Ill. App. 3d 21, 392 N.E.2d 154).

Department may refuse to issue or renew or may revoke, suspend, or take other disciplinary action including fines not to exceed $5,000 for first violation and not to exceed $10,000 for subsequent violation for any of following: (1) Violation of Act or its rules; (2) conviction of collection agency or its principals of any felony, of misdemeanor where dishonesty involved; (3) making any misrepresentation for purposes of obtaining license; (4) habitual or excessive use or addiction to alcohol or any chemical agent making principal unable to practice with reasonable skill, safety or judgment; (5) discipline by another U.S. jurisdiction or foreign nation, if at least one ground is substantially equivalent to those set forth in Act; (6) finding by Department that license on probation violated probation terms; (7) practicing under name other than on license; or (8) finding by Federal Trade Commission that license violated Federal Fair Debt and Collection Act (15 U.S.C. §1692 et seq.) plus 23 additional enumerated violations (225 ILCS 425/9).

Act creates Collection Agency Advising Board composed of five members employed in collection agency registered under Act and two members representing general public. Board members receive no compensation, and shall be constituted in order to make suggestions to Director on matters affecting collection agencies. (225 ILCS 425/13.1).

Collection agency or employee who knowingly, while attempting to collect debt, makes telephone call to debtor designed to harass, annoy or intimidate commits business offense of disorderly conduct punishable by fine not to exceed $3,000. (720 ILCS 5/26-1[b]). In addition to fine, court shall order person convicted to perform community service of not less than 30 and not more than 120 hours if community service is available and funded by county board where offense committed. (720 ILCS 5/26-1[c]).

Collection agency or employee who while attempting to collect debt represents he is person authorized by statute to enforce law or court order; threatens to adversely affect debtor's credit rating without disclosing right to inspect credit rating; misrepresents to debtor or family business name under which engaging in debt collection or adds illegal fees or charges to existing debt; or accepts payment knowing it is not owed, commits business offense of deceptive collection practice punishable by fine not to exceed $3,000. (720 ILCS 5/17-5).

Health and Medical Licenses.

See category Health, topic Licensure and Certification.

3.20 MONOPOLIES, RESTRAINT OF TRADE AND COMPETITION:

Antitrust Act.

Illinois Antitrust Act has been adopted, effective July 21, 1965. (740 ILCS 10/1 et seq.).

Violations.

Persons violate Act who:

(1) Make any contract or engage in any combination or conspiracy with any other person who is or except for prior agreement would be competitor of such person: (a) fixing prices or rates charged for any commodity sold or bought, or any service performed or received by parties; (b) controlling, limiting, or discontinuing production, manufacture, mining, sale or supply or any commodity, or sale of any service, having effect of price-fixing; (c) allocating or dividing customers, territories, markets, either functionally or geographically, relating to any commodity or service; or

(2) By contract, combination, or conspiracy unreasonably restrain trade or commerce; or

(3) Establish, maintain, use or attempt to acquire monopoly power over any substantial part of trade of this State for purpose of excluding competition or controlling, fixing, or maintaining prices; or

(4) Lease or sell goods or services upon condition that purchaser not deal with competitor of seller where effect of such lease or sale may substantially lessen competition or tend to create monopoly; or

(5) Enforce, attempt to enforce, or further, while employee, officer or agent of foreign government or of company doing business with foreign government or instrumentality thereof, any discriminatory practice of foreign government based on race, color, creed, national ancestry, sex, ethnic or religious grounds when conduct or agreement takes place in U.S. and affects business in state. (740 ILCS 10/3).

Exclusive dealing contract does not violate this Act absent proof of a substantial lessening of competition in relevant competitive market. (14 Ill. App.3d 141, 302 N.E.2d 79).

Definitions.

“Trade or commerce” includes all economic activity involving any commodity or service. “Commodity” means any kind of real or personal property. “Service” means any activity not covered by definition of “commodity,” performed in whole or in part for purpose of financial gain including master or cable television services. “Service” does not include labor performed by natural persons as employees. (740 ILCS 10/4).

Exceptions.

The Act excepts the following: (1) legitimate activities of labor organizations; (2) activities of agricultural or horticultural co-operative organizations; (3) activities of public utilities or telecommunication carriers subject to jurisdiction of Illinois Commerce Commission, or activities of telephone mutual concerns; (4) regulated activities of insurers, subject to regulation by Director of Insurance; (5) religious and charitable activities of not-for-profit corporations and organizations, established exclusively for religious or charitable purposes; (6) activities of telephone or electrical service co-operatives, operating not-for-profit; (7) activities of securities dealers who are licensed by State or are members of National Association of Securities Dealers or members of any National Securities Exchange registered with the Securities and Exchange Commission, in business of offering, selling securities as agent, broker, or principal, including establishment of commission rates and schedules of charges; (8) activities of any board of trade designated as “contract market” by Secretary of Agriculture; (9) activities of motor carriers regulated by Illinois Commerce Commission; (10) activities of state or national banks to extent that activities are regulated under banking laws of this state or United States; (11) regulated activities of state or federal savings and loan associations; (12) fee schedules, to be used solely as guidelines by enumerated professions; (13) certain conduct involving trade or commerce (other than import trade or commerce) with foreign nations; (14) activities of units of local governments and their employees and of school districts and their employees. (740 ILCS 10/5).

Prosecutions.

Persons knowingly doing any act prohibited by (1)(a), (b) and (c) and (4) under catchline Violations, supra, commits Class 4 felony and may be fined up to $100,000 or $1,000,000 if corporation. Prosecution must be commenced within four years of commission of offense. No prosecution may be commenced against any defendant who, at that time, is defendant in action filed by U.S. for violation of Federal Antitrust laws. (740 ILCS 10/6).

Investigations.

Attorney General may subpoena documents and witnesses (740 ILCS 10/7.2 to 10/7.6), and may appear before grand jury (49 Ill.2d 403, 273 N.E.2d 835), in investigating violations. Privilege against self-incrimination may not be invoked, and actions brought by Attorney General based on compelled testimony are prohibited. (740 ILCS 10/7.7). But testimony to grand jury convened by court, even if at request of Attorney General, is admissible in prosecution under Act. (28 Ill. App. 3d 622, 329 N.E.2d 28).

Civil Actions.

Civil remedies are provided by Act:

(1) Attorney General may sue to prevent and restrain acts prohibited under catchline Violations, supra. Court may exercise all equitable powers necessary, including injunction, divestiture, dissolution, and suspension or termination of foreign corporation's right to do business in state.

(2) Attorney General may sue on behalf of people of state in lieu of penalty otherwise prescribed by Act, but in addition to suit under (1) above, against any person, foreign or domestic corporation, trustee, director, manager or officer or agent of corporation for penalty up to $100,000 or up to $1,000,000 for corporation, for acts committed in violation of any provision of Act.

(3) Any person who suffers or may suffer injury by acts prohibited under sections (1), (4) and (5) of catchline Violations, supra, may sue for treble damages, injunction, or both and costs and reasonable attorney's fees.

(4) Any person who suffers or may suffer injury by acts prohibited under sections (2) and (3) of catchline Violations, supra, may sue for actual damages, injunction, or both and costs and reasonable attorney's fees, and if violation found willful, court has discretion to award up to three times amount of actual damages.

(5) For purposes of (3) and (4) above, “person” includes state, counties, municipalities, townships and other political subdivisions. Attorney General also may sue on their behalf to recover damages provided under (3) and (4) above or any comparable Federal Law. (740 ILCS 10/7). Actions by indirect purchasers are not barred.

(6) Judgment in defendant's favor in suit brought by Attorney General under (2) above bars subsequent private suit for same cause. (18 Ill. App.3d 884, 310 N.E.2d 710). Judgment for defendant in damage actions gives court discretion to avoid attorneys fees if action commenced in bad faith.

Per Se Violations.

Conduct described under (1) of catchline Violations constitutes per se violation of Act. All other conduct judged by federal “reasonableness” test, irrespective of federal common law characterizations. (36 Ill. App.3d 730, 345 N.E.2d 18).

Prima Facie Evidence.

Final judgment or order rendered in any civil or criminal proceeding brought by Attorney General under Act to effect that defendant has violated Act is prima facie evidence in action brought by other person against that defendant under (3)-(5) of catchline Civil Actions, supra, as to matters that judgment or order would be estoppel between parties thereto. Section does not apply to civil consent judgments or orders entered before taking of testimony. (740 ILCS 10/8).

Limitations.

Four-year limitation on criminal prosecutions. (740 ILCS 10/6). Four year limitation on actions brought under (2)-(5) of catchline Civil Actions, supra, but suit by Attorney General for violation of Act tolls statute with respect to every private right of action for damages based in whole or part on matter in Attorney General's suit during pendency thereof and for one year thereafter. (740 ILCS 10/7).

Common Law Conspiracies.

Conduct which violates Act not actionable as conspiracy at common law. (740 ILCS 10/9).

Fair Trade Laws.

See category 17 Intellectual Property, topic 17.01 Trademarks and Tradenames, subhead Fair Trade Act.

Federal Antitrust Law.

When language of Act is similar to federal antitrust law, state courts to follow construction given to federal law in federal courts (740 ILCS 10/11), but not compelled to do so (21 Ill. App.3d 97, 315 N.E.2d 124). State exemption from Federal Antitrust Laws available to municipalities and their agents, officers and employees acting within authority. (65 ILCS 5/1-1-10).

Repeals.

Act repeals Illinois Antitrust Act of 1891, and Antitrust Act of 1893 (Laws 1893, p. 182).

See also topics: Banks and Banking, Brokers, Carriers, Consumer Protection, Securities; categories Business Organizations, topics Associations, Corporations; Civil Actions and Procedure, topics Injunctions, Limitation of Actions; Employment, topic Labor Relations; Intellectual Property, topic Trademarks and Tradenames.

Deceptive Trade Practices.

The Uniform Deceptive Trade Practices Act has been adopted. (815 ILCS 510/1 to 510/7).

Acts Prohibited.

A person engages in a deceptive trade practice when, in course of his business, vocation or occupation, he: passes off goods or services as those of another; causes likelihood of confusion or of misunderstanding as to source, sponsorship, approval or certification of goods or services or as to affiliation, connection or association with or certification by another, except when any trade identification was used in good faith and not abandoned prior to January 1, 1966; uses deceptive representations or designations of geographic origin in connection with goods or services; represents that goods or services have sponsorship, approval, characteristics, ingredients, uses, benefits or quantities that they do not have or that a person has a sponsorship, approval, status, affiliation or connection that he does not have; represents that goods are original or new if they are deteriorated, altered, reconditioned, reclaimed, used or secondhand; represents that goods or services are a particular standard, quality or grade or that goods are a particular style or model, if they are of another; disparages goods, services or business of another by false or misleading representation of fact, advertises goods or services with intent not to sell them as advertised; advertises goods or services with intent not to supply reasonably expectable public demand, unless advertisement discloses limitation of quantity; make false misleading statements of fact concerning reasons for, existence of or amounts of price reductions; engages in any other conduct which similarly creates likelihood of confusion or of misunderstanding. Complainant need not prove competition between parties or actual confusion or misunderstanding. (815 ILCS 510/2 to 510/4). Conduct creating likelihood of confusion is not limited to practices used to effect sale but also reaches practices used in financing of sale. (340 F.Supp. 1095). In measuring unfairness regarding business practice, Illinois courts recognize the influence of following factors in determining what constitutes unfairness: (1) whether practice offends public policy, (2) whether it is immoral, unethical, oppressive, or unscrupulous, and (3) whether it causes substantial injury to consumers. Although though consumers do not have to establish all three factors, their failure to show that any of thos factors applied generally means dismissal of their complaint for failure to show that Deceptive Business Practices Act violation would be proper. (201 Ill. 2d 403, 266 Ill. Dec. 879, 775 N.E.2d 951).

Injunctive Relief.

In addition to remedies provided under the common law or other Illinois statutes, injunctive relief is available to a person likely to be damaged by a deceptive trade practice without proof of monetary damage, loss of profits or intent to deceive. (815 ILCS 510/3). Where allegations of complaint based on deceptive trade practice are denied in answer preliminary injunction may not be issued without hearing. (129 Ill. App.2d 181, 262 N.E.2d 713). Injunction not proper where alleged confusing names are composed of generic terms, unless secondary meaning is shown. (39 Ill.App.3d 73, 350 N.E.2d 109). Costs and attorneys' fees may be assessed against a defendant whose deceptive trade practices are willful. (815 ILCS 510/3).

Inapplicability of Act.

The act does not apply to conduct in compliance with orders, rules or statutes administered by any governmental agency; or persons engaged in the dissemination of information or reproduction of printed or pictorial matter without knowledge of its deceptive character. (815 ILCS 510/4).

Scope of Protection.

Act does not provide relief from past conduct or sales. (47 Ill. App.3d 266, 361 N.E.2d 815). Protection against false representations extends only to non-functional aspects of goods

(46 Ill. App.3d 145, 360 N.E.2d 798) and injunction not proper, where alleged confusing names are composed of generic terms, unless secondary meaning is shown (39 Ill. App.3d 73, 350 N.E.2d 109).

Class Actions.

Consumer class action alleging only past and not future injury is improper under Act. (47 Ill. App. 3d 266, 361 N.E.2d 815). Class representative may not act as attorney in same suit. (45 Ill. App.3d 494, 359 N.E.2d 886).

Consumer Buying Clubs.

Misrepresentations by consumer buying clubs or club membership salesmen that mislead purchaser violate Act (46 Ill. App. 3d 252, 361 N.E.2d 1370) irrespective of intent of seller (46 Ill. App.3d 270, 361 N.E.2d 1383).

Damages.

No private right of action for damages is created by this Act (47 Ill. App. 3d 266, 361 N.E.2d 815) but damages or other relief may be available under other statutes and common law. See topic 3.12 Consumer Protection.

Fraudulent Advertising and Consumer Fraud.

See topic 3.12 Consumer Protection.

Instructional Materials.

Person offering instructional materials for adoption, sale or exchange in State shall not enter into any understanding, agreement or combination to control prices or restrict competition in sale of such materials. (105 ILCS 5/28-1).

3.21 NEGOTIABLE INSTRUMENTS:

Article 3, Uniform Commercial Code became effective on July 2, 1962. (810 ILCS 5/3-101 to 5/3-806). 1972 Official Text became effective July 1, 1973. See topic 3.02 Bill and Notes. .

3.22 RESTRAINT OF TRADE:

See topic 3.20 Monopolies, Restraint of Trade and Competition.

3.23 SALES:

Art. 2, Uniform Commercial Code governs. See topic 3.09 Commercial Code.

Contracts of Sales.

Contract for sale of goods may be made in any manner sufficient to show agreement including conduct by both parties which recognizes existence of such contract. Agreement sufficient to constitute contract for sale may be found even though moment of its making is undetermined, and even though one or more terms are left open contract for sale does not fail for indefiniteness if parties intended to make contract and there is reasonably certain basis for giving appropriate remedy. (810 ILCS 5/2-204).

Subject to certain exceptions, contract for sale of goods for price of $ 500 or more is not enforceable by way of action or defense unless there is some writing sufficient to indicate that contract for sale has been made between parties and signed by party against whom enforcement is sought or by his authorized agent or broker. Writing is not insufficient because it omits or incorrectly states term agreed upon but contract is not enforceable beyond quantity of goods shown in such writing. (810 ILCS 5/2-201). See also topic 3.16 Fraud, Statute of.

Product Liability.

Manufacturer of any product which, when it is sold by manufacturer, is in defective condition, unreasonably dangerous to user or to consumer or to his property, is liable to ultimate user or consumer for personal injury or property damage, resulting from such defective condition, regardless of existence of privity or negligence. (32 Ill.2d 612, 210 N.E.2d 182). Assumption of risk, but not contributory negligence, is a bar to recovery in strict liability tort action. (45 Ill.2d 418, 261 N.E.2d 305). Specific limitations period for products liability claims is imposed by statute. (735 ILCS 5/13-213).

Retail Installment Sales.

Act of 1967 (815 ILCS 405/1 et seq.) covers retail installment contracts entered into in Illinois for goods or services purchased primarily for personal, family or household purposes (excludes “motor vehicle” as defined in The Illinois Motor Vehicle Code (815 ILCS 405/2 to 405/2.14) but includes bicycles, motorcycles, motor scooters, snowmobiles and trailers when purchased primarily for personal, family or household purposes). (815 ILCS 405/2 to 405/2.14). Every retail installment contract must be in writing, dated, signed by buyer and seller, and must contain certain notices printed in at least ten point bold type. (815 ILCS 405/3). Printed or typed portion of contract must be at least eight point type. (815 ILCS 405/3). Contract must contain names of seller, buyer, their addresses, description of goods or services and all other information required in such transactions by Federal Truth-in-Lending Act. There is no obligation to disclose to obligor (1) any agreement to sell, transfer or assign contract to third party for amount equal to, in excess of or less than amount financed or (2) that assignee may pay seller of contract all or portion of prepaid finance charges and other fees. (815 ILCS 405/4, 405/5). Installment payments must be periodic and may provide for balloon-note financing. (815 ILCS 405/6). Retail installment contract is unenforceable by seller when it contains blank spaces to be filled in with essential terms after it has been signed by buyer unless delivery of goods is not made at time of execution of contract, in which case certain information identifying goods and date first payment is due may be inserted after execution by buyer. (815 ILCS 405/3, 405/15).

Buyer's written acknowledgment of delivery of copy of contract in accordance with this Act protects assignee who buys contract without knowledge that seller has failed to comply with Act. (815 ILCS 405/14).

Buyer may cancel contract at any time before seller delivers copy if buyer not yet received goods or furnished services. (815 ILCS 405/14).

Provision in contract providing for arbitrary acceleration in absence of buyer default is unenforceable. Provision for acceleration when buyer in default unenforceable unless prior to acceleration buyer in default for at least 30 days or has abandoned or destroyed property or holder has reasonable cause to believe buyer is about to leave state. (815 ILCS 405/13).

Provisions in contracts waiving buyer's legal rights against seller are unenforceable. (815 ILCS 405/13). All defenses available against holder in due course under Uniform Commercial Code (810 ILCS 5/3-305[2]) may be asserted by buyer notwithstanding any agreement to contrary (815 ILCS 405/18). Rights of assignee under waiver of defense clause as holder in due course are valid unless he is affiliated with seller or on notice of repeated statutory breaches by seller or buyer fails to receive required notice. (815 ILCS 505/2D). Cosigner agreements require explanation in statutory form. (815 ILCS 405/19).

Refund credit for prepayment is mandatory. (815 ILCS 405/7). Credit insurance may be required by seller subject to limitations. (815 ILCS 405/8 to 405/11). Delinquency charges are limited. (815 ILCS 405/12). Notwithstanding other statutes on retail installment contracts executed after Sept. 25, 1981 there shall be no limit on finance charges charged, collected and received. (815 ILCS 405/27). Upon account holder's request total finance charges charged to or paid by account holder shall be provided within 60 days after end of year or within 60 days after termination of account. (815 ILCS 405/28.1).

Seller or holder must give buyer written receipt for payment in cash and, upon request, written statement of amounts of payments and total amount unpaid covering transactions during period not to exceed 18 months from request. One statement every six months must be furnished without charge; seller or holder may charge up to $10 for each additional statement. (815 ILCS 405/16).

Parties shall have rights and remedies provided in Art. 9 of The Uniform Commercial Code (810 ILCS 5/9-101 et seq.) with respect to default and disposition of collateral. If buyer has paid 60% or more of deferred price at time of default, holder may elect to: (1) Receive and retain goods and release buyer from further obligation, or (2) allow buyer to retain goods and be limited to an action to recover unpaid balance. (815 ILCS 405/26). If buyer has paid 30% or more of deferred payment price at time of repossession, buyer may, within 15 days, redeem collateral from holder by tendering all unpaid amounts, including delinquency and deferred charges, and performance necessary to cure default and any reasonable costs incurred by holder in retaking goods. (815 ILCS 405/26).

One who knowingly violates Act is guilty of Class A misdemeanor. Attorney General or States Attorney may bring action to restrain violations. Violators may not recover finance charges. (815 ILCS 405/30, 405/31). Violation does not render entire contract unenforceable. (53 Ill.2d 396, 292 N.E.2d 726).

Seller may waive right to insist upon prompt installment payments if he repeatedly accepts late payments. (132 Ill.App.2d 527, 270 N.E.2d 140).

See also topic 3.17 Interest.

Rental Purchase Agreement.

Merchant who leases goods to consumer for nonbusiness uses for four months or more with automatic renewal and option to buy must disclose facets of deal in rental agreement. Agreement cannot include confession of judgment clause, waiver of defense clause or required insurance clause. Agreement must disclose total number of payments, amount, timing of payments, explanation of fees, liability, notice of right to reinstate agreement and cash price. (815 ILCS 655/2).

“Going Out of Business” Sales.

All sales which will be represented to the public as “going out of business sales,” regardless of how described, are licensed and regulated under the provisions of 815 ILCS 350/1 to 350/12. Failure to comply with act constitutes Class B misdemeanor. (815 ILCS 350/11). Attorney General may enjoin sale conducted without license. (815 ILCS 350/10.5). See also Motor Vehicle Retail Installment Sales Act. (815 ILCS 375/1).

Type Size.

See subhead Retail Installment Sales, supra.

Bulk Sales.

See topic 3.09 Commercial Code.

Sales of Motor Vehicles.

See category 23 Transportation, topic 23.01 Motor Vehicles.

International Sales of Goods.

United States is contracting state to United Nations Convention on International Sale of Goods (CISG). Therefore, CISG applies as law of contract in contracts for sale of goods between parties whose places of business are in different contracting states. See Selected International Conventions in Law Digest.

Resale Price Maintenance.

See category 17 Intellectual Property, topic 17.01 Trademarks and Tradenames, subhead Fair Trade Act.

Fraudulent Advertising.

See topic 3.12 Consumer Protection, subhead Advertising.

Deceptive Trade Practices.

See topic 3.20 Monopolies, 3.22 Restraint of Trade and Competition.

Consumer Fraud and Deceptive Business Practice Act.

See topic 3.12 Consumer Protection.

Consumer Protection.

See topic 3.12 Consumer Protection.

Illinois Franchise Disclosure Act.

See topic 3.24 Securities, subhead Franchise Disclosure Act.

3.24 SECURITIES:

Blue Sky Law known as Illinois Securities Law of 1953 (“Act”). (815 ILCS 5/1 to 5/19). Uniform Securities Act not adopted. Uniform Commercial Code adopted. See topic 3.09 Commercial Code.

Supervision.

Secretary of State, Securities Division. (815 ILCS 5/11).

Regulatory Powers of Supervising Authority.

Secretary has broad regulatory powers including power to: Make rules and regulations; conduct investigations; prohibit or suspend sale of securities or prohibit or suspend person from selling securities or from acting as investment adviser; deny or revoke registration of securities or of dealer, salesperson or investment adviser; and raise or lower any fee imposed by, and which he is authorized by law to collect under, Act. (815 ILCS 5/11 and 5/11a).

Prerequisites to Sales or Offerings.

All securities except those set forth in 815 ILCS 5/2a, those exempt (815 ILCS 5/3) or sold in transactions exempt (815 ILCS 5/4) must be registered prior to sale.

Securities to Which Act Applicable.

“Security” means any note, stock, treasury stock, bond, debenture, evidence of indebtedness, certificate of interest or participation in any profit-sharing agreement, collateral-trust certificate, preorganization certificate or subscription, transferable share, investment contract, investment fund share, face-amount certificate, voting-trust certificate, certificate of deposit for security, fractional undivided interest in oil, gas, or other mineral lease, right, or royalty, any put, call, straddle, option or privilege on any security, certificate of deposit, or group or index of securities (including any interest therein or based on value thereof), or any put, call, straddle, option or privilege entered into relating to foreign currency, or, in general, any interest or instrument commonly known as “security”, or any certificate of interest or participation in, temporary or interim certificate for, receipt for, guarantee of, or warrant or right to subscribe to or purchase, any of foregoing. (815 ILCS 5/2.1).

Exempt Securities.

Provisions of 815 ILCS 5/2a, 5/5, 5/6, 5/7 do not apply to any of following securities: (A) Any security (including revenue obligation) issued or guaranteed by U.S., any state, any political subdivision of state, or any agency or corporation or other instrumentality of any one or more of foregoing, or any certificate of deposit for any such security; (B) any security issued or guaranteed by Canada, any Canadian province, any political subdivision of any such province, any agency or corporation or other instrumentality of one or more of foregoing, or any other foreign government with which U.S. then maintains diplomatic relations, if security is recognized as valid obligation by issuer or guarantor; (C) any security issued by and representing interest in or debt of, or guaranteed by, any bank, savings bank, bank holding company or credit union organized under laws of U.S., or any bank, savings bank, savings institution, trust company, bank holding company or credit union organized and supervised under laws of any state; or any security issued or guaranteed as to both principal and interest by international bank of which U.S. is member, or any interest or participation in any common trust fund or similar fund maintained by any such bank, savings bank, savings institution or trust company exclusively for collective investment and reinvestment of assets contributed thereto by such bank, savings bank, savings institution or trust company or any affiliate thereof, in its capacity as fiduciary, trustee, executor, administrator or guardian; (D) any security issued by and representing interest in or debt of, or guaranteed by, any federal savings and loan association, or any savings and loan association or building and loan association organized and supervised under laws of any state; or any security issued or guaranteed by any federal credit union or any credit union, industrial loan association, or similar organization organized and supervised under laws of any state; (E) any security issued or guaranteed by any railroad, other common carrier, public utility or holding company where such issues or guarantor is subject to jurisdiction of Interstate Commerce Commission or is registered holding company under Public Utility Holding Company Act of 1935 or subsidiary of such company within meaning of that Act or is regulated in respect of its rates and charges by governmental authority of U.S. or any state or is regulated in respect of issuance or guarantee of security by governmental authority of U.S., any state, Canada, or any Canadian province; (F) equipment trust certificates in respect of equipment leased or conditionally sold to person, if securities issued by such person would be exempt under 815 ILCS 5/3; (G) any security which at time of sale is listed, or approved for listing upon notice of issuance on New York Stock Exchange, Inc., American Stock Exchange, Inc., Pacific Coast Stock Exchange, Inc., Midwest Stock Exchange, Inc., Chicago Board of Trade, Philadelphia Stock Exchange, Inc., Chicago Board of Options Exchange, Incorporated, National Market System of Nasdaq Stock Market, or any other exchange, automated quotation system or board of trade which Secretary of State, by rule or regulations, deems to have substantially equivalent standards for listing or designation as required by any such exchange, automated quotation system or board of trade; and securities senior or of substantially equal rank, both as to dividends or interest and upon liquidation, to securities so listed or designated; and warrants and rights to purchase any of foregoing; provided that exemption does not apply to investment fund shares or securities of like character, which are being continually offered at price or prices determined in accordance with prescribed formula; (H) any security issued by person organized and operated not for pecuniary profit and exclusively for religious, educational, benevolent, fraternal, agricultural, charitable, athletic, professional, trade, social or reformatory purposes, or as chamber of commerce or local industrial development corporation, or for more than one of said purposes and no part of net earnings of which inures to benefit of any private stockholder or member; (I) instruments evidencing indebtedness under agreement for acquisition of property under contract of conditional sale; (J) note secured by first mortgage upon tangible personal or real property when such mortgage is made, assigned, sold, transferred and delivered with such note or other written obligation secured by such mortgage, either to or for benefit of purchaser or lender; or bonds or notes not more than ten in number secured by first mortgage upon title in fee simple to real property if aggregate principal amount secured by such mortgage does not exceed $500,000 and also does not exceed 75% of fair market value of such real property; (K) note or notes not more than ten in number secured by junior mortgage lien if aggregate principal amount of indebtedness represented thereby does not exceed 50% of amount of then outstanding prior lien indebtedness and provided that total amount of indebtedness (including indebtedness represented by subject junior mortgage note or notes), does not exceed 90% of fair market value of property securing such indebtedness; provided each such note or notes bears across face thereof required legend; (L) any negotiable promissory note or draft, bill of exchange or bankers' acceptance which arises out of current transaction or proceeds of which have been or are to be used for current transactions, and which evidences obligation to pay cash within nine months of date of issuance exclusive of days of grace, or any renewal of such note, draft, bill or acceptance which is likewise limited, or any guarantee of such note, draft, bill or acceptance or of any such renewal; (M) any security issued by and representing interest in or debt of, or guaranteed by, any insurance company organized under laws of any state; (N) any security issued pursuant to employee stock option or other security-purchase plans, if securities which are subject of such plans would be exempt, pursuant to any other subsection of 815 ILCS 5/3, from registration under 815 ILCS 5/5, or, if securities which are subject of employee stock option or other security-purchase plans are registered under provisions of 815 ILCS 5/7, or any security issued by or pursuant to employee profit-sharing trusts or plans or employee pension trusts or plans (interpreted by regulation to mean trusts or plans exempt under §3[a][2] of Federal Securities Act of 1933 or trusts or plans that meet requirements for qualification under §401(a) of Internal Revenue Code); (O) any option, put, call, spread or straddle issued by clearing agency registered as such under Federal Securities Exchange Act of 1934, if security, currency, commodity, or other interest underlying option, put, call, spread or straddle is not required to be registered under 815 ILCS 5/5; (P) any security which meets all of following conditions: (1) if issuer is not organized under laws of U.S. or state, it has appointed duly authorized agent in U.S. for service of process and has set forth name and address of agent in its prospectus; (2) class of issuer's securities is required to be and is registered under §12 of Federal Securities Exchange Act of 1934, and has been so registered for three years immediately preceding offering date; (3) neither issuer nor significant subsidiary has had material default during last seven years, or for period of issuer's existence if less than seven years, in payment of (i) principal, interest, dividend, or sinking fund installment on preferred stock or indebtedness for borrowed money, or (ii) rentals under leases with terms of three years or more; (4) issuer has had consolidated net income, before extraordinary items and cumulative effect of accounting changes, of at least $1,000,000 in four of its last five fiscal years including its last fiscal year; and if offering is of interest bearing securities, has had for its last fiscal year, net income, before deduction for income taxes and depreciation, of at least 1½ times issuer's annual interest expense, giving effect to proposed offering and intended use of proceeds. (For purposes of this clause “last fiscal year” means most recent year for which audited financial statements are available, provided that such statements cover fiscal period ended not more than 15 months from commencement of offering); (5) if offering is of stock or shares other than preferred stock or shares, securities have voting rights and rights include: (i) right to have at least as many votes per share, and (ii) right to vote on at least as many general corporate decisions, as each of issuer's outstanding classes of stock or shares, except as otherwise required by law; (6) if offering is of stock or shares, other than preferred stock or shares, securities are owned beneficially or of record, on any date within six months prior to commencement of offering, by at least 1,200 persons, and on that date there are at least 750,000 such shares outstanding with aggregate market value, based on average bid price for that day, of at least $3,750,000. (In connection with determination of number of persons who are beneficial owners of stock or shares of issuer, issuer or dealer may rely in good faith for purposes of clause upon written information furnished by record owners); and (7) issuer meets conditions specified in 815 ILCS 5/3(Q)(2)(4) if either issuer or issuer and issuer's predecessor, taken together, meet such conditions and if: (a) succession was primarily for purpose of changing state of incorporation of predecessor or forming holding company and assets and liabilities of successor at time of succession were substantially same as those of predecessor; or (b) all predecessors met such conditions at time of succession and issuer has continued to do so since succession; (Q) any security appearing on List of OTC Margin Stock published by Board of Governors of Federal Reserve System or any security incorporated by reference to List of OTC Margin Stocks; any other securities of same issuer which are of senior or substantially equal rank; any securities called for by subscription rights or warrants so listed or approved; or any warrants or rights to purchase or subscribe to any of foregoing; (R) any security issued by bona fide agricultural cooperative operation in Illinois that is organized under laws of Illinois or as foreign cooperative association organized under law of another state that has been duly qualified to transact business in Illinois. (815 ILCS 5/3).

Exempt Transactions.

Provisions of 815 ILCS 5/5 to 5/7 do not apply to any of following transactions, except where otherwise specified in 815 ILCS 5/4: (A) Any offer or sale in good faith, whether through dealer or otherwise, of securities by person who is not issuer, underwriter, dealer or controlling person in respect of such securities, and who, being bona fide owner of such securities, disposes thereof for his own account; provided, that such offer or sale not made directly or indirectly for benefit of issuer, underwriter or controlling person; (B) any offer, sale, issuance or exchange of securities of issuer to or with security holders of issuer except to or with persons who are security holders solely by reason of holding transferable warrants, transferable options, or similar transferable rights of issuer, if no commission or other remuneration paid or given directly or indirectly for or on account of procuring or soliciting of such sale or exchange (other than fee paid to underwriters based on their undertaking to purchase any securities not purchased by security holders in connection with such sale or exchange); (C) any offer, sale or issuance of securities, other than fractional undivided interests in oil, gas or other mineral lease, right or royalty, to any corporation, bank, savings bank, savings institution, Savings and Loan Association, trust company, insurance company, building and loan association, dealer, pension fund or pension trust, employees' profit sharing trust, other financial institution or institutional investor, any government or political subdivision or instrumentality thereof, whether purchaser is acting for itself or in some fiduciary capacity, or to any partnership or other association engaged as substantial part of its business or operations in purchasing or holding securities, or to any trust in respect of which bank or trust company is trustee or co-trustee or to any entity which at least 90% of equity is owned by persons described under 815 ILCS 5/4(c), (d), (h) or (s); or to any employee benefit plan within meaning of Title I of Federal ERISA Act if (i) investment decision is made by plan fiduciary as defined in §3(21) of Federal ERISA Act and such plan fiduciary is either bank, insurance company, registered investment adviser or investment adviser registered under Federal 1940 Investment Advisers Act, or (ii) plan has total assets in excess of $5,000,000, or (iii) in case of self-directed plan, investment decisions are made solely by persons described under 815 ILCS 5/4(c), (d), (h) or (s); or to any plan established and maintained by, and for benefit of employees of, any state or political subdivision or agency or instrumentality thereof if such plan has total assets in excess of $5,000,000; or to any organization described in §501(c)(3) of Internal Revenue Code of 1986, any Massachusetts or similar business trust, or any partnership, if such organization, trust, or partnership has total assets in excess of $5,000,000; (D) any transaction, as identified by rule or regulation promulgated under authority of Secretary of State, that furthers objectives of compatibility with federal exemptions and uniformity among states. Secretary of State shall prescribe by rule or regulation amount of fee for filing any report required under this subsection, but fee shall not be less than minimum amount nor more than maximum amount established under 815 ILCS 5/11a and not returnable in any event; (E) any offer or sale of securities by executor, administrator, guardian, receiver or trustee in insolvency or bankruptcy, or at any judicial sale, or at public sale by auction held at advertised time and place, or offer or sale of securities in good faith and not for purpose of avoiding provisions of Act by pledgee of securities pledged for bona fide debt; (F) any offer or sale by registered dealer, either as principal or agent, of any securities (except face amount certificate contracts and investment fund shares) at price reasonably related to current market price of such securities, provided: (1)(a) securities are issued and outstanding; (b) issuer required to file reports pursuant to §13 or §15(d) of Federal 1934 Act and has been subject to requirements during 90 day period immediately preceding date of offer or sale, or is issuer of security covered by §12(g)(2)(B) or (G) of Federal 1934 Act; (c) dealer has reasonable basis for believing that issuer is current in filing reports required to be filed at regular intervals pursuant to provisions of §13 or §15(d), as case may be, of Federal 1934 Act, or in case of insurance companies exempted from §12(g) of Federal 1934 Act by subparagraph 12(g)(2)(G) thereof, annual statement referred to in §12(g)(2)(G)(i) of Federal 1934 Act; and (d) dealer has in its records, and makes reasonably available upon request to any person expressing interest in proposed transaction in securities, issuer's most recent annual report filed pursuant to §13 or §15(d), as case may be, of Federal 1934 Act or annual statement in case of insurance company exempted from §12(g) of Federal 1934 Act by subparagraph 12(g)(2)(G) thereof, together with any other reports required to be filed at regular intervals under Federal 1934 Act by issuer after such annual report or annual statement; provided that making available of such reports pursuant to 815 ILCS 5/4(F), unless otherwise represented, will not constitute representation by dealer that information is true and correct, but constitute representation by dealer that information is reasonably current; or (2)(a) prior to any offer or sale, application for authorization thereof and report set forth under subparagraph (d) of this paragraph (2) has been filed by any registered dealer with and approved by Secretary of State pursuant to such rules and regulations as Secretary of State may prescribe; (b) Secretary of State has power to refuse to approve any application or report filed pursuant to clause (2) if (i) application or report does not comply with provisions of clause, or (ii) offer or sale would work or tend to work fraud or deceit, or (iii) issuer or applicant have violated any of provisions of Act; (c) each application and report filed pursuant to clause shall be accompanied by filing and examination fee in amount established pursuant to 815 ILCS 5/11(a), which shall not be returnable in any event; (d) there is submitted to Secretary of State certain information no later than 120 days following end of issuer's fiscal year, each year during period of authorization; (e) prior to any offer or sale of securities under provisions of this paragraph (2), each registered dealer participating in offer or sale of such securities shall provide upon request of prospective purchasers of such securities copy of most recent report required under provisions of sub-paragraph (d) of this paragraph (2); (f) approval of application filed pursuant to clause expires five years after date of granting of approval, unless approval is sooner terminated by (1) suspension or revocation by Secretary of State in same manner as is provided for in 815 ILCS 5/11 in (E), (F) or (G) or (2) applicant filing with Secretary of State affidavit evidencing either that (i) subject securities have become exempt under 815 ILCS 5/3 or (ii) applicant no longer is capable of acting as applicant and reasons therefor or (iii) applicant no longer desires to act as applicant. In event of filing of affidavit under either of subclauses (ii) or (iii) Secretary of State may authorize substitution of applicant upon new applicant executing application as originally filed. Substituted execution shall have no effect upon date of expiration of approval of application. Notwithstanding provisions of 815 ILCS 5/4(F)(2)(f) approvals granted under 815 ILCS 5/4(F)(2) prior to effective date of Act are governed by provisions of Act in effect on such date of approval; (g) no person shall be considered to have violated 815 ILCS 5/5 by reason of any offer or sale effected after termination under 815 ILCS 5/4(F)(2)(f) if official notice of such termination has not been circulated generally to dealers by Secretary of State and if such person sustains burden of proof that he did not know, and in exercise of reasonable care, could not have known, of termination; or (3) securities or securities of same class, are subject of existing registration under 815 ILCS 5/5; exemption provided by 815 ILCS 5/4(F) applies only if offer or sale is made in good faith and not for purpose of avoiding any provisions of Act and only if offer or sale is not made for direct or indirect benefit of issuer of securities, or controlling person in respect of such issuer; (G)(1) any offer, sale or issuance of security, whether to residents or to nonresidents of Illinois, where: (a) all sales of such security to residents of Illinois (including most recent such sale) within immediately preceding 12-month period have been made to not more than 35 persons or have involved aggregate sales price of not more than $1,000,000; (b) such security has not been sold by means of any general advertising or general solicitation in Illinois; and (c) no commission, discount, or other remuneration exceeding 20% of sale price of such security, if sold to Illinois resident, is paid or given directly or indirectly for or on account of such sales; (2) in computing number of resident purchasers or aggregate sales price under 815 ILCS 5/4(G)(1)(a), there is excluded any purchaser or dollar amount of sales price, as case may be, with respect to any security which at time of its sale was exempt under 815 ILCS 5/3 or was registered under 815 ILCS 5/5 to 5/7 or was sold in transaction exempt under other subsections of 815 ILCS 5/4; (3) prospectus or preliminary prospectus with respect to security for which registration statement is pending or effective under Federal Securities Act of 1933 shall not be deemed to constitute general advertising or general solicitation in Illinois as such terms are used in 815 ILCS 5/4(G)(1)(b) provided such prospectus or preliminary prospectus has not been sent or otherwise delivered to more than 150 residents of Illinois; (4) Secretary of State by rule or regulation requires and prescribes form of report containing certain information to be filed in connection with all sales made in reliance upon exemption provided by 815 ILCS 5/4(G), but failure to file any such report does not affect availability of such exemption; provided that failure to file any such report will constitute violation of 815 ILCS 5/12(D), subject to penalties enumerated in 815 ILCS 5/14, and provided further that civil remedies of rescission and appointment of receiver, conservator, ancillary receiver or ancillary conservator provided for in 815 ILCS 5/13(F) will not be available against any person by reason of failure to file any such report or on account of contents of any such report. Such report must set forth name and address of issuer and of controlling person, if sale was for direct or indirect benefit of such person, total amount of securities sold under 815 ILCS 5/4(G) to Illinois residents, names and addresses of resident purchasers, representation that sales of such securities were not made to Illinois residents in excess of those permitted by 815 ILCS 5/4(G) and any other information deemed necessary by Secretary of State to enforce compliance with 815 ILCS 5/4(G). Filing fee is prescribed by rule or regulation of Secretary of State, but will not be less than minimum amount nor more than maximum amount established pursuant to 815 ILCS 5/11(a), and is not returnable in any event. Secretary of State may impose, in such cases as he may deem appropriate, penalty for failure to file any such report in timely manner, but no such penalty shall exceed amount equal to five times filing fee. Any such report shall be deemed confidential and shall not be disclosed to public except by order of court or in court proceedings; (H) any offer, sale or issuance of security to (1) any natural person who has, or is reasonably believed by person relying on 815 ILCS 5/4(h) to have, net worth, or joint net worth with that person's spouse, at time of offer, sale or issuance in excess of $1,000,000 excluding value of principal residence or (2) natural person who had, or is reasonably believed by person relying on 815 ILCS 5/4(h) to have had income or joint income with that person's spouse in excess of $200,000 in each of two most recent years and who reasonably expects or is reasonably expected to have, income in excess of $200,000 in current year, or (3) any person that is not natural person and in which at least 90% of equity interest is owned by persons who meet either of tests set forth in 815 ILCS 5/4(h)(1) or (2); provided that such security is not offered or sold by means of any general advertising or general solicitation in Illinois; (I) any offer, sale or issuance of securities to or for benefit of security holders incident to vote by such security holders pursuant to such person's organizational document or applicable statute of jurisdiction of such person's organization, on merger, consolidation, reclassification of securities, or sale or transfer of assets in consideration of issuance of securities of same or another issuer; (J) any offer, sale or issuance of securities in exchange for one or more outstanding securities, claims or property interests, or partly in such exchange and partly for cash, where such offer, sale or issuance is incident to reorganization, recapitalization, readjustment, or composition or settlement of claim, as approved by court of competent jurisdiction of U.S., or any state; (K) any offer, sale or issuance of securities for patronage, or as patronage refunds, or in connection with marketing agreements by cooperative associations organized exclusively for agricultural, producer, marketing, purchasing, or consumer purposes; and sale of subscriptions for or shares of stock of cooperative associations organized exclusively for agricultural, producer, marketing, purchasing, or consumer purposes, if no commission or other remuneration is paid or given directly or indirectly for or on account of such subscription, sale or resale, and if any person does not own beneficially more than 5% of aggregate amount of issued and outstanding capital stock of such cooperative association; (L) offers for sale or solicitations of offers to buy (but not acceptance thereof), of securities which are subject of pending registration statement filed under Federal Securities Act of 1933 and: (1) which are subject of pending application for registration under Act, or (2) sale of which would be exempt under 815 ILCS 5/3(B) if registration under Federal Securities Act of 1933 were then in effect; (M) any offer or sale of preorganization subscriptions for any securities prior to incorporation, organization or formation of any issuer under laws of U.S., or any state, or issuance by such issuer, after its incorporation, organization or formation, of securities pursuant to such preorganization subscriptions, provided number of subscribers does not exceed 25 and either (1) no commission or other remuneration is paid or given directly or indirectly for or on account of such sale or sales or issuance, or (2), if any commission or other remuneration is paid or given directly or indirectly for or on account of such sale or sales or issuance, securities are not offered or sold by any means of general advertising or general solicitation in Illinois; (N) execution of orders for purchase of securities by registered dealer, provided such dealer acts as agent for purchaser, has made no solicitation of order to purchase securities, has no direct interest in sale or distribution of securities ordered, receives no commission, profit, or other compensation other than commission involved in purchase and sale of securities and delivers to purchaser written confirmation of order which clearly identifies commission paid to registered dealer; (O) any offer, sale or issuance of securities, other than fractional undivided interests in oil, gas or other mineral lease, right or royalty, for direct or indirect benefit of issuer thereof, or of controlling person, whether through dealer (acting either as principal or agent) or otherwise, if securities sold, immediately following sale or sales, together with securities already owned by purchaser, would constitute 50% or more of equity interest of any one issuer provided that number of purchasers is not more than five and provided further that no commission, discount or other remuneration exceeding 15% of aggregate sale price of securities is paid or given directly or indirectly for or on account of sale or sales; (P) any offer, sale or issuance of securities (except face amount certificate contracts and investment fund shares) issued by and representing interest in issuer which is business corporation incorporated under laws of Illinois purposes of which are to provide capital and supervision solely for redevelopment of blighted urban areas located in municipality in Illinois and whose assets are located entirely within that municipality, provided: (1) no commission, discount or other remuneration is paid or given directly or indirectly for or on account of sale or sales of such securities; (2) aggregate amount of any securities of issuer owned of record or beneficially by any one person will not exceed lesser of $5,000 or 4% of equity capitalization of issuer; (3) population of municipality within which area that is to be redeveloped is located does not exceed 50,000 population as based on last U.S. Census; (4) officers and directors of corporation have been bona fide residents of municipality not less than three years immediately preceding effectiveness of offering sheet for securities under 815 ILCS 5/4(P); and (5) issuer files with Secretary of State offering sheet descriptive of securities that sets forth certain information. Secretary of State will within reasonable time examine offering sheet so filed and, unless Secretary of State makes determination that offering sheet so filed does not conform to requirements of 815 ILCS 5/4(P), will declare offering sheet to be effective, which offering sheet shall continue effective for period of 12 months from date it becomes effective. Fee for examining offering sheet shall be as established pursuant to 815 ILCS 5/11(a), and shall not be returnable in any event. Secretary of State may by rule or regulation require and prescribe form of report to be filed and time within which such report shall be filed in connection with all sales made in reliance upon 815 ILCS 5/4(P) and every six months after first such sale unless report due upon conclusion of all such sales has been filed, but failure to file any such report shall not affect availability of such exemption; provided that failure to file any such report will constitute violation of 815 ILCS 5/12(D), subject to penalties enumerated in 815 ILCS 5/14, and provided further that civil remedies provided for in 815 ILCS 5/3(A) and civil remedies of rescission and appointment of receiver, conservator, ancillary receiver or ancillary conservator provided for in 815 ILCS 5/13(F) will not be available against any person by reason of failure to file any such report or on account of contents of any such report. Filing fee is prescribed by rule re regulation of Secretary of State, but such fee shall not be less than minimum amount nor more than maximum amount specified in 815 ILCS 5/11a, and will not be returnable in any event. Secretary of State may impose, in such cases as he may deem appropriate, penalty for failure to file any such report in timely manner. Any such report shall be deemed confidential and shall not be disclosed to public except by order of court or in court proceedings. (This exemption not available for sale of face amount certificate contracts or investment fund shares); (Q) any isolated transaction whether effected by dealer or not provided that such security is not offered or sold by means of any general advertising or general solicitation in Illinois; (R) any offer, sale or issuance of security to any person who purchases at least $150,000 of securities being offered, where purchaser's total purchase price does not, or it is reasonably believed by person relying on 815 ILCS 5/4(r) that such purchase price does not, exceed 20% of purchaser's net worth at time of sale, or if natural person joint net worth with that person's spouse, for one or any combination of following: (i) cash, (ii) securities for which market quotations are readily available, (iii) unconditional obligation to pay cash or securities for which quotations are readily available which obligation is to be discharged within five years of sale of securities to purchaser, or (iv) cancellation of any indebtedness owed by issuer to purchaser; (S) any offer, sale or issuance of security to any person who is, or is reasonably believed by person relying on 815 ILCS 5/4(s) to be, director, executive officer, or general partner of issuer of securities being offered or sold, or any director, executive officer, or general partner of general partner of that issuer. For purposes of 815 ILCS 5/4(S), “executive officer” means president, any vice president in charge of principal business unit, division or function [such as sales, administration or finance], any other officer who performs policy making function, or any other person who performs similar policy making functions for issuer. Executive officers of subsidiaries may be deemed executive officers of subsidiaries may be deemed executive officers of issuer if they perform such policy making functions for issuer.); (T) any offer, sale or issuance of security pursuant to limited offering transactional exemption pursuant to rule or regulation of Secretary of State. (815 ILCS 5/4).

Registration of Securities.

All securities except those set forth in 815 ILCS 5/2a, those exempt under 815 ILCS 5/3 or offered or sold in transactions exempt under 815 ILCS 5/4, or face amount certificate contracts if required to be registered under 815 ILCS 5/6, or investment fund shares if required to be registered under 815 ILCS 5/7 must be registered prior to their offer or sale in Illinois either by coordination or qualification. (815 ILCS 5/5). Fee for registration is established by rule or regulation, and in no case shall such fee be returnable, plus examination fees, if any. (815 ILCS 5/5(C). Registration effective for one year from date of registration or renewal of registration unless sooner terminated. (815 ILCS 5/5[D]).

Registration by Coordination.

Securities which have been or are being registered under Federal 1933 Act may be registered by coordination by filing with Secretary of State following: (a) One copy of the registration statement (without exhibits) descriptive of securities on file with Securities and Exchange Commission in its most recent form as of date of initial filing under 815 ILCS 5/5(A); (b) consent to service of process executed by issuer or controlling person conforming to requirements of 815 ILCS 5/10, provided that such consent need not be filed if: (i) applicant is registered dealer and securities are being offered and sold in Illinois by one or more registered dealers as principal and not as agent, or (ii) issuer or controlling person is corporation organized or authorized to transact business under laws of Illinois; (c) application, in such form and executed by such person as Secretary of State shall by rule or regulation prescribe, setting forth title and total amount of securities to be offered, amount of securities, and proposed maximum aggregate price thereof to be offered in Illinois under 815 ILCS 5/5(A) and, if applicant is electing date of effectiveness of post-effective amendment as its effective date as provided in 815 ILCS 5/2.13, specifying such date as effective date for purposes of registration under 815 ILCS 5/5(A); (d) undertaking to forward to Secretary of State, in writing (which may be by electronic transmission), any and all subsequent amendments of and supplements to registration statement not later than seventh day after forwarding thereof to Securities and Exchange Commission, or such longer period as Secretary of State may permit by rule, regulation or order; (e) if applicant is not registered dealer, name of at least one registered dealer for securities being registered under this subsection A (except that, in case of securities being offered and sold on delayed or continuous basis pursuant to Rule 415 under Securities Act of 1933, or any similar or successor rule thereto as may be designated by Secretary of State by rule or regulation, name of registered dealers may be furnished no later than close of business on second business day following commencement of sales of registered securities in this state) or written statement setting forth method of offer and sale in this state of securities being registered in compliance with 815 ILCS 5/8. Registration of securities by coordination takes effect automatically as of effective date of registration statement (or post-effective amendment) filed under Federal 1933 Act, provided that on effective date, required information has been on file with Secretary of State for at least ten business days, or such shorter period as Secretary of State may permit by rule, regulation or order. If, however, time period referred to in preceding sentences shall not have expired on effective date of registration statement (or post-effective amendment) filed under Federal 1933 Act, registration of such securities by coordination, upon expiration of such time period, takes effect automatically as of effective date of registration statement (or post-effective amendment) filed under Federal 1933 Act. If required information is not filed with Secretary of State prior to effective date of registration statement (or post-effective amendment) filed under Federal 1933 Act, any registration of securities by coordination under 815 ILCS 5/5(A) takes effect automatically as soon as all of following conditions have been satisfied: (a) Required information has been on file with Secretary of State for ten business days, or for such shorter period as Secretary of State may permit by rule, regulation or order; (b) registration statement filed under Federal 1933 Act is then in effect; and (c) prospectus then on file with Secretary of State satisfies requirements of §10(a)(3) of Federal 1933 Act.

Registration by Qualification.

Any security may be registered by qualification by filing with Secretary of State application, certain documents and prospectus. Required documents waived or supplemented by Secretary of State. Unless within reasonable time Secretary of State finds that filing does not conform to requirements of 815 ILCS 5/5(B) or there is proceeding pending under 815 ILCS 5/11, upon receipt of registration fee Secretary of State will register securities. Additional information may be required if all securities not sold within six months of registration date. Amendments or supplements to prospectus after registration must be filed with Secretary of State forthwith. (815 ILCS 5/5[B]).

Registration of Face Amount Certificate Contracts and Investment Fund Shares.

Unless set forth in 815 ILCS 5/2a, all face amount certificate contracts and investment fund shares not exempt under 815 ILCS 5/3 or offered or sold in transaction exempt under 815 ILCS 5/4 must be registered either by coordination or qualification prior to offer or sale in Illinois by filing with Secretary of State application and certain documents. Unless within reasonable time Secretary of State finds that filing does not conform to requirements of 815 ILCS 5/6 with regard to face amount certificate contracts, or 815 ILCS 5/7, with regard to investment fund shares, or there is proceeding pending under 815 ILCS 5/11, upon receipt of registration fee and, in case of face amount certificate contracts, deposit, Secretary of State will register face amount certificate contracts and investment fund shares. (815 ILCS 5/6[B] and 815 ILCS 5/7[B]). Registration effective for one year from date of registration or renewal of registration unless sooner terminated, provided certain statements and reports filed on issuance and throughout year. (815 ILCS 5/6[D] and 815 ILCS 5/7[F]).

"Face amount certificate contract" means any form of "face amount certificate" or "periodic payment plan certificate" (as so designated and defined under Federal Investment Company Act of 1940) and also means any form of annuity contract (other than annuity contract issued by life insurance company authorized to transact business in Illinois), or installment face amount certificate contract, or installment face amount certificate, or installment participation certificate, or installment face amount certificate bond, or similar security evidencing obligation on part of issuer to pay stated or determinable sum or sums at fixed or determinable date or dates more than 24 months after date of issuance, or to pay proceeds of liquidation of interest in certain specified securities or in unit or fund, upon payment of single lump sum at date of issuance, or in consideration of payment of periodic installments of stated or determinable amount. (815 ILCS 5/2.14). Issuer must establish and maintain with Secretary of State deposit of debt obligations of kind in which life insurance companies organized under laws of Illinois permitted to invest their funds, in amount having fair market value of not less than $100,000 and at no time less than current contract liability on all such face amount certificate contracts held by Illinois residents. (815 ILCS 5/6[G]).

"Investment fund shares" means securities issued by persons known as "investment funds" or "investment companies" or "investment trusts" but not including securities issued by persons not within intent of this definition as Secretary of State may designate by rules and regulations or order. (815 ILCS 5/2.15). Investment fund shares will not be registered unless underlying securities or cash are and are to be deposited and held under appropriate agreement for holders with and by trustee or custodian which is clearing corporation, bank, trust company or member of national securities exchange registered under Securities Exchange Act of 1934, provided any such bank, trust company or member has aggregate capital, surplus and undivided profits of at least $2,000,000 and any such member complies with provisions of Investment Company Act of 1940 and rules and regulations of Securities and Exchange Commission promulgated thereunder relating to custody of underlying securities of investment funds. (815 ILCS 5/7[B]).

Registration of Dealers, Salespersons and Investment Advisers.

Every dealer, salesperson and investment adviser must be registered as such with Secretary of State; provided that no dealer or salesperson need be registered when offering or selling securities in transactions believed in good faith to be exempted by subsections A, B, C, D, E, G, H, I, J, K, M, O, P, Q, R or S of 815 ILCS 5/4, provided that such dealer or salesperson is not regularly engaged in business of offering or selling securities in reliance on exemption set forth in 815 ILCS 5/4(g) or 815 ILCS 5/4(m). No dealer, issuer or controlling person shall employ salesperson unless such salesperson is registered as such with Secretary of State or is employed for purpose of offering or selling securities solely in transactions believed in good faith to be exempted by subsections A, B, C, D, E, G, H, I, J, K, L, M, O, P, Q, R or S of 815 ILCS 5/4. Registration as dealer, salesperson or investment adviser effectuated by filing with Secretary of State application and certain documents and by applicant passing examination. Registration may be denied, suspended or revoked by Secretary of State upon certain occurrences. (815 ILCS 5/8).

Licenses.

See subhead Registration of Dealers, Salespersons and Investment Advisors, supra.

Advertising.

Secretary of State may by rule or regulation require filing of any prospective, pamphlet, circulars, form letter, advertisement or other sales literature or advertising communication addressed or intended for distribution or dissemination in this state to prospective investors, including clients or prospective clients of and investment adviser; provided that no such filing may be required with respect to: (1) Securities exempt from registration pursuant to 815 ILCS 5/3 or sold solely in transactions set forth in 815 ILCS 5/4, (2) securities registered under both Federal Securities Act of 1933 and 815 ILCS 5/5(A) or 815 ILCS 5/6(A) or 815 ILCS 5/7(A), or (3) advertisements appearing in newspapers, magazines and periodicals of regular publication and established paid circulation, other than any such advertisement which constitutes offer of securities which is not covered by any of exemptions set forth in 815 ILCS 5/4, and which securities are not exempt from registration pursuant to provisions of 815 ILCS 5/3. Special rules regulate unsolicited telephone solicitations. (815 ILCS 5/8[b]). Telephone solicitor may not make unsolicited telephone call to natural person who does not have previously existing account relationship with telephone solicitor unless certain requirements are established. (815 ILCS 5/8b).

Violations of Act specifically enumerated (815 ILCS 5/12), and severe criminal penalties provided therefor (815 ILCS 5/14) along with injunctive relief (815 ILCS 5/13). Sales in violation voidable at election of purchaser within six months after purchaser has knowledge that sale is voidable provided purchaser serves written notice of election by registered letter or personal service within said six months. Sale is not voidable if purchaser failed, within 15 days from receipt thereof, to accept offer to repurchase at full price plus interest less income received. Limitation period of three years from date of sale. (815 ILCS 5/13).

Liabilities.

Rescission is only remedy available for sale of securities by unregistered brokers and compliance with conditions set forth in 815 ILCS 5/12 is prerequisite to recovery. (195 Ill. Dec. 935, 629 N.E.2d 520). Courts have refused to imply damages remedy. (754 F. Supp. 1226).

Tender Offers.

See topic 2.03 Corporations.

Uniform Simplification of Fiduciary Security Transfers Act.

Not adopted. See Illinois Fiduciary Security Transfer Simplification Act. (760 ILCS 70/0.01 to 70/9). Art. 8 of Uniform Commercial Code governs transfers, except to extent of any inconsistency between it and Illinois Fiduciary Security Transfer Simplification Act. (810 ILCS 5/8-407).

Uniform Securities Ownership by Minors Act.

Not adopted.

Franchise Disclosure Act.

Offer and sale of franchises regulated by Franchise Disclosure Act of 1987. (815 ILCS 705/1-705/44). Act requires registration of franchise by filing disclosure statement. Registration effective on 20th business day after date of filing unless prior thereto Administrator takes certain action. (815 ILCS 705/10). Act also requires registration of franchise brokers and salespersons. (815 ILCS 705/13). Civil (815 ILCS 705/24) and criminal (815 ILCS 705/25) penalties for noncompliance and private right of action (815 ILCS 705/26). Administered by Office of Attorney General. (815 ILCS 705/3[19]).

3.25 STATUTE OF FRAUDS:

See topic 3.15 Frauds, Statute of.

3.26 TRUST RECEIPT SECURITY:

Uniform Trust Receipts Act has been replaced by Art. 9 of Uniform Commercial Code. (810 ILCS 5/9-101). 1972 Official Text became effective July 1, 1973. See topic 3.09 Commercial Code.

3.27 WAREHOUSEMEN:

Uniform Commercial Code adopted. (810 ILCS 5/7–101 to 5/7–704). See topic 3.09 Commercial Code.

Bonds.

Required for public warehouses (240 ILCS 10/6) and grain warehouses (240 ILCS 10/6).

Prior to the issuance of a license, personal property warehouseman shall file surety bond, or legal liability insurance policy signed by warehouseman as principal and by responsible company authorized to execute surety bonds within State of Illinois. (240 ILCS 10/6).

Regulation and Licenses.

No person shall operate warehouse or engage in business of storing personal property for compensation, or hold himself out as being in storage or warehouse business, or as offering storage or warehouse facilities, or advertise for, solicit or accept personal property for storage, without license issued by Illinois Department of Agriculture, except that licenses issued by Illinois Commerce Commission prior to May 4, 1967, shall remain valid for all purposes unless such license is terminated, surrendered or revoked as provided. (240 ILCS 10/1).

There are other statutory provisions in respect to regulation and licensing of public warehouses, including governmental fairs, which store personal property for compensation or hold themselves out as offering storage facilities (240 ILCS 10/1 to 10/22), cold storage locker plants (225 ILCS 650/3), refrigerated warehouses (240 ILCS 35/1 to 35/13), unclaimed property (770 ILCS 90/1 to 90/3), salvage warehouses and stores for food, alcoholic liquors, drugs, medical devices and cosmetics (240 ILCS 30/1 to 30/14), and warehouses receiving, holding, storing or delivering alcoholic liquors (235 ILCS 5/7A-1 to 5/7A-6).

Lien.

See topic 3.09 Commercial Code. See also special rule granting priority lien on “grain assets” of warehousemen for benefit of persons holding written evidence of ownership indicating storage obligation. (20 ILCS 205/40.23).

4 CITIZENSHIP

4.01 ALIENS:

Generally.

Legal rights of aliens with regard to property governed by Property Owned By Aliens Act. (765 ILCS 60/0.01 et seq.).

Personal Property.

Alien may acquire and hold personal property same as citizen. Personal estate of alien dying intestate is distributed same as estate of citizen, and alien can share therein. (765 ILCS 60/7).

Personal and Real Property.

Alien may acquire, hold and dispose of real and personal property same as natural born citizens. (765 ILCS 60/7).

Report to Director of Agriculture must be filed by alien individual, corporation or entities controlled by or benefiting alien individuals upon acquisition or transfer of agricultural land. (765 ILCS 50/3).

Dower Rights.

See category 21 Property, topic 21.08 Dower.

5 CIVIL ACTIONS AND PROCEDURE

5.01 ACCORD AND SATISFACTION:

Common law rules govern. Must be unliquidated claim, over which bona fide dispute exists as to which settlement is reached and executed. (431 N.E.2d 445, 103 Ill. App. 3d 380). General release by insured-subrogor does not bar insurer-subrogee's claim against tortfeasor, if tortfeasor or his insurance carrier had knowledge of insurer-subrogee's interest prior to release. (71 Ill.2d 210, 375 N.E.2d 115). See category 3 Business Regulation and Commerce, topic 3.09 Commercial Code. See Illinois Contribution Among Joint Tortfeasors Act. (740 ILCS 100/1-100/5).

Pleading.

(735 ILCS 5/2-613, 735 ILCS 5/2-619).

5.02 ACTIONS:

Under amended Civil Practice Law, effective July 1, 1982, neither names theretofore used to distinguish ordinary actions at law nor any prior formal requisites of pleading are necessary or appropriate, and there are no distinctions in manner of pleading between actions at law and suits in equity except as specified in Civil Practice Law and rules adopted under it. Fact averments necessary to state any cause of action either at law or in equity, are in no way affected by Civil Practice Law. (735 ILCS 5/2-601).

Forms of Action.

Provisions of Civil Practice Law apply to all civil proceedings except as otherwise provided in cases of administrative review (735 ILCS 5/3-101), attachment (735 ILCS 5/4-101), ejectment (735 ILCS 5/6-101), eminent domain (735 ILCS 30/10-5-5), forcible entry and detainer (735 ILCS 5/9-101), habeas corpus (735 ILCS 5/10-101), injunctions (735 ILCS 5/11-101), enforcement of judgments (735 ILCS 5/12-101), mandamus (735 ILCS 5/14-101), foreclosure of mortgages (735 ILCS 5/15-1101), ne exeat (735 ILCS 5/16-101), partition (735 ILCS 5/17-101), quo warranto (735 ILCS 5/18-101), replevin (735 ILCS 5/19-101), or other proceedings in which, and to extent, that separate statutes regulate matters of procedure (735 ILCS 5/1-108).

Equity.

Legal and equitable issues may be tried together if no jury is employed. (735 ILCS 5/2-614[b]).

Conditions Precedent.

Clerk shall issue summons upon request of plaintiff. Form and substance of summons, and of all other process, and issuance of alias process, and service of copies of pleadings shall be according to court rules. (735 ILCS 5/2-201[b]).

Immunity.

Except as General Assembly may provide, sovereign immunity has been abolished. (Const., Art. 13, §4). Smaller government units are granted only such immunity as provided in Local Governmental and Governmental Employees Tort Immunity Act. (745 ILCS 10/1-101 et seq.).

Actions Against the State.

Except for actions arising under Workers' Compensation Act or Workers' Occupational Diseases Act, State has consented to be sued in Court of Claims only. State may be sued on claims founded upon any law of State, on contract, for time unjustly served in prisons, and in tort. Claims are also heard for Line of Duty Compensation Act, for Crime Victims Compensation Act, for the Illinois National Guardsman's Compensation Act and under the Administrative Procedure

Act for expenses incurred by a party in a contested case on the administrative level.. (705 ILCS 505/8). Except for infants, incompetents, and persons under other disability, contract claims are barred unless filed with clerk of court within five years after they first accrue. However, claims by vendors of goods or services under Illinois Public Aid Code shall have one year after accrual of cause of action. (705 ILCS 505/22[b]). Actions under Law Enforcement Officers, Firemen's and National Guardsmen's Compensation Acts must commence within a year of on-duty death. All other claims are barred unless filed with clerk of court within two years after they first accrue. (705 ILCS 505/22[h]). Actions for personal injuries or death will be barred unless, within one year from date of injury or accrual of cause of action, signed written statement is served on Attorney General and clerk of court of claims, giving name of person to whom cause of action has accrued, name and residence of person injured, date, hour, and place or location of accident, and general nature thereof, and name and address of attending physician and hospital unless claimant files claim within one year of accrual. (705 ILCS 505/22-1, 505/22-2). Applications under Crime Victims Compensation Act must be served on Attorney General within two years of date of occurrence of crime. (740 ILCS 45/6.1). Effective Jan. 1, 2008, application must be filed within two years of occurrence of crime, or within one year after criminal indictment of person for offense upon which claim is based.

Immunity of Local Public Entities and their Employees.

Local public entity includes any county, township, municipality, municipal corporation, school district or board, forest preserve or park district, fire protection district, sanitary district, museum district, trustees of schools of townships, treasurers of schools of townships, and all other local governmental bodies. (745 ILCS 10/1-206).

Punitive Damages.

A local public entity is not liable for punitive damages. (745 ILCS 10/2-102).

General Immunity.

A local public entity and its employees are not liable for injury caused by: adoption or failure to adopt or enforce any law; any authorized issuance, denial, suspension or revocation of a permit or license; or failure to inspect or negligent inspection of any property not its own. (745 ILCS 10/2-103 to 2-105; 745 ILCS 10/2-205 to 2-207).

A local public entity is not liable for injury caused by: its employees' oral promises or misrepresentations, whether negligent or intentional; its employees' libelous or slanderous actions; or for provision of information either orally, in writing by computer or other electronic transmission; granting or failure to grant public welfare goods or monies; or for injury resulting from employee's act or omission, where employee is not liable. (745 ILCS 10/2-106 to 2-109).

A public employee in position involving determination of policy or exercise of discretion is not liable for injury resulting from act or omission in determining policy, even if discretion is abused. (745 ILCS 10/2-201). Public employee is not liable for injury caused by: act or omission in executing or enforcing law unless willfully and wantonly negligent; good faith acts under unconstitutional, invalid or inapplicable enactment except to extent of liability had enactment been constitutional, valid and applicable; acts or omissions of another person; instituting or prosecuting any judicial or administrative proceeding within scope of employment, unless employee acts maliciously and without probable cause; entry upon any property where entry is expressly or impliedly authorized by law; negligent misrepresentation within scope of employee's employment. (745 ILCS 10/2-202 to 2-204, 10/2-208 to 2-210).

Immunity from Liability for Injury Occurring in Use of Public Property.

A local public entity must use ordinary care to maintain its property in reasonably safe condition but is not liable for injury unless it has actual or constructive notice of unsafe condition in sufficient time prior to injury to have remedied or protected against such condition. (745 ILCS 10/3-102).

Special Provisions.

Special provisions provide, under certain circumstances, immunity to local public entities and their employees for police and correctional activities (745 ILCS 10/4-101 to 107), fire protection activities (745 ILCS 10/5-101 to 103), and medical, hospital and public health activities (745 ILCS 10/6-101 to 109).

Limitation of Actions and Notice.

Civil actions against local public entity must be commenced within one year from date of injury or accrual of action, except for action for damages due to injury or death, which must be commenced within two years from date of injury or death, or two years from discovery of injury or death, but no more than four years after date on which act or omission causing injury or death occurred. (745 ILCS 10/8-101). Special one year limitation and six month notice provisions of School Tort Liability Act (745 ILCS 25/2, 25/3) invalid as to both public and nonprofit private schools (57 Ill.2d 384, 312 N.E.2d 635).

Payment of Judgments by Local Government.

Local governments have specific authority to settle and compromise tort claims and law suits and pay judgment arising therefrom and may pay associated attorneys fees and costs. (745 ILCS 10/9-102). Local government may pay tort claim or judgment through insurance (745 ILCS 10/9-103), installments over ten years plus interest (745 ILCS 10/9-104), bond issue (745 ILCS 10/9-105), rate or fee increases (745 ILCS 10/9-106), or special tax levy (745 ILCS 10/9-107) at discretion of local government.

Charitable Immunity.

Doctrine of charitable immunity has been abolished in Illinois as to causes of action accruing after Nov. 18, 1965. (33 Ill.2d 326, 211 N.E.2d 253).

Immunity from Liability.

Special provisions provide, under certain circumstances, immunity to licensed dentists for free dental clinic services unless willful or wanton misconduct (225 ILCS 25/54), and immunity to mental health or developmental disability facilities and their employees for disclosure to United States Secret Service or State Police information necessary to protect the life of a public official or a person under the protection of the Secret Service, to disqualify patient from retaining Firearm Owner's Identification Card, or where peace officers or prosecuting authority who is conducting bona fide investigation of criminal offense or attempting apprehension of fugitive, disclosing whether person is present at the facility. The facility director may also provide certain information to the peace officer who takes a person into custody and transports them to the facility regarding their identity and contact information for their nearest relative.(740 ILCS 110/12).

See also category 14 Family, topics 14.11 Marriage, subhead Action for Breach of Promise; 14.05 Dissolution of Marriage.

Commencement.

Commencement of every civil action, unless otherwise expressly provided by statute, is by filing of complaint. (735 ILCS 5/2-2011[a]). Duplicate original summons may be issued to facilitate service. (735 ILCS 5/2-201[b]). Copy of complaint must be attached to each copy of summons. (Ill. Sup. Ct. R. 104[a]). See also topic 5.20 Process.

Jury Trial.

Plaintiff waives jury trial unless demand made when complaint filed. Defendant waives jury trial unless demand filed not later than date answer filed. Unless either party expressly demands jury trial by 12 jurors in cases involving $50,000 or less, trial shall be before jury of six. (735 ILCS 5/2-1105).

Lis Pendens.

If a plaintiff in a suit in equity or in the nature of equity affecting real property files a statutory notice of pendency of the proceeding in office of recorder of deeds in county where real estate is located, this statutory notice operates from time it is filed as constructive notice to every person subsequently acquiring an interest in the property (including persons with a prior interest who are not in possession and whose interest is not shown of record at the time of filing of the notice). If plaintiff fails to complete service within six months the statutory notice ceases to be constructive notice until service is accomplished. (735 ILCS 5/2-1901). If property is registered in Torrens (765 ILCS 35/1), no constructive notice is created unless procedure specified in statutes relating to property in Torrens (765 ILCS 35/84) is first followed (735 ILCS 5/2-1901). For constructive notice to be created in foreclosure action, requirements with respect to notice of foreclosure must also be met. (735 ILCS 5/15-1503).

Certified copy of petition or adjudication in bankruptcy proceeding may be filed in office of recorder of deeds in county where real estate is located. Recorder shall record such certified copy in same manner and for same fee as recording deeds. (735 ILCS 5/2-1902).

Parties.

Party commencing an action shall be called plaintiff; the adverse party defendant. (735 ILCS 5/2-401). On appeal the relative position of parties and their designation is same as in trial court, but they are further designated appellant and appellee (Ill. Sup. Ct. R. 341[f]). For good cause shown, parties may appear under fictitious names. (735 ILCS 5/2-401).

Misnomer of parties is not ground for dismissal, but name of any party may be corrected at any time before or after judgment on motion on any terms and proof as court requires. (735 ILCS 5/2-401[b]).

Medical Malpractice-Respondents in Discovery.

Plaintiff in action based on allegation of negligence in performance of health care services may designate as respondents in discovery those individuals, other than defendants, believed to have information essential to determination of who should be named as additional defendants. Those persons so named shall be required to respond to discovery in same manner as are defendants, and may on motion be added as defendants if evidence discloses probable cause for such action. Plaintiff must serve copy of complaint on each individual named as respondent in discovery. Person named as respondent in discovery may on his own motion be made defendant, in which case this section of statute is no longer applicable to that person. Each respondent in discovery shall be paid expenses and fees as provided for witnesses. Respondent in discovery may be made defendant in same action within six months after he is named as respondent in discovery, even though time during which action may otherwise be initiated against him may have expired during such six month period. (735 ILCS 5/2-402). Extension from original six-month period for good cause may be granted only once for up to 90 days for withdrawal of plaintiff's counsel or good cause. Notwithstanding limitations herein court may grant reasonable extensions for failure or refusal by respondent to comply with discovery. Plaintiff shall serve upon respondent(s) copy of complaint together with summons in form set forth in statute.

Who may be Plaintiff.

Assignee of nonnegotiable chose in action may sue thereon in his own name, but must in his pleading on oath allege that he is the actual bona fide owner, and set forth how and when he acquired title. Such action is subject to any defense or set-off existing before notice of assignment. (735 ILCS 5/2-403[a]). Where chose in action consists of wages, at least five days written notice of the pendency of such action must be served on assignor before trial; and he may, on application, intervene, and he or defendant may set up any set-off or defense to the assignment or the indebtedness, and judgment against defendant may not exceed the amount found due and unpaid from assignor to assignee, judgment for any balance remaining due from defendant being rendered in favor of assignor. (735 ILCS 5/2-403[b]). Suit brought by virtue of subrogation (by contract or operation of law) must be brought either in name or for use of subrogee, who must, in his pleading on oath, allege that he is the actual bona fide subrogee, and set forth how and when he became such. (735 ILCS 5/2-403[c]).

Joinder of Plaintiffs.

Subject to rules of court, all persons in whom any right to relief arising out of same transaction or series of transactions is alleged to exist, whether jointly, severally, or in the alternative, may join in one action as plaintiffs whenever, and separate actions been brought, any common question of law or fact would arise, provided that if on application of any party it appears that such joinder may embarrass or delay trial, court may order separate trials or make such order as may be expedient, and judgment may be given for one or more of the plaintiffs for the relief to which he or they may be found entitled. A necessary plaintiff, counterclaimant or third party plaintiff, declining to join may be made a defendant, cross defendant or third party defendant, the reason therefor being stated in the complaint, counterclaim or third party complaint. (735 ILCS 5/2-404).

Joinder of Defendants.

Any person may be made defendant who, jointly, severally, or in alternative, is alleged to have or claim interest in controversy or in any part thereof or in transaction or series of transactions out of which same arose, or whom it is necessary to make party for complete determination or settlement of any question involved, or against whom liability is asserted jointly, severally, or in alternative, arising out of same transaction or series of transactions, regardless of number of causes of action joined. It is not necessary that each defendant be interested as to all relief prayed or as to every cause of action included in any proceeding, but court may make any order that may be just to prevent any defendant from being embarrassed or put to expense by being required to attend proceeding in which he may have no interest. Where plaintiff is in doubt as to person from whom he is entitled to redress, he may join two or more defendants and state his claim against them in alternative, in same count, or plead separate counts in alternative against different defendants, so that question which, if any, of defendants is liable and to what extent, may be determined. (735 ILCS 5/2-405).

Bringing in New Parties.

If complete determination of controversy cannot be had without presence of other parties, court may direct them to be brought in. If person not party has interest or title which judgment may affect, court, on application, may direct him to be made party. (735 ILCS 5/2-406[a]).

Third Party Proceedings.

Within time for filing answer or thereafter by leave of court, defendant may by third party complaint bring in as defendant a person not a party to the action who is or may be liable to defendant for all or a part of the plaintiff's claim. Third party defendant may assert any defense he has against third party complaint or which third party plaintiff has against plaintiff's claim. Third party defendant has same right to file counterclaim or third party complaint as any other defendant. Plaintiff may assert any claim against third party defendant which might have been asserted had third party defendant been originally joined as a defendant. When a counterclaim is filed against a party, he may likewise proceed against third parties. Nothing herein applies to liability insurers or creates any substantive right to contribution among tort feasors or against any insurer or other person which has not heretofore existed. (735 ILCS 5/2-406[b]). Action is commenced against new party by filing of appropriate pleading or entry of order naming him party. Process is had upon new party in like manner as is provided for service on defendants. (735 ILCS 5/2-406[c]).

Contribution and Indemnity.

In causes of action arising out of occurrences on or after Mar. 1, 1978, one tortfeasor may seek contribution from other tortfeasors. (740 ILCS 100/2[a]). Right of contribution exists only in favor of tortfeasor who pays more than his pro rata share of common liability; recovery limited to excess paid. Liability of tortfeasor for contribution limited to pro rata share of common liability. (740 ILCS 100/2[b]). Release or covenant not to sue or not to enforce judgment given in good faith does not discharge other tortfeasors but reduces amount recoverable against other tortfeasors to extent of greater amount stated or consideration actually paid. (740 ILCS 100/2[c]). Tortfeasor who settles with claimant pursuant to above is discharged from all liability for any contribution to any tortfeasor (740 ILCS 100/2[d]), and is not entitled to recover contribution from another tortfeasor whose liability is not extinguished by settlement (740 ILCS 100/2[e]). One who discharges tortfeasor's obligation is subrogated to right of contribution. (740 ILCS 100/2[f]). Pro rata share of each tortfeasor determined by relative culpability. (740 ILCS 100/3). Where no underlying action for recovery for injury or death to person or damage to property has been filed, no action for contribution or indemnity may be commenced more than two years after party seeking contribution or indemnity has made payment to claimant. Where underlying action has been filed by claimant, no action for contribution or indemnity may be commenced more than two years after party seeking contribution or indemnity has been served with process in underlying action or more than two years from time party, or his privy, knew or reasonably should have known of act or omission giving rise to action for contribution or indemnity whichever is later. Effect of these limitation periods on application of other statutes of repose and limitation is noted in certain instances. These limitation periods do not apply to action for damages in which contribution or indemnification is sought from party alleged to have been negligent where negligence has been alleged to have resulted in injuries or death by reason of medical or healing art malpractice. (735 ILCS 5/13-204). Claims for contribution may be asserted by separate action before or after payment, or by counterclaim or third-party complaint in pending action. (740 ILCS 100/5). If tortfeasor brings action against plaintiff's employer, employer's liability shall not exceed employer's liability to plaintiff under Worker's Compensation Act or Worker's Occupational Diseases Act and tortfeasor not entitled to recover money from employer; tortfeasor shall receive only credit against liability of tortfeasor in amount equal to amount of contribution, if any, for which employer is found liable to that tortfeasor even if amount exceeds employer's liability under Worker's Compensation Act and Worker's Occupational Diseases Act. (740 ILCS 100/3.5).

Several Liability.

In any action brought on account of death, bodily injury to person or physical damage to property where recovery based on negligence or product liability, based on strict tort liability, all defendants found liable are jointly and severally liable for plaintiff's past and future medical and medically related expenses. Any defendant whose fault is less than 25% of fault attributable to plaintiff, defendants sued by plaintiff and any third party defendant except plaintiff's employer, shall be severally liable for all other damages. Any defendant whose fault is found to be 25% or greater of total fault attributable to plaintiff, defendants sued by plaintiff, and any third party defendant except plaintiff's employer liable jointly and severally for all other damages. (735 ILCS 5/2-1117). In any medical malpractice action defined at 735 ILCS 5/2-1704, based on negligence, and in any action involving discharge of pollutant, any defendant found liable is jointly and severally liable. (735 ILCS 5/2-1118).

Nonjoinder or Misjoinder.

No action will be dismissed for misjoinder of parties, or dismissed for nonjoinder of necessary parties without reasonable opportunity to add them as parties. New parties may be added and parties misjoined dropped by order of court before or after judgment, as ends of justice require. (735 ILCS 5/2-407).

Joint Debtors or Partners.

All parties to joint obligation, including partnership obligation, may be sued jointly or separate actions may be brought against one or more of them. Judgment against fewer than all of parties to joint or partnership obligation does not bar action against those not included in judgment or not sued. Statute does not permit more than one satisfaction. (735 ILCS 5/2-410).

Actions Against Partnerships.

Partnership may be sued in names of partners as individuals doing business as partnership, or in firm name, or both. (735 ILCS 5/2-411[a]). Unsatisfied judgment against partnership in its firm name does not bar action to enforce individual liability of any partner. (735 ILCS 5/2-411[b]).

Actions Against Voluntary Unincorporated Associations.

Voluntary unincorporated association may sue or be sued in own name. (735 ILCS 5/2-209.1).

Change in Parties.

No change in parties impairs any previous attachment of estate or body of any person remaining defendant, or bonds or recognizances of any person remaining party as against himself or sureties, or receipts to officers for property attached. When parties are changed, court may order new bonds if deemed necessary. (735 ILCS 5/2-412).

Class Actions.

Uniform Class Actions Act not adopted. Action may be maintained as class action either by or against representative party only if court determines that: (1) Class is so numerous that joinder of all members is impracticable; (2) there are questions of fact or law common to class, which predominate over any questions affecting only individual members; (3) representative parties will fairly and adequately protect interest of class; and (4) class action is appropriate method for fair and efficient adjudication of controversy. (735 ILCS 5/2-801). Court shall determine by order whether suit may be maintained as class action and may divide class into sub-classes. (735 ILCS 5/2-802). Court may in its discretion order notice to protect interests of class and parties and may condition class certification upon giving of such notice. (735 ILCS 5/2-803). Intervention by any class member is to be liberally granted except where such intervention is found to be disruptive or prejudicial. (735 ILCS 5/2-804[a]). Any class member may be excluded from class upon request. (735 ILCS 5/2-804[b]). Any judgment entered in class action shall be binding on all class members who have not been excluded. (735 ILCS 5/2-805). Class action may not be dismissed except with court approval. (735 ILCS 5/2-806).

Unknown Parties.

If persons whose names are unknown are interested in any action, they may be made parties by description as unknown owners or unknown heirs or devisees of any deceased person who may have been interested in subject matter previous to death, or as unknown heirs or devisees of person not known to be living or dead. On filing of affidavit stating that names of such persons are unknown, process may issue and publication be had against such persons by the names and description so given, and judgments rendered in respect to such parties are of same effect as though they had been designated by their proper names. Affidavit as to unknown parties may be combined with affidavit for service by publication. (735 ILCS 5/2-413). Persons required to register under assumed business name who fail to do so may be sued as unknown owners and are bound by judgment against business under its assumed name. (805 ILCS 405/6).

Joinder of Causes of Action.

Subject to rules of court, plaintiffs may join any causes of action against any defendant or defendants; and defendant may set up by answer any and all cross-demands whatever, whether recoupment, set-off, or otherwise, which are designated as counter claims. Court may order separate trials of causes of action or counterclaims which cannot be conveniently disposed of with other issues. Legal and equitable issues may be tried together if no jury is employed. (735 ILCS 5/2-614).

Splitting of Causes of Action.

Court may, in its discretion, order separate trial of any causes of action, counterclaim or third-party claim if it cannot be conveniently disposed of with other issues in case. (735 ILCS 5/2-614).

Consolidation and Severance.

Action may be severed and actions pending in same court may be consolidated whenever it can be done without prejudice to substantial right. (735 ILCS 5/2-1006).

Stay of Proceedings.

Stay while action pending and prior to judgment must conform to prior agreements between parties. (339 Ill. App. 3d 258; 790 N.E.2d 908).

Intervention.

Upon timely application anyone shall be permitted to intervene as of right when statute confers unconditional right to do so, when representation by existing parties of applicant's interest is or may be inadequate and applicant will or may be bound by order or judgment, or when applicant will be adversely affected by disposition of property subject to control or disposition of court or officer thereof. (735 ILCS 5/2-408[a]). Upon timely application anyone may in court's discretion be permitted to intervene when statute confers conditional right or when applicant's claim or defense and main claim have common question of law or fact. (735 ILCS 5/2-408[b]).

In all cases involving validity of constitutional provision, statute or regulation of state, ordinance or regulation of municipality or governmental subdivision of state and affecting public interest, state, municipality or government subdivision involved upon timely application may, in discretion of court, be permitted to intervene. (735 ILCS 5/2-408[c]-[d]).

Petition setting forth grounds for intervention shall accompany applicant's proposed initial pleading or motion. In cases in which intervention is discretionary, court shall consider whether it will unduly delay or prejudice adjudication of rights of original parties. (735 ILCS 5/2-408[e]). Intervenor shall have all rights of original party, except court may in its order allowing intervention provide that intervenor shall be bound by orders or judgments theretofore entered or evidence theretofore received, that intervenor shall not raise issues more properly raised at earlier stage of proceeding, that intervenor shall not raise new issues or add new parties, or that in other respects intervenor shall not interfere with control of litigation, as justice and avoidance of undue delay may require. (735 ILCS 5/2-408[f]).

Interpleader.

Persons having claims against plaintiff arising out of same or related subject matter may be joined as defendants and required to interplead when their claims may expose plaintiff to double or multiple liability. It is not a ground for objection to interpleader that claims of the several claimants or titles upon which their claims depend do not have a common origin or are not identical or are adverse to or independent of one another or that plaintiff avers that he is not liable in whole or in part to any of or all claimants. Defendant under similar circumstances may obtain like relief by counterclaim. Provisions are not a limitation upon joinder of parties or causes of action. (735 ILCS 5/2-409).

Abatement and Revival.

If by reason of marriage, bankruptcy, assignment or other event occurring after commencement of action, either before or after judgment, causing change or transmission of interest or liability, or by reason of any person interested coming into existence after commencement of action, it becomes necessary or desirable that any person not already party should be before court, or that any person already party should be made party in another capacity, action does not abate but on motion order may be entered that proper parties be substituted or added and cause be carried on with remaining parties and new parties with or without change in title of cause. (735 ILCS 5/2-1008[a]).

Death.

If a party dies and the action is one which survives, the proper party or parties may be substituted by order of court upon motion. If motion to substitute is not filed within 90 days after death is suggested of record, the action may be dismissed as to the deceased party. If a party dies and the action is one in which the right sought to be enforced survives only as to the remaining parties to the action, action does not abate. Death is suggested of record and action proceeds in favor of or against remaining parties. No action brought for use of another abates by reason of death of plaintiff whose name is used but may be maintained by party for whose use it was brought in his own name upon suggesting death of record and entry of order of substitution. If death of party to personal action is suggested of record and no petition for letters of office for his estate has been filed, court, upon motion, may appoint special administrator for deceased party for purpose of prosecuting action of any party who appears entitled to participate in decedent's estate and reciting names and last known addresses of all known heirs and legatees and name of executor named in any will that has been filed. Within 90 days special representative shall mail certain information to heirs and legatees. If estate subsequently opened with representative other than special representative, such person shall substitute, and disbursements and fees of special representative and attorney will be allowed as claim against proceeds. If person against whom action has been brought dies, and cause of action survives, personal representative of decedent's estate shall be substituted. If no petition has been filed for letters of office, court may, upon motion of plaintiff, appoint special representative for defendant; recovery limited to any liability insurance protecting estate but estate not barred from enforcing any claims available to it as counterclaims. (735 ILCS 5/2-1008[b]).

Suit instituted by administrator to collect does not abate by the revocation of his letters, but may be prosecuted by permanent executor or administrator. (755 ILCS 5/10-4). On death of garnishee procedure is same as that when defendant dies in other civil cases. (735 ILCS 5/12-711; 735 ILCS 5/2-1008[b]). Interested person may file petition to contest validity of will within six months after admission of will to probate. Right to institute or continue such proceeding survives and descends to heir, legatee, devisee, executor, administrator, grantee, or assignee of person entitled to institute proceeding. (755 ILCS 5/8-1).

In addition to actions which survive by common law, the following survive: replevin, actions for damages for injury to the person (except slander and libel); actions for damages for injuries to real or personal property or for detention or conversion of personal property; actions against officers for misfeasance, malfeasance or non-feasance, actions for fraud or deceit, and Dram shop actions. (755 ILCS 5/27-6). See also category Estates and Trusts, topic Executors and Administrators.

Legal Disability.

If party is declared to be person under legal disability, that fact is suggested of record and prosecution or defense maintained by his representative, guardian ad litem or next friend, as may be appropriate. (735 ILCS 5/2-1008[c]).

Trustees and Public Officers.

If any trustee or public officer ceases to hold the trust or office and that fact is suggested of record the action shall proceed in favor of or against his successor. (735 ILCS 5/2-1008[d]).

Service of Process.

Parties against whom relief is sought, substituted under 735 ILCS 5/2-1008(a), must be brought in by service of process. Service of process on parties substituted under 735 ILCS 5/2-1008(b), (c), or (d), is not required, but notice must be given as court may direct. (735 ILCS 5/2-1008[e]).

Use or operation of motor vehicle by any person or his agent or employee shall be deemed appointment of Secretary of State as agent for service of all legal process in action growing out of such use and operation if person is nonresident or is resident at time cause arises but subsequently becomes nonresident. Service made by serving Secretary with copy and affidavit from plaintiff stating that all service requirements have been met is sufficient if notice of service and copy of process are sent registered mail by plaintiff to defendant at defendant's last known address within ten days. (625 ILCS 5/10-301). See topic 5.20 Process.

Sanctions may now be imposed against both client and counsel for unfounded or frivolous pleadings, or filings made for other improper purposes. (Ill. Sup. Ct. R. 137).

Single Action for Libel, Slander, etc.

Uniform Single Publication Act is in effect. (740 ILCS 165/1 to 165/5).

Small Claims.

See category 6 Courts and Legislature, topic 6.01 Courts.

Limitation of.

See topic 5.16 Limitation of Actions.

Direct Actions Against Insurer.

See category 16 Insurance, topic 16.01 Insurance Companies.

5.03 APPEAL AND ERROR:

To seek review of final appealable order of circuit court, party generally must file notice of appeal in manner set out in Supreme Court Rules, for civil (Ill. Sup. Ct. R. 303) and criminal (Ill. Sup. Ct. R. 606) cases. Criminal rule contains verbatim forms and precise instructions. Appeals to Appellate Court matter of right except with respect to acquittal on merits in criminal cases. (Const. Art. VI, §6). When death sentence imposed, appeal is automatically perfected. (Ill. Sup. Ct. R. 606[a]). Appeals by State in criminal cases are limited by Rules. (Ill. Sup. Ct. R. 604[a][1]).

Appeal Bond.

No cost or other bond required as condition of appeal, except under circumstances discussed infra subheads Security for Costs, Stay Pending Appeal.

Certification of State Law Questions.

U.S. Supreme Court or U.S. Court of Appeals for Seventh Circuit may certify state law questions to Illinois Supreme Court in absence of controlling Illinois Supreme Court precedents.

Briefs and oral argument allowed pursuant to Rules. (Ill. Sup. Ct. R. 20).

Direct Appeals to Supreme Court.

Direct appeals as matter of right to Supreme Court from final judgments of circuit courts are limited to: (a) Cases in which statute of U.S. or Illinois has been held invalid, (b) criminal cases in which death sentence has been imposed and (c) proceedings commenced under Ill. Sup. Ct. R. 21(c). (Const. Art. VI, §4; Ill. Sup. Ct. R. 302[a], 603). In other cases Supreme Court may permit direct appeal if public interest requires prompt adjudication. (Ill. Sup. Ct. R. 302[b]).

Appeals from Appellate Court to Supreme Court.

Appeals from Appellate to Supreme Court lie as matter of right only in cases in which statute of U.S. or Illinois has been held invalid: (a) Federal or state constitutional question arises for first time in and as result of action of Appellate Court, or (b) Appellate Court issues certificate of importance. (Const. Art. VI, §4; Ill. Sup. Ct. R. 316, 317). Otherwise all appeals from Appellate to Supreme Court permitted only if petition for leave to appeal granted. (Ill. Sup. Ct. R. 315). Unless timely petition for rehearing filed in Appellate Court, party seeking leave to appeal must file petition for leave in Supreme Court within 21 days after entry of judgment in Appellate Court or within same 21 days file with Appellate Court affidavit of intent or verification by certification under §1-109 of Code of Civil Procedure of intent to file petition for leave, and file petition within 35 days after entry of such judgment. (Ill. Sup. Ct. R. 315). Form for and grounds for granting such petition prescribed in Rules. (Ill. Sup. Ct. R. 315). Forms for and grounds for granting appeals from orders of Illinois Workers' Compensation Commission division of Appellate Court are prescribed in Rules. (Ill. Sup. Ct. R. 315).

Final judgment as to less than all parties or claims appealable upon express finding that there is no just reason for delaying enforcement or appeal (Ill. Sup. Ct. R. 304[a]) and in certain situations described in Rules (Ill. Sup. Ct. R. 304[b]) primarily concerning administration of estates, receiverships, etc., and proceedings under 735 ILCS 5/2-1401, 1402.

Appeals from interlocutory orders may be taken as of right within 30 days if order respects injunction, receiver, parental rights, temporary commitment in adoption case, custody of assets of financial institution, mortgagee's right to possess mortgaged premises, or issues raised in proceedings to exercise right of eminent domain under §7-104 of Code of Civil Procedure, but procedure for appeal and stay as provided therein. (Ill. Sup. Ct. R. 307). To appeal interlocutory order entered on ex parte application, party intending to appeal must first present motion to trial court to vacate order. Appeal may be taken if motion denied or if court does not act within seven days of its presentation. (Ill. Sup. Ct. R. 307[b]).

Appeal of temporary restraining order is by petition filed with Appellate Court, with proof of service, within two days of entry or denial of order in question. Petitioner and respondent may each file memoranda, but no replies are permitted and no oral argument will be heard. Appellate Court shall consider and decide petition within five days of receiving memoranda. (Ill. Sup. Ct. R. 307[d]).

Appellate Court may permit appeal from any interlocutory order if the trial court has certified that there is substantial ground for difference of opinion and that immediate appeal may materially advance the litigation. (Ill. Sup. Ct. R. 308). Application for leave to appeal to Appellate Court must thereafter be filed within 14 days and must contain statement of facts, question presented, and reason why substantial question exists. Party opposing appeal may answer within 14 days of due date of application. (Ill. Sup. Ct. R. 308).

Appeal from order awarding new trial, denying motion to transfer or dismiss on grounds of forum non conveniens, denying motion to dismiss for lack of jurisdiction, granting or denying transfer of venue or from interlocutory order affecting care and custody of unemancipated minor allowed only if petition for leave to appeal filed within 30 days and granted by Appellate Court. Record must be filed with petition. Answer may be filed within 21 days of petition due date. If petition granted, all rulings on post-trial motions may be reviewed without filing cross-appeal. (Ill. Sup. Ct. R. 306[a], [b], [c]).

Transfer of Cases Appealed to Wrong Court.

A case appealed to the wrong court must be transferred to proper court and then proceeds as though properly appealed in the first instance. Any bond theretofore given remains binding. (Ill. Sup. Ct. R. 365).

Time for Appealing—Perfecting Appeal.

Except for local improvement cases and Illinois Drainage Code cases, no appeal may be taken to Supreme or Appellate Court after expiration of 30 days from entry of order, decree, judgment or other determination complained of or from entry of order disposing of timely post-trial motion. (Ill. Sup. Ct. R. 303[a], [b], 307[a], 606[b]). Extension of time for filing notice of appeal may be granted by reviewing court under circumstances discussed infra under subhead Notice of Appeal. In civil cases, other parties may join in appeal or file separate or cross-appeals within later of 30 days from judgment or ten days from service of notice of appeal. (Ill. Sup. Ct. R. 303[a]).

Appeal is initiated when notice of appeal is filed in trial court. No other step is deemed jurisdictional. (Ill. Sup. Ct. R. 301). If death sentence is imposed, appeal is automatically perfected. (Ill. Sup. Ct. R. 301, 606[a]).

Case placed on appellate docket by clerk once notice of appeal filed. (Ill. Sup. Ct. R. 303[e]). Within 14 days of filing notice of appeal, appellant must file docketing statement, proof of service, and filing fee. (Ill. Sup. Ct. R. 312, 313). Appellant must thereafter file record or certificate in reviewing court within 63 days after filing of last notice of appeal, or within 14 days after expiration of any trial court extension. (Ill. Sup. Ct. R. 326, 323).

Notice of Appeal.

Rules specify forms verbatim and manner of service. (Ill. Sup. Ct. R. 303[c], [d], 606[d], [e]). Filing required within 30 days of judgment or within 30 days after entry of order disposing of last pending post-trial motion. (Ill. Sup. Ct. R. 303[a], 606). May be extended if motion filed in reviewing court within 30 days after due date, supported by affidavit showing reasonable excuse for tardiness, and accompanied by proposed notice of appeal and filing fee. (Ill. Sup. Ct. R. 303[d]). Criminal rules permit motion within six months of due date if showing made that appeal has merit and not due to appellant's culpable negligence. (Ill. Sup. Ct. R. 606[c]). Failure to file timely notice of appeal properly identifying order appealed from may result in dismissal of appeal with prejudice. (24 Ill. App.3d 751, 320 N.E.2d 576).

As to notice of separate appeal or cross appeal, see Ill. Sup. Ct. R. 303(a)(3).

Motions in Reviewing Court.

If record has not been filed, all motions made to reviewing court (e.g., for stay or for extension of time for filing notice of appeal or record) must be accompanied by supporting record (authenticated by clerk's certificate or by affidavit of filing party or attorney). (Ill. Sup. Ct. R. 361[a]). Motions must be in writing. Written objections may be filed within five days of personal service, ten days of mailing, or such further time as court may allow. No further replies or oral argument without leave of court. (Ill. Sup. Ct. R. 361[b][2]).

Record, Procedure, Etc., on Appeal.

As to contents and filing of record, see Ill. Sup. Ct. R. 321 to 331; abstracts and briefs, Ill.

Sup. Ct. R. 341 to 345, oral argument, Ill. Sup. Ct. R. 351-352, rehearings, Ill. Sup. Ct. R. 367.

Stay of Proceedings.

Appeal stays enforcement of judgment for money if timely filing of notice of appeal filed within 30 days of entry of judgment and bond or other form of security including letters of credit, escrow agreements and certificates of deposit presented, approved and filed within time for filing notice of appeal. Circuit court may grant extension of not more than 45 days unless agreement of parties to contrary. (Ill. Sup. Ct. R. 305[a], [c]).

Circuit court or reviewing court may stay, pending appeal, enforcement of judgment, other than judgment or portion of judgment for money not otherwise stayed, or enforcement of any other final or interlocutory judgment or judicial or administrative order. (Ill. Sup. Ct. R. 305[b], [d]). Except in order terminating parental rights automatically stayed for 60 days after order of termination and if notice of appeal filed within 60 days, automatic stay shall continue until appeal complete or lifted by reviewing court. (Ill. Sup. Ct. R. 350[e]). Automatic stay prevents entry of order of adoption without parent's consent and withholds power of person or agency to consent to adoption. Rules for lifting automatic stay pursuant to order terminating parental rights. (Ill. Sup. Ct. R. 305[e]).

Application for stay of enforcement ordinarily made first to trial court. Motion for stay may be made to reviewing court only on showing that application to trial court is impracticable or trial court denied application or failed to afford requested relief. (Ill. Sup. Ct. R. 305[d]).

Bond may be required in any case and is mandatory in case of money judgment or protection of property interests. (Ill. Sup. Ct. R. 305[b]).

Where stay is not perfected within time for filing notice of appeal or within extension, reversal or modification of judgment does not affect right, title, or interest of any person not party to such action in any real or personal property acquired after judgment becomes final but before judgment stayed. Reversal or modification does not affect rights of any person not party to such action by virtue of any certificate of sale issued before judgment is stayed. (Ill. Sup. Ct. R. 305[j]).

Extent of Review.

Reviewing courts have original jurisdiction as may be necessary to complete determination of any cause on review. (Const. Art. VI, §§4, 6). Reviewing court may exercise all powers of amendment of trial court, allow substitution of parties, allow new parties to be added or parties to be dropped or allow parties to be rearranged as appellants or appellees on reasonable notice; order or permit record to be amended by correcting errors or adding matters which should have been included; draw inferences of fact; give any judgment and make any order which ought to have been given or made, and make such further orders and grant such relief, including remandment, partial reversal, partial new trial, entry of remittitur or issuance of execution, as case may require. (Ill. Sup. Ct. R. 366[a]).

Disposition of Cause.

Clerk of reviewing court must transmit mandate to trial court, with notice to parties, not earlier than 35 days after entry of judgment unless court orders otherwise. (Ill. Sup. Ct. R. 368[a]). Appellate Court or Supreme Court or judge of either may stay or recall mandate from Appellate Court until time for appeal to Supreme Court has expired. (Ill. Sup. Ct. R. 368[c]). On dismissal of appeal or affirmance, execution may issue and other proceedings be had as if no appeal had been taken, on filing of mandate of reviewing court with clerk of lower court. When cause is remanded for new trial or hearing, upon filing of mandate, cause is reinstated on ten days notice served on adverse party. (Ill. Sup. Ct. R. 369[b], [c]).

Review of Decisions of Administrative Agencies.

Administrative Review Act provides for uniform method of review by circuit courts, or by appellate court in case of Illinois Educational Labor Relations Board, of final decisions of administrative agencies, where act creating or conferring power on such agency, by express reference, adopts Administrative Review Act as method of review. (735 ILCS 5/3-102, 3-104). Illinois Constitution permits legislature to authorize direct review by appellate court (Art. VI, §6). Procedure for statutory direct review to appellate court at 735 ILCS 5/3-113, applies where other statute provides for such review, such as in Pollution Control Board cases (415 ILCS 5/41; Ill. Sup. Ct. R. 335). In other cases, review is pursuant to statute creating agency (220 ILCS 5/10-201 et seq.); held unconstitutional in part (144 Ill. App. 3d 229, 493 N.E.2d 1148); or common law (see, e.g. topic Certiorari). In all cases, especially local tax cases, essential to consult statutes, rules and common law respecting exhaustion and election of remedies, need for seeking preliminary relief or for posting bond, timing of review and similar technical matters because such doctrines are complex, variegated and strictly applied.

Action for review is commenced by filing, within 35 days from service by summons of copy of decision, complaint containing statement of decision or part thereof to be reviewed and specifying whether agency should file transcript of evidence. (735 ILCS 5/3-103, 5/3-108). Unless a particular venue is prescribed by statute under authority of which the decision sought to be reviewed is rendered, actions to review decisions of administrative agencies may be commenced in the circuit court of any county in which: (1) any part of hearing or proceeding was held; (2) any part of subject matter involved is situated; (3) any part of the transaction which gave rise to the proceedings before the agency occurred. (735 ILCS 5/3-104). Summons is served by clerk by registered mail on the agency and other defendants. (735 ILCS 5/3-105). If pertinent statute requires plaintiff to pay to agency costs of preparing record of proceedings, failure to make such payment relieves agency from answering and authorizes dismissal of complaint and entry of judgment for amount shown to be due plus costs. (735 ILCS 5/3-109).

Review covers all questions of law and fact presented by the entire record. Additional evidence is not admissible. Findings of agency are prima facie correct. (735 ILCS 5/3-110). Circuit court may stay decision upon notice to agency and good cause shown; amend record; allow substitution of, dismiss or realign parties; affirm, reverse, remand in whole or in part; enter money judgment where agency decision requires that; and take proofs and enter appropriate orders in cases of failure to comply with statutory provisions requiring bond to be filed by plaintiff. (735 ILCS 5/3-111). Final decisions of circuit court are appealable as in ordinary civil cases. (735 ILCS 5/3-112).

Special Appeal Rules exist for certain proceedings, including local improvement, Illinois Drainage Code, and pollution cases.

Failure to comply with rules or frivolous appeals may result in appropriate sanctions being imposed on offending party. (Ill. Sup. Ct. R. 375).

5.04 BONDS:

See topics 5.03 Appeal and Error, Costs, Injunctions, Replevin; categories 2 Business Organizations, topic Corporations; Business Regulation and Commerce, topics Brokers, Securities; Debtor and Creditor, topics Attachment, Execution; Estates and Trusts, topic Executors and Administrators; Family, topic Guardian and Ward; Legal Profession, topic Attorneys and Counselors; Mortgages, topic Mortgages of Real Property.

By statute, many public officials, e.g. sanitary district trustees, must be bonded. Some types of businesses, e.g. importing distributors, must post bond as condition of doing business. State, counties, districts, regional authorities and municipalities authorized by statute to issue variety of revenue bonds, e.g. “Capital Development Bond Act of 1972”, (30 ILCS 420/3). Local government units and school districts authorized to issue bonds may issue interest-bearing commercial paper instead. Authority to issue such paper shall not be construed to permit issuing unit of local government or school district to increase or otherwise alter its debt limits. (30 ILCS 365/3).

Surety.

Surety on official bond may be released on petition. (5 ILCS 260/10). Surety may compel creditor to sue within reasonable time or face discharge of surety's obligations (740 ILCS 155/1), but surety may not confess judgment if principal intervenes with counter-security (740 ILCS 155/4).

Surety company may execute bond whenever bond required or authorized. (215 ILCS 5/390). Surety company estopped to deny liability on executed bond. (215 ILCS 5/392).

False swearing in application to become surety for another on bail bond as to ownership or value of property, willfully done to secure approval of bond, constitutes crime of perjury or subornation of perjury. (720 ILCS 540/1).

Enforcement.

Requirements vary with type of bond. Ordinarily action on bond must be between parties to it, but assignees of bond owner may bring suit. (735 ILCS 5/2-403). Official bond may be enforced through suit against surety. (5 ILCS 260/13). In action on penal bond, number of breaches which may be alleged not limited. Damages assessed on breaches proved. Judgment for penalty stands as security for all subsequent breaches. (735 ILCS 5/2-901).

5.05 CERTIORARI:

Though largely supplanted by statute, common law writs of certiorari may be issued by Supreme Court (705 ILCS 5/8), appellate courts (705 ILCS 25/11), and circuit courts (705 ILCS 35/26). Common law review extends only to determination from record whether inferior tribunal has exceeded jurisdiction or proceeded illegally and writ is available if no other remedy. (18 Ill. App.3d 412, 305 N.E.2d 404).

Administrative Review Act (735 ILCS 5/3-101) has replaced certiorari for review of administrative decisions where state statute so provides. Numerous forms of statutory certiorari have expanded scope of review to questions of both law and fact. (See e.g. Revenue [35-120/12, 35 ILCS 620/12]; Illinois Health and Safety Act [820-225/7.09 et seq.]; Workmen's Compensation [820-305/19]). Review of municipal administrative agency decisions may be by writ of certiorari. (62 Ill.2d 11, 338 N.E.2d 186). See topic 5.03 Appeal and Error.

5.06 CHARITABLE IMMUNITY:

See topic 5.02 Actions, subhead Immunity.

5.07 COMMISSIONS TO TAKE TESTIMONY:

See topic 5.11 Depositions and Discovery.

5.08 COSTS:

Costs statutory, taxed against losing (judgment, dismissal or nonsuit) party (735 ILCS 5/5-108, 5/5-109, 5/5-110, 5/5-113, 5/5-116, 5/5-118, 5/5-119), but not against State (735 ILCS 5/5-117) or executors (735 ILCS 5/5-109). Discretionary where decision not on all issues. (735 ILCS 5/5-111, 5/5-112). Includes fees for filing, service of process, jury, court officer charges, and two witnesses. Court also may tax fees for additional witnesses (735 ILCS 5/5-115) and costs of depositions (Ill. Sup. Ct. R. 208[d]). Cost of preparing abstract of record for appeal is recoverable, except for unnecessary matter incorporated therein (Ill. Sup. Ct. R. 342[e]), as is stenographer's fee in supplementary proceedings to enforce judgment (Ill. Sup. Ct. R. 277[i]). Cost of incorporating unnecessary matter in report of proceedings may be taxed by reviewing court against party designating matter, even if he prevails. (Ill. Sup. Ct. R. 323[a]). Attorneys' fees and other expenses not recoverable unless parties agree or statute allows, e.g., as discovery sanctions (Ill. Sup. Ct. R. 209, 219), or in suits to recover wages (705 ILCS 225/1). Defendant who tenders sufficient amends for injury, or pays unliquidated damages or demands, including costs of suit if commenced up to time of tender, not liable to pay costs of suit after tender if tender sufficient. (735 ILCS 5/5-126). Defendant may recover costs after sufficient tender. (735 ILCS 5/5-126).

Security for Costs.

Nonresident plaintiff (735 ILCS 5/5-101) must furnish cost bonds or action may be dismissed (735 ILCS 5/5-101 to 5/5-104). Bonds also necessary for qui tam actions and actions on bonds of executors, administrators, guardians, or officials. (735 ILCS 5/5-101).

Liability of Attorney.

Where bond required but not filed, plaintiff's attorney liable for costs. (735 ILCS 5/5-103).

Indigents.

Indigents may sue or defend without paying costs as incurred (735 ILCS 5/5-105), but unsuccessful indigent plaintiff must later pay his costs, unless excused by court (735 ILCS 5/5-107).

See also topic 5.04 Bonds.

5.09 DAMAGES:

Common law generally prevails as to compensatory damages, except where specific statute grants cause of action. See e.g., Wrongful Death Statute (740 ILCS 180/1, 180/2); Dram Shop Act (235 ILCS 5/6-21). Contribution among joint tortfeasors provided. (740 ILCS 100/2).

Comparative Negligence Rule.

Modified Comparative Negligence Rule adopted. (735 ILCS 5/2-1116).

Sovereign Immunity.

State immunity statute adopted, but State can be party to cases under Illinois Public Labor Relations Act, Court of Claims Act, State Officials and Employees Ethics Act, and Clean Coal FutureGen for Illinois Act (745 ILCS 5/1). Other exceptions for what otherwise constitute Age Discrimination Act, Fair Labor Standards, Family and Medical Leave Act, Americans with Disabilities Act, and Tit. VII violations to State employees 745 ILCS 5/1.5). .

No-Fault Insurance.

Statute creating no-fault insurance held unconstitutional. (51 Ill.2d 478, 283 N.E.2d 474). See category 23 Transportation, topic 23.01 Motor Vehicles, subhead No-Fault Auto Insurance.

Limitations on Recovery.

Recovery in wrongful death action is without dollar limitation if death occurred on or after Aug. 18, 1967. Jury determines amount of damages without regard to and with no special instructions as to statutory limit on recovery for deaths after 1967. (740 ILCS 180/2). Amount of damages shall be reduced or barred because of contributory fault of decedent or beneficiary as to actions accruing on or after 3/9/95. (740 ILCS 180/2). In its application to nonprofit private schools and school districts, previous $10,000 limitation provision of 745 ILCS 25/5 was held to violate Art. 4, §22 of Old Illinois Constitution. (41 Ill. 2d 336, 243 N.E.2d 203). Recovery in tort actions against the State, other than those involving operation of State vehicle, is limited to $100,000. (705 ILCS 505/8[d]). Recovery against State for time unjustly served in prison is limited to various amounts up to $199,150 plus cost of living adjustment, depending on length of imprisonment, but no annual increase greater than 5%, and attorney's fees not to exceed 25% of award granted. (705 ILCS 505/8[c]), (705 ILCS 505/22). Recovery under Law Enforcement Officers, Civil Defense Workers, Civil Air Patrol Members, Paramedics and Firemen Compensation Act limited to $10,000 if death occurred prior to Jan. 1, 1974, to $20,000 if death occurred after Dec. 31, 1973 and before July 1, 1983, to $50,000 if death occurred on or after July 1, 1983 and before Jan. 1, 1996 and to $100,000 if death occurred on or after Jan. 1, 1996 and $118,000 if death occurred on or after effect of amendatory act of 2001 and before Jan. 1, 2003. For death in line of duty occurring on or after Jan. 1, 2003, compensation is $259,038 plus annual increases based on Consumer Price Index. There are also provisions for recovery where benefits have not been paid within six months of filing application and for applicants who are claiming the duty death benefit for a deceased member of the Armed Forces. The Court of Claims will send written notice to all claimants within 2 weeks of initiation of a claim to let them know if their application is complete. (820 ILCS 315/3). Under National Guardsman's and Naval Militiaman's Compensation Act recovery is limited to $100,000. (20 ILCS 1825/3). Punitive damages are not recoverable in legal and/or medical malpractice actions. (735 ILCS 5/2-1115). Maximum attorney's contingent fee recoverable in medical malpractice actions is set by statute. (735 ILCS 5/2-1114).

In all actions on account of bodily injury or death or physical damage to property, in which recovery is predicated on fault, plaintiff is barred from recovering damages if contributory fault of plaintiff is more than 50% of proximate cause of injury or damage for which recovery is sought. If contributory fault of plaintiff is less than 50%, any damages allowed shall be diminished in proportion to amount of fault attributable to plaintiff. (735 ILCS 5/2-1116).

Legislation barring hedonic damages and limiting noneconomic damages in all actions that seek damages on account of death, bodily injury or physical damage to property based on negligence or product liability has been declared unconstitutional. (735 ILCS 5/2-1115.1; 179 Ill. 2d 367, 228 Ill. Dec. 636).

Product Liability Tort Reform.

In 1997, 1989 legislation that enacted following statutory provisions was declared to be unconstitutional. Legislature has not attempted to separately reenact any of these provisions. In product liability action, product presumed safe if aspect of product or product component that allegedly caused harm was specified or required by state or federal statute or regulation promulgated by agency responsible for safety or use of product before product is distributed into stream of commerce. (735 ILCS 5/2-2103). Presumption that design of product or product component is reasonably safe unless, at time product left control of manufacturer, practical and technically feasible alternative design was available that would have prevented harm without significantly impairing usefulness, desirability or marketing of product. (735 ILCS 5/2-2104). Manufacturer or product seller not liable for harm caused by failure to warn anticipated users if warnings, instructions or labelling were adequate under statute and where, at time product left control of manufacturer, knowledge of danger that allegedly caused harm was not reasonably available in light of existing scientific, technical or medical information. (735 ILCS 5/2-2106). No liability for harm caused by inherent characteristic of product that is generic aspect of product that cannot be eliminated without substantially compromising product's usefulness and which is recognized by ordinary person. (735 ILCS 5/2-2106.5).

No punitive damages in product liability action if conduct of manufacturer, seller or reseller that allegedly caused harm was in compliance with state or federal statutes or regulations promulgated by agency responsible for safety or use of product which regulation was in effect at time of alleged misconduct unless plaintiff proves by clear and convincing evidence that manufacturer or product seller intentionally withheld from or misrepresented to Congress, state legislature or agency material information regarding safety or use of product that would have or could have changed rule created. (735 ILCS 5/2-2107).

In specified instances, recoveries may be reduced to reflect certain collateral payments. (735 ILCS 5/2-1205, 2-1205.1).

Exemplary damages will not be awarded unless conduct complained of includes willfulness, wantonness, reckless malice or such willful or reckless action as to imply malice. (74 Ill. 2d 172; 384 N.E.2d 353). There can be no award of punitive damages where actual damages are not recoverable. (100 Ill. App.2d 6, 241 N.E.2d 697). Exemplary damages generally not recoverable in breach of contract actions. (6 Ill. App. 3d 827, 286 N.E.2d 777). Certain statutes prohibit award of exemplary damages (e.g., Alienation of Affections [740-5/3]); others prescribe fixed and treble damages. See e.g. Anti-trust (740 ILCS 10/7).

Trial court may, in its discretion, determine whether jury award of punitive damages is excessive, and, if so, enter remittitur and conditional new trial. Trial court may also apportion the punitive damage award among plaintiff, plaintiff's attorney, and Illinois Department of Human Services. (735 ILCS 5/2-1207).

Claim for punitive damages may be pled in negligence cases only where permitted by court upon filing of motion not later than 30 days after close of discovery and at conclusion of appropriate hearing. (735 ILCS 5/2-604.1).

For causes of action accruing after 3/5/95 punitive damages may only be awarded if actual damages are awarded, shall not exceed three times economic damages and requires showing by clear and convincing evidence that defendant's conduct was with evil motive or with reckless and outrageous indifference to highly unreasonable risk of harm and with conscious indifference to rights and safety of others except where defendant charged and convicted of criminal act for which incarceration is or may be part of sentence. (735 ILCS 5/2-1115.05). However, legislation enacting this section has been declared to be unconstitutional.

See also topic 5.02 Actions, subhead Immunity; category 13 Estates and Trusts, topic 13.05 Death, subhead Actions for Death.

5.10 DECLARATORY JUDGMENTS:

See topic 5.15 Judgments.

5.11 DEPOSITIONS AND DISCOVERY:

Depositions are to be taken pursuant to Supreme Court Rules 201 to 212 (Ill. Sup. Ct. R. 201 to Ill. Sup. Ct. R. 212).

See topic 5.02 Actions, subhead Parties, for medical malpractice discovery.

Outside of State for Use Within State.

See subhead Persons Before Whom Taken infra.

Within State for Use Elsewhere.

See subhead Compelling Appearance of Deponent, infra.

Commissions.

See subhead Persons Before Whom Taken, infra.

Return.

See subhead Errors, Irregularities and Objections, infra.

Depositions in Pending Action—Purposes and Time of Taking.

Any party may take deposition of any other party or person, orally or on written questions, for discovery or for use in evidence. Notice, order or stipulation to take deposition must specify whether deposition is for discovery or evidence, and in absence of specification deposition is for discovery only. Discovery and evidence depositions of same witness must be taken separately unless parties stipulate or court orders otherwise. (Ill. Sup. Ct. R. 202).

Deposition may be taken without leave of court any time after commencement of action, except that leave must be obtained if deposition is to be taken before all defendants have appeared or are required to appear. (Ill. Sup. Ct. R. 201[d]). On personal jurisdiction motion, discovery is allowed only on issue of personal jurisdiction unless otherwise agreed by parties or ordered by court upon showing of good cause and participation in hearing regarding discovery by objecting party does not waive jurisdiction question. (Ill. Sup. Ct. R. 201[l]). Except by leave of court, depositions may not be taken in small claims cases, i.e., civil actions for money not in excess of $10,000, exclusive of interest and costs. (Ill. Sup. Ct. R. 281, 287). Trial of case will not be delayed for taking of depositions unless due diligence is shown. (Ill. Sup. Ct. R. 201[f]).

Persons Before Whom Taken.

Depositions within United States or territory or insular possession thereof are to be taken before officer authorized to administer oaths by laws of Illinois or United States or place where examination is held, or before person appointed by court. (Ill. Sup. Ct. R. 205[a]). Depositions in foreign state or country are to be taken before secretary of embassy or legation, consul general, consul, vice consul, or consular agent of United States, or any officer authorized to administer oaths under laws of Illinois, United States, or place where examination is held, or before person appointed by court. (Ill. Sup. Ct. R. 205[b]). A dedimus potestatem or commission is not required but if desired will be issued by clerk upon application without notice and may designate officer either by name or descriptive title. (Ill. Sup. Ct. R. 205[c]). No deposition can be taken before person who is relative of or attorney for any party or is relative of attorney or is financially interested in action. (Ill. Sup. Ct. R. 205[d]).

Scope and Manner of Examination.

On discovery depositions deponent may be examined regarding any matter not privileged relating to subject matter of pending litigation, including existence, location, etc., of documents or tangible things, and identity and location of persons having knowledge of relevant facts, and deponent may be questioned by any party. (Ill. Sup. Ct. R. 206[c][1]). Examination on evidence deposition is same as though deponent were testifying at trial. (Ill. Sup. Ct. R. 206[c][2]).

Matters Privileged Against Discovery.

All matters privileged against disclosure on trial are privileged against disclosure on discovery. Disclosure will not be required of memoranda, reports or documents made by or for a party in preparation for trial or any privileged communications between party or his agent and his attorney. Material prepared by or for a party is subject to discovery only if it does not disclose theories, mental impressions, or litigation plans of party's attorney. (Ill. Sup. Ct. R. 201[b][2]). Court may enter orders for protection of parties and deponents. (Ill. Sup. Ct. R. 201[c][1]). If communication is otherwise privileged, privilege is not waived by presence of interpreter aiding party with hearing or speaking impairment or language difficulty. (735 ILCS 5/8-911[b]). See topic 5.13 Evidence, subhead Witnesses, catchline Privileged Communications.

Method of Taking Deposition on Oral Examination.

Party desiring to take deposition serves notice in writing reasonable time in advance on other parties, time and place of taking deposition, names and addresses of deponents, if known, or, if not known, information sufficient to identify them or class or group to which they belong, and whether deposition is for discovery or evidence. Notice of intent to record deposition by audio-visual device required. (Ill. Sup. Ct. R. 206[a][2]). If deposition is taken pursuant to subpoena, copy of subpoena must be attached to notice. Court may extend or shorten time on motion. (Ill. Sup. Ct. R. 206[a]).

Officer before whom deposition is taken must swear deponent and personally, or by someone acting under his direction and in his presence, record testimony of deponent. Deposition taken stenographically, by sound recording device, by audio-visual recording device, or any combination thereof. Testimony will be transcribed at request of any party. Objections made at time of examination to qualifications of officer taking depositions, manner of taking it, evidence presented, conduct of any person, and any other objection to proceedings, are included in deposition. Evidence objected to is taken subject to objection. Parties served with notice of taking deposition may transmit written questions to officer in lieu of oral examination, and officer propounds questions to deponent and record answers verbatim. (Ill. Sup. Ct. R. 206[f]).

During taking of deposition, on motion of any party or deponent, upon showing that examination is being conducted in bad faith or so as to unreasonably annoy, embarrass, or oppress deponent or party, court may order deposition to cease or may limit scope and manner of taking deposition. Deposition terminated by order resumes only on further order of court. On demand of objecting party or deponent, taking of deposition will be suspended for time necessary to present motion for order. Court may require either party or deponent to pay costs or expenses, including reasonable attorney's fees. (Ill. Sup. Ct. R. 206[e]).

If testimony is transcribed, deponent must provide officer with address to which notice may be sent when transcript is available for examination and signing. Any changes in form or substance which deponent desires to make are entered on deposition by officer along with reasons given by deponent for making them. Deponent has 28 days after notice to appear or within that time to make other arrangements for examination. If neither is done and if transcript remains unsigned at end of 28 day period, officer must state in his certificate reason therefor, and deposition may then be used as though signed, unless court determines on motion to suppress that deposition should be rejected. (Ill. Sup. Ct. R. 207[a]).

Certification and Filing.

If testimony is transcribed, officer must certify on deposition that deponent was duly sworn and that deposition is true record of testimony given by deponent. Certified deposition requires no further proof of authenticity. At request of party, officer must securely seal deposition together with all exhibits or copies thereof in envelope bearing title and number of action and marked “Deposition(s) of (here insert names of deponent[s])” and promptly file it or send it by registered or certified mail to clerk of court for filing. Party causing deposition to be filed must promptly serve notice thereof on other parties. (Ill. Sup. Ct. R. 207[b]).

Fees and Charges.

Physician or surgeon deposed as witness in professional capacity (other than as expert witness) must be paid reasonable professional fee. (Ill. Sup. Ct. R. 204[c]). Party at whose instance deposition is taken pays witness and officer fees and charges of recorder and stenographer. Party at whose request deposition is transcribed and filed pays cost of transcription and filing. Party requesting filing of tape recorded deposition pays cost of filing, but if later transcribed, party requesting transcription must pay for cost of transcription. However, if scope of examination by any other party exceeds scope of examination by party at whose instance deposition is taken, fees and charges, due to excess, must be summarily taxed by court and paid by other party. Upon payment of reasonable charges therefor, officer must furnish copy of deposition to any party or to deponent. (Ill. Sup. Ct. R. 208[a]).

Failure to Attend or Serve Subpoena.

Court may order payment of expenses, including reasonable attorney's fee, occasioned by failure of party serving notice of taking deposition to attend or proceed therewith or to serve subpoena or notice on deponent whose deposition is to be taken. (Ill. Sup. R. Ct. 209).

Deposition on Written Questions.

Depositions may be taken on written questions, which must be served on other parties with notice stating name and address of deponent, or if unknown, general description sufficient to identify him, and name or descriptive title and address of officer before whom deposition is to be taken. (Ill. Sup. R. Ct. 206[f], Ill. Sup. R. Ct. 207), to take testimony of deponent and prepare, certify and file or mail deposition, attaching thereto copy of notice and questions received by him. No other party, attorney, or person interested in event of action may be present during taking of deposition or dictate, write, or draw up any answers to questions. Party causing deposition to be filed must promptly serve notice thereof on other parties. (Ill. Sup. Ct. R. 210).

Compelling Appearance of Deponent.

When action is pending in Illinois, clerk of trial court issues subpoena on request except that subpoena for discovery deposition of physician or surgeon in professional capacity (other than as expert witness) may only be issued on order of court. When deponent is to be party or current officer or agent of party, service on party of notice of taking of deposition is sufficient to require appearance of deponent. Subpoena or notice may command person to whom it is directed to produce documents or tangible things which constitute or contain evidence relating to any matters within scope of permitted examination. (Ill. Sup. Ct. R. 204[a][1],[3]).

Deponent must respond to any lawful subpoena of which he has actual knowledge, if fee and mileage are tendered. Service by mail may be proved prima facie by return receipt, certified or registered mail, dated at least seven days before appearance date together with mailing affidavit including statement of fee tender. (Ill. Sup. Ct. R. 204[a][2]).

When action is pending in another state, territory, or country, any officer or person authorized by laws of that jurisdiction to take deposition in Illinois, with or without commission, may petition circuit court in county in which deponent resides or is employed or transacts his business in person or is found for subpoena to compel appearance of deponent or for order to compel giving of testimony by him. Court may hear and act upon petition, with or without notice as court directs. (Ill. Sup. Ct. R. 204[b]).

Place of Examination.

Unless otherwise agreed upon, deponent may be required to attend examination only in county in which he resides, is employed or transacts his business in person, or in case of plaintiff—deponent, in county in which action is pending. However, court may order party or officer, director or employee of party to appear at designated place in Illinois or elsewhere for purpose of having deposition taken upon just terms and conditions including payment of reasonable expenses. (Ill. Sup. Ct. R. 203).

Errors, Irregularities and Objections.

Errors and irregularities in notice for taking deposition are waived unless written objection is promptly served upon party giving notice. Objection to qualification of person before whom deposition is to be taken is waived unless made before deposition begins or as soon as disqualification is known or could have been discovered with reasonable diligence. Grounds of objection to competency of deponent or admissibility of testimony which might have been corrected if presented during taking of deposition are waived unless then made; otherwise they may be made when testimony is offered in evidence. Objections to form of question or answer and errors and irregularities which might be corrected if promptly presented are waived unless seasonably objected thereto at taking of deposition. Objections to form of written question are waived unless served in writing on party propounding them within time allowed for serving succeeding questions, and in case of last questions authorized, within seven days after service thereof. Objection seasonably made is preserved without motion to suppress, but any party may obtain ruling on objections in advance of trial. Errors and irregularities in manner in which testimony is transcribed or deposition is dealt with by officer are waived unless motion to suppress is made with reasonable promptness after defect is or with due diligence might have been ascertained. (Ill. Sup. Ct. R. 211). If parties so stipulate, depositions may be taken before any person, at any time or place, for any purpose and in any manner. (Ill. Sup. Ct. R. 201[i]).

Use of Depositions.

Discovery depositions may be used to impeach deponent as witness like any inconsistent statement, as admission, if otherwise admissible as exception to hearsay rule, for any purpose for which affidavit may be used, or as evidence at trial under certain circumstances. (Ill. Sup. Ct. R. 212[a]). Evidence depositions may be used for any purpose for which discovery depositions may be used and for any purpose if court finds at time of trial that deponent is dead, out of county (unless party offering deposition procured his absence) or unable to attend or testify because of age, sickness, infirmity, or imprisonment; or if party offering deposition has exercised due diligence but has been unable to procure attendance of deponent by subpoena. Party who is nonresident of Illinois may introduce his own deposition if he is absent from county. Evidence deposition may also be used for any purpose if court finds in advance of trial that exceptional circumstances exist which make it desirable in interest of justice to allow deposition to be so used. (Ill. Sup. Ct. R. 212[b]). Substitution of parties does not affect right to use depositions previously taken. In any action in which same matter and parties (or successors) involved and which was previously dismissed or remanded, all depositions previously taken and filed in former action or before remand may be used. (Ill. Sup. Ct. R. 212[d]).

Refusal to Comply with Rules or Order as to Depositions.

Refusal of deponent to answer any question without substantial justification subjects him or party responsible to liability to aggrieved party for expenses incurred in requiring answer, including reasonable attorney's fee. If refusal to answer question was justified court may require party moving to compel answer to pay opposing party or deponent reasonable expenses incurred in opposing motion, including reasonable attorney's fee. Failure to comply with rules or order relating to depositions subjects offender to contempt proceedings and, if party, dismissal of all or part of his pleadings, on issue to which refusal or failure relates, prevention of his witnesses from testifying on that issue, dismissal of suit or default judgment on claims or defenses to which issue is material, or stay of proceedings pending compliance. (Ill. Sup. Ct. R. 219). Parties must personally confer and reasonably attempt to resolve differences before seeking order of court. (Ill. Sup. Ct. R. 201[k]).

Perpetuating Testimony.

Any person who desires to perpetuate his own testimony or that of another person regarding any matter that is or may be cognizable in any court or proceeding may file verified petition for that purpose and proceed after notice and service, as required by rule, to take deposition by substantially same procedure prescribed for taking of other depositions. (Ill. Sup. Ct. R. 217[a]).

Depositions Pending Appeal.

If appeal is taken or before appeal is taken if time therefor has not yet run, trial court may, on motion and for good cause, allow taking of depositions of witnesses to perpetuate their testimony in event of further proceedings in that court. (Ill. Sup. Ct. R. 217[b]).

De Bene Esse.

Other than the statute and rule regulating the matter of perpetuating testimony there is no

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statute with respect to depositions de bene esse. The common law and general equity rules obtain, and the circuit courts will entertain applications to take testimony de bene esse.

The following form may be used:

Forms

STATE OF ILLINOIS

COUNTY OF COOK } SS.

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS

JOHN DOE,

Plaintiff,

vs.

RICHARD ROE,

Defendant. } No. . . . .

The deposition of Robert Smith, 1 N. State Street, Chicago, Illinois, called by the (plaintiff) (defendant) for examination, pursuant to (notice) (notice and subpoena) (agreement of counsel for the respective parties), and pursuant to the provisions of the Illinois Code of Civil Procedure of the State of Illinois and the rules of the Supreme Court thereof pertaining to the taking of depositions, for the purpose of (evidence) (discovery), taken before Mary Jones, a notary public in and for the County of Cook and State of Illinois, at 135 S. LaSalle Street, Chicago, Illinois, on the 5th day of November, 20. . . . ., at the hour of 2 P.M.

Certificate attached is usually in the following form:

STATE OF ILLINOIS

COUNTY OF COOK } ss.

I, Mary Jones, a notary public in and for the County of Cook, State of Illinois, do hereby certify that Robert Smith was by me first duly sworn to testify to the truth, the whole truth, and nothing but the truth in the cause aforesaid; that the deposition of the said Robert Smith was taken before me commencing at the hour of 2 o'clock P.M. on Tuesday, the 5th day of November, 20. . . . ., and was concluded on that date: that the testimony given at said deposition by said witness was taken down by me in shorthand, in the presence of said witness, and was thereafter (by me) (under my direct personal supervision) transcribed into typewriting; I further certify that the foregoing transcript of said deposition is a complete and correct transcript of my shorthand notes so made as aforesaid and is a complete and correct report of the entire testimony so given by said witness, together with such other matters and things as counsel for the parties present at the taking of said deposition desire to have appear of record, including Exhibits 1 to 10, marked by me for identification at said deposition and attached hereto; that William White appeared on behalf of plaintiff and Harold Green appeared on behalf of defendant during the taking of said deposition; that I am not of counsel for, nor attorney for any of the parties to the aforesaid cause, nor am I related to any of the parties to said cause, nor am I interested in any manner in the said cause or in its outcome: (I further certify that the reading and signing of said deposition was waived by the witness and counsel for the respective parties;)

In witness whereof I have hereunto set my hand and affixed my seal of office, at Chicago, Illinois, this 10th day of November, 20. . . . . . .

. . . .

Notary Public in and for the

County of Cook, State of Illinois

My commission expires:

. . . ., 20. . . .

5.12 EQUITY:

See topic 5.02 Actions.

5.13 EVIDENCE:

See topic 5.11 Depositions and Discovery.

Witnesses.

No person is disqualified in a civil action solely by reason of interest in the event or by reason of conviction of crime; interest or conviction only affect credibility. (735 ILCS 5/8-101). Test of competency is not age or religious belief, but intelligence, understanding, and moral obligation to speak the truth. (17 Ill.2d 502, 162 N.E.2d 381; 22 Ill.2d 513, 177 N.E.2d 224; 2 Ill.2d 311, 118 N.E.2d 1). No witness may be compelled to testify if his testimony is to be broadcast or televised, or if motion pictures are to be taken of him while testifying (735 ILCS 5/8-701) but see, Ill. Sup. Ct. R. 206(g) regarding videotape depositions. Provision is made for appointment of interpreters in cases in which deaf persons are parties, jurors, or witnesses. (735 ILCS 5/8-1402).

See also topic 5.11 Depositions and Discovery.

Book Account.

Any writing or record, in form of a book entry or otherwise, made as a memorandum or record of any act, transaction, occurrence, or event, is admissible as evidence of the act, transaction, occurrence or event, if made in regular course of business, and if it was regular course of the business to make such a memorandum or record at time of such an act, transaction, occurrence, or event or within a reasonable time thereafter. All other circumstances of making of record, including lack of personal knowledge by entrant or maker, may affect its weight, but not its admissibility. Term “business” includes business, profession, occupation, and calling of every kind, but rule does not sanction admissibility of police accident reports. (Ill. Sup. Ct. R. 236). Books of account not admissible to show loan or payment of money. (108 Ill. App.2d 264, 247 N.E.2d 631). Account books and documents photographed or microfilmed in usual course of business or pursuant to statute authorizing reproduction of public documents and meeting certain standards of quality are deemed original records for evidence purposes. (735 ILCS 5/8-401).

Privileged Communications.

Attorney is not allowed to disclose anything communicated by his client to him in his professional capacity, in order to obtain legal opinion or advice. (See 219 Ill. App. 230.) Client can waive this privilege. (See 265 Ill. 448, 107 N.E. 165.) Statements of client to attorney in presence of third parties or opposing party are not within rule of exclusion. (211 Ill. 612, 71 N.E. 1112).

No physician or surgeon may disclose any information he acquires in attending patients in a professional character necessary to enable him to serve the patient except in certain enumerated cases. (735 ILCS 5/8-802). Both recipient of mental health services and therapist (defined to include psychiatrist, physician, psychologist, social worker, and nurse under appropriate circumstances) may refuse to disclose or prevent disclosure of recipient's records or communications except in certain enumerated cases. Recipient's records and communications must be disclosed to Inspector General of Department of Human Services in course of investigation authorized by Abused and Neglected Long Term Care Facility Residents Reporting Act. (210 ILCS 30/1 et seq.). Person refusing to comply with request guilty of Class A misdemeanor. (740 ILCS 110/10). Psychologist may not disclose any information acquired from patient consulting him in his professional capacity or necessary to enable him to render services in his professional capacity except in enumerated case. 740 ILCS 110/1 et seq. controls in case of conflict. (5 ILCS 70/6). However, therapist has right to communicate with his counsel or professional liability insurance company concerning treatment provided by recipient or disclose record or communication to therapist's supervisor and others on team providing services; persons conducting peer review of therapist; Institutes for Juvenile Research and Study of Developmental Disability; Inspector General of Dept. of Family and Children Services when investigation pending under 20 ILCS 505/35.5. (740 ILCS 110/9).

Rape crises personnel may not disclose statements made by victim unless victim consents in writing. (735 ILCS 5/8-802.1).

Printed books or pamphlets purporting on their face to be session or other statutes of any of United States, or territories thereof, or of any foreign jurisdiction, are prima facie evidence of such statutes. (735 ILCS 5/8-1101).

Clergyman or religious practitioner cannot be required to disclose confession or admission made to him in his professional capacity in court proceeding, before administrative board or to public officer. (735 ILCS 5/8-803).

Public accountant cannot be required by court to divulge information or evidence obtained by him in his confidential capacity. (225 ILCS 450/27).

News reporter may not be compelled to disclose source of information unless court finds that other sources of information have been exhausted, disclosure is essential to public interest and information does not concern secret information under laws of State or U.S. or, in libel and slander cases, need for information outweighs public interest in confidentiality of sources under facts of each case. (735 ILCS 5/8-901 to 5/8-909).

Husband and wife may testify for or against each other in civil or criminal actions, except as to communications or admissions made by either to the other or conversations between them during marriage. Exception does not apply in civil cases in actions between husband and wife, or where custody or support of children is directly in issue, or where either has acted as agent for other. (735 ILCS 5/8-801).

Where husband is disqualified by reason of interest, wife is also incompetent; and that incompetency continues after the marriage relation is dissolved, whether by death or divorce. (331 Ill. App. 535, 73 N.E.2d 624).

Communications or Transactions with Persons Since Deceased or Incompetent.

No party to any civil proceeding or person directly interested may testify on own behalf to any conversation with deceased or incompetent person or any event that took place in presence of deceased or incompetent person when any adverse party sues or defends as representative of deceased or incompetent person with following exceptions: (a) If any person testifies on behalf of representative to conversation or event occurring in presence of deceased or incompetent person, adverse party or interested person may testify to same; (b) if deposition of deceased or incompetent person is admitted in evidence at trial, any adverse party may testify concerning same matters; (c) any testimony competent under account books exception (735 ILCS 5/8-401) is not affected by this act; (d) no person is barred from testifying to heirship of decedent (735 ILCS 5/8-201).

Partners, Joint Contractors, Agents, etc.

In suit by or against surviving partner or partners, joint contractor or joint contractors, no adverse party or person adversely interested is a competent witness to testify to any admission or conversation by any deceased partner or joint contractor, unless some one or more of the surviving partners or joint contractors were also present at the time of such admission or conversation; nor is the adverse party who has contracted with an agent, since deceased, of the opposite party, a competent witness as to conversation with that agent unless that conversation took place in the presence of a surviving agent or agents, and then only if he would be permitted to testify by 735 ILCS 5/8-201 & 735 ILCS 5/8-401 had deceased been principal rather than agent. (735 ILCS 5/8-301).

Incompetency cannot be removed by an assignment or release of claim made in suit for purpose of enabling witness to testify. (735 ILCS 5/8-501).

Self-incrimination.

No person may be compelled in any criminal case to give evidence against himself. (Const. Art. 1, §10).

Prior Sexual Activity or Reputation as Evidence

Evidence of prior sexual activity or reputation is generally inadmissible in any civil proceeding, with limited exceptions. (735 ILCS 5/8–2801).

5.14 INJUNCTIONS:

Jurisdiction.

Circuit courts have jurisdiction to grant injunctions. (705 ILCS 35/25 & 35/26; Const. Art. 6, §9).

Procedure.

Code of Civil Procedure (735) and Supreme Court Rules (Ill. Sup. Ct. R.) apply, except as provided herein. Exhaustion of administrative remedies is not condition precedent to issuance of injunction when constitutionality of regulatory act is challenged. (86 Ill.2d 274, 427 N.E.2d 550).

Temporary restraining order may be issued without notice only if it clearly appears from specific facts shown by verified complaint or affidavit accompanying same that immediate and irreparable injury will result to applicant before notice can be served and hearing had thereon. (735 ILCS 5/11-101). Every temporary restraining order granted without notice expires by its terms within such time after signing of order as fixed by court, not to exceed ten days, subject to extension for like period for good cause shown. (735 ILCS 5/11-101). Party restrained without notice may, on two days' notice to party who obtained restraining order, appear and contest restraining order. (735 ILCS 5/11-101). If temporary restraining order is granted without notice, motion for preliminary injunction must be set for hearing at earliest possible time, and if party obtaining such temporary restraining order does not proceed with application for preliminary injunction, temporary restraining order must be dissolved.

Preliminary Injunction.

No preliminary injunction can be granted without previous notice of time and place of application having been given adverse party. (735 ILCS 5/11-102).

Bond.

In all cases before issuance of restraining order or preliminary injunction, bond may be required in such sum with such security and upon such conditions as deemed proper by court. (735 ILCS 5/11-103). Damage provision of Injunction Act applies only to wrongful issuance of temporary injunction. (42 Ill.2d 45, 245 N.E. 2d 468). No bonds required of any governmental office or agency. (735 ILCS 5/11-103). Party wrongfully enjoined may sue on injunction bond or for damages. (735 ILCS 5/11-110).

Dissolution.

Motion to dissolve injunction may be made at any time before or after answer. If motion to dissolve filed after answer, court will rule on motion upon weight of evidence. (735 ILCS 5/11-108). Affidavits may be filed by either party on motion to dissolve and may be read in evidence at hearing (735 ILCS 5/11-109), but only if answer to petition for injunction on file (326 Ill. App. 430, 62 N.E.2d 32). If temporary restraining order or preliminary injunction is dissolved as having been wrongfully issued, court, prior to final disposition of matter, upon filing of petition under oath from party claiming damages by reason of such temporary restraining order or preliminary injunction, determines and enters judgment in favor of party injured by such temporary restraining order or preliminary injunction for damages suffered by reason thereof. (735 ILCS 5/11-110).

Supreme Court Rules on appeals supersede statutory provisions inconsistent with rules and govern all appeals. (Ill. Sup. Ct. R. 1). Orders granting, modifying, dissolving, or refusing to dissolve or modify injunction or temporary restraining order are appealable as of right. Appeal from granting or denial of temporary restraining order must be perfected within 30 days of entry of order. If such order granted ex parte, party intending to appeal must first present, on notice, motion to trial court to vacate order; if such motion is denied or not acted upon within seven days, 30 days for appeal begins to run on day such motion is denied or from last day for action thereon. (Ill. Sup. Ct. R. 307[b]).

Persons Bound.

Injunction is binding only upon parties to action, their officers, agents, servants, employees and attorneys, and persons in concert with parties who receive actual notice. (735 ILCS 5/11-101).

Liability on bond may be enforced on motion. No new action required. (735 ILCS 5/11-103). In all cases where restraining order or injunction is dissolved, circuit court will grant damages on petition by aggrieved party. (735 ILCS 5/11-110).

Amended pleadings may be permitted on motion to pleadings or summary judgment or at trial if wrong remedy sought, court to consider effect on defendant as well. (735 ILCS 5/11-107).

See also specific statutes authorizing injunctive relief.

5.15 JUDGMENTS:

Court must determine rights and grant relief to which party is entitled based on pleadings and proofs. More than one judgment may be rendered. If satisfaction of judgment creates reimbursement rights against another party, court may render later judgment accordingly, upon motion and notice. (735 ILCS 5/2-1301[a]). If judgment is entered as to less than all parties or claims, it is generally not enforceable or appealable, and is subject to revision, until adjudication of all claims is completed, unless trial court expressly finds no just reason for delaying enforcement or appeal. There are exceptions to this rule for probate, receivership, and certain post-judgment proceedings. (Ill. Sup. Ct. R. 304).

Copy of judgment order, certified by clerk of court, performs function of writ of execution and other writs. (735 ILCS 5/2-1501).

Determination in favor of plaintiff on defense of abatement requires that defendant answer or otherwise plead.

Judgments by Default or Dismissal for Want of Prosecution.

May be entered, but court may require proof of allegations upon which relief is based. (735 ILCS 5/2-1301[d]). Court may determine damages without jury (735 ILCS 5/2-1206); relief is limited to that originally demanded unless notice of amended relief is given to defaulted party, who has 30 days to answer or appear with respect to new or additional relief (Ill. Sup. Ct. R. 105[a]). Notice of entry of default must be given by attorney for moving party to each party who has appeared, against whom order was entered, or to such party's attorney of record; notice of dismissal for want of prosecution is required if plaintiff had been notified that court was considering entry of such order, unless required by local rule. (735 ILCS 5/2-1302).

Setting Aside Defaults.

Default may be set aside by court before final order or judgment and thereafter, upon motion filed within 30 days after entry of default, set aside any final order or judgment upon any reasonable terms and conditions (735 ILCS 5/2-1301[e]); joint judgment or order may be set aside as to fewer than all parties (735 ILCS 5/2-1301[f]). Motion is addressed to court's discretion, and is treated liberally with view toward doing substantial justice. (20 Ill. App.3d 253, 313 N.E.2d 613). Judgment entered against defendant served only by publication, who did not appear, may be set aside or amended upon motion made within 90 days if he received written notice of judgment, and within one year if no notice was received. (735 ILCS 5/2-1301[g]). If there has been sale pursuant to such judgment, court may permit it to stand, but redemption must be permitted if debtor was entitled to it.

Sureties may not confess judgment or default if principal enters as defendant and tenders counter-security. (740 ILCS 155/4).

Judgment by confession, without service of defendant, may be entered on any bona fide debt except consumer transaction in county where defendant resides or owns property, or where instrument executed. (735 ILCS 5/2-1301[c]). Rule concerning reopening of judgment by confession (Ill. Sup. Ct. R. 276) is constitutional on its face (424 F. Supp. 1200), but enforcement of confessed judgment through garnishment statute providing no procedure for determining “knowing and voluntary” waiver of due process rights is unconstitutional (343 F.Supp. 1272). General Order 6.4(b), Circuit Court of Cook County, now prohibits non-wage garnishments based on confessed judgments unless debtor has been served. For form of judgment note see category 3 Business Regulation and Commerce, topic 3.02 Bills and Notes.

Consumer Transactions.

No power to confess judgment will be required or given after Sept. 24, 1979, in any instrument used in consumer transaction; any power to confess given in violation of Act is null and void, and any judgment entered by court based upon such power is unenforceable. Consumer transaction means sale, lease, assignment, loan, or other disposition of item of goods, consumer service, or intangible to individual for purposes that are primarily personal, family, or household. (735 ILCS 5/2-1301[c]).

Opening Judgments by Confession.

Upon motion diligently filed, accompanied by verified answer and affidavit, which shows complete or partial prima facie defense, court must open judgment to extent defense is stated, and proceed to additional pleading and trial. Unopened parts of judgment may be executed. If defendant presents counterclaim, court may permit its filing and stay execution of judgment. (Ill. Sup. Ct. R. 276). Determination of defendant's diligence in moving to open judgment is within court's discretion. (10 Ill. App.3d 322, 293 N.E.2d 719).

Judgment by Consent.

No applicable statute. Consent decree treated as contract binding on parties. (30 Ill. App.3d 880, 334 N.E.2d 825).

Judgment on pleadings may be granted upon seasonable motion (735–5/2–615[e]), if no issues of material fact are presented (30 Ill. App.3d 423, 331 N.E.2d 832).

Summary judgment may be granted upon motion, with or without supporting affidavits, filed after opposite party has appeared. (735 ILCS 5/2-1005[a-b]). Opposing party may present counter-affidavits before or at hearing. Record must show no issue of material fact. (735 ILCS 5/2-1005[c]).

Affidavits must be made on personal knowledge and set forth material evidentiary facts with particularity; if material facts are known only to opposing parties, affidavits may state facts as believed, and court may proceed to grant summary judgment or order discovery. (Ill. Sup. Ct. R. 191). Affidavits made in bad faith or for delay may cause imposition of resulting expenses, and contempt citations. (735 ILCS 5/2-1005[f]).

Declaratory Judgments.

Illinois declaratory judgment statute (735 ILCS 5/2–701, 735 ILCS 5/2–702) is not based on Uniform Act, but follows similar format. In cases of actual controversy, court may make binding declaration of rights, including construction of statutes, ordinances, regulations, wills and other private written instruments. Such declaration must terminate part or all of controversy. Political questions may not be considered if defendant is constitutional officer. Declaratory relief may be sought alone or in addition to other relief. Supplementary declaratory relief may be granted after initial declaration, upon petition. Issues of fact must be tried as in other civil cases, to jury if required. Actual controversy exists if there is substantial dispute, between parties with adverse interests, of sufficient immediacy and reality. (18 Ill. App.3d 33, 309 N.E.2d 408). In general, existence of another remedy does not preclude declaratory judgment action, except in revenue cases (86 Ill.2d 479, 427 N.E.2d 1226), but administrative remedies must be exhausted (83 Ill. App.3d 1034, 404 N.E.2d 1050).

Offer of Judgment.

Offer can be made before or after suit filed. If sufficient to make amends for injury, and to pay costs if suit commenced, plaintiff cannot recover costs incurred after such tender, and is liable for defendant's costs. Offer of judgment is admissible as admission of liability (30 Ill. App.578), but offer to compromise claim is not admissible (37 Ill. App.3d 848, 346 N.E.2d 475). Judgment debtor may by tender of payment of judgment, costs and interest accrued to date of tender, stop further accrual of interest on such judgment notwithstanding prosecution of appeal. (735 ILCS 5/2-1303).

In proceedings under 735 ILCS 30/5-5-5(c)-(f) for acquisition of property for private ownership or control, defendant may make offer of settlement. (735 ILCS 30/10-5-110). If plaintiff does not accept and if court awards compensation equal to or in excess of amount of offer, court must order plaintiff to pay defendant's attorneys fees and costs incurred after making of offer. (735 ILCS 30/10-5-110[e]). If defendant does not make such offer, he may not recover attorney's fees and costs.

Docketing.

Judgments are rendered or entered by court and docketed or registered by clerk. (735 ILCS 5/2–1201, 5/2–1301, 5/2-1303). Interest accrues at 9% rate from date of rendering, or 6% against governmental entity. (735 ILCS 5/2-1303).

Relief from Judgments and Decrees.

Within 30 days after entry of order of judgment, court may on motion set aside order of judgment on such terms as are reasonable. (735 ILCS 5/2-1301[e]).

After 30 days and before two years, relief may be sought by petition under 735 ILCS 5/2-1401, general statute abolishing and supplanting writs of error coram nobis and coram vobis, writs of audita querela, and bills of review. Petition is filed in proceeding which produced judgment, but is not continuation of that proceeding, and does not affect or stay judgment automatically. Matters not of record must be shown by affidavit or other appropriate means. Notice must be given by service, by registered mail, or by publication in appropriate cases. (Ill. Sup. Ct. R. 105). Relief from judgment under 735 ILCS 5/2-1401 does not affect property rights of nonparties acquired after judgment, unless lack of jurisdiction to enter judgment appears in record. Procedure does not affect relief from void judgments.

Note: Except as provided in 750 ILCS 50/20b (adoption) or in petition based upon 725 ILCS 5/116-3 (criminal procedure), computation of two year period excludes time during which petitioner under legal disability or duress or where ground for relief is concealed.

Lien.

Legislation enacted in 1963 substantially revised law concerning liens arising from judgments entered subsequent to Dec. 31, 1963. Prior statute should be consulted for treatment of prior judgments.

Land.

Land Titles ("Torrens") Act (765 ILCS 35/1) was repealed effective July 1, 1997. Judgment is lien on debtor's real estate only from time when transcript, certified copy or memorandum of judgment is filed with recorder of deeds in county in which land is located. (735 ILCS 5/12-101). Lien runs for seven years from rendering of judgment. (735 ILCS 5/12-101 to 12-104). Lien may be extended for additional seven years by revival of judgment (735 ILCS 5/12-101) and filing of revival order with recorder of deeds. Foreign judgments registered pursuant to Uniform Enforcement of Foreign Judgments Act (735 ILCS 5/12-650-657) are liens only when petition for registration of foreign judgment, or judgment of domestic court on that petition, is filed with recorder of deeds in county where land located. Final judgment entered by appellate court is lien when filed in manner described above. (Ill. Sup. Ct. R. 366[c]). Lien may be foreclosed in same manner as mortgage of real property except redemption period is six months from date of sale and real estate homestead exemption under 735 ILCS 5/12-901 applies. (735 ILCS 5/12-101).

Personalty.

Judgments become liens against personal property only on delivery of certified copy of execution to proper officer to be executed (735 ILCS 5/12-111); but party placing execution with proper officer may lose lien by failure to enforce it promptly by levy and sale (19 Ill. App.2d 165, 153 N.E.2d 298).

Chancery.

Chancery decrees for money are liens like judgments. Chancery decrees respecting realty are liens on such realty; court may order acts other than payment of money to be lien on realty or personalty.

Federal Courts.

Judgments of federal courts held in state may be recorded in public offices of state. (735 ILCS 5/12-501). Upon filing, judgment of federal court is lien upon real estate in same manner as state judgment. (735/5-12-502).

Scope.

All nonexempt property of judgment debtor is subject to execution. (735 ILCS 5/12-112). Judgment rendered against partnership in firm name is enforceable only against firm property and is lien only upon realty held in firm name. (735 ILCS 5/12-102). Judgment rendered against person solely because he is holder of title to property in fiduciary capacity will support execution only against property held in particular representative capacity. (735 ILCS 5/12-103).

Judgment rendered against unregistered business operating under assumed name in action against business and known and unknown owners, is personal judgment against all named known owners, immediately enforceable against property of business, and is lien upon real estate held in name of business. If identity of previously unknown owner is discovered, that person is to be named as party defendant by motion to court upon proper notice supported by affidavit; and, within ten days after service, previously unknown owner may appear and defend, which defense will not affect any personal judgment previously entered. If previously unknown owner does not appear or is found liable, judgment theretofore entered may be amended to include him personally. (805 ILCS 405/6).

Arrest of Judgment.

When judgment is arrested pursuant to post trial motion, plaintiff is not compelled to recommence. If appropriate, the court must order new pleadings. (735 ILCS 5/2-1204).

Revival of judgment of court may be had by action brought within 20 years after its date and not after as provided by 735 ILCS 5/2-1602. (735 ILCS 5/13-218).

Assignment.

Judgments are assignable if made bona fide and for valuable consideration. (388 Ill. 392, 58 N.E.2d 545). Assignee may enforce judgment. (735 ILCS 5/2-403).

Satisfaction.

Judgment creditor who has received full payment on judgment is required, at request of judgment debtor, to execute and deliver to judgment debtor or his legal representative a written release of judgment. Clerk of Court which rendered judgment required to record satisfaction of judgment and release of liens (no fee), or record assignment of judgment ($2 fee), and make appropriate notations on judgment and execution docket of book and page where release or assignment of judgment recorded. (735 ILCS 5/12-183). If judgment creditor willfully refuses to execute satisfaction on tender by debtor of full amount due, court, on petition and tender, may satisfy judgment of record. (735 ILCS 5/12-183). Upon filing of release or satisfaction of judgment, signed by party in whose favor judgment was entered or by his attorney, court vacates judgment and dismisses action. (735 ILCS 5/12-183).

Form

Form of Satisfaction.

. . . ., the . . . .

(judgment creditor)

. . . .

(assignee of record) (legal representative)

having received full satisfaction and payment, releases the judgment entered on . . . ., 20. . . . ., against defendant . . . . for $. . . . . and costs.

Actions.

See topic 5.16 Limitation of Actions.

Foreign Judgment.

Uniform Enforcement of Foreign Judgments Act, with certain modifications, has been adopted. (735 ILCS 5/12-651 to 12-653).

Uniform Foreign Money-Judgments Recognition Act has been adopted. (735 ILCS 5/12-618 to 12-626).

5.16 LIMITATION OF ACTIONS:

This section describes in general terms limitation periods for Illinois civil actions. It summarizes time requirements for actions commonly filed in Illinois courts. It does not purport to present limitation periods for every action recognized under Illinois law, nor to present every exception to limitation periods that are described.

Actions must be brought within the following periods after the respective causes of action accrue:

No Limitation.

Action for damages against person for conduct which resulted in conviction for first degree murder, Class X felony, or Class 1 felony. (735 ILCS 5/13-202.1).

Seventy-five Years.

No deed, will, plat, affidavit, or other proof of ownership, including court judgment, etc., dated, entered into or recorded more than 75 years prior to effective date of Act (1872) or more than 75 years prior to date claim of interest or ownership, etc. is asserted can constitute cloud on title or be used as evidence in any proceeding affecting title. (735 ILCS 5/13-114). Limitation is deferred for ten more years by written claim describing real estate filed with Recorder of Deeds of county where land is located if filed within three years prior to 75 year limit, within three years after effective date of Act or, after 75 year limit in case of infant or otherwise incompetent claimant, within two years after competency disability has been removed or guardian has been appointed. (735 ILCS 5/13-114).

Forty Years.

Actions to recover or establish interest in real estate against record title holder and his grantors who have held chain of title for 40 years prior to action; unless:(1) Claimant has filed verified statement with county recorder describing real estate and setting forth interest in and basis of his claim within 40 years after action accrued or (2) real estate is in adverse possession of one other than record title holder. (735 ILCS 5/13-118).

Thirty Years.

Lien of mortgage, trust deed in nature of mortgage, and vendor's lien, where no due date is stated on face or is ascertainable from its written terms, unless, within 30 year period, owner of lien files for record affidavit showing amount due or files for record extension agreement. Affidavit or extension agreement can extend lien only ten years. (735 ILCS 5/13-116[b]).

Twenty years: Actions for recovery of or entry upon lands (735 ILCS 5/13-101), except that period is seven years from time action accrues: (a) When action is based upon breach of condition subsequent (continuing or recurring breaches do not extend time) or upon termination of estate upon limitation or upon estate upon conditional limitation (735 ILCS 5/13-102, 5/13-103); (b) when land is possessed by actual residence thereon for seven successive years by persons with connected record title (as defined in statute) (735 ILCS 5/13-107); (c) with exceptions, when there is actual possession under claim and color of title for seven years and payment of taxes is made for those seven years (735 ILCS 5/13-109); or, (d) with exceptions, when in case of vacant land, there is payment of taxes for seven years by person with color of title (735 ILCS 5/13-110); see exceptions (735 ILCS 5/13-108, 5/13-111, 13-112, 13-113). Proceedings to revive circuit court judgments under 735 ILCS 5/2-1602. (735 ILCS 5/13-218). Mortgage, trust deed in nature of mortgage, or vendor's lien on both registered and unregistered land, due date of which is stated on its face, ceases to be lien if more than 20 years have lapsed after last payment on indebtedness is due upon its face and according to its written terms, unless owner of such lien within prescribed time files extension agreement for record or files affidavit showing amount due. (735 ILCS 5/13-116). Affidavit or extension agreement can extend lien only ten years. (735 ILCS 5/13-116[b]).

Ten years: Except as provided in §2-725 of Uniform Commercial Code (c. 810), actions on bonds, notes, bills of exchange, written leases and written contracts and other evidences of indebtedness in writing—part payment or new promise to pay in writing within or after initial ten year period extends time to ten years after such payment or promise. With regard to promissory note dated on or after amendatory Act of 1997, cause of action on promissory note payable at definite date accrues on due date or date stated in note or date upon which note is accelerated. With respect to demand promissory note dated on or after Jan. 1, 1998 if demand is made to maker, action to enforce obligation must be commenced within ten years after demand. Action to enforce demand promissory note is barred if neither principal nor interest on such note has been paid for continuous period of ten years and no demand for payment has been made to maker during that period. (735 ILCS 5/13-206). This section also applies to actions brought under Illinois Wage Payment and Collection Act. (820 ILCS 115/1 et seq.). Foreclosure of mortgages (735 ILCS 5/13-115); but see subhead Twenty Years, supra as to cessation of lien of mortgage or trust deed in nature of mortgage. Actions under Registered Titles Act for loss or damage as result of omission, mistake, misfeasance in registering, or recording land titles must be brought within ten years. (765 ILCS 35/103).

Murder or Class X Felony.

Actions for damages for injuries described in 735 ILCS 5/13-202 or 203 (for personal injury, loss of consortium, or other injury to another person derived from victim's injury) arising out of murder or Class X felony must be filed within ten years after perpetrator has completed sentence. (735 ILCS 5/13-214.1). Actions for loss of means of support or loss of parental or in loco parentis relationship sustained by minor from injury described in 735 ILCS 5/13-214.1 must be filed within ten years after person who inflicted injury has completed sentence. (735 ILCS 5/13-203.1).

Seven years: Actions for recovery of or entry upon lands (see exceptions to 20-year limitation above). Actions to enforce judgments (with exceptions, including revival of judgment under 735 ILCS 5/2-1602, see subhead Twenty Years, supra and judgments recovered for injuries specified in 735 ILCS 5/13-214.1, see subhead Ten Years, supra) but real estate, levied upon within the seven years, may be sold to enforce judgment within one year after expiration of seven years. Child support judgments, including those arising by operation of law, may be enforced at any time. (735 ILCS 5/12-108).

Six years: Actions or claims against bank in dissolution, from date of publication of dissolution, unless this time would extend limitation period on action otherwise earlier barred. (205 ILCS 5/73).

Five years: Actions against state founded upon contract. (705 ILCS 505/22[a]). Actions by or against dissolved corporation, from date of dissolution, if action existed prior to dissolution (805 ILCS 5/12.80), except if action based on written instruments and falls within ten year limitation period of 735 ILCS 5/13-206 (142 Ill. App.3d 948, 492 N.E. 2d 528). Except as provided in §2-725 of Uniform Commercial Code (c. 810) and in §§11-13 of Illinois Public Aid Code 305 ILCS 5/11-1 to 5/13-5 (c. 305) actions on unwritten contracts, express or implied, part oral and part written contracts (53 Ill. App. 3d 344, 368 N.E. 2d 767) and awards of arbitration; actions for injuries to real or personal property; actions to recover possession of or damages for detention or conversion of personal property; and all civil actions not otherwise expressly provided for (735 ILCS 5/13-205). Last category named includes judgments of courts of another state. (735 ILCS 5/13-205; 139 Ill. 311, 28 N.E. 841). It also includes, inter alia, statutory causes of action for which limitation period is not otherwise provided. (446 F.Supp. 1048; 90 Ill. App.2d 61, 234 N.E. 2d 109). Five year period also applies to fraudulently concealed causes of action (735 ILCS 5/13-215) (see subhead Concealment of Cause of Action, infra).

Trade Secrets Act.

Actions for misappropriation as defined in Trade Secrets Act must be brought within five years after misappropriation is discovered or by exercise of reasonable diligence should have been discovered. (765 ILCS 1065/7).

Four years: Action for breach of any contract for sale of goods must be commenced within four years unless by original agreement parties reduce period of limitations to not less than one year. (810 ILCS 5/2-725). No action may be brought against registered land surveyor or professional land surveyor for negligence more than four years after person claiming damages actually knows or should have known of such negligence. In no event can action be brought if ten years have elapsed from time of act or omission. If person entitled to bring action is under 18 years of age or legal disability, period of limitation does not begin to run until person reaches 18 or disability removed. (735 ILCS 5/13-222). Action for violation of state antitrust laws barred unless commenced within four years after cause of action arose. (740 ILCS 10/7[2]). See category 3 Business Regulation and Commerce, topic 3.20 Monopolies, 3.22 Restraint of Trade and Competition, subhead Antitrust Act.

Improvements to Real Property.

With exceptions, any actions arising from design planning, supervision, observation, management or construction of improvements to real property, including negligence and Structural Work Act claims of worker injured at contract site (149 Ill.2d 190), must be commenced within four years from date plaintiff knew or should have known of action, but in no event more than ten years after improvements made unless defendant expressly warranted or promised improvements for longer period (735 ILCS 5/13-214).

Three years: Suits against sheriff or other officers for damages in replevin (705 ILCS 505/8); and actions by or against carriers to collect or recover transportation charges for property moved wholly in Illinois (735 ILCS 5/13-219); action to recover on accident or health insurance policy, measured from time proof of loss required to be submitted (215 ILCS 5/357.12); actions under Consumer Fraud Act (815 ILCS 505/10a[e]).

Franchise Disclosure Act.

Actions for violations of Franchise Disclosure Act of 1988 must be brought within three years of violation except that: (a) If plaintiff becomes aware of facts or circumstances reasonably indicating that plaintiff may have claim for relief under this Act, then action must be brought within one year from date of discovery; and (b) if plaintiff was given written notice disclosing violation, then action must be brought within 90 days of delivery of written notice. (815 ILCS 705/27).

State Securities Act.

Actions for violations of state securities laws must be brought within three years of date of sale of securities except that if violation involves 815 ILCS 5/12(E)-(J), and purchaser did not and would not with reasonable diligence have known of violation, three year period commences at earlier of: (1) Date of actual knowledge; (2) notice of facts that should lead to knowledge, but in no event can limitation period be extended more than two years beyond initial three year period. (815 ILCS 5/13[D]).

Two years: Actions for injury to person, or for abduction, seduction, criminal conversation, false imprisonment, malicious prosecution, or for statutory penalty, except actions against defendant arising from Structural Work Act, see subhead Four Years supra; and from first degree murder or Class X felony, and perpetrator is convicted of crime, must be brought within two years after cause of action accrued. However, such action against defendant under Crime Victim's Escrow Account Act must be brought within two years of establishment of account and, victim must register notice of intent to file claim with Treasurer within one year of establishment of account (735 ILCS 5/13-202); but see subhead Ten Years supra as to actions for damages, loss of means of support, or loss of parental or in loco parentis relationship arising out of first degree murder or Class X felony; and actions arising under “The Illinois Public Aid Code,” “Law Enforcement Officers and Firemen Compensation Act,” or “Illinois National Guardsman's and Naval Militiaman's Compensation Act,” against State in Claims Court, including personal injury or wrongful death actions (705 ILCS 505/22[h]). Wrongful death actions (740 ILCS 180/2); actions to recover for unlawful interest rates, discounts or charges in connection with loans of money from earlier of: (1) Date of last scheduled payment; or (2) date total amount is fully paid (815 ILCS 205/6); with several exceptions and varying accrual provisions, action brought by party alleging s(he) is child's natural parent must be commenced within two years after child reaches age of majority (18 years) (750 ILCS 45/8). Effective Jan. 1, 1991, actions by non-minor for damages based on childhood sexual abuse must be brought within two years of date claimant discovers or should have discovered both that abuse occurred and injury was caused by abuse and within ten years of date when limitation period begins to run after period of legal disability and limitation periods do not run during time when person abused is subject to threats, intimidation, manipulation or fraud perpetuated by abuser or person acting in interest of abuser. (735 ILCS 5/13-202.2[d-1]). Mechanics' lien action must be filed within two years after completion of contract or additional work. (770 ILCS 60/9). Actions to enforce contracts to make will must be commenced within two years after death or, if letters are applied for within two years after death, within time for claims against estate. (735 ILCS 5/13-221). Action for damages for injury or death whether based on tort or breach of contract against local public entity or public employee under Local Governmental and Governmental Employees Tort Immunity Act if arising out of patient care must be brought no more than two years after claimant knew, or should know by reasonable diligence or received notice in writing of death or injury for which damages are sought, whichever date occurs first but no action brought more than four years after date on which act or omission. (745 ILCS 10/8-101[b]). Effective June 4, 2003, unless changes in 745 ILCS 10/8-101(b) take away or impair vested right under existing law or, with regard to past transaction or consideration, create new obligation, impose new duty or attach new liability. (745 ILCS 10/8-101[d]).

Professional Treatment.

Actions for injury or death against physician, dentist, registered nurse or hospital must be brought within two years of date claimant knew or should have known of existence of injury, but no action may be commenced after four years after date act or omission causing injury occurred except as provided in 735 ILCS 5/13-215 (see subhead Concealment of Cause of Action, infra). (735 ILCS 5/13-212). Minority of plaintiff: where action for injury or death from patient care, and person entitled to bring action is under 18 years of age at time action accrues, action must be brought within eight years after date of act or omission causing injury, and in no event may action be brought after person's 22nd birthday, (735 ILCS 5/13-212[b]).

Attorney Malpractice.

Effective Jan. 1, 1991, actions for damages against attorney or attorney's employee must be brought within two years of date claimant knew or should have known of injury, but not more than six years after date of act or omission causing injury. (735 ILCS 5/13-214.3).

Contribution.

Action for contribution among joint tortfeasors may be commenced within two years after payment only where no lawsuit initiated by injured party. Where underlying action has been filed by claimant, no action for contribution or indemnity may be commenced more than two years after party seeking contribution or indemnity has been served with process in underlying action or more than two years from time party, or his privy, knew or reasonably should have known of act or omission giving rise to action for contribution or indemnity whichever is later. However, these rules do not apply where contribution or indemnification sought from party whose alleged negligence has caused injuries or death by reason of medical malpractice. (735 ILCS 5/13-204[e]; 740 ILCS 100/5; 135 Ill. App.3d 794, 482 N.E.2d 382).

Improvements to realty superceded by subsequent enactment, see subhead Four Years, supra.

One year: Actions for slander, libel or publication of matter which violates right of privacy (735 ILCS 5/13-201); actions for personal injuries against Chicago Transit Authority (70 ILCS 3605/41); as to actions accruing after Jan. 1, 1996, actions for wrongful death or personal injury against Regional Transportation Authority (70 ILCS 3615/5.03); actions against local public entity or its employees under Local Governmental Tort Immunity Act other than actions in 745 ILCS 10/8-101(b); actions against school districts (745 ILCS 25/2) (questioned or invalidated 57 Ill.2d 384, 312 N.E.2d 635); and actions against State arising under “The Illinois Public Aid Code,” “Law Enforcement Officers and Firemen Compensation Act,” “Crime Victims Compensation Act,” or “Illinois National Guardsman's and Naval Militiaman's Compensation Act” (705 ILCS 505/22[e]); actions under Liquor Control Act (“Dram Shop Act”) (235 ILCS 5/6-21); actions for violation of Sale of Fine Prints Act must be brought within one year of discovery of violation, but no more than three years after sale of print (815 ILCS 345/8); action to void or revoke consent to adoption must be brought within 12 months of date of consent or surrender (705 ILCS 50/11); breach of promise or agreement to marry (740 ILCS 15/6). Actions under Residential Real Property Disclosure Act from earlier of date of possession, date of occupancy or date of recording of instrument of conveyance. (765 ILCS 77/60). See topic 5.02 Actions, subhead Immunity; category 11 Employment, topic 11.02 Labor Relations, subhead Worker's Compensation Act.

Six Months.

Actions or levies with respect to bulk transfers under Commercial Code must be effected within six months after transferee took possession of goods unless transfer was concealed. If transfer was concealed, action or levy must be within six months of discovery of transfer. (810 ILCS 5/6-110). Six months limitation applicable only to transferee. (4 Ill. App.3d 881, 280 N.E.2d 266). Actions for violation of Equal Wage Act must be brought within six months of alleged violation. (820 ILCS 110/2). See subhead, Notice of Claims, infra.

See also category 13 Estates and Trusts, topic 13.16 Wills, subhead Contest.

Three Months (90 days).—Motion to substitute party, after death of party to action that survives, must be filed within 90 days after death is suggested of record or action may be dismissed as to deceased party. (735 ILCS 5/2-1008).

Notice of Claims.

In certain cases notice of claims prior to expiration of applicable limitation period, must be filed as prerequisite to commencing actions. Although such notice provisions apply to several of actions described in this section, they are not set forth. See topic 5.02 Actions.

Accrual of Action.

Date action is considered to have accrued, for limitation purposes, depends upon common law or statutes applying to particular action. This section does not, in all instances, describe manner in which accrual date is determined.

New Actions.

Where an action is brought within the time limit and judgment is given for the plaintiff but reversed on appeal, or there is a verdict for the plaintiff and, upon matter alleged in arrest of judgment, the judgment is given against plaintiff, or by U.S. District Court for lack of jurisdiction, or for improper venue plaintiff may bring new action within one year after such termination or reversal or within remaining period of limitation, whichever is greater. No action voluntarily dismissed by plaintiff or for want of prosecution may be filed where time for commencing action has expired. (735 ILCS 5/13-217).

Actions Unknown at Common Law.

Provision in statute creating a right unknown at common law and limiting the time in which an action thereon may be brought is not a statute of limitation and is not in pari materia with the statute of limitations; bringing suit within the designated time is a condition precedent to assertion of the right (404 Ill. 307, 89 N.E.2d 22; 20 Ill. App.2d 401, 156 N.E.2d 241), e.g., wrongful death, two years unless person entitled to recover is under 18 years, then within two years of such person attaining 18 (740 ILCS 180/2); action under Dram Shop Act, one year (235 ILCS 5/6-21); products liability, various limitations (735 ILCS 5/13-213). Provisions in general statutes of limitation extending time for bringing action in case of death or disability do not apply; however, particular statute creating right of action may expressly provide for extension of limitation period. (92 Ill. 2d 1, 440 N.E.2d 112; 20 Ill. App.2d 401, 156 N.E.2d 241). These statutes may make specific provision for extensions of time and should be consulted. However, 735 ILCS 5/13-217 (see subhead New Actions supra) applies equally to these actions. (51 Ill. App.3d 523, 366 N.E.2d 1068).

Foreign Causes of Action.

Action may not be brought in this state if barred by statute of limitations of state, territory or foreign country where it arose. (735 ILCS 5/13-210).

Derivative Actions.

Actions for loss of consortium or other actions including actions for medical expenses if minors or persons under legal disability deriving from injury to person of another, except for damages for first degree murder or commission of Class X felony, must be commenced within same period of time as any action that person might have for injury to himself. (735 ILCS 5/13-203).

Disabilities of Plaintiff.

In case of disability (generally minority, incompetency, imprisonment or other legal disability), unless otherwise provided, time is extended for two years after disability removed.

(735 ILCS 5/13-112, 5/13-211). However, effective 7/20/87, actions against health care professionals subject to statutorily specified tolling provisions where disability involves minority of person at time cause of action accrued. (735 ILCS 5/13-212[b]; see subhead Two Years, catchline Professional Treatment, supra). Although not otherwise identified in this section, different extension times, after disability is removed, apply to certain of actions described in this section. Particular statutes or rules should be consulted to determine effect of disability upon applicable limitation period. See supra, subhead Actions Unknown at Common Law.

Death of Party.

In case of death of person entitled to bring action, if cause survives, action may be brought by representative within limitations period or within one year from death, whichever is later. If person against whom action may be brought dies within limitations period and cause survives and is not otherwise barred, action may be commenced against his representatives after expiration of limitations period and within six months after letters of office are issued. (735 ILCS 5/13-209). (See supra, subhead Three Months where party dies after he has previously commenced action on his own behalf.) See supra, subhead Actions Unknown at Common Law.

Defective Products.

In general product liability actions based on any theory or doctrine to recover for injuries or death must be commenced within applicable limitation period for type of injury, but no action may be brought more than 12 years of first sale by seller or within ten years of delivery to initial user whichever occurs first; provided that if injury or death occurs within above 12 or ten year periods, action may be commenced within two years from date claimant knew or should have known of injury, death or property damage but in no event later than eight years after injury, death or property damage. (735 ILCS 5/13-213).

Absence or Concealment of Defendant.

In general statutes of limitation do not run during absence of potential defendant from state even if both parties were nonresidents (76 Ill.2d 439, 394 N.E.2d 385) when cause of action accrued. Limitations period also tolled for time that, after cause of action accrues, potential defendant departs from and resides out of state. (735 ILCS 5/13-208). By amendment of Oct. 1, 1973 party is not absent from state and statute of limitations runs if he is subject to long-arm jurisdiction statutes (735 ILCS 5/13-208, 5/13-209, 625 ILCS 5/10-301) or any other service of process statute. If service of process attempted pursuant to certain specified statutes but not obtained, statute of limitation does not run. (735 ILCS 5/13-208). Amendment applies only to actions commenced after Oct. 1, 1973. (735 ILCS 5/13-208).

Concealment of Cause of Action.

If person fraudulently conceals action against himself from person entitled to assert that action then action may be commenced within five years from time potential plaintiff discovered cause of action. (735 ILCS 5/13-215).

Interruption of Statutory Period.

Statute does not run while action stayed by injunction or statutory prohibition. (735 ILCS 5/13-216). See supra, subhead Ten Years.

Revival of Barred Claims.

Any payment or new written promise to pay made after full statutory period has run will revive certain barred claims. (735 ILCS 5/13-206). See supra, subhead Ten Years.

Set-off or Counterclaim.

Defendant may plead set-off or counterclaim otherwise barred by statute of limitations to cause of action owned by plaintiff before defendant's claim was barred. (735 ILCS 5/13-207).

Contractual Limitations.

Permitted subject to UCC. (810 ILCS 5/2-718, 5/2-719).

Pleading.

Statute of limitations is an affirmative defense and should be pleaded by one who relies thereon. (735 ILCS 5/2-613).

Actions Not Specifically Provided For.

See supra, subhead Five Years.

Uniform Commercial Code.

See category 3 Business Regulation and Commerce, topic 3.09 Commercial Code.

Other Actions.

Limitation periods for actions not addressed in this section may be located in category sections addressing those specific areas of law, e.g., Business Regulation and Commerce, topics Banks and Banking, Bills and Notes, Commercial Code, Sales; Estates and Trusts, topics Trusts, Wills; Mortgages, topics Mortgages of Personal Property, Mortgages of Real Property; Property, topic Real Property; Taxation, topic Taxes, etc.

5.16A PARTITION:

Lands, tenements or hereditaments, held in joint tenancy or tenancy in common, or other form of co-ownership, irrespective of claimant's age, may, by one or more of such claimants, be partitioned. Ownership of interest in surface of land by co-owner of interests in minerals underlying surface does not prevent partition of mineral estate. (735 ILCS 5/17-101). Common elements in condominium units may not be partitioned (765 ILCS 605/8), except in limited circumstances relating to damage or destruction (765 ILCS 605/14[1][d]).

Upon complaint for partition, court may determine all questions of conflict over title and may remove all clouds on title. (735 ILCS 5/17-124).

Jurisdiction and Venue.

Suit must be commenced in circuit court of county in which land or some part thereof is situated. Where premises are situated in two or more counties, the venue may be in either circuit court, but the one first acquiring jurisdiction retains sole and exclusive jurisdiction. (735 ILCS 5/17-101).

Proceedings.

Action is commenced by verified complaint, and proceedings and practice are same as in other civil cases. (735 ILCS 5/17-102). Complaint must describe premises and set forth interests of all parties, including tenants for years and life tenants, and all persons entitled to any beneficial interest in premises, and must pray for partition, or if partition would result in manifest prejudice to owners, for sale and distribution of proceeds. (735 ILCS 5/17-102). Every person having any interest, possessory, contingent or otherwise, who is not plaintiff, must be made defendant. (735 ILCS 5/17-103). Appropriate allegations regarding unknown persons having interests in property must be stated in complaint. (735 ILCS 5/17-104). Upon entry of decree of partition declaring right, title and interest of all parties, court must determine whether premises or part of premises can be divided without manifest prejudice to parties. If premises or part thereof cannot be divided, court orders public sale at fixed value. No sale may be approved for less than two-thirds of fixed value. (735 ILCS 5/17-105, 5/17-106). Court may decree pecuniary sum or easement to equalize shares in kind. (301 Ill. 191, 133 N.E. 658; 6 Ill.2d 577, 129 N.E.2d 673). Parties in interest may, after decree of partition and before division or sale, voluntarily settle their respective rights and interests so that division or sale becomes unnecessary, whereupon court must discontinue further proceedings, although decree remains in full force and effect respecting rights and interests adjudicated therein. (735 ILCS 5/17-126). Costs, including reasonable attorney's fee to plaintiff's attorney, must be apportioned so that each party pays his equitable portion thereof; except where good defense to complaint is interposed, in which event parties so defending will recover their costs against plaintiff. (735 ILCS 5/17-125).

Report of sale must be filed within ten days by person making such sale pursuant to directions of court, to which exceptions may be filed. Upon confirmation of report person making sale must execute and deliver proper conveyances to purchasers and distribute proceeds of sale to those entitled thereto according to their interests. (735 ILCS 5/17-118, 17-119).

When appropriate, payment is made in accordance with applicable sections of Probate Act relating to small estates. (735 ILCS 5/17-119). See category 13 Estates and Trusts, topic 13.08 Executors and Administrators, subhead When Administration Unnecessary. Shares payable to unknown parties are deposited with county treasurer, to be paid out upon order of court. (735 ILCS 5/17-122).

Homestead.

Homestead in premises may be set off in suit to partition. (735 ILCS 5/17-112). However, right of homestead cannot be asserted between joint tenants or tenants in common. (735 ILCS 5/12-901; 74 Ill.2d 27, 383 N.E.2d 973).

Effect on Lien.

Mortgage, attachment, or other liens on the share of a part owner remain in effect only on the part assigned to said part owner. (735 ILCS 5/17-114).

5.17 [RESERVED]

5.18 PLEADING:

Pleading is governed by Civil Practice Law (c. 735) and Supreme Court Rules (Ill. Sup. Ct. R.). See topics 5.02 Actions, Practice, Process; category 8 Debtor and Creditor, topic 8.09 Garnishment. First pleading by plaintiff is complaint, first pleading by defendant is answer. When answer pleads new matter by defense or counterclaim, plaintiff files reply and further pleadings may be permitted by court. (735 ILCS 5/2-602, 5/2-608[d]).

General Form of Pleadings.

Pleadings must contain plain, concise statement of cause of action, counterclaim, defense or reply. (735 ILCS 5/2-603[a]. Notice pleading, which prevails under federal rules, is not sufficient. Pleader must state facts essential to his cause of action. (18 Ill. App.2d 273, 151 N.E.2d 819; 108 Ill. App.2d 251, 247 N.E.2d 434). Each separate claim or cause of action on which separate recovery might be had must be stated in separate count or counterclaim. (735 ILCS 5/2-603[b], 2-613[a]).

Each count, counterclaim, defense or reply must be separately pleaded, designated and numbered and divided into paragraphs numbered consecutively containing separate allegations. (735 ILCS 5/2-613[a]).

A pleading must set forth names of all parties for and against whom it seeks relief. (735 ILCS 5/2-401[c]).

Every pleading, motion or other paper must contain signature and address of attorney or of party if not represented by counsel. No verification or affidavit required unless by rule or statute. Signature constitutes certification of knowledge of contents and good faith assertion of law and facts. If pleading, motion or other paper is signed in violation of this section, court must impose upon signer appropriate sanction. (Ill. Sup. Ct. R. 137).

General issues are not permitted. Every answer and subsequent pleading must contain explicit admissions or denials. Allegations, except of damages, not explicitly denied, are admitted unless pleader states on affidavit that he has no knowledge sufficient to form a belief, or unless he has had no opportunity to deny. An issue as to amount of damages only may be raised by so stating. (735 ILCS 5/2-610).

Parties may plead as many causes of action, counterclaims, defenses, and matters in reply or rejoinder as they may have, each separately designated and numbered. When in doubt as to which of two or more statements of fact is true, parties may state them in the alternative or hypothetically in same or different counts or defenses. A bad alternative does not affect a good one. (735 ILCS 5/2-613[a], [b]).

All defenses, whether to jurisdiction of subject matter, in abatement, or in bar, may be pleaded together, without waiving any defense so pleaded, but court may order defenses to subject matter jurisdiction or in abatement to be tried first. (735 ILCS 5/2-613[c]). However, to contest personal jurisdiction, special appearance must be used. See topic 5.19 Practice, subhead Appearance. Answer containing only defenses to subject matter jurisdiction or in abatement does not constitute admission of facts alleged in complaint, counterclaim or third party complaint. (735 ILCS 5/2-613[c]). Facts constituting affirmative defense or defense which if not expressly stated would be likely to take opposite party by surprise, must be plainly set forth. (735 ILCS 5/2-613[d]).

Subject to rules, plaintiff may join any cause of action against any defendant; defendant may answer with any cross demand whatever, designated as counterclaim. Court may, in its discretion, order separate trial of any action, counterclaim or third-party claim. Legal and equitable issues may be tried together if no jury is used. (735 ILCS 5/2-614).

Medical Malpractice.

Special provisions for pleading medical malpractice actions. (735 ILCS 5/2-622).

Frivolous Claims.

All pleadings and claims may be brought only after reasonable inquiry shows claim is well grounded in fact and is warranted by existing law or good-faith argument for extension, modification, or reversal of existing law. Claims cannot be brought for any improper purpose such as harassment, delay or to needlessly increase cost of litigation. (Ill. Sup. Ct. R. 137). Signature of attorney or party on any pleading filed with court serves as certification that above is true. (Ill. Sup. Ct. R. 137). If pleading is signed in violation of this section, court may impose sanctions on attorney and/or client. Sanctions may include, but are not limited to, reasonable attorneys' fees as result of filing pleading. (Ill. Sup. Ct. R. 137).

Counterclaim or Set-off.

Any demand by one or more defendants against one or more plaintiffs, or one or more co-defendants, whether set-off, recoupment or otherwise, in tort or contract, for liquidated or unliquidated damages, or for other relief, may be pleaded in separate part of answer as counterclaim in same manner and with same particularity as complaint. (735 ILCS 5/2-608). Counterclaims under Illinois law are permissive and not compulsory.

Prayers for Relief.

Every count in every complaint and counterclaim must contain specific prayer for relief which, whether based on one or more counts, may be asked in alternative. In personal injury actions, no ad damnum may be pleaded except to minimum extent necessary to comply with circuit rules of assignment. Relief demanded but not sustained by pleading may be objected to by motion or by answering pleading. Except in case of default, prayer for relief does not limit relief obtainable, but where other relief is sought court must by proper orders on just terms protect adverse party from prejudice by surprise. In case of default, if relief beyond that prayed is sought, notice must be given to defaulted party as provided by rule. (735 ILCS 5/2-604).

Punitive Damages.

For causes of action accruing after Nov. 25, 1986, no complaint can contain prayer seeking punitive damages in bodily injury or property damage actions based on negligence or product liability based on any theory or doctrine. Plaintiff may amend complaint to add punitive damage prayer only upon pretrial motion and hearing establishing reasonable likelihood of proof of facts at trial supporting punitive damages award. (735 ILCS 5/2-604.1). No punitive or exemplary damages are allowed in cases alleging medical or legal malpractice (735 ILCS 5/2-1115) or malicious prosecution of medical malpractice claims (735 ILCS 5/2-109). See also topic 5.09 Damages, subhead Limitations on Recovery.

Pleadings must be liberally construed to do substantial justice. (735 ILCS 5/2-603[c]).

Demurrer.

Not in use. (735 ILCS 5/2-615).

Amendments.

At any time before final judgment, amendments may be allowed on just and reasonable terms, introducing any party who ought to have been joined, discontinuing as to any plaintiff or defendant, changing cause of action or defense, or adding new causes of action or defenses, and in any matter either of form or substance in any process, pleading, bill of particulars, or proceedings, which may enable plaintiff to sustain claim or defendant to make defense or establish cross-demand. (735 ILCS 5/2-616[a]).

On motion directed to pleadings or for summary judgment or upon trial, amendments may be allowed on just and reasonable terms to change remedy sought. (735 ILCS 5/2-617).

For causes of action accruing after Nov. 25, 1986, complaints for bodily injury or property damage, or based on negligence or product liability based on any theory or doctrine, can be amended to seek punitive damages only upon motion and after hearing where plaintiff establishes reasonable likelihood of proving facts at trial sufficient to support award of punitive damages. (735 ILCS 5/2-604.1).

For further particulars regarding amendment, see 735 ILCS 5/2-616(b), (d), 5/2-617.

Supplemental pleadings setting up matters arising after original pleadings were filed, may be filed within a reasonable time by leave of court. (735 ILCS 5/2-609).

Bills of Particulars.

Where allegations are wanting in details, pleader must file and serve copy of bill of particulars on being served with notice demanding same and pointing out specifically defects complained of or details desired. A copy of notice must be filed. Pleader has 28 days to file and serve bill of particulars, and party who requested bill has 28 days to plead after being served with bill. On unreasonable neglect to furnish, or if bill of particulars furnished is insufficient, court may strike pleading, allow further time or require more particular bill. Items of indebtedness in an action on a contract stated in bill of particulars and verified by oath are admitted except insofar as opposite party files affidavit specifically denying same and stating facts as to each item denied, unless such affidavit is excused by court. Party may move court to deny or modify demand for bill of particulars. (735 ILCS 5/2-607).

Verification.

Any pleading, although not required to be sworn to, may be verified by any person having knowledge, in which event all subsequent pleadings must be verified unless verification is excused by court. Verified allegations do not constitute evidence except by way of admission. An allegation of the execution or assignment of any written instrument is deemed admitted unless denied by verified pleading or unless latter is excused by court. (735 ILCS 5/2-605). Verification by certification under penalty of perjury has same effect as verification under oath. (735 ILCS 5/1-109).

Exhibits.

If claim or defense is founded upon written instrument, a copy thereof, or so much of same as is relevant, must be attached to pleading as exhibit or recited therein unless pleader attaches to his pleading affidavit stating facts showing that instrument is not accessible to him. In either case exhibit constitutes part of pleading for all purposes. (735 ILCS 5/2-606).

Motions are used in place of demurrers and must point out specifically defects complained of and ask for appropriate relief. (735 ILCS 5/2-615[a]). Court may make appropriate orders as to pleading over or amending. (735 ILCS 5/2-615[d]). Any party may seasonably move for judgment on the pleadings. (735 ILCS 5/2-615[e]). Motions for involuntary dismissal based on certain defects or defenses also are governed by 735 ILCS 5/2-619 and may require support by affidavit if defects or defenses do not appear on face of pleading attached.

Service.

Plaintiff must furnish copies of the complaint, which must be attached to every copy of a summons used in making service. (Ill. Sup. Ct. R. 104[a]). Proper service of process is governed by 735 ILCS 5/2-201 through 735 ILCS 5/2-213.

Pleadings subsequent to the complaint, written motions and other papers must be filed with a certificate of counsel or other proof that copies thereof have been served on all parties who have appeared. (Ill. Sup. Ct. R. 104[b]).

Failure to comply with the foregoing in no way impairs the jurisdiction of the court but the aggrieved party may obtain a copy of any pleading from the clerk and the court must order the offending party to reimburse the aggrieved party for the expense thereof. (Ill. Sup. Ct. R. 104[d]).

Time for Filing.

Filing complaint commences action. (735 ILCS 5/2-201[a]). Answer (or motion to dismiss) must be filed 30 days after service of summons except in forcible detainer actions, actions for recovery of personal property, and actions for money not in excess of $50,000. (Ill. Sup. Ct. R. 101 [b, d]). In latter case, defendant must appear at a date specified in summons, not less than 21 or more than 40 days after issuance of summons (Ill. Sup. Ct. R. 101 [b][1]); if appearance is not by answer or motion, defendant has ten days after date of appearance to file answer or motion (Ill. Sup. Ct. R. 181[b][1]). In forcible detainer actions and actions for recovery of personal property, defendant must appear at date specified in summons, not less than seven or more than 40 days after issuance of summons (Ill. Sup. Ct. R. 101[b][2]); defendant, unless required by court, need not appear by filing answer and, when he does not, plaintiff's allegations are deemed denied and any defense may be proved as though specifically pleaded (Ill. Sup. Ct. R. 181[b][2]).

Replies to answers, responses to counterclaims and motions attacking pleadings other than complaints must be filed within 21 days after last day allowed for filing of answer, counterclaim or pleading. (Ill. Sup. Ct. R. 182). Subsequent pleadings to be filed as court may order. (Ill. Sup. Ct. R. 182[a]).

Special provision is made for small claims (actions for money not in excess of $10,000). (Ill. Sup. Ct. 281 R. et seq.).

See also topic 5.19 Practice, subhead Appearance.

Small Claims.

See category 6 Courts and Legislature, topic 6.01 Courts.

5.19 PRACTICE:

New Illinois Code of Civil Procedure has been adopted effective July 1, 1982. (735 ILCS). Practice is governed by The Code and Supreme Court Rules (Ill. Sup. Ct.) which specify trial and appellate practice.

See also topics 5.02 Actions, Appeal and Error, Depositions and Discovery, Injunctions, Judgments, Pleading, Process, Venue; category 8 Debtor and Creditor, topics 8.02 Attachment, 8.05 Executions, 8.09 Garnishment.

Appearance.

Special appearance may be made prior to filing any other pleading or motion, for purpose of objecting to jurisdiction of court over person of defendant, as to entire proceeding or any cause of action involved therein. Every other appearance prior to judgment is a general appearance. (735 ILCS 5/2-301[a]).

If objection to jurisdiction is overruled and defendant takes part in further proceedings he waives the objection unless it is on ground that he is not amenable to process issued by a court of Illinois. (735 ILCS 5/2-301[c]).

In actions for forcible detainer or for recovery of possession of tangible personal property, defendant must appear at date specified in summons not less than seven or more than 40 days after issuance of summons. (Ill. Sup. Ct. R. 101[b][2]). In actions for money not in excess of $50,000 answer must be filed at date specified in summons not less than 21 or more than 40 days after issuance of summons. (Ill. Sup. R. Ct. 101[b][1]). In other actions for money, appearance must be filed within 30 days after service of summons, exclusive of day of service. (Ill. Sup. Ct. R. 101[d]). 30 day period is computed from day copy of summons is left with person designated by law and not from day copy is mailed, in case mailing is also required. (Ill. Sup. Ct. R. 181[a]).

Special provision is made for small claims (actions for money not in excess of $10,000). (Ill. Sup. Ct. R. 281 et seq.).

Discovery.

May be had by deposition, interrogatories to parties, inspection of documents, tangible things or premises, physical examination, or mental examination or by admissions of facts obtained from opposite party. (Ill. Sup. Ct. R. 201 to 219). Request procedure permits discovery of documents or tangible things and entry on real estate, in control of party, without court order.

(Ill. Sup. Ct. R. 214). Except by leave of court, no discovery proceedings are permitted in small claims actions (not in excess of $10,000) (Ill. Sup. Ct. 201[g], R. 287) or in suits for violations of municipal ordinances where penalty is fine only (Ill. Sup. Ct. R. 201[h]). In all cases, plaintiff may initiate discovery upon nonparty who is believed to have information essential to determine who should be named as additional defendants. Fictitious defendants may not be named in complaint in order to designate respondents in discovery. (735 ILCS 5/2-402; 166 Ill. 2d 507, 655 N.E.2d 888). See topic 5.11 Depositions and Discovery.

Demand for Admission of Facts or Genuineness of Documents.

Each matter of which admission is requested is admitted unless opposing party, within 28 days after service of notice to admit, files sworn statement denying specifically matters of which admission is requested or setting forth reasons he cannot admit or deny those matters or files written objections on ground that matter is privileged or irrelevant or that request is otherwise improper. (Ill. Sup. Ct. R. 216).

Direct Actions Against Insurer.

See category 16 Insurance, topic 16.01 Insurance Companies.

Interrogatories to Parties.

Party may direct written interrogatories to any other party. The attorney directing interrogatories has the duty to restrict them to the subject matter of the particular case, avoid undue detail and avoid imposing unnecessary burdens and expenses on answering party. No more than 30 interrogatories unless leave granted by court on written motion. (Ill. Sup. Ct. R. 213[c]). Party to whom interrogatory is directed has 28 days after service to file a sworn answer or an objection. Where an answer may be obtained from documents in possession or control of party on whom interrogatory was served, affording opportunity for inspection and copying of pertinent documents is sufficient answer. (Ill. Sup. Ct. R. 213[e]).

Trial by Jury in Civil Actions.

A plaintiff desirous of a trial by jury must file demand with clerk at time action is commenced. Defendant must file demand no later than date of filing of answer. (735 ILCS 5/2-1105[a]). If court determines, in equitable action, that party is entitled to jury, plaintiff within three days from entry of order or defendant within six days may file demand for jury. If plaintiff or co-defendant files jury demand and thereafter waives jury any defendant may promptly demand jury. (735 ILCS 5/2-1105[a]). All jury cases where claim for damages does not exceed $50,000 shall be tried by jury of six, unless either party demands jury of 12. (735 ILCS 5/2-1105[b]).

Default Judgment.

Additional relief may be sought against defaulted party by serving notice of amended relief by personal service, certified or registered mail or by publication where provided for. (Ill. Sup. Ct. R. 105).

Small Claims.

See category 6 Courts and Legislature, topic 6.01 Courts.

5.20 PROCESS:

General Requisites.

Summons is issued by clerk of court under seal of court, attested and signed in name of clerk of court, dated on day issued. Its caption must contain names of all parties plaintiff and defendant, together with number of cause. It must be directed to each defendant, in most cases advising that he is summoned to answer complaint or otherwise file appearance within 30 days after service, exclusive of day of service. In action for money judgment not in excess of $50,000, exclusive of interest and costs, summons shall require each defendant to appear on day specified in summons not less than 21 nor more than 40 days after issuance. In any action for forcible detainer or recovery of possession of tangible personal property, summons shall require each defendant to appear on day specified in summons not less than seven or more than 40 days after issuance. Summons must bear address and telephone number of plaintiff or his attorney and if service or notices of motion or filings by facsimile transmission will be accepted, telephone number of facsimile machine of plaintiff or his attorney. (735 ILCS 5/2-201) (Ill. Sup. Ct. R. 101). Copy of complaint must be attached to copy of summons used in making service. (Ill. Sup. Ct. R. 104). Person making service must indorse date of service on copy served. (Ill. Sup. Ct. R. 102[c]). See topics 5.02 Actions; 5.17 Pleading.

Who May Serve.

Summons is served by sheriff, or if he be disqualified, by coroner. In counties with fewer than 1,000,000 people, any licensed private detective may serve process. Sheriff of county with population less than 1,000,000 may employ civilian personnel to serve process. Court may, upon motion, permit service by some private person over age of 18 if not party to action. It is not necessary that service be made by sheriff or coroner of county in which service is made. If served or sought to be served by sheriff or coroner he must endorse his return thereon and if by private person return shall be by affidavit. Any person who refuses or neglects to make return may be held for contempt. (735 ILCS 5/2-202). In countries with population of 3,000,000 or more members of housing authority police force may serve process for forcible entry and detainer actions by housing authority and may execute orders of possession for that housing authority. (735 ILCS 5/2-202[e]).

Summons returnable on a day certain may not be served later than three days before day for appearance. (Ill. Sup. Ct. R. 102[b]).

Summons requiring defendant to appear within 30 days after service may not be served later than 30 days after its date. (Ill. Sup. Ct. R. 102[b]).

Waiver of Service.

Plaintiff may request that defendant waive service by providing notice of action. Notice and request must be: (1) addressed to defendant or representative of defendant; (2) sent via first class mail or other equally reliable means; (3) contain copy of complaint; (4) identify consequences of compliance and failure to comply; (5) allow at least 30 days, if mailed in U.S., or 60 days if mailed outside of U.S., in which to respond to request for waiver; and (6) provide prepaid means of compliance in writing. (735 ILCS 5/2-213[a]).

Defendant who waives service is not required to appear or answer complaint until 60 days from date on which request was sent (notices and requests sent outside U.S. are granted 90 days from date request was sent). (735 ILCS 5/2-213[c]). Upon filing waiver of service, action shall then proceed as if summons and complaint had been served. (735 ILCS 5/2-213[d]). If defendant does not return waiver, plaintiff must serve summons and complaint as otherwise provided. (735 ILCS 5/2-213[e]).

Personal Service on Individual.

Except as otherwise expressly provided, service of summons upon individual defendant must be made: (a) By leaving copy thereof with defendant personally, or (b) by leaving copy at his usual place of abode with some person of family of age of 13 years or upwards or person residing there and informing that person of contents thereof, provided officer or other person making service shall also send copy of summons in sealed envelope with postage fully prepaid addressed to defendant at his usual place of abode. Certificate of officer or affidavit of person that he has sent copy is evidence he has done so. (735 ILCS 5/2-203).

Service in Small Claims Cases.

Special provision is made for service by certified or registered mail in small claims (civil actions based on tort or contract for money not in excess of $10,000, exclusive of interest and costs) unless otherwise provided by circuit court rule. (Ill. Sup. R. Ct. 284).

Service on Partnership.

Partnership sued in its firm name may be served by leaving copy of the process with any partner personally or with any agent of partnership found anywhere in state. A partnership sued in its firm name may also be notified by publication and mail and with like manner and like effect as individuals. (735 ILCS 5/2-205[a]). When personal judgment is sought against partner for partnership liability partner may be served: (1) In any manner provided for service on individuals, or (2) by leaving copy of summons for him with any other partner and mailing copy of summons in sealed envelope with postage prepaid addressed to partner against whom judgment is sought at his usual place of abode as shown by affidavit filed in cause. Service on nonresident partner against whom personal judgment is sought may be made by leaving copy with any other partner and mailing copy as provided herein only if cause of action sued on is partnership liability arising out of transaction of business within state. (735 ILCS 5/2-205[b]).

Service on Private Corporations.

Private corporation may be served by leaving copy of process with its registered agent or any officer or agent of corporation found anywhere in state or in any other manner now or hereafter permitted by law. Private corporation may also be notified by publication and mail in like manner and in like effect as for individuals. (735 ILCS 5/2-204).

A corporation must have registered agent on whom process may be served. (805 ILCS 5/5.05). If corporation does not have registered agent, or if agent cannot be found, service can be made upon Secretary of State. (805 ILCS 5/5.25).

Service on Voluntary Unincorporated Associations.

Voluntary unincorporated association sued in own name may be sued by leaving copy of process with any officer of association or at office of association with any agent of association. (735 ILCS 5/2-205.1). Voluntary unincorporated association, sued in its own name may also be notified by publication and mail in like manner, and with like effect as individuals. (735 ILCS 5/2-205.1).

Service on Persons Doing Business Under Assumed Name.

Persons doing business under an assumed name who have failed to register names of true owners as required under Assumed Name Act (805 ILCS 405/1) may be served by leaving copy of summons with any agent of business and thereafter publishing notice as provided (735 ILCS 5/2-205[c]). See also topic 5.15 Judgments, subhead Lien.

Personal Service on Public, Municipal, Governmental and Quasi-municipal Corporation.

May be served by leaving copy of summons with chairman of board or clerk of a county, mayor or clerk of a city, president of board or clerk of village, supervisor or clerk of a town, and president or clerk or other officer corresponding thereto in case of other such corporations. (735 ILCS 5/2-211).

Personal Service on Trustee of Corporation or Any Receiver.

Such party may be served in any manner provided for service on individuals or corporations as is appropriate or by leaving a copy with an agent in employ of trustee or receiver anywhere in state. (735 ILCS 5/2-212).

Personal Service Outside of State.

Personal service of summons may be made upon any party outside Illinois. If upon a citizen or resident of Illinois or upon person who has submitted to jurisdiction of the courts of Illinois it has force and effect of personal service of summons within Illinois; otherwise it has force and effect of service by publication. (735 ILCS 5/2-208[a]). Service of summons must be made in like manner as service within Illinois by any person over 18 years of age not party to action. No court order is required. Affidavit of service must be filed stating time, manner and place of service and court may consider affidavit or other competent proof in determining if service has been properly made. (735 ILCS 5/2-208[b]). No default may be entered until expiration of at least 30 days after service. Default judgment rendered on such service may be set aside only on showing which would be timely and sufficient to set aside a default judgment rendered on personal service within Illinois. (735 ILCS 5/2-208[c]).

Service of Process on Nonresidents for Collection of State Taxes.

Any nonresident acting as a supplier, retailer or serviceman and maintaining a place of business in Illinois as defined in statutes, and any resident who incurs use tax liability and then leaves Illinois, may be served for purposes of Illinois Revenue Act by leaving certified copy of process or notice, at least 15 days before return day, with Secretary of State and by sending nonresident at his last known address a like certified copy by registered or certified mail. (35 ILCS 105/12a, 110/13, 115/13).

Service on Unauthorized Insurance Companies.

See category 16 Insurance, topic 16.01 Insurance Companies.

Service by Mail.

Such service is made only in addition to whatever mode of service is used when defendant is not served personally except in small claims and actions to review final administrative decisions under the Administrative Review Law. (Ill. Sup. Ct. R 284; 735 ILCS 5/3-105).

Substituted Service.

This is covered under the above personal service classifications.

Actions Arising from Motor Vehicle Accidents.

See category 23 Transportation, topic 23.01 Motor Vehicles.

Long Arm Statute.

Any person whether or not a citizen or resident of Illinois, who, in person or through an agent does any of acts hereinafter enumerated, thereby submits such person, and, if an individual, his or her personal representative, to jurisdiction of the courts of this state as to any cause of action arising from doing of any of such acts: (1) Transaction of any business within Illinois; (2) commission of tortious act within Illinois; (3) ownership, use or possession of any real estate situated in Illinois; (4) contracting to insure any person, property or risk located within Illinois at time of contracting; (5) with respect to actions of dissolution of marriage, declaration of invalidity of marriage, and legal separation, maintenance in Illinois of matrimonial domicile at time this cause of action arose or commission in Illinois of any acts giving rise to cause of action; (6) with respect to actions brought under Illinois Parentage Act of 1984, as now of hereinafter amended, performance of act of sexual intercourse within Illinois during possible period of conception; (7) making or performance of any contract or promise substantially connected with Illinois; (8) performance of sexual intercourse within Illinois which is claimed to have resulted in conception of child who resides in Illinois; (9) failure to support child, spouse or former spouse who continued to reside in Illinois since person either formally resided with them in Illinois or directed them to reside in Illinois; (10) acquisition of ownership, possession or control of any asset or thing of value present within Illinois when ownership, possession or control was acquired; (11) breach of any fiduciary duty within Illinois; (12) performance of duties as director or officer of corporation organized under laws of Illinois or having principal place of business within Illinois; (13) ownership of interest in any trust administrated within Illinois; or (14) exercise of powers granted under authority of Illinois as fiduciary. (735 ILCS 5/2-209[a]). However, only causes of action arising from acts enumerated above may be asserted against defendant in action in which jurisdiction over him is based upon these provisions. (735 ILCS 5/2-209[f]). Court may exercise jurisdiction in any action arising within or without Illinois against any person who: (1) Is natural person present within Illinois when served; (2) is natural person domiciled or resident within Illinois when cause of action arose, action was commenced, or process was served; (3) is corporation organized under laws of Illinois; or (4) is natural person or corporation doing business within Illinois. (735 ILCS 5/2-209[b]). Court will have personal jurisdiction over anyone subject to a foreign defamation judgment residing in the state (735 ILCS 5/2–209(b-5). Court may also exercise jurisdiction on any other basis now or hereinafter provided by Illinois Constitution and Constitution of U.S. (735 ILCS 5/2-209[c]). Service of process upon any person who is subject to jurisdiction of courts of Illinois, as above provided, may be made by personally serving summons upon defendant outside Illinois, with same force and effect as though summons had been personally served within Illinois. (735 ILCS 5/2-209[d]). Service of process on nonresident in action based on product liability may be made by service of summons upon Secretary of State. Said summons shall be accompanied by copy of complaint, $5 fee, affidavit stating defendant's last known address and certificate verifying that copy of summons and complaint was mailed to defendant at such address. (735 ILCS 5/2-209[e]). Above in no way limits or affects right to serve process in any other manner now or hereafter provided by law. (735 ILCS 5/2-209[g]). If person is engaged in Illinois in conduct which violates Illinois Antitrust Act, he is deemed to have submitted to jurisdiction of Illinois courts and may be personally served outside Illinois. (740 ILCS 10/7.1).

Service by Publication.

Whenever, in any action affecting property or status within jurisdiction of court, including actions for specific performance, reformation or rescission of a contract for conveyance of land, or in action to revive judgment or decree, plaintiff or his attorney shall file, at office of clerk of court where action is pending, affidavit showing that defendant resides or has gone out of state, or on due inquiry cannot be found or is concealed within this state, so that process cannot be served on him, and stating residence, if known, or that on diligent inquiry his place of residence cannot be ascertained, clerk must cause publication to be made in newspaper published in county where suit is pending, or if there be none in newspaper in adjoining county having circulation in county where suit is pending, containing notice of pendency of suit, title of court, title of case showing first named plaintiff and defendant, number of case, names of parties to be served by publication, date on or after which default may be entered, and clerk must also within ten days of first publication mail copies to defendants whose residences are stated in affidavit. (735 ILCS 5/2-206[a]). In any action brought by government for demolition, repair or enclosure of dangerous or unsafe, uncompleted, or abandoned building, notice by publication may be started while attempts are being made to locate defendant for personal service. (735 ILCS 5/2-206[b]). Such published notice may be given any time after commencement of action, and must be published at least once a week for three successive weeks. No default or other proceeding may be taken against defendant not served with summons or copy of complaint unless first publication is at least 30 days prior to time when such default is sought to be taken. (735 ILCS 5/2-207).

Affidavit in support of service by publication may be combined with that for unknown parties. (735 ILCS 5/2-414).

In Cook County, such publication must be made in a newspaper published in a township in said county where it appears by affidavit that (1) none of defendants reside in City of Chicago, (2) one or more defendants reside in a township or townships of Cook County, and (3) a newspaper is published in said township or townships.

Proof of Service.

Where officer has sent copy of summons by mail, his certificate that he has complied with statute is evidence that he did so. (735 ILCS 5/2-203[b], 5/2-206). In other cases of service, affidavit of server filed with court stating manner of service constitutes evidence thereof. (735 ILCS 5/2-208). Person making service must make return by filing proof of service immediately after service on all defendants has been had, and in any event: (a) Not less than three days before specific return day specified in summons, or (b) in other cases, immediately after last day fixed for service. Failure of server to return summons or file proof of service does not invalidate summons or service thereof, if accomplished. (Ill. Sup. Ct. R. 102[d]). Mail service of subpoena on witness or deponent proved prima facie by return receipt showing delivery by certified or registered mail at least seven days before date appearance required and affidavit showing mailing prepaid, addressed to witness or deponent, restricted delivery, return receipt requested, with check or money order for fee and mileage enclosed. (Ill. Sup. Ct. R. 204[2], 237[a]).

Nonresident Motorist.

See category 23 Transportation, topic 23.01 Motor Vehicles.

Dismissal for Lack of Diligence.

Defendant may move for, or court on own motion may order, dismissal if plaintiff fails to exercise reasonable diligence to obtain service. If dismissal is prior to applicable statute of limitations, it is without prejudice. (Ill. Sup. Ct. R. 103[b]).

5.21 REPLEVIN:

Right to Maintain.

Person entitled to possession or owner of chattels may bring replevin for wrongful taking or detaining, but not to recover chattels taken under execution or attachment, unless such goods are exempt from seizure. (735 ILCS 5/19-101 to 5/19-102).

Venue provisions as to other civil cases (see topic 5.26 Venue) apply, but action also may be brought in county where goods, or a part thereof, are found. (735 ILCS 5/19-103). Order for replevin may also be directed to other counties, upon request of plaintiff. (735 ILCS 5/19-110).

Commencement of Action.

Action is commenced by filing a verified complaint describing property, stating that plaintiff is owner or entitled to possession of such property, that property has been wrongfully detained by defendant, and that property has not been taken for any tax, assessment, or fine levied by law of this state against property or against plaintiff individually, nor seized under any lawful process, nor held under any order for replevin against plaintiff. (735 ILCS 5/19-104). Answer or appearance must be made as in other civil cases. (735 ILCS 5/19-119).

Notice and Waiver.

Defendant shall be given five days written notice of hearing in manner required by Supreme Court Rule 72 to contest entry of order for replevin. No order may issue nor property be seized prior to such notice and hearing, except as provided in 735 ILCS 5/19-106 (see subhead

Hearing, infra). Right to notice and hearing as to any particular property may not be waived by any consumer. Consumer is defined as individual who obtained possession of property for personal, family, household, or agricultural purposes. Any waiver of notice and hearing must be in writing and must be given voluntarily, intelligently, and knowingly. (735 ILCS 5/19-105). Notice to defendant is not required if plaintiff establishes and court finds as matter of record and supported by evidence that summary seizure of property is necessary to protect plaintiff from immediate impending harm resulting from imminent destruction or concealment of disputed property, imminent removal from state of property (taking into consideration availability of judicial remedies in event of such removal), perishable nature of property, imminent sale, transfer or assignment to extent such is fraudulent or in derogation of plaintiff's rights in property, or to recover property from defendant who has obtained possession by theft. If court determines at ex parte hearing that notice is not required or waiver is in accordance with law, it shall order hearing as soon as practicable on issuance of order for replevin. (735 ILCS 5/19-106).

Hearing.

Court reviews plaintiff's claim to possession at hearing on issuance of order for replevin, which may be pursuant to notice under 735 ILCS 5/19-105 or ex parte pursuant to finding under 735 ILCS 5/19-106. Court issues order for replevin if plaintiff establishes prima facie case of superior right to possession and also demonstrates probability that he will ultimately prevail on underlying claim to possession. (735 ILCS 5/19-107).

Bond.

Prior to service of order for replevin, plaintiff must give secured bond, to sheriff or other officer, for double value of property to be replevied. (735 ILCS 5/19-112). Officer serving order must deliver property replevied to plaintiff immediately, unless, before actual delivery to plaintiff, defendant gives forthcoming bond and security approved by such officer in amount double value of property. (735 ILCS 5/19-116).

Proceedings.

If the property, or any part, is not found by or delivered to officer, and defendant is summoned or enters his appearance, plaintiff may proceed as in action for wrongful taking and detention of such unfound or undelivered property. If his action is sustained, he is entitled to judgment for value of his interest therein and damages for wrongful taking and detention. (735 ILCS 5/19-120).

Claims of Third Persons.

Any person other than defendant claiming property replevied, may intervene, verifying petition by affidavit; and if judgment is rendered for such claimant he must receive his costs, and if he is found entitled to immediate possession, the property must be ordered delivered to him. If judgment is for plaintiff, he recovers costs from claimant. Nonresident claimant must file security for costs. (735 ILCS 5/19-124).

Judgment or Order.

If judgment is for plaintiff he recovers damages for wrongful detention. (735 ILCS 5/19-125). If judgment is for defendant, he recovers damages for use of property from time it was taken until its return, less any time in which plaintiff was entitled to possession; if property was held by defendant for payment of money, defendant recovers either amount for which such property was rightfully held, with proper damages, or property itself, if it was delivered to plaintiff. (735 ILCS 5/19-123).

Amendment of Pleadings.

Where relief is sought under this Act and court determines that plaintiff has pleaded or established facts entitling him to relief but that he has sought wrong remedy, pleadings may be amended and relief to which plaintiff is entitled may be granted on amended pleadings or upon evidence. In considering whether a proposed amendment is just and reasonable, court considers right of defendant to assert additional defenses, to demand a trial by jury, to plead a counter-claim or third party complaint, and to order plaintiff to take additional steps which were not required under pleadings as previously filed. (735 ILCS 5/19-122).

5.22 SEQUESTRATION:

See category 8 Debtor and Creditor, topics 8.02 Attachment, 8.05 Executions, 8.09 Garnishment, and 8.16 Receivers.

Insurance holding companies, sequestration of voting securities for wrongful acquisition. (215 ILCS 5/131.23).

5.23 SERVICE:

See topic 5.20 Process.

5.24 STAY OF EXECUTION:

See topic 5.03 Appeal and Error; category 8 Debtor and Creditor, topic 8.05 Executions.

5.25 SUBMISSION OF CONTROVERSY:

No statutory provision for submission directly to court. As to submission to arbitrators, see category 9 Dispute Resolution, topic 9.02 Arbitration and Award.

5.26 VENUE:

Every civil action must be commenced (a) in county or residence of any defendant who is joined in good faith and with probable cause for purpose of obtaining judgment against him and not solely to fix venue in that county, or (b) in county in which transaction or some part thereof occurred out of which cause of action arose, with certain exceptions. If all defendants are nonresidents of State, action may be commenced in any county. If corporate limits of city, village or town extend into more than one county, venue of action or proceeding by such municipality to enforce any fine, imprisonment, penalty or forfeiture for violation of any law of municipality regardless of county in which violation occurred may be venued in appropriate court in county where municipal clerk's office is located, or in any county in which at least 35% of territory within municipality's corporate limits is located. (735 ILCS 5/2-101).

Actions Against Private Corporations and Partnerships.

Residence for venue purposes of private corporation, railroad or bridge corporation or foreign corporation authorized to do business in Illinois is county in which corporation has registered office or other office or is doing business. Partnership sued in firm name is resident of county in which any partner resides or firm has office or is doing business; if no partners are residents, partnership is nonresident. (735 ILCS 5/2-102). Action may be brought against insurance company incorporated under law of this state or doing business in this state in any county where plaintiff or one of plaintiffs resides. (735 ILCS 5/2-103[e]).

Actions Against Voluntary Unincorporated Associations.

Residence for venue purposes of voluntary unincorporated association is any county in which association has office, or, if on due inquiry no office found, in which any officer resides. If association has no member or office within state, it is deemed nonresident of state. (735 ILCS 5/2-102).

Actions Against Public or Quasi-Public Corporations.

Action against public, municipal, governmental or quasi-municipal corporation must be brought in county in which its principal office is located, or in county in which transaction or some part thereof occurred out of which cause of action arose. Action to recover damages to real estate overflowed or otherwise damaged by reason of act of such corporation may be brought in county where such real estate is situated or in county where corporation is located, at option of plaintiff. (735 ILCS 5/2-103[a]).

Actions By or Against Counties.

Action, local or transitory, against a county may be brought in circuit court in said county; action, local or transitory, by a county may be brought in county where defendant resides. (55 ILCS 5/1-6001).

Actions for Libel.

Action against owner, publisher, editor, author or printer of a newspaper or magazine of general circulation for libel contained therein must be commenced in county in which defendant resides or has his principal office or in which article was composed or printed, except that when defendant resides or article was printed outside of state, action may be commenced in any county in which libel was circulated or published. (735 ILCS 5/2-103[d]).

Administrative Agency Review.

Except where prescribed expressly by administrative procedure statute, action to review final administrative decisions may be brought in circuit court in county in which administrative proceeding was held, or subject matter situated, or transaction giving rise to proceeding occurred. (735 ILCS 5/3-104).

Real Actions.

Action to quiet title to real estate, to partition or recover possession thereof or to foreclose mortgage or other lien must be brought in county where real estate or some part of it is situated. (735 ILCS 5/2-103[b]).

Confession of Judgment.

See topic 5.15 Judgments.

Local Actions.

Any action made local by statute must be brought in county designated in such statute. (735 ILCS 5/2-103[c]).

Defendants in Different Counties.

When defendants reside in different counties and venue is based on residence, overruling of nonresident defendant's motion to transfer is not ground for reversal, if after it is overruled moving defendant proceeds to trial on merits, unless motion is renewed at close of all evidence and it then appears from record that defendant was joined in bad faith solely for purpose of fixing venue. (735 ILCS 5/2-105).

Place of Trial.

All actions must be tried in county in which instituted except as otherwise provided by law. (735 ILCS 5/2-108).

Effect of Wrong Venue.

No order, judgment or decree is deemed void for want of jurisdiction because rendered in the wrong venue if there is proper venue to which cause may be transferred (735 ILCS 5/2-104), except judgment by confession rendered in county in which obligation was not executed, no defendant resides and no property of any defendant is located (735 ILCS 5/2-1301[c]).

Substitution of judge in civil cases as matter of right once without cause upon motion before trial or hearing begins and before ruling on any substantial issue (735 ILCS 5/2-1001[a][2]); and when judge is party, interested in action, material witness or is counsel to party, or related to such counsel (735 ILCS 5/2-1001[a][1]) for cause by verified petition setting forth specific cause for substitution and upon hearing by judge other than judge named in petition. Judge named in petition need not testify but may submit affidavit. If petition allowed, case is assigned to judge not named in petition. If petition is denied, case is assigned back to judge named in petition (735 ILCS 5/2-1001[a][3]); and in contempt proceedings by defendant who fears he will not receive fair trial because defendant attacked character or conduct of judge otherwise than in open court, on verified petition filed before trial of contempt proceeding (735 ILCS 5/2-1001[a][4]).

Change of venue in any civil action when court determines any party may not receive fair trial in court where action is pending because inhabitants of that county are prejudiced against party, party's attorney or adverse party has undue influence over minds of inhabitants. (735 ILCS 5/2-1001.5). Application for change of venue must be by verified petition setting forth facts and supported by affidavits of at least two other reputable persons residing in county. Adverse party may controvert petition by counter-affidavits. Petition must be presented before trial or hearing begins and before judge has ruled on any substantial matter. However, if ground for change of venue occurs thereafter, petition may be presented based upon that ground (735 ILCS 5/2-1001.5[c]). When change of venue is granted, it goes to convenient county to which there is no valid objection (735 ILCS 5/2-1001.5[e]). Upon entry of judgment when venue has been changed, transcript of judgment may be filed with clerk of court in which action was instituted and has same effect as if judgment was originally recovered in such court. (735 ILCS 5/2-1001.5[m]).

Forum Non Conveniens.

Even where venue is proper, if original forum causes unnecessary hardship to defendant and interested parties, circuit court may in its discretion transfer cause to circuit court of another county in state. (98 Ill.2d 338, 456 N.E.2d 601).

Waiver of Objections.

Objections to improper venue waived unless motion to transfer is made on or before date defendant must appear or within further time that is granted him to answer or move with respect to complaint except that if defendant upon whom venue depends is dismissed upon motion of plaintiff, remaining party may promptly move for transfer. (735 ILCS 5/2-104[b]). Objections to change of venue waived after verdict. (735 ILCS 5/2-1001).

Waiver of service by defendant does not waive any objection to venue or jurisdiction. (735 ILCS 5/2-213[b]).

Proceedings to Compel or Stay Arbitration.

See category 9 Dispute Resolution, topic 9.02 Arbitration and Award.

6 COURTS AND LEGISLATURE

6.01 COURTS:

United States District Courts.

Fees.

Filing fee is $350; fee of $5 for filing applications for writ of habeas corpus. (28 U.S.C. §1914[a]). Clerk may collect only such additional fees as are prescribed by Judicial Conference of United States. (28 U.S.C. §1914[b]).

Northern District divided into Eastern and Western Divisions. Eastern Division comprises counties of Cook, DuPage, Grundy, Kane, Kendall, Lake, LaSalle, and Will, and sits in Chicago and Wheaton; Western Division comprises counties of Boone, Carroll, DeKalb, Jo Daviess, Lee, McHenry, Ogle, Stephenson, Whiteside and Winnebago, and sits in Freeport and Rockford. (28 U.S.C. §93[a]) Clerk's office located at Eastern Division address is Everett McKinley Dirksen Building, 219 South Dearborn Street, Chicago, Illinois 60604; Western Division address is United States Courthouse, 211 South Court Street, Rockford, Illinois 61101; telephone: (312) 435-5670 in Chicago, (815) 987-4354 in Rockford.

Southern District comprises counties of Alexander, Bond, Calhoun, Clark, Clay, Clinton, Crawford, Cumberland, Edwards, Effingham, Fayette, Franklin, Gallatin, Hamilton, Hardin, Jackson, Jasper, Jefferson, Jersey, Johnson, Lawrence, Madison, Marion, Massac, Monroe, Perry, Pope, Pulaski, Randolph, Richland, St. Clair, Saline, Union, Wabash, Washington, Wayne, White and Williamson, and sits at Alton, Benton, Cairo, and East St. Louis. (28 U.S.C. §93[c]). Telephone of clerk 618-482-9371 in East St. Louis and 618-439-7760 in Benton. Clerk maintains offices at 750 Missouri Avenue, East St. Louis, Illinois 62201, and at 301 West Main Street, Benton, Illinois 62812.

Central District (Clerk's office Springfield 62705) comprises counties of Adams, Brown, Bureau, Cass, Champaign, Christian, Coles, DeWitt, Douglas, Edgar, Ford, Fulton, Greene, Hancock, Henderson, Henry, Iroquois, Kankakee, Knox, Livingston, Logan, McDonough, McLean, Macoupin, Macon, Marshall, Mason, Menard, Mercer, Montgomery, Morgan, Moultrie, Peoria, Piatt, Pike, Putnam, Rock Island, Sangamon, Schuyler, Scott, Shelby, Stark, Tazewell, Vermilion, Warren and Woodford, and sits at Champaign-Urbana, Danville, Peoria, Quincy, Rock Island and Springfield. (28. U.S.C. §93[b]). Clerk's offices: Peoria Division, 309 U.S. Courthouse, 100 N.E. Monroe Street, Peoria, Illinois 61602, telephone: 309-671-7117, fax: 309-671-7120; Rock Island Division 40 U.S. Courthouse, 211 19th Street, Rock Island, Illinois 61201, telephone: 309-793-5778, fax: 309-793-5878; Springfield Division, 151 U.S. Courthouse, 600 E. Monroe Street, Springfield, Illinois 62701, telephone: 217-492-4020, fax: 217-492-4028; Urbana Division, 218 U.S. Courthouse, 201 S. Vine Street, Urbana, Illinois 61802, telephone: 217-373-5830, fax: 217-373-5834.

State Courts Generally.

Judicial power vested in Supreme Court, Appellate Court and Circuit Courts. (Art. VI, §1). For selection of supreme and appellate court judges, state is divided into five judicial districts (Art. VI, §2), with 23 circuits (705 ILCS 35/1 et seq.). Judicial Redistricting Act of 1997, 1996 Ill. Laws 719, unconstitutional in its entirety. (181 Ill. 2d 65; 691 N.E.2d 374). Notices of appeal filed on or after Nov. 17, 1997, must go to appellate court district defined by laws in effect prior to Act. (687 N.E.2d 1067). Juvenile causes are governed by the Juvenile Court Act of 1987, as amended. (705 ILCS 405/1–1 et seq.). The Court of Claims is established and governed by the Court of Claims Act. (705 ILCS 505/1 et seq.). Military and veterans affairs are governed by the Military and Veterans Courts Act (330 ILCS 135/1 et seq.). Illinois courts website: http://www.state.il.us/court/

First District.

Cook County.

Second District.

Counties of Boone, Carroll, DeKalb, Du Page, Jo Daviess, Kane, Kendall, Lake, Lee, McHenry, Ogle, Stephenson and Winnebago.

Third District.

Counties of Bureau, Fulton, Grundy, Hancock, Henderson, Henry, Iroquois, Kankakee, Knox, LaSalle, Marshall, McDonough, Mercer, Peoria, Putnam, Rock Island, Stark, Tazewell, Warren, Whiteside and Will.

Fourth District.

Counties of Adams, Brown, Calhoun, Cass, Champaign, Clark, Coles, Cumberland, DeWitt, Douglas, Edgar, Ford, Greene, Jersey, Livingston, Logan, Macon, Macoupin, Mason, McLean, Menard, Morgan, Moultrie, Piatt, Pike, Sangamon, Schuyler, Scott, Vermilion and Woodford.

Fifth District.

All counties south of Fourth District.

Supreme Court sits at Springfield, consists of seven judges: three from first district and one from each remaining district. (Art. VI, §3; 37-6) They are nominated by primary election or petition and elected at general or judicial elections (Art. VI, §12), for terms of ten years (Art. VI, §10). Court elects chief justice from their number for three year term. Four judges quorum; four necessary for decision. (Act VI, §3). Court has original and exclusive jurisdiction over cases relating to redistricting of General Assembly (Art. IV, §3) and ability of Governor to serve or resume office (Art. V, §6), and may exercise original jurisdiction over revenue, habeas corpus, prohibition and mandamus cases; appellate jurisdiction over all other cases. (Art. VI, §4[a]). Direct appeal from circuit court judgments imposing sentence of death. (Art. VI, §4[b]). Appeal from appellate court as matter of right if question under federal or state constitution arises for first time in and as result of appellate court's action or if division of appellate court certifies case to be one involving question of sufficient importance. (Art. VI, §4[c]; 705 ILCS 25/8.2; Sup. Ct. R. 316). Direct appeal from circuit court to Supreme Court may be taken when statute held unconstitutional, or in cases commenced to compel person or agency to comply with administrative order of chief circuit judge. (Ill. Sup. Ct. R. 302[a]). If notice of appeal from circuit court to Appellate Court has been filed in case in which public interest requires prompt adjudication, Supreme Court or justice thereof may order that appeal be taken directly to it. (Ill. Sup. Ct. R. 302[b]). Supreme Court Act gives supreme court power and authority necessary to carry into complete execution all its judgments and determinations and allows it to grant relief by mandamus, habeas corpus, certiorari, and all other lawful relief necessary to enforce due administration of justice. (705 ILCS 5/7, 5/8).

Appellate Court sits in five branches, one in each judicial district. Each district constitutes single division unless Supreme Court orders otherwise. Supreme Court assigns judges to divisions, and presiding judge of division designates three-judge panels. (Art. VI, §5; 705 ILCS 25/1[d]; Ill. Sup. Ct. R. 22[b]). Selection and terms of judges same as for Supreme Court. (Art. VI, §§10, 12). Appeal from circuit courts within district is of right. (Art. VI, §6; 705 ILCS 25/8.1).

Circuit Court sits in 23 judicial circuits including county of Cook as one judicial circuit and circuits First through Twenty-second for rest of State (705 ILCS 35/1; Art. VI, §7), each with numbers of circuit and associate judges prescribed by statute (705 ILCS 35/2). Circuit judges elected from within circuits at general elections (705 ILCS 35/2) for six year terms (Art. VI, §10). Associate judges appointed by judges of circuit (Art. VI, §8; Ill. Sup. Ct. R. 39) for terms of four years (Art. VI, §10), and may be assigned to any matter except trial of criminal cases in which defendant is charged with offense punishable by imprisonment for more than one year (Ill. Sup. Ct. R. 295). Circuit courts have jurisdiction of all justiciable matters except where Supreme Court has exclusive and original jurisdiction relating to redistricting of general assembly and ability of Governor to serve or resume office (Art. VI, §9), and of appeals from decisions of administrative bodies except final orders of Educational Labor Relations Board (735 ILCS 5/3-104). Circuit courts may enter such judgments, orders and injunctions, and must issue all such processes as may be necessary or proper to carry into effect their powers. (705 ILCS 35/25). Circuit courts and judges thereof have power to award relief by injunction, ne exeat, habeas corpus, quo warranto, and all other processes that may be necessary to due execution of their powers. (705 ILCS 35/26). Circuits are:

Circuit Court of Cook County consists of departments, divisions and districts. County Department composed of Law Division, which hears civil actions at law within monetary limits as well as certain other matters, and consists of eight sections; Chancery Division, which consists of General Chancery Section and Mortgage Foreclosure—Mechanics Lien Section; Domestic Relations Division, which deals with matters such as dissolution marriage, custody, and payment of maintenance or support; County Division, which hears actions and proceedings concerning mental health, adoption of children and other subjects; Probate Division, which handles matters related to wills, estate administration and structured settlement payments; and Criminal Division, which hears, among other things, criminal actions and prosecutions commenced by indictment or information. Juvenile Justice and Child Protection Department composed of Juvenile Justice Division and Child Protection Division. Municipal Department divided into six geographical districts, which determine proper venue, and has jurisdiction over civil actions and proceedings at law or actions to recover property if amount does not exceed maximum for particular districts; criminal actions based on complaint or information; and certain other proceedings. District One consists of City of Chicago and may hear civil actions and proceedings at law seeking compensatory and consequential money damages or actions for recovery of property if amount does not exceed $30,000 in addition to actions of forcible entry and detainer and ancillary and supplemental proceedings. Districts Two, Three, Four, Five and Six are composed of various townships or parts thereof and may hear civil actions and proceedings at law seeking compensatory and consequential money damages or actions for recovery of property if amount does not exceed $100,000 in addition to actions of forcible entry and detainer and ancillary and supplemental proceedings. Municipal Department also hears certain other types of civil actions and handles criminal and quasi-criminal actions that are commenced by complaint or information. (Gen. Orders, Cir. Court of Cook County, 1.2). Rule governs offices in which actions commenced on and after July 1, 2005 must be filed. (Gen. Ords. Cir. Ct. Cook Co. 1.4).

First Circuit.

Counties of Alexander, Jackson, Johnson, Massac, Pope, Pulaski, Saline, Union and Williamson.

Second Circuit.

Counties of Crawford, Edwards, Franklin, Gallatin, Hamilton, Hardin, Jefferson, Lawrence, Richland, Wabash, Wayne and White.

Third Circuit.

Counties of Bond and Madison.

Fourth Circuit.

Counties of Christian, Clay, Clinton, Effingham, Fayette, Jasper, Marion, Montgomery and Shelby.

Fifth Circuit.

Counties of Clark, Coles, Cumberland, Edgar and Vermilion.

Sixth Circuit.

Counties of Champaign, DeWitt, Douglas, Macon, Moultrie and Piatt.

Seventh Circuit.

Counties of Greene, Jersey, Macoupin, Morgan, Sangamon and Scott.

Eighth Circuit.

Counties of Adams, Brown, Calhoun, Cass, Mason, Menard, Pike and Schuyler.

Ninth Circuit.

Counties of Fulton, Hancock, Henderson, Knox, McDonough and Warren.

Tenth Circuit.

Counties of Marshall, Peoria, Putnam, Stark and Tazewell.

Eleventh Circuit.

Counties of Ford, Livingston, Logan, McLean and Woodford.

Twelfth Circuit.

County of Will.

Thirteenth Circuit.

Counties of Bureau, Grundy and LaSalle.

Fourteenth Circuit.

Counties of Henry, Mercer, Rock Island and Whiteside.

Fifteenth Circuit.

Counties of Carroll, Jo Daviess, Lee, Ogle and Stephenson.

Sixteenth Circuit.

Counties of DeKalb, Kane and Kendall.

Seventeenth Circuit.

Counties of Boone and Winnebago.

Eighteenth Circuit.

County of DuPage.

Nineteenth Circuit.

Before 12/4/06 Counties of Lake and McHenry; on and after 12/4/06 County of Lake with six subcircuits.

Twentieth Circuit.

Counties of Monroe, Perry, Randolph, St. Clair and Washington.

Twenty-first Circuit.

Counties of Iroquois and Kankakee.

Twenty-second Circuit.

On and after 12/4/06; County of McHenry.

Court of Claims (705 ILCS 505/1 et seq.) has exclusive jurisdiction of all claims against state founded on any state law, regulation, contract, or tort (tort damages limited to $100,000 except in cases involving operation of motor vehicle by state employee), claims for time unjustly served in state prisons (subject to limits), claims made under certain statutes (crime victims compensation, national guardsman compensation, police and fireman compensation), claims in tort (subject to $100,000 limitation) against certain state agencies (Medical Center Commission, governing boards of state colleges and universities) and all claims for recipient made by state against any claimant. (705 ILCS 505/8). Excepted are Workers' Compensation and Workers' Occupational Disease claims and claims for expenses in civil litigation or claims for review administrative decisions reviewable by statute in circuit or appellate court. (705 ILCS 505/8[a]). Jurisdiction includes actions concerning Clean Coal FutureGen for Illinois Act. (705 ILCS 505/8.5). Actions against the State or a State agency based on personal injury are barred unless notice given within one year of injury. (705 ILCS 505/22-1, 505/22-2). Cognizable claims barred unless filed within applicable time limitation. (705 ILCS 505/22). Other remedies and sources of recovery, whether administrative or judicial, must be exhausted before seeking final determination of claim. (705 ILCS 505/25). Court consists of seven judges appointed by governor. (705 ILCS 505/1). Court may hold sessions at such places as it deems necessary and sit at any place within state to take evidence in any case. (705 ILCS 505/6, 705 ILCS 505/13). See category 5 Civil Actions and Procedure, topic Limitation of Actions for special period applicable.

Small Claims actions may be brought in circuit courts for tort or contract claims of $5,000 or less in cases pending on Jan. 1, 2006, exclusive of interest and costs, or tax collections of like amount; effective Jan. 1, 2006, jurisdictional limit increased to $10,000 for new claims. (Ill. Sup. Ct. R. 281).

In any small claims case, on motion by either party or by court, dispute may be adjudicated by court at informal hearing during which court may relax rules of procedure and rules of evidence. (Ill. Sup. Ct. R. 286[b]).

Service of simplified complaint in many circuit courts may be made by certified mail, handled by court. (Ill. Sup. Ct. R. 284).

Appearance is all that is required of defendant; he need not plead unless ordered to do so. (Ill. Sup. Ct. R. 286[a]).

Jury of six or 12 may be demanded by plaintiff upon filing, or by defendant upon appearance, subject to payment of fee of $12.50 or $25, depending upon number of jurors. (Ill. Sup. Ct. R. 285).

Discovery, including depositions, available only by leave of court. (Ill. Sup. Ct. R. 287[a]).

Judgments may be paid by installments over period of up to three years if court so orders. (Ill. Sup. Ct. R. 288).

See category 5 Civil Actions and Procedure, topics 5.17 Pleading, subhead Time for Filing; 5.19 Practice, subheads Appearance and Discovery.

Juvenile Court. Juvenile causes are governed by the Juvenile Court Act of 1987, as amended. (705 ILCS 405/1–1 et seq.)

Military claims. Military and veterans affairs are governed by the Military and Veterans Courts Act (330 ILCS 135/1 et seq.).

6.01A JUSTICES OF THE PEACE:

Justices of the Peace were abolished effective Jan. 1, 1964. (64 Ill. App. 2d 114, 212 N.E.2d 338).

6.02 LEGISLATURE:

General Assembly consisting of Senate and House of Representatives convenes annually on second Wed. in Jan. Governor may call special sessions for stated purposes. (Const. Art. IV, §5). Presiding officers of both houses may call special sessions by joint proclamation stating purpose. (Const. Art. IV, §5; [25 ILCS 15/1]). State is divided into 59 legislative districts and 118 representative districts. (Const. Art. IV, §§1,3; 10 ILCS 5/29C-5). One senator elected from each Legislative District. Each Legislative District divided into two Representative Districts, with one Representative elected from each Representative District (Const. Art. IV, §2); senators' terms two or four years according to system of staggering; representatives' terms are two years. Legislators elected at general elections in even-numbered years. (Const. Art. IV, §4).

Effective Dates of Laws.

Bill passed prior to June 1 of calendar year with no effective date provided in terms of bill becomes effective on Jan. 1 of following year, or on becoming law, whichever is later. Bill passed prior to June 1 of calendar year that provides for effective date in terms of bill becomes effective on that date, if it is same as or subsequent to date bill becomes law. If effective date provided in terms of bill is prior to date bill becomes law, then date bill becomes law is effective date. (5 ILCS 75/1). Bill passed after May 31 shall become effective on June 1 of following year unless later date if provided in bill or unless earlier effective date is approved by three-fifths vote of both houses of General Assembly. (Const. Art. IV, §10; [5 ILCS 75/2]).

Initiative and Referendum.

While many statutes provide for local initiative and referendum on specific matters, there is no general provision covering legislative enactments.

Lobbying.

Lobbyist Registration Act (25 ILCS 170/1 to 170/12) requires registration with Secretary of State of all persons individually or employed by others who by communication with official of executive or legislative branch of government seek to influence executive, legislative or administrative action. Exceptions to broad definition include government employees and uncompensated persons appearing only before legislative committees, bona fide news media and persons drafting legislation as professional service (25 ILCS 170/4). Detailed reports under oath need to be filed under four categories: travel and lodging; meals, beverages and entertainment; gifts; honorarium. Also, individual expenditures over $100 shall be itemized. Registrant shall preserve receipts and records used in preparing reports for two years and within 30 days notify each official on whose behalf expenditure has been reported. (25 ILCS 170/6). Violators barred from lobbying for three years, subject to $10,000 fine. (25 ILCS 170/10).

6.03 REPORTS:

Decisions are contained in Illinois Reports, Illinois Appellate Reports, and Illinois Court of Claims Reports. Series are numbered consecutively. First ten volumes of Supreme Court and first 20 of Appellate Court are cited by name of reporter and volume number.

Reporter of Decisions.

Preparation of official reports of Supreme Court and Appellate Court decisions is duty of reporter of decisions, a salaried employee of State appointed by Supreme Court who receives no remuneration for services other than salary. (705 ILCS 65/1).

Publication and Distribution.

Reporter, subject to prior approval of Supreme Court, contracts with publisher for sale of official reports on terms most advantageous to public and state. Reporter shall supervise publication. (705 ILCS 65/2).

Style, Quality and Format.

Supreme Court determines style, manner, size, quality and general format in which official reports are published. (705 ILCS 65/4). Volumes containing official reports are copyrighted in name of Supreme Court and reporter of decision. (705 ILCS 65/5). Reporter of decisions may license use.

Clerk of Supreme and Appellate Courts.

Clerks of Supreme and Appellate Courts furnish, without cost, opinions of court to reporter within ten days. Clerk furnishes opinions to other persons at price fixed by Supreme Court. (705 ILCS 65/7).

Unofficial Reports.

Decisions of both Supreme and Appellate Courts, commencing with volumes 114 Ill. and 284 Ill. App., respectively, are also reported in the Northeastern Reporter and Illinois Decisions.

Digests and Encyclopedia: Callaghan's Ill. Digest, West's Ill. Digest, Ill. Law and Practice and Ill. Law Reporter, all Ill., Ill. App. and federal cases to date; older digests primarily of historical importance.

Legislative Reference Bureau.

Reviews Federal and Illinois appellate court decisions that affect interpretation of Illinois Constitution or statutes, indicates problem areas, reports annually to legislature. (25 ILCS 135/5.05).

6.04 STATUTES:

See topic 6.02 Legislature.

On Jan. 1, 1993 new official compilation of Illinois Statutes became effective. New statutes are known as “Illinois Compiled Statutes”. The session laws are printed at close of each session. Accurate but unofficial compilations are also published and are known as “Illinois Compiled Statutes (20—).”

Legislative Reference Bureau may charge reasonable fee for providing copies of compilation of statutes. (25 ILCS 135/5.04[a]).

Uniform Acts adopted and presently in force are: Illinois Conviction Information Act, 1991 (20 ILCS 2635/1 et seq.); Facsimile Signature of Public Officials Act, 1959 (30 ILCS 320/1 et seq.); Penalty and Interest Act, 1994 (35 ILCS 735/3–1 et seq.); Peace Officers' Disciplinary Act (50 ILCS 725/1 et seq.); Interstate Compact for Juveniles Act of 2008 (45 ILCS 11/1 et seq.); Prescription Drug Information Card Act (215 ILCS 138/1 et seq.); Health Care Service Benefits Information Card Act (215 ILCS 139/1 et seq.); Uniform Provisions for Liquidation, 1941 (215 ILCS 5/221.1 et seq.); Extradition of Persons of Unsound Mind Act, 1917 (405 ILCS 10/1 et seq.); Hazardous Substances Act of Illinois Act (430 ILCS 35/1 et seq.); Commercial Driver's License

Act (625 ILCS 5/6–500 et seq.); Arbitration Act, 2000 (710 ILCS 5/1 et seq.); Mediation Act, 2001 (710 ILCS 35/1 et seq.); Secure the Attendance of Witnesses from Within or Without a State in Criminal Proceedings Act, 1936 (725 ILCS 220/1 et seq.); Criminal Extradition Act, 1955 (725 ILCS 225/1 et seq.); Rendition of Accused Persons Act, 1969 (725 ILCS 230/1 et seq.); Rendition of Prisoners as Witnesses in Criminal Proceedings Act, 1963 (725 ILCS 235/1 et seq.); Foreign Money-Judgments Recognition Act, 1962 (735 ILCS 5/12–618 to 5/12-626); Foreign-Money Claims Act, 1989 (735 ILCS 5/12-630 et seq.); Enforcement of Foreign Judgments Act, 1964 (735 ILCS 5/12-650 et seq.); Fraudulent Transfer Act, 1984 (740 ILCS 160/1 et seq.); Controlled Substances Act, 1971 (740 ILCS 40/0.01 et seq.); Single Publication Act, 1959 (740 ILCS 165/1 et seq.); Premarital Agreement Act, 1983 (750 ILCS 10/1 et seq.); Interstate Family Support Act, 2001 (750 ILCS 22/101 et seq.); Child-Custody Jurisdiction and Enforcement Act, 1997 (750 ILCS 36/101 et seq.); Marriage and Divorce Act, 1977 (750 ILCS 5/101 et seq.); International Wills Act, 1977 (755 ILCS 10/0.01et seq.); Anatomical Gift Act, 1987 (755 ILCS 50/1–1 et seq.); Illinois Uniform Transfers to Minors Act (1983, 1986) (760 ILCS 20/1 et seq.); Uniform Management of Institutional Funds Act, 1972 (760 ILCS 50/1 et seq.); Common Trust Fund Act, 1943 (760 ILCS 45/1 et seq.); Recognition of Acknowledgments Act, 1969 (765 ILCS 30/1 et seq.); Real Property Electronic Recording Act (765 ILCS 33/1 et seq.); Vendor and Purchaser Risk Act, 1963 (765 ILCS 65/1 et seq.); Uniform Disposition of Unclaimed Property Act (765 ILCS 1025/0.05 et seq.); Uniform Environmental Covenants Act (765 ILCS 122/1 et seq.); Federal Lien Registration Act (1978, 1982) (770 ILCS 110/1 et seq.); Partnership Act, 1997 (805 ILCS 206/100 et seq.); Limited Partnership Act, 2001 (805 ILCS 215/0.01 et seq.); Preservation of Private Business Records Act, 1957 (805 ILCS 410/1 et seq.); Commercial Code, 1972 (810 ILCS 5/1–101 et seq.); TOD Security Registration Act, 1989 (815 ILCS 10/0.01 et seq.); Deceptive Trade Practices Act, 1965 (815 ILCS 510/1 et seq.).

Fiduciary Security Transfers Simplification Act, which was patterned after Uniform Simplification of Fiduciary Security Transfers Act, but had substantial differences, has been repealed. (89–364; 89–626).

For text of Uniform Acts falling within the scope of the Martindale-Hubbell Law Digests see Uniform and Model Acts section.

6.05 UNIFORM LAWS:

For list of Uniform Acts in force in this state, see topic 6.04 Statutes. For text of Uniform Acts within the scope of the Martindale-Hubbell Digests see Uniform and Model Acts section.

7 CRIMINAL LAW

7.00A BAIL:

See topic 7.01 Criminal Law.

7.01 CRIMINAL LAW:

Criminal Code defines crimes, Code of Criminal Procedure and Supreme Court Rules govern procedure, and Unified Code of Corrections governs penalties and sentences. (c. 720). Miscellaneous procedural rules and definitions of crimes are found in other portions of Illinois Statutes. Rules of Evidence applicable to civil proceedings are applied in criminal proceedings unless expressly provided otherwise or unless such application would be inconsistent with intention of rule read in context. (735 ILCS 5/8-2401). Portion of Criminal Code defining substantive crimes was completely revised effective Jan. 1, 1962. Code of Criminal Procedure, revising and reorganizing older laws, became effective Jan. 1, 1964.

Uniform Acts.

Illinois has adopted, with some modifications, Interstate Compact for Juveniles Act of

2008 (45 ILCS 11/1), Uniform Criminal Extradition Act (725 ILCS 225/1 to 225/32), Uniform Act to Secure the Attendance of Witnesses from Within or Without a State in Criminal Proceedings (725 ILCS 220/1 to 220/6), Uniform Rendition of Accused Persons Act (725 ILCS 230/1 to 230/6), Uniform Extradition of Persons of Unsound Mind Act (405 ILCS 10/1 to 10/6) and Uniform Rendition of Prisoners as Witnesses in Criminal Proceedings Act (725 ILCS 235/1 to 235/11), Uniform Controlled Substances Act (720 ILCS 570/101 et seq.) and Interstate Corrections Compact (730 ILCS 5/3-4-4).

Other Acts.

Crime Victims Compensation Act extends to spouses, parents, children, or siblings of persons killed as result of felony and affords such persons opportunity to be heard at sentencing (740 ILCS 45/1 et seq.); Sexual Assault Survivors Emergency Treatment Act (410 ILCS 70/1 et seq.); Rights of Crime Victims and Witnesses Act (725 ILCS 120/1).

Criminal Victims' Asset Discovery Act provides victim or victim's representative right to depose person convicted of first degree murder, Class X felony or aggravated kidnapping or person found not guilty by reason of insanity or guilty but mentally ill of first degree murder, Class X felony, or aggravated kidnapping; right to discover and seek attachment against property of such person. (725 ILCS 145/3, 735 ILCS 5/4-101).

The Stalking No Contact Order Act provides victims of stalking with the means to obtain an emergency protective order preventing contact between the respondent and the petitioner and providing certain additional protections. (740 ILCS 21/1 to 21/135).

The Civil No Contact Order Act allows sexual assault victims to seek a civil remedy requiring only that the offender stay away from the victim. (740 ILCS 22/101 et seq.)

The Controlled Substance and Cannabis Nuisance Act declares that all places and the fixtures and movable contents thereof used for the purpose of unlawfully selling, possessing, serving, storing, delivering, manufacturing, cultivating, giving away or using controlled substances are nuisances and therefore subject to abatement proceedings. (740 ILCS 40/1 to 40/13).

Narcotics Profit Forfeiture Act (725 ILCS 175/1 to 175/11) creates separate offense, Class I felony, for narcotics racketeering and mandates forfeiture of assets obtained by or used in narcotics racketeering or obtained through any act which violates §3 of Drug Paraphernalia Control Act (720 ILCS 600/3).

The Sex Offender and Child Murderer Community Notification Law provides for the registration of convicted sex offenders, the maintenance of the Sex Offender Database and the Missing Sex Offender Database, and the procedures governing community notification of the presence of sex offenders. (730 ILCS 152/101 et seq.).

Torture. The Torture Inquiry and Relief Commission Act establishes an extraordinary procedure to investigate and determine factual claims of torture. (775 ILCS 40/1 to 40/99).

Unlawful Use of Computer.

Computer tampering is a Class B Misdemeanor for a first offense. Criminal violators who transmit unsolicited bulk e-mail also subject to civil remedies including $25,000 per day or actual damages, reasonable attorneys' fees, other litigation expenses, or other relief. (720 ILCS 5/16D-3).

The Child Online Exploitation Reporting Act requires electronic communications service or remote computing service providers to register certain information with the Cyber Tipline at the National Center for Missing and Exploited Children in order to facilitate the required reporting onf child pornography crimes. (325 ILCS 47/10 et seq.)

Child Abduction.

Intentional violation of court order awarding custody of child under age of 18 is Class 4 felony. (720 ILCS 5/10-5).

Indictment or Information.

Prosecution may be begun by complaint, information or indictment when authorized by law. (725 ILCS 5/111-1). Felony prosecutions must be commenced by indictment or information. If begun by information, accused must be given preliminary hearing unless informed waiver is made in open court. (725 ILCS 5/111-2). Accused is entitled to speedy trial. (725 ILCS 5/103-5; Const., Art. I, §8). But, delay considered to be agreed to by defendant unless written demand for trial or oral demand for trial on record. (725 ILCS 5/103-5[a]). Failure to provide accused with speedy trial is grounds for dismissal of charges. (725 ILCS 5/114-1). Dismissal authorized where State fails to use due diligence to bring to trial. (725 ILCS 5/114-4[e]). For contents of a charge, see 725 ILCS 5/111-3. In all cases where imposition of death penalty is not possibility, if alleged fact is not element of crime but could increase range of penalties, alleged fact must be included in charging instrument or through written notice to defendant before trial and proved beyond reasonable doubt. Failure to prove fact does not bar conviction but is bar to increasing range of penalties. (725 ILCS 5/111-3[c]). Uniform Traffic Ticket or Uniform Conservation Ticket filed with circuit court is complaint, unless defendant requests filing of verified complaint. (725 ILCS 5/111-3).

Bail is governed by Art. 110, Code of Criminal Procedure, which initiates non-bondsmen system (725 ILCS 5/110-1 to 5/110-17 and 725 ILCS 195/1 to 195/5), and regulates bail in quasi-criminal offenses and misdemeanors.

All persons bailable before conviction except for following offenses where proof is evident and presumption great: Capital offenses; offenses for which life imprisonment may be imposed; felony offenses for which sentence of imprisonment, without conditional and revocable release, must be imposed by law or consequence of conviction; stalking or aggravated stalking, when court, after hearing, determines that release would pose real and present threat to physical safety of any person; and making a terrorist threat, when court determines that release would pose a real and present threat to any person. (725 ILCS 5/110–4), (Const., I, §9). Person charged with capital offense or offense for which life imprisonment may be imposed is not bailable until hearing is held wherein such person has burden to demonstrate that guilt is not evident and presumption is not great. (725 ILCS 5/110-4). Court may release defendant on own recognizance under certain circumstances. (725 ILCS 5/110-2).

Person for whom bail has been set must execute bail bond and deposit with clerk of court before which proceeding is pending sum of money equal to 10% of bail, but in no event less than $25. Where person is charged with offense under Controlled Substances Act that is Class X felony, court may require deposit equal to 100% of bail. (725 ILCS 5/110-7). 90% of sum deposited returned to accused when discharged from all obligations in cause unless court enters order that bail bond deposited by or on behalf of accused be used to satisfy financial obligations of same accused in different case. In no event will amount retained be less than $5. (725 ILCS 5/110-7). In lieu of bail deposit, bond may be secured by deposit with clerk of court, in amount equal to required bail, of cash, or stocks and bonds in which trustees are authorized to invest trust funds or by real estate situated in this state with unencumbered equity not exempt owned by accused or by sureties worth double amount of bail set in bond. (725 ILCS 5/110-8). Judge is to endorse required bail on warrant issued after filing of information or charge. (725 ILCS 5/111-2).

When bail has been set by a judicial officer for a particular offense or offender, any sheriff or other peace officer may take bail in accordance with 725 ILCS 5/110-7 or 725 ILCS

5/110-8 and release offender to appear in accordance with conditions of bail bond, Notice to Appear or Summons. (725 ILCS 5/110-9). Other provisions apply in cases involving traffic, quasi-criminal, and certain misdemeanor offenses (725 ILCS 5/110-10[d]) and domestic violence (725 ILCS 5/110-15).

Violation of Bail Bond.

If bail is given in connection with felony charge, pending appeal or certiorari after conviction, person who incurs forfeiture of bail and willfully fails to surrender within 30 days following date of forfeiture commits felony of next lower class or Class A misdemeanor if underlying offense was Class 4 felony. If bail is given in connection with misdemeanor charge or for appearance as witness, person who incurs forfeiture of bail and willfully fails to surrender within 30 days following date of forfeiture commits misdemeanor of next lower class but not less than Class C misdemeanor. Person who violates condition of bail by possessing firearm commits Class 4 felony for first violation and Class 3 felony for second violation. Statute does not affect court's power to punish for contempt. (720 ILCS 5/32-10). Bail bondsman may not seize or transport person found in Illinois who is allegedly in violation of bail bond posted in another state. (725 ILCS 5/103-9).

Pretrial service agencies provide courts with background data regarding pretrial release of persons charged with felonies and supervise compliance with terms and conditions of release. (725 ILCS 185/3 to 185/33).

8 DEBTOR AND CREDITOR

8.01 ASSIGNMENTS:

Uniform Commercial Code adopted. (c. 810). See categories 3 Business Regulation and Commerce, topic Commercial Code; Documents and Records, topic Records; Property, topic Deeds.

Assignee and bona fide owner of any nonnegotiable chose in action may sue thereon in his own name. (735 ILCS 5/2-403).

Voluntary assignment in trust for benefit of creditors is valid, if in writing. (15 Ill. App.2d 207, 145 N.E.2d 797).

Partner's right in specific partnership property is not assignable except in connection with assignment of rights of all partners in same property. (805 ILCS 205/25[2][b]).

Assignment of wages earned or to be earned is invalid unless: (1) In writing signed by assignor, bearing date of execution, and stating name of employer at time of execution, consideration given, rate of interest or time-price differential, if any, and date payments due; (2) given to secure existing debt of assignor or one contracted by assignor simultaneously with execution; (3) exact copy furnished to assignor at time of execution; (4) words “Wage Assignment” in bold face letters one-quarter inch or more in height appear at head of instrument and one inch above or below signature line; (5) written as separate instrument complete in itself. Wage assignments made after Jan. 1, 1966 must include assignor's social security number. (740 ILCS 170/1). Demands served on employer have no legal effect unless: (1) There is continuing default which has existed in excess of 40 days in payment of indebtedness secured by assignment; (2) demand contains correct statement of amount in default; (3) original or photostatic copy of assignment is exhibited to employer; (4) notice of intention to make demand is served upon employee by registered or certified mail and copy sent to employer not less than 20 days prior to service of demand. (740 ILCS 170/2). Demand applies only to wages due at time of service of demand and to subsequent wages until amount due under assignment is paid or until expiration of payroll period ending immediately prior to 84 days after service of such demand, whichever first occurs. (740 ILCS 170/2). Assignor may file with his employer affidavit of existence of defense within 20 days after receipt of notice of intention to make demand or within five days after service of demand. If copy of affidavit is served upon creditor by registered or certified mail before service of demand, creditor may not serve demand. (740 ILCS 170/4.1). If affidavit of defense is filed with employer within five days after service of demand, no wages are subject to demand unless employer receives copy of subsequent written agreement between assignor and creditor authorizing payments; and creditor must then proceed by filing action on claim against assignor. In this action creditor may serve summons by registered or certified mail. If no affidavit of defense is filed with employer within five days after service of demand, employer is to pay to creditor wages subject to demand. (740 ILCS 170/4.2). Provision is made for collection of statutory damages for wrongful service of demand, service of notice, or failure to release demand. Service of demand when no assignment was in fact executed or under assignment known to be invalid is petty offense. (740 ILCS 170/6). Statute contains forms for demand, notice to employee, and affidavit of defense. (740 ILCS 170/2.1, 170/2.2, 170/4.1). Assignment is valid against employer of assignor at time assignment is made only for three years from date of execution and against future employers of assignor only for two years from date of execution. (740 ILCS 170/3, 170/5). Amount subject to collection by any and all assignees for any work week cannot exceed lesser of: (1) 15% of gross amount payable for that week or (2) amount by which disposable earnings for that week exceeds 45 times Federal minimum hourly wage or minimum hourly wage prescribed by §4 of Minimum Wage Law, whichever is greater; order of service of demand on employer determines priorities. (740 ILCS 170/4). Employer must withhold fee of $12 for each wage assignment, to be credited against assignor's outstanding debt. (740 ILCS 170/4). Wages of state and municipal government employees are not subject to collection under wage assignment. (740 ILCS 170/9). Any employer who discharges or suspends employee on account of wage assignment is guilty of Class A misdemeanor. (740 ILCS 170/10).

For special procedures and defenses involving wage assignments see 735 ILCS 5/2-403(b). Special provisions exist regarding assignment of wages in connection with support payments. (705 ILCS 405/6-9, 750 ILCS 5/706.1).

Benefits due under Unemployment Compensation Act may not be assigned but individual may voluntarily elect to have payment of past due child support or federal and state income tax deducted and withheld from unemployment benefit payments. (820 ILCS 405/1300). Annuities and other benefits payable pursuant to State Employees' Retirement System of Illinois and State Universities Retirement System are not assignable. (40 ILCS 5/14-147). Compensation due under Viet Nam Veterans Compensation Act may not be assigned. (330 ILCS 30/4).

Interest in common trust fund under Common Trust Fund Act not assignable. (760 ILCS 45/6). Payment, claim, award, or decision under Illinois Workmen's Occupational Diseases Act or Illinois Workmen's Compensation Act not assignable. (820 ILCS 310/21, 820 ILCS 305/21).

8.02 ATTACHMENT:

Constitutionality.

Former §§735-5/4-101, 4-104, 4-105, 4-112, 4-114 and 4-119 held unconstitutional by three judge federal district court. (405 F.Supp. 757). Reversed and remanded on grounds of abstention and equitable restraint. (97 Sup.Ct. R. 1911). Judgment reinstated following remand. 471 F.Supp. 516). New §§735-5/4-104, 4-105, 4-107, 4-110, 4-114 4-132, and 4-137 added, to cure defects.

Actions in Which Allowed.

May be used in all actions whether contract or tort or based upon statutory cause of action created by law in favor of State of Illinois or any agency thereof. (735 ILCS 5/4-101). But re prejudgment attachment, see 407 U.S. 67.

Courts Which May Issue Order.

Any court having competent jurisdiction may issue order. (735 ILCS 5/4-101).

In Whose Favor Order May Issue.

Any person, including a nonresident or foreign corporation, may obtain an attachment. (735 ILCS 5/4-101).

Against Whom Order May Issue.

Order may issue against resident or nonresident. (735 ILCS 5/4-101).

Claims on Which Order May Issue.

An attachment may issue on any money claim exceeding $20, whether liquidated or unliquidated. (735 ILCS 5/4-101).

Property Subject to Attachment.

Attachment may issue against both real and personal property. For property exempt from attachment, see topic 8.06 Exemptions.

Water Craft.

Special provision is made for attachment of water craft used in state or having home port therein to enforce certain liens or claims, and also for attachment to enforce lien for freight on goods shipped by water craft. (735 ILCS 5/4-201 to 5/4-228).

Time for Issuing Attachment.

Attachment may issue either at time of instituting suit or thereafter. (735 ILCS 5/4-101). Order may issue prior to filing of complaint upon affidavit of creditor, provided that complaint is filed ten days before return day of order, in which event defendant is required to appear or answer on or before return day. If complaint is not so filed, defendant is not required to appear or to answer until 15 days after return day; and if complaint is not filed five days after return day, defendant may, at court's discretion, have suit dismissed. (735 ILCS 5/4-130).

Attachment may issue in aid of a pending case. Notice of pendency of suit and of issue and levy of order is given as in cases of original attachments, unless defendant has previously been served with process in original cause. (735 ILCS 5/4-138).

Grounds.

Attachment may issue where: (1) Debtor is nonresident; (2) debtor conceals himself or defies officer so that process cannot be served on him; (3) debtor has departed from state with intention of having his effects removed from state; (4) debtor is about to depart from state with intention of having his effects removed therefrom; (5) debtor is about to remove his property from state to injury of creditor; (6) debtor has within two years preceding filing of affidavit, fraudulently conveyed or assigned all or part of his effects, or (7) fraudulently concealed or disposed of his property so as to hinder or delay his creditors; (8) debtor is fraudulently about to conceal, assign or otherwise dispose of his property or effects so as to hinder or delay creditors; or (9) debt was fraudulently contracted by debtor, provided fraudulent statement was in writing and debtor's signature attached thereto by himself, his agent or attorney; (10) debtor convicted of first degree murder, Class X felony or aggravated kidnapping or found not guilty by reason of insanity or guilty but mentally ill of those crimes against creditor so that creditor is “victim” under Criminal Victims Asset Discovery Act or debtor is defendant in suit brought by Attorney General to cover debtor's incarceration expense. (735 ILCS 5/4-101). Provisions for attachment are to be construed in most liberal manner for detection of fraud. (735 ILCS 5/4-102).

Affidavit must be filed with court by plaintiff, stating: Amount of claim, after allowing just credits and set-offs; facts establishing at least one of above causes; place of residence of defendant or that on diligent inquiry plaintiff could not ascertain it; facts establishing cause of action. Judgment will be set aside if affiant has not complied with requirement of diligent inquiry to ascertain address of defendant. (13 Ill. App.2d 76, 141 N.E.2d 63). In addition, written statement showing whether action sounds in tort and designation of return day for summons must be filed. Where action sounds in tort, plaintiff, his agent or attorney must apply to judge and be examined under oath concerning cause of action. Such judge endorses on affidavit amount of damages for which order will issue and no greater amount may be claimed. (735 ILCS 5/4-104).

Form of affidavit may be substantially as follows (735 ILCS 5/4-105):

Form

STATE OF ILLINOIS,

. . . . County } ss.

A B, being duly sworn, says: That (here state if affiant is agent or attorney of the creditor; if suit is by an individual or corporation, the name of the individual or corporation, and if the suit is by a firm, the name of the partners) has a just demand against (name of debtor), on account of (here state facts giving rise to cause of action and amount of the claim), and the affiant believes (the name of the creditor) is entitled to recover of said (name of debtor), after allowing all just credits and set-offs . . . . dollars and . . . . cents, which is now due, and that he has good reason to believe and does believe that (name of debtor) (here state facts which give rise to one or more of the causes which authorize an attachment). (Name of debtor) resides at (here state the residence of the debtor if known, or if not, that the affiant has made diligent inquiry and cannot ascertain his place of residence).

Affiant has personal knowledge that the foregoing statements are true.

. . . .

Subscribed and sworn to before me on this . . . . . . day of . . . . . ., ..., A.D.

. . . .

My commission expires . . . . . ., ..., A.D.

(If action sounds in tort here include the endorsement of judge as to amount of damages for which writ shall issue.)

Bond must be taken by court with sufficient security, payable to People of State of Illinois, for use of person interested in property attached, in double sum sworn to be due, conditioned for satisfying all costs awarded to defendant or any others interested in proceedings, and all damages and costs recovered against plaintiff for wrongfully suing out attachment. All attachments issued without bond and affidavit taken (except where State is plaintiff) are void. (735 ILCS 5/4-107). Court may, on ex parte motion, without notice, supported by affidavit of plaintiff describing specific property to be attached and value thereof, fix bond at double value of property to be attached instead of double sum sworn to be due. (735 ILCS 5/4-108).

If no property found or a designated garnishee is not served, and where property seized is of insufficient value, orders may issue without additional bond, except where additional specific property is desired to be attached, in which case additional bond at least double value of additional property is furnished as stated above. (735 ILCS 5/4-115).

Form of Order for Attachment.

Order commands sheriff to attach property described, summon debtor to appear at hearing or prior thereto, and summon any garnishee to hearing. (735 ILCS 5/4-110).

Issuance on Sunday.

If debtor is actually absconding or concealed, or stands in defiance of officer, or has left state with intention of having his effects removed, or intends to depart with such intention, order may issue and be served on Sun. (735 ILCS 5/4-117).

Property Outside County.

Order may be levied only in county in which issued (735 ILCS 5/4-112) unless defendant, or person acting for defendant, is in act of removing personal property (735 ILCS 5/4-116). Orders may issue to other counties in state. (735 ILCS 5/4-118).

Execution of Order.

In case of joint debtors order issues against property of those brought within Act; and others are summoned to answer action. (735 ILCS 5/4-111). Order may be executed upon property described in order, or in absence of such description, upon debtor's real and personal property, or upon lands or tenements in which debtor has equitable interest or title. (735 ILCS 5/4-112).

Service of Order.

Order must be served on defendant within five days of execution; if later, defendant may have order quashed at any time absent showing of good cause for delay. (735 ILCS 5/14-114). Defendant may move for hearing on order any time after issuance. Order will be quashed unless plaintiff shows cause for issuance and probability of success on merits. (735 ILCS 5/4-137).

Indemnity.

In practice, officer executing order demands indemnity bond in double the amount alleged due where personal property is seized. (735 ILCS 5/4-107).

Sale of perishable property is provided for. (735 ILCS 5/4-125). Provision also made for sale of live stock. (735 ILCS 5/4-145).

Lien.

Attachment becomes lien on real estate after officer making levy files certificate of said fact with recorder. (735 ILCS 5/4-113).

Priorities.

Judgments in attachments against same defendant returnable on same day, and judgments in suits by summons or attachment against such defendant recovered within 30 days from day when judgment in first attachment on which judgment is recovered is rendered, share pro rata in proceeds of attached property. Court may allow priority to creditors through whose diligence property being removed was secured. (735 ILCS 5/4-142).

Proceedings in Action.

Where defendant is a nonresident, or has left state, or cannot be found, or is concealed so process cannot be served, and where property has been attached or garnishees summoned, clerk must give notice by publication, and by mailing copy of such notice to defendant, if his place of residence is stated. (735 ILCS 5/4-127). At any time after issuance of order, upon motion of defendant, court sets hearing on order or affidavit to be held not more than five days after service on plaintiff. At hearing, either party may introduce affidavits or oral testimony. Order will be quashed unless plaintiff shows by preponderance of evidence that cause for issuance exists, and demonstrates probability that he will ultimately prevail on his cause of action. If defendant is personally served or appears, judgment is of same force as in suit commenced by summons. (735 ILCS 5/4-139). Where defendant is notified by publication but not served and does not appear, judgment is in rem against property attached and special execution issues. (735 ILCS 5/4-140). Defendant may traverse facts stated in affidavit by verified answer. If, on trial, that issue is found for plaintiff, defendant may answer or move as in other cases; if found for defendant, attachment is quashed. Where personal jurisdiction of defendant has been obtained, suit proceeds to final judgment as if commenced by summons. (735 ILCS 5/4-131). Any defendant may file any counterclaim pleadable by laws of Illinois. (735 ILCS 5/4-135). Original affidavit or attachment bond may be amended by filing legally sufficient affidavit or bond; and order itself may also be amended, in such time and manner as court may direct. (735 ILCS 5/4-132).

Third Party Claims.

Person other than defendant may intervene by verified petition, without giving bond, but property is not thereby replevied. Jury is impaneled to inquire into right of property. If jury finds for claimant, he is given judgment for his costs, and if it further finds he is then entitled to possession of property, it is ordered delivered to him. If jury finds for plaintiff, he is given judgment against claimant for his costs. Nonresident claimant must file security for costs as in case of nonresident plaintiffs. (735 ILCS 5/4-134).

Release of Property.

Person from whose possession property is taken may obtain same by entering into bond to officer, approved by him, in double value of property, conditioned that property will be forthcoming to answer judgment. (735 ILCS 5/4-119). In lieu of said bond defendant desiring return of attached property may give like bond and security in sum sufficient to cover debt and damages sworn to, with interest, damages and costs, conditioned that defendant will pay plaintiff amount of judgment and costs rendered on final trial within 90 days after judgment; or recognizance in same substance may be taken in open court, entered of record, and approved by court, on forfeiture of which judgment may be rendered and execution issued. In either case attachment is dissolved, property restored, and cause proceeds as if commenced by summons. (735 ILCS 5/4-120).

Amendment of pleadings may be permitted on motion directed to pleadings or for summary judgment or upon trial, if wrong remedy sought; court to consider effect on defendant in considering amendment. (735 ILCS 5/4-133).

8.03 [RESERVED]

8.04 CREDITORS' SUITS:

Creditors' suits have been abolished. However, supplementary proceedings are available. See subhead Supplementary Proceedings under topic Executions.

8.05 EXECUTIONS:

After judgment, execution against all nonexempt real and personal property of judgment debtor (735 ILCS 5/12-112) may be issued to any county (735 ILCS 5/12-106).

Kinds of Execution.

Execution may be issued against person or property. (735 ILCS 5/12-106).

Exemptions.

See topic 8.06 Exemptions.

Special Limitation.

Special rule is applicable when judgment to be enforced is against police officer employed by municipality which allows judgment creditor in certain circumstances to enforce judgment against municipality. (735 ILCS 5/12-108[b]).

Time for Issuance.

Execution may issue at once or at any time within seven years (735 ILCS 5/12-108), not counting period of injunction, appeal, stay or delay due to defendant's death (735 ILCS 5/12-104). Execution may issue after seven years on judgment pursuant to Illinois Civil Practice Act and real estate levied on within seven years may be sold within one year after expiration of said seven years. (735 ILCS 5/12-108). Judgment in action for damages for injuries described in 735 ILCS 5/13-214.1 and child support judgments may be enforced at any time. (735 ILCS 5/12-108).

Stay of execution for cause is within inherent power of courts. There is no automatic stay in court of record when no appeal is taken. On motion for retrial, rehearing or new trial, judgment in arrest or judgment notwithstanding verdict, made before judgment is entered or within 30 days thereafter, final judgment and execution thereon are stayed until such motion can be heard. (735 ILCS 5/2-1202[d], 5/2-1203[b]). Statutes are silent as to security for issuance of execution and in practice none is required.

Lien.

See category 5 Civil Actions and Procedure, topic 5.15 Judgments, subhead Lien.

Interest.

Every execution issued upon judgment will direct collection of interest thereon as provided in 735 ILCS 5/2-1303. (735 ILCS 5/12-109).

Death of Judgment Creditor.

If judgment creditor dies, personal representative may record his letters in court which entered judgment, proceed with execution in his own name (735 ILCS 5/12-155) and if necessary to secure collection, must purchase real estate at sale thereof (735 ILCS 5/12-156).

Death of Judgment Debtor.

When judgment debtor dies, execution may be issued against real estate and sale made without reviving judgment against heirs or legal representatives; but no execution may issue or sale be made until 12 months after death, and no sale may be made except on three months' notice of existence of judgment to representative, or if there is none, to heirs. (735 ILCS 5/12-157).

Set Off of Judgments.

Judgments between same parties may be set off (735 ILCS 5/12-176, 5/12-177) except: (1) When parties are not in same capacity and trust, (2) when sum due has been assigned bona fide, (3) when there are several creditors in one execution and sum due on other is from part of them, and (4) when there are several debtors in one judgment and sum due on other is owing to part of them. Also, setoff is not allowed as to so much of judgment as is due attorney for fees and disbursements. (735 ILCS 5/12-178).

Return.

Certified copies of judgments delivered to appropriate officer for enforcement are returnable in 90 days. (735 ILCS 5/12-110).

Priorities.

See infra, subheads Levy, Sale, Redemption.

Orders granting equitable relief may be enforced by sequestration of real and personal estate, attachment against person, fine, imprisonment by causing possession of property to be delivered and may be carried into effect by execution or other final process having same operation and force as similar writ issued on judgment at law. (735 ILCS 5/2-1501). General execution may issue on attachment judgment when defendant appeared or was served. (735 ILCS 5/4-139). Special execution issues against only property attached when defendant defaults. (735 ILCS 5/4-140). Judgment or order of execution may serve as writ if specific conditions are met. (735 ILCS 5/2-1501).

Claims of Third Persons.

See infra, subhead Trial of Right of Property.

Levy.

Judgment creditor may elect on what property to levy provided personalty be last taken, except that municipalities, at their option, may levy against either personalty or real property with no restrictions as to priority. (735 ILCS 5/12-113).

Satisfaction.

See infra subheads Release of Judgment, Supplementary Proceedings and Body Execution and topic Judgments, subhead Satisfaction.

Sale.

Real estate is sold at public sale between 9 A.M. and sundown, after three weeks published and posted notice. (735 ILCS 5/12-115). Party who gives notice of public sale shall also give notice to all parties in action who have appeared and not previously been found in default for failure to plead. (735 ILCS 5/15-1507).

Redemption.

On such sale by judgment, or enforcement of lien, purchaser obtains certificate of sale (735 ILCS 5/12-119), and any defendant or his privies may redeem within six months of sale by paying sum for which premises sold with interest at 10% from date of sale unless right of redemption is waived or sale is had upon consent to waiver of deficiency judgment (735 ILCS 5/12-122). Redemption period is seven months after foreclosure sale for residential real estate and six months after all other foreclosure sales. (735 ILCS 5/15-1603[b][1], [2]). Where premises are abandoned, redemption period may be shortened. (735 ILCS 5/15-1603[b][4]). Misrepresentation or wrongful inducement of abandonment is Class B misdemeanor. (735 ILCS 5/15-1104). If any defendant or his privies fails to redeem after three months and within six months after sale, judgment creditor or his successor may redeem within remaining time by getting execution on his judgment, levying, and paying sum for which premises were sold with interest at 10%, whereupon property is sold under this execution. (735 ILCS 5/12-132). If no greater amount is bid at that sale than amount of redemption money with interest at 6% from date of redemption, such creditor is entitled to deed forthwith, and no further redemption is allowed. (735 ILCS 5/12-133). If greater amount is bid, excess is applied on execution under which redemption was made, and certificate of purchase given to new purchaser for deed in 60 days unless redemption is made within said time by other judgment creditors or by defendants. (735 ILCS 5/12-134).

Successive redemptions may be made any time within 60 days of last sale for more than redemption money, interest and costs, on like procedure. (735 ILCS 5/12-135). Creditor having senior judgment or decree has preference to redeem during first two days after commencement of period in which creditors may redeem, and others respectively have preference during like time in order of seniority. Where judgments bear equal date creditor first paying redemption money has preference. (735 ILCS 5/12-136). Defendant or privies may redeem after redemption by creditor within six months after original sale and thereby terminate right to further redemptions by creditors. (735 ILCS 5/12-137). Redemption of parcels as sold is allowed. (735 ILCS 5/12-138).

A joint owner or a judgment creditor of a joint owner may redeem his interest on payment of his proportionate amount. (735 ILCS 5/12-139). Certified copy of order allowing probated claim issued by court permits redemption of decedent's real estate by claimant as judgment creditor on probated claim. (735 ILCS 5/12-140). Upon redemption, redeeming party must reimburse sums paid by certificate holder for taxes and assessments, plus 10% interest. (735 ILCS 5/12-141). Certificates of purchase are assignable. (735 ILCS 5/12-144). When not redeemed, holder is entitled to deed from officer at any time within five years from expiration of time of redemption; and if deed is not taken, certificate is void, unless purchaser has gone into possession relying on certificate. Refusal of officer to deliver deed or pendency of injunction restraining delivery does not weigh against five year period. (735 ILCS 5/12-145). Suggested form of deed is prescribed by statute. (735 ILCS 5/12-147):

Form

Whereas, A.B. . . . . . in the . . . . . Court of . . . . . County recovered a judgment against C.D. for the sum of . . . . . and costs on . . . . . 20 . . . . . and a certified copy of the judgment, issued on . . . . . 20 . . . . ., by virtue of which . . . . . levied upon the premises hereinafter described, and the time and place of the sale thereof having been duly advertised according to law, the same were struck off and sold to . . . . , he or she being the highest and best bidder therefor. (If the certificate has been transferred, recite the fact.)

Now, therefore, I, ..., of the county of . . . . ., in consideration of the premises, hereby convey to . . . . ., his or her heirs and assigns, the following described lot or parcel of land (here describe the premises), to have and to hold the same with all the appurtenances thereto belonging, forever.

Witness my hand and seal this . . . . . 20 . . . . .

Title of purchaser or assignee of sale who was not party to proceeding resulting in such sale is not divested by action or proceeding to review judgment, unless at time of sale appeal was pending which operated as supersedeas, or petition under 735 ILCS 5/2-1401 had been filed. (735 ILCS 5/12-149).

When levy is made on real estate in any county, it is ineffective against creditors and bona fide purchasers without notice until certificate of levy is recorded. (735 ILCS 5/12-152). Levy of attachment on real estate is effective as to such creditors and purchasers after the filing of certificate of levy with recorder of county where land situated. (735 ILCS 5/4-113). In case of land registered under Land Titles Act no lien arises from levy on attachment or execution until memorial is entered on register. (765 ILCS 35/86).

Where the state, as real party in interest, holds a judgment which is a lien on land junior to a lien which is foreclosed, the state's right to redeem terminates 12 months (except under enumerated circumstances) after filing for record or registering in county where land is situated of a copy of certificate of sale endorsed by state's attorney for such county, showing service of such copy on him. (735 ILCS 5/12-401, 5/12-404).

Mortgage Foreclosures.

For special provisions applicable to mortgage foreclosure proceedings see category 20 Mortgages, topic 20.04 Mortgages of Real Property, subheads Foreclosure and Sale, Deficiency Judgment, Redemption.

Sale of Personalty.

Ten days notice of sale of personalty must be given by posting notice. (735 ILCS 5/12-166). Postponements not to exceed ten days at one time may be made, on notice at time fixed for sale, or by posting if postponed for more than a day. (735 ILCS 5/12-167). Compensation to officer for sustenance of live stock or care of personalty levied upon is collectible as part of costs. (735 ILCS 5/12-158). Levying officer may require sufficient security to indemnify him for taking property. (735 ILCS 5/12-161). Defendant may retain property levied on by giving delivery bond to officer in double amount of judgment. (735 ILCS 5/12-162). Where property has been attached or seized on other writs, proceeds of sale are applied in order in which writs became liens. (735 ILCS 5/12-169). If goods are perishable, and in danger of immediate waste or decay, officer shall demand in writing that plaintiff obtain order for sale within 24 hours after levy; failure or refusal by plaintiff absolves officer from liability for failure to sell. (735 ILCS 5/12-158).

Provision is made for levy on and sale of corporate stock by delivery of attested copy of execution and return to an officer of the company without actual seizure of the shares (735 ILCS 5/12-170 to 5/12-175), but Uniform Commercial Code provides that no attachment or levy on shares of stock for which certificate is outstanding shall be valid until such certificate is actually seized or surrendered to corporation (810 ILCS 5/9-203[b][3][C]).

Trial of right of property may be had whenever execution or attachment is levied on personalty claimed by person other than defendant, or claimed by defendant as exempt. On notice in writing to officer of such claim, officer notifies judge, who causes a court proceeding to be entered, claimant being plaintiff therein, and plaintiff in execution or attachment being defendant. Clerk issues notice to said defendant of the time and place of trial not more than ten nor less than five days from date of notice. In apt cases notice is by publication. Trial is had without written pleadings, and either party may demand a jury, which may be of six jurors. If property is found exempt or claimant found entitled to it, it is released and costs awarded; and if claimant is entitled to immediate possession, delivery to him is ordered. Otherwise, costs are awarded the plaintiff in the execution or attachment and the officer directed to sell. (735 ILCS 5/12-201 to 5/12-205).

Release of Judgment.

Judgment creditor, his assigns or legal representative having received full payment of sums due from judgment debtor on any judgment rendered must, at request of judgment debtor or his legal representative, execute and deliver to judgment debtor or his legal representative written release of judgment. (735 ILCS 5/12-183[a]). If judgment creditor, his assigns or other legal representative to whom tender has been made of money due from judgment debtor, including interest, on any judgment rendered in court, willfully fails or refuses, at request of judgment debtor or his legal representative, to execute and deliver to judgment debtor or his legal representative written release of judgment, judgment debtor may petition court in which such judgment is of record making tender therewith to court of principal sums plus interest on such judgment, for use of judgment creditor, his executors, administrators and assigns, whereupon court shall enter judgment satisfying judgment and releasing all liens based on such judgment. (735 ILCS 5/12-183[b]). After Jan. 1, 1952, no judgment shall be released of record except by instrument in writing recorded in court in which such judgment is of record; however, nothing contained in statute shall affect validity of any release of judgment made, prior to Jan. 1, 1952, in judgment and execution dockets by judgment creditor, his attorney, assignee or other legal representative. (735 ILCS 5/12-183[f]).

Supplementary Proceedings.

A judgment creditor or his successor in interest, when that interest is made to appear of record, may prosecute supplementary proceedings for the purposes of examining the judgment debtor or any other person to discover nonexempt assets or income of the debtor and compel the application of such assets or income toward the payment of the amount due under judgment. Supplementary proceeding is commenced by the service of a citation issued by the clerk. Procedure for conducting supplementary proceedings is prescribed by rules, including statutory language for citation and citation notice and it is not prerequisite to commencement of proceeding that execution be returned wholly or partly unsatisfied. (735 ILCS 5/2-1402[a]). When nonexempt assets or income of judgment debtor are discovered, court may by appropriate order or judgment: (a) Compel judgment debtor to deliver up money, property or effects in his possession or control capable of delivery and to which his title or right of possession is not substantially disputed; (b) compel judgment debtor to pay judgment creditor in installments portion of his income having due regard for reasonable requirements of judgment debtor and his family, provided that court may modify order for installment payments from time to time upon application of either party upon notice to other; (c) compel any person cited other than judgment debtor to deliver up assets so discovered to be applied in satisfaction of judgment when assets are held under circumstances that in action by judgment debtor he could recover them in specie or obtain judgment for proceeds or value thereof; (d) enter any order upon or judgment against person cited that could be entered in garnishment proceeding; (e) compel any person cited to execute assignment of any chose in action or conveyance of title to real or personal property in same manner and extent as court of chancery could do in any proceeding by judgment creditor to enforce payment of judgment or in aid of execution; (f) authorize judgment creditor to maintain action against any person or corporation that is indebted to judgment debtor for recovery of debt, forbid transfer or other disposition of debt until action can be commenced and prosecuted to judgment, direct that papers or proof in possession or control of judgment debtor and necessary in prosecution of action be delivered to judgment creditor or impounded in court and provide for disposition of any monies in excess of sum required and judgment creditor's judgment and by costs allowed by court. (735 ILCS 5/2-1402[c]).

All property ordered delivered up, except as otherwise provided, shall be delivered to sheriff to be collected or sold by him at public sale, and proceeds of such sale will be applied to satisfaction of judgment. (735 ILCS 5/2-1402[e]). Citation may prohibit party to whom it is directed from making or suffering any transfer or other disposition of, or interfering with, any nonexempt property belonging to judgment debtor or to which he may be entitled or which may thereafter be acquired by or become due to him, and from paying off or otherwise disposing of any nonexempt monies which are due or to become due judgment debtor; provided that third party shall not be obliged to withhold payment of any monies beyond double amount of balance due to be enforced by judgment creditor. Court may punish any party who violates restraining provision of citation as and for contempt, or if third party may enter judgment against him in amount of unpaid portion of judgment and costs allowable under this section or in amount of value of property transferred, whichever is lesser. (735 ILCS 5/2-1402[f][1]).

The court may enjoin any person, whether or not a party to the supplementary proceedings, from making or allowing any transfer, disposition of or interference with property of judgment debtor or property or debt concerning which any person is required to attend and be examined until further direction in premises. (735 ILCS 5/2-1402[f][2]). If any property, chose in action, credit or effect discovered, or any interest therein, is claimed by any person other than judgment debtor, court shall, as in garnishment proceedings, permit or require claimant to appear and maintain his right. Rights of person cited (other than judgment debtor) and rights of any adverse claimant shall be asserted and determined pursuant to law relating to garnishment proceedings. (735 ILCS 5/2-1402[g]). Costs in proceedings authorized by this section shall be allowed, assessed and paid in accordance with rules. (735 ILCS 5/2-1402[h]). This section is in addition to and does not affect enforcement of judgments or proceedings supplementary thereto, by any other methods now or hereafter provided by law. (735 ILCS 5/2-1402[i]). This section does not grant power to any court to order installment or other payments from, or compel sale, delivery, surrender, assignment or conveyance of any property exempt by statute from exemption, garnishment, attachment, sequestration, process or other levy or seizure. (735 ILCS 5/2-1402[j]).

See also Ill. Sup. Ct. R. 277 for rules as to conduct of supplementary proceedings. Use of supplementary proceedings to reach wages is limited by wage deduction procedure. See topic 8.09 Garnishment, subhead Garnishment of Wages.

Citation of Behalf of Decedent's Estate.

Upon filing of petition, court shall order citation for appearance of any person believed to have concealed, converted, embezzled or possessed property of estate or having information regarding same. (755 ILCS 5/16-1).

Body Execution.

No order shall be rendered for incarceration of defendant to satisfy money judgment except when judgment is obtained for tort committed by him, it appears from special finding that malice is gist of action and defendant refuses to deliver up estate for benefit of creditors. (735 ILCS 5/12-107).

8.06 EXEMPTIONS:

Following personal property is exempt from execution, writ of attachment and distress for rent: Necessary wearing apparel, bible, school books, and family pictures of debtor and debtor's dependents; debtor's equity interest, not to exceed $4,000 in value, in any other property; debtor's interest, not to exceed $2,400 in value, in any motor vehicle; debtor's equity interest, not to exceed $1,500 in value, in any implements, professional books or tools of trade of debtor; professionally prescribed health aids for debtor and debtor's dependents; benefits and net cash value of life insurance, endowment policies and annuity contracts payable to spouse or dependent of insured; debtor's right to receive social security, unemployment compensation, public assistance, veteran's benefit, disability, illness or unemployment benefits, certain pension benefits to extent reasonably necessary for support, alimony and support benefits to extent reasonably necessary for support; debtor's right to receive property traceable to award under crime victim's reparation law, wrongful death payment for person of whom debtor was dependent, payment under life insurance contract on individual of whom debtor was dependent (to extent reasonably necessary for support), or payment (not to exceed $15,000) on account of personal bodily injury of debtor or individual of whom debtor was dependent for certain limited period as listed; debtor's right to receive award relating to crime victim's awards. Exempt property purchased with intent of converting nonexempt property into exempt property is not exempt. (735 ILCS 5/12-1001). Money from sale of exempt property remains exempt. Debtor cannot convert nonexempt property to exempt property within six months of Petition for Bankruptcy. (735 ILCS 5/12-1001).

Federal exemptions provided in Bankruptcy Code, 11 U.S.C. §522(d), are not available to residents of Illinois. (735 ILCS 5/12-1201).

Statutory provisions also exempt from attachment, garnishment, judgment, levy, execution and other process, all pensions, annuities and disability benefit funds, received by employees (735 ILCS 5/12-803, 5/12-804), see also Ill. Pension Code (40 ILCS 5/2-154). Exemption also extends to payments, claims and awards under Worker's Compensation Act (820 ILCS 305/21); and to proceeds and aggregate net cash value of life and endowment policies and annuity contracts payable to wife, husband, child, parent or other person dependent upon insured except as to premiums paid in fraud of creditors (215 ILCS 5/238). See individual statutes for exceptions.

Maximum amounts subject to deduction order for any week not to exceed lesser of: (1) 15% of gross weekly wages or, (2) amount by which disposable income for week exceeds 30 times amount of current Federal Minimum Wage. (29 U.S.C. 206[a][1], 15 U.S.C. 1673). All amounts so deducted are exclusive of deductions required by law. (735 ILCS 5/12-803).

Debts for Which Exemption Not Allowed.

Claim for wages of laborer or servant, provided court finds demand sued on is for such wages and such finding is expressed in record and endorsed on execution when issued. (735 ILCS 5/12-1004). Term “laborer or servant” has been strictly construed to include only one performing manual or menial labor requiring no special knowledge or skill. (98 Ill. App. 245).

Waiver of Exemption.

Exemption rights may not be waived by contract if debtor is head of family, but may be waived by individual where his rights are purely personal. (163 Ill. 646, 45 N.E. 414).

Improper Seizure of Exempt Property.

Officer seizing exempt property is liable for double its value plus costs. (735 ILCS 5/12-1005).

Trial of right of property is provided as to property levied upon if owner claims it is exempt. (735 ILCS 5/12-201 to 12-205). Debtor cannot both recover exempt property and sue for double its value. (217 Ill. App. 234).

Necessity of Claiming Exemption.

The debtor need not make a schedule of his personal property to secure exemption of his equity interest in any other personal property not to exceed $2,000. In order to select certain household furniture for exemption or to select other personal property instead of household furniture or to select part household furniture and part other personal property, debtor must give schedule, under oath, of all his personal property, including money on hand and debts due him, to officer having judgment, or attachment or distress warrant within ten days after service of judgment, or attachment or distress warrant. Anything not in schedule will not be exempt. Three householders, appointed by court, value each article on schedule, and debtor may select articles at appraised values, but not exceeding aggregate amount of exemptions; balance being subject to judgment, or attachment or distress warrant. If no schedule is filed and value of household furniture exceeds debtor's exemption, appraisal is made in same manner and officer selects and disregards household furniture of aggregate value equal to debtor's exemption. If debtor presents sufficient schedule, return of execution unsatisfied and issuance of alias or subsequent execution will not require him to file additional schedule in order to retain exemption, unless debtor acquires additional property before 90 days from certified judgment. (735 ILCS 5/12-1002).

Rights of Debtor's Family.

When head of family dies, deserts or does not reside with the same, family is entitled to same exemptions. (735 ILCS 5/12-1003).

Attempts to Evade Exemption Law.

It is petty offense punishable by fine not less than $10 nor more than $50 to send claim to another state for collection from wages of debtor by garnishment, or other process, in order to avoid exemptions provided by laws of Illinois where all parties are within jurisdiction of Illinois courts. (735 ILCS 5/12-1101). It is petty offense to assign or transfer claim for same purpose.

(735 ILCS 5/12-1102).

Exemption of Compensation.

See topic 8.09 Garnishment.

Homestead Exemption.

See topic 8.10 Homesteads.

8.07 FORECLOSURE:

See topic 8.13 Liens; category 20 Mortgages, topic 20.04 Mortgages of Real Property.

8.08 FRAUDULENT SALES AND CONVEYANCES:

Uniform Fraudulent Transfer Act adopted. (740 ILCS 160/1 et seq.).

Every gift, grant, conveyance, assignment or transfer of, or charge upon any estate, real or personal, or right or thing in action, or any rent or profit thereof, made with intent to disturb, delay, hinder or defraud creditors or other persons, and every bond or other evidence of debt given, suit commenced, decree or judgment suffered, with like intent, is void as against such creditors, purchasers or other persons. (740 ILCS 160/1 et seq.).

Conveyance of goods and chattels on consideration not deemed valuable at law is fraudulent, unless it is by will proved and recorded or by written deed acknowledged or proved, and recorded, or unless actual bona fide possession remains with donee. (740 ILCS 160/1 et seq.).

Delivery of goods on pretended loan or reservation of interest, followed by five years' possession, is fraudulent as to creditors of and purchasers from the person in possession, unless the loan, etc., is declared by will or deed in writing, proved and recorded. (810 ILCS 5/2-403, 5/9-408).

Uniform Fraudulent Conveyance Act.

Not adopted.

Attachment.

Creditor may have an attachment against property of debtor where debtor is about to fraudulently convey or has conveyed his effects so as to hinder or delay his creditors. (735 ILCS 5/4-116). Illinois Attachment Act held violative of due process. (405 F. Supp. 757, rev'd on other grounds).

Penalty.

Criminal penalties are provided for debtor when under terms of security agreement: (i) without right of sale of collateral, or (ii) with right of sale of collateral but under duty to account to secured party for proceeds of sale thereof, debtor sells collateral and willfully and wrongfully fails to pay secured party amount due under security agreement. (810 ILCS 5/9-315.01). Criminal penalties are provided for when, under terms of security agreement, debtor is required to disclose to secured party persons to whom he desires to sell or otherwise dispose of collateral, and debtor fails to do so. (810 ILCS 5/9-315.01).

Consumer Fraud.

See category 3 Business Regulation and Commerce, topics 3.12 Consumer Protection, 3.23 Sales.

Bulk Sales.

Article 6 of Uniform Commercial Code repealed and replaced by Uniform Fraudulent Transfer Act (UFTA) effective for transfer on or after Jan. 1, 1990.

Director of Illinois Department of Employment Security must be informed at least seven days before sale by any person of substantially all of: (a) Business, or (b) stock or goods, or (c) furniture or fixtures, or (d) machinery and equipment, or (e) good will of any employing unit. Failure to do so makes such person personally responsible for all loss of Illinois Unemployment Compensation Act contributions, etc., thereby suffered. Any employing unit which, outside of usual course of its business, makes any of above sales and ceases to do business must, within ten days thereafter, pay all contributions, etc., due under Illinois Unemployment Compensation Act. Purchaser must withhold sufficient of purchase money to pay all such contributions, etc., in event seller fails to pay. Failure to withhold sufficient of purchase money makes purchaser personally liable to Director for payment of such contributions, etc., up to amount of reasonable value of property acquired by such purchaser. (820 ILCS 405/2600). Any person who acquires any property subject to valid lien in favor of Director of Illinois Department of Employment Security is personally liable to Director for sum equal to amount of contributions secured by such lien but not to exceed reasonable value of such property. (820 ILCS 405/2600). In event taxpayer, outside usual course of business, sells or transfers major part of any one or more of: (i) Stock of goods which he is engaged in business of selling, (ii) furniture or fixtures, or (iii) machinery and equipment or (iv) real property, of any business subject to Retailer's Occupation Tax Act (35 ILCS 120/1 et seq.), seller or buyer must within ten days after such sale or transfer, submit report to Illinois Director of Revenue setting forth names and addresses of each of seller and buyer, description of assets conveyed and purchase price thereof. Buyer or transferee is personally liable to Director for amounts owing by seller to Director under Act at date of sale up to reasonable value of assets conveyed by seller. Buyer is to withhold from purchase price amount of all unpaid taxes, etc. owing by seller under Act at date of sale and may request at least 10 days prior to sale that Director audit books and records of seller to determine amount owing by seller to Director. (35 ILCS 120/5j).

8.09 GARNISHMENT:

Prefatory Note.

In 1961, laws relating to garnishment in Illinois were altered to provide two separate sets of garnishment proceedings, one relating to garnishment of wages, the other relating to all other garnishments. (735 ILCS 5/12-701 to 12-819). Illinois garnishment statute, 735 ILCS 5/12-701, unconstitutional when invoked to satisfy judgment by confession. (343 F.Supp. 1272).

Garnishment of Property Other Than Wages.

Commencement.

Clerk of court in which judgment was entered will issue summons upon filing by judgment creditor, its attorney or other designee of (1) affidavit that affiant believes any person is indebted to judgment debtor, other than for wages, or has possession of property of debtor, or property in which debtor has an interest, and (2) written interrogatories to be answered by garnishee respecting said indebtedness or other property. (735 ILCS 5/12-701).

Practice.

Summons is issued by clerk following filing of affidavit and written interrogatories, as set forth above, returnable not less than 21 days nor more than 30 days after date of issuance. Where summons is served less than 10 days prior to return date, case is continued to new return date 14 days later. In counties of less than 1,000,000 population, service by certified or registered mail, return receipt requested, is permitted instead of personal service. In such instance, Clerk mails by first class copy of garnishment notice and summons to judgment debtor no sooner than two business days nor later than four business days after date of mailing. (735 ILCS 5/12-705).

Judgment creditor or judgment debtor may contest answer, and trial is conducted as in other civil cases. Answer considered denied without further pleading. If findings are against garnishee, judgment is entered against garnishee and in favor of judgment debtor for use of judgment creditor. (735 ILCS 5/12-711). If garnishee fails to answer, then conditional judgment is entered against garnishee for amount due upon judgment against debtor, and a summons to confirm conditional judgment then issues against garnishee returnable in same manner as original garnishment summons. If garnishee fails to answer summons to confirm conditional judgment, a final judgment is then entered. (735 ILCS 5/12-706). Judgment against garnishee is enforceable as in other civil cases and acquits garnishee of all claims by judgment debtor for the indebtedness or other property paid, delivered or accounted for by virtue of judgment. (735 ILCS 5/12-712, 735 ILCS 5/2-1402). As to procedural matters not specifically provided for in 735 ILCS 5/12-701 to 12-819; Code of Civil Procedure, 735 ILCS 5/1-108, controls. (735 ILCS 5/12-711[b], 735 ILCS 5/12-811[c]; 52 Ill. App.2d 394, 202 N.E.2d 73).

Property Subject to Garnishment.

Any nonexempt indebtedness or nonexempt property of judgment debtor, or in which debtor has an interest, which garnishee has in his possession, custody, or control, other than wages, is subject to garnishment. Answer to written interrogatories filed by garnishee speaks in all cases as of date of service of garnishment summons. Answer must list any indebtedness due or to become due to judgment debtor, as well as any other property in garnishee's possession, custody, or control (a) belonging to debtor or (b) in which debtor has an interest. Judgment or balance due becomes lien on indebtedness and other property held by garnishee at time of service and remains lien pending garnishment suit. (735 ILCS 5/12-707).

Adverse Claims.

Adverse claimant to property in garnishee's hands may become party to garnishment proceeding by appearing and filing his claim within time allowed by court and by serving copy of claim on judgment creditor, judgment debtor and garnishee. This claim is tried with other issues in garnishment proceeding. Claimant not voluntarily appearing must be served with notice as court directs. If claimant fails to appear after notice, he is concluded by judgment entered in garnishment proceeding. (735 ILCS 5/12-710). Garnishee has duty to notify court of any conflicting claim to property. Notice to claimant mandatory. (3 Ill. App.3d 299, 278 N.E.2d 526).

Negotiable Paper.

No one is liable as garnishee on negotiable paper in hands of judgment debtor at time of service of garnishment summons or of rendition of judgment when instrument not yet due. (735 ILCS 5/12-709). However, installment interest due on negotiable instrument is subject to garnishment. (48 Ill. App.3d 915, 363 N.E.2d 619).

Assignment of Claims Against Garnishee.

Notice to garnishee, given before filing of his answer but after commencement of garnishment proceeding, of assignment of claim of his creditor, made prior to garnishment proceedings, is sufficient to protect rights of assignee; and assignee is entitled to prosecute garnishment proceedings. (161 Ill. 85, 43 N.E. 727). Assignment by judgment debtor prior to commencement of garnishment proceedings, absent fraud, precludes garnishor from prevailing against garnishee. (19 Ill. App.3d 27, 311 N.E.2d 250).

Set-off by Garnishee.

Garnishee is entitled to set-off against judgment creditor and judgment debtor. (735 ILCS

5/12-708).

Sale of Pledged Property.

Garnishee's power to sell pledged property is not disturbed by service of summons, if sale would be authorized as between garnishee and judgment debtor. (735 ILCS 5/12-714[c]).

Release of Property.

Creditor may pay debt or perform condition for which pledge was made and have property released by court order. (735 ILCS 5/12-714[b]).

Executors and administrators may be garnisheed, but no judgment may be had against them until after order of distribution. (735 ILCS 5/12-703). No assignment or transfer by heir or distributee defeats garnishment, unless it be in writing and filed with clerk of court issuing letters before service of garnishment. (735 ILCS 5/12-719).

Attachment Suits.

Persons named as garnishees in attachment writs and all other persons whom creditor designates as having property belonging to defendant or as being indebted to defendant, although not named in such attachment writ, may be summoned as garnishees and thereafter must hold said property or indebtedness subject to the order of court. Said property is treated as attached pending disposition of plaintiff's claim. (735 ILCS 5/4-126).

Attachment proceedings (including garnishment in attachment, or before judgment) are regulated by 735 ILCS 5/4-101 to 5/4-145. Straight garnishment proceedings after judgment are regulated by 735 ILCS 5/12-701 to 5/12-819.

Costs and Fees.

Costs of obtaining garnishment order to be charged to judgment debtor unless court determines costs incurred by judgment creditor were improperly incurred, in which case costs to be paid by judgment creditor. (735 ILCS 5/12-716[a]). No appearance fee for garnishee. (735 ILCS 5/12-716[b]). No fee due garnishee unless called as witness. (735 ILCS 5/12-716[c]).

Garnishment of Wages.

Prefatory Note.

In Chicago and environs clerk of court no longer accepts any type of garnishment summons based on confessed judgments unless judgment has been confirmed after service of process. Provisions of 735 ILCS 5/12-801 do not apply to orders for withholding of income entered under Illinois Public Aid Code or under several domestic relations Acts. (735 ILCS 5/12-819).

Commencement.

Upon filing by judgment creditor, its attorney or other designee, defined as recipient of any judgment except judgment by confession which has not been confirmed, of (a) affidavit that affiant believes any person is indebted to judgment debtor for wages due or to become due and last known address of judgment debtor known to affiant, and (b) written interrogatories to person named with respect to indebtedness, clerk of court in which its judgment was entered will issue summons against employer named. Summons commands federal agency employers to pay over deducted wages in accordance with 735 ILCS 5/12-808(b). Summons must be accompanied by copy of judgment relied on or statement of amount of judgment, name of court issuing it, and case number, and copy of Title III of Federal Consumer Credit Protection Act, certified to by judgment creditor's attorney or clerk of court issuing judgment. (735 ILCS 5/12-805).

Practice.

Summons returnable not less than 21 nor more than 40 days after issuance. If employer is served less than three days prior to return date, case is continued to new date not less than 21 days after service. Requirements for service and return are same as in other civil cases. (735 ILCS 5/12-806). In counties of less than 1,000,000 population, at request of judgment creditor or attorney Clerk mails to employer copy of judgment, summons, interrogatories and wage deduction notice by certified or registered mail, return receipt requested at address shown in affidavit instead of personal service. Return receipt must be attached to original summons and, if delivery at least three days before return date, constitutes proof of service. (735 ILCS 5/12-805[b]).

Upon service of summons amount due on underlying judgment becomes lien on wages due at time of service plus all subsequent earnings until balance of underlying judgment and costs is paid. Lien on subsequent earnings terminates sooner if underlying judgment vacated or modified or employment ends. Lien for support of spouse or dependent children has priority. Subsequent summonses are effective in order in which they are served. (735 ILCS 5/12-808).

When summons served, employer must pay employee all exempt wages due and hold all nonexempt wages to extent of balance due on underlying judgment. (735 ILCS 5/12-808).

On or before return date, employer files sworn answer to interrogatories. (735 ILCS 5/12-808). Illinois Supreme Court may by rule allow employer to file answers to interrogatories by facsimile. (735 ILCS 5/12-808[d]).

Judgment creditor may contest answer without further pleading, and case will proceed to trial, conducted as in other civil cases. If finding is against employer, “deduction order” is rendered against employer, in favor of judgment debtor. (735 ILCS 5/12-811). “Deduction order” has same force and effect as judgment. (735 ILCS 5/12-802). Deduction orders are enforceable in same manner as judgment in other civil cases and acquit employer of all claims by judgment debtor for indebtedness paid or accounted for under deduction order. (735 ILCS 5/12-812, 5/2-1402).

If employer fails to appear and answer, conditional judgment may be entered against employer for amount due on underlying judgment against judgment debtor. Summons to confirm conditional judgment then issues against employer returnable not less than ten nor more than 20 days after issuance. If employer fails to answer summons to confirm, final judgment is entered for balance of underlying judgment and costs. If summons to confirm cannot be served on employer by reason of his leaving state or concealing himself within state, he may be notified in same manner as nonresident defendants in attachments. Plaintiff may then proceed as though summons to confirm had been personally served. If employer appears and answers summons to confirm, same proceedings are had as in other cases. (735 ILCS 5/12-807).

Plaintiff who wrongfully causes issuance of summons is liable to employer and employee for damages, including attorneys' fees. (735 ILCS 5/12-817).

Maximum Amounts Collectible.

Maximum wages, salary, commissions and bonuses subject to collection under deduction order for any work week must not exceed lesser of: (1) 15% of gross amount paid for that week, or, (2) amount of disposable earnings in excess of 45 times Federal minimum hourly wage. (29 U.S.C. 206[a][1]). “Disposable earnings” means earnings remaining after deduction of amounts required by law to be withheld. Applies regardless of place where wages earned or state where employee resides. No payroll deductions of any kind required by law may be taken from amount collected by creditor. (735 ILCS 5/12-803). Benefits and refunds payable by pension or retirement funds or systems and any assets of employees held by such funds or systems, and any moneys employee is required to pay or contribute to such funds or systems, are exempt and not subject to garnishment. (735 ILCS 5/12-704, 735 ILCS 5/12-804).

Penalty for Employer.

Any employer discharging or suspending employee because earnings are subject to deduction order for any one indebtedness may be fined not to exceed $1,000 or imprisoned for less than a year or both (Class A misdemeanor). (735 ILCS 5/12-818).

Judgments by Confession.

Judgment by confession without process will not support deduction order unless judgment is confirmed, by trial de novo after service of process. (735 ILCS 5/12-813; 6 Ill. App.3d 956, 286 N.E.2d 83). If employee is not found, alias summons to confirm judgment by confession may be served by leaving copy with employee's employer, or at employer's place of business with employer's superintendent, manager, cashier, general agent or clerk, upon filing by creditor of affidavit that employee-debtor is in fact employed by named employer at time alias is sought. If notice of defense to wage assignment has been filed under 48-39.4a summons to confirm judgment by confession may be served by registered or certified mail to address shown on notice of defense within six months after filing such defense. (735 ILCS 5/12-813).

Adverse Claims.

Same rules apply as in garnishment of property other than wages, except notice to claimant not appearing served in person or by certified or registered mail. (735 ILCS 5/12-810).

Set-Off by Garnishee.

Same rules apply as in ordinary garnishment. (735 ILCS 5/12-809).

Costs and Fees.

Court orders costs of obtaining deduction order paid by judgment debtor unless costs incurred by judgment creditor improper, in which case those costs paid by judgment creditor. No appearance fee for employer. Employer entitled to fee greater of $12 or 2% of amount deducted off judgment debt but no other fee unless called as witness. (735 ILCS 5/12-814).

Supplementary Proceedings.

See 735 ILCS 5/12-1402.

8.10 HOMESTEADS:

Every individual has estate of homestead to extent in value of $15,000 value in land and buildings thereon, in condominium or in personal property, owned or possessed by lease or otherwise and occupied as residence, or in cooperative that owns property that individual uses as residence, which estate is exempt from attachment, judgment, levy or sale for payment of debts or other purposes, and from laws of conveyance, descent and devise, except as otherwise provided or as provided in §20-6 of Probate Act. This provision is not applicable between joint tenants or tenants in common, but applies as to creditors of those persons. (735 ILCS 5/12-901).

Limitation of value of homestead which is exempt is $15,000. If two or more persons own property exempt as homestead, value of exemption for each person may not exceed proportionate share of $30,000 based upon percentage of ownership. (735 ILCS 5/12-901).

If creditors believe homestead premises are worth more than $15,000, officer holding execution must summon three individuals, as commissioners, to appraise property, and if in their opinion property may be divided without injury they must set off to debtor so much of said premises, including dwelling house, as is worth $15,000 and residue may be sold. (735 ILCS 5/12-910). When premises cannot be divided, and in opinion of commissioners value is more than $15,000, unless execution debtor pays to officer excess value within 60 days, premises may be sold and out of proceeds $15,000 must be paid to debtor and balance applied on execution. (735 ILCS 5/12-911, 735 ILCS 5/12-912). If court of equity orders sale to enforce lien, bid must exceed $15,000. (735 ILCS 5/12-908, 735 ILCS 5/12-909).

Proceeds of sale of homestead property to extent of $15,000 exempt from execution for one year and may be reinvested in new homestead. (735 ILCS 5/12-906). Same is true of proceeds of insurance on homestead property. (735 ILCS 5/12-907).

Limitation of Area.

There is no statutory provision limiting extent of area of homestead.

Debts or Liabilities Against Which Exemption Not Available.

Homestead is not exempt as against taxes or assessments or debts or liabilities incurred for purchase or improvement thereof or from lien pursuant to paragraph (g)(1) of §9 of Condominium Property Act (765 ILCS 605/9); nor is it exempt from judgment for possession pursuant to paragraph (a)(7) or (a)(8) of 735 ILCS 5/9-102. (735 ILCS 5/12-903).

Designation of Homestead.

There is no statutory provision for filing or recording homestead claim.

Waiver of Exemptions.

Release or waiver of right of homestead by husband or wife does not bind other spouse unless other spouse joins in release or waiver. No deed or other instrument waives right of homestead unless it contains clause expressly releasing or waiving such right. (765 ILCS 5/27). It must be acknowledged. (413 Ill. 204, 108 N.E.2d 438).

Conveyance of homestead must be in writing signed by individual and his or her spouse. (735 ILCS 5/12-904).

Rights of Surviving Spouse and Family.

Exemption continues after death of individual for benefit of surviving husband or wife so long as he or she occupies homestead, and for benefit of children until youngest child becomes 18 years of age; and in case husband or wife deserts family, exemption continues in favor of the one occupying premises as resident. (735 ILCS 5/12-902). If exception is continued to minor, court order is necessary to release homestead. (735 ILCS 5/12-904). Guardian of minor or conservator of incompetent may assent in writing pursuant to court order to sale free of his ward's homestead interest. (755 ILCS 5/20-22).

In case of divorce, court may dispose of homestead estate according to equities. (735 ILCS 5/12-905).

In case of partition, see category 5 Civil Actions and Procedure, topic 5.16A Partition.

8.11 JUDGMENT NOTES:

See categories 3 Business Regulation and Commerce, topic Bills and Notes; Civil Actions and Procedure, topic Judgments, subhead Judgment by Confession.

8.12 LEVY:

See topics 8.02 Attachment, 8.05 Executions.

8.13 LIENS:

Uniform Commercial Code is in force. (c. 810). See category 3 Business Regulation and Commerce, topic 3.09 Commercial Code.

Statutes provide liens in favor of: State on real property of welfare recipients (305 ILCS 5/3-10); credit union on shares of member for debts owing by member to credit union; horse shoers on animals shod (770 ILCS 30/1); landlord for growing crops (770 ILCS 60/1); contractors, subcontractors, laborers and material men on oil and gas wells and pipelines (770 ILCS 70/2, 70/3 and 70/4); miners for value of their labor (770 ILCS 65/1); hotel, boarding house and inn keepers on baggage and other valuables of guests or boarders on the premises (770 ILCS 40/48) (section held unconstitutional, 338 F.Supp. 390); stable keepers and others on horses, carriages and harnesses kept by them (770 ILCS 40/49); agisters and persons keeping, yarding, feeding or pasturing domestic animals (770 ILCS 40/50); contractors, subcontractors, laborers and material men on railroad property (770 ILCS 55/2); owner or lessee of threshing machine, clover huller, corn sheller or hay baler for work done for others (770 ILCS 40/50a); laborers or servants for wages (770 ILCS 60/21 and 60/22); agent on property for which he has paid assessments on behalf of his principal (35 ILCS 200/21-70); township supplying water and sewerage services on real estate for which it is supplied (60 ILCS 1/205-75; 60 ILCS 1/205-140); sanitary districts for delinquent user charges on real property to which service supplied (70 ILCS 2605/7); commercial real estate brokers on commercial real estate (770 ILCS 15/10); plastic or metal processors on tools, dies, molds, jigs, fixtures, forms or patterns (770 ILCS 105/1[A]); tool maker on all special tools produced and on all proceeds from assignment, sale, transfer, exchange or other disposition (770 ILCS 105/1[B]).

Court may order lien on nonmarital property for contributions made by spouse. (750 ILCS 5/503[c][2]).

Provision is made for recording of notices of lien by United States for internal revenue taxes. (770 ILCS 110/1).

There is a statutory lien on water craft navigated in state, used between ports within state, or having its home port here, for debts contracted and liabilities incurred in use of such craft (735 ILCS 5/4-201); also lien on goods shipped by water for freight, advanced charges and demurrage (735 ILCS 5/4-202).

Waiver, Loss and Extinguishment.

See individual subheads.

Chattel liens exist in favor of persons expending labor, skill or materials on any chattel or furnishing storage therefor at request of owner, his agent, reputed owner, or lawful possessor thereof. Lien attaches as of date of commencement of expenditure of labor, skill and/or materials, or of storage; it continues for one year after completion of expenditure of labor, skill or materials or of such storage notwithstanding surrender of possession of chattel (770 ILCS 45/1); it ceases 60 days from date of surrender unless lien claimant within said 60 days files with recorder of local county notice of claim for lien (770 ILCS 45/2). It is subject to lien of bona fide security interest as defined by Uniform Commercial Code (810 ILCS 5/9 et seq.) recorded prior to time chattel lien attaches; it is subject to prior liens and is not exclusive of liens afforded by common law (770 ILCS 45/4); it may be enforced through foreclosure in equity or through advertisement and sale by sheriff (770 ILCS 45/6).

Inexpensive means of enforcing liens for $2,000 or less is provided by permitting public sale after 30 days notice unless chattel is redeemed within 90 days after completion of work or date agreed upon for redemption. (770 ILCS 50/1 to 50/6).

Mechanics' Liens.

Any person who by any contract, express or implied, with owner of land, or with one whom owner has authorized or knowingly permitted to contract to improve same or tract of land or to manage structure under construction, furnishes material, labor, services, fixtures, apparatus, or machinery, forms or form work used in process of construction where cement, concrete or like material is used, for purpose of, or in building, altering, repairing or ornamenting any house or other building, walk, driveway, fence or improvement or appurtenance thereto on such lot, or connected therewith and upon, over or under sidewalk, street or alley adjoining, or fills, sods or excavates such lot, or does landscape work, or raises or lowers any house thereon, or removes any house thereto, or removes any house or other structure therefrom, or drills any water well thereon, or performs services as architect, superintendent, structural engineer, professional engineer, surveyor, property manager, timekeeper, mechanic, laborer or otherwise, is contractor, and has lien on such premises for amount due to him for such material, fixtures, apparatus, machinery, services or labor and interest at rate of 10% per annum from date same is due. (770 ILCS 60/1[a]).

Lien extends to estates in fee, for life, for years, or any other interest which owner may have in premises at time of contract or may subsequently acquire. (770 ILCS 60/1[a]). Labor and materials furnished with consent of particular condominium unit owner is lien only against that unit. (765 ILCS 605/9.1[a]). Taking of security does not waive lien in absence of agreement or if prohibited by this Act. (770 ILCS 60/1[c]). Agreement to waive lien in anticipation of and in consideration for awarding contract unenforceable. (770 ILCS 60/1[d]). As against owner, contractor must file proper lien claim and bring suit not more than two years after completion of work. As against third person, contractor must file lien claim or bring suit within four months after last work. (770 ILCS 60/7). In all cases, suit to enforce lien must be commenced within two years after completion of work. (770 ILCS 60/9). Lien claim, verified by affidavit, consists of brief statement of contract, balance due after allowing all credits, and sufficient description of land so that it can be identified. Lien claim is filed with recorder of deeds of county where work was performed. (770 ILCS 60/7).

Subcontractor has lien on the real estate co-extensive with contractor's and, in addition, on material, fixtures, apparatus or machinery furnished and on moneys or other considerations due or to become due from owner under original contract. Agreement to waive any right to enforce or claim lien, where agreement is in anticipation of and in consideration for awarding of contract or subcontract, is against public policy and unenforceable. (770 ILCS 60/1[d]). Provision in contract, agreement or understanding conditioning payment to subcontractor or supplier by contractor on receipt by contractor of payment from any other party, whether private or public owner, is not defense to claim under §21, 22, 23, or 28. (770 ILCS 60/21[e]). Where subcontractor furnishes materials or labor with respect to existing owner-occupied single family residency, to preserve lien he must give occupant personal or certified notice in statutory form within 60 days from first furnishing labor or materials (770 ILCS 60/5, 60/21); provided that notice given after 14 day period is effective to extent owner not prejudiced by payments made prior to receipt of such notice. Any contractor who, with intent to defraud, induces subcontractor to waive his lien for the purpose of enabling contractor to obtain final payment and upon representation that contractor will pay subcontractor from final payment, and who then wilfully fails to pay subcontractor within 30 days of final payment, is guilty of class A misdemeanor. (770 ILCS 60/21.01).

Subcontractor must within 90 days of completion of his contract cause written notice of his claim to be personally served, or sent registered mail return receipt requested, on owner or his agent, architect or superintendent, unless contractor's statement to owner sets forth subcontractor's name and amount due him. If land in question is registered pursuant to 765 ILCS

35/1, then notice must be filed with register of titles in county wherein land is situated. (770 ILCS 60/24).

Contractor must give to owner, and owner must require of contractor, before any consideration is paid on behalf of owner to contractor, statement in writing under oath or verified by affidavit of names and addresses of all parties furnishing materials and labor, and of amounts due or to become due each. (770 ILCS 60/5). Each subcontractor, as often as requested by owner or contractor in writing, must furnish to such owner or contractor statement under oath listing names of all persons furnishing material and labor and amounts due or to become due each. Penalty for failure to furnish within five days of demand such statement is forfeiture of $50 for each offense to such owner or contractor, subordination of lien to all other creditors, and such contractor has no right of action against either owner or contractor until statement is furnished. (770 ILCS 60/22).

Payment by owner to contractor is not rightful as against subcontractor, laborer, or party furnishing labor or materials, if owner has not exercised and enforced rights and powers conferred upon owner by §§5, 21 and 22 of this Act. (770 ILCS 60/32). Subcontractor must file his petition or suit to enforce lien within same period as given to contractor or may sue owner and contractor jointly. (770 ILCS 60/28).

Liens are assignable. Pleading and practice are the same as in other civil actions. All persons having any interest in the premises must be made parties. (770 ILCS 60/8, 60/11). Necessary averments provided in statute. (770 ILCS 60/11 et seq.).

Public Works.

Contractor and subcontractor have lien for value of material, apparatus, fixtures, machinery or labor furnished on money due contractor on public improvement with state or political subdivision provided notice is given to government unit by registered or certified mail, return receipt requested and delivery limited to addressee only, or by delivery to public officials responsible for paying contractor. Notice must be given clerk or secretary of public entity and contractor prior to payment. Subcontractor must notify state or political subdivision of lien within 30 days after written demand by contractor to do so or forfeit lien. (770 ILCS 60/23). Accounting suit against contractor must be commenced within 90 days after filing such notice and certified copy of complaint must be delivered to political subdivision or lien is forfeited. In addition, contractor must furnish bond, irrevocable letter of credit, surety bond, or letter of commitment issued by bank, savings and loan association, surety or insurance company to state or political subdivision thereof, conditioned on payment for all materials and labor but county or municipality may not require cash bond to guarantee completion of project improvement when builder or developer has filed current irrevocable line of credit in amount equal to greater than 110% of amount bid. (30 ILCS 550/3; 30 ILCS 550/1). Upon notice of lien, public unit must withhold sufficient sums to satisfy claim and upon notice of suit, these funds are withheld until final adjudication, unless court orders substitution of contractor's surety bond as adequate security. (770 ILCS 60/23). To sue on said bond subcontractor, materialman or laborer must file verified notice of claim setting forth certain requisite facts with officer or body awarding such contract within 180 days after date of furnishing last item of material or labor and must furnish copy of such verified notice to contractor within ten days of filing notice with public body or officer. Such action cannot be brought until 120 days after date of furnishing of last item of material or labor, except that when final settlement is made between contractor and officer or body awarding such contract action may be brought immediately after final settlement. No action may be brought after six months from date when state or political subdivision thereof accepted building, project or work. Such action must be brought in circuit court of district in which contract was performed. Remedy is in addition to and independent of other rights at law or in equity. Waiver of rights under Mechanics Lien Act does not constitute waiver under §2 unless specified in waiver. (30 ILCS 550/2).

Liens Upon Public Nuisances.

Any building used in commission of an offense defined as a public nuisance in 720 ILCS 5/37-1 (including, inter alia, murder, kidnapping, prostitution, theft, abortion, gambling, and violations of Uniform Narcotics Drug Act) with intentional, knowing, reckless or negligent permission of owner thereof, or agent of owner managing building, is, together with underlying real estate and all fixtures, subject to lien and may be sold to pay any fine imposed for maintaining nuisance or to pay to any person any unsatisfied judgment for damages sustained as consequence of nuisance. Action to enforce lien may be commenced by State's Attorney or by person suffering damages or both, except that person seeking to recover damages must pursue his remedy within six months after damages are sustained. This lien does not affect rights of any subsequent purchaser, mortgagee, judgment creditor or other lien holder unless filed in office of recorder where real estate is located. Notice must include description of real estate, nature and extent of lien, and facts upon which it is based. (720 ILCS 5/37-2).

Commercial Vehicle Relocation Lien.

Relocation of trespassing vehicles may establish lien on vehicles for reasonable charges for removal and storage. (770 ILCS 50/1, 625 ILCS 5/4-203, 625 ILCS 5/18a-501).

Redemption of sales made in enforcement of mechanics' lien may be made in same manner as provided for redemptions of real estate from sales under judgments and executions at law. (770 ILCS 60/20).

Attachment Lien.

See topic 8.02 Attachment.

Attorney's Lien.

See category 18 Legal Profession, topic 18.01 Attorneys and Counselors.

Chattel Mortgage Lien.

See Uniform Commercial Code, Article 9.

Collateral Security.

See Uniform Commercial Code, Article 9.

Condominium Owners Lien.

See category 21 Property, topic 21.16 Real Property, subhead Condominium Property Act.

Execution Lien.

See topic 8.05 Executions.

Factor's Lien.

See category 3 Business Regulation and Commerce, topics 3.14 Factors and 3.09 Commercial Code, Article 9.

Judgment Lien.

See category 5 Civil Actions and Procedure, topic 5.15 Judgments.

Landlord's Lien.

See category 21 Property, topic 21.10 Landlord and Tenant.

Miner's Lien.

See category 19 Mineral, Water and Fishing Rights, topic 19.01 Mines and Minerals.

Liens on Homestead.

See topic 8.10 Homesteads.

Real Estate Mortgage Lien.

See category 20 Mortgages, topic 20.04 Mortgages of Real Property.

Tax Lien.

See category 22 Taxation, topics 22.06 Estate Tax, subhead Lien of Tax, 22.15 Property Taxes, subheads Real Property Taxes, Liability, Lien, and Personal Property Taxes, Liability, Lien.

8.14 MECHANICS' LIENS:

See topic 8.13 Liens.

8.15 PLEDGES:

Pledgee of corporate stock not liable as stockholder. (805 ILCS 5/6.40).

Uniform Trust Receipts Act has been replaced by Article 9 of the Uniform Commercial Code. (810 ILCS 5/9-101 et seq.). 1972 Official Text became effective July 1, 1973. See category 3 Business Regulation and Commerce, topic 3.09 Commercial Code.

See also category 2 Business Organizations, topic 2.03 Corporations, subhead Disposition of Assets.

8.16 RECEIVERS:

Specific provisions are made for receivers in foreclosing mechanics' liens (770 ILCS 60/12), winding up community currency exchanges, banks, savings and loan associations (205 ILCS 105/10–1), corporations (805 ILCS 5/12.60), not-for-profit corporations (805 ILCS 105/112.60), development credit corporations (805 ILCS 35/28), insurance companies, cemetery authorities (760 ILCS 100/15a), credit unions (205 ILCS 305/62; 205 ILCS 657/92), publicly run airports in counties under 500,000 population. Court may appoint receiver to take possession and to dispose of property of debtor in hands of garnishee (735 ILCS 5/12-718), to cause building or structure to conform to municipal regulations (65 ILCS 5/11-31-2), to take possession of and operate housing project where housing authority is in default (310 ILCS 10/23), and to prevent use of advertising fraudulent as to consumers (815 ILCS 505/7, 505/8), to administer and property and deal with landlords who do not pay utility bills for tenants (765 ILCS 735/2), administration of certain municipal toll bridges where bond default occurs (605 ILCS 5/10-711) and in other instances of bond defaults such as, pollution control facility related bonds (20 ILCS 3515/10), defaults on bonds for roads and bridges over rivers forming state boundaries (605 ILCS 10/807) and river conservancy districts (70 ILCS 2105/15.4). Interlocutory appeal from order appointing or refusing to appoint receiver may be perfected to Appellate Court by filing notice of appeal in trial court and record in Appellate Court within 30 days of order unless time for filing record is extended by Appellate Court. (Ill. Sup. Ct. R. 307[a]).

Court may appoint trust company as receiver. (205 ILCS 620/3-1 to 620/3-3; 205 ILCS 620/6-4). Sale of securities by receiver is exempt transaction under Securities Act of 1953. (815

ILCS 5/4[E]).

Mortgage Foreclosures.

In lieu of appointing receiver (735 ILCS 5/15-1704), court may place mortgagee in possession of premises (735 ILCS 5/15-1701 to 5/15-1702). In foreclosure mortgagee may use form complaint (suggested form set forth in statute) to apply for receiver. (735 ILCS 5/15-1504).

Bonds.

Party applying for receiver must give bond covering all damages and attorney's fees resulting from appointment and acts of receiver, unless court for good cause, on notice and hearing, is of opinion that a receiver ought to be appointed without bond. (735 ILCS 5/2-415[a]). Court may, in lieu of appointing receiver, permit party to retain possession upon court-approved bond. (735 ILCS 5/2-415[b]).

Actions Against Receivers.

Receiver of any property, appointed by any Illinois court, may be sued in respect of any act or transaction of his in carrying on business connected with such property, without previous leave of the court appointing him; but such suit is subject to general equity jurisdiction of appointing court so far as necessary to ends of justice. (735 ILCS 5/2-415[c]). Service on receiver can be made as provided for individual or corporation, as is appropriate, or by serving agent employed within state. (735 ILCS 5/2-212).

8.17 REDEMPTION:

See topics 8.05 Executions, Liens; categories 20 Mortgages, topic Mortgages of Real Property; Taxation, topic Property Taxes, subhead Redemption.

8.18 SUPPLEMENTARY PROCEEDINGS:

See topic 8.05 Executions.

8.19 TRUSTEE PROCESS:

See topic 8.09 Garnishment.

8.20 USURY:

See category 3 Business Regulation and Commerce, topic 3.19 Interest.

9 DISPUTE RESOLUTION

9.01 ALTERNATIVE DISPUTE RESOLUTION:

Mandatory (Alternative) Dispute Resolution.

Governed by Mandatory Arbitration System (735 ILCS 5/2-1001A to 1009A) and Illinois Supreme Court Rules 86 to 95. Supreme Court of Illinois may provide for mandatory arbitration of civil action in order to expedite in less costly manner any litigation with claim not exceeding $50,000. (735 ILCS 5/2-1001A).

Arbitrators.

Qualifications and method of appointment are prescribed by rule. (Ill. Sup. Ct. R. 87). Arbitrators are entitled to reasonable compensation, $100 per hearing. (Ill. Sup. Ct. R. 87[e]). Hearings will be conducted before panel of three arbitrators or lesser number agreed to by parties. (735 ILCS 5/2-1003A).

Decisions.

Following hearing arbitrator's decision must be filed with circuit court together with proof of service on parties. (735 ILCS 5/2-1004A). Parties to proceeding may file with clerk written rejection within 30 days of filing of award and upon payment of $200 fee; $500 fee for awards greater than $30,000. (735 ILCS 5/2-1004A, Ill. Sup. Ct. R. 93). In case of such rejection parties may proceed to trial before judge or jury. (735 ILCS 5/2-1004A). Filing of single rejection will enable all parties, not debarred from rejecting, to proceed to trial without filing separate rejections. (Ill. Sup. Ct. R. 93).

Award and Judgment.

Panel must make award promptly upon termination of hearing and dispose of all claims for relief. (Ill. Sup. Ct. R. 92). Award must be signed by arbitrators or majority of them. (Ill. Sup. Ct. R. 92). Where no rejection is filed, judge may enter award as judgment of court. (735 ILCS 5/2-1005A).

Expenses including arbitrator fees determined by Illinois Supreme Court and paid from State Treasury. (735 ILCS 5/2-1007A). Arbitration fee is charged at time of filing first pleading, paper or other appearance. (735 ILCS 5/2-1009A).

Voluntary (Alternative) Dispute Resolution.

Validity of Arbitration Agreement.

(710 ILCS 5/1). See topic 9.02 Arbitration and Award, subhead Forms and Requisites of Submission.

Alternative Dispute Resolution Jurisdictional Bodies/Commissions.

Circuit Court of Cook County.

Mandatory arbitration program is governed by Supreme Court rules for Conduct of Mandatory Arbitration Proceedings. (Circuit Ct. Cook Cty. [Cook] rule 18.2). All actions filed in First Municipal District after Jan. 16, 1990 involving injury to person in whole or in part, seeking money damages only, not in excess of $30,000, are assigned to arbitration calendar. Small claims actions are excluded. (Cook rule 18.3).

Appointment of Arbitrator-Cook County.

Applicants eligible for appointment to serve as members of panel by filing application with Arbitration Administrator certifying that applicant has: (1) Attended mandatory arbitration seminar, (2) has read and is informed of rules of Supreme Court and Act related to mandatory arbitration, (3) is presently licensed to practice law in Illinois and (4) has engaged in practice of law in Illinois for minimum of three years or is retired judge. (Cook rule 18.4).

Scheduling.

Cases filed after effective date of these rules will be given hearing date and time 280 days from filing date, or next available hearing date. (Cook rule 18.5).

Conduct and Award.

Stenographic records are not provided unless party does so at his or her own expense.

Witness fees and costs are paid in same manner as provided for at trial. (Cook rule 18.6). Panel renders its award same day hearing is completed. Arbitration panel will file its decision with Clerk of Court, who will serve notice of award. (Cook rule 18.7).

Defective Hearing Dates.

If defective hearing date is received litigants should request new date within seven days of receiving defective date and not later than 20 days prior to defective date. (Cook rule 18.11).

19th Circuit Mandatory Arbitration (Lake and McHenry Counties).

Generally, Rules of Circuit Court-19th Circuit Part 17.00. All civil actions are subject to mandatory arbitration if each claim is exclusively for money in amount exceeding $10,000 but not exceeding $50,000, interest, costs and attorneys fees not included. (19th Circuit rule 17.01[c]). Every complaint or counterclaim filed must contain specific prayers for relief, except in actions for injury to person, no ad damnum may be pleaded except to state amount of damages sought. (19th Circuit rule 17.01[d]).

Cases not assigned to arbitration may be ordered to arbitration at status call, pretrial conference or upon receipt from another jurisdiction where claim is greater than $10,000 but does not exceed $50,000. (19th Circuit rule 17.01[e]).

Appointment, Qualification and Compensation of Arbitrators.

Retired judges licensed to practice in Illinois and residing in 19th Judicial Circuit and all attorneys licensed in Illinois who reside in, maintain offices in or practice in counties of Lake and McHenry may be eligible as arbitrators in their respective counties, upon filling out appropriate forms. (19th Circuit rule 17.02).

Motions.

All motions addressed to supervising Judge of Arbitration of respective county. (19th Circuit rule 17.04).

Hearings.

Cases are to be heard in one-half day where possible, but not to exceed one full day. (19th Circuit rule 17.03). Hearings conducted in conformity with procedures followed in civil trials. (19th Circuit rule 17.06[a]). Failure of party to be present either in person or through counsel will be governed by Ill. Sup. Ct. R. 91(a). (19th Circuit rule 17.06[d]).

Awards.

Panel makes award promptly on termination of hearing. Award cannot be more than amount prayed for in complaint and in no event no more than $50,000, exclusive of interest costs and attorney's fees. Award will be filed immediately with Clerk of Court, who serves notice of award, to all parties, including any in default. (19th Circuit rule 17.07).

18th Circuit Mandatory Arbitration (DuPage County).

Generally Rules of Circuit Court-18th Circuit Art. 13. All civil actions are subject to mandatory arbitration on all claims exclusively for money in amount exceeding $10,000 but not to exceed limit authorized by Illinois Supreme Court. Cases not originally assigned to arbitration calendar may be ordered to arbitration on motion of either party, by agreement of parties or by order of court, when it appears case is within prescribed monetary limits. (18th Circuit rule 13.01).

Arbitrators.

Must complete required Arbitrator Training Seminar. All arbitrator applicants must maintain law office or residence in 18th Judicial Circuit. (18th Circuit rule 13.02).

Hearings.

Upon return date of all summons court assigns hearing date on earliest date thereafter, provided that not less than 60 days notice be given to parties or their attorneys of record. Consolidated cases are heard on dates date assigned. (18th Circuit rule 13.03[c], [e]). Upon settlement plaintiff must immediately notify Arbitration Administrator in writing. Presentation and decision is expected to take maximum of two hours. Any party seeking hearing longer than two hours must obtain court order and tender to Arbitration Administrator ten days prior to arbitration. (18th Circuit rule 13.03[f], [g]).

Alternative Dispute Resolution Acts.

Uniform Arbitration Act.

(710 ILCS 5/1 et seq.). See topic 9.02 Arbitration and Award, subhead Uniform Arbitration Act Adoption/Deviation.

Labor Arbitration Services Act.

(710 ILCS 10/0.01 et seq.).

Health Care Arbitration Act.

(710 ILCS 15/1 et seq.). See subhead Health Care Arbitration Act, infra.

Illinois Not-For-Profit Dispute Resolution Center Act.

(710 ILCS 20/1 et seq.).

Seed Arbitration Act.

(710 ILCS 25/1 et seq.). See subhead Seed Arbitration Act, infra.

International Commercial Arbitration Act.

(710 ILCS 30/1–1 et seq.).

Health Care Arbitration Act.

Applicability.

Act applies to and governs all agreements to arbitrate claims arising out of providing health care services. Uniform Arbitration Act (710 ILCS 5/1 to 5/23) governs health care arbitration agreements except where inconsistent with this Act (710 ILCS 15/3). “Health care arbitration agreement” or “agreement” defined as written agreement between patient and hospital or health care provider to submit to binding arbitration claims for damages or death of patient due to provider's or hospital's negligence or wrongful act, but not included intentional torts. “Health care provider” is person or entity in practice of medicine, surgery, chiropractics, dentistry, podiatry, optometry, physical therapy or nursing. “Hospital” is person or entity operating or administering hospital, clinic, nursing home or sanitarium. (710 ILCS 15/2). Act does not apply to arbitration claims arising out of Seed Arbitration Act. (710 ILCS 25/1 through 25/80). See subhead Seed Arbitration Act, infra.

Conditions of Agreement.

Every health care arbitration agreement must be separate, independent instrument; be clearly captioned “Health Care Arbitration Agreement”; state date of commencement of hospitalization or specify cause for which services are provided; must contain specified notice to patient printed in letters at least 3/16" high; and copy must be delivered to and be reaffirmed by patient at time of discharge. Failure to so deliver voids agreement. Such agreements may not be required as condition to rendering health care services, limit, nor impair or waive substantive rights or defenses (including statute of limitations) or procedural due process rights. (710 ILCS 15/8, 15/9). Employees of hospitals or health care providers are deemed parties to every agreement signed by their employers. Agreements may bar action at law against such employers based on respondeat superior for negligent or wrongful act of employee. (710 ILCS 15/6).

Parent may bind minor child to health care arbitration agreement. Parent may be minor and agreement will not be voidable for this reason. (710 ILCS 15/7).

Cancellation of Agreement.

Health care arbitration agreements may be cancelled within 60 days of execution, discharge from hospital or last treatment, whichever is later and become invalid one year after execution. Nonsignatory employees may cancel (as to themselves) until 30 days following notification that they are parties to disputes on which arbitration is demanded under agreement. Personal representatives may cancel agreements of decedents who die during period of cancellation up to 60 days from appointment. (710 ILCS 15/9[c]). If no legal representative is appointed within six months, next of kin may cancel agreement within eight months of death.

Proceedings.

(a) Demand and Claim: Arbitration is commenced by serving notice of demand for arbitration and statement of claim and cause of action on all parties from whom damages are sought. Statement is to be in form of complaint and it and demand are to be served in accordance with Civil Practice Act. Service of notice of demand tolls statute of limitations for parties named in notice. (710 ILCS 15/10). (b) Parties: Necessary parties include hospital, health care provider, employee of either, or supplier (defined as person or entity that manufactured, designed, distributed, sold or otherwise provided medication, device, equipment, service or other product used in diagnosis or treatment [710 ILCS 15/2]) reasonably alleged to be joint tortfeasor. Arbitration may be stayed on basis that necessary party is not signatory or party to agreement. (710 ILCS 15/5). By consent of all parties, person or entity which did not sign agreement may participate upon execution of written undertaking to be bound by award. (710 ILCS 15/4). (c) Discovery and admissibility of evidence governed by rules applicable to civil cases. (710 ILCS 15/11, 15/12; 710 ILCS 5/7).

Arbitrators.

Parties may agree to single arbitrator. Otherwise there is to be panel of three, one to be appointed by each side (multiple parties to resolve differences by lot) and third to be appointed by other two. Upon affidavit that agreement cannot be reached, court submits list of five practicing attorneys (including retired Supreme, Appellate or Circuit judges), each party strikes two names and remaining person becomes single or neutral arbitrator. (710 ILCS 15/13). Court appointed arbitrators are to receive $100 per day compensation (others maximum of $100 per day) and reimbursement for expenses to be apportioned equally among parties selecting arbitrator or all parties when arbitrator is appointed by court or agreement of parties. (710 ILCS 15/14).

Seed Arbitration Act.

Act requires seed purchasers to submit claim to arbitration prior to civil action. Arbitration results are nonbinding. (710 ILCS 25/10).

9.02 ARBITRATION AND AWARD:

Health Care arbitration is also governed by “Health Care Arbitration Act” effective Sept.

19, 1976, as am'd Sept. 22, 1977. (710 ILCS 15/1). Disputed questions are subject to arbitration under “Workmen's Compensation Act”. (820 ILCS 305/19).

Forms and Requisites of Submission.

Written agreement to submit either existing or future controversies to arbitration is valid, enforceable, and irrevocable except upon such grounds as any contract may be subject to revocation. (710 ILCS 5/1). Agreements to arbitrate claims arising out of providing of health care services are also subject to “Uniform Arbitration Act”. (710 ILCS 15/3).

Judgment on Award.

Award must be in writing, signed and served upon parties personally or by registered mail. Award must be within time fixed by agreement or within such time as court may order upon application by party. Parties may extend time for award either before or after expiration thereof, and party waives any objection that award is not made within required time unless he objects before it has been delivered to him. (710 ILCS 5/8). Upon court confirmation or modification of award, judgment or decree is to be entered in conformity therewith and have same force and effect as any judgment or decree. Court may enter judgment for costs as it sees just. (710 ILCS 5/14). Except as otherwise provided, applications are to be by motion and to be heard in same manner and upon same notice as provided for motions in civil cases. Unless parties have otherwise agreed, notice of initial application for order is to be served in manner provided for service of summons in civil cases. (710 ILCS 5/15). Term “court” as used in Act means any circuit court. Making of agreement for arbitration in Illinois confers jurisdiction upon court to enforce agreement and to enter judgment upon award thereunder. (710 ILCS 5/16). Initial application is to be made to court of county in which arbitration agreement provides for hearing or where hearing is actually held. Otherwise application may be made in any county where adverse party resides or has place of business or, if neither applies, in any county. All subsequent applications are to be made in court hearing initial application unless that court otherwise directs. (710 ILCS 5/17). Appeals may be taken in same manner and with same effect as in civil cases. (710 ILCS 5/18). See category 5 Civil Actions and Procedure, topic 5.03 Appeal and Error.

Enforcement.

Any circuit court may compel or stay arbitration. If existence of agreement to arbitrate is challenged, that issue is to be summarily determined. If issue referable to arbitration is involved in pending litigation, party seeking arbitration is to apply to court wherein litigation is pending; otherwise application is to be made as set forth under subhead Venue, infra. If issue in any pending action is subject to arbitration, application to stay may be made in that proceeding; if issue is severable, stay may be entered with respect to that issue only. Arbitration order will not be refused merely because claim in issue lacks merit, bona fides, or because any fault or grounds for claim sought to be arbitrated have not been shown. (710 ILCS 5/2[a]-[e]). In proceeding to stay or compel arbitration, court will decide whether parties have agreed to arbitrate items on which arbitration is sought. (13 Ill. App.3d 485, 300 N.E.2d 795).

Mandatory Arbitration.

Illinois Supreme Court has authorized circuit courts to adopt procedures requiring mandatory arbitration for civil actions if each claim therein is exclusively for money in amount or value of $50,000 or any lesser amount as authorized by Supreme Court for any circuit or if judge of circuit court determines at pretrial conference that no greater amount appears genuinely to be in controversy, exclusive of costs and interest. (735 ILCS 5/2-1001A to 2-1009A). Steps are currently being taken by some of circuits to implement system for mandatory arbitration of such claims. Provisions of Uniform Arbitration Act summarized below will not be applicable to claims within scope of mandatory arbitration rules. (735 ILCS 5/2-1006A).

Powers of Arbitrators.

Arbitrators may act by majority vote unless agreement provides otherwise. (710 ILCS 5/4). Unless agreement provides otherwise, arbitrators are to set time and place for hearing and notify parties personally or by registered mail not less than five days before hearing. Appearance constitutes waiver of notice. Arbitrators may adjourn hearings from time to time when necessary or upon request of party for good cause. Arbitrators may determine controversy notwithstanding failure of duly notified party to appear. Upon application court may direct arbitrators to promptly hear and determine controversy. All parties are entitled to be heard, present evidence, and cross-examine witnesses. Hearings are to be conducted by all arbitrators, but majority may determine any question and render final award. If during hearing arbitrator ceases to act, remaining arbitrators or arbitrators appointed to act as neutrals may continue hearings and determine controversy unless otherwise provided in agreement. (710 ILCS 5/5[a] to [c]). Party has right to be represented by attorney, and waiver of such right prior to hearing is ineffective. (710 ILCS 5/6). Arbitrators may issue subpoenas for attendance of witnesses and production of documents, etc., and are to have power to administer oaths. Subpoenas are to be served and are, upon proper application to court by either party or arbitrator, to be enforced as provided by law for subpoenas in civil cases.

Arbitrators may permit use of depositions to be taken in manner and upon terms designated by arbitrators of witnesses who cannot be subpoenaed or are unable to attend hearings.

All provisions of law compelling persons under subpoena to testify are to be applicable. Fees for attendance of witnesses are to be same as witnesses in Circuit Court. (710 ILCS 5/7[a] to [d]).

Rescission.

Vacating.

Upon application court is to vacate award where (1) it was procured by corruption, fraud or other undue means; (2) neutral arbitrator showed evident partiality, or any arbitrator showed corruption or misconduct; (3) arbitrators exceeded their powers; (4) arbitrators refused to postpone hearings even though sufficient cause was shown or refused to hear material evidence or acted in some other way prejudicial to substantial rights of any party; or (5) if there was no arbitration agreement and issue was not adversely determined in any proceeding to compel or stay arbitration. (710 ILCS 5/12[a]). In vacating award court may order rehearing under certain circumstances. (710 ILCS 5/12[c]).

Application for vacation must be made within 90 days of delivery of copy of award to applicant or corruption, fraud or other undue means was known or should have been known. (710 ILCS 5/12[b]).

If an application to vacate is denied and there is no motion pending to modify or correct award, court is to confirm award. (710 ILCS 5/12[d]).

Modification on Correction.

Upon application within 90 days after service of copy of award, court may modify or correct award when there has been evident miscalculation of figures or mistake in description of any person, thing or property; where arbitrators have acted upon matter not submitted to them; or, where award is imperfect as matter of form. If modification application is granted, court is to correct award so as to effect proper intent and then confirm award as corrected. Application to modify or correct may be joined in alternative with application to vacate award. (710 ILCS 5/13). Arbitrators may upon application or upon order of court modify or correct award where there has been evident miscalculation of figures or mistake in description of any person, thing or property, or where award is imperfect as matter of form or to clarify award. Application is to be made within

20 days after delivery of award. Written notice is to be given opposing party, who must serve his objections thereto within ten days of notice. (710 ILCS 5/9).

Uniform Arbitration Act Adoption/Deviation.

Uniform Arbitration Act, modified in certain respects, is in effect. (710 ILCS 5/1 to 5/23).

§1: Reads as follows: “A written agreement to submit any existing controversy to arbitration or a provision in a written contract to submit to arbitration any controversy thereafter arising between the parties is valid, enforceable and irrevocable save upon such grounds as exist for the revocation of any contract, except that any agreement between a patient and a hospital or health care provider to submit to binding arbitration a claim for damages arising out of (1) injuries alleged to have been received by a patient, or (2) death of a patient, due to hospital or health care provider negligence or other wrongful act, but not including intentional torts, is also subject to Health Care Arbitration Act.” (710 ILCS 5/1).

§2: “That issue” is substituted for “Such issues” in subsection (b). (710 ILCS 5/2).

§3: Reads as follows: “If the arbitration agreement provides a method of appointment of arbitrators, this method shall be followed. In the absence thereof, any method of appointment of arbitrators agreed upon by the parties to the contract shall be followed. An arbitrator so appointed has all the powers of one specifically named in the agreement. When an arbitrator appointed fails or is unable to act, his successor shall be appointed in the same manner as the original appointment. If the method of appointment of arbitrators is not specified in the agreement and cannot be agreed upon by the parties, the entire arbitration agreement shall terminate.” (710 ILCS 5/3).

§4: No change. (710 ILCS 5/4).

§5: Following “controversy” in subsection (c), “unless otherwise provided in the agreement” is added. (710 ILCS 5/5).

§6: No change. (710 ILCS 5/6).

§7: “issue” is used in subsection (a). (710 ILCS 5/7).

§8: No change. (710 ILCS 5/8).

§9: Following “party” in first sentence, “to the arbitrators” is added. (710 ILCS 5/9).

§10: No change. (710 ILCS 5/10).

§11: No change. (710 ILCS 5/11).

§12: In clause (5) of subsection (a), “the circuit court” is substituted for “a court of law or equity”. In subsection (c) “the agreement, or in the absence thereof, by the court in accordance with” is omitted. Subsection (e) is added and reads as follows: “Nothing in this Section or any other Section of this Act shall apply to the vacating, modifying or correcting of any award entered as result of an arbitration agreement which is part of or pursuant to a collective bargaining agreement; and the grounds for vacating, modifying or correcting such an award shall be those which existed prior to the enactment of this Act.” (710 ILCS 5/12).

§13: No change. (710 ILCS 5/13).

§14: “or decree” omitted both times and “as to the court seems just” is added at end of section. (710 ILCS 5/14).

§15: Judgment Roll, Docketing. This section is omitted.

§16: No change. (710 ILCS 5/15).

§17: No change. (710 ILCS 5/16).

§18: No change. (710 ILCS 5/17).

§19: Subsection (a) is omitted. Subsection (b) reads as follows: "Appeals may be taken in the same manner, upon the same terms, and with like effect, as in civil cases." (710 ILCS 5/18).

§20: No change. (710 ILCS 5/19).

§21: Text is same. Title in Illinois is "Construction of Act". (710 ILCS 5/20).

§22: Text is same. Title in Illinois is "Severability". (710 ILCS 5/21).

§23: No change. (710 ILCS 5/22).

§24: Reads as follows: "'An act to revise the law in relation to arbitrations and awards', approved June 11, 1917, as amended, is repealed; provided, however, that any agreement entered into prior to the effective date of this Act to submit to arbitration a dispute existing at the date of the agreement shall be governed by said Act approved June 11, 1917; provided further, that this Act does not impair the validity of any proceeding under said Act, approved June 11, 1917, commenced prior to the effective date of this Act." (710 ILCS 5/23).

Act applies only to agreements made subsequent to effective date of Act (Aug. 24, 1961). (710 ILCS 5/19). Act is to be construed in same manner as Uniform Act is construed in other states where it has been adopted. (710 ILCS 5/20). Act contains severability clause. (710 ILCS 5/21).

Credential of/Qualifications of/Standards for Arbitrators.

If agreement provides method, that method is to be followed; in absence thereof, any method upon which parties agree is to be followed. When arbitrator fails or is unable to act, his successor is to be appointed in same manner as original arbitrator. If no method of appointing arbitrator is set forth in agreement and parties cannot agree upon method, arbitration agreement is terminated. (710 ILCS 5/3). All fees other than attorney's fees are to be paid as provided in award unless agreement provides otherwise. (710 ILCS 5/10). Upon application court is to confirm award unless timely, valid application is made to vacate, modify or correct award. (710 ILCS 5/11).

10 DOCUMENTS AND RECORDS

10.01 ACKNOWLEDGMENTS:

Uniform Recognition of Acknowledgments Act adopted. (765 ILCS 30/1 to 30/10).

Short Form Acknowledgments valid whether executed in Illinois or any other state. (765 ILCS 30/7).

Within State.

May be taken before notary public, United States commissioner, county clerk, or any court, or any judge, clerk or deputy clerk of any such court. When taken before notary public or United States commissioner, official seal must be affixed. When taken before court or clerk or deputy clerk thereof, seal of court must be affixed. (765 ILCS 5/20).

Outside State but Within United States.

May be taken before justice of peace, notary public, master in chancery, United States commissioner, commissioner to take acknowledgments of deeds, mayor of city, clerk of county, or any judge, justice, clerk or deputy clerk of Supreme, circuit or district court of United States, or any judge, justice, clerk, deputy clerk, prothonotary, surrogate or registrar of supreme, circuit, superior, district, county, common pleas, probate, orphan's or surrogate's court of any state, territory or dependency of United States. In dependency may also be taken before any commissioned officer in military service of United States. Acknowledgment before notary public or United States commissioner or commissioner of deeds must be under seal of office; if before mayor, under seal of city; if before clerk, deputy clerk, prothonotary, registrar or surrogate, under seal of court; if before justice of peace or master in chancery, certificate of proper clerk under his seal of office stating that person was such justice of peace or master in chancery must be supplied. If clerk of any court of record within state, territory, dependency or district, under signature and seal of court, certifies acknowledgment was made in conformity within its laws or it appears by laws of such state, territory, dependency or district, instrument or duly proved or certified, copy of record of deed, mortgage or other instrument relating to real estate made and recorded in proper county may be admitted in evidence as in other cases involving admission of certified copies. (765 ILCS 5/20).

Outside United States.

May be taken before any court of any republic, dominion, state, kingdom, empire, colony, territory or dependency having a seal, or any judge, justice or clerk thereof, any major or chief officer of any city or town having a seal, notary public, commissioner of deeds, ambassador, minister or secretary of legation, or consul of United States, vice consul, deputy consul, commercial agent or consular agent of United States, attested by his official seal, or any officer authorized by laws of place where taken to take acknowledgments of conveyances of real estate or to administer oaths in proof of conveyances of real estate. Such acknowledgment must be attested by official seal of court or officer; or if no official seal, then certificate by ambassador, minister, secretary of legation, consul, vice consul, deputy consul, commercial agent or consular agent of United States residing in such place, under his official seal, showing court or officer was duly elected, appointed or created and acting at time of acknowledgment must be added. (765 ILCS 5/20).

Persons Serving in or with U.S. Armed Forces within or without the U.S., and the spouse or former spouse of any such person, may acknowledge the instrument wherever located before any commissioned officer in active service of armed forces of the U.S. with rank of second lieutenant or higher in army, air force or marine corps or ensign or higher in navy or U.S. Coast Guard. Instrument is not invalid for failure to state therein place of execution or acknowledgment; nor is authentication of officers' certificate of acknowledgment required and such certificate need not be under seal but certificate in form substantially same as that prescribed by statute must be endorsed on acknowledgment or attached thereto. (765 ILCS 5/20).

General Requirements as to Taking.

Judge or other officer before whom acknowledgment is taken must personally know person acknowledging or identity of person acknowledging must be established by credible witness. Foregoing must be affirmatively recited in instrument. (765 ILCS 5/24, 5/26). No general statutory provision disqualifying acknowledging officer from acting in certain cases.

General Requirements of Certificate.

Seal of acknowledging officer must be affixed. (765 ILCS 5/20).

Married woman may acknowledge as though unmarried. (765 ILCS 5/19).

Attorneys in Fact.

When power of attorney relating to real estate executed by person in service or employment of Federal Government and reported missing, missing in action, or being held incommunicado or imprisoned in foreign country is recorded in county where real estate is located along with affidavit of attorney-in-fact or agent declaring absence of actual knowledge or notice of revocation or termination of power by death or otherwise, or facts indicating same, persons dealing with attorney-in-fact in good faith are not required to ascertain whether person he represents is living, and are protected against claims against real estate interests acquired in dealings with such attorneys-in-fact unless prior to acquisition revocation of power or affidavit of death of person who executed power has been filed in office of recorder of deeds where power recorded. Military report of “missing” does not constitute actual notice of death of principal nor does it operate to revoke agency. (765 ILCS 5/28b).

Corporations.

All documents required to be filed with Secretary of State which must be verified may be acknowledged and sworn to before officer competent to take acknowledgments of deeds, or by signature, without more, of person signing instrument. (805 ILCS 5/1.10 & 805 ILCS 105/101.10). Acknowledgment of corporation or person signing on its behalf may be taken by notary public who is officer, director or employee of corporation provided notary public does not sign instrument acknowledged on behalf of corporation. (765 ILCS 25/1).

Foreign Acknowledgments.

Uniform Recognition of Acknowledgments Act adopted. (765 ILCS 30/1 to 30/10). Where any deed, conveyance or power of attorney has been acknowledged in foreign state, certificate, under seal, of any consul or minister of U.S. in said country that deed, etc. was executed in conformity with such foreign law shall be prima facie evidence of that fact and all deeds, etc. acknowledged in conformity with foreign law shall be deemed as good and valid as though acknowledged in conformity with Illinois law. (765 ILCS 5/22, 5/23).

Effect of Acknowledgment.

Acknowledgment is not necessary to validity of conveyance or recordation thereof. Unacknowledged document may not be read as evidence unless execution is proved in accordance with rules of evidence. (765 ILCS 5/31). Deeds, mortgages, powers of attorney, conveyances or other writings concerning lands, tenements or hereditaments required or entitled to be recorded, being acknowledged or proved by subscribing witness, may be read in evidence without further proof of execution. (765 ILCS 5/35). Certified copy of lost original, or of original not in personal possession of person wishing to use it, may be read in evidence without further proof of execution if original was acknowledged or proved by subscribing witness. (765 ILCS 5/35, 5/36). All deeds which may be executed by any administrator, executor, guardian, commissioner, sheriff, or other officer, of any real estate sold in pursuance of any judgment upon being acknowledged or proved by subscribing witness before any officer authorized to take acknowledgments or proof of deeds, and certified as other deeds, shall be admitted to record in county where real estate is situated. (765 ILCS 5/32).

Proof by Subscribing Witness.

A deed or instrument not duly acknowledged may be proved by testimony of subscribing witness, or in case of death of grantor and subscribing witnesses, or when subscribing witnesses cannot be had, by proof of handwriting of grantor and of at least one subscribing witness, such proof to consist of testimony of two or more disinterested persons swearing to each signature.

(765 ILCS 5/25).

Authentication—Certificate of Conformity.

Acknowledgment taken in conformity with laws of state, territory, dependency or district of United States where taken is sufficient if certified to be such by clerk of court of record under court seal. (765 ILCS 5/20).

Certificate of any consul or minister of the United States in any foreign state, kingdom, empire or country, under his official seal, that execution or acknowledgment is in conformity with such foreign law is deemed prima facie evidence thereof. (765 ILCS 5/22).

An acknowledgment made before a justice of peace or master in chancery in another state, territory, dependency or district of United States must have added a certificate of proper clerk under seal of his office that person was such justice of peace or master in chancery at time of acknowledgment. (765 ILCS 5/20).

Fraudulent Acknowledgments.

A person, knowing that his acknowledgment is not authorized by law and who acknowledges the execution of any document which by law may be recorded, commits a Class 4 felony and may be fined not to exceed $25,000 or imprisoned from one to three years or both. (720 ILCS 5/32-6, 730 ILCS 5/5-9-1). Statute provides that any officer authorized to take proof and acknowledgment of any conveyance of real or personal property, or other instrument, who wilfully certifies that such was duly proven or acknowledged when none such was made, or when such was not made at time it was certified to have been made, with intent to injure or defraud or to enable another to injure or defraud, shall be fined not to exceed $25,000 or imprisoned from one to three years or both. (720 ILCS 5/17-15, 730 ILCS 5/5-9-1).

Forms.

By statute the following are sufficient:

Forms

State of (name of state) County of (name of county) ss. I (here give name of officer and his official title) do hereby certify that (name of grantor and, if acknowledged by wife, her name and add ‘his wife’) personally known to me to be the same person whose name is (are) subscribed to the foregoing instrument, appeared before me this day in person, and acknowledged that he (she or they) signed and delivered the said instrument as his (her or their) free and voluntary act, for the uses and purposes therein set forth. Given under my hand and official seal, this (day of the month) day of (month) A. D. (year). (Signature of officer) (Seal). (765 ILCS 5/26).

Acknowledgment by Persons Serving in or with U.S. Armed Forces and spouse or former spouse of any such person:

On (insert date), before me, ..., the undersigned officer, personally appeared . . . . ., known to me (or satisfactorily proven) to be serving in or with the armed forces of the United States (and/or the spouse or former spouse of a person so serving) and to be the person whose name is subscribed to the within instrument and acknowledged that, he . . . . . executed the same as . . . . . free and voluntary act for the purposes therein contained. And the undersigned does further certify that he is at the date of this certificate a commissioned officer of the rank stated below and is in the active service of the armed forces of the United States. (Signature of Officer, Rank of Officer and Command to which attached.) (765 ILCS 5/20).

Acknowledgment on Behalf of Corporation on Document filed with Secretary of State:

State of . . . . . County of . . . . . ss.

I (insert name and official capacity of official) do hereby certify that on the . . . . . day of . . . . . 20. . . . ., (insert names of persons signing document), personally appeared before me and being first duly sworn by me severally acknowledged that they signed the foregoing document in the respective capacities therein set forth and declared that the statements therein contained are true.

In Witness Whereof, I have hereunto set my hand and seal the day and year before written. (insert official capacity of official). (805 ILCS 105/101.01).

Short Form for Individual Acting in Own Right:

State of . . . County of . . .

The foregoing instrument was acknowledged before me this (date) by (name of person acknowledged).

(Signature of person taking acknowledgment)

(Title)

Short Form for Corporation:

State of . . . County of . . .

The foregoing instrument was acknowledged before me this (date) by (name of officer or agent, title of officer or agent) of (name of corporation acknowledging) a (state or place of incorporation) corporation, on behalf of the corporation.

(Signature of person taking acknowledgment)

(Title)

Short Form for Partnership:

State of . . . County of . . .

The foregoing instrument was acknowledged before me this (date) by (name of acknowledging partner or agent), partner (or agent) on behalf of (name of partnership), a partnership.

(Signature of person taking acknowledgment)

(Title)

Short Form for Individual Acting as Principal by Attorney in Fact:

State of . . . County of . . .

The foregoing instrument was acknowledged before me this (date) by (name of attorney in fact) as attorney in fact on behalf of (name of principal).

(Signature of person taking acknowledgment)

(Title)

Short Form for any Public Officer, Trustee, or Personal Representative:

State of . . . County of . . .

The foregoing instrument was acknowledged before me this (date) by (name and title of position).

(Signature of person taking acknowledgment)

(Title)

The following forms are in common use, but are not specifically sanctioned by statute.

Acknowledgment on Behalf of Corporation:

State of . . . . County of . . . . ss.

I (name and official title) do hereby certify that (name of President or other authorized officer) personally known to me to be the (official capacity) of (name of corporation), a (state) corporation, and (name of Secretary or other authorized officer) personally known to me to be the (official capacity) of said corporation, and personally known to me to be the same persons whose names are subscribed to the foregoing instrument, appeared before me this day in person and severally acknowledged that as such (official capacities of both officers), they signed and delivered the said instrument as (official capacities of both officers) of said corporation, and caused the corporate seal of said corporation to be affixed thereto, pursuant to authority, given by the Board of . . . . of said corporation as their free and voluntary act, and as the free and voluntary act and deed of said corporation, for the uses and purposes therein set forth. Given under my hand and (private or official, as the case may be) seal, this (date). Commission expires (date). (Signature of officer). (Seal).

Proof by a subscribing witness:

State of . . . . County of . . . . ss.

I (here give name of officer and his official title), hereto duly appointed and commissioned, do hereby certify that on this . . . . day of . . . . 20. . . . before me personally appeared A. B., personally known to me (or proved to me by C. D., a credible witness under oath) to be the person whose name appears subscribed to the foregoing deed as a witness of the execution thereof, who on oath testified that E. F., whose name appears subscribed to said deed as grantor, is the real person who executed the same as grantor, and that he, A. B., subscribed his name as a witness thereto in the presence and at the request of said E. F.; which is satisfactory proof to me of the due execution of said deed.

In witness whereof I have hereunto set my hand and seal this . . . . day of . . . . 20. . . . .

(Signature, title, and seal).

Proof where subscribing witnesses are dead or unavailable:

State of . . . . County of . . . . ss.

I (here give name of officer and his official title), hereto duly appointed and commissioned, do hereby certify that on this . . . . day of . . . . 20. . . . before me personally appeared C. D., a competent and credible witness, who stated on oath that he personally knew E. F., and A. B., both now deceased, whose names appear subscribed to the foregoing deed as grantor and witness respectively, and well knew their signature (here state means of knowledge), and that he believes the names of said E. F. and A. B. to said deed were subscribed thereto by said E. F. as grantor and said A. B. as witness respectively; which is satisfactory proof to me of the due execution of said deed.

In witness whereof I have hereunto set my hand and seal this . . . . day of . . . . 20. . . . .

(Signature, title, and seal).

Alternative to Acknowledgment or Proof.

Unless Supreme Court Rules provide otherwise, whenever any complaint, petition, answer, reply, bill or particulars, answer to interrogatories, affidavit, return or proof of service, or other document or pleading filed in Illinois state court is required or permitted to be verified or sworn to under oath, this includes certification of pleading, affidavit or other document. One having knowledge of matter stated in pleading, affidavit or other document shall certify in following form:

"Under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, the undersigned certifies that the statements set forth in this instrument are true and correct, except as to matters therein stated to be on information and belief and as to such matters the undersigned certifies as aforesaid that he verily believes the same to be true."

Any pleading, affidavit, or other document so certified may be used as affidavit. False statements, not believed to be true, are subject to penalty as Class III felony. (735 ILCS 5/1-109).

Validating Acts.

All deeds or other instruments duly certified or proven which have been acknowledged or proven prior to Aug. 30, 1963, in manner provided in 765 ILCS 5/20 shall be deemed to be good and effectual in law and may be read in evidence without further proof of their execution. (765 ILCS 5/20[5]).

All deeds or mortgages heretofore irregularly executed by omission of seal are validated and made effective as though seal affixed (adopted 1941). (765 ILCS 5/35b).

10.02 AFFIDAVITS:

All courts and each judge, and clerk thereof, county clerks, deputy county clerks, Secretary of State, notaries public, commissioned officers in active service of U.S. Armed Forces and persons certified under 255 ILCS 415/1 have power to administer oaths and take affidavits and depositions in Illinois in respective counties or jurisdictions. (5 ILCS 255/1, 255/2). Persons having conscientious scruples against oaths may affirm. (5 ILCS 255/4). See topic 10.01 Acknowledgments.

Outside Illinois, oaths may be administered by any officer there authorized, and his certificate, under his official seal, stating that he is authorized, is prima facie evidence of authority. (5 ILCS 255/6).

Commissioned officer in U. S. Armed Forces may administer oaths within or without U.S. Oaths, affidavits and depositions need not be authenticated nor attested by any seal and jurat need not state venue. (5 ILCS 255/2).

Forms.

No form of affidavit is prescribed. In common practice the venue is followed by the statement of facts and the affiant's signature. Affidavit is completed with the usual jurat:

Form

"Subscribed and sworn to before me this . . . . day of . . . . A. D., 20. . . ., (name and title of officer)" and official seal.

If officer has no official seal, certificate of magistracy should be supplied.

In case of oath administered outside Illinois, jurat may read:

Form

"Subscribed and sworn to this . . . . day of . . . . A. D., 20. . . ., before me, a (here state official title), who hereby certifies under my official seal that I am duly authorized by the laws of the State of . . . . to administer oaths in the county and state (or whatever the venue may be) aforesaid." (Add signature, official seal, and date of expiration of commission).

Certification is fully effective alternative to verification under oath from notary public. (735 ILCS 5/1-109). Person having knowledge of matters shall subscribe to certification in substantially following form:

Form

Under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, the undersigned certifies that the statements set forth in this instrument are true and correct, except as to matters therein stated to be on information and belief and as to such matters the undersigned certifies as aforesaid that he verily believes the same to be true. (735 ILCS 5/1-109).

Use of Affidavits.

When used in opposition to or in support of summary judgment or motion to dismiss, affidavit made on personal knowledge of affiant and shall set forth with particularity facts upon which claim is based. (Ill. Sup. Ct. R. 191).

Alternative to Affidavit.

See topic 10.01 Acknowledgments.

10.03 NOTARIES PUBLIC:

Note: The Illinois Notary Public Act has been adopted, effective July 1, 1986.

Qualification.

Secretary of State appoints and commissions all notaries. (5 ILCS 312/2-101). Notary must be at least 18 years old, citizen of U.S. or alien lawfully admitted for permanent residence in U.S., resident in Illinois for at least 30 days preceding notary application or is resident of state bordering Illinois and has worked or maintained business in Illinois for 30 days preceding application, able to read and write English, never convicted of felony, and must not have had commission as notary, if any, revoked within past ten years. (5 ILCS 312/2-102). Notaries must post bond with surety of $5,000 (5 ILCS 312/2-105) and take oath prescribed by statute (5 ILCS

312/2-104). Fee for appointment and commission is $10. (5 ILCS 312/2-103). Recording fee is $5 if done in person or $10 if done by mail. (5 ILCS 312/2-106).

Seal.

Notaries must provide themselves with official rubber stamp seal conforming to specified design and containing specified information. (5 ILCS 312/3-101). Seal must be used to authenticate their official acts. (5 ILCS 312/3-102).

Powers and Duties.

Notaries public may do anything authorized by law, including taking acknowledgment, administering oath or affirmation, taking verification upon oath or affirmation, and witnessing or attesting signature. (5 ILCS 312/6-101). Notary may not acknowledge any instrument in which notary's name appears as party to transaction. (5 ILCS 312/6-104).

Civil and criminal penalties imposed for violation of notarial responsibilities. These can extend to employers if notary was acting within course or scope of employment, with employer's consent. (5 ILCS 312/7-101 to 7-109).

Territorial Extent of Powers.

Notaries public may act anywhere in state so long as they reside in county of appointment. (5 ILCS 312/3-105).

Expiration of Commission.

Term of office is four years. (5 ILCS 312/2-101). No statutory duty to state date of expiration of commission in connection with official signature.

Fees.

Maximum fee for any notarial act is $1 with certain exceptions where notary filling out immigration forms. (5 ILCS 312/3-104).

Acknowledgment by Corporation Employee.

No specific provision.

Authentication.

See topic 10.01 Acknowledgments.

10.04 RECORDS:

Recorder is elected in each county having population of 60,000 or more; in counties having less population county clerk is recorder. (55 ILCS 5/3-5001).

Recordable Instruments.

Deeds, mortgages and other instruments relating to real estate must be recorded in county in which real estate is situated and take effect as to creditors and subsequent purchasers without notice from time of filing same for record, but otherwise are not required to be filed for record within any certain time. (765 ILCS 5/28, 5/30).

For list of Counties and County Seats see first page for this state in Volume containing Practice Profiles Section.

No deed, mortgage assignment of mortgage or other instrument relating to or affecting title to real estate may prohibit recording of instrument and any such provision in instrument signed after July 19, 1995 is void and of no force.

Effective Jan. 1, 1968, all contracts for sale of dwelling structure may be recorded in same manner as deed or other instrument relating to real estate. Any provision in contract for sale of dwelling structure which forbids contract buyer to record contract or provides that recording does not constitute notice or provides for any penalty for recording is void. (765 ILCS 70/2). Possession of real property is notice of unrecorded deed. (118 Ill. 619, 8 N.E. 808). Tax deeds must be recorded within one year after time of redemption expires. (35 ILCS 200/22-85). County board of counties having population of 250,000 or more may require recording of diagrams indicating location and size of drain tiles within 30 days after installation. (70 ILCS 605/2-13).

Requisites for Recording.

County recorder may require that prior to recording any conveyance containing metes and bounds description for unsubdivided land, affidavit be attached as to facts which exempt conveyance from provisions of Plat Act. (765 ILCS 205/5a). Plat Act requires that whenever owner of land subdivides it into two or more parts, any of which is less than five acres, he must first have survey and plat (no smaller than 8 1/2" by 14" and no larger than 30" by 36") made by Registered Land Surveyor, signed and approved by specified parties, and recorded. (765 ILCS 205/1 to 205/2). Act contains following specific exemptions from its application: (1) Division or subdivision of land into parcels or tracts of five acres or more in size which does not involve any new streets or easements of access; (2) division of lots on blocks of less than one acre in any recorded subdivision which does not involve any new streets or easements of access; (3) sale or exchange of parcels of land between owners of adjoining and contiguous land; (4) conveyance of parcels of land of interests therein for use as right of way for railroads or other public utility facilities and other pipelines which does not involve any new streets or easements of access; (5) conveyance of land owned by railroad or other public utility which does not involve any new streets or easements of access; (6) conveyance of land for highway or other public purposes or grants or conveyances relating to dedication of land for public use or instruments relating to vacation of land impressed with public use; (7) conveyances made to correct descriptions in prior conveyances; (8) sale or exchange of parcels or tracts of land following division into no more than two parts of particular parcel or tract of land existing on July 17, 1959 and not involving any new streets or easements of access; (9) sale of single lot of less than five acres from larger tract when survey is made by registered surveyor; (10) preparation of a plat for wind energy devices; this exemption does not apply to sale of any subsequent lots from same larger tract of land, as determined by dimensions and configuration of larger tract on Oct. 1, 1973, and does not invalidate any local requirements applicable to subdivision of land. (765 ILCS 205/1[b]). If plat made of parcel otherwise exempt, such plat must be recorded. (765 ILCS 205/1[c]).

No instrument affecting title to real estate can be recorded without name and address of preparer on face thereof. Failure to comply does not impair validity and effect of recorded instrument. (55 ILCS 5/3-5022). Several counties, including Cook County, require instrument to indicate permanent tax identification number of parcel. Recorder cannot record plat unless plat states current mailing address of person submitting plat for recording. (765 ILCS 205/2).

Recording Fees.

For recording deeds or other instruments: $12 for first four pages, $1 for each additional page plus $1 for each additional document number therein noted; minimum fee $12. If premises affected by instrument to be recorded is referred to by document number and not legal description, additional $1 for each document number noted. For recording maps or plats of additions or subdivision approved by county or municipality or plats of condominiums, $50 for first page, plus $1 for each additional page except, if single page, 8½ x 14 plat of survey in which there are no more than two lots or parcels, $12. Maps or plats must be accompanied by such number of exact, true, legible copies as recorder deems necessary. For certified copies, same fee as for recording except $10 fee maximum for map or plat of addition, subdivision or other. After Jan. 1, 1995, recorder charges additional fee equal to fee otherwise charged for documents that do not conform to certain standards of page size (8.5 by 11 inches); except graphic displays accompanying document up to 11 inches x 17 inches recorded without additional fee; legibly printed in black ink by hand, type or computer; signatures and dates may be in contrasting colors if reproducible; white paper of at least 20 lb. and ½ inch margin on top, bottom and sides; blank space of at least 3 in. by 5 in. in upper right corner of first page; no attachment stapled or affixed to any page. Unless additional fee is paid, recorder will not record such nonconforming document. No filing fee charged for informational copies of financing statements pursuant to §9-403 of UCC. Recorder collects $10 Rental Housing Support Program State surcharge for recordation of any real estate-related document. (55 ILCS 5/3-5018).

In third class counties (population exceeding 1,000,000) for recording deeds or other instruments: requirements as to page size, paper, printing etc. are same as for counties that are not third class counties except: $20 for first two pages, $2 for each additional page, any page over 8.5 by 11 inches equals two pages; minimum fee $20. If referred to by document number and not legal description, additional $4 for each document number noted. If instrument describes more than one tract or parcel and such are in separate subdivision, addition, or quarter-section, $4 for each subdivision or addition referred to. For recording maps or plats of additions or subdivisions, $100 plus $2 for each tract, parcel or lot therein. Filing release of chattel mortgage or trust deed, $10. For certified copies, same fee as for recording except $200 fee maximum for map or plat of addition, subdivision or other. For non-certified copies of records, amount not to exceed one-half amount for certified copies. Recorder collects $10 Rental Housing Support Program State surcharge for recordation of any real estate-related document. (55 ILCS 5/4-12002).

For processing sworn statement required for filing deed or assignment of beneficial interest in land trust, $2. Recorder charges additional fee equal to fee otherwise provided by law for documents that do not conform to paper size (8.5 x 11 inches), not permanently bound and not continuous form; black ink, typewritten or computer generated in 10 point type or higher; white paper of at least 20 lb. and ½ inch margin on top, bottom and sides; blank space of at least 3 in. by 5 in. in upper right corner of first page; no attachment stapled or affixed to any page. Unless additional fee is paid, recorder will not record such nonconforming document.

Real Estate Transfer Tax.

See category 21 Property, topic 21.16 Real Property, subheads State Stamp Tax, County Stamp Tax, and Local Stamp Tax.

Filing Under Commercial Code—Place; Fees.

Uniform Commercial Code was adopted by Act approved July 31, 1961 and became effective July 2, 1962. 1972 amendments became effective July 1, 1973. See category 3 Business Regulation and Commerce, topic 3.09 Commercial Code.

Proper place to file to perfect security interest under 1972 revisions of Art. 9 of Commercial Code is as follows: (a) When collateral is consumer goods, in office of Recorder in county of debtor's residence or, if debtor nonresident, in office of Recorder in county where goods are kept; (b) when collateral is timber to be cut, minerals, or like (including oil and gas) or accounts subject to 810 ILCS 5/9-103(5), when collateral is investment property subject to 810 ILCS 5/9-103(6), or when financing statement filed as fixture filing (810 ILCS 5/9-313, 810 ILCS 5/9-502) and collateral is goods which are or are to become fixtures, then in office where mortgage on real estate would be filed or recorded; and (c) in all other cases, in office of Secretary of State, but with respect to filings to perfect security interest in collateral, including fixtures, of transmitting utility, proper place of filing is in office of Secretary of State (810 ILCS 5/9-

501). Neither Secretary of State nor Recorder, nor any of their respective employees or agents, incurs personal liability by reason of any error or omission in performance of duties under Art. 9 of Uniform Commercial Code, except for willful negligence. (55 ILCS 5/3-5045).

See Art. 11 of Uniform Commercial Code for transition provisions on changes in requirements of filings and required refilings and priorities. (810 ILCS 5/11-101 to 5/11-108).

Prior to July 1, 1973 proper place of filing in order to perfect security interest under Art. 9 of Commercial Code was as follows: (a) When collateral is equipment used in farming operations, farm products, or accounts, contract rights or general intangibles arising from or relating to sale of farm products by farmer, or consumer goods, then in office of Recorder in county of debtor's residence; or, if debtor is nonresident, then in office of Recorder in county where goods are kept; in addition, when collateral is crops, in office of Recorder in county where land on which crops are growing or are to be grown is located; (b) when collateral is goods, which at time security interest attaches are or are to become fixtures, then in office where mortgage on real estate concerned would be filed or recorded; and (c) in all other cases, in office of Secretary of State. (810 ILCS 5/9-501).

Fees are: (a) for filing, indexing and stamping furnished copy of original financing statement or continuation statement, $20 if in Secretary of State's prescribed form; (c) for filing, indexing and furnishing filing data for financing statement disclosing assignment, $20 if in Secretary of State's prescribed form, otherwise $8, plus $4 for each additional name or address against which such statement required to be indexed (810 ILCS 5/9-525); (d) for filing, indexing and furnishing filing data for separate statement of assignment, $20 if in Secretary of State's prescribed form, otherwise $8, plus $4 for each additional name or address against which statement of assignment required to be indexed (810 ILCS 5/9-525); (e) for filing of statement releasing all or part of collateral described in filed financing statement, and noting same, $20 if in Secretary of State's prescribed form, otherwise $8, plus $4 for each additional name or address against which statement of release must be indexed (810 ILCS 5/9-525). Certificate obtainable from filing officer showing whether any presently effective financing statement naming particular debtor or statement of assignment exists; fee is $10 per name searched. Copies furnished on request at $1 per page. (810 ILCS 5/9-525).

Federal Tax Lien Notices.

Notices of liens for internal revenue taxes and certificates discharging such liens must be filed in office of Recorder of county within which property subject to lien is situated. (770 ILCS 110/2).

Torrens Repeal Law.

Effective Jan. 1, 1991, all property registered under Torrens Registration System which is transferred will be converted to regular title system. No additional land may be registered under Registered Titles (Torrens) Act. Effective July 1, 1997, all converted to regular title system. Effective July 1, 2037, Torrens Act repealed. Torrens Act had only been adopted in Cook County and only as to certain limited lands. (765 ILCS 35/1 to 35/110.3).

Transfer of Decedent's Title.

If decedent was a resident of Illinois, probate proceedings are sufficient evidence of transfer to his devisees or heirs of his real estate in the county where such proceedings were had. (335 Ill. 184, 166 N.E. 538). With respect to other real estate, a certified transcript of the probate proceedings should be filed with the recorder of deeds or registrar of titles of county in which such real estate is situated. (765 ILCS 5/33).

If decedent was nonresident, probate of his will, whether originally proved in state of his residence (or elsewhere) or not, is necessary to transfer title to his devisees. (755 ILCS 5/7-1 to

5/7-5). Record of foreign will probated in other state but not in Illinois, exemplified according to Act of Congress, may be recorded with recorder of deeds or registrar of titles in county where real estate is located (765 ILCS 5/33); but such recording only provides notice of existence of will. (328 Ill. 431, 159 N.E. 780). If probate of will already proved in another state is had in one county in Illinois, filing of transcript of said probate proceedings in another Illinois county where decedent's real estate is located has effect of transferring title to that real estate. (765 ILCS 5/33). Probate proceedings are also necessary to bar claims of decedent's creditors against real estate except all claims other than expenses of administrator and surviving spouse's or child's award are barred two years after decedent's death whether or not letters of office are issued. (755 ILCS 5/18-12[b]). Transfer of title of real estate of nonresident decedent is accomplished by ancillary probate proceedings in Illinois.

Vital Statistics.

Office of Vital Records of Department of Public Health operates system of maintaining vital records. (410 ILCS 535/2). http://www.idph.state.il.us/health/statshome.htm or http://www.idph.state.il.us/vitalrecords/index.htm. State Registrar of Vital Records supervises such office and establishes registration districts throughout State. (410 ILCS 535/5 to 535/6).

Births and Deaths.

Births and deaths must be registered within seven days with local registrar of district in which birth or death occurs. (410 ILCS 535/12, 535/18). Electronic reporting system for death registrations permitted. (410 ILCS 535/18.5). Local Registrar transmits monthly copy of registration to State Registrar and to County Clerk of his county. (410 ILCS 535/8). State Registrar, local registrars and county clerks are official custodians of birth and death records. (410 ILCS 535/23). Upon request to State Registrar, and payment of $10 search fee, certification of birth and fetal death records will be furnished if available and if other statutory requisites are satisfied. Certified copies require additional $5 fee for first copy and $2 for each additional copy plus $2 for certified copy of death or fetal death certificate. (410 ILCS 535/25). Birth and death records from 1916 to present available by request to State Registrar, Division of Vital Records, 605 W. Jefferson, Springfield, Illinois 62702-5097. http://www.vitalrec.com/il.html. In case of resident of Chicago deceased less than three months from date of request, request for death certificate must be directed to Chicago Board of Health, Daley Center, Chicago, Illinois 60602 which also has record of all deaths occurring in Chicago from 1947 to present date. After three month period request may also be made to County Clerk of Cook County, Bureau of Vital Statistics, 130 N. Wells St., Chicago, Illinois 60606 which has record of all deaths occurring in Cook County from 1871 to present date.

Establishing Birth Records.

Delayed registration of birth will be made upon submission of satisfactory documentary proof and payment of $15 fee. (410 ILCS 535/14).

Marriages, Divorces and Annulments.

System of central registration of marriages, divorces or annulments occurring after Jan. 1, 1962 is maintained by Department of Public Health. (410 ILCS 530/1 et seq.). Forms relating to divorce must, among other things, show age of individuals at time of marriage and at time of divorce. (410 ILCS 530/1). Department may reproduce on microfilm records subject to Act. Such microfilm deemed original record for all purposes including as evidence in all courts and administrative agencies. (410 ILCS 530/2). Requests for copies of records of marriages, divorces or annulments occurring after Jan. 1, 1962 may be made to Department of Public Health in Springfield, Illinois, by parties to marriage, their children or their parents. Fee of $5 should accompany request. If record is found, Department will verify fact of marriage, divorce or annulment in writing and notify applicant of place where original record is maintained. (Clerk of county in which marriage, divorce or annulment occurred.) Certified copies may be obtained only from such local office, except upon court order or request of court clerk. (410 ILCS 530/3).

Records of marriages, divorces and annulments occurring prior to Jan. 1, 1962 are maintained by clerk of county in which such marriages, divorces or annulments occurred. Copies of such records should be requested from such county clerks.

Private Business Records.

Uniform Preservation of Private Business Records Act has been adopted. (805 ILCS 410/1 to 410/6). Records required by law to be preserved may be destroyed after three years unless express contrary provision. (805 ILCS 410/2). Durable reproductions of original business records constitute compliance if made in the regular course of business and if certain conditions are met. (805 ILCS 410/3). Reproductions are admissible in evidence when satisfactorily identified if original would be admissible. (805 ILCS 410/3[b]).

State Records.

Art. 5, §19 of Ill. Constitution requires all officers of executive branch to keep accounts, to make such reports as may be required by law and to provide Governor with information relating to their offices as Governor may require. All records created or received by or under authority of or coming into custody, central or possession of public officials of State are property of State. Records may not be mutilated, destroyed, transferred, removed, or otherwise damaged or disposed of except as provided by law. (5 ILCS 160/3[a]).

Art. 8, §1(c) of Ill. Constitution provides that reports and records of obligation, receipt and use of public funds of State, units of local government and school districts are available for public inspection according to law. There is also statutory provision to this effect. (5 ILCS 160/3).

Public has access to these public records for purpose of copying. (5 ILCS 160/4).

10.05 SEALS:

Use of private seals on written contracts, deeds, mortgages, or any other written instruments heretofore required by law to be sealed is abolished, but addition of a private seal to any such instrument does not in any manner affect its force, validity or character, or in any way change construction thereof. (815 ILCS 650/1).

Use of corporate seals is authorized. (805 ILCS 5/3.10[c]).

Uniform Commercial Code has been adopted, effective July 2, 1962. (c. 810). See category 3 Business Regulation and Commerce, topic 3.09 Commercial Code.

10.06 TORRENS ACT:

See topic 10.04 Records.

10.07 VITAL STATISTICS:

See topic 10.04 Records.

11 EMPLOYMENT

11.01 EMPLOYER AND EMPLOYEE:

See topic 11.02 Labor Relations.

11.02 LABOR RELATIONS:

Statutes cover labor disputes, hiring of strike breakers, length of workweek, child labor, payment of wages, minimum wages and overtime, assignment of wages, workmen's compensation, unemployment compensation, discrimination in employment, employment agencies and regulation and inspection of factories, mills, and workshops with regard to health, safety and comfort of employees. (c. 820).

Hours of Labor.

Eight hour day, except for farm occupations, or where parties agree otherwise. (820 ILCS 145/1, 145/2). Illinois Female Employment Act, setting maximum hours for females employed in mechanical or mercantile establishments or other enumerated occupations held unconstitutional in 1977 and repealed. (317 F.Supp. 1304).

Employer must allow one day of rest in seven, and a 20-minute meal period within five hours after start of 7½ continuous hours of work, with exceptions. (820 ILCS 140/1 to 140/8). Hotel room attendant in county with greater than three million population has two 15 minute paid rest periods and 30 minute meal period in clean and comfortable environment provided by employer. It is unlawful for employer or agent to retaliate against person for exercise of these rights. (820 ILCS 140/3.1). Employer must post schedule of employees for Sun. work and alternative day of rest and keep time book. (820 ILCS 140/4 to 140/5).

Jury Duty.

Employer must allow time off to employee giving reasonable notice unpaid leave for petit or grand jury duty pursuant to summons regardless of employee's shift. (705 ILCS 305/4.1, 705 ILCS 310/10.1).

Child labor laws provide no minor under 16 may be employed in enumerated occupations except for minors 14 and 15 in certain federal programs; but minors between 14 and 16 may work outside school hours except in dangerous or hazardous factory work. (820 ILCS 205/1 to 205/7). Minors age 12 and 13 years may officiate youth sports activities for not-for-profit club, park district or municipal park and recreation department if certain restrictions are met. (820 ILCS 205/2.5). Minors under 12, except members of farmer's family, may not work in agriculture; minors ten or older, however, may work in agriculture outside school hours. (820 ILCS 205/1). Otherwise, law does not apply to agricultural work. Law also does not apply to work around home outside school hours and not in connection with business, or to distribution or sale of newspapers or magazines during school hours; or caddies 13 years old or over. (820 ILCS 205/2). During summer hours minors under 16 in enumerated occupations limited to eight in one day, 48 in one week, six consecutive days in one week; with time of day regulated; may not exceed three in one day when school is in session or total of eight work hours in one day outside and in school with special rules for employees of park district or municipal park and recreation department. (820 ILCS 205/3). Minors under 16 must receive 30-minute meal period in five continuous hours of work. (820 ILCS 205/4). Employer must post abstract of law and hours of work and meals and Department's toll free telephone number conspicuously and keep register of name, age and place of residence of minors (820 ILCS 205/5, 820 ILCS 205/6), and must obtain and keep on file employment certificate for minors under 16 (820 ILCS 205/9, 820 ILCS 205/10). On termination of employment, certificate must be returned to issuing officer. (820 ILCS 205/13). Violations are subject to civil penalties and wilful violations are Class A misdemeanor; each day wilful violation continues and each minor affected, is separate offense. (820 ILCS 205/17, 205/19). Minors under 16 may appear in theatrical productions on authorization of school superintendent, with some limitations. (820 ILCS 205/8[a]). Minors under 16 may appear as model or in movie, radio, or television on authorization of school superintendent, with some limitations. (820 ILCS 205/8[b]). Employment of minors in certain street trades (e.g., shoe shining, advertising, distribution) requires employer to obtain certificate from Department of Labor and issue permit to minor to be carried while working. (820 ILCS 215/1 to 215/10). Violators are subject to criminal penalties. (820 ILCS 215/9). No person under 18 may be employed at manual labor in mines. (225 ILCS

705/9.01).

Wages.

Employer of six or more persons in the manufacture of any article must pay women equally with men for equal work, except due to seniority, skill, training, experience or where otherwise provided by contract with recognized bargaining agent. (820 ILCS 110/1). (See also, catchline General Minimum Wage Law and Overtime, infra.) Every employer, at least semi-monthly, must pay every employee all wages earned during that semi-monthly period, except that period for professional, executive and administrative employees may be monthly. At request of person employed by employment or labor placement agency which ordinarily makes daily wage payments, agency holds daily wages and makes weekly or semiweekly payments. Such agencies must provide written notification to all such employees. (820 ILCS 115/3). Absent contrary collective bargaining agreement, wages must be paid within 13 days after end of semi-monthly pay period, within seven days after end of weekly pay period, within 24 hours after day worked by day laborer, and for professional, executive and administrative employees within 21 days after relevant pay period ends. Employee absent on payday must be paid upon demand at any time within five days of payday or, if that expired, on five days demand. (820 ILCS 115/4). Wages of separated employees must be paid in full at time of separation but in no case later than next scheduled payday. Unless otherwise provided in collective bargaining agreement, employer must pay all unused earned vacation to employee on resignation or termination as final compensation in accordance with contract or employment policy; no forfeiture of earned vacation time. (820 ILCS 115/5). All commissions due at termination of contract with sales representative must be paid within 13 days of termination. Contracts to contrary are void. Treble damages for violation. (820 ILCS 120/1 to 120/3). Deductions by employer from wages prohibited unless required by law, to benefit of employee, in response to valid wage assignment or deduction order, pursuant to employee's voluntary written consent given at time of deduction, or made by certain municipalities or housing authorities. Employer must timely pay undisputed portion. Employee's acceptance does not release disputed amount and employer efforts to obtain such release are void. (820 ILCS 115/9). Contributions to employee benefit, trust or fund treated like wages for purposes of collection. (820 ILCS 115/8). “Wages” defined broadly to include monetary equivalent of earned vacations and holidays. (820 ILCS 115/2). Willful failure to pay “wages” is class C misdemeanor; each day constitutes separate offense. (820 ILCS 115/14). State's Attorney of any county may enforce provisions, and Department of Labor, upon assignment by employee, or employee, may also institute civil suit for wages and costs. (820 ILCS 115/11). Employer must maintain records of employees and wages, furnish employees with itemized statement of deductions and post notices of payday and place for payment. Employer must notify employees, whenever possible in writing and acknowledged by both parties, of rate of pay and time and place of payment and changes therein prior to implementation. (820 ILCS 115/10). Officer or agent of employer knowingly permitting violation of Act deemed employer of employee. (820 ILCS 115/13). Employer or agent who discharges or discriminates against employee for complaint concerning payment of wages or for testifying in wage proceeding is guilty of Class C misdemeanor. (820 ILCS 115/14[c]).

Enumerated employee benefit trusts are exempt from rules against perpetuities or suspension of power of alienation, with exceptions. (760 ILCS 40/1 to 40/3). Employers obligated in writing to make payments to certain employee benefit plans may under certain circumstances be held criminally liable for failure to do so. (820 ILCS 160/1).

Employer operating leased mine, quarry, oil or gas well or leased plant manufacturing certain designated products must file with Circuit Court Clerk surety bond in double semi-monthly or weekly payroll to secure payment of wages, unless employer owns property worth that amount. (820 ILCS 155/1). Where business is suspended by action of creditors, or put in hands of receiver or trustee, wage and pension fund claims have preference. (770 ILCS 85/1). Employee who agreed to permit deductions from wages for payments to certain medical service plans must be permitted to continue such payments to employer for up to six months where wages do not exceed deductions but employee status continues; anyone who violates Medical Contribution Act guilty of petty offense. (820 ILCS 150/1 & 150/2). Employers must pay cost of medical examination or of furnishing records of such examination where required by employer; anyone who violates Medical Examination of Employees Act is guilty of petty offense and may be fined up to $100. (820 ILCS 235/1, 235/4).

General prevailing wage rates, determined in June of each year in accordance with statute, must be paid employees on public works. (820 ILCS 130/2, 130/3, 130/9). Public body awarding contract for public work or otherwise undertaking public works must ascertain general prevailing rate of hourly wages in locality and insert stipulation into contract. (820 ILCS 130/4). Criminal penalties for filing false certified payroll or willful violation of Act. (820 ILCS 130/6). List of noncomplying contractors or subcontractors must be published in Illinois Register; no contract may be awarded to contractor or subcontractor appearing on list until four years have elapsed from date of publication. (820 ILCS 130/11a). Prevailing Wage Act empowers Department of Labor, through Attorney General, to sue for injunctive relief against award of any contract or continuation of work if prevailing wage prerequisites have not been met. Contractor or subcontractor liable for civil damages to employee who is paid less than stipulated rates under contract for public works. Public Works employees paid less than prevailing wage rates may request Department of Labor to take assignment of wage claim in trust and bring legal action to collect claim. (820 ILCS 130/11).

Discharge or discipline or discrimination against employee or representative of employees because employee or representative has filed action under Prevailing Wage Act is prohibited. (820 ILCS 130/11b).

A minimum wage for women and minors in any occupation may be fixed by Department of Labor, after public hearing on report of wage board, in a directory order which, after nine months, may be made mandatory after public hearing. Name of employer violating directory order may be published. Violation of mandatory order subjects employer to Class B misdemeanor each week of continued violation constituting separate offense; discrimination based upon service on wage board or testimony in investigation or proceeding under Wages of Women and Minors Act or failure to keep records is petty offense. Employee receiving less than minimum wage under mandatory order, even under agreement, may recover difference and attorney's fee. Contract as to employment of woman or minor at oppressive or unreasonable wage is void. (820 ILCS 125/1 to 125/17). General minimum wages and overtime rates are now set by statute. (820 ILCS 105/1 to 105/15). See, catchline General Minimum Wage Law and Overtime, infra.

Where collective bargaining agreement sets minimum wages, it is illegal and punishable by fine to require employee to pay back any part of such wages (820 ILCS 165/2); but contributions for hospitalization, union dues and other designated purposes are allowed (820 ILCS 165/3).

In action for wages, attorney's fees may be allowed in favor of plaintiff where demand for sum not exceeding amount recovered was made in writing at least three days prior to suit. (705 ILCS 225/1).

Assignments of wages are regulated. (740 ILCS 170/.01 to 170/11). See also category 8 Debtor and Creditor, topic 8.01 Assignments, subhead Assignment of Wages.

See also category 8 Debtor and Creditor, topic 8.09 Garnishment, subhead Garnishment of Wages. Employer subject to Class “A” misdemeanor for discharging or suspending employee whose wages are garnished for any one indebtedness. (735 ILCS 5/12-818).

See also category 14 Family, topic 14.05 Dissolution of Marriage, subhead Support of

Children.

General Minimum Wage Law and Overtime.

Every employer had to pay wages of not less than $2.30 or, in case of employees under 18 years of age, $1.95 per hour, unless otherwise provided, until Jan. 1, 1984, when minimum wage rose to $2.65 per hour or $2.25 for employees under 18. On Oct. 1, 1984, minimum became $3.00 or $2.55, depending upon age of employee; on July 1, 1985, $3.35 or $2.85 per hour. From Jan. 1 through Dec. 31, 2004, minimum wage was $5.50 per hour for employees over 18; from Jan. 1, 2005 through June 30, 2007, $6.50 per hour. From July 1, 2007 through June 30, 2008, minimum wage is $7.50 per hour for employees over 18. From July 1, 2008 through June 30, 2009, minimum wage will be $7.75 per hour employees over 18; from July 1, 2009 through June 30, 2010, $8.00 per hour; on and after July 1, 2010, $8.25 per hour. (820 ILCS 105/4[a]). No employer can employ any employees for more than 40 hour week unless wage for time over 40 hours is not less than 1½ times regular rate; statute specifies exceptions. (820 ILCS 105/4a). No employer may discriminate on basis of sex or handicap by paying less for same or substantially similar work, except where payment is pursuant to: (a) Seniority system; (2) merit system; (3) quality or quantity of production; (4) factor other than sex or mental or physical handicap. (820 ILCS 105/4[b]). In occupations where gratuities customarily form part of wages, employer may recognize to extent of actual receipt up to 40% of applicable minimum, but employer must provide substantial evidence that exempt amount claimed was received. (820 ILCS 105/4[c]). Camp counselors residing on premises of seasonal camp not subject to adult minimum wage if working 40 hours or more per week and receiving weekly salary equal to adult minimum wage for 40 hour week. Employers of camp counselors entitled to 25% of minimum wage rate for meals and lodging allowance. (820 ILCS 105/4[d]). Camp counselors at day camps not subject to adult minimum wage if they are paid a stipend on either a onetime or periodic basis and, if the camp counselor is a minor, the minor's parent, guardian or other custodian has consented in writing to the terms of payment before the commencement of employment. (820 ILCS 105/4(e)).Exemptions may be promulgated by Department of Labor for learners, those of impaired capacity, and handicapped. (820 ILCS 105/5, 105/6, 105/10). Pay records must be kept for three years. (820 ILCS 105/8). Act and regulations must be posted (820 ILCS 105/9), and actions for wages due, with attorneys' fees and costs, may be brought by employee within three years of date of underpayment. Employer is liable to employee for punitive damages equal to 2% of amount of underpayment per month that amount remains unpaid. (820 ILCS 105/12[a]). Director of Labor may bring legal action for unpaid wages within five years from date of failure and punitive damages, and employer must pay costs and 20% of amount of underpayment. (820 ILCS 105/12[b]). Employer paying or agreeing to pay wages at rate less than provided for by law subject to Class B misdemeanor, and each week in which on one day such minimum wage provided for by law was not paid is separate offense. (820 ILCS 105/11). Employees excludes certain categories of farm laborers, domestics, outside salesmen, members of religious orders and certain students covered by Fair Labor Standards Act employed by accredited Illinois college or university. (820 ILCS 105/3). Commissioned salesman covered by §7(i) of Fair Labor Standards Act, salesmen or mechanics primarily engaged in selling, servicing automobiles, trucks or farm implements employed by non-manufacturers if sales are to ultimate purchaser, and salesmen of trailers, boats or aircraft employed by non-manufacturers if sales are to ultimate purchaser, agricultural employees, governmental employees, bona fide executive, administrative and professional employees, including any radio or television announcer, news editor or chief engineer, certain child care employees and employees in worktime exchange agreements and those employed as crew member of any uninspected towing vessel defined by §2101(40) of Title 46 of USC operating in navigable waters in or along boundaries of State of Illinois are excluded from overtime requirements. (820 ILCS 105/4a[2]). Act does not amend more favorable standards under other acts. (820 ILCS 105/13).

Leaves of Absence

School Visitation Rights Act grants parents certain leave to attend school conferences or activities (820 ILCS 147/1 et seq.); Civil Air Patrol Leave Act requires employers to grant leave to employees performing a civil air patrol mission (820 ILCS 148/10 et seq.); Employee Blood Donation Leave Act provides for time off to donate blood (820 ILCS 149/1 et seq.); Family Military Leave Act provides spouses or parents of military personnel deploying for more than 30 days (820 ILCS 151/1 et seq.).

Labor Unions.

Contracts whereby either party promises not to join or remain a member of a labor or employers' organization, or to terminate employment relation in case he joins or remains a member of such organization, are wholly void. (820 ILCS 15/1). Illinois has no “right to work” law. Right to work has, however, been held to be property right. (52 Ill. 2d 516, 288 N.E.2d 97).

The president or executive officer of every labor organization must report to Department of Labor concerning any strike or lockout, actual or threatened, involving members of his organization. (820 ILCS 35/6a).

Discrimination.

Human Rights Act (775 ILCS 5/1-101 et seq.).—“Employer” includes all persons employing 15 or more persons within state during 20 or more calendar weeks within calendar year of or preceding alleged violation. Additionally, party to public contract and joint apprenticeship or training committee included regardless of number of employees, and all persons with one or more employees are covered regarding alleged handicap and sexual harassment discrimination. (775 ILCS 5/2-101[B][1]). Excluded is any religious corporation, association, educational institution, society, and certain nonprofit nursing institutions regarding employment of individuals of particular religion to perform work connected with carrying on by entity of its activities. (775 ILCS 5/2-101[B][2]). State, its subdivisions and other governmental units included as “employer” regardless of number of employees (775 ILCS 5/2-101[B][1][c]), but excluded from “employee” are elected officials, members of their immediate personal staffs, and principal administrative officers, as well as domestics, and certain clients in certified vocational rehabilitation facilities, and persons employed by others who are not “employers” within Act's definition. (775 ILCS 5/2-101[A]).

Unlawful discrimination defined as discrimination against person because of his or her race, color, religion, national origin, ancestry, age, sex, marital status, order of protection status, disability, military status, sexual orientation, or unfavorable discharge from military service. (775 ILCS 5/1-103[Q]). It is civil rights violation for employer to refuse to hire, to segregate, or to act with respect to recruitment, hiring, promotion, renewal of employment, selection for training or apprenticeship, discharge, discipline, tenure or terms, privileges or conditions of employment on basis of unlawful discrimination or citizenship status. (775 ILCS 5/2-102[A]). It is also violation for employer to impose restriction with effect of prohibiting language from being spoken by employee in communications unrelated to employee's duties (775 ILCS 5/2-102[A-5]); for employment agency to fail or refuse to classify properly, accept applications and register for referrals, refer for employment or apprenticeship on basis of unlawful discrimination or citizenship status or to accept any job order, requisition or request for referral conditioned upon unlawful discrimination or discrimination on basis of citizenship status (775 ILCS 5/2-102[B]); for labor organization to limit, segregate or classify its membership, or to limit employment opportunities, selection and training for apprenticeship in any trade or craft, or otherwise to take, or fail to take, any action that affects adversely any person's status as employee, apprentice, or applicant or such person's wages, tenure, hours of employment or apprenticeship conditions on basis of unlawful discrimination or citizenship status (775 ILCS 5/2-102[C]); for any employer, employee, employer's agent, employment agency or labor organization to engage in sexual harassment (775 ILCS 5/2-102[D]); for public employer to refuse to permit public employee who takes time off from work in order to practice his or her religious beliefs to engage in work, during hours other than regular working hours, consistent with employer's operational needs and in order to compensate for work time lost for such religious reasons (775 ILCS 5/2-102[E]); or for any employer, employment agency or labor organization to discriminate against person on basis of age in selection, referral for or conduct of apprenticeship or training programs (775 ILCS 5/2-102[F]). Also, civil rights violation for employer to request for purposes of satisfying requirements of 8 U.S.C.S. §1324a(b) more or different documents than are required or to refuse to honor tendered documents that on their face reasonably appear to be genuine. (775 ILCS 5/2-102[G]). After Jan. 1, 2008, immigration-related practices provision further makes it violation for employer participating in Basic Pilot Program under 8 U.S.C.S. 1324a to refuse to hire, to segregate, or to act with respect to recruitment, hiring, promotion, renewal of employment, selection for training or apprenticeship, discharge, discipline, tenure or terms, privileges or conditions of employment without following applicable procedures. (775 ILCS 5/2-102[G][2]). Effective Jan. 1, 2008, it will be violation for public employer to refuse to temporarily transfer pregnant female peace officer or fire fighter to less strenuous or hazardous position for duration of her pregnancy if she so requests, with advice of her physician, where transfer can be reasonably accommodated. (775 ILCS 5/2-102[H]). It is violation for employer, employment agency, or labor organization to inquire regarding arrest record that has been ordered expunged, sealed or impounded or to use such information as basis for employment decision, but state agency, unit of local government or school district, or private organization not prohibited from requesting or utilizing sealed felony conviction information under laws or regulations that require criminal background checks in evaluating qualifications and character of employee or prospective employee. (775 ILCS 5/2-103[A]). Civil rights violation occurs when any higher education representative commits or engages in sexual harassment in higher education or any institution of higher education fails to take appropriate remedial or disciplinary action with regard to higher education representative in its employ whom it knows has committed or engaged in sexual harassment in higher education. (775 ILCS 5/5A-102). Other civil rights violations are retaliation against person because he or she has opposed what he or she reasonably and in good faith believes to be unlawful discrimination, sexual harassment in employment or sexual harassment in higher education, discrimination based on citizenship status in employment, or because he or she has made charge, filed complaint, testified, assisted, or participated in related investigation, proceeding, or hearing; to aid, abet, compel or coerce person to commit any violation of Act; or to wilfully interfere with performance of duty or exercise of power by Human Rights Commission. (775 ILCS 5/6-101). Act exempts action based on certain professionally developed ability tests; action based on certain merit and retirement systems; action based on bona fide occupational qualification; preferential treatment of veterans and relatives as required by law; and use of age in certain apprenticeship programs, in effecting compulsory retirement of certain executives at age 65 and certain firefighters/paramedics and law enforcement officers at age set by state or local law; and making legitimate distinctions based on citizenship status if specifically authorized or required by law. (775 ILCS 5/2-104).

Act enforced by Department of Human Rights and Human Rights Commission. (775 ILCS 5/7-101). Sworn charge to be filed with or issued by Department within 180 days after alleged violation. (775 ILCS 5/7A-102[A][1]). Department must serve copy of charge on respondent within ten days (non-jurisdictional) of receipt and investigate (775 ILCS 5/7A-102[B], [C]), and may hold fact-finding conference, on reasonable notice, within 365 days of filing of charge unless time is waived (775 ILCS 5/7A-102[C][4]). Absent finding of substantial evidence, charge is dismissed subject to complainant's right to request review by Chief Legal Counsel of Department within 30 days from receipt of dismissal notice. (775 ILCS 5/7A-102[D][2]). Effective Jan. 1, 2008, if Director determines that there is no substantial evidence, charge must be dismissed and complainant given notice of right to seek review of dismissal order before Human Rights Commission or commence civil action in appropriate circuit court. Request for review must be filed with Commission within 30 days after receipt of notice. If complainant chooses to request review by Commission, he or she may not later commence civil action in circuit court; if complainant chooses to commence civil action, he or she must do so within 90 days after receipt of notice. (775 ILCS 5/7A-102[D][3]).

Determination that there is substantial evidence requires Director to notify parties of decision and of complainant's right to either commence civil action in circuit court or request that Department file complaint with Commission. (775 ILCS 5/7A-102[D][4]). Attorney for Department also designated to employ conference and conciliation to eliminate effect of alleged violation and to prevent repetition. (775 ILCS 5/7A-102[E][1]).

Parties must be given ten days written notice of formal conference, if called, to be within 35 miles of place of alleged violation. (775 ILCS 5/7A-102[E]). Department's efforts to conciliate matter specifically do not stay or extend time for filing complaint with Commission or circuit court. (775 ILCS 5/7A-102[E][5]). Department and Commission have authority to approve settlement. Department may dismiss charge if respondent has eliminated effects of violation and has taken steps to prevent its repetition or if complainant refuses to accept terms of settlement which Department deems sufficient, subject to complainant's right to request review of dismissal. (775 ILCS 5/7A-103, 775 ILCS 5/8-105). Review of dismissal order by Commission must be requested by complainant within 30 days from receipt of notice. (775 ILCS 5/7A-103[D]). Department must prepare and file complaint with Commission when conciliation fails to settle or adjust charge, or upon request of complainant. (775 ILCS 5/7A-102[F][1]). Absent settlement or dismissal, Department must file sworn complaint with Commission or order that no complaint issue, within 365 days of filing of charge or written extension agreed to by all parties; 365-day time limit applies to issuance of report by Department after effective date. (775 ILCS 5/7A-102[G][1]). Complainant has 90 days to either file own complaint with Commission or commence civil action if Department has not issued its report within 365 days after charge was filed. (775 ILCS 5/7A-102[G][2]). If aggrieved party files civil action or complaint with Commission or time for filing complaint expires, Department must immediately cease its investigation and dismiss the charge; failure to immediately cease investigation and dismiss charge constitutes grounds for entry of permanent injunction by circuit court. (775 ILCS 5/7A-102[G][3]). Any time after charge is filed, Department or complainant may petition appropriate court for temporary relief. (775 ILCS 5/7A-104[A][1]). Petition must be filed in circuit court for county in which respondent resides or transacts business or in which alleged violation took place. (775 ILCS 5/7A-104[A][2]).

Separate provisions applicable to civil rights violations in real estate transactions. (775 ILCS 5/7B-101 et seq.).

Within five days after Department or aggrieved party files complaint, Commission must serve it upon respondent with notice of hearing before Commission hearing officer to be held within 100 miles of alleged violation at stated time not less than 30 nor more than 90 days after service of complaint. (775 ILCS 5/8A-102[A], [B]). Respondent must file sworn answer within 30 days after service of complaint or within 15 days of denial of motion to dismiss. (775 ILCS 5/8A-102[D][1], [2]). Hearing officer may, for good cause shown, extend date of hearing or grant further time for filing of answer. Complainant and respondent have right of cross-examination, transcript must be made of hearing, and rules of evidence applicable in state courts apply. (775 ILCS 5/8A-102[G]). Attendance of parties or their employees at hearing may be compelled by serving notice. (775 ILCS 5/8A-102[H]).

Hearing officer's determination sustaining complaint must be based upon preponderance of evidence. (775 ILCS 5/8A-102[I][1]). He must make findings of fact and, if complaint not sustained, issue recommended order dismissing complaint, which may include award of reasonable attorneys fees in favor of respondent if complaint was frivolous, unreasonable, or groundless or complainant continued to litigate after it became clearly so (775 ILCS 5/8A-102[I][3], [5]), or, if finding against respondent, issue recommended order for appropriate relief, which may include cease and desist order, payment of actual damages, hiring, reinstatement, back pay, interest (from date of violation), restoration of fringe benefits, award of reasonable attorney and expert witness fees, compliance reports and posting of notices (775 ILCS 5/8A-102[I][2], 775 ILCS 5/8A-104), and, regarding party to public contract, termination of contract, (three year maximum) debarment, and penalty of sum no greater than profit acquired as direct result of violation (775 ILCS 5/8-109).

Parties may file written exceptions with argument within 30 days of receipt of service of recommended order. (775 ILCS 5/8A-103[A]). Non-excepting party may file response within 21 days of receipt of service of exceptions (775 ILCS 5/8A-103[B]), and either party may request oral argument (775 ILCS 5/8A-103[C]). Commission may, on own motion or written request, remand case to hearing officer for rehearing or for taking additional evidence (775 ILCS 5/8A-103[D]), and may adopt, modify or reverse in whole or in part hearing officer's findings and recommendations, but must adopt hearing officer's findings of fact unless contrary to manifest weight of evidence (775 ILCS 5/8A-103[E]). Commission may modify or set aside in whole or in part any finding or order any time prior to final order by reviewing court. (775 ILCS 5/8A-103[G]). Decisions of Commission or panels thereof are published within 120 days of completion of service of written decision upon parties. (775 ILCS 5/8-110). Subpoenas available to Department and party to aid investigation and hearing, respectively. (775 ILCS 5/8-104). Commission order is judicially reviewable in appellate court if petition filed within 35 days after service of Commission's decision on affected party, but finding of fact at administrative level must be sustained unless contrary to manifest weight of evidence. (775 ILCS 5/8-111[B]). Commission must enforce its order by proceeding in circuit court if violation of order and effects thereof not promptly corrected; aggrieved party may also file complaint for enforcement of valid order. (775 ILCS 5/8-111[C]).

All parties to public contract must refrain from violations, undertake affirmative action to assure equal employment opportunity, eliminate effects of past discrimination, comply with Department regulations, provide Department with certain information and have written sexual harassment policies containing at least certain prescribed information. (775 ILCS 5/2-105[A]).

Human Rights Act repeals, with savings provisions, following statutes, among others: (1) certain provisions of Criminal Code of 1961; (2) Equal Opportunities for the Handicapped Act; (3) Fair Employment Practices Act; and (4) age discrimination prohibitions.

Right to Privacy in the Workplace Act prohibits employer from refusing to hire, discharge or otherwise disadvantage individual with respect to terms or conditions of employment because individual uses lawful products off premises of employer during nonworking hours. (820 ILCS 55/1).

Not violation of Act for employer to have health, disability or life insurance policy that makes distinctions among employees with regard to coverage based upon employees' use of lawful products if certain requirements are met. (820 ILCS 55/5). Act administered, enforced by Director of Labor. (820 ILCS 55/15).

Constitution.

In enacting Human Rights Act, legislature did not intend to preserve private cause of action under Const. Art. I, §17. (129 Ill. App. 3d 537, 472 N.E.2d 596). Act is exclusive remedy for employment discrimination claims. (159 Ill. 2d 249, 636 N.E.2d 551).

Employee Patent Act prohibits employment agreements from requiring employee to assign rights to employer for invention when no equipment, supplies, facilities, or trade secret information of employer was used and invention developed on employee's own time unless it relates to business of employer, anticipated research and development, or results from any work performed for employer. (765 ILCS 1060/2[1]). Employer to provide written notification to employee of requirements of Act if employment agreement entered into after Jan. 1, 1984 contains provision requiring assignment of employee's rights in any invention. (765 ILCS 1060/2[3]).

Access to personnel records granted to current employees, those on layoff or leave and employees terminated within preceding year (820 ILCS 40/1); right to inspect and obtain copies of documents used by employer to determine qualifications for employment, promotion, transfer, compensation, discharge or discipline, with certain exceptions (820 ILCS 40/2, 40/10). Employer to grant two inspection requests per year within seven working days of request with seven additional days if cannot reasonably meet deadline. Employer may require written requests on its own forms. (820 ILCS 40/2). Employees may submit written position statement on documents contained in file. (820 ILCS 40/6). Employer must serve written notice to employee before divulging disciplinary reports to third parties; disciplinary records more than four years old must be deleted unless disclosure required pursuant to legal proceeding. (820 ILCS 40/7 & 40/8). Employees may file complaint with Department of Labor, which can subpoena employer's files and sue in circuit court. Employee can also file suit if Department does not. Willful violation or retaliation against employee is petty offense. (820 ILCS 40/12).

Labor Disputes.

Controversies between employer employing not less than twenty-five persons and employees not involving questions which may be the subject of civil actions may be submitted to Department of Labor for investigation. (820 ILCS 35/2). Statute provides procedure to be followed. (820 ILCS 35/3). Decision is binding for six months, unless terminated by either party on 60 days notice to other party. (820 ILCS 35/5). Failure to abide by decision subjects party to court proceedings for contempt. (820 ILCS 35/5a). Uniform Arbitration Act, modified in certain respects is in effect. (710 ILCS 5/1 to 5/23). Written agreements to arbitrate enforceable. (710 ILCS 5/1). Arbitration may be compelled (710 ILCS 5/2[a]) or stayed (710 ILCS 5/2[b]), confirmed (710 ILCS 5/11), vacated (710 ILCS 5/12) or modified (710 ILCS 5/13). Any controversy between employer and its employees or bargaining representative may, if all parties request, be submitted to Department of Labor, which provides arbitration services in accordance with Uniform Arbitration Act. (710 ILCS 10/1 to 10/3). See also category 9 Dispute Resolution, topic 9.02 Arbitration and Award, subhead Labor Controversies.

It is a punishable offense for employer to advertise for employees during a strike unless advertisement states that a strike is in progress. (820 ILCS 25/1). This section of statute held preempted by federal labor law. (62 Ill.2d 549, 344 N.E.2d 1). Except for purposes of maintenance and protection, employment of professional strikebreakers prohibited. (820 ILCS 30/1 to 30/4).

As to duties of Department of Labor in case of strike or threatened strike, see 820 ILCS 35/6 to 35/6b.

Injunction may not be granted against peaceful picketing by striking employees. (820 ILCS 5/1).

Public Employees.

Collective bargaining procedures established for public employees, except elected officials, managers, employees of school districts, higher education institutions (not including state university firefighters), and legislative branch of State government. (5 ILCS 315/6[a], 315/3[n]). Given right to organize, bargain and strike, except security employees, State police, State firefighters, and State legislative branch employees may not strike. (5 ILCS 315/6[a], 315/17[a]). Separate statute grants collective bargaining rights to State educational employees. (115 ILCS 5/3).

Worker's Compensation Act is compulsory as to State and its political subdivisions and as to following extra-hazardous businesses: erection, maintaining, removing, remodeling, altering or demolishing of any structure; construction, excavating or electrical work; carriage by land, water or aerial service; warehouse operations; mining or quarrying; any enterprise in which explosive materials are manufactured, handled or used in dangerous quantities; any enterprise where molten metal or explosive or injurious gases, dusts, or vapors, or inflammable vapors, dusts or fluids, or corrosive acids or atomic radiation are manufactured, used, generated, stored or conveyed; any enterprise in which sharp edged cutting tools are used; any enterprise in which statutory or municipal ordinance regulations are imposed on use of machinery; any enterprise in connection with laying out or improvement of subdivisions of tracts of land; any enterprise for treatment of cross-ties, timber or other wood with creosote or other preservatives; establishments open to general public, where alcoholic beverages are sold to general public for consumption on premises; any public beauty shop wherein chemicals, solutions, or heated instruments or objects are used or applied in dressing, treatment or waving of human hair; any enterprise serving food to public for consumption on premises, where any employee uses cutting instruments or where any employee is in hazard of being scalded or burned; businesses using electric, gasoline or power driven equipment; businesses in which goods, merchandise or wares are produced; businesses with annual payroll of $1,000 or more in which goods, merchandise or wares are sold or services are rendered to public at large; on and after July 1, 1980, households where domestics are employed 40 or more hours per week in 13 or more weeks per calendar year; and certain agricultural enterprises. (820 ILCS 305/3). All other employers including sole proprietors, members of limited liability company, and partners, may elect to submit voluntarily to Act. (820 ILCS 305/1 to 305/2).

Employers engaged in erection, maintaining, removing, altering or demolishing any structure or construction, excavating, or electrical work are liable to pay compensation to employees of uninsured contractors or subcontractors they engage. (820 ILCS 305/1[a][3]). Liability of borrowing and loaning employers is joint and several. (820 ILCS 305/1[a][4]). Act applies to employees if contract of hire made within Illinois, injury occurs in Illinois, or employment is principally localized in State. (820 ILCS 305/1[b][2]). Also applies to aliens and minors. Excluded from coverage are real estate brokers and salespersons paid by commission only. (820 ILCS 305/1[b][3]).

Employer who has submitted to Act voluntarily may withdraw by giving written notice at least 60 days prior to end of calendar year. Employee of voluntarily submitting employer may reject coverage by written notice within 30 days of hiring, or of employer's election to submit, and can withdraw from coverage by written notice at least ten days prior to end of calendar year. (820 ILCS 305/2). Act provides exclusive remedy for employee and his representatives against covered employer or employer's insurer or broker or service organization hired to provide safety services, except that an illegally employed minor or his representative has right to reject his rights under Act and to pursue his or her common law remedies by filing rejection within later of six months after injury, death, or appointment of legal representative. (820 ILCS 305/5). 1995 amendment by P.A. 89–7 declared unconstitutional. (179 Ill. 2d 367, 689 N.E.2d 1057). Also, fact that employee's action for damages against his employer is barred by Act does not preclude manufacturer, which is sued by employee on strict product liability theory, from filing third-party action against employer for indemnification or for contribution. (70 Ill. 2d 41, 374 N.E.2d 455). Employer must self-insure, with or without security, indemnity or bond, or acquire insurance. (820 ILCS 305/4). Self-insured employers must reapply to Illinois Workers' Compensation Commission ["Commission"] for approval annually. (820 ILCS 305/4[a]). Self-insurers advisory board provides continuation of benefits due to inability of insolvent self-insured employer to meet obligations. (820 ILCS 305/4a-1 to 4a-9). Insurer must notify employer of compensable claims each month, and employer may challenge certain payments in proceeding before Commission. (820 ILCS 305/19[o]). Two or more employers with similar risks can pool their liabilities to qualify as group self-insurers. (820 ILCS 305/4[a][1]). Agreements requiring employee to pay for covered insurance are null and void; withholding wages to pay for insurance is Class B misdemeanor. (820 ILCS 305/4[g]). Discrimination because of exercise of rights or remedies under Act is unlawful. (820 ILCS 305/4[h]). Civil action for compensatory and punitive damages allowed for discharge in retaliation for asserting compensation claim. (74 Ill.2d 172, 384 N.E.2d 353).

Employee may bring action against third parties responsible for injury or death despite acceptance of benefits from employer under Act, but employer is subrogated to employee's claim to the extent of his payments to employee, and may institute action against third party if employee has failed to do so prior to three months before the statute of limitations would run against employee. (820 ILCS 305/5). Employer is bound by statute of limitations applicable to employee in action against third party for recovery of payments under the Act. (25 Ill. 2d 241, 184 N.E.2d 882). Injuries resulting from participation in recreational programs are not compensable unless employer orders employee to participate, and injuries occurring while participating in drug or alcohol rehabilitation program are not compensable. Injury or disease or death of employee arising from administration of vaccine to prepare for or as response to threatened bioterrorist incident to employee as part of voluntary innoculation program in connection with employment or any governmental program is deemed to arise out of and in course of employment for all purposes under this Act. (820 ILCS 305/11).

Amount of compensation is fixed by 820 ILCS 305/7 to 305/10. Compensation for injury resulting in death payable to surviving spouse and children and under some circumstances to collateral heirs. (820 ILCS 305/7). Employer may elect to apply life insurance benefits to satisfy portion or all of death benefit due. (820 ILCS 305/4[i]).

Notice of injury must be given to employer within 45 days and application for compensation filed with Commission within three years of injury, death, or within two years of last payment of compensation, with certain exceptions, particularly regarding radiation and incompetents. Any agreement between employer and employee or beneficiary made within seven days after injury is presumed to be fraudulent. Employer is obligated to post notices regarding Act, and insurance status, and to make timely reports and to maintain records regarding certain work-related deaths, injuries and illnesses. Commission is to compile and distribute aggregate statistics based on employers' reports. Injured employee granted compensation under Act must be notified of rights to and location of rehabilitation services. (820 ILCS 305/6). Employer's liability to pay for medical services chosen by employee is limited to emergency treatment plus medical services provided by two doctors or hospitals and any subsequent services in chain of referral. (820 ILCS 305/8[a]).

Illinois Workers' Compensation Commission is composed of ten members appointed by Governor, three representing employer class, three representing employee class, and four not identified with either class. (820 ILCS 305/13). Commission determines questions not settled by parties. (820 ILCS 305/18). Complaints about conduct of commissioners and arbitrators may be filed with Commission Review Board which is led by Chairman of Workers' Compensation Commission and which can recommend to Governor that arbitrator be dismissed or commissioner not be reappointed. (820 ILCS 305/14.1).

Arbitrators conduct initial hearings and render decisions containing findings of fact and conclusions of law. Employees not receiving medical, surgical, or hospital services or compensation may petition for emergency hearing on issue whether they are entitled to such services or compensation. Such petitions have priority over all others. Petition for review by Commission may be filed by either party within 30 days. Either party may request oral argument before panel of three commissioners and decision containing findings of fact and conclusions. Except for claims against State, final award can be presented to circuit court where accident occurred or where any parties defendant may be found for judgment to be rendered thereon. (820 ILCS 305/19).

Employer or insurance carrier may tender payments due under award to stop further accrual of interest notwithstanding prosecution by either party of review, certiorari, appeal to Supreme Court or other steps to reverse, vacate or modify award. (820 ILCS 305/19[n]).

Commission may review agreement or award within 30 months after entered on ground disability recurred, increased, diminished or ended. (820 ILCS 305/19[h]). Act provides penalties in form of additional compensation for unreasonable or vexatious delay of payment, intentional underpayment, institution or carrying on of proceedings without real controversy which are frivolous or for delay, and wilful violation of health and safety standard in 820 ILCS 225/1 et seq. (820 ILCS 305/19[m]).

Losing party in circuit court may appeal to Illinois Workers' Compensation Commission Division of Appellate Court. (Ill. Sup. Ct. R. 22[g]).

Payment, claim, award or decision under Act is not assignable or subject to lien or attachment except beneficiaries of deceased annuitants under Illinois Pension Code may assign benefits to State Employee's Retirement System. Compensation allowed is entitled to preference over unsecured debts of employer contracted after date of injury apart from wages. (820 ILCS 305/21). Employee, personal representative and beneficiary, in effect, may not waive Act regarding compensation amount or compromise or settle compensation rights without prior approval of Commission. (820 ILCS 305/23). Wilful neglect, refusal or failure to do things required by Act is petty offense. (820 ILCS 305/26). Criminal penalties and civil liability for unlawful acts. (820 ILCS 305/25.5).

See also Workers' Occupational Diseases Act (820 ILCS 310/1 to 310/27), Health and Safety Act (820-225/.01 to 225/23), and Safety Inspection and Education Act (820 ILCS 220/0.01 to 220/11) which are administered by Workers Compensation Commission and Department of Labor.

It is petty offense to fail to provide shield and hood on automobiles or auto trucks to protect chauffeurs (625 ILCS 20/1, 20/2), and suitable and sanitary washroom and soap in certain businesses where working conditions warrant such facilities (820 ILCS 230/1 to 230/5).

Employer must furnish to each employee whose duties may reasonably be expected to involve entering underground sewer information concerning prevention of injury and disease by contact with poisonous or deleterious materials, vapors, gases or fumes. Employer must also have certain safety information and equipment available at such work site. (820 ILCS 250/2 to 250/3).

See also Work Under Compressed Air Act. (820 ILCS 245/1 to 245/8).

Statute regulating poisonous fumes and dust unconstitutional and repealed. (365 Ill. 384, 6 N.E.2d 623).

See also Vehicle Code provision which renders employer not liable for passenger injuries in ride-sharing arrangements when employer does not own or lease vehicle or pay driver. (625 ILCS 5/10-202).

Toxic Substances Disclosure to Employees Act (820 ILCS 255/1 to 255/20) requires employers to obtain material safety data sheet for toxic substances used, produced or stored in workplace to which employees are exposed (820 ILCS 255/9[a]). Material safety data sheet describes properties and methods of safe handling toxic substances. (820 ILCS 255/3[j]). Employees, their representatives, treating health care professionals, emergency service agencies and Director of Labor are entitled to material safety data sheets within ten days of written request. (820 ILCS 255/9[d]). Employee may refuse to work if employer does not provide requested information it possesses. (820 ILCS 255/14[a]). Toxic substance means any substance mixture, or compound containing substance which is determined as hazardous as defined in 29 C.F.R. 1910.1200. (820 ILCS 255/3[m]). Department of Labor enforces provisions of Act with right of judicial review. (820 ILCS 255/17). Act does not apply to use of toxic substances intended for personal consumption by employees in workplace, certain consumer goods, substances with less than 1% concentration, certain laboratories, and various retail trade establishments. (820 ILCS 255/6).

Unemployment Insurance.

Illinois has compulsory unemployment insurance program. (820 ILCS 405/100 to 405/3200). “Employer” (defined 820 ILCS 405/205) includes with respect to years 1972 and thereafter, any employing unit (any individual or type of organization, including State and each of its instrumentalities) which pays or paid, for services in employment, wages of at least $1,500 within calendar quarter of current or preceding calendar year or which has or had in employment one individual within each of 20 or more calendar weeks within current or preceding calendar year, and certain nonprofit organizations; with respect to years 1978 and thereafter, certain governmental entities, certain agricultural employers, and employers of domestics; and successor employers and employers electing to become “employer.” “Employer” pays contributions to state to be held as unemployment trust fund. Benefits are payable upon involuntary unemployment of individual who received from “employer” during base period (first four consecutive of last five calendar quarters before benefit year [820-405/237]) for “insured work”, at least $1,600 in wages with respect to benefit year beginning on or after Jan. 3, 1982. At least $440 of wages during base period must have been paid outside of calendar quarter in which wages paid were highest. (820 ILCS 405/500). “Benefit year” normally begins on first day of week with respect to which valid benefit claim is filed (820 ILCS 405/242). Amount of benefits depends on amount of wages received and number of dependents. (820 ILCS 405/401 to 405/403). Employee is ineligible if, among other reasons, loss of work is due to discharge for felony, he fails to actively seek work or is unable to or unavailable for work, unemployment is from stoppage of work caused by labor dispute, he seeks benefits to which he is entitled from another state, he is receiving workers' compensation, he receives full weekly benefits for certain period of time, he is employed in connection with educational institution and is unemployed between academic years or terms, he is athlete unemployed between sport seasons, or, with limitations he is nonresident alien. Employee may be ineligible, or amount of benefits may be reduced, because of vacation pay, holiday pay, social security benefits, or retirement pay. (820 ILCS 405/402, 820 ILCS 405/500 to 405/614). Employees who leave work voluntarily without good cause attributable to employing unit, with exceptions, are discharged for misconduct, or refuse to accept suitable work are ineligible for benefits until reemployed and earn amount equal to benefit amount in each of four weeks. (820 ILCS 405/601 to 405/603). However, lockouts or failures to cross picket line do not automatically disqualify employee from benefits. (820 ILCS 405/604). Act excludes certain agricultural labor and enumerated other occupations (820 ILCS 405/214 to 405/232) but noncovered employing units may elect coverage (820 ILCS 405/302). Employer's tax is based upon wages paid up to $9,000 per employee per year for calendar years 1988 through 2003 and up to $9,800 per employee per year for calendar year 2004. Employer's tax based upon wages paid up to $10,500 for calendar year 2005; $11,000 for calendar year 2006; $11,500 for calendar year 2007; $12,000 for calendar year 2008; $12,300 for calendar year 2009. (820 ILCS 405/235). Contribution rates determined according to statute. (820 ILCS 405/1500 to 405/1506.1).

Insurance Code provides employees with continuation privilege for group hospital, surgical and major medical coverage and group Health Maintenance Organization (HMO) coverage (215 ILCS 125/4-9.2) after termination from employment or reduction in hours below minimum required by group contract (215 ILCS 5/367e[4]) except persons covered by Medicare or other group plan or persons who exercise conversion privilege; dental, vision care, drug benefits, disability income and other supplementary benefits need not be included. Continuation only available to employees insured under group policy for three months prior to termination. Employer to provide written notice of continuation to employee upon termination; employee must pay premium. Continuation effective for up to six months. (215 ILCS 5/367e[6]). Retired or disabled police officers and deputies have continuation privileges under group accident and health insurance policies (215 ILCS 5/367g-h), as do employees' spouses and dependent children after divorce or death of employee (215 ILCS 5/367.2). Employees discharged for committing felony or theft in connection with work are not entitled to continuation if they admit guilt or are convicted. (215 ILCS 5/367e[8]). HMO continued coverage similarly unavailable. (215 ILCS 125/4-9.2).

Employers agreeing to make payments to employee health insurance plan must notify employees of failure to make payments if loss of insurance may result. Employer guilty of Class B misdemeanor if fails to provide timely notice of prospective termination of health insurance plan. (820 ILCS 160/2).

Farm Labor Contractor Certification Act (225 ILCS 505/1 to 505/14).—No person may act as “farm labor contractor” without possessing non-assignable certificate of registration issued by Director of Department of Labor. (225 ILCS 505/3). “Farm labor contractor” includes with exceptions anyone who for valuable consideration recruits, supplies or hires, or transports in such connection, into or within State any farmworker (anyone who moves seasonally to obtain employment relating to agricultural or horticultural commodities) not of his immediate family to work for third person or for farm labor contractor. (225 ILCS 505/2). Full-time and regular employees of contractor must carry identification of such employment. (225 ILCS 505/5). Contractor may not require farmworkers to purchase goods or services from him or other person (225 ILCS 505/10), is required to post certain notices (225 ILCS 505/8), and is regulated regarding payroll, security bond, records, and recruiting (225 ILCS 505/6 to 505/9). Act provides for civil actions, administrative regulation with judicial review and criminal penalties. (225 ILCS 505/12, 505/13, 505/14).

Private Employment Agencies (225 ILCS 515/.01 to 515/15).—Any person engaged for gain or profit in business of attempting to secure employment for persons seeking employment or employees for employers, except person who is compensated solely by employer to identify, appraise or recommend individual at least 18 years old or holds high school diploma and no fee directly or indirectly charged to that individual (exception for theatrical and domestic service employment agencies), must procure license from Department of Labor, file bond, schedule of intended fees, charges and commissions, and all intended forms and contracts and changes therein. (225 ILCS 515/1, 515/2, 515/11). Licensing requirements include among other things furnishing affidavit to establish business integrity and financial responsibility, good moral character and lack of ever having been party to fraud, and lack of jail or prison record or membership in subversive societies. License fees vary with number of “employment counselors” or “placement counselors” (employees of agency who interview, counsel or advise applicants or employers or both on employment or allied problems, or who arrange contracts or contacts between employers and employees or who solicit orders for employees from employers [225 ILCS 515/11]). (225 ILCS 515/1). Employment counselors are individually licensed. (225 ILCS 515/4).

Agency must keep records including among others record of job orders, advertisement register, applicant's records, fee transaction record, record of all registration fees charged pursuant to permit, separate record of receipts for additional fees charged to applicants and referral slip record. (225 ILCS 515/3, 515/5). Licensee may not solicit, persuade or induce employee to leave employment in which placed or induce employer to discharge such employee; divide or offer to share fee received from employee with person connected with employer; or give or promise anything of value to employer or applicant if contingent upon use of licensee's services except licensee may incur reasonable business entertainment expenses or distribute items for promotional or advertisement purposes. (225 ILCS 515/6). Licensee must file and give person sent to work as contract or railroad workers, outside licensee's city, statement of name and nature of work, wages offered, destination, and terms of transportation and probable employment duration. Licensee must first notify applicant, and record on referral slip given to applicant, any facts regarding strike, lock-out or other labor trouble existing at place applicant is sent. (225 ILCS 515/7). See under subhead Labor Disputes, supra, holding regarding 820 ILCS 25/1.

Additional records are required of theatrical employment agency (225 ILCS 515/8), providers of employees for domestic service (225 ILCS 515/9.1), and farmworker recruiters (225 ILCS 515/10.1, 515/10.2). Licensee must file with Department of Labor annual statement showing number and character of placements. (225 ILCS 515/5). Licensee may not send females to certain questionable places; permit certain questionable characters to frequent agency; accept applications from or place children in violation of Child Labor Law; publish or print misleading or anonymous notice, advertisement or sign or excerpt of Act. (225 ILCS 515/10). Licensee providing employees for domestic service must require all such employees receive annual physical examination. (225 ILCS 515/9.1).

Agency deriving no placement fees from applicants may act with same rights and powers as persons not “employment agency” with regard to contacting applicants and identifying selves and advertising to public so long as advertisement states agency is acting as agency or representative of employer. Such licensee placing individual and accepting fee for such placement which recontacts individual for replacement is subject to hearing and revocation of license. (225 ILCS 515/5.1).

Illinois Laborers on Public Work Projects.

If Illinois unemployment exceeds 5% for two consecutive months, public works projects employ only Illinois laborers (skilled, semi-skilled, or unskilled), if available or capable. (30 ILCS 570/1, 570/3). Contractors may use no more than three nonresident executives or experts; six if hazardous waste clean-up and on-site disposal project. (30 ILCS 570/4). Willful violation is Class C misdemeanor, but statute not enforced if it conflicts with federal law when federal funds expended. (30 ILCS 570/5 to 570/6).

11.03 WORKERS' COMPENSATION LAW:

See topic 11.02 Labor Relations.

12 ENVIRONMENT

12.01 ENVIRONMENTAL REGULATION:

Constitution.

1970, Article XI: Each person has right to healthful environment and may enforce right against any party, governmental or private, through appropriate legal proceedings.

State Bodies.

State pollution control is administered by: (1) Environmental Protection Agency (surveillance, investigation of facilities, presentation of enforcement cases to Board, administration of permit and certification system, collection and dissemination of information, recommendation of regulations) (415 ILCS 5/4), (2) Pollution Control Board (regulations defining, controlling and eliminating pollution, with quasi-judicial authority to implement and enforce Act and regulations (415 ILCS 5/5), (3) Department of Commerce and Economic Opportunity (research, provide assistance, and preparation of economic impact studies) (20 ILCS 1105/1), (4) Illinois Coal Development Board (20 ILCS 1105/8), and (5) Illinois Emergency Management Agency (20 ILCS 3305/5). Department of Public Health is mandated by Environmental Toxicology Act to establish program to study threats to public health from exposure to hazardous substances and to assess health effects of such exposure. (415 ILCS 75/1-75/8).

Records.

All records of above bodies available to anyone except (1) trade secrets, (2) judicially privileged information, (3) internal communication, (4) secret manufacturing processes or confidential data submitted under Act. (415 ILCS 5/7, 5/7.1). All documents submitted with application to Environmental Protection Agency, except trade secrets, must be made available to public at office of county Board or governing body of municipality. (415 ILCS 5/39, 5/39.2, 5/39.3).

Prohibitions.

Cause, threaten, or allow discharge of any contaminant so as to cause air or water pollution or so as to violate regulations. (415 ILCS 5/9[a], 5/12[a], [b]). Open dumping of garbage or refuse. (415 ILCS 5/21[o]). Open burning of refuse or burning in unapproved chambers except in certain circumstances. (415 ILCS 5/9[c]). Burning of landscape waste is permitted except in specified instances. (415 ILCS 5/9[c]). Sale or use of fuel or other articles prohibited by Board because of air or water pollution. (415 IlCS 5-9[d], 415 ILCS 5/12[e]). Sale of used oil for burning. (415 ILCS 5/9[f]). Land contaminant dumping creating water pollution hazards. (415 ILCS 5/12[d]). Unsafe public water supply. (415 ILCS 5/18). Open dumping on public land except where approved by Agency and under regulations. (415 ILCS 5/21[b]). Disposing of refuse or transporting refuse into state for disposal except at a site in compliance with Act and regulations. (415 ILCS 5/21[e], [g]). Disposal by land application of untreated grease trap sludge. (415 ILCS 5/22.30). Disposal of any “potentially infectious medical waste”. (415 ILCS 5/56). Abandonment of autos in violation of Illinois Vehicle Code. (415 ILCS 5/21[c]). Beginning July 1, 1994, offer for collection or collection of “white goods” for disposal in landfill unless “white good components” are removed. (415 ILCS 5/22.28). Household waste drop-off points for controlled substances, pharmaceutical products, personal care products, batteries, paints, automotive fluids, compact fluorescent lightbulbs, mercury thermometers and mercury thermostats. (415 ILCS 5/22.55). Noise which unreasonably interferes with enjoyment of life or business and violates a Board standard including nighttime noise emission standards for some organized amateur and professional sporting events.(415 ILCS 5/24, 415 ILCS 5/25). Actions in violation of terms of permits required by Act. (415 ILCS 5/9[b], 5/12[b)]). Breaking or removing seal affixed on pollution source by Agency. (415 ILCS 5/34[c]). Use, cause, or allow spraying of loose asbestos or to otherwise permit asbestos fibers to pollute air. (415 ILCS 5/9[e]). Operating private sewage disposal system in violation of regulations or without license except that homeowner may service his own sewer system without license. (225 ILCS 225/4). Violating provisions of §§111 and 112 of federal Clean Air Act (42 USC 7411-12) relating to emissions from new stationary sources and emissions of hazardous air pollutants (415 ILCS 5/9.1). Conducting refuse collection or disposal operations without permit. (415 ILCS 5/21[d]). Depositing liquid or hazardous hospital wastes in landfill. (415 ILCS 5/21[g], 415 ILCS 5/22.6, 415 ILCS 5/56.1). Unauthorized use, delivery or disposal, or concealment of disposal, of hazardous waste. (415 ILCS 5/44). To expose ionizing radiation in amounts which are or may be detrimental to health. (420 ILCS 40/2). Act to be repealed Jan. 1, 2011. (420 ILCS 40/1, 5 ILCS 80/4.21). Dispose of, store, or accept spent nuclear fuel used in facility outside State unless other State has disposal or storage facilities like those in Illinois and grants reciprocity. (420 ILCS 15/2). Failure to pay hazardous waste disposal fees. (415 ILCS 5/21[k]). Failure to disclose test results within 45 days. Releasing genetically engineered organism into environment without complying with 430 ILCS 95/1, et seq. (430 ILCS 95/1). Effective Jan. 1, 2008, no person may smoke in public places, places of employment, and government vehicles. (410 ILCS 82/15). Beginning July 1, 1994, no product or packaging may be sold if it contains any ink, dye, pigment, adhesive, stabilizer or other additive containing lead, cadmium, mercury or hexavalent chromium intentionally introduced or exceeds certain limits. (415 ILCS 5/21.5). Beginning July 1, 1996, no knowing mix of liquid used oil with municipal waste intended for collection and disposal at landfill. (415 ILCS 5/21.6).

Hazardous Waste.

Regulations and guidelines. (5/22[g], 5/22.4). Liability for all costs of removal or remedial action taken by state as result of release or substantial threat of release of hazardous substance. (415 ILCS 5/22.2). Responsibility for 20 years after site closure. (415 ILCS 5/22.3). Funding of “Hazardous Waste Fund” and “Hazardous Waste Research Fund”. (415 ILCS 5/22.2). Bond may be required for hazardous waste disposal site permit. (415 ILCS 5/39[a]). County Boards and Municipal Boards have veto power over location of landfills and disposal sites within their jurisdictions. (415 ILCS 5/39[c]). Deposit of waste streams at disposal sites prohibited unless specifically authorized by agency. (415 ILCS 5/39[h]). Labeling requirements and uniform response system. (430-50/.01 et seq.). Local approval of regional pollution control facility. (415 ILCS 5/39.2). Once State expends funds for certain cleanups of property, environmental reclamation lien in favor of State attaches to real property. (415 ILCS 5/21.3). Act authorizes Agency to acquire fee, or any lesser interest, in real property where, among other things, it is necessary to respond to hazardous substance release. (415 ILCS 5/21.4).

Solid Waste Management Regulations and Guidelines.

Conducting certain landscape waste composting operations without permit unlawful. (415 ILCS 5/21[q]). Permit not required in certain situations. (415 ILCS 5/21[q][1-3]). Accepting landscape waste at sanitary landfill unless certain conditions met. (415 ILCS 5/22.22[c]). Knowingly mixing landscape waste with municipal waste (415 ILCS 5/22.22[a]), or knowingly putting landscape waste into non-biodegradable container if container is bound for landfill (415 ILCS 5/22.22[b]). State agencies must, to the maximum extent feasible, use compost in maintenance of public lands. (415 ILCS 20/3[a]). State must separate and collect office wastepaper for recycling and implement aluminum can recycling program in State buildings (415 ILCS 20/3[b]), and, except in certain circumstances, purchase only recyclable paper (415 ILCS 20/3[d]). Disposing of lead-acid batteries in municipal waste sanitary landfills. (415 ILCS 5/22.23[f]). Failure to accept used lead-acid battery turned in by customer when purchasing new battery. (415 ILCS 5/22.23[a], [d], [e]). Failure to provide method at sanitary landfill, in county over 275,000, for cleaning mud and debris from vehicles entering upon property (415 ILCS 5/22.4). Any person violating act or regulating determination or order of board is liable for civil penalty. (415 ILCS 5/42). Institutions of higher learning must develop comprehensive waste reduction plan addressing management of solid waste generated by academic, administrative, student housing and other institutional functions. (415 ILCS 20/3.1). Sanitation Code violations dealing with any municipal ordinance that pertains to or regulates sanitation practices, forestry practices, attachment of bills or notices to public property, abatement of public nuisances, accumulation, disposal, and transportation of garbage, refuse and other forms of solid waste in municipality. (65 ILCS 5/11-19.2-1). Corporate authorities of municipality having population of 100,000 or more may establish code hearing unit. (65 ILCS 5/11-19.2-2). Hearing procedures and administrative review. (65 ILCS 5/11-19.2-3 through 5/11–19.2–13). Recycled Newsprint Use Act governed by 415 ILCS 110/2001. Landfill and incinerator operators must report quarterly volume and state of origination of nonhazardous solid waste. (415 ILCS 5/22.31). Recycling of electronic products governed by the Electronic Products Recycling and Reuse Act. (415 ILCS 150/1 et. seq.).

Wind Farms

Counties (55 ILCS 5/5/-4200) and municipalities (65 ILCS 5/11–15.3–1) may own and operate wind generation turbine farms, either individually or jointly with another unit of local government.

Water Pollution.

Discharge of oil or other pollutants into any waters used for water supply, recreation or navigation is prohibited. (415 ILCS 25/1). Any governmental body having such polluted waters within its territory, as a result of a discharge in violation of 415 ILCS 25/3, is authorized to remove oil or other pollutants. (415 ILCS 25/4). Owner or operator of facility discharging oil or pollutant into waters is liable to governmental body for actual costs of removal, attorneys fees, court costs and other expenses of litigation. (415 ILCS 25/5). Stormwater and Floodplain Management governed by 55 ILCS 5/5-1062.

Soil Erosion.

Department of Agriculture adopts guidelines for erosion and sediment control. (70 ILCS 405/36). Soil and water conservation districts adopt technically feasible, economically reasonable control programs. (70 ILCS 405/38). Any person engaged in land disturbing activities (except those subject to Pollution Control Board regulations) must comply with standards established by district. (70 ILCS 405/39). Department holds hearings following complaint by unit of government or aggrieved party. (70 ILCS 405/41). All final administrative decisions of any district or department are subject to judicial review under Administrative Review Law. (70 ILCS 405/42).

Toxic Substances.

Businesses that use, store, or manufacture a chemical substance in a quantity that poses a threat to the environment or public health must prepare emergency response plans and publish inventory of toxic chemicals, including any petroleum, stored on site. (430 ILCS 45/4). Agency must review these plans and prepare written findings and recommendations; these must then be acted upon by business which submitted plan. (430 ILCS 45/8). Agency Toxic Pollution Prevention program to identify all federal and state laws or regulations pertaining to waste disposal and release of toxic substances into environment. (415 ILCS 85/4). Every pesticide distributed, sold, offered for sale within state, delivered for transportation or transported in interstate commerce between points within state through any point outside state, must be registered and renewed annually. Registration not required if pesticide is shipped from one plant or warehouse to another plant or warehouse by same person and used solely at such plant or warehouse as constituent part to make pesticide which is registered under provisions of Illinois Act and FIFRA. (415 ILCS 60/6[1]). Registration fees. (415 ILCS 60/6[6]). Commercial applicators of pesticides must obtain license. (415 ILCS 60/10). Pesticide dealers must be registered. (415 ILCS 60/13). Department of Agriculture develops procedures, methods and guidelines for addressing agrichemical pesticide contamination at agrichemical facilities in Illinois. (415 ILCS 60/19[8]).

Groundwater Contamination.

No new noncommunity, semiprivate or private water supply well may be located within prescribed distance from potential source of groundwater contamination. (415 ILCS 30/6a). Minimum setback zones for new community water supplies (415 ILCS 5/14.1) and for new sources of groundwater contamination (415 ILCS 5/14.2). Counties and municipalities may increase setback zones for particular community water supplies upon petition and approval by EPA. (415 ILCS 5/14.3). EPA proposes standards and requirements for activities which could cause groundwater contamination. (415 ILCS 5/14.4). Certification system for sites which represent minimal groundwater contamination hazard. (415 ILCS 5/14.5). Any county or municipality served by community water supply may prepare groundwater protection needs assessment. (415 ILCS 5/17.1). EPA to establish regional groundwater protection planning program. (415 ILCS 5/17.2).

Underground Storage Tanks.

Underground Storage Tank Fund monies deposited are received and may be used by Agency and Office of State Fire Marshall. (415 ILCS 5/57.11). Where notice was provided, Agency has authority to require owner, operator or both to undertake preventive or corrective action whenever there is release or substantial threat of release. (415 ILCS 5/57.12[d]). Failure to respond to release or substantial threat of release of petroleum may subject owner or operator of tank to treble damages for state response. (415 ILCS 5/57.12[f]). Owner or operator is eligible for fund reimbursement of specified corrective action or indemnification if costs were incurred from release of designated petroleum products and owner or operator meets specified requirements. (415 ILCS 5/57.8, 5/57.13).

Agency Permits Required.

To construct, install or operate facility Board determines to be capable of causing or contributing to air or water pollution. (415 ILCS 5/9[b], 5/9.1, 5/12[b], 5/39.1). Agency may deny application for issuance or renewal of air pollution operating permit if site fee not paid within 60 days of due date. Denial of permit subject to Board review. (415 ILCS 5/9.6[f]). Amounts of fees with regard to water pollution. (415 ILCS 5/12.2[c]). Agency approves or disapproves application for construction permit within 45 days of receipt of permit application and fee. (415 ILCS 5/12.2[g]). Fees not required from state or local governments. (415 ILCS 5/12.2[e]). To conduct waste-storage, waste-treatment or waste-disposal operations (415 ILCS 5/21[d]) or certain landscape waste composting operations (415 ILCS 5/21[q]). Fee required to operate hazardous disposal site. (415 ILCS 5/22 et seq.).

Board Required Permits.

Section granting Board power to adopt standards to protect citizens from radiation hazard where not preempted (415 ILCS 5/13.6).

Regulations.

Board may adopt regulations related to air pollution (415 ILCS 5/10), water pollution (415 ILCS 5/13), public water supplies (415 ILCS 5/17), groundwater contamination (415 ILCS 5/14), land pollution (415 ILCS 5/22), hazardous waste disposal (415 ILCS 5/22[g]), noise pollution (415 ILCS 5/25), nuclear facility construction (415 ILCS 5/25b). Board adopts hazardous waste regulations identical to federal regulations promulgated under §§3001 to 3005 of Resource Conservation and Recovery Act. (415 ILCS 5/22.4). Board adopts regulations identical, if necessary and appropriate, to federal regulations promulgated under §§111-12 of Federal Clean Air Act (415 ILCS 5/9.1) and federal regulations implementing §105 of Comprehensive Environmental Response, Compensation and Liability Act (415 ILCS 5/7.2, 415 ILCS 5/22). Board may adopt regulations relating to state contingency plan not identical to federal regulations implementing §105 of Comprehensive Environmental Response, Compensation and Liability Act. (415 ILCS 5/22). Agency adopts specific limitations on emission of mercury, chromium, cadmium and lead and good combustion practices from municipal waste incinerators. (415 ILCS 5/22.16b[c]). Agency establishes household hazardous waste collection centers and shall ensure that wastes collected are properly disposed of. Such centers not regulated as hazardous waste facilities under RCRA. (415 ILCS 5/22.16b[d]). Agency promulgates rules to establish standards applicable to facilities for storage, treatment or disposal of low-level radioactive wastes at regional disposal facility. (420 ILCS 20/6[a]). Board regulations may be procedural (415 ILCS 5/26) and substantive (415 ILCS 5/27[a]). Substantive regulations may apply to sources outside Illinois causing, contributing to, or threatening environmental damage in Illinois (415 ILCS 5/27[a]). Regulation by imposition of monetary charges for emission of air or water contaminants is prohibited. (415 ILCS 5/27([a]). Board shall consider economic impact of proposed regulations. (415 ILCS 5/27). Board may establish alternative requirements in adjusted standard proceeding for direct discharge of waste solids to Mississippi or Ohio Rivers. (415 ILCS 5/28.3). Board must adopt any rules required by the state Clear Air Act as amended by the Clean Air Act Amendments of 1990 (CAAA) using a fast-track rulemaking procedure. (415 ILCS 5/28.5). Board may grant variances beyond limitations of Act and individual adjusted standards from regulations of general applicability if consistent with federal Water Pollution Control Act Amendments of 1972, Safe Drinking Water Act, Clean Water Act of 1977, Clean Air Act as am'd in 1977 and Resource Conservation and Recovery Act of 1976. (415 ILCS 5/28.1, 415 ILCS 5/35).

Public may propose adoption, repeal or change of regulations and compel prescribed hearings thereon if nonfrivolous petition with 200 signatures is presented and Board has not dealt with matter in hearing within six months. (415 ILCS 5/28). Petitioner must submit recommendation as to whether economic impact study is advisable and describe reasons for recommendation. (415 ILCS 5/27). When Agency proposes rule that it believes to be required, Agency must certify in proposal identifying federal law which proposed rule will respond and rationale upon which certification is based. (415 ILCS 5/28.2[b]). In addition, within 21 days of Board's acceptance of proposal for hearing, any person may request Board to determine that economic impact study be prepared or not be prepared and submit reasons therefor. (415 ILCS 5/28.1, 415 ILCS 5/28.2). If Board determines that economic impact study is necessary for required rule, Department prepares study within six months. (415 ILCS 5/28.2). If Board determines that economic study is not necessary, it considers economic impact of proposed rule to extent possible. (415 ILCS 5/28.2). Whether or not study is submitted within six months, Board may proceed to adopt required rule. (415 ILCS 5/28.2). Prior to initiating any hearing on regulatory proposal, Board may schedule prehearing conference before qualified hearing officer. (415 ILCS 5/27[d]). Notice requirements of §28 do not apply and record need not be kept. (415 ILCS 5/27[d]). Prescribed hearings must always be held on Agency or Department proposals. (415 ILCS 5/28). Anyone adversely affected or threatened by any regulation may obtain determination of its validity or application by petition for review but not in any subsequent enforcement or variance proceeding. (415 ILCS 5/29). See subhead Judicial Review, infra.

Complaints.

Within 180 days of becoming aware of alleged violation of Act, rule adopted or permit granted by Agency, Agency issues and serve by certified mail written notice of alleged violation. (415 ILCS 5/31[a][1]).Written response must be submitted to Agency within 45 days of receipt of notice of violations unless extended by Agency. If person complained against fails to respond, failure considered waiver of requirements on Agency in §31(a) and Agency may proceed to pursue legal action. If person complained against requests meeting with Agency personnel, it will be held within 60 days of notice by person complained against unless Agency agrees to postpone. If meeting occurs, person complained against has 21 days to submit written response or if none Agency may pursue legal action. (415 ILCS 5/31[a][2]). Upon prescribed notice public hearings are held. (415 ILCS 5/31[c][1], 5/32). Complainant has burden of showing actual or threatened: (1) Air or water pollution or (2) violation of Act or Board regulations or permit conditions. Upon such showing, respondent has burden of showing compliance would impose arbitrary or unreasonable hardship. (415 ILCS 5/31[e]). Any party may be represented by counsel, present evidence, and cross-examine. Record of hearing is kept. (415 ILCS 5/32).

When complaint is filed by Agency or State, parties may file with Board stipulation and proposal for settlement accompanied by request for relief from requirement of hearing before Board. Unless Board in its discretion determines that hearing will be held, Board must publish proposed settlement and request relief from hearing. If any person requests hearing, Board must deny settlement request. (415 ILCS 5/31[d]).

Specific considerations for decision are (1) character and degree of injury to health, welfare and property, (2) social and economic value of pollution source, (3) suitability of pollution source to its area, including priority of location, (4) technical practicality and economic reasonableness of reducing or eliminating pollution source, and any subsequent compliance. (415 ILCS 5/33[c]). Compliance with regulations under this Act prima facie defense in proceedings on complaints. (415 ILCS 5/49[e]). Subsequent compliance with regulations is not defense to violation of those regulations. (415 ILCS 5/33[a]).

Out of State Service.

735 ILCS 5/2–208, 5/2–209 apply to service of complaints based on actual or threatened acts outside Illinois contributing to environmental damage in Illinois. (415 ILCS 5/31[c][1]). See category 5 Civil Actions and Procedure, topic 5.20 Process, subhead Long Arm Statute.

Orders.

Board may enter cease and desist orders, assess money penalties not to exceed $50,000 plus $10,000 for each day violation continues, assess money penalties of up to $10,000 per day for National Pollutant Discharge Elimination System violations, assess money penalties of at least $10,000 per day for violation of underground injection control program and assess civil penalties of $25,000 per day for violation of hazardous waste control program regulations, require in addition payment for destroyed aquatic life, and revoke permits. (415 ILCS 5/33[b], 5/42). Summary powers granted to Agency if it determines violation of Board regulations creates emergency, including power to seal pollution source. Owner or operator may secure hearing or injunctive relief from sealing. (415 ILCS 5/34). Final order or determination of Board must be based solely on evidence in record and must not be against manifest weight of evidence. (415 ILCS 5/41[b]).

Variances.

Persons seeking variances may petition Agency on grounds of arbitrary or unreasonable hardship. Upon investigation, Agency recommends action to Board, which may hold hearings and must if objection is made. In granting variance, Board may impose conditions, including posting of performance bond where request is solely for reasonable delay in which to correct violation. Board upon granting or denying variance must publish opinion. If Board fails to take final action within 120 days variance is deemed granted. Filing petition within 20 days after effective date of complained-of regulation stays effectiveness of regulations as to petitioner. (415 ILCS 5/35 to 5/38). Agency may grant provisional variances for period not to exceed 45 days. (415 ILCS 5/35[b], 5/36[c]).

Individual Adjusted Standards.

Board may grant individual adjusted standards from regulations of general applicability. (415 ILCS 5/28.1[a]). If Board has not specified level of justification required for adjusted standard, one may be sought by showing that factors relating to petitioner are substantially and significantly different than factors relied on by Board in adopting general regulation, that these factors justify adjusted standard, that adjusted standard will not adversely affect health or environment, and that adjusted standard is consistent with federal law. (415 ILCS 5/28.1[c]). If petition is filed within 20 days of effective date of regulation, operation of regulation is stayed as to that petitioner pending resolution of petition providing such action is consistent with federal law. (415 ILCS 5/28.1[f]).

Permits.

Permits for individual sewerage disposal systems. (55 ILCS 5/5-15010). Any well for which permit is required under Illinois Oil and Gas Act, other than plugged well, drilled prior to Aug. 15, 1990 and for which no permit has been issued, is required to be permitted. (225 ILCS 725/12). Agency permits for development or operation of new municipal waste incinerator conditions. (415 ILCS 5/22.16b[b]). Agency authorized to grant experimental permits which include provision for disposal of wastes from combustion of coal and other materials. (415 ILCS 5/21[r]). Agency issues development or construction permit for composting facility if applicant gives adequate notice. (415 ILCS 5/22.26). Agency must issue Board-required permits upon applicant's proof of nonviolation of Act and regulations. In granting permits, Agency may impose such conditions as may be necessary to accomplish purpose of this Act. Refusal of permit reviewable by petition to Board within 35 days which may be extended to no more than 90 days by applicant giving written notice to Board and Agency within initial appeal period. (415 ILCS 5/40). Generally if Agency or Board fails to take final action within 90 days of application or review, application deemed granted, except extended to 120 days where review requires public hearing. (415 ILCS 5/39, 5/40[a]). Contestant of hazardous waste disposal site permit may petition Board within 35 days after date on which Agency served its decision on applicant for hearing. (415 ILCS 5/40). If Agency issues NPDES permit that imposes limits which are based upon criterion or denies permit based upon application of criterion, then Agency has burden of going forward with basis for derivation of limits of criterion which were derived under Board's rules. (415 ILCS 5/40[a][1]). Review procedure, including direct review to appellate court of final order of Emergency Management Agency under Low Level Radioactive Waste Management Act. (420 ILCS 20/18). Discharge of sewage or wastes into sewerage system that violates terms or conditions of sanitary district's ordinances or permit subject to civil penalties. (70 ILCS 2605/7a).

Judicial Review.

(1) Party to Board hearing or (2) any person who was denied a hearing, variance or

permit or (3) any party adversely affected by a final order or determination of Board or (4) any person adversely affected or threatened by any Board regulation, may obtain judicial review by filing petition for review within 35 days from date copy of order or other final action was served upon affected part, under Administrative Review Law, in Appellate Court of District in which cause of action arose (415 ILCS 5/41[a]). Any person affected by final order or determination of Emergency Management Agency may obtain judicial review, under Administrative Review Law except that review will be directly in Appellate Court. (420 ILCS 20/18).

Actions.

Existing civil and criminal actions not affected by Act. (415 ILCS 5/45[a]). Authorization of E.P.A. to prosecute cases before Pollution Control Board held unconstitutional (65 Ill.2d 485, 359 N.E.2d 149) and statute amended (415 ILCS 5/4[e]).

By State.

Violations of Act or regulations, or submitting false information, are misdemeanors. Certain violations, particularly those relating to delivery and disposal of hazardous wastes, are felonies. (415 ILCS 5/44). If State brings action to compel waste removal or clean-up against person with real interest in property for allowing open dumping or burning by third party, defendant may bring in third-party defendant. (415 ILCS 5/45[d]). Final order by Board may be enforced through civil action for injunctive or other relief by person who was party to Board enforcement proceeding. (415 ILCS 5/45[e]). State may prosecute corporation for any offense defined in §44 of Act (720 ILCS 5/5-4), and if convicted, corporation may be fined up to $50,000 or amount stated in offense, whichever is greater, for offense (730 ILCS 5/5-9-1).

By Private Person.

Any person adversely affected in fact by a violation of Act or regulations or any permit or term or condition of permit may sue for injunctive relief. (415 ILCS 5/45[b]). Regardless of whether landfill operation for disposal of hazardous substances has been licensed, it must still be operated in way that does not constitute nuisance. Otherwise, court may order shutdown of landfill and removal of hazardous substances buried there. (86 Ill.2d 1, 426 N.E.2d 824). Plaintiff must complain to Board first and wait 30 days after denial of relief before instituting suit. Prevailing party awarded costs and attorney's fees. (415 ILCS 5/45[b]). Any person in county may bring action against seller of beverages packaged in unapproved plastic containers. (415 ILCS 15/10.1[d]). Penalty for knowing violation not to exceed $5,000, and may include attorney fees. (415 ILCS 15/10.1[d]).

State of Illinois has no liability to person or entity by reason of failure, delay or cessation in operation of disposal facility. (420 ILCS 20/6[f]).

Defenses.

Compliance with Act or regulation prima facie defense to any action by any person. (415 ILCS 5/49[e]).

Financing.

Agrichemical Incident Response Fund created for payment of costs of response action incurred by owners of agrichemical facilities to take emergency action in response to release of agricultural pesticides from agrichemical facility and for costs of administering activities. (415 ILCS 60/22.2, 60/22.3). Environmental Facilities Financing Authority may construct or finance environmental facilities within state. (20 ILCS 3515/1 et seq.). Special consideration to small business. (20 ILCS 3515/2[c], 3515/7, 3515/9). Special consideration to projects reducing volume of hazardous waste products or recycling hazardous waste. (20 ILCS 3515/2[e]). Environmental Protection Trust Fund receives and administers funds for environmental protection. (30 ILCS 125/1). Sanitary districts under order to abate violations. (415 ILCS 5/46). Environmental

Protection Agency receives and administers funds for waste disposal. (415 ILCS 5/4[k]). Hazardous Waste Fund receives funds to prevent or correct immediate or long-term danger caused by hazardous waste disposal sites. (415 ILCS 5/22.2[d]). Low-Level Radioactive Waste Development and Operation Fund is created from fees assessed against generators of low-level radioactive waste. (420 ILCS 20/13, 20/14). Underground Storage Tank Fund created from fees for underground storage tanks and used for payment of costs of corrective action and indemnification, as well as other costs relating to tanks. (415 ILCS 5/57.11). Beginning Jan. 1, 1991, Agency assesses and collects fee from owner or operator of new municipal waste incinerator. (415 ILCS 5/22.16b[a]). Toxic pollution prevention assistance program fund used for consulting, for developing plans to prevent toxic pollution and for sponsoring projects to develop innovative technologies. (415 ILCS 85/5). Financial incentives provided to encourage recycling of lead-acid batteries. (415 ILCS 5/22.23[b]).

13 ESTATES AND TRUSTS

13.01 ADMINISTRATION:

See topic 13.08 Executors and Administrators.

13.02 ADVANCEMENTS:

See topic 13.07 Descent and Distribution.

13.03 ALLOWANCES:

See topic 13.08 Executors and Administrators.

13.04 CLAIMS:

See topic 13.08 Executors and Administrators; category 5 Civil Actions and Procedure, topic 5.17 Pleading.

13.05 DEATH:

Death defined under Uniform Anatomical Gift Act as irreversible cessation of total brain function, according to usual and customary standards of medical practice. (755 ILCS 50/1-10).

Unexplained and unaccounted for absence for seven years raises presumption of death at end of period. (92 Ill. 2d 207, 441 N.E.2d 68).

Administration of estate may be sought on presumption of death. (755 ILCS 5/9-6). In such case costs of administration and claims are paid in usual course, but distributees must furnish bond for double value of their distributive shares or have their distributive shares on deposit with county treasurer for period of 20 years. (755 ILCS 5/24-5).

Special death certificate available for presumed-dead missing persons, pursuant to court order. (410 ILCS 535/18[5]).

Letters of administration to collect may be issued on estate of missing person. (755 ILCS 5/10-1). Upon issuance of letters testamentary or of administration or location of missing person, power of administration to collect ceases. (755 ILCS 5/10-5).

Living Wills.

See topic 13.16 Wills, subhead Living Wills.

Survivorship.

Illinois has adopted Uniform Simultaneous Death Act. (755 ILCS 5/3-1).

Coroners.

Every coroner informed that body of dead person is within county takes charge of body and investigates circumstances of death when death is suspected of being (a) sudden, violent or result of domestic violence as defined at 750 ILCS 60/1 et seq.; (b) due to abortion, sex crime, or crime against nature; (c) suspicious or mysterious or where attending physician indicates in writing that cause of death is unknown; (d) death where addiction to alcohol or any drug may have been contributory cause; or (e) death where decedent was not attended by licensed physician. (55 ILCS 5/3-3013). In cases of apparent suicide, homicide, or accidental death, coroner may conduct an inquest with a petit jury. (55 ILCS 5/3-3013).

Actions for Death.

Action for wrongful death may be brought by and in names of personal representatives of decedent for exclusive benefit of spouse and next of kin; must be brought within two years after death; unless person entitled to recover benefits is under 18 at time cause of action accrued, then suit must be brought within two years after attainment of age of 18; there is no numerical limitation on damages recoverable. (740 ILCS 180/2). If trier of fact finds that contributory fault of beneficiary is 50% or less of proximate cause of wrongful death, damages will be diminished proportionately. (740 ILCS 180/2[1]). If beneficiary is more than 50% of proximate cause, that beneficiary's damages are not payable by any defendant to any beneficiary. (740 ILCS 180/2[2]). Where no spouse or next of kin survive decedent, action may be brought by personal representatives for benefit of persons furnishing hospital and medical services to decedent in connection with last illness or injury; to personal representative for expenses and costs of administering estate. Recoveries in such case are limited to: (a) $450 to persons providing hospital services, (b) $450 to persons providing medical or surgical services, and (c) $900 plus reasonable attorney's fee to personal representatives for hospital, medical, funeral, litigation, and estate administration expenses. (740 ILCS 180/2).

Child, including unborn child, is “person” within meaning of Wrongful Death Act, upon determination of viability. (55 Ill.2d 368, 304 N.E.2d 88; 71 Ill. 2d 501; 377 N.E.2d 37). Statutory cause of action available for death of unborn child. Physicians performing lawful abortion under valid consent exempted. (740 ILCS 180/2.2).

Certificate.

See category 10 Documents and Records, topic 10.04 Records, subhead Vital Statistics.

13.06 DECEDENTS' ESTATES:

See topics 13.07 Descent and Distribution, Executors and Administrators, Wills; category 8 Debtor and Creditor, topic 8.10 Homesteads.

13.07 DESCENT AND DISTRIBUTION:

Entire intestate estate, both real and personal, of deceased resident, and real estate of deceased nonresident, where there is no surviving spouse (see subhead Surviving Spouse, infra), descends and is distributed as follows, each class of which a member is living taking to exclusion of subsequent classes: (1) descendants per stirpes; (2) parents, brothers and sisters equally, descendants of deceased brothers and sisters taking by representation and, if one parent be dead, surviving parent taking a double portion; (3) one-half to paternal grandparents or to survivor of them or to their descendants per stirpes and one-half to maternal grandparents in like fashion or, if only one set of grandparents or descendants survive, entire estate to those grandparents or descendants; (4) one-half to paternal great grandparents or to survivor of them or to their descendants per stirpes and one-half to maternal great grandparents in like fashion or, if only one set of great grandparents or descendants survive, entire estate to those great grandparents or descendants; and (5) nearest kindred of equal degree according to civil law rules, without representation. (755 ILCS 5/2-1).

Surviving Spouse.

If there is surviving spouse and also descendant of decedent, one-half of entire estate to surviving spouse; if there is surviving spouse but no descendant of decedent, entire estate to surviving spouse. (755 ILCS 5/2-1). If surviving spouse renounces will, surviving spouse takes one-third of entire estate if testator leaves descendant or one-half of entire estate if testator leaves no descendant. (755 ILCS 5/2-8[a]).

Election.

Dower and curtesy are abolished in Illinois. See category 21 Property, topic 21.08 Dower.

Half Blood.

No distinction is made between relatives of the whole blood and those of the half blood. (755 ILCS 5/2-1).

Posthumous child receives same share of ancestor's estate as though born in decedent's lifetime. (755 ILCS 5/2-3).

Adopted Child.

See category 14 Family, topic 14.01 Adoption, subhead Effect of Adoption.

Child born out of wedlock, or his or her lawful issue, inherits from and through mother and from any person from whom mother might have inherited if living. Surviving spouse of child born out of wedlock who left descendants has same rights as any other surviving spouse; if child born out of wedlock left no descendants, surviving spouse takes entire estate. Where there is no descendant or surviving spouse, estate goes one-half to mother and other half to her descendants per stirpes, or failing such heirs, to maternal grandparents in equal parts or to survivor of them, or to their descendants per stirpes or, failing such, to maternal great-grandparents or their descendants per stirpes or, failing such, to next of kin of mother according to civil law rules. Eligible parent is parent who during decedent's lifetime acknowledged child as parent's child, established parental relationship, and supported decedent as parent's child. (755 ILCS 5/2-2). If both parents are eligible parents, distribution as provided in 755 ILCS 5/2-1. Child born out of wedlock loses such status and is deemed legitimate by intermarriage of parents and acknowledgment by father. (755 ILCS 5/2-2). If decedent acknowledges child born out of wedlock or if prior to or after death decedent is adjudged father of child born out of wedlock, child born out of wedlock is heir of father and any paternal ancestor. Descendants of child born out of wedlock represent him and take through him on descent. Paternity proved by copy of judgment where adjudged; by clear and convincing evidence in all other cases. After child born out of wedlock is adopted, that person's relationship to adopting and natural parents governed by 755 ILCS 5/2-4 as to decedents who die on or after Jan. 1, 1998 and as to property rights of person under any instrument executed on or after Jan. 1, 1998. (755 ILCS 5/2-2).

Person Causing Descendent's Death.

See topic 13.16 Wills, subhead Person Causing Decedent's Death.

Determination of Heirship.

All courts having probate jurisdiction are given power to make determinations of heirship. (755 ILCS 5/5–1, 5/5-3). On absence of contrary evidence, court may presume that decedent and any person through whom heirship is traced was not parent of any child born out of wedlock, and, if decedent or person was male, that no child born out of wedlock was filiated or acknowledged or legitimated by decedent or person. (755 ILCS 5/5-3[d]).

Advancements must be so expressed by decedent or so acknowledged by recipient in writing and are regarded as part of estate and included in share of person by whom received, but refund not required although share exceeded. (755 ILCS 5/2-5).

Disclaimer.

See topic 13.16 Wills, subhead Disclaimer.

Liabilities of Heirs for Debts.

Under certain limitations, heirs are liable for ancestor's debts to the extent of assets received. (740 ILCS 80/11, 80/12).

Escheat.

If decedent left no surviving spouse or kindred, property escheats as follows: Real estate to county where located; personal estate, within state and personal estate outside state but subject to ancillary administration of Illinois estate, to county where decedent resided, or if decedent was a nonresident, to county where located; all other personal estate wherever situated to state. (755 ILCS 5/2-1[h], 5/2-2[h]).

See also topic 13.08 Executors and Administrators.

13.07A ESTATES: (in property)

See category 21 Property, topic 21.16 Real Property.

13.0813.09

13.10 EXECUTORS AND ADMINISTRATORS:

Probate jurisdiction is exercised by branches of the circuit court. (Art. VI, §9). See category 6 Courts and Legislature, topic 6.01 Courts.

Probate venue is (1) in the county where decedent had a known place of residence, or (2) if he had no known place of residence, in the county wherein the greater portion of his real estate is located, or (3) if none of the above, in the county where the greater part of his personal estate is located at death. (755 ILCS 5/5-1).

Preferences in Right to Administer.

Right to administration is in following order: (1) Surviving spouse; (2) legatees with preference to legatees who are children; (3) children; (4) grandchildren; (5) parents; (6) brothers and sisters; (7) next of kin; (8) representative of estate of deceased ward; (9) Public Administrator; (10) creditor of estate. Nominee of person in classes 1 to 7 inclusive, has same precedence as person making nomination. Only persons who can qualify as administrators have right to nominate; but residents of U.S. not qualified to act solely because of nonresidence in Illinois may nominate. Person removed as representative loses right to name successor. (755 ILCS 5/9-3).

Eligibility and Competency.

Person not qualified to act as executor or administrator if less than 18 years of age or of unsound mind or disabled person or convicted of felony or not resident of U.S. (755 ILCS 5/6-13, 755 ILCS 5/9-1). Any corporation qualified to accept and execute trusts in Illinois is qualified to act as executor or administrator. (755 ILCS 5/1-3). Person who is not resident of Illinois can act as administrator (755 ILCS 5/9-1), and can act as executor and must file in court where estate is pending designation of resident agent to accept service of process, notice or demand, and failing such designation, clerk of court is constituted executor's agent and must mail copy of process, notice or demand to executor at last known address and to his attorney of record (755 ILCS 5/1-11, 755 ILCS 5/6-13). Foreign corporation may act as such only if: (1) It is authorized by laws of state of its organization or domicile to act in such fiduciary capacity in that state and (2) corporation organized under law of Illinois may act in similar fiduciary capacity in foreign corporation's state under conditions and qualifications which commissioner finds not unduly restrictive when compared to Illinois requirements. (205 ILCS 620/4-2). Before acting as executor or as administrator in Illinois, foreign corporation must obtain authority from Commissioner of Banks and Real Estate. (205 ILCS 620/4-5).

Qualification.

Individual representatives must execute oath of faithful performance of duties. (755 ILCS 5/12-2). To qualify, every individual representative must file bond in double value of personalty if individuals act as sureties or if security on bond is excused, or one and one-half times such value if surety company acts as surety. (755 ILCS 5/12-2, 5/12-4, 5/12-5). Cause of action for wrongful death or personal injury initially valued at $500 for this purpose but must be adjusted to amount likely to be received as proceeds of judgment or settlement. (755 ILCS 5/12-5[b]). Additional bond related to income required if representative takes possession of real estate. (755 ILCS 5/12-5[a]).

Exemption from Surety.

Where will excuses representative from giving security no surety is required unless court has cause to suspect fraud or incompetence or believes estate insufficient to discharge claims, and amount of bond required from time to time is in effect without writing, unless required by court. (755 ILCS 5/12-2, 5/12-4). If will specifies security, no greater security can be required than is so specified unless same grounds exist. (755 ILCS 5/12-4). But court may in its discretion require bond and surety of nonresident executor despite contrary provision of will. (755 ILCS 5/6-13). Except for appeal bonds, corporations qualified to act as representative need not furnish bond. (755 ILCS 5/12-1). Office of State Guardian not required to have sureties. (755 ILCS 5/12-4[c]).

Petition for Issuance of Letters.

Admission of will or issuance of letters testamentary requires verified petition stating, if known: (1) Name and residence of decedent at death; (2) date and place of death; (3) date of will and petitioner's belief that will is valid last will of testator; (4) approximate value of real and personal estate in Illinois; (5) names and addresses of all heirs and legatees and whether any are minors or disabled persons; (6) name and address of executor; (7) unless supervised administration is requested, name and address of personal fiduciary acting or designated under 755 ILCS 5/28-3. When will creates or adds to trust, trustee's name and address is sufficient and beneficiary's name and address not necessary unless beneficiary is also legatee or heir. For letters of administration with will annexed, petition must also state, if known: (1) Reason for issuance; (2) facts showing right to act as administrator or to nominate; (3) name and address of person nominated and of each person entitled to administer or nominate in equal or greater preference to petitioner; (4) date of admission where will previously admitted. (755 ILCS 5/6-2).

Issuance of letters of administration for intestate estate requires petition stating, if known: (1) Name and residence of decedent at death; (2) date and place of death; (3) approximate value of real and personal estate in Illinois; (4) names and address of all heirs and whether any are minors or disabled persons and whether any are entitled either to administer or to nominate person to administer equally with or in preference to petitioner; (5) name and post office address of person nominated administrator; (6) facts showing right to act as administrator or to nominate; (7) when de bonis non, reason for issuance; (8) unless supervised administration is requested, name and address of personal fiduciary acting or designated under 755 ILCS 5/28-3. (755 ILCS 5/9-4).

When letters sought on presumption of death, petition must include items 3 through 8 above, and: (1) Facts and circumstances raising presumption; (2) name and last known address of decedent; (3) name and address of each person in possession or control of decedent's property, if known. (755 ILCS 5/9-6[a]). Special notice provisions for presumption of death cases. (755 ILCS 5/6-20[b]).

When any person entitled to administer or nominate equally with or in preference to petitioner, petitioner must mail copy of petition to such persons and give such persons 30 days notice by mail of hearing on petition. Petitioner must file proof of mailing with clerk of court. (755 ILCS 5/9-5[a]). Within 14 days after letters have issued, administrator must give notice of petition and order by mail, or by publication if necessary, to each heir not entitled to prior notice. Administrator must file proof of mailing and of publication, if required, with clerk of court. (755 ILCS 5/9-5[b]). Copy of petition and order need not be sent to, nor notice published for, any person not under disability or minor who personally appears at hearing or who files waiver of notice. (755 ILCS 5/9-5[c]). Letters may be revoked for failure to give notice if petition is filed within three months of issuance of letters. (755 ILCS 5/9-7).

Removal.

On petition of interested person or on court's own motion, representative may be removed when: (1) Letters were secured by false pretenses; (2) adjudged incompetent or in need of mental treatment under Mental Health Code; (3) convicted of felony; (4) wastes or mismanages estate; (5) endangers co-representative or surety on his bond; (6) fails to give sufficient bond or security pursuant to court order; (7) fails to file inventory or accounting pursuant to court order; (8) conceals himself to avoid process or notice; (9) becomes incapable of or unsuitable for discharge of his duties; (10) other good cause; (11) becomes nonresident of U.S. (755 ILCS 5/23-2). Procedure for citation for removal, notice, answer and hearing are prescribed. (755 ILCS 5/23-3).

Special Kinds of Administration.

General statutory provisions apply to administrator de bonis non, administrator with will annexed, and administrator de bonis non with will annexed. (755 ILCS 5/1-2.01, 5/1-2.02). Executor or administrator with will annexed administers all testate and intestate estate. (755 ILCS 5/6-15). Administrator to collect may be appointed by court on its own motion or upon petition of any interested person when: (a) Delay occurs in issuance of letters and it appears estate is liable to waste, loss or embezzlement or, (b) person is missing from his usual place of residence and cannot be located, or when in military service is reported missing. Court may appoint any person who is qualified to act as administrator. (755 ILCS 5/10-1). On issuance of letters testamentary or of administration, powers of administrator to collect cease. (755 ILCS 5/10-5).

Public Administrator.

When person dies and no person in this state has prior right to administer, public administrator of proper county may take steps to protect property until issuance of letters or until demand for removal of property is made by nonresident representative. (755 ILCS 5/13-4).

Inventory and Appraisal.

Inventory to be filed within 60 days from date of letters. (755 ILCS 5/14-1). If representative believes that appraisal of goods and chattels is necessary for proper administration, he may appraise them or appoint one or more competent, disinterested appraisers with compensation. (755 ILCS 5/14-2). Additional inventories and appraisals may be made from time to time as new assets are discovered and must be filed within 60 days after discovery of property. (755 ILCS 5/14-1).

Collection of Assets.

Court, upon filing of petition by representative or person interested in estate, by citation proceedings, may compel persons to produce and deliver to personal representatives any personal property, books of account, evidences of debt or title to lands belonging to decedent or any information relating to any of these matters. In such proceedings, court may decide questions of title and rights of property. Court enforces its decisions by imprisonment for contempt or by execution against respondent's property. (755 ILCS 5/16-1[d]).

Access to Safe Deposit Box.

Effective for decedents dying after Dec. 31, 1982, lessor of safe deposit box permitted to open deceased lessee's box in presence of person who presents affidavit stating he is interested in filing decedent's will or in decedent's burial arrangements, believes safe deposit box contains decedent's will or burial instructions, and is interested person. Interested person includes anyone who had right of access to box prior to decedent's death, presents copy of decedent's will naming him or her as executor, or is decedent's surviving spouse, adult descendant, parent, brother or sister, or otherwise has legitimate interest in filing of will or in burial arrangements. Only will and burial instructions can be removed. Lessor must deliver burial instructions to interested person and will to Circuit Court Clerk in county of decedent's residence, or if unknown, in county where safe deposit box is located. Delivery may be made by registered mail. Lessor must not open box if he has received copy of letters of office or other applicable court order. Box need not be opened if it has previously been opened, key or combination is not available, or lessor has reason to believe someone would object. (755 ILCS 15/1).

Operation of Decedent's Business.

Unless provided otherwise in decedent's will or by law, representative may continue to operate decedent's unincorporated business, during one month next following date of issuance of letters and for further time as court may authorize under court supervision without personal liability except for malfeasance or misfeasance. Obligations incurred or contracts entered into are entitled to priority of payment out of assets of business. (755 ILCS 5/19-6).

Filing of Tax Return and Payment of Taxes.

For decedents dying after Dec. 31, 1982, no inheritance tax due; estate tax due in amount equal to maximum federal credit for state death taxes. Executor, administrator or, if no legal representative appointed, person in possession of property must file copy of Illinois return and of federal estate tax return with Attorney General. Must also file Illinois return with county treasurer of county in which decedent resided and any tax due payable at same time federal estate tax return due.(35 ILCS 405/6).

Executor or administrator is personally liable for payment of estate tax and interest. (35 ILCS 405/10[c]).

Illinois Income Tax applies to trusts and estates. (35 ILCS 5/201). See category 22 Taxation, topic 22.11 Income Tax. Representative may file, with surviving spouse, joint federal or state income tax return. (755 ILCS 5/27-7).

Notice to Creditors.

Representative must publish once each week for three successive weeks and mail or deliver to each known or reasonably ascertainable creditor whose claim has not been disallowed under §18-11, notice of decedent's death, including name and address of representative and attorney of record, that claim must be filed on or before six months from date of publication or three months from date of mailing or delivery of notice, whichever is later, or claim is barred. (755 ILCS 5/18-3[a]). Publication must be in newspaper published in county where estate is being administered. (755 ILCS 5/18-3[b]). If no newspaper is published in county, such notice must be published in such newspaper as court directs. (755 ILCS 5/27-8). Representative must file proof of publication with court. (755 ILCS 5/18-3[b]).

Presentation of Claims.

Representative may at any time pay or consent in writing to all or any part of any claim filed within date stated in original notice or notice of disallowance, as applicable, if not disallowed by court and representative determines claim is valid. Representative's payment or consent constitutes allowance and binds estate. Representative must file notice of allowance with court, but failure does not affect allowance. Any interested person can compel representative to establish propriety of allowance. (755 ILCS 5/18-11[a]).

Representative may at any time disallow all or any part of any claim not filed with court by mailing notice to claimant and his attorney, if known, stating that claim not filed with court on or before date stated in notice, not less than two months from date of notice, will be barred. Claim thus disallowed is barred if not timely filed. (755 ILCS 5/18-11[b]).

Every claim against estate, except administration expenses and spouse or child award, is barred if proper notice is given by representative and claimant fails to file claim with representative or court, as appropriate, on or before required date stated in applicable notice. (755 ILCS 5/18-12[a]). Execution of judgment is not barred against estate assets after six months if suit was pending at decedent's death and executor is properly substituted defendant. (77 Ill.2d 452, 397 N.E.2d 842). All claims which could otherwise have been barred are barred two years after descendent's death whether or not Letters of Office are issued. (755 ILCS 5/18-12[b]). Actions to establish decedent's liability are not barred to extent estate is protected by liability insurance. (755 ILCS 5/18-12[c]). Except with respect to claims known to representative and not paid or otherwise barred, representative acting in good faith to give proper notice to creditors is not personally liable to creditors. Any claim not barred may be asserted against estate or distributee except distributee's share will not be diminished below that which he or she would have received had claim been paid by representative. (755 ILCS 5/18-12[d]).

Unmatured claims may be presented. (755 ILCS 5/18-4).

Contingent claims may not be presented. (288 Ill. 142, 123 N.E. 300). But see 321 Ill. 612, 152 N.E. 539 regarding certain types of guarantees treated as unmatured claims.

As to secured claims, see subhead Secured Claims, infra.

Proof of Claims.

Every claim filed must be in writing and state sufficient information to notify representative of nature of claim or other relief sought. (755 ILCS 5/18-2). Following is approved, though not required, form of affidavit of claim: State of Illinois, County of Cook, ss. In the Circuit Court of Cook County. In the matter of the estate of . . . ., deceased . . . ., being duly sworn, says that the annexed claim against the estate of . . . . deceased is just and unpaid, after allowing all just credits, and that (name of claimant) has no other claim against said estate. (Signature and jurat).

Prosecution of Claims.

Every claim against decedent's or ward's estate may be filed with representative or court or both. If filed only with representative, representative may file with court but is under no duty. (755 ILCS 5/18-1[a]). Claimant must, within ten days after filing claim, mail or deliver copy of claim to each representative to whom letters of office have been issued and not revoked, including guardian of person of ward and his attorney of record, unless either consents to claim or waives delivery, and must file with court proof of any required mailing or delivery. (755 ILCS 5/18-1[b]). Any interested party may demand jury trial. (755 ILCS 5/18-6). When claim is called, if consented to or no pleading filed, court may allow claim or require proof. (755 ILCS 5/18-7). Contested claims are set for trial and tried as in other civil cases. (755 ILCS 5/1-6). Appeals lie from final orders, judgments or decrees of circuit court to Appellate or Supreme Courts as in other civil cases. (755 ILCS 5/26-1).

Payment of Claims.

Representative is required to pay from estate all claims entitled to be paid therefrom, in order of their classification; and when estate is insufficient to pay claims in any one class, claims in that class are paid pro rata. (755 ILCS 5/18-13).

Where unmatured claim is allowed, interest included in the principal obligation from date of allowance to time when debt would have become due is deducted. (755 ILCS 5/18-4).

As to secured claims, see subhead Secured Claims, infra.

Priorities.

Claims against estates are classified as follows and paid in that order: (1) funeral expenses and costs of administration; (2) surviving spouse's or children's awards; (3) debts due U.S. Government; (4) (a) money due employees for services within four months of death but not more than $800 for each claimant, and (b) expense of last illness; (5) money and property received or held in trust by decedent which cannot be traced or identified; (6) debts due State of Illinois and any county, township, city, town, village or school district within state; (7) all other claims. (755 ILCS 5/18-10).

Secured claims need not be presented to protect security (162 Ill. 410, 44 N.E.2d 735), but must be filed in order to participate as to excess over security. In insolvent estates, if claimant first realizes on security and then files claim, he may file and participate only to the extent of the excess. If claim is first allowed for entire debt, security may then be liquidated; and if claimant realizes from security less than amount of claim, he is entitled to receive dividend on the basis of entire debt, amount realized from security being taken into account only to prevent dividend in excess of complete satisfaction. (147 Ill. 570, 35 N.E.2d 624).

Nonresident creditors have no special rights.

Sale of Personalty.

Where necessary for proper administration, court may authorize representative to sell personal property at public or private sale or at public auction or to mortgage or to pledge personal property. (755 ILCS 5/19-1[a], 5/19-5). Where will gives executor power to sell, mortgage or pledge personal property, no order of court is necessary. (755 ILCS 5/19-1[c]).

Lease, sale, mortgage or pledge of any personal estate by representative under power given in will is valid regardless of subsequent setting aside of will or any other action which might limit or restrain right of representative to transfer title or to lease, sell, mortgage, or pledge such personal estate. (755 ILCS 5/19-1[c]). Personal property specifically bequeathed or directed by testator not to be sold may not be sold, mortgaged or pledged unless necessary for payment of claims, expenses, taxes or proper administration of estate. (755 ILCS 5/19-1[a]). If sale of personal estate is not necessary for payment of claims or expenses of administration, court may order personal estate to be distributed in kind. (755 ILCS 5/19-1[b]).

Sale or Mortgage of Real Estate.

In absence of power in will, court may grant representative power to sell or mortgage real estate for proper administration of estate. (755 ILCS 5/20-4).

Representative selling or mortgaging real estate, whether pursuant to court order or power in will, must file bond for one and one-half times value thereof if surety on bond is corporate, or for double value thereof if surety on bond is individual. (755 ILCS 5/12-9[c]).Bond must identify real estate or interest therein being sold or mortgaged. (755 ILCS 5/12-9[b]). No security required where will so provides, and no greater security required than specified in will, unless the court has cause to suspect the representative of fraud or incompetence or believes that the estate of the decedent will not be sufficient to discharge all the claims against the estate. (755 ILCS 5/12-4[a]). If will excuses written bond, then amount of bond without writing increases, unless court requires written bond. (755 ILCS 5/12-9[d]).

Foreign representative, acting pursuant to validly admitted will in foreign domiciliary jurisdiction, may give deed to real property in Illinois upon admission of foreign will in Illinois without issuance of letters of office in Illinois. (755 ILCS 5/22-6, 755 ILCS 5/7-1 through 5/7-5).

If representative with power under will to lease, sell or mortgage any real estate or interest therein leases, sells, or mortgages such real estate, such lease, sale or mortgage is valid regardless of subsequent setting aside of will or any other action limiting right of representative to alienate realty involved. (755 ILCS 5/20-15).

Upon petition of representative or other interested party, court may, with or without notice, order representative to perform contract of decedent or incompetent legally subsisting at time of death or adjudication to convey real estate or interest therein and to execute all necessary documents. Petition must contain description of real estate and factual basis for right to convey. Court may authorize representative to waive defaults or compound or compromise any balance due. If contract requires warranties, they bind the estate but not the representative personally. (755 ILCS 5/20-17).

All real and personal property and the income therefrom are chargeable with claims, expenses, taxes and legacies without distinction, except if the will otherwise provides. (755 ILCS 5/18-14).

Possession of Real Estate.

Representative must take possession of real estate, except where provided otherwise in will or real estate is occupied by heir or legatee as his residence, and must collect rents and pay various expenses. (755 ILCS 5/20-1).

Actions by Representative.

If no letters have been issued in Illinois upon estate of nonresident decedent, representative to whom letters have been issued by court of competent jurisdiction of another state may sue in Illinois in any case in which resident representative could sue. (755 ILCS 5/22-3). If letters are subsequently issued in Illinois, resident representative will be substituted on motion. (755 ILCS 5/22-5). Concerning survival of cause of action, see 755 ILCS 5/8-1.

If party to action dies, court on motion may substitute proper parties if action survives. (735 ILCS 5/2-1008[b]).

Actions against Representatives.

Right to sue on claims is not suspended and action may be brought within period of statute of limitations without first presenting claim, but judgment in suit filed after expiration of period for filing claims can be satisfied only from property other than that inventoried. (162 Ill. 410, 44 N.E. 742). Service of process on personal representative must be made within claims period in order for tort claimant to share in inventoried assets, unless claim is filed in probate proceedings. (28 Ill. App.2d 110, 170 N.E.2d 640).

Action pending at time of decedent's death may be continued against representative, but if a motion to substitute is not filed within 90 days after the death is suggested of record, the action may be dismissed as to the deceased party. (735 ILCS 5/2-1008).

It is the duty of the executor or administrator with will annexed to defend suits contesting validity of will. (755 ILCS 5/8-1[e]).

Personal Property Claimed by Third Parties.

On petition, court may hear and determine rights of third parties to personal property in possession or control of representative. (755 ILCS 5/16-2).

Allowances.

Surviving spouse of resident decedent whose estate is being administered in state, whether spouse died testate or intestate, must, to exclusion of all debts except funeral and administration expenses, be allowed as such spouse's sole exclusive property, such sum of money as court deems reasonable for proper support of such spouse and minor and adult dependent children residing with spouse for nine months after death of decedent in manner suited to such spouse's condition in life, taking into account condition of estate. Non-probate assets received by spouse may be considered. (120 Ill. App.3d 917, 458 N.E.2d 1147). Award to be not less than $10,000 together with additional sum not less than $5,000 for each minor child and adult dependent child of decedent. That part of award to be paid in cash must be paid in not more than three installments, as court directs. If surviving spouse dies before award for his support is paid in full, amount unpaid goes to his estate. If spouse dies or abandons child, amount allowed for that child remaining unpaid will be paid for benefit of child. Spouse entitled to award unless will provides that bequest is in lieu of award and spouse does not renounce will. (755 ILCS 5/15-1).

Surviving spouse may receive award in money or at his election, in whole or in part, in personal property not specifically bequeathed at appraised value, selection to be made within 30 days after written notice of allowance of award. (755 ILCS 5/15-4).

Each minor child of decedent and each adult dependent child must be allowed at least $5,000 plus, if there is no surviving spouse, share of at least $10,000 divided among all such children, with same right of selection of chattels. Such award may be apportioned as court may direct. (755 ILCS 5/15-2, 755 ILCS 5/15-4).

Representative must apply to court to make award when allowable. (755 ILCS 5/15-3).

Where assets, after payment of first class claims, do not exceed surviving spouse's or child's award or both, court discharges representative and orders personal estate delivered to person entitled to award without such person being liable for any of decedent's debts except first class claims to extent of personal estate so received. (755 ILCS 5/24-7).

Investments.

In addition to investments authorized in will, representative may invest funds of estate during period of administration in obligations of U.S. or obligations principal and interest of which is unconditionally guaranteed by U.S., maturity of which is no longer than five years from date of purchase; in savings accounts or certificates of deposit in state or national bank doing business in Illinois to extent insured by U.S. Government; withdrawable capital accounts, deposits, investment certificates and certificates of deposit of savings and loan associations doing business in Illinois, to extent they are insured by U.S. Government or Government Agency; common trust fund as provided in Common Trust Fund Act; mutual funds and money market funds investing solely in securities authorized by statute for investment by representatives; shares of any corporation with market capitalization over $200,000,000 if registered with SEC on national securities exchange or electronic securities quotation system and so long as no shares of corporation would cause market value of all stock held to exceed two-thirds of estate held; and any other investments authorized by court or legislature. (755 ILCS 5/21-1 to 5/21-2.15).

Intermediate Accountings.

Representative must present accounts to court within 60 days after expiration of 12 months from date of letters and thereafter whenever required by court until estate has been fully administered. Court may excuse accountings if all interested persons file written consents. (755 ILCS 5/24-1).

Final Accounting and Settlement.

Representative's final account will not be approved until allowance or rejection of all claims filed, or if allowed claims are unsatisfied and there are assets applicable thereto. If representative fails to make settlement of estate within 30 days after expiration of the time provided in statute he may be brought before court by citation and ordered to do so. Failure to appear authorizes issuance of body attachment against representative, and failure to make settlement after such attachment may be dealt with as for contempt. If representative fails or refuses to pay any money or deliver any property to any person entitled thereto, pursuant to court order, within 30 days after demand, court may on verified petition of any interested party or on its own motion attach delinquent representative and imprison him until he complies or is discharged by due course of law and may remove him as representative. (755 ILCS 5/24-16). Also, such failure or refusal is deemed to amount to devastavit, and action on representative's bond or against sureties may be maintained. (755 ILCS 5/24-17).

Representative must give notice of final settlement to unpaid creditors and to every person entitled to share of estate who has not received that share in full, or waived notice, and account as approved at hearing is binding on all persons to whom notice was given or who waived notice, in absence of fraud, accident or mistake. (755 ILCS 5/24-2). For procedure in reopening closed estate to permit administration of newly discovered asset see 755 ILCS 5/24-9.

Notice.

Must be given, as court directs, to unpaid creditors and persons who have not received their full share, to bind them. In Cook County notice and copy of account must be given ten days before hearing. Other counties have similar provisions. Trust beneficiaries may be entitled to notice although not named in will. (143 Ill. App.3d 741, 493 N.E.2d 121).

Distribution.

On settlement, when assets are sufficient to pay claims, court may order distribution of estate to persons entitled thereto. Unless otherwise provided by will, if estate is insufficient to pay all legacies under will, specific legacies are satisfied pro rata before general legacies and general legacies are paid pro rata without priority in either case between realty and personalty. (755 ILCS 5/24-3). If assets are sufficient to pay claims, court may order distribution before expiration of period when claims are barred, if distributee gives bond. (755 ILCS 5/24-4). Distributee of estate of person presumed to be dead must give bond. (755 ILCS 5/24-5). Suit for accounting may be maintained by distributee against representative. (755 ILCS 5/24-8). There is no statute or well settled statewide practice regarding distribution to legatee residing abroad.

Liabilities.

Representatives and sureties on bond are liable to successor representatives, to co-representatives, and to any person aggrieved thereby for any mismanagement of the estate committed to their care. (755 ILCS 5/24-18).

Compensation.

Representatives and their attorneys allowed reasonable compensation. (755 ILCS 5/27-1, 5/27-2).

Independent Administration.

Independent administration with minimal court filings, available as of Jan. 1, 1980, for estates not then under administration and those under administration but not yet closed. Independent administration is available regardless of monetary value of estate. (755 ILCS 5/28-1).

Independent administration is granted unless petition for letters requests supervised administration, or at any time on petition during supervised administration. When independent administration is granted, independent representative must explain rights of heirs and legatees and provide petition for termination of independent administration in notice to heirs and legatees. (755 ILCS 5/28-2[a]). Independent representative must file proof of mailing, and, when required, proof of publication, with clerk of court. (755 ILCS 5/28-2[a]).

Court must grant supervised administration on objection of interested person (as defined in 755 ILCS 5/1-2.11), unless objector is creditor or legatee other than residuary, then only if court finds supervision necessary to protect objector's interest; or, if will directs independent administration, only upon good cause shown (755 ILCS 5/28-2[b]).

Special notice provisions applicable. (755 ILCS 5/28-2[a]).

Any interested person may petition court at any time during independent administration for hearing and order on matters germane to estate. (755 ILCS 5/28-5).

Independent administrator must mail or deliver copy of inventory to all interested persons at least 30 days before closing estate, but need not file with court. (755 ILCS 5/28-6[a]). Independent administrator must provide surety with inventory by certified mail within 90 days after issuance of letters, and thereafter when he receives notice of additional property. Failure to do so may result in termination of independent administration. (755 ILCS 5/28-6[b]).

Special powers and limitations provided for independent administrators. (755 ILCS 5/28-8).

Independent administrator may distribute estate to persons entitled at any time he finds sufficient assets to pay all claims. Administrator may require bond and must require it if distribution is before expiration of period when claims are barred. (755 ILCS 5/28-10[a]).

Independent administrator is accountable to all interested persons for administration and distribution, but need not present account to court unless interested person requests accounting. Separate procedures for closing independent administration. (755 ILCS 5/28-11).

When Administration Unnecessary.

Where heirs (and legatees, if will) are residents of Illinois and under no disability, no Illinois inheritance or federal estate tax is due and all claims are paid, estate valued up to $100,000 may be settled without issuance of letters if all interested parties agree (755 ILCS 5/6-8, 755 ILCS 5/9-2, 755 ILCS 5/9-8); order directing specified holders of property to distribute directly to heirs or legatees is issued in lieu of letters. Distribution on summary administration available upon petition of interested person after ascertainment of heirship and admission of will to probate. Requirements are: (1) Gross value of probate assets not in excess of $100,000; (2) no unpaid claims, or all claimants and amounts of claims known and listed in petition; (3) no state or Federal death taxes due or all such taxes paid or obligation of another fiduciary; (4) no person entitled to surviving spouse or child's award, or, if allowable, name and age of each person so entitled and amount already paid is listed in petition; (5) all heirs and legatees consent in writing; (6) each distributee gives bond to extent of distributive share and conditioned to refund due proportion of any valid claim or prior right of distribution, along with costs of recovery and reasonable attorneys fees; and (7) notice is published. (755 ILCS 5/9-8).

Where aggregate personal estate does not exceed $100,000, no probate is required; and any person or corporation must turn over assets of decedent on filing of required affidavit by heirs or persons entitled thereto. (755 ILCS 5/25-1).

Small Estates.

See subhead When Administration Unnecessary, supra.

Foreign Executors or Administrators.

Representative to whom letters are issued on estate of nonresident by court of competent jurisdiction of state or territory of U.S. may collect any personal estate of decedent in Illinois and remove it to jurisdiction in which his letters are issued upon delivering to person or corporation indebted to or holding personal estate, following: (1) affidavit by representative that no letters have been issued or no application for letters is pending in Illinois, and there are no creditors in Illinois; (2) copy of letters must be certified within 60 days before date of presentation. No delivery may be made until 30 days after decedent's death. (755 ILCS 5/22-1). Such representative may sue, when no letters are issued in this state, in any case in which resident representative may sue (755 ILCS 5/22-3) and may petition circuit court of county where greater part of personal or real estate is located for sale, lease or mortgage of estate for any purposes for which resident representative may sell, lease or mortgage (755 ILCS 5/22-4). Deed executed pursuant to power vested in foreign executor is evidence of title in grantee to same extent as was vested in testator if will is admitted to probate in circuit court of proper county in Illinois before delivery of deed unless letters have been issued in Illinois and remain unrevoked. (755 ILCS 5/22-6).

See also topic 13.16 Wills, subhead Foreign Wills.

Uniform Fiduciaries Act.

See topic 13.15 Trusts.

Uniform Principal and Income Act.

See topic 13.15 Trusts.

Uniform Simplification of Fiduciary Security Transfers Act.

Not adopted. But see Illinois Act for Fiduciary Security Transfers. (760 ILCS 70/0.01 to 70/9).

See also topic 13.16 Wills, subhead Contest.

13.11 FIDUCIARIES:

See topics 13.08 Executors and Administrators, Trusts; category 14 Family, topic 14.07 Guardian and Ward.

13.12 INTESTACY:

See topic 13.07 Descent and Distribution.

13.13 [RESERVED]

13.14 PROOF OF CLAIMS:

See topic 13.08 Executors and Administrators; category 5 Civil Actions and Procedure, topic 5.17 Pleading.

13.15 TRUSTS:

Equitable principles applicable to trusts under the common law are generally followed by the courts except where specific statutes govern.

Creation.

All declarations or creations of trusts in lands, tenements, or hereditaments must be manifested and proved by some writing signed by party who is by law enabled to declare such a trust, or by his last will in writing, provided that resulting or constructive trusts may be proved by parol. (740 ILCS 80/9).

Revocation.

Unless instrument or dissolution decree provides otherwise, judicial termination of marriage of grantor or settlor of trust revokes every provision which is revocable by settlor or grantor pertaining to former spouse, for all trusts and amendments executed before entry of dissolution decree. Former spouse is treated as having been deceased on date of entry of dissolution decree. Land trusts, totten trusts, and other special trusts are exempt. Effective for trusts executed after effective date of Jan. 1, 1982. (760 ILCS 35/1).

Appointment of Trustee.

Any corporation incorporated in Illinois or any state bank or state savings and loan authorized by law to accept or execute trusts may be appointed trustee. (205 ILCS 620/2-1). Grantor can designate trustee and provide for successor in trust instrument (116 Ill. 83, 4 N.E.773) and can authorize trustee to choose own successor (209 Ill. 222, 70 N.E.731) or court in default can appoint trustee (300 Ill. 302, 133 N.E.335).

Eligibility and Competency.

Corporations must comply with Corporate Fiduciary Act in order to serve as trustees. (205 ILCS 620/1-2). Foreign corporations, including banks, and national banking associations domiciled in other states, may also serve as trustees under stated conditions. (205 ILCS 620/4-2).

Qualification of Trustee.

No statutory requirement of bond.

Removal of Trustee.

Commissioner of Banks and Real Estate has power to remove corporate trustee for violation of law for unsafe or unsound practice in conduct of business. Commissioner may issue order prohibiting former director, officer, employee or agent of corporate fiduciary from further service with corporate fiduciary if Commissioner is of opinion that such person violated law, rule or order relating to corporate fiduciary or engaged in unsafe or unsound practice prior to termination of service with corporate fiduciary. (205 ILCS 620/5-6). Court has power to remove trustee for breach of trust or misconduct. (368 Ill. 146, 13 N.E.2d 153).

Discharge.

Beneficiaries receiving final accounting and such beneficiaries' heirs and assigns are bound by final accounting unless action against trustee instituted within three years of final accounting or trustee guilty of fraud in which case 725 ILCS 5/13-215 controls time within which action may be brought. Effective for trusts terminating Jan. 1, 1988 and thereafter. (760 ILCS 5/11[b], [f]).

Virtual Representation.

Except as to agreement that accelerates termination of trust in whole or in part, if all primary beneficiaries are adults and not incapacitated, any written agreement (including one construing provision of trust or any duty, power, responsibility or action of trustee) between trustee and all of primary beneficiaries is final and binding as to trustee and all beneficiaries, current and future, as if ordered by court with competent jurisdiction over all parties. Effective Aug. 16, 1993 as to all existing and future trusts but only as to agreements entered into after effective date. (760 ILCS 5/4.25).

General Powers and Duties of Trustees Under Express Trusts.

As to all trusts created after Sept. 30, 1973, powers and duties of trustees, unless otherwise specified in instrument creating express trust or by order of court, are defined by statute. (760 ILCS 5/4). Previous statutory provisions (148 ILCS 31/37) are repealed. Trustee has power to lease, borrow, mortgage and pledge, grant easements, appoint trustee in another jurisdiction, enter into deposit, investment and agency agreements, exercise powers of individual owner over securities, pay taxes and expenses, appoint attorneys and other agents, delegate powers to co-trustee, compromise or abandon claims, execute contracts which may contain warranties binding upon trust estate and excluding personal liability, receive additional property in trust (and for trusts created and action is taken before, on or after Jan. 1, 1994, to administer additional property as part of trust estate or as separate trust having terms identical to existing trust), invest in undivided interests, deal with other fiduciaries, distribute in cash or in kind, rely upon affidavit, certificate, etc., for distribution, exercise rights pending distribution and during litigation and purchase insurance for protection of trust estate (760 ILCS 5/4.02); for trusts created and actions taken before, on or after Jan. 1, 1994, to sever any trust on fractional basis into two or more separate trusts for any reason; to segregate amount to reflect partial disclaimer; to reflect differences in federal tax treatment including generation-skipping transfer tax liability (760 ILCS 5/4.25). Bank operated by or affiliated with trustee may provide certain services to trust. (760 ILCS 5/4.06). If beneficiary under legal disability trustee may distribute income and principal to beneficiary or others including to trust created prior to time distribution becomes payable for sole benefit of beneficiary and those dependent on beneficiary during his lifetime and any amounts to such trust is indefeasibly vested in beneficiary or expend for beneficiary's benefit. (760 ILCS 5/4.20). Trustee may cause stocks, bonds and other property belonging to trust to be registered and held in name of nominee. (760 ILCS 5/6). Majority of trustees are competent to act after notice or waiver. (760 ILCS 5/10). Trustee may resign by written notice to settlor, if living, to co-trustee, if any, and to income beneficiaries. (760 ILCS 5/12). During vacancy of trusteeship, where more than one trustee is provided for, remaining trustees have all rights, powers and duties of original trustees, and beneficiaries may appoint successor trustee if there is no remaining trustee. (760 ILCS 5/13). Representative of estate of beneficiary under legal disability, if any, otherwise relative of such beneficiary may act for beneficiary in approving accounts, executing receipt and receiving notice from trustee. (760 ILCS 5/15). See also category 3 Business Regulation and Commerce, topic 3.01 Banks and Banking, subhead Trust Companies. Trust and Trustees Powers Act expanded to include special farm powers, oil and gas powers, specific provision for one or more trustees to act as manager or to continue unincorporated business and provision for trustee or trustee's agent to continue partnership, act as partner, limited partner, employee of partnership or enter into partnership and incorporate existing partnership. Effective Sept. 2, 1981. (760 ILCS 5/1 to 5/20). Regarding powers over partnerships, trustees or trustees' agent are not personally liable for actions not sounding in tort, unless they have failed to identify trust estate or that they were acting in representative capacity. Effective Jan. 1, 1986. (760 ILCS 5/4.24).

Accounting.

Trustee must furnish at least annually to beneficiaries then entitled to receive or receiving income from trust estate, or if none, then those beneficiaries eligible to have benefit of income from trust estate current account of receipts, disbursements and inventory of trust. Upon termination of trust, trustee must furnish to beneficiaries final account for period from date of last current account to date of distribution showing inventory, receipts, disbursements and distributions of trust and must make available to beneficiaries copies of prior accounts not theretofore furnished. (760 ILCS 5/11[a], [b]).

Compensation.

Trustee must be reimbursed for proper expenses incurred in management and protection of trust and is entitled to reasonable compensation for services rendered. (760 ILCS 5/7).

Uniform Principal and Income Act previously in effect as modified is repealed effective Jan. 1, 1982. New Principal and Income Act effective for all receipts and disbursements after 12/31/81 in any trust, decedent's estate, or legal life estate, notwithstanding date of establishment or date of acquisition of assets. Act follows Uniform Principal and Income Act with substantial revision. Absent trust provisions or statutory provisions to contrary, trustee may now allocate in accordance with what is “reasonable and equitable.” Income and expenses of estates are now credited and charged in accordance with identical rules applicable to trusts, with minor exceptions. (760 ILCS 15/1). Act allows accrued but undistributed income to be paid to income beneficiary at termination of income interest where necessary to qualify for marital deduction under Federal Estate and Gift Tax. Any pecuniary bequest to surviving spouse under either will or trust entitled to proportionate part of income of estate or trust. (760 ILCS 15/1 to 15/17).

Gifts to Minors.

See category 14 Family, topic 14.10 Infants.

Uniform Fiduciaries Act adopted (760 ILCS 65/1, 65/2, 65/4 to 65/12) except as to transfers of securities, governed by Fiduciary Security Transfer Simplification Act (760 ILCS 70/0.01 to 70/9).

Investments.

When not otherwise provided by will, agreement, court order or other instrument creating or defining trustee's duties and powers, trustees, including trustees of common trust funds, in acquiring, investing, reinvesting, exchanging, retaining, selling, and managing trust property, must exercise judgment and care under circumstances then prevailing which men of prudence, discretion and intelligence exercise in management of their own affairs, not in regard to speculation but in regard to permanent disposition of their funds, considering probable income as well as probable safety of their capital. (760 ILCS 5/5.1[a]) Trustee may not delegate duty to exercise judgment and discretion, but may retain investment advisor or professional, who submits to jurisdiction of the court and is subject to same standards and liabilities as trustee. (760 ILCS 5/5.1[b]). If investment agent is selected with reasonable care, skill, and caution, trustee will not otherwise be responsible for the investment decisions or actions of the investment agent. (760 ILCS 5/5.1[c]). Although still subject to duty of using reasonable care, trustee may invest in certain obligations of state of Illinois or subdivisions thereof (30 ILCS 335/1, 335/2) and in unit investment trust funds, including mutual funds for which trustee or its affiliate acts as manager or advisor (760 ILCS 5/5.1; 760 ILCS 5/5.2). When entering into contract with State or local government affecting ownership or use of real property to which he has title, trustee is required to disclose in writing and under oath identity of every owner and beneficiary having any interest in property and every member, shareholder, limited or general partner entitled to receive more than 7.5% of total distributable income of any limited liability company, corporation or limited partnership having any interest in property. (50 ILCS 105/3.1).

Prudent investor rule adopted. (760 ILCS 5/5[a]). The terms “legal investment” or "authorized investment" or words of similar import as used in any such instrument mean any investment which is permitted by the foregoing standard. (760 ILCS 5/5[d]).

Sales.

Trustee is empowered to sell, contract to sell and grant options to purchase any part or all of trust estate at public or private sale, for cash or on credit, and to exchange any part or all of trust estate for other property. (760 ILCS 5/4.01).

Securities in Name of Nominee.

A trustee may register securities in name of a nominee without mention of trust, and trustee is liable for acts of nominee with respect to any investment so registered. (760 ILCS 5/6). See also category 3 Business Regulation and Commerce, topic 3.01 Banks and Banking, subhead Trust Companies.

Bequests and Devises to Inter Vivos Trusts.

See topic 13.16 Wills, subhead Bequests and Devises to Inter Vivos Trusts.

Disclaimers under nontestamentary instruments may be made as provided in Probate Act. See topic 13.16 Wills, subhead Disclaimers. (760 ILCS 25/1).

Uniform Common Trust Fund Act.

Uniform Common Trust Fund Act has been adopted with significant changes and additions and is known as Common Trust Fund Act. (760 ILCS 45/1 to 45/8). See category 3 Business Regulation and Commerce, topic 3.01 Banks and Banking.

Charitable Trusts.

Uniform Supervision of Trustees for Charitable Purposes Act, with significant changes, adopted. (760 ILCS 55/1 to 55/4). Act is known as Charitable Trust Act (760 ILCS 55/1) and applies to trustees who hold property, whether under a written instrument or not, corpus of which exceeds $4,000 (760 ILCS 55/2). "Trustee" means any individual, group of individuals, corporation, not for profit corporation, estate representative or other legal entity holding property for any charitable purpose. (760 ILCS 55/3). Excluded legal entities include U.S., any state, territory or possession of U.S., District of Columbia, Puerto Rico and their agencies or governmental subdivisions, corporation sole, or other religious, charitable, educational and hospital organizations and those organizations operating cemeteries and homes for aged. (760 ILCS 55/4). Attorney General is required to establish and maintain register of trustees subject to Act. (760 ILCS 55/5). Trustee must file copies of trust instruments, or if there is no written instrument, then statement of title, powers and duties, and, except for Illinois banks and trust companies, periodic reports in accordance with rules and regulations of Attorney General. (760 ILCS 55/6 to 55/8). Attorney General is empowered to conduct investigations and issue subpoenas. (760 ILCS 55/9, 55/10). Register, copies of instruments and reports filed with Attorney General are open to public inspection (760 ILCS 55/11), except for confidential registrations (760 ILCS 55/6[b]). Trustees of trusts that fall within §509 or §4947 of Internal Revenue Code, subject to governing instrument provisions, may amend terms of trust instrument to conform to requirements of Federal Tax Reform Act of 1969. (760 ILCS 60/1).

Uniform Act for Simplification of Fiduciary Security Transfers.

Not adopted. See Fiduciary Transfer of Securities Act. (760 ILCS 70/0.01 to 70/9).

Accumulations.

See category 21 Property, topic 21.12 Perpetuities.

Perpetuities.

See category 21 Property, topic 21.12 Perpetuities.

Testamentary Trustee as Beneficiary of Insurance.

See topic 13.16 Wills, subhead Insurance Payable to Testamentary Trustee.

Pour Over Trusts.

See topic 13.16 Wills, subhead Bequests and Devises to Inter Vivos Trusts.

Illusory Trust.

See topic 13.16 Wills, subhead Renunciation of Will.

Real Estate Investment Trusts (“REIT”).

Shareholders or beneficiaries of “real estate investment trust” (defined by reference to Federal Internal Revenue Code [745 ILCS 60/1]) not, as such, personally liable for obligations of REIT arising after July 1, 1963 and persons who become shareholders or beneficiaries of REIT after July 1, 1963, not personally liable, as such, for obligations of REIT. (745 ILCS 60/2). Effective registration with Secretary of State of securities issued or issuable by such unincorporated trust or association under §5 of Illinois Securities Law of 1953 is conclusive evidence that unincorporated trust or association is REIT as to all persons who become shareholders or beneficiaries after such effective registration and as to all REIT'S obligations arising after July 1, 1963, whether they arose before or after such effective registration. (745 ILCS 60/2).

Land Trusts.

See category 21 Property, topic 21.16 Real Property, subhead Land Trust.

Trusts for Domestic or Pet Animals.

Valid, but terminates when no living animal is covered by trust. (760 ILCS 5/15.2).

13.16 WILLS:

Every person, of age of 18, who is of sound mind and memory, may make will. (755 ILCS 5/4-1).

Testamentary Disposition.

There is no limitation on charitable gifts, except that right of surviving spouse to renounce cannot be defeated thereby.

Execution.

Will must be in writing, signed by testator or by another in his presence and at his direction and attested in his presence (but not necessarily in each other's presence) by two or more credible witnesses. (755 ILCS 5/4-3).

Form of Attestation Clause.

Form

We, the undersigned, certify that the foregoing instrument was, on the date thereof, signed and declared by . . . . . . as . . . . . . last will in the presence of us, who in . . . . . . presence and in presence of each other have, at . . . . . . request, hereunto signed our names as witnesses of the execution thereof this . . . . day of . . . ., 20. . . . .; and we hereby certify that we believe said . . . . .. to be of sound mind and memory. (Signatures of witnesses, together with their addresses.)

Holographic wills as such are not valid. (226 Ill. App. 3d 948, 168 Ill. Dec. 600).

Nuncupative wills are not valid.

Living Wills.

Living will is written declaration, executed by same persons eligible to make, and with same formalities required for, valid will, instructing declarant's attending physician to withhold or withdraw life-sustaining procedures in event declarant is diagnosed as having terminal condition. Physician who certifies declarant terminally ill is immune from civil or criminal liability. No health care professional or medical care facility or employee who in good faith and pursuant to reasonable medical standards withholds or withdraws life sustaining procedures pursuant to declaration is subject to criminal or civil liability. Living will may be revoked in same manner as will; also may be revoked by oral expression in presence of witness who signs and dates writing confirming oral expression of intention to revoke. (755 ILCS 35/1). Statutorily prescribed form follows:

DECLARATION

Declaration made this . . . . day of . . . . (month, year). I, ..., being of sound mind, willfully and voluntarily make known my desires that my moment of death shall not be artificially postponed under the circumstances set forth below, do hereby declare:

If at any time I should have an incurable injury, disease, or illness judged to be a terminal condition by my attending physician who has personally examined me, and has determined that my death is imminent except for life-sustaining procedures, I direct that such procedures be withheld or withdrawn, and that I be permitted to die naturally with only the administration of medication, sustenance, or the performance of any medical procedure deemed necessary to provide me with comfort care.

In the absence of my ability to give directions regarding the use of such life-sustaining procedures, it is my intention that this declaration shall be honored by my family and physician as the final expression of my legal right to refuse medical or surgical treatment and accept the consequences from such refusal.

I understand the full import of this declaration and I am emotionally and mentally competent to make this declaration.

Signed . . . .

City, County and State of Residence . . . .

The declarant has been personally known to me and I believe him or her to be of sound mind. I did not sign the declarant's signature above for or at the direction of the declarant. I am not related to the declarant by blood or marriage, entitled to any portion of the estate of the declarant according to the laws of intestate succession or under any will of declarant or codicil thereto, or directly financially responsible for declarant's medical care.

Witness . . . .

Witness . . . .

Durable Powers of Attorney for Property and Health Care.—See subhead Durable Powers of Attorney under category Property, topic Powers of Attorney—includes statutory forms.

Revocation is effected only (a) by burning, tearing, cancelling or obliterating by testator or by some person in his presence and at his direction, (b) by execution of some later will declaring same, (c) by later will to extent it is inconsistent with prior will or (d) by execution of instrument in writing declaring revocation and signed and attested as will. (755 ILCS 5/4-7[a]).

Will may not be revoked by any change in circumstances of or marital status of testator, except that divorce or annulment revokes every devise, legacy, or interest or power of appointment or nomination to fiduciary office made to or for former spouse before entry of decree, and will takes effect as if former spouse died before testator. (755 ILCS 5/4-7[b]).

Revival.

No will in any manner revoked is revived otherwise than by (1) re-execution thereof or (2) an instrument in writing declaring revival and signed and attested in manner prescribed for will. If will is partially revoked by an instrument which is itself revoked, revoked part of will is revived. (755 ILCS 5/4-7[c]).

Testamentary Gifts to Subscribing Witnesses.

Persons, or spouses of persons, incompetent as attesting witnesses because of interest are by statute rendered competent and may be compelled to testify, but such persons are deprived of any interest under will, except so much as does not exceed amount witness would be entitled to were will not established. Such persons are not so deprived if there is statutorily sufficient number of other attesting and testifying witnesses. (755 ILCS 5/4-6[a]). Fact that employee or partner of individual or employee or shareholder of corporation attests execution of will or testifies thereto does not disqualify said individual or corporation from acting or from receiving compensation for acting in any fiduciary capacity with respect to will of decedent. No attorney is disqualified to act or to receive compensation by reason of fact that such attorney is attesting or testifying witness or is employee or partner of attesting or testifying witness. (755 ILCS 5/4-6[b]).

Bequests and Devises to Inter Vivos Trusts.

Pour-over wills to existing and identified revocable trusts, and to testamentary trust of predeceased person where will in existence and identified by pouring testator's will, are valid. Unless will provides otherwise, gifts are governed by instrument creating trust, including written amendments or modifications made at any time before death of testator, or after if testator's will directs, and if trust revoked prior to testator's death, gift takes effect as trust existed at revocation. (755 ILCS 5/4-4).

Testamentary Guardians.

See category 14 Family, topic 14.07 Guardian and Ward.

Simultaneous Death.

See topic 13.05 Death, subhead Survivorship.

Probate of will is in first of following counties applicable: (a) where testator has a known place of residence, (b) if no known place of residence, wherein greater portion of his real estate is located, (c) if no known place of residence and no real estate, wherein greater portion of his personal estate is located. (755 ILCS 5/5-1). On application for probate, two witnesses must recount facts of execution, each stating that in his belief testator was then of sound mind and memory. Other competent evidence to establish will may be introduced. If proponent establishes will by sufficient evidence it will be admitted to probate unless there is proof of fraud, forgery, compulsion or other improper conduct. (755 ILCS 5/6-4[a]). Above statements to prove will may be by: (1) Testimony before court; (2) attestation clause signed by witnesses and forming part of or attached to will; (3) affidavit signed at or after attestation which forms part of will or is attached to will or to accurate facsimile of will. (755 ILCS 5/6-4[b]).

Self-proved Wills.

Statements required to prove will may also be made by: (1) Attestation clause signed by witness and forming part of or attached to will; (2) attestation clause signed by witnesses and forming part of or attached to will; (3) affidavit signed at or after attestation which forms part of will or is attached to will or to accurate facsimile of will. (755 ILCS 5/6-4[b]).

If will is admitted to probate before notice given under 755 ILCS 5/6-10, any person so entitled may file petition within 42 days after effective date of order admitting will to require formal proof of will. Court must set hearing at which will may be proved by testimony of witnesses and other evidence allowable under Probate Act, but not by attestation clause or affidavit under 755 ILCS 5/6-4(b). If will established by sufficient evidence, original order is confirmed and effective against all persons. This petition does not extend time for filing contest under 755 ILCS 5/8-1 unless original order is vacated, at which point time begins to run. (755 ILCS 5/6-21).

Form Of Affidavit.

Form

Each of the undersigned, attesting witnesses to the will of . . . . ., dated . . . . ., 20. . . ., of which this affidavit is a part, first having been sworn on oath states that said testator stated to us that the above and foregoing instrument was . . . . . last will and requested each of us to witness . . . . . signing of said will, that each of us was present and saw the said testator sign said will in the presence of each of us, that said will was attested by each of us in the presence of the said testator and each other and that each of us believed said testator to be of sound mind and memory at the time of signing said will. (Signature and address of each witness; signatures must be acknowledged. See category 10 Documents and Records, topic 10.01 Acknowledgments, subhead Forms.)

Contest.

Petition for contest of domestic or foreign will may be filed within six months of admission to probate either in administration proceeding or, if none, in court which admitted will. (755 ILCS 5/8-1[a]). Petitioner must mail or deliver copy of petition to representative, representative's attorney of record, and to each heir and legatee named in petition to admit will. Failure to so mail or deliver does not extend time to file contest or affect validity of judgment entered. (755 ILCS 5/8-1[b]).

Process served as in other civil proceedings.

Any proponent or contestant may demand jury. Contestant has burden of proving invalidity. Witness affidavits admissible. (755 ILCS 5/8-1[c]).

Right to institute or continue proceeding survives and descends to heir, etc. of person so entitled. (755 ILCS 5/8-1[d]).

It is duty of representative to defend contest and prosecute appeal from judgment, and court may appoint special administrator for that purpose if he fails or refuses to do so or if there is no representative then acting. (755 ILCS 5/8-1[e]).

Similar provision for contest of denial of will to probate. (755 ILCS 5/8-2).

Legacies need not be paid until period of administration has expired. When it appears that estate is solvent, court may order payment of all legacies, specific legacies being first satisfied. (755 ILCS 5/24-3). Executor or administrator is chargeable with interest at rate of 10% per annum on fair market value of all personal estate which has come into his possession or control and has not been properly distributed; interest runs for period in excess of two years from issuance of letters testamentary or of administration, with certain exceptions. (755 ILCS 5/24-10).

Ademption.

Gift of specifically bequeathed or devised property where subject property is transferred or disposed of or destroyed during decedent's lifetime is forever adeemed, notwithstanding reacquisition. (167 Ill. 129, 47 N.E.376).

Unclaimed Legacies.

See category 21 Property, topic 21.01 Absentees, subhead Escheat.

Lapse.

A legacy or devise lapses in case of death of legatee or devisee before testator unless will provides otherwise, except (1) in case of legacy or bequest to descendant of testator, in which case his descendants take per stirpes, and (2) in case of legacy or bequest to class and member of class predeceases testator, in which case surviving members of class take share of deceased member unless deceased member is descendant of testator, in which case his descendants take per stirpes. Otherwise lapsed legacy or devise passes as residue under will. (755 ILCS 5/4-11).

Person Causing Decedent's Death.

Effective for decedents dying on or after Sept. 8, 1983, any person intentionally and unjustifiably causing decedent's death will not receive any interest of decedent, by reason of death, as heir, legatee, beneficiary, joint tenant, survivor, appointee or in any other capacity. Interest will pass as if person causing death died before decedent. Any interest in joint tenancy property possessed prior to death by person causing death will not be affected by this statute. Any person convicted of first or second degree murder, or otherwise determined by any court apart from criminal proceeding to have intentionally and unjustifiably caused decedent's death, will be barred from taking pursuant to this provision. Holder of property covered by this statute who knows or has reason to know that potential beneficiary caused death of decedent must cooperate fully in investigation of decedent's death. (755 ILCS 5/2-6).

Children may be disinherited, and mere failure to mention children living when will is executed is sufficient to disinherit them; but child born after making of will and not provided for therein takes share of estate to which entitled under law of descent unless will shows intention to disinherit. (755 ILCS 5/4-10).

Disclaimer.

Person receiving property by any means may disclaim in whole or in part. Power with respect to property also can be disclaimed. Disclaimer may be made at any time before acceptance of property or interest. Legal representative of decedent, minor, or disabled person may disclaim with leave of court, or without leave of court if will or designation of guardian so authorizes. Place of delivery or filing disclaimer and its effect are set forth. (755 ILCS 5/2-7).

Renunciation of Will.

Renunciation is effected by filing in court where will was admitted to probate a written declaration of renunciation within seven months after admission of will to probate or within such further time as court allows upon filing verified petition within such seven months or any extension, setting forth pendency of litigation which affects spouse's share. Filing of instrument is complete bar to any claim of surviving spouse under will. (755 ILCS 5/2-8[b]).

In case of renunciation, surviving spouse takes, after payment of claims, one-third of entire estate if testator leaves descendant, or one-half of entire estate if testator leaves no descendant. (755 ILCS 5/2-8[a]). Payment of claims include federal estate tax. (83 Ill.2d 379, 415 N.E.2d 416).

If no intent to defraud by colorable or sham transaction, valid lifetime transfer in trust or otherwise by decedent is not invalid on ground that it is illusory because decedent retained right regarding property. (755 ILCS 25/1, 25/2; 73 Ill.2d 342, 383 N.E.2d 185).

When will is renounced by testator's surviving spouse, any future interest to take effect in possession or enjoyment at or after termination of estate given by will to surviving spouse takes effect as if surviving spouse had predeceased testator, unless will expressly provides against acceleration in case of renunciation. (755 ILCS 5/2-8[c]).

Contribution.

Court must increase or decrease proportionately other legacies when spouse renounces. (755 ILCS 5/2-8[d]). Discriminatory abatement required. (26 Ill. App.3d 780, 326 N.E.2d 167). All devises and bequests abate proportionately for afterborn child. (755 ILCS 5/4-10). When real or personal estate specifically devised is sold by executor, other devisees or legatees will be ordered by court to contribute to devisee or legatee whose part of estate was sold, to accomplish abatement and equalization. (755 ILCS 5/24-3).

Executory contract for sale of property specifically devised or bequeathed by testator does not revoke legacy, but property passes to legatee subject to contract. (755 ILCS 5/4-8).

Foreign Wills.

A written will admitted to probate outside Illinois or executed outside Illinois in accordance with law of Illinois, of place where executed, or of testator's domicile may be admitted to probate in Illinois. (755 ILCS 5/7-1). Procedure for admission is same as for domestic will except for manner of proof. (755 ILCS 5/7-2). Where foreign will has been admitted to probate outside Illinois, duly authenticated copy of will and order admitting it to probate is sufficient proof; or if other state or country does not require probate, then authenticated copy of will and certificate of legal custodian thereof that will has become operative is sufficient proof; or if other state or country requires will to remain in custody of notary, then copy of will authenticated by notary is sufficient proof. (755 ILCS 5/7-3). When foreign will has not been admitted to probate outside Illinois, it may be admitted to probate in Illinois by proof sufficient for domestic will or by proof in manner provided by law of place where executed or by law of testator's domicile. (755 ILCS 5/7-4).

Order admitting will to probate makes will effective to transfer title to real and personal property devised or bequeathed therein. (755 ILCS 5/4-13, 5/7-5). (See also topic 13.08 Executors and Administrators, subhead Foreign Executors or Administrators.)

Testamentary Trusts.

See topic 13.15 Trusts.

Uniform Anatomical Gift Act adopted in Illinois. (755 ILCS 50/1-1 10 to 50/5-50). Act defines death as irreversible cessation of total brain function, according to customary standards of medical practice. (755 ILCS 50/1-1 to 50/5-50).

Insurance Payable to Testamentary Trustee.

Person having right to designate beneficiary under any insurance, annuity or endowment contract or any pension, retirement, or other employee benefit plan or trust may designate trustee named or to be named in will. Will need not be in existence when designation made. Proceeds are held as part of trust estate under will terms. Unless otherwise provided in policy or beneficiary designation, if within 18 months no trustee qualifies or it is shown no trustee can qualify, executor or administrator takes proceeds. Proceeds subject to claims, estate and inheritance taxes only to same extent that named beneficiary other than estate would be. (755 ILCS 5/4-5).

14 FAMILY

14.01 ADOPTION:

Adoption Act of 1959 became effective Jan. 1, 1960. Terms appearing in quotes herein are defined in Act as amended.

Any reputable person of legal age who has resided continually in Illinois for at least six months, or, if member of U.S. armed forces has been domiciled in Illinois for 90 days, may initiate proceeding to adopt. There is no residence requirement if adoption is of “related child” or child placed by “agency.” If petitioner is married, husband or wife must join in petition; and adoption must be by both spouses jointly unless living separate and apart for 12 months or longer. Minor may also petition by leave of court upon good cause shown. (750 ILCS 50/2).

Any minor child may be adopted. An adult may be adopted under certain circumstances. (750 ILCS 50/3).

Definitions.

Unfit person means person court finds unfit to have child without regard to whether that child will be placed for adoption. Grounds include: abandonment of child; failure to maintain interest, concern or responsibility as to child's welfare; substantial, repeated neglect; continuous or repeated neglect of any child residing in household which resulted in death of that child; open and notorious adultery or fornication; drunkenness or drug addiction for one year; depravity that is presumed if conviction of certain crimes including first degree murder; failure to show interest, concern or responsibility in welfare of newborn during first 30 days after birth; inability to discharge parental responsibilities supported by competent evidence from psychiatrist, licensed clinical social worker, or clinical psychologist; two or more findings of physical abuse to any children supported by clear and convincing evidence or criminal conviction or finding of not guilty by reason of insanity resulting from death of any child or finding of physical abuse resulting from death of any child; failure to protect child from injurious conditions within child's environment; other neglect or misconduct toward child; desertion of child for more than three months next preceding adoption proceeding; failure of parent to make reasonable efforts to correct conditions that were basis for removal of child from parent or to make reasonable progress toward return of child within nine months after adjudication of neglected, abused or dependent minor; repeated or continuous failure by parents, though physically and financially able, to provide adequate food, clothing or shelter; finding at birth of certain controlled substances in infant's blood, urine or meconium where biological mother is biological mother of at least one other child who was adjudicated neglected minor; child has been in foster care for 15 months out of any 22 month period with tolling of time limit in certain circumstances; and evidence of interest to forego parental rights including burden on alleged father to take affirmative action in some cases to establish parental rights. (750 ILCS 50/1[D]).

Consent Required.

Consent of parents, including father of child born out of wedlock, required except where parent found by court by clear and convincing evidence to be “unfit person” or in case of adoption of adult. Other party with legal custody of child, such as legal guardian or “agency,” may consent and in certain circumstances consent is not required. For consent parent does not include man who is child's father as result of criminal sexual abuse or assault or to be father of child who is family member of mother of child and mother is under 18 at time of child's conception or is at least five years older than child's mother and mother was 17 at time of child's conception unless mother and father voluntarily acknowledge paternity by marrying or by establishing paternity by consent of parties pursuant to Illinois Parentage Act of 1984. Criminal conviction of any offense pursuant to Act 12 of Criminal Code of 1961 is not required. (750 ILCS 50/8). Notice may be served on putative father who may affirm or deny paternity. (750 ILCS 50/12a). If party adopted is 14 years or over, his written consent is required. (750 ILCS 50/12).

Consent to adoption by parent, including minor, is irrevocable unless it has been obtained by fraud or duress and court so finds. (750 ILCS 50/11[a]).

No consent or surrender may be made by mother until 72 hours after birth of child. Consent or surrender may be made by father prior to birth, but such consent or surrender is revocable by written notification within 72 hours after birth. Consent may be given to standby adoption by parent to be effective when parent dies or so requests. (750 ILCS 50/9).

Form of consent of mother or father must be acknowledged before appropriate authority including presiding judge of court where petition is brought, designated judge or licensed child welfare agency. (750 ILCS 50/10B-5[1]). Surrender or consent occurring in another jurisdiction is valid if it conforms to law of that jurisdiction. Certificate of magistry or other comparable proof of office of notary public satisfactory to court must be attached to consent acknowledged in another state. If person signing consent or surrender is in military, execution may be made before commissioned officer.

Consents or surrenders to agency for purposes of adoption must be executed in substantial conformance with specified forms. (750 ILCS 50/10B-5[3]). Consent to adoption by specified person or persons in whose physical custody child resided at least six months or in whose physical custody at least one sibling of child has resided for at least six months or in whose physical custody child under one year of age has resided at least three months; where petition under Juvenile Court Act is pending (705 ILCS 405/2-13), consent may be given by parent(s) with approval of Department of Children and Family Services (750 ILCS 50/10[O]).

Actions to revoke consent or surrender for adoption must be commenced within one year from execution. (750 ILCS 50/11[a]).

Jurisdiction and Venue.

Petition may be filed in circuit court of county in which (a) petitioner resides, (b) person to be adopted resides or was born, or (c) parents of child reside. Petition may be filed in any county (a) if an “agency” has acquired custody and control of child and is authorized to consent to adoption or (b) if guardian of person of child has been appointed by court of competent jurisdiction. (750 ILCS 50/4).

Petition.

Petition to adopt adult or “related child” may be filed at any time. Petition to adopt child other than “related child” must be filed within 30 days from time child has become “available for adoption” (or at later date under certain conditions). (750 ILCS 50/5A). In case of child born outside U.S., if prospective adoptive parents have been appointed guardians by court in foreign country, petition to adopt child must be filed within 30 days of child's entry into U.S. (750 ILCS 50/5A).

Verified petition must state petitioners' names, place and length of residence in Illinois, when and from whom custody acquired; child's name, sex, place and date of birth, and relationship to petitioners; parents' names, place of residence, and any legal incapacity, or if no parent, name of guardian and appointing court, or if none, name of near relative. Parents' names and addresses are omitted and they are not to be made parties defendant if: (a) Their rights have been judicially terminated, or (b) child has been surrendered to an agency, or (c) parents deny or fail to declare paternity. Must state name to be given child and consent of authorized person or agency, and any prior orders affecting parties or proceedings. Petition for standby adoption must state facts concerning consent of child's parent to standby adoption. (750 ILCS 50/5B).

Person over 18 who has cared for child for continuous period of one year or more in licensed foster home may petition guardian for consent to adopt and petition will be given preference over other applications subject to final judicial approval. (750 ILCS 50/15.1[a], [b]).

Guardian's final decision to be based on welfare and best interest of child. Guardian considers all relevant factors including child's wishes, relationship with applicant, need for stable and continuous relationship with parent figures, adjustment to present home, school and community, and family ties with applicant and relatives, and wishes of child's parent (if expressed in writing prior to consent for adoption), mental and physical health of all involved and background and criminal background check report required by 750 ILCS 5/6. (750 ILCS 50/15.1[b]).

Proceedings.

All persons (except petitioners) named in petition are made parties defendant and notified in same manner as in other civil proceedings. (750 ILCS 50/7). Form of publication notice prescribed by statute. (750 ILCS 50/7A).

Notice of proceeding must be given to following for sole purpose of enabling such persons to present evidence relevant to best interests of child: person adjudicated in Illinois or other state to be father of child; person registered in Putative Father Registry; person recorded on child's birth certificate as father; person openly living with child or child's mother and openly holding self out as father; person identified as child's father by mother in written sworn statement including Affidavit of Identification under §11; person married to child's mother on date of child's birth or within 300 days prior to child's birth. (750 ILCS 50/7C).

Adoption records are impounded in accordance with Illinois Supreme Court's Administrative Order of Record Keeping. (750 ILCS 50/18).

Investigation.

Within ten days after filing of petition for adoption or standby adoption of child other than “related child,” court must appoint agency, licensed child placement agency, or person deemed competent by court, or in Cook County, Court Services Division of Cook County Department of Public Aid, to investigate (a) allegations of petition, (b) character, reputation and general standing in community of petitioners, (c) religious faith of petitioners and of child, (d) whether petitioners are proper persons to adopt child, (e) health of petitioners, (f) whether child is proper subject of adoption. Written report on such investigation remains confidential and does not become part of record nor is it considered at hearing of such proceeding unless established by competent evidence and (g) criminal background check not more than two years old including list of when, where and by whom criminal background check was prepared with review of fingerprints by state and federal authorities. (750 ILCS 50/6A).

Counsel.

If petition alleges person to be unfit because of inability to discharge parental responsibilities that person must be represented by counsel. If that person has failed to appear or does not have sufficient funds for attorney court appoints counsel. (750 ILCS 50/13B[c]).

Interim Order.

After appointing licensed attorney other than State's Attorney acting in official capacity as guardian ad litem to represent child to be adopted (and any other incompetent defendants), court will hold hearing to determine validity of consent and temporary custody of child. An interim order terminating parental rights, and awarding temporary custody may be entered after service of summons or reasonable notice on parents whose rights not terminated and opportunity to be heard. Interim custody order without notice possible upon presentation of written petition accompanied by affidavit that there is immediate danger to child and irreparable harm if notice given to parents or legal guardian. (750 ILCS 50/13). In case of child born outside U.S., if court of foreign country has previously appointed petitioners as guardians of child, court may order that petitioners continue as guardians of such child. (750 ILCS 50/13C)In standby adoption, court appoints licensed attorney other than State's Attorney as guardian ad litem of child to be adopted. (750 ILCS 50/13D).

Death of Adoptive Child.

After a court has acquired jurisdiction over child in adoption proceeding, if such child dies before entry of final decree, upon petition by intended adoptive parents, the court may proceed to hearing and final decree to enable child to have intended name by adoption. (750 ILCS 50/14a). In case of adoption proceeding commenced after death of child sought to be adopted, intended adoptive parents do not, by reason of such adoption, acquire any interest in estate of such child, or incur any other right or obligation with respect to such child. (750 ILCS 50/14a).

Decree.

In any case other than adoption of related child or of adult, each petitioner, person, or agency consenting to adoption must execute affidavit setting forth any monetary cost given, promised, or received. If total of money or things of value given, promised or received is less than $4,500, affidavit to that effect is sufficient. No affidavit need be filed by non-consenting parent, judge or clerk. After expiration of six months from entry of interim order, unless waiver of six month waiting period is found to be for welfare of child (750 ILCS 50/16), petitioners may apply to court for decree of adoption. Petitioners must serve notice of such application upon investigating agency or person and guardian ad litem. Decree for adoption of: (a) “Related child,” (b) adult or (c) child to whose adoption “agency” or person has authority to consent, may be entered at any time after service of process and return day designated therein. Standby adoption judgment may be entered upon notice of death of consenting parent or request of same for final judgment. (750 ILCS 50/14).

Final propriety of adoption is within sole discretion of court, which bases its decision on welfare and best interest of child. Court considers all relevant factors including those to be considered by guardian when determining whether to consent to child's adoption by foster parent. If court finds that guardian abused discretion in consenting to adoption, court may grant or deny adoption without guardian's consent. (750 ILCS 50/15.1[c], [d]).

Prohibition of Compensation for Placing Children.

No compensation is allowed any person, agency, etc., for placing out a child for adoption, except a statutorily defined child welfare agency. (750 ILCS 50/21, 720 ILCS 525/1 to 525/5). Any person who gives or receives compensation for placing child out for adoption is guilty of Class 4 felony, if first conviction, or Class 3 felony, if subsequent conviction. (720 ILCS 525/5).

Payment of Certain Expenses.

Person who has filed or intends to file petition to adopt with prior court approval may pay reasonable expenses of biological parents during biological mother's pregnancy and for no more than 120 days prior to expected date of delivery and for no more than 60 days after birth of child. Payments will be permitted only where there is demonstrated need to protect heath of biological parents or child. Within 14 days after completion of permitted payments, petitioners must present final accounting to court with verified statements of petitioners, attorneys of record and biological parent(s) attesting to accuracy of accounting. Petitioners also permitted to pay reasonable attorneys fees of biological parents with leave of court. (720 ILCS 525/4.1). However, no person or entity may offer, provide or co-sign loan or other credit accommodation, directly or indirectly, with biological parent or relative of biological parent based on contingency of surrender or placement of child for adoption. (720 ILCS 525/4.1[d-5]).

Effect of Adoption.

Adopted child is deemed a descendant of adopting parent for purposes of inheritance from adopting parent and lineal or collateral kindred of adopting parent. (755 ILCS 5/2-4). For purposes of inheritance from or through natural parent and for determining property rights under any instrument, adopted child is not child of natural parent, nor descendant of natural parent or lineal or collateral kin of natural parent unless (1) child is adopted by descendant or spouse of descendant of greatgrandparent of child in which case adoptee is child of both natural parents, (2) natural parent died before child was adopted in which case adoptee is child of deceased parent and heir of lineal and collateral kin of that parent, (3) contrary clear and convincing evidence by terms of instrument effective Jan. 1, 1998 for purposes of inheritance and for purposes of determining property rights as to all instruments executed on or after that date. Heir of adopted child, who is not child of natural parent under 755 ILCS 5/2-4(d) is not heir of that natural parent or of lineal or collateral kin of that natural parent. (755 ILCS 5/2-4[d]). Adopting parent is deemed parent for purposes of inheritance from adopted child, but not as to property which child has taken by gift, will or intestate succession from natural parent or lineal or collateral kindred of natural parent. For purposes of determining property rights under agreement executed after Aug. 31, 1955, adopted child deemed child born to adopting parent unless contrary intent is demonstrated by terms of instrument by clear and convincing evidence. After Sept. 30, 1989 adopted child is deemed child born to adopting parent for purposes of determining property rights of any person under instrument executed before Sept. 1, 1955 unless contrary intent is demonstrated by instrument by clear and convincing evidence or unless adopting parent's belief that instrument executed prior to Sept. 1, 1955 would not benefit adopted child is demonstrated by adopting parent's lifetime acts to substantially benefit adopted child. (755 ILCS 5/2-4[f]).

Natural parents of child are deprived of all legal rights with respect to child, and child is free from all obligations of maintenance or obedience with respect to natural parents. (750 ILCS 50/17). But natural parents have ultimate liability to support their child. (48 Ill.2d 16, 268 N.E.2d 11).

Registry.

Child surrendered for adoption, adoptee, biological parent, and biological sibling may register to obtain identifying information, and information will be exchanged if child surrendered for adoption, adoptee, biological parent, and biological sibling authorize exchange through Illinois Department of Health, but not before adoptee reaches age 18 or 21, depending upon statutory factors. (750 ILCS 50/18.1 to 50/18.6). Confidential intermediary may be appointed to obtain medical background of adoptee from biological parent or sibling where statutory criteria met. (750 ILCS 50/18.3a). Illinois Adoption Registry and Medical Information Exchange creates procedure by which mutually consenting adults of birth families, adoptive parents and legal guardians of adopted and surrendered children may voluntarily exchange vital medical information throughout life of adopted or surrendered person. (750 ILCS 50/18.04 et seq.). Birth Parent Registration Identification Forms. (750 ILCS 50/18.2).

14.02 ALIMONY:

See topic 14.05 Dissolution of Marriage.

14.02A ANNULMENT:

See topic 14.11 Marriage.

14.03 COMMUNITY PROPERTY:

This system does not prevail in Illinois.

14.04 DESERTION:

See topics 14.05 Dissolution of Marriage, 14.09 Husband and Wife.

14.05 DISSOLUTION OF MARRIAGE:

Grounds.

One of following grounds for dissolution must be proved: Without fault by petitioner respondent is impotent, or has another spouse living at time of marriage or has committed adultery or has deserted himself or herself from petitioner for one year which includes any time in which parties were involved in proceedings for dissolution or separation; habitual drunkenness for two years; attempt on life of spouse by poisoning or other means showing malice; extreme and repeated mental or physical cruelty; conviction of felony or infamous crime; infection of spouse with sexually transmitted disease; or excessive use of addictive drugs for two years. Additionally, marriage may be dissolved if spouses have been separated for two years and irreconcilable differences have caused breakdown in marriage and reconciliation has failed or would be impracticable; if separation has been for six months two year requirement may be waived upon written stipulation. (750 ILCS 5/401[a]). At any time after parties cease to cohabit, following periods are included in period of separation: (1) Any period of cohabitation during which parties in good faith attempt to reconcile and seek marriage counseling as defined by statute, and (2) any period of cohabitation under written agreement of parties to attempt to reconcile. (750 ILCS 5/401[a][2]).

Residence Requirements.

One of spouses must be resident of Illinois or stationed here and residence had been maintained for 90 days before commencement of action or finding. (750 ILCS 5/401).

Jurisdiction of proceeding for dissolution of marriage, legal separation or declaration of invalidity of marriage is exclusively in Circuit Courts. (Const. Art. VI, §9). Court may enter judgment for dissolution which reserves any issue, including custody, child support, maintenance and disposition of property upon agreement of both parties or motion of either party and court's finding that appropriate circumstances exist. If party dies after entry of judgment but before resolution of reserved issues, proceedings continue. (750 ILCS 5/401[b]).

Commencement of Action.

By filing verified petition, containing required allegations (750 ILCS 5/403[a]), as in other civil actions, or, at petitioner's option, by filing praecipe for summons with clerk. Where action is commenced by filing praecipe for summons, petition must be filed within six months thereafter or action will be dismissed. (750 ILCS 5/411[d]). Until petition is filed or unless respondent voluntarily files appearance, praecipe for summons filed without petition must be served on respondent within 30 days of issuance and upon failure to obtain service action will be dismissed. (750 ILCS 5/411[c]). Identification of party's street address in proceedings not required if court finds that physical, mental or emotional health of party or minor child would be seriously endangered by such disclosure. (750 ILCS 5/708).

Venue.

Must be had in county where plaintiff or defendant resides. Objection to venue is barred if not made by time defendant's response is due. (750 ILCS 5/104).

Process.

May be directed to any county in state. (750 ILCS 5/104).

Practice.

When respondent appears and files response in contested action, trial may be on bifurcated basis with grounds being tried first. If court finds grounds exist, it may allow parties additional time to settle remaining issues or it may proceed to trial immediately. (750 ILCS 5/403[e]). In cases where grounds are uncontested and proved as in cases of default, trial on all other remaining issues proceeds immediately by court order or by stipulation of parties. No trial by jury available. (750 ILCS 5/103). Conciliation may be ordered on court's own motion or at request of either party. (750 ILCS 5/404). In case of default, cause is heard by examination of petitioner in open court. (750 ILCS 5/405). No confession of respondent can be taken as evidence unless court is satisfied it was made in sincerity and without fraud or collusion to enable petitioner to obtain relief sought. (750 ILCS 5/407). Fault or conduct of petitioner not bar to action unless raised in pleadings. (750 ILCS 5/406). If court is satisfied that injury complained of was occasioned by collusion of parties, relief sought will not be granted. (750 ILCS 5/408). Defenses of recrimination and condonation abolished. (750 ILCS 5/403[c]).

Temporary Custody of Children.

Pending trial and judgment, court may make orders concerning custody, support and visitation of minor children and provisions for their education and maintenance by either or both spouses. (750 ILCS 5/501).

Temporary Alimony and Suit Expenses.

Court may require any party to pay temporary maintenance (formerly known as temporary alimony) and expenses to other, including attorney's fees and including interim fees to achieve substantial parity in parties' access to funds for litigation costs. (750 ILCS 5/501, 5/508). For cases pending on or after June 1, 1997, after proofs have closed in final hearing and before judgment entered, Court decides party's petition for contribution to fees and costs incurred. (750 ILCS 5/503[j]). Court also has power to restrain any party from transferring, concealing or disposing of any property; to enjoin party from removing child from jurisdiction of court or from striking or interfering with personal liberty of other party or any child; or to grant any other proper injunctive relief. (750 ILCS 5/501).

Representation of Child.

In any proceeding involving support, custody, visitation, education, parentage, property interest or general welfare of minor or dependent child, court, on own motion or by party, may appoint attorney to serve as attorney to represent child, to serve as guardian ad litem, or as child representative to advocate best interest of child. Court may order appropriate costs, fees or disbursements to be paid by either or both parents, or any other party or source or from marital or child's separate estate. Such fees and costs will be deemed in nature of child support and not dischargeable in bankruptcy under 11 USC 523. (750 ILCS 5/506).

Division of Property of Spouses.

Marital property distribution system used. See subhead Disposition of Property, infra.

Disposition of Property.

Marital property means all property acquired by either spouse subsequent to marriage, except certain described non-marital property, regardless of whether title is held individually or in some form of co-ownership. Non-marital property does not become marital where increase in its value arose from contribution of material property, non-marital property or personal effort of spouse. Right to reimbursement does exist. Where marital and non-marital property have been commingled contributing property is classified as receiving property unless both classes are commingled into newly acquired property which will be marital. Right to reimbursement exists, but no reimbursement for contribution which is not traceable by clear and convincing evidence, or which was gift, or which was result of personal effort which was not both significant and resulted in substantial appreciation. In proceeding for dissolution of marriage or declaration of invalidity of marriage, court assigns each spouse's non-marital property to that spouse and divides marital property, without regard to marital misconduct, in just proportions, considering relevant factors, including: (1) Contribution of each party to acquisition of property, (2) dissipation by each party of marital or nonmarital property, (3) value of property, (4) duration of marriage, (5) economic circumstances of each spouse, (6) obligations and rights arising from prior marriages, (7) any antenuptial agreement, (8) age, health, occupation, needs, etc. of parties, (9) custodial provisions for children, (10) whether apportionment is in lieu of or in addition to maintenance, (11) reasonable opportunity of each spouse to acquire future assets and income, and (12) tax consequences of property division. Each spouse has species of common ownership in marital property during dissolution proceedings. Such interests do not restrict property unless specifically enjoined. (750 ILCS 5/503). In determining value of marital and nonmarital property, court values property as close to date of trial as practicable. (750 ILCS 5/503[f]).

Unless otherwise provided in trust instrument, judicial termination of marriage revokes all revocable provisions which pertain to settlor's spouse in trust. (760 ILCS 35/1).

Transfer of marital property between spouses per agreement or by court order is not considered taxable event. Court may set aside portion of each spouse's property in separate fund or trust for support, maintenance and welfare of child. (750 ILCS 5/503[g]).

Court may enforce judgments affecting marital property by ordering sale of marital property with proceeds to be applied as determined by court. (750 ILCS 5/503[i]).

Possession of Marital Residence.

Court may, during pendency of proceedings, enter order granting exclusive possession of marital residence to either spouse until final determination of proceeding, where physical or mental well-being of either spouse or children is jeopardized by occupancy of marital residence by both spouses. Order does not affect estate of homestead of either party. (750 ILCS 5/701).

Custody.

Illinois has adopted Uniform Child-Custody Jurisdiction and Enforcement Act. (750 ILCS 36/101). Court has jurisdiction to make initial child custody determination only if: (1) Illinois is home state of child or was within six months prior to commencement of action and child is absent but parent or person acting as parent continues to live in this state; (2) court of another state does not have jurisdiction or court of home state of child declined to exercise jurisdiction and (a) child and parents or child and at least one parent or person acting as parent have significant connection with state other than mere physical presence; and (b) substantial evidence in state concerning child's care, protection, training and personal relationship; (3) all counts having jurisdiction have declined exercise of jurisdiction on ground that court of this state is appropriate forum; or (4) no court of any other state would have jurisdiction under criteria specified in (1), (2), or (3). Physical presence of, or personal jurisdiction over, party or child is not necessary or sufficient to make child custody determination. (750 ILCS 36/201). Court retains such jurisdiction over child until it concedes jurisdiction to foreign state or no party, including child, remains in Illinois. (750 ILCS 36/202). Child custody proceeding is commenced by: (1) Parent filing petition for dissolution of marriage or legal separation or declaration of invalidity of marriage or for custody of child, (2) person other than parent by filing petition for custody, if child not in physical custody of one of his parents, (3) stepparent if: child at least 12 years old, custodial parent and stepparent married for at least five years and child resided with them, custodial parent is deceased or disabled, stepparent provided for care of child prior to initiation of custody proceedings, child wishes to live with stepparent and best interests and welfare of child so indicate or (4) grandparent who is parent or stepparent of deceased parent if surviving parent had been absent from marital abode for more than one month without deceased parent knowing whereabouts; or surviving parent is in state or federal custody; or surviving parent had received supervision for or been convicted of any violation of Act 12 of Criminal Code of 1961 towards deceased parent or received supervision or been convicted of violating order of protection under Illinois Domestic Violence Act of 1986 for protection of deceased parent or child. (750 ILCS 5/601[b]).

Notice Provisions for Custody Proceedings.

Before making judgment, reasonable notice must be given to contestants, any parent whose rights have not been terminated, and any person who has physical custody of child. Process and notice governed by Civil Practice Law. Where person is out of state, notice must be given in accordance with law of Illinois or state in which service is made. (750 ILCS 36/108). In action for modification of previous custody order, written notice and copy of modification petition must be served on child's parent, guardian and custodian at least 30 days prior to hearing. (750 ILCS 5/601).

Simultaneous Custody Proceedings in Other States.

Court will not exercise jurisdiction if at time of filing of custody petition, custody proceeding was pending in another state exercising jurisdiction in substantial conformity with Act unless such proceeding is stayed. Court which has jurisdiction under this Act may decline to exercise jurisdiction if it finds it is inconvenient forum. (750 ILCS 36/206; 36/207). Court may decline to exercise jurisdiction if petitioner has wrongfully taken child from another state or engaged in similar reprehensible conduct. (750 ILCS 36/208).

Res Judicata Custody Judgment.

Custody judgment binds all parties who have been served, or notified in accordance with §108 (750 ILCS 36/108) or who have submitted to jurisdiction of court or notified in accordance with Act and who have been given opportunity to be heard (750 ILCS 36/106).

Recognition of Foreign Judgment and Registration.

Illinois courts recognize and enforce initial or modification judgment of court of another state which assumed jurisdiction under statutes substantially in accordance with Act (750 ILCS 36/303), and will not modify foreign judgment unless foreign court does not have jurisdiction under jurisdictional requisites of this Act or has declined to assume jurisdiction and Illinois has jurisdiction (750 ILCS 36/203). Certified copy of custody judgment of another state may be filed in office of any circuit clerk and is treated as judgment of this State. Registry of out-of-state custody judgments and proceedings maintained by each circuit. (750 ILCS 36/305).

Deposition in Another State.

Any party to proceeding or guardian ad litem or other representative of child may adduce testimony of witnesses by evidence or discovery deposition or otherwise in another state. Court on own motion may direct that testimony of person be taken in another state. Illinois court may request appropriate court of another state to hold hearing to adduce evidence, to order party to produce or give evidence, or to have social studies made. (750 ILCS 36/111).

Practice.

Court determines custody in accordance with best interests of child and considers: (1)

Wishes of parents, (2) wishes of child, (3) relationship of child with parents and siblings, (4) child's adjustment to home, school and community, (5) mental and physical health of all persons involved, (6) physical violence or threat of physical violence by child's potential custodian, whether directed against child or another person but witnessed by child, (7) occurrence of ongoing or repeated abuse in household whether directed at child or another person, (8) willingness and ability to encourage continuing close relationship between other parent and child, and (9) whether one of parents is sex offender. (750 ILCS 5/602[a]). Court not to consider conduct of present or proposed custodian that does not affect relationship with child and presumes that both parents' maximum involvement regarding physical, mental, moral and emotional well-being of their child is in child's best interest. No presumption in favor or against joint custody. (750 ILCS 5/602[b], [c]). In custody proceeding where stepparent has standing under 750 ILCS 5/601 presumption that best interests of child served by custody of natural parent. (750 ILCS 5/602[a]).

Upon application of either parent, both parents or upon court's own motion, court will consider award of “joint custody”. (750 ILCS 5/602.1[b]). Court initially requests parents to produce joint parenting agreement specifying each parent's powers, rights and responsibilities for personal care of child and for major decisions and procedure for mediating future disputes. If parents fail to produce joint parenting agreement, court may enter joint parenting order containing same elements. (750 ILCS 5/602.1[b]). Before ordering joint custody, court must find it is in best interests of child after taking into account parents' ability to cooperate, parents' residential circumstances and all other relevant factors. (750 ILCS 5/602.1[c]).

Noncustodial parent will be given access to child's records including medical, dental and school records unless he or she is subject to an order of protection. (750 ILCS 5/602.1(e))

Court may interview child in chambers, seek professional advice, or order investigation of custodial arrangements. (750 ILCS 5/604, 750 ILCS 5/605). Counsel must be present at child's interview in chambers, unless otherwise agreed upon by parties. Attendance of court reporter during child's interview mandatory and cannot be waived by parties. (62 Ill. App.3d 837, 379 N.E.2d 396). Temporary custody orders may be entered. (750 ILCS 5/603). Court may grant leave to remove child from Illinois. Party seeking removal has burden of proving removal is in child's best interest. (750 ILCS 5/609). Court may appoint attorney to represent best interests of minor or dependent child with respect to support, custody, visitation, education, parentage, general welfare and property. Same attorney may be appointed child's guardian ad litem and as child representative. (750 ILCS 5/506). Except for certain circumstances, no motion can be made to modify custody within two years of its date. (750 ILCS 5/610[a]).

Adult Education Program.

In divorce or post-judgment proceeding involving minor children, if it is determined to be in best interests of child, court may order parties to attend education program not to exceed four hours in duration focusing on effects of divorce on minor children. Unless stipulated in writing, facts adduced at program cannot be considered in adjudication of any action and resulting report does not become part of record of case. (750 ILCS 5/404.1).

Expedited Procedure for Enforcement of Visitation Orders.

Where one party wilfully and without justification denies other party visitation or exercises his or her visitation rights in harmful way, complaining party may commence action stating (a) name and address of both parties; (b) nature of abuse; (c) that reasonable attempt was made to resolve dispute; and (d) relief sought. (750 ILCS 5/607.1[b]).Court may order one or more of following: (1) Modification of visitation order; (2) supervised visitation; (3) makeup visitation; (4) counseling or mediation, except where there is evidence of domestic violence; (5) other appropriate relief. (750 ILCS 5/607.1[c]).

Investigation and Report.

In contested cases, upon request of parent or custodian, court may order a child welfare agency to make a report of custodial arrangements for child. Such report may be considered by court in determining custody. (750 ILCS 5/605).

Cost and Attorneys Fees.

In every proceeding for enforcement of order or judgment where court finds failure of party to comply with order or judgment is without compelling cause, that party must pay other party's costs and reasonable attorneys fees. (750 ILCS 5/508[b]). Court may order any party to pay reasonable amount for own or other party's costs and attorney fees including interim attorney fees and costs from opposing party under 750 ILCS 5/501(c-1) in wide variety of proceedings, including prosecution of claim on appeal if prosecuting party substantially prevailed. (750 ILCS 5/508[a]).

Maintenance.

In proceeding for dissolution of marriage or legal separation or declaration of invalidity of marriage court may grant temporary or permanent maintenance order for either spouse in such amounts and for such periods of time, as court deems just, without regard to marital misconduct, considering: (1) income and property of each party including marital and nonmarital property assigned to party seeking maintenance, (2) needs of each party, (3) present and future earning capacity of each party, (4) any impairment of present and future earning capacity of party seeking maintenance due to party's commitment to domestic duties or delayed education, training, employment, or career opportunities due to marriage, (5) time needed to acquire education or training and employment of party seeking maintenance and whether that party is able to support self through employment or is custodian of child so that it is appropriate that custodian not seek employment, (6) standard of living established during marriage, (7) duration of marriage, (8) age and physical, emotional condition of parties, (9) tax consequences of property division upon parties, (10) contributions and services by party seeking maintenance to education, training, career, career potential or license of other party, (11) any valid agreement of parties, (12) other factors court considers just and equitable. Any maintenance obligation including unallocated maintenance and child support or any portion that remains unpaid accrues simple interest. Any new or existing maintenance order is deemed series of judgments having full force, effects and attributes of any other judgment. Lien arises by operation of law against real and personal property of obligor for each installment of overdue support. (750 ILCS 5/504).

Modification.

Judgment for maintenance or support may be modified only as to installments accruing after proper notice of filing of motion for modification with notice and only upon showing of substantial change in circumstances unless party is receiving child and spouse support services from Illinois Department of Healthcare and Family Services and if certain other conditions exist. Property dispositions may not be revoked or modified unless Court finds conditions justifying reopening of judgment under Illinois law. Petition to modify or terminate child support, custody or visitation does not delay child support litigation or supplementary proceeding on behalf of obligee. (750 ILCS 5/510).

Termination.

Unless otherwise agreed by parties in written separation agreement approved by court, obligation to pay future maintenance terminates upon death of either party, or remarriage of party receiving maintenance, or if person receiving maintenance cohabits with another person on resident, continuing conjugal basis. (750 ILCS 5/510[c]).

Support of Children.

In proceeding for dissolution of marriage, legal separation, declaration of invalidity of marriage, or subsequent proceedings for child support, court may order either or both parents to pay reasonable and necessary child support, without regard to marital misconduct. Court determines minimum amount of support in accordance with guidelines in statute, which establish amount as minimum percent of supporting party's “net income” based upon number of children. These guidelines are to be applied in each case, unless court, after considering evidence presented on all relevant factors as to best interests of child, finds reason for deviating from guidelines. Support obligation, or any portion, unpaid for 30 or more days accrues simple interest as set forth in §12-109 of Code of Civil Procedure. “Child” defined as under 18 years and under 19 if attending high school. (750 ILCS 5/505). If necessary best interest of child, court may set aside portion of joint or separate estate of parties in separate trust or fund for support, maintenance, education and general welfare of minor, dependent or incompetent child. Court may consider special needs for child's care, healing and counselling if child is victim of crime perpetrated by one of parties. (750 ILCS 5/503[g]).

As of Jan. 1, 1982, child support payment orders entered in any county with population of 2,000,000 or more (or any other county desiring to be included within mandatory child support payment program) must direct that such payments be made to clerk of court if person entitled to payment receives public assistance; otherwise court may direct payments to clerk. (750 ILCS 5/709 to 5/712). Support is terminated by emancipation of child except as otherwise provided, but not by death of parent obligated to support child. In event of death of such parent, amount of support may be modified, revoked or commuted to lump sum payment as appropriate, which may be determined at time of dissolution of marriage or later. (750 ILCS 5/510[d]). In counties covered by this program support is enforced by clerk of circuit court and state's attorney. (750 ILCS 5/710).

Orders for support under this code subject to Income Withholdings for Support Act. (305 ILCS 5/10-16.2, 750 ILCS 28/1 et seq.).

Note: Expedited Child Support Act of 1990 providing for creation, by counties, of system for expeditious determination of parentage and for establishment, modification and enforcement of child support obligations beginning July 1, 1991, became effective Sept. 1, 1990. (750 ILCS 25/1 - 25/13).

Failure to Pay Support.

Effective Oct. 1, 1985, Illinois Department of Healthcare and Family Services may direct Comptroller to withhold from state income tax refunds amounts for past due child support. (305 ILCS 5/10-17.5). Failure of either party to comply with order to pay support is punishable as in other cases of contempt. Lien arises against real and personal property of non-custodial parent for each installment of overdue support. Order requires obligor to report to obligee and clerk of court within ten days each time obligor obtains new employment and each time obligor's employment is terminated for any reason. Failure to report is indirect criminal contempt if coupled with nonpayment of support in excess of 60 days. Order must include provisions requiring obligor/ee parents to advise each other of change of residence except where court finds disclosure would seriously endanger child. Where parent is 90 days or more delinquent in payment of support, court may order that parent's Illinois driving privileges be suspended. Court does not lose powers of contempt, driver's license suspension or other child support enforcement mechanisms upon emancipation of minor child/children. (750 ILCS 5/505).

Spousal Health Insurance Rights.

Effective Dec. 1, 1985, no group accident or health insurance policy can be issued, renewed, amended or extended unless it provides for continuation of existing insurance benefits for employee's spouse and dependent children who are insured thereunder notwithstanding that marriage is dissolved by judgment or terminated by death or retirement of employee spouse without any other eligibility requirements. (215 ILCS 5/367.2).

Social Security Requirements.

Parent or custodian of child who fails or refuses to comply with federal Social Security requirements and regulations regarding child or spousal support obligations may be ineligible for medical assistance. (305 ILCS 5/5-2.2).

Unemployed.

Court may order unemployed person owing duty of support or maintenance obligation to seek employment and report periodically to court on efforts. (750 ILCS 5/505.1).

Visitation.

Parent not granted child custody is entitled to reasonable visitation rights and electronic communication rights, unless after hearing, court finds that visitation would seriously endanger child's physical, mental, moral or emotional health. Court may grant visitation to grandparents, great-grandparents or siblings of child or to stepparent upon petition if court finds it is in best interests of child and certain other conditions exist. (750 ILCS 5/607[a-3]). If both natural parents of grandchild have died and grandchild was subsequently adopted, however, grandparents will not be granted visitation rights unless adoption is by “close relative”. (755 ILCS 5/11-7.1). If custodian's street address is not identified pursuant to court order, court must require parties to identify reasonable alternative arrangements for visitation. (750 ILCS 5/607[a]).

Change of Wife's Name.

Court may allow wife to resume maiden name or any former name. (750 ILCS 5/413[c]).

Change of Minor Child's Name.

Minor child's name may be changed upon petition to court by parent only if court finds by clear and convincing evidence that change is necessary to serve best interest of child. Court considers all relevant factors including wishes of child, parents, and custodian, relationship of child with parents, custodian, stepparents, siblings and step-siblings and child's adjustment to home, school and community. (735 ILCS 5/21-101).

Remarriage.

No restrictions on remarriage of persons whose marriage was dissolved.

Legal Separation.

Party may choose to pursue action for legal separation rather than dissolution of marriage and obtain maintenance during legal separation if, without fault of that party, he or she is living separately and apart from other spouse. (750 ILCS 5/402[a]). Pendency of action or judgment for legal separation does not bar either party from moving for dissolution of marriage. (750 ILCS 5/402[c]).

Separation agreements may be entered into to provide for disposition of property, maintenance of either spouse, and support, custody and visitation of children. Terms of separation agreement, except those providing for support, custody and visitation of children, are binding on court, unless it finds that terms are unconscionable. Separation agreement must be set forth in judgment or identified in judgment with statement that court has approved its terms. Except for terms concerning support, custody or visitation of children, separation agreement may preclude or limit modification of its terms. (750 ILCS 5/502).

Annulment of Marriage.

See topic 14.11 Marriage.

14.06 DIVORCE:

See topic 14.05 Dissolution of Marriage.

14.07 [RESERVED]

14.08 GUARDIAN AND WARD:

Estate of minors and disabled adults are administered in Circuit Courts. (755 ILCS 5/11-1 to 5/11a-22). See category 6 Courts and Legislature, topic 6.01 Courts.

The Uniform Adult Guardianship and Protective Proceedings Jurisdiction Act governs the jurisdiction for guardianship and conservatorship proceedings. (755 ILCS 8/101 to 8/505).

Appointment of Guardian.

Guardian may be appointed by court in county wherein minor resides or, if minor is nonresident, in county where he has real estate, or personal estate as court finds to be in best interest of child. (755 ILCS 5/11-6). No guardian need be appointed if personal estate of minor does not exceed $10,000, in which case any person or corporation holding personal estate of minor may deliver same to parent or person standing in loco parentis upon receiving affidavit setting forth certain facts and said person or corporation is thereby released. (755 ILCS 5/25-2). Court lacks jurisdiction to appoint guardian for minor if minor has living parent, adoptive parent or adjudicated parent whose rights have not been terminated, whose whereabouts are known and who is willing and able to carry out day to day child care. Rebuttable presumption that parent is willing and able to carry out day to day child care that can be rebutted by preponderance of evidence. (755 ILCS 5/11-5[b]). Guardian for disabled adult may be appointed by court in county where he resides, or, if nonresident, in county where his real or personal estate is located. (755 ILCS 5/11a-7). Petition for appointment filed by any interested person or by disabled person. (755 ILCS 5/11a-3). Minor age 14 or over may nominate guardian of person and estate subject to court approval. (755 ILCS 5/11-5[c]). Disabled adult is defined in 755 ILCS 5/11a-2. Power to appoint guardian of estate of disabled adult where demonstrated by clear and convincing evidence of inability to manage estate or financial affairs. Power to appoint guardian of person for disabled adult limited to demonstration by clear and convincing evidence of inability to communicate responsible decisions regarding self-care. (755 ILCS 5/11a-3).

Selection of Guardian.

Parent, adoptive parent or adjudicated parent whose parental rights have not been terminated or guardian of person of minor may designate in any writing, including will, guardian or standby guardian to become effective at later date (755 ILCS 5/11-5.3) of person or estate or both of unmarried minor or of child likely to be born. Writing must be witnessed by two or more credible persons over 18 years and not designated guardian. (755 ILCS 5/11-5[a-1]). Minor over 14 years old may nominate with court's approval. (755 ILCS 5/11-5[c]). Court, however, cannot appoint as guardian someone who either has caused or has substantially contributed to minor becoming abused or neglected (755 ILCS 5/11-5[d]) and previous statements by minor as to abuse and neglect of minor are admissible at hearing on appointment (755 ILCS 5/11-5[e]). In all other cases, court may nominate upon petition of reputable citizen or on its own motion. (755 ILCS 5/11-5[a]). Person of sound mind and memory may designate in writing person, qualified not-for-profit corporation, department or agency to become guardian of his person or estate if later adjudged disabled. Corporation qualified to accept and execute trusts in state may be designated guardian of estate. Designation does not bind court, but is prima facia valid if executed and attested as will. (755 ILCS 5/11a-6).

Eligibility and Competency.

Resident of U.S. who has attained 18 years of age, is not of unsound mind, is not ward, has not been convicted of felony unless court finds appointment of person convicted of felony to be in minor's best interest, and who court finds is capable of providing active and suitable guardianship may be guardian of person and estate of minor. (755 ILCS 5/11-3).

Nonresident guardian, when no guardian has been appointed in this state, may bring suit (755 ILCS 5/22-3) or sell minor's personal estate (755 ILCS 5/22-4) or petition court for leave to lease, sell or mortgage real estate (755 ILCS 5/22-4). Petition of nonresident guardian to sell personal estate or lease, sell or mortgage real estate must have attached authenticated copies of: (1) His authority to act; (2) order of court issuing letters authorizing application in court of this state for leave to lease, sell or mortgage; (3) bond required by court which issued letters; and (4) order of that court approving bond. (755 ILCS 5/22-4[b]).

Parents are entitled to custody of person of minor, even though minor has guardian of estate. (755 ILCS 5/11-7).

Grandparents and close relatives have certain visitation rights after death of both parents of minor, unless minor has subsequently been adopted by persons other than close relative (755 ILCS 5/11-7.1) and except where person convicted of first degree murder of parent, grandparent, great-grandparent or sibling of child (755 ILCS 5/11-7.1[b]).

Requirements for guardians for disabled adults same as for minors, plus court must find guardian capable of providing active and suitable program of guardianship for disabled, and potential guardian must not be directly providing residential services for ward. (755 ILCS 5/11a-5).

Qualification.

Guardian of minor or disabled adult must file bond unless bond is waived by court or by will or if guardian is Office of State Guardian; or by person designating in event of becoming disabled. (755 ILCS 5/12-4). He must also file acceptance of office and oath that he will faithfully perform his duties. (755 ILCS 5/12-1, 5/12-2).

Appointment of Guardian Unnecessary.

When personal estate of ward does not exceed $10,000, property may be transferred or indebtedness paid on affidavit of one standing in loco parentis to minor or spouse of ward, or if no spouse, relative having responsibility to support ward, stating that no representative has been appointed for estate. Transferor or debtor is protected as though transfer has been made to legally qualified representative. (755 ILCS 5/25-2).

Inventory.

Guardian must file inventory within 60 days after appointment. (755 ILCS 5/14-1).

Powers and Duties.

Guardian of minor has custody and responsibility for nurturing and providing education for the minor, and must care for, manage frugally and invest estate under direction of court. (755 ILCS 5/11-13). Guardian may, with approval of court, operate ward's business. (755 ILCS 5/19-7). Guardian must keep ward's funds invested, character of investments being regulated by statute. (755 ILCS 5/21-2, 5/24-21). Guardian of estate also represents ward in all legal proceedings. (755 ILCS 5/11-13). Upon petition of guardian, Court may permit guardian to make will or create revocable or irrevocable trust in light of changes in state or federal income, estate or inheritance tax but distribution only to persons who would be entitled if minor intestate and in same amounts as if minor died intestate. (755 ILCS 5/11-13[b]).

Guardian of disabled adult by court order must have custody of ward and children, make provision for care, comfort, maintenance, education and professional services, and provide for ward's self-reliance. Ward's spouse not to be deprived of child custody without consent unless adjudged unfit by court. (755 ILCS 5/11a-17[a]). If court directs, guardian must file annual or more frequent report stating ward's mental, physical and social condition, present living arrangement, professional services rendered, and resume of guardian's visit with recommendations regarding continued need for guardianship. (755 ILCS 5/11a-17[b]). If ward filed petition for dissolution of marriage before adjudicated disabled person, guardian may maintain that action. (755 ILCS 5/11a-17[a-5]). Guardian must obtain special permission from the court before consenting to the sterilization of ward. (755 ILCS 5/11a-17.1).

Guardian of ward other than minor, with authority of probate court, may take action not required for ward's current and future maintenance and support so long as they are in keeping with ward's wishes so far as ascertainable whether or not tax savings are involved. These actions include making gifts of income or principal either outright or in trust; conveying, releasing or disclaiming contingent and expectant interests including marital property rights; exercising options regarding securities; exercising rights to elect benefits, terminate, assign, borrow or receive cash for life insurance, annuities, mutual fund investment plan, retirement and employee welfare plans; changing ward's residence or domicile; modifying terms of ward's will or trust in light of tax law changes. If ward's intentions cannot be ascertained, presumption ward favors reduction in taxes. (755 ILCS 5/11a-18[a-5]).

Adjudication of disability does not revoke or terminate trust revocable by ward. Guardian of ward's estate has no authority to revoke or amend trust revocable or amendable by ward, except that court may authorize guardian to revoke Totten trust or similar deposit or withdrawable capital account in trust to extent necessary to provide for authorized expenditures. If trustee of any trust for benefit of ward has discretionary power to apply trust's income or principal for ward's benefit, trustee is not required to distribute any income or principal to guardian of ward's estate. (755 ILCS 5/11a-18[d]).

Securities in Name of Nominee.

See category 13 Estates and Trusts, topic 13.15 Trusts, subhead Securities in Name of Nominee.

Real Estate.

Guardian, by leave of court, may sell, at private sale if interest in estate is less than $2,500, or mortgage ward's real estate when court deems it necessary for support and education of persons entitled thereto, for payment of ward's debts or for reinvestment (755 ILCS 5/20-3, 755 ILCS 5/25-4) and by leave of court may lease real estate (755 ILCS 5/20-2), including leasing for mineral development (755 ILCS 5/20-20).

Liabilities of Guardian.

Guardian and surety are liable for mismanagement to ward, successor guardian or conservator, co-guardian or co-conservator, or to any aggrieved person. Any of these persons may maintain action against guardian and surety for all money and property withheld, wasted, embezzled or misapplied and no satisfaction made therefor. (755 ILCS 5/24-18).

Personal property may be sold, leased, mortgaged or pledged by leave of court if it is for best interest of ward or his estate. (755 ILCS 5/19-2).

Accounts.

At end of first year and at termination of guardianship and whenever required by court, guardians must file verified accounts. Accounts must list receipts and disbursements and personal estate on hand. (755 ILCS 5/24-11).

Termination of Guardianship.

Office of guardian terminates (1) when ward dies (except that certain authority continues until personal representative is appointed [755 ILCS 5/24-19]) or attains majority, (2) when guardian dies or his letters are revoked (755 ILCS 5/24-12), or (3) if estate consists only of cash by leave of court under special statutory provision (755 ILCS 5/24-21). Marriage of minor ward terminates right of guardian to custody and education of ward but not to control of estate. (755 ILCS 5/24-12).

Upon written notice and hearing, court will discharge conservator (appointed under prior law) or guardian of disabled person or his estate, or modify his duties, when ward's capacity for self-care and management has been demonstrated by clear and convincing evidence. Petition may be made by ward or any person on ward's behalf. (755 ILCS 5/11a-20).

Gifts to Minors.

See topic 14.10 Infants.

Compensation.

Guardians and their attorneys are allowed reasonable compensation for their services. (755 ILCS 5/27-1, 5/27-2). Guardian may be authorized by court order to make conditional gifts from estate of disabled to spouse, brother, sister or child of disabled who lives with and personally cares for disabled for at least three years but gift not distributed to donee until disabled person's death. All potential heirs and legatees of disabled person entitled to notice on hearing of conditional gifts. Gifts may be revoked or modified in order to release funds for care of disabled. (755 ILCS 5/11a-18.1). Potential recipient of conditional gift who has lived with and personally cared for the disabled person for at least 3 years is entitled to claim against estate of disabled person based in part on nature and extent of person's disability. (755 ILCS 5/18-1.1).

Kinship Navigator Act

Kinship care means the full time care, nurturing and protection of children by relatives, members of their tribes or clans, grandparents, godparents, stepparents or any adult who has physical custody and a kinship bond with a child. Kinship Navigator is a statewide program designed to ensure kinship caregivers the necessary resources for the preservation of the family. (325 ILCS 42/1 et seq.)

Insane Persons.

Guardians appointed for disabled adults, as defined by statute. (755 ILCS 5/11a-1, 5/11a-2, 5/11a-3).

Uniform Fiduciaries Act.

See category 13 Estates and Trusts, topic 13.15 Trusts.

Uniform Simplification of Fiduciary Security Transfers Act.

Not adopted. See Illinois Fiduciary Transfer of Securities Act. (760 ILCS 70/0.01 to 70/7).

Uniform Adult Guardianship and Protective Proceedings Jurisdiction Act

Effective January 1, 2010. (755 ILCS 8/101 to 8/505).

14.09 HUSBAND AND WIFE:

Abortion.

Provision of Illinois Abortion Act of 1975 requiring spousal consent to abortion held unconstitutional. (Wynn v. Scott, 449 F. Supp. 1302 [1978]).

Disabilities of Married Women.

All disabilities have been removed.

Separate Property.

A married woman may hold real and personal property, and dispose of the same in same manner and to same extent that husband may deal with his property. However, transfers of personal property between husband and wife living together, to be valid as against third parties, are required to be in writing, acknowledged and recorded in same manner as chattel mortgages (750 ILCS 65/9). If either husband or wife unlawfully retains possession or control of property belonging to other, either before or after marriage, owner may maintain action therefor, or for any right growing out of same in same manner as if they were not married. (750 ILCS 65/10).

Uniform Premarital Agreement Act adopted, effective Jan. 1, 1990. Agreement must be in writing, signed by both parties and is enforceable without consideration. Agreement can cover any matter not in violation of public policy or criminal statute. (750 ILCS 10/1 to 10/11).

Earnings of Married Person.

Married person is entitled to his or her own earnings, and may sue for same in his or her own name, free from interference of his or her spouse or his or her creditors. (750 ILCS 65/7).

Contracts may be made and liabilities incurred by married person and same may be enforced against him or her to same extent, and in same manner, as if he or she were unmarried. (750 ILCS 65/6). Husband and wife may contract with each other as with third person (750 ILCS 65/6; 195 Ill. 378, 63 N.E. 269), and may become bound as surety for other.

Actions.

Married person may, in all cases, sue and be sued, without joining his or her spouse, to same extent as if he or she were unmarried. (750 ILCS 65/1). Attachment or judgment may be enforced against him or her as if he or she were single. (750 ILCS 65/1). If husband and wife are sued together, wife and husband may defend for his or her own right, and if either neglect to defend, they may defend for such one also. (750 ILCS 65/2). Husband and wife may sue each other on all contracts (106 Ill. 36), or for tort committed during marriage. Testimony and judgment in dissolution proceedings are barred as prima facie evidence of tort. (750 ILCS 65/1).

When husband has deserted his family, wife may prosecute or defend, in his name, any action which he might have prosecuted or defended, and under like circumstances, same right applies to husband upon desertion of wife. (750 ILCS 65/3). For all civil injuries committed by married person, damages may be recovered from him or her alone, and spouse is not responsible therefor because of marital relation. (750 ILCS 65/4).

With some exceptions, husband and wife competent to testify for or against each other. (735 ILCS 5/8-801).

Agency.

Husband or wife may constitute other as his or her attorney in fact, to control or dispose of his or her property for their mutual benefit or otherwise, and may remove such attorney at will. (750 ILCS 65/14).

Conveyance or Encumbrance of Property.

Homestead must be expressly waived. (765 ILCS 5/27). Dower and curtesy are abolished. See category 21 Property, topic 21.08 Dower.

Liability for Debts of Spouse.

Neither husband nor wife is responsible for debts or liabilities of other before or after marriage, except for expenses of family, and education of children, which are chargeable upon property of both husband and wife, or either of them, and for which they are jointly and severally liable. (750 ILCS 65/5, 65/15).

Liability for Support.

Husband is liable for support of his wife, and wife for support of her husband if he is in need of support and is, or is likely to become, public charge. Unless child is emancipated, husband and wife are severally liable for support of any child under age 18 and for any child age 18 who is attending high school, until that child graduates or attains age 19, whichever is earlier. (305 ILCS 5/10-2).

Consumer Fraud Act-Penalty.

No person may make any attempt to collect an obligation from spouse of obligor unless spouse cosigned instrument evidencing obligation or unless obligation is in default at least 30 days or unless goods or services furnished to obligor and giving rise to obligation were necessaries for which spouse would be liable to pay under statute or common law. Person who commits an unlawful practice within meaning of this act is guilty of a Class C misdemeanor. (815 ILCS 505/2H).

Criminal Acts of Wife.

Married woman not entitled, by reason of presence of husband, to any presumption of compulsion, or to any defense of compulsion against liability for criminal offense unless such defense exists by reason of other provisions in Criminal Code. (720 ILCS 5/7-11).

Desertion and Nonsupport.

Where husband or wife abandons other, and leaves state for a year without providing for family maintenance, or is imprisoned in penitentiary, any court of record in county where remaining spouse resides may authorize remaining party to manage, sell or encumber property of other to support family and pay debts of other. (750 ILCS 65/11).

Domestic Violence.

Action for order of protection commenced by filing petition in any civil court unless specific courts are designated by local rule or order, or if in conjunction with other civil proceedings involving same parties, or in conjunction with delinquency petition or criminal prosecution under same case number. (750 ILCS 60/202). Civil Practice Law applies and standard of proof is by preponderance of evidence. (750 ILCS 60/205). No right to trial by jury. (750 ILCS 60/206). Upon finding of abuse, court may issue order of protection granting certain specified remedies. (750 ILCS 60/214). Order to be filed with clerk of court, copy to be served on sheriff, and respondent to be served personally. Notice provided to schools, health care facilities and health care practitioners. (750 ILCS 60/222). Violation may be enforced by criminal or civil contempt procedures and court permitted to award additional penalties. (750 ILCS 60/223).

Insurance.

Spouse of employee who has died, retired or divorced employee may choose to continue coverage under group policy at previous combined charge to employee and employer for period of two years. After two years, if spouse is age 55 or older and if spouse wishes to continue coverage, insurer may add additional 20%. (215 ILCS 5/367.2).

Revised Uniform Reciprocal Enforcement of Support Act repealed effective July 28, 1997.

Uniform Interstate Family Support Act adopted, July 3, 1994. (750 ILCS 22/101 et seq.).

Alienation of Affections and Criminal Conversation.

Recovery is limited to actual damages; no punitive, exemplary, vindictive or aggravated damages allowed. (740 ILCS 5/1, 5/2, 5/3, 5/4, 50/1, 50/2, 50/3, 50/4).

Separate Maintenance.

See topic 14.05 Dissolution of Marriage, subhead Legal Separation.

Community Property.

This system does not prevail in Illinois.

14.10 INFANTS:

Age of Majority.

Males 18 and females 18 years of age are of legal age for all purposes, except that it is unlawful to sell, give or deliver alcoholic liquor to any male or female under age of 21 years or for any parent or guardian to permit residence to be used by invitee of parents' child who is under age of 21 in manner that constitutes violation (235 ILCS 5/6-16); and except as provided in Illinois Uniform Transfers to Minors Act (755 ILCS 5/11-1). For purpose of Uniform Act all persons under 21 years of age are minors. (760 ILCS 20/2).

Emancipation.

Minors between ages of 16 and 18 may apply for court ordered emancipation. (750 ILCS 30/7). Court order may partially or completely emancipate minor including homeless minor regarding ability to contract or other rights not inconsistent with federal or state law. (750 ILCS 30/1 to 30/10).

Power of appointment under testamentary or non-testamentary instruments may be exercised by a holder who has attained age of 18 years, unless instrument contains express contrary provision. (755 ILCS 5/4-2, 765 ILCS 320/1).

Contracts of infants are voidable, except contract for “necessaries,” even when executed or partially executed. (20 Ill. App.2d 528, 156 N.E.2d 597). Executory contract is binding only if it is ratified after attainment of majority. (345 Ill. 219, 177 N.E.2d 724). Executed contract is binding unless it is disaffirmed within reasonable time after attainment of majority. (288 Ill. 64, 122 N.E. 808). Ratification of contract after attainment of majority may be express or implied. Upon disaffirmance, consideration remaining in possession or control of minor must be returned, but if lost or expended minor not obligated to make restitution. (241 Ill. 398, 89 N.E. 796).

A minor student accepted for admission to an approved institution of higher education in Illinois may execute a legally binding promissory note for a loan necessary to attend or continue in attendance at that institution, subject to approval by institution. (815 ILCS 155/0.01).

Married or pregnant minors, parent who is minor or anyone 18 years of age or older, can consent to performance of medical or surgical procedure by licensed physician, advanced practice nurse who has written collaborative agreement with physician that authorizes provision of services for minor, or physician assistant who has been delegated authority to provide services for minors. (410 ILCS 210/1). Anyone 12 years old or older who might have had contact with sexually transmitted disease, or suffers from use of stimulant, depressant or narcotic drugs may give consent to medical care or counseling related to treatment of disease. (410 ILCS 210/4). Parental notification may, however, be required. (410 ILCS 210/5). Anyone 17 years of age or older can consent to give blood. (210 ILCS 15/1). Minor child is bound by health care malpractice arbitration agreement executed by parent, even if parent is minor. (710 ILCS 15/7).

Duty to Support.

Child's mother or person found to be father of child pursuant to Illinois Parentage Act of 1984 is not relieved of support and maintenance obligations to child because he or she is minor. (750 ILCS 45/3.1). See topics 14.09 Husband and Wife, subhead Liability for Debts of Spouse, catchline Liability for Support; 14.05 Dissolution of Marriage, subhead Support of Children.

Artificial Insemination.

Illinois Parentage Act, effective July 1, 1984, provides that sperm donor is not considered father of child conceived by artificial insemination unless he is husband of child's mother. Where mother's husband is not donor, he will be treated as child's natural father if both he and mother consent in writing to artificial insemination. Records regarding insemination are open to inspection only upon court order for good cause shown. (750 ILCS 40/1 to 40/3).

Actions.

Representative of ward's estate represents ward in all actions unless another appointed for that purpose. (755 ILCS 5/11-13[d]).

Parental Responsibility.

Parent or guardian liable for willful or malicious acts of unemancipated minor who resides with such parent or guardian. (740 ILCS 115/1 to 115/7). Act held constitutional. (69 Ill. App.3d 193, 387 N.E.2d 341).

Disabilities.

See categories 11 Employment, topic Labor Relations, subhead Child Labor Laws; Transportation, topic Motor Vehicles, subhead Operator's License.

Sexual Abuse Counseling Programs.

Department of Juvenile Justice establishes and offers sexual abuse counseling to both victims of sexual abuse and sexual offenders in as many facilities as necessary to insure sexual abuse counseling throughout State. (730 ILCS 5/3-9-7).

Revised Uniform Gifts to Minors Act.

Repealed and replaced with Uniform Transfers to Minors Act (760 ILCS 20/1 to 20/24) effective July 1, 1986, with following differences: (1) In §2 definition of “benefit plan” expanded and several definitions added; (2) in §4, custodian may be nominated by court order; (3) in §6 transfers permitted by court order; (4) in §10 mechanism for transfer of beneficial interests in Illinois land trusts provided; (5) in §12 appointment of ineligible transferor as custodian does not void creation of custodianship; (6) in §13 custodian may invest custodial property in common trust funds; (7) in §16 custodian not compensated for his services liable only for losses due to bad faith, gross negligence, intentional wrongdoing or failure to maintain standard of prudence required by Act; and (8) in §19 transferor may designate successor custodian.

Uniform Securities Ownership by Minors Act not adopted.

Adoption.

See topic 14.01 Adoption.

Uniform Child Custody Jurisdiction Act adopted. See topic 14.05 Dissolution of Marriage, subhead Custody.

14.11 MARRIAGE:

Persons of age 18 or over may marry without consent of parent or guardian. (750 ILCS 5/203).

Consent Required.

Where person is of age 16 but under age 18, parent or guardian must consent. (750 ILCS 5/203).

License issued by county clerk of county where marriage is to take place is required. Both applicants must appear in person with satisfactory proof each party will have attained age 18 at time license is to be effective or have attained age 16 and obtained proper consent and proof that marriage is not prohibited. (750 ILCS 5/203). All persons applying for marriage license are provided with brochure concerning sexually transmitted diseases and inherited metabolic diseases. (750 ILCS 5/204). Any judge of circuit court in county in which license is to be issued may waive medical examination and tests if satisfied that same will offend applicants' religious tenets or practices, or when woman is pregnant at time of application or has given birth to child out of wedlock which is living at time of application and man making application makes affidavit that he is father of such child. (750 ILCS 5/205). Court has power to order issuance of license to underaged applicant aged 16 or 17 who has no parent capable of consenting to marriage or whose parent has not consented. (750 ILCS 5/208). Any person who violates Part II of Act (dealing with licensing and solemnization of marriages) is guilty of Class B misdemeanor. (750 ILCS 5/215).

Waiting Period.

License to marry becomes effective one day after date issued (unless court orders it effective when issued) and expires 60 days after it becomes effective. (750 ILCS 5/207).

Ceremony may be performed by judge of court of record, county clerk in counties having 2,000,000 or more inhabitants, public official with power to marry, or in accordance with prescriptions of any religious denomination or Indian Nation or Tribe. (750 ILCS 5/209).

Reports of Marriages.

Person performing marriage, or if no individual acting alone performed marriage, both parties to marriage must complete marriage certificate form and forward same to county clerk within ten days after marriage. (750 ILCS 5/209[a]).

Record.

See category 10 Documents and Records, topic 10.04 Records, subhead Marriages, Divorces and Annulments.

Common law marriages contracted in Illinois after June 30, 1905 are invalid. (750 ILCS 5/214).

Prohibited Marriages.

Marriages between parent and child, grandparent and grandchild, brother and sister (half blood included), uncle and niece, aunt and nephew, and first cousins (half blood included) under 50 years of age, marriages entered into prior to dissolution of earlier marriage of one of parties, and marriage between two individuals of same sex are prohibited. (750 ILCS 5/212). Parties to marriage prohibited because marriage entered into prior to dissolution of earlier marriage of one of parties, who cohabit after impediment is removed are lawfully married as of date of removal of impediment. Children born or adopted of prohibited or common law marriage are legitimate. (750 ILCS 5/212). If resident of Illinois contracts in another state marriage prohibited in Illinois, such marriage is null and void in Illinois. (750 ILCS 5/216).

Annulment.

Court may enter judgment declaring invalidity of marriage (formerly known as annulment) on grounds of lack of capacity to consent to marriage, incapability to consummate marriage by sexual intercourse, underaged party lacking parental consent, or marriage prohibited by this statute. (750 ILCS 5/301). Children born of marriage declared invalid are legitimate. (750 ILCS 5/303).

Action for Breach of Promise.

Actual damages only are recoverable; no punitive, exemplary, vindictive or aggravated damages allowed. (740 ILCS 15/1, 15/2, 15/3). Such actions must be brought within one year after cause accrued (740 ILCS 15/6) and will be dismissed unless notice of intent to sue was given within three months after breach (740 ILCS 15/5).

Court Ordered Marriages.

Persons of age 16 and 17 may receive license and marry on presentation of court order. (750 ILCS 5/208).

Injunction Against Abortion.

Court may issue injunction against performing abortion upon finding that interests of husband in preventing abortion outweigh those of wife in having abortion performed after unborn child is viable, but only where court makes finding that mother's life or physical health are not in danger. (735 ILCS 5/11-107.1).

14.12 MARRIED WOMEN:

See topics 14.09 Husband and Wife, Marriage; categories 5 Civil Actions and Procedure, topic Evidence, subhead Witnesses; Debtor and Creditor, topic Homesteads; Documents and Records, topic Acknowledgments; Estates and Trusts, topics Executors and Administrators, Wills; Property, topic Dower.

14.12A SEPARATE MAINTENANCE:

See topic 14.05 Dissolution of Marriage.

15 HEALTH

15.0115.04

15.05 FOOD, DRUGS, DEVICES AND COSMETICS:

Illinois Food, Drug and Cosmetic Act. (410 ILCS 620/1 et seq.). Food and drug terminology such as “food”, “drug”, “labeling”, “label”, and “cosmetic” defined. (410 ILCS 620/2.1-

2.39). Prohibits acts such as manufacture, sale or delivery of misbranded or adulterated articles, dissemination of false advertising, failure of prescription drug manufacturer to supply information to practitioner or to dispense different drug in place of brand of drug ordered, without permission. (410 ILCS 620/3.1-3.22). Director of Public Health is authorized to seek injunction or temporary restraining order against any person violating provision in 410 ILCS 620/3.1-3.22. (410 ILCS 620/4).

Violation of any provision of Act, except 3.22 and 6, is Class C misdemeanor, unless violation committed after conviction under this section has become final, then it is Class A misdemeanor. Violation of §6 is Class A misdemeanor and Class 4 felony if violation occurs after conviction under section became final. (410 ILCS 620/5[a]).

Food is deemed misbranded if, among other things, its labeling is false or misleading, is offered for sale under name of another food, is imitation of another food and not properly marked. (410 ILCS 620/11). Adulterated food is explained. (410 ILCS 620/10). Regulations exempting drugs and devices from labeling or packaging requirements are explained. (410 ILCS 620/16). Adulterated and misbranded cosmetics defined. (410 ILCS 620/18 & 620/19). Administrative Procedure Act is adopted in this Act and applies to all administrative rules of director. (410 ILCS 620/22.1).

15.05A EMPLOYEE WELLNESS PROGRAM GRANT ACT:

Employee Wellness Program Grant Act. (30 ILCS 770/1—770/99). Grants will be provided to employers providing one or more of wellness services listed in 30 ILCS 770/15, such as stress management, smoking cessation, aerobic exercise or nutrition education. (30 ILCS 770/15). Illinois Department of Public Health develops list of wellness providers to provide for programs listed in 30 ILCS 770/15. (30 ILCS 770/20).

15.05B ILLINOIS INDOOR CLEAN AIR ACT:

Illinois Indoor Clean Air Act (410 ILCS 80/1—80/11) repealed by Ill. Pub. Act 95-17, effective Jan. 1, 2008. Replaced by Smoke Free Illinois Act, which prohibits smoking in public places, places of employment, and governmental vehicles and subjects persons, public places, and places of employment to civil fines for violations. (410 ILCS 82/15).

15.05C OTHER HEALTH RELATED ACTS:

Health Maintenance Organization Act. (215 ILCS 125/1-1 through 125/6-19). Managed Care Reform and Patients Rights Act. (215 ILCS 134/1 through 134/299). Illinois Health Insurance Portability and Accountability Act. (215 ILCS 97/1 through 97/99). Genetic Information Privacy Act (410 ILCS 513/1 et seq.). Health and Hazardous Substances Registry Act. (410 ILCS 525/1). Obesity Prevention Initiative Act (410 ILCS 115/1 et seq.)

16 INSURANCE

16.01 INSURANCE COMPANIES:

Regulated generally by Illinois Insurance Code (215 ILCS 5/1 to 5/1416) and regulations. Many provisions are set to be repealed effective Jan. 1, 2017 under sunset law (5 ILCS 80/4.27). Specific provisions of Illinois Insurance Code should be consulted in connection with holding companies and certain acquisitions (215 ILCS 5/131.1 to 5/131.28), not-for-profit organizations (215 ILCS 5/245.2), cancellation, nonrenewal, or refusal to issue insurance policies (215 ILCS 5/141.01, 5/143.10 to 5/143.26 & 5/155.22), uninsured motor vehicle policies (215 ILCS 5/143a), motor vehicle theft and insurance fraud (215 ILCS 5/155.24), limitation of risk (215 ILCS 5/144, 5/144.1), improper claims practice procedures (215 ILCS 5/154.5 to 5/155), identity theft insurance consumer fact sheet (215 ILCS 5/155.42), claims for excessive charges (720 ILCS 325/1 et seq.), merger, consolidation or plans of exchange (215 ILCS 5/156 to 5/172), reinsurance (215 ILCS 5/173 to 5/179), rehabilitation, liquidation, conservation and dissolution (215 ILCS 5/187 to 5/221.13), credit life and credit accident and health insurance (215 ILCS 5/155.51 to 5/155.65), legal reserve life insurance (215 ILCS 5/222 to 5/245.1, 215 ILCS 5/245.21 to 5/245.60), group life insurance (215 ILCS 5/230.1 to 5/231.1), assessment legal reserve life companies (215 ILCS 5/274 to 5/281.1), fraternal benefit societies (215 ILCS 5/282.1 to 5/314.1), mutual benefit associations (215 ILCS 5/316 to 5/337), burial societies (215 ILCS 5/338 to 5/351), accident and health insurance (215 ILCS 5/352 to 5/370e), fibrocystic breast conditions coverage (215 ILCS 125/4-16), infertility coverage (215 ILCS 5/356m), family life insurance coverage of newborn children (215 ILCS 5/356c), breast implant removal coverage (215 ILCS 5/356p), group accident and health insurance (215 ILCS 5/367), continuation of existing group accident and health coverage after involuntary termination of employment (215 ILCS 5/367.2), municipal group accident and health insurance (40 ILCS 5/7-199.1), continuance of insurance for municipal employees (215 ILCS 5/367i), casualty insurance, fidelity bonds and surety companies (215 ILCS 5/378 to 5/392.1), fire and marine insurance (215 ILCS 5/393 to 5/400.1), cancellation of fire and marine insurance (215 ILCS 5/143.20a), unfair methods of competition (215 ILCS 5/421 to 5/434), premium finance companies (215 ILCS 5/513al to 5/513a12), urban property insurance (215 ILCS 5/522 to 5/530a), legal expense insurance (215 ILCS 5/900 to 5/906), insurance guaranty fund (215 ILCS 5/532 to 5/553), group vehicle insurance (215 ILCS 5/388a to 5/388g), group professional liability insurance (215 ILCS 5/393a to 5/393g), life and health insurance guaranty association (215 ILCS 5/531.01 to 5/531.19), property line loss information (215 ILCS 145/0.1 to 145/1), earthquake coverage (215 ILCS 5/143.21c), Insurance Exchange (215 ILCS 5/107.01 to 5/107.31), mine subsidence insurance (215 ILCS 5/801.1 to 5/817.1), comprehensive health insurance plan (215 ILCS 105/1 to 105/15), registration of policies and deposit of reserves (215 ILCS 5/246 to 5/253), separate accounts (215 ILCS 5/245.21 to 5/245.60), risk retention for banking associations (215 ILCS 5/1101 to 5/1109), condominium risk-pooling (765 ILCS 605/12.1), municipal insurance availability program (65 ILCS 5/11-152-1). Statutes other than Illinois Insurance Code govern district, township and county mutual companies (215 ILCS 120/1 et seq.), insurance of titles to real estate (215 ILCS 155/3), health maintenance organizations (215 ILCS 125/1-1 to 125/5-9), including continuation of Group HMO coverage after termination of employment (215 ILCS 125/4-9.2), property subject to bailment contract (765 ILCS 1015/1 to 1015/4), voluntary health service plans (215 ILCS 165/1 to 165/30), long term care provider funding (305 ILCS 5/5B-1 to 5/5B-10), HIV coverage and prenatal HIV testing (305 ILCS 5/5-5.04, 215 ILCS 5/356z.1), dental service plans (215 ILCS 110/1 to 110/47), and State Employees Group Insurance (5 ILCS 375/1 to 375/17).

Supervision by Director of Insurance.

Director is charged with enforcement and execution of insurance laws. He has power to make rules and regulations, to conduct investigations and examinations (215 ILCS 5/132.1 to 5/132.7), to hold hearings and to issue subpoenas and orders. His orders and decisions are subject to judicial review. (215 ILCS 5/401 to 5/407.2). Jurisdiction of Insurance Department over entities supplying health care insurance coverage in Illinois presumed unless otherwise shown. (215 ILCS 5/122-1).

Rates.

Workers' compensation and employer's liability rates. (215 ILCS 5/454 to 5/471). (See category 11 Employment, topic 11.02 Labor Relations.)

Annual Statements.

Insurance companies must file annual statement with Director of Insurance. (215 ILCS 5/136, 5/155.25, 5/223[1a], 140/1).

Claims Reporting.

Director of Insurance can issue rules requiring insurance companies to report information concerning suspected fraudulent claims. (215 ILCS 5/155.23). Director of Insurance issues rules requiring medical liability insurers to report information concerning experience in this state. (215 ILCS 5/155.25).

Policies.

Policy forms regulated generally by 215 ILCS 5/143 to 5/143.11 and, in some instances, by certain sections cited under subhead Regulated Generally By, supra.

Discrimination is prohibited by 215 ILCS 5/236, 5/364, 5/356g, 5/424. See also various cancellation provisions, supra.

Privacy Protection.

Collection of information from insured and disclosure of information regulated. Insured allowed access to information collected for purposes of correction. (215 ILCS 5/1001 to 5/1024). Licensees must comply with privacy protection provisions of Title V of federal Gramm-Leach-Bliley Act (PL 106-102, 106th Cong) and Director of Insurance has authority to enforce those provisions. (215 ILCS 5/1023.5).

Rebates.

Payment or acceptance prohibited except nothing prevents company from offering child passenger restraint system or discount on restraint system purchase price to policyholders. (215 ILCS 5/151). Penalties. (215 ILCS 5/152).

Agents and Brokers.

Now regulated as “insurance producers, limited insurance representatives and registered firms” article of Code. (215 ILCS 5/500-5 through 5/500-150 and 215 ILCS 5/141 to 5/141.1).

Process Agent.

Nonresident agents and brokers and foreign and alien insurance companies must appoint Director as attorney to accept service of process and service upon any such agent, broker or foreign or alien insurance company may be made upon Director. (215 ILCS 5/112). Principal place of business of domestic stock companies and domestic mutual companies must be located within Illinois, unless Director approves otherwise. (215 ILCS 5/8, 5/38). Principal office of attorney-in-fact of domestic reciprocal and domestic Lloyds must be maintained in Illinois. (215 ILCS 5/64, 5/89). Attorney-in-fact of each domestic, foreign and alien reciprocal and Lloyds transacting business in Illinois must appoint Director of Insurance as attorney to accept service of process and service of process may be made on any reciprocal or Lloyds by service upon its attorney-in-fact or by service upon Director. (215 ILCS 5/77, 5/105). Domestic, foreign and alien fraternal benefit societies and mutual benefit societies transacting business in Illinois must appoint Director as attorney to accept service of process and service upon any such fraternal benefit society or mutual benefit society may be made upon Director. (215 ILCS 5/315.2, 5/321). Service of process on company not authorized to do business in Illinois may be made, under certain circumstances, by serving Director or by serving persons acting for company within Illinois. Act subjects to jurisdiction of Director of Insurance and to jurisdiction of courts of Illinois insurers not authorized to transact business in Illinois which place or send into Illinois false advertising designed to induce Illinois residents to purchase insurance from such insurers. (215 ILCS 5/123, 215 ILCS 5/123.1). Filing of statement required for acquisition of control or merger with domestic company subjects filer to jurisdiction of Illinois courts and constitutes appointment of Director as attorney to accept service. (215 ILCS 5/131.12).

Investments.

Regulated by 215 ILCS 5/131.2 & 5/131.3.

Insurance Exchange.

Regulated by 215 ILCS 5/107.01 to 5/107.31.

Foreign Insurance Companies.

Regulated by 215 ILCS 5/108 to 5/120. Foreign or alien insurance company applying for certificate of authority to transact business in Illinois must file application with Director. (215 ILCS 5/109). Supporting documents, including articles of incorporation or power of attorney of attorney-in-fact (reciprocal or Lloyds), appointment of U.S. manager (alien companies), by-laws, appointment of Director as agent for service of process, financial statements in compliance with requirements for annual statement, report of examination and certificate of authority from official of state of incorporation, must be delivered to Director with application. (215 ILCS 5/110). Applicant must satisfy Director that its funds invested in accordance with laws of its domicile and in securities or property which afford degree of financial security equal to that required of domestic companies and that it meets capital, surplus and/or contingent liability requirements of domestic companies. (215 ILCS 5/111). Applicant must deposit with Director securities in amount required to be deposited by domestic companies or certificate of deposit from official of another state certifying that such company has deposited like amount of securities with such official. (215 ILCS 5/111[3]). Director may renew annually certificate of authority of foreign or alien company if he is satisfied that grounds for revoking such certificate of authority do not exist (215 ILCS 5/114) and that company is complying with conditions for admission (215 ILCS 5/113). Unauthorized foreign and alien companies regulated by 215 ILCS 5/121 to 5/123.3. Any foreign or alien company admitted to do business in Illinois may withdraw from Illinois by filing statement of withdrawal with Director. (215 ILCS 5/118).

Retaliatory Laws.

Whenever laws of foreign state or country require, as condition precedent to qualification of Illinois insurance companies to do business in such jurisdiction, compliance with laws which are more burdensome than those imposed by Illinois on foreign and alien companies or require larger deposit of securities than required by Illinois or otherwise require of Illinois insurance companies or their agents or brokers higher penalties, fees, charges or taxes than imposed by Illinois on foreign or alien companies and their agents and brokers, then such more burdensome laws, requirement of larger deposit and higher penalties, fees, charges or taxes apply to foreign or alien companies incorporated in such jurisdiction and doing business in Illinois and their agents and brokers. (215 ILCS 5/444).

Premium or Privilege Taxes.

Fees, charges and taxes regulated by 215 ILCS 5/408 to 5/416. As of Jan. 1, 1998, every insurance company doing business in state excluding fraternal benefit societies, farm mutual companies, religious charitable risk pooling trusts, and statutory residual market entities, pays privilege tax. (215 ILCS 5/409).

Direct Actions Against Insurer.

Liability policies must contain provision that injured party or his representative may maintain action against insured's insurance company if execution against insured is returned unsatisfied. (215 ILCS 5/388). Limitation period tolled from date proof of loss filed until date claim denied. (215 ILCS 5/143.1).

No-Fault Auto Insurance.

None. Statute repealed.

Insurance Holding Company Systems regulated by 215 ILCS 5/131.1 to 5/131.28.

Political Contributions.

See category 2 Business Organizations, topic 2.03 Corporations, subhead Political Contributions.

16.02 SURETY AND GUARANTY COMPANIES:

Director of Insurance has jurisdiction over surety and guaranty companies and they are governed generally by Insurance Code. For specific provisions, see 215 ILCS 5/378 through 5/392.1. See topic 16.01 Insurance Companies.

Rights and Powers.

Unearned premium and loss reserve must be maintained. (215 ILCS 5/378, 5/379.1). Bonds and guaranties of surety and guaranty company satisfy legal requirement of bond and guaranty. Two or more companies may execute bond and guaranty assuming pro rata liability. (215 ILCS 5/390). Trustee may have corporate surety. (215 ILCS 5/391). Surety bond may be deposited with court in lieu of appeal bond to stay execution pending appeal. (215 ILCS 5/392.1).

17 INTELLECTUAL PROPERTY

17.01 TRADEMARKS AND TRADENAMES:

Acquired by prior, exclusive appropriation and continuing use by person or entity of distinctive name, word, character, device, label, brand, seal, or like identifying source of origin.

What May be Used.

Mark may not be registered if immoral, scandalous or deceptive, disparaging of or falsely suggesting connection with persons or beliefs, consisting of flag of country or state, consisting of name, signature or portrait of nonconsenting living individual, or confusingly similar to another's mark. (765 ILCS 1036/10). Merely descriptive, deceptively misdescriptive, primarily geographically descriptive or misdescriptive marks or primarily merely surnames not registrable unless mark has become distinctive of applicant's goods or services. (765 ILCS 1036/10[e]).

Registration.

Trademarks adopted and used to identify goods made, sold, produced or distributed and service marks adopted and used to identify services rendered may be registered with Secretary of State. Filing fee of $10. Application must set forth description of mark, goods and services to which mark applies, mode or manner in which mark is being used, classes of goods or services (765 ILCS 1036/50), date applicant first used mark in Illinois and elsewhere, and owner's statement he believes he owns mark. Application must be accompanied by specimen or facsimile of mark in triplicate and $10 fee. (765 ILCS 1036/15). Upon compliance with Act certificate of registration is issued. (765 ILCS 1036/25). Secretary's decisions on registration are subject to judicial review. (765 ILCS 1036/20[f]).

Duration and Renewal.

Registration of mark is effective for five-year term subject to renewal for successive five-year periods 60 days prior to end of term. Renewal application must have affidavit by registrant that mark is still used in Illinois or excusing nonuse in Illinois. Notice before expiration is furnished by Secretary of State. Renewal fee is $5. (765 ILCS 1036/30).

Assignment of marks must be in writing and recorded with Secretary of State for $5 fee, and new certificate of registration will issue. Assignment void as to subsequent purchaser for valuable consideration without notice unless recorded with Secretary of State within three months after the assignment or prior to such subsequent purchase. (765 ILCS 1036/35).

Protection Afforded.

Certificate of registration admissible as evidence of registration of mark. (765 ILCS 1036/25). Registrant may proceed by suit to seek injunction and to acquire profits and/or damages suffered by reason of acts enumerated in 765 ILCS 1036/60 and to compel destruction of reproductions, counterfeits, copies, etc. under control of defendant. (765 ILCS 1036/70). Common law rights preserved. (765 ILCS 1036/80).

Cancellation of Registration.

Secretary of State may cancel a registration (a) for failure to renew ten-year old marks registered under prior acts, (b) upon request of registrant, (c) failure to renew and (d) pursuant to a judgment of a court of competent jurisdiction.

Action to cancel mark may be brought in circuit court on grounds that (1) mark has been abandoned, (2) registrant is not owner of mark, (3) registration was granted contrary to Act, (4) registration was obtained fraudulently, (5) mark is so similar to a mark registered in U.S. Patent Office or in Illinois as to be likely to cause confusion or mistake or to deceive, and (6) mark is generic name for goods or services for which it has been registered. (765 ILCS 1036/45).

Infringement.

Civil action available to registrant for injunction and recovery of profits and damages for another's use of copy or colorable imitation of registered mark in sale, offering for sale, or advertising goods or services if likely to cause confusion or mistake or to deceive as to source of origin (765 ILCS 1036/60); registrant may recover treble damages if use is knowing or in bad faith. (, 765 ILCS 1036/70).

Person adopting and using trademark, tradename or service mark may sue to enjoin subsequent use by another of same or similar mark or name if there is likelihood of injury to business reputation or dilution of distinctive quality of mark or name, even in absence of competition or confusion as to source of goods or services. (765 ILCS 1036/65).

Fair use of famous mark by another person in comparative commercial advertising or promotion to identify competing goods or services; noncommercial use of mark and all forms of news reporting and news commentary are not actionable. (765 ILCS 1036/65[b]).

Fair Trade Act.

Illinois Fair Trade Act repealed Aug. 4, 1977. (P.A. 80-233).

Deceptive Trade Practices.

The Uniform Deceptive Trade Practices Act has been adopted. (815 ILCS 510/1 to 510/7). See category 3 Business Regulation and Commerce, topic 3.20 Monopolies, 3.22 Restraint of Trade and Competition. Consumer Fraud and Deceptive Business Practices Act (815 ILCS 505/1 to 505/12) grants damaged consumers relief for damage suffered through unfair methods of competition and unfair or deceptive acts, including violations of Uniform Deceptive Trade Practices Act. See category 3 Business Regulation and Commerce, topics Monopolies Restraint of Trade and Competition, 3.12 Consumer Protection, and 3.23 Sales.

Tradenames.

Assumed business names or designations, if other than real names of individuals owning or conducting such business, must be registered before commencing business. Certificate must be filed with County Clerk of county in which business is to be conducted and county of each new or additional place of business setting forth assumed name, business address, true names and post office addresses of all proprietors, and must be duly acknowledged by persons intending to conduct such business. Notice of certificate filing must be published in newspaper of general circulation in filing county once a week for three consecutive weeks commencing within ten days of filing. Certificate void unless proof of publication filed with clerk within 50 days of certificate filing. (805 ILCS 405/1). Indexing and filing fee $5.00. (805 ILCS 405/3). Filing requirement inapplicable to corporations, limited liability companies, limited partnerships, and limited liability partnerships, trusts created by written instruments or partnerships using names of all partners. (805 ILCS 405/4). Use of words Army, Navy, etc. in name of mercantile establishment prohibited. (720 ILCS 230/1). Persons not complying with Act are subject to fine and imprisonment (805 ILCS 405/5, 720 ILCS 230/2) and may be sued under assumed name (805 ILCS 405/6). For corporate name regulations, see category 2 Business Organizations, topic 2.03 Corporations.

17.02 TRADE SECRETS:

Uniform Trade Secrets Act adopted, with slight variations, effective Jan. 1, 1988. (765 ILCS 1065/1 to 1065/9). “Trade secret” includes financial data and lists of actual or potential suppliers or customers. (765 ILCS 1065/2[d]). Limitations is five years. (765 ILCS 1065/7).

18 LEGAL PROFESSION

18.01 ATTORNEYS AND COUNSELORS:

The bar of Illinois is not integrated.

Jurisdiction over Admission.

By statute licenses to practice may be obtained from Supreme Court. (705 ILCS 205/1). By Supreme Court Rule, jurisdiction over admission to bar is vested in Board of Admissions to the Bar. (Ill. Sup. Ct. R. 701). Supreme Court has held that power to prescribe qualifications for admission to Bar is judicial and not legislative. (66 Ill.2d 398, 362 N.E.2d 1047). Any person admitted to practice is privileged to practice in every court in Illinois. However, for all capital cases filed after Mar. 1, 2002, no person except Attorney General or States Attorney of county of venue may appear as lead or co-counsel for State or defense unless person is member of Capital Litigation Trial Bar provided for in Ill. Sup. Ct. R. 714. (Ill. Sup. Ct. R. 701[b]).

Eligibility.

Persons may be admitted to practice if they are U. S. citizens, have declared intention to become citizens or have applied for naturalization within 30 days after becoming eligible to do so (705 ILCS 205/2), are 21 years of age, of good moral character, have satisfactorily passed examination before Board of Admissions to the Bar and, effective July 1, 1981, have satisfactorily passed professional responsibility examination—all subject, however, to certain conditions and requirements hereinafter described. (Ill. Sup. Ct. R. 701).

Registration as Law Student.

Applications to register as candidate for admission must be filed no later than Mar. 1 in year after registrant started law school. However, students commencing law school after Jan. 1 and before Mar. 1 must file application no later than July 1. Fee of $100 must accompany timely application; fee of $450 must accompany other application. (Ill. Sup. Ct. R. 706).

Educational Requirements.

Applicant must have graduated from four-year high school or preparatory school and must have satisfactorily completed at least 90 semester hours at college or university approved by Board of Law Examiners. In lieu of such college or preliminary work, Board may accept satisfactory completion of program or curriculum of particular college or university. (Ill. Sup. Ct. R. 703). Applicant must have pursued course of law studies and received first degree in law from

A.B.A. approved school. (Ill. Sup. Ct. R. 703). Person who received law degree in foreign country may apply for admission upon academic qualification examination upon conditions: (a) applicant is licensed to practice law in country where law degree conferred and/or in highest court of law in any state of U.S. or District of Columbia and in good standing where admitted; (b) applicant actively and continuously engaged in practice of law for five of seven years immediately prior to making application; (c) Board determines applicant's preliminary, college and legal education is acceptable based on documents and proofs which Board may require; (d) applicant achieve passing score on full academic qualification examination and Multistate Professional Responsibility Examination; (e) applicant meets character and fitness standards; (f) applicant files requisite registration and applications and pays fees in accord with Rule 706. (Ill. Sup. Ct. R. 715).

Petition for Admission.

Any person who meets educational requirements and pays required fee may make application for admission on examination provided, however, that following must first receive certification from Committee on Character and Fitness: Individuals who (1) have been convicted of felonies or misdemeanors involving moral turpitude or have indictments or complaints charging same pending against them; (2) were rejected in another jurisdiction on character and fitness grounds; or (3) have been reprimanded, censured, disciplined, suspended or disbarred in another jurisdiction or have such charges or proceedings pending against them. (Ill. Sup. Ct. R. 704, 706).

Examination.

Form of application prescribed by Board; must be accompanied by proof of educational qualifications and proof applicant meets other statutory requirements. (Ill. Sup. Ct. R. 704).

Academic and professional responsibility examinations are held separately. Academic examination held semiannually at times determined by Board, generally Feb. and July; professional responsibility examination held tri-annually in Mar., Aug., and Oct. Both examinations conducted under supervision of Board, academic by uniform printed questions on subjects listed below, professional responsibility either by uniform printed questions on Ill. Code of Prof. Resp. or by Multistate Professional Responsibility Examination, as Board designates. Academic examinations may cover subjects of administrative law, agency and partnership, business organizations, commercial paper, conflict of laws, contracts, criminal law and procedure, family law, equity jurisprudence, evidence, federal and state constitutional law, federal jurisdiction and procedure, federal taxation, Illinois procedure, personal property including sales and bailments, real property, suretyship, torts, and wills and decedents' estates. Academic qualification examination may also include performance test. Board may include Multistate Bar Examination, Multistate Essay Examination and Multistate Performance Test of National Conference of Bar Examiners. (Ill. Sup. Ct. R. 704).

Applicant failing to pass first examination may take successive examinations provided he furnishes Board satisfactory evidence of diligent study of law subsequent to prior examination. After fifth examination failure, permission of Board or Supreme Court is required before admission to another examination. (Ill. Sup. Ct. R. 704).

Clerkship.

No requirement that applicant serve clerkship before admission.

Admission Without Examination.

Attorney licensed to practice in highest court of any other state, U.S. territory or District of Columbia, may apply for admission to Illinois bar without taking written examination provided that certain criteria are met: applicant licensed in jurisdiction granting reciprocal admission to Illinois attorneys; applicant actively and continuously engaged in qualified practice of law for at least five of seven years immediately prior to application and during requisite period applicant must have practiced either in or law of reciprocal jurisdiction with some exceptions. (Ill. Sup. Ct. R. 705).

Fees Required of Applicants and Filing Deadlines for Admission.

$250 to $1000 on application for examination for admission; $150 to $500 on application for reexamination; $800 on application for admission on foreign license. (Ill. Sup. Ct. R. 706).

Limited Admission of House Counsel.

Lawyer admitted to practice in another state or District of Columbia may receive limited license to practice law in this state when employed in Illinois as house counsel exclusively for single corporation, partnership, association or other legal entity whose lawful business consists of activities other than practice of law and provision of legal services provided requirements are met including completed application for limited license; certificate of good standing from highest court of each jurisdiction of admission; certificate from disciplinary authority of each jurisdiction of admission that: (1) States applicant has not been suspended, disciplined or disbarred and no charges pending or (2) identifies any suspensions, disbarments or disciplinary sanctions or pending charges; certificate from applicant's employer and such other affidavits, proofs and documentation as prescribed by Board. (Ill. Sup. Ct. R. 716).

Character and Fitness Requirements.

Before admission, applicant must be passed on by Character and Fitness Committee in his District as to his character and moral fitness. Applicant must furnish Committee with affidavit, in form prescribed by Board, concerning applicant's history. Applicant must appear before Committee of his District or member thereof. (Ill. Sup. Ct. R. 708).

Admission Pro Hac Vice.

Under statute (705 ILCS 205/12) attorney residing in another state may practice in courts of this state on same terms that attorneys residing in this state may practice in such other state; and Supreme Court Rule provides that attorney from another jurisdiction in U.S. or foreign country may, in discretion of any court of record, be permitted to participate before such court in trial or argument of particular cause (Ill. Sup. Ct. R. 707).

Group Legal Services.

No attorney may participate in plan that provides group legal services unless plan is registered with Administration of Attorney Registration and Disciplinary Commission. (Ill. Sup. Ct. R. 730).

Licenses.

No one may practice law without obtaining license from Supreme Court. No person will be granted license or renewal who has defaulted on educational loan guaranteed by Illinois Student Assistance Commission or who is more than 30 days delinquent in child support order unless person has established satisfactory repayment record. (705 ILCS 205/1). Annual fees are required (Ill. Sup. Ct. R. 756), but see subhead Disbarment or Suspension, infra.

Lien.

Attorney has lien on claim or cause of action placed in his hands for collection or suit, or upon which suit instituted, for agreed fee or, in absence of agreement, for reasonable fee, provided he serves written notice of his claim of lien. Service by registered or certified mail is sufficient where total amount of all liens under Health Care Services Lien Act meets or exceeds 40% of sum paid or due to injured person, total amount of all liens under Attorneys Lien Act not to exceed 30% of sum paid or due injured person. All attorneys share proportionate amounts within this limit. If appeal is taken by any party to suit based on claim or cause of action, attorney's lien not affected or limited by this Act. (770 ILCS 5/1).

Privileges.

Attorneys are privileged from arrest while attending, going to or returning from court. (705 ILCS 205/9).

Disabilities.

No attorney may post bail or act as surety in any criminal action or proceeding. (725 ILCS 5/110-13).

Liabilities.

See category 5 Civil Actions and Procedure, topic 5.08 Costs.

Attorney Ethics.

American Bar Association Rules of Professional conduct modified in certain respects, is in effect. (Ill. Sup. Ct. Art. VIII).

Disbarment or Suspension.

Conduct which violates Illinois Rules of Professional Conduct, defeats administration of justice or brings courts or profession into disrepute is ground for discipline by Supreme Court including disbarment, disbarment on consent, suspension for specified time or censure. (Ill. Sup. Ct. R. 770). Procedures for investigation, hearing, review, and reinstatement set forth in Rules of Attorney Registration and Disciplinary Commission.

Disciplinary proceedings affecting members of Illinois Bar are under administrative supervision of Attorney Registration & Disciplinary Commission (Ill. Sup. Ct. R. 751) and Administrator (Ill. Sup. Ct. R. 752). Commission appoints members of subordinate Inquiry and Hearing Boards pursuant to statute. (Ill. Sup. Ct. R. 752, 753). Inquiry and Hearing Boards empowered to take and transcribe evidence of witnesses and cause issuance of subpoenas. (Ill. Sup. Ct. R. 754). Burden of proving misconduct is on accusers. (64 Ill.2d 407, 356 N.E.2d 333).

If attorney licensed in Illinois and another state is disciplined in foreign state, he may upon proof of order be subjected to concurrent discipline in Illinois after specified notice and hearing. (Ill. Sup. Ct. R. 763).

With certain exceptions, every attorney admitted to practice law in Illinois must pay annual registration fee to Disciplinary Commission. No fee required of members of Bar for less than one year before Jan. 1 for which fee is due, $105 annual fee required of members of Bar for more than one but less than three years before Jan. 1 for which fee is due, $289 annual fee is required of members of Bar for more than three years. (Ill. Sup. Ct. R. 756). As part of annual registration each lawyer must identify accounts maintained during prior 12 months to hold property of clients or third persons in lawyers possession in connection with representation. (Ill. Sup. Ct. R. 756[d]). With exception of attorneys serving in office of justice, judge or magistrate, attorney must disclose whether he has malpractice insurance on date of registration and dates of coverage. (Ill. Sup. Ct. R. 756[e]). As part of registering, each lawyer must report approximate amount of pro bono legal service and amount of qualified monetary contributions made during preceding 12 months. (Ill. Sup. Ct. R. 756[f]).

Justices of Supreme Court may at their discretion strike name of any attorney from roll of attorneys for misconduct. Any judge of Circuit Court may for like cause suspend any attorney from practice in court over which he presides for such time as he deems proper. (705 ILCS 205/6). If person's name is stricken from roll of attorneys, he may petition for reinstatement by filing with Clerk of Supreme Court and depositing $500 against costs of investigation. Petition may not be made sooner than five years after order of disbarment, three years after disbarment on consent, two years after denial of prior petition, or one year after order allowing withdrawal of prior petition. (Ill. Sup. Ct. R. 767). Burden of proving rehabilitation is on petitioner (64 Ill.2d 407, 356 N.E.2d 333), who must establish rehabilitation by clear and convincing evidence (77 Ill.2d 154, 395 N.E.2d 571).

When attorney refuses or neglects on demand and tender of reasonable fees and expenses to pay over or deliver client's money or property to client, any person interested may apply to Supreme Court for rule on attorney to show cause why name should not be stricken from roll. (705 ILCS 205/7).

Solicitation.

Contract of employment of attorney is void if obtained as result of solicitation by non-attorney of claim for personal injuries or death. (705 ILCS 210/3).

Unauthorized Practice.

Only licensed attorneys may receive fees for legal services. Nor may unlicensed person advertise or hold himself out to provide legal services. Violation subjects offender to contempt of court proceeding. (705 ILCS 205/1). Unauthorized practice may be enjoined but is not grounds for an award of damages. (59 Ill. App.3d 560, 375 N.E.2d 871).

No coroner, sheriff or deputy sheriff may practice law in the county in which he is commissioned. No clerk or deputy clerk of a court may practice before that court. (705 ILCS 205/10).

Law students and recent graduates may, under certain circumstances, perform certain specified tasks. (Ill. Sup. Ct. R. 711).

Professional Associations.

See category 2 Business Organizations, topic 2.02 Associations, subhead Professional Associations.

Professional Corporations.

See category 2 Business Organizations, topic 2.03 Corporations, subhead Professional Service Corporations.

19 MINERAL, WATER AND FISHING RIGHTS

19.01 MINES AND MINERALS:

Mining Board of Department of Natural Resources administers Coal Mining Act. (225 ILCS 705/2.01 et seq.). Mineral mining regulated by Fluorspar and Underground Limestone Mines Act. (225 ILCS 710/1 et seq.). Surface mining regulated by Surface Coal Mining Land Conservation and Reclamation Act. (225 ILCS 720/1.01 et seq.).

Operation of Mines.

Coal Mining Act is comprehensive and deals with mine safety, including regulation and inspection, operation, employment requirements, standards for construction and equipment, and use of explosives. Mining Board of Department of Natural Resources adopts rules to promote health and safety of mine workers. (225 ILCS 705/2.12). Director of Office of Mines and Minerals appoints inspectors under Mines-inspection Act, and each mine operator must make monthly reports. (225 ILCS 710/2.01 to 710/6.01).

Mine operators and workers must observe detailed rules governing mine operations, and failure is misdemeanor. (225 ILCS 705/36.01). Serious violations are subject to criminal prosecution. (225 ILCS 710/16).

Miners and laborers in coal mines have lien on real and personal property of owner used in operating coal mine. (770 ILCS 65/1).

Safeguarding of Employees.

Coal Mining Act and Mines-inspection Act contain detailed safety rules applicable to mine work.

Inspection of Mines.

Certified mine examiner is required at each mine, and examiner must conduct inspections required by statute. (225 ILCS 705/6.01 to 705/6.16).

Taxes.

Statute governs valuation of real property on which coal mine is located. (35 ILCS 205/20).

Oil and Gas.

Oil and gas drilling regulated by Oil and Gas Act (225 ILCS 725/1), and Department of Natural Resources adopts rules (225 ILCS 725/3). Act also establishes rules for leases of public lands for exploration and extraction (5 ILCS 615/22) and plugging and restoration (225 ILCS 730/1). Other statutes involving oil and gas pertain to abandonment (765 ILCS 515/1; 765 ILCS 530/6) and administration of decedents' estates (755 ILCS 5/20-20). Contractor or subcontractor furnishing labor or materials for drilling operations for oil or gas has lien on land, leaseholds, machinery and oil or gas products. (770 ILCS 70/2).

20 MORTGAGES

20.01 CHATTEL MORTGAGES:

Uniform Commercial Code, Article 9, replaced chattel mortgage statutes effective July 2, 1962. 1972 Official Text was enacted, effective July 1, 1973. See category 3 Business Regulation and Commerce, topic 3.09 Commercial Code.

For forms see end of this Digest.

20.02 COLLATERAL SECURITY:

This subject is covered comprehensively by Art. 9 of Uniform Commercial Code.

20.03 MORTGAGES OF PERSONAL PROPERTY:

See topic 20.01 Chattel Mortgages; category 3 Business Regulation and Commerce, topic 3.09 Commercial Code.

20.04 MORTGAGES OF REAL PROPERTY:

Mortgages and trust deeds are made and acknowledged like deeds, and requirements concerning release of homestead are same.

Execution.

Execution may be proved by secondary evidence without producing or accounting for the absence of subscribing witnesses. (735 ILCS 5/8-1601).

Trust deeds are extensively used in the place of mortgages.

Reverse Mortgages.

Bank, savings and loan association or credit union may make “reverse mortgages” on basis of existing equity in homestead property. Mortgagee may add deferred interest to principal or provide for interest on interest. (205 ILCS 5/5a, 105/1-6a, 305/46[3]). Additional provisions made for nonrecourse reverse mortgage loans available only to homeowners who are at least 62 years of age. (205 ILCS 5/6.1).

Revolving Credit Loans.

Banks, savings and loan associations or credit unions may make revolving credit loans secured by mortgages or deeds of trust on real property or by security assignments of beneficial interest in land trusts. Lien arising thereunder includes existing indebtedness and such future advances as are made within 20 years from date thereof. (205 ILCS 5/5d, 105/1-6b, 305/46).

Recording.

In order to be effective against creditors of mortgagor and subsequent purchasers from him without notice, mortgage must be recorded in office of recorder of deeds of county where real estate is situated. No deed, mortgage, assignment of mortgage, or other instrument affecting title to real estate may include provision prohibiting recording and any such provision in instrument signed after July 19, 1995 is void and of no effect. (765 ILCS 5/28, 5/30).

Recording Fees.

Fees of recorder of deeds (which must be paid in advance) for recording real estate mortgages and trust deeds are same as those for deeds. See category 10 Documents and Records, topic 10.04 Records.

Taxes on realty are normally paid into escrow by mortgagor. Absent agreement, no interest is due to mortgagor on such funds. (1 Ill.App.3d 621, 275 N.E.2d 300).

Future Advances.

The lien includes all moneys thereafter advanced or applied on account of the principal indebtedness or authorized to be advanced by the provisions of the mortgage or by law; but as to subsequent purchasers and judgment creditors the mortgage is, as to moneys advanced or applied on account of the principal indebtedness, a lien only from the time such moneys are advanced or applied, unless such advancement or application occurs within 18 months of the date of recordation, or unless the mortgagee is required by contract to make it. (765 ILCS 5/39). Future advances clauses must set upward limit to be advanced or lose protection. (48 Ill.App.3d 82, 365 N.E.2d 382).

Rights of Junior Mortgagee.

Mortgagee of land against which prior mortgage exists may pay prior mortgage defaults of principal or interest, and such payments become part of debt secured by his junior mortgage and bear interest from date of payment at same rate as prior mortgage indebtedness, and are collectible with, as a part of, and in the same manner as the amount secured by the junior mortgage. (765 ILCS 905/13).

Assignment.

Mortgagee may assign his interest.

Release and satisfaction of mortgage or trust deed in nature of mortgage may be made by release deed, executed by mortgagee, trustee or his executor, administrator, heirs or assignee of record and acknowledged, and delivering same to mortgagor or grantor, his heirs, legal representatives or assigns. If delivered to mortgagor or grantor, it must have imprinted on its face in bold letters at least ¼ inch in height following:

"FOR THE PROTECTION OF THE OWNER, THIS RELEASE SHALL BE FILED WITH THE RECORDER OR THE REGISTRAR OF TITLES IN WHOSE OFFICE THE MORTGAGE OR DEED OF TRUST WAS FILED." (765 ILCS 905/2).

If any mortgagee or trustee, in deed in nature of mortgage, of real property, or his executor or administrator, heirs or assigns, knowing same to be paid, does not, within one month after payment of debt secured by such mortgage or trust deed, comply with requirements of 905/2, for every such offense, he is liable to pay to party aggrieved sum of $200 which may be recovered by party aggrieved in a civil action, together with reasonable attorney's fees. In any such action, introduction of loan payment book or receipt which indicates that obligation has been paid is sufficient evidence to raise presumption that obligation has been paid. Upon finding for party aggrieved, court orders mortgagee or trustee, or his executor or administrator, heirs or assigns, to make, execute and deliver release as provided in 905/2. Successor in interest to mortgagee or trustee in deed in nature of mortgage is not liable for penalty prescribed in this section if he complies with requirements of 905/2 within one month after succeeding to interest. (765 ILCS 905/4).

Note: New mortgage foreclosure law took effect July 1, 1987. (735 ILCS 5/15-1101 to 5/15-1706). Mortgages may also be released upon compliance with Mortgage Certificate of Release Act (765 ILCS 935/1 et seq.), effective August 6, 2002.

New mortgage foreclosure law applies to: (1) Any mortgage created prior to or after July 1, 1987; (2) any real estate installment contract for residential real estate entered into on or after July 1, 1987 and under which (i) purchase price is to be paid in installments over period in excess of five years and (ii) amount unpaid under terms of contract at time of filing of foreclosure complaint is less than 80% of original purchase price of real estate as stated in contract; (3) any collateral assignment of beneficial interest made on or after July 1, 1987 (i) which is made with respect to land trust which was created contemporaneously with collateral assignment of beneficial interest, (ii) which is made pursuant to requirement of holder of obligation to secure payment of money or performance of other obligations and (iii) as to which security agreement or other writing creating collateral assignment permits real estate which is subject of land trust to be sold to satisfy obligations. (735 ILCS 5/15-1106[a]). Contract seller may elect to enforce in foreclosure under new law any other real estate installment contract entered into on or after July 1, 1987. (735 ILCS 5/15-1106[c]).

Curing Default on Accelerated Maturity.

In case of mortgage executed after July 21, 1959, where entire principal sum has become due prior to fixed maturity date through acceleration because of default, mortgagor may, at any time prior to expiration of 90 days from date court obtains jurisdiction over mortgagor cure all existing defaults by paying principal amount due, including costs, expenses, attorneys' fees and other fees, excluding portion of principal which would not have been due in absence of acceleration. This relief may be granted only once every five years under any particular mortgage if court has made express written finding that mortgagor has exercised its right to reinstate. Judgment of foreclosure prior to expiration of reinstatement period is subject to mortgagor's right to reinstate mortgage. (735 ILCS 5/15-1602).

Foreclosure and Sale.

Power of sale is ineffective, and mortgages must be foreclosed in accordance with Mortgage Foreclosure Law. (735 ILCS 5/15-1405). Common law remedy of strict foreclosure is still available in Illinois. (14 Ill. App. 3d 68, 302 N.E.2d 248; 735 ILCS 5/15-1403). Due on sale clauses are enforceable. (61 Ill.2d 119, 333 N.E.2d 1; 97 Ill. 2d 187, 454 N.E.2d 249).

After default, mortgagor may agree with mortgagee to provide deed in lieu of foreclosure to terminate mortgagor's interest and relieve all personal liability by its acceptance. (735 ILCS 5/15-1401).

Shortened redemption period ends at later of expiration of 90-day reinstatement period (735 ILCS 5/15-1602) or 60 days after judgment entered if court: (i) Finds value of mortgaged real estate is less than 90% of specified amount and mortgagee waives right to deficiency judgment; or (ii) enters consent foreclosure judgment (735 ILCS 5/15-1603[b][3]). If mortgaged real property was abandoned, redemption and reinstatement periods end 30 days after judgment. (735 ILCS 5/15-1603[b][4]).

A form of complaint is provided by statute (735 ILCS 5/15-1504) and optional procedure for barring redemption rights of non-record claimants is also detailed (735 ILCS 5/15-1502[c]). Under certain circumstances, court may empower mortgagee to take possession of property during foreclosure. (735 ILCS 5/15-1701 to 5/15-1706). Notice to the homeowner must be attached to the summons (735 ILCS 5/15–1504.5). Payoff demands from the mortgagor must contain certain information. (735 ILCS 5/15–1505.5).

Trial of foreclosure action must be in open court. No evidence is required in support of facts stated in verified complaint or if separate affidavit verifies allegations which are not controverted by verified answer or verified counterclaim or if response states no knowledge of allegations in complaint pursuant to 735 ILCS 5/2-610. If none of such facts are controverted, plaintiff may have judgment on motion supported by affidavit stating amount due. (735 ILCS 5/15-1506[a]).

Court may enter judgment satisfying mortgage indebtedness by vesting absolute title to mortgaged property in mortgagee, free of all claims of mortgagor, if owner of mortgaged property expressly consents thereto and if other conditions are met. (735 ILCS 5/15-1402). In such event, mortgagor has later of 90-day reinstatement period (735 ILCS 5/15-1602) or 60 days after judgment entered to redeem by paying judgment creditors amount due on mortgage with interest and costs (735 ILCS 5/15-1603[b]). Subject to redemption rights of mortgagor, non-mortgagor party objecting to consent foreclosure may redeem within 30 days after judgment entered. (735 ILCS 5/15-1402[b]).

Deficiency Judgment.

Personal judgment for deficiency against any party will be entered if: (i) Otherwise authorized and (ii) to extent requested in complaint and proven. In residential mortgage foreclosure, notice of hearing to confirm sale must be mailed to mortgagor even if previously found to be in default. (735 ILCS 5/15-1508[b-5]. Entering and enforcement of deficiency judgment permitted only when personal service made upon persons personally liable for mortgage indebtedness, unless appearance entered in foreclosure action. (735 ILCS 5/15-1508[e]).

Redemption.

Except for consent foreclosures, only owner of redemption (i.e. mortgagor, other owner or co-owner of mortgaged premises) may redeem. (735 ILCS 5/15-1603[a]). Residential real estate redemption period ends on later of: (i) Date seven months from date mortgagor served with summons or by publication or otherwise submitted to jurisdiction or (ii) date three months from date of entry of judgment. Redemption period for all other foreclosures ends on later of: (i) Date six months from date mortgagor served with summons or by publication or otherwise submitted to jurisdiction or (ii) date three months from date of judgment. (735 ILCS 5/15-1603[b]). Shortened redemption period procedure described supra. Redemption period may be extended only by proper court stay order or by statute of U.S., as provided in 735 ILCS 5/15-1603(c)(2). Amount required to redeem and procedure involved described in 735 ILCS 5/15-1603(d-g).

Waiver.

Mortgagor of residential real estate or agricultural real estate may not waive mortgagor's rights of reinstatement and redemption. Domestic or licensed foreign corporation or any corporate trustee of any express trust when waiver is authorized by trust instrument or person having power of direction, who is mortgagor of agricultural real estate, may waive redemption rights. Unless otherwise prohibited, mortgagors of nonresidential real estate may waive redemption rights. (735 ILCS 5/15-1601).

Fairness in Lending.

Financial institution including any bank, credit union, insurance company, mortgage banking company, savings bank, savings and loan association or other residential mortgage lender, may not deny or vary loan terms without considering all regular and dependable income of each person liable for repayment of debt or because real estate offered as security is located in specific geographical area or by utilizing lending standards having no economic basis and which are discriminatory in effect or on sole basis of childbearing capacity of applicant or spouse. Financial institution may not engage in equity stripping or loan flipping or charge higher interest rate than is usual for particular type of loan. (815 ILCS 120/1 to 815 ILCS 120/5).

Statutory form is as follows (765 ILCS 5/11):

Form

The mortgagor (here insert name or names), mortgages and warrants to (here name or names of mortgagee or mortgagees), to secure the payment of (here recite the nature and amount of indebtedness, showing when due and the rate of interest, and whether secured by note or otherwise), the following described real estate (here insert description thereof), situated in the County of . . . . in the State of Illinois.

Dated this . . . . day of . . . ., A.D., 20. . . . .

A.B. [L.S.]

Names of parties signing must be typed or printed below signatures, and instrument must have blank space 3 1/2 x 3 1/2 inches for recorder's use. Omission of these requirements will not affect validity of instrument.

21 PROPERTY

21.01 ABSENTEES:

There is no general provision affecting rights or liabilities of absentees or nonresidents. Particular provisions are digested under following categories/topics: categories Business Organizations, topic Corporations; Civil Actions and Procedure, topics Costs, Limitation of Actions, Process; Debtor and Creditor, topic Attachment; Estates and Trusts, topics Death, Executors and Administrators; Family, topic Husband and Wife; Transportation, topic Motor Vehicles.

Missing Persons in Armed Forces and Other Missing Persons.

The Circuit Court has jurisdiction to administer the estates of persons missing from their usual place of residence or reported missing while in military service. Upon issuance of letters testamentary or discovery of the missing person, the administrator's power ceases. (755 ILCS 5/5-2, 5/10-1 through 5/10-5).

Escheat.

Uniform Disposition of Unclaimed Property Act is in effect. (765-1025/.05 to 30). Act held unconstitutional in part but has since been amended. See category 3 Business Regulation and Commerce, topic 3.01 Banks and Banking, subhead Unclaimed Deposits.

Voting.

Qualified elector expecting to be absent from county of his residence on election day may, within statutorily prescribed time periods, apply for an absentee ballot. (10 ILCS 5/19-1 through 5/20-20).

21.02 ADVERSE POSSESSION:

Duration and Character of Possession.

In general, open, adverse and uninterrupted possession for 20 years defeats legal title to real estate. (735 ILCS 5/13-101). Right of entry accrues from date of wrongful ouster, death of prior owner where title derived as heir or devisee, or upon termination of prior estate where title derived from remainder interest. (735 ILCS 5/13-106). Action to recover lands or entry thereon for breach of condition subsequent must occur within seven years of first breach. (735 ILCS 5/13-102). Seven year limitation applies to actions by reason of termination of estates upon limitation or conditional limitation. (735 ILCS 5/13-103). Limitations on actions for recovery of or entry on lands do not affect time for enforcement of any right under mortgage or lease. (735 ILCS 5/13-104). Possession by actual residence for seven years under grant from public authority, such as sale for nonpayment of taxes or on execution, is sufficient; but if possessor gets color of title after possession, seven year period runs from date of title. (735 ILCS 5/13-107). Bona fide claim and color of title, with possession and payment of taxes for seven successive years, gives legal title to extent of paper title. (735 ILCS 5/13-109). Bona fide color of title to vacant land with payment of taxes for seven successive years gives legal title to extent of paper title except as to person having better paper title who during any one or more of such seven years pays taxes. (735 ILCS 5/13-110).

Easement by prescription arises only if there is adverse, uninterrupted, exclusive, open, continuous use of land under claim of right for 20 years. (129 Ill. App.2d 45, 263 N.E.2d 356). No easement by prescription arises if owner posts notice that use permitted and subject to owner's control. (735 ILCS 5/13-122).

Disabilities, etc.

Such payment of taxes (735 ILCS 5/13-109, 110) of no aid in strengthening title against U.S. or State, or on lands held for religious or public use, or where adverse title is held by minor or person under legal disability, imprisoned, or out of limits of U.S. in employment of U.S. or State, provided person under such disability brings action within three years after termination of disability, or in case of vacant and unoccupied land pays to adverse possessor all taxes paid during disability with 12% interest (735 ILCS 5/13-111). Adverse possession does not operate against minor or person under legal disability, or imprisoned or absent from U.S. in service of U.S. or Illinois, if action is brought within two years after removal of disability. (735 ILCS 5/13-111, 5/13–112). Death of disabled person first entitled to bring action tolls statute for two years. (735 ILCS 5/13-113).

Tacking.

Heirs, devisees, and assigns of adverse possessor have same benefits as person from whom they take title or possession. (735 ILCS 5/13-108).

21.03 [RESERVED]

21.04 CONVEYANCES:

Livery of seizin unnecessary, but every conveyance must be signed and in writing. (765 ILCS 5/1). Grantees may disclaim interests conveyed to them by delivering and recording written disclaimer within time set by statute. (760 ILCS 25/1 et seq.). See topic 21.06 Deeds.

21.05 CURTESY:

Abolished. (755 ILCS 5/2-9). See topic 21.08 Dower.

21.06 DEEDS:

See topic Real Property for types of estates.

Execution.

Deed must be signed by grantor. Grantor's marital status should appear in deed. It must be delivered and accepted. It should be properly acknowledged before notary public or other officer. Witness to execution is not required. Corporate seal should be affixed to corporate deed even if by-laws do not so require.

Curtesy and dower have been extinguished. (755 ILCS 5/2-9).

To waive homestead, deed must expressly contain clause releasing or waiving such right. It must be acknowledged. (413 Ill. 204, 108 N.E.2d 438). No release or waiver of right of homestead unless spouse joins in execution of said deed. (765 ILCS 5/27).

Names of parties signing conveyance, including witnesses, if any, and name of person taking acknowledgment, must be typed or printed below their signatures. There must be 3½" square blank space on each document for recorder's use. Name and address of owner to receive tax bills must be stated on conveyance. Metes and bounds description in conveyance must contain section, township and range with identifiable point of beginning. Subsequent courses must contain linear distances and direction values either by angular description or by bearing of one course relative to bearing of previous course, another described course or known point. Failure to comply with these requirements does not invalidate instrument. (765 ILCS 5/35c). However, it may furnish basis for refusal by county recorder to record.

See topic 21.16 Real Property, subheads Foreign Conveyances or Encumbrances, and Land Trust; categories 8 Debtor and Creditor, topic Homesteads, subhead Conveyance; Family, topic Husband and Wife, subhead Conveyance or Encumbrance of Property.

Risk of Loss.

Uniform Vendor and Purchaser Risk Act adopted. Unless contract provides otherwise, risk of loss is on vendor until either legal title or possession is transferred. (765 ILCS 65/1).

Recording.

Deeds, mortgages and other instruments of writing relating to real estate are, from time of being filed for record, notice to subsequent purchasers and creditors, though not acknowledged or proven according to law; but same cannot be read as evidence, unless their execution be proved in manner required by rules of evidence applicable to such writings, so as to supply defects of such acknowledgment or proof. (765 ILCS 5/31).

No deed transferring title to real estate may be recorded unless and until name and address of grantee appears on its face. (55 ILCS 5/3-5026). In counties with 3,000,000 or more inhabitants, no deed or assignment of beneficial interest in land trust transferring title to real estate in transaction which is exempt from filing real estate transfer declaration may be recorded unless deed or assignment of beneficial interest is accompanied by: (1) sworn statement executed by grantor or his agent stating that name of grantee shown on deed or assignment of beneficial interest is either natural person, Illinois corporation or foreign corporation authorized to do business or acquire and hold title to real estate in Illinois, partnership authorized to do business or acquire and hold title to real estate in Illinois, or other entity recognized as person and authorized to do business or acquire and hold title to real estate under laws of State of Illinois; and (2) sworn statement executed by grantee or his agent verifying that name of grantee shown on deed or assignment of beneficial interest is either natural person, Illinois corporation or foreign corporation authorized to do business or acquire and hold title to real estate in Illinois, partnership authorized to do business or acquire and hold title to real estate in Illinois, or other entity recognized to do business or acquire and hold title to real estate under laws of State of Illinois. (55 ILCS 5/3-5020[b]). If conveyance is due to resignation of Land Trustee, sworn statement to that effect with name of beneficiary is required. (55 ILCS 5/3-5020[c]). See also category 10 Documents and Records, topic 10.04 Records.

Recording Fees.

See category 10 Documents and Records, topic 10.04 Records, subhead Recording Fees.

Real Estate Transfer Tax.

See topic 21.16 Real Property, subheads State Stamp Tax, County Stamp Tax, and Local Stamp Tax.

Abutting Street or Alley.

Deed deemed to convey grantor's existing or subsequently acquired rights in abutting street or alley for continued use in manner of grantor's use unless such rights expressly excluded in description of property. Grantor's covenants do not apply to such rights. (765 ILCS 5/7a).

Form.

The following form may be used:

Form for Warranty Deed.

“The grantor, A, of . . . ., for and in consideration of . . . . dollars in hand paid, conveys and warrants to B the following described real estate . . . . situated in the county of . . . ., in the State of Illinois. Dated this . . . . day of . . . ., A. D. 20. . . . . A. B.” (765 ILCS 5/9).

Words “convey and warrant” include all covenants of general warranty (765 ILCS 5/9); a deed in above form conveys fee simple title, with covenants: (1) That grantor was, at execution of deed, seized with an indefeasible estate in fee simple, with full power to convey; (2) that property was then free from all incumbrances; (3) that grantor warrants to grantee, his heirs and assigns, quiet and peaceable possession, and will defend title against all persons who may lawfully claim same (765 ILCS 5/9). Such covenants are as obligatory on grantor, his heirs and personal representatives, as if written at length in deed (765 ILCS 5/9), and after-acquired interest inures to grantee (765 ILCS 5/7).

A deed in which the words “grants, bargains and sells” are used in place of “conveys and warrants" conveys fee simple title, with covenants: (1) That grantor was seized with an indefeasible estate in fee simple, free from encumbrances done or suffered by grantor, except rents or services reserved; (2) quiet enjoyment against the grantor, his heirs and assigns. (765 ILCS 5/8).

Form for quitclaim deed is the same except "conveys and quitclaims to . . . . all interest in" is substituted for "conveys and warrants to . . . . ." Deed in such form conveys in fee all existing legal or equitable rights of the grantor. (765 ILCS 5/10).

Contracts for Sale of Dwelling Structure.

See topic 21.16 Real Property.

21.07 DEEDS OF TRUST:

See category 20 Mortgages, topic 20.04 Mortgages of Real Property.

21.08 DOWER:

Dower abolished. All inchoate rights to elect to take dower existing on Jan. 1, 1972 are extinguished. (755 ILCS 5/2-9).

21.09 ESCHEAT:

See topic 21.01 Absentees, subhead Escheat; categories 3 Business Regulation and Commerce, topic Banks and Banking, subhead Unclaimed Deposits; Estates and Trusts, topic Descent and Distribution, subhead Escheat.

21.10 LANDLORD AND TENANT:

Leases.

"Lease" includes every letting, whether verbal or written. (735 ILCS 5/9-214). Municipal ordinances—regarding landlord-tenant relationship supercedes state law when municipality has "home rule" powers under 1970 Ill. Const. art. VII §6(a), 95 Ill.2d 101, 421 N.E.2d 196. See e.g., Residential Landlord and Tenant Ordinance (Municipal Code of Chicago 5-12). Rental for over 30 days of land for mobile home or of mobile home and land is lease of real property but does not affect classification of mobile home for purposes of taxation. (735 ILCS 5/9-103). Mobile Home Landlord and Tenant Rights Act sets forth comprehensive list of rights and duties of parties to leases of mobile homes or mobile home lots in mobile home parks containing five or more units. (765 ILCS 745/1 et seq.). Lessor covered by Act must offer written 24-month lease to prospective tenant. (765 ILCS 745/6[a]). Lease of condominium must be delivered to Board within ten days of execution prior to occupancy. (765 ILCS 605/18[n]). Leasehold estate, when unexpired term exceeds five years, is "real estate" under Judgments Act. (735 ILCS 5/12-105). See category 5 Civil Actions and Procedure, topic 5.15 Judgments.

Leases must be definite as to property leased, term, amount of rent and time and method of payment to be valid. (53 Ill. App.3d 145, 368 N.E.2d 196).

Lease provision permitting landlord to terminate or refuse to renew residential lease because tenant complained to governmental authority of bona fide building code violation, health ordinance or similar regulation is void; landlord's termination or refusal to renew lease for such reason is against public policy. (765 ILCS 720/1).

Agreement exempting landlord from liability for damages for injuries to person or property as result of landlord's negligence void as against public policy and wholly unenforceable. (765 ILCS 705/1). However, does not apply to provision in nonresidential lease exempting lessor from liability for property damage. (765 ILCS 705/1[b]).

Waiver of provisions in Mobile Home Landlord and Tenant Act is void. (765 ILCS 745/10).

Limitations.

No action can be brought on lease for more than year which is not in writing and signed by parties to be charged or their agents authorized in writing. (740 ILCS 80/2).

Recording.

Unacknowledged lease may be recorded but execution thereof must be proved in accordance with rules of evidence. (765 ILCS 5/31). Leases take effect as to creditors and subsequent purchasers, without notice, from date of recordation. (765 ILCS 5/30). However, actual and open possession by tenant under unrecorded lease constitutes notice of his rights. (106 Ill.App.2d 16, 245 N.E.2d 539).

Recovery of rent or a reasonable charge for use and occupation may be had by civil action: (1) When rent is due and in arrears on lease for life or lives; (2) when lands are held and occupied without special agreement for rent; (3) when possession is obtained under agreement for purchase, and before deed, agreement is terminated by fault of purchaser and possession is wrongfully refused on written demand by party entitled thereto, but payments made by vendee may be set off against such rent; (4) when land has been sold under judgment or decree, and party to such judgment or person holding under him refuses to surrender possession after demand in writing by person entitled thereto; (5) when lands have been sold upon mortgage and mortgagor, or person holding under him, refuses to surrender possession after written demand by person entitled thereto. (735 ILCS 5/9-201).

Rent Concession.

Where rent concession is given in any lease, except of farm property, lessor must place across face and text thereof, plainly legible and in letters not less than one-half inch in height, words: “Concession Granted,” with notation on margin stating nature of concession. Failure to do so constitutes Class A misdemeanor. (765 ILCS 730/2, 730/3, 730/5a, 730/6). Agreement by lessor to waive condition or terms of lease other than those relating to rent payment is not rent concession. (765 ILCS 730/2).

Termination of Tenancy.

When tenancy is for certain period and term expires by terms of lease, tenant must surrender possession; no notice to quit or demand of possession necessary. (735 ILCS 5/9-213).

Year to year tenancies (except farm leases) may be terminated by 60 days written notice given within four months preceding last 60 days of year. (735 ILCS 5/9-205). Year to year farm leases require four months written notice to terminate. (735 ILCS 5/9-206). Tenancies for less than year, except week to week, may be terminated by 30 days written notice. (735 ILCS 5/9-207). Week to week tenancies may be terminated by seven days written notice. (735 ILCS 5/9-207). Tenant at will not entitled to notice. (14 Ill. App.3d 652, 303 N.E.2d 251). Where tenancy is terminated by notice, no further demand is necessary before bringing forcible detainer or ejectment suit. (735 ILCS 5/9-208).

Any time after rent due, landlord may demand payment and serve written notice that unless payment made within time stated in notice, not less than five days after service thereof, lease terminated. If rent not paid within time stated, landlord may consider lease ended and sue for possession. Partial payment of past due rent demanded in notice does not waive landlord's right to terminate lease where notice demands payment in full and states that only full payment will waive right to terminate, unless landlord agrees in writing to continue lease for partial payment. (735 ILCS 5/9-209). When default is made in any lease term, landlord may give ten days notice to quit or of termination of tenancy. (735 ILCS 5/9-210). Notices may be served by delivering copy to tenant, or by leaving with person 13 years or upwards residing on or in possession of premises, or by sending copy to tenant by certified or registered mail with return receipt from addressee; in case no one in actual possession of premises, notice may be served by posting on premises. (735 ILCS 5/9-211). Parties to lease may waive statutory notices (397 Ill. 497, 74 N.E.2d 699) or provide for method of service other than statutory methods (3 Ill. App.2d 368, 122 N.E.2d 292).

Dispossession.

When year to year tenancy of farmland, or tenancy for less than year where tenant holds over without special agreement, terminated by written notice, no further demand necessary before bringing forcible detainer or ejectment suit. (735 ILCS 5/9-208). When tenancy terminated by written demand for rent ("five day notice"), landlord may consider lease ended and sue for possession by forcible entry and detainer or maintain ejectment; claim for rent may be joined in complaint. (735 ILCS 5/9-209). After ten days notice to quit for default in lease term, no other notice, demand of possession or termination of tenancy necessary. (735 ILCS 5/9-210). See subhead Termination of Tenancy, supra.

Forcible entry and detainer may be maintained, inter alia, when lessee or person holding under him holds possession without right after termination of lease by its own terms, by notice to quit or otherwise or when lessor-owner of condominium unit fails to comply with leasing requirements of Condominium Property Act 765 ILCS 605/18[n], declaration, bylaws and regulations of condominium or if lessee of condominium unit owner is in breach of same and Board of Managers have served demand under 765 ILCS 5/9-104.2. (735 ILCS 5/9-102). Forcible entry and detainer summons requires defendant to appear on day specified in summons not less than seven or more than 40 days after issuance. (Ill. Sup. Ct. R. 101[b][2]). If defendant appears, no answer need be filed unless ordered by court; complaint is deemed denied and any defense may be proved as if specifically pleaded. (Ill. Sup. Ct. R. 181[b][2]). Either party may demand jury, notwithstanding jury waiver in lease only if property is used for residential purposes. (735 ILCS 5/9-108). Dispossession of tenant without process of law, even if such right provided for in lease, may be enjoined and may create liabilities for landlord. (11 Ill. App.3d 791, 298 N.E.2d 262). Judgment for possession normally enforceable only for 90 days after entry. (735 ILCS 5/9-117).

Holding Over.

If tenant wilfully holds over, and after written demand by landlord, he is liable for holdover period at double rent while possession withheld. (735 ILCS 5/9-202). If tenant pursuant to lease gives notice of intention to quit and fails to do so, he is liable for double rent. (735 ILCS 5/9-203). Statutory double rent remedy excludes right to recover other damages in tort by reason of wilful holdover. (154 N.E.2d 327, 19 Ill. App. 2d 459). It does not, however, affect enforceability of liquidated damages provisions in lease. (278 N.E.2d 188, 3 Ill. App. 3d 165).

Mitigation of Damages.

Landlord must take reasonable measures to mitigate damages recoverable against defaulting tenant. (735 ILCS 5/9-213.1). If former tenant tenders "suitable tenant," landlord must either consent or credit former tenant with amount which would have been paid by new tenant had he been accepted. (67 Ill. App.2d 8, 214 N.E.2d 506).

Lien.

Landlord has lien on crops grown or growing on land, for rent thereof, whether payable in money or property, and for performance of terms of lease. Such lien is good for six months after expiration of term and may be enforced by distraint. Lien has priority over any agricultural lien as defined in, and over any security interest arising under, provisions of Art. 9 of UCC. (735 ILCS 5/9-316). Lessor may enforce lien rights against sub-lessee or assignee. (735 ILCS 5/9-317). No liens other than those expressed in statute exist. (112 Ill. 247; 138 Ill. 483, 28 N.E. 955).

Distress.

Landlord may seize for rent any personal property of tenant found in county where tenant resides. (735 ILCS 5/9-301). However, statutory right of distress may not be exercised without resort to judicial proceedings; due process rights of notice and hearing must also be observed. (11 Ill. App.3d 791, 298 N.E.2d 262). Person making distress must immediately file with clerk of circuit court copy of distress warrant, together with inventory of property levied on, whereupon clerk will issue summons against party against whom distress has issued, returnable as other summons. (735 ILCS 5/9-302, 5/9-303). When by proper affidavit it appears that defendant is a nonresident or has departed from state or cannot be found, notice may be given by publication, as in case of attachment. (735 ILCS 5/9-304). Case proceeds as in attachment, but plaintiff need file no complaint, as distress warrant stands for complaint and is amendable, like other complaints. (735 ILCS 5/9-305). Defendant may counterclaim or assert any defense which would have been proper in suit for rent. (735 ILCS 5/9-306). If defendant is served or appears and plaintiff prevails, judgment is in personam and not in rem; but execution is first applied to property distrained. (735 ILCS 5/9-308). If defendant is not served and does not appear, judgment is in rem; and execution applies only to distrained property. (735 ILCS 5/9-309). Defendant may release property distrained by giving bond in double amount of rent claimed, with sufficient sureties. (735 ILCS 5/9-311). If property distrained is perishable, lessor may, on giving notice to defendant or his attorney, or without notice if they cannot be found, apply to judge for order for immediate sale. (735 ILCS 5/9-312). Right of distress continues for six months after termination of tenancy. (735 ILCS 5/9-313). Personal property which by law is exempt from execution is also exempt from distress, except crops grown or growing on premises. (735 ILCS 5/9-315). Subject to right to distrain for rent, tenant may remove removable fixtures erected by him during tenancy. (735 ILCS 5/9-319).

Exculpatory Clause.

Agreement in or collateral to lease exempting lessor from liability for own negligence is void except provision in nonresidential lease exempting lessor from liability for property damage. (765 ILCS 705/1).

Rent Withholding and Implied Warranty of Habitability.

With respect to single-family and multiple dwelling residential structures there is implied warranty of habitability fulfilled by substantial compliance with pertinent provisions of local building codes. In forcible entry and detainer action (see subhead Dispossession, supra) brought because of nonpayment of rent, tenant may establish that damages suffered as result of landlord's breach of implied warranty equal or exceed rent claimed to be due, so no rent is owed and action fails. (50 Ill.2d 351, 280 N.E.2d 208; 84 Ill.2d 178, 417 N.E.2d 1297).

Owner may also, under specified conditions, be liable, to tenant or governmental unit making vendor payments, for up to three times amount of rent collected while number of apartments in building exceeds that permitted by ordinance, plus costs and attorney's fees. (65 ILCS 5/11-31.1-1 to 5/11-31.1-12.1).

Rent Credit.

Where lessor is required to pay for water, gas, or electricity and fails to pay, lessee may pay or terminate lease. Utility must restore service and lessee may deduct amount paid from rent. (765 ILCS 735/1).

Security Deposits.

Lessor of residential real property, containing five or more units, who has received security deposit from lessee to secure payment of rent or to compensate for damage to leased property may not withhold any part of deposit for property damage unless he has within 30 days of lessee's vacation of premises, personally delivered or mailed to said lessee itemized statement of damage allegedly caused and actual or estimated cost to repair or replace each item on statement, attaching paid receipts or copies thereof for repair or replacement. If lessor utilizes own labor to repair any damage caused by lessee, lessor may include reasonable cost of labor to repair such damage. If estimated cost is given, lessor must furnish lessee paid receipts or copies thereof within 30 days after above statement of estimated cost was furnished. If no such statement and receipts, or copies thereof, are furnished to lessee as required by this Act, lessor must return security deposit in full within 45 days after lessee vacated premises. Upon circuit court's finding that lessor refused to supply itemized statement, or supplied statement in bad faith, and failed to return security deposit within time permitted, lessor is liable for twice amount of deposit plus court costs and reasonable attorneys' fees. (765 ILCS 710/1). Where property is transferred by lessor who has collected security deposit, transferee is jointly and severally liable to lessee for security deposit. (765 ILCS 710/1.1).

When security deposit delivered as security only and not as advance rent, landlord's obligation is personal as pledgee and landlord's assignment of benefits of lease and conveyance of reversion does not result in release of duty to act as pledgee. (28 Ill. App.3d 732, 328 N.E.2d 897).

Lessor of mobile home park, where security deposit is required, must send lessee itemized list of damages and cost of repair within 15 days after tenancy expires. If tenant fails to object in 15 days, amount of damages is deducted from deposit and balance returned to tenant. If no list furnished, deposit must be returned in full. (765 ILCS 745/18).

Interest on Security Deposits by Lessees.

Lessor of residential real estate with 25 or more units, in either single building or complex of buildings located on contiguous parcels of real property, must pay at end of each 12-month term interest on any security deposit by lessee at rate equal to interest paid by largest commercial bank in state on minimum passbook savings account as of Dec. 31 of calendar year immediately preceding inception of rental agreement on any security deposit held for more than six months, and if security deposit not with respect to public housing. Penalty for lessor's wilful failure to pay interest is amount equal to security deposit plus attorneys fees and court costs. (765 ILCS 715/1 to 3).

Management and Insurance.

Owner of residential real property, containing more than four living units, who does not reside or maintain office on premises and does not employ manager or agent who resides or maintains office on premises, is required to notify residents of person responsible for managing building, companies insuring building and cancellation of insurance. (735 ILCS 5/9-320).

Utilities.

Agreements dealing with payment for and termination of utilities are restricted. (765 ILCS 735/1, 735/2).

21.11 LEASES:

See topic 21.10 Landlord and Tenant.

21.12 [RESERVED]

21.13 PERPETUITIES:

Common law rule (life in being plus 21 years) is in effect but is modified in Illinois by statute for instruments becoming effective after Sept. 22, 1969. (765 ILCS 305/1).

Application of Rule.

Rule does not apply to disposition of property expressly exempted by statute; to powers of trustee to sell, lease, or mortgage property or to administer or manage trust assets; to mandatory powers of trustee to distribute income or to discretionary powers to distribute principal prior to termination of trust, to a beneficiary having a vested interest in principal; to discretionary powers of a trustee to allocate income and principal among beneficiaries, but such power may not be exercised after expiration of period of rule; to leases commencing in future, provided lease commences in possession 40 years from date of execution; to commitments by a lessor to enter into a lease with a subtenant or holder of leasehold mortgage, or by a lessee or sublessee to enter into a lease with holder of mortgage; to options in gross or rights of first refusal, but no option in gross is valid for more than 40 years from its creation; or to qualified perpetual trusts created by will or inter vivos agreement executed or amended after Jan. 1, 1998. (765 ILCS 305/4[a]).

Rule does not commence to run as long as, by terms of instrument, maker of instrument has power to revoke instrument or transfer or direct to himself entire legal and equitable ownership of property. (765 ILCS 305/4[b]).

There is a presumption that interest was intended to be valid; that will was to be probated or any administrative contingencies occur within period of rule; and that “widow,” “widower,” or “spouse” of another person mentioned in instrument was living at date period of rule commenced to run. (765 ILCS 305/4[c][1]).

Where interest would be invalid because it is made to depend upon a person attaining or failing to attain an age in excess of 21 years, age specified is to be reduced to 21 years. (765 ILCS 305/4[c][2]). Furthermore, no person is deemed capable of having child before he has attained 13 years or after he has attained age 65; evidence is admissible to show incapacity of having child by living person who has not attained 65; and possibility of having child or more remote descendant by adoption is disregarded. (765 ILCS 305/4[c][3]).

Trusts.

New statutory section states various rules as to when a trust which would violate rule against perpetuities actually terminates and how principal is to be distributed. (765 ILCS 305/5).

Accumulations.

Accumulations must be limited to 21 years after end of life or lives in being at effective date of settlement or disposition. (765 ILCS 315/1). Exceptions are trusts to which §5 of statute concerning perpetuities (765 ILCS 305/5) applies, cemetery trusts, qualified perpetual trusts as defined, and trusts created by employers as part of stock bonus, pension or profit-sharing plan, etc. (765 ILCS 315/1). No disposition is effective as long as, by terms of instrument, maker of instrument has power to revoke instrument or to have entire legal and equitable ownership of property transferred to himself. (765 ILCS 315/1).

21.14 PERSONAL PROPERTY:

Tenancy by entirety in personal property does not exist in Illinois. (392 Ill. 477, 64 N.E.2d 729). Expressed intent is necessary to create joint tenancy with right of survivorship in personal property. (765 ILCS 1005/2).

21.15 POWERS OF ATTORNEY:

Power of Attorney.

Principal who appoints agent by written instrument while competent deemed competent for purposes of agency and agent's dealings until principal is adjudged to be legally disabled. (755 ILCS 45/2-1). Absent actual knowledge to contrary, third party may presume valid execution of agency instrument and competence of principal at time of execution. Person including health care provider has right to rely on decision or direction made by guardian, standby guardian or short-term guardian of ward as long as person has no actual knowledge to contrary that decision or direction does not conform to provisions of law. (755 ILCS 5/11a-23, 755 ILCS 45/2-8).

Durable Powers of Attorney.

Under Illinois Power of Attorney Act (755 ILCS 45/1-1 to 45/4-12), principal in writing may authorize agent to make financial and health care decisions for principal throughout principal's lifetime including periods of disability; health care personnel and other third parties who rely in good faith will be protected. Statutory form power of attorney for property (755 ILCS 45/3-3); statutory form power of attorney for health care (755 ILCS 45/4-10[a]).

21.16 REAL PROPERTY:

Estates recognized are as follows: fee simple; life estate; estate for years; estate from year to year; homestead; joint tenancy with right of survivorship; tenancy in common; and tenancy by entireties. Tenancy by entirety is created with conveyance, assignment or other transfer of property (including beneficial interest in land trust) maintained or intended for maintenance as homestead by both husband and wife together during coverture to tenants by entirety. (765 ILCS 1005/1c). Joint tenancy with right of survivorship can be created only by express declaration that estate must pass in joint tenancy and not as tenancy in common. (765 ILCS 1005/1). Grantor can create joint tenancy with right of survivorship notwithstanding fact that he is also grantee. (765 ILCS 1005/1b).

Conservation right is created by statute as interest in real property, which may be conveyed to governmental body or to nonprofit trust or corporation whose primary purpose is conservation, or to the holder of the fee. Conservation rights are enforceable by certain parties other than grantee and his privies. (765 ILCS 120/1).

See also topics 21.05 Curtesy, Deeds, Dower; category 14 Family, topic 14.09 Husband and Wife.

Rule in Shelley's Case is recognized in Illinois, but only in connection with documents executed and delivered prior to July 15, 1953, and wills of decedents dying before that date. (765 ILCS 345/1, 2).

Doctrine of worthier title is recognized in Illinois only in connection with instruments and wills which became effective on or before July 1, 1955. (765 ILCS 350/1, 2). However, statute does not require trust to be construed in such a way as to override expressed intent of maker. (3 Ill. App.3d 337, 278 N.E.2d 10).

Rule Against Perpetuities.

Common law rule against perpetuities (life in being plus 21 years) is in effect but has been modified by statutes. (765 ILCS 305/1 to 305/6). See topic 21.12 Perpetuities.

Foreign Conveyances or Encumbrances.

Deeds, conveyances, and powers of attorney for the conveyance of Illinois land, acknowledged, proved, or authenticated pursuant to law of any foreign state, are deemed good and valid as though acknowledged or proved pursuant to Illinois law. (765 ILCS 5/22, 5/23).

Illinois has adopted Uniform Recognition of Acknowledgments Act. (765 ILCS 30/1 to 30/10).

Land Trust.

"Land Trust" is Illinois institution and is widely used. Land trust is trust in which corpus consists of real estate and in which deed to trustee appears to confer upon him full powers to deal with real estate and complete legal and equitable title to trust property. So far as public records are concerned, trustee's powers are complete. (765 ILCS 430/1). Such powers, however, are in fact restricted by trust agreement mentioned in deed in trust. Such trust agreements typically vest in beneficiary full powers of management and control. While not specifically authorized by statute, land trusts have been defined as any arrangement under which title, both legal and equitable, to real property, is held by trustee and interest of beneficiary is personal property. Beneficiary or any person designated in writing by beneficiary, has exclusive power to direct or control trustee in dealing with title, and exclusive control of management, operation, renting and selling of trust property together with exclusive right to earnings, avails, and proceeds of said property is in beneficiary of trust. (765 ILCS 430/1, 765 ILCS 405/1). However, beneficiary cannot deal with property as if no trust existed. (309 N.E.2d 368, 18 Ill. App. 3d 1). Unless appointed as agent for trustee, beneficiary cannot purport to act as trustee's "agent" (266 N.E.2d 401, 131 Ill. App. 2d 1087) and generally, when he contracts without authority with third parties, his contract is void (18 Ill.App.3d 1, 309 N.E.2d 368). Under appropriate circumstances, beneficiary may contract to sell trust property. (9 Ill.App.3d 419, 292 N.E.2d 71; 9 Ill.App.3d 361, 292 N.E.2d 177). Beneficiary's interest is personal property, not real property. (11 Ill.2d 178, 142 N.E.2d 94). Beneficiary, and not trustee, of land trust is liable for injuries sustained on trust property. (132 Ill.App.2d 307, 270 N.E.2d 254; rev'd on other grounds, 54 Ill.2d 504, 301 N.E.2d 296). Trust agreement may provide that trustee, when directed by beneficiaries, may convey trust property directly to another trustee on behalf of beneficiaries or others named by beneficiaries. (765 ILCS 410/2).

Recent legislation provides that secured creditor trustee has same rights as any other secured creditor, including right to purchase trust property at judicial sale, and such dealings are not breach of fiduciary duty. (765 ILCS 415/1). Illinois Supreme Court upheld retroactive application of legislation. (108 Ill.2d 1, 483 N.E.2d 226).

Trustee or managing agent of real property must disclose to enforcement agency, within ten days after receipt of notice or complaint, identity of owners and beneficiaries of trust holding property against which complaint has been filed alleging violation of ordinance, regulation or resolution enacted by political subdivision relating to condition or operation of property affecting health or safety. For residential buildings, if violation charged is not cured within 180 days of notice, enforcing agency makes public disclosure of owners' or beneficiaries' identity. If violation is subsequently corrected, information will be removed from register where such information is kept. (765 ILCS 425/1). Where trust property is damaged or destroyed by fire, inspector may require prompt disclosure by trustee of identities of beneficiaries of land trust and may require any named beneficiary to: (1) Disclose identity of those having direct or indirect interest in trust or deriving any direct or indirect benefit therefrom; and (2) provide list of properties located in same county as damaged or destroyed property and with respect to which any claim has been made, directly or indirectly, by or for such beneficiary's benefit under any fire insurance policy for loss or damage by fire within previous five years, together with identity of insurer and policy number. (765 ILCS 425/1.1). Violation is petty offense, penalty for which is fine of $100 for each day the violation continues, notwithstanding any exculpatory provision in the trust instrument or management agreement. (765 ILCS 425/2).

Residential property (single family residence or multiple dwelling structure of six or less family units) subject to a land trust may not be sold under a real estate installment contract (purchase price to be paid over period in excess of five years with title conveyed upon payment of purchase price or a specified portion thereof) unless, when contract is executed, names of trustee and beneficiaries and designation of trust are disclosed to buyer and beneficiaries having power of direction sign contract. Contract deemed to include provision that beneficiaries will convey or cause to be conveyed the property in accordance with contract. Violation of act makes contract voidable at purchaser's option. (765 ILCS 430/1 to 430/2).

A cause of action against a beneficiary of a land trust not originally named as a defendant is not barred by any limitation period if, among other statutory conditions, service of summons was had within the limitation period upon a land trustee who had title but no power of management or control over the real estate. (735 ILCS 5/2-616[e]).

Condominium Property Act (765 ILCS 605/1) became effective July 1, 1963 Act applies to all condominiums. Provisions in condominium instrument inconsistent with Act are void and against public policy and ineffective. (765 ILCS 605/2.1). Terms appearing in quotes are defined in Act.

Owner may submit “parcel” to provisions of Act by recording “declaration” and “plat” in accordance with Act. (765 ILCS 605/3, 605/4, 605/5). Parcel submitted must be owned in fee simple except parcel may be subject to lease, expiration of which would terminate condominium and lessor is: (a) Exempt from taxation under §501(c)(3) of Internal Revenue Code; (b) limited liability company where sole member is exempt from taxation under §501(c)(3) of Internal Revenue Code; or (c) Public Housing Authority located in municipality having population in excess of one million inhabitants. (765 ILCS 605/2[x]).

Each “unit owner” is entitled to percentage of ownership in “common elements” appertaining to his or her “unit” as set forth in “declaration”. (765 ILCS 605/6). “Condominium instruments” may contain provisions for adjustment and reallocation of percentage ownership in limited circumstances by recording amended “plat”. (765 ILCS 605/6). “Unit owners” may, unless prohibited by “condominium instruments” subdivide or combine “units” in manner provided by Act, and may, in certain situations, transfer use of “limited common elements”. (765 ILCS 605/26, 605/31). “Unit owner” owning two or more “units” may, subject to reasonable limitations contained in “condominium instruments” remove or alter intervening partitions upon notice to board of managers, unless removal or alteration would weaken, impair or endanger another “unit” or any “common element”. (765 ILCS 605/29). See also category 5 Civil Actions and Procedure, topic 5.16A Partition.

Deed, leases, mortgages or other instruments may describe “unit” by its identifying number or symbol as shown on “plat” and as set forth in “declaration”. (765 ILCS 605/7).

Each “unit owner” must pay proportionate share of “common expenses”. “Developer” must pay proportionate share of “common expenses” prior to first conveyance of unit. (765 ILCS 605/9[a]). Foreclosure purchaser, mortgagee in possession, or mortgagee-owner must pay proportionate share. (765 ILCS 605/9[g][3]). Unit which is individually owned and includes right to use common area is assessed for real estate tax purposes at value which includes proportional share of value of common area. (35 ILCS 200/10-35).

Amount of unpaid “common expenses” together with interest, late charges, reasonable attorneys' fees and costs of collection only for services actually incurred or amount of any unpaid fine, constitutes lien on defaulting “unit owner's” interest in his or her “unit”. Lien is in favor of board of managers for benefit of all other “unit owners” and, upon recording of notice by board of managers or if developer is manager or has majority of seats on board of managers and manager or board of managers fails to record notice, upon recording of notice by any unit owner, may be foreclosed in like manner as mortgage. (765 ILCS 605/9[g]). Such lien is prior to all other liens and encumbrances except: (i) Taxes, special assessments and special taxes or Federal taxes which are lien prior to preexisting recorded encumbrance, and (ii) encumbrances recorded prior to unit owner's refusal to pay “common expenses”. With respect to encumbrances executed prior to Sept., 1984 and encumbrances which are neither bona fide first mortgages or trust deeds and contain mailing address in Illinois, upon notice to encumbrancer by manager or board of managers of unpaid common expense, prior recorded encumbrance may be subject to lien of unpaid common expenses becoming due in 90-day period following mailing of notice. (765 ILCS 605/9[g][2]). In event of default by unit owner, tenant, invitee or guest, board of managers may file action for possession against defaulting unit owner, among other remedies. (765 ILCS 605/9.2, 735 ILCS 5/9-102[7]).

Declaration or bylaws may require mediation or arbitration of disputes where value of controversy less than $10,000, other than levying and collection of assessments, or that arises out of violation of declaration, bylaws, or rules and regulations of association. Disputes not required to be mediated or arbitrated may be submitted by disputants. Illinois Uniform Arbitration Act (710 ILCS 5/1 et seq.) and Uniform Mediation Act (710 ILCS 35/1 et seq.) applies. Association may require disputants to bear costs. (765 ILCS 605/32).

Board of managers has standing to act in representative capacity on behalf of “unit owners” or in relation to matters involving “common elements” or more than one “unit”. (765 ILCS 605/9.1[b]). Statute of limitations for actions brought by condominium association does not run until unit owners have elected majority of board of managers. (765 ILCS 605/18.2[f]). Actions requiring vote of majority of board of managers require vote of more than 50% of total number of persons constituting such board. (765 ILCS 605/2[h]). Board of managers in condominium of 30 or more units required to obtain fidelity bond and directors' and officers' liability coverage and to have management company furnish fidelity bond as provided in Act. (765 ILCS 605/18[g]).

Except as provided in 765 ILCS 605/12.1, board of directors has duty to obtain comprehensive public liability insurance and to obtain insurance for full insurable replacement cost covering “common elements” and “units”, including improvements made by unit owner if so provided in “declaration” against loss or damage by fire or other hazards covered by standard extended coverage provisions. (765 ILCS 605/12[a][1]). Board of directors may require condominium unit owners to obtain insurance covering personal liability and compensatory damages caused to another unit caused by negligence of owner or guests. (765 ILCS 605/12[h]). In case of fire or other damage, building must be reconstructed if insurance proceeds are sufficient. (765 ILCS 605/13). If insurance proceeds are not sufficient, board of managers may, in certain circumstances, record notice whereby “property” becomes owned in common by “unit owners”, or, if “condominium instruments” make provision, assessments may be voted for reconstruction if fewer than one-half of units are rendered uninhabitable or portion of “property” may be withdrawn. (765 ILCS 605/14).

Distressed condominium property means units which are operated in a manner or have conditions which may constitute a danger, blight or nuisance to the surrounding community. A municipality may bring an action to take possession and sell or condemn property found to be distressed under the definition of this section. (765 ILCS 605/14.5)

“Property” may be sold in manner provided in Act. (765 ILCS 605/15). “Property” may be removed from provisions of Act by all “unit owners”, provided that all lienholders consent, by recorded instrument, to that effect. (765 ILCS 605/16).

Unless “condominium instrument” provides for greater percentage, 2/3 majority of unit owners at meeting may elect to dedicate portion of common elements to public body for street or utility (765 ILCS 605/14.2) and greater than 50% majority of unit owners at meeting may authorize granting of easement for television cable (765 ILCS 605/14.3).

“Condominium instruments” may be amended by vote of 2/3 of those voting or upon majority specified by condominium instruments, together with approval of any mortgagees required by condominium instruments, unless Act provides otherwise. For property subject to declaration recorded on or after July 1, 1984, no condominium instruments may require more than 3/4 vote of unit owners to amend bylaws. (765 ILCS 605/27). Amendments to declaration or bylaws are effective upon recordation unless amendment states otherwise. (765 ILCS 605/17).

Administration of “property” is governed by by-laws which may either be in “declaration” or in separate instrument recorded with “declaration”. (765 ILCS 605/17). Bylaws must contain certain provisions as required by Act. In event of conflict between declaration and bylaws or other condominium instruments, unless otherwise specifically provided in Act, provisions of Act are applicable. Any condominium instruments to contrary are void as against public policy and ineffective. (765 ILCS 605/18).

Board of managers must provide to each “unit owner” copy of proposed annual budget indicating which portions are intended for reasonable reserves for capital expenditures or repairs or payment of real estate taxes, and other financial information concerning condominium. (765 ILCS 605/18[a]).

Owners or board of managers may form not-for-profit corporation to facilitate administration and operation of “property”. (765 ILCS 605/18.1).

“Developer” may manage “property” prior to election of first unit owner board of managers. (765 ILCS 605/18.2[a]). First unit owner board must be elected within 60 days after conveyance of 75% of “units” or three years after “declaration” is recorded, whichever is earlier. “Developer” must give at least 21 days notice of meeting to elect first unit owner board of managers and must provide to any unit owner, within three working days of request, names, addresses, phone numbers, and weighted vote of each “unit owner” entitled to vote at meeting. Any unit owner must be provided same information within same time period with respect to each subsequent meeting to elect members of Board of Managers. If developer does not call meeting to elect board managers within above-referenced time period, unit holders holding 20% interest in association may call meeting. (765 ILCS 605/18.2[b]). After election of first unit owner board of managers, “developer” must turn over certain funds, documents and personal property. (765 ILCS 605/18.2[d]). Any contract made by “developer” for term longer than two years may be cancelled as provided in Act. (765 ILCS 605/18.2[e]).

Buyer or prospective buyer of “unit” at initial sale or offering is entitled to disclosures by seller prior to executing contract of sale. (765 ILCS 605/22). Earnest money deposited with “developer” under sale contract or option where conveyance is to be made within one year must be held in escrow account. Deposits, payments or advances towards purchase price for initial sale of unit, received by developer, must be held in escrow account until title is conveyed to purchaser. Developer must deposit all payments in interest bearing account at federally insured bank or savings and loan institution and such interest credited to purchaser toward purchase price of unit. Interest accrues from time of deposit, payment or advance. No interest where transfer of title occurs 45 days from time contract to purchase is entered. In event of refund or default, interest follows disposition of deposit, payment or advance. (765 ILCS 605/24). In event of any resale of condominium unit, owner, if other than developer, must make disclosures to prospective buyer upon demand. (765 ILCS 605/22.1).

“Add-on Condominiums” are authorized by Act. (765 ILCS 605/25).

“Conversion Condominiums” are permitted under Act, but tenants are given certain rights with respect thereto and specific disclosures are required. Notice of intent to convert must include schedule of prices for units in conversion project. Tenants have right of first refusal and may enforce their rights by obtaining an injunction or seeking damages, including moving expenses, three months' rent, and attorneys' fees and costs. (765 ILCS 605/30).

Act permits formation of unit owners' association which has responsibility for overall administration of condominium property, consists of each “unit owner” and has powers specified in General Not for Profit Corporation Act of 1986 not inconsistent with Act or condominium instruments, whether or not association is incorporated. (765 ILCS 605/18.3). Powers of unit owners' association may be exercised by “master association,” provided certain requirements are met. (765 ILCS 605/18.5).

“Condominium and Common Interest Community Risk Pooling Act” permits formation of trust fund for insurance purposes by two or more “condominium associations”. Trust fund to be funded by unit owner assessments and is authorized to indemnify unit owners, as beneficiaries of trust fund, against risk of loss due to damage, destruction or loss of property or imposition of legal liability as required or authorized by Act or declaration. Act prescribes procedure for formation and administration of trust fund. (765 ILCS 605/12.1).

Local Condominium Ordinances.

Number of municipalities, including Chicago, have enacted ordinances with respect to condominiums.

Chicago ordinance, which became effective Jan. 1, 1978, requires that developer prepare property report for distribution to prospective purchasers which must disclose information concerning condominium. (13-72-020 and 13-72-050 Chicago Municipal Code). Ordinance, in addition, requires developer to give notice of intent to tenants in buildings undergoing conversion to condominium no less than 120 days prior to recording declaration. During 120 day period after notice has been given (180 days if tenant is over 65, blind, deaf or handicapped) tenant may continue to occupy unit, with right of first refusal to purchase. (13-72-060 Chicago Municipal Code).

Real Estate Time–Share Act.

See 765 ILCS 101/1-1 et seq.

Dormant Mineral Interests.

Surface owner may gain title to severed mineral interests owned by unknown or missing owners by instituting proceeding in circuit court of county where such interest is located, seeking judgment that surface owner and his or her privies are exercising presumptive adverse possession of severed interests from date of judgment. If: (1) Owners of severed interests remain unknown or missing for seven years thereafter, or (2) owners of severed interests remain unknown or missing for one year thereafter and severance occurred over 20 years prior to date of filing original petition, court will enter judgment vesting title to severed interests in surface owner, provided that notice requirements have been met and surface owner has paid all taxes assessed on severed interests. (765 ILCS 515/11). Prior statute held unconstitutional. (82 Ill.2d 364, 412 N.E.2d 522).

State Stamp Tax.

Tax is imposed on privilege of transferring title to real estate, as represented by deed filed for recordation, and on privilege of transferring beneficial interest in real property which is subject of land trust on lessee interest in ground lease that provides for term of 30 or more years when all options to renew or extend are included; or indirect interest in real property as reflected in controlling interest in real estate entity (more than 50% of fair market value of all ownership interests) as represented by trust document filed for recordation (35 ILCS 200/31-5), at rate of 50¢ for each $500 of value or fraction thereof. If real estate is transferred subject to mortgage, amount of mortgage outstanding at time of transfer is not included in basis for computing the tax. Tax is collected by Recorder of Deeds through sale of revenue stamps (35 ILCS 200/31-10, 200/31-15, 200/31-20, 200/31-25, 200/31-30, 200/31-35).

Deeds exempt from tax include: transfers made before Jan. 1, 1968; property acquired from, by or between governmental or tax exempt corporations; which secure debt or other obligation; correction or supplementary deeds; actual consideration under $100; tax deeds; release deeds; partition deeds; pursuant to mergers, consolidation, or sales pursuant to plans of reorganization; or by subsidiary to parent corporation in exchange for cancellation or surrender of subsidiary's stock; exchange deeds except to extent of money difference; deeds issued to holder of mortgage pursuant to mortgage foreclosure proceeding or pursuant to transfer in lieu of foreclosure; deed or trust document related to purchase of principal residence under Home Ownership Made Easy Act. (35 ILCS 200/31-45).

When a deed or trust document transferring title to real estate is presented for recordation, declaration of value must also be presented. (35 ILCS 200/31-10, 200/31-15, 200/31-20, 200/31-25, 200/31-30, 200/31-35). No declaration is required for deeds or trust documents exempt from tax; except that declaration must be presented for deeds or trust documents conveying property from, by or between governmental bodies or tax exempt corporations, and purchases of principal residences under Home Ownership Made Easy Act. (35 ILCS 200/31-45). Declaration must state full consideration for property, must include complete description of property and transaction value of personal property sold with real estate, sales finance charges (points), sales price, type of financing (conventional, VA, FHA, seller-financed), down payment, term, interest rate, type and description of interest rate (fixed, adjustable, or renegotiable), monthly principal and interest, year contract initiated if contract of sale name, address, and telephone number of person filling out declaration, and must be signed by seller and buyer or their attorneys or agents, must state type of improvement, if any, whether transfer is between relatives or compulsory, and additional information as provided in Act. (35 ILCS 200/31-10, 200/31-15, 200/31-20, 200/31-25, 200/31-30, 200/31-35). Any person who willfully falsifies value of real estate or willfully omits any other required information on declaration is guilty of Class B misdemeanor. All declarations of value made pursuant to this Real Estate Transfer Tax Act are public records, available for inspection. (35 ILCS 200/31-50, 200/31-55).

County Stamp Tax.

County board may impose transfer tax upon privilege of transferring title to real estate and upon privilege of transferring beneficial interest in land trust holding legal title to real estate at rate of 25¢ for each $500 of value or fraction thereof as stated in declaration of value for State transfer tax purposes. If real estate is transferred subject to mortgage, amount of mortgage outstanding at time of transfer is excluded from determination of value. Tax is collected prior to recording deed or registering title and is due if the transfer is made by one or more related transactions or involves one or more persons or entities, regardless of whether a document is recorded. Real estate exempt from State transfer tax is also exempt from county tax. (55 ILCS 5/5-1031). Cook County imposes tax on assignment of beneficial interest in land trust. (85-033 Cook County Code). In counties with 3,000,000 or more inhabitants deed or assignment of beneficial interest in land trust will not be recorded unless accompanied by sworn or affirmed statement of grantor and grantee that grantee is either natural person, Illinois corporation or foreign corporation, partnership or other entity which is authorized to do business or acquire and hold title to real estate in Illinois. (55 ILCS 5/3-5020[b]).

Local Stamp Tax.

Number of home-rule municipalities impose local tax on transfer of real property or beneficial interest in real property. Check with municipality for information. After ordinance has been of record 30 days, instruments transferring title to real estate in municipality which imposes tax may not be accepted for recording or registration without proof of payment of local transfer tax. (55 ILCS 5/3-5021).

Chicago imposes local transfer tax of $3.75 per $500 of transfer price or fraction thereof on transfer of title or assignment of beneficial interest in land trust. (3-33-030 Chicago Municipal Code). Tax is collected by City Department of Revenue through sale of revenue stamps.

Declaration which states full consideration for property must be presented together with certificate from Commissioner of Water certifying that water and sewer assessments have been paid in full at time stamps are purchased. (3-33-030 and 3-33-060 Chicago Municipal Code). Certain transactions are exempt. (3-33-030 and 3-33-060 Chicago Municipal Code).

Contracts for Sale of Dwelling Structure.

After Aug. 20, 1968 installment contracts voidable at buyer's election unless there is attached to or incorporated in contract: (a) Certificate of compliance; or (b) (i) Express written warranty that owner has not received notice of any dwelling code violations which existed before contract was executed within ten years of date of execution; or (ii) if such notice received, list of all such notices with detailed statement of all violations referred to in notices. Requirements of section cannot be waived by buyer or seller. (765 ILCS 75/2).

Any provision in contract for sale of dwelling structure which forbids buyer to record contract or provides any penalty for recording is void. (765 ILCS 70/2).

Environmental Covenants.

Uniform Environmental Covenants Act (765 ILCS 122/1 et seq.).

Fraudulent Transfers.

See category 8 Debtor and Creditor, topic 8.08 Fraudulent Sales and Conveyances.

Fair Housing.

Corporate authorities of municipalities may enact ordinances prescribing fair housing practices in accordance with Fair Housing Act (65 ILCS 5/11-11.1-1) and Human Rights Act (775 ILCS 5/7-108).

Demolition and Repair of Unsafe Buildings.

Corporate authorities of each municipality may demolish or repair dangerous and unsafe buildings or uncompleted and abandoned buildings within territory, except that in counties having county health departments, county board may demolish or repair such buildings. (65 ILCS 5/11-31-1[a]). Any owner or tenant of real property within 1,200 feet of such buildings within municipality with population of 500,000 or more may file with municipal authority request that municipality apply to circuit court of county for order permitting demolition or repair of building. (65 ILCS 5/11-31-1[b]). Corporate authorities may remove or environmentally remediate hazardous substances on, in or under any abandoned and unsafe property and cost incurred is lien on real estate superior to all prior or existing liens and encumbrances except taxes and other liens created under 65 ILCS 5/11-31-1(a) or (e). (65 ILCS 5/11-31-1[f]).

21.17 TRUST DEEDS:

See category 20 Mortgages, topic 20.04 Mortgages of Real Property.

22 TAXATION

22.01 ADMINISTRATION:

Penalties.

Unless otherwise specified in a tax Act, the Uniform Penalty and Interest Act applies to all taxes administered by the Department of Revenue, except for the Racing Privilege Tax Act, the Property Tax Code, 35 ILCS 200/1 et seq., the Real Estate Transfer Tax Act, 35 ILCS 305/1 et seq., and the Coin Operated Amusement Device Tax, 35 ILCS 510/1 et seq. (35 ILCS 735/3-1A).

Penalties provided for failing to file return, to keep books and records as required, filing fraudulent return, or willfully violating any rule or regulation of Department of Revenue for administration and enforcement of taxes, or any accountant or other agent who knowingly enters false information on return. Any purchaser who either obtains registration number or resale number through misrepresentation, or knowingly represents he has number when he does not, or knowingly misrepresents that he is buying for resale, any person who engages in business without appropriate certificate of registration, and any person who accepts money that is due to Department and fails to remit such payment or collects or attempts to collect tax which he knows is not properly collectible violates a tax act. (35 ILCS 5/1001, 120/13, 105/14, 115/15, 110/15, 145/8, 610/13, 620/13, 625/15). Any person who fails to file annual information return for Service Occupation and Retail Occupation Taxes, or income tax return is subject to penalty. (35 ILCS 5/1002, 115/9, 120/3).

In event of late filing or late payment, penalty determined in accordance with Uniform Penalty and Interest Act will be added. (35 ILCS 5/1003, 120/5, 105/12, 115/12, 115/9, 120/3, 110/12, 145/7).

Liability of Corporate Officers or Employees.

Any officer or employee of any taxpayer subject to the provisions of a tax Act administered by the Department of Revenue who has the control, supervision or responsibility of filing returns and making payment of the amount of any trust tax imposed in accordance with that Act and who wilfully fails to file the return or make the payment to the Department or wilfully attempts in any other manner to evade or defeat the tax is personally liable for a penalty equal to the total amount of tax unpaid by the taxpayer including interest and penalties thereon. (35 ILCS 735/3-7). The Department may revoke any distributor's license if they commit a prohibited act or fail to comply with cigarette tax stamp requirements. Department may also impose a civil penalty not to exceed the greater of 500% of the retail value of the cigarettes involved or $ 5,000. (35 ILCS 505/16). The Department may revoke any distributor's, receiver's, or supplier's license of a person who is registered as a reseller of motor fuel if they fail to collect prepaid tax on invoiced gallons of motor fuel sold or fail to deliver a statement of tax paid to the purchaser or to the Department as required. (35 ILCS 505/16). If a corporation violates the Unemployment Compensation Act, its principal officers may be punished. Each violation is separate offense. (820 ILCS 405/2800).

Collection.

At the request of any officer or agency charged with the responsibility of collecting any tax that is imposed by this State or that is collectible by this State on behalf of a political subdivision thereof, the Attorney General of this State may bring suit to collect any tax legally due to this State or to the political subdivision on whose behalf this State is required or authorized to act as a tax collector. Any political subdivision of this State or the appropriate officer thereof, acting in its behalf, may bring suit to collect any tax legally due to such political subdivision. (35 ILCS 705/1).

Exemption.

The United States Naval Training Station and hospital in Lake County is exempt from all state and local taxes. (35 ILCS 810/1).

General.

Taxpayer Bill of Rights. (20 ILCS 2520/4). Tax statutes imposing licenses commonly provide, in addition to other penalties, that violations of all, or stated, provisions are grounds for revoking license. Individual statutes should be checked.

22.02 ALCOHOL, BEVERAGES AND TOBACCO TAXES:

Alcoholic beverages tax imposed on manufacturers, importing distributors and certain retailers of beer, cider, wine and other alcoholic liquors. (235 ILCS 5/8-1).

Cigarette Tax.

Tax at rate of 5 and one-half mills per cigarette (20¢ per pack of 20; 25¢ per pack of 25) plus additional 20 mills per cigarette (40¢ per pack of 20) sold or otherwise disposed of imposed on retailers, prepaid by distributors and passed on to consumers. (35 ILCS 130/2). Complementary use tax (not payable where retailers' tax has been paid) imposed at same rate. (35 ILCS 135/2, 135/3). Municipalities are authorized to tax retail vendors of cigarettes. (65 ILCS 5/8-11-3). Anyone other than distributor possessing unstamped cigarettes in original packages must pay a civil penalty of $15 per package in excess of 100 packages. (35 ILCS 135/25a).

Tobacco Products Tax.

Repealed by P.A. 89-21, § 10-90, effective June 6, 1995.

22.03 BUSINESS TAXES:

Franchise Taxes.

See category 2 Business Organizations, topic 2.03 Corporations.

22.04 CORPORATE TAXES:See category Business Organizations, topic Corporations.

22.05 EMPLOYMENT TAXES:

Unemployment compensation tax (termed “contributions”) is imposed by 820 ILCS 405/100 et seq., which is administered by Director of Department of Employment Security.

Act applies to all employers who pay wages of at least $1,500 in a calendar quarter of current or preceding calendar year or employ at least one individual on at least part of one day within each of 20 or more weeks during current or preceding calendar year, any nonprofit organization employing four or more individuals within each of 20 or more calendar weeks, State of Illinois, and other employers who elect to come within Act. (820 ILCS 405/205).

Following employees not within Act: Agricultural workers unless work in unit which either paid wages of $20,000 or more per calendar quarter or employed ten or more individuals for 20 weeks; domestic servants, unless wages paid by employer for domestic service equaled or exceeded $1,000 in calendar quarter; certain governmental workers; members of crews of foreign vessels or aircraft (if such services are performed while aircraft is outside U.S.) and crews of U.S. vessels if operating office is outside Illinois; commissioned real estate salesmen and insurance agents; U.S. government employees; those working for certain nonprofit organizations' workers covered under unemployment compensation plan created by Congress; students and spouses of students who work at same school student is attending; those under 18 who deliver newspapers; those engaged in illegal recording or making of bets; students participating in work experience program; those engaged in services performed entirely outside State of Illinois pursuant to reciprocal arrangements with other states; patients, student nurses or interns performing services to hospital; workers covered by unemployment compensation law of another state; directors of corporations while performing their services as directors; children under 18 employed by their parents or persons employed by their children or spouse; certain direct sellers of consumer products. (820 ILCS 405/214-405/232).

Contributions by employers are required only with respect to wages not in excess of $7,000 per annum to any individual; $8,000 for last three calendar quarters of 1983 and calendar year 1984; $8,500 for calendar years 1985 and 1986 and 1987. For 1984, 1985, 1986 and 1987 new employers pay greater of 2.7%, 2.7% multiplied by current adjusted state experience factor or average contribution rate for employer's major classification in Standard Industrial Code. Contribution rate for employers who were liable for contributions during three (two for 1984, 1985 and 1986) preceding calendar years is determined under experience-rating provisions. (820 ILCS 405/1500). Implementation of emergency contribution rates determined by fund balance on preceding June 30 computation date may raise total rates for following calendar year from .04% to .06%. (820 ILCS 405/1506.3). Employer's minimum contribution is greater of .2% or product obtained by multiplying .2% by adjusted state experience factor for applicable calendar year. Maximum contribution rate is greater of 6.4% or product of 6.4% and adjusted state experience factor for applicable calendar year. If quarterly payroll is less than $50,000, rate may not exceed 5.4% for 1989 and subsequent years. (820 ILCS 405/1506.1).

Contributions are not exacted from employees, and agreement by employees to pay part of employer's contributions is void. (820 ILCS 405/1600). Deduction from wages by employer to pay contributions is class B misdemeanor. (820 ILCS 405/2800).

Contributions are payable quarterly on or before last day of month next following calendar quarters for which such contributions have accrued, calendar quarters being three-month periods ending Mar. 31, June 30, Sept. 30 and Dec. 31. (820 ILCS 405/238, 405/1400). Delinquent employer may be required to pay on calendar month basis. (820 ILCS 405/1400). Late contributions subject to interest of 2% per month. Returns must be made and contributions paid to Director of Department of Employment Security.

22.06 ENVIRONMENTAL TAX:

Hazardous Waste *fees fund Hazardous Waste Fund and Hazardous Waste Research Fund. (415 ILCS 5/22.2).*

Mines, Minerals and Fisheries *are not separately taxed, but are treated as other property. Developed and undeveloped coal valued differently. (35 ILCS 200/10–175, 200/10-180). No severance tax per se*. The stock of nurseries, when growing, is assessed as property and when severed is considered merchandise. (35 ILCS 200/10-225).

Recycling *encouraged through county waste management plans, which may provide for recycling diversion credits to public and private parties engaged in recycling activities. (415 ILCS 15/6, 15/7).*

22.07 ESTATE TAX:

Note.

Prior to a change in the federal estate tax law, in 2003, Illinois had defined state estate tax liability as the amount of the credit for state tax allowable under federal law, reduced by the amount of state tax paid to any other state or states; this was known as a "pick-up" tax. The federal estate tax return was gradually phased out and was entirely eliminated in 2005. Despite this change in the federal law, Illinois' estate and GST tax laws continue to include the amount of the federal state death-tax credit that would have been payable to Illinois had the new federal law not been enacted. (35 ILCS 405/2, 405/3). For residents, all property subject to federal estate tax has taxable situs in Illinois, except real property and tangible personal property physically situated in another state. For nonresidents, only real property and tangible personal property physically situated in Illinois has taxable situs in Illinois. (35 ILCS 405/5). All Illinois real property, whether or not held in trust, has taxable situs in Illinois. (35 ILCS 405/5).

Interstate Cooperation.

Uniform Act on Interstate Arbitration of Death Taxes, and Uniform Act on Interstate Compromise of Death Taxes not adopted.

Return and Appraisement.

Effective for decedents dying after Dec. 31, 1982, return must be filed with Attorney General. Copy of federal estate tax return must be filed with Attorney General. Return due at same time federal return due. (35 ILCS 405/8).

Lien of Tax.

Same as under Inheritance Tax Act—see topic 22.12 Inheritance Tax. (35 ILCS 405/9).

Payment.

Effective for decedents dying after Dec. 31, 1982, tax due same time federal estate tax due. (35 ILCS 405/8). Penalty of 5% of tax due is charged each month return is not filed after due date, not to exceed 25% of tax due. Penalty of .5% of tax due charged for each month tax is past due, not to exceed 25% of tax due. (35 ILCS 405/8).

Application for Transfer of Assets.

For decedents dying after Dec. 31, 1982, executor, survivor, or heirs not required to apply to Attorney General for inheritance tax consent to transfer assets owned by decedent.

Apportionment.

No statute. Equitable apportionment applies if the decedent provided no direction, such as in a will, about payment of Federal estate tax and costs. Federal estate tax and administration expenses apportioned between probate and non-probate assets under doctrine of equitable apportionment in intestate estate (69 Ill.2d 525, 372 N.E.2d 662) and testate estate (82 Ill.2d 15, 411 N.E.2d 266); surviving spouse's share of probate or nonprobate property which qualifies for federal estate tax marital deduction not charged with federal estate tax (82 Ill.2d 15, 411 N.E.2d 266), except that surviving spouse's statutory renunciatory or intestate share computed after payment of federal estate tax (83 Ill.2d 379, 415 N.E.2d 416); doctrine of equitable apportionment not applicable to estates consisting exclusively of probate assets, rather Illinois follows burden on residue rule (383 Ill. 489, 50 N.E.2d 461; 109 Ill.App.3d 57, 440 N.E.2d 222).

22.07A EXCISE TAXES:

Electricity Excise Tax Law.

Tax depends on number of kilowatt hours consumed per month. (35 ILCS 640/2-4). Application of every exemption, credit and deduction against this tax is limited by any reasonable and appropriate sunset date specified in public act creating exemption, credit or deduction and if none specified, then taxpayer is not entitled to exemption, credit or deduction beginning five years after effective date of public act creating it. (35 ILCS 640/2-6).

Telecommunications Excise Tax Act.

State tax is imposed at rate of 7% of gross charge on interstate and intrastate telecommunications. (35 ILCS 630/3). Additional tax may be imposed by municipality: up to 6% of gross charge for municipalities with population less than 500,000; up to 7% for municipalities with population of 500,000 or more. (35 ILCS 636/5-15). Monthly returns are due by last day of each month and estimated payments are due on seventh, 15th, 22nd and last day of month. (35 ILCS 630/6 and 636/5–50). Less frequent estimated payments are due if average monthly liability is less than $25,000. Prepaid telephone calling arrangements are not considered telecommunications subject to the tax imposed under this Act. (35 ILCS 630/3 and 636/5–7). Application of every exemption, credit and deduction against this tax is limited by any reasonable and appropriate sunset date specified in public act creating exemption, credit or deduction and if none specified, then taxpayer is not entitled to exemption, credit or deduction beginning five years after effective date of public act creating it. (35 ILCS 630/4.5).

22.07B GAMBLING AND ENTERTAINMENT TAXES:

Bingo Tax Act.

Tax of 5% of gross proceeds of any game of bingo is imposed. Quarterly reports and payments are due before 20th day of Apr., July, Oct. and Jan. Insofar as practicable, administrative provisions of Retailers' Occupation Tax Act are applicable. (230 ILCS 25/1 to 25/7).

Coin-in-slot Amusement Devices.

License and annual $30 privilege tax requirement exists. (35 ILCS 510/1 to 510/16). Counties and municipalities may license, control and tax such devices. (35 ILCS 510/7).

Riverboat Gambling Act.

License fee $25,000 first year and $5,000 for each succeeding year. (230 ILCS 10/7[a]). Beginning August 23, 2005, for owner licensee admitting 1,000,000 or fewer persons in previous calendar year, admission tax is $2 per person; for owner licensee admitting more than 1,000,000 persons in previous year, tax is $3 per person. (230 ILCS 10/12[a]). For licensed managers on behalf of the State admitting 1,000,000 or fewer persons in previous calendar year, admission tax is $3 per person; for manager licensee admitting more than 1,000,000 but no more than 2,300,000 persons in previous year, tax is $4 per person; for manager licensee that admitted more than 2,300,000 persons in the previous calendar year, the tax is $ 5 per person admitted.. (230 ILCS 10/12[a-5]). Wagering tax imposed on persons engaged in the business of conducting riverboat gambling operations, other than licensed managers conducting riverboat gambling operations on behalf of the State, at varying rates between 15% and 50% based on annual adjusted gross receipts. (230 ILCS 10/13[a-4]).

22.08 GASOLINE AND SPECIAL FUELS TAXES:

Motor Fuel Tax administered and enforced by Department of Human Services (20 ILCS 2505/2505-20, 35 ILCS 505/1 et seq.). Tax is 19 cents per gallon of gasoline, 21.5 cents per gallon of diesel fuel. (35 ILCS 505/2). Aircraft fuel is exempt. Tax is 3/10th cent per gallon on motor fuel owned or possessed on Aug. 1, 1990 and before Jan. 1, 2013 and 3/10th cent per gallon on motor fuel owned or possessed on Jan. 1, 1990 and before Jan. 1, 2013 imposed upon privilege of engaging in business of selling motor fuel as retailer or reseller, on all motor fuel used in motor vehicles operating on public highways and recreational type watercraft operating in waters in State with exceptions for specified aviation fuels and kerosenes at certain airports and no tax on diesel fuel used in operation of ships, barges, or vessels transporting property in interstate commerce on rivers bordering on Illinois. (35 ILCS 505/2a).

22.09 GIFT TAX:

None; but, for decedents dying before Jan. 1, 1983, inheritance tax applies to gifts in contemplation of death made within two years of death. (120-375).

22.10 HOTEL AND RESTAURANT TAXES:

Hotel occupation tax is imposed at rate of 5% of 94% (plus 1% of 94% for Tourism Fund) of gross rental receipts from hotel rooms (other than from "permanent residents"). (35 ILCS 145/1 to 145/10). Counties and municipalities may also impose tax up to 5% of such gross rental receipts. (55 ILCS 5/5-1030, 65 ILCS 5/8–3–13). Chicago Municipal Tax is additional 3.5%. (Municipal Code of Chicago, 3-24-030).

Hotel use tax. Municipality may impose a tax upon the privilege of renting or leasing rooms in a hotel within the municipality at a rate not to exceed 5% of the rental or lease payment. (65 ILCS 5/8–3–14a)

22.11 INCOME TAX:

Income tax imposed on every individual, corporation, trust, and estate on privilege of earning or receiving income in or as resident of state. (35 ILCS 5/201[a], 5/201[c]). Tax is administered by Illinois Department of Revenue. Unless expressly provided otherwise or clearly appearing from context, any term used in income tax act has same meaning as when used in comparable context in U.S. Internal Revenue Code and other statutes of U.S. relating to federal income tax as are in effect for that taxable year. (35 ILCS 5/102, 5/103).

Base of tax is "net income," which is "base income" allocated and apportioned to Illinois, less standard exemption. (35 ILCS 5/202). "Base income" is computed by making adjustments to federal adjusted gross income of individuals and to federal taxable income of corporations, estates, trusts and partnerships. (35 ILCS 5/203). Standard exemption for taxable years ending on or after Dec. 31, 1998 and prior to Dec. 31, 1999, $1,300; for taxable year ending on or after Dec. 31, 1999 and prior to Dec. 31, 2000, $1,650; for taxable year ending on or after Dec. 31, 2000, $2,000 is allowed every taxpayer, with additional exemptions of $1,000 (or portion thereof) allowed individuals 65 years of age or older or blind except that for corporations, exemption is zero for tax years ending on or after Dec. 31, 2003. For taxable year ending on or after Dec. 31, 1992, taxpayer whose Illinois base income exceeds base amount and who is claimed as dependent on another person's federal income tax return is not allowed basic amount. (35 ILCS 5/204).

Basic tax for individuals, trusts and estates is 3% of net income. (35 ILCS 5/201[b][3]). Basic tax for corporations is 4.8% of net income. (35 ILCS 5/201[b][6]). Personal Property Tax Replacement Income Tax imposes additional income tax of 2.5% on corporations except subchapter S corporations, and 1.5% on trusts, partnerships and subchapter S corporations. (35 ILCS 5/201[c], [d]). Personal Property Replacement Income Tax determined constitutionally valid. (78 Ill.2d 387, 401 N.E.2d 491). See topic 22.15 Property Taxes, subhead Personal Property Taxes, Liability, Lien. Special rules for certain insurance companies, regulated investment companies, real estate investment trusts, financial organizations, (including bank-holding companies), international banking facilities, consolidated corporations, Western Hemisphere trade corporations, China Trade Act corporations, possessions corporations, transportation service companies, cooperatives, exempt organizations, subchapter S corporations, certain trusts, combat zone deaths, military pay, and government civilian employee pay earned while prisoners of war or missing in action. (35 ILCS 5/203, 5/205, 5/304).

Credits.

Taxpayers allowed investment tax credit against personal property tax replacement income tax of .5% of basis of property used in manufacturing, mining, or retailing placed in service after June 30, 1984, additional .5% credit for property placed in service after June 30, 1986, provided taxpayer's base employment increased by 1% over preceding year. Credit limited to taxpayers replacement tax liability and credit not allowed for any year other than year in which property was placed in service. For tax years ending on or after Dec. 31, 1985, excess investment tax credits may be carried forward five years if taxpayer meets certain conditions. (35 ILCS 5/201[e]). Unless extended by law, credit terminates after Dec. 31, 2008. (35 ILCS 5/201[e]). Tax credit against income taxes of .5% of basis of qualified property placed in service by taxpayer in High Impact Business or Enterprise Zone. (35 ILCS 5/201[h], [j]). For tax years ending on or after Dec. 31, 1987, excess investment credits for enterprise zone property may be carried forward five years. (35 ILCS 5/201[h], [i]). Taxpayers conducting trade or business in enterprise or redevelopment zone or qualifying as high impact business in foreign trade zone are allowed jobs credit of $500 per eligible employee, effective for employees hired on or after Jan. 1, 1986. For tax years ending on or after Dec. 31, 1988, credit allowed in year following year employees hired. Excess jobs credits may be carried forward five years but no credit may be carried forward to any year ending on or after Dec. 31, 2003. (35 ILCS 5/201[g]). Training expense credit against income tax of 1.6% of amounts paid or accrued by taxpayer for educational or vocational training for tax years beginning on or after Dec. 31, 1986. Excess training expense credits may be carried forward five years and prior to Dec. 31, 2003. (35 ILCS 5/201[j]). For tax years beginning July 1, 1990 and prior to Dec. 31, 2003 and beginning again for tax years ending on or after Dec. 31, 2004, taxpayer given credit equal to 6½% of qualifying expenditures for increased research in state. (35 ILCS 5/201[k]). For tax years ending after Dec. 31, 1997 and on or before Dec. 31, 2001 taxpayer allowed credit for certain unreimbursed eligible environmental mediation costs. (35 ILCS 5/201[1]). Excess may be carried forward five years if taxpayer meets certain conditions. (35 ILCS 5/201[l]).

Residents receive tax credit for taxes paid to another state on income which is also subject to Illinois basic income tax (no credit against replacement income tax). Credit provided, however, not to exceed amount which bears same ratio to tax otherwise due as amount of taxpayer's base income subject to tax by other taxing jurisdiction bears to his total base income for taxable year, and provided further that such credit not allowed if any creditable tax has been deducted in determining base income for taxable year. (35 ILCS 5/601[b][3]). Income up to $2,000 annually per account, derived by individuals from investments in accordance with College Savings Programs are exempt from state and political subdivision taxes, except estate, transfer and inheritance taxes.

There are also a variety of other tax credits available. (35 ILCS 5/206 to 5/250).

Tax Credit for Residential Property Taxes.

Beginning tax years ending Dec. 31, 1991, individual income taxpayers entitled 5% tax credit of real property taxes paid on principal residence. (35 ILCS 5/208).

Resident individuals, estates, trusts, and partners: entire base income allocated to Illinois. (35 ILCS 5/301[a]).

Nonresident individuals, estates, trusts, and partners are taxed on net income from business transactions or property located within state and from performance of personal services within state including nonresident professional athletes. (35 ILCS 5/302 to 5/307). Nonresident shareholders of Subchapter S corporation are taxed on their share of income allocated or apportioned to Illinois. (35 ILCS 5/308[a]).

Part-year residents are taxed in same manner as residents for part of year they reside in state, and as nonresidents for part of year they reside outside state. (35 ILCS 5/301[b]).

Corporations and others deriving business income from within and without state must determine that apportionable to state on three-factor basis consisting of property, payroll, and sales. (35 ILCS 5/304). Effective Aug. 29, 1975, Illinois repealed Act adopting Multistate Tax Compact. Effective for tax years ending on or after Dec. 31, 1982, members of "unitary business group" must use combined method to apportion domestic corporate income. (35 ILCS 5/1501, 35 ILCS 5/304[e]). "Unitary business group" excludes members which conduct 80% or more of their total business activity outside U.S. (35 ILCS 5/1501[a][27]). Worldwide combined reporting may be used for years prior to 1982. (84 Ill.2d 102, 417 N.E.2d 1343, appeal dismissed, 457 U.S. 1103).

Partnerships are subject to the replacement tax under 35 ILCS 5/201(c), (d), and must determine income allocable and apportionable to state in same manner as corporations; partners are taxed on shares of partnership profits, whether or not distributed. (35 ILCS 5/205[b], 35 ILCS 5/305). Special treatment of taxable income of investment partnership defined in §1501(a)(11.5). (35 ILCS 5/305[c-5]).

Returns.

Return must be made by every person for any taxable year for which person is liable for tax or where person is resident or corporation qualified to do business in Illinois and required to file federal tax return whether or not liable for Illinois income tax. No return needed if person has Illinois income less than base amount in 35 ILCS 5/204(b) and is claimed as dependent on another person's federal or Illinois income tax return. (35 ILCS 5/502). Returns of individuals, partnerships and fiduciaries are due on or before 15th day of fourth month following close of taxable year. (35 ILCS 5/505[a][1]). Two month extension available for certain individuals traveling abroad. (35 ILCS 5/505[c]). Corporate returns due by 15th day of third month following close of taxable year. (35 ILCS 5/505[a][2]). Exempt organizations returns due by 15th day of fifth month following close of taxable year. (35 ILCS 5/505[a][3]). Director of Revenue may grant extensions of time to file return, not to exceed six months in aggregate. (35 ILCS 5/505[a]). If extension granted, tentative return must be filed on or before due date of return (without regard to extension period) and payment made of tax estimated to be due for such taxable year. (35 ILCS 5/602). When taxpayer has been granted extension of time to file federal return, filing of copy of federal extension with Department will automatically extend due date of Illinois return for same taxable year, provided tentative return is filed on time and proper amount of tax estimated is paid. (35 ILCS 5/505[b]; 35 ILCS 5/602). No penalty or interest applicable for taxable year ending on or after Dec. 31, 1990 following filing extension granted by presidential proclamation under IRC §7508 for member or spouse, if filing joint return, of armed forces serving in combat zone. (35 ILCS 5/602[b])

Payment in full required with return. Credit given for tax withheld, estimated payments previously made, foreign tax paid and overpayments made in previous years. (35 ILCS 5/601, 35 ILCS 5/909).

Limitations on Assessment.

None if fraud, if no return filed, if supplemental return is required but is not filed, if taxpayer fails to notify Department of change in his federal return, or if taxpayer fails to report change or correction that is treated in same manner as if it were a deficiency for federal income tax purposes; six years from date return was filed if more than 25% of base income stated in return is omitted; otherwise, three years from date return (or supplemental return) was filed. (35 ILCS 5/905). Period of assessment and collection against transferee is two years after expiration of period of limitation against transferor. (35 ILCS 5/905[m], 35 ILCS 5/1405).

Sales Outside Usual Course of Business.

Transferee of assets outside usual course of transferor's business must file disclosure report with Illinois Department of Revenue within ten business days of transfer. Transferee may be personally liable for transferor's unpaid taxes up to reasonable value of property transferred if transferee fails to file disclosure report. (35 ILCS 5/902[d]).

Where Returns Filed and Taxes Paid.

Returns are filed with and taxes paid to Illinois Department of Revenue, Springfield, Illinois. (http://www.revenue.state.il.us/)

Appeal and Refund.

Taxpayer may protest a proposed assessment of tax by filing a written protest with Department within 60 days after issuance of a notice of deficiency (150 days if taxpayer is outside U.S.) and may request hearing. (35 ILCS 5/908[a]). After hearing, if any, Department will mail to taxpayer notice of its decision, briefly setting forth its findings of fact and basis of decision in each case decided adversely to taxpayer. (35 ILCS 5/908[b].) Taxpayer may then, within 30 days, file written request for rehearing. (35 ILCS 5/908[c]). Department's action on taxpayer's protest request becomes final 30 days after issuance of notice of decision or, if timely request for rehearing is filed, upon issuance of denial of request or issuance of notice of final decision. (35 ILCS 5/908[d]). If no protest filed, taxes covered by notice of deficiency deemed assessed upon expiration of 60 days following issuance of such notice (150 days if taxpayer is outside U.S.). (35 ILCS 5/904[d]). Provisions of Administrative Review Law apply to and govern all proceedings for judicial review of final action of Department. Circuit court of county wherein taxpayer has his residence or commercial domicile, or Cook County in those cases where taxpayer does not have his residence or commercial domicile in state, has power to review all final administrative decisions of Department in administering provisions of Act. (35 ILCS 5/1201, 5/1202).

Claims for refund must be filed with Department within three years after date return was filed or one year after date tax was paid, whichever is later. (35 ILCS 5/911[a]). If denied, or if no notice of denial is issued before expiration of six months from date claim was filed, taxpayer may file written protest with Department within 60 days and may request hearing. (35 ILCS 5/909[e], [f], 910[a]). After hearing, if any, Department will mail to taxpayer notice of its decision, briefly setting forth its findings of fact and basis of decision for each case decided adversely to taxpayer. (35 ILCS 5/910[b]). Taxpayer may within 30 days file written request for rehearing. (35 ILCS 5/910[c]). Department's action on taxpayer's protest becomes final 30 days after issuance of notice of decision or, if timely request for rehearing is filed, upon issuance of denial of request or issuance of notice of final decision. (35 ILCS 5/910[d]). Rules for judicial review of such denial of request, or issuance of notice of final decision same as under catchline Appeal and Refund, supra.

Withholding.

Every employer maintaining office or transacting any business in state and required to withhold federal income tax on compensation paid in state to an individual must deduct and withhold, from such compensation amount equal to applicable tax rate for individuals as provided in 35 ILCS 5/201(b) after deducting appropriate withholding exemption attributable to payroll period. (35 ILCS 5/701). Each individual entitled to withholding exemption in amount equal to base amount in 35 ILCS 5/204(b) times number of such exemptions permitted him under Internal Revenue Code (other than those permitted under IRC §3402m), plus an allowance for business, educational and alimony expenses that are deductible from gross income in arriving at adjusted gross income pursuant to Section 62 of the Internal Revenue Code, plus an additional allowance equal to $ 1,000 for each $ 1,000 eligible for subtraction on his Illinois income tax return as Illinois real estate taxes paid during the taxable year, or lesser amount claimed by him. (35 ILCS 5/702). Any person making payment of lottery winnings of $1,000 or more must deduct and withhold amount equal to applicable tax rate for individuals. (35 ILCS 5/710). Withheld taxes are required to be paid to Department, or to designated depositary, on or before third banking day following close of quarter monthly period whenever aggregate amounts withheld (together with amounts previously withheld and not paid to Department) exceed $1,000. Withheld taxes are required to be paid to Department, or to designated depositary, on or before 15th day of second and third months of each calendar quarter, and on or before last day of month following last month of each calendar quarter, whenever aggregate amount withheld (together with amounts previously withheld and not paid to Department) exceeds $500 but does not exceed $1,000. Quarterly returns required, due on or before last day of first month following close of calendar quarter. Annual return reconciling quarterly and monthly returns required on or before Feb. 28 of following calendar year. (Form IL-700). If amount of compensation paid by employer is not sufficient to require withholding tax for any employees, or if aggregate amount withheld, is less than $500 for calendar year, employer may request permission from Department to file only annual return and to pay taxes required to be withheld at time of filing annual return. On and after Jan. 1, 1998 employer who deducts and withholds from person engaged in domestic service employment may file annual return and pay tax on or before 15th day of fourth month following close of employer's taxable year and return may be submitted with employer's individual tax return. Permission for annual filing must be renewed on or before Apr. 30 of each year. (35 ILCS 5/704; Form IL-700).

Estimated Tax.

Every taxpayer, other than estate, trust, partnership or subchapter S corporation, must file declaration of estimated tax for taxable year if amount payable as estimated tax can reasonably be expected to be more than $250 for individuals or more than $400 for corporations. Due dates, rules and procedures parallel federal. (35 ILCS 5/803). Effective for taxable years ending after Jan. 1, 1986, estimates must be paid in four equal installments. (35 ILCS 5/803[d]). Penalty for underpayment of estimated tax is calculated under the Uniform Penalty and Interest Act, 35 ILCS 735/3-3. (35 ILCS 5/804).

Electronic Payments.

Beginning on Oct. 1, 2002 taxpayer having tax liability in amount set forth in 20 ILCS 2505/2505-210(b) must make all payments by electronic funds transfer. Any taxpayer is allowed to make payment by electronic funds transfer. (35 ILCS 5/601.1).

Information Statements.

Every employer must furnish two copies of statement with respect to compensation paid in calendar year to each employee by Jan. 31 of succeeding year and to each former employee on date of last payment of compensation. (35 ILCS 5/703). Effective Jan. 1, 1989, any person maintaining office or transacting business in Illinois who makes payments with respect to certain personal service contracts, prizes and awards in excess of $1,000 must maintain record in format in which record is available to review by Department of all payments made under contract for personal services. (35 ILCS 5/1405.2; 35 ILCS 5/1405.3). Any person maintaining office or transacting business in Illinois and required under §6041 and §6050N of Internal Revenue Code to report to U.S. Secretary of Treasury payments made to another person is not also required to file with Department copies of those reports. Person must maintain, in format available for review by Department, copies of reports that include payments for rents or royalties of $1,000 or more from real or tangible personal property located in Illinois, or royalties on patent or copyright used in Illinois. (35 ILCS 5/1405.1).

Reciprocal Agreements for Exemption of Compensation of Nonresidents.

Agreements with Iowa, Kentucky, Michigan, and Wisconsin providing for exemption of compensation paid to residents of one state for performance of services in other state and for similar exemption from withholding are in effect. (35 ILCS 5/302, 35 ILCS 5/701).

22.12 INHERITANCE TAX:

Effective for decedents dying after Dec. 31, 1982, inheritance tax repealed, leaving in place Illinois Estate and Generation—Skipping Transfer Tax. See Topic 22.07 Estate Tax.

22.13 LOCAL AND MUNICIPAL TAXES:

Chicago Employers' Expense Tax.

Employers doing business in Chicago who have 50 or more individual employees are subject to tax of $5 per employee per month ($4 per employee per month for period Jan. 1, 1986 to June 10, 1986). Taxes to be paid to Chicago Dept. of Revenue on or before last day of month following close of each calendar quarter. Governmental agencies and federally tax-exempt organizations are, in general, exempt. (Municipal Code of Chicago, 3-20-030). Illinois Supreme Court has held ordinance valid exercise of home rule powers not violating constitutional prohibition against imposition of taxes upon or measured by earnings or upon occupations. (57 Ill.2d 553, 317 N.E.2d 3).

Chicago Service Tax.

Tax held unconstitutional by Ill. Sup. Ct. (89 Ill. 2d 45, 432 N.E.2d 227).

Chicago Transaction Tax.

Tax imposed on two types of transaction, rentals of personal property and transfers of interests in real property.

Rental or Lease of Personal Property.

Tax of 6% of lease price is imposed on all leases and rentals of personal property delivered or used in City of Chicago unless lease is consummated outside City and at least 50% of use occurs outside City. Personal property is defined as all property other than real property, including leased time on equipment, such as computer, not otherwise rented. Specifically excluded is medical equipment leased by consumers for their own use. Ultimate liability for tax is on lessee. However, lessor is required to collect and remit to Chicago Department of Revenue on monthly basis tax due on all such leases. Exemptions from tax include leases which involve, as lessee, governmental entity or international, charitable, religious or educational organization; and certain fiduciary transfers.

Transfers of Interest in Real Property.

Tax of $3.75 for each $500 of transfer price or fraction thereof is imposed on all transfers of title to and transfers of beneficial interest in real property located within City of Chicago. Beneficial interests in Illinois land trusts are expressly included. Tax is paid through purchase of tax stamps which must be affixed to face of deeds. Ultimate liability for tax is on grantee or purchaser. However, person making or effectuating transfer is responsible for payment of tax. Director of Revenue must not issue stamps unless shown: (1) Certificate by commissioner of water management that water and sewer assessments paid in full but none required for residential unit (townhouse, condominium unit or cooperative apartment) not having separate meter service (Municipal Code of Chicago, 3-33-040[c]), (2) as to residential property unless shown certificate of zoning compliance issued by zoning administrator (Municipal Code of Chicago, 3-33-040[E]). Exemptions from tax include transfers involving governmental bodies or charitable, religious or education organizations; transfers where consideration is less than $500; and certain fiduciary transfers. (Municipal Code of Chicago, 3-33-010 to 3-33-150).

Chicago Vehicle Fuel Tax.

Vehicle fuel tax of 5¢ per gallon imposed on privilege of purchasing or using, in City of Chicago, vehicle fuel purchased in sale at retail, effective Oct. 6, 1986. (Municipal Code of Chicago, 3-52-020). Tax held valid as to all taxpayers by Ill. Sup. Ct. (116 Ill. 2d 311, 507 N.E.2d 858).

Mobile Home Local Services Tax.

Annual local services tax imposed payable, at rates between 15¢-7.5¢ per square foot, depending on model year of mobile home, in county in which home located. 20% reduction is provided for owners who are disabled or age 65 or older who live in mobile home. (35 ILCS 515/1). Taxpayers have six months from receipt of tax bill to claim error in tax. (35 ILCS 515/6.1).

22.14 MOTOR VEHICLE TAXES:

Flat Weight or Mileage Tax on Motor Vehicles.

See category 23 Transportation, topic 23.01 Motor Vehicles, subhead Motor Vehicle Carriers.

22.15 [RESERVED]

22.16 PROPERTY TAXES:

Real Property Taxes, Liability, Lien.

Owner of real property on Jan. 1 is liable for taxes for that year. (35 ILCS 200/9-175). Leasehold on tax exempt property is taxed as real estate, but lien does not attach to exempt property. (35 ILCS 200/9-145, 200/9-195). Real estate taxes first lien, superior to all other liens and encumbrances, on or from Jan. 1. (35 ILCS 200/21-75).

Personal Property Taxes, Liability, Lien.

Illinois Constitution mandated legislature to adopt substitute for personal property tax by Jan. 1, 1979. (Const. Art. IX, §5[c]). Repeal by constitutional amendment of individual personal property tax effective Jan. 1, 1971 held valid. (410 U.S. 356). Illinois passed Personal Property Tax Replacement Income Tax to substitute for ad valorem personal property tax on corporations, partnerships and trusts. No property taxed as personal property may be classified as real property subject to taxation. [35 ILCS 200/24-5]. Personal Property Replacement Income Tax determined constitutionally valid. (78 Ill.2d 387, 401 N.E.2d 491). See topic 22.11 Income Tax.

Exemptions.

Property used for educational, religious, governmental, charitable and certain other such purposes exempt from taxation. (35 ILCS 200/15-35 to 200/15-185). Duty of owner of any property which is exempt from taxation to file certificate, on or before Jan. 31 of each year, stating facts that qualify property for exemption or continued exemption, and owner that qualifies for senior citizen homestead must file by May 31 of each year. (35 ILCS 200/15-10, 200/15-15, 200/15-20, 200/15-30). All property belonging to the State of Illinois is exempt, but with certain exceptions state owned property that is leased is taxable to the lessee. (35 ILCS 200/15-55). Taxpayer may request hearing by filing application in writing within 60 days after notice by certified mail of decision. Department reconsiders exemption decision and grant any party a hearing. After reconsideration on hearing, Department issues notice of decision by certified mail. Notice sets forth findings of fact and basis of decision. Within 30 days after mailing of notice of decision, party may file written request for rehearing, setting forth grounds for request. If rehearing or review granted and, as soon as practical after rehearing or review held, Department issues revised decision. Action of Department on petition for hearing is final later of (a) 30 days after issuance of notice of decision, if no request for rehearing or (b) if timely request for rehearing, upon issuance of denial of request or issuance of notice of final decision. No action for judicial review allowed unless party commencing action has filed application for hearing which Department has acted upon. (35 ILCS 200/8-35[b]). Judicial determination of tax exempt status of property must be made pursuant to Administrative Review Law, except that governmental agency may seek judicial determination of exempt status for years during which eminent domain proceedings were pending, judicial determination of exemption for disabled veterans and homestead exemptions is permitted, and court proceedings for exemption for 1985 and preceding assessment years are permitted. (35 ILCS 200/23-25). If exemption approved by Department of Revenue or circuit court, then certification of error issued for: (a) Prior period of eligibility of up to three assessment years immediately preceding assessment year for which exemption approved, or (b) subsequent erroneous assessment of property as nonexempt, or (c) subsequent assessment year for which property remains eligible for exemption but owner fails to file application for exemption or certificate of status. (35 ILCS 200/14-25).

State-owned property leased to Illinois Prairie Path Corporation and used for conservation and certain other specified purposes is exempt from property taxes. (35 ILCS 200/15-55[b]).

Exempt from state and municipal taxes are: Municipal retirement fund benefits (40 ILCS 5/7-217), park and retirement board employees' annuity and benefit fund in cities over 500,000 (40 ILCS 5/12-190), teacher pension and retirement funds in cities over 500,000 (40 ILCS 5/17-151), and teacher's retirement system (40 ILCS 5/16-190). Exemption for tangible personal property for farming purposes held invalid. (55 Ill.2d 393, 304 N.E.2d 65). Retirement trust exempt from personal property tax. (Helson v. Rosewell, Cook Co. Doc. No. 78CH-5168).

Assessment.

Except in counties with population of more than 200,000 which classify and except for “farms” that qualify for farm value assessment and except for real property constituting coal, real property valued for tax assessment purposes at 331/3% of its fair cash value. (35 ILCS 200/9-145, 200/1-60, 200/10-170). Counties, with population of more than 200,000, by ordinance of county board, must classify real property for purpose of fixing assessed valuation at percentage other than 331/3% of its fair cash value. (35 ILCS 200/9-150). Farm is eligible for farm value assessment. (35 ILCS 200/10-110). Farm dwelling, appurtenant structures and tract upon which they are immediately situated are assessed at 331/3% of fair cash value except that in counties with population of more than 200,000, county board by ordinance may fix assessed valuation at percentage other than 331/3% of fair market value. (35 ILCS 200/10-145). Department of Revenue has power to lower or raise total assessed value of property in any county so that assessments in county will be uniform with assessments in all counties by applying equalization factor to all property (except farm that has qualified for farm value assessment and except for property qualified for coal assessment) in county. (35 ILCS 200/16–5 to 200/16-205). No tax may be assessed against property with equalized assessed value under $150 for particular year. (35 ILCS 200/18-40).

Taxing districts may abate portion of taxes for period not to exceed ten years and in aggregate amount not to exceed $4,000,000 where industrial firm locates within taxing district from another state, territory, or country, was newly created within Illinois, or expands existing facility. (35 ILCS 200/18-165).

Pollution control facilities given special consideration in determining fair cash value for purposes of fixing assessed valuation for tax purposes. (35 ILCS 200/11-5 to 200/11-65). $4,000 maximum reduction from value of real property, as equalized, given owner of residence if owner is 65 or over, is liable for payment of tax, and occupies residence. (35 ILCS 200/15-170). Cooperatives and condominiums assessed on same basis as single family residence in counties with population of over 200,000 which classify real property. (35 ILCS 200/10-15). Residential property which is individually owned and includes right to use common area is assessed at value which includes proportional share of value of common area. (35 ILCS 200/10-35).

Repairs and maintenance to residential real estate owned and used exclusively for residential purposes do not increase assessed value of real property if such work does not increase area of improvements, materially alter character or condition of structures, is performed to keep property in good condition, and materials used are not of value greater than replacement value of materials removed. (35 ILCS 200/10-20).

Owner-occupied single-family residence or building owned and operated as cooperative and listed on National or Illinois Register of Historic Places or designated historic building by municipal ordinance entitled to special valuation if Director of Historic Preservation issues certificate of rehabilitation to owner who has restored or preserved residence in accordance with standards set by U.S. Secretary of Interior. Valuation is as follows: For eight year period following rehabilitation, fair cash value of residence in year in which rehabilitation begins (base year); ninth year, base year valuation plus 25% of adjustment in value; tenth year, base year plus 50% of adjustment; 11th year, base year plus 75% of adjustment; following years, current fair market value. Any taxing district by majority vote may elect to bar application of this section to taxes levied by it. (35 ILCS 200/10-40, 200/10-45, 200/10-50, 200/10-55, 200/10-60, 200/10-65, 200/10-70, 200/10-75, 200/10-80, 200/10-85).

Tax Credit for Residential Property Taxes.

Beginning tax years ending Dec. 31, 1991, individual income taxpayers entitled 5% income tax credit of real property taxes paid on principal residence. (35 ILCS 5/208).

Homestead Exemption.

Persons over 65 who are liable for real estate taxes on their residence may claim $2,000 through 1990 levy year in all counties maximum reduction in equalized valuation. Beginning with 1991 levy year maximum reduction of $2,500 in counties with 2,000,000 population or more and $2,000 in all other counties. For taxable years 2004-2005, maximum reduction is $3,000 in all counties, and for taxable years 2006 to 2007, maximum reduction is $3,500 in all counties. For taxable years 2008 and thereafter, maximum reduction is $4,000. (35 ILCS 200/15-170). In case of land improved by apartment building owned and operated as cooperative or life care facility that qualifies as cooperative (210 ILCS 40/2), maximum reduction from value of such real property is be multiplied by number of apartments or units occupied by each person 65 years or older who is liable for paying real estate taxes and is owner of record of interest in cooperative, other than leasehold interest. If such person becomes resident of licensed facility after exemption granted, exemption continues so long as former residence is occupied by qualifying person's spouse and spouse is 65 years or older, or if residence remains unoccupied but is still owned by person qualified for homestead exemption. (35 ILCS 200/15-170). Assessor shall notifies person who qualifies for exemption that person may qualify for deferral of taxes under Senior Citizen Real Estate Tax Deferral Act (320 ILCS 30/1 et seq.).

Owners of residential property used by owner as principal dwelling place may claim annual homestead exemption of maximum reduction before taxable year 2004 of $4,500 in counties of 3,000,000 or more and $3,500 in all other counties. For taxable years 2004 to 2007, maximum reduction is $5,000 in all counties. For taxable year 2008, maximum reduction is $5,500 and for taxable years 2009 and thereafter, maximum reduction is $6,000 in all counties. (35 ILCS 200/15-175). Married persons residing in separate residences qualifying for exemption may each claim 50% of authorized reduction. (35 ILCS 200/15-175). Statute as applied by Cook County Assessor declared invalid. (84 Ill.2d 229, 417 N.E.2d 1290).

Cooperative association must credit savings resulting from homestead exemptions to apportioned tax liability of owner eligible for exemption. (35 ILCS 200/15-175).

Homestead improvement exemption of up to $30,000 per year through Dec. 31, 1997, $45,000 through Dec. 31, 2003 and $75,000 beginning Jan. 1, 2004 in actual value of improvements available to residential buildings upon demonstration that increased assessment is attributable solely to new improvements or rebuilding of residential structure following catastrophic event. Exemption lasts until later of four years from date improvement is completed and occupied or next general assessment. (35 ILCS 200/15-180). Earlier version of this exemption was held to be unconstitutional on its face. (84 Ill.2d 229, 417 N.E.2d 1290).

Cash Grant to Elderly and Disabled.

Persons over 65 or who will become 65 years old during calendar year in which claim is filed, and any surviving spouse of such claimant who at time of death received or was entitled to receive grant pursuant to this Section, which surviving spouse will become 65 years of age within 24 months immediately following death of such claimant and which surviving spouse but for his or her age is otherwise qualified to receive grant pursuant to this Section and disabled persons whose annual household income is less than $14,000 and whose household is liable for property taxes may claim cash grant from state under Property Tax Relief Act. (320 ILCS 25/1 to 25/12). If claimant dies after filing claim, amount disbursed to surviving spouse, or dependent minor children if no surviving spouse, provided same resided with claimant at time claim filed. (320 ILCS 25/1 et seq.).

Review of Assessment.

If values placed on real property are deemed excessive, taxpayer should file complaint with Board of Appeals on or before date specified by Board, at least 20 days from date of publication of notice in counties over 3,000,000 population (35 ILCS 200/16-110) and with Board of Review on or before Aug. 10 in counties with fewer than 150,000 inhabitants, and on or before Sept. 10 in counties with 150,000 or more but fewer than 3,000,000 inhabitants (35 ILCS 200/12-40, 16-20, 16-50, 16-55, 16-60, 16-70, 16-75, 16-80). These boards have power to revise entire assessment of any taxpayer or any part thereof. (35 ILCS 200/12-40, 16-20, 16-50, 16-55, 16-60, 16-70, 16-75, 16-80). Taxpayer may appeal decision of Board of Review to Property Tax Appeal Board and then to Circuit Court under Administrative Review Act. (35 ILCS 200/1-5, 16-160). If Board of Review or Property Tax Appeal Board lowers assessment of owner-occupied residence, reduced assessment remains in effect for remainder of general assessment period, unless that parcel is subsequently sold in arm's length transaction establishing fair market value that is different from fair market value on which Board's assessment is based, or unless reversed or modified upon review. (35 ILCS 200/16-185, 16-190, 16-195). Taxpayer may contest decision of Board of Appeals in Circuit Court by paying total tax under protest except that payment under protest not required if basis for objection is that property exempt and proceeding to determine tax exempt status is pending before board of review, board of appeals or Department of Revenue. (35 ILCS 200/23-5, 200/21-175).

Payment.

Real estate taxes are due and payable in two equal installments in year following year tax becomes lien, first normally becoming delinquent on, and bearing interest after, June 1 at rate of 1 1/2% per month for all real property other than farmland, 1% per month for farmland; and second becoming delinquent on, and bearing interest at same rate after, Sept. 1. In counties with accelerated method of billing, first installment is due on Mar. 1 and second installment on Aug. 1. (35 ILCS 200/21-15, 200/21-20, 200/21-25). In counties of less than 3,000,000 population in which unemployment rate equals or exceeds 10% county board may defer payment of 50% of each installment of taxes for 60 days. (35 ILCS 200/21-40). If Illinois resident is member of Illinois National Guard or reserve component of armed forces of U.S. and has ownership interest in property taxed and is called to active duty for deployment outside continental U.S. that person, if delinquent in payment of installment is not liable for interest subject to condition that such person makes reasonable effort to notify County Clerk and County Collector within 180 days after deactivation. (35 ILCS 200/21-15). Interest on unpaid taxes is charged to mortgage lender in certain circumstances and duty on mortgage lender to redeem property and take steps to remove liens accruing because of delinquency where mortgage lender received all payments due under written terms of mortgage or promissory note secured by mortgage. (35 ILCS 200/21-15).

Collection and Sale.

After Sept. 1 next after delinquent taxes become due real estate may be advertised for sale for nonpayment of taxes and judgment applied for to circuit court and sale made at later date to be designated, except that in counties over 3,000,000 population time for advertisement and application for judgment has been extended. (35 ILCS 200/21-110, 200/21-115, 200/21-120). Payment may be made at any time before sale. (35 ILCS 200/21–240). Collector or deputy must, on day of sale, attend at court house, and between 9 A.M. and 4 P.M. (between 8 A.M. and 8 P.M. in counties having population of 3,000,000 or more) offer for sale separately and in consecutive order each tract of land or lot. (35 ILCS 200/21-205). Person offering to pay amount due on each tract or lot for least percentage thereon as penalty is considered purchaser thereof, provided, that no bid may be accepted for penalty exceeding 18% of amount of tax or special assessment. (35 ILCS 200/21-215). Person offering to pay amount due must provide, not less than ten days prior to making offer, letter of credit or unconditional bond for not less than one and one-half times amount of tax or special assessment owed. (35 ILCS 200/21-220). Municipality may bid at sale. (35 ILCS 200/21-210). Every tract or lot so offered at public sale and not sold is forfeited to state. (35 ILCS 200/21-225).

Collector may conduct special “scavenger” sale of tracts for which all or part of general taxes for two or more years are delinquent. Such tracts are sold at public sale to highest bidder for cash, notwithstanding fact that bid less than amount of taxes, assessments, and penalties due. Sale extinguishes in rem lien of taxes; redemption does not revive lien. Confirmation of sale neither affects owner's personal liability for taxes, interest and penalties nor prevents institution of in personam suit under 35 ILCS 205/275 to collect amount remaining due after sale. (35 ILCS 200/21-200/145, 200/21-180, 200/21-185). No certificate of purchase for scavenger sales held after Jan 1, 1980 are issued to bidder unless bidder provides affidavit that bid is not made by party or agent for party who is responsible for delinquent taxes. (35 ILCS 200/21-145, 200/21-180, 200/21-185).

Redemption may be made by owners of property or those having interest in property, other than undisclosed beneficiary of Illinois land trust, even if interest is not recorded or filed; this does not apply to undisclosed beneficiaries of Illinois land trusts. (35 ILCS 200/21-345, 200/21-350, 200/21-355, 200/21-360, 200/21-365, 200/21-380). Redemption may be made at any time before expiration of two years from date of sale, subject to certain exceptions, by payment in money or in other specified form, to county clerk, of amount for which property was sold, together with following amounts: If redemption within first six months after sale, amount of penalty bid at sale; if within second six months, double amount of penalty; if within third six months, treble amount of penalty; if within fourth six months, four times amount of penalty; if between 24 and 30 months, five times amount of penalty; and if between 30 and 36 months, six times amount of penalty. Person redeeming must also pay amount of all taxes and special assessments accruing after such sale, and paid by purchaser or his assignee, with 12% penalty thereon for each year or portion thereof between time of payment and redemption. Additional amounts including redemption of forfeitures occurring after tax sale with 12% penalty for each year between date of forfeiture redemption and redemption from sale; and certain fees paid by certificate holder, to county clerk, registrar of titles, circuit clerk, sheriff, owner, city, village or town and for publication of notice of tax sale and receivership. Period of redemption may be extended by purchaser or his assignee and redemption may be made during extended period by payment of amount for which property was sold, 6% interest, penalties, taxes, special assessments and miscellaneous fees and costs. For scavenger sales after Jan. 1, 1980, excepting owner-occupied condominium units, cooperative units or dwellings, single family residential units, amount required to be paid for redemption must also include amount equal to all delinquent taxes on property at time of sale. (35 ILCS 200/21-145, 200/21-350, 200/21-385, 200/22-10). Purchaser or assignee is not entitled to tax deed to property sold unless he delivers, within four months and 15 days after sale, notice of sale and date that redemption period expires to County Clerk. Clerk is required to mail notice to party last shown on Collector's warrant books as taxpayer for property. (35 ILCS 200/22-5). Further, purchaser or assignee must give notice of sale and date of expiration of redemption period to owners and other interested parties, through Sheriff, not less than three nor more than six months prior to expiration of redemption period. Any notice by publication where allowed under Act must be given three times any time after filing petition for tax deed, but not less than three months nor more than six months prior to expiration of redemption period. (35 ILCS 200/22-10).

Redemption after scavenger sale under same time conditions as judgment sale except time period is six months from date of sale for commercial, industrial, vacant nonfarm real estate, or real estate improved with structure containing seven or more residential units, and in lieu of penalty, person redeeming pays interest as follows: 3% per month on amount for which property sold if redeemed within two months of sale; if redeemed between two and six months of sale, 12% of amount for which property sold; if between six and 12 months, 24%; if between 12 and 18 months, 36%; if between 18 and 24 months, 48%; if after 24 months, 48% for 24 months and 6% per annum thereafter. (35 ILCS 200/21-260, 200/21-345).

Effect of Forfeiture.

In counties of 3,000,000 persons or less, when land has been forfeited for nonpayment of taxes in any year, there is added to tax thereafter assessed upon it all back taxes, costs, penalty and 12% per year interest on previous forfeitures, and the total is collected in the usual way. In counties of more than 3,000,000 persons, same procedure is followed except that previous forfeitures are not added, but remain a lien on the land and bear same interest as if forfeited annually. In counties of more than 3,000,000 county clerk in 1995 through 2000 makes examination of collector's warrant books and Tax Judgment, Sale, Redemption and Forfeiture record for tax years previous to 1993 and note all taxes due or forfeited that have not been subject to Uncollectable Tax Act (35 ILCS 200/20–180 — 200/20–190) and clerk enters such taxes upon collector's books of following year in same manner as taxes remaining due or forfeited for 1993. After Jan. 1, 2000, any taxes remaining due or forfeited against real property in such county not entered in warrant books for 1994 through 1999 are deemed uncollectable and void and not subject to posting or other requirement of Uncollectable Tax Act. (35 ILCS 200/18-250).

Reimbursement.

Beginning July 1, 1992, taxing districts determining surplus funds from any source must disburse surplus proportionally among owners of taxable homestead property based on most recent ad valorem property tax bill on homestead property. (35 ILCS 200/30-20, 200/30-25).

Real Estate Conveyance Tax.

See topic 22.18 Stamp and Seal Taxes, subhead Stamp Tax, and category 21 Property, topic 21.16 Real Property, subheads State Stamp Tax, County Stamp Tax, and Local Stamp Tax.

22.17 SALES AND USE TAXES:

Sales Tax.

Note: "Sales Tax" means the tax levied under the Service Occupation Tax Act (35 ILCS 115/1 et seq.) and the Retailers' Occupation Tax Act (35 ILCS 120/1 et seq.). "Sales tax" also means any local sales tax levied under the Home Rule Municipal Retailers' Occupation Tax Act (65 ILCS 5/8-11-1), the Non-Home Rule Municipal Retailers' Occupation Tax Act (65 ILCS 5/8-11-1.3), the Non-Home Rule Municipal Service Occupation Tax Act (65 ILCS 5/8-11-1.4), the Home Rule Municipal Service Occupation Tax, the Home Rule County Retailers' Occupation Tax Law (55 ILCS 5/5-1006), the Special County Occupation Tax for Public Safety Law (55 ILCS 5/5-1006.5), the Home Rule County Service Occupation Tax Law (55 ILCS 5/5-1007), subsection (b) of the Rock Island County Use and Occupation Tax Law (55 ILCS 5/5-1008.5), the Metro East Mass Transit District Retailers' Occupation Tax, the Metro East Mass Transit District Service Occupation Tax, the Regional Transportation Authority Retailers' Occupation Tax, the Regional

Transportation Authority Service Occupation Tax, the County Water Commission Retailers' Occupation Tax, or the County Water Commission Service Occupation Tax. (35 ILCS 171/2[e]).

Sales tax is imposed on persons engaged in business of selling tangible personal property at retail in Illinois at rate of 6.25% of gross receipts from sales in Illinois. (35 ILCS 120/2-10). Sales of food which is to be consumed off premises where sold (excluding alcoholic beverages, soft drinks and food prepared for immediate consumption) and sales of prescription and nonprescription medicines, drugs and certain medical related materials are taxed at rate of 1%. However Regional Transportation Authority is authorized to impose 1.25% sales tax on sales of food, drugs, medical supplies, and insulin, and 1% on other items in Cook County, and 3/4% in five surrounding counties. (70 ILCS 3615/4.03[e]). Exemptions include among others: Sales for resale; newspapers and magazines; newsprint and ink used in newspapers and magazines; meals served under Federal Nutrition Program for the Elderly; occasional sales; sales through bulk vending machines; pollution control facilities; low sulfur dioxide emission coal fuel devices, including coal gasification equipment; coal exploration, mining, off-highway hauling, processing, maintenance and reclamation equipment costing $250 or more, including replacement parts and equipment costing $250 or more purchased for lease, and excluding motor vehicles required to be registered pursuant to Illinois Vehicle Code; graphic arts machinery and equipment; certain motor vehicles to be used in automobile renting; farm machinery and equipment; farm chemicals; personal property sold by teacher-sponsored student organization affiliated with Illinois elementary or secondary school; sales to federal, state and local governments; sales to Illinois county fair associations for use in operating or promoting county fair; sales to charitable religious or educational institutions; sales in interstate commerce; tangible personal property used by interstate carriers for hire for use as rolling stock in interstate commerce; machinery and equipment used in manufacturing or assembling, and machinery and equipment used in general maintenance or repair of exempt machinery and equipment; photo processing machinery and equipment and repair and replacement parts; transactions with out-of-state florists; proceeds from sale of motor vehicles subject to Replacement Vehicle Tax; fuel for certain river vessels; motor vehicles sold to nonresidents for out-of-state use; sales to nonprofit organizations operated exclusively for persons 55 years of age or older; sales of oil field exploration drilling and production equipment costing $250 or more, including replacement parts costing in excess of $250 and equipment purchased for lease and excluding motor vehicles required to be registered pursuant to Illinois Vehicle Code; “qualified” sales of building materials to be incorporated into real estate in enterprise zone established by county or municipality under Illinois Enterprise Zone Act, so long as sales meet certain conditions; subject to county or municipal limitation after Feb. 18, 1992 (35 ILCS 120/5k); sales of property used or consumed in manufacturing or assembling of property for wholesale or retail conducted within enterprise zone; purchase of machinery and equipment by aircraft maintenance facility in enterprise zone provided certain conditions are met; semen used for artificial insemination of livestock for direct agricultural production; horses, or interests in horses meeting requirements of certain registries as appropriate to be used for purposes of breeding or racing for prizes. Sales of building materials to high impact business may qualify for credit or refund of state, municipal and county retailers' occupation tax; effective July 1, 1987, charities, religious or educational institutions must provide exemption identification number to make tax-free purchases (35 ILCS 120/2-5). Taxes imposed on sale of gasohol applies to 70% of proceeds of sales made between Jan. 1, 1990 and July 1, 2003 and to 100% of proceeds of sale thereafter. Returns and payment of tax liability for each month required on or before last day of following month, but Department may authorize quarterly or annual returns where average monthly tax liability does not exceed $200 or $50 respectively, or taxpayer can prove to satisfaction of Department that substantial change has occurred. Department may request annual information return for specific tax years to be filed within 60 days after receipt of notice. (35 ILCS 120/3). Transient merchants and certain retail concessionaires (county fairs, art shows, etc.) may be required to make daily reports and payments. (35 ILCS 120/3). Retailers granted credit against remittance of tax of 2.1% of tax liability or $5 per calendar year (whichever is greater) to cover remittance and recordkeeping expenses incident to tax collection. (35 ILCS 120/3). Beginning Oct. 1, 2002 and thereafter taxpayer, who has average monthly tax liability of $200,000 must make all payments by electronic funds transfer. (20 ILCS 2505/2505-210[b]). Obligation on taxpayer required by §2d to collect and remit prepaid taxes and has collected prepaid taxes in excess of $20,000 per month during preceding calendar quarters has special filing and payment requirements after Oct. 1, 2001. Any taxpayer may make electronic funds transfer. (35 ILCS 120/3). Penalty on tax due will be added. (35 ILCS 735/3-3). Responsible corporate officer or employee personally liable for tax, interest and penalties if corporation unable to pay same. (35 ILCS 735/3-7[a]). Counties, cities and villages have power to impose additional sales tax of 1% in 1/4% increments without referendum. (65 ILCS 5/8-11-1). Effective Jan. 1, 1986, by order or resolution, counties of less than 3,000,000 inhabitants have power to impose supplementary retailers' occupation tax of ¼%. Municipalities may impose the tax by ordinance or resolution without referendum. (65 ILCS 5/8-11-1, 65 ILCS 5/8-11-1.1, 65 ILCS 5/8-11-1.2). City of Chicago imposes additional 1¼% sales tax under home rule powers (Municipal Code of Chicago, 3-28-030), on basis similar to state sales tax. Regional Transportation Authority imposes additional sales tax of 1.25% on food and medicine, and 1% on other items in Cook County, and 3/4% in five surrounding counties (DuPage, Kane, Lake, McHenry and Will). (70 ILCS 3615/4.03[e]). RTA tax determined constitutionally valid. (81 Ill.2d 221, 407 N.E.2d 28). Metro East Mass Transit Districts may impose additional sales tax of ¼% within such districts without a referendum; larger tax requires referendum; form provided in statute. (70 ILCS 3610/5.1[b]). Retailers may pass on to consumers municipal, county, Metro East Mass Transit Districts and regional transportation authority retailer's occupation taxes. (70 ILCS 3615/4.03[e]; 70 ILCS 3610/5.1[b]; 65 ILCS 5/8-11-1; 57 Ill.2d 272, 312 N.E.2d 271). Transferee of assets outside usual course of transferor's business must file disclosure report with Illinois Department of Revenue within ten business days of transfer. Transferee may be personally liable for transferor's unpaid taxes up to reasonable value of property transferred if transferee fails to file disclosure report. (35 ILCS 120/5j).

Use Tax.

"Use tax" means the tax levied under the Use Tax Act (35 ILCS 105/1 et seq.) and the Service Use Tax Act (35 ILCS 110/1 et seq.). "Use tax" also means any local use tax levied under the Home Rule Municipal Use Tax Act (65 ILCS 5/8-11-6), provided that the State and the municipality have entered into an agreement that provides for administration of the tax by the State. (35 ILCS 171/2[h]). Tax complements sales tax and is imposed at same rates. (35 ILCS 105/3). Use Tax is computed on selling price (or lower of fair market value or selling price for by-products or waste products used in Illinois and refined, manufactured and produced from property purchased at retail). (35 ILCS 105/3–10). Cities and villages may impose additional use tax of 1% of selling price of tangible personal property purchased from out-of-state retailer which is titled or registered with Illinois. (65 ILCS 5/8-11-6). City of Chicago imposes additional 1¼% use tax under home rule powers (Municipal Code of Chicago, 3-28-030), on basis similar to state use tax. Regional Transportation Authority imposes additional use tax of 1% in Cook County and 3/4% in five counties (DuPage, Kane, Lake, McHenry and Will) of selling price of tangible personal property purchased from out-of-county retailer which is titled or registered with Illinois. (70 ILCS 3615/4.03[g]). Certain vehicles or trailers not otherwise subject to use tax are subject to motor vehicle tax equal to 5% of selling price, or fair market value, for vehicles acquired by gift, transfer, or purchase for use in Illinois prior to Jan. 1, 1988; thereafter tax varies depending on whether selling price is less than $15,000 and model year of vehicle. Statute includes table of tax owed. (625 ILCS 5/3-1001).

Service Occupation Tax.

See Note under subhead Sales Tax, supra. Tax is imposed on businesses making sales of service (”servicemen”) at rate of 6.25% on cost of all tangible personal property transferred as incident to sale of service and is collected by supplier. (35 ILCS 115/3-10). This includes prepaid telephone calling arrangements. (35 ILCS 115/3, 35 ILCS 115/3-27). Sales of food which is to be consumed off premises where sold (excluding alcoholic beverages, soft drinks and food prepared for immediate consumption) and sales of prescription and nonprescription medicines, drugs and medical related materials to certain residents of long-term care facilities are exempt. (35 ILCS

115/3-5[13], 35 ILCS 115/3-5.5). However, units of local government, Regional Transportation Authority, and any Metro East Mass Transit District are authorized to impose 1% service occupation tax on sales of food, drugs, medical supplies, and insulin. (35 ILCS 171/2[e]). Returns and payment of tax liability for each month required on or before last day of following month but Department may authorize quarterly or annual returns where average monthly tax liability does not exceed $100 or $20 respectively. Supplier granted credit against remittance of tax of 1.75% of tax liability or $5 per calendar year (whichever is greater) to cover remittance and recordkeeping expenses incident to tax collection. Beginning Oct. 1, 2002 and thereafter taxpayer, who has average monthly tax liability of $200,000 must make all payments by electronic funds transfer. (20 ILCS 2505/2505-210[b]). Department adopts rules to effectuate program of electronic funds transfer. (35 ILCS 115/9). Counties, cities and villages have power to impose additional service occupation tax of 1% without referendum. (65 ILCS 5/8-11-5). The tax may be imposed or discontinued by ordinance or resolution without referendum. (65 ILCS 5/8-11-5; 65 ILCS 5/8-11-1.1; 65 ILCS 5/8-11-1.2). Regional Transportation Authority imposes additional service occupation tax of 1.25% on food and medicine, and 1% on other items in Cook County, and 3/4% in five counties (DuPage, Kane, Lake, McHenry and Will). (70 ILCS 3615/4.03[f]).

Service Use Tax.

See Note under subhead Sales Tax, supra. Tax complements service occupation tax, is imposed at same rates, and is collected from user by serviceman. (35 ILCS 110/1-110/21).

For purposes of use, service occupation and service use taxes, “retailer (supplier, serviceman) maintaining a place of business in this state” (defined to include any representative operating within state and any retailer (supplier, serviceman) engaged in soliciting orders within state from users by means of catalogues or other advertising, whether orders received or accepted within or without state) is required to collect use tax and service use and occupation taxes. (35 ILCS 105/2; 35 ILCS 115/2; 35 ILCS 110/2). Requirement that sellers who solicit orders only by means of catalogues or other advertising must collect use tax was declared unconstitutional. (386 U.S. 753). See category 5 Civil Actions and Procedure, topic 5.20 Process.

If property acquired and used outside Illinois before brought to Illinois, selling price reduced by reasonable allowance for depreciation. (35 ILCS 110/3–10).

For purposes of use, service occupation and service use taxes, “tangible personal property” includes computer software and beginning 1/1/01 includes prepaid telephone calling arrangements. (35 ILCS 110/3, 35 ILCS 110/3-27).

Automobile renting occupation and use tax is imposed at rate of 5% on gross receipts of businesses engaged in rental of automobiles for period of one year or less, and 5% on the rental price paid by the customer (35 ILCS 155/2-155/4). Additional tax of 1% each may be imposed by municipalities (65 ILCS 5/8-11-7), Metro East Transit Districts (70 ILCS 3610/5.02) and Regional Transportation Authority (1% in Cook county, 1/4% in 5 surrounding counties). (70 ILCS 3615/4.03.1). Additional municipal tax of $2.75 per rental may be imposed by municipalities. (65 ILCS 5/8-11-11).

Replacement Vehicle Tax of $200 is imposed on any motor vehicle purchased by or on behalf of insurance company to replace vehicle of insured person in settlement of total loss claim until July 1, 2003. (625 ILCS 5/3-2001). Tax is paid by purchaser insurance company or broker. (625 ILCS 5/3-2002). Motor vehicles subject to Motor Vehicle Replacement Tax are exempt from Use Tax (35 ILCS 105/3) and Sales Tax (35 ILCS 120/2). Counties, cities and villages have authority to impose additional replacement vehicle tax of $50. (65 ILCS 5/8-11-9, 55 ILCS 5/5-1035). Regional Transportation Authority may impose additional replacement vehicle tax of $50. (70 ILCS 3615/4.03[h]).

Leasing occupation tax repealed.

Leasing use tax repealed.

22.18 STAMP AND SEAL TAXES:

Stamp Tax.

No requirement of documentary stamps on corporate stock or other instruments exists, except on privilege of transferring title to real estate at rate of 50¢ for each $500 of value or fraction thereof. (35 ILCS 200/31-10). See category 21 Property, topic 21.16 Real Property.

22.19 [RESERVED]

22.20 UTILITIES TAX:

Public Utilities Revenue Act.

Tax imposed on every taxpayer (other than an electric cooperative, a school district or unit of local government) at rates varying from 0.031 cents per kilowatt hour first 500,000,000 kilowatt-hours, to 0.131 cents for kilowatt-hours in excess of 18,000,000,000. Additional tax is imposed at rate of 0.8% on amount of “invested capital” of electric cooperatives that are required to file reports with the Rural Utilities Service. Exemption for persons not regulated by Illinois Commerce Commission and electric cooperatives not subject to Rural Electrification Administration filing requirements. (35 ILCS 620/2a.1). Annual returns are due by 15th day of third month following close of taxable year. Estimated quarterly tax payments are due on first day of third, sixth and ninth months of each taxable period. (35 ILCS 620/1 to 620/14a).

Water Companies Tax Act.

In addition to income taxes, tax of 0.8% is imposed on “invested capital” of water companies allocable or apportionable to Illinois. Annual returns and payments are due by 15th day of third month following close of taxable year. Estimated quarterly payments are due on 15th day of third, sixth, ninth and 12th months of each taxable period. (35 ILCS 625/1 to 625/15). Application of every exemption, credit and deduction against this tax is limited by any reasonable and appropriate sunset date specified in public act creating exemption credit or deduction and if none specified, then taxpayer is not entitled to exemption, credit or deduction beginning five years after effective date of public act creating it. (35 ILCS 625/4.5).

23 TRANSPORTATION

23.01 MOTOR VEHICLES:

Illinois Vehicle Code adopted in 1969 became effective July 1, 1970. (625 ILCS 5/1-101 to 5/20-402).

Secretary of State is responsible for administration of Illinois Vehicle Title and Registration Law (625 ILCS 5/2-101 to 5/5-802), Illinois Drivers Licensing Law (625 ILCS 5/6-101 to 5/6-708), Illinois Safety Responsibility Law (625 ILCS 5/7-101 to 5/7-708), Registration of Motor Vehicles Used for Transportation of Passengers Law (625 ILCS 5/8-101 to 5/8-116), and Regulation of Owners of For Rent Vehicles For-Hire Law (625 ILCS 5/9-101 to 5/9-110). (64 Ill. App. 3d 14, 380 N.E.2d 999). Correspondence may be addressed to Secretary of State, Statehouse, Springfield, IL 62756. (http://www.cyberdriveillinois.com/home.html). Department of Natural Resources is responsible for administration of Boat Registration and Safety Act. (625 ILCS 45/3-13 to 45/10-2) and Snowmobile Registration and Safety Act (625 ILCS 40/1-1 to 40/11-

1). (http://dnr.state.il.us/admin/boats.htm). The Department of Transportation is responsible for administration of Hazardous Materials Transportation Act (430 ILCS 30/1 to 30/16).

Other aspects of motor vehicle regulation, including motor common carriers, are under jurisdiction of Illinois Commerce Commission, 527 East Capitol Avenue, Springfield, IL 62706. (http://www.icc.illinois.gov/).

Vehicle License.

Registration plates have indefinite term of at least one year, providing that current annual registration stickers are attached to rear registration plates. Registration stickers designate year number for which they are issued and such other letters or numbers as Secretary of State may prescribe and are of contrasting color with registration plates and previous year's registration sticker. Illinois has adopted system of staggered registration. (625 ILCS 5/3-414 to 5/3-832). It is unlawful to drive unregistered motor vehicle or vehicle without evidence of registration or drive-away permit under 625 ILCS 5/3-603 displayed. (625 ILCS 5/3-401[a], 5/3-701). New residents need not secure registration until 30 days after establishing residency provided vehicle is properly registered in another jurisdiction. (625 ILCS 5/3-801). Effective Oct. 1, 1984 no vehicle required to pay Federal Highway Users Tax will be registered without proof of payment. (625 ILCS 5/3-401[c]). Registration plates for motorcycle, trailer, semitrailer, apportioned bus must be securely fastened to rear of vehicle. Registration for truck-tractor or apportioned truck must be fastened to rear of vehicle. Registration for truck-tractor or apportioned truck must be fastened to the front. All other motor vehicles must have plates securely fastened to front and rear in position to be clearly visible and in condition to be clearly legible or drive-away permit affixed as required by secretary. (625 ILCS 5/3-413). Loss of registration plate(s) requires $26 replacement fee or $29 for pair of plates on or after Jan. 1, 2005. Substitute sticker for loss of registration sticker is furnished by Secretary of State for fee of $20 for stickers issued after Mar. 1, 2005. (625 ILCS 5/3-820). Registration of motor vehicle expires upon transfer. (625 ILCS 5/3-501). Registration is subject to suspension or revocation by Secretary of State. (625 ILCS 5/3-704). Applicant for motor vehicle registration must affirm that vehicle is insured as required by Motor Vehicle Code. (625 ILCS 5/3-405[a]). No person can operate motor vehicle unless it is covered by insurance policy in accordance with §7-601 of Motor Vehicle Code, regardless of state or jurisdiction in which licensed or registered. Operation of an uninsured vehicle is a Class A misdemeanor. (625 ILCS 5/3-707). All motorboats must now be equipped with muffler or underwater exhaust system. (625 ILCS 45/4-3).

Secretary of State will make title or registration search of records of his office and a written report on same for any person upon application accompanied by fee of $5 for each registration or title search. Secretary may furnish to any applicant vehicle or driver data on computer tape, disk or computer processable medium for $500 per 1,000 units. (625 ILCS 5/2-123).

Operator's license is required (625 ILCS 5/6-101) except for (1) Employees of U.S. Government or members of Armed Forces when operating on official business a vehicle owned or leased by U.S. Government; (2) persons operating road machines temporarily on a highway or farm machines or tractors in farming operations; (3) residents of Illinois for period of 45 days following return to continental limits of U.S. after service as member of Armed Forces outside said continental limits; (4) nonresidents who hold valid licenses in their home state, generally, for 90 days, or for duration of attendance at Illinois college or university or active military duty; (5) new residents who hold valid licenses from their original home state, for 90 days. (625 ILCS 5/6-102). License is not issued to person under 18 except for instruction purposes, or unless applicant is at least 15 and has passed an approved driver's education course. Graduated Licensing Program for applicants under 18 years of age with special rules. (625 ILCS 5/6-103, 5/6-107). Licenses issued to persons under 21 to be distinct from those issued to persons over 21. (625 ILCS 5/6-110[e] and [e-1]). Licenses are subject to cancellation, revocation or suspension by Secretary of State (625 ILCS 5/6-201, 5/6-202), including summary suspension for refusal to submit to chemical, blood, breath or urine tests for presence of alcohol concentration of 0.08% or more or drugs (625 ILCS 5/11-501.1). Secretary of State must examine every licensed driver at least every eight years. (625 ILCS 5/6-109). Driver's license compact requiring interstate reporting of motor vehicle violations has been adopted. (625 ILCS 5/6-700 to 5/6-708). Revocation of operator's license, permit or driving privileges mandatory in certain cases. (625 ILCS 5/6-205). License contains space for operator's picture and approved stickers concerning Illinois Anatomical Gift Act, existence of a living will or durable power of attorney for health care, and operator's blood type and Rh factor. Anyone rendering emergency aid and relying in good faith upon such stickers is free from civil liability. (625 ILCS 5/6-110[d], [g], [h]). See infra, subhead Nonresident Operators.

Restricted driving permit available for drivers whose privileges have been suspended, revoked, or cancelled. Restricted permit is immediately invalidated upon issuance of citation for certain offenses. (625 ILCS 5/6-113[e]).

Short term permit may be issued to operate nonregistered first or second division vehicle for not more than 48 hours.

Secretary of State will make a record of: current driver's license issuance information, including convictions and orders revoking, suspending or cancelling a driver's license or privilege, for any person upon application accompanied by fee of $12 for each registration or title search. (625 ILCS 5/2-123).

Motorized pedalcycle, which produces no more than two brake horsepower and is capable of propelling vehicle at maximum speed of no more than 30 m.p.h., and which, if driven by internal combustion engine, has displacement of no more than 50 cubic centimeters and requires no gear shifting authorized. Any person may operate motorized pedalcycles, if such person has valid, current Illinois drivers' license, regardless of classification. (625 ILCS 5/1-148.2).

Low-speed vehicle, any 4–wheeled vehicle with a maximum speed greater than 20 miles per hour but not greater than 25 miles per hour. (625 ILCS 5/1–140.7).

Low-speed electric bicycles and **low-speed gas bicycles** are also included in the purview of the Vehicle Code. (625 ILCS 5/1–140.10, 625 ILCS 5/1–140.15, 625 ILCS 5/11–1516).

Driver's Training School.

Commercial driver training schools and teachers must register with, and be licensed by, Secretary of State. (625 ILCS 5/6-401, 5/6-411).

Auto Towing.

Commercial vehicle relocators in counties over 1,000,000 population, and in any other county by county request, must register with, be licensed by, and file indemnity bond, insurance bond, or certificates or bonds of insurance with Illinois Commerce Commission. Methods of regulation, amount of fees, and collection of fees regulated by statute. (625 ILCS 5/18a-100 to 5/18a-700).

Special Restrictions for Vehicle Operators.

No person under age of 21 years or who has had less than one year of driving experience can drive school, day camp, summer camp or nursery school vehicle for transportation of children or any motor vehicle of second division when used for transportation of persons for compensation; no person under age of 18 years can be licensed to transport property for hire or for purpose of transporting persons for compensation in motor vehicle of first division; school bus drivers must have school bus driver permit issued by Illinois Office of Education;

religious organization bus drivers must have school bus driver permit or specially classified license. (625 ILCS 5/6-104 to 5/6-521). Any individual or business entity that contracts with school district to transport students and whose drivers have not met requirements to drive bus is guilty of business offense and will be fined. (625 ILCS 5/6-106.11). Driver of school bus involved in accident is deemed as matter of law to have given consent to submit to test of driver's breath, blood or urine for purpose of determining presence of alcohol, or other drugs in person's system. (625 ILCS 5/6-516). Any school bus driver who is found guilty of transporting children while under influence of drugs or alcohol is guilty of Class A misdemeanor for first conviction with more serious classification and penalties for subsequent convictions and under certain circumstances. (625 ILCS 5/11-501). Minimum driving requirements for persons driving vehicle for transportation of elderly in connection with organization activities. (625 ILCS 5/6-106.3). A person may not operate a motor vehicle on a roadway while using an electronic communication device to compose, send or read an electronic message. (625 ILCS 5/12–610.2)

Certificate of title is issued by Secretary of State on registration or renewal of registration by owner of motor vehicle and must be obtained before any person may operate motor vehicle. (625 ILCS 5/3-103). Certificate must include odometer certification. Certificate of title unnecessary for husbandry vehicles. (625 ILCS 5/3-102). Proof of payment of use tax or of nonliability therefor condition precedent to issuance of certificate of title. (625 ILCS 5/3-104) Expedited process for issuance of certificate of title (625 ILCS 5/3–104). Scrapping, junking or destroying vehicle permissible only upon application to Secretary of State for appropriate certificate and surrender of certificate of title; additional provision applicable to insurance companies. (625 ILCS 5/3-117.1). When certificate of title is made out to two or more persons, it is presumed that title is held as joint tenants with right of survivorship. (625 ILCS 5/3-107.1). Effective Jan. 1, 2009, title will have space for owner to designate beneficiary to whom vehicle ownership will pass upon owner's death. (625 ILCS 5/3-104[a-5], 625 ILCS 5/3-107[b-5]). Effective Jan. 1, 2010, application must designate if vehicle is to be titled as a custom vehicle or street rod. (625 ILCS 5/3-107).

Liens and encumbrances are required to be shown on certificate of title in order of priority and dates of security agreements. (625 ILCS 5/3-107).

Sales.

Except as between parties to sale, no sale of motor vehicle is effective without owner's having obtained certificate of title and without an endorsement and assignment of certificate of title, showing all interests, liens, or incumbrances thereon, and delivering same to purchaser with warranty of title in seller. Transferee must thereupon apply for new certificate of title, surrendering endorsed and assigned certificate. (625 ILCS 5/3–112). Vendor must remove license plates when sale is made. (625 ILCS 5/3-501). Retail installment sales of motor vehicles are regulated by 815 ILCS 375/1 to 375/8. Sunday closing Law for motor vehicle establishments declared constitutional. (102 Ill. 2d 1, 464 N.E.2d 275).

Consumer Protection.

See category 3 Business Regulation and Commerce, topic 3.12 Consumer Protection, subhead New Car Buyer Protection Act.

Identification Marks.

Altering engine number or other distinguishing mark or giving wrong description in application for registration is Class 4 felony. (625 ILCS 5/4-103, 5/4-105, 5/4-108[b]). If vehicle uses liquified petroleum or compressed natural gas, marking in accordance with National Fire Protection Association (NFPA) standards for storage and handling of Liquified Petroleum Gases and Compressed Natural Gas Vehicular Fuel System and published as NFPA 58 and NFPA 52 dated 2/10/92 and 8/14/92 is required. (625 ILCS 5/12-704.3).

Operation Prohibited.

The following persons may not be issued operator's licenses: Persons who use alcohol or any other drug to degree which renders such person incapable of safely driving motor vehicle; persons convicted within 12 months of license application of sex offenses enumerated in 625 ILCS 5/6-205; persons adjudged afflicted with physical or mental disease; persons who are required to take an examination including drug and alcohol evaluation or to prove financial responsibility but have not done so; persons under age 18 with exceptions; persons adjudicated by Juvenile Court based on offense determined to be in furtherance of organized gang activity; persons whose driver's licenses have been suspended or revoked; persons required to deposit security or proof of financial responsibility and has not done so; persons 69 years or older unless complied with 625 ILCS 5/6-109; persons under 18 years who committed offense of operating motor vehicle without valid license; persons 90 days or more delinquent in court ordered child support payments; persons released from prison term for violating §9-3 of Criminal Code of 1961 or similar provision of law of another state relating to reckless homicide within 24 months of release from prison or for violation of §11-501(1)(d)(F) of code for aggravated driving under influence of alcohol, drugs or intoxicating compound if violation was proximate cause of death or to any person for whom Secretary of State cannot verify accuracy of information or documentation submitted in application or to any person who with intent to influence any act related to issuance of license promises or tenders any property or personal advantage to person not authorized by law to accept. (625 ILCS 5/6-103).

Vehicle Classification.

Vehicles designed and used for carrying not more than ten persons are vehicles of first division. Vehicles designed and used for pulling or carrying freight or for carrying of more than ten persons, or for living quarters, are vehicles of second division. (625 ILCS 5/1-146). Motorized wheelchairs and low-speed electric or gas-powered bicycles are not deemed motor vehicles. (625 ILCS 5/1-146).

Motorboat Operators.

No person less than ten years of age may operate motorboat. Persons at least ten years of age, but less than 12 years of age, may operate motorboat, if accompanied and controlled by parent or guardian or designee of parent or guardian at least 18 years of age. Persons at least 12 years of age but less than 18 years of age may operate motorboat only if accompanied and controlled by parent or guardian or person at least 18 years of age designated by parent or guardian, or if such motorboat operator possesses Boating Safety Certificate issued by Department of Natural Resources authorizing holder to operate motorboats. (625 ILCS 45/5-18). Each boat must carry one flotation device per person as well as one emergency flotation device of approved type. (625 ILCS 45/4-1).

Snowmobile Operators.

Persons less than ten years of age may not operate snowmobiles. Snowmobiles may be operated on public highway, where permitted, only with valid driver's license or snowmobile safety instruction certificate. Persons ten years but less than 12 years of age may operate snowmobile if accompanied and controlled by parent or guardian or designee of parent or guardian at least 18 years of age. Persons 12 years but less than 16 years of age may operate snowmobile only if accompanied and controlled by parent or guardian or designee of parent or guardian at least 16 years of age, or such operator possesses operation certificate issued by Department of Conservation. (625 ILCS 40/5-3). Snowmobiles must be registered and display registration number. (625 ILCS 40/3-1). Registration valid for three years, expires Sept. 30 of second year following registration. (625 ILCS 40/3-8). Snowmobiles must have one white headlamp, one red taillamp, reflective side markings, brakes and adequate sound suppression. (625 ILCS 40/4-1).

Annual Fees.

Registration fee for vehicles of first division is $98, except for motorcycles, motor driven cycles and pedacycles, which is $38. (625 ILCS 5/3-806). Fee for vehicle owner who has been approved for benefits under the Senior Citizens and Disabled Persons Property Tax Relief and Pharmaceutical Assistance Act (320 ILCS 25/1 et seq.) or who is the spouse of such a person is $ 24. Exceptions to this general fee are made for particular vehicles, e.g., electric or antique vehicles. (625 ILCS 5/3-804, 5/3-805). Municipality where owner resides may charge license fee. (625 ILCS 5/2-121).

Owners of most vehicles of second division must pay registration fee of $10 for each such vehicle. (625 ILCS 5/3-813). Fees other than this general fee are specified for particular vehicles, e.g., not-for-profit organization vehicles, busses, farm machinery, etc. (625 ILCS 5/3-807 to 5/3-809). Also such owners are required to pay either flat-weight tax or mileage-weight tax, depending upon written election made at time of application for or renewal of registration, which election is binding until end of calendar year and applies only to particular vehicle for which made. Failure to file election subjects owner to payment of flat-weight tax.

Flat-weight tax (which includes $10 registration fee) is graduated in amount by brackets according to gross weight, including weight of vehicle and maximum load; it varies from $98 on vehicles having gross weight of 8,000 lbs. or less to $2,790 on vehicles having gross weight of between 77,001 and 80,000 lbs. (625 ILCS 5/3-815). Two-axle vehicles used as busses in public system for transporting more than ten passengers entirely within territorial limits of single or contiguous municipalities and whose rates for transportation are subject to regulation of Illinois Commerce Commission, must pay registration fee of $13 per two-year registration period, but are exempt from either flat-weight tax or mileage-weight tax. (625 ILCS 5/3-807).

Owners electing mileage-weight tax must pay minimum guaranteed mileage-weight tax, which permits operation for a specified number of miles in Illinois. An additional tax must be paid at rates depending upon gross weight of vehicle for each mile traveled in Illinois in excess of maximum mileage provided under minimum guaranteed basis. Daily record of mileage and monthly returns thereof, including payment of appropriate tax for excess mileage, is required; and failure so to act prohibits further operation without first paying applicable flat-weight tax. Owner electing to pay a mileage weight tax must file a bond in the amount of $500, conditioned upon his paying all moneys due by reason of his operation of second-division vehicles in Illinois. (625 ILCS 5/3-818).

Aforesaid annual fees do not apply to nonresident owner, if (1) he has complied with registration laws in force at his place of residence and (2) like exemptions and privileges are granted to motor vehicles owned by residents of Illinois when operated at place of his residence. Nonresidents operating places of business in Illinois and using motor vehicles in connection with such business must comply with aforesaid annual fees. (625 ILCS 5/3-402[B]).

Owner of vehicle fleet operating vehicles in Illinois and one or more other states may make proportional registration in Illinois in lieu of registration under general provisions of 625 ILCS 5/3-402, 5/3-815, 5/3-819. Apportionment factor based on ratio of Illinois miles to total fleet miles used to determine portion of fleet license fee payable. (625 ILCS 5/3-402.1).

Size and Weight Limits.

Regulated by 625 ILCS 5/15-101 to 5/15-319.

Equipment.

Regulated by 625 ILCS 5/12-100 to 5/12-714.

Lights Required.

Regulated by 625 ILCS 5/12-101 to 5/12-217.

Inspection.

Second class vehicles and limousines, with numerous exceptions, must submit to state safety test and secure safety certificate before operation on state highways. Department of Transportation is authorized to promulgate inspection rule. (625 ILCS 5/13-101 to 5/13-114). Municipalities with over 40,000 population may require their residents to submit vehicles to inspections not more frequent than semi-annually. (65 ILCS 5/11-40-2). Secretary of State may decline to register vehicle subject to safety inspection unless registration application accompanied by valid certificate of safety. (625 ILCS 5/3-825).

Emissions Inspection.

With certain exceptions, after Jan. 1, 1986, owner of every motor vehicle must display valid unexpired emission inspection sticker. Initial inspection sticker for each vehicle is obtained from Illinois Environmental Protection Agency and specifies date by which owner must have vehicle inspected and obtain renewal emission inspection sticker. Inspection must be done every other year and consists of test of exhaust gas sample to determine if pollutants emitted exceed standards set for vehicles of that type. Exempt vehicles include motorcycles, military vehicles, farm vehicles, antique vehicles, diesel powered vehicles, parade or ceremonial vehicles, vehicles for which junking certificate has been issued, vehicles with model year before 1967, and vehicles used exclusively in amateur or professional sports. (625 ILCS 5/13C-15, 625 ILCS 5/13C-10, 625 ILCS 5/13C-25).

Traffic Regulations.

Illinois traffic regulations are set out in 11 (“Rules of the Road”) of Illinois Vehicle Code. (625 ILCS 5/11-100 to 5/11-1425). Traffic rules provide regulation of traffic signs (625 ILCS 5/11-301 to 5/11-313), driving while intoxicated, transporting alcoholic beverages and reckless driving (625 ILCS 5/11-501 to 5/11-504), speeding (625 ILCS 5/11-601 to 5/11-610), passing (625 ILCS 5/11-701 to 5/11-711), turning and starting (625 ILCS 5/11-801 to 5/11-806), right-of-way (625 ILCS 5/11-901 to 5/11-907), pedestrians (625 ILCS 5/11-1001 to 5/11-1011), street cars and safety zones (625 ILCS 5/11-110 to 5/11-1104), special stops (625 ILCS 5/11-1201 to 5/11-1205), stopping, standing and parking (625 ILCS 5/11-1301 to 5/11-1305), and miscellaneous (625 ILCS 5/11-1401 to 5/11-1425). Court proceedings in traffic offense cases now governed by uniform practice rules (Ill. St. Ct. 501 to 556); parents of minors charged with traffic offenses may be required to appear in court (625 ILCS 5/16-107).

Accidents.

Any driver involved in motor vehicle accident causing injury, death or vehicle damage must stop, give his name, address, identity of vehicle's owner if known, vehicle registration number, and chauffeur's number, if any, to injured persons, driver or occupant(s) of other vehicle, or, if no such persons are capable of receiving and understanding such information, to nearest police officer or police station. If any person is injured, driver must render reasonable assistance or make arrangements for such assistance, including carrying person to medical assistance, if such assistance is requested or is apparently necessary. Failure to comply with foregoing provisions is Class 4 felony. (625 ILCS 5/11-401).

Driver, or passenger if driver is unable, involved in accident resulting in personal injury or death or property damage amounting to more than $1500 ($500 if any of the vehicles involved in the accident is not covered by a liability insurance policy) must give notice of accident to police immediately. (625 ILCS 5/11-406, 5/11-407).Driver must also submit written report to Administrator, Dept. of Transportation within ten days. (625 ILCS 5/11-406). Municipal ordinance may also require driver or owner of vehicle involved in accident to file with designated municipal office written report of accident. (625 ILCS 5/11-415).

Any person failing to stop at scene of an accident in which he is a party must within one-half hour after accident, or, if hospitalized and incapacitated, within 48 hours after being discharged from hospital, report accident at police station or sheriff's office near place where accident occurred. Any person failing to comply reporting requirement is guilty of Class 2 felony if accident does not cause death of any person and Class 1 felony if death of any person results. (625 ILCS 5/11-401).

Driving while under influence of alcohol or drugs, or driving with blood or breath alcohol concentration of 0.08% or more, are prohibited. (625 ILCS 5/11-501). Person is presumed not under influence if alcohol concentration is .05% or less; if between .05% and 0.08%, no presumption arises; if 0.08% or more, person presumed under influence. (625 ILCS 5/11-501.2). Variety of mandatory punishments including fines, community service or imprisonment under circumstances where offense committed while transporting person under age 16 or second conviction within five years or prior conviction of this section or similar provision of law of another state or local ordinance or during period where driving privileges already revoked, suspended or restricted. (625 ILCS 5/11-501[c]). There are also a variety of additional administrative sanctions including evaluations, reimbursement for emergency responders, attendance at a victim impact panel, and fines (625 ILCS 5/11–501.01). Driving under influence of alcohol or drugs: (1) If driving school bus with children on board, (2) if involved in accident causing great bodily harm, (3) by person who committed violation for third or subsequent time or (4) by person who committed violation second time and prior conviction of reckless homicide while under influence of alcohol or drugs is Class 4 felony that carries additional mandatory fines, community service and imprisonment. (625 ILCS 5/11-501[d]). A person convicted for a second offense of driving under the influence will be required to use an ignition interlock device on any vehicle they operate and will pay a monthly fee for the use of the device. (625 ILCS 5/11–501.01).

Any person driving in state impliedly consents to chemical test of breath, blood or urine, following lawful arrest, to determine alcohol or drug content of blood. (625 ILCS 5/11-501.1). Illinois law enforcement officer, who is investigating person for 625 ILCS 5/11-501 offense, may travel to adjoining state to complete investigation and request tests where person has been transported to adjoining state for medical care. Instead of arrest, officer issues Uniform Traffic Ticket notifying person of probable cause for arrest in county where offense was committed (625 ILCS 5/11-501.1[a]). Refusal to submit to such test will result in summary suspension of drivers license for period of six months on first arrest and one year on each subsequent arrest. (625 ILCS 5/6-208.1, 5/11-501.1). Refusal to submit to test is admissible in any civil or criminal action arising out of acts allegedly committed while person was driving while under influence of alcohol or drugs. (625 ILCS 5/11-501.2). Results of chemical tests of blood or urine performed during medical treatment in hospital emergency room are admissible in evidence as business record exception to hearsay rule only in prosecutions for violation of §11-501 or prosecutions for reckless homicide and only if certain testing criteria are met. (625 ILCS 5/11-501.4). If person submits to test which reveals alcohol concentration of 0.08% or more, drivers license will be summarily suspended for three months for first offense and one year for each subsequent offense. (625 ILCS 5/6-208.1). Subsequent to notification of statutory summary suspension, person may apply for a Monitoring Device Driving Permit to relieve undue hardship. (625 ILCS 5/6-206.1).

Department of Law Enforcement or other law enforcement agencies may furnish copy of Illinois State Police Accident Report for fee of $5, or $20 for accident investigated by Accident Reconstruction Officer or Team. (625 ILCS 5/11-416).

Safety Belts.

Drivers and passengers required to use safety belts. (625 ILCS 5/12-603.1).

Child Passengers.

Parents and legal guardians of children under four years are required to provide child restraint system to any person who transports such child. Any person who transports child under four years must secure child in such system if it is provided by parent or guardian. Any person who transports child between four and 16 years must secure such child in either child restraint system or seat belt. Failure to secure child not contributory negligence and not admissible in civil action. (625 ILCS 25/1 to 25/9).

Liability of owner for negligence of another is dependent on relationship of principal and agent or master and servant and has not been extended by statute. But proof of ownership is prima facie proof of agency. (8 Ill.2d 468, 134 N.E.2d 311). Family purpose doctrine has not been adopted. Mere relationship of parent and child does not fix liability on parent even though car is family car, but fact of agency must be present. (342 Ill. 266, 174 N.E. 371).

Liability to Guests.

Nonpaying guest passenger who has solicited ride in violation of 625 ILCS 5/11-1006(a) or his representatives may not recover damages from owner or operator for injury or death caused by any accident unless attributable to willful and wanton misconduct. (625 ILCS 5/10-201).

Proof of Financial Responsibility.

Secretary of State must suspend all registration certificates and license plates issued for vehicle registered in name of owner whose operator's license has been revoked unless such owner immediately gives and thereafter maintains for three years proof of ability to respond in damages for any liability arising out of operation of motor vehicle to extent of $20,000 for injury to or death of one person or $40,000 for injury to or death of two or more persons in same accident, and $15,000 for damage to property. (625 ILCS 5/7-203; 5/7-304). Such proof must be furnished for each vehicle registered by such person and may be given either by policy of liability insurance or deposit of bond or securities. (625 ILCS 5/7-314). Similar proof of financial responsibility is required in order to prevent suspension of operator's license issued to any person failing to satisfy within 30 days final judgment in action arising from operation of vehicle. (625 ILCS 5/7-303).

Administrator, Department of Transportation, as soon as practicable after receipt of report of motor vehicle accident resulting in bodily injury or death to any person or in which damage to property of any one person exceeds $1500 ($500 if any of vehicles is not covered by a liability insurance policy), determines (1) whether provisions of Act require deposit of security and filing of proof of financial responsibility for future by person who was operator or owner of motor vehicle in any manner involved in accident, (2) what amount of security will be sufficient to satisfy any judgment for damages resulting from said accident, and certifies his determination to Secretary of State. (625 ILCS 5/7-201).

Secretary of State is authorized to suspend drivers' licenses and registration unless (1) security is deposited or (2) a liability insurance policy (with company meeting specified requirements) in effect at time of accident is exhibited showing coverage of not less than (a) $20,000 in event of injury to or death of one person, (b) $40,000 in event of death of or injury to two or more persons arising out of accident, and (c) $15,000 in event of property damage only. (625 ILCS 5/7-205, 5/7-201, 5/7-202, 5/7-203).

An owner or operator of a motor vehicle is relieved from foregoing requirements if he files (1) proof of financial responsibility for future and (2) satisfactory evidence of (a) a release from liability, (b) a covenant not to sue or (c) a final adjudication of nonliability. (625 ILCS 5/7-206, 5/7-207).

Secretary of State may also suspend or revoke registration or certificate of title when he determines that owner of a for-hire motor vehicle has failed to give proof of financial responsibility.

See 625 ILCS 5/7-101 to 5/7-329 for detailed provisions relative to security following accident and proof of financial responsibility for future.

Insurance.

All persons who operate motor vehicles and all motor vehicles subject to registration under Motor Vehicle Code must be covered by liability insurance policy or bond in amounts as set forth in §7-203 of Code. (625 ILCS 5/7-601). Every operator of motor vehicle subject to this section must carry proper evidence of insurance within vehicle. (625 ILCS 5/7-602).

No-Fault Auto Insurance.

None. Statute creating same held unconstitutional. (51 Ill.2d 478, 283 N.E.2d 474).

Foreign vehicle registered in home state or country and displaying license plates (including dealer's plates) required by laws of home state may operate without license to extent that such state or country allows reciprocal privileges. (625 ILCS 5/3-402[B]).

Nonresident Operators.

See subhead Operator's License, supra. If nonresident has been convicted of offense which would require revocation of operator's license of resident, such nonresident must give proof of financial responsibility in order to cause registration of or to operate within this state any vehicle owned by him. (625 ILCS 5/7-306).

Actions Against Nonresidents.

Service of process on nonresident or those who were residents of state at time cause of action arose but who subsequently became nonresidents or, if motor vehicle or motorcycle is owned by nonresident and operated on highways, with owner's permission, may be had by serving upon or filing copy of process in office of Secretary of State, paying fee of $5, sending notice and copy of process within ten days by registered mail to defendant at last known address and appending to summons an affidavit of compliance with statute. If such notice and process are not received and judgment is entered against nonresident defendant, he may, within one year of notice of judgment, if notice thereof is given him, or within five years of entry of judgment, if notice thereof is not given, appear and open judgment and proceed to trial. (625 ILCS 5/10-301).

Direct Actions.

See category 16 Insurance, topic 16.01 Insurance Companies.

Soliciting rides from driver of vehicle by standing on roadway prohibited except local government may expressly permit soliciting of charitable contributions from vehicle occupants if certain criteria met. (625 ILCS 5/11-1006).

Motor vehicle carriers of passengers cannot operate any motor vehicle for any purpose without approval of Illinois Commerce Commission. (625 ILCS 5/18c-6103). Operators must file proof of continuous insurance or surety coverage in accordance with regulations, minimum amounts, and maximum deductible limits established by Commission. (625 ILCS 5/18c-4902, 15/18c-6503). Commission may exempt carrier from filing proof of insurance or surety coverage if Commission determines that carrier has financial ability to pay for all damages for which proof of insurance or surety coverage would otherwise be required. (625 ILCS 5/18c-4905). When operating in incorporated cities, towns or villages, operator must file with Secretary of State either: (a) Approved bond of surety company authorized to do business in state; (b) approved personal bond with surety owning Illinois real estate valued at minimum of $250,000 over-encumbrances; (c) approved policy of insurance covering personal and property damage with designated types of insurers; or (d) if person operates more than 25 registered motor vehicles, certificate of self insurance issued by Director of Department of Insurance. (625 ILCS 5/7-502, 5/8-101 to 8-103, 5/8-108). Surety bond or real estate bond must be in sum of $250,000 for each motor vehicle operated, conditioned to pay each final judgment for injury, death or damage to property through negligence of owner or agent in operation of vehicle. (625 ILCS 5/8-103, 5/8-104). Policy of insurance must insure owner for liability for injury, death or property damage to property through negligence of owner or agent in operation of vehicle to sum of $300,000 on each vehicle. (625 ILCS 5/8-109). Bonds and insurance policies expire June 30 or Dec. 31 annually for vehicles registered on fiscal and calendar years respectively, but expiration does not terminate liabilities arising during period for which bond or policy filed. (625 ILCS 5/8-112).

Business of transportation of property for hire by motor vehicles is regulated by statute under administration of Illinois Commerce Commission. (625 ILCS 5/18c-1101). No such service may be furnished by household goods common carrier without first obtaining from Commission certificate of public convenience and necessity (625 ILCS 5/18c-4202), as well as license, for intrastate carriers, or registration, for interstate carriers (625 ILCS 5/18c-4104). Before furnishing service in Illinois, household goods contract carrier must first obtain permit from Commission, which issues after hearing upon finding that applicant is able to perform proposed service and that said service will be in public interest. (625 ILCS 5/18c-4203). Transportation of property between points which are both within ten mile radius of corporate limits of municipality is exempt from statutory provisions respecting tariffs and rate schedules. (625 ILCS 5/18c-4503). Before terminating authorized services, household goods common carrier must obtain Commission approval. (625 ILCS 5/18c-4207). Interstate carrier may not operate over public highways without first obtaining from Commission registration, issuance of which depends upon payment of any registration fee or tax due to state. (625 ILCS 5/18c-4104[1][a], 5/18c-4401 to 5/18c-4402).

Dual operation as household goods common and household goods contract carrier is prohibited, except where authorized by Commission. (625 ILCS 5/18c-4206). Commission to provide for approval of certain agreements between carriers. (625 ILCS 5/18c-4502). Provision is made for temporary authority to operate as common or contract carrier and for amendment, suspension, cancellation, or revocation of authority upon complaint, or upon Commission's own initiative, after notice and hearing, for wilful failure to comply with statute. (625 ILCS 5/18c-2017). Security approved by Commission and executed by surety, indemnity or insurance company authorized to transact business in Illinois is required for both common and contract carriers, in amounts set by Commission. (625 ILCS 5/18c-4901 to 5/18c-4905).

Exemptions from statute include vehicles operated: (1) For U.S. Postal Service, (2) by agricultural co-operative association, (3) for transportation of farm or dairy products or livestock when incident to principal business of farming or livestock raising, or for shipment of such products to or from farm, market, warehouse, dairy or shipping terminal, (4) for transportation of farm machinery, (5) for towing pursuant to legal order or pursuant to towing license issued by Secretary of State, (6) by commercial relocators of trespassing vehicles, (7) by owner for incidental purpose of delivering newspapers, (8) for transportation of nonhazardous waste of no commercial value, and (9) incidentally to person's primary business other than transportation of persons or property for hire. (625 ILCS 5/18c-4102).

Before operating in Illinois, motor carrier must also obtain motor fuel use tax license and decals from Department of Revenue and file bond to secure payment of motor fuel taxes. Identification cards and decals issued by Department must be carried in cab of commercial motor vehicle. (35 ILCS 505/13a4). Beginning with membership of State of Illinois in International Fuel Tax Agreement, decals are placed on both exterior sides of cab. (35 ILCS 505/13a4).

Rented Vehicles.

Renters of motor vehicles required to have insurance policy, bond, or, if person has more than 25 registered motor vehicles, a certificate of self-insurance. (625 ILCS 5/9-101, 5/9-102).

Bond must be in sum of $100,000, executed by surety company qualified to do business in state or by person and surety owning Illinois real estate of value of at least $100,000 in excess of encumbrances, and must be conditioned to pay trial judgment against customer and owner, or against person operating vehicle with customer and owner's express or implied consent, for injury, death or damage to property arising out of operation of vehicle. (625 ILCS 5/9-103). Insurance policy must cover same liabilities as bond, in minimum amount of $50,000. (625 ILCS 5/9-105). Approval of Secretary of State required. (625 ILCS 5/9-108). Sureties may withdraw on appropriate notice, and must be replaced. (625 ILCS 5/9-104). Insurance policies may be cancelled on notice, and expire June 30 or Dec. 31 annually for vehicles registered on fiscal and calendar years, respectively. (625 ILCS 5/9-106). No lessor of motor vehicle will be liable for parking tickets incurred by lessee provided lessor provides name and address of lessee to authorities upon request. (625 ILCS 5/11-1306).

Motor Fuel Tax.

See category 22 Taxation, topic 22.08 Gasoline and Special Fuels Tax.

Traffic and Parking Violations.

Secretary of State can suspend without hearing license of person having warrant outstanding for arrest on ten or more parking violations or two or more traffic violations in any one county. Suspension may not be removed until outstanding warrant satisfied. (See 625 ILCS 5/6-306.5.)

Replacement Vehicle Tax.

Until July 1, 2003 $200 tax imposed on passenger car purchased by or on behalf of insurance company to replace passenger car of insured in settlement of total loss claim. (625 ILCS 5/3-2001). Municipalities and counties may impose replacement vehicle tax of $50 on any passenger car to be collected by Department of Revenue. (65 ILCS 5/8-11-9, 55 ILCS 5/5-1035).

23.02 RAILROADS:

See category 3 Business Regulation and Commerce, topic 3.07 Carriers.

24 Forms

Commercial Code Forms

(Click here to view)

1
INDIANA LAW DIGEST

—Scope —

Revised for 2010 edition by

ICE MILLER LLP, of Indiana.

(Citations unless otherwise indicated are to the Indiana Code. For mode of citation, see topic Statutes. “IC” refers to the Indiana Code. “I.A.C.” refers to Indiana Administrative Code. “PL” refers to a Public Law passed during sessions of the Legislature. “TR” refers to Rules of Trial Procedure. “AP” refers to Rules of

Appellate Procedure. “AD” refers to Admission and Discipline Rules. Parallel citations to the North Eastern Reporter begin with 102 Ind. and 1 Ind. App.)

Effective July 1, 2000, Indiana adopted the Uniform Commercial Code, Article 9, 1999 Official Text (with conforming amendments) with minor local variations as set forth in the Commercial Code section of this Digest. Note: Revision includes legislation signed into law through June 30, 2009. Legislature reorganizes biannually with annual sessions.

1 INTRODUCTION

1.01 GOVERNMENT AND LEGAL SYSTEM:

The State of Indiana is a constituent state of the United States of America. For further discussion of the U.S. federal system, see Introduction to the Federal Government of the United States at the beginning of this volume. A great many laws are promulgated by the federal government of the United States and are not reflected in the topics below. See the Introduction to this volume for references to the federal law topics covered.

Like all but one of the United States, Indiana has a common law legal system, with roots in English common law. For information on the courts and legislature of Indiana, see category 6 Courts and Legislature.

1.02 [RESERVED]

1.03 HOLIDAYS:

Legal Holidays.

Legal holidays are: Sun.; Jan. 1; 3d Mon. in Jan.; Feb. 12; 3d Mon. in Feb.; Good Friday; last Mon. in May; July 4; 1st Mon. in Sept.; 2d Mon. in Oct.; Nov. 11; 4th Thurs. in Nov.; Dec. 25; day of any general, municipal or primary election (IC 1-1-9-1).

In computing time prescribed by Trial Rules, if last day falls on Sat., Sun., legal holiday, or day office in which act is to be done is closed during regular business hours, it is not counted in computation. (Rule TR 6).

Holiday Falling on Sunday.

When legal holiday falls on Sun., following Mon. is holiday. (IC 1-1-9-1).

Holiday Falling on Saturday.

When legal holiday falls on Sat., preceding Fri. is holiday. (IC 1-1-9-1).

Legality of Transactions on Saturday, Sunday or Holiday.

Some transactions are prohibited by penal statute on Sun. Bank transactions done or performed other than at regular banking hours are valid. (IC 28-2-2-1). Any action taken by state, political subdivision, or General Assembly on any holiday shall be valid for all purposes. (IC 1-1-9-1).

1.04 OFFICE HOURS AND TIME ZONE:

Most of Indiana is in Eastern (GMT -05:00) time zone. State currently observes daylight savings time (began Apr. of 2006). (IC 1-1-8.1-1 – 1-1-8.1-3; Indiana Senate Enrolled Act 127; PL 243-2005). Under Federal Law, 75 Indiana counties are in Eastern time zone and 17 are in Central time zone. (71 Fed. Reg. 3,228 [Jan. 20, 2006] [codified at 49 CFR 71]). Central time zone counties include six in northwest (Lake, Porter, La Porte, Newton, Jasper, and Starke) and 11 in southwest (Posey, Vanderburgh, Warrick, Spencer, Perry, Pike, Dubois, Knox, Daviess, Martin and Gibson). Remaining 75 counties are in Eastern time zone. Indiana supports county efforts to change its time zone, provided it petitions therefore in compliance with procedures of federal law. (IC 1-1-8.1-3). Office hours are generally from 9 a.m. to 5 p.m.

2 BUSINESS ORGANIZATIONS

2.01 AGENCY:

Common law rules govern.

2.02 ASSOCIATIONS:

Unincorporated associations governed by rules of common law but certain associations also governed by statute.

Formation.

Veterans may form associations for educational and charitable purposes. (IC 10-18-6-1 – 10-18-6-5).

Persons engaged in production of agricultural products may form nonprofit cooperative association with or without capital stock to engage in any activity in connection with producing, marketing or selling agricultural products of its members and others, provided that business with and services provided for nonmembers do not amount to greater value than to members. (IC 15-12-1-1 – 15-12-1-48). Nonprofit associations organized under agricultural cooperative laws of other states, before doing business in Indiana, must apply for admission to do business in Indiana. (IC 15-12-1-49 – 15-12-1-51).

Fraternal benefit societies may incorporate and engage in social, benevolent and insurance activities subject to law. (IC 27-11-1-1 - 27-11-1-9-4). Such societies may engage in land acquisition and construction of buildings for benevolent purposes subject to law. (IC 23-10-2-1 – 23-10-2-22).

Rights and Powers.

No special provisions.

Liabilities.

No special provisions.

Actions.

Unincorporated association may sue or be sued in its common name. Judgment by or against unincorporated association will bind organization as if it were an entity. Money judgment against unincorporated association not binding on individual member unless he is named as party or is bound as class member under TR 23 or 23.2. (Rule TR 17[E]).

Dissolution.

No special provisions.

Professional Associations.

See topic 2.03 Corporations, subhead Professional Corporation.

Partnerships.

Governed by Uniform Partnership Act. (IC 23-4-1-1 et seq.). See topic 2.07 Partnerships.

Limited Liability Companies.

Governed by Indiana Business Flexibility Act. (IC 23-18-1-1 et seq.). See topic 2.06 Limited Liability Companies.

Limited Liability Partnerships.

Governed by IC 23-4-1-44 et seq. See topic 2.08 Partnerships, subhead Limited Liability Partnership.

2.03 CORPORATIONS:

Indiana Business Corporation Law.

In 1986 Indiana adopted modified version of Official Text of Revised Model Business Corporation Act (1984) ("Model Act"), known as "Indiana Business Corporation Law" ("IBCL"), which automatically applies to all domestic corporations in existence on July 31, 1987 (regardless of law under which such corporation was incorporated) or incorporated thereafter, and to all foreign corporations. Foreign corporations qualified to do business in Indiana on July 31, 1987, are governed by IBCL, but need not obtain new certificate of authority. (IC 23-1-17-3). IBCL repealed The Indiana General Corporation Act effective Aug. 1, 1987. Official comments to IBCL (which incorporate, with exceptions, Model Act official comments) approved by General Assembly available from Secretary of State's office.

IBCL is based on Model Act (IC 23-1-17-1 – IC 23-1-17-55), although there are number of significant variations: (1) All references to "mail" mean first class certified or registered U.S. mail, postage prepaid, or private carrier service, fees prepaid or billed to sender (IC 23-1-20-15); (2) all notices must be in writing, unless articles or bylaws authorize oral notice (IC 23-1-20-29); (3) "emergency", for purposes of emergency powers and bylaws, exists if extraordinary event prevents quorum of directors from assembling in time to deal with business (IC 23-1-21-7[d]); (4) corporation may establish in articles or bylaws procedures regulating transactions that would result in changes of control as defined in IC 23-1-22-4; (5) corporate name must be distinguishable from corporate name or other business entity name already on Secretary of State's records, although name that is not distinguishable may be used if written consent filed by other corporation (IC 23-1-23-1[b] and [c]); reservation of corporate name renewable (IC 23-1-23-2); (6) preemptive rights created under prior law remain in effect until articles of incorporation are amended with respect to preemptive rights (IC 23-1-54-2); (7) if corporation acquires its own shares, those shares are authorized, but unissued, unless resolution of board of directors or articles provide otherwise (IC 23-1-27-2[a]) and corporation has authority to use, hold, acquire, cancel and dispose of treasury shares (as defined by prior law) (IC 23-1-27-2[d]); (8) cancelled treasury shares are authorized, but unissued (IC 23-1-27-2[e]); (9) IBCL has not adopted 1986 amendments to Model Act §§ 6.40(f), (g) which relate to distributions to shareholders; (10) if bylaws so provide, shareholders may participate in annual or special meetings through telephonic communications where all may simultaneously hear (IC 23-1-29-1[d], 23-1-29-2[e]); (11) for corporations with more than 50 shareholders, if articles require special meeting on demand of shareholders but do not specify percentage of votes entitled to be cast at shareholders meeting required for valid shareholder demand for special meeting, board of directors may establish percentage in bylaws; if no bylaw provision, percentage is 100% (IC 23-1-29-2[a]); for corporations with 50 or fewer shareholders, at least 25% of votes entitled to be cast at shareholders meeting required for valid shareholder demand for special meeting (IC 23-1-29-2[b][2]); (12) notice of special meeting must be given within 60 days of shareholder demand or court

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may order meeting to be held (IC 23-1-29-3); (13) court may only order that meeting be held and time and place of meeting, otherwise meeting conducted in accordance with articles and bylaws (Id.); (14) action taken by consent of shareholders is effective when last shareholder signs, unless prior or subsequent effective date is stated (IC 23-1-29-4[c]); (15) § 4.5 (a) does not apply to any corporation registered with Securities Exchange Commission, (b) unless articles provide otherwise, action may be taken at shareholder meeting without meeting if consent signed by number of shareholders necessary to authorize action, (c) unless articles provide otherwise, shareholders must be provided with ten days prior written notice of action, (d) record date for determining shareholders entitled to take action is date of first shareholder signs consent, (e) each signature must bear date on consent, (f) unless otherwise specified in consent, written consent is effective for 60 days from date of first signature, (g) electronic consent permitted provided it is manually or electronically signed and delivered to corporation, (h) unless unanimous written consent obtained, notice of action is required (IC 23-1-29-4.5); other revisions exist regarding access to shareholders list (IC 23-1-30-1); (16) appointment of proxy valid for 11 months unless shorter or longer period provided in appointment form (IC 23-1-30-3[d]); (17) procedure authorized for recognition by and disclosure to corporation of beneficial owners of shares (IC 23-1-30-4[b]); (18) IBCL deletes §§ 7.25(d) and 7.27(b) of Model Act regarding amendment of articles changing quorum or voting requirements for voting group; (19) IBCL revises provisions relating to voting trusts (IC 23-1-31-1); (20) derivative proceedings may not be maintained if it appears person commencing proceeding not fairly and adequately representing shareholders' interests (IC 23-1-32-1); IBCL provides for establishment of disinterested committee to consider derivative action (IC 23-1-32-4); (21) IBCL deletes § 8.03(b) of Model Act regarding limits on increasing or decreasing number of directors, and part of § 8.03(c); (22) term of directors elected to fill vacancy expires at end of term for which director's predecessor was elected (IC 23-1-33-5[d]); (23) regardless of number of directors, board may be staggered (IC 23-1-33-6[a]); (24) corporation with class of voting shares registered with SEC shall provide for staggering terms of directors. If corporation fails to provide for staggering, then they will be placed in 1/3 groups based on alphabetical listings by last name (IC 23-1-33-6[c],[d]); (25) articles or bylaws may designate additional officer to whom resignations from board may be delivered (IC 23-1-33-7[a][2]); (26) articles may set forth provision regarding manner of removal of directors (IC 23-1-33-8); (27) IBCL deletes § 8.09 of Model Act regarding removal of director by judicial proceedings; (28) unless articles provide otherwise, only directors can fill vacancy on board of directors (IC 23-1-33-9[a]); (29) committees of board may consist of one or more members (IC 23-1-34-6[a]); (30) committees not prohibited from authorizing issuance of shares or determination of relative rights, preferences or limitations of class or series of shares within limits prescribed by board, or from authorizing distributions within formula, method or range set by board (IC 23-1-34-6[e]); (31) IBCL had not adopted §§ 8.61-8.63 of Model Act but is based on original provisions of §§ 6.31 through 6.33 of Model Act; (32) in considering best interests of corporations, director may consider effects of action on shareholders, employees, suppliers and customers and on community, among other factors (IC 23-1-35-1[d]); (33) director not liable for action taken as director, or failure to take action, unless director breached or failed to perform duties, and breach or failure to perform constitutes willful misconduct or recklessness (IC 23-1-35-1[e]); this standard also applicable for distributions (IC 23-1-35-4); (34) after conversion has been adopted, officer must execute articles of entity conversion on behalf of other entity and must set forth name of other entity before and after filing of articles of conversion, state when plan of conversion was approved and if surviving entity is filing entity, contain all provisions required to be set forth in public organic document and other desired permitted provisions (IC 23-1-38.5-13[c]); (35) after conversion of foreign entity to different foreign entity, articles of entity conversion must be executed by officer and contain name of other entity before and after filing of entity conversion, jurisdiction and date under which other entity was organized; state that conversion was approved by other entity, and if surviving entity is filing entity, contain provisions required to be set forth in its public organic document and its desired provisions (IC 23-1-38.5-13[e]); (36) in exercising business judgment, directors may consider effects of proposed corporate action on any particular corporate constituent group or interest as they deem appropriate (IC 23-1-35-1[f]). Directors not required to consider any constituency as predominant or controlling. (Id.). Both directors and validity of corporate action taken by them in good faith exercise of their business judgment after reasonable investigation are protected under statute. (Id.); (37) in exercising business judgment, directors may also consider any other factors they deem pertinent, assigning whatever weight they deem appropriate to various competing factors. (IC 23-1-35-1[g]). If director action is approved by majority of disinterested directors, defined in IC 23-1-35-1(h) and (i), it will be conclusively presumed valid unless not made in good faith after reasonable investigation (IC 23-1-35-1[g]); (38) IBCL deletes § 8.51(d) of Model Act which prohibits indemnifying director liable to corporation or in proceeding charging director with improper personal benefit; (39) indemnification under IBCL not exclusive of other rights to indemnification or advance for expenses (IC 23-1-37-15); (40) amendment to articles without shareholder vote permitted for reduction in authorized shares upon cancellation of treasury shares (IC 23-1-38-2[6]); (41) converting entity means corporation or other entity that adopts plan of entity conversion (IC 23-1-38.5-1[2]); (42) corporation, nonprofit corporation, or any other entity engaging in business that is subject to regulation under another statute may be party to transaction under this chapter, however, this chapter may not be used for transaction that (1) converts insurance company organized on mutual principle to company organized on stock basis, (2) converts nonprofit corporation to corporation or other business entity, or (3) converts domestic corporation or other business entity to nonprofit corporation (IC 23-1-38.5-2); (43) approval of department of financial institutions or department of insurance is required (IC 23-1-38.5-3); (44) plan of domestication must include statement of jurisdiction, terms and conditions, basis for reclassifying shares of corporation, and amendments to articles of incorporation (IC 23-1-38.5-4); (45) in case of domestication of domestic corporation in foreign jurisdiction, plan of domestication must be adopted by board of directors and shareholders (IC 23-1-38.5-5); (46) articles of domestication must be executed by officer or authorized representative and must set forth certain information such as name of corporation, jurisdiction of incorporation and statement that domestication of corporation in Indiana was duly authorized as required by law of jurisdiction in which corporation was incorporated (IC 23-1-38.5-6); (47) officer or authorized representative must execute articles of charter surrender when domestic corporation is to be domesticated in foreign jurisdiction (IC 23-1-38.5-7); (48) when domestication of foreign corporation in Indiana becomes effective, title to real and personal property remain in corporation, liabilities of corporation and actions against corporation continue, shares of corporation are reclassified and corporation is considered to be incorporated under laws of Indiana and incorporated when originally incorporated in foreign jurisdiction (IC 23-1-38.5-8); (49) unless otherwise provided in plan of domestication of domestic corporation, plan of domestication may be abandoned by board of directors without action by shareholders prior to its effective date (IC 23-1-38.5-9); (50) this section details types of conversions allowed under Indiana law (IC 23-1-38.5-10); (51) plan of entity conversion must include statement of type of other entity that surviving entity will be and, if it will be foreign other entity, its jurisdiction of organization, terms and conditions of conversion and manner and basis of converting shares or interests (IC 23-1-38.5-11); (52) this section sets forth requirements for conversion of domestic business corporation to domestic other entity or foreign other entity (IC 23-1-38.5-12); (53) this section sets forth minimum requirements of items that should be included in articles of entity conversion (IC 23-1-38.5-13); (54) this section sets forth minimum requirements of items to be included in articles of charter surrender (IC 23-1-38.5-14); (55) when conversion under this section is domestic corporation or entity and becomes effective, title to real and personal property remain in surviving entity, liabilities and actions remain with surviving entity, shares, interests, other securities, obligations, or rights to acquire shares, interests, or other securities of converting entity are reclassified, surviving entity is considered domestic corporation or entity organized on date converting entity was originally organized (IC 23-1-38.5-15); (56) unless otherwise provided in plan of entity conversion of domestic entity, plan of entity conversion may be abandoned by governing or managing body or person of governing entity without action by shareholders or interest holders at any time before effective date (IC 23-1-38.5-16); (57) unless articles of incorporation provide otherwise, only board of directors may amend or repeal bylaws (IC 23-1-39-1); (58) short form merger procedure added for merger of parent into 90%-owned subsidiary (IC 23-1-40-4); (59) provisions of plan of merger or share exchange not included in articles create only contract rights (IC 23-1-40-6); (60) one or more domestic corporations may merge with or into one or more other business entities organized under laws of Indiana or any other state provided that requirements of this section are met (IC 23-1-40-8); (61) IBCL contains two new chapters regulating “control share acquisitions” (IC 23-1-42) and “business combinations” (IC 23-1-43). Former chapter applies to corporation with 100 or more shareholders and designated contacts with State of Indiana. Constitutionally upheld in CTS Corporation v. Dynamics Corporation of America, 481 U.S. 69, 107 S.Ct. 1637, 95 L.Ed.2d 67 (1987). Latter chapter applies to corporations with 100 or more shareholders and class of shares registered under § 12 of Securities Exchange Act of 1934 (unless articles provide otherwise), and limits for period of five years certain business combinations with acquirer of 10% or more voting shares unless specified approval obtained and otherwise in accordance with specified mechanism; (62) provisions on dissenting shareholders rights not applicable to holders of shares traded on registered U.S. securities exchange or traded on NASDAQ or similar market (IC 23-1-44-8[b]). Dissenting shareholders or those who would be entitled to dissent but for IC 23-1-44-8(b) may not challenge corporate action creating shareholders’ entitlement (IC 23-1-44-8[c]); (63) requirement that corporation pay accrued interest on fair value of dissenters’ shares partially deleted (IC 23-1-44-15[a]); (64) court may assess cost in appraisal proceedings on value of dissenters’ shares against such parties in such amount as court finds equitable (IC 23-1-44-20[a]); (65) procedure expanded concerning claims against dissolved corporations (IC 23-1-45-6[b] through [e]). Claims barred unless proceeding to enforce commenced within two years of publication of notice of dissolution (IC 23-1-45-7[b] and [c]); (66) IBCL deletes § 14.30(2)(ii) and (iv) of Model Act regarding grounds for dissolution; (67) qualification requirements for foreign corporations do not apply to foreign banking, surety, trust, safe deposit, railroad, insurance and building and loan corporations (IC 23-1-49-1[a]); exemptions from qualification for transaction of business apply for purposes of Financial Institutions Act and Indiana Insurance Law; (68) use and distribution of information or records obtained from corporation by shareholder restricted solely to proper purpose (IC 23-1-52-5); (69) Exchange Act reports satisfy certain state requirements (IC 23-1-53-2[b]).

Filing Fees.

Articles of incorporation is $90 (or electronically, $75); amendment of articles of incorporation is $30 (or electronically, $20); biennial report is $30 (or electronically, $20); articles of dissolution is $30 (or electronically, $20); application for certificate of authority is $90, or electronically $75). (IC 23-1-18-3). Filing fees may be paid by credit card, debit card, charge card or similar method. (IC 23-1-18-1[l]).

Paid in Capital Requirements.

None.

Reports.

(1) Corporation must provide annual financial statements to shareholder upon written request (IC 23-1-53-1); (2) corporation must report to shareholders indemnification of or advancement of expenses to directors and issuance of shares for promissory notes or for promises to render services in future (IC 23-1-53-2); and (3) domestic corporations and foreign corporations authorized to transact business in state must file biennial report with Secretary of State (IC 23-1-53-3).

Transfer of Stock.

Uniform Commercial Code in effect since July 1, 1964. (IC 26-1-1-101 – IC 26-1-10-105).

Uniform Simplification of Fiduciary Security Transfers Act adopted. (IC 30-2-5-1 – 30-2-5-11).

Stock Transfer Tax.

See category 22 Taxation.

Unclaimed dividends or other distributions neglected for five years are presumed abandoned where there have been at least seven dividends or other distributions paid during such period, none of which has been claimed by owner. (IC 32-9-1.5-20). Uniform Disposition of Unclaimed Property Act adopted. (IC 32-9-1.5-1 to IC 32-9-1.5-54).

Business Take-Over Act.

See category 3 Business Regulation and Commerce, topic 3.24 Securities.

Close Corporations.

Corporations with 50 or fewer shareholders may dispense with board of directors (IC 23-1-33-1[c]), requirements for special meetings (IC 23-1-29-2[b]) otherwise no special statutory provisions. Common law fiduciary duty officers, director and shareholders of closely held corporations, W & W Equipment Co., Inc. v. Mink, 568 N.E.2d 564 (Ind.App. Ct. 1991).

Taxation of Corporate Property.

See category 22 Taxation, topic 22.15 Property Taxes.

Franchise Tax.

No franchise tax is imposed on foreign or domestic corporations.

Continuing Care Contracts.

Special provisions dealing with continuing care contracts entered into in Indiana, providing for care at home in Indiana or executed by Indiana residents. (IC 23-2-4-1 – 23-2-4-24).

Deceptive Franchise Practices.

Special provisions dealing with deceptive practices as to franchisee who is resident of Indiana. (IC 23-2-2.7-1 – 23-2-2.7-7).

Gross income tax, applicable to corporations, see category 22 Taxation, topic 22.10 Income Tax.

Professional Corporation.

Professional corporations are governed by Indiana Business Corporation Law (IC 23-1-17-1 – IC 23-1-55) and special provisions pertaining to various professions (IC 23-1.5-1-1 – IC 23-1.5-5-2). In event of conflict between provisions of IBCL and special provisions, special provisions are controlling. (IC 23-1.5-2-1). Professional corporation may be formed by individual or group of individuals, at least one shareholder of whom holds unlimited license to practice profession in state, only to render professional accounting, architectural or engineering, legal, health care, veterinary or real estate professional services. (IC 23-1.5-2-3). Name of professional corporation must include words “Professional Services Corporation” or “Professional Corporation”, or abbreviation thereof. (IC 23-1.5-2-8).

Deeds.

See category 21 Property, topic 21.06 Deeds.

Model Non-Profit Corporation Act, adopted with variations, is effective immediately for all not-for-profit corporations formed after July 31, 1991 (IC 23-17-1-1 to IC 23-17-30-4) (“Indiana Nonprofit Corporation Act of 1991”). Model Non-Profit Act applies to all domestic not-for-profit corporations effective July 1, 1993 or such earlier time as they shall elect.

Limited Liability Companies.

See topic 2.06 Limited Liability Companies.

2.04 [RESERVED]

2.05 JOINT STOCK COMPANIES:

Business trusts are authorized by statute. (IC 23-5-1-1 – IC 23-5-1-11). Business trust is unincorporated association created by trust instrument including but not limited to Massachusetts trusts and real estate investment trusts under § 856 of Internal Revenue Code, but excluding certain land trusts. (IC 23-5-1-2[a]). Statute does not invalidate any business trust created or doing business prior to Aug. 12, 1963. (IC 23-5-1-3).

Purposes and Powers.

Business trust may engage in such business activities as are stated in trust instrument, with certain stated exceptions. Subject to these exceptions, persons dealing with business trusts are bound by terms of trust instrument. (IC 23-5-1-8).

Formation.

Business trust created or doing business on or after Aug. 12, 1963 must be formed in compliance with provisions of the act. (IC 23-5-1-3 – 23-5-1-6). Every business trust authorized to transact business in Indiana must file biennial report with Secretary of State every second year during same month as month in which trust was created or authorized to transact business. (IC 23-5-1-10.1).

Actions.

Business trust may sue or be sued (IC 23-5-1-8), and is subject to law applicable to corporations as to issuance and transfer of securities, merger into domestic corporation, and filing of required statements, reports and service of process (IC 23-5-1-9). Business trust may adopt provision of law related to domestic and foreign corporations not listed in statute (IC 23-5-1-9) by filing notice of adoption with Secretary of State and recording same with county recorder of county where principal office is located (IC 23-5-1-9.1).

Certificates of Beneficial Interest.

Trust instrument may provide for limited liability of holders of certificates of beneficial interest, and may restrict transferability. (IC 23-5-1-2, 23-5-1-8).

Dissolution.

Statute provides method and requirements for dissolving. (IC 23-5-1-11).

Professional Corporations.

See topic 2.03 Corporations, subhead Professional Corporation.

2.06 LIMITED LIABILITY COMPANIES:

The Indiana Business Flexibility Act (referred to in this subsection as “Act”), which provides for creation and operation of limited liability companies, became effective July 1, 1993. Following summarizes principal provisions of Act.

Purpose.

Limited liability companies may be formed and may conduct business for any lawful purpose unless restricted by articles of organization, and must comply with other applicable statutes. (IC 23-18-2-1).

Powers.

Unless restricted by articles of organization, every limited liability company has same powers as individual to do all things necessary or convenient to carry out its business and affairs. (IC 23-18-2-2).

Other Authorities.

Act does not affect, restrict or limit licensing authority or authority to regulate provision of professional services or engaging in practice of profession. (IC 23-18-2-3).

Formation.

At least one person, who need not be member, may form limited liability company by causing articles of organization to be executed and filed with secretary of state. (IC 23-18-2-4 [a]).

Articles of Organization.

Shall contain name of limited liability company, street address of limited liability company's registered office, name of limited liability company's registered agent, and latest date for dissolution or statement that duration shall be perpetual; articles of organization may contain statement as to whether limited liability company will have manager and any other matters not inconsistent with Act. (IC 23-18-2-4). Articles of organization may be amended (IC 23-18-2-5) or restated (IC 23-18-2-6) in accordance with prescribed procedures.

Name of limited liability company must contain words "limited liability company" or either of following abbreviations: "L.L.C." or "LLC". Provisions with respect to registering or reserving name are similar to Indiana Business Corporation Law ("IBCL").

Registered Office and Agent.

Must be continuously maintained by limited liability company (IC 23-18-2-10); these may be changed in accordance with prescribed procedures (IC 23-18-2-11).

Powers, Rights, and Duties of Members and Managers, and Attorney-in-Fact.

Members generally will have authority to bind limited liability company if act is for carrying on of usual business of limited liability company, unless articles of organization provide for manager and limit power of members, or member does not have authority and other party is aware of lack of authority. (IC 23-18-3-1). Notice to member, or to manager if provided for in articles of organization, constitutes notice to limited liability company. (IC 23-18-3-2). Member, manager, agent, or employee is not personally liable for debts of limited liability company (IC 23-18-3-3), but Act does not alter or affect any law with respect to professional liability (IC 23-18-3-4). Members shall manage affairs of limited liability company unless manager is provided for in articles of organization and duly elected according to prescribed procedures or in accordance with operating agreement. (IC 23-18-4-1). Members and managers will not be liable for damages caused to limited liability company by their acts except due to willful misconduct or recklessness. (IC 23-18-4-2). Approval or consent of majority of members or managers is generally required to conduct business, but approval of all members is required to adopt or amend operating agreement, unless otherwise provided in operating agreement being amended. Person may, as attorney-in-fact, sign articles of organization, operating agreement, or amendment to articles of organization or operating agreement. Power of attorney relating to signing of document under this subsection by attorney-in-fact must be retained in records of limited liability company. (IC 23-18-4-6). Members may enter into operating agreement to regulate or establish any aspect of affairs of limited liability company. (IC 23-18-4-5). Copies of governing documents must be kept at principal office of limited liability company and members shall have access to such documents on written request of at least five business days. Legal representatives of deceased member or member under legal disability shall have similar access for any purpose reasonably related to member's interest. If limited liability company is managed by manager(s), member or legal representative of deceased member or member under legal disability may obtain information only upon request at least five business days, member makes request in good faith and for proper purpose, member describes with reasonable particularity member's purpose and information that member wishes to obtain, and information is directly connected to member's purpose. (IC 23-18-4-8).

Contributions and Distributions.

Unless otherwise provided in operating agreement, profits and losses must be allocated on basis of agreed value, as stated in records of limited liability company, of contributions made by each member to extent contributions have been received by limited liability company and not previously returned. (IC 23-18-5-3). Unless otherwise set forth in operating agreement, distributions must be allocated on basis of agreed value of contributions made by each member to extent such contributions have been received and not returned and except upon event of dissociation that does not cause dissolution. (IC 23-18-5-4). Distributions may not be made if such would render limited liability company insolvent. (IC 23-18-5-6).

Distributions to members may be direct or indirect transfers of money, other property, or indebtedness, and may be in form of declaration or payment of dividend, purchase, redemption, or other acquisition of interest, distribution of indebtedness, or otherwise. Distribution does not include amounts constituting reasonable compensation for past or present services or reasonable payments made in ordinary course of business under bona fide retirement plan or other benefit program. Distribution does not include making of payment or performance upon bona fide guaranty or similar arrangement by corporation to or for benefit of its shareholders. (IC 23-18-1-7).

Membership.

May have at least one member. (IC 23-18-6-0.5). Person may become member in accordance with articles of organization and operating agreement. (IC 23-18-6-1). Interest in limited liability company is assignable (IC 23-18-6-3), but assignee may only become member upon unanimous consent of remaining members or in accordance with articles of organization and operating agreement (IC 23-18-6-4). For limited liability company formed prior to June 30, 1999, person ceases to be member upon event of disassociation, such as withdrawal, removal, death and other specified circumstances, or in accordance with operating agreement. (IC 23-18-6-5). For limited liability company formed after June 30, 1999, member may not withdraw prior to dissolution and winding up, except as provided in written operating agreement.

Merger.

Limited liability company may merge into another limited liability company in accordance with prescribed procedures similar to those in IBCL. Limited liability companies may also merge with other business entities. (IC 23-18-7).

Entity Conversion.

Domestic limited liability company may convert to domestic business corporation, domestic other entity, foreign business corporation, or foreign other entity, or from one of such entities to domestic limited liability company. (IC 23-18-7-10). As used in this section, "other entity" means limited liability company, limited liability partnership, limited partnership, general partnership, business trust, real estate investment trust, or any other entity that is formed under requirements of applicable law and that is not corporation. (IC 23-1-38.5-1).

Dissolution.

May occur voluntarily (IC 23-18-9) or administratively by proceedings instituted by secretary of state (IC 23-18-10). Unless otherwise provided in written operating agreement, upon event of disassociation, limited liability company will be dissolved unless all members consent to continuation of business within 90 days. For companies existing on or before June 30, 1999, limited liability companies will be dissolved upon written consent of 2/3 interest in each class or group of members. (IC 23-18-9-1 to IC 23-18-9-3). Provisions with respect to winding up of business of limited liability company upon dissolution and distribution of assets are similar to corresponding provisions respecting partnerships. Secretary of State may commence dissolution proceedings for failure to deliver annual reports, lack of registered agent or office, and expiration of period of duration specified in articles of organization (IC 23-18-10-1), and proceedings for dissolution, reinstatement, and revocation of dissolution are prescribed (IC 23-18-10-2, IC 23-18-10-4, IC 23-18-10-5).

Foreign Limited Liability Companies.

Certificate of authority is required for foreign limited liability company to transact business. Procedures to obtain original or amended certificate of authority, ongoing requirements, and events requiring amended certificate of authority for foreign limited liability companies and penalties for failure to comply with these provisions are set forth at IC 23-18-11.

Filing Fees and Reports.

Filing of articles of organization must be accompanied by $90 fee, or $75 fee if filed electronically, and amendments thereto or restatement thereof require $30 fee, or $20 fee if filed electronically; application for certificate of authority must be accompanied by $90 fee, or $75 fee if filed electronically; biennial report required by IC 23-18-12-11 must include $30 fee, or $20 fee if filed electronically; other fees are set forth. (IC 23-18-12-3). Biennial reports, setting forth name of limited liability company, address of registered office, name and address of registered agent, and address of principal office, must be filed with Secretary of State by both domestic and qualified foreign limited liability companies. Filing fees may be paid by credit card, debit card, charge card or similar method.

2.07 [RESERVED]

2.08 PARTNERSHIPS:

Uniform Partnership Act adopted. (IC 23-4-1-1 to IC 23-4-1-54).

Limited Liability Partnership.

IC 23-4-1-44 to IC 23-4-1-54, added to Uniform Partnership Act effective Oct. 1, 1995, provides for formation and operation of limited liability partnerships.

Limited Partnership.

Revised Uniform Limited Partnership Act (1976) adopted. (IC 23-16-1 – 23-16-14). Uniform Limited Partnership Act (IC 23-4-2-1 – 23-4-2-31) repealed effective July 1, 1993, which repeal does not impair or affect organization or existence of limited partnership existing before July 1, 1988, nor impair any contract or affect any right accrued before July 1, 1988.

Partnership Name.

For limited partnership, exclusive right to use may be reserved by filing with Secretary of State (IC 23-16-2-2) and must contain words “limited partnership” or abbreviation “L.P.” (IC 23-16-2-1). For foreign limited partnership, may register for exclusive use by filing with Secretary of

State (IC 23-16-2-2.5), must file name with Secretary of State, and must contain words "limited partnership" or abbreviation "L.P." (IC 23-16-10-4). For limited liability partnership, exclusive right to use may be reserved by filing with Secretary of State (IC 23-4-1-45.3) and must contain words "Limited Liability Partnership" or abbreviation "L.L.P." or "LLP". (IC 23-4-1-45). For foreign limited liability partnership, may register for exclusive use by filing with Secretary of State (IC 23-4-1-45.4), must file name with Secretary of State, and must contain words "Limited Liability Partnership" or abbreviation "L.L.P." or "LLP". (IC 23-4-1-49).

Out-of-State Partnership.

Foreign limited partnership (IC 23-16-10-2) and foreign limited liability partnership (IC 23-4-1-49) must register with Secretary of State.

Actions.

Partnership may sue or be sued in its common name. Judgment by or against partnership will bind organization as if it were entity. Money judgment against partnership is not binding on individual partner unless he is named as party or is bound as class member under TR 23 or 23.2. (TR 17[E]).

Filing Fees.

Filing registration for limited liability partnership must be accompanied by $90 fee, or $75 fee if filed electronically.

3 BUSINESS REGULATION AND COMMERCE

3.01 BANKS AND BANKING:

Uniform Commercial Code in effect since July 1, 1964. 1972 amendments in effect since Jan. 1, 1986. 1977 Amendments in effect since Sept. 1, 1987. 1990 amendments in effect since July 1, 1994. 1994 and 1995 amendments in effect since July 1, 1996. (IC 26-1-1-101 et seq.). Uniform Consumer Credit Code in effect since Oct. 1, 1971. (IC 24-4.5-1-101 et seq.).

All financial institutions organized under Indiana law are controlled by "The Indiana Financial Institutions Act." (IC 28-1-1-1 et seq.).

Supervision is by the Department of Financial Institutions, which has rule-making power. (IC 28-11-1-12). Department is required to make periodic examinations of all financial institutions. (IC 28-11-3-1).

Stock.

Articles of Incorporation must prescribe number of shares that corporation organized under Act is authorized to issue. If more than one class of shares authorized by articles, articles must prescribe number of shares in each class and distinguishing designation for each class. Before issuance of shares of class, preferences, limitations, and relative rights of class must be described in articles. (IC 28-13-1-1). Act requires that articles authorize at least one class of shares that together have unlimited voting rights and at least one class of shares (which may be same class or classes of shares with voting rights) that together are entitled to receive net assets of corporation upon dissolution. (IC 28-13-1-2). Shareholders of corporation do not have preemptive rights, except to extent such rights are provided in articles. (IC 28-13-3-1). Bank or trust company may not purchase or make loans secured by its own stock, except when stock is taken to prevent loss on previous debt, in which case it must be resold within six months, unless otherwise ordered by Department. (IC 28-1-13-8).

Bank Holding Companies.

Multi-bank holding companies are permitted. Out-of-state bank holding companies may acquire existing Indiana Banks. (IC 28-2-16-17; IC 28-2-17-1 et seq.).

Deposits.

Joint Accounts. P.O.D. accounts and trust accounts are controlled by Non-Probate Transfer Act. (IC 32-17-11).

At death of party to joint account sums remaining on deposit belong to surviving party or parties as against estate of decedent unless there is clear and convincing evidence of different intention when account is created. (IC 32-17-11-18).

Right of survivorship arising from express terms of account or under this section, beneficiary designation in trust account or P.O.D. payee designations cannot be changed by will. (IC 32-17-11-18). Form of account may be altered by written order given by party to financial institution to change form of account or to stop or vary payment under terms of account which is signed by party, received by financial institution during party's lifetime and not countermanded by another written order of same party during party's lifetime. (IC 32-17-11-19).

Unclaimed Deposits.

Unclaimed Property Act adopted, effective July 1, 2002. (IC 32-34-1).

Branch Banking.

Interstate branching, de novo and by acquisition, is authorized. However, out-of-state banks may not establish de novo branches or branches through branch acquisitions unless laws of home state of out-of-state bank permit Indiana state banks reciprocal privileges. Indiana banks may establish new branches and may acquire existing branches in any location with approval of Department and subject to certain other statutory requirements. (IC 28-2-13-19; IC 28-2-18-1 et seq.). Establishment of automated teller machines (ATMs) is unrestricted. (IC 28-2-13-22).

Trust Department.

Every bank or trust company exercising fiduciary powers must maintain a trust department, keeping separate books of account and maintaining all trust property segregated from other property. (IC 28-1-12-3). Every bank or trust company holding securities as fiduciary is authorized to deposit securities in clearing corporation as defined by IC 26-1-8.1-102(a)(5). (IC 28-1-12-3). Trust departments may establish or invest in common trust funds. (IC 30-1-8-2). No profit or commission, other than interest at legal rate on loan, may be received by any bank, trust company or corporate fiduciary, directly or indirectly, out of any sale to or purchase from any estate, guardianship, or trust of which it is fiduciary, unless specifically authorized by creator or court. (IC 28-1-12-4). Money awaiting investment or distribution may be kept on deposit in its commercial banking department provided sufficient book entries show true ownership of such money in both bank and trust departments. On liquidation of any bank, trust company or corporate fiduciary, all persons beneficially entitled to receive property or proceeds held by it in trust have preference and priority in all assets over general creditors for all uninvested funds, to extent that such money is commingled with general assets and is not duly accounted for. (IC 28-1-12-6). Bank holding company, in some circumstances, may by resolution filed with Department cause Indiana affiliate to succeed to trust business of another Indiana affiliate. (IC 28-2-14-18).

Common trust funds provided for. (IC 30-1-8-1 et seq.).

Institutions Other Than Banks or Trust Companies.

Department also regulates formation, management, etc., of various financial institutions other than banks and trust companies, such as corporate fiduciaries (IC 28-14-1-1 et seq.), savings associations (IC 28-15-1-1, et seq.) credit unions (IC 28-7-1-0.5 et seq.), pawn brokers

(IC 28-7-5-1 et seq.). C. 21 of Financial Institutions Act was repealed effective July 1, 1997 and replaced by IC 28-15 et seq. Industrial loan and investment companies are regulated by IC 28-5-1-1 et seq. and may offer negotiable order of withdrawal (NOW) accounts. (IC 28-5-1-12). Currency Exchange Act (IC 28-8-3-1) was repealed effective Jan. 1, 1994, and replaced with chapter governing money transmitters (IC 28-8-4-1 et seq.). Check cashing businesses are also regulated, effective Jan. 1, 1994. (IC 28-8-5-1 et seq.).

Foreign Corporations.

Before transacting business in Indiana, any bank, savings bank, trust company, corporate fiduciary, credit union, industrial loan and investment company or savings association organized under laws of any other state or U.S., other than those domiciled in Indiana, must procure certificate of admission from Department, which must be filed with Secretary of State. (IC 28-1-22-1).

The application submitted to Department must include copy of articles of incorporation or association, state names of certain officers, and contain such other information as Department may require. (IC 28-1-22-4).

If any foreign corporation transacts business in this state before it has received approval of Department, officers and directors of corporation are severally liable for debts of corporation arising out of such business. (IC 28-1-22-10).

Supervision.

Department has power to interrogate applicant corporation in matters pertaining to its proposed business or other matters stated in admission application. Department shall have power to investigate all foreign corporations with respect to character of business in which such corporation proposes to engage. (IC 28-1-22-11). Department’s power of examination is same as for domestic corporations. (IC 28-11-3-1).

Permissible Business.

No foreign corporation may be admitted for purpose of transacting any kind of business in this state which domestic corporation is not permitted by laws of state to transact. (IC 28-1-22-2).

Name.

No foreign corporation admitted to do business in this state may have name which domestic corporation with like powers could not have. (IC 28-1-22-3).

Certificate of admission may be revoked at any time by Department: (a) On failure for 30 days to maintain resident agent; (b) on failure to keep authenticated copies of instruments amending articles of incorporation on file with Secretary of State within 30 days after amending; (c) on failure for 30 days to file certificate of admission or amendments thereof with county recorder; (d) on failure for 30 days to pay fees required; (e) for willful misrepresentation of material matters in application, affidavits or other papers. (IC 28-1-22-24).

Foreign corporation transacting business without procuring certificate of admission may not maintain any suit or action in any courts of state and such corporation is subject to injunctive action and penalty not exceeding $10,000 to be recovered in suit brought by Attorney General. (IC 28-1-22-28).

Application for withdrawal from state by any corporation must be filed with and approved by Department. (IC 28-1-22-22).

Franchise Tax.

Tax on corporation transacting business of financial institutions in Indiana at rate of 8½% on remainder of apportioned income, minus deductible Indiana net operating losses and minus apportioned net capital losses multiplied by apportionment percentage applicable to taxpayer. Replaces other taxes on financial institutions. (IC 6-5.5-2-1).

Duty to Report Secured Transactions.

Secretary of state shall report annually to general assembly on operation of filing office and report must be in electronic format (IC 5-14-6-4) and must contain statement of extent to which filing office rules are not in harmony with rules of filing offices in other or with most recent version of Model Rules promulgated by International Association of Corporate Administrators (IC 26-1-9.1-527).

3.02 BILLS AND NOTES:

Uniform Commercial Code in effect since July 1, 1964. (IC 26-1-1-101 et seq.).

Judgment notes or cognovit notes are expressly prohibited and any agreement or authority to confess judgment made before action accrues, is void, and procurement of execution of such note or attempt to recover upon or enforce such note is Class B misdemeanor. (IC 34-54-3, 34-54-4, 24-4.5 and 26-1). But see category 5 Civil Actions and Procedure, topic 5.15 Judgments, subhead Foreign Judgments.

See also topic 3.09 Commercial Code.

3.03 BILLS OF LADING:

See topic 3.08 Carriers.

3.04 BILLS OF SALE:

No statutory provisions.

3.05 BLUE SKY LAW:

See topic 3.24 Securities.

3.06 BROKERS:

Uniform Commercial Code in effect since July 1, 1964. (See IC 26-1-8-303, 26-1-8-306, 26-1-8-313, 26-1-8-314.)

Real estate brokers and salespersons are under supervision of Indiana Real Estate Commission and required to be licensed thereby. (IC 25-34.1-2 et seq.). To obtain salesperson's license, one must be 18, and not have conviction for act or crime which would constitute ground for disciplinary sanction under IC 25-1-11 or which has direct bearing on applicant's ability to practice competently or that indicates that person has propensity to endanger public, complete eight semester credit hours in principles, practices and laws of real estate at accredited college or university or have completed approved salesperson course, pass written exam and submit license fee established by Commission within one year after passing exam. Salespersons must be associated with and act under auspices of broker. (IC 25-34.1-3-3.1). To obtain broker's license, one must be 18 and not have conviction for act or crime which would constitute ground for disciplinary sanction under IC 25-1-11 or which has direct bearing on applicant's ability to practice competently or that indicates that person has propensity to endanger public, have completed educational requirements for salesperson's license and have continuous active experience as licensed salesperson in Indiana for one year immediately preceding application (which experience requirement may be waived upon Commission finding of equivalent experience) and have successfully completed approved broker course, submit application and fee, pass written exam and submit fee established by Commission within one year after passing exam. (IC 25-34.1-3-4.1). Commission may issue license to nonresidents meeting requirements as long as one files written consent for suit or service of process arising from conduct. (IC 25-34.1-3-5). Commission may waive requirements if jurisdiction of nonresident grants same privilege to licensee of Indiana, nonresident is licensed in his jurisdiction, licensing requirements of that jurisdiction are substantially similar to requirements of Indiana, and nonresident states that he has studied, is familiar with and will abide by statutes and rules of Indiana. (IC 25-34.1-3-5). Broker's licenses may be granted to corporations, limited liability companies and partnerships. (IC 25-34.1-3-4.1, IC 25-34.1-4-3). Out-of-state commercial broker may, for consideration, perform acts with respect to commercial real estate that would otherwise require license, provided out-of-state commercial broker: works in cooperation with broker licensed by Commission; enters into written agreement with such licensed broker describing terms of cooperation and compensation and including statement that out-of-state commercial broker and its agents will comply with Indiana law; provides licensed broker with copy of out-of-state broker's license; files written consent with Commission; advertises in compliance with Indiana law and includes name of licensed broker in such advertising; deposits all monies in trust account maintained by licensed broker; and deposits all documentation, books and records related to transaction with licensed broker. (IC 25-34.1-3-11). Out-of-state commercial salesperson may perform acts that otherwise require license if salesperson: is licensed with and works under direct supervision of out-of-state commercial broker; provides copy of salesperson's license to licensed broker with whom such out-of-state commercial broker is cooperating; and collects monies only in name of and with consent of out-of-state commercial broker. (IC 25-34.1-3-11). If there is no legal distinction in jurisdiction between real estate broker license and real estate salesperson license, person licensed in that jurisdiction must satisfy requirements of IC 25-34.1-3-11(a) to perform acts as broker. (IC 25-34.1-3-11). Brokers and salespersons may form professional corporation. (IC 23-1.5-2-3). If not renewed by filing renewal application, license expires automatically. If not renewed within applicable time frame, license may be reinstated by commission within three years of expiration if holder meets requirements under IC 25-1-8-6(c). If license has been expired for more than three years, license may be reinstated by commission if holder satisfies requirements under IC 25-1-8-6(d). (IC 25-34.1-3-3.1, 25-34.1-3-4.1). Licensee who is convicted of crime shall send copy of complaint or other information that describes crime and judgment to Commission not more than 30 days after date of conviction. (IC 25-34.1-3-12). Commission has authority to revoke or suspend license for misconduct or conviction of real estate related crime, censure, issue reprimand, put licensee on probation or assess civil penalty up to $1,000. (IC 25-1-11-12). Statute provides for granting of inactive license to salespersons or brokers. (IC 25-34.1-3-10). Statute establishes guidelines for real estate courses and for schools to acquire Commission's approval. (IC 25-34.1-5-1 – 25-34.1-5-11). Except for those with inactive licenses, statute imposes continuing education requirements on individuals who are licensed brokers or salespersons including special requirements regarding Indiana attorneys in good standing who are also licensed brokers or salespersons. (IC 25-34.1-9-10, 25-34.1-9-11). Statute establishes Real Estate Recovery Fund to provide pool of funds from which recovery may be obtained for any act by licensee of embezzlement, unlawfully obtaining property or money by false pretenses, use of device, trickery or forgery, to extent such act results in actual cash loss to aggrieved person and aggrieved person is unable to obtain recovery directly from licensee. (IC 25-34.1-7 et seq.). Recovery limited to $20,000 per judgment and aggregate lifetime limit of $50,000 against any one licensee. (IC 25-34.1-7-4). Statute provides funding of Real Estate Recovery Fund through license fee surcharge. (IC 25-34.1-7-2). Recovery available only if act occurred after Dec. 31, 1987, when licensee was licensed, and is act for which license was required under IC 25-34.1 et seq. (IC 25-34.1-7-4). Statute establishes real estate investigation fund to provide funds for investigating and taking enforcement action against real estate and real estate appraisal fraud. (IC 25-34.1-8-7.5). Statute provides funding of investigation fund through license surcharge on appraisers and real estate brokers and salespersons. (IC 25-34.1-3-9.5).

Relationship between broker, broker's client and other parties to real estate transaction is regulated under IC 25-34.1-10, which, inter alia, specifies duties and obligations of broker with respect to client and other parties to transaction. Broker may act as limited agent representing both seller and buyer or both landlord and tenant with written consent (containing certain requirements) of all parties to real estate transaction. (IC 25-34.1-10-12). Licensee who does not have fiduciary relationship with its client due to written agreement to contrary must, at minimum, perform certain specified duties. (IC 25-34.1-10-9.5). Principal broker must develop and enforce written office policy on agency relationships which specifically permits or rejects practice of disclosed limited agency. (IC 25-34.1-10-13[a]). Parties to transaction must be advised whether compensation will be shared with other principal brokers who may represent other parties whose interests are different or even adverse. (IC 25-34.1-10-13[c]). Duties and obligations of licensee set forth in IC 25-34.1-10 supersede any fiduciary duties of licensee based on common law principles of agency to extent of any inconsistency. (IC 25-34.1-10-15). With certain exceptions, client is not liable for misrepresentations made by licensee in connection with agency relationship and licensee is not liable for misrepresentations of another licensee he retains to provide brokerage services to client. (IC 25-34.1-10-16).

Contract for commission on sale of real estate must be in writing, signed by the owner of the real estate or his legally appointed and qualified representative. (IC 32-21-1-10).

Commission Sales Representatives.

Payment of commissions by principal to sales representative, upon termination of contract, is due within 14 days after payment would have been due under contract if contract had not been terminated. (IC 24-4-7-5). Sales representatives are persons who contract with principal to solicit wholesale orders in Indiana and are compensated, in whole or in part, by Commission. (IC 24-4-7-4).

See also topic 3.09 Commercial Code.

3.07 BULK SALES:

Previously governed by c. 6.1 of Uniform Commercial Code, in effect since July 1, 1964. (IC 26-1-6.1-101 et seq.). See topic 3.09 Commercial Code. Repealed by P.L. 77-2007, effective July 1, 2007. Rights and obligations arising before repeal of IC 26-1-6.1 remain valid and may be enforced as if IC 26-1-6.1 had not been repealed.

3.08 CARRIERS:

Department of State Revenue supervises and regulates motor carriers that transport property (IC 8-2.1-24-1 et seq., IC 8-2.1-20-5) and passengers or household goods (IC 8-2.1-22-1 et seq.). Certificates or permits required for common carriers (IC 8-2.1-20-5), contract carriers (IC 8-2.1-24-15), carriers that transport passengers (IC 8-2.1-22-11), carriers that transport household goods (IC 8-2.1-22-12.5), and special or charter carrier (IC 8-2.1-22-28). Intrastate motor carriers not operating under authority issued by U.S. Department of Transportation must register with Indiana Department of Revenue. (IC 8-2.1-24-18). Certification and annual renewal of motor carrier required, except for carrier or guest operator operating motor vehicle as farm vehicle and not part time or incidentally in conduct of commercial enterprise. (IC 8-2.1-24 et seq.). Annual registration of vehicles required. (IC 8-2.1-24-16, IC 8-2.1-22-33). Additional rules required for registration of vehicles to transport passengers or household goods and failure to comply with such rules and obtain appropriate operating authority can result in vehicle impoundment. (IC 8-2.1-22-29). Annual registration of certificate or permit required. (IC 8-2.1-20-5 and 7; IC 8-2.1-22-12.5). Surety bonds, insurance or other proof of financial responsibility required. (IC 8-2.1-24-17, IC 8-2.1-22-46). Brokerage licenses required. (IC 8-2.1-22-27). Annual fuel permit required. (IC 6-6-4.1-12). All other carriers are under supervision of Indiana Department of Transportation. (IC 8-23-2-4.1). Rules of transportation coordinating board, planning office, department of highways and department of transportation treated as adopted by Department of Transportation. (IC 8-23-2-10). Department of State Revenue or State Police Department may revoke and confiscate any registrations, license plates or cab cards issued under IC 9-18 pursuant to operations out of service order issued by Department of Transportation or Federal Highway Administration. (IC 8-2.1-24-28). Department of State Revenue may not register or title motor carrier who fails to comply with 49 CFR 386, is under operations out of service order or whose ability to operate has been terminated. (IC 8-2.1-24-28). Indemnification provisions contained in motor carrier transportation contracts are void and unenforceable, other than certain provisions regarding indemnification by motor carrier, contained in contract with regulated public utility or contained in Uniform Intermodal Interchange and Facilities Access Agreement. (IC 8-2.1-26-1 – 8-2.1-26-5).

Certain Federal Regulations incorporated into State law effective Jan. 1, 1996. (IC 8-2.1-24-18). Federal requirements regulating hours of service of drivers, including requirements for maintenance of logs, do not apply to vehicles used as farm trucks, vehicles operated in intrastate construction or construction related service or restoration of public utility services. (IC 8-2.1-24-18). Notwithstanding incorporated federal requirements, persons between ages 18 and 21 may operate commercial motor vehicles intrastate. (IC 8-2.1-24-18). Federal requirements regulating insulin dependent diabetics do not apply to private carriers of property operated only in intrastate commerce or any carriers of property operated in intrastate commerce whether or not carrier vehicle is of class that requires commercial driver's license. (IC 8-2.1-24-18).

Discrimination defined and prohibited. (IC 8-2.1-24-1; IC 8-2.1-24-3 – 8-2.1-24-26; IC 8-2.1-22-18, 8-2.1-22-38; IC 8-3-1-12). Railroads may be both civilly and criminally liable for discrimination. (IC 8-3-1-13 to 8-3-1-15).

Rates.

Department of State Revenue has power to prescribe just and reasonable rates, fares and charges of motor carriers. (IC 8-2.1-22-12.5; IC 8-2.1-24-1; IC 8-2.1-24-3 – 8-2.1-24-26 and IC 8-2.1-22-21). Contract carriers must establish and observe reasonable minimum rates, fares and charges (IC 8-2.1-22-12.5; IC 8-2.1-24-1; IC 8-2.1-24-3 – 8-2.1-24-26; IC 8-2.1-22-24) and common carriers must file tariffs showing all rates, fares and charges (IC 8-2.1-20-5; IC 8-2.1-22-12.5; IC 8-2.1-24-1; IC 8-2.1-24-3 – IC 8-2.1-24-26; IC 8-2.1-22-23). Indiana Department of Transportation has authority to hold hearings and pass on reasonableness of railroad rate schedules. (IC 8-2-19-1).

Sale to Enforce Lien.

Baggage or freight unclaimed for period of three months at place to which it is consigned or checked may be sold at public auction by common carrier. (IC 8-2-6-1). Perishable freight or livestock may be sold after expiration of five days at public auction. (IC 8-2-6-4).

No liability for stock injured when railroad is securely fenced in and properly maintained. (IC 8-4-32-1 – IC 8-4-32-7). Railroads are obligated to construct and maintain fencing along right-of-way. (IC 8-4-33-1 – IC 8-4-33-4).

Statute of Limitations.

All actions for recovery of charges shall commence within two years. (IC 8-2.1-20-5; IC 8-2.1-22-12.5; IC 8-2.1-24-1; IC 8-2.1-24-3 – IC 8-2.1-24-26; IC 8-2.1-22-22).

Motor Vehicle Carriers.

See category 23 Transportation, topic 23.01 Motor Vehicles.

See topics 3.06 Brokers, 3.09 Commercial Code.

3.09 COMMERCIAL CODE:

Uniform Commercial Code (as reproduced in Uniform and Model Acts section) was enacted by 1963 Legislature, and became effective on July 1, 1964. (IC 26-1-1-101 et seq.).

1962 Official Text adopted with variations described below.

1966 Official Amendments adopted in part.

§ 2-702–1966 Official Amendment adopted.

§ 3-501–1966 Official Amendment not enacted.

§ 7-209–1966 Official Amendment not enacted.

1966 Official Optional Amendments adopted in part.

§ 1-209–1966 Official Optional Amendment not enacted.

§ 2-318–1966 Official Optional Amendment Alternative A enacted.

1972 Official Text, Art. 9, repealed effective July 1, 2001.

1973 Official Amendment adopted.

1977 Official Amendments adopted.

1987 Official Text, Art. 2A, adopted.

1989 Official Text, Art. 4A, adopted.

1989 Official Text, Revised Art. 6, adopted with variations described below.

1990 Amendments to Art. 2A adopted with variations described below.

1991 Official Text, Revised Art. 3, with Amendments to Arts. 1 and 4 adopted with variations described below.

1994 Official Text, Revised Art. 8, with Amendments to Arts. 1, 3, 4, 5, 9, and 10 adopted.

1995 Official Text, Revised Art. 5, with Amendments to Arts. 1, 2, and 9 adopted.

1998 Official Text, Revised Art. 9, with Amendments to Arts. 1, 2, 2A, 4, 5, 6, 7, and 8 adopted effective July 1, 2001 with variations described below.

In general, Indiana Code U.C.C. section numbers consist of “IC 26-1-” followed by section number from U.C.C. official text. Exceptions are as follows:

Art. 2A—IC 26-1-2.1-

Revised Art. 3—IC 26-1-3.1-

Art. 4A—IC 26-1-4.1-

Revised Art. 5—IC 26-1-5.1-

Revised Art. 6—IC 26-1-6.1-

Revised Art. 8—IC 26-1-8.1-

Revised Art. 9—IC 26-1-9.1-

Intentional Deviations from 1962 Official Text are as follows ("IC 26-1-" omitted before section numbers):

§ 1-109, U.C.C.—Omitted.

§ 1-108.1.—New nonuniform section added governing acceptance of payment of U.C.C. filing fees by Secretary of State.

§ 1-201(9)—After phrase "does not include a pawnbroker." there is inserted "All persons who sell minerals or the like (including oil and gas) at a wellhead or minehead shall be deemed to be persons in the business of selling goods of that kind."

§ 1-201(37)—Omits phrase "buyer of accounts, chattel paper, or contract rights" and inserts "buyer of accounts or chattel paper."

§ 2-102—Adds sentence which reads: "IC 26-1-2 does not impair or repeal IC 9-14, IC 9-17 or IC 9-22-5."

§ 2-107(1)—Omits phrase "A contract for the sale of timber, minerals or the like or a structure" and inserts "A contract for the sale of minerals or the like (including oil and gas) or a structure or its materials to be removed from realty."

§ 2-107(2)—After phrase "but not described in subsection (1)" there is inserted "or of timber to be cut."

§ 2-316(3)—Adds subparagraphs (d) and (e), providing: No implied warranty that cattle, hogs or sheep are free from disease if seller shows that all federal and state regulations concerning animal health have been met; and, with respect to audio or visual entertainment products solicited through mail order catalogue, all implied warranties may be excluded if contract is in writing and conspicuously states product is sold "as is" or "with all faults" and that "the entire risk as to the quality and performance of the product is with the buyer."

§ 2-702(3)—Omits phrase "or lien creditor."

§ 2-721—Also provides for recovery of attorneys fees in fraud cases.

§ 7-403(1)(b)—After optional clause, there is inserted, "whenever the claimed loss or destruction resulted from fire, and the amount of the claimed loss or destruction under the document exceeds the sum of ten thousand dollars ($10,000)."

§ 7-503(3)—Words "a bill issued by the freight forwarder covering such goods has been duly negotiated" substituted for "a bill issued by the freight forwarder is duly negotiated."

Optional Provisions from 1962 Official Text:

§ 2-318—Alternative A adopted.

§ 4-106—Optional Language omitted.

§ 4-202—Optional clause adopted.

§ 4-212—Optional subsection adopted.

§ 7-204—Optional subsection (4) omitted.

§ 7-403—Optional clause adopted.

§ 10-104(2)—Saving Uniform Simplification of Fiduciary Security Transfers Act from repeal, enacted.

Optional Provisions from 1987 Official Text:

§ 2.1-216—Adopts Alternative A.

Intentional Deviations from 1989 Official Text are as follows ("IC 26-1-" omitted before section numbers):

§ 6.1-108(3)—Words "[End of Notice]" omitted.

§ 6.1-109—Term "filing officer" replaced with "Secretary of State."

§ 6.1-109(4)—Reference to fee for indexing each name more than two is deleted. Cross-reference is made to IC 26-1-9.1 for fees.

§ 6.1-109(5)—Cross-reference is made to IC 26-1-9.1 for fees.

Intentional Deviations from 1990 Amendments are as follows ("IC 26-1-" omitted before section numbers):

§ 2.1-507(1)—Words "at the times specified in sections 2A-519 and 2A-528" replaced with "at the time of default."

Intentional Deviations from 1991 Official Text are as follows ("IC 26-1-" omitted before section numbers):

§ 3.1-307(b)(2) and (b)(4)—Reads "(2) In the case of an instrument payable to the represented person or the fiduciary as such, the taker has notice of the breach of fiduciary duty if the instrument is: (A) taken in payment of or as security for a debt known by the taker to be the personal debt of the fiduciary; (B) taken in a transaction known by the taker to be for the personal benefit of the fiduciary; or (C) deposited to an account other than an account of the fiduciary, as such, or an account of the represented person and the bank receiving the deposit has: (i) actual knowledge that the fiduciary is committing a breach of its obligation as fiduciary in making the deposit; or (ii) knowledge of other facts that the bank's action in receiving the deposit constitutes bad faith." Subsection (b)(4) reads: "(4) If an instrument is issued by the represented person or the fiduciary as such, to the taker as payee, the taker has notice of the breach of fiduciary duty if the instrument is: (A) taken in payment of or as security for a debt known by the taker to be the personal debt of the fiduciary; (B) taken in a transaction known by the taker to be for the personal benefit of the fiduciary; or (C) deposited to an account other than an account of the fiduciary, as such, or an account of the represented person and the bank receiving the deposit has: (i) actual knowledge that the fiduciary is committing a breach of its obligation as fiduciary in making the deposit; or (ii) knowledge of other facts that the bank's action in receiving the deposit constitutes bad faith."

§ 3.1-312—Adds new section providing procedures for claimant to recover from obligated bank amount of cashier's check, teller's check, or certified check that was lost, destroyed, or stolen.

§ 3.1-404(d)—Adds after “and that failure” the word “substantially.”

§ 3.1-420—Provides that measure of liability for conversion is presumed to be amount payable on instrument, notwithstanding IC 34-24-3-1 which allows awards of treble damages, attorneys fees and costs.

§ 3.1-502.5—Adds new section: “A person to whom a check, a draft, an order, or like instrument is tendered may, if the instrument is dishonored or returned unpaid for any reason, charge and collect from the maker or drawer, or the person for whose benefit the instrument was given, an amount not to exceed twenty dollars ($20) plus an amount equal to the actual charge by the depository institution for each returned or dishonored instrument. The charge shall not be considered an interest charge, a finance charge, a time price differential, or any charge of a similar nature.”

§ 4-104(a)(3)—Specifies that “Banking Day” does not include Sat., Sun. or legal holiday.

§ 4-107(1) and (2)—Eliminated and replaced with: “A branch or separate office of a bank is a separate bank for the purpose of computing the time within which and determining the place at or to which action may be taken or notices or orders must be given under IC 26-1-4 and IC 26-1-3.1.”

§ 4-405(1)—Adds “mental” before “incompetence.”

§ 6.1-102(1)(e)—Amends definition of “claimant,” deleting exception for person holding claim for taxes owing to governmental unit.

Deviations from 1995 Official Text are as follows (“IC 26-1-” omitted before section numbers):

§ 5.1-101—Incorporates transition provisions located elsewhere in Official Text.

§ 5.1-103(a)—States in apparent error that “IC 26-1-8.1 [rather than IC 26-1-5.1] applies to letters of credit.”

Intentional Deviations from 1998 Official Text (enacted with effective date of July 1, 2001) are as follows (“IC 26-1-” omitted before section numbers):

§ 9.1-103—Applies rules for purchase money security interests to consumer goods transactions.

§ 9.1-109—Extends scope of IC 26-1-9.1 to security interests in insurance agent commissions; excludes from scope of IC 26-1-9.1 any security interest created by any governmental entity, certain claims arising from injury or sickness, and certain claims to receive benefits under special need trust.

§ 9.1-311—Adds nonstandard language which does not alter meaning of section specifying filing statutes which apply to certificate-of-title property held as inventory.

§ 9.1-320—Adds extensive provisions governing sale of farm products subject to security interest; includes criminal sanctions for violation.

§ 9.1-501—Continues mandatory local filing, in county filing offices, of financing statements for farm related collateral until July 1, 2002. Extends non-UCC provisions for filing of agricultural liens until July 1, 2002.

§ 9.1-502—Requires secured party to furnish copy of financing statement to debtor within 30 days after filing. Failure to furnish financing statement to debtor does not affect effectiveness of financing statement but subjects secured party to penalties under § 9.1-625.

§ 9.1-625—Provides that secured party who fails to furnish copy of financing statement to debtor within 30 days after filing is subject to $500 statutory damages as well as actual damages.

§ 9.1-626—Applies rebuttable presumption rule regarding commercial reasonableness to all transactions including consumer transactions.

§§ 1.5-1 and -2—Adds “UCC Financing Statement” form and “UCC Financing Statement Amendment” form as separate chapter, IC 29-1-1.5. Forms are modified from Official Text by deleting block for debtor’s social security account number.

Intentional Deviations from 1998 Official Text (enacted with effective date of July 1, 2002) are as follows (“IC 26-1-” omitted before section numbers):

§ 2.1-303—Reference to IC 26-1-9 changed to IC 26-1-9.1.

§ 4-210—Reference to 26-1-9 changed to 26-1-9.1.

§ 10-102(1)—“Such” replaced by “the” and reference to IC 32-8-35 replaced with IC 32-33-14.

§ 10-102(2)—“Such” replaced by “the”.

Intentional Deviations from 1998 Official Text (enacted with effective date of July 1, 2005) are as follows (“IC 26-1-” omitted before section numbers):

§ 9.1-311(a)(2)—Removed “farm tractors or the like” from list providing for security interest to be indicated on certificate as condition or result of perfection as referenced therein.

Intentional Deviations from 1998 Official Text (enacted with effective date of July 1, 2007) are as follows (“IC 26-1-” omitted before section numbers):

§ 1-101—Retains original language as new subsection (1) and adds new subsection (2) to reference that IC 26-1 applies to extent that it is governed by another article of the UCC.

§ 1-105—Repealed.

§ 1-108.2—New section to affirmatively state that this article “modifies, limits, and supersedes the Electronic Signatures in Global and National Commerce Act (15 U.S.C. 7001 et seq.)” but that this article does not “(a) modify, limit or supersede 15 U.S.C. 7001(c); or (b) authorize the electronic delivery of a notice described in 15 U.S.C. 7003(b).”

§ 1-201—Amends definitions of “agreement,” “bearer,” “bill of lading,” “delivery,” “document of title,” “holder,” “insolvent,” “notice,” “notifies” or “gives,” and “warehouse receipt.” Also amends subsection (27) to change “his” to “the person’s” and “he” to “the person.”

§ 1-205—Adds definition of “course of performance” as subsection (2). Renumbers prior subsections (2) through (6) as new subsections (3) through (7). Adds “course of performance” to several subsections relating to “course of dealing.” Provides new prevailing hierarchy in subsection (5). Adds new subsection (8): “Subject to IC 26-1-2-209, a course of performance is relevant to show a waiver or modification of any term inconsistent with the course of performance.”

§ 1-301—New section pertaining to choice of law.

§ 1-302—New section pertaining to subordinate obligations.

§ 2-103(3)—Adds “ \‘Control’ as provided in IC 26-1-7-106 and \‘before’ the following definitions apply.”

§ 2-104(2)—Adds “or are associated with” before “the draft.”

§ 2-202—Reference to IC 26-1-2-208 replaced with IC 26-1-1-205.

§ 2-208—Repealed.

§ 2-310—Retains original language as (I), shifts placement of phrase “of where the goods are to be received” and adds new (II): “at the time the buyer is to receive delivery of the electronic documents and at the seller’s place of business or, if none, the seller’s residence” as alternative scenario to (I).

§ 2-323(2)—Adds “tangible” before “bill of lading.”

§ 2-401—Adds “tangible” before “document of title,” adds “and if the seller is to deliver an electronic document of title, title passes when the seller delivers the document” after “where he delivers such documents,” and adds “of title” after “no documents.”

§ 2-403—Replaces “his” with “the purchaser’s,” replaces “him” with “the merchant,” and removes reference to IC 26-1-6.1.

§ 2-503(4)(b)—Replaces “written direction to” with “record directing” and adds “except as otherwise provided in IC 26-1-9.1,” before “receipt by the bailee.”

§ 2-505—Adds “or control” before “of the bill of lading” and adds “of title” after “negotiable document.”

§ 2-506(2)—Removes “on its face.”

§ 2-509(2)—Adds “possession or control of” after “his receipt of” in two instances, adds “in a record” after “to deliver,” and removes “written” before “direction.”

§ 2-605(2)—Replaces “on the face of” with “in.”

§ 2-705—Replaces “warehouseman” with “a warehouse” and adds “of possession or control” before “of the document.”

§ 2.1-103—Replaces “receiving” with “acquiring” in two instances.

§ 2.1-207—Repealed.

§ 2.1-514(2)—Replaces “on the face of” with “in.”

§ 2.1-526(2)—Replaces “warehouseman” with “a warehouse.”

§ 3.1-502.5(12)—Adds additional references to fees which may be charged if check is dishonored.

§ 4-104(c)—Adds “ \‘Control’ as provided in IC 26-1-7-106 and \‘before’ the following definitions.”

§ 4-210(c)—Adds “possession or control of the” before “accompanying documents.”

§ 6.1—Repealed.

§ 7-101—Replaces “IC 26-1-7 shall be known and” to “this chapter.”

§ 7-102—Amends definitions of “bailee,” “consignee,” “consignor,” “delivery order,” “goods,” and “issuer.” Adds definitions of “carrier,” “good faith,” “person entitled under the document,” “record,” “shipper,” and “sign.” Removes definition of “document.” Changes “warehouseman” to “warehouse.” Changes subsection relating to other definitions applicable to this chapter.

§ 7-103—Adds language regarding effect of this chapter to other treaties, statutes, or regulatory statutes.

§ 7-104—Provides revisions to negotiability and nonnegotiability of document of title.

§ 7-105—Provides extensive revisions regarding issuance of tangible document of title upon request of person entitled under electronic document of title.

§ 7-106—New section regarding person’s control of electronic document of title.

§ 7-201—Provides revisions to issuance of warehouse receipt by warehouse.

§ 7-202—Provides extensive revisions regarding form and terms of warehouse receipt.

§ 7-203—Provides revisions regarding liability for nonreceipt or misdescription of goods.

§ 7-204—Provides extensive revisions regarding duty of care of warehouse and contractual limitation of warehouse’s liability.

§ 7-205—Provides revisions regarding instances where title under warehouse receipt may be defeated.

§ 7-206—Provides extensive revisions regarding removal of goods from warehouse and termination of storage at warehouse’s option.

§ 7-207—Provides revisions regarding separation of goods covered by each receipt and commingling of fungible goods.

§ 7-208—Provides revisions regarding alteration of warehouse receipts and their resulting enforceability.

§ 7-209—Provides extensive revisions regarding warehouse liens.

§ 7-210—Provides extensive revisions regarding enforcement of warehouse liens.

§ 7-301—Provides extensive revisions regarding liability for nonreceipt or misdescription of goods and provisions regarding issuer of bill of lading.

§ 7-302—Provides extensive revisions regarding issuance of and goods covered by through bill of lading or other document of title.

§ 7-303—Provides extensive revisions regarding delivery of goods to person or destination other than provided in bill of lading and other instruction changes.

§ 7-304—Provides extensive revisions regarding issuance of tangible bill of lading in set of parts.

§ 7-305—Provides revisions regarding issuance of bill of lading at destination rather than place of shipment.

§ 7-307—Provides extensive revisions regarding carrier's lien and its potential loss thereof.

§ 7-308—Provides extensive revisions regarding enforcement of carrier's lien by public or private sale of goods.

§ 7-309—Provides extensive revisions regarding duty of care of carrier that issues bill of lading and contractual limitations of carrier's liability.

§ 7-401—Provides extensive revisions regarding irregularities in issuance or receipt of document of title or conduct of issuer.

§ 7-402—Provides extensive revisions regarding duplicate documents of title and liability for damages for overissue or failure to identify duplicate documents.

§ 7-403—Provides extensive revisions regarding obligations of warehouse or carrier to deliver goods.

§ 7-404—Provides extensive revisions regarding liability of bailee for receipt and delivery of goods.

§ 7-501—Provides extensive revisions regarding rules applicable to negotiable tangible and electronic documents of title.

§ 7-502—Provides extensive revisions regarding rights by holder to which negotiable document of title has been duly negotiated.

§ 7-503—Provides extensive revisions regarding rights conferred by document of title and title to goods based upon unaccepted delivery order or bill of lading issued to freight forwarder.

§ 7-504—Provides extensive revisions regarding title and rights conveyed in absense of due negotiation and diversion or other change of shipping instructions.

§ 7-505—Adds "tangible" before "document" and removes "by" before "previous endorsers."

§ 7-506—Adds "tangible" before "document" and replaces "his" with "the."

§ 7-507—Provides extensive revisions regarding warranties provided to immediate purchaser of goods from person with goods.

§ 7-508—Provides revisions regarding warranties of collecting bank or other intermediary known to be entrusted with documents of title.

§ 7-509—Provides revisions regarding adequacy of document to fulfill contracts for sale or lease or conditions for letter of credit.

§ 7-601—Provides extensive revisions regarding effect of lost, stolen, or destroyed documents of title.

§ 7-602—Provides extensive revisions regarding attachment of goods covered by negotiable document of title.

§ 7-603—Provides revisions regarding situations when more than one person claims title or possession of goods and assertion of interpleader by bailee.

§ 8.1-103—Adds new subsection (g): “A document of title is not a financial asset unless section 102(a)(9)(iii) of this chapter applies.”

§ 9.1-102—Reference to IC 26-1-7-201(2) replaced with IC 26-1-7-201(B) in subsection (30), adds “ ‘Control’ as provided in IC 26-1-7-106 and ‘before’ the following definitions” and adds “ ‘Issuer’ (with respect to documents of title) IC 26-1-7-102” in subsection (80).

§ 9.1-203(b)(3)(D)—Removes “or” before “letter-of-credit,” adds “or electronic documents,” after “letter-of-credit,” and adds reference to IC 26-1-7-106.

§ 9.1-207(c)—Adds reference to IC 26-1-7-106.

§ 9.1-208—Adds additional requirement of secured party as new subsection (b)(6).

§ 9.1-301—Adds “tangible” before “negotiable documents.”

§ 9.1-310(b)—Adds “control” before “or possession” and adds “electronic documents,” before “investment property.”

§ 9.1-312(e)—Adds “or control” after “possession.”

§ 9.1-313(a)—Adds “tangible” before “negotiable documents.”

§ 9.1-314—Adds references to “or electronic documents” and IC 26-1-7-106 in two instances and removes “or” in two instances.

§ 9.1-317—Adds “tangible” before “documents” in subsection (b) and adds “electronic documents,” before “general intangibles” in subsection (d).

§ 9.1-338—Adds “tangible” before “chattel paper” and “documents.”

§ 9.1-521—Corrected reference to IC 26-1-9.1-516(b).

§ 9.1-601(b)—Adds reference to IC 26-1-7-106.

§ 9.1-706—Corrected reference to IC 26-1-9.1-515.

(“IC 26-2-” omitted before section number):

§ 2-7.2—Removes "that accepts deposits" and states that financial institution "does not include a person licensed under IC 24-4.5."

("IC 26-3-" omitted before section numbers):

§ 7-6—Adds new subsection (i): "Fees collected under this section shall be deposited in the grain buyers and warehouse licensing agency license fee fund established by section 6.3 of this chapter."

§ 7-6.3—New section pertaining to grain buyers and warehouse licensing agency license fee fund.

Intentional Deviations from 1998 Official Text (enacted with effective date of July 1, 2010) are as follows ("IC 26-1-" omitted before section numbers):

§ 1-201—Amends definitions of "bank" and "good faith". Adds definition of "record" as subsection (33b).

§ 3.1-103(a)—Adds definition of "consumer account" as subsection (2). Adds definition of "consumer transaction" as subsection (3). Adds definition of "principal obligor" as subsection (11). Adds definition of "remotely-created consumer item" as subsection (15). Adds definition of "secondary obligor" as subsection (16). Renumbers prior subsections (2) through (8) as new subsections (4) through (10) and subsections (9) through (11) as new subsections (12) through (14).

§ 3.1-103(b)—Removes "'Bank'. IC 26-1-4-105".

§ 3.1-106(a)—"Writing" replaced by "record" in subsections (2) and (3).

§ 3.1-106(a)—"Writing" replaced by "record" in subsection (1).

§ 3.1-116—Reference to IC 26-1-3.1-419(e) changed to IC 26-1-3.1-419(F) in subsection (b). Subsection (c) removed regarding right of contribution from discharged party having joint and several liability with non-discharged party.

§ 3.1-119—Removes "written" and adds "in a record" after "notice of litigation".

§ 3.1-305—Replaces "stated in subsection (b)" with "otherwise provided in this section" in subsection (a). Adds new subsection (e) pertaining to rights of issuer against subsequent holder or transferee in connection with consumer transaction in absence of statement of available claims or defenses required to be in instrument. Adds new subsection (f) subordinating section to other law establishing different rule for consumer transactions.

§ 3.1-309(a)(1)—Replaces "was in possession of the instrument and" with "seeking to enforce the instrument: (A) was", replaces "it" with "the instrument", adds "or" after "possession occurred;" and adds new subparagraph (B) "has directly or indirectly acquired ownership of the instrument from a person who was entitled to enforce the instrument when loss of possession occurred;".

§ 3.1-312(a)(3)—Removes "written" and adds "in a record" after "statement, made".

§ 3.1-416(a)—Relocates "and" from end of subparagraph (4) to end of subparagraph (5) and adds new subparagraph (6) "with respect to a remotely-created consumer item, the person on whose account the item is drawn authorized the issuance of the item in the amount for which the item is drawn."

§ 3.1-417(a)—Relocates "and" from end of subparagraph (2) to end of subparagraph (3) and adds new subparagraph (4) "with respect to a remotely-created consumer item, the person on whose account the item is drawn authorized the issuance of the item in the amount for which the item is drawn."

§ 3.1-419—Adds new subsection (c) pertaining to obligations of accommodation party when signing instrument guaranteeing payment or not unambiguously stating intention to guaranty collection rather than payment. Renumbers prior subsection (e) as new subsection (f) and adds following after first sentence: "In proper circumstances, an accommodation party may obtain relief that requires the accommodated party to perform its obligations on the instrument.". Replaces "who" with "that" in last sentence of subsection (f).

§ 3.1-602—Replaces references to "subsection (b)" with reference to "subsection (e)". Adds new subsection (b) pertaining to adequate notice of transfer of note to party obliged to pay. Relabels portion of prior subsection (a) as new subsection (c), adds "Subject to subsection (e)," before "to the extent", removes "of the" after "to the extent" and adds "is made under subsections (a) and (b),". Adds new subsection (d) pertaining to adequate notification of note transfer. Relabels prior subsection (b) as subsection (e) and replaces reference to "subsection (a)" with reference to "subsections (a) through (d)". Adds new subsection (f) pertaining to use of term "signed" in record that is not writing.

§ 3.1-604—Replaces "writing" with "record". Adds new subsection (c) pertaining to use of term "signed" in record that is not writing.

§ 3.1-605—Provides extensive revisions regarding recourse of secondary obligor when obligation of principal obligor is modified or released.

§ 4-104(a)—Adds definition of "good faith" as subsection (9). Renumbers prior subsections (9) through (12) as new subsections (10) through (13).

§ 4-104(b)—Adds references to "'Record'. IC 26-1-1-201(33b)" and "'remotely-created consumer item'. IC 26-1-3.1-103".

§ 4-207(a)—Relocates "and" from end of subparagraph (4) to end of subparagraph (5) and adds new subparagraph (6) "with respect to a remotely-created consumer item, the person on whose account the item is drawn authorized the issuance of the item in the amount for which the item is drawn."

§ 4-208(a)—Relocates "and" from end of subparagraph (2) to end of subparagraph (3) and adds new subparagraph (4) "with respect to a remotely-created consumer item, the person on whose account the item is drawn authorized the issuance of the item in the amount for which the item is drawn."

§ 4-212(a)—Replaces "written" with "record providing".

§ 4-301(a)—Adds new subparagraph (2) pertaining to payor bank's return of image of demand item in connection with revocation and recovery of settlement. Replaces "written" with "a record providing".

§ 4-403(b)—Replaces "writing" with "record".

§ 6.2-1—New section pertaining to validity and enforcement of rights and obligations arising under former § 6.1.

Optional Provisions from 1998 Official Text: Indiana has not adopted § 9-103A or § 9-324A relating to production money security interests.

Filing Fees.

For filing offices and fees under Revised Art. 9, see category 10 Documents and Records, topic 10.04 Records, subhead Filing Under Commercial Code.

Credit Agreements.

IC 26-2-9 is new chapter effective July 1, 2002, covering Credit Agreements, defining related terms: credit agreement, creditor and debtor. Explains debtor's standing to bring action upon credit agreement and agreement with creditor to enter into new or amended agreement.

Forms (National Article 9).

For filing forms see IC 26-1-1.5 et seq. Indiana Secretary of State website also contains guidance. National forms are also acceptable. (See Uniform and Model Acts section of this Digest, Commercial Code Amendments for National Forms.) In Indiana, if codified prerequisites are met, filings will not be refused, regardless of form.

Intentional Deviation from 1998 Official Text (enacted with effective date of July 1, 2003) adds new section to read as follows: § 1. IC 26-1-9.1-102.5. § 102.5. As used in this chapter, "take free", "takes free", "takes the money free", and "takes the funds free", when used in conjunction with security interest in collateral which is transferred, means that following transfer collateral is no longer encumbered by security interest and security interest is terminated with respect to transferred collateral.

See also topics: Banks and Banking; Bills and Notes; Brokers; Carriers; Contracts; Factors; Frauds, Statute of; Sales; Securities; Warehousemen and categories Business Organizations, topic Corporations; Civil Actions and Procedure, topic Limitations of Actions; Debtor and Creditor, topics Assignments, Fraudulent Sales and Conveyances, Liens, Pledges; Documents and Records, topics Records, Seals.

3.10 CONDITIONAL SALES:

See topic 3.23 Sales.

3.11 CONSIGNMENTS:

See topic 3.14 Factors.

3.11A CONSUMER CREDIT:

Effective 12.01 a. m. Oct. 1, 1971, consumer loans and credit sales are controlled by Consumer Credit Code. (IC 24-4.5-1-101 – IC 24-4.5-7-414). Provisions of Code setting maximum charges for revolving charge accounts and revolving loan accounts and establishing debtor's remedies and criminal penalties for violations thereof and also provisions dealing with regulated and supervised lenders and with administration became effective Mar. 5, 1971. 1968 final draft of Uniform Law with 1970 amendments was enacted into law with certain minor changes.

Principal Changes.

Deleted from Indiana law were §§ 1.106(6), 1.203(2), 1.301(1)-(2), 2.104(3), 2.106(3), 2.203, 2.207(5), 2.302-2.313, 2.403, 2.404, 2.416, 2.503-2.505, 2.602(4), 3.104(2), 3.203, 3.301(3), 3.302-3.312, 3.408, 3.409, 3.501(1) and (2), 3.514, 3.602(1)(b), 3.602(3), 5.302(2) and

(3), 6.104(2), 6.104(3), 6.202(e)-(g), and 6.301 to end of Uniform law.

Deleted from Indiana law was all language with respect to "agricultural" purpose in §§ 2.106, 2.403-2.407, 2.409, 3.104, 3.402 and 4.202 of Uniform law.

Alternative B was used in §§ 2.413 and 3.404 of Indiana law.

Deviations from Uniform Law.

§ 1.102 paragraph (4) added stating that reference to federal law is reference to law in effect Dec. 31, 2007; § 1.106(1), substitute "October, 1971" for "December, 1967" as reference base index; § 1.201(1) includes receipt by persons acting on behalf of seller/lessor/lender, as applicable, in paragraphs (a), (b) and (c); § 1.202 exempts from Consumer Credit Code (i) extension of credit primarily for business, commercial, or agricultural purpose, (ii) installment agreement for purchase of home fuels in which finance charge is not imposed, (iii) loans made, insured or guaranteed under program authorized by Title IV of Higher Education Act of 1965 (20 U.S.C. 1070 et seq.), (iv) transactions in securities or commodities accounts in which credit is extended by broker-dealers registered with Securities and Exchange Commission or Commodity Futures Trading Commission, (v) loans made by community development corporation acting as sub-recipient of Indiana housing and community development and in compliance with requirements thereof, (vi) extensions of credit to governmental agencies or instrumentalities, (vii) sale of insurance by insurer, except as provided in chapter on insurance (IC 24-4.5-4), (viii) transactions under public utility, municipal utility, or common carrier tariffs if subdivision or agency of this state or of United States regulates charges for services involved, charges for delayed payment, and any discount allowed for early payment, (ix) rates and charges and disclosure rates and charges of licensed pawnbroker established in accordance with statute or ordinance concerning these matters, (x) sale of goods, services, or interest in land in which goods, services, or interest in land are purchased primarily for purpose other than personal, family or household purpose, and (xi) loan in which debt is incurred primarily for purpose other than personal, family, or household purpose; § 1.301(2) which previously defined "Administrator" has been deleted and replaced by definition of "Department" (§ 6.103); § 1.301(6) defines "Consumer Credit"; § 1.301(8) defines "Creditor" in manner consistent with Federal Truth-in-Lending Act (Reg. Z); § 1.301(9) defines "Earnings" in manner consistent with Federal Truth-in-Lending Act (Reg. Z); § 1.301(12) includes limited liability companies within definition of "Organization"; § 1.301(13) defines "Payable in installments" in manner consistent with Federal Truth-in-Lending Act (Reg. Z); § 1.301(18) defines "Regularly engaged" in manner consistent with Federal Truth-in-Lending Act (Reg. Z); § 1.301(19) defines "Seller credit card" replacing "or others licensed or franchised to do business under his business or trade name or designation" with "or from that person and any other person. The term includes a card that is issued by a person, that is in the name of the seller, and that can be used by the buyer or lessee only for purchases or leases at locations of the named seller"; § 1.301(21) defines "Mortgage servicer"; § 1.301(22) defines "Affiliate"; § 1.303 adds definition of "Director", which means director of department of financial institutions (§ 6.103.5); § 1.301(20) (a) and (b) expands definition of "supervised financial organization" by replacing references to "this state" with "a state"; §§ 2.104(1)(e) and 3.104(1)(d) include personal property used or expected to be used as principal dwelling of debtor and change dollar amount to $50,000; § 2.106(1)(b) change dollar amount to $50,000; § 2.109 deletes requirement of seller to include charges/fees of loan broker/arranger in finance charge and excludes from meaning of "credit service charge" certain charges paid to third parties not required by seller as condition to extension of credit except for borrower paid mortgage broker fees; § 2.201(2)(b), 21% replaces 18%; § 2.201(4) 30 days replaces ten days; § 2.201(4)(a) adds exceptions to delay in commencement date of sale agreement where delays are attributable to customer or partial deliveries are made within 30 days; § 2.201(6) permits minimum credit service charge of not more than $30 and establishes when minimum service charge is applied; § 2.202(1)(c) notwithstanding provisions of Federal Consumer Protection Act concerning disclosure, allows sellers to assess additional charges provided that such charges are determined by Department of Financial Institutions to be reasonable and of benefit to borrower or buyer; § 2.202(1)(e) allows participation fees assessed in connection with revolving charge account as long as fees are reasonable in amount relative to seller's cost and not assessed to circumvent or evade this article; § 2.202(2)(b) includes insurance providing coverage for unemployment or other loss of income; § 2.202(3) includes as additional charges in transactions where debt is secured by interest in land reasonable closing costs such as title and recording fees, fees for credit reports, amounts required to be paid into escrow or trust account, and appraisal fees; § 2.203.5 provides for delinquency charges on consumer credit sales, refinancings or consolidations that are not precomputed and permits creditor to convert precomputed consumer credit sale to sale with service credit charge on unpaid balance if all or part of two installments are in default for ten days or more; § 2.205(1) deletes exception for not allowing minimum credit service charge; § 2.207(3) limited to 1¾% charge on all balances; § 2.209(2) limits total credit service charge that may be charged upon prepayment of credit sale not subject to provisions of rebate upon prepayment (IC 24-4.5-2-210); § 2.209(3) describes duties and liabilities of creditor or mortgage servicer to debtor at time of prepayment; § 2.210(3) delete references regarding sale of interest in land or consumer credit sale secured by interest in land; § 2.210(5)(c) expands from four to five additional number of days that will be considered computation period; § 2.210(9) applies whether or not credit sale is precomputed; § 2.210(10) added to require that unearned part of credit service charge on prepayment of precomputed consumer loan be calculated by applying disclosed annual percentage rate that would yield credit service charge originally contracted for to unpaid balances for period following prepayment whenever transaction with term of more than 61 months is prepaid in full; § 2.301(2) adds disclosure by lessor to lessee in consumer lease; § 2.301(3) excuses disclosure requirement on consumer credit sales exempt from Federal Consumer Credit Protection Act; § 2.405(1) excludes sales on which only credit service charges are payable before time final payment is due; §§ 2.405(2) and 3.402(2) added to define "terms of refinancing" to include fixed and variable rate consumer credit sales and loans; § 2.406 three times replaces twice; § 2.413 15% limit deleted; § 2.501 includes telephone solicitations and solicitations through mailing, advertisements or telephone where seller has no permanent business establishment in city or town and buyer is required to meet seller at location other than seller's permanent business establishment; § 2.502 revised to be consistent with Federal Truth-in-Lending Act (Reg. Z), and specifically references compliance with 16 CFR 429; § 2.602(1) dollar amount changed to $50,000; §§ 2.602(2) and 2.604(1)(b) 21% replaces 18%; § 3.104(d)(i) dollar amount changed to $50,000; § 3.105 exempts home mortgage transactions from certain requirements; § 3.109 deletes requirement of lender to include charges/fees of loan broker/arranger in finance charge and excludes from meaning of "loan finance charge" certain charges paid to third parties not required by seller as a condition to extension of credit except certain borrower paid mortgage broker fees; § 3.201(1) 21% replaces 18%; § 3.201(4) substitute "maximum annual percentage rate" for "18% per year", substitute 1¾% for 1½% and substitute "1/12th the maximum annual percentage rate" for "1½%"; § 3.201(6) permits minimum loan finance charge of $30 (subject to change); § 3.201(8) for consumer loan, lender may contract for loan origination fee of not more than 2% of loan amount or, if revolving loan account, of line of credit contracted for; § 3.201(9) loan origination fee under § 3.201(8) not subject to refund or rebate, not permitted if lender makes specified settlement charge limited to lesser of $40 or 2% of loan amount, and may not be charged on replacement loan within 90 days of prior loan except on amount replacement exceeds prior loan; § 3.201 fees for preparing deeds, mortgages, reconveyances and similar documents are permitted in addition to charges under § 3.201(8); § 3.202(1) added four new additional charges for which lender may contract and receive with loan finance charges on consumer loan; § 3.202(1) allows creditors to assess additional charges provided that such charges are determined by Department of Financial Institutions to be reasonable and of benefit to debtor and establishes maximum limits on some fees; § 3.202(1)(c) revised to apply to annual or periodic participation fees assessed in connection with revolving loan account; § 3.202(1)(e) adds notwithstanding provisions of Federal Consumer Credit Protection Act concerning disclosure; § 3.203.5 provides for delinquency charges on consumer loans, refinancings or consolidations provides that delinquency charge on consumer loan made under revolving loan account may be applied each month that payment is less than minimum required payment on account, prohibits delinquency charge on deferred installments if deferral fee has been paid, and permits lender to convert precomputed loan to loan with finance charges on unpaid balance if all or part of two installments are in default for ten days or more; § 3.209(1) allows lenders 2% charge for prepayment in full of loan that is secured by interest in land, subject to three limitations; § 3.209(2) limits total finance charge that may be charged upon prepayment of consumer loan not subject to provisions of rebate upon prepayment (IC 24-4.5-3-210); § 3.209(3) describes duties and liabilities of creditor or mortgage servicer to debtor at time of prepayment; generally, § 3.210(2) mirrors § 2.210(2); § 3.210(3) mirrors § 2.210(2); § 3.210(9) applies whether or not precomputed; § 3.210(10) added to require lenders to compute unearned finance charge by applying disclosed annual percentage rate that would yield loan finance charge originally contracted for to unpaid balances for periods following prepayment on loans with term of more than 61 months; § 3.301(3) provides that disclosures shall not be required on consumer loan if transaction is exempt from Federal Consumer Credit Protection Act; § 3.404 deletes introductory exception and 15% maximum; § 3.408 prohibits assessment of finance charges, delinquency charges, or late charges for consumer loans and revolving loan accounts as result of lender posting consumer's payment after date of receipt, permits two day delay in posting and assessment of charges if consumer fails to submit coupon or statement provided by lender, and requires credit to consumer's account in next month of any charges assessed in violation of § 3.408 and assignee's application has not been denied; § 3.501 loan finance charge changed from 18% to 21%; § 3.502 provides that unless person is supervised financial organization, collection agency licensed under IC 25-11-1 or has first obtained license from department, person may not make consumer loans or take assignments, but assignee may collect and enforce for three months without license, if assignee promptly applies for license; § 3.503(3) allows director to request evidence of compliance at time of application, time of renewal of license, or any other time considered necessary by director; § 3-503(4) such evidence including report of criminal background checks, credit histories or other background checks; § 3-503(5) establishes that application may be denied by director if it is submitted for benefit of, or on behalf of, person who does not qualify for license; § 3.503(6) cross-references IC 4-21.5; § 3.503(7) establishes that applicant pay fees referenced in IC 28-11-3-5 as established by department; § 3.503(8) establishes that fee may be charged for each day annual fee is delinquent under § 3.503(6); § 3.503(8) permits deduction of fees (other than delinquent renewal fees) under § 3.503(7) from filing fees paid under § 6.203; § 3.503(10) states that loan license issued is not assignable or transferable; § 3.503(11) allows director to designate automated central licensing system and repository, operated by third party to process applications and renewals for licenses and other services that director determines are necessary; § 3.503(12) places limitations on director's ability to designate central licensing system and repository under § 3.503(11); § 3.503.5 providing for license revocation for at least two years if person fails to file renewal form or pay license renewal fee; § 3.504(2) provides no revocation of licenses unless certain conditions are met or as provided under § 3.503.5; § 3.504(8) adds ability of director to proceed with revocation of license under IC 4-21.5-3-6 if director (1) has just cause to believe emergency exists from which it is necessary to protect public or (2) determines person for whom license was obtained does not qualify; § 3.505(2), replaces Apr. 15 with "as required by the department, but not more frequently than annually" and permits fee in amount fixed by department under IC 28-11-3-5 to be imposed for each day that licensee fails to file required report; § 3.505.5 added to define "automated loan machine"; § 3.508(2)(b), 21% replaces 18%; § 3.508(6) amounts under subsections (2) and (7) are subject to change; § 3.508(7) permits minimum loan finance charge up to $30 and establishes when minimum loan finance charge may be imposed; § 3.602(1) dollar amount changed to $50,000; § 3.604(1)(b) 21% substituted for 18%; § 3.606 requires specific conspicuous written disclosure on any negotiable instrument used to solicit loan, relieves intended payee of liability if instrument is stolen or incorrectly received and is fraudulently cashed; § 3.701 effective July 1, 2004 lenders must comply with IC 6-1.1-12-43 with respect to consumer loans secured by interest in land used or expected to be used as principal dwelling of debtor; § 4.103 deletes exclusion for insurance provided in credit transaction with payment ten years after credit extended; § 4.108(6) added to provide for interest at contract rate on amount of refund received under § 4.108(1) and director may impose civil penalty not made to debtor within 60 days after debt terminates; § 4.301(4) amount of $300 under subsection (3) is subject to change;

add § 4.305 unearned premium for property insurance with respect to which creditor or credit account of consumer is beneficiary refunded by creditor or creditor's assignee on payment in full of consumer credit sale or consumer loan; § 5.102 part also applies to garnishments of individual's earnings; § 5.103(7) amount of $1,000 under subsections (2) and (3) are subject to change; § 5.104 no attachment of debtor's earnings by garnishment prior to entry of judgment; § 5.105 adds health and child support as part of withholding and authorizing employer to collect $2 fee for each withholding; § 5.105(2)(b) substitutes 30 for 40 times; § 5.105(3) limits wages subject to garnishment for purpose of support to 50% if such person is supporting spouse or child, and to 60% if supporting any other person, increased to 55% and 65% respectively, if support is at least 12 weeks overdue; § 5.105(5) allows employer to impose fee for garnishment, equal to greater of 3% or $12, to be borne equally by creditor and employee; § 5.202(9) added to enable department to enforce debtor's requests against creditor's licensed/registered or required to be licensed/registered; § 5.203 provides for creditor's liability in class action as well as in individual action, provides for one recovery of damages if multiple obligors, and provides for one recovery for multiple failures to disclose to any person; § 5.203(2) replace 15 days with 60 days; § 5.204(1) right to rescind per § 125 of Federal Consumer Credit Protection Act, no interest accrued during period when loan may be rescinded; § 5.204(2) creditor must make available for disbursement proceeds of transaction on later of date creditor is reasonably satisfied consumer has not rescinded transaction or first business day after rescission period; § 5.302 modified so that only offense is Class A misdemeanor for supplying false information or failing to provide information as required in §§ 2.301 and 3.301; § 6.106(1) records of any transaction must be retained for two years; § 6.106(2) fee may be charged if department investigates or examines books and records of person subject to IC 24-4.5-6-201, IC 24-4.5-6-202 and IC 24-4.5-6-203, but person is only liable for costs exceeding filing fees paid; § 6.117 defines "civil court" as any court of Indiana having civil jurisdiction; §§ 6.201, 6.202 and 6.203 apply to persons, including supervised financial organization, but not including licensed collection agency, placing consumer credit insurance, receiving commissions or acting as limited line credit insurance provider in sale of same, selling insurance or other benefits, charges for which are approved by Department under § 2-202 or § 3-202 not applicable if seller's entire credit sales are made pursuant to seller credit card issued by lender in name of seller which can be used only at locations of named seller, provided conditions of §§ 6.202 and 6.203 are met; § 6.203 provides that director under IC 28-11-3-5 is to fix uniform fee per $100,000; § 6.203(3) added to require credit sellers to pay volume fees when they assign consumer credit transactions to institutions which are not filed with or refuse to file with Department of Financial Institutions; § 6.203(4) added to allow licensees/registrants that pay fee under § 3.503 to deduct such fees from § 6.203(3); § 6.203(5) added to require fee for notification filed under § 6.202; add § 6.204 which provides that c. 6, part 2, is not applicable to payment of attorneys' fees. For details of all variations see U.L.A. Master Edition § 7.101 which pertains to small loans.

Blanks filled by Indiana law.

§ 6.103, administrator refers to Department of Financial Institutions; § 6.104(5), Dec. 1, and Governor; and § 6.203, fee is fixed by Department of Financial Institutions based on unpaid balances amounts.

Small Loans.

Effective July 1, 2002, as amended effective July 1, 2004, IC 24-4.5-7 is new chapter covering small loans, which are loans with principal amount that is at least $50 and not more than $550 in which lender holds borrower's check or receives borrower's written authorization to debit borrower's account under agreement, express or implied, for specified period before either offering check for deposit or exercising authorization to debit borrower's account. Amount of $550 is subject to change under provisions of dollar amounts in IC 24-4.5-1-106. Finance charges, fees that may be charged on such loans, term of loan and security that may be required are all limited. All provisions of CCC also apply to small loans.

3.12 CONSUMER PROTECTION:

Residential Real Estate Sales Disclosure.

(IC 32-21-5-1 to IC 32-21-5-13). Disclosure form required for sales and exchanges of, installment sales contracts for, and leases with options to buy residential real estate containing four or less dwelling units, other than first sales of new homes. Applies to all such offers accepted on or after July 1, 2002. (IC 32-21-5-1). Form prescribed by Indiana real estate commission provides for disclosure regarding foundation, mechanical systems, roof, structure, water, sewer system and airports located within geographical distance as determined by Indiana real estate commission. (IC 32-21-5-7).

Deceptive Consumer Sales Act.

(IC 24-5-0.5-1 to IC 24-5-0.5-12). Deceptive act defined by IC 24-5-0.5-3. Consumer or consumer class may recover actual damages or $500, whichever is greater; damages for willful deceptive act can be increased by $1,000 and prevailing party may be awarded attorneys fees. Attorney general may seek injunction, litigation costs, and civil penalty of up to $15,000 can be levied on person violating injunction against deceptive act. Civil penalties of up to $500 fine may be imposed on any person who commits incurable deceptive act. Actual damages awarded to class have priority over civil penalties. Persons at least 65 years of age may seek treble damages. (IC 24-5-0.5-4 and 8). Any supplier organized to offer benefits to persons from cooperative purchase of goods which offers contract for that purpose which is to be effective for more than five years is subject to $500 civil fine. (IC 24-5-0.5-8, 9). Certain unconscionable acts constitute deceptive acts. There is rebuttable presumption that person has knowledge of terms of contract or agreement if person signs written contract. (IC 24-5-0.5-10). Two year statute of limitations governs all actions brought under this Act, including actions brought by attorney general to enjoin deceptive acts. (IC 24-5-0.5-5).

Retail Installment Sales.

(IC 24-5-2-21 – 24-5-2-24). Agreements to lessen competition are unlawful and void.

Health Spa Services.

(IC 24-5-7-1 – IC 24-5-7-18). Contracts for health spa services must be in writing and contract and payment term may not exceed three years. (IC 24-5-7-2, IC 24-5-7-3). Services at health spa facility within 45 days for existing facility and within 12 months for planned facility, from date contract executed. (IC 24-5-7-4). Contracts must provide in 10 point bold face type for cancellation within three days after execution of contract, and for cancellation by buyer or buyer's estate if buyer dies, becomes physically disabled, facility moves over five miles without transferring contract to facility within five miles, or seller discontinues operation. (IC 24-5-7-5 – 24-5-7-8). Money must be refunded within 30 days of notice of cancellation. (IC 24-5-7-5). Contracts voidable by buyer if not in compliance with this chapter and contract void if based on willfully or fraudulently disseminated false or misleading information. (IC 24-5-7-10 and 11). Waiver by buyer of rights under chapter void. (IC 24-5-7-12). Health spa selling contracts prior to commencing services must file and maintain surety bond with Secretary of State of Indiana in amount not less than $25,000 until services commence. (IC 24-5-7-13 to 15). Violation of chapter is deceptive act under IC 24-5-0.5-1 et seq. (IC 24-5-7-17).

Business Opportunity Transactions.

(IC 24-5-8-1 to IC 24-5-8-21). Business Opportunity Transactions defined as solicitation of investors, wherein representation of earnings are made, involving sale or lease or offer to sell or lease any goods or services to be used in beginning or operating business and requiring payments greater than $500 but less than $50,000 within first six months of business. (IC 24-5-8-1). Detailed written disclosures, including express language in ten point type, must be made to prospective investors at least 72 hours before contract is signed or seller receives any consideration. (IC 24-5-8-2). Seller must obtain surety bond, or issue irrevocable letter of credit to state upon approval of attorney general in amount not less than $75,000. (IC 24-5-8-3). Prior to any advertisement or representation, seller must file disclosure statement and bond with consumer protection division of office of attorney general, pay $50 initial filing fee, $10 annual fees, and $10 fee for any amendments to such filings (which are necessary when material changes occur); all advertisements must contain registration number issued by division. (IC 24-5-8-4). Seller must provide investors detailed substantiation for all claims of earnings potential. (IC 24-5-8-5). Contract must be in writing with detailed provisions, including express language in specified size type. (IC 24-5-8-6). Seller must keep detailed records. (IC 24-5-8-7). No waiver or attempt of waiver of rights by investors is allowed, and no note can cut off rights or defenses of investor or third party. (IC 24-5-8-8 to 10). Limits placed on investor's payments prior to receipt of goods or services. (IC 24-5-8-11 and 12). Seller prohibited from referring to compliance with these provisions and from using mark or name of business that neither controls seller nor accepts responsibility for seller's representations. (IC 24-5-8-13 and 14). Investor may cancel any contract where seller fails to comply with these provisions. (IC 24-5-8-15). Investor may recover all consideration paid if seller uses any untrue or deceptive statement, fails to deliver promised goods or services within 45 days or fails to provide written contract pursuant to IC 24-5-8-6. (IC 24-5-8-16). If seller fails to comply with any of these provisions or breaches contract, investor may recover actual damages and attorney fees to extent of amount of seller's bond and obtain injunction. (IC 24-5-8-17 and IC 24-5-8-18). Seller who fails to file as required with consumer protection division commits Class D felony (up to four years imprisonment and $10,000 fine). (IC 24-5-8-19). Substantial sellers of business opportunities, those with net worth of at least $5,000,000 or at least $1,000,000 if seller is at least 80% owned by corporation with net worth of at least $5,000,000 are exempted from many of above requirements. (IC 24-5-8-1 to IC 24-5-8-6). Attorney general may bring action under Deceptive Consumer Sales Act for failure to comply with any of these provisions. (IC 24-5-8-20). Compliance with these provisions does not relieve seller from compliance with IC 23-2-1 (securities regulations), IC 23-2-2.5 (franchises) or IC 23-2-2.7 (deceptive franchise practices). (IC 24-5-8-21).

Time Share and Camping Club Projects.

(IC 32-32-2-1 et seq., IC 32-32-3-1 et seq.). Regulates sale of any time shares or camping club membership. (IC 32-32-3-1). Person who violates this chapter commits deceptive act and is subject to penalties and remedies of IC 24-5-0.5. (IC 32-32-3-14).

Uniform Deceptive Trade Practices Act not adopted.

Home Solicitation Sales.

Buyer's right to cancel is governed by IC 24-5-10, IC 24-4.5-2-501 – 24-4.5-2-502.

Home Improvement Contracts.

Regulates residential home improvement contracts (IC 24-5-11) and imposes criminal penalties for fraud (IC 35-43-6).

Automatic Dialing Machines.

Regulates use of automatic dialing/announcing devices in commercial telephone solicitation. (IC 24-5-14).

Motor Vehicle Protection.

(IC 24-5-13-1 to IC 24-5-13-24 and IC 24-5-13.5-1 – IC 24-5-13.5-14). IC 24-5-13-5 now includes in its definition of "motor vehicle" or "vehicle" any self-propelled vehicle that is sold to buyer in Indiana who is not Indiana resident. If motor vehicle suffers from defect that substantially impairs its use, value or safety or renders it nonconforming to terms of applicable manufacturer's warranty, and buyer reports same within 18 months or 18,000 miles to manufacturer or authorized dealer, then manufacturer or dealer must make necessary repairs to correct defect.

(IC 24-5-13-6 – 24-5-13-8). If vehicle has been subject to repair at least four times and defect continues to exist, or if vehicle is out of service by reason of repair for cumulative total of at least 30 business days and defect continues to exist, then manufacturer must accept return of vehicle and must, at buyer's option, either, within 30 days, refund amount paid by buyer or provide replacement vehicle of comparable value. (IC 24-5-13-10 – 24-5-13-15). IC 24-5-13.5 imposes requirements on resale of motor vehicle that has been replaced or repurchased by manufacturer, or nonresident manufacturer's agent, or authorized dealer.

Unsolicited Merchandise.

Intended receiver may refuse delivery or may deem it gift. (IC 24-5-5-1).

Plain Language.

See topic 3.13 Contracts.

Interest.

See topic 3.19 Interest.

Sales.

See topic 3.23 Sales.

3.13 CONTRACTS:

Uniform Commercial Code in effect since July 1, 1964. (IC 26-1-1-101 et seq.).

Plain Language.

No "plain language" statute. However, Indiana Constitution does require every act and joint resolution to be plainly worded. (Ind. Const. Art. 4, § 20).

Where one of following provisions applies, contrary agreement is effective only to extent permitted by law specified: IC 26-1-2-402, rights of creditors against sold goods; IC 26-1-2.1-105, IC 26-1-2.1-106, leases; IC 26-1-4-102, bank deposits and collections; IC 26-1-4.1-507, fund transfers; IC 26-1-5.1-116, letters of credit; IC 26-1-8.1-110, investment securities; IC 26-1-9.1-301 through IC 26-1-9.1-307, perfection of secured transactions. (IC 26-1-1-105). Replaced by P.L. 143-2007, § 78.

See also topic 3.09 Commercial Code.

3.14 FACTORS:

Relation of principal and factor gives factor possession of property and power to sell it, and factor may do anything not inconsistent with such general power of sale. (207 Ind. 374, 192 N.E. 887).

Uniform Commercial Code in effect since July 1, 1964. (IC 26-1-1-101 et seq.). See topic 3.09 Commercial Code.

Consignment Agreements.

See IC 26-1-9.1-505.

See topic 3.09 Commercial Code.

Liens.

See IC 26-1-9.1-302; IC 26-1-9.1-310, IC 26-1-9.1-322, IC 26-1-9.1-333.

3.15 FRANCHISES:

Franchises may not be sold in Indiana unless properly registered by notification or exempt from registration. (IC 23-2-2.5-9). Exemptions from registration are provided for in IC 23-2-2.5-3 through IC 23-2-2.5-5.

Notification of registration must be submitted on notification form prescribed by Commissioner, must contain disclosure statement and must be submitted with required fee. (IC 23-2-2.5-10.5). Before person may offer to sell franchise, person must file irrevocable consent to receive service of process through Secretary of State. (IC 23-2-2.5-24). If no stop order is issued by Commissioner, registration becomes effective upon Commissioner's receipt of notification form. (IC 23-2-2.5-17). Franchisor must provide to prospective franchisee disclosure statement and copies of all proposed contracts at least ten days prior to execution of binding franchise agreement or receipt of consideration, whichever is earlier. (IC 23-2-2.5-9).

Registration by notification is effective for one year. (IC 23-2-2.5-17). To renew, registration renewal form must be filed not later than date registration is due to expire. (IC 23-2-2.5-18). Unless stop order is in effect, renewal registration is effective at time registration would otherwise expire and is effective for one year, unless shorter period is specified by Commissioner. (IC 23-2-2.5-18).

Unlawful franchise agreement provisions, acts and practices are governed by Indiana Deceptive Franchise Practices Law, IC 23-2-2.7 et seq.

Business opportunity transactions are governed by IC 24-5-8-1 et seq.

3.16 FRAUDS, STATUTE OF:

Uniform Commercial Code in effect since July 1, 1964. (IC 26-1-1-101 et seq.).

Unless there is some note or memorandum thereof in writing, signed by party to be charged, or some person lawfully authorized by him, no action may be maintained: (1) To charge executor or administrator to answer damages out of his own estate upon special promise (IC 32-21-1-1); or (2) to charge any person upon special promise to answer for debt, default or miscarriage of another (IC 32-21-1-1); or (3) on contract made in consideration of marriage (IC 32-21-1-1); or (4) on contract for sale of lands (IC 32-21-1-1); or (5) on contract not to be performed within one year (IC 32-21-1-1); or (6) upon any representation made concerning character, conduct, credit, ability, trade or dealings of any other person (IC 32-21-1-6); or (7) on lease for term longer than three years (IC 32-21-1-1); or (8) upon agreement, promise, contract or warranty of cure relating to medical care or treatment; provided, however, that this does not affect right to sue for malpractice or negligence (IC 32-21-1-1); or (9) on contract to pay commission for sale of lands (IC 32-21-1-10); or (10) on conveyance of existing trust in lands, goods or things in action (IC 32-21-1-3); or (11) on contract for sale of goods for price of $500 or more, except between merchants if confirmation of contract is received by party to be charged and no written objection to confirmation is given within ten days, or except for goods received and accepted or for which payment has been made and accepted, or unless goods are to be specially manufactured for buyer, are not suitable for sale to others in ordinary course of seller's business, and seller, before receipt of notice of repudiation, has substantially begun manufacture or commitments for procurement, or unless party to be charged has admitted in court that contract for sale was made (IC 26-1-2-201); or (12) upon contract for sale of standing trees or standing timber (IC 32-34-9-10); or (13) upon contract between teachers and school corporations (IC 20-6.1-4-3); or (14) on contract for sale of personal property in excess of $5,000, except for contract for sale of goods or security agreements (IC 26-1-1-206). Contract for sale of goods is not enforceable beyond quantity of goods shown in writing. (IC 26-1-2-201).

Consideration for any promise required by statute of frauds to be in writing does not have to be stated in writing. (IC 32-21-1-2).

Rules of common law apply as to cases taken out of statute.

3.17 [RESERVED]

3.18 INFORMATION TECHNOLOGY, INTERNET AND NEW MEDIA:

Uniform Electronic Transaction Act (IC 26-2-8-101 to -302) was enacted to remove barriers to electronic commerce by validating and effectuating electronic records and signatures (IC 26-2-8-101). Act applies only to transactions related to business, commercial (including consumer) and governmental matters. Excludes unilaterally generated electronic records and signatures which are not part of transaction, including creation and execution of wills, codicils and testamentary trusts. (IC 26-2-8-103). Act applies only to transactions between parties that agree to conduct transactions electronically. (IC 26-2-8-104). Record or signature may not be denied legal effect or enforceability solely because it is in electronic form. (IC 26-2-8-106). Contract may not be denied legal effect or enforceability solely because electronic record or electronic signature was used in its formation. (IC 26-2-8-106). Electronic signature authentication and identification may be used for individuals participating in agreements, authorizations, contracts, records, or transactions that involve individually identifiable health information. (IC 26-2-8-116).

Uniform Trade Secrets Act.

Computer programs are protected under Uniform Trade Secrets Act. (IC 24-2-3-1 – 24-2-3-8). Obligation exists to keep trade secrets confidential until information is no longer maintained as trade secret by its owner. (IC 24-2-3-2 – 24-2-3-8).

See also category 17 Intellectual Property, topic 17.02 Trade Secrets.

Computer Tampering.

Person who knowingly or intentionally alters or damages computer program or data, which comprises part of computer system or computer network, without consent of owner commits Class D Felony. (IC 35-43-1-4).

Computer Trespass.

Criminal code makes it Class A misdemeanor for anyone to knowingly or intentionally access computer system, network, or any part thereof, without consent of owner. (IC 35-43-2-3). Criminal code makes it Class A misdemeanor for anyone to knowingly or intentionally use hoarding program to purchase merchandise by means of computer network or sell, purchase or distribute hoarding program. (IC 35-43-2-3). It is defense that person used hoarding program with permission of person selling merchandise or that hoarding program was sold, purchased, or distributed for legitimate scientific or educational purposes, respectively. (IC 35-43-2-3).

Indiana Technology Fund was created to install, maintain, and improve computers, media distribution system, automation systems, networks, electronic gateway access and related systems in libraries and schools in state. (IC 4-34-1 et seq.).

Office of Technology.

Office established to consolidate State’s management of information technology responsible for designing, developing, contracting for, and managing statewide, integrated telecommunications networks and information technology services. (IC 4-13.1-2-1).

Security Breach Disclosure and Identity Deception.

Requires disclosure to Indiana residents without unreasonable delay when security breach of personal information in computerized database could result in identity theft. (IC 24-4.9).

3.19–3.16 [RESERVED]

3.17 INTEREST:

See topic 3.11A Consumer Credit.

Judgments.

Effective Jan. 1, 1994, interest runs at contract or agreed upon rate up to 8% or if no agreement at 8%. (IC 24-4.6-1-101). Governmental entities are liable for 6% interest from date of judgment or settlement if not paid within 180 days, unless structured settlement, even if case appealed, provided original judgment upheld. (IC 34-13-3-18).

Prejudgment.

Court may award prejudgment interest in tort action of 6%-10% per year for period not exceeding 48 months and beginning to accrue no earlier than 15 months after action accrued and six months after claim filed if party filing makes written offer to settle within one year after filing for amount exceeding 11/3 of judgment and party against whom claim is filed fails to make written offer to settle within nine months after filing for at least 2/3 of judgment. (IC 34-51-4).

Pawnbrokers.

Interest charged by pawnbrokers is controlled by law and cannot exceed maximum loan finance charge for supervised lenders under IC 24-4.5-3-508. (IC 28-7-5-28). Additionally, pawnbroker may impose charge for servicing pledge, not to exceed 1/5 of principal amount of loan per month or any fractional part of month. Further, fee for each month after second month is limited to 1/30 of monthly fee for each day loan is outstanding. (IC 28-7-5-28.5).

Maximum annual rate for unsupervised consumer loan is 21%. (IC 24-4.5-3-201). Class A misdemeanor for lender to knowingly charge in excess of amount specified in IC 24-4.5-3-508 for consumer loan. (IC 24-4.5-5-301). Consumer who pays in excess of statutorily determined amount has right to refund of excess. (IC 24-4.5-5-202).

Usury.

Most business loans are not subject to limitation. At time of publication, Indiana had not acted to reimpose state limits as allowed by federal Depository Institutions Deregulation Act of 1980.

3.18 [RESERVED]

3.19 LICENSES, BUSINESS AND PROFESSIONAL:

License, registration or certification is required for large number of businesses and occupations, including following: Accountant (IC 25-2.1-12), architect (IC 25-4-1-6, 25-4-1-26), attorney (IC 33-43-2-1), auctioneer (IC 25-6.1-3-1), barber, barber instructor, barber school, barber shop (IC 25-7-7 – 25-7-10), cosmetologist, cosmetology salon, master cosmetologist (IC 25-8-4-9, IC 25-8-7 through IC 25-8-9, IC 25-8-14-5), electrologist, electrology salon (IC 25-8-10, IC 25-8-7.2), manicurist, manicurist salon (IC 25-8-11; IC 25-8-7.1), esthetician, esthetician shop

(IC 25-8-12.5 – 25-8-12.6), cosmetology school (IC 25-8-5), esthetics instructor (IC 25-8-6.1), electrology instructor (IC 25-8-6.2), acupuncturist (IC 25-2.5-2), boxing, sparring and wrestling (IC 25-9-1), money transmission (IC 28-8-4-20), chiropractor (IC 25-10-1-11), collection agency (IC 25-11-1-3, 7), continuing education waiver (IC 25-1-4-4), dental hygienist (IC 25-13-1-3), dentist (IC 25-14-1-1), embalmer and funeral director (IC 25-15-4-4, IC 25-15-8-21 – 25-15-8-24), employment services (IC 25-16-1-1), electrical contractor (regulated by local ordinance), geologist (IC 25-17.6-4), going out of business, removal of business, fire, or other altered goods sales (IC 25-18-1-2), health facility administrator (IC 25-19-1-11), hearing aid dealer (IC 25-20-1-2), home inspectors (IC 25-20.2-3), physician, osteopath (IC 25-22.5-8-1), dietician (IC 25-14.5-4), midwife (IC 25-23-1-13.1), nurse (IC 25-23-1-27), occupational therapist (IC 25-23.5-3-1), marriage and family therapist (IC 25-23.6-3-1), social worker (IC 25-23.6-4-1), optometrist (IC 25-24-1-17), pharmacist and pharmacies (IC 25-26-13-1 – 25-26-13-29), prescription electronic collection and tracking program (IC 25-1-13), wholesale legend drug distributors (IC 25-26-14-14), pharmacy technicians (IC 25-26-19), physical therapist (IC 25-27-1-1), physician's assistant (IC 25-27.5-4-1), boat pilot (IC 25-28-1-1, IC 14-22-15-1), home health care (IC 16-27-0.5), plumber (IC 25-28.5-1-11), podiatrist (IC 25-29), private detective (IC 25-30-1-3), engineer (IC 25-31-1-13), land surveyor (IC 25-21.5-13-2), environmental health specialist (IC 25-32-1-16), psychologist (IC 25-33-1-14, IC 20-1-1.9), real estate broker, real estate salesperson (IC 25-34.1-3-2), real estate appraiser (IC 25-34.1-8-12), respiratory care practitioners (IC 25-34.5-3-1), speech pathologist and audiologist (IC 25-35.6-1-3), timber buyer (IC 25-36.5-1-10), retail merchant (IC 6-2.5-8), transient merchant (IC 25-37-1-3), water well drilling (IC 25-39-3-1, IC 25-39-5), alcoholic beverages (IC7.1-3), aircraft pilot (IC 8-21-2-3), dry cleaning (IC 25-1-2-2.1), fireworks display (regulated by Fire Prevention and Building Safety Commission pursuant to IC 22-11-14-2), bail agent (IC 27-10-3-1), surety (IC 27-10-2-4), bedding manufacturer (IC 16-41-32-21), egg wholesalers and retailers (IC 16-42-11-9), hospital and ambulatory outpatient surgical center (IC 16-21-2), commercial broker (IC 25-34.1-3-11), nursing home and other health facilities (IC 16-28-2-1), home health agencies (IC 16-27-1-8), emergency medical services (IC 16-31-3), advanced life support (IC 16-31-3-22), radioactive material (IC 16-41-35-26), radiologic technicians (IC 16-41-35-29), tanning facility (IC 25-8-15.4-5), milk product producers and handlers (IC 15-18), budget service company (IC 28-1-29-3), pawnbroker (IC 28-7-5-3), livestock dealer (IC 15-17-14-1 – 15-17-14-11), feeder pig dealer (IC 17-13-1), nursery dealer (IC 14-24-7-1), military service (IC 25-1-12), veterinarian (IC 25-38.1), child care (IC 12-17.2-4-1), driver training schools and instructors (IC 9-27-4), ferries operating to and from points outside Indiana (IC 8-2-15-1 and IC 8-2-17-1), mobile home park (IC 16-41-27-18), handguns: dealer (IC 35-47-2-14), individual (IC 35-47-2-1), hunting, fishing, trapping wild animals (IC 14-22), fur buyer (IC 14-22-19-1), game breeders (IC 14-22-20-1), insurance agent (IC 27-1-15.63), radiologic technologists (IC 16-41-35-29), representative, producer, consultant, surplus line producer (IC 27-1-15.6, 27-1-15.8), strip mining (IC 14-34-3-1, IC 14-36-1-13), mining (IC 14-35-1-1), oil and gas well drilling (IC 14-37, IC 14-38), boat racing, water ski events (IC 14-15-5-1), motor fuel distributor (IC 6-6-1.1-401), securities broker, dealer, agent, investment advisor (IC 23-2-1-8), taxidermist (IC 14-22-21-2), teacher (IC 20-6.1-3-1 to 10), polygraph examiner (IC 25-30-2-5), professional fund raiser consultant or professional solicitor for charitable organization (IC 23-7-8-2), warehouseman, grain dealer (IC 26-3-7-4, 26-3-7-34), motor vehicle buying and selling (IC 9-23-2-1), hazardous waste facilities, disposal, emissions, and transportation of contaminants (IC 13-22, IC 13-15), manufacturer, distributor, dispenser of controlled substances (IC 35-48-3-3), pari-mutuel wagering (IC 4-31), riverboat gambling (IC 4-33), tobacco (IC 6-7-2-8, IC 6-7-2-15), public utility (IC 8-1-2-91), transportation brokerage (IC 8-2.1-22), vending stands in public buildings (IC 12-12-5-1), private mental health institution (IC 12-25-1-3), supervised group living facility (IC 12-28-5), disposal of dead animals (IC 15-2.1-16-2), commercial lawn care—fertilizer and pesticide (IC 15-16-2, IC 15-16-3, IC 15-16-5), pest inspector (IC 15-16-5), certain contractors in Lake and Porter counties (IC 22-11-3.1-2), boiler and pressure vessel inspector (IC 22-15-6-5), consumer loans (IC 24-4.5-3-502), agriculture commodities warehouse (IC 26-3-7-4), hypnotist, hypnotherapist (IC 25-20.5-1-10), athletic trainer (IC 25-5.1-3-1), athlete agents (IC 25-5.2-1-3), hospice program (IC 16-25-3), water treatment, wastewater treatment, water distribution (IC 13-18-11), professional soil scientist (IC 25-31.5-1), elevator inspector, mechanic, or contractor (IC 22-15), manufactured home installer (IC 25-23.7-5). Other activities, occupations and professionals are regulated by statute and related ordinances.

Collection Agency Licenses.

There are provisions of UCC that apply to licensed collection agencies. (IC 24-4.5-3-502). Any person desiring to conduct collection agency or renew collection agency license must accompany application for license or renewal thereof with fee of $100 plus additional $30 for each office. Renewal applications must be accompanied by renewal fee and fee of $30 for each office. Issuance of licenses is staggered and licenses are effective for two years. Renewal and original must be accompanied by $5,000 surety bond for each office. (IC 25-11-1-3). All bonds and applications filed with Secretary of State. Nonresident applicant must appoint resident service agent and stipulate validity of service on himself by service on agent. (IC 25-11-1-3). Nonresident collection agency having only incidental contact with debtor is not required to be licensed. (IC 25-11-1-5). Applicants must be U.S. citizens, 18 or older, of good moral character, not defaulted in payment of money collected or received for another, and not be former licensee under act whose license was suspended or revoked and not subsequently reinstated. (IC 25-11-1-4). Foregoing does not apply to attorneys, persons regularly employed as credit men, banks, fiduciaries and financial institutions, licensed real estate brokers, employees of licensees under act, any person or business whose primary object is not collection of claims, or any public utility or any express company subject to motor carrier or railroad regulation under IC 8-2.1 or 8-3. (IC 25-11-1-2).

Powers of Collection Agent.

Licensed collection agent may receive or be assignee of another person's accounts, bills or other evidence of indebtedness, and, at direction of assignor(s), may file action to collect debt in county of preferred venue. Assignee may consolidate claims against individual or joint debtors in county of preferred venue. Court upon motion shall order assignee to pay attorneys' fees necessitated by transfer of action to preferred venue county. (IC 25-11-1-13).

3.20 MONOPOLIES, RESTRAINT OF TRADE AND COMPETITION:

Monopolies of and attempts to monopolize any part of trade or commerce within state, and combinations which are in restraint of trade or which limit production or control prices are Class A misdemeanors. (IC 24-1-2-1 – 24-1-2-3). Private party may recover treble damages, costs and attorneys' fees. (IC 24-1-2-7).

Contracts Controlling Output or Prices.

Arrangement, contract, combination, etc., between persons or corporations controlling output of article of merchandise made with view or tending to lessen competition in importation or sale of articles, or designed or tending to advance, reduce or control price or cost to producer or consumer is unlawful and void. Penalty: domestic corporation forfeits charter, foreign corporation may not do business in state. Person or corporation injured may recover full consideration paid for articles controlled. Attorney General may bring action on behalf of state or political subdivision. Violation committed knowingly is Class C felony. (IC 24-1-1-1 – 24-1-1-6).

Refusing Sales to Dealer or Mechanic.

Contract or combination to prevent sales to dealer or mechanic of merchandise or articles intended for trade or used by mechanic, etc., in business is void, and party thereto who refuses to sell because intending purchaser is not member of combination, etc., is guilty of Class A misdemeanor. Attorney General may bring action on behalf of state or political subdivision. Violation punishable by forfeiture of $50 for each day of continuation after notice. Person injured may recover damages, with costs and attorneys' fees. (IC 24-1-3-1 – 24-1-3-5).

Forcing Manufacturers Out of Business.

Arrangement or agreement to refuse to furnish articles required in manufacture of merchandise, to charge more than usual price therefor, or to do or omit any act to prevent or hinder manufacturing, and arrangement or act to compel manufacturer to cease manufacturing article or close down or go out of business is unlawful and void. Penalty: domestic corporation forfeits charter, foreign corporation may not do business in state. Person injured may recover consideration paid for controlled goods. Attorney General may bring action on behalf of state or political subdivision. Violation committed knowingly is Class C felony. (IC 24-1-4-1 – 24-1-4-5).

Collusive Bidding.

Scheme or agreement restricting bidding on public or private work illegal and violation is Class A misdemeanor. Person injured may recover treble damages with costs and attorneys' fees. Person letting contract secured by collusive bidding may recover all amounts paid with interest and attorneys' fees, and contract cannot be enforced. (IC 24-1-2-3 – 24-1-2-12).

Retail installment sales licensees are prohibited from entering into any contract or agreement which would tend to lessen competition in such business field. (IC 24-5-2-21).

Insurance unfair trade practices policed by Department of Insurance through cease and desist orders, imposition of civil penalties, and suspension or revocation of licenses. (IC 27-4-1-1 – 27-4-1-19).

Discrimination in price of milk and milk products to destroy competition prohibited, and contracts in violation are void. Penalty: corporation forfeits right to do business in state violation is Class B misdemeanor. (IC 24-4-1-1 – 24-4-1-6).

Cigarette retailers and distributors prohibited from selling cigarettes below cost with intent to injure competitors or destroy or substantially lessen competition. Penalty: Violation is Class A infraction and distribution subject to registration certificate revocation. (IC 24-3-2-1 – 24-3-2-13). Retailers must produce invoice or other evidence proving cigarettes or tobacco products obtained from distributor holding valid registration certificate. (IC 24-3-2-4.7).

Motion picture distributors subject to legislation prohibiting blind selling, requiring notice of trade screening and regulating bid procedure. Plaintiff in civil action may recover damages and attorney fees. (IC 24-1-5-1 – IC 24-1-5-7).

Unfair Trade Practices.

Common law tort of unfair competition recognized. (676 F.Supp. 1421; 554 F.Supp. 1088 Copyright Cases or Patent Cases; 501 N.E.2d 458). Common law tort of trade libel recognized. (411 N.E.2d 653). See also topic 3.12 Consumer Protection.

3.21 NEGOTIABLE INSTRUMENTS:

See topic 3.02 Bills and Notes.

3.22 RESTRAINT OF TRADE:

See topic 3.20 Monopolies, 3.22 Restraint of Trade and Competition.

3.23 SALES:

Uniform Commercial Code in effect since July 1, 1964. (IC 26-1-1-101 et seq.).

Uniform Consumer Credit Code in effect with respect to revolving charge accounts and revolving loan accounts since Mar. 5, 1971, and in other respects since Oct.1, 1971. (IC 24-4.5-1-101 et seq.).

Contracts of Sale.

No statutory limitation on type size in printed contracts for either contracts of sales or conditional sales contracts. However, implied warranty disclaimers or modifications must be conspicuous. (IC 26-1-2-316).

See topics 3.16 Frauds, Statute of; 3.09 Commercial Code.

Bills of Sale.

No statutory provisions.

Product Liability.

Privity of contract no longer necessary for injured party to maintain an action against manufacturer. All product liability actions are governed by IC 34-20-1-1 et seq., which restates law of strict liability in tort, defines defective products, establishes three defenses to strict liability in tort, establishes statute of limitations for product liability actions, creates rebuttable presumption that certain products are not defective, and imposes several liability on defendants.

Statute of Limitations.

Person who is under legal disabilities when cause of action accrues may bring action within two years after disability is removed. (IC 34-11-6-1).

Product liability action based on property damage, personal injury, disability, disease, or death resulting from exposure to asbestos must be commenced within two years of date when injured person knows that he has asbestos related disease, injury, or property damage. This section applies only to product liability actions against persons who mined and sold commercial asbestos, and against funds which have been created for payment of asbestos related claims as result of bankruptcy proceedings or to avoid bankruptcy proceedings. (IC 34-20-3-2).

See also category 5 Civil Actions and Procedure, topic 5.16 Limitation of Actions.

Conditional Sales.

Governed by Uniform Commercial Code. See topic 3.09 Commercial Code.

Retail Credit Sales.

See topic 3.11A Consumer Credit.

Consumer Protection.

See topic 3.12 Consumer Protection.

Bulk Sales.

Governed by Uniform Commercial Code, see topic 3.09 Commercial Code.

Sales of Motor Vehicles.

See category 23 Transportation, topic 23.01 Motor Vehicles.

International Sales of Goods.

United States is contracting state to United States Convention on the International Sale of Goods. Therefore, CISG applies as law of contract in contracts for sale of goods between parties whose places of business are in different contracting states. See Selected International Conventions in Law Digest.

3.24 SECURITIES:

Uniform Commercial Code in effect since July 1, 1964. (IC 26-1-1-101 et seq.). See topic 3.09 Commercial Code.

In 2007, Indiana adopted "Indiana Uniform Securities Act" ("Act") that replaces existing Indiana Securities Act, and is effective as of July 1, 2008, based on Uniform Securities Act of 2002. Goal of ACT was to modernize statute to parallel uniform law, but ultimately it contains many variations from that uniform law.

Supervision, Regulatory Powers of Supervisory Authority.

Act is administered by Office of Secretary of State of Indiana. Secretary of State appoints Securities Commissioner who is responsible for direction and supervision of securities division and administration of ACT. (IC 23-19-6-1). Commissioner may: (1) Conduct public or private investigations to determine whether person has violated Act, or to aid in enforcement of Act or in adoption of rules and forms under Act; (2) require or permit person to testify, file statement, or produce record, under oath, as to all facts concerning matter being investigated; and (3) publish record concerning action, proceeding, or investigation under, or violation of, Act if Commissioner deems it necessary or appropriate in public interest and for protection of investors. (IC 23-19-6-2). Commissioner may issue stop order suspending offer and sale of securities in Indiana. (IC 23-19-3-2). After administrative hearing, Commissioner may revoke designation of securities exchange if Commissioner finds that revocation is necessary or appropriate in public interest and for protection of investors. (IC 23-19-2-2).

Securities Defined.

"Security" means note; stock; treasury stock; security future; bond; debenture; evidence of indebtedness; certificate of interest or participation in profit-sharing agreement; collateral trust certificate; preorganization certificate or subscription; transferable share; investment contract; voting trust certificate; certificate of deposit for security; fractional undivided interest in oil, gas, or other mineral rights; put, call, straddle, option, or privilege on security, certificate of deposit, or group or index of securities; put, call, straddle, option, or privilege entered into on national securities exchange relating to foreign currency; interest or instrument commonly known as "security"; or certificate of interest or participation in, temporary or interim certificate for, receipt for, guarantee of, or warrant or right to subscribe to or purchase. "Security" also includes both certificated and uncertificated securities, "investment contract" for investment in common enterprise with expectation of profits to be derived primarily from efforts of person other than investor, interest in limited partnership and limited liability company and investment in viatical settlement or similar agreement. "Security" does not include insurance or endowment policy or annuity contract under which insurance company promises to pay fixed or variable sum of money either in lump sum or periodically for life or another specified period, nor interest in contributory or noncontributory pension or welfare plan subject to Employee Retirement Income Security Act of 1974. (IC-23-19-1-2[28]).

Restriction of Sale or Offering of Security.

It is unlawful for any person to offer or sell security in Indiana unless: (i) Security is "federal covered security" which is defined in IC 23-19-1-2(7) as security that is covered under § 18(b) of Securities Act of 1933; (ii) security, transaction or offer is exempted from registration under IC 23-19-2-1 – IC 23-19-2-3; or (iii) security is registered under IC 23-19-3. (IC 23-19-3-1).

Exempt Securities.

Following securities are exempt from registration: (i) Security, (including revenue obligation) issued, insured, or guaranteed by U.S.; by state; by political subdivision of state; by public authority, agency, or instrumentality of state; by person controlled or supervised by and acting as instrumentality of U.S.; or certificate of deposit for any of foregoing; IC 23-19-2-1(1); (2) security issued, insured, or guaranteed by foreign government with which U.S. maintains diplomatic relations, or any of its political subdivisions, if security is recognized as valid obligation by issuer, insurer, or guarantor IC 23-19-2-1(2); (3) security issued by and representing or that will represent interest in or direct obligation of, or be guaranteed by: (a) international banking institution, (b) banking institution organized under laws of U.S.; member bank of Federal Reserve System; or depository institution substantial part of business of which consists of receiving deposits or share accounts that are insured to maximum amount authorized by statute by Federal Deposit Insurance Corporation, National Credit Union Share Insurance Fund, or successor authorized by federal law, or (c) any other depository institution IC 23-19-2-1(3); (4) security issued by and representing interest in or debt of, or insured or guaranteed by, insurance company authorized to do business in Indiana IC 23-19-2-1(4); (5) security issued or guaranteed by railroad, other common carrier, public utility, or public utility holding company that is: regulated in respect to its rates and charges by U.S., state, Canada, or Canadian province or territory, IC 23-19-2-1(5); (6) federal covered security specified in § 18(b)(1) of Securities Act of 1933 or by rule adopted under that provision or security listed or approved for listing on another securities market specified by rule IC 23-19-2-1(6); (7) member's or owner's interest in, or retention certificate given in lieu of cash patronage dividend issued by cooperative organized and operated as nonprofit membership cooperative under cooperative laws of state, but not member's or owner's interest, retention certificate, or like security sold to persons other than bona fide members of cooperative IC 23-19-2-1(7); (8) equipment trust certificate with respect to equipment leased or conditionally sold to person, if any security issued by person would be exempt or would be federal covered security IC 23-19-2-1(8); (9) security issued by nonprofit corporation as defined by § 501(c)(3) of Internal Revenue Code that is designated by governor as secondary market for guaranteed student loans under IC 20-12-21.2. (IC 23-19-2-1).

Exempt Transactions.

Subject to Commissioner's power to revoke or deny exemption with respect to specific security or transaction, following are exempted from registration: (1) Isolated nonissuer offer or sale; (2) nonissuer transaction (defined as transaction not directly or indirectly for benefit of issuer IC 23-19-1-2[18]) by or through registered broker-dealer, or exempt from registration, and resale transaction by sponsor of unit investment trust registered under Investment Company Act of 1940, in security of class that has been outstanding in hands of public for at least 90 days, if, at date of transaction: (a) issuer of security is engaged in business, issuer is not in organizational stage or in bankruptcy or receivership, and issuer is not blank check, blind pool, or shell company, (b) security is sold at price reasonably related to its current market price, (c) security does not constitute whole or part of unsold allotment to, or subscription or participation by, broker-dealer as underwriter of security or redistribution, (d) nationally recognized securities manual or its electronic equivalent or record filed with Securities and Exchange Commission that is publicly available contains: (i) description of business and operations of issuer; (ii) names of issuer's executive officers and names of issuer's directors; (iii) audited balance sheet of issuer as of date within 18 months before date of transaction; and (iv) audited income statement for each of issuer's two immediately previous fiscal years or for period of existence of issuer, whichever is shorter, and (e) any one of following requirements is met: (i) issuer of security has class of equity securities listed on national securities exchange registered under § 6 of Securities Exchange Act of 1934 or designated for trading on National Association of Securities Dealers Automated Quotation System; (ii) issuer of security is unit investment trust registered under Investment Company Act of 1940; (iii) issuer of security has been engaged in continuous business for at least three years; (iv) issuer of security has total assets of at least $2,000,000 based on audited balance sheet as of date within 18 months before date of transaction; (3) nonissuer transaction by registered broker-dealer or exempt from registration in security of foreign issuer that is margin security defined in regulations or rules adopted by Board of Governors of Federal Reserve System; (4) nonissuer transaction by registered broker-dealer or exempt from registration in outstanding security if guarantor of security files reports with SEC under reporting requirements of § 13 or 15(d) of Securities Exchange Act of 1934; (5) nonissuer transaction by registered broker-dealer or exempt from registration in security that: (a) is rated at time of transaction by nationally recognized statistical rating organization in one of its four highest rating categories, or (b) has fixed maturity or fixed interest or dividend, if: (i) default has not occurred during current fiscal year or within three previous fiscal years, or during existence of issuer and any predecessor if less than three fiscal years, in payment of principal, interest, or dividends on security; and (ii) issuer is engaged in business, is not in organizational stage or in bankruptcy or receivership, and is not and has not been within previous 12 months blank check, blind pool, or shell company that has no specific business plan or purpose or has indicated that its primary business plan is to engage in merger or combination of business with, or acquisition of, unidentified person; (6) nonissuer transaction by registered broker-dealer or exempt from registration under Act effecting unsolicited order or offer to purchase; (7) nonissuer transaction executed by bona fide pledgee without purpose of evading registration; (8) nonissuer transaction by federal covered investment adviser with investments under management in excess of $100,000,000 acting in exercise of discretionary authority in signed record for account of others; (9) transaction in security in exchange for one or more bona fide outstanding securities, claims, or property interests, or partly in such exchange and partly for cash, if terms and conditions of issuance and exchange or delivery and exchange and fairness of terms and conditions have been approved by commissioner after hearing; (10) transaction between issuer or other person on whose behalf offering is made and underwriter, or among underwriters; (11) transaction in note, bond, debenture, or other evidence of indebtedness secured by mortgage or other security agreement if: (a) note, bond, debenture is offered and sold with mortgage or other security agreement as unit, (b) general solicitation or advertisement of transaction is not made, and (c) commission or other remuneration is not paid or given, directly or indirectly, to person not registered under Act as broker-dealer or as agent; (12) transaction by executor, administrator of estate, sheriff, marshal, receiver, trustee in bankruptcy, guardian, or conservator; (13) sale or offer to sell to: (a) institutional investor, (b) federal covered investment adviser, or (c) any other person exempted by rule adopted or order; (14) sale or offer to sell securities of issuer, if transaction is part of single issue in which: (a) not more than twenty-five purchasers are present in Indiana during any twelve consecutive months, other than those designated, (b) general solicitation or general advertising is not made in connection with offer to sell or sale of securities, (c) commission or other remuneration is not paid or given, directly or indirectly, to person other than broker-dealer registered under Act or agent registered under Act for soliciting prospective purchaser in Indiana, and (d) issuer reasonably believes that all purchasers in Indiana, other than those designated, are purchasing for investment; (15) transaction under offer to existing security holders of issuer, including persons that at date of transaction are holders of convertible securities, options, or warrants, if commission or other remuneration, other than standby commission, is not paid or given, directly or indirectly, for soliciting security holder in Indiana; (16) offer to sell, but not sale, of security not exempt from registration under Securities Act of 1933 if: (a) registration or offering statement or similar record as required under Securities Act of 1933 has been filed, but is not effective, or offer is made in compliance with Rule 165 adopted under Securities Act of 1933, and (b) stop order of which offeror is aware has not been issued against offeror by commissioner or Securities and Exchange Commission, and an audit, inspection, or proceeding that is public and that may culminate in stop order is not known by offeror to be pending; (17) offer to sell, but not sale of, security exempt from registration under Securities Act of 1933 if: (a) registration statement has been filed, but is not effective, (b) solicitation of interest is provided in record to offerees in compliance with rule adopted by commissioner, and (c) stop order of which offeror is aware has not been issued by commissioner and audit, inspection, or proceeding that may culminate in stop order is not known by offeror to be pending; (18) transaction involving distribution of securities of issuer to security holders of another person in connection with merger, consolidation, exchange of securities, sale of assets, or other reorganization to which issuer, or its parent or subsidiary and other person, or its parent or subsidiary, are parties; (19) rescission offer, sale, or purchase under IC 23-19-5-10; (20) offer or sale of security to person not resident of Indiana and not present in Indiana if offer or sale does not constitute violation of laws of state or foreign jurisdiction in which offeree or purchaser is present and is not part of unlawful plan or scheme to evade Act; (21) employees' stock purchase, savings, option, profit-sharing, pension, or similar employees' benefit plan, including any securities, plan interests, and guarantees issued under compensatory benefit plan, established by issuer, for participation of their employees including offers or sales of such securities to: (a) directors; general partners; trustees, if issuer is business trust; officers; consultants; and advisers, (b) family members who acquire such securities from those persons through gifts or domestic relations orders, (c) former employees, directors, general partners, trustees, officers, consultants, and advisers if those individuals were employed by or providing services to issuer when securities were offered, and (d) insurance agents who are exclusive insurance agents of issuer; (22) transaction involving: (a) stock dividend or equivalent equity distribution, if nothing of value is given by stockholders for dividend other than surrender of right to cash or property dividend if each stockholder may elect to take dividend distribution in cash, property, or stock, (b) judicially approved reorganization in which security is issued in exchange for one or more outstanding securities, claims, or property interest, or (c) tender offer in compliance with Rule 162 adopted under Securities Act of 1933; (23) nonissuer transaction in outstanding security by registered broker-dealer or exempt from registration, if issuer is reporting issuer in foreign jurisdiction, has been subject to continuous reporting requirements in foreign jurisdiction for not less than 180 days before transaction, and security is listed on foreign jurisdiction's securities exchange or is warrant or right to purchase or subscribe to any of foregoing. (IC 23-19-2-2).

Exemption Rulings.

Rule adopted or order issued by Commissioner may exempt security, transaction, or offer; rule may exempt class of securities, transactions, or offers from any or all of registration requirements of IC 23-19-3-1 – IC 23-19-3-6 and IC 23-19-5-4; and order under Act may waive, in whole or in part, any or all of conditions for exemption or offer. (IC 23-19-2-3).

Registration of Securities.

All securities except those specifically exempted under IC 23-19-2-1 and those offered or sold in exempt transactions under IC 23-19-2-2 must be registered under Act. Application for registration may be filed by issuer, other person on whose behalf offering is made or registered broker-dealer. (IC 23-19-3-5). Sealed and acknowledged consent appointing Secretary of State as agent to receive service of process required. Person filing registration statement shall pay filing fee of 0.05% of maximum aggregate offering price at which registered securities are to be offered in Indiana, but fee may not be less than $250 and may not be more than $1,000. (IC 23-19-3-5). Fee of $100 for filing amendment to effective registration statement. (IC 23-19-3-5). Registration statement is effective for one year after its effective date. (IC 23-19-3-5). Periodic reports required so long as registration is effective. (IC 23-19-3-5).

Registration by coordination is available for any security for which registration statement has been filed with SEC under Securities Act of 1933 in connection with same offering. (IC 23-19-3-3). Registration statement for registration by coordination must contain: (1) Copy of latest form of prospectus filed under Securities Act of 1933; (2) copy of articles of incorporation and bylaws or their equivalents; copy of any agreement with or among underwriters; copy of any indenture or other instrument governing issuance of security to be registered; and specimen, copy, or description of security that is required by rule adopted or order issued under Act; (3) copies of any other information or any other records filed by issuer under Securities Act of 1933 requested by commissioner; (4) undertaking to forward each amendment to federal prospectus promptly after it is filed with SEC. (IC 23-19-3-3). Application for registration by coordination automatically effective when federal registration effective if no stop order in effect, documents on file with Commissioner for twenty days, promptly notify Commissioner of date and time of effectiveness of federal registration and pricing amendment promptly filed as post-effective amendment. (IC 23-19-3-3; IC 23-2-1-4).

Registration by qualification is available for all securities. Registration statement must be filed with Commissioner and must contain documents enumerated by statute including prospectus containing: (1) issuer's name, address, and form of organization; state of jurisdiction and date of its organization; general character and location of its business; description of its physical properties and equipment; and statement of general competitive conditions in industry; (2) with respect to each director and officer of issuer, name, address, and principal occupation for previous five years; amount of securities of issuer held by person; amount of securities covered by registration statement to which person has indicated intention to subscribe; and description of any material interest of person in any material transaction with issuer or significant subsidiary effected within previous three years or proposed to be effected; (3) with respect to directors and officers, aggregate sum of remuneration paid to those persons during previous 12 months and estimated to be paid during next 12 months, directly or indirectly, by issuer; (4) with respect to person owning 10% or more of outstanding shares of any class of equity security of issuer, information specified in subdivision (2) other than person's occupation; (5) with respect to promoter, if issuer organized within previous three years, information or records specified in subdivision (2), any amount paid to promoter and consideration for payment; (6) with respect to person on whose behalf any part of offering is to be made in nonissuer distribution, person's name and address; amount of securities of issuer held by person as of date of filing of registration statement; description of any material interest of person in any material transaction with issuer or any significant subsidiary effected within previous three years or proposed to be effected; and statement of reasons for making offering; (7) capitalization and long term debt of issuer, including description of each security outstanding or being registered or otherwise offered, and statement of amount and kind of consideration; (8) kind and amount of securities to be offered; proposed offering price or method by which it is computed; estimated amounts of other selling expenses, including legal, engineering, and accounting charges; name and address of each underwriter and each recipient of finder's fee; copy of any underwriting agreement; and description of plan of distribution of any securities that are to be offered otherwise than through underwriter; (9) estimated monetary proceeds to be received by issuer from offering; purposes for which proceeds are to be used; estimated amount to be used for each purpose; (10) description of stock options and amount of those options held by officers, directors, or beneficial owners; (11) dates of, parties to, and general effect of each managerial or other material contract not made in ordinary course of business and copy of contract; (12) description of any pending litigation, action, or proceeding to which issuer is party; (13) copy of any prospectus, pamphlet, circular, form letter, advertisement, or other sales literature to be used in connection with offering; (14) specimen or copy of security being registered, unless security is uncertificated; copy of the issuer's articles of incorporation and bylaws or their equivalents, in effect; and copy of any indenture or other instrument covering security to be registered; (15) signed copy of opinion of counsel concerning legality of security being registered; (16) signed copy of consent of any accountant, engineer, appraiser, or other person whose profession gives authority for statement made by person; (17) balance sheet of issuer as of date within four months before filing of registration statement; statement of income and statement of cash flows for each of three fiscal years preceding date of balance sheet and for any period between close of immediately previous fiscal year and date of balance sheet, or for period of issuer's and any predecessor's existence if less than three years; and, if any part of proceeds of offering is to be applied to purchase of business, financial statements that would be required if that business were registrant; (18) any additional information or records required by rule adopted or order issued under Act. (IC 23-19-3-4). Registration by qualification effective on 30th day after filing date of registration statement, assuming stop order is not in effect and applicant has not requested delayed effectiveness. (IC 23-19-3-4). Commissioner may delay effectiveness once for not more than 90 days if Commissioner determines registration statement is not complete in all material respects. (IC 23-19-3-4).

Registration of Offerers.

No requirements other than in connection with registration of securities and dealers and agents. See subheads Registration of Securities, Registration of Dealers, etc. infra.

Fraud and Liabilities.

Unlawful for person, in connection with offer, sale, or purchase of security, directly or indirectly: (1) To employ device, scheme, or artifice to defraud; (2) to make untrue statement of material fact or to omit to state material fact necessary in order to make statement made, in light of circumstances under which they were made, not misleading; or (3) to engage in act, practice, or course of business that operates or would operate as fraud or deceit upon another person. (IC 23-19-5-1). It is unlawful for person to make or cause to be made, statement that is false or misleading in material respect, or to omit to state material fact necessary to make statement made not false or misleading. (IC 23-19-5-5). Person who knowingly violates security offering provisions commits Class C felony. (IC 23-19-5-8). Provisions are made for civil liability for persons who offer, purchase or sell in violation of Act and those who control sellers or purchasers and certain affiliates liable to others unless purchaser or seller did not know and through exercise of reasonable care could not have known of violation. (IC 23-19-5-9). May rescind transaction or recover amount paid plus interest at rate provided in security or 8% interest per year for non-interest-bearing securities, costs and reasonable attorney's fees. (IC 23-19-5-9). Statute of limitations is three years after discovery of violation. (IC 23-19-5-9). Suit precluded if offer to refund consideration plus interest at rate provided in security or 8% interest for non-interest-bearing securities less income received on security and offer not accepted within 30 days. (IC 23-19-5-10).

Broker-Dealer Defined.

"Broker-dealer" means person engaged in business of effecting transactions in securities for account of others or for person's own account. Term does not include: (a) Agent; (b) issuer; (c) bank, savings institution, or trust company; (d) international banking institution; or (e) person excluded by rule adopted or order issued under Act. (IC 23-19-1-2[3]).

Broker-Dealer Registration Requirement and Exemptions.

Unlawful for person to transact business in Indiana as broker-dealer unless person is registered under Act or is exempt from registration as broker-dealer. (IC 23-19-4-1). Following persons are exempt from registration requirement: (1) Broker-dealer without place of business in Indiana if its only transactions effected in Indiana are with: (a) issuer of securities involved in transactions, (b) broker-dealer registered as broker-dealer or not required to be registered as broker-dealer, (c) institutional investor, (d) nonaffiliated federal covered investment adviser with investments under management in excess of $100,000,000 acting for account of others under discretionary authority in signed record, (e) bona fide preexisting customer whose principal place of residence is not in Indiana, and person is registered as broker-dealer under Security Exchange Act of 1934 or not required to be registered under Securities Exchange Act of 1934 and is registered under securities act of state in which customer maintains principal place of residence, (f) bona fide preexisting customer whose principal place of residence is in Indiana but who was not present in Indiana when customer relationship was established, if: (i) broker-dealer is registered under Securities Exchange Act of 1934 or not required to be registered under Securities Exchange Act of 1934 and is registered under securities laws of state in which customer relationship was established and where customer had maintained principal place of residence; and (ii) within 45 days after customer's first transaction in Indiana, person files application for registration as broker-dealer in Indiana and further transaction is not effected more than 75 days after date on which application is filed, or, if earlier, date on which commissioner notifies person that commissioner has denied application for registration or has stayed pendency of application for good cause, (g) not more than three customers in Indiana during previous 12 months, and (h) any other person exempted by rule adopted or order issued under Act; (2) person that deals solely in U.S. government securities and is supervised as dealer in government securities by Board of Governors of Federal Reserve System, Comptroller of Currency, Federal Deposit Insurance Corporation, or Office of Thrift Supervision. (IC 23-19-4-1).

Investment Adviser Defined.

"Investment adviser" means person that, for compensation, engages in business of advising others, either directly or through publications or writings, as to value of securities or advisability of investing in, purchasing, or selling securities or that, for compensation and as part of regular business, issues or promulgates analyses or reports concerning securities. Term includes financial planner or other person that, as integral component of other financially related services, provides investment advice to others for compensation as part of business or that holds itself out as providing investment advice to others for compensation. Term does not include: (a) investment adviser representative; (b) lawyer, accountant, engineer, or teacher whose performance of investment advice is solely incidental to practice of person's profession; (c) broker-dealer or its agents whose performance of investment advice is solely incidental to conduct of business as broker-dealer and that does not receive special compensation for investment advice; (d) publisher of bona fide newspaper, news magazine, or business or financial publication of general and regular circulation; (e) federal covered investment adviser; (f) bank, savings institution, or trust company that is wholly owned subsidiary of bank or savings institution; (g) any other person that is excluded by Investment Advisers Act of 1940 from definition of investment adviser; or (h) any other person excluded by rule adopted or order issued under Act. (IC 23-19-1-2[15]).

Investment Adviser Registration Requirement and Exemptions.

It is unlawful for person to transact business in Indiana as investment adviser unless person is registered under Act as investment adviser or is exempt from registration as investment adviser under subsection. (IC 23-19-4-3). Following persons are exempt from registration requirement: (1) Person without place of business in Indiana that is registered under securities act of state in which person has its principal place of business if its only clients in Indiana are: (a) federal covered investment advisers, investment advisers registered under Act, or broker-dealers registered under Act, (b) institutional investors, (c) bona fide preexisting clients whose principal places of residence are not in Indiana if investment adviser is registered under securities act of state in which clients maintain principal places of residence, or (d) any other client exempted by rule adopted or order issued under Act; (2) person without place of business in Indiana if person has had, during preceding 12 months, not more than five clients that are resident in Indiana in addition to foregoing; (3) any other person exempted by rule adopted or order issued under Act. (IC 23-19-4-3).

Registration of Broker-Dealers and Investment Advisers, Fees, Renewals.

Person shall register as broker-dealer, agent, investment adviser, or investment adviser representative by filing application and consent to service of process complying with IC 23-19-6-11, and paying appropriate registration fee (fee amounts set forth in IC 23-19-4-10, broker-dealer $250; agent $25; investment adviser $100; investment adviser representative $25; federal covered investment adviser $50). (IC 23-19-4-6). Registration application must contain: (1) Information or record required for filing of uniform application; and (2) upon request by commissioner, any other financial or other information or record that commissioner determines is appropriate. If information in application filed becomes inaccurate or incomplete in material respect, registrant shall promptly file correcting amendment. If order is not in effect and proceeding is not pending, registration becomes effective at noon on 45th day after completed application is filed, unless registration is denied. Rule adopted or order issued under Act may set earlier effective date or may defer effective date until noon on 45th day after filing of any amendment completing application. Registration is effective until midnight on Dec. 31 of year for which application for registration is filed. Registration may be automatically renewed each year by filing such records as are required, by paying renewal fee, and by paying costs charged by designee of commissioner for processing filings. (IC 23-19-4-6).

Unlawful Practices.

Unlawful for person that advises others for compensation, either directly or indirectly or through publication or writings, as to value of securities or advisability of investing in, purchasing, or selling securities or that, for compensation and as part of regular business, issues or promulgates analyses or reports relating to securities, or that receives compensation to solicit, offer, or negotiate for sale of or for selling investment advice: (1) To employ device, scheme, or artifice to defraud another person; or (2) to engage in act, practice, or course of business that operates or would operate as fraud or deceit upon another person. (IC 23-19-5-2). See also: IC 23-19-5-1 – regarding unlawful acts in offer and sale if securities; IC 23-19-4-1 – regarding unlawful acts by broker-dealers; and IC 23-19-4-3 – regarding unlawful acts by investment advisers.

Franchise Agreements are regulated by statute. (IC 23-2-2.5-1, et seq.). No person may offer or sell any franchise unless (1) franschise is registered or is exempt from registration and (2) prospective franchisee received disclosure statement together with copy of all proposed contracts relating to sale of franchise in specified time. (IC 23-2-2.5-9). Requirements for notification form of registration of franchise are set forth in IC 23-2.5-10.5. Filing fee for registration by notification of sale of franchises is $500 and fee for filing registration renewal $250. (IC 23-2-2.5-43). Antifraud provisions adopted for franchises. (IC 23-2-2.5-27). Knowing violation of franchise provisions is class C felony. (IC 23-2-1.5-37).

Commodity Contracts and Commodity Options are regulated by statute. (IC 23-2-6). No person may sell, purchase or offer to sell or purchase commodity (IC 23-2-6-4) under commodity contract (IC 23-2-6-6) or commodity option (IC 23-2-6-10) or offer to enter into as seller or purchaser any commodity contract or commodity option unless exempt transaction (IC 23-2-6-17). Exemptions set forth in IC 23-2-6-18 and IC 23-2-6-19. Antifraud provisions adopted for licensees. (IC 23-2-6-24). Commissioner authorized to enforce statute through notices and orders, investigations and hearings. (IC 23-2-6-29). Knowing violation of commodity provisions is class C felony. (IC 23-2-6-33). Commissioner may impose civil penalty not to exceed $10,000 per violation. (IC 23-2-6-33).

Business Take-Over.

“Tender Offers” are regulated pursuant to Take-Over Offers Act (IC 23-2-3-1) requiring filing with Commissioner of disclosure statement prior to offer to acquire equity security of “target company” if after acquisition, offeror is directly or indirectly record or beneficial owner of more than 10% of any class of outstanding equity securities of target company. (IC 23-2-3.1-3). “Target company” means issuer of securities organized under laws of Indiana, with principal place of business in state, and with substantial assets in state. It does not include certain domestic corporations, regulated by Utility Regulatory Commission, financial institutions, public utilities, public utility holding companies, bank holding companies or savings and loan associations if takeover offer subject to regulation of entity’s primary regulatory agency. (IC 23-2-3.1-1). Acquisitions of less than 2% of class of shares, issuers of class of equity securities held of record of 75 or fewer persons at time of offer and acquisitions Commissioner determines to be not for purpose and without effect of changing or influencing control are exempt from regulation. (IC 23-2-3.1-8.6). Before making takeover offer, offeror must file statement with Commissioner and deliver copy to president of target company at principal office no later than filing date. Consent of offeror to service of process specified in IC 23-2-1-16 and filing fee of $750 must accompany statement. If takeover offer subject to any federal law including Securities Exchange Act of 1934, statement must include copy of all documents filed with Securities and Exchange Commission or other proper federal agency. If takeover offer not subject to federal law, statement must be filed on forms prescribed by Commissioner and must include: (1) Identity and material facts concerning offeror; (2) source and amount of funds used to acquire any equity security; (3) if purpose of offer is to gain control over target company, statement of any plans to liquidate, sell assets, effect merger or consolidation or other major changes in business, structure, management or personnel of target company; (4) number of shares or units of equity security of target company of which offeror is record or beneficial owner or has right to acquire; (5) information as to any contracts, arrangements, understandings or negotiations with any person concerning any equity security of target company; (6) information as to any contracts, arrangements or understandings with any person who is officer, director, administrator, manager or executive employee, or owner of any equity securities of target company, with respect to tender of equity securities of target company, purchase of any equity security from such person otherwise than pursuant to tender offer and retention of any person in his presence or any other management position or giving or withholding of favorable recommendation regarding offer; (7) description of provisions for providing material information of takeover offer to offerees and any other information Commissioner prescribes by regulation. (IC 23-2-3.1-5). Must describe contract or subsidy received by offeror during three years prior to filing or office or appointment held by offeror, directors or officers from or with foreign (non-U.S.) government. If offereor incorporated in or citizen of non-U.S. country must disclose financial sources and proposed consummation date. Hearing must be held within 20 business days after statement filed. (IC 23-2-3.1-7). Following hearing and within 20 business days after statement filed, Commissioner may prohibit or condition purchase if Commissioner finds by preponderance of evidence that takeover statement fails to provide full and fair disclosure to offerees of all material information concerning takeover offer or if takeover offer is not made to all offerees of same class of equity securities of target company on substantially equivalent terms. (IC 23-2-3.1-7). No shares may be purchased or paid for pursuant to takeover offer within 20 business days after it is made. (IC 23-2-3.1-8). Offeror may not acquire equity security of target company for two years after conclusion of takeover offer unless seller offered terms substantially equivalent to takeover offer. (IC 23-2-3.1-8.4). Commissioner may investigate, issue ex parte cease and desist orders without notice, or bring suit if he believes any person is violating or about to violate any provision or regulation of Takeover Offers Act. (IC 23-2-3.1-10). Offeror, target company, or any beneficial owner of equity security subject to offer may bring court action to enforce Act or enjoin violation. Any party to proceeding may appeal to Indiana Court of Appeals from final order of Commissioner. (IC 23-2-3.1-11).

For discussion of provisions relating to consequences of acquisition of controlling interest in and business combinations with certain Indiana corporations, see category 2 Business Organizations, topic 2.03 Corporations.

Uniform Simplification of Fiduciary Security Transfers Act adopted. (IC 30-2-5-1 – IC 30-2-5-11).

Indiana Uniform Transfers to Minors Act.

See IC 30-2-8.5.

Continuing Care Agreements are regulated pursuant to statute. (IC 23-2-4-1, et seq.). Persons who agree to furnish living accommodations in home and meals, nursing care, medical or other health related services, or any combination thereof, to five or more individuals for life of individual or for more than one month in exchange for payment of entrance fee of at least $25,000 and periodic charges must register each continuing care retirement community with Commissioner. (IC 23-2-4-1). Form of application for registration is prescribed by Commissioner, and must be accompanied by $250 application fee. (IC 23-2-4-3). Application must contain initial disclosure statement whose contents are mandated by statute. (IC 23-2-4-4). Provider must file annual disclosure statement within four months at end of Provider's fiscal year containing specific financial information, together with $100 filing fee. (IC 23-2-4-5). Obligation to amend disclosure statements to prevent material misstatement or omission of fact and to reflect sale of continuing care retirement community. (IC 23-2-4-6). Copies of initial and latest annual disclosure statements must be delivered to prospective resident prior to execution of continuing care agreement. (IC 23-2-4-7). Commissioner after notice and hearing may deny, revoke or not renew registration or prohibit execution of continuing care agreements if there is failure to file annual statement or to deliver disclosure statements to prospective resident, use of misleading disclosure statement, failure to comply with cease and desist order of Commissioner or willful violation of statute, or provider insolvent and financial condition may jeopardize care of residents. (IC 23-2-4-8). Failure to comply with registration or disclosure requirements is class A infraction. (IC 23-2-4-9). Commissioner must act upon application within 60 days of filing. If application insufficient, Provider has 60 days to correct deficiencies. (IC 23-2-4-3). Provider must establish interest-bearing escrow account to hold entrance fees received prior to occupancy of living unit by prospective resident. Conditions for release of funds from escrow established by statute. (IC 23-2-4-10). Provider may post letter of credit, negotiable securities or bond in favor of Commissioner in lieu of escrow account. (IC 23-2-4-11). Statute establishes Indiana Retirement Home Guaranty Fund to protect financial interests of residents from bankruptcy of Provider. (IC 23-2-4-13). $100 fee levied on each person who enters into continuing care agreement after Aug. 1, 1982, to be collected by Provider and forwarded to Commissioner within 30 days of occupancy. (IC 23-2-4-13).

Loan Broker is any person who, for consideration from any source, procures, attempts to procure, or assists in procuring residential mortgage loan from third party or any other person whether or not person seeking loan actually obtains loan. (IC 23-2-5-3). Loan broker does not include any banks, trust companies, savings associations or other regulated financial institutions regularly and actively engaged in business of making consumer loans not secured by real estate or taking assignment of consumer sales contracts not secured by real estate, any person who arranges financing for sale of that person's product or creditor that is licensed under IC 24-4.4-2-402. (IC 23-2-5-3). Loan broker must obtain license from Commissioner. (IC 23-2-5-4). Information to be contained in application for license specified by IC 23-2-5-5, including: (i) Consent to service of process; (ii) evidence of $50,000 bond; (iii) application fee of $200, plus $100 for each ultimate equitable owner; (iv) affidavit affirming that none of applicant's ultimate equitable owners, directors, managers, or officers have been convicted, in any jurisdiction, of any felony within previous seven years or offense involving fraud or deception that is punishable by at least one year of imprisonment, unless such affidavit is waived by commissioner; (v) evidence that applicant, if applicant is individual, has completed education requirements (See IC 23-2-5-21); (vi) name and license number for each mortgage loan originator to be employed by licensee; (vii) name and license number for each principal manager; and (viii) for each ultimate equitable owner, following information: (1) Name of ultimate equitable owner; (2) address of ultimate equitable owner, including home address of ultimate equitable owner if ultimate equitable owner is individual; (3) telephone number of ultimate equitable owner, including home telephone number if ultimate equitable owner is individual; (4) ultimate equitable owner's Social Security number and date of birth, if ultimate equitable owner is individual. (IC 23-2-5-5). Licenses and initial certificates of licensure issued by commissioner are valid until Jan. 1 of second year after issuance. (IC 23-2-5-5). Renewal of license requires evidence of completion of academic instruction. (IC 23-2-5-21). License must be renewed biennially. (IC 23-2-5-6). Contracts for services of licensee must be in writing and signed by all contracting parties with copy retained by borrowing party. (IC 23-2-5-9). Licensees required to keep records specified in statute for two years. (IC 23-2-5-18). Antifraud provisions adopted for licensees. (IC 23-2-5-20). Commissioner authorized to enforce statute through notices and orders, investigations and hearings. In addition to any other remedies, Commissioner may impose civil penalty not to exceed $10,000 per violation. (IC 23-2-5-14). Knowing violation of loan broker provisions is class D felony. (IC 23-2-5-16). If person violates statute, contract void and prospective borrower entitled to recover funds paid to loan broker and may recover damages, interest at legal rate and attorney's fee. (IC 23-2-5-15).

3.25 STATUTE OF FRAUDS:

See topic 3.16 Frauds, Statute of.

3.26 TRUST RECEIPT SECURITY:

Uniform Commercial Code in effect since July 1, 1964. (IC 26-1-1-101 et seq.).

3.27 WAREHOUSEMEN:

Uniform Commercial Code in effect since July 1, 1964. (IC 26-1-1-101 et seq.). See topic 3.09 Commercial Code.

Lien.

Governed by Uniform Commercial Code. (IC 26-1-7-209, IC 26-1-7-210). See topic 3.09 Commercial Code.

Warehouses for Grain Storage

Governed by IC 26-3-7-1 et seq.

Cold Storage Warehouses.

Defined in IC 16-18-2-57, IC 16-18-2-58.

Licenses.

Required for grain storage warehouses. (IC 26-3-7-4 et seq.).

Penalties for Issuing False or Misleading Warehouse Receipts.

Governed by IC 26-3-2-1 et seq., 26-3-4-1 et seq.

Self-service Storage Facilities.

Governed by IC 26-3-8-1 et seq.

4 CITIZENSHIP

4.01 ALIENS:

Before beginning employment, citizen or subject of any country other than U.S. teaching at university supported partially or totally by public funds must subscribe to oath to support U.S. institutions and policies. (IC 20-12-0.6-2).

Aliens residing in foreign countries or U.S. may acquire by purchase, devise, or descent, and may hold, enjoy, convey, devise, transmit, mortgage, or otherwise encumber real estate, with equal privilege of citizens of state or U.S. (IC 32-22-2-5). But, see IC 32-22-2-1 and IC 32-22-2-7.

Aliens are not permitted to serve as grand jurors. (IC 35-34-2-3[c]). It shall be good cause for challenge to any person called as juror in criminal trial if that person is alien. (IC 35-37-1-5).

No unemployment benefits may be paid on basis of services performed by alien unless alien is lawfully admitted for permanent residence or is lawfully present for purposes of performing such services or otherwise permanently residing in U.S. under color of law at time services were performed. (IC 22-4-14-9). Eligibility of refugees, lawful permanent residents, illegal aliens and their children for Medicaid and AFDC, are discussed at IC 12-15-2.5-1 et seq., and IC 12-14-2.5-1 et seq. respectively. Hospital care for indigent program not available to individual who is neither U.S. citizen nor lawfully admitted alien. (IC 12-16-7.5-7; IC 12-16.1-7-7).

Failure of attorney to advise noncitizen defendant that consequences of guilty plea may be deportation constitutes ineffective assistance of counsel. (In. Const. Art. 1, § 13; 641 N.E.2d 44).

Aliens may not hold permits for the sale of beer. (IC 7.1-3-4-2).

Foreign national (not lawful permanent resident or U.S. citizen) may not make contribution in connection with election, convention, or caucus in which candidate is selected. (IC

3-9-2-11).

It is Class A misdemeanor for person to prepay transportation or assist migration of any alien into Indiana under contract before migration to perform labor or service in Indiana. (IC 22-5-1-1 et seq.).

5 CIVIL ACTIONS AND PROCEDURE

5.01 ACCORD AND SATISFACTION:

Accord is agreement to compose or settle, and satisfaction is execution of agreement. (29 N.E.2d 560, 629 N.E.2d 1280). Where amount of debt is uncontroverted, payment of less than amount due will not amount to satisfaction, unless it is supported by some new or independent consideration. (116 Ind. 370, 19 N.E. 159). If amount is unliquidated and disputed, compromise will be binding. (49 Ind. App. 109, 96 N.E. 791). Where goods or property are received in full satisfaction of debt, it amounts to accord and satisfaction. (59 Ind. 27). Accord and satisfaction is affirmative defense which must be pled in responsive pleading, upon which pleader carries burden of proof. (Rule TR 8[C]; 554 N.E.2d 1180). Offer in satisfaction must be accompanied by express condition that acceptance is in full satisfaction of claim or circumstances must clearly indicate such condition. (629 N.E.2d 1280). Accord and satisfaction requires meeting of minds or evidence that parties intended to agree to accord and satisfaction. (629 N.E.2d 1280). Satisfaction is shown as matter of law when judgment for damages is lower than funds received in settlement. (597 N.E.2d 337). Creditor's approval of bankruptcy reorganization plan cannot constitute accord and satisfaction. (629 N.E.2d 1246).

See also category 3 Business Regulation and Commerce, topic 3.09 Commercial Code.

5.02 ACTIONS:

Indiana Rules of Trial Procedure to some extent are based on Federal Rules of Civil Procedure.

There is one form of action to be known as "civil action." Right of a civil action is not merged in a public offense or a public remedy, but may be sought independently of and in addition to punishment given or relief granted for public offense. (Rule TR 2).

Equity.

The distinction between actions at law and suits in equity, and the forms of each, are abolished. (Rule TR 2).

Conditions Precedent.

Tort actions against state are barred unless notice is filed with attorney general or state agency involved within 270 days after loss occurs. (IC 34-13-3-6). Tort action against political subdivision is barred unless notice is filed with governing body of political subdivision and with Indiana political subdivision risk management commission within 180 days after loss occurs. (IC 34-13-3-8). Actions pertaining to assessment of contributions, penalties and interest; which accounts should be charged for benefits to be paid or ordered to be paid; successorship; and claims for refunds of contributions under Employment Security Act shall be preceded by notice of appeal, served on adverse party at any time before decision of administrative law judge becomes final, and shall stay the finality of decision for 30 days from service of said notice. (IC 22-4-32-8). Actions for refund of virtually all taxes administered by state department of revenue must be filed with department within three years of due date of return or date of payment, whichever is later. (IC 6-8.1-9-1). For list of taxes see IC 6-8.1-1-1. Actions for slander or libel against news service requires four days' notice prior to suit and, in case of newspaper, six days for daily publication and 11 days for weekly. (IC 34-15-4-2). In action for wrongful death, personal representative must file suit within two years of date of death. (IC 34-23-1-1).

Commencement.

See topic 5.20 Process; also category 23 Transportation, topic 23.01 Motor Vehicles, subhead Action Against Nonresident.

Parties.

Every action must be prosecuted in name of real party in interest. Executor, administrator, guardian, bailee, trustee of an express trust, party with whom or in whose name contract has been made for benefit of another, party authorized by statute, or state, when authorized by statute to sue on relation of another, may sue in his own name on behalf of benefiting party, but must state his relationship and capacity in which he sues. No action will be dismissed that is not prosecuted in name of real party in interest until reasonable time after objection has been allowed for real party in interest to ratify action. Ratification, joinder, or substitution has same effect as action commenced initially in name of real party in interest. (Rule TR 17[A]).

Partnership or unincorporated association may sue or be sued in its common name. (Rule TR 17[E]).

State may be made a party defendant to an action involving real estate. (Rule TR 17.1).

There is no distinction for purposes of suing or being sued between men and women, or between men and women because of marital or parental status; however, this does not apply to actions in tort. (Rule TR 17[D]).

Infant or incompetent person may sue or be sued in any action: (1) In his own name, (2) in his own name by his guardian ad litem or a next friend, or (3) in name of his court-appointed representative or other like fiduciary. (Rule TR 17[C]).

One or more members of a class may be sued or sue as representative parties on behalf of all if procedural prerequisites are met. (Rule TR 23).

All persons may be joined in one action as plaintiffs or defendants if they assert or if there is asserted against them any right of relief jointly, severally, or in alternative, they are in respect of or arise out of same transaction or occurrence, or series of transactions or occurrences and if any question of law or fact common to all these persons will arise in action. (Rule TR 20[A]).

Person who is subject to service of process shall be joined by court as party in action if person is needed for just adjudication. (Rule TR 19[A]).

Joinder of assignor or transferor of claim or chose in action will not be required in suit by assignee who establishes his title by appropriate pleading and proof, but such assignor or transferor shall be subject to permissive joinder as provided in Rule TR 20. (Rule TR 19[E]).

Court may order substitution of proper parties upon death, incompetency, or transfer of interest. (Rule TR 25).

Intervention is allowed, as of right or by permission, on application in certain instances, or where applicant’s ability to protect property may be affected, or where applicant’s claim or defense and main action have common question of law or fact. (Rule TR 24).

Interpleader of other parties by either defendant or plaintiff is permitted when other parties have, or are asserting, claims which may expose plaintiff or defendant to double or multiple liability. (Rule TR 22).

Third-Party Practice.

Defendant may implead person not party to action who is or may be liable to him for all or part of plaintiff's claim against him. When counterclaim or other claim is asserted against plaintiff, he may bring in third party under circumstances that would entitle defendant to do so. (Rule TR 14).

Joinder of Causes of Action.

Party asserting a claim for relief may join as many claims as he has against opposing party. Whenever claim is one heretofore cognizable only after another claim has been prosecuted to a conclusion, two claims may be joined in a single action; but court can grant relief in that action only in accordance with relative substantive rights of parties. (Rule TR 18).

Consolidation of Actions.

Courts have broad discretion to consolidate actions which involve common questions of law or fact, and to order joint hearings or trials of any or all of matters in issue. (Rule TR 42[A]).

Severance of Actions.

Court may order parties dropped or added at any stage of action and on such terms as are just and will avoid delay. Any claim against a party may be severed and proceeded with separately. (Rule TR 21[A]). Incorrect names and misnomers may be corrected by amendment. (Rule TR 21[A]; Rule TR 15). Courts have broad discretion to order separate trials of claims, cross-claims, counterclaims, third-party claims, or any separate issue when convenient or to avoid prejudice or when it would be conducive to expedition and economy. (Rule TR 42[B]).

Stay of Proceedings.

Appeals in eminent domain actions do not stay proceedings. (IC 32-24-1-8).

Survival of Action.

If individual who is entitled or liable in cause of action dies, action survives by or against decedent's representative, except actions for libel, slander, malicious prosecution, false imprisonment, invasion of privacy and personal injuries to deceased party. (IC 34-9-3-1).

In actions for personal injuries which were reduced to judgment, and were thereafter reversed on appeal for new trial, such actions survive death of plaintiff. (IC 34-9-3-5). If person receives personal injuries caused by wrongful act or omission of another, and subsequently dies from causes other than those personal injuries, decedent's personal representative may maintain action against wrongdoer to recover all damages resulting before date of death from those injuries to which decedent would have been entitled had decedent lived. Damages inure to exclusive benefit of decedent's estate. (IC 34-9-3-4).

Prohibited Actions.

All civil causes of action for breach of promise to marry, alienation of affections, criminal conversation or seduction of female over 18 years old are abolished (IC 34-12-2-1) and contracts and instruments executed after June 10, 1935 which are in settlement or compromise of such causes of action are void as against public policy. (IC 34-12-2-7).

There are criminal penalties for knowingly filing suit on such causes of action. (IC 34-

12-2-3).

Limitation of.

See topic 5.16 Limitation of Actions.

Direct Actions Against Insurer.

See category 23 Transportation, topic 23.01 Motor Vehicles, subhead Direct Actions.

Small Claims.

See category 6 Courts and Legislature, topic 6.01 Courts.

5.03 APPEAL AND ERROR:

Appeals (except application to Supreme Court for writs) are generally covered by Rule TR 59 and Rules of Appellate Procedure. Motion to correct errors addressed to trial court is prerequisite to appeal only when party seeks to address: (1) Newly discovered material capable of production within 30 days of final judgment but which in exercise of reasonable diligence could not have been discovered and produced at trial; or (2) claim that jury verdict is excessive or inadequate. (Rule TR59[A]). Motion to correct error must be filed not later than 30 days after final judgment or appealable final order. (Rule TR59[C]). Motion to correct error must be filed not later than 30 days after final judgment or appealable final order. (Rule TR59[C]). Motions to correct error not timely set for hearing or ruled upon may be deemed denied by procedure specified in Rule TR 53.3.

Appeal is initiated by filing Notice of Appeal with clerk of trial court 30 days after: (1) Court’s ruling on motion to correct errors, (2) motion to correct error is deemed denied under Rule TR 53.3, or (3) entry of final judgment. Notice of Appeal shall include designation of appealed order or judgment, designation of court to which appeal is taken, direction for assembly of Clerk’s Record, and Request for Transcript; otherwise, right to appeal forfeited. (Rule AP 9[A], [F]). Motion to trial court requesting certification of interlocutory order for appeal must be made within 30 days of interlocutory order. (Rule AP 14[B][1][a]). Motion requesting that Court of Appeals accept jurisdiction over interlocutory appeal shall be filed within 30 days of date of trial court’s certification. (Rule AP 14[B][2]). If Court of Appeals accepts interlocutory jurisdiction, appellant must file Notice of Appeal with trial court clerk within 15 days of Court of Appeals order accepting jurisdiction. (Rule AP 14[B][3]). $250 filing fee shall accompany Notice of Appeal. (Rule AP 9[E]).

Any party who has filed Notice of Appeal with trial court clerk shall file Appellant’s Case Summary with Clerk of Indiana Supreme Court, Court of Appeals, and Tax Court. (Rule AP 15[A]). Appellant’s Case Summary shall be filed within 30 days of filing of Notice of Appeal or, in case of interlocutory appeal under Rule AP 14, at same time of filing of motion to Court of Appeals requesting permission to file interlocutory appeal. (Rule AP 15[B]). Appellant’s Case Summary shall set forth following information, as applicable: (1) party information; (2) trial information; (3) transcript information; and (4) appeal information. (Rule AP 15[C]). Following documents must be attached to Appellant’s Case Summary: (1) in civil cases, copy of judgment or order appealed from, including findings of fact and conclusions, where made; (2) in criminal appeals, copy of judgment or order appealed from, including any sentencing order; (3) copy of any motion to correct errors filed in trial court; (4) file-stamped copy of Notice of Appeal, except in discretionary interlocutory appeals; (5) in Administrative Agency cases, copy of order, ruling or decision appealed from, including any order or ruling on any motion or request for rehearing; (6) in Appeals filed in forma pauperis, proof of appointment or proof of indigency; and (7) copy of all trial court entries relating to sealing of any court records from public access. (Rule AP 15[D]). No record, motion, paper, or other filing by appellant shall be accepted by Appellate Court Clerk until appellant has filed its Appellant’s Case Summary. (Rule AP 15[E]).

Appearances.

Filing of Appellant's Case Summary satisfies requirement of appellant to file appearance. (Rule AP 16[A]). Other parties participating in appeal must file appearance form within 30 days after filing of first Appellant's Case Summary or contemporaneously with first document filed by appearing party, whichever comes first. (Rule AP 16[B]).

Pre-Appeal Conference.

Court of Appeals may direct, or parties may request, pre-appeal conference to consider simplification of issues, stipulations of fact, designation of what record is necessary, scheduling, settlement and other matters which may aid in disposition of appeal. Failure to participate in pre-appeal conference or gross unpreparedness for conference can result in sanctions, including attorney's fees. (Rule AP 19).

From Courts of General Jurisdiction.

Judgment is final judgment if (1) it disposes of all claims as to all parties; (2) court in writing expressly determines that there is no just reason for delay and in writing expressly directs entry of judgment as to fewer than all claims or parties under Rule TR 54(B), or as to fewer than all issues, claims, or parties under Rule TR 56(C); (3) it is deemed final under Rule TR 60(C); (4) it is ruling on either mandatory or permissive Motion to Correct Error; or (5) it is otherwise deemed final by law. (Rule AP 2[H]). Supreme Court has mandatory and exclusive jurisdiction over (a) criminal appeals in which sentence of death or life imprisonment without parole is imposed and in post-conviction relief cases in which sentence was death; (b) appeals of final judgments declaring state or federal statute unconstitutional in whole or in part; (c) appeals involving waiver of parental consent to abortion under Rule TR 62; (d) appeals involving mandate or funds under Rule TR 60.5(B) and Rule TR 61. Supreme Court has discretionary jurisdiction over cases in which it grants Transfer under Rule 56 or 57 or Review under Rule 63. (Rule AP 4[A]). Supreme Court has exclusive jurisdiction over (1) practice of law; (2) supervision of judges; (3) supervision of courts; and (4) issuance of writs. (Rule AP 4[B]). In all other cases, appeal must be taken to Court of Appeals. (Rule AP 5).

Within 30 days of filing of Notice of Appeal, trial court clerk or Administrative Agency shall assemble Clerk's Record. Trial court clerk or Administrative Agency is not obligated to index or marginally annotate Clerk's Record. (Rule AP 10[B]). When Clerk's Record is assembled, trial court clerk or Administrative Agency shall file Notice of Completion of Clerk's Record with Appellate Courts' Clerk and shall send notice to parties that Clerk's Record has been assembled and is complete. Notice of Completion shall include certified copy of Chronological Case Summary and shall state whether Transcript is (a) completed; (b) not completed; or (c) not requested. (Rule AP 10[C]). If trial court clerk or Administrative Agency fails to issue timely Notice of Completion of Clerk's Record, appellant shall seek order from Court of Appeals compelling trial court clerk to complete Clerk's Record and issue its Notice of Completion. Failure of appellant to seek such order not later than 15 days after Notice of Completion of Clerk's Record was due to have been issued shall subject appeal to dismissal. (Rule AP 10[F]). Provisions for Record on Appeal can be found at Rules AP 27-33.

Trial court reporter shall prepare, certify and file Transcript designated in Notice of Appeal with trial court clerk or Administrative Agency in accordance with Rule AP 28, 29 and/or 30. Trial court reporter shall provide notice to all parties to appeal that Transcript has been filed with Clerk of Trial Court or Administrative Agency in accordance with Rule AP 28, 29 and/or 30. (Rule AP 11[A]). Trial court reporter or Administrative Agency shall have 90 days after appellant files Notice of Appeal to file Transcript with Clerk. (Rule AP 11[B]). If court reporter fails to file Transcript with trial court clerk within time allowed, appellant shall seek order from Court of Appeals compelling court reporter to do so. Failure of appellant to seek such order not later than 15 days after Transcript was due to have been filed with trial court clerk shall subject appeal to dismissal. (Rule AP 11[D]).

Appellant's brief shall be filed no later than 30 days after (a) date trial court clerk or Administrative Agency issues its Notice of Completion of Clerk's Record if Notice reports that Transcript is complete or that no Transcript has been requested; or (b) in all other cases, date trial court clerk or Administrative Agency issues its Notice of Completion of Transcript. (Rule AP 45[B][1]). Appellee's brief shall be filed no later than 30 days after service of appellant's brief. (Rule AP 45[B][2]). Appellant's reply brief shall be filed no later than 15 days after service of appellee's brief. If reply brief also serves as cross-appellee's brief, it shall be filed no later than 30 days after service of appellee's brief. (Rule AP 45[B][3]). Any cross-appellant's reply brief shall be filed no later than 15 days after service of appellant's reply brief. (Rule AP 45[B][4]). Interlocutory appeals are governed by same rules. (Rule AP 45[A]).

Court to which Appeal is Taken.

Appellate Rules of Procedure specify jurisdiction of Supreme Court and of Court of Appeals. (Rule AP 4-8).

Petition for extension of time to complete Clerk's Record and to file Transcript is governed by technical requirements. (Rules AP 10 and 11). Any motion for extension of time shall be filed at least seven days before expiration of time unless movant was not aware of facts on which motion was based. (Rule AP 35[A]). No motion for extension of time shall be filed after time for doing act expires. (Rule AP 35[A]). Contents of motion for extension of time are specific and set forth in Rule AP 35. No motion for extension of time shall be granted to file Petition for Rehearing, Petition to Transfer to Supreme Court, any brief supporting or responding to such Petitions, or in appeals involving termination of parental rights. (Rule AP 35[C]). Motions for extension of time in appeals involving Workers' Compensation, issues of child custody, support, visitation, paternity, adoption, and determination that child is in need of services shall be granted only in extraordinary circumstances. (Rule AP 35[D]).

Petition for rehearing shall be filed no later than 30 days after decision. (Rule AP 54[B]). Rule 25(C), which grants three day extension of time for service by mail or third-party commercial carrier, does not extend due date, and no extension of time shall be granted. (Rule AP 54[B]). Brief in response to Petition for Rehearing shall be filed no later than 15 days after Petition is served or 15 days after Court issues its order requesting response. No brief in response to Petition for Rehearing is required unless requested by Court, except that Attorney General shall be required to file brief in response to Petition in criminal case where sentence is death. (Rule 54[C]). Transfer to Supreme Court is granted pursuant to judicial discretion. Following provisions articulate principal considerations governing Supreme Court's decision whether to grant transfer: (1) Conflict in Court of Appeals' decisions; (2) conflict with Supreme Court decision; (3) conflict with federal appellate decision; (4) undecided question of law; (5) precedent in need of reconsideration; or (6) significant departure from law or practice. (Rule AP 57[H]).

Correction or Modification of Clerk's Record or Transcript.

If disagreement arises as to whether Clerk's Record or Transcript accurately discloses what occurred in trial court or Administrative Agency, any party may move trial court or Administrative Agency to resolve disagreement. Trial court retains jurisdiction to correct or to modify Clerk's Record or Transcript at any time before reply brief is due to be filed. After that time, party making motion must request leave of Court on Appeal to correct or to modify Clerk's Record or Transcript. Trial court or Administrative Agency shall issue order, which will become part of Clerk's Record, that either confirms that Clerk's Record or Transcript reflects what actually occurred or that corrects Clerk's Record or Transcript to reflect what actually occurred. (Rule AP 32[A]).

Mandate and Prohibition Writs.

Separate rules apply to procedure for seeking writs of mandate and prohibition from Supreme Court. (See Rules of Procedure for Original Actions.)

Certification of Questions from Federal Courts.

Rule AP 64 allows Supreme Court of U.S. and circuit courts of appeals to certify questions under Indiana law where it appears to federal court that proceeding presents issue of state law that is determinative of case and on which there is no clear controlling precedent of Supreme Court of Indiana on questions or propositions of Indiana law.

Bonds.

No bond necessary to perfect appeal from any judgment or appealable interlocutory order; however, bond generally required to stay enforcement during appeal. Trial court can fix and approve bond and order stay prior to and pending appeal. At any time after trial court denial of stay, appellate court can grant or deny stay and fix bond. (Rule TR 62[D], AP 18, 39).

Bonds on appeal from appointment of receiver are governed by special statute which requires them to be given within ten days from appointment of receiver and to be for amount required of receiver as bond. Filing of such bond with perfecting of appeal suspends authority of receiver until final termination of appeal. (IC 32-30-5-10).

But government organizations, executors, administrators, guardians, and other court appointed representatives may have stay on appeal without filing bond. (Rule TR 62[E]).

Appeal bonds in criminal cases are governed by criminal code which prohibits them in certain serious cases, sets qualifications for sureties, requires certain terms in bonds, and sets penalties for noncompliance. (IC 35-33-9-1 to IC 35-33-9-4).

Stay of Proceedings.

Enforcement of judgment or appealable interlocutory order generally will be suspended during appeal upon giving of adequate bond with approved sureties. Appellate court may reconsider trial court denial of stay. (Rule TR 62[D], AP 39).

In its discretion court may suspend enforcement of judgment during pendency of motion to correct errors, for judgment on evidence, for new trial, or judgment for relief from judgment. (Rule TR 62[B]). In its discretion court may modify order for specific relief during appeal. (Rule TR 62[C]). Certified appeal from interlocutory order does not stay proceedings except by court order. (Rule AP 14[H]).

Court rules preserve prior case law which exempts certain judgments from stay pending appeal. (Rule TR 62[D][3]).

In criminal cases appeal from conviction stays execution only if sentence is death or if court orders stay of judgment for fine and costs. State appeal does not affect judgment until reversal. (IC 35-38-4-4 to 6). If criminal defendant is released on bail during appeal, conviction is stayed until disposition of appeal. (IC 35-33-9-5).

5.04 BONDS:

Bond must be filed before relief is granted in following classes of civil cases: (1) Attachment; (2) arrest; (3) injunction, where injunction or restraining order demanded before final hearing; (4) ne exeat; (5) replevin suits in which possession of property is demanded before final hearing; (6) will contests; and (7) ejectment. See also topic 5.03 Appeal and Error, subhead Bonds.

Bail Agents.

Must be approved by insurance commissioner and appointed by insurer qualified to transact surety business in Indiana. (IC 27-10-1-4). If defendant fails to appear, bail agent must produce defendant or prove, within 365 days, that defendant could not appear: (1) By reason of defendant's illness or death; (2) because defendant was in custody of U.S., state, or political subdivision; or (3) because required notice was not given; and that defendant's absence was without consent or connivance of surety. (IC 27-10-2-12). If bail agent fails to comply with these requirements within 120 days after mailing of notice, late surrender fee is charged according to statutory schedule. (IC 27-10-2-12). Licensure and regulation of bail agents and runners are controlled by IC 27-10-3-1 – 27-10-3-15, IC 27-10-3-17 – 27-10-3-20, and 760 IAC 1-6.2-1 – 6.2-14.

Defective Official Bonds.

Official bonds entered into by any officer in discharge of duties of his office that contain certain defects are cured by statute. (IC 34-49-2-1).

Fixed Sum.

If not provided by statute, judge fixes amount of bond as he deems adequate but not less than $100. (IC 34-49-1-1). Officer may accept deposit of cash or certified check for full amount of bond rather than bond. (IC 34-49-1-2).

Enforcement.

Party may sue to enforce bond. (IC 34-55-5-5; IC 30-4-6-9; IC 5-1-6-15; IC 29-1-11-10).

Public Officials.

Bonding of public officials provided for. (IC 5-4-1 – 5-4-5).

Public Welfare Directors.

Official bonds of county directors of public welfare upon appointment are $5,000 for counties having population less than 100,000 according to last U.S. Census, and $10,000 for counties having population of 100,000 or more according to last U.S. Census. (470 IAC 1-2-8).

5.05 CERTIORARI:

See topic Appeal and Error for rules regarding transfer to Indiana Supreme Court.

5.06 CHARITABLE IMMUNITY:

See topic 5.09 Damages.

5.07 COMMISSIONS TO TAKE TESTIMONY:

See topic 5.11 Depositions and Discovery.

5.08 COSTS:

In all civil actions, party recovering judgment shall recover costs, except in those cases in which different provision is made by law. Prevailing party may recover attorneys' fees if suit was frivolous, unreasonable, groundless, or litigated in bad faith. (IC 34-52-1-1). Costs allowed to prevailing party as matter of course unless court otherwise directs. Costs may be computed and taxed by clerk on one day's notice. On motion served within five days thereafter, action of clerk may be reviewed by court. (Rule TR54[D]).

5.09 DAMAGES:

Common law generally prevails as to compensatory damages.

Indiana follows “modified impact rule” and damages for mental suffering may be awarded if plaintiff sustains direct impact by negligence of another, and by virtue of that direct involvement sustains emotional trauma which is serious in nature and of kind and extent normally expected to occur in reasonable person. Plaintiff can recover for emotional trauma regardless of whether plaintiff sustained physical injury as result of negligence. (726 N.E.2d 272). Further, plaintiff can recover regardless of whether plaintiff sustained direct impact so long as plaintiff had sufficient direct involvement with injury causing event that legitimate claims of emotional trauma can be distinguished from mere spurious claims. (729 N.E.2d 569).

Damages for lost love and companionship from wrongful death of unmarried adult person without dependents is limited to $300,000. (IC 34-23-1-2).

Immunity from damages in civil actions extends to all persons who gratuitously render care at scene of accident or emergency, except acts or omissions amounting to gross negligence or willful or wanton misconduct. (IC 34-6-2-51 and IC 34-30-12-1).

Immunity is available to “mental health service providers” under some circumstances for failing to warn or protect persons from violent patient. (IC 34-30-16-1 et seq.).

Immunity is available to event advertiser or event sponsor in some circumstances. (IC 34-30-22-1 et seq.).

Charitable Immunity.

Doctrine of charitable immunity has been abolished. (250 Ind. 491, 237 N.E.2d 242).

Nonprofit religious organizations have certain limited duties related to premises that they own, operate or control. (IC 34-31-7-1 et seq., IC 34-6-2-88.3).

Sovereign Immunity.

Immunity is available to governmental entities in some situations (IC 34-13-3-1 et seq.), and political subdivisions may enter structured settlements (IC 34-13-3-23). Notice requirements apply to claims against state and local governments. (IC 34-13-3-6 and IC 34-13-3-8). Immunity exists in other unique circumstances.

Immunity from damages in civil actions extends to certain volunteer directors for liability arising from negligent performance of volunteer directors’ duties. (IC 34-30-4-1 et seq.).

Treble Damages for Victims of Crimes.

Damages are available to persons suffering pecuniary loss from certain crimes (theft, conversion, criminal confinement, interference with custody, adoption-related offenses, etc.) in amount not to exceed three times actual loss in addition to costs of action, reasonable attorney’s fees, certain travel expenses, compensation for time lost to file papers and attend proceedings and all other reasonable costs of collection. (IC 34-24-3-1, IC 34-24-3-1.5).

Prejudgment interest in tort actions shall be computed by court at simple rate between 6% and 10% per year. (IC 34-51-4-9). Prejudgment interest is not available if certain conditions are either satisfied by defendant or not satisfied by plaintiff. (IC 34-51-4-5, IC 34-51-4-6).

Punitive damages are recoverable in actions where there is clear and convincing evidence that defendant acted with malice, fraud, gross negligence, or oppressiveness which was not result of mistake of fact or law, honest error or judgment, overzealousness, mere negligence, or other human failing. (622 N.E.2d 515). To recover punitive damages in lawsuit founded upon breach of contract, plaintiff must plead and prove existence of independent tort, and not merely "tort-like" conduct. (608 N.E.2d 975). Likewise, punitive damages are not available in wrongful death actions. (IC 34-23-1-2). Without compensatory damages, there can be no punitive damages. (622 N.E.2d 515). Rapidly developing case law in area of punitive damages must be consulted for specifics. Punitive damages may be no more than greater of: (1) Three times amount of compensatory damages awarded in action; or (2) $50,000. (IC 34-51-3-4). If trier of fact awards more than these amounts, court shall reduce punitive damage award within foregoing limits. (IC 34-51-3-5). Party against whom punitive damages are awarded shall notify office of attorney general of punitive damage award and pay amount of punitive damages to clerk of court where action is pending. (IC 34-51-3-6[a][b]). Upon receiving payment, court shall: (1) Pay person to whom punitive damages were awarded 25% of punitive damage award; and (2) pay remaining 75% of punitive damage award to treasurer of state, who shall deposit funds into violent crime victims compensation fund. (IC 34-51-3-6; IC 34-51-3-3). Office of attorney general may negotiate and compromise punitive damage award described at IC 34-51-3-6(c). (IC 34-51-3-6[d]). Jury shall not be advised of limitation on punitive damages or distribution of punitive damages. (IC 34-51-3-3).

Comparative Fault Rule has been adopted providing that plaintiffs may not recover if fault attributed to them is greater than 50%. (IC 34-51-2-1 et seq.). Defendant may assert as defense that damages of claimant were caused in full or in part by nonparty. (IC 34-51-2-14).

Medical Malpractice Act.

(IC 34-18-1-1 et seq.). If action qualifies under IC 34-18-1-1 et seq., then total amount recoverable for any injury or death of patient may not exceed $500,000. That limit was increased to $750,000 for malpractice occurring after Dec. 31, 1989 and to $1,250,000 for malpractice occurring after June 30, 1999. (IC 34-18-14-3). Act applies to all "qualified" health care providers, and maximum recovery from health care provider is $250,000. (IC 34-18-14-3).

No-Fault Insurance.

Not adopted.

Uniform Contribution Among Tortfeasors Act.

Not adopted.

See also category 13 Estates and Trusts, topic 13.05 Death, subhead Actions for Death.

5.10 DECLARATORY JUDGMENTS:

See topic 5.15 Judgments.

5.11 DEPOSITIONS AND DISCOVERY:

After commencement of action, any party may take testimony of any person, including party, by oral or written deposition. (Rules TR 30-31). Leave of court, granted with or without notice, must be obtained only if plaintiff seeks to take oral deposition prior to expiration of 20 days after service of summons and complaint upon any defendant except that leave is not required: (1) If defendant has served notice of taking deposition or otherwise sought discovery, or (2) if special notice is given as provided in subdivision (B)(2) of Trial Rule 30. (Rule TR 30[A]).

Uniform Foreign Depositions Act not adopted.

Within State for Use within State.

Deposition must be taken before person authorized to administer oaths under laws of

U.S., this state, or before person appointed by court in which action is pending. (Rule TR 28[A]).

Outside of State for Use within State.

See subhead Before Whom Taken, infra.

Within State for Use Elsewhere.

Court of this state may order a person domiciled or found within this state to give his testimony or statement, to produce documents or other things, to allow inspections and copies, or to permit physical and mental examination for use in proceeding in tribunal outside this state. (Rule TR 28[E]).

De Bene Esse.

See subhead Perpetuating Testimony.

Perpetuating Testimony.

Person who desires to perpetuate his own testimony or that of another person regarding any matter that may be cognizable in any court in which action may be commenced, may file verified petition in any court of this state. Deposition may be used in any action involving same subject matter subsequently brought in court of this state in accordance with provision of Rule 32. (Rule TR 27).

Notice.

Petitioner must notify anticipated adverse party with copy of petition to perpetuate testimony at least 20 days before date of hearing. (Rule TR 27[A][2]).

Form of Petition.

Petition must include following: (1) Name of petitioner; (2) that petitioner expects to be party to action; (3) subject matter of anticipated action and petitioner's interest; (4) facts to be established by testimony and reasons for testimony prior to action; (5) names or descriptions of person anticipated to be adverse and addresses; and (6) names and addresses of persons to be examined and substance of testimony sought. (Rule TR 27[A][1][a-e]).

Before Whom Taken.

Depositions may be taken within U.S., territory or insular possession of U.S. before officer authorized to administer oaths by laws of U.S. or of state of Indiana, or of place where examination is held, or before person appointed for that purpose by court in which action is pending. Depositions may be taken in foreign countries on notice before person authorized to administer oaths in place in which examination is held; before person commissioned by court; or pursuant to letter rogatory. No deposition can be taken before person who is relative or employee or attorney or counsel of any of parties, or is relative or employee of such attorney or counsel, or is financially interested in action. (Rule TR 28).

Unless court orders otherwise, parties may by written stipulation provide that depositions may be taken before any person, at any time or place, upon any notice and in any manner and may by written stipulation modify procedures provided by these rules for other methods of discovery. (Rule TR 29).

Compelling Attendance of Witnesses.

Attendance of witnesses may be compelled by use of subpoena as provided in Rule 45. (Rule TR 30[A]). Failure to obey subpoena without adequate excuse may be deemed contempt. (Rule TR 45[F]). See Rule TR 45(D). Individual may be required to attend examination only in county wherein he resides or is employed or transacts his business in person, or at such other convenient place as is fixed by order of court. (Rule TR 45[D]).

Witnesses.

Depositions of person confined in prison may be taken only by leave of court on such terms as court prescribes. (Rule TR 30[A]). Organization may be named as deponent and matters on which examination is requested designated with reasonable particularity. Organization must designate appropriate individual to testify on its behalf. (Rule TR 30[B][6]).

Notice.

Party desiring to take deposition of any person upon oral examination must give reasonable notice in writing to every other party to action. (Rule TR 30[B]). Notice shall state time and place for taking deposition and name and address of each person to be examined, if known, and if name is not known, general description sufficient to identify him or particular class or group to which he belongs. If subpoena duces tecum is to be served on person to be examined, designation of material to be produced thereunder shall be attached to or included in notice. (Rule TR 30[B]).

Party desiring to take deposition upon written questions must serve them upon every party with notice stating name and address of deponent and officer before whom deposition is to be taken. (Rule TR 31).

When Used.

Any deposition may be used by any party for purpose of contradicting or impeaching testimony of deponent as witness. (Rule TR 32[A]).

Deposition of party, agent, or anyone who at time of deposition is officer, director, managing agent, executive officer, or person designated under Rule 30(B)(6) or 31(A) to testify on behalf of organization may be used by adverse party for any purpose. (Rule TR 32[A]).

Any part or all of deposition, so far as admissible under rules of evidence applied as though witness was then present and testifying, may be used against any party who was present or represented at taking of deposition, by or against any party who had reasonable notice thereof or by any party in whose favor it was given in accordance with provisions of Rule 32(A)(1)-(4). (Rule TR 32[A]).

Deposition of a witness may be used by any party for any purpose if court finds: (1) That witness is dead; or (2) that witness is outside state; or (3) that witness is unable to attend because of age, sickness, infirmity, or imprisonment; or (4) that party offering deposition has been unable to procure attendance of witness by subpoena; or (5) exceptional circumstances exist; or (6) by agreement of parties. (Rule TR 32[A]).

Examination of Witness.

Examination and cross-examination of witness may proceed as permitted at trial under provisions of Rule 43(B). Officer before whom deposition is to be taken must put witness on oath and must record testimony of witness. All objections made at time of examination must be noted by officer upon deposition. (Rule TR 30[C]).

When testimony is fully transcribed, deposition must be submitted to witness for reading and signing unless waived by witness and by each party. Deposition should then be signed by witness or upon refusal to sign within 30 days of its submission to him, officer must execute certificate and cause certificate to be delivered to party taking it. (Rule TR 30[E]).

Court may, for cause shown, enlarge or shorten time for taking deposition or grant any protective relief requested. (Rule TR 30[B] and Rule TR 26[C]).

Certificate and Filing.

Officer must certify on deposition that witness was duly sworn by him and that deposition is a true record of testimony given by witness. He must then securely seal deposition in envelope indorsed with title of action and marked “Deposition of (here insert name of witness)” and must promptly deliver it to party taking deposition. Officer must give prompt notice to all parties of its delivery to party taking deposition. (Rule TR 30[F]).

Form

The following form may be used:

Deposition of . . . ., a witness produced before and sworn by me, a notary public of . . . ., at . . . ., in the county of . . . ., and state of . . . ., on the . . . ., day of . . . ., 20. . . ., in pursuance to the notice hereto attached (and commission, if any), in a cause now pending in the . . . . court, of . . . . county, in the State of Indiana, wherein . . . . is plaintiff, and . . . . is defendant, on the part of said . . . . .

Appearances for the plaintiff: . . . . .

Appearances for the defendant: . . . . .

The said . . . ., having been first duly sworn by me, to testify the truth, the whole truth, and nothing but the truth, relating to the said cause, deposes and says as follows:

Questions by . . . . .

Question 1. . . . . .

Answer. . . . . .

(And so on, all questions being numbered consecutively.)

State of . . . ., county of . . . ., ss.:

I, ..., a . . . ., in and for the said county, do hereby certify that . . . ., the above named witness, was first by me duly sworn according to law, to testify the truth, the whole truth, and nothing but the truth, relating to the above named cause; that the foregoing deposition was reduced to writing by me (by said deponent, [or by . . . ., a disinterested person], in my presence, and under my direction); that the said . . . ., (adverse party) attended the taking of the said deposition in person (by . . . ., his attorney), (was not present or represented at the taking of the said deposition); and that the said deposition was taken at . . . ., in the county of . . . ., and state of . . . ., on the . . . . day of . . . ., 20. . . ., between the hours of . . . . A. M., and . . . . P. M.

In witness whereof I have hereunto set my hand and my official seal this . . . . day of . . . ., 20. . . . . (Signature). County of Residence . . . .

Discovery.

Parties may conduct discovery by following methods: (1) Depositions (oral examination or written questions); (2) interrogatories; (3) production of documents, electronically stored information, and things and inspections of land; (4) physical and mental examination; and (5) requests for admission. (Rule TR 26[A]). Parties have duty to supplement discovery. (Rule TR 26[E]).

Discovery Disputes.

Parties must first attempt to resolve any discovery disputes informally before seeking relief from court. (Rule TR 26[F]).

Failure to Comply with or Cooperate in Discovery.

Court may order compliance upon motion by party requesting discovery. If court grants motion, court must, after opportunity for hearing, order party that failed to cooperate to pay expenses incurred in obtaining order unless court finds that refusal to respond was substantially justified or other circumstances make award unjust. (Rule TR 37[A]). If party fails to comply with order of court, further sanctions may be imposed. (Rule TR 37[B]).

Demand for Admission of Facts.

Party may demand from any other party admission of truth of matters, including authenticity of documents, limited to pending action. (Rule TR 36[A]). Party must respond within 30 days, unless otherwise agreed or ordered. (Rule TR 36[A]). Any denials must be specific. (Rule TR 36[A]). Responding party may not rely on lack of information to avoid admission or denial unless party makes reasonable inquiry and information known or available is insufficient to respond. (Rule TR 36[A]). Request for admission not limited to factual matters, but may include admissions of legal issues, contentions, and conclusions. See General Motors Corp., Chevrolet Motor Div. v. Aetna Cas. & Sur. Co., 573 N.E.2d 885, 888 (Ind. 1991).

Effect of Refusal to Respond.

If party fails to timely respond to demand for admissions, matters are deemed admitted. (Rule TR 36[A]). Party making demand may recover costs and fees incurred in establishing proof of genuineness of documents or truth of matter. (Rule TR 37[C]). Court must award expenses unless it finds: (1) Request was objectionable; (2) admission not substantially important; (3) party failing to respond reasonably believed it might prevail; or (4) other good reason. (Rule TR 37[C]).

Effect of Admission.

Matters admitted are conclusively established unless court allows withdrawal or amendment of admission. (Rule TR 36[B]). Admissions are limited to pending action only and may not be used against party in any other proceeding. (Rule TR 36[B]).

Interrogatories.

Party may serve written interrogatories on any other party. (Rule TR 33[A]). Answers to interrogatories may be used at trial according to evidentiary rules. (Rule TR 33[D]). Party must respond within 30 days, unless otherwise agreed or ordered by court. (Rule TR 33[C]). Interrogatories must be answered under oath and signed by person responding. (Rule TR 33[B]). Objections to interrogatories signed by attorney. (Rule TR 33[B]).

Option to Produce Business Records.

Responding party may produce business records where answer can be obtained from such records and burden on responding party in locating answer is substantially same for party serving interrogatory. (Rule TR 33[E]). Reference to business records must be specific to permit interrogating party to readily locate answer. (Rule TR 33[E]).

Format of Interrogatories.

Party serving interrogatories must set forth interrogatory and reasonable space to respond. Responses to interrogatories must include interrogatory set forth preceding answer or objection. (Rule TR 33[B]).

Production of Documents and Things.

Party may request any other party to produce documents, electronically stored information, or tangible things within scope of discovery. (Rule TR 34[A]). Party must respond within 30 days, unless otherwise agreed or ordered by court. (Rule TR 34[B]). Documents must be produced as kept in usual course of business or must be organized and labeled according to document requests unless otherwise agreed to or ordered by court. (Rule TR 34[B]).

Request for Production of Documents or Things from Nonparties.

Party may request that nonparty produce documents or things under Trial Rule 34. (Rule TR 34[C]).

Procedure.

Request must be served on other parties and served with subpoena upon nonparty. (Rule TR 34[C][1]). Party serving request must give notice to other parties at least 15 days prior to service of subpoena on nonparty. (Rule TR 34[C][2]). Party receiving documents must serve copies on all parties within 15 days of receiving documents. (Rule TR 34[C][4]).

Format.

Request must advise nonparty of its rights. (Rule TR 34[C][3]).

Entry upon Land for Inspection and Other Purposes.

Party may request that any other party allow entry upon identified land or other property in party’s control for inspection, surveying, etc. (Rule TR 34[A]).

Physical and Mental Examination of Persons.

Party may obtain mental or physical examination of another party when such condition is in controversy and upon court order. (Rule TR 35[A]). Party must establish good cause. (Rule TR 35[A]). Order must give notice to person to be examined and all parties and must include time, place, manner, conditions, scope of examination and person to perform examination. (Rule TR 35[A]).

5.12 EQUITY:

See topic 5.02 Actions.

5.13 EVIDENCE:

Rules of Evidence.

Indiana courts follow Indiana Rules of Evidence which are modeled on Federal Rules of Evidence.

Witnesses.

All persons, whether parties to or interested in suit, are competent witnesses in civil action proceeding (IC 34-45-2-1), except: (1) Insane persons insane at time they are offered as witnesses, whether they have been so adjudged or not (IC 34-45-2-2 et seq.); (2) in all suits against any person adjudged to be mentally incompetent or against mentally incompetent person’s guardian founded upon contract with or demand against, to obtain possession of real or personal property or to affect person’s property, neither party to transaction is competent witness to any matter that occurred before appointment of guardian (IC 34-45-2-3); (3) where judgment may be rendered for or against estate involving matters occurring during lifetime of decedent, necessary party to proceedings with interest adverse to estate is not competent witness except as to matters testified to by decedent in deposition or otherwise prior to his death (IC 34-45-2-4); (4) in suits by or against heirs or devisees founded on contract with or against ancestor concerning property, neither party to such suit shall be competent witness as to any matter which occurred prior to death of ancestor (IC 34-45-2-5); (5) agent contracting with decedent shall be competent witness in suit on such contract only if called by representatives of decedent and only to extent that he is interrogated by them (IC 34-45-2-7); (6) in suits for conversion or damage to personalty, defense that acts were done as executor, administrator, guardian, or heir, as such, renders incompetent any person who would not be competent if person so defending were complainant (IC 34-45-2-8); (7) when on behalf of estate, decedent's agent testifies as to his transactions as agent with party to suit or his privy and in absence of decedent, party against whom this evidence is introduced is competent to testify (IC 34-45-2-6); (8) if any witness testifies on behalf of estate as to any conversations or admissions of party to suit, or his privies, as having been had or made in absence of deceased, party against whom such evidence is introduced becomes competent (IC 34-45-2-6); (9) assignors of parties incompetent under preceding sections are likewise incompetent in suits involving estates except that they be called by adverse party in its discretion (IC 34-45-2-10); and (10) adversely interested parties are incompetent in suits by or against insane persons in actions on contract or affecting property, unless insane person is adjudged competent to testify. This section is inapplicable when party is called by adverse party. (IC 34-45-2-3).

See also topic 5.11 Depositions and Discovery.

Privileged Communications.

Following communications are privileged: (a) To attorneys as to confidential communications made to them in course of their professional business and as to advice given professionally; (b) to physicians as to matters told them by patients, in course of their professional business, or advice given by them professionally; (c) to clergymen as to confessions and admissions made to them in course of discipline enjoined by their respective churches or made in clergyman's professional character as spiritual advisor or counselor; and (d) between husband and wife as to communications made to each other subject to limitations noted below. (IC 34-46-3-1).

Husband and Wife.

Spouse may testify as to communications made in presence of third persons and business transactions, or in dissolution proceedings.

Accountant and Client.

Information derived from or as result of provision of professional accounting services is confidential and privileged. (IC 25-2.1-14-2). However, accountant may disclose any data required to be disclosed by standards of profession: (1) In rendering opinion on presentation of financial statements; (2) in ethical investigations; (3) in course of quality reviews; or (4) making disclosure where financial statements or professional services are contested. (IC 25-2.1-14-2).

Subpoena.

Upon application of any party to action, witness may be served with subpoena on trial anywhere in state and thereby require his attendance. Attorney admitted to practice law in Indiana, may also issue subpoena on behalf of: (a) Court in which attorney has approval on behalf of party or (b) court in which deposition or production is compelled by subpoena, if deposition or production pertains to action pending in court where attorney has approval for party in that case. (Rule TR45[A]). When permitted by laws of U.S., this or another state or foreign country, court may authorize service of subpoena outside state. (Rule TR 45[E]).

Experts may be compelled to testify in any court in county of residence of witness or any court in adjoining county on normal per diem and mileage allowed other witnesses. (IC 34-45-3-3).

Self-incrimination.

No person in any criminal proceeding may be compelled to testify against himself. (Const., Art. 1, § 14).

5.14 INJUNCTIONS:

Jurisdiction.

Injunctions and restraining orders may be granted (a) by Supreme Court, or justice thereof when necessary and proper for exercise of jurisdiction and powers of court or (b) by circuit courts, or by judges thereof in vacations, and temporary injunctions and restraining orders only, by judges of adjoining circuits when regular judge is unavailable. (IC 34-26-1-2 and 3). Other courts are in specific cases given concurrent jurisdiction with circuit courts. (See category 6 Courts and Legislature, topic 6.01 Courts.) Appellate Court has in practice issued injunctions. (28 Ind. App. 185, 62 N.E. 520).

Prerequisites.

Plaintiff must show by his complaint that he is entitled to relief restraining commission or continuance of some act, commission or continuance of which during litigation would produce great injury to plaintiff. (IC 34-26-1-5). Plaintiff must show likelihood of success on merits, no adequate remedy at law, that harm not granting injunctive relief outweighs harm granting injunction, and that public interest would not be disserved. (795 N.E.2d 1103). During litigation plaintiff is entitled to injunctive relief if it appears that defendant is doing, or threatens, or is about to do, or is procuring or suffering some act to be done, in violation of plaintiff’s rights, respecting subject of action, and tending to render judgment ineffectual, or when such relief consists in restraining proceedings upon any final order or judgment. Temporary injunction may be granted to restrain removal or disposition of property which defendant threatens or is about to move or dispose of with intent to defraud his creditors. (IC 34-26-1-5 and 6). Remedies in addition to use of injunctions are provided for Securities Commission. (IC 23-19-6-3).

Bond.

No restraining order or preliminary injunction will be issued except upon giving of security by applicant, as court deems proper, for payment of such costs and damages as may be incurred or suffered by any party who is found to have been wrongfully enjoined or restrained. (Rule TR 65[C]). If a bond is given upon a temporary injunction or upon a restraining order, no second bond is required upon granting of permanent injunction unless first bond is deemed insufficient. (IC 34-26-1-10).

Procedure.

Applications for injunctions must be verified by affidavit. (IC 34-26-1-7). Notice to opposing parties is necessary before injunction can issue. (Rule TR 65[A]). However, temporary restraining order may be issued in emergencies until notice can be given. (Rule TR 65[B]). In hearing on application for temporary restraining order or injunction it is proper to read affidavits or documentary or record evidence. (IC 34-26-1-8). Court may impose conditions upon granting or continuing of injunction. (IC 34-26-1-9). Writs of injunctions are not issued but instead order of court certified by clerk is served upon adverse party. (IC 34-26-1-11). Injunctions may be enforced by contempt proceedings when it appears there has been willful disobedience of order.

(IC 34-26-1-14, IC 34-26-1-15, IC 34-26-1-16).

Motion to Dissolve or Modify.

Upon court's own motion or motion of any party, orders granting or denying temporary restraining order or preliminary injunction may be dissolved, modified, granted, or reinstated. (Rule TR 65[A]).

When appeal is taken from interlocutory or final judgment granting, dissolving, or denying injunction, court may suspend, modify, restore, or grant injunction as it considers proper for security of rights of adverse party. (Rule TR 62[C]). See Rule TR 65.1.

Labor Disputes.

Issuance of injunctions in labor disputes is limited to cases prescribed in statute. (IC 22-6-1-1, IC 22-6-1-12, IC 22-6-2-14).

5.15 JUDGMENTS:

Appeals may be taken by either party from all final judgments including ruling or order by trial court granting or denying Motion to Correct Error. (Rule AP5[A]). Upon verdict or decision announced, court must promptly prepare and sign judgment and clerk must thereupon enter it. Judgment must be set forth on separate document, except judgment may appear on same document with court's findings, conclusions, or opinion upon issues. (Rule TR 58[A]).

Default Judgment.

When party against whom judgment for affirmative relief is sought has failed to plead or otherwise defend, party may be defaulted. (TR 55[A]). In all cases party entitled to judgment by default can apply to court therefor. (TR 55[B]). Judgment by default may be entered against governmental organization. (Rule TR 55[E]). Default judgment can be set aside by court for reasons including mistake, excusable neglect, newly discovered evidence, fraud or fact that default judgment was entered against party who was served only by publication and who was without actual knowledge of action and judgment. (Rule TR 60[B]).

Confession of Judgment.

Authority to confess judgment, made before cause of action accrues on any negotiable instrument or other written contract to pay money, is void. (IC 34-54-3-1 to 3). Whenever confession of judgment is made by power of attorney or otherwise, party confessing must make affidavit that debt is just and owing and that confession is not made for purpose of defrauding creditors, and affidavit must be filed with court. (IC 34-54-2-3).

Declaratory Judgments.

Uniform Declaratory Judgments Act adopted. (IC 34-14-1-1 – 34-14-1-16).

Declaratory relief may be allowed even though property right is not involved. Affirmative relief may be allowed under such remedy when right thereto is established. (Rule TR 57).

Summary Judgments.

Claimant may move for summary judgment after expiration of 20 days from commencement of action or after service of motion for summary judgment by adverse party. (Rule TR 56[A]). Motion may be filed by defending party at any time. (Rule TR 56[B]). Upon motion by any party within ten days of when response was filed or due, Court shall hold hearing not less than ten days from filing of response by defending party. (Rule TR 56[C]). Partial summary judgment expressly permitted. (Rule TR 56[C]).

Offer of Judgment.

At any time more than ten days before trial begins, a party defending against a claim may serve upon adverse party an offer to allow judgment to be taken against him with costs then accrued. If offer is accepted within ten days after service, either party may then file offer and notice of acceptance together with proof of service thereof and thereupon clerk will enter judgment. If final judgment obtained by offeree is not more favorable than offer, offeree must pay costs incurred after making of offer. (Rule TR 68).

Support Judgments.

Any payment delinquent under child support order is judgment against individual obligated to make payment under order, and is lien against real and personal property of that individual. (IC 31-16-16-2 to IC 31-16-16-3). Upon application to court for enforcement of support order, court may enforce judgment created under IC 31-16-16-2, or may issue or activate income withholding order. (IC 31-16-12-4). When court finds that person is delinquent, court may find party in contempt of court and shall issue order to bureau of motor vehicles, board regulating practice of person’s profession or occupation, Indiana horse racing commission, Indiana gaming commission, and commissioner of department of insurance as appropriate. (IC 31-16-12-6 – IC 31-16-12-10).

Lien.

Judgment of court of record is lien on all defendant’s real estate within county where rendered and becomes lien on real estate in any other county when judgment has been duly entered and indexed in judgment docket in such county. Lien continues for ten years. (IC 34-55-9-2).

Limitation.

After lapse of ten years from entry, judgment can be enforced only on leave of court upon proof that judgment remains unsatisfied, and only after ten days notice to adverse party. (IC 34-55-1-2).

Relief from Judgment.

Clerical mistakes in judgments and orders may be corrected by court at any time before record is filed on appeal of its own initiative or on motion of any party. (Rule TR 60[A]). On motion and upon such terms as are just, court may relieve party from final judgment, order, default, or proceeding for reasons that include mistake, excusable neglect, newly discovered evidence, and fraud. (Rule TR 60[B]). Order denying or granting relief is final judgment from which appeal may be taken. (Rule TR 60[C]).

Revivor of Judgments.

Claim based upon judgment against party who dies before or after judgment is entered must be allowed by court administering his estate if representative of such estate is timely substituted as party. Judgments upon an action against party who dies must be satisfied from assets of his estate by decedent’s representative. (Rule TR 25[E]).

Assignment.

Judgments of courts of record for the recovery of money may be assigned by plaintiff or complainant. Assignees successively on or attached to entry of judgment and assignment, and when attested by clerk of court vests title to judgment in each assignee successively. (IC 34-54-7-1 – IC 34-54-7-4). There may be equitable assignment of judgment without complying with statute. (20 Ind. App. 169, 49 N.E. 856).

Satisfaction.

Every endorsement of payment, satisfaction or release in whole or in part upon the record or margin thereof of any judgment or decree, or upon any execution or order of sale issued thereon, signed by the judgment plaintiff or his attorney of record or attorney in fact or by the assignee of such judgment plaintiff (whose assignment is upon or annexed to the record of such judgment and attested by the clerk), upon the record of such judgment or decree or by the sheriff upon such execution or order of sale, operates as a satisfaction or release of such judgment or decree, or of such part thereof so endorsed thereon as paid, satisfied or released, in favor of subsequent purchasers or lienholders in good faith, and when such satisfaction, payment or release is entered by an attorney in fact, such fact must be noted on the margin of the record or the execution, as the case may be, but such power of attorney must be recorded in miscellaneous records of the recorder's office. (IC 34-54-6-1).

Unless court directs otherwise, payment of money owing under judgment may be made to judgment creditor or his attorney, to sheriff holding writ of execution, or to clerk of court where judgment is rendered. Person receiving payment or satisfaction of judgment must furnish sheriff, clerk, or person making payment signed statement of total or partial satisfaction and any necessary assignment identifying judgment by cause number and acknowledged as in case of deed which, when delivered to clerk, statement of satisfaction must be entered in records with judgment. (Rule TR 67[B]).

Judgment on Evidence.

Where issues tried before a jury are not supported by sufficient evidence or a verdict thereon is clearly erroneous, court must withdraw such issues from jury and enter judgment thereon or must enter judgment thereon notwithstanding verdict. (Rule TR 50[A]).

Foreign Judgments.

Where it appears that court of general jurisdiction of sister state has entered judgment, rebuttable presumption exists that judgment is valid. (160 Ind. App. 244, 311 N.E. 2d 640). In pleading judgment or decision of domestic or foreign court, it is sufficient to aver judgment or decision without setting forth matter showing jurisdiction to render it. (Rule TR 9[E]). Cognovit judgment obtained in another state may be enforced in this state. (223 Ind. 570, 63 N.E.2d 417).

Revised Uniform Enforcement of Foreign Judgments Act not adopted.

5.16 LIMITATION OF ACTIONS:

General.

Fifteen years: Action arising before Sept. 1, 1982, and not limited by any other statute. (IC 34-11-1-2).

Ten years: Action arising on or after Sept. 1, 1982, and not limited by any other statute. (IC 34-11-1-2).

Specific.

Fifty years: To rectify certain defects in record title. (IC 32-20-3-1).

Twenty years: On contracts in writing, other than for payment of money, chattel mortgages, deeds of trust, judgments of courts of records, or for recovery of possession of real estate if contract entered into before Sept. 1, 1982 (IC 34-11-2-11); on real estate mortgages or vendors' liens on real estate created before Sept. 1, 1982, time running from date when last installment became due, or if mortgage does not show when debt became due, from date of mortgage or, if that date be not shown, from time of recording (IC 32-28-4-1 – IC 32-28-4-3).

Twelve years: From date of substantial completion of real estate improvement and submission of plans and specifications to owner for action based on deficiency of design against designer or possessor for action accruing after June 30, 2005 (IC 32-30-1-5), with additional two year period for personal injury or wrongful death occurring during ninth and tenth years following completion of improvements (IC 32-30-1-6).

Ten years: On judgment of courts of record; on deeds of trust; on action for recovery of possession of real estate (IC 34-11-2-11); on promissory notes, bills of exchange and other written contracts, for payment of money executed before Sept. 1, 1982 (IC 34-11-2-9); for recovery of real property sold under execution by debtor, or any person claiming under him, by title subsequent to date of judgment, if sale of property occurred before Sept. 1, 1982 (IC 34-11-2-8); to foreclose lien of series mortgage (after final maturity date of series mortgage) (IC 32-29-10-5); from date of substantial completion of improvement, action based on any deficiency, or alleged deficiency, in design, planning, supervision, construction or observation of construction of improvement to real property, and for injury or death to person or property arising therefrom, with certain exceptions for injuries occurring during ninth and tenth years following substantial improvements (IC 32-30-1-5 and IC 32-30-1-6), on real estate mortgages or vendors' liens on real estate created after Aug. 31, 1982, time running from when last installment becomes due (IC 32-28-4-1); on written contracts other than for payment of money entered into after Aug. 31, 1982 (IC 34-11-2-11).

Six years: On accounts and contracts not in writing; for use, rent, or profits of real property; for injuries to real property; damages for detention and for recovery of personal property; for relief on ground of fraud (except private actions under securities law) (IC 34-11-2-7); for moneys collected by public officer (IC 34-11-2-6); for recovery of real property sold on execution by debtor or any person claiming under him by title acquired after date of judgment, effective Sept. 1, 1982 (IC 34-11-2-8); upon promissory notes, bills of exchange, or other written contracts for payment of money executed after Aug. 31, 1982 (IC 34-11-2-9).

Five years: Against public officer or his sureties (IC 34-11-2-6); for recovery of real property sold by fiduciaries under judgment directing sale, by party to judgment or any person claiming under him by title subsequent to date of judgment, time running from confirmation of sale (IC 34-11-2-5). Foreclosure of lien of assessment for street, sewer, sidewalk, ditch or other public improvement, title running from date right of action accrues unless assessment is payable in installments (then 15 years after date of fixed approval of assessment). (IC 32-28-8-1).

Four Years: On actions for breach of any contract for sale of goods. Cause of action accrues when breach occurs under Commercial Code, regardless of aggrieved party's lack of knowledge of breach. Breach of warranty occurs with tender of delivery except where warranty explicitly extends to future performance and discovery must await performance, with cause of action then accruing when breach is, or should have been discovered. Law on tolling of statute of limitations not altered by these provisions. (IC 26-1-2-725).

Three years: On action for railroad transportation charges (IC 8-2-21-1); employer's subrogation rights under Workmen's Compensation (IC 22-3-2-13); wages under minimum wage law (IC 22-2-2-9); private actions under securities laws (IC 23-19-5-9[g]).

Two years: For injuries to person or character; for injuries to personal property; for forfeitures of statutory penalties (IC 34-11-2-4); for malpractice, two years from act or omission, subject to certain exceptions (IC 34-11-2-3; IC 34-18-7-1 – IC 34-18-7-3); for original claims or modifications arising under Workmen's Compensation (IC 22-3-3-3; IC 22-3-3-27) and occupational diseases (IC 22-3-7-32); in death caused by radiation or asbestos-related diseases two year period starts from date of knowledge of injury (IC 22-3-3-3; IC 34-20-3-2); for violation of

Deceptive Franchise Practices Act (IC 23-2-2.7-7); for violation of Deceptive Consumer Sales Act (IC 24-5-0.5-5); wrongful death (IC 34-23-1-1); actions relating to terms, conditions and privileges of employment not based on written contract (IC 34-11-2-1 and 2); paternity actions by mother or father (IC 31-14-5-3).

One year: Actions to reopen judgments or invalidate deeds involving foreclosure of public improvement liens (IC 32-28-9-1); application for increased permanent partial impairment (IC 22-3-3-27); actions to foreclose mechanics' liens (IC 32-28-7-1); actions based on negligence or breach of contract brought against accountant, partnership of accountants, or accounting corporation as result of financial statements or other information examined, compiled, certified, audited, or reported on by defendant accountant as result of agreement to provide professional accounting services (IC 25-2.1-15-2); actions by volunteer firefighter or member of volunteer emergency medical services association connected with unit of governments against volunteer's political subdivision for being absent from employment while responding to emergency from time of disciplinary notice (IC 34-11-2-10.5).

Nine months: Claims against decedent's estate, following date of decedent's death, subject to certain requirements. (IC 29-1-14-1).

Three months: Action to contest or resist probate of will in court having jurisdiction over probate of will must be brought within five months after date of order admitting will to probate. (IC 29-1-7-17).

30 days for state employee to initiate complaint for change in status of employment. (IC 4-15-2-34).

Product Liability Actions.

Any negligence or strict liability product action must be commenced within two years after cause accrues or within ten years after delivery of product to initial user or consumer; except that if cause of action accrues more than eight years but not more then ten years after initial delivery, action may be commenced at any time within two years after action accrues; but this does not affect right of indemnification. (IC 34-20-3-1).

Disabilities.

Persons who are under legal disabilities at time cause of action accrued may bring action at any time within two years after removal of disability, though period of limitation has expired. (IC 34-11-6-1). Case law defines disabilities, and must be carefully reviewed.

Absence.

The statute will not run during the time of defendant's nonresidence except where there is within the state a person who may be served with process as agent for the defendant. (IC 34-11-4-1).

New Actions.

If action fails from any cause except negligence in prosecution, or action abates or is defeated by death, or judgment is arrested or reversed on appeal, new action may be brought within later of: (1) three years after action fails, or (2) last date action could have been commenced under statute of limitations governing original action. (IC 34-11-8-1).

Mutual Accounts.

In actions on mutual, open, and current accounts cause is deemed to have accrued on date of last proved item on either side. (IC 34-11-3-1).

Acknowledgment, New Promise, and Partial Payment.

New promise or acknowledgment will not toll statute unless in writing, and signed by party to be charged. Acknowledgment or promise of one joint party does not make other joint party liable. Endorsement or memorandum of payment made upon instrument of writing and by or on behalf of party to whom payment is purported to be made is not sufficient to exempt action from statute of limitations. (IC 34-11-9-1 – IC 34-11-9-4).

Death.

In case of death of person entitled to sue or liable to be sued on any cause of action, before expiration of prescribed period of limitation, cause will survive for or against his representatives or successors, and may be brought within 18 months after date of death, though time limited has expired. (IC 34-11-7-1).

Nonresidence.

When cause has been fully barred by laws of place where defendant resides and where cause of action arose, such bar is same defense as though it had arisen in this state. (IC 34-11-4-2). See also subhead Absence, supra.

Emergencies.

Where war, insurrection, pestilence or act of God prevents performance of an act essential to conserve substantial rights, proper court official may declare emergency and period of such emergency is excluded from time within which such act must be done. (IC 34-7-6-1 – IC 34-7-6-3).

Counterclaims.

Statute of limitations will not bar a counterclaim to extent that it arises out of subject matter of opposing party’s claim. (TR 13[J]).

Pleading.

Statutes of limitations are affirmative defenses and must be affirmatively pleaded. (TR 8[C]).

See also category 3 Business Regulation and Commerce, topics 3.09 Commercial Code, 3.23 Sales.

Child Support.

Action to enforce child support obligation must be commenced not later than ten years after (1) 18th birthday of child; or (2) emancipation of child; whichever occurs first. (IC 34-11-2-10).

Judgment of any court of record considered satisfied after expiration of 20 years. (IC 34-11-2-12).

Paternity Action by Child.

Child may file paternity action any time before child reaches 20 years of age. If incompetent at age 18, may file action within two years after becoming competent. (IC 31-14-5-2).

5.16A PARTITION:

Any person holding lands as joint tenant or tenant in common, whether in his own right or as executor or trustee, may compel partition thereof. Trustees, administrators and executors may also be made defendants in actions for the partition of real estate to answer as to any interest they may have in the same. Any person owning an undivided interest in fee simple in lands and at the same time owning a life estate in the remaining portion of such lands, or any part thereof, may compel partition thereof. Such action is commenced by petition in circuit court or court having probate jurisdiction of county in which such lands are situated, and proceedings, practice and pleadings shall be same as in civil suits. If upon trial of issue, default or consent of parties, court determines that partition should be made, court may enter interlocutory judgment ordering such partition and appointing three commissioners, unrelated, disinterested resident freeholders residing in and owners of land in county in which such lands are situated, to make such partition, or if land cannot be divided without damage to owners, sale may be ordered, with division of proceeds according to respective interests of owners. (IC 32-17-4-1 to 24). Life tenants cannot force partition of real property. (834 N.E.2d 1024). Trial court is entitled to determine whether property was susceptible to being divided without appointing commissioners to make determination. (833 N.E.2d 110). In determining sale price for real property subject to partition, statutory procedures concerning appraisal must be followed. (833 N.E.2d 110).

Where one or more persons is or are entitled to an estate in real estate for life or years, estate tail, fee-simple conditional, base or qualified fee, any particular, limited, or conditional estate in real estate or any interest in personal property, and any person or persons, whether in being or not, is or are entitled to remainder or remainders, vested or contingent or executory devise or any other interest vested or contingent in the same real estate or personal property, decree may be entered by proceedings in circuit court authorizing sale, exchange or lease of real estate, or sale or exchange of personal property. (IC 32-17-5-1 – IC 32-17-5-6).

5.17 [RESERVED]

5.18 PLEADING:

Indiana Rules of Trial Procedure to some extent are based on Federal Rules of Civil Procedure.

Every pleading must contain a caption setting forth name of court, title of action, file number, and designation. In complaint, title of action must include names of all parties, but in other pleadings it is sufficient to state name of first party with appropriate indication of other parties. All averments of claim or defense must be made in numbered paragraphs. (Rule TR 10).

Every pleading of party represented by attorney must be signed by at least one attorney of record in his individual name, whose address, telephone number and attorney number must be stated, except pleadings and motions made and transcribed at trial or hearing before judge and received by him in such form. As in Federal Rule, attorney's signature certifies pleading, and attorney may be subject to sanctions for willfully violating rule. (Rule TR 11).

Pleadings Permitted.

Only pleadings allowed are: complaint, answer, reply to denominated counterclaim, answer to cross-claim, third-party complaint, and third party answer. (Rule TR 7).

Complaint.

Action is commenced when complaint is filed. (Rule TR 3). No technical forms of pleading are required. To state a claim for relief, pleading must contain a short and plain statement of claim showing that pleader is entitled to relief and a demand for relief to which he deems himself entitled. Relief in alternative or of several different types may be demanded. In complaint seeking damages for personal injury or death, or seeking punitive damages, no dollar amount shall be included in demand. (Rule TR 8).

Answer.

Responsive pleading must state in short and plain terms pleader's defenses to each claim asserted and must admit or controvert averments set forth in complaint. If in good faith pleader intends to deny all averments in complaint, he may do so by general denial. Denials must fairly meet substance of averments denied. Pleader without sufficient knowledge to form opinion regarding averments shall so state, and statement will be considered denial. Averments to which responsive pleading is required, except as to amount of damages, are admitted when not denied. (Rule TR 8).

Affirmative Defenses.

Responsive pleading shall set forth affirmatively and carry burden of proving: Accord and satisfaction, arbitration and award, discharge in bankruptcy, duress, estoppel, failure of consideration, fraud, illegality, injury by fellow servant, laches, license, payment, release, res judicata, statute of frauds, statute of limitations, waiver, lack of jurisdiction, improper venue, insufficiency of process or service of process, same action pending in another state court, and any other affirmative defense. (Rule TR 8).

Counterclaim or Set-Off.

Pleading must state as a counterclaim any claim pleader has against opposing party, if it arises out of transaction or occurrence that is subject matter of opposing party's claim and if court has jurisdiction over all necessary third parties. Pleading may state as a counterclaim: (a) Any claim against an opposing party not arising out of transaction or occurrence that is subject matter of opposing party's claim; (b) any claim owned by person against whom he has recourse who has notice of suit, is a party, is insolvent, has assigned his claim to party asserting it or surety or cannot be found. As to (b), counterclaim must diminish or defeat recovery sought by opposing party, or claim or opposing claim must relate to payment or security for other. This is necessary unless person against whom there is recourse is party, or counterclaim has been assigned to party asserting it. If counterclaim recovery exceeds opposing party's claim, excess is held in trust for person against whom there is recourse. (Rule TR 13).

Frivolous Claims.

Court may award attorney fees as part of costs to prevailing party if it finds that either party brought action or defense that was frivolous, unreasonable, or groundless or continued to litigate action or defense after party's claim or defense clearly became frivolous, unreasonable, or groundless or litigated action in bad faith. (IC 34-52-1-1[b]). Claim or defense is "frivolous" for purpose of determining whether attorney fees should be imposed if it is taken primarily for purpose of harassment, if attorney is unable to make good faith and rational arguments on merits of action, or if attorney is unable to support action taken by good faith and rational argument for extension, modification, or reversal of existing law. Claim or defense is "unreasonable" for purpose of determining whether attorney fees should be awarded if, based on totality of circumstances, including law and facts known at time of filing, no reasonable attorney would consider claim or defense worthy of litigation or justified. Claim or defense is "groundless" for purpose of determining whether attorney fees should be awarded if no facts exist which support legal claim presented by losing party. (736 N.E.2d 308; 611 N.E.2d 135; 581 N.E.2d 1279; 577 N.E.2d 588; 569 N.E.2d 748; 543 N.E.2d 627).

Reply.

Court may in its discretion order a reply to an answer or third-party answer. Matters formerly required to be pleaded by a reply or other subsequent pleading may be proved even though they are not pleaded. (Rule TR 7).

Demurrer.

Demurrers and exceptions for insufficiency of a pleading or improper service cannot be used. (Rule TR 7). All fictions in pleadings are abolished. (Rule TR 8 [E]).

Abatement.

Pleas in abatement are abolished. (Rule TR 7).

Amended or Supplemental Pleadings.

Party may amend his pleading once as a matter of course at any time before a responsive pleading is served, or if pleading is one to which no responsive pleading is permitted, and action has not been placed upon trial calendar, he may amend it at any time within 30 days after it is served. Otherwise, leave of court or written consent of adverse party is necessary. Upon motion of a party, court may permit him to serve a supplemental pleading setting forth transactions or occurrences or events which have happened since date of pleading sought to be supplemented. (Rule TR 15).

Bills of Particulars.

If pleading is so vague or ambiguous that party cannot reasonably be required to frame a responsive pleading, he may move for a more definite statement. (Rule TR 12 [E]).

Verification.

When in connection with any civil or special statutory proceeding it is required that all pleadings be verified, it is sufficient if subscriber simply affirms truth of matter to be verified by affirmation in substantially following language (Rule TR 11):

Form

I affirm, under the penalties for perjury, that the foregoing representation is true.

(Signed) . . . .

Service.

Every party must be served with every pleading subsequent to original complaint, as well as with any other paper described in Rule 5. Whenever party is represented by attorney of record, service must be made upon such attorney. Service upon attorney or party must be made by delivering or mailing copy of papers to him at his last known address. (Rule TR 5).

Time.

Responsive pleading must be served within 20 days after service of prior pleading. Three days are added to this period for response to pleading or paper served by mail. Reply must be served within 20 days after entry of order requiring it. In computing any period of time, day of act is not included whereas last day of period so computed is included. This is subject to some exceptions. (Rule TR 6).

Proof of Claims.

Party required to affirmatively plead any matter has burden of proving such matters. Burden of proof is subject to rules of evidence. (Rule TR 8).

Small Claims.

See category 6 Courts and Legislature, topic 6.01 Courts.

5.19 PRACTICE:

Indiana's Rules of Trial Procedure became effective Jan. 1, 1970. Rules are basically patterned after Federal Rules of Procedure. General summaries of procedural matters can be found under appropriate digest topics.

Discovery.

Parties may obtain discovery regarding any matter, not privileged, which is relevant to subject-matter involved in pending action. Discovery can be obtained by one or more of following methods: (1) Depositions upon oral examination or written questions; (2) written interrogatories; (3) production of documents, electronically stored information, or things or permission to enter upon land or other property for inspection and other purposes; (4) physical and mental examinations; (5) requests for admission. (Rule TR 26[A]). Court may make an order to protect party or person from annoyance, embarrassment, oppression, or undue burden or expense. (Rule TR 26[C]). Party under duty to seasonably supplement discovery relating to identity and location of persons with knowledge of discoverable matters and expert witnesses expected to be called at trial. (Rule TR 26[E]). Before filing any discovery motion or request, party must make reasonable effort to resolve discovery dispute with opposing party. (Rule TR 26[F]).

Request for Admissions.

Party may serve upon any other party a written request for admission, for purposes of pending action only, of truth of any matters within scope of Rule 26(B). Matter is admitted unless matter is answered or objection is addressed to matter. Any matter admitted is conclusively established unless court permits withdrawal or amendment of admission. (Rule TR 36).

Jurisdiction.

Court acquires jurisdiction over party or person who commences or joins in action, who is served with summons or enters appearance, or who is subjected to power of court under any other law. (Rule TR 4). Broad basis of jurisdiction is asserted which includes almost any action arising from acts which have sufficient nexus between person or thing and state to permit court's power to be asserted over it, including marital relationship within state despite later departure of one party. (Rule TR 4.4[A]). Court has power to order litigation to be held at more convenient forum. (Rule TR 4.4[C]).

Local Courts.

Each local court may make and amend rules governing its practice not inconsistent with Indiana Rules of Trial Procedure. (Rule TR 81[A]).

Direct Actions Against Insurer.

See category 23 Transportation, topic 23.01 Motor Vehicles, subhead Direct Actions.

Small Claims.

See category 6 Courts and Legislature, topic 6.01 Courts.

See also topics 5.02 Actions, Appeal and Error, Depositions and Discovery, Injunctions, Judgments, Pleading, Process; category 8 Debtor and Creditor, topics 8.02 Attachment, 8.05 Executions, 8.09 Garnishment.

5.20 PROCESS:

Indiana Rules of Trial Procedure to some extent are based on Federal Rules of Civil Procedure.

Civil actions are commenced by filing complaint with court or such equivalent pleading or document as may be specified by statute by paying required filing fee and by furnishing as many copies of complaint and summons as needed. (Rule TR 3).

General Requisites.

Contemporaneously with filing of complaint or equivalent pleading, as many copies of complaint and summons as are necessary shall be furnished to clerk. Summons must contain name and address of person on whom service is to be effected; name, street address, and telephone number of court and cause number; title of case; name, address, and telephone number of attorney for person seeking service; and time required for person being served to respond and penalty for not responding (i.e., possible default judgment). (Rule TR 4).

Issuance.

After service is effectuated and summons returned to clerk, clerk will enter filing date and issuance date on summons. Such filing or issuance dates are evidence of date of filing or issuance without further authentication when entered in court records, or when paper is admitted into evidence. (Rule TR 4.15).

Who May Serve.

Clerk of court will cause service to be made by mail. (Rule TR 4.11). Whenever service is made by delivering copy to person personally or at his dwelling or place of employment, summons will be issued to and served by sheriff, his deputy, or some person appointed by court. (Rule TR 4.12). Upon application of any party court may make appropriate order for service in manner not provided by these rules or statutes when such service is reasonably calculated to give defendant actual knowledge of proceeding and opportunity to be heard. (Rule TR 4.14). Summons can be served in any county of state. (Rule TR 4.12).

Personal Service on Individuals.

Service may be made upon individual or individual acting in representative capacity by (1) Sending copy of summons and complaint by registered or certified mail to his residence, place of business, or employment, with return receipt requested and returned showing receipt; (2) delivering copy of summons and complaint to him personally; (3) leaving copy of summons and complaint at his dwelling house or usual place of abode; or (4) serving his agent. Whenever service is made under (3) or (4), person making service must also send copy of summons by first class mail to last known address of person being served, and this fact shall be shown upon return. (Rule TR 4.1).

Personal Service on Infants.

Service shall be made upon his next friend or guardian ad litem if infant is so represented in case; if there is no next friend or guardian ad litem service shall be made upon his court-appointed representative; if there is no court-appointed representative, service shall be made upon parent known to have custody of infant or if no parent, then person standing in position of custodian or parent. If infant is 14 years of age or older, he must also be served. (Rule TR 4.2).

Personal Service on Incompetent Persons.

Service shall be made upon his next friend or guardian ad litem if incompetent is so represented in case. If there is no next friend or guardian ad litem, service shall be made upon his court appointed representative. If there is no court appointed representative, service shall be made upon named party and person known to be standing in position of custodian of his person. (Rule TR 4.2).

Service Upon Institutionalized Persons.

Service must be made by delivering or mailing a copy of summons and complaint to official in charge of institution. Official must then immediately deliver it to person being served. Official shall indicate upon return whether person has received summons and been allowed opportunity to retain counsel. (Rule TR 4.3).

Service upon a partnership may be made upon a general partner thereof. (Rule TR 4.6).

Service on Domestic Organization.

Service may be made upon executive officer thereof, or if there is agent appointed or deemed by law to have been appointed to receive service, then upon such agent, in same manner as service on individuals except that service cannot be made at individual's dwelling absent special circumstances. (Rule TR 4.6). Under certain circumstances, Secretary of State can be deemed to be such agent. (Rule TR 4.7). When service upon organization cannot otherwise be made, service may be made by leaving copy of summons and complaint at any office of such organization located within this state with person in charge of such office. (Rule TR 4.6).

Personal Service on Domestic Corporation.

See subhead Service on Domestic Organization, supra.

Service on Governmental Organizations.

State governmental organization may be served by service made upon executive officer thereof and also upon Attorney General. Service on a local governmental organization may be made upon executive thereof and attorney who represents government organization. (Rule TR 4.6[A]).

Personal Service on Associations.

No specific statutory provisions.

Personal Service on Joint Stock Companies.

No specific statutory provisions.

Service on Foreign Organizations.

Foreign corporations admitted to do business in state are reached by service upon resident agent, which may be a corporation, or, if agent cannot be found, then, upon Secretary of State. (Rules TR 4.6, 4.7 and 4.10). Service may also be made as on domestic organizations.

Foreign banks doing business within the state may be served by process upon the agent named in the application for permission to do business within the state. (IC 28-1-22-12).

Foreign insurance companies must appoint individual or corporate resident of Indiana, or authorized Indiana insurer, as agent for service of process in order to be admitted to do business, except as provided in § 4.2 of this chapter. (IC 27-1-17-4[7]). Unauthorized foreign insurers who are transacting insurance business within state impliedly appoint secretary of state as agent for service of process. (IC 27-4-5-4[a]).

Personal Service Outside the State.

Personal service, when permitted to be made outside state (see Rule TR 4.4), may be made there by any disinterested person or by attorney representing person seeking such service (Rule TR 4.12).

Service by Mail.

Service may be made upon individual, or individual acting in representative capacity, by sending copy of summons and complaint by registered or certified mail or other public means by which written acknowledgement of receipt may be requested and obtained to his residence, place of business or employment with return receipt requested and returned showing receipt of letter. (Rule TR 4.1[a][1]). Service of process may be effected in or out of state by mailing summons and complaint by clerk to person to be served, unless attorney designates different method of service. (Rule TR 4[D]). If address of person served is not included on summons or cannot be determined, or if service by mail is returned without acceptance, complaint and summons will be delivered to sheriff or his deputy for service. (Rule TR 4).

Service by Registered or Certified Mail.

When service by registered or certified mail is requested, clerk must send summons and complaint to person being served, and make notation of date, place of mailing, and on return, file receipt and return with pleadings as part of record. (Rule TR 4.11).

Substituted Service.

Service by leaving a copy of summons and complaint at individual's dwelling house or usual place of abode is permitted. If this mode of service is employed, copy of summons without complaint shall be sent by first-class mail to last known address of person being served and this fact shall be shown upon return. (Rule TR 4.1).

Service by Publication.

Service of summons by publication shall be made and procured by clerk, by person appointed by court for that purpose, or by clerk or sheriff of another county where publication is to be made. Person seeking such service must submit his request therefor upon praecipe for summons along with supporting affidavits that diligent search has been made and that defendant cannot be found, has concealed his whereabouts, or has left state, and must prepare contents of summons to be published. Summons shall be signed by clerk or sheriff. Summons must be published three times, first publication promptly and each two succeeding publications at least seven and not more than 14 days after prior publication, in newspaper authorized by law to publish notices, and published in county where complaint or action is filed, where res is located, or where defendant resides or where he was known last to reside. (Rule TR 4.13).

Unknown husband, wife, widow, widower, heir or devisee may be made party to suit to quiet title and brought into court by publication. (IC 32-30-3-14).

Long Arm Statute.

See topic 5.19 Practice, subhead Jurisdiction.

Proof of Service.

Person making service must make his return upon or attach it to a copy of summons. When delivered to clerk, return becomes part of record and will have evidentiary effect. Written admission stating date and place of service, signed by person being served, will constitute evidence of proper service. Filing and issuance date made by clerk of court will constitute evidence of date of filing and issuance. (Rule TR 4.15).

Nonresident Motor Vehicle Operators.

See category 23 Transportation, topic 23.01 Motor Vehicles.

Process Against State Employees.

When suit is filed against state employee in his official capacity and attorney general is required or authorized to represent state or is entitled to be heard then copies of complaint, cross-complaint, petition, bill or pleading must be served on attorney general before proceedings will begin. (IC 4-6-4-1).

5.21 REPLEVIN:

When any personal goods are wrongfully taken, or unlawfully detained, from the owner or person claiming the possession thereof, or when goods taken on execution or attachment are claimed by any person other than the defendant, the owner or claimant may bring an action in replevin for them. (IC 32-35-2-1). Property seized by law enforcement officer subject to lawful arrest, search or administrative inspection is not subject to replevin. (IC 34-24-1-2[c]).

Proceedings.

At time of issuing summons or at any time before final judgment plaintiff may apply for immediate delivery of property in question by filing affidavit describing property and stating that he is owner or is lawfully entitled to possession of property and stating that property has been wrongfully taken or wrongfully detained, that estimated value is in stated amount, that property is believed to be detained in specific county and that property has not been taken for tax assessment or fine pursuant to statute or seized under execution or attachment against property of plaintiff or if so seized that property is exempt from such seizure. (IC 32-35-2-2 – IC 32-35-2-4). Upon filing of such affidavit, (as practical matter) court clerk issues order directing defendant to appear to contest plaintiff’s affidavit, or show cause why prejudgment order for possession and delivery to plaintiff should not issue. Hearing on replevin must be set for no earlier than five days after service of order on defendant (exclusive of Sundays and holidays). (IC 32-35-2-5 – IC 32-35-2-7). Order to show cause must inform defendant that it may file affidavits, appear and present testimony at hearing, and file undertaking with court to stay delivery of property. If defendant fails to appear, plaintiff may be granted judgment of possession. (IC 32-35-2-7).

Upon examination of complaint, affidavits, and other evidence, court may give order of possession prior to hearing on probable cause when: (1) Defendant gained possession by theft or criminal conversion; (2) property consists of negotiable instruments or credit cards; or (3) property is perishable or is in immediate danger of destruction, harm, concealment, sale or removal from state. (IC 32-35-2-9). Order of possession issued without notice shall direct sheriff or other executing officer to hold property until order of court. (IC 32-35-2-12). Affidavit or certificate showing efforts to give notice and reasons why notice cannot be given is prerequisite to order issuing without notice. (IC 32-35-2-10). Where order of possession is issued prior to hearing, defendant may apply for order shortening time for hearing to not less than 48 hours after providing notice of such hearing to plaintiff. In lieu of ordering immediate possession prior to hearing, court may issue temporary restraining order directed to defendant prohibiting such acts with respect to property as may appear to be necessary for preservation of rights of parties and status of property. (IC 32-35-2-11; IC 32-35-2-13).

Repossession by Defendant.

At any time prior to preliminary hearing or final judgment, defendant may recover or retain possession by posting bond in amount fixed by court. If posted prior to preliminary hearing, that proceeding terminates unless there is objection to surety. (IC 32-35-2-21 – IC 32-35-2-23).

Possession by Plaintiff.

Court may order possession given to plaintiff, if he has a reasonable probability of entitlement or defendant defaults by failure to appear at preliminary hearing. If defendant defaults, judgment of possession is final. (IC 32-35-2-17).

Order of possession for plaintiff cannot be issued unless he posts bond in amount fixed by court, not less than value of property, except for order upon default. If defendant fails to appear and final judgment is entered, no bond is required. (IC 32-35-2-21).

Unique Property.

If property claimed by plaintiff is unique and of such a nature that its loss cannot be compensated for by damages, court may, in lieu of possession order, appoint a receiver to hold property pending further order of court. (IC 32-35-2-16).

Issuance and Execution of Order of Possession.

Order of possession shall describe property to be seized and shall direct executing officer to take property into custody, and, unless issued without notice, deliver it to plaintiff if defendant does not file written undertaking within time fixed by court to show why delivery to plaintiff should not be made. (IC 32-35-2-18). If order is final judgment, delivery to plaintiff should be immediate. (IC 32-35-2-2). If property is being used as principal dwelling of defendant, executing officer may not take possession of property prior to 48 hours after issuance of order of possession. (IC 32-35-2-29). If property is in building or enclosure and property is not voluntarily relinquished, executing officer may cause building or enclosure to be broken open to retrieve property. (IC 32-35-2-30). Executing officer must return order of possession to court, with his proceedings indorsed thereon, within five days after taking property. (IC 32-35-2-32). Executing officer may receive reasonable fees for keeping property until delivered to plaintiff. (IC 32-35-2-31).

Concealment of Property.

See subhead Proceedings, supra.

Claims of Third Persons.

No specific statutory provision.

Judgment or Order.

If judgment is for plaintiff it entitles him to delivery of property or value thereof, and damages for unlawful detention. When property has been delivered to plaintiff prior to final judgment, and defendant claims return thereof, judgment for defendant may be for return of property, or its value, in case return cannot be had, and damages for taking and withholding of property. (IC 32-35-2-33 to IC 32-35-2-34). If possession is not surrendered judgment is for full value of property and damages for taking or unlawful detention. (IC 32-35-2-35).

5.22 SEQUESTRATION:

On application of party entitled to performance, clerk shall issue writ of attachment, writ of assistance, or sequestration against property of disobedient party to compel obedience to judgment. (TR 70[A]). See TR 64(A).

5.23 SERVICE:

See topic 5.20 Process.

5.24 STAY OF EXECUTION:

See topic 5.03 Appeal and Error; category 8 Debtor and Creditor, topic 8.05 Executions.

5.25 SUBMISSION OF CONTROVERSY:

Parties have the right, with or without process, by agreement, to submit any matter of controversy between them, to any court that would otherwise have jurisdiction of such cause, upon agreed statement of facts made out and signed by parties. However, it must appear by affidavit that controversy is real and that proceedings are good faith effort to determine rights of parties. Thereupon court proceeds to try cause and render judgment as in other cases. (IC 34-54-5-1).

5.26 VENUE:

Preferred Venue.

Any case may be filed in any court in any county, subject to transfer to preferred venue. (Rule TR 75[A]). Cases will not be dismissed or abated for failure to select proper venue but will, upon filing of pleading or motion to dismiss under Rule TR 12(B)(3), be transferred to preferred venue if court determines that court or county where action is filed does not meet preferred venue requirements, and that court or county selected by party first filing motion to transfer meets preferred venue requirements. When case is transferred to preferred venue plaintiff must pay cost incidental to transfer. (Rule TR 75[C]). These costs include filing costs of refiling in proper court and mileage reasonably incurred by parties and their attorneys in resisting venue. They shall also include reasonable attorneys' fees incurred in resisting venue if action was commenced in wrong county by sham pleading, in bad faith, or without cause. Where proper objection has been made, court shall order case transferred to proper court, and papers and records shall be certified to court of transfer in like manner as upon change of venue. (Rule TR 75[B]). Preferred venue lies in: (1) County where greater percentage of individual defendants reside or if no greater percentage, place where any defendant resides; or (2) county where land or chattels are regularly located if claim is for interest in or injuries to land or chattels; or (3) county where accident or collision occurred if relating to vehicle; or (4) county where principal office or agency of defendant organization is located; or (5) county where either one or more individual plaintiffs reside or office of governmental organization is located, if one or more governmental organizations are included as defendants; or (6) county fixed by written stipulation signed by all parties and filed with court; or (7) county where individual is held in custody if action pertains to that custody; or (8) county where claim may be commenced under any statute recognizing or creating special or general remedy or proceeding; or (9) county where property is located if case seeks only judgment in rem against property of defendant being served by publication; or (10) county where either one or more individual plaintiffs reside or office of plaintiff or governmental organization is located, if case is one not subject to above nine requirements or if defendants are nonresident individuals or nonresident organizations without principal office in state. (Rule TR 75[A]).

Appeal.

Order transferring or refusing to transfer case pursuant to preferred venue requirements is interlocutory order appealable pursuant to Ind. Appellate Rule 14(A)(8). However, interlocutory appeal does not stay proceedings in trial court unless trial court or Court of Appeals so orders. (Rule TR 75[E]).

Change of Venue from County or Judge.

In civil actions, change of venue from county may be had only upon filing of verified motion stating grounds for requested change of venue. (Rule TR 76[A]). Motion shall be granted only upon showing that county where suit is pending is party, or that party seeking change of venue will be unlikely to receive fair trial due to local prejudice or bias regarding party, claim, or defense. Specifically, causes justifying change of venue include: (1) Judge has been engaged as counsel in cause prior to becoming judge or is otherwise interested in case; or (2) judge is related to either party; or (3) opposite party has undue influence over citizens of county; or (4) county is party; or (5) convenience of witnesses and ends of justice would be promoted by change; or (6) judge is material witness; or (7) judge is otherwise biased or prejudiced. (IC 34-35-1-1; IC 34-35-3-3). Party is entitled to only one change of venue. (Rule TR 76[A]). For purposes of changing venue from county, all plaintiffs are considered one party, and all defendants are considered one party. (IC 34-35-3-1). Denial of motion for change of venue is reviewable only for abuse of discretion. (Rule TR 76[A]).

In civil actions in which change may be taken from judge, motion shall be granted upon filing of unverified application or motion without stating specific grounds for change. Party is entitled to only one change of judge. (Rule TR 76[B]).

Except in criminal cases, application for change of venue or change of judge must be filed not later than ten days after issues are first closed on merits, except: (1) In cases where no pleading or answer is required by defending party to close issues or no responsive pleading is required, each party has 30 days from date action is placed and entered court's Chronological Case Summary; (2) in cases of claims in probate, receivership, remonstrances, and like, parties have 30 days from date matter is placed and entered on court's Chronological Case Summary; (3) when new trial is granted, parties have ten days from date order granting new trial is entered on record of trial court. (Rule TR 76[C]).

In event change of judge or county is granted within prescribed period, request for change of judge or county may be made by party still entitled thereto within ten days after qualification of special judge or after moving party has knowledge cause has reached receiving county or there has been failure to perfect change. Provided, however, that this provision will only operate to enlarge time allowed for such requests. (Rule TR 76[C][4]).

Where party has appeared at or received advance notice of hearing prior to expiration of time within which to move for change of venue or change of judge, and where at such hearing trial date is set and is entered on court's Chronological Case Summary, that party will be deemed to have waived request for change of judge or change of venue unless within three days such party files written objection to trial setting and written motion for change of venue from judge or county. (Rule TR 76[C][5]).

If moving party first obtains knowledge of grounds from change of venue from judge or county after expiration of time limits described above, that party may file application for change of venue or change of judge. Such application must be personally verified by party, and must allege when cause was first discovered, how cause was discovered, facts showing grounds for change, and reason why such cause could not have been discovered before through exercise of due diligence. Opposing party may file counter-affidavits on issue within ten days. Ruling of court is reviewable only for abuse of discretion. (Rule TR 76[C][6]).

Selection of New Venue After Change.

When change of venue is granted, cause is transferred to county agreed on by parties if they agree in open court within three days. In absence of agreement, court shall, within two days thereafter, submit list of all adjacent counties. Moving party strikes one, then nonmoving party strikes one, and so on until only one county remains. Cause is venued to such county. If moving party fails to strike within seven days or within time set by court, not to exceed 14 days, court resumes general jurisdiction of case. If nonmoving party fails to strike within that time limit, clerk of court shall strike for that party. (Rule TR 76[D]; IC 34-35-2-4).

In event moving party seeks change of judge, judge shall call judge of any circuit, superior or other court of general jurisdiction, or any judge of supreme court, to preside in such case, and try same. (IC 34-35-1-3).

Jurisdiction Pending Change of Venue.

Whenever court has granted change of venue and costs have been paid, either party may file certified copy of order making such change in new court, and thereafter new court has full jurisdiction, even though transcript has not been filed. This rule does not divest original court's jurisdiction to hear and determine emergency matters between filing and granting of motion. (Rule TR 78).

Other Rules.

See Ind. Crim. Rule 12 (change of venue in criminal cases); Ind. Tax Court Rule 13 (Venue of tax appeals lies with Tax Court); and Ind. Small Claims Rule 12.

Statutes.

See Ind. Code § 34 (civil procedure) and § 35 (criminal procedure). See also Burn's Indiana Statutes Annotated, General Index and West's Annotated Indiana Code, General Index. *Note:* Rule TR 75 supercedes any other rule or statute relating to venue, place of trial, or authority of court to hear case, even if such rule or statute is more stringent than Rule TR 75.

Waiver.

Defense of improper venue must be set forth affirmatively in responsive pleading, or may be made by motion. (Rule TR 8[C]; Rule TR 12[B][3]). Defense is waived if it is omitted from motion made under Rule 12 or from responsive pleading or amendment thereto. (Rule TR 12[H]). Also, if party appears at or receives advanced notice of hearing held before expiration of date within which that party may ask for change of venue, and at that hearing trial date is set and entered on court's Chronological Case Summary, that party waives right to change venue unless party files written objection to trial setting and written motion for change of venue within three days. (Rule TR 76[C][5]).

6 COURTS AND LEGISLATURE

6.01 COURTS:

United States District Courts.

Northern District is divided into four divisions and clerk maintains office in city from which each division takes its name. (Hammond 46320, Hammond Division at Lafayette 47901, Fort Wayne 46802, South Bend 46601).

Fort Wayne Division is composed of following counties: Adams, Allen, Blackford, DeKalb, Grant, Huntington, Jay, Lagrange, Noble, Steuben, Wells and Whitley.

South Bend Division is composed of following counties: Cass, Elkhart, Fulton, Kosciusko, LaPorte, Marshall, Miami, Pulaski, St. Joseph, Starke and Wabash.

Hammond Division is composed of following counties: Lake and Porter.

Hammond Division at Lafayette is composed of following counties: Benton, Carroll, Jasper, Newton, Tippecanoe, Warren and White.

Southern District.

Southern District is divided into four divisions and clerk maintains an office in city from which each division takes its name (Indianapolis 46204, Terre Haute 47808, Evansville 47708, New Albany 47150).

Indianapolis Division is composed of following counties: Bartholomew, Boone, Brown, Clinton, Decatur, Delaware, Fayette, Fountain, Franklin, Hamilton, Hancock, Hendricks, Henry, Howard, Johnson, Madison, Marion, Monroe, Montgomery, Morgan, Randolph, Rush, Shelby, Tipton, Union and Wayne.

Terre Haute Division is composed of following counties: Clay, Greene, Knox, Owen, Parke, Putnam, Sullivan, Vermillion and Vigo.

Evansville Division is composed of following counties: Daviess, Dubois, Gibson, Martin, Perry, Pike, Posey, Spencer, Vanderburgh and Warrick.

New Albany Division is composed of following counties: Clark, Crawford, Dearborn, Floyd, Harrison, Jackson, Jefferson, Jennings, Lawrence, Ohio, Orange, Ripley, Scott, Switzerland and Washington.

For filing fees in U.S. District Courts, see 28 U.S.C. § 1914.

United States Bankruptcy Courts.

Northern District is divided into four divisions for filing (Fort Wayne Division, South Bend Division, Hammond Division, and Hammond Division at Lafayette).

Fort Wayne Division is comprised of counties of Adams, Allen, Blackford, DeKalb, Grant, Huntington, Jay, LaGrange, Noble, Steuben, Wells and Whitley.

South Bend Division is comprised of counties of Cass, Elkhart, Fulton, Kosciusko, LaPorte, Marshall, Miami, Pulaski, St. Joseph, Starke and Wabash.

Hammond Division is comprised of counties of Lake and Porter.

Hammond Division at Lafayette is comprised of counties of Benton, Carroll, Jasper, Newton, Tippecanoe, Warren and White.

Southern District is divided into four Divisions (Indianapolis, Terre Haute, Evansville and New Albany).

Indianapolis Division is comprised of counties of Bartholomew, Boone, Brown, Clinton, Decatur, Delaware, Fayette, Fountain, Franklin, Hamilton, Hancock, Hendricks, Henry, Howard, Johnson, Madison, Marion, Monroe, Montgomery, Morgan, Randolph, Rush, Shelby, Tipton, Union and Wayne.

Terre Haute Division is comprised of counties of Clay, Greene, Knox, Owen, Parke, Putnam, Sullivan, Vermillion and Vigo.

Evansville Division is comprised of counties of Daviess, Dubois, Gibson, Martin, Perry, Pike, Posey, Spencer, Vanderburgh and Warrick.

New Albany Division is comprised of counties of Clark, Crawford, Dearborn, Floyd, Harrison, Jackson, Jefferson, Jennings, Lawrence, Ohio, Orange, Ripley, Scott, Switzerland and Washington.

For filing fees in bankruptcy cases, see 28 U.S.C. § 1930.

Supreme Court and Court of Appeals.

Selection of Justices.

When a vacancy occurs on Supreme Court or Court of Appeals, Judicial Nominating Commission presents to Governor a list of three attorneys. Governor fills vacancy with person from list without regard to political affiliation within 60 days, or Chief Justice chooses person from list. (Const., art. 7, § 10). Judicial Nominating Commission consists of seven members. Chairman is Chief Justice of Supreme Court or Justice of Supreme Court whom he designates. Three attorney-members are elected by attorneys of state, and three non-attorney members are appointed by Governor. (Const., art. 7, § 9).

A justice of the Supreme Court or a judge of the Court of Appeals serves initially until next general election following expiration of two years from date of appointment, at which time he is subject to referendum by voters. Electorate of entire state votes on question of approval of Supreme Court Justices, while electorate of particular Court of Appeals District (infra) votes on Court of Appeals judge. Approval by voters means retention in office for ten year term. At end of ten year term, justice or judge is again subject to referendum. (Const., art. 7, § 11). There is no limitation on number of terms of office that may be served. (Const., art. 7, § 15).

Supreme Court consists of chief justice and four justices, any three of whom constitute quorum. (Const., art. 7, § 2; IC 33-24-1-1).

Chief Justice is selected by Judicial Nominating Commission from members of Supreme Court. He serves five-year term of office. (Const., art. 7, § 3).

Jurisdiction.

This Court has exclusive jurisdiction in admission to practice of law; discipline and disbarment of those admitted; unauthorized practice of law; discipline, removal and retirement of justices and judges; supervision of exercise of jurisdiction by other courts of state; issuance of writs necessary or appropriate in aid of its jurisdiction; appeals in criminal cases from a judgment imposing a sentence of death or life imprisonment, appeal from denial of post-conviction relief in which sentence was death; appealable cases involving constitutionality of statutes; and appeals, upon granting of petition to transfer, involving substantial question of law of great public importance and where need exists for speedy determination. (Const., art. 7, § 4; Rule AP4[A]).

Court of Appeals is composed of 15 judges sitting in five geographic districts. (Const. art. 7, § 5; IC 33-25-1-1).

First District.

Counties: Bartholomew, Boone, Brown, Clark, Clay, Crawford, Daviess, Dearborn, Decatur, Dubois, Fayette, Floyd, Fountain, Franklin, Gibson, Greene, Hancock, Harrison, Hendricks, Henry, Jackson, Jefferson, Jennings, Johnson, Knox, Lawrence, Martin, Monroe, Montgomery, Morgan, Ohio, Orange, Owen, Parke, Perry, Pike, Posey, Putnam, Randolph, Ripley, Rush, Scott, Shelby, Spencer, Sullivan, Switzerland, Union, Vanderburgh, Vermillion, Vigo, Warrick, Washington, and Wayne. (IC 33-25-1-2).

Second District.

Counties: Adams, Blackford, Carroll, Cass, Clinton, Delaware, Grant, Hamilton, Howard, Huntington, Jay, Madison, Marion, Miami, Tippecanoe, Tipton, Wabash, Wells, and White. (IC 33-25-1-2).

Third District.

Counties: Allen, Benton, DeKalb, Elkhart, Fulton, Jasper, Kosciusko, LaGrange, Lake, LaPorte, Marshall, Newton, Noble, Porter, Pulaski, St. Joseph, Starke, Steuben, Warren, and Whitley. (IC 33-25-1-2).

Fourth District.

Entire State constitutes Fourth District. (IC 33-25-1-2).

Fifth District.

Entire State constitutes Fifth District. (IC 33-25-1-2).

All cases appealed to Court of Appeals are placed upon docket of district from which appeals originated. To prevent congestion, Court may order transfer from one district to another. (IC 33-25-1-5).

Chief Judge.

Judges of Court of Appeals elect one of their number to serve as chief judge for three year period. (IC 33-25-3-1).

Presiding Judges.

Each district, other than district from which chief judge was chosen, selects one of their number as presiding judge of their respective district. (IC 33-25-3-1).

Jurisdiction.

Court has jurisdiction of appeals of all cases other than those in which Supreme Court has exclusive jurisdiction, including interlocutory orders for payment of money or to compel execution of any document, or delivery or assignment of any securities, evidence of debt, documents or things in action; delivery of possession of real property or sale thereof; granting or refusing to grant, or dissolving or overruling motions to dissolve preliminary injunctions; or appointment of receivers; habeas corpus actions not authorized to be taken directly to Supreme Court; transferring or refusing to transfer case pursuant to Trial Rule 75; any other interlocutory order, if trial court certifies and court of appeal or judge thereof finds on petition that appellant will suffer substantial damage if order is erroneous and appeal delayed or there is substantial question of law, early determination of which will promote more orderly disposition of case or remedy by appeal after judgment is otherwise inadequate. (Rule AP5[B]; Rule AP14). Court has jurisdiction to review final decisions of various administrative agencies. (Rule AP5[C]).

Superior Courts.

In 75 counties, Superior Courts have been statutorily authorized. (IC 33-33-1 – IC 33-33-92). Each court is individually created and authorized.

Small Claims and Misdemeanor Division of Superior Courts (IC 33-29-2-2 et seq.).— Superior courts may have standard small claims and misdemeanor division established by statute. (IC 33-29-2-1). This division has small claims docket and minor offenses and violations docket. Small claims docket has jurisdiction over civil actions where amount in controversy is $6,000 or less, possessory actions between landlord and tenant where rent due does not exceed $6,000, and emergency possessory actions between landlord and tenant under IC 32-31-6. (IC 33-29-2-4). Trials within small claims docket are to be conducted informally and are not bound by statutes or rules governing practice, procedure, pleadings or evidence except for provisions relating to privileged communications and offers of compromise. (IC 32-29-2-5). Minor offenses and violations docket has jurisdiction over all class D felony, misdemeanor, infraction and ordinance violation cases. Court shall also establish traffic violations bureau. (IC 33-29-2-8). Standard small claims and misdemeanor divisions have been established by statute in Adams, Allen, Bartholomew, Benton, Blackford, Boone, Brown, Carroll, Cass, Clark, Clay, Clinton, Crawford, Daviess, Dearborn, Decatur, DeKalb, Delaware, Dubois, Elkhart, Fayette, Floyd, Fountain, Franklin, Fulton, Gibson, Grant, Greene, Hamilton, Hancock, Harrison, Hendricks, Henry, Howard, Huntington, Jackson, Jasper, Jay, Jefferson, Jennings, Johnson, Knox, Kosciusko, LaGrange, LaPorte, Lawrence, Madison, Marion, Marshall, Martin, Miami, Moore, Morgan, Newton, Noble, Orange, Owen, Parker, Perry, Pike, Porter, Posey, Pulaski, Putnam, Randolph, Ripley, Rush, Scott, Shelby, Spencer, St. Joseph, Starke, Steuben, Sullivan, Tippecanoe, Tipton, Union, Vanderburgh, Vermillion, Vigo, Wabash, Warren, Warrick, Washington, Wayne, Wells, White and Whitley. (IC 33-33-1 – 33-33-92).

Courts, Creating Statute, Location and Jurisdiction.

Adams Superior Court (IC 33-33-1-2 et seq.) Decatur.—Jurisdiction concurrent with Adams Circuit Court excluding juvenile matters.

Allen Superior Court (IC 33-33-2-4 et seq.) Fort Wayne.—Jurisdiction concurrent with Allen Circuit Court. Court has exclusive juvenile jurisdiction in Allen County, except that court has concurrent jurisdiction with Allen circuit court concerning paternity actions.

Bartholomew Superior Courts (IC 33-33-3-2 et seq.) Columbus.—Jurisdiction concurrent with Bartholomew Circuit Court excluding juvenile matters.

Blackford Superior Court (IC 33-33-5-2 et seq.) Hartford City.—Jurisdiction same as Blackford Circuit Court excluding juvenile matters.

Boone Superior Court No. 1 (IC 33-33-6-2 et seq.) Lebanon.—Jurisdiction same as Boone Circuit Court excluding juvenile matters; specially including probate matters.

Boone Superior Court No. 2 (IC 33-33-6-2 et seq.) Lebanon.—Jurisdiction same as Boone Superior Court No. 1 excluding probate matters.

Carroll Superior Court (IC 33-33-8-2 et seq.) Delphi.—Jurisdiction same as Carroll Circuit Court.

Cass Superior Court (IC 33-33-9-2) Logansport.—Jurisdiction same as Cass Circuit Court excluding juvenile matters. Court has standard small claims and misdemeanor division.

Clark Superior Court No. 1 (IC 33-33-10-3 et seq.) Jeffersonville.—Jurisdiction same as Clark Circuit.

Clark Superior Court No. 2 (IC 33-33-10-3 et seq.) Jeffersonville.—Jurisdiction same as Clark Superior Court No. 1.

Clark Superior Court No. 3 (IC 33-33-10-3 et seq.) Jeffersonville.—Jurisdiction same as Clark Superior Court No. 1. Clark Superior Court No. 3 has standard small claims and misdemeanor docket.

Clay Superior Court (IC 33-33-11-2 et seq.) Brazil.—Jurisdiction same as Clay Circuit Court, excluding juvenile and probate matters.

Clinton Superior Court (IC 33-33-12-2 et seq.) Frankfort.—Jurisdiction same as Clinton Circuit excluding juvenile matters.

Daviess Superior Court (IC 33-33-14-2 et seq.) Washington.—Jurisdiction same as Daviess Circuit Court.

Dearborn Superior Court (IC 33-33-15-2 et seq.) Lawrenceburg.—Jurisdiction same as Dearborn Circuit Court excluding juvenile matters.

Decatur Superior Court (IC 33-33-16-2 et seq.) Greensburg.—Jurisdiction same as Decatur Circuit Court.

DeKalb Superior Court (IC 33-33-17-2 et seq.) Auburn.—Same jurisdiction as DeKalb Circuit Court.

Dubois Superior Court (IC 33-33-19-2 et seq.) Jasper.—Jurisdiction same as Dubois Circuit Court.

Elkhart Superior Court (IC 33-33-20-3 et seq.) Elkhart and Goshen.—Jurisdiction same as Elkhart Circuit Court.

Fayette Superior Court (IC 33-33-21-2 et seq.) Connersville.—Jurisdiction same as circuit court excluding juvenile.

Floyd Superior Court (IC 33-33-22-2 et seq.) New Albany.—Jurisdiction same as Floyd Circuit Court excluding juvenile, probate, and trust matters.

Fulton Superior Court (IC 33-33-25-2 et seq.) Rochester.—Jurisdiction same as Fulton Circuit Court excluding juvenile jurisdiction.

Gibson Superior Court (IC 33-33-26-2 et seq.) Princeton.—Jurisdiction same as Gibson Circuit Court excluding juvenile and probate jurisdiction.

Grant Superior Court No. 1 (IC 33-33-27-3 et seq.) Marion.—Jurisdiction same as Grant Circuit Court.

Grant Superior Court No. 2 (IC 33-27.2-2 et seq.) Marion.—Jurisdiction same as Grant Circuit Court.

Grant Superior Court No. 3 (IC 33-27.3-2 et seq.) Marion.—Jurisdiction same as Grant Circuit Court. Grant Superior Court No. 3 has standard small claims and misdemeanor division.

Greene Superior Court (IC 33-33-28-2 et seq.) Bloomfield.—Jurisdiction same as Greene Circuit Court.

Hamilton Superior Court No. 1 (IC 33-33-29-2 et seq.) Noblesville.—Jurisdiction same as Hamilton Circuit Court.

Hamilton Superior Court No. 2 (IC 33-33-29-2 et seq.) Noblesville.—Jurisdiction same as Hamilton Circuit Court.

Hamilton Superior Court No. 3 (IC 33-33-29-2 et seq.) Noblesville.—Jurisdiction same as Hamilton Circuit Court.

Hamilton Superior Court No. 4 (IC 33-33-29-2 et seq.) Noblesville.—Jurisdiction same as Hamilton Circuit Court. Hamilton Superior Court No. 4 has standard small claims and misdemeanor division.

Hamilton Superior Court No. 5 (IC 33-33-29-2 et seq.) Noblesville.—Jurisdiction same as Hamilton Circuit Court. Hamilton Superior Court No. 5 has standard small claims and misdemeanor division.

Hancock Superior Court No. 1 (IC 33-33-30-2 et seq.) Greenfield.—Jurisdiction same as Hancock Circuit Court.

Hancock Superior Court No. 2 (IC 33-33-30-2 et seq.) Greenfield.—Jurisdiction same as Hancock Circuit Court. Hancock Superior Court No. 2 has standard small claims and misdemeanor division.

Harrison Superior Court (IC 33-29-1-2; IC 33-33-31-2 et seq.) Corydon.—Jurisdiction same as Harrison Circuit Court.

Hendricks Superior Courts No. 1, No. 2, No. 3, No. 4, No. 5 (IC 33-33-32-2 et seq.) Danville.—Jurisdiction same as Hendricks Circuit Court, except juvenile matters.

Henry Superior Court No. 1 (IC 33-33-33-2 et seq.) New Castle.—Jurisdiction same as Henry Circuit Court.

Henry Superior Court No. 2 (IC 33-29-1-3; IC 33-33-33-2 et seq.) New Castle.—Jurisdiction same as Henry Circuit Court. Henry Superior Court No. 2 has standard small claims and misdemeanor division.

Howard Superior Courts No. 1, No. 2, No. 3, No. 4 (IC 33-33-34-3 et seq.) Howard Superior Court No. 3 has jurisdiction over standard small claims and misdemeanors. Kokomo.—Jurisdiction same as Howard Circuit Court excluding juvenile matters.

Huntington Superior Court (IC 33-33-35-2 et seq.) Huntington.—Jurisdiction same as Huntington Circuit Court excluding juvenile matters.

Jackson Superior Court (IC 33-33-36-2 et seq.) Seymour.—Jurisdiction same as Jackson Circuit Court.

Jasper Superior Court (IC 33-33-37-2 et seq.) Rensselaer.—Jurisdiction same as Jasper Circuit Court except that only circuit court has jurisdiction over juvenile matters.

Jay Superior Court (IC 33-33-38-2 et seq.) Portland.—Jurisdiction same as Jay Circuit Court, excluding juvenile matters.

Jefferson Superior Court (IC 33-33-39-2 et seq.) Madison.—Jurisdiction same as Jefferson Circuit Court.

Jennings Superior Court (IC 33-33-40-2 et seq.) Vernon.—Jurisdiction same as Jennings Circuit Court. Court has standard small claims and misdemeanor division.

Johnson Superior Courts No. 1, No. 2, No. 3 (IC 33-33-41-3 et seq.) Franklin.—Jurisdiction same as Johnson Circuit Court. All have standard small claims and misdemeanor divisions.

Knox Superior Courts (IC 33-33-42-2 et seq.) Vincennes.—Jurisdiction same as Knox Circuit Court, except exclusive jurisdiction over juvenile matters.

Kosciusko Superior Courts No. 1, No. 2 and No. 3 (IC 33-33-43-2 et seq.) Warsaw.—Jurisdiction same as Kosciusko Circuit Court. Kosciusko Superior Courts No. 2 and No. 3 have standard small claims and misdemeanor divisions.

LaGrange Superior Court (IC 33-33-44-2 et seq.) LaGrange.—Jurisdiction same as LaGrange Circuit Court.

Lake Superior Court (IC 33-33-45-3 et seq.) Places in Lake County as court determines.—Jurisdiction same as Lake Circuit Court in all civil and probate cases and matters whether original or appellate, has original exclusive jurisdiction of all felony cases, has original concurrent jurisdiction of all misdemeanor cases, infraction cases and ordinance violation cases, has such appellate jurisdiction in criminal cases as is vested in circuit court, and has original exclusive juvenile jurisdiction.

LaPorte Superior Courts (IC 33-33-46-2 et seq.) Michigan City.—Jurisdiction same as LaPorte Circuit Court. LaPorte Superior Courts No. 3 and 4 have standard small claims and misdemeanor division.

Lawrence Superior Court (IC 33-33-47-2 et seq.) Bedford.—Original and concurrent jurisdiction with Lawrence Circuit Court in all civil and criminal cases, excluding juvenile and probate matters.

Madison Superior Court (IC 33-33-48-2 et seq.) Anderson.—Jurisdiction same as Madison Circuit Court except Superior Court has exclusive juvenile jurisdiction.

Marion Superior Court (IC 33-33-49-6 et seq.) Indianapolis.—Concurrent and coextensive jurisdiction with circuit court in civil, criminal, probate, juvenile, and statutory cases and matters, whether original or appellate. Exclusive probate and juvenile jurisdiction.

Marshall Superior Courts (IC 33-33-50-2 et seq.) Plymouth.—Jurisdiction same as Marshall Circuit Court.

Marshall Superior Court No. 2 has standard small claims and misdemeanor division.

Miami Superior Court (IC 33-33-52-2 et seq.) Peru.—Jurisdiction same as Miami Circuit Court.

Montgomery Superior Courts No. 1 and No. 2 (IC 33-33-54-2 et seq.) Crawfordsville.—Jurisdiction same as Montgomery Circuit Court.

Morgan Superior Court (IC 33-33-55-3 et seq.) Martinsville.—Jurisdiction same as Morgan Circuit Court.

Along with Morgan Circuit Court, one judge in Morgan Superior Court has exclusive jurisdiction in all juvenile matters.

Newton Superior Court (IC 33-33-56-2 et seq.) Kentland.—Jurisdiction same as Newton Circuit Court excluding juvenile matters.

Noble Superior Court (IC 33-33-57-2 et seq.) Albion.—Jurisdiction same as Noble Circuit Court.

Orange Superior Court (IC 33-33-59-2 et seq.) Paoli.—Jurisdiction same as Orange Circuit Court excluding juvenile matters.

Porter Superior Court (IC 33-33-64-3 et seq.) Valparaiso and Portage Township.—Jurisdiction same as Porter Circuit Court excluding matters concerning delinquent children or children in need of services.

Posey Superior Court (IC 33-33-65-2 et seq.) Mount Vernon.—Jurisdiction same as Posey Circuit Court.

Pulaski Superior Court (IC 33-33-66-2 et seq.) Winamac.—Jurisdiction same as Pulaski Circuit Court excluding juvenile matters.

Putnam Superior Court (IC 33-33-67-2 et seq.) Greencastle.—Jurisdiction same as Putnam Circuit Court.

Randolph Superior Court (IC 33-33-68-2 et seq.) Winchester.—Jurisdiction same as Randolph Circuit Court.

Ripley Superior Court (IC 33-33-69-2 et seq.) Versailles.—Jurisdiction same as Ripley Circuit Court.

Rush Superior Court (IC 33-33-70-2 et seq.) Rushville.—Jurisdiction same as Rush Circuit Court.

St. Joseph Superior Court (IC 33-33-71-5 et seq.) South Bend and Mishawaka.—Exclusive original jurisdiction of traffic violations within cities of county and violation of ordinances of cities in county. Original and appellate jurisdiction concurrent with circuit court of county traffic violations, civil, criminal and probate matters.

Scott Superior Court (IC 33-33-72-2 et seq.) Scottsburg.—Jurisdiction same as Scott Circuit Court.

Shelby Superior Court No. 1 (IC 33-33-73-2 et seq.) Shelbyville.—Jurisdiction same as Shelby Circuit Court and exclusive juvenile jurisdiction.

Shelby Superior Court No. 2 (IC 33-33-73-2 et seq.) Shelbyville.—Jurisdiction same as Shelby Circuit Court. Shelby Superior Court No.2 has standard small claims and misdemeanor division.

Steuben Superior Court (IC 33-33-76-2 et seq.) Angola.—Jurisdiction same as Steuben Circuit Court.

Sullivan Superior Court (IC 33-33-77-2 et seq.) Sullivan.—Jurisdiction same as Sullivan Circuit Court.

Tippecanoe Superior Court (IC 33-33-79-3 et seq.) Lafayette.—Jurisdiction same as Tippecanoe circuit excluding probate and juvenile matters.

Tippecanoe Superior Court No. 2 (IC 33-33-79.2-2 et seq.) Lafayette.—Jurisdiction same as Tippecanoe circuit excluding probate and juvenile matters.

Tippecanoe Superior Court No. 3 (IC 33-33-79.3-2 et seq.) Lafayette.—Jurisdiction same as Tippecanoe circuit excluding probate matters.

Tippecanoe Superior Court Nos. 4, 5 and 6 (IC 33-33-79.4-2 et seq.) Lafayette.—Jurisdiction same as Tippecanoe Circuit Court excluding probate and juvenile matters. Each court has small claims and misdemeanor division.

Vanderburgh Superior Court (IC 33-33-82-5 et seq.) Evansville.—Original and exclusive jurisdiction of probate matters, estate administrations, juvenile matters, trust assignments, adoptions and surviving partnerships. Original and appellate jurisdiction concurrent with circuit court of civil and criminal matters.

Vigo Superior Court (IC 33-33-84-3 et seq.) Terre Haute.—Jurisdiction same as Vigo Circuit Court.

Wabash Superior Court (IC 33-33-85-2 et seq.) Wabash.—Jurisdiction same as

Wabash Circuit Court.

Warrick Superior Courts No. 1 and No. 2 (IC 33-33-87-3 et seq.) Boonville.—Jurisdiction same as Warrick Circuit Court.

Washington Superior Court (IC 33-33-88-2 et seq.) Salem.—Jurisdiction same as Washington Circuit Court excluding juvenile matters.

Wayne Superior Court No. 1 (IC 33-33-89-3 et seq.) Richmond.—Jurisdiction same as Wayne Circuit Court.

Wayne Superior Court No. 2 (IC 33-33-89.2-2 et seq.) Place to be determined by county council of Wayne County.—Jurisdiction same as Wayne Circuit Court.

Wayne Superior Court No. 3 (IC 33-33-89.3-2 et seq.) Place to be determined by county council of Wayne County.—Jurisdiction same as Wayne Circuit Court. Wayne Superior Court No. 3 has standard small claims and misdemeanor division.

Wells Superior Court (IC 33-33-90-2 et seq.) Bluffton.—Jurisdiction concurrent with Wells Circuit Court excluding juvenile matters.

White Superior Court (IC 33-33-91-2 et seq.) Monticello.—Jurisdiction same as White Circuit Court.

Whitley Superior Court (IC 33-33-92-2 et seq.) Columbia City.—Jurisdiction same as Whitley Circuit Court excluding juvenile matters.

Probate Courts.

In St. Joseph county there is probate court. Excluding civil matters, St. Joseph Probate Court exercises concurrent jurisdiction with superior court over all probate matters and exclusive jurisdiction of juvenile matters. (IC 33-31-1-1 et seq.).

Circuit and/or superior courts have probate jurisdiction in other counties.

Circuit courts have general, civil and criminal jurisdiction over cases, except where exclusive jurisdiction is conferred upon some other court, board, or officer. (IC 33-28-1-2). See subheads dealing with superior, probate, county, municipal, city, criminal, magistrate, town and juvenile courts.

Adams County: Twenty-sixth Circuit; court sits at Decatur.

Allen County: Thirty-eighth Circuit; court sits at Fort Wayne.

Bartholomew County: Ninth Circuit; court sits at Columbus.

Benton County: Seventy-sixth Circuit; court sits at Fowler.

Blackford County: Seventy-first Circuit; court sits at Hartford City.

Boone County: Twentieth Circuit; court sits at Lebanon.

Brown County: Eighty-eighth Circuit; court sits at Nashville.

Carroll County: Seventy-fourth Circuit; court sits at Delphi.

Cass County: Twenty-ninth Circuit; court sits at Logansport.

Clark County: Fourth Circuit; court sits at Jeffersonville.

Clay County: Thirteenth Circuit; court sits at Brazil.

Clinton County: Forty-fifth Circuit; court sits at Frankfort.

Crawford County: Seventy-seventh Circuit; court sits at English.

Daviess County: Forty-ninth Circuit, court sits at Washington.

Dearborn County: Seventh Circuit; court sits at Lawrenceburg.

Decatur County: Sixty-ninth Circuit; court sits at Greensburg.

DeKalb County: Seventy-fifth Circuit; court sits at Auburn.

Delaware County: Forty-sixth Circuit; court sits at Muncie.

Dubois County: Fifty-seventh Circuit; court sits at Jasper.

Elkhart County: Thirty-fourth Circuit; court sits at Goshen.

Fayette County: Seventy-third Circuit; court sits at Connersville.

Floyd County: Fifty-second Circuit; court sits at New Albany.

Fountain County: Sixty-first Circuit; court sits at Covington.

Franklin County: Thirty-seventh Circuit; court sits at Brookville.

Fulton County: Forty-first Circuit; court sits at Rochester.

Gibson County: Sixty-sixth Circuit; court sits at Princeton.

Grant County: Forty-eighth Circuit; court sits at Marion.

Greene County: Sixty-third Circuit; court sits at Bloomfield.

Hamilton County: Twenty-fourth Circuit; court sits at Noblesville.

Hancock County: Eighteenth Circuit; court sits at Greenfield.

Harrison County: Third Circuit; court sits at Corydon.

Hendricks County: Fifty-fifth Circuit; court sits at Danville.

Henry County: Fifty-third Circuit; court sits at New Castle.

Howard County: Sixty-second Circuit; court sits at Kokomo.

Huntington County: Fifty-sixth Circuit; court sits at Huntington.

Jackson County: Fortieth Circuit; court sits at Brownstown.

Jasper County: Thirtieth Circuit; court sits at Rensselaer.

Jay County: Fifty-eighth Circuit; court sits at Portland.

Jefferson County: Fifth Circuit; court sits at Madison.

Jennings County: Eighty-sixth Circuit; court sits at Vernon.

Johnson County: Eighth Circuit; court sits at Franklin.

Knox County: Twelfth Circuit; court sits at Vincennes.

Kosciusko County: Fifty-fourth Circuit; court sits at Warsaw.

Lagrange County: Thirty-fifth Circuit; court sits at Lagrange.

Lake County: Thirty-first Circuit; court sits at Crown Point.

LaPorte County: Thirty-second Circuit; court sits at LaPorte.

Lawrence County: Eighty-first Circuit; court sits at Bedford.

Madison County: Fiftieth Circuit; court sits at Anderson.

Marion County: Nineteenth Circuit; court sits at Indianapolis.

Marshall County: Seventy-second Circuit; court sits at Plymouth.

Martin County: Ninetieth Circuit; court sits at West Shoals.

Miami County: Fifty-first Circuit; court sits at Peru.

Monroe County: Tenth Circuit; court sits at Bloomington.

Montgomery County: Twenty-second Circuit; court sits at Crawfordsville.

Morgan County: Fifteenth Circuit; court sits at Martinsville.

Newton County: Seventy-ninth Circuit; court sits at Kentland.

Noble County: Thirty-third Circuit; court sits at Albion.

Ohio County: Seventh Circuit; court sits at Lawrenceburg.

Orange County: Eighty-seventh Circuit; court sits at Paoli.

Owen County: Seventy-eighth Circuit; court sits at Spencer.

Parke County: Sixty-eighth Circuit; court sits at Rockville.

Perry County: Seventieth Circuit; court sits at Cannelton.

Pike County: Eighty-third Circuit; court sits at Petersburg.

Porter County: Sixty-seventh Circuit; court sits at Valparaiso.

Posey County: Eleventh Circuit; court sits at Mt. Vernon.

Pulaski County; Fifty-ninth Circuit; court sits at Winamac.

Putnam County: Sixty-fourth Circuit; court sits at Greencastle.

Randolph County: Twenty-fifth Circuit; court sits at Winchester.

Ripley County: Eightieth Circuit; court sits at Versailles.

Rush County: Sixty-fifth Circuit; court sits at Rushville.

Scott County: Sixth Circuit; court sits at Scottsburg.

Shelby County: Sixteenth Circuit; court sits at Shelbyville.

Spencer County: Eighty-fourth Circuit; court sits at Rockport.

Starke County: Forty-fourth Circuit; court sits at Knox.

Steuben County: Eighty-fifth Circuit; court sits at Angola.

St. Joseph: Sixtieth Circuit; court sits at South Bend.

Sullivan County: Fourteenth Circuit; court sits at Sullivan.

Switzerland County: Ninety First Circuit; court sits at Vevay.

Tippecanoe County: Twenty-third Circuit; court sits at Lafayette.

Tipton County: Thirty-sixth Circuit; court sits at Tipton.

Union County: Eighty-ninth Circuit; court sits at Liberty.

Vanderburgh County: First Circuit; court sits at Evansville.

Vermillion County: Forty-seventh Circuit; courts sits at Newport.

Vigo County: Forty-third Circuit; court sits at Terre Haute.

Wabash County: Twenty-seventh Circuit; court sits at Wabash.

Warren County: Twenty-first Circuit; court sits at Williamsport.

Warrick County: Second Circuit; court sits at Boonville.

Washington County: Forty-second Circuit; court sits at Salem.

Wayne County: Seventeenth Circuit; court sits at Richmond.

Wells County: Twenty-eighth Circuit; court sits at Bluffton.

White County: Thirty-ninth Circuit; court sits at Monticello.

Whitley County: Eighty-second Circuit; court sits at Columbia City.

Small Claims and Misdemeanor Division of Circuit Courts.

Following circuit courts are to maintain standard small claims and misdemeanor division for civil actions in which amount sought is not more than $6,000, and for all possessory actions between landlord and tenant in which rent due is not more than $6,000 (IC 33-28-3-1 et seq.); and for all Class D felonies, misdemeanors, infractions and ordinance violations (IC 33-28-3-8); Benton, Brown, Carroll, Crawford, Fountain, Franklin, Jennings, Martin, Newton, Owen, Parke, Perry, Pike, Ripley, Spencer, Starke, Switzerland, Tipton, Union, Vermillion, Warren, and Washington.

City and Town Courts.

IC 33-35-1-1 provides for city or town courts in second or third class cities or towns. Jurisdiction of all violations of city ordinances and all infractions and misdemeanors. (IC 33-35-2-3; IC 33-35-2-8). Original concurrent jurisdiction with circuit courts in all civil cases where amount in controversy does not exceed $3,000 except for actions for slander or libel, probate, dissolution of marriage, or injunction or mandate actions. (IC 33-35-2-3 et seq.). During 2006 and every fourth year thereafter, second or third class cities or towns by ordinance may create or abolish city or town court. (IC 33-35-1-1).

Juvenile Court.

Circuit courts have juvenile jurisdiction unless it is given exclusively to another court in that county. Other courts have juvenile jurisdiction only when provided by statute. (IC 33-23-7-1). See also IC 33-33-45-6.

Justices of the Peace.

Justice courts abolished Jan. 1, 1976. Replaced by county court system. Last county courts abolished in 2009.

Small Claims Courts.

(IC 33-34-1-2; IC 33-34-3-2 et seq.). There must be small claims court in each county containing consolidated city of first class (Marion County). County-wide jurisdiction with original and concurrent jurisdiction with circuit and superior in all civil cases founded in contract or tort where amount in controversy is $6,000 or less (excluding attorney fees and interest); in possessory actions between landlord and tenant where rent due at time of filing does not exceed $6,000. Small claims court has no jurisdiction in actions seeking injunctive relief or involving partition of real estate, or to declare or enforce any lien thereon except as provided in IC 33-34-3-14; and has no jurisdiction in cases where appointment of receiver sought, or in suits for dissolution or annulment of marriage. Trial must be informal and not bound by statutory provisions or rules of practice, procedure, pleadings and evidence except provisions relating to privileged communications and offers of compromise. All judgments rendered in civil actions may be recorded in judgment docket book of proper division of small claims court. Such judgment constitutes lien on real estate when entered in circuit court judgment docket in same manner as judgment in court of general jurisdiction becomes lien on real estate under IC 34-55-9. Appeals must be taken to superior court and tried de novo.

See subheads County Courts; Municipal Court; Circuit Courts; Superior Courts.

Tax Court.

Indiana has tax court with exclusive jurisdiction over any case that arises under tax laws of state and that constitutes initial appeal of final determination made by Department of State

Revenue, Indiana Board of Tax Review or initial appeals of final determination by or State Board of Tax Commissioners before Jan. 1, 2002. Tax court decisions may be appealed directly to Indiana Supreme Court. (IC 33-26-1-1 et seq.).

6.02 LEGISLATURE:

Reorganizes biannually with annual sessions. Convenes on third Tues. after first Mon. in Nov. in even-numbered years and may extend through Apr. 29 of following year. Convenes on third Tues. after first Mon. in Nov. in odd-numbered years and may extend through Mar. 14 of following year. (IC 2-2.1-1 – 2-2.1-3). Governor may call special session at any time by proclamation. (Const. art. 4, § 9).

Legislation must be confined to one subject matter. (Const. art. 4, § 19).

Initiative and referendum do not exist in Indiana.

Lobbyists.

Regulated by Indiana Lobby Registration Commission. (IC 2-7-1.6-1 et seq.).

6.03 REPORTS:

Indiana Supreme Court (Ind.): Blackford (Blackf.), 8 vols. (1817-1847); Indiana Reports, 275 vols. (1848-1981); North Eastern Reporter (N.E., N.E.2d) (1885-date).

Indiana Court of Appeals (Ind. Ct. App.) (previously, Indiana Appellate Court) (Ind. App.): Indiana Appellate Court Reports (1890-1972); Indiana Court of Appeals Reports (1972-1979); North Eastern Reporter (N.E., N.E.2d) (1891-date).

Citation Form in State Courts.—Citation to cases should follow format put forth in current edition of Uniform System of Citation (Bluebook). Thus, cases decided prior to May 5, 1981, in Indiana Supreme Court and Nov. 7, 1979, in Indiana Court of Appeals shall be cited by giving title of case followed by volume and page of state report, volume and page of regional reporter, and year of final disposition. (E.g., Warren v. Indiana Tel. Co., 217 Ind. 93, 26 N.E.2d 399 [1940].) Cases decided after above noted dates shall be cited by giving title of case, followed by volume and page of regional reporter, Court of disposition, and year of final disposition. (E.g., Condon v. Patel, 459 N.E.2d 1205 [Ind. Ct. App. 1984].)

Digests.

West's Indiana Digest and supplements; (covers Indiana decisions, 1817-date); North Eastern Digest (1933-1971); West's American Digest System (including Century Digest [1658-1896], Decennial Digest [1897-2001], and General Digest [2001-date]).

Other Indiana digests: Callaghan's Indiana Digest; Burns Indiana Digest and supplement; Davis' New Indiana Digest; Ripley's Digest; Black's Digest; Woolworth's Digest; Remy's Digest. The four last named cover only earlier reports.

6.04 STATUTES:

The 1975 Legislature officially revised and codified statutes of this State into Indiana Code. http://www.in.gov/legislative/ic/code. Code is divided into 36 titles and each title is then subdivided into articles, chapters, and sections. Thus, citation, IC 29-1-5-1 would be found under Title 29, Article 1, Chapter 5, and Section 1 of Indiana Code.

Unofficial Compilations.

Burns Indiana Statutes Annotated; West's Annotated Indiana Code.

Public Laws (PL) of Legislature are not included in official publication of Indiana Code, but are added in separate volumes of sessions.

Uniform Acts of the National Conference of Commissioners on Uniform State Laws enacted in state are: †Anatomical Gift 1987 (1987, adopted 1997, 2002); Arbitration of 1956 (1956, adopted 1969, 1998); Athlete Agents (2000, adopted 2001); Certification of Questions of Law (1967, adopted 1971); Child Custody Jurisdiction of 1968 (1977, 1997); †Commercial Code (1963, 2001); Conservation Easement (1981, adopted 1984, 2002); Consumer Credit Code of 1968 (1971, 2001); Controlled Substances of 1970 (1977, 2002); Custodial Trust (1987, adopted 2003); Declaratory Judgments (1927, 1998); Determination of Death (1980, adopted 1986); Disclaimer of Property Interests (1999, adopted 2003); †Electronic Transactions (2000, 2001); Extradition of Persons of Unsound Mind (1935, 1992); †Fiduciaries (1927, 1982); †Fraudulent Transfer (1994, 2002); Interstate Family Support of 1996 (1996, 1997); †Limited Partnership of 1976 (1988, 2001); †Management of Institutional Funds (1989, 1995); Multiple Persons Accounts of 1969 (2002); Partnership of 1914 (1949, 1995); Premarital Agreement (1995, 1997); †Principal and Income of 1997 (2002); Prudent Investor (1999); Revised UCC Article 6 (1977); Revised UCC Article 8, Investment Securities (1995); Revised UCC Article 9, Secured Transactions (2000); †Securities of 1956 (1961, 2001) effective July 1, 2008; Simultaneous Death of 1940 (1941, 1982); Statutory Rule Against Perpetuities (1991, 2002); Testamentary Additions to Trusts (1954); †TOD Security Registration (1997, 2002); Trade Secrets of 1979 (1982, 1993); Transfers to Minors (1989, 1994); UCC Article 2A, Leases (1990, 1991); UCC Article 5, Letters of Credit (1996); Unclaimed Property of 1995 (1996, 2002).

Other Uniform Acts enacted in state are: †Attendance of Witnesses from Without the State in Criminal Cases (1983); †Criminal Extradiction (1935, 1984); Fresh Pursuit (1949, 1981); Health-Care Consent (1987, 1993); †Simplification of Fiduciary Security Transfers (1961, 1989); Veterans' Guardianship of 1942 (1953, 1990); Military Justice (2003); Proof of Statutes (1998); Warehouse Receipts (1986).

†Adopted with significant variations or modifications. See appropriate topics.

Uniform Commercial Code enacted by 1963 Legislature and in effect since July 1, 1964. (IC 26-1-1-101 et seq.).

See category 3 Business Regulation and Commerce, topic 3.09 Commercial Code.

For text of Uniform Acts falling within the scope of the Martindale-Hubbell Law Digests see Uniform and Model Acts section.

6.05 UNIFORM LAWS:

For list of Uniform Acts in force in this state see topic 6.04 Statutes. For text of Uniform Acts within the scope of the Martindale-Hubbell Law Digests see Uniform and Model Acts section.

7 CRIMINAL LAW

7.00A BAIL:

See topic 7.01 Criminal Law.

7.01 CRIMINAL LAW:

Generally, IC Tit. 35, Arts. 41-49 define crimes, IC Tit. 35, Art. 50 governs sentences and IC Tit. 35, and Arts. 32-38 govern procedure.

Criminal liability for omission can only result when one has statutory, common law or contractual duty to act. (IC 35-41-2-1[a]).

Guidelines for use of deadly force are those approved by U.S. Supreme Court in Tennessee v. Garner, 471 U.S. 1, 105 S.Ct. 1694, 85 L.E. 2d 1 (1985).

Indictment or Information.

Except as provided in IC 12-15-23-6(d) (Medicaid fraud), all prosecutions of crimes shall be instituted by filing of information or indictment by prosecuting attorney, in court with jurisdiction over crime charged. (IC 35-34-1-1[b]).

Bail.

Offenses other than murder and treason are bailable. Murder and treason are not bailable where proof is evident or presumption strong. (Const., art. I, § 17; IC 35-33-8-2). Persons arrested for domestic violence crimes cannot be released on bail for first eight hours. (IC 35-33-1-1.7, IC 35-33-8-6.5). Special provisions apply to bail for sexually violent predators. (IC 35-33-8-3.5).

Bail for Juveniles.

Juveniles may not be released on bail unless jurisdiction is waived under IC 31-30-3-1 et seq. (IC 31-37-6-9).

Violent Crime Victims’ Compensation Fund.

Persons injured as result of violent crimes or terrorist act may receive assistance. (IC 5-2-6.1-1 et seq.). Victims of crimes entitled to certain information and services under Victim Assistance Programs. (IC 35-40-1-1 et seq. governing victims rights generally).

Interstate Compact for Supervision of Parolees and Probationers.

Out-of-State Probationer or Parolee. (IC 11-13-4-1 et seq.). Interstate Parole and Probation Hearings. (IC 11-13-5-1 et seq.).

Uniform Act to Secure Attendance of Witnesses from Without a State in Criminal Proceedings.

Adopted. (IC 35-37-5-1 et seq.).

Uniform Criminal Extradition Act.

Adopted, but is original act of 1926 not 1936 version. (IC 35-33-10-3).

Agreement in Detainers.

Adopted. (IC 35-33-10-4).

Child Abuse Registry.

Established with tracking system and automated child protection system. (IC 31-33-17-1 et seq.).

Sex Offender Registry.

Established. (IC 5-2-12-1 et seq.) and located at http://www.insor.org/insasoweb/.

Probation.

Established. (IC 35-38-2-1).

8 DEBTOR AND CREDITOR

8.01 ASSIGNMENTS:

Uniform Commercial Code in effect since July 1, 1964. (IC 26-1-1-101 et seq.).

Action may be continued by or against original party, unless court upon motion directs person to whom interest is transferred be substituted in action or be joined with original party. (Rule TR 25C).

Wages.

Any direction given by employee to his or her employer to make deduction from wages to be earned by employee constitutes assignment of wages. (IC 22-2-6-1).

Assignment of wages is valid only if: (1) It is in writing and signed by employee, by its terms revocable at any time by employee upon written notice, and agreed to in writing by employer; (2) executed copy is delivered to employer within ten days of date of its execution; and (3) it is made for purpose of paying any of 13 specified obligations, including dues owed by employee to labor organization of which he or she is member. (IC 22-2-6-2).

No assignment of wages or salary by any employee or wage earner to any wage broker as defined in IC 22-2-7-1 is valid unless it is for fixed and definite part of wages or salary earned or to be earned during period not to exceed 30 days immediately following date of assignment. (IC 22-2-7-2).

No assignment of wages by married person residing in Indiana who is living with that person's spouse to any wage broker is valid without consent of spouse evidenced by spouse's signature to assignment executed and acknowledged before notary public except for deductions applied to credit union account or nonprofit organizations of employees. (IC 22-2-7-4).

No assignment of wages is valid unless notice in writing of same accompanied by copy of assignment is given to employer within ten days from date of its execution. (IC 22-2-7-5).

Court may require support payments be made through clerk of court or state central collection unit. Clerk of court shall forward payments to Title IV-D agency if child receives assistance under federal Aid to Families with Dependent Children Program (42 U.S.C. 601 et seq.) or federal Temporary Assistance to Needy Families Program (45 CFR 265) and assignment in effect against person obligated to make payments. Clerk is obligated to maintain specified records. (IC 31-16-10-1 et seq.).

See also category 3 Business Regulation and Commerce, topic 3.09 Commercial Code.

8.02 ATTACHMENT:

Rules of Trial Procedure extend historical remedies of attachment. (IC 34-25-2-1; Rule TR 64 [B]).

Actions in Which Allowed.

Attachment is allowed upon any claim of creditor state, municipal corporation, political subdivision or school corporation if plaintiff's complaint is for money or to determine rights in property or obligation attached or garnished. (IC-34-25-2-1; Rule TR 64[B]). See subhead Grounds, infra.

Courts Which May Issue Writ.

Any court of first instance having civil jurisdiction.

In Whose Favor Writ May Issue.

Any plaintiff, whether resident or nonresident.

Claims on Which Writ May Issue.

Attachment may issue on a claim which is not payable in the state. (96 Ind. App. 325, 183 N.E. 699, reh'g denied, 96 Ind. App. 341, 185 N.E. 169). As to unmatured claims, see infra, subhead Grounds.

Time for Issuance.

Attachment may issue any time, or during pendency of action after filing of complaint, even though summons has not been served (183 N.E. 699), and on Sundays if plaintiff's affidavit shows that defendant is about to abscond on that day to injury of plaintiff (IC 34-25-2-8).

Grounds.

Attachment may be issued when defendant is foreign corporation or nonresident, or being resident, if he secretes himself so that summons may not be served upon him, or is secretly about to leave state, or has departed therefrom, or is removing his property therefrom or has sold or is about to sell or to dispose of his property subject to execution with intent to defraud or delay his creditors, state, municipal corporation, political subdivision, or school corporation, or is person whose residence and whereabouts are unknown and cannot be determined after reasonable investigation before commencement of action. (IC 34-25-2-1 to -2; Rule TR 64[B]).

Unmatured Claims.

Attachment may not issue on unmatured claim, except on ground that defendant is removing or has removed his person from Indiana with intent to defraud, has sold or is about to sell or convey his property with intent to defraud or is removing or about to remove property subject to execution leaving an insufficient excess subject to execution. (IC 34-25-2-1).

Proceedings to Obtain.

Any plaintiff except state, if process is returned indicating that defendant was not found, must file affidavit showing nature and amount of his claim and existence of one or more of statutory grounds for attachments. (IC 34-25-2-4 and IC 34-25-2-24). Writ of attachment against defendant's real estate or his interest is effectively served by recordation of action in appropriate lis pendens record, and, unless vacant, by serving writ of attachment or notice thereof upon person in possession of land. (Rule TR 64[B][6]). Exception: No attachment shall issue against any debtor whose spouse and family remain in county of debtor's usual residence prior to his absence, until debtor has been absent from state for more than one year, unless attempt has been made to conceal his absence. Exception does not apply when debtor is removing, selling or otherwise disposing or about to dispose of his property. (IC 34-25-2-2).

Attachment Bond.

Any plaintiff except State and except in actions filed by attorney general under IC 5-11-5-1 or IC 5-11-6-1, if process is returned indicating that defendant was not found, must file written undertaking with security to approval of county clerk conditioned that plaintiff will prosecute attachment (IC 34-25-2-5 and IC 34-25-2-24) and pay defendant all damages he may sustain if proceedings prove to be wrongful or oppressive (IC 34-25-2-23).

Levy and Lien.

Attachment must be levied first on personalty and may be levied on realty if sufficient personalty is not found. (IC 34-25-2-11).

Indemnity.

There is no statutory authority for the officer to demand indemnity before making a levy.

Lien attaches from time of delivery of order of attachment to sheriff. (IC 34-25-2-10).

Release of Property.

Defendant or any other person having had possession may secure release of property by giving bond for the appraised value of the goods attached or for payment of any judgment which plaintiff may secure. (IC 34-25-2-12).

Sale.

Perishable goods held under attachment may be ordered sold at public auction by the court upon reasonable notice and proceeds shall be deposited with clerk. (IC 34-25-2-17).

Third Party Claims.

Where personal property is in the possession of officer by virtue of writ of attachment and third person brings action to replevy same, such officer may demand of attachment plaintiff indemnifying bond against loss for attorney's fees or judgment for damages and costs, and after five days in default thereof may deliver property to replevin plaintiff. (IC 32-35-2-26).

Consigned goods are attached subject to lien of consignee. (IC-34-25-2-15).

Adverse claimants to attached property may be examined under oath. (IC 34-25-2-14).

Intervention of Other Creditors.

Any other creditors of defendant may enter complaint and file their affidavits and bonds and prove their claims as parties to the original action at any time before final judgment. The money realized from sale and garnishees after paying costs and expenses is shared pro rata on the amount of all claims filed. The original attaching creditor has no preference. (IC 34-25-3-13; 34-25-1-4).

Dismissal by original creditor does not affect intervening creditors. (IC 34-25-2-19).

Appeals.

After judgment for defendant, attached property is released unless plaintiff files notice of intention to appeal and notice that plaintiff will file bond within 72 hours. (IC 34-25-2-21).

8.03 [RESERVED]

8.04 CREDITORS' SUITS:

There is but one form of action in Indiana, but suits in the nature of creditors' bills may be brought by a creditor to reach assets fraudulently concealed. If receiver has been appointed, receiver has exclusive right to bring such action or bring suit. (128 Ind. 222, 27 N.E. 494).

Procedure for filing, consideration, allowance or trial of claims in receiverships and assignments for benefit of creditors must, insofar as is practical, conform with procedures relating to claims in decedents' estates. (Rule TR 66[D]).

8.05 EXECUTIONS:

Process to enforce a judgment or a decree for payment of money must be by writ of execution, unless court directs otherwise or a particular statute provides otherwise. (Rule TR 69).

Time for Issuance.

Execution from court of record may issue at any time within ten years after rendition of judgment, but thereafter may be issued only on leave of court obtained on notice and motion. (IC 34-55-1-2). Execution may issue to sheriff of any county in state, but if it requires delivery of real or personal property, it must be issued to sheriff of county where property is situated. (IC 34-55-1-10; 835 F.2d 1215). Execution is lien on personal property within jurisdiction of officer from time of delivery, but if there are several executions in hands of different officers, first levied has preference, and divests all liens created by prior delivery. (IC 34-55-1-12). Execution to another county from that in which judgment is rendered is lien against real estate of judgment debtor in such other county only from time of levy. (IC 34-55-9-5). Executions are returnable in 90 days unless judgment creditor designates shorter time in praecipe. (IC 34-55-1-11). On judgment rendered on delivery bonds no stay is permitted, and execution is returnable in 30 days. (IC 34-55-5-6).

Exemptions.

See topic 8.06 Exemptions.

Stay of Execution.

Execution upon judgment for recovery of money or sale of property may be stayed and personal property taken in execution may be delivered up as now provided by law. However, party has right to protection of surety bond or security or to obtain relief by furnishing surety bond, letter of credit, or security before or as condition of final judgment, including such protection or relief in replevin, ejectment, attachment and injunction action, upon judicial review of administrative actions, in suits upon lost instrument, for costs and the like. (Rule TR 62[F]). Stays are not allowed on judgments on delivery bonds, for money received in fiduciary capacity or for breach of official duty. (IC 34-55-2-10; IC 34-55-5-6).

Sale.

Before property may be sold, it must be appraised by two disinterested householders of neighborhood where levy is, one of whom shall be selected by plaintiff and other by defendant, and sale cannot be effected for less than two-thirds of appraised value, unless judgment orders that it is to be executed without relief from appraisement laws. Except for requirements of appraisal and requirement that land sell for at least two-thirds of its appraised value, sale of real estate must be conducted under same rule and same procedures applicable to foreclosure of mortgages. Real estate cannot be sold until elapse of six months from time judgment or execution thereon becomes lien on property. (Rule TR 69[A]; IC 34-55-4-1 – 34-55-4-7; IC 34-54-1-1; IC 34-54-1-2).

Unless otherwise ordered by court, sheriff or person conducting sale of any property upon execution is not required to offer it for sale in any particular order or in parcels, or to first offer rents and profits, and is required to sell real and personal property separately pursuant to applicable law. (Rule TR 69[A]). Court may order judgment creditor, person seeking sale, or officer conducting sale to procure qualified title opinion or title insurance policy with respect to interest of person whose land is being sold. (Rule TR 69[F]).

Supplementary Proceedings.

Proceedings supplemental to execution may be enforced by verified motion or with affidavits in court where judgment is rendered. If court determines that motion meets statutory requirements as to supplementary proceedings it will, ex parte and without notice, order judgment debtor, other named party defendants and garnisher to appear for hearing thereon or to answer interrogatories attached to motion. Date fixed for appearance and hearing cannot be less than 20 days after service. Judgment creditor or debtor may utilize discovery provisions. Witnesses may be required to appear and testify in supplementary proceedings. Court shall issue order directing depository financial institution to place hold on deposit account in which judgment debtor has interest, either individually or jointly, when certain conditions are met. Such order is subject to limitations of IC 34-55-8-7. (IC 34-55-8-2 – 34-55-8-8; Rule TR 69[E]). Proceedings supplemental to execution are applicable to debt that is or will be due from garnishee to judgment debtor, even though amount of debt is not presently discernible. Thus, third party who has property or will be indebted to judgment debtor at any time, in undetermined amount, is subject to proceedings supplemental. (627 N.E.2d 1323; IC 34-55-8-5).

See also topic 8.09 Garnishment.

8.06 EXEMPTIONS:

On judgments obtained after Sept. 30, 1977, every debtor domiciled in state may exempt from levy or sale on execution or other final process, for judgment founded upon express or implied contract or tort claim, following nonexclusive list of property: Up to $15,000 of real estate or personal property constituting personal or family residence of debtor; up to $8,000 other real estate or tangible personal property; up to $300 intangible personal property, including choses in action; professionally prescribed health aids, real estate held by entireties (unless debtor and debtor’s spouse are jointly liable); interests, whether vested or not, that judgment debtor has in retirement plan to extent of contributions made by or on behalf of debtor (including roll-overs of contributions), and earnings on contributions, so long as such contributions were not subject to federal income tax at time of contributions and such earnings are not subject to federal income tax at time of judgment; money that is in medical care savings account established under IC 6-8-11. (IC 34-55-10-2); money that is in health savings account established under § 223 of Internal Revenue Code of 1986; interests in qualified tuition program as defined in § 529(b) of Internal Revenue Code of 1986, except to extent that funds are attributable to excess contributions or earnings on excess contributions, made by debtor within one year before date of levy, or excess over five thousand dollars of aggregate contributions made by debtor for all programs and education savings accounts having same designated beneficiary not later than one year before and not earlier than two years before date of levy; interests in education savings account as defined in § 530(b) of Internal Revenue Code of 1986, subject to same limitations imposed on qualified tuition programs; and debtor’s interest in refund or credit received or to be received under § 32 of Internal Revenue Code of 1986. Creditor of one spouse may not seize, sell or attach entireties property. (172 Ind. App. 279).

Right to exempt property may be claimed by spouse of execution defendant if latter is absent. (IC 34-55-10-13).

Municipal property is exempt from execution except where judgment arises from action against another municipality or state. (IC 34-55-12-2).

There is no exemption for real estate from mechanic’s or purchase money liens, nor any exemption from sale for taxes. (IC 34-55-10-14).

Claim of Exemption.

The debtor must file with the officer a schedule of all of his property, and claim property he desires to exempt, which shall be appraised under direction of officer. (IC 34-55-10-3 to -12).

Sale of Property.

Provision is made for sale of property claimed under exemption law, but whose value exceeds exemption. (IC 34-55-10-9).

Voluntary Liens.

Real estate or personal property upon which debtor has voluntarily granted lien is not, to extent of balance due on debt secured by lien: (1) Subject to IC 34-55-10; or (2) exempt from levy or sale on execution or any other final process from court. (IC 34-55-10-2[e]).

8.07 FORECLOSURE:

See topic 8.12 Liens; category 20 Mortgages, topic 20.03 Mortgages of Real Property.

8.08 FRAUDULENT SALES AND CONVEYANCES:

Uniform Commercial Code in effect since July 1, 1964.

Uniform Fraudulent Transfer Act adopted and applies to all transfers made and obligations incurred after June 30, 1994. (IC 32-18-2-1 et seq.).

Bulk Sales.

Indiana's Bulk Sales Act was repealed by P.L. 77-2007, § 4, effective July 1, 2007.

8.09 GARNISHMENT:

Uniform Consumer Credit Code, in effect since Oct. 1, 1971, prescribes maximum earnings which may be garnished. (IC 24-4.5-5-105). All other assets of debtor in possession of third persons may be reached by garnishment (IC 34-25-3-1 to IC 34-25-3-15; IC 34-25-2-19 – 34-25-2-24; and IC 34-25-1-4) or by proceedings supplementary to execution (IC 34-55-8-1 – 34-55-8-9). Garnishment will be allowed in favor of plaintiff suing upon claim for money, whether founded on contract, tort, equity, child support, or any other theory and whether it is liquidated, contingent or unliquidated; or upon claim to determine rights in property or obligation garnished. (Rule TR 64[B][3]). Proceedings supplementary may be had after return of execution on any type of judgment. (IC 34-55-8-1). See Rule TR 69(E).

Property Which May Be Reached.

On proceedings supplementary, property in excess of statutory exemptions may be reached. (IC 34-55-8-7). Any interest in tangible or intangible property owned by defendant can be subject to garnishment if it is subject to execution, proceedings supplementary to execution or any creditor process allowed by law. Wages or salaries shall not be subject to attachment and garnishment under IC 34-25. (TR 64[B][2]; Rule TR 64[B]).

Money judgment creditors who wish to garnish deposit accounts in financial institutions must comply with notice procedures, including those procedures regarding notice to be sent by such financial institution to debtor concerning legal exemptions from garnishment and right to prompt hearing. (IC 28-9-3-4). Upon receipt of required documents and compliance with notice procedures, financial institution shall restrict withdrawal from deposit within commercially reasonable time after receiving documents and process. (IC 28-9-4-2). Restriction on withdrawal from deposit account may not exceed 90 days pending court's determination of rights. (IC 28-9-4-2).

It is not objectionable that property or obligation garnished is in possession of plaintiff or is owing by plaintiff to defendant or by defendant to plaintiff. (TR 64[B][4]; Rule TR 64[B]).

Jurisdiction.

Proceedings supplementary are within jurisdiction of any circuit, superior, municipal or city court. (IC 34-55-8-1). Garnishment proceedings are within jurisdiction of any court of general jurisdiction. (IC 34-25-3-2). Jurisdiction is denied any court if plaintiff-creditor and principal debtor are both nonresidents and garnishee doing business within state owes debtor for wages or personal earnings. (IC 34-25-1-2).

Proceedings to Obtain.

Upon plaintiff's filing an affidavit and bond to protect garnishee, clerk issues summons making garnishee a party. (IC 34-25-3-2). No garnishment of unpaid earnings is allowed prior to entry of judgment against debtor. (IC 24-4.5-5-104). After return of execution and upon affidavit, but without requirement of bond, plaintiff may reach his debtor's debtor on proceedings supplementary. (IC 34-55-8-5). See Rule TR 69(E).

Answer of Garnishee.

Garnishee must furnish to sheriff certificate within five days of service of writ, listing schedule of any interest held by debtor in garnishee entity, any property of debtor held by garnishee, and any debts owed by garnishee to debtor. (IC 34-25-3-4). Garnishee failing to answer may be defaulted and judgment rendered against him as against other defendants. (IC 34-25-3-5). Third parties in proceedings supplementary need appear only if specially ordered to do so by court. Normal practice provides only for answering interrogatories by mail. (IC 34-55-8-5).

Practice.

A garnishee expected to abscond may be held under bail. (IC 34-25-3-6). Garnishee defendants may be examined under oath as to property in their possession and are liable for disbursements from time of service of writ. (IC 34-25-3-3, IC 34-25-3-4). Garnishees may discharge themselves from liability by delivery of defendant's property to sheriff or court. (IC 34-25-3-11).

Governmental organization, or a representative, including guardian, receiver, assignee for benefit of creditors, trustee or representative of decedent's estate may be named as garnishee and bound by duties of garnishee. (Rule TR 64[B][5]).

Adverse Claims.

Other creditors of the defendant debtor may join in a garnishment proceeding by filing affidavits and bond. (IC 34-25-3-13). Thereafter dismissal by original plaintiff does not dismiss as to such subsequent creditors. (IC 34-25-2-19). No statutory provision is made for other creditors of judgment debtor joining in proceeding supplementary.

Judgment.

After hearing with notice to debtor, court may order application of property, income or profits to judgment. (IC 34-55-8-7). Final judgment cannot be rendered against garnishee until action against defendant debtor is determined. (IC 34-25-3-7).

Earnings.

Maximum amount to be garnished is 25% of disposable earnings or amount by which disposable earnings exceed 30 times federal minimum wage, whichever is less. Maximum amount to be garnished for support orders is not to exceed 50% of disposable earnings where individual is supporting spouse or child, or 60% where he is not. These increase to 55% and 65% if withholding is to enforce support order for period more than 12 weeks prior to withholding. This limitation applies to cumulative total of all liens and not merely lien of one creditor on proceedings supplementary. Employer required to make deductions is entitled to greater of $12 or 3% of total deducted as fee for services; ½ of fee is to be borne by debtor, and that amount may be deducted from disposable earnings. ½ of fee is chargeable to creditor and may be deducted from amount due. Judgment debt is not increased by amount of collection fee. Support withholding orders take priority over garnishment orders. If person is subject to both, garnishment is allowed only to extent that disposable income withheld under support order does not exceed statutory maximum amount subject to garnishment. (IC 24-4.5-5-105).

8.10 HOMESTEADS:

Urban homesteading is allowed in any city, town or county (unit) adopting ordinance to administer program in accord with IC 36-7-17-1 – 36-7-17-12. Family dwellings may be purchased from unit by qualified persons or community organization under conditions for application provided in IC 36-7-17-7.

Duties of Applicants.

Persons must reside in dwelling as principal residence of not less than three years. Community organizations must agree to list dwelling for sale within 12 months after possession. Applicants must comply with conditions listed in IC 36-7-17-6 relating to bringing residence into compliance with applicable code standards, carrying insurance on dwelling, and other terms agency may impose.

Conveyance.

Real property may be conveyed by conditional sales contract or determinable fee, on conditions set forth in IC 36-7-17-7(c) and (d). Fee simple title is conveyed after person or community organization meets all of requirements under this Chapter. (IC 36-7-17-9).

For exempt real property, see topic 8.06 Exemptions.

8.11 JUDGMENT NOTES:

See category 3 Business Regulation and Commerce, topic 3.02 Bills and Notes.

8.12 [RESERVED]

8.13 LIENS:

Uniform Commercial Code in effect since July 1, 1964. (IC 26-1-1-101 et seq.).

Mortgagor, or other person with right to demand, may cause forfeiture and recover up to $500 with costs and attorney's fees for failure, neglect or refusal, to release, discharge, and satisfy of record any mortgage, mechanic's lien, judgment or other lien when obligation secured, including interest, has been fully paid. Cause arises after 15 days from written demand by registered or certified mail, return receipt requested. (IC 32-28-1-2).

Laborers and employees of individuals or corporations have preferred claims to amount of $600 against assets for wages earned during the three months preceding seizure of property of employer on any mesne or final process, suspension of business by action of creditors, or appointment of trustee or receiver. (IC 22-2-10-1). Corporate employees have special priority lien upon corporate property and earnings for work performed from date of employment. Corporate employee lien arising out of sale of real estate is limited to lien upon real estate. Lien acquired by filing notice with county recorder and enforced by filing complaint within six months of acquiring lien. (IC 32-28-12-1 – 32-28-12-7).

Boats, vessels and water craft are subject to liens for supplies, wages, repairs, equipment, etc. (IC 32-33-2-1). Lien is dischargeable before judgment by filing bond with sureties for amount of lien. (IC 32-33-2-7).

Keepers of hotels, motels, boarding houses, restaurants and the like have a lien upon baggage or other articles of value belonging to the boarder or lodger being in house to extent of bill for food, lodging, entertainment, and other accommodation. Keeper may sell such articles after 60 days by giving ten days notice. (IC 32-33-6-1).

Hospital has lien for reasonable service fees or expenses on any judgment for personal injuries if recorded on judgment docket, except in cases under state or federal worker's compensation acts or federal liability act. (IC 32-33-4-1).

Providers of emergency ambulance services have lien for reasonable and necessary service fees on patient's cause of action, suit, or claim arising from illness or injury. Lienholder perfects lien by filing verified statement with county recorder within 60 days after providing services. Lien does not apply to cases under federal worker's compensation acts or federal employers' liability act. (IC 32-33-5-1 – 32-33-5-8).

Bailees.

All entities engaged in storing, warehousing and forwarding goods, wares, and merchandise have lien upon such goods, wares, and merchandise to extent of value of their services. All such merchandise that has remained in their possession for six months or more may, with ten days notice, be sold at public auction to pay amount of lien. (IC 32-33-14-1 – 32-33-14-3).

Persons towing, repairing, storing, servicing, or furnishing supplies for motor vehicles, airplanes, construction or farm machinery or maintain motor vehicle garage, airport or repair shop for airplanes, or repair shop which services construction or farm machinery have lien if filed in recorder's office of county where repairs, storage or servicing was performed or supplies were furnished within 60 days after performance which may be foreclosed in circuit or superior court within one year from time lien is recorded. (IC 32-33-10-1 – 32-33-10-10).

Transfer men and draymen have a lien upon goods, merchandise, etc., for charges for hauling, packing, transferring, conveying or erecting the same and for money paid for freight, storage or demurrage on the same. Notice of lien must be filed within 60 days after performing such labor or payment of money. No redemption after sale. Lien may be foreclosed within one year from time lien is recorded. (IC 32-33-11-1 – 32-33-11-7).

Mechanics and tradesmen have a lien upon goods left for alteration or repair, liverymen and feeders on stock left with them, blacksmiths on animals shod, forwarding men and commission merchants on goods in storage, watch, clock or jewelry workers on articles worked on, all regulated by statute. (IC 32-33-9-1 – 32-33-9-8, IC 32-33-8-1, IC 32-33-1-1 – 32-33-1-5, IC 32-33-14-1 – 32-33-14-3, IC 32-33-13-1 – 32-33-13-3).

Owner or operator of threshing machine or other farm machinery has a lien upon grain or seed threshed or crops produced to secure payment of services. Notice of lien must be filed within 30 days after work for plowing, disking or cultivating and ten days after work for combining, bailing or picking. (IC 32-33-12-1 – 32-33-12-2).

Board of Public Works has lien against any lot, parcel of real estate, or building connected with and using works by or through sewage system of city or town for payment of rates or charges assessed by board for said sewage service. (IC 36-9-23-29 – 36-9-23-34).

Electronic home entertainment repairmen have possessory lien on equipment repaired to extent of reasonable value of labor performed and materials used. Lienholder may sell equipment in his possession at public auction if payment not made within 60 days of due date after giving owner 30 days notice of intent to sell. (IC 32-33-15-1 – 32-33-15-4).

Dry cleaners, launderers and servicers of household goods have liens for services which have not been paid for 90 days or more. (IC 32-33-3-1 – IC 32-33-3-5).

Engineers, Surveyors and Architects.

Registered professional engineers, registered land surveyors and registered architects may have same lien for services rendered as is provided for in mechanics' lien statute. (IC 32-28-11-1 – 32-28-11-2).

Fabricators have possessory lien on dies, molds, jig, forms or patterns to extent of amount due for work performed. Lienholder may sell items at auction if payment not made within 60 days of due date after giving owner and perfected secured parties 30 days notice of intent to sell. (IC 32-33-16-1 – 32-33-16-9).

Landlords have lien for payment of rent upon crops raised on leased premises. Lien acquired by filing in proper place specified in IC 26-1-9.1-501, 30 days prior to maturity of crop notice specifying amount claimed and substantial description of real estate. Landlord may sell crop subject to lien when rent becomes overdue, but tenant has right to remove his portion of crop not subject to lien after notifying landlord. (IC 32-31-1-19).

Federal Liens.

In order to perfect any federal lien on real property or any federal tax lien on personal property (including liens for federal taxes and superfund liability), agency must file notice of lien in recorder's office of county where subject real or personal property is located. (IC 36-2-11-25).

Mechanics' Liens.

All persons performing labor or furnishing material or machinery for erecting, repairing or removing any Class 2 structure (as defined in IC 22-12-1-5), have lien on said structure and upon real estate upon which structure is situated, for their pay, by filing in recorder's office within 60 days after time labor was performed or material furnished, sworn statement in duplicate of intention to hold lien upon such property, specifically setting forth amount claimed, and giving substantial description of lot or land upon which structure stands. All other persons who wish to acquire lien upon any property shall file same in recorder's office within 90 days after time labor was performed or material furnished. Suppliers to materialmen, however, are not entitled to hold liens. (IC 32-28-3-1 – 32-28-3-15).

Such lien may be enforced by suit in circuit or superior court, and if no action is brought within one year from time notice of lien is filed to enforce same, lien becomes null and void. (IC 32-28-3-6). In case of liens relating to Class 2 structures and certain public or not-for-profit utilities, mechanics' liens have priority over all liens suffered or created after date when mechanic or other person began to perform labor or furnish materials or machinery (this is limited by fact that notice of lien must be recorded within 60 days after labor has been performed or materials have been furnished, except liens of other mechanics and materialmen, as to which there is no priority). (IC 32-28-3-5). In case of all other mechanics' liens, mortgage of lender has priority over all liens under this chapter recorded after date mortgage was recorded to extent of funds actually owed to lender for specific project to which lien rights relate. Notice of intention to hold lien, otherwise valid and enforceable, but filed prior to Mar. 10, 1967, is valid and enforceable. (IC 32-28-3-4).

Railroad laborers and mechanics have a lien on right of way and franchises and appurtenances of railways on filing notice with recorder. Person who, in doing business with railroad company, has constructed building on portion of right of way adjacent to such person's place of business may have lien to extent of fair market value of improvement on that portion of right of way in event of sale or abandonment by railroad company. (IC 32-28-3-12).

Provision or stipulation in contract between property owner and contractor, providing that there shall be no lien on premises, may only be included in construction contract for construction, alteration, or repair of Class 2 structure, or contract to prepare property for Class 2 residential construction (as defined in IC 22-12-1-5), not-for-profit utilities or quasi-governmental utilities. Such contracts are not valid against subcontractors, laborers, etc., unless in writing, containing specific references by legal description of real estate to be improved, acknowledged in same manner as deeds, and recorded within five days of execution. No-lien contract need not be posted on premises, and is not valid against any work or material supplied prior to recording of such contract. (IC 32-28-3-1).

In construction contracts other than contracts for Class 2 structures, not-for-profit utilities or quasi-governmental utilities, or contracts to prepare property for Class 2 residential construction, provisions in such contract for improvement of real estate in Indiana is void if provision requires person to waive right to lien against real estate or to claim against payment bond before person is paid for labor or materials furnished. Provisions under which person agrees not to file notice of intention to hold lien is void. (IC 32-28-3-16).

Provision in contract for improvement of real estate in Indiana is void if provision makes contract subject to laws of another state or requires that any litigation, arbitration, or other dispute resolution process on contract occur in another state. (IC 32-28-3-17).

Except as to contracts for construction of Class 2 structures (as defined in IC 22-12-1-5), if contract provides for improvement of real estate and conditions right of provider to receive payment on obligor’s receipt of payment from third person with whom provider does not have contractual relationship, obligor’s receipt of payment from third person shall not be condition precedent to, or any way limit, or be defense to provider’s right to record or foreclose lien against real estate that was improved by provider’s labor, material, or equipment. (IC 32-28-3-18).

Owner may give notice to lienholder to sue within 30 days after receiving notice, and if he does not do so lien is discharged. (IC 32-28-3-10).

Mechanics’ liens are released by recorder after 13 months from filing, on application of owner supported by filed affidavit alleging no suit is pending to enforce lien and no unsatisfied judgment has been rendered on lien. (IC 32-28-6-1 – 32-28-6-2). Liquidated damages provided if lienholder fails to cause lien to be released after it has been satisfied. (IC 32-28-6-1).

Lien may be released by filing bond with sureties before judgment. (IC 32-28-3-11).

No redemption after sale.

Criminal penalty provided for certain acts. (IC 32-28-3-15).

When owner-occupied dwelling is involved, if work was done or delivery made to other than owner or his representative, then written notice of work or delivery and existence of lien rights must be given to owner within 30 days from date of first work or delivery. When original construction is done for intended occupancy of owner upon whose land construction is performed, then as to all work and materials furnished to other than owner or his representative, written notice of such work and material and existence of lien rights must be given to owner within 90 (or in case of Class 2 structures, 60) days from date of first work or delivery. In all cases involving original construction, mechanic’s lien is not valid against innocent purchaser for value without notice unless notice of intent to hold lien is properly recorded prior to recording of deed by which such purchaser takes title. This paragraph applies only to single or double family dwelling. (IC 32-28-3-1).

Public Works.

Contractor must execute good and sufficient bond, in amount equal to contract price, conditioned on payment for all labor and materials. Materialmen and laborers may also claim against funds due contractor from the public agency. Claim is made by filing duplicate verified statements of amount due with public agency within 60 days of last services or materials furnished. (IC 5-16-5-1 – 5-16-5-2).

Common Law Liens.

Common law lien is lien against real or personal property that is not statutory lien, security interest created by agreement, or judicial lien obtained by legal or equitable process or proceeding. (IC 32-28-13-1). Person asserting common law lien must prove existence of lien as prescribed by common law of Indiana. (IC 32-28-13-4). No common law lien exists against property of public official for performance or nonperformance of public official's official duty. (IC 32-28-13-4). Common law lien is void if common law lienholder fails to commence suit on lien within 180 days after it is recorded. (IC 32-28-13-4). Party may record common law lien by recording statement of intent to hold lien in county where property is located, including statement of amount claimed, full description of property and legal basis upon which right to hold common law lien is asserted. (IC 32-28-13-5). Statement must be recorded no later than 60 days after date of last service having been provided. (IC 32-28-13-5). Property owner may give notice to lienholder to sue within 30 days after notice is given; if suit is not commenced, lien is void. (IC 32-28-13-6). Upon recording of affidavit from property owner that suit was not commenced, lien is released. (IC 32-28-13-7). Lienholder must file certificate of satisfaction when lien is satisfied. (IC 32-28-13-8).

For other liens, see categories 3 Business Regulation and Commerce, topic Warehousemen; Employment, topic Labor Relations; Legal Profession, topic Attorneys and Counselors; Mineral, Water and Fishing Rights, topic Mines and Minerals. See also category 3 Business Regulation and Commerce, topic 3.09 Commercial Code.

8.14 MECHANICS' LIENS:

See topic 8.12 Liens.

8.15 PLEDGES:

Uniform Commercial Code in effect since July 1, 1964. (IC 26-1-1-101 et seq.).

See also category 3 Business Regulation and Commerce, topic 3.09 Commercial Code.

8.16 RECEIVERS:

Receiver may be appointed by court in following cases: (1) In action by vendor to vacate fraudulent purchase of property, or by creditor to subject any property or fund to his claim; (2) in actions between partners, or persons jointly interested in any property or fund; (3) in all actions when it is shown that property, fund or rent, and profits in controversy, is in danger of being lost, removed or materially injured; (4) in actions in which mortgagee seeks to foreclose mortgage, except that upon motion by mortgagee court shall appoint receiver if at time motion is filed property is not occupied by owner as owner's principal residence and: it appears that such property is in danger of being lost, removed or materially injured, it appears that such property may not be sufficient to discharge mortgaged debt, either mortgagor or owner of property has agreed in mortgage or in some other writing to appointment of receiver, person not personally liable for debt secured by mortgage has, or is entitled to, possession of all or portion of property, owner of property is not personally liable for debt secured by mortgage, or all or any portion of property is being, or is intended to be, leased for any purpose; (5) when corporation has been dissolved, or is insolvent, or is in imminent danger of insolvency, or has forfeited its corporate rights; (6) to protect or preserve, during time allowed for redemption, any real estate or interest therein sold on execution or order of sale, and to secure to person entitled thereto rents and profits thereof; (7) in such other cases as may be provided by law, or where, in discretion of court, it may be necessary to secure ample justice to parties. (IC 32-30-5-1).

Jurisdiction.

Receivers may be appointed by courts of general jurisdiction under circumstances listed above. (119 Ind. App. 63, 78 N.E.2d 881).

Proceedings.

An adverse party must appear or have had reasonable notice to appear before a receiver can be appointed, except upon sufficient cause shown by affidavit. (IC 32-30-5-9). There is right of appeal within ten days from order appointing or refusing receiver without waiting for final determination of entire case. (IC 32-30-5-10). Proper bond on appeal suspends authority of receiver pending appeal. (IC 32-30-5-10). When receiver is appointed to take over business or assets of any person, organization, or partnership, appropriate person representing that person, organization, or partnership may be required to file with clerk full, complete, itemized statement in affidavit form, setting forth in detail all assets and liabilities including all known creditors. (TR 66[B]). There is same right as in any civil action to change of judge and right to change of venue from county except as to trial of certain specified issues enumerated in act. (IC 32-30-5-22).

Eligibility and Competency.

No party, attorney representing party, or other interested party may be receiver. (IC 32-30-5-2).

Qualification and Bond.

Receiver before entering upon his duties must be sworn to perform them faithfully, and must, with one or more sureties approved by court, execute written undertaking, payable to such person as court shall direct, to effect that he will faithfully discharge duties of receiver in action and obey orders of court or judge thereof. (IC 32-30-5-3).

Powers and Duties.

Receiver must give reasonable notice of his appointment by publication as ordered by court and must mail copy of notice to all creditors listed on sworn statement of assets and liabilities of organization in receivership. This notice must fix time, not less than six months from date of appointment, in which creditors may file claim. (TR 66[C]). Procedure for filing, consideration and allowance or trial of claims, must, insofar as is practicable, conform with procedure relating to claims in decedent’s estate. (TR 66[D]). Receiver has power, under control of court, to bring and defend actions, to take and keep possession of property, to receive rents, to collect debts, to sell property and generally to do such acts respecting property as court may authorize. (IC 32-30-5-7). He is obligated to file report of receipts and disbursements and other appropriate information. (IC 32-30-5-14 – 32-30-5-18). Receiver must pay or make distributions according to priorities as required by law upon all claims if claim is liquidated in amount, owing, and shown to be unpaid. (TR 66[E]). Receiver has no discretion in application of funds in his hands but holds them strictly subject to order of court to be disposed of as court directs. (199 Ind. 311, 157 N.E. 441).

Compensation.

No statutory provisions generally applicable to all receivers appointed by court; however Indiana statutory law in certain particular circumstances expressly authorizes reasonable compensation for receivers.

Discharge.

All objections to a receiver's report must be filed within time set by clerk of court (not less than 30 days after report has been filed) or be forever barred. Hearing on all objections filed is set by court without delay following 30-day period. (IC 32-30-5-18 – 32-30-5-19). Discharge of receiver and his surety follows court's approval of receiver's final report and upon receiver duly complying with court's order made on final report. (IC 32-30-5-20 – 32-30-5-21).

8.17 REDEMPTION:

See topics 8.05 Executions, Liens; categories 20 Mortgages, topic Mortgages of Real Property; Taxation, topic Property Tax, subhead Redemption.

8.18 SUPPLEMENTARY PROCEEDINGS:

See topic 8.05 Executions.

8.19 TRUSTEE PROCESS:

See topic 8.09 Garnishment.

8.20 USURY:

See category 3 Business Regulation and Commerce, topic 3.11A Consumer Credit.

9 DISPUTE RESOLUTION

9.01 ALTERNATIVE DISPUTE RESOLUTION:

Mandatory Dispute Resolution.

With limited exceptions, medical malpractice claims must be submitted for evaluation by independent medical review panel. (IC 34-18-8-4, IC 34-18-10-1 et seq.). By statute, action against health care provider may not be commenced in Indiana court before claim is submitted to medical review panel and panel issues opinion unless specific conditions are met. (IC 34-18-8-7). Statutes govern selection of, and proceedings before, medical review panel. (IC 34-18-10-4 et seq.).

Arbitration conducted by Indiana seed arbitration council is precondition to maintaining certain legal actions, counterclaims, or defenses against seller of agricultural or vegetable seeds. (IC 15-15-5-1 et seq.).

Indiana courts may not issue restraining order or grant injunctive relief in labor dispute until complainant makes every reasonable effort to settle dispute by negotiation through governmental mediation or voluntary arbitration. (IC 22-6-1-7).

Collective bargaining impasse between administration and public school employees subject to mandatory mediation. (IC 20-29-6-13).

Court may not order parties into mediation or refer parties to mediation for resolution of issues in petition for order for protection regarding family or domestic violence. (IC 34-26-5-15).

Voluntary Dispute Resolution.

Specific alternative dispute resolution rules adopted. (IC ADR Rules 1.1 – 8.8). Settlement negotiations, arbitration, mediation, conciliation, facilitation, mini-trials, mini-hearings, summary jury trials, private judges and judging, convening or conflict assessment, neutral evaluation and fact-finding, multi-door case allocation and negotiated rulemaking are recognized but not exclusive forms of alternative dispute resolution. (IC ADR Rule 1.1). ADR Rules apply in all civil and domestic relations litigation filed in all Circuit, Superior, County, Municipal and Probate courts in state. (IC ADR Rule 1.4). With certain exceptions, claims involving estate in fee or for life to any real estate may not be submitted for arbitration. (IC 34-57-1-2). Presiding judge may order case referred to mediation, nonbinding arbitration or mini-hearing, but may not order binding arbitration or summary jury trial without consent of parties. (IC ADR Rule 1.6). Evidentiary rule regarding inadmissibility of conduct or statements made in compromise negotiations applies to most forms of ADR. (Evid. Rule 408; IC ADR Rules 2.11, 3.4[E], 4.4[C], 5.6).

Program to subsidize private community dispute resolution centers established. (IC 34-57-3-2 et seq.). Program and funding administered by chief justice of Indiana Supreme Court. (IC 34-57-3-2 et seq.). Civil action submitted to dispute resolution center is suspended until court receives written agreement or decision from dispute resolution center. (IC 34-57-4-3). Agreement by prosecuting attorney to withhold prosecution against accused person of certain offenses may include condition that person participate in dispute resolution under IC 34-57-3 or program established by prosecuting attorney. (IC 33-39-1-8).

Referral of case to ADR alters court’s time limitations for ruling on motion or setting motion for hearing. (Rule TR 53.1). Litigants in state and federal court are expected to address ADR in case management plans and during pretrial conferences. (Rule TR 16; N.D. Ind. Local Rule 16.1; S.D. Ind. Local Rule 16.1).

Uniform Arbitration Act adopted. (IC 34-57-2-1 et seq.). General arbitration statute also exists. (IC 34-57-1-1 et seq.).

Shareholder disputes relating to stock value arising out of sale or lease of railroad property may be submitted to arbitration. Railroad company may seek arbitration without consent of dissenting shareholder. (IC 8-4-21-2, IC 8-4-21-3). In certain cases founded exclusively on contract, tort, or combination thereof, but not involving utility, parties may petition to have case heard by private judge. (IC 33-38-10-2; IC ADR Rule 6.1).

Counties may participate in program creating fund to foster domestic relations alternative dispute resolution. (IC 33-23-6-1 et seq.; IC ADR Rule 1.11).

Administrative agencies may elect to use mediation procedures and statutes govern use of mediation within administrative proceedings. (IC 4-21.5-3.5-1 et seq.).

Under certain circumstances, parties may agree in writing to submit family law matter to arbitration by qualified family law arbitrator. (IC 34-57-5-1 et seq.; IC 34-6-2-44.7).

Indiana Natural Resources Commission may mediate disputes between users of surface water in watershed areas. (IC 14-25-1-8).

Boards of trade, exchanges, and chambers of commerce may adopt rules, by-laws, and regulations relating to arbitration and settlement of business controversies. (IC 23-5-2-7).

Upon its own motion or motion of any party, Indiana Supreme Court or Court of Appeals may conduct or order appellate alternative dispute resolution. (App. Rule 20). Appellant’s Case Summary shall state whether ADR has been used and whether it should be used on appeal. (App. Rule 15).

See also topic 9.02 Arbitration and Award.

Alternative Dispute Resolution Jurisdictional Bodies/Commissions.

Supreme Court of Indiana has authority to provide by rule procedure employed in all courts of State of Indiana and has adopted rules governing Alternative Dispute Resolution. (IC ADR Rules 1.1-8.8). Indiana Supreme Court Disciplinary Commission enforces conduct standards placed on persons conducting Alternative Dispute Resolution process. (IC ADR Rule 7.1). Federal district courts also have ADR rules: N.D. Ind. Local Rule 16.6; S.D. Ind. Local ADR Rules 1.1 to 3.6.

Alternative Dispute Resolution Acts.

Private Judges, IC 33-38-10-1 et seq.; general arbitration statute, IC 34-57-1-1 et seq.; Uniform Arbitration Act, IC 34-57-2-1 et seq.; Community Dispute Resolution program, IC 34-57-3-1 et seq.; Alternative Dispute Resolution, IC 34-57-4-1 et seq.; Family Law Arbitration, IC 34-57-5-1 et seq.; IC Title 34, app. Court Rules (Civil), IC ADR Rules 1.1 to 8.8. Some local courts have supplementary alternative dispute rules: IC MARION CIR AND SUPER CTS CIV Rule 16.3; IC LAKE ADR Rule A-C, app. A; IC ALLEN JT ADR Rule, and IC ST JOSEPH DOM. REL. Rule DR 7.

9.02 ARBITRATION AND AWARD:

General.

Three sources of arbitration authority in Indiana: (1) IC 34-57-1-1 – 34-57-1-26 (general arbitration statute); (2) IC 34-57-2-1 – 34-57-2-22 (Indiana's Uniform Arbitration Act); and (3) Indiana Supreme Court's Rules on alternative dispute resolution ("ADR"). (IC ADR Rule 3.1 – 3.5).

Indiana Supreme Court arbitration rules apply only to matters that are subject of pending civil and domestic relations litigation in state court. (IC ADR Rule 1.4). Indiana Uniform Arbitration Act and general arbitration statute define arbitration rules for any other controversy existing between parties that might be subject of lawsuit. (IC 34-57-1-1). Arbitration not available for disputes regarding consumer leases, sales, loan contracts (IC 34-57-2-1[b]), and, in general, for disputes regarding estates in fee or for life to any real estate (IC 34-57-1-2).

Forms and Requisites of Submission.

Any competent adult may consent to arbitration. (IC 34-57-1-3). Written agreements to submit controversy to arbitration are valid and enforceable (IC 34-57-2-1), including agreements between employers and employees (Id.). Party initiates arbitration by written notice sent by registered or certified mail, or delivered directly to other party stating claim, grounds for claim, and amount of claim. (IC 34-57-2-2). Issues are joined upon written notice of admissions, denials, counterclaims, or set-offs. (Id.). Applicable statutes of limitations cease to run upon notice of claim or counterclaim. (Id.). If party refuses to arbitrate claim, other party may apply to court where dispute exists or another court with jurisdiction for enforcement of agreement. (IC 34-57-2-3). Court may likewise stay commenced or threatened proceeding upon application by party if no agreement to arbitrate exists. (Id.). Ten days' notice must be given to opposing party of hearing on either subject. (Id.). Arbitrators are selected by method specified in agreement, by method agreed to by parties if none is specified in agreement, or by court if no method specified and no agreement reached and party applies to court for same. (IC 34-57-2-4). Arbitrators select time and place of hearing and notify parties by personal service or registered mail. Parties entitled to present all evidence regardless of admissibility under judicial rules. (IC 34-57-2-6). Parties entitled to representation by attorneys, and waivers of same are ineffective. (IC 34-57-2-7). Arbitrators may issue enforceable subpoenas, except for financial records or documents in dispute between labor and management. (IC 34-57-2-8).

Judgment on Award.

Award must be written, signed by arbitrators, include determination on submitted issues necessary to decide matter, and delivered to each party personally, by registered mail, or as otherwise provided in agreement within time agreed or within reasonable time if no fixed time. (IC 34-57-2-9). Award must be attested by subscribing witness. (IC 34-57-1-11).

Enforcement.

Agreement to arbitrate confers power on Indiana courts to enforce agreement and enter judgment. (IC 34-57-2-17). If party fails to comply with award, other party may file award and agreement of submission with court. (IC 34-57-1-13). Under Indiana's Uniform Arbitration Act, application for confirmation of award may take place any time after 90 days from mailing of award. (IC 34-57-2-12). Upon application, court must confirm award unless grounds exist for vacation, modification, or postponement. (IC 34-57-2-12). Upon ten days' service without appearance of adverse party, court may make determination. (IC 34-57-1-16). When confirmed or enforced, award has force and effects as any other judicial judgment. (IC 34-57-2-12; IC 34-57-2-15; 34-57-1-15; IC 34-57-1-20).

Mandatory Arbitration.

Agreement to arbitrate enforceable like other contracts. (IC 34-57-2-1). Indiana courts may suspend litigation and order arbitration where valid agreement to arbitrate exists. (Id.; IC 34-57-1-1; IC 34-57-2-3). If other issues involved are determinative of action but not subject to agreement to arbitrate, court may stay order to arbitrate until judicial issues are resolved. (IC 34-57-2-3[f]). Indiana Medical Malpractice Act requires mandatory submission of claims to medical review panel. (IC 34-18-8-4).

Powers of Arbitrators.

Arbitrators may hear and determine controversy, even if notified party fails to appear. (IC 34-57-2-6). Arbitrators may issue subpoenas for witnesses and production of evidence and order depositions of witnesses (for evidence and not for discovery). Arbitrators may administer oaths. (IC 34-57-2-8). Powers of arbitrators exercised by majority if more than one, unless otherwise provided. (IC 34-57-2-5).

Rescission.

Party may petition for vacation of award any time within 90 days following mailing of award, unless grounds for vacation based on corruption, fraud or other undue means, in which case party has 90 days after discovery of corruption of fraud to move for vacation. Upon petition, court may vacate award only on grounds that: (1) award was obtained by corruption or fraud; (2) arbitrators were partial, corrupt, or engaged in misconduct; (3) arbitrators exceeded powers and award cannot be corrected without affecting merits; (4) arbitrators refused to postpone hearing, hear material evidence, or otherwise prejudiced rights of party in manner of conducting hearing; or (5) no agreement to arbitrate existed, no adverse determination under arbitration proceedings, and no participation by moving party in arbitration hearing without raising objection. Errors in law or equity not grounds for vacation. (IC 34-57-2-13).

Application to modify or correct award must be made by application to vacate within 90 days of mailing award. Grounds for modification or correction include mistake in calculation or description, imperfection in form, or error in basis of award where award based on matter not submitted and where award can be corrected without affecting merits of decision. (IC 34-57-2-14). When modified or corrected, judgment entered and enforced as any other judicial judgment. (IC 34-57-2-15).

Appeal may be taken from: (1) Orders denying application to compel arbitration; (2) orders granting applications to stay arbitration; (3) orders confirming or denying awards; (4) orders modifying or correcting awards; (5) orders vacating awards with no rehearing; and (6) any judgments or decrees made pursuant to Indiana's Uniform Arbitration Act. (IC 34-57-2-19).

Appeals from arbitration orders follow same procedures as outlined for appeals from judgments in civil actions. (Id.).

Uniform Arbitration Act Adoption/Deviation.

Original Uniform Arbitration Act codified, with modifications, at IC 34-57-2 et seq. Deviations include (1) § 5(a) of Uniform Act (unless parties otherwise agree, 30 days' notice of hearing time and place is required); (2) § 5(b) of Uniform Act (no language requiring cross-examination); (3) § 15 of Uniform Act was excluded and has no effect; (4) § 12(a) of Uniform Act (no provision for vacation of award for other undue means); (5) § 17 of Uniform Act (term "court" means any circuit or superior court); (6) § 18 of Uniform Act (initial application made to court in county where adverse party resides or has place of business; if nonresident or no place of business in state, then court in any county).

Additions to Uniform Act include: (1) Parties may agree that agreement can be enforced by third persons (IC 34-57-2-1[a]); (2) consumer leases, sales, and loan contracts specifically excluded from coverage (IC 34-57-2-1[b]); (3) arbitration initiated by written notice, stating claim, grounds, and amount, counterclaims and joinder provided for, and limitations period tolled on commencement (IC 34-57-2-2); (4) ten days' notice of hearing required after refusal to arbitrate or for proceeding to stay arbitration upon submission to court (IC 34-57-2-3[a]-[b]); (5) stay of arbitration available where arbitrable issues not determinative of litigation and where method of appointment of arbitrators will result or has resulted in bias (IC 34-57-2-3[f]-[g]); (6) agreement of parties on method of selection available where no method contained in agreement to arbitrate (IC 34-57-2-4); (7) party may require hearing to be recorded (IC 34-57-2-6[a]); (8) evidence presented need not be admissible under judicial rules (IC 34-57-2-6[b]); (9) no subpoenaing of financial records permitted in labor/management disputes (IC 34-57-2-8[a]); (10) award must include all determinative issues (IC 34-57-9[a]); (11) award must be rendered in reasonable time if not fixed or agreed upon (IC 34-57-2-9[b]); (12) written application required for modification or correction of award (IC 34-57-2-10); (13) party must wait 90 days from mailing of award to apply for confirmation and upon confirmation, court shall enter judgment and docket entry as if rendered by court (IC 34-57-2-12); and (14) requirement for vacation based on arbitrators exceeding powers must include no possibility for correction without affecting merits (IC 34-57-2-13).

Jurisdictional Arbitration Acts.

Supreme Court of Indiana has published rules for arbitration conducted under supervision of courts. (ADR Rule 3.1 et seq.). Marion County, Indiana has promulgated similar local rules for superior and circuit courts. (IC Marion Cir. and Super. Cts. Civ. Rule 16.3[B]). Lake County, Indiana's local rules do not diminish or add to Indiana Supreme Court's rules with respect to arbitration. (IC Lake ADR Rule B).

Chapter on Community Dispute Resolution adopted and became effective July 1, 1998. (IC 34-57-3-1 et seq.).

Purpose.

Establishes community dispute resolution centers program and gives Chief Justice of Indiana Supreme Court powers to supervise program, select centers to receive funding, distribute funds for establishment and continuance of centers, adopt rules for program, and hire personnel necessary to administer program. (IC 34-57-3-2).

Inclusion.

Applies to (1) criminal offense referred to community dispute resolution center under diversion program; (2) civil action referred by court to community dispute resolution center under IC 34-57-4-1 et seq.; and (3) civil disputes not involving insurance claim where parties voluntarily submit to community dispute resolution and where no action filed. (IC 34-57-3-1). Party who has been referred to community dispute resolution center after court action has been filed may file motion for trial de novo. (IC 34-57-3-14).

Funding.

Indiana Supreme Court may collect voluntary contributions of $25 from each attorney admitted to practice to fund program. (IC 34-57-3-2). Centers are not state agencies, but are nonprofit corporations or organizations and are required to submit applications for funding. (IC 34-57-3-3; IC 34-57-3-9).

Chapter on Alternative Dispute Resolution adopted and became effective July 1, 1998. (IC 34-57-4-1 et seq.).

Purpose.

Applies to any civil action referred by court to dispute resolution center under IC 34-57-3-1 et seq. after civil action filed (IC 34-57-4-1), but does not apply to matters covered by Indiana Supreme Court's ADR rules (IC 34-57-4-2).

Suspension.

Court must suspend action on case until written agreement or decision from dispute resolution center is submitted to court. (IC 34-57-4-3).

Credentials of/Qualifications of/Standards for Arbitrators.

Statutes provide no standards or qualifications for arbitrators other than allowing vacation of award for partiality, corruption, or misconduct. (IC 34-57-2-13). Uniform Act provides for selection of arbitrators by method in agreement to arbitrate, and if none, by agreement of parties on method; if no agreement reached, selection made by court of application. (IC 34-57-2-4). Supreme Court Rules provide that each court must maintain list of practicing attorneys who will act as arbitrators for disputes submitted for ADR. (IC ADR Rule 3.3). Under Indiana's Code of Judicial Conduct, Canon 4(F), judges may not act as arbitrators or otherwise perform judicial functions in private capacity, unless otherwise authorized by law. Judges not precluded from participating in arbitration, mediation, or settlement negotiations as part of their judicial duties.

9.02A MEDIATION:

Jurisdictional Mediation Acts.

Supreme Court of Indiana published state rules governing mediation. (IC ADR Rule 2.1 et seq.). Fifteen days or more after time has expired in which party may file Trial Rule 76(B) motion for peremptory change of judge, court may, upon own motion or upon motion by party in case, refer civil or domestic relations case for mediation. (IC ADR Rule 2.2). Party then has 15 days in civil case or seven days in domestic case to file written objection for court to consider. (IC ADR Rule 2.2). Some local courts have supplementary rules pertaining to mediation: IC Marion Cir and Super Cts LR49-ADR; IC Lake ADR Rules A-C, app. A; IC Allen JT ADR Rule; St. Joseph Cts LR71-FL00 Rule 411; Vigo Cir and Sup Cts LR84-TR16 Rule 6; Hancock Cir and Sup Cts Rule 13.

Credentials of/Qualifications of/Standards of Mediators.

Mediator must have completed at least 40 hours of mediation training in certified courses as deemed by Commission for Continuing Legal Education or be registered as domestic relations mediator and complete Commission approved crossover course by Dec. 31 of second full year after being so registered. (IC ADR Rule 2.5[A][3], [4]). For civil case mediation, mediator must be attorney in good standing with Supreme Court of Indiana and have requisite training hours, and in either event, whose professional license may not be currently suspended, revoked, or voluntarily relinquished while disciplinary action is pending. (IC ADR Rule 2.5[A][1] and [2]). For mediation of domestic relations cases, mediator must be either attorney admitted to practice law in State of Indiana or person with bachelor's degree from accredited institution of higher learning, and in either event, whose professional license may not be currently suspended, revoked, or voluntarily relinquished while disciplinary action is pending (unless otherwise agreed by both parties and approved by court order). (IC ADR Rule 2.5[B][1] and [2]). Judge may serve as mediator in civil or domestic case pending before another judicial officer. (IC ADR Rule 2.5[A][5] and [B][5]).

10 DOCUMENTS AND RECORDS

10.01 ACKNOWLEDGMENTS:

Within the State.

Acknowledgments may be taken within state by notaries public; justices and judges of court in their respective jurisdictions; Secretary of State; clerk of Supreme Court; mayors, clerks, clerk-treasurers of town and cities, and township trustees, in their respective towns, cities and townships; clerks of circuit courts and master commissioners in their respective counties; judges of U.S. district courts of Indiana in their respective jurisdictions; U.S. commissioners appointed for any U.S. district court of Indiana in their respective jurisdictions; precinct election officer and absentee voter board member appointed under IC 3-11-10, for any person authorized under IC 3; member of Indiana election commission, co-director of election division, or employee of election division under IC 3-6-4.2; county auditors in their respective counties; any member of general assembly anywhere in Indiana (IC 33-42-4-1); probate commissioners (IC 29-2-2-3); Attorney General and his deputies and assistants (IC 4-6-1-5); prosecuting attorneys or deputy prosecuting attorneys (IC 33-39-2-1); official circuit, superior, criminal, probate, juvenile and county reporter (IC 33-41-1-6); or township trustees (IC 33-42-5-1). When any instrument required to be recorded is acknowledged in any county in this state other than one in which same is required to be recorded, acknowledgment must be certified by clerk of circuit court of county in which such acknowledging officer resides and attested by seal of said court; but acknowledgment before officer having official seal, if attested by such official seal, is sufficient without such certificate. (IC 32-21-2-4). Acknowledgments by Attorney General and his or her deputies shall be attested by official seal. (IC 4-6-1-5).

Head of any state department, division, board, bureau or commission may appoint special deputies to take free acknowledgments in connection with matters pertaining to said office. (IC 4-2-4-1).

Within the United States.

Acknowledgments may be made in other states in the United States in the same manner as they may be made in this state, and in addition they may be made before any commissioner appointed in any other state by the Governor of Indiana. (IC 32-21-2-3). To entitle instrument so acknowledged to record in this state, same must be certified by clerk of any court of record of county in which officer receiving acknowledgment resides, and attested by seal of said court, but acknowledgment before officer having official seal, attested by his official seal, shall be sufficient without such certificate. (IC 32-21-2-5).

Outside of the United States.

To entitle instruments made in foreign countries to record in this state, they must be acknowledged by the grantor or person executing the same and proved before diplomatic or consular official of the United States duly accredited or before any officers of such countries who by the law thereof, are authorized to take acknowledgments or proof of conveyances, and if such acknowledgment or proof is in English language and attested by official seal of such officer, it shall be sufficient to admit such instrument to record, but if in some other language or not attested by such official seal, then such instrument must be accompanied by a certificate of officer of U.S., as aforesaid, to effect that it is duly executed according to laws of such foreign countries, that officer certifying to acknowledgement or proof had legal authority to do so, and giving meaning of certificate if same is made in foreign language. (IC 32-21-1-11).

Members of U. S. Armed Forces or any person who is serving as merchant seaman outside limits of U.S., wherever located, may acknowledge instruments before commissioned officers of Army, Navy, Marine Corps or Coast Guard. (IC 32-21-9-1).

Persons engaged in the prosecution of a war on behalf of the United States Government and outside of the United States by consent of the Government may make acknowledgments under the same terms as members of the United States Armed Forces. (IC 32-21-9-1).

Authentication.

Clerks of circuit courts authenticate acknowledgments for use outside of state, and fee is usually 50¢ to $1, according to kind of authentication required.

Proof by Subscribing Witness.

There is no express statutory provision for proof by a subscribing witness instead of acknowledgment by the grantor; but it is provided that deeds may be proved according to the common law before any officer authorized to take acknowledgments and, when so proved, are entitled to record. (IC 32-21-2-6).

Necessity and Effect.

Acknowledgment or proof in due form is necessary to entitle an instrument to be recorded (IC 32-21-2-3) but is not essential to its validity.

Acknowledgments before officers of the Armed Forces are prima facie evidence of identity, authority, agency and free volition of persons making them. (IC 32-21-9-2).

Forms.

The statutory form of an acknowledgment for an individual is as follows:

Form

“Before me, A. B. (title of officer), this . . . . day of . . . ., Y. Z acknowledged the execution of the annexed deed (mortgage, etc.).”

No statutory form is given for corporations, but the following form is suggested:

Before me, A. B. (name of corporation), this . . . . day of . . . . personally appeared by C. D. and X. Y. (name of officers), its President and Secretary respectively, and acknowledged the execution of the foregoing instrument.

Form for member of U. S. Armed Forces:

With the Armed Forces of the United States . . . .

At . . . . } ss.

The foregoing instrument was acknowledged this . . . . day of . . . ., 20. . . . ., by . . . . serving (in) . . . . (with) the Armed Forces of the United States, before me, a commissioned officer in the active service of the (United States Army, Navy, Marine Corps or Coast Guard as the case may be).

Signature of officer

Rank and branch of service.

Place where acknowledgment is taken before officer in Armed Forces need not be stated (IC 32-21-9-3) or it may be stated to be taken at "an undisclosed place" (IC 32-21-9-1). If Indiana notary public takes acknowledgment, notary must affix notary's name, expiration date and seal; print or type notary's name immediately beneath notary's signature on certificate of acknowledgment, jurat or other official document, unless notary's name appears in printed form on document or as part of notary's stamp in form that is legible when document is photocopied; and indicate notary's county of residence on document. (IC 33-42-2-9).

Alternative to Acknowledgment or Proof.

No statutory provision.

Legalizing Acts.

No statutory provision.

See also topic 10.03 Notaries Public.

10.02 AFFIDAVITS:

Affidavit is written statement of fact sworn to as truth before authorized officer. (609 N.E.2d 1104). Affidavit may not be certified by notary public unless affiant appears before notary public and acknowledges truth of statements therein. (IC 33-42-2-2).

Every official circuit, superior, criminal, probate, juvenile, and county court reporter is authorized to administer oaths generally and to take and certify affidavits, examinations and depositions. (IC 33-41-1-6).

Except as provided in Section B of this chapter, no warrant for search or arrest shall be issued until filed with judge affidavit: (1) particularly describing (A) house or place to be searched and things to be searched for; or (B) particularly describing person to be arrested; (2) alleging substantially offense in relation thereto and that affiant believes and has good cause to believe that: (A) things as are to be searched for are there concealed; or (B) person to be arrested committed offense; and (3) setting forth facts then in knowledge of affiant or information based on hearsay, constituting probable cause. When based on hearsay, affidavit must either: (1) contain reliable information establishing credibility of source and of each of declarants of hearsay and establishing that there is factual basis for information furnished; or (2) contain information establishing that totality of circumstances corroborates hearsay. (IC 35-33-5-2).

( ) An affidavit for search substantially in the following form shall be treated as sufficient:

STATE OF INDIANA)

) SS:

COUNTY OF ____________)

A B swears (or affirms, as the case may be) that he believes and has good cause to believe (here set forth the facts and information constituting the probable cause) that (here describe the things to be searched for and the offense in relation thereto) are concealed in or about the (here describe the house or place) of C D, situated in the county of _____________, in said state.

Subscribed and sworn to before me this _____ day of _____________, 20____.

Alternative to Affidavit.

When in connection with any civil or special statutory proceeding it is required that any pleading, motion, petition, supporting affidavit, or other document of any kind, be verified, or that oath be taken, it shall be sufficient if subscriber simply affirms truth of matter to be verified by affirmation or representation in substantially following language: "I (we) affirm, under the penalties for perjury, that the foregoing representation(s) is (are) true. (Signed) ____________________" (Rule TR 11[B]). Any person who falsifies affirmation or representation of fact shall be subject to same penalties as are prescribed by law for making of false affidavit.

10.03 NOTARIES PUBLIC:

Jurisdiction of any notary public is coextensive with limits of state but he cannot be forced to act outside of county in which he resides. (IC 33-42-1-1). Every notary must attest all notarial acts with seal which will stamp distinct impression on paper so as to indicate his official character (IC 33-42-2-4) and must append to all acknowledgments and jurats true statement of date of expiration of his commission at time document is signed. (IC 33-42-3-1). Each notary in addition to affixing his name, expiration date, and seal, shall print or type his name below his signature on all acknowledgments, jurats, or other official documents unless his name appears in printed form on document or as part of his stamp in form that is legible when photocopied and also shall indicate his county of residence on document. (IC 33-42-2-9).

Every notary public has power to administer oaths and to take and certify affidavits and depositions, and to take and certify all acknowledgments of deeds or other instruments of writing required or authorized by law to be acknowledged and do all acts that by common law, and custom of merchants, notaries are authorized to do. (IC 33-42-2-5).

Certificate of Authority.

See topic 10.01 Acknowledgments, subhead Authentication.

Notary public may not acknowledge execution of affidavit unless affiant acknowledges truth of statements therein. (IC 33-42-2-2).

Notary public may not acknowledge execution of instrument unless person who executed instrument signs instrument before notary or affirms to notary that it is his signature on instrument. (IC 33-42-2-2).

Notary public may not acknowledge execution of instrument in which his name appears as party. (IC 33-42-2-2).

Township trustee has power to perform any act notary public may perform. (IC 33-42-5-1).

10.04 RECORDS:

Uniform Commercial Code in effect since July 1, 1964. (IC 26-1-1-101 et seq.).

To entitle any conveyance, mortgage or instrument in writing to be recorded it must be acknowledged by the grantor or proved in due form. (IC 32-21-2-3). To be eligible for recording, all instruments executed on or after July 1, 1959, which convey, create, encumber, assign or otherwise dispose of interest in or lien upon any real or personal property (except court orders, wills, death certificates, and instruments executed or acknowledged outside state) must contain, at conclusion thereof, name of person who, and governmental agency, if any, which prepared instrument. All instruments recorded prior to July 26, 1967, not complying with these requirements, but in all other respects correct and in proper form, are deemed legally recorded. (IC 36-2-11-15). Subject to few exceptions, to be eligible for recording, instrument or photocopy of it must contain legibly printed, typewritten or stamped names of all persons executing, witnessing and acknowledging instrument immediately beneath their respective signatures, and names of all persons executing instrument must appear identically in body of instrument, in acknowledgment or jurat, in signature and beneath signature. (IC 36-2-11-16).

Form

This instrument was prepared by (name).

To be eligible for recording, all conveyance documents must be acknowledged or properly proven, and certain "conveyance documents" must be accompanied by sales disclosure form. (IC 6-1.1-5.5). See category 21 Property, topic 21.06 Deeds. After June 30, 2007, all conveyance documents to be recorded must contain street address or rural route address of grantee.

Every conveyance or mortgage of land or of any interest therein and every lease for more than three years must be recorded in the recorder's office of the county where such land is situated, and every conveyance, mortgage or lease takes priority according to the time of filing thereof. (IC 32-21-4-1). For mortgage, if mortgage is recorded but does not comply with requirement of proper acknowledgement or proving or technical requirements of IC 36-2-11-16(c), instrument is validly recorded and provides constructive notice of its contents regardless of when mortgage was recorded. (IC 32-21-4-1). Memorandum of lease may be recorded in lieu of lease. (IC 36-2-11-20). *For list of Counties and County Seats see first page for this state in Volume containing Practice Profiles Section.*

IC 32-21-4-2 provides that assignment, mortgage, or pledge of rents and profits arising from real estate that is intended as security, whether contained in separate interest or otherwise, shall be recorded under IC 32-21-4-1. Upon recording, security interest is immediately perfected. § 16.3 does not apply to security interests in: (1) farm products; (2) accounts or general intangibles relating to sale of farm products by farmer, (3) timber to be cut; or (4) minerals or the like (including oil and gas) that may be perfected under IC 26-1-9.1. § 16.3 applies to instrument regardless of when such was recorded except that § 16.3 does not divest rights that vested before May 1, 1993.

Recording Fees.

For recording most documents not larger than 8½" by 14", cost is $6 for first page and $2 for each additional page. There is additional $1 fee for recording of deed. For documents larger than 8½" by 14", cost is $15 for first page and $5 for each additional page.

Photographic copies of records are $1 per page for documents 8½" x 14" or smaller, $2 per page for documents larger than 8½" x 14"; certification of document costs $5. By ordinance, county legislative body may authorize fee for duplicating computer tape, computer disk, optical disk, microfilm, or similar media. In addition, county recorder imposes $2 county identification security protection fee per document. (IC 36-2-7-10). Bulk form copies of records are 7¢ per page. (IC 36-2-7-10.1).

Filing Under Commercial Code.

Indiana filing offices accept Standard National UCC Forms as well as Standard Indiana UCC Forms and will accept filings in any written format which include information required by law. UCC forms may now be filed electronically via Indiana Secretary of State's website. All forms should be submitted in one copy only. Fee for filing UCC1 Financing Statement with or without UCC1 Addendum; UCC3 Amendment with or without UCC3 Addendum; or Correction Statement is $4 for one or two pages, $8 for three or more pages. Instruction pages of forms are not counted for determination of fees. Fee for processing Information Request is $5. These fees are same for central filing office and county filing offices. However, some county filing offices may charge supplemental fee of $3 for some or all filings. Central filing office is Indiana Secretary of State, UCC Division, 302 West Washington Street, Room E018, Indianapolis, Indiana 46204, Telephone 317.234.1553.

Transfer of Decedent's Title.

The clerk of the circuit court of each county, who is also clerk of the superior and probate courts, is required to record all proceedings in relation to decedent and guardianship estates in separate books kept for that purpose and, in addition, to keep final record book on which must be spread complete record of all matters and proceedings in administration of estates. (IC 29-1-1-23).

Vital Statistics.

Information on certificates of birth and death and stillborn registrations may be obtained from State Department of Health at 2 North Meridian Street, P.O. Box 7125, Indianapolis, Indiana 46206. (Phone [317] 233-2700.)

Establishing Birth Records.

Provision is made for judicial determination by circuit or superior court of time and place of birth of residents (IC 34-28-1-1) in absence of recorded birth certificate, and also of nonresidents who were born in Indiana (IC 34-28-1-2). Proceedings are instituted by filing of verified application (IC 34-28-1-1, 2) and publication of notice (IC 34-28-1-4). Certified copies of decrees are prima facie evidence of time and place of birth. (IC 34-28-1-8).

Bankruptcy Records.

Certified copy of matter relating to bankruptcy must be recorded where federal law requires that copy be filed in county in which bankrupt's lands are located in order to give notice of bankruptcy. Recorder must index such records in same manner as deeds under names of both bankrupt and trustee. (IC 36-2-11-22).

See category 3 Business Regulation and Commerce, topic 3.09 Commercial Code.

10.05 SEALS:

Uniform Commercial Code in effect since July 1, 1964. (IC 26-1-1-101 et seq.). See category 3 Business Regulation and Commerce, topic 3.09 Commercial Code.

No seal or scroll is necessary to validate conveyance of land or interest in land executed by natural persons, business trusts, or corporations. (IC 32-21-1-12). Authenticating officers must use seal when law so requires. (IC 32-21-1-12). There is no difference in evidence between sealed and unsealed writings. (IC 34-37-1-1). Use of corporate seal is not required and does not affect validity of any instrument. (IC 23-17-4-2).

10.06 TORRENS ACT:

Not adopted.

10.07 VITAL STATISTICS:

See topic 10.04 Records.

11 EMPLOYMENT

11.01 EMPLOYER AND EMPLOYEE:

See topic 11.02 Labor Relations.

11.02 LABOR RELATIONS:

Cognizance of labor matters lies with Department of Labor. (IC 22-1-1-1). Created within Department of Labor are: (a) Bureau of Mines and Mine Safety and (b) Bureau of Child Labor. (IC 22-1-1-4).

Alien Labor.

Importing or assisting or encouraging importation of alien labor on contract to work in state of Indiana, such contract being made prior to their arrival in Indiana, is punishable as misdemeanor and contracts are void. (IC 22-5-1-1, 2).

Termination Letters.

Employer must give to employee who quits or is discharged "termination letter" on written request of employee, setting forth nature of employee's duties, dates of employment, and reasons, if any, employee quit or was terminated, unless employer is one who does not require written recommendations or written applications showing qualifications or experience for employment. (IC 22-6-3-1).

Armed Forces.

Reserve members of armed forces are entitled to temporary leave of absence not exceeding 15 days a year for military training. Such leaves may be granted with or without pay within discretion of employer. (IC 10-17-4-4). State, municipal and school corporation employees may not experience loss of pay during said training. (IC 10-16-7-5). Employer subject to suit in damages for violation. (IC 10-17-4-5). Family of armed forces members are entitled to temporary leave of absence not exceeding ten days per calendar year relating to service member's call to or return from active military duty service. (IC 22-2-13). Employers may not discipline employees who are members of Indiana's civil air patrol for absence related to engagement in emergency service operation. (IC 10-16-19).

Wages.

Wages must be paid semi-monthly or bi-weekly, if requested, except for salaried employees eligible for overtime compensation under federal Fair Labor Standards Act. (IC 22-2-5-1; IC 22-2-5-1.1). Employees who have been separated from work by their employer or whose work has been suspended as result of industrial dispute must file wage claim with Department of Labor and may not file complaint with trial court. Commissioner of Labor will investigate and may hold hearing regarding wage claim. (IC 22-2-9-4[a]). Commissioner may refer wage claim to Attorney General, who then may initiate civil action on behalf of wage claimant or refer wage claim to private attorney. (IC 22-2-9-4, IC 22-2-9-5). Only where wage claim is initiated by Attorney General or Attorney General's designee may above-mentioned employees seek treble damages and attorneys' fees under IC 22-2-5-2. However, for current employees and those who have voluntarily left employment, employees may proceed directly to trial court to seek treble damages and attorneys' fees under IC 22-2-5-1 et seq. However, in certain industries mutual agreement and/or contract may provide payment on weekly basis. (IC 22-2-4-1). Farmers are specifically exempt. (IC 22-2-5-3). Payment must be made in money or negotiable checks, drafts or money orders, or by electronic transfer to financial institution designated by employee (IC 22-2-5-1, IC 22-2-4-2), and failure to make payments in accordance with statute subjects employer to penalties and attorneys' fees of employee (IC 22-2-5-2, IC 22-2-4-4).

As of July 1, 2007, minimum wage is equivalent to minimum wage payable under federal law. (IC 22-2-2-4). Minimum Wage Act provides for certain exceptions including minors under 16, commission-paid employees, farm labor and students performing jobs for schools. (IC 22-2-2-3). Employers must pay overtime to nonexempt employees for time worked in excess of 40 hours in work week at rate not less than one and one-half (1.5) times employee's regular rate. (IC 22-2-2-4). Failure to comply with this law may result in suit by employees for double wages (IC 22-2-2-9) and Class A infraction or Class B misdemeanor for repeat violations (IC 22-2-2-11). When employer separates any employee from payroll, unpaid wages or compensation become due and payable at regular payday for pay period in which separation occurred; such provision does not apply to railroads. (IC 22-2-9-2). If work is suspended due to industrial dispute, wages and compensation earned and unpaid at time of suspension become due and payable at next regular payday including all amounts due all employees whose work has been suspended due to such dispute. (IC 22-2-9-2).

In interpreting this statute, IC 22-2-5-1 (known as Indiana's Wage Payment Statute), Indiana Supreme Court ruled that Wage Payment Statute governs both frequency of payments and amount employer has to pay its employees, rather than only frequency. (St. Vincent Hospital and Health Care Center, Inc. v. Steele, M.D., 766 N.E.2d 699 [Ind. 2002]). Failing to pay full amount of wages when due as required by Wage Payment Statute subjects employer to penalties including liquidated damages equal to double amount of unpaid wages, reasonable attorneys' fees incurred to recover unpaid wages, and costs. (Id.; IC 22-2-5-2).

Operator leasing mine, quarry or manufacturing plant to engage in business must file with clerk of circuit court bond equal to twice such lessee's weekly payroll to insure payment of wages unless lease is from U.S. or one of its subsidiary agencies or value of physical property owned by lessee in conducting such business is at least double amount of weekly payroll of such lessee. (IC 22-2-11-1).

Wage claims of laborers or employees not exceeding $600 may be preferred debts against failing employer. (IC 22-2-10-1).

Employer may not assess fine against any employee and deduct it from wages due. (IC 22-2-8-1). Sale of merchandise or supplies to employees at higher prices than such is sold to others is prohibited. (IC 22-2-4-3).

Authorization for deductions from wages for payment of union dues and other purposes is governed by statute. (IC 22-2-6-2).

Child Labor.

Certificate issued by guidance counselor, school social worker, or licensed attendance officer necessary for employment of minor between 14 and 18 years of age. (IC 20-33-3-5). Employment certificates issued in form approved by, and under rules adopted by department of labor and state board of education. (IC 20-33-3-43).

No minor aged 14 or 15 may be employed before 7:00 a.m. nor after 7:00 p.m., nor more than eight hours in any one day, nor more than 40 hours in any one week, nor more than eight hours on any non-school day, nor more than three hours on school day, nor more than 18 hours in any week in which school is in session. Minors aged 14 and 15 may work until 9:00 p.m. from June 1 through Labor Day. (IC 20-33-3-22). No minor 16 years of age may be employed more than eight hours in any one day, nor more than 30 hours in any one week, nor more than six days in any one week, nor before 6:00 a.m. (IC 20-33-3-23), except that such minor may be employed up to nine hours in any one day and up to 48 hours in any one week when schools are closed for summer vacation if employer obtains written permission from minor's parent. (IC 20-33-3-27). Minor who is 17 years of age may not begin work day before 6:00 a.m. on school day nor work more than eight hours in any one day, nor work more than 30 hours in any one week, nor work more than six days in any one week. (IC 20-33-3-24). Minors aged 16 and 17 may work up to 40 hours during school week with written permission of parent or legal guardian. (IC 20-33-3-27). Children aged 16 and 17 may be employed until 10:00 p.m. on nights that are followed by school day except in occupations determined to be physically dangerous or injurious to health or morals (IC 20-33-3-25); it is also lawful for minors 16 years of age to work until midnight at such times as schools are closed for summer vacation and on nights not followed by school day if written permission is obtained from minor's parent. (IC 20-33-3-26). Children who are 17 years of age may work until 11:30 p.m. on nights followed by school days if employer has obtained written permission from child's parent. Children who are at least 17 years of age may work until 1 a.m. on two nonconsecutive nights followed by school days (but not more than two nights per week) if employer has written permission from parent or legal guardian. (IC 20-33-3-28). Child who is at least 16 years of age and less than 18 years of age may be employed same daily and weekly hours and at same times of day as adults if child is member of any of following categories: (1) Child is high school graduate; (2) child has completed approved career and technical education program or special education program; (3) child is not enrolled in regular school term. (IC 20-33-3-29). Child less than 18 years of age is entitled to one or two breaks totaling at least 30 minutes if child is scheduled to work at least six consecutive hours. (IC 20-33-3-30).

Employment in designated hazardous occupation prohibited to any person under 18 years of age. (IC 20-33-3-35). It is unlawful for child who is less than 18 years of age to work after 10:00 p.m. and before 6:00 a.m. in public establishment, unless another employee at least 18 years of age also works in establishment during same hours. (IC 20-33-3-36).

No minor under age of 14 years may be employed or allowed to work in any occupation other than farm labor or domestic services, or as carrier of newspapers or as golf caddie. No minor under 12 years of age may work at farm labor except on farm operated by minor's parents. No child less than 18 years of age may work in any occupation after 7:30 a.m. and before 3:30 p.m. on school day unless child presents written exception issued by school. (IC 20-33-3-31). Any child, regardless of age, may appear in various enumerated theatrical or musical performances under conditions set by statute. (IC 20-33-3-32).

Emancipated minors are subject to statutory provisions regulating employment of minors. (Opinion of Attorney General, 1968, No. 3, p. 16).

Labor Unions.

Contracts between an employer and a current or prospective employee whereby either party agrees to resign from or not join a labor organization are unenforceable. (IC 22-6-1-3).

Right to work law repealed in 1965.

Labor Disputes.

No Indiana court has jurisdiction to issue a restraining order or injunction, in any case involving or growing out of a labor dispute, prohibiting strikes and other specified lawful activities. (IC 22-6-1-4). In such cases unlawful activities may be prohibited by injunction after hearing of testimony in open court and specific findings of facts as set forth in statute. (IC 22-6-1-6).

A special act governs public utilities and requires compulsory arbitration. (IC 22-6-2-1 to 15). (Indiana Public Utility Anti-Strike Act was held unconstitutional in Marshall v. Schricker [1951] Cir. Ct. of Vanderburg County, 28 LRRM 2167.)

Employee Benefit Plans.

Employer who has contracted in writing to make payments to any type of employee benefit plan must give written notice of nonpayment to employees not later than seven days after failing to make payment under agreement. Employee may recover double damages plus costs and attorney fees from employer who fails to give notice and make payments. (IC 22-2-12-4).

Public Employee Bargaining.

Public Employee Bargaining Act was enacted by 1975 Legislature. (IC 22-6-4-1 – IC 22-6-4-13). This Act was subsequently held to be unconstitutional by Supreme Court of Indiana. See: 266 Ind. 491, 365 N.E.2d 752. Act was repealed by 1982 Legislature. (Acts 1982, P.L. 3).

Executive order establishing terms, conditions, and procedures for recognition of employee organizations representing employees of executive branch of State government became effective May 22, 1990 (E.O. 90-6), was repealed Jan. 11, 2005. (E.O. 05-14).

School employee collective bargaining is governed by statutes which set out duty to bargain collectively on certain subjects, recognized right of school employees to form and join unions, and certain defined unfair practices. (IC 20-29-1-1, IC 20-29-5-1 et seq.; IC 20-29-6-1, IC 20-29-7-1). It is unlawful for school employee or school employee organization to take part in or assist in strike against school employer or school corporation. (IC 20-29-9-1 et seq.). However, school employers and exclusive representatives of school employees may mediate disputes to delineate problems involved in bargaining collectively to find solutions that can reasonably be accepted by both parties and to determine common grounds. (IC 20-29-8-1 et seq.).

Discrimination.

It is unlawful for employer or union to discriminate on basis of race, religion, color, sex, disability, national origin, ancestry, and age (where individual is between 40 and 70) except that it shall not be discriminatory practice for private or religious educational institution to continue to maintain and enforce policy of admitting students of one sex only. (IC 22-9-1-1 et seq.; IC 22-9-2-1 et seq.). It is unlawful for employer to discriminate on basis of sex as to wage payments, except where such payment is made pursuant to seniority system, merit system, system which measures earnings by quantity or quality of production, or differential based on any other factor other than sex. (IC 22-2-2-4). The Employment Discrimination Against Disabled Persons Act mirrors requirements of Title I of Americans With Disabilities Act. (IC 22-9-5-1 et seq.).

If, after investigating complaint of unlawful discrimination, Indiana Civil Rights Commission issues finding of probable cause, parties have option of proceeding to full hearing before Commission or, upon written consent of both complainant and respondent before Commission has begun hearing with regard to finding of probable cause, may elect to file civil action in circuit or superior court in county in which discriminatory practice allegedly occurred. Such civil action must be tried by court without benefit of jury. (IC 22-9-1-16, IC 22-9-1-17, IC 22-9-1-18).

To extent reasonably possible, employers with 25 or more employees must provide: (1) Private location, other than toilet stall, for employees to express breast milk and (2) provide cold storage for expressed breast milk or allow employee to provide own portable cold storage device for expressed breast milk. (IC 22-2-14-1 and IC 22-2-14-2).

Worker’s Compensation Act applies to all employees except certain railroad employees and municipal workers. (IC 22-3-2-2). It does not apply to part-time youth coaches working with nonprofit organizations. (IC 22-3-2-2). It also provides limited coverage for unpaid student worker’s participating in school to work programs. (IC 22-3-2-2.5 and IC 22-3-7-2.5). It does not apply to casual or farm workers or to domestics unless employer so chooses. (IC 22-3-2-9). Volunteer workers at state institutions (as defined by IC 12-7-2-184) may be subject to medical benefits described under IC 22-3-2 through IC 22-3-6. (IC 22-3-2-2.3).

Compliance with act is required. (IC 22-3-2-2). Remedy of employee on account of personal injury or death by accident arising out of and in course of employment against his employer under act is exclusive (IC 22-3-2-2; IC 22-3-2-6), except for remedies available under Compensation for Victims of Violent Crimes Act (IC 5-2-6.1 et seq.). Burden of proof is on employee. (IC 22-3-2-2). Definition of employer includes parent or subsidiary of corporation and lessor or lessee of employees. (IC 22-3-6-1).

Employers must carry insurance or obtain permission to be self-insured. (IC 22-3-2-5).

Employers subject to act must post notice in their places of business informing employees of worker’s compensation coverage and name, address, and telephone number of employer’s administrator or insurance carrier. (IC 22-3-2-22).

Rights against third parties are alternative to compensation for same accident but acceptance of compensation by employee or his dependents does not bar action against third parties. If employee proceeds against third party, employer has lien upon any amount paid by third party to employee equal to amount actually paid by employer, subject to employer paying its pro rata share of costs, expenses, and attorney’s fees. If employee does not proceed against third party, within two years after cause of action accrues, or if such proceeding is commenced but later dismissed, employer is subrogated against third party in amount of his liability to employee and may maintain action within one year from date of two years from when cause of action accrued or date when employee’s action was dismissed. No release or settlement of claim for damages and no satisfaction of judgment in third party proceedings shall be valid without written consent of employer or employer’s worker’s compensation insurance carrier. Employer’s liability to pay medical expenses and further compensation terminates if settlement is made or judgment is obtained by employee against third party. (IC 22-3-2-13).

Contractors who fail to demand of subcontractors certificate that subcontractors have complied with provisions of Act are liable for injuries to employees of subcontractors in accordance with terms of Act. Employers can not relieve themselves from terms of this Act by contract. Person must obtain stamped certificate of exemption for independent contractor in construction trades as proof that contractor is not employee and subject to worker’s compensation. (IC 22-3-2-14, IC 22-3-2-14.5, IC 22-3-2-15).

Claims under terms of act must be filed within two years from date of accident or death, except for claims resulting from exposure to radiation, which must be filed within two years from date on which employee knew or should have known of existence of such injury and its causal relationship to his employment. (IC 22-3-3-3). Act contains complicated schedule of injuries for which recovery may be had and of persons who are conclusively presumed to be dependents. (IC 22-3-3-10, IC 22-3-3-19).

After injury and prior to adjudication of permanent impairment, employer must furnish all necessary medical services and supplies. Worker’s Compensation Board may order employer to furnish medical services and supplies for longer period. Employer directs medical treatment, and if employee refuses to accept medical services provided by employer, employee is barred from receiving all compensation otherwise payable during period of refusal. Employer will be ordered to pay for unauthorized medical care if Worker’s Compensation Board finds emergency, employer failed to provide medical treatment, or any other good reason. (IC 22-3-3-4). For injuries producing temporary total disability or temporary partial disability to work, compensation is due beginning on eighth calendar day of such disability, and is allowed for first seven calendar days only if disability continues for longer than 21 days. (IC 22-3-3-7). Amount of compensation due and number of weeks of entitlement for temporary total disability and temporary partial disability is based on date of injury and average weekly wage. (IC 22-3-3-8 and 9). For injuries resulting in permanent partial impairment, act provides detailed schedule of injuries which assigns certain number of degrees of impairment for specific body part. Amount of compensation to which employee is entitled varies based on number of degrees. Value of each degree is based on date of injury. Compensation for permanent partial impairment is paid on weekly basis. (IC 22-3-3-10). Average weekly wage is defined as earnings of injured employee in employment in which employee was working at time of injury for 52 weeks immediately preceding date of injury divided by 52. (IC 22-3-6-1[d]). Act provides minimum and maximum average weekly wage caps that vary according to date of injury. (IC 22-3-3-22). Temporary total disability, temporary partial disability, permanent partial impairment, and permanent total disability are considered compensation for purposes of Act. Act provides maximum compensation cap, exclusive of medical benefits, payable based on date of injury. (IC 22-3-3-22). Award of compensation may not exceed 500 weeks. (IC 22-3-3-32). Totally disabled individuals and certain other individuals may also be able to receive additional payments by application to Board-administered Second Injury Fund. (IC 22-3-3-13). Weekly compensation may not exceed average weekly wages of employee at time of injury. Average weekly wage figure to be determined without regard to any salary reduction agreement under § 125 of Internal Revenue Code. For purposes of computing average weekly wage of minor student employee who has been permanently impaired employed part-time as part of approved training program, such student's hourly wage rate is multiplied by 40 hours. (IC 22-3-6-1). Burial expenses are limited to $7,500. (IC 22-3-3-21).

Workers Compensation Board composed of seven members, one or more of whom hears cases and awards compensation in case employer and employee or employee's dependents do not agree upon compensation. (IC 22-3-1-1, IC 22-3-4-5, IC 22-3-4-6). Any party dissatisfied with award of single hearing member may file petition for review, and case is reviewed by full board, which files finding of facts and conclusions of law. Hearings are to be scheduled as early as practicable after time of accident. Within 30 days from date of award by full board, either party may appeal on questions of law to Court of Appeals. (IC 22-3-4-5, 8).

Employer's Liability Act applies to employers in business, trade or commerce employing five or more persons. Act is of little importance being largely succeeded in fact by worker's compensation law, although sections are not repealed and affect persons not operating under compensation law. (IC 22-3-9-1 – 22-3-9-11).

Unemployment Compensation.

Unemployed are required to register within certain time and report in manner and at places, times, and with frequency prescribed by rule. (IC 22-4-14-2). Unemployed are eligible only if able to work, available, making effort to obtain full-time work and (in some circumstances) participating in reemployment services. (IC 22-4-14-3). Ineligible unemployed include, generally: certain students; certain governmental employees; those in full-time military service or civilian service as conscientious objectors; those suspended due to misconduct at work (IC 22-4-14-3); those unemployed due to labor dispute in which they or members of class or grade of workers to which they belong participate or are directly interested or which they finance (IC 22-4-15-3); and certain persons employed in educational institutions and who cease working between two successive academic years or terms or during sabbatical provided for under contract, where persons have reasonable expectations of resuming work when new academic year resumes (IC 22-4-14-7). Persons accepting layoff under inverse seniority clause of collective bargaining agreement are eligible for benefits if they otherwise qualify. (IC 22-4-14-1). See IC 22-4-11-1; IC 22-4-12-2 for benefit rates. Persons are also not eligible for full benefits if they are terminated for just cause or, they left employment without good cause in connection with work, as defined by statute. (IC 22-4-15-1).

Workmen's Occupational Diseases Act provides for compensation for death or disablement by occupational disease arising out of and in course of employment. Provisions of this Act follow closely corresponding provisions of Workmen's Compensation Act and compensation payments are substantially same. (IC 22-3-7-2 to 38).

Employees' Off-Duty Use of Tobacco.

Employer may not require employee or prospective employee to refrain from using tobacco outside of course of employment, nor may employer discriminate against employees who use tobacco outside course of employment in terms of compensation, benefits, or working conditions. Employer may implement financial incentives: (1) intended to reduce tobacco use; and (2) related to employee health benefits provided by employer. (IC 22-5-4-1).

Indiana Occupational Safety and Health Act (OSHA) has established agencies of Department of Labor to regulate and promote health and safety standards. These agencies have power to tax and enforce penalties. (IC 22-8-1.1-1 et seq.). No state standard may be more stringent than corresponding federal standards under OSHA. (IC 22-8-1.1-17.5).

11.03 WORKERS' COMPENSATION LAW:

See topic 11.02 Labor Relations.

11.03A WORKMEN'S OCCUPATIONAL DISEASES ACT:

See topic 11.02 Labor Relations.

12 ENVIRONMENT

12.01 ENVIRONMENTAL REGULATION:

General Supervision.

Indiana Department of Environmental Management provides for comprehensive environmental development and control on statewide basis. (IC 13-12-3-1; IC 13-13). Specific areas of responsibility are vested in Indiana State Department of Health (IC 16-41-27) (mobile home parks); Water Pollution Control Board (IC 13-18); Air Pollution Control Board (IC 13-17); Environmental Quality Service Council and Compliance Advisory Board (IC 13-13-7); Department of Natural Resources (IC 14-9); Natural Resources Commission (IC 14-10); Solid Waste Management Board (IC 13-19); State Chemist for control of pesticides (IC 15-16-2-32); Groundwater Task Force (IC 13-18-17); Indiana Recycling and Energy Development Board (IC 4-23-5.5); and Solid Waste Management Districts created under IC 13-21-3. Local units of government may also regulate generation of sound or emissions into air. (IC 36-8-2-8; IC 13-14-1-10; IC 13-14-3-1).

Prohibited Acts.

Pollution of air or water, disposal or dumping solid waste, surface mining activities, and transportation, treatment, storage or disposal of hazardous waste in violation of statutes, standards and regulations of appropriate state agency or local government are prohibited. (IC 13-7-5-3; IC 13-18-4; IC 13-30-2-1; IC 14-34-3-1; Indiana Administrative Code, Titles 312 [Natural Resources Commission], 326 [Air Pollution Control Board], 327 [Water Pollution Control Board], 329 [Solid Waste Management Board], 355 [State Chemist]). Certain activities with regard to use and labeling of pesticides prohibited. (IC 15-16-5; IC 15-16-4).

It is unlawful to use or sell any nondegradable detergent containing alkyl benzine sulfonate. It is unlawful to use or sell detergent with any phosphorus, except for those amounts not exceeding ½ of 1% by weight incidental to manufacturing in accordance with Indiana Water Pollution Control Board regulations. These standards do not apply to detergents for cleaning in place food processing and dairy equipment, phosphoric acid products including sanitizers, brighteners, acid cleaners and metal conditioners; detergents for use in dish washing equipment including household and commercial dishwashers; institutional laundry detergents including detergents for use in hospitals and health care facilities; detergents for use in dairy, beverage, food processing and other industrial cleaning equipment; detergent for cleaning compound contained in fuel or lubricating oil, and any other use of detergent in which phosphorous contents are not permitted to enter public or private sewer or be disposed into natural environment. (IC 13-18-9-1 – 13-18-9-3).

Whole waste tire cannot be disposed of at solid waste landfill. Person may not act as waste tire transporter without being registered with Indiana Department of Environmental Management. Tire retailers must post notices regarding tire recycling and disposal and must accept used tires from customers. (IC 13-20-14).

After 2010, certain manufacturers of video devices and collectors of electronic devices cannot allow mixing of such devices with waste that is intended to be disposed at landfill, burned or incinerated. (IC 13-20.5-10-1).

Person may not create or maintain certain waste tire processing operations without obtaining certificate of registration from Indiana Department of Environmental Management. (IC 13-20-13-2).

Person may not incinerate PCB in incinerator without permit from IDEM and approval of county executive of county in which incinerator is located. (IC 13-17-10-1).

Person shall not sell or manufacture for sale in this state compound polychlorinated biphenyls or terphenyls (PCB). There are also various restrictions as to amounts of PCB that may be in products or materials sold or manufactured in Indiana. (IC 13-20-15).

Person may not engage in certain lead-based paint activities such as inspection, remodeling, renovation, maintenance or abatement and must obtain license after undergoing training in approved program. (IC 16-41-39.8).

Certain plastic bottles may not be sold in Indiana unless bottles are coded for recycling. (IC 13-20-19-1).

Disposal of vegetative matter in landfills prohibited. (IC 13-20-9). Composting operations require registration. (IC 13-20-10).

Water quality standards and rights to public use do not apply to off-stream privately-owned bodies of water used to reduce pollutants or cool water before discharge into public waters. (IC 14-26-2-14).

Vehicle that has been used to transport more than 4,000 pounds of solid waste to landfill, incinerator or transfer station may not be used to transport food for at least 15 days unless vehicle has been sanitized in accordance with State Board of Health rules. (IC 16-42-18-3).

Disposal of lead-acid batteries is restricted, and retailers must accept used lead-acid batteries from purchasers of new batteries. (IC 13-20-16).

No person may install, test, retrofit, or remove underground storage tank unless person has been certified by State Fire Marshall. (IC 13-23-3-3).

No person may inspect, manage, or abate asbestos-containing materials without being accredited or licensed. (IC 13-17-6-1).

Registration or license required for certain pesticide activities and certain of these activities may be restricted. (IC 15-16-4, IC 15-16-5).

No person may engage in waste transfer activities without submitting disclosure statement to IDEM. (IC 13-20-6).

Enforcement.

Agencies regulating environmental matters have control over enforcement of their regulations. However, under specified conditions and procedures, any person, corporation, association, or governmental unit may maintain action for declaratory and equitable relief for protection of environment from significant pollution, impairment, or destruction. (IC 13-30-1-1; IC 13-30-3).

For surface mining activities, special enforcement provisions conducted by Director of Dept. of Natural Resources provide for inspection, written notice of violations, and opportunity for public hearing. Civil actions by any person with interest which may be adversely affected to remedy violation also permitted. (IC 14-34-15-12).

Department employees authorized to enter premises to inspect and obtain samples of hazardous substances but must give owner report. (IC 13-14-2-2; IC 13-14-5-2). Department authorized to issue order mandating corrective action and to seek court order to permit entrance on private land to carry out corrective action, including order requiring removal of hazardous substances released from containment or other appropriate action. (IC 13-14-2-1; IC 13-14-2-6; IC 13-30-3-11).

Asbestos project may be enjoined if it is not performed in accordance with state rules, and asbestos contractors and workers may be reprimanded or their licenses may be suspended or revoked under certain circumstances. (IC 13-17-6-10 to -11).

Judicial Review.

To obtain judicial review of final order of department, board or agency, proceed under IC 4-21.5-5.

Emergency Orders.

Whenever contamination of air, water or land constitutes a clear and present danger to health and safety of persons, Governor may proclaim existence of an emergency and order all persons causing contamination to reduce or discontinue immediately emission and/or discharge of contaminants. (IC 13-14-10-1).

Penalties.

Persons who violate statutes, regulations or standards adopted by agency or board are liable for civil penalty not to exceed $25,000 per day of any violation. (IC 13-30-4-1). Department enforcement action must commence by issuing notice of violation within three years after date department first discovers event or last of series of events that serves as basis for enforcement action. (IC 13-14-6-2). Persons who fail to pay annual fees for underground storage tanks subject to penalty of up to $2,000 per year per tank. (IC 13-23-12-7). Violation of surface mining statutes or regulations only, civil penalty not to exceed $5,000 per violation, plus $750 per day of continuing violation. (IC 14-34-16-1). Penalties not to exceed $10,000 per day of violation of flood control laws, regulations, or permits. (IC 14-28-1-36). Penalty of up to $1,000 for violation of pesticide laws or regulations. (IC 15-16-4-69, IC 15-16-5-66). Violations of electronic waste statutes or regulations will not result in criminal or civil penalty. (IC 13-20.5-10-2).

Violation of Emergency Order.

Penalty not to exceed $500 per hour of violation. (IC 13-30-4-2).

Criminal Penalties.

Class D felony and fine of $5,000 to $50,000 per day of violation of terms of permit or Indiana law. (IC 13-30-10). Penalty for second and subsequent convictions is fine not to exceed $100,000 per day and imprisonment. Class D felony for falsification of documents or monitoring. Class C felony if violation results in death of person. (IC 13-12-6). Class C infraction for person to obstruct, delay, resist, prevent, or interfere with inspection or investigation of department. Each day of violation constitutes separate infraction. (IC 13-30-5-1). Responsible corporate officers may be prosecuted. (IC 13-30-6-4). Class C misdemeanor for violation of certain pesticide rules. (IC 15-16-4-77). Class B infraction for failure to deliver disclosure documents under Indiana Responsible Transfer Law. Class A infraction for false statement or failure to record disclosure document. (IC 13-25-3-10 – 13-25-3-12). Failure of final disposal facility to pay to state fee collection for disposal of solid waste in Indiana constitutes Class D felony. (IC 13-20-22-19).

Permits or certificates are required for various activities affecting environment (IC 13-15-2-2); for certain air pollutant emitting facilities (IC 13-15-1-1); certain discharges into navigable waters (IC 13-15-1-2); solid and hazardous waste activities (IC 13-15-1-3); surface mining activities (IC 14-34-3-1); chemical munitions destruction or treatment facilities (IC 13-11-3-10); hazardous waste facility sites (IC 13-22-3-1). Applicants for permits involving management of solid waste, hazardous waste, or atomic radiation must disclose history of past violations, actions, and other “good character” matters. (IC 13-19-4). Owner or operator of final disposal facility in Indiana must register with IDEM. (IC 13-20-22-4). Applicants for construction or operation of landfill or transfer station also must satisfy financial responsibility requirements. (IC 13-20-2-1; IC 13-22-9-1). Municipal waste collection and transportation vehicles must be registered. (IC 13-20-4-2). Certain underground storage tanks must be registered. (IC 13-23-12-1). Permits are required for construction in floodways. (IC 14-28-1-22). Registration required for composting operations (IC 13-20-10-2), and for waste tire storage site (IC 13-20-13).

Fees.

Owners or operators of underground storage tanks must pay annual fees. (IC 13-23-12-1). Annual fees are assessed against facilities required to submit emergency and hazardous chemical inventory form. (IC 6-6-10-6). Fees required for various permits, registrations, licenses, authorizations, and certificates. (See subhead Permits or Certificates, supra.) Fees established by statute are charged for disposal or incineration of solid waste in Indiana; additional fees established by rule may be assessed against solid waste generated outside Indiana. (IC 13-20-22-1). Fee required for registration of final disposal facility in Indiana. (IC 13-20-22-4). Fees are charged for mandatory inspection of solid waste transfer stations. (IC 13-20-6-7).

Reports.

Department of Environmental Management responsible for collection of information and copying of records concerning hazardous substances. Operations generating at least 100 kilograms of hazardous waste transported for disposal or storage must file report with Department. Manifest is required for transportation of hazardous waste. (IC 13-22-4). Specified information concerning generation of hazardous waste must be reported. (IC 13-22-11). Certain spills of pollutants into waters of Indiana must be reported within two hours of discovery. (327 IAC 2-6.1-1 et seq.). Notification required for asbestos demolition or renovation activities. (326 IAC 14-10-3; see also local government rules).

Interstate Compacts.

Indiana belongs to several interstate compacts and commissions: Ohio River Valley Water Sanitation Compact Commission (1939) (IC 13-29-2); Midwest Interstate Low-Level Radioactive Waste Compact (1983) (IC 13-29-1); and Interstate Mining Compact (IC 14-34-4).

Responsible Property Transfer Law.

Transferor of certain real property must furnish disclosure document to other parties to transfer which discloses prior uses of property. Disclosure document must include criteria set forth in statute and must be recorded in county where property is located. (IC 13-25-3).

State Cleanup Laws.

Persons who are liable under § 107(a) of 42 U.S.C. 9607(a) are liable, in same manner and to same extent, to State of Indiana, subject to additional defenses for creditors, fiduciaries, non-profit corporations and political subdivisions. (IC 13-25-4-8). State may impose lien on property with respect to which state has incurred environmental response costs. (IC 13-25-4-11; IC 13-24-1-4). Owners and operators of certain underground storage tanks are liable to state for costs of corrective action with respect to release of hazardous substances or petroleum from tanks; private parties who have incurred corrective action costs have right of contribution. (IC 13-23-13-8). Owners or operators of petroleum facilities, or other responsible persons, are liable to state for reasonable costs of response or remedial actions taken with respect to facility; owner, operator, or responsible person is entitled to all rights of state to recover such costs from responsible person. (IC 13-24-1-4). State or private person may bring action to recover reasonable costs of removal or remedial action against persons who caused or contributed to certain releases of hazardous substances or petroleum. (IC 13-30-9). Voluntary remediation can result in contribution protection, covenant not to sue, and certificate of completion. (IC 13-25-5).

13 ESTATES AND TRUSTS

13.01 ADMINISTRATION:

See topic 13.08 Executors and Administrators.

13.02 ADVANCEMENTS:

See topic 13.07 Descent and Distribution.

13.03 ALLOWANCES:

See topic 13.08 Executors and Administrators.

13.04 CLAIMS:

See topic 13.08 Executors and Administrators; category 5 Civil Actions and Procedure, topic 5.17 Pleading.

13.05 DEATH:

Presumption of Death.

Where a resident of the state is absent for five years without tidings, presumption of death arises and his will may be probated or administration had on his estate. (IC 29-2-5-1 and IC 29-2-6-1). Before court may determine that individual should be presumed dead, notice to individual must be published once each week for three consecutive weeks, with first notice published more than 30 days before hearing in newspaper of general circulation in county where individual last resided or where individual's property is located. (IC 29-2-5-1).

In case of life insurance, absence of insured for five years is not sufficient to raise presumption of death, but common law presumption of death after seven years prevails. (197 Ind. 50, 149 N.E. 718; 410 N.E.2d 1377).

Where nonresident of state who, if alive, would be entitled to real estate in state by descent or devise, has been absent from his last place of residence in any other state or country for seven years, and not heard from by his or her spouse, parents, children, brothers or sisters for seven years, he or she is presumed to be dead. In such case his real estate or that which he would have inherited vests in his heirs after complaint and notice filed in circuit or superior court of county in which real estate is situated to quiet title to real estate as against him. Judgment becomes absolute at end of three years unless, within that time, he appears and moves to have it vacated. (IC 32-30-3-18 – 32-30-3-19).

Uniform Determination of Death Act adopted. (IC 1-1-4-3).

Definition of Death.

At least for purposes of homicide law, death legally occurs when all brain functions irreversibly cease or when circulatory and respiratory functions irreversibly cease. (421 N.E.2d 596).

Proof of Death.

Official findings and records or certified copies of same issued by authorized officer or employee of U.S. concerning death, presumed death or other status of missing persons, upon receipt in any court, is evidence of death or status of any missing person. (IC 34-37-4-1 – 34-37-4-2).

Local health officers maintain permanent record of deaths occurring in their jurisdiction. These records are open to public inspection; however, deceased's Social Security number is confidential and may not be disclosed to public. (IC 16-37-3-9).

Survivorship.

Uniform Simultaneous Death Act has been adopted. (IC 29-2-14-1 et seq.).

Actions for Death.

Personal representative of deceased may bring action against one causing death of his decedent by wrongful act or omission, if decedent might have brought action had he lived. Such action must be brought within two years after death. Damages in death actions shall be in such amount as may be determined by court or jury to compensate for pecuniary loss. (400 N.E.2d 778). Pecuniary loss for which damages are recoverable in wrongful death action pursuant to IC 34-23-1-1 may include reasonable medical, hospital, funeral, and burial expenses necessitated by wrongful act or omission causing death, and may include loss of decedent's love and companionship. (IC 34-23-1-2 and IC 34-23-2-1). Supreme Court of Indiana has held that punitive damages are not recoverable in wrongful death actions brought under IC 34-23-1-1. (745 N.E.2d 755). Damages recovered for medical and burial expenses inure to exclusive benefit of decedent's estate for payment thereof. Remaining damages must inure to exclusive benefit of widow or widower and dependent children, if any, or dependent next of kin, to be distributed as personal property. If there is no surviving spouse, dependent children, or dependent next of kin, damages inure to benefit of those who provided hospital and medical services and for burial expenses, administrator's expenses and attorney's fees. (IC 34-23-1-1).

Personal representative of adult person may bring action against one causing death of his decedent by wrongful act or omission. "Adult person" defined as unmarried individual without dependents who is not child under IC 34-23-2-1. Damages must be determined by court or jury and may include (1) reasonable medical, hospital, funeral, and burial expenses necessitated by wrongful act that caused adult person's death and (2) loss of adult person's love and companionship. No more than $300,000 may be received for loss of love and companionship; jury may not be advised of limit. Punitive damages and damages for grief are not allowed. Damages awarded for medical, hospital, funeral, and burial expenses inure to exclusive benefit of adult person's estate. All other damages inure to exclusive benefit of nondependent parent or nondependent child who proves he had genuine, substantial, and ongoing relationship with adult person. No evidence regarding lost earnings may be heard. (IC 34-23-1-2).

Father or mother, or in case of divorce or dissolution of marriage, person to whom custody of child was awarded, may maintain action for death of child, and guardian may maintain such action for death of protected person. “Child” defined as unmarried individual without dependents who is: (1) Less than 20 years of age; or (2) less than 23 years of age and enrolled in postsecondary educational institution or career and technical education school or program that is not postsecondary educational program. Damages may be recovered: (1) For loss of child’s services; (2) for loss of child’s love and companionship; and (3) to pay expenses for deceased child’s medical care necessitated by wrongful act which caused child’s death, child’s funeral expenses and counseling for surviving parent or minor sibling, uninsured debts of child, including debtors for which parent is obligated on behalf of child, and administration of child’s estate, including reasonable attorney’s fees. In addition, uninsured debts of child may be recovered as well as expenses related to administration of child’s estate. (IC 34-23-2-1).

Court having probate jurisdiction may appoint administrator for estate of a nonresident for sole purpose of bringing action to recover damages for wrongful death of such nonresident. (IC 29-1-10-18). See also category 23 Transportation, topic 23.01 Motor Vehicles, subhead Action Against Nonresident.

In action against personal representative of wrongdoer brought after death of wrongdoer, cause must be prosecuted in same manner as claims against estate. (IC 34-9-3-3). See also topic 13.08 Executors and Administrators, subhead Time for Filing.

For survival of tort actions see IC 34-9-3-1 et seq.

Medical Malpractice Act.

(IC 34-18-1-1 et seq.). If action qualifies under IC 34-18-1-1, then total amount recoverable for any injury or death of patient may not exceed $500,000. That limit was increased to $750,000 for malpractice occurring on or after Jan. 1, 1990. (IC 34-18-14-3[a]). That limit increased to $1,250,000 for malpractice occurring on or after July 1, 1999. (IC 34-18-14-3[a]). Act applies to all “qualified” health care providers, and maximum recovery from health care provider is $100,000. (IC 34-18-14-3[b]). That limit increased to $250,000 for malpractice occurring on or after July 1, 1999. (IC 34-18-14-3[b]).

Death Certificate.

See category 10 Documents and Records, topic 10.04 Records, subhead Vital Statistics.

Revised Uniform Anatomical Gift Act adopted with modifications. (IC 29-2-16.1-1 – 29-2-16.1-21).

Living Wills.

See topic 13.16 Wills.

13.06 DECEDENTS’ ESTATES:

See topics 13.07 Descent and Distribution, Executors and Administrators, Wills; category 8 Debtor and Creditor, topic 8.10 Homesteads.

13.07 DESCENT AND DISTRIBUTION:

See also topic 13.08 Executors and Administrators.

The share of the net estate not distributable to the surviving spouse, or the entire net estate if there is no surviving spouse, will descend as follows: (a) to the issue of intestate; if they are all in the same degree of kinship to the intestate, they will take equally, otherwise, to those of more remote degrees, by representation; (b) if there is surviving spouse but no surviving issue of intestate, then to intestate's surviving parents; (c) if no surviving spouse or issue of intestate, then to surviving parents, brothers and sisters and issue of deceased brothers and sisters of intestate, provided that each parent will get no less than one-fourth of net estate and issue of deceased brothers and sisters take by representation; (d) if no surviving parent or brother or sister of intestate, then to issue of brothers and sisters, equally if all of same degree of kinship to intestate, otherwise, to those of more remote degrees by representation; (e) if no surviving issue, or parent of intestate, or issue of parent, then to surviving grandparents of intestate equally; (f) if no surviving issue, or parent, or issue of parent, or grandparent, then estate shall be divided into number of shares equal to sum of: (1) number of brothers and sisters of decedent's parents surviving decedent, plus (2) number of deceased brothers and sisters of decedent's parents leaving issue surviving both them and decedent; such shares shall pass per stirpes to each of said brothers and sisters of decedent's parents or their issue per stirpes; (g) if interest in real estate go to husband and wife under this section, aggregate interests shall be owned by them as tenants by entireties, while personal property shall be owned as tenants in common; if there is no person mentioned in (a) through (g), then to state. (IC 29-1-2-1).

Surviving Spouse.

Common law dower and curtesy are abolished and a surviving spouse takes as a statutory heir. (IC 29-1-2-11).

If decedent left surviving child or children or other descendants by prior marriage, and no issue by surviving spouse, surviving spouse will take only amount equal to 25% of remainder of fair market value as of date of death of real property of deceased spouse, minus value of liens and encumbrances on real property of deceased spouse, with fee vesting in decedent's surviving issue. Surviving spouse will receive regular statutory share in personal property of decedent. (IC 29-1-2-1).

Subject to exceptions above, surviving spouse will receive following share of net estate: (1) One-half, if intestate is survived by at least one child or by issue of at least one deceased child; (2) three-fourths, if there is no surviving issue, but intestate is survived by one or both of intestate's parents; (3) all, if there is no surviving issue or parent. (IC 29-1-2-1).

Surviving spouse of decedent domiciled in Indiana at decedent's death is entitled to receive allowance of $25,000 in personal property from estate, or real property that is part of decedent's estate or combination of both. Individual entitled to allowance may file election with respect to type of property for allowance. If no election is filed within 90 days after estate administration is commenced, allowance must be satisfied in following order of preference: (1) Intangible personal property; (2) tangible personal property; and (3) real property. If no surviving spouse, decedent's children who are under 18 years of age at time of decedent's death are entitled to same allowance to be divided equally among them. If less than $25,000 in personal property in estate, spouse or decedent's children who are under 18 years of age at time of decedent's death are entitled to any real estate in estate to extent necessary to make up difference. Amount of difference is lien on real estate. No real estate sale may be sold to satisfy survivor's allowance unless sale is approved in agreement signed by all interested persons or by court order following notice to all interested persons. Allowance under this section is not chargeable against distributive share of either surviving spouse or children, and is deductible for inheritance tax purposes from value of property interests transferred by resident decedent under his will or under laws of intestate succession. (IC 6-4.1-3-13[b] 10; IC 29-1-4-1).

Circumstances Barring Participation in Estate of Deceased Spouse.

Surviving spouse who is living apart in adultery at time of death of other spouse is barred from any participation in estate or trust of deceased spouse. (IC 29-1-2-14). Individual who abandons spouse, without just cause, shall take no part of estate or trust of deceased spouse. (IC 29-1-2-15).

Half Blood.

Kindred of half blood inherit the same share which they would have inherited if they had been of the whole blood. (IC 29-1-2-5).

Posthumous Children or Other Issue.

Descendants of intestate begotten before but born after his death inherit as if they had been born during his lifetime and survived him. (IC 29-1-2-6).

Children born out of wedlock inherit from and through mother and she and her relatives from them. Children born out of wedlock inherit from and through father if: (1) Paternity has been established by action filed during father's lifetime if child was at least 20 years of age when father died; (2) paternity has been established by action filed during father's lifetime or within five months after father's death; if child was less than 20 years of age when father died; (3) paternity has been established by action filed within 11 months after father's death if child born after father died; (4) putative father marries mother of child and acknowledges child to be his own; or (5) putative father executes paternity affidavit as set forth in IC 16-37-2-2.1. If either of above occurs father and his relatives inherit from child born out of wedlock. (IC 29-1-2-7).

Adopted Children.

See category 14 Family, topic 14.01 Adoption.

Forfeiture of Rights.

Person is constructive trustee of property to which person is otherwise entitled to receive as result of individual's death if person found guilty or guilty but mentally ill, of murder, causing suicide, or voluntary manslaughter, because of individual's death. Beneficiaries of constructive trust include those who are legally entitled to property other than constructive trustee. However, if any property under constructive trust is sold to innocent purchaser, that property is no longer subject to constructive trust, but property received in transaction becomes subject to constructive trust. (IC 29-1-2-12.1).

Determination of Heirship.

With exception of treatment of posthumous issue, descent and distribution of intestate estate is determined by relationship to intestate at date of death. (IC 29-1-2-6). At any time during administration of estate, personal representative or any interested person may petition court to determine heirs of decedent and their respective interests in estate. (IC 29-1-6-6). When no administration has been commenced, nor any will offered for probate, within five months after decedent's death, any person claiming interest in decedent's property as heir or through heir may petition to determine heirs of said decedent and their respective interests as heirs in estate. (IC 29-1-17-15.1).

Advancements.

Advancements may be made to any heir, including spouse. Gifts are deemed not to be advancements unless contrary is proved by written declaration of decedent or acknowledgment by heir. Advancements are counted toward intestate share of advancee to extent of value of advancement at time advancee came into possession or enjoyment or at death of intestate, whichever occurs first. If advancee dies before intestate, leaving lineal heir who takes from intestate, advancement is taken into account as if it had been made directly to heir. But if heir is entitled to lesser share than advancee would have been, heir is charged only with that part of advancement as amount he would have inherited bears to amount advancee would have received had there been no advancement and had advancee survived intestate. (IC 29-1-2-10).

Disclaimer.

See topic 13.16 Wills, subhead Disclaimer.

Escheat.

Estate of person dying intestate without heirs escheats to the state. (IC 29-1-2-1, IC 29-1-17-12).

13.07A ESTATES: (in property)

See category 21 Property, topic 21.16 Real Property.

13.08–13.09 [RESERVED]

13.10 EXECUTORS AND ADMINISTRATORS:

Jurisdiction and Venue.

Jurisdiction over administration of estate of a decedent (including probate of will and issuance of letters testamentary or of administration) is in the court exercising probate jurisdiction (see category 6 Courts and Legislature, topic 6.01 Courts) in the county where decedent had his domicile at the time of his death or, in the case of a decedent not domiciled in this state, (1) in any county wherein he left assets or (2) in any county into which assets subsequently come. Where jurisdiction may be in courts in more than one county, court first assuming jurisdiction has exclusive jurisdiction extending to all counties unless and until proper venue is determined to be elsewhere. (IC 29-1-7-1).

Preferences in Right to Administer.

Letters testamentary or of administration will be granted to persons in the following order: (1) the executor or executors designated in will that has been admitted to probate; (2) surviving spouse who is devisee in will admitted to probate; (3) devisee in will admitted to probate; (4) surviving spouse and/or surviving spouse’s nominee; (5) heir and/or his/her nominee; (6) any other qualified person. (IC 29-1-10-1).

Eligibility and Competency.

No person is qualified to serve as a personal representative who is: (1) under 18 years of age; (2) incapacitated (unless incapacity is caused by physical illness, physical impairment or physical infirmity); (3) convicted felon; (4) resident corporation not authorized to act as fiduciary in this state; or (5) person whom court finds unsuitable. (IC 29-1-10-1).

Nonresident individual or corporate fiduciary may serve as joint personal representative with resident personal representative by filing bond with court that has jurisdiction of administration, if otherwise qualified. Nonresident individual who otherwise qualifies may serve as personal representative by filing notice of acceptance of appointment, notice of appointment of resident agent, and bond. (IC 29-1-10-1).

Exemption from Bond.

Personal representative is not required to execute and file bond unless: (1) Will provides for filing of bond; or (2) court finds on its own motion or petition by interested person bond is necessary to protect creditors, heirs, legatees or devisees. (IC 29-1-11-1). Nonresident personal representative is required to file bond. (IC 29-1-10-1-[c]).

Special Administration.

Unsupervised administration: If decedent dies intestate, heirs at law of estate, or, if testate, legatees and devisees under will, or personal representative may file petition for administration without court supervision. Court may grant petition if: (1) All heirs or devisees and legatees have joined in petition; (2) estate is solvent; (3) personal representative is qualified to administer estate without court supervision; (4) heirs or legatees and devisees, or parent (as defined in IC 29-3-1-11), or if none, guardian (as defined in IC 29-3-1-6), of heir, legatee, or devisee, as case may be, freely consent to and understand significance of administration without supervision; and (5) will does not request supervised administration. (IC 29-1-7.5-1, IC 29-1-7.5-2). In addition, court may grant petition without (1) and (4) above, if decedent in will authorized unsupervised administration and if all other requirements met. (IC 29-1-7.5-2). If granted, personal representative may then perform any act necessary or appropriate to administer estate and follow procedures of statute. (IC 29-1-7.5-3, IC 29-1-7.5-4).

Representative not required to file bond unless will provides for it or court finds bond is necessary. (IC 29-1-7.5-2.5). Within two months of being appointed, representative shall prepare verified inventory of estate's assets. (IC 29-1-7.5-3.2). Distribution of real property by representative in unsupervised administration is sufficient to distribute all title therein if conveyance includes certain language. (IC 29-1-7.5-3.4, IC 29-1-7.5-3.6). Representative must close estate administered without supervision as promptly as possible. (IC 29-1-7.5-3.8). Unless barred by adjudication and except as provided in closing statement, claims against personal representative are barred, including claims by person under disability, unless proceeding to assert claims is commenced within three months after filing of closing statement. Rights barred do not include rights to recover from personal representative for fraud, misrepresentation, or inadequate disclosure. (IC 29-1-7.5-6).

Special administrators may be appointed for a specified time to perform duties respecting specific property or to perform particular acts. (IC 29-1-10-15).

Inventory.

Personal representative must prepare inventory showing fair market value of decedent's property which he has received or of which he has knowledge, including statement of all known liens and other charges on any item. Fair market value of each item may be established by appraisals. Personal representative or administrator may employ disinterested appraiser to assist him in valuing asset whose value may be subject to doubt. (IC 29-1-12-1).

Extension of Time for Payment of Debt to Estate.

When it appears to be in best interest of estate, personal representative may, on order of court, extend time for payment of any debt due estate or make any fair and reasonable compromise with any debtor. (IC 29-1-13-5).

Notice of Appointment.

Clerk of court must give notice of appointment by publication and by mail to heirs, devisees, legatees and known creditors, except as otherwise ordered by court. (IC 29-1-7-7).

Notice to Creditors.

Personal representative must give notice of appointment by mail to each known creditor of decedent upon issuance of letters testamentary. Actual notice must be given to all creditors known or reasonably ascertainable within one month of published notice of appointment and whose claims have not been paid or settled by personal representative. (IC 29-1-7-7). Personal representative must exercise reasonable diligence in discovering reasonably ascertainable creditors within one month of first publication of notice. (IC 29-1-7-7.5).

Filing of Claims.

The holder of any claim against decedent, whether such claim be due or not, must file succinct and definite statement thereof in office of clerk of court in which estate is pending. (IC 29-1-14-2). Certain negligence claims are subject to special rules. (IC 29-1-14-1). See subhead Time for Filing, infra.

If claim is secured by lien on any real or personal property such lien must be particularly set forth in such statement and reference given to where lien, if of record, will be found. (IC 29-1-14-2).

Time for Filing.

Unless personal representative fails to give actual notice to known or reasonably ascertainable creditors, all claims other than expenses of administration and claims of governmental body, whether due or to become due, absolute or contingent, are barred unless filed within three months after first published notice to creditors or three months after court has revoked probate of will if claimant was named as beneficiary in will, whichever is later. (IC 29-1-14-1). If personal representative fails to give actual notice to known or reasonably ascertainable creditors, creditor may submit claim against estate during time period above specified plus additional two months after date actual notice is given to creditor but no later than nine months after decedent’s death. (IC 29-1-7-7). Claims arising out of negligence for injury to person or damages to property against estate are not so limited if recovery does not affect any interest in assets of estate. Such negligence claims may be filed within regular period of limitations. (IC 29-1-14-1).

Proof of Claims.

If claim is on written instrument, original or complete copy thereof must be filed with statement which must set forth all credits and deductions to which estate is entitled. (IC 29-1-14-2).

Claim must be accompanied by affidavit, after deducting all credits, set-offs and deductions to which estate is entitled, is justly due and wholly unpaid or if not yet due, when it will or may become due. (IC 29-1-14-2).

Form for proof of claim may be obtained from clerk of court exercising probate jurisdiction.

Contest of Claims.

Any interested person may contest a claim upon petition to the court and at his own expense. (IC 29-1-14-14).

Allowance or Disallowance of Claims.

Claims which have been filed are immediately entered on the claim docket, and all claims must be allowed or disallowed within three months and 15 days after first published notice to creditors. Any claim disallowed is set for trial in probate court upon petition of either party to claim. Trial of such claims is conducted as ordinary civil case. (IC 29-1-14-10, IC 29-1-14-13). Claims by personal representative cannot be acted upon unless all interested parties consent. If interested parties do not consent, special personal representative appointed by court to examine and allow or disallow claim. (IC 29-1-14-17).

Payment of Claims.

Claims are paid prior to final report on estate. Prior to expiration of three months after first published notice to creditors, personal representative, if estate clearly is solvent, may pay any claims which he believes are just and correct, whether or not such claims have been filed, and must pay claims ordered by court at any time so long as such claims were filed within three months after date of publication of notice to creditors. (IC 29-1-14-19).

Insolvent Estates.

If applicable assets of estate are insufficient to pay all claims and allowances in full, personal representative must make payment in following order: (1) costs and expenses of administration; (2) reasonable funeral expenses; (3) allowance made to surviving spouse or children; (4) all debts and taxes having preference under law of U.S.; (5) reasonable and necessary medical expenses of last sickness including compensation of persons attending him; (6) all debts and taxes having preference under laws of this state; (7) all other claims allowed. (IC 29-1-14-9).

Actions Against Representative.

No action by summons or complaint may be brought against personal representative for recovery of any claim against decedent, but sole remedy is filing and prosecuting claim. (IC 29-1-14-2). Enforcement of claims arising out of certain negligence actions is excepted. (IC 29-1-14-1). Action against decedent, started before his death, may be continued by substitution of executor or administrator as party. (IC 34-9-3-3).

Liens on real estate by judgment or otherwise cannot be enforced until three months from death of decedent unless earlier date is authorized by judge of court with jurisdiction of estate. (IC 29-1-14-16). See Rule TR 69(C).

Sales.

In determining what property of the estate will be sold, there is no priority as between real and personal property except as provided by will, court order, or IC 29-1-17-3. (IC 29-1-15-1). If will gives personal representative power to sell, mortgage, lease, or exchange any estate property then he may do so without obtaining court order. When will does not authorize sale, personal representative must get court order. (IC 29-1-15-2). No sale of real estate by personal representative is voided by irregularity or defect if he acted in substantial conformity with authority granted by court, power given in will or power given to unsupervised personal representative and premises are held by or under one who purchased in good faith or power given to unsupervised personal representative. (IC 29-1-15-19).

Personal representative appointed in another state for estate of one not inhabitant of Indiana at time of his death may be authorized to sell real estate in this state by court having probate jurisdiction in county in which real estate of deceased is located subject to conditions imposed on nonresidents generally. (IC 29-2-1-6). Court in which appointment was first filed has jurisdiction over all sales of real estate in this state. (IC 29-2-1-8 – 29-2-1-10).

Liability of Beneficiaries.

If distribution made with contingent claim pending, distributees are liable to holder of claim when it becomes absolute, but not in excess of the amount distributed. Action must be brought within three months of time when claim becomes absolute. (IC 29-1-14-8).

Allowances.

See topic 13.07 Descent and Distribution, subhead Surviving Spouse.

Final Account and Settlement.

Estate must be closed as promptly as possible. Unless for good cause shown, final account must be filed within one year after appointment of personal representative. (IC 29-1-16-2). Upon filing final account, clerk of court must set deadline for filing written objections prior to hearing and must give notice to all interested persons by mail at least 14 days prior to deadline for objections to those entitled to share in residue of estate if their addresses are known. No notice or hearing is required if all persons entitled to share in final distribution waive service of notice and consent to final account. Notice of final account to unknown or unlocated persons may be made by publication. (IC 29-1-16-6). If any person entitled to part of estate cannot be found after reasonable search, that part will be paid into court. Upon sufficient proof clerk will pay person share to which he is entitled as distributee, heir, or claimant. No payment will be made seven years after court has received proceeds. (IC 29-1-17-12).

Consent Settlement.

There are provisions for the settling of disputes over the estate and for the appointment of a guardian ad litem to represent minors, incapacitated and absent parties whose consent will make agreement binding upon all interested persons. (IC 29-1-9-1 – 29-1-9-3).

After-Discovered Property.

When other property is discovered after estate is closed, the discharged personal representative or any interested person may petition to have estate reopened and the property administered. If estate was solvent, court may order the property distributed without reopening estate. (IC 29-1-17-14 or IC 29-1-7.5-8).

Compensation of Representatives.

Personal representative receives compensation which court considers just and reasonable in absence of provision for compensation in will. Personal representatives may renounce all claims for compensation provided for by will before qualification and have their compensation determined by court. (IC 29-1-10-13).

Distribution if Abroad.

No specific provision.

When Administration is Unnecessary.

If value of gross estate less liens and encumbrances does not exceed $50,000, costs and expenses of administration, and reasonable funeral expenses, personal representative or person acting on behalf of distributees, if not supervised personal representative or prohibited by court order from distributing assets, may immediately distribute estate to persons entitled to it without any administration and may file closing statement with court. (IC 29-1-8-3, IC 29-1-8-4). Person claiming right to payment or delivery of personal property of decedent is entitled thereto provided: (1) 45 days have elapsed since decedent’s death; (2) value of gross probate estate less liens and encumbrances does not exceed $50,000; (3) no petition for appointment of personal representative is pending or has been granted; (4) name and address of each other person that is entitled to share of property and part of property to which that person is entitled is included in affidavit; (5) claimant notified each person identified in affidavit of claimant’s intention to present affidavit; (6) claimant is entitled to payment or delivery of property on behalf of each person identified in affidavit; and (7) affidavit showing above conditions is given to anyone owing debts to estate or in custody of any assets of estate. (IC 29-1-8-1). Person paying or delivering personal property is discharged and released as if he dealt with personal representative of decedent. (IC 29-1-8-2).

Small Estates.

See subhead When Administration is Unnecessary, supra.

Foreign executors or administrators have generally all rights of personal representatives under wills duly executed and admitted to probate in state. (IC 29-2-1-6). However, petition for appointment of local personal representative terminates power of foreign executor or administrator. (IC 29-2-1-7). Objection by resident creditor to payment to foreign personal representative by debtor of nonresident decedent prevents payment or delivery without court authorization. (IC 29-2-1-4).

Uniform Fiduciaries Act.

See topic 13.15 Trusts.

Revised Uniform Principal and Income Act adopted with modifications. (IC 30-2-14-1 et seq.).

Uniform Simplification of Fiduciary Security Transfers Act adopted. (IC 30-2-5-1 et seq.).

Revised Uniform Anatomical Gift Act adopted with modifications. (IC 29-2-16.1-1 et seq.).

13.11 FIDUCIARIES:

See topics 13.08 Executors and Administrators, Trusts; category 14 Family, topic 14.07 Guardian and Ward.

13.12 INTESTACY:

See topic 13.07 Descent and Distribution.

13.13 [RESERVED]

13.14 PROOF OF CLAIMS:

See topic 13.08 Executors and Administrators; category 5 Civil Actions and Procedure, topic 5.17 Pleading.

13.15 TRUSTS:

Uniform Fiduciaries Act has been adopted (IC 30-2-4-1 to IC 30-2-4-14), but § 3 (IC 30-2-4-3) was repealed on effective date of Uniform Commercial Code, July 1, 1964, to extent that § 3 is inconsistent with Code.

Creation.

Trust in real or personal property enforceable only if there is written evidence of terms signed by settlor or by authorized agent. No formal language required except terms must be definite as to property, trustee, trustee’s interest, beneficiary, beneficiary’s interest, and purpose of trust. If same person is sole trustee and sole beneficiary trust terminates. (IC 30-4-2-1, IC 30-4-2-8).

Trustee’s Eligibility and Competency.

Natural person must have capacity to take, hold and deal with property for his own benefit, be 18 years old, and be of sound mind and good moral character. Natural person from another state can act as trustee of property located in Indiana. Corporation must have power to take, hold, and deal with property for its own benefit and act as trustee. (IC 30-4-2-11). Person may be both trustee and beneficiary. (IC 30-4-1-1).

Qualifications.

Trustees need not post bonds unless specified by terms of trust or required by judicial discretion. (IC 30-4-6-8).

Removal of Trustee.

Trustees may be removed by court, person authorized by terms of trust and unless prohibited by terms of trust, by beneficiary of trust whose petition is granted by court. (IC 30-4-3-29). Effective July 1, 2005, trustee may resign if at least 30 days notice is given to qualified beneficiaries, settler (if living), and all co-trustees. Alternatively, resignation may be effectuated with approval of court. (IC 30-4-3-29[b]). Successors are selected by terms of trust, by charitable organizations designated to receive distributions of trust with approval by attorney general, or, if neither of previous successor selection processed apply, by court. (IC 30-4-3-33).

General Powers and Duties of Trustees.

Powers and duties of trustees specified by statute. Standard of care required by a trustee is as required under Indiana Uniform Prudent Investor Act (IC 30-4-3.5) for trusts created after June 30, 1999, and actions of trustee occurring after June 30, 1999 for trusts already in existence as of June 30, 1999 (IC 30-4-3-3).

Sales.

Trustee has power to sell or convey all real, personal, or mixed property. (IC 30-4-3-3).

Investments.

Governed by Indiana Uniform Prudent Investor Act. (IC 30-4-3.5). Self dealing by trustee governed by IC 30-4-3-7 and IC 30-4-3-5.

Securities in Name of Nominee.

Statute allows bank, trust company, or corporate fiduciary incorporated under Indiana law, or national banking association with its principal office in Indiana to hold securities in name of nominee. (IC 28-2-6-1).

Bequests and Devises to Inter Vivos Trusts.

See topic 13.16 Wills.

Uniform Common Trust Fund Act not adopted. Common trust funds provided for. (IC 30-1-8-1 – 30-1-8-7).

Accounting.

Annual written report must be sent to each income beneficiary containing all receipts, disbursements, and items of property. Report may be waived by terms of trust or in writing by an adult beneficiary. (IC 30-4-5-12).

Compensation.

Unless terms of trust provide otherwise, trustees are entitled to reasonable compensation. Court has discretion to increase or decrease compensation if scope of duties are different from those contemplated at time of creation of trust or if court finds terms of trust unreasonable with respect to compensation. (IC 30-4-5-16, 30-4-5-17).

Discharge.

Court may modify terms of trust or terminate trust that has been fulfilled or becomes illegal, impossible, impracticable, or wasteful, or if continuance would impair trust's administration. Termination of trust requires distribution of trust property in manner consistent with purposes of trust. (IC 30-4-3-24.4).

Compromise.

If controversies exist with respect to construction, validity or effect of trust instrument, identity, rights or interests of beneficiary, or trust administration, parties may execute compromise. (IC 30-4-1 to IC 30-4-10).

Revised Uniform Principal and Income Act adopted with modifications. New chapter effective Jan. 1, 2002. (IC 30-2-14 et seq.).

Gifts to Minors.

See category 14 Family, topic 14.10 Infants.

Uniform Simplification of Fiduciary Security Transfers Act adopted. (IC 30-2-5-1 – 30-2-5-11).

Accumulated Property.

Limited to lives in being plus 21 years after effective date of instrument. (IC 32-17-8-1 to IC 32-17-8-6). Employee trusts excepted. (IC 30-2-6-2).

Perpetuities.

See category 21 Property, topic 21.12 Perpetuities.

Pour Over Trusts.

See topic 13.16 Wills, subhead Bequests and Devises to Inter Vivos Trusts.

Renunciation.

Beneficiary may disclaim interest in trust, in whole or in part, as provided in IC 32-17.5-1 – 32-17.5-10.

13.16 WILLS:

Will may be executed by any person of sound mind, who is 18 years of age or older or who is member of armed forces or merchant marine even though under 18. (IC 29-1-5-1).

Testamentary Disposition.

Testator may not limit gift by noncontesting provision nor devise to his wife with condition in restraint of remarriage. (IC 29-1-6-2, IC 29-1-6-3).

Execution.

Will, unless nuncupative, must contain signatures of testator and at least two witnesses. Testator, in presence of two or more attesting witnesses, shall signify to them that instrument is his will and then sign will, or at his direction and in his presence have someone else sign his name for him, or acknowledge his signature as already made. Attesting witnesses must sign will in presence of testator and presence of each other. (IC 29-1-5-3). If will is to be self-proved, acknowledgment of will by testator and verifications of witnesses must be attached or annexed to will or self-proving clause signed by testator and witnesses must be attached to will. (IC 29-1-5-3.1). Subject to rules of trial procedure, videotape may be admissible evidence of proper execution of will. (IC 29-1-5-3[c]).

Attestation Clause.

No formal attestation clause required unless self-proved will. See subhead Self-Proved Will, infra.

Holographic Wills.

There are no statutory provisions governing holographic wills.

Nuncupative Wills.

Valid only if made in imminent peril of death and testator died from such peril. Must be declared by testator as his will before two disinterested witnesses, reduced to writing by or under direction of one of witnesses within 30 days after declaration and submitted to probate within six months after death. May only dispose of personal property not exceeding $1,000 in value, person in active military service in time of war may dispose of personal property not exceeding $10,000 in value. Does not revoke existing written will, but does modify to extent necessary to give effect to nuncupative will. (IC 29-1-5-4).

Revocation.

Written will may be revoked by testator or another in his presence and at his direction mutilating or destroying will with intent to revoke same. Will may also be revoked by writing signed and subscribed and attested as required for making of will. Partial revocation may be only by written instrument properly executed. (IC 29-1-5-6).

If testator is divorced or his marriage annulled, all provisions in will in favor of his former spouse are revoked. Otherwise, no written will can be revoked by any change in circumstances or conditions of testator. (IC 29-1-5-8).

Nuncupative will or any part of it can be revoked by another nuncupative will. (IC 29-1-5-7).

Revival.

Revoked will may be revived only by republication or when revocation of second will shows clearly that testator intended to revive prior will. (IC 29-1-5-6).

Testamentary Gifts to Subscribing Witnesses.

Subscribing witness may not take under will where his testimony is necessary to prove will, except that if he is otherwise entitled to distributive share of testator’s estate, he shall take amount of estate equal to lesser of: (i) Such distributive share, or (ii) amount provided for him in will. (IC 29-1-5-2).

Bequests and Devises to Inter Vivos Trusts.

Instrument creating inter vivos trust need not be executed as testamentary instrument, even though settlor reserves power to alter or amend or power to control investments, or power to consume principal. (IC 29-1-5-9). Testator may devise or bequeath property to trust which is clearly described in his will and in existence at his death. Unless will provides otherwise, property shall pass subject to provisions of trust, including any amendments in writing made before or after execution of will and before or after testator’s death. (IC 29-1-6-1[j]).

Uniform Testamentary Additions to Trusts Act adopted. (IC 29-1-5-9).

Probate.

Original jurisdiction over administration of decedent's estate and probate is vested in circuit courts (IC 33-4-4-3) and in certain superior and probate courts specified by statute (IC 33-5). Probate proceedings are considered in rem. (IC 29-1-7-2). Venue is in county of decedent's domicile at death, and if not domiciled in this state, then in county where he left property or into which property may have come after his death. (IC 29-1-7-1).

Will of decedent shall not be admitted to probate before latest of following dates: (1) Three years after individual's death; (2) 60 days after entry of order denying probate of will of decedent previously offered for probate and objected to under IC 29-1-7-16; (3) 60 days after entry of order revoking probate for will of decedent previously admitted to probate and contested under IC 29-1-7-17. In case of individual presumed dead, three year period commences with date individual's death has been established by appropriate legal action. (IC 29-1-7-15.1[d]). Personal representative or any interested person may petition to have will probated. Such petition may be combined with petition for issuance of letters testamentary to executor or for appointment of administrator with will annexed if no executor. (IC 29-1-7-4).

Unless objection is filed, will must be admitted to probate upon finding that: (i) Testator is dead, (ii) will was executed according to law (IC 29-1-7-13[a]), and (iii) unless self-proved, will proved by testimony of one or more subscribing witnesses, or, if they are dead, out of state, or incapacitated, by proof of handwriting of testator or of one of subscribing witnesses (IC 29-1-7-9). Every will proved must have certificate to that effect endorsed on it giving number and page of record where it is recorded. (IC 29-1-7-14).

Grounds for contest include unsound mind, undue execution of will, duress or fraud in execution, and any other valid objection. (IC 29-1-7-17).

Self-Proved Will.

Attested will may be admitted to probate without testimony of any subscribing witness if self-proved. Non-self-proved will may later be made self-proved if testator and all witnesses execute self-proving clause. Language for self-proved will is as follows:

Under penalties for perjury, we, the undersigned testator and the undersigned witnesses, respectively, whose names are signed to the attached or foregoing instrument declare:

(1) that the testator executed the instrument as the testator's will;

(2) that, in the presence of both witnesses, the testator signed or acknowledged the signature already made or directed another to sign for the testator in the testator's presence;

(3) that the testator executed the will as a free and voluntary act for the purposes expressed in it;

(4) that each of the witnesses, in the presence of the testator and of each other, signed the will as witnesses;

(5) that the testator was of sound mind when the will was executed; and

(6) that to the best knowledge of each of the witnesses the testator was, at the time the will was executed, eighteen (18) or more years of age or was member of the armed forces or of the merchant marine of the United States or its allies.

. . . . .

Date

. . . .

Testator

. . . .

Witness

. . . .

Witness

(IC 29-1-5-3).

Will is presumed attested and if it is executed by testator and includes attestation clause signed by at least two witnesses that contains information similar to foregoing self-proof clause except that information in first clause need only contain reference that testator signified instrument is testator’s will. (IC 29-1-5-3[d]).

Contest.

Any interested person may, after filing proper bond, contest validity of will within three months after date of order admitting will to probate, by properly filing allegations in court having probate jurisdiction. Attack must be made by verified pleading setting forth objections to will’s validity. (IC 29-1-7-17, IC 29-1-7-19).

Grounds for contest include unsound mind, undue execution of will, duress or fraud in execution and any other valid objection. (IC 29-1-7-17).

Legacies.

Partial distribution may be decreed after the period allowed for filing claims and before final settlement of accounts. (IC 29-1-17-1). General legacies do not bear interest unless will shows contrary intent. (IC 29-1-17-8). Common law rules govern questions of ademption. (See 155 Ind. App. 637, 294 N.E.2d 141.)

Unclaimed Legacies.

If any heir, distributee, devisee or claimant cannot be found, personal representative shall sell that share of estate, pursuant to court order first obtained, and pay proceeds to clerk of court for benefit of persons entitled thereto according to law. If there are no known heirs, net estate not disposed of by will must escheat to common school fund. (IC 29-1-17-12). See IC 29-1-17-12(e) for exceptions to this section. See also topic 13.08 Executors and Administrators, subhead Distribution if Abroad.

Lapse.

Where testamentary devise is made to descendant of testator, who died before testator, leaving descendant who survives testator, such devise does not lapse and the descendant will take. (IC 29-1-6-1[g]).

Posthumous Children.

See topic 13.07 Descent and Distribution, subhead Posthumous Children or Other Issue.

Testamentary Guardian.

See category 14 Family, topic 14.07 Guardian and Ward, subhead Eligibility and

Competency.

Election.

Surviving spouse may not by will be deprived, without consent, of one-half of testator's net personal and real estate. However, if surviving spouse is second or other subsequent spouse without issue by decedent and decedent left surviving issue, surviving spouse may elect only one-third of personal property and amount equal to 25% of fair market value as of date of death of real property of testator, minus liens and encumbrances on real property of testator. (IC 29-1-3-1[a]). When value of property given surviving spouse under will is less than elective share, spouse may elect to retain specific bequests or devises at fair market value at time of decedent's death and receive balance in cash or property. (IC 29-1-3-1[b]). In electing against will, spouse is deemed to renounce all interests in property of deceased. (IC 29-1-3-1[c]). Election must be in writing, signed and acknowledged by surviving spouse or guardian of his estate and must be filed in office of clerk of court in which will was probated not later than ten days after period allowed for filing claims. If there is litigation pending which will affect amount of surviving spouse's share, then he (or if incompetent, his conservator [540 N.E. 2d 74]) has 30 days after final determination of such litigation within which to elect. (IC 29-1-3-2, IC 29-1-3-3).

Children.

When testator fails to provide in will for child born or adopted after making last will, such child entitled to receive share of estate equal to share if testator had died intestate, unless it appears from will that omission was intentional or testator had one or more children living when will made and devised substantially all estate to surviving spouse. (IC 29-1-3-8[a]). If testator believed child was dead at time will executed and failed to provide for such child in will, such child entitled to receive share of estate equal to share if testator had died intestate, unless it appears that testator would not have provided for child had he known child was alive. (IC 29-1-3-8[b]).

Contribution.

When property that has been specifically devised, or charged with legacy, must be sold to pay claims, allowance provided by IC 29-1-4-1, or elective share of surviving spouse or pretermitted children, other legatees and devisees must contribute portion of respective interests so as to accomplish proper abatement as provided by statute. (IC 29-1-17-4). Order of abatement, unless otherwise provided in will, is as follows: (1) Property not disposed of by will, (2) residuary devises, (3) property disposed of by will but not specifically devised and not devised to residuary devisee, (4) specific devises. (IC 29-1-17-3).

Disclaimer of interest devolved from decedent is effective only if: (1) Filed in court where estate proceedings pending, or if no proceedings are pending then in court where proceedings could be pending if commenced, (2) delivered in person or by first class mail to personal representative or to holder of legal title of property, (3) recorded in each country where real property located, and (4) above requirements accomplished in case of present interest, not later than nine months after date of death, or in case of future interest, not later than nine months after later of (a) event by which final taker ascertained or (b) day disclaimant turns 21. (IC 32-17.5-7-8).

Foreign Wills Generally.

Will is legally executed if manner of its execution complies with Indiana law, place of execution, or domicile of testator at time of execution or at time of his death. (IC 29-1-5-5).

Foreign Probated Wills.

Will proved or allowed in another state or country may be received and recorded in Indiana within three years of testator's death if: (1) Will is duly certified by seal of court or official originally probating it, or (2) copy of will and probate thereof is duly certified by clerk of court admitting it to probate and by attestation of power of clerk by presiding or sole judge of court, or (3) Indiana court having probate jurisdiction is satisfied that will should be allowed. (IC 29-1-7-25 – 29-1-7-27). After expiration of 45 days following death of nonresident decedent and upon affidavit and proof of appointment, foreign personal representative of estate of nonresident may collect payment for debt, personal property, or instrument evidencing debt, obligation, stock, or chose in action belonging to estate of nonresident without any local administration. (IC 29-2-1-2).

Simultaneous Death.

See topic 13.05 Death, subhead Survivorship.

Testamentary Trusts.

See topic 13.15 Trusts.

Revised Uniform Anatomical Gift Act adopted with modifications. (IC 29-2-16.1 – 29-2-16.21).

Living Will.

Competent adults have right to control decisions relating to their own medical care, including decision to have medical or surgical means of prolonging life provided, withheld, or withdrawn. (IC 16-36-4-6). Any competent person may consent to or refuse consent for medical treatment, including life-prolonging procedures. (IC 16-36-4-7). ("Life-prolonging procedure" does not include medical procedure necessary to comfort or alleviate pain.) (IC 16-36-4-1). Duly appointed health care representative or certain family members may consent, on behalf of nonterminal incompetent patient, to withholding of life prolonging procedures, including nutrition and hydration. (IC 16-36-1; 579 N.E.2d 32). Health care providers are not obligated to treat patient properly refusing to consent thereto, nor are they subject to civil or criminal penalty for failure to treat such patient. (IC 16-36-4-7).

Person of sound mind, and at least 18 years of age or older, may execute life-prolonging procedures will declaration or living will declaration. (IC 16-36-4-8). Life-prolonging procedures will declaration (see form infra) is for person desiring use of life-prolonging procedures in event of terminal condition. (IC 16-36-4-11). Life-prolonging declaration requires physician to use life-prolonging procedures as requested. (IC 16-36-4-8[g]). Mentally competent person desiring that dying not be artificially prolonged may execute living will declaration (see form infra). (IC 16-36-4-10). Living will declaration does not obligate physician, but is presumptive evidence of patient's desires, and must be given great weight by physician. (IC 16-36-4-8[f]).

Declarations must be voluntary, written, dated and signed by declarant or by another in declarant's presence and at his express request, and signed in presence of at least two competent witnesses of at least 18 years of age. Witness may not be person signing declaration at declarant's request; parent, spouse or child of declarant; person entitled to take part of declarant's estate; or person financially responsible for medical care of declarant. (IC 16-36-4-8).

Attending physician of patient with terminal condition who executed living will or life-prolonging procedures declaration must certify patient as "qualified patient" to gain protection from potential civil or criminal liability offered by statute. Certificate must state that diagnosis is terminal condition and that patient executed declaration in accordance with statute. (IC 16-36-4-13). Attending physician may lawfully withhold or withdraw life-prolonging procedures from such qualified patient. Such withholding or withdrawal, if in good faith and in accordance with reasonable medical standards, will not subject health care provider or employees thereof to criminal or civil liability. (IC 16-36-4-13[d]).

Statutory procedures are required of attending physician who refuses to honor qualified patient's declaration. (IC 16-36-4-13). Physician must attempt to transfer patient to another physician who will honor declaration, unless reason to believe declaration invalid or patient no longer desires that it be enforced, and patient is unable to validate declaration. In latter event, procedure exists to be followed for consultation with certain designated persons, including those with knowledge of patient's intentions and any appointed guardian of person. Procedure does not require appointment of guardian. (IC 16-36-4-13[g]).

Living will or life-prolonging declaration may be revoked by signed and dated writing, physical cancellation or destruction of declaration by declarant or at declarant's direction in his presence, or by oral expression of intent to revoke. Revocation is effective when communicated to attending physician. (IC 16-36-4-12).

Criminal sanctions are imposed for knowingly or intentionally destroying declaration without declarant's consent or forging revocation of declaration (Class D felony), and for forging living will or concealing or withholding knowledge of revocation of living will, with intent to cause withholding or withdrawal of life-prolonging procedures (Class C felony). (IC 16-36-4-15, 16-36-4-16).

IC 16-36-4 also contains provisions to effect that: (i) Declaration of no effect during patient pregnancy; (ii) qualified patient not committing suicide; (iii) declaration does not affect sale or issuance of life insurance, nor does it modify terms of life insurance policy; (iv) life insurance not impaired; (v) declaration cannot be made as condition for issuing or receiving health care services; (vi) no presumption regarding person who does not execute declaration; (vii) affirmative or deliberate acts to end life (euthanasia) not authorized; and (viii) withholding or withdrawing life-prolonging procedures not to be considered as intervening force and not to affect proximate cause with respect to conduct that placed patient in terminal condition.

Written appointment of health care representative under IC 16-36-1-7 must include language of IC 30-5-5-17 if appointment authorizes withholding or withdrawing care from terminal individual. (IC 16-36-1-14).

Forms

Living Will Declaration:

Declaration made this . . . day of . . . . . (month, year) I, ... being at least eighteen (18) years of age and of sound mind, willfully and voluntarily make known my desires that my dying shall not be artificially prolonged under the circumstances set forth below, and I declare:

If at any time my attending physician certifies in writing that: (1) I have an incurable injury, disease, or illness; (2) my death will occur within a short time; and (3) the use of life prolonging procedures would serve only to artificially prolong the dying process, I direct that such procedures be withheld or withdrawn, and that I be permitted to die naturally with only the performance or provision of any medical procedure or medication necessary to provide me with comfort care or to alleviate pain, and, if I have so indicated below, the provision of artificially supplied nutrition and hydration. (Indicate your choice by initialling or making your mark before signing this declaration):

I wish to receive artificially supplied nutrition and hydration, even if the effort to sustain life is futile or excessively burdensome to me.

I do not wish to receive artificially supplied nutrition and hydration, if the effort to sustain life is futile or excessively burdensome to me.

I intentionally make no decision concerning artificially supplied nutrition and hydration, leaving the decision to my health care representative appointed under IC 16-36-1-7 or my attorney in fact with health care powers under IC 30-5-5.

In the absence of my ability to give directions regarding the use of life prolonging procedures, it is my intention that this declaration be honored by my family and physician as the final expression of my legal right to refuse medical or surgical treatment and accept the consequences of the refusal.

I understand the full import of this declaration.

Signed: . . . .

City, County, and State of Residence . . . .

The declarant has been personally known to me, and I believe (him/her) to be of sound mind. I did not sign the declarant's signature above for or at the direction of the declarant. I am not a parent, spouse, or child of the declarant. I am not entitled to any part of the declarant's estate or directly financially responsible for the declarant's medical care. I am competent and at least eighteen (18) years of age.

Witness . . . .

Date . . . .

Witness . . . .

Date . . . .

Life-Prolonging Procedures Declaration:

Declaration made this . . . day of . . . . . (month, year) I, ..., being at least eighteen (18) years old and of sound mind, willfully and voluntarily make known my desire that if at any time I have an incurable injury, disease, or illness determined to be a terminal condition I request the use of life-prolonging procedures that would extend my life. This includes appropriate nutrition and hydration, the administration of medication, and the performance of all medical procedures necessary to extend my life, to provide comfort care, or to alleviate pain.

In the absence of my ability to give directions regarding the use of life-prolonging procedures, it is my intention that this declaration be honored by my family and physician as the final expression of my legal right to request medical or surgical treatment and accept the consequences of the request.

I understand the full import of this declaration.

Signed: . . . .

City, County, and State of Residence . . . .

The declarant has been personally known to me, and I believe (him/her) to be of sound mind. I am competent and at least eighteen (18) years old.

Witness: . . . .

Date: . . . .

Witness: . . . .

Date: . . . .

14 FAMILY

14.01 ADOPTION:

Both children and adults may be adopted, with few additional requirements necessary when adult is adopted. (IC 31-19-2-1). Any resident of state may by petition adopt another person but, if married, spouse of adopter must join in petition, or merely give duly acknowledged consent if such spouse is biological or adoptive parent. (IC 31-19-2-4). Interstate Compact on placement of children applies to interstate adoptions. (IC 31-19-1-1, IC 31-28-4).

Consent Required.

Written consent executed by: (1) Each living parent of born in wedlock child; (2) mother of child born out of wedlock, and father whose paternity has been established by court proceedings other than adoption proceeding or by paternity affidavit; (3) any person, agency, or county department with lawful custody; (4) court of jurisdiction, if legal guardian without consent power; (5) child over 14; and (6) spouse of child to be adopted if child is married. (IC 31-19-9-1). Child's father may consent to adoption before birth, but child's mother may not execute consent to adoption before birth of child. (IC 31-19-9-2). Consent not required for: (1) Parents who abandon child for six months, fail to communicate when able to do so for one year period (not necessarily from time of petition) or fails to provide support, or make only token effort at support or communication; (2) biological father of illegitimate child whose paternity has not been established by court proceeding other than adoption proceeding nor by paternity affidavit; (3) putative father if his consent to adoption is irrevocably implied as matter of law; (4) biological father who fails to timely file with putative father registry; (5) biological father who denies paternity; (6) parent who relinquishes right to consent; (7) parent whose parental rights are terminated by court order; (8) parent judicially declared incompetent or mentally defective; (9) any legal guardian who unreasonably withholds consent; (10) biological father of illegitimate child conceived as result of rape, child molesting, sexual misconduct with minor or incest; (11) parent if it is established by clear and convincing evidence that dispensing with parent's consent is in best interest of child. (IC 31-19-9-1 and 31-19-9-8). Putative father is irrevocably implied to consent to adoption if he fails to file paternity action within 30 days after receiving notice of adoption. (IC 31-19-9-15). Parent under 18 may give consent unless court requires concurrence of individual's guardian or parents. (IC 31-19-9-1). Agency arranging for adoption must receive written consent from birth parent and adult adoptee prior to releasing identifying information. (IC 31-19-22-2). Consent given in foreign jurisdictions is valid if valid in that jurisdiction. (IC 31-19-28-3). Adults adopted must consent in open court. (IC 31-19-2-1). Putative father of illegitimate child has 30 days after notice of adoption proceeding to contest adoption or his consent is irrevocably implied. (IC 31-19-9-12). Putative father registry maintained by state to assist putative fathers in obtaining notice. (IC 31-19-5).

Conditions Precedent.

A period of supervision by an approved agency of a length determined by court must precede adoption. (IC 31-19-8). Written approval by approved agency is needed to place child in proposed adoptive home except where child is to be adopted by stepparent or blood relative, received from agency outside state with consent of division of family and children, or court waives this requirement after a hearing. (IC 31-19-7).

Proceedings require filing of extensive medical history on adopted child and natural family. Information to be retained by state registrar and released under certain conditions to qualified persons. Information also to be provided to adoptive parents at time of adoption. (IC 31-19-20, IC 31-19-2-7).

Jurisdiction exclusively lies with any county court having probate jurisdiction and is not limited to county of residence. (IC 31-19-1-2).

Venue lies in the county of petitioner's residence or in the county where agency has custody of children to be adopted or in county where child resides. (IC 31-19-2-2).

Dependent Children.

Human Services Division of Family and Children has power and duty to administer and supervise care of dependent children and children placed for adoption. (IC 12-13-5-1; IC 31-10-2-1).

Petition.

Proceedings are begun by a verified petition stating name, if known, sex, race and age, if known, place of birth of child, name to be given child, amount of its property, if any; name, age, place of residence of adopting parent or parents, and if married, place and date of their marriage; name and place of residence, if known to adopting parent or parents, of (a) parent or parents of child; or (b) if child is orphan, guardian; or (c) if there is no guardian, name of child's nearest kin; or (d) name of court or agency of which child is ward, if he is ward; or (e) of agency sponsoring adoption; period during which child has lived in home of petitioners; and additional information including whether seeking subsidy. (IC 31-19-2-6). Report of health status and medical history of adoptee and adoptee's birth parents must be filed within 60 days of petition. (IC 31-19-2-7).

Decree.—A final decree of adoption is granted on proof of: (1) best interest of child; (2) suitability of adopting parents; (3) proper notice (as set forth in IC 31-19-2.5), if necessary; (4) proper consents; and (5) proper investigation reports. (IC 31-19-11-1). Parents whose parental rights terminated by decree must appeal within six months of adoption decree or one year of custody obtained by adoptive parents, whichever is later. (IC 31-19-14-2).

Name.

If new name is requested in petition for adoption, child takes name requested. (IC 31-19-11-4).

Effect of Adoption.

Legal relations between adopted child and adoptive parent are the same as in case of natural born child of such parent. (IC 31-19-15-2).

Birth parent voluntarily terminating parent-child relationship may petition for visitation rights at time decree is entered. (IC 31-19-16).

There is no distinction as to inheritance rights between a person adopted as a minor and a person adopted as an adult. (IC 29-1-2-8).

Provision is made for recording of decrees of adoption and issuance of birth certificates based thereon. (IC 31-19-12, 31-19-13).

Health and accident insurance policies must cover adopted children on same basis as other dependents. (IC 27-8-5-21).

Confidentiality.

All files and records bearing upon court, agencies, county and state departments of welfare proceedings are confidential and may only be released to adoptee, birth parent, adoptive parents and certain specified others. (IC 31-19-19). Adoption history files contain medical history, identifying information, and nonidentifying information. (IC 31-19-20, IC 31-19-21, IC 31-19-22, IC 31-19-23). Nonidentifying information is information other than medical history that does not identify birth parent, adoptive parent or adoptee. Certain persons and organization may have access to non-identifying information if petition is filed alleging that adoptive child is in need of special services. (IC 31-19-23).

Adult adoptee, birth parent and adoptive parents and certain specified others may obtain nonidentifying information upon request (IC 31-19-23), and may request search by guardian ad litem of other records (IC 31-19-23).

Identifying information may only be released upon consent of following persons: Adult adoptee and birth parent. (IC 31-19-22-2). Adoptees adopted after Dec. 31, 1993 may, if age 21, request identifying information by request to state registry unless birth parent has filed non-release form. (IC 31-19-25). Adoptees and pre-adoptive siblings may also ask state registry to locate each other if both are 21 years of age. (IC 31-19-25-6).

Subsidies For Adoption.

IC 31-19-27 provides for public programs to encourage adoption of hard to place children. Division of Family and Children authorized to enter into interstate compacts on adoption assistance to aid in adoption of hard to place children. (IC 31-19-29).

Adoptions in other states or countries, if valid under law where proceedings were effected, are recognized if filed with any court clerk of this state in county within this state and entered upon order book of court in open session. (IC 31-19-28).

14.02 ALIMONY:

See topic 14.05 Dissolution of Marriage.

14.03 COMMUNITY PROPERTY:

System does not obtain in Indiana.

14.04 DESERTION:

See topics 14.05 Dissolution of Marriage, 14.09 Husband and Wife, 14.01 Adoption, subhead Dependent Children.

14.05 DISSOLUTION OF MARRIAGE:

This subject is governed by IC 31-15-1-1 – IC 31-17-7-2.

Grounds for Dissolution of Marriage.

Marriage may be dissolved by decree upon court finding of one of following grounds: (1) Irretrievable breakdown; (2) conviction of felony subsequent to marriage; (3) impotency existing at time of marriage; (4) incurable insanity for two years or more. (IC 31-15-1-2).

Common Law Marriage.

Claims brought as common-law spouse under current Indiana dissolution of marriage or intestate succession statutes clearly would not be actionable; however, recovery can be based upon legally viable contractual and/or equitable grounds which parties could establish according to their own particular circumstances. (410 N.E.2d 1325).

Grounds for Legal Separation.

Court may grant decree for separation for period not to exceed one year if neither party has filed petition for dissolution of marriage and court finds conditions of marriage render it currently intolerable for both parties to live together, but that marriage shall be maintained during that period. (IC 31-15-3-9).

Citizenship Requirements.

None.

Residence Requirements.

At time of filing of petition, at least one party to marriage must have been resident of Indiana or stationed at U.S. military installation in Indiana for prior six months, and a resident of county or stationed at U.S. military installation in county where filed for prior three months. (IC 31-15-2-6). These residence requirements do not apply to actions for child support; however, one of such parties must reside in county at time of filing of action. (IC 31-16-2-6).

Jurisdiction.

Separate acts confer jurisdiction on Indiana courts, each court being subject to its own act. In general, circuit and superior courts have jurisdiction of actions.

Indiana statutes relating to recognition and enforcement of custody decrees of other states apply to other nations when legal institutions are similar in nature if rendered by appropriate authorities of other nations and reasonable notice and opportunity to be heard were given to all affected persons. (IC 31-21-1-3).

Any person submits to jurisdiction of Courts of Indiana by living in marital relationship within state notwithstanding subsequent departure from state, as to all obligations for alimony, custody, child support, or property settlement, if other party to marital relationship continues to reside in state. (Rule TR 4.4).

Venue.

See subhead Residence Requirements, supra.

Process.

When petition filed for dissolution of marriage or child support, summons and petition must be served on other partner, or person allegedly responsible for child support. Service in same manner as in civil actions generally. (IC 31-15-2-1 and IC 31-15-2-8; IC 31-16-2-1 and IC 31-16-2-5).

Pleadings.

Verified petition is necessary and must set forth: (1) Residence of each party and length of residence in state and county; (2) date that parties separated; (3) date of marriage; (4) names, ages, addresses of living children under 21, any incapacitated children, and whether wife is pregnant; (5) grounds for dissolution; (6) relief sought. (IC 31-15-2-5). Responsive pleading may be filed but is not required. (526 N.E.2d 231).

Practice.

Proceedings for dissolution of marriage must be commenced by filing verified petition entitled: “In Re the Marriage of _____________ and _____________”. (IC 31-15-2-4). Final hearing cannot be held until 60 days from filing of petition. (IC 31-15-2-10; Rule TR 6[F]). Proceedings for legal separation must be commenced by filing of verified petition entitled “In Re the Legal Separation of _____________ and _____________” (IC 31-15-3-4).

Provisional orders may be granted either party for temporary maintenance, support or custody of children, counseling, or possession of property, including restraining orders if certain conditions are met. Affidavit setting forth factual basis and relief sought must accompany motion. (IC 31-15-4).

Temporary restraining orders may be requested to restrain party from: (1) transferring, encumbering, concealing, selling or disposing of any joint property of parties or asset of marriage except in usual course of business or for necessities of life, without written consent of parties or permission of court; (2) abusing, harassing, disturbing peace or committing battery upon person of other party or any child or stepchild of parties; and (3) removing any child of parties then residing in State with intent to deprive court of jurisdiction over such child without prior written consent of all parties or permission of court. (Rule TR 65[E]).

Temporary restraining order may be issued if court finds on basis of moving party's affidavit that injury would result to moving party if no immediate order were issued. (Rule TR 65[B]).

Protective orders may be requested to prevent domestic or family violence at any time during dissolution of marriage or legal separation. (IC 31-15-5-1).

Judgment or Decree.

Upon final hearing, court shall hear evidence and, if it finds material allegations true, enter dissolution decree or continue matter 45 days if reasonable possibility of reconciliation exists. Upon request of party after 45 day period, judge may enter dissolution. After 90 days without such request, matter automatically dismissed. (IC 31-15-2-15). Summary dissolution decree may be entered on some or all issues, without hearing, if verified pleadings signed by both parties have been filed which state that: (1) Both parties waive final hearing, and (2) there are no contested issues or written agreement as to all contested issues has been reached. Hearing must be held as to remaining contested issues. (IC 31-15-2-13 and IC 31-15-2-14).

Dissolution decree is final when entered, subject to appeal. Appeal from dissolution decree that does not challenge findings as to dissolution itself does not delay finality of provision dissolving marriage, so that parties can remarry pending appeal. (IC 31-15-2-16).

Decree may include terms of agreement between parties as to provisions for maintenance, disposition of property, and custody and support of children. Disposition of property by agreement not subject to later modification by court except as provided in agreement itself or with consent of parties. (IC 31-15-2-17). Decree may also contain orders for disposition of property in lump sum or installment payments, child support, educational support, maintenance, persons entitled to receive payments, security for payment, attorneys fees, and name change of woman. (IC 31-15-7-1 – IC 31-15-7-8; IC 31-15-2-18 and IC 31-16-6-1). Provisions on child support may be modified on showing of changed circumstances so substantial and continuing as to make original terms unreasonable or upon showing that child support amount differs by more than 20% from Indiana Child Support Guidelines and order requested to be modified or revoked was issued at least 12 months before petition requesting modification was filed. (IC 31-15-7-3; IC 31-16-8-1). Provisions on property division may only be modified upon showing of changed circumstances so substantial and continuing as to make terms unreasonable if order requested to be modified was issued at least 12 months prior to filing of petition for modification (IC 31-15-7-3; IC 31-16-8-1), or revoked within six years and only for fraud (IC 31-15-7-9.1). Court may enter order for money judgment not limited to existing property for financial contribution of one spouse to other spouse's post secondary education. (IC 31-15-7-6).

Dissolution decree may be enforced by contempt, assignment of wages, or other income, or any other remedy available for enforcement of court order. (IC 31-15-7-10).

Temporary Alimony.

See subhead Practice, supra.

Allowance for Prosecution of Suit.

Court may order one party to pay reasonable costs and attorneys fees of other party. (IC 31-15-10-1).

Maintenance.

Agreement.

Parties may agree in writing to maintenance, division of property, child support and custody. Agreement, if approved by court, shall be incorporated into final decree. (IC 31-15-2-17). Court may order maintenance of spouse in case of: (1) Physically or mentally incapacitated spouse; (2) spouse lacks sufficient property to provide for his needs and spouse is custodian of child whose physical or mental incapacity requires custodian to forego employment; or (3) rehabilitative maintenance, not to exceed three years, is necessary after considering educational level of each spouse, interruption in education or employment of spouse due to homemaking or child care responsibilities, earning capacity of each spouse, and time and expense necessary to acquire sufficient education or training to find appropriate employment. (IC 31-15-7-1 and IC 31-15-7-2).

Division of Property (Not Under Maintenance).

Court presumes equal division of marital property is just and reasonable. Presumption may be rebutted based on following factors: (1) Contribution of each spouse to acquisition; (2) extent of acquisition prior to marriage or through inheritance or gift; (3) economic circumstances of spouse (including desirability of custodial parent living in marital residence while raising children); (4) conduct of parties during marriage as related to disposition of property; (5) earnings or earning ability of each party as related to final division of property; and final determination of property rights of parties. (IC 31-15-7-5).

Division of Property of Spouses.

See subhead Permanent Alimony, supra.

Change of Wife’s Name.

Wife’s name or prior married name shall be restored if requested in petition. (IC 31-15-2-18).

Custody of Children.

Child custody proceedings are commenced by a parent or person seeking determination filing petition. (IC 31-17-2-3).

Custody Order.

Court must determine custody in best interests of child based on all relevant factors with no presumption favoring either parent. (IC 31-17-2-8). Joint legal custody may be awarded if in best interests of child. (IC 31-17-2-13). Court may order investigations and reports on custodial arrangements in custody proceedings if requested by parent or custodian. (IC 31-17-2-12). Custody proceedings have priority in being heard. (IC 31-17-2-6). Upon request of either party, court can review and, if warranted, modify custody, and visitation orders. (IC 31-17-2-21; IC 31-17-4-2). Relocating individual must file notice of intent to move. (IC 31-17-2.2-1 et seq.).

Visitation.

Parent not granted custody entitled to reasonable visitation rights, unless court determines visitation would endanger child's physical health or significantly impair child's emotional development. (IC 31-17-4-1). In action filed to enforce or modify order granting or denying visitation rights, court may award reasonable attorneys' fees, court costs and other reasonable expenses of litigation. (IC 31-17-4-3). Non-custodial parent may also obtain temporary restraining order or permanent injunction to enforce visitation rights. (IC 31-17-4-4 – 31-17-4-5). If child's mother or father is deceased, marriage is dissolved, or, in some cases, if child is born out of wedlock, grandparents may be granted reasonable visitation rights when court determines that it is in best interests of child. Proceeding for grandparent's visitation must be commenced by filing of verified petition entitled "In Re The Visitation of . . . . . ." (IC 31-17-5-1 to IC 31-17-5-3). Visitation rights survive adoption of child by stepparent, grandparent, sibling, aunt, uncle, niece or nephew. (IC 31-17-5-9).

Allowance for support of children may be ordered of either parent or both based on all relevant factors including: (1) Financial resources of custodial parent; (2) child's standard of living within marriage; (3) child's physical, mental condition, and educational needs; (4) financial resources and needs of noncustodial parent. Support order may include sums for education, special medical, hospital, or dental expenses, basic health and hospitalization insurance coverage, and will terminate when: (a) Child becomes 21; except for order for educational needs which may continue in court's discretion; (b) child is over 18, has not attended secondary or post-secondary school for four months and is capable of supporting himself through employment, or (c) child is emancipated. Support order will continue if child is incapacitated. If under subsection (b) child is partially capable of supporting himself, order may be modified rather than terminated. (IC 31-16-6-1 and IC 31-16-6-6). Upon death of parent obligated to pay support, amount of support may be modified or revoked to extent just and appropriate and circumstances on petition of representatives of deceased parent's estate. (IC 31-16-6-7). For enforcement of child support orders, see IC 31-16-12.

Uniform Reciprocal Enforcement of Support Act adopted. (IC 31-2-1-1 – 31-2-1-39). (Repealed effective Jan. 1, 1997).

Remarriage.

See topic 14.11 Marriage, subhead License. Parties may remarry pending appeal of provisions of dissolution decree if appeal does not challenge dissolution of marriage. (IC 31-15-2-16).

Foreign Divorce.

No provisions.

Antenuptial Contracts.

See topic 14.09 Husband and Wife.

14.06 DIVORCE:

See topic 14.05 Dissolution of Marriage.

14.07 [RESERVED]

14.08 GUARDIAN AND WARD:

Jurisdiction to appoint guardian for incapacitated person or minor rests in court having probate jurisdiction of county in which incapacitated person or minor resides, or if incapacitated person or minor is nonresident of state, in county in which there is property of incapacitated person or minor. (IC 29-3-2-2). Temporary guardian may be appointed for incapacitated person or minor in need of medical care in county where medical facility is located. (IC 29-3-2-2). Residence determined by actual presence, not technical domicile. (IC 29-3-2-5). Juvenile court has exclusive original jurisdiction over certain matters relating to minors. (IC 29-3-2-1; IC 31-30-1-1). Courts with child custody jurisdiction have original and continuing jurisdiction over other custody matters relating to minors. (IC 29-3-2-1). Courts with child custody jurisdiction have concurrent jurisdiction with juvenile court where child is under jurisdiction of juvenile court because: (1) Child is subject of child in need of services proceeding; (2) child is subject of juvenile delinquency proceeding that does not involve act described in IC 31-37-1-2; or (3) child is subject of paternity proceeding. (IC 31-30-1-12). Mental health division of superior court has concurrent jurisdiction in matters relating to guardianship in connection with mental health proceedings under IC 12-26. (IC 29-3-2-1). Court may appoint attorney to appear for alleged incapacitated person or minor in action to determine competency. (IC 29-3-5-1).

Incapacitated person is any person who: (1) Cannot be located upon reasonable inquiry, (2) is incapable by reason of mental deficiency, mental or physical illness, habitual drunkenness, excessive use of drugs, insanity, duress, fraud, detention, incarceration, infirmity, confinement, undue influence of others, or other incapacity of managing his personal property or caring for himself or both, or (3) has developmental disability, as defined in IC 12-7-2-61. (IC 29-3-1-7.5).

Selection of Guardian.

Court will appoint qualified person or persons most suitable and willing to serve, considering: (1) Requests made by allegedly incapacitated person or minor at least 14 years of age; (2) requests in wills, durable powers of attorney, or other written instruments; (3) requests made by spouse of allegedly incapacitated person; (4) relationship of proposed guardian to person for whom guardianship is sought; (5) best interest of incapacitated person or minor and his property. (IC 29-3-5-4).

Persons are entitled to consideration for appointment as guardian in following order: (1) Persons designated in durable power of attorney; (2) incapacitated person's spouse; (3) incapacitated person's adult child; (4) incapacitated person's parent or person nominated by will of deceased parent, or by any writing signed by parent of incapacitated person and attested to by at least two witnesses; (5) person related by blood or marriage with whom has resided for more than six months; and (6) person nominated by incompetent who is caring for or paying for care of. Court shall appoint person with lower or no priority if in best interest of incompetent. (IC 29-3-5-5).

Eligibility and Competency.

Foreign guardian of estate may file if no local guardian has been appointed and no petition for Indiana guardianship proceeding is pending. (IC 29-3-13-2). See category 13 Estates and Trusts, topic 13.08 Executors and Administrators, subhead Eligibility and Competency.

Appointment of Guardian.—Any person may file petition for appointment of himself or another as guardian. (IC 29-3-5-1).

If petition is for minor, notice must be given by first class postage prepaid mail to: (1) Minor if at least 14 years of age; (2) living parents of minor, unless parental rights terminated by court order; and (3) persons having principal care and custody of minor for 60 days prior to petition. If petition is for alleged incapacitated person, notice must be given to: (1) Alleged incapacitated person; (2) alleged incapacitated person's spouse; (3) alleged incapacitated person's adult child or, if none, alleged incapacitated person's parents; (4) if no spouse, child, or parent is notified, at least one person most closely related by blood or marriage; (5) person serving as guardian or having care and custody of incapacitated person; (6) person serving as alleged incapacitated person's attorney in fact under durable power of attorney. (IC 29-3-6-1).

Alleged incapacitated person must be present at hearing unless court determines by evidence that: (1) Health or safety of alleged incapacitated person is threatened; (2) incapacitated person is unavailable due to disappearance or absence from state; (3) person has knowingly and voluntarily consented to appointment of guardian; or (4) incapacitated person has knowingly and voluntarily waived notice of hearing. (IC 29-3-5-1). Court may appoint attorney to represent alleged incapacitated person. (IC 29-3-5-1). After notice and hearing, guardian may be appointed after minority or incapacity is established and court determines guardian is necessary. (IC 29-3-5-2, IC 29-3-5-3).

Under certain circumstances court may appoint temporary guardian to deal with emergencies. (IC 29-3-3-4). Temporary guardian may be appointed for period not to exceed 60 days, and without notice and hearing only if court finds immediate and irreparable harm in delay. (IC 29-3-3-4). Without appointing guardian, court may order protective order for benefit of minor or incapacitated person. (IC 29-3-4-1, IC 29-3-4-2, IC 29-3-4-3). Also without appointing guardian, chief of social services at mental health institution, or his appointee, may execute documents on behalf of minor or incapacitated person in institution to receive public assistance or transfer patient to alternate care facility. (IC 29-3-3-5).

Qualification.

Unless otherwise determined by court, or unless guardian is bank or trust company, guardians must file bond procured at expense of guardianship estate and must take oath or affirmation. (IC 29-3-7-1).

Inventory.

Within 90 days of appointment (30 days in case of temporary guardian), guardian must file inventory indicating fair market value of property under guardian's control and known liens or other charges on any item, as set forth in IC 29-1-12-1. (IC 29-3-9-5). Guardian must provide notice of filing of inventory to each party that was required to be notified of hearing on petition to establish guardianship. (IC 29-3-9-5).

Powers and Duties.

Guardian of minor has authority and responsibilities of parent and is responsible for preservation of all minor's property regardless of location. (IC 29-3-8-1). Guardian of incapacitated person is responsible for care and custody and is responsible for property to extent ordered by court. (IC 29-3-8-1). Parent or guardian of incompetent, by properly executed power of attorney, may delegate for certain periods any of his powers except consent to marriage or adoption of incompetent under age 18. (IC 29-3-9-1). Guardian remains liable for acts or omissions of donee of power of attorney. (IC 29-3-9-1). Guardian of estate has power to take possession of all property of ward, continue business of ward, represent ward in all actions, invest property, pay debts of ward, sell, lease and mortgage property under court order to pay debts of ward, provide for care, maintenance, and education of ward and other powers as specified. (IC 29-3-8-2). Orders binding guardian of estate bind ward. (IC 29-3-2-4[b]). Temporary guardian has only court ordered powers necessary to prevent immediate and substantial injury or loss to ward or ward's property. (IC 29-3-3-4).

Uniform Veterans' Guardianship Act adopted. There are special provisions concerning guardian of ward whose estate includes assets derived from Veterans Administration benefits. (IC 29-1-19-1 et seq.).

Investments.

See category 13 Estates and Trusts, topic 13.15 Trusts.

Securities in Name of Nominee.

See category 13 Estates and Trusts, topic 13.15 Trusts, subhead Securities in Name of Nominee.

Real Estate.

Guardian may purchase real property for home for ward or for ward's dependent family, or protect ward's existing home, or protect ward's existing interest in any real estate, or purchase any other interest in real property where court finds purchase is in best interest of ward. (IC 29-3-8-2). Guardian may sell, lease, and mortgage real property to pay debts of ward and provide for his and his dependents' care, maintenance and education. (IC 29-3-8-1, IC 29-3-8-4).

Liabilities of Guardian.

Guardian may be personally liable for breach of duty to protected person or acts or omissions in bad faith. (IC 29-3-11-2).

Accounts.

Guardian shall file with court at least biennially and not more than 30 days after anniversary date of appointment, and within 30 days after termination of appointment, written verified account of his administration that includes minor or incapacitated person's current residence and description of conditions and circumstances of minor or incapacitated person. (IC 29-3-9-6).

Termination of Guardianship.

Guardianship shall be terminated: (1) by ward's attaining his 18th birthday if sole reason for guardianship was ward's minority; (2) by adjudication of ward's competency; (3) by death of ward. (IC 29-3-12-1).

Court may terminate guardianship: (1) on ward's adoption or marriage if sole reason for guardianship was ward's minority; (2) if guardianship is of estate and estate is exhausted or does not exceed $3,500; (3) if ward's residence is changed to another state and another guardian has been appointed by that state; (4) if guardianship is no longer necessary for any other reason. (IC 29-3-12-1).

Insane Persons.

Court may establish guardianship for mentally ill individual or individual's property in lieu of regular commitment to facility under IC 12-26-7, or at any other time, at request of individual or any other person. (IC 12-26-16-1).

Removal of Guardian.

Guardian may be removed for cause as specified. (IC 29-3-12-4). Guardian may be removed for cause after notice and hearing. (IC 29-1-10-6, IC 29-3-12-4). Court may remove guardian for cause as specified without notice or hearing in case of emergency. (IC 29-1-10-6).

Compensation.

Guardians are entitled to such compensation for their services as court shall determine to be just and reasonable. (IC 29-3-4-4, IC 29-3-9-3).

Foreign Guardians.

Foreign guardian, by following prescribed procedure, is entitled to sell real estate of his ward located in this state as if he were resident guardian, to take possession of personal property or real property and to sue to recover property of ward in courts of this state. (IC 29-3-13-1, IC 29-3-13-2).

Gifts to Minors.

See topic 14.10 Infants.

Uniform Fiduciaries Act.

See category 13 Estates and Trusts, topic 13.15 Trusts.

Uniform Simplification of Fiduciary Security Transfers Act adopted. (IC 30-2-5-1 – 30-2-5-11).

14.09 HUSBAND AND WIFE:

Contracts of Married Women.

All legal disabilities of married women to make contracts abolished, except as otherwise provided. (IC 31-11-7-1). Married women have same rights concerning real and personal property as unmarried women. (IC 31-11-7-2).

Married woman may contract with her husband same as with third person and may become bound as surety for her husband or any other person. (93 Ind. 389).

Actions.

Married woman may sue without joinder of her husband when action is on her contract, concerns her separate property or is between herself and her husband. No distinction is made between men and women because of marital status or parental status; however, this does not apply to actions in tort. (Rule TR 17[D]).

Doctrine of interspousal immunity is not applicable to actions in tort, notwithstanding allowance for such distinction in Rule TR 17 (D). (259 Ind. 16, 284 N.E.2d 794).

It is Class D felony to knowingly or intentionally touch spouse, person with whom living as spouse, or person with whom have child in common, in rude, insolent or angry manner if it results in bodily injury and if such person was previously convicted of battery in which victim was same person or if such person committed offense in physical presence of child less than 16 years of age, knowing that child was present and might be able to see or hear offense. (IC 35-42-2-1, IC 35-42-2-1.3).

Agency.

Either spouse may act as attorney in fact for other if power executed and recorded.

Antenuptial Contracts.

Uniform Premarital Agreement Act in effect for agreements made on or after July 1, 1995. All such agreements must be in writing, signed by both parties. Such agreements are not enforceable if not voluntarily executed or unconscion- able at time of making. Allows premarital agreement to be amended or revoked after marriage under certain circumstances. Premarital agreement may not restrict child’s right to support. (IC 31-11-3).

Conveyance or Encumbrance of Property.

Married woman may sell, exchange, mortgage, lease or execute any instrument of any kind affecting her property same as if she were unmarried. (IC 31-11-7-2). Married man may sell, exchange, mortgage, lease or execute any instrument of any kind affecting his property without his wife's joinder, and any such act or instrument as to real property extinguishes wife's right to one third of such property and to other rights in property by reason of marriage. (IC 29-1-2-3.1). See also category 21 Property, topic 21.06 Deeds, subhead Married Persons.

Liability of Husband for Debts of Wife.

Husband not liable for contracts or torts of his wife. (IC 31-11-7-4).

Married Woman as Fiduciary.

Married woman may act in fiduciary capacity, e.g., as executrix or administratrix, etc. (IC 29-1-10-1).

Estate by Entireties.

When husband and wife take title to real estate, it creates estate by entireties, estate in which each owns equal and unseverable interest, and upon death of either, survivor holds entire estate in severalty. (IC 32-17-3-1).

Real estate purchased by husband and wife under written contract, or held as lessees with option to purchase deemed to be held by them as tenants by entireties. (IC 32-17-3-1).

Custody of Children.

Parents of minor child jointly, or survivor if one parent is deceased, if not incapacitated, are entitled to custody of minor child. (IC 29-3-3-3 and 29-3-3-6). See also topic 14.05 Dissolution of Marriage.

Desertion and Nonsupport.

Dependent spouse may obtain provision from other spouse for support and support of dependent children in his or her custody where other spouse has deserted dependent spouse or dependent children without cause, when other spouse has been convicted of felony and imprisoned, when other spouse is habitual drunkard, when other spouse joins sect or denomination and renounces marriage or refuses to live with spouse in marital relationship, or when other spouse is insane. Dependent spouse or children must also show there is no sufficient provision for support. (IC 31-16-14).

Community property system does not obtain in Indiana. See Black's Law Dictionary 297 (8th ed. 2004).

Uniform Reciprocal Enforcement of Support Act (1958 version) is repealed effective Jan. 1, 1997 and is replaced by Uniform Interstate Family Support Act. (IC 31-18-1-1 – 31-18-9-4).

Validity of Marriage.

Circuit Court may issue declaratory judgment order, upon proof by oral testimony or affidavits that any errors made by individual who solemnized marriage do not affect validity of marriage. (IC 31-11-4-17).

14.10 INFANTS:

Age of majority, 18 for most purposes.

Alcohol.

Persons under age of 21 years are minors for purposes of laws relating to sale and consumption of alcohol. (IC7.1-1-3-25).

Contracts.

Males and females under age of 18 years are not competent to contract, except for necessities and borrowing of money to finance college education and defray expense of attending post secondary educational institutions. (IC 20-12-21.3-1). Contracts are voidable rather than void. (IC 29-3-8-5). Infants may become purchasers of certificates of investment or indebtedness issued by industrial loan and investment company organized under laws of Indiana. (IC 28-5-3-1).

Conveyance or Encumbrance of Property.

Infant married to person at least age 18 may convey real estate with approval of Circuit, Superior or Probate Court of county where person resides, upon payment of required fee. (IC 32-22-1-3).

Actions.

If infant is not represented, court will appoint guardian ad litem for him. Court, in its discretion, may honor infant's choice of next friend or guardian ad litem but court may deny approval or remove person who is not qualified. It is not necessary that person for whom guardianship is sought be represented by guardian ad litem in such proceeding. (Rule TR 17[C]). See category 5 Civil Actions and Procedure, topic 5.02 Actions, subhead Parties. See Rule TR 71. Infant not represented by guardian or next friend can get relief from judgment. (Rule TR 60[B]). Juvenile court has concurrent original jurisdiction with probate court in proceedings to terminate parent-child relationship. (IC 31-30-1-5).

Insurance.

Minors age 16 or older are deemed competent to contract life, accident, and sickness insurance or annuities. (IC 27-1-12-15). Persons above age of majority, 18, are competent to contract for any kind of insurance. (IC 27-2-11.1 et seq.). Person over 18 has right to enjoy and exercise benefits of insurance contracts; to receive and give full acquittance and discharge for payments made by company under such contract, or settlement agreement on such contract. (IC 27-1-12-15).

Parental Responsibility.

Parents liable up to $5,000 for damages to person or property knowingly, intentionally or recklessly caused by child under 18. (IC 34-4-31-1). However, parent of child who is member of criminal gang (as defined in IC 35-45-9-1), who actively encourages or knowingly benefits from child's involvement in criminal gang, liable for actual damages caused by child while engaged in gang activity if parent has custody of child, child is living with parent, and parent failed to use reasonable efforts to prevent child's involvement in criminal gang.

Paternity of Child.

Court may order, upon motion, blood test or genetic testing to determine paternity. Genetic test results are admissible as evidence of paternity unless properly objected to. (IC 31-6-6.1-8). Court may enter default order against man who fails to appear at hearing related to his paternity. (IC 31-6-6.1-8.5).

Revised Uniform Transfers to Minors Act adopted. Age of majority under Act is 21. (IC 30-2-8.5-1 – 30-2-8.5-40).

Uniform Securities Ownership by Minors Act not adopted.

Adoption.

See topic 14.01 Adoption.

Abortion.

No physician may perform abortion upon unemancipated pregnant woman under age 18 without first having obtained written consent of one of parents or legal guardian, subject to certain exceptions. (IC 16-34-2-4).

See also topic 14.05 Dissolution of Marriage.

14.11 MARRIAGE:

Any male or female 18 or over may marry. (IC 31-11-1-4). However, consent of parent, guardian or presiding judge is required for any male or female under 18. (IC 31-11-1-5, IC 31-11-2). Judge of circuit, superior or juvenile court may authorize license for pregnant female or mother that is at least age 15 with consent of parent or guardian. (IC 31-11-1-6). Only marriages to persons of opposite sex permitted. (IC 31-11-1-1).

Medical Examination.

Any unsterilized female under age 50 must submit with application for license medical report stating whether she has immunological response to rubella, or written record that rubella vaccine was administered on or after her first birthday. Circuit or superior judge may by order dispense with these requirements. Applicants may object to tests on various grounds. (IC 31-11-5).

License.

Clerk of circuit court may not issue marriage license unless individuals have authority to marry each other under IC 31-11-1. (IC 31-11-4-2). License is issued by clerk of circuit, superior or juvenile court of county where either resides. No license may be issued except upon written and verified application containing statement of full names, birthplace, residence and ages of parties, names of dependent children and showing such other facts as may be necessary to determine whether any legal impediment to proposed marriage exists. (IC 31-11-4-4). Each individual applying for marriage must provide clerk of circuit court with birth certificate or other evidence of date and place of birth and full name, last known address and place of birth of applicant’s parent, if known. (IC 31-11-4-4; IC 31-11-4-6). If written consent is required by IC 31-11-2, clerk of circuit court may not receive application for marriage license unless clerk has filed consent form in clerk’s office. (IC 31-11-4-8).

Application for marriage license expires 60 days after issuance. (IC 31-11-4-10).

Ceremony may be performed by minister of gospel, priest or rabbi, by judges within or without their respective jurisdictions, mayors within their counties, by clerks and clerk-treasurers of cities and towns within their respective cities and towns, and by clerks of circuit courts within or without their respective jurisdictions. Friends Church, German Baptists, Bahai religion, Church of Jesus Christ of Latter Day Saints and religion of Islam may solemnize according to rules of each. (IC 31-11-6-1).

Common law marriages entered into after Jan. 1, 1958 are null and void. (IC 31-11-8-5). No authority concerning local recognition of out-of-state common law marriage. See also topic 14.05 Dissolution of Marriage, subhead Common Law Marriage.

Prohibited Marriages.

Declared void: between persons nearer of kin than second cousins; however, marriages entered into after 9-1-77 between first cousins 65 years of age and older shall not be void (IC 31-11-8-3); where either party had husband or wife living or was of unsound mind when marriage was solemnized (IC 31-11-8-2; IC 31-11-8-4). Issuance of license prohibited: Where either party has been adjudged to be of unsound mind, unless that adjudication is no longer in effect, or where either party is under influence of liquor or drugs at time of application. (IC 31-11-4-11).

Status of Children.

Children born of marriage void on account of consanguinity, affinity or by reason of prior marriage of one of parties, shall be treated as if they were children of valid marriage if parties reasonably believed such disability did not exist. (IC 31-13-1). Petition may be made to circuit or superior court to determine status of child. (IC 31-13-2).

Foreign Marriages.

If residents of state, with intent to evade provisions of law relative to license, go to another state and there have marriage solemnized with intention of returning and residing in this state, and do so return and reside in this state, such marriage is void. Does not apply to persons who in good faith become or are citizens of another state. (IC 31-11-8-6).

Annulment.

Court having jurisdiction in divorce may annul marriage of party incapable of marrying because of lack of age or understanding, on application of incapable party, or may annul marriage procured through fraud of one party on application of innocent party. (IC 31-11-10). Children begotten before annulment are legitimate. (IC 31-13-1-3).

Record.

See category 10 Documents and Records, topic 10.04 Records, subhead Vital Statistics.

Offenses.

(IC 31-11-11).

Antenuptial Contracts.

See topic 14.09 Husband and Wife.

14.12 MARRIED WOMEN:

See topics 14.09 Husband and Wife, Marriage; categories 5 Civil Actions and Procedure, topic Evidence, subhead Witnesses; Debtor and Creditor, topic Homesteads; Documents and Records, topic Acknowledgments; Estates and Trusts, topics Executors and Administrators, Wills; Property, topic Deeds.

15 HEALTH

15.01–15.04 [RESERVED]

15.05 FOOD, DRUGS, DEVICES AND COSMETICS:

Regulated generally by IC 16-42-1-1 et seq. Title 16, Art. 42 coverage includes alteration and misbranding of foods (IC 16-42-2-1 – 16-42-2-9); alteration and misbranding of drugs or devices (IC 16-42-3-1 – 16-42-3-12); alteration and misbranding of cosmetics (IC 16-42-4-1 – 16-42-4-5); sanitation requirements for food establishments (IC 16-42-5-0.5 to IC 16-42-5-29); and enforcement of pharmacy laws and rules (IC 16-42-20-1 – 16-42-20-12).

15.06 [RESERVED]

15.07 HEALTH INSURANCE BENEFITS:

Children’s Health Insurance Program.

Office of children’s health insurance program established to design and administer system to provide health benefits for eligible children. (IC 12-17.6-2-1 et seq.).

Comprehensive Health Insurance.

Indiana comprehensive health insurance association established to assure that health insurance is made available throughout year to each eligible Indiana resident applying to association for coverage. All carriers, health maintenance organizations, limited service maintenance organizations, and self-insurers providing health insurance or health care services in Indiana must be members of association. (IC 27-8-10-1 – 27-8-10-10).

Health Maintenance Organizations and Limited Services Health Maintenance Organizations.

Establishment, powers, responsibilities, patient protection provisions and grievance procedures of HMO’s are regulated by IC 27-13-1 et seq.

Small Employer Group Health Insurance.

IC 27-8-15-1 et seq. regulations apply to health insurance plan providers who issue plans to small employers. Sets limitations on premium rates and reasons for cancellation of insurance plans.

See also category 16 Insurance.

15.07A NURSING:

Licensing, examinations, and educational requirements for licensed practical, registered, and advanced practice nurses are regulated by Indiana State Board of Nursing. (IC 25-23-1-1 et seq.). Health facility, hospital based health facility or entity that contracts to provide nurse aides and other unlicensed employees to health facility may not knowingly employ persons convicted of specified crimes, including sex crimes, battery, murder, and exploitation of endangered adult. (IC 16-28-13-3).

15.08–15.11 [RESERVED]

15.12 PUBLIC HEALTH:

Childhood Lead Poisoning Act enables state department to undertake efforts to lower lead poisoning levels in young children. (IC 16-41-39.4-1 et seq.).

Shaken Baby Syndrome Education Act requires state department to establish education program focusing on awareness and prevention of childhood hazards. (IC 16-41-40-1 et seq.).

Regulations regarding appointment of health care representatives are governed by IC 16-36-1-1 et seq.

Living Wills and Life-Prolonging Procedures Act governs execution of living wills and life-prolonging procedures declarations. Forms for both declarations are provided in Act. (IC 16-36-4-1 et seq.). Out of Hospital DNR declarations and orders may be made by individuals who do not wish to be resuscitated should cardiac or pulmonary failure occur outside acute care hospital or licensed health facility. (IC 16-36-5-1 et seq.).

15.13 SMOKING REGULATIONS:

Clean Indoor Air Act restricts smoking in public buildings, retail grocery or drug stores, restaurants, and school buses to designated smoking area. (IC 16-41-37-2 et seq.). Act specifically allows for local governments to adopt more restrictive ordinances or resolutions. (IC 16-41-37-9).

16 INSURANCE

16.01 INSURANCE COMPANIES:

Regulated by Indiana Code Title 27.

General supervision is by Department of Insurance (IC 27-1-1-1), which is administered by Insurance Commissioner (IC 27-1-1-2). Uniform Unauthorized Insurers Act regulates conduct of insurers not authorized to conduct business in Indiana. (IC 27-4-5-1 – 27-4-5-8).

All policy forms filed with Insurance Commissioner after June 30, 1982 must meet minimum policy simplification standards. All policies issued in Indiana after June 30, 1985 must either meet minimum policy simplification standard or be approved by Department of Insurance. (IC 27-1-26-1 et seq.). See category 3 Business Regulation and Commerce, topics 3.12 Consumer Protection, 3.13 Contracts.

Rates.

Worker's compensation insurance regulated by IC 27-7-2-1.1 – 27-7-2-1.39. Casualty (including fidelity, surety and guaranty bonds), motor vehicle, fire, marine, and inland marine insurance rates are established by insurers and rating bureaus under supervision of Department of Insurance. (IC 27-1-22-1 – 27-1-22-27).

Annual Statements.

Each company must file annual financial statement with Department of Insurance before Mar. 1 of each year. (IC 27-1-20-21 et seq.).

Life insurance policies issued after Jan. 1, 1948, are required to have certain statutory clauses including provision for thirty days of grace, prepayment of premiums, inclusion of the application in the contract of insurance, an incontestability clause, a clause providing for automatic adjustment of the policy to correct for a misstatement of age, a provision that statements by the assured are representations and not warranties, provisions for extended insurance and non-forfeiture, provisions for loans on the security of the policy, and provision for determination of claim within two months after proof of death. Policies must be properly titled on both face and back. (IC 27-1-12-6). Standard policy provisions do not need to be included on substandard or impaired risks. Insurance Department may approve policy forms more favorable to assured than policies containing standard provisions. (IC 27-1-12-6). Required nonforfeiture provisions are extensive and detailed. (IC 27-1-12-7).

Variable life insurance providing for immediate or future life insurance benefits must contain statement that benefits are variable instead of stipulating dollar amount. Such policies must contain other provisions so prescribed by Insurance Commissioner. (IC 27-1-12-33).

Regulation of advertisements containing guaranteed interest rates. (IC 27-8-21-2).

Wholesale, franchise or employee life insurance must be issued or delivered according to statutory regulations. (IC 27-1-12-34.1).

Interest on policy loans on policies issued after Aug. 31, 1983 is established at no more than 8% or at adjustable rate per certain guidelines. (IC 27-1-12.3-2).

Group Life Insurance Policies.

Employees or members may insure against loss due to death of spouse or dependent subject to certain limitations. (IC 27-1-12-40). Representations by employees cannot be made warranties, and no statement by employee can support defense unless statement is in writing on application. These policies must further provide for adjustment of premium for misstatement of age and for delivery to employee of certificate of insurance. Group policies must further provide for conversion to standard policies upon cessation of employment. (IC 27-1-12-41).

Annuity Contracts.

Nonforfeiture provisions (IC 27-1-12.5-1 et seq.) and general provisions (IC 27-1-12.6-1 et seq.).

Health and Accident Policies.

No policy of accident and sickness may be issued until a copy of the form, the classification of the risks and the premium rates have been filed with the commissioner. (IC 27-8-5-1). There are special provisions relating to group accident and sickness policies (IC 27-8-5-16 – 27-8-5-24) including special reporting requirements (IC 27-8-30-1 et seq.). Preferred provider organizations are subject to special reporting requirements. (IC 27-8-11-5). Effective July 1, 2006, insurer may not require repayment of overpayment to provider, nor can providers require insurer to correct payment errors two years after error was made. (IC 27-8-5.7-10). Effective July 1, 2008, State law regulates contracts between third parties and health care providers. (IC 27-1-37.3-1 et seq.). All accident and sickness policies issued after July 1, 2008, must provide coverage for orthotic and prosthetic devices. (IC 27-8-24.2 et seq.).

Comprehensive health insurance is made available to all eligible residents via association established by state. (IC 27-8-10-1 et seq.).

Legal insurance policies may be issued by certain insurers to insure against legal expenses incurred in connection with use of professional services of attorneys, in consideration of specified payment for interval of time, regardless of whether payment is made by beneficiaries individually or by third person for them. (IC 27-1-5-1). Certain legal expenses resulting from following are excepted and may not be insured against: (1) Retainer contracts made with single client and similar contracts made with group of clients involved in same or closely-related legal matters (class actions); (2) plans providing no benefits other than limited amount of consultation and advice on simple matters either alone or in combination with referral services; (3) plans providing limited benefits on simple legal matters on voluntary and informal basis; (4) legal services provided by unions or employee associations to its members in matters solely relating to employment or occupation; and (5) payment of fines, penalties, judgments, or assessments. Group legal services, except for (4) above, are permitted and can be provided by issuance of group legal insurance. (IC 27-1-5-1, IC 27-7-8-1 to IC 27-7-8-7).

Liability policies are required to have certain standard provisions including: provisions against release of liability by bankruptcy, provision that notice to any authorized agent is notice to the insurer. The statute also provides for an omnibus insuring clause protecting the owner against liability because of the negligent operation of such vehicle by another person using such vehicle in the business of the owner or otherwise with the express or implied permission of the owner. (IC 27-1-13-7). All motor vehicle liability policies must include uninsured and underinsured motor vehicle coverage unless insured specifies in writing that he does not want coverage. (IC 27-7-5-2 et seq.). Failure to include these provisions in liability policy does not invalidate policy but policy is deemed amended to conform to Act. (IC 27-1-13-7). “Uninsured motor vehicle” includes insured motor vehicle where liability insurer thereof is unable to make payment with respect to legal liability of its insured because of insolvency. (IC 27-7-5-4). Restrictions established as to cancellation of automobile insurance policies. (IC 27-7-6-1 – 27-7-6-12).

Garage liability policy is primary insurance for damage to motor vehicle occurring when under control of person, or his agent, in business of storing, parking, servicing, or repairing vehicles and that vehicle is owned by another person. (IC 27-8-9-6). If only motor vehicle insurance provided by owner of vehicle is garage liability policy, primary insurance for damage is that of permissive operator of vehicle. (IC 27-8-9-10). In all other cases, primary insurance for damage is that of owner when vehicle is operated with permission of owner and within scope of that permission. (IC 27-8-9-7).

Credit life insurance and credit accident and health insurance are controlled and regulated by statute. (IC 27-8-4-1 – 27-8-4-14; IC 24-4.5-4-101 – 24-4.5-4-203).

Prearranged funeral insurance is controlled by IC 27-1-15.6-19.

Crop hail insurance is controlled by IC 27-1-15.6-20.

Insurance offered by depository institutions is regulated by 27-1-38-1 et seq.

Long term care insurance policies may be issued pursuant to specified statutory requirements. (IC 27-8-12-1 – 27-8-12-18).

Medicare supplement insurance policies may be issued pursuant to specified statutory requirements. (IC 27-8-13-1 – 27-8-13-20).

Discrimination.

Insurance Commissioner is empowered to regulate rates to insure that they are not unfairly discriminatory. (IC 27-1-22-1).

Rebates are prohibited. (IC 27-1-20-30).

Fair trade practices in insurance are defined in detail and regulated by cease and desist orders, monetary penalties ranging from $25,000 to $50,000 per act violation, and license or certificate of authority revocation, in discretion of Insurance Commissioner. (IC 27-4-1-1 – 27-4-1-18, IC 4-21.5-5-1 – 4-21.5-5-15). Insurance company may not cancel individual or group policy between policy renewal dates because of individual’s medical or physical condition. (IC 27-4-1-4). Life insurers may not promote purchase of life insurance policy with stranger oriented policies. (IC 27-8-19.8-20.1). Person who believes they have been subject to unfair claim settlement practice can file complaint with Commissioner, who then has duty to investigate it and forward it to insurer and report to complaining party. Insurer must respond in writing. (IC 27-4-1-5.6).

Insurance producers, insurance consultants and limited insurance representatives are licensed separately after investigation and compliance with minimum requirements (IC 27-1-15.6-6) and payment of nominal fee (IC 27-1-15.6-32). They are required to take specified program of study and written examination except that nonresidents may be licensed without examination if nonresident is licensed for same lines of authority in another state. (IC 27-1-15.6-8). Subject to certain limitations, provisions are made for nonresident agents. (IC 27-1-15.6-9). Agent may represent one company exclusively but if he represents two companies, company cannot require or induce him to refrain from representing others. (IC 27-4-3-2).

To renew license, resident insurance producer must complete at least 20 hours of credit in continuing education courses, resident limited lines producer must complete at least five hours of credit in continuing education courses, and limited lines producer with title qualification must complete at least seven hours of credit in continuing education courses. (IC 27-1-15.7-2).

Certain individuals are exempt from licensing requirements for consultants including attorneys, duly licensed insurance agents, surplus lines insurance agents, trust officers of banks, actuaries and certified public accountants. (IC 27-1-15.6-23).

Process Agent.

Duly appointed individual or corporate resident of Indiana, or authorized Indiana insurer may serve as agent for service of process for foreign insurance companies. (IC 27-1-17-4, IC 27-4-4-3). Domestic companies are served in same fashion as other corporations.

Adjusters.

With certain exceptions, public adjusters are required to be certified. Certificates are issued by Insurance Commissioner upon payment of $50 fee and passing examination. Residency of one year is required. (IC 27-1-27-1 – 27-1-27-11). Commissioner may issue nonresident certificate of authority only to applicant who holds resident certificate of authority from another state or any foreign country. (IC 27-1-27-3).

Investments by life insurance issuers (IC 27-1-12-2 – 27-1-12-4) and all other (IC 27-1-13-3 – 27-1-13-5) insurance companies are regulated by statute.

Each life insurance company shall deposit amount equal to lesser of its reserve liabilities, net reserve value of its policies, or $1,000,000 for security and benefit of its policyholders. (IC 27-1-12-11).

Advertising referring to financial condition of insurance company must set forth certain minimum information as to assets, surplus, etc. (IC 27-1-20-19 to IC 27-1-20-20).

Indiana Insurance Guaranty Association protects claimants or policyholders from delay and excessive loss due to insolvency of insurer. (IC 27-6-8-1 – 27-6-8-19). Excepted are certain types of insurance, including life, annuity, health, or disability. (IC 27-6-8-3).

Life and Health Insurance Guaranty Association protects policy owners, insureds, beneficiaries, annuitants, payers, and assignees of life insurance policies, health insurance policies, annuity contracts, and supplemental contracts against failure in performance of contractual obligations because of impairment or insolvency of insurer issuing policies or contracts, and allows tax credit or premium increase to compensate member insurers for assessments paid to association. (IC 27-8-8-1 – 27-8-8-18).

Receivership.

No insurance company may be placed in receivership except by action of judgment creditor, proceedings supplementary to execution, or in action brought by Department of Insurance. (IC 27-1-20-23).

Title insurance companies operate under separate act by which they are required to have not less than $100,000 fully paid in stock (IC 27-7-3-5) and are required to maintain deposit with state of 10% of premiums collected until fund reaches $50,000 (IC 27-7-3-9). Foreign corporations may be admitted to do title insurance business. (IC 27-7-3-12). Such companies are under same supervision as other insurance companies, except that higher percentage of single risk to total capital, surplus, and reserves may be assumed, namely 50%, by title insurance company. (IC 27-7-3-20). Before title insurance policy can be issued in conjunction with mortgage secured by real estate, title search must be performed unless mortgage meets certain conditions. (IC 27-7-3-21). Title Insurance Enforcement Fund provides Commissioner with funding for departmental obligations relating to title insurance. (IC 27-7-3.6-1 – 27-7-3.6-7). Title insurance companies will be required to file electronically certain data from residential closings occurring after Dec. 31, 2009. (IC 27-7-3-15.5).

Companies organized under prior acts still exist and those which are not subject to regulation may adopt Act of 1935. (IC 27-1-11-1).

Fraudulent insurance acts are defined in detail and specific provisions regarding reporting and civil liability therefor have been enacted. (IC 27-1-3-22 – 27-1-3-23).

Insurers required to file annual statements with National Association of Insurance Commissioners and with Indiana State Department of Insurance. (IC 27-1-20-21 – 27-1-20-33).

Insurance rates regulated by separate chapter. (IC 27-1-22-1 – 27-1-22-26).

Utilization review agents must be registered with Department of Insurance. Utilization review agents review medical necessity and appropriateness of proposed health care services. (IC 27-8-17-9).

Charitable entity may purchase, own, or be transferred ownership of life insurance policy on life of individual who consents to charitable entity's purchase or ownership of policy. (IC 27-8-18-1 et seq.).

Special charter companies are regulated and must make specified reports. (IC 27-2-2-1).

Persons or entities issuing "Lloyd's Insurance" are subject to regulation. (IC 27-7-1-1 – 27-7-1-12).

Model Risk Retention Act adopted. (IC 27-7-10-1 – 27-7-10-34). Governs establishment of risk retention groups, establishes reporting and disclosure requirements and prescribes rules of conduct for purchasing groups and risk retention groups.

Insider Trading.

Directors, officers, or beneficial owners of 10% of any class of equity security of domestic insurance company must file number of such securities owned with Indiana Insurance Commissioner. Any changes in that number must be reported within ten days after end of month of sale. (IC 27-2-10-1). Profits realized by sale of securities owned less than six months are recoverable by insurance company in either direct or derivative suit within two years after gain was realized. (IC 27-2-10-2).

Powers of Foreign Insurance Companies.

Qualification of foreign companies is handled through Department of Insurance, which requires copies of company's articles of incorporation and information as to its place of business, names of other states in which it has been admitted or qualified to do business, character of business it will transact, its total authorized capital stock, total amount of its assets and its surplus and other matters concerning its financial condition. Company must also file certificate from state of incorporation attesting its power to do insurance business and power of attorney appointing Commissioner of Insurance its agent for process. (IC 27-1-17-4). In addition, company must meet financial requirements of domestic companies. (IC 27-1-17-5). Company must make $100,000 deposit or prove that equivalent amount is on deposit in another state for payment of claims and creditors. (IC 27-1-17-6). If its charter or articles are amended this must be filed with Commissioner. (IC 27-1-18-3).

Any foreign insurance company may, upon complying with requirements for formation of domestic company, become domestic insurer. (IC 27-1-6.5-1 – 27-1-6.5-6).

Foreign insurance companies are required to be qualified before transacting business (IC 27-1-17-1) and when qualified have any powers permitted by charter and available to domestic companies (IC 27-1-17-2). They are permitted to reorganize under Indiana insurance law (IC 27-1-19-1 – 27-1-19-8) and may withdraw from state (IC 27-1-18-6).

Retaliatory Provisions.

If any state imposes on Indiana insurance companies doing business therein taxes, fines, penalties, obligations, prohibitions, license requirements or deposit requirements greater than are imposed by laws of Indiana, same obligations, prohibitions, etc., are imposed on all insurance companies incorporated under laws of such state and on alien companies with their principal agency in such state. If any jurisdiction refuses admission to Indiana insurance companies presenting proper credentials, companies from that jurisdiction may not be permitted to do business in Indiana. (IC 27-1-20-12). Specific retaliatory provisions are also provided for mutual life and accident companies (IC 27-8-1-14).

Premium Tax.

For privilege of doing business in state foreign insurance companies must pay tax on gross premiums received for insurance covering Indiana risks less following deductions: Amounts received for reinsurance of risks within state; dividends paid or credited to resident insureds or used to reduce their current premiums; premiums returned to residents on account of applications not accepted, policies not delivered or cancellation of policies. Estimated tax payments are made on quarterly basis, payable on or before Apr. 15, June 15, Sept. 15, and Dec. 15. Any balance of tax is due upon filing of annual report; any overpayment is allowable credit on first installment of current year. (IC 27-1-18-2).

Political Subdivision Risk Management Fund and Political Subdivision Catastrophic Liability Fund, administered by Indiana Political Subdivision Risk Management Committee, is available for payment of liabilities of political subdivisions of state. (IC 27-1-29-1 – 27-1-29-17, IC 27-1-29.1-1 – 27-1-29.1-22).

Mine Subsidence Insurance Fund is available to owners of property in certain counties for damage resulting from collapse of underground coal mines. (IC 27-7-9-1 – 27-7-9-17).

Direct Actions Against Insurer.

See category 23 Transportation, topic 23.01 Motor Vehicles, subhead Direct Actions.

Independent Educational Institution Self-Insurance Consortium.

As of July 1, 2006, two or more independent educational institutions may establish trust for self-insurance purposes. (IC 27-1-39-1 et seq.).

Discount Medical Card Programs.

Organization may provide cardholders with access to medical services for fee. (IC 27-17-1 et seq.).

No-Fault Insurance.

Not adopted.

See also category 3 Business Regulation and Commerce, topic 3.24 Securities, subhead Prerequisites to Sales or Offerings.

See also category 14 Family, topic 14.10 Infants, subhead Insurance.

16.02 SURETY AND GUARANTY COMPANIES:

Surety and guaranty companies are subject to Indiana Insurance Law, surety and guaranty contracts constituting one type of class 2 insurance (IC 27-1-5-1); see topic 16.01 Insurance Companies.

Mortgage guarantee company may not be incorporated or organized under any law of Indiana except that mutual savings bank may be organized with all rights and privileges under IC 28-6.1 only by mutual bank conversion under IC 28-1-21.7. (IC 28-1-23-6).

17 INTELLECTUAL PROPERTY

17.01 TRADEMARKS AND TRADENAMES:

What May Not Be Used.

Cannot register mark which: (1) Consists of immoral, deceptive, or scandalous matter; (2) may disparage or falsely suggest connection with persons, institutions, beliefs or national symbols; (3) may bring into contempt or disrepute persons, institutions, beliefs or national symbols; (4) consists of flag, coat of arms, or insignia of United States, state or municipality, United Nations or foreign nation; (5) consists of name, signature or portrait identifying particular living individual, without person’s consent; (6) is merely descriptive, deceptively misdescriptive, primarily geographically descriptive or deceptively geographically misdescriptive or primarily merely surname; or (7) is likely to cause deception, confusion, or mistake to another mark registered in Indiana or mark used in Indiana that is not abandoned. (IC 24-2-1-3). Foreign entities are required to qualify and be admitted to do business in Indiana prior to registration of mark.

Registration.

Trademark may be registered with Secretary of State and several statutory requirements for registration met. Three specimens showing actual use of mark and application fee are required. (IC 24-2-1-4).

Assignment.

Trademark and its registration assignable with good will of businesses. Assignment must be in writing and recorded with Secretary of State for recording fee. (IC 24-2-1-8).

Protection Afforded.

Registration is effective for five years and may be renewed for successive periods of five years for renewal fee. (IC 24-2-1-6). Registration does not grant statutory presumption of right to use or priority. Common law rights not affected by registration.

Infringement.

Remedies: all common law remedies, injunction, and destruction of counterfeits; if act is intentional damages may be obtained and in exceptional cases, attorney's fees may be awarded; criminal penalties available. (IC 24-2-1-13 – 24-2-1-15).

Dilution.

Indiana has no statutory or common law dilution or antidilution doctrine.

Counterfeiters.

Action against counterfeiters is provided under common law for unregistered marks, under statute for registered marks. (IC 24-2-1-13).

Tradenames.

Following are subject to tradename filing requirements: (1) Person conducting or transacting business in Indiana under name or title other than real name of person conducting or transacting such business; (2) corporation or limited liability company conducting business in Indiana under name or title other than name shown by its articles; (3) foreign corporation conducting business in Indiana under name or title other than name shown by its application for certificate of authority to transact business in Indiana; (4) limited partnership, limited liability company or limited liability partnership conducting business in Indiana under name or title other than name shown by its certificate of limited partnership; and (5) foreign limited partnership, limited liability company or limited liability partnership conducting business in Indiana under name or title other than name shown by its application for registration. Each must file certificate in office of recorder of each county in which place of business or office (if none, then registered office) is situated. Certificate must state assumed name to be used, in case of person full name and address of each person engaged in or transacting such business, and in case of foreign or domestic corporation, partnership, or foreign limited partnership full name and address of principal office in Indiana (if none, then registered agent and office). Corporations, limited liability companies, and limited partnerships shall also file copy of certificate with secretary of state. Does not apply to person doing business under name that includes true surnames of person (or true surnames of individuals comprising person), or to any church, lodge, or association business of which is transacted by trustees under written instrument or declaration of trust that is recorded in recorder's office of each county in which business is conducted or transacted. Violation is Class B infraction. (IC 23-15-1-1 – 23-15-1-5).

Federal Names.

Use of names such as Army, Navy, PX, GI, Marines, Government, Federal, etc., are prohibited in selling goods where name may mislead public to believe goods have been sold by, manufactured for, or manufactured in accordance with specifications of named agency. (IC 24-2-2-1 – 24-2-2-4).

Certain Names.

Special requirements govern use of names which include "bank", "banc", "banco", "trust", "building and loan association", "savings and loan association", "savings bank" "savings association", "rural", "guaranty" (IC 23-15-8, IC 28-1-20-4, IC 28-12-3-3), "credit union" (Sec. 8. [a] Use of any name or title that contains words "credit union", or that means "credit union" in any language, is unlawful unless name is used by: (1) Corporation authorized to use words "credit union" under Indiana or United States law; or (2) Indiana Credit Union League, Inc., and its affiliates. [b] Department is authorized to exercise powers under IC 28-1-4 against person, firm, limited liability company, or corporation that improperly holds itself out as credit union. [c] Any person, firm, limited liability company, or corporation that violates this section is subject to penalty of $500 per day for each day during which violation continues. Penalty imposed shall be recovered in name of state on relation of department and, when recovered, shall be paid into financial institutions fund established by IC 28-11-2-9.) (IC 28-7-1-8), "lottery" (IC 4-30-14-7), "engineer" (IC 25-31-1-34), "landscape architect" (IC 25-4-2-11), "land surveyor" (IC 25-21.5-1-8), "soil scientist" (IC 25-31.5-7-1).

Right of Publicity.

Indiana recognizes person's right of publicity to include their name, voice, signature, likeness and certain other aspects, if they have commercial values. (IC 32-36-1-7). Use of any of those aspects of person for commercial purpose (such as on or in connection with products, services or commercial activities, including use in advertisements or promotions) without that person's consent violates person's right of publicity. Violators may be liable for actual damages, profits derived from unauthorized use, treble or punitive damages, attorneys' fees and costs incurred by other party, and may be subject to injunction.

Certain exceptions to this right are included for uses in material that has political or newsworthy value, in literary works, musical compositions, film, radio and television programs, and also for uses by newspapers, magazines and television stations. (IC 32-36-1 et seq.).

17.02 TRADE SECRETS:

Indiana has adopted Uniform Trade Secrets Act. (IC 24-2-3-1 to 8). Minor variations to uniform act were made regarding displacement of law (IC 24-2-3-1[c]), circumstances permitting future use of trade secret upon payment of royalty (IC 24-2-3-3[b]), and additional damages in form of royalty (IC 24-2-3-4[b]). Indiana has not adopted 1985 amendments to Uniform Trade Secrets Act. Listed examples in IC 24-2-3-2 do not constitute exhaustive list of protectible trade secrets. (634 N.E.2d 778, at 783). However, employer's right to contractually protect confidential information that does not meet statutory definition of trade secret found in IC 24-2-3-1 et seq. is limited. (806 N.E.2d 833, 852). Any information that requires substantial investment of time, expense or effort to obtain may be trade secret. (622 N.E.2d 912).

18 LEGAL PROFESSION

18.01 ATTORNEYS AND COUNSELORS:

State bar consists of all attorneys in good standing admitted by circuit courts prior to July 1, 1931 and all attorneys in good standing admitted by state Supreme Court thereafter. (Rule AD 1).

State Bar is not integrated.

Jurisdiction over Admission.

Supreme Court of Indiana has exclusive jurisdiction to admit attorneys to practice law in all courts of state. (IC 33-2-3-1; Rule AD 3).

Eligibility.

Applicant for admission to bar must: (1) be 21 years of age or older; (2) be of good moral character; (3) have passed bar examination; and (4) certify satisfactory completion of coursework at approved law school. (Rule AD 12, 13).

Registration As Law Student.

No such requirement.

Educational Requirements.

Graduation from law school located in U.S. on approved list of Council of Legal Education and Admissions to Bar of the American Bar Association or school approved by Indiana Supreme Court or agency thereof is required as prerequisite to taking bar examinations. (Supreme Court of

Indiana reserves right to disapprove any school regardless of ABA approval.) (Rule AD 13).

Petition for Admission.

Application for admission upon examination is required to be made on forms prepared and furnished by State Board of Law Examiners and must be accompanied by certified transcript of applicant's law school record and affidavit of dean or faculty that nothing in record or personal knowledge indicates applicant is not of good moral character or unfit to practice law. (Rule AD 15). Application for admission should be filed with Executive Director of Board of Law Examiners by Apr. 1 for July examination and by Nov. 15 of previous year for Feb. examination. (Rule AD 15). Applicant must be at least 21 years old and of good moral character; graduate of approved law school, and have completed two cumulative semester hours of legal ethics or professional responsibility. (Rule AD 13).

Examination.

Bar examination is conducted by Board of Law Examiners in Feb. and July. (Rule AD 18). Examinations are usually held in Indianapolis. Fee is $250 for examination within one year of application; fee is $250 for reexamination. (Rule AD 15). Board must report on applications within 100 days after examination. (Rule AD 18). Applicants must pass Multistate Professional Responsibility Examination. MPRE passing score is scaled score of 80 which must be achieved within two years before or after date applicant passes bar examination. (Rule AD 17).

Review of final action by Board of Law Examiners may be obtained from Supreme Court as to failure to recommend admission for failing reexamination, or for reason other than failing any examination, by filing petition with Board within 20 days of final determination. There is no review by State Board of Law Examiners or Supreme Court on failure of first or second examination. (Rule AD 14).

Clerkship.

No requirement for clerkship before admission.

Admission Without Examination.

Persons admitted to practice law in highest courts of other state or territory of U.S. or District of Columbia may be conditionally admitted to bar upon proof of fact that he or she is member in good standing of bar(s) of his admission, and that he engaged in private or government practice of law, judicial position, or teaching of law for period of at least five of seven years immediately preceding application; that admission of applicant is in public interest; that applicant meets character and fitness requirements, has paid $750 fee, has not failed Indiana Bar examination within two years of application, and has filed affidavit of applicant's intent to engage actively and predominantly in practice of law in Indiana. Conditional admission continues in force for one year and may be renewed for five one-year periods. Fee for each renewal is $50. Upon fifth consecutive renewal, admission to practice shall be permanent. (Rule AD 6).

Admission Pro Hac Vice.

Provided petitioner strictly complies with requirements of Rule AD 3, member of bar of another state in good standing may, as courtesy, be admitted in this state for particular case for limited time. (Rule AD 3). Before Supreme Court, Court of Appeals, Tax Court, or trial courts, petitioner not admitted to practice in Indiana, who does not reside in Indiana, must associate with co-counsel admitted in this state who must sign all briefs, papers and pleadings. (Rule AD 3). In addition, petitioner must file verified petition with court before which petitioner seeks admission: (1) stating petitioner's residential address, office address and name and address of petitioner's law firm or employer; (2) identifying states or territories in which petitioner has ever been licensed to practice law, including dates of admission and any attorney registration numbers; (3) averring that petitioner is member in good standing in all jurisdictions in which petitioner has been admitted; (4) averring that petitioner has never been disbarred or resigned as result of disciplinary charge, investigation, or proceeding; (5) averring that no disciplinary proceeding is presently pending against petitioner; (6) listing all proceedings, including caption and cause number, in which attorney, or any member of attorney's current law firm, has appeared in any court of this state during previous five years; (7) averring circumstances demonstrating good cause for pro hac vice admission; (8) stating that petitioner has read and will be bound by Rules of Professional Conduct adopted by Indiana Supreme Court that petitioner consents to jurisdiction of State of Indiana, Indiana Supreme Court, and Indiana Supreme Court Disciplinary Commission to resolve any disciplinary matter arising as result of representation; and (9) stating petitioner will file Notice of Pro Hac Vice Admission, which fully complies with Rule AD 3, with clerk of Indiana Supreme Court within 30 days after court grants permission to appear in proceeding. During pendency of proceeding for which pro hac vice admission is obtained, petitioner must pay annual registration fee required of members of bar of this state. (Rule AD 3; Rule AD 23).

Licenses.

None; however, registration with Clerk of Supreme Court required. (Rule AD 2).

Privileges.

No special provisions.

Authority.

Attorneys have authority to receive money claimed by client in action and to discharge claim or acknowledge satisfaction of judgment upon payment thereof; and to bind client by actions filed with clerk or entered in court minutes. (IC 33-43-1-4). Written authority is required for attorney to confess judgment in absence of notice to party or party's personal appearance. (IC 33-43-1-5).

Disabilities.

No special provisions.

Liabilities.

Attorneys appearing without authorization become liable for consequent injuries. (IC 33-43-1-7). Attorneys refusing to deliver money or papers to person for whom or from whom received may be held in contempt and subject to suspension and/or judgment for amount of money withheld plus 10% damages. (IC 33-43-1-9; IC 33-43-1-10).

Lien.

Attorneys have lien for their fees on all judgments taken by them upon entering notice upon docket or order book within 60 days from time such judgment was rendered. (IC 33-43-4-1; IC 33-43-4-2).

Compensation.

Fee in medical malpractice action may not exceed 15% of any recovery when claim is satisfied from patients compensation fund. (IC 34-18-18-1). Attorney and client may agree to compensation on per diem basis if agreement is in writing at time of employment. (IC 34-18-18-2).

Disbarment or Suspension.

Supreme Court of Indiana has exclusive jurisdiction over charges of attorney misconduct. Grounds for disbarment or suspension are: (1) violation of Rules of Professional Conduct, (2) disbarment or suspension by another state, (3) disability by reason of physical or mental illness or because of use of or addiction to alcohol or drugs. (Rule AD 23).

Unauthorized Practice.

Practice of law by persons not admitted to bar is made misdemeanor. (IC 33-43-2-1). Supreme Court has exclusive jurisdiction to issue restraining orders and injunctions against unauthorized practice of law. (IC 33-24-1-2). Corporations must appear by attorneys in most cases with exceptions for some corporations appearing in small claims courts. (IC 34-9-1-1). Original actions may be brought to Supreme Court by Attorney-General, Indiana State Bar Association or committee thereof without leave, and local bar association with court’s leave. (Rule AD 24).

Mandatory Continuing Legal Education.

Each attorney and judge who is not attorney shall complete at least six hours of approved continuing legal education per year and at least 36 hours of approved continuing legal education each three year educational period. Grace periods are provided based on attorney’s year of admission to Bar and means of admission (i.e. on foreign license, by passing exam, etc.). (Rule AD 29).

Specialty Certification Requirements.

None.

Attorney Ethics.

ABA Model Rules of Professional Conduct have been adopted with modification. (Ind. Code Ann. Title 34, Appendix R.P.C. 1.1 et seq. [West 1995]).

Professional Association (or Corporation).

See category 2 Business Organizations, topic 2.03 Corporations, subhead Professional Corporation.

19 MINERAL, WATER AND FISHING RIGHTS

19.01 MINES AND MINERALS:

Mine laws are administered by Bureau of Mines and Mining Safety in Department of Labor. (IC 22-1-1-5).

Statutes regulate number of miners to be employed, number of outlets and shafts, furnishing of maps, ventilation of mines, protection against gas and water, management of engines and cages, use of explosives, and types, examination and inspection of machinery. Statute also provides for examination and certification by Mining Board of any mine foreman, assistant foreman, fire-boss, shot-firer, hoisting engineer, mine electrician, and belt examiner. Certificate is required for certain persons employed in mining positions. (IC 22-10-2, IC 22-10-3 and IC 22-10-7).

Miners in deep shaft (IC 22-10-11-16) and strip (IC 32-28-10-2) coal mines have liens on mines, machinery and fixtures for work and labor.

Surface mining and reclamation of surface mines are regulated by Department of Natural Resources and Natural Resources Commission. Power to grant, suspend, revoke, modify or release permits for surface mining is defined by I-SMCRA. (See IC 14-34 et seq. and 310-12 IAC.) Historical properties protected. (IC 14-34-4-10). Self-bonding permitted. (IC 14-34-7).

Indiana has also adopted legislation to implement federal Surface Mining Control and Reclamation Act of 1977. (IC 14-34-1 et seq.).

Indiana has adopted Interstate Mining Compact. (IC 14-35-4, et seq.).

Geophysical Survey.

Regulated by Natural Resources Commission. (IC 14-37-2, IC 14-37-3). Permit and bond required. (IC 14-37-1, IC 14-37-4, IC 14-37-6).

Oil and gas permits are treated by IC 14-37 et seq.; may be refused for pattern of willful violations of statute. (IC 14-37-4-9). Department of Natural Resources Membership in Interstate Oil and Gas Compact Commission authorized. (IC 14-38-3-1).

Petroleum Severance Tax.

Tax on value of petroleum and gas removed is imposed on producers and owners at time of severance from land. (IC 6-8-1-1 – 6-8-1-28).

20 MORTGAGES

20.01 [RESERVED]

20.02 COLLATERAL SECURITY:

See category 8 Debtor and Creditor, topic 8.15 Pledges.

20.03 [RESERVED]

20.04 MORTGAGES OF REAL PROPERTY:

Lien theory of mortgages prevails. (117 Ind. App. 68, 66 N.E.2d 614).

Mortgagee is entitled to possession of property only if such agreement is contained in mortgage. This rule does not apply to security interests in rents and profits arising from property. (IC 32-29-1-1).

Execution and Recording.

Mortgages of real property must be in writing, executed and acknowledged (IC 32-21-1-1; IC 32-21-2-3), and, in order to be effective as against certain third persons, recorded, as are deeds (IC 32-21-4-1, IC 32-21-4-2). All documents submitted for recording must include following phrase and legible, printed, typewritten, stamped or signed name of preparer: “I affirm under the penalties for perjury, that I have taken reasonable care to redact each social security number in this document unless required by law (insert name).” (IC 36-2-11-15[b]). Disclosure of last four digits of social security number is not disclosure of social security number. (IC 36-2-7.5-3). In addition, documents submitted for recording must include address to which tax statements under IC 6-1.1-22-8.1 will be mailed. If such address is not street address or rural route address of grantee, must also include street address or rural route address of grantee. Such address must immediately precede or follow statements required by IC 36-2-11-15. (IC 32-21-2-3).

Recording fee is $6 for first page and $2 for each page thereafter unless pages are larger than 8½” by 14” in which case fee is $15 for first page and $5 for each page thereafter. Recorder shall collect $3 for each mortgage on real estate in addition to these other fees. (IC 36-

2-7-10). Recorder shall collect additional $2 as county identification security protection fee.

Trust deeds are recognized. Power of sale is forbidden. (IC 26-2-2-1, IC 32-29-1-4). Sale may only be had under judicial proceeding.

Mortgages by public utilities, railroads, and pipeline companies executed and recorded in manner provided for execution and recording of mortgages on real estate may extend to cover all or any of property of mortgagor, real, personal, or mixed, chattels real and fixtures. Mortgage need not be filed in compliance with any other filing requirements to perfect security interest in collateral covered by IC 26-1 (Uniform Commercial Code). Such mortgages may also include terms to cover property acquired after instrument's date. (IC 8-1-5-1).

Purchase Money Mortgages.

A mortgage given to secure all or part of purchase price of property mortgaged has preference over prior judgment against purchaser. (IC 32-29-1-4). Purchase money mortgage should state on its face that it is given for that purpose.

Under common law, liens of obligatory future advances, as well as extensions, renewals, and modifications made under or to existing mortgages were generally given priority relating back to that of original mortgage, so long as there was no resulting increase in principal amount of debt or interest payment secured thereunder. Mortgage liens created after June 30, 1990 may secure any future advances, up to maximum amount stated in mortgage, and modifications, extensions and renewals, if and to extent that mortgage states that same are so secured, with priority of all such future advances, modifications, extensions and renewals relating back to time and date of filing of original mortgage in county recorder's office without regard to fact that such future advances, modifications, extensions or renewals may occur thereafter. (IC 32-29-1-10). Uncertainty exists as to effect of IC 32-29-1-10 on existing rule as to priority between mechanic's liens and construction loan mortgages. (173 Ind. 535, 91 N.E. 7).

Deficiencies.

Unless a mortgage contains an express covenant for payment of the money intended to be secured thereby, or there is separate bond, or note, or other agreement to pay sum due, remedy of mortgagee is limited to property mortgaged. (IC 32-29-1-2).

Assignments.

At county recorder's discretion, assignments of mortgages may be made by entry on margin of record, executed by assignor and attested by recorder, or assignments may be made in writing and executed, acknowledged, and recorded in same manner as original mortgage. Facsimile (machine generated) signature allowed on assignment of mortgage. (IC 32-29-1-8). Assignment must contain location and business address of person to whom mortgage is assigned. (IC 32-29-2-2). All documents submitted for recording must include following phrase and legible, printed, typewritten, stamped or signed name of preparer: "I affirm under the penalties for perjury, that I have taken reasonable care to redact each social security number in this document unless required by law (insert name)." (IC 36-2-11-15[b]). Disclosure of last four digits of social security number is not disclosure of social security number. (IC 36-2-7.5-3).

Release.

A mortgage which has been satisfied may be released by certificate of satisfaction, acknowledged and recorded, or by entry made on the margin of the record, by the mortgagee, and attested by the recording officer. (IC 32-29-1-6, IC 32-29-1-7, IC 32-29-3-1). President or other listed officer, attorney-in-fact or other authorized representative, of corporation may act for it in executing such release. (IC 32-29-5-1). Failure to release mortgage properly within 15 days after written demand, if mortgage has actually been discharged, renders mortgagee liable to penalties. (IC 32-28-1-1, IC 32-28-1-2). All documents submitted for recording must include following phrase and legible, printed, typewritten, stamped or signed name of preparer: “I affirm under the penalties for perjury, that I have taken reasonable care to redact each social security number in this document unless required by law (insert name).” (IC 36-2-11-15[b]). Disclosure of last four digits of social security number is not disclosure of social security number. (IC 36-2-7.5-3).

Assignment and Release Fees.

Fee for attesting to each release or assignment of instrument on multiple transaction document is $6 for first page and $2 for each page thereafter, plus $1 for each cross reference of recorded document and $1 for marginal assignments or releases. Some counties charge additional $3 for each recorded document. (IC 36-2-7-10). Number of releases or assignments by each county recorder to be included in single instrument, whether one or more, may vary, and if recorder permits more than one such release or assignment per instrument, recording fee for each transaction is $6 for first page and $2 for each page thereafter, plus $1 for each cross reference of recorded document and $1 for marginal assignments or releases. (IC 36-2-7-10, IC 32-29-2-1, IC 32-29-2-2). All documents submitted for recording must include following phrase and legible, printed, typewritten, stamped or signed name of preparer: “I affirm under the penalties for perjury, that I have taken reasonable care to redact each social security number in this document unless required by law (insert name).” (IC 36-2-11-15[b]). Disclosure of last four digits of social security number is not disclosure of social security number. (IC 36-2-7.5-3).

Foreclosure.

Execution may issue on any judgment three months after filing of complaint on any mortgage executed on or after July 1, 1975, provided that such period is 12 months for mortgages executed before Jan. 1, 1958, and shall be six months for mortgages executed after Dec. 31, 1957, but before July 1, 1975. However, for complaints filed on or after July 1, 1995, execution may issue on date judgment is entered, regardless of date mortgage was executed, if court finds mortgaged real estate is residential and has been abandoned. (IC 32-29-7-3). Also, if owner files with clerk of court waiver of time limitation upon which judgment holder has endorsed his consent, then process shall issue immediately. Consideration for waiver, whether or not expressed by its terms, shall be waiver and release by judgment holder of any deficiency judgment against owner. (IC 32-29-7-5). Sale can be made after publication once each week for three successive weeks in newspaper of general circulation and published in each county where real estate is located, and posting notice at door of courthouse in each county where real estate is situated. First publication must be at least 30 days prior to date of sale. At time of first publication, sheriff must serve each owner of real estate with notice of sale. (IC 32-29-7-3). At time of first publication, sheriff must serve each owner of real estate with notice of sale. (IC 32-29-7-3). Where real estate lies in more than one county, court of either county has jurisdiction to foreclose mortgage and sale must be in county where action is brought, unless court directs otherwise. Judgment shall be recorded in lis pendens record of each county where real estate is located, unless judgment is filed in judgment docket of clerk in county as provided in IC 33-32-3-2. (IC 32-29-7-6). Owner of real estate may redeem same from judgment at any time prior to sale. Part owner redeeming real estate has lien on same for respective shares due from other owners. (IC 32-29-7-7). Real estate may be sold as entire body unless otherwise ordered by court. (IC 32-29-7-8). Sheriff or his agent may not directly or indirectly purchase property. (IC 32-29-7-9). Sheriff’s deed must be given and recorded by Sheriff immediately after sale and conveys all right, title and interest in and to property claimed by parties to action. (IC 32-29-7-10). Sheriff not required to record deed if mortgage involved in foreclosure action was insured by United States Dept. of Housing and Urban Development. (IC 32-29-7-10). If owner resides in dwelling upon property, he may remain in possession of mortgaged property, rent-free, until sale, provided he continues to pay all taxes, assessments, and does not commit waste, etc.; if he does not pay taxes, assessments, etc., he is entitled to occupy, rent free, portion actually occupied as dwelling, not to exceed 15 acres, so long as he does not commit waste. (IC 32-29-7-11). In addition, owner of mortgaged premises or owner of crops thereon may at any time within one year from filing action enter and care for and harvest any crop growing at time action was filed. (IC 32-29-7-12). No redemption from foreclosure after date of sale. (IC 32-29-7-7).

See IC 32-29-7-1 – 32-29-7-14 for procedure.

Form (With Warranty)

The following form may be used:

This indenture witnesses, That . . . . of . . . . County, in the State of . . . . mortgages and warrants to . . . . of . . . . County, in the State of . . . ., the following described real estate, in . . . . County, in the State of Indiana, to wit: (Description of real estate) to secure the repayment of (sum loaned, note or other evidence of debt, including maturity date) . . . . dollars.

And the mortgagor expressly agrees to pay the debt above secured, without any relief whatsoever from valuation or appraisement laws of the State of Indiana.

In witness whereof, the mortgagor has executed this mortgage this . . . . . day of . . . . . ., 20. . . . .

(Signature of Mortgagor)

(Acknowledgment)

This instrument prepared by:

(See IC 32-29-1-5.)

"I affirm under the penalties for perjury, that I have taken reasonable care to redact each social security number in this document unless required by law (insert name here)." (IC 36-2-11-15[b]).

21 PROPERTY

21.01 ABSENTEES:

Property of absentee may be attached. (IC 34-25-2-1; Rule TR 64[B]). Where property of nonresident is sold on judgment recovered in case in which notice was provided by publication, plaintiff is required to give refunding bond. (IC 34-55-7-8).

See also categories 13 Estates and Trusts, topic Death; Transportation, topic Motor Vehicles.

Guardian to act under court supervision may be appointed, under certain circumstances for property of absentee person serving with armed forces or merchant marine. (IC 29-2-8-1 to -3).

Escheat.

Effective July 1, 1996, Indiana follows Uniform Unclaimed Property Act (IC 32-34-1, et seq.) instead of Uniform Disposition of Unclaimed Property Act. This chapter does not apply, among other things, to property held in foreign country and arising out of foreign transaction or to unclaimed overpayments of utility bills. Time for abandonment of property held in normal course of business varies greatly depending upon type of property. (IC 32-34-1-20). Unclaimed property is subject to custody of state if it falls within IC 32-34-1-21 requirements. Unclaimed property in safe deposit box is presumed abandoned five years after expiration of rental or lease period on box. (IC 32-34-1-24).

Attorney general has three years to sell abandoned property. (IC 32-34-1-31). Under certain circumstances, another state may recover abandoned property. (IC 32-34-1-37). Holder that fails to abide by requirements of this chapter may be assessed civil penalties and/or charged with misdemeanor. (IC 32-34-1-45).

See categories 2 Business Organizations, topic Corporations, subhead Unclaimed Dividends; Business Regulation and Commerce, topic Banks and Banking, subhead Unclaimed Deposits; Citizenship, topic Aliens; Estates and Trusts, topics Descent and Distribution, subhead Escheat, Wills, subhead Unclaimed Legacies.

21.02 ADVERSE POSSESSION:

Adverse possession entitles person without legal title to obtain ownership to parcel of land upon clear and convincing proof of four factors: control, intent, notice and duration. (829 N.E.2d 476). To prove control element, claimant must demonstrate it exercised degree of use and control over parcel that is normal and customary considering characteristics of land. (829 N.E.2d 476). To prove intent element, claimant must demonstrate intent to claim full ownership of tract superior to rights of all others, particularly legal owner. (829 N.E.2d 476). To prove notice element, claimant must demonstrate its actions with respect to land were sufficient to give actual or constructive notice to legal owner of claimant’s intent and exclusive control. (829 N.E.2d 476). To prove duration element, claimant must demonstrate each of these elements continuously for required period of time. (829 N.E.2d 476).

In suit to establish title by adverse possession, claimant must also prove that he has paid and discharged all taxes and special assessments that claimant reasonably believes in good faith to be falling due on real estate during period he claims to have adversely possessed real property at issue. (IC 32-21-7-1). Claimant satisfies tax and special assessments requirements in boundary dispute where adverse claimant has reasonable and good faith belief that he is paying taxes during period of adverse possession. (829 N.E.2d 476). Cause of action for recovery of possession of real estate must be brought within ten years after cause of action accrues or action is barred. (IC 34-11-2-11).

This statute of limitation may be extended for person under legal disability, who may bring suit within two years after disability is removed. (IC 34-11-6-1).

Easement may be acquired by 20 years continuous uninterrupted adverse use. (IC 32-23-1-1). Owner may cause interruption by written notice served on adverse user or, if adverse user cannot be found, posted for ten days in some conspicuous place on or adjoining premises where right is disputed and recorded. (IC 32-23-1-2 to IC 32-23-1-4).

Persons cannot acquire title by adverse possession of real property owned by state or political subdivisions of state. (IC 32-21-7-2).

21.03 [RESERVED]

21.04 CONVEYANCES:

See topic 21.06 Deeds.

21.05 CURTESY:

Common law curtesy is abolished. (IC 29-1-2-11). As to right of husband in deceased wife's estate, see category 13 Estates and Trusts, topic 13.07 Descent and Distribution.

21.06 DEEDS:

See topic Real Property for types of estates.

Execution.

Conveyances of lands, or any interest therein (except leases for term not exceeding three years), shall be by deed in writing, subscribed, sealed and duly acknowledged by grantor or his attorney. (IC 32-21-1-13). Seal or scroll is not necessary in deed of natural person, business trust or corporation. (IC 32-21-1-12). See infra subhead Married Persons, also category Family, topic Husband and Wife, subhead Conveyance or Encumbrance of Property.

Recording.

In order to be entitled to be recorded deed must be acknowledged or proved, include mailing address to which statements of taxes and assessments should be mailed and, if such address is not street address or rural route address, street address or rural route address of grantee after mailing address to which statements of taxes and assessments should be mailed. (IC 32-21-2-3). Deeds must also contain name of person and governmental agency, if any, that prepared instrument at conclusion of deed and statement in following form: "I affirm, under the penalties for perjury, that I have taken reasonable care to redact each social security number in this document, unless required by law (insert name)." (IC 36-2-11-15). See category 10 Documents and Records, topics 10.01 Acknowledgments, 10.04 Records.

In order to be effective as against third persons without notice, deed must be recorded in office of recorder of county in which land is situated. (IC 32-21-3-3; IC 32-21-4-1). Conveyances, mortgages and leases for more than three years take priority according to time of filing. (IC 32-21-4-1). Every "conveyance document" transferring real property interest for valuable consideration must be accompanied by sales disclosure form, signed by all parties to transaction, for filing with county auditor. (IC 6-1.1-5.5-3). Separate sales disclosure form is required for each parcel conveyed in conveyance instrument unless parcels are contiguous and located entirely within single taxing district. (IC 6-1.1-5.5-3). County auditor may not accept conveyance document without proper sales disclosure form included. (IC 6-1.1-5.5-6). County recorder shall not record conveyance document without evidence that parties have filed with county auditor completed sales disclosure form approved by county assessor. (IC 6-1.1-5.5-6). Certain transfers of interests in real estate are exempt from requirement to file sales disclosure form. (IC 6-1.1-5.5-2). Preprinted forms available from county auditor.

Recording fees vary according to type of instrument. Recording fee for deed is $16 for first page, and $2 for each page thereafter provided such page is not larger than 8½" in width and 14" in length. (IC 36-2-7-10). Additional fee of $2.50 for first page and $1.00 for each additional page may be charged by certain counties on all recorded documents. (IC 36-2-7-10). Additional fee of $1 per nonconforming page will be due if document is not typewritten or computer generated in black ink in at least 10 point type, is not on white paper of at least 20 pound weight, does not have margins of at least 2" at top and bottom of first and last pages, does not have at least ½" margins at top and bottom of all other pages and at least ½" margins on each side of each page, or if any page exceeds 8½" by 14". (IC 36-2-11-16.5). Acknowledgment or certification to document, $5. For each cross reference of recorded document, $1. (IC 36-2-7-10). Fee of $10 is charged by county auditor for filing sales disclosure form. (IC 6-1.1-5.5-4). If authorized by ordinance, county auditor may collect fee of up to $5 for each deed or legal description of each parcel contained in deed. (IC 36-2-9-18).

If auditor of county or township or county assessor determines it necessary, deed for less than whole of tract that will result in division of tract into two or more parcels for property tax purposes may not be recorded unless auditor or assessor is furnished with drawing or other reliable evidence of number of acres in each new tax parcel being created, existence or absence of improvements on each new tax parcel being created and location within original tract of each new tax parcel being created. (IC 32-21-2-13).

Conveyance by tenant for life or years of estate greater than he has, or could lawfully convey works no forfeiture, but passes to grantee all of estate which tenant could convey. (IC 32-17-2-5).

Conveyance by Attorney in Fact.

See topic 21.15 Powers of Attorney.

Married Persons.

Joint deed of husband and wife is sufficient to convey and pass any interest described therein of either or both husband and wife in lands held by them. (IC 32-17-3-4). Married man may execute deed to his separate property as if he were unmarried without his spouse's joinder. (IC 29-1-2-3.1). Married women have same rights concerning real and personal property that unmarried women have. (IC 31-11-7-2).

Form of Warranty Deed

Any conveyance of lands worded in substance as follows:

"A.B. conveys and warrants to C.D." [here describe premises] "for the sum of" [here insert consideration] said conveyance being dated and duly signed, sealed and acknowledged by grantor, shall be deemed to be conveyance in fee simple to grantee, his heirs and assigns, with covenant from grantor that he is lawfully seized of premises, has good right to convey same, and guarantees quiet possession thereof; that same are free from all encumbrances, and that he will warrant and defend title to same against all lawful claims. (IC 32-17-1-2).

Actual consideration does not need to be recited in deed and it is customary to recite consideration as "Ten Dollars and other good and valuable consideration". (35 Ind. 170).

Words "heirs and assigns of the grantee" are not necessary to create in grantee estate of inheritance. (IC 32-21-1-16).

Substitution of word "quitclaims" for "conveys and warrants" makes sufficient deed in quitclaim to grantee, his heirs and assigns. (IC 32-21-1-15).

No special statutory form for corporate deed. See, however, category Documents and Records, topic Records.

21.07 DEEDS OF TRUST:

See category 20 Mortgages, topic 20.03 Mortgages of Real Property.

21.08 DOWER:

Common law dower is abolished. (IC 29-1-2-11). As to right of widow in deceased husband's estate, see category 13 Estates and Trusts, topic 13.07 Descent and Distribution.

21.09 ESCHEAT:

See categories 2 Business Organizations, topic Corporations, subhead Unclaimed Dividends; Business Regulation and Commerce, topic Banks and Banking, subhead Unclaimed Deposits; Citizenship, topic Aliens; Estates and Trusts, topics Descent and Distribution, subhead

Escheat, Wills, subhead Unclaimed Legacies.

21.10 LANDLORD AND TENANT:

All general tenancies, in which premises are occupied by consent, either express or constructive, of landlord, except those covering lands used for agricultural purposes, are deemed tenancies from month to month.

Tenancy at will can be created only by express contract, and may be terminated by one month's notice in writing. Tenancies from year to year require at least three months' notice; and in all tenancies from one period to another of less than three months duration, notice equal to interval between such periods is required. Where tenancy is for definite period of time, or time for termination of tenancy is expressed, or where tenant at will commits waste, or, in case of tenancy at sufferance, or where rent is agreed to be paid in advance and tenant has entered and refuses or neglects to pay rent, or where relation of landlord and tenant does not exist, no notice to quit is necessary; otherwise, ten days notice to quit is required unless otherwise provided in contract or by agreement between parties. Notice provisions apply only to landlord; tenant has no statutory obligation to give notice of intent to surrender leased premises. (431 N.E. 2d 543). Landlord may obtain lien on crop for his rent upon timely filing financing statement giving notice of intention to hold such lien in proper place specified in IC 26-1-9.1-501. (IC 32-31-1-19).

Lease for more than three years must be in writing and signed by party to be charged (IC 32-21-1-1, IC 32-21-1-13), and recorded, being void against subsequent purchaser, lessee or mortgagee in good faith and for valuable consideration whose grant is first recorded. (IC 32-21-4-1; IC 32-31-2-2). Possession of land by person other than vendor is notice to world of rights of one in possession. (103 Ind. App. 16, 5 N.E.2d 315).

Upon termination of lease, landlord must return all of security deposit to tenant, except for amounts applied to accrued rent, actual damages, and unpaid utility charges tenant is obligated to pay under lease. (IC 32-31-3-12). Landlord, however, is only entitled to deduct such amounts from security deposit if landlord provides itemized list of specific deductions claimed to tenant within 45 days of termination of lease. (IC 32-31-3-14). Tenant is required to provide landlord mailing address to which to deliver notice and any refund of security deposit. Tenant is entitled to return of entire security deposit plus reasonable attorney fees if landlord fails to comply with statutory requirements regarding use of security deposits. (IC 32-31-3-12).

Ejectment may be instituted to recover possession of property. (IC 32-30-2-1). Plaintiff may be entitled to possession prior to judgment. To obtain possession prior to judgment, plaintiff must file affidavit stating his right to possession, defendant's unlawful possession, estimated value, and estimated rental value of property. (IC 32-30-3-1). Clerk then orders defendant to appear to contest affidavit or show cause why he should not be removed and plaintiff put in possession. (IC 32-30-3-2). Court may issue order for possession prior to hearing if probable cause of immediate harm, destruction, or sale of property. (IC 32-30-3-3). Court may also issue temporary restraining orders as deemed proper. When possession ordered prior to hearing, defendant may apply for hearing upon 48 hours' notice to plaintiff. (IC 32-30-3-4).

On hearing, court may give prejudgment order for possession, or appoint a receiver if property has unique value. (IC 32-30-3-5).

Bond in amount fixed by court is required before plaintiff may have order of possession. (IC 32-30-3-6). Defendant may retain or regain possession prior to final judgment by bond in amount fixed by court. (IC 32-30-3-8).

Upon issuance of order for plaintiff's possession, executing officer must remove occupants and take property into custody within 48 hours of service of order. (IC 32-30-3-10).

21.11 LEASES:

See topic 21.10 Landlord and Tenant.

21.12 [RESERVED]

21.13 PERPETUITIES:

Statute adopted Uniform Statutory Rule Against Perpetuities. (IC 32-17-8-1 – IC 32-17-8-6). Additional exception is made to applicability of statute for accumulations of income of trust reasonably needed for upkeep, repair or proper management of subject matter of trust estate, accumulations for sinking or reserve funds, accumulations made in accordance with statutory provisions or accumulations made under directions in trust which provide for allocation wholly or in part to principal of trust of stock dividends or stock rights derived from shares held in trust. (IC 32-17-8-2[8]).

21.14 PERSONAL PROPERTY:

Estates by entirety do not exist as to personal property except when such property is directly derived from real estate held by entirety, e.g., crops. (194 Ind. 433, 142 N.E. 117). Profits, such as rental income, derived from real property owned by entireties do not retain character of entireties' ownership. (Ind. App., 544 N.E.2d 179).

Personal property, other than account, owned by two or more persons is owned as tenants in common unless expressed otherwise in written instrument. However, household goods acquired during coverture and in possession of both husband and wife and any promissory note, bond, certificate of title to motor vehicle, or other written or printed instrument evidencing interest in tangible or intangible personal property, other than account, in name of both husband and wife, shall upon death of either become sole property of surviving spouse unless clear contrary intention is expressed in written instrument. (IC 32-17-11-29).

Although IC 32-17-11-29 provides for right of survivorship in certain cases, it does not prevent joint tenant from entering contract creating obligation to sell what would otherwise pass to joint tenant under right of survivorship. (Ind. App., 434 N.E.2d 97).

21.15 POWERS OF ATTORNEY:

Indiana has adopted comprehensive Power of Attorney Act. (IC 30-5-1 – 30-5-10).

Attorneys in Fact.

Attorney-in-fact may act under power of attorney that has not been recorded with county recorder. However, attorney-in-fact must duly record power authorizing execution of document that must be recorded before presenting such document for recording. Document presented by attorney-in-fact for recording must reference book and page or instrument number where instrument creating power is recorded. (IC 30-5-3-3).

Formalities.

To be valid, power of attorney must be in writing, name attorney-in-fact, give attorney-in-fact power to act on behalf of principal and must be signed by principal or at principal's direction in presence of notary public. If power of attorney is signed at principal's direction, notary must state that individual who signed on behalf of principal did so at principal's direction. (IC 30-5-4-1). To be recorded, instrument creating power of attorney must comply with all recording requirements, including notary, preparation statements and redaction statements. County recorder may not accept document for recording if document was executed and is presented by attorney-in-fact whose power is unrecorded. (IC 30-5-3-3). General power of attorney, designation of health care representative, and appointment of representative under living will declaration or life prolonging procedures declaration may be made concurrently or independently. (IC 30-5-8-6). Model living will and life prolonging procedures declaration forms effective since July 1, 1993, and revised effective July 1, 1994. (IC 16-36-4-10, IC 16-36-4-11). No conveyance of land by attorney is valid unless there is a written power of attorney, subscribed and acknowledged by principal as conveyance is required to be. (IC 32-21-1-14).

Revocation.

Except as otherwise provided in instrument creating power of attorney, revocation of executed power must be in writing signed by principal that identifies power being revoked. Revocation is not effective until attorney-in-fact has actual knowledge of revocation. If executed power of attorney was recorded, revocation must be recorded and refer to book and page or instrument number where instrument creating power is recorded. (IC 30-5-10-1). Revocation of living will or life prolonging procedures declaration or appointment of health care representative may be oral or in writing. (IC 16-36-1-7 and IC 16-36-4-12). Except as otherwise stated in instrument creating power of attorney, power of attorney is not terminated by incapacity of principal. (IC 30-5-10-3). Generally, power of attorney terminates on death of principal. However, death of principal who has executed power of attorney, does not revoke or terminate agency as to attorney-in-fact or other person, who, without actual knowledge of death, acts in good faith. Further, death of principal who has executed power of attorney, does not revoke or terminate agency as to attorney-in-fact or other person, granted general authority with respect to health care powers, who: (i) Makes anatomical gifts on principal's behalf, (ii) requests autopsy, or (iii) makes plans for disposition of principal's body. Any such action binds principal and principal's successors, unless action is inconsistent with written directive executed by principal before principal's death. Any otherwise valid or enforceable action binds principal's successors. Notice from U.S. Dept. of Defense of death of principal who has given power of attorney constitutes actual notice of participant's death. Report or listing of principal being missing or missing in action does not constitute notice of principal's death or terminate any power of attorney. (IC 30-5-10-4). Disability or incapacity of principal who has executed durable power of attorney has no effect at all on acts done by attorney-in-fact. Disability or incapacity of principal who has executed power of attorney that terminates on principal's incapacity does not revoke or terminate agency as to attorney-in-fact or other person, who, without actual knowledge of disability or incapacity, acts in good faith. Any otherwise valid and enforceable action binds principal and his successors. (IC 30-5-10-3).

Uniform Durable Power of Attorney Act.

Indiana has repealed statute that adopted Uniform Durable Power of Attorney Act (formerly IC 30-2-11-1 to IC 30-2-11-7). (P.L. 149, 1991, § 6).

21.16 REAL PROPERTY:

All common law estates exist, except estate in tail which has been abolished. (IC 32-17-1-3). Joint tenancy, tenancy in common and tenancy by entirety are recognized.

Conveyance or devise of land or interest therein to two or more persons is taken to create tenancy in common and not joint tenancy, unless contrary intention is expressed in instrument of conveyance, grant or devise. This does not apply to mortgages, conveyances in trust or conveyances to husband and wife. Estate vested in executors or trustees as such is held by them in joint tenancy. (IC 32-17-2-1).

Freehold estates and less than freehold estates may be created to begin at future date. Estates for life may be created in term of years with or without intervention of precedent estate, and remainder limited thereon. Remainder of freehold or less than freehold, either contingent or vested, may be created expectant on termination of term of years. (IC 32-17-2-3).

Remainder may be limited on contingency which would operate to abridge or determine precedent estate. (IC 32-17-2-4).

Rule in Shelley's Case is recognized by courts (141 Ind. 170, 40 N.E. 662) but is limited in application in interpretation of trusts (IC 30-4-2-7).

Condominiums are allowed. (IC 32-25-1-1 to IC 32-25-9-2).

See also topics 21.05 Curtesy, Deeds, Dower, Landlord and Tenant; categories 3 Business Regulation and Commerce, topic Consumer Protection; Civil Actions and Procedure, topic Partition; Family, topic Husband and Wife; Mortgages, topic Mortgages of Real Property.

21.17 TRUST DEEDS:

See category 20 Mortgages, topic 20.03 Mortgages of Real Property.

22 TAXATION

22.01 ADMINISTRATION:

Effective as of Jan. 1, 2002, administration of tax and revenue laws was delegated to Department of Local Government Finance ("DLGF") and Indiana Board of Tax Review ("Indiana Board") in case of real and personal property (formerly delegated to State Board of Tax Commissioners ["State Board"]) and to Department of State Revenue ("Department") in case of most other taxes. DLGF assumes administrative functions of State Board such as prescribing property tax forms, adopting assessment manuals and procedures, and assessing certain types of utility property. Indiana Board assumes assessment review responsibilities and authority previously granted to Division of Appeals of the State Board. Indiana Board conducts reviews of all appeals concerning assessed valuation, deductions, and exemptions that are made from determination of assessing official, county auditor, or County Property Tax Assessment Board of Appeals ("PTABOA"). (IC 6-1.5-4-1). Certain determinations of DLGF may also be appealed to Indiana Board such as utility assessments. (IC 6-1.5-5-1 – IC 6-1.5-5-10).

Penalties.

See subheads detailing particular taxes, supra; also IC 6-8.1-1-1, IC 6-8.1-10-1 et seq.

Revised Uniform Federal Tax Lien Registration Act.

Not adopted. See IC 36-2-11-25.

Tax court, established by IC 33-26-1-1, has exclusive jurisdiction over any case that arises under tax laws of state and that constitutes initial appeal of final determination made by Department or Indiana Board, except cases that arise under any provision of Charity Gaming (IC 4-32.2), other than Gaming Card Excise Tax provision (IC 35-3-5-2). In addition to its regular division, tax court has small claims division of limited jurisdiction (claims for refund not exceeding $5,000 and appeals of assessed property values not exceeding $45,000). (IC 33-26-5-1). Tax court's principal office is in Indianapolis, but court holds trials in various county seats. (IC 33-26-3-4). Tax court has its own rules of procedure and evidence. Taxpayers may petition Indiana Supreme Court to review tax court decisions.

22.02 ALCOHOL, BEVERAGES AND TOBACCO TAXES:

Alcoholic Beverage Excise Taxes.

Imposed by IC 7.1-4-2 – 7.1-4-5.

Cigarette Tax.

Imposed by IC 6-7-1-1 et seq.

22.03 BUSINESS TAXES:

Financial Institutions Tax.

Imposed by IC 6-5.5-1-1 et seq. Tax is imposed on corporation that is transacting business of financial institution in Indiana, including: (1) Holding company (corporation registered under Bank Holding Company Act of 1956 [12 U.S.C. 1841-1849], or registered as savings and loan holding company other than diversified savings and loan holding company [as defined in § 10(a)(F) of Home Owners' Loan Act of 1933 (12 U.S.C. 1467[a][1][F])]); (2) regulated financial corporation (which includes: [a] institution, deposits, shares or accounts of which are FDIC insured, [b] Federal Home Loan Bank member, [c] any other bank or thrift institution incorporated or organized under laws of state that is engaged in business of receiving deposits, [d] credit union incorporated and organized under laws of this state, [e] production credit association organized under 12 U.S.C. 2071, [f] Edge Act corporation organized under 12 U.S.C. 611 through 631, [g] federal or state agency or branch of foreign bank [as defined in 12 U.S.C. 3101] or [h] trust company formed under IC 28-1-12); (3) subsidiary of holding company or regulated financial corporation; and (4) any other corporation organized under laws of U.S., this state, another taxing jurisdiction, or foreign government that is carrying on business of financial institution. Carrying on business of financial institution includes: (1) For holding company, regulated financial corporation, or subsidiary of either, activities that each is authorized to perform under federal or state law, including activities authorized by regulation or order of federal or state law, including activities authorized by regulation or order of Federal Reserve Board for such subsidiary under § 4(c)(8) of Bank Holding Company Act of 1956 (12 U.S.C. 1843[c][8]); and (2) for any corporation described in (4) above, all of corporation's business activities, if 80% or more of corporation's gross income, excluding extraordinary income, is derived from: (a) making, acquiring, selling, or servicing loans or extensions of credit, (b) leasing, or acting as agent, broker, or adviser in connection with leasing real and personal property that is economic equivalent of extension of credit if transaction is not treated as lease for federal income tax purposes; and (c) operating credit card, debt card, charge card, or similar business. (IC 6-5.5-1-17).

If corporation is transacting business of financial institution (as defined in IC 6-5.5-1-17[d]) and is partner in partnership or grantor and beneficiary of trust transacting business in Indiana, and partnership or trust is conducting in Indiana activity that would be business of financial institution if transacted by corporation, corporation is taxpayer and shall, in calculating corporation's tax liability, include in corporation's adjusted or apportioned income, corporation's percentage of partnership or trust adjusted gross or apportioned income. (IC 6-5.5-2-8[a]). Term "partnership" means association of two or more entities formed to conduct business. (IC 6-5.5-1-19).

Rate of Tax.

Tax is measured by apportioned income and imposed for privilege of exercising franchise or corporate privilege of transacting business of financial institution in Indiana. Amount of tax is 8.5% of remainder of: (1) Taxpayer's apportioned income, minus (2) taxpayer's deductible Indiana net operating losses (with certain statutory restrictions), minus (3) taxpayer's net capital losses minus taxpayer's net capital gains computed under IRC for each taxable year or part thereof after Dec. 31, 1989, multiplied by apportionment percentage applicable under IC 6-5.5-2 for taxable year of loss. (IC 6-5.5-2-1).

Apportioned income of taxpayer not filing combined return is subject to tax. Apportioned income is taxpayer's adjusted gross income multiplied by quotient of taxpayer's total receipts attributable to transacting business in Indiana divided by taxpayer's total receipts from transacting business in all jurisdictions (as determined under IC 6-5.5-4). (IC 6-5.5-2-3). Combined group's apportioned income subject to tax is its aggregate adjusted gross income, from whatever source derived, of members of unitary group; multiplied by quotient of all receipts of taxpayer members of group attributable to transacting business in Indiana, divided by receipts of all members of group from transacting business in all taxing jurisdictions. (IC 6-5.5-2-4).

Apportioned Receipts.

For purposes of apportionment, receipts means gross income (as defined in IC 6-5.5-1-10), plus gross income excluded under IRC § 103, less gross income derived from sources outside U.S. However, upon disposition of assets such as securities and money market transactions in regular course of business receipts are limited to gain (as defined in IRC § 1001) that is recognized upon disposition. (IC 6-5.5-4-2). Receipts attributed to Indiana include receipts from: (1) Lease or rental of property located in Indiana (IC 6-5.5-4-3); (2) loan and installment sale contracts dealing with or secured by property located in Indiana (IC 6-5.5-4-4); (3) unsecured consumer loans to Indiana residents (IC 6-5.5-4-5); (4) unsecured commercial loans and installment obligations (and receipts from letters of credit, acceptance of drafts and other devices for assuring or guaranteeing loans or credit) where funds applied in Indiana, or if application undeterminable, if loan applied for in Indiana (IC 6-5.5-4-6; IC 6-5.5-4-7); (5) credit cards regularly billed in Indiana (IC 6-5.5-4-8); (6) sales of property apportioned to Indiana if income from property would be apportioned to Indiana (IC 6-5.5-4-9); (7) performance of fiduciary and other services to extent benefits are consumed in Indiana (IC 6-5.5-4-10); (8) traveler's checks, money orders or U.S. savings bonds purchased in Indiana (IC 6-5.5-4-11); and (9) investments in securities of Indiana or its political subdivisions, agencies or instrumentalities (IC 6-5.5-4-12).

Nonresident taxpayer is entitled to credit for amount of net income tax, franchise tax, or other tax measured by net income that is due to nonresident taxpayer's domiciliary state if receipt of interest or other income from loan or loan transaction for which principal amount is at least $2,000,000 is attributable to both Indiana and domiciliary state under its laws. Amount of credit is lesser of: (1) Tax actually paid to domiciliary state attributable to loan or loan transaction, or (2) tax due to Indiana under IC 6-5.5 attributable to loan or loan transaction. Amount determined under (1) and (2) above shall be reduced by amount of any credit for tax due from nonresident taxpayer under IC 6-5.5 (calculated without credit in IC 6-5.5-2-6) and that may be used by nonresident taxpayer in calculating income tax due under laws of nonresident taxpayer's domiciliary state. (IC 6-5.5-2-6). Additional credits available for hiring math and science teachers during summer recess (IC 6-3.1-2-1 – 6-3.1-2-7), furnishing neighborhood assistance (IC 6-3.1-9-1 – 6-3.1-9-6), qualified rehabilitation of property in military base recovery site (IC 6-3.1-11.5-1 – 6-3.1-11.5-26), creation or retention of jobs in Indiana (IC 6-3.1-13-1.5), qualifying capital investments (IC 6-3.1-13.5-1 – 6-3.1-13.5-13), donation of qualified computer equipment to educational service centers (IC 6-3.1-15-1 – 6-3.1-15-17), qualifying investments in building or refurbishing riverboat (IC 6-3.1-17-1 – 6-3.1-17-9), contributions to individual development account fund (IC 6-3.1-18-1 – 6-3.1-18-11), investments in community revitalization enhancement district (IC 6-3.1-19-1 – 6-3.1-19-6), certain voluntary remediation expenditures (IC 6-3.1-23-1 – 6-3.1-23-17), venture capital investments (IC 6-3.1-24-1 – 6-3.1-24-13), qualified investments in Hoosier businesses (IC 6-3.1-26-1 – 6-3.1-26-26), production of blended biodiesel (IC 6-3.1-27-1 – 6-3.1-27-13), production of ethanol (IC 6-3.1-28-1 – 6-3.1-28-11), investment in coal gasification or fluidized bed combustion technologies (IC 6-3.1-29-1 – 6-3.1-29-21), headquarters relocation (IC 6-3.1-30-1 – 6-3.1-30-3), qualified investments in industrial recovery sites (IC 6-3.1-11-1 – 6-3.1-11-23) and lending money to entities in enterprise zones (IC 6-3.1-7-1 – 6-3.1-7-6).

Exemptions.

No tax imposed on: (1) Insurance companies subject to tax under IC 27-1-18-2 or IC 6-3; (2) international banking facilities (as defined in Regulation D of Board of Governors of Federal

Reserve System), (3) any corporation that is exempt from federal income tax under IRC § 1363, or (4) any corporation exempt from federal income taxation under IRC, except for corporation’s unrelated business income. However, exemption does not apply to corporation exempt from federal income taxation under IRC § 501(c)(14). (IC 6-5.5-2-7). Transaction involving tangible personal property is exempt from state gross retail tax if property is acquired for direct use in motion picture production in Indiana after Dec. 31, 2006 and on or before Jan. 1, 2012. (IC 6-2.5-5-41). Depositor or owner of capital stock, capital shares, share accounts, certificates of indebtedness or investment, or comparable investment or interest in taxpayer with its principal offices in Indiana is not liable for tax on such interest. (IC 6-5.5-9-5).

If tax is held inapplicable or invalid with respect to taxpayer, then notwithstanding statute of limitations set forth in IC 6-8.1-5-2(a), taxpayer is subject to taxes imposed for such periods. (IC 6-5.5-9-3). Taxpayer subject to this tax is not subject to income taxes (IC 6-3), except to extent taxpayer is acting in fiduciary capacity (IC 6-5.5-9-4).

Transacting Business within Indiana.

Taxpayer is transacting business within Indiana if taxpayer: (1) Maintains office (regular, continuous and fixed place of business) in Indiana; (2) has employee, representative, or independent contractor conducting business in Indiana (regularly engaged in taxpayer’s business in Indiana, or employee’s activities are directed or controlled by Indiana office and majority of employee’s service is not performed in another taxing jurisdiction, or contribution to Indiana employment security fund is required under IC 22-4-2 with respect to employee); (3) regularly sells products or services to Indiana customers that are received in Indiana; (4) regularly solicits business from Indiana customers (subject to IC 6-5.5-3-4 threshold); (5) regularly performs services outside Indiana that are consumed within Indiana; (6) regularly engages in transactions in Indiana that involve certain intangible property and result in receipts from Indiana customers; (7) owns or leases tangible personal or real property located in Indiana; or (8) regularly solicits and receives deposits from Indiana customers. (IC 6-5.5-3-1 – IC 6-5.5-3-7). Taxpayer, except for trust company formed under IC 28-1-4, is not transacting business in Indiana solely by: (1) Maintaining or defending lawsuit; (2) filing, modifying, renewing, extending, or transferring mortgage, deed of trust, or security interest; (3) acquiring, foreclosing or otherwise conveying property in Indiana as result of default under terms of any mortgage, deed of trust, or other security instrument relating to property; (4) selling tangible personal property, if taxation is precluded by 15 U.S.C. 381 through 384; (5) owning interest in (or activities related to): (a) real estate mortgage investment conduit, real estate investment trust, or regulated investment company (as defined by IRC), (b) loan backed security in pool of promissory notes or certificates of interest, (c) loan or other asset from which interest is attributed in IC 6-5.5-4-4, IC 6-5.5-4-5, and IC 6-5.5-4-6 and originated by independent party, (d) right to service or to collect income from loan or other asset from which interest is attributed in IC 6-5.5-4-4, IC 6-5.5-4-5 and IC 6-5.5-4-6 and originated by independent party, and (e) amount held in escrow or trust account with respect to foregoing property; or (6) acting as executor of estate, trustee of benefit plan or employees’ pension, profit sharing or other retirement plan, or of testamentary or inter vivos trust or corporate indenture, or in any other fiduciary capacity, including holding title to real property in Indiana. (IC 6-5.5-3-8).

Returns.

Annual return required for each taxpayer subject to tax (or subject to tax but for loss), except that only one return must be filed for unitary group. (IC 6-5.5-6-1). Returns and unpaid taxes are due 15th day of fourth month following close of taxpayer’s taxable year, with filing extensions available. (IC 6-5.5-6-2, IC 6-5.5-6-4). Quarterly reports and payments of 25% of annual estimated tax due Apr. 20, June 20, Sept. 20, and Dec. 20 if taxpayer uses taxable year ending on Dec. 31. If taxpayer uses taxable year that does not end on Dec. 31, due dates for filing estimated quarterly financial institutions tax return and paying tax are on or before 20th day of fourth, sixth, ninth, and 12th months of taxpayer’s taxable year. This only applies to taxpayers having financial institutions tax liability in excess of $2,500. If Department determines taxpayer's (i) estimated quarterly financial institutions tax liability for current year or (ii) average quarterly financial institutions tax payment for preceding year exceeds $5,000, then taxpayer shall pay quarterly financial institutions taxes due by electronic fund transfer (as defined in IC 4-8.1-2-7) or by delivering in person or by overnight courier payment by cashier's check, certified check, or money order to Department. Transfer or payment shall be made on or before date tax is due. If taxpayer pays by electronic fund transfer, taxpayer need not file quarterly financial institutions tax return. (IC 6-5.5-6-3). Duty to file notice with Department of any alteration or modification of federal income tax return within 120 days. (IC 6-5.5-6-6). Except as otherwise provided in IC 6-5.5-5-1, unitary group consisting of at least two taxpayers shall file combined return covering all operations of unitary business and including all of members of unitary business. However, only one combined return needs to be filed, as provided in IC 6-5.5-6-1. In order to fairly represent taxpayer's income within Indiana, Department may require or allow: (1) Separate accounting, (2) filing of separate return for taxpayer, or (3) reallocation of tax items between taxpayer and member of its unitary group. (IC 6-5.5-5-1). Partnership or trust shall file information return in compliance with IC 6-5.5-2-8(b) and (c). Partnership or trust transacting business in Indiana, which if transacted by corporation would constitute business of financial institution, shall withhold from all nonresident corporate partners or beneficiaries amount prescribed in withholding instructions issued by Department of Revenue. (IC 6-5.5-2-8[b][3]).

Penalties.

Penalty prescribed by IC 6-8.1-10-2.1(b) for failing to pay tax is applicable, except that no penalty shall be assessed for quarterly payment if payment is at least 20% of final tax liability or 25% of prior year's final tax liability, and penalty is only assessed to extent of shortfall. (IC 6-5.5-7-1). Violation of IC 6-5.5 can be class C infraction. (IC 6-5.5-7-2). Failure to file or other actions taken with intent to defraud state or to withhold evidence can be class D felony. (IC 6-5.5-7-3, IC 6-5.5-7-4).

22.03A CONTROLLED DANGEROUS SUBSTANCES TAX:

Controlled Substance Excise Tax.

Imposed by IC 6-7-3-3.

22.04 [RESERVED]

22.05 EMPLOYMENT TAXES:

County Employment Tax.

Every county with population of more than 400,000 but less than 700,000 may impose employment tax on each employer and employee. (IC 6-3.5-2-2). Rate must not be in excess of 50¢ per employee per month. (IC 6-3.5-2-2).

Exempted Parties and Employees.

(1) Agricultural labors; (2) domestic service solely on daily basis for private homes; (3) newspaper carrier delivery or distribution if individual under 18; (4) services in employ of one's father, mother, son, daughter or spouse; following employers only: (i) U.S.; (ii) agency of U.S.; (iii) Indiana; (iv) agency of political subdivision of Indiana; and (v) any organization operated exclusively for religious, charitable, scientific, literary, educational and/or civic purposes whose gross income is not used for private gain or benefit. (IC 6-3.5-2-1, 6-3.5-2-4).

Unemployment compensation tax, in the form of "contributions," is imposed on every employing unit which, in 20 different weeks, whether or not consecutive, employs four or more individuals. Employing units owned or controlled by the same interests are treated as one unit. Exemptions of employing units extend generally to charitable, religious, educational and scientific organizations, and employment is defined to exclude work for governmental units, agricultural labor, domestic service and service by child under 21 years old in employ of parent. (IC 22-4-7-1 – 22-4-8-3). Employer's contribution rate is 2.5% after Dec. 31, 2009, or as fixed by Department of Workforce Development on basis of statutory merit rating. (IC 22-4-11-2, 22-4-11-3). Contributions are payable to department in such manner as department may prescribe. Under department rules, reports must be made quarterly and contributions are payable on or before last day of month following quarter for which such reports and contributions are made.

22.06 ENVIRONMENTAL TAXES:

Hazardous Waste Land Disposal Tax.

Imposed on disposal of hazardous waste in disposal facilities. (IC 6-6-6.6-1 et seq.). $50 fee imposed on "facility" (defined in 42 U.S.C. 11049[4]) submitting emergency and hazardous chemical inventory form. (IC 6-6-10-6).

22.07 ESTATE TAX:

Indiana estate tax is greater of (i) zero or (ii) value of decedent's Indiana gross estate divided by value of decedent's total gross estate, multiplied by federal state death tax credit allowable against decedent's federal estate tax, and subtracted therefrom amount of all Indiana inheritance taxes actually paid as result of decedent's death. Nonresident decedent's Indiana gross estate equals total fair market value of tangible personal property and real estate having actual situs in Indiana at time of decedent's death which is included for federal estate tax under IRC §§ 2031-2044. Resident decedent's Indiana gross estate equals total fair market value of personal property and real estate having actual situs in Indiana at time of decedent's death and all intangible personal property wherever located that is included for federal estate tax.

Any personal representative, trustee, or transferee of resident or nonresident decedent's estate subject to Indiana Estate or Inheritance Tax must file with Department executed copy of federal estate tax return when same is filed. Within 30 days after receipt of final determination of federal estate tax by Internal Revenue Service or federal court same must be filed with Department. (IC 6-4.1-4-8).

Tax accrues at death of decedent but does not become due until 18 months after his death, or one month after final notice of federal estate tax due is given, whichever is later. (IC 6-4.1-11-3).

If tax is not paid when due, interest at 6% per annum is added. (IC 6-4.1-11-4).

Apportionment Against Inter Vivos Disposition.

By statute, federal estate tax liability is allocated to property included in taxable estate unless otherwise directed by will. (IC 29-2-12-2).

Interstate Co-operation.

No statutory procedure available for compromise of death taxes where decedent's domicile is disputed.

22.07A EXCISE TAXES:

Boat Excise Tax.

Imposed by IC 6-6-11 et seq.

Boat may not be operated, used, docked or stored in Indiana unless boat excise tax, department of natural resources fees, and lake and river enhancement fees have been paid for that year and required decals are affixed (with certain exceptions). In addition, if boat is registered in another state and Indiana boat excise tax and fees are paid, fee to collect excise tax under IC 9-29-15-9 must be paid. (IC 6-6-11-13). Boats subject to boat excise tax are not subject to Indiana personal property tax. (IC 6-6-11-8). Exemption provided for boats: (1) Owned by U.S.; (2) owned by Indiana or political subdivision; (3) owned by IRS § 501(c)(3) organization; (4) which are human powered vessels; (5) held by boat manufacturers, distributors, or dealers for sale in ordinary course of business; (6) used by person for production of income and subject to personal property tax; (7) stored in Indiana for less than 22 consecutive days during year and not operated, used or docked in Indiana; (8) registered outside Indiana and operated, used or docked in Indiana for combined total of less than 22 consecutive days during year; and (9) subject to commercial vessel tonnage tax under IC 6-6-6. (IC 6-6-11-9).

Amount of tax is based on boat class and age. Motorized boats and sailboats are classified for excise tax purposes according to value of boat when boat was new and are taxed at statutory rates set forth in IC 6-6-11-10. Tax is $12 for motorized boat or sailboat stored in Indiana for 60 consecutive days or more but not operated, used, or docked in Indiana waters, except to facilitate storage of boat. (IC 6-6-11-10). Tax due under IC 6-6-11-10 is reduced by 10% for each year since boat was manufactured, but not to exceed 50%. However, tax may not be reduced to less than $6. (IC 6-6-11-11). In addition to excise tax, annual $5 natural resources fee and lake and river enhancement fees (based on value of boat) may be assessed if decals required. (IC 6-6-11-12). Taxes are payable to Bureau of Motor Vehicles at same time owner pays or would pay registration fee and motor vehicle excise tax on motor vehicles under IC 9-1-4 and IC 6-6-5. (IC 6-6-11-13). Additional provisions for situations in which boats are purchased or brought into Indiana after regular annual tax payment date. Credit is available if boat is sold and refund is available if boat is destroyed. (IC 6-6-11-14 – 6-6-11-18). 100% delinquent fee for failure to timely pay tax (IC 6-6-11-26), and class C infraction and class C misdemeanor sanctions for certain actions in violation of these taxing provisions (IC 6-6-11-25, 6-6-11-27).

Aircraft License Excise Tax payable upon obtaining certificate of registration. (IC 6-6-6.5-1 et seq.).

Utility Services Use Tax is imposed by IC 6-2.3-5.5 on retail consumption of utility services in Indiana that are billed after June 30, 2006.

County Option Dog Tax is imposed by IC 6-9-39 at option of fiscal body of county on person who keeps or harbors dogs of at least six months of age.

22.07B GAMBLING AND ENTERTAINMENT TAXES:

Riverboat Taxes.

Riverboat Admissions Tax (RAT) applies to all riverboats. RAT imposed on all admissions to riverboats that have not implemented flexible scheduling at rate of $3 for each person admitted to gamble. RAT imposed on all admissions to riverboats that have implemented flexible schedule at rate of $4 or $3 for each person admitted to gamble, depending on county in which boat docks. RAT is paid by riverboat owner. (IC 4-33-12-1[a] and IC 4-33-12-1[b]).

Riverboat Wagering Tax. For riverboats that have not implemented flexible scheduling, riverboat wagering tax (RWT) is imposed on adjusted gross receipts received from gambling games at rate of 22.5% of amount of adjusted gross receipts. (IC 4-33-13-1[a] and IC 4-33-13-

1[b]). For riverboats that have implemented flexible scheduling, RWT is graduated tax, ranging from 15% to 35%, on adjusted gross receipts received from gambling games.

Closed Circuit Television.

5% tax is imposed on gross receipts received from closed circuit telecasts of boxing or sparring matches, semiprofessional elimination contests, or exhibitions. (IC 25-9-1-22).

Charity Gaming.

Qualified organizations required to obtain license to conduct charity games; preclusion of local governments from regulating and taxing charity games. (IC 4-32.2-4).

Gaming Card Excise Tax.

10% tax imposed on gross receipts received by wholesalers. (IC 4-32.2-10-1 et seq.).

Local Tax on Admissions to Professional Sporting Events.

If held in certain facilities located in certain counties. (IC 6-9-13-1 – 6-9-13-5).

Local Tax on Amusement Park Attendance.

In certain counties. (IC 6-9-28-1).

Local Tax on Food and Beverage.

In certain counties. (IC 6-9-12, IC 6-9-20, IC 6-9-21, IC 6-9-24 – 6-9-27, IC 6-9-33, IC 6-9-36, IC 6-9-38, IC 6-9-40, and IC 6-9-41).

Local Tax on Hotels, Motels, and Tourist Camps.

In certain counties. (IC 6-9-1-1 et seq.).

Pari-Mutuel Tax (IC 4-31-9 et seq.) imposed on permit holders.

22.08 GASOLINE AND SPECIAL FUELS TAXES:

Gasoline Tax (IC 6-6-1.1-101 et seq.).—18¢ per gallon tax imposed on use of all gasoline, subject to certain exceptions. Motor Carrier Fuel Tax (IC 6-6-1.1-101 et seq.). Rural transit system meeting certain requirements and submitting properly completed claim for refund is entitled to refund of tax paid on gasoline used for transporting persons by means of motor vehicle or trackless trolley. (IC 6-6-1.1-902.5).

Petroleum Severance Tax.

(IC 6-8-1-1 to IC 6-8-1-28). See category 19 Mineral, Water and Fishing Rights, topic 19.01 Mines and Minerals.

Special Fuel Tax (IC 6-6-2.5 et seq.).—16¢ per gallon tax imposed on all special fuel sold or used in producing or generating power for propelling motor vehicles, subject to certain exceptions. Each supplier of special fuel must obtain supplier’s license.

22.08A GENERATION SKIPPING TAX:

Generation-Skipping Transfer Tax.

Indiana generation-skipping transfer tax greater of (i) value of transferred property legally located in Indiana divided by total value of transferred property, multiplied by maximum allowable tax credit under IRC § 2604, or (ii) maximum allowable tax credit under IRC § 2604 minus generation-skipping transfer taxes paid to other states. (IC 6-4.1-11.5-8 [a]). Value of transferred property is final value of property determined for federal generation-skipping transfer tax purposes. (IC 6-4.1-11.5-8[b]).

Indiana generation-skipping transfer tax imposed on every generation-skipping transfer. (IC 6-4.1-11.5-7). Indiana generation-skipping transfer includes every transfer subject to tax under IRC §§ 2601 et seq. if (1) original transferor is resident of Indiana on date of original transfer or (2) transferor is not resident of Indiana and transferred property is real property located in Indiana or tangible personal property legally located in Indiana. (IC 6-4.1-11.5-3). Original transferor means donor, grantor, testator, or trustee who by gift, grant, will, or trust makes transfer of real or personal property that results in imposition of federal generation-skipping transfer tax. (IC 6-4.1-11.5-4). Transferred property means real or personal property, whether located in Indiana or another jurisdiction, transfer of which gives rise to federal generation-skipping transfer tax. (IC 6-4.1-11.5-6).

Tax due 12 months after date of death of person whose death resulted in generation-skipping transfer. (IC 6-4.1-11.5-9). Tax paid to Indiana Department of Revenue. (IC 6-4.1-11.5-10). Late payments subject to interest at 6% from due date of tax until date tax is paid. (IC 6-4.1-11.5-12). Must file with Department of Revenue copy of federal return and schedule indicating value of transferred property and tax. (IC 6-4.1-11.5-11).

22.09 GIFT TAX:

None; but inheritance tax applies to gifts in contemplation of death or to take effect after death.

22.10 [RESERVED]

22.11 INCOME TAX:

Adjusted Gross Income Tax

Enacted by 1963 legislature, applies to individuals, trusts, estates and corporations. (IC 6-3-1-1 to IC 6-3-1-25). Provisions are tied to Internal Revenue Code of 1986 as amended and in effect on Jan. 1, 2007 (“IRC”). (IC 6-3-1-11).

Rate of Tax.

Rates are 3.4% of adjusted gross income of resident persons and nonresident persons, and 8.5% of adjusted gross income of corporations, when derived from sources within state.

Adjusted gross income consists of “adjusted gross income as defined for individuals in IRC § 62, modified as follows: Subtract income exempt from taxation by statutes or Constitution of U.S.; add amount equal to any deduction allowed or allowable pursuant to IRC § 62 for taxes based on or measured by income and levied at state level by any state; subtract $1,000, or in case of joint return subtract $1,000 for each spouse; subtract $1,000 for each exemption provided by IRC § 151(c) and additional amount allowable under IRC § 63(f), and $1,000 for spouse of taxpayer if separate return is made by taxpayer if such spouse for taxable year has no gross income and is not dependent of another taxpayer; subtract $1,500 for each of exemptions allowed under IRC § 151(c)(1)(B) for taxable years beginning after Dec. 31, 1996 and $500 for each additional amount allowable under § 63(f) if adjusted gross income of taxpayer (or taxpayer and spouse in case of joint return) is less than $40,000; subtract lesser of adjusted gross income, as defined in IRC § 62, that is subject to income tax by political subdivision of another state or $2,000 (IC 6-3-1-3.5); add amount equal to total capital gain portion of lump sum distribution, as defined in IRC § 402(e)(4)(D), if lump sum distribution is received during taxable year and capital gain portion is taxed as provided in IRC § 402; subtract amounts included in federal adjusted gross income under IRC § 111 as recovery of items previously deducted as itemized deduction from adjusted gross income; subtract amounts received by individual as supplemental railroad retirement annuities under 45 U.S.C. 231; add amount of deduction allowed under IRC § 221 for married couples filing jointly of taxable year began before Jan. 1, 1987; add amount equal to interest excluded from Federal gross income under § 128 if taxable year began prior to Jan. 1, 1985. Subtract amount equal to amount of federal Social Security and Railroad Retirement benefits included in taxpayer's federal gross income by IRC § 86; subtract certain amounts for recipients of welfare; subtract amount of eligible Holocaust victim's settlement payment included in federal adjusted gross income; effective Jan. 1, 2000, subtract amount equal to portion of premiums paid during year for qualified long term care policy (IC 12-15-39.6-5) for taxpayer, spouse or both; subtract lesser of $2,500 or amount of state property taxes paid on taxpayer's principal place of residence; subtract amount equal to Sept. 11 terrorist attack settlement payment included in individual's federal adjusted gross income; add or subtract amount necessary to make adjusted gross income of taxpayer that owns property for which bonus depreciation was allowed in current taxable year or earlier year pursuant to IRC § 168(k) equal to amount of adjusted gross income that would have been computed had election not been made under IRC § 168(k) to apply bonus depreciation to property in year it was placed in service; add amount equal to any deduction allowed under IRC § 172; add or subtract amount necessary to make adjusted gross income of any taxpayer that placed IRC § 179 property in service in current taxable year or earlier year equal to amount of adjusted gross income that would have been computed had election had not been made under IRC § 179 in total amount exceeding $25,000; add amount equal to amount that taxpayer claimed as deduction for domestic production activities for taxable year under IRC § 199; subtract amount equal to amount of taxpayer's qualified military income (as defined in IC 6-3-1-34) that was not excluded from taxpayer's gross income for federal income tax purposes under § 112 of IRC. (IC 6-3-1-3.5). Subtract any amount of credit that is provided under Federal Economic Stimulus Act of 2008 and included in taxpayer's federal adjusted gross income. Adjusted gross income of corporations consists of "taxable income" as defined in IRC § 63, modified as follows: Subtract income exempt from taxation by Constitution or statutes of U.S.; add deductions allowed or allowable pursuant to IRC § 170; add any deduction or deductions allowed or allowable pursuant to IRC § 63 for taxes based on or measured by income levied at state level by any state; subtract amount equal to amount included in taxable income pursuant to IRC § 78; add or subtract amount necessary to make adjusted gross income of taxpayer that owns property for which bonus depreciation was allowed in current taxable year or earlier year pursuant to IRC § 168(k) equal to amount of adjusted gross income that would have been computed had election not been made under IRC § 168(k) to apply bonus depreciation to property in year it was placed in service; add amount equal to any deduction allowed under IRC § 172; add or subtract amount necessary to make adjusted gross income of any taxpayer that placed IRC § 179 property in service in current taxable year or earlier year equal to amount of adjusted gross income that would have been computed had election not been made under IRC § 179 in total amount exceeding $25,000; add amount equal to amount that taxpayer claimed as deduction for domestic production activities for taxable year under IRC § 199. Add to extent required by IC 6-3-2-20 amount of intangible expenses (as defined in IC 6-3-2-20) and any directly related intangible expenses (as defined in IC 6-3-2-20) for taxable year that reduced corporation's taxable income (as defined in § 63 of IRC) for federal income tax purposes. (IC 6-3-1-3.5). Adjusted gross income for life insurance companies, as defined in IRC § 816(a), is "life insurance taxable income" as defined in IRC § 801, modified as follows: Subtract income exempt from taxation by Constitution or statutes of U.S.; add deductions allowed or allowable pursuant to IRC § 170; add deductions allowed or allowable under IRC § 805 or IRC § 831(c) for taxes based on or measured by income levied at state level by any state; subtract amount equal to amount included in taxable income pursuant to IRC § 78; add or subtract amount necessary to make adjusted gross income of taxpayer that owns property for which bonus depreciation was allowed in current taxable year or earlier year pursuant to IRC § 168(k) equal to amount of adjusted gross income that would have been computed had election not been made under IRC §

168(k) to apply bonus depreciation to property in year it was placed in service; add amount equal to any deduction allowed under IRC § 172 or IRC § 810; add or subtract amount necessary to make adjusted gross income of any taxpayer that placed IRC § 179 property in service in current taxable year or earlier year equal to amount of adjusted gross income that would have been computed had election not been made under IRC § 179 in total amount exceeding $25,000; add amount equal to amount that taxpayer claimed as deduction for domestic production activities for taxable year under IRC § 199. Adjusted gross income for insurance companies subject to tax pursuant to IRC § 831 is "taxable income" as defined in IRC § 832, modified as follows: Subtract income exempt from taxation by Constitution or statutes of U.S.; add deductions allowed or allowable pursuant to IRC § 170; add deductions allowed or allowable pursuant to IRC § 805 or IRC § 831(c) for taxes based on or measured by income levied at state level by any state; subtract amount equal to amount included in taxable income pursuant to IRC § 78. Adjusted gross income for trusts and estates is "taxable income" as defined for trusts and estates in IRC § 641(b) modified as follows: subtract income that is exempt from taxation under this Act by constitution and statutes of U.S.; subtract amount equal to Sept. 11 terrorist attack settlement payments included in federal adjusted gross income of estate of victim of Sept. 11 terrorist attack or trust to extent it benefits victim of Sept. 11 attack; add or subtract amount necessary to make adjusted gross income of taxpayer that owns property for which bonus depreciation was allowed in current taxable year or earlier year pursuant to IRC § 168(k) equal to amount of adjusted gross income that would have been computed had election not been made under IRC § 168(k) to apply bonus depreciation to property in year it was placed in service; add amount equal to any deduction allowed under IRC § 172; add or subtract amount necessary to make adjusted gross income of any taxpayer that placed IRC § 179 property in service in current taxable year or earlier year equal to amount of adjusted gross income that would have been computed had election not been made under IRC § 179 in total amount exceeding $25,000; add amount equal to amount that taxpayer claimed as deduction for domestic production activities for taxable year under IRC § 199. See special rules under IC 6-3-1-3.5(f) for payment by individuals of property taxes in 2004. (IC 6-3-1-3.5).

Adjusted Gross Income Subject to Tax.

In cases of resident individual, trusts with situs in state, or estates of deceased residents, tax is imposed on entire adjusted gross income. For corporations and nonresident individuals, life insurance companies and insurance companies, trusts and estates, tax is imposed on adjusted gross income derived from sources within the state. (IC 6-3-2-1, IC 6-3-1-12). Income derived from sources within Indiana includes income from following sources: income from real or tangible personal property located in state; income from doing business in state; income from trade or profession conducted in state; compensation for labor or services rendered within state; income from various enumerated intangibles attributable to Indiana. (IC 6-3-2-2, IC 6-3-2-2.2). For life insurance companies and insurance companies, income derived from sources within Indiana is determined by multiplying adjusted gross income by fraction, numerator of which is direct premiums and annuity considerations received during taxable year for insurance upon property or risks in Indiana and denominator of which is direct premiums and annuity considerations received during taxable year for insurance upon property or risks everywhere. For corporations subject to adjusted gross income tax under IC 6-3-2-1, certain intangible expenses and directly related intangible interest expenses are added to taxable income. (IC 6-3-2-20).

Return and Payment of Tax.

Corporations, trusts, estates, nonresident individuals having any gross income from Indiana sources except for team member (as defined in IC 6-3-2-2.7) who is covered by composite return filed under IC 6-3-2-2.7, and any resident individual having gross income in excess of personal exemptions must file annual returns on or before 15th day of fourth month following close of taxable year (IC 6-3-4-1; IC 6-3-4-3). Taxable year must be same as used for federal income tax purposes. (IC 6-3-1-16). Any individual required to file declaration of estimated tax for federal purposes must file one for Indiana purposes at same time federal is filed. (IC 6-3-4-

4.1). Estimated tax for nonresident alien (§ 770 IRC) must be computed by applying not more than one exclusion under IC 6-3-1-3.5(a)(3) and (a)(4) regardless of total exclusions under IC 6-3-1-3.5(a)(3) and (a)(4) permitted. In addition, if individual has gross income subject to tax and from which no withholding is made declaration of estimated tax must be filed unless estimated tax can reasonably be expected to be less than $1,000. Effective Jan 1, 2009, individual filing estimated return must designate both portion that represents estimated state adjusted gross income tax liability and portion that represents estimated local lax liability under IC 6-3.5. Every corporation with $2,500 adjusted gross income tax liability must report and pay quarterly lesser of 25% of estimated liability, less credits in conjunction with reporting of gross income tax, or annualized income determined under § 6655(e) of IRC. 10% penalty per annum is assessed for failure to pay estimated tax. (IC 6-3-4-4.1). Employers generally must withhold tax on wages subject to tax. (IC 6-3-4-8). Partnerships and S corporations must withhold payments or credits to nonresident partners or shareholders. Partnerships and S Corporations shall file corporate adjusted gross income tax return on behalf of all nonresident partners regardless of whether such partners have income from Indiana sources. (IC 6-3-4-12, IC 6-3-4-13). Trusts and estates must withhold payments to nonresident beneficiaries. (IC 6-3-4-15). Penalties of 10% for willful negligence and 100% for fraud added to deficiencies. If taxpayer fails to make return, Department may prepare return from best information available and add to computation of tax therein penalty of 20% of such tax, together with interest on such tax at such rate as is established annually by commissioner from date such tax was due. Partnership or S corporation that fails to include all nonresident individuals or shareholders in composite return shall be subject to penalty of $500. (IC 6-8.1-10-1 – 6-8.1-10-5). In addition to above penalties, fine of not more than $10,000 or imprisonment for two years, with up to one year subtracted for mitigating circumstances and up to two years added for aggravated circumstances, or both, may be imposed for failure or refusal to file return or making false or fraudulent return with intent to defraud state or evade payment of tax. (IC 6-3-6-11).

Allocation and Apportionment of Income.

For corporations and nonresident persons, adjusted gross income includes nonbusiness income allocable to state, and business income derived from sources within state determined by using specified three factor formula which takes property, payroll and sales into account, giving extra weight to sales factor after certain periods of economic growth. Sales are determined without regard to f.o.b. point or other conditions of sale and appointment formula is gradually shifting to single sales factor. Department also has discretion to vary terms of apportionment formula either on its own motion or upon taxpayer's petition. For life insurance companies, adjusted gross income includes income derived from sources within Indiana determined by formula based on direct premiums and annuity considerations received. (IC 6-3-2-2, IC 6-3-2-2.2).

Credits.

Credits are allowed to individuals for wages withheld (IC 6-3-3-1), for 50% of donations to higher education and 21st century scholars program (IC 20-12-70.1-5) in Indiana, but not to exceed $100 on single return or $200 on joint return for taxpayers other than corporations and not to exceed $1,000 for corporations (IC 6-3-3-5, IC 6-3-3-5.1), and certain taxes paid to other states (IC 6-3-3-3). Taxpayer entitled to credit on enterprise zone income under formula. (IC 6-3-3-10). Taxpayer entitled to credit for portion of amount contributed to college choice 529 education savings plan. (IC 6-3-3-12). Refundable credit is allowed to individuals 65 years or over whose federal adjusted gross income is less than $10,000 for taxable year to provide relief from state adjusted gross income taxes. (IC 6-3-3-9). Effective July 1, 2007, compliance reporting may be required for certain recipients of certain economic incentives, including credits, loans and grants. (IC 5-28-28).

Neighborhood Assistance Credit.

Any business entity authorized to do business in state and having adjusted gross income tax, or financial institutions tax liability or any individual subject to adjusted gross income tax shall receive credit, not to exceed $25,000 for any year, against such tax due of 50% of amount invested or contributed to qualified neighborhood assistance program. (IC 6-3.1-9-1 – 6-3.1-9-3).

Business firms or individuals desiring credit under this provision must file application with Department, and total amount of credits allowed in any state fiscal year shall not exceed $2,500,000. (IC 6-3.1-9-4 – 6-3.1-9-5). Applications will be acted upon in order of submission and once $2,500,000 limit is reached no further applications will be approved. (IC 6-3.1-9-5).

Energy System Credit.

Any person, corporation, or partnership subject to adjusted gross or supplemental net income tax is entitled to credit against such tax in amount based on type and use of qualified energy system. (IC 6-3.1-8-1 – 6-3.1-8-12).

Additional credits are provided for: Companies that qualify for Economic Development for Growing Economy tax credit (IC 6-3.1-13); entering into agreement to invest in or employ inmates within correctional facilities (IC 6-3.1-6-1 – 6-3.1-6-5); lending money to entities in “enterprise zones” (IC 6-3.1-7-1 – 6-3.1-7-6); qualified investments in enterprise zones (IC 6-3.1-10-1 – 6-3.1-10-9); industrial recovery sites (IC 6-3.1-11-1 – 6-3.1-11-23); incurring certain Indiana qualified research expenses (IC 6-3.1-4-1 – 6-3.1-4-6); hiring math and science teachers during summer recess (IC 6-3.1-2-1 – 6-3.1-2-7); preserving or rehabilitating historic property (IC 6-3.1-16); owning and operating maternity home in Indiana (IC 6-3.1-14-1 – 6-3.1-14-8); incurring certain qualified costs to build or refurbish riverboat (IC 6-3.1-17-1 – 6-3.1-17-8); incurring certain qualified costs to rehabilitate property within military base recovery site (IC 6-3.1-11.5); providing qualified investment capital to qualified Indiana business (IC 6-3.1-24); obtaining coal combustion products (IC 6-3.1-25.2-1 – 6-3.1-25.2-10); taxpayers that qualify for Hoosier Business Investment tax credit (IC 6-3.1-26-1 – 6-3.1-26-26); producing blended biodiesel in Indiana (IC 6-3.1-27-1 – 6-3.1-27-13); producing ethanol (IC 6-3.1-28-1 – 6-3.1-28-11); coal gasification (IC 6-3.1-26-1 – 6-3.1-26-21); and headquarters relocation (IC 6-3.1-30-1 – 6-3.1-30-13).

Deductions.

Deduction of up to $5,000 is provided for income, including retirement or survivor’s benefits, received by individual or his surviving spouse for individual’s service in armed forces of U.S. provided recipient has attained age 60. (IC 6-3-2-4). Individual may also deduct difference between first $2,000 received from federal civil service annuity which is included in adjusted gross income under IRC § 62, and total amount of Social Security and Railroad Retirement benefits received. (IC 6-3-2-3.7). Individual renting dwelling as principal place of residence may deduct lesser of amount of rent paid during taxable year or $3,000. Deduction not available for dwelling exempt by Indiana property tax. (IC 6-3-2-6). Resident individual receives deduction limited to lesser of $1,000 or cost of installing new insulation in three year old residence. (IC 6-3-2-5). Deduction available for certain export sales. (IC 6-3-2-13).

Exemption is provided for: Organizations described in IRC § 501 (except as to unrelated business income of most such organizations); S corporations; corporations subject to financial institutions tax; insurance companies subject to tax under state insurance law; international banking facilities, building and loan associations (IC 6-3-2-2.8, IC 6-5.5-9-4); certain fares collected for public transportation services (IC 6-3-2-3.5). Exemption provided up to $1,000 for certain law enforcement rewards. (IC 6-3-2-17). Amount deposited by employer in employee’s medical care savings account is exempt in taxable year of deposit and is exempt in taxable year of withdrawal if used for payment of eligible medical expenses unless taxpayer excluded or deducted amount deposited into medical care savings account from adjusted gross income under IRC § 106, IRC § 220 or any other section of Internal Revenue Code. (IC 6-3-2-18).

Multistate Tax Compact.

Indiana's membership terminated July 1, 1977.

County Adjusted Gross Income Tax.

Unless County Option Income Tax is in effect, every county is authorized to impose tax on adjusted gross income of all county taxpayers ("county taxpayer" meaning only individuals), and on taxpayers residing in other counties not imposing County Adjusted Gross Income Tax, County Option Income Tax or County Economic Development Income Tax but working in taxing county. (IC 6-3.5-1.1-1 – IC 6-3.5-1.1-2).

Rate of Tax.

County may impose a rate of .5%, .75% or 1% on adjusted gross income of resident taxpayers, and .25% on other taxpayers from counties without tax but working in taxing county. (IC 6-3.5-1.1-2). County council may decrease county adjusted gross income tax rate pursuant to specified procedures. (IC 6-3.5-1.1-3.1).

Credits.

Individual allowed credit for elderly and totally disabled under IRC § 22 is entitled to credit equal to lesser of tax imposed or credit for elderly multiplied by county rate and divided by .15. (IC 6-3.5-1.1-7). Credits allowed to county taxpayers for tax liability to governmental entities of another state on income derived outside Indiana but subject to this tax. (IC 6-3.5-1.1-6). Credits may be subject to certain reciprocity requirements. (IC 6-3.5-1.1-17).

Collection and Administration of Tax.

Except where expressly provided, all provisions of adjusted gross income tax (IC 6-3 et seq.) are applicable to imposition, collection and administration of tax. Employers must annually submit report to Department along with annual withholding report of amount of withholdings attributable to each county. (IC 6-3.5-1.1-18).

County Economic Development Income Tax imposed by IC 6-3.5-7-1 et seq.

County Option Income Tax.

Every county income tax council of any county in which County Adjusted Gross Income Tax will not be in effect may impose County Option Income Tax on "adjusted gross income" of county taxpayers ("county taxpayer" meaning only individuals) and on taxpayers residing in other counties not imposing County Option Income Tax, County Adjusted Gross Income Tax or County Economic Development Income Tax but working in taxing county. (IC 6-3.5-6-1 – IC 6-3.5-6-8). Except as provided in IC 6-3.5-7-1, term "adjusted gross income" has same meaning as set forth in IC 6-3-1-3.5(a) for adjusted gross income tax purposes.

Rate of Tax.

County may initially impose rate of 0.2% on adjusted gross income of resident taxpayers, and 0.05% on other taxpayers from counties without tax but working in taxing county. (IC 6-3.5-6-8). If tax is imposed, then rate in effect for resident county taxpayers increases by 0.1% each succeeding year until rate equals 0.6%. (IC 6-3.5-6-8). By ordinance, county may then increase rate by 0.1% each year up to maximum rate of 1%. (IC 6-3.5-6-9). County income tax council may decrease county option income tax rate pursuant to specified procedures. (IC 6-3.5-6-12.5). Rate in effect for county taxpayers who are not resident county taxpayers is at all times one-fourth of tax rate imposed on resident country taxpayers. (IC 6-3.5-6-8).

Credits.

Individual allowed credit for elderly and totally disabled under IRC § 22 is entitled to credit equal to lesser of tax imposed or credit for elderly multiplied by county rate and divided by 0.15%. (IC 6-3.5-6-24). Credit also available for tax liability to government entities of another state. (IC 6-3.5-6-23).

Collection and Administration of Tax.

Except where expressly provided, all provisions of adjusted gross income tax (IC 6-3 et seq.) are applicable to imposition, collection and administration of tax. Employers must annually submit report to Department along with annual withholding report of amount of withholdings attributable to each county. (IC 6-3.5-6-22).

Utility receipts tax, enacted by 2002 legislature, applies to taxable gross receipts of any taxpayer that is resident or domiciliary of Indiana or, in case of nonresident or nondomiciliary, receipts derived from activities or businesses or other sources within Indiana.

Rate of Tax.

Rate is 1.4% of taxable gross receipts of resident taxpayers and from activities or business within state of nonresident taxpayers. (IC 6-2.3-2).

Taxable Gross Receipts.

All receipts in consideration for retail sale of utility services for consumption, before deducting any costs incurred in providing service, with exception of certain specified exemptions and deductions. (IC 6-2.3-1).

Exemptions are provided for: sales to U.S. government to extent state is prohibited from taxing receipts by Constitution; receipts from interstate commerce to extent state is prohibited from taxing by Constitution; gross receipts received by conservancy district established under IC 14-33-20 or IC 13-3-4, regional waste, sewage or solid waste district established under IC 13-26 or IC 13-3-2; nonprofit corporation formed solely to supply water to public; county or joint solid waste management district established under IC 13-21 or IC 13-9.5-2; nonprofit corporation formed to provide combination of water, sewer and sewage service to public; county onsite waste management district established under IC 36-11; certain sales between members of controlled group. (IC 6-2.3-4).

Deductions.

Deduction of $1,000 multiplied by fraction, numerator of which is number of days in taxable year which taxpayer is subject to this tax and denominator is number of days in taxable year. Accrual-basis taxpayer may deduct bad debts in same manner as IC 6-2.5-6-9. Right to deduction is not assignable to individual or entity that is not part of same affiliated group as assignor. (IC 6-2.5-6-9). Deduction is permitted for certain resource recovery systems which process solid or hazardous waste and for which taxpayer takes federal depreciation deduction pursuant to IRC § 167 or 179. Taxpayer may deduct amounts paid for return of empty container customarily returned by buyer for reuse as container. (IC 6-2.3-5).

Return and Payment of Tax.

Every taxpayer with $1,000 annual utility receipts tax liability must report and pay quarterly 25% of estimated liability. Annual return is due of every taxpayer having more than $1,000 in gross receipts during taxable year. Return is due on Apr. 15 for calendar year taxpayers and as otherwise specified for non-calendar year taxpayers. Corporations which are members of affiliated group may file consolidated return. Criminal penalties may be imposed on taxpayer which fails to maintain records or permit inspection thereof and on taxpayer’s officer, employee or partner who maintains false or fraudulent records.

22.12 INHERITANCE TAX:

Inheritance tax is imposed and regulated by IC 6-4.1-1-1 et seq.

Department is charged with enforcement of Act and will provide forms required. Department, Indiana Government Center North, 100 N. Senate Ave., Indianapolis, Indiana 46204.

Taxable Transfers: (1) By will; (2) under laws of intestate succession; (3) made in contemplation of transferor's death (transfer within one year prior to death presumed to have been so made); (4) made in such manner that they are intended to take effect in possession or enjoyment at or after transferor's death; (5) made in payment of claim against transferor's estate, provided that claim is result of contract or antenuptial agreement made by transferor and payment of amount claimed is due at or after transferor's death under terms of his will or contract; (6) exercise, by surviving joint owner or owners, of rights to immediate ownership or possession and enjoyment of property held jointly by surviving joint owner or owners and decedent is taxable transfer, and total value of jointly held property is subject to tax, less value of that portion of jointly held property which surviving joint owner or owners prove belonged to him or them; (7) made by deed of trust in such manner that transferor reserves to himself any interest or reserves to himself and others powers of revocation, alteration, or amendment which if exercised would cause property to revert to transferor is taxable transfer upon death of transferor, and value of property subject to tax is equal to value of property subject to powers, and in respect to which powers remain unexercised at transferor's death; (8) made to executor or trustee in lieu of executor or trustee's fee, and value to be taxed is amount by which value of property transferred exceeds fee that would have been due if transfer had not been made. If transfer described in (1) through (5) is made for valuable consideration, value of property transferred is reduced by equivalent in money value of consideration received by transferor. "Consideration" does not include love and affection. (IC 6-4.1-2-4 – 6-4.1-2-7).

Property Taxed.

Subject to conditions and limitations, tax applies to property interest transfer: made by resident decedent in real property located in state (unless real property was transferred without retained interest to irrevocable trust during decedent's lifetime and transfer was not made in contemplation of transferor's death), tangible personal property which does not have actual situs outside state, and intangible personal property wherever located; made by nonresident decedent in real property located in state (unless real property was transferred without retained interest to irrevocable trust during decedent's lifetime and transfer was not made in contemplation of transferor's death), tangible personal property having actual situs in state. (IC 6-4.1-2-2 – 6-4.1-2-3). Real property located outside state is not subject to tax, regardless of whether property is held in trust or whether trustee is required to distribute property in-kind. (IC 6-4.1-2-2[b][1]).

Deductions.

Resident Decedent.

For resident decedent following items may be deducted from value of property interests transferred by will or laws of intestate succession or under trust: Decedent's debts which are lawful claims against his resident estate; taxes on decedent's real property which is located in this state and subject to inheritance tax if real property taxes were lien at time of decedent's death; taxes on decedent's personal property which is located in this state and subject to inheritance tax if personal property taxes are personal obligation of decedent or lien against property and if taxes were unpaid at time of decedent's death; taxes imposed on decedent's income to date of death if taxes were unpaid at time of his death; inheritance, estate, or transfer taxes, other than federal estate taxes, imposed by other jurisdictions with respect to intangible personal property which is subject to inheritance tax; mortgages or special assessments which, at time of decedent's death, were lien on any of decedent's real property which is located in this state and subject to inheritance tax (but only from value of real property encumbered by mortgage or special assessment); decedent's funeral expenses; amounts, up to $1,000, paid for memorial for decedent; expenses incurred in administering property subject to the inheritance tax, including but not limited to reasonable attorney fees, personal representative fees, and trustee fees; amount of any allowance provided to resident decedent's dependent children by IC 29-1-4-1; value of any property actually received by resident decedent's surviving spouse in satisfaction of allowance provided by IC 29-1-4-1, regardless if claim for allowance filed under IC 29-1-14. (IC 6-4.1-3-13).

Deductions from property interests transferred by resident decedent other than by will or laws of intestate succession or under trust are: inheritance, estate, or transfer taxes, other than federal estate taxes, imposed by other jurisdictions with respect to intangible personal property which is subject to inheritance tax; liens against property interests that are transferred; decedent's debts and funeral expenses and estate administration expenses, including reasonable attorney's fees incurred in filing inheritance tax return, and in addition, any portion of deduction for amount of allowance provided to resident decedent's children by IC 29-1-4-1 which is not needed to reduce to zero value of probate property transferred by decedent may be deducted from value of nonprobate property transferred by decedent to his children who are entitled to such allowance, each such child entitled to equal share of deduction. (IC 6-4.1-3-14).

Nonresident Decedents.

For nonresident decedents, deductions from value of property interests transferred are: Taxes other than federal estate taxes; expenses incurred in administering property subject to inheritance tax, including but not limited to reasonable attorney fees, personal representative fees and trustee fees; liens against property so transferred; claims against decedent's domiciliary estate which are allowed by court having jurisdiction over that estate and which will not be paid from that estate because it is exhausted. (IC 6-4.1-3-15).

Exemptions and Rates of Tax.

General Exemptions.

Transfer of property to cemetery association if property used for cemetery purposes; proceeds of life insurance which do not become subject to distribution as part of his estate and subject to claims against his estate; each property interest which decedent transfers to surviving spouse; each transfer described in IRC § 2055(a); annuity or other payment to extent excluded from federal gross estate under IRC § 2039. Transfers of property interests described in IRC § 2056(b) that were exempt from inheritance tax will be subject to that tax at death of surviving spouse. (IC 6-4.1-3-1, IC 6-4.1-3-1.5, IC 6-4.1-3-6, IC 6-4.1-3-6.5 – IC 6-4.1-3-7). Specified amounts exempt for transfers to classes of transferees. (IC 6-4.1-3-10 – 6-4.1-3-12).

Rates of tax and exemptions based on class vary according to relationship of beneficiary and amount of transfer, as follows:

Each property interest decedent transfers to surviving spouse is exempt from inheritance tax.

Class A.—Lineal ancestor or descendant of transferor; stepchild of transferor; descendant of stepchild or transferor. Adopted children are treated as if they are natural children of adopting parents if adoption occurred before individual was totally emancipated. If relationship of loco parentis has existed for period of at least ten years and if relationship began before child's 15th birthday child is considered natural child of loco parentis parent. Stepchild is child of transferor's surviving, deceased, or former spouse who is not child of transferor. (IC 6-4.1-1-3).

Exemptions in Class A are $100,000 to any member of class. (IC 6-4.1-3-10).

Rates of tax for Class A are: 1% on amount by which amount or value of transfer exceeds exemption and deductions applicable and does not exceed $25,000; 2% on next $25,000 or part thereof (excess over $25,000 up to $50,000); 3% on next $150,000 or part thereof (excess over $50,000 up to $200,000); 4% on next $100,000 or part thereof (excess over $200,000 up to $300,000); 5% on next $200,000 or part thereof (excess over $300,000 up to $500,000); 6% on next $200,000 or part thereof (excess over $500,000 up to $700,000); 7% on next $300,000 or part thereof (excess over $700,000 up to $1,000,000); 8% on next $500,000 or part thereof (excess over $1,000,000 up to $1,500,000); 10% on excess over $1,500,000. (IC 6-4.1-5-1).

Class B.—Brother or sister of transferor; descendant of brother or sister of transferor; spouse, widow or widower of child of transferor. (IC 6-4.1-1-3).

Exemptions in Class B are: $500 to any member of class. (IC 6-4.1-3-11).

Rates of tax for Class B are: 7% on amount by which amount or value of transfer exceeds exemption and deductions applicable and does not exceed $100,000; 10% on next $400,000 or part thereof (excess over $100,000 up to $500,000); 12% on next $500,000 or part thereof (excess over $500,000 up to $1,000,000); 15% on excess over $1,000,000. (IC 6-4.1-5-1).

Class C.—All others.

Exemptions in Class C are: $100 to any member of class. (IC 6-4.1-3-12).

Rates of tax for Class C are: 10% on amount by which amount or value of transfer exceeds exemption and deductions applicable and does not exceed $100,000; 15% on next $900,000 or part thereof (excess over $100,000 up to $1,000,000); and 20% on excess over $1,000,000. (IC 6-4.1-5-1).

Basis of Tax.

Tax is imposed on fair market value of property minus specified exemptions and deductions. (IC 6-4.1-5-1).

Tax Report and Schedule.

Personal representative of resident decedent’s estate or trustee or transferee of property transferred by decedent must file inheritance tax report and schedule of property with probate court within nine months after death of resident decedent. (IC 6-4.1-4-1). Personal representative of nonresident decedent’s estate or trustee or transferee of property transferred by decedent must file inheritance tax report and schedule of property with Department, Inheritance Tax Division, Indiana Government Center North, 100 N. Senate Ave., Indianapolis, Indiana 46204, within nine months after nonresident decedent’s death. (IC 6-4.1-4-7). No return or statement is required if value of transferred property does not exceed exemption amounts. (IC 6-4.1-4-0.5).

Value.

In general, each future, contingent, defeasible, or life interest in property and each annuity is determined by using rules, methods, standards of mortality and actuarial tables used by Internal Revenue Service on Oct. 1, 1988, for federal estate tax purposes. (IC 6-4.1-6-1[a]).

Value of future interest in specific property equals remainder of: (1) Total value of property minus (2) value of all others’ interest in property. (IC 6-4.1-6-1[b]).

Any property interest which may be divested because of act or omission of transferee shall be appraised as if there was no possibility of divestment. (IC 6-4.1-6-2).

When it is impossible to compute present value of property interest transferred or tax on transfer cannot be computed because contingency makes it impossible to determine who will take property, personal representative of estate, or trustee of trust, without approval of probate court, may enter into agreement with Department to have Department determine tax due. However, if contingency makes it impossible to determine each transferee's exact interest and no agreement is made between taxpayer and Department, then appropriate probate court shall, so far as possible, determine manner in which property will probably be distributed. Unless this court determination is appealed, it is final and binding on all parties. (IC 6-4.1-6-3 and 4). If proceedings are not instituted to determine inheritance tax due by transfer of contingent or defeasible future interest in property, or inheritance tax due is postponed until enjoyment or possession of property, property interest shall be appraised at its fair market value when transferee of interest obtains beneficial enjoyment or possession of property. (IC 6-4.1-6-6).

Appraisal Date.

Value of assets is determined as of date used to value property interest for federal estate tax purposes or, if no federal estate tax return filed, as of date of decedent's death. (IC 6-4.1-5-1.5).

Determination of Tax.

Tax on transfer by a resident of the state is determined by the appropriate court having probate jurisdiction of the decedent's estate. After filing of the tax return, court refers return to county inheritance tax appraiser to appraise fair market value of property in estate and if it appears to court's satisfaction that no tax could be payable, it enters decree to that effect. Otherwise provision is made for notice of appraisal, hearing upon appraisal report and rehearing to persons interested or department of state revenue. (IC 6-4.1-5-2 – 6-4.1-5-13). Person may obtain rehearing of probate court's determination if petition for rehearing is filed with probate court within 120 days after determination is made. (IC 6-4.1-7-1). Person may petition court for reappraisal within one year after entry of order determining value of estate and tax thereon or within two years in cases where tax determination has been fraudulently or erroneously made. (IC 6-4.1-7-2).

Department shall determine inheritance tax imposed as result of nonresident decedent's death. Department may appraise property transferred by decedent and determine tax due without intervention of court. (IC 6-4.1-5-14). Any appeal from this determination shall be made to probate court of county in which administration of decedent's estate is pending; or, if no administration is pending, probate court of any county in which any of decedent's property was located at time of his death within 90 days after notice of Department's determination of inheritance tax due. (IC 6-4.1-7-5).

Resident or special administrator may be appointed by Probate Court of Marion County for nonresident decedent's estate if Department shows that property interest transferred by decedent under taxable transfer has not been properly appraised for inheritance tax purposes and that property involved is located in this state or that decedent has been dead for at least two years and inheritance tax as determined by Department has not been paid. (IC 6-4.1-9-12).

Tax on Future Estates.

Inheritance tax imposed on decedent's transfer of contingent or defeasible interest in property accrues and is due when transferee of interest obtains beneficial enjoyment or possession of property if fair market value of property interest as of appraisal date cannot otherwise be ascertained. (IC 6-4.1-6-6[b]).

Liability for Tax.

Any personal representative or trustee who has possession or control of property and transferee of property are personally liable for tax. (IC 6-4.1-8-1).

Personal representative or trustee may not transfer or deliver property to transferee unless inheritance tax imposed with respect to transfer has been paid. (IC 6-4.1-8-2). Personal representative or trustee may sell property of decedent to pay inheritance tax. (IC 6-4.1-8-3).

Person holding personal property of resident decedent including property held jointly shall not transfer such property without written consent of Department or county assessor of deceased's domicile at death, unless surviving joint tenant is decedent's surviving spouse or if property is money held in joint checking account. Person with possession over or control of personal property subject to inheritance or estate tax which is held in trust at time of resident decedent's death may only transfer property without written consent of department of state revenue or county assessor if (i) transferee is decedent's surviving spouse; or (ii) transferee is domiciled in Indiana and files sworn affidavit that property isn't subject to inheritance or estate tax and reasons property is not subject to tax with department of state revenue. If transfer is made without requisite consent, transferor is liable for tax and also subject to penalty of not more than $1,000. (IC 6-4.1-8-4, IC 6-4.1-8-7).

Tax is lien on property transferred, provided that such lien expires when inheritance tax is paid, when IC 6-4.1-4-0.5 provides for termination of lien, or five years after death, whichever occurs first. (IC 6-4.1-8-1).

Payment.

Inheritance tax due 12 months after date of decedent's death or within 30 days of final determination of inheritance tax redetermination. (IC 6-4.1-9-1, IC 6-4.1-9-1.5). Tax on transfer of property of resident of state is payable to treasurer of county where resident decedent was domiciled at time of death. If one believes more tax due than determined by court, he can pay additional tax and interest without court order. (IC 6-4.1-9-5). Tax on transfer or property of nonresident is payable to Department. (IC 6-4.1-9-4). In either case, if tax is paid within nine months from date of decedent's death deduction of 5% is allowed, while if tax is not paid within 12 months from date of decedent's death interest at 10% from date is assessed, although interest rate reduced to 6% if nonpayment due to unavoidable delay. (IC 6-4.1-9-1, IC 6-4.1-9-2 and IC 6-4.1-9-5).

Compromise Agreements.

Department may enter into compromise agreement as to amount of inheritance tax due or interest charges on delinquent inheritance tax provided approval of attorney general is given and both department and attorney general have substantial doubt as to: (1) right to impose tax under applicable Indiana law; (2) constitutionality under either Indiana or U.S. Constitutions of tax; (3) correct value of property transferred under taxable transfer; (4) correct amount of tax due; (5) collectability of tax; or (6) whether decedent was resident or nonresident of this state. (IC 6-4.1-12-5).

See also category 21 Property, topic 21.14 Personal Property.

22.13 LOCAL AND MUNICIPAL TAXES:

County Economic Development Tax.

For counties with populations of up to 200,000, county economic development tax can be imposed on adjusted gross income of county taxpayers. (IC 6-3.5-7-5). Depending on population, rates may range between 0.1% and 0.5%. (IC 6-3.5-7-5). In general, county economic development tax rate together with county adjusted gross income tax rate cannot exceed 1.25%. (IC 6-3.5-7-5[c]). County economic development tax together with county option income tax cannot exceed 1%. (IC 6-3.5-7-5[c]). If, for taxable year, county taxpayer is allowed credit for elderly or totally disabled under IRC § 22, county taxpayer is entitled to credit against county economic development tax liability for taxable year. (IC 6-3.5-7-9).

County Adjusted Gross Income Tax.

See category 22 Taxation, topic 22.01.

County Employment Tax.

See § 22.05, category 21 Taxation, topic 22.05.

County Option Income Tax.

See category 22 Taxation, topic 22.11.

22.14 MOTOR VEHICLE TAXES:

County Motor Vehicle Excise Surtax.

In certain counties. (IC 6-3.5-4-1 et seq.).

Motor Vehicle Excise Tax.

See category 23 Transportation, topic 23.01 Motor Vehicles, subhead Excise Tax and IC 6-6-5-1 et seq. Trailer excise tax (IC 6-6-5-5.5). Auto Rental Excise Tax (IC 6-6-9-1 – 6-6-9-11) which imposes upon rental of passenger motor vehicles in Indiana for period less than 30 days 4% tax on such gross retail income.

County Wheel Tax.

In certain counties. (IC 6-3.5-5-1 et seq.).

Commercial Vessel Tonnage Tax is 3¢ per net ton on any vessel registered at Indiana port on May 1 of any year. (IC 6-6-6-1 – 6-6-6-10).

22.15 [RESERVED]

22.16 PROPERTY TAXES:

For assessment dates before Mar. 1, 2001, all property not expressly exempt must be valued and assessed for taxation purposes at a uniform and equal rate on a just valuation basis at one-third of its true tax value. (IC 6-1.1-1-3, IC 6-1.1-2-1 and IC 6-1.1-2-2, IC 6-1.1-4-1). For assessment dates after Feb. 28, 2001, all property not expressly exempt must be valued and assessed at uniform and equal rate on just valuation basis at true tax value of such property.

Beginning in 2009, property tax caps being phased in. Property taxes first due and payable in 2009 will be capped at 1.5% for residential homesteads, 2.5% for other residential and agricultural property, and 3.5% for commercial and other property. Beginning in 2010, caps will drop to 1%, 2%, and 3% respectively. (IC 6-1.1-20-7 and IC 6-1.1-20-7.5). Certain commercial vessels, motor vehicles and trailers, boats, and property used by certain cemeteries, certain commercial and recreational vehicles, certain inventory and certain non-business personal property are not subject to assessment and taxation under Art. 1.1. (IC 6-1.1-2-7).

Sales Disclosure Statement.

No conveyance documents (i.e., deeds, contracts of sale, agreements, certain leases, or any other documents presented for recording) will be accepted by county recorder unless properly completed and executed sales disclosure form is included with document. (IC 6-1.1-5.5).

Exemptions.

Property of U.S. (except where U.S. Constitution permits taxation thereof), this state or political subdivision of this state, and city or town used to provide municipal service. (IC 6-1.1-10-1 – 6-1.1-10-6). Generally and under certain conditions, following property is exempt from taxation: Certain property used for educational, literary, scientific, religious, fraternal or charitable purposes, water and sewage systems, public airports, public libraries, cemetery property used for cemetery purposes, church parsonages, and property owned by certain organizations, and nonprofit corporations promoting or housing fine arts, operating health facility, operating residential facility for aged, Christian Science home or sanatorium. (IC 6-1.1-10). Tangible property is not exempt from property taxation if it is used by exempt organization in trade or business not substantially related to exercise or performance of organization's exempt purpose. (IC 6-1.1-10-36.5). If real or personal property that is exempt from taxation because it is property of State or political subdivision is purchased by another person (i) whose property is not exempt, and (ii) who is not engaged in exempt activity with purchased property, then purchased property shall be assessed and taxed as if property were owned by purchaser or purchaser's assignee. (IC 6-1.1-10-41). Certain property used predominantly for industrial air pollution control (IC 6-1.1-10-12 to 6-1.1-10-14) and as industrial waste control facility is also exempt (IC 6-1.1-10-9 – 6-1.1-10-11) (including certain spare parts, property under construction or property in process of installation as long as such property will qualify for exemption when placed in service), as is property held under Urban Homestead Statute. Certain in transit property held in public or private warehouses. (IC 6-1.1-10-29 – 6-1.1-10-31). Property held on assessment date in foreign trade zone which was either imported into foreign trade zone or was placed in zone exclusively for export to foreign country. (IC 6-1.1-10-30.5). Certain truck chassis, certain passenger motor vehicles, and certain school bus bodies and chassis. (IC 6-1.1-10-31.4 – 6-1.1-10-31.7). Intangible personal property is exempt (IC 6-1.1-10-39). Certain commodities located or stored in warehouse, shipping plant, depositary, or other facility in Indiana that has been designated by board of trade or certain metal exchanges as regular delivery point. (IC 6-1.1-10-40). No specific exemptions for members of armed forces. Failure to comply with statutory procedure to obtain exemption amounts to waiver of exemption. (IC 6-1.1-11-1). See also IC 6-1.1-10-38.

Deductions.

Certain deductions from assessed valuation allowed for disabled veterans and veteran's surviving spouse (IC 6-1.1-12-13, IC 6-1.1-12-14, IC 6-1.1-12-16), blind or disabled persons (IC 6-1.1-12-11), persons over 65 (IC 6-1.1-12-9), real property subject to mortgage or being purchased under recorded land contract which provides that buyer is to pay property taxes (IC 6-1.1-12-1), increases in assessments of certain rehabilitated real property that do not exceed certain levels of assessed valuation (IC 6-1.1-12-18 – 6-1.1-12-22), of solar energy heating or cooling systems (IC 6-1.1-12-26), wind power devices (IC 6-1.1-12-29), increases in assessment of certain real property located in economic revitalization areas (IC 6-1.1-12.1-1 – 6-1.1-12.1-12), certain coal conversion systems (IC 6-1.1-12-31), certain maritime opportunity districts (IC 6-1.1-40 et seq.), hydroelectric power devices and geothermal energy heating or cooling devices (IC 6-1.1-12-33, IC 6-1.1-12-34), real property that qualifies for homestead credit and certain contracts with respect to which buyer of property is required to pay property tax under IC 6-1.1-10-41 (IC 6-1.1-12-39), and 100% of business inventory (IC 6-1.1-12-42). Closing agents are required to provide their customers with information regarding property tax deductions on form prescribed by Department of Local Government Finance and effective Dec. 31, 2009, input data required into Department of Insurance system. (IC 6-1.1-12-43).

Standard Homestead Deduction.

Effective Jan. 1, 2009, standard homestead deduction increased to lesser of $45,000 or 60% of assessed value of homestead property. Qualifying property also entitled supplemental homestead deduction which applies after standard deduction but before application of any other deduction, exemption or credit. Supplemental homestead deduction will equal 35% of next $600,000 of assessed value after standard deduction and 25% of remaining assessed value, if any. Homestead credit will be replaced effective at same time. (IC 6-1.1-12-37 and 6-1.1-20.9 et seq.).

Assessment.

Personal property is listed for taxation between Mar. 1 and May 15 of each year, with reference to quantity held or owned on first day of Mar. in year for which property is required to be listed. Household goods and automobiles are excluded. Realty is listed and assessed by township assessor. Reassessment of real property must begin July 1, 2009, and each fifth year thereafter. Each reassessment must be completed by Mar. 1 of immediately following odd-numbered year and is basis for taxes payable in year following year in which assessment is completed. (IC 6-1.1-4-4). Assessment returns of personal property are filed with township assessor. (IC 6-1.1-3-7). From assessment of township assessor, appeal may be taken to County Property Tax Assessment Board of Appeals. Appeal lies from county board to Indiana Board of Tax Review, and from Indiana Board of Tax Review to Indiana Tax Court. (IC 6-1.1). Class action suit before any court, including Indiana Tax Court, may not be maintained on behalf of any person who has not complied with administrative requirements prior to certification of class. (IC 6-1.1-15-15). Taxpayer must be informed in writing of opportunity and procedures for review at time notice of assessment is given and after each step of administrative procedure. (IC 6-1.1-9-1, IC 6-1.1-15-1 et seq.). When claim for refund is allowed on appeal, amount shall be equal to amount of claim plus 4% interest. (IC 6-1.1-26-5[a]).

Special procedure for assessment of property of public utilities is provided. (IC 6-1.1-8-1 et seq.).

There are special provisions relating to reassessments of real estate (IC 6-1.1-4-5 – 6-1.1-4-12), and personal property, one of which provides for reassessment of property values and corresponding tax adjustment in areas sustaining substantial amount of damage and destruction due to disaster (IC 6-1.1-4-11). Another allows for land held by developer or builder to be assessed as under its previous classification even if it is rezoned until certain events occur. (IC 6-1.1-4.12).

Return and Payment of Tax.

On or before May 15 of each year taxpayer must file returns with assessor of each township in which taxpayer’s personal property is subject to assessment or may file consolidated return with county assessor if taxpayer has personal property subject to assessment in more than one township in county and total assessed value of personal property in county is less than $1,500,000. (IC 6-1.1-3-7). County assessor may refuse to accept consolidated return if there is no attached schedule listing, by township, all personal property and its assessed value. (IC 6-1.1-3-7[g]). $25 penalty shall be added to next installment for failure to file return or include requisite information. In addition, 20% penalty shall be added for failure to file return within 30 days after such return is due. (IC 6-1.1-37-7). Additional penalties are provided for failing to report property and for undervaluing property. (IC 6-1.1-37-7, IC 6-1.1-37-7.5, IC 6-1.1-37-9, IC 6-1.1-37-10). Property taxes are payable in two equal installments: First half becomes delinquent if not paid on or before May 10th of year following year of assessment; second installment becomes delinquent if not paid on or before Nov. 10th of year following year of assessment. (IC 6-1.1-22-9). Personal property taxes are payable to treasurer of county in which property is assessed; real property taxes are payable to treasurer of county in which realty is situated. (IC 6-1.1-3-1, IC 6-1.1-4-1, IC 6-1.1-22-8). No discount is allowed for prompt payment but interest is imposed on delinquent taxes and underpayments. (IC 6-1.1-37-9, IC 6-1.1-37-10). On day after May and November due dates in each year following year of initial delinquency, additional penalty of between 5% and 10% of any tax remaining unpaid shall be added, unless payment delayed by emergency. (IC 6-

1.1-37-10).

Collection.

Collection is made by county treasurer, who sells property and may enter into contracts for collection services where necessary. (IC 6-1.1-23-1 et seq.).

Lien.

Taxes attach as a lien on real estate on Mar. 1 of year for which taxes assessed. (IC 6-1.1-1-2, IC 6-1.1-22-13). Lien remains valid for ten years and is not divested by any sale or transfer. (IC 6-1.1-22-13). After written demand has been given for payment of taxes on personal property and 30 days have passed if total amount due is not paid county treasurer shall levy upon and sell sufficient personal property of taxpayer to pay delinquent taxes, penalties and anticipated collection expenses. (IC 6-1.1-23-1, IC 6-1.1-23-2). Taxing unit may institute civil suit for delinquent property taxes and may collect penalties, costs and expenses if successful. (IC 6-1.1-22-13[d]).

Sales of real estate for taxes take place annually (IC 6-1.1-24). If tract or item of real property is offered for sale but statutory minimum amount is not received, it may be offered for sale again. If minimum sales price is not received, county acquires lien in amount of minimum sale price which attaches on day on which tract or item was offered. (IC 6-1.1-24-6). Upon such lien, county executive may, after public notice and hearings, transfer such property to nonprofit corporation for use for public good. (IC 6-1.1-24-6.7). No real estate may be sold until 15 months after installment is delinquent, until payment of special assessment is delinquent or until unpaid costs of prior tax sale incurred by county are due and certain notice requirements are satisfied. (IC 6-1.1-24-1 et seq.). Personal property taxes that are delinquent are not to be included in sale of real estate for delinquent taxes. (IC 6-1.1-24-5).

Redemption.

Property may generally be redeemed from private purchaser by payment of delinquent property taxes and delinquent special assessments plus penalty of 10% if within six months, or 15% if within second six months, plus amount of purchase price in excess of delinquent property tax and delinquent special assessments plus 10% interest per annum, plus taxes and special assessments paid after sale plus 10% interest per annum, plus filing fees, plus costs of giving notice, plus costs of updating and examining title abstract, less certain amounts that must be claimed from tax sale surplus fund. (IC 6-1.1-25-2). Redemption may be made within specified periods following date of sale. Upon expiration of such periods, no redemption may be made. (IC 6-1.1-25-4). Notice of sale and expiration of period of redemption must be provided within specified periods to owner and any person with substantial property interest of public record. (IC 6-1.1-25-4.5, IC 6-1.1-25-4.6). Failure to provide notice prior to specified redemption period results in loss of lien. (IC 6-1.1-25-7). Tax deed may be set aside if any substantial provision of law has not been complied with, and redemptions are generally favored by courts, even after deed has issued. (IC 6-1.1-25-16). Special procedures allow for transfer of certain environmentally hazardous property to petitioner agreeing to eliminate hazardous conditions. (IC 6-1.1-25-4.1).

Forest Lands, Windbreaks, Wildlife Habitats, Filter Strips Property Tax or Cemetery Land.

More favorable rates may be imposed on land falling in defined classifications. (IC 6-1.1-6-1 et seq.; IC 6-1.1-6.2-1 et seq.; IC 6-1.1-6.5-1 et seq.; IC 6-1.1-6.7-1 et seq.; IC 6-1.1-6.8-1 et seq.).

Property Tax Replacement Credit.

Each year taxpayers of each county receive property tax replacement credit against liability for real and personal property taxes. (IC 6-1.1-21-5).

Real Estate Conveyance Tax.

None.

22.17 SALES AND USE TAXES:

Rate is 7% on gross retail income from sales. (IC 6-2.5-2-2). Tax is added to sales price and borne by purchasers and collected and paid by retail merchants. (IC 6-2.5-2-1).

Sales Tax (State Gross Retail Tax).

Taxable Transactions.

Tax imposed on retail transactions of retail merchants constituting selling at retail (IC 6-2.5-1, IC 6-2.5-2, IC 6-2.5-2-1), including transfers of tangible personal property in ordinary course of regularly conducted business (IC 6-2.5-4-1), wholesale sales except for certain transactions (IC 6-2.5-4-2), regularly furnishing accommodations for less than 30 days (IC 6-2.5-4-4), furnishing public utility services, with certain exceptions (IC 6-2.5-4-5 – 6-2.5-4-6), private or proprietary activities of governmental units and agencies where taxable if by retail merchant (except activities by political subdivisions related to annual festival, carnival, fair or similar event) (IC 6-2.5-4-8), sales of property for incorporation in structure constituting part of land (IC 6-2.5-4-9), leasing tangible personal property (IC 6-2.5-4-10), cable television or radio service or satellite television or radio service (IC 6-2.5-4-11), auctions of tangible personal property (IC 6-2.5-4-12), sales of prepaid telephone calling cards or authorization numbers (IC 6-2.5-4-13), sales of cigarettes at retail on full amount of sales price including other taxes imposed (IC 6-2.5-4-1[f]), sales of motor fuel at retail on full amount of sales price including other taxes imposed except that part of sales price which is state or federal motor fuel tax (IC 6-2.5-4-1[f]), engaging in business of softening and conditioning water (IC 6-2.5-4-3), and bundled transactions, which means retail sale of two or more products that are distinct, identifiable and sold for one non-itemized price (IC 6-2.5-1.11.5 and IC 6-2.5-4-15).

Exemptions.

Tax does not apply to sales for resale nor to sales: of food, food ingredients for human consumption, excluding food prepared and sold at eating or carry-out establishments and certain specific consumables; of certain specific consumables used by merchant regularly furnishing accommodations for less than 30 days; to farmers of certain items used in production of food, food ingredients and commodities; of nonreturnable and returnable containers under certain circumstances; of newspapers; of tangible personal property or services directly used or consumed in rendering public transportation; to state, counties, townships, municipal corporations and their agencies and instrumentalities of (including county solid waste management districts and joint solid waste management districts established under IC 13-9.5-2 or IC 13-21) tangible personal property, and public utility services and commodities predominantly for use in performing governmental functions; of manufacturing machinery, tools, equipment and utilities to be directly used in direct production, manufacture, fabrication, assembly, extraction, mining, processing, refining or finishing of tangible personal property; of specific tangible personal property to certain public utilities; of agricultural machinery, tools and equipment to be directly used in agriculture or in animal waste transportation; of tangible personal property to be directly used in direct production or manufacture of exempt manufacturing or agricultural machinery, tools, and equipment; sales of tangible personal property purchased with food stamps; certain sales to and by various educational, cultural, religious, social and charitable organizations. Tax does not apply to: 35% of gross income received from sales of manufactured homes or of structure that is both industrialized building system and one or two family private residence and sales of preowned manufactured homes; sales of drugs by registered pharmacist or licensed practitioner; sales of insulin and equipment used to administer insulin, oxygen, blood, or plasma when used for medical purposes; sales of non-legend drugs; prescribed orthopedic devices; sale of hearing aids, sales of prescribed dental devices, sales of prescribed eye glasses and contact lenses by licensed seller; rentals of medical equipment, supplies, and devices; sales of tangible personal property incorporated in school building; sales of meals to hospital patients; sales of food prescribed as medically necessary; sales of school meals; sales of tangible personal property to be incorporated as part of public street or public utility service required under approved subdivision plat; sales of tangible personal property constituting or incorporated into, or consumed in operation of environmental device, facility, or structure; sales of home energy acquired before July 1, 2009 through home energy assistance; sales of tangible personal property used in direct production or publication of free distribution newspaper; sales of free distribution newspaper or printing services performed in publishing free distribution newspaper; receipts representing charges for serving or delivering food or beverages furnished, prepared or served for consumption at location or on equipment provided by retail merchant; and sales of lottery tickets (IC 6-2.5-5-1 – 6-2.5-5-34). Other receipts exempt from sales tax are: such receipts from interstate commerce and payments by U.S. as state is constitutionally prohibited from taxing; taxes received or collected as agent of state or U.S.; such receipts from sales to U.S. as state is constitutionally prohibited from taxing; certain excise taxes imposed by U.S.; amounts represented by incumbrance on tangible personal property received by retail merchant in reciprocal exchange for property of like kind (IC 6-2.5-5-24); sales of tangible personal property that is leased, owned, or operated by professional racing team, and comprises any part of professional motor racing vehicle, excluding tires and accessories (IC 6-2.5-5-37); sales of certain computer equipment to schools (IC 6-2.5-5-38.1); like-kind exchanges of vehicles in lease transactions (IC 6-2.5-5-38.2); sales of certain cargo trailers, recreational vehicles and aircraft to nonresidents (IC 6-2.5-5-39); sales of certain research and development equipment (IC 6-2.5-5-40); certain sales of tangible personal property for direct use in qualified media production in Indiana (IC 6-2.5-5-41); and sales of aircraft titled, registered, or based outside state (IC 6-2.5-5-42).

Permit.

Every retail merchant must procure certificate and must list each place of business where he makes retail transactions. Manufacturers and wholesalers may apply to Department of Revenue for certificates. (IC 6-2.5-8-1 – 6-2.5-8-5). Person required to procure certificate if such person: (a) Makes retail transactions from outside Indiana to destination in Indiana; does not maintain place of business in Indiana; and engages in regular soliciting of retail transactions from potential customers in Indiana; or (b) enters into contract to provide property or services or agrees to sell property to state agency or state educational institution. (IC 6-2.5-8-10). Registration fee is $25 for each place of business. (IC 6-2.5-8-1). Manufacturer’s or wholesaler’s certificate and exempt organizations certificate is valid so long as business is in existence and certificate not revoked by Department for cause or on account of unsatisfied tax liabilities owed by taxpayer. (IC 6-2.5-8-5, IC 6-2.5-8-7). Effective Jan. 1, 2007, all registered retail merchants certificates will be valid only for two years after originally issued. (IC 6-2.5-8-1). If all required returns have been filed and all taxes remitted, department will renew certificate within 30 days of expirations, at no cost. Exempt organizations must obtain certificate for which there is no fee. (IC 6-2.5-8-4).

Liability for Tax.

Tax must be added to purchase price of goods and purchaser is liable for tax (IC 6-2.5-2-1) and retail merchant may not advertise or state to public or any customer that tax will be paid by him (IC 6-2.5-9-4). Taxes collected by retail merchant constitute a trust fund owned by State, and retail merchant and officers, employees or members thereof are personally liable for payment of tax, and intentional failure to collect or remit is class D felony. (IC 6-2.5-9-3). Retail merchants are entitled to deduct 0.73% of merchant’s accrued state gross retail and use tax liability, if their gross retail and use tax liability does not exceed $60,000; 0.53% if their gross retail and use tax liability exceeds $60,000, but is less than $600,000; and 0.26% if their gross retail and use tax liability exceeds $600,000, and retain it as collection allowance. (IC 6-2.5-6-10).

Returns and Payments.

Persons collecting sales tax must file return and pay tax collected for previous month to Department 30 days after end of each month if average monthly liabilities for prior year did not exceed $1,000. Otherwise, person must file return and pay taxes collected within 20 days after end of each month. If taxpayer files combined sales and withholding (IC 6-2.5-6-1, IC 6-3-4-8.1[d]) report, it must be filed within 20 days of end of preceding month. Permission may be obtained for depositing on quarterly, semiannual or annual basis. (IC 6-2.5-6-1).

Penalties.

Upon failure to make a return, return may be computed by Department using best information available, and tax computed thereon. (IC 6-8.1-5-1 and IC 6-8.1-10-3). 20% penalty will be added and interest at 2% above average investment yield of state money, as established by commissioner. Taxpayer may also be subject to 10% negligence penalty, 100% fraud penalty. Taxpayer who knowingly fails to file return commits class A misdemeanor. (IC 6-8.1-10-1 to 4).

Use tax is imposed on storage, use or consumption within state of tangible personal property acquired in retail transaction regardless of location of transaction, retail merchant or acquisition of materials for manufacture, fabrication or assembly at same rate (7 %) as gross retail tax under IC 6-2.5-2-2 (IC 6-2.5-3-2 and IC 6-2.5-3-3), including isolated sales of vehicles, aircraft and watercraft required to be titled, registered, or licensed or registered by state (IC 6-2.5-3-2[b]). Storage, use or consumption does not include keeping, retaining or exercising right or power over tangible personal property delivered by, or for purchaser into state solely for processing, printing, fabricating, or manufacturing, attaching or incorporating into other tangible personal property if property is thereafter transported outside state for use solely outside state. (IC 6-2.5-3-2[e]).

Exemptions.

Use tax does not apply to storage, use, or consumption within state of tangible personal property sold in state in transaction subject to sales tax or listed as exempt from sales tax under category described under subhead Sales Tax, catchline Exemptions, of this topic. (IC 6-2.5-3-4). Burden of proving that property sold by retail merchant for delivery in state has not been purchased for storage, use or consumption within state is placed on purchaser and also on retail merchant unless retail merchant receives exemption certificate from purchaser. (IC 6-2.5-3-7). Purchaser of vehicle, watercraft or aircraft must prove payment of sales or use tax in respect to vehicle as prerequisite to titling or registration. Knowingly failing to remit all or part of state use tax due is class A misdemeanor. (IC 6-2.5-9-6).

Liability for Tax.

Use tax is paid by purchaser either collected by retail merchant as agent for state or paid directly to Department. (IC 6-2.5-3-6). Retail merchants engaged in business within state, if requested, must give receipt to purchaser for amount of tax paid. (IC 6-2.5-3-8). Persons subject to use tax are personally liable for tax imposed on transactions for which no receipt or other written evidence of collection of tax was procured from registered retail merchant. (IC 6-2.5-3-8).

Credit.

Persons liable for payment of use tax are entitled to credit in amount of any sale, purchase or use tax paid to any other state or to territory or possession of U.S. with respect to acquisition of such property. (IC 6-2.5-3-5).

Permit.

Retail merchants engaged in business in the state but not required to register for purposes of sales tax must prior to conducting transactions subject to use tax, apply to Department for certificate. (IC 6-2.5-8-1).

Returns and Payments.

Provisions are same as for sales tax. See subhead Sales Tax (State Gross Retail Tax), supra.

22.17A TAX INCENTIVES AND EXEMPTIONS:

Municipal Bond Exemption.

Interest on Indiana bonds and similar indebtedness issued in 1959 and thereafter, and proceeds received at maturity or redemption prior to maturity are exempt from taxation except state inheritance tax under IC 6-4.1. Proceeds received by holder on sale are exempt to extent of holder's cost of acquisition. Does not apply to measuring franchise tax imposed on privilege of transacting business of financial institution in Indiana under IC 6-5.5. No other statute exempting interest paid on debt obligations of state or local public entity or corporation or other entity leasing real or personal property to state or local public entity applies to measuring franchise tax imposed on financial institutions under IC 6-5.5. (IC 6-8-5-1).

23 TRANSPORTATION

23.01 MOTOR VEHICLES:

General administration of motor vehicle laws is under Bureau of Motor Vehicles. Commissioner of Motor Vehicles, State Office Building, Indianapolis, Indiana 46204.

Vehicle license and registration required annually. (IC 9-18-2-8). Proof of ownership and financial responsibility are required to register. (IC 9-18-2-10, 9-18-2-11). Owner of semitrailer has option to register for five consecutive years or permanently. (IC 9-18-10-2). Farm wagons and tractors and new motor vehicles being operated solely to remove them from accident site to storage. (IC 9-18-1-1). License plates must be displayed in rear of vehicle (front for farm tractor used in transportation) (IC 9-18-2-26) and registration certificate or copy must be kept in vehicle or on person of driver (IC 9-18-2-21). Transport operators may secure special registration for all cars transported. (IC 9-18-2-23). Members of armed forces are not generally exempt, but may register in absentia. (IC 9-18-5-1). If active member of armed forces is assigned outside of Indiana, person is exempt from registration and excise and property taxes for previously-registered vehicle for any year so assigned, if vehicle is not being operated. (IC 9-18-2-1). New residents must register within 60 days. (IC 9-18-2-1). Nonresidents are exempt if resident state reciprocates with Indiana. (IC 9-18-2-2). Certain dual residents are exempt for limited periods of operation. (IC 9-18-2-1). Registration may be applied for and obtained in any county. (IC 9-18-2-13). Commissioner of Bureau of Motor Vehicles may suspend registration for various reasons, including failure to pay parking tickets (IC 9-30-11-1 – 9-30-11-8) or to comply with any emissions control rules (IC 9-18-2-39, IC 13-17-5-4), upon conviction for violation of motor vehicle laws (IC 9-30-4-6), or for other reasonable grounds (IC 9-30-4-1). See IC 9-29-4-1, 9-29-5-1 for registration fees, IC 9-18-3-1 for exemption of certain vehicles from registration fees.

Operator's license required to operate motor vehicle on Indiana highway or street, unless exempted under IC 9-24-6 or IC 9-24-1-7. (IC 9-24-1-1). New residents possessing unexpired driver's license from former state of residence have 60 days to obtain Indiana license. (IC 9-24-1-7). Members of armed forces exempt if operating official vehicle of Armed Forces. (IC 9-24-1-7). License must be renewed every four years if license was issued between Dec. 31, 1996 and Dec. 31, 2005, or every six years if issued after Dec. 31, 2005 (IC 9-24-12-1), or if applicant is 75 years or older every three years (IC 9-24-12-1) and must be in immediate possession of operator of motor vehicle (IC 9-24-13-3). Reissuance is provided for residents temporarily residing outside state with good cause shown (IC 9-24-12-6), except that person serving in armed forces has 90 days following discharge in which to obtain reissued license (IC 9-24-12-6). Written examination is not required for renewal unless applicant is under 21 and has active points on driving record or has accumulated six or more points on driving record. (IC 9-24-12-5). Commercial drivers must have special license unless in approved training course. (IC 9-24-1-6). Learner permits are not issued to persons under 15 years of age (IC 9-24-7-1) or persons under 18 years with certain school disciplinary records (IC 9-24-2-1); nor operator's license or learner's permit to person under 18 years of age if person suspended, expelled, or withdrawn from school (IC 9-24-2-1) or is delinquent child as determined by juvenile court (IC 9-24-2-2); nor validated learner's permit under 16 (IC 9-24-7-3); nor operator's license under 16 and 30 days (IC 9-24-3-2); nor public passenger chauffeur's license under 18 (IC 9-24-5-2), nor chauffeur's license to person under 18 (IC 9-24-4-2); nor commercial driver's license or commercial driver's license learner's permit for transportation of property to persons under 18 (IC 9-24-6-4) or commercial driver's license for transportation of individuals to persons under 21 (IC 9-24-6-3); public passenger chauffeur's license to drive taxicab may be issued to person age 18 and older (IC 9-24-5-2). License will not be issued to minor under 18 without guarantee of financial responsibility by parent, guardian, or other adult willing to assume obligations (IC 9-24-9-3), or meeting of certain requirements (IC 9-24-9-1). Juvenile court orders relating to child's driving privileges are governed by IC 31-37-5-7, et seq. Restricted driving permits are allowed where suspension of license would result in undue family hardship or where public transportation is unavailable and travel is for certain designated purposes. (IC 9-24-15-2, 9-24-15-6.7). Exceptions to restricted permit are listed in IC 9-24-15-9. Special motorcycle license or endorsement is required for operation of motorcycle on public highways. (IC 9-24-8-1). Bureau of Motor Vehicles must maintain operating records for each licensed operator, such records are available on request to insurance carriers. (IC 9-14-3-5). State identification card also available from Bureau of Motor Vehicles. (IC 9-24-16-1). For permit and license fees see IC 9-29-1 – 9-29-16.

Titles and Sales.

Owner must obtain certificate of title, issued by Bureau of Motor Vehicles, and good for life of car while held by original owner. On sale, or within 21 days of sale in case of certain transfers by licensed vehicle dealer, certificate must be assigned to purchaser. (IC 9-17-3-3). It is unlawful to operate under Indiana registration without certificate. (IC 9-17-3-7, IC 9-29-4-4). Certified copy of certificate of title is prima facie evidence of ownership of motor vehicle in criminal or civil proceeding. (IC 34-40-4-1, IC 35-37-4-9). Provision made for certificates of origin for manufacturers and dealers. (IC 9-17-8-1, et seq.).

Owner who is in armed forces may authorize transfer of title by letter to Bureau of Motor Vehicles. (IC 9-17-3-4).

Liens and Encumbrances.

Applicant for certificate of title must indicate on application all liens and encumbrances on vehicle. (IC 9-17-2-2). Upon transfer of any certificate already issued, transferor must list all liens and encumbrances on certificate. (IC 9-17-3-3). Lienholder having possession of certificate by reason of lien must surrender same to owner upon satisfaction of lien; and failure to so deliver such certificate is Class C infraction. (IC 9-17-5-1, et seq.). Lienholder having possession of certificate by reason of lien must surrender same to owner or agent of owner who holds power of attorney for owner not more than ten business days after receipt of payment of satisfaction. (IC 9-17-5-1). Certificate may not issue to lienholder for reason of repossession except when records show person repossessed from was last registered owner, and lienholder establishes his entitlement to certificate. (IC 9-17-5-2).

Identification Marks.

It is Class C felony to alter or remove engine serial number (IC 9-18-8-12) and Class D felony to sell or offer for sale car so altered (IC 9-18-8-13). Persons possessing car with altered or destroyed serial number must obtain replacement number within 20 days. (IC 9-18-8-2). Vehicle may be impounded for up to 48 hours to determine internal serial numbers if external serial numbers undeterminable. (IC 9-18-8-7). It is Class D felony to misuse identification number assigned to motor vehicle or part thereof or to misuse plate or label containing such number. (IC 9-18-8-15). It is Class C infraction to operate motor vehicle if engine number removed. (IC 9-18-8-16).

Operation Prohibited.

Persons with suspended licenses or permits; physically, mentally or legally impaired persons (i.e., illiterates, child support defaulters) cannot get license. (IC 9-24-2-3). It is Class C misdemeanor to operate vehicle while intoxicated. (IC 9-30-5-2). It is Class A misdemeanor to operate vehicle while intoxicated in such manner that endangers person. (IC 9-30-5-2). It is Class C misdemeanor to operate vehicle under influence of narcotics or with .08% but less than .15% blood-alcohol concentration (IC 9-30-5-1), or with .02% if under age 21 (IC 9-30-5-8.5). It is Class D felony if serious bodily injury results. (IC 9-30-5-4). It is Class C felony if prior conviction within five years has occurred or if driver causes death. (IC 9-30-5-5.5). It is Class B felony if driver caused death and has had prior conviction within five years or knowingly operated vehicle with license that was suspended or revoked for prior conviction for operating vehicle while intoxicated. It is Class B felony if adult causes death with alcohol concentration of at least .15%. (IC 9-30-5-5). Person who operates motor vehicle impliedly consents to submit to analysis of blood, breath, urine or other bodily substance to determine presence of alcohol or controlled substance. (IC 9-30-7-2). Commissioner of Bureau of Motor Vehicles may for good cause suspend or revoke driver's right to operate. (IC 9-30-4-1). Court may order driving privileges restricted to automobiles equipped with alcohol ignition interlock device during probationary period for DWI conviction. (IC 9-30-5-16). It is Class B infraction to knowingly consume alcoholic beverages while motor vehicle is being operated on public highway. (IC 9-30-15). It is Class A misdemeanor to knowingly operate motor vehicle with suspended or revoked license if such infraction occurs within ten years of conviction for prior unrelated violation for operating motor vehicle with suspended or revoked license. (IC 9-24-19-2). It is Class D felony (plus suspension of license for up to two years) for knowingly operating motor vehicle with suspended or revoked license if operation results in bodily injury. (IC 9-24-19-4). It is Class C felony (plus suspension of license for up to two years) for knowingly operating motor vehicle with suspended or revoked license if operation results in death of another person. (IC 9-24-19-4).

Habitual Traffic Offenders.

Regulated by IC 9-30-10-1 et seq. Any person found to be "habitual violator" must surrender operator's license and may be placed on probation for up to ten years. (IC 9-30-10-9).

See infra, subhead Suspension of License.

Size and Weight Limits.

Regulated by IC 9-20-1-1, et seq.

Equipment Required.

Regulated by IC 9-19-1-1, et seq.

Seat Belts.

(IC 9-19-10-1 to IC 9-19-10-9). All post-1964 model autos bought, sold, leased or transferred must have front seat safety belts. (IC 9-19-10-5). Front seat occupants in passenger motor vehicles (excludes trucks, tractors and recreational vehicles) equipped with safety belts must wear such belts while vehicle is in forward motion. (IC 9-19-10-2). Violation is Class D infraction. (IC 9-19-10-8). Operator of passenger motor vehicle equipped with safety belts must properly restrain children less than eight years of age in child passenger restraint systems or safety belts. (IC 9-19-11-2). Violation is Class D infraction. Vehicle may be stopped solely to determine compliance of this chapter. (IC 9-19-10-3.1). Except in limited instances, failure to comply may not be admitted in evidence in civil action to mitigate damages. (IC 9-19-11-1 to 11). Exceptions to seat belt requirement listed in IC 9-19-10-1.

Child Restraint Systems.

Children less than eight years old must be restrained in child passenger restraint system or, if it is reasonably determined that child will not fit in child passenger restraint system, seat belt. Violation is Class D infraction. (IC 9-19-11-1 – 9-19-11-11).

Emission control equipment and testing governed by IC 13-17-5.

Rear bumper required on vehicles of certain length and height. (IC 9-19-4).

Odometer repair, replacement, tampering governed by IC 9-19-9-1 to 7. Violation thereof with intent to defraud is Class D felony and is subject to up to $1,500 civil penalty per violation.

Window transparency standards governed by IC 9-19-19-1 to 8.

Automated Vehicle Identifier.

Required for vehicles having total gross weight over 80,000 pounds but less than 134,000 pounds. (IC 9-20-5-7).

Lights required regulated by IC 9-19-6-2 to IC 9-19-6-24.

Inspection.

State police department may inspect vehicles used to provide transportation of six or more passengers by profit or not-for-profit corporation that receives revenue for transportation service from government (IC 9-19-20-1, IC 9-19-20-2) except private buses (defined in IC 9-13-2-133). Vehicles not purchased or previously registered in Indiana must be inspected by police officer or other authorized person prior to obtaining Indiana certificate of title. (IC 9-17-2-12).

Traffic Regulations.

Regulated by IC 9-21-1-1 to 9-21-21-7. Class C misdemeanor not to stop vehicle meeting or overtaking school bus stopped on roadway when arm signal device is extended. (IC 9-21-12-1). It is Class B misdemeanor to violate speed limit imposed only in immediate vicinity of school when children are present. (IC 9-21-5-13). Operator of vehicle approaching stationery emergency vehicle with flashing lights must change lanes or reduce speed of vehicle. (IC 9-21-8-35). Drivers cannot pass other vehicles within no passing zone associated with work zone if other vehicles are in lane not closed by work zone. (IC 9-21-8-7.5).

Implied Consent.

Drivers of vehicles on public highways are deemed to have consented, by virtue of such driving, to submit to portable breath test or chemical test for intoxication. (IC 9-30-6-1).

Accidents.

Driver must stop when injury to person or property occurs and give name, residence and registration number, exhibit drivers license upon request, and give reasonable assistance when person injured. (IC 9-26-1-1 – 9-26-1-4). Written reports by driver are required ten days thereafter. (IC 9-26-1-1 – 9-26-1-4). Failure to stop may result in fine and/or imprisonment. (IC 9-

26-1-8). Failure to file written report may result in revocation or suspension of driver's license. (IC 9-26-1-10).

Owner liable for negligence of others only when servant or agent operating car within scope of authority. Owner of car kept for family use is probably not liable for negligence of family member, unless owner knows at time of entrustment that driver is incompetent to drive safely. (489 N.E.2d 144 [Ind. Ct. App., 1986]).

Suspension of License.

Any person arrested for driving under influence of intoxicants who refuses to submit to a breath analysis test when it is within his capacity to do so may have his driver's license suspended for a period not to exceed one year. (IC 9-30-6-7).

Any person using motor vehicle to commit recklessness, obstruction of traffic or criminal mischief may have their license suspended not less than 60 days nor more than two years. (IC 9-30-13-1). Any person who commits involuntary manslaughter or reckless homicide resulting from operation of motor vehicle may have license suspended for from two to five years. (IC 9-30-13-4).

Commission of Motor Vehicles must suspend for at least 90 days license or permit of person for reasons listed in IC 9-17-2-16, IC 9-18-2-42, and IC 9-24-18-8.

Commissioner of Bureau of Motor Vehicles may suspend or revoke license for conviction of traffic offenses listed in IC 9-30-4-6, or for traffic offenses committed in jurisdiction with whom Indiana has Nonresident Violator Agreement. (IC 9-28-2-1 – 9-28-2-12).

Person whose driving privileges have been suspended for intoxication, or for whom ignition interlock device order has been issued, and who requests early trial may have driving privileges reinstated, or ignition interlock device requirement rescinded, for delay in trial or disposition of charges. (IC 9-30-6-18).

See supra, subhead Operation Prohibited.

Notice.

Rebuttable presumption of knowledge of suspension or revocation is created when Bureau provides service of notice by first class mail to person's last known address in Bureau's records. (IC 9-30-10-16).

Guests.

No liability for death of, injury to or loss sustained by parent, spouse, child or stepchild, brother or sister of owner, operator or responsible person, or hitchhiker, unless accident was caused by wanton or willful misconduct of operator, owner or person responsible for operation of vehicle. (IC 34-30-11-1, 484 N.E.2d 967 [Ind. Ct. App., 1985]). This does not apply to common carrier or owner or operator of vehicle being demonstrated to prospective purchaser. (IC 34-30-11-2).

Proof of financial responsibility must be produced in order to obtain registration of motor vehicle and must be continuously maintained. (IC 9-25-4-1 to IC 9-25-4-3). Sufficient proof may be policy of insurance, execution of bond, or obtaining certificate of self-insurance. (IC 9-25-4-7 – 9-25-4-11). Proof by nonresidents is governed by IC 9-25-5-10. Bureau may suspend registration of vehicle owned by registrant who provides bureau with false indicia of financial responsibility. (IC 9-25-6-19.2). Operator and/or owner of vehicle which is involved in motor vehicle accident resulting in bodily injury, death, or property damage in excess of $750 must post security (or give proof of insurance coverage in lieu thereof) for any judgment which may be rendered against him arising out of such accident, and proof of his financial responsibility in future, or receive suspension of his operator's license. (IC 9-25-5-1 – 9-25-5-10). However, Commissioner may not revoke license of driver involved in accident resulting in bodily injury or property damage in excess of $1,000 solely because of failure to show financial responsibility, if his insurer has become insolvent either after or within 15 days before accident. (IC 9-25-7-1). Persons convicted of any of certain offenses and crimes under and in connection with motor vehicle laws must give, and thereafter maintain for three years, proof of financial responsibility. (IC 9-30-4-6, IC 9-30-6-12).

Such proof must be in amount of $25,000 for damages resulting from bodily injury to or death of any one person, or $50,000 for two or more persons in any one accident; and $10,000 for property damage in any one accident. (IC 9-25-2-3).

Insurance, bond or other certain types of security is required to operate vehicle. Amount required is $25,000/$50,000 bodily injury and $10,000 property damage. (IC 9-25-4-5). Motor vehicle manufacturers, factory representatives, distributors, auctioneers, dealers and brokers must maintain garage liability insurance in amounts specified in IC 9-23-2-10. See also category 16 Insurance, topic 16.01 Insurance Companies, subhead Liability Policies.

No-fault insurance not adopted.

Uninsured motorist coverage must be made available by all motor vehicle insurers, though named insured may reject such coverage. (IC 27-7-5-2).

Foreign vehicle registered in home state or country and conspicuously displaying license plates may be operated without registration for 60 days, to extent that home state gives reciprocal rights to Indiana cars. (IC 9-18-2-2). Nonresident transporting nonprocessed agricultural products grown in state may get one 90-day permit per year. (IC 9-18-2-6). New residents must register and title vehicles within 60 days. (IC 9-18-2-1). Violation is Class C infraction. (IC 9-18-2-40). Any trailer or semitrailer properly registered and licensed in another state with no permanent base or fixed terminus in Indiana is exempt from Indiana registration and plate requirements to extent home state gives reciprocal rights. (IC 9-18-2-5). Any person may obtain special registration permit for motor vehicle, semitrailer, trailer designed for use with semitrailer, or recreational vehicle, valid for 30 days, if person obtained vehicle in Indiana and will title or register it in another state; or person who is resident of Indiana plans to leave and their current registration will expire before moving; or person who is resident of Indiana and their registration in another state will expire while waiting for Indiana title; or if person not operating as lessor both owns and operates empty vehicle which is being moved from one lessee-carrier to another. Manufacturers of trailers or semitrailers who lease same for 30 day periods may be bulk-issued special registration permits. (IC 9-18-7-1). Ninety day temporary permits are available for vehicles manufactured in Indiana and purchased by individuals that are citizens of foreign countries if those vehicles are intended to be registered in country of purchaser's citizenship. (IC 9-18-7-1.5).

Nonresident operators have same operating privileges as Indiana resident has in nonresident's state. (IC 9-18-2-3). See IC 9-24-1-7 for license exemptions.

Action against nonresident arising out of accident or collision while operating motor vehicle on highway or street in state, may be commenced by leaving copy of process, with fee of $5, with Secretary of State, who forwards copy thereof, by registered mail, to defendant. (IC 34-33-3-2). Such service also permissible for resident who becomes nonresident and executor or administrator of nonresident who died prior to commencement of action. (IC 34-33-3-4). If nonresident dies after commencement of action, action may be continued against executor or administrator. (IC 34-33-3-5). See also category 5 Civil Actions and Procedure, topic 5.26 Venue.

Direct actions against insurer by injured person are not allowed based on contract theory. (409 N.E.2d 1239 [Ind. Ct. App., 1980]). However, it is possible such action may be brought under third party beneficiary theory. (567 N.E.2d 838, 840 [Ind. Ct. App., 1991]).

Pedestrians are governed by IC 9-21-17-1 – 9-21-17-24.

Motor vehicle carriers are regulated by Department of State Revenue. (IC 8-2.1-24-4 et seq.). Common carriers must have certificate of convenience and necessity. Permits required for contract carriers of persons or household goods. (IC 8-2.1-22-11, IC 8-2.1-22-12.5, IC 8-2.1-22-16). Carriers operating interstate vehicles into or through Indiana must register ICC permit with and obtain acknowledgment from Department of State Revenue. (IC 8-2.1-20-5). Intrastate carriers must register under single state registration system. (IC 8-2.1-22-33). Nonresident carriers must file name of agent for service of process. (IC 8-2.1-22-34). See IC 8-2.1-20-1 for rules on intrastate motor carriers. Operation of motor busses governed by IC 8-2.1-25.

Vehicle Equipment Safety Compact Act has been adopted. (IC 9-28-6-1 – 9-28-6-8).

Driver License Compact Act has been adopted. (IC 9-28-1-1 – 9-28-1-6).

Nonresident Violator Agreement may be in force between Indiana and other jurisdictions. (IC 9-28-2-1 – 9-28-2-12). See supra, subhead Suspension of License.

Manufacturers, Distributors and Dealers.

Persons engaged in distributing and selling motor vehicles are governed by IC 9-23-1-1 – 9-23-6-9. Manufacturer or distributor may terminate new vehicle family franchise for good cause only. (IC 9-23-5-3). See IC 9-23-2.5 for disclosure requirements imposed on retail lessors.

Motor clubs' ability to guarantee payment of fines and costs imposed on member governed by IC 9-30-2-8.

Motorboats.

Operation of all boats is regulated by special provisions. (IC 14-15). Motorboats are required to be inspected, registered and titled. (IC 14-15-6).

Motorcycles.

Operation and equipment of motorcycles and operators is regulated by a special act. (IC 9-21-10-1 – 9-21-10-13). Motorcyclists and passengers less than 18 years old must wear protective headgear. (IC 9-21-10-9).

Bicyclists have same rights and duties as operators of other types of vehicles. (IC 9-21-11-2). Special rules governing motorized bicycles in IC 9-21-11-12, IC 9-21-11-13.

Snowmobiles must be registered and are further regulated by special provisions. (IC 14-16-1). Other off-road vehicles, with some exceptions, must be registered and are specially regulated. (IC 14-16-1).

Mobile or "manufactured homes" are governed by special provisions concerning certificate of title. (IC 9-17-6-1 et seq.).

Aircraft registration is governed by IC 6-6-6.5 et seq.

Excise Tax.

Excise tax on passenger cars is payable when license plates are purchased. Certain types of vehicles and vehicles owned, operated, or leased by entities such as government or institutions of higher education are exempt from motor vehicle excise tax. (IC 6-6-5-1 – 6-6-5-16). Registering vehicle without paying tax is Class B misdemeanor. (IC 6-6-5-11). All boats are subject to boat excise tax based on boat's class and age. (IC 6-6-11-1 – 6-6-11-36). See IC 6-6-9.7 for excise tax on auto rentals.

Beginning Jan. 1, 2010, annual license excise tax will be imposed on RV's and truck campers, instead of ad valorem property tax levied for state and local purposes, but in addition to any registration fees imposed on RV's. (IC 6-6-5.1-1 et. seq.).

Gasoline Tax.

Governed by IC 6-6-1.1 et seq. See category 22 Taxation, topic Gasoline and Special Fuels Tax, subhead Gasoline Tax.

Disclosure of Personal Information.

Mobile or "manufactured homes" are governed by special provisions concerning certificate of title. (IC 9-17-6-1 et seq.). Person's social security number shall not be disclosed in any way on motor vehicle registration. (IC 9-14-3.5-7).

Lemon Law.

(IC 24-5-13-1 et seq.). See category 3 Business Regulation and Commerce, topic 3.12 Consumer Protection, subhead Motor Vehicle Protection.

23.01A CREDITS:

Tax credits available for variety of specific business activities, including headquarters relocation (IC 6-3.1-30), ethanol production (IC 6-3.1-28-11), offering health benefit plans to employees (IC 6-3.1-31-8), research and development (IC 6-3.1-4), venture capital investment (IC 6-3.11-24-3), blended biodiesel production or sale (IC 6-3.1-27), coal gasification technology investment (IC 6-3.1-29-14), and media production expenditures (IC 6-3.1.32). Most credits are detailed in IC 6-3.1.

Incentives.

Tax incentives available for certain activities in designated enterprise zones (IC 6-3-2-8, IC 6-3-3-10, IC 6-3.1-7, IC 6-3.1-10-6, IC 6-3.1-9, and IC 6-1.1-45), airport development zones (IC 8-22-3.5), industrial recovery sites (IC 6-3.1-11), military base recovery sites (IC 6-3.1-11.4), and brownfield revitalization zones.

23.02 RAILROADS:

See category 3 Business Regulation and Commerce, topic 3.08 Carriers.

1
IOWA LAW DIGEST

—Scope —

Revised for 2010 edition by

FINLEY, ALT, SMITH, SCHARNBERG, CRAIG, HILMES & GAFFNEY, P.C., of Polk County.

(Citations, unless otherwise indicated, are to Code of Iowa, 2009, which is numbered according to decimal system by which figures preceding decimal point indicate chapters and those following indicate sections. R.C.P. refers to Rules of Civil Procedure revised effective Feb. 15, 2002. R.A.P. refers to Rules of Appellate Procedure. R. Crim. P. refers to Rules of Criminal Procedure. D.R. refers to Disciplinary Rules. Parallel citations to North Western Reporter begin with 51 Iowa.)

Note: This revision covers legislation adopted and approved by Governor through July 31, 2009. Legislature meets in Jan. of each year.

1 INTRODUCTION

1.01 GOVERNMENT AND LEGAL SYSTEM:

The State of Iowa is a constituent state of the United States of America. For further discussion of the U.S. federal system, see Introduction to the Federal Government of the United States at the beginning of this volume. A great many laws are promulgated by the federal government of the United States and are not reflected in the topics below. See the Introduction to this volume for references to the federal law topics covered.

Like all but one of the United States, Iowa has a common law legal system, with roots in English common law. For information on the courts and legislature of Iowa, see category 6 Courts and Legislature.

1.02 [RESERVED]

1.03 HOLIDAYS:

Following are legal holidays: Jan. 1, 3d Mon. in Jan., Feb. 12, 3d Mon. in Feb., last Mon. in May, July 4, 1st Mon. in Sept., Nov. 11, 4th Thurs. in Nov., Dec. 25. (Iowa Code 4.1).

Uniform Commercial Code adopted. (554). See category 3 Business Regulation and Commerce, topic 3.09 Commercial Code.

Legality of Transactions on Holiday.

No statutory prohibition of business transactions on Sundays or holidays. Banking transactions on holiday are specifically declared to be valid. (Iowa Code 541.202).

1.04 OFFICE HOURS AND TIME ZONE:

Iowa is in the Central (GMT -06:00) time zone. Office hours are generally from 8:00 a.m. to 4:30 p.m.

2 BUSINESS ORGANIZATIONS

2.01 AGENCY:

Common law rules govern.

2.02 ASSOCIATIONS:

No general statutory provisions governing unincorporated associations.

Method of service, R.C.P. 1.305(6). See category 5 Civil Actions and Procedure, topic

5.20 Process.

Professional Associations.

See topic 2.03 Corporations, subhead Professional Corporations.

2.03 CORPORATIONS:

Note: New Iowa Business Corporation Act was enacted in 1989 with effective date of Dec. 31, 1989. It appears as c. 490 of 2005 Iowa Code.

New Iowa Business Corporation Act, c. 490 (hereinafter cited as I.B.C.A.) repealed c. 496A (Senate File 502 § 195). It specifically excludes various types of corporations, foreign and domestic, from its operation, as hereinafter noted. Except as specifically provided in this chapter, this chapter applies to all domestic corporations in existence on effective date of this Act that were incorporated under any general statute of this state providing for incorporation of corporations for profit if power to amend or repeal statute under which corporation was incorporated was reserved. (Iowa Code 490.1701). For more specific transitional rules, see 490.1701 through 490.1704. Following is summary of this new I.B.C.A., effective Dec. 31, 1989.

Purposes.

Corporation incorporated under I.B.C.A. has purpose of engaging in any lawful business unless more limited purpose is set forth in articles of incorporation. (Iowa Code 490.301).

Name.

Names of domestic and foreign corporations must include word “corporation,” “company,” “incorporated,” or “limited,” or abbreviation thereof. (401). Such name may be registered, and a domestic or foreign corporation may also file with Secretary of State fictitious name, other than corporate name, under which it will do business. (Iowa Code 490.401-403).

Secretary of State will indicate, without fee, whether corporate name available.

To reserve corporate name, file with Secretary of State application to reserve specified corporate name, executed by applicant. If available, Secretary will reserve same for exclusive use of applicant for 120 days. (Iowa Code 490.402).

Term of corporate existence of domestic corporation may commence on any date, within 90 days of filing of articles, specified in articles and in certificate issued by Secretary of State, and is deemed perpetual unless otherwise specified in articles. In absence of specification of future date, existence commences on date and time of filing of Articles of Incorporation. (Iowa Code 490.123, 490.203, 490.302).

Incorporators.

Corporation need have only one incorporator. (Iowa Code 490.201).

Articles of Incorporation.

Articles must contain certain items specified by statute. (Iowa Code 490.202).

Filing Requirements.

To be entitled to be filed in office of Secretary of State, document must contain information required by chapter, be typewritten or printed, be in English (except corporate names), be properly executed and signed, be on prescribed form (if there is one), be delivered to office of Secretary of State for filing and be accompanied by correct filing fee.

Fees.

Filing fees $50 for filing articles of incorporation, articles of amendment and certificate of amendment, restated articles of incorporation, articles of merger or share exchange and $45 for biennial report; $20 for application for renewal of registered name; $10 for filing application to reserve corporate name, notice of transfer of reserved corporate name, application for use of indistinguishable name; $5 for articles of dissolution, revocation of voluntary dissolution proceedings, application for reinstatement following administrative dissolution, articles of correction, and application of certificate of existence or authorization; $2 for application for registered name per month or part thereof. (Iowa Code 490.122, .1622). Fee of $5 for any other document required to be filed.

Judicial Review.

Where Secretary of State refuses to file document delivered to Secretary of State for filing, corporation has 30 days after document's return to appeal to District Court for county in which corporation's principal office, or, if none in this state, its registered office is or will be located. (Iowa Code 490.126).

Organization.

After incorporation, initial directors (if named in articles of incorporation) or incorporator(s) shall hold organizational meeting. Incorporators may take action without meeting if action is evidenced by written consents. (Iowa Code 490.205).

Transfer of Stock.

Articles of incorporation, bylaws, agreement among shareholders, or agreement between shareholders and corporation may impose restrictions on transfer or registration of transfer of shares of corporation. (Iowa Code 490.627).

Shareholders.

Articles of incorporation may specify greater or lesser vote than that statutorily required for corporate action. (Iowa Code 490.1003, 490.1103, 490.1202, 490.1402). Preemptive right to unissued shares does not exist, unless articles provide it, except for corporations which were incorporated under, or which elected to be governed by, c. 496A prior to Dec. 31, 1989, in which case 490.1704 applies until Dec. 31, 1992. (Iowa Code 490.630, 490.1704).

Shareholders' Meetings.

Corporation shall hold annually, at time stated in or fixed in accordance with bylaws, meeting of shareholders. (Iowa Code 490.701). Corporation shall hold special meeting of shareholders either on call of board of directors or person(s) authorized to call special meeting by articles of incorporation or bylaws or if holders of at least 10% of all votes entitled to be cast on any issue proposed to be considered at proposed special meeting deliver signed, dated, written demand for meeting. (Iowa Code 490.702). Court may also order meeting. (Iowa Code 490.703). Shareholders may vote by proxy. (Iowa Code 490.722). Action required or permitted to be taken at shareholders' meetings may be by consent. (Iowa Code 490.704). Number of shares establishing quorum may be varied by bylaws. (Iowa Code 490.1021). Percentage of vote statutorily required for various corporate actions may also be varied by articles of incorporation. (Iowa Code 490.1003, 490.1103, 490.1202, 490.1402).

Following corporate actions require majority of votes of shareholders entitled to vote thereon unless articles, bylaws, or board of directors pursuant to statute provide otherwise. Amendment of articles (Iowa Code 490.1003); disposition (other than mortgage or pledge) of assets other than in ordinary course of business (Iowa Code 490.1202); voluntary dissolution by act of corporation (Iowa Code 490.1402).

Merger and Consolidation.

Shareholder approval of share exchange or consolidation requires majority vote of outstanding shares. (Iowa Code 490.1104).

Voting Trusts.

One or more shareholders may create voting trust. (Iowa Code 490.730). Voting trusts are valid for not more than ten years unless extended for additional term of not more than ten years. (Iowa Code 490.730).

Directors.

Corporations need have only one director. (Iowa Code 490.803). Procedure for removal of directors may be contained in articles. (Iowa Code 490.808). Informal action of board of directors or committee thereof can be formalized by consent in writing to such action by all entitled to vote. (Iowa Code 490.821).

Articles of incorporation may contain provision eliminating or limiting personal liability of director to corporation or its shareholders for monetary damages for business decisions as director, provided that provision does not eliminate or limit liability of director for breach of director's duty of loyalty to corporation or its shareholders, for acts/omissions not in good faith or which involve intentional misconduct of knowing violation of law, for transaction from which director derives improper personal benefit, or under 490.833 (liability for unlawful distribution). (Iowa Code 490.831). Further, business opportunity doctrine no longer serves to prohibit director liability. (Iowa Code 490.831).

Unless articles of incorporation or bylaws require different number, quorum of fixed number board of directors is majority. (Iowa Code 490.824).

Officers.

Corporation has officers described in its bylaws or appointed by board in accordance with bylaws. (Iowa Code 490.840). Any one or more offices may be held by same person. (Iowa Code 490.840).

Dividends.

Board of directors may authorize and corporation may make distributions to shareholders subject to restriction by articles of incorporation. Also, no distribution may be made if, after giving effect, either (1) corporation would not be able to pay its debts as they become due in usual course of business or (2) corporation's total assets would be less than sum of its total liabilities plus, unless articles permit otherwise, amount that would be needed, if corporation dissolved at time of distribution, to satisfy preferential rights of shareholders whose rights are superior to those receiving distribution. (Iowa Code 490.640). Share dividends may also be issued. (Iowa Code 490.623).

Unclaimed Dividends.

See category 21 Property, topic 21.01 Absentees, subhead Escheat.

Reports.

Annual report due between Jan. 1 and Apr. 1. (Iowa Code 490.1622). Fee for filing annual report is determined by Secretary of State. (Iowa Code 490.1622). If not filed within time allowed by notice, certificate may be cancelled. (Iowa Code 490.1420).

Dissent and Appraisal Rights.

Shareholder is entitled to dissent from and obtain payment of fair value of shareholder's shares in event of certain corporate actions. (Iowa Code 490.1302).

Foreign corporations shall not transact business in Iowa until they obtain certificate of authority from Secretary of State. (Iowa Code 490.1501). Statute outlines activities which do not constitute "transacting business" under statute. (Iowa Code 490.1501).

Dissolution.

Statutes provide that incorporators, initial directors (Iowa Code 490.1401), board of directors and shareholders (Iowa Code 490.1402), Secretary of State (Iowa Code 490.1420), or court (Iowa Code 490.1430) may dissolve corporation.

Poison Pill Defense.

Terms and conditions of stock rights or options issued by corporation may include restrictions or conditions that preclude or limit exercise, transfer, or receipt of such rights or options by person or group of persons owning or offering to acquire specified number or percentage of outstanding common shares or other securities of corporation, or transferee of offeror, or that invalidate or void such stock rights or options held by offeror or transferee of offeror. (Iowa Code 490.624A).

Income Tax on Corporations.

See category 22 Taxation, topic 22.10 Income Tax.

Professional Corporations.

Corporation may be formed under general corporation law (490, 496C.3) for purpose of qualifying as professional corporation to render specific professional service. Certificate of incorporation must be obtained from Secretary of State. All shareholders, directors and officers must be licensed professionals. (496C.16). Professions which may incorporate: certified public accountancy, architecture, chiropractic, dentistry, physical therapy, psychology, professional engineering, land surveying, landscape architecture, law, medicine and surgery, optometry, osteopathy, osteopathic medicine and surgery, accounting practitioner, podiatry, real estate brokerage, speech pathology, audiology, veterinary medicine, pharmacy and practice of nursing. (496C.2[4]).

Limited Liability Companies.

See topic 2.06 Limited Liability Companies.

Deeds.

See category 21 Property, topic 21.06 Deeds.

Model Non-Profit Corporation Act not adopted.

2.04 [RESERVED]

2.05 JOINT STOCK COMPANIES:

No statutory provisions.

Professional Corporations.

See topic 2.03 Corporations, subhead Professional Corporations.

2.06 LIMITED LIABILITY COMPANIES:

Limited liability companies may generally be formed for any lawful purpose, regardless of whether for profit and have perpetual duration. (Iowa Code 489.104). Certificate of Organization must state name of LLC, name and address of registered agent, address of principal office, and may state other provisions. (489.201). Members or management of entity formed under Iowa LLC Act will have limited liability unless otherwise provided in articles. (489.304). LLC's can be dissolved under multiple conditions. (489.701).

2.07 [RESERVED]

2.08 PARTNERSHIPS:

Uniform Partnership Act adopted. (486A). Uniform Limited Partnership Act (1976) adopted with modifications. (488).

3 BUSINESS REGULATION AND COMMERCE

3.01 BANKS AND BANKING:

Regulated by Iowa Banking Act of 1969 (524) and Uniform Commercial Code (554). (Revised c. 3 and 4, 1994).

Uniform Common Trust Fund Act not adopted.

Powers.

State banks may be authorized by superintendent of banking to act in a fiduciary capacity. Bank has rights which an individual has in such capacity; however, superintendent of banking may limit such authorization to such capacities as he deems appropriate. (Iowa Code 524.1001).

Foreign Banks.

Person other than state bank which is subject to provisions of this chapter, and national bank authorized by laws of U.S. to engage in business of receiving money for deposits, shall not engage in this state in business of receiving money for deposit, transact business of banking or lawfully establish in this state place of business for such purpose. (Iowa Code 524.107).

Fiduciary Powers.

See category 13 Estates and Trusts, topic 13.09 Executors and Administrators, subhead Eligibility.

Liability of Shareholders.

Holder of shares of state bank under no obligation to state bank or creditors with respect to such shares, except as provided in 524.521 or 524.525. Subscriber to shares same as holders except additional obligation to pay full consideration for shares prior to issuance. (Iowa Code 524.527).

Deposits.

Minors.

Bank may deal with minor with respect to deposits without consent of parent as though minor were an adult. Actions of minor with respect to deposits are binding as if he were an adult. (Iowa Code 524.805).

Joint Accounts.

If deposit is made in name of two individuals, payable to either, or to survivor, deposit may be paid to either individual whether other is living or not. (Iowa Code 524.806).

Pay-on-Death Account.

State bank may receive deposit with provision that upon death of depositor account shall be property of designee, subject to debts and charges of depositors and payment of Iowa inheritance tax. (Iowa Code 524.805).

See also Uniform Commercial Code. (554).

Unclaimed Deposits.

Revised Uniform Disposition of Unclaimed Property Act adopted, with some modifications. (556).

Collections.

Uniform Commercial Code adopted. (554).

Trust Companies.

Trust company existing and operating on Jan. 1, 1970 and which was authorized to act only as trust company may continue to act only in fiduciary capacity according to terms of its articles of incorporation. Articles of incorporation of trust company may be renewed in perpetuity. See § 524.1005.

Electronic Transactions.

Uniform Electronic Transactions Act. (554D).

3.02 BILLS AND NOTES:

Uniform Commercial Code adopted. See topic 3.09 Commercial Code.

Recitals.

No special requirements as to recitals in notes given for particular purposes or based on particular considerations.

Attorney fee clauses are enforceable, with fee to be determined by court. (Iowa Code 625.22). Affidavit showing no improper fee-sharing arrangement and that requested compensation for services actually rendered must be filed prior to any fees being taxed. (Iowa Code 625.24). Reasonable opportunity to pay indebtedness before action brought required with some exceptions. (Iowa Code 625.22).

3.03 BILLS OF LADING:

See topic 3.08 Carriers.

3.04 BILLS OF SALE:

See topic 3.23 Sales.

3.05 BLUE SKY LAW:

See topic 3.24 Securities.

3.06 BROKERS:

Real estate brokers and salesmen must be licensed by Iowa Real Estate Commission. Commission may after hearing, deny, suspend or revoke license. Nonresident may be licensed if he has license issued by state of domicile and has an active place of business in such state, and consents that process against him may be served on chairman of commission. (543B).

See also topic 3.24 Securities; category 16 Insurance, topic 16.01 Insurance Companies.

Uniform Commercial Code adopted. (554). See topic 3.09 Commercial Code.

3.07 BULK SALES:

Art. 6 of Commercial Code (Bulk Transfers) repealed Jan. 1, 1995.

3.08 CARRIERS:

Iowa Department of Transportation has general supervision of all carriers within state.

Uniform Commercial Code adopted. (554). See topic 3.09 Commercial Code.

Property Damage Claims.

Department of Transportation is to prescribe by rule, pursuant to § 17A, regulations necessary for orderly disposition of claims arising from loss or damage to property tendered for transportation. (327D.160).

Limiting Liability.

Contract may not exempt common carrier from any liability which would exist had no contract been made except as may be provided for liability for property loss by order of regulation board. (327D.187).

Bills of Lading.

Uniform Commercial Code adopted. (554). See topic 3.09 Commercial Code.

Liens.

Uniform Commercial Code adopted. (554). See topic 3.09 Commercial Code.

Motor Vehicle Carriers.

See category 23 Transportation, topic 23.01 Motor Vehicles.

3.09 COMMERCIAL CODE:

Uniform Commercial Code adopted. (554). Section numbers will not include dashes that appear in Uniform Code. Thus, Section 1–101 of Uniform Commercial Code will be Iowa Code Section 554.1101, etc.

Material Variations from 1962 Text.

§ 1-209—1966 Official Optional Amendment enacted.

§ 2-318—1966 Official Optional Amendment Alternative C enacted.

§ 2-702—1966 Official Amendment enacted.

§ 2-725(1)—First sentence omitted. Ordinary statute of limitations will govern. See category 5 Civil Actions and Procedure, topic 5.16 Limitation of Actions.

§ 2-725(3)—Words “law or by agreement as provided in” added after words “time limited by.”

§ 3—Revised Article 3 adopted.

§ 4—Amended Article 4 adopted.

§ 6—Repealed.

§ 7-209—1966 Official Amendment enacted.

§ 9—Revised Article 9 adopted.

§ 10-102—No Specific Repealer Provision.

Minor Variations from 1962 Text have been made in several Sections.

Blanks Filled Up.

Section	*Action Taken*
554.9201(2)	Chapter 537 or any other statute or regulation of this state that regulates the rates, charges, agreements, and practices for loans, credit sales, or other extensions of credit, and to any consumer protection statute or regulation.
554.9501(1)(b), 554.9501(2)	Secretary of State.
554.9406	on a form conforming to standards prescribed by the secretary of state shall be five dollars, or if such statement otherwise conforms to the requirements of this section six dollars.

1972 Official Amendments.

Adopted. Filing fee for release of collateral filed electronically in office of Secretary of State is $8 if statement is in standard form, and otherwise $10.

1973 Official Amendment not adopted.

1977 Official Amendments not adopted.

Revised Article 9 adopted effective July 1, 2000.

See Uniform and Model Acts section for 1962 Official Text of Uniform Commercial Code.

Forms.

See end of this Digest.

See also topics 3.01 Banks and Banking, Bills and Notes, Brokers, Carriers, Contracts, Factors, Frauds, Statute of, Sales, Securities, Warehousemen; categories 2 Business Organizations, topic Corporations; Civil Actions and Procedure, topic Limitation of Actions; Debtor and Creditor, topics Assignments, Fraudulent Sales and Conveyances, Liens, Pledges; Documents and Records, topics Records, Seals; Mortgages, topic Chattel Mortgages.

3.10 CONDITIONAL SALES:

See topic 3.23 Sales.

3.11 CONSIGNMENTS:

See topic 3.14 Factors.

3.11A CONSUMER CREDIT:

Iowa has enacted consumer credit code patterned after uniform act. (537). Major variance from uniform act is section regulating debt collection practices. Section applies to all debt collectors including attorneys who send collection letters or contact debtors.

Debt collector not to collect or attempt to collect debt by illegal threat, coercion or attempt to coerce. (Iowa Code 537.7103[1]). Illegal threat, coercion or attempt to coerce under section defined as: Use or threat of use of force, violence or other criminal means, to cause harm to person or property; false accusation or threat to falsely accuse person of fraud or other crime; false accusations made to person, including credit reporting agency, or threat to falsely accuse, that debtor is willfully refusing to pay just debt (failure to reply to requests for payment and failure to negotiate disputes in good faith are deemed willful refusal); threat to sell or assign to another obligation of debtor with attending representation or implication that result of sale or assignment will be to subject debtor to harsh or abusive collection attempts; false threat that nonpayment of debt may result in arrest of person or seizure, garnishment, attachment or sale of property or wages; action or threat of action prohibited by consumer credit code or other law. (Iowa Code 537.7103[1][a]-[f]).

Debt collector not to oppress, harass, or abuse person in connection with collection or attempted collection of debt. Oppressive, harassing or abusive under this section defined by: (Iowa Code 537.7103[2][a]-[d]).

Debt collector not to disseminate or communicate information relating to debt or debtor. Dissemination/communication described in 537.7103(3).

Debt collector not to use fraudulent, deceptive or misleading representation or means to collect or attempt to collect debt or to obtain information concerning debtors. (Iowa Code 537.7103[4][a]-[i]).

Additional prescribed conduct described in Iowa Code 537.7103(5)(a)-(e).

Debt collector not to use or distribute, sell, or prepare for use, written communication that violates or fails to conform to U.S. postal laws and regulations. (Iowa Code 537.7103[6]).

Debt collector not to collect or attempt to collect charges from employee or employee's dependents for treatment rendered to employee by any health service provider, after receiving actual notice that contested case proceeding for determination of liability of workers' compensation benefits is pending as provided in c. 85.27, subsection 6. (Iowa Code 537.7103[7]).

Exclusions from Act are: (1) Extensions of credit to government agencies or instrumentalities, (2) sales of certain insurance, (3) transactions regulated by public utility or common carrier tariffs regulated by state or federal government, (4) transactions in securities and commodities with registered broker dealer, (5) credit extended by pawn brokers under certain circumstances and to certain extents. (Iowa Code 537.1202).

Maximum annual interest rates as follows: Consumer credit sale or loan other than one pursuant to open end credit: maximum charge permitted by U.S. law not to exceed 21%. (Iowa Code 537.2201[1]-[2]).

Consumer credit sale or loan pursuant to open end credit: see 537.2202.

3.12 CONSUMER PROTECTION:

Consumer fraud section in Iowa Code. (Iowa Code 714.16). Unlawful to use deception or fraud in sale or advertisement of merchandise. (Iowa Code 714.16[2][a]). Unlawful to advertise or sell merchandise at price or with rebate or other consideration to purchaser contingent upon procurement of prospective customers by purchaser and any obligation incurred in such manner completely void. (Iowa Code 714.16[2][b]). Unlawful to advertise sale of merchandise at reduced rate due to cessation of business operations and after such advertisement to remain in business under same or substantially same ownership or trade name or continue to offer for sale same type merchandise at same location for more than 120 days. (Iowa Code 714.16[2][c]). Not permissible to offer or advertise within Iowa for sale or lease certain subdivided lands without first filing with real estate commission true and accurate copies of all road plans, plats, field notes and diagrams of water, sewage and electric power lines as they exist at time of filing. (Iowa Code 714.16[2][d]). Attorney General may require sellers to file reports on facts and circumstances surrounding sales and advertisements and examine individuals and records. Special civil penalties for consumer fraud against elderly. (Iowa Code 714.16A). Statutory private right of action is provided in Iowa for consumer fraud. (Iowa Code 714H.1. et seq.).

See topics 3.11A Consumer Credit, 3.17 Interest, 3.23 Sales.

Plain Language.

No Plain Language statute.

3.13 CONTRACTS:

Uniform Commercial Code adopted. (554). See topic 3.09 Commercial Code.

See topic 3.16 Frauds, Statute of; categories 10 Documents and Records, topic Seals; Family, topic Infants.

3.14 FACTORS:

Consignments of merchandise which are to be sold by the consignee as sales agent for a consignor, reserving the title in the latter, are recognized and the common law of factors and bailees applies.

Lien.

Uniform Commercial Code adopted. (554). See topic 3.09 Commercial Code.

Uniform Commercial Code adopted. (554). See topic 3.09 Commercial Code.

3.15 FRANCHISES:

§ 523H governs insurance franchises. § 537A.10 applies to other franchises whose agreements were entered into on or after July 1, 2000.

Franchise may be transferred subject to certain conditions. (537A.10[5]). Existing franchisee may sue for encroachment if another franchisee’s new outlet has adverse effect on gross sales of existing franchisee’s outlet. (537A.10[6]). Generally, franchise cannot be terminated prior to expiration of its terms without good cause. (537A.10[7]). Nonrenewal of franchise requires six months notice or good cause. (537A.10[8]). Generally, franchisor cannot dictate source of goods or services. (Iowa Code 537.10[9]).

3.16 FRAUDS, STATUTE OF:

No evidence of following classes of contracts is competent, unless in writing, signed by party to be charged, or his authorized agent: (1) Those in consideration of marriage; (2) when one person agrees to answer for debt, default of miscarriage of another; (3) for creation or transfer of interest in lands, except leases for a term not exceeding one year, except where purchase money, or a part thereof, has been received by vendor, or where vendee, with actual or implied consent of vendor, has taken and held possession under contract, or where there is any other circumstance, which, by law heretofore in force, would take it out of statute; (4) those not to be performed within one year from making thereof. But in any of above cases opposite party may be called as a witness and contract proven by his oral testimony. (Iowa Code 622.32-.35).

Uniform Commercial Code adopted. (554). See topic 3.09 Commercial Code.

3.17 INTEREST:

(535). See also topic 3.11A Consumer Credit.

Judgments.

Variable rate tied to latest average auction price of 52 week U.S. Treasury bills plus 2% unless different rate (not exceeding maximum under 535.2) is expressed in contract on which judgment is based, in which case judgment should express such rate. (Iowa Code 535.3, 668.13). Interest on tort claims shall accrue on judgment from date action was commenced. (Iowa Code 668.13).

Finance Charges.

2% of loan principal where loan processing fee on loan for purchase of one or two family owner occupied dwelling. (Iowa Code 535.8).

1% of amount refinanced or assumed where loan processing fee on refinancing or assumption of existing loan on one or two family owner occupied dwelling. (Iowa Code 535.8).

10% computed by add-on or discount method where loan from industrial loan company. (536A.23[1]).

Accounts receivable in absence of written agreement: Closed-end transaction up to $35,000, 21% with proper notice; closed-end transaction over $35,000, no maximum level with proper notice; open-end transaction, 18% on initial $500 and 15% on any excess balance with proper notice. (Iowa Code 535.11).

Automobile installment sales: New autos, 21%; autos not more than two years old, 24%; autos over two years old, 27%.

Mobile and modular home sales contracts, 21% irrespective of age. (321).

Semi-tractor and travel trailer installment sales: New vehicles, 21%; vehicles not more than two years old, 24%; vehicles more than two years old, 27%. (321).

Finance charge for consumer loans or sales pursuant to open-end credit, see topic: Consumer Credit, subhead Maximum Annual Interest Rates.

Finance charge for consumer loans or sales not pursuant to open-end credit, 21%. (Iowa Code 537.2201[2], 2401[1]).

Finance charge for loan secured by certificate of title to motor vehicle used for person, family, or household purposes—21%. (Iowa Code 537.2403[1]).

Usury.

Where contract sued on is usurious, plaintiff can have judgment only for principal debt without interest or costs, and judgment is entered in favor of state against defendant for 8% per annum on amount of judgment. (Iowa Code 535.5).

3.18 [RESERVED]

3.19 LICENSES, BUSINESS AND PROFESSIONAL:

Licenses and permits from different authorities, on varying conditions and at various fees, are required for a large number of occupations and activities.

Commercial travelers need not be licensed.

Collection Agencies.

Certain prohibited debt collection practices specified by statute. (Iowa Code 537.7103). Civil penalties and injunctive relief authorized. (Iowa Code 537.6111, 537.6113). See topic 3.11A Consumer Credit.

3.20 MONOPOLIES, RESTRAINT OF TRADE AND COMPETITION:

Combination to regulate or fix price of commodity or limit quantity to be manufactured, produced or sold prohibited. Party to such combination guilty of conspiracy. (553). Combination restraining or preventing full and free competition in trade prohibited (Iowa Code 553.4 & . 5) but labor unions excepted (Iowa Code 553.6[1]). Violations punishable by fine and imprisonment. (Iowa Code 553.12-.14).

3.21 NEGOTIABLE INSTRUMENTS:

See topic 3.02 Bills and Notes.

3.22 RESTRAINT OF TRADE:

See topic 3.20 Monopolies, 3.22 Restraint of Trade and Competition.

3.23 SALES:

Uniform Commercial Code adopted. (554). See topic 3.09 Commercial Code.

Product Liability.

Common law rules prevail except as modified by Uniform Commercial Code. Privity abolished by decision at least in certain situations. (252 Ia. 1289, 110 N.W. 2d 449). Effective for claims arising on or after July 1, 1986, retailers immune from strict liability or breach of implied warranty which arise solely from alleged defect in original design or manufacture of product. (Iowa Code 613.18). See category 5 Civil Actions and Procedure, topic 5.09 Damages.

Retail Credit Sales.

No special restrictions. See also topic 3.11A Consumer Credit.

Consumer Protection.

Sale of merchandise with a rebate contingent upon procurement of prospective customers by purchaser is unlawful unless in writing and made part of sales contract. (Iowa Code 714.16[2][b]). See also topics 3.11A Consumer Credit, 3.17 Interest.

"Unsolicited goods" statute adopted. (556A.1).

Bulk Sales.

Art. 6 of Commercial Code repealed.

Sales of Motor Vehicles.

See category 23 Transportation, topic 23.01 Motor Vehicles, subhead Sales.

3.24 SECURITIES:

Uniform Securities Act adopted, effective Jan. 1, 1976. See Uniform and Model Acts section. (Iowa Code 502.101-.612).

Major departures from Uniform Act: Broker-dealers and agents' licenses expire on Sept. 30 of each year. Persons filing with SEC under Regulation A may become registered by coordination in Iowa. Registration of securities is perpetually effective. Registration of equity securities under qualification provisions limited to aggregate of $2,000,000. No registration by notification section. Administrator may deny securities registration if it is found to be unfair or inequitable. Limited offering exemption available if not more than 35 purchasers, exemption not available for oil, gas and mining leases or for partnerships formed in foreign jurisdictions. Mergers, reorganizations, and stock dividends treated as exempt transactions. Additional prohibitions include trading on inside information, market manipulation, use of manipulative devices by broker-dealers, misstatements in publicity, and employees of administrator using official capacity to promote security. Contains varying statutes of limitations depending upon alleged violation and its discovery. Registration by coordination automatically effective if it has been on file with administrator for 20 days.

Model State Commodity Code, adopted Apr. 16, 1990. (502A.1-22).

Uniform Simplification of Fiduciary Security Transfers Act repealed.

Uniform Commercial Code adopted (554). See topic 3.09 Commercial Code.

Uniform Securities Ownership by Minors Act not adopted.

See also topic 3.12 Consumer Protection.

3.25 STATUTE OF FRAUDS:

See topic 3.16 Frauds, Statute of.

3.26 TRUST RECEIPT SECURITY:

See category 8 Debtor and Creditor, topic 8.15 Pledges.

Uniform Commercial Code adopted. (554). See topic 3.09 Commercial Code.

3.27 WAREHOUSEMEN:

Uniform Commercial Code adopted. (554). See topic 3.09 Commercial Code.

4 CITIZENSHIP

4.01 ALIENS:

Foreigners who are, or may hereafter become residents of this State, shall enjoy same rights in respect to possession, enjoyment and descent of property, as native born citizens. (IA Const. Art. 1, § 22).

Agricultural Land.

Nonresident aliens, or corporations organized or owned as above-mentioned or foreign governments, may not purchase or acquire agricultural land after Jan. 1, 1980. Agricultural land owned or held on Jan. 1, 1980 may continue to be owned or held. (9I.3).

Restriction set forth above does not apply to agricultural land acquired by devise or descent; bona fide encumbrance taken for purposes of security; agricultural land acquired by process of law in collection of debts, by deed in lieu of foreclosure, pursuant to forfeiture of contract for deed, or by any procedure for enforcement of lien or claim on land, however, agricultural land so acquired must be sold or otherwise disposed of within two years after title transferred and must be leased for farming purposes in interim; agricultural land acquired primarily for research or experimental purposes used for testing, development, or production of seeds, or until July 1, 2001, to develop breeding stock; or plants for sale or resale to farmers, or for incidental activities; nor to interest in agricultural land, not to exceed 320 acres, acquired for immediate or pending use other than farming. (Iowa Code 567.3, am'd 1986, c. 1217). If more than 320 acres of agricultural land is lawfully owned on Jan. 1, 1980, additional agricultural land must not be purchased or acquired except by devise or descent from nonresident alien. (9I.3).

Nonresident aliens, corporations organized or owned as above-mentioned or foreign governments which acquire agricultural land or interest in agricultural land by devise or descent after Jan. 1, 1980, must divest selves of all right, title and interest in land within two years from date of acquisition. Agricultural land acquired by nonresident alien by devise or descent from nonresident alien will not have to be divested if such land or interest in such land was acquired by any nonresident alien prior to July 1, 1979. (9I.5).

Nonresident aliens, or corporations organized or owned as above-mentioned or foreign governments must not transfer title to or interest in agricultural land to nonresident aliens, corporations organized or owned as above-mentioned or foreign governments except by devise or descent. (9I.3).

Certain authorized farm corporations and authorized trusts may not acquire or lease more than 1,500 acres of agricultural land, upon certain conditions. (9H).

Effective July 1, 2001, nonresident aliens may no longer acquire or lease agriculture land used primarily for testing, developing, or producing animals, subject to exceptions. (9I.3[3][d][b]).

5 CIVIL ACTIONS AND PROCEDURE

5.01 ACCORD AND SATISFACTION:

Common law rules govern except as modified by Uniform Commercial Code. See category 3 Business Regulation and Commerce, topic 3.09 Commercial Code. Defense must be specifically pleaded. (R.C.P. 1.419).

5.02 ACTIONS:

Every proceeding in court is an action either civil, special or criminal. Civil actions are of two kinds, ordinary or equitable. Cases formerly cognizable in equity are tried as equitable proceedings and all others by ordinary proceedings. (Iowa Code 611.1-.3).

Equity.

A plaintiff may prosecute an action by equitable proceedings in all cases where courts of equity had jurisdiction before adoption of code. (Iowa Code 611.4). Mortgages and deeds of trust are foreclosed (Iowa Code 611.5) and mechanics' liens enforced (Iowa Code 572.26) by equitable proceedings.

Commencement.

See topics 5.17 Pleading, 5.20 Process.

Parties.

Every action must be prosecuted in the name of the real party in interest. (R.C.P. 1.201). Any person may be made a defendant who has or claims an interest in controversy adverse to plaintiff, or is a necessary party to complete determination or settlement of question involved. (R.C.P. 1.234).

Class Actions.

(R.C.P. 1.261). If persons composing class are so numerous that it is impracticable to bring all before Court through joinder, such number of them as will insure adequate representation of all may sue or be sued on behalf of all, where question of law or fact exists that is common to class. (R.C.P. 1.407[1]).

Intervention.

Any person has intervention by right if statute confers unconditional right to intervene, or person has interest and disposition of matter may impair person's ability to protect interest.

Any person may be permitted to intervene if statute confers conditional right to intervene, or person's claim or defense has common question of law or fact. (R.C.P. 1.407[2]).

Interpleader.

A person who is or may be exposed to multiple liability or vexatious litigation because of several claims for the same thing, may bring an equitable action of interpleader against all such claimants. Their claims or titles need not have a common origin nor be identical, and may be adverse to or independent of each other. Such person may dispute liability, wholly or in part. (R.C.P. 1.251).

Joinder.

Plaintiff may join in same petition as many causes of action, legal or equitable, independent or alternative, as there are against single defendant. (R.C.P. 1.231). Any number of persons claiming relief jointly, severally or alternatively, arising out of same transaction may join as plaintiffs in single action, presenting any question of law or fact common to all of them. (R.C.P. 1.232). Any number of defendants may be joined in one action which asserts against them, jointly, severally or in alternative, any right to relief in respect of, or arising out of same transaction, when any question of law or fact common to all is presented. (R.C.P. 1.233). Misjoinder is not ground for dismissal of action, but parties may be dropped by order of court on its own motion or that of any party at any stage of action. Actions improperly joined may be severed on motion. (R.C.P. 1.231-1.233, 1.236).

Splitting Causes of Action.

Highly disfavored in Iowa. (158 N.W.2d 739).

Consolidation of Actions.

Unless some party shows party will be prejudiced thereby, court may consolidate separate actions which involve common questions of law or fact, or order single trial of any or all issues therein. In such cases it may make such orders concerning proceedings as tend to avoid unnecessary cost or delay. (R.C.P. 1.913).

Severance of Actions.

In any action, the court may for convenience or to avoid prejudice, order a separate trial of any claim, counterclaim, cross-claim, or of any separate issue, or any number of any of them. Any claim against a party may be thus severed and proceeded with separately. (R.C.P. 1.914).

Stay of Proceedings.

A continuance may be allowed for any cause not growing out of the fault or negligence of the applicant, which satisfies the court that substantial justice will be more nearly obtained. It shall be allowed if all parties so agree, and the Court approves. (R.C.P. 1.911).

Abatement.

No action abates by the transfer of any interest therein during its pendency. (R.C.P. 1.222). All causes of action survive death, and action may be begun or continued by or against personal representative. (Iowa Code 611.20, .22).

Prohibited Actions.

No action may be brought to renew or extend judgment on promissory obligation secured by mortgage or in real estate foreclosure or on a claim for rent or judgment assigned by receiver of closed bank or federal governmental agency to which bank or receiver is indebted, or on credits assigned by such receiver when the assignee is not trustee for depositors or creditors, subject to certain limited exceptions provided by statute. (615).

Limitation of.

See topics 5.16 Limitation of Actions, 5.17 Pleading, 5.19 Practice.

Small Claims.

See category 6 Courts and Legislature, topic 6.01 Courts.

Administration.

See category 13 Estates and Trusts, topic 13.09 Executors and Administrators.

Direct Actions Against Insurer.

See category 23 Transportation, topic 23.01 Motor Vehicles, subhead Direct Actions.

5.03 APPEAL AND ERROR:

Supreme Court.

Appeals may be taken from district courts to Supreme Court, at any time within 30 days from rendition of judgment or order appealed from where an interest in real estate is involved or where amount in controversy exceeds $6,000 or where Supreme Court certifies that case is one in which appeal should be allowed. Review by Supreme Court of small claims is discretionary. Interlocutory appeals may be allowed by Supreme Court or justice thereof. When motion for new trial is filed, time is extended to 30 days after entry of ruling on such motion. (R.A.P. 6.1-6.5).

Court of Appeals.

Appeals to Supreme Court may be transferred by supreme court to court of appeals by issuing order of transfer. Party to appeal decided by court of appeals may, as matter of right, file application with supreme court for further review within 20 days of filing of decision by court of appeals upon payment of $25 fee.

District court has jurisdiction in appeals and writs of error taken in civil and criminal actions and special proceedings authorized to be taken from tribunals, boards, or officers under laws of this state, and has general supervision thereof, in all matters, to prevent and correct abuses where no other remedy is provided. (Iowa Code 602.6102).

Stay of Proceedings.

No appeal to Supreme Court shall stay proceedings under a judgment or order unless appellant executes a bond with sureties to be filed with and approved by clerk of court where judgment or order was entered. If judgment or order appealed from is for money, penalty of such bond must be at least 110% of amount, including costs; in all other cases an amount sufficient to save appellee harmless from consequences of appeal, but in no event less than $1,000. (R.A.P. 6.7).

Appeal Cost Bond.

Appellant may be required to give bond for costs under the same circumstances and upon the same showing as plaintiffs in civil actions in the inferior court may be. See topic 5.08 Costs, subhead Security for Costs. (625A.12).

Character of Hearing.

Equity cases are heard de novo in appellate courts and Supreme Court. In other cases, errors at law only are reviewable. (R.A.P. 6.4).

Discretionary Review by Supreme Court.

Civil actions tried as small claims may be appealed for discretionary review to Supreme Court. (Iowa Code 631.16).

5.04 BONDS:

Executors', administrators', guardians' and receivers' bonds are fixed by judge or clerk of district court and sureties approved by clerk. (Iowa Code 633.170). Other bonds are fixed by statute, and generally sureties must be approved by clerk of district court. (Iowa Code 633.171). However, in case of indemnifying bond given to sheriff under execution and attachment proceedings, sureties are approved by sheriff.

Sureties.

Any company which shall execute any bond as surety for fiduciaries shall be estopped, in any proceeding to enforce liability which it shall have assumed to incur, to deny its corporate power to execute such instrument or assume such liability; and private property of stockholders shall be liable for debts of corporation to full amount of capital stock held by such stockholders. (Iowa Code 636.22).

All agents for surety company licensed to do business in Iowa must be resident of Iowa for purpose of acting on behalf of surety company with respect to any bond or bail in criminal cases. (Iowa Code 636.11).

See also category 16 Insurance, topic 16.02 Surety and Guaranty Companies.

Enforcement.

Action on a bond given to the state, any municipal corporation or any officer for the security of the public may be brought in name of any person intended to be secured who has sustained an injury by any breach. (R.C.P. 1.202). Summary enforcement may be had in undistributed estates. (Iowa Code 633.186[2]).

5.05 CERTIORARI:

Writ is not a substitute for appeal or writ of error, but may be granted where statutorily permitted and in all cases where an inferior tribunal, board or officer, exercising judicial functions is alleged to have exceeded its proper jurisdiction, or otherwise acted illegally. (R.C.P. 1.1401).

Jurisdiction.

Writ may be granted only by district court acting through district judge unless it is directed to that court, district judge, or district associate judge, and then by supreme court or justice thereof. Only district court acting through district judge may grant writ directed at judicial magistrate appointed pursuant to 602.6402 or 602.6403. (R.C.P. 1.1404).

Proceedings.

By ordinary proceedings so far as applicable. (R.C.P. 1.1402[2]). Court may receive transcript of original proceedings and other evidence, but may consider only legality of original proceedings and sufficiency of evidence therein. (R.C.P. 1.1402[3]).

Court or justice granting writ may stay original proceedings, though no stay is sought. When sought by plaintiff, stay can be granted only on plaintiff’s filing bond with penalty and conditions, including security for costs, prescribed by court or justice, and with sureties approved by it or its clerk. (R.C.P. 1.1405).

Review.

Appeal to Supreme Court lies from judgment of district court and is governed by rules applicable to appeals in ordinary actions. No writ may issue unless petition is filed within 30 days from time inferior tribunal exceeded its jurisdiction. (R.C.P. 1.1412).

5.06 CHARITABLE IMMUNITY:

See topic 5.09 Damages.

5.07 COMMISSIONS TO TAKE TESTIMONY:

See topic 5.11 Depositions and Discovery.

5.07A COMPARATIVE NEGLIGENCE:

See topic 5.09 Damages.

5.08 COSTS:

Costs generally are awarded in favor of prevailing party. (Iowa Code 625.1).

Security for Costs.

Where plaintiff in action in district court is nonresident or private or foreign corporation, defendant may, on motion, require plaintiff to file bond for costs, to be approved by clerk. (Iowa Code 621.1).

5.09 DAMAGES:

Multiple Exemplary Damages.

Common law generally prevails as to compensatory damages. Multiple or exemplary damages are permitted by statute for waste or malicious or wanton injury to property (Iowa Code 658.1A); for certain deceits by attorneys (Iowa Code 602.10113); for certain violations by rail carriers (327G.7); for malicious attachment (Iowa Code 639.14); for libel and slander (Iowa Code 659.3); and under common law where malice, recklessness, fraud or gross negligence are proven.

Punitive Damages.

Where plaintiff seeks punitive damages in action filed on or after July 1, 1986, court shall instruct jury to answer following interrogatories: (1) Was defendant's conduct willful and wanton, to be proven by preponderance of clear, convincing and satisfactory evidence; (2) was defendant's conduct specifically directed at plaintiff. If (1) and (2) both affirmative, all punitive recovery goes to plaintiff. If (1) affirmative and (2) negative, plaintiff recovers 25% of punitive findings and remaining 75% goes to state fund. Plaintiff cannot discover defendant's wealth until plaintiff establishes prima facie evidence exists for affirmative finding to interrogatory (1). (668A.1).

Party may petition court to pay judgment on structured, periodic or other non-lump sum payment basis. Collectibility and equitable considerations govern. (Iowa Code 668.3[7]).

Charitable immunity abrogated as to paying hospital patients. (241 Ia. 1269, 45 N.W. 2d 151).

Product Liability.

Person not manufacturer, assembler or designer who sells product is immune from suit based on strict liability or breach of implied warranty of merchantability which arises solely from alleged defect in original design or manufacture of product, with some exceptions. (Iowa Code 613.18).

Collateral Source Rule Partially Abolished in Personal Injury Actions.

Evidence of past or future payment, from sources other than state or federal program or claimant's immediate family, of expenses of medical, rehabilitative, and custodial care is admissible. (Iowa Code 668.14). This rule has been abolished in medical malpractice actions. (Iowa Code 147.136).

Comparative Negligence Rule.

Comparative fault statute enacted in 1984. Fault means one or more acts or omissions that are in any measure negligent or reckless toward person or property of actor or others, or that subject person to strict tort liability. (Iowa Code 168.1[1]). Term also includes breach of warranty, unreasonable assumption of risk not constituting enforceable express consent, misuse of product for which defendant otherwise would be liable, and unreasonable failure to avoid injury or to mitigate damages. (Iowa Code 668.1[1]).

Party means any of following: (1) Claimant; (2) person named as defendant; (3) person who has been released pursuant to § 668.7; (4) third-party defendant. (Iowa Code 668.2).

Contributory fault shall not bar recovery in action by claimant to recover damages for fault resulting in death or injury to person or property or to recover damages for loss of services, companionship, society, or consortium, unless claimant bears greater percentage of fault than combined percentage of fault attributed to defendants, third-party defendants and persons who have been released pursuant to § 668.7, but any damages allowed shall be diminished in proportion to amount of fault attributable to claimant. (Iowa Code 668.3[1][a] and [b]).

Rule of joint and several liability shall not apply to defendants who are found to bear less than 50% of total fault assigned to all parties. Defendants found 50% or more at fault are jointly and severally liable only for economic damages and not for any noneconomic awards. (Iowa Code 668.4).

For cause of action arising on or after July 1, 1986, nonuse of safety belt admissible to mitigate damages, provided substantial evidence first introduced that failure to wear safety belt contributed to injuries claimed. Maximum mitigation reduced factor of 5% of plaintiff's damages. (Iowa Code 321.445).

Comparative fault percentage not assigned if defendant pleads and proves product conformed to state of the art. However, duty to warn still applies to subsequently acquired knowledge of defect or dangerous condition. (Iowa Code 668.12).

Sovereign Immunity.

Suits against State of Iowa are governed by c. 669 of Iowa Code. Notice of claim must be given within two years or barred.

See also category 13 Estates and Trusts, topic 13.05 Death, subhead Action for Death.

No Fault Insurance.

See category 23 Transportation, topic 23.01 Motor Vehicles.

5.10 DECLARATORY JUDGMENTS:

Uniform Act substantially adopted. (R.C.P. 1.1101-1.1109).

5.11 DEPOSITIONS AND DISCOVERY:

Deposition of any person may be taken on any relevant matter, not privileged, for discovery or for use as evidence. (R.C.P. 1.701-703, 1.705). Federal R.C.P. 30(a)-(b)(5), 30(c), 30(d), 30(e), 30(f)(1)(2), 30(g), and 45(b) were substantially adopted effective July 1, 1973.

Oral depositions may be taken only in Iowa or within 100 miles from the state, except on motion and notice of hearing. (R.C.P. 1.701). Court may order such deposition taken orally if sufficiently important and written interrogatories are not desirable. (R.C.P. 1.701). Conduct of oral deposition is as follows: Deponent first sworn in by officer taking deposition, testimony then taken including any objections thereto, including objections to officer's qualifications. Any adverse party may cross-examine or submit written interrogatories which the officer will put to deponent, whose answers will be recorded. (R.C.P. 1.707-1.708). Telephonic depositions may be taken upon reasonable notice. Absent agreement of all parties, reporter must be present with witness. Any desired exhibits must be sent to deponent and parties prior to deposition. Party or counsel may be in witness' presence at time of deposition. (R.C.P. 1.701[7]).

Compelling Attendance and Testimony of Witnesses.

Attendance of witnesses can be compelled by subpoena issued by clerk of court in cases pending in Iowa district court, or by officer or commissioner authorized to take deposition, where it may be taken for use in court of any state or country, pursuant to the laws of such state or country. If witness fails to attend or refuses to testify, such officer or commissioner can report same to a judge of the district court, who may enforce obedience as if such action was pending in district court or such refusal had occurred in district court. (Iowa Code 622.84, .102). No resident of Iowa can be thus compelled to attend out of the county where he resides, or is employed, or transacts his business in person (R.C.P. 1.715[2]) except that party can normally be deposed in county where action is pending (R.C.P. 1.701, 1.707).

Deposition on written interrogatories may be taken after all parties are served with copies thereof and with a notice stating name and address of officer taking them and names and addresses of deponents. Officer can be anyone qualified to administer an oath, except a party interested in the suit. All parties may elect to appear and orally cross-examine. Party taking deposition may then waive written interrogatories and examine orally. (R.C.P. 1.710-1.713).

Outside of State for Use within State.

Depositions within U.S. or a territory or insular possession thereof may be taken before any person authorized to administer oaths, by laws of U.S., Iowa or of place where examination is held. (Iowa Code 1.713[3]). Depositions in a foreign land may be taken before secretary of Embassy or legation or consul, vice-consul, consul general or consular agent of U.S. (Iowa Code 1.713[4]). When witness is in military or naval service of U.S., his deposition may be taken before any commissioned officer under whose command he is serving, or any commissioned officer in Judge Advocate General's department. (R.C.P. 1.713[5]).

To Perpetuate Testimony.

Court's common law powers to entertain actions to perpetuate testimony are not limited by statute. (R.C.P. 1.721).

Application to take depositions to perpetuate testimony for use in an action not yet pending must be entitled in the name of the applicant, be supported by affidavit and show: that applicant expects to be party to action in Iowa which cannot correctly be brought, subject matter of such action and applicant interest therein; facts to be shown by proposed testimony and reasons for desiring to perpetuate it; name and address of each expected adverse party; name and address of each deponent and substance of deponent testimony. Application must be filed with court where prospective action might be brought, and notice and copy of application served on person named in petition as expected adverse party. Deposition is taken in manner hereinbefore outlined. (R.C.P. 1.722-1.728).

The following form may be used:

Form

The deposition of . . . ., of the county of . . . ., in the state of . . . ., produced, sworn and examined on his oath on the . . . . day of . . . ., A.D. 20. . . ., at the office of . . . ., in the city of . . . ., in the county of . . . ., and state of . . . ., by . . . ., a commissioner duly appointed by a commission issued from the office of the clerk of the district court of . . . . county, in the State of Iowa, bearing the signature of . . . ., clerk, and directed to said commissioner for the examination of said witness in a certain suit and matter in controversy now pending and undetermined in the said court, wherein . . . . is plaintiff and . . . . is defendant, in behalf of the said . . . ., both upon the interrogatories of the . . . . and the cross-interrogatories of the . . . . .

Oath of Shorthand Reporter.

State of . . . ., county of . . . ., ss: I, ..., being first duly sworn upon my oath do solemnly swear that I will take down and transcribe correctly the testimony of . . . ., witness, whose deposition is hereinafter set forth.

. . . .

Subscribed and sworn to before me this . . . . day of . . . ., A.D. 20. . . . .

Notary Public in and for said

county and state.

Seal.

The said . . . ., witness as aforesaid, being first duly sworn by said commissioner as a witness in said cause previous to the commencement of his examination, to testify the truth as well on the part of the plaintiff as the defendant, testified and deposed as follows: (Here set forth first interrogatory, or if upon written interrogatories state same by number; then insert answer of witness to first interrogatory and so on successively in order in which interrogatories propounded and answered. Then follow: “Cross-interrogatories of the . . . . and answers of the witness thereto.” Here again insert interrogatories, or if upon written interrogatories state same by number, and answers thereto successively in order aforesaid).

(After deposition is completed, the whole must be reduced to writing and read over by or to the witness and subscribed and sworn to by him in the usual manner. The shorthand reporter, if the testimony is taken in shorthand, and the commissioner should then append to the deposition their respective certificates as follows:)

Affidavit of Shorthand Reporter.

State of . . . ., county of . . . ., ss: I, ..., of the city of . . . ., county of . . . ., state of . . . ., being first duly sworn, upon oath state that I was called to the office of . . . ., in the city of . . . ., county of . . . ., state of . . . ., to take down and transcribe the testimony of . . . ., the witness whose name is subscribed to the foregoing deposition; that previous to the commencement of the examination of said witness, I took and subscribed the oath above set forth to take down and transcribe correctly the testimony of said witness; that pursuant thereto I correctly took down the interrogatories and answers of said witness thereto in shorthand, that I correctly transcribed said shorthand notes and that the full, true and complete translation thereof in the order in which said interrogatories were propounded and answered is as in said deposition set forth.

(Jurat)

. . . .

Certificate of Commissioner.

I, ..., of the city of . . . ., county of . . . ., state of . . . ., commissioner duly appointed as aforesaid to take the deposition of said . . . ., the witness whose name is subscribed to the foregoing deposition, do hereby certify that previous to the commencement of the examination of said witness, ..., the shorthand reporter called to take the testimony of said witness, was duly sworn by me as such commissioner to take down and transcribe correctly the testimony of said witness and to correctly translate the shorthand notes thereof and reduce same to writing, and that also previous to the commencement of the examination of said witness he was duly sworn by me as such commissioner to testify the truth in relation to the matters concerning which he should be interrogated; that said deposition was taken by me at my office (or at the office of . . . .) in the city of . . . ., county of . . . ., state of . . . ., on the . . . . day of . . . ., A.D. 20. . . .; that I caused all the interrogatories and cross-interrogatories enclosed with or attached to said commission (or in the case of oral interrogatories all the interrogatories directed to be put to said witness by either party litigant) to be propounded to said witness; that the testimony of said witness in answer thereto was correctly and fully written down by me (or by . . . ., a disinterested person under my direction and in my presence) and the said interrogatories and answers were read over by me to said witness and subscribed and sworn to by him in my presence; that exhibits . . . . were offered, identified and received in evidence as a part of said deposition and said exhibits (or true copies thereof) so marked and identified as exhibits . . . . are attached to and returned with said depositions; and that said . . . ., the aforesaid shorthand reporter, made affidavit as above set forth, certifying that the testimony and answers of said witness were correctly taken down and transcribed and that the deposition as above set forth is a true, full and complete translation of said testimony as given by said witness. In witness whereof, I have hereunto set my hand and official seal this . . . . day of . . . ., A. D. 20. . . . .

. . . .

Commissioner

CERTIFICATE FOR DEPOSITION

I, the undersigned, a Certified Shorthand Report and Notary Public of the State of Iowa, do hereby certify that I acted as the Certified Shorthand Reporter in the foregoing matter at the time and place indicated herein; that I took in shorthand the proceedings had at said time and place; that said shorthand notes were reduced to typewriting under my supervision and direction, and that the foregoing pages are a full and correct transcript of the shorthand notes so taken; that said deposition was submitted to the witness for signature as requested and that any changes, if any, requested by the witness are attached hereto. That said deposition was not submitted for review.

I further certify that I am neither attorney nor counsel for, or related to or employed by any of the parties in the foregoing matter, and further that I am not a relative or employee of any attorney or counsel employed by the parties hereto, or financially interested in this action.

IN WITNESS WHEREOF, I have hereunto set my hand and seal this . . . . day of. . . . . ., 20 . . . .

____

CERTIFIED SHORT HAND REPORTER

AND NOTARY PUBLIC

5.12 EQUITY:

See topic 5.02 Actions.

5.13 EVIDENCE:

See topic 5.11 Depositions and Discovery.

Witnesses.

No person is disqualified as a witness because he is a party to the action or interested in the result thereof. (Iowa Code 622.3).

Depositions.

See topic 5.11 Depositions and Discovery, subhead Compelling Attendance and Testimony of Witnesses.

Expert Witnesses.

In professional liability cases, plaintiff must disclose and certify to court plaintiff’s expert witness within 180 days of defendant’s answer. Defendant must disclose within 90 days of plaintiff’s certification. Failure to follow time requirements shall bar expert’s testimony, unless leave of court for good cause shown is obtained. Rule not applicable to rebuttal or court appointed experts. (Iowa Code 668.11). Medical malpractice experts must possess medical or dental qualifications which relate directly to medical problem at issue. (Iowa Code 147.139).

Privileged Communications.

Attorney, counselor, physician, surgeon, physician’s assistant, advanced registered nurse practitioner, mental health professional, confidential stenographer or clerk of such person who obtains information by reason of that employment, minister or priest shall not be allowed, in giving testimony, to disclose any confidential communication properly entrusted to person in professional capacity. Such prohibition does not apply in civil action to recover damages for personal injury or wrongful death in which condition plaintiff in whose favor such prohibition is made is element or factor of claim or defense of such person or party claiming through or under adverse party. Such evidence shall be admissible upon trial of action only as it relates to condition alleged. (Iowa Code 622.10). In some cases, communications between taxpayer and federally authorized tax practitioner relating to tax advice are privileged and confidential. (Iowa Code 622.10A).

Husband and Wife.

In all civil and criminal cases, husband and wife may be witnesses for each other. (Iowa Code 622.8).

Neither husband or wife can be examined as to communications made by one to other while married, nor may either, after marriage relation ceases, reveal such communication. (Iowa Code 622.9).

Self-incrimination.

A witness cannot be compelled to answer or produce evidence after asserting answer or evidence would tend to incriminate or violate his 5th Amendment rights unless he waives rights or is granted immunity under statutory procedure. Refusal to testify after grant of immunity is subject to punishment for contempt of court. (R. Crim. P. 2.20).

5.14 INJUNCTIONS:

Injunction may be obtained as an independent remedy by an action in equity or as an auxiliary remedy in any action. In either case the party applying therefor may claim damages or other relief in same action. Injunction may be granted as part of the judgment; or may be granted by order at any prior stage of the proceedings, and is then known as a temporary injunction. (R.C.P. 1.1501).

Writs of injunction may also be obtained in many special cases mentioned in the statute. (R.C.P. 1.1502).

Temporary writs of injunction may be obtained by making application to the proper court or judge, giving notice of hearing to party to be enjoined (or certifying impracticality of notice or attempts thereto) and giving of bond to be fixed by such court or judge. (R.C.P. 1.1502-1508).

Self-Incrimination/Civil Liability.

No witness is excused from answering question upon mere ground that witness would be thereby subjected to civil liability. (Iowa Code 622.13).

5.15 JUDGMENTS:

Every final adjudication of any of rights of parties in action is judgment. (R.C.P. 1.951).

Judgment by confession for money due may be entered without action on a written statement by the defendant setting forth the facts out of which the indebtedness arose. (Iowa Code 676.3).

Judgment by default is entered when defendant fails to appear or file pleading when due. (R.C.P. 1.971).

Judgment on Pleadings.

Any party may, at any time, on motion, have any judgment to which that party is entitled under uncontroverted facts stated in all pleadings, or on any portion of that party's claim or defense which is not controverted, leaving action to proceed as to any other matter of which such judgment does not dispose. (R.C.P. 1.954).

Summary Judgment.

Claimant may, at any time after appearance day or after filing of motion for summary judgment by adverse party, move with or without supporting affidavits for summary judgment in claimant's favor upon all or any part thereof. (R.C.P. 1.981[1]). Defending party may, at any time, move with or without supporting affidavits for summary judgment in that party's favor as to all or any part thereof. (R.C.P. 1.981[2]). Motion shall be filed not less than 60 days prior to date case is set for trial, unless otherwise ordered by court. (R.C.P. 1.981[3]).

Declaratory Judgments.

Uniform Act substantially adopted. (R.C.P. 1.1101-1.1109).

Offer of Judgment.

Defendant may, either before or after action is commenced, offer to confess judgment for a stated amount. If such offer be not accepted and plaintiff fails to recover judgment in excess of the amount offered, all costs after the offer must be paid by plaintiff. If judgment exceeds offer, all costs are taxed against defendant. (677).

Real property redeemed by debtor after sale under judgment (see category 8 Debtor and Creditor, topic 8.05 Executions) is free from liability for unpaid portion of judgment under which sold. (Iowa Code 628.3).

Lien.

District or appellate court judgment, including support judgment, is lien, from date judgment is entered in judgment docket and lien index of clerk of court having jurisdiction, on all real estate of judgment debtor in county in which judgment was entered and becomes lien on other real estate on filing of transcript of judgment in district court of county in which such real estate is located. Same rule applies to judgment of United States district court within state. Foreign judgments pursuant to c. 626A and 626B and tribal judgments as defined in 626D.2 shall not attach until appeal is concluded, time for appeal has expired, or stay of execution expired or was vacated under 626A.4, 626B.3, 626B.5 or 626D.7. (Iowa Code 624.24 and 624.24A).

Lien of judgments of appellate courts shall not attach to real estate until attested copy of judgment is filed with clerk of court of county in which real estate lies. (Iowa Code 624.25).

On filing of transcript of judgment, clerk must docket and index same as though rendered in his own county. (Iowa Code 624.26).

Lien of judgment continues for ten years after rendition, and attaches to real estate acquired after its rendition. (Iowa Code 624.23[1]). Judgment liens shall not remain lien upon real estate of defendant, platted as homestead pursuant to 561.4, unless execution is levied within 30 days of time defendant or defendant's agent has served written demand on owner of judgment. Demand shall state that lien and all benefits derived therefrom as to real estate platted as homestead shall be forfeited unless owner of judgment levies execution against that real estate within 30 days from date of service of demand. Written demand shall be served in any manner authorized for service of original notice under Iowa rules of civil procedure. Copy of written demand and proof of service thereof shall be filed in office of county recorder of county where real estate platted as homestead is located. (Iowa Code 624.23[2]). Judgment liens described in this section shall not attach to subsequently acquired real estate owned by defendant if personal liability of defendant on judgment has been discharged under bankruptcy laws of U.S. (Iowa Code 624.23[3]).

Revivor of Judgment.

The death of one or all of the plaintiffs shall not prevent an execution being issued. In such case, surviving plaintiff or personal representative, or heirs or decedent's attorneys, shall file affidavit with clerk, of death of plaintiff, and clerk shall then indorse on execution, death of plaintiff, or if all be dead names of representatives, and execution shall then be proceeded with, as if survivor or representatives were only plaintiffs. Death of part only of defendants does not prevent execution issuing against survivors. (Iowa Code 626.103-.107).

Action on judgment of court of record may not be brought after 20 years, nor on judgment of court not of record after ten years. (Iowa Code 614.1[5], [6]). Action may not be brought on any judgment within nine years without leave of court. (Iowa Code 614.3).

See also topic 5.02 Actions, subhead Prohibited Actions.

Assignment.

General assignments of judgments are proper and are recognized the same as any other sale of intangibles.

Where a levy is made on a judgment which is held or owned by the execution debtor, the sheriff may assign the judgment to the execution creditor, and such assignment has the same validity as if made by the execution debtor. (Iowa Code 626.21).

Satisfaction of judgment must be acknowledged by filing instrument referring to it. (Iowa Code 624.37). There is no statutory form of satisfaction.

Foreign Judgments.

Suit must be brought on a foreign judgment here in order to secure judgment thereon in this state. Foreign judgment may be proved by the attestation of the clerk and seal of the court annexed if there be a seal, together with a certificate of judge, chief justice or presiding magistrate, that the attestation is in due form of law, and the official certificate of a justice of the peace of any state to any judgment and the preliminary proceedings before him, supported by the official certificate of the clerk of any court of record, within the county in which said justice resides, stating said justice is an acting justice of the peace of that county, and that the signature to his certificate is genuine, is sufficient evidence of such proceeding and judgment. (Iowa Code 622.52 et seq.).

Uniform Enforcement of Foreign Judgments Act adopted. Judgment creditor has option to proceed under this Act. (626A.6).

Judgment Notes.

See category 3 Business Regulation and Commerce, topic 3.02 Bills and Notes.

Interest.

See category 3 Business Regulation and Commerce, topic 3.17 Interest, subhead Judgments.

5.16 LIMITATION OF ACTIONS:

Actions must be commenced within following periods. (614):

Twenty years: On judgment of a court of record of any state of the United States or of a federal court. (Iowa Code 614.1[6]).

Fifteen years: For injury to person or property related to unsafe or defective condition of improvement to real property, except against owner, occupant, or operator of improvement. (Iowa Code 614.1[11]). Product liability actions must be brought within 15 years after product first purchased, leased, bailed, or installed for use unless expressly warranted for longer time. (Iowa Code 614.1[2A]).

Eleven years: Actions in connection with transfers or obligations regarding public bonds must be brought within 11 years of cancellation, transfer, redemption, or replacement of public bonds or obligations. (Iowa Code 614.1[13]).

Ten years: On judgment of a court not of record; to recover real property; on written contract; or to set aside decree quieting title to real estate (Iowa Code 614.1[5]); to enforce title to real estate conveyed after July 1, 1981 by deed, mortgage, or other instrument, where spouse failed to join in conveyance (Iowa Code 614.15[2]).

Five years: On unwritten contract; on account, time running from date of last item; for injury to real or personal property including injury suffered as result of sexual abuse by counselor or therapist; to recover possession of personal property; for fraud, time running from discovery thereof; action not otherwise provided for. (Iowa Code 614.1[4] and [12]).

Three years: Against public officer for liability incurred in official capacity. (Iowa Code 614.1[3]).

Two years: To enforce mechanic's lien, time running from expiration of time allowed for filing lien claim (Iowa Code 572.27); for injuries to person or reputation, including injuries to relative rights whether based on contract or tort (Iowa Code 614.1[2]); for statutory penalty; action founded on claim for wages or for liability or penalty for failure to pay wages (Iowa Code 614.1[8]). Claims permitted against state under c. 25A barred unless within two years after claim accrued claim in writing made to State Appeal Board. (Iowa Code 669.13). Claims founded on secured interest in farm products within two years of date of sale of farm products against secured interest of creditor. (Iowa Code 614.1[10]).

One year: To enforce payment of a penalty or forfeiture under an ordinance. (Iowa Code 614.1[1]).

Three months: In special charter cities for claims arising from defective streets or sidewalks or from any cause originating in neglect or failure of municipal corporation or its officers to perform their duties, notice must be filed within 30 days after incident and actions must be commenced within two years. (Iowa Code 420.45). In special charter cities, no suit against such city for unliquidated claim or demand can be brought unless within two years from time same became due or accrued and notice must be filed with clerk 30 days prior to commencement of said suit. (Iowa Code 420.44).

Absence.

Time of nonresidence of defendant not included in computing period; but suit can not be maintained on claim barred in another country prior to defendant coming here, unless cause of action arose in this state. (Iowa Code 614.6, .7).

Disability of Plaintiff.

In case of infancy or mental illness of the person having a right of action, except for a penalty or forfeiture, the time is extended for one year after the removal of the disability. (Iowa Code 614.8, .19, .27).

Death of Defendant.

In all cases where by the death of the party to be charged, the bringing of an action against his estate shall have been delayed beyond the period provided for by statute, the time within which action may be brought against his estate is extended for six months from the date of the death of said decedent. (Iowa Code 614.2).

Death of Plaintiff.

If person having a cause of action dies within one year previous to expiration of limitation, time to sue is extended to one year after death. (Iowa Code 614.9).

Revival of Barred Claims.

Cause of action on contract barred by limitations is revived by an admission that the debt is unpaid or a new promise to pay, either of which must be in writing and be signed by the party to be charged in order to have this effect. (Iowa Code 614.11).

Pleading.

Bar of limitations of actions is primarily affirmative defense to be specially asserted in separate division of responsive pleading to claims for relief, except where obvious from face of assailed pleading not only that claim may be barred but that necessarily barred when action commenced, then motion to dismiss is proper. (173 N.W.2d 549).

Contractual limitations are permitted.

Uniform Commercial Code adopted. (554). See category 3 Business Regulation and Commerce, topic 3.09 Commercial Code. However, § 2-725(1) has been modified so as to remove four year limitation found in Uniform Commercial Code (Iowa Code 554.2725). Ordinary limitations, as outlined above, apply to contracts of sale.

5.16A PARTITION:

Real or personal property may be partitioned by equitable proceedings. (R.C.P. 1.1202[1]). Petition must describe property and interests of parties therein. (R.C.P. 1.1203). Court may order abstract filed; if none is available, plaintiff may be ordered to have one prepared and filed. (R.C.P. 1.1204). All owners of undivided interests and lienholders are indispensable parties. Where entire interest in real estate is owned by decedent on whose estate administration or probate is pending, action cannot be brought until four months after second publication of notice of appointment of personal representative, or at any time while application for authority to sell such real estate is pending in said probate proceeding. (R.C.P. 1.1202).

Partition in Kind or Sale.

Real property must be partitioned by sale and division of proceeds, unless partition in kind is prayed. Personal property subject to lien can be partitioned only by sale. (R.C.P. 1.1201).

Service may be made by publication when an affidavit is filed that personal service cannot be made within the state. See topic 5.20 Process, subhead Publication.

Costs of partition proceedings are paid eventually by all parties in proportion to their interests, except costs created by contests, which are taxed against the losing contestant unless otherwise ordered. (R.C.P. 1.1224).

5.17 [RESERVED]

5.18 PLEADING:

(R.C.P. 1.401-1.458).

All common counts, general issues, demurrers, fictions and technical forms of pleading are abolished. The pleadings are: Petition, answer and such counter-claim, reply, amendment, cross-claim, third party petition or petition of intervention as are proper. (R.C.P. 1.401).

Petition must contain: (1) Name of court and county in which action is brought; (2) names of parties to action, with words “Petition at Law” or “Petition in Equity;” (3) statement of facts constituting plaintiff’s cause of action; (4) demand of relief to which plaintiff considers himself entitled. Petition must not specify amount of damages sought, except in small claims cases and cases involving only liquidated damages, although petition must certify that amount sought satisfies applicable jurisdictional amount. (Iowa Code 619.18, R.C.P. 1.402, 1.403). Petitions must be separated into numbered paragraphs, and separate causes of action must be stated in separate counts. (R.C.P. 1.402-403, 1.411-412).

Answer must show on whose behalf it is filed and specifically admit or deny each paragraph of the petition. Denial may be for lack of information. It must state any additional facts deemed to show a defense and may raise points of law appearing on the face of the petition. It may contain as many defenses, legal or equitable, as the pleader claims, which may be inconsistent. It may contain a counterclaim, which must be in a separate division. Each separate cause of action or defense must be stated in a separately numbered division. (R.C.P. 1.405).

Counterclaim.

Unless prohibited by statute or rule, counterclaim may be filed on any matured cause of action against opposing party. Compulsory if arising out of same transaction or occurrence. (R.C.P. 1.241, 1.242).

Reply.

There must be a reply to a counterclaim and to new matter in an answer, but this must not be inconsistent with the petition. Points of law arising on the face of the answer may be raised by a reply. Facts asserted in a reply are denied by operation of law. (R.C.P. 1.401, 1.406 [Official Comment]; 224 N.W. 809 [Iowa 1929]).

Demurrer is no longer recognized in Iowa.

Verification.

Pleadings need not be verified unless special statutes so require. Counsel’s or party’s signature to every motion or pleading deemed person’s certificate that person has read motion, to best of person’s knowledge, information, and belief formed after reasonable inquiry it is grounded in fact, warranted by existing law or good faith argument for extension, modification, or reversal of existing law, good grounds for making claims therein, and not interposed for harassment or delay. (R.C.P. 1.413). Unsigned pleading or motion may be stricken unless signed promptly after brought to signer's attention. If signed in violation of Rule, court must impose appropriate sanction on person signing, party, or both. (Iowa Code 619.19).

Service on adverse parties is made to party or his attorney, by delivery, mail or fax; copies for them must be provided if they have appeared. (R.C.P. 1.442).

Time.

Motions attacking pleading must be served before responding to pleading or, if no response required, within 20 days after service of pleading on such party. (R.C.P. 1.441[1]). Answer to petition must be served on or before appearance date prescribed in R.C.P. 1.303. Party served with pleading stating cross-claim against party must serve answer thereto within 20 days of service of that pleading. Plaintiff must serve reply to counterclaim in answer within 20 days after service of answer, or if reply ordered by court, within 20 days after service of order unless order otherwise directs. (R.C.P. 1.441[2]). Service of motion permitted under rules alters time periods as follows unless different time ordered by court: (1) If motion is so disposed of as to require further pleading, such pleading shall be served within ten days after notice of court's action; (2) party shall plead in response to original pleading or within ten days after service of amended pleading, whichever is longer, unless court otherwise orders. (R.C.P. 1.44).

Party must respond to amended pleading within time remaining in response to original pleading or ten days after service, whichever longer, unless court orders otherwise. (R.C.P. 1.441).

Proof of Claims.

An attorney forwarding a claim for collection should forward the instrument or contract, if any, sued upon, a full statement of the facts upon which the cause of action is based, an itemized statement of the claim, together with an affidavit of one who has knowledge thereof that such statement is true and correct, that the amount stated is due and unpaid after allowing all just deductions, credits and offsets, and that the claim is the property of the claimant, and information about the parties, including addresses, whether an individual, an individual doing business under a trade name, a firm or a corporation; if a corporation, state of organization and location of principal place of business, and if a partnership, the names of the partners.

Small Claims.

See category 6 Courts and Legislature, topic 6.01 Courts.

Frivolous Claims.

If party commencing action has in preceding five year period unsuccessfully prosecuted three or more frivolous actions, proceedings may be stayed until party furnishes undertaking secured by cash or approved securities to pay all costs resulting to opposing parties to action including reasonable attorney fee. (R.C.P. 1.413[2], Iowa Code 617.16).

5.19 PRACTICE:

Regulated by Rules of Civil Procedure.

Discovery.

Allowed liberally by various methods. (R.C.P. 1.501-1.517).

Demand for admission of facts may be served. Failure to admit, not in good faith, may make party subject to paying other party's expenses of proving same, including reasonable attorneys fees. (R.C.P. 1.510, 1.517, 252 N.W.2d 393 [Iowa 1977]).

Direct Action Against Insurer.

See category 23 Transportation, topic 23.01 Motor Vehicles, subhead Direct Actions.

Small Claims.

(631). See category 6 Courts and Legislature, topic 6.01 Courts.

See also topics 5.02 Actions, Appeal and Error, Depositions and Discovery, Injunctions, Judgments, Pleading, Process; category 8 Debtor and Creditor, topics 8.02 Attachment, 8.05 Executions, 8.09 Garnishment.

5.20 PROCESS:

Original Notice.

Civil action is commenced by filing petition with court. Original notice and petition shall be served upon defendant within 90 days of filing of petition. Original notice must contain name of court where action brought, names of parties, be directed to defendant, state name and address of plaintiff's attorney, and time within which rules require defendant to serve, and within reasonable time thereafter file, motion or answer, and must notify defendant that in case of his failure to do so, judgment by default will be entered against him for relief demanded. Original notice must be signed by clerk and be under seal of court. Clerk may require party delivering original notice to advance reasonable costs of service. Original notice and copy of petition must be served together except when service by publication. If service by publication, original notice alone shall be published and must contain general statement of cause or causes of action, relief demanded, and if for liquidated damages or for small claim, amount thereof. Defendant served by publication or publication and mailing must appear on or before date fixed in notice as published, which cannot be less than 20 days after date of last publication. Defendant served in manner prescribed by statute or court order must appear on or before date so fixed. If service by mail under R.C.P. 1.306 appearance date shall appear in original notice and must be not less than 60 days following mailing date. In all other cases defendant shall serve and within reasonable time thereafter file motion or answer within 20 days after service of original notice and petition upon such defendant. (R.C.P. 1.302).

Who May Serve.

Notice may be served by any person not a party to the action nor an attorney therein. A party, his agent or attorney may take acknowledgment of service and deliver copy of notice in connection therewith and may mail copy of original notice when mailing is required or permitted under any rule or statute. (R.C.P. 1.302).

Personal Service.

Original notices are served by delivering copy to proper person along with copy of petition. (R.C.P. 1.305, 1.306).

Personal service on individual aged 18 years or more, who has not been adjudged incompetent, may be made by serving him personally; or by serving, at his dwelling house or usual place of abode, any person residing therein who is at least 18 years old, but if such place is a rooming house, hotel, club, or apartment building, the copy must be delivered to such a person who is either a member of defendant's family or the manager, clerk, proprietor or custodian of such place. (R.C.P. 1.305[1]).

Personal service on minor under eighteen years old is made by serving either the guardian of his person or property unless the notice is served on behalf of such guardian, or his parent or some person aged 18 years or more who has his care and custody, or with whom he resides, or in whose service he is employed. Where the notice upon a minor is served on behalf of one who is the guardian or other fiduciary and the guardian or other fiduciary is the only person who would be available upon whom service could be made, the court must appoint, without prior notice on the ward, a guardian ad litem upon whom service shall be made. (R.C.P. 1.305[2]).

Personal service on incompetent person not confined in a state hospital for the mentally ill may be made by serving the guardian of his person or property, unless the notice is served on behalf of such guardian, or his spouse, or some person aged 18 years or more who has his care and custody or with whom he resides. Where the notice upon an incompetent is served on behalf of one who is the guardian or other fiduciary, and there is no other person upon whom service could be made, the court must appoint, without prior notice to the ward, a guardian ad litem upon whom service shall be made. (R.C.P. 1.305[3]).

Personal service on person, whether competent or not, confined to county care facility or state hospital for mentally ill, University of Iowa hospital, or other institution in charge of Iowa Board of Control or of U. S. may be made by official in charge of such institution or his assistant. (R.C.P. 1.305[4]).

Personal service on patient in hospital for mentally ill, or person adjudged incompetent confined to county care facility shall be accepted, in patient's behalf, by official in charge of such institution or his assistant if, in opinion of official in charge or his assistant, direct service on defendant would injuriously affect him, which fact must be stated in such acceptance. (R.C.P. 1.305[5]).

Personal service on a partnership or association suable under a common name may be made by serving any present or acting or last known officer thereof, or any general or managing agent or any agent or person now authorized by appointment or by law to receive service of original notice, or on the general partner of a partnership. (R.C.P. 1.305[6]).

Corporations.

If an action is against a domestic corporation organized for profit, service may be had on any trustee or officer thereof, or on any agent employed in the general management of its business, or on any of the last known or acting officers of such corporation. (Iowa Code 617.6).

Foreign Corporations.

If foreign corporation doing business in state has made application for permit to transact business and has failed to file designation of agent for service of process (see category 2 Business Organizations, topic 2.03 Corporations), or such agent cannot be found, service on said corporation may be had by sending notice to Secretary of State. (Iowa Code 617.3). Service may also be made on general agent of foreign corporation wherever found within state. (Iowa Code 617.3). Statute purports to make foreign corporation making contract with Iowa resident to be performed in whole or in part in Iowa, or committing tort in Iowa, subject to suit in this state by serving notice on Secretary of State. (Iowa Code 617.3).

Insurance Companies.

If action for loss or damage on contract of insurance or indemnity, service may be on general agent, recording agent, or agent with authority to issue policies. (Iowa Code 617.5).

Surety Companies.

If action on bond, service may be upon any agent in this state, or if none, on Commissioner of Insurance 15 days before court term of trial. (Iowa Code 636.20).

Foreign Insurance Companies.

Service may be on Commissioner of Insurance. (Iowa Code 636.21).

Service on Local Agent or Clerk.

When a corporation or individual has, for the transaction of any business, an office or agency in any county other than that in which the principal resides, service may be made on any agent or clerk employed in such office or agency, in all actions growing out of or connected with the business of that office or agency. (R.C.P. 1.305[7]). Foregoing has been construed to afford process sufficient to give jurisdiction over nonresidents. (See 294 U.S. 623.)

Long Arm Statute.

See subhead Foreign Corporations, supra and subhead Nonresident Individuals, infra.

Nonresident defendant in criminal action, present in this state, either voluntarily or involuntarily, may be served with process, either civil or criminal. (Iowa Code 617.1).

Nonresident Individuals.

For mode of service on nonresident motorist see category 23 Transportation, topic 23.01 Motor Vehicles, subhead Actions Against Nonresidents.

Service on nonresident who makes contract to be performed in whole or in part in Iowa or commits a tort in whole or in part in Iowa by serving notice on Secretary of State. Nonresident includes resident at time of tort but later becomes nonresident or a person who has absented himself from state at least six months from commission of tort. (Iowa Code 617.3).

Nonresident Watercraft.

Nonresident who uses any watercraft on Iowa waters may be served by sending notice to Secretary of State under procedure similar to actions against nonresident motorists. (461B.4).

Publication.

Service may be made by publication when an affidavit is filed that personal service cannot be made on the defendant within this state. (R.C.P. 1.3111[1]). Such service is made by publishing notice, in paper selected by the plaintiff, once each week for three consecutive weeks. (R.C.P. 1.313). In every case where service is made upon a known defendant by publication, copy of the original notice must also be sent by ordinary mail addressed to defendant at last known mailing address, unless affidavit of party or his attorney if filed before entry of judgment or decree, stating that no mailing address is known and that diligent inquiry has been made to ascertain it. (R.C.P. 1.311[1]). Such copy of notice must be mailed not less than 20 days before date set for appearance. (R.C.P. 1.311[2]). Proof of such mailing must be by affidavit filed before entry of judgment or decree. (R.C.P. 1.311[3]).

Service by publication may be had in the following cases: for recovery of real property or any estate or interest therein; for the partition of real or personal property in Iowa; to foreclose a mortgage, lien, encumbrance or charge on real or personal property; for specific performance of a contract for sale of real estate; to establish, set aside or construe a will, if defendant resides out of Iowa, or if his residence is unknown; against a nonresident of Iowa or a foreign corporation which has property, or debts owing to it in Iowa, sought to be taken by any provisional remedy, or appropriated in any way; against any defendant who, being a nonresident of Iowa, or a foreign corporation, has or claims any actual or contingent interest in or lien on real or personal property in Iowa which is the subject of such action, or to which it relates; or where the action seeks to exclude such defendant from any lien, interest or claim therein; against any resident of the state who has departed therefrom, or from the county of his residence, with intent to delay or defraud his creditors, or to avoid service, or who keeps himself concealed with like intent; for divorce or separate maintenance or to modify a decree in such action, or to annul an illegal marriage, against a defendant who is a nonresident of Iowa or whose residence is unknown; to quiet title to real estate, against a defendant who is a nonresident of Iowa, or whose residence is unknown; against a partnership, corporation or association sueable under a common name, when no person can be found on whom personal service can be made; to vacate or modify a judgment or for a new trial under Rules 1.1012 and 1.1013. (R.C.P. 1.310).

When publication is completed, proof of publication by affidavit of publisher must be filed with clerk. (R.C.P. 1.314).

5.21 REPLEVIN:

(643).

An action of replevin may be brought in any county in which the property or some part thereof is situated. (Iowa Code 643.1). District court sitting in small claims has concurrent jurisdiction of action of replevin if value of property claimed $5,000 or less. (Iowa Code 631.1[3]).

Petition must be verified and must state:

1. A particular description of the property claimed. (Iowa Code 641.1[1]).

2. Its actual value and where there are several articles, the actual value of each. (Iowa Code 641.1[2]).

3. The facts constituting the plaintiff's right to the present possession thereof, and the extent of his interest in the property, whether it be full or qualified ownership. (Iowa Code 641.1[3]).

4. That it was neither taken on the order or judgment of a court against him, nor under an execution or attachment against him, or against the property; but if it was taken by either of these modes, then it must state the facts constituting an exemption from seizure by such process. (Iowa Code 641.1[4]).

5. The facts constituting the alleged cause of detention thereof, according to his best belief. (Iowa Code 641.1[5]).

6. The amount of damages which the affiant believes the plaintiff ought to recover for the detention thereof. (Iowa Code 643.1[6]).

District court sitting in small claims has concurrent jurisdiction of action for abandonment of mobile home or personal property pursuant to § 555.B3, if no money judgment in excess of $5,000 is sought. (Iowa Code 631.1[4], [5]).

Bond must be filed with clerk for use of any person injured by proceeding. (Iowa Code 643.6). When plaintiff desires immediate delivery of property, he must execute bond to defendant, with sureties approved by clerk, in double value of property conditioned upon plaintiff appearing and prosecuting action to judgment and returning property if ordered to do so. (Iowa Code 643.7).

Writ.

Upon direction of court after notice and opportunity for such hearing as court may prescribe, clerk shall issue a writ directed to proper officer requiring him to take property described and deliver it to plaintiff. (Iowa Code 643.5). If petition shows that property has been wrongfully removed into another county from one in which action is commenced, writ may issue from county whence property was wrongfully taken, and may be served in any county where it may be found. (Iowa Code 643.8).

Retention by Defendant.

Before delivery to plaintiff, the defendant may stay delivery and retain possession by executing a bond with sureties to be approved by the clerk or sheriff. (Iowa Code 643.12).

Concealment.

When it appears by affidavit that the property claimed has been disposed of or concealed so that the writ cannot be executed, the court upon verified petition therefor, may compel the attendance of the defendant or other person claiming or concealing the property, and examine him on oath as to the situation of the property, and punish a wilful obstruction or hindrance or disobedience of the order of court in this respect, as in case of contempt. (Iowa Code 643.21).

Claims of Third Persons.

If a third person claims the property or any part thereof, the plaintiff may amend and bring him in as a co-defendant or the defendant may obtain his substitution by the proper mode, or the claimant may himself intervene by the process of intervention. (Iowa Code 643.4).

Judgment.

The judgment must determine which party is entitled to the possession of the property and designate his right therein and, if such party has not the possession thereof, must also determine the value of the right of such party, which right shall be absolute as to an adverse party, and must also award such damages to either party as he may be entitled to for the alleged detention of the property. If the judgment be against the plaintiff for the money value of the property, it must also be against the sureties on his bond. (Iowa Code 643.17).

5.22 SEQUESTRATION:

Sequestration of Voting Securities.

In any case where person has acquired or is proposing to acquire any voting securities in violation of Iowa laws or regulations, certain district courts may, with notice, upon application of insurer or commissioner seize or sequester any voting securities of insurer owned directly or indirectly by such person, and issue such orders with respect thereto as may be appropriate to effectuate provisions of this chapter. (521A.9[3]).

Of Insurer.

Court shall not have jurisdiction over petition praying for dissolution, liquidation, rehabilitation, sequestration, conversation or receivership of insurer, or praying for injunction or restraining order or other relief preliminary to, incidental to or relating to such proceedings other than pursuant to this chapter. (507C.4[2]).

For Lessees.

Lessee has right of replevin, detinue, sequestration, claim and delivery, or like for goods identified to lease contract if after reasonable effort lessee is unable to effect cover for those goods or circumstances reasonably indicate that effort will be unavailing. (Iowa Code 554.13521[3]).

5.23 SERVICE:

See topic 5.20 Process.

5.24 STAY OF EXECUTION:

See topic 5.03 Appeal and Error; category 8 Debtor and Creditor, topic 8.05

Executions.

5.25 SUBMISSION OF CONTROVERSY:

Parties to question which might be subject of civil action may present agreed statement of facts to any court having jurisdiction of subject matter, and on showing that controversy is real and proceeding in good faith court will hear and determine case and render judgment which is enforceable and reviewable in same manner as if rendered in action. (678).

5.26 VENUE:

Actions must be brought in the county where the defendants or some of them reside (Iowa Code 616.5), or where the real property is situated (Iowa Code 616.1), or where, by its terms, a written contract is to be performed (Iowa Code 616.17); or if none of the defendants has any residence in this state, then in a county where either of them may be found (Iowa Code 616.17). Motor vehicle damage actions may also be brought in the county in which the damage or injury is sustained. (Iowa Code 616.18).

Public Utilities.

Actions against express, railroad, telegraph, telephone or electric transmission line companies may be brought in any county through which their line passes. (Iowa Code 616.8).

Corporations.

When any corporation or person has an office or agency in any county for the transaction of business, any suits growing out of or connected with the business of that office or agency, may be brought in such county. (Iowa Code 616.14).

Insurance companies may be sued in the county of the principal place of business, the county of the residence of the plaintiff, the county in which the contract of insurance was made, or in which the loss occurred, or, on death or disability policy, in county of insured’s domicile at time of loss. (Iowa Code 616.10).

Actions Against Nonresident Motorists.

See category 23 Transportation, topic 23.01 Motor Vehicles, subhead Actions Against Nonresidents.

Action Brought in Wrong County.

May be transferred to proper county on motion of defendant prior to answer. (R.C.P. 1.808).

Change of Venue.

The place of trial may be changed on motion showing one of the following grounds: (a) if the county where the case would be tried is a party, and the motion is by the adverse party, and the issue being triable by a jury and a jury having been demanded; (b) where the trial judge is directly interested in the action or related by consanguinity or affinity within the fourth degree to any party so interested; (c) if a trial judge or the inhabitants of the county are so prejudiced against the moving party or if an adverse party has such undue influence over such inhabitants that the movant cannot obtain a fair trial; (d) pursuant to written agreement of the parties. A defendant, sued in a county where he does not reside, on a written contract expressly performable in such county, who has filed a sworn answer claiming fraud in the inception of said contract as a complete defense thereto, may have the case transferred to the county of his residence. (R.C.P. 1.801).

Contract Provisions.

Written agreements fixing venue are enforceable. (R.C.P. 1.801).

6 COURTS AND LEGISLATURE

6.01 COURTS:

United States District Courts.

Northern District.

Clerk's office: 329 Federal Building, 101 1st St., P.O. Box 74710, Cedar Rapids 52407.

Cedar Rapids Division is composed of following counties: Benton, Cedar, Grundy, Hardin, Iowa, Jones, Linn and Tama.

Court sits at Cedar Rapids.

Eastern Division is composed of following counties: Allamakee, Black Hawk, Bremer, Buchanan, Chickasaw, Clayton, Delaware, Dubuque, Fayette, Floyd, Howard, Jackson, Mitchell and Winneshiek.

Court sits sometimes at Dubuque and Waterloo.

Western Division is composed of following counties: Buena Vista, Cherokee, Clay, Crawford, Dickinson, Ida, Lyon, Monona, O'Brien, Osceola, Plymouth, Sac, Sioux and Woodbury.

Court sits at Sioux City.

Central Division is composed of following counties: Butler, Calhoun, Carroll, Cerro Gordo, Emmett, Franklin, Hamilton, Hancock, Humboldt, Kossuth, Palo Alto, Pocahontas, Webster, Winnebago, Worth and Wright.

Court sits sometimes at Fort Dodge and Mason City.

Deposit for fees required in all civil cases; plaintiff, $150, defendant in removal case, $150.

Southern District.

Clerk's office: 103 U.S. Courthouse, 123 E. Walnut St., P.O. Box 9344, Des Moines 50309.

Central Division is comprised of following counties: Adair, Adams, Appanoose, Boone, Clark, Dallas, Davis, Decatur, Greene, Guthrie, Jasper, Jefferson, Keokuk, Lucas, Madison, Mahaska, Marion, Marshall, Monroe, Polk, Poweshiek, Ringgold, Story, Taylor, Union, Wapello, Warren and Wayne.

Court sits at Des Moines.

Western Division is comprised of following counties: Audubon, Cass, Fremont, Harrison, Mills, Montgomery, Page, Pottawattamie and Shelby.

Court sits at Council Bluffs.

Davenport Division is comprised of following counties: Clinton, Des Moines, Henry, Johnson, Lee, Louisa, Muscatine, Scott, Van Buren and Washington.

Court sits at Davenport.

Deposit for fees required in all cases; plaintiff, $150, defendant in removal case, $150.

Supreme Court.

Sits at Des Moines.

Court of Appeals.

Sits at Des Moines.

District Courts.

State is divided into eight judicial districts, composed of several counties and judges in each district. District courts are courts of general original jurisdiction in all cases, including civil, criminal, and probate matters.

Districts.

First Judicial District: Counties of Allamakee, Black Hawk, Buchanan, Chickasaw, Clayton, Delaware, Dubuque, Fayette, Grundy, Howard, and Winneshiek.

Second Judicial District: Counties of Boone, Bremer, Butler, Calhoun, Carroll, Cerro Gordo, Floyd, Franklin, Greene, Hamilton, Hancock, Hardin, Humboldt, Marshall, Mitchell, Pocahontas, Sac, Story, Webster, Winnebago, Worth, and Wright.

Third Judicial District: Counties of Buena Vista, Cherokee, Clay, Crawford, Dickinson, Emmet, Ida, Kossuth, Lyon, Monona, O'Brien, Osceola, Palo Alto, Plymouth, Sioux, and Woodbury.

Fourth Judicial District: Counties of Audubon, Cass, Fremont, Harrison, Mills, Montgomery, Page, Pottawattamie, and Shelby.

Fifth Judicial District: Counties of Adair, Adams, Clarke, Dallas, Decatur, Guthrie, Jasper, Lucas, Madison, Marion, Polk, Ringgold, Taylor, Union, Warren, and Wayne.

Sixth Judicial District: Counties of Benton, Iowa, Johnson, Jones, Linn, and Tama.

Seventh Judicial District: Counties of Cedar, Clinton, Jackson, Muscatine, and Scott.

Eighth Judicial District: Counties of Appanoose, Davis, Des Moines, Henry, Jefferson, Keokuk, Lee, Louisa, Mahaska, Monroe, Poweshiek, Van Buren, Wapello, and Washington.

Place of Sitting.

Adair County: Fifth District; court sits at Greenfield.

Adams County: Fifth District; court sits at Corning.

Allamakee County: First District; court sits at Waukon.

Appanoose County: Eighth District; court sits at Centerville.

Audubon County: Fourth District; court sits at Audubon.

Benton County: Sixth District; court sits at Vinton.

Black Hawk County: First District; court sits at Waterloo.

Boone County: Second District; court sits at Boone.

Bremer County: Second District; court sits at Waverly.

Buchanan County: First District; court sits at Independence.

Buena Vista County: Third District; court sits at Storm Lake.

Butler County: Second District; court sits at Allison.

Calhoun County: Second District; court sits at Rockwell City.

Carroll County: Second District; court sits at Carroll.

Cass County: Fourth District; court sits at Atlantic.

Cedar County: Seventh District; court sits at Tipton.

Cerro Gordo County: Second District; court sits at Mason City.

Cherokee County: Third District; court sits at Cherokee.

Chickasaw County: First District; court sits at New Hampton.

Clarke County: Fifth District; court sits at Osceola.

Clay County: Third District; court sits at Spencer.

Clayton County: First District; court sits at Elkader.

Clinton County: Seventh District; court sits at Clinton.

Crawford County: Third District; court sits at Denison.

Dallas County: Fifth District; court sits at Adel.

Davis County: Eighth District; court sits at Bloomfield.

Decatur County: Fifth District; court sits at Leon.

Delaware County: First District; court sits at Manchester.

Des Moines County: Eighth District; court sits at Burlington.

Dickinson County: Third District; court sits at Spirit Lake.

Dubuque County: First District; court sits at Dubuque.

Emmet County: Third District; court sits at Estherville.

Fayette County: First District; court sits at West Union.

Floyd County: Second District; court sits at Charles City.

Franklin County: Second District; court sits at Hampton.

Fremont County: Fourth District; court sits at Sidney.

Greene County: Second District; court sits at Jefferson.

Grundy County: First District; court sits at Grundy Center.

Guthrie County: Fifth District; court sits at Guthrie Center.

Hamilton County: Second District; court sits at Webster City.

Hancock County: Second District; court sits at Garner.

Hardin County: Second District; court sits at Eldora.

Harrison County: Fourth District; court sits at Logan.

Henry County: Eighth District; court sits at Mt. Pleasant.

Howard County: First District; court sits at Cresco.

Humboldt County: Second District; court sits at Dakota City.

Ida County: Third District; court sits at Ida Grove.

Iowa County: Sixth District; court sits at Marengo.

Jackson County: Seventh District; court sits at Maquoketa.

Jasper County: Fifth District; court sits at Newton.

Jefferson County: Eighth District; court sits at Fairfield.

Johnson County: Sixth District; court sits at Iowa City.

Jones County: Sixth District; court sits at Anamosa.

Keokuk County: Eighth District; court sits at Sigourney.

Kossuth County: Third District; court sits at Algona.

Lee County: Eighth District; court sits at Ft. Madison and Keokuk.

Linn County: Sixth District; court sits at Cedar Rapids.

Louisa County: Eighth District; court sits at Wapello.

Lucas County: Fifth District; court sits at Chariton.

Lyon County: Third District; court sits at Rock Rapids.

Madison County: Fifth District; court sits at Winterset.

Mahaska County: Eighth District; court sits at Oskaloosa.

Marion County: Fifth District; court sits at Knoxville.

Marshall County: Second District; court sits at Marshalltown.

Mills County: Fourth District; court sits at Glenwood.

Mitchell County: Second District; court sits at Osage.

Monona County: Third District; court sits at Onawa.

Monroe County: Eighth District; court sits at Albia.

Montgomery County: Fourth District; court sits at Red Oak.

Muscatine County: Seventh District; court sits at Muscatine.

O'Brien County: Third District; court sits at Primghar.

Osceola County: Third District; court sits at Sibley.

Page County: Fourth District; court sits at Clarinda.

Palo Alto County: Third District; court sits at Emmetsburg.

Plymouth County: Third District; court sits at LeMars.

Pocahontas County: Second District; court sits at Pocahontas.

Polk County: Fifth District; court sits at Des Moines.

Pottawattamie County: Fourth District; court sits at Avoca and Council Bluffs.

Poweshiek County: Eighth District; court sits at Montezuma.

Ringgold County: Fifth District; court sits at Mt. Ayr.

Sac County: Second District; court sits at Sac City.

Scott County: Seventh District; court sits at Davenport.

Shelby County: Fourth District; court sits at Harlan.

Sioux County: Third District; court sits at Orange City.

Story County: Second District; court sits at Nevada.

Tama County: Sixth District; court sits at Toledo.

Taylor County: Fifth District; court sits at Bedford.

Union County: Fifth District; court sits at Creston.

Van Buren County: Eighth District; court sits at Keosauqua.

Wapello County: Eighth District; court sits at Ottumwa.

Warren County: Fifth District; court sits at Indianola.

Washington County: Eighth District; court sits at Washington.

Wayne County: Fifth District; court sits at Corydon.

Webster County: Second District; court sits at Ft. Dodge.

Winnebago County: Second District; court sits at Forest City.

Winneshiek County: First District; court sits at Decorah.

Woodbury County: Third District; court sits at Sioux City.

Worth County: Second District; court sits at Northwood.

Wright County: Second District; court sits at Clarion.

Probate Courts.

There are no separate probate courts. Probate jurisdiction is exercised by district courts. (Iowa Code 633.10).

Judicial Magistrates.

Judicial magistrates have jurisdiction of simple misdemeanors, including traffic and ordinance violations, preliminary hearings, search warrant proceedings, county and municipal infractions and small claims. Magistrates have jurisdiction to exercise powers specified in 556F.2 and 556F.12 and to hear complaints or preliminary informations, issue warrants, order arrests, make commitments, and take bail. Magistrates have jurisdiction over violations of § 123.49[2][h]. They may conduct hearings authorized under § 809.4. (Iowa Code 602.6405). For simple misdemeanors plaintiff may appeal only upon finding of invalidity of ordinance or statute. Defendant may appeal upon judgment of conviction. Execution of judgment stayed by filing of appeal bond. Party may orally notify magistrate of appeal or deliver written notice of appeal to magistrate within ten days of judgment. Payment of fine or serving sentence of imprisonment does not waive right to appeal. Upon appeal, case is tried anew in district court. (R. Crim. P. 2.73).

District Associate Judges.

District associate judges serve as full-time magistrates and have jurisdiction possessed by judicial magistrates (see 602.6306) and jurisdiction of civil actions to $10,000, Class D felonies, indictable misdemeanors, and juvenile proceedings. They shall hold court as directed at any place within judicial district that judicial magistrate may do so, and shall employ district judges practice and procedure. They may temporarily exercise jurisdiction of district court judge. While exercising such temporary jurisdiction they shall employ district judges' practice and procedure. Venue shall be as in other district court proceedings. Appeals from judgments of district associate judges while exercising jurisdiction possessed by judicial magistrates shall be governed by laws relating to appeals from judicial magistrates. Appeals from judgments while exercising any other jurisdiction shall be governed by laws relating to appeals from district judges. See category 5 Civil Actions and Procedure, topic 5.03 Appeal and Error. (Iowa Code 602.6301-.6306).

Small Claims.

Small claim is civil action for $5,000 or less, and certain replevin and forcible entry and detainer actions. Small claims on file for 90 days and not determined are dismissed without prejudice by clerk. (Iowa Code 631.8[1]). If commenced as regular action, shall be transferred to small claims docket. (Iowa Code 631.8[3]). Small claim action is commenced by filing of original notice with clerk. (Iowa Code 631.3). If action for money judgment, defendant required to appear not later than 20 days following date of filing of original notice. If action for forcible entry or detention original notice to be personally served, service to be at least three days prior to hearing date. (Iowa Code 631.4[2]). If personal service cannot be made, plaintiff may post original notice on real property sought to be detained and mail copy of original notice to defendant's last known address. (Iowa Code 631.4[2]). Both mailing and posting must be done three days before hearing date and only after two attempts to perfect personal service have been made. (Iowa Code 631.4[2]). Service shall be deemed complete upon filing with district court clerk, affidavit indicating that copies of original notice were both mailed and posted. (Iowa Code 631.4[2]). If defendant appears before appearance date, clerk assigns claim to magistrate for hearing at time not less than five days nor more than 20 days after defendant's appearance. Clerk notifies parties of time for hearing by ordinary mail. (Iowa Code 631.5). Hearing is informal, to court, is conducted without regard to technicalities of procedure, and will be reported electronically, unless party provides reporter at party's expense. (Iowa Code 631.11). Judgment is entered on original notice, and court may provide for installment payments. Such judgments are liens to same extent as other judgments of district courts. (Iowa Code 631.12). If defendant fails to appear, clerk renders judgment if relief is readily ascertainable. If relief not readily ascertainable, magistrate determines claim. (Iowa Code 631.5[6]).

6.02 LEGISLATURE:

2007 (first regular) session of 82d Iowa General Assembly will convene Mon., Jan. 8, 2007, and continue until end of Apr. Meets in Jan. of each year. Governor may call special sessions. (Const., art. III, § 2, Legislative Dept.).

Lobbyists.

See c. 68B.

6.03 REPORTS:

The decisions of Supreme Court of Iowa are published in the Iowa Reports, namely, 1 Morris, 1 to 4 Greene and Iowa reports beginning with Vol. 1 and continuing to Vol. 261. Iowa decisions in 158 N.W. 2d and subsequent thereto are official opinions of Iowa Supreme Court.

Digests are West's Iowa Digest and Iowa and Northwestern Digest, Iowa Code Annotated, and Callaghan's Iowa Digest.

6.04 STATUTES:

Latest compilation of Iowa statutes is Code of Iowa (2005).

Uniform Acts adopted are: Alcoholism and Intoxication Treatment (promulgated 1971, adopted 1974); Anatomical Gift (promulgated 1987, adopted 1995); Arbitration (promulgated 1955, adopted 1981); Attendance of Witnesses from Without a State in Criminal Proceedings, Act to Secure (promulgated 1936, adopted 1978); †Business Corporation (ABA 1959); Certification of Questions of Law (promulgated 1967, adopted 1980); Child Custody Jurisdiction and Enforcement (promulgated 1997, adopted 1999); Class Actions (promulgated 1976, adopted 1980); Commercial Code (adopted 1966, Adopted Article 2A (Leases), 1990 Revision of Article 3, 1990 Amendments to Article 4, Article 4A (Funds Transfers), 1994 Revision of Article 8, and 2000 Revision of Article 9; repealed Article 6 without adopting 1989 Revision of Article 6); Common

Trust Fund (promulgated 1938, adopted 1964); †Consumer Credit Code (promulgated and adopted 1974); Controlled Substances (promulgated 1970, adopted 1971); Criminal Extradition (promulgated 1936, adopted 1949); Declaratory Judgments (promulgated 1922, adopted 1943); Disclaimer of Property Interests (promulgated 1999, adopted 2004); †Disposition of Unclaimed Property (promulgated 1966, adopted 1967); Electronic Transactions (promulgated 1999, adopted 2000); Enforcement of Foreign Judgments (promulgated 1964, adopted 1980); Evidence, Rules of (promulgated 1974, adopted 1983); Federal Lien Registration (promulgated 1978, adopted 1989); Foreign Money-Judgments Recognition (promulgated 1962, adopted 1989); Fraudulent Transfer (promulgated 1984, adopted 1995); Interstate Family Support (promulgated 1994, adopted 1996 without repealing 1968 Uniform Reciprocal Enforcement of Support Act); Limited Partnership (promulgated 1997, adopted 1999); Management of Institutional Funds (promulgated 1972, adopted 1990); Military Justice (promulgated 1961, adopted 1965); Money Services (adopted 2003); Nonprobate Transfers on Death (Part 3 only) (promulgated 1991, adopted 1997); Partnership (promulgated 1997, adopted 1999); Photographic Copies of Business and Public Records as Evidence (promulgated 1949, adopted 1951); Post-Conviction Procedure (promulgated 1966, adopted 1970); Premarital Agreement (promulgated 1983, adopted 1992); Principal and Income (promulgated 1997, adopted 1999); Prudent Investor (promulgated 1994, adopted 2000); Reciprocal Enforcement of Support (promulgated 1968, but see Interstate Family Support above); Rendition of Prisoners as Witnesses in Criminal Proceedings (promulgated 1957, adopted 1995); †Residential Landlord and Tenant (promulgated 1972, adopted 1979); Rights of the Terminally Ill (promulgated 1985, adopted 1985); †Securities (promulgated 1959, adopted 1976); Simultaneous Death (promulgated 1940, adopted 1964); State Administrative Procedure (promulgated 1961, adopted 1975); Statutory Construction (promulgated 1965, adopted 1971); Testamentary Additions to Trusts (promulgated 1960, adopted 1964); Trade Secrets (promulgated 1985, adopted 1990); Transfer on Death Security Registration (promulgated 1989, adopted 1997); Transfers to Minors (promulgated 1983, adopted 1986).

Uniform Commercial Code adopted. (554). See category 3 Business Regulation and Commerce, topic 3.09 Commercial Code.

For text of Uniform Acts falling within the scope of the Martindale-Hubbell Law Digests see Uniform and Model Acts section.

†Adopted with significant variations or modifications. See appropriate topics.

6.05 UNIFORM LAWS:

For list of Uniform Acts in force in this state see topic 6.04 Statutes. For text of Uniform Acts within the scope of the Martindale-Hubbell Law Digests see Uniform and Model Acts section.

7 CRIMINAL LAW

7.00A BAIL:

See topic 7.01 Criminal Law.

7.01 CRIMINAL LAW:

Crimes and criminal procedure governed by Title XVI of Code.

Indictment or Information.

Prosecutions unless provided otherwise are by indictment or information.

Bail.

By constitution and by statute, all persons are bailable with sufficient sureties, except for certain felony offenses where proof is evident or presumption great. (811).

Interstate Compact for Supervision of Paroles and Probationers.

In effect. (Iowa Code 905.10).

Uniform Fresh Pursuit Law adopted. (806).

Uniform Criminal Extradition Act adopted. (820).

8 DEBTOR AND CREDITOR

8.01 ASSIGNMENTS:

(539).

Bonds, due bills and all non-negotiable instruments, and open accounts, are assignable, even though instrument purports to prohibit it. (Iowa Code 539.1-.3). Where provisions of foregoing sections conflict with Uniform Commercial Code, latter governs. (Iowa Code 539.1-.3). Includes those taking assignments in regular course of business. (Iowa Code 539.1).

Uniform Commercial Code adopted. (554). See category 3 Business Regulation and Commerce, topic 3.09 Commercial Code.

Instrument Transferring Title.

Except as required by Uniform Commercial Code, assignment is made by indorsement on instrument, or by other writing. (Iowa Code 539.1).

Filing and Recording.

Not required, except as provided in Uniform Commercial Code.

Notice.

Not required, except as provided in Uniform Commercial Code.

Effect.

Assignee's rights are subject to any defense or counterclaim which maker or debtor had against assignor before notice of such assignment, except as provided in Uniform Commercial Code. (Iowa Code 539.1-.3).

Assignment of wages of head of family must be signed and acknowledged by both husband and wife. Wage assignments, other than to labor union representing employee in labor relations with employer, are not binding on employer unless agreed to by employer in writing. (Iowa Code 539.4).

8.02 ATTACHMENT:

(639).

Attachment may be obtained in any civil action, by any plaintiff, including nonresident or foreign corporation, provided one or more of the necessary grounds exists. It may issue on a claim not payable in the state.

Grounds for attachment are that defendant is: (1) A foreign corporation or acting as such; or (2) a nonresident; (3) is about to remove property from the state without leaving sufficient to pay debts; (4) has disposed; or (5) is about to dispose of property with intent to defraud creditors; (6) has absconded so that ordinary process cannot be served on him; (7) is about to remove permanently out of the county and has property therein not exempt; or (8) is about to remove permanently out of the state, and refuses to pay or secure plaintiff's debt; (9) is about to remove property out of county with intent to defraud creditors; (10) is about to convert property into money in order to place it beyond reach of creditors; or (11) has property or rights in action which he conceals; (12) that debt is due for property obtained under false pretenses; (13) is about to dispose of property belonging to plaintiff; (14) is about to convert plaintiff's property into money for purposes of placing it beyond reach of plaintiff; or (15) is about to move permanently out of state and refuses to return property belonging to plaintiff. (Iowa Code 639.3). Attachment may be had before debt due on grounds 4, 5, and 12, or where defendant has removed or is about to remove from state and refuses to secure payment of debt, if plaintiff did not know of removal or contemplated removal when debt contracted. (Iowa Code 639.9).

Proceedings.

Plaintiff must file petition sworn to by him, or his agent or attorney (knowing the facts) setting out the claim and one or more grounds for attachment. (Iowa Code 639.3).

Bond.

Plaintiff must give bond with surety approved by clerk of court in penalty at least double value of property sought to be attached, in no event less than $250. Where only real property is attached, bond must be in penalty fixed by court or clerk. (Iowa Code 639.11, .12).

Levy.

The sheriff must, as nearly as the circumstances of the case will permit, levy upon property 50% greater in value than the amount of the claim. Any property not exempt from execution may be attached. (Iowa Code 639.7, .19).

Indemnity.

There is no statute authorizing the officer to demand indemnity before levying.

Priorities.

In case of two or more attachments, the attaching creditors do not share pro rata, but the attachments have priority in the order of their levy. (Iowa Code 639.20).

Release.

The defendant, or any person in possession of any attached property, or any person making affidavit that he has an interest in same, may, at any time before judgment, discharge the property attached by giving bond with security to be approved by the sheriff, or after return of the writ, by the clerk, in a penalty at least double value of property. Bond must be filed with clerk of court. (Iowa Code 639.45).

Sale.

Where the property attached is perishable, the sheriff may summon three persons having the qualification of jurors to examine it. Defendant, if within county, must have three days notice of the hearing. If it is the opinion of those who examine the property that it should be disposed of, they must specify in writing a day beyond which the property should not be kept. If this day occurs before trial, the property must be sold as goods are sold on execution. An earlier sale may be made if the condition of the goods warrants it. Sale may be made on written consent of defendant without such finding. (Iowa Code 639.48-.50).

Third Party Claims.

Any third party may, before sale of attached property or before payment to plaintiff of the proceeds thereof or any attached debt, present his verified petition to the court disputing the validity of the attachment or stating a claim to the attached property and setting forth the facts upon which the claim is founded. (Iowa Code 639.60).

Uniform Commercial Code enacted, effective July 4, 1966. See category 3 Business Regulation and Commerce, topic 3.09 Commercial Code.

8.03 [RESERVED]

8.04 CREDITORS' SUITS:

No statutory provisions, except those for equitable proceedings auxiliary to execution. (Iowa Code 630.16).

8.05 EXECUTIONS:

Judgments requiring payment of money or delivery of possession of property are enforced by execution. (Iowa Code 626.1).

Exemptions.

See topic 8.06 Exemptions.

Time for Issuance.

Executions may issue at any time before judgment is barred by statute of limitations, and from district and appellate courts may issue into any county. (Iowa Code 626.2).

Issuance of Writ.

Upon rendition of judgment, execution may be at once issued by clerk on demand of party entitled thereto. (Iowa Code 626.7).

Stay of Execution.

Stay must be taken within ten days from date of judgment. Time of stay under $100, three months, over $100, six months. No stays on judgments of appeal or writs of error. No stay allowed on judgment obtained by laboring men, or mechanics, for wages. (626). In order to obtain stay, debtor must give bond for payment of judgment, with interest and costs, with one or more freehold sureties. (Iowa Code 626.58). As to stay pending appeal, see category 5 Civil Actions and Procedure, topic 5.03 Appeal and Error.

Levy.

The officer must execute the writ by levying on the property of the judgment debtor, collecting the things in action by suit in his own name, or selling the same, and paying the proceeds, less his own costs, to the clerk. The officer must select for levy such property, in such quantities, as will be likely to bring the exact amount required to be raised as nearly as practicable, and may make other levies if necessary. (R.C.P. 1.1018). If real estate is levied upon, except by special execution under foreclosure, the officer must make an entry in the Incumbrance Book in the clerk's office, showing the number and title of the case, date of levy, date of entry, amount claimed, description of the real estate, and signature of the officer. This constitutes notice to all persons of such levy. (Iowa Code 626.20). Levy upon a judgment is made by entering upon the judgment docket a memorandum thereof. (Iowa Code 626.22). Property of the defendant in the possession of another or debts due him may be reached by garnishment. (Iowa Code 626.26). When levy is made on personal property, the sheriff takes possession thereof and signs and appends to execution its exact description at length, with date of levy. (R.C.P. 1.1020[1]).

If the creditor or his agent first so requests in writing, the officer may view the property, inventory its exact description at length, and append such inventory to the execution, with his signed statement of the number and title of the case, the amount claimed under the execution, the exact location of the property and in whose possession, and the last known address of the judgment debtor; and, if the property is consumer goods or if judgment debtor is not resident of this state, file with County Recorder of county where property is located his certified transcript of such inventory and statement; and, in all other cases, file with Secretary of State his certified transcript of such inventory and statement. Such filing shall be accepted by County Recorder or Secretary of State as financing statement and shall be marked, indexed and certified in same manner, and shall be constructive notice of levy to all persons. Whenever writ is satisfied or levy discharged officer shall file termination statement with County Recorder or Secretary of State. Fees normally charged by County Recorder or Secretary of State for filing of financing statement and filing of termination statement shall be paid by officer and shall be taxed by him as part of his costs of levy. (R.C.P. 1.1020[2]). Sheriff's duty to levy not applicable to garnishments. (Iowa Code 626.50).

Sale.

The sheriff must give four weeks notice of the sale of real estate and three weeks notice of the sale of personal property, by posting notice in three public places in the county, one of which must be in county courthouse, and in case of real estate or personal property of the value of $200, there must be two weekly newspaper publications in addition. (Iowa Code 626.74, .75).

Return.

Officer receiving execution must give receipt therefor, stating when it was received, and make return thereof, together with money collected, on or before 120th day from date of its issuance. (Iowa Code 626.16).

Redemption.

Real property, or an interest therein larger than a leasehold with two years unexpired term, may be redeemed by the debtor within one year after sale, during which time he is entitled to possession. His right to redeem is exclusive except that after expiration of six months and before expiration of nine months creditors whose claims became liens before expiration of the nine months or mortgagees, whether or not debt has matured, may redeem. (Iowa Code 628.2-.3, .5). Mortgage on less than ten acres may provide for six months redemption period if mortgagee waives right to deficiency judgment. (628.-26).

Creditors having right of redemption may redeem from each other within time above limited. (Iowa Code 628.8). When senior creditor redeems from his junior, he is required to pay off only amount of those liens which are paramount to his own (Iowa Code 628.9), but junior creditor may redeem from senior creditor as often as land is taken from him by virtue of paramount lien (Iowa Code 628.14).

Mode of redemption by lien holder is by paying into clerk's office amount necessary to effect same and filing his affidavit or that of his agent, stating as nearly as practicable nature of his lien and amount still due and unpaid thereon. (Iowa Code 628.18). Mode of redemption by title holder is by paying into clerk's office amount of certificate and all sums paid by holder thereof in effecting redemptions with interest and costs. (Iowa Code 628.3).

Rights of debtor in relation to redemption are transferrable. (Iowa Code 628.25).

Real property redeemed by debtor is thereafter free from any liability on judgment under which sale was made. (Iowa Code 628.3).

Chattels and leasehold interests with less than two years to run, when sold under execution, may not be redeemed. (628[2]).

Party who has stayed execution on judgment is not entitled to redeem. (Iowa Code 628.4).

If real property is not used for agricultural purposes and is not residence of debtor, or if it is residence of debtor but not single-family or two-family dwelling, period of redemption after foreclosure is 180 days. First 90 days after sale, right of redemption is exclusive to debtor and time periods provided in §§ 628.5, 628.15, and 628.16 are reduced to 135 days. (Iowa Code 628.28). If, for such property, deficiency judgment waived, then period of redemption reduced to 90 days. First 30 days after sale, debtor has exclusive right of redemption and time periods provided in §§ 628.5, 628.15, and 628.16 reduced to 60 days. (Iowa Code 628.28).

Where § 654.18 alternative nonjudicial voluntary foreclosure procedure used, junior lienholders have 30-day redemption period from date required notice sent. (Iowa Code 628.29).

Supplementary Proceedings.

When execution has been returned unsatisfied, plaintiff is entitled to order for examination of debtor (Iowa Code 630.1), or such order may be had on proof by affidavit that debtor has property which he unjustly refuses to apply towards satisfaction of judgment (Iowa Code 630.2). If debtor refuses to appear or refuses to answer all proper interrogatories he may be arrested and imprisoned until he complies. (Iowa Code 630.11). Upon proof that defendant will leave state, or conceal himself, he may be arrested and required to give bonds to appear, or in default thereof be imprisoned for safekeeping until his examination is concluded. (Iowa Code 630.14, .15). Other witnesses may also be required to appear and testify. (Iowa Code 630.5). If any property, rights, or credits, subject to execution, are thus ascertained, they may be levied upon accordingly. (Iowa Code 630.6). Court may also appoint receiver. (Iowa Code 630.7).

8.06 EXEMPTIONS:

(627).

General Exemptions.

Debtor who is resident of this state may hold exempt from execution following property: (1) All wearing apparel of debtor and debtor's dependents kept for actual use and trunks or other receptacles necessary for wearing apparel, not to exceed in value $1,000 in aggregate, and wedding/engagement rings owned and received on or before wedding date; (2) one shotgun, and either one rifle or one musket; (3) private libraries, family bibles, portraits, pictures, and paintings not to exceed $1,000 in aggregate; (4) interment space or interest in public or private burying ground, not exceeding one acre for any defendant; (5) debtor's interest, in household furnishings, household goods, and appliances held primarily for personal, family, or household use of debtor or dependent of debtor, not to exceed in value $2,000 in aggregate; (6) certain, specific interests in life insurance policies; (7) professionally prescribed health aids for debtor or dependent of debtor; (8) debtor's rights in: (a) social security benefit, unemployment compensation, or public assistance benefit, (b) veteran's benefit, (c) disability or illness benefit, (d) alimony, support, or separate maintenance, to extent reasonably necessary for support of debtor and dependents of debtor, (e) payment under pension, annuity, or similar plan or contract on account of illness, disability, death, age, or length of service, except for portion of payments attributable to contributions of debtor above normal and customary rate made within one year of filing bankruptcy petition, (f) other specific investment income; (9) one motor vehicle not to exceed $7,000 in value; (9A) in event of bankruptcy proceeding, debtor's interests in accrued wages and in state and federal tax refunds as of date of filing of petition in bankruptcy, not to exceed $1,000 in aggregate. This exemption is in addition to limitations contained in §§ 642.21 and 537.5105; (10) if debtor engaged in any profession or occupation other than farming, proper implements, professional books, or tools of trade of debtor or dependent of debtor, not to exceed $10,000 in aggregate; (11) if debtor is engaged in farming and does not exercise delay of enforceability of deficiency judgment or general execution under § 654.6 in relation to execution under which exemption claimed, any combination of following, not to exceed $10,000 in aggregate: (a) implements and equipment reasonably related to normal farming operation. This exemption in addition to motor vehicle held exempt under paragraph 9, (b) livestock and feed for livestock reasonably related to normal farming operation; (12) if debtor is engaged in farming agricultural land upon commencement of action for foreclosure of mortgage on agricultural land or for enforcement of obligation secured by mortgage on agricultural land, if deficiency judgment issued against debtor, and if debtor does not exercise delay of enforceability of deficiency judgment or general execution under § 654.6 in relation to execution under which exemption claimed, disposable earnings of debtor are exempt from garnishment to enforce deficiency judgment after two years from entry of deficiency judgment, §§ 642.21 and 642.22 notwithstanding. However, earnings paid to debtor directly or indirectly by debtor not exempt; (13) debtor's interests, not to exceed $100 in any cash, bank deposits, credit union share drafts or other deposits, or other personal property not otherwise specifically provided; (14) debtor's interest, not to exceed $500 in any residential rental deposit, residential utility deposit and any prepaid rent under any unexpired residential lease; (15) debtor's interest in payments reasonably necessary for support of debtor or debtor's dependents to or for benefit of debtor or debtor's dependents, including structured settlements, resulting from personal injury to debtor or debtor's dependents or wrongful death of decedent upon which debtor or debtor's dependents were dependent. (Iowa Code 627.6).

Purchase Money Claims.

No property is exempt from execution issued for purchase money of property claimed to be exempt. (Iowa Code 627.5).

Automobile necessary and used for purpose of earning a living is exempt, except as against purchase money mortgage or claim for damage occasioned by use on public highway in this state. (Iowa Code 627.7).

Money received as a pension from the United States is exempt in case of a resident, whether head of a family or not. (Iowa Code 627.8).

Workmen's compensation awards are exempt except for non-Federally protected financial support indebtedness. (Iowa Code 627.13).

Rights of surviving widow in exempt property. See category 13 Estates and Trusts, topic 13.07 Descent and Distribution.

Proceeds of Insurance.

See 627.6(6) as amended by 1988 legislation and 627.6(8) as amended by 1992 legislation and 627.6(8) as amended by 1999 Acts.

Earnings.

Individual earnings exempt as provided by Federal Consumer Protection Act, Title III. No judgment creditor can garnish debtor earning less than $12,000 per year for more than $250 per year. Debtor earning more than $12,000 per year can be garnished in higher amounts pursuant to 642.21.

Homestead Exemption.

See topic 8.10 Homesteads.

Bankruptcy Exemption.

Debtor to whom law of this state applies on date of filing of petition in bankruptcy is not entitled to elect to exempt from property of bankruptcy estate property that is specified in 11 U.S.C. § 522(d) (1979). This section is enacted for purpose set forth in 11 U.S.C. § 522(b)(1) (1979). (See 627.10.)

8.07 FORECLOSURE:

See topic 8.13 Liens; category 20 Mortgages, topic 20.04 Mortgages of Real Property.

8.08 FRAUDULENT SALES AND CONVEYANCES:

Grantor of real estate conveyed in fraud of creditors shall, as to such creditors, be deemed equitable owner thereof, and such interest may be attached, when petition alleges such fraudulent conveyance and holder of legal title is made party to action. (Iowa Code 639.60).

Bulk Sales.

Art. 6 of Uniform Commercial Code repealed. (554).

8.09 GARNISHMENT:

Property or money belonging to defendant in hands of debtor may be garnished either in attachment proceedings or upon execution. (Iowa Code 642.13).

Answer of Garnishee.

When plaintiff, in writing directs sheriff to take answer of garnishee, sheriff shall put to garnishee specific questions and append examination to sheriff’s return. (Iowa Code 624.5).

When garnishee has answered interrogatories propounded to garnishee, plaintiff may controvert them by pleading thereto, and issue may be joined, which shall be in usual manner, upon which trial such answer of garnishee shall be competent testimony. (Iowa Code 642.11).

Judgment.

If garnishee is indebted to defendant or is in possession of property not exempt, judgment may be entered against him for amount of his indebtedness, not exceeding amount of claim, or the property in his hands. (Iowa Code 642.13).

Release.

The garnishee may be released by payment or delivery to officer of the money or property in his possession belonging to the defendant. (Iowa Code 642.10).

Exemption of Earnings.

See topic 8.06 Exemptions.

8.10 HOMESTEADS:

The homestead of every family, whether owned by the husband or wife, and within the limit as to value, is exempt except as to debts contracted prior to its acquisition, those created by written contract by persons having the power to convey expressly stipulating that it shall be liable, and those incurred for work done or material furnished exclusively for the improvement of the homestead. (Iowa Code 561.16, 561.21).

Limitation of Value and Area.

A homestead must embrace the house used as a home by the owner and may contain one or more contiguous lots or tracts of land with the building and other appurtenances thereon used in good faith as part of the same. If within a city or town plat, it must not exceed one-half acre, otherwise it must not contain more than 40 acres but, if the value of such area is less than $500, the area may in either event be enlarged until it reaches the value of $500. It must not embrace more than one dwelling house, and the buildings appurtenant thereto; but may include building situated thereon used by owner in business not exceeding $300 in value. (Iowa Code 561.1, .2, .3).

Designation of Homestead.

Owner may select homestead and record plat of it, and may change or vacate plat. (Iowa Code 561.4, .7).

Claim of Exemption.

After levy, owner must plat and record, where statutory notice to do so is given by levying officer to owner or spouse. Owner failing, officer must plat and record. (Iowa Code 561.5).

Conveyance or Encumbrance.

Subject to the rights of the surviving husband or wife, the homestead may be devised like other real estate of a testator, but no conveyance or encumbrance of or contract to convey or encumber the homestead is valid unless the husband and wife join in the execution of the same or like instrument. However, if one spouse specifically relinquishes homestead rights in conveyance by other spouse it is not necessary that first mentioned spouse join in granting clause. (Iowa Code 561.13). Purchase money mortgage is valid although purchaser's spouse did not join therein or relinquish homestead rights. (See 14 Iowa. 438.)

Effective May 30, 1986, if homestead exemption waiver contained in written contract, affecting agricultural land or appurtenances on land, contract must contain statement in substantially following form, in boldface type of minimum size of ten points, signed and dated by person waiving exemption at time of contract's execution: "I understand that homestead property is in many cases protected from the claims of creditors and exempt from judicial sale; and that by signing this contract, I voluntarily give up my right to this protection for this property with respect to claims based upon this contract." (Iowa Code 561.22).

Rights of Surviving Spouse.

In case of death of homestead owner, surviving spouse has a right to elect to retain the homestead for life in lieu of his or her distributive share of the real estate. (Iowa Code 561.12; 633.240).

8.11 JUDGMENT NOTES:

See category 3 Business Regulation and Commerce, topic 3.02 Bills and Notes.

8.12 LEVY:

See topics 8.02 Attachment, 8.05 Executions.

8.13 LIENS:

Livery and feed stable keepers, herders, feeders and keepers of stock and garage keepers have liens on all property coming into their hands for charges and expenses of keeping; may be enforced by sale of said property after giving to the owner or claimant, if found within the county, ten days notice in writing of the time and place of sale and posting written notices thereof in three public places in the township where the property was kept. (579).

Artisan has a lien for services or material in making, repairing or improving personal property, while same is lawfully in his possession; may be enforced by suit in equity or in same manner as common carrier's lien. (577).

Hotel keeper has a lien on baggage of guest for accommodations, etc., furnished and money paid for or advanced to guest; may be enforced by taking and retaining possession of all baggage and by action at law aided by attachment and execution or, after 90 days, by sale of baggage after notice. (583).

Hospital furnishing medical or other service to person injured in accident not covered by Workmen's Compensation Act has lien for its reasonable charges on any recovery by such person or his representative for such injury. Written notice of lien must be filed in office of clerk of district court of county in which hospital is located and a copy mailed to person alleged to be liable. (582).

Veterinarian shall have agricultural lien as provided in § 554.9102 for actual and reasonable value of treating livestock, including cost of any product used and actual and reasonable value of any professional service rendered by veterinarian. Veterinarian is secured party and owner of livestock is debtor for purposes of c. 554, art. 9. Lien applies to livestock treated by veterinarian. (Iowa Code 581.2A). Such lien may receive special priority if perfected. (Iowa Code 581.2). Veterinarian may enforce his lien in manner provided for agricultural liens pursuant to UCC, § 554, Art. 9, Part 6. (Iowa Code 581.4).

Harvester's Lien.

One who bales, chops, combines, cuts, husks, picks, shells, stacks, threshes, or winnows crop shall have agricultural lien as provided in § 554.9102 for reasonable value of harvesting services. Such harvester is secured party and person for whom harvester renders such harvesting services is debtor for purposes of c. 554, Art. 9. Lien applies to crops harvested by harvester. (Iowa Code 571.1A, .1B). Liens perfected under § 571.3 have priority over conflicting security interest in harvested crops regardless of when such security interest is perfected. (Iowa Code 571.3A). Lien is enforced in manner provided for agricultural liens pursuant to UCC § 554, Art. 9, Part 6. (Iowa Code 571.5).

Release of Property.

The owner of any personal property within the state where the same is held by any one claiming a common law or statutory lien upon the said property, may have the property released upon the giving of a bond in double the amount of the lien claimed, conditioned on the payment to the one claiming the lien, any sum that may be found to be due and to have been a lien on the personal property at the time the bond was given, by the judgment of any court having jurisdiction. The bond must be signed by one or more sureties and be filed with and approved by clerk of district court. After the bond is filed and written notice of such filing given, the one claiming the lien must surrender possession of the property to the owner thereof. (584).

Redemption.

There is no right of redemption as to personalty sold in the enforcement of a lien thereon.

Mechanics' Liens.

Person laboring on or furnishing material, machinery, or fixtures for any building or improvement upon land, including those engaged in the construction or repair of any work of internal improvement, or in grading, sodding, installing nursery stock, landscaping, sidewalk building, or fencing any land or lot by virtue of any contract with owner, may have for his labor done or material furnished, lien upon said improvement and upon the land belonging to the owner on which it is situated. (Iowa Code 572.2).

To protect lien against subsequent purchasers in good faith and without notice, party entitled to lien must file with clerk of district court verified statement of claim after allowing all credits, showing dates of performing labor or furnishing material together with correct description of property to be charged with lien and name and last known mailing address of owner, agent, or trustee of property. (Iowa Code 572.8). If principal contractor, or if subcontractor within 90 days from date on which last material or labor was furnished. Failure to file such statement does not defeat lien, but it becomes subject to rights of purchasers or encumbrancers in good faith, without notice, whose rights accrued after expiration of 90 days and before statement was filed. (Iowa Code 572.9). In case of lien upon railway, subcontractor shall have 90 days from last day in month in which last labor was done or material furnished in which to file his statement. (Iowa Code 572.12). In case of "owner-occupied dwelling" lien of subcontractor is not enforceable except to extent of amount owed to principal contractor at time subcontractor serves written notice form of claim on owner. (Iowa Code 572.14). Subcontractor filing his statement more than 90 days after last materials or services were provided must also serve notice of filing of lien on owner or his agent in order fully to protect his lien against subsequent purchasers or encumbrances. (Iowa Code 572.10). Subcontractor may be awarded exemplary damages from principal contractor for failure to pay after receiving full payment from owner. (Iowa Code 572.30).

Foreclosure.

Mechanic's lien is enforced by equitable proceeding within two years from expiration of time for filing lien. (Iowa Code 572.26-.27). If owner serves written demand for suit, action must be commenced within 30 days or rights are lost. (Iowa Code 572.28).

Public Improvements.

Person performing labor or furnishing materials, service, transportation, feed, provisions, fuel, lubricants, or workmens compensation insurance, in construction of any public improvement may make claim against bond required of contractor officer of public corporation by filing with board or commission authorized by law to let contracts for such improvement verified, itemized statement of demand, within 30 days after completion and final acceptance of improvement. (Iowa Code 573.1, .10). Claims for material, unless ordered by general contractor or his authorized agent, must be supported by certified statement that general contractor was notified within 30 days after materials were furnished, or by itemized invoices rendered to contractor during progress of work, of amount, kind and value of material. (Iowa Code 573.15). On improvement involving $25,000 or over, principal contractor must give bond, in amount not less than 75% of contract price, for faithful performance of contract and payment of all just claims for labor or material. If no part of contract price paid until after completion of improvement, amount of bond may be 25% of contract price. (Iowa Code 573.2, .5).

Public corporation, principal contractor, any claimant for labor or material who has filed his claim, or surety on any bond given for performance of contract, may after expiration of 30 days and not later than 60 days following completion and final acceptance of such improvement, bring action in equity in county where improvement is located to adjudicate all rights to said fund or to enforce liability on said bond. (Iowa Code 573.16). Court must adjudicate all claims and payments must be made in following order: Costs of action, claims for labor, claims for materials, claims of public corporation. (Iowa Code 573.18).

Attachment Lien.

See topic 8.02 Attachment.

Attorney's Lien.

See category 18 Legal Profession, topic 18.01 Attorneys and Counselors.

Execution Lien.

See topic 8.05 Executions.

Judgment Lien.

See category 5 Civil Actions and Procedure, topic 5.15 Judgments.

Landlord’s Lien.

See category 21 Property, topic 21.10 Landlord and Tenant.

Liens on Exempt Property.

See topic 8.06 Exemptions.

Liens on Homestead.

See topic 8.10 Homesteads.

Real Estate Mortgage Lien.

See category 20 Mortgages, topic 20.04 Mortgages of Real Property.

Tax Lien.

See category 22 Taxation, topic 22.13 Property Taxes, subhead Lien.

Uniform Commercial Code adopted. (554). See category 3 Business Regulation and Commerce, topic 3.09 Commercial Code.

8.14 MECHANICS’ LIENS:

See topic 8.13 Liens.

8.15 PLEDGES:

Uniform Commercial Code adopted. (554). See category 3 Business Regulation and Commerce, topic 3.09 Commercial Code.

Pledgee of stock of corporation under Iowa Business Corporation Act may vote. (Iowa Code 490.724[2][d]). See category 2 Business Organizations, topic 2.03 Corporations.

8.16 RECEIVERS:

On petition of either party to civil action or proceeding, where he shows that he has probable right to or interest in any property which is subject of controversy, and that such property or its rents and profits are in danger of being lost or materially injured or impaired, court may appoint receiver to take charge of such property during pendency of action. (Iowa Code 680.1).

See also category 2 Business Organizations, topic 2.03 Corporations.

8.17 REDEMPTION:

See topics 8.05 Executions, Liens; categories 20 Mortgages, topic Mortgages of Real Property; Taxation, topic Taxes.

8.18 SUPPLEMENTARY PROCEEDINGS:

See topic 8.05 Executions.

8.19 TRUSTEE PROCESS:

See topic 8.09 Garnishment.

8.20 USURY:

See category 3 Business Regulation and Commerce, topic 3.17 Interest.

9 DISPUTE RESOLUTION

9.01 ALTERNATIVE DISPUTE RESOLUTION:

Mandatory Dispute Resolution.

Neither Iowa legislature nor Iowa courts have imposed any rules or regulations requiring individuals to submit to mandatory alternative dispute resolutions except that in certain situations involving issues of public welfare, parties may be required to submit to mediation, arbitration or binding arbitration. (Iowa Code 20.20-22, 275.30, 357A.21, 358.30, 679B).

Voluntary Dispute Resolution.

Locally organized dispute resolution centers have been created to make mediators and informal dispute resolution procedures available in many types of cases, including civil claims and disputes, child custody and visitation disputes, juvenile offenses and criminal complaints. (Iowa Code 679.5). Mediation also is contemplated under Iowa law in several other types of matters such as farm credit disputes and warranty disputes. (654A). Arbitration is available to individuals if enforceable arbitration agreement exists, but generally application can be made to district court to confirm, modify or vacate award. (679A-679B).

9.02 ARBITRATION AND AWARD:

(c. 679A).

Uniform Arbitration Act adopted.

Controversy which might be subject of civil action may be submitted to decision of one or more arbitrators by written agreement of parties specifying demands to be submitted, names of arbitrators, and court by which judgment on award to be rendered.

Rescission.

Submission cannot be revoked except by consent of parties.

Judgment on Award.

When award is adopted it has same force and effect as jury verdict and judgment may be entered and execution issued accordingly and appeal may be taken to Supreme Court. (679A.14).

Labor Disputes.

A dispute arising between any employers and their employees or association of employees, except employers or employees having interstate trade relations operating through or by state or international boards of conciliation, which dispute is likely to cause a strike or lock-out involving ten or more wage earners and is likely to interfere with business, or public peace, or the welfare of the community, may be referred to a board of arbitration, on application of either of the parties, or of the mayor of the city, or the chairman of the board of supervisors of the county or on petition of twenty-five citizens. The Governor appoints two members of the board, who appoint a third. Witnesses may be subpoenaed, evidence taken and decisions made and filed with the Governor who shall publish the same. The decision is binding only if so agreed in advance by the parties. (679B.1-679B.8).

Implementation of Agreements to Arbitrate.

Validity of agreement, and procedural aspects of arbitration process including hearing, vacating award, modification and judgment or decree or award, adopted in 679A, and applies to agreements made after July 1, 1981.

10 DOCUMENTS AND RECORDS

10.01 ACKNOWLEDGMENTS:

Acknowledgment of any deed, conveyance, or other instrument in writing by which real estate in this state is conveyed or encumbered, whether made within this state, outside this state, outside U.S., or under federal authority is notarial act and must comply with c. 9E. (Iowa Code 558.20).

Notarial acts in this state may be performed by following persons: Notary public; judge, clerk, or deputy clerk of court of this state; person authorized by law of this state to administer oaths; any other person authorized to perform specific act by law of Iowa; registrar of vital statistics or designee of registrar of vital statistics. (9E.10).

Notarial acts in other jurisdictions of U.S. have same effect under law of Iowa as if performed by notarial officer of Iowa, if notarial act is performed in another state, commonwealth, territory, district, or possession of United States by any of following persons: notary public of that jurisdiction; judge, clerk, or deputy clerk of court of that jurisdiction; any other person authorized by law of that jurisdiction to perform notarial acts. (9E.11).

Notarial acts under federal authority have same effect under law of Iowa as if performed by notarial officer of Iowa, if notarial act is performed anywhere by any of following persons under authority granted by law of United States: judge, clerk, or deputy clerk of court; commissioned officer on active duty in military service of United States; officer of foreign service or consular officer of U.S.; any other person authorized by federal law to perform notarial acts. (9E.12).

Married persons acknowledge as though sole; separate examination not required. (Iowa Code 558.35).

Attorneys in Fact.

Execution of written instrument by attorney in fact may be acknowledged by attorney executing it. (Iowa Code 558.36).

Necessity and Effect.

Acknowledgment is not necessary to validity of any instrument except assignment of wages by head of family. (Iowa Code 539.4). Document shall not be deemed lawfully recorded, unless it has been previously acknowledged or proved in manner prescribed in c. 9E, except that affidavits, and certified copies of petitions in bankruptcy with or without schedules appended, of decree of adjudication in bankruptcy, and of orders approving trustees' bonds in bankruptcy, and Uniform Commercial Code financing statements and financing statement changes need not be thus acknowledged. (Iowa Code 558.42).

Proof by Witness.

Proof of the due and voluntary execution and delivery of a deed or other instrument may be made before any officer authorized to take acknowledgments by one competent person other than the vendee or other person to whom the instrument is executed in the following cases: (1) If the grantor dies before making the acknowledgment; (2) if his attendance cannot be procured; (3) if, having appeared, he refuses to acknowledge the execution of the instrument. (Iowa Code 558.31).

In such case the certificate of the officer must state (1) title of officer taking proof, (2) that it was satisfactorily proved that grantor was dead, or that for some other reason his attendance could not be procured in order to make acknowledgment, or that, having appeared, he refused to acknowledge same, (3) name of witness by whom proof was made, and that it was proved by him that instrument was executed and delivered by person whose name is thereunto subscribed as party. (Iowa Code 558.32).

Authentication.

For acknowledgments in Iowa, in other jurisdictions of U.S., or made under federal authority, signature and title of person performing acknowledgment are prima facie evidence that signature is genuine and that person holds designated title. (9E.10, .11, .12).

Secretary of State will issue certificate stating person residing in state bordering Iowa is Notary Public in State of Iowa if such person has place of work in Iowa. (9E.3). Fee for issuance is $30. (9E.6).

Alternative to Acknowledgment or Proof.

No statutory provision.

Forms—Certificate of Notarial Acts.

Notarial act must be evidenced by certificate signed and dated by notarial officer. Certificate must include identification of jurisdiction in which notarial act is performed and title of office of notarial officer and shall include official stamp or seal of office. If notarial officer is commissioned officer on active duty in military service of U.S., certificate must also include officer’s rank. (9E.14[1]).

The following short form certificates of notarial acts are sufficient for the purposes indicated, if completed with the information required by § 9E.14(1).

1. For an acknowledgment in an individual capacity:

State of . . . .

(County) of . . . .

This instrument was acknowledged before me on . . . . . (date) by . . . . (name(s) of person(s)).

(signature, title (and rank), and stamp/seal of notarial officer)

2. For an acknowledgment in a representative capacity:

State of . . . .

(County) of . . . .

This instrument was acknowledged before me on (date) by (name(s) of person(s)) as (type of authority, e.g., officer, trustee, etc.) of (name of party on behalf of whom instrument was executed).

(signature, title (and rank), and stamp/seal of notarial officer)

3. For a verification upon oath or affirmation:

State of . . . .

(County) of . . . .

Signed and sworn to (or affirmed) before me on . . . . by . . . . (date) (name(s) of person(s) making statement).

(signature, title (and rank), and stamp/seal of notarial officer)

4. For witnessing or attesting a signature:

State of . . . .

(County) of . . . .

Signed or attested before me on . . . . . by . . . . (date) (name(s) of person(s)).

(signature, title (and rank), and stamp/seal of notarial officer)

5. For attestation of a copy of a document:

State of . . . .

(County) of . . . .

I certify that this is a true and correct copy of a document in the possession of . . . . Dated . . . . .

(signature, title (and rank), and stamp/seal of notarial officer)

(9E.15).

Validating Acts.

Any written instrument, and recording thereof, acknowledged more than ten years earlier, in proper county, is legalized and valid, although defectively acknowledged. (Iowa Code 586.1).

10.02 AFFIDAVITS:

Affidavits should be made in writing, under oath, before any person authorized to administer oaths within or without the state. (Iowa Code 622.85).

Affidavits may be made before: The judges, including district associate and magistrates, official reporters and clerks of courts, notaries public, certified short hand reporters. (63A.1). Affidavits taken out of state before any judge or clerk of court of record, before notary public, or before commissioner appointed by governor of Iowa, are of same credibility as if taken within state. (Iowa Code 622.86).

General Requirements.

The parties making oath must appear before the officer; otherwise the officer may not lawfully attach his seal to the document sworn to. (9E.9).

Use of Affidavits.

May be used to evidence facts such as posting of notice. (Iowa Code 622.92, 94).

Alternative to Affidavit.

No statutory provision.

Form of Jurat

State of . . . ., County of . . . ., ss: Signed and sworn to before me this . . . . day of . . .., ... (Seal impression affixed, followed by title and signature of officer.) (9E.15[3]).

10.03 NOTARIES PUBLIC:

(9E).

Secretary of state may appoint as notaries public Iowa residents and residents of bordering states whose work or business is within state of Iowa. (9E.3). All applicants, except members of general assembly, must pay $30 fee. (9E.6). Notary public term is three years for Iowa residents, one year for residents of bordering states and length of term of office for general assembly members. (9E.4).

Powers.

Notaries are authorized to take acknowledgments, take verifications upon oath or affirmation, witness or attest signature, certify or attest copy of document, and make or note protest to negotiable instrument. (9E.9).

Certificate of Authority.

See topic 10.01 Acknowledgments, subheads Authentication and Forms—Certificate of Notarial Acts.

Stamp or Seal.

No stamp or seal is required to execute notarial act by judicial officer. (9E.6A).

10.04 RECORDS:

No instrument affecting real estate is valid against subsequent purchasers for value without notice unless filed and recorded in county in which real estate is located. (Iowa Code 558.41). *For list of Counties and County Seats see first page for this state in Volume containing Practice Profiles Section.* No instrument deemed lawfully recorded unless previously acknowledged in manner prescribed. (Iowa Code 558.42). No deeds or other instruments unconditionally conveying real estate, or altering real estate contract, will be recorded until entered for taxation upon transfer books in office of county auditor. (Iowa Code 558.57). With each declaration of value submitted to county recorder, there must be submitted statement regarding whether any private burial sites, wells, solid waste, disposal sites, underground storage tanks, or hazardous wastes are known to be situated on property. (Iowa Code 558.69).

Uniform Commercial Code adopted. (554). See category 3 Business Regulation and Commerce, topic 3.09 Commercial Code.

Filing Under Commercial Code.

In § 9-501 (IA 554.9501), relating to place of filing to perfect security interest, second alternative subsection has been adopted as subsection (1). Proper office for filing pursuant to this subsection is office of county recorder or secretary of state (Secretary of State, UCC Filings, Hoover State Office Building, Des Moines, IA 50319), depending on nature of collateral. If on form conforming to standards prescribed by secretary of state, filing fee shall be $10 for one or two pages, $20 if there are additional pages. Fee is $5 if filed in authorized non-paper manner.

Recording Fees.

$5 for each page or fraction thereof, plus additional transaction fee of no more than $4, depending on transaction and as provided by statute. (Iowa Code 331.604).

Torrens Act.

No Torrens Act or other statute for registration of land titles is in force.

Transfer of Decedent's Title.

Probate records are sufficient to show transfer to decedent's devisees or heirs of his title to real estate in county where estate was administered. Certified transcript of probate proceedings should be filed with clerk of district court in any other county in which real estate of decedent is situated in order to show transfer of title thereto. If decedent was a nonresident, ancillary administration is usually necessary, although in some situations where the statute of limitations has run or security for claims of creditors has been given the filing of a transcript of foreign probate proceedings may be accepted as showing merchantable title, save for showing as to inheritance tax. (Iowa Code 633.350).

Vital Statistics.

Reports of births and deaths must be made to local registrar of vital statistics; of marriages to clerk of district court of county where solemnized. (144).

Copies of birth, death or marriage certificates may be obtained from Clerk of District Court of county or from State Registrar of Vital Statistics, Iowa State Department of Health, Records Division, Lucas Building, Des Moines, Iowa 50319. Fee, $10.

Establishing Birth Records.

Department of Vital Statistics will issue a certificate on presentation of prescribed evidentiary requirements. (Iowa Code 144.13).

10.05 SEALS:

Use of private seals on written contracts, except those of corporations, is abolished. (537A.1).

Corporate Seals.

In the execution of instruments affecting real estate a corporation may attach its seal. If none has been adopted such fact may be stated in conveyance. (Iowa Code 558.2-.3).

Effect of Seal.

Use of seals has no legal effect.

Uniform Commercial Code adopted. (554). See category 3 Business Regulation and Commerce, topic 3.09 Commercial Code.

10.06 TORRENS ACT:

None.

10.07 VITAL STATISTICS:

See topic 10.04 Records.

11 EMPLOYMENT

11.01 EMPLOYER AND EMPLOYEE:

See topic 11.02 Labor Relations.

11.02 LABOR RELATIONS:

For regulations as to labor disputes, see category 9 Dispute Resolution, topic 9.02 Arbitration and Award. For provisions as to lien for labor, see category 8 Debtor and Creditor, topic 8.13 Liens.

Child Labor.

Child under ten may not work in street occupations of peddling, bootblacking, distribution or sale of newspapers, magazines, periodicals, or circulars. Child under 12 may not work in connection with migratory labor. (Iowa Code 92.1). Child 12 to 14 may not work in connection with migratory labor during school hours. (Iowa Code 92.3). Child under 16 may not work in any occupation during school hours except for limited exceptions. (Iowa Code 92.4). Child 14 to 15 may work in retail food and gasoline service areas, office and clerical work, cashiering, selling, modeling, art work, advertising, window trimming, comparative shopping, price marking, assembling orders, bagging and carry-out service, errand and delivery, clean-up work, kitchen work, cleaning vegetables and fruits. (Iowa Code 92.5). Child 14 to 15 may not work in any mine, manufacturing occupation, processing occupations, public messenger service, operation of any power-driven machinery, hazardous occupations, transportation of persons or property, warehousing and storage, communications and utilities, construction, including repair, certain occupations in retail food or gasoline service establishments. (Iowa Code 92.6). Child under 18 shall not work in any occupation concerning explosives, motor vehicle driver and helper, logging and sawmill occupations, power-driving wood-working machines, radioactive substances, elevators, power-driving machinery, mining, meat packing and slaughtering, manufacturing of brick and tile, shipbreaking operations, roofing operations, excavation, foundries, laundry and poisonous dyes or chemicals, and others. (92). Employer who violates these regulations is subject to civil penalty of $10,000 for each violation. (Iowa Code 92.2).

Health and Safety Appliances-Labor-Occupational Safety and Health Act.

Labor commissioner authorized to set mandatory occupational safety and health standards applicable to business, and an occupational safety and health review commission created for carrying out adjudicatory functions. (Iowa Code 88.1). Each employer, a person engaged in a business who has one or more employees, including state, its agencies and political subdivisions, has duty to furnish to employees employment and a place of employment free from recognized hazards that are causing or likely to cause death or serious physical harm to his employees, and comply with standards promulgated under Act. (Iowa Code 88.3, .4). Each employee has duty to comply with such standards applicable to him. (Iowa Code 88.4). Each employer must keep such records as prescribed by commissioner including records of deaths, injuries, illnesses, loss of consciousness, restriction of work or motion, transfer to another job, and exposures to toxic materials. (Iowa Code 88.6).

Wages must be paid employee at least monthly on regular paydays. Regular payday shall not be more than 12 days, excluding Sundays and legal holidays, after end of period in which wages were earned, except upon written agreement between employer and employee. Expenses incurred by employee and authorized by employer must be reimbursed in advance or within 30 days after submission of expense claim. (91A.3). When employment suspended or terminated, employer must pay all wages earned (less deductions) up to time of suspension or termination not later than next regular payday. If vacations are due employee under agreement with employer or policy of employer establishing pro rata vacation accrued, increment shall be in proportion to fraction of year which employee was employed. (91A.4).

Priority is accorded to all wage claims for services rendered within 90 days preceding an assignment for benefit of creditors (Iowa Code 681.13); to extent of $100 when property is seized under process or placed in the hands of a receiver (Iowa Code 626.69).

Iowa minimum wage shall be either that imposed by Fair Labor Standards Act, 29 U.S.C. § 206, or State minimum wage defined in c. 91D.1, whichever is greater. (91D.1).

Labor Unions.

Membership and nonmembership in unions recognized and protected. (Iowa Code 731.1). “Right to work” law adopted. (732).

Workmen’s Compensation Act provides compensation for injuries to employees in the course of, and arising out of, the employment. (85). Exemptions from compensation listed. (Iowa Code 85.1 et seq.).

In said act there is schedule by which compensation of any injured employee is to be determined. (Iowa Code 85.36, .34). All settlements are subject to the approval of workers’ compensation commissioner. (Iowa Code 85.35). Action for recovery under compensation law must be begun within two years after injury. (Iowa Code 85.26). Action for review of award or agreement for settlement must be brought within three years after last payment of compensation. (Iowa Code 85.26). Judicial review of decisions or orders of Industrial Commissioner may be sought in accordance with c. 17A, Iowa Administrative Procedure Act, or petitions for judicial review may be filed in district court of county where hearing was held. Said reviews are given priority over other matters pending before district court. (Iowa Code 86.26).

Each employer coming within provisions of act is required to insure with some responsible company approved by commissioner of insurance against liability under said act, and all insurance is required to be carried for benefit of employees or their dependents. (Iowa Code 87.1). Upon showing of financial responsibility or posting security which is satisfactory to industrial and insurance commissioner, employer may be relieved from obligation of carrying insurance. (Iowa Code 87.11).

Occupational Diseases.

Certain occupational diseases are compensable. (85A).

Unemployment Compensation.

With numerous exceptions and qualifications, payable to persons involuntarily unemployed who have worked for covered employer or who have worked in declining occupation. (96).

Discrimination.

Employer shall not discriminate on basis of age, race, creed, color, sex, sexual orientation, gender identity, national origin, religion, or disability of such applicant or employee, unless based upon nature of occupation. (Iowa Code 216.6). Wage discrimination—paying members of above-referenced groups lower wage than other employees—is also considered employment discrimination under Iowa statute. (Iowa Code 216.6A).

11.03 WORKERS' COMPENSATION LAW:

See topic 11.02 Labor Relations.

12 ENVIRONMENT

12.01 ENVIRONMENTAL REGULATION:

General Supervision.

Director of Department of Natural Resources, Natural Resource Commission, Environmental Protection Commission. Director plans, coordinates, and executes functions vested in department. Natural Resource Commission establishes policy and adopts rules to provide for effective management of lands and waters of Iowa. Environmental Protection Commission establishes policy and adopts rules to provide for effective protection of environment of Iowa. (455A.4-.6).

Prohibited Acts of Pollution.

Air Pollution.

Defined as: Presence in outdoor atmosphere of one or more air contaminants in sufficient quantities and of such characteristics and duration as is or may reasonably tend to be injurious to human, plant, or animal life, or to property, or which unreasonably interfere with enjoyment of life and property (455B.131). Prohibited acts specified in statute. (455B).

Water Pollution.

Defined as: Contamination or alteration of physical, chemical, biological, or radiological integrity of any water of state by source resulting wholly or partly from activities of humans, which is harmful, detrimental, or injurious to public health, safety, or welfare, to domestic, commercial, industrial, agricultural, or recreational use or to livestock, wild animals, birds, fish, or other aquatic life. (455B.171). Prohibited acts specified in statute. (455B).

Solid, Radioactive, Hazardous Wastes.

Defined by statute. (455B.301, -.331, -.411). Prohibited acts specified in statute. (455B). Moratorium on construction and operation of certain commercial waste incinerators. (455B.151). Ownership of hazardous condition sites. (455B.171[16]).

Enforcement.

Director of Department of Natural Resources, Environmental Protection Commission, and Attorney General may enforce. Citizens' suits permitted in certain situations. Injunctive relief, civil and criminal penalties available. (455B.111).

Penalties.

Civil penalties will be imposed for specified violations. (455B.109). Federal Air Quality regulations adopted with and civil penalties for violations. (455B.133[3]).

Permits.

General permits are granted, modified, denied, suspended, or revoked by Director of

Natural Resources. (455B.103A). Permits required for infectious waste treatment or disposal facilities. (455B.503).

13 ESTATES AND TRUSTS

13.01 ADMINISTRATION:

See topic 13.09 Executors and Administrators.

13.02 ADVANCEMENTS:

See topic 13.07 Descent and Distribution; category 20 Mortgages, topic 20.04 Mortgages of Real Property.

13.03 ALLOWANCES:

See topic 13.09 Executors and Administrators.

13.04 CLAIMS:

See topic 13.09 Executors and Administrators; category 5 Civil Actions and Procedure, topic 5.17 Pleading.

13.05 DEATH:

Five years unexplained absence of a person will raise a presumption of death, provided his relatives show that a diligent inquiry has been made. (Iowa Code 633.510 et seq.). See category 21 Property, topic 21.01 Absentees.

Survivorship.

Uniform Simultaneous Death Act has been adopted. (Iowa Code 633.523.-.528).

Action for Death.

Action for death survives and may be maintained by administrator of decedent. (Iowa Code 611.20, 22; 613.15). Must be commenced within two years. (R.C.P. 1.221). Parent may maintain action for wrongful death of infant child and recover for loss of services. (R.C.P. 1.206). Parent may maintain action for loss of service, companionship and society resulting from injury or death to adult or minor child. (Iowa Code 613.15A). No statutory limitation on amount of recovery. In case of both men and women, recovery may include value of services and support as spouse or parent. (Iowa Code 613.15).

If decedent leaves spouse, child or parent, damages for wrongful death shall not be subject to debts and charges of decedent’s estate, except for amounts repaid to Dept. of Human Services for Medical Assistance paid pursuant to c. 249A. (Iowa Code 633.336).

Official certificate of death of a person may be obtained from the State Registrar of Vital Statistics, Iowa State Department of Health, Records Division, Lucas Building, Des Moines, Iowa 50319, or from county registrar. Fee, $10.

Revised Uniform Anatomical Gift Act.

Promulgated 2006, adopted 2007. (142C).

Living Wills.

See topic 13.16 Wills.

13.06 DECEDENTS' ESTATES:

Notice.

At any time following issuance of letters testamentary or of administration upon decedent's estate, any interested person may file written request for notice of time and place of all hearings in such estate. (Iowa Code 633.42).

Share of Heirs.

Order in which intestate estate passes when not passed to surviving spouse. See 633.219.

See also topics 13.07 Descent and Distribution, Executors and Administrators, Wills; category 8 Debtor and Creditor, topic 8.10 Homesteads.

13.07 DESCENT AND DISTRIBUTION:

Share of Others than Surviving Spouse.

Part of intestate estate not passing to surviving spouse passes as follows: (1) To issue of decedent per stirpes; (2) if no surviving issue, to parents of decedent equally; (3) if not (1) or (2) of this section, estate shall be divided and set aside into two equal shares. One share shall be distributed to issue of decedent's mother per stirpes and one share shall be distributed to issue of decedent's father per stirpes. If there is no surviving issue of one deceased parent, entire estate passes to issue of other deceased parent; (4) if not (1), (2) or (3) of this section, and decedent is survived by one or more grandparents, half estate passes to paternal grandparents if both survive, or to surviving paternal grandparent if only one survives. If neither paternal grandparent survives, this half share shall be further divided into two equal sub-shares. One sub-share shall be distributed to issue of decedent's paternal grandmother per stirpes and one sub-share shall be distributed to issue of decedent's paternal grandfather per stirpes. If there are no surviving issue of one deceased paternal grandparent, entire half share passes to issue of other deceased paternal grandparent and their issue in same manner. Other half of decedent's estate passes to maternal grandparents and their issue in same manner. If there are no surviving grandparents on either paternal or maternal side, surviving grandparents or issue of grandparents on either paternal or maternal side, entire estate passes to decedent's surviving grandparents or their issue on other side; (5) if not (1), (2), (3), or (4) of this section, and decedent is survived by one or more great grandparents or issue of great grandparents, estate passes equally to each set of great grandparents, or to their issue, if any survive, per stirpes; (6) if not (1), (2), (3), (4) or (5) of this section, uninherited portion shall go to issue of deceased spouse of intestate, per stirpes. If intestate has had more than one spouse who died in lawful wedlock, it shall be equally divided between issuer, per stirpes, of those deceased spouses; (7) if not (1), (2), (3), (4), (5) or (6) of this section, intestate property shall escheat to State of Iowa. (Iowa Code 633.219).

Share of Surviving Spouse.

If decedent dies intestate leaving surviving spouse and leaving no issue or leaving issue all of whom are issue of surviving spouse, surviving spouse shall receive following share: (1) All value of all legal or equitable estates in real property possessed by decedent at any time during marriage, which have not been sold on execution or by other judicial sale, and to which surviving spouse has made no relinquishment of right; (2) all personal property that, at time of death, was, in hands of decedent as head of family, exempt from execution; (3) all other personal property of decedent which is not necessary for payment of debts and charges. (Iowa Code 633.211).

If decedent dies intestate leaving surviving spouse and leaving issue some of whom are not issue of surviving spouse, surviving spouse shall receive following share: (1) One-half in value of all legal or equitable estates in real property possessed by decedent at any time during marriage, which have not been sold on execution or by other judicial sale, and to which surviving spouse has made no relinquishment of right; (2) all personal property that, at time of death, was in hands of decedent as head of family, exempt from execution; (3) one-half of all other personal property of decedent which is not necessary for payment of debts and charges; (4) if property received by surviving spouse under subsections 1, 2, and 3 of this section is not equal in value to sum of $50,000, then so much additional of any remaining homestead interest and of remaining real and personal property of decedent that is subject to payment of debts and charges against decedent's estate, after payment of debts and charges, even to extent of whole of net estate, as necessary to make amount of $50,000. (Iowa Code 633.212).

Except as provided in §§ 633.211 and 633.212, shares of distributees shall abate, for payment of debts and charges, federal and state estate taxes, legacies, shares of children born or adopted after making of will, or share of surviving spouse who elects to take against will, without any preference or priority as between real and personal property, in following order: (1) Property not disposed by will; (2) property devised to residuary devisee, except property to surviving spouse who takes under will; (3) property disposed of by will, but not specifically devised and not devised to residuary devisee, except property devised to surviving spouse who takes under will; (4) property specifically devised, except property devised to surviving spouse who takes under will; (5) property devised to surviving spouse who takes under will. (Iowa Code 633.436).

This Act applies to estates of decedents dying on or after effective date of Act. (July 1, 1985).

Half-blood share equally with whole blood in inheritance derived through the common parent. (172 Ia. 575, 154 N.W. 940).

Posthumous children begotten before intestate's death but born thereafter, inherit as though born in decedent's lifetime. (Iowa Code 633.220).

Biological children inherit from mother and mother inherits from them. They inherit from father if evidence proving paternity is available during father's lifetime or they are recognized by him during his lifetime. Recognition must be general and notorious, or in writing. If recognition is mutual, father inherits from them. (Iowa Code 633.221-.222).

Adopted Children.

See category 14 Family, topic 14.01 Adoption.

Advancements.

Property given by the intestate prior to his death to an heir, for the purpose of division and distribution of his estate, is considered to have been given toward the heir's share of the estate, but if advancement exceeds his share he cannot be required to refund any portion thereof. Every gratuitous inter vivos transfer is presumed to be absolute gift, and not advancement. Such presumption is rebuttable. (Iowa Code 633.224).

Effective Disclaimer.

Unless otherwise provided for by decedent, any disclaimed interest shall be distributed as if disclaimant had predeceased decedent. (Iowa Code 633.704F).

Election between distributive share and homestead, see category 8 Debtor and Creditor, topic 8.10 Homesteads; testamentary provision, see topic 13.16 Wills.

Escheat.

Revised Uniform Disposition of Unclaimed Property Act adopted, with some modifications. (556). In default of heirs, property escheats to state, subject to reclamation of proceeds within ten years. (Iowa Code 633.219, .543-.546).

See also topic 13.09 Executors and Administrators.

13.08 ELECTION:

See topic 13.16 Wills; category 8 Debtor and Creditor, topic 8.10 Homesteads.

13.08A ESTATES: (in property)

See topic 13.06 Decedents' Estates; category 21 Property, topic 21.16 Real Property.

13.09 [RESERVED]

13.10 EXECUTORS AND ADMINISTRATORS:

Jurisdiction of estates of decedents is in district courts. (Iowa Code 633.10). Venue is in county where decedent resided, or if decedent was nonresident, where he owned property. (Iowa Code 633.12). If nonresident owned property in more than one county, that court has jurisdiction in which proceedings are first commenced. (Iowa Code 633.14).

Preferences in Right to Administer.

Administration is granted in the following order of preference where there is no will: (1) To surviving spouse; (2) to heirs; (3) to creditors; (4) to any other person showing good grounds therefor. (Iowa Code 633.227). Surviving spouse has 20 days in which to apply for letters, after burial of decedent; other classes have ten days each; then any member of any class may file. (Iowa Code 633.228).

Eligibility.

Any person of full age, except under legal competency, alcoholic, spendthrift, or determined by court to be unsuitable, and any bank or trust company organized under laws of U.S. or state of Iowa when approved by superintendent of banking under 524-.1001 of Code, are authorized to act in fiduciary capacity in Iowa, and may serve as executor or administrator. (Iowa Code 633.63). Nonresident may be appointed. (Iowa Code 633.64). Banks and trust companies organized under laws of U.S. or other state, and authorized to act in fiduciary capacity in other state, are permitted to act as fiduciary in Iowa if banks and trust companies of this state are permitted to act as fiduciary in state where such bank or trust company is located. (Iowa Code 633.64). Private nonprofit corporations organized under 504 or 504A qualified to act as guardian or conservator under certain circumstances. (Iowa Code 633.63).

Bond.

Administrators, and executors must give bonds fixed by court or clerk. (Iowa Code 633.169-.171). Bond may be waived by will, and court may waive it if distributees consent in writing or other good cause is shown. (Iowa Code 633.172-.175). Banks and trust companies not required to provide bond unless required by instrument creating relationship or order of court. (Iowa Code 633.172).

Removal.

When fiduciary becomes ineligible for original appointment, has mismanaged estate, has failed to perform any duty imposed by law or by court order, or ceases to be a resident of the state, he may be removed. (Iowa Code 633.65).

Limitations.

Probate of will, original administration of intestate estate or ancillary administration of estate, shall not be granted after five years from death of decedent, unless petition for probate or administration is filed within five year period. (Iowa Code 633.331).

Inventory must be filed by executor or administrator within 90 days after his qualification unless longer time is granted by court. (Iowa Code 633.361).

Notice to Creditors.

Executors and administrators must, as soon as letters are issued, publish notice of appointment once each week for two consecutive weeks. (Iowa Code 633.230[1], .304). If personal knowledge of name and address of potential person believed to own or possess claim, heir must give notice by ordinary mail. (Iowa Code 633.230[2]).

Presentation of Claims.

Claim must be filed with clerk of court within four months after publication of notice to creditors or one month if notice was given to claimant by mail. (Iowa Code 633.410[1]). This does not bar claims for which there is insurance coverage, to extent of coverage. (Iowa Code 633.410[3]).

Unmatured claim must be presented like any other claim. (Iowa Code 633.421, .422).

Secured claim need not be presented in order to protect security, but must be presented in order to protect excess over security. (Iowa Code 633.414, .422, .423).

Claim on which action was pending when decedent died need not be presented, but notice of substitution must be served on personal representative within time for filing claims. (Iowa Code 633.415).

Separate action may be commenced against personal representative within four months of last publication of notice in lieu of filing claim against estate. (Iowa Code 633.415).

Proof of Claims.

Claims must be entitled in the name of the claimant against the executor or administrator, naming him, and the estate, and must be correctly stated; if based on a written instrument must have a copy thereof attached; and must be sworn to. (Iowa Code 633.418-.420).

Form

Form for proof of claim is as follows:

In the District Court of . . . . County, Iowa. . . . . vs. . . . ., administrator (or executor) of the estate of . . . ., deceased. Probate No. . . . .

. . . ., claimant, claims of . . . ., administrator (or executor) of the estate of said decedent, the sum of $. . . . and interest at the rate of . . . .% from the . . . . day of . . . ., 20. . . ., for (here set forth the nature of the claim) as now fully appears by the (statement of account or other evidence of claim) hereto attached, marked Exhibit A, and made a part hereof.

Wherefore claimant asks the allowance of said claim.

. . . .

Claimant

by . . . . Attorney

State of Iowa, County of . . . . ss.

. . . ., being first duly sworn, states that he is . . . ., and that the claim against the estate of . . . ., deceased, as above set forth, is just, true and correct and remains unpaid and that there is no legal offset to the same or any part thereof. (Jurat).

. . . .

Approval or Rejection of Claims.

In absence of fraud or collusion, claim stands allowed if admitted in writing by the personal representative. If he rejects claim, he must mail notice of disallowance to claimant and attorney of record. Claim then is barred unless claimant within 20 days, files request for hearing. (Iowa Code 633.428, .439-.443).

Priorities.

(1) Court costs; (2) other costs of administration; (3) reasonable funeral and burial expenses; (4) debts and taxes having preference under laws of U.S.; (5) expenses of last illness; (6) taxes having preference under laws of Iowa; (7) any debt for medical assistance paid pursuant to c. 249A.5(2); (8) debts owing to employees for labor performed during the 90 days next preceding death of decedent; (9) unpaid support payments; (10) all other claims allowed. (Iowa Code 633.425).

Claims Barred.

All claims not filed within four months after giving published notice of appointment or one month if notice was given to claimant by mail are forever barred, unless personal representative waives such limitation, or unless peculiar circumstances entitle claimant to equitable relief. (Iowa Code 633.410[1]). This does not bar claims for which there is insurance coverage, to extent of coverage, or claims for certain debts relating to recovery of medical assistance payments, or claimants entitled to equitable relief under peculiar circumstances. (Iowa Code 633.410[2], [3]).

Sale of realty to pay debts, and charges, distribute estate, or for any other purpose in best interests of estate, may be had on petition of the representative. (Iowa Code 633.386 et seq.).

Allowances.

Court may, set off to surviving spouse, or to decedent's minor children not living with surviving spouse, sufficient of decedent's property of such kind as is appropriate to support them for 12 months from time of his death. (Iowa Code 633.374-.377). Right of surviving spouse in exempt property, see topic 13.07 Descent and Distribution.

Actions.

There is no suspension of right to sue on claims and claimant may bring action, within four months after the giving of the notice of appointment or within one month if notice was given to claimant by mail, without other presentation of claim. Action pending against decedent at time of death may be continued against the representative. (Iowa Code 633.415).

Accounts and Final Settlement.

Representative may, and must upon order of court, file interlocutory accountings from time to time. Final settlement must be made in three years unless otherwise ordered by court. (Iowa Code 633.469, .473). Unless notice is waived in writing, representative shall serve notice of final report at such time and in such manner as court may prescribe. (Iowa Code 633.478).

Distribution of Estate.

Property not otherwise disposed of may be distributed in kind. (Iowa Code 633.472). Specific bequests must be delivered after estate has been open nine months unless court orders otherwise. (Iowa Code 633.355). Final settlement must be made within three years unless otherwise ordered by court. (Iowa Code 633.473).

Inability to Distribute.

Where fiduciary cannot make delivery to person entitled to funds, he may deposit same with clerk. (Iowa Code 633.109).

Fees.

Executors and administrators are allowed reasonable fees, as determined by court, not in excess of following percentages upon gross assets listed for Iowa inheritance tax purposes: 6% on first $1,000; 4% on excess up to $5,000; 2% on excess over $5,000. Gross assets do not include life insurance proceeds unless payable to decedent's estates. (Iowa Code 633.197). Fees of attorney for representative are determined in same manner and subject to same limitations. (Iowa Code 633.198). Further allowances may, however, be made by court to executors or administrators and their attorneys for actual, necessary and extraordinary services or expenses. (Iowa Code 633.199).

Small Estates.

See c. 635.

When gross value of probate assets of decedent subject to jurisdiction of this state does not exceed $100,000, petition may be filed with clerk for administration of small estate upon certain conditions. Clerk will issue letters of appointment for administration to proposed personal representative, if qualified to serve. (Iowa Code 635.1). Personal representatives must file report and inventory. (Iowa Code 635.7). Interested parties may convert proceedings from small estate to regular estate or from regular estate to small estate only upon showing of good cause and court approval. (Iowa Code 635.7). Creditors having claims against estate must file them with clerk within time period specified in notice of administration of small estate. (Iowa Code 635.13).

When Administration Unnecessary.

As a practical matter, administration is necessary in most estates. All of property of decedent is subject to possession of personal representative of estate and control of court for purposes of administration, sale, or other disposition under law. If heirs or persons entitled to inherit property of an estate desire to avoid appointment of administrator, they or one of them shall file under oath inventories and reports and perform all of duties required under law, of administrators, including payment of taxes. (Iowa Code 633.350, 450.22).

Foreign Executors or Administrators.

If nonresident decedent has property within this state and administrator has been appointed in accordance with laws of state or country where he resided at his death, administrator may qualify in Iowa for purpose of administering property in Iowa by filing with clerk, in county in which property is situated, certified copy of original letters or other authority making him administrator. Resident fiduciary must also be named unless otherwise ordered by court. Court may require payment of all claims filed and allowed belonging to residents of this state, and all legacies or distributive shares payable to residents of this state, before allowing property to be removed from this state. (Iowa Code 633.500-.504). See also topic 13.16 Wills, subhead Foreign Probated Wills.

Uniform Fiduciaries Act not adopted.

Uniform Principal and Income Act.

Promulgated 1997, adopted 1999. (637).

Uniform Simplification of Fiduciary Security Transfers Act repealed.

Uniform Transfer on Death Security Registration Act.

Promulgated 1989, adopted 1997. (Iowa Code 633.800).

13.11 FIDUCIARIES:

See topics 13.09 Executors and Administrators, Trusts; category 14 Family, topic 14.07 Guardian and Ward.

13.12 INTESTACY:

See topic 13.07 Descent and Distribution.

13.13 [RESERVED]

13.14 PROOF OF CLAIMS:

See topic 13.09 Executors and Administrators; category 5 Civil Actions and Procedure, topic 5.17 Pleading.

13.15 TRUSTS:

Iowa Trust Code 1999. (Iowa Code 633.1101 et seq.). Trust provisions control over trust code and common law of trusts supplements trust code. (Iowa Code 633.1104-1105).

Kinds.

Definition in probate code includes testamentary trusts and other trusts where court's jurisdiction is conferred or invoked. (Iowa Code 633.3[35]). Charitable Trusts (Iowa Code 633.1102, .5101). Trust does not include: (1) Totten trust account; (2) custodial arrangement pursuant to Uniform Transfers to Minors Act of any state; (3) business trust that is taxed as partnership or corporation; (4) investment trust subject to regulation under laws of this state or any other jurisdiction; (5) common trust fund; (6) voting trust; (7) security arrangement; (8) transfer in trust for purposes of suit or enforcement of claim or right; (9) liquidation trust; (10) trust for primary purpose of paying debts, dividends, interest, salaries, wages, profits, pensions, or employee benefits of any kind; (11) arrangement under which person is nominee or escrow agent for another; (12) constructive or resulting trusts. (Iowa Code 633.1102).

Creation.

Trust created by (1) Transfer of property to trustee during settlor's life or by will upon settlor's death; (2) declaration by owner that owner holds property as trustee; (3) appointment of another person as trustee; (4) promise enforceable by trustee to transfer property to trustee. (Iowa Code 633.2101).

Trustees, Appointment, Qualification, Removal, General Powers and Duties of Trustees and Sales and Accountings.

Trustee office filled by methods specified in terms of trust; if no terms specify methods, then fill trustee office by: (1) Majority vote of all qualified beneficiaries, who are adults, and representative of any minor or incompetent qualified beneficiary as provided in § 633.6303, or (2) by person appointed by court on petition of interested person. (Iowa Code 633.4105).

Trustee accepts office by (a) signing trust instrument or written acceptance; or (b) knowingly accepting delivery of trust property. (Iowa Code 633.4101).

Trustee may be removed in accordance with terms of trust on petition of settlor, co-trustee or beneficiary, or by court. (Iowa Code 633.4107). Trustee may resign by certain procedures. (Iowa Code 633.4106).

Trustee has powers conferred by terms of trust and powers conferred by trust code unless limited by terms of trust. (Iowa Code 633.4401-4402).

Trustee has duty to administer trust according to its terms and duty of loyalty to act solely in interest of beneficiaries. (Iowa Code 633.4202).

Trustee must keep beneficiaries reasonably informed of administration of trust. (Iowa Code 633.4213).

Trustee must exercise discretionary power within bounds of reasonable judgment and in accordance with fiduciary principles and terms of trust. (Iowa Code 633.4214).

Eligibility and Competency.

Same as for executors and administrators. (Iowa Code 633.63). Nonresident may be appointed.

Investments.

Model Prudent Person Investment Act repealed by 1999 legislation. Adopted Uniform Prudent Investor Act. (Iowa Code 633.4301-4302).

Securities in Name of Nominee.

Permissible for bank or trust company fiduciaries, but records of institution must show ownership of such investment. (Iowa Code 633.124, .125).

Compensation.

Trustee entitled to reasonable compensation (Iowa Code 633.4109) and repayment for administration expenses (Iowa Code 633.4110).

Uniform Common Trust Fund Act.

Promulgated 1938, adopted 1964. (Iowa Code 633.126-.127).

Uniform Principal and Income Act.

Promulgated 1997, adopted 1999. (637).

Gifts to Minors.

Uniform Act repealed effective July 1, 1986. (565A).

Uniform Fiduciaries Act not adopted.

Uniform Simplification of Fiduciary Security Transfers Act repealed.

Uniform Transfers to Minors Act adopted effective July 1, 1986. (565B).

Accumulations.

No statutory restrictions.

Perpetuities.

See category 21 Property, topic 21.12 Perpetuities.

Pour Over Trusts.

See topic 13.16 Wills, subhead Bequests and Devises to Inter Vivos Trusts.

13.16 WILLS:

Testamentary Capacity.

Any person of full age and sound mind may dispose of his property by will. (Iowa Code 633.264).

Testamentary Disposition.

Testator may dispose of all his property, subject to the rights of homestead and exemption created by law, and the distributive share of surviving spouse, except sufficient to pay debts and costs of administration. (Iowa Code 633.264).

Execution.

All wills must be in writing, signed by the testator, or by some person in his presence and by his express direction, declared by him to be his will, and witnessed, at his request, by two competent witnesses. The witnesses must sign in the presence of the testator and of each other. (Iowa Code 633.279).

Form

Form of Attestation.

The following may be used:

In witness whereof I have hereunto set my hand this . . . . day of . . . ., A. D., 20. . . ., (Signature).

The foregoing instrument was on the day of the date thereof signed, published, and declared by . . . . as, and for, his last will and testament in the presence of us, the undersigned, who at his request and in his sight and presence and in the sight and presence of each other have hereunto subscribed our names as witnesses. (Signatures).

Holographic will not executed as stated above is not recognized.

Nuncupative Wills.

Not authorized.

Revocation.

Will can be revoked in whole or in part only by being cancelled or destroyed by act or direction of testator with intention of revoking or by execution of subsequent will. Revocation by cancellation must be witnessed in same manner as making of new will. (Iowa Code 633.284).

Testamentary Gifts to Subscribing Witnesses.

No will is invalidated because attested by interested witness; but any interested witness shall, unless will is also attested by two competent and disinterested witnesses, forfeit so much of provisions therein made for him as in aggregate exceeds that which he or she would have received had testator died intestate. (Iowa Code 633.281).

Probate.

District court of county of which decedent died resident has original and exclusive jurisdiction to probate will. (Iowa Code 633.10, .12). Any person having custody of will must, as soon as notified of death of testator, file same with clerk. (Iowa Code 633.285).

Upon filing of a petition for probate of a will, court or clerk may hear it forthwith, or at such time and place as court may direct, with or without requiring notice. (Iowa Code 633.293).

Self-proved Will.

Attested will may be made self-proved at time of execution, or at any subsequent date, by acknowledgment thereof by testator and affidavits of witnesses, each made before person authorized to administer oaths and take acknowledgments under laws of state, and evidenced by such person's certificate, under seal, attached or annexed to will, in form and content substantially as follows:

Affidavit

State of Iowa

County of . . . . } ss

We, the undersigned, ..., ... and . . . ., the testator and the witnesses, respectively, whose names are signed to the attached or foregoing instrument, being first duly sworn, declare to the undersigned authority that said instrument is the testator's will and that the testator willingly signed and executed such instrument, or expressly directed another to sign the same in the presence of the witnesses, as a free and voluntary act for the purposes therein expressed; that said witnesses, and each of them, declare to the undersigned authority that such will was executed and acknowledged by the testator as the testator's will in their presence and that they, in the testator's presence, at the testator's request, and in the presence of each other, did subscribe their names thereto as attesting witnesses on the date of the date of such will; and that the testator, at the time of the execution of such instrument, was of full age and of sound mind and that the witnesses were sixteen years of age or older and otherwise competent to be witnesses.

. . . .

Testator

. . . .

Witness

. . . .

Witness

Subscribed, sworn and acknowledged before me by . . . ., the testator; and subscribed and sworn before me by . . . . and . . . ., witnesses, this . . . . day of . . . ., 20. . . .

. . . .

(Seal)

Notary Public, or other officer

authorized to take and certify

acknowledgments and administer oaths

Self-proved will shall constitute proof of due execution of such instrument as required by section 633.293 and may be admitted to probate without testimony of witnesses. (Iowa Code 633.279).

Contest.

Admission of will to probate may be contested prior to probate hearing, or at time of hearing on application to admit or by action to set will aside brought in district court within four months from time of second publication of notice of admission to probate or one month following mailing of notice. (Iowa Code 633.308-.311).

Children.

Legitimate children (posthumous or otherwise) born after execution of the will and not provided for by the will or by settlement and not mentioned in the will, take the share of the estate to which they would have been entitled in case of intestacy, unless it appears from will that omission was intentional. (Iowa Code 633.267). Children living when will is executed may be disinherited by mere disposition of entire estate otherwise than to them, without any declaration of intent to disinherit them.

Legacies may be paid during the four months period for filing claims upon court order. Specific legacies must be delivered after estate has been open nine months unless court orders otherwise. (Iowa Code 633.353-.355; 633.410).

Unclaimed legacies are presumed abandoned if not claimed within three years after they become payable. (Iowa Code 656.7). Every person holding funds or other property, tangible or intangible, presumed abandoned under this chapter shall report and deliver said property to state treasurer. (Iowa Code 556.11, .13). Treasurer will give notice of all abandoned property. (Iowa Code 556.12). Treasurer may sell abandoned property and deposit those and other abandoned funds into state’s general fund in trust. (Iowa Code 556.17, .18). Claims for abandoned property or for proceed of sale thereof are made to Treasurer. (Iowa Code 556.19, .20).

Revised Uniform Disposition of Unclaimed Property Act adopted, with some modifications. (556).

See also topic 13.09 Executors and Administrators, subhead Inability to Distribute.

Lapses.

A devise or bequest does not lapse if the devisee or legatee die before testator and leaves issue who survive testator. Heirs of devisee or legatee inherit property devised or bequeathed, unless from terms of will contrary intent is manifest. But devise to spouse lapses if spouse does not survive testator, unless contrary intent is manifest in will. (Iowa Code 633.273, .274).

Election.

Surviving spouse may elect to take or refuse to take under a will within two months after date of second publication of notice of admission of will to probate. If no voluntary election is filed within that time, executor must serve notice upon such surviving spouse, reciting admission of will to probate and date thereof, stating name of court, and requiring such spouse within four months thereafter to elect either in open court or by writing filed therein. If surviving spouse does not make such election within four months after such notice, or if such surviving spouse is executor of will and fails to make such election within four months after second publication of notice, it is conclusively presumed that such survivor elects to take under will, unless within such period an affidavit is filed that such survivor is incapable of making an election, in which case court must enter an order electing for such survivor as court shall deem for best interests of such spouse. (Iowa Code 633.237). Surviving spouse who elects not to take under will may elect right to occupy homestead (Iowa Code 633.240) as set forth under category Debtor and Creditor, topic Homesteads, subhead Rights of Surviving Spouse, or may elect statutory share (Iowa Code 633.238) as set forth under topic Descent and Distribution, subhead Share of Surviving Spouse (Iowa Code 633.237).

Bequests and Devises to Inter Vivos Trusts.

Permitted. (Iowa Code 633.275). Uniform Testamentary Additions to Trusts Act adopted. (Iowa Code 633.275, .277).

Testamentary Guardian.

See category 14 Family, topic 14.07 Guardian and Ward.

Foreign Executed Wills.

Last will and testament executed without this state, in mode prescribed by the law of the place where executed or of the testator’s domicile, is deemed to be legally executed, and has the same force and effect as if executed in the mode prescribed by the laws of this state, provided said last will and testament is in writing and subscribed by the testator. (Iowa Code 633.283).

Foreign Probated Wills.

Will probated in any other state or country shall be admitted to probate in this state, without notice required in case of domestic wills, on production of a copy thereof and of original record of probate, authenticated by certificate of clerk of court in which such probation was made, or, if there be no clerk, by certificate of judge thereof, and seal of office of such officers, if they have a seal. (Iowa Code 633.496).

Living Wills.

Living wills are governed by c. 144A of Iowa Code. Person who is competent may execute in writing declaration directing that life sustaining procedures be withdrawn if terminal illness occurs. Declaration may be revoked at any time. (144A.3, .4).

Simultaneous Death.

See topic 13.05 Death, subhead Survivorship.

Testamentary Trusts.

See topic 13.15 Trusts.

Revised Uniform Anatomical Gift Act.

Promulgated 2006, adopted 2007. (142C).

14 FAMILY

14.01 ADOPTION:

Following persons may adopt: (1) Unmarried adult; (2) husband and wife together; (3) husband or wife separately if person to be adopted is not other spouse and if adopting spouse (a) is stepparent of person to be adopted or (b) has been separated from other spouse by reason of said spouse's abandonment as prescribed in § 597.10 or (c) if unable to petition with other spouse because of prolonged and unexplained absence, unavailability or incapacity of other spouse or because of unreasonable withholding of joinder by other spouse as determined by court under Act. (Iowa Code 600.4).

Consent of following persons needed, although if person required to consent refuses or cannot be located to give consent, court can determine such person's consent unnecessary: (1) Guardian of person to be adopted; (2) spouse of petitioner who is stepparent; (3) spouse of petitioner who is separately petitioning to adopt adult; (4) person to be adopted if 14 years or older. (Iowa Code 600.7).

Consent must be in writing, name person to be adopted and petitioner, and be signed by person consenting in following manner: (1) If by minor 14 or older, in presence of court in which adoption petition filed; (2) if by any other person, either in presence of court in which petition filed or before notary public. (Iowa Code 600.7).

Consent may be withdrawn prior to issuance of decree by filing affidavit of consent withdrawal with court. (Iowa Code 600.7).

Condition Precedent.

Child must have lived 180 days in home of adopter before adoption unless court waives or shortens this requirement. (Iowa Code 600.10).

Jurisdiction and Venue.

District court of county in which adopter or adoptee is domiciled or resides if adult adoption; or court in county of guardian of minor person. (Iowa Code 600.3).

Procedure is by petition by adopter. Upon filing of petition for adoption of minor child, State Department of Human Services or designated agency conduct investigations to determine if home of prospective adopter is suitable and if adopter suitable, although investigation may be waived by court if prospective adopter is stepparent or relative to person to be adopted within fourth degree of consanguinity. (Iowa Code 600.5, .8).

Name of adoptee may be changed by decree. (Iowa Code 600.13[5]).

Decree.

If petition is granted, decree must be entered, setting forth all facts and name by which adoptee shall thereafter be known. (Iowa Code 600.13).

14.02 ALIMONY:

See topic 14.05 Dissolution of Marriage.

14.03 COMMUNITY PROPERTY:

System does not apply.

14.04 DESERTION:

See topics 14.05 Dissolution of Marriage, 14.09 Husband and Wife.

14.05 DISSOLUTION OF MARRIAGE:

Jurisdiction and Venue.

District court in county where either party resides has jurisdiction in all cases of dissolution of marriage. (Iowa Code 598.2).

Grounds for Absolute Divorce.

Decree dissolving marriage may issue when there has been breakdown of marriage relationship to extent that legitimate objects of matrimony have been destroyed and there remains no reasonable likelihood that relationship can be preserved. (Iowa Code 598.17).

Grounds for Legal Separation.

May be decreed on same grounds as dissolution of marriage. (Iowa Code 598.28).

Residence Requirements.

Except where respondent is a resident of state and served by personal service, petition must show that petitioner has been for last year a resident of state, specifying town and county in which he has so resided. (Iowa Code 598.6).

Process.

Service by publication is authorized where respondent is a nonresident of Iowa or his residency is unknown. See category 5 Civil Actions and Procedure, topic 5.20 Process, subhead Publication.

Temporary Matters.

Court may order either party to pay to clerk sum of money for separate support of adverse party and children and to enable such party to prosecute or defend action, and such order may be aided by attachment. (Iowa Code 598.11). Notwithstanding 561.15, court may order either party to vacate homestead pending entry of decree upon showing that other party or children in imminent danger of harm if order not issued. (Iowa Code 598.33).

Trial shall be in open court on oral testimony or deposition; however, court may close hearing. Court may enter decree of dissolution without hearing under specific circumstances. (Iowa Code 598.8).

Decree.

Provisions of dissolution decree are final as to circumstances, then existing. Matters will not be relitigated in absence of showing of change of circumstances. (300 N.W.2d 164).

Change of Wife’s Name.

Return of maiden name to wife is discretionary with court. (Iowa Code 598.37).

Division of Property of Spouses.

Marital Property System. See subhead Property Disposition and Custody of Children, infra.

Property Disposition and Custody of Children.

When dissolution of marriage is decreed, court may make such order in relation to children, property, parties and maintenance of parties as may be equitable upon consideration of multiple statutory factors. (Iowa Code 598.21). See Iowa Rules of Practice and Procedure Chapter 9 for Child Support Guidelines. Court may grant joint custody of children in dissolution action. (Iowa Code 598.41). Grandparents and great-grandparents of minor child can petition court for visitation rights. (600C.1). With regard to division of property of spouses, ultimate question is whether distribution of property and assets is equitable under specific facts of case (309 N.W.2d 510, 514 [Iowa 1981]); where accumulated property is not product of joint efforts of both parties, or where one party brings property into marriage, there need not necessarily be equal division (305 N.W.2d 448 [Iowa 1981]). Uniform Child Custody Jurisdiction and Enforcement Act adopted. (598B). Uniform Interstate Family Support Act promulgated 1996, adopted 1998 without repealing 1968 Uniform Reciprocal Enforcement of Support Act. (252K).

Upon finding of willful disobedience court may cite for contempt, or order assignment of periodic earnings or trust income to clerk or collection services center for use of person for whom assignment ordered. (Iowa Code 598.23). Court may require security, bond, or other guarantee which court determines is satisfactory to secure payment of support, or may require payments by bank draft or money order if obligor submits insufficient funds support payment to clerk of district court. (Iowa Code 598.22).

Waiting Period.

Dissolution of marriage will normally not be granted until 90 days after service of notice. (Iowa Code 598.19).

Separation agreements are recognized and enforced. (Iowa Code 598.28).

Annulment of Marriage.

See topic 14.11 Marriage.

14.06 DIVORCE:

See topic 14.05 Dissolution of Marriage.

14.07 [RESERVED]

14.08 GUARDIAN AND WARD:

Petition for guardianship must allege proposed ward is: (1) Minor, or (2) is person whose decision making capacity is so impaired that person is unable to care for his personal safety or to attend to or provide for necessities such as food, shelter, clothing, or medical care, without which physical injury or illness might occur. Or guardian may be appointed for person or property of any person other than minor under 14 upon his own application. (Iowa Code 633.557, .572, .635).

Eligibility and Competency.

Selection of guardian is within discretion of court. Guardian cannot be appointed by will but person named in will must be preferred, after parents. (Iowa Code 633.559). No statutory prohibition or authorization of nonresident guardian for resident ward.

Bond.

Bond is required as in estates of decedents, except that guardian of the person need not give bond unless ordered by court to do so. (Iowa Code 633.633).

Powers and Duties.

A guardian has control of the person, and a conservator has control of property, of the ward. (Iowa Code 633.635, .641). Same person may serve in both capacities. (Iowa Code 633.628). Conservator has the authority, with approval of court, to sell property of the ward for any purpose which may be deemed conducive to his interest. (Iowa Code 633.641-.649).

Real estate may be sold or mortgaged by conservators under same conditions and subject to same procedure as in estates of decedents. (Iowa Code 633.652).

Investments by guardians are subject to Court approval. (Iowa Code 633.647).

Securities in Name of Nominee.

See category 13 Estates and Trusts, topic 13.15 Trusts, subhead Securities in Name of Nominee.

Reports.

Guardians and conservators must make reports as provided by 633.669, 633.641, 633.670 and 633.671.

Exoneration.

Guardian can be exonerated from responsibility only upon filing of such final report and notice to ward of time and place of hearing thereon. (Iowa Code 633.677-.682).

Insane Persons.

No special provisions.

Foreign Guardians.

A foreign guardian or conservator of a nonresident ward may be appointed conservator of the property of such person in this state. Such appointment may be made by applying with clerk of district court of county where there is any such property; application shall include certified copy of original letters or other authority conferring power upon foreign conservator or guardian to act as such. Court may dispense with requirement of appointment of resident co-conservator. (Iowa Code 633.603-.604).

Foreign conservator or guardian may be authorized to receipt for personal property by filing in office of clerk of court in county where the property is situated a certified copy of his official bond duly authenticated by court granting the letters. (Iowa Code 633.605-.608).

See also category 13 Estates and Trusts, topic 13.09 Executors and Administrators, subheads Eligibility, and Bond.

Uniform Gifts to Minors Act repealed effective July 1, 1986.

Uniform Fiduciaries Act not adopted.

Uniform Simplification of Fiduciary Security Transfers Act repealed.

Uniform Transfers to Minors Act adopted effective July 1, 1986. (565B).

14.09 HUSBAND AND WIFE:

Husband and wife may contract with each other and transact business with each other as though unmarried, except that they may not contract for compensation for the performance of obligations incident to the marital relation (224 Ia. 109, 275 N.W. 490) or contract with each other with relation to the interest which one spouse has in the property of the other arising out of the marital relation (Iowa Code 597.2).

Disabilities of Married Women.

All disabilities have been removed.

Separate Property.

Married woman may own in her own right real and personal property, and manage and dispose of it in same manner as husband can dispose of property belonging to him. (Iowa Code 597.1). But right of either spouse to distributive share in realty of other (see category 13 Estates and Trusts, topic 13.07 Descent and Distribution) cannot be affected by conveyance or mortgage in which he or she does not join. (Iowa Code 633.211, .212).

Antenuptial Agreements.

Antenuptial contracts are recognized under Iowa law and should be construed liberally to carry out intentions of parties. (Norris v. Norris, 174 N.W.2d 368 [Iowa 1970]). Uniform Premarital Agreement Act adopted in 1991. (Iowa Code 596.1).

Wages.

Married person may recover and retain his or her own wages. (Iowa Code 597.16).

Actions.

Married person may sue and be sued in his or her own separate name. (Iowa Code 597.16, .19).

Liabilities.

Neither husband nor wife is liable for separate debts of other. For expenses of family and education of children both are liable, and they may be sued therefor either jointly or separately. (Iowa Code 597.17, .14).

Contracts of Married Person.

May make contracts and incur liabilities to same extent as if unmarried. Person may become surety for spouse or any other person. (Iowa Code 597.18).

Agency.

Husband or wife may constitute the other attorney in fact to control and dispose of property for their mutual benefit. (Iowa Code 597.5).

Negligence.

As it pertains to actions for personal injury resulting from spousal negligence or intentional torts, doctrine of interspousal immunity abrogated with respect to all actions in which final order, decree or judgment has not been entered as of Aug. 25, 1979. (281 N.W.2d 616). For civil injuries committed by married person, damages may be recovered from person alone, and partner shall not be liable therefor, except in cases where partner would be jointly liable if marriage did not exist. (Iowa Code 597.19).

Desertion.

Where spouse abandons other for one year, or leaves state and is absent therefrom for such term, without providing for maintenance and support of family, or is confined in jail or penitentiary for such period, district court of county where abandoned party resides may, on application by petition setting forth facts, authorize applicant to manage, control, sell, and encumber property of guilty party for support and maintenance of family and for purpose of paying debts. (Iowa Code 597.10).

Support of Dependents Law has been adopted in substantially form proposed by Council of State Governments. (252A). Variations from that form follow: (1) State may institute proceedings, without consent of dependent, to obtain reimbursement for support furnished dependent. (252A.5[2]). (2) Persons entitled to periodic support payments pursuant to order or judgment entered in uniform support action under this chapter, who are welfare recipients, must assign their rights to payments to department of social services. (Iowa Code 598.34). (3) Verified petition may be filed by petitioner or petitioner's representative, in district court, in equity, and may include such exhibits or information as may assist in identifying and locating respondent. (252A.6[1]). (4) Support payments made to clerk of district court, dependent, or collection services center, as court may direct. (252A.6-5). (5) Costs incurred in Iowa shall be advanced by initiating party or agency, unless action brought by state or county, or unless court otherwise directs. (252A.10). New paternity determination procedures adopted 1994. (252A.6A).

Uniform Interstate Family Support Act adopted. (252K).

Community property system does not apply.

14.10 INFANTS:

Age of majority 18 both sexes. Infant attains majority by marriage. Person who is convicted and sentenced as adult but who is less than 18 years old and incarcerated shall be deemed to have reached age of majority for purposes of making decisions and giving consent to medical care while incarcerated. (Iowa Code 599.1).

Contracts.

Minor is bound by his contract for necessaries and for other contracts unless disaffirmed within a reasonable time after attaining majority and restoration made to other party of all money or property received by the minor by virtue of such contract, and remaining within his control. (Iowa Code 599.2).

Actions.

Action of minor must be brought by his guardian if he has one, if not, by his next friend, but court may dismiss it if not for his benefit, or may substitute guardian or other person as next friend. (R.C.P. 1.210). At or before hearing of petitions and contest for probate of wills, letters testamentary or of administration, for sale of real estate and confirmation thereof, settlements and distribution of estates and all other proceedings where all parties interested in estate are required to be notified thereof, court may in its discretion, appoint some competent attorney at law to represent therein minors having interest in estate or proceeds from estate, who have no general guardian in county. (Iowa Code 633.118-.120).

Termination of Parental Rights.

Parent, prospective parent, custodian, or guardian of child may petition juvenile court for termination of parental rights, if parent has signed release of custody, petitioned for termination, abandoned child, failed to contribute to support, or failed to object to termination. (600A.1, .8).

Child's guardian, guardian ad litem, or custodian, department of human services, juvenile court officer, or county attorney may file petition for termination of parent-child relationship and parental rights with respect to child for grounds such as consent, abandonment, desertion, abuse, and many other specific grounds. (Iowa Code 232.111, .116).

Uniform Gifts to Minors Act repealed effective July 1, 1986.

Uniform Securities Ownership by Minors Act not adopted.

Uniform Transfers to Minors Act adopted effective July 1, 1986. (565B).

Interstate Compact on Juveniles.

State of Iowa through its courts and agencies authorized to enter into with other states in form approved by Council of State Governments on Jan. 21, 1955. (Iowa Code 232.171).

Adoption.

See topic 14.01 Adoption.

14.11 MARRIAGE:

Age of consent—18. (Iowa Code 595.2).

Consent Required.

Consent of parents or guardian necessary where either party is under 18. If parents are divorced, one having custody of minor may give consent. (Iowa Code 595.2).

License is required and must be issued by a clerk of district court. (Iowa Code 595.3). Application may be procured in person or mailed upon request and may be procured by either of prospective parties. Clerk must require affidavit from some competent disinterested person stating facts as to age and qualification of parties. (Iowa Code 595.4). Clerk must wait three days after application is filed before issuing license unless court orders otherwise. (Iowa Code 595.4, .10). Marriage license must be picked up (officially issued) within six months following issuance of license. (Iowa Code 594.4).

Ceremony may be performed by judicial magistrate, judge of Supreme, court of appeals or district court, or minister ordained or licensed according to usages of his denomination. (Iowa Code 595.10). Marriages solemnized in any other manner with consent of parties are valid but parties to such proceedings are liable to fine. (Iowa Code 595.11). Where marriage solemnized without services of clergyman or magistrate either spouse must make return to clerk. (Iowa Code 595.16).

Reports of Marriages.

Officiating minister or magistrate must file return within 15 days with county registrar on form provided for that purpose. (Iowa Code 595.13).

Record.

See category 10 Documents and Records, topic 10.04 Records, subhead Vital Statistics.

Common law marriages are recognized (278 N.W.2d 505) including those contracted out of state (Iowa Code 595.20).

Prohibited Marriages.

Same sex marriages. (Iowa Code 595.2). Between people related by blood are void, including first cousins. Where either party has spouse living marriage is void but becomes valid if parties live and cohabit together after death or divorce of former spouse. (Iowa Code 595.19).

Annulment.

Marriage may be annulled: (1) Where marriage between parties is prohibited by law; (2) where either party was impotent at time of marriage; (3) where either party had husband or wife living at time of marriage, provided they have not with knowledge of such fact lived and cohabited together after death or divorce of former spouse of such party; (4) where either party was ward under guardianship and was found by court to lack capacity to contract valid marriage. Nonage is not specific ground for annulment but marriage of party below age of consent will be nullity at option of such party made known at any time before such party reaches his or her 18th birthday. (Iowa Code 595.2).

Children.

Children of a marriage terminated or annulled shall be legitimate. (Iowa Code 598.31).

Alimony.

In case either party enters into the marriage in good faith supposing the other to be capable of contracting and the marriage is declared to be a nullity, the court may decree that such innocent party shall receive compensation as in case of dissolution of marriage. (Iowa Code 598.32).

14.12 MARRIED WOMEN:

See topics 14.09 Husband and Wife, Marriage; categories 5 Civil Actions and Procedure, topic Evidence, subhead Witnesses; Debtor and Creditor, topic Homesteads; Documents and Records, topic Acknowledgments; Estates and Trusts, topics Executors and Administrators, Wills.

16 INSURANCE

16.01 INSURANCE COMPANIES:

Department of Commerce’s Insurance Division has supervision of domestic insurance companies and business of foreign companies transacted in this state. (505 et seq.).

Classes of Risk Permitted.

With certain exceptions, companies may write on all classes of risks provided certain reinsurance for excess loss is in effect. (Iowa Code 515.48-.49 as am’d 1988, H.F. 2307). Mutual life insurance companies are subject to certain special conditions. (Iowa Code 508.9).

Annual statement of condition must be filed by all companies with Commissioner before Mar. 1 on form which Commissioner must furnish. (Iowa Code 511.1; 515.63).

Policies.

Standard forms of fire insurance policies are required (Iowa Code 515.109); also for sickness and accident policies (514A.2). Forms of all policies and of applications and endorsements must be approved by Insurance Commissioner. (Iowa Code 508.25; 515.101A). Health, life, and accident policies under group plan must comply with 509. As to assignability of life policy, see category 8 Debtor and Creditor, topic 8.01 Assignments.

Annuities may be sold by any life insurance company organized on stock or mutual plan. (Iowa Code 508.31).

Combinations or agreements between companies as to rates, commissions or manner of doing business are forbidden; but companies may appoint same person as common agent to file forms of policies or permits required by law to be examined and approved by commissioner. (Iowa Code 515.140).

Investments of life insurance companies are controlled by 511.8. Investments of life insurance companies in agricultural land are controlled by 511.8A. Investments of nonlife companies are controlled by 515.35.

Brokers and agents need not be licensed by Commissioner of Insurance as of Jan. 1, 2002. (522).

Process Agent.

See infra, subhead Foreign Companies.

Foreign Companies.

Foreign stock company may not do non-life insurance business in state unless it has $2,500,000 paid-up capital, plus surplus in cash or authorized securities of $2,500,000, exclusive of assets deposited in state or territory for benefit of those insured therein. (Iowa Code 515.69). Foreign life insurance companies must meet same standards as domestic life companies. (Iowa Code 508.10).

Foreign company must file with Insurance Commissioner an agreement in writing that service of notice or process of any kind may be made on Insurance Commissioner. (Iowa Code 511.27; 515.76).

For other requirements pertaining to foreign companies see category 2 Business Organizations, topic 2.03 Corporations, subhead Foreign Corporations.

Premium Tax.

Varying tax on gross amount of premiums received from business within state during preceding calendar year applies to both domestic and foreign companies payable on or before Mar. 1 of year following calendar year for which tax due, except if premium tax greater than $1,000, then prepayment schedule applies. Dividends, except those granted as paid-up additions, and premiums on policies issued in connection with certain pension plans are excluded. Fraternal beneficiary associations, county mutual associations and nonprofit hospital and medical service corporations are exempt. (Iowa Code 432.1). Reinsurance premiums are exempt. (Iowa Code 515.24).

Trade Practices.

Unfair methods of competition and discriminatory or deceptive trade practices in sale of insurance prohibited and subject to jurisdiction of Insurance Commissioner. (507B).

Direct Actions Against Insurer.

See category 23 Transportation, topic 23.01 Motor Vehicles, subhead Direct Actions.

16.02 SURETY AND GUARANTY COMPANIES:

Commissioner of insurance shall annually file, with clerk of district court of each county complete list of corporate sureties to whom commissioner has issued current certificate of authority to transact business of surety in this state. (Iowa Code 636.11). No bond may be accepted for amount in excess of 10% of paid-up cash capital of such company, unless excess be re-insured in some other company so authorized, and then not to exceed 10% of capital of re-insuring company. (Iowa Code 636.17). Agent for authorized surety must be Iowa resident for purposes of acting on behalf of company with respect to any bond or bail in criminal cases. (Iowa Code 636.11).

Commissioner of Insurance is process agent. (Iowa Code 636.21).

Surety companies may be released from liability on bond, except performance bond on public works contract, or criminal appearance bond, by petitioning approving officer or board for relief stating grounds therefor, giving principal at least 24 hours notice of filing of such petition. Approving officer or board may conduct hearing and if there appears substantial ground for apprehension may order new bond, and upon such being given petitioning surety may be declared discharged for future acts. (Iowa Code 65.7).

17 INTELLECTUAL PROPERTY

17.01 TRADEMARKS AND TRADENAMES:

Person, firm, association or corporation that has adopted any label, trademark or form of advertising, may file same for record in office of Secretary of State. (Iowa Code 548.103). Such trademark must be of distinctive character and not of any near resemblance to any trademark previously filed. (Iowa Code 548.102). Fee: $10 for filing. Certificate issued by Secretary under this section or copy thereof duly certified by Secretary shall be admissible in evidence as competent and sufficient proof of registration of such mark in action or judicial proceeding in any court in this state. (Iowa Code 548.105). Its use, imitation or infringement by any other person may be enjoined by owner and damages recovered. (Iowa Code 548.114). Unlawful use is punishable by imprisonment or fine. (715A).

Registrations expire five years from date thereof, and may be renewed at any time within six months before date of termination by filing application for renewal in office of Secretary of State and payment of renewal fee. (Iowa Code 548.106).

Assignment.

Trademarks, labels and forms of advertising registered in the office of the Secretary of State may be assigned of record by the registrant or record owner thereof by the execution of an appropriate written instrument duly executed filed in office of Secretary of State, and upon payment to Secretary of State of an appropriate fee for each filing. (Iowa Code 548.107).

Tradenames.

It is unlawful to conduct business under tradename other than surname of each person owning business, unless verified statement showing name, post-office address and residence address of each person having interest in business, and address where business is to be conducted, is filed with county recorder of county where business is to be conducted. (Iowa Code 547.1). Fee, $5. All changes must likewise be recorded. (Iowa Code 547.2, .3). Corporations may use assumed name after filing same with Secretary of State. (Iowa Code 490.401).

17.02 TRADE SECRETS:

Uniform Trade Secrets Act adopted 1990. (c. 550).

Injunctions.

Owner of trade secret may petition district court to enjoin actual or threatened misappropriation. (Iowa Code 550.3).

Damages may include actual loss caused by misappropriation, plus unjust enrichment caused by misappropriation. In lieu of damages measured by any other method, damages may be measured by imposition of reasonable royalty. (Iowa Code 550.4). Prevailing party may recover attorney fees if evidence of bad faith or willful or malicious conduct. (Iowa Code 550.6).

Limitations.

Action must be brought within three years after misappropriation discovered or reasonably should have been discovered. (Iowa Code 550.8).

18 LEGAL PROFESSION

18.01 ATTORNEYS AND COUNSELORS:

State bar is not integrated.

Jurisdiction over admission is in the Supreme Court. (Iowa Code 602.10101).

Eligibility.

Applicant for admission must be (1) of good moral character, (2) inhabitant of this state, (3) graduated from reputable law school. (Iowa Code 602.10102).

Registration as law student required.

Educational Requirements.

Applicant for admission on examination must have pursued a regular course of study of law in a reputable law school and have degree of LL.B. or J.D. However, law student in reputable law school who expects to receive degree of LL.B. or J.D. within 45 days from first day of July or Feb. examination permitted to take examination upon filing of affidavit by dean of said school stating he expects such student to receive degree within said time, affidavit being in addition to other requirements. (Ct. Rule 31.8).

Continuing Legal Education.

All attorneys required to complete minimum of 15 hours legal education accredited by continuing legal education commission during each calendar year and minimum of two ethics credits during every two-year period. (Ct. Rule 41.3).

Application for examination must be made to Supreme Court in writing and under oath on forms furnished by clerk of Supreme Court showing applicant's eligibility and compliance with educational requirements, and must be filed no later than Mar. 1 preceding July examination or Oct. 1st preceding Feb. examination next bar exam date. (Ct. Rule 31.5). All applicants examined in June, 1989, and thereafter are required to pass The Multistate Professional Responsibility Examination for admission to practice. (Ct. Rule 31.3).

Examination is conducted by Board of Law Examiners at Polk County on Mon. preceding last Wed. in July in even-numbered years and on Mon. preceding last Wed. in Feb. in odd-numbered years and at Iowa City on Mon. preceding last Wed. in July in odd-numbered years and on Mon. preceding last Wed. in Feb. in even-numbered years. Multi-State Bar Examination is now used in Iowa. (Ct. Rule 31.3).

Admission fee and examination fee set by Board of Examiners. (Iowa Code 602.10108).

Admission Without Examination.

An attorney of bar of any state or any territory of United States or District of Columbia, who is a resident of Iowa, may be admitted to Iowa bar without examination and proof of study on showing, in addition to all other requirements of law, that he has practiced for five full years under license in such other jurisdiction within the seven years preceding date of application and that he still holds such license. (Iowa Code 602.10109; Ct. Rule 31.12).

In order to secure admission without examination following proofs must be filed with Iowa Board of Law Examiners: (1) Certificate of admission in state of licensure; (2) certificate of clerk or judge of court of record in such state that applicant was regularly engaged in practice of law in said state for five years; (3) certificate of judge or clerk of district court in this state or of court where applicant has practiced within last five years that he is of good moral character; (4) affidavit of qualifications as to inhabitancy or intent to establish office for practice of law in Iowa. (Ct. Rule 31.13).

Person applying for admission pursuant to this rule must pay to Clerk of Supreme Court at time of filing application for admission fee of $575, no part of which is refundable. (Ct. Rule 31.12).

The applicant must appear for admission before Supreme Court or member thereof. (Ct. Rule 31.13).

Admission Pro Hac Vice.

An out-of-state attorney may appear in and conduct any cause or matter pending in Iowa courts in which he is actually engaged, provided that he files with clerk of court an appointment of some attorney of the county where suit is pending, upon whom service may be had in all matters connected with action. Failing to make such appointment, his pleadings must be stricken from court files and he may not be permitted so to practice. (Iowa Code 602.10111, Ct. Rule 31.14).

License.

License renewed in multi-year intervals by Supreme Court under conditions determined by Court. (Iowa Code 602.10137).

Powers.

Attorneys may receive for money claimed by client in action or proceeding, during pendency thereof or afterward, unless previously discharged, and acknowledge satisfaction. (Iowa Code 602.10114).

Liens.

An attorney has a lien for a general balance of compensation on: (1) Any and all papers or money in his hands belonging to his client; (2) any money due his client in the hands of the adverse party or attorney of said party in an action or proceeding in which the attorney claiming the lien was employed, from the time of giving notice in writing to such adverse party or his attorney; (3) after judgment in any court of record such notice may be given and the lien made effective against the judgment debtor by entering the same in the judgment or combination docket, opposite the entry of the judgment. (Iowa Code 602.10116). Lien may be released by executing bond in sum double amount claimed or in such sum as fixed by district judge, payable to attorney, and will be released in any case unless attorney, within ten days after demand thereof, files with clerk full and complete bill of his services. (Iowa Code 602.10117, .10118).

Grievances.

Members of grievance committee of Iowa State Bar Association are Commissioners of the Supreme Court, with authority to hold hearings and receive evidence concerning alleged violations, wherever such violations occur, of Iowa Code of Professional Responsibility for Lawyers or laws of U.S., and laws of State of Iowa or any other state or territory within their respective jurisdictions by lawyers who are members or nonmembers of bar of Supreme Court. (Ct. Rule 35.1).

Suspension or Disbarment.

Supreme Court may suspend or revoke an attorney's license to practice, upon proceedings instituted at direction of court or on petition of any individual. (Iowa Code 602.10121-.10123).

Advertising Law Lists.

Numerous restrictions on lawyer holding out publicly as practicing in certain fields of law and explicit directions for publication of disclaimer in connection therewith. (D.R. 2-105). Lawyer may not engage in in-person or telephone solicitation of legal business under any circumstance and all other solicitation and advertising highly regulated. (D.R. 2-101).

Professional Corporations.

See category 2 Business Organizations, topic 2.03 Corporations, subhead Professional Corporations.

Attorney Ethics.

Iowa Supreme Court has adopted c. 32, "Iowa Rules of Professional Conduct." Ethical considerations mandatory.

19 MINERAL, WATER AND FISHING RIGHTS

19.01 MINES AND MINERALS:

Supervision.

Department of Agriculture and Land Stewardship supervises mines and mining operations. (208). Department of Agriculture and Land Stewardship may commence proceedings to suspend, revoke, or refuse to renew mining license for repeated or willful violation of any provisions of Act. (Iowa Code 208.8).

Operation of Mines.

No person, firm, partnership or corporation shall engage in mining without first obtaining license from Department of Agriculture and Land Stewardship. Licenses are issued upon application, expire on Dec. 31 of each year, and are renewable upon application. (Iowa Code 208.7).

Inspection of Mines.

Department of Agriculture and Land Stewardship may enter lands on which operator is licensed to operate mine at any time to determine compliance with Act. (Iowa Code 208.26).

Oil and gas wells are regulated by 458A.

20 MORTGAGES

20.01 CHATTEL MORTGAGES:

Uniform Commercial Code adopted. (554). See category 3 Business Regulation and Commerce, topic 3.09 Commercial Code.

Motor Vehicles.

Security interest in vehicle subject to registration is perfected by delivery to county treasurer of county where certificate of title was issued or, in case of new certificate, to county treasurer where certificate will be issued, of application for certificate of title which lists security interest, or application for notation of security interest signed by owner, or certificate of title from another jurisdiction which shows security interest, and payment of fee of $5 for each security interest shown. Date of delivery shall be date of perfection of security interest in vehicle, regardless of date security interest is noted on certificate of title. (Iowa Code 321.50). Except as provided in 321, Uniform Commercial Code applies to security interests in motor vehicles. (Iowa Code 321.47-.50).

Forms.

For free samples of form of Financing Statement, and Statement of Continuation, Partial Release, Assignment, Termination or Amendment, write Iowa Secretary of State. For forms of Security Agreement and Financing Statement, see end of this Digest.

20.02 COLLATERAL SECURITY:

See category 8 Debtor and Creditor, topic 8.15 Pledges.

20.03 MORTGAGES OF PERSONAL PROPERTY:

See topic 20.01 Chattel Mortgages.

20.04 MORTGAGES OF REAL PROPERTY:

Lien theory of mortgages governs.

Execution and Recording.

Mortgages must be executed, acknowledged and recorded in the same manner as deeds. (Iowa Code 558.1). Recording fee is $5 for each page or fraction thereof, plus additional transaction fee of no more than $4, depending on transaction and as provided by statute. (Iowa Code 331.604).

Husband or wife of mortgagor must join in mortgage in order to bar his or her right to a distributive share of the property. See categories 8 Debtor and Creditor, topic Homesteads, subhead Conveyance or Encumbrance; Estates and Trusts, topic Descent and Distribution; Family, topic Husband and Wife.

Advancements made by junior lien holders for the protection of the junior lien may be made liens by filing a verified statement of said expenditures with the clerk of the district court of the county in which the land is situated and such advancements may be recovered in an action to foreclose the junior lien. (629).

Redlining and discrimination is prohibited where loans are for purchase, construction or rehabilitation of residential property (four or fewer family dwellings), where property is used for security. (535A.2).

Priority.

Where two or more mortgages each grant the right to subject rents and income of the real estate to payment of the debt, the respective mortgagees have priority in this respect in the same order as priority of the mortgage liens. (Iowa Code 654.13).

Release, Satisfaction or Assignment.

Whenever the amount due on any mortgage is paid off, the mortgagee, or those legally acting for him, must acknowledge satisfaction thereof by written instrument referring to mortgage, duly acknowledged and recorded. (Iowa Code 655.1). Where released or assigned by separate instrument, recorder must so note on original instrument. (Iowa Code 558.45).

Foreign Fiduciaries.

Mortgage or deed of trust may be released, satisfied or assigned, in whole or in part, by foreign fiduciary officer when no resident fiduciary officer has been appointed or qualified in state. To effect this there must be recorded in office of county recorder of county in which mortgage or deed of trust is of record such release, satisfaction or assignment by such foreign officer, accompanied by certificate of judge or clerk of court by which he was appointed, showing name of court making appointment, date of appointment and that foreign officer has not been discharged at time of executing such release, satisfaction or assignment and is authorized to execute same. Release, satisfaction or assignment by foreign officer may be made in any manner, or by any instrument, which would be valid and effective if made by like officer qualified under law of Iowa. (Iowa Code 633.144-.147).

Foreclosure.

Except where § 654.18 alternative nonjudicial voluntary foreclosure procedure employed, real estate mortgage can be foreclosed only by equitable proceedings (Iowa Code 654.1) in county where property or some part thereof is located (Iowa Code 654.3). Special moratorium provisions may apply upon Governor's declaration of economic emergency. (Iowa Code 654.15).

Service of notice may be by publication once each week for three consecutive weeks, in some newspaper printed in the county where the petition is or will be filed, provided an affidavit is first filed that personal service cannot be made within state. See category 5 Civil Actions and Procedure, topic 5.20 Process, subhead Publication.

In foreclosure proceedings, judgment may be rendered against mortgagor for whole debt (Iowa Code 654.5), and after sale of mortgaged premises under special execution mortgagee has right to general execution against mortgagor for any deficiency (Iowa Code 654.6), but judgment on mortgage foreclosure has no force except as set-off or counterclaim after two years from entry thereof exclusive of any time during which execution of judgment was stayed pending bankruptcy action (Iowa Code 615.1), and no action may be brought to renew or extend such judgment (Iowa Code 615.2).

Mediation proceedings required prior to foreclosure on agricultural land securing debt of over $20,000 and where borrower is individual operating farm, family farm corporation, trust or limited partnership as defined in 9H.1. (654A.4). Creditor must file, or, borrower may file, request for mediation with Farm Mediation Service. (654A.5, .6). Borrower may waive mediation only after initial consultation (654A.6[2]), otherwise, notice must be given and initial meeting must be held within 21 days of notice of meeting (654A.8). Foreclosure proceedings may be commenced only after mediation release is issued or if, after notice and hearing, court has determined that time delay required for mediation would cause creditor irreparable harm. (Iowa Code 654.26). Mediation release can be acquired after written statement is prepared representing agreement made or showing that agreement could not be reached. (654A.11).

Also, prior to foreclosure proceedings on agricultural lands, creditor must give borrower notice of alleged default and of right to cure. (Iowa Code 654.2A[2]). Borrower has right to cure unless: (a) Creditor has given borrower proper Notice of Right to Cure with respect to two prior defaults on obligation secured by deed of trusts or mortgage; (b) borrower has voluntarily surrendered possession of agricultural land and creditor has accepted it in full satisfaction of any debt owing on obligation in default; or (c) if creditor has given borrower proper Notice of Right to Cure with respect to prior default within 12 months prior to alleged default. (Iowa Code 654.2A[3]). If borrower has right to cure default creditors may not accelerate unpaid balance of obligation or take possession of land, other than by voluntary surrender, or otherwise attempt to enforce obligation until 45 days after proper Notice of Right to Cure is given. (Iowa Code 654.2A[4]). During 45-day period, running concurrently with 42-day period provided in c. 654A, borrower may cure by tendering unpaid installments due at time of tender, without acceleration, plus delinquency charge of scheduled annual interest rate plus 5% per annum for period between giving of Notice of Right to Cure and tender or amount stated in Notice of Right to Cure, whichever is less. (Iowa Code 654.2A[4][b]). Borrower may always voluntarily surrender possession of land. (Iowa Code 654.2A[6]).

Notice of Right to Cure for any real estate foreclosure shall: (a) Be in writing; (b) conspicuously state name, address and telephone number of creditor to which payment is to be made; (c) give brief identification of obligation secured by mortgage and of borrower’s right to cure default; (d) contain statement of nature of right to cure default; (e) contain statement of nature of alleged default; (f) contain statement of total payment including itemization of any delinquency or deferral charges or other performance necessary to cure alleged default; (g) state exact date on which amount must be paid or performance tendered; and (h) notify borrower that creditor may proceed with foreclosure. (Iowa Code 654.2B).

If homestead exemption waiver contained in written contract, contract must contain statement in substantially following form, in boldface type of minimum size of ten points, and be signed and dated by person waiving exemption at time of execution of contract: “I understand that homestead property is in many cases protected from the claims of creditors and exempt from judicial sale; and that by signing this contract, I voluntarily give up my right to this protection for this property with respect to claims based upon this contract.” (Iowa Code 561.22).

Alternative nonjudicial voluntary foreclosure procedure available upon mutual written agreement of mortgagor and mortgagee and fulfillment of following requirements: (1) Mortgagor must convey to mortgagee all interest in mortgaged property; (2) mortgagee must accept such conveyance and waive any right to deficiency; (3) mortgagee must be given immediate access to mortgaged property to maintain and protect same; (4) mortgagor and mortgagee must file jointly executed statement of election to follow said nonjudicial voluntary foreclosure procedure with recorder in county where mortgaged property located; (5) mortgagee must send notice of election either by certified mail or by general publication to all junior lienholders as of date of paragraph 1 conveyance, notifying junior lienholders of 30 day redemption period from date of such mailing or from completion of publication, respectively; and (6) when mortgagor signs agreement to proceed under said nonjudicial voluntary foreclosure procedure, mortgagee must furnish mortgagor duplicate completed “Disclosure and Notice of Cancellation” form set forth below, which must be in 10 point type and attached to said agreement. (Iowa Code 654.18).

DISCLOSURE AND NOTICE OF CANCELLATION

____

(enter date of transaction)

Under a forced foreclosure Iowa law requires that you have the right to reclaim your property within one year of the date of the foreclosure and that you may continue to occupy your property during that time. If you agree to a voluntary foreclosure under this procedure you will be giving up your right to reclaim or occupy your property.

Under a forced foreclosure, if your mortgage lender does not receive enough money to cover what you owe when the property is sold, you will still be required to pay the difference. If your mortgage lender receives more money than you owe, the difference must be paid to you. If you agree to a voluntary foreclosure under this procedure you will not have to pay the amount of your debt not covered by the sale of your property but you also will not be paid any extra money, if any, over the amount you owe.

NOTE: There may be other advantages and disadvantages, including an effect on your income tax liability, to you depending on whether you agree or do not agree to a voluntary foreclosure. If you have any questions or doubts, you are advised to discuss them with your mortgage lender or an attorney.

You may cancel this transaction, without penalty or obligation, within five business days from the above date.

This transaction is entirely voluntary. You cannot be required to sign the attached foreclosure agreement.

This voluntary foreclosure agreement will become final unless you sign and deliver or mail this notice of cancellation to ______ (name of mortgagee) before midnight of ______ (enter proper date).

I HEREBY CANCEL THIS TRANSACTION.

____

DATE

____

SIGNATURE

Receivers.

When receiver is appointed, preference in leasing the premises must be given to owner or person in possession and rents or income must be applied to: (1) Costs of receivership; (2) payment of taxes; (3) payment of insurance and such other benefits to real estate as court may order; (4) distribution as fixed by court. (Iowa Code 654.14).

Redemption.

The right of redemption is the same as in case of sale under a general execution. See category 8 Debtor and Creditor, topic 8.05 Executions. Real property redeemed by debtor is free from any liability for deficiency judgment. (Iowa Code 628.3).

Forms

RELEASE OF REAL ESTATE MORTGAGE

The undersigned, the present owner(s) of the mortgage hereinafter described, do hereby acknowledge that a certain mortgage bearing date of the . . . . made and executed by . . . . to . . . . and Recorded in the records of the office of the Recorder of the County of . . . . on the . . . . is redeemed, paid off, satisfied and discharged in full.

Words and phrases herein, including acknowledgement hereof, shall be construed as in the singular or plural number, and as masculine, feminine or neuter gender, according to the context.

Dated this . . . . . .

(Signature, Title)

(Notarial Acknowledgment)

PARTIAL RELEASE OF REAL ESTATE MORTGAGE

The undersigned, the present owner(s) of the mortgage hereinafter described, for valuable consideration, receipt of which is hereby acknowledged, do hereby acknowledge that the following described real estate situated in . . . . . County, Iowa, to wit:

. . . . . . is hereby released from the lien of the real estate mortgage, executed by . . . . . dated . . . . ., recorded in the records of the Office of the Recorder of the County of . . . . ., State of Iowa, in Book . . . . . of . . . . ., page . . . . . specifically reserving and retaining the mortgage lien and all mortgage rights against all of the remaining property embraced in the mortgage above described.

Words and phrases herein, including acknowledgment hereof, shall be construed as in the singular or plural, and as masculine, feminine or neuter gender, according to the context.

Dated this . . . . . .

(Signature, Title)

(Notarial Acknowledgment)

If waiver of homestead exemption desired, special requirements apply. See category 8 Debtor and Creditor, topic 8.10 Homesteads, subhead Conveyance or Encumbrance. (Iowa Code 561.22).

Chattel Mortgages.

See topic 20.01 Chattel Mortgages.

21 PROPERTY

21.01 ABSENTEES:

Care of Property.

Conservator may be appointed to take charge of, preserve and control property of an adult person whose whereabouts unknown and no provision has been made for such property, when such person's property within state is liable to become injured, lost or damaged by reason of such absence, or dependents of such owner are likely to be deprived of means of support because of such absence. (Iowa Code 633.580).

Administration of Absentee's Estate.

Administration may be had on the estates of persons who have absented themselves from their usual place of residence and concealed their whereabouts from their family without known cause for five years as though such persons were dead, but petition praying administration must be filed by one who would be entitled to administer upon such estate if absentee were known to be dead. (Iowa Code 633.510). Notice must be published three weeks and mailed to absentee and alleged distributees at their last known address. (Iowa Code 633.511, .512). Proof of such service must be filed with clerk on or before day set for hearing. (Iowa Code 633.513). Written findings of presumed death under Federal Missing Persons Act are admissible as evidence of that fact. (Iowa Code 633.517).

Escheat.

Uninherited property escheats to state of Iowa. (Iowa Code 633.219, .543-.546). Revised Uniform Disposition of Unclaimed Property Act adopted, with some modifications. (556).

If unclaimed for period of years intangible personal property is presumed abandoned, and holder of such property must then file report to State Treasurer. (Iowa Code 556.11). By Nov. 30 of each year, State Treasurer shall publish notice of names of persons appearing to be owner of abandoned property. (Iowa Code 556.12). Notice shall contain statement that information concerning amount or description of property and name and address of holder may be obtained by any persons possessing interest in property by addressing inquiry to State Treasurer. (Iowa Code 556.12). If no claims are timely filed or filed claims are disallowed, funds are deposited in general funds of state. (Iowa Code 556.18). Holding periods prior to reporting and transfer to Treasurer vary according to identity of holder. (Iowa Code 556.2-.9).

See also category 13 Estates and Trusts, topics 13.07 Descent and Distribution, subhead Escheat, and 13.16 Wills, subhead Unclaimed Legacies.

Process Agent.

Nonresident may in writing appoint resident of county in which parcel is located as agent, and file appointment with county treasurer, who shall make note of appointment, after which personal service of notice shall be made upon agent. (Iowa Code 447.11).

21.02 ADVERSE POSSESSION:

Real Property.

Ten years hostile, actual, open, exclusive and continuous possession of real property under claim of right or color of title bars action for recovery of same from person thus in possession. (242 Ia. 692, 46 N.W.2d 72).

Easements.

When an easement is claimed by prescription, the fact of claim of right and adverse possession must be established by evidence distinct from and independent of its use and there must be a showing that party against whom easement is claimed had express notice thereof. (Iowa Code 564.1). Notice in writing served by owner on person claiming the easement of owner's intention to dispute any right arising from the use, when recorded in county recorder's office, will prevent acquiring of any right to property by any use thereof. (Iowa Code 564.4-.7).

Boundaries.

Ten years acquiescence by parties in any corner or boundary is sufficient to establish the same. (Iowa Code 650.14).

21.03 CONDOMINIUMS:

See topic 21.16 Real Property.

21.04 CONVEYANCES:

See topic 21.06 Deeds.

21.05 CURTESY:

Abolished. (Iowa Code 633.211, .212, .238). As to rights of surviving spouse see category 13 Estates and Trusts, topic 13.07 Descent and Distribution.

21.06 DEEDS:

Execution.

Deeds conveying real estate (see topic Real Property for types of estates) must be in writing and subscribed by grantor. (Iowa Code 622.32). Seal is not necessary. (Iowa Code 558.34). Acknowledgment is not necessary to validity as between parties, but is necessary to entitle instrument to be recorded. (Iowa Code 558.20, 9E). Names of signers must be typed or printed legibly under signatures or instrument must be accompanied by affidavit wherein those names are typed or printed legibly, to entitle instrument to be recorded. (Iowa Code 331.602). No witnesses are necessary. For circumstances in which spouse must join, see also categories 14 Family, topic Husband and Wife, subhead Separate Property; Debtor and Creditor, topics Homesteads, subhead Conveyance or Encumbrance, Assignments, subhead Assignment of Wages; Civil Actions and Procedure, topic Limitation of Actions.

Recording.

To be valid against subsequent purchasers for valuable consideration without notice, or against state or any of its political subdivisions during or after condemnation proceedings against real estate, deed must be filed and recorded in county in which real estate office is located. (Iowa Code 558.41). See also category 10 Documents and Records, topic 10.04 Records.

Recording fee is $5 for filing or recording each page or fraction thereof, plus additional transaction fee of no more than $4, depending on transaction and as provided by statute. (Iowa Code 331.604). In addition, transfer fee of $5 per parcel imposed. (Iowa Code 331.507).

Tax.

When there is consideration and actual market value of real property transferred exceeds $500, tax of 80¢ for each $500 or fractional part in excess of $500 is imposed on deed. (428A.1). Tax does not apply to mortgages, plats, leases, certain executory contracts for deed, satisfactions or releases of mortgages, certain corrective deeds, deeds in lieu of foreclosure, deeds without consideration, and other statutorily specified documents. (428A.2). Person or firm or corporation who grants, assigns, transfers, or conveys any land is liable for tax. (428A.3). Written declaration of value signed by at least one party or agent required prior to recording document of conveyance or assignment with numerous statutory exceptions. (Iowa Code 428.4). With each declaration of value submitted to County Recorder under 428A, there must be submitted statement regarding whether any private burial sites, wells, disposal sites, underground storage tanks, or hazardous wastes are known to be situated on property. (Iowa Code 558.69).

Form.

No particular form of deed is required. The following or equivalent form is sufficient to convey title to real estate:

Forms

1. FOR A QUITCLAIM DEED:

For the consideration of . . . . . dollars, I hereby quitclaim to . . . . . all my interest in the following tract of real estate (describing it).

2. FOR A DEED IN FEE SIMPLE WITHOUT WARRANTY:

For the consideration of . . . . . dollars, I hereby convey to . . . . . the following tract of real estate (describing it).

3. FOR A DEED IN FEE WITH WARRANTY:

The same as the preceding form, adding the words: “And I warrant the title against all persons whomsoever” (or other words of warranty, as the party may desire).

4. FOR A MORTGAGE:

The same as deed of conveyance, adding the following: “To be void upon condition that I pay,” etc.

Add acknowledgment. See category 10 Documents and Records, topic 10.01 Acknowledgments.

21.07 DEEDS OF TRUST:

See category 20 Mortgages, topic 20.04 Mortgages of Real Property.

21.08 DOWER:

Abolished. (Iowa Code 633.211-.212, .238). As to rights of surviving spouse see category 13 Estates and Trusts, topic 13.07 Descent and Distribution.

21.09 ESCHEAT:

See topic 21.01 Absentees, subhead Escheat; categories 3 Business Regulation and Commerce, topic Banks and Banking, subhead Unclaimed Deposits; Estates and Trusts, topics Descent and Distribution, subhead Escheat, Wills, subhead Unclaimed Legacies.

21.10 LANDLORD AND TENANT:

Kinds of Tenancy.

At will and for a fixed term.

Leases for more than one year must be in writing; no seal or witnesses required; acknowledgment necessary only for recording. (Iowa Code 622.32).

Farm Tenancy.

At termination of life estate, farm tenancy granted by life tenant continues until following Mar. 1st for that year. If life estate terminates between Sept. 1st and Mar. 1st, then tenancy will continue for that year as provided by 562.6 of Iowa Code and until proper notice under 562.7. (Iowa Code 562.8).

Recording is not required; those dealing with property must take notice of tenants in possession.

Rent.

If tenant remains in possession without landlord’s consent after expiration of term of rental agreement landlord may bring action for possession. If tenant’s holdover is willful, landlord may also recover actual damages and attorneys fees. (562A.34[3]). Landlord may assign right to rent. (111 N.W. 329).

Lien.

Lien on behalf of landlord on tenant's household goods abolished. (562A.31).

Mobile Homes.

Actions for abandonment under lease agreement. (555B).

Termination of Tenancy.

Thirty days notice is necessary to terminate tenancy at will, unless rent is paid at less than 30 day intervals, in which case notice must be same as such interval. (Iowa Code 562.4). But if property is farm occupied and cultivated by tenant he cannot be dispossessed before Mar. 1 and notice of termination of tenancy must be given on or before Sept. 1 preceding in manner prescribed by statute. (Iowa Code 562.5). Mere cropper who does not live on land may be put off when crop is harvested. (Iowa Code 562.5). Week to week tenancy may be terminated by written notice given to other at least ten days prior to termination date specified in notice. (562A.34[1]). Landlord may file suit to recover possession after three days written notice of termination and to quit if tenant creates clear and present danger. (562A.27A). Petition must state incidents giving rise to notice of termination and notice to quit. (562A.27A; 562B.25A).

Dispossession.

An action of forcible entry and detainer is allowable where tenant's lease has expired either by own provisions or notice and he holds over. (648).

Distress for rent is not recognized. (562A.31).

Implied Warranty of Habitability.

Landlord impliedly warrants at outset of lease that there are no latent defects in facilities and utilities vital to use of premises for residential purposes and that these essential features shall remain during entire term in such condition to maintain habitability of dwelling. Implied warranty in lease situation is a representation that there neither is nor shall be during term a violation of applicable housing law, ordinance or regulation which shall render premises unsafe, or unsanitary and unfit for living therein. (200 N.W.2d 791, codified by amendment [562A.15]).

Residential.

Uniform Residential Landlord and Tenant Act substantially adopted. (562A).

21.11 LEASES:

See topic 21.10 Landlord and Tenant.

21.12 [RESERVED]

21.13 PERPETUITIES:

Nonvested interest in property is not valid unless it must vest, if at all, within 21 years after one or more lives in being at creation of interest and any relevant period of gestation. Period of rule shall be measured by actual events rather than by possible events, in any case in which that would validate interest.

Accumulations.

Common law rules prevail. See also category 13 Estates and Trusts, topic 13.15 Trusts.

21.14 PERSONAL PROPERTY:

Tenancies by the entireties not recognized. (207 N.W. 369).

21.15 POWERS OF ATTORNEY:

Power of Attorney.

Conveyance or mortgage of real estate may be executed by an attorney in fact acting under written power of attorney executed in the same manner as conveyance (Iowa Code 557.10), which must be recorded (Iowa Code 558.41).

Form

POWER OF ATTORNEY—SHORT FORM

The undersigned, ... of . . . . . County, Iowa, does hereby make, constitute and appoint . . . . . of . . . . . County, Iowa, the undersigned's true and lawful Attorney-in-Fact, with full right, power and authority for the undersigned and in the undersigned's name, place and stead:

Giving and Granting unto said Attorney-in-Fact the full power and authority to do and perform each and every act, deed, matter and thing whatsoever required and necessary to be done in and about the foregoing, as fully as the undersigned might or could do if personally present and acting.

In the event my Attorney-in-Fact is unable to serve for any reason or if my Attorney-in-Fact is currently my spouse and we become legally separated or our marriage is dissolved, I name . . . . . of . . . . ., as my successor to my Attorney-in-Fact.

The undersigned further directs that this Power of Attorney shall take effect immediately and shall be irrevocable unless and until such time as there is filed of record a duly acknowledged revocation of this instrument in the same office in which the instrument containing this power is recorded. This Power of Attorney shall not be affected by my disability.

The undersigned does hereby authorize said Attorney-in-Fact to relinquish all rights of dower, homestead and distributive share in and to any real estate described herein in which the undersigned has an interest.

Words and phrases herein, including acknowledgment hereof, shall be construed as in the singular or plural number, and as masculine or feminine gender, according to the context.

Dated: . . . .

(Acknowledgment if recording desired).

(Signature)

Death of principal ordinarily revokes power of attorney unconnected with interest, even though agent be without knowledge of death (39 Ia. 426), attorney-in-fact, agent or other person who, without actual knowledge of death of principal, acts in good faith (Iowa Code 633.706). But written power of attorney given by principal who at time of execution thereof is or thereafter becomes member of U. S. Armed Forces, merchant seaman outside limits of U. S. or any person outside said limits by permission, assignment or direction of U. S. government in connection with prosecution of war in which U. S. is engaged is not revoked or terminated by death of principal unless attorney has actual knowledge or actual notice of such death. (29A.74).

Revocation should be exercised in same manner in which power was created. See also subhead Death of Principal, supra.

Undisclosed Principal.

Uniform Commercial Code adopted. (554). See category 3 Business Regulation and Commerce, topic 3.09 Commercial Code.

Uniform Commercial Code adopted. (554). See category 3 Business Regulation and Commerce, topic 3.09 Commercial Code.

21.16 REAL PROPERTY:

Among estates recognized are: fee simple, legal, equitable, tenancy in common, joint tenancy, life estate; also the various uses and remainders. (557).

Conveyances to two or more are construed as creating a tenancy in common unless intent to create joint tenancy is expressed. (Iowa Code 557.15).

Tenancies by the entirety are not recognized. (201 Ia. 1290, 207 N.W. 369).

Rule in Shelley's Case does not apply. (Iowa Code 557.20).

Condominiums.

Horizontal property act adopted. (499B). Co-operative apartments also provided for. (499A).

See also topics 21.05 Curtesy, Deeds, Dower, Landlord and Tenant; categories 3 Business Regulation and Commerce, topic Consumer Protection; Civil Actions and Procedure, topic Partition; Debtor and Creditor, topic Homesteads; Documents and Records, topic Records; Family, topic Husband and Wife; Mortgages, topic Mortgages of Real Property.

21.17 TRUST DEEDS:

See category 20 Mortgages, topic 20.04 Mortgages of Real Property.

22 TAXATION

22.01 ADMINISTRATION:

(Title X, Chapters 421-454).

Penalties.

Sales Tax.

Penalties as provided by 422.58 were repealed as of July 1, 2004.

Use Tax.

Penalties as provided by 423.18(3) were repealed as of July 1, 2007.

Cigarette Tax.

Penalty imposed by 453A.50.

Beer Tax.

Penalty imposed by 123.137.

As to penalties with regard to income and inheritance taxes, see topics detailing those taxes.

22.02 ALCOHOL, BEVERAGES AND TOBACCO TAXES:

Beer tax imposed by 123.136.

Cigarette tax imposed by 453A.43.

22.03 BUSINESS TAXES:

Premium tax on insurance companies, see category 16 Insurance, topic 16.01 Insurance Companies.

Franchise Tax.

See category 2 Business Organizations, topic 2.03 Corporations.

22.04 CORPORATE TAXES:

See topic 22.10 Income Tax, subhead Corporations; category 2 Business Organizations, topic 2.03 Corporations.

22.05 EMPLOYMENT TAXES:

Unemployment compensation tax, in the form of "contributions," is imposed. (96).

Contributions are required from all employers who, for some portion of day in each of 20 different weeks in current or preceding calendar year have or had in employment one or more individuals.

Exemptions.

Act does not apply to following employments: Certain agricultural labor; certain domestic service in private home; service of federal, state, municipal or other government; service in employ of son, daughter, or spouse or service of minor in employ of parent; service in employ of religious, charitable, scientific, literary or educational enterprise, or after school or vacation employment of students. (Iowa Code 96.19[18][g]). Employers operating under unemployment compensation system established by act of Congress, who have made arrangements with department providing for reciprocal treatment of unemployed, are also exempt. (Iowa Code 96.19[18][g][2]).

Rate of contributions is based on employer's benefit experience in accordance with rules adopted by Job Division on all taxable wages paid by employer for insured work. (Iowa Code 96.7).

Contributions are payable to Department of Employment Services' Job Services Division at such time as it may prescribe.

22.06 [RESERVED]

22.07 ESTATE TAX:

Aside from inheritance tax (see topic 22.12 Inheritance Tax), there is no Iowa estate tax due to elimination of Federal Estate Tax Credit for state death taxes. (C. 451 repealed by Iowa Acts of 2008.)

22.07A EXCISE TAXES:

Excise tax on grain imposed by 428.35.

22.08 [RESERVED]

22.09 GIFT TAX:

None; but inheritance tax applies to gifts in contemplation of death or to take effect after death. (Iowa Code 450.3).

22.10 [RESERVED]

22.11 INCOME TAX:

Income tax is imposed on taxable income of individual residents of the state. “Taxable income” means “net income” less allowable deductions. (Iowa Code 422.4[16]). “Net income” means adjusted gross income before net operating loss deduction as properly computed for federal income tax purposes, with some adjustments as described in § 422.7. Credit is allowed for tax paid to other states on income of resident earned outside state. Income tax is imposed on nonresidents with respect to income from property and business within state. Income of nonresident not subject to Iowa income tax, if taxed where person resides and that state allows similar exclusion for income received in that state by Iowa residents. (Iowa Code 422.8). Income from estates and trusts is subject to tax. (Iowa Code 422.6). Deductions similar to federal income tax deductions, with certain exceptions, are allowed. (Iowa Code 422.9).

Rates for tax years beginning on or after Jan. 1, 1998 are: (a) On all taxable income from zero through $1,000, 36/100 of 1%; (b) taxable income exceeding $1,000 but not exceeding $2,000, 72/100 of 1%; (c) exceeding $2,000 but not exceeding $4,000, 243/100%; (d) exceeding $4,000 but not exceeding $9,000, 4½%; (e) exceeding $9,000 but not exceeding $15,000, 612/100%; (f) exceeding $15,000 but not exceeding $20,000, 648/100%; (g) exceeding $20,000 but not exceeding $30,000, 68/10%; (h) exceeding $30,000 but not exceeding $45,000, 792/100%; and (i) exceeding $45,000, 898/100%. (Iowa Code 422.5).

Exemptions that are deductible from computed tax, estate or trust, single individual, or married person filing separate return, $40; head of household, or husband and wife filing joint return, $80; for each dependent, $40. (Iowa Code 422.12). Additional exemptions of $20 are allowed for persons over 65 or blind. (Iowa Code 422.12). Additional deductions are allowed for parents of children for tuition and textbooks in private schools, provided certain conditions are met. (Iowa Code 422.12).

Alternative Minimum Tax.

(Iowa Code 422.5).

Corporations.

Domestic corporations and foreign corporations doing business within the state, or deriving income from sources within state, are taxed annually on basis of net income received during income year. Rates are: 6% on first $25,000 or part thereof; 8% on taxable income between $25,000 and $100,000; 10% on taxable income between $100,000 and $250,000; 12% on taxable income of $250,000 or more; capital gains and losses in accord with 422.33(2)(b)(2). (Iowa Code 422.33). Certain corporations are entirely exempt. (Iowa Code 422.34A).

Returns on forms provided by director of revenue must be filed with director of revenue on or before last day of 4th month after expiration of tax year, except that cooperative associations must file returns before 15th day of ninth month. (Iowa Code 422.21).

Residents and nonresidents required to file a federal income tax return who have net income from taxable source of $9,000 or more or as otherwise required by director must file return. (Iowa Code 422.13).

Payment.

Total tax due to be paid in full at time of filing return. (Iowa Code 422.24).

Penalties.

Willful filing of false return, or willful failure to file return or to pay tax is punishable as class "D" felony. (Iowa Code 422.25). Variable rate of interest as set forth in 421.7 is payable on all tax delinquencies. (Iowa Code 422.25).

22.12 INHERITANCE TAX:

Estates of all deceased persons, whether decedents be inhabitants of this state or not, which estates or property are or are brought within state or subject to jurisdiction of courts of this state, or property of any decedent domiciled within this state even though situated outside of this state, except real estate, are subject to tax when passing: (a) By will or under statutes of inheritance; (b) by deed, grant, sale, gift or transfer made within three years of death of grantor or donor which is not bona fide sale for adequate and full consideration in money or money's worth and which is in excess of annual gift tax exclusion allowable for each donee under state and federal law; (c) under general power of appointment exercised after adoption of inheritance tax law; (d) property held in joint tenancy by decedent and any other person or persons; however if joint property is held by decedent and surviving spouse one-half is not subject to tax and for any additional percentage spouse can show he or she helped to acquire that portion also not subject to tax; and in addition such portion as may be proven to have belonged to any other joint tenant not subject to tax; (e) property disposed of by decedent in any manner to take effect at his death. (Iowa Code 450.2-.3).

In estates of decedents dying on or after July 1, 1997, property passing to surviving spouse and all lineal ascendants and descendants is fully exempt from tax. (Iowa Code 450.9).

There is no tax if estate is not over $25,000, or on value of annuity payments under employees' pension or retirement plan, where beneficiary pays income taxes on same, or when property passes to charitable, educational, religious, cemetery or humane societies within state, or for maintenance of burial lot, or to any veterans' organization as defined by 26 U.S.C. § 170. (Iowa Code 450.4).

Property passing to surviving spouse and lineal ascendants and descendants from decedents dying on or after July 1, 1997 is not subject to tax. Rates of tax for other beneficiaries are based upon individual share and vary according to beneficiary classification and amount received. (Iowa Code 450.9, .10).

Brother, sister, son-in-law or daughter-in-law. No exemption. Rates: 5% on first $12,500 or part thereof; 6% on next $12,500 or part thereof; 7% on next $50,000 or part thereof; 8% on next $25,000 or part thereof; 9% on next $50,000 or part thereof; 10% on excess over $150,000.

(Iowa Code 450.10[1]).

All other persons (except those falling within subsequent classes). No exemption. Rates: 10% on first $50,000 or part thereof; 12% on next $50,000 or part thereof; 15% on excess over $100,000. (Iowa Code 450.10[2]).

Societies, institutions or associations of other states or countries for charitable, educational, religious, cemetery or humane purposes, or resident trustees for uses without the state, 10% on entire amount. (Iowa Code 450.10[3]).

Firm, corporation or society organized for profit, 15% on entire amount. (Iowa Code 450.10[4]).

Payment.

Tax accrues at death of decedent owner and must be paid to director of revenue on or before last day of ninth month after death of decedent unless period is extended by director. (Iowa Code 450.6). Tax is charge against and lien upon estate subject to tax, until paid and draws interest as provided. (Iowa Code 450.6-.7, .63).

Penalties.

10% of amount due is added to tax if less than 90% of tax paid by due date, with specified exceptions. (Iowa Code 450.63, 421.27).

22.1322.15 [RESERVED]

22.16 PROPERTY TAXES:

Exemptions from taxation, subject to specified limitations in some cases, are accorded the following classes of property: federal property, unless taxation thereof is authorized by U. S.; state property; municipal and military property; public grounds and cemeteries; fire equipment buildings and grounds; property of associations of war veterans; certain property of nonprofit cemetery associations; libraries and art galleries for public use; real and personal property of religious, literary and charitable societies; like property of students of said institutions used for their education; real property of educational institutions; homes for soldiers; growing agricultural produce except commercial orchards and vineyards; government lands entered or purchased, for year in which made; public airports; real property used to provide rural water to public; certain pollution control and recycling property in certain impoundment structures; property owned and operated by nonprofit organization providing low-rent housing for elderly and physically and mentally handicapped but only until terms of original low-rent housing development mortgage paid in full or expires and subject to filing requirements; natural conservation or wildlife areas; land designated native prairie and wetland; land certified as wildlife habitat; data center business property; public television stations; speculative shell buildings of certain organizations; joint water utilities; methane gas conversion property; mobile home park storm shelters; dwelling unit property owned by nonprofit organizations; and property other than land and buildings and other improvements utilized by web search portal business as defined in c. 423.3. (Iowa Code 427.1). In addition to foregoing, exemptions are granted to war veterans (426A.11), and tax credits are granted persons over age 65, persons with disabilities and owners of homesteads (425).

There is real property tax credit or exemption for members of armed forces. (426A). Disabled veterans may have tax credit equal to entire tax levy on homestead. (Iowa Code 425.15).

Persons receiving cash payments under Title XVI of Social Security Act and certain state supplementary assistance, or persons residing in a health care facility who are receiving payment from department of social services for their care, are deemed unable to contribute to public revenue, and collection of taxes on all property, real and personal, owned by them is suspended while they receive assistance. (Iowa Code 427.9).

Assessment.

Property is assessed by county assessor, except that cities over 10,000 may, by ordinance, provide for city assessor (Iowa Code 441.1); personal property annually (427A.1); real property in 1981 and every two years thereafter (Iowa Code 428.4).

Budget requirements of taxing districts, including townships, school districts, cities, towns and counties, are certified to county auditor or board of supervisors and taxes are levied at such rate as will raise the required amount. (444).

Review of Assessment.

Redress in case of excessive assessment is by complaint presented to local board of review. (Iowa Code 441.37). Appeals from action of board may be taken within 20 days after its adjournment to district court of county in which board sits, by written notice of appeal served on presiding officer of board in same manner as original notice. (Iowa Code 441.38). Appeal is heard in equity and court determines anew questions raised before board of review and fixes amount of assessment. (Iowa Code 441.39). Appeals may be taken from decree of district court in usual manner.

Lien.

Lien attaches at time of levy, but sale after assessment and before levy will not defeat lien. (123 Ia. 485, 99 N.W. 133). Where buildings are erected by person other than land owner, taxes thereon are lien from date of levy until paid. (Iowa Code 445.32). Taxes on real estate are lien on real estate against all persons except state. Taxes on real estate shall be lien on real estate against state which is liable for payment of property taxes as purchaser under certain provisions of Act. (Iowa Code 445.28).

Payment.

Fiscal year adopted. Real estate and personal property taxes for preceding fiscal year must be paid between first Mon. in Aug. and Sept. 1, and may be paid one-half before Sept. 1 and other half before Mar. 1 without becoming delinquent. (Iowa Code 445.36). If first half is not paid before Oct. 1, that half becomes delinquent and draws interest from Oct. 1 (Iowa Code 445.37), at 1½% per month (Iowa Code 445.39). Second half becomes delinquent if not paid before Apr. 1. (Iowa Code 445.37).

Tax sales are had on third Mon. in June when all lands on which there are delinquent taxes are sold. (Iowa Code 446.7).

Redemption.

Owner may redeem within two years by paying amount for which land sold with penalty and interest at 2% per month on sale price plus penalty from date of sale. (447).

Real Estate Conveyance Tax.

80¢ for each $500 or fractional part in excess of $500, when actual market value is in excess of $500. When there is no consideration or when deed or writing is executed and recorded to correct title, and so states, there is no tax. At time of recording document of transfer declaration of value must be filed, with certain exceptions. (428A.1).

22.17 SALES AND USE TAXES:

Sales Tax.

A general tax of 5% is imposed on gross receipts from all retail sales of tangible personal property in state or taxable services, or for resale of tangible personal property in connection with taxable services, sales of gas, electricity, water and communication service, including pay television, sales of admissions to places of amusement and athletic events except those of elementary and secondary educational institutions, fairs; and like rate of tax upon that part of private club membership fees or charges paid for privilege of participating in any athletic sports provided club members and on gross receipts of commercial amusements, and services, rendered, furnished or performed, with certain exceptions, such as resale of property accepted as trade-in on articles sold at retail and other sales as defined by statute. (Iowa Code 423.2, .3).

Report for each calendar quarter year must be made, and tax for such quarter paid, to director of revenue on or before last day of month following close of quarter. (Iowa Code 423.31).

Use tax of 5% is imposed to supplement and enlarge application of sales tax to cover sales and services involving interstate shipments where the subject of the sale is used in this state, with certain exceptions. (423).

Report and payment required similar to those for sales tax. (Iowa Code 423.32).

23 TRANSPORTATION

23.01 MOTOR VEHICLES:

Regulated by Revised Motor Vehicle Code. (321).

Vehicle registration required annually. (Iowa Code 321.34). Issued by county treasurer. Nonresidents may apply to Dept. of Public Safety or to treasurer of county where primary users are located. (Iowa Code 321.20). No exemption for members of armed services. (Iowa Code 321.18, .19). Number plates must be displayed front and rear. (Iowa Code 321.37).

Operator's or chauffeur's license from Motor Vehicle Department is required to operate motor vehicle on highway (Iowa Code 321.174), but there are exemptions in favor of operators of road or farm machinery, persons in service of United States Army, Navy or Marine corps, holders of temporary permits, and nonresident operators (Iowa Code 321.176).

Graduated driver's licenses for persons aged 14 through 17. (Iowa Code 321.180B).

Instruction permit may be issued to applicant between ages of 14 and 18 years if applicant meets requirements of §§ 321.184 and 321.186, other than driving demonstration, and pays required fee. (Iowa Code 321.180B[1]).

Intermediate driver's license may be issued to person 16 or 17 years of age who possesses instruction permit for at least six months, meets certain driving experience requirements, shows satisfactory completion of driver education, and pays required fee. Person with intermediate license is subject to driving restrictions between the hours of 12:30am and 5am. (Iowa Code 321.180B[2]). Full driver's license may be issued to person 17 years of age who possesses intermediate license for at least 12 months, meets certain driving experience requirements, has not had their driving privileges suspended, revoked, or barred, has been accident and conviction free continuously for 12-month period immediately preceding application for full driver's license, and has paid required fee. (Iowa Code 321.180B[4]).

Operators' and chauffeurs' licenses expire during second or fifth year of issuance depending on age of applicant and rules of Public Safety Commissioner and are generally to be renewed within 60 days after operator's birthday. (Iowa Code 321.196).

Transfer of Title.

Transfer can only be effected by assigning certificate of title. (Iowa Code 321.45). Transferee must then apply for transfer of registration and new certificate of title. (Iowa Code 321.46). Decedent's car can be transferred upon filing of affidavit by heirs, without opening estate. (Iowa Code 321.47).

Sales.

Conditional sales must be noted on certificate of title. (Iowa Code 321.50). Security interest in vehicle is perfected through delivery of application for certificate of title which lists security interest. (Iowa Code 321.50). Dealer selling motor vehicle in transaction that does not include sale of liability insurance must obtain buyer's signature on statement to that effect. (321A.39).

Identification Marks.

Criminal offense to deface or alter, with fraudulent intent, any serial, engine or assembling number or knowingly to possess any vehicle, serial or engine number of which is defaced, altered or tampered with. (Iowa Code 714.8).

Operation Prohibited.

By person without valid operator's or chauffeur's license, unless exempted, (Iowa Code 321.174); by intoxicated person (321J). Person under age of 18 may not drive school bus. Person under age of 18 may not get commercial or chauffeur licenses (Iowa Code 321.177), or transport hazardous materials (Iowa Code 321.449[3]).

Where final judgment for damages caused by operation of motor vehicle has not been satisfied within 60 days after entry, license is suspended until judgment is satisfied and proof of financial responsibility is given. But payment of $20,000 for injury to or death of one person, $40,000 for two or more persons and/or $15,000 for property damage is deemed satisfaction. (321A.5).

Size and Weight Limits.

Regulated by 321.452-.481.

Equipment Required.

Regulated by 321.384-.451.

Child restraint devices must be used for children zero-11 years of age in motor vehicles. Violation may result in misdemeanor conviction. (Iowa Code 321.446).

Safety belt or harness must be worn by driver and front seat occupants. (Iowa Code 321.445). See also category 5 Civil Actions and Procedure, topic 5.09 Damages.

Lights Required.

Regulated by 321.384-.423.

Accidents.

Where injury or death occurs, driver must stop, give reasonable aid, give his name and address and vehicle registration number to injured person or driver, occupant or person attending vehicle, and report accident at office of peace officer as near as practicable to place of accident. (Iowa Code 321.263).

Liability of Owner.

The owner of a motor vehicle is liable for the negligence of any person operating the same with the owner's consent. Former owner who has made bona fide sale of vehicle is not liable for its negligent operation, regardless of whether certificate of title has been transferred. (Iowa Code 321.493).

No motor vehicle is exempt from judgment for damages occasioned by use of same. (Iowa Code 627.7).

Guests.

Formerly liability to guests was limited by 321.494, but limitation declared unconstitutional under Iowa Constitution. (293 N.W.2d 577).

Financial Responsibility.

In case of accident involving personal injury or death or property damage in amount of $1,000 or more, licenses or operating privileges of persons involved are suspended 60 days thereafter, unless approved security, sufficient to satisfy any possible judgment, is furnished. (321A.5[1]). This provision does not apply, however, to owner where there is no injury or damage except to him or his property, to owner whose vehicle was stopped, standing or parked in legal manner and properly lighted at time of accident, or to owner whose vehicle was being operated without his permission. (321A.6). Neither does it apply if evidence is filed with Director that person who would otherwise have to file security has been released from liability, or adjudicated not liable, or has confessed judgment with agreement for payment satisfactory to both parties. (321A.6[4]).

The security required must be in such form and in such amount as Director may require, except that where certificate of insurance is filed this must show coverage of not less than $20,000 for injury to or death of one person, $40,000 for injury to or death of two or more persons in same accident, and $15,000 for property damage. (321A.5[3]).

Insurance compulsory as of Jan. 1, 1998. (321A.21, 321.20B).

Foreign vehicle registered in home state or country and displaying license plates required by laws of home state may operate without registration, provided home state or country grants similar privilege to Iowa vehicles. Such vehicle need not be registered nor are any fees required. (Iowa Code 321.53). Exemption from local registration does not extend to vehicles used in transportation for hire or other remunerative business within the state. (Iowa Code 321.54). Vehicles purchased for removal from state must purchase transit plates from county treasurer. (Iowa Code 321.109).

Actions Against Nonresidents.

Nonresident motorist is subject to suit for damages to person or property arising out of his operation of motor vehicle in this state. Such operation is deemed: (1) Agreement by him that he is subject to jurisdiction of district court of this state; (2) appointment by him of State Director of Department of Transportation to act as his process agent; and (3) agreement that process served on said Director shall be of same force and validity as if personally served in this state. (Iowa Code 321.498). Method of service is by filing copy of notice or process with said Director, together with fee of $2, and mailing notice of such filing, together with copy of process or notice of suit, to each defendant by restricted certified mail (i.e., mail delivered to addressee only) within ten days after such filing. (Iowa Code 321.501). In lieu of such mailing, plaintiff may cause such notice to be personally served upon nonresident defendant. (Iowa Code 321.504).

Venue may be in county of plaintiff's residence or in county where injury occurred. If judgment is against plaintiff, it must include reasonable expenses incurred by defendant or his attorney in appearing and defending, if in the judgment of the trial court the action was commenced maliciously or without probable cause. (Iowa Code 321.510). Liability insurance policy of nonresident decedent is considered asset of estate with situs in Iowa. (Iowa Code 321.512). Person who was Iowa resident at time of accident, but who later moves out of state is deemed nonresident. (Iowa Code 321.498[4]).

Direct Actions.

Liability insurance policies issued in this state must contain provision that in event execution on judgment against insured be returned unsatisfied, judgment creditor shall have right of action against insurer to same extent that insured could have enforced his claim against such insurer had such insured paid such judgment. (Iowa Code 516.1). Period of limitation on such action is 180 days from entry of judgment or, in case of appeal, from affirmance of judgment on appeal. (516[3]).

Motor vehicle carriers must have special license and are subject to regulation by Iowa Department of Transportation. (325A.2). They must file approved liability insurance policy or bond with minimum limits as specified in chapter. (325A.3, .6).

Division of Iowa State Patrol of Department of Public Safety enforces provisions of chapter relating to traffic on public highways. (Iowa Code 321.2).

23.02 RAILROADS:

See category 3 Business Regulation and Commerce, topic 3.08 Carriers.

24 Forms

Commercial Code Forms

1
KANSAS LAW DIGEST

—Scope —

Revised for 2010 edition by

YOUNG, BOGLE, MCCAUSLAND, WELLS & BLANCHARD, P.A. of Wichita.

(Citations, unless otherwise indicated, are to chapters and sections of Kansas Statutes Annotated. (K.S.A.). Year and chapter of Session Laws are used for those 2009 bills that do not yet have statutory citation. "Rules" refers to Supreme Court rules, which are published in c. 20, art. 31 of K.S.A. Parallel citations to Pacific Reporter begin with 30 Kan. and 1 Kan. App. See also category 6 Courts and Legislature, topic 6.04 Statutes.)

Note: This revision covers all legislation enacted by 2009 legislature effective July

1, 2009. Legislature meets annually in Jan.

1 INTRODUCTION

1.01 GOVERNMENT AND LEGAL SYSTEM:

The State of Kansas is a constituent state of the United States of America. For further discussion of the U.S. federal system, see Introduction to the Federal Government of the United States at the beginning of this volume. A great many laws are promulgated by the federal government of the United States and are not reflected in the topics below. See the Introduction to this volume for references to the federal law topics covered.

Common Law.

Like all but one of United States, Kansas has common law legal system, with roots in English common law. For information on courts and legislature of Kansas, see category 6 Courts and Legislature.

Legislative Session.

2010 legislative session convenes Jan. 11 and adjourns in May.

1.02 [RESERVED]

1.03 HOLIDAYS:

Following are legal holidays: New Year's Day, Jan. 1; Martin Luther King, Jr. Day, 3d Mon. in Jan.; Presidents' Day, 3d Mon. in Feb.; Memorial Day, last Mon. in May; Independence Day, July 4; Labor Day, 1st Mon. in Sept.; Columbus Day, 2d Mon. in Oct.; Veteran's Day, Nov. 11; Thanksgiving Day, 4th Thurs. in Nov.; Christmas Day, Dec. 25. (K.S.A. 35-107).

Legality of Transactions on Sat., Sun. or Holiday.

Holidays do not affect commercial paper, making or execution of agreements or instruments in writing. (K.S.A. 38-108).

1.04 OFFICE HOURS AND TIME ZONE:

Kansas is in the Central Standard (GMT -06:00) time zone. Office hours are generally from 8 a.m. to 5 p.m.

2 BUSINESS ORGANIZATIONS

2.01 AGENCY:

Common law rules govern.

2.02 ASSOCIATIONS:

Formation.

No statutes or case law.

Rights and Powers.

No statutes or case law.

Liabilities.

Member of unincorporated association is generally liable for tortious acts committed by association's agents acting within scope of employment where wrongful acts were within range of purposes for which association was formed. (206 Kan. 682, 481 P.2d 958).

Actions.

No capacity to sue or be sued. (196 Kan. 1, 408 P.2d 891). Certain members may be named as representative parties if court satisfied they will adequately represent association. (K.S.A. 60-223b).

Dissolution.

No statutes or case law.

Massachusetts or Business Trust.

See topic 2.04 Joint Stock Companies.

Partnerships.

See topic 2.07 Partnerships.

Professional Associations.

See topic 2.03 Corporations, subhead Professional Corporations.

2.03 CORPORATIONS:

Kansas general corporate code (K.S.A. 17-6001 to 7513) based on Delaware code. Governs all corporations whenever organized. (K.S.A. 17-6101[b]). For statutes applying to particular kinds of corporations, see particular categories and topics such as category Business Regulation and Commerce, topic Banks and Banking, category Insurance, topic Insurance Companies, etc.

General Supervision.

Secretary of State, State Capitol, Topeka, KS 66612, 785-296-2564 (corporation division).

Purposes.

Corporation may engage in any lawful activity. (K.S.A. 17-6002[a][3]). However, corporations generally prohibited from directly or indirectly owning or leasing agricultural land in Kansas. Prohibition does not apply to: (1) Encumbrance taken as security; (2) land acquired as gift by educational, religious or charitable nonprofit corporation; (3) land needed and used for nonfarming operations; (4) land acquired by process of law if divested within ten years; (5) land held in fiduciary capacity; (6) land held by family farm corporation, authorized farm corporation, limited liability agricultural company, family farm limited liability agricultural company, and certain other trusts and entities; and (7) land held for feedlots, swine, dairy or poultry production, coal mining, forestry, farming research and miscellaneous other exceptions. (K.S.A. 17-5904).

Name.

Except for banks and where conflicts with special regulation, must include "association," "church," "college," "company," "corporation," "club," "foundation," "fund," "incorporated," "institute," "society," "union," "university," "syndicate," or "limited," or one of the abbreviations "Co.," "Corp.," "Inc.," "Ltd.," or words or abbreviations of like import (K.S.A. 17-6002[a][1]). Name may be reserved for 120 days. (K.S.A. 17-7402). Application to Secretary of State with fee required. (K.S.A. 17-7506[c][15]). Availability of name may be determined by contacting Secretary of State.

Term of Corporate Existence.

Term of corporate existence is perpetual unless otherwise provided in articles of incorporation. (K.S.A. 17-6002[b][5]).

Incorporators.

Any person, partnership, association or corporation, singly or jointly may incorporate or organize a corporation. (K.S.A. 17-6001[a]). There are no restrictions as to residence or citizenship.

Articles of Incorporation.

Must set forth: (1) Corporate name; (2) address, including street, number, city and zip code of registered office in Kansas and name of registered agent at that address; (3) nature of business, which may be any lawful activity; (4) classes of stock authorized, number of authorized shares in each class, par value of each share in each class or statement that shares have no par value, and any preferences or restrictions on any class or any series of any class; (5) name(s) and mailing address(es) of incorporator(s); and (6) if powers of incorporators terminate on filing, names and mailing addresses of initial directors. (K.S.A. 17-6002[a]).

May set forth, instead of in by-laws, any provision required or permitted in by-laws, or any provision: (1) For management of corporation; (2) defining powers of corporation, directors, stockholder, any class of stockholders or members of non-stock corporation; (3) regulating sale or disposition of stock; (4) granting stockholders preemptive right to subscribe to any or all additional issues of any or all stock; (5) requiring supermajority vote of any class or series of stock or of directors; (6) limiting duration of corporation's existence to specified date; (7) on manner of adoption, alteration and repeal of by-laws; (8) eliminating or limiting personal liability of director for breach of fiduciary duty (see subhead Liabilities of Directors, infra); and (9) provision using specified words, requiring ¾ shareholder approval of compromise between corporation and its creditor on application by corporation, any stockholder, any creditor, any receiver or trustees in dissolution to court of competent jurisdiction in Kansas. (K.S.A. 17-6002[b]).

Filing of Articles.

Articles must be signed by incorporator. (K.S.A. 17-6003[a][1]). Original signed instrument must be delivered to Secretary of State along with all taxes and fees. Secretary will stamp filing date on original and return to filer. Corporate existence begins on filing date unless date within 90 days specified. (K.S.A. 17-6003[d]).

Incorporation Tax.

None.

Filing Fees.

Articles of Incorporation.

At time of filing each domestic corporation organized for profit must pay to Secretary of State application and recording fee not exceeding $250. (K.S.A. 17-7506[a]). Fee for domestic not for profit corporation not to exceed $50. (K.S.A. 17-7506[b]).

Foreign Corporation Authorization to do Business.

Filing fee not to exceed $250. (K.S.A. 17-7506[a]).

Other Fees.

Not to exceed $150 for issuing, filing and indexing: (1) Certificate of extension, restoration, renewal or revival of articles of incorporation; (2) certificate of amendment of articles of incorporation, either prior to or after payment of capital; (3) certificate of designation of preferences; (4) certificate of retirement of preferred stock; (5) certificate of increase or reduction of capital; (6) certificate of dissolution, either prior to or after beginning business; (7) certificate of revocation of voluntary dissolution; (8) certificate of change of location of registered office and resident agent; (9) agreement of merger or consolidation; (10) certificate of ownership and merger; (11) certificate of extension, restoration, renewal or revival of certificate of authority of foreign corporation to do business in Kansas; (12) change of resident agent or amendment by foreign corporation; (13) certificate of withdrawal of foreign corporation; (14) certificate of correction of any instruments designated in this section; (15) reservation of corporate name; (16) restate articles of incorporation; and (17) annual report extension. (K.S.A. 17-7506[c]).

Not to exceed $50 for issuing certified copies, photocopies, certificates of good standing and certificates of fact; and any other certificate or filing for which filing or indexing fee is not prescribed by law. (K.S.A. 17-7506[d]).

License to do Business.

Duly certified copy of articles of incorporation or of any other instrument filed with Secretary of State is prima facie evidence of: (1) Due execution and filing of instrument; (2) performance of all conditions precedent to instrument’s effectiveness; and (3) any other facts required or permitted to be stated in instrument. (K.S.A. 17-6005).

Organization.

Incorporators have control of organization until directors are named or elected, with power to obtain stock subscriptions and perfect organization. (K.S.A. 17-6007).

Notice of first meeting may be waived by all incorporators, and need not be given to anyone who attends meeting; otherwise person calling meeting must give other incorporators or directors two days written notice. (K.S.A. 17-6008).

Paid-in Capital Requirement.

No minimum paid-in capital required.

Amendment of Articles.

Articles of incorporation may be amended to include any provision lawful to insert in original articles and in particular: (1) To change its corporate name; or (2) to change its corporate powers and purposes; or (3) to increase, decrease or reclassify its capital stock; or (4) to cancel or affect right of shareholders of any class to receive dividends accrued but not declared; or (5) to create new classes of stock; or (6) to change period of its duration. (K.S.A. 17-6602[a]).

Any or all such changes may be effected by one certificate of amendment. Amendment is effected by majority vote of voting stock entitled to vote, adopting resolution by board of directors setting forth proposed amendment, at annual or special stockholders’ meeting held upon proper notice. Certain restrictions on open ended investment company amendments. (K.S.A. 17-6602[b]). Certificate duly executed, setting forth amendment and certifying that such amendment has been duly adopted, must be filed with Secretary of State. If amendment would alter preferences, special rights or powers of any class of stock so as to affect such class adversely, or would increase or decrease amount of authorized stock of any class, or would increase or decrease par value of any class, affirmative vote of majority in interest of each class so affected is necessary in addition to majority vote of all stock; provided, amount of authorized stock of any class may be increased or decreased by affirmative vote of majority of voting stockholders only, if articles of incorporation so provide. (K.S.A. 17-6602[c]).

Majority vote of directors or governing body of corporation without capital stock may amend articles of incorporation. (K.S.A. 17-6602[c][3]).

Increase or Decrease of Authorized Capital Stock.

Corporation may amend its articles of incorporation to increase or decrease its authorized capital stock or to reclassify same by changing number, par value, designations, preferences or relative, participating, optional or other special rights of shares. (K.S.A. 17-6602[a][3]).

Corporation may reduce its capital by resolution of directors, provided assets remaining after such reduction are sufficient to pay all debts. Duly executed and acknowledged certificate of such reduction must be filed and recorded in manner of articles of incorporation. (K.S.A. 17-6605[d]).

By-laws.

Articles of incorporation may provide manner of and authority for adoption, alteration and repeal of by-laws, otherwise by-laws are adopted by incorporators or stockholders or, on their failure to act, by board of directors. Thereafter power to make, alter or repeal by-laws is in stockholders or members of a nonstock corporation, but corporation may confer that power concurrently on directors. For corporations in existence on July 1, 1972, right to amend, alter or repeal is in board of directors, unless otherwise provided in corporation articles and subject to power of stockholders so to act. (K.S.A. 17-6009).

Stock.

Corporation may issue different classes of stock, with or without par value and with such full or limited voting rights, preferences, optional or special rights, qualifications, limitations or restrictions as is provided for in articles of incorporation or in resolution of board of directors authorized thereby. Preferred or special stock may be made redeemable or convertible into or exchangeable for shares of other classes and its holders be entitled to receive dividends at such rates, on such conditions, and at such times, payable in preference to, or in relation to, dividends payable on any other class, cumulative or noncumulative, and have such preferences on distribution or dissolution as are provided for in articles of incorporation or resolution of board of directors authorized thereby. (K.S.A. 17-6401).

For purposes of title, actions, garnishment and jurisdiction of Kansas courts, situs of stock of Kansas corporation is regarded as being in Kansas. (K.S.A. 17-6419).

Stock Certificates.

Every stockholder is entitled to a certificate, certifying number of shares owned by him. (K.S.A. 17-6408).

Issuance of Stock.

Shares having par value must be issued for at least par value. No-par shares may be issued for consideration determined by board or, if articles so provide, by stockholders. (K.S.A. 17-6403). Consideration may be paid in whatever form and manner board determines. Absent actual fraud, judgment of directors as to value of such consideration is conclusive. Stock so issued will be fully paid and nonassessable if corporation received either: (a) Entire consideration in cash, services rendered, personal or real property, or leases of real property, or terms authorized by board, or (b) par value, or stated value for no-par shares, in such consideration and binding obligation from purchaser for remainder of purchase price. (K.S.A. 17-6402).

Transfer of Stock.

Governed by Art. 8 of Uniform Commercial Code. (K.S.A. 84-8-101 et seq.; K.S.A. 17-6409).

Determining Stockholders Entitled to Notice of or to Vote at Meeting.

Board may fix record date not preceding date of resolution and between ten and 60 days before date of meeting. If no record date fixed, record date will be close of business two days before date notice of meeting is given or, if notice is waived, at close of business two days before meeting date. Directors may set new record date for adjourned meeting. (K.S.A. 17-6503[a]).

Determining Stockholders Entitled to Consent in Writing without Meeting.

Board may fix record date within ten days after resolution. If no date fixed and no prior act of directors required, date is first date that signed, written consent is delivered to corporation. If prior action of directors is required and no date has been fixed, date is at close of business on day directors adopt resolution taking action. (K.S.A. 17-6503[b]).

Determining Stockholders Entitled to Other Rights.

Board may fix record date within 60 days after resolution. If no date fixed, date is close of business on date of resolution affecting shares. (K.S.A. 17-6503[c]).

Uniform Simplification of Fiduciary Security Transfers Act.

Adopted. (K.S.A. 17-4903 to 4913). Uniform Commercial Code (K.S.A. 84-1-101 et seq.) specifically provides that it does not repeal this uniform act and if any inconsistency, provisions of Simplification of Fiduciary Security Transfers Act control (K.S.A. 84-10-101[2]).

Stock Transfer Tax.

None.

Stockholders.

Holders of preferred or special stock entitled to receive dividends at such rate and condition stated in articles of incorporation. Holders of preferred or special stock entitled to rights upon dissolution or distribution of assets as stated in articles of incorporation. (K.S.A. 17-6401).

Stockholders Actions.

K.S.A. 60-223a follows Federal Rule 23.1. See also subhead Liabilities of Directors, infra.

Stockholders' Liabilities.

Not personally liable for debts of corporation, absent contrary provision in articles of incorporation, except as may be liable by reason of own conduct. (K.S.A. 17-6002[b][6]). Liable for stock not paid in full unless bona fide purchaser. (K.S.A. 17-6412).

Stockholders' Meeting.

When and Where Held.

Annual meeting must be held at time and date specified in by-laws. (K.S.A. 17-6501[b]). Special meetings may be called by board or by persons so authorized by articles of incorporation or by-laws. (K.S.A. 17-6501[e]). Meetings may be held inside or outside Kansas at place specified in by-laws or, if not designated, as determined by board. (K.S.A. 17-6501[a]).

Right to Vote.

One vote per share unless otherwise specified in articles of incorporation. (K.S.A. 17-6502[a]). See also subhead Share Exchanges or Acquisitions, infra.

Quorum.

Articles or by-laws may set at not less than 1/3 of shares conferring voting powers. If not specified, quorum is majority of shares entitled to vote. (K.S.A. 17-6506).

Proxies.

Effective for three years unless different period specified. (K.S.A. 17-6502[b]). Duly executed proxy is irrevocable if stated to be irrevocable and if coupled with sufficient legal interest. Such interest may be in stock itself or in corporation generally. (K.S.A. 17-6502[e]).

Cumulative Voting.

Articles may permit. (K.S.A. 17-6502[a]).

Vote Required.

Absent specification in articles or by-laws, directors are elected by plurality and all other matters approved by majority of shares represented and entitled to vote. (K.S.A. 17-6506). Unless otherwise provided in articles, all elections of directors must be by written ballot. (K.S.A. 17-6501[f]).

Voting Trusts.

Stockholders may, by agreement in writing, create voting trusts. Stockholders by agreement may waive provisions of Corporation Code pertaining to voting trusts when interest of public or some third party is not involved. (175 Kan. 479, 264 P.2d 888). If copy of agreement filed in registered Kansas office it is open to inspection of any stockholder. Certificates of stock deposited under said agreement must be cancelled and new certificates issued to voting trustees, in which certificates, and on stock ledger, it must appear that they are issued under agreement. Voting trustees may vote in person or by proxy, but incur no liability as stockholders, trustees or otherwise except for individual malfeasance. Majority of voting trustees determine manner of voting unless otherwise provided in agreement; if equally divided, vote must be divided equally among trustees. (K.S.A. 17-6508[a]).

Directors.

Board consists of one or more directors. Number fixed by articles, by-laws or in manner provided by by-laws. Directors need not be stockholders unless articles or by-laws provide otherwise. Articles or by-laws may prescribe other qualifications. Director serves until successor elected and qualified or until resignation or removal. (K.S.A. 17-6301[b]). See also subhead Stockholders' Meeting, supra.

Classes.

Directors may be divided into one, two or three classes serving staggered terms by articles, initial by-law or by-law adopted by vote of stockholders. Articles may give class or series of stock right to elect one or more directors. (K.S.A. 17-6301[d]).

Removal.

Director may be removed by majority of shares entitled to vote. If directors serve in classes, cause required unless articles provide otherwise. If less than entire board to be removed, no director may be removed without cause if votes cast against removal would be sufficient to elect director if voted cumulatively. (K.S.A. 17-6301[k]).

Director's Meetings.

Where Held.

Unless articles or by-laws require otherwise, board may have office(s) and hold meetings outside Kansas. (K.S.A. 17-6301[g]). Directors may take action without meeting if all members consent in writing filed with minutes. (K.S.A. 17-6301[f]). Directors may hold meeting using telephone conference call or similar communications equipment. (K.S.A. 17-6301[i]).

Quorum and Required Vote.

Unless articles or by-laws require otherwise, majority vote when quorum is present is act of board. Quorum is majority of board, but articles or by-laws may require greater number or lesser number not less than 1/3. (K.S.A. 17-6301[b]).

Powers and Duties of Directors.

Business and affairs of corporation must be managed by or under direction of board of directors unless otherwise provided in articles. (K.S.A. 17-6301[a]). Board may delegate powers to committee by majority vote. (K.S.A. 17-6301[c]).

Liabilities of Directors.

Articles of incorporation may incorporate provision eliminating or limiting personal liability of director to corporation or stockholders for monetary damages for breach of fiduciary duty, but such provision may not limit liability for: (1) Any breach of duty of loyalty; (2) acts or omissions not in good faith or which involve intentional misconduct or knowing violation of law; (3) unlawful payment of dividend or unlawful stock purchase or redemption; or (4) any transactions from which director derived improper personal benefit. Provision does not affect liability for acts committed before effective date. (K.S.A. 17-6002[b][8]).

Nonprofit Organizations.

If nonprofit organization carries general liability coverage, liability of non-compensated director limited to insurance coverage available unless director's misconduct was willful or wanton or intentionally tortious. (K.S.A. 60-3701[b]).

Officers.

Officers and means of choosing officers determined by by-laws or directors' resolution. (K.S.A. 17-6302).

Liabilities of Officers.

Nonprofit Organizations.

If nonprofit organization carries general liability coverage, liability of non-compensated officer or volunteer limited to insurance coverage available unless misconduct was willful or wanton or intentionally tortious. (K.S.A. 60-3601[b]).

Indemnification of Directors and Officers.

Actions Other Than on Behalf of Corporation.

Corporation may indemnify if person acted in good faith and in manner he reasonably believed to be not opposed to best interests of corporation and, in criminal actions, had no reasonable cause to believe his action was unlawful. (K.S.A. 17-6305[a]).

Actions on Behalf of Corporation.

Corporation may indemnify if person acted in good faith and in manner he reasonably believed to be not opposed to best interest of corporation. No indemnification permitted regarding claims for which person adjudged liable to corporation unless court determines he is fairly and reasonably entitled to such expenses court deems proper. (K.S.A. 17-6305[b]).

Insurance may be purchased on behalf of directors, officers, employees or agents of corporation against any liability arising out of person's status as such regardless of corporation's power to indemnify. (K.S.A. 17-6305[g]).

Principal Office.

Corporation must maintain registered office in Kansas. This need not be its place of business. (K.S.A. 17-6201[a]). Directors may change by resolution stating new location. Certificate certifying change must be executed and filed like articles of incorporation. (K.S.A. 17-6203[a]). See subheads Filing of Articles and Filing Fees, supra.

Resident Agent.

Corporation must maintain resident agent in Kansas. This may be corporation itself, Kansas resident, corporation, LLC, partnership or business trust, domestic or foreign. (K.S.A. 17-6202[a]). Directors may change by resolution stating name and location of new agent. Certificate certifying change must be executed, acknowledged and filed like articles of incorporation. (K.S.A. 17-6203[a]). See subheads Filing of Articles and Filing Fees, supra.

If corporation does not name new agent within 30 days after agent dies or leaves state, Secretary of State, after 30 days notice, may declare existence of Kansas corporation forfeited or, in case of foreign corporation, authority to do business in Kansas forfeited. (K.S.A. 17-6203[b]).

General Powers of Corporation.

In addition to enumerated powers every corporation may exercise all powers granted by Corporation Code so far as necessary or convenient to conduct, promotion or attainment of business as set forth in articles.

Every domestic corporation has power to: Have perpetual succession by its corporate name; sue and be sued; have a corporate seal; acquire, own and otherwise deal in and with real and personal property and mortgage or pledge any of its assets, wherever situated; appoint and pay such officers and agents as business requires; adopt, amend, and repeal by-laws; wind up and dissolve itself; conduct business and have offices within or without this state; make public welfare or charitable donations; be an incorporator, promoter, or manager of other corporations; participate with others in any corporation, partnership, limited partnership, joint venture or association of any kind; transact any lawful business directors find to be in aid of governmental authority; contract, including contracts of suretyship, incur liabilities, borrow money, issue notes, bonds and other obligations and encumber all or any of its property; lend money; pay pensions and carry out pension and profit sharing plans; provide insurance on life of any officers or employees; renounce business opportunities in articles or act of board. (K.S.A. 17-6102).

Corporation may hold and otherwise dispose of any security of any corporation, partnership, association, individual, or governmental body. While owner of securities, corporation may exercise all incidents of ownership including right to vote. (K.S.A. 17-6103).

May purchase and otherwise deal in and with its own shares; but it cannot do so if capital of corporation would be impaired. (K.S.A. 17-6410).

Any corporation may lend money to or otherwise assist any officer or other employee when, in judgment of directors, it would benefit corporation. (K.S.A. 17-6303).

Ultra Vires.

No act of corporation and no conveyance or transfer of real or personal property to or by corporation is invalid for lack of capacity or power. Lack of capacity or power may be asserted: (1) By stockholder to enjoin corporation; (2) in derivative action; or (3) by attorney general to enjoin or dissolve corporation. (K.S.A. 17-6104).

Dividends.

Subject to restrictions in articles of incorporation, directors may declare and pay dividends out of (a) net assets in excess of capital, or (b) net profits for fiscal year then current or preceding fiscal years in case there shall be no excess as mentioned in (a). No dividends can be declared out of such net profits if capital is less than aggregate amount of capital represented by issued and outstanding stock having a preference on distribution. (K.S.A. 17-6420). Corporations exploiting wasting assets may determine net profits from exploitation or liquidation without considering depletion of such assets. (K.S.A. 17-6420). Dividends may be paid in cash, property, or shares of stock. (K.S.A. 17-6423).

Unclaimed Dividends.

Uniform Unclaimed Property Act adopted. Unclaimed dividend presumed abandoned after five years. (K.S.A. 58-3935).

Sale or Transfer of Corporate Assets.

Board may sell, lease or exchange all or substantially all of corporation’s assets if authorized by stockholders’ resolution adopted by majority vote at meeting called on 20 days’ notice. (K.S.A. 17-6801[a]).

Books and Records.

Stockholders have right to inspect by-laws, stock register, books of account and records of proceedings of stockholders and directors and to make copies thereof. Director has similar right for purposes reasonably related to his position. (K.S.A. 17-6510).

Reports.

Every corporation must file annual report with Secretary of State on forms prescribed by Secretary. Report must show corporate name, principal office, officers and directors and their residence addresses, shares authorized and issued and any holdings of Kansas agricultural land. (K.S.A. 17-7503 to 7505). If report is not filed within 90 days of due date, in addition to penalties, Secretary of State may forfeit articles of Kansas corporation and authorization to do business of foreign corporation (K.S.A. 17-7509 and 7510). At time of filing corporation must pay annual report fee. (K.S.A. 17-7503 to K.S.A. 17-7505a). See subhead Franchise Tax, infra.

Nonprofit corporations must file report by 15th day of sixth month after end of tax year, but Secretary may grant 90 day extension. (K.S.A. 17-7504).

Kansas For Profit Corporations.

Report must be filed at same time Kansas income tax return is due. (K.S.A. 17-7503[a]).

Foreign for profit corporations must show name of corporation and where by state or country place of incorporation; location of principal office; names and addresses of principal officers and board of directors; number of shares of capital stock issued; nature of business; and equity ownership of parent company. Must be filed when Kansas income tax return is due. (K.S.A. 17-7505).

Corporate Bonds or Mortgages.

Corporation may issue notes, bonds and other obligations, and may secure any obligation by mortgage, pledge or other encumbrance of any or all of its property, franchises and income. (K.S.A. 17-6102[13]).

Merger and Consolidation.

Domestic corporations or any foreign and domestic corporations may merge or consolidate on filing with Secretary of State duly certified written agreement adopted by vote representing majority of capital stock of each corporation at meeting duly called for that purpose, except that under certain conditions stockholder vote is not required; or by filing certificate of merger or consolidation. (K.S.A. 17-6701 and 6702). Special rules apply to wholly owned subsidiaries. (K.S.A. 17-6701[g]). Resultant corporation possesses all rights, privileges, powers, franchises and property of all kinds of each constituent corporation, subject to all restrictions, disabilities, debts, liabilities and taxes of said constituent corporations. (K.S.A. 17-6709). Merger or consolidation does not affect rights of creditors or holders of liens, does not abate actions pending against either corporation (K.S.A. 17-6711) and does not affect liabilities of stockholders or officers of either corporation (K.S.A. 17-6709). Resultant corporation has power to issue bonds, mortgage its franchise and property and issue certificated or uncertificated shares of stock in exchange or payment for original shares. (K.S.A. 17-6710).

Business Combinations.

Corporation shall not engage in any business combination with any interested stockholder for period of three years following date stockholder became interested stockholder, can opt out in articles of incorporation, or by amending articles or by-laws. (K.S.A. 17-12,100).

Share Exchanges or Acquisitions.

17-1286 et seq. regulates exchanges of certain Kansas corporations.

Applies to Kansas corporations having: (1) At least 100 shareholders and its principal place of business, principal office or substantial assets in Kansas; and (2) at least 10% of its shareholders reside in Kansas, at least 10% of its shares are owned by Kansans, or 2,500 shareholders reside in Kansas. Corporations may provide in articles or by-laws that this act does not apply. (K.S.A. 17-1289).

Tender Offer.

Control share acquisition. (K.S.A. 17-1286 et seq.).

Thresholds are: (1) 1/5 to 1/3; (2) 1/3 to 1/2; or (3) majority of all voting power. (K.S.A. 17-1286).

Restrictions.

If any person acquires shares within 120 day period bringing his voting power above one of three thresholds (see catchline Thresholds, infra), his shares lose voting rights. Rights may be restored at special or next annual shareholders' meeting by: (1) Majority vote of all shares entitled to vote for directors by class; and (2) same test excluding interested shares. (K.S.A. 17-1287).

Thresholds are: (1) 1/5 to 1/3; (2) 1/3 to 1/2; or (3) majority of all voting power. (K.S.A.

17-1286).

Dissolution.

Before payment of capital stock or beginning business, incorporators may surrender franchise by filing certificate to that effect with Secretary of State (K.S.A. 17-6803); otherwise, dissolution may be effected by consent in writing of all stockholders having voting power, without a meeting, or by vote of two-thirds in interest of voting stockholders at a meeting called for that purpose (K.S.A. 17-6804).

On dissolution, corporate existence is continued for three years for winding up (K.S.A. 17-6807), or court may appoint receivers (K.S.A. 17-6808). In latter case, creditors must prove and file claims as directed by court. (K.S.A. 17-6905). Action pending against corporation dissolved does not abate but proceeds to final judgment against trustees or receivers in name of corporation. (K.S.A. 17-6811).

Insolvency and Receivers.

On application of any creditor or stockholder of insolvent corporation, district court may appoint receiver. (K.S.A. 17-6901). Receiver is vested with title of all property except real estate outside Kansas. (K.S.A. 17-6902). Receiver must file inventory of assets with court. (K.S.A. 17-6904). Creditors must file proof of claims within six months of receiver's appointment. (K.S.A. 17-6905). If receiver disputes claim, creditor must submit to examination. Court may approve, disapprove or modify recommendations of receiver. (K.S.A. 17-6906[b]). If cause for liquidation no longer exists, court has discretion to dismiss proceedings on appropriate conditions. (K.S.A. 17-6911).

Close Corporations.

Corporations organized as close corporations are managed by stockholders not board of directors. (K.S.A. 17-7201 to 7216). If existing corporation desires to become close corporation it may amend its articles of incorporation to comply with said sections by two-thirds vote. (K.S.A. 17-7204). Special provisions must be included in articles of incorporation. (K.S.A. 17-7202). Many requirements applicable to regular corporations do not apply to close corporations and there are special statutory requirements applicable to close corporations which do not apply to regular corporations. Breach of certain special requirements relating to close corporations can cause loss of status as such. (K.S.A. 17-7208).

Appraisal.

In corporation merging or consolidating, appraisal rights shall be available for shares of any class of constituent corporation, with exceptions. (K.S.A. 17-6712).

Nonprofit corporations may not have capital stock and have power to set forth, in by-laws or articles, rules for ascertaining membership in absence of which directors shall be members. Members may vote by proxy. (K.S.A. 17-6505).

Foreign Corporations.

Foreign corporation may not do business in Kansas until it files application for authority to engage in business in Kansas with Secretary of State. (K.S.A. 17-7301[b]).

Application must set forth: (1) Certificate issued within 90 days of application by proper officer of jurisdiction of incorporation stating that corporation is in good standing in that jurisdiction; (2) statement of good standing as of date application signed; (3) address of principal office of corporation; (4) full nature of business to be conducted in Kansas; (5) location of registered office in Kansas and name of resident agent; (6) date when corporation intends to commence business in Kansas; and (7) irrevocable written consent of foreign corporation that actions may be commenced against it where there is proper venue and service. (K.S.A. 17-7301[b]).

Filing Requirements.

In accordance with K.S.A. 17-6003 for filing any instrument with Secretary of State. (K.S.A. 17-7301[b]).

To withdraw from state, corporation must file with Secretary of State: (1) Certificate, under seal and attested by secretary, stating it surrenders authority in Kansas and withdraws therefrom, and stating address to which process may be mailed; (2) certificate of dissolution issued by jurisdiction of incorporation and address to which to mail process; or (3) order or decree of dissolution of court of jurisdiction of incorporation and address to which to mail process. Secretary of State shall record and return original certified and appointment of resident agent is revoked. (K.S.A. 17-7306). After withdrawal state courts still have jurisdiction in actions arising out of any act or transaction of corporation prior to order of withdrawal or revocation of license. (K.S.A. 17-7306).

See other subheads throughout this topic, including Purposes, Registered Office, Resident Agent, and Reports, supra.

Franchise Tax.

At time of filing its annual report all corporations for profit, domestic and foreign, except banking, insurance, savings and loan corporations or associations, credit unions, or corporations organized under electric cooperative act, must pay a report fee of $40. (K.S.A. 17-7503[c], [d]).

Every corporation organized under electric cooperative act must pay an annual report fee of $40. (K.S.A. 17-4634).

Professional corporations pay same franchise tax as regular corporations for profit.

Nonprofit corporations must pay an annual report fee of $40 for all tax years commencing after Dec. 31, 2003. (K.S.A. 17-7504[d]).

Professional Corporations.

Professional corporations permitted are: CPA; architect; attorney; chiropractor; dentist; engineer; optometrist; osteopathic physician or surgeon; physician, surgeon or doctor of medicine; veterinarian; podiatrist; pharmacist; real estate broker or salesperson; land surveyor; clinical social work specialist; licensed physical therapist; landscape architect; RPN; clinical professional counselor; geologist; clinical psychotherapist; clinical marriage and family therapist; licensed physician assistant; licensed occupational therapist; licensed audiologist and licensed speech-pathologist. (K.S.A. 17-2707). Generally, provisions of general corporation code control. Corporate name may be any name not contrary to law or ethics of profession, and must end with word “chartered” or “professional association” or abbreviation “P.A.” (K.S.A. 17-2711).

Deeds.

See category Property, topic Deeds.

Model Non-Profit Corporation Act.

Not adopted.

Income Tax.

See category Taxation.

2.04 FOREIGN CORPORATIONS:

See topic Corporations.

2.05 JOINT STOCK COMPANIES:

Massachusetts or Business Trust.

Purposes.

Association of individuals for purpose of profit possessing common capital contributed by members of company, such capital divided into transferable shares. Form of partnership with some characteristics of corporation. (K.S.A. 17-6704).

Formation.

Must file with Secretary of State: (1) Executed copy and certified copy of trust instrument; (2) verified list of trustees' names and addresses; (3) balance sheet certified by CPA; (4) location of registered office and name of resident agent; and (5) for foreign trusts, irrevocable consent to service of process similar to that required of foreign corporations (see topic 2.03 Corporations, subhead Foreign Corporations). (K.S.A. 17-2030). Filing fee is $50. (K.S.A. 17-2031).

Rights and Powers.

As provided in trust instrument, but may not engage in any business forbidden to for profit corporations. (K.S.A. 17-2034). Corporation laws generally apply. (K.S.A. 17-2035). See topic 2.03 Corporations.

Liabilities.

Holders of certificates have same limitation of liability as stockholders of corporation. (K.S.A. 17-2035).

Actions.

Same capacity to sue or be sued as corporation. (K.S.A. 17-2035).

Dissolution.

Any business trust with authority to transact business in Kansas may surrender authority by filing certified copy of resolution adopted by trustees declaring withdrawal with Secretary of State accompanied by withdrawal fee of $20 and filing all reports and fees required. (K.S.A. 17-2037).

Professional Corporations.

See topic Corporations, subhead Professional Corporations.

2.06 LIMITED LIABILITY COMPANIES:

General Supervision.

Limited liability company (LLC) is authorized by Kansas limited liability company act. (K.S.A. 17-7662 to 76, 142). Formation, operation, reporting, and dissolution of Kansas LLC and registration of foreign LLC are supervised by Kansas Secretary of State, as for corporations.

Formation.

Any “person” may form LLC, which shall have one or more “members”, by executing and filing with Secretary of State articles of organization. (K.S.A. 17-7662[f], K.S.A. 17-7673). “Person” means natural person, general and limited partnership (domestic or foreign), LLC (domestic or foreign), trust, estate, association, corporation or other entity. “Member” is any person admitted to LLC in accordance with act. (K.S.A. 17-7663[l]). LLC is considered organized upon filing of articles of organization. (K.S.A. 17-7673[b]). Date of existence is date of filing, except articles may specify date not later than 90 days subsequent to filing. (K.S.A. 17-7673[b]).

Professional LLC.

“Qualified person” may be member of LLC organized to exercise powers or professional association or corporation. “Qualified person” is natural person licensed to practice some type of profession as professional corporation, trustee of § 401, 409A IRS qualified trust, trustee of qualified revocable trust, qualified Kansas or foreign professional corporation and qualified general partnership or LLC. (K.S.A. 60-304[d], [e], [f]).

Purposes.

LLC may conduct any lawful business except insurance or banking. LLC is separate legal entity. (K.S.A. 17-7668[a] and [b]).

Powers.

Kansas LLC may exercise all lawful acts. (K.S.A. 17-7668[b]).

Name.

Words or abbreviations “limited company” or “LC” or “limited liability company” or “LLC” shall be included. Name shall be such as to distinguish it from any other entity reserved, registered or organized under Kansas law, except with filed written consent of other entity. (K.S.A. 17-7664).

Articles of Organization.

Information required is: (1) name of LLC; (2) address of registered office and name of initial resident agent; (3) any other provision member determines to include; and (4) if organized as professional association or corporation, profession shall be stated. (K.S.A. 17-7673[a]). Articles are signed by any person.

Filing Articles of Organization.

Original signed copy is filed with filing fee. Secretary of State certifies time and date of filing, files and indexes original, and returns copy to person filing. Professional LLC must file certificate from licensing body. (K.S.A. 17-7678[a] and [f]).

Registered Office and Registered Agent.

Kansas LLC must have registered office and resident agent. Office may, but not need be, same as place of business. Agent may be individual or domestic or foreign corporation, LLC, LLP or business trust. (K.S.A. 17-7666[a]). K.S.A. 17-7666(b)-(e) sets forth provisions for change of address, resignation, death, move and appointment of successor. Service of process may be served as by law as if LLC were partnership or to resident agent. (K.S.A. 60-304[e] and [f]). Foreign LLC must register with Secretary of State by submitting fee and original and duplicate application with following: (a) name of foreign LLC; (b) state or jurisdiction of its organization, date of organization, certificate of good standing; (c) nature of business to be conducted in Kansas; (d) address of registered office and name and address of resident agent; (e) irrevocable written consent to jurisdiction, venue and service of process; (f) names and addresses of members and/or managers; and (g) date LLC first did or intends to do business in Kansas. Secretary files and indexes application. (K.S.A. 17-76,121 and 76,122). Foreign LLC has requirements similar to Kansas LLC for maintaining registered office and agent. (K.S.A. 17-76,123). Foreign LLC may not maintain any legal action in Kansas until it has registered and paid all fees and penalties for years it did business in Kansas. (K.S.A. 17-76, 126).

Management.

Vested in members, each with one vote, unless articles provide for manager or managers, who shall be chosen by members as prescribed in articles or operating agreement. Articles or operating agreement establish responsibilities of managers. Operating agreement adopted and approved by members governs rights, duties and obligations of members and managers, including terms for members transacting business with LLC. Agreement also provides for location of principal office and meetings of members and managers. (K.S.A. 17-7687, 7693 and 7695).

Dissolution.

LLC shall be dissolved upon occurrence of following: (1) As specified in operating agreement; (2) at time there are no members; (3) upon entry of judicial decree of dissolution; or (4) majority agreement of all members unless personal representative of last member agrees to continue. (K.S.A. 17-76,116[a]). Death, retirement, dissolution, expulsion, bankruptcy or other event terminating continued membership of any member does not cause dissolution unless majority of members agree in writing to dissolve. (K.S.A. 17-76,116[b]). Upon dissolution and until certificate of dissolution filed, LLC shall wind up business. Upon winding up of LLC assets shall be distributed first to creditors and then to members. Articles are canceled by issuance of certificate of dissolution. (K.S.A. 17-7675). LLC may be dissolved involuntarily by court order for statutorily enumerated acts of misconduct. (K.S.A. 17-76,117).

Filing Fees.

Filing fee for articles of organization is $150. Fee for foreign registration is $150. (K.S.A. 17-76,136[b]). Fee of $20 is specified for other filings including amendments, certificate of change of location of registered office or resident agent or other certificate, affidavit or paper provided for in act. (K.S.A. 17-76,136[a]). Annual report of domestic and foreign LLC is filed same as Kansas income tax return with required report fee of $40. (K.S.A. 17-76,139). Any instrument required by act may be filed by facsimile for additional fee to be prescribed by Secretary. Such filing is effective upon its filing date. (K.S.A. 17-76,142).

2.07 LIMITED PARTNERSHIP:

See topic Partnerships.

2.08 PARTNERSHIPS:

Uniform Partnership Act is repealed effective July 1, 1999 and Kansas Uniform Partnership Act K.S.A.56a-101 et seq. became effective Jan. 1, 1999. Only significant deviations is article on partnership estates in Kansas Probate Code. (K.S.A. 59-1001 et seq.).

Formation.

Association of two or more persons to carry on as co-owners business for profit whether or not persons intend to form partnership. (K.S.A. 56a-202).

Recording of Agreement.

Statement may be filed in Office of Secretary of State. Statement filed by partnership must be executed by at least two partners. Statement may be filed by telefacsimile communication; if communication is accompanied with appropriate fee and meets statutory requirements, it shall be effective upon filing date. (K.S.A 56a-105).

Rights and Liabilities of Partners Inter Se.

Partnership may maintain action against partner for breach of partnership agreement, for violation of duty to partnership, or causing harm to partnership. (K.S.A. 56a-405).

Rights and Liabilities of Partners as to Third Persons.

Partnership may sue and be sued in name of partnership. (K.S.A. 56a-307). All partners are liable jointly and severally for all obligations of partnership. Person not personally liable if not admitted as partner at time obligation incurred. Partnership solely liable if obligation of partnership incurred while partnership is limited liability partnership. (K.S.A. 56a-306). Purported partner liable to person to whom representation is made if person relies on representation and enters into transaction with actual or purported partnership. (K.S.A. 56a-308).

Dissolutions.

Partnership at will dissolves with partner's express will to withdraw as partner. Partnership for definite term dissolves with at least half of remaining partners' express will to dissolve; express will of all partners to wind up partnership; and expiration of term or completion of undertaking. Event agreed to in partnership agreement. Event that makes it unlawful for business of partnership to continue. Judicial determination. (K.S.A. 56a-801).

Administration of Partnership Property.

Property acquired by partnership is property of partnership and not of partners individually. (K.S.A. 56a-203).

Limited Partnerships.

Revised Uniform Limited Partnership Act adopted with variations. (56-1a101, et seq.).

Nature.

Limited partnership may conduct any lawful business or purpose. (56-1a106). Foreign limited partnership must register with secretary of state and submit to jurisdiction in state before doing business. (56-1a502).

Formation.

Two or more persons must execute certificate of limited partnership which is filed with secretary of state. Must establish registered office and have resident agent in state. Name must contain words "Limited Partnership" or "L.P." (56-1a102).

Partnership Name.

Exclusive right to use of name may be reserved in same manner as corporation names are reserved as set forth in K.S.A. 17-7402. (K.S.A. 56-1a103).

Business Conducted.

Limited partnership may conduct or promote lawful business or purposes, except as otherwise provided by law of this state. (K.S.A. 56-1a106).

Liability.

Limited partners are not liable for obligations of limited partnership unless limited partner is also general partner, or in addition to exercise of rights and powers of limited partner, limited partner participates in control of business. (K.S.A. 56-1a203).

Dissolution.

Upon dissolution and winding up, certificate of cancellation of limited partnership must be filed with secretary of state. (56-1a451 to 56-1a454).

Fees.

For issuing, filing, indexing documents, secretary of state shall collect following fees: For certificate of amendment, restated certificate of limited partnership, certificate of cancellation of limited partnership, certificate of change of location of registered office, $20; for certified copies, $7.50 for each copy certified; providing certificate of good standing and certification of fact, $7.50; report of record search, $5; photocopies of documents not certified, fee per page in amount set by secretary of state. At time of filing certificate of domestic limited partnership or application to do business of foreign limited partnership, application and recording fee of $150 must be paid. (56-1a605).

Purposes.

Partnerships, limited partnerships, LLPs and corporate partnerships are subject to same restrictions on ownership and leasing of agricultural land in Kansas as corporations. (K.S.A. 17-5904). See topic 2.03 Corporations, subhead Purposes.

Limited Liability Partnership.

1996 Revised Uniform Partnership Act enacted effective Jan. 1, 1999.

Out-of-State Partnerships.

Foreign LLP must file statement of qualification and annual report. (K.S.A. 56-1a607).

3 BUSINESS REGULATION AND COMMERCE

3.01 BANKS AND BANKING:

Uniform Commercial Code (K.S.A. 84-1-101 et seq.) in effect. See topic Commercial Code.

Regulated by State Banking Commissioner, 700 Jackson, Topeka, KS 66603, (785) 296-2266. (K.S.A. 74-1304 et seq.). Commissioner must examine each bank at least once every 18 months and shall provide to bank's board of directors copy of examination report. (K.S.A. 9-1701). Commissioner must approve merger, consolidation (K.S.A. 9-1724), or change of control (K.S.A. 9-1720). Advised by State Banking Board. (K.S.A. 74-3004 et seq.).

Stockholders.

If capital stock is impaired, commissioner must notify bank to restore capital within 90 days. Directors must levy assessment on common stockholders within 15 days to restore capital or, if permissible, reduce capital. (K.S.A. 9-906). Preferred stockholders not liable for assessments. (K.S.A. 9-909).

Deposits.

Joint accounts may be maintained in name of two or more persons, including minors, payable to either or any of them or payable to either or any survivors or sole survivor. (K.S.A. 9-1205).

Deposits of minors may be received and paid on order of minor until bank receives certified copy of appointment of guardian. (K.S.A. 9-1204).

Payable on Death Contracts.

Individual adult or minor may contract in writing for balance of his account at death to be paid to designated beneficiary. (K.S.A. 9-1215).

Adverse claim to deposit is not effective until claimant adequately indemnifies bank or bank is served with court order. (K.S.A. 9-1207).

Unclaimed Deposits.

Uniform Unclaimed Property Act adopted with certain modifications relating to property distributable in course of demutualization, rehabilitation or related reorganization of insurance company. (K.S.A. 58-3934 to 58-3978).

Collections.

Uniform Commercial Code (K.S.A. 84-4-101 et seq.) in effect. See topic 3.09 Commercial Code.

Bank Holding Companies and Financial Holding Companies

Company which directly or indirectly owns or has power to vote 25% or more of voting shares of bank; controls in any manner election of majority of directors of bank; and trustees hold 25% or more of any class of voting shares. (K.S.A. 9-519).

Uniform Unclaimed Property Act adopted with certain modifications relating to property distributable in course of demutualization, rehabilitation or related reorganization of insurance company. (K.S.A. 58-3934 to 58-3978).

Trust Companies.

May: (1) Receive for safekeeping personal property; (2) accept and execute any trust agreement and perform any trustee duties; (3) act as assignee, transfer agent, registrar or receiver; (4) accept and execute all trusts and perform any fiduciary duties; (5) act as agent or attorney in fact in any agreed capacity; (6) act as executor or trustee under last will and testament or administrator of estate of deceased; (7) be conservator for any minor, incapacitated person or trustee for any convict; (8) loan money upon real estate, chattel, collateral or personal security; (9) execute and issue notes, bonds or debentures; (10) receive money in trust; (11) act in any fiduciary capacity and perform any act Kansas state bank could under state banking laws; (12) act as originating or contracting trustee; (13) buy and sell foreign or domestic exchange, gold, silver, coin or bullion; and (14) exercise any other power expressly conferred upon trust companies by any laws of state. (K.S.A. 9-2103). Banking code is applicable with some exceptions. (K.S.A. 9-702).

Uniform Common Trust Fund Act.

Adopted with minor variations. (K.S.A. 9-1609, 9-1610). 1952 Amendment not adopted.

Foreign Banks.

See categories 13 Estates and Trusts, topics Executors and Administrators, and Trusts, subhead Eligibility and Competency; Family, topic Guardian and Ward. No financial institution insured by FDIC may conduct business in state unless it may legally accept demand deposits and make commercial loans. (K.S.A. 9-811).

Credit unions may be organized by seven residents of state on application to Bank Commissioner. (K.S.A. 17-2201). Membership is limited to groups having common bond of occupation or association, or residing within well defined neighborhood, community or rural district. (K.S.A. 2008 Supp. 17-2205[b][1]).

Union may lend money, provide checks, money orders, other money type instruments or transfer methods and safe deposit boxes or similar facilities to members. (K.S.A. 17-2204). Name “Credit Union” may not be used by any company other than one organized under Act or credit union organized pursuant to federal law. (K.S.A. 17-2203).

Savings and loan associations are under supervision of State Banking Commissioner (K.S.A. 75-1309 et seq.), prescribing and limiting investments, loans (see also K.S.A. 17-5001) and management. Provision is made for conversion to federal savings and loan association.

Branch Banking.

After applying for and obtaining approval of state banking board, branch banks may be established and operated in Kansas by bank incorporated under Kansas law. (K.S.A. 9-1111[b]).

Bank Holding Companies.

Permitted. (K.S.A. 9-519 et seq.). No holding company and its subsidiaries may control more than 15% of total deposits in state as determined by Banking Commissioner. (K.S.A. 9-520[a]). After July 1, 1992 bank holding company located in state contiguous to Kansas or in Arkansas or Iowa may acquire ownership or control of or power to vote shares of interest in or assets of Kansas bank or bank holding company.

3.02 BILLS AND NOTES:

Uniform Commercial Code (K.S.A. 84-1-101 et seq.) in effect. See topic Commercial Code.

Judgment Notes.

Not in common use. Void in consumer credit transactions. (16a-3-306).

Attorney Fees.

Any note, mortgage or other credit agreement may provide payment of reasonable collection costs including court costs, attorney fees and collection agency fees. (K.S.A. 58-2312).

3.03 BILLS OF LADING:

See topic Carriers.

3.04 BILLS OF SALE:

See topic Sales.

3.05 BLUE SKY LAW:

See topic Securities.

3.06 BROKERS:

Uniform Commercial Code (K.S.A. 84-1-101 et seq.) in effect. See topic 3.09 Commercial Code.

Licenses.

Generally not required. See also topic Licenses, Business and Professional.

Real Estate Brokers.

Salespersons and brokers must be licensed by Real Estate Commission. (K.S.A. 58-3036). Applicants must pass written exam and provide proof of good reputation. (K.S.A. 58-3039 and 58-3040). Applicants for original salesperson license must also attend 30 hours of approved instruction within 12 months prior to applying for license. Six months temporary salesperson license granted on application. (K.S.A. 58-3039[f]). Broker applicants must attend 24 hours instruction within prior 12 months (K.S.A. 58-3046a) and must have been salespersons in Kansas or other state for at least two of preceding five years (K.S.A. 58-3039[c]).

Liability.

Act does not create private cause of action and does not affect other statutory or common law causes of action. See 229 Kan. 252, 624 P.2d 420. State real estate recovery fund provides reimbursement up to $15,000 aggregate per transaction for losses caused by certain statutory violations. (K.S.A. 58-3066 to 58-3072).

Futures Dealers.

Buying, selling or dealing in grain, stocks, bonds, securities or any other commodities upon telegraphic or telephone market reports without intent to receive or deliver prohibited. (K.S.A. 50-121). Preempted by federal law regarding interstate grain sales (142 Kan. 426, 49 P.2d 973) and of doubtful application today.

3.07 BULK SALES:

See topic Commercial Code; also category Debtor and Creditor, topic Fraudulent Sales and Conveyances.

3.08 CARRIERS:

All common carriers except railroads supervised by Kansas Corporation Commission, State Office Bldg., Topeka, KS 66612, (785) 296-3355. (K.S.A 66-1,216 and 66-105). Exceptions listed in 66-1,109. Railroads supervised by Kansas Department of Transportation. (K.S.A. 66-201 et seq.).

Uniform Commercial Code (K.S.A. 84-1-101 et seq.) in effect. See topic Commercial Code.

Licenses.

Before any carrier may engage in business, application must be made to Commission and certificate obtained that public convenience will be promoted by transaction of business and permit obtained to transact such business within state. (K.S.A. 66-131 and 66-1,114).

Rates.

Must be reasonable. (K.S.A. 66-1,217). Carrier must file schedule of all rates affecting Kansas traffic. (K.S.A. 66-1,218). Commission may investigate and alter rates that are unreasonable, unreasonably discriminatory or unduly preferential. (K.S.A. 66-1,219). Formal public hearing required before rates may be altered. (K.S.A. 66-1,220).

Discrimination.

Unreasonably discriminatory or unduly preferential rates prohibited. (K.S.A. 66-1,217). See subhead Rates, supra.

Limiting Liability.

Common carrier transporting property from one point in Kansas to another point in Kansas may not limit liability for loss. (K.S.A. 66-304). However UCC limits liability of connecting carrier to period goods are in its possession. (K.S.A. 84-7-302[2]).

Bills of Lading.

Uniform Commercial Code governs. (K.S.A. 84-7-301 et seq.). See topic 3.09 Commercial Code.

Liens.

Carrier or other bailee may sell liened goods remaining in bailee's possession for six months or more. (K.S.A. 58-208). Uniform Commercial Code governs. (K.S.A. 84-7-301).

Motor Vehicle Carriers.

See category Transportation, topic Motor Vehicles.

3.09 COMMERCIAL CODE:

Uniform Commercial Code adopted, effective Jan. 1, 1966. Code is given Kansas Statutes Annotated (K.S.A.) chapter number 84, and running section numbers contain said chapter citation followed by numerical part of Uniform Commercial Code citation, for example, 84-1-101. New and separate volume of K.S.A. (Vol. 7) has been printed containing Code. Code as adopted in Kansas is virtually word for word the same as 1972 Code found in Uniform and Model Acts section. Kansas has adopted Revised Article 9 and accepts National Article 9 Forms.

1972 Amendments.—Adopted.

1977 Amendments.—Adopted.

1986 Amendments.—Not adopted.

Articles 2a, Leases, and 4a, Fund Transfers adopted.

1998 Amendments.—Adopted effective July 1, 2001.

Alternative provisions of the 1972 official Uniform Commercial Code which have been adopted in Kansas (Official U.C.C. section is designated first and then Kansas citation designated in parentheses):

1-209—1966 Official Optional Amendment enacted.

2-318 (84-2-318)—1966 Official Optional Amendment Alternative B enacted.

2-702 (84-2-702)—1966 Official Amendment enacted.

Major revisions in Arts. 3 and 4 to clarify points of ambiguity in case law and to serve as companion to Art. 4A applying to funds transfers.

6-106 (84-6-106)—adopted with modifications. See infra subhead Material Variations.

7-209 (84-7-209)—1966 Official Amendment enacted.

7-403 (84-7-403)—bracketed part of (1) (b) not adopted.

Material variations from 1972 official version of Uniform Commercial Code are as follows (Official U.C.C. section is designated first and then Kansas citation designated in parentheses):

6-106 (84-6-106) is amended in subsection (4) (a) to require a filing of a copy of scheduled property and list of creditors as required by section K.S.A. 6-104 and providing that notice required by subsection (4) shall fix a reasonable time by which any such interested party shall file his claim. Subsection (b) is amended to read "On motion of any interested party, after the time fixed for filing claims, the court may order the distribution of the consideration to the persons entitled to it according to the following order of priorities (i) Secured claims (ii) Taxes (iii) Non-secured claims which shall be on a pro rata basis if sufficient funds are not available to satisfy all unsecured claims."

Filing Fees.

See category Documents and Records, topic Records, subhead Filing Under Commercial Code.

Forms.

National forms adopted. See Part III, Uniform and Model Acts, Commercial Code Amendments.

See also topics Banks and Banking, Bills and Notes, Brokers, Carriers, Contracts, Factors, Frauds, Statute of, Sales, Securities, Warehousemen; categories Business Organizations, topic Corporations; Civil Actions and Procedure, topic Limitation of Actions; Debtor and Creditor, topics Assignments, Fraudulent Sales and Conveyances, Liens, Pledges; Documents and Records, topics Records, Seals; Mortgages, topic Chattel Mortgages.

3.09A CONSUMER CREDIT:

Uniform Consumer Credit Code adopted with numerous minor variations. Numbering generally corresponds to section number of Official Text with prefatory addition of "16a". Administrator is Kansas Consumer Credit Commissioner.

Application.

Act applies to credit transactions in Kansas. Includes multi-state transaction if creditor received in Kansas signed obligation or offer from consumer, or creditor solicited consumer by any means, including but not limited to: mail, telephone, radio, television or any other electronic means in Kansas. (K.S.A. 16a-1-201[1]).

Definitions.

Consumer means buyer, lessee or debtor to whom credit is granted in consumer credit transaction. (K.S.A. 16a-1-301[13]).

Consumer credit transaction means consumer credit sale, consumer lease or consumer loan or modification thereof including refinancing, consolidation or deferral. (K.S.A. 16a-1-301[15]).

Consumer credit sale is sale of goods, services or interest in land on credit in which: (1) Creditor regularly grants credit in similar transactions, except for lender credit cards; (2) buyer is person other than organization; (3) goods, services or interest in land are purchased primarily for personal, family or household purposes; (4) either debt is by written agreement payable in more than four installments or finance charge is made; and (5) with respect to sale of goods or services, amount financed does not exceed $25,000. Consumer credit sale does not include purchases through lender credit cards; or sale of interest in land, unless parties agree in writing to make subject to Code. (K.S.A. 16a-1-301[14][b]). See topic 3.17 Interest.

Consumer lease means lease of goods in which: (1) Lessor in business of leasing regularly makes to individual for personal use; (2) amount payable does not exceed $25,000; (3) term does not exceed four months; and (4) not made with lender credit card. (K.S.A. 16a-1-302[16]).

Consumer loan is loan made by person regularly engaged in business of making loans in which: (1) Debtor is individual; (2) loan is for personal use; (3) either debt is payable by written agreement in more than four installments or finance charge is made; and (4) either amount financed does not exceed $25,000 or debt is secured by interest in land. However, unless loan made subject to act by agreement, "consumer loan" does not include: (1) Loan secured by first mortgage unless loan to value ratio at time made exceeds 100%; or (2) annual percentage rate of loan exceeds code mortgage rate; or (3) loan made by qualified 401 plan to individual participant. (K.S.A. 16a-1-301[17][b]).

Finance Charges.

See topic 3.17 Interest.

3.10 CONDITIONAL SALES:

See topic Sales.

3.11 CONSIGNMENTS:

See topic Factors.

3.12 CONSUMER PROTECTION:

Kansas Consumer Protection Act

Kansas Consumer Protection Act (K.S.A. 50-623 et seq.) is substantial enactment of Uniform Consumer Sales Practices Act. Act applies to "consumer transactions", including sale, lease, assignment or other disposition for value of property or services in Kansas. (K.S.A. 50-624[c]). "Consumer" means individual, husband and wife, sole proprietor or family partnership who seeks or acquires property or services for personal, family, household, business or agricultural purposes. (K.S.A. 50-624[b]). Consumer may not waive rights except in conscionable settlement of claim. (K.S.A. 50-625).

Deceptive acts are prohibited, including knowing misrepresentations and willful omissions of material facts. (K.S.A. 50-626).

Unconscionable acts and practices are prohibited, including unconscionable advertising techniques, contract terms and debt collection practices. (K.S.A. 50-627).

Disclaimer or Limitation of Warranties.

Supplier in consumer transaction may not exclude, modify or limit implied warranties of merchantability and fitness for particular purpose, nor may he exclude, modify or limit any remedy provided by law, including measure of damages available, for breach of implied warranty. Government surplus is subject to notice requirements of 16 CFR 455.2, et seq. (K.S.A. 50-639).

Door-to-Door Sales.

Consumer may cancel sale of $25 or more within three business days. Seller must make required disclosures. (K.S.A. 50-640).

Enforcement.

Attorney general investigates and enforces. (K.S.A. 50-628 and 50-631). Attorney general or district attorney may obtain declaratory and injunctive relief in addition to actual damages on behalf of individual consumers, or enter into consent decree. (K.S.A. 50-632).

Private Remedies.

Consumer may bring individual or class action. Attorneys' fees may be recoverable. (K.S.A. 50-634). Civil penalties available. (K.S.A. 50-636).

Venue is in district court of county where violation occurred or where defendant resides or has principal place of business. If defendant is nonresident with no place of business, venue is also proper in Shawnee county. (K.S.A. 50-638).

Collision Damage Waiver Act.

Applies to all persons acting as authorized drivers of rental motor vehicles for 60 days or less from locations in Kansas. If agreement obligates authorized driver to pay for any damages to vehicle, any waiver clause must use simple language, be prominently displayed and include specified language in at least ten point type. Deceptive acts prohibited. (K.S.A. 50-657).

Fair Credit Reporting Act (K.S.A. 50-701 et seq.) is enactment of federal act (15 USC § 1681).

Lemon Law.

Applies only to original purchaser or lessee of new vehicle. If manufacturer or authorized dealers cannot conform vehicle to applicable warranty after reasonable number of attempts, manufacturer must replace with comparable vehicle or refund purchase or lease price less allowance for use. Reasonable number of attempts presumed if: (1) Same nonconformity subject to repair four times or more during either warranty period or one year after delivery; (2) vehicle out of service because of repair for cumulative total of 30 days or more during such period; or (3) ten or more repair attempts for any nonconformities substantially impairing vehicle's use and value. (K.S.A. 50-645).

Odometer Tampering.

See category Transportation, topic Motor Vehicles, subhead Odometer Alteration.

Receipt of Unsolicited Property.

If supplier delivers property or services not affirmatively ordered or requested by recipient, receipt of such unordered property or services shall be deemed unconditional gift. (K.S.A. 50-617).

Attempts to collect for property or services received as unconditional gift is deceptive act or practice. (K.S.A. 50-617[b]).

Uniform Deceptive Trade Practices Act.

Not adopted.

Plain Language.

No Plain Language statute.

3.13 CONTRACTS:

Uniform Commercial Code (K.S.A. 84-1-101 et seq.) in effect. See topic Commercial Code.

All contracts which by common law are joint only shall be construed to be joint and several. (K.S.A. 16-101). All contracts in writing signed by party bound thereby import a consideration. (K.S.A. 16-107). Want of consideration a defense in action on contract brought by one not bona fide holder. (K.S.A. 16-108). See also categories 10 Documents and Records, topic Seals; Family, topic Infants.

Uniform Consumer Credit Code (K.S.A. 16a-1-101 et seq.) in effect.

3.14 FACTORS:

Uniform Commercial Code (K.S.A. 84-1-101 et seq.) in effect. See topic Commercial Code.

3.15 FRANCHISES:

City authorized to grant franchises to person, firm or corporation to supply certain services within city. (K.S.A. 12-2001 et seq.).

Uniform Franchise and Business Opportunities Act not adopted.

3.16 FRAUDS, STATUTE OF:

Uniform Commercial Code (K.S.A. 84-1-101 et seq.) in effect. See topic Commercial Code.

Person to whom goods or chattels loaned becomes owner if possession thereof is retained for five years unless written reservation of title in lender recorded in Register of Deeds office in county where one or both parties reside, within six months from date of lending property. Exception in museum property act. (K.S.A. 58-4001, et seq.). No leases or interest in land, for more than one yearmay be made, except by deed or note in writing and signed by person assigning or granting same or his authorized agent or by act and operation of law. (K.S.A. 33-105). No action may be brought to charge a party on special promise, for debt of another or executor or administrator, to answer charges out of his own estate, nor to charge on any marriage contract, or contract concerning lands, or agreement for over a year, unless the agreement or a memorandum or note thereof, be in writing, and signed by party to be charged, or some one duly authorized by him or her. (K.S.A. 33-106).

Contracts of Sale.

Contract for sale of goods for $500 or more must be in writing indicating contract for sale made between parties and signed by party against whom enforcement is sought. If within reasonable time, writing in confirmation of contract and sufficient against sender is received and party receiving has reason to know contents, it satisfies requirements of writing. (K.S.A. 84-2-201).

Part Performance.

Contract that does not meet writing requirements is valid of goods are specifically manufactured for buyer and not suitable for sale in ordinary course of business and seller made substantial beginning of their manufacture or if party against whom enforcement is sought admits in his pleading in court that contract for sale was made or if payment was made and accepted with respect to goods. (K.S.A. 84-2-201).

Credit Agreements.

Debtor or creditor may not maintain action or defense unless agreement is in writing and signed by creditor and debtor. Includes agreement to lend or delay repayment of money, goods or things in action. (K.S.A. 16-117; K.S.A. 16-118).

Doctrine of part performance recognized in contracts relating to land. (187 Kan. 418, 357 P.2d 757).

3.17 INTEREST:

Legal rate, 10%. (K.S.A. 16-201).

Maximum rate which may be contracted for is 15%, except as otherwise specifically authorized by law. (K.S.A. 16-207). Lender may collect actual fees paid government and reasonable expenses incurred in connection with making, closing, disbursing, extending, readjusting or renewing loans subject to provisions of K.S.A. 16-207. (K.S.A. 16-207[d]). Parties may contract for higher rates if they agree in writing to abide by requirements of uniform consumer credit code. (K.S.A. 16-207; 16a-1-109).

Business or agricultural loans are not subject to interest rate limitation. (K.S.A. 16-207[f]).

Consumer loans are covered by uniform consumer credit code. (K.S.A. 16a-1-101 et seq.). Maximum rates for unsupervised lender is 18% for amounts less than $1,000 and 14.45% for amounts over $1,000. Supervised loans under license have maximum rates which vary according to size of loan, except that up to 18% on unpaid balance may always be charged. (K.S.A. 16a-2-401[1]). Minimum finance charge of $5 may be assessed if amount financed does not exceed $75, and $7.50 when amount financed exceeds $75. Lender may contract for prepaid finances not to exceed 8% of amount financed if loan secured by first or second mortgage provided that aggregate of prepaid finance charges payable to lender or person related to lender do not exceed 5% of amount financed; and for any other consumer loan, prepaid finances in amount not to exceed lesser of 2% of amount financed or $100. Prepaid finance charges stated are in addition to certain other statutorily allowed finance charges. (K.S.A. 16a-2-401[6]).

Consumer sales are covered by uniform consumer credit code. (K.S.A. 16a-1-101 et seq.). Maximum rate for closed end sale is 21% on part of unpaid balance under $1,000, and 14.45% on unpaid balance over $1,000. Minimum finance charge of $5 if amount financed does not exceed $75, and $7.50 when amount financed exceeds $75. Seller may contract for any finance charge not exceeding that agreed to by consumer. Rebate may be required upon prepayment. (K.S.A. 16a-2-201). Rate for open end credit is finance charge contracted for in agreement governing account. Parties may agree on minimum amount. (K.S.A. 16a-2-202).

Notes secured by mortgages and contracts for deeds to real estate executed after May 17, 1980 may not charge interest in excess of 1½% above yield of 30-year fixed rate conventional home mortgages committed for delivery within 61 to 90 days accepted under federal home loan mortgage corporation’s daily offerings for sale on last day when commitments for such mortgages were received in preceding month, unless otherwise specifically authorized by law. Maximum rate is computed and published by secretary of state monthly in Kansas Register. Rate of interest upon conventional loan is rate quoted in application executed by borrower on day application is made. Notes secured by mortgage or contracts for deed that permit adjustment of interest rate, term or amortization schedule are not subject to interest rate limitation. (K.S.A. 16-207[b]).

No penalty may be assessed because of prepayment of home loan evidenced by note secured by mortgage made subject to K.S.A. 16-207 where prepayment is over six months after execution of note. (K.S.A. 16-207[c]). Lender may collect actual fees paid government and reasonable expenses incurred. (K.S.A. 16-207[d]).

Judgments, including judgments against state or political subdivision, bear interest at 8% until July 1, 1980. Judgments rendered or unpaid thereafter bear interest at 12% until July 1, 1982. Judgments rendered or unpaid thereafter and before July 1, 1986 bear interest at 15%.

After July 1, 1986, post-judgment rate will be 4% above federal discount rate as of July 1 preceding date of judgment. (K.S.A. 16-204). Where judgment founded on contract specifying different rate, contract rate controls. (K.S.A. 16-205).

Open accounts bear interest from the time when they are liquidated and balance ascertained. (K.S.A. 16-201).

Small Loans.

Uniform Consumer Credit Code, K.S.A. 16a-1-101 et seq., applies.

Usury.

Usury statute repealed. (1973). Defense of usury not available to corporations. (K.S.A. 17-7105).

See also topic Consumer Credit.

3.18 INFORMATION TECHNOLOGY, INTERNET AND NEW MEDIA:

Generally K.S.A. 7201 et seq.

3.19 LICENSES, BUSINESS AND PROFESSIONAL:

State licenses are required for a large number of businesses and occupations.

Collection Agencies.

No legislation.

Health and Medical Licenses.

See category Health, topic Licensure and Certification.

3.20 MONOPOLIES, RESTRAINT OF TRADE AND COMPETITION:

Trust is defined as combination of capital, skill or acts, by two or more persons, firms, corporations or associations to restrict trade or commerce, fix prices, control costs or rates of insurance, prevent competition or enter into any agreement for these purposes. (K.S.A. 50-101). Such combination is unlawful and may not do business in state. (K.S.A. 50-105). Corporation party to such combination forfeits charter and may be dissolved by proceedings brought for purpose. (K.S.A. 50-103 to 104). Contract violating above provisions void. (K.S.A. 50-107). Trust agreement placing two or more businesses in hands of trustees to control prices or limit production or sale of commodities is illegal and void. (K.S.A. 50-113).

Pooling agreements to divide earnings or fix prices are illegal. (K.S.A. 50-136).

Discrimination in prices between different localities (except to equalize freight charges) is illegal and subjects to fine and imprisonment. (K.S.A. 50-149).

Unfair Trade Practices.

All arrangements, contracts, agreements, trusts or combinations between persons which tend to prevent full and free competition in importation, transportation or sale of articles imported into this state, or in product, manufacture or sale of articles of domestic growth, or for loan or use of money, and all arrangements, contracts, agreements trusts or combinations between persons designed to reduce or control price or cost to producer or consumer is declared to be against public policy unlawful and void. (K.S.A. 50-112). Free and unrestricted competition must prevail in business of financing purchase or sale of motor vehicles and other specific commodities. (K.S.A.

8-502).

3.21 NEGOTIABLE INSTRUMENTS:

See Topic Bills and Notes.

3.22 RESTRAINT OF TRADE:

See topic Monopolies, Restraint of Trade and Competition.

3.23 SALES:

Uniform Commercial Code (K.S.A. 84-1-101 et seq.) in effect. See topic Commercial Code.

Bills of Sale.

Uniform Commercial Code governs. (K.S.A. 84-2-101 et seq.).

Conditions or Warranties.

Uniform Commercial Code governs. (K.S.A. 84-2-301 et seq.).

Product Liability.

Commercial Code defines warranty claims. (K.S.A. 84-2-314 to 84-2-318). Alternative B to K.S.A. 2-318 adopted. Kansas Consumer Protection Act abolishes privity in all consumer warranty cases. (K.S.A. 50-639[b]). Kansas Product Liability Act governs all product liability claims on issues of useful safe life, regulatory, compliance, duty to warn, product seller's liability. (K.S.A. 60-3301 to K.S.A. 60-3307).

Retail Credit Sales.

See topic Consumer Credit. No special restrictions. See topic 3.17 Interest.

Consumer Protection.

See topic Consumer Protection.

Transfer of Title.

Uniform Commercial Code governs. (K.S.A. 84-2-401 et seq.).

Delivery.

Uniform Commercial Code governs. (K.S.A. 84-2-501 et seq.).

Bulk Sales.

Uniform Commercial Code governs. (K.S.A. 84-6-101 et seq.). See also Debtor and Creditor, Fraudulent Sales and Conveyances.

Sales of Motor Vehicles.

See category Transportation, Motor Vehicles.

International Sales of Goods.

United States is contracting state to United Nations Convention on International Sale of Goods. Therefore, CISG applies as law of contract in contracts for sale of goods between parties whose places of business are in different contracting states. See Selected International

Conventions.

3.24 SECURITIES:

The Speculative Securities Act or Blue Sky Law is K.S.A. 17-12a101 et seq. Kansas Act is substantial adoption of major provisions of Uniform Securities Act, promulgated by National Conference of Commissioners on Uniform State Laws, but there are numerous differences. Kansas statute is summarized below. For text of Uniform Act, see Uniform and Model Acts section.

Uniform Commercial Code (K.S.A. 84-8-101 et seq.) in effect. See topic Commercial Code.

Supervision.

Securities Commissioner of Kansas, 503 Kansas, Topeka, KS 66603, (785) 296-3307 has jurisdiction to administer Act. (K.S.A. 17-12a601).

Regulatory Powers of Supervising Authority.

Commissioner has investigatory powers; may promulgate rules, regulations and forms necessary to carry out provisions of Act; may, under certain circumstances, by order deny, suspend, or revoke any registration of a broker-dealer, investment advisor or agent; and has other discretionary powers necessary to administer Securities Act. (K.S.A. 17-12a601 to 12a612).

Prerequisites to Sales or Offerings.

Except as otherwise provided, may require filing of prospectus, pamphlet, circular, form letter, advertisement, and sales literature relating to security addressed for distribution to prospective investors, including clients of person registered as investment adviser. (K.S.A. 17-12a504).

Securities to Which Act Applicable.

Security means any note; stock; treasury stock; bond; debenture; evidence of indebtedness; certificate of interest or participation in any profit-sharing agreement; collateral-trust certificate; preorganization certificate or subscription; transferable share; investment contract; voting-trust certificate; thrift or investment certificates or thrift notes issued by investment companies; certificate of deposit for a security; certificate of interest in oil and gas royalties, leases or mineral deeds; or, in general, any interest or instrument commonly known as a "security," or any certificate of interest or participation in, temporary or interim certificate for, guarantee of, or warrant or right to subscribe to or purchase, any of foregoing. "Security" does not include any insurance or endowment policy or annuity contract under which an insurance company promises to pay money either in a lump sum or periodically for life or some other specified period. (K.S.A. 17-1252).

Exempt Securities.

Act exempts following securities: (1) Issued or guaranteed by U.S., any state, territory, insular possession, or political subdivision of such, or by District of Columbia, or any public agency of foregoing; (2) issued, insured or guaranteed by foreign government with which U.S. currently maintains diplomatic relationships, or any of its political subdivisions, if security is recognized as valid obligation by issuer, insurer or guarantor; (3) issued by and representing an interest in, debt of, or guarantee by, any federal bank, or any domestic bank, savings institution, credit union or trust company; provided, issuer is subject to banking, savings and loan department, or credit union administrator supervision; (4) issued by and representing an interest in, debt of, or guarantee by, any federal or domestic savings and loan association; (5) issued by and representing an interest in, debt of, or guarantee by, any insurance company authorized to do business in this state when sold by issuer (6) issued or guaranteed by any railroad or public utility which is (a) registered holding company under public utility holding company act, or (b) regulated by governmental authority; (7) any security as to which commissioner finds registration is not necessary or appropriate for protection of investors; (8) issued by any person organized exclusively for religious, educational, benevolent, charitable, fraternal, social, athletic, fire protection, fire fighting or reformatory purposes, or as chamber of commerce or trade or professional association; if no part of net earnings inure to any private stockholder (issuer must file with commissioner notice setting forth terms of proposed sale and copies of sales and advertising literature used ten days prior to sale); (9) any commercial paper arising out of current transaction and which evidences obligation to pay cash within nine months; (10) any securities issued in connection with employees' stock purchase, savings, pension, profit sharing, or similar plan; (11) issued as patronage or membership dividend by domestic cooperative conducting exclusively agricultural, dairy, livestock or produce business; (12) issue representing interest in, debt of, membership in, or patronage dividend to residents or landowners of not to exceed five contiguous counties in Kansas by cooperative association organized in Kansas exclusively to conduct agricultural, dairy, livestock or produce business, or selling, processing, storing, marketing, retailing, or otherwise handling above products or farm supplies and any incidental activities; (13) issue, which has been heretofore lawfully sold and distributed to public in this and any other state, when offered for resale in good faith, and not to benefit issuer; (14) issued by bank holding company wholly or partially in exchange for capital stock of bank that is or will become subsidiary of said holding company or issued by savings and loan holding company wholly or partially in exchange for capital stock of insured institution that is or will become subsidiary of said holding company. (K.S.A. 17-12a201).

Exempt Transactions.

Act does not apply to the following transactions:

(1) Any isolated transaction, whether effected through broker-dealer or not; (2) any nonissuer distribution by registered broker-dealer at reasonable market price, if any recognized securities manual contains issuer's officers, directors, balance sheet, and profit and loss statement; (3) any non-issuer transaction by registered broker-dealer pursuant to an unsolicited offer to buy; (4) any transactions in bond or other evidence of indebtedness secured by real or chattel mortgage or deed of trust, or by an agreement for the sale of real estate or chattels, if such are offered and sold as unit; (5) any transaction by an executor, administrator, sheriff, marshal, receiver, trustee in bankruptcy, guardian, or conservator; or any transaction executed by bona fide pledgee; (6) any offer or sale to bank, savings institution, trust, insurance, or investment company, pension or profit-sharing trust, or other financial institution, or to broker-dealer or underwriter; (7) any offer or sale of a pre-organization certificate or subscription if no commission is paid for soliciting any prospective subscriber and no advertising has been published in connection with any such sale, and no payment is made by any subscriber and such certificate or subscription is expressly voidable by subscriber until notification of final acceptance or completion of organization and until securities subscribed for have been registered; commissioner may by rule or order require reports of sales under this exemption; (8) any transaction pursuant to offer to existing security holders of issuer, including persons who at time are holders of convertible securities, nontransferable warrants, or transferable warrants exercisable within 90 days, if (a) no commission or other remuneration (other than standby commission) is paid directly or indirectly for soliciting any security holder in this state, or (b) issuer first files notice specifying terms of offer and commissioner does not disallow exemption within next five business days; (9) any offer (but not sale) of security if registration statements for such security have been filed under both this act and securities act of 1933 if no stop order or refusal order is in effect, or pending or registration statement for such security has been filed under K.S.A. 17-12a510 no stop order or emergency order issued is in effect and offer made is by registered broker-dealer; (10) issuance of any stock dividend, whether by issuer or not, if nothing of value is given by stockholders for distribution other than surrender of right to cash dividend; (11) transaction involving distribution of securities of issuer to security holders of another person in connection with merger, consolidation,

exchange of securities, sales of assets or other reorganizations to which issuer, or its parent or subsidiary, and other person, or its parent or subsidiary, are parties, if: (a) securities to be distributed are registered under Securities Act of 1933 before consummation of transaction, or (b) securities to be distributed are not required to be registered under Securities Act of 1933, written notice of transaction and copy of materials, if any, by which approval of transaction will be solicited is given to commissioner at least ten days before consummation of transaction and commissioner does not disallow, by order, exemption within next ten days; (12) offer or sale by Kansas corporation, limited partnership or limited liability company of its securities to purchaser if aggregate number of sales by corporation in 12-month period ending on date of sale does not exceed 20 sales, if (a) seller believes purchaser is purchasing for investment, (b) no commission nor other remuneration is paid or given, directly or indirectly, for soliciting purchaser, and (c) neither issuer nor any person acting on its behalf offered or sold securities by any form of general solicitation or general advertising. Sales made in violation of Act and sales exempt from registration under exemptions (1) or (12) are counted toward 20 sales limit of this exemption. Corporation, partnership, association, joint-stock company, trust, other unincorporated organization or husband and wife, is considered one purchaser for purposes of this exemption; (13) any transaction pursuant to rule or regulation of securities commissioner for limited offerings; (14) any transaction pursuant to rule or regulation of securities commissioner concerning offer or sale of oil, gas or mining lease; (15) offer or sale of security issued by Kansas Venture Capital, Inc. or its successor; (16) any transaction through registered broker-dealer or agent involving viatical investment. By rules, regulation or order commissioner may require filing notice and specify conditions for exemption. (K.S.A. 17-12a202).

Registration of Offerers.

It is unlawful to transact business as investment adviser or investment adviser representative unless individual is registered as same. (K.S.A. 17-12a403 and 404).

Registration of Securities.

It is unlawful to offer or sell security unless security is federal covered security; security or offer is exempted from registration; or security is registered under this Act. (K.S.A. 17-12a301).

Notice filing is effective for one year commencing on later of notice filing or effectiveness of offering filed with securities and exchange commission. (K.S.A. 17-12a302).

Registration by coordination of any security may be registered by coordinator under this act if registration statement has been filed but has not been declared effective under Federal Securities Act of 1933 in connection with same offering by filing in office of Commissioner by issuer, any other person on whose behalf securities will be offered or any registered broker-dealer following information: (1) One copy of prospectus filed under Securities Act of 1933 with all amendments; (2) amount of securities to be offered in Kansas; (3) any adverse order, judgment or decree relating to offering made by regulatory authorities in any state or by any court or Securities & Exchange Commission; (4) copy of current articles and by-laws, underwriting agreements, any indenture or other instrument governing security's issuance, and specimen copy of security; (5) payment of registration fee; (6) consent to service of process of nonresident applicant or issuer which will offer security in Kansas through agent or broker-dealer on agency basis; (7) undertaking to forward promptly all amendments to federal registration statement other than those merely delaying effective date. Registration becomes effective at moment federal registration becomes effective if: (1) No stop order by Commissioner or proceeding therefore is in effect or pending; (2) registration statement has been on file ten days; (3) statement of maximum and minimum offering prices and maximum underwriting discounts and commissions has been on file two full business days or such shorter period permitted by Commissioner. Registrant must promptly notify Commissioner of effective date and time of federal registration and content of any federal price amendment and must file post-effective amendment of federal price amendment information and documents. Commissioner may make retroactive stop order without notice or hearing upon failure to receive notification and post-effective amendment if he promptly notifies registrant thereof by telephone or electronic means. Commissioner may waive prior filing specified in (2) and (3). If federal registration becomes effective prior to compliance and compliance is not waived registration becomes effective when compliance is made. If registrant advises Commissioner of expected effective date of federal registration, Commissioner must promptly advise registrant whether all conditions are satisfied and whether stop order is contemplated, but Commissioner is not precluded thereby from instituting such proceeding at any time. (K.S.A. 17-12a303).

Registration by qualification is permitted of any other securities. The statute enumerates eighteen requirements to be filed in applying for registration of such securities. (K.S.A. 17-12a304).

Registration statement may be filed by issuer or broker-dealer registered under this Act. Filer must pay fee of not more than $2,500 for each year that registration statement is effective. (K.S.A. 17-12a305).

Registration and License of Dealers.

“Broker-dealer” means person engaged in business of effecting transactions in securities for account of others. (K.S.A. 17-12a101). It is unlawful to transact business as broker-dealer unless person is registered under this Act and unless broker-dealer is exempt from registration. (K.S.A. 17-2a401).

Brokers and Agents.

“Agent” means an individual, other than broker-dealer, who represents broker-dealer in effecting or attempting to effect purchases or sales of securities. Term does not include individual excluded by rule adopted or order issued under this Act. (K.S.A. 17-12a101). It is unlawful for individual to transact business as agent unless registered under this Act as agent or is exempt from registration. (K.S.A. 17-12a402).

Fees.

Broker-dealers and investment advisers must pay not more than $300 when initially filing application for registration. Agents and investment adviser representatives must pay fee of not more than $100 when initially filing application for registration. (K.S.A. 17-12a410).

Bonds.

Registrants must post bonds and maintain minimum capital requirements as required by Commissioner. (K.S.A. 17-12a411).

Advertisements.

Except as otherwise provided, rule adopted to file prospectus, pamphlet, circular, form letter, advertisement, sales literature, or other advertising record relating to security or investment advice, addressed, or intended for distribution to prospective investors, including clients or prospective clients of person registered or required to be registered as investment adviser under this Act. (K.S.A. 17-12a504).

Liabilities.

Broker-dealer, agent, investment adviser, federal covered investment adviser, or investment adviser representative not liable to another broker-dealer, agent, investment adviser, federal covered investment adviser, or investment adviser representative for defamation relating to statement contained in record required by administrator. (K.S.A. 12a-507).

Except as otherwise provided, conviction for intentional violation of this Act is severity level 7, nonperson felony. Violation of rule may be fined, but not imprisoned if individual did not have knowledge of rule or order. (K.S.A. 17-12a508).

Person is liable to purchaser if person sells security in violation of K.S.A. 17-12a301. Person is liable to seller if person buys security by means of untrue statement of material fact. (K.S.A. 17-12a301). Person acting as broker-dealer in violation of K.S.A. 17-12a401 is liable to customer. (K.S.A. 17-12a301).

Tender Offers.

See Business Organizations, Corporations.

Uniform Simplification of Fiduciary Security Transfers Act.

Uniform Simplification of Fiduciary Security Transfers Act adopted. (K.S.A. 17-4903-4913). Uniform Commercial Code (K.S.A. 84-1-101 et seq.) specifically provides that it does not repeal this uniform act and if any inconsistency between two, provisions of Simplification of Fiduciary Security Transfers Act control. (K.S.A. 84-10-101[2]).

Kansas Uniform Securities Act adopted effective July 1, 2005. (K.S.A. 17-12a101 et seq.).

Kansas Uniform Trust Code adopted. (K.S.A. 58a-101 et seq.).

Uniform Securities Ownership by Minors Act not adopted.

3.25 STATUTE OF FRAUDS:

See topic Frauds, Statute of.

3.26 TRUST RECEIPT SECURITY:

See category Debtor and Creditor, topic Pledges.

3.27 WAREHOUSEMEN:

Uniform Commercial Code (K.S.A. 84-7-101 et seq.) in effect. See topic Commercial Code. Grain warehousemen regulated by K.S.A. 34-223 et seq.

Bond is required in the sum of not less than $5,000, or more than $50,000. (K.S.A. 82-165).

License must be procured from the Secretary of State. Fee $25. (K.S.A. 82-163). Expires on July 1st following date of issuance if issued before July 1, 1984, otherwise expires Dec. 31 following date of issuance. (K.S.A. 82-164).

4 CITIZENSHIP

4.01 ALIENS:

Property.

If alien heir has conveyed for valuable consideration and land has been held without claim by state for 25 years, right to escheat is deemed barred. (K.S.A. 58-2238).

5 CIVIL ACTIONS AND PROCEDURE

5.01 ACCORD AND SATISFACTION:

Uniform Commercial Code (K.S.A. 84-1-101 et seq.) in effect. The agreement that a smaller sum shall be accepted in discharge of a larger one originally claimed must have been entered into by the parties understandingly and with unity of purpose. (214 Kan. 769, 522 P.2d 959).

Pleading.

An accord and satisfaction must be pleaded. (K.S.A. 60-208).

See also category Business Regulation and Commerce, topic Commercial Code.

5.02 ACTIONS:

Federal Rules of Civil Procedure form the basis for procedural statutes, with few minor variations. (K.S.A. 60-101 et seq.). For rules applying to specific actions, see topics 5.17 Pleading and 5.19 Practice.

Equity.

No distinction in form between legal and equitable remedies. (K.S.A. 60-202).

Forms of Action.

One form of action known as “civil action”. (K.S.A. 60-202).

Conditions Precedent.

Civil action commenced at time of filing petition with clerk of court or service of process. (K.S.A. 60-203).

Claims Against Municipality.

Written notice of claim must be submitted to municipality and denied before action may be brought against municipality. (K.S.A. 12-105b).

Punitive Damages.

See topics Damages, subhead Punitive Damages; Pleading, subhead Punitive Damages.

Commencement.

See topics Process; Pleading.

Parties.

Action must be prosecuted in name of real party in interest, but fiduciary may bring suit on behalf of another without joining that person. (K.S.A. 60-207[a]). Representative may sue or defend on behalf of minor or incapacitated person. (K.S.A. 60-217[a]).

Claim accruing under law of another state may be sued upon in Kansas by person authorized to bring or maintain action in state where claim arose. (K.S.A. 60-217[b]).

Class Actions.

May be brought if: (1) Class so numerous that joinder of all members is impractical; (2) common questions of law or fact; (3) claims or defenses of representative parties are typical of class; and (4) representative parties will adequately protect interest of class. (K.S.A. 60-223[a]). Additionally, (1) separate actions must create risk of inconsistent judgments or practically dispose of claims of class members who are not parties; (2) final injunctive or declaratory relief must be appropriate to class as whole; or (3) common questions predominate over individual questions and class action is superior method of adjudication. (K.S.A. 60-223[b]).

Court determines whether class action is maintainable. (K.S.A. 60-223[c][1]). Judgment binds all class members except those opting out. Reasonable notice must be given to class. (K.S.A. 60-223[c][2] and [3]). Court must approve dismissal or compromise. (K.S.A. 60-223[e]).

Uniform Class Actions Act not adopted.

Intervention.

Anyone may intervene of right when: (1) Statute gives right to intervene or (2) applicant claims interest in property or transaction which is subject of action and disposition might affect his interest, unless interest is adequately represented by existing parties. (K.S.A. 60-224[a]). Anyone may intervene with permission of court when: (1) Statute gives conditional right to intervene or (2) applicant's claim or defense has question of law or fact in common with main action. (K.S.A. 60-224[b]).

Interpleader.

When plaintiff may be exposed to multiple liability, persons having claims against him may be joined as defendants. Defendant may obtain interpleader by crossclaim or counterclaim. (K.S.A. 60-222[a]). Defendant may deposit money or property subject to multiple claims in court with notice to possible claimants. (K.S.A. 60-222[b]).

Third Party Practice.

Defendant may issue third party summons and petition against person who is or may be liable to him for all or part of plaintiff's claim. (K.S.A. 60-214).

Joinder of Causes of Action.

Party may join as many claims as he has against opposing party. (K.S.A. 60-218[a]).

Splitting Causes of Action.

All grounds or theories upon which cause of action is founded must be asserted in one action or they will be barred in any subsequent action. (216 Kan. 138, 531 P.2d 435).

Consolidation of Actions.

Court may consolidate actions involving common questions of law or fact. (K.S.A. 60-242[a]).

Severance of Actions.

Court may order separate trial of separate claims or issues for convenience, to avoid prejudice, or for judicial economy. (K.S.A. 60-242[b]).

Stay of Proceedings.

No special provision for stay before judgment while action is pending.

Abatement and Revival.

In addition to causes of action which survive at common law, causes of action for mesne profits, or for injury to the person, or to real or personal estate, or for any deceit or fraud, or for death by wrongful act or omission, also survive; and the action may be brought notwithstanding the death of the person entitled or liable for same. (K.S.A. 60-1801). No action pending abates by the death of either or both the parties thereto, except an action for libel, slander, malicious prosecution, or for nuisance. (K.S.A. 60-1802). If party dies and claim is not thereby extinguished, court must on motion by any party or by successors or representatives of deceased party order substitution of proper parties. If such motion is not made within a reasonable time, action must be dismissed as to the deceased party. If party dies in an action in which the right sought to be enforced survives only to the surviving plaintiffs or against the surviving defendants, action does not abate and action proceeds in favor of or against surviving parties. In case of any transfer of interest, action may be continued by or against original party, unless court directs transferee to be substituted in the action or joined with original party. (K.S.A. 60-225).

See also category Estates and Trusts, topic Executors and Administrators.

Limitation of.

See topic Limitation of Actions.

Small Claims.

See category Courts and Legislature, topic Courts.

Termination of Actions.

Action may terminate by judgment (K.S.A. 60-254); by stipulation or voluntary dismissal (with or without prejudice) (K.S.A. 60-241[a]); by court sua sponte or on defendant’s motion for lack of prosecution (K.S.A. 60-241[a][2], [b]).

Prohibited Actions.

No statutory prohibitions.

Administration.

See category Estates and Trusts, topic Executors and Administrators.

Direct Actions Against Insurer.

See category Transportation, topic Motor Vehicles, subhead Direct Actions.

5.03 APPEAL AND ERROR:

From Administrative Agency.

All appeals are to district court unless otherwise specifically provided by statute for particular agency. Must exhaust all administrative remedies before petitioning for district court review. Petition for review may be filed by person directly affected by administrative proceedings or by party to administrative proceedings. Reconsideration not mandatory unless statutorily prerequisite for seeking judicial review. If reconsideration not requested and not prerequisite to judicial review, petition shall be filed within 30 days of administrative order. If reconsideration requested, petition for judicial review shall be filed within 30 days of service of order rendered upon reconsideration, unless further reconsideration required by K.S.A. 66-1186; within 30 days of order denying reconsideration; or in KCC proceeding within 30 days of date request for reconsideration is deemed denied. 30-day time does not run while administrative remedies are pursued. (K.S.A. 77-612 to 613).

Stay of Proceedings.

Agency may grant stay on appropriate terms or other temporary remedies during pendency of judicial review. (K.S.A. 77-613).

From District Magistrate Judge.

All appeals are to district judge. Taken by notice of appeal specifying order, ruling, decision or judgment complained of and filed in district court from which appeal is taken within ten days from date of order, ruling, decision or judgment. (K.S.A. 60-2103a).

Appeal Bond.

Security for costs must be given notice of appeal, amount to be determined by court and subject to statutory guidelines. (K.S.A. 60-2103).

Stay of Proceedings.

Taking of an appeal does not stay proceedings for enforcement of final judgment unless party appealing gives bond in amount to satisfy judgment, costs, interest and damages for delay. (K.S.A. 60-262; 61-2105).

Character of Hearing.

There is trial de novo on appeal, except where record made in civil cases appeal tried and determined on record by district judge. (K.S.A. 20-302b[c]).

Judgment or Order on Appeal.

Case is determined by district judge same as if originally set with that judge, except that in civil cases where record was made of original proceeding, appeal shall be determined on record. (K.S.A. 20-302b[c]).

From District Courts.

Court of Appeals hears appeals from decisions of district judge, except where direct appeal to Supreme Court required by law. (K.S.A. 22-3601 and 60-2102). Court of Appeals may transfer appeal to Supreme Court when: it lacks jurisdiction; subject matter has significant public interest; case involves significant legal questions; or caseload is burdensome. (K.S.A. 20-3016). Court of Appeals has jurisdiction to correct, modify, vacate or reverse any act, order or judgment of district court in order to assure that, any such act, order or judgment is just, legal and free of abuse. (K.S.A. 60-2101[a]). Appellate jurisdiction of Court of Appeals may be invoked by appeal as matter of right from: (1) Order that discharges, vacates or modifies provisional remedy; (2) order that grants, continues, modifies, refuses or dissolves injunction, or order that grants or refuses relief in form of mandamus, quo warranto or habeas corpus; (3) order that appoints receiver, or refuses to wind up receivership or to take steps to accomplish purposes thereof; (4) final decision in any action, except in action where direct appeal to Supreme Court is required by law. Appellate jurisdiction may also be invoked where district court certifies, on order not otherwise appealable, that there is involved controlling question of law involving substantial ground for difference of opinion and immediate appeal may materially advance ultimate end of litigation. (K.S.A. 60-2102).

Supreme Court has exclusive appellate jurisdiction of district court decisions declaring federal or state law unconstitutional. (K.S.A. 60-2101[b]). In cases appealed originally to Court of Appeals, Supreme Court may accept or reject transfer before final decision of Court of Appeals (K.S.A. 20-3016) and after decision by Court of Appeals may accept petition for review considering following factors: (1) General importance of question; (2) existence of conflict between decision and prior law; (3) need for exercising Supreme Court supervisory authority; (4) final or interlocutory character of judgment, order or ruling sought to be reviewed. (K.S.A. 20-3018[b]).

Appeal Bond.

Security for costs on appeal must be given in such sum and manner as may be prescribed by general rule of Supreme Court and statutory guidelines unless court makes different order applicable to particular case. (K.S.A. 60-2103).

Stay of Proceedings.

Stay granted in district court's discretion upon presentment of supersedeas bond conditioned for satisfaction of judgment costs, interest and damages for delay. (K.S.A. 60-262; 60-2103; 61-2105). Court of Appeals may stay pending appeal. (K.S.A. 20-3001).

Time for Appeal.

Appeal to Court of Appeals taken within 30 days of entry by district court (possible extension of up to 30 days on grounds of excusable neglect). (K.S.A. 60-2103). Petition for review from Court of Appeals to Supreme Court filed within 30 days of decision. (K.S.A. 20-3018). Record on appeal must contain such matters and be prepared in such manner and form, as prescribed by rules of Supreme Court. (K.S.A. 60-2104).

5.04 BONDS:

Bonds are required in a great variety of cases.

Surety Company Bonds.

Whenever bond or undertaking conditioned for faithful performance of any contract of duty, or for doing or refraining from doing of anything in such bond or undertaking specified, is by law of State of Kansas required to be given with one surety or sufficient surety, execution of same is sufficient when executed or guaranteed solely by corporation incorporated under laws of U.S. or of any state, having power to guarantee fidelity of persons holding positions of public or private trust and to execute and guarantee bonds and undertakings in judicial proceedings. Such corporation must be authorized to do business in state, and bond must be approved by head of department, court judge, officer, board of directors or body executive, legislative or judicial, required to approve same. (K.S.A. 78-102).

It is no defense on such a bond that false statements or representations were made in the application therefore by person or party named as principal therein or giving same. (K.S.A. 78-102).

As to venue of action on bond, see topic Venue.

Enforcement.

Procedure varies with type of bond.

5.05 CERTIORARI:

The writ of certiorari was abolished in 1868.

5.06 CHARITABLE IMMUNITY:

See topic Damages.

5.07 COMMISSIONS TO TAKE TESTIMONY:

See Topic Depositions and Discovery.

5.08 COSTS:

Unless otherwise provided by statute, or by order of court, costs must be allowed to successful party. Court has discretion to award alternative dispute resolution fees. (K.S.A. 60-2002).

Docket fee for district courts in sum of $156 on and after July 1, 2009 through June 30, 2013, and $154 on and after July 1, 2013 must be paid by plaintiff before case can be filed or docketed unless plaintiff files affidavit that claim is just and he is unable to pay costs. (K.S.A. 2008 Supp. 60-2001). Secretary of Corrections authorized to disburse money from inmates trust fund to satisfy costs determined by court. (K.S.A. 2008 Supp. 60-2001).

Docket fee for small claims is $39 on and after July 1, 2009 through June 30, 2013, and $37 on and after July 1, 2013, if claim does not exceed $500; or $59 on and after July 1, 2009 through June 30, 2013, and $57 on and after July 1, 2013, if claim exceeds $500; unless for good cause shown, judge waives fee. (K.S.A. Supp. 61-2704).

Docket fee for cases filed under Code of Civil Procedure for limited actions is $37 on and after July 1, 2009 and $35 on and after July 1, 2013 if claim does not exceed $500; $57 on and after July 1, 2009 and $55 on and after July 1, 2013 if claim exceeds $500 but does not exceed $5,000; $103 on and after July 1, 2009 and $101 on and after July 1, 2013 if claim exceeds $5,000. (K.S.A. Supp. 61-4001).

Security for Costs.

State of Kansas and all municipalities are exempt in any civil action in which such state or municipality is involved from depositing court sots or paying docket fees prescribed by any other law of this state. (K.S.A. 60-2005).

5.09 DAMAGES:

Common law generally prevails. Numerous statutes allowing punitive damages, penalties, trebling or doubling of damages, are discussed under topics relating to substantive provisions.

Comparative Negligence Rule.

Comparative negligence rule adopted. Joint and several liability abolished. (K.S.A. 60-258a and 258b).

Charitable Immunity.

Abrogated. (175 Kan. 751, 267 P.2d 934).

Sovereign Immunity.

Kansas Tort Claims Act (K.S.A. 75-6101 et seq.) imposes liability on “governmental entity”, including state, any political subdivision, and any agency, authority or institution thereof, for damages caused by negligent or wrongful act or omission of government employee acting within scope of employment if private person would be liable. (K.S.A. 75-6102, 6013). Members of municipal governing bodies and municipal appointive boards are immune unless they act with actual fraud or malice. (K.S.A. 75-6119). Act not applicable to claims arising from negligence of health care provider other than charitable health care provider; municipally owned hospital and its employees; local health department; and indigent health care clinic or district coroner. (K.S.A. 75-6115[a]). Claims for damages against health care provider other than in (a) recovered same as against private health care provider. (K.S.A. 75-6115).

Government entity and employees are immune for damages resulting from: (1) Legislative functions; (2) judicial functions; (3) enforcement of or failure to enforce law; (4) any discretionary function; and (5) assessment or collection of taxes. See statute for other exceptions.

(K.S.A. 75-6104).

Damages arising from single event limited to $500,000 unless greater amount of insurance purchased. (K.S.A. 75-6105 and 75-6111). Governmental entity not liable for punitive damages or prejudgment interest. Employee acting within scope of employment not liable for punitives or prejudgment interest unless actual fraud or malice. (K.S.A. 75-6105[c]).

See also topic Practice, subhead Claims Against Government.

No-Fault Insurance.

See category Transportation, topic Motor Vehicles, subhead No-Fault Insurance.

Uniform Contribution Among Tortfeasors Act (Revised).

Not adopted.

Collateral Source Rule.

None.

Medical Malpractice.

$1,000,000 cap for all claims against all defendants in actions accruing between July 1, 1986 and June 20, 1988, unconstitutional. (K.S.A. 60-3407; 243 Kan. 333, 757 P.2d 251 [1988]).

Noneconomic Loss.

For medical malpractice actions accruing on or after July 1, 1986, and for all personal injury or wrongful death actions accruing on or after July 1, 1987, each party limited to $250,000. (K.S.A. 60-3407, K.S.A. 60-19a01). Cap on noneconomic loss upheld. (244 Kan. 726, 771 P.2d 71 [1989]).

Punitive Damages.

Trier of fact determines whether to allow. Court in separate proceeding determines amount. Plaintiff must prove by clear and convincing evidence that defendant acted with willful conduct, wanton conduct, fraud or malice. Limited to lesser of $5,000,000 or defendant's highest gross annual income during five years before wrongful act, except court may award 1.5 times amount of profit defendant earned or will earn from wrongful act. Applies to all civil causes of action accruing on or after July 1, 1988, and all nonmedical malpractice causes of action accruing on or after July 1, 1987. (K.S.A. 60-3701, et seq.).

In medical malpractice actions accruing between July 1, 1985 and June 30, 1988, punitives may not exceed lesser of $3,000,000 or 25% of defendant's highest annual gross income during five years before wrongful act. (K.S.A. 60-3401 to 3402). One-half punitive damages collected paid to health care stabilization fund and one-half to plaintiff. (K.S.A. 60-3402[e]).

Person or entity may purchase insurance covering vicarious liability for punitive damages payable when insured lacks actual prior knowledge of tortfeasor's acts or omissions. (K.S.A. 40-2,115). See also categories Employment, topic Labor Relations; Estates and Trusts, topic Death, subhead Action for Death; Mortgages, topics Chattel Mortgages, Mortgages of Real Property; Transportation, topic Motor Vehicles, subhead No-Fault Insurance.

Itemized Verdicts.

Trier of fact must itemize verdict in all personal injury actions, including medical malpractice and wrongful death. Except for wrongful death, verdict must show amount awarded for: (1) Noneconomic losses including pain and suffering, disability, disfigurement and accompanying mental anguish; (2) reasonable expenses of necessary medical and hospital care; and (3) other economic injuries. (K.S.A. 60-249a and 60-19a02). Wrongful death verdicts must show amounts awarded for: (1) Nonpecuniary damages; (2) expenses for care of deceased; and (3) other pecuniary damages. In all personal injury actions, amount awarded must be itemized to reflect current and future damages. Court may instruct jury only on items of damages for which there is evidence on which to base award. (K.S.A. 60-1903).

Hazardous Waste Cleanup.

See category Environment, topic Environmental Regulation, subhead Hazardous Waste Cleanup.

5.10 DECLARATORY JUDGMENTS:

See topic Judgments.

5.11 DEPOSITIONS AND DISCOVERY:

Federal Rules of Civil Procedure generally followed. (K.S.A. 60-226 to K.S.A. 60-237). See topic Practice. Parties by stipulation of court upon motion may order that deposition be taken by telephone. Stenographic record shall be made while deposition being taken. Deposition may be videotaped by giving notice. (K.S.A. 60-230[b]).

Within State for Use Within State.

Federal Rules 26 to 32 generally followed.

Within State for Use Elsewhere.

District court in county where deponent resides or is employed or transacts his business in person may, upon ex parte petition, order issuance of subpoena in aid of taking of deposition and may make any order in accordance with K.S.A. 60-230(d), K.S.A. 60-237(a) or K.S.A. 60-237(b), K.S.A. 60-228(d).

Outside of State for Use Within State.

Within U.S. must be taken before official authorized to administer oaths by law of place where examination held or before person appointed by court in which action is pending. (K.S.A. 60-228[a]). In foreign countries may be taken: (1) Pursuant to treaty or convention; (2) pursuant to letter request; (3) on notice before person authorized to administer oaths in place where examination is held, either by U.S. or local law, or (4) before person appointed by commission. (K.S.A. 60-228[b]).

De Bene Esse.

Federal Rule 27 followed with variations based on Uniform Perpetuation of Testimony Act, particularly regarding wills. (K.S.A. 60-227). Deposition taken under similar procedure of another jurisdiction admissible in Kansas to same extent as deposition taken under Kansas law. (K.S.A. 60-227[f]).

Perpetuating of Testimony.

Court may act on equitable considerations. (K.S.A. 60-227[d]). See also subhead De Bene Esse, supra.

Before Whom Taken.

Depositions may be taken in this state before any officer or person authorized to administer oaths. (K.S.A. 60-228). See also this topic, various subheads.

Commissions.

Any court of record in Kansas before which action is pending may grant commission to take depositions within or without Kansas. (K.S.A. 60-228[a]).

Compelling Attendance of Witnesses.

Subpoena compelling attendance at trial or hearing issues from district where proceeding is held. Deposition subpoena issues where deposition taken. Clerk may issue blank subpoena on request. (K.S.A. 60-245[a]). Each subpoena must set forth statutory requirements for protection of persons subject to subpoena with provision for timely motion to quash or modify subpoena. (K.S.A. 60-245[c]). Notice procedure added for subpoena of records of business not party. (K.S.A. 60-245[a]).

Examination of Witnesses.

Federal Rule 30(c) followed. Reference to Federal Rules of Evidence replaced with reference to K.S.A. 60-243. (K.S.A. 60-230[c]).

Return.

Unless waived, deponent has 30 days after receiving notice to obtain, review and correct transcript. (K.S.A. 60-230[3]).

Form.

Officer administering must certify on deposition that witness was duly sworn by officer and that deposition is true record of testimony given by witness. (K.S.A. 60-230[f]).

Discovery.

Modified Federal Rule 26(b) followed. (K.S.A. 60-226[b]).

Demand for Admission of Facts.

Federal Rule 36 followed. (K.S.A. 60-236). Court may hold case management conference and order disclosures of witnesses and evidence. (K.S.A. 60-216[b]).

Interrogatories.

Federal Rule 33 followed. Interrogatories must not be filed except on order of court or until used in trial or hearing, at which time documents must be filed. (K.S.A. 60-205).

5.12 EQUITY:

See Topic Actions.

5.13 EVIDENCE:

Witnesses.

Person is disqualified as witness if he is incapable of expressing himself concerning matter so as to be understood by judge and jury either directly or through interpretation by one who can understand him, or is incapable of understanding the duty of a witness to tell the truth. (K.S.A. 60-417).

Privileged Communications.

Lawyer-client (K.S.A. 60-426); physician-patient (K.S.A. 60-427); penitential communications (K.S.A. 60-429).

Husband and Wife.

Communications are privileged except: In action by one spouse against other; in action for damages for alienation of affection of other; for criminal conversation with other; in criminal action in which one of them is charged with crime against person or property of other or of child of either; crime against person or property of third person committed in course of committing a crime against other; bigamy or adultery; desertion of other or of child of either; in criminal action in which accused offers evidence of communication between him and his spouse; or if judge finds that sufficient evidence, aside from communication, has been introduced to warrant a finding that communication was made, in whole or in part, to enable or aid anyone to commit or to plan to commit crime or tort. Privilege terminates if judge finds that spouse while holder of privilege testified or caused another to testify in any action to any communication between spouses upon the same subject matter. (K.S.A. 60-428).

Communications or Transactions with Persons Since Deceased or Incompetent.

No special provision. See K.S.A. 60-460(e) for hearsay exception for dying declarations.

Self Incrimination.

Every natural person has privilege to refuse to disclose in action or to public official of this state or the United States or any other state or any governmental agency or division thereof any matter that will incriminate him. (K.S.A. 60-425).

Compelling Attendance.

See topic Depositions and Discovery.

Medical Malpractice.

To qualify as expert witness on standard of care given by defendant, must have devoted at least 50% of professional time in two years before incident to actual clinical practice in same profession in which defendant is licensed. (K.S.A. 60-3412).

5.14 INJUNCTIONS:

May be final judgment in action, and may also be allowed as provisional remedy. (K.S.A. 60-901).

Jurisdiction.

Any time before judgment, party restrained may apply to judge of court in which action is brought, to vacate or modify same. (K.S.A. 60-910).

Prerequisites and Procedure.

Party demanding relief must file affidavit or verified pleading showing that relief demanded consists in restraining actual or threatened commission or continuance of some act which would produce injury to party, violate party’s rights respecting subject of the action, or which would render judgment ineffective. (K.S.A. 60-902). Restraining order may issue without notice or bond, except on issue growing out of labor dispute (K.S.A. 60-904) or if it appears that order may result in damages. Application for restraining order shall also be considered as application for temporary injunction and either party may give notice of hearing thereon. (K.S.A. 60-903).

Bond.

No temporary injunction may operate unless party obtaining same gives bond in amount fixed by court, securing to party injured damages he may sustain, including attorney fees, if it be finally determined that injunction should not have been granted. (K.S.A. 60-905).

Temporary Injunction.

Reasonable notice and an opportunity to be heard must be granted the party to be enjoined. (K.S.A. 60-905).

Form and Scope.

Every order granting injunction and every restraining order must set forth reasons for its issuance; must be specific in terms; must describe in reasonable detail act or acts sought to be restrained; and is binding only upon the parties to the action, their officers, agents, servants, employees, and attorneys, and upon those persons in concert with them who receive actual notice of the order. (K.S.A. 60-906).

5.15 JUDGMENTS:

Judgment is final determination of rights of parties in action. Partial judgment for fewer than all claims or parties may be directed. Before default judgment is taken where money damages exceed $75,000, party seeking relief must notify other party by certified mail at least ten days prior to date judgment is sought. (K.S.A. 60-254). Federal Rules of Civil Procedure form basis for procedural statutes. (K.S.A. 60-254 et seq.). See topic Practice.

Judgments by Confession.

Void in consumer credit transactions. (K.S.A. 16a-3-306).

Judgments on Pleadings.

Federal Rule 12(c) followed. (K.S.A. 60-212[c]).

Summary Judgments.

Federal Rule 56 followed. (K.S.A. 60-256).

Declaratory Judgments.

Authorized. (K.S.A. 60-1701 et seq.).

Default Judgments.

Federal Rule 55 followed. (K.S.A. 60-255). Default judgment rendered on service by publication may be reopened within two years. (K.S.A. 60-309).

Offer of Judgment.

Any time more than 15 days before trial begins, party defending against claim may serve upon adverse party offer to allow judgment to be taken against such party for money or property or effect specified in such party's offer, with costs then accrued. (K.S.A. 60-2002). Offer not accepted must be deemed withdrawn and evidence thereof not admissible except in proceeding to determine costs. (K.S.A. 60-2002).

Vacation or Modification.

Court may relieve party of final judgment for following reasons: (1) Mistake; (2) newly discovered evidence; (3) fraud, misrepresentation; (4) judgment is void; (5) judgment has been satisfied; and (6) other reason justifying relief from judgment. Motion to set aside must be made within one year after judgment entered for (1), (2), and (3) or within reasonable time. (K.S.A. 60-260). Motion to alter or amend judgment must be served and filed not later than ten days after entry of judgment. (K.S.A. 60-259).

Liens.

Any judgment rendered in Kansas by district court under c. 60 or U.S. court becomes lien on debtor's real estate in county where judgment rendered. Effective date of lien limited to shorter of four months before entry of judgment or date petition was filed. Attested copy of judgment together with statement of costs may be filed with clerk of court of any other county and judgment will become lien on real estate in that county from date copy is filed. (K.S.A. 60-2202[a]). Fee if execution can be issued is $15, otherwise $5. Judgments in c. 61 limited actions do not become liens until creditor pays filing fee and clerk enters judgment on appearance docket. (K.S.A. 60-2202[b]). Support order from another state creates lien when order is filed on this state's appearance docket. (K.S.A. 60-2202[d]).

Revival.

Dormant judgment may be revived if, within two years of date on which such judgment became dormant, holder thereof files motion and gives notice for revivor and requests immediate issuance of execution thereof if such motion is granted. If motion for revival filed within two years after judgment became dormant, court must order revival and execution must follow. In child support cases, if motion for revival filed prior to child's emancipation, within two years of emancipation, or within two years after judgment became dormant, court must order revival and execution must follow. Judgment may also be revived by filing of written stipulation of revivor signed by all parties affected thereby. (K.S.A. 60-2404). See category Debtor and Creditor, topic Executions.

Judgment becomes lien against debtor's real property in county from date judgment revived. (K.S.A. 60-2418[a]).

Satisfaction.

Judgment creditor or his assignee must file satisfaction and release of judgment within 20 days after demand therefore. (K.S.A. 60-2803).

Form

IN THE ____(number)____ JUDICIAL DISTRICT, DISTRICT COURT, ____________ COUNTY, KANSAS

________________, Plaintiff.

v.

________________, Defendant.

Case No. ________

SATISFACTION OF JUDGMENT

The judgment in this case has been paid and satisfied and same is hereby fully released as to ____.

Done this ________ day of ________, 20 ____

(attorney's signature)

____

Attorney for ____________________

Foreign Judgments.

Copy of any foreign judgment authenticated in accordance with act of congress, statutes of this state, or certified in accordance with statutes of state in which judgment rendered, may be filed in office of clerk of any district court of this state. (K.S.A. 60-3002).

Revised Uniform Enforcement of Foreign Judgments Act.

Uniform Enforcement of Foreign Judgments Act in effect. (K.S.A. 60-3001 et seq.).

5.16 LIMITATION OF ACTIONS:

Uniform Commercial Code (K.S.A. 84-1-101 et seq.) in effect. See category Business Regulation and Commerce, topic Commercial Code.

Actions must be commenced within the following periods after the respective causes of action accrue (K.S.A. 60-501 et seq.):

Fifteen Years.

No action can be maintained for recovery of real property or for determination of any adverse claim or interest therein after 15 years. (K.S.A. 60-503). See category Property, topic Adverse Possession.

Five Years.

Action upon any agreement, contract or promise in writing; action brought on any covenant of seizin contained in any deed of conveyance of land; any action brought on covenant of warranty contained in any deed of conveyance of land, after there shall have been final decision against title of covenantor in such deed; action upon official bond or undertaking of executor, administrator, guardian, sheriff, or any other officer, or upon bond or undertaking given in attachment, injunction, arrest, or in any case required by statute. (K.S.A. 60-511). An action for recovery of real property by execution debtor, his heirs, or any person claiming under him by title acquired after date of judgment, from date of recording of deed made in pursuance of sale. (K.S.A. 60-504). Action for recovery of real property sold by executors, administrators or guardians, upon order or judgment of court directing such sale, brought by heirs or devisees of deceased person, or ward or his guardian, or any person claiming under any of them by after-acquired title, from date of recording of deed made in pursuance of sale. (K.S.A. 60-505).

Four Years.

Action for breach of any contract for sale must be commenced within four years after cause of action has accrued, and by original agreement parties may reduce period of limitation to not less than one year but may not extend it. (K.S.A. 84-2-725).

Three Years.

All actions upon contracts, obligations, or liabilities expressed or implied but not in writing; an action upon a liability created by a statute other than penalty or forfeiture. (K.S.A. 60-512).

Two Years.

Forcible entry and detention, or for forcible detention only. (K.S.A. 60-506). Action for trespass upon real property; action for taking, detaining or injuring personal property, including actions for specific recovery thereof; action for relief on ground of fraud, but cause of action is not deemed to have accrued until fraud is discovered; action for injury to rights of another, not arising on contract, and not herein enumerated; action for wrongful death; action for malpractice against health care provider. Cause of action in this section is not deemed to have accrued until act giving rise to cause of action first causes substantial injury, or, if fact of injury is not reasonably ascertainable until some time after initial act, then period of limitation does not commence until fact of injury becomes reasonably ascertainable to injured party, but in no event may action be commenced more than ten years beyond time of act giving rise to cause of action. (K.S.A. 60-513). Action against health care provider accrues at time of act giving rise to cause of action, unless injury not reasonably ascertainable at time of act, but in no event shall action be commenced more than four years from time of act. (K.S.A. 60-513[c]). Negligence cause of action by corporation against officer or director does not accrue until substantial ascertainable injury but in no event more than five years from time of act. All other causes of action by corporation against officer or director do not accrue until substantial ascertainable injury and non-culpable directors are majority but in no event more than ten years from time of act. (K.S.A. 60-513[d]).

One Year.

Action for libel or slander; for assault, battery, malicious prosecution, or false imprisonment; action upon a statutory penalty or forfeiture. (K.S.A. 60-514).

New Action.

If plaintiff fails in any action commenced within due time otherwise than upon merits and time limited for same has expired, plaintiff, or if he dies and cause of action survives, his representatives, may commence new action within six months after such failure. (K.S.A. 60-518).

Foreign Causes of Action.

Where cause of action has arisen in another state or country in which such action cannot be maintained by reason of lapse of time, no action can be maintained thereon in this state except in favor of one who is a resident of this state and who has held cause of action from time it accrued. (K.S.A. 60-516).

Disabilities of Plaintiff.

If any person entitled to bring action, other than for recovery of real property or penalty or a forfeiture, at time cause of action accrued, or at any time during period statute of limitations is running, is under 18, or incapacitated, or imprisoned for term less than his natural life, such person may bring action within one year after such disability is removed. No such action can be maintained after eight years from time of act giving rise to cause of action. If person dies during the continuance of any disability so specified and no determination is had of the title, claim, interest, or action to him accrued, any person entitled to claim from, by or under him, may commence such action within one year after his death, but in no event more than eight years after act giving rise to cause of action. Notwithstanding foregoing, person imprisoned for any term having access to court to bring action is not under legal disability. (K.S.A. 60-515).

Absence of Concealment of Defendant.

If cause of action accrues against person who is out of the state, or has absconded or concealed himself, limitation period does not begin to run until he comes into state or while he is so absconded or concealed. If after cause of action accrues he departs from state, or absconds or conceals himself, time of his absence or concealment is not computed as any part of period within which action must be brought. This does not extend period of limitation as to any defendant whose whereabouts are known and upon whom service of summons can be effected. (K.S.A. 60-517).

Interruption of Statutory Period.

In any contract case, when any part of the principal or interest has been paid, or an acknowledgment of an existing liability, debt or claim, or any promise to pay same, has been made, action may be brought within period prescribed for same, after such payment, acknowledgment or promise; but such acknowledgment or promise must be in writing, signed by party to be charged thereby. (K.S.A. 60-520).

Pleading.

Party must set forth affirmatively statute of limitations constituting avoidance or affirmative defense. (K.S.A. 60-208).

5.16A PARTITION:

When object of action is to effect partition of personal or real property or an estate or interest created by an oil, gas or mineral lease or an oil or gas royalty, petition must describe property and, with reasonable certainty, respective interest of owners thereof. Persons claiming specific or general lien upon all or any portion of property may be made parties. Allegation of ownership of interest implies allegation of right to possession, and it is not necessary to claim remedy of ejectment. (K.S.A. 60-1003).

Venue.

Action must be brought in county in which real estate situated, except if it be entire tract situated in two or more counties and there is common ownership, action may be brought in any county in which a part thereof is situated. (K.S.A. 60-601).

Proceedings.

Upon all interests being determined and partition ordered, court appoints three commissioners to partition property among parties according to their respective interests, but if such cannot be done without manifest injury, or is impracticable, commissioners appraise value of property. Where property is not subject to partition in kind, any one or more of parties may elect to take property or any separate tract at appraised value, but if no party elect to so take, or two or more so elect to take, in opposition to each other, court must order a sheriff's sale in manner provided for sale of property on execution, at not less than two-thirds valuation. (K.S.A. 60-1003).

Costs and Fees.

Court must tax costs, attorney fees and expenses, including allowance for bringing up to date abstract of title or title insurance, and apportion same among parties according to their respective interests. (K.S.A. 60-1003).

5.17 NEGLIGENCE:

See topic Damages.

5.18 PLEADING:

Federal Rules of Civil Procedure form basis for procedural statutes. (K.S.A. 60-201 et seq. and 61-1601 et seq.). See topics Actions and Practice.

Pleadings Permitted.

Federal Rule 7 followed except provision added for substituting lost, destroyed or withheld pleadings. (K.S.A. 60-207).

Complaint.

Federal Rule 8 followed except no need for jurisdictional statement and, except in contract, may not specify exact amount of damages in excess of $75,000. (K.S.A. 60-208[a]).

Answer.

Federal Rule 8 followed. (K.S.A. 60-208).

Counterclaim or Set-Off.

Federal Rule 13 followed except subsection (d) substituted on effect of death or statute of limitations. (K.S.A. 60-213).

Reply.

Federal Rule 12 followed except subsection (a) makes specific provision for time to respond to service by mail or publication and subsection (i) allows answer for minor or incapacitated person. (K.S.A. 60-212).

Demurrer.

Abolished. (K.S.A. 60-207[c]). Substitute is Federal Rule 12(b) defenses. (K.S.A. 60-212[b]).

Amended or Supplemental Pleadings.

Federal Rule 15 followed. (K.S.A. 60-215).

Affidavits of Merits.

Not required. (K.S.A. 60-211).

Affidavits of Defense.

Not required. (K.S.A. 60-211).

Bills of Particulars.

Federal Rule 12(e) followed. (K.S.A. 60-212[e]). May be demanded in divorce actions, but will not become part of record except on appeal. (K.S.A. 60-1604[d]).

Verification.

Not required (K.S.A. 60-211) except for motions to vacate or modify injunction after final judgment (K.S.A. 60-1001[b]), restraining orders (K.S.A. 60-902), divorce actions (K.S.A. 60-1604 et seq.), and where otherwise specifically required.

Service.

Federal Rule 5(b) followed. (K.S.A. 60-205[b]). Service by telefacsimile permitted. However other methods may be authorized by substantive law. (K.S.A. 60-205).

Filings.

Federal Rule 5(e) followed. (K.S.A. 60-205[e]).

Time.

Federal Rules followed.

Proof of Claims.

Pleading which sets forth claim for relief must contain short statement of claim showing that pleader is entitled to relief and demand for judgment for relief to which pleader deems entitled. (K.S.A. 60-208).

Sister States.

Revised Uniform Enforcement of Foreign Judgments Act adopted. (K.S.A. 60-3001 et seq.). No material variations, except § 3(c) not adopted. § 5 docket fee is $55.

Foreign Countries.

No statute or case law on enforcement of judgments. Kansas has acceded to Hague Convention Abolishing the Requirement of Legalization for Foreign Public Documents. (See Part V, Selected International Conventions.) (K.S.A. 53-401).

Punitive Damages.

No tort claim for punitives may be included in petition or other pleading without permission of court. Court may allow filing of amended petition seeking punitives on motion and on basis of supporting and opposing affidavits establishing probability that plaintiff will prevail. Motion must be filed before pretrial conference. (K.S.A. 60-3703). See topic Damages, subhead Punitive Damages.

Small Claims.

See category Courts and Legislature, topic Courts.

5.19 PRACTICE:

Federal Rules of Civil Procedure form basis for procedure in civil matters.

Chapter 60 Actions.

Rules of procedure (K.S.A. 60-201 et seq.) are identical except for minor variations. Apply to all civil actions not brought under K.S.A. 61-1601 et seq.

Verdicts.

Agreement of ten of twelve jurors sufficient to render verdict. Parties may stipulate that fewer jurors be used. In cases using less than 12 jurors, verdict must be unanimous unless parties have stipulated otherwise. (K.S.A. 60-248).

Chapter 61 Actions.

Actions for $25,000 or less may be brought pursuant to K.S.A. 61-1601 et seq. which is abbreviated form of Federal Rules. Limitations on certain discovery and pretrial procedures. Ch. 61 does not apply to following actions regardless of amount in controversy: (1) Against state officers or state, except as authorized by Kansas tort claims act; (2) specific performance of real estate contracts; (3) title to real estate; (4) foreclosure of real estate; (5) divorce, separate maintenance, or child custody; (6) habeas corpus; (7) receivership; (8) change of name; (9) declaratory judgments; (10) mandamus and quo warranto; (11) injunction; (12) class actions; (13) rights of majority; (14) appeal of administrative order or ruling. (K.S.A. 61-2802).

Discovery.

Federal Rules generally followed but Kansas has not adopted Rule 26(a)(1) initial disclosure practice. (K.S.A. 60-226 to K.S.A. 60-237). Court may conduct case management conference and order disclosures of key documents and witnesses. (K.S.A. 60-216[b]). Information transmitted between party to dispute and neutral person conducting mediation shall be confidential. Admissions, representations or statements not admissible as evidence or subject to discovery with limited exceptions. (K.S.A. 60-452a).

Demand for Admission of Facts.

Federal Rules followed. (K.S.A. 60-236).

Direct Action Against Insurors.

Generally not permitted. See category Transportation, topic Motor Vehicles, subhead Direct Actions.

Claims Against Government.

Kansas Tort Claims Act (K.S.A. 75-6101 et seq.) abrogates sovereign immunity for some acts. Action for less than $25,000 may be brought as limited action. (K.S.A. 75-6103[b][1]; see K.S.A. 61-1606 et seq.). Action may not be brought under small claims procedure act. (K.S.A. 75-6103[b][2]; see K.S.A. 61-2701 et seq.). Written notice of claim must be submitted to municipality and denied before action may be brought against municipality. (K.S.A. 12-105b). No lien rights created against employee's real or personal property on date of judgment if pleadings allege negligent or wrongful act or omission while acting within scope of employee's employment. Judgment against employee shall become lien upon employee's property when judgment rendered only if found (1) employee's negligent or wrongful act occurred when employee acting outside scope of employee's employment or (2) employee's conduct was because of actual fraud or actual malice of employee. (K.S.A. 2008 Supp. 60-2203a). Judgment against either governmental entity or employee is complete bar to action against other. (K.S.A. 75-6107). See topic Damages, subhead Sovereign Immunity.

Medical Malpractice.

On request of any party, screening panel must be convened. (K.S.A. 65-4901). Panel determines whether there was departure from standard practice of care and whether such departure caused claimant's damages. (K.S.A. 65-4903). If either party rejects panel's recommendations, plaintiff may proceed with action. (K.S.A. 65-4905). Settlement conference with judge, attorneys and all parties mandatory within 30 days of trial. (K.S.A. 60-3413). Attorney fees must be reasonable and approved at evidentiary hearing. (K.S.A. 7-121b). See topics Damages, Pleading, subhead Punitive Damages, Evidence, subhead Witnesses, catchline Medical Malpractice.

Professional Malpractice.

Applies to any profession which professional corporation is licensed to practice except health care provider. (K.S.A. 60-3501). See category Business Organizations, topic Corporations, subhead Professional Corporations. On request of any party, screening panel must be convened. (K.S.A. 60-3502). Panel determines whether breach of standard practice caused claimant's damages. (K.S.A. 60-3505[a]). Panel's written report is admissible in any subsequent legal proceeding and panel members may be subpoenaed to testify. (K.S.A. 60-3505[c]). If any party rejects panel's recommendations, plaintiff may proceed with action. (K.S.A. 60-3506).

Small Claims.

See category Courts and Legislature, topic Courts.

See also topics Actions, Appeal and Error, Depositions and Discovery, Injunctions, Judgments, Pleading, Process; category Debtor and Creditor, topics Attachment, Executions, Garnishment.

5.20 PROCESS:

Federal Rules of Civil Procedure form the basis for procedural statutes. (K.S.A. 60-301 et seq.; see K.S.A. 60-204). See topic Practice.

Civil action is commenced at time of filing petition with clerk of court if service is obtained or first publication made within 90 days. Court may extend that time additional 30 days upon showing of good cause, otherwise action is commenced at time of service or first publication. If service or first publication purports to have been made within specified time but is later found invalid due to any irregularity in form or procedure or defect in making service, action is still deemed commenced at applicable time under K.S.A. 60-203(a) if valid service obtained or first publication made within 90 days of that finding. Court may extend time additional 30 days upon showing of good cause. (K.S.A. 60-203).

General Requisites.

Summons is signed by clerk under seal of court, dated, and must be in substantial conformity with forms for summons in appendix following K.S.A. 60-269. (K.S.A. 60-302). Restricted mail is delivered to addressee only and requires return receipt showing address where delivered. If addressee not natural person endorsement “deliver to addressee only” not required. (K.S.A. 60-103).

By Whom Issued.

Upon filing of petition, clerk issues summons for service upon each defendant in accordance with K.S.A. K.S.A. 60-303. (K.S.A. 60-301).

Who May Serve.

Unless personal or residence service requested, sheriff or attorney for party requesting service shall serve any process by certified mail or other reliable delivery service. Service of process considered obtained under K.S.A. 60-203 upon delivery of certified mail envelope. When plaintiff files written request, service or process shall be made by personal or residence service. Personal service shall be made by delivering copy of process to person to be served. Residence service shall be made by leaving copy of process to be served at dwelling house or usual place of abode of person to be served with some person of suitable age and discretion residing therein.

If service cannot be made upon individual other than minor or disabled person by personal service, service may be made by leaving copy of process at defendant’s dwelling house or usual place of abode and mailing notice by first class mail to individual. (K.S.A. 60-303).

Personal Service on Individual.

Making service described in K.S.A. 60-303 must be made by serving individual, other than minor or disabled person, or agent authorized to receive service. Service by return receipt delivery shall be addressed to individual’s dwelling or usual place of abode and to authorized agent’s usual or designated address. If service by return receipt delivery is refused or unclaimed, service may be completed by certified mail, restricted delivery, at business address if return on service filed stating return receipt delivery refused or unclaimed. (K.S.A. 60-304).

Personal Service on Infant.

Making service described in K.S.A. 60-303 must be made by serving minor and also either minor’s guardian, conservator, father, mother or other person having care or control of minor or if service cannot be had upon any of them, then as provided by judge’s order. Service by return receipt delivery shall be addressed to individual’s dwelling house or usual place of abode and to corporate guardian or conservator’s usual place of business. (K.S.A. 60-304).

Upon Disabled Person (as defined by K.S.A. 59-3002).—By serving disabled person and such person’s guardian, conservator or competent adult member of such person’s family with whom person resides; if such person is living in institution then to director or chief executive officer of institution; or if service cannot be had upon them, then as provided by judge's order. Service by return receipt delivery shall be addressed to director or chief executive officer of institution, to any individual at their dwelling or usual place of abode, and to corporate guardian or conservator at their usual place of business. (K.S.A. 60-304).

Personal Service on Partnership, Association or Corporation.

Service is made upon domestic or foreign corporation, partnership, limited liability company or partnership or other unincorporated association by serving officer, partner or resident, managing or general agent by leaving copies at any business office of defendant with person having charge thereof or serving any other agent authorized by appointment or law and if agent is authorized by law, and law requires, by mailing copy to defendant. Service by return receipt delivery on officer, partner or agent shall be addressed to such person at their usual place of business. (K.S.A. 60-304).

Service on Foreign Corporation.

Service upon foreign corporation or foreign limited liability company or partnership may be made on its resident agent. Whenever any foreign corporation or foreign limited liability company or partnership authorized to transact business or transacting business without authority shall fail to appoint or maintain resident agent upon whom service may be had, or whenever any such resident agent cannot with reasonable diligence be found at registered office in this state, secretary of state shall be irrevocably authorized as agent and representative of such foreign corporation or foreign limited liability company or partnership to accept service. Such service shall be made by delivering to and leaving with him original and two copies, or clerk of court may send such copies directly to secretary of state by return receipt delivery. When any process is served on secretary of state, he shall immediately cause copy to be forwarded by return receipt delivery, addressed to such corporation or limited partnership at its principal office as same appears in his records or to registered or principal office of such corporation or limited partnership in state of its incorporation or formation. Fee of $40 paid to Secretary of State for costs of such service. (K.S.A. 60-304).

Where foreign corporation has been licensed to do business in state, service may be made upon secretary of state. (K.S.A. 17-7301[b]). All methods of service upon foreign corporations, including publication service, are cumulative.

Person with cause of action against foreign corporation, whether or not corporation qualified to do business in Kansas, which cause of action arose out of corporation's doing business in Kansas, may file suit in county with venue. Service of process obtained in manner of K.S.A. 60-304, supra. (K.S.A. 17-7307).

Service on Governmental Bodies.

Service upon county may be made by serving one of county commissioners or county clerk or county treasurer; upon township, by serving clerk or trustee; upon city by serving clerk or mayor; upon any other public corporation, body politic, district or authority by serving clerk or secretary or, if not to be found, to any officer, director, or manager thereof; and upon state or any governmental agency of state, when subject to suit, by serving attorney general or assistant attorney general; income withholding orders for support and orders of garnishment of earnings of state employees served on state or agency as in K.S.A. 60-723. (K.S.A. 60-304).

Process against state or any board, commission, department or agency thereof, except secretary of transportation, may be served on attorney general. (K.S.A. 60-304).

Service on Insurance Companies.

Unauthorized Insurers Process Act provides for service of process upon insurance companies authorized to do business in Kansas. Prescribes conditions upon which suit may be defended and for allowance of attorneys' fees. (K.S.A. 40-2001 to 40-2006). Service may also be made on any insurance company or association, organized under laws of Kansas by service on commissioner of insurance in same manner as that provided for service on foreign insurance companies and requirements of law relating to service on foreign insurance companies so far as applicable also apply to domestic insurance companies. (K.S.A. 60-304).

Personal Service Outside the State.

Service may be made upon any party outside state. If upon person domiciled in this state or upon person who has submitted to jurisdiction of courts of this state, service shall provide personal jurisdiction over that party; otherwise it shall provide in rem jurisdiction over specifically identified property party may have in state.

Service shall be made in like manner as service within this state, by any officer authorized to make service of process in this state or in state where defendant is served or by sending copy of process and petition to person to be served in accordance with K.S.A. 60–308(d).

No default shall be entered until expiration of at least 30 days after service.

Service by Mail.

Service of process by return receipt delivery must include service effected by certified mail, priority mail, commercial courier service, overnight delivery service, or other reliable personal delivery service. In each instance evidenced by written or electronic receipt showing to whom delivered, date of delivery, address of delivery, and person effecting delivery. (K.S.A. 60-303).

Service upon Employee.

Plaintiff, his agent or attorney may file affidavit of belief that defendant's residence unknown, or that defendant is nonresident employed in this state, and direct process server to serve process by directing officer, partner, managing or general agent having charge of defendant's place of employment to make defendant available for service. (K.S.A. 60-304[h]).

Service by Publication.

Service may be made by publication in any of following cases: (1) In actions to obtain divorce, maintenance or annulment of contract of marriage if defendant resides out of state or if party is unable to make service of summons upon defendant within state; (2) in actions brought against nonresident or foreign corporation having in this state property or debts owing to him or her sought to be taken by any of provisional remedies or to be appropriated in any way; (3) in actions which relate to or subject of which is real or personal property in this state, if any defendant has or claims lien or interest, vested or contingent, in property, or relief demanded consists wholly or partly in excluding defendant from any interest in property, or for partition or for foreclosure of lien, and such defendant is nonresident or foreign corporation or where plaintiff is unable to make service of summons upon defendant within state; (4) in all actions where defendant, being resident of this state, has departed from this state, or from county of defendant's residence, with intent to delay or defraud his creditors or to avoid service, or hides in state or county with like intent; or in action against domestic corporation which has not been legally dissolved, where officers thereof have departed from state or cannot be found; (5) in any of actions mentioned above publication service may be had on unknown heirs, executors, administrators, devisees, trustees, creditors and assigns of any deceased defendants; unknown spouses of defendants, unknown officers, successors, trustees, creditors and assigns of such defendants as are existing, dissolved or dormant corporations; unknown executors, administrators, devisees, trustees, creditors, successors and assigns of such defendants as are or were partners or in partnership; and unknown guardians, conservators and trustees of such of defendants as are minors or are in anywise under legal disability; and unknown heirs, executors, administrators, devisees, trustees, creditors and assigns of any person alleged to be deceased.

If defendant so served does not appear, judgment may be rendered affecting said property, res or status within jurisdiction of court as to said defendant, but such service shall not warrant personal judgment against such defendant.

Before service by publication as provided in this section can be made, one of parties or party's attorney shall file his affidavit stating such of following facts as are applicable: (1) Residences of all named defendants sought to be served, if known, and names of all such defendants whose residences are unknown after reasonable effort to ascertain same; (2) affiant has made reasonable but unsuccessful effort to ascertain names and residences of any defendants sought to be served as unknown parties; (3) party seeking service by publication is unable to procure service of summons on such defendants in this state; (4) case is one of those authorizing service by publication.

Notice shall be published once a week for three consecutive weeks in newspaper published in county where petition is filed authorized by law to publish legal notices. It must name defendants to be served and notify them and all other persons who are or may be concerned that he or they have been sued in named court and must answer or plead to petition, or other pleading, filed therein, on or before date to be stated, not less than 41 days from date notice is first published, or petition or other pleading so filed will be taken as true, and judgment, nature of which shall be stated, will be rendered accordingly.

Within seven days after first publication, copy of publication notice shall be mailed by plaintiff to each defendant whose address is stated in affidavit for service by publication. (K.S.A. 60-307).

Submitting to Jurisdiction.

(1) Any person, whether or not citizen or resident of this state, who in person or through agent or instrumentality does any of acts hereinafter enumerated, thereby submits said person, and, if individual, his personal representative, to jurisdiction of courts of this state as to any cause of action arising from doing any of said acts: (A) Transaction of any business within this state; (B) commission of tortious act within this state; (C) ownership, use, or possession of any real estate situated in this state; (D) contracting to insure any person, property or risk located within this state at time of contracting; (E) entering into express or implied contract, by mail or otherwise with resident, to be performed wholly or partly within state; (F) acting within state as director, manager, trustee or other officer of corporation organized under laws of state or having place of business within state, or as executor or administrator of estate within state; (G) causes injury to persons or property within this state arising out of act or omission outside of this state by defendant, provided in addition, that at time of injury either (i) defendant was engaged in solicitation or service activities within this state; or (ii) products, materials or things processed, serviced or manufactured by defendant anywhere were used or consumed within this state in ordinary course of trade or use; (H) living in marital relationship within state notwithstanding subsequent departure from state, as to all obligations arising for maintenance, child support, or property settlement, if other party to marital relationship continues to reside in state; (I) serving as insurer at time of act of insured which results in judgment being taken against him; (J) performing act of sexual intercourse within state as to paternity action or as to support action if conception of child results and other party to act remains in state; (K) entering into express or implied arrangement, whether by contract, tariff or otherwise, with corporation or general or limited partnership, residing or doing business in this state under which corporation or partnership has supplied transportation services, or communication services or equipment, including telephonic communication services, for business or commercial user where services supplied are managed, operated or monitored within

this state, provided such person is put on reasonable notice that arranging or continuing such transportation or telecommunication services may result in extension of jurisdiction pursuant to this section. (2) Person may be considered to have submitted to jurisdiction of courts of this state for cause of action which did not arise in this state if substantial, continuous and systematic contact with state is established to support jurisdiction consistent with constitution of U.S. and this state. (K.S.A. 60-308).

Long Arm Statute.

See subhead Methods of Service, catchlines Service Outside the State; and Service on Foreign Corporation, supra.

Proof of Service.

Personal Service.

Officer makes statement under penalty of perjury stating time, place and manner of service. Private process server makes affidavit as to time, place and manner of service. (K.S.A. 60-312[a]).

Service by Return Receipt Delivery.

Shall be in manner provided for in K.S.A. 60–303(b) or 60–308(e).

Publication Service.

Proved by affidavit showing newspaper and dates when notice was published. Copy of notice must be attached to affidavit. When mailing copies of publication notice is required, proof is by affidavit of person mailing copies. Affidavit must be filed with clerk of court. (K.S.A. 60-312[c]).

Long Arm Statute.

Affidavit of server must be filed stating time, manner and place of service. Court may consider affidavit or any other competent proofs in determining whether service has been properly made. (K.S.A. 60-308[a][2]).

Nonresident Motorist.

See category Transportation, topic Motor Vehicles.

Probate.

Probate Code specifies many instances in which publication service is necessary. Form of notice is prescribed by statute and must be published each week for three consecutive weeks. First publication must be had ten days after order fixing time and place of hearing. Seven days after first published notice petitioner must mail or cause to be mailed copy of notice, petition and attachments, will, accounting and settlement agreement (if applicable) to persons designated and prove mailing by affidavit. (K.S.A. 59-2208-11).

5.21 REPLEVIN:

The plaintiff in an action to recover possession of specific personal property may at any time before judgment is rendered claim immediate possession thereof as hereinafter set out. (K.S.A. 60-1005).

Proceedings.

By filing a verified petition or an affidavit showing that plaintiff owns described property, or is lawfully entitled to possession thereof, and that it is wrongfully detained by defendant, or if it is held by an officer under legal process, that demand has been made and refused, and estimated value thereof. After hearing judge may order delivery of property to plaintiff. Judge may enter order ex parte if satisfied: (1) Possession by plaintiff is necessary to protect governmental or public interest; and (2) immediate danger defendant will destroy or conceal property. Plaintiff files with clerk of court a bond in not less than double amount of value of property. (K.S.A. 60-1005).

Repossesion.

Order for delivery of the property is delivered to sheriff of any county in the state in which the property is located, commanding him to take immediate possession of the property and deliver it to plaintiff at the expiration of 24 hours unless the defendant delivers to said sheriff a redelivery bond in not less than double the amount of the value of the property in which event the sheriff shall return the property to the defendant. (K.S.A. 60-1005).

Judgment or Order.

Judgment may be for possession or for the recovery of possession, or the value thereof in case a delivery cannot be had, and for damages for the detention. (K.S.A. 60-1005). Order for delivery of property to plaintiff must be delivered to sheriff of any county in state in which property is located. (K.S.A. 60-1005).

Code of Procedure for Limited Actions allows replevin up to jurisdictional amount. Affidavit in replevin fixing value of property will govern. (K.S.A. 61-1603). Otherwise law is substantially same as in cases under K.S.A. 60-101 et seq. (K.S.A. 61-2401).

5.22 SEQUESTRATION:

No statutory provisions.

5.23 SERVICE:

See Topic Process.

5.24 STAY OF EXECUTION:

See topic Appeal and Error; also category Debtor and Creditor, topic Executions.

5.25 SUBMISSION OF CONTROVERSY:

No statutory provision. However controversies are commonly submitted to district court on agreed statement of facts.

5.26 VENUE:

General Rules.

Unless specifically provided otherwise:

Action against resident may be brought in county where: (1) Defendant resides; (2) plaintiff resides if defendant is served therein; (3) cause of action arose; (4) where defendant has place of business or of employment if served therein; (5) estate of decedent is being probated if decedent was jointly liable with defendant and demand has been duly exhibited in probate proceeding; or (6) there is tangible personal property which is subject of action for immediate possession. (K.S.A. 60-603).

Action against Kansas or qualified foreign corporation may be brought in county in which: (1) Registered office is located; (2) cause of action arose; (3) defendant is transacting business at time of filing of petition if plaintiff is resident of such county at time cause of action arose; (4) there is tangible personal property which is subject of action for immediate possession; or (5) equipment or facilities for use in supply of transportation services or communication services are located, where subject of action relates to transportation services or communication services supplied or rendered using such equipment or facilities. (K.S.A. 60-604).

Action against nonresident or non-qualified corporation may be brought in county where: (1) Plaintiff resides or if plaintiff is corporation, where it has registered office or place of business; (2) defendant is served; (3) cause of action arose; (4) defendant is transacting business at time of filing of petition; (5) there is property of defendant or debts owing to defendant; (6) there is tangible personal property which is subject of action for immediate possession. (K.S.A. 60-603).

Particular Actions.

Real property actions must be brought in county in which real estate is situated. If tract or tracts are situated in two or more counties, action may be brought in county where any tract or part thereof is situated. Real property actions include: (1) Ejectment; (2) partition; (3) actions for sale under mortgage, lien or other encumbrance or charge; (4) actions for specific performance of contract for sale of real property; and (5) eminent domain actions. Action for specific performance may also be brought in any county where defendant resides. (K.S.A. 60-601).

Recovery of fine, forfeiture or penalty, other than against public utilities or common carriers; venue is in county in which cause arose, except if act was committed on road or river which forms boundary of two or more counties, action may be brought in any one of bordering counties. (K.S.A. 60-602).

Action against public official under color of office or for neglect of official duties or on official bond must be brought in county in which cause arose. (K.S.A. 60-602).

Action against public utility, common carrier or transportation system for any liability or penalty or forfeiture may be brought in any county through which such operates regularly. But action for personal injury or death must be brought in county where plaintiff lived at time of injury or where injury occurred. (K.S.A. 60-606).

Actions concerning marriage may be brought in county in which petitioner is actual resident at time of filing petition or in county where respondent resides or may be served or if petitioner resides or is stationed at U.S. military post within state at time of filing petition, in county adjacent to post. For venue purposes, spouse may have residence separate from residence of other spouse. (K.S.A. 60-607).

Uniform Arbitration Act.

Initial application must be made to court of county where agreement provides that arbitration hearing will be held or, if hearing has already been held, in county where hearing was held. Otherwise application must be made in county where adverse party resides or has place of business or, if party has no residence or place of business in Kansas, to court of any county. (K.S.A. 5-417).

Multiple Parties.

If several plaintiffs properly joined and venue is determined by residence of one of them, it is necessary that such plaintiff's claim is substantial part of action. If several defendants properly joined, venue may be determined at election of plaintiff as to any one of defendants against whom substantial claim exists. (K.S.A. 60-608).

Change of Venue.

If it appears that fair and impartial trial cannot be had in district court in county where suit is pending, for reasons other than disqualification of judge, court may upon application of either party change place of trial to some county where objection does not exist. On motion of any party court may transfer any civil action to county where it might have been brought upon finding that transfer will serve convenience of parties, witnesses and interests of justice. When all non-defaulting parties agree, and agreement is approved by court of original venue and supreme court, civil action may be transferred to any county. (K.S.A. 60-609).

Contract Provisions.

No statutes or case law.

Witnesses.

See topic Evidence, subhead Witnesses.

6 COURTS AND LEGISLATURE

6.01 COURTS:

United States District Court.

Clerk's office, 401 N. Market, Wichita, KS 67202, (316) 269-6491.

Record offices are maintained at Topeka, Kansas City, Wichita. Cases may be filed at any one of these offices.

Parties may file designation of city where they desire trial to be held.

Court sits at Kansas City, Topeka, Salina, Leavenworth, Wichita, Hutchison, Dodge City, Fort Scott, and at such places as may be required.

Supreme Court.

Court has original jurisdiction in quo warranto, mandamus, and habeas corpus, and appellate jurisdiction as provided by law. (Const. Art. 3. § 3). Jurisdiction is coextensive with state.

Appellate jurisdiction fixed by statute extends to review of Court of Appeals decisions (K.S.A. 20-3018) and exclusive jurisdiction over district court decisions declaring federal or state statute unconstitutional (K.S.A. 60-2101[b]). Supreme Court is court of record.

Court sits at Topeka. Address: Kansas Judicial Center, Topeka, 66612, (785) 296-3220 (clerk).

Court of Appeals.

Court of Appeals has jurisdiction over appeals in civil and criminal cases and from administrative bodies and officers of state as prescribed by law. (K.S.A. 20-3001, K.S.A. 60-2101[a]).

Principal office at Topeka. May hear oral argument in any county. (K.S.A. 20-3013).

District Courts.

Jurisdiction.

In each county there is district court with general original jurisdiction over all matters, civil, criminal, juvenile, and probate. (K.S.A. 20-301). Judges divided into two classifications: district judge and district magistrate judge. Administrative judge assigns all cases to appropriate judge. (K.S.A. 20-301a).

District judge has jurisdiction over all civil, criminal, juvenile, and probate matters, and appeals from district magistrate judge. (K.S.A. 20-301).

District Magistrate Judge has jurisdiction in criminal misdemeanor charges and preliminary examination of felony charges. Concurrent jurisdiction exists in civil actions other than: (1) Cases exceeding $10,000 in controversy excepting certain replevin cases and actions seeking judgment for unsecured debt not sounding in tort and arising out of contract for provision of goods, services or money; (2) against state officers or state; (3) specific performance of real estate contracts; (4) real estate titles; (5) foreclosure of real property mortgages or liens; (6) divorce, separate maintenance, custody of minors, issuance of support orders, actions for care of children or under juvenile justice code and those cases involving request for termination of parental rights per K.S.A. 20-302(b); (7) habeas corpus; (8) receivership; (9) change of name; (10) declaratory judgments; (11) mandamus or quo warranto; (12) injunctions; (13) class actions; (14) rights of majority; (15) actions pursuant to protection from abuse act; and (16) actions pursuant to Sexual Predator Act. In absence, disability or disqualification of district judge other powers are specified. Orders appealed to district judge for trial de novo, except where record made of magistrate proceedings, appeal tried and determined on record. (K.S.A. 20-302[b]).

Districts.

District courts sit in at least one location in each county. Administrative judge of each judicial district, with approval of Supreme Court may designate other locations within county whenever suitable facilities are available. (K.S.A. 20-347). District courts currently sit in at least following communities (Rules of District Court 101):

Allen County: Thirty-first District; court sits at Iola.

Anderson County: Fourth District; court sits at Garnett.

Atchison County: First District; court sits at Atchison.

Barber County: Thirtieth District; court sits at Medicine Lodge.

Barton County: Twentieth District; court sits at Great Bend.

Bourbon County: Sixth District; court sits at Fort Scott.

Brown County: Twenty-second District; court sits at Hiawatha.

Butler County: Thirteenth District; court sits at El Dorado.

Chase County: Fifth District; court sits at Cottonwood Falls.

Chautauqua County: Fourteenth District; court sits at Sedan.

Cherokee County: Eleventh District; court sits at Columbus and Galena.

Cheyenne County: Fifteenth District; court sits at St. Francis.

Clark County: Sixteenth District; court sits at Ashland.

Clay County: Twenty-first District; court sits at Clay Center.

Cloud County: Twelfth District; court sits at Concordia.

Coffey County: Fourth District; court sits at Burlington.

Comanche County: Sixteenth District; court sits at Coldwater.

Cowley County: Nineteenth District; court sits at Winfield and Arkansas City.

Crawford County: Eleventh District; court sits at Girard and Pittsburg.

Decatur County: Seventeenth District; court sits at Oberlin.

Dickinson County: Eighth District; court sits at Abilene.

Doniphan County: Twenty-second District; court sits at Troy.

Douglas County: Seventh District; court sits at Lawrence.

Edwards County: Twenty-fourth District; court sits at Kinsley.

Elk County: Thirteenth District; court sits at Howard.

Ellis County: Twenty-third District; court sits at Hays.

Ellsworth County: Twentieth District; court sits at Ellsworth.

Finney County: Twenty-fifth District; court sits at Garden City.

Ford County: Sixteenth District; court sits at Dodge City.

Franklin County: Fourth District; court sits at Ottawa.

Geary County: Eighth District; court sits at Junction City.

Gove County: Twenty-third District; court sits at Gove.

Graham County: Seventeenth District; court sits at Hill City.

Grant County: Twenty-sixth District; court sits at Ulysses.

Gray County: Sixteenth District; court sits at Cimarron.

Greeley County: Twenty-fifth District; court sits at Tribune.

Greenwood County: Thirteenth District; court sits at Eureka.

Hamilton County: Twenty-fifth District; court sits at Syracuse.

Harper County: Thirtieth District; court sits at Anthony.

Harvey County: Ninth District; court sits at Newton.

Haskell County: Twenty-sixth District; court sits at Sublette.

Hodgeman County: Twenty-fourth District; court sits at Jetmore.

Jackson County: Second District; court sits at Holton.

Jefferson County: Second District; court sits at Oskaloosa.

Jewell County: Twelfth District; court sits at Mankato.

Johnson County: Tenth District; court sits at Olathe.

Kearny County: Twenty-fifth District; court sits at Lakin.

Kingman County: Thirtieth District; court sits at Kingman.

Kiowa County: Sixteenth District; court sits at Greensburg.

Labette County: Eleventh District; court sits at Oswego and Parsons.

Lane County: Twenty-fourth District; court sits at Dighton.

Leavenworth County: First District; court sits at Leavenworth.

Lincoln County: Twelfth District; court sits at Lincoln.

Linn County: Sixth District; court sits at Mound City.

Logan County: Fifteenth District; court sits at Oakley.

Lyon County: Fifth District; court sits at Emporia.

Marion County: Eighth District; court sits at Marion.

Marshall County: Twenty-second District; court sits at Marysville.

McPherson County: Ninth District; court sits at McPherson.

Meade County: Sixteenth District; court sits at Meade.

Miami County: Sixth District; court sits at Paola.

Mitchell County: Twelfth District; court sits at Beloit.

Montgomery County: Fourteenth District; court sits at Independence and Coffeyville.

Morris County: Eighth District; court sits at Council Grove.

Morton County: Twenty-sixth District; court sits at Elkhart.

Nemaha County: Twenty-second District; court sits at Seneca.

Neosho County: Thirty-first District; court sits at Erie and Chanute.

Ness County: Twenty-fourth District; court sits at Ness City.

Norton County: Seventeenth District; court sits at Norton.

Osage County: Fourth District; court sits at Lyndon.

Osborne County: Seventeenth District; court sits at Osborne.

Ottawa County: Twenty-eighth District; court sits at Minneapolis.

Pawnee County: Twenty-fourth District; court sits at Larned.

Phillips County: Seventeenth District; court sits at Phillipsburg.

Pottawatomie County: Second District; court sits at Westmoreland.

Pratt County: Thirtieth District; court sits at Pratt.

Rawlins County: Fifteenth District; court sits at Atwood.

Reno County: Twenty-seventh District; court sits at Hutchinson.

Republic County: Twelfth District; court sits at Belleville.

Rice County: Twentieth District; court sits at Lyons.

Riley County: Twenty-first District; court sits at Manhattan.

Rooks County: Twenty-third District; court sits at Stockton.

Rush County: Twenty-fourth District; court sits at LaCrosse.

Russell County: Twentieth District; court sits at Russell.

Saline County: Twenty-eighth District; court sits at Salina.

Scott County: Twenty-fifth District; court sits at Scott City.

Sedgwick County: Eighteenth District; court sits at Wichita.

Seward County: Twenty-sixth District; court sits at Liberal.

Shawnee County: Third District; court sits at Topeka.

Sheridan County: Fifteenth District; court sits at Hoxie.

Sherman County: Fifteenth District; court sits at Goodland.

Smith County: Seventeenth District; court sits at Smith Center.

Stafford County: Twentieth District; court sits at St. John.

Stanton County: Twenty-sixth District; court sits at Johnson.

Stevens County: Twenty-sixth District; court sits at Hugoton.

Sumner County: Thirtieth District; court sits at Wellington.

Thomas County: Fifteenth District; court sits at Colby.

Trego County: Twenty-third District; court sits at Wakeeney.

Wabaunsee County: Second District; court sits at Alma.

Wallace County: Fifteenth District; court sits at Sharon Springs.

Washington County: Twelfth District; court sits at Washington.

Wichita County: Twenty-fifth District; court sits at Leoti.

Wilson County: Thirty-first District; court sits at Fredonia.

Woodson County: Thirty-first District; court sits at Yates Center.

Wyandotte County: Twenty-ninth District; court sits at Kansas City.

Probate Courts.

Abolished, Jan. 10, 1977. (K.S.A. 20-335). See subhead District Courts, supra.

City Courts.

Abolished, Jan. 10, 1977. (K.S.A. 20-335). See subhead District Courts, supra.

County Courts.

Abolished, Jan. 10, 1977. (K.S.A. 20-335). See subhead District Courts, supra.

Justices of the Peace.

Abolished. (K.S.A. 61-1603).

Magistrate Courts.

Abolished, Jan. 10, 1977. (K.S.A. 20-335). See subhead District Courts, supra.

Small Debtor’s Courts.

20-1301 et seq. repealed, Jan. 10, 1977.

Small Claims Procedure Act.

Provides alternate procedure supplementing Code of Civil Procedure for Limited Actions processing small claims. (K.S.A. 61-2701). Jurisdiction limited to $4,000. (K.S.A. 61-2703). Action commenced by filing written statement of claim and payment of $39 on and after July 1, 2009 and $37 on and after July 1, 2013 if claim does not exceed $500; or $59 on and after July 1, 2009 and $57 on and after July 1, 2013 if claim exceeds $500, unless waived. Only 20 claims per person in one court per year allowed. (K.S.A. 2008 Supp. 61-2704). No party may be represented by attorney until judgment. (K.S.A. 61-2707). Judgment debtor must submit to clerk of court list of assets and place of employment within 30 days after receipt of form therefore. (K.S.A. 61-2707). List mailed to judgment creditor by court, copy is not retained. (K.S.A. 61-2707). Appeal may be taken to district court for trial and determination de novo. (K.S.A. 61-2709).

6.02 LEGISLATURE:

General Session.

Meets annually in Jan. (Const. art. 2, § 8).

Special Sessions.

Governor may call. (Const. art. 1, § 5). Must call if petitioned by 2/3 of each house. (K.S.A. 40-1401 to 1403).

Initiative and Referendum.

Not provided for.

Lobbyists.

K.S.A. 46-265 to 46-280.

6.03 REPORTS:

Decisions of Supreme Court are reported in Kansas Reports. Reports of first court of appeals, now abolished, comprise ten volumes. New court of appeals created Jan. 10, 1977 and decisions published in Kansas Court of Appeals Reports, second.

Unofficial Reports.

Kansas decisions are also published in Pacific Reporter, covering from December 1883 (30 Kan.) to present date.

Digests.

West's Kansas and Pacific Digests.

6.04 STATUTES:

Kansas Statutes Annotated (K.S.A.) is 15 volume work, including index and state constitution, published by state. K.S.A. was first published in 1965. Individual bound volumes are updated and replaced every few years. Bound volumes are supplemented annually with cumulative supplements.

Uniform Acts of the National Conference of Commissioners on Uniform State Laws which have been adopted are: (1990) Alcoholism and Intoxication Treatment (1972); Anatomical Gift (1969); Arbitration (1973); Attendance of Witnesses from Without a State in Criminal Proceedings, Act to Secure (1951); Certification of Questions of Law (1979); Child Custody Jurisdiction (1978); Commercial Code (1965); Common Trust Fund (1951); Consumer Credit Code (1973); †Consumer Sales Practices enacted under title Consumer Protection (1974); Controlled Substances (1972); †Crime Victims Reparations (1978); Criminal Extradition (1937); Determination of Death (1984); †Disclaimer of Transfers by Will, Intestacy or Appointment, Revised (1985) and †Disclaimer of Transfers Under Nontestamentary Instruments, Revised (1985) (enacted as single act); Division of Income for Tax Purposes (1963); Durable Power of Attorney (1980); Enforcement of Foreign Judgments (1970); Facsimile Signatures of Public Officials (1963); Federal Lien Registration (1988); Fraudulent Transfer (1998); Interstate Family Support (1994); Land Sales Practices (1967); †Limited Partnership (1976 version) (1983); Management of Institutional Funds (1973); Mandatory Disposition of Detainers (1959); Motor Vehicle Operators' and Chauffeurs' License (1931); Motor Vehicle Registration (1929); Notarial Acts (1984); Revised Partnership (1998); Photographic Copies of Business and Public Records as Evidence (1963); Premarital Agreement (1988); Principal and Income Revised (1965); †Residential Landlord and Tenant (1975); Simplification of Fiduciary Security Transfers (1961); Simultaneous Death (1947); Testamentary Additions to Trusts (1968); Trade Secrets (1981); Transfers to Minors (1985); Trustees' Powers (1968); Unauthorized Insurers (1969); Unclaimed

Property (1994); Vital Statistics (1951); Voting by New Residents in Presidential Elections (1972).

†Adopted with significant variations or modifications. See appropriate topics as to Acts within scope of Digests volume.

As to Uniform Securities Act, see topic Securities.

For text of Uniform Acts falling within the scope of the Martindale-Hubbell Law Digests see Uniform and Model Acts section.

Other Uniform Acts adopted are: Adoption and Relinquishment Act (1990).

6.05 UNIFORM LAWS:

For list of Uniform Acts in force in this state see topic Statutes. For text of Uniform Acts within the scope of the Martindale-Hubbell Law Digests see Uniform and Model Acts section.

7 CRIMINAL LAW

7.00A BAIL:

See topic Criminal Law.

7.01 CRIMINAL LAW:

Kansas Criminal Code (K.S.A. 21-3101 et seq.) defines crimes and punishments therefore. There is a code of criminal procedure. (K.S.A. 22-2101 et seq.).

All crimes punishable by death or confinement in penitentiary are felonies, as well as any crime defined as felony by law. There are separate classifications for traffic and tobacco infractions. All other offenses are misdemeanors. (K.S.A. 21-3105).

Indictment and Information.

Offenses are prosecuted by complaint, by information filed by county attorney or (rarely) by indictment by grand jury. (K.S.A. 22-2301 to 2303).

Bail.

All offenses are bailable, unless offense charged is one shown to be punishable by death or life imprisonment under laws of state where offense committed. (K.S.A. 22-2716).

Interstate Compact for Supervision of Parolees and Probationers.

Adopted. (K.S.A. 22-4110).

Amended Uniform Criminal Extradition Act.

Adopted. (K.S.A. 22-2701 et seq.). Amended Act not adopted.

8 DEBTOR AND CREDITOR

8.01 ASSIGNMENTS:

Generally all chooses in action, except torts, are assignable (189 Kan. 649, 371 P.2d 181) except where nature or terms of contract make it nonassignable (230 Kan. 361, 634 P.2d 1123).

Uniform Commercial Code (K.S.A. 84-1-101 et seq.) in effect. See category Business Regulation and Commerce, topic Commercial Code.

Instrument Transferring Title.

No particular form is necessary. (201 Kan. 412, 441 P.2d 815). Acknowledgment is not necessary.

Filing or recording is not necessary, except that state or municipal bonds require formal assignment before notary public, identifying bond by name of issuing municipality, number, date, and amount and acknowledged like conveyance of real property and filed with State Treasurer. Printed forms furnished on request from State Treasurer, State Capitol, Topeka, KS 66612, (785) 296-3171. (K.S.A. 10-602).

Notice.

Debtor must have notice of assignment before he has duty to pay assignee. (183 Kan. 190, 326 P.2d 299).

Effect.

Assignment passes all assignor’s title or interest to assignee and divests assignor of all right of control over subject matter of assignment. (215 Kan. 856, 528 P.2d 1198).

Assignment of Wages.

Recognized and enforced. (201 Kan. 412, 441 P.2d 815).

Assignment of Unemployment Benefits.

Not assignable, but benefits may be subject to withholding for child support obligation being enforced under plan described in § 454 federal Social Security Act or overissuance of Food Stamps. Employer subject to penalty for violation. (K.S.A. 44-718).

8.02 ATTACHMENT:

Actions in Which Allowed.

At or after commencement of any civil action. (K.S.A. 60-701).

Courts Which May Issue Writ.

District court (K.S.A. 60-701). Limitations on writ in limited actions involving $25,000 or less. (K.S.A. 61-1601 et seq.).

In Whose Favor Writ May Issue.

Any plaintiff, resident or nonresident.

Against Whom Writ May Issue.

Any defendant or defendants, resident or nonresident.

Claims Upon Which Writ May Issue.

Action may be commenced and attachment issued on demand not yet due in any of cases mentioned under subhead Grounds (infra), clauses (1) and (2), but no judgment may be rendered until maturity of demand. (K.S.A. 60-702). No order of attachment shall be issued before judgment where defendant’s property is in possession of third party and is in form of earnings due and owing. (K.S.A. 60-703).

Grounds.

When defendant whose property is to be attached, (1) Is nonresident or foreign corporation; (2) has absconded or concealed himself so that summons cannot be served upon him, or is about to move out of state with intent of changing his domicile; (3) is about to remove his property or effects out of this state; (4) is about to convert his property into money for purpose of placing it beyond reach of his creditors; (5) has concealed, removed, assigned, conveyed or otherwise disposed of his property so as to hinder or delay his creditors or is about to do so; (6) fraudulently contracted debt or incurred liability; (7) is liable for damages for injuries arising out of commission of some felony or misdemeanor, or seduction of a person; (8) has failed to pay price or value of any article or thing delivered which by contract he was bound to pay upon delivery. (K.S.A. 60-701).

Proceedings to Obtain.

Affidavit must be filed by plaintiff stating: (1) Grounds upon which attachment sought, specifying facts with particularity, (2) that plaintiff has just claim, and (3) amount of claim, less credits and setoffs. (K.S.A. 60-703 and 60-704).

Attachment Bond.

Required except in actions instituted on behalf of State of Kansas or county thereof. (K.S.A. 60-703). Bond is executed by plaintiff with sufficient sureties, in sum double amount of plaintiff's claim, or such lesser amount as may be approved by court order. (K.S.A. 60-705).

Levy.

Order commands sheriff or county officer to attach property of defendant, real or personal, tangible or intangible, or so much thereof as will satisfy plaintiff's claim, or such specific property as plaintiff directs, and to summon as garnishees all persons in whose possession any personal property or money of defendant may be. (K.S.A. 60-706).

Indemnity.

No statutory authority for levying officers to require.

Priorities.

Orders of attachment are levied on in the same order in which they were received by levying officers. If several attachments issue out of different courts, all questions arising must be determined by court out of which was issued first attachment served. (K.S.A. 60-713).

Release of Property.

Defendant or any other person in whose hands property of defendant is found may retain or regain possession at any time before final judgment or sale of such property under court order by giving bond with sufficient sureties in an amount which is (1) Equal in amount to plaintiff's claim and probable court costs, or (2) equal to appraisal of property pursuant to K.S.A. 60-706, or (3) lesser amount as required by court. Person giving bond has option of clause (1) or (2). (K.S.A. 60-707).

Sale.

When property seized is likely to perish or materially depreciate in value before probable termination of suit, or keeping of which would be attended with unreasonable loss or expense, property may be ordered sold. (K.S.A. 60-710). See topic Executions.

Third Party Claims.

Any person claiming an interest in any property attached and, in discretion of judge, any creditor of party if creditor's claim is liquidated in amount will be permitted to intervene and court will adjudicate their respective rights. (K.S.A. 60-713).

Vacation or Modification.

Any interested person may file motion to dissolve attachment, verified by affidavit, putting in issue sufficiency of proceedings, defendants or other persons claim of exemption as to attached property, or truth of facts alleged in attachment affidavit. Court may permit amendments to petition or affidavit. Court shall hold hearing within five days of receipt of motion. (K.S.A. 60-712).

Upon filing of bond, attachment is discharged and restitution of property taken is made. (K.S.A. 60-707).

Receiver.

Receiver may be appointed in aid of attachment. (K.S.A. 60-711).

8.03 CONSUMER CREDIT:

Uniform Consumer Credit Code enacted. (K.S.A. 16a-1-101, et seq.).

8.04 CREDITORS' SUITS:

Creditors' bill is proceeding in rem and used to make effective judgment against property which cannot be reached by execution. Governed by rules of common law and successful creditors' bill conditioned on affirmative showing that indebtedness reduced to judgment. (158 Kan. 242, 146 P.2d 665).

8.05 EXECUTIONS:

Execution may be issued upon judgment in any court of record.

Kinds of Execution.

General execution is direction to an officer to seize any nonexempt property of judgment debtor and cause it to be sold in satisfaction of judgment. Special execution or order of sale is court direction to officer to effect some action as to some specified property. (K.S.A. 60-2401).

Exemptions.

See topic Exemptions.

Time for Issuance.

No execution may issue nor proceedings be taken for enforcement until expiration of ten days after entry of judgment, with some exceptions. (K.S.A. 60-262). May be issued any time within five years from date of judgment, revival of judgment, or last execution. (K.S.A. 60-2403 and 61-2201). See categor5 Civil Actions and Procedure, topic Judgments.

Stay.

When court has ordered final judgment on some but not all multiple claims, enforcement may be stayed until entering of subsequent judgment. (K.S.A. 60-262). See category Civil Actions and Procedure, topic Appeal and Error.

In actions brought pursuant to c. 61, Code of Civil Procedure for Limited Actions, stays of execution are granted only on appeal by posting a supersedeas bond. (K.S.A. 61-2015). See category Civil Actions and Procedure, topic Appeal and Error.

Levy.

General execution is levied upon any nonexempt real or personal property. Special executions or orders of sale are levied as court directs. (K.S.A. 60-240).

Return.

Officer must return execution or order of sale to court from which it issued within 60 days from date thereof (K.S.A. 60-2401) but c. 61 execution is returnable within 30 days from date of its receipt by officer to whom it is directed (K.S.A. 61-2201).

Priorities.

Subject to any rights, liens, or preferences existing by law independently of levy of execution, when two or more general executions are levied against property of same judgment debtor, all questions of priority must be determined by court out of which was issued first execution served. (K.S.A. 60-2402 and 60-713).

Claims of Third Persons.

Officer may refuse to proceed against property claimed by third persons until plaintiff gives him bond to pay all costs and damages that may be sustained by reason of the detention or sale of such property. (K.S.A. 60-2407).

Sale.

Personal property taken on execution may not be sold until at least ten days public notice of sale is given by advertisement in some newspaper meeting qualifications of K.S.A. 64-101 for legal publications, or, in court’s discretion, posting advertisements in five public places in county. Notice must be sent to defendant within five days of first publication or posting notice. (K.S.A. 60-2409). Real property taken on execution may not be sold until public notice of time and place of sale be given once each week for three consecutive weeks prior to day of sale, by publication in county where judgment rendered and county where real property located, with last publication not less than seven nor more than 14 days prior to day of sale. (K.S.A. 60-2410[a]). Interest of judgment debtor may be sold on execution subject to liens or encumbrances already existing. (K.S.A. 60-2406). All sales of real property must be held at courthouse located in county seat of county in which judgment was rendered. Upon application, district judge whose jurisdiction includes county where judgment rendered, may, for good cause shown, order such sale on premises or other location. (K.S.A. 60-2410[b]). Sale must be confirmed by court and officer making sale must execute to purchaser certificate of sale or deed. Court may decline to confirm sale where bid is substantially inadequate, or may fix minimum or upset price at which property must be bid in if sale is to be confirmed, or, after hearing, may require fair value of property be credited upon judgment, interest, taxes and costs. Sale for full amount of judgment, taxes, interest and costs is deemed adequate. (K.S.A. 60-2415). Sheriff’s deeds vests in purchaser as good and perfect title as was vested in person against whom execution or order of sale was issued. Title to property conveyed vests in grantee as of date of execution of sheriff’s deed. (K.S.A. 60-2416).

Redemption.

Purchaser at execution sale of real estate receives certificate of sale stating amount paid by such purchaser, amount of costs to date, a proper description of property and unless redemption is made according to law, purchaser, his heirs or assigns will be entitled to deed therefore. (K.S.A. 60-2410[e]). Owner has 12 months within which to redeem, except if land has been abandoned or not occupied in good faith court may shorten or extinguish. Period of redemption may also be reduced to three months where mortgage or instrument giving lien is in default before 1/3 of original indebtedness secured by mortgage has been paid. Three month redemption period may be extended to six months if owner involuntarily lost primary source of income after sale and before three month period expired. During period of redemption owner is entitled to possession of property and income therefrom. For first three months after sale right of defendant owner to redeem is exclusive: thereafter, any lien creditor may redeem same within six months from date of sale. All redemption periods and rights of lien creditors under this section commence on date of judgment or date of judicial sale and expire three months thereafter, if judgment of foreclosure finds no redemption for owner by reason of valid waiver. Any creditor whose claim becomes lien prior to expiration of time allowed by law for redemption of creditors may redeem. Creditors may redeem from each other. Any corporation, general partnership or limited partnership organized under law of U.S. or any state may agree in mortgage instrument to shorter redemption period or waive same entirely as to mortgagor and its assigns. Any person may agree in mortgage instrument to shorter period or waive same entirely, excepting mortgagee of dwelling or dwellings for occupancy by not more than two families or of agricultural land. (K.S.A. 60-2414).

Defendant owner may redeem for amount paid by current holder of certificate of purchase together with interest, costs and taxes to date of redemption. During redemption period holder of certificate of purchase or creditor who has redeemed may pay taxes on land, insurance premiums on improvements thereon, and other sums necessary to prevent waste, and interest on sums due, upon any prior lien or encumbrance thereon, and upon redemption he is entitled to repayment of all sums thus paid by him, together with interest thereon. All expenses incurred by holder of certificate or creditor who has redeemed shall be shown by receipts or vouchers filed in office of clerk of district court. (K.S.A. 60-2414).

If defendant fails to redeem, purchaser or creditor who last redeemed prior to expiration of redemption period will hold property absolutely. If held by redeeming creditor, his lien will be extinguished, unless, redeeming creditor is unwilling to hold property and credit defendant owner therefore with full amount of his lien, he files at time of redemption statement with clerk of court of amount that he is willing to credit on his claim. If redeeming creditor files statement and defendant owner fails to redeem, creditors claim extinguished by amount in statement. Sheriff executes deed to owner of certificate of purchase. (K.S.A. 60-2414).

Mode of redemption is by paying the proper amount to clerk of the district court and filing an affidavit, if the redemption is by other than defendant owner, stating amount still unpaid due on his claim. Any distinct portion of property sold in parcels may be redeemed and undivided interests of tenants in common may be redeemed separately. Defendant owner’s redemption rights may be assigned or transferred but are not subject to levy or sale on execution. Holder of the legal title has same right of redemption and possession as defendant in execution. (K.S.A. 60-2414).

Party entitled to a deed under sale may, after deed is made to him, assert claim for damages for any injury or waste permitted on property after sale. (K.S.A. 60-2414).

Real estate once sold upon proper legal process is not again liable for any balance due upon judgment or decree under which it has been sold, nor for any judgment or lien inferior thereto including unadjudicated liens filed after petition is filed in foreclosure action. (K.S.A. 60-2414).

Holder of certificate of purchase may get injunction or receiver to prevent waste or destruction of premises, but income still goes to person entitled to possession during redemption, except fees and expenses of receiver and as is necessary to keep up repairs, pay taxes and insurance premiums and prevent waste. (K.S.A. 60-2414).

Supplementary Proceedings.

When execution is returned unsatisfied, in whole or in part, or judgment creditor lacks knowledge of debtor's assets, judgment creditor is entitled to order requiring debtor to appear and answer concerning his property and income. Debtor may be ordered to periodically appear and answer as to his property and income if it appears that debtor will have nonexempt property or income in future. Witnesses may also be subpoenaed. Out of county debtor may be ordered to appear if no undue hardship. Debtor or witness who fails to appear or answer is subject to citation for contempt. (K.S.A. 60-2419).

If at hearing, nonexempt property is disclosed, court must order debtor to deliver to sheriff who must sell any such property that is not cash and apply proceeds to judgment and costs. (K.S.A. 60-2419).

Executions in Special Cases.

If execution be for delivery of possession of real or personal property, it must require the officer to deliver same to party entitled thereto and may at same time require officer to satisfy any costs or damages recovered in the same judgment out of the personal property of the party against whom it was rendered; and for want of such personal property, then out of the lands and tenements, and in this respect it is deemed an execution against the property. In special cases not otherwise covered, the execution shall conform to the order of the court. (K.S.A. 60-2417).

8.06 EXEMPTIONS:

Every person residing in Kansas, except as otherwise provided, has exempt from seizure and sale any: (1) Pension, retirement or disability benefit; (2) public assistance benefits; (3) worker's compensation; (4) unemployment benefits; (5) partnership property; (6) crime victims reparations award; (7) liquor license; (8) interest in life insurance; (9) fraternal benefit society benefit; (10) cemetery merchandise trust fund; (11) prearranged funeral account or trust; and (12) money held by court order for support of any person whether child or spousal support, alimony or maintenance. (K.S.A. 60-2313, 2308). Following personal property is also exempt: (1) Furnishings, equipment and supplies, including food, fuel and clothing, for person for period of one year on hand and reasonably necessary at principal residence; (2) ornaments of debtor's person, including jewelry, not exceeding $1,000 in value; (3) one means of conveyance regularly used for transportation up to $20,000 in value; (4) burial plot, crypt or cemetery lot; (5) books, documents, furniture, instruments, tools, implements and equipment, breeding stock, seed grain or growing plants stock, or other tangible means of production regularly and reasonably necessary to carrying on profession, trade, business or occupation in aggregate value not to exceed $7,500. (K.S.A. 60-2304).

No personal property is exempt from sale for taxes (K.S.A. 60-2306), nor from attachment or execution for wages of any clerk, mechanic, laborer or servant (K.S.A. 60-2307).

Earnings.

Only aggregate disposable earnings may be subjected to garnishment and maximum which may be subjected to garnishment for any pay period is restricted and contained in detailed form of instructions to garnishee. (K.S.A. 61-2605). In general, garnishment may not exceed either (1) 25% of aggregate disposable earnings for work week or multiple thereof, or (2) amount by which aggregate disposable earnings for work week or multiple thereof exceed amount equal to 30 times federal minimum hourly wage, or equivalent multiple thereof for longer period, whichever is less. Provided, no one creditor may issue more than one garnishment against same debtor per month. Act not construed as charging plaintiff with knowledge of amount of defendant's earnings prior to commencement of garnishment action. If debtor is prevented from working due to own or family sickness for at least two weeks, provision of this section shall not be invoked against such debtor until after two months after recovery. Collection agency taking assignment of account may not garnish wages. Restrictions on wage garnishment inapplicable to order for child support, alimony, order in bankruptcy, or on debt due for state or federal tax.

Debtor is to receive statutorily required notice of his rights and may request hearing.

Maximum part of aggregate disposable earnings for any workweek subject to garnishment to enforce order for support of person shall not exceed: (1) 50% for individual supporting spouse or child, (2) 60% for individual not supporting spouse or child, and (3) for unpaid support for period 12 weeks prior to garnishment, as to individuals in paragraphs (1) and (2), 55% and 65% respectively. (K.S.A. 60-2310). Garnishment to enforce order for support shall not exceed 50% unless specified in application and order. (K.S.A. 60-718).

Pensions.

All money received for pension from the United States by the debtor, within three months next preceding the issue of execution, attachment or garnishment is exempt, if pensioner makes affidavit that it is necessary for support of debtor or family supported wholly or in part by said pension. Money, assets, interests from any qualified retirement plan are also exempt, except from qualified domestic relations order. (K.S.A. 60-2308).

Nonprofit hospital property income and proceeds therefrom, is exempt from attachment, garnishment, execution or other forced process, except for contractual obligations and those due the state and its agencies. (K.S.A. 17-1745).

See topic 8.10 Homesteads.

8.07 FORECLOSURE:

See category Mortgages, topic Mortgages of Real Property.

8.08 FRAUDULENT SALES AND CONVEYANCES:

Uniform Commercial Code (K.S.A. 84-1-101 et seq.) in effect. See category Business Regulation and Commerce, topic Commercial Code.

Uniform Fraudulent Conveyance Act.

Not adopted.

Uniform Fraudulent Transfer Act.

Enacted (1998).

Gifts and conveyances, made in trust for use of person making same, are void as to past, present and future creditors, but otherwise valid. (K.S.A. 33-101). Gifts, grants or conveyances of lands, etc., or executions made or obtained, with intent to defraud, hinder or delay creditors, or to deceive the buyers of such, are void. (K.S.A. 33-102). See also category Estates and Trusts, topic Trusts.

Bulk Sales.

No statutory provision. UCC Art. 6 repealed.

8.09 GARNISHMENT:

Before judgment, order of garnishment may be obtained upon order of court pursuant to proceedings for attachment. Garnishment shall not be commenced before judgment where such garnishment proceedings affect earnings of defendant. (K.S.A. 60-729). Ten days after judgment order of garnishment may be obtained without prior execution unsatisfied and no bond is required. (K.S.A. 60-731).

Property Which May Be Reached.

Order of garnishment attaches all property of defendant in or coming into possession or control of garnishee, and all credits and indebtedness due or becoming due from garnishee to defendant after service of order until answer of garnishee is signed. (K.S.A. 60-732).

Jurisdiction.

District court has jurisdiction. (K.S.A. 60-730).

Answer of Garnishee.

Within ten days after service of order of garnishment attaching property or funds other than earnings and within 15 days following end of month after order attaching earnings, garnishee must file his answer. If garnishee fails to so answer judgment may be taken against garnishee for amount of plaintiff's judgment or claim. Garnishee's answer may not contain less than statutory form. (K.S.A. 60-736 and 60-737).

Practice.

Order of garnishment is served along with statutory form for garnishee's answer on garnishee by officer making service in same manner as process. Order of garnishment issued to attach funds held by bank, savings and loan association, credit union or finance company shall include defendant's address and tax identification number if known and specify amount garnished at 110% of plaintiff's claim or judgment. Garnishee may withhold administrative fee of $10 for each order. Fee is in addition to amount withheld. Party seeking order must have good faith belief that party served has or will have assets of debtor. No more than two garnishments in any 30 day period except when judge finds (1) garnishment not to harass and (2) facts indicate garnishee has nonexempt property or credits of debtor. (K.S.A. 60-732 and 733). If served prior to judgment on plaintiff's claim, said order and notice of debtor's rights under law must also be served on defendant, if he can be found, but failure to serve defendant will not relieve garnishee from liability under said order. (K.S.A. 60-732). Defendant may controvert statements in answer of garnishee, defend proceedings against garnishee, and he may participate in trial of any issue between plaintiff and garnishee for protection of his interests. Garnishee in his answer may, on behalf of defendant, state any claim of exemption or other objection which defendant may have, and may defend principal action for defendant who defaults, but he is under no obligation to do so. (K.S.A. 60-735). If any person, firm or corporation sells or assigns his account to any person or collecting agency, then such person, firm or corporation or their assignees may not garnish wages except for certain state and federal claims regarding support, taxes and restitution. (K.S.A. 60-2310).

Adverse Claims.

Garnishee claims that he is not indebted to defendant for reason that defendant is indebted to garnishee, or that indebtedness due to defendant is reduced thereby, garnishee is not discharged unless and until he applies amount of his indebtedness to defendant to liquidation of his claim against defendant. (K.S.A. 60-719).

Judgment.

Judgment shall be entered: (1) By determining liability of garnishee upon default; or (2) discharging garnishee; or (3) making available to satisfaction of plaintiff's claim any indebtedness due from garnishee to defendant or any property in hands of garnishee belonging to defendant, including ordering payment of money by garnishee into court, or impoundment, preservation and sale of property as provided for disposition of attached property; or (4) rendering judgment against garnishee for amount of his indebtedness to defendant held by garnishee; and (5) if answer of a garnishee is controverted without good cause, awarding garnishee judgment against controverting party for garnishee's expenses, including reasonable attorney's fees. Court may enter continuing order for garnishment to enforce order for support under specified circumstances. (K.S.A. 60-721). Defendant may at any time after proceeding is commenced file with clerk bond in double amount of claim or such lesser amount as court may approve to effect that he will pay amount of judgment and costs that may be assessed against him and thereupon garnishee will be discharged. (K.S.A. 60-722).

Earnings.

See topic Exemptions, subhead Earnings.

Exceptions.

No judgment shall be rendered in garnishment by reason of the garnishee: (1) Having drawn, accepted, made, endorsed, or guaranteed any negotiable bill, draft, note, or other security; or (2) holding moneys on a claim not arising out of contract and not liquidated as to amount; or (3) holding moneys or property exempt by law, or the proceeds therefrom. (K.S.A. 60-724).

Public Officials.

Garnishment laws apply to all state, county, city, township and school district officers and employees, as well as to all officers and employees of all municipal or quasi-municipal corporations to same extent and effect as such laws apply to officers and employees of private corporations. Order of garnishment on state employee is served on director of accounts and reports. Provided, if garnishee is public officer of state or instrumentality thereof and indebtedness sought by plaintiff to be withheld from defendant is an indebtedness to defendant incurred by or on behalf of state or instrumentality thereof, judgment against state or such instrumentality shall be limited to an amount for claim and costs not exceeding total amount of indebtedness of state or instrumentality thereof to defendant. (K.S.A. 60-718[c]). Property, funds, credits and indebtedness of state or state agency are exempt from garnishment, attachment, levy and execution and sale. Judgment against state does not create charge or lien on property of state. (K.S.A. 60-723).

Under Code of Procedure for Limited Actions, K.S.A. 61-4501, et seq., garnishment may be obtained before judgment only upon order of court pursuant to procedure for attachment. Garnishment shall not be commenced before judgment on plaintiff’s claim in principal action where such garnishment proceedings affect earnings of defendant. (K.S.A. 61-3503). Ten days after judgment garnishment may be obtained either in connection with execution or independently thereof and no bond is required. (K.S.A. 61-3504). Garnishee stands liable to plaintiff for all property, money and articles in his hands belonging to defendant at time of service of such summons and all such property, money and articles coming into his hands until time of signing his answer. (K.S.A. 61-3505 to 3507).

Garnishee must answer within ten days from date of service of garnishment attaching property or funds other than earnings or within 15 days after end of each month for earnings. Answer must be supported by unsworn declaration. (K.S.A. 61-3509 and 61-3510).

8.10 HOMESTEADS:

Homestead occupied as residence by owner or family of owner, together with all improvements on same, is exempt from forced sale under any process of law, except as hereinafter stated. (Const., art. 15, § 9; K.S.A. 60-2301).

Limitation of Value.

None.

Limitation of Area.

One hundred and sixty acres of farming land or one acre within the limits of an incorporated city or town. (Const., art. 15, § 9; K.S.A. 60-2301).

Debts or Liabilities Against Which Exemption Not Available.

Taxes; obligations contracted for purchase of premises or erection of improvements thereon; liens given by consent of homestead owner and his or her wife or husband, if any. (Const., art. 15, § 9; K.S.A. 60-2301).

Claim of Exemption.

Whenever any levy is made upon lands of householder whose homestead has not been selected and set apart, such householder, householder's spouse, agent or attorney may notify officer in writing at time of making such levy, or at any time before sale, of what householder regards as homestead, with description thereof, and remainder alone is subject to sale under such levy. (K.S.A. 60-2302).

Waiver of Exemption.

There is no form of homestead waiver.

Alienation or Incumbrance.

A conveyance or incumbrance of homestead of a married person is absolutely void unless husband and wife join in same instrument. (Const., art. 15, § 9). A contract for the sale of homestead is also void unless it is signed by both husband and wife.

Where one spouse is an incapacitated person, consent to lease for oil and gas or mortgage may be obtained by appropriate district court proceedings. (K.S.A. 59-2314 et seq.).

Proceeds of sale of the homestead are not exempt unless debtor intends to invest in another homestead. (217 Kan. 683, 538 P.2d 655).

Rights of Surviving Spouse and Family.

Homestead, which for this purpose may be manufactured or mobile home, is exempt from distribution, and exempt from debts of decedent to same extent that it was exempt in his lifetime. Homestead descends just as other real property, but it is not divided until spouse dies or remarries or children arrive at age of majority. (K.S.A. 59-401).

See also categories Family, topic Husband and Wife; Property, topics Curtesy, Deeds, Dower and/or Real Property.

8.11 JUDGMENT NOTES:

See Category Business Regulation and Commerce, topic Bills and Notes.

8.12 LEVY:

See Topics Attachment; Executions.

8.13 LIENS:

Types of Liens Recognized.

Kansas recognizes variety of liens, including: (1) Mechanic's (K.S.A. 58-201 et seq.) (see subhead Mechanic's Lien, infra); (2) contractor's (K.S.A. 60-1101 et seq.) (see subhead Contractors, infra); (3) bailee's (K.S.A. 58-208); (4) agister's for grazing of livestock (K.S.A. 58-220); (5) on crops or grain harvested, threshed and seeded, or baled (K.S.A. 58-203; 204; 218);

(6) agricultural production input (K.S.A. 58-241 et seq.); (7) attorney's (K.S.A. 7-108, 198) (see category 18 Legal Profession, topic Attorneys and Counselors); (8) innkeeper's (K.S.A. 38-201); (9) carrier's (see category 3 Business Regulation and Commerce, topic 3.07 Carriers); (10) on manufactured or mobile homes for amounts due for leased space (K.S.A. 58-227); (11) hospital on first $5,000 of patient's claim for nonworker's compensation injury (K.S.A. 65-406 et seq.); (12) landlord's (see category 21 Property, topic Landlord and Tenant); (13) judgment (K.S.A. 60-2202) (see category 5 Civil Actions and Procedure, topic 5.15 Judgments); (14) tax (K.S.A. 79-1804) (see topic Taxation); and (15) county or township bonds on all real estate in county or township (K.S.A. 10-1001). Other miscellaneous liens exist.

Uniform Commercial Code (K.S.A. 84-1-101) adopted. See category Business Regulation and Commerce, topic Commercial Code. See also category Transportation, topic Motor Vehicles, subhead Liens.

Mechanic's Lien.

Whenever any person, at owner's request or with owner's consent, performs work or makes repairs or improvements on owner's personal property, first and prior lien on personal property is created in his favor for reasonable amount of his services, including materials used. (K.S.A. 58-201).

Lien is valid so long as claimant retains possession. Claimant may retain lien after parting with possession by filing statement under oath with register of deeds within 90 days. If claimant never had possession, he may file within 90 days after work was last performed or materials last furnished. Statement must include items of account, description of liened property and owner's name. Must be filed in county where work was performed and in county where owner resides, if known. (K.S.A. 58-202).

Lien may be enforced and foreclosed like security agreement under Uniform Commercial Code. (K.S.A. 58-202).

Contractors.

Any person furnishing labor, equipment, material or supplies, including cost of transporting same, used or consumed for improvement of real property, under a contract with owner or with trustee, agent or spouse of owner, has lien upon the property. (K.S.A. 60-1101).

Subcontractors.

Any subcontractor or other person furnishing labor, equipment, material or supplies, used or consumed at site of the property subject to lien, under agreement with contractor, subcontractor or owner contractor may obtain lien. Notice of intent to perform must have been filed on new residential property and attached to lien statement. (K.S.A. 60-1103).

Filing and Notice.

Contractors must file verified statement within four months after date materials, equipment or supplies used or consumed were last furnished or last labor performed. Statement filed with clerk of the district court and must contain name of owner, claimant, description of real property, and itemized statement and the amount of the claim. If claim is evidenced by written instrument or promissory note, a copy thereof may be attached in lieu of itemized statement. For nonresidential property time may be extended to five months if notice is filed within four months. Notice sufficient if in compliance with Judicial Council form. (K.S.A. 60-1102). Subcontractors must file lien statement within three months after date material or equipment was last furnished or labor performed, and statement must also include name of contractor. Notice of extension filed within three months on Judicial Council form can extend filing period to five months. Subcontractor claimant must mail copy of lien statement to owner of property, holder of recorded equitable interest and to party obligated to pay same by registered or certified mail, or must post copy of lien statement on premises if address of owner or such party obligated to pay same is unknown. Requirements for service of lien statement are complied with if it is shown that person to be served actually received copy. Subcontractor may only claim lien for improvement of residential property if claimant has mailed warning statement to owner of property or has owners signed statement that general contractor or claimant has given such statement. Warning statement not required if claim is under $250. (K.S.A. 60-1103 and 60-1103a).

Rights and Liability of Owner.

As to subcontractor owner of real property is not liable for greater amount than he has contracted to pay original contractor, except for any payments to contractor made prior to expiration of three month period for filing lien claims if no warning statement required or subsequent to date owner received warning statement if required. Owner may discharge any lien which contractor fails to discharge and credit such payment against amount due contractor. (K.S.A. 60-1103[d]).

Preference of Liens.

Such liens are preferred to all other liens or encumbrances which are subsequent to commencement of furnishing of such labor, equipment, materials or supplies. (K.S.A. 60-1101).

Assignment.

All claims for liens and rights of action to recover therefore are assignable so as to vest in assignee all rights and remedies. (K.S.A. 60-1104).

Enforcement.

Action to foreclose must be brought within one year from time of filing lien statement, but if promissory note has been attached to lien statement in lieu of itemized statement, action must be commenced within one year from maturity of said note. (K.S.A. 60-1105). All persons whose liens are filed, and other encumbrancers of record, shall be made parties, except those encumbrancers whose lien has priority over claim of plaintiff. (K.S.A. 60-1106). Court may stay foreclosure action on building or improvement still under construction to permit filing of lien statement by party engaged in furnishing labor or materials. (K.S.A. 60-1107). If proceeds of the sale are insufficient to pay all claimants, court must order them to be paid in proportion to amount due each. (K.S.A. 60-1109).

Action by Landowner for Adjudication.

If no action to foreclose has been commenced, landowner may bring action, making lien claimants defendants, for adjudication of such liens. (K.S.A. 60-1108).

Limitations.

If no action commenced within the time allowed, clerk of district court enters on mechanic's lien docket statement that lien is cancelled by limitation of law. (K.S.A. 60-1108).

Bond to Prevent Liens.

Contractor or owner may execute bond to State of Kansas for use of all persons in whose favor liens might accrue, or to any person claiming lien which is disputed, conditioned for payment of all claims which might be basis of liens in sum not less than contract price. When approved and filed, no liens shall attach, and liens already filed are discharged. Suit may be brought on said bond by any person interested but such suit shall not name as defendant any person not principal or surety on bond or contractually responsible. (K.S.A. 60-1110).

Public Buildings and Improvements.

If contract exceeds $100,000, contracting public official must take from party contracted with bond to State of Kansas in sum not less than contract price, conditioned that such contractor or subcontractor of said contractor shall pay all indebtedness incurred for labor furnished, materials, equipment, or supplies, used or consumed in connection with said construction. Any person to whom there is due any sum for labor or material furnished, or his assigns, may bring action on said bond, but no such action may be brought after six months from completion of said public improvements. In case of contract for construction or improvements for state or state agency under K.S.A. 75-3739 or K.S.A. 75-3741, certificate of deposit payable to state may be accepted in lieu of bond. (K.S.A. 60-1111).

Oil and Gas.

Contractor.

Any person furnishing under contract, express or implied with owner of an oil and gas leasehold or oil and gas pipe line either labor or material or machinery or oil well supplies used in making, operating or repairing any oil or gas well or constructing or putting together machinery so used has a lien upon whole of such leasehold or oil pipe line or gas pipe line and buildings and appurtenances and upon material and supplies so furnished. (K.S.A. 55-207).

Lien Statement of Contractor.

Unless period of more than four months elapses between dates of employing labor or furnishing material or supplies, whether labor or material, machinery or supplies are upon same or different wells, performing such labor or furnishing material constitutes single transaction or contract, whether done under single contract or series of contracts, and it is only necessary for claimant to file one lien statement covering transactions as a whole. (K.S.A. 55-207).

Preference of Lien.

Lien is preferred to all other liens or encumbrances, which attach subsequent to commencement of or furnishing or putting up of any such machinery or supplies. (K.S.A. 55-207).

Subcontractors' Lien.

Person who furnishes machinery or supplies to subcontractor under contractor or laborer under subcontractor with contractor may obtain lien upon leasehold or pipe lien in same manner and to same extent as original contract for amount due him. (K.S.A. 55-208).

Lien statement of subcontractor must be filed in office of clerk of district court of county in which land and leasehold is situated, setting forth amount claimed and items thereof as nearly as practicable, name of owner of land, name of owner of leasehold, name of contractor, name of lien claimant and a description of property subject to lien, whether personal or real or both, and it must be verified by affidavit. If promissory note bearing lawful rate of interest is taken, it is not necessary to file itemized statement of labor or material furnished, but in lieu thereof, copy of note may be filed with statement that note or any part thereof was given for such labor or material furnished. Statement must be filed within four months after date upon which material was last furnished or labor last performed. (K.S.A. 55-208).

Enforcement.

Lien is enforced in same manner and notice of same is given in same manner, whether by contractor, subcontractor, material man or laborer, as is provided for enforcement of liens of mechanics. After sale of property, there is no redemption. (K.S.A. 55-210).

Trucker's Lien.

One who transports or hauls oil field supplies, machinery, heavy machinery, buildings, tanks, engines, etc., under express contract with owner or operator of oil and gas lease or pipe line has lien on interests of such owner in leasehold or pipe line, equipment, buildings and appurtenances. Lien statement must be filed, within 120 days after equipment was transported and delivered, in office of clerk of district court of county where equipment delivered. Copy of statement must be served on owner by registered mail to last known address. Owner must notify lien claimant before removing equipment and material from leasehold. If material is moved to another county, lien claimant has thirty days after receiving notice to file copy of lien statement in office of clerk of district court of county to which material moved. Action on lien must be commenced within six months. Lien is not prior to any valid and existing chattel mortgage of record. (K.S.A. 55-212 et seq.).

Uniform Federal Lien Restoration Act.

Adopted. (K.S.A. 79-2613 et seq.).

Attachment Lien.

See topic Attachment.

Attorney’s Lien.

See category Legal Profession, topic Attorneys and Counselors.

Carrier’s Lien.

See category Business Regulation and Commerce, topic Carriers.

Chattel Mortgage Lien.

See category Mortgages, topic Chattel Mortgages.

Collateral Security.

See topic Pledges.

Execution Lien.

See topic Executions.

Factor’s Lien.

See category Business Regulation and Commerce, topic Factors.

Judgment Lien.

See category Civil Actions and Procedure, topic Judgments.

Landlord’s Lien.

See category Property, topic Landlord and Tenant.

Liens on Exempt Property.

See topic Exemptions.

Liens on Homestead.

See topic Homesteads.

Real Estate Mortgage Lien.

See category Mortgages, topic Mortgages of Real Property.

Tax Lien.

See category Taxation.

8.14 MECHANICS' LIENS:

See topic Liens.

8.15 PLEDGES:

Uniform Commercial Code (K.S.A. 84-1-101 et seq.) in effect. See category Business Regulation and Commerce, topic Commercial Code.

Remedies of Secured Party.

Secured party may bring action in district court to reduce indebtedness to money judgment and to foreclose security interest in specific personal property given to secure that indebtedness. (K.S.A. 60-1006).

Secured party must file either affidavit or verified petition showing: (1) Terms of indebtedness; (2) amount owed; (3) terms of security agreement; (4) description of personal property; (5) plaintiff is lawfully entitled to foreclosure of specific personal property; (6) estimated value of each piece of personal property; and (7) personal property is wrongfully detained by defendant. (K.S.A. 60-1006[a]).

Plaintiff must apply for order for delivery of property to him. Copy of motion must be served on defendant. After hearing and presentation of evidence, if court satisfied as to probable validity of plaintiff's claim and that justice will be served, court may grant order. Expedited procedure available if immediate danger that defendant will destroy or conceal property. (K.S.A. 60-1006[b]). Order will command sheriff to seize property. (K.S.A. 60-1006[c]).

Judgment for plaintiff must be for money judgment and foreclosure of security interest in accord with Uniform Commercial Code. If judgment not satisfied within ten days, court directs sheriff to sell property. (K.S.A. 60-1006[h]).

Notice of sale must be given at least ten days before sale through publication in legal newspaper each week for two consecutive weeks. Plaintiff must send copy of notice by restricted mail to defendant and to persons known to have security interest in property. (K.S.A. 60-1007).

8.16 RECEIVERS:

May be appointed whenever deemed necessary to keep, preserve and manage all property and protect any business or business interest entrusted to him pending determination of any proceeding in which such property or interest may be affected by final judgment. (K.S.A. 60-1301).

Jurisdiction.

Justice of supreme court, judge of court of appeals, district judge, or in absence of said judge, district magistrate judge, has authority to appoint receiver. (K.S.A. 60-1301).

Proceedings.

Receiver cannot be appointed without notice and an opportunity for interested parties to be heard unless judge finds that immediate and irreparable injury is likely to result, and bond may be required of applicant conditioned on such terms as judge may direct. This does not apply where defendant is nonresident or foreign corporation not authorized to do business in Kansas. (K.S.A. 60-1304).

Eligibility and Competency.

Person who has interest in property or in outcome of proceeding cannot be appointed or continue as receiver if objection is made thereto by another interested party unless judge finds such objection is arbitrary or unreasonable. (K.S.A. 60-1301).

Qualifications.

Receiver must be sworn to perform duties faithfully and execute bond to such persons on such conditions and in such sum as judge directs. (K.S.A. 60-1302).

Powers and Duties.

Receiver shall perform such acts respecting property or business as judge may authorize. (K.S.A. 60-1303).

Appeal.

Aggrieved party may within ten days appeal from order appointing or refusing to appoint receiver without awaiting final determination of proceedings. If receiver has been appointed and appellant files appeal bond with such terms and conditions as judge may direct, appointment is suspended and property retained in possession of appellant pending final determination of appeal. (K.S.A. 60-1305).

See category Business Organizations, topic Corporations, subhead Insolvency and Receivers.

Redemption.

See Category Mortgages, topic Chattel Mortgages.

Supplementary Proceedings.

See topic Executions.

Trustee Process.

See topic Garnishment.

Usury.

See category Business Regulation and Commerce, topic Interest.

9 DISPUTE RESOLUTION

9.01 ALTERNATIVE DISPUTE RESOLUTION:

Mandatory (Alternative) Dispute Resolution.

Mandatory mediation of domestic disputes concerning child custody or visitation under order of court or hearing officer. (K.S.A. 23-601 et seq.).

Voluntary (Alternative) Dispute Resolution.

Available under Dispute Resolution Act. (K.S.A. 5-501 et seq.).

Alternative Dispute Resolution Jurisdictional Bodies/Commissions.

Director of dispute resolution appointed by judicial administrator. (K.S.A. 5-503). Advisory council (K.S.A. 5-504) advises director on policy, provides technical assistance, promotes cooperation, advises regarding financial assistance, review of dispute resolution programs, recommends legislation (K.S.A. 5-505).

Alternative Dispute Resolution Acts.

Dispute Resolution Act (K.S.A. 5-501 et seq.). Applies to registered and approved programs, individuals, disputes referred by court, by state government or as otherwise provided by statute. (K.S.A. 5-501). Applies to matters referred by judge. (K.S.A. 5-509). Supreme court to adopt standards and ethics requirements (K.S.A. 5-510) rules of procedure (K.S.A. 5-511). See Rules of Supreme Court. (Rule 901).

9.02 ARBITRATION AND AWARD:

Forms and Requisites of Submission.

Uniform Act.

If opposing party refuses to arbitrate, party may apply to district court to compel arbitration. If opposing party denies existence of agreement, court must summarily determine issue. (K.S.A. 5-402).

Voluntary Arbitration.

All persons having controversy may submit it to arbitration of mutually agreed upon parties. Such submission may be made rule of any court of record. (K.S.A. 5-201).

Rescission.

Contract to submit disputes may be revoked if grounds exist in law or equity. (K.S.A. 5-401).

Powers of Arbitrators.

Uniform Act.

Arbitrators may issue subpoenas and administer oaths. (K.S.A. 5-407).

Uniform Arbitration Act.

Adopted. (K.S.A. 5-401 et seq.). Existing arbitration statutes (K.S.A. 5-201 to -213) not repealed.

Jurisdictional Arbitration Acts.

Statutes (K.S.A. 5-201 to 213) apply to existing controversies. (K.S.A. 5-201).

Credentials of/Qualifications of/Standards for Arbitrators.

No provisions.

Enforcement.

Uniform Act.

District court must confirm award unless urged to vacate, correct or modify award. (K.S.A. 5-411).

Judgment on Award.

Uniform Act.

Judgment entered on confirmed award. (K.S.A. 5-414).

Voluntary Arbitration.

If no exceptions raised, district court may enter judgment and issue execution on award. (K.S.A. 5-209).

Mandatory Arbitration.

In all medical malpractice actions filed in district court upon request of party, judge must convene medical malpractice screening panel. Where dispute is unfiled, court may convene panel on own motion. (K.S.A. 65-4901). Findings by panel are not binding and dispute may be pursued by civil action if findings are rejected but written report of screening panel is admissible into evidence in subsequent legal action. (K.S.A. 65-4904 and 65-4905).

9.02A MEDIATION:

Jurisdictional Mediation Acts.

Dispute resolution act. (K.S.A. 5-501 to 517). See topic Alternative Dispute Resolution.

Credentials of/Qualifications of/Standards for Mediators.

Standards and qualifications set by Supreme Court. (K.S.A. 5-516). No qualifications imposed on person chosen and agreed by parties. (Sup. Ct. Rule 902[a]). Mediators are specifically trained. (Sup. Ct. Rule 902[b]). Sixteen hours training, agreement on ethical standards, co-mediate three cases or 15 hours supervised mediation. (Sup. Ct. Rule 902[d][e]). Domestic, parent/adolescent, general c. 60 cases, require additional training. (Sup. Ct. Rule 902[e]).

10 DOCUMENTS AND RECORDS

10.01 ACKNOWLEDGMENTS:

Uniform Law on Notarial Acts adopted July 1, 1984. (K.S.A. 53-501 et seq.).

Within State.

By notary public, or judge, clerk or deputy clerk of any state court. (K.S.A. 53-504). Instruments affecting real property may also be acknowledged by county clerk, register of deeds, mayor or clerk of incorporated city. (K.S.A. 58-2211).

Outside State but within United States.

By notary public or judge, clerk or deputy clerk, or by any person authorized by law of that jurisdiction to perform notarial acts. (K.S.A. 53-505).

Outside United States

By notary public or notary, or judge, clerk or deputy clerk of court of record, or any other person authorized by law of that jurisdiction to perform notarial acts. (K.S.A. 53-507).

Persons in or with U.S. Armed Forces.

No special provision.

General Requirements as to Taking.

Notarial officer must determine from personal knowledge, affirmation of credible witness personally known to him, or identification documents that person appearing before him is person who signed instrument. (K.S.A. 53-503).

General Requirements of Certificate.

Must be signed and dated by notarial officer. Must identify jurisdiction and title of notarial office. Notary public must give date appointment expires. Commissioned U.S. officer must give rank. Official stamp or seal optional. (K.S.A. 53-508[a]). See subhead Forms, infra.

Married Women.

No special requirements.

Attorneys-in-Fact.

No special requirements.

Corporations.

Corporate execution under c. 17 constitutes oath. Conveyances of real property interests shall be acknowledged by any authorized officer or by authorized agent under letter of attorney. (K.S.A. 17-6003[g]).

Foreign Acknowledgments.

Same effect as if performed in Kansas if performed within jurisdiction of and under authority of foreign nation or its constituent units, or multi-national or international organization by specified persons. (K.S.A. 53-508[a]). See also subhead Outside U.S., supra.

Instruments affecting real property valid if executed in conformity with either Kansas law or law of foreign state or country where executed. (K.S.A. 58-2228).

Effect of Acknowledgment.

Instrument may be recorded (K.S.A. 58-2221) and read in evidence without further proof (K.S.A. 58-2229). Unacknowledged instrument, even though recorded, does not impart constructive notice of its contents. However latent defect in acknowledgment does not prevent constructive notice. (9 Kan. App. 2d 614, 683 P.2d 1288).

Proof by Subscribing Witness.

If grantor dies before acknowledging execution of deed, or if for any other reason his attendance cannot be procured, or if, having appeared, he refuses to acknowledge, proof of due execution and delivery of deed may be made by any competent testimony. (K.S.A. 58-2214). Such proof may be made before any court or officer authorized to take acknowledgments. (K.S.A. 58-2215). Certificate endorsed upon deed thus proved must state: (1) Title of court or officer taking proof; (2) that it was satisfactorily proved that grantor was dead or that for some other cause his attendance could not be procured, or that, having appeared, he refused to acknowledge deed; and (3) names of witnesses by whom proof was made and that it was proved by them that instrument was executed by person whose name is thereto subscribed as party. (K.S.A. 58-2216). Proof of handwriting may only be resorted to where all subscribing witnesses are dead or cannot be had. (K.S.A. 58-2220). Witnesses may be subpoenaed. (K.S.A. 58-2219).

Authentication.

Signature and title of person performing notarial act are prima facie evidence that signature is genuine and person holds designated title. (K.S.A. 53-504[c]; 53-505[c]; 53-506[b]). Signature and title of notary public or judge, clerk or deputy clerk outside Kansas but in U.S. conclusively establish that signature is genuine and person holds designated title. (K.S.A. 53-505[d]). Signature and title of judge, clerk or deputy clerk or active duty commissioned U.S. officer acting under federal law also given conclusive effect. (K.S.A. 53-506[c]). Foreign notarial acts conclusively established by “Apostille”, certificate by U.S. or foreign consul, or listing in recognized source of information. (K.S.A. 53-507[b], [c], and [f]). Official stamp or seal is prima facie evidence. (K.S.A. 53-507[d] and [e]).

Forms.

Following are acceptable statutory forms. (K.S.A. 53-509).

Forms

Individual:

State of . . . .

County of . . . .

This instrument was acknowledged before me on (date) by (name(s) of person(s)).

(Signature of notarial officer)

(Seal, if any)

Title (and Rank)

My appointment expires: . . . .

Representative Capacity:

State of . . . .

County of . . . .

This instrument was acknowledged before me on (date) by (name(s) of person(s)) as (type of authority, e.g., officer, trustee, etc.) of (name of party on behalf of whom instrument was executed).

(Signature of notarial officer)

(Seal, if any)

Title (and Rank)

My appointment expires: . . . .

For witnessing or attesting signature:

State of . . . .

County of . . . .

Signed or attested before me on (date) by (name(s) of person(s)).

(Signature of notarial officer)

(Seal, if any)

My appointment expires: . . . .

For attestation of copy of document:

State of . . . .

County of . . . .

I certify that this is a true and correct copy of a document in the possession of . . . .

Dated: . . . .

(Signature of notarial officer)

(Seal, if any)

My appointment expires: . . . .

For power of attorney in a representative capacity:

State of...................

County of ....

This instrument was signed before me on (date) by (name[s] of designee[s]) as (power of attorney of (name of party on behalf of whom instrument was executed.)

(Signature of notarial officer)

(Seal, if any)

Title (and Rank)

My appointment expires:...................

Validating Acts.

Unacknowledged or defectively acknowledged instrument of record ten years is validated. (K.S.A. 58-2237).

Alternative to Acknowledgment or Proof.

Unsworn written declarations may be permitted as support or evidence. (K.S.A. 53-601). Exceptions noted. (K.S.A. 53-601[b]).

Forms.

Following are acceptable statutory forms. (K.S.A. 53-601).

Forms

If executed inside or outside this state:

I declare (or verify, certify or state) under penalty of perjury that the foregoing is true and correct. Executed on (date).

10.02 AFFIDAVITS:

Affidavit may be made in or out of state before any person authorized to take depositions. See category Civil Actions and Procedure, topic Depositions and Discovery.

General Requirements as to Administration.

Affidavit must be sworn to before some person authorized to administer oath. Simple acknowledgment before notary not sufficient. (219 Kan. 863, 549 P.2d 1397). Affidavit must be signed in presence of notary. (5 Kan. App. 2d 622, 621 P.2d 1021).

General Requirements of Jurat.

Jurat is not required. It is mere evidence that oath was duly administered. This may be proved by other evidence. (199 Kan. 652, 433 P.2d 454). Use of jurat given under subhead Forms, infra, is advisable.

Use of Affidavit.

See specific topics.

Forms

State of . . . . . ., County of . . . ., ss: . . . . . ., of lawful age, being first duly sworn, upon his oath deposes and says: (Here insert statement, followed by signature of affiant). Subscribed and sworn to before me, a . . . . . . in and for the county and state aforesaid, on this . . . . . . day of . . . . . ., 20 . . . . (Signature, seal, and if notary public, expiration date of appointment).

If the affidavit is to be filed for record, the following jurat is advisable:

Subscribed and sworn to before me, a . . . . . . in and for the county and state aforesaid, by said . . . . . ., who is personally known to me, and he duly acknowledged to me the execution of the foregoing instrument. (Signature, seal, and if notary public, expiration date of appointment).

Alternative to Affidavit.

No statutory provision.

10.03 NOTARIES PUBLIC:

Qualification.

Must file with Secretary of State an oath of office and bond in sum of $7,500. (K.S.A. 53-102).

Authentication.

See topic 10.01 Acknowledgments, subhead Authentication.

Seal.

Notary must provide seal containing name exactly as it appears on application for appointment and words “notary public” and “State of Kansas” and authenticate all official acts therewith. Seal of notary shall be either seal press, or impression thereof inked or blackened, or rubber stamp used with permanent ink. (K.S.A. 53-105).

Powers and Duties.

Notary has authority to take acknowledgments, administer oaths and affirmations, take verification upon oath or affirmation, witness or attest signature, certify or attest copy, note protest of negotiable instrument, and perform any other act permitted by law. (K.S.A. 53-503). Notary must determine from personal knowledge or satisfactory evidence that signature notarized is that of person appearing before notary. (K.S.A. 53-503[c]). Satisfactory evidence of identity is personal knowledge, identification upon oath or affirmation by credible witness personally known to notary, or identification documents. (K.S.A. 53-503[f]).

Depositions may not be taken before notary. (K.S.A. 60-228[a] and 53-107).

Uniform Law on Notarial Acts adopted. (K.S.A. 53-501 et seq.).

Territorial Extent of Powers.

Notaries may perform services throughout state.

Expiration of Commission.

Notary must add to his official signature date thereof. (K.S.A. 53-105).

Fees.

Fees vary.

Certification of Authority.

See Acknowledgments, subhead Authentication.

Officers of U.S. Armed Forces.

Notarial act performed under authority granted by law of U.S. while on active duty has same effect as if done by notary of this state. (K.S.A. 53-506[a]).

10.04 RECORDS:

Uniform Commercial Code (K.S.A. 84-1-101 et seq.) in effect. See category Business Regulation and Commerce, topic Commercial Code.

All books, records, deeds, mortgages, maps, instruments, microphotographs and writings authorized by law to be recorded in office of register of deeds must be recorded in books for that purpose, on computer disks, tapes or other electronically accessed media, and indexed. (K.S.A. 19-1204). Photographic copies of instruments, bound, paged and indexed, are sufficient recordation. (K.S.A. 58-2224). *For list of Counties and County Seats see first page for this state in Volume containing Practice Profiles Section.*

Recording Fees.

Deeds, mortgages and other instruments filed with county register of deeds: First page, $6; each additional page, $2; recording town plats, $20 per page; release or assignment of mortgage, $5; notice or release of tax liens, $5; liens for material and services, $5. Register of deeds shall collect additional $2 per page for recording instrument to be paid to county treasurer. (K.S.A. 28-115).

Recording Taxes.

Category Taxation.

Foreign Conveyances or Encumbrances.

Where instrument has been recorded for ten years in another state, certified copy of same will be taken as prima facie evidence of existence of original by courts in this state and may be filed in any county in this state where land is located with like effect as original instrument. (K.S.A. 58-2230).

Effect of Record.

Every instrument in writing conveying or affecting real estate or any interest created by oil and gas lease, properly acknowledged, may be recorded in Office of Register of Deeds of county in which said land is located. (K.S.A. 58-2221). Such instrument imparts notice to all persons of contents thereof from date of filing. (K.S.A. 58-2222). No such instrument in writing is valid except as to parties thereto and such as have actual notice thereof until it is deposited with recorder of deeds for record. (K.S.A. 58-2223).

Certified copy of record of instrument must be received in court as evidence, upon proof that original cannot be produced. (K.S.A. 58-2230).

Torrens Act.

Torrens System of land registration has not been adopted.

Transfer Book.

County clerk must keep transfer book recording all transfers of real estate in his county. (K.S.A. 58-2239). His certificate of transfer must be upon deed before register of deeds may record it. When registrar receives instrument not entered on transfer record he shall have such instrument entered on said record immediately upon recording same in his office. (K.S.A. 58-2241).

Transfer of Decedent’s Title.

Where decedent died testate, probate of will passes title to devisees. If real estate is in counties other than county where will is probated, authenticated copies of will and order of probate must be admitted to record in district courts of such other counties. (K.S.A. 59-2249).

Duly authenticated copy of foreign will may be admitted to record in the district court of any county where real estate devised is located and when so recorded has same validity as will duly proved in this state. (K.S.A. 59-806).

When final decree of distribution of decedent’s estate includes real estate, certified copy thereof must be entered on transfer record of county clerk of county where the real estate is located. (K.S.A. 59-2249).

Filing Under Commercial Code.

Local filing of financing statements made with Register of Deeds of appropriate county and central filing made in Office of Secretary of State, Capitol Building, Topeka, 66612. (K.S.A. 84-9-401). Filing fees: Financing statement, amendments thereto, continuation statement, assignment of security interest, and release of collateral filed with Secretary of State must be $6 plus $1 for each additional page not to exceed $10 plus $1 for each additional page. (K.S.A. 84-9-402, 403, 405, and 406).

Vital Statistics.

Records of births, deaths, marriages and divorces are kept by Division of Health of Department of Health and Environment, State Capitol, Topeka, Kansas 66612. (K.S.A. 65-2419-2421). Fee for certified copies of birth and death certificates is $12 for first copy and $8 for each additional copy of same certificate. (K.A.R. 28-17-6).

Establishing Birth Record.

Provision is made for delayed registration of birth of persons born in this state, upon such proof as Secretary of Health and Environment requires. (K.S.A. 65-2410 to 2421).

Lis pendens.

K.S.A. 60-2201.

10.05 SEALS:

Seals and scrolls abolished (K.S.A. 16-106), except corporation may have seal if so desired (K.S.A. 17-6102).

Uniform Commercial Code (K.S.A. 84-1-101 et seq.). See category Business Regulation and Commerce, topic Commercial Code.

Torrens Act.

See topic Records.

Vital Statistics.

See topic Records

11 EMPLOYMENT

11.01 EMPLOYER AND EMPLOYEE:

See topic Labor Relations.

11.02 LABOR RELATIONS:

Safety Appliances.

Secretary of Labor has power to enter and inspect place of business to examine employee protection from dangerous and unsanitary conditions. Employers are notified of hazardous or unsanitary conditions and given up to 60 days in which to correct condition. Employers are prohibited from removing safety apparatus or devices. Secretary may order closing of business until hazardous conditions are corrected. (K.S.A. 44-636).

Hours of Labor.

No statutory provision.

Wages.

Employer must pay time and half for hours worked in excess of 46 hours per week. (K.S.A. 44-1204[a]). Employer must pay employees at least once per month and within 15 days of end of pay period. (K.S.A. 44-314). Employee who has quit or been discharged must be paid wages owed not later than next regular pay period. (K.S.A. 44-315[a]).

Employee may assign claim to Secretary of Human Resources who may maintain action pursuant to Act for fee not to exceed $25 per claim. (K.S.A. 44-324). Except for such assignment, no provision of or right under act may be contravened, set aside or waived. (K.S.A. 44-321).

Where employer becomes insolvent, wages due his employees for six months prior thereto are preferred to every other debt or claim. (K.S.A. 44-312).

See category 8 Debtor and Creditor, topic 8.01 Assignments, subhead Assignment of Wages.

Child Labor.

Children under 14, with limited exceptions, may not work. (K.S.A. 38-601). Children under 16 generally may not work more than eight hours per day or 40 hours per week and may not work between 10 p.m. and 7 a.m. on school nights. (K.S.A. 38-603[a]). Children under 18 may not work at jobs that are dangerous or injurious to their lives, health, safety, morals or welfare. (K.S.A. 38-602).

Female Labor.

No special provisions.

Discrimination in employment by reason of race, religion, color, sex, disability, national origin or ancestry prohibited unless valid business motive exists. (K.S.A. 44-1009).

Age discrimination prohibited unless valid business motive exists. (K.S.A. 44-1113). Executives may be forced to retire at 65 if they will receive at least $44,000 per year in retirement benefits. (K.S.A. 44-1118).

Labor Unions.

Employees have right to organize and to bargain collectively. (K.S.A. 44-803). “Right to Work” laws in effect. (Const. art. 15, § 12).

Actions.

Unincorporated labor organization may sue or be sued in its commonly used name. (K.S.A. 44-811).

Labor Disputes.

Members of collective bargaining unit may not strike unless unit approves strike by secret ballot. (K.S.A. 44-809[3]). No person may picket beyond area of industry in which dispute arises (K.S.A. 44-809[13]) or engage in non-peaceful picketing (K.S.A. 44-809[14]). Secondary boycotts prohibited. (K.S.A. 44-809a[1]). Secretary of Labor may investigate and make orders for welfare of public and parties. (K.S.A. 44-607 et seq.).

Workers’ Compensation Act (K.S.A. 44-501 et seq.) is administered by Workers’ Compensation Board. Covers accidental injury or death arising out of and in course of employment. Burden of proof on claimant to establish right to award of compensation by proving conditions on which rights depend. Employee not entitled recovery for aggravation of preexisting condition, except to extent injury increases disability. Employer not liable where use or consumption of alcohol or illegal drugs contributes to injury. (See exception and probable cause requirements.) (K.S.A. 44-501[a]). Subject to K.S.A. 44-506, Act applies to all employments wherein employers employ employees within state except Act does not apply to: (1) Agricultural pursuits and employment incident thereto; (2) any employment where total gross annual payroll for preceding calendar year and estimated gross payroll for current year are less than $20,000 for all employees; except, no wages paid to employee who is member of employer's family by marriage or consanguinity shall be included in total gross annual payroll; (3) any employment where employer had no payroll for calendar year and estimated gross payroll for current year is less than $20,000; (4) employment of fireman in firemen's relief association; or, (5) services by real estate agent as independent contractor. (K.S.A. 44-505[a]). Employers excepted from Act by K.S.A. 44-505(a) may elect to come within provisions of Act by becoming member and maintaining membership in qualified group-funded workers' compensation pool or filing with Director written statement of election to accept thereunder. Election effective until employer files written statement withdrawing election with Director. Written statements of election or withdrawal to be made in such form as required by regulation of Director. (K.S.A. 44-505[b]).

Employers must report all accidents on forms prepared by director within 28 days after receipt of knowledge and must keep liability insurance in force, or may carry own insurance subject to approval by Director. Five or more employers of same trade or profession may agree to pool their liabilities for Kansas workers' compensation benefits and employers' liability, to be known as group-funded workers' compensation pools. (K.S.A. 44-532; 44-557; 44-581).

Notice of Accident.

To entitle injured workman to compensation, notice of accident must be given to employer within ten days from date of same, but no notice is necessary where the employer or his agent has actual knowledge. Extended to 75 days for just cause. (K.S.A. 44-520).

Written claim for compensation must be served on employer, personally, through agent or by registered mail, within 200 days from date of accident, or date of last payment of compensation, or if death results from injury within five years, then within one year from date of death. These limitations are tolled under certain conditions. (K.S.A. 44-520a).

Procedure.

Amount of compensation due may be settled by agreement of parties. (K.S.A. 44-521). Whenever employer, workman or insurance carrier cannot agree upon right to compensation or upon any issue regarding compensation benefits due, employer, workman, or insurance carrier may apply in writing to Director for determination of such. Application must be in form prescribed by Director's rules and must set forth substantial and material facts of claim. No proceeding maintainable under Act unless application for hearing is on file in Director's office within three years of accident date or within two years of date of last compensation date, whichever is later. Any claim not brought to final hearing within five years of filing shall be dismissed unless extended for good cause. (K.S.A. 44-534). Director, administrative law judge, or board not bound by technical rules of procedure, but shall give parties reasonable opportunity to be heard and present evidence. (K.S.A. 44-523a). Upon application for hearing under K.S.A. 44-534, matter shall be assigned to administrative law judge for hearing. Claimant is to submit all evidence no later than 30 days after initial hearing before administrative law judge and respondent is to submit all evidence no later than 30 days thereafter. (K.S.A. 44-523a). When all parties submit case for award, administrative law judge must issue award within 30 days, unless time extended by agreement of parties, if employee receiving temporary or permanent disability, for medical examination, or other good cause. If award not entered in 30 days, any party to action may so notify Director and Director shall assign matter to Assistant Director to enter award forthwith based on record evidence. Director may also remove case on his own motion when administrative law judge fails to issue award within 30 days. Prehearing settlement conference scheduled not less than ten days before hearing. Party may move for change of administrative law judge pursuant to statutory procedure. (K.S.A. 44-523).

Review.

Workers’ Compensation Board established with exclusive jurisdiction to review all decisions, findings, orders and awards of administrative law judges. Review of law and fact as shown by transcript. Action of board, other than disposition of appeals of preliminary orders or awards, is subject to review per act for judicial review and civil enforcement of agency actions by appealing directly to court of appeals. Any party may appeal from final order of board by filing with court of appeals within 30 days of final order. Review by court of appeals limited to questions of law. (K.S.A. 44-556).

Enforcement of award is by court action as for collection of debt, except that civil penalties and attorney fees may also be awarded. (K.S.A. 44-512a).

Rate of compensation is based upon percentage of average weekly wage of employee in accordance with schedule contained in act. Maximum weekly rate is 112.5% of state’s average weekly wage, as determined by K.S.A. 44-511. (K.S.A. 44-510c). Maximum compensation benefits payable by employer shall not exceed $125,000 for permanent total disability, $100,000 for temporary total disability and $100,000 for permanent or partial disability except that when permanent partial disability where functional impairment only is awarded limit is $50,000. (K.S.A. 44-510f).

Rehabilitation benefits reasonably necessary to restore injured employee to work at comparable wage are provided for when agreed to by employer or insurance carrier. (K.S.A. 44-510g).

Death benefits are payable to dependents in accordance with statutory formula, up to $250,000 including funeral expenses up to $5,000. (K.S.A. 44-510b).

Occupational diseases are covered. (K.S.A.).

Subrogation.

Where insurer or qualified group funded workers’ compensation pool pays compensation of employee or employee’s dependents under Act, insurer or pool is subrogated to rights, duties and immunities of employer. (K.S.A. 44-532). Worker’s Compensation Fund subrogated to rights of employer. (K.S.A. 44-504).

See category 18 Legal Profession, topic 18.01 Attorneys and Counselors, subhead Compensation.

Occupational Diseases.

Treated as injuries by accident under Workmen’s Compensation Act. (K.S.A. 44-5a01).

Unemployment Compensation.

Individual performing service for wages or under contract of hire, written or oral, express or implied, eligible for benefits if Commissioner finds that he has registered for work at an unemployment office, has made a claim for benefits, is able and available for work and is making reasonable efforts to obtain work. (K.S.A. 44-701 et seq.). Discharge due to misconduct, or failure to apply for, or accept suitable work are grounds for disqualification. Terms defined by statute. (K.S.A. 44-706). Regulations of Commissioner largely govern procedure. (K.S.A. 44-701 et seq.).

11.03 WORKERS’ COMPENSATION LAW:

See topic Labor Relations.

12 ENVIRONMENT

12.01 ENVIRONMENTAL REGULATION:

General Supervision.

State Board of Health, Secretary of Health and Environment and State Corporation Commission have general supervision of all pollution control acts and receive assistance under certain acts from advisory councils. Disposal of oil or gas field brines and mineralized waters supervised by Secretary of Health and Environment. (K.S.A. 55-1003; 65-184; 65-3301; and 65-3401).

Kansas Storage Tank Act.

(K.S.A. 65-34,100 et seq.). Requires owners of storage tanks to notify Department of Health and Environment of tank's existence, age, size, type, location, other equipment and uses. Owner of underground storage tank taken out of service after Jan. 1, 1974 and prior to May 8, 1986 shall notify department of date, age, capacity, type, location, and type and quantity of contents on date removed from operation. Notice form provided by department. No person shall construct, modify or operate underground storage tank without permit or other approval from secretary. Separate trust funds established for upgrades or removal of above and underground storage tanks. Owner or operator liable for all costs of corrective action taken in response to release.

Prohibited Acts of Pollution.

Plans for disposal of oil or gas field brines and mineralized waters must be submitted to State Corporation Commission. Commission determines sufficiency of plan in protecting from loss or waste of resources and determines adequacy of protection against pollution of water resources. (K.S.A. 55-1003). No person, company, corporation, institution or municipality may dispose, discharge or allow escape of sewage, chemical or waste products into waters of state without permit issued by Secretary of Health and Environment. Not applicable to public sewer system established prior to Mar. 20, 1907, unless Secretary determines system polluting waters in manner prejudicial to health of citizenry. (K.S.A. 65-164). Secretary authorized to designate sanitation zones surrounding certain impoundments of water and to fix standards to prevent pollution in said area. (K.S.A. 65-184 to 189). It is unlawful to operate, construct, or alter solid waste processing facility or disposal area or allow dumping or depositing of solid wastes without permit (certain exceptions). County or regional solid waste management committee must review management plan annually and submit plan to county commission. Commission must hold hearings every five years, approve plan and notify Secretary of Health and Environment of plan. Permit for solid waste facility contingent upon satisfying financial assurance requirement for closure and post-closure care and providing liability insurance for accident occurrences. Permit revocable if facility is hazard to area or environment or public nuisance. (K.S.A. 65-3405; 3407; 3409). Installation, alteration or use of any machine or device found to contribute to air pollution may be prohibited by Secretary and Secretary has authority to prescribe motor vehicle emission controls, industrial emission controls and establish requirements and prohibitions relating to open burning. (K.S.A. 65-3001 et seq.). Cities and counties authorized to provide for disposal of solid wastes and levy charges on persons receiving service. (K.S.A. 2008 Supp. 65-3410).

Enforcement.

Primary enforcement responsibilities rest with county attorney and may be enforced by attorney general. Enforcement actions may include actions for injunction, mandamus or quo warranto. Certain acts provide for administrative hearings. (K.S.A. 55-1007; 65-171d; 65-188; 65-3001 et seq.; 65-3412; and 65-3414). Secretary may take necessary action to protect health of persons or environment when emission of air pollution presents substantial endangerment to persons or environment or imminent or actual violation of act occurs. Action includes order to owner/operator to prevent or eliminate practice; commencing injunctive action through attorney general or district attorney or seek court order directing compliance. (K.S.A. 65-3012).

Penalties.

Violation of restrictions on disposal of oil or gas filed brines and mineralized waters constitutes a misdemeanor allowing a fine of up to $500 and imprisonment of one year. Each day violation continues is a separate offense. (K.S.A. 55-1003 and 1007). Penalty for discharge of sewage into waters of state without permit allows minimum $2,500 and maximum $25,000 fine and further penalty of not more than $25,000 for each day violation continues. Penalty for discharge without filing report where required is minimum $1,000 and maximum $10,000 per day offense is maintained. (K.S.A. 65-167). Failure to furnish information required by Secretary of Health and Environment relative to discharge a misdemeanor with $50 minimum fine to $500 maximum fine. Failure to comply with requirements of Secretary a misdemeanor with fine ranging from $25 to $100 for each offense and each day constitutes separate offense. (K.S.A. 65-169). Secretary may establish regulations relating to motor vehicle emissions. (K.S.A. 65-3017). Violation of air pollution regulations allows fine not to exceed $10,000 with each day a separate offense. Right of individual to civil action for damage maintained. (K.S.A. 65-3018).

Permits.

Disposal of oil or gas field brines and mineralized waters subject to plan approved by State Corporation Commission. (K.S.A. 55-1003). Permit to discharge sewage, chemical or waste products subject to approval of application accompanied by plans and specifications submitted to Secretary of Health and Environment. (K.S.A. 65-166). Compliance with sanitation zone regulations subject to exceptions where undue hardship shown and where granting of exceptions not unduly harmful to health and welfare of area.(K.S.A. 65-189f). Operation of solid waste processing facility or disposal area unlawful without permit. Application for permit made on forms provided by Secretary of Health and Environment. Fee established by Secretary. (K.S.A. 65-3407). Secretary may require notice be given prior to construction, installation or establishment of air contaminant sources specified in its rules and regulations and may require application for permit prior to construction, installation or establishment of such air contaminant source. Permit may be denied if applicant fails to show other sources under applicant's control comply with applicable standards. Permit fee may be fixed by secretary. (K.S.A. 2008 Supp. 65-3008a).

Hazardous Materials.

Any person who assists in cleaning up hazardous materials accident is not civilly liable for his acts or omissions while mitigating or attempting to mitigate damage or assisting cleanup, unless he caused accident, is compensated for assistance, or is grossly negligent. (K.S.A. 65-3472).

Solid Waste Management.

Protection of health and welfare of citizens requires safe and sanitary disposal of solid wastes. (K.S.A. 65-3401 et seq).

Underground Storage Tanks.

Any storage tank which 10% or more of tank volume, including volume of piping, is below surface of ground. Does not include any storage tank situated in underground area if storage tank is situated upon or above surface of floor. (K.S.A. 65-34,102 et seq).

13 ESTATES AND TRUSTS

13.01 ADMINISTRATION:

See topic Executors and Administrators.

13.02 ADVANCEMENTS:

See topic Descent and Distribution.

13.03 ALLOWANCES:

See topic Executors and Administrators.

13.04 CLAIMS:

See topic Executors and Administrators.

13.05 DEATH:

See category Property, topic Absentees.

Survivorship.

Uniform Simultaneous Death Act adopted. (K.S.A. 58-701).

Action for death may be maintained for damages resulting from wrongful act or omission of another if decedent might have maintained action had he lived. (K.S.A. 60-1901). May be commenced by any of the heirs at law of deceased who sustained a loss by reason of death, and is for exclusive benefit of all of heirs who have sustained loss regardless of whether they join or intervene in action. (K.S.A. 60-1902). No limitation on amount of damages recoverable for pecuniary loss sustained by heir at law, but $250,000 limitation on amount recoverable for intangibles such as mental anguish, suffering, or bereavement; loss of society, companionship, comfort, or protection; loss of marital care, attention, advice or counsel; loss of filial care or attention; and loss of parental care, training, guidance, or education. (K.S.A. 60-1903[a]). If no probate administration for estate of deceased has been commenced, expenses for care of deceased which resulted from wrongful act may also be recovered by any heir who paid or became liable for them, and such expenses, and funeral expenses, are not included in $250,000 limitation. (K.S.A. 60-1904). Jury makes separate awards for pecuniary damages without instruction on limitation on nonpecuniary damages. Court enters judgment for maximum of $250,000 for nonpecuniary loss. (K.S.A. 60-1903[b]). Net amount recovered, after allowance by court of costs and reasonable attorney's fees, must be apportioned by court upon hearing with notice to all known heirs. Apportionment must be in proportion to loss sustained by each of heirs whether or not they joined or intervened in action. In absence of fraud, no person who failed to join or intervene in action may claim any error in such apportionment after order has been entered and funds distributed. (K.S.A. 60-1905).

See also category Civil Actions and Procedure, topic Actions, subhead Abatement and Revival.

Death Certificate.

See category Documents and Records, topic Records, subhead Vital Statistics.

Transfer on Death.

See category Property, topic Deeds, subhead Transfer on Death, and category Transportation, topic Motor Vehicles, subhead Titles and Sales.

Uniform Anatomical Gift Act.

See topic Wills.

Living Wills.

See topic Wills, subhead Living Wills.

13.06 DECEDENTS' ESTATES:

See topics Descent and Distribution, Executors and Administrators, Wills; category Debtor and Creditor, topic Homesteads.

13.07 DESCENT AND DISTRIBUTION:

In case of intestacy, real and personal estate descends and is distributed as follows: (1) Where decedent left surviving spouse and child or children, one-half to surviving spouse and one-half to child or children surviving and living issue, if any, of prior deceased children, but such issue inherit per stirpes; if no surviving spouse, then all to children as aforesaid; (2) if decedent left no issue, whole of estate goes to surviving spouse; (3) if decedent left no surviving spouse or issue, whole of estate goes to parents. If one of parents be dead, whole of estate goes to surviving parent. If both parents be dead, property which would have passed to parents had both been living passes to heirs of such parents, respectively (excluding their respective spouses), same as it would have passed had such parents owned it in equal shares and died intestate, but if either of said parents left no such heirs, then to living heirs of other parent. Each generation in ascending and descending line is counted as one degree of blood relationship and no property will pass except by lineal descent to persons more than six degrees removed from decedent. (K.S.A. 59-502 to 509).

See also topic Executors and Administrators.

Surviving Spouse.

See Introductory Paragraph, supra.

Half Blood.

No statutory provision. Children of half blood inherit equally with children of whole blood from common parent only. (136 Kan. 228, 14 P.2d 722).

Stepchildren do not inherit from brother or sister of half blood, through stepparent. (68 Kan. 53. 74 Pac. 623).

Children.

"Children" means: (1) Biological children, including posthumous child; (2) children adopted as provided by law; and (3) children whose parentage is or has been determined under Kansas Parentage Act or prior law. (K.S.A. 59-501[a]). See category Family, topic Infants, subhead Determination of Parentage.

"Issue" includes adopted children of deceased children or issue. (K.S.A. 59-501[b]).

Determination of Descent.

When person has been dead for more than six months and has left property, and no petition has been filed for probate of will nor administration commenced, any person interested in estate may petition for determination of descent in county of decedent's residence or in any county where any property or any interest in property is situated. (K.S.A. 59-2250). Where real estate is involved, notice must be by publication and mailing. Otherwise, notice is as court directs. (K.S.A. 59-2251). Decree determines descent of property and is conclusive (K.S.A. 59-2251), except that party served only by publication in proceeding to determine descent of real property may within one year have decree opened or set aside (K.S.A. 59-2252).

Informal Administration Act permits one comprehensive notice to interested parties and one court appearance for court approval of plan for disposition of property. May be used for testate and intestate proceedings. (K.S.A. 59-3301).

Advancements.

Property given by way of advancement to heir is considered part of estate and is taken by such heir toward his part of estate. If advancement exceeds amount to which he would be entitled, he cannot be made to refund any portion thereof. If person who received advancement is deceased and property advanced has descended to his heir, advancement is considered as having been made directly to such heir. (K.S.A. 59-510).

Election.

None.

Incapacity to Take.

Person convicted of feloniously killing or obtaining killing of another person cannot inherit or take by will, by intestate succession, as surviving joint tenant, as beneficiary under trust or otherwise any portion of estate or other property in which decedent had interest. When any person kills or causes killing of own spouse and thereafter takes own life, estates and property of both persons disposed of as if deaths were simultaneous. (K.S.A. 59-513). See topic Death.

Renunciation.

Beneficiary may disclaim interest in whole or in part. (K.S.A. 59-2291[a]). Written disclaimer must be filed within nine months latest of: (1) Decedent's death; (2) date taker's interest is finally ascertained both in quality and quantity; or (3) date taker becomes 21 years of age. (K.S.A. 59-2292[a]). Disclaimer must be filed in district court in which estate is or may be administered. (K.S.A. 59-2292[b]). Disclaimer valid to extent it does not conflict with K.S.A. K.S.A. 39-709 eligibility requirements for welfare assistance. (K.S.A. 59-2292[c]).

Effect.

Disclaimer will relate back to death of decedent. Disclaimant will be treated as if he predeceased decedent. Once filed and recorded, disclaimer is irrevocable. (K.S.A. 59-2293).

Escheat.

If intestate decedent leaves no person entitled to receive property as heir, then such property passes to living heirs of intestate's last spouse dying prior to death of intestate, and if there be no such heirs, then estate escheats to state. (K.S.A. 59-514). Where no heirs are found within six months after appointment of an administrator, court must direct decedent's real and personal property to be sold for cash and estate must be closed. Net proceeds of estate are remitted to State Treasurer and become temporarily a part of escheat proceeds suspense fund. (K.S.A. 59-901). Claimant as heir must present his claim to such money or any part thereof to district court not later than ten years after administrator was appointed. (K.S.A. 59-903). If money is paid to such claimant, another person who thereafter establishes claim as heir has no action against state but only against person to whom money was paid. (K.S.A. 59-904).

13.08 ELECTION:

See topic Wills.

13.09 ESTATES (in property):

See topic Decedents' Estates; category Property, topic Real Property.

13.10 EXECUTORS AND ADMINISTRATORS:

Proceedings for probate of will or administration must be in district court of county of residence at time of death if decedent owned real property in that county. If decedent did not own real property in county where he resided at death, probate proceedings allowed in county of death or any county where he owned real property. If decedent nonresident, proceedings may be had in any county wherein he left any estate to be administered. Administration first granted extends to all property within state and is exclusive. (K.S.A. 59-2203).

See topic Wills, subhead Probate.

Preferences in Right to Administer.

Where decedent left will, letters testamentary are granted to executor named in will if he is legally competent and accepts the trust; otherwise letters of administration with will annexed must be granted. (K.S.A. 59-701).

Administration of intestate's estate must be granted, in order, to: (1) Surviving spouses or next of kin or both, or person or persons selected by them; (2) if such persons are incapable, unsuitable or do not accept, one or more creditors or their nominees; (3) if court determines that it is for the best interests of the estate, any other person. (K.S.A. 59-705).

Eligibility and Competency.

In administration of resident's estate letters testamentary may be granted to nonresident upon appointing resident agent. Administrator of intestate estate must be resident and when becomes nonresident, court shall revoke letters until nonresident appoints agent. (K.S.A. 59-706).

Corporate fiduciaries prohibited except for: (1) Banks and savings and loan located in Kansas or in state that would allow Kansas banks or savings and loans as fiduciaries; or (2) other corporations incorporated and having principal place of business in Kansas. (K.S.A. 59-1701[a]).

Qualification.

Executor or administrator must take oath (oath of corporate fiduciary by duly authorized officer [K.S.A. 59-1702]) and execute and file bond with sufficient sureties, approved by court, in such amount as court directs, not less than 125% of value of personalty and probable annual income from real estate which comes into his possession. Court may thereafter order bond increased or reduced or a new bond given. Joint executors or administrators may have separate or joint bonds. Bond may be waived by provision in will to that effect. (K.S.A. 59-1101 et seq.).

Removal.

Fiduciary may be removed whenever he (1) becomes incapable of performing the duties of his trust, or (2) fails or refuses to perform any duties imposed upon him by law or lawful order of the court. (K.S.A. 59-1711).

Special Kinds of Administration.

When person named as executor is minor without rights of majority, administration with will annexed may be granted during his minority or disability unless another executor will accept the trust until the minor arrives at full age or possesses the rights of majority, when he may be admitted as joint executor, (K.S.A. 59-702).

If authority of sole or surviving executor or administrator terminates before estate is fully administered, a new administrator with the same powers and duties as his predecessor must be appointed. (K.S.A. 59-708). For good cause shown court may appoint special administrator to perform particular duties, either before or after appointment of general administrator, without the latter's removal. (K.S.A. 59-710).

Inventory and Appraisal.

Within 30 days after appointment, executor or administrator must make verified inventory of estate coming into his possession or knowledge. (K.S.A. 59-1201). Independent appraisement not required unless requested by party in interest. Appointment subject to approval of court. No more than three allowed. Have 30 days after approval to file appraisement. (K.S.A. 59-1202). Supplemental inventory and appraisal of properties not included in original inventory shall be filed within 30 days after discovery thereof. (K.S.A. 59-1203). Discharge or bequest in will of debt to testator is not valid against creditors, but amount thereof must be included in inventory and if necessary applied to payment of debts. Any claim which testator had against his executor must be included in inventory. Annual crops, severed or not from land at time of his death, are deemed personal property and must be inventoried and administered as such. (K.S.A. 59-1201 et seq.). Representative may employ advisor(s) whose compensation set by court. (K.S.A. 59-1207).

General Powers and Duties.

Personal representative has right to possession of all properties of resident decedent except homestead and allowances for surviving spouse and minor children and to all real and personal property of nonresident within state. Representative must pay taxes, collect rents and earnings, keep in tenantable repair buildings and fixtures under his control, and may, by himself or with heirs or devisees, maintain action for possession of, or to quiet title to, real estate. (K.S.A. 59-1401). Executor or administrator may, with court's consent, authorize representative to continue any business of decedent under such conditions, restrictions, regulations and requirements and for such periods, not exceeding six months for any one period, as court may determine. (K.S.A. 59-1402). Executor or administrator has same right to foreclose mortgage or collect debt secured or complete any such proceedings in that regard, receive money and execute release, as decedent would have had if living. (K.S.A. 59-1403).

Property specifically bequeathed may be delivered to legatee on his giving security for its redelivery. (K.S.A. 59-1406). Executor or administrator may, by court order, compromise any debt or other obligation or pay encumbrances on assets if this appears to be for best interest of estate. (K.S.A. 59-1304).

Required notice of probate proceedings must be given to all interested persons in manner and for time considered reasonable by court. Copies of petition and attachments, will (if applicable), accounting and settlement agreement must be served with notice unless excused by order. (K.S.A. 59-2208).

Until letters testamentary are granted, executor has no power to dispose of any part of estate except to pay reasonable funeral expenses and to conserve the estate. (K.S.A. 59-704).

Executor of executor has no authority to administer estate of first testator. (K.S.A. 59-703).

Notice of Appointment.

Petitioner for administration, probate of will or refusal to grant letters must, within ten days after filing, commence publication of notice to creditors in county newspaper weekly for three consecutive weeks, unless petition filed six months after decedent's death. (K.S.A. 59-709). Notice must be to all creditors concerned, must state date of filing and must notify creditors to exhibit their demands within four months from date of first published notice or be forever barred. (K.S.A. 59-2236). Actual notice must be given to known or reasonably ascertainable creditors. (K.S.A. 59-709[b]).

Notice to Creditors.

See subhead Notice of Appointment, supra.

Form.

No specific form required. The following is in common use:

Form

IN THE DISTRICT COURT OF . . . . COUNTY, KANSAS IN THE MATTER OF

THE ESTATE OF . . . . PETITION PURSUANT TO CHAPTER 59 FOR ALLOWANCE OF DEMAND

Deceased.

. . . ., whose residence and address is . . . ., for and on behalf of . . . . does hereby represent that said estate is indebted to . . . . as herein set forth.

. . . .

Less off-sets of . . . .

Balance due, ...

WHEREFORE, petitioner respectfully requests the Court to fix the time and place for the hearing of this demand and at said hearing to make allowance of said demand, and assign the same to the . . . . Class.

. . . .

Petitioner

By . . . .

STATE OF KANSAS,

COUNTY OF . . . ., ss.

I do solemnly swear that I am the above claimant, or agent of said claimant, and individually, or as such agent, had the management and transaction of the business out of which the above demand originated and have had the means of knowing, personally, the facts set forth above, and same are true; that allowance has been made for all payments and set-offs, and that the amount claimed is justly due said claimant and remains unpaid. So help me God.

. . . .

Subscribed and sworn to before me, this . . . . . day of . . . ., 20 . . .

. . . .

Notary Public

My Appointment expires . . . .

Payment of Claims.

All property of decedent, except homestead and allowances to spouse and minor children, is liable for payment of lawful demands against estate. Unless will provides otherwise, or court otherwise determines, property of testator is applied to payment of debts in following order: (1) Personal property not disposed of by will; (2) real estate not disposed of by will; (3) personal property bequeathed to residuary legatee; (4) real estate devised to residuary legatee; (5) property not specifically bequeathed or devised; (6) property specifically bequeathed or devised. (K.S.A. 59-1405).

Priorities.

If assets are insufficient to pay all demands allowed, payment must be made in following order: (1) reasonable funeral expenses; (2) reasonable and necessary expenses of last sickness and costs of administration; (3) judgments rendered against decedent in his lifetime; and (4) all other demands duly proved and for tombstone if approved by court. Debts having preference by laws of Kansas or U. S. must be paid according to such preference. No demand may be given preference in payment over any other demand of same class, nor may demand due and payable be given preference over demands not due. (K.S.A. 59-1301). If claimant holds security for his demand it must be allowed for full amount due if security has been surrendered, or for remaining amount found due after security has been exhausted. (K.S.A. 59-1303). If estate is solvent executor or administrator may, after four months from notice of his appointment, pay claims in order of classification. (K.S.A. 59-1302).

Sales.

Executor or administrator may lease real estate in his possession for not more than one year or, together with heirs and devisees, for longer than one year; and may execute oil and gas or other mineral lease. Income from lease must be received by executor or administrator as income from such property. (K.S.A. 59-1409).

Executor or administrator may file a petition to sell real estate of decedent whenever necessary for payment of expenses of decedent's funeral, last sickness, servant's wages during last sickness or costs of administration, taxes, debts, legacies charged on such property or whenever court determines realty is wasting asset detrimental to estate, or otherwise determines sale in best interests of estate. Proceeds distributed as if real estate. Bona fide purchaser takes free of all liens and claims of creditors, including lien of state for inheritance taxes, and all such liens and claims are transferred to proceeds of sale. (K.S.A. 59-1410). When such petition is filed, court must fix time and place for hearing and notice of same must be published as court directs. (K.S.A. 59-2304). Petition for lease for three years or less may be heard with or without notice. (K.S.A. 59-2302). On hearing of petition, court may order sale, lease or mortgage of real estate described in petition, and manner thereof, and with consent of mortgagee may order sale of real estate subject to mortgage. (K.S.A. 59-2304). Such consent releases estate should deficit appear later. (K.S.A. 59-2304). Lease cannot be made for less than three-fourths of appraised value of lease-hold interest, and realty cannot be sold at private sale for less than three-fourths of its appraised value. (K.S.A. 59-2305). Appraisal in both cases is made by no more than three disinterested persons appointed by personal representative and approved by court. (K.S.A. 59-2307). Notice of public sale must be given by weekly publication for three consecutive weeks in newspaper of county in which real estate is located, and sale may not be held earlier than seven nor later than 14 days after date of last publication of notice. (K.S.A. 59-2308). Sale must be confirmed and execution of deed ordered. (K.S.A. 59-2309).

Sale of any property may be made by executor or administrator with will annexed without order of district court if will authorizes executor to sell such property. (K.S.A. 59-1413).

Actions against Representative.

Claims against estate of decedent may be made by filing verified petition for allowance in district court, stating nature of demand and all offsets. Petitioner must provide copy of demand to personal representative of estate. Court from time to time after proper hearing must enter its judgment allowing or disallowing. Verified claim under $5,000 may be allowed by executor or administrator without filing and allowance by court. (K.S.A. 59-2237). If action was pending against decedent at time of death, which by law survives, it is revived in court where action pending, and is considered demand legally exhibited from time of revival; if action commenced against administrator or executor after death of decedent, it is considered demand legally exhibited from time of serving process on administrator or executor; judgment creditors in such cases must file certified copy of such judgment in district court within 30 days after judgment is final. (K.S.A. 59-2238). Demands payable at future date may be allowed at then present value thereof or court may order executor or administrator to retain sufficient funds to satisfy same at maturity, or heirs, devisees, or legatees may give bond in satisfaction thereof. (K.S.A. 59-2240).

All demands against decedent's estate (including action in tort or for wrongful death [157 Kan. 336, 139 P.2d 401], and any "demand" that amounts to contest of will [158 Kan. 345, 148 P.2d 278]), due or to become due, absolute or contingent, including demands arising out of any statutory or suretyship liability of decedent, not exhibited within four months after date of first published notice to creditors or within 30 days of notice to known creditor, whichever is later, are forever barred from payment, unless testator's will requires payment of demand exhibited later. No creditor may have any claim against estate, other than liens existing at date of death, unless petition filed for probate of will or administration of estate within six months after death of decedent and creditor has exhibited his demand in manner and within time above described. (K.S.A. 59-2239).

Allowances.

After inventory and appraisement have been filed, surviving spouse of Kansas decedent, on petition to court, must be allowed from personal or real property, for benefit of such spouse and decedent's minor children during minority, wearing apparel, family library, pictures and musical instruments, furniture and household goods, utensils and implements used in the home, one automobile, provisions and fuel on hand necessary for support of spouse and minor children for one year, and not more than $50,000 cash or other personal or real property at appraised value in full or part payment thereof. If no minor children, such property belongs to spouse. If there are minor children and no spouse, it belongs to minor children. Selection must be made by spouse, if living; otherwise by guardian of minor children. (K.S.A. 59-403). Surviving spouse, by electing to take under will of decedent, or by consenting thereto, does not waive homestead right nor right to allowances unless will clearly provides otherwise. (K.S.A. 59-404).

Widow's Quarantine.

None.

Intermediate Accountings.

If prior to final settlement, there is sufficient money to pay all demands against estate, personal representative may pay legacies and distributive shares (satisfying specific legacies first) upon court order. (K.S.A. 59-1503).

Final Accounting and Settlement.

Executor or administrator has nine months from date of appointment for settlement of estate. Administrator de bonis non has such time, not exceeding nine months, as court may determine. Period may be extended by court not exceeding nine months at a time. (K.S.A. 59-1501). If four months have not passed since date of death, representative may not be compelled to pay partial distribution unless redelivery bond and court so orders. (K.S.A. 59-1503). Personal representative must present verified account within time limited and make application to court to settle and allow account and assign estate to persons entitled thereto. (K.S.A. 59-1502). If title to real property is to be assigned, notice of hearing for final account and settlement must be published weekly for three consecutive weeks in county newspaper, beginning within ten days after order fixing time and place of hearing, and copy of notice, and petition and attachments, will, accounting and settlement agreement, when applicable, must be mailed to each known heir, devisee or legatee within seven days after first published notice. (K.S.A. 59-224 and 2209). Otherwise notice is as court directs. (K.S.A. 59-2247 and 2208). On hearing, court must determine heirs, devisees and legatees entitled to estate, and if it appears that there is sufficient money to satisfy all demands against estate, must assign and make distribution of legacies and shares by its decree. Said decree is binding as to all of decedent's estate, but no final decree may be entered until after determination and payment of inheritance taxes. If distributee is defendant of garnishment and executor or administrator is garnishee no funds may be delivered to distributee until order of court issuing garnishment. (K.S.A. 59-2249).

If by will use or income of personal property is given to person for term of years or for life, and another person has interest in such property as remainderman, court, unless will provides otherwise, may order such property delivered to or held for benefit of person having limited estate. (K.S.A. 59-1506).

After executor or administrator has transferred all property of the estate to the persons entitled thereto, paid taxes required to be paid by him, and otherwise fully discharged his trust, the court must finally discharge. (K.S.A. 59-1718).

Distribution.

If any part of unclaimed money has not been paid over because person entitled thereto cannot be found or refuses to accept the same, "or for any other good and sufficient reason" the court may order it paid to the County Treasurer. (K.S.A. 59-1508).

Liabilities.

Any fiduciary who embezzles or converts any personal property of decedent is liable for double the value thereof. (K.S.A. 59-1704).

Compensation of Representatives.

Personal representative is allowed necessary expenses and reasonable compensation for services and attorney fees of estate. (K.S.A. 59-1717). If will makes provision for executor's compensation, this must be taken as full compensation unless executor files waiver of will's provisions. Heir or beneficiary who prosecutes or defends action for benefit of estate may receive expenses. (K.S.A. 59-1504). Executor or administrator failing or refusing to perform any duty imposed by law may be removed and compensation reduced or forfeited in discretion of court. (K.S.A. 59-1711).

When Administration Unnecessary.

Where decedent has been dead more than six months and no petition has been filed for probate of will nor administration commenced in this state, then short proceeding to determine heirs may be filed. (K.S.A. 59-2250). See topic Descent and Distribution, subhead Determination of Descent.

When established that personal estate of decedent does not exceed $40,000 said assets transferrable to successors of decedent by affidavit. (K.S.A. 59-1507b). Court may remit court costs where total assets of estate do not exceed $5,000. (K.S.A. 59-2215). See subhead Estate of Nonresidents, infra.

Small Estates.

Simplified Estates Act, see topic Wills, subhead Probate.

Informal Administration Act (K.S.A. 59-3301) provides for one comprehensive notice of all assets to interested parties (K.S.A. 59-3301) and one court appearance for approval of dispositional plan for property (K.S.A. 59-3301). Act applies to testate and intestate proceedings. (K.S.A. 59-3302). Required contents of petition are specified in K.S.A. 59-3302. Court may determine informal administration is not appropriate because of contested matter, need for administration, disagreement among beneficiaries or other circumstances. (K.S.A. 59-3305).

Estates of Nonresidents.

Administered with respect to all property within jurisdiction as original proceedings as if decedent were resident. (K.S.A. 59-804). To avoid hardship to creditors or others, court may order distribution to foreign personal representative or may find administration unnecessary and order distribution. If liabilities exceed assets, court must distribute pro rata to creditors here and elsewhere with regard to preferential rights. (K.S.A. 59-806). Nonresident may be appointed executor or administrator. (K.S.A. 59-807). Intestate estate personal property passes under laws of place of residence at death; real estate governed by laws of Kansas. (K.S.A. 59-806). See topic Wills, subheads Foreign Executed Wills and Foreign Probated Wills.

Determination of Descent.

Where decedent has been dead more than six months, no will has been filed under K.S.A. 59-618a, no petition has been filed for probate of will nor administration commenced in this state, then short proceeding to determine heirs may be filed. (K.S.A. 59-2250). See topic Descent and Distribution, subhead Determination of Descent.

Foreign executors or administrators, on filing in proper district court proof of authority, and appointment of resident agent to receive service of process (K.S.A. 59-1706), may assign, extend, release, satisfy or foreclose any mortgage, judgment or other lien, or collect any debt secured thereby, belonging to the estate. They must follow same proceeding as domestic representative in making sale, lease or mortgage of real property acquired on execution or judicial sale. (K.S.A. 59-1707).

Foreign executor or administrator may sue or be sued in any Kansas court in like manner and under like circumstances as nonresident may sue or be sued. (K.S.A. 59-1708).

Foreign Beneficiaries.

If it appears that a citizen of a foreign country is interested in estate, district court must notify consular representative of such country for Kansas, provided such consular representative has filed his credentials with probate court. Failure to give such notice does not affect validity of any proceeding. (K.S.A. 59-1705).

See also subhead Unclaimed Money, supra.

Uniform Disclaimer of Transfers by Will, Intestacy or Appointment Act and Uniform Disclaimer of Transfers Under Nontestamentary Instruments Act, combined and adopted with modification. (K.S.A. 59-2291).

Uniform Fiduciaries Act not adopted.

Uniform Principal and Income Act adopted. (K.S.A. 58-901 to 913).

Uniform Simplification of Fiduciary Security Transfers Act adopted. (K.S.A. 17-4903 to 4913). Uniform Commercial Code (K.S.A. 84-1-101 et seq.) specifically provides that it does not repeal this uniform act and if any inconsistency between two, provisions of Simplification of Fiduciary Security Transfers Act control. (K.S.A. 84-10-101[2]).

Uniform Anatomical Gift Act.

See topic Wills.

13.11 FIDUCIARIES:

See topics Executors and Administrators, and Trusts; also category Family, topic Guardian and Ward.

13.12 INTESTACY:

See topic Descent and Distribution.

13.13 LIVING WILLS:

See topic Wills.

13.14 PROOF OF CLAIMS:

See topic Executors and Administrators; also category Civil Actions and Procedure, topic Pleading.

13.15 TRUSTS:

Kinds.

Testamentary Trusts.

Actions must be brought in district court under c. 59 (Probate Code). (K.S.A. 59-103).

Inter Vivos Trusts.

Actions must be brought in district court under c. 60 (Code of Civil Procedure), except that trusts in favor of imprisoned convicts or persons subject to conservatorship are treated as testamentary trusts. (K.S.A. 59-103[a]).

Implied trusts arise by operation of law.

“Business”, “Common Law” or “Massachusetts” Trust.

See category 2 Business Organizations, topic 2.02 Associations.

Creation.

Express trust created by: (1) Explicit declaration with intent to create; (2) definite property or subject matter; and (3) acceptance of subject matter by trustee. (241 Kan. 698, 740 P.2d 571). If subject matter is real property, must be created by writing signed by settlor (K.S.A. 58-2401) and executed like conveyance (K.S.A. 58-2210).

Resulting Trust.

When conveyance for valuable consideration is made to one person but consideration is paid by another, title vests in grantee and no use or trust results in favor of person paying consideration. (K.S.A. 58-2406). However conveyance is presumed fraudulent as to creditors of person paying consideration. If fraudulent intent not disproved, trust will result in favor of prior creditors to extent of just demands and, if sufficient evidence of fraudulent intent, in favor of subsequent creditors. (K.S.A. 58-2407). Trust will also result if grantee takes conveyance in own name without consent of person paying consideration, if purchase money belonged to another and was used in violation of trust, or if party buying and party advancing money intended for trust to arise. (K.S.A. 58-2408).

Trust Purposes.

Trusts are generally prohibited from directly or indirectly owning or leasing agricultural land in Kansas. Prohibition does not apply to: (1) Defined family and testamentary trusts; (2) certain authorized trusts; and (3) agricultural land held by charitable nonprofit corporation, held for nonfarm purposes, or acquired by process of law if divested within 10 years. (K.S.A. 17-5904).

Trust for use of settlor void as to all creditors. (K.S.A. 33-101).

Cy-Pres doctrine codified. (K.S.A. 59-22a01).

Appointment of Trustee.

Testamentary Trusts.

District court appoints. If nominee unsuitable, court may appoint another. (6 Kan. App. 2d 1001, 637 P.2d 444).

Inter Vivos Trust.

Settlor appoints.

Eligibility and Competency.

Corporate fiduciaries prohibited except for: (1) Banks and savings and loans located in Kansas or in state that would allow Kansas banks or savings and loans as fiduciaries; or (2) other corporations incorporated and having principal place of business in Kansas. (K.S.A. 59-1701[a]).

Qualification.

Trustee, before entering on duties, must take oath unless qualification with court has been excused or waived. (K.S.A. 59-1702). Court may require bond of at least 125% of value of personal property and probable annual income from real estate which will come into trustee's possession (K.S.A. 59-1101), unless: (1) Will or trust agreement waives bond; (2) all beneficiaries file written waiver; or (3) trustee is bank with trust authority or trust company organized and having principal place of business in Kansas (K.S.A. 59-1104). Court may increase or decrease bond. (K.S.A. 59-1106).

Foreign fiduciary must appoint agent residing in county of appointment and consent to service on agent. Writing must state agent's address, acceptance of appointment by agent, and must be filed in district court. (K.S.A. 59-1706).

Removal of Trustee.

District court on petition and after hearing may remove trustee for breach of trust or other good cause. Court may also remove trustee if incapacitated or otherwise incapable of performing trust duties or for failure or refusal to perform any duty imposed by law or court order. (K.S.A. 59-1711).

General Powers and Duties of Trustees.

Trustee has power, without court authorization, as provided by trust, as if acting as individual, and as conferred by this code.

Foreign Fiduciary.

Fiduciary appointed by court of competent jurisdiction in another state or country must file authenticated copy of fiduciary's letters or other record of authority and certificate that authority is still in force in district court of proper county. (K.S.A. 59-1707).

Sales.

Sale of land in contravention of trust will not defeat title of bona fide purchaser without notice of trust. (K.S.A. 58-2402).

Investments.

(K.S.A. 17-5001 et seq.).

Securities in Name of Nominee.

Bank or trust company may appoint nominee. (K.S.A. 9-1607).

Bequests and Devises to Inter Vivos Trusts.

See topic 13.16 Wills.

Accounting.

Testamentary Trust.

Within 30 days after end of each annual trust period or termination of trust, trustee must file accounting in district court of county where will was probated showing: (1) Period account covers; (2) complete statement of trust capital and income received and expended; (3) present investments and other trust property held; (4) names and addresses of beneficiaries and which, if any, are minors or incapacitated; (5) proposed distribution; (6) payment of expenses, commissions and counsel fees; and (7) such other facts as court may require. (K.S.A. 59-1602, K.S.A. 59-1603, Sup. Ct. Rule 109). Distribution accounting must be filed within 30 days of distribution. (K.S.A. 59-1604).

Accounting is required on resignation of fiduciary (K.S.A. 59-1709) or death or disability of sole or last surviving fiduciary (K.S.A. 59-1712).

Inter Vivos.

No specific statutory provisions.

Compensation.

Testamentary Trust.

On application to district court fiduciary is allowed necessary expenses, reasonable compensation and reasonable attorney fees. (K.S.A. 59-1717). Court may reduce or forfeit compensation if fiduciary is removed for failing or refusing to perform lawful duties. (K.S.A. 59-1711).

Discharge.

Trustee of any express trust may resign by petitioning district court. Court accepts resignation and discharges trustee on terms set by court. (K.S.A. 58-2411).

Testamentary Trust.

Court may discharge trustee upon approved intermediate distribution accounting (K.S.A. 59-2255) or upon final distribution if trustee has otherwise fully discharged his duties (K.S.A. 59-1718).

Uniform Common Trust Fund Act.

Adopted. (K.S.A. 9-1609 and 9-1610). Official amendment not adopted.

Revised Uniform Principal and Income Act.

Adopted. (K.S.A. 58-901 et seq.).

Gifts to Minors.

See category Family, topic Infants.

Uniform Fiduciaries Act.

Not adopted.

Uniform Simplification of Fiduciary Security Transfers Act adopted. (K.S.A. 17-4903 to 4913). Uniform Commercial Code (K.S.A. 84-1-101 et seq.) specifically provides that it does not repeal this uniform act and if any inconsistency between two, provisions of Simplification of Fiduciary Security Transfers Act control. (K.S.A. 84-10-101[2]).

Accumulations.

No statutory provisions.

Perpetuities.

See category Property, topic Perpetuities.

Pour Over Trusts.

See topic Wills, subhead Bequests and Devises to Inter Vivos Trusts.

Renunciation.

Beneficiary of testamentary or inter vivos trust may disclaim any interest in whole or in part. (K.S.A. 59-2291[a]). Disclaimer must: (1) Describe interest subject to disclaimer; (2) contain declaration of disclaimer and extent thereof; and (3) be signed and acknowledged by disclaimant. (K.S.A. 59-2291[b]). Disclaimer must be filed and recorded in district court within nine months after latest of: (1) Death of decedent; (2) date taker's interest becomes finally ascertained and fixed both in quality and quantity; or (3) date taker becomes 21 years of age. (K.S.A. 59-2292). Disclaimer valid to extent it does not conflict with K.S.A. 39-709. (K.S.A. 59-2292[c]).

13.16 WILLS:

Any person of sound mind and possessing rights of majority may dispose of property by will, subject to statutory provisions. (K.S.A. 59-601). To be effectual, will must be admitted to probate. (K.S.A. 59-616).

Uniform Probate Code.

Not adopted.

Testamentary Disposition.

There is no limitation as to amount or time of making of devise or bequest to religious, charitable and educational institutions.

Any devise of real estate located in Kansas and any bequest of personal property by resident of Kansas, to, or in trust for, any foreign country, subdivision or city, body politic or corporation of such foreign country, except devises and bequests to religious, charitable and educational institutions, is void. (K.S.A. 59-602).

Execution.

Every will, except an oral will, must be in writing signed at end by testator, or someone for him in his presence and at his express direction, and must be attested and subscribed in presence of testator by two or more competent witnesses, who saw testator subscribe or heard him acknowledge same. Will may be made self-proved, at execution or during lifetime of testator and witnesses, by their affidavit acknowledged and sealed by proper officers. Codicil or election to take under will may be proved in same manner. (K.S.A. 59-606).

Forms

Attestation Clause: In witness whereof, I have hereunto subscribed my name this . . . . . day of . . . . . ., in the presence of A. B. and C. D., whom I have requested to become attesting witnesses hereto.

(Signature of testator).

The foregoing instrument was subscribed, published and declared by (name of testator) as and for his last will and testament in our presence and in the presence of each of us, and we, at the same time, at his request, in his presence, and in the presence of each other, hereunto subscribe our names as attesting witnesses, this . . . . . . day of . . . .

(Signatures of both witnesses).

Spouse's Consent: I, A. B., wife (or husband) of C. D., do hereby consent to each and all of the terms and provisions of the foregoing last will and testament of the same C. D., and, having been fully advised of my rights under the law and being fully acquainted therewith, do hereby accept the provision made in said will for me, expressly waiving any and all rights that I have or might have as his wife (or husband) in or to his (or her) property under the law. In witness whereof, I have hereunto subscribed my name in the presence of two witnesses in the city of . . . . . ., County of . . . . . ., State of . . . . . ., this . . . . . . day of . . . .

(Signature of wife or husband).

Testator and Witnesses Affidavit:

State of Kansas . . . .

County of . . . .   }   ss.

Before me, the undersigned authority, on this day personally appeared . . . ., ..., and . . . ., known to me to be the testator and witnesses, respectively, whose names are subscribed to the annexed or foregoing instrument in their respective capacities, and, all of said persons being by me first duly sworn, said . . . ., testator, declared to me and to the said witnesses in my presence that said instrument is his last will and testament, and that he had willingly made and executed it as his free and voluntary act and deed for the purposes therein expressed; and the said witnesses, each on his oath stated to me, in the presence and hearing of said testator that the said testator had declared to them that said instrument is his last will and testament, and that he executed same as such and wanted each of them to sign it as a witness; and upon their oaths each witness stated further that they did sign the same as witnesses in the presence of each other and in the presence of the testator and at his request, and that said testator at that time possessed the rights of majority, was of sound mind and under no restraint.

. . . .

(Testator)

. . . .

(Witness)

. . . .

(Witness)

Subscribed, acknowledged and sworn to before me by . . . ., testator, and . . . . and . . . ., witnesses, this . . . . . day of . . . ., A.D., ...

(Seal) (Signed) . . . .

. . . .

(Official capacity of officer)

(Certificate concerning witnesses similar to that in attestation clause of will, followed by signatures of two witnesses). (K.S.A. 59-606).

Holographic Wills.

Holographic wills are not recognized.

Nuncupative Wills.

Nuncupative will made in last sickness is valid in respect to personal property if reduced to writing and subscribed by two disinterested witnesses within 30 days after speaking of testamentary words, when testator called on some person present to bear testimony to said disposition as his will. (K.S.A. 59-608).

Revocation.

Will is revoked by some other will in writing; by some other writing of testator declaring such revocation, executed with formalities required for execution of will; by burning, tearing, canceling, obliterating or destroying such will with intent and purpose of revoking same by testator or by another in his presence by his direction. If, after making a will, testator marries and has child by birth or adoption, will is revoked. If, after making will, testator is divorced, all provisions in such will in favor of the testator's spouse so divorced are thereby revoked. (K.S.A. 59-610 and 611).

Revival.

Revocation of second will does not revive first unless it appears by terms of revocation that such was testator's intention or unless first will is duly republished. (K.S.A. 59-612).

Testamentary Gifts to Subscribing Witnesses.

Void if testimony is required to prove will. But if such witness would have been entitled to share of estate in absence of will, so much of such share as does not exceed value of devise or bequest will pass from part of estate included in void devise or bequest. (K.S.A. 59-604).

Bequests and Devises to Inter Vivos Trusts.

Pour over trusts valid. Trust instrument may be amended after date of will. (K.S.A. 59-3101). Uniform Testamentary Additions to Trusts Act adopted. (K.S.A. 59-3101 et seq.).

Testamentary Guardians.

See category Family, topic Guardian and Ward.

Probate proceedings are had in district court in county of decedent's last residence, if decedent owned real property in that county. If decedent did not own real property in county where he resided at death, probate proceedings allowed in county of death or any county where he owned real property. If decedent nonresident, proceedings in county where he left estate to be administered. (K.S.A. 59-2203). After petition is filed, court fixes time and place for hearing and statutory notice of same must be given unless court orders otherwise. All parties interested may, when petition is filed, enter their appearance in writing, waive notice required and consent to immediate hearing, which may be had. Any heir, devisee or legatee may prosecute or oppose probate of any will. (K.S.A. 59-2219 et seq.).

Undue Influence.

If will prepared by beneficiary (includes parent, children, issue, sibling or spouse) gift is invalid unless gift does not exceed intestate share or testator had independent legal advice. (K.S.A. 59-605).

Time for Filing Petition.

Will is not effective to pass real or personal property unless petition is filed for probate of such will within six months after testator's death. (K.S.A. 59-617). Person who has possession of will or knowingly withholds same from probate for more than six months forfeits all rights under will and is liable for all damages and reasonable attorney fees sustained by beneficiaries; but will may be probated as to any innocent beneficiary within 90 days after he has knowledge of will and access thereto, if within five years after testator's death, although title of innocent purchaser in good faith, without knowledge of will, is not defeated if application for probate is not filed within six months after testator's death. (K.S.A. 59-618). If estate contains no real property and value of assets less than claims specified in K.S.A. 59-1301, person possessing will may file it and affidavit pursuant to K.S.A. 59-618a(b) to preserve will for record in case probate is necessary later. (K.S.A. 59-618a). Oral will of testator who died while resident of Kansas is not admitted to probate unless application for probate is made within six months after testator's death except as provided by K.S.A. 59-2229 and 2230. (K.S.A. 59-619).

Simplified Estates Act provides for administration without supervision. (K.S.A. 59-3201 et seq.). Request for procedure made in petition. (K.S.A. 59-2219). Notice given parties, advising of procedure, stating court will not take part in administration unless written objection filed. (K.S.A. 59-2222). Once estate opened under act, further court supervision unnecessary until closing estate, unless executor or administrator requests court determination of proceeding or act. (K.S.A. 59-3205). Executor or administrator may sell, liquidate or exchange personal property not specifically bequeathed or make distribution subject to bond, prior to closing. (K.S.A. 59-3204). Court may terminate administration under act if valid objection filed or executor or administrator shows procedure disadvantageous under circumstances. (K.S.A. 59-3206).

Informal Administration Act provides for one comprehensive notice to interested parties and one court appearance for approval of plan for disposition of property if court finds there are no contested matters. (K.S.A. 59-3301 et seq.).

Lost will may be established if its provisions are clearly and distinctly proved. (K.S.A. 59-2228).

Self-proved Wills.

Will may be made self-proved, at execution or during lifetime of testator and witnesses by their affidavit acknowledged and sealed by officer authorized to administer oaths. Codicil or election to take under will may be proved in same manner. Self-proved will, unless contested, shall be admitted to probate without testimony of subscribing witnesses. Form and contents of affidavits should be substantially similar to those under subhead Forms. (K.S.A. 59-606).

Living Wills.

Any adult person may execute declaration directing withholding or withdrawal of life-sustaining procedures in terminal condition. Form must be executed like will or acknowledged before notary public. (K.S.A. 65-28,103[a]). Statutory form provided. (K.S.A. 65-28,103[c]).

Contest.

Will must be proved before judgment or decree may issue, verified petition sufficient absent written defenses or appearance by adverse party. (K.S.A. 59-2213). Proof may be either by self-proof or by testimony and affidavit, but if self-proved will is contested it must be proved by testimony, affidavits or depositions. Court may waive testimony of witnesses upon showing of unavailability. (K.S.A. 59-2224). Contest is made when will is presented for probate. (K.S.A. 59-2225). Order admitting will to probate must be appealed no later than 30 days of entry. (K.S.A. 59-2401[a]). If after will is admitted to probate another will is presented, probate proceedings will be held for second will. If second will admitted to probate, order admitting first will is revoked. (K.S.A. 59-2226).

Legacies.

Time for Payment.

May be paid on order of court at any time prior to final settlement if estate has sufficient money to satisfy all demands. Specific legacies must be first satisfied. (K.S.A. 59-1503).

Ademption.

Whether inter vivos gift to legatee works ademption by satisfaction depends on intention of testator when gift was made. (222 Kan. 245, 564 P.2d 472).

Unclaimed Legacies.

Court may order unclaimed legacies paid to county treasurer and held for ten years. After ten years no recovery may be had. (K.S.A. 59-1508).

Lapse.

Where will makes devise or bequest to spouse, relative by lineal descent or within sixth degree, whether by blood or adoption, and spouse or relative dies before testator leaving issue surviving testator, such issue shall take estate said devisee or legatee entitled to had he survived unless will otherwise provides. In will executed after July 1, 1973, unless provisions of will otherwise provide, term “issue” means offspring, progeny, or lineal descendants, by blood or adoption, in whatever degree. (K.S.A. 59-615).

Children.

Living Children Not Provided for in Will.

No statute or case law requires affirmative showing of intent to disinherit.

Children Born after Execution of Will.

If, after making will, testator marries and has child, will is thereby revoked. (K.S.A. 59-610). No other statute or case law.

Election.

Surviving spouse may take elective share determined by length of marriage. (K.S.A. 59-6a202). Election against will is made by filing written instrument within six months after probate of will with district court. (K.S.A. 59-6a211). If surviving spouse has consented to will consent controls. (K.S.A. 59-6a213). If surviving spouse is incapacitated, court must order election if more favorable than will to spouse. (K.S.A. 59-2234).

Contribution.

Unless will provides otherwise or court in interest of estate otherwise determines, property subject to payment of debts or other items exhausted in following order (all of one class to contribute ratably if all property therein not required): (1) Personal property not disposed of by will; (2) real estate not disposed of by will; (3) personal property bequeathed to residuary legatee; (4) real estate devised to residuary devisee; (5) property not specifically bequeathed or devised; (6) property specifically bequeathed or devised. (K.S.A. 59-1405).

Renunciation.

Beneficiary may disclaim in whole or in part any real or personal property or any interest therein. (K.S.A. 59-2291[a]). Disclaimer is by written instrument filed within nine months of latest of: (1) Death of decedent; (2) date that taker's interest is ascertained and becomes indefeasibly fixed in quality and quantity; or (3) date taker becomes 21 years of age. (K.S.A. 59-2292). Disclaimer valid to extent it does not conflict with K.S.A. 39-709. (K.S.A. 59-2292[c]).

Foreign Executed Wills.

Will executed outside Kansas is valid if in writing and signed at end by testator and executed according to: (1) Kansas law; (2) law of place of execution; or (3) law of testator's residence either at time of execution or time of death. (K.S.A. 59-609). This is variation of Uniform Wills Act, Foreign Executed.

Foreign Probated Wills.

Authenticated copies of will duly executed and proved according to laws of any other state or territory, relative to any property in Kansas, may be admitted to probate or record at any time in district court of any county where any part of such property is situated. Authenticated copies so admitted to probate or record have same validity as wills made in Kansas in conformity with laws thereof. (K.S.A. 59-806).

Procedure.

Verified petition with notice of hearing same as in resident decedent's estate required to admit authenticated copy of will to probate or record. Title of good faith purchaser of estate property shall not be defeated by production of will and petition to probate after expiration of six months from testator's death. (K.S.A. 59-2229 and 2230).

Administration.

Same, with respect to all property within jurisdiction, as original proceedings as if decedent were resident (K.S.A. 59-804) and assets distributed: (1) Personal property according to terms of will applicable, but if no will applicable, then according to law of decedent's residence; and (2) real property is assigned according to terms of will applicable, but if no will applicable, then according to laws of Kansas. (K.S.A. 59-806).

See also topic Executors and Administrators, subhead Estates of Nonresidents.

Simultaneous Death.

See topic Death, subhead Survivorship.

Testamentary Trusts.

See topic Trusts.

Transfer on Death.

See categories Property, topic Deeds; and Transportation, topic Motor Vehicles.

Revised Uniform Anatomical Gift Act.

Adopted. (K.S.A 65-3220 et seq.). No material variations.

14 FAMILY

14.01 ADOPTION:

Kansas Adoption and Relinquishment Act. (K.S.A. 59-2111 et seq.).

Any adult, or husband and wife jointly may adopt minor or adult as their child, except one spouse cannot do so without consent of other.

Consent Required.

Must be given in writing acknowledged by: (1) Living parents of child; (2) one of parents if other failed to assume duties of parent for two consecutive years or is incapable of consenting; (3) legal guardian if both parents dead or if both failed to assume duties of parent for two consecutive years; (4) court entering order under K.S.A. 38-1584(c)(1)(B); (5) judge of court with jurisdiction over child if parental rights not terminated; (6) child if over 14 and of sound intellect. (K.S.A. 59-2105). Minority of parent does not invalidate consent.

Consent acknowledged before judge of court of record. Court must advise consenting person of consequences. Consent is final when executed unless consenting party, prior to final decree of adoption, alleges and proves by clear and convincing evidence that consent was not freely and voluntarily given.

Consent or relinquishment may not be given by mother or accepted until 12 hours after birth.

Consent or relinquishment executed and acknowledged outside of Kansas in accordance with Kansas law or law of place where executed is valid.

See topic Infants, subhead Termination of Parental Rights.

Conditions Precedent.

None.

Jurisdiction.

District court has jurisdiction.

Venue.

In county of residence of adopting party or in county where child resides, except if child is in custody of agency authorized to place child for adoption, venue is in county where agency is located. If adopting party resides upon or is stationed at U.S. military post or reservation within Kansas and child resides with adopting party, venue is proper in county where post is located or in any immediately adjacent county.

Petition must state: (1) Medical and social history of child and parents; (2) names, addresses and telephone numbers of child's biological parents, if known; (3) any hospital records for child or properly executed release for such records; (4) child's birth verification, including date, time and place of birth and name of attending physician. See K.A.R. 30-45-1 thru -4 for detailed requirements.

Proceedings.

Minor Child.

Hearing must be held between 30 and 60 days after petition is filed.

Notice must be given to parents or presumed parents, unless parental rights have been terminated, and any other persons as court directs.

Except for stepparent adoption, court must require petitioner to obtain adoption advisability assessment by licensed social worker or adoption placement agency. For nonresidents, assessment must be completed in petitioner's state of residence. Assessment must be less than one year old when petition is filed. Assessment must be filed with court not less than ten days before hearing on petition.

See topic Infants, subhead Termination of Parental Rights.

Adult.

Petition may be heard forthwith, with or without notice, in court's discretion.

Decree.

Final order of adoption entered after hearing on petition. No interlocutory decree, however court may make appropriate order for care and custody of child pending hearing.

Name.

Child assumes surname of adoptive parent, but court may permit different surname upon request. Upon request, given name may be changed.

Effect of Adoption.

Adopted child entitled to same personal and property rights as natural child of adoptive parent. Adoptive parent has all rights and liabilities of natural parent.

Upon adoption natural parent's rights cease, including right to inherit from child, except for natural parent who is spouse of adopting parent.

Setting Aside Adoption.

Adoption proceeding not subject to collateral attack unless record affirmatively shows lack of jurisdiction. (215 Kan. 102, 523 P.2d 743).

Charges.

Request for, offer of, gift of or receipt of consideration in connection with adoption is prohibited except reasonable legal fees, reasonable fees of licenced child-placing agency, actual and necessary expenses incident to placement and proceeding, actual medical expenses for child and mother due to pregnancy and birth, and reasonable living expenses incurred by mother during or as result of pregnancy. Court reviews all expenditures.

Record of adoption proceeding is not open to public inspection.

Interstate Compact on Adoption and Medical Assistance.

Entered into July 1, 1985. (K.S.A. 38-336).

14.02 ALIMONY:

See topic Dissolution of Marriage or See topic Divorce.

14.03 COMMUNITY PROPERTY:

See topic Divorce or See topic Dissolution of Marriage.

14.04 DESERTION:

See Topics Dissolution of Marriage; Husband and Wife or See topics Divorce; Husband and Wife.

14.05 DISSOLUTION OF MARRIAGE:

See topic Divorce.

14.06 DIVORCE:

This subject is governed by K.S.A. 60-1601 et seq.

Protection from Abuse.

Act provides emergency relief to protect household members from abusive treatment by person with whom petitioner resides or has resided or has child in common. (K.S.A. 60-3101 et seq.). Any person on own behalf of parent or adult residing with minor on behalf of minor may seek relief by filing petition. Service of process shall be personal and not by certified mail, return receipt requested. (K.S.A. 60-3104). Abuse defined at K.S.A. 60-3102. District judge may grant relief out of court when court not in session. Order issued ex parte expires at 5:00 p.m. on first day court resumes regular business. (K.S.A. 60-3105). Hearing on petition must be held within 20 days and plaintiff must prove abuse by preponderance of evidence. Defendant must have opportunity to present evidence. (K.S.A. 60-3106). Court may approve consent agreement or grant following relief: (1) Direct defendant to refrain from abuse; (2) grant possession of residence or household to plaintiff to exclusion of defendant; (3) require defendant to provide suitable alternate housing for plaintiff and minor children of parties; (4) award temporary custody and establish temporary parenting time; (5) order law enforcement officer to evict defendant from residence or household; (6) order support payments by party for support of party’s minor child, if party is father or mother of child, or plaintiff, if plaintiff is married to defendant; (7) award costs and attorney fees; (8) make provision for possession of personal property; (9) require person against whom order is issued to seek counseling. (K.S.A. 60-3107[a]). No order shall be entered against plaintiff unless (1) defendant properly files written cross or counter petition; (2) plaintiff had reasonable notice of written cross or counter petition by personal service; and (3) issuing court made specific findings of abuse against both plaintiff and defendant and determined both parties acted primarily as aggressors and neither party acted primarily in self defense. (K.S.A. 60-3107[b]). Limitations in length of support order (K.S.A. 60-3107) and number of petitions each year (K.S.A. 60-3111).

Grounds for Divorce or Separate Maintenance.

(1) Incompatibility; (2) failure to perform material marital duty or obligation; (3) incompatibility by reason of mental illness or incapacity (requires finding of confinement of spouse in institution by reason of mental illness for two years which need not be continuous or adjudication of mental illness or incapacity while spouse is confined in institution by reason of mental illness. In either case two or three court appointed physicians must find poor prognosis for recovery but decree granted on this ground will not relieve party from contributing to support and maintenance of mentally ill or incapacitated spouse). (K.S.A. 60-1601).

Citizenship Requirements.

None.

Residence Requirements.

Petitioner or respondent must have been actual resident of state for 60 days next preceding filing of petition. This includes persons stationed at or resident of U.S. military base within state for 60 days preceding filing of petition. Spouse may have residence in this state separate and apart from residence of other spouse. (K.S.A. 60-1603).

Jurisdiction.

District courts. (K.S.A. 60-1601).

Venue.

May be brought in county in which petitioner is actual resident at time of filing petition or where respondent resides or may be served. Military residents may file in any county adjacent to base. (K.S.A. 60-607).

Process.

A summons is issued as in other cases. See category Civil Actions and Procedure, topic Process.

Pleading.

Grounds for divorce or separate maintenance must be alleged in the general language of the statute, without detailed statement of facts. Names and dates of birth of minor children must be stated. Affidavit containing jurisdictional information concerning children required. Respondent may answer and may also file counter petition. New material set up in answer must be verified by respondent in person. Opposing party may demand bill of particulars and facts stated therein will be specific facts upon which action will be tried. Copy delivered to judge, but not filed with clerk of court or made part of record except on appeal, and then only when issue to be reviewed relates to such facts. (K.S.A. 60-1604 and 1605).

Practice.

An action for divorce may not be heard until 60 days after filing of petition unless court declares existence of emergency. In case of emergency, unless waived by parties, action shall not be heard until time permitted for filing answer expires. Upon request of either party or sua sponte, court shall set pretrial conference to explore possibilities of settlement and to expedite trial. After filing of responsive pleading, court may require both parties to seek marriage and parental counseling if available within judicial district of venue of action. Cost of counseling may be assessed as costs in case. (K.S.A. 60-1608). Either party is competent to testify upon all material matters involved in controversy. Decree of divorce, separate maintenance or annulment may be granted upon uncorroborated testimony of either party or both of them. (K.S.A. 60-1609). Attorney for prevailing party to divorce or annulment must provide certain information to court for report to state registrar of vital statistics. (K.S.A. 65-2422b).

Judgment or Decree.

Becomes final when time for appeal expires or waiver of appeal is incorporated into decree or signed by parties. (K.S.A. 60-1610).

Temporary Alimony.

After filing of petition, court may, if necessary, provide for support of either party while action is pending. (K.S.A. 60-1607[a][3]). Support order may be enforced by garnishment. (K.S.A. 60-1607[c]).

Allowance for Prosecution of Suit.

Interlocutory Decree.

If necessary to ensure either party's efficient preparation for trial, court may provide for expenses of suit including reasonable attorney's fees. (K.S.A. 60-1607[a][4]).

Final Decree.

Court may award costs and attorney fees to either party as justice and equity require. (K.S.A. 60-1610). Costs may include family counseling (K.S.A. 60-1617[b]), marriage counseling (K.S.A. 60-1608[d]) and enforcement of visitation rights (K.S.A. 60-1616[d] and 23-701[f][4]).

Permanent Alimony.

Court may award allowance for future support, called maintenance, to either party in amount court finds fair, just and equitable under circumstances. Maintenance may be in lump sum, periodic payments, on percentage of earnings or on any other basis. (K.S.A. 60-1610[b][2]).

Termination.

Court may not award in excess of 121 months. Decree may specify circumstances terminating, but court may reserve power to order reinstatement. (K.S.A. 60-1610).

Modification.

Decree may specify circumstances modifying, but court may reserve power to reinstate. At any time, on hearing with reasonable notice to affected party, court may modify maintenance payments not already due. Court may make modification of maintenance retroactive to date at least one month after date motion to modify was filed with court. (K.S.A. 60-1610).

Division of Property of Spouses.

Court may divide all real and personal property of parties acquired before or during marriage. Court may consider: (1) Age of parties; (2) duration of marriage; (3) property owned by parties; (4) parties' present and future earning capacities; (5) time, source and manner of acquisition; (6) family ties and obligations; (7) allowance or disallowance of maintenance; (8) dissipation of assets; and (9) other factors necessary to just and reasonable division of property. (K.S.A. 60-1610).

Change of Wife's Name.

On request of spouse, court must order restoration of maiden or former name. (K.S.A. 60-1610).

Custody of Children.

Interlocutory decree restraining parties and providing for child custody and support may be entered after petition is filed. (K.S.A. 60-1607[a]).

Final Decree.

Best interests of child control. Relevant factors include: (1) Length of time someone other than parent has cared for child; (2) desires of parents; (3) desires of child; (4) relationship of child with parents, siblings and other persons; (5) child's adjustment to home, school and community; (6) ability of each parent to allow continuing relationship between child and other parent; (7) evidence of spousal abuse; (8) whether parent has or is living with someone subject to registration under Kansas offenders act or similar state or federal registration; and (9) whether parent has or is living with someone who has child abuse conviction. Rebuttal presumption exists that it is not in child's best interest to be in custody or residency of persons within (8) and (9) above. Provisions of written agreement of parties, if any, presumed in best interests of child, but presumption may be overcome on specific findings of fact. (K.S.A. 60-1610).

Types of Custodial Arrangements.

Court may order any arrangement that is in best interests of child, including, in order of preference, joint custody, sole custody, divided custody of two or more children, and non-parental custody. (K.S.A. 60-1610).

Change in Custody.

Subject to Uniform Child Custody Jurisdiction Act (K.S.A. 38-1301 et seq.) court may change or modify any prior order upon showing of material change in circumstances, but may not enter ex parte change order absent sworn testimony showing extraordinary circumstances (K.S.A. 60-1610).

Visitation Rights.

Court may grant grandparents of unmarried minor child reasonable visitation rights during child's minority. (K.S.A. 38-129). If custody is awarded to person other than parent, court may grant any person visitation rights. (K.S.A. 38-129). If court orders non-parental custody, court will prefer to award custody first to relative of child and second to person with close emotional ties to child. (K.S.A. 60-1610). Court will award reasonable attorney's fees and costs of any proceeding to enforce visitation rights against parent who unreasonably denies or interferes with such rights. (K.S.A. 60-1616[d]).

Allowance for Support of Children.

Interlocutory Decree.

After filing of petition, court may, if necessary, provide for support of minor children during pendency of action. (K.S.A. 60-1607). Order may be enforced by garnishment. (K.S.A. 60-1607).

Final Decree.

Court must provide for support and education of minor children. Regardless of custodial arrangement, court may order expenses paid by either or both parents for any child less than 18 years of age unless: (1) Parent(s) agree in writing approved by court to pay support beyond 18 years of age; (2) child reaches 18 while still attending high school, in which case support continues, unless court orders otherwise, until June 30 of that school year; (3) if child still bona fide high school student after June 30 of school year in which child turned 18, court may order support to continue through school year during which child turns 19 provided parents jointly participated or acquiesced in delaying child's completion of high school. (K.S.A. 60-1610).

In determining amount of support court must consider all relevant factors without regard to marital misconduct, including: (1) Financial resources and needs of both parents; (2) financial resources and needs of child; and (3) physical and emotional condition of child. Until child reaches 18, court may set apart any portion of property of husband or wife or both that seems necessary and proper for support of child. (K.S.A. 60-1610).

Remarriage.

Any marriage contracted by party inside or outside Kansas before decree becomes final is voidable until decree becomes final. Agreement waiving right of appeal either incorporated in decree or signed by parties and filed will shorten time during which remarriage is voidable. (K.S.A. 60-1610).

Foreign Divorces.

Judgment or decree of divorce rendered in any other state or territory of U.S., in conformity with laws thereof, must be given full faith and credit in this state; except, that if respondent in action, at time of judgment or decree, was resident of this state and did not personally appear or defend action in court of that state or territory, and that court did not have jurisdiction over his person, all matters relating to maintenance and property rights of parties and to support of minor children of parties are subject to inquiry and determination in any proper action or proceeding brought in courts of this state within two years after date of foreign judgment or decree, to same extent as though foreign judgment or decree had not been rendered. Court may not enter custody decree contrary to provisions of Uniform Child Custody Jurisdiction Act. (K.S.A. 60-1611).

Separation Agreements.

If parties have entered into valid, just and equitable separation agreement, it must be incorporated and confirmed in decree, except that any provisions for custody, support or education of minor children are subject to control of court. Matters so settled by separation agreement are not subject to subsequent modification by court except as agreement itself may prescribe or parties may subsequently consent. (K.S.A. 60-1610).

Antenuptial or Prenuptial Contracts.

See topic Husband and Wife.

Annulment of Marriage.

See topic Marriage.

14.07 DOMESTIC PARTNERS:

14.08 GUARDIAN AND WARD:

“Guardian” appointed by court to act on behalf of ward’s person. “Conservator” is same except to act on behalf of conservatee’s estate. (K.S.A. 59-3051). Proceedings for appointment of guardian or conservator may be had in district court of county of proposed ward’s or conservatee’s residence or where it is in best interest of proposed ward or conservatee. (K.S.A. 59-3058[a][3] and [4]). “Impaired person” means any adult person whose ability to receive and evaluate information effectively or to communicate decisions, or both, even with assistive technologies, is impaired to extent person lacks capacity to manage estate or meet essential needs for physical health or safety, or both. Person shall not be considered impaired for sole reason such person relies on treatment by prayer in practice of religion. (K.S.A. 59-3051). “Manage such person’s estate” means actions reasonably necessary to receive and account for financial resources. “Meet essential needs for physical health, safety or welfare” means actions necessary to provide health care, sustenance, shelter or personal hygiene, without which serious injury or illness is likely to occur. (K.S.A. 59-3051).

Selection of Guardian.

Natural guardian may, by last will or inter vivos trust, nominate guardian or conservator of person and estate of his minor children. In other cases, district court appoints guardian or conservator upon recommendation of applicant. (K.S.A. 59-3053[a]).

Eligibility and Competency.

No restriction against appointment of nonresident. No corporation, other than certified nonprofit Kansas corporation (K.S.A. 59-3070[a]), may be appointed guardian (K.S.A. 59-1701[c]). Corporation may not be appointed conservator except: (1) Banks and savings and loans located in Kansas or in state that would allow Kansas banks or savings and loans as fiduciaries; or (2) other corporations incorporated and having principal place of business in Kansas. (K.S.A. 59-1701[a]).

Appointment of Guardian.

Court in appointing guardian must give priority in following order to: (1) Nominee of proposed ward if nomination made within any durable power of attorney; (2) nominee of natural guardian; (3) nominee of minor who is proposed ward if minor is over 14 years of age; (4) nominee of spouse, adult child, or other close family member of proposed ward; or (5) nominee of petitioner. (K.S.A. 59-3069 revised per 2008 c. 64).

Qualification.

Guardian must take oath (oath of corporate fiduciary by duly authorized officer [K.S.A. 59-1702]) and give bond with sufficient sureties in such amount as court directs, but not less than 125% of value of personalty and probable annual income from real estate which comes into his possession. (K.S.A. 59-1101). District court may thereafter order bond increased or decreased or new bond given. (K.S.A. 59-1106; K.S.A. 59-1107).

Inventory.

Within 30 days after appointment, representative must make verified inventory of ward’s estate coming into his possession or knowledge. Three disinterested persons will be appointed by personal representative and approved by court to appraise property if requested by party in interest. Appraisal must be filed within 30 days of appraisers’ appointment and is subject to court approval. (K.S.A. 59-1202).

Powers and Duties.

Guardian and conservator always subject to control and direction of district court. Guardian shall have charge of person of ward and shall promote and protect safety, health and welfare of ward. Ward may be placed in institution only on court approval. (K.S.A. 59-3075[c][9]). Conservator shall (1) pay reasonable support charges; (2) pay just and lawful debts of conservatee; (3) possess and manage property; (4) prosecute and defend suits; (5) sell assets of estate; (6) possess and manage going business of conservatee; (7) invest funds. (K.S.A. 59-3078[b]).

Investments.

Investments by conservator are governed by K.S.A. 59-3078(b)(7).

Limited Guardianship or Conservatorship.

If court finds that disabled person should be permitted to make some decisions regarding his person or property, guardian or conservator may be appointed with specified, limited powers. (K.S.A. 59-3014[d]; K.S.A. 59-3018[c]).

See category Estates and Trusts, topic Trusts, subhead Securities in Name of Nominee.

Liabilities of Guardian or Conservator.

Any person who embezzles or converts any personal property of a ward is liable for double the value of such property. (K.S.A. 59-1704). Conservator is not personally liable on any mortgage note or by reason of covenants in any instrument of conveyance duly executed in representative capacity. (K.S.A. 59-3078[d][2]).

Accounts.

Guardian must file annual report with court on condition of ward. Supreme Court prescribes form. (K.S.A. 59-3083, K.S.A. 59-3084).

Termination of Guardianship or Conservatorship.

Guardianship or conservatorship of minor terminates upon: (1) Death or (2) attainment of legal age. Other guardianships and conservatorships terminate upon death or restoration to capacity, or there is no further need for guardianship or conservatorship. (K.S.A. 59-3090, K.S.A. 59-3091 and 59-3092).

Foreign Guardian.

Must appoint resident agent for service of process (K.S.A. 59-1706) and file authenticated copy of letters of authority and certificate that letters are still in force with district court (K.S.A. 59-1707).

Foreign guardian may sue or be sued in Kansas courts in like manner and under like circumstances as nonresident may sue or be sued. (K.S.A. 59-1708).

Conservator.

Must file verified annual account. Upon termination of conservatorship, or removal or resignation, must file verified final account with petition for settlement and allowance thereof. Supreme Court prescribes forms. (K.S.A. 59-3083, K.S.A. 59-3086[a]).

Gifts to Minors.

See topic Infants.

Trial.

There are provisions for hearing by court or trial by jury if demanded prior to appointment of guardian or conservator for impaired person. (K.S.A. 59-3067[a]).

Uniform Fiduciaries Act.

Uniform Fiduciaries Act not adopted.

Uniform Simplification of Fiduciary Security Transfers Act.

Uniform Simplification of Fiduciary Security Transfers Act adopted. (K.S.A. 17-4903 to 4913). Uniform Commercial Code (K.S.A. 84-1-101 et seq.) specifically provides that it does not repeal this uniform act and if any inconsistency between two, provisions of Simplification of Fiduciary Security Transfers Act control. (K.S.A. 84-10-101[2]).

14.09 HUSBAND AND WIFE:

Disabilities of Married Women.

None.

Separate Property.

All property: (1) Owned by spouse before marriage, and rents, issues and profits thereof; (2) acquired by descent, devise or bequest, and rents, issues and profits thereof; or (3) acquired by gift except from other spouse remains spouse's sole and separate property. (K.S.A. 23-203[a]). Spouse's earnings also separate property. (K.S.A. 23-204). At time divorce action is filed, however, all property becomes marital property for purposes of divorce action. (K.S.A. 23-203[b]). See topic Divorce, subhead Division of Property of Spouses.

Contracts.

Married person may buy, sell and contract with respect to such person's separate property. (K.S.A. 23-202).

Antenuptial Contracts.

Uniform Premarital Agreement Act adopted 1988. Applies to agreements executed on or after effective date. (K.S.A. 23-801 et seq.).

Common Law.

Applies to agreements executed before effective date of Uniform Premarital Agreement Act. Contracts made either before or after marriage that fix property rights between husband and wife are not against public policy unless terms encourage separation of parties. Such contracts are liberally interpreted to carry out maker's intentions when contract was fairly made and its terms are equitable. (223 Kan. 679, 576 P.2d 629). Homestead rights cannot be waived. (202 Kan. 684, 452 P.2d 286).

Actions.

Married person may sue and be sued as if unmarried. (K.S.A. 23-206).

Agency.

Neither husband or wife has power to act as agent of other merely by virtue of marital relation. (195 Kan. 626, 408 P.2d 697).

Conveyances or Encumbrance of Property.

It is not necessary that either husband or wife join in a conveyance by other except to bar inchoate statutory interest (see category Property, topic Dower) or where the property conveyed is a homestead (see category Debtor and Creditor, topic Homesteads).

Loss of Spouse's Services.

Right of action for loss or impairment of married person's ability to perform household and domestic services is in such person for benefit of such person's spouse so far as spouse is entitled thereto. (K.S.A. 23-205).

Children.

Husband and wife have equal rights in the possession of their children. (Const., art. 15, § 6). See topic Divorce, subhead Custody of Children.

Desertion or Nonsupport.

Any individual who, without just cause, fails to provide for support and maintenance of his or her spouse, if in necessitous circumstances, or any parent who, without lawful excuse, deserts, neglects or refuses to provide for support and maintenance of his or her child or children under age of 18 years, if in necessitous circumstances, is guilty of a crime. Court may make orders providing for support. (K.S.A. 21-3605).

Revised Uniform Interstate Family Support Act.

Adopted effective Jan. 1995.

Community Property.

Community property system does not obtain in Kansas.

14.10 INFANTS:

Age of majority, 18 for both sexes; except married persons 16 years of age have majority in matters relating to contracts, property rights, liabilities, and capacity to sue and be sued. (K.S.A. 38-101). Minimum age to consume cereal malt beverages (K.S.A. 41-2701) and alcoholic beverages (K.S.A. 41-175) is 21.

Emancipation.

Rights of majority may be conferred on minors by proceedings in district court. (K.S.A. 38-109).

Ratification of Contracts.

Minor is bound by contracts for necessaries and for other contracts unless he disaffirms within reasonable time after reaching majority and restores all of money or property received and then remaining within his control (K.S.A. 38-102), unless minor obtained contract by misrepresentations as to his age and other party had good reasons to believe minor was capable (K.S.A. 38-103). Where minor is paid for his personal services under contract made with him alone this is complete satisfaction. (K.S.A. 38-104).

Minors may be shareholders in building and loan associations (K.S.A. 17-1048), and may carry a deposit in bank. Payment by bank, on order of minor, releases it from liability. (K.S.A. 9-1204).

Minors may consummate contracts respecting insurance same as adults, and any policy, certificate or other evidence of such contract and any promissory note or installment contract for premium payment is as binding upon minor as though he were of legal age, but all such contracts made by minor must have written consent of parent, guardian, or conservator, and contract or note must be cosigned by person over 18 years. (K.S.A. 40-237).

Actions.

Infant’s representative may sue and defend on behalf of infant, and if no representative, infant may sue by his next friend or by guardian ad litem. Court must appoint guardian ad litem for infant not otherwise represented in action. (K.S.A. 60-217 and 59-2205). In any probate proceeding court may appoint guardian ad litem to defend any minor who is party, and unborn beneficiaries may be represented by living competent members of class to which they would belong or by a guardian ad litem. (K.S.A. 59-2205).

Support of Minor.

Parent’s failure to support minor in necessitous circumstances is severity level 10, nonperson felony. (K.S.A. 21-3605[7]).

Parental Responsibility.

Any person may bring action against parents for bodily injury or property damage caused by willful or malicious act of child living with parents. Damages limited to lesser of actual damages or $1,000. If child’s act resulted from parental neglect, $1,000 limitation does not apply. (K.S.A. 38-120). Resulting injury must be intended. (240 Kan. 30, 726 P.2d 1319).

Adoption.

See topic Adoption.

After father or possible fathers are identified, each must be given notice as court directs. If any fail to appear, their rights are terminated. Father’s rights may also be terminated if he cannot be identified and does not appear to assert rights. When father or alleged father appears, court may order parental rights be terminated upon finding by clear and convincing evidence that father: (1) Abandoned or neglected child after learning of birth; (2) is unfit parent; (3) made no reasonable effort to communicate with child after learning of birth; (4) failed without cause to support mother during six months prior to birth; (5) abandoned mother after learning of pregnancy; (6) birth resulted from rape; or (7) failed or refused to assume duties of parent for two consecutive years.

Determination of Parentage.

Kansas Parentage Act adopted. (K.S.A. 38-1110 et seq.).

Artificial Insemination.

Child treated as natural child of husband and wife if both consented to use of technique. (K.S.A. 23-129).

Termination of Parental Rights.

Procedure.

Any interested party may petition district court to terminate rights of either or both parents. Pleading must include statement of specific facts. (K.S.A. 38-1581). Court must order hearing. Before hearing court must determine due diligence was used in determining identity of interested parties and in serving process. Attorney must be appointed for any parent who fails to appear. (K.S.A. 38-1582).

Criteria.

If child is in need of care, court may terminate parent’s rights on clear and convincing evidence that parent is unfit to care for child or parent has been convicted of certain offenses listed in K.S.A. 38-1585. (K.S.A. 38-1583[a]). Court may also terminate if parent abandoned child, custody of child surrendered pursuant to K.S.A. 38-15,100, or if parent’s identity cannot be ascertained. (K.S.A. 38-1583[d]).

Procedure after Termination.

Court may authorize adoption if viable, or long-term foster care. (K.S.A. 38-1584[b]). See topic 14.01 Adoption.

Kansas Parentage Act.

(K.S.A. 38-1110).

Uniform Transfers to Minors.

Uniform Transfers to Minors Act adopted. (K.S.A. 38-1702). Age of majority under Act is 21. (K.S.A. 38-1702). Optional subsection (c) to § 22 of Act not adopted.

Uniform Securities Ownership by Minors Act not adopted.

14.11 MARRIAGE:

Age of consent for common law marriage: Males 14; females 12. (216 Kan. 445, 532 P.2d 1325).

Consent of both parents or one parent, guardian and court required when person is 16 or 17. Court may issue license for person age 15. Where no legal guardian judge of district court may give required consent. (K.S.A. 23-106).

Medical Examination.

None.

License is required; issued by clerk or judge of district court of any county. One of applicants must personally apply for license. (K.S.A. 23-106).

Waiting period of three calendar days after application is filed must elapse before license is issued, unless judge of district court orders immediate issuance. (K.S.A. 23-106).

Ceremony may be performed by ordained, licensed or appointed clergyman or judge or retired judge of court of record or municipal. (K.S.A. 23-104a).

Reports of Marriage.

Person performing marriage must endorse certificate of marriage on license and return same within ten days to judge or clerk issuing same. Judge or clerk must thereupon make record of same and forward license and certificate of marriage to secretary of health and environment. (K.S.A. 23-109).

Record.

See category Documents and Records, topic Records, subhead Vital Statistics.

Common law marriage recognized. (220 Kan. 225, 552 P.2d 629). No decision concerning local recognition of purported marriage in another state where such would be void.

Proxy marriages are neither authorized nor prohibited by statute and are sometimes performed.

Prohibited Marriages.

Between: parent and child, grandparent and grandchild, brother and sister (half blood included), uncle and niece, nephew and aunt, first cousins. Such marriages absolutely void. (K.S.A. 23-102).

Foreign Marriages.

Marriages between parties of opposite sex valid under law of place where contracted are valid in this state. (K.S.A. 23-115).

Annulment.

District court shall grant decree of annulment for either of following grounds: (1) Marriage is void for any reason; or (2) contract of marriage is voidable because induced by fraud. District court may grant annulment if contract of marriage was induced by mistake of fact, lack of knowledge of material fact or other reason justifying rescission of contract of marriage. (K.S.A. 60-1602).

Antenuptial Contracts.

See topic 14.09 Husband and Wife.

MARRIED WOMEN:

Disabilities, see topic Husband and Wife.

Married Women.

Disabilities, see topic Husband and Wife.

15 HEALTH

—Scope —

Secretary of Health and Environment supervises and regulates sickness, disease and sanitation.

15.01 ABORTIONS:

(K.S.A. 65-6701 et seq.). Before person performs abortion upon unemancipated minor, person must give actual notice of intent to perform such abortion to one of minor's parents or legal guardian. (K.S.A. 65-6705).

15.02 ADMINISTRATION:

15.03 DISEASES:

Occupational Diseases.

See category Employment, topics Occupational Diseases, Workers' Compensation Law.

15.04 DURABLE POWER OF ATTORNEY:

See Category Property, topic Powers of Attorney.

15.05 FOOD, DRUGS, DEVICES AND COSMETICS:

Governed by Kansas Food, Drug and Cosmetic Act. (K.S.A. 65-655, et seq.).

15.06 FRAUD AND ABUSE:

15.07 HEALTH INSURANCE BENEFITS:

Health care benefits are governed by general provisions of Kansas insurance code (K.S.A. 40-201 to 40-2, 162), Kansas uniform policy provisions (K.S.A. 40-4601, et seq.), and special provisions for life and health insurance guaranty associations (K.S.A. 40-3001, et seq.), health maintenance organizations (K.S.A. 40-3201, et seq.) and managed care (K.S.A. 40-4601, et seq.).

15.08 LICENSURE AND CERTIFICATION:

15.09 LIVING WILLS:

See Category Estates and Trusts, Topic Wills, subhead Living Wills.

15.10 ORGAN DONATIONS:

15.11 PATIENTS' BILL OF RIGHTS:

15.12 PUBLIC HEALTH:

15.13 SMOKING REGULATIONS:

Smoking in public places or public meetings is prohibited except in designated areas pursuant to Kansas Criminal Code. (K.S.A. 21-4009, et seq.). Local regulations may be more stringent. (K.S.A. 21-4013).

16 INSURANCE

16.01 INSURANCE COMPANIES:

Regulated by.

(K.S.A. 40-951, et seq.).

Supervision by.

Commissioner of Insurance through Insurance Department supervises, regulates and controls organization of insurance companies and conduct of insurance business.

Copy of Insurance Code may be obtained by writing Commissioner of Insurance, 420 S.W. 9th, Topeka, KS 66612 (1-800-432-2484). Code does not apply to certain fraternal benefit societies. (K.S.A. 40-202).

Rates.

(K.S.A. 40-951, et seq.).

Annual statements.

Annual statements must be filed with Commissioner of Insurance. (K.S.A. 40-225).

Policies.

(K.S.A. 40-410, 411; K.S.A. 2,100 et seq.; K.S.A. 84-1-202).

Cancellation.

Property or casualty policy, except accident or sickness, used primarily for business or professional needs, in effect for 90 days or more, cannot be canceled except for: (1) Nonpayment of premium; (2) policy issued under material misrepresentation; (3) insured violated material term or condition of policy; (4) unfavorable underwriting factors, specific to insured, not present when policy written; (5) Commissioner determines that continuation of coverage could place insurer in hazardous financial condition or in violation of state laws; (6) insurer no longer has adequate reinsurance to meet its needs. Insurer to cancel for valid reason, must give 60 days written notice and written explanation. (K.S.A 40-2,120).

Reports.

All insurance companies must file with the Commissioner annual statements of their condition as of Dec. 31. (K.S.A. 40-225).

Discrimination.

Excessive and discriminatory rates are prohibited. (K.S.A. 44-2404).

Mental or Physical Handicap.

Rate discrimination prohibited unless based on sound actuarial principles or related to actual or reasonably anticipated experience. (K.S.A. 40-2,109).

Rebates.

Prohibited. (K.S.A. 40-956).

Limits of Risk.

No company, other than title insurance company, may insure single risk for amount exceeding 10% of company's capital or surplus unless excess is reinsured with authorized insurer. (K.S.A. 40-1107).

Title Insurance.

No insurer may insure single risk exceeding 50% of capital and surplus unless reinsured by authorized insurer or nonauthorized company meeting Kansas requirements. (K.S.A. 40-1107a).

Agents and Brokers.

Term "insurance agent" includes agents, brokers, and producers unless context requires otherwise.

Agent.

May be individual or legal entity. Must have license from Commissioner. Application fee $30; Commissioner prescribes forms. Individual applicant must pass examination. (K.S.A. 40-4905). Commissioner collects annual fee from insurer. (K.S.A. 40-4903). Continuing education required.

Process Agent.

Authorized Insurer.

Insurance Commissioner deemed process agent. (K.S.A. 40-3304[g]).

Unauthorized Insurer.

Secretary of State acts as process agent. (K.S.A. 40-2704).

Investments.

K.S.A. 40-2b01 et seq.

Foreign Insurance Companies.

Must obtain certificates before selling stock in state and may not do business in state until authorized by Commissioner. When certificate is issued, company is not subject to general corporation code relating to foreign corporations. (K.S.A. 40-209 and 40-214).

Commissioner of Insurance may issue license to write policies of insurance to legal residents of this state. (K.S.A. 40-4905). Commissioner may issue license to nonresident agents who are licensed in state where they reside, on payment of biennial fee of $50. (K.S.A. 40-4906).

Retaliatory Laws.

Whenever another state or country requires Kansas insurer to pay greater taxes or fees than Kansas requires of foreign insurers, insurers from that state or country must pay increased amount equal to that required by their state or country. (K.S.A. 40-253).

Premium Tax.

Imposed by K.S.A. 40-252d.

Privilege Tax.

Repealed for calendar year 1998 and thereafter. (K.S.A. 40-2801).

Uniform Unauthorized Insurers Act adopted. (K.S.A. 40-2701).

Other Insurance Taxes.

See Business Organizations, topic Corporations.

Uniform Insurers Liquidation Act.

Not adopted.

Viatical Settlements.

Authorized by K.S.A. 40-5001 et seq.

Direct Actions Against Insurer.

See category Transportation, topic Motor Vehicles, subhead Direct Actions.

No-Fault Insurance.

See category Transportation, topic Motor Vehicles, subhead No-Fault Insurance.

Plain Language.

See category Business Regulation and Commerce, topic Consumer Protection.

16.02 SURETY AND GUARANTY COMPANIES:

Surety companies are under control of Commissioner of Insurance. (K.S.A. 40-103). See topic Insurance Companies.

Reports.

Must file annual reports same as life insurance companies. (K.S.A. 40-225).

Surety Company Bonds.

See category Civil Actions and Procedure, topic Bonds.

Venue of action on surety company bond, see category Civil Actions and Procedure, topic Venue.

Foreign companies admitted to do business in Kansas must have same capital and surplus as domestic company. Foreign company organized under laws of country other than United States must show that it has on deposit with proper state officials somewhere in United States securities equal to capital and surplus required of domestic companies. Such companies must also file with Commissioner of Insurance a copy of charter and by-laws, and verified, detailed statement of all matters required to be included in annual report of domestic company. (K.S.A. 40-1104).

17 INTELLECTUAL PROPERTY

17.01 TRADEMARKS AND TRADENAMES:

Any person may register trademark or service mark (mark) he adopts and uses in Kansas. (K.S.A. 81-204).

What May Be Used.

Any word, name, symbol, device or combination thereof used to identify and distinguish goods made or sold and services (K.S.A. 81-202), unless it: is immoral, deceptive, or scandalous; disparages or falsely suggests connection with persons, living or dead, institutions, beliefs, or national symbols; simulates flag or other insignia of any governing body; is signature or portrait of any living person, except with written consent; is merely descriptive or misdescriptive of goods or geographical location; is merely surname; or so resembles mark registered in Kansas or previously used by another that it is likely to cause confusion or mistake. (K.S.A. 81-203).

Labor unions, veterans' organizations, fraternal or benefit associations and societies may register names and insignia with Secretary of State. (K.S.A. 75-421 et seq.).

Registration.

Verified application filed with Secretary of State on form furnished by him, accompanied by specimen of mark in triplicate. (K.S.A. 81-204). Filing fee, $25. (K.S.A. 81-218). Certificate of registration is issued. (K.S.A. 81-206). Must be renewed every five years. (K.S.A. 81-207). Fraudulent registration renders party liable for any damages caused thereby. (K.S.A. 81-212).

Assignment.

Mark may be assigned with good will of business, but such assignment is void as to subsequent purchaser unless instrument is duly executed and recorded with Secretary of State within three months or prior to subsequent purchase. Fee is $5. (K.S.A. 81- 208).

Protection Afforded and Infringement.

Use of registered trademark or counterfeit or imitations thereof without consent can be enjoined and all damages caused thereby can be recovered. (K.S.A. 81-215). Common law trademark rights not affected. (K.S.A. 81-217).

Resale Price Agreements.

Fair Trade Act repealed.

Tradenames.

No statutory provisions for registration.

17.02 TRADE SECRETS:

Uniform Trade Secrets Act adopted. (K.S.A. 60-3320, et seq.). Provides for injunctive relief of actual or threatened misappropriation of trade secret upon application to court. Except when inequitable recovery of damages for misappropriation allowed and includes actual loss and unjust enrichment caused by misappropriation or by imposing liability for reasonable royalty for unauthorized disclosure or use of trade secret. Punitive damages and attorney fees may be awarded in cases involving willful and malicious misappropriation, bad faith claims or motions to terminate injunction. (K.S.A. 60-3321-3323). Court shall preserve secrecy of trade secret by reasonable means. (K.S.A. 60-3324). Action must be brought within three years of discovery of misappropriation. (K.S.A. 60-3325).

18 LEGAL PROFESSION

18.01 ATTORNEYS AND COUNSELORS:

The state bar is not integrated.

Admission to the bar of the Supreme Court entitles one to practice in any court in the state.

Jurisdiction Over Admission.

For admission to bar one must comply with rules adopted by Supreme Court. (Sup. Ct. Rule 701 et seq.). Supreme Court has jurisdiction of admission. (K.S.A. 7-103).

Eligibility.

Applicants for admission to bar must be of good moral character and have requisite education. (Sup. Ct. Rule 702[a]). See subhead Educational Requirements, infra.

Registration as Law Student.

Not required.

Educational Requirements.

Applicant must hold degree from accredited college and law school. (Sup. Ct. Rule 702[a]).

Petition for admission is made on forms which may be procured from clerk of Appellate Courts, and must be verified by applicant and filed with clerk of Appellate Courts 90 days prior to examination.

Examination.

Board of Law Examiners conducts written examinations each year in Feb. and July using essay questions on local law and Multistate Bar Examination. (Sup. Ct. Rule 704[e]). Applicant may transfer MBE scores from another jurisdiction if taken within 13 months of current examination and if applicant passed entire bar examination of other jurisdiction. (Sup. Ct. Rule 704[f]). Applicant must pass Multistate Professional Responsibility Examination not later than 180 days after taking Kansas Bar Examination. (Sup. Ct. Rule 704[h]). Current fee is $250. (Sup. Ct. Rule 707[a][3]).

Clerkship not required for admission.

Admission without Examination.

Not permitted. However attorney may be granted special temporary permit to practice law if: (1) Attorney passed written bar exam in some other jurisdiction; (2) has or intends to become Kansas resident to accept employment other than practice of law; (3) will perform legal services for single employer only; and (4) is of good moral character. (Sup. Ct. Rule 706[a]). Forms available from Clerk of Appellate Courts. (Sup. Ct. Rule 706[b]). Current fee is $400 plus current charge for investigation and report. (Sup. Ct. Rule 707[a][4]).

Admission Pro Hac Vice.

Non-Kansas attorney may be admitted for purposes of particular case upon taking oath, upon filing showing local counsel and on personal appearance of local counsel. All service may be had on local counsel. Non-Kansas attorney is subject to Kansas disciplinary rules. (Sup. Ct. Rule 116).

Licenses.

All attorneys must register on or before July 1 each year with Clerk of Appellate Courts. Supreme Court sets annual fee. (Sup. Ct. Rule 208[a] and [c]). Current fee is $60. Attorneys subject to mandatory continuing legal education pay annual fee set by CLE Commission. (CLE Rule 11.01). Current fee is $20. Attorneys must also register and pay fees to clerk of local district court.

In larger counties attorneys must pay registration fee for county law library. Fee varies from $10 to $25 depending on county population and assessed valuation. (K.S.A. 19-1308). Registered attorneys are exempt from all municipal license fees or occupation taxes. (K.S.A. 19-1310).

Privileges.

No special provisions.

Disabilities.

Attorney may not be surety on any official bond or bond in any legal proceeding in district in which he resides. (K.S.A. 78-101[a]).

Liabilities.

See category Civil Actions and Procedure, topic Costs.

Compensation.

Generally no requirement for filing fee agreements. Fee must be reasonable. Basis for fee must be communicated to client. All fee contracts are subject to review by appropriate court. (M.R.P.C. 1.5).

Insurance Actions.

Insurer liable for reasonable attorney's fees if it lacked just cause for refusing to pay and judgment exceeds any settlement offer. (K.S.A. 40-256). In action on policy against loss by fire, tornado, lightning or hail, insurer liable for reasonable attorney's fees if judgment exceeds settlement offer. (K.S.A. 40-908).

Kansas Consumer Protection Act.

Consumer recovers reasonable attorney's fees if supplier violated act. Supplier recovers if consumer knowingly brought groundless action. (K.S.A. 50-634[e]).

Medical Malpractice Actions.

Attorney's fees must be reasonable and approved at evidentiary hearing. (K.S.A. 7-121b).

Negligent Operation of Motor Vehicle.

Prevailing party allowed reasonable attorney fees for property damages less than $7,500 unless prevailing party recovers no damages or adverse party tendered amount equal to or greater than judgment. Written demand must be made within 30 days before commencing of action or by defendant within 30 days after answer. (K.S.A. 60-2006).

Unemployment Benefits.

Legal fees must be approved by Secretary of Human Resources. (K.S.A. 44-718[b]).

Uniform Consumer Credit Code.

If creditor violates, court shall award reasonable attorney's fees to consumer's attorneys. (16a-5-201[8]).

Worker's Compensation.

Written contract must be filed and approved. (K.S.A. 44-536[b]). Generally fee limited to total of 25% of compensation recovered and paid. (K.S.A. 44-536[a]).

Wrongful Death Actions.

Court determines reasonable attorney's fees. If more than one attorney, court apportions fees in accordance with services rendered. Fees are paid out of net recovery. (K.S.A. 60-1905).

Lien.

Attorney has lien for general balance of compensation upon any papers of his client which have come into his possession in course of his professional employment, upon moneys in his hands belonging to his client, and upon money due to his client and in hands of adverse party, in any action or proceeding in which attorney was employed, from time of giving notice of lien to party. Such notice must be in writing and may be served in same manner as summons, and upon any person, officer or agent upon whom summons may be served, and it may also be served upon regularly employed salaried attorney of party. (K.S.A. 7-108). When judgment upon which lien is claimed has been collected and paid, clerk in term time or judge at chambers on application may determine amount due on lien and make order for distribution. Notice of application and time and place of hearing must be served on opposite party at least five days prior to time named in notice. (K.S.A. 7-109).

Disbarment or Suspension.

Attorney may be disbarred or suspended by Supreme Court for collusion, deceit, bringing action without authority, willful disobedience of a court order, willful violation of oath, neglecting or refusing to pay over money due client, or destroying, secreting or altering court papers or records, or for violation of disciplinary rules. (Sup. Ct. Rule 202).

Sanctions may be imposed if any motion or other paper signed without first making reasonable inquiry to support position taken. Abuse of procedural devices also subject to sanctions. (K.S.A. 60-211).

Unauthorized Practice.

Prohibited.

Mandatory Continuing Legal Education.

All attorneys must earn minimum of 12 hours per year including two hours of professional responsibility, except: (1) Attorneys newly admitted during first year of practice; (2) retired or inactive attorneys; (3) federal and state judges; and (4) others exempted for good cause. (Sup. Ct. Rule 802).

Specialty Certification Requirements.

Specialties are not recognized in Kansas.

Professional Corporations.

See category Business Organizations, topic Corporations, subhead Professional Corporations.

Prepaid Legal Service Plans.

Authorized. (K.S.A. 40-4201 et seq.).

19 MINERAL, WATER AND FISHING RIGHTS

19.01 MINES AND MINERALS:

State Geologist has supervision of operation of mines, and provisions for safety and inspection which are required. (K.S.A. 49-201 et seq.).

Operation of Mines.

Kansas Dept. of Health and Environment must have jurisdiction and authority to regulate reclamation of lands affected by surface mining operations in order to encourage productive use of such lands. (K.S.A. 49-402a).

Inspection of Mines.

Partmental inspections must be made on irregular basis averaging not less than one partial inspection per month and one complete inspection per calendar quarter for mining and reclamation operations covered by each permit. (K.S.A. 49-405d). Inspections must occur without prior notice to operator. (K.S.A. 49-405d).

Oil and Gas.

State Corporation Commission has supervision of provisions pertaining to regulation of oil and gas wells (K.S.A. 55-101 et seq.), production and sale of crude oil or petroleum (K.S.A. 55-601 et seq.), and production and conservation of natural gas (K.S.A. 55-701 et seq.).

Mineral Deeds.

Estates in oil and gas in place may be created in same quantity and quality as estates in land. They may be created by reservations in deed or by separate conveyance which is commonly but erroneously called royalty deed. (K.S.A. 79-420).

Recording Mineral Deed.

Deed conveying or reserving title to minerals in place must be recorded within ninety days after execution or it is void (fees, see category Property, topic Deeds), but if listed for taxation within such period it is valid as between parties without recording. (K.S.A. 79-420). Time for recording may be extended under some circumstances. (145 Kan. 88, 64 P.2d 56).

Oil and gas lease is mere privilege to go on land and explore and if production is obtained to appropriate working interest (generally seven-eighths of the oil and gas produced) provided for in lease. It is not conveyance of minerals in place, and passes no title thereto. (214 Kan. 415, 521 P.2d 254). Law implies covenant to explore and develop. (K.S.A. 55-223).

Execution and Recording of Lease.

Leases should be executed same as deeds and may be recorded in same manner. If executed prior to Jan. 1, 1925, a lease is void unless recorded prior to Jan. 1, 1952, and after Jan. 1, 1952, no assignment of such unrecorded lease, or any interest therein, can be recorded. (K.S.A. 55-216 to 218). Husband and wife should join in execution of lease but it is not necessary for husband or wife of assignor to join in assignment.

Recording and Extending Lease.

Recording of oil and gas lease in office of register of deeds imparts notice to public of validity and continuance of lease for definite term therein expressed but no longer. If lease contains statement of any contingency upon happening of which term of such lease may be extended (such as “and as long thereafter as oil and gas or either of them are produced in paying quantities”) owner of lease may at any time before expiration of definite term thereof file with register of deeds affidavit setting forth description of lease, that affiant is owner thereof and facts showing that required contingency has happened. Affidavit is notice to public of existence and continuing validity of lease. (K.S.A. 55-205).

Royalty interest refers to right to share in production of oil and gas at severance and is personal property, concerning proceeds from oil and gas leases if and when there is production. (204 Kan. 658, 465 P.2d 938).

Forfeiture of Lease.

It is duty of lessee of forfeited oil and gas lease to release same of record within 60 days after date of forfeiture and if lessee, his successors or assigns fail or neglect to execute and record such surrender within time provided for, owner of land may serve upon lessee, his successors or assigns, by registered mail at his last known address, or by publication for three consecutive weeks in newspaper of general circulation in county where land is situated, statutory notice, and owner of land may after twenty days from date of service registration or first publication of notice file with register of deeds of county where said land is situated affidavit setting forth that affiant is owner of land, that lessee, his successors or assigns have failed to comply with terms of lease, reciting facts constituting such failure, and that lease has been forfeited and is void. A copy of notice served should be attached to affidavit. Lessee, within 30 days after filing of such affidavit, may give notice in writing to register of deeds of county where land is located that lease has not been forfeited and that he still claims that lease is in full force and effect. If lessee does not so notify register of deeds then register of deeds must record affidavit and thereafter record of lease is not notice to public of existence of lease or any interest therein or rights thereunder and record thereof can not be received in evidence in any court of this state on behalf of lessee, his successors or assigns. (K.S.A. 55-201).

If owner of lease refuses to execute release as provided for, land owner may sue to obtain such release and may recover sum of $100 as damages and costs, together with reasonable attorney's fee, and he may also recover any additional damages that evidence in case may warrant. (K.S.A. 55-202).

Taxation.

Estates in oil and gas in place are taxed separately from land. Excise tax upon severance and production of oil, gas and coal for profit or commercial use. (K.S.A. 79-4216 et seq.).

Reclamation of Surface-Mined Real Property.

See category Taxation.

20 MORTGAGES

20.01 CHATTEL MORTGAGES:

Uniform Commercial Code (K.S.A. 84-1-101 et seq.) in effect. See category Business Regulation and Commerce, topic Commercial Code.

Filing.

Consumer Goods.

Office of register of deeds in county of debtor's residence or, if debtor is not Kansas resident, in county where goods are kept. (K.S.A. 84-9-401[1][a]).

Land Related Transactions.

In office where mortgage on real estate would be filed or recorded (K.S.A. 84-9-401[1][b]), i.e., register of deeds (K.S.A. 58-2308). Note that legal description and name, SSN and FEIN of record owner of real estate must always be given on financing statement for security interest in timber, minerals or fixtures located on that realty. (K.S.A. 84-9-402[3]).

Transmitting Utility.

Office of secretary of state. (K.S.A. 84-9-401[5]).

In All Other Cases.

In office of secretary of state. (K.S.A. 84-9-401[1][c]).

Filing Fees.

Fee is $6 plus $1 for each additional page (see subhead Forms infra and Commercial Code Forms at end of Kansas Digest). (K.S.A. 84-9-403[5]). Last sentence allowing secured party to index under debtor's trade name for extra fee is deleted. See also category Documents and Records, topic Records, subhead Filing Under Commercial Code.

Taxation.

Unless otherwise agreed, when collateral is in secured party's possession, taxes incurred are chargeable to debtor. (K.S.A. 84-9-207[2][a]).

Forms.

Security agreement is illustrative. Secretary of State has approved forms of Financing

Statement, Statement of Continuation, Termination, Release, Assignment, etc., and Request for Information, printed infra. Latter forms are available from printing companies, names of which Secretary will provide on request, and which may also be used for local filings. Various security agreement forms are also available from these printing companies.

For forms for Financing Statement, Statement of Continuation, Termination, Release, Assignment, etc. and Request for Information or Copies see end of this Digest.

Forms

Security Agreement.—Form UCC SA-1.

Date . . . ., 20. . . . .

. . . .

(Name) (Street Address)

. . . .

(City) (County) (State)

hereinafter called "Debtor," hereby grants to . . . ., hereinafter called "Secured Party," a security interest in the following described property:

. . . .

. . . .

together with all additions, accessions and substitutions thereto or therefore, and all similar property hereafter acquired, hereinafter called "Collateral." Proceeds of Collateral are also covered but this shall not be construed to mean that Secured Party consents to any sale of such Collateral.

If Collateral includes livestock, Debtor hereby grants a security interest in all increase thereof, all feed, both hay and grain, owned by Debtor, all water privileges, all equipment used in feeding and handling said livestock, and all of Debtor's right, title, and interest in and to all contracts and leases covering lands for pasture and grazing purposes.

If any of the collateral has been attached to or is to be attached to real estate, or if the Collateral includes crops or oil, gas or minerals to be extracted or timber to be cut, a description of the real estate is as follows:

and the name of the record owner of the real estate is . . . .

This security interest is given to secure: (1) Payment of a note dated . . . ., executed and delivered by Debtor to Secured Party in the principal sum of $. . . . ., payable as to principal and interest as therein provided; (2) future advances to be evidenced by like notes to be made by Secured Party to Debtor at Secured Party's option; (3) all expenditures by Secured Party for taxes, insurance, repairs to and maintenance of the Collateral and all costs and expenses incurred by Secured Party in the collection and enforcement of the note and other indebtedness of Debtor; and (4) all liabilities of Debtor to Secured Party now existing or hereafter incurred, matured or unmatured, direct or contingent, and any renewals and extensions thereof and substitutions therefore.

DEBTOR EXPRESSLY WARRANTS AND COVENANTS:

OWNERSHIP FREE OF ENCUMBRANCES. Except for the security interest granted hereby, Debtor now owns or will use the proceeds of the advances hereunder to become the owner of the Collateral free from any other prior lien, security interest or encumbrance, and Debtor will defend the Collateral against all claims and demands of all persons at any time claiming the same or any interest therein.

FINANCING STATEMENTS. No financing statement covering the Collateral or any proceeds thereof is on file in any public office and Debtor will join with Secured Party in executing one or more financing statements in form satisfactory to Secured Party.

INSURANCE. Debtor will insure the Collateral with companies acceptable to Secured Party against such casualties and in such amount as Secured Party shall require. All insurance policies shall be written for the benefit of Debtor and Secured Party as their interests may appear, and such policies or certificates evidencing the same shall be furnished to Secured Party. All policies of insurance shall provide at least ten (10) days prior written notice of cancellation to Secured Party.

MAINTENANCE. Debtor will keep the Collateral in good condition and free from liens and other security interests, will pay promptly all taxes and assessments with respect thereto, will not use the Collateral illegally or encumber the same and will not permit the Collateral to be affixed to real or personal property without the prior written consent of Secured Party. Secured Party may examine and inspect the Collateral at any time, wherever located.

REIMBURSEMENT FOR EXPENSES. At its option, Secured Party may discharge taxes, liens, security interests, or other encumbrances on the Collateral and may pay for the repair of any damage to the Collateral, the maintenance and preservation thereof and for insurance thereon. Debtor agrees to reimburse Secured Party on demand for any payments so made and until such reimbursement, the amount of any such payment, with interest at ten (10%) per cent per annum from date of payment until reimbursement, shall be added to the indebtedness owed by Debtor and shall be secured by this security agreement.

CHANGE OF RESIDENCE OR LOCATION OF COLLATERAL. Debtor will immediately notify Secured Party in writing of any change in Debtor’s residence, and Debtor will not permit any of the Collateral to be removed from the location specified herein without the written consent of Secured Party.

DEBTOR FURTHER WARRANTS AND COVENANTS:

1. The Collateral covered by this agreement is to be used by Debtor primarily for

Personal, family or household purposes

Farming operations

Business other than farming operations.

2. The Collateral is

Now owned by the Debtor

Being acquired with the proceeds of the advance evidenced by this agreement.

3. Debtor’s residence is

At the address shown above

At . . . .

(Street Number) (City) (State)

4. The Collateral will be kept at

Debtor’s residence as shown above

At . . . .

(Street Number) (City) (State)

5. Debtor’s chief place of business is

In the county of Debtor’s residence

At . . . .

(Street Number) (City) (State)

EVENTS OF DEFAULT. Debtor shall be in default under this agreement upon the happening of any of the following events or conditions:

1. Default in the payment or performance of any obligation, covenant or liability contained or referred to herein;

2. Any warranty, representation or statement made or furnished to Secured Party by or in behalf of Debtor proves to have been false in any material respect when made or furnished;

3. Any event which results in the acceleration of the maturity of the indebtedness of Debtor to others under any indenture, agreement or undertaking;

4. Loss, theft substantial damage, destruction, sale or encumbrance to or of any of the Collateral, or the making of any levy, seizure or attachment thereof or thereon;

5. Any time the Secured Party believes that the prospect of payment of any indebtedness secured hereby or the performance of this agreement is impaired;

6. Death, dissolution, termination of existence, insolvency, business failure, appointment of a receiver for any part of the Collateral, assignment for the benefit of creditors or the commencement of any proceeding under any bankruptcy or insolvency law by or against Debtor or any guarantor or surety for Debtor.

REMEDIES. Upon such default and at any time thereafter Secured Party may declare all obligations secured hereby immediately due and payable and may proceed to enforce payment of the same and exercise any and all of the rights and remedies provided by the Uniform Commercial Code as well as all other rights and remedies possessed by Secured Party. Secured Party may require Debtor to assemble the Collateral and make it available to Secured Party at any place to be designated by Secured Party which is reasonably convenient to both parties. Unless the Collateral is perishable or threatens to decline speedily in value or is of a type customarily sold on a recognized market, Secured Party will give Debtor reasonable notice of the time and place of any public sale thereof or of the time after which any private sale or any other intended disposition thereof is to be made. The requirements of reasonable notice shall be met if such notice is mailed, postage prepaid, to the address of the Debtor shown at the beginning of this agreement at least ten days before the time of sale or disposition.

No waiver by Secured Party of any default shall operate as a waiver of any other default and the terms of this agreement shall be binding upon the heirs, executors, administrators, successors, and assigns of the parties hereto.

Signed and delivered the day and year first above written.

SECURED PARTY:

By . . . .

(Name) (Title)

DEBTOR:

. . . .

(Name)

. . . .

(Name)

. . . .

(Corporate or partnership name)

By . . . .

(Name) (Title)

20.02 COLLATERAL SECURITY:

See category Debtor and Creditor, topic Pledges.

20.03 MORTGAGES OF PERSONAL PROPERTY:

See topic Chattel Mortgages.

20.04 MORTGAGES OF REAL PROPERTY:

A mortgage of real property must be executed, acknowledged and recorded like a deed. (See category Property, topic Deeds.) Lien theory obtains.

Recording.

(K.S.A. 58-2332 et seq.). Record instrument with Register of Deeds. (K.S.A. 58-2231).

Recording Fees.

See category Documents and Records, topic Records, subhead Recording Fees.

Taxes.

See category Taxation, topic Taxes.

Mortgage Registration Tax.

All mortgages on real estate or renewals or extensions of same filed for record are in addition to recording fee subject to a registration fee of .26% of “principal debt or obligation”. “Principal debt or obligation” does not include finance charge or interest. “Mortgages” are defined by law to include every instrument by which lien is created or imposed on real property and executory contracts for sale on real estate which are not to be completed within 90 days and by which grantee is entitled to possession but grantor holds legal title to secure payment of unpaid purchase money. (K.S.A. 79-3101). No mortgage subject to registration fee shall be filed for record by any register of deeds or received in evidence in any suit or proceeding, and no judgment, decree or order of enforcement shall be rendered, unless registration fee has been paid. (K.S.A. 79-3107). Where mortgaged land is partly within and partly without state, register of deeds requires affidavit of fair market or appraisal value. Registration fee collected by applying relative values of property in and out of state to indebtedness secured by mortgage. (K.S.A. 79-3106).

No registration fee is required on any mortgage (1) solely for correcting previous instrument, (2) given for additional security where fee was paid on original instrument, (3) upon that portion verified by affidavit to be principal in previous instrument with same lender upon which fee has been paid, (4) instruments incident to migration to Kansas of corporation by merger or consolidation with domestic corporation where original instrument for which fee has been paid is continued or otherwise acknowledged or validated, (5) given in form of affidavit of equitable interest solely for purpose of providing notification by purchaser of real property of his interest therein, (6) participated in by certified development corporation certified by U.S. small business administration pursuant to community economic development program, (7) given for purpose of changing trustee; or (8) for which registration fee is otherwise not required by law. (K.S.A. 79-3102).

Possession of Mortgaged Premises.

A mortgagor of real property is entitled to possession thereof in absence of any stipulation to contrary. (K.S.A. 58-2301).

Reasonable costs of collection, including attorney fees, permitted in mortgage. (K.S.A. 58-2312).

Trust deeds are infrequently used. They must be foreclosed in same manner as regular mortgages. Trustee cannot obtain judgment for fees or compensation. (136 Kan. 247, 14 P.2d 659).

Future Advances.

Mortgage may secure future advances. Lien of such mortgage attaches upon execution and has priority from time of recording as to all advances made thereunder until mortgage is released. However lien of such mortgage may not at any one time exceed maximum amount stated in mortgage. (K.S.A. 58-2336).

Priorities.

A mortgage for purchase money has preference over prior judgment against purchaser. (K.S.A. 58-2305).

Assignment.

Where real estate mortgage covers rents and profits or assignment of rents and profits to take effect either before or after default, provision is valid but is effective only until sheriff’s sale.

Before mortgagee is entitled to benefit of such stipulation rents and profits must be subjected to possession of mortgagee by appropriate legal proceedings. (136 Kan. 247, 14 P.2d 659).

If mortgagor fails to pay taxes on mortgaged land, mortgagee may pay them and have amount thereof, with interest prescribed by law from date of payment, included in mortgage. (K.S.A. 79-2901; K.S.A. 79-2004).

Removal of Buildings.

No buildings may be removed from real property covered by properly recorded, unsatisfied mortgage without written permission of mortgagee. (K.S.A. 58-2315).

Assignment of mortgage must set forth clearly the full name and post office address of the assignee (K.S.A. 58-2319) and must be acknowledged and recorded like a deed. If such assignments are not recorded, mortgagor may pay all matured interest or principal debt itself prior to recording of such assignment to mortgagee and such payment shall be effectual to extinguish all claims against such mortgagor for or on account of such interest or principal indebtedness. (K.S.A. 58-2321).

Discharge or Release.

Mortgage shall be assigned or discharged by instrument acknowledging assignment or satisfaction of such mortgage, signed by mortgagee, attorney in fact, assignee of record, personal representative, or by lender or closing agent in sale, financing or refinancing of real estate subject to mortgage who has caused indebtedness to be paid in full and duly acknowledged and certified as other instruments affecting real estate. Mortgages released prior to July 1, 1977 by notation on original instrument and duly signed by mortgagee may be filed with register of deeds. (K.S.A. 58-2306 to 2307).

Where mortgage has been foreclosed but no execution or order of sale issued within five years and no proceedings to revive or appeal taken within seven years, clerk of district court must, on application file separate instrument releasing said mortgage on record. (K.S.A. 58-2314).

A duly executed release of a mortgage by last recorded assignee is effectual both as a release of the land and as a release of the debt secured by the mortgage, unless specifically stated to be only a partial release of property covered.

See also category Documents and Records, topic Records, subhead Recording Fees.

Satisfaction.

When any recorded mortgage is paid, mortgagee or his assignee must record satisfaction and pay recording fees. (K.S.A. 58-2309a). If mortgagee or his assignee fails to enter satisfaction within 20 days of demand, lender or closing agent may pay indebtedness and enter satisfaction. If mortgagee not paid lender or closing agent liable to mortgagee. Mortgagee's failure to enter satisfaction within 20 days makes mortgagee liable for $500 plus reasonable attorney's fees and any additional damages evidence warrants. (K.S.A. 58-2309a[a] and [d]).

Foreclosure and Sale.

In actions to enforce mortgages a judgment for sale of property must be rendered. Sale is same as in executions. See category Debtor and Creditor, topic Executions.

Stay on Foreclosure of Agricultural Land.

Family Farm Rehabilitation Act (K.S.A. 2-3401 et seq.) unconstitutional (240 Kan. 624, 732 P.2d 710).

Deficiency Judgments.

Judgment is for amount due and proceeds of sale are applied thereon. Deficiency judgments are not uncommon. However, court, in its power of confirmation of sale, may refuse to confirm where sale price is not equivalent to or more than amount of judgment. See category 8 Debtor and Creditor, topic 8.05 Executions.

Redemption from foreclosure sale is governed by the same rules as apply to execution sales (see category Debtor and Creditor, topic Executions).

Forms.

Statutory form is as follows:

Form

"A. B. mortgages and warrants to C. D. (here describe the premises) to secure the payment of (insert the sum for which the mortgage is granted or the notes or other evidences of debt sought to be secured; also date of payment)."

A mortgage so drawn, being dated, signed, and acknowledged by the grantor is deemed a sufficient mortgage with warranty and if the words "and warrants" be omitted, the mortgage is good without warranty. (K.S.A. 58-2303).

The following forms are in general usage:

Forms

Assignment: A, in consideration of the sum of . . . . . . dollars, the receipt whereof is hereby acknowledged, does hereby sell, assign, transfer, set over and convey unto B, heirs and assigns, one certain mortgage, dated the . . . . . . day of . . . . . ., 20. . . ., executed by . . . . . . to . . . . . . covering the following described property, to-wit: . . . . . . given to secure the payment of $. . . . . . and the interest thereon, and duly filed for record in the office of the Register of Deeds of . . . . . . County, Kansas, and recorded in book . . . . . . on page . . . . . . together with the note, debt and claim secured by said mortgage, and the covenants contained in said mortgage. Dated this . . . . . . day of . . . . . ., 20. . . .

(Signed) . . . ."

Acknowledgment is necessary.

Satisfaction: "In consideration of full payment of the debt secured by a mortgage made by . . . . . . in favor of . . . . . . and assigned to . . . . . . given to secure the payment of . . . . . dollars, dated the . . . . . . day of . . . . . ., 20. . . ., which is recorded in book . . . . . . of mortgages, at page . . . . . ., of the records of . . . . . . County, Kansas, satisfaction of said mortgage is acknowledged and the same is hereby released. Dated this . . . . . . day of . . . . . ., 20. . . .

(Signed) . . . ."

Acknowledgment is necessary.

Partial release: A, mortgagee in (or assignee of) that certain mortgage hereinafter described, does hereby certify that said mortgage, dated the . . . . . . day of . . . . . .,20. . ., executed by . . . . . . to . . . . . ., and recorded in the office of the Register of Deeds of . . . . . . County, Kansas, in book . . . . . . at page . . . . . ., is, as to the property herein described, to-wit: . . . . . ., released and discharged. This release is given on the express terms and condition that it shall in no way affect the lien of the above mentioned mortgage on the remaining land described in said mortgage, but shall only be construed as a release from the lien of said mortgage of the land herein described. Dated this . . . . . . day of . . . . . ., 20. . . .

(Signed) . . . ."

Acknowledgment is necessary.

Chattel Mortgages.

See topic Chattel Mortgages.

21 PROPERTY

21.01 ABSENTEES:

Absentee refers to any person who has disappeared and remains unheard from by persons most likely to hear from him or any person who is reported by U.S. Department of Defense to be a prisoner of war or missing in action. (K.S.A. 59-2701).

Care of Property.

District court has jurisdiction to appoint trustee to manage and conserve property within state of any absentee. (K.S.A. 59-2702). If absentee remains unheard from for five years or is missing as result of catastrophic event and diligent search has been conducted by persons with bona fide motive for locating absentee, death is presumed. (K.S.A. 59-2704). Upon petition by absentee or his attorney-in-fact court shall declare absentee alive, order state registrar to rescind presumptive death certificate and direct termination of trust estate and transfer of property to absentee or attorney-in-fact. (K.S.A. 59-2705[a]). Upon filing of petition by person interested in estate, district court administers estate as if absentee was known to have died on date of said filing. (K.S.A. 59-2705[a]). Upon petition of person interested in estate of absentee declared by U.S. to be missing in action for three years, district courts shall terminate trust estate and administer it as if person deceased on date of filing, except, court shall not declare absentee to be deceased. (K.S.A. 59-2705[c]). Title under order of final settlement does not pass until distributees file bond conditioned for return of property or value thereof if absentee returns and sets aside order of final settlement upon application filed within five years of final settlement if filed by absentee within three months after he learned or should have learned of such order. Exceptions made for spouse and children. Action on bond may be brought only within one year after absentee learned of distribution and in no event more than six years after such distribution. (K.S.A. 59-2705[d]).

Escheat.

See category Estates and Trusts, topics Executors and Administrators, subhead Unclaimed Money, Descent and Distribution, subhead Escheat.

Uniform Unclaimed Property Act adopted. (K.S.A. 58-3934 to 3978). Act does not apply to estates of absentees administered (K.S.A. 59-2701 et seq.), estates passing by intestate succession (K.S.A. 59-514, and 59-901 to 905), salvage property (K.S.A. 70-101 et seq.), or abandoned motor vehicles (K.S.A. 8-1101 et seq.).

21.02 ADVERSE POSSESSION:

Fee simple title to real property may be acquired by possession inconsistent with title of another.

Character and Duration of Possession.

No action may be maintained against any person for recovery of real property who has been in open, exclusive and continuous possession of such, either under a claim knowingly adverse or under a belief of ownership, for a period of 15 years. (K.S.A. 60-503).

Easements may be acquired by adverse use.

Disabilities.

Person entitled to bring action must do so within two years after disability removed. If person dies during disability period, his heirs, or any person entitled to claim from, by or under him, may commence such action after time specified as a limitation, and within two years after his death, but not after that period. (K.S.A. 60-508).

21.03 CONDOMINIUMS:

See topic Real Property.

21.04 CONVEYANCES:

See topic Deeds.

21.05 CURTESY:

Estate by curtesy is abolished. Husband has same interest in deceased wife's property as widow has in deceased husband's property. (K.S.A. 59-505). See topic Dower.

21.06 DEEDS:

The term "heirs" or other words of inheritance are not necessary to create or convey estate in fee simple. Every conveyance of real estate passes all of estate of grantor therein unless intent to pass less estate expressly appears or is necessarily implied in terms of grant. (K.S.A. 58-2202). See topic Real Property for types of estates.

Execution.

Seals are abolished. (K.S.A. 16-106). Grantor may sign by mark and no witnesses are necessary in any case. It is not necessary that spouse join in conveyance by other except as to homestead (see category Debtor and Creditor, topic Homesteads, subhead Alienation or Incumbrance) and to bar the inchoate statutory interest (see topic Dower).

See also category Family, topic Husband and Wife.

Recording.

Conveyances and instruments affecting lands are not valid except as between the parties thereto and such as have actual notice, until they are deposited for record with the register of deeds of the county where the land is situated. (K.S.A. 58-2223). No deed or instrument providing for transfer of title to real estate or affidavit of equitable interest in real estate shall be recorded unless such deed, instrument or affidavit shall be accompanied by completed real estate sales validation questionnaire, available from Register of Deeds office. Real estate validation questionnaire shall not apply to transfers of title: (1) Solely for security; (2) to modify or supplement prior recorded instrument without new consideration; (3) as gifts; (4) for cemetery lots; (5) by leases and transfers of severed mineral interests; (6) to trust and without consideration; (7) resulting from divorce settlement; (8) made for purpose of creating joint tenancy or tenancy in common; (9) by way of sheriff's deed; (10) by way of deed escrowed for more than five years; (11) by way of quit claim deed for purpose of clearing title encumbrances; (12) when title transfers right of way or pursuant to eminent domain; (13) made by guardian, executor, administrator, conservator, or trustee of estate pursuant to judicial order; or (14) when title transferred due to repossession. (K.S.A. 79-1437[e]). See subhead Forms, infra. Failure to acknowledge does not impair validity (except statutory short form deeds, which must be acknowledged); but unacknowledged or defectively acknowledged instrument is not entitled to record, even though spread of record gives no notice of its contents. (169 Kan. 342, 219 P.2d 345). Filing of conveyance for record is deemed to impart notice to all persons of contents thereof. (K.S.A. 58-2222). See also category 10 Documents and Records, topic 10.04 Records.

Recording Fees.

See category Documents and Records, topic Records, subhead Recording Fees.

Taxes.

Category Taxation, topic Taxes, subhead Real Estate Conveyance Tax.

Corporation.

Corporate deed must be executed by any authorized officer of corporation and attested by secretary. (K.S.A. 17-6003[g]).

Conveyance by Attorney.

See topic Powers of Attorney.

Foreign Executed Deeds.

Conveyances of real estate, executed and acknowledged or proved in any other state, territory or country in conformity with the laws thereof or in conformity with the laws of Kansas, are as valid as if properly executed within this state. (K.S.A. 58-2228).

After-acquired title passes under a warranty deed but not under a quitclaim deed. (K.S.A. 58-2207).

Transfer on Death.

Interest in real estate may be titled in transfer-on-death. (K.S.A. 59-3501, et seq.). Statutory deed is recorded in county where real estate is located. (K.S.A. 59-3502). Transfer on death deed may not be revoked by will. (K.S.A. 59-3503). Alternative beneficiaries may be designated.

Forms.

The following forms are contained in the statute:

Form

Any conveyance of lands, worded in substance as follows: “A. B. conveys and warrants to C. D. (here describe the premises), for the sum of (here insert the consideration), the said conveyance being dated, duly signed and acknowledged by the grantor, shall be deemed and held a conveyance in fee simple to the grantee, his or her heirs and assigns, with covenants from the grantor, for himself or herself and his or her heirs and personal representatives, that the grantor is lawfully seized of the premises, has good right to convey the same and guarantees the quiet possession thereof, that the same are free from all encumbrances, and the grantor will warrant and defend the same against all lawful claims” (K.S.A. 58-2203).

If word “quitclaims” is substituted for words “conveys and warrants” in above form, conveyance will be a good and sufficient quitclaim deed to grantee, his or her heirs and assigns.

(K.S.A. 58-2204).

The following forms are in general usage:

Form

Warranty Deed: This Indenture, Made this . . . . . . day of . . . . . ., A. D., 20. . . ., Between . . . . . . of . . . . . . County, in the State of . . . . . ., of the first part and . . . . . . of . . . . . . County, in the State of . . . . . . of the second part. Witnesseth, That the said part. . . . of the first part, in consideration of the sum of . . . . . . Dollars, the receipt whereof is hereby acknowledged, do . . . . by these presents grant, bargain, sell and convey unto the said part . . . . of the second part . . . . . . heirs and assigns all the following described real estate, situated in the County of . . . . . . and State of . . . . . . to-wit: . . . . . . To Have and to Hold the Same, Together with all and singular the tenements, hereditaments and appurtenances thereunto belonging or in anywise appertaining forever. And said . . . . . . for . . . . . . and for . . . . . . heirs, executors, or administrators, do . . . . hereby covenant, promise and agree to and with said part. . . . of the second part, that at the delivery of these presents . . . . . . lawfully seized in . . . . . . own right, of an absolute and indefeasible estate of inheritance, in fee simple, of and in all and singular the above granted and described premises, with the appurtenances; that the same are free, clear, discharged and unincumbered of and from all former and other grants, titles, charges, estates, judgments, taxes, assessments and incumbrances of what nature and kind soever: . . . . . . and that . . . . . . will Warrant and Forever Defend the same unto said part . . . . of the second part, ... heirs and assigns, against said part . . . . of the first part . . . . heirs, and all and every person or persons whomsoever, lawfully claiming or to claim the same. In Witness whereof, the said part . . . . of the first part . . . . hereunto set . . . . . . hand . . . . the day and year first above written. (Signature and acknowledgment.)

Quitclaim Deed: Same as warranty deed except: (1) Substitute “remise, release and quitclaim” for “grant, bargain, sell and convey”; and (2) eliminate warranty sentence beginning “And said . . . . . . for . . . . . . and for . . . . . . heirs,” and ending “or to claim the same.”

Transfer on Death: (Name of Owner), as owner, transfers on death to (Name of . . . .

Beneficiary), as grantee beneficiary, the following described interest in real estate. . . . . .

(here insert description of interest in real estate). THIS TRANSFER ON DEATH . . . .

DEED IS REVOCABLE. IT DOES NOT TRANSFER ANY OWNERSHIP UNTIL THE DEATH OF THE OWNER. IT REVOKES ALL PRIOR BENEFICIARY DESIGNATIONS BY THIS OWNER FOR THIS INTEREST IN REAL ESTATE.

21.07 DEEDS OF TRUST:

See category Mortgages, topic Mortgages of Real Property.

21.08 DOWER:

Common law dower is abolished. In lieu thereof, surviving spouse is given right to receive undivided one-half interest in all of real estate in which deceased spouse at any time during marriage had legal or equitable interest. (K.S.A. 59-505).

Release, Bar, Election.

Conveyance by spouse alone in whom title is vested does not defeat inchoate interest of other spouse unless: (1) Other spouse has consented in writing (usually by joining as grantor) or by election to take under grantor's will (see category Estates and Trusts, topic Wills); (2) real estate has been sold on execution or judicial sale or taken by other legal proceeding; or (3) non-joining spouse was not resident of Kansas at time of conveyance and was never such resident during existence of marriage relation. (K.S.A. 59-505).

Effect of Sale by One Spouse Alone.

Purchaser from spouse in whom title is vested takes entire fee simple, subject to inchoate right of non-joining spouse. Until death of such grantor other spouse is not entitled to profits and has no right of possession. (K.S.A. 59-505).

21.09 ESCHEAT:

See categories Business Regulation and Commerce, topic Banks and Banking, subhead Unclaimed Deposits; Estates and Trusts, topics Descent and Distribution, subhead Escheat, Executors and Administrators, subhead Unclaimed Money.

21.10 LANDLORD AND TENANT:

Uniform Commercial Code Art. 2A.

Adopted.

Kinds of Tenancy.

Tenancy at will presumed unless shown otherwise. (K.S.A. 58-2501). If premises are let for one or more years and tenant, with assent of landlord, continues to occupy after expiration of term, tenant deemed to be tenant from year-to-year. (K.S.A. 58-2502). If rent is payable at intervals of three months or less, tenant holds for period equal to interval unless express contract to contrary. (K.S.A. 58-2503).

Uniform Residential Landlord and Tenant Act.

Unless rental agreement fixes definite term, tenancy of roomer paying weekly rent is week-to-week and all others hold month-to-month. (K.S.A. 58-2546).

Leases.

Statute of Frauds is applicable to leases. (K.S.A. 33-105). See category Business Regulation and Commerce, topic Frauds, Statute of.

Security Deposits.

Residential Dwellings.

Limited to one month's rent for unfurnished apartments and 1.5 month's rent for furnished apartments. Landlord may collect additional ½ month's rent if rental agreement permits tenant to keep pets. (K.S.A. 58-2250[a]).

Recording.

Leases may be recorded same as deeds. (K.S.A. 58-2221). See topic Deeds and category Documents and Records, topic Records. Public has notice of rights of tenant actually in possession of property.

Term.

Any person in possession of real property with assent of owner is presumed to be tenant at will, unless contrary is shown. (K.S.A. 58-2501). Where tenant continues to occupy land, with assent of owner, after expiration of term for one or more years, he is tenant from year to year. (K.S.A. 58-2502). Where rent is payable at intervals of three months or less, tenant holds from one payment date to next, except where there is an express contract. (K.S.A. 58-2503).

Occupant of land without special contract is liable for rent to person entitled thereto. (K.S.A. 58-2520).

Rent.

Residential Dwellings.

Duty to pay rent must be conditioned on landlord’s performance of duties. (K.S.A. 58-2549; 2553; 2559).

Assignment of Lease.

Tenant at will, by sufferance or for term of less than two years cannot assign his lease or interest without consent of landlord. (K.S.A. 58-2511).

Attornment of tenant to stranger is void, unless with consent of landlord or pursuant to judgment or court order. (K.S.A. 58-2514).

Conveyance by landlord of leased real estate is valid without attornment of tenant, but payment of rent to grantor before tenant receives notice of sale is good as against grantee. (K.S.A. 58-2513).

Waiver of Exemption.

Tenant may waive, in writing, benefit of exemption laws with respect to all debts contracted for rent. (K.S.A. 58-2530).

Attachment for Rent.

Where tenant liable for rent, which may either be due or to become due within year, intends to remove, is removing, or has within 30 days removed his property or crops from leased premises, landlord may sue for such rent, and may, upon filing affidavit stating amount due and setting out one or more of above grounds, and giving bond as in other cases of attachment, have attachment issued. (K.S.A. 58-2527).

Lien.

Rent due for farming land is lien on crop grown on premises. (K.S.A. 58-2524). Purchaser of crop, with notice of lien, takes subject thereto. (K.S.A. 58-2526). Lien may be enforced by attachment. (K.S.A. 58-2528). This is only statutory lien for rent, although lien may be reserved by contract in lease.

Residential Dwellings.

Lien or security interest in tenant’s personal property unenforceable. (K.S.A. 58-2567[a]).

Termination of Tenancy.

Thirty days notice in writing required by either party to terminate tenancy at will, or tenancy for period of three months or less. If rent is payable at intervals of less than 30 days, notice equaling such interval must be given. Where tenant is employee of landlord, ten days written notice to vacate is sufficient. Where tenant in military, 15 days written notice by tenant sufficient if termination necessitated by government ordered move. (K.S.A. 58-2504).

Tenancies from year to year, except farm tenancies, are terminated by 30 days notice in writing, given prior to expiration of year. (K.S.A. 58-2505).

Notice of termination of tenants occupying and cultivating farmland or occupying or leasing pastureland must be given 30 days before Mar. 1 and must fix date of termination as Mar. 1, or for fall seeded crops day following end of harvest or Aug. 1, except, where tenant becomes tenant from year to year by holding over after written lease, date of termination is same day of same month as fixed in written lease. 30 days notice required. If notice given after Mar. 30 and prior to planting of fall seeded crops, but cropland prepared for fall seeded crop, termination is last day of harvest or Aug. 1 of succeeding year, whichever comes first. (K.S.A. 58-2506).

Above periods apply where there has been no breach of lease. If, however, tenant fails to pay rent when due, notice in writing for following period shall be sufficient (unless rent is paid during such notice period): tenancies for three months or longer, ten days (K.S.A. 58-2507); tenancies for less than three months, three days (K.S.A. 58-2508).

Notices may be served on tenant, or if he cannot be found, by leaving a copy at his usual place of residence, or by delivering a copy to some person over 12 years of age residing on premises, or if no person is found thereon, by posting a copy of said notice in a conspicuous place thereon, or by registered mail or registered or certified mail, return receipt requested, addressed to tenant at usual place of residence. (K.S.A. 58-2510).

No notice to quit is necessary where the time for termination is specified in contract, or where tenant at will commits waste, or in case of tenant by sufferance, or where telation of landlord and tenant does not exist. (K.S.A. 58-2509).

Residential Dwellings.

Landlord may terminate for material noncompliance by tenant upon 30 days notice to tenant, during which tenant has 14 days to remedy breach (K.S.A. 58-2264), or if tenant abandons dwelling (K.S.A. 58-2565).

Tenant may terminate for material noncompliance by landlord on 30 days notice. If landlord begins good faith effort to remedy within 14 days, lease will not terminate, unless landlord has previously failed to remedy same condition. (K.S.A. 58-2259).

Landlord or tenant may terminate week-to-week tenancy by seven days written notice. Month-to-month tenancy may be terminated on 30 days notice, except tenant may terminate on 15 days notice if tenant is in military and termination is necessary due to military orders. (K.S.A. 58-2570).

Holding Over.

If tenant remains in possession without landlord’s consent after expiration of term, landlord may bring action for possession and if tenant’s holdover is willful and not in good faith, landlord may recover 1½ months’ rent or 1½ times actual damages, whichever is greater. (K.S.A. 58-2570).

Dispossession.

If tenant for term of less than two years assigns interest to another without written consent of landlord, landlord, on ten days notice, has right to reenter and dispossess tenant. (K.S.A. 58-2511 to 2512).

Distress.

Residential Dwellings.

Distraint for rent abolished (K.S.A. 58-2567[b]) unless tenant abandons dwelling and property (K.S.A. 58-2565).

Uniform Residential Landlord and Tenant Act adopted. (K.S.A. 58-2540, et seq.). Following sections omitted: §§ 1.102 to 1.106, 1.201, 1.302, 1.304, 2.104(b), 4.103, 4.104, 4.202. Jurisdiction is in district court and actions may be commenced under K.S.A. 61-1601 et seq. regardless of amount in controversy. (K.S.A. 58-2542).

Following provisions are in addition to Uniform Act: Paragraph K.S.A. 58-2548 requires inventory of premises by landlord and tenant within five days of occupancy. Paragraphs K.S.A. 58-2565(d), (e), (f) provide for seizure and sale by landlord of tenant's personal possessions where tenant abandons lease. Paragraph K.S.A. 58-2570(d) provides for immediate possession by landlord upon motion, notice, and hearing in district court. Paragraph K.S.A. 58-2570(e) requires that document signed by landlord or tenant or both which constitutes tenant's written notice to landlord of tenant's intent to vacate premises contain specific language in ten-point boldface type as to intent to vacate.

21.11 LEASES:

See topic Landlord and Tenant; category Mineral, Water and Fishing Rights, topic Mines and Minerals.

21.12 PARTITION:

Jurisdiction and Venue.

Action brought in county in which real estate is situated, except if entire tract situated in two or more counties, then action may be brought in any county in which any tract is situated. (K.S.A. 60-601).

Proceedings.

Petition must describe property and respective interests of owners. (K.S.A. 60-1003). Answer to Petition includes allegations of nature and extent of respective interests. (K.S.A. 60-1003). Judge determines and makes order specifying interest of respective parties and directing partition. (K.S.A. 60-1003).

21.13 PERPETUITIES:

Common law rule as to perpetuities in force. (215 Kan. 472, 524 P.2d 1187).

21.14 PERSONAL PROPERTY:

Tenancy by the entirety does not exist. (K.S.A. 58-501).

21.15 POWERS OF ATTORNEY:

Attorneys in Fact.

Attorney in fact with general powers has, with respect to subjects for which powers are conferred, all rights, power, and authority to act for principal that principal would have with respect to principal's own person or property, including property owned jointly or by entireties with another. (K.S.A. 58-654).

Revocation.

Authority granted in power of attorney must be modified or terminated as follows: (1) On date shown in power of attorney; (2) when principal orally or in writing informs attorney that power of attorney is modified; or (3) when written notice of modification or termination is filed by principal in Office of Register of Deeds. (K.S.A. 68-657).

Power of Attorney.

Kansas has adopted comprehensive power of attorney act.

For Health Care Decisions.

Power of attorney by which principal designates another as his agent. Must be in writing containing words indicating principal's intent that authority conferred shall be exercisable notwithstanding principal's subsequent disability or incapacity. (K.S.A. 58-625). Limitations on agent's powers and effect of death of principal. (K.S.A. 58-629).

Members of Armed Forces.

Adopts by reference 50 U.S.C. 591 of soldiers and sailors civil relief act.

21.16 REAL PROPERTY:

Fee simple estates and life estates exist. The word "heirs" or other words of inheritance are not necessary to create an estate in fee simple. (K.S.A. 58-2202). Marketable record title act in force. (K.S.A. 58-3401).

Joint tenancies and estates by entirety abolished May 20, 1891. Those existing prior that date were not affected (78 Kan. 215, 96 Pac. 140), and it was held that joint tenancy may be created by specific contract in spite of statute (95 Kan. 798, 149 Pac. 691). Under law passed in 1939, estate which would have been at common law joint tenancy or estate by entirety is tenancy in common, unless language used in grant or devise makes it clear that joint tenancy was intended to be created. (K.S.A. 58-501). However, grant or devise to executors or trustees as such creates joint tenancy unless there is express declaration to contrary. Joint tenancy may be created by grant from owner to himself and another. (K.S.A. 58-501).

Estates tail are abolished after July 1, 1939. (K.S.A. 58-502). Prior to that date such estates existed and could be barred by conveyance of tenant in tail. (88 Kan. 708, 129 Pac. 1131).

Rule in Shelley's Case is abolished as to all instruments taking effect after July 1, 1939. Under a devise or conveyance, after that date, to "A for life and then to his heirs," or "heirs of his body," "issue" or the like, A takes a life estate and his heirs, issue, etc., take a fee simple in remainder. (K.S.A. 58-503).

Construction of Instruments.

In instruments disposing of property such as "to B and his heirs, but if B dies without issue then to C and his heirs," death of B without having issue living at the time of his death is indicated, and B's death without living issue need not occur in lifetime of maker of instrument. These rules apply when limitation is on death without "heirs," "heirs of the body," "issue," "children," "offspring," "descendants" or any such relatives, however described. (K.S.A. 58-504).

Conveyance "to B and his children," or "issue" or words of similar import creates life estate in B and remainder in children, etc. (K.S.A. 58-505).

A devisee who is also heir or next of kin of testator takes under will and not by descent. (K.S.A. 58-506).

Foreign Conveyances or Encumbrances.

Instruments executed and acknowledged or proved in any other state, territory or country in conformity with laws of such state, territory or country, or in conformity with laws of Kansas, are as valid as if executed within this state. (K.S.A. 58-2228).

Death of a life or joint tenant, and fact of devolution of title of real or personal property may be judicially determined in probate court. (K.S.A. 59-2286).

Condominiums permitted. (K.S.A. 58-3101 et seq.). Uniform Condominium Act not adopted.

See also topics Curtesy, Deeds, Dower, Landlord and Tenant; categories Civil Actions and Procedure, topic Partition; Debtor and Creditor, topic Homesteads; Family, topic Husband and Wife; Mortgages, topic Mortgages of Real Property.

Trust Deeds.

See Category Mortgages, topic Mortgages of Real Property.

22 TAXATION

22.01 ADMINISTRATION:

State Taxes.

General supervision of tax matters is in division of taxation of Department of Revenue. (K.S.A. 75-5102). Forms, waivers, etc. can be obtained from Division of Taxation, State Office Building, Topeka 66625; (785) 296-3044.

County, School and Municipal Taxes.

Local government agencies impose and collect various taxes, including property (ad valorem) taxes, occupational license taxes, economic and industrial development taxes. School financing is equalized and provided by state income tax and local mill levy.

Assessment of Taxes.

All property, except that appraised by state, is listed and appraised annually as of Jan. 1 by county or district appraiser. (K.S.A. 79-301; 79-1412a). Property sold after Jan. 1 is taxed to owner of record as of that date. (K.S.A. 79-306). Every person who owns tangible personal property must list it for assessment. (K.S.A. 79-303). Individuals file between Jan. 1 and Mar. 1, corporations by Apr. 1, and merchants listing inventory by Apr. 15. (K.S.A. 79-306). Appraiser notifies taxpayer of appraised value for real property by Mar. 1 and for personal property by May 1. (K.S.A. 79-1460).

Appeal of Assessed Value.

Informal Meeting.

Taxpayer files notice of appeal within 30 days of mailing of notice for real property and by May 15 for personal property. Appraiser must hold informal meeting regarding real property by May 15 and make determination before May 20. (K.S.A. 79-1448).

Hearing Panel.

Taxpayer may appeal final determination to hearing officer or panel. (K.S.A. 79-1448).

Officer or panel appointed by county commissioners. (K.S.A. 79-1602). Orders uniformly changing assessment to all property of any class must be approved by board upon written application and hearing, with Director of Property Valuation party thereto. (K.S.A. 79-1481).

County Board of Equalization.

Taxpayer may appeal final determination to state board of tax appeals. (K.S.A. 79-1448). Appeal must be made within 18 days of final determination by officer or panel. County clerk furnishes forms. Hearing must be held before July 1. (K.S.A. 79-1606).

State Court of Tax Appeals.

Taxpayer aggrieved by any order of hearing officer or panel may appeal to state court by written notice within 30 days. County appraiser may appeal also. (K.S.A. 79-1609). State court may change value (K.S.A. 79-1409) or order reappraisal of all or part of property in tax district (K.S.A. 79-1413a). Court must make written findings of fact in final order. (K.S.A. 74-2426).

Judicial Review.

Final order of state court may be reviewed pursuant to Kansas Judicial Review Act. (K.S.A. 77-601 et seq.). Motion for rehearing with state board is condition precedent for judicial review. (K.S.A. 74-2426[b]). Court of Appeals has jurisdiction to review any property appraisal. (K.S.A. 74-2426[c][3]).

Exemptions.

Government Property.

All property of U.S. is exempt unless Congress declares otherwise. Property used exclusively by state, municipality or political subdivision or Kansas Turnpike Authority is exempt. (K.S.A. 2008 Supp. 79-201).

Property used for religious, educational or other benevolent purposes is exempt. (K.S.A. 2008 Supp. 79-201).

Property used for nonprofit hospitals and housing is exempt. (K.S.A. 2008 Supp. 79-201).

Farm Related.

Exemptions include: (1) Certain livestock and all hay and silage (K.S.A. 79-201j); (2) all grain before milling or processing (K.S.A. 79-201j); (3) most farm or ranch machinery and equipment (K.S.A. 79-201j); and (4) all farm machinery and equipment in merchant's inventory after taxation preceding year (K.S.A. 79-217).

Intangibles.

Money, notes and other evidence of debt are exempt from tax by State. (K.S.A. 79-3109c). Counties, cities and townships may tax intangibles. (12-1,101 et seq.).

Miscellaneous exemptions exist at K.S.A. 79-201(c) to (x).

Penalties.

Uniform Civil Penalty Act.

Not adopted.

Real and Personal Property Tax.

Owner removing residence or building from real property without paying taxes due and delinquent thereon is guilty of misdemeanor and subject to fine up to $500. (K.S.A. 79-319a). Giving false or fraudulent list of oil and gas property is misdemeanor subject to fine of $50 to $5,000. (K.S.A. 79-333). Giving knowingly false answer to questions submitted by Director of Property Valuation is perjury with sentence of one to five years; willfully refusing to answer questions is misdemeanor with fine of $100 to $1,000 and imprisonment of six to 12 months. (K.S.A. 79-1420). Knowingly giving false list, schedule or statement to assessor, or temporarily converting property to evade taxes is misdemeanor with fine of not less than $1,000 or more than $5,000. (K.S.A. 79-1420).

Inheritance and Estate Tax.

Inheritance tax is abolished. Estate tax must be paid before final accounting is approved in probate estate. Tax, with interest, is lien on all property of estate. Interest is charged at legal rate from nine months after date of death.

Income Tax.

10% penalty and 1½% monthly interest for failure to file or pay taxes without intent to evade if return or payment is made within six months after due date. 25% penalty and interest for voluntary failure to file or pay taxes within six months of due date. 50% penalty and interest for failure to file return within 20 days of notice of failure to file from Director of Revenue. Penalty equal to amount of unpaid tax plus interest for fraudulent failure to pay tax, make return or provide required information. Tax fraud is misdemeanor with fine up to $1,000 and imprisonment of 30 days to one year. Willfully signing fraudulent return is felony punishable by imprisonment of not more than five years. (K.S.A. 79-3228).

Interstate Co-operation.

No statutory provision for compromise of death taxes where decedent's domicile disputed.

Taxpayer Bill of Rights.

No specific provisions. All taxing authority derives from Kansas Constitution, Art. 11.

Payment.

Full amount of real property taxes is due on or before Dec. 20 of each year, or half thereof on or before Dec. 20 and remaining half on or before June 20 next ensuing. (K.S.A. 79-2004).

Payment.

Full amount of real property taxes is due on or before Dec. 20 of each year, or half thereof on or before Dec. 20 and remaining half on or before June 20 next ensuing. (K.S.A. 79-2004).

22.02 ALCOHOL, BEVERAGES AND TOBACCO TAXES:

Alcoholic Beverages Tax.

Cereal malt beverage tax on beverages containing 3.2% or less alcohol by weight. (K.S.A. 41-501[2]). Liquor tax imposed. (K.S.A. 41-501 et seq.).

Cigarette Tax.

Imposed by K.S.A. 79-3310 and 3311.

Tobacco Product Tax.

Tax imposed on selling or dealing in tobacco products at rate of 10% of wholesale sales price of tobacco products. (K.S.A. 79-3371).

22.03 BUSINESS TAXES:

Provider Tax.

No special tax.

Franchise Tax.

See category Business Organizations, topic Corporations.

22.03A CONTROLLED DANGEROUS SUBSTANCES TAX:

Marijuana and Controlled Substances Tax.

Taxed pursuant to K.S.A. 79-5201, et seq.

22.04 CORPORATE TAXES:

Financial Institutions State Franchise Tax.

None. See category Business Organizations, topic Corporations, subhead Franchise Tax.

Tax on Corporation Stock.

See category Business Organizations, topic Corporations, subhead Franchise Tax.

Corporation License Taxes.

None.

22.05 EMPLOYMENT TAXES:

Unemployment Compensation Tax.

Imposed as contributions from employers by K.S.A. 44-701 et seq. Contributions payable by each contributing employer to Employment Security Fund and voluntary payments made by employers. Amount payable is based upon classification of employer and wages paid during calendar year. (K.S.A. 44-710 and 44-710a). See provisions respecting Indian tribe or tribal unit. (K.S.A. 44-710). Returns are made and paid to Secretary of Human Resources at times prescribed with penalty and interest charges for unpaid contributions. (K.S.A. 44-710[e]).

22.06 ENVIRONMENTAL TAXES:

Pollution Abatement Authority Tax.

Use of tax increment finance districts allows municipalities to use bonds to abate blighted areas. (K.S.A. 12-1770, et seq.). Abatement by state is paid by cost recovery actions against responsible party. See category Environment.

22.07 ESTATE TAX:

For estates of decedents dying after June 30, 1998, "pickup" tax is amount equal to maximum credit allowed by § 2011 of Internal Revenue Code against tax that otherwise would be imposed on transfer of taxable estate of decedent, multiplied by fraction, numerator of which is Kansas gross estate value and denominator of which is total gross estate value.

Apportionment.

Representative must charge each person interested in estate, fraction of total estate tax assessed against estate. Representative must not apportion estate taxes that are otherwise apportioned by federal law. (K.S.A. 79-15,126).

22.07A GAMBLING AND ENTERTAINMENT TAXES:

Race Tracks.

No special tax.

22.08 GASOLINE AND SPECIAL FUELS TAXES:

Gasoline and Fuel Tax.

Imposed by K.S.A. 79-3408.

22.08A GENERATION SKIPPING TAX:

No provision.

22.09 GIFT TAX:

None.

22.10 HOTEL AND RESTAURANT TAXES:

22.11 INCOME TAX:

Imposed by K.S.A. 79-3201 et seq. which closely parallels federal code.

Returns and Payment.

Returns must be filed by individual filing federal return or whose gross income exceeds Kansas exemption and standard deduction. (K.S.A. 79-3220). Return due on 15th day of 4th month following close of tax year. (K.S.A. 79-3221). Extensions for payment up to six months, or longer for taxpayer who is abroad, with 1½% monthly interest. (K.S.A. 79-3225). Extension granted by IRS will extend state return date if agreement filed with state within 30 days after execution agreement. (K.S.A. 2008 Supp. 79-3230). Withholding and declaration of estimated tax act adopted. (K.S.A. 79-3294). Any entity doing business in Kansas which makes payments to Kansas residents or entities subject to Kansas income tax and which files information returns to IRS must file copy with state at same time. (K.S.A. 79-3222).

Individuals in Military or in Support of Armed Services.

Excluded from time computation in respect to any tax liability for time served in designated combat zone and periods of hospitalization outside U.S. resulting from injury incident to service, with 180 day grace period. (K.S.A. 79-3221).

Income Taxed—Individual.

Resident taxed on entire federal adjusted gross income with certain statutory modifications. (K.S.A. 79-32,117).

Rate.

For married individuals, filing joint return rate is 3.5% of first $30,000; $1,050 plus 6.25% of excess over $30,000; and $2,925 plus 6.45% of excess over $60,000. For all others, rate is 4.1% of first $20,000; $820 plus 7.5% of excess over $20,000; and $1,570 plus 7.75% of excess over $30,000. (K.S.A. 79-32,110).

Exemptions.

$2,250 for each federal exemption and additional exemption for head of household. (K.S.A. 79-32,121).

Optional Tax Table.

Provided for taxable income less than $50,000 in tax booklet.

Nonresidents.

Taxed on Kansas taxable income based on ratio of income derived from sources in Kansas to Kansas adjusted gross income. (K.S.A. 79-32,110).

Income Taxed—Corporations.

Corporations doing business within or deriving income from within Kansas are taxed at rate of 4% on Kansas taxable income. Surtax at 3% of Kansas taxable income in excess of $50,000. (K.S.A. 79-32,110).

22.12 INHERITANCE TAX:

Kansas inheritance tax repealed for estates of decedents dying after June 30, 1998. For decedents dying on or before repeal date, act was at K.S.A. 79-1537 et seq.

22.12A MINES, MINERALS AND FISHERIES TAXES:

Coal Severance Tax.

Excise tax upon severance and production of coal. (K.S.A. 79-4216 et seq.).

22.12B MOTOR CARRIER FUELS TAX:

No separate tax. See topic Gasoline and Special Fuels Taxes.

22.13 LOCAL AND MUNICIPAL TAXES:

22.14 MOTOR VEHICLE TAXES:

See also category Transportation, topic Motor Vehicles.

Automobile Rental Surcharge.

In addition to tax imposed pursuant to Kansas retailers' Sales Tax Act, excise tax at rate of 3.5% upon gross receipts received from rental or lease for period of time not exceeding 28 days of motor vehicles. (K.S.A. 79-5117).

22.15 PREMIUM AND PRIVILEGE TAXES:

See Category Insurance, topic Insurance Companies, subheads Premium Tax, Privilege Tax.

22.16 REAL AND PERSONAL PROPERTY TAXES:

All property not exempt is taxable. See topic Administration, subheads Assessment of Taxes and Exemptions.

State Tax Rates.

None.

Local Tax Rates.

Levied on or before Aug. 25 by local, school and county taxing authorities. (K.S.A. 79-1801 et seq.).

Payment and Collection.

All taxes due on Nov. 1, payable to county treasurer. (K.S.A. 79-1804). County treasurer must mail tax information form by Dec. 15. (K.S.A. 79-2001). One-half may be paid on Dec. 20 and second half on May 10. (K.S.A. 79-2004 and 79-2004a).

Protesting Payment.

Taxpayer must file written statement on form provided by county treasurer stating ground of protest. Protest must be made at time of payment or by Dec. 20, or with respect to taxes paid in whole, or in part in amount equal to at least one-half of such taxes on or before Dec. 20, or for taxes paid by escrow or tax service no later than Jan. 31 of next year. (K.S.A. 79-2005). When grounds of such protest is assessment of taxes, county treasurer may not distribute taxes paid under protest until appeal is final. Within 30 days of result, taxpayer may appeal to state board of tax appeals. (K.S.A. 79-2005).

Real Estate Conveyance Tax.

No special tax.

22.17 SALES AND USE TAXES:

Sales Tax.

Tangible personal property taxed at 5.3% plus additional 2% in redevelopment district; sales of motor vehicles; repair and servicing of tangible personal property; and many services, including food, entertainment and temporary lodging, intrastate or international telecommunications services, mobile telecommunication services and gross receipts of sale of computer software and services. (K.S.A. 79-3603).

Exemptions are numerous and are frequently revised. (K.S.A. 79-3606).

Collection by retailer at time of sale. Tax on motor vehicles paid to county treasurer at time of registration. Tax on various other transactions paid to director of taxation. (K.S.A. 79-3604).

Retailer returns and payment made to director of taxation. Deadlines vary from annually to bimonthly depending upon annual tax liability with certain model sellers required to file returns electronically. (K.S.A. 79-3607).

Use Tax.

Rate of 5.3% after July 1, 2002 and before July 1, 2006 and 5% after July 1, 2006 of purchase price imposed for privilege of using, storing or consuming within state any article of tangible personal property, except such articles as: (a) Property brought into state by nonresident within state not to exceed 60 days for personal use or enjoyment or by railroad or public utility for use in interstate commerce; (b) purchase otherwise than at retail; (c) property which has been subject to tax of above rate under Kansas or other state law; (d) which would not have been subject to sales tax if purchased in this state. Where tax of sale or use of article has been imposed at lesser rate in Kansas or other state, tax is difference between tax imposed and above rate. State treasurer shall credit fraction of revenue collected in certain instances per statute. (K.S.A. 79-3702-3713 and 79-3603).

22.18 STAMP AND SEAL TAXES:

Stamp Tax.

No documentary stamp tax, but cigarette, cereal malt beverage and liquor taxes are payable by affixing stamps. See applicable topics.

22.18A TAX LIENS:

Uniform Federal Lien Registration Act Amended.

Act adopted with 1982 amendments. (K.S.A. 79-2613 et seq.). Filing officer shall charge filing fee same as financing statements filed under part 5 of Article 9 of UCC. (K.S.A. 79-2617).

22.19 USE TAXES:

See topic Sales and Use Taxes.

23 TRANSPORTATION

23.01 MOTOR VEHICLES:

General supervision is by the Department of Revenue, Division of Vehicles, State Office Building, Topeka, 66626, (785-296-3601) headed by Vehicle Commissioner, and under jurisdiction of State Highway Commission. Kansas Highway Patrol functions as enforcement agency.

Vehicle license plates are required. Special vehicle plates available for antique vehicles. (K.S.A. 8-172). Issued from officer of county treasurer in county where owner resides or has principal place of business if such vehicle is garaged in such county for period exceeding 90 days. (K.S.A. 8-129). Number plates must be attached to rear, except plates must be displayed in front on truck tractors. Personalized plates may also be attached to front. Special plates for person with disability. (K.S.A. 8-1, 124 et seq.).

Members of Armed Forces.

No specific exemption. However, in their case application for registration may be signed by member’s spouse, parent, eldest brother or sister, in order named. (K.S.A. 8-129).

Operator’s License.

An operator’s or chauffeur’s license, issued by state division of vehicles is required (K.S.A. 8-235), except for those exempted (K.S.A. 8-236), and must be in immediate possession of person to whom issued when operating motor vehicle (K.S.A. 8-244). For persons at least 21 years old but less than 65 years old, licenses expire on sixth anniversary of date of birth of licensee nearest date of application. Licenses issued to persons under 21 or over 65 and commercial licenses expire every four years. (K.S.A. 8-247). Licenses may be suspended or canceled. (K.S.A. 8-250 et seq.). Examination may be required. (K.S.A. 8-235; 8-241; and 8-245). Restricted licenses (K.S.A. 8-245) and temporary instruction permits (K.S.A. 8-239) may be issued. Age limit: 14 and 17 may apply for instruction permit. At least 17 years old to apply for instruction permit. (K.S.A. 8-239 revised per 2009 c. 34).

Members of Armed Forces.

No specific exemption.

Titles and Sales.

Certificate of title, good for life of vehicle, is issued on each motor vehicle required to be registered in Kansas. Certificate contains form for assignment of title, and blank spaces so that abstract of mileage as to each owner will be available. It is unlawful to buy or sell such vehicle unless at time of delivery or within 30 days of delivery if parties agree such certificate is given to buyer with assignment duly executed. Sale without such assignment and exchange of certificate of title is fraudulent and void unless title is in possession of seller at time of delivery and parties on form prescribed by department agree that title and assignment pass within 30 days of delivery and assigned title thereafter mailed by registered or restricted mail to purchaser within 30 days. Sale may be reaffirmed in writing when title is not timely delivered. (K.S.A. 2009 Supp. 8-135).

Manufacturers and Dealers.

Regulation and licensure pursuant to K.S.A. 2009 Supp. 8-2401 et seq.

Members of Armed Forces.

In case of members of Armed Forces while U.S. is engaged in war and for period of six months next following cessation of hostilities, application for certificate of title may be signed by member's spouse, parents, eldest brother or sister, in order named. (K.S.A. 2009 Supp. 8-135).

Transfer on Death.

Motor vehicle may be registered in transfer-on-death form by designating on certificate of title names of tenant in common or joint tenant followed by words "transfer on death to (Name of Beneficiary)" or by abbreviation "TOD". . . . .

Liens.

Assignment of certificate of title contains statement of no more than two liens or encumbrances on vehicle at time of assignment. (K.S.A. 2009 Supp. 8-135).

Identification Marks.

Sale or possession of motor vehicle, original engine number of which has been defaced, altered or removed, is punishable by fine and imprisonment. (K.S.A. 8-113). Unlawful to knowingly own or have custody or possession of motor vehicle, original identification number of which has been destroyed, removed, altered or defaced. (K.S.A. 8-116[b]).

Odometer Alteration.

Prohibitions based on federal odometer law. (15 USC § 1981 et seq.). Injured consumer may void sale and recover civil penalties and attorney's fees. Attorney General may act on behalf of injured consumers. Criminal penalties provided. (K.S.A. 21-3757).

Operation prohibited, by persons not having valid licenses (K.S.A. 8-235): licenses may not be issued to habitual violators, habitual drunkards or drug addicts who are incapable of safely driving vehicle, or to persons adjudged as affected with or suffering mental disability or disease and who have not been rehabilitated. (K.S.A. 2009 Supp. 8-237). Operation prohibited if opened container of alcoholic beverage accessible to driver. Second or subsequent violation results in restriction or suspension of driver's license. (K.S.A. 41-804).

Size and Weight Limits.

Regulated by Uniform Act to Regulate Traffic on Highways as modified by Kansas statutes. (K.S.A. 8-1401, et seq.; K.S.A. 8-1901 et seq.).

Equipment Required.

Regulated by K.S.A. 8-1701 et seq.

Seat Belts.

Use required (K.S.A. 8-2503), but evidence of nonuse not admissible in any action for purpose of determining comparative negligence or mitigation of damages (K.S.A. 8-2504[c]).

Lights Required.

Regulated by K.S.A. 8-1701 et seq.

Inspection.

Any police officer or properly designated department of revenue agent or employee may, upon reasonable cause, stop vehicles for inspection and test. If vehicle found with unlawful weight, it cannot be operated until placed in proper condition. (K.S.A. 8-1910).

Traffic Regulations.

Generally K.S.A. 8-1401 et seq.

Accidents.

Driver involved must give name, address and vehicle registration number to other party and render reasonable assistance to injured persons. If other vehicle unattended must either locate owner or leave name and address. If injury or property damage of $200 or more, must forward report to Vehicle Department within ten days. (K.S.A. 8-1607).

Liability of Owner.

Owner is liable for operation of his car by himself or person acting in his service or under his direction. An owner who causes or knowingly permits minor under age of 16 to drive his vehicle upon a highway, or any person who gives or furnishes a motor vehicle to such minor, is jointly and severally liable with minor for any damages caused by minor's negligence in driving such vehicle. (K.S.A. 8-222). Otherwise, "family car doctrine" not recognized.

Guests.

Guest Statute repealed.

Proof of Financial Responsibility.

Driver must carry proof of insurance card issued by insurer. Card must show both effective date and expiration date. Police must ticket any driver who fails to show proof upon demand. Ticket may be cancelled within ten days upon showing that insurance was in effect. (K.S.A. 40-3104[e]).

Insurance.

See subhead No-Fault Insurance, infra.

No-Fault Insurance.

"No-fault" insurance legislation embodied in K.S.A. 40-3101, et seq. Purpose is to compensate persons promptly for accidental bodily injury arising out of ownership, operation, maintenance or use of motor vehicles in lieu of liability for damages to extent provided in act. (K.S.A. 40-3102).

Requires every owner to provide motor vehicle liability insurance coverage in accordance with provisions of act for every motor vehicle owned by him unless such motor vehicle is included under an approved self-insurance plan or is expressly exempted by act. (K.S.A. 40-3104[a]). Liability insurance coverage required by act includes $25,000/$50,000 liability for bodily injury or death and $10,000 liability for property damage. (K.S.A. 40-3107[e]). Liability coverage for passengers' bodily injuries shall be included in policy unless insured rejects in writing. (K.S.A. 40-3107). Coverage also includes personal injury protection benefits to named insured, relatives residing in same household, persons operating insured motor vehicle, passengers in such motor vehicle and pedestrians. (K.S.A. 40-3107[f]).

Plaintiff in action for tort may recover damages for pain, suffering, mental anguish, inconvenience and other non-pecuniary loss only if injury requires medical treatment of kind described in Act as medical benefits, reasonably valued at $2,000 or more, or injury consists in whole or part of permanent disfigurement, fracture to weightbearing bone, compound, comminuted, displaced or compressed fracture, loss of a body member, permanent injury with reasonable medical probability, permanent loss of a bodily function or death. (K.S.A. 40-3117). No motor vehicle shall be registered or reregistered in state unless owner at time of registration has in effect policy of liability insurance covering such motor vehicle as provided by Act, or is self-insurer thereof. (K.S.A. 40-3118[a]). Personal injury protection benefits may be rejected by insured in policies covering motorcycles and motor-driven cycles. (K.S.A. 40-3107[f]).

Any person who knowingly drives or permits operation of an uninsured motor vehicle is guilty of a class B misdemeanor or class A misdemeanor for second conviction within three years. (K.S.A. 40-3104[g]). Additional penalties for violation include suspension of operator's and owner's licenses, vehicle registration, and operating privileges in state. (K.S.A. 40-3104[h]). These penalties can be avoided by presenting evidence of coverage in court or before arresting officer within ten days. (K.S.A. 8-1604).

Foreign Vehicles.

Director of vehicles is empowered to enter into interstate compacts regulating use of vehicles owned or operated by citizens of other states provided that other state grants reciprocal rights to Kansas citizens. (K.S.A. 74-4302).

Nonresident Operator.

Nonresident over age of 16, possessing valid home state operator's license may operate motor vehicle in Kansas only as operator. If home state does not require license, nonresident over 18 may operate vehicle in Kansas for 90 days in any calendar year, if vehicle operated is registered in home state or country of nonresident. (K.S.A. 8-236). These privileges may be suspended in like manner as residents' licenses. (K.S.A. 8-251).

Actions Against Nonresidents.

Operation by nonresident or his authorized chauffeur or agent of motor vehicle on public highways is deemed equivalent to appointment of Secretary of State as his agent on whom may be served all lawful processes in any action against nonresident growing out of any accident or collision in which said motor vehicle may be involved while it is operated in Kansas. (K.S.A. 8-

401).

Direct Actions.

Action may be brought directly against insurance company on its liability policy to recover for personal injuries or property damage caused by the negligent operation of a licensed motor carrier. (66-1,128 revised per 2008 c. 45; 185 Kan. 50, 341 P.2d 90).

Motor vehicle carriers regulated by State Corporation Commission. (K.S.A. 66-1,108 et seq.). Must have a certificate of convenience and necessity if operated over a regular route. Must pay a special license fee and carry liability insurance. Public motor carriers who have more than 25 registered vehicles may be approved as self-insurers. (K.S.A. 66-1,128).

Motor carrier inspection stations authorized under authority and control of superintendent of Kansas highway patrol. Superintendent enforces laws of state concerning operation and registration of motor carriers. (K.S.A. 66-1318 et seq.).

Motor Vehicle Taxes.

See Category Taxation, topic Motor Vehicle Taxes.

Gasoline Tax.

See category Taxation, topic Gasoline and Special Fuels Taxes.

Lemon Law.

See category Business Regulation and Commerce, topic Consumer Protection.

Railroads.

See category Business Regulation and Commerce, topic Carriers.

23.01A COMMERCIAL CODE FORMS:

See Part III, Uniform and Model Acts, Commercial Code Amendments for National Article 9 Forms.

1
KENTUCKY LAW DIGEST

—Scope —

Revised for 2010 edition by

STITES & HARBISON, PLLC of the Louisville, Frankfort and Lexington Bars.

(KRS indicates Kentucky Revised Statutes; CR indicates Kentucky Rules of Civil Procedure; SCR indicates Rules of Supreme Court; RCr. indicates Rules of Criminal Procedure; KRE indicates Kentucky Rules of Evidence; KAR indicates Kentucky Administrative Regulations. Session Laws are cited by year and chapter number. OAG indicates Opinions of Attorney General. Parallel citations to the South Western Reporter begin with 85 Ky. and 12 K.L.R. Official reports end in 1951 with 314 Ky.)

This revision reflects all Acts passed by General Assembly through Aug. 31, 2009. Bicameral legislature meets in regular sessions annually.

1 INTRODUCTION

1.01 GOVERNMENT AND LEGAL SYSTEM:

The Commonwealth of Kentucky is constituent state of United States of America. For further discussion of U.S. federal system, see Introduction to Federal Government of United States at beginning of this volume. A great many laws are promulgated by federal government of United States and are not reflected in topics below. See Introduction to this volume for references to federal law topics covered. Kentucky's official home page on Internet is http://www.ky.gov. Site offers links to state agencies, local governments, publications, research, maps, business applications, forms and licenses, and other frequently requested information.

Common Law.

Like all but one of U.S., Kentucky has common law legal system, with roots in English common law. For information on courts and legislature of Kentucky, see category 6 Courts and Legislature.

1.02 [RESERVED]

1.03 HOLIDAYS:

Following are legal holidays: Jan. 1; 3d Mon. in Jan.; Jan. 19; Jan. 30; Feb. 12; 3d Mon. in Feb.; last Mon. in May; June 3; July 4; first Mon. in Sept.; 2d Mon. in Oct.; Nov. 11; Dec. 25; and all days appointed by president or governor as days of thanksgiving. (KRS 2.110). Presidential election days are state holidays. (KRS 2.190).

Holiday Falling on Sun.

No statutory provision.

Holiday Falling on Sat.

No statutory provision.

Legality of Transactions on Holiday.

No objection may be taken to any process, writ, summons, affidavit, order for provisional remedy or bond in any action because issued, made or dated on holiday (KRS 454.125).

1.04 OFFICE HOURS AND TIME ZONE:

Eastern half of Kentucky, including cities of Louisville, Lexington, Somerset, Campbellsville, Elizabethtown and Brandenburg, are in Eastern (GMT -05:00) time zone; western half, including cities of Owensboro, Bowling Green, Paducah, Jamestown, Leitchfield and Hardinsburg, are in Central (GMT -06:00) time zone. Daylight saving time is observed from 2d Sun. in Mar. to 1st Sun. in Nov. Office hours for state government offices are from 8 a.m. to 4:30 p.m.; for other offices, generally from 9 a.m. to 5 p.m.

1.04A OPEN MEETINGS:

All meetings of quorum of any “public agency” at which public business is discussed or at which action is taken must be open to public at all times. (KRS 61.800 to 61.884). “Public agency” includes substantially every state and local public entity or body. (KRS 61.805[2]). Partial or total exemptions provided to protect confidential and proprietary information and deliberations. (KRS 61.810; 61.815; 61.823). Specific procedures required for closed sessions. (KRS 61.815). Schedules of regular meetings of public agencies must be made available, and minutes of regular meetings must be recorded and open to public. (KRS 61.820; 61.835).

1.04B OPEN RECORDS:

Free and open examination of public records of public agencies is required and is in public interest, subject to enumerated exceptions. (KRS 61.870 to 61.884). “Public record” is defined broadly. (KRS 61.870[2]). “Public agency” for purpose of law includes substantially every state and local public entity or body in state and certain private entities expending state or local authority funds. (KRS 61.870[1]). Information excepted from statute includes: records of committee of hospital medical staff; information of personal nature where public disclosure would constitute clearly unwarranted invasion of personal privacy; records confidentially disclosed to agency and compiled and maintained for scientific research; records disclosed to agency by requirement which if openly disclosed would permit unfair commercial advantage to competitors; confidential and proprietary information disclosed to agency under requirement along with application for or administration of loan or grant, or with application for certain tax incentives, or concerning regulation of commercial enterprise (including mineral exploration records, unpatented, secret commercially valuable plans of appliances, formulae or processes), or for grant or review of license to do business; prospective location of business or industry for which no previous public disclosure has been made; records relating to regulation or supervision of financial institutions which disclose agency's internal examining or audit criteria; real estate appraisals, engineering or feasibility estimates and evaluations made for public agency before property acquired; test questions, scoring keys and other examination data used to administer examinations for licensing, employment or academic credit; records of law enforcement agencies or agencies involved in administrative adjudication; preliminary drafts, notes or correspondence not intended to give notice of final action; preliminary recommendations and preliminary memoranda containing opinions relating to policies being formulated; information disclosure of which is prohibited by federal law or regulation; information disclosure of which is prohibited by general law; public records disclosure of which would have reasonable likelihood of threatening public safety. (KRS 61.878). Exceptions construed strictly. (KRS 61.871). Any person allowed access to any public record relating to him or in which he is mentioned by name. (KRS 61.884).

2 BUSINESS ORGANIZATIONS

2.01 AGENCY:

Common law principles prevail generally. As to agent's authority to sign negotiable instrument under Uniform Commercial Code, see KRS 355.3-402. See category 21 Property, topic 21.15 Powers of Attorney.

2.02 ASSOCIATIONS:

Common law principles apply to voluntary, unincorporated associations. No special statutes for joint stock companies. Agricultural marketing associations regulated by KRS c. 272. Burial Associations regulated by KRS c. 303. Fraternal benefit societies regulated by subtitle 29 of KRS c. 304. Labor unions recognized and locals required by KRS 336.170. KRS 273.070 to 273.140 set forth rules governing rights and property of unincorporated religious, charitable and educational societies. Business trusts recognized. See topic 2.02A Business Trusts.

As used in statutes, words “corporation” and “company” may extend and be applied to any corporation, company, person (in case of “company”), partnership, joint stock company or association. (KRS 446.010).

Formation.

Members of association may adopt reasonable constitutions, articles, by-laws or rules for governance of membership and enforce compliance with them. (211 Ky. 638, 277 S.W. 500; 126 F.2d 254). Unincorporated associations are not required to file annual statements with Kentucky

Secretary of State. KRS 271B.16-220. (123 Ky. 720, 97 S.W. 386).

Rights and Powers.

Association may determine property rights and interests of its members and rights to funds and property accumulated by association. (211 Ky. 638, 277 S.W. 500). Unincorporated associations cannot hold title to real property in absence of authorizing statute. (687 S.W.2d 871).

Liabilities.

Individual members of unincorporated associations organized for gain or profit, such as joint stock companies, are liable for contracts, torts, and undertakings of association (172 Ky. 693, 189 S.W. 914), but individual members of unincorporated associations, such as mutual benefit associations, organized for moral, social, political or like nonprofit purposes, are not liable unless they have authorized or ratified actions from which such liability arose (215 Ky. 177, 284 S.W. 1045; 126 F.2d 254).

Actions.

Voluntary associations may not sue or be sued in common name. (375 S.W.2d 389). Association may sue on behalf of its members when members would otherwise have standing to sue in their own right, interests at stake are germane to organization's purpose, and neither claim asserted nor relief requested requires participation of individual members in lawsuit. (389 F.3d 536). Service upon associations, such as labor unions, may be made by servicing officer, managing agent of association or agent authorized by appointment or by law to receive process. (CR 4.04[4]). Joint stock company may sue or be sued in common name if it has large number of members. (111 Ky. 832, 64 S.W. 903; 218 Ky. 172, 291 S.W. 21). Labor unions may sue or be sued in class action proceeding under CR 23. (307 Ky. 485, 211 S.W.2d 138). Service upon business agent has been held service on union and its members. (240 S.W.2d 49).

Professional Associations.

See topic 2.03 Corporations, subhead Professional Corporations.

2.02A BUSINESS TRUSTS:

Business trust defined as express trust created by written declaration whereby property is conveyed to one or more trustees for benefit and profit of holders of transferable certificates of beneficial interest. (KRS 386.370). Business trusts may be formed for any lawful purpose, including but not limited to, real estate investment trusts which comply with requirements of Internal Revenue Code. (KRS 386.380; **386.370**).

Supervision.

Domestic business trusts must file copy of declaration of trust with Secretary of State and county clerk in county of principal place of business (KRS 386.420[2]). Foreign business trust may not transact business in state until it obtains certificate of authority from Secretary of State. (KRS 386.4422).

Regulation of business trusts provided in KRS 386.370 to KRS 386.4448.

2.03 CORPORATIONS:

Revised Model Business Corporation Act (1984), printed in Uniform and Model Acts section and referred to in this topic as “Act,” adopted effective Jan. 1, 1989 as basis for Kentucky Business Corporation Act. Kentucky Business Corporation Act is codified as KRS c. 271B.

Codification of sections of Act begins with KRS 271B.1-200 and continues by tens through 271B.17-050, with numbering following sections of Act. For example, § 3.01 of Act is codified as KRS 271B.3-010; § 10.22 of Act is codified as KRS 271B.10-220; § 15.31 of Act is codified as KRS 271B.15-310; etc. Principal subdivisions of Act codified numerically and then alphabetically in Kentucky statutes rather than alphabetically and then numerically in Act, e.g., § 1.20(f)(2) of Act is codified as KRS 271B.1-200(6)(b). All sections of Act are adopted with exception of §§ 1.01, 1.02, 8.09, 10.21 and 17.06. Minor substitutions in text made to conform to statutory style, such as replacing "must" in Act with "shall". Material additions to and other deviations from Act are noted under following substantive subheads. Unless otherwise indicated, section numbers appearing in text refer to Act. 1986 technical corrections to Act noted in Uniform and Model Acts section adopted. Amendments proposed to §§ 7.40 to 7.47 by ABA Committee on Corporate Laws in Dec. 1989 not adopted. Amendments to cc. 7, 8, 10 and 13 adopted by ABA Committee on Corporate Laws on June 3, 2006 and Aug. 1, 2006 not adopted.

General supervision of corporations and Act placed with Secretary of State, Capitol Building, Frankfort, Kentucky 40601. Information concerning availability of names, status, registered offices and registered agents, etc. may be obtained by telephone from Corporations Division, (502) 564-2848 or at Secretary of State website, http://sos.ky.gov.

Purposes.

Every corporation has purpose of engaging in any lawful business unless more limited purposes set forth in articles of incorporation. (KRS 271B.3-010).

Name.

§ 4.01 of Act adopted with addition in § 4.01(b) that name also must be distinguishable from any name of record with Secretary of State and addition of subsection providing that filing of articles with particular name does not automatically prevent use of that name by other persons. (KRS 271B.4-010[6]). Name availability may be determined by telephone from Corporations Division, Office of Secretary of State, (502) 564-2848 or http://sos.ky.gov. Name may be reserved for 120 days. Application fee to reserve name—$15. (KRS 271B.1-220).

Term of Corporate Existence.

Every corporation has perpetual duration unless its articles of incorporation provide otherwise. (KRS 271B.3-020).

Incorporators.

KRS 271B.2-010 is identical to § 2.01 of Act.

Articles of Incorporation.

KRS 271B.2-020 similar to § 2.02 of Act, except that articles must set forth mailing address of corporation's principal office and of each incorporator. Permissive provisions of articles authorize incorporators or shareholders to adopt nonuniform provisions, allow eliminating or limiting personal liability of directors to corporation or shareholders for monetary damages for breach of directors' duties, provided that such provisions may not eliminate or limit any director's liability for self-dealing or corporate opportunity, for intentional misconduct or known violations of law, for unlawful distributions (KRS 271B.8-330, which adopts § 8.33 of Act, may not be superceded by articles), or for acts or omissions occurring prior to date provision in articles limiting liability under section becomes effective (KRS 271B.2-020[2][d][4]). Any supermajority shareholder voting provisions must be stated in articles. (KRS 271B.7-270).

Filing of Articles.

Articles and two exact or conformed copies must be filed with Secretary of State (may be filed electronically). (KRS 271B.1-200[9]). One copy is then filed with and recorded by county clerk of county where registered office is located. (KRS 271B.1-200[10]). Scrivener information is required on articles of incorporation and certain other documents. (KRS 382.335). Unless registered agent signs articles, corporation must deliver consent of registered agent with articles. (KRS 271B.2-020[4]).

Incorporation Tax.

Domestic corporation having capital stock divided into shares must pay into state treasury, at time of incorporation, organization tax based upon number of shares authorized by its articles, at following rates: 1¢ for each share up to and including 20,000; ½¢ for each share in excess of 20,000 up to and including 200,000; 1/5¢ for each share in excess of 200,000. (KRS 136.060[1]). Minimum tax, $10. (KRS 136.060[5]).

When domestic corporation amends articles by changing authorized number of shares, tax on shares authorized by amendment must be computed at rates set forth above. If tax exceeds tax paid on basis of number of shares authorized prior to amendment, excess tax must be paid when amendment is filed. (KRS 136.060[2]).

Domestic corporation existing prior to July 1, 1946, which, by amendment after that date, changes its name, increases powers, enlarges scope, or prolongs corporate life, must on filing such amendment, pay organization tax at rates above set forth, on entire capital stock on which tax has not been previously paid. (KRS 136.060[3]).

Consolidated or merged corporation formed under Kentucky law is not required to pay any organization tax on number of shares of capital stock on which organization tax has been paid by constituent corporations prior to consolidation or merger, but such organization tax must be paid on any increase in number of shares of capital stock of consolidated corporation over aggregate number of shares of constituent corporations prior to consolidation or merger. (KRS 136.060[4]).

When domestic corporation consolidates or merges with foreign corporation under Kentucky law, organization tax must be paid on shares of capital stock of foreign corporation. (KRS 136.060[4]).

No corporation subject to tax may exercise corporate powers in Kentucky until organization tax (if any) due has been paid, and upon such payment it must file statement with Secretary of State. (KRS 136.060[5]).

Filing Fees.

Secretary of State.

Filing fees: Articles of incorporation or amendments or restatements of articles—$40; articles of merger or share exchange—$50; amended and restated articles—$80; articles of dissolution—$40; articles of revocation of dissolution—$15; annual report—$15; certificate of existence or authorization—$10. (KRS 271B.1-220).

County Clerk.

$12 for filing with county clerk all documents specified in KRS 271B.1-220 for first three pages and $3 for each additional page. (KRS 64.012). Clerk may also require prepayment of postage for returning recorded corporate documents. (KRS 382.240). These fees include county clerk charge of up to $1 for each instrument recorded, regardless of whether instrument is returned by mail. Postage, if any, charged by clerks should be confirmed prior to recordation.

License to do Business.

Domestic corporation's existence begins with filing of articles with Secretary of State unless articles specify delayed effective date. (KRS 271B.2-030). Foreign corporation must register with Secretary of State to transact business. (KRS 271B.15-010). KRS 271B.1-280 authorizes Secretary of State to issue certificate of existence for domestic corporation or certificate of authorization for foreign corporation. Certificate must set forth name, duration if less than perpetual, that all fees, taxes and penalties which are collected by Secretary of State and which affect existence have been paid, that most recent annual report has been filed, and that articles of dissolution have not been filed. Certificate is conclusive evidence of corporation's existence or authorization to do business in state. (KRS 271B.1-280[3]).

Organization.

KRS 271B.2-050 adopts § 2.05 of Act without material variation.

Paid In Capital Requirements.

None. (KRS 271B.6-210). See subhead Issuance of Stock, infra.

Amendment of Articles.

KRS 271B.10-010 to 271B.10-090 adopt §§ 10.01 to 10.09 of Act without material variation.

Increase or Decrease of Authorized Capital Stock.

See subhead Amendment of Articles, supra.

Bylaws.

KRS 271B.2-060 and 271B.2-070 adopt §§ 2.06 and 2.07 of Act. KRS 271B.10-200 and 271B.2-220 adopt §§ 10.20 and 10.22 of Act, relating to bylaw amendments, without material variation. § 10.21 of Act, permitting “supermajority” shareholder quorum and voting provisions in bylaws is omitted. “Supermajority” provisions are permitted, but must be set forth in articles. (KRS 271B.7-270).

Stock.

§§ 6.01 and 6.02 of Act adopted with three nonuniform subsections relating to amendments to articles. (KRS 271B.6-010; 271B.6-020).

Stock Certificates.

§ 6.25 of Act adopted. (KRS 271B.6-250). § 6.26 of Act, permitting uncertificated shares, adopted. (KRS 271B.6-260).

Issuance of Stock.

§ 6.20 of Act, regarding subscriptions, adopted. (KRS 271B.6-200). § 6.21 of Act, regarding issuance, adopted with addition to subsection 4 and revised subsection 5 in place of § 6.21(e) of Act. Caveat, case decided under subsequently repealed Constitution section, 728 S.W.2d 529, holds that shares issued in consideration of unsecured promissory note are void. Second sentence added to KRS 271B.6-210(4) to provide that consideration for shares consisting of note or contract for services or other benefits is fully paid and nonassessable when note issued or contract executed. Nonstandard subsection provides that directors or committee of directors may authorize one or more officers to issue shares and designate rights, preferences or limitations of shares within limits provided by board. (KRS 271B.6-210[5]). § 6.23 of Act, relating to share dividends, adopted. (KRS 271B.6-230). § 6.28 of Act, relating to expense of issuance, adopted. (KRS 271B.6-280).

Transfer of Stock.

§ 6.27 of Act, relating to transfer restrictions, adopted with variations as follows: (1) Restriction, even if improperly noted, may be enforceable against holder or transferee with actual knowledge; (2) restriction authorized in connection with shares issued by corporation to its officers, directors, employees or independent contractors; (3) restrictions may, without limitation, obligate shareholder to transfer restricted shares to corporation or others for agreed price or price based on valuation formula, including obligation to transfer shares for amount equal to original consideration paid for shares; (4) subsection (f) of § 6.27 of Act omitted. (KRS 271B.6-270). See category 3 Business Regulation and Commerce, topic 3.09 Commercial Code. § 7.07 of Act, relating to fixing record date, adopted. (KRS 271B.7-070).

Uniform Simplification of Fiduciary Security Transfers Act has not been adopted.

Uniform Commercial Code.

1972, 1977, 1994 and 2000 amendments adopted with variations. (KRS c. 355). See category 3 Business Regulation and Commerce, topic 3.09 Commercial Code.

Stock Transfer Tax.

None.

Shareholders.

Cc. 6 and 7 of Act governing general rights of shareholders adopted without significant variation unless noted under separate subheads. § 6.30 of Act, relating to preemptive rights, substantially adopted with special transition provisions recognizing preemptive rights to shareholders of corporations incorporated prior to effective date of Act. (KRS 271B.6-300[4]).

Shareholders' Actions.

§ 7.40 of Act adopted with additional requirement that person commencing action must fairly and adequately represent shareholders' interests in enforcing corporation's right. (KRS 271B.7-400[1]). Dec. 1989 amendments to Revised Model Act by ABA Committee on Corporate Laws to § 7.40 of Act and proposing new §§ 7.41 to 7.47 not adopted. Kentucky Rules of Civil Procedure do not have rule equivalent to Rule 23.1 of Federal Rules of Civil Procedure. No requirement exists that person commencing action post security for expenses of action.

Shareholders' Liabilities.

§ 6.22 of Act adopted. (KRS 271B.6-220).

Shareholders' Meetings.

§§ 7.01 to.27 of Act adopted without significant variations (KRS 271B.7-010 to 270), except: Shareholders' meetings must be called by holders of at least 331/3% of shares, unless other percentage is called for in articles (KRS 271B.7-020[2]); shareholder action by unanimous written consent without meeting authorized unless prohibited by articles (KRS 271B.7-040[1]); unanimous consent of shareholders is effective as of delivery of last necessary writing to secretary, unless other date is specified (KRS 271B.7-040[4]); shareholder may revoke consent prior to delivery of votes required to take action (KRS 271B.7-040[5]); articles may authorize any action, other than election of directors, by consent of 80% of voting shares, but prompt notice of any action taken by less than unanimous vote shall be given to non-consenting shareholders (KRS 271B.7-040[2], [7] and [8]); § 7.20 of Act adopted with omission of subsection (d) (KRS 271B.7-200); written or electronic proxy appointments by shareholder or agent or attorney in fact are specifically authorized (KRS 271B.7-240[1]); revocation of proxy appointment is effective upon receipt by secretary (KRS 271B.7-220[6]); shares held by corporation may be voted by president, proxy appointed by him, or other person designated by board of directors, and special provisions govern voting by administrator, executor, guardian, fiduciary, or receiver (KRS 271B.7-240[6] to [9]); pledged shares must be voted by pledgor until transferred into name of pledgee (KRS 271B.7-240[10]); quorum and voting requirements presently in effect shall govern vote to amend articles provisions relating to quorum and voting requirements (KRS 271B.7-270[2]); cumulative voting applicable only if provided for in articles (KRS 271B.7-280); and directors may permit electronic participation in shareholders meeting (KRS 271B.7-080).

Voting Trusts.

§§ 7.30 and 7.31 of Act adopted. (KRS 271B.7-300, -310).

Directors.

Subchapter A of c. 8 of Act adopted. (KRS 271B.8-010 to -100). Directors to be elected by plurality unless articles provide for cumulative voting. (KRS 271B.7-280; 8-080[3]). § 8.09 of Act, relating to court-ordered removal of directors, omitted; and, only two directors required in order to stagger terms of office. (KRS 271B.8-060).

Directors Meetings.

Subchapter B of c. 8 of Act adopted. (KRS 271B.8-200 to 250).

Powers and Duties of Directors.

See subheads Directors, supra, and Liabilities of Directors, infra. § 8.30 of Act, regarding general standards for discharging duties, adopted with variations described in subhead Liabilities of Directors, infra.

Liabilities of Directors.

§ 8.30 of Act adopted (KRS 271B.8-300) with following variations: Director shall discharge his duties in good faith, “on an informed basis,” and in manner “honestly” believed to be in best interest of corporation (KRS 271B.8-300[1]); director shall be considered to act on “informed basis” if he makes, with care ordinarily prudent person in like position would exercise under similar circumstances, inquiries into corporation's business and affairs or into particular action to be taken or decision to be made (KRS 271B.8-300[2]); standard of “honest” belief is substituted for “reasonable” belief (KRS 271B.8-300[3]); nonuniform additions to statute provide that action of any director shall not be basis for monetary damages or injunctive relief unless: (1) Director breached duties under KRS 271B.8-300, (2) in case of monetary damages, breach constituted willful misconduct or wanton or reckless disregard for best interests of corporation and its shareholders (KRS 271B.8-300[5]); and plaintiffs have burden of proving breach, willfulness, wantonness or recklessness and legal causation by clear and convincing evidence (KRS 271B.8-300[6]); but nothing in KRS 271B.8-300, or its predecessor section KRS 271A.202, eliminates or limits liability of directors for acts prior to July 15, 1988 (KRS 271B.8-300[7]). § 8.33 of Act adopted (KRS 271B.8-330) with 1986 technical changes allowing compliance with KRS 271B.8-300 as defense.

Officers.

Subchapter D of c. 8 of Act adopted. (KRS 271B.8-400 to 440). KRS 271B.8-420 contains nonuniform standards of officers' conduct comparable to those applicable to directors. See subhead Liabilities of Directors, supra.

Indemnification of Directors and Officers.

Subchapter E of c. 8 of Act adopted (KRS 271B.8-500 to 580) with following variation: § 8.58(a) of Act replaced by provision that KRS 271B.8-500 to 580 do not prevent adoption in bylaws or by agreement by vote of shareholders or disinterested directors, or otherwise, of other indemnification rights. (KRS 271B.8-580[1]).

Principal Office.

Articles must set forth mailing address of principal office. (KRS 271B.2-020[1][d]).

Resident Agent.

Chapter 5 of Act adopted, KRS 271B.5-010 to 040, with following variations: agent may be domestic or authorized foreign limited liability company or domestic authorized limited partnership and agent must sign appointment or deliver written acceptance to Secretary of State before appointment is effective. (KRS 271B.5-010[2]).

General Powers of Corporations.

Chapter 3 of Act adopted (KRS 271B.3-010 to 040), with addition that presence or absence of corporate seal on official documents shall not affect legality or validity thereof (KRS 271B.3-020[2]).

Dividends.

§ 6.40 of Act adopted (KRS 271B.6-400) with addition that indebtedness not considered liability for purposes of determinations under subsection (3) (§ 6.40[c]) of Act, if its terms provide that payment of principal and interest are made only if and to extent that payment of distribution to shareholders could be made. If indebtedness is issued as distribution, each payment of principal or interest is treated as distribution with its effect measured on date payment is actually made. (KRS 271B.6-400[7]). § 6.23 of Act, relating to share dividends, adopted. (KRS 271B.6-230). KRS 271B.6-210(5) and (6) set forth method for determining deemed consideration.

Unclaimed Dividends.

See category 21 Property, topic 21.01 Absentees, subhead Escheat.

Sale or Transfer of Corporate Assets.

C. 12 of Act adopted without material variation. (KRS 271B.12-010 to 020).

Books and Records.

Subchapter A of c. 16 of Act adopted (KRS 271B.16-010 to 040) with 1986 technical change to § 271B.16-020(f) (KRS 271B.16-020[6]).

Reports.

Subchapter B of c. 16 of Act adopted (KRS 271B.16-200 to 220) except: § 16.20 of Act replaced with provision that corporation required to send its most recent financial statements showing in reasonable detail its assets and liabilities and results of its operations to any shareholder or holder of voting trust certificates upon written request (KRS 271B.16-200); § 16.21(b) of Act omitted; subsections 5 through 7 of § 16.22(a) of Act omitted; last sentence of § 16.22(d) omitted; and June 30 substituted for Apr. 1 as last date in § 16.22(c) for submission of annual reports (KRS 271B.16-220[3]). Procedure for amendment of annual report described by KRS 271B.16-220(4).

Corporate Bonds or Mortgages.

See subheads General Powers of Corporations and Sale or Transfer of Corporate Assets, supra.

Merger and Consolidation.

C. 11 of Act adopted. (KRS 271B.11-010 to 070). Merger of one or more domestic or foreign limited liability companies or limited partnerships allowed with one or more domestic corporations. (KRS 271B.11-080). Consolidations not authorized by statute.

Share Exchanges or Acquisitions.

See subhead Merger and Consolidation, supra.

Antitakeover Provisions.

Nonuniform antitakeover statute, referred to as Shareholder Protection Act and applicable to most corporations with 500 or more beneficial shareholders and principal office located in Kentucky, requires approval of majority of disinterested directors or affirmative vote of 80% of all shares and two thirds of disinterested shares for approval of merger or other business combination with any 10% shareholder or other corporation which after transaction would be 10% shareholder. (KRS 271B.12-200 to 230). Special voting requirements do not apply if fair price standards are met. (KRS 271B.12-220[2]). Business combinations with interested shareholders prohibited for five-year period after such party became shareholder in many circumstances. (KRS 271B.12-210[3]). Business combination of two or more railroad, telegraph, bridge or other common carrier companies owning parallel or competing lines or structures is prohibited (Ky. Const. § 201; 144 Ky. 324, 138 S.W. 291) but telephone companies are permitted to make such combination upon strict compliance with conditions (KRS 278.510).

Tender Offers.

See subhead Merger and Consolidation, supra.

Dissolution.

C. 14 of Act adopted (KRS 271B.14-010 to 070) with following variations: Original and three copies of articles of dissolution must be filed with Secretary of State (KRS 271B.14-030[1]); Secretary of State must forward one copy to secretary of revenue (KRS 271B.14-030[2]); dissolution does not alter corporation's federal or state tax obligations (KRS 271B.14-050[2][h]; 271B.14-060[4]); claims against dissolved corporations are barred unless proceedings are commenced within two years after publication of notice (KRS 271B.14-070[2][c]; 271B.14-070[3]); § 14.20(1) of Act omitted; notices concerning administrative dissolution are sent by first class mail to corporation's registered office, rather than by procedure described in § 5.04 of Act (KRS 271B.14-210[1], [2]; 271B.14-220[2]; 271B.14-230[1]); reinstatement following administrative dissolution may occur at any time after effective date rather than only within first two years (KRS 271B.14-220[1]) and reinstatement penalty and filing fee for each delinquent annual report must accompany application (KRS 271B.14-220[1][e]). Corporation is prohibited from reinstatement if it has administratively dissolved, taken action to wind-up and liquidate its affairs and notified claimants. (KRS 271B.14-220[4]). Corporation which was refused reinstatement and subsequently reincorporated as new corporation may reinstate first corporation and merge new corporation into first corporation. First corporation shall be treated as if it had continuous existence and dissolution never occurred. (KRS 271B.14-225). Appeals made to circuit court of county where corporation's principal office is located (KRS 271B.14-230[2]) or, if foreign corporation, to Franklin Circuit Court (KRS 271B.15-320[1][2]). Circuit court may dissolve corporation; “oppressive” omitted from equivalent of § 14.30(2)(ii) (KRS 271B.14-300[2][6]); § 14.30(2)(iv) of Act omitted; actions by attorney general lie in Franklin County (Frankfort) (KRS 271B.14-310).

Insolvency and Receivers.

§§ 14.32 and 14.40 of Act adopted. (KRS 271B.14-320; 400).

Close Corporations.

No special provisions adopted.

Appraisal.

C. 13 of Act adopted (KRS 271B.13-010 to 310) with following variations: In any business combination subject to Shareholder Protection Act (KRS 271B.12-200 to 230), “fair value” shall be at least amount required to be paid pursuant to KRS 271B.12-220(2) (KRS 271B.13-010[3]); § 13.02(a)(4)(iii) of Act relating to preemptive rights, omitted; shareholder may also dissent from any transaction subject to Shareholder Protection Act (KRS 271B.12-200 to 230) or exempted from that act by KRS 271B.12-220(2) (KRS 271B.13-020[1][e]); under KRS 271B.13-200(1) corporation need only provide copy of statute to persons entitled to notice of dissenters' rights on shareholder's request; under KRS 271B.13-250, payment must be accompanied by information regarding value and balance sheet, income statement and statement of changes in shareholders' equity of corporation; § 13.22(b) of Act modified to require notice sent ten days after proposed corporate action was authorized by shareholders or, if shareholder approval was not required, by board of directors (KRS 271B.13-220[2]); and § 13.25(b)(5) of Act omitted. See also subheads Merger and Consolidation and Share Exchanges or Acquisitions, supra.

Authority to Transact Business.

§§ 15.01 through 15.05 of Act adopted, KRS 271B.15-010 to 050, except that agent must sign application or deliver written consent. (KRS 271B.15-030). Monetary penalties for transacting business without certificate of authority: $2 per day, not to exceed $500 per year. (KRS 271B.15-020[4]).

Name.

§ 15.06 of Act adopted (KRS 271B.15-060) with addition that name must be distinguishable from any corporate or partnership, name or assumed name filed with Secretary of State pursuant to KRS 365.015. (KRS 271B.15-060[2][e]).

Registered Agent.

§ 15.07 of Act adopted, KRS 271B.15-070, with following variations: agent must sign appointment or deliver written consent and agent may also be domestic or foreign limited liability company.

Service of Process.

§ 15.10 of Act adopted. (KRS 271B.15-100).

Withdrawal and Revocation of Authority.

§ 15.20 of Act relating to withdrawal, adopted. (KRS 271B.15-200). § 15.30 of Act, relating to revocation adopted (KRS 271B.15-300) with following variations: “deliver” is changed to “file” (KRS 271B.15-300[1]); § 15.30(2) of Act omitted; and remaining subsections renumbered. §§ 15.31 and 15.32 of Act adopted (KRS 271B.15-310; 271B.15-320) except that service of notice effected by first class mail to corporation's registered office (KRS 271B.15-320). § 15.30(2) of Act omitted from grounds for revocation for foreign corporation. Foreign corporations appeal revocation to Franklin Circuit Court. (KRS 271B.15-320).

Taxation of Corporate Property.

Property of ordinary business corporation is assessed and taxed as natural person. (KRS 132.220 to 132.240; 136.020). See category 22 Taxation, topics 22.15 Property Taxes, subhead Real and Personal Property Taxable and 22.04 Corporate Taxes, subhead Corporation License Taxes.

Returns for assessment must be made as of Jan. 1 in each year and filed with property valuation administrator of county where property located by Mar. 1 (KRS 132.220), except in case of: (1) Certain public service corporations assessed by revenue cabinet; and (2) certain kinds of taxpayers, such as banks, trust companies, building and loan associations, turnpike companies, railroads, owners or bailees of distilled spirits, etc., covered by special provisions which require reports to revenue cabinet or other tribunal or officer charged with duty of assessment.

All corporate property is subject to taxation unless exempted by constitution or statute. (KRS 132.190). All intangible personal property of corporations considered in corporate franchise tax valuation, unless corporation has acquired business situs outside Kentucky. (KRS 132.190).

Intangibles.

All intangible personal property of corporations is exempt from state and local taxation, unless subject to financial institution deposit tax (KRS 132.030) or within calculation of corporate franchise tax. (KRS 132.208, 136.575).

Taxation of Corporate Stock.

Treated no differently than other intangible property.

Franchise Tax.

Corporation license tax imposed by KRS 136.070 to 136.100 does not apply to tax periods ending on or after Dec. 31, 2005. (KRS 136.0701).

Financial Institutions.

Franchise and local deposit taxes imposed on state and national banks, “Edge act” banks (12 U.S.C. §§ 611 to 631) and branches of foreign banks (12 U.S.C. § 3101) regularly engaged in business in Kentucky in lieu of corporation income taxes (KRS 136.500 to 136.575). Rate of taxes 1.1% of net capital (as defined in KRS 136.515) with minimum tax of $300 (KRS 136.510). Net capital for financial institutions both within and outside state apportioned equally based upon in-state receipts, property and payroll factors. (KRS 136.525). Local governmental units authorized to impose separate franchise taxes upon same entities based upon deposits within their jurisdiction. (KRS 136.575).

Public Service Corporations.

Separate franchise tax is imposed alike on corporations, associations, partnerships and individuals engaged in any public or quasi-public service. (See category 22 Taxation, topic 22.15 Property Taxes, subhead Public Service Corporation Property Tax.)

Income tax on corporations, see category 22 Taxation, topic 22.11 Income Tax, subhead Income Taxed—Corporations and Limited Liability Pass Through Entities.

Professional corporations may be organized under KRS c. 274 by those rendering personal services to public of a type which requires a license or other legal authorization, and which prior to Act could not be performed by corporation. Includes, but is not limited to, certified public accountants, chiropractors, osteopaths, physicians, surgeons, dentists, podiatrists, chiropodists, architects, veterinarians, optometrists, and attorneys-at-law. Incorporation does not alter professional responsibility or privilege nor does it insulate principal from malpractice liability.

Deeds.

See category 21 Property, topic 21.06 Deeds.

Nonstock, nonprofit corporations without capital stock may be formed by one or more persons for any lawful purpose, such as civic, athletic, recreational or social, not involving pecuniary gain. Act does not apply to cooperatives. KRS 273.161 to 273.401, “Nonprofit Corporations Act”, contains special provisions applicable to articles of incorporation, powers, membership and agent for service, and incorporates portions of Act for profit with respect to holding of real estate, amendment of articles and dissolution. (KRS 273.161 to 273.401). Such corporations can be organized for charitable, educational, civic, religious, or like purposes, but not for labor unions or trade associations. (KRS 273.167). Nonstock, nonprofit corporation may not convert to stock corporation (KRS 271B.10-010) though stock corporation may convert to nonstock, nonprofit corporation (KRS 273.382).

Model Non-Profit Corporation Act not adopted.

Limited Liability Companies.

See topic 2.06 Limited Liability Companies.

2.04 [RESERVED]

2.05 JOINT STOCK COMPANIES:

No provision for organization of joint stock companies. Members of unincorporated companies are individually liable for obligations of such companies. See topic 2.02 Associations.

Business Trusts.

See topic 2.02A Business Trusts.

Professional Associations.

See topic 2.03 Corporations, subhead Professional Corporations.

2.06 LIMITED LIABILITY COMPANIES:

Kentucky Limited Liability Company Act (“LLC Act”) effective July 15, 1994, permits formation of limited liability companies (“LLC”). Act is codified in KRS c. 275.

General Supervision.

Secretary of State, 700 Capital Avenue, Suite 154, Frankfort, Kentucky 40601. Information concerning availability of names, status, registered offices and registered agents, etc. may be obtained by telephone at (502) 564-3490 or at Secretary of State website, http://sos.ky.gov.

Formation.

One or more persons may serve as organizer by delivering executed articles of organization to Secretary of State for filing. Organizer need not be member of LLC. (KRS 275.020).

Conversion.

Partnerships and corporations may convert to LLC. (KRS 275.370; 275.376).

Purposes.

May be organized for any lawful purpose, including nonprofit and provision of professional services. (KRS 275.005; 275.015).

Powers.

LLC has power to do all things necessary or convenient to carry out its business and affairs, except as limited by LLC Act, articles of organization or operating agreement. (KRS 275.010).

Name.

Must contain words “limited liability company,” “limited company” or abbreviations “LLC” or “LC.” If professional LLC, name must contain words “professional limited liability company”, “professional limited company” or abbreviations “PLLC” or “PLC.” Word “Limited” may be abbreviated as “Ltd.” and word “Company” may be abbreviated “Co.” (KRS 275.100).

Articles of Organization.

Must set forth: (1) Name satisfying above-listed requirements; (2) street address of initial registered office and name of initial registered agent; (3) mailing address of initial principal office; and (4) statement that LLC will be managed by manager(s) or by member(s). If PLLC, articles must designate professional services to be practiced. If nonprofit LLC, articles must state nonprofit purpose. (KRS 275.025[7]). Articles must be accompanied by written consent of initial registered agent to serve in that capacity. (KRS 275.025[5]). Articles may include any other matter permitted in operating agreement and not inconsistent with law. (KRS 275.025[4]).

Filing Articles of Organization.

Articles must be filed with Secretary of State (may be filed electronically) with correct filing fee. One exact or conformed copy must be filed with county clerk of county in which registered office is located. (KRS 275.045).

Registered Office and Registered Agent.

Every domestic and foreign LLC authorized to transact business in Kentucky must maintain registered office and agent in Kentucky. Registered office may be at any place of business. Business office of registered agent must be identical to registered office. (KRS 275.115).

Management.

Unless articles of organization vest management of LLC in manager, management of business and affairs of LLC vests in members. If articles vest management in manager, manager shall have exclusive power to manage business and affairs of LLC, except to extent otherwise provided in LLC Act, articles or operating agreement. Unless otherwise provided by articles or operating agreement, manager: (1) Must be designated, elected, removed or replaced by consent of majority-in-interest members; (2) need not be member or natural person; and (3) holds office until successor elected, unless sooner removed or resigned. (KRS 275.165).

Dissolution.

LLC dissolved and affairs wound up upon first to occur of: expiration of term, if set forth in articles; events specified in articles; written consent of majority-in-interest of LLC's members; there are no remaining members, unless written operating agreement provides for admission of member upon occurrence of event terminating last remaining member or last remaining member's successor-in-interest agrees, within 90 days of event terminating last remaining member, to continue LLC and to admission of successor-in-interest or its designee as member; decree of judicial dissolution; or dissolution by Secretary of State. (KRS 275.285). After dissolution, LLC must deliver articles of dissolution to Secretary of State setting forth name, section of KRS 275.285 pursuant to which dissolved, effective date of dissolution, and other information members or managers deem proper. (KRS 275.315). LLC may dispose of known claims by filing articles of dissolution and sending written notice to known claimants. (KRS 275.320). LLC may dispose of unknown claims by publishing notice of dissolution in newspaper of general circulation in county where principal office was last located. (KRS 275.325).

Filing Fees.

Articles of organization—$40; certificate of authority as foreign LLC—$90; amendment of articles of organization—$40; restatement of articles of organization—$40; amendment and restatement of articles of organization—$80; articles of dissolution—$40; change of registered agent, registered office or both—$10; registered agent's change of registered office—$10 per LLC, not to exceed total of $1,000; change of address of principal office—$10; reservation of name—$15; renewal of name reservation—$15; transfer of reserved name—$15; use of indistinguishable name—$20; registered name—$36; renewal of registered name—$36; articles of merger—$50; amended certificate of authority—$40; certificate of withdrawal—$40; articles of correction—$20; certificate of existence or authorization—$10; reinstatement following administrative dissolution—$100; annual report—$15; amended annual report—$10; articles of share exchange—$50; and any other document required or permitted to be filed by LLC Act—$15. (KRS c. 275.055).

2.07 LIMITED PARTNERSHIP:

See topic 2.08 Partnerships, subhead Limited Partnership.

2.08 PARTNERSHIPS:

Uniform Partnership Act (1997) adopted without substantial modification as KRS c. 362.1, effective July 12, 2006. (KRS 362.1-101 to 362.1-1205) (“UPA 1997”). UPA 1997 governs only partnerships formed on or after July 12, 2006; previously formed partnership may elect to be governed by UPA 1997. (KRS 362.1-1204). See Appendix of U.S. Uniform and Model Acts, Partnership (1997). For partnerships formed before July 12, 2006, Uniform Partnership Act (1914), adopted by Kentucky without substantial modification, remains applicable. (KRS 362.150 to 362.360). See Appendix of U.S. Uniform and Model Acts, Partnership.

Formation.

No formalities, filing or recording required. (KRS 362.1-202). See also Appendix of U.S. Uniform and Model Acts, Partnership (1997).

Name of limited liability partnership must contain “Registered Limited Liability Partnership,” “Limited Liability Partnership,” “R.L.L.P.,” “L.L.P.,” “RLLP,” or “LLP.” (KRS 362.1-1002). Unless name of partnership includes real name of each partner, partnership must file certificate of assumed name. (KRS 365.015). See also category 17 Intellectual Property, topic 17.01 Trademarks and Tradenames. See also Appendix of U.S. Uniform and Model Acts, Partnership (1997).

Rights and Liabilities of Partners Inter Se.

See KRS 362.1-401 to 362.1-406. See also Appendix of U.S. Uniform and Model Acts, Partnership (1997).

Rights and Liabilities of Partners as to Third Persons.

See KRS 362.1-301 to 308. See also Appendix of U.S. Uniform and Model Acts, Partnership (1997).

Dissolution.

See KRS 362.1-801 to 807. See also Appendix of U.S. Uniform and Model Acts, Partnership (1997).

Administration of Partnership Property.

See KRS 362.1-601 to 705. See also Appendix of U.S. Uniform and Model Acts, Partnership (1997).

Limited Partnership.

Uniform Limited Partnership Act (2001) adopted as KRS c. 362.2 without substantial modification effective July 12, 2006. (KRS 362.2-102 to 1207) ("ULPA 2001"). ULPA 2001 governs only limited partnerships formed on or after July 12, 2006. (KRS 362.2.-1205). Limited partnership formed before July 12, 2006, may elect to be subject to ULPA 2001. (KRS 362.2-1205[1][b]). Limited partnership formed under any statute prior to July 15, 1988 still governed by provisions of statute under which formed, unless or until it becomes limited partnership under ULPA 2001. (KRS 362.2-1204[1]). Upon occurrence of event requiring limited partnership to file certificate of amendment under ULPA 2001 or statute under which limited partnership formed prior to July 12, 2006 was formed, limited partnership must file amended and restated certificate of limited partnership complying with KRS 362.2-201. (KRS 362.2-1204[3]). Under ULPA 2001, limited partnership must file amended and restated certificate of limited partnership complying with KRS 362.2-201 upon occurrence of any event requiring it to file certificate of amendment under KRS 362.401 to 362.525, as existing on July 12, 2006, or under statute under which it was formed. (KRS 362.2-120[2]). Name of limited partnership that is not limited liability limited partnership must contain "limited" or "Ltd." or "limited partnership" or "L.P." or "LP," may not contain "limited liability limited partnership" or "LLLP" or "L.L.L.P." (KRS 362.2-108[2]). Name of limited partnership that is limited liability limited partnership must contain "limited liability limited partnership" or "LLLP" or "L.L.L.P.," may not contain only "limited partnership" or abbreviation "L.P." or "LP." (KRS 362.2-108[3]). See also Appendix of U.S. Uniform and Model Acts, Limited Partnership Act (2001). For limited partnerships formed after July 15, 1988 but prior to July 12, 2006, Revised Uniform Limited Partnership Act (1976) with 1985 amendments, adopted by Kentucky without substantial variation, remains applicable. (KRS 362.401 to 362.527). See Appendix of U.S. Uniform and Model Acts, Revised Uniform Limited Partnership Act (1976).

Out of State Partnerships.

No special registration requirements apply to general partnerships organized under laws of foreign state, but special requirements do apply to foreign limited partnerships (KRS 362.2-901 to 910) and foreign limited liability partnerships (KRS 362.1-111 to 120). See also Appendix of U.S. Uniform and Model Acts, Limited Partnership Act (2001) and Partnership (1997).

Filing Fees.

Statement of partnership authority—$40; statement of denial—$20; statement of dissociation—$20; statement of dissolution—$40; statement of merger—$40; statement of qualification—$40; amended statement of qualification—$40; statement of foreign qualification-$90; reinstatement of statement of qualification—$100; change of registered agent or registered office—$10; registered agent's change of registered office—$10 per partnership, not to exceed total of $1,000; change of address of principal office—$10; reservation of name—$15; transfer of reserved name—$15; registered name—$36; renewal of registered name—$36; annual report—$15; amended annual report—$10; and any other filings—$15. (KRS 362.1-109).

3 BUSINESS REGULATION AND COMMERCE

3.01 BANKS AND BANKING:

Uniform Commercial Code adopted. (KRS c. 355). See topic 3.09 Commercial Code.

General laws regulating organization and management of corporations and limited liability companies apply to banks, trust companies and combined bank and trust corporations unless inconsistent with special provisions or otherwise made inapplicable. (KRS 286.3-050; 271B.17-010).

Regulated by Department of financial institutions which is headed by Commissioner. (KRS 286.1-011; 286.3-690; 286.3-854). Department of financial institutions located at 1025 Capital Center Drive, Suite 200, Frankfort, Kentucky 40601. Website at http://www.kfi.ky.gov. Commissioner of financial institutions also regulates affairs of trust companies, savings and loan associations, consumer loan companies, investment and industrial loan companies, credit unions and mortgage loan companies and administers general laws relating to securities (blue sky laws). (KRS 286.1-011[2]; 286.8-010 to 286.8-990; c. 292).

Parity Provisions.

Wild-card parity statutes adopted. State bank may engage in activities available to national banks if authorized by letter ruling of executive director of financial institutions. (KRS 286.1-020[3]). State bank rated CAMEL 1 or 2 may engage in activities available to national banks operating in Kentucky, or state banks or thrift institutions operating in any other state, if it obtains legal opinion specifying applicable authority to office. (KRS 286.3-102[2] and [3]).

Stockholders.

Holders of shares of stock in banks have same type of liability to bank and creditors thereof as do shareholders of private business corporations. Such liability is limited to payment of authorized or subscribed consideration upon original issuance and liability for his own act or conduct. (KRS 271B.6-220).

Private Banking.

Only corporations and limited liability companies may conduct private banking business in state. (KRS 286.3-030; 286.3-010[16]).

Deposits.

General provision authorizes banks to receive deposits and allow interest thereon. (KRS 286.3-180). Officers prohibited from receiving deposits or assenting to receipt of deposits with knowledge that bank is insolvent. (KRS 517.100). Violation of section is felony punishable by imprisonment from one to five years (KRS 532.060[2][d]), and fine of not less than $1,000 nor greater than $10,000, or double gain from transaction, whichever is greater (KRS 534.030). Separate authorization is provided to allow banks to pay any amount deposited by minor to minor (KRS 286.3-380), and, subject to their charters, to pledge assets or provide surety bonds as collateral security for governmental deposits made with them (KRS 286.3-330). Deposits subject to reserve requirements on demand deposits as mandated by Board of Governors of Federal Reserve System. (KRS 286.3-300).

Unclaimed Deposits.

Demand and time deposits, sums payable on money orders escheat to state if abandoned for three years; funds or other property held in safe deposit boxes or other safekeeping arrangements escheat to state if abandoned for three years (KRS 393.060[1] and [3]); and sums payable on travelers checks escheat after seven years from issuance (KRS 393.060[2]). Intangible property held in fiduciary capacity may escheat three years after date prescribed for delivery. (KRS 393.066). See also category 21 Property, topic 21.01 Absentees, subhead Escheat.

Bank Holding Companies.

Multibank holding companies are allowed. (KRS 286.3-900). No individual or bank holding company can control banks holding more than 15% of total deposits and member accounts in offices of all federally insured depository institutions in Kentucky. (KRS 286.3-900[2]).

Geographic Expansion.

Banks may branch without geographic limitation. (KRS 286.3-180[2]).

Collections are governed by Uniform Commercial Code. See topic 3.09 Commercial Code.

Banks and trust companies are authorized to: be appointed, and act, as fiduciaries (KRS 286.3-210[1]; 395.005); act as agent for transaction of any business or management of estates, collection of rents, accounts, interest, dividends, notes, bonds, securities for money and debts, and demands of every character (KRS 286.3-210[2]); receive on deposit and for safekeeping gold, silver, jewelry, money, and other personal property of every kind (KRS 286.3-210[3]); and participate in interstate merger transactions (KRS 286.3-920). Only banks may: accept for future payment drafts or bills of exchange drawn upon them by their customers; issue letters of credit authorizing holders thereof to draw drafts upon them or their correspondents at sight or on time, and accept or discount acceptances. (KRS 286.3-190).

Investments by banks and trust companies of their own funds are regulated by KRS 286.3-100, 286.3-103, 286.3-110, 286.3-310; of trust funds by KRS 286.3-225, 286.3-230 and 286.3-240. Permissible investments include owning or operating courier service, discount brokerage service or travel agency. (KRS 286.3-100). Banks can hold and own personal property. (KRS 286.3-105).

Four or more banks, trust companies or national banks may form fiduciary investment company for investment management of funds held in fiduciary capacity. (KRS 386.510 to 386.600).

Uniform Common Trust Fund Act not adopted.

Credit unions organized under supervision of Commissioner of financial institutions. (KRS 286.6-010 to 286.6-645). Credit unions authorized to charge interest rates of 2% per month, rate which is often used for “most favored lender” purposes. (KRS 286.6-435).

Savings and loan associations may be organized under supervision of Commissioner of financial institutions. (KRS 286.5-005 to 286.5-991).

Industrial loan companies may be organized under supervision of Commissioner of financial institutions. (KRS 2868.7-410 to 286.7-990). Loans may be made in amounts up to $7,500 at interest rates up to 7%, which may be discounted or charged in advance. (KRS 286.7-460). Loan term may not exceed five years and 32 days. (KRS 286.7-460). Industrial loan companies may offer revolving credit plans at interest rates available to banks, if secured by first or second mortgage on residential property. (KRS 286.7-460[5]).

Consumer loan companies may be established and make loans not exceeding $15,000, subject to supervision of Commissioner of financial institutions. (KRS 286.4-410 to 286.4-991). Licensed consumer loan companies may make loans at 36% per annum for loans of $1,000 or less, and 24% for larger loans. See topic 3.19 Interest, subhead Small Loans.

Check cashing for fee authorized by KRS 286.9-010 to 286.9-990. Service fee shall not exceed $15 per $100 for 14 days, and may be prorated. (KRS 286.9-100[2]).

Foreign Banks.

Banks chartered in other states and national banks having their principal place of business in other states may lend money in state without qualification or approval but such banks may not receive deposits or transact other banking business in state unless specifically authorized by law or regulation or they have merged with domestic bank pursuant to merger transaction. (KRS 286.3-030[3]). Detailed listing is provided of loan activities which may be undertaken in state without rendering foreign banking or lending organizations subject to business qualification requirements. (KRS 286.2-670; 286.2-680; 271B.15-010).

See also categories 13 Estates and Trusts, topics Executors and Administrators, Trusts; Family, topic Guardian and Ward.

Reports and Tax on Deposits.

State and national banks, trust companies, federally chartered foreign banks and domestic branches of foreign banks must report to revenue department amount of deposits of persons, firms and corporations subject to taxation in state as of Jan. 1, and pay on or before Mar. 1 tax thereon of 1/1000 of 1%, which may be deducted from such deposit in each case. (KRS 132.030; 132.040; 136.500).

High-Cost Home Loans.

Local option preempted. (KRS 286.2-015). Federal HOEPA interest threshold adopted; points and fees threshold is greater of $3,000 or 6% of loan amount. (KRS 360.100). See topic 3.12 Consumer Protection, subhead High-cost Home Loans.

3.02 BILLS AND NOTES:

Uniform Commercial Code adopted. See topic Commercial Code for variations from Official Text and citation.

Special Requirements.

No special requirements as to form are set for notes because of their purpose or intended use. Nonnegotiable note payable to maker or order of maker and indorsed by him constitutes promise to pay face amount to party to whom delivered or assigns. (KRS 371.070).

Judgment Notes.

A provision in a note authorizing a confession of judgment thereon is void (KRS 372.140), but the insertion of such void provision does not render the note itself void or affect its negotiability (KRS 355.3-104[1][c]). Appearance under such power is criminal offense. (KRS 372.990).

Attorney Fees.

Provisions in any writing which create debt, or lien on real property, obligating debtor to pay reasonable attorney fees in event of default are enforceable to extent paid or agreed to be paid to other than salaried employee of creditor. (KRS 411.195).

Special defenses against holders in due course of consumer paper are recognized. See topic 3.12 Consumer Protection.

3.03 BILLS OF LADING:

See topic 3.08 Carriers.

3.04 BILLS OF SALE:

See topic 3.23 Sales.

3.05 BLUE SKY LAW:

See topic 3.24 Securities.

3.06 BROKERS:

Various provisions regulate business of negotiating contracts for others relative to property without custody thereof. Written brokerage contracts required. See topic 3.16 Frauds, Statute of.

Insolvent Brokers in Margin Transactions.

Broker in business of buying or selling, upon margin, stocks, bonds, grain, produce or cotton, and charging commissions therefor, who, being insolvent, with knowledge of that fact, accepts from customer ignorant of such insolvency, deposits of money, stocks, bonds, securities or other things of value, to be used as margin for purchase of stock, bonds, grain, produce or cotton, otherwise than in payment of or security for existing indebtedness, thereby causing customer to lose property or money so deposited, shall be guilty of Class D felony. (KRS 434.320; 434.340).

Pledge or Disposition of Securities Without Customer Consent.

Broker who has in his possession money or securities belonging to customer and pledges or disposes of them without customer's consent guilty of Class D felony. (KRS 434.330; 434.340).

Uniform Commercial Code adopted. (KRS c. 355). See topic 3.09 Commercial Code.

Real Estate Brokers.

Brokers and sales associates must be licensed by real estate commission before listing Kentucky property (KRS 324.020; but see 395 F.Supp. 2d 541 and 2007 U.S. Dist. LEXIS 65286, allowing brokers licensed in other states to engage in interstate brokerage of Kentucky property). Six hours annual continuing education required for all active agents. (KRS 324.281[7]; 324.085). License may be suspended or revoked following hearing, by commission, or hearing officer, from whose findings appeal lies to circuit court. (KRS 324.160; 324.170; 324.200). Licenses must be renewed annually; failure to renew results in termination and $200 fine. (KRS 324.090). Commission may obtain injunction against unlicensed persons acting as brokers. (KRS 324.020[6]). Application for license as sales associate or broker must be made on prescribed form. School instruction, examination and criminal record check required for license. (KRS 324.040; 324.045; 324.046). Bond not required. Licensees must carry errors and omissions insurance. (KRS 324.395).

If commission has reciprocity agreement with other state, broker or sales associate holding license from another state with equivalent licensing and educational standards may be issued license without examination. (KRS 324.141). Statute prohibiting commission sharing declared unconstitutional. (395 F.Supp. 2d 541 and 2007 U.S. Dist. LEXIS 65286). Kentucky licensee may split commissions with broker licensed by another state in connection with interstate brokerage of Kentucky property if statutory requirements met. (KRS 324.020[4]; 324.235 to 324.238).

Advertising governed by statute and commission regulations. (KRS 324.117). All contract deposits must be held in escrow account maintained in Kentucky, with interest, if any, used as agreed to in writing by parties. (KRS 324.111).

Written brokerage contract required. See topic 3.16 Frauds, Statute of.

Mortgage Loan Brokers.

Each person who for compensation or gain holds himself out as agent for borrowers or prospective lenders with respect to loans to be secured by mortgage lien on single- family residence, including condominium or apartment dwelling with four or fewer units or single-family cooperative, required to obtain license from Commissioner of financial institutions before transacting business in state. (KRS 286.8-030; 010). Applicants supply information required in verified application. (KRS 286.8-032). Investigation fees for initial application—$300 for principal office and $150 for each branch office; initial licensing fee $450 for principal office and $250 for each branch office in Kentucky (license fees prorated if submitted in second half of year). (KRS 286.8-034[1]). Banks exempt. HUD-approved lenders and others may be exempt but must file written application for exemption before Dec. 31st each year. (KRS 286.8-020). Individual brokers and loan officers must register with department of financial institutions, maintain agent for service of process in state, and meet education requirements. (KRS 286.8-250 to 286.8-260). As of Jan. 1, 2010, examination required. (KRS 286.8-038 to 286.8-042). Annual renewal fees in same annual rates payable by Nov. 30th each year. (KRS 286.8-034[3], [4]). Surety bond in amounts not less than $250,000 for each mortgage loan company and $50,000 for each broker required. (KRS 286.8-060). Mortgage loan brokers' practices regulated, including rates (KRS 286.8-110; 286.8-120; 286.8-125) and escrow accounts (KRS 286.8-130). Licenses subject to suspension by Commissioner upon proof that mortgage broker has violated or is about to violate law. (KRS 286.8-090; 286.8-190; 286.8-200).

Criminal Penalties.

Penalties provided for violation of mortgage loan broker statutes. (KRS 286.8-046; 286.8-990). Criminal background check required. (KRS 286.8-255[9]).

Penalties for Violation of KRS 286.8-010 to 286.8-285.

(KRS 286.8-046; 286.8-990).

Insurance Brokers.

See category 16 Insurance, topic 16.01 Insurance Companies.

Broker-Dealers in Securities.

See topic 3.24 Securities.

Loan Brokers.

See topic 3.12 Consumer Protection.

Payment of Taxes.

As to duty of stock and bond brokers to pay taxes due from customers, see category 22 Taxation, topic 22.15 Property Taxes, subhead Assessment.

3.07 BULK SALES:

Art. 6 of Uniform Commercial Code repealed in 1992. No other statutory provision.

See category 8 Debtor and Creditor, topic 8.08 Fraudulent Sales and Conveyances; also topic Commercial Code, this category.

3.08 CARRIERS:

This digest deals only with carriers in intrastate commerce.

Supervision.

Transportation Cabinet has responsibility of regulating railroads. (KRS 174.057). Regulation of carriers by water and by air repealed. As to carriers by motor vehicle, see category 23 Transportation, topic 23.01 Motor Vehicles, subhead Motor Vehicle Carriers. (KRS c. 281).

Other carriers, such as telephone and telegraph companies, natural gas transportation companies, commercial mobile radio services, and water districts/commissions are brought under jurisdiction and control of Public Service Commission as to services, rates, tolls and charges. (KRS c. 278).

Licenses.

Operators of air carriers must be licensed by Federal Aviation Administration. (KRS 183.050). Other carriers must obtain from Public Service Commission certificate of convenience and necessity before furnishing public utility other than electric (KRS 278.020) and certificate of environmental compatibility for generation of electricity (KRS 278.025).

Rates of carriers that are subject to control of Public Service Commission must file with Commission. (KRS 278.160; 278.190; 278.270).

Discrimination.

Unjust discrimination and unreasonable preferences prohibited by railroads (Ky. Const. § 213); by other utilities (KRS 278.170).

Limiting Liability.

Limitation of common-law liability is prohibited. (Ky. Const. § 196).

Bills of lading and other documents of title governed by Uniform Commercial Code. (KRS c. 355 Art. 7).

Liens.

Carriers lien conferred by Uniform Commercial Code. (KRS 355.7-307, 355.7-308).

Employers' Liability.

As to employees in intrastate commerce, railroads are subject to an Employers' Liability Law, similar to Federal Employers' Liability Act. (KRS 277.310).

Motor Vehicle Carriers.

See category 23 Transportation, topic 23.01 Motor Vehicles.

Rails to Trails.

Railtrail Development Office has been created to coordinate railtrail development efforts (KRS 147A.250), and encourage railbanking (KRS 277.400).

3.09 COMMERCIAL CODE:

Uniform Commercial Code adopted effective July 1, 1960 and codified as c. 355 of KRS. Official Article and section numbers retained, following decimal point (e.g., § 2-201 of Code as published in Uniform and Model Acts section codified as KRS 355.2-201). Kentucky uses numbers and then letters in UCC subsections, instead of letters then numbers (e.g., KRS 355.9-307[6][a] instead of Revised § 9-307[f][1]).

1962 Official Text adopted.

1966 Official Amendments adopted.

1966 Official Optional Amendments to §§ 1-209, 7-209 and 9-105 adopted.

1972 Official Amendments adopted. See subhead Variances from 1962, 1972, 1977, 1987, 1989 and 1990 Official Text, infra for variations from official text.

1973 Official Amendment adopted.

1977 Official Amendments adopted. See subhead Variances from 1962, 1972, 1977, 1987, 1989 and 1990 Official Text, infra for variations from official text.

1987 Official Text—Art. 2A - Leases adopted. See subhead Variances from 1962, 1972, 1977, 1987, 1989 and 1990 Official Text, infra for variation from official text.

1989 Official Text—Repealer of Art. 6 adopted.

1990 Amendments to Art. 2A - Leases adopted. See subhead Variances from 1962, 1972, 1977, 1987, 1989 and 1990 Official Text, infra for variations from text.

1991 Official Text of Revised Art. 3 with Conforming and Miscellaneous Amendments to Arts. 1 and 4 adopted.

1994 Official Text of Revised Art. 8 adopted with conforming and miscellaneous amendments to Arts. 1, 3, 4, 5, 9 and 10 adopted.

1995 Official Text of Revised Art. 5 adopted.

2001 Official Text of Revised Art. 1 adopted.

1998 Official Text of Revised Art. 9 adopted, effective July 1, 2001.

2002 Official Amendments to Arts. 3 & 4 adopted.

Options in 1962, 1966, 1972, 1977, 1986, 1989, 2001 and 2002 Official Textsexercised as follows:

§ 2-318, 1966 alternative A adopted;

§ 2A-216, alternative A adopted;

§ 4-106, alternative A to subsection (2) adopted;

§ 4-202(1)(b), optional phrase adopted;

§ 5-112(1), optional phrase omitted;

§ 5-114, optional sections (4) and (5) omitted;

Article 6, Alternative A, repeal, adopted;

§ 7-204, optional subsection (4) for reference to local statutes, omitted.

§ 7-403(1)(b), optional phrase adopted;

Variances from 1962, 1972, 1977, 1987, 1989, 1998, 2001 and 2002 Official Text appear in:

§ 1-103(3) official comments shall be used as “guide for interpretation.”

§ 1-301 retains Kentucky's “reasonable relationship” rule in conflict of laws.

§ 2-316(3), new subsection (d) added excluding implied warranties that farm animals are free from disease or sickness unless seller knows of diseased or sick condition.

§ 2A-103(1)(e), deletes “if the total payments to be made under the lease contract, excluding payments for options to renew or buy, do not exceed $25,000.”

§ 2A-108(4)(b), deletes “and the lessee claiming unconscionability has brought or maintained an action he knew to be groundless.”

§ 2A-201(1)(a), changes $1,000 to $500.

§ 2A-521(3), adds “writ of possession.”

New section 2A-110 provides that official comments may be consulted in construction and application of Article 2A.

§ 2A-524(1), 1990 amendment not adopted.

Variations to Revised Art. 9

Effective on and after July 1, 2001.

Scope.

Kentucky excludes assignments of workers compensation benefits and claims, payments from special needs trusts, structured settlements, public finance transactions and governmental transfers. (KRS 355.9-109[4][c], [n], [o], [p], [q]).

Equine Provisions.

“Farm products” expanded to include “equine interests”, including interests in horses, stallion shares, seasons and syndicates, whether or not debtor is engaged in farming operations. (KRS 355.9-102[1][ah][5]). Farm products exception applies to sale of horses, except as provided by Federal Food Security Act. Security interest attaches to proceeds from sale. (KRS 355.9-320). Secured party with interest in equine interest that has been sold must pursue debtor/seller to judgment before bringing claim against buyer. (KRS 413.242).

Uniform 9-334(j)

omitted.

Uniform 9-406(j)

omitted.

Restrictions on Assignment.

Restrictions imposed by specified statutes are ineffective. (KRS 355.9-408[5]). Certain restrictions enacted by Department of Insurance under KRS 304.2-260, 304.24-420, 304.33 and 304.37 remain effective. (KRS 355.9-408[6]; 355.9-409[3]).

Debtor Name Change.

Financing statement amendment must be filed to reflect debtor name change within four months after receipt of written notice. (KRS 355.9-507).

Repossession Title.

Acquisition of repossession title by secured party not disposition of collateral. (KRS 355.9-610[7]).

Transfer Statements.

Repossession affidavit qualifies as transfer statement. (KRS 355.9-619[4]).

Savings clause extended to "in lieu" financing statements. (KRS 355.9-706[5]).

Financing Statements and Organizational Numbers.

Published on Secretary of State website - http://sos.ky.gov.

Forms.

Secretary of State accepts national Art. 9 filing forms, see Uniform and Model Acts section of Law Digest, or non-standard forms.

Fees.

Standard filing fee is $10; $20 for more than two pages or non-standard forms; $5 for electronic medium authorized by filing office rules. Search fee $5. (KRS 355.9-525). County clerk's fees: $29 for fixture filing and $22 for motor vehicle title lien statement.

Transition Rules.

Old Article 9 required financing statements to be filed in county of debtor's residence. Transition rules gave secured parties five years from date of Old Art. 9 filing to file initial financing statement (or in lieu statement) in appropriate jurisdiction, or, if Kentucky, in Secretary of State's office. (KRS 355.9-705[3]). County filings are permissive, not mandatory, and do not affect perfection. (KRS 355.9-706[4]).

See also topics: Banks and Banking, Bills and Notes, Brokers, Carriers, Contracts, Factors, Frauds, Statute of, Sales, Securities, Warehousemen; categories Business Organizations, topic Corporations; Civil Actions and Procedure, topic Limitation of Actions; Debtor and Creditor, topics Assignments, Fraudulent Sales and Conveyances, Liens, Pledges; Documents and Records, topics Records, Seals; Mortgages, topic Chattel Mortgages; Transportation, topic Motor Vehicles.

3.10 CONDITIONAL SALES:

See topic 3.23 Sales.

3.11 CONSIGNMENTS:

See topic 3.14 Factors.

3.12 CONSUMER PROTECTION:

General Consumer Protection Act declares unlawful all unfair (defined for purposes of Act as "unconscionable"), false, misleading or deceptive acts or practices in conduct of any trade or commerce. (KRS 367.110 to 367.370 and 367.990). Enforcement and supervisory powers placed in department of law. (KRS 367.150). Attorney General granted broad investigation powers (KRS 367.240) and, on petition, is authorized to seek and obtain restraining order or temporary or permanent injunction of unfair, false, misleading or deceptive acts or practices (KRS 367.190). Courts granted additional authority to make additional orders or judgment including restoration of moneys, appointment of receiver for business, or revocation of license or certificate authorizing person to engage in business in state. (KRS 367.200 to 367.220). Civil penalty to Commonwealth of $2,000 per violation authorized for unlawful practices, or $10,000 per violation when victim is aged 60 or older (KRS 367.990[2]) and fine up to $500 or imprisonment up to 12 months or both for concealing, falsifying documentary material subject to investigation by Attorney General or intentionally falsifying, withholding, etc. documents, records or materials from investigation (KRS 367.900[3]; 367,990[4]; 532.090[1]; 534.040[2]).

Business Opportunity.

See topic 3.15 Franchises.

Buying clubs and vacation clubs regulated and their contracts subject to being cancelled under KRS 367.395 to 367.405.

Consumer Credit Loans.

Balloon payments subject to right to refinance. (KRS 367.390).

Crematory operators and contracts regulated. (KRS 367.97501 to 367.97534).

Fresh meat produced outside U.S. and sold by retailer, wholesaler, distributor or processor generally must be so identified to purchaser. (KRS 367.855 to 367.857). Kosher meat protected from false representation. (KRS 367.850).

Health discount plans (that are not insurance) must contain specific disclosures. (KRS 367.828).

Health spa establishments must file registration statement with Attorney General's consumer protection division and comply with regulation of their business dealings with consumers. (KRS 367.905 to 367.930).

High-Cost Home Loans.

Statute adopts federal high-cost home loan interest thresholds, and establishes state points and fees thresholds at greater of $3 or 6% of total amount and imposes numerous restrictions. Violations of act constitute usury and violation of consumer protection act. (KRS 360.100; 367.320).

Holder in due course defense abolished for consumer purchase money loan contracts not affected by FTC trade regulation rule. (KRS 367.600 to 367.610).

Home solicitation sales, including home mortgage loans, regulated with ten business day rescission period if security interest taken in principal dwelling. (KRS 367.410 to 367.450). Use of pre-screened trigger lead information from consumer reports regulated. (KRS 286.8-220[4]).

Loan Brokers.

Persons who arrange or offer to arrange or advise concerning loan of money or credit card or line of credit for consideration may not collect advance fee. (KRS 367.380[4]; 381.381). Most regulated lenders and all business loans exempted. (KRS 367.380[4]).

Mobile home sales regulated. (KRS 367.710 to 367.775).

New car lemon bill mandates arbitration of warranty claims arising in first 12,000 miles or one year after sale or lease. (KRS 367.840 to 367.846). New motor vehicle manufacturers must offer informal dispute resolution procedures (arbitration) to purchasers who have disputes relating to unsatisfactory warranty repairs, malfunctions and other problems with performance of purchased vehicle during first two years or 25,000 miles of ownership. (KRS 367.860 to 367.870).

See also topic 3.23 Sales; category 23 Transportation, topic 23.01 Motor Vehicles.

Plain Language Statutes.

Insurance policies for homeowners, automobile, accident and health, life and other forms of personal insurance must be in English and readable and understandable by persons of average intelligence and education. Insurance applications may also be filed in language other than English. If there is conflict, English version controls. (KRS 304.14-440; 304.14-435). Insurance policy simplification provisions provided for in KRS 304.14-420 to 304.14-450. Contracts must be signed at end. (KRS 446.060).

Pre-need funeral contracts regulated. (KRS 367.932 to 367.974).

Professional solicitors for charitable and civic purposes must file IRS Form 990, if applicable, or notice of intent to solicit with Attorney General. (KRS 367.657).

Pyramid distribution plans outlawed. (KRS 367.830 to 367.836).

Referral sales outlawed. (KRS 367.350).

Rental-Purchase Agreements.

Disclosure requirements imposed on agreements for use of personal property by consumers for initial period of four months or less, automatically renewable, and permitting ultimate purchase. (KRS 367.976 to 367.985). Definition of regulated instrument excludes Art. 9 security agreements, non-consumer leases, credit sales governed by federal truth-in-lending regulations, home solicitation sales, and retail installment sales under KRS 371.210.

Sales of land for recreation and retirement use regulated under supervision of Attorney General. (KRS 367.470 to 367.486).

Solicitors of magazines, encyclopedias, bibles, periodicals, etc., required to file statement with county clerk; fee for filing statement $15. (KRS 367.510; 64.012[18]).

Telephone solicitation is regulated by KRS 367.46951 to 367.46999, but calls to persons with existing or prior business relationship are exempt. Consumers may request listing on national “Do Not Call” registry maintained by Federal Trade Commission. Calls to persons on list and other unfair acts prohibited. (KRS 367.46955).

Unlicensed health care practitioners may use academic title or claim possession of academic degree only if accredited, and honorary degree only if disclosed. (KRS 367.825 to 367.826).

Underground facilities for producing, storing or distributing goods, except coal, regulated. (KRS 367.4901 to 367.4917).

Uniform Deceptive Trade Practices Act not adopted.

Unsolicited goods delivered to person deemed gift. (KRS 365.710).

3.13 CONTRACTS:

Common law rules apply generally, but see topic 3.16 Frauds, Statute of. Uniform Commercial Code adopted (KRS c. 355.1 to 355.11); see category 3 Business Regulation and Commerce, topic 3.09 Commercial Code. Also see categories 3 Business Regulation and Commerce, topic Consumer Protection; Documents and Records, topic Seals; Family, topics Infants, Husband and Wife and Adoption, subhead Surrogate Parenting Contracts.

Guaranty contract must be in writing, signed by guarantor and, unless it is written on, or expressly refers to, instrument guaranteed, specify maximum aggregate liability and termination date. (KRS 371.065[1]). Guaranty may cover interest and costs of collection (including attorney's fees). (KRS 371.065[2]).

3.14 FACTORS:

Business of receiving and selling goods consigned or otherwise entrusted for sale is not regulated business in state.

Uniform Commercial Code adopted. (KRS c. 355). See topic 3.09 Commercial Code.

License Requirements.

None.

Liens.

Governed by Uniform Commercial Code.

Consignment Agreements.

No provision for recording or filing but see Art. 9 of Uniform Commercial Code. (KRS 355.9-101 et seq.).

3.15 FRANCHISES:

Uniform Franchise and Business Opportunities Act.

Not adopted.

Business Opportunity.

Sale of Business Opportunity Act, KRS 367.801 to 367.819, regulates opportunities to offer, sell or distribute goods or services supplied in whole or in part by offeror when offeror obtains initial required consideration of not less than $500 from purchase or lease of opportunity or inventory associated therewith and (a) offeror has represented that investor can earn profit from opportunity, or (b) offeror has represented that market demand will enable investor to earn profit from opportunity, or (c) offeror has provided locations or assistance in finding locations for operation of opportunity, or (d) offeror has represented that there is guaranteed market or likely buy-back program for product offered to investor. (KRS 367.801[5]). Offerors who do not qualify for exemption under KRS 367.807 must register with Consumer Protection Division of Attorney General's Office and post bond of not less than $75,000. (KRS 367.815; 367.807; 367.805).

Motor Vehicle Franchises.

Relationship between manufacturers, distributors or importers of new motor vehicles and motor vehicle dealers regulated. (KRS 190.010 to 190.990). Statutes, including insurance requirements administered by Motor Vehicle Commission. (KRS 190.058 to 190.059). License fees for all dealers in motor vehicles in KRS 190.030.

3.16 FRAUDS, STATUTE OF:

KRS 371.010 provides that unless some memorandum or note thereof is in writing, signed by party to be charged, or by authorized agent, no action may be brought to charge any person: (1) Upon representation concerning character, credit, etc., of another, made with intent that such other may thereby obtain credit, money or goods; (2) upon promise to pay debt contracted during infancy; (3) upon promise of personal representative to answer out of own estate any liability of his decedent; (4) upon promise to answer for debt, default or misdoing of another; (5) upon any agreement in consideration of marriage, except mutual promises to marry; (6) upon any contract for sale of real estate or any lease thereof for term longer than one year; (7) upon any agreement which is not to be performed within one year; (8) upon any agreement for commission or compensation for sale or lease of real estate; or (9) upon any promise, contract, agreement, undertaking or commitment to loan money, to grant, extend or renew credit, or make any financial accommodation to new or existing business enterprise (but not including credit card or consumer credit transactions). It is not necessary to express consideration for agreement in writing. Consideration may be proved or disproved by parol or other evidence.

KRS 371.090 provides that no person shall be bound as surety of another by act of agent unless authority of agent is in writing signed by principal. For other limitation on guaranty contracts, see topic 3.13 Contracts.

Sales of Personalty.

See topic 3.09 Commercial Code. KRS 355.2-201 expresses requirements as to sales of goods valued at $500 or more.

Contracts for sale of standing trees or timber must be in writing, signed by person to be charged, or authorized agent. (KRS 371.100).

Part performance may take agreement out of statute only if agreement is not to be performed within one year. (300 Ky. 69, 187 S.W.2d 1015).

3.17 [RESERVED]

3.18 INFORMATION TECHNOLOGY, INTERNET AND NEW MEDIA:

Uniform Electronic Transaction Act (1999) adopted with modifications effective Aug. 1, 2000. (KRS 369.101 to 369.120). Uniform Act applies to contracts created or renegotiated on and after effective date. Contracts created under repealed, nonuniform act between July 15, 1998 and July 31, 2000 and not renegotiated thereafter governed by prior law.

Variations from Uniform Act:

§ 2, Definitions. Clause added to provide that definitions apply unless context requires otherwise. (KRS 369.102).

§ 3 subsections (c) and (d) modified to provide Act does not apply to conveyance of interest in real property, or to transfer of negotiable instrument, or to instrument establishing title to extent conveyance, transfer or title is governed by other law. (KRS 369.103[2(c) and (d)]).

§ 17 modified to provide each governmental agency must determine whether it will create electronic records. Kentucky Department of Libraries and Archives must determine whether

Commonwealth will retain electronic records and convert written records to electronic records. (KRS 369.117).

§ 18(a) revised to read: “Except as otherwise provided in KRS 369.112(6), each governmental agency of this state, in compliance with standards established by the Commonwealth Office of Technology, shall determine whether, and the extent to which, it will send and accept electronic records and electronic signatures to and from other persons and otherwise create, generate, communicate, store, process, use, and rely upon electronic records and electronic signatures.” (KRS 369.118[1]).

§ 18(b) revised to read: “To extent that a governmental agency uses electronic records and electronic signatures under [KRS 369.118(1)]: (a) The Commonwealth Office of Technology, giving due consideration to security, may specify the manner and format in which the electronic records must be created, generated, sent, communicated, received, and stored and the systems established for those purposes; (b) if electronic record must be signed by electronic means, each governmental agency, giving due consideration to security, may specify the type of electronic signature required, the manner and format in which the electronic signature must be affixed to the electronic record, and the identity of, or criteria that must be met by, any third party used by a person filing a document to facilitate the process; (c) the Commonwealth Office of Technology and the Department for Libraries and Archives, giving due consideration to security, may specify control processes and procedures as appropriate to ensure adequate preservation, disposition, integrity, security, confidentiality, and auditability of electronic records; and (d) each governmental agency, giving due consideration to security, may specify any other required attributes for electronic records which are specified for corresponding nonelectronic records or reasonably necessary under the circumstances.” (KRS 369.118[2]).

§ 19, Interoperability. Commonwealth Office of Technology identified as applicable governmental agency. (KRS 369.119).

Campaign Finance Reports.

Subject to adequate funding, Registry of Election Finance may accept electronic reporting under election laws. (KRS 121.120[6 and 7]).

Model Procurement Code, applicable to purchasing practices of state agencies. Using agency contract administrator may sign opinion as to whether vendor has fully complied with terms of construction contract with electronic signature. Using agency head shall sign determination as to whether performance bond should be released or whether claim should be made against performance bond with electronic signature. (KRS 45A.190[3]).

Uniform Commercial Code.

Electronic transactions authorized to create and perfect security interests in collateral generally and in electronic chattel paper by adoption of Revised Article 9 with medium-neutral definitions. (KRS 355.9-102). See topic 3.09 Commercial Code. Communication with Secretary of State and with local filing officers is advised before sending financing statements in electronic form.

Uniform Computer Information Transactions Act not adopted.

3.193.16

3.17 INTEREST:

Legal rate in absence of agreement fixing rate is 8%. (KRS 360.010). Instrument does not bear interest unless it so provides. (KRS 355.3-112).

Maximum Rates.

Any party or parties may agree in writing for higher rates, unless another law of state sets another maximum rate, as follows: (a) Up to 4% in excess of discount rate on 90-day commercial paper in effect at Federal Reserve Bank in Federal Reserve District where transaction consummated or 19%, whichever is less, on money due where original principal amount is $15,000, or less; and (b) at any rate on money due where original principal amount exceeds $15,000. (KRS 360.010[1]).

Banks.

State or national bank may charge a minimum of $10 interest on any loan made by it in this state (KRS 360.010[2]) and state-chartered banks may charge any rate allowed to national banks on loans less than $15,000 (KRS 286.3-214; see 12 U.S.C. § 85). Bank or trust company may collect interest in advance to maturity of loan if loan has maximum maturity of not more than five years and 32 days (KRS 286.3-215) and bank or trust company may charge up to 1.75% per month pursuant to revolving credit plan (KRS 286.3-740). See topic 3.01 Banks and Banking.

Credit Unions.—State chartered credit unions may make loans to members, and charge interest at rate not to exceed 2% per month on unpaid balances. (KRS 286.6-435).

Installments of interest may be made payable at fixed times and if not then paid they bear interest just as principal if contract expressly so provides. (90 Ky. 340, 13 S.W. 249).

Time-price differential rule, holding that owner of real or personal property may set credit price for sale without regard to usury limit, recognized in line of cases. (309 Ky. 295, 217 S.W.2d 641; 58 Ky. 663).

Judgments.

Interest runs on judgment at rate of 12% compounded annually, but judgment for accruing interest on written obligation bears interest according to instrument, whether higher or lower than 12%. Court may direct, after hearing with due notice, that judgment for unliquidated damages bear interest at lesser rate. (KRS 360.040).

Interest on open account runs from date when account is liquidated by demand, or by rendering account to debtor. (285 Ky. 727, 149 S.W.2d 22).

Small Loans.

Persons licensed to make small loans may contract in writing for interest at rate of 3% per month on unpaid balance up to $1,000, 2% per month on unpaid balance exceeding $1,000 but not exceeding $3,000, but where original amount of loan exceeds $3,000 rate is limited to 2% per month on unpaid balance. Loan period may not exceed 60 months and 15 days if loan is $3,000 or less and may not exceed 120 months if loan is in excess of $3,000. (KRS 286.4-530; 286.4-580).

Securities broker-dealers exempt from usury statutes for credit granted on debit balance secured by securities and payable at will. (KRS 292.545).

Pawnbrokers are limited to 2% per month on unpaid balances, plus reasonable service fee not to exceed 1/5 of value of loan per month. (KRS 226.080).

Usury.

Taking, receiving, reserving or charging more than authorized interest constitutes forfeiture of entire interest when knowingly done. Borrower may recover twice amount of interest paid under usurious agreement if action brought within two years. (KRS 360.020). Corporations, limited partnerships, limited liability companies and business trusts, except those whose principal asset is ownership of one or two family dwelling, may not plead usury as defense. (KRS 360.025; 360.027). Defense of usury is available against holder in due course of negotiable paper. (255 Ky. 339, 73 S.W.2d 1105).

Requirement by insurance company lending money that borrower insure life or that of another or property with such company, and pay premiums during continuance of loan, and assign policy as security, is not usurious, if premiums are not higher than charged for similar policies to persons without loans. (KRS 360.030). Statute may be unconstitutional, see 22 F.Supp. 233, because of improper titling of legislation.

Contracts made and to be performed in other states, if valid there, will be enforced in Kentucky, even though they would be usurious if made in Kentucky. (307 Ky. 612, 211 S.W.2d 831).

All unfair, false, misleading or deceptive acts or practices are declared unlawful by KRS 367.170. See topic 3.12 Consumer Protection.

3.18 [RESERVED]

3.19 LICENSES, BUSINESS AND PROFESSIONAL:

Various occupations are subjected to license tax (KRS c. 137)—some as revenue measure—others, by way of regulation, e.g., real estate brokers (KRS c. 324); race tracks (KRS 137.170). Out-of-state principal brokers engaged in commercial real estate brokering in Kentucky regulated by KRS 324.235 to 324.238.

Cities and towns, if authorized by charter, may collect city license taxes on motor vehicles as revenue measure and as police regulation. (229 Ky. 186, 16 S.W.2d 1034; 229 Ky. 722, 17 S.W.2d 1017; 225 Ky. 123, 7 S.W.2d 833).

Licenses for hunting and fishing must be obtained by all nonresidents of Kentucky, and by residents not hunting on their own lands. (KRS 150.170). Reciprocal agreements with contiguous states honored for nonresidents. Detailed information may be obtained from Department of Fish and Wildlife Resources, #1 Sportsmans Lane, Frankfort, Kentucky 40601, http://kdfwr.state.ky.us/.

Commercial Travelers.

State imposes no license requirements.

See also topic 3.24 Securities; categories 16 Insurance, topic Insurance Companies; Transportation, topic Motor Vehicles.

Collection Agencies.

Persons engaged in debt adjusting, budget counseling, debt pooling, or other debt management services are subject to business practice guidelines. (KRS 380.010; 380.040). Such persons must file initial registration form and pay $250 fee. (KRS 380.040[5]). Attorneys licensed in Kentucky, full-time employees of debtor acting as adjuster of debtor's debts, persons acting pursuant to court order or state, creditors of debtor adjusting debtor's debts without cost to debtor, lenders to debtor adjusting debts in disbursement of loan without compensation for adjusting debts, and certain charitable, religious or educational organizations not in business of debt adjusting are exempt from coverage. (KRS 380.030). Violation of statutes is misdemeanor. (KRS 380.990).

3.20 MONOPOLIES, RESTRAINT OF TRADE AND COMPETITION:

State antitrust statute ("Little Sherman Act") declares every contract, combination in form of trust or otherwise, or conspiracy, in restraint of trade or commerce in state to be unlawful and further declares that it is unlawful for any person or persons to monopolize or attempt to monopolize or combine or conspire with any other person or persons to monopolize any part of trade or commerce in state. (KRS 367.175). Activities of legitimate labor unions, agricultural or horticultural cooperative organizations (KRS 272.295) and consumer organizations, and individual members thereof, public utilities, and any activities authorized or approved under any federal or state statute or regulation are exempt from coverage of Act. (KRS 367.176). Attorney General authorized to bring action to recover civil penalty on behalf of Commonwealth up to $5,000 or $200 per day for violations of KRS 367.175 in addition to penalties contained in KRS 367.990. (KRS 367.990[8]). Prior to adoption of statute it had been held that contract in unreasonable restraint of trade was void (276 Ky. 666, 124 S.W.2d 1019), but reasonable restraint of competition was legal (277 Ky. 301, 126 S.W.2d 165).

Unfair Trade Practices.

KRS 365.020 to 365.070 forbid anyone doing business in Kentucky to: (1) Discriminate between different localities by selling or distributing goods at different rates (transportation costs considered) with intent to destroy or prevent competition; or (2) make secret payments or rebates or extend secretly any special services or privileges to injury of competitor "where such payment or allowance tends to destroy competition." Contracts made in violation of Act are illegal and no recovery thereon is allowed (KRS 365.030); however, prohibiting below cost sales has been ruled unconstitutional. (764 S.W.2d 80).

Any person or corporation, private or public, may maintain action to enjoin violation of Act and, if injured thereby, may recover treble damages. (KRS 365.070).

Corporation violating Act is subject to severe penalties. Partners, officers, directors and agents of any firm or corporation aiding in violation are guilty of misdemeanor and subject to civil liability. Penalty for each violation is fine of $100 to $1,000, imprisonment not exceeding six months, or both. (KRS 365.990).

Remedies given in Act are cumulative. (KRS 365.070[3]).

Special acts govern regulation of motor vehicle dealers (KRS 190.010 to 190.085) and transfer of motor vehicle installment sale contracts (KRS 190.090 to 190.140). Southern Dairy Compact governing sale and marketing of milk adopted. (KRS 260.670 to 260.672).

Resale Price Contracts.

Special act governs resale price of cigarettes. (KRS 365.260 to 365.380).

Franchises.

See topic 3.15 Franchises.

3.21 [RESERVED]

3.22 RESTRAINT OF TRADE:

See topic 3.20 Monopolies, 3.21 Restraint of Trade and Competition.

3.23 SALES:

Uniform Commercial Code adopted: Art. 2 of Code replaces Uniform Sales Act. (KRS 355.2).

Contracts of Sale of Personalty.

Contracts must be signed at end. (KRS 446.060). No other unusual requirements exist with general application concerning formality, validating or size of type. For requirements that some sales contracts be in writing, see topic 3.16 Frauds, Statute of. For requirements applicable to consumer sales contracts, see topic 3.12 Consumer Protection; and subhead Retail Credit Sales, infra this topic.

Bills of Sale.

No set forms prescribed. Any instrument showing intention is sufficient.

Product Liability.

Three theories of liability recognized: ordinary negligence (294 S.W.2d 534); “strict liability” as set forth in § 402A of Restatement 2d, Torts (402 S.W.2d 441); and contract liability for breach of warranty under Uniform Commercial Code. Lack of privity of contract is defense in breach of warranty action brought by one not in family or household and not guest of buyer. (KRS 355.2 to 318; 695 S.W.2d 411).

Product Liability Act states certain evidentiary presumptions and sets certain limitations upon introduction of evidence and amounts of liability in actions brought for or on account of personal injury, death or property damage caused by or resulting from manufacture, construction, design, formulations, development of standards, preparation processing, marketing, etc., of any product. (KRS 411.300 to 411.350). Rebuttable presumptions established that any product was not defective if injury, death or property damage occurred more than five years after date of first sale to first consumer or more than eight years after date of manufacture and that product was not defective if its design, methods of manufacture and testing conformed to generally recognized and prevailing standards in state of art at time design prepared and product manufactured. (KRS 411.310). Manufacturer's liability for damages limited to damages resulting from use of product in original, unaltered and unmodified condition. (KRS 411.320[1]). Manufacturers not liable for any damages if plaintiff's unauthorized alteration or modification was substantial cause of injury or if plaintiff failed to exercise ordinary care in use of product. (KRS 411.320[2 & 3]). Wholesalers', distributors' and retailers' liability for injuries caused by products not manufactured by them limited to circumstances when express warranty breached or when they knew or should have known product was defective. (KRS 411.340).

Retail Credit Sales.

Retail seller of tangible chattels, sold primarily for personal, family or household use must furnish copy of contract to buyer. (KRS 371.210; 371.220). Contract required to contain notice to buyer, in at least ten point bold type, not to sign unless all blank spaces filled in and until he has read same, and that he is entitled to a copy of the contract. (KRS 371.220). If copy of contract not delivered or mailed to buyer before goods delivered buyer may rescind contract and is entitled to refund of down payment. (KRS 371.220). Contract must contain names and addresses of seller and buyer, description of goods, cash sale price, amounts of down payment, difference between down payment and cash sale price, insurance premium, if any (stating type of insurance and terms of coverage), official fees, principal balance and time price differential, number of installments, amount of each, and due date of payment. (KRS 371.220). Contract need not be contained in one document. (KRS 371.230). Buyer has right to prepay in full unpaid time balance and is entitled to refund credit specifically set out in statute. (KRS 371.260). Amendment of contract and refinancing charge provided for. (KRS 371.270). Subsequent purchases may be consolidated with earlier, but each subsequent purchase treated as an individual contract. (KRS 371.290).

Retail charge agreements for open-end credit sales are covered by act, with specific requirements as to form set forth. (KRS 371.300 to 371.330).

"Time price differential" may be contracted for and received under either retail installment contract or retail charge agreement. No maximum rate provided in statute. (KRS 371.260; 371.300[3]).

Installment sales of motor vehicles regulated in detail by KRS 190.090 to 190.140.

Consumer Protection.

Unsolicited goods delivered to person deemed gift. (KRS 365.710). See subhead Retail Credit Sales, supra, and topic Consumer Protection; category Transportation, topic Motor Vehicles. Revised Uniform Deceptive Trade Practices Act adopted with variations. See topic 3.12 Consumer Protection.

Bulk Sales.

See topic 3.09 Commercial Code.

Sales of Motor Vehicles.

See category 23 Transportation, topic 23.01 Motor Vehicles, subheads Titles and Sales.

3.24 SECURITIES:

Uniform Commercial Code.

Adopted. See topic 3.09 Commercial Code.

Supervision.

Administrator is Director of Division of Securities in Department of Financial Institutions, 1025 Capitol Center Drive, Suite 200, Frankfort, Kentucky 40601; 502-573-3390; http://www.kfi.ky.gov.

Uniform Securities Act (1985) (see Uniform and Model Acts section) adopted. (KRS 292.310 to 292.991). Kentucky Act contains numerous variations from Uniform Act and order of sections is different.

Deviations From Uniform Act:

Not Adopted.

Following provisions of Uniform Securities Act are not found in Kentucky Act: §§ 201(c); 202; 203(b); 204; 205(b); 206; 208; 211; 215; 302; 304(b)(6); 305; 401(b)(6); 402(2) and (3); 502; 607; 702-705; 707; 802-807; 909-911.

Significant additions to Uniform Act provisions include:

Brokers, Dealers, Agents and Advisers.

Written examination may be required before registration as broker-dealer, agent, investment adviser or investment adviser representative (KRS 292.330[5]), and director may require minimum liquid net capital and consider ratio between net capital and aggregate indebtedness for registration applicants (KRS 292.330[6]). Amount of surety bond may be up to $25,000 but bond not required if net capital exceeds $100,000 (KRS 292.330[7]). Fidelity bonds up to $250,000 in penal amount may also be required. (KRS 292.330[8]). Renewal applications may be made contingent upon updated information. (KRS 292.330[10]). Fees for initial registration and annual renewal are $120 for broker-dealer, $100 for investment adviser, and $50 each agent and investment adviser representative. (KRS 292.330[11][a]). Fee for transfer of agent or investment adviser representative is $50. (KRS 292.330[11]). Covered advisers must make notice filing with commissioner. (KRS 292.330[2][b]). Fee for notice filings for covered advisers is $100. (KRS 292.330[11][a]).

Registration by Notification (KRS 292.350) is available for non-issuer distribution securities if previously offered and sold outside of state. (KRS 292.350[1][b]). Statement for registration by notification must contain name and address of managing underwriters and description of plan of distribution (KRS 292.350[2][g]) and identify any adverse order, judgment or decree relating to security by court or by SEC. (KRS 292.350[2][i]).

Registration by Coordination.

Available for securities for which registration statement under Securities Act of 1933 or offering statement under Regulation A of Securities Act of 1933 has been filed with SEC. (KRS 292.360[1]). Statement must contain amount of securities to be offered in state (KRS 292.360[2][b]), other states in which registration statement has been or is expected to be filed (KRS 292.360[2][c]), identification of any adverse order, judgment or decree previously entered by any court or by SEC relating to offering, any other documents as Commissioner may require (KRS 292.360[2][d]), consent to service of process if required under KRS 292.430 and registration fee required by KRS 292.330(11).

Registration by Qualification.

Statement must contain, among other things, one copy of latest prospectus or offering circular (KRS 292.370[2][m]), actual amount received and to be received by directors and officers (see § 304[b][2] of Uniform Act) if more than $15,000 (KRS 292.370[2][c]), cost basis of property to be acquired with proceeds (KRS 292.370[2][h]), other states in which registration statement has been or is expected to be filed (KRS 292.370[2][k]), identification of any adverse order, judgment or decree previously entered by any court or by SEC relating to offering (KRS 292.370[2][1]), opinion of counsel must state whether or not offering will comply with 1933 Act requirements (KRS 292.370[2][o]), and certain financial information depending upon maximum amount of proceeds to be received in offering (KRS 292.370[2][p]). Commissioner may require undertaking for registrants by qualifications of keeping securities registered up to five years and that issuer forward audited annual financial statements to holders during period securities are registered. (KRS 292.380[4]).

Examination fee of $125 is required in addition to registration fee ($60-$1,200). (KRS 292.380[5]).

Bases for stop order include commissions or fees exceeding 20% of offering or such other amount specified in guidelines adopted by North American Securities Administration Association. (KRS 292.390[1][j]).

Exempt securities include securities issued by rural electric and rural telephone cooperative corporations (regulated by KRS c. 279), any security issued or guaranteed by U.S. or any state, any security commissioner expressly by rule or order finds registration is not necessary or appropriate in public interest or for protection of investors, and certain stock and patronage refunds issued by cooperative corporations. (KRS 292.400). Insurance or endowment policies, or annuity contracts under which insurance company promises to pay fixed dollar amount are exempted from definition of “security”. (KRS 292.310[18]).

Exempt transactions include stock dividends, securities issued in connection with reorganizations, mergers, etc. and certain securities of subsidiary or affiliated corporations. (KRS 292.410). Before certain securities may be issued as exempt securities, claim of exemption must first be filed with Commissioner. (KRS 292.415[1]). Commissioner has authority to determine whether security or transaction is entitled to exemption. May request Commissioner to make ruling by submitting verified statement and $250 filing fee. (KRS 292.420[3]). Certain verified statements required to support claim for exemption of issues transaction. (KRS 292.420).

Limitations.

Three-year limitations period applies for civil actions instead of two-year period in § 410(e) of Uniform Act. (KRS 292.480[3]).

Tender Offers.

No statutory regulation after July 15, 1986.

Franchising, Pyramid Sales, Etc.

Offers of business opportunities regulated by KRS 367.801 to 367.819. Pyramid sales schemes have been held violative of Consumer Protection Act, KRS 367.110 to 367.390. (511 S.W.2d 224). See topic 3.12 Consumer Protection, subhead Broad Consumer Protection Act. See also topic 3.15 Franchises.

Uniform Simplification of Fiduciary Security Transfers Act not adopted.

Uniform Securities Ownership by Minors Act not adopted.

Insurance Company Stock.

See category 16 Insurance, topic 16.01 Insurance Companies.

3.253.26

3.27 WAREHOUSEMEN:

Elaborate provisions define warehousemen and their powers, duties, rights and liabilities as such, and deal with: (1) Warehouses generally, (2) oil warehouses, (3) grain warehouses, (4) tobacco warehouses, (5) unbonded farm agricultural warehouses and (6) self-service storage facilities, and self-contained storage units. (KRS cc. 359, 251, 248).

Uniform Commercial Code adopted. See topic 3.09 Commercial Code.

Warehouse Companies.

Warehouse company may be organized as corporation with power to guarantee warehouse receipts issued by itself or by other warehouse companies. Such guaranty is governed by insurance laws of state and is subject to regulation by Department of Insurance. (KRS 359.170).

Bonds.

Person to whom grain warehouseman's license is issued must file: (1) With county clerk, bond with good surety, conditioned upon faithful performance of duty as public grain warehouseman (KRS 359.060), and (2) with Department of Agriculture, bond issued by surety company authorized to do business in state, or in lieu of bond, certificate of deposit, irrevocable letter of credit or, upon Commissioner's approval, warehouse receipt for temporary surety until permanent surety issued by surety company. (KRS 251.430, 251.440, 251.451). Grain warehouseman must file with county clerk bond of $25,000 with good sureties (KRS 359.060; 359.160).

Licenses.

Grain warehouseman must obtain annual license from county clerk. (KRS 359.050). Fee, $10. (KRS 64.012[36]). Separate license from Department of Agriculture required; fees range from $300 to $750. (KRS 251.430). Special storage or warehouse license and bottling house storage license fee is $500 per year. (KRS 243.030). Tobacco warehouse must secure license; fee $125 per year. (KRS 248.290). Oil warehouseman must obtain annual license from county clerk. Fee, $8. (KRS 64.012[17]). Stored oils may be subject to environmental regulation. See Category 12 Environment, subhead Solid and Hazardous Waste.

Liens and warehouse receipts, and many rights, duties and liabilities of warehousemen are governed by Art. 7 of Uniform Commercial Code (KRS c. 355.7-101 et seq.). See topic 3.09 Commercial Code.

4 CITIZENSHIP

4.01 ALIENS:

Property.

For summary of common and statutory law, see 201 Ky. 513; 256 S.W. 1106.

Alien may be distributee of personal estate of intestate as though he were citizen, (KRS 391.030) and may take and hold any personal property, except chattels real, unless he is enemy (KRS 381.320).

Alien, not being enemy, shall, after he has declared his intention to become citizen of U.S. according to forms required by law, be enabled to recover, inherit, hold and pass by descent, devise or otherwise, any interest in real or personal property in same manner as if he were citizen of Kentucky. (KRS 381.290). Any alien who shall have purchased or contracted to purchase or who shall hold or have title to real property and who shall become citizen of U.S. before same is escheated by proper procedure (which may be at any time after expiration of eight years from time title is acquired by nonresident alien) and any purchaser, lessee, heir or devisee of him, if citizen of U.S., who shall before property is escheated become owner thereof by purchase or inheritance, shall take and hold same free and released from any right or claim of Commonwealth by reason of such person having been alien. (KRS 381.300). Any alien not being enemy residing in Kentucky may take and hold any lands for purpose of residence or occupation by him or his servants, or for purpose of any business, trade or manufacture, as long as he remains resident of state. (381.320.)

Any person whose spouse is citizen of U.S. and any person whose father or mother at his birth was citizen of U.S., although born elsewhere, may take and hold both real and personal property by devise, purchase, descent or distribution. (KRS 381.310).

Real estate in Kentucky passing to a nonresident alien by descent or devise may be held by such alien for eight years after final settlement of estate of decedent from whom acquired, and during such period may be held and alienated by such nonresident alien, and, if he be minor, may be sold by proper proceedings in conformity to laws regulating sales of infants' real estate, if commenced within such period of eight years. (KRS 381.330).

If nonresident alien obtaining possession of real estate acquired by descent or devise dies before such eight year period expires, alien's rights thus acquired pass by descent or devise; if to citizen of U.S., then as fully as if such alien had himself been citizen, but if to alien, then to be held for him and disposed of by him within such eight year period. (KRS 381.300; 381.340).

Title by Descent from Alien.

It is no bar in itself to claimant of title by descent that intestate ancestor through whom claimant derives descent is or has been alien. (KRS 391.060).

Escheat.

Except as otherwise provided in law, any real estate of nonresident alien may be escheated to state at any time after expiration of eight years after he acquired title. (KRS 381.300[1]; 201 Ky. 513, 256 S.W. 1106).

5 CIVIL ACTIONS AND PROCEDURE

5.01 ACCORD AND SATISFACTION:

No general statute on subject. Common-law principles apply. (226 Ky. 109, 9 S.W.2d 1091). When claim is in dispute and debtor delivers check stating in full payment of claims and creditor endorses check without objection, creditor accepts accord and satisfaction. (230 Ky. 509, 20 S.W.2d 276). See also KRS 355.3-311 for claims subject to UCC.

If sum smaller than debt is paid in full satisfaction of claim not yet due, payment satisfies claim; but if due, payment of smaller sum than acknowledged and uncontested debt will not satisfy it, unless based upon valuable consideration, such as composition with creditors wherein other creditors likewise compromise their claims. (193 S.W.2d 423).

Uniform Commercial Code adopted. See category 3 Business Regulation and Commerce, topic 3.09 Commercial Code.

Compromise.

If claim is disputed, lesser amount paid in compromise operates to discharge liability thereon.

Pleading.

Defense must be pleaded. (CR 8.02).

5.02 ACTIONS:

Term action includes proceedings in any court. Kentucky Rules of Civil Procedure (CR) similar to Federal Rules of Civil Procedure (FRCP) have been adopted.

See topic 5.19 Practice.

Equity.

No distinctions made between actions seeking legal or equitable remedies, except in district court whose jurisdiction excludes matters affecting title in real estate and matters in equity. (KRS 24A.120[1]).

Forms of Action.

CR 2 substantially identical to FRCP 2.

Condition precedent to maintaining action against city for injury resulting from defects in any bridge, street, sidewalk, alley or other public thoroughfare therein is that claimant must, within 90 days of such injury, give written notice of such claim to city as prescribed by KRS 411.110; 299 Ky. 87, 184 S.W.2d 890, 440 S.W.2d 265. Strict compliance is required. (Id.).

Commencement.

See topics 5.20 Process, 5.17 Pleading.

Parties.

CRs 17, 18, 19, 20 and 21 substantially identical to federal counterparts.

Class Actions.

CR 23 substantially identical to FRCP 23. Uniform Class Actions Act not adopted.

Intervention.

CR 24 substantially identical to FRCP 24.

Interpleader.

CR 22 is substantially identical to FRCP 22(1). Equivalent to FRCP 22(2) not adopted.

Third Party Practice.

CR 14 substantially identical to FRCP 14.

Joinder of Causes of Action.

CR 18 substantially identical to FRCP 18.

Splitting Causes of Action.

CRs 20.02 and 42.02 substantially identical to FRCPs 20(b) and 42(b) respectively.

Consolidation of Actions.

CR 42.01 identical to FRCP 42(a).

Severance of Actions.

CR 41 substantially identical to FRCP 41.

Stay of Proceedings.

CR 43.03 authorizes trial judge, in his discretion, to order postponement of trial on basis of absence of evidence or witness.

Abatement and Revival.

CR 25 substantially identical to FRCP 25 except that time for revival is not fixed, but depends upon applicable statutes. All actions for personal injury or injury to property survive except actions for slander, libel, criminal conversation, and so much of action for malicious prosecution as is intended to recover for personal injury. (KRS 411.140). Excepted actions or claims die with person, either plaintiff or defendant.

Limitation of.

See topic 5.16 Limitation of Actions.

Small Claims.

See category 6 Courts and Legislature, topic 6.01 Courts.

Termination of Actions.

May occur by dismissal or by judgment. CRs 41, 54, 55 and 56 similar to federal counterparts.

Prohibited Actions.

None. Every person shall have remedy by due course of law in court for injuries done him in his lands, goods, person or reputation. (Ky. Const. § 14).

Administration.

See category 13 Estates and Trusts, topic 13.08 Executors and Administrators.

Direct Actions Against Insurer.

See category 23 Transportation, topic 23.01 Motor Vehicles, subhead Direct Actions.

Submission of Controversy.

See topic 5.25 Submission of Controversy.

Action lies against Commonwealth in favor of those with lawfully authorized written contracts with Commonwealth for actions, including enforcement of or breach of contract, in Franklin Circuit Court, without jury. (KRS 45A.245). Action lies against Commonwealth before statutory Board of Claims in favor of persons who have sustained damages to person or property as proximate result of negligence of Commonwealth, its departments or agencies, or its officers, agents or employees while acting in scope of their employment. Recovery is limited to $200,000 for single claim or $350,000 if single act results in multiple claims (but award limited to $200,000 to any individual claimant). Damages not allowed for collateral or dependent claims, mental distress or pain and suffering. (KRS 44.070).

Privity no longer required in action by buyer against manufacturer for personal injuries and property loss suffered as result of defect in product. (402 S.W.2d 441). Privity remains requirement in claims for breach of warranty, limited to buyer and his family, household member, or guest in home. (KRS 355.2-318).

5.03 APPEAL AND ERROR:

General.

Courts.

Courts with appellate jurisdiction, in descending order, are Supreme Court, court of appeals, and circuit court. Supreme Court and court of appeals have, with certain very limited exceptions, appellate jurisdiction only. Circuit courts, in addition to hearing appeals from district courts, serve as trial courts of general jurisdiction. Rules for appellate procedure are found in Rules 72-76 of Kentucky Rules of Civil Procedure (CR). Kentucky Rules of Civil Procedure are patterned generally after Federal Rules of Civil Procedure. See topic 5.19 Practice.

Appeals Allowed.

At least one appeal is allowed as matter of right in all cases, civil and criminal, except from judgments of acquittal in criminal cases (other than for purposes of securing certification of law) and from that portion of judgment dissolving marriage. (Ky. Const. § 115; KRS 22A.020[3]). Appeals after first appeal are discretionary with next higher appellate court. (CR 76.20).

Appeal Bond.

No appeal bond is required. Filing fees are required which vary from court to court. No filing fee exceeds $150. There are no costs except filing fee. (CR 76.42[2][a]).

Stay of Proceedings.

Stay of proceedings on appeal is not automatic. Injunction judgments are stayed at discretion of appellate court. (CR 62.02; 65.08). Monetary judgments may be stayed as matter of right by giving adequate supersedeas bond for full amount of judgment plus costs, interest, and damages. (CR 62.03; 73.04). 10% penalty is imposed upon appellant who has superseded judgment and after first appeal seeks further appellate relief without success. (KRS 26A.300).

Extent of Review.

Appellate review is limited to issues of law, except issues of fact found by jury may be set aside where flagrantly or palpably against evidence or unsupported by evidence of probative value. Findings by court may be set aside where clearly erroneous. (CR 52.02; 500 S.W.2d 405; 336 S.W.2d 343).

Character of Hearing.

All appeals from one court to another (as opposed to appeals from rulings of administrative agencies, see subhead Administrative Agencies, Boards, Etc., infra) are upon record and not by trial de novo. (Ky. Const. § 115).

Appeals from District Courts.

Review is by appeal to circuit court from final action of district court. (KRS 23A.080).

How Taken.

Appeal from district court to circuit court in civil cases is taken by filing notice of appeal and paying filing fee within 30 days after date of judgment or order was entered, or within 30 days from entry of order granting or denying certain timely post-judgment motions (CR 72.02; 73.02), or within ten days from date of judgment in small claims division (KRS 24A.340). Cross appeals are permitted. (CR 74.01). Appeal must be perfected within 30 days after date of filing of first notice of appeal. (CR 72.08). Perfection includes filing of appellant's statement of appeal (concise statement of appellant's legal questions and propositions shall not exceed ten pages). (CR 72.06; 72.10). Appellee has 30 days after date on which appellant's brief is filed in which to file its counterstatement (not exceeding ten pages). (CR 72.12). Record on appeal from district court includes entire original record of proceedings in district court. Record need not be certified until court of appeals grants motion for review of circuit court's action. (CR 72.04).

Appeals from Circuit Court.

Appeal lies as matter of right to court of appeals from judgment or final order in all actions originating in circuit court, except from judgments imposing sentence of death or imprisonment for life or for 20 years or more, in which cases appeal lies directly to Supreme Court. (Const. § 110). Within ten days from time notice of appeal to court of appeals has been filed, any party may file motion in Supreme Court for transfer of case directly to that court. (CR 74.02[1]). Filing motion for transfer to Supreme Court suspends running of time to perfect appeal in court of appeals. (CR 74.02[3]). Motion for transfer to Supreme Court will be granted only upon showing that case is of great and immediate public importance.

How Taken.

In civil cases where appeal lies as matter of right, filing fee must be paid to, and notice of appeal must be filed with clerk of circuit court within 30 days after date judgment or final order was entered or within 30 days from entry of order granting or denying certain timely post-judgment motions. (CR 73.02; 77.04[2]). Notice of appeal filed timely but before disposition of post-judgment motions becomes effective upon entry of order disposing of last remaining post-judgment motion; post-judgment order may be appealed by filing of motion of appeal or amended notice of appeal. (CR73.02[1][e]). Motion may be made to circuit court to proceed in forma pauperis on appeal or cross-appeal. (CR 73.02[1][b]). Failure to file timely notice of appeal or cross-appeal shall result in dismissal (CR 73.02[2]) and frivolous appeal may result in award of damages and single or double costs to appellee (CR 73.02[4]). In criminal cases different form of notice must be filed within ten days from entry of judgment or final order. (R.Cr. 12.04). Cross-appeal may be taken and must be filed within ten days after last day allowed for notice of appeal. (CR 74.01). Appeal from circuit court judgment in case originally appealed from district court is taken by filing motion for discretionary review within 30 days after entry of circuit court judgment. (CR 76.20[2][a]). Response to such motion may be filed within 30 days. (CR 76.20[5]). If granted, appeal shall proceed as if taken as matter of right. (CR 76.20[9]). Following notice of appeal appellant and appellee designate such untranscribed portions of proceedings before circuit court as they wish prepared in record on appeal. (CR 75.01). Circuit court clerk must, within ten days after filing of transcript of evidence by court reporter, or within 30 days from first notice of appeal if trial proceedings were taken solely by video recordation or if there were no proceedings to transcribe (which period may be extended by appellate court upon motion and showing of good cause) prepare original record and upon completion so certify to parties. (CR 73.08; CR 75.07[5]). Record remains with circuit court for use by parties until all briefs are completed. (CR 75.07[7]). Appellant has responsibility to insure that circuit court clerk prepares and certifies record in timely fashion. Within 20 days after filing notice of appeal, appellant shall file with court of appeals prehearing statement, and prehearing conference may be had. (CR 76.03). Appeals are perfected by causing circuit court clerk's certification of record to be filed with clerk of appropriate appellate court, and by filing appellant's brief (which may be either printed or typed) in appellate court within 60 days from circuit court clerk's certification that record has been prepared. (76.02). Appellee's brief must be filed within 60 days after appellant's brief, and appellant may file reply brief within 15 days. (CR 76.12[2]). Parties are encouraged to file electronic briefs (on diskette or, preferably, CD-ROM) with required copies of paper briefs. (CR 76.12[3][b]). Circuit court clerk thereafter forwards record to appellate court. Certain special rules apply in appeals where videotape equipment is used to record lower court proceedings. (CR 98).

How Decided.

Unless waived by all parties or unless court of appeals enters order dispensing with oral argument, court of appeals hears all parties on oral argument. (CR 76.16). Court of appeals sits in panels of three judges each. (SCR 1.030). All decisions are by written opinion, although only certain opinions are published. (KRS 21A.070[2]).

Post-Decision Motions.

Petitions for rehearing or modification or extension of opinion are permitted and must be filed within 20 days after date on which opinion is issued. (CR 76.32). Responses are permitted and must be filed within 20 days after date on which petition is filed. (CR 76.32).

Appeals from Court of Appeals.

Motion for discretionary review by Supreme Court of final order entered in appellate case decided by court of appeals must be filed within 30 days after date of order or opinion for which review is sought, or, if post-decision motion was filed in court of appeals, within 30 days after denial of post-decision motion or 30 days after final order or opinion disposing of case. (CR 76.20[2][b]). Each respondent may file response to motion within 20 days after motion is filed. Cross motions are permitted. (CR 76.21). If motion is denied, decision appealed from shall be affirmed; if granted appeal shall be perfected and prosecuted as appeals taken as matter of right. (CR 76.20[9]). Cross appeals are permitted. (CR 74.01). Appellant has 60 days from date of entry of order granting review to file brief, which may be printed or typewritten. (CR 76.12). Appellee has 60 days to file brief and appellant has 15 days to file reply brief. (CR 76.12).

How Decided.

Supreme Court hears oral argument in all cases unless oral argument is dispensed with by order of Supreme Court. (CR 76.16). Decision is by entire court. (SCR 1.020[1]).

Post-Decision Motions.

Petitions for rehearing or modification or extension of opinion are permitted. Motions must be filed within 20 days after date of opinion. (CR 76.32). Responses are permitted and must be filed within 20 days after date petition is filed. (CR 76.32).

Administrative Agencies, Boards, Etc.

Procedures generally applicable to administrative hearings, records of proceedings, and orders or decisions of state administrative agencies are provided in KRS c. 13B; appeals from orders or decisions of administrative commissions, agencies, or boards are generally taken to circuit court. Form of proceeding is considered original action and not appeal. (KRS 23A.010). For example, review of decision of Board of Claims is taken to circuit court of county where hearing conducted or, if claim less than $1,000, claimant may file in district court where claim arose (KRS 44.140); Kentucky Board of Tax Appeals: Franklin Circuit Court or circuit court where taxpayer resides (KRS 131.370); Public Service Commission: Franklin Circuit Court (KRS 278.410); Commissioner of Department of Financial Institutions: Franklin Circuit Court (KRS 292.490).

5.04 BONDS:

Bonds required or permitted in civil actions or proceedings differ depending upon particular proceeding. Typical uses include to stay appeal, obtain restraining order or temporary injunction (CR 65.05), attach or replevy property, discharge writ of attachment or replevin or warrant of distress and sue as nonresident plaintiff. Governmental units exempt from requirement to give bond in such proceedings. (KRS 454.190; CR 81A). Clerk of appropriate court prepares bonds to be taken therein and is empowered to refuse any surety deemed insufficient. (KRS 30A.060[2]). Jailers may prepare bail bonds for incarcerated prisoners. (KRS 431.5305).

Sureties.

Surety, who may be individual or surety company (KRS 304.21-050), must be resident of Kentucky (KRS 454.185) or be certified as sole surety (KRS 304.21-060). Sureties must be worth double sum to be secured beyond amount of surety's liabilities, and must have property liable to execution in Kentucky equal to sum secured; two or more sureties on same bond must meet these qualifications in aggregate. (KRS 454.185). Officer taking surety upon bond may require surety to make affidavit of qualifications. (KRS 454.180).

Trust companies and banks authorized to act in fiduciary capacity need no surety on fiduciary bond, other than own capital stock, which is pledged by law. However, court, in its discretion, may require additional surety. (KRS 286.3-220).

All public or fiduciary bonds must be limited as to surety in definite penal sum, to be fixed by court or officer approving bond but not less than estimated value of estate fiduciary is in charge of, with right in such court or officer to increase penal sum of bond or require renewal with additional sureties. (KRS 62.060).

No person, which includes corporation, partnership, registered limited liability partnership and limited liability company (KRS 446.010[27]), can be bound as surety of another by act of agent, without written authority, signed by principal (KRS 371.090).

If bond in judicial proceeding is adjudged defective, new and sufficient bond may be executed within such reasonable time as court may fix, with same effect as if originally executed. (KRS 454.175).

Enforcement.

Any person beneficially interested may sue on bond, but others likewise interested must be made parties either as plaintiffs or as defendants. (CR 17.01, 19.01). Surety may sue principal or cosurety on bond after payment due (KRS 412.140), but creditor must also be made defendant, but is not liable for costs (KRS 412.150). Statute of limitations for enforcement against surety of bonds given in judicial proceedings is seven years after accrual of action (KRS 413.220); generally, limitation is five years with respect to fiduciary bonds (KRS 413.230).

5.05 CERTIORARI:

This writ is not used in Kentucky. For discretionary review by Supreme Court of final order of court of appeals, see topic 5.03 Appeal and Error, subhead Appeals from Court of Appeals. For discretionary review by court of appeals of final order of circuit court sitting as appellate court, see topic 5.03 Appeal and Error, subhead Appeals from Circuit Court, catchline How Taken.

5.06 CHARITABLE IMMUNITY:

See topic 5.09 Damages.

5.07 COMMISSIONS TO TAKE TESTIMONY:

See topic 5.11 Depositions and Discovery.

5.08 COSTS:

Costs in court proceedings are fixed by statute and taxed by clerk of court. (KRS 23A.200; 30A.090). Generally, successful party, though liable to officials for his own costs, is entitled to recover costs against losing party, to be awarded in judgment. (KRS 453.040[1]). Exceptions to general rule apply for defendants who are necessary nominal parties and may apply to actions between partners, tenants in common or joint tenants and actions for settling distribution and division of deceased persons' estates, to settle partnerships and settle or enforce trusts. (KRS 453.040 [1 and 2]).

Personal representative, curator, conservator, assignee, guardian or trustee, if unsuccessful, shall be liable for costs to extent of fiduciary's assets. (KRS 453.140).

In civil actions brought by Commonwealth, in actions brought to challenge assessment or collection of taxes, and in appeals initiated by Commonwealth from administrative review board decisions, prevailing party, subject to judicial approval and discretion, may recover costs for necessary attorneys' fees ($40 per hour maximum) and expenses of experts up to total of $10,000. (KRS 453.010; 453.255; 453.260).

Reasonable attorneys' fees may be awarded as costs to extent actually incurred (but not for salaried employee) in action after default on writing which creates debt or creates lien on real property, if writing so provides. (KRS 411.195; 705 S.W.2d 920; 902 S.W.2d 830).

Security for Costs.

Former requirements for cost bonds from nonresidents of state or private corporations before commencing proceedings in courts have been repealed. To stay enforcement of judgment on appeal, appellant must give supersedeas bond with good and sufficient surety, amount of which includes coverage of costs in judgment and costs on appeal. (CR 62.03; 73.04).

Liability of Attorney.

No provision exists. Former provision which required attorney for plaintiff to give security for costs was repealed in 1996.

5.09 DAMAGES:

Common law generally prevails as to compensatory damages.

Punitive damages are specifically recoverable by statute in some actions, e.g., for wrongful death (KRS 411.130); by surviving spouse or child of person killed by use of deadly weapon (KRS 411.150); for striking by certain weapons (KRS 411.020); or where defendant acted toward plaintiff with oppression, fraud or malice (KRS 411.184), *Caveat:* 972 S.W.2d 260 which includes gross negligence. Punitive damages not recoverable for breach of contract. (KRS 411.184[4]). In all other actions, punitive damages recoverable only upon clear and convincing evidence defendant acted with oppression, fraud or malice. (KRS 411.184[2]). *Caveat:* 972 S.W.2d 260 which includes gross negligence. Where property is wrongfully distrained for rent, owner may recover treble damages. (KRS 383.020). In action for waste, treble damages may be recovered of tenant. (KRS 381.350, 381.400).

Comparative Negligence Rule.

Pure form adopted judicially, 673 S.W.2d 713, and superceded by statute in KRS 411.182. See 883 S.W.2d 898. Uniform Comparative Fault Act not adopted. Jury must, under instructions, apportion damages by degree of contribution to causation by joint trespassers or tortfeasors, including third party defendants. (KRS 411.182; 201 F.3d 815).

Charitable Immunity.

Doctrine of charitable immunity abrogated. (348 S.W.2d 930). Officers, directors, trustees and volunteers of charitable organizations receive limited immunity if they are not compensated for their services, and if acting in good faith within scope of official functions and duties. (KRS 411.200).

Sovereign Immunity.

Commonwealth has partially waived sovereign immunity allowing awards up to $200,000 per individual claimant (and up to $350,000 if single act results in multiple claims, total award to be equitably divided among claimants) granted by statutory Board of Claims for damages to person or property for negligence of Commonwealth, its departments or agencies or their officers, agents or employees while acting in scope of employment. (KRS 44.070). Damages not allowed for collateral or dependent claims, mental distress or pain and suffering. (KRS 44.070[1]). Sovereign immunity not extended to negligent performance of ministerial acts by state employees. (e.g., 793 S.W.2d 823). Claim barred if not presented to Board of Claims within one year from time it accrued or, in personal injury cases, two years from injury. (KRS 44.110). Claims made are tried before Board and appeals heard by circuit court on basis of record created before Board. (KRS 44.086, 44.140). Action lies against Commonwealth in favor of those with lawfully authorized written contracts with Commonwealth, such actions to be brought in Franklin Circuit Court. (KRS 45A.245).

Limited waiver of sovereign immunity implicit in Board of Claims Act does not apply to counties which are entitled to defense of sovereign immunity for damages from performance of governmental functions and for damages from performance of discretionary functions. (327

S.W.2d 98). Cities and municipal corporations (e.g. board of health, sewer districts) are not protected by doctrine of sovereign immunity (805 S.W.2d 133; 705 S.W.2d 933) except in exercise of regulatory functions (687 S.W.2d 144) and with respect to traffic control devices (KRS 44.071). State agencies and county governments may acquire motor vehicle and workers compensation insurance without waiving immunity (KRS 44.055; 67.180; 67.185) and claims can be made against such policies.

No-Fault Insurance.

See category 23 Transportation, topic 23.01 Motor Vehicles, subhead No-Fault Insurance.

Uniform Contribution Among Tortfeasors Act (Revised) not adopted. KRS 412.030 allows contribution among wrongdoers where wrong is mere act of negligence and involves no moral turpitude. (See 27 S.W.3d 775.) Apportionment is permitted between all parties against whom claims have been made and all persons released by claimant. (KRS 411.182).

See category 13 Estates and Trusts, topic 13.05 Death, subhead Action for Death.

5.10 DECLARATORY JUDGMENTS:

See topic 5.15 Judgments.

5.11 DEPOSITIONS AND DISCOVERY:

Rules substantially similar to federal rules have been adopted and amended periodically to conform generally to existing federal practice. See also topic 5.19 Practice.

Deposition of any party or other person may be taken by plaintiff upon notice served 30 days or more after action commenced, or within that time by leave of court, and by defendant at any time after action commenced. (CR 30.01).

Kinds.

Deposition of witness or party may be taken upon oral examination on notice (CR 30); or upon written questions with notice (CR 31); provision is also made for: interrogatories to parties (CR 33), production for inspection or copying (CR 34), requests for admission (CR 36), physical and mental examination of persons (CR 35)—all substantially similar to federal rules, except CR 30.02 which contains more specific provisions than FRCP 30(b) for video depositions and no specific authorization for telephonic or remote depositions and CR 8.01[2] which limits amount of unliquidated changes to last amount stated in answers to interrogatories. (12 S.W.3d 269). Each party limited to serving 30 interrogatories and 30 requests for admission on each other party without order of court. (CR 33.01).

Within State for Use within State.

See subhead Before Whom Taken, infra.

Within State for Use Elsewhere.

See subhead Before Whom Taken, infra.

Outside of State for Use within State.

See subhead Before Whom Taken, infra.

Before Whom Taken.

By written stipulation of parties, deposition may be taken before any person. (CR 29).

Within State for Use Within State.

In absence of stipulation, depositions taken within state to be used in its courts must be taken before examiner; judge, clerk, commissioner, or official reporter of a court; notary public (CR 28.01) or before such persons as may be prescribed by special statute; e.g., commissioned officers of U.S. Armed Forces, under KRS 384.080.

Within State for Use Elsewhere.

Depositions taken within state for use elsewhere are governed, generally speaking, by the laws of the jurisdiction to which the court belongs. CR 28.03 provides for such taking by production of commission or proof of notice duly served to district court judge of district where witness resides and issuance of subpoena thereon.

Outside State for Use Within State.

Depositions may be taken outside state for use within state before a commissioner appointed by the governor of state where taken or before any other person empowered by commission directed to him by consent of parties or order of court or before judge, justice of peace, mayor, or notary public, or by such persons as authorized by this state or place where deposition to be taken. (CR 28.02). Such persons as authorized by this state include commissioned officers of armed forces. (KRS 384.080).

Commissions.

See subhead Before Whom Taken, supra.

Purpose.

Depositions may be taken upon oral examination or written questions for discovery or for use in evidence, or both (CR 26.01), and may be used as evidence at trial if court finds witness is more than 100 miles from place of trial, is absent from state, occupies one of certain enumerated positions, is dead, is of unsound mind, is prevented from attending for certain enumerated causes, or that justice requires use in exceptional circumstances (CR 32.01).

Perpetuating Testimony.

Depositions may be taken before action by resident, or by nonresident having interest in real property in state, to perpetuate testimony, by filing verified petition in circuit court of county of residence of expected adverse party or in which real estate is situated. (CR 27.01). Provision is also made for taking depositions in trial court pending appeal to perpetuate testimony for use in event of further proceedings in trial court. (CR 27.02).

Certain actions equitable in nature may be tried by deposition. (CR 43.04[1]).

Attendance of witness may be compelled by subpoena by clerk of court or other authorized officer; similar provision is made for subpoena duces tecum under rules substantially same as Federal Rule 45 (a) and (b). (CR 45.01, 45.02). Subpoena may be served by any person who may serve summons, or by any person over 18 years of age, by delivering or offering to deliver a copy to the person to whom it is directed. (CR 45.03). Resident may be required to attend only in county where he resides, is employed, or transacts his business in person, or at such other place as fixed by order of court. (CR 45.04). Witness subpoenaed outside county of residence to be paid mileage. (KRS 421.015).

Compelling Attendance of Witnesses.

See subhead Attendance of Witness May Be Compelled, supra.

Examination of Witnesses.

Deponent may be examined upon any matter not privileged relevant to subject matter of action including existence, custody, etc., of tangible items, location of persons having knowledge of relevant facts, and insurance agreements. Fact that testimony may be inadmissible is not ground for objection, if testimony is reasonably calculated to lead to discovery of admissible evidence. (CR 26.02). Protective orders may be made by court, upon motion and notice. (CR 26.03).

Return.

Officer taking deposition must certify thereon that witness was duly sworn by him and that deposition is true record of the testimony given and must promptly deliver or send deposition by registered mail to the clerk of court where action pending, for filing. (CR 30.06). Where deposition taken on written questions, copies of notice and interrogatories received by officer must be attached to deposition. (CR 31.02). Submission to and signing by witness is required only upon written request of party. (CR 30.05).

Forms.

The following forms, in use prior to adoption of Civil Rules, may be substantially followed.

Form

Deposition on Questions.

After style of court and case, use following caption:

The depositions of John Doe and Richard Roe, taken on behalf of the plaintiff, in an action now pending in the Jefferson Circuit Court, wherein John Jones is plaintiff and Richard Smith is defendant. The said Richard Roe, having been first duly sworn, deposes as follows:

(Here follows the deposition, which after having been read to the witness must be subscribed by him, unless all parties expressly waive reading and signature).

When all the depositions are taken and signed, let the officer taking them add the following certificate, varying it to suit names and facts:

The State of Ohio }

} ss

County of Hamilton }

I, John Smith, a notary public in and for the county and state aforesaid, do certify that the above and foregoing depositions of John Doe and Richard Roe were taken before me, at my office in the city of Cincinnati, County of Hamilton, and State of Ohio, on the tenth day of November, 20. . . ., upon the questions and cross-questions hereto annexed; that said witnesses were each sworn by me that the evidence they should give in the action should be the truth, the whole truth, and nothing but the truth, before giving their testimony; that the testimony of each of said witnesses was written by me in their presence (or if either of the witnesses wrote his own testimony, state the fact, and that it was so written in the presence of the officer), read to and subscribed by him in my presence. I further certify that at the taking of said deposition neither party was present in person, nor represented by agent or attorney (or if both parties, or either party, attended, state the fact). My commission expires on the. . . . . . day of. . . . . ., 20. . . . .

John Smith, Notary Public. (Seal.)

Deposition on Notice.

The form of caption and certificate should be the same as above, substituting the word “notice” for “questions” wherever it occurs, and particularly stating in certificate which of parties attended at examination. If taken by consent, without notice, certificate should state that fact.

If the notice specifies the hours between which the depositions are to be taken, the certificate should state them likewise.

5.12 EQUITY:

See topic 5.02 Actions.

5.13 EVIDENCE:

See topic 5.11 Depositions and Discovery.

Witnesses.

Kentucky Rules of Evidence (KRE) adopted by Supreme Court, patterned after Federal Rules of Evidence, state rules of competency of witnesses and testimony. (KRE 601 to 615).

Privileged Communications.

Communications between lawyers and clients (KRE 503), husbands and wives (KRE 504), clergymen and penitents (KRE 505), counselors and clients (KRE 506) and psychotherapists and patients (KRE 507) are protected by qualified privileges. State, sister states and U.S. may claim privilege to protect identity of informers. (KRE 508). Except as provided by constitution, statute, or rules of evidence or other rules promulgated by Supreme Court, no person has privilege to refuse to be witness, or to disclose any matter, or to produce any object or writing, or to prevent another from being witness. (KRE 501).

Privilege exists for confidential communications to certified public accountant or public accountant but does not excuse compliance with validly issued subpoena or summons or limit investigations by state board of accountancy or by quality review committees. (KRS 325.440).

Husband and Wife.

Spouse of party has privilege to refuse to testify against party and party has privilege to prevent spouse from testifying as to events occurring after date of marriage, but no privilege exists when sufficient evidence has been introduced to support finding that spouse conspired or acted jointly in commission of crime charged or when one spouse is charged with wrongful conduct against person or property of other spouse, minor child of either, resident in household of either, or bystander to conduct affecting persons named. Court may refuse to allow privilege in any proceeding if interests of minor child would be adversely affected. (KRE 504).

Communications or Transactions with Infants or Persons Since Deceased or Incompetent.

Evidence which is otherwise competent is not inadmissible solely because it consists of statements of infants, persons who have died, or who are incompetent. Statements which constitute hearsay, as defined in KRE 801(c), may be admissible under exceptions provided in KRE 801A to 806.

Compelling Attendance.

Subpoenas for attendance at hearing or trial may be served at any place in state, but deposition of certain witness may be used in place of personal attendance, unless witness failed when subpoenaed to appear for deposition. (CR 45.05). Mileage fee allowed for witness subpoenaed outside county of residence. (KRS 421.015). See topic 5.11 Depositions and Discovery.

5.14 INJUNCTIONS:

Injunctions may be issued to prevent commission of illegal or unconscionable act, to compel that act be taken, or to protect status quo while rights of parties are decided.

Writ of injunction is abolished. In its stead, circuit court by interlocutory order or by final judgment, may enjoin or command doing of act in question. (CR 65.01). CR 65 in its separate parts is comparable to, but not identical to, FRCP 65. See topic 5.19 Practice. CR 65 authorizes issuance of restraining orders, temporary injunctions and permanent injunctions and provides procedures for interlocutory review in court of appeals and Supreme Court. Unlike FRCP 65, CR 65 does not provide for automatic expiration of restraining orders after ten days nor require immediate hearing following issuance of restraining order. Restraining orders, unlike temporary injunctions, may be issued without notice and may not be mandatory. (CR 65.01; 65.03).

Jurisdiction.

Circuit court is only court of original jurisdiction authorized to issue injunction or restraining order. (CR 65.01). Any circuit court with jurisdiction over parties and subject matter sufficient to support action relating to subject matter may issue restraining order, temporary injunction or permanent injunction. Restraining order, temporary injunction or permanent injunction may be issued only at commencement of or during pendency of civil action in circuit court. (CR 65.03; 65.04).

Prerequisites.

Restraining Order.

Applicants must clearly show by verified complaint or affidavit that their rights are being or will be violated by adverse party, that they will suffer immediate and irreparable injury, loss or damage before notice can be served and hearing had, and that applicant's attorney has made effort to give notice to adverse party and has stated reasons why notice shall not be required. (CR 65.03). Injury is regarded as irreparable if there is no certain pecuniary standard for measurement of damages. (350 S.W.2d 454). Every restraining order granted without notice shall define injury, state why it is irreparable, and show why order was granted without notice. (CR 65.03).

Temporary Injunction.

Movants must give notice and clearly show by verified complaint, affidavit or other evidence that their rights are being or will be violated by adverse party and that they will suffer immediate and irreparable injury, loss or damage pending final judgment in action or that acts of adverse party will tend to render such final judgment ineffectual. (CR 65.04). In determining whether to issue temporary injunctive relief, court must determine whether plaintiff has shown irreparable injury, weigh equities involved, including possible detriment to public interest, harm to defendant, and whether injunction will merely preserve status quo, and evaluate complaint to see whether substantial question has been presented. (575 S.W.2d 695). Order is void which grants mandatory injunction that in effect gives plaintiff entire relief sought in action, unless notice and opportunity to be heard be afforded to defendant affected by such order, before it is made. (575 S.W.2d 695). Order is void which grants mandatory injunction that in effect gives plaintiff entire relief sought in action, unless notice and opportunity to be heard be afforded to defendant affected by such order, before it is made. (107 Ky. 419, 54 S.W. 732).

Permanent injunction may be entered as part of final judgment in action on merits of cause. (CR 65.01).

Procedure.

Restraining order may be granted without notice at commencement of action or during pendency thereof by judge of court in which action is pending, or by district judge of that judicial district if circuit judge is absent, or in their absence from county, by district court trial commissioner of that county if he/she is attorney, or by any circuit judge if no judge of circuit court where action is pending is present in that judicial circuit. (CR 65.03). Temporary injunction may be granted by circuit court in which action is pending on motion, or if judge of circuit court where action pending is disqualified or absent, by any circuit judge. (CR 65.04).

Bond must be secured prior to issuance of temporary injunction or restraining order. (CR 65.05).

Appellate Review.

If circuit court grants, denies, modifies, or dissolves temporary injunction, such action in any of these cases may be reviewed upon application to court of appeals to grant or to dissolve or to reinstate injunction pendente lite. (CR 65.07, 65.08).

If circuit court dissolves temporary injunction previously granted or on motion grants, suspends, or modifies injunction previously granted or denied in final judgment, circuit court may, in its discretion, suspend operation of dissolution or of portion of final judgment relating to injunction for specified period of time to allow party adversely affected by ruling to appeal. (CR 65.07, 65.08).

Any party adversely affected by order of court of appeals may move Supreme Court to vacate or modify order. Motion must show extraordinary cause. (CR 65.09).

See also category 11 Employment, topic 11.02 Labor Relations.

5.15 JUDGMENTS:

Kentucky Rules of Civil Procedure (CR) are based on Federal Rules of Civil Procedure with conforming amendments from time to time, and variations to conform to state court system. Judgment is written order of court which determines all or some of claims in action. (CR 54.01). Any judgment which adjudicates less than all claims in action and which does not state that there is no just reason for delay and that it is final with respect to claim adjudicated is interlocutory and subject to revision before entry of final judgment. (CR 54.02). Some miscellaneous practice statutes affect rights to seek judgment and enforcement and revival of judgments (see subheads infra). Circuit or district judge required to enter written judgment or order within 90 days from date of submission. (KRS 454.350). Judge's failure to comply with time limits does not render judgment or order void, but authorizes mandate or writ from higher court to issue order or, as last resort, removal of offending jurist by judicial retirement and removal commission. (SCR Part IV; KRS 454.350; SCR Part IV; 653 S.W.2d 652).

Judgments by confession are permitted only upon personal appearance of defendant (KRS 454.090 to 454.100), or offer made in pending suit to confess judgment for part or all of amount claimed (CR 68).

Judgment by consent or agreement of parties is valid and enforceable. (283 Ky. 317, 141 S.W.2d 265).

Judgment on compromise is valid. (CR 68).

Judgment on pleadings is authorized. (CR 12.03). Provision also made for directed verdict and judgment notwithstanding verdict. (CR 50).

Summary Judgment.

Provision is made for summary judgment, substantially similar to that made in Federal Rule 56. (CR 56). Standard for grant is stricter than under Federal Rules. (807 S.W.2d 476). In addition, special provision is made for summary judgment in following instances: (1) Surety against principal or co-surety for money paid; (2) client against attorney for money or property received; (3) party or officer against surety for costs; (4) party against officer for money or property received, and damages; and (5) in cases specially authorized by statute. (KRS 418.005).

Declaratory Judgments.

Act, but not Uniform Act, adopted. (CR 57; KRS 418.005 to 418.090).

Default judgments are authorized. Court, commissioner or jury may hear proof and assess damages. (CR 55.01). Default judgment shall not be entered against Commonwealth or U.S. unless claimant establishes right to relief by satisfactory evidence. (CR 55.04).

Offer of Judgment.

Defendant more than ten days before trial may serve upon adverse party an offer to allow judgment to be taken against him with costs then accrued. Offer may be conditioned upon defendant's failure in his defense. Offer cannot be withdrawn before acceptance and before elapse of ten-day period. (816 S.W.2d 911). Offer not accepted within ten days is deemed withdrawn and evidence thereof is not admissible. If judgment obtained by offeree is not more favorable than offer, the offeree must pay costs incurred after offer made. (CR 68).

Vacation or Modification.

Judgment rendered in trial court may be altered, amended or vacated by it (CR 59.05, 60), or reversed or modified by court of appeals (KRS 22A.060), or by Supreme Court (KRS 21A.050). Trial court may relieve party from final judgment for following reasons: (1) Mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence; (3) perjury or falsified evidence; (4) fraud affecting proceedings; (5) judgment is void; (6) judgment has been satisfied, released, discharged, or prior judgment upon which it has been based is properly reversed or vacated; or (7) any other reason of extraordinary nature. Motion must be made within reasonable time and in cases of 1, 2, and 3 above, not more than one year after judgment was entered. (CR 60.02).

Lien.

Final judgment for recovery of money in state or federal court shall act as lien upon all real estate in which judgment debtor has any ownership interest located in any county in which judgment creditor files notice of judgment lien with county clerk, county clerk enters notice in lis pendens record, judgment creditor sends notice of judgment by first class mail to judgment debtor with required wording and judgment debtor certifies on notice filed with clerk that statute has been complied with. (KRS 426.720). Personal judgments against sheriffs and other collectors of public monies or their sureties create lien on their property. (KRS 135.100; 283 Ky. 462, 141 S.W.2d 867). As to lien of execution, see category 8 Debtor and Creditor, topic 8.05 Executions. As to lis pendens notice, see KRS 382.440; 382.510.

Revival.

Not necessary upon death of defendant after sale of his property under execution. (KRS 426.550; 426.555[1]). Before sale, levy of execution is suspended until revived against personal representative or successor of defendant after lapse of six months from time of qualification of his first representative, though if property be of perishable nature, or cost of keeping it ought to be avoided, revivor may be had upon rule in action after ten days notice, served in same manner as summons. (KRS 426.555). After recovering judgment, death of plaintiff in judgment will not prevent issuance of execution, but execution must be in favor of his representative or successor, if there be one, or if judgment be recovered by several parties, execution must be issued in favor of those surviving, and where all of them be dead, execution must issue in favor of representative of last survivor. (KRS 426.551). Judgment, or levy of execution thereunder, may be revived against a real representative (i.e., an heir or devisee of lands) after 12 months from defendant's death. Revivor may be by order based upon show-cause rule after ten days notice thereof, served like a summons. (KRS 426.555). See category 8 Debtor and Creditor, topic 8.05 Executions.

Each successive issuance of execution within 15 years after judgment or from date of last execution issued acts as a revival of the judgment. (KRS 413.090[1]).

Assignment.

Certain assignments of judgments are recognized by statute, e.g., to sureties (KRS 412.090) and to officer holding execution (KRS 426.380).

Equitable assignments of judgments are recognized in practice by filing in the court that rendered the judgment informal written assignment of judgment proved by oath of attesting witness in open court or by acknowledgment before officer authorized to take acknowledgments of deeds. Thereafter judgment or any execution thereon will run in name of judgment plaintiff for benefit of assignee.

Satisfaction.

Upon return of execution showing judgment satisfied, clerk must enter on judgment: Satisfied by execution. Party or his/her attorney receiving satisfaction of judgment otherwise than by execution, may make, date and sign on judgment: Satisfied in full. Court may compel entry of satisfaction to be made. (CR 79.02).

Bar.

Actions on judgments are barred after lapse of 15 years from date of last execution issued thereon, although limitations period may differ in certain situations (KRS 413.090[1]), and judgment barred in state or country where rendered is barred here unless rendered in favor of resident of Kentucky who had cause of action from time it accrued (KRS 413.330).

Judgment Based on Constructive Service.

If defendant constructively served is deprived of property because of judgment, court shall retain control over and not dispose of property or proceeds for one year, unless plaintiff executes bond with surety approved by court, to effect that if defendant shall procure vacation or modification of judgment, plaintiff shall restore to defendant any property or money obtained under such judgment, restoration of which shall be adjudged (CR 4.11), and defendant may obtain any relief (such as new trial, relief from judgment or order) available to party personally served (CR 4.10). Provision for bond does not apply to judgments in favor of State. (CR 81A).

Judgment for Attorney's Fees.

See topic 5.08 Costs; category 3 Business Regulation and Commerce, topic 3.02 Bills and Notes.

Judgment Notes.

See category 3 Business Regulation and Commerce, topic 3.02 Bills and Notes.

Actions on judgments where no property found must be brought in county where judgment was rendered, or in which defendant resides or is summoned. (KRS 452.440).

Foreign Judgments.

Recognized and enforced per Revised Uniform Enforcement of Foreign Judgments Act. (KRS 426.950 to 426.990). See subhead Revised Uniform Enforcement of Foreign Judgments Act, infra.

Revised Uniform Enforcement of Foreign Judgments Act printed in Uniform and Model Acts section adopted in part. (KRS 426.950 to 426.975). §§ 1-6 of Act adopted without material variation. §§ 7-10 of Act not adopted. Must pay amount otherwise provided for filing suit to file foreign judgment. (KRS 426.970). No execution or other process shall issue until 20 days after date foreign judgment is filed. (KRS 426.960[3]).

5.16 LIMITATION OF ACTIONS:

Actions must be brought within following periods after respective causes of action accrue:

Eighteen years: Action to determine paternity under KRS 406.021(1). (KRS 406.031).

Fifteen years: Action to recover real estate (KRS 413.010), except that seven years adverse possession bars action (KRS 413.060); action on judgment or decree (KRS 413.090[1]) (limitation running from last issue of execution thereon for collection of judgment debt as distinguished from costs [See 299 Ky. 729, 187 S.W.2d 289]); actions on recognizance, bond or written contract, official bond of public officer or bond posted by individuals appointed by court or authority of law (such as receivers, conservators, trustees, etc.), or on bonds for payment of money or performance of undertakings (such as appeal, injunction, supersedeas, attachment, payment of costs, replevin, etc. bonds), except when shorter period provided for specific purposes (KRS 413.090. See 241 Ky. 541, 44 S.W.2d 518). (*Caveat*, absent fraud, action against personal representative or any distributee must be brought within two years from date of order of discharge of personal representative. [KRS 396.205]); action to recover unpaid child support arrearages, may be initiated as one cumulative action for all child support arrearages owed under court order, with time to commence action under subsection being tolled until all current child support obligations cease as to last child covered by order. (KRS 413.090[5]). As for actions on sales contracts, see infra, subhead Four Years.

Accrual of Cause of Action.

Valid contract to devise property is not broken until death of contracting party. (299 Ky. 719, 187 S.W.2d 264).

Ten years: Probate of will; action for which no other limitation is prescribed. (KRS 413.160). Action for relief or damages on ground of fraud or mistake is barred after ten years after making of contract or perpetration of fraud, regardless of time of discovery. (KRS 413.130[3]). Action on negotiable note payable on demand if no payment of principal or interest and on unaccepted draft (KRS 355.3-118[2] and [3]); action to enforce lien for unpaid installments of unemployment compensation (KRS 341.300).

Eight years: In product liability action, rebuttable presumption lies that product was not defective if injury, death or property damage occurs more than eight years after date of manufacture. (KRS 411.310). Action for wrongful death or damage to person or property from deficiency in construction components, design, planning, supervision, inspection or construction of any improvement to real property, occurring within seventh year from substantial completion, must be brought within one year from date of injury or eight years after substantial completion, whichever is sooner. (KRS 413.135[2]). (*Caveat*, predecessor statute twice held unconstitutional. [808 S.W.2d 809; 704 S.W.2d 179]). Also, note apparent conflict with KRS 413.120(14) in subhead Five Years, infra.

Seven years: Action against sureties on any contract or bond or action on judgment or decree against a surety on which no execution has issued in seven years. (KRS 413.220). Action to recover title or possession of real property from person in adverse possession. (KRS 413.060). See category 21 Property, topic 21.02 Adverse Possession.

Action for damages to property or personal injury or death arising from deficiency in construction components, design, planning, supervision, inspection or construction of any improvement to real property must be brought within seven years following substantial completion of such improvement. (KRS 413.135[1]). (*Caveat*, apparent conflict created by KRS 413.135[2], which allows additional time to bring action for injury occurring during seventh year from substantial completion. See subhead Eight Years, supra.)

Six years: Action for installments on negotiable note, for accelerated principal or for demand note after demand; action on certificate of deposit after demand made to maker or after due date when demand in effect; action and accepted draft after due date or date of acceptance. (KRS 355.3-118).

Five years: Action against surety for executor, administrator, guardian or curator, or for sheriff to whom decedent's estate has been transferred (KRS 413.230); action on contract not in writing, express or implied; on draft or bill of exchange; on sealed or unsealed negotiable promissory note actually negotiated (241 Ky. 541, 44 S.W.2d 518); on open or stated account (any item due more than five years barred, but due date is computed from Jan. 1 following date of purchase [KRS 413.130]); for fraud or mistake (time running from discovery, but time may not exceed ten years from transaction); for injury to real or personal property or injury by trustee to rights of beneficiary (KRS 413.120); proceeding by state for retrospective assessment of particular intangibles, namely, money in hand, notes, bonds, shares of stock, accounts or other credits, secured or unsecured (KRS 132.290); to enforce liability created by statute not fixing different limitation, including action to recover taxes (115 Ky. 239, 72 S.W. 1090); for penalty or forfeiture under statute not fixing different limitation; to enforce liability of steamboat or other vessel; to foreclose liens securing street improvement bonds authorized in cities of certain classes (259 Ky. 47, 81 S.W.2d 865); action for personal injuries against builder of home or other improvements, cause to accrue at time of original occupancy (*Caveat*, note apparent conflict with KRS 413.135, in subheads Seven Years and Eight Years, supra.); to enforce liability of bail; for injury to rights not arising on contract and not otherwise enumerated (KRS 413.120).

In product liability action, rebuttable presumption lies that product was not defective if injury, death or property damage occurs more than five years after sale to first consumer. (KRS 411.310).

Four years: Action for breach of contract for sale of goods, unless parties have, by sales agreement, reduced period; but period may not be reduced to less than one year. (KRS 355.2-725).

Three years: Action on unaccepted draft to require payment of draft after dishonor; action against acceptor of certified teller's, cashier's or traveler's check after demand. (KRS 355.3-118[3][4]). Unless governed by law regarding indemnity or contribution, action for conversion of negotiable instrument or like action, for breach of warranty related to negotiable instrument or other action arising under Art. 3 of Uniform Commercial Code. (KRS 355.3-118[7]).

Two years: Action for taking, detaining or injuring personal property, including action for specific recovery. (KRS 413.125). Action for no-fault insurance benefits for injury other than death (period runs from date injured person suffers loss and knows, or should know, loss was caused by accident but action must be commenced within four years of date of accident) (KRS 304.39-230[1]); action for tort liability arising out of use of motor vehicle not limited by no-fault insurance act (period runs from date of injury or death or date of last benefit payment made by no-fault carrier, whichever is later) (KRS 304.39-230[6]); action on state warrant which has been called for payment (KRS 413.110); actions which accrued against deceased person during life if no personal representative appointed (KRS 396.011) (*caveat*, see subhead Six Months, infra); actions for recovery of usurious interest paid (KRS 360.020); action by party aggrieved by decision of district court admitting will to probate or rejecting will, within two years of decision of district court (KRS 394.240); action against personal representative or any distributee (period runs from date of order of discharge of personal representative [KRS 396.205]).

One year: Action for personal injury or death not covered by longer limitation period (481 S.W.2d 668); for libel, slander, malicious prosecution, conspiracy, arrest, seduction, criminal conversation, breach of promise of marriage or negligence or malpractice of physician or surgeon; against licensed or certified real estate appraiser for acts or omissions in rendering or failing to render professional services, whether action is brought in contract or tort; for escape of prisoner arrested on civil process; for recovery of stolen property or its value or damages against thief or any accessory; for killing or injuring of cattle by railroad or other corporation; for recovery of usury; and damages arising out of detention facility disciplinary proceeding (KRS 413.140). *Caveat*, conflict exists with respect to recovery of interest paid; see subhead Two Years, supra. Action for survivor's no-fault insurance benefits (period runs from date of death resulting from accident or four years from date of accident, whichever occurs first). (KRS 304.39-230[2]). Action in tort or contract for professional service malpractice. (KRS 413.245). Action in Board of Claims for damages caused by negligence of Commonwealth, its departments or agencies or its officers, agents or employees while acting in scope of employment. (KRS 44.110). See topic 5.09 Damages, subhead Sovereign Immunity. For claims against estate of decedent, see category 13 Estates and Trusts, topic 13.08 Executors and Administrators, subhead Presentation of Claims.

Accrual of Cause of Action.

Cause of action accrues for professional services malpractice when injury was discovered or should have been discovered. (KRS 413.245; 459 S.W.2d 166). Same rule applies to product liability actions for personal injury from latent disease caused by exposure to harmful substance. (580 S.W.2d 497).

Six months: Actions, other than claims in favor of U.S., Commonwealth of Kentucky or any instrumentalities thereof or as to security proceedings to enforce any mortgage, pledge, lien or other security interest or proceedings to establish liability of decedent under policy of liability insurance, which accrued against deceased person during life (period runs from date personal representative appointed; two years from date of death if no representative is appointed) (KRS 396.011).

Uniform Commercial Code adopted, (KRS c. 355), but bulk sales article repealed. See category 3 Business Regulation and Commerce, topic 3.09 Commercial Code.

Actions Not Specifically Provided For: Action for liability created by statute when no other period provided, five years. (KRS 413.120). Action for injury to rights, not arising under contract and not otherwise enumerated, five years. (KRS 413.120). Action for relief not provided by statute and not otherwise provided for, ten years. (KRS 413.160).

Limitation statutes do not apply to express trust that is both continuing and subsisting or to action by vendee in possession to obtain conveyance of real property. (KRS 413.340; 849 S.W.2d 534).

Commencement of Action.

An action is commenced on date of first summons or process issued thereon in good faith from court having jurisdiction of cause of action. (KRS 413.250; CR 3). Good faith requirement is missing if service not attempted in due course.

New Actions.

If action is commenced in due time and in good faith in any court or other tribunal, and upon defense being made court adjudges that it has no jurisdiction of action, plaintiff may, within 90 days from time of such judgment, commence new action in proper court or other appropriate tribunal. Time elapsed between commencing the two actions is not counted in applying any statute of limitation. (KRS 413.270).

Foreign Causes of Action.

When cause of action has arisen in another state or country and by its laws action thereon is barred by limitation shorter than that prescribed by Kentucky, action thereon in Kentucky is barred by such shorter period of limitation, regardless of residence of the parties. (KRS 413.320).

Extension of Time.

If act required to perfect cause of action is restrained by injunction or other lawful means, or through vacancy in office, absence of officer or his/her refusal to act, time covered by such restraint is not counted as part of limitation period, and this applies also where collection of judgment or commencement of action is stayed by injunction. Period of such stay is not counted in computing limitation. (KRS 413.260). Written agreements entered into in good faith and at arms length to extend limitations period for filing of civil actions are enforceable. (KRS 413.265).

Disability of Plaintiff.

Actions for recovery of real property may be brought by former disabled person or person claiming through him within three years after disability removed (KRS 413.020), but no later than 30 years from time right of action first accrued (KRS 413.030). To extend statutory period to bring action, disability must have existed when cause of action first accrued. (KRS 413.020). In all other actions, if person entitled to bring action was disabled when cause of action accrued, applicable period of limitation does not begin to run until disability removed, or until death. (KRS 413.170). Intervening inception of disability does not toll running of statute. (246 Ky. 404, 55 S.W.2d 39).

Absence or Concealment of Defendant.

If resident defendant is absent from Kentucky when a cause of action accrues the statute runs from the date of his return, and if he obstructs prosecution of the action by departing from state, absconding or concealing himself or other indirect means, time of such obstruction is not included in the period within which action shall be commenced. (KRS 413.190). Cited statute does not apply to defendants not residing in Kentucky when cause of action accrued. (299 Ky. 751, 187 S.W.2d 281).

Death of Defendant.

All claims against decedent's estate which arose before death, if not barred by other limitation before death, are barred against estate, personal representatives and heirs and devisees unless presented within six months if personal representative appointed or within two years after decedent's death if no personal representative appointed. (KRS 396.011). No claims barred by limitation which would expire during six month period from decedent's death (KRS 396.045) (*caveat*, except for limitations imposed by KRS c. 396). With consent of all successors with affected interests personal representative may waive any limitation available to estate. (KRS 396.065). Actions commenced before death must be revived against estate of deceased defendant within one year from death. (KRS 395.278).

Interruption of Statutory Period.

Statutory period commences anew upon new promise in substitution for old (294 Ky. 664, 172 S.W.2d 457), or part payment (299 Ky. 664, 186 S.W.2d 797).

Revival of Barred Claims.

A debt barred by limitations cannot be revived by mere partial payment. There must be actual acknowledgment of debt and promise, either oral or written, to pay, and any action must be based on new promise. (226 Ky. 301, 10 S.W.2d 1095; 285 Ky. 128, 147 S.W.2d 70).

Contractual limitations are enforced where period is not unreasonably short. (276 Ky. 132, 122 S.W.2d 990).

Record Memorandum of Extension.

Period of limitation upon actions (required to be brought within 15 years) on any bond or obligation for the payment of money secured by a lien, may not be prolonged or extended as against purchasers or creditors without notice (246 Ky. 225, 54 S.W.2d 906), unless promisor and holder of lien before 15 years after maturity of the debt enter a memorandum on the margin of the record of the deed or mortgage, attested by the clerk, showing that debt is extended, and for what time it is extended, and amount still due thereon. Clerk's fee, 25¢. (KRS 413.100). Clerk's fee, $12 for first three pages, $3 for each additional page, and $4 for each additional reference. (KRS 64.012[1][a][23]).

Pleading.

Ordinarily defense of limitation must be pleaded. This is always the safe course (293 Ky. 627, 169 S.W.2d 823), but a motion to dismiss complaint may be sustained in exceptional cases, e.g., fraud cases where plaintiff, suing after five years from commission of alleged fraud, fails to state facts showing that he could not discover the fraud within the five year period (297 Ky. 257, 180 S.W.2d 93). Defense may be raised by motion to dismiss if fact that limitations period has run is clear on face of complaint. (429 S.W. 2d 860).

Notice to City.

See topic 5.02 Actions.

5.16A PARTITION:

Jurisdiction and Venue.

Suit by person desiring partition of land held jointly with others, or by person desiring allotment of dower or curtesy, or by person with 20% or more ownership interest in closely held farm or partnership must be brought in circuit court of county where land or greater part thereof lies. (KRS 381.135).

Proceedings.

Commissioners are appointed to determine division or allotment thereof according to rights of parties. Registered land surveyor must perform survey according to determination, signed and sealed, unless such survey exists. (KRS 381.135).

Partition in Kind or Sale.

Where equitable partition cannot be made, court may order sale and division of proceeds. (271 Ky. 84, 111 S.W.2d 579).

5.17 [RESERVED]

5.18 PLEADING:

Kentucky Rules of Civil Procedure (CR) govern pleading in all civil actions, except for special statutory proceedings, such as claims in small claims division of district court (see category 6 Courts and Legislature, topic 6.01 Courts, subhead Small Claims Courts), petitions for dissolution of marriage (see category 14 Family, topic Dissolution of Marriage, subhead Pleading), sales of realty of persons under disability (see category Family, topic Guardian and Ward, subhead Real Estate), and cases placed on economical litigation docket in certain circuit courts (see topic 5.19 Practice, subhead Economical Litigation Docket) for which proceedings statutory provisions prevail over inconsistent procedures set forth in Rules. (CR 1[2]). Rules are patterned on Federal Rules of Civil Procedure with modifications for peculiarities of state practice. See topic 5.19 Practice. No differences apply to pleadings seeking equitable relief from those seeking relief at law.

Form of Pleadings.

All pleadings and papers other than exhibits, computer printouts and printed briefs shall be typewritten, double spaced in black type no smaller than 12 point with 1½ inch margin on left side on unglazed paper not greater than 8½ inches by 11 inches in size. (CR 7.02[4]).

Pleadings permitted are: Complaint and answer; reply to counterclaim denominated as such; answer to cross-claim; third party complaint; third party answer; and where ordered by court, reply to answer or third party answer. (CR 7.01).

Complaint and other claims for relief must contain short statement of claim and demand for judgment. (CR 8.01[1]). Claim for unliquidated damages shall not recite amount of alleged damages other than allege that damages exceed jurisdictional amount. Party may obtain information as to amount claimed by interrogatories; amount claimed shall not exceed last amount stated in answer to interrogatories. (CR 8.01[2]; 12 S.W.3d 269).

Counterclaim or Set-off.

Pleading must state as counterclaim any claim which at the time of serving pleader has against any opposing party, if it arises out of transaction or occurrence that is subject matter of opposing party's claim, and does not require for adjudication presence of third parties of whom court cannot acquire jurisdiction, except claim need not be stated if such claim is subject of another pending action. (CR 13.01). Counterclaims may be permitted as to any claim against opposing party not arising out of transaction or occurrence that is subject matter of opposing party's claim. Reply may not contain such counterclaim. (CR 13.02).

Reply.

Permitted on order of court to answer or third party answer; without court order reply is required to a counterclaim denominated as such. (CR 7.01).

Demurrer has been abolished; but matters formerly asserted by special and general demurrers may be raised by motion. (CR 7.02[3], 12.02).

Amended or Supplemental Pleadings.

Party may amend once as matter of course at any time before responsive pleading is served, or if no responsive pleading is permitted and action has not been placed upon trial calendar, party may amend any time within 20 days after pleading is served; otherwise, amendment may only be made by leave of court or by consent of adverse party. (CR 15.01; 479

S.W.2d 6). Leave to amend shall be freely given when justice so requires. (CR 15.01). Amendments to conform to evidence may be made on motion even after judgment. (CR 15.02).

Supplemental pleadings setting forth transactions, occurrences or events which have happened since pleading to be supplemented, may be permitted by court on motion. (CR 15.04).

Service of pleadings and motions must be made upon party. If represented by attorney, the service must be made on attorney. Service may be made by delivering or mailing copy to last known address, or if no address is known, by leaving copy with clerk of court. (CR 5.02).

Time.

Answer must be served within 20 days after service of summons on defendant, or within 20 days after service of pleading stating cross-claim against party answering. Reply to counterclaim must be served within 20 days after service of answer or, if reply is ordered by court, within 20 days after service of order, unless order otherwise directs. (CR 12.01).

Response to amended pleading must be made within time remaining for response to original pleading or ten days after service, whichever is longer. (CR 15.01).

Proof of Claims.

In sending claims to Kentucky for suit, clear statement of claim and its origin, nature and amount in detail should be furnished, and original note, contract, etc., upon which claim is based should be forwarded.

Economical Litigation Docket.

Supreme Court has adopted supplemental rules, CR 88-97, to be applied in few circuits and divisions identified by Supreme Court order for all contract, personal injury, property damage, property rights and termination of parental rights cases filed in designated circuits and divisions.

Small Claims.

See category 6 Courts and Legislature, topic 6.01 Courts.

Frivolous Claims.

Attorney's or party's signature on pleading warrants that to best of knowledge, information and belief, pleading is well-grounded in fact and warranted by existing law or good faith argument for extension, modification or reversal of existing law, and is not interposed for any improper purpose. (CR 11). Bad faith is not required before sanction imposed. (746 S.W.2d 85). Court shall postpone ruling on Rule 11 motion in litigation until after entry of final judgment. Malicious prosecution action also lies for asserting frivolous claim in either civil or criminal action. (621 S.W.2d 895). Signing attorney must be attorney actually representing party. (621 S.W.2d 895). Standard for determining adequacy of attorney's inquiry is “reasonableness under the circumstances”. (746 S.W.2d 85).

5.19 PRACTICE:

Practice is regulated by Rules of Civil Procedure (CR), patterned on federal rules as amended periodically with modifications relevant to state practice.

Discovery, in addition to provisions of Civil Rules, is allowed: in actions for recovery of specific personal property (KRS 425.106); against garnishee (KRS 425.511); on return of no property found (KRS 426.381). See also category 8 Debtor and Creditor, topic 8.05 Executions.

Filing Discovery Documents with Court.

Interrogatories, requests for production or inspection, requests for admission and subpoenas shall not be filed with court. Party responsible for serving those documents shall retain originals and become custodian. (CR 5.06[1]).

Demand for Admission of Facts.

Written request for admission of facts or of genuineness of documents may be made after action commenced. Facts not denied are deemed admitted. (CR 36.01). Expense of proving documents or facts after denial of validity, including reasonable attorney's fees, may be charged to party denying. (CR 37.01). Court may order answer or amended answer. (CR 36.01). Each party limited to serving 30 interrogatories and 30 requests for admission on each other party without order of court. (CR 33.01).

Direct Actions Against Insurer.

See category 23 Transportation, topic 23.01 Motor Vehicles, subhead Direct Actions.

Economical Litigation Docket.

Supreme Court has adopted supplemental rules, CR 88-97, to be applied in few circuits and divisions identified by Supreme Court order for all contract, personal injury, property damage, property rights and termination of parental rights cases filed in designated circuits and divisions.

Videotape Records and Transcripts.

At option of individual circuit judges, videotape equipment may be used in place of reporter to record proceedings in civil and criminal cases. Procedures for use of equipment and use of resulting recording as transcript on appeal governed by CR 98.

Small Claims.

See category 6 Courts and Legislature, topic 6.01 Courts.

See also topics 5.02 Actions, Appeal and Error, Depositions and Discovery, Injunctions, Judgments, Pleading, Process; category 8 Debtor and Creditor, topics 8.02 Attachment, 8.05 Executions, 8.09 Garnishment.

5.20 PROCESS:

Action is commenced by filing of complaint and issuance of warning order or summons thereon. (CR 3.01). Process is regulated by Kentucky Rules of Civil Procedure (CR) patterned after Federal Rules of Civil Procedure. See topic 5.19 Practice.

General Requisites.

Process may not issue until plaintiff's complaint is filed. (CR 4.01[1]). Officer need not serve process in civil case unless party obtaining it deposits with clerk who issues it cost of service, not exceeding $5, or secures right to sue in forma pauperis. (KRS 64.080). As a means of bringing defendant into court, service of process may be actual or constructive. Summons and copy of complaint must be served together. (CR 4.04[1]).

By Whom Issued.

Clerk of court in which action properly brought, issues summons. (CR 4.01).

Who May Serve.

Summons may be served by registered or certified mail, return receipt requested (CR

4.01[1][a]; see subhead Service by Mail, infra) or may be served by any person authorized by law to serve (CR 4.01[1][b]). Persons so authorized include county sheriff (KRS 454.140), any person appointed by him (KRS 70.050) or at request of plaintiff, coroner, jailer or constable (KRS 454.140), or special bailiff appointed by court to serve particular process or order (KRS 454.145).

Personal Service on Individual.

Summons is served by delivering or, if acceptance refused, by offering to deliver copy to person to be summoned or by delivery to agent authorized by appointment or by law to receive service of process for such individual. (CR 4.04[2]).

Personal service on infant is on guardian; or if none, on father or mother within state; or if none, on person having control of unmarried infant. If there are no such individuals or if all foregoing are plaintiffs, clerk must appoint guardian ad litem for service. (CR 4.04[3]).

Personal Service on Incompetent Person.

Same as on infant. (CR 4.04[3]).

Personal service on partnership subject to suit under common name, is made by serving partner or agent authorized by law to receive service on its behalf. (CR 4.04[4]).

Domestic limited liability partnerships required to identify registered office and registered agent with Secretary of State. (KRS 362.1-1001[3][c]). Foreign limited liability partnerships required to identify registered office and registered agent with Secretary of State. (KRS 362.1-1102[1][c]). Domestic limited partnerships and limited liability limited partnerships required to identify registered office and registered agent with Secretary of State. (KRS 362.2-201[1][c]). Foreign limited partnerships required to identify registered office and registered agent with Secretary of State. (KRS 362.2-902[1][d]).

Personal service on domestic or foreign corporation is made by serving officer or managing agent thereof or chief agent in county where action is brought, or any other agent authorized by appointment or law to receive service on its behalf. (CR 4.04[5]). Any process may be served on registered agent appointed by corporation, or if corporation fails to appoint or maintain registered agent or agent cannot be served by reasonable diligence, process may be served on secretary of corporation by registered or certified mail, return receipt requested. (KRS 271B.5-040[2]; 273.3644[2]). Process may be served on foreign corporation by serving Secretary of State under Long Arm Statute (KRS 454.210; see subhead Long Arm Statute, infra), or by serving corporation's registered agent in Kentucky or, if foreign corporation has no registered agent or agent cannot be served by reasonable diligence by serving secretary of foreign corporation by registered or certified mail, return receipt requested. (KRS 271B.15-100[2]). These are alternate methods of serving process on foreign corporation. (KRS 271B.5-040[3]; 271B.15-100[4]; 690 S.W.2d 393). Process for corporation formerly, but no longer, qualified to do business in state may be served on Secretary of State. (KRS 271B.15-200[3]; 273.363). Long arm statute reaches person making telephone solicitation. (KRS 454.210[2][a][9]).

Limited Liability Companies.

Limited liability company (“LLC”) authorized to transact business shall maintain registered office and registered agent in Commonwealth. (KRS 275.115). LLC's registered agent shall be agent for service of process. (KRS 275.130). If no registered agent exists, or cannot be served with reasonable diligence, LLC may be served by registered or certified mail, return receipt requested, addressed to LLC at its principal office. (KRS 275.130).

Personal service on partnership or association, subject to suit under common name, is made by serving member, managing agent, or agent authorized by appointment or law to receive service on its behalf. (CR 4.04[4]).

Personal service outside Kentucky upon certain defendants is authorized either by certified mail with return receipt requested or upon delivering copy of summons to defendant by person over 18 years of age. Such service without appearance does not authorize personal judgment. (CR 4.04[8]). See subhead Long Arm Statute, infra, for alternate method of service which does authorize personal judgment.

Service by Mail.

At direction of initiating party and payment of costs, clerk shall mail copy of summons and complaint by registered or certified mail, return receipt requested, to address set forth in caption on complaint or to alternate address set forth in written instructions. Service by registered or certified mail is complete only upon delivery of envelope to addressee. Return receipt is proof of time, place and manner of service. (CR 4.01[1][a]).

For service by mail in small claims cases in district court, see category 6 Courts and Legislature, topic 6.01 Courts, subhead Small Claims Courts.

Constructive Service.

Following parties may be constructively served: (1) Nonresident individual absent from state, (2) corporation, partnership or association subject to suit under common name, having no agent in state known to plaintiff upon whom summons may be served, (3) individual absent from state four months or who has departed with intent to delay or defraud creditors, (4) individual who has left county of residence to avoid service of summons or has so concealed himself that summons cannot be served, (5) individual whose name and place of residence are unknown to plaintiff. (CR 4.05).

In such cases plaintiff or attorney must file affidavit with clerk stating one or more of grounds above mentioned and, except in case of (5), last known address of defendant, or, in case of (2), last known address of one upon whom service might be had, or his ignorance of such fact. If affidavit is made by other than plaintiff, it must state affiant's connection with plaintiff and affiant's belief that plaintiff is ignorant of such facts as are unknown to affiant. (CR 4.06). Thereupon clerk makes warning order upon complaint warning defendant to appear and defend within 50 days (CR 4.05), and must appoint attorney for defendant (CR 4.07).

Neither plaintiff nor attorney may be appointed or may suggest name of warning order attorney. It is duty of warning order attorney to make diligent efforts to inform defendant by mail concerning pendency and nature of action and to report result of efforts to court within 50 days after appointment. If attorney cannot inform defendant concerning action or if he learned that defendant is under disability, must so report and make affirmative defense if he can, or report to court that he cannot. No judgment can be rendered against defendant for whom warning order is made until defense or report has been filed. (CR 4.07).

Defendant constructively summoned deemed to have been summoned on 30th day after entry of warning order and action proceeds accordingly. (CR 4.08).

Substituted service is allowed in certain classes of cases, such as suits against foreign insurance companies (see category 16 Insurance, topic Insurance Companies), suits under the “Blue Sky Law” (see category 3 Business Regulation and Commerce, topic 3.24 Securities), and suits against nonresident owners or operators of motor vehicles (see category 23 Transportation, topic Motor Vehicles) or nonresident real estate brokers (see category 3 Business Regulation and Commerce, topic 3.06 Brokers). But in suit against insurance company, held that right to have substituted service is confined to cases involving contracts entered into or transactions had in Kentucky and does not extend to contracts entered into or transactions had in another state. (277 Ky. 320, 126 S.W.2d 468).

Service by publication on creditors of decedent may be had in actions for settlement of decedents' estates. (KRS 395.520). As to effect of such service on creditor failing to appear, see KRS 395.535. As to time, mode and medium of publication, see KRS 424.110 to 424.210.

Long Arm Statute.

Personal jurisdiction granted courts over nonresidents who act directly or by agent as to claims arising from person's: (1) Transacting any business in state; (2) contracting to furnish goods or services in state; (3) causing tortious injury by act or omission in state; (4) causing tortious injury in state by act or omission outside state if person regularly does or solicits business or engages in other persistent course of conduct or derives substantial revenue from consumption of goods or services in state; (5) breach of express or implied warranty in state resulting from sale outside state when seller knew person injured would use, consume or be affected by goods in state and seller also regularly does or solicits business or engages in persistent course of conduct in state or derives substantial revenue from goods used or consumed in state; (6) owning or using real property in state if claim arises from voluntary ownership, use or possession of property; (7) contracting to insure person or property in state; (8) committing sexual intercourse in state which causes birth of child if certain conditions met; (9) making telephone solicitation. Nonresident defined by Act to include individuals, partnerships, corporations, personal representatives, and other legal entities. Process to be served on nonresident in any county or on Secretary of State as statutory agent for nonresident. Venue lies in county where plaintiff resides or where claim arose. (KRS 454.210; see 302 F. Supp. 174).

Proof of Service.

Postal return receipt showing time and place of delivery or official return of officer whose name appears on summons, endorsed thereon, is proof of service. (CR 4.01).

Nonresident Motorist.

See category 23 Transportation, topic 23.01 Motor Vehicles.

Service on Holiday or Sunday.

See category 1 Introduction, topic 1.02 Holidays.

5.20A REPLEVIN AND SEQUESTRATION:

Common law action of replevin and equitable remedy of sequestration have been superceded by statutory writ of possession procedure under KRS 425.006 to 425.126 (see 194 Ky. 648, 240 S.W. 363) (see category 8 Debtor and Creditor, topic Writ of Possession) and by secured party's self-help remedy under Uniform Commercial Code (see category 3 Business Regulation and Commerce, topic 3.09 Commercial Code). See also category 8 Debtor and Creditor, topics 8.02 Attachment and 8.09 Garnishment.

5.215.23

5.24 STAY OF EXECUTION:

See topic 5.03 Appeal and Error; category 8 Debtor and Creditor, topic 8.05 Executions.

5.25 SUBMISSION OF CONTROVERSY:

Parties to a question that might be the subject of a civil action, may, without action, state the question and the facts upon which it depends, and present a submission thereof to any court which would have jurisdiction if an action had been brought, but it must appear by affidavit that the controversy is real and the proceedings in good faith to determine the rights of the parties. The court must thereupon decide the matter as if an action were pending. (KRS 418.020 to 418.030; 930 S.W.2d 408).

5.26 VENUE:

Venue in civil actions is prescribed by KRS 452.400 to 452.505 and by KRS 452.700.

(A) Actions affecting real property must generally be brought in county in which land or some part thereof is located: (1) For recovery of land or some estate or interest therein; (2) for partition of land except in settlement of decedent's estate; (3) for sale of land under mortgage, lien or other encumbrance, except in satisfaction of debts of decedent; (4) for injury to land (KRS 452.400) (as distinguished from any injury to crops growing on land) (223 Ky. 751, 4 S.W.2d 717).

(B) Various other actions ordinarily transitory in nature, are localized and must be brought in certain designated counties. (KRS 452.400; 223 Ky. 751, 4 S.W.2d 717).

(C) Other transitory actions must be brought in the county in which defendant resides, or in which one of several defendants resides or is summoned. (KRS 452.480).

Venue for consumer protection action set forth in KRS 367.220.

Venue for determination of disability and guardianship for disabled set forth in KRS 387.520.

Venue for administration of trusts set forth in KRS 386.680-386.690.

Venue in paternity action set forth in KRS 406.151.

Certain exceptions to these general rules exist in case of suits against common carrier or corporation. (KRS 452.450; 452.455).

Change of Venue.

Parties to any suit may by consent have order in or out of court for its removal to any other court. Party to any civil proceeding triable by jury in circuit court may have change of venue to circuit court of adjacent county (KRS 452.050), upon showing that he cannot have fair and impartial trial by filing verified motion setting forth grounds relied on (KRS 452.010; 452.030). Court may hear evidence and arguments at hearing. Granting motion in discretion of court and will be granted when justice so requires. (KRS 452.030). Change of venue may be taken from district court in one county to district court of another county under like limitations and restrictions. (KRS 452.700).

Contract Provisions.

No specific authority on enforceability of provisions in agreement fixing venue. Provisions in agreement fixing forum are given effect unless provisions attempt to oust state of judicial jurisdiction or are unfair or unreasonable. (583 S.W.2d 97; 556 F. Supp. 819).

6 COURTS AND LEGISLATURE

6.01 COURTS:

United States District Courts.

Kentucky is divided into two judicial districts, known as Eastern and Western Districts. (28 USC § 97). It is authorized ten district judges, commissioned respectively, five to serve in Eastern District, four to serve in Western District, and one to serve in either district or both of them. (28 USC § 133).

Division of business in each district among judges is determined in accordance with 28 USC § 137.

Eastern District.

Clerk's office: 101 Barr Street, Lexington, KY 40507. General information available: http://kyed.uscourts.gov.

Counties Composing Eastern District.

Anderson, Bath, Bell, Boone, Bourbon, Boyd, Boyle, Bracken, Breathitt, Campbell, Carroll, Carter, Clark, Clay, Elliott, Estill, Fayette, Fleming, Floyd, Franklin, Gallatin, Garrard, Grant, Greenup, Harlan, Harrison, Henry, Jackson, Jessamine, Johnson, Kenton, Knott, Knox, Laurel, Lawrence, Lee, Leslie, Letcher, Lewis, Lincoln, Madison, Magoffin, Martin, Mason, McCreary, Menifee, Mercer, Montgomery, Morgan, Nicholas, Owen, Owsley, Pendleton, Perry, Pike, Powell, Pulaski, Robertson, Rockcastle, Rowan, Scott, Shelby, Trimble, Wayne, Whitley, Wolfe and Woodford.

Clerk's offices, and court sessions held in: Ashland, Covington, Frankfort, Lexington, London and Pikeville.

Western District.

Clerk's office: 601 West Broadway, Louisville, KY 40202. General information available at: http://kywd.uscourts.gov.

Counties Composing Western District.

Adair, Allen, Ballard, Barren, Breckinridge, Bullitt, Butler, Caldwell, Calloway, Carlisle, Casey, Clinton, Christian, Crittenden, Cumberland, Daviess, Edmonson, Fulton, Graves, Grayson, Green, Hancock, Hardin, Hart, Henderson, Hickman, Hopkins, Jefferson, Larue, Livingston, Logan, Lyon, Marion, Marshall, McCracken, McLean, Meade, Metcalf, Monroe, Muhlenberg, Nelson, Ohio, Oldham, Russell, Spencer, Simpson, Taylor, Trigg, Todd, Union, Warren, Washington, and Webster.

Clerk's offices, and court sessions held in: Bowling Green, Louisville, Owensboro and Paducah.

Judicial System of State.

Judicial power of Commonwealth (excepting as to impeachments alone which are brought by House of Representatives and tried by Senate) is vested in one unified court of justice which is divided into a Supreme Court, a court of appeals, trial courts of general jurisdiction known as circuit courts, and trial courts of limited jurisdiction known as district courts. (Ky. Const. §§ 109, 66 to 68).

Supreme Court.

General information available at http://www.kycourts.net/supreme.

Seat of Court and Clerk's Office.

In state Capitol Building, Frankfort, Kentucky 40601; Telephone: (502) 564-5444.

Jurisdiction.

Supreme Court has appellate jurisdiction only, except it shall have power to issue all writs necessary in aid of its appellate jurisdiction or complete determination of any cause or as may be required to exercise control of court of justice. (Ky. Const. § 110). Direct appeals from judgments of circuit court imposing sentence of death or life imprisonment or imprisonment for 20 years or more mandated by Constitution. Otherwise, Supreme Court to have such appellate jurisdiction as provided by its Rules. (Ky. Const. § 110). All causes and proceedings pending before old court of appeals as of Jan. 1, 1976 transferred to Supreme Court as of that date, (1974, c. 84) and all records of old court of appeals involving proceedings of that court from Oct. 1793 through Dec. 1975 entitled to same dignity as records of Supreme Court from and after Jan. 1, 1976 (KRS 21A.100).

Rule-Making Power.

Supreme Court's power includes prescribing rules governing its appellate jurisdiction, practice and procedure in all judicial courts, and admission to and discipline of members of bar. (Ky. Const. § 117).

Power to Certify Law.

Supreme Court may answer questions of law certified to it by U.S. Supreme Court, or U.S. Court of Appeals or U.S. District Court or by highest appellate court of any other state or District of Columbia on any issue of Kentucky law determinative of cause in requesting court. (CR 76.37).

Court of Appeals.

Seat of Court and Clerk's Office.

Clerk, Court of Appeals, 360 Democrat Drive, Frankfort, Kentucky 40601-9229; Telephone: (502) 573-7920. http://www.kycourts.net/appeals.

Jurisdiction.

Court of Appeals exercises appellate jurisdiction from final and interlocutory judgments, convictions, orders or decrees of circuit courts except for judgment dissolving marriage. (Ky. Const. § 111; KRS 22A.020).

Circuit Courts.

Seats of Court and Clerks' Offices.

State is divided into 57 judicial circuits (KRS 23A.020) with court held in each county (Ky. Const. § 112). Court is held, and clerks' offices located, in county courthouse or in other county owned facilities approved by Supreme Court. (KRS 26A.100).

Circuit courts are courts of record and have original jurisdiction of all matters, both in law and equity, of which jurisdiction is not exclusively delegated to some other tribunal. They have jurisdiction in all cases where title to real estate is in question, in contested probate matters, and cases in equity. Except in cases involving title to or affecting real estate, contested probate matters and matters in equity, value in controversy exclusive of interest and costs must exceed $4,000. (KRS 23A.010; 24A.120[1][a]). They have appellate jurisdiction of judgments and final orders of district courts. (KRS 23A.080). Circuit courts are authorized to review actions and decisions of most administrative agencies, special districts and boards, such proceedings being original actions not appeals.

Family Court Divisions.

Within each judicial circuit family court division retains jurisdiction in following cases: dissolution of marriage, child custody, visitation, maintenance and support, equitable distribution of property in dissolution case, adoption and termination of parental rights. (Ky. Const. § 112[6]; KRS 23A.100[1]; 23A.110). In addition to general jurisdiction of circuit court, family court has jurisdiction in domestic violence and abuse proceedings subsequent to issuance of emergency protective orders, proceedings under Uniform Act on Paternity and Uniform Interstate Family Support Act, neglect and abuse proceedings, and certain juvenile status offenses. (KRS 23A.100[2]). District courts share concurrent jurisdiction with family court divisions for family law proceedings. (KRS 23A.100[3]).

By KRS 26A.020 provisions are made for selection of special circuit court judge when regular judge is absent, deceased, or incapable of affording party fair or impartial trial or decision on application for change of venue.

Judicial Circuits.

Adair County: Twenty-ninth Circuit; court sits at Columbia.

Allen County: Forty-ninth Circuit; court sits at Scottsville.

Anderson County: Fifty-third Circuit; court sits at Lawrenceburg.

Ballard County: First Circuit; court sits at Wickliffe.

Barren County: Forty-third Circuit; court sits at Glasgow.

Bath County: Twenty-first Circuit; court sits at Owingsville.

Bell County: Forty-fourth Circuit; court sits at Pineville and Middlesboro.

Boone County: Fifty-fourth Circuit; court sits at Burlington.

Bourbon County: Fourteenth Circuit; court sits at Paris.

Boyd County: Thirty-second Circuit; court sits at Ashland.

Boyle County: Fiftieth Circuit; court sits at Danville.

Bracken County: Nineteenth Circuit; court sits at Brooksville.

Breathitt County: Thirty-ninth Circuit; court sits at Jackson.

Breckinridge County: Forty-sixth Circuit; court sits at Hardinsburg.

Bullitt County: Fifty-fifth Circuit; court sits at Shepherdsville.

Butler County: Thirty-eighth Circuit; court sits at Morgantown.

Caldwell County: Fifty-sixth Circuit; court sits at Princeton.

Calloway County: Forty-second Circuit; court sits at Murray.

Campbell County: Seventeenth Circuit; court sits at Newport. Part of session held at Alexandria.

Carlisle County: First Circuit; court sits at Bardwell.

Carroll County: Fifteenth Circuit; court sits at Carrollton.

Carter County: Thirty-seventh Circuit; court sits at Grayson.

Casey County: Twenty-ninth Circuit; court sits at Liberty.

Christian County: Third Circuit; court sits at Hopkinsville.

Clark County: Twenty-fifth Circuit; court sits at Winchester.

Clay County: Forty-first Circuit; court sits at Manchester.

Clinton County: Fortieth Circuit; court sits at Albany.

Crittenden County: Fifth Circuit; court sits at Marion.

Cumberland County: Fortieth Circuit; court sits at Burkesville.

Daviess County: Sixth Circuit; court sits at Owensboro.

Edmonson County: Thirty-eighth Circuit; court sits at Brownsville.

Elliott County: Thirty-seventh Circuit; court sits at Sandy Hook.

Estill County: Twenty-third Circuit; court sits at Irvine.

Fayette County: Twenty-second Circuit; court sits at Lexington.

Fleming County: Nineteenth Circuit; court sits at Flemingsburg.

Floyd County: Thirty-first Circuit; court sits at Prestonburg.

Franklin County: Forty-eighth Circuit; court sits at Frankfort.

Fulton County: First Circuit; court sits at Hickman.

Gallatin County: Fifty-fourth Circuit; court sits at Warsaw.

Garrard County: Thirteenth Circuit; court sits at Lancaster.

Grant County: Fifteenth Circuit; court sits at Williamstown.

Graves County: Fifty-second Circuit; court sits at Mayfield.

Grayson County: Forty-sixth Circuit; court sits at Leitchfield.

Green County: Eleventh Circuit; court sits at Greensburg.

Greenup County: Twentieth Circuit; court sits at Greenup.

Hancock County: Thirty-eighth Circuit; court sits at Hawesville.

Hardin County: Ninth Circuit; court sits at Elizabethtown.

Harlan County: Twenty-sixth Circuit; court sits at Harlan.

Harrison County: Eighteenth Circuit; court sits at Cynthiana.

Hart County: Tenth Circuit; court sits at Munfordville.

Henderson County: Fifty-first Circuit; court sits at Henderson.

Henry County: Twelfth Circuit; court sits at New Castle.

Hickman County: First Circuit; court sits at Clinton.

Hopkins County: Fourth Circuit; court sits at Madisonville.

Jackson County: Forty-first Circuit; court sits at McKee.

Jefferson County: Thirtieth Circuit; court sits at Louisville.

Jessamine County: Thirteenth Circuit; court sits at Nicholasville.

Johnson County: Twenty-fourth Circuit; court sits at Paintsville.

Kenton County: Sixteenth Circuit; court sits at Covington. Part of session held at Independence.

Knott County: Thirty-sixth Circuit; court sits at Hindman.

Knox County: Twenty-seventh Circuit; court sits at Barbourville.

Larue County: Tenth Circuit; court sits at Hodgenville.

Laurel County: Twenty-seventh Circuit; court sits at London.

Lawrence County: Twenty-fourth Circuit; court sits at Louisa.

Lee County: Twenty-third Circuit; court sits at Beattyville.

Leslie County: Forty-first Circuit; court sits at Hyden.

Letcher County: Forty-seventh Circuit; court sits at Whitesburg.

Lewis County: Twentieth Circuit; court sits at Vanceburg.

Lincoln County: Twenty-eighth Circuit; court sits at Stanford.

Livingston County: Fifty-sixth Circuit; court sits at Smithland.

Logan County: Seventh Circuit; court sits at Russellville.

Lyon County: Third Circuit; court sits at Eddyville.

Madison County: Twenty-fifth Circuit; court sits at Richmond.

Magoffin County: Thirty-sixth Circuit; court sits at Salyersville.

Marion County: Eleventh Circuit; court sits at Lebanon.

Marshall County: Forty-second Circuit; court sits at Benton.

Martin County: Twenty-fourth Circuit; court sits at Inez.

Mason County: Nineteenth Circuit; court sits at Maysville.

McCracken County: Second Circuit; court sits at Paducah.

McCreary County: Thirty-fourth Circuit; court sits at Whitley City.

McLean County: Forty-fifth Circuit; court sits at Calhoun.

Meade County: Forty-sixth Circuit; court sits at Brandenburg.

Menifee County: Twenty-first Circuit; court sits at Frenchburg.

Mercer County: Fiftieth Circuit; court sits at Harrodsburg.

Metcalfe County: Forty-third Circuit; court sits at Edmonton.

Monroe County: Fortieth Circuit; court sits at Tompkinsville.

Montgomery County: Twenty-first Circuit; court sits at Mt. Sterling.

Morgan County: Thirty-seventh Circuit; court sits at West Liberty.

Muhlenberg County: Forty-fifth Circuit; court sits at Greenville.

Nelson County: Tenth Circuit; court sits at Bardstown.

Nicholas County: Eighteenth Circuit; court sits at Carlisle.

Ohio County: Thirty-eighth Circuit; court sits at Hartford.

Oldham County: Twelfth Circuit; court sits at La Grange.

Owen County: Fifteenth Circuit; court sits at Owenton.

Owsley County: Twenty-third Circuit; court sits at Booneville.

Pendleton County: Eighteenth Circuit; court sits at Falmouth.

Perry County: Thirty-third Circuit; court sits at Hazard.

Pike County: Thirty-fifth Circuit; court sits at Pikeville.

Powell County: Thirty-ninth Circuit; court sits at Stanton.

Pulaski County: Twenty-eighth Circuit; court sits at Somerset.

Robertson County: Eighteenth Circuit; court sits at Mount Olivet.

Rockcastle County: Twenty-eighth Circuit; court sits at Mount Vernon.

Rowan County: Twenty-first Circuit; court sits at Morehead.

Russell County: Fifty-seventh Circuit; court sits at Jamestown.

Scott County: Fourteenth Circuit; court sits at Georgetown.

Shelby County: Fifty-third Circuit; court sits at Shelbyville.

Simpson County: Forty-ninth Circuit; court sits at Franklin.

Spencer County: Fifty-third Circuit; court sits at Taylorsville.

Taylor County: Eleventh Circuit; court sits at Campbellsville.

Todd County: Seventh Circuit; court sits at Elkton.

Trigg County: Fifty-sixth Circuit; court sits at Cadiz.

Trimble County: Twelfth Circuit; court sits at Bedford.

Union County: Fifth Circuit; court sits at Morganfield.

Warren County: Eighth Circuit; court sits at Bowling Green.

Washington County: Eleventh Circuit; court sits at Springfield.

Wayne County: Fifty-seventh Circuit; court sits at Monticello.

Webster County: Fifth Circuit; court sits at Dixon.

Whitley County: Thirty-fourth Circuit; court sits at Williamsburg and Corbin (KRS 23.060).

Wolfe County: Thirty-ninth Circuit; court sits at Campton.

Woodford County: Fourteenth Circuit; court sits at Versailles.

District Courts.

Seats of Court and Clerks' Offices.

State is divided into 60 judicial districts (KRS 24A.030) with same boundaries as judicial circuits except that: Nelson County, part of tenth judicial circuit, is fifty-seventh judicial district; Marshall County, part of forty-second judicial circuit, is fifty-eighth judicial district; Ballard and Carlisle Counties, part of first judicial circuit, are fifty-ninth judicial district; and Cumberland and Monroe Counties, part of fortieth judicial circuit, are sixtieth judicial district. See subhead Circuit Courts, catchline Judicial Circuits, supra. Court is held in each county. (Ky. Const. § 113).

Clerks of circuit courts also serve as clerks for district courts. (KRS 30A.010[1]). District courts are courts of record having continuous session and exercising limited original jurisdiction. (KRS 24A.010).

Jurisdiction.

District courts exercise exclusive original jurisdiction of all: (1) Offenses designated as misdemeanors, unless joined in indictment with felony, and all violations of city or county ordinances, except those denominated as felonies or capital offenses or offenses punishable by imprisonment in penitentiary by state statutes (KRS 24A.110; 26A.030[1]); (2) all civil cases in which amount in controversy does not exceed $4,000, exclusive of interest and costs, except matters affecting title to real estate and matters of equity (KRS 24A.120); (3) uncontested probate matters (KRS 24A.120); and (4) matters relating to juveniles or minors (KRS 24A.130), except for matters for which jurisdiction is vested in other courts, such as child support matters incident to dissolution of marriage (divorce) proceedings (KRS 403.210) or certain juvenile status offenses with which it has concurrent jurisdiction with family court division of circuit court. (KRS 23A.100[1]). District courts exercise jurisdiction to examine any charge alleging felony or capital offense (to determine if probable cause exists for trial in circuit court) and may upon motion and for good cause shown, reduce charge of felony to misdemeanor. (KRS 24A.110[3], [4]).

Fees.

Filing fees and miscellaneous costs for civil cases filed in circuit court and district court are set by rules of Supreme Court. (KRS 23A.200; 24A.170). Filing fees and costs are set separately for each circuit and each district; consult clerk of court to determine fees and costs in particular court. Examples: Filing fee for civil complaint in Jefferson Circuit Court is $153 in nonjury action and $213 in jury action; filing fee for civil complaint in Jefferson District Court is $75.50. Where amount in controversy is $1,500 or less (small claims division of Jefferson District Court), filing fee is $42.87, plus cost of service ($ 9.62 by certified mail, or $40 by sheriff). $43 filing fee applies to probate dispensing with administration; $172 filing fee applies to probate with administration, guardianship, paternity and certain other matters. (KRS 23A.200; 24A.170). Jury fee for civil trial in circuit court is $60 (see supra) and jury fee for civil trial in district court is $30. (KRS 29A.330; 48.195). Additional fees will be charged for additional filings and other matters such as court library and technology or court facilities use, and court is authorized to require payment of additional costs in cases requiring extraordinary services. Filing fee is $60 for appeal from district court to circuit court; $60 fee also applies where case is transferred from district court to circuit court when counterclaim or cross-claim exceeding jurisdiction of district court is filed. In civil cases, clerk may require additional deposit of $5 to cover plaintiff's fees. (KRS 64.080). Court costs for criminal cases in circuit court are $130. (KRS 23A.205). Parties and counsel should consult clerk of courts above for total of applicable fees and costs.

Small Claims Courts.

Small claims division is established in each district court (see subhead District Courts, supra) with civil jurisdiction concurrent with district court (except for libel, slander, alienation of affections, malicious prosecution and abuse of process claims) when damages or personal property claimed do not exceed $1,500 exclusive of interest and costs or when claim involves contract or agreement relating to purchase of goods or services of value of not in excess of $1,500 exclusive of interest and costs. (KRS 24A.230). Division may enter all orders or judgments authorized for district courts except for provisional remedies, such as attachments, garnishments, replevin, etc. (KRS 24A.230). Assigned claims and class action claims may not be filed in division (KRS 24A.240[2]); persons engaged in business of lending money at interest and collection agents may not file claims for collection in division (KRS 24A.240[3]), and no person may file more than 25 claims per business location in division in any one year (KRS 24A.250[1]). Attorneys are permitted to represent parties but their participation is not required. (KRS 24A.240[1]).

Action commenced by filing claim on form provided by clerk of division where defendant or his agent resides or is doing business. (KRS 24A.260). (For service on nonresident defendants, see category 5 Civil Actions and Procedure, topic 5.20 Process, subhead Long Arm Statute.) Upon filing of claim, court sets time for hearing on date not less than 20 nor more than 40 days after service of process and clerk institutes process by sending notice as authorized by statute or procedural rule. (KRS 24A.280[2]). See category 5 Civil Actions and Procedure, topic 5.20 Process. Continuances granted only in interests of fairness and justice. (KRS 24A.280[3]). Counterclaims stating facts showing claim arising out of same subject matter as plaintiff's claim and within jurisdictional limits of division heard with plaintiff's claim. (KRS 24A.290). No other formal pleadings necessary and no pretrial discovery allowed. (KRS 24A.300). Action removed to regular docket of district court if counterclaim is filed which exceeds jurisdiction of small claims division, or if defendant entitled to jury trial claims right to jury, or if court deems action too complex for simplified procedures. (KRS 24A.310). All claims in division are tried to court without jury (KRS 24A.320) and hearing and disposition of matters is informal (KRS 24A.330). Appeal from judgment of division lies to circuit court in judicial circuit where division is located. (KRS 24A.340).

6.02 LEGISLATURE:

Bicameral legislature meets in regular sessions annually. Session may last for no more than 60 legislative days in even numbered years and for no more than 30 legislative days in odd numbered years. (Ky. Const. §§ 36 and 42).

Special or Extraordinary Sessions.

Governor may call special sessions limited to subjects identified by governor in proclamation. (Ky. Const. § 80).

Initiative.

No provision for.

Referendum allowed with respect to legislation classifying personal property for ad valorem taxation at a rate lower than applies to real estate. (Ky. Const. § 171).

Lobbyists.

Lobbying defined in KRS 6.611(26). Legislative agents, i.e., lobbyists, and their employees required to register with Kentucky Legislative Ethics Commission by KRS 6.807. Legislative ethics regulated by KRS 6.601 to 6.829. Executive agency lobbying and registration regulated by KRS 11A.201 to 11A.246.

6.03 REPORTS:

Official Reports.

Volumes of reported decisions are named and cover periods, as follows:

Hughes, one volume, 1785-1801; Sneed, one volume, 1801-1805; Hardin, one volume, 1805-1808; Bibb, four volumes, 1808-1817; A. K. Marshall, three volumes, 1817-1821; Littell, five volumes, 1821-1824; Littell's Selected Cases, one volume, 1795-1821; T. B. Monroe, seven volumes, 1824-1828; J. J. Marshall, seven volumes, 1828-1832; Dana, nine volumes, 1832-1840; Ben Monroe, 18 volumes, 1840-1858; Metcalf, four volumes, 1858-1863; Duvall, two volumes, 1863-1865; Bush, 14 volumes, 1865-1879; Kentucky Reports, cited Ky., since 1879. Official Ky. Reports and advance sheets were discontinued in 1951, with volume 314.

Unofficial Reports. —Kentucky Law Reporter, in 32 volumes reported all decisions of Kentucky Court of Appeals and Superior Court (which no longer exists) from 1880 to 1908.

Kentucky Opinions, in 13 volumes, contains decisions of court of appeals not officially reported, from 1864 to 1886.

Decisions of Kentucky Court of Appeals and Kentucky Supreme Court from June, 1886 to date are reported in Southwestern Reporter and in separately bound Kentucky Decisions (West Pub. Co.).

Digests.

Kentucky Digest (West Pub. Co.) covers all reported Kentucky cases.

6.04 STATUTES:

Official compilation of Kentucky Revised Statutes is supplemented with periodic replacement volumes and annual pocket supplements. Lexis Law Publishing has been designated publisher of the official compilation, designated “Michie's”, under supervision of Legislative Research Commission.

An unofficial edition of Kentucky Revised Statutes, with supplements, is published by West Group under name “Baldwin”.

Session laws published by Legislative Research Commission as Kentucky Acts. Kentucky Rules of Civil Procedure and Rules of Criminal Procedure promulgated by Supreme Court, with amendments, are published with Kentucky Revised Statutes and in separate volumes by Michie's and by Baldwin.

Uniform acts which have been adopted are: Anatomical Gift (promulgated 1968; adopted 1970); Arbitration (1955, 1984); Athlete Agents (2000, 2003); Attendance of Witnesses From Without A State in Criminal Proceedings, Act To Secure (1936, 1952); Bus. Corp., Revised (1984, 1988); Certification of Questions of Law (1967, 1978); Child Custody Jurisdiction and Enforcement (1997, 2004); Commercial Code (1951, 1960, 1990, 2000); Conservation Easement (1981, 1988); Controlled Substances (1970, 1972); Criminal Extradition (1936, 1960); Disclaimer of Transfers by Will, Intestacy or Appointment (1974, 1978); Disclaimer of Transfers Under Nontestamentary Instruments (1978, 1980); Disposition of Community Property Rights at Death (1971, 1974); †Division of Income for Tax Purposes (1957, 1966, 1985); †Durable Power of Attorney (1972, 1979); Electronic Transactions (1999, 2000); Emergency Volunteer Health Practitioners (2006, 2007); Enforcement of Foreign Judgments, Revised (1964, 1990); †Interstate Compromise of Death Taxes (1943, 1960); Interstate Family Support (1996, 1998); Limited Partnership (2001, 2006); Management of Institutional Funds (1972, 1976); †Marriage and Divorce (1970, 1972); †Motor Vehicle Accident Reparations (1972, 1974); †Nonprobate transfers on Death (1991, 1998); Partnership (1997, 2002); Paternity (1960, 1964); Photographic Copies of Business and Public Records as Evidence (1949, 1952); Principal and Income, Revised (1997, 2004); Recognition of Acknowledgments (1968, 1970); Rendition of Prisoners as Witnesses in Criminal Proceedings (1957, 1976); Residential Landlord and Tenant (1972, 1974, 1984, available for adoption by units of local government only); †Rules of Evidence (1974, 1992); †Securities (1956, 1961, 1972); Simultaneous Death (1993, 1998); Testamentary Additions to Trusts (1991, 1998); TOD Security Registration (1989, 1998); Trade Secrets (1979, 1990); Transfers to Minors (1983, 1986); Trustees' Powers (1964, 1976); †Veterans' Guardianship, Revised (1942).

†Adopted with significant variations or modifications. See appropriate topics as to Acts within scope of Digests volume.

For text of Uniform Acts falling within the scope of the Martindale-Hubbell Law Digests see Uniform and Model Acts section.

6.05 UNIFORM LAWS:

See topic 6.04 Statutes.

7 CRIMINAL LAW

7.00A BAIL:

See topic 7.01 Criminal Law.

7.01 CRIMINAL LAW:

Principal criminal laws of Commonwealth found in penal code in KRS cs. 500 to 534, and in sections of Unified Juvenile Code, KRS cs. 600 to 645. These laws are supplemented by specific prohibitions in KRS cs. 431 to 441 and concluding sections of other KRS Chapters, such as KRS 189.990 to 189.933 which provide penalties for violation of regulatory provisions previously set forth in KRS c. 189, traffic regulations. Most matters of procedure governed by separate Rules of Criminal Procedure (RCr.) and sections of Unified Juvenile Code.

All offenses may be prosecuted by indictment and felonies must be so prosecuted. (Ky. Const. § 12). All offenses, except those required by law to be prosecuted by indictment, may be prosecuted by information, complaint or uniform citation. (RCr. 6.02).

Indictment is found by grand jury, presented to court in presence of grand jury, and warrant or summons issued thereon. (RCr. 5.20, 6.52).

Bail.

All prisoners shall be bailable upon sufficient security, except in cases of capital offenses when proof is evident or presumption of guilt great; habeas corpus shall not be suspended except during rebellion, invasion or when public safety requires. (Ky. Const. § 16). Procedures for bail before and after conviction pending appeal provided in RCr. 4.00 to 4.58. Commercial bail bond business is prohibited. (KRS 431.510).

Interstate Compact for Supervision of Parolees and Probationers.

KRS 439.560 in effect until later of July 1, 2001 or enactment of Interstate Compact for Adult Offender Supervision by no less than 35 states. (KRS 439.561; 439.562).

Amended Uniform Criminal Extradition Act (1936) in effect. (KRS 440.150 to 440.420).

Uniform Act to Secure Attendance of Witnesses from Without State in Criminal Proceedings (1936) in effect. (KRS 421.230 to 421.270).

8 DEBTOR AND CREDITOR

8.01 ASSIGNMENTS:

Uniform Commercial Code adopted, and it governs assignments within its scope. (KRS 355.9-101 et seq.). See category 3 Business Regulation and Commerce, topic 3.09 Commercial Code.

All bonds, bills or notes for money or property are assignable. (KRS 371.040). Choses in action have been held assignable, such as claims to fund in court (231 Ky. 298, 21 S.W.2d 457), claims of insurance companies, by way of subrogation, to value of property destroyed by tort (218 F. 315) and claims for value of property wrongfully taken by defendant's tort (139 Ky. 402, 58 S.W. 987). Unliquidated claims for personal injuries due to defendant's tort have been held not assignable either at law or in equity. (228 Ky. 679, 15 S.W.2d 461). Once claim is liquidated, it is assignable by subrogation. (517 S.W.2d 737).

Suit on assigned claims other than on instruments covered by Uniform Commercial Code, may be brought in name of assignee only, subject to personal defenses against obligee or intermediate assignor that accrued prior to obligor's receipt of notice. (KRS 371.040). Suits on assigned claims other than in cases governed by Uniform Commercial Code or KRS 371.040 must be brought in name of assignor for use and benefit of assignee, or assignor must be made party defendant or both assignor and assignee must be joined in suit on assigned claim. (231 Ky. 298, 21 S.W.2d 457). If note is nonnegotiable, due diligence in prosecution of maker is necessary in order to hold assignor and maker must be prosecuted to insolvency at first term of court after maturity of note. (113 Ky. 147, 67 S.W. 260). Suit by assignee against assignor must state amount paid by assignee to assignor and recovery limited to that amount, KRS 371.050, but principle not applicable to suit by assignee against obligor. (239 Ky. 813, 40 S.W.2d 322).

Instrument Transferring Title.

No particular form of written instrument is required. No writing is necessary (281 Ky. 779, 136 S.W.2d 1083; 69 Ky. 687) except in case of: (1) Assignments between husband and wife (KRS 404.020); (2) assignments of wages, see subhead Assignment of Wages, infra; (3) assignments covered by Uniform Commercial Code; (4) assignments of trademarks (KRS 365.583); and (5) assignments of notes secured by recorded instruments (KRS 382.290).

Assignment by endorsement of obligations to pay money or like obligations is sufficient to pass title between parties. (KRS 371.040).

Recording is not required except: (1) In case of transfer of personal property between husband and wife (KRS 404.020); (2) assignments of trademarks (KRS 365.583); and (3) where notes secured by recorded instrument are assigned (KRS 382.290). Assignment of recorded liens may be made by assignor personally noting assignment on recorded instrument in clerk's office which is to be attested by clerk or by recordable instrument which sets forth date and brief description of note, name and address of assignee, and deed book and page of instrument wherein lien or mortgage is recorded and complies with clerk's indexing system. (KRS 382.290; 382.335; 382.430). Filing required where assignment covered by Uniform Commercial Code.

Notice.

No notice to debtor or obligor is required for validity of assignment. Giving of notice of assignment of nonnegotiable bonds, bills or notes may affect ability of nonconsumer obligor to assert defenses against original obligee against assignee. See KRS 371.040 and 355.9-403. Consumer obligor's defenses may not be so affected. See category 3 Business Regulation and Commerce, topic 3.12 Consumer Protection, subhead Holder in Due Course.

Assignment between husband and wife is not valid as to third persons, unless in writing, acknowledged and recorded as in case of chattel mortgages. (KRS 404.020; 205 Ky. 450, 266 S.W. 43). This applies to tangibles and intangibles. (285 Ky. 125, 147 S.W.2d 67).

Assignment of Wages.

No assignment of wages to be earned or paid in future where consideration is less than $200 is valid unless contract is in writing stating terms, date of maturity of debt, and full name and address of assignee, or if assignee is nonresident, name and address of some person in Kentucky upon whom process may be served. Assignment is not valid except as to fixed or definite amount of wages earned or to be earned within 90 days from date of instrument, and must be assented to by employer to be valid against him. National and state banks, trust companies, and credit unions are exempt from foregoing provisions. (KRS 371.110 to 371.150).

Person licensed to engage in small loan business and taking assignment of future wages as security may not collect from borrower's employer, at any one time, more than 10% of amount then owing to borrower by employer. (KRS 286.4-570).

8.02 ATTACHMENT:

Actions in Which Allowed.

General attachment may be had, where grounds therefor exist, in any action for recovery of money. (KRS 425.301). Special provisions govern procedure for prejudgment attachment or garnishment of earnings. (See topic 8.09 Garnishment, subhead Earnings.) Procedures for writ of possession may be employed to recover property from defendant where grounds therefor exist. (See topic 8.18A Writ of Possession.)

Courts Which May Issue Writ.

Writs may be issued from circuit court or district court which has jurisdiction over subject matter of claim for money. (KRS 425.301).

In Whose Favor Writ May Issue.

Attachment remedy is available to any plaintiff, including nonresident and foreign corporation.

Against Whom Writ May Issue.

Property of any defendant in civil action is subject to attachment, unless exempted by statute. (See topic 8.06 Exemptions.) Writ may issue against any person holding property of defendant (KRS 425.316), as for example funds due governmental employees (KRS 427.130).

Claims on Which Writ May Issue.

Claim must be for recovery of money. It is not necessary that claim sued on should have accrued or become payable in Kentucky if court otherwise has jurisdiction.

Before debt or liability on contract becomes due, equitable action may be brought for indemnity, and attachment against defendant's property may be obtained by court order on grounds similar to those hereinafter stated and after bond given. (KRS 425.306).

Attachment may also be issued as security for satisfaction of recorded judgment in action for recovery of money due on contract, judgment, or award, if defendant has no property in this state subject to execution or not enough property to satisfy plaintiff's demand, and collection of demand will be endangered by delay in obtaining judgment, execution and return of no property found. (KRS 425.301[2]).

Limitations Upon Right to Attach.

Attention is called to limitations imposed by following laws: Upon right to attach goods covered by negotiable documents unless such documents are impounded by court (KRS 355.7-602); and securities transferable in manner set forth in Uniform Commercial Code (KRS 355.8-104).

Grounds of attachment, other than stated above, are that defendant, or one or more of several defendants: (1) Is foreign corporation or nonresident of state; (2) has been absent from state for four months; (3) has departed from state with intent to defraud his creditors; (4) has left county of his residence to avoid service of summons; (5) so conceals himself that summons cannot be served upon him; (6) is about to remove or has removed his property, or material part thereof, out of this state, not leaving enough therein to satisfy plaintiff's claim, or claims of said defendant's creditors; (7) has sold, conveyed, or otherwise disposed of his property, or suffered or permitted it to be sold, with fraudulent intent to cheat, hinder, or delay his creditors; or (8) is about to sell, convey, or otherwise dispose of his property with such intent. But attachment may not be granted on sole ground that defendant is foreign corporation or nonresident of this state except in action on debt or demand arising on contract or judgment or award. (KRS 425.301; 154 Ky. 162, 156 S.W. 1079).

Proceedings to Obtain.

Person seeking prejudgment attachment must file written motion for order under oath and set forth nature of plaintiff's claim, that it is just, sum plaintiff believes he ought to recover, and existence of any ground for issuance set forth in KRS 425.301 or 425.306. (KRS 425.307). Order may issue ex parte by judge, commissioner, or other officer appointed by court for these purposes if plaintiff shows by affidavit that great and irreparable injury will result if issuance of order delayed until hearing held and posts bond with one or more sufficient sureties. (KRS 425.308; 425.309). Otherwise plaintiff must deliver written demand, along with copy of complaint, motion, and summons, to debtor, or send them by registered or certified mail, return receipt requested, to debtor's last known residence not less than seven nor more than 60 days before order sought. Demand must give debtor seven days to petition court for hearing or pay claim in full and must state that unless hearing requested or claim paid, order will be sought to subject debtor's property to payment of claim. Compliance with this procedure must be proved by affidavit. (KRS 425.301[3]).

Attachment Bond.

Must be in amount not less than double amount of plaintiff's claim and be executed by one or more sufficient sureties. (KRS 425.309). Surety not required on bond posted by any domestic bank, savings and loan institution, or member of farm credit system as defined in 12 U.S.C. § 2002. (KRS 425.001).

Levy.

Statutes provide no procedure for levy of order of attachment. General practice follows procedure for levy of writ of execution and garnishment. See topics 8.05 Executions, subhead Levy; and 8.09 Garnishment, subhead Proceedings to Obtain.

Indemnity.

Bond required of plaintiff to obtain writ of attachment covers damages sustained by defendant which are proximately caused by operation of levy of writ of attachment. (KRS 425.309).

Lien and Priorities.

Orders of attachment against earnings have priority according to date of service on employer. (KRS 425.506[2]). Former statute setting priorities between different attachments on other property has been repealed and no corresponding new statute has been enacted. Rule appears to be that priorities determined by date of levy upon property unless several deliveries made to same officer and his deputies in which case priority governed by dates of delivery to officer and deputies. (45 Ky. 414).

Notice Required to Preserve Lien of Attachment.

To preserve lien of attachments upon real estate of defendants affected thereby, memorandum giving style and nature of case, amount of attachment, names of parties, and description of real estate attached, must be filed in clerk's office of county in which land is located. (KRS 382.440-382.470; 345 F. Supp. 342).

Release of Property.

Defendant may dissolve attachment by posting bond with sufficient surety equal to plaintiff's claim. (KRS 425.309[2]).

Vacation or Modification.

Defendant may file motion for order quashing attachment and is entitled to immediate hearing. (KRS 425.302).

Sale.

Statutes provide no procedure for sale of attached property. General practice follows procedure for sale of property subject to execution. See topic 8.05 Executions, subhead Sale for comparable procedures with respect to executions.

Third Party Claims.

Statutes do not provide procedures for third party claims. See topic 8.05 Executions, subhead Claims of Third Persons for comparable procedures with respect to executions.

8.03 [RESERVED]

8.04 CREDITORS' SUITS:

General principles of equity apply to creditors' suits, subject to extension of such principles: (1) By KRS 426.381, which authorizes proceeding in equity to enforce, by attachment without bond, judgment upon which there has been execution issued and returned and property, if any, found is insufficient to satisfy judgment; and (2) by KRS 378.060 to 378.100 which constitute preferential transfer in contemplation of insolvency as assignment of all property of debtor for benefit of all creditors under jurisdiction of circuit court. See also topics 8.08 Fraudulent Sales and Conveyances, Garnishment; category 13 Estates and Trusts, topic 13.08 Executors and Administrators.

8.05 EXECUTIONS:

Writs of execution may be issued upon any judgment rendered by court of record and not barred by limitation. (KRS 426.010; 426.035).

Kinds of execution are: (1) Fieri facias or writ of execution upon personalty and realty (KRS 426.020 and CR 69.03); (2) judicial sale of mortgaged real property, see category 20 Mortgages, topic 20.04 Mortgages of Real Property, subhead Enforcement; (3) post judgment attachment (KRS 426.010 and CR 69.02); (4) post judgment garnishment (KRS 425.501 and CR 69.02); and (5) venditioni exponas on sale of property by sheriff or other person (KRS 426.440 and CR 70). Statute preserves all other appropriate writs of execution allowable by ancient practice of chancery courts (KRS 426.430), except body execution, which is abolished. See subhead Body Execution, infra.

Exemptions.

See topic 8.06 Exemptions.

Time for Issuance.

Execution may issue at any time within 15 years after judgment (KRS 413.090), except that no execution may be issued on any judgment until after ten days from its rendition, unless judgment sets forth that execution may issue forthwith. (KRS 426.030). Execution upon surety required within seven years. (KRS 413.220). As to execution upon decedent's estate, see category 13 Estates and Trusts, topic 13.08 Executors and Administrators, subhead Presentation of Claims.

Stay.

Except in certain cases, such as judgments enforcing lien or judgments against lawyer, agent, or collecting officer for money collected and withheld, and certain other cases specified by law, execution may be replevied for three months, at any time before sale, by defendant giving to officer obligation to plaintiff, with good security for amount thereof, including interest, costs, and half commissions. If replevin bond is not paid at maturity, execution may issue against estate of defendant and surety, upon which no security can be taken, and sale must be for cash. No other stay of execution is provided by law. Similar bond to stay execution of judgment may be executed in clerk's office, before execution issues, for debt, interest, and costs. (KRS 426.450 to 426.470).

Lien.

Ordinary writ of execution (fieri facias) is not a lien upon either personalty or realty of the execution defendant except from time it is placed in hands of proper officer for execution. (KRS 426.120). In order to preserve such lien as against subsequent purchasers, lessees, and encumbrancers of defendant's real estate without notice, memorandum thereof, giving necessary details, must be filed in county clerk's office of county in which land is located. This applies also to executions issued by United States courts. (KRS 382.440 to 382.470). Final judgment acts as lien on realty upon filing notice of judgment lien with county clerk stating: court entering judgment; civil action number; and amount of judgment, including interest, court costs, and attorney fees. (KRS 426.720[1]). Copy of notice of judgment lien to be served on defendant, which shall include text of KRS 427.060 and also meet requirements of KRS 426.720(3). For judgment lien, see category 5 Civil Actions and Procedure, topic 5.15 Judgments.

Levy.

Levying officer must make return to court which specifies: (1) Execution satisfied; (2) no property found; (3) property sold; or (4) property not sold for lack of bidders. (KRS 426.040). Special provisions are made as to executions levied on livestock (KRS 426.310) or on property jointly owned by defendant and another (KRS 426.680).

Officer holding execution must levy on sufficient property to make amount of execution, and sell first personalty (not exempt) and next land to raise amount of execution. (KRS 426.130). Sale must be on terms of three months time, and purchaser must execute bond with good surety, to be approved by the officer, bearing interest from date of sale. (KRS 426.490; 426.705).

Return.

All executions are returnable within 30 days after levy but in no event more than 60 days after issue. (KRS 426.040).

When execution issues from court of another county, sheriff must report any levy thereof upon land for record in circuit court clerk's office of his county. (KRS 426.110).

Priorities.

Executions issued against same person take precedence in order in which they come into hands of officer. (KRS 70.370; 426.120).

Claims of Third Persons.

Sale under execution of real or personal property on which bona fide encumbrance created prior to execution exists gives to purchaser no title to property but mere lien thereon, subject to encumbrance, for purchase price under execution sale with 10% per annum interest from date of execution sale. Such lien is enforceable in equity, and execution defendant may redeem property by payment of original encumbrance and discharge of purchaser's lien. (KRS 426.290).

Joint owner may not be deprived of property levied on except for purpose of inventory and appraisal. Execution creditor has lien on property enforceable in equity and, upon affidavit that creditor believes property is about to be removed from county, sold, or disposed of, court may order officer to possess property unless forthcoming bond executed. (KRS 426.680).

Satisfaction.

See subheads Levy, supra; Sale, infra.

Sale.

Any interest in land, legal or equitable, vested or contingent, in possession, reversion, or remainder, absolute or defeasible, may be taken and sold under execution. (KRS 426.190). Personal property is to be levied on and sold prior to levy on and sale of real property. (KRS 426.130).

Officer making sale of land under execution must sell at court house door of county in which land lies. He can sell only so much land as will satisfy execution. Before making sale, he must advertise time and place thereof, by written notice, describing land, posted at court house door and in three other public places in vicinity of land to be sold, for 15 days next preceding sale and by newspaper notice if required by KRS 426.560. (KRS 426.200). Defendant who has interest in several tracts of land can designate tract to be sold. (KRS 426.210). Sheriff will convey title of land to purchaser if land not redeemed and redemption period has expired. (KRS 426.250). Purchaser may file motion to obtain possession of land. (KRS 426.260).

Personal estate may be sold at or near place of levy, ten days after levy thereon, provided time and place of sale and description of property be first advertised by posting written or printed notices ten days preceding at three of most public places in vicinity of place of sale and by newspaper notice if required by KRS 426.560. (KRS 426.160).

All public sales of any kind of property, appraised value of which is $100 or more, when sold under execution, judgment, or decree, must, unless otherwise agreed by parties thereto, be advertised in newspaper of bona fide circulation (paid subscriptions) published in county of such sale at least once a week for three consecutive weeks next preceding day of sale; provided that in counties where there is daily newspaper, publication of such notice of sale for three consecutive days (excluding Sunday) next preceding day of sale is sufficient. Advertisement must state time, place, and terms of sale and describe property to be sold. (KRS 426.560).

Redemption.

Land sold under execution must be appraised before sale by disinterested intelligent householders of county appointed by officer making sale and if it does not bring two-thirds of such appraised value, execution defendant has right to redeem it within one year from sale by paying purchase price at execution sale with 10% per annum interest thereon. (KRS 426.200). Upon occurrence of sale for less than two-thirds appraised value, judgment debtor entitled to remain in possession until right of redemption expires and purchaser is entitled to deed and possession at that time. (KRS 426.220 to 426.240).

Such right of redemption may itself be sold under execution. (KRS 426.240).

Mortgage and Other Sales Distinguishable.

Real estate sold under judgment or decretal sale for debt other than on execution must in like manner be appraised before sale and is likewise subject to redemption upon substantially same terms with like right to sell right of redemption. (KRS 426.520 to 426.540).

There is no right of redemption of personal property sold under execution or decretal sale. Purchaser at sale of land pursuant to judgment, other than execution, for less than two-thirds appraised value shall receive immediate writ of possession and deed containing lien in favor of defendant reflecting his right to redeem during year. (KRS 426.530).

Supplementary Proceedings.

After return of “no property found”: (1) Execution plaintiff may bring equitable action based on such return, in which attachment may be issued without affidavit or bond and made writ of garnishment. Full disclosure by garnishee and execution defendant may be compelled and court may compel surrender of any property discovered by appropriate writ or process of contempt (KRS 426.381); (2) execution plaintiff, by amended and supplemental petition in same action, may have judgment redocketed and join with judgment debtor any person believed to be indebted to him or to hold money or property for him. Thereupon case is transferred to equity and court may enforce full discovery and subject to judgment any property discovered (KRS 426.381); (3) execution plaintiff may file petition in equity to subject to judgment any real estate to which judgment defendant has legal or equitable title, even though property is in adverse possession of another, who must be made defendant (KRS 372.070); (4) Court may enforce surrender of property, money, or securities therefor discovered during action or during enforcement of judgment proceedings and may use its contempt power to enforce surrender thereof from defendant (KRS 426.384). Garnishees must appear and disclose sums owing to defendant and upon failure to do so may be proceeded against as in contempt. (KRS 425.511).

Judgment plaintiff may also file in office of clerk of court which rendered judgment affidavit showing date of judgment, amount due thereon, and that a named garnishee is indebted to judgment defendant or holds property belonging to him. Thereupon, plaintiff may obtain writ of garnishment without bond and proceed as in case of garnishment before judgment. (KRS 425.501). See topic 8.09 Garnishment.

Revivor of Execution.

Death of defendant after sale of his property under execution does not call for revivor. It must be conveyed as if defendant were living. Levy of execution, under which sale has not taken place, is not discharged by defendant's death. It is merely suspended thereby until revived as in case of proceedings taken to revive judgments. (KRS 426.555).

Death of one defendant does not prevent execution against a surviving defendant. (KRS 426.553).

Death of judgment plaintiff does not require same proceedings for revivor of execution as in case of death of judgment defendant. Affidavit will suffice. (KRS 426.551; 426.552).

As to corresponding provisions in case of decretal sales, compare KRS 426.550.

Body execution (capias ad satisfaciendum) abolished (Acts 1976, c. 91, § 46) but contempt powers of court may be sought against defendant refusing to surrender property. (KRS 426.384).

8.06 EXEMPTIONS:

Personal Property.

Following personal property of individual debtor resident in Kentucky is exempt from execution, attachment, garnishment, distress, or fee bill except for maintenance of minor children:

household furnishings, jewelry, personal clothing and ornaments not to exceed $3,000; tools, equipment, and livestock, including poultry, of person engaged in farming not to exceed $3,000; one motor vehicle and its necessary accessories including one spare tire not exceeding $2,500; professionally prescribed health aids of debtor or dependent of debtor (KRS 427.010[1]); earnings, see subhead Earnings, infra (KRS 427.010[2]); tools necessary in trade for individual debtor not exceeding $300 in value and one motor vehicle not exceeding $2,500 in value and its accessories of mechanic or other service or repair artisan are similarly exempt, (KRS 427.030); professional library, office equipment, instruments, furnishings not exceeding $1,000 in value, and one motor vehicle not exceeding $2,500 in value and accessories of minister, attorney, physician, surgeon, chiropractor, veterinarian, or dentist are similarly exempt (KRS 427.040). Additional exemptions from execution or other process include: benefits payable by any assessment, cooperative life or casualty insurance company or by any fraternal benefit society (KRS 427.110); police and firefighters' pension fund in cities of first, second, or third classes, with exception of child support obligations (KRS 427.120; 427.125); award made under crime victim's reparation law; payment not to exceed $7,500 on account of personal bodily injury of debtor or individual of whom debtor is dependent but awards for pain and suffering or compensation for actual pecuniary loss not included within this exemption; retirement allowances in accumulated contributions accrued under Kentucky state employees' retirement system or Kentucky teachers' retirement system; right or interest in qualified individual retirement account, annuity, deferred compensation account, pension, profit-sharing, stock bonus, or other retirement plan which qualifies for deferral of income tax until date benefits are distributed to extent of amounts contributed more than 120 days before bankruptcy and not subject to court order for maintenance or support (KRS 427.150[2]; 61.690; 161.700); public assistance grants for aid to families with dependent children, elderly, blind, or disabled (KRS 205.220); unemployment compensation rights, with exception of child support obligations (KRS 341.470); and workers' compensation claims and payments with exception of child support obligation pursuant to KRS 403.212 (KRS 342.180). Following additional property is exempt to extent reasonably necessary for support of debtor and debtor's dependents: money or property constituting awards for alimony, support, or maintenance; payment on account of wrongful death of individual of whom debtor was dependent; and payment in compensation of loss of future earnings of debtor or individual of whom debtor is or was dependent. (KRS 427.150[1] and [2][b] and [d]). Debtor who has filed for bankruptcy under provisions of Federal Bankruptcy Code entitled to additional general exemption not to exceed $1,000 to be applied toward any property in bankruptcy estate. (KRS 427.160).

Real Property.

In addition to exempt personalty, there is exempt from sale under execution, attachment, or judgment individual debtor's aggregate interest, not to exceed $5,000 in value, in real or personal property used by debtor as principal residence or in burial plot for debtor or dependent. Exemption does not apply if debt or liability existed prior to purchase of property or erection of improvements thereon. (KRS 427.060).

Federal Bankruptcy Code Exemptions Allowed.

Residents in bankruptcy cases authorized to avail themselves of exemptions specified under 11 U.S.C. § 522(d). (KRS 427.170; 2009 Ky. LEXIS 146). Such exemptions not otherwise available to debtors in Kentucky.

Substitution.

There is no provision giving a debtor who does not possess articles specifically exempted right to hold money or other property exempt in lieu thereof.

Debts Against Which Exemption Not Allowed.

Husband not entitled to exemption as against decree awarding alimony (240 S.W.2d 609), nor to executions, attachments, or garnishments issued for collection of maintenance for minor children (KRS 427.045). No exemption against debts of public officers to state, arising through defalcation (187 Ky. 260, 218 S.W. 740); no exemption against landlord's lien on growing crop for money or supplies furnished toward raising crop (KRS 383.110); state has specific lien on property for taxes (KRS 134.420).

Waiver of Exemption.

Personal property exemption may not be waived in advance. (73 Ky. 156). Real property exemption cannot be waived except in formal writing. (KRS 427.100).

Necessity of Claiming.

Burden of proof on debtor to prove specific property is subject to exemption. (175 Ky. 513, 194 S.W. 545; KRS 425.501).

Earnings.

Maximum amount of any aggregate disposable earnings, as defined in KRS 427.005 to include wages, salary, commissions, bonus, etc. as reduced by any amounts required by law to be withheld, which may be subjected to garnishment, may not exceed lesser of 25% of disposable earnings for week or amount by which disposable earnings for week exceed 30 times current minimum hourly wage under Fair Labor Standards Act of 1938. (KRS 427.010[2]).

Restriction does not apply to amounts due under any order of court for support of any person, under any order of any bankruptcy court pursuant to c. 13 of Bankruptcy Code, or under any debt due for any state or federal tax. (KRS 427.010[3]).

Effect of Exemptions Under Foreign Law.

Exemptions provided by law of state where wages earned and payable apply to all garnishments served in Kentucky and debtor may plead them except where personal service effected in Kentucky, where defendant was bona fide resident of Kentucky when subject debt arose, or where defendant was bona fide resident of Kentucky when cause of action arose. (KRS 427.050).

See topic 8.09 Garnishment.

Special exemptions include: certain insurance benefits (KRS 427.110); police and firefighter's pension funds in cities of first, second, third, and fourth classes, before or after payment to beneficiary, with exception of child support obligations (KRS 427.120); public assistance grants for aid to families with dependent children, elderly, blind or disabled (KRS 205.220); growing crops, in certain cases (KRS 426.170); retirement funds in teachers' retirement system, with exception of child support obligations (KRS 161.700); unemployment compensation rights, with exception of child support obligations (KRS 341.470); workmen's compensation claims and payments, with exception of child support obligation pursuant to KRS 403.212 (KRS 342.180).

Homestead Exemption.

See topic 8.10 Homesteads.

Uniform Exemptions Act not adopted.

8.07 FORECLOSURE:

See topic 8.13 Liens; category 20 Mortgages, topic 20.04 Mortgages of Real Property.

8.08 FRAUDULENT SALES AND CONVEYANCES:

Uniform Fraudulent Conveyance Act not adopted.

Lack of Valuable Consideration.

Every gift, conveyance, assignment, or transfer made by debtor of or upon any of his estate without valuable consideration therefor is void as to all his then existing liabilities, but is not on that account alone void as to creditors whose debts or demands are thereafter contracted, nor as to purchasers with notice of voluntary alienation or charge (KRS 378.020); and though it be adjudged void as to prior creditor, it is not therefore deemed void as to such subsequent creditors or purchasers (KRS 378.020; 217 Ky. 164, 289 S.W. 213).

It makes no difference under statute that debtor making gift of his property may have ample estate outside of Kentucky that could be subjected to payment of his debt. (203 Ky. 127, 261 S.W. 868). Nor does fact that gift is to debtor's wife and amounts only to reasonable provision for her out of his estate affect rights of existing creditors. (166 Ky. 61, 178 S.W. 1146).

Intent to Hinder, Delay, or Defraud.

Every gift, conveyance, assignment, or transfer of or charge upon a debtor's estate made by him with intent to delay, hinder, or defraud creditors, purchasers, or other persons, and every bond or other evidence of debt given or action commenced or judgment suffered with like intent, is void as against such creditors, purchasers, and other persons. This provision does not affect the title of purchaser for valuable consideration unless it appears that he had notice of fraudulent intent of his immediate grantor or of fraud rendering void title of such grantor. (KRS 378.010).

Transfers to hinder or evade collection of taxes also condemned. Payment of full consideration by transferee is defense against seizure. (KRS 131.550).

Pretended Loans of Personalty.

Where any loan of personal property is pretended to have been made to any person with whom (or those claiming under him) possession has remained for five years, or where any reservation or limitation by way of condition, reversion, remainder, or otherwise, is pretended to have been made in alienation of such property so possessed, absolute right is deemed to be with possession in favor of purchaser without notice, or any creditor of person so remaining in possession, unless written evidence of loan, reservation, or limitation be duly recorded in county where person resides, before possession is taken, or unless it is contained in properly recorded will. (KRS 378.050).

Transfers Operating as Assignments for Benefit of Creditors.

Any sale, mortgage, assignment, act, or device resorted to by debtor, in contemplation of insolvency or with design to prefer one creditor over another, operates as assignment and transfer of all property of debtor and inures to benefit of all creditors. (KRS 378.060).

Transfers Between Husband and Wife.

See category 14 Family, topic 14.09 Husband and Wife.

Remedy of Aggrieved Person.

When any real property has been fraudulently conveyed, transferred, or mortgaged by a debtor, any party aggrieved thereby may, without waiting to reduce his claim to judgment and return of “No property found,” file petition in equity against parties to such fraudulent transfer or conveyance or mortgage, or their representatives or heirs, alleging facts which show their right of action, and alleging such fraud or facts constituting it, and describing property and seeking to subject it. When such petition is filed, lis pendens is thereby created upon property so described, and suit progresses and is determined as other suits in equity and as though it had been brought upon return of “No property found,” as required prior to enactment of this statute. (KRS 378.030).

Lis Pendens.

To prevail as against subsequent purchasers, lessees, or encumbrancers of such real estate for value and without notice, plaintiff must file lis pendens statement in county clerk’s office in which such real estate is located, giving description of real estate and reference to action, and name of person whose right, title or interest, therein is involved or affected. Where real estate consists of tracts lying in different counties, separate notice must be filed in each county, as to tract lying in that county. (KRS 382.440).

Sequestration of Estate.

Detailed provisions are made by KRS 378.060 to 378.090 for sequestering estate of debtor, including fraudulent or preferential transfers thereof, and distributing same among creditors generally, subject to preferences in distribution prescribed by KRS 378.090.

By KRS 378.080, writ of ne exeat may be granted in this case.

Bulk Sales.

Art. 6 of Uniform Commercial Code repealed in 1992. No other statutory provision.

8.09 GARNISHMENT:

Statutes govern remedy whereby creditor may reach property of debtor in possession of third party. Garnishment recognized as post judgment remedy (KRS 425.501; CR 69.02) but same type of relief available through attachment procedure (KRS 425.301). See topic 8.02 Attachment.

Property Which May Be Reached.

Any property or claim which is subject to attachment or execution is subject to garnishment when held for debtor by another. (KRS 425.501). Special provisions govern procedure for prejudgment garnishment which is treated as form of attachment (see topic 8.02 Attachment), garnishment of wages (see subhead Earnings, infra) and garnishment against security which is transferable matter in manner set forth in KRS 425.126.

Jurisdiction.

Court having jurisdiction to issue execution in particular action has sole jurisdiction to issue garnishment. (58 Ky. 97). Personal jurisdiction over employer is sufficient since employee may claim wages wherever employer may be found. (476 S.W.2d 197).

Proceedings to Obtain.

After entry of final judgment in personam against debtor, judgment creditor may file affidavit signed by him or his agent or attorney in office of clerk of court in which judgment was entered showing date of judgment, amount due thereon, that one or more persons hold property belonging to or are indebted to judgment debtor and obtain order of garnishment to be served upon garnishee, along with $10 processing fee paid by judgment creditor, in accordance with Rules of Civil Procedure. (KRS 425.501). Standard, multi-part form (AOC-150) available from administrative office of courts, 502-573-2350. (Note: In some instances, collection actions may be delayed ten days from date of judgment.)

Answer of Garnishee.

Each garnishee summoned shall appear in person or by affidavit served and filed in manner and at time required for answer under Rules of Civil Procedure disclosing any sums, whether due or not, owed defendant and any property of defendant in control or in possession of garnishee and in case of corporate garnishee, any shares of stock therein held by or for benefit of defendant. If garnishee defaults, court may compel appearance for examination by process of contempt or it may hear proof of debt owing or property held by garnishee and make order in relation thereto as if what is so proved had appeared on examination of garnishee. (KRS 425.511).

Practice.

Garnishee may pay any money owing to defendant by him, not exceeding plaintiff's claim and costs, to officer having in hand order of attachment, or may pay it into court or to such person as court may direct and to that extent garnishee is discharged from liability to defendant, and he is not subjected to costs beyond those caused by his resistance of claim against him, and if he make true disclosure and payment as required by law, he is allowed his costs. (KRS 425.516).

Court may compel payment or delivery of property by garnishee or garnishee may give bond retain possession of property pending final order. (KRS 425.521).

Adverse Claims.

When answer of garnishee shows property claimed belongs to one not party, court must order such claimant brought before it. (56 Ky. 625; 70 Ky. 116). If garnishee fails to disclose adverse claim, he is liable to adverse claimant, notwithstanding judgment against him as garnishee. (62 Ky. 186).

Judgment.

If garnishee fails to make disclosure satisfactory to plaintiff, he may be made defendant in suit by petition or amended petition, and plaintiff may proceed against garnishee in same manner as defendant might proceed in action against garnishee to recover property held or debt owing by garnishee. (KRS 425.526).

Earnings in excess of amount exempt (see topic 8.06 Exemptions) are subject to garnishment. Earnings are defined in KRS 427.005 to include wages, salary, commissions, and bonus.

Salaries or sums due to state, county, school board and city officers and employees and all sums owing to any person by state or any agency or department thereof, or by any county school board, city or county, are subject to attachment or garnishment. (KRS 427.130).

Each order of garnishment of earnings creates lien on all nonexempt earnings earned during pay period in which order served and such succeeding pay periods designated in order. Priority among garnishments is based according to date of service on employer and each inferior order shall take effect as if served at commencement of next succeeding pay period. (KRS 425.506). No employer may discharge any employee by raising of fact that his earnings have been subjected to garnishment for any one indebtedness (KRS 427.140), and fine up to $1,000 and imprisonment up to one year may be imposed for violation of this provision (KRS 427.990).

Exemptions.

See topic 8.06 Exemptions.

8.10 HOMESTEADS:

Debtors in bankruptcy may use federal exemptions of 11 U.S.C. § 522(d). (KRS 427.170).

State homestead exemption is allowed to debtor or dependent of debtor in real or personal property to extent of $5,000 if property used as permanent residence in state but exemption does not apply against debt which existed prior to purchase of property or erection of improvements thereon. (KRS 427.060).

Limitation of value of property which may be held exempt is $5,000, including improvements. (KRS 427.060).

Limitation of Area.

None.

Debts or Liabilities Against Which Exemption Not Available.

Exemption is not available in case of suit brought to enforce lien for purchase money of land claimed or to enforce mortgage thereon given by owner, in which his spouse joins, nor in any case where debt or liability being enforced existed prior to purchase of land or erection of improvements thereon. (KRS 427.060; 163 Ky. 502, 173 S.W. 1108).

Designation of Homestead.

No particular form of words in a deed is necessary to create a homestead and there is no requirement of filing or recording a claim of homestead. But specific provisions are made for valuation and allotment of homestead. (KRS 427.080 to 427.100).

Claim of Exemption.

Where debtor inherits land, a reasonable time is allowed him to establish and claim homestead therein. (230 Ky. 696, 20 S.W.2d 734).

Homestead claim may be asserted even after sale under execution, where sheriff did not observe statutory requirements. (255 Ky. 221, 72 S.W.2d 1037).

Waiver, Alienation or Encumbrance of Exemption.

No express relinquishment of the homestead is necessary in deed or mortgage of the property, if words are used which purport to convey the entire estate; but no mortgage, release or waiver of homestead exemption is valid unless in writing subscribed by husband and wife, and acknowledged and recorded in the same manner as conveyances of real estate. (KRS 427.100).

It has been held, however, that husband may convey his homestead without his wife joining in deed, subject only to her dower right therein. (117 Ky. 695, 78 S.W. 915).

Loss of Exemption.

Common law applies. Whether unoccupied property has been abandoned as homestead depends on facts. (247 Ky. 105, 56 S.W.2d 710).

Proceeds of sale of homestead are exempt pending intended investment in a new homestead. (229 Ky. 728, 17 S.W.2d 1022).

Sale to pay debts of deceased husband may be made subject to rights of widow and children (KRS 427.070) or if property sought to be sold is in opinion of appraisers worth more than $5,000 and is not divisible without great diminution in value, it may be sold for not less than $5,000 and that amount paid to defendant (KRS 427.090).

Rights of Surviving Spouse and Family.

The homestead is for use of debtor's widow so long as she occupies it as a home, and unmarried infant children have right of joint occupancy. In like manner, wife's homestead is for benefit of surviving husband and her children, under like situation. (KRS 427.070; 230 Ky. 143, 18 S.W.2d 961).

8.11 JUDGMENT NOTES:

See category 3 Business Regulation and Commerce, topic 3.02 Bills and Notes.

8.12 LEVY:

See topics 8.02 Attachment, 8.05 Executions.

8.13 LIENS:

Uniform Commercial Code has been adopted. (KRS 355.1-101 et seq.). See category 3 Business Regulation and Commerce, topic 3.09 Commercial Code.

Agisters and livery stable keepers or persons feeding or grazing cattle for compensation have lien on cattle for one year for reasonable charges for keeping, caring for, feeding and grazing cattle. (KRS 376.400). “Cattle” includes horses, mules, asses, cows, oxen, sheep, hogs or goats of any age or sex. (KRS 446.010[6]).

Aircraft.

Liens on aircraft for storage, repairs or accessories are created exactly as for motor vehicles. (KRS 376.281). See subhead Repairmen, infra.

Architects and landscape architects have lien similar to mechanic's lien on improvements and land for which services performed based on contract with owner or his agent. (KRS 376.075, 323.010[3], 323A.010[3]). See subhead Mechanics' Liens, infra. Provider must file statement in county clerk's office within six months, KRS 376.075(4), and suit within year from date of filing statement to preserve lien. (KRS 376.075[5]). Lien not applicable to public improvement projects but does not displace that lien. See subhead Mechanics' Liens, catchline Public Improvements, infra.

Artisans.

Persons who repair radios, phonographs and other electrical appliances have lien on articles on completion of repair for agreed or reasonable charges for parts, supplies, accessories and labor. Liens may be enforced by action or articles may be sold after 30 day notice to owner. (KRS 376.430). Persons performing work on watches, clocks or jewelry have lien on article for amount due for work. Articles may be sold after 30 day notice to owner if account not paid within six months. (KRS 376.290).

Boats and Watercraft.

Any boat remaining in possession of one who has performed labor, repairs or furnished accessories or supplies may be sold to pay charges which have been due for more than 30 days. Sale procedures are prescribed by statute. (KRS 376.280). Officers or employees, except captain, aboard steamboat or other vessel have lien on vessel, tackle, furnishings and apparel for wages due and said lien has priority over all other debts of owner or other liens; mechanics, trades people have like liens for work and supplies furnished to vessel. (KRS 376.360).

Bondholders.

Statutory mortgage lien exists in favor of all bond and coupon holders for municipal hospitals and appurtenances (KRS 216.140), waterworks and appurtenances (KRS 96.400), and industrial buildings (KRS 103.250) until payment in full of bond principal.

Child Support.

Cabinet for Human Resources has lien or levy for unpaid child support, enforceable against all real and personal property of obligor, if individual has failed to make child support payment in amount equal to support payable for one month and child support has been assigned to Cabinet of Human Resources. (KRS 205.745). Lien or levy is superior to any mortgage or encumbrance created after notice of lien or levy is recorded and lien or levy shall have first priority over any other lien assigned by any other agency, association or corporation. (KRS 205.745).

Cleaners, Launderers and Tailors.

Any person who cleans, presses, glazes, alters or repairs clothing or household goods has lien on articles remaining in possession to secure reasonable or agreed upon charges. If charge is not paid within 90 days article may be sold after notice to customer. (KRS 376.300). Notice must be by registered letter stating time and place of sale mailed 30 days in advance of sale. (KRS 376.300). Persons who store clothes or household goods have similar lien. If charges have not been paid for 12 months, articles may be sold with notice to owner. (KRS 376.310). Notice as required above is registered letter stating time and place of sale and must be mailed 15 days in advance of sale. (KRS 376.320).

Employees.

When property of any business, either by its own act or by operation of law, is assigned for benefit of its creditors or comes to be distributed among them, there is lien on all such property securing wages due employees (excluding chief officer, directors and stockholders), and in case of railroad, there is lien securing claims for materials and supplies furnished for its operation. (KRS 376.150). Such liens are superior to lien of any mortgage or other encumbrance thereafter created, and in case of employees, to extent of wages coming due within six months before event stated, are also superior to any mortgage or encumbrance theretofore created. (KRS 376.160, 376.170 to 376.190).

Environmental Response Costs.

See category 12 Environment, topic 12.01 Environmental Regulation, subhead Solid and Hazardous Waste.

Other Liens.

Frozen food locker plant owner has lien on contents of each locker, compartment or space for payment of locker rental, processing or other charges. Ten days after written notice by certified mail of foreclosure, owner may sell contents of locker for their reasonable value. (KRS 221.100).

Keepers of hotels, inns, boarding house or houses of private entertainment have lien on baggage and personal property owned and brought in by person receiving board, nursing, care or attention of landlord for contract price or reasonable price. (KRS 376.340). Person holding such lien may have district court in county where debt created issue warrant directed to sheriff, constable or town marshal authorizing him to seize property described in affidavit supplied by lienholder. If property has been removed with consent of landlord, lien shall continue no longer than ten days from removal. (KRS 376.350).

Garagemen and others in business of towing or storing motor vehicles have lien for reasonable charges as long as vehicle remains in lienholder's possession. Vehicle may be sold after 45 days to pay for charges after ten days' notice by certified mail of time and place of sale. This lien is subject to prior recorded liens. (KRS 376.275).

Levees.

Lien exists for costs of construction, enlargement, repair, and maintenance of any levee against land within territory protected by levee, superior to all other liens except tax liens. (KRS 266.180).

Lottery Lien.

State lottery corporation holds lien on all funds and other personal and real property of participating retailer to secure remittance of lottery proceeds due to corporation. Notice of lien filed with clerk of county of retailer's business or residence. Once filed, lien is of equal rank with state tax liens and has same priority over other obligations except security interests for advances within 45 days after filing of corporation's notice. (KRS 154A.420).

Mine Reclamation.

Lien for reclamation expenses attaches to mined land to secure costs incurred for restoration, reclamation, or abatement of adverse effects of past coal mining. Special provisions for creation and enforcement of lien are set out by statute. (KRS 350.575).

Motor Vehicles, Local Government Lien.

Motor vehicle taxes including liens for license taxes, excise taxes, motor fuel taxes or other motor vehicular taxes may be filed by Department of Vehicle Regulation with county clerk. (KRS 281.602; KRS 134.420).

Local government shall possess lien on motor vehicle impounded pursuant to KRS 82.625 for all fines, penalties, towing, handling, storage charges and fees imposed thereon. Such lien is superior to all other liens on vehicle. (KRS 82.625).

Professional engineers and professional land surveyors have lien under same statute as architects and landscape architects. (KRS 376.075, 322.010[4, 9 and 10]). See subhead Architects and Landscape Architects, supra.

Real estate brokers have lien under same statute as architects and landscape architects, see subhead Architects and Landscape Architects, supra. Broker must have direct agreement with purchaser of newly constructed residential real estate to pay broker's fee. Broker must have listing or representative agreement with owner or owner's agent and broker must establish that his or his sales associate's services resulted in procuring buyer or lessee under terms of agreement or other terms satisfactory to owner or his agent. (KRS 376.075, 324.010[1], 322.010).

Real Estate of Public Assistance Recipient.

KRS 98.013 provides for lien in favor of any first class city on real estate owned or thereafter acquired by any recipient of general assistance through city's department of public welfare. Lien includes all amounts paid recipient. Director of public welfare must record said lien in office of county clerk in county where property is located in order for it to be effectual against any mortgage, purchase or judgment creditor without actual notice. Lien is not enforceable while real estate is occupied by surviving spouse or until she remarries, or is occupied by dependent child, provided no action is brought to settle estate.

Repairmen.

Automobile, aircraft and boat repairmen have prior lien for repairs, accessories or supplies furnished. (384 S.W.2d 302). Lien is not lost by removal of automobile or aircraft from repairmen's possession if statement similar to that for mechanic's lien is filed within six months. (*Query*, as to loss of lien on boats where possession relinquished.) When charges have been due over 30 days, vehicle, aircraft or boat may be sold, after advertisement. (KRS 376.270; 376.280; 376.281). *Caveat:* Motor vehicle sale and registration transfer pursuant to these statutes has been held unconstitutional by one court (378 F.Supp. 491) but in light of more recent authority statute is considered constitutional. (See 436 U.S. 149; slip op. C 80-0548 [W.D. Ky. Feb. 11, 1981]; OAG 84-154.) Equipment, machine, machinery and motor repairmen have possessory lien for charges, which is lost upon relinquishing possession, unless lien statement is filed in office of county clerk in county of owner's residence within three months. (KRS 376.440).

Road Construction by Public Road Districts.

Assessment made by board of directors of public road district against each owner of property abutting upon road improvement shall become lien on property of such owner and shall be prior and superior to all other liens except those of taxes. (KRS 184.130).

Sanitation District—Bondholder's Lien.

Statutory mortgage lien exists upon all property of sanitation district in favor of holders of sanitation district bonds, to secure payment of bonds and coupons. (KRS 220.420). Bonds are issued under KRS 220.380.

Savings and loan association lien applies on every share of stock of savings and loan association which is not fully paid up to ultimate value fixed by articles of incorporation and for such other charges as may be lawfully incurred thereon. (KRS 289.301). By-laws of association may prescribe manner of enforcing lien.

Service Fee of Stallion, Jack or Bull.

Lien for payment of services of stallion, jack or bull attaches to offspring for one year after birth. (KRS 376.420).

Unemployment Compensation—Lien on Property of Employer.

Lien is created in favor of human resources cabinet upon all property, real and personal, then owned or subsequently acquired, of any employer from whom contributions, interest or penalties are or may be due under KRS 341.260 of Unemployment Compensation Act. (KRS 341.310). Lien on any property of employer also exists for any unpaid contributions which has same force and effect of mechanics' lien (see subhead Mechanics' Liens, infra), and lien on gas, oil or other mineral leasehold (KRS 376.140), by reason of labor performed (KRS 341.315).

Vendor's liens upon lands sold and not fully paid for are recognized as originating in equitable principles regardless of express reservation in deed. They are not created but are rather restricted by KRS 382.070, which requires that in order to preserve such lien as against bona fide creditors and purchasers deed must state what part of consideration remains unpaid. This statute has no effect as to parties or volunteers claiming under them. (103 Ky. 710, 46 S.W. 219; 233 Ky. 673, 26 S.W. 551).

Veterinarians.

Any licensed veterinarian who performs professional services for animal by contract with or by written consent of owner or agent has lien for reasonable value of services provided. (KRS 376.470). Lien dissolved unless statement filed in county clerk's office within six months as provided in KRS 376.475 and enforced within one year as provided in KRS 376.110, 376.120 and 376.130. Veterinarians may also sell any unclaimed animal after ten days to pay for charges after notification to owner by certified mail of time and place of sale. (KRS 257.105).

Liens attach to water craft for unpaid wages of officers and employees, except captain, and for costs of work done and materials furnished to such craft by mechanics and materialmen. (KRS 376.360).

Workers' Compensation.

All rights of compensation by Workers' Compensation Act, KRS c. 342, shall have same preference or priority for whole thereof against assets of employer as is allowed by law for any unpaid wages for labor. (KRS 342.175, 342.340[38 § 1A]).).

Liens and other remedies for sellers of goods are provided by Sales Article of Uniform Commercial Code. (KRS 355.2-101 et seq.).

See also topics 8.02 Attachment, Executions, Pledges; categories 3 Business Regulation and Commerce, topics Commercial Code, Factors, Warehousemen; Civil Actions and Procedure, topic Judgments; Legal Profession, topic Attorneys and Counselors; Mortgages, topics Chattel Mortgages, Mortgages of Real Property; Property, topics Dower, Landlord and Tenant; Taxation, topic Property (Ad Valorem) Taxes, subhead Lien.

Federal Liens.

Act similar to original Uniform Federal Tax Lien Registration Act adopted with variations (KRS 382.480 to 382.500) provide that proper place for filing notices of tax liens, and other liens such as in favor of Environmental Protection Agency, on real and personal property are to be filed in office of county clerk of each county within which property subject to lien located, that clerks shall record such notices in federal tax lien notice file or encumbrance book, and that discharge of lien is filed in same office. Revised Uniform Federal Tax Lien Registration Act and Uniform Federal Lien Registration Act not adopted.

Defrauding secured creditors by destroying, removing, concealing, transferring, or encumbering property subject to security interest to hinder enforcement of interest is felony if collateral exceeds $100 in value; if less, misdemeanor. (KRS 517.060).

Waiver, Loss or Extinguishment.

Governed by common law principles, except where statute creating specific lien imposes conditions by which lien may be lost, waived or extinguished. Real property lienholder must release lien in county clerk's office within 30 days from date of satisfaction. Penalties up to $500 per day may accrue, plus attorneys' fees, for failure of holder to comply. (KRS 382.365).

Enforcement.

Liens, including mortgages, are enforced generally by judicial foreclosure in equity. In Jefferson County (Louisville), circuit court local rule requires notice to be sent to owners in residential foreclosures advising of right to mandatory mediation with lender. Strict foreclosure of real estate is forbidden, but mortgagee may take possession for account of mortgagor after default and abandonment. (KRS 426.525). In certain cases affecting personal property, such as security agreements or deeds of trust, vendor or trustee may sell under express power in written instrument. (160 Ky. 557, 169 S.W. 986; 293 Ky. 637, 169 S.W.2d 820). See Uniform Commercial Code. Otherwise as to lands, see KRS 381.190.

Mechanics' Liens.

A general law (KRS 376.010 to 376.130) gives mechanics and materialmen, upon conditions therein stated, lien, dating from commencement of work, upon improvements and interest of contracting owner in land for work done and material furnished. Where work is done by contract with lessee for term of years, in making additions or improvements to leased estate, lien claimant may remove such additions or improvements if he can do so without material injury to previous improvements. (KRS 376.040; 19 K.L.R. 386). Subcontractors and laborers also have liens under this statute not to exceed, in aggregate, original contract price agreed on between owner and original contractor. Provision is made for protection of purchasers and mortgagees. By KRS 376.140, person furnishing work, supplies, machinery or other things of value to lessee of oil, gas or other mineral lease, for use in improving leasehold, is given lien on lessee's entire interest to secure payment.

Provision is made by KRS 376.010 for protection of owners and lienholders or other persons in interest in land by requiring materialman or mechanic who has not contracted directly with owner or his agent to give notice to owner or his authorized agent, within following time limits after last item of work or material is furnished: 75 days for claims less than $1,000; 120 days for claims over $1,000; 75 days for claims of any amount for improvements made to either single or double family dwelling or appurtenances unless owner-occupant has paid another for such improvements prior to receipt of such notice. Provision for single or double family dwelling applies only to construction pursuant to contract. (KRS 376.010[4]). Lien waived by mechanic or materialman who has not contracted directly with owner, or owner-occupant, if such written notice not given within such time periods.

Lien may be enforced by a suit in equity by any one holding such lien, and all others may file and prove their claims without pleading. Lien is lost unless a prescribed statement under oath of claim of lien is filed in county clerk's office within six months from time claimant ceases work or last furnishes material, copy of statement is sent by regular mail to owner within seven days of filing with county clerk's office, and suit is brought thereon within 12 months after filing such claim, with extension of time for suit in case of debtor's death within 12-month period, for six months from such death. Lien statement shall include name, address of claimant, or if claimant is corporation, name and address of process agent. If no name or address is included, service in action involving real property shall be on person signing statement. (KRS 376.080; 376.090. See 184 Ky. 244, 211 S.W. 765; 201 Ky. 45, 255 S.W. 846; 211 Ky. 536, 277 S.W. 836; 211 Ky. 809, 278 S.W. 105; 213 Ky. 741, 281 S.W. 988, and later cases).

Owner of legal or equitable interest in land or improvements who contracts for labor or materials for improvement thereof but who sells or mortgages same before time expires for perfecting liens is required to pay, out of proceeds of sale or mortgage, all amounts owing to lien holders, or if proceeds insufficient, to pay all holders pro rata. (KRS 376.060). Contractors, architects and others who receive proceeds of sale or mortgage from owner required to pay lien holders either in full, or if proceeds insufficient, pro rata. (KRS 376.070). Penal provisions apply to any person violating statutes. (KRS 376.990[2]). Any mortgage taken to secure loan made for purpose of erecting, improving or adding to building must state such facts. (KRS 376.050[1]). Anyone willfully misappropriating or misapplying such loan proceeds is guilty of criminal offense. (KRS 376.050[2]; 376.990[1]).

Prior real estate mortgage, recorded without knowledge of party's intent to file mechanic's lien statement, takes precedence over subsequent mechanic's lien. (394 S.W.2d 930).

Release – Mechanic’s lien must be released within 30 days of satisfaction. (KRS 382.365[1]).

Public Improvements.

Persons who perform or furnish labor, materials or supplies, including rental equipment, for construction or improvement of any canal, railroad, bridge, public highway or other public improvement in Kentucky, by contract with owner or by subcontract thereunder, have a lien on all property and franchises of owner, except as to property owned by state, subdivision or agency thereof or by any city, county, urban-county government, or charter county government in which event lien attaches to funds due to contractor from owner of property improved. Such lien is for full contract price of labor, materials and supplies furnished, and is superior to all other liens thereafter created, provided (1) that person intending to perform or furnish labor, materials or supplies must file in county clerk's office written statement setting forth what he has contracted to furnish and price thereof, (2) within 60 days after last day of last month in which any labor was performed or materials or supplies furnished, claimant must file in county clerk's office statement, verified by affidavit, setting forth amount for which and project on which lien is claimed, and attested copy must be delivered to owner. (KRS 376.195; 376.210 to 376.230).

Proper county clerk's office for filing statement in case of bridge, highway or other property of state, county or city, charter county, urban county, consolidated government is in county in which owner's seat of government is located. In other cases, required statements must be filed in each county where claim accrues. (KRS 376.230).

Mechanics' liens on public improvements are enforced by proper proceedings in equity, to which other lienholders shall be made parties. (KRS 376.260). If court action is filed to enforce lien on public improvements and owner of property is state, subdivision or agency thereof, or city, county, urban-county, or charter county government, that owner shall be given notice of court action to enforce lien, but that owner shall not be required to respond to or participate in court action. (KRS 376.260). All suits for enforcement of mechanics' liens on public improvements shall be instituted in circuit court of county in which is located property on which improvement is made, except where property is owned by public university in which event, suit shall be instituted in circuit court of county in which is located main campus of public university. (KRS 376.250).

Contractors on public works are almost invariably required to give surety bonds for compliance with their contracts. In specific instances (e.g., county road contracts and contracts of certain classes of cities), a surety bond is required by law, but there is no statute of general application on the subject. After filing of lien, contractors may post bond in double amount of lien claimed at any time prior to judgment enforcing lien to discharge lien and lien claimant may join obligors on bond in enforcement action. (KRS 376.212).

Attachment Lien.

See topic 8.02 Attachment.

Attorney's Lien.

See category 18 Legal Profession, topic 18.01 Attorneys and Counselors.

Collateral Security.

See topic 8.14 Pledges.

Execution Lien.

See topic 8.05 Executions.

Judgment Lien.

See category 5 Civil Actions and Procedure, topic 5.15 Judgments.

Landlord's Lien.

See category 21 Property, topic 21.10 Landlord and Tenant.

Liens on Exempt Property.

See topic 8.06 Exemptions.

Liens on Homestead.

See topic 8.10 Homesteads.

Real Estate Mortgage Lien.

See category 20 Mortgages, topic 20.04 Mortgages of Real Property.

Tax Lien.

See category 22 Taxation, topic 22.15 Property Taxes, subhead Lien.

8.14 [RESERVED]

8.15 PLEDGES:

Pledges are among the security devices governed by Uniform Commercial Code. (KRS 355.9). See category 3 Business Regulation and Commerce, topic 3.09 Commercial Code.

Attachment.

Any interest of pledgor or pledgee in things pledged is subject to attachment. Pledgee is responsible only for reasonable care in preservation of thing pledged. Pledgee of note must use ordinary diligence to collect it at maturity.

Trust Receipts.

Governed by Uniform Commercial Code. (KRS 355.9).

8.16 RECEIVERS:

In general conduct of receivership, such as issuing receiver's certificates, etc., court is governed by general equitable principles.

Jurisdiction and Proceedings.

Circuit court, in exercise of its equitable jurisdiction, may sequester property of defendant by appointing receiver to take charge thereof, subject to regulations and conditions prescribed by statute as to receivership generally, by KRS 381.420 as to actions against tenant committing waste, and by KRS 378.080 as to preferential transfers by insolvent debtor.

Court may appoint receiver, on motion of any party to action who shows that he has, or probably has, right to, lien upon or interest in any property or fund involved in action, that is in danger of being lost, removed or materially injured. Court may order and coerce delivery of such property or fund to its receiver. (KRS 425.600).

Order appointing or refusing to appoint receiver is deemed final order for purposes of appeal to appellate court. (KRS 425.600).

Eligibility and Competency.

Excepting personal representatives, guardians, curators and committees of persons of unsound mind, neither party to action nor his attorney, nor any person interested therein, may be appointed receiver. (KRS 31A.080[2]).

Qualification.

Receiver, before acting, must take oath to perform duties faithfully, and must give bond therefor in such sum and to such person as the court shall direct. (KRS 31A.080; 31A.020; 31A.030).

Powers and Duties.

Receiver has, under control of court, power to bring and defend actions; to take and keep possession of property; to receive rents, collect debts, and generally to do such acts with respect to property as court may authorize. (KRS 425.600[2]).

Discharge.

Regularly appointed receivers under KRS c. 31A hold office for four years, unless sooner removed at pleasure of court. (KRS 31A.080[1] and 31A.010).

As to receivership to preserve assets of going corporation, see KRS 271B.14-310 through 271B.14-330. As to receivership of corporation that has become insolvent or has its capital impaired or has violated law under which it was organized, see category 2 Business Organizations, topic 2.03 Corporations.

Consumer Protection Matters.

See category 3 Business Regulation and Commerce, topic 3.12 Consumer Protection.

8.17 [RESERVED]

8.18 SUPPLEMENTARY PROCEEDINGS:

See topic 8.05 Executions.

8.18A WRIT OF POSSESSION:

Common law action of replevin has been superceded by statutory writ of possession procedures under KRS c. 425 (194 Ky. 648, 240 S.W. 363), by secured party's self-help remedy under Uniform Commercial Code (see category 3 Business Regulation and Commerce, topic 3.09 Commercial Code), and by statutory attachment and garnishment procedures (see category 8 Debtor and Creditor, topics Attachment and Garnishment). Discussion under this topic describes writ of possession practice.

Proceedings.

Plaintiff may upon filing complaint or at any time prior to judgment in action move court for writ of possession. Motion shall be verified or supported by affidavit and shall set forth following: (1) Showing of basis of claim and that plaintiff is entitled to possession and if based on written instrument, copy of same must be attached to; (2) showing that it is wrongfully detained by defendant, how possession was acquired by defendant and reason for detention to plaintiff's best knowledge and belief; (3) description of property and statement of its value; (4) statement of location of property and if property is located in private place, creditable showing of probable cause based upon credible and reliable information supporting belief property is located therein; (5) that it has not been taken for tax, fine or seized under execution or if so seized it is exempt from such seizure. (KRS 425.011).

Plaintiff must make demand in writing at or after time suit is filed by delivering such demand and copy of complaint, motion and summons to defendant or by sending them to defendant by registered or certified mail, return receipt requested, to last known place of residence at least seven and not more than 60 days before such order of possession is sought. Demand must inform defendant that he has seven days in which to petition court for hearing, or in which amount claimed in complaint must be paid in full, and that unless hearing is set or amount paid, writ of possession will issue. Demand must identify court in which suit has been filed, grounds therefor, date of demand, amount claimed, and name and address of plaintiff and his attorney. Affidavit must be filed evidencing compliance with this subsection prior to issuance of writ. Circuit court clerk will issue writ of possession upon compliance with this statute unless defendant has requested hearing. (KRS 425.012[2]).

Writ of possession shall contain statutory requirements (KRS 425.046), and if there is request by defendant or intervening party for hearing, writ shall then issue if plaintiff establishes before judicial officer probable validity of claim and files bond for double value of property (KRS 425.031; 425.036; 425.111). Domestic banks do not have to post bond. (KRS 425.001).

If immediate possession or order restraining defendant from transferring, encumbering, concealing, or impairing value of property is desired, ex parte writ of possession is available if affidavit shows great or irreparable injury as described in KRS 425.076, or plaintiff may at or after filing of motion apply for temporary restraining order which shall be issued if there is showing that there is immediate danger that property will be transferred, concealed or moved or substantially impaired in value. (KRS 425.066; 425.071).

Officer executing writ must retain property for ten days and if defendant does not retake possession, shall deliver same to plaintiff. (KRS 425.101).

Levy.

Officer executing writ of possession shall take possession of property and remove same to place of safe keeping, or upon order of court or officer appointed by court, install keeper for property. (KRS 425.091).

Repossession.

During ten days property is held by officer, defendant may regain possession by executing bond in amount equal to plaintiff's bond or if no judicial determination, then for value of property as stated in plaintiff's complaint. (KRS 425.116).

All bonds shall have sufficient surety and either party may take exception to other's sureties. Plaintiff must take exception within ten days after defendant files bond and defendant must take exception within ten days after writ of possession is executed. (KRS 425.121).

Claims of Third Persons.

Third person claiming property may prevent plaintiff from taking possession or regaining possession in same manner as defendant. (KRS 425.116).

Judgment or Order.

Judgment may include damages for taking and withholding of property. (89 Ky. 388, 12 S.W. 772). Ultimate right to possession must abide result of suit, but if either plaintiff or defendant wrongfully converts or disposes of property so that it cannot be reached, person so wrongfully converting is liable to wronged party for value of property thus wrongfully converted.

Sale.

Property taken under writ of possession may be sold by order of court during pendency of action if, by reason of its perishable nature or cost of keeping it, sale would be beneficial to parties. (KRS 425.101[2]).

9 DISPUTE RESOLUTION

9.01 ALTERNATIVE DISPUTE RESOLUTION:

Constitution allows General Assembly to enact laws concerning arbitration. (Const. § 250).

Uniform Arbitration Act adopted. See topic 9.02 Arbitration and Award. Common law and voluntary mediation procedures also in use.

Mandatory Dispute Resolution.

Labor Relations.

Secretary of Labor has duty to investigate and mediate labor disputes. (KRS 336.151). Secretary is authorized to create boards to which disputes between employers and employees may be submitted for mediation. (KRS 336.140). Information received by mediator relating to labor dispute is confidential. (KRS 336.153). Prior to representing or agreeing to represent party to any labor/management negotiation or arbitration, any individual, partnership, association or corporation who represents, advises or acts as consultant or spokesman for any party to dispute must notify Secretary of Labor of that intent and be certified. (KRS 336.156). Secretary maintains roster of qualified arbitrators and insures that persons listed on roster comply with rules and regulations pertaining to arbitration, ethical standards and procedures. (KRS 336.1661 to 336.1663).

Motor Vehicle Warranties.

Manufacturers of motor vehicles required to offer arbitration (informal dispute resolution procedures) to buyers to settle disputes relating to unsatisfactory warranty repairs, malfunctions and other problems arising during first two years or 25,000 miles of ownership. (KRS 367.860 to 367.870). Buyers of new motor vehicles required to pursue arbitration of warranty claims arising in first 12,000 miles or one year before seeking judicial relief. (KRS 367.842[4]). Any mechanism established in compliance with 16 C.F.R. Part 703 satisfies Kentucky requirements so long as it provides each party right to oral hearing. (KRS 367.867).

Miscellaneous.

Provision in motor vehicle liability insurance policy agreeing to arbitrate all future disputes not binding. (KRS 304.20-050). In divorce proceedings, court, at request of either party shall, or sua sponte may, order conciliation conference. (KRS 403.170). Disputes involving fee in excess of $500 of fire departments not included within regular city fire departments shall be submitted to arbitration. (KRS 75.450[2][c]). Under Interstate Compact on Juveniles, Commission has power and duty to provide for dispute resolution among compacting states, make rules for both mediation and non-binding dispute resolution, attempt to resolve issues arising under compact, and impose dispute resolution as penalty for any party defaulting on rules. (KRS 615.010).

Voluntary Dispute Resolution.

Statutory provisions authorizing include:

Workers Compensation Act allows for binding mediations and arbitration which may provide that decision of arbiter is subject to review by administrative law judge as long as alternative dispute resolution is part of bargained agreement and does not diminish rights of any parties under Workers Compensation Law. (KRS 342.277).

Discrimination in Housing complaints under investigation by Commission on Human Rights may, by agreement, be submitted to binding arbitration of dispute. Arbitration may award any appropriate relief including monetary relief. (KRS 344.605).

Nonprofit Kentucky Insurance Arbitration Association provides mechanism for reimbursement among reparations obligors of losses paid as basic or added reparation benefits for motor vehicle torts. (KRS 304.39-290).

Legal negligence claims of $10,000 or less may be resolved by submission to binding arbitration. (SCR 3.800). Fee disputes between attorney and client and fee disputes between attorneys may be resolved by submission to binding arbitration. (SCR 3.810). Mediation and arbitration procedures to resolve disputes between attorneys by submission to mediation, binding arbitration or nonbinding arbitration established in SCR 3.815.

Solid waste management conflicts associated with municipal solid waste facilities, including those concerning host community compensation, collection and disposal fees and other issues related to municipal solid waste management facility siting and operations but excluding issues related to permit conditions imposed by Energy and Environment Cabinet may be resolved by negotiation, mediation or arbitration. (KRS 147A.031).

Department of Mines and Minerals provides for mediation at option of oil and gas well operator when well operator has been unable to reach agreement with surface owners concerning proposed use of land. (KRS 353.5901).

Manufactured Home Certification and Licensure Board may utilize dispute resolution prior to formal hearings of those in violation of Board's regulations. Dispute resolution shall be nonbinding. (2004 Ky. Acts 74).

Kentucky Labor Cabinet may use mediation to effectuate settlement between parties to collective bargaining agreement when, after 30 days of negotiations for such agreement, parties have deadlocked and petitioned Cabinet to initiate fact-finding. (2004 Ky. Acts 100).

Kentucky Board of Licensure for Private Investigators may utilize arbitration to resolve disciplinary matters. (2004 Ky. Acts 185).

Circuit courts are encouraged to refer disputes to mediation. (KRS 454.011). Supreme Court has adopted Model Mediation Rules (Order 99-1) pursuant to SCR 1.010 for voluntary adoption by circuit courts. Effective Apr. 15, 2005, Supreme Court adopted guidelines for mediators. (Administrative Procedures of the Court of Justice, AP Part XII, Order 2005-02). Jefferson Circuit (Rule 14), Fayette Circuit (Rule 29) and Jefferson District Courts have mediation rules (Rule 702).

Foreclosure defendants in Jefferson County (Louisville) are entitled by local rule to demand mediation with plaintiff/mortgagee prior to sale.

Federal Courts in Kentucky have authorized alternative dispute resolution and set guidelines for mediation. (Joint Local Rule 16.2 of U.S. District Courts for Eastern and Western Districts of Kentucky).

Mediation Prohibited.

Statutes prohibiting include:

Courts issuing emergency protective orders for reasons of immediate and present danger of violence or abuse shall not refer parties to mediation for resolution of issues alleged in petition for emergency protective order. (KRS 403.740[2]).

9.02 ARBITRATION AND AWARD:

Uniform Arbitration Act adopted and effective for agreements to arbitrate made subsequent to July 12, 1984. (KRS 417.045 to 417.240). Agreements to arbitrate disputes entered into prior to July 13, 1984 are governed by common law principles. (KRS 417.230).

Deviations from Uniform Act (see Uniform and Model Acts, Part VI).—§ 1 of Act provides Act does not apply to collective bargaining agreements and other employer-employee agreements and insurance contracts but Act does not invalidate contractual arbitration provisions among insurers, including reinsurers. (KRS 417.050).

§ 7(d), reference is to circuit court. (KRS 417.110[4]).

§ 8(a), certified mail substituted for registered mail. (KRS 417.120[1]).

§ 10, award of attorneys' fees to prevailing party allowed only if provision therefor contained in written agreement submitted to arbitration. (KRS 417.140).

§ 12(c), reference in first clause is to ground 12(a)(1) instead of ground 12(a)(5). (KRS 417.160[3]).

§ 15, omitted.

§ 18, references are to county. (KRS 417.210).

§ 22, omitted.

§ 24, omitted.

See also topic 9.01 Alternative Dispute Resolution.

Mandatory Arbitration.

See topic 9.01 Alternative Dispute Resolution, subhead Mandatory Dispute Resolution, catchline Motor Vehicle Warranties.

10 DOCUMENTS AND RECORDS

10.01 ACKNOWLEDGMENTS:

Uniform Law on Notarial Acts not adopted. Uniform Recognition of Acknowledgments Act, except § 2 thereof, adopted to supplement other provisions. (KRS 423.110; 423.130 to 423.190).

Within State.

County clerk, notary public or deputy of any county clerk may take. (KRS 382.130; 382.250; 423.010). Fees: clerk, $4; notary, not more than 50¢, plus recording, 75¢. (KRS 64.012; 64.300).

Outside State but Within United States.

Judge, clerk or deputy clerk of court; notary public; mayor; Secretary of State; justice of peace; or commissioner authorized to take acknowledgment of deeds. Official seal required. (KRS 423.110; 382.140).

Outside United States.

Any foreign minister, secretary of legation, officer in U.S. consular service, secretary of foreign affairs, notary public or judge or clerk of superior court of nation where taken. (KRS 423.110). Official seal required on deed. (KRS 382.150). Officer of foreign service of U.S., consular agent or other person authorized by regulation of U.S. Department of State to perform notarial acts in place where act is performed. (KRS 423.110).

Persons in or with U.S. Armed Forces.

Any commissioned officer in active service of U.S. Armed Forces may take acknowledgments, affidavits, or depositions of: (a) Members of U.S. Armed Forces, wherever located, (b) merchant seaman serving outside U.S. limits, or (c) persons outside U.S. limits by official U.S. permission, assignment or direction. Certificate showing date of acknowledgment and that person appearing before certifying officer acknowledged instrument is sufficient and officer's official signature is prima facie evidence that person acknowledging is within purview of statute. Acknowledgments so taken previous to enactment of statute are validated. (KRS 384.080; 423.110).

General Requirements as to Taking.

Officer is liable on bond for failure to use reasonable care to identify person acknowledging. Showing that imposter acknowledged instrument creates prima facie case of negligence. (123 Ky. 437, 96 S.W. 801).

General Requirements of Certificate.

Requirement that Kentucky notary's certificate state date of expiration of his commission (KRS 423.010) has been held merely directory (22 K.L.R. 1169, 60 S.W. 186). Official seal of officer taking acknowledgment in Kentucky not required.

Married women acknowledge like other persons; no separate examination required.

Attorneys in Fact.

No special requirements, but form provided. See subhead Forms, infra.

Corporations.

No special requirements, but form provided. See subhead Forms, infra.

Foreign Acknowledgments.

Uniform Recognition of Acknowledgments Act, except § 2 thereof, adopted as supplement to other provisions. See subheads Outside United States and Officers in U.S. Armed Forces, supra.

Effect of Acknowledgment.

Proper acknowledgment or proof entitles deed to be admitted to real property record. (KRS 382.130 et seq.). Notary's or other authorized officer's certificate sufficient for self-authentication. (KRE 902[9]).

Proof by Subscribing Witness.

Deeds not acknowledged by parties before authorized officials, may be admitted to record if executed and acknowledged by parties before two subscribing witnesses, (1) upon proof of such subscribing witnesses of such execution and acknowledgment, or by like proof of one subscribing witness, who proves also attestation of other, or (2) by like proof of two witnesses that both subscribing witnesses are dead and like proof of signature of one of them and of grantor, or (3) by like proof of two witnesses that both subscribing witnesses are out of state, or that one of them is so absent and other is dead, and like proof of signature of one of witnesses and of grantor or (4) on certificate of county clerk in Kentucky or of any notary public that instrument had been acknowledged or proven before him in one of methods above set forth. (KRS 382.130).

Where deed is proven for record by persons other than subscribing witnesses, officer's certificate must state names and addresses of witnesses making proof. (KRS 382.160).

Authentication.

Official character and genuineness of signature of Kentucky notary is by certificate under seal of county clerk in county in which notary is qualified to act. (KRS 423.020). Fee, not more than 50¢, plus recording, 75¢. (KRS 64.300). No special requirements for authentication of official character or genuineness of signature of officer taking acknowledgment outside of Kentucky, but in practice resort is frequently had to authentication as provided by act of Congress or law of official's own state. General authentication requirements are set forth in KRE 901.

Forms.

Words “acknowledged before me” mean: (1) That person acknowledging appeared before person taking acknowledgment, (2) that person acknowledged that he/she executed instrument, (3) that person acknowledging instrument executed it for purposes stated and/or with authority to act in capacity stated, and (4) that person taking acknowledgment either knew or had satisfactory evidence that person acknowledging was person named in instrument or certificate. (KRS 423.150). Following short forms of certificates of acknowledgment are authorized pursuant to KRS 423.160 for use within or outside state.

Forms

For Individual Acting in his Own Right:

STATE OF..........

COUNTY OF..........

The foregoing instrument was acknowledged before me this (date) by (name of person acknowledged).

My Commission expires (for Notary Public).

(Signature of Person Taking Acknowledgment)

(Title or Rank)

(Serial Number, if any)

For a Corporation:

STATE OF..........

COUNTY OF..........

The foregoing instrument was acknowledged before me this (date) by (name of officer or agent, title of officer or agent) of (name of corporation acknowledging) a (state or place of incorporation) corporation, on behalf of the corporation.

My commission expires (for Notary Public).

(Signature of Person Taking Acknowledgment)

(Title or Rank)

(Serial Number, if any)

For Partnership:

STATE OF..........

COUNTY OF..........

The foregoing instrument was acknowledged before me this (date) by (name of acknowledging partner or agent), partner (or agent) on behalf of (name of partnership), a partnership.

My commission expires (for Notary Public).

(Signature of Person Taking Acknowledgment)

(Title or Rank)

(Serial Number, if any)

For Individual Acting as Principal by an Attorney-in-Fact:

STATE OF..........

COUNTY OF..........

The foregoing instrument was acknowledged before me this (date) by (name of attorney in fact) as attorney in fact on behalf of (name of principal).

My commission expires (for Notary Public).

(Signature of Person Taking Acknowledgment)

(Title or Rank)

(Serial Number, if any)

By any Public Officer, Trustee, or Personal Representative:

STATE OF..........

COUNTY OF..........

The foregoing instrument was acknowledged before me this (date) by (name and title of position).

My commission expires (for Notary Public).

(Signature of Person Taking Acknowledgment)

(Title or Rank)

(Serial Number, if any)

Validating Acts.

See KRS 382.230; 207 Ky. 391, 269 S.W. 318; 209 Ky. 806, 273 S.W. 476.

Alternative to Acknowledgment or Proof.

No statutory provision.

10.02 AFFIDAVITS:

Within State.

Following officers authorized to administer oaths and affirm statements of affiant: any examiner, judge, clerk, commissioner, official court reporter and notary public; other persons may be authorized by law for special circumstances. (CR 43.13, 28). Agent or attorney for person may make such affidavit for such person if affiant absent from county, mentally incapable, or physically unable to appear but must state circumstances in affidavit. (CR 43.13[1]). County clerk's fee for same, $5. (KRS 64.012). Notary public's fee, 50¢, plus recording, 75¢. (KRS 64.300).

Outside State but Within United States.

Commissioner appointed by governor of state where taken, person specially commissioned, judge of court, justice of peace, mayor of city, notary public or by person authorized by court order or otherwise under law of Kentucky or of state where taken. (CR 28.02, 43.13[1]).

Persons in or with U. S. Armed Forces.

Before commissioned officers of U. S. Armed Forces as prescribed for acknowledgments. (KRS 384.080). See topic 10.01 Acknowledgments.

General Requirements as to Administration.

See topic 10.01 Acknowledgments, subhead General Requirements as to Taking.

General Requirements of Jurat.

Certificate of officer is proof of time and manner of affidavit being made. (CR 43.13[2]). No proof of officer's commission or qualification is required, except that certificate of Kentucky notary should state when his commission expires (KRS 423.010), but statute held merely directory (22 K.L.R. 1169, 60 S.W. 186).

Affidavit of Agent or Attorney.

Any affidavit which code requires or authorizes party to make may, unless otherwise expressed, be made by his agent or attorney, if he be absent from county or mentally incapable of taking oath, or physically unable to attend before officer. (CR 43.13[1]).

Use.

Affidavit may be used to verify pleading (CR 11); to prove service of summons, notice or other process in action (CR 5.03); to obtain provisional remedy (such as arrest and bail [CR 4.30], injunction [CR 65.04], etc.), or summary judgment (CR 56), or examination of witness (CR 45.05); postponement of proceedings (CR 43.03) or warning order (CR 4.06); or upon motion (CR 6.04); and in certain other exceptional cases allowed by law. It may also be used to prove for record execution and acknowledgment of recordable instruments. (KRS 382.130 and 423.080).

Form.

Declaration must be written statement, subscribed and sworn to before proper officer, whose certificate must be separate and must follow signature of affiant. (CR 43.13). Where affidavits are filed in suits, style of court and case is made caption of affidavit, otherwise state and county in which executed is all that is shown.

A form in general use is as follows:

Form

Affidavit

[Style of proceeding]

or

Commonwealth of Kentucky

County of. . . . .

The affiant, John Doe, first being duly sworn, deposes and says:

1. . . . .

2. . . . ., etc.

Further the affiant sayeth not.

....

(signature)

COMMONWEALTH OF KENTUCKY

COUNTY OF................... } SS

The foregoing instrument was sworn to and acknowledged before me this. . . . . day of. . . . . ., 20. . . . by (name).

My commission expires.......... (for Notary Public)

. . . .

Name and Title of Officer

Alternative to Affidavit.

No statutory provision.

10.03 NOTARIES PUBLIC:

Qualification.

Must be 18 years or older, resident of, or principally employed in, county from which application made, and of good moral character. (KRS 423.010).

Authentication.

See topic 10.01 Acknowledgments, subhead Authentication.

Seal.

To be recorded, instruments acknowledged out of state must be under seal, but certificates on affidavits made in state for use within state need not be certified under seal. See topic 10.01 Acknowledgments.

Powers and Duties.

Notary may administer oaths and take acknowledgments of deeds, mortgages, etc., and has important powers and responsibilities with respect to protest of commercial paper. (KRS 423.010).

Territorial Extent of Powers.

Jurisdiction is limited to county for which appointed, but notary in any county may qualify and act as notary in any other county on compliance with KRS 423.020 and subject to its conditions.

Expiration of Commission.

Certificate must state date of expiration of his commission (KRS 423.010), and ought to show venue of act certified. Failure to state date of expiration of commission is not fatal to instrument or certificate (22 K.L.R. 1169, 60 S.W. 186), nor does failure of certificate to show venue invalidate it (113 F. 443), nor does omission of jurat invalidate affidavit actually signed and sworn to (287 Ky. 814, 155 S.W.2d 223).

Fees.

Not more than following amounts may be charged: attestation, protestation or taking acknowledgment and certifying under seal, 50¢; recording same in book kept for that purpose, 75¢; each notice of protest, 25¢; administering oath and certificate thereon, 20¢. (KRS 64.300).

Commissioners of Deeds.

Commissioners appointed by governor for each state may take acknowledgment or proof of any instrument, except will, if instrument is required by law of this state to be recorded. Commissioners may administer any oath or take any affirmation necessary to discharge of official duties; may take and certify depositions. (KRS 423.070, 423.080).

Officers of U. S. Armed Forces.

See topic 10.01 Acknowledgments.

10.04 RECORDS:

County clerk is officer having charge of records relating to conveyances and encumbrances upon property (various sections of KRS c. 382), wills (KRS 394.300), statutory liens (KRS 376.080; 376.100; 376.110; 376.230), corporations with registered office in county (duplicate of copy filed with Secretary of State, see e.g. KRS 271B.1-200[10]), assumed names of individuals, general partnerships, limited partnerships, business trusts, corporations and limited liability companies doing business in or maintaining registered agent in county (KRS 365.015), UCC financing statements for agricultural liens and fixture filings (KRS 355.9-501) (but note, pursuant to KRS 355.9-401 in effect prior to July 1, 2001, other UCC financing statements as well), records of title to roads, maps etc. (KRS 178.320), records of licenses of grain warehousemen (KRS 359.050), changes of name (KRS 401.040), marriage licenses (KRS 402.230), etc.

Uniform Commercial Code (1962 Official Text) has been adopted (KRS c. 355), with 1972, 1977 and 2000 (effective July 1, 2001) Official Amendments; see category 3 Business Regulation and Commerce, topic 3.09 Commercial Code.

Recordable Instruments.

No deed conveying any title to or interest in land, for longer time than five years, no lease of oil, gas, coal or mineral right for longer time than five years, and no agreement in consideration of marriage is valid against purchaser for valuable consideration without notice, or any creditor, until such document is acknowledged or proved, and lodged for record. (KRS 382.080). No deed or mortgage conveying title to land shall be recorded unless acknowledged or proved according to law, however, if deed or mortgage is not so acknowledged or proved but is ``otherwise lodged for record'', then instrument deemed validly recorded and all interested parties deemed to have constructive notice, including creditors (term “creditors” includes all creditors and not merely those who have acquired liens by legal or equitable proceedings or by voluntary conveyance). (KRS 382.270; 102 Ky. 434, 43 S.W. 205).

Contract for sale of land or any interest therein, or option to buy or offer to sell land or any interest therein, may be recorded when duly acknowledged or proved for record. (KRS 382.090; 382.100).

Copy of document generated and recorded in Kentucky may be recorded in any other Kentucky county as original document, provided document is for use in Kentucky, is certified by official public custodian of document as true, complete and unaltered, and document satisfies all other recording requirements of KRS c. 382. (KRS 382.110[3]).

Recorded mortgage may be amended to correct clerical errors or omitted information by affidavit of amendment prepared by attorney, but amendment may not change any term, dollar amount or interest rate unless signed by mortgagor and secured party; attorney preparing affidavit shall certify that notice of filing has been given to mortgagor by mailing copy of amendment to mortgagor. Subsequent release of mortgage releases amendments to original mortgage. (KRS 382.297).

Party to deed, attorney who prepared deed or other person with personal knowledge may file with county clerk signed affidavit containing name, address and signature of preparer, to correct or supplement information regarding marital status of party to deed or information contained in or absent from acknowledgment, but for no other purpose. (KRS 382.337).

Place of Recording.

Instruments affecting real property must be recorded in county where land, or greater part thereof, is located. (KRS 382.110). *For list of Counties and County Seats see first page for this state in Volume containing Practice Profiles Section.*

Requisites for Recording.

Clerk may not record any deed conveying any interest in real estate equal to or greater than life estate unless it plainly specifies and refers to next immediate source from which grantor derived title, and in referring to former conveyance, states office, book, and page where recorded and date thereof, e.g., (following property description) “being the same property conveyed to the grantors by A. B. by deed dated January 1, 1900, and recorded in the office of the Jefferson County Clerk in Deed Book 500, Page 100.” This requirement does not apply to deeds made by any court officer in his official capacity. (KRS 382.110).

Instruments executed in state may be recorded only when acknowledged or proved as provided in KRS 382.130. (See topic 10.01 Acknowledgments.) Instruments executed out of state to be acknowledged in same manner. (KRS 382.140).

No county clerk may receive or record any instrument not executed or acknowledged prior to July 1, 1962 (other than financing statement filed under Uniform Commercial Code [O.A.G., 62-263]) conveying or granting any interest in or lien upon real or personal property, or relating to organization or dissolution of private corporation, unless instrument bears name and address and signature or facsimile thereof of person who prepared it. (KRS 382.335[1]). No county clerk shall receive or permit recording of any instrument not executed or acknowledged prior to July 1, 1970 which conveys grants, assigns or otherwise disposes of real estate or any interest therein unless such instrument contains mailing address of grantee or assignee. (KRS 382.335[2]). Those provisions do not apply to wills or statutory liens in favor of state (KRS 382.335[3]) and receipt and recordation by clerk without compliance with these provisions shall not prevent such record of filing of instrument from becoming notice as otherwise provided by law, nor impair admissibility of record as evidence (KRS 382.335[5]).

Clerk may not record mortgage or other instrument of conveyance constituting lien for payment of indebtedness unless instrument states county and state and post office address of person or corporation owning such evidence of indebtedness. (KRS 382.430).

See also category 3 Business Regulation and Commerce, topic 3.09 Commercial Code.

Recording Fees.

Base fees for commonly recorded documents follow. Deeds, mortgages, leases, deeds of release, powers of attorney, real property options, lis pendens notices, mechanics liens, federal tax liens and financing statements (assignment, amendment or continuation) $12 plus $3 for each page over three and $4 for each additional reference relating to same instrument. State tax liens $5. Marriage licenses $24. Initial financing statements $24 (includes $12 release fee). (KRS 64.012). If collateral includes Kentucky licensed motor vehicles, fee is $17 for noting lien on certificate of title ($12 for recording and $5 for termination statement). (KRS 186A.190[7]; 64.012).

Taxes on legal processes and instruments, collected by clerk include $4.50 on each marriage license and $4 on each mortgage, security agreement, financing statement, notation of security interest on certificate of title under KRS 186A.190, conveyance of real property, lien or conveyance of coal, oil, gas or other mineral rights/privileges, and power of attorney to convey real or personal property. (KRS 142.010). No tax applies under this section on deeds of release or subsequent assignments of instruments.

In addition to fees in KRS 64.012, county clerk may require prepayment of postage for returning recorded instrument. (KRS 382.240). Postage, if any, to be charged by clerks should be confirmed prior to recordation. All fees and taxes should be confirmed with county clerk's office in advance of filing or recording. Most clerks will not file or record when requested by mail unless exact amount received.

Recording Tax.

See category 22 Taxation, topic 22.15 Property Taxes, subhead Real Estate Conveyance Tax.

Foreign Conveyances or Encumbrances.

Recordable when acknowledged before officer authorized to take acknowledgments outside of Kentucky, and official seal affixed. (See topic 10.01 Acknowledgments.)

Effect of Record.

Certified copies of all instruments legally recorded are prima facie evidence in all courts and tribunals of this state.

Torrens Act.

Not adopted.

Transfer of Decedent's Title.

Where decedent leaves will, its probate in proper district court affords only evidence of transfer of title to real estate required by Kentucky law.

Where decedent does not leave will, persons claiming title to real estate by laws of descent must, before recording any deed to such real estate, file with county clerk to whom such deed is presented for record, affidavit of grantor therein or of any one of heirs at law or next of kin of decedent, or affidavit of two persons resident in Kentucky, each of whom has personal knowledge of facts, setting forth: (1) Name of decedent; (2) date of his death; (3) whether he was married or single, and if married name of surviving spouse; (4) place of decedent's residence at time of death, if known to affiant; (5) that decedent died intestate; (6) names, ages and addresses, so far as known or ascertainable, of all of decedent's heirs at law and next of kin who inherited such real estate, relationship of each to said decedent and interest in real estate inherited by each of them. Such affidavit must be recorded by clerk in record of deeds and indexed in general index of deeds in his office in name of decedent as grantor, and in name of each of such heirs at law or next of kin as grantees, as though such names had occurred in deed of conveyance from deceased to his said heirs at law or next of kin. Clerk is forbidden to receive for record any deed of intestate's real estate by person or persons claiming to have inherited same until such affidavit is presented to him, but law provides that nothing therein shall be construed to invalidate recording as legal notice of any such deed lodged for record prior to filing of such affidavit. Any person willfully or fraudulently making affidavit to any statements which he knows to be false is subject to fine or imprisonment or both, and is also liable to any person injured by making, filing, recording or use of such affidavit. (KRS 382.120; 382.990[2]).

Filing Under Commercial Code.

Kentucky adopted 1962 official version of and 1966, 1972, 1977 and 2000 (effective July 1, 2001) official amendments to U.C.C. Under Revised Article 9, effective July 1, 2001, state of debtor's organization generally governs filing. (KRS 355.9-301, 355.9-307). UCC filings for Kentucky debtors are made in office of Secretary of State (except for security interests in minerals or timber or fixtures if financing statement is filed as fixture filing, in which case property place is clerk of county where related real property is located). (KRS 355.9-501[1]). Mailing address for filing office is: Secretary of State, UCC Branch, P.O. Box 1470, Frankfort, Kentucky 40601-1470. Online filing available for certain filings (see http://sos.ky.gov/business/ucc). Fee for online filing is $5. (KRS 353.9-525[1][c]).

Fees on Filing; Tax.

County clerk's fees: $28 for filing and indexing financing statement includes tax and fee for filing and indexing termination statement (see KRS 64.012); $12 for filing continuation statement, amendment or assignment (KRS 64.012). Secretary of State's fee for filing financing statement by written communication is $10 if two pages or less, $20 if more than two pages. Fee is $5 for filing financing statement if communicated to Secretary of State by medium other than by writing and authorized by filing office rule. (KRS 355.9-525). Fee for issuing certificate pursuant to KRS 355.9-523(4) is $5. (KRS 14.090[1]). Tax of $4 applies to filing of every financing statement or security agreement in county clerk's office. (KRS 142.010). In addition, clerk may require prepayment of postage for returning recorded financing statement or security agreement. (KRS 382.240). These fees include county clerk's charge of up to $1 for each instrument recorded, regardless of whether instrument is returned by mail. Postage, if any, charged by clerks should be confirmed prior to recordation.

Vital Statistics.

Records of births, deaths, marriages, divorces, annulments and adoptions are prepared by local registrars and forwarded periodically for permanent record to Vital Statistics Branch, Cabinet for Health and Family Services in Frankfort, Kentucky. (KRS 213.031; 213.036; 213.066).

Certified copies of records on file with Vital Statistics Branch available upon request for births and deaths. (KRS 213.136). Other records available for research or administrative purposes under certain conditions. (KRS 213.131[4]). Requests for copies of records should be directed to Kentucky Department for Public Health, Vital Statistics Branch, Vital Records, 275 East Main Street 1EA, Frankfort, Kentucky 40621. Ordering by phone, fax and online also available (see http://chfs.ky.gov/dph/vital). Fee for copy of any certificate on record may not exceed $10 (KRS 213.141[1], [2]); no fee charged military service veterans for certificates of birth or death required for certain claims against government (KRS 213.141[4]). Commemorative copy of birth or marriage certificate available from State Registrar for $35. (KRS 213.143). Telephone information concerning availability of records and procedures may be available from (502) 564-4212.

Records of marriages are kept in offices of county clerks which issued licenses. (KRS 402.230). Records of dissolutions of marriage, annulments, etc. contained in final court judgments maintained by clerks of circuit courts entering decrees. (KRS c. 403; 30A.080).

Establishing Birth Record.

Establishing record of birth not recorded at time of occurrence is governed by administrative regulations. (KRS 213.056). In case proof becomes necessary, rules of evidence established by cabinet for human resources apply. (KRS 213.056[1]).

Lis Pendens.

Notice of pendency of action required to be filed in county clerk's office in county where real property located for any action involving interest in real property in order to provide constructive notice to third parties. Notice must include: (i) Number of action; (ii) style of action; (iii) name of person whose interest affected; and (iv) description of real property. (KRS 382.440; 382.450). Certified copy of any matter in reference to bankruptcy should be filed in county clerk's office wherein lands of bankrupt are located and recorded in general deed index in name of bankrupt, as grantor, and trustee or receiver (if any), as grantee. (KRS 382.510).

10.05 SEALS:

Seal or scroll is not necessary to give effect to deed or other writing. Unsealed writings stand on same footing with sealed writings. (KRS 371.020). This statute does not apply to negate any other law requiring state or county seal or seal of court, corporation or notary to any writing.

Scroll may be used by corporation or individual in execution of deed. (36 Ky. 37, 6 Dana 37).

Corporate Seal.

General powers authorize every corporation to have and use corporate seal, KRS 271B.3-020(1), but provide that neither absence nor presence of seal on any writing adds to or detracts from legality or validity of any writing. (KRS 271B.3-020[2]). Absence of corporate seal does not affect entitlement of writing to be filed by Secretary of State. (KRS 271B.1-200[7]).

Effect of Seal.

Fact that instrument is sealed does not preclude impeachment thereof for lack of consideration. (KRS 371.030).

Uniform Commercial Code.

In effect. (KRS c. 355). See KRS 355.2-203 as to seals.

10.06 TORRENS ACT:

See topic 10.04 Records, subhead Torrens Act.

10.07 VITAL STATISTICS:

See topic 10.04 Records.

11 EMPLOYMENT

11.01 EMPLOYER AND EMPLOYEE:

See topic 11.02 Labor Relations.

11.02 LABOR RELATIONS:

Office of Workplace Standards in Labor Cabinet regulates wages, hours, and safety of employees. Office located at 1047 US 127 South, Suite 4, Frankfort, Kentucky 40601. 502-564-3070; http://www.labor.ky.gov.

Hours of Labor.

Persons under 18 may not work more than five hours continuously without 30-minute lunch period. (KRS 339.270). No employee may be required to work more than four hours without ten minute rest period, in addition to lunch period. (KRS 337.365). Reasonable lunch break required not sooner than three hours after beginning of shift nor later than five hours after beginning of shift. (KRS 337.355).

Wages, which as defined includes commissions and earned bonuses, payable to employees, as defined to include all persons permitted to work with limited exceptions, must be paid in legal tender of U.S. or in checks on demand deposit accounts. (KRS 337.010; Const., § 244). Not less than local “prevailing wage”, as determined by Office of Workplace Standards, may be paid on public works costing more than $250,000, adjusted annually. (KRS 337.010; 337.530).

Employers of ten or more persons, who pay by check and make deductions from salaries or wages due employees, must furnish, at time of payment, a statement showing amount and purpose of each deduction made. (KRS 337.070). No employer shall withhold any part of employee's wages except to extent authorized by law, by employee in writing or by employer-employee contracts. (KRS 337.060). Mandatory tip pools prohibited. (KRS 337.065).

Every employer must pay employees as often as semi-monthly all wages or salary earned by such employees to a day not more than 18 days prior to date of payment. No employer may exempt itself from this provision by special contract. (KRS 337.020). Time for payment is 15 days for all employers engaged in mining. (KRS 352.540).

Employees who leave or are discharged must be paid all earned wages on next regular payday or within 14 days of dismissal or leaving, whichever is later. (KRS 337.055). Violation of section renders employer liable for civil penalties up to $1,000 and twice amount withheld. (KRS 337.385; 337.990).

As to assignments of wages, see category 8 Debtor and Creditor, topic 8.01 Assignments.

Wage and hours laws adopt (a) minimum wage rate set out in 29 U.S.C. § 206(a)(1) or (b) wages not less than $5.85 per hour prior to July 1, 2008, $6.55 per hour from July 1, 2008 through June 30, 2009 and $7.25 per hour beginning July 1, 2009. (KRS 337.275). Time and one-half required for all hours over 40 in work week except for retail and hotel and motel employees and those exempted from federal overtime coverage by 29 U.S.C. §§ 213(b)(1), 213(b)(6), 213(b)(10) and 213(b)(17), and except for employees of private nonprofit childcare facilities under KRS

c. 199. (KRS 337.285).

Exemptions from all coverage under statutes provided for: agricultural employees; executives, administrative, supervisory, professional and outside sales personnel; U.S. gov't. employees; domestic servants if only one in household; certified learners, apprentices, workers with disabilities and students; employees of small retail stores, service industries, hotels, motels and restaurants and family employees in all such establishments; baby-sitters and in-home companions employed by third-party employer or agency other than family or household for sick, convalescing, or elderly person; newspaper persons; employees of organized nonprofit camp, religious or nonprofit educational conference center if in operation less than seven months per year; and certain state employees. (KRS 337.010[2][a]).

Office of Workplace Standards given enforcement duties and powers under wage and hour laws (KRS 337.275 to 337.405) and civil penalties provided for violation of various sections of wage and hours statutes (KRS 337.990). Order or decision of Office may be appealed in accordance with KRS c. 13B. (KRS 337.310).

Child Labor.

Children under 14 years of age may not be employed in certain establishments, and during the school term may not be employed at all unless in program supervised and sponsored by child's school district and approved by Department of Education under regulations of Office of Workplace Standards. (KRS 339.220). Children as young as 11 years old may be employed as caddies on public or private golf courses. (KRS 339.225). Certain rigid requirements are made for employment of children between 14 and 18. (KRS 339.230). There are other regulations for other children. (KRS 339.210 to 339.990).

Female Labor.

No provisions.

Discrimination in employment by employers, labor organizations and employment agencies and in apprenticeship programs and in advertisements for employment on basis of race, color, religion, national origin, sex, disability or age over 40 unlawful. (KRS 344.030 to 344.110). Enforcement by Human Rights Commission in coordination with federal agencies. (KRS 344.150 to 344.190). Civil action available, regardless of whether employee files complaint with Human Rights Commission. (KRS 344.450). Specific prohibition of discrimination in payment of wages on basis of sex. (KRS 337.423). Civil rights protection extended to smokers and others who use tobacco products, but individual must comply with any workplace policy concerning smoking. (KRS 344.040).

Discrimination against persons with physical disabilities prohibited; protection extended to any person with AIDS. (KRS 207.130 et seq.). Enforced through administrative proceedings or civil action. (Id.). (With regard to disability discrimination potential conflict exists between KRS 344.010 et seq. and 207.130 et seq.)

Employer may not retaliate or discriminate against employee who files claim for workers' compensation benefits. (KRS 342.197). Enforced through civil action. (Id.).

Employer may not require applicant or employee to waive, arbitrate or otherwise diminish any existing or future claim, right or benefit under Kentucky or federal statutory law. (KRS 336.700).

Labor Unions.

Employees may organize, designate representatives for collective bargaining, strike, engage in peaceful picketing and assemble collectively for peaceful purposes. Neither employers nor employees may engage in unfair acts or resort to violence, intimidation, threats, or coercion. (KRS 336.130). Kentucky has no statewide “right to work” law. Cities cannot enact local “right to work” ordinances. (391 S.W.2d 360).

Labor Disputes.

Secretary of Labor Cabinet has duty to inquire into and endeavor to settle labor disputes (KRS 336.151; 336.010); may create boards to which disputes may be submitted on request (KRS 336.140). Employers, employees, and their representatives have duty to meet and confer to resolve disputes. (KRS 336.152).

Injunctions will lie to restrain violence, personal injury or damage to property after hearing on petition accompanied by affidavit that such acts have occurred or to prohibit picketing in violation of no-strike clause in contract. (KRS 336.130[3]; 411 S.W.2d 935). Affidavit specifying acts of violence, etc. and prior hearing apparently not required to restrain picketing in violation of no-strike clause. (KRS 336.130[3]). Submission of false affidavit concerning acts of violence, etc. is punishable as form of perjury. (KRS 336.130[4]; 523.030).

Employer-Employee Relations Act.

A comprehensive statute dealing with employer-employee relations extends the functions and duties of the Secretary of Labor Cabinet, creates Kentucky Occupational Safety and Health Standards Board and Kentucky Apprenticeship and Training Council. Another Act prescribes certain duties of employers and employees, provides for safety standards and devices, and deals with payment of wages and apprenticeship agreements. (KRS, Title XXVII, Labor, cc. 336, 337, 338, 343).

Occupational safety and health standards, including federal standards, have been adopted and enforced by board within Office of Occupational Safety and Health. (KRS 338.011 to 338.991; 803 KAR c. 2). Standards apply to all employers, employees and places of employment in state except those subject to regulatory authority of federal Occupational Safety and Health Administration (OSHA) of U.S. Department of Labor and federal government employees. (KRS 338.021). Employees reporting violations are statutorily protected. (KRS 338.121). Administrative proceedings provided for enforcement (KRS 338.081) or Director of Office of Occupational Safety and Health may request civil or criminal action including injunction in court to restrain substantially dangerous acts and practices (KRS 338.133).

Worker's Compensation Act provides for compensation for injury, occupational disease, or death, which arises out of and in course of employment, without regard to fault as cause of injury, occupational disease, or death. (KRS 342.610[1]; 342.0011[2]; 342.0011[5]). Psychological, psychiatric or stress-related changes excluded unless direct result of physical injury. (KRS 342.0011[1]). Employer's liability under Act is exclusive. (KRS 342.690).

Employers and Employees Applicable.

Term “employers” as used in Act means any person having one or more employees, except those engaged solely in agriculture. Included as an employer are states and local governments and school districts. (KRS 342.630).

“Employees” exempt from Act are: persons employed as domestic servants in private home by employer who has less than two regularly employed employees working 40 hours or more per week; persons employed for 20 consecutive days or less in maintenance, repair, remodeling or similar work in or about private home of an employer, if employer has no other employees subject to Act; any person performing services in return for aid and/or sustenance from religious or charitable organization; any person for whom rule of liability for injury or death is provided under laws of U.S., except those persons covered under “black lung benefit” provisions of the Federal Coal Mine Health and Safety Act: any person employed in agriculture; any person who would otherwise be covered but who elects not to be covered; any person participating in voluntary carpool or vanpool program; any member of religious sect that adheres to established tenets opposing benefits if members of sect have longstanding practice of providing for dependent members. (KRS 342.650). Employer may elect that coverage apply to exempt employees. (KRS 342.660).

Acceptance or Rejection of Act.

Act is mandatory for those employers not specifically excluded, and employee is considered covered under Act unless he specifically elects not to be covered or is exempt. (KRS 342.630; 342.650). Assets of employers who are not exempted and who have not purchased insurance or qualified as self-insurers (KRS 342.340) subject to lien in favor of uninsured employers fund from time certificate is filed (KRS 342.770). Award on such claim is statutorily liquidated to be present value of all probable payments, discounted by 4% and may be pursued by Attorney General on behalf of state. (KRS 342.790).

Reports to Board.

Employers subject to Act required to keep records of all injuries, fatal or otherwise, received by employees in course of employment. Report of every injury to employee causing absence from work for more than one day must be sent to Board in Frankfort within one week of injury and knowledge. Follow-up reports also required. (KRS 342.038). Injury report must be sent to workers' compensation carrier or other party responsible for payment of benefit within three days from date employer receives notice of incident. (KRS 342.038[3]).

Notice of Claim, Time for and Contents.

Notice of an accident shall be given to employer as soon as practicable after happening thereof, and no proceeding shall be maintained unless application for resolution of claim shall have been made within two years after date of accident, or in case of death, within two years after such death or, in case voluntary payments have been made, within two years after suspension of such payments or two years after date of accident whichever is later. (KRS 342.185). Claim resulting from work-related exposure to human immunodeficiency virus barred unless notice of injurious exposure is given to employer as soon as practicable after happening thereof and application for adjustment of claim is filed within five years from date of exposure. (Id.).

In case of occupational disease, time for filing claim is three years after last injurious exposure to occupational hazard, or after employee first experiences distinct manifestation of disease, whichever last occurs. Three year limitation also applies to occupational disease claims resulting in death. Maximum time limit remains five years from last injurious exposure regardless of when disease manifests itself, except in radiation disease or asbestos related disease cases time limit is 20 years from last injurious exposure. (KRS 342.316). Printed copies of claim forms will be provided by Workers' Compensation Board, Frankfort, Kentucky 40601.

Hearings on Claims.

Act is administered by Commissioner of Department of Workers' Claims. (KRS 342.260). Generally, cases are assigned to administrative law judge (ALJ). (KRS 342.270; 342.275). Disputes shall be determined in summary manner. (KRS 342.260). There is provision for appeal to Workers' Compensation Board and to court of appeals. (KRS 342.285; 342.290).

Benefits.

Injured employee entitled to prompt medical rehabilitation services to accomplish feasible, practical and justifiable physical rehabilitation and to vocational rehabilitation of up to 52 weeks, or longer on order of ALJ after hearing. (KRS 342.710). Employee suffering from occupational injury or disease, in addition to income compensation, is entitled to select medical treatment at employer's expense. (KRS 342.020). Income benefits for total disability are set at

662/3rds of employee's average weekly wage, maximum 100% and minimum 20% of state average weekly wage. Income benefits for permanent, partial disability, based on 662/3rds of employee's average weekly wage, maximum 75% of state average weekly wage multiplied by permanent impairment rating published by AMA times a factor set forth in statute. (KRS 342.730). If injury results in death within four years, lump sum of approximately $50,000 adjusted annually payable to estate, from which burial expenses and costs of transportation are paid. (KRS 342.750). State average weekly wage determined annually by Commissioner. (KRS 342.740; 342.143). Income and other benefits for occupational “black lung” covered specifically. (KRS 342.732).

All fees of attorneys and physicians are subject to approval by ALJ, subject to statute and administrative regulations. In original claim, fees are fixed at no more than 20% of first $25,000 of award, 10% of next $10,000, and 5% of remainder of award with maximum of $12,000. (KRS 342.320). Employer's attorney's fees also capped. (Id.).

To Whom Compensation for Death Payable.

If injury causes death, income benefits shall be payable to (a) widow or widower during widowhood or widowerhood and to (b) surviving children until any such child dies, marries, or reaches age of 18. Child who originally qualified as dependent by virtue of being less than 18 may upon reaching age 18 continue to qualify if he satisfies tests of being physically or mentally incapable of self support and actual dependency. Enrollment in educational institution up to age of 22 will entitle child to benefits. Also entitled to benefits is (c) each parent, if actually dependent, and, (d) brothers, sisters, grandparents and grandchildren, if actually dependent. (KRS 342.750). In addition, lump sum payable to estate if injury results in death within four years.

Enforcement of awards is by action in circuit court of county in which injury occurred. (KRS 342.305).

Occupational diseases are covered by Workers' Compensation Act. See subhead Worker's Compensation Act, supra. To be covered, disease must arise out of and in course of employment, have causal connection with work conditions and be traced to employment as proximate cause. (KRS 342.0011[2] to 342.0011[3]).

Employers' Liability Act.

Common carriers by railroad and their employees, while engaged in intrastate commerce in Kentucky, are subject to the terms of an employers' liability law substantially similar to the Federal Employers' Liability Act. (KRS 277.310 to 277.320).

Public Works.

Contractors and subcontractors engaged in construction of public works are subject to strict regulation in respect to selection of employees, wages, hours of work and overtime. (KRS 337.505 to 337.550).

Unemployment Compensation.

See category 22 Taxation, topic 22.05 Employment Taxes, subhead Unemployment Compensation Tax.

For eligibility, unemployed worker must: (a) Make claim; (b) register for work; (c) be able to work or be enrolled in approved training program; (d) serve one-week waiting period; (e) have earned sufficient base-period wages, determined by formula, and (f) not be disqualified by reason of enumerated acts. (KRS 341.350 to 341.370).

Benefits, based on wages earned in base period (quarter) are determined annually by

Secretary of Human Resources on basis of average monthly employment for previous year, not exceeding lesser of 26 times weekly benefit or one third of base period wages. (KRS 341.380).

Liens of Employees.

See category 8 Debtor and Creditor, topic 8.13 Liens.

11.03 WORKERS' COMPENSATION LAW:

See topic 11.02 Labor Relations.

12 ENVIRONMENT

12.01 ENVIRONMENTAL REGULATION:

Kentucky statutory and regulatory provisions relating to environment treat problems of water, air and noise pollution control, solid and hazardous waste disposal, coal and surface mining reclamation, clay mining reclamation, and use, storage and application of pesticides.

General supervision of environment placed in Energy and Environment Cabinet, 500 Mero St. 12th Floor, Capital Plaza Tower, Frankfort, Kentucky 40601, 502-564-3350; http://www.eec.ky.gov. (See category Introduction, topic Government and Legal System, subhead Pending Government Reorganization.) Storage, use and application of pesticides and storage of fertilizer supervised by Dept. of Agriculture, Office of Consumer and Environmental Protection, Division of Environmental Services, 107 Corporate Drive, Frankfort, Kentucky 40601, 502-573-0282; http://www.kyagr.com/consumer/envsvs/index.htm. On-site sewage disposal systems regulated by Dept. for Public Health in Cabinet for Health and Family Services, 275 East Main Street, Frankfort, Kentucky 40621; http://chfs.ky.gov/dph/.

Jurisdiction over air pollution control held concurrently by Energy and Environment Cabinet and local boards of county air pollution control districts. In counties with concurrent jurisdiction, standards and facilities must equal or exceed state standards, except that standards for vehicle exhaust testing may not exceed state standards. (KRS 224.20-130; 77.115, 77.170). Local boards granted broad powers including issuance, suspension and revocation of permits, collection of permit fees, enforcement of violations and assessment of fines. (KRS 77.005 et seq.). Concurrent jurisdiction exists for Jefferson County (Louisville).

Petroleum Storage Tank Environmental Assurance Fund, attached to Energy and Environment Cabinet, established by statute to administer funds intended to reimburse expense of corrective action required by release of motor fuels from underground storage tanks. (KRS 224.60-130). Underground storage tanks must be registered to be eligible for reimbursement. (KRS 224.60-142). Petroleum environmental assurance fee of $0.014 per gallon paid by fuel dealers. (KRS 224.60-145). Annual fee levied of $30 per tank for purpose of funding administration program. (KRS 224.60-150).

Cabinet and governor advised by Environmental Quality Commission, composed of seven members appointed by governor. (KRS 224.01-100; -110). Commission serves as forum for exchange of information and ideas relating to natural environment. (KRS 224.01-110).

Environmental Board controls and manages Environmental Trust Fund. Board is composed of secretary of Energy and Environmental Cabinet, chairman of Environmental Quality Commission, and six members at large appointed by governor. (KRS 224.01-210). Fund may be used to support research and development, education or training necessary to guide development of environmental policy. (KRS 224.01-205).

Brownfield Redevelopment Fund established to provide financial assistance to government agencies to perform assessments, corrective action, or other similar actions to prepare brownfield properties for beneficial use. (KRS 224.01-030).

Kentucky Infrastructure Authority assists governmental agencies with construction and acquisition of infrastructure projects including those for pollution abatement. (KRS 224A.035, 224A.011[16]). Affairs of authority managed by nine member board which for administrative purposes is attached to Office for Local Development. (KRS 224A.030). Authority empowered to levy tax of not more than 2% on purchase of water service or sewer service in state, and may make loans or grants to assist construction of infrastructure projects. (KRS 224A.070). Agriculture Water Quality Authority is multidiscipline peer group that establishes state-wide and regional agriculture water quality plans. (KRS 224.71-100 through 224.71-145). Authority consists of fifteen members and is administratively attached to Energy and Environment Cabinet.

Kentucky River Authority, attached to Finance and Administration Cabinet, responsible for development of comprehensive plans for management of Kentucky River. (KRS 42.016; 151.700 to 151.730). Authority composed of secretaries of Finance and Administration Cabinet and Energy and Environment Cabinet and ten other members. (KRS 151.710).

Stream restoration and mitigation authorities may be established to restore, protect, and enhance watersheds in Commonwealth. (KRS 151.610 to 151.615). Authorities composed of members appointed by governor. (KRS 151.613[2]).

Cabinet designated as state agency for purpose of following federal acts: Water Pollution Control Act, Clean Air Act, Solid Waste Disposal Act, Resource Conservation and Recovery Act, and Surface Mining Control and Reclamation Act. (KRS 224.16-060).

Prohibited Acts of Pollution.

Cabinet has adopted standards of air and water quality, air and noise emissions and generation, handling and disposal of solid and hazardous waste in form of administrative regulations to implement statutory prohibitions. Cabinet has adopted standards for reclamation of surface coal mining operations.

Air pollution, in contravention of emission standards, ambient air standards, or rules and regulations of Cabinet, is prohibited. (KRS 224.20-110). Vehicle emissions regulated, except emissions from motorcycles. (KRS 224.20-710 to 224.20-765). Air emission fees for administering air quality program mandated by Title V of Clean Air Act Amendments authorized by statute. (KRS 224.20-050).

Water pollution in contravention of standards, rules, regulations of Cabinet, or which alters physical, thermal, chemical, biological, or radioactive properties of waters of Commonwealth in a manner detrimental to public health or welfare, animal, aquatic or marine life, present or future uses of water as public water supply, or recreational, commercial, industrial, agricultural or other use of water is prohibited. (KRS 224.01-010[34]; 224.70-110). Discharges from boats specifically regulated. (KRS 235.420 to 235.440).

On-site sewage disposal systems regulated by Cabinet for Health and Family Services (“CHS”). (KRS 211.350 to 211.380). Service of septic tanks and transportation and disposal of septic tank waste also regulated by CHS. (KRS 211.970 to 211.982; 211.995; 224.10-194).

General criminal statute (KRS 438.060) prohibits placing in any stream, dam, pool or pond any substance rendering waters unfit or producing a stench, and prohibits placing carcass of any beast in any water course, or within 25 yards of any water course, spring or pond.

Water resources of Commonwealth must be put to their most beneficial use. (KRS c. 151). To ensure continued growth and economic well- being of Commonwealth and to advance safety, happiness and welfare of people, Commonwealth specifically empowered to protect rights to use and availability of water and to prevent harmful overflows from flooding. (KRS 151.110).

Wild Rivers System.

Cabinet restricts and regulates development and use of land along designated portions of Cumberland River, Red River, Rockcastle River, Green River, Big South Fork of Cumberland River, Martins Fork of Cumberland River, Rock Creek, Little South Fork of Cumberland River and Bad Branch of Poor Fork of Cumberland River. Construction and change-of-use permits required. (KRS 146.200 to 146.360; 146.990).

Solid and hazardous waste generation and disposal regulated. (KRS 224.01-010[10], [13], [31]; KRS 224 subchapters 40 through 50). Special waste (e.g., mining and utility wastes, sludge, cement kiln dust, etc.) regulated. (KRS 224.50-760). New and expanded solid waste disposal facilities must meet requirements of Energy and Environment Cabinet. Special requirements for disposal of “limited quantities generator” hazardous waste in solid waste landfills. (KRS 224.43-614). Hazardous waste generators required to compile and retain records regarding wastes and to report activities to local government officials (KRS 224.46-510) and subject to assessments to fund hazardous waste management fund (KRS 224.46-580). Local government solid waste management plans required by KRS c. 109. Permits required for waste disposal facilities. (KRS 224.40-305; 224.46-520). Manifest system adopted for transport of hazardous wastes. (KRS 224.46-560; 224.46-570). Underground storage tanks regulated. (KRS 224.60-100 through 224.60-160). Open dumps regulated. (KRS 224.40-100). Kentucky Pride Fund established for identification, characterization and corrective action assessments of landfills and for elimination of illegal open dumps. (KRS 224.43-505). Environmental remediation fee to fund program imposed on waste generators. (KRS 224.43-500). Agricultural wastes and hazardous wastes in amounts determined not harmful to public are exempt from regulation. (KRS 224.46-540). Labeling required for rigid plastic containers and bottles sold in state. (KRS 224.50-585). Waste tires regulated. (KRS 224.50-850 to 224.50-880). Waste tire trust fund established for management of waste tires. (KRS 224.50-880). Division for air quality to provide public notice and comment on tire-derived fuel use application. (KRS 224.50-856[1][b]).

Release or threatened release of hazardous substance, pollutant or contaminant into environment required to be reported to Cabinet. (KRS 224.01-400[6], [7], [9],[10], and [11]). Cabinet to establish contingency plan for response to release or threatened release of hazardous substance, pollutant or contaminant. (KRS 224.01-400[14]). Cabinet authorized to bring action for recovery of response costs against persons liable for release, and Cabinet has lien for response costs against real and personal property of person liable for release. (KRS 224.01-400[15] and [23]). Cabinet may designate hazardous substances, pollutants and contaminants and is required to prepare inventory of sites where releases of same have occurred. (KRS 224.01-400[2] and [17]). Criteria for cleanup of release enumerated in KRS 224.01-400(21). Defenses and limitations to liability determined in accordance with Comprehensive Environmental Response Compensation and Liability Act and Federal Clean Water Act. (KRS 224.01-400[25]). Cabinet to establish decontamination standards for methamphetamine-contaminated properties. (KRS 224.01-410[3][a]).

Noise pollution regulated by multi-section acts involving licensing, regulation, standards, product labeling and abatement and insulation standards with state and local enforcement. (KRS 224.30-050 et seq.). Emission of noise from boundaries of property or moving vehicle which interferes with another's enjoyment of life or with any lawful business is prohibited. (KRS 224.30-050).

Pesticide use regulated by Division of Environmental Services, Dept. of Agriculture to prevent injury. (KRS 217B.010 to 217B.990). No person may apply any pesticide professionally without license issued by Dept. (KRS 217B.070). Dept. issues licenses after examination for pesticide operators, pesticide applicators, pesticide sellers and distributors, pest control consultants and pesticide sales agents. (KRS 217B.040 to 217B.105; 217B.185). Right of way and aerial applicators must provide surety or liability insurance to protect persons damaged. (KRS 217B.130).

Enforcement of general environment statutes vested in Cabinet. Agents of Cabinet are authorized to enter upon public and private property to inspect and investigate compliance or noncompliance with law. Persons engaged in regulated activity must file descriptive information as required by Cabinet and may be required to install self-monitoring equipment. Cabinet may require performance bond. (KRS 224.10-100; 224.40-650; 224.46-520). Scope of regulatory powers described. (KRS 224.46-530). Emergency power specified. (KRS 224.46-580[3] and [15]; 224.01-400).

Procedures for administrative hearings for consideration of orders and complaints, and provisions for appeal of final Cabinet orders and determinations are detailed. (KRS 224.10-420 to 224.10-470; 151.182 to 151.186; 350.0301 to 350.032).

Penalties.

Civil penalties up to $25,000 per day and injunction lie for discharging any substance into any waters of Commonwealth which causes or contributes to violation of water quality standards (KRS 224.70-110; 224.99-010[1]; 224.99-020), for failure to monitor and report on introduction of incompatible pollutants into publicly owned sewage treatment works (KRS 224.73-120; 224.99-010[1]; 224.99-020), for emitting or discharging into air any contaminant which causes or contributes to violation of air quality standards (KRS 224.20-110; 224.99-010[1]; 224.99-020), or for violating hazardous waste management provisions of c. 224 (KRS 224.99-010[5]).

Civil penalties of up to $5,000 per day and injunction lie for violations of waste disposal or waste facility permit laws, water purification, or noise pollution provisions and for failure to perform other duties imposed by c. 224. (KRS 224.99-010[2]).

Knowing violations of water, air, sewage and waste disposal provisions constitute Class D felony, and carry fine of up to $25,000 and/or imprisonment for up to five years for each day in violation. (KRS 224.99-010[4] and [6]). Knowing violations of noise pollution act constitute Class A misdemeanor. (KRS 224.99-010[3]).

Civil and criminal enforcement actions for water or air pollution may be brought in Franklin Circuit Court (Frankfort) or in county where violation occurs by Cabinet's Office of Legal Services or, at request of secretary, by Attorney General. (KRS 224.99-020; 224.99-010[9]).

Additional civil liability provided in favor of Commonwealth for destruction, death or injury to fish or other wildlife, resulting from violation of any orders, rules, regulations, or determinations of Cabinet. (KRS 224.01-070).

Removal of methamphetamine contamination notice is Class A misdemeanor. (KRS 224.99-010[14]). Leasing, renting, or selling methamphetamine-contaminated property without providing written notice of contamination to other party is Class D felony. (KRS 224.99-010[15]).

Criminal littering as defined in KRS 512.070 is Class A misdemeanor carrying maximum imprisonment of 12 months (KRS 532.090) and/or $500 fine for individual (KRS 534.040 [2][a]) or $10,000 for corporation (KRS 534.050[1][b]). Civil penalties of up to $5,000 per day per violation may be assessed for violations of c. 350. (KRS 350.990). Civil penalties of not less than $5,000 nor more than $25,000 per day for mining without permit. (KRS 350.990[2]). Knowing and willful violations of c. 350 may constitute Class A misdemeanors or Class D felonies. (KRS 350.990[4]-[8]).

Permits.

Permit issued by Cabinet must be held before discharging any sewage into water or emitting any matter into ambient air, constructing or operating waste disposal site or facility, or installing air pollution control device. (KRS 224.10-100[19]).

Permits also required for withdrawal of public water from stream, lake, ground water source or other body of water with certain exceptions (KRS 151.140) and construction in, along or across floodway of any stream (KRS 151.250; 151.310).

Surface Mining Reclamation.

No person may engage in surface coal mining operations without first obtaining permit from Cabinet (KRS 350.060) and filing reclamation bond (KRS 350.064). Reclamation standards detailed at KRS 350.405 to 350.455. Reclamation bond will be released upon reclamation to satisfaction of Cabinet in accordance with schedule set forth in statutes and regulations. (KRS 350.093). Cabinet may revoke permit or forfeit bond for violations of reclamation standards. (KRS 350.130). Cabinet may issue permit authorizing disposal of coal combustion by-products at surface coal mining operations. (KRS 350.270). Alternate reclamation and bonding requirements authorized for remaining operations. (KRS 350.075).

Exemptions.

Cabinet may grant exemptions from its regulations where serious hardship would otherwise occur and measurable impact on quality of ambient air or water of Commonwealth will not be produced. (KRS 224.10-270).

Interstate Compacts.

Kentucky has entered into Ohio River Valley Water Sanitation Compact with states of Illinois, Indiana, New York, Ohio, Pennsylvania, Tennessee, and West Virginia. (KRS 224.18-760). Additional agreements with Tennessee authorized by KRS 224.18-785. Three members of Interstate Water Sanitation Board authorized to serve as Commonwealth's representatives on boards of interstate commissions and to enforce provisions of compacts. (KRS 224.18-710; 224.18-715). Kentucky has adopted provisions of Interstate Compact on air pollution. (KRS 224.18-200). Secretary of Energy and Environment Cabinet and four commissioners appointed by governor serve as members of Interstate Air Pollution Control Commission to carry out terms of Compact. (KRS 224.18-210). Kentucky has joined Interstate Environmental Compact to deal with ecological systems and environmental problems which cross state lines. (KRS 224.18-100 to -110). Kentucky has enacted and entered into interstate mining compact. (KRS 350.300).

Tax exemptions provided for certified pollution control facilities. (KRS 224.01-300 to-310). See category 22 Taxation, topic 22.17 Sales and Use Taxes, subhead Exemptions from Sales and 22.19 Use Taxes.

13 ESTATES AND TRUSTS

13.01 ADMINISTRATION:

See topic 13.08 Executors and Administrators.

13.01A ADVANCE DIRECTIVES:

See topic 13.16 Wills, subhead Living Wills.

13.02 ADVANCEMENTS:

See topic 13.07 Descent and Distribution.

13.03 ALLOWANCES:

See topic 13.08 Executors and Administrators.

13.04 CLAIMS:

See topic 13.08 Executors and Administrators.

13.05 DEATH:

If resident of Kentucky leaves state and does not return for seven successive years, presumption of death arises. (KRS 422.130). Substantially common law rule as to presumption is provided by an escheat statute. (KRS 393.050). Both presumptions subject to earlier presumption if resident, or nonresident, disappears in specific event that is declared emergency by governor. (KRS 422.132). Statutory presumptions do not supersede common law presumption of death after seven years' absence unheard from, but are merely declaratory of common law. (240 Ky. 172, 41 S.W.2d 935; 300 Ky. 797, 190 S.W.2d 479; 2 F. Supp. 365). Determination by federal agency or service of death is prima facie evidence in courts and before agencies of state. (KRS 422.135). Both statutory and common law presumptions are rebuttable. (252 Ky. 793, 68 S.W.2d 393).

Uniform Simultaneous Death Act adopted in 1998 with minor modifications including extending presumption of death period to seven years. (KRS 397.1001 to 397.1009). Any rule of construction or presumption provided in Act does not apply to instruments executed and multiple-party accounts opened prior to effective date.

Uniform Survival and Death Act.

Not adopted.

Action for Death.

Action lies for death of person caused by negligence or wrongful act of another. (Ky. Const. § 241; KRS 411.130). Action must be brought by personal representative of decedent (KRS 411.130), within one year after date personal representative appointed but no later than two years after date of death. (KRS 413.140; 161 S.W.3d 345). Recovery distributed according to statutory direction. (KRS 411.130; 2009 Ky. App. Lexis 30). Damages recoverable include funeral expense and loss of earning power (307 Ky. 135, 210 S.W.2d 340), and pain and suffering of deceased before death (KRS 411.133). In wrongful death of minor, surviving parent may recover for loss of affection and companionship in addition to other elements. (KRS 411.135).

Right of action, including vindictive damages, accrues to surviving spouse and child under 18 of one killed by careless, wanton or malicious use of firearms or certain other deadly weapons. (KRS 411.150).

Personal representative permitted to recover both for wrongful death and for personal injuries suffered prior to death. (KRS 411.133). Parent willfully abandoning care and maintenance of child, forfeits right to maintain or recover from wrongful death action unless parent resumes care and maintenance of child one year prior to child's death or unless abandonment due to court order. (KRS 391.033; 411.137).

No statutory limitation may be placed on the amount recoverable for death. (Ky. Const., § 54).

As to award under Workmen's Compensation Act, see category 11 Employment, topic 11.02 Labor Relations.

As to death from faulty design of building, see category 5 Civil Actions and Procedure, topic 5.16 Limitation of Actions.

Survival of Tort Actions.

Causes of action for personal injury or property damage survive, except actions for slander, libel, criminal conversation, and so much of action for malicious prosecution as is intended to recover for personal injury. (KRS 411.140).

Death Certificate.

See category 10 Documents and Records, topic 10.04 Records, subhead Vital Statistics.

Uniform Anatomical Gift Act (1970, adopted 1970 with modifications). (KRS 311.165 to 311.235). Addition to § 1 defines "transplantable organ" as including kidney, liver, lung, heart, and bone marrow and excludes other body parts. (KRS 311.165[5]). Nonuniform additions to Uniform Act prohibit profiting from trade in transportable organs (KRS 311.171) and condemn prohibited acts as criminal offenses with fines up to $500,000 and imprisonment up to ten years (KRS 311.990[24 to 29]).

Uniform Anatomical Gift Act (1987) not adopted.

Living Wills.

See topic 13.16 Wills, subhead Living Will.

13.06 DECEDENTS' ESTATES:

See topics 13.07 Descent and Distribution, Executors and Administrators, Wills; category 8 Debtor and Creditor, topic 8.10 Homesteads.

13.07 DESCENT AND DISTRIBUTION:

See also topic 13.08 Executors and Administrators; category 21 Property, topic 21.08 Dower.

Real and personal property are subject to slightly different treatment.

Real Estate.

Undevised real estate of decedent descends, subject to right of homestead, and right of dower or curtesy, if any, to kindred in following order: (1) To children and/or descendants of deceased children; (2) to parents equally or all to surviving parent; (3) to brothers and sisters and/or descendants of deceased brothers and sisters; (4) to surviving spouse; (5) if none of aforementioned, one moiety of estate to paternal and other to maternal kindred, in following order: (a) First, to grandfather and grandmother equally if both are living; but if one is dead, entire moiety shall go to survivor; if no grandfather or grandmother, then (b) to uncles and aunts and/or their descendants, if none, then (c) to great-grandfathers and great-grandmothers, in same manner prescribed for grandfather and grandmother above, if none, then (d) to brothers and sisters of grandfathers and grandmothers and their descendants; and so on in other cases without end, passing to nearest lineal ancestors and their descendants; (6) if there is no such kindred of one of parents, whole goes to kindred of other. If there is neither paternal nor maternal kindred, whole goes to kindred of surviving spouse, as if he or she had survived and died entitled to estate. (KRS 391.010). Title to intestate's real estate passes, as matter of law, directly to heirs, whether legitimate or illegitimate, and vests in persons named in KRS 391.010. Special sections govern disposition of real property acquired with proceeds of or income from community property. (KRS 391.210 to 391.260).

Descendants of person who if living would be entitled to inherit, take per stirpes share of such deceased ancestor. (KRS 391.040).

Ancestral Estates.

When person dies intestate without issue, owning real estate of inheritance which was gift of either of his parents, such parent, if living, inherits it. (KRS 391.020[1]). If decedent was under 18 and died without issue, having title to real estate derived by gift, devise, or descent from one of his parents, whole descends to that parent, and that parent's kindred, if none, then in like manner to other parent and his or her kindred; but kindred of one may not be so excluded by kindred of other parent if such kindred are more remote than grandfather, grandmother, uncles and aunts of intestate and their descendants. (KRS 391.020[2]).

Aliens.

See category 4 Citizenship, topic 4.01 Aliens.

Personal Estate.

Title to personal property passes first through administration and does not descend directly to statutory heirs. (816 S.W.2d 899). Surplus personalty of intestate, left after payment of funeral expenses, charges of administration and debts, subject to right, if any, of dower or curtesy, descends to same persons to whom real estate of intestate would descend, with these exceptions: (a) Personal estate of infant distributed as though he died after attaining full age; (b) alien may be distributee of personal estate; (c) personal property or money on hand or in bank or other depository up to $15,000 exempt from distribution upon application of surviving spouse, or if none, of surviving children. (KRS 391.030). Exemption also applies to surviving spouse of person dying testate. (KRS 391.030[4]). See topic 13.08 Executors and Administrators, subhead Allowances. Special sections govern disposition of property under community property laws of another state. (KRS 391.210 to 391.260).

Surviving Spouse.

Rights of surviving spouse to inherit surplus real estate and surplus personalty set forth under category Property, topic Dower. If decedent left no children, parents, or brothers or sisters or descendants of deceased brothers or sisters surviving, surviving spouse takes all real estate. (KRS 391.010). See subhead Real Estate, supra. Conviction of felony in connection with taking life of decedent causes forfeiture of all interest in and to property of decedent, including right to take under decedent's will, as joint tenant with rights of survivorship or as beneficiary of any insurance policy. (KRS 381.280). If surviving spouse is alien, certain restrictions apply. See category 4 Citizenship, topic 4.01 Aliens.

Collaterals of the half-blood inherit half as much as those of whole blood, or as ascending kindred, when they take with either. (KRS 391.050).

Abandoned Child.

Parent willfully abandoning care and maintenance of child forfeits rights to intestate succession and to administer estate, and is treated as predeceasing child, unless parent resumes care and maintenance one year prior to child's death or unless abandonment due to court order. (KRS 391.033).

Posthumous child of decedent takes as though born in decedent's lifetime, if born within ten months of decedent's death. (KRS 391.070).

Illegitimates.

For purpose of intestate succession, illegitimate child may inherit by, through and from natural mother. (KRS 391.105). Illegitimate child may also inherit by, from and through natural father if natural parents married before or after birth of child, even if marriage void, or adjudication of paternity before death of father or after upon clear and convincing proof. (KRS 391.105; 635

S.W.2d 316; 896 S.W.2d 15). Issue of illegitimate child may inherit through such child. (87 Ky. 216, 8 S.W. 337). Natural father may inherit from and through illegitimate child born to unmarried mother. (799 S.W.2d 5).

Adopted Child.

See category 14 Family, topic 14.01 Adoption.

Determination of Heirship.

When property passes by intestate succession, or under will to beneficiary not named, proceeding may be had in district court to determine persons entitled. Adversary action may be commenced in circuit court. (KRS 391.035).

Advancements.

Any real or personal property or money, given or devised by parent or grandparent, to descendant, must be charged to descendant, or those claiming through him in division and distribution of undevised estate of parent or grandparent; and such party receives nothing further therefrom until other descendants made proportionately equal with him, according to his descendable and distributable share of whole estate, real and personal, devised and undevised. Advancement estimated according to value of property when given. Maintaining or educating, or giving of money to child or grandchild, without view to portion or settlement in life, not deemed advancement. (KRS 391.140).

Advancement made to distributees not taken as part of decedent's personal estate in estimating distributable share of widow or widower. (KRS 391.140). Gift from one spouse to other, even though called “advancement,” not within this statute. (286 Ky. 504, 151 S.W.2d 369).

Desertion; Divorce.

Spouse who voluntarily leaves other and lives in adultery forfeits all right and interest in property of other, unless he or she afterward reconciles and they live together as husband and wife. (KRS 392.090). Decree of dissolution of marriage bars all future distributive rights in estate of former spouse. (KRS 392.090).

Renunciation.

See topic 13.16 Wills, subhead Renunciation.

Election between curtesy or dower and distributive shares, see topic 13.16 Wills.

Escheat.

On failure of heirs or if beneficiary, devisee or heir fails to claim property, it escheats to state after three years. (KRS 393.020; 393.066). Inconsistent statute provides personal representative shall deliver net property and profits, if any, to state after seven years. (KRS 393.040). See topic 13.05 Death.

Uniform Probate Code.

Not adopted.

13.07A ESTATES: (in property)

See category 21 Property, topic 21.16 Real Property.

13.0813.09

13.10 EXECUTORS AND ADMINISTRATORS:

Jurisdiction and Venue.

Probate proceedings held in and letters of administration issued by district court of county in which: (1) Decedent resided at death, if resident of Kentucky; or (2) if residence on military reservation or fort, in any adjacent county thereto; or (3) if not then resident of Kentucky, (a) In county in which land, if any devised or owned by decedent, or part thereof, is located, or (b) if no land in Kentucky devised, or owned, in county in which he died or in which estate or part thereof located or where there is debt or demand owing to him. (KRS 394.140; 395.030).

Preferences in Right to Administer.

When decedent leaves no will or no qualified person named in will who can execute its provisions, letters of administration must be issued to following named persons or their nominees respectively (if qualified) in following order: (1) Surviving husband or wife or suitable administrator nominated by such spouse; (2) or if surviving husband or wife does not nominate suitable administrator, one or more of those next entitled to distribution as court deems best suited to manage estate. (KRS 395.040). Preferential right of administration or of nominating administrator not absolute (185 Ky. 449, 215 S.W. 86; 239 Ky. 263, 39 S.W.2d 258); it may be waived, but without legal cause one entitled can not be deprived of right to administer (246 Ky. 338, 55 S.W.2d 20) or to nominate suitable person (178 Ky. 573, 199 S.W. 58; 240 S.W.2d 593). If decedent's surviving spouse and relations fail to apply for administration within 60 days of death, court may grant administration to creditor or any other person, except to master or other commissioner whose duty it is to settle accounts of personal representative. If will later produced and proved, administration theretofore granted ceases. (KRS 395.040).

Eligibility and Competency.

Any resident of Kentucky over 18 years of age, resident under 18 years of age (if will specifically directs appointment of minor [KRS 395.080]), any national bank located in Kentucky having fiduciary powers, and any Kentucky bank or trust company incorporated under and authorized by Kentucky law to act as fiduciary, may qualify as executor or administrator. (KRS 395.005).

Nonresident of legal age may be appointed executor or administrator if related to decedent by consanguinity, marriage, adoption, or spouse of such person so related. (KRS 395.005). Nonresident personal representative must designate resident of county of probate as process agent. (KRS 395.015).

Foreign corporation may not act as executor or administrator of one who died domiciled in Kentucky or as testamentary trustee under will of such decedent. (O.A.G. 62-1141).

Application for Appointment.

Applicant for appointment as executor or administrator must file written application in duplicate under oath, stating names of decedent's surviving spouse and all heirs at law, or such as are known, their post office addresses, if known, date of decedent's death, in general terms of what the estate consists and probable value of personal and real estate, and any indebtedness owed to decedent by applicant. Executor named in will may omit names and addresses of heirs at law unless requested by court. Application of nonresident must include designation of resident of county where administration pending as process agent for actions against estate or against him accrued in administration thereof. Clerk must mail duplicate copy of application to Department of Revenue. (KRS 395.015[1]).

Notice and Hearing.

In case of intestacy, or where administrator with will annexed or de bonis non to be appointed, if no surviving spouse, or if such spouse waives right to appointment or not qualified to act and does not nominate suitable administrator and there are two or more resident heirs at law entitled to appointment, court must appoint time for hearing application for appointment. (KRS 395.015[2]). At least five days written notice by certified mail, of hearing must be given to surviving spouse and all known heirs residing in Kentucky, except where gross amount involved is less than $5,000, court may dispense with notice. (KRS 395.016).

Qualification.

Executor, administrator or other fiduciary must take oath and give bond sufficient to secure value of decedent's whole estate. (KRS 62.060).

Exemption from Surety on Bond.

Every fiduciary, must provide surety on his bond unless, on petition of interested party, court satisfied all interests are protected or if will or trust directs no surety required. (KRS 395.130). Capital stock sufficient security for corporate fiduciary unless court or party in interest demands additional security. (KRS 286.3-220[2]).

District court judge must annually inquire into solvency of sureties and require new bond or additional surety where necessary for protection of estate. (KRS 395.640; 395.160).

Issuance of Letters.

Before entering on execution of his trust, executor or administrator must receive letters of appointment from district court having jurisdiction. (KRS 395.105). At time of appointment he may (but is not required to) designate attorney who will represent him in matters relating to trust, and if done notices to such fiduciary must also be sent by court to such attorney. (KRS 395.145).

Removal.

Grounds: residence out of state without appointing agent for service of process; insanity or other incapability of discharging trust; bankruptcy, insolvency or failing circumstances; failure to give additional security when required (KRS 395.160); neglect or refusal to file inventory or account on date fixed by court (KRS 395.255).

Special Kinds of Administration.

Provision made for: Administrator with will annexed, if will names no executor or named executor cannot or does not qualify (KRS 395.050); administrator de bonis non, if personal representatives die and decedent was intestate (KRS 395.060); curators (q.v.); ancillary administrators (see subhead Foreign Executors or Administrators, infra).

Curators.

Curator may be appointed to take charge of decedent's estate during contest over probate of will or while court delayed in granting letters testamentary or of administration. (KRS 395.410-395.430).

Public Administrators.

District court of each county must appoint public administrator, to whom it may commit estates as to which no one will qualify as administrator or apply for administration, within 60 days after death. (KRS 395.380 to 395.400).

Inventory and Appraisal.

Personal representative must file in district court, within two months after qualification, inventory in duplicate of estate coming into his hands, original to be recorded by clerk and duplicate mailed by clerk to Department of Revenue. (KRS 395.250).

Personal representatives accountable only for such estate as comes or may come into their hands for administration (KRS 395.290), but may be held responsible by successor personal representative by action on predecessor's bonds for failure to use due diligence in collecting or managing estate (KRS 395.300).

Settlement Suit.

Provision made for settlement suit in circuit court when appears genuine issue concerning correct settlement of estate or right of beneficiary or creditor to receive payment. (KRS 395.510-395.515; 949 S.W.2d 594).

Assets for Payment of Debts.

Decedent's property, whether real or personal (except property exempted to widow and infant children, see subhead Allowances, infra), constitutes assets for payment of his debts. (KRS c. 396).

General Powers and Duties.

Representative has such duties as required by law or ordered by court. (KRS 395.105; 395.195 to 395.220). See also subhead Sales, infra.

Notice to Creditors.

At least once a month, each probate court clerk must publish in newspaper having general circulation in county, list of all fiduciary appointments made since preceding publication, with name and address of each decedent or ward, name and address of fiduciary, date of appointment, name and address of fiduciary's attorney, if any, and date by which claims of creditors must be presented. (KRS 424.340).

Presentation of Claims.

In action pending at decedent's death, which action survives at law, substitution of personal representative for decedent, or motion therefor, constitutes presentation of claim. (KRS 396.015[2]). No action may be brought on claim against estate until claim presented in manner set forth in KRS 396.015. (KRS 396.035). All claims against decedent's estate which arose before death of decedent, excluding claims of U.S., state or any subdivision thereof, whether due or to become due, absolute or contingent, liquidated or unliquidated, founded on contract, tort, or other legal basis, if not previously barred by other statutes of limitations, are barred against estate, personal representative, and heirs and devisees of decedent, unless brought within six months of appointment of personal representative or within two years after decedent's death if no personal representative appointed. (KRS 396.011; 396.205). This section does not affect any proceedings to enforce security interest securing decedent's obligation or on property of estate, to extent of security, or proceedings to establish liability of decedent or personal representative, to extent of liability insurance. (KRS 396.011[2]).

Proof of Claims.

To participate in distribution, claimant must deliver or mail to personal representative or file with court clerk written statement of claim. If filed with clerk, claimant must certify copy delivered or mailed to personal representative. (KRS 396.015). Personal representative may require claimant's affidavit or other evidence that, to claimant's knowledge, claim justly due, no payments made thereon and no offsets against same; or if payments made or offsets exist, nature and amount of each must be shown by evidence or stated in affidavit. (KRS 396.026).

Approval or Rejection of Claims.

Personal representative may mail notice to claimant of allowance or disallowance of claim, and, if decision changes, must notify claimant. (KRS 396.055). Disallowance of claim irreversible if statute of limitations has run. (KRS 396.055). When claim rejected in whole or in part by mailed notice warning of impending bar, action to enforce must be commenced within 60 days. (KRS 396.055). Personal representative's failure to mail notice to claimant 60 days after time for original presentation of claims has expired constitutes notice of allowance, except court may disallow claim for cause shown. (KRS 396.055[1]; construed in 150 S.W.3d 58). Judgment against personal representative to enforce claim is allowance of claim. (KRS 396.055[2]).

Payment of Claims.

Six months after date of appointment, personal representative may pay allowed claims in order of priority. (KRS 396.075[1]). Personal representative may pay any claim not barred, with or without formal presentation, but personally liable to any other claimant whose claim is allowed and is injured by such payment if payment prior to six month limit and adequate security for refund not obtained, or payment made due to negligence or willful fault of personal representative and injured claimant deprived of priority. (KRS 396.075[2]).

If any allowed claim, unmature, contingent or unliquidated, matures prior to distribution, it must be paid as matured and absolute claims of same class. (KRS 396.115[1]).

Priorities.

Claims against insolvent estates paid in following order: (1) Costs and expenses of administration; (2) funeral expenses; (3) debts and taxes with preference under federal and state laws; (4) all other claims. No preference given to any claim over others within same class. (KRS 396.095). If estate insufficient, each claimant entitled to receive equal proportionate share of claim. If preference or security allowed in another jurisdiction but not this state, benefited creditor may receive only balance of claim from local assets. (KRS 396.175[2]).

Sales.

Power of sale of property, real or personal, conferred by will on executor or trustee, may be exercised according to its terms. (KRS 395.200-395.220; 250 Ky. 584, 63 S.W.2d 776). Power so conferred upon executors, if not restricted personally, may be exercised by surviving executor (KRS 395.060) or administrator d. b. n., c. t. a. (KRS 395.050). Unless authorized by express terms of will, personal representative has no power to sell real estate. (KRS 395.220). In order to enforce sale of property for payment of debts representative must bring suit in circuit court for settlement of decedent's estate or move district court for order of sale. (KRS 389A.010-389A.025; 395.510 to 395.550).

In all cases, personal representative, when satisfied sale in best interests of estate, may sell at public or private sale, and at fixed price or for best price obtainable, and for cash or on such terms as personal representative may determine, any part or all of personal property belonging to estate, except (a) Tangible personalty set apart as exempt to surviving spouse; (b) property specifically bequeathed, when sale not necessary to pay debts, provided that sale may be made with consent of legatee; (c) property suitable for distribution in kind or where such distribution is demanded prior to sale; (d) property sought to be sold contrary to provisions of will, unless sale is necessary to pay debts and charges or its retention will probably cause great loss to estate. Prior court order authorizing or setting conditions for sale of personal property not necessary. (KRS 395.200).

Actions by Representative.

Representative may sue on claims of decedent. (CR 17.01). As to revival of actions commenced by decedent, see topic Actions. Action commenced by representative may be continued by successor. (KRS 395.280). If person dies prior to expiration of time for bringing action and action survives, personal representative may bring action after expiration date, if commenced within one year of representative's qualification. (KRS 413.180[1]). If person dies prior to accrual of action and personal representative qualifies more than one year after decedent's death, representative deemed qualified on last day of one year period. (KRS 413.180[2]).

See topic Death for wrongful death action by representative.

See subhead Settlement Suit, supra.

Actions Against Representatives.

No suit may be brought against executor or administrator until after two months from qualification of first personal representative of estate except against executor de son tort or upon denial by fiduciary in writing of claim by alleged creditor. (KRS 395.270). After two months creditor may bring suit on claim against personal representative, unless claim had previously been denied by personal representative, in which case creditor may bring suit earlier. (KRS 395.270). All claims pending against decedent at time of death, if not barred by other limitation period, must be brought within six months from date of appointment of personal representative or within two years from date of death if no representative appointed or be barred. (KRS 396.011). Application to revive action for or against deceased pending at date of death must be made within one year after death. (KRS 395.278). Notwithstanding any other statute to contrary, no cause of action, except fraud, on any unbarred claim may be brought against personal representative or distributee after two years from date of order of discharge of personal representative. (KRS 396.205). See category 5 Civil Actions and Procedure, topic 5.16 Limitation of Actions.

Allowances.

Personal property or money of decedent, on hand or in bank or other depository up to amount of $15,000 exempt from distribution and sale and set apart by district court to surviving spouse, or if no surviving spouse to surviving children. Surviving spouse, or surviving children if no surviving spouse, may select personal property up to $15,000 in value. (KRS 391.030).

On petition of surviving spouse, before appointment of administrator, district judge having jurisdiction may authorize by order surviving spouse to withdraw from any bank or other depository not exceeding $1,000 belonging to deceased spouse's estate. (KRS 391.030[2]).

Widow's Quarantine.

Surviving spouse entitled to share of rents and profits of deceased spouse's real estate equal to share in real estate itself and must hold dwelling house, yard, garden, stable and lot in which it stands and orchard adjoining any of aforesaid premises until dower or curtesy assigned. (KRS 392.050).

Intermediate and Final Accounting and Settlement.

Executor, administrator or curator must, within two years after appointment and annually thereafter or whenever required by court, render accounting to and make settlement with court appointing him. (KRS 395.610). Court may require testamentary trustee to render accounting upon motion of court of interested party. (KRS 395.610). Informal settlement allowed from fiduciary who is sole beneficiary of estate or upon verified waiver from all beneficiaries of estate if no beneficiary is under disability. (KRS 395.605). Beneficiaries may request estate accounting prior to executing waiver of formal settlement. No verified waiver required from non-residuary legatee who received legacy; cancelled check or signed receipt attached to settlement sufficient. (KRS 395.605[2]). District court must make settlements with personal representatives in his county (KRS 395.600) and must make written report of settlement to circuit clerk (KRS 395.620).

Clerk must indorse on settlement report time of filing and hearing date. (KRS 395.620). At hearing or in interval exceptions thereto may be filed. (KRS 395.615). If no exceptions filed and report made according to law, report must be approved and recorded. If exceptions filed, must be hearing thereon. Settlement so made and recorded prima facie evidence between parties interested. (KRS 395.630).

Not less than ten days prior to date of hearing, clerk, at cost of estate, must cause notice of filing of settlement to be published in newspaper of general circulation in county, or with court's approval, fiduciary must give at least ten days written notice by mail to all unpaid creditors and distributees. (KRS 395.625). If value of trust or estate is $2,500 or less and assets are held in account accessible only through order of court, KRS 395.625 will not apply to settlements of that trust or estate.

At expiration of trust, every fiduciary must fully account and pay estate over to persons entitled thereto. Such account must list all unpaid creditors whose claims were allowed and all creditors whose claims were disallowed. (KRS 395.610).

Except in case of corporate fiduciaries supervised by state or federal banking authorities, no account of any fiduciary may be approved until after exhibition to court for its examination of securities shown in account as being in fiduciary's hands or certificate of bank having possession thereof or in which they have been deposited for safekeeping, and also certified bank statement showing funds to credit of trust. (KRS 395.610).

As to procedure when fiduciary neglects or refuses to file inventory or account when due by law or when ordered by court, see KRS 395.255; 395.990.

Notwithstanding provisions regulating settlement with district court, where suit in equity for settlement of decedent's estate or trust estate brought pursuant to KRS 395.510 to 395.550, circuit court thereafter has exclusive jurisdiction over such settlements. (Compare 221 Ky. 396, 298 S.W. 975; 227 Ky. 670, 13 S.W.2d 1025). In such cases circuit court clerk must make and file certificate of each approved settlement. (KRS 395.650). Fiduciary may file proposed final settlement prior to actual delivery of estate assets. Any exceptions to settlement heard by court while fiduciary has assets in hand. (KRS 395.617).

In case of property subject to escheat, estate must be settled within one year or as soon thereafter as practicable. (KRS 393.030).

Distribution.

Law allows personal representatives two years to distribute residue of estate without accounting for interest except as collected by them (KRS 395.310), but they may distribute after six months from qualification (KRS 395.190). Specific pecuniary legacies must be paid within one year and carry interest thereafter. (KRS 394.520). If doubt as to sufficiency of assets for proposed distribution, personal representatives should require refunding bond from persons to whom distribution made, and if suit brought in circuit court for settlement, safe course is to await regular distribution under orders of court. (227 Ky. 670, 13 S.W.2d 1025).

Distribution Not Feasible.

Provision made for distribution of funds payable to curator appointed for distributee to whom not feasible or permissible to make payment because of absence from last known place of residence for period of one year and who is not known to have been living during that time. (KRS 395.410 to 395.440). Similar provision made for disposition of funds due convict. (KRS 387.290). In proper circumstances circuit court may appoint receiver to accept and manage funds due distributee. (141 Ky. 455, 132 S.W. 1039).

Distribution if Abroad.

No specific provision. However, KRS 395.410 may cover such instances. This section and those following provide for appointment of curator. If situation does not apply it is probable that application for appointment of receiver to protect property should be made in circuit court. Administrator or executor could then, pursuant to order of court, turn over funds to receiver who would hold, manage and protect them pending return of the distributee.

Liabilities of Representatives.

Unless otherwise provided in contract, personal representative not individually liable on contract if acting in fiduciary capacity in administration of estate, unless he fails to reveal representative capacity and identify estate in contract. (KRS 396.185[1]). Representative individually liable for obligations arising from ownership or control of estate or for torts committed in course of administration due to personal fault. (KRS 396.185[2]). All claims may be asserted against personal representative in fiduciary capacity, regardless of individual liability. (KRS 396.185[3]). Failure to plead or defend action cannot render representative liable for more than amount of his decedent's assets chargeable to him; and he is liable only for amount of such unadministered assets remaining in his hands. (KRS 395.290).

Successor representative may maintain action against former representative, his sureties and representatives, for damages or debts arising from maladministration or omissions of predecessor. (KRS 395.300).

Up to two years from qualification, representative charged with interest realized on assets; after two years, charged with interest on surplus assets in his hands. (KRS 395.310).

Compensation of representatives may not exceed 5% of value of personal estate plus 5% of income collected, except that court may allow additional compensation for unusual and extraordinary services in connection with real estate or with estate or inheritance taxes claimed against property not part of estate. (KRS 395.150, construed in 292 Ky. 701, 168 S.W.2d 24; 931 S.W.2d 149).

When Administration Unnecessary.

Provision made for dispensing with administration of estate of decedent: (1) By agreement of all beneficiaries when no debts or claims owed by or made on estate, or (2) when spouse survives and probate estate less than $15,000 plus claims of preferred creditors. Person applying per alternative: (1) Must advertise for creditors in newspaper of general circulation each week for six weeks and must post bond for benefit of creditors in amount of personal estate. District court must be satisfied provision made for paying inheritance and estate taxes before granting petition to dispense by agreement. (KRS 391.030; 395.450-500).

Small Estates.

See subhead When Administration Unnecessary, supra.

Foreign Executors or Administrators.

Foreign executors or administrators have no right, merely by virtue of appointment in foreign jurisdiction, to act in Kentucky, or to resort to Kentucky courts to enforce claims asserted by them. (91 Ky. 88, 15 S.W. 4). Their rights are those recognized by comity or by express statute in Kentucky. In absence of Kentucky administration, they may sell and transfer personal property in Kentucky, and sell and transfer stocks in Kentucky corporations by proceeding in conformity with requirements prescribed for Kentucky fiduciaries. See supra, subhead Sales.

Foreign representative cannot sue in Kentucky except for collection of debt. (KRS 395.170[1]). Must be administration in Kentucky before suit can be brought for any other purpose. If no resident representative, foreign representative of nonresident decedent may prosecute actions in Kentucky for recovery of debts due decedent, but no judgment may be rendered in any such action until plaintiff gives bond as required to pay any debt due by decedent to any resident of Kentucky to extent of assets coming into plaintiff's hands. (KRS 395.170[2]). If resident representative of nonresident decedent appointed, resident representative alone has power to sue, but Kentucky debtor paying debt to foreign representative, without notice of appointment of Kentucky representative is discharged from debt to extent of such payment. (KRS 395.170[4]; 179 Ky. 695, 201 S.W. 20).

See also topic 13.16 Wills, subhead Foreign Probated Wills.

Uniform Fiduciaries Act (1930) adopted in 1942 with substantial modifications. (KRS 386.100 to 386.150).

Uniform Principal and Income Act (1997, adopted 2004 with substantial modifications; amended 2008). Effective Jan. 1, 2005 (KRS 386.450 to 386.504).

Uniform Simplification of Fiduciary Security Transfers Act not adopted.

Uniform Anatomical Gift Act (1970, adopted 1970 with modifications). (KRS 311.165 to 311.235). See topic 13.05 Death.

Uniform Anatomical Gift Act (1968) adopted. See topic 13.16 Wills.

Uniform Anatomical Gift Act (1987) not adopted.

Uniform Probate Code not adopted.

13.11 FIDUCIARIES:

Term “fiduciary” as used in KRS c. 395 includes executors, administrators, curators, guardians, conservators, trustees and testamentary trustees and associations and corporations where appointed by or accountable to district court and any other individual or corporation holding funds or otherwise acting in fiduciary capacity. (KRS 386.010; 395.001).

See topics 13.08 Executors and Administrators, Trusts; category 14 Family, topic 14.07 Guardian and Ward.

13.12 INTESTACY:

See topic 13.07 Descent and Distribution.

13.13 LIVING WILLS:

See topic 13.16 Wills, subhead Living Wills.

13.14 [RESERVED]

13.15 TRUSTS:

Uniform Probate Code not adopted.

Kinds.

General common law and equity principles recognize express trusts and constructive trusts. Resulting trusts generally not recognized in favor of person paying consideration but not taking title; would be fraud against payor's existing creditors. (KRS 381.170). Principle extended to personal property. (161 S.W.2d 930). Charitable trusts recognized if gift, etc. made to organization devoted to charitable, religious or like purpose or if gift clearly made for charitable or humane purpose. (KRS 381.260).

Spendthrift Trusts.

Valid as to income and principal; exceptions for settlor's creditors, taxes, necessities, child support and maintenance. (KRS 381.180).

Creation.

No particular form or language necessary for creation of express trust if intention to create trust clearly manifested and beneficiary and property insurance proceeds enforceable. (279 Ky. 334, 130 S.W.2d 809; 277 Ky. 245, 126 S.W.2d 127). Parol trusts for both personalty and realty may be enforced. (293 Ky. 565, 169 S.W.2d 617). Trusts will not fail for want of trustee. (250 Ky. 1, 61 S.W.2d 904). Attempted trust may fail if settlor fails to divest himself of control of corpus or retains absolute power to revoke. (272 S.W.2d 666). Failure to place active duty on trustee may cause trust to fail. (299 S.W.2d 629).

Appointment of Trustee.

Any person or organization competent to enter into contract may serve as trustee of inter vivos trust. (KRS 395.001). Testamentary trustee may serve only after appointment by district court exercising probate jurisdiction. (KRS 395.105).

Eligibility and Competency.

Any resident of Kentucky over 18 years of age, any national bank located in Kentucky having fiduciary powers, any state bank or trust company incorporated in Kentucky and authorized by Kentucky law to act, and any nonresident of legal age related to decedent by consanguinity, marriage, adoption, or spouse of such related person may be testamentary trustee. (KRS 395.005).

Foreign corporation may serve as fiduciary, except as limited by KRS 395.005. (O.A.G. 62-1141).

Qualification.

Testamentary trustees must take oath (KRS 62.030) and furnish bond with surety unless waived (KRS 62.060; 395.130).

Removal of Trustee.

Common law fiduciary duties prevail with power in district court to remove. (KRS 395.160). Trustee of trust less than $25,000 may petition district court for distribution to beneficiaries and discharge of trust. (KRS 386.185).

General Powers and Duties of Trustees.

Administration of trusts governed by KRS c. 386. Uniform Trustees' Powers Act adopted at KRS 386.800 to 386.845.

Testamentary trustee of real estate, under conditions justifying it in opinion of court, may make long term lease of trust property covering period which may extend beyond duration of trust, where term of trust is indeterminate and term of lease is reasonable under circumstances of particular case. (255 Ky. 244, 73 S.W.2d 41).

As to release of power in trust, see KRS 386.095.

Sales.

Various provisions made for the sale of real estate held in trust. (KRS 389A.010 to.045).

Trustee not having power of sale may move district court for order of sale. Act does not limit trustee's power to sell and convey real estate where authorized by instrument creating trust or otherwise authorized by law to do so. Where approval required, sale must be made on terms and conditions for best interest of trust estate. (KRS 389A.020). Without previous judicial proceeding, interest in real estate held by fiduciary for ward, or by more than one person or by unknown heir may be sold by private sale subject to circuit court approval pursuant to KRS 389A.030 and 389A.035. (KRS 389A.032). Real estate held by trustee as security for debt cannot be sold except under judgment of court, unless debtor joins in writing evidencing sale. (KRS 381.190).

Investments and changes of investments are regulated by KRS c. 386. When bank or trust company acts as “fiduciary” under instrument reserving in grantor or vesting in investment advisory committee, etc., any power to direct acquisition, disposition, or retention of investments or to authorize acts proposed by fiduciary, then fiduciary not liable for: (1) Loss resulting from compliance with grantor's or investment advisory committee's directions, or (2) loss resulting from failure to take action proposed by fiduciary requiring prior authorization of grantor or investment advisory committee, if fiduciary timely sought but failed to obtain prior authorization. (KRS 286.3-275). Fiduciary not obligated to perform investment reviews or make investment recommendations to extent grantor or investment advisory committee has authority to make investment decisions. (KRS 286.3-275). Instrument may opt out of liability limits. (KRS 286.3-275).

Securities in Name of Nominee.

Any bank or trust company acting as fiduciary may have securities registered in own name, or name of nominee. (KRS 286.3-225).

Bequests and Devises to Inter Vivos Trusts.

See topic 13.16 Wills.

Accounting.

Court may require testamentary trustees to render accounting upon court's motion or upon motion of interested party (KRS 395.610); trustees' actions may be reviewed in judicial proceedings (KRS 386.675).

Compensation.

Trustee of estate may receive for services 6% of income collected, plus annual commission of 3/10 of 1% of fair value of real and personal estate in care of fiduciary; however, at option of fiduciary, in lieu of annual commission on principal, fiduciary may have commission not exceeding 6% of fair value of principal distributed, paid when distributed. (KRS 386.180[1]). Court may allow additional compensation for unusual or extraordinary services not normally incident to care and management of estate. (KRS 386.180[2]).

Final Settlement and Discharge.

Final settlements of testamentary trustees not required. See subhead Accounting, supra.

Uniform Common Trust Fund Act not adopted. Authorization for and regulation of common trust funds found in KRS 286.3-230 and 286.3-235.

Uniform Principal and Income Act of 1997 adopted with substantial modifications effective Jan. 1, 2005. (KRS 386.450 to 386.504).

Gifts to Minors.

See category 14 Family, topic 14.10 Infants.

Uniform Fiduciaries Act (1930) adopted in 1942 with substantial modifications. (KRS 386.100 to 386.150).

Uniform Simplification of Fiduciary Security Transfers Act not adopted.

Uniform Trustees' Powers Act adopted in 1976. (KRS 386.800 to 386.845).

Accumulations.

Provision for accumulation of income for period not contravening statute relating to restraint on alienation valid. (131 Ky. 609, 115 S.W. 739).

Perpetuities.

See category 21 Property, topic 21.12 Perpetuities.

Pour Over Trusts.

See topic 13.16 Wills, subhead Bequests and Devises to Inter Vivos Trusts.

Renunciation.

Trust may be terminated by consent of all beneficiaries when continuance not necessary to carry out material purpose of settlor. (238 S.W.2d 142). Irrevocable trust revocable with consent of settlor and all beneficiaries. (727 S.W.2d 408).

13.16 WILLS:

Uniform Probate Code not adopted.

Testamentary Capacity.

Every person of sound mind, 18 years of age or older, may by will dispose of his real or personal estate to which he may be entitled at his death. Will effectively disposes of property acquired after execution of will. (KRS 394.020). Person under 18 years of age can make will only: (1) In pursuance of power specifically given to that effect and (2) if parent, he or she may appoint guardian for child by will. (KRS 394.030).

Testamentary Disposition.

Testator may dispose of any estate, right or interest in real or personal estate that he may be entitled to at his death, which would otherwise go to heirs or personal representatives. (KRS 394.020). No limitation imposed on bequests to charities or religious institutions.

Execution.

No will valid unless in writing, with name of testator subscribed by himself or by some other person in his presence and by his direction. If will not written wholly by testator, subscription must be made or will acknowledged by testator in presence of two credible witnesses, who must subscribe names to will in presence of both testator and each other. (KRS 394.040). No absolute requirement that both witnesses sign at same time or in presence of each other if acknowledged by testator upon witness' signing. (233 Ky. 23, 24 S.W.2d 902).

Validity of will not affected by fact that attesting witness, competent at time of attestation, subsequently becomes incompetent to testify. (KRS 394.210).

Statutorily approved form for execution and attestation of self-proved will set forth infra, under Form for self-proved will.

Attestation Clause.

No set form required, but wording in form set out in subhead Self-Proved Will, infra, recommended.

Holographic wills recognized. (KRS 394.040; 166 Ky. 421, 179 S.W. 389).

Nuncupative Wills.

Statutory provisions recognizing validity of unwritten will for personal property for soldiers in actual service or mariners at sea repealed effective June 16, 1972.

Revocation.

Testator's marriage does not revoke previously made will or codicil. (KRS 394.090). Testator's divorce or annulment of testator's marriage after executing will revokes any disposition or appointment of property made by will to former spouse, and any nomination of former spouse as fiduciary, unless will expressly provides otherwise. Property not passing to former spouse passes as if former spouse predeceased testator; provisions conferring some power upon former spouse are interpreted as if former spouse predeceased testator. (KRS 394.092). Will speaks at time of testator's death. (KRS 394.330). Divorce does not revoke will making no bequest or devise to former spouse. (KRS 394.092). Will may also be revoked by later will or codicil, by writing executed like will, declaring intention to revoke, or by testator or someone in his presence and by his direction tearing, burning, obliterating, canceling or destroying instrument or signature thereto with intent to revoke. (KRS 394.080).

Revival.

Will once revoked revived by re-execution of revoked will or execution of codicil for that purpose with all formalities required for original execution, but only to extent intention to revive shown. (KRS 394.100). Will revoked by divorce revived by testator's remarriage to former spouse. (KRS 394.092).

Testamentary Gifts to Subscribing Witnesses.

If will attested by person to whom, or to whose spouse, any beneficial interest in estate devised or bequeathed, and will cannot otherwise be proved, such person deemed competent witness; but such devise or bequest shall be void, unless such witness would be entitled to intestate share of estate if will not established, in which case witness shall receive so much of share of intestate estate as does not exceed value devised or bequeathed. (KRS 394.210[2]).

Bequests and Devises to Inter Vivos Trusts.

Properly identified trust instrument may be incorporated in will by reference. If trust instrument amended subsequent to date of testator's will, operative effect of will not changed by amendment. (245 S.W.2d 914). Uniform Testamentary Additions to Trusts Act (1991) adopted 1998 with minor modifications. (KRS 394.076).

Testamentary Guardians.

Guardians, or alternatively, limited guardian or conservator, or both, may be nominated by will of surviving parent (KRS 387.040), and appointed by district court (KRS 387.070). See category 14 Family, topic 14.07 Guardian and Ward, subhead Eligibility and Competency.

Probate.

Wills proved before district court (KRS 394.140) and recorded in office of county clerk (CR 79.05[2]). As to venue of probate proceedings, see topic 13.08 Executors and Administrators.

Person offering will for probate must file verified application for probate, stating testator's residence at death and facts necessary to establish court's jurisdiction and, as far as known, names, ages and post office addresses of testator's surviving spouse and, if required by court, heirs at law. Application for probate may be combined with application for appointment as executor or administrator with will annexed. (KRS 394.145).

Person offering will may cause summons to be issued requiring any person interested to appear and show cause why will should not be probated. (KRS 394.170). Court may fix date for hearing and summon persons interested to appear then (KRS 394.180) or it may proceed to probate or reject will without summoning anyone (KRS 394.220).

Two modes of procedure allowed—(1) Ex parte (common form), and (2) inter partes (solemn form). Only difference in legal effect is procedure to review or vacate judgment of district court. (274 Ky. 99, 118 S.W.2d 200).

No person is, on account of being creditor of estate or executor of will, incompetent as witness for or against it. (KRS 394.200).

Where witnesses unavailable, will may be probated on proof by at least two credible disinterested witnesses of handwriting of purported testator; or upon sufficient proof of such handwriting; but court may require additional proof of pertinent facts and circumstances. (KRS 394.235). See subhead Self-Proved Will, infra.

Ten year limitation (see category 5 Civil Actions and Procedure, topic 5.16 Limitation of Actions) applies to original probate of wills (KRS 413.160; 395.010; 96 Ky. 313, 28 S.W. 497), but not to ancillary probate in Kentucky of wills properly probated in other states (119 Ky. 488, 84 S.W. 548; see also 130 Ky. 445, 113 S.W. 490).

When paper probated as will and later will discovered, proceedings may be instituted in court vacating judgment admitting will to probate and probating later will, provided such proceedings instituted within ten years after testator's death. (KRS 394.295; 255 Ky. 695, 75 S.W.2d 353. Compare 272 Ky. 147, 113 S.W.2d 1133 as to procedure).

As to procedure and evidence required for probate of lost will, see 458 S.W.2d 759.

No will admissible in evidence until probated by court having jurisdiction. Such probate is conclusive, except as to jurisdiction of court, until superseded, reversed or annulled. (KRS 394.130; 286 Ky. 768, 151 S.W.2d 1017; 255 Ky. 27, 72 S.W.2d 712).

Self-Proved Wills.

Attested will may at execution or later be made self-proved by acknowledgment of testator and witnesses before officer authorized to administer oaths. Self-proved wills may be admitted to probate without testimony of subscribing witness, but otherwise treated no differently than will not self-proved. (KRS 394.225). For form to self-prove attested will after execution, see

KRS 394.225(2). Execution and attestation before notary public, or other officer authorized to take oaths, in format substantially similar to statutory form below allows will to be admitted to probate without testimony of subscribing witness:

Form

I, _____________, the testator, sign my name to this instrument this ________ day of __________, 20__, and being first duly sworn, do hereby declare to the undersigned authority that I sign and execute this instrument as my last will and that I sign it willingly (or willingly direct another to sign for me), that I execute it as my free and voluntary act for the purposes therein expressed, and that I am eighteen (18) years of age or older, of sound mind, and under no constraint or undue influence.

____

(Testator)

We, __________, __________, the witnesses, sign our names to this instrument, being first duly sworn, and do hereby declare to the undersigned authority that the testator signs and executes this instrument as his last will and that he signs it willingly (or willingly directs another to sign for him), and that each of us, in the presence and hearing of the testator and in the presence of the other subscribing witness, hereby signs this will as witness to the testator's signing, and that to the best of our knowledge the testator is eighteen (18) years of age or older, of sound mind, and under no constraint or undue influence.

____

(Witness)

____

(Witness)

THE STATE OF ____________

COUNTY OF _____________

Subscribed, sworn to and acknowledged before me by __________, the testator and subscribed and sworn to before me by _____________, and ____________, witnesses, this ____ day of __________.

(Signed)____________________

____

(OFFICIAL CAPACITY OF OFFICER)

Living Wills.

For Health Care.

Kentucky Living Will Directive Act adopted 1994. (KRS 311.621 to 311.643). Any person 18 years or older of sound mind and with decisional capacity may make written living will directing any or all of following: (a) Withholding or withdrawal of life-prolonging treatment; (b) withholding or withdrawal of artificially provided nutrition or hydration; (c) designating one or more adults as surrogate or successor surrogate to make health care decisions on grantor's behalf; or (d) directing giving of all or any part of adult's body upon death for purpose specified in KRS 311.185. (KRS 311.623). Living will directive must be honored by grantor's family, regular family or attending physician and any health care facility in which grantor is patient. (KRS 311.623[2]). Notification to emergency medical responder or paramedic, of person's wish not to be resuscitated, only recognized if on standard form or identification approved by Kentucky Board of Medical Licensure, in consultation with Cabinet for Health and Family Services. (KRS 311.623[3]). Individuals also have common law right to refuse medical treatment, including nutrition and hydration. (858 S.W.2d 698). Surrogate may make any health care decisions which grantor could make individually if grantor had decisional capacity; decisions must be made in accordance with grantor's desires as indicated in advance directive. (KRS 311.629).

Living will directive must be in writing, dated, and signed by grantor or at his direction, either witnessed by two or more adults in grantor's presence and in presence of each other, or acknowledged before notary public or other person authorized to administer oaths. Witnesses must be 18 years old and following may not serve as witnesses: (a) Grantor's blood relative; (b) beneficiary of grantor under Kentucky descent and distribution statute; (c) employee of health care facility where grantor is patient, unless employee serves as notary public; (d) grantor's attending physician; or (e) any person directly financially responsible for grantor's health care. (KRS 311.625[2]). Surrogate may resign any time by giving written notice to grantor; to immediate successor surrogate, if any; to attending physician; or to any health care facility then waiting for surrogate to make health care decision. (KRS 311.625[3]). Designated health care surrogate may continue to act even after judicial appointment of guardian. (KRS 311.6231).

Revocation of living will directive accomplished by: (a) Writing, declaring intention to revoke, signed and dated; (b) oral statement of intent by grantor with decisional capacity in presence of two adults, one of whom must be health care provider; or (c) destruction of document by grantor or some person in grantor's presence and at grantor's direction. (KRS 311.627[1]). Any revocation effective immediately. (KRS 311.627[3]). Oral statement by grantor with decisional capacity to revoke advance directive overrides any previous written advance directive. (KRS 311.627[2]). Notwithstanding advance directive, life sustaining treatment and artificially provided nutrition and hydration must be provided to pregnant woman unless medical certainty procedures: (a) Will not maintain woman in such way as to permit unborn child's continuing development and live birth; (b) would be physically harmful to woman; or (c) prolong severe pain which cannot be alleviated by medication. (KRS 311.629[4]). Grantor or responsible party of grantor responsible for notifying health care provider of advance directive. (KRS 311.633).

Following, in order of priority, may make health care decisions for adult whose physicians have determined lacks decisional capacity and who has not executed advance directive: (a) Patient's judicially appointed guardian if medical decisions within scope of guardianship; (b) attorney-in-fact under durable power of attorney specifically including authority for health care decisions; (c) patient's spouse; (d) patient's adult or majority of reasonably available adult children; (e) patient's parents; (f) patient's nearest living relative or majority of reasonably available relatives of same relation. (KRS 311.631). Persons acting in good faith under advance directive exonerated from criminal and civil liability. (KRS 311.635).

Living will directive must be substantially in following form and may include other specific directions which are in accordance with accepted medical practice and not specifically prohibited by any other statute. Invalidity of any other specific direction shall not affect rest of directive. (KRS 311.625).

Form

LIVING WILL DIRECTIVE

My wishes regarding life-prolonging treatment and artificially provided nutrition and hydration to be provided to me if I no longer have decisional capacity, have a terminal condition, or become permanently unconscious have been indicated by checking and initialing the appropriate lines below. By checking and initialing the appropriate lines, I specifically:

____ Designate _____________ as my health care surrogate(s) to make health care decisions for me in accordance with this directive when I no longer have decisional capacity. If ____________ refuses or is not able to act for me, I designate ___________ as my health care surrogate(s).

Any prior designation is revoked.

If I do not designate a surrogate, the following are my directions to my attending physician. If I have designated a surrogate, my surrogate shall comply with my wishes as indicated below:

____ Direct that treatment be withheld or withdrawn, and that I be permitted to die naturally with only the administration of medication or the performance of any medical treatment deemed necessary to alleviate pain.

____ DO NOT authorize that life-prolonging treatment be withheld or withdrawn.

____ Authorize the withholding or withdrawal of artificially provided food, water, or other artificially provided nourishment or fluids.

____ DO NOT authorize the withholding or withdrawal of artificially provided food, water, or other artificially provided nourishment or fluids.

____ Authorize my surrogate, designated above, to withhold or withdraw artificially provided nourishment or fluids, or other treatment if the surrogate determines that withholding or withdrawing is in my best interest; but I do not mandate that withholding or withdrawing.

____ Authorize the giving of all or any part of my body upon death for any purpose specified in KRS 311.185.

____ DO NOT authorize the giving of all or any part of my body upon death.

In the absence of my ability to give directions regarding the use of life-prolonging treatment and artificially provided nutrition and hydration, it is my intention that this directive shall be honored by my attending physician, my family, and any surrogate designated pursuant to this directive as the final expression of my legal right to refuse medical or surgical treatment and I accept the consequences of the refusal.

If I have been diagnosed as pregnant and that diagnosis is known to my attending physician, this directive shall have no force or effect during the course of my pregnancy.

I understand the full import of this directive and I am emotionally and mentally competent to make this directive.

Signed this ____ day of ________, 20___.

____

LIVING WILL GRANTOR

____

ADDRESS

In our joint presence, the grantor, who is of sound mind and eighteen (18) years of age, or older, voluntarily dated and signed this writing or directed it to be dated and signed for the grantor.

____

WITNESS

____

ADDRESS

____

WITNESS

____

ADDRESS

OR:

STATE OF KENTUCKY)

__________ COUNTY)

Before me, the undersigned authority, came the grantor who is of sound mind and eighteen (18) years of age, or older, and acknowledged that he voluntarily dated and signed this writing or directed it to be signed and dated as above.

Done this ______ day of __________, 20___.

____

NOTARY PUBLIC

MY COMMISSION EXPIRES: ___________

Execution of this document restricts withholding and withdrawing of some medical procedures. Consult Kentucky Revised Statutes or your attorney.

For Mental Health.

Kentucky Advance Directive for Mental Health Act adopted 2003. Any person 18 years or older with right to execute legal documents (KRS 202A.420[2]) may make written advance directive including refusal of specific psychotropic medications, refusal of electric shock therapy, stated preferences for psychotropic medications, stated preferences for emergency interventions, and provision of information in any area specified (KRS 202A.422[1]). Directive must be signed before two adult witnesses and limitations about witnesses apply. (KRS 202A.422[2]-[3]). Surrogate may act for grantor. (KRS 202A.424). Health care facility shall comply unless court order or life-threatening emergency requires otherwise. (KRS 202A.426). Grantor may revoke in writing, by oral statement to witness, or by destruction. (KRS 202A.428). Directive must be substantially in following form. (KRS 202A.430).

Form

“Advance directive for mental health treatment

I,_____________, willfully and voluntarily execute this advance directive for mental health treatment. I want the instructions in this advance directive to be followed as described below.

Designated surrogate

___I am naming a surrogate to see that my instructions for mental health treatment are carried out.

___I am not naming a surrogate to see that my instructions for mental health treatment are carried out.

I designate_____________ to act as my surrogate. If this person withdraws or is unwilling to act on my behalf, or if I revoke that person's authority to act as my surrogate, I designate_____________ to act as my alternate surrogate.

If I do not designate a surrogate, if my surrogate and alternate surrogate withdraw or are unwilling to act on my behalf, or if I revoke their authority to act, then the health care provider and health care facility may proceed to render treatment in accordance with my instructions as described here and in accordance with standards for mental and physical health care.

The person acting as my surrogate is authorized to act in accordance with the content of this advance directive and may override the advance directive if, and only if, there is substantial medical evidence that failing to do so would result in harm to me. If my instructions and preferences are not stated in the advance directive, the surrogate may act in good faith in making treatment decisions in the manner in which the surrogate believes I would act.

Psychotropic medication provisions

I may indicate below any refusals of treatment with specific psychotropic medications, not to include an entire class of medications, due to factors that may include but are not limited to lack of efficacy, known drug sensitivity, or experience of adverse reaction:

I specifically do not consent and do not authorize my surrogate to consent to the administration of the following medications or their respective brand-name or generic equivalents for the reasons given:

Specific psychotropic medication Reason for refusal

____

____

____

____

I may list below any specific psychotropic medications that I would be willing to have administered to me if additional medications become necessary:

Specific psychotropic medications:

____

____

____

____

Electroconvulsive therapy provisions

Below are my instructions regarding electroconvulsive therapy (ECT):

___I consent to electroconvulsive therapy (ECT) if it is deemed clinically appropriate to treat my condition.

___I do not consent to electroconvulsive therapy (ECT).

Preferred procedures for emergency interventions

May state preferences for procedures for emergency interventions to be used when necessary for my protection or the protection of others. I understand that I am requesting consideration of my preferences for procedures for emergency interventions but that my surrogate, my health care provider, and the health care facility where I am a patient are not subject to civil liability for not abiding by these preferences. I understand that in the case of possible harm to myself or others, my health care provider or the health care facility may need to use procedures that override my stated preferences. If during an admission or while a patient in a health care facility, it is determined that I am engaging in behavior that requires emergency intervention, my preferences regarding the procedures to be used during an emergency intervention and the order that I prefer the interventions to be used are as follows:

Intervention	Order of preference	Reason for this preference
Seclusion	_______________	_____________________
Physical restraints	_______________	_____________________
Seclusion and physical restraint combined	_______________	_____________________
Medication by injection	_______________	_____________________
Medication in pill form	_______________	_____________________
Liquid medication	_______________	_____________________
Other ___	____________	_____________________

Signed this ___day of ________, 20___. Signature of grantor:_____________ Address of grantor:____

In my presence, the grantor voluntarily dated and signed this writing or directed it to be dated and signed. I am not the grantor's current health care provider, a relative of the current health care provider, or an owner, operator, employee or relative of an owner or operator of a health facility in which the grantor is a client or resident.

Signatures of witnesses:____

Surrogate contact information (if designated):Name:_____________________Address:____________________________________

_____Telephone:____________________Signed this ___day of _________, 20___. Signature of surrogate:____________________ Alternate surrogate contact information (if designated):Name:____________________Address:___________________________________

_____Telephone:____________________Signed this ___day of _________, 20___. Signature of alternate surrogate:____________________"

Contest.

Original action, with trial de novo, may be brought in circuit court of same county to contest action of district court admitting will to record or rejecting it, provided party appealing has interest in estate of decedent entitling him to do so. (KRS 394.240). Same procedure is used to obtain interpretation or reformation of will. (KRS 394.240). (As to right of testator's widow, see 186 Ky. 486, 217 S.W. 365.) Such action must be filed in circuit court within two years of district court judgment. (KRS 394.240). Proceeding takes form of civil action and plaintiff is required to join all necessary parties. (KRS 394.260). Notice of action to be filed by plaintiff and indexed in county clerk's office. (KRS 394.240[2]).

Filing action in circuit court, unless taken within 12 months, does not prevent appointment of executor or administrator by district court, or settlement, distribution and division of decedent's estate. (KRS 394.250). Circuit court may enter order restraining further distribution and division of estate. (KRS 394.250).

Final decision in circuit court, subject to appeal to court of appeals, bars any other proceeding to question probate or rejection of will, but this does not preclude jurisdiction to impeach final decision for any reason that would give jurisdiction over any other judgment at law, e.g., fraud or lack of jurisdiction. (KRS 394.260; 286 Ky. 768, 151 S.W.2d 1017).

Legacies.

If will fixes no time for payment, pecuniary legacies become payable and interest bearing one year after probate of will. (KRS 394.520; 228 Ky. 73, 14 S.W.2d 397). Legatees and creditors may sue for settlement of estate six months after qualification of representative. (KRS 395.510). Conversion of money or property or proceeds of property, devised to testator's heirs, into other property not ademption unless intent of testator. Devisee receives value of property unless contrary intent of testator shown. (KRS 394.360). For other actions, see topic 13.08 Executors and Administrators, subhead Actions Against Representatives.

Unclaimed Legacies.

Escheat to Commonwealth after seven years. (KRS 393.020).

Lapse.

If devisee or legatee predeceases testator, leaving issue who survive testator, such issue take parent's share, unless will indicates different intent. (KRS 394.400). When devise to several as class, or as tenants in common, or joint tenants, and one or more of devisees predecease testator and others survive, shares of those that die go to their descendants, if any; if none, to surviving devisees, unless will indicates different intent. (KRS 394.410[1]). Devise to children embraces grandchildren where no children and no other construction will give effect to devise. (KRS 394.410[2]). If devise to several as joint tenants with right of survivorship, share of deceased devisee divided amongst such as survive. If all such joint tenants predecease testator, property devolves as if devised to several as tenants in common. (KRS 394.410[3]).

Children.

Child born or adopted after execution of will receives intestate share (see topic 13.07 Descent and Distribution) unless: (1) Omission appears intentional from will; (2) when will executed testator had one or more children and devised substantially whole estate to other parent of omitted child; or (3) evidence outside will relating to transfers to omitted child during life of testator show intent that those transfers be in lieu of testamentary provision. (KRS 394.382[1]). Pretermitted child or children's shares satisfied by taking ratably from interest of heirs, devisees and legatees. (KRS 394.382[2]). As to rights of posthumous child to estate in remainder, see KRS 381.140; 394.460; 394.470.

Election.

Surviving spouse may, within six months after probate or within six months after disposition of any contest arising from probate, renounce will of deceased spouse and take dower or curtesy share of estate as if no will, except share in real estate held in fee simple directly or beneficially by decedent at time of death is only in one-third of such real estate. Renunciation must be acknowledged before and left for record with county clerk in county where probate made or acknowledged before subscribing witness and proved before and left with county clerk. Copy of renunciation must be filed with clerk of court in which probate made. Time for election may be extended for additional six month period by order of district court if extension applied for before expiration of original six months period. (KRS 392.080).

On proper application in behalf of insane widow, chancellor may exercise right of election for her. (243 Ky. 202, 47 S.W.2d 1059). Presumably same procedure applies on behalf of insane husband surviving his wife. But, district court has jurisdiction under KRS 24A.120(1) to give effect to renunciation of will by guardian of incompetent adult. (977 S.W.2d 929).

Contribution.

When widow's dower or widower's curtesy taken from estate devised to devisee, such devisee receives contribution on principles of KRS 394.420 to 394.490, unless different intent appears in will. (KRS 394.480).

Contract to Make Will.

Agreement to will property is valid and enforceable in action for its breach if based upon legal consideration. (299 Ky. 103, 184 S.W.2d 579). Where unrecorded contract to convey property to children part of divorce settlement and judgment, property subject to constructive trust and not subject to dower. (638 S.W.2d 711). Cause of action accrues at death of promissor. (299 Ky. 721, 187 S.W.2d 259). If contract executed after June 16, 1972, contract established only by provisions in valid will stating material provisions of contract, by express reference in valid will to contract and evidence proving provisions of contract, or by writing signed by decedent evidencing contract. (KRS 394.540[1]; 856 S.W.2d 892). Execution of joint will or mutual wills not presumption of contract not to revoke will or wills. (KRS 394.540[2]; 856 S.W.2d 892).

Renunciation.

Surviving spouse may renounce will and receive share under KRS 392.020 (see subhead Election, supra), with interest in real estate changed from one-half to one-third. (KRS 392.080). Renunciation must be made within six months after probate of will, but such period may be extended on application to district court. Surviving spouse or children if no surviving spouse may claim $15,000 exemption provided by KRS 391.030.

Beneficiary of any testamentary instrument, joint tenant, heir, next of kin, devisee, legatee, person succeeding to disclaimed interest, or appointee under power of appointment exercised by testamentary instrument may disclaim interest to any property or interest therein by filing written disclaimer in district court prior to acceptance of property or interest or benefit thereunder and within nine months after date of death of decedent. (KRS 394.610 to 394.680). No disclaimer by living person's legal representative, except for person's attorney-in-fact, shall be made unless court with jurisdiction of estate has authorized disclaimer. (KRS 394.610[3]). No disclaimer by person's attorney-in-fact shall be made unless instrument governing attorney-in-fact's authority expressly authorizes disclaimer. (KRS 394.610[3]). Nontestamentary instruments or contracts may be disclaimed within nine months after event determining beneficiary or his interest. (KRS 394.035).

Foreign Executed Wills.

Real and personal estate in Kentucky of person domiciled outside Kentucky may be disposed of by will executed according to law of testator's domicile. (KRS 394.120). Statutes do not prohibit nonresident's will from original probate in Kentucky if property located in Kentucky.

Foreign Probated Wills.

When will of nonresident relative to any estate in Kentucky is probated outside Kentucky, authenticated copy and certificate of probate thereof may be offered to district court having jurisdiction to probate such will in Kentucky. When so offered, court must presume, in absence of evidence to contrary, that will was duly executed and admitted to probate as will in state or county of testator's domicile, and must admit such copy to probate as will in Kentucky. (KRS 394.150).

Simultaneous Death.

See topic 13.05 Death, subhead Uniform Simultaneous Death Act.

Testamentary Trusts.

See topic 13.14 Trusts.

Uniform Anatomical Gift Act adopted with insignificant modifications. (KRS 311.165 to 311.235).

Uniform Disclaimer of Transfers by Will, Intestacy or Appointment Act adopted in 1974. (KRS 394.610 to 394.680).

14 FAMILY

14.01 ADOPTION:

Department for community based services (502-564-3703) within Cabinet for Health and Family Services establishes criteria for and regulates adoption (KRS 199.472; 992 KAR c. 1) (275 East Main Street, Frankfort, Kentucky 40601; http://www.chfs.ky.gov).

Any person of any age may be adopted. (KRS 199.470; 405.390). Any person over 18 who is resident of or who has resided in Kentucky for 12 months immediately preceding filing may file in circuit court of his county petition for leave to adopt child. (KRS 199.470[1]).

Consent Required.

Voluntary and informed consent of living parent or parents of child born in lawful wedlock or mother of child born out of wedlock, or father of child born out of wedlock if paternity legally established or if affidavit filed stating affiant is father of child; but such consent not required if: (a) Parent(s) adjudged mentally disabled not less than one year before filing of petition; (b) parental rights have been terminated; (c) living parents divorced and parental rights of one have been terminated and consent has been given by parent having custody; or (d) biological parent has not established parental rights as required by KRS 625.065. (KRS 199.500[1]). No consent of biological parents required if pleaded and proved that parent has (a) abandoned child for 90 days or more; (b) inflicted or allowed to be inflicted serious, non-accidental physical injury; (c) continuously or repeatedly inflicted or allowed to be inflicted physical injury or emotional harm; (d) been convicted of felony for infliction of serious physical injury to child named in adoption petition;

(e) failed for six months or more to provide essential parental care and protection; (f) caused or allowed child to be sexually abused or exploited; or (g) for reasons other than poverty alone, failed continuously or repeatedly to provide essential food, clothing, shelter, medical care or education for child; (h) had parental rights involuntarily terminated with another child, current child to proceeding born after or during pendency of previous termination and basis for previous termination not corrected; or (i) been convicted in criminal matter for causing or contributing to death of child from physical or sexual abuse or neglect. (KRS 199.502[1]). Minor parent who is party defendant may consent to adoption but guardian ad litem for minor parent appointed. (KRS 199.500[2]). If adoptee is 12 or over, his or her consent must be given in court, unless waived by court. (KRS 199.500[3]). Consent may not be given within 72 hours after birth of child. Consent given at 72 hours after birth shall be final and irrevocable 20 days after later of placement approval by Secretary of Cabinet, or signing of voluntary and informed consent. (KRS 199.500[5]). If adoptee over 18, only adoptee's consent necessary. (KRS 405.390).

Conditions Precedent.

No petition for adoption of child may be filed until child has lived continuously in home of petitioner for at least 90 days immediately prior to filing of petition, unless child is placed in home of petitioner by Cabinet, by child placement agency licensed by Cabinet, or with written approval of Secretary of Cabinet, in which case petition may be filed at time of placement. (KRS 199.470[3]). No petition to be filed unless child has been placed for adoption by child-placement agency, by Cabinet or with written approval of Secretary of Cabinet but no approval necessary if petitioner is stepparent, grandparent, sister, brother, aunt, uncle, great grandparent, great aunt or great uncle of child sought to be adopted or if child is placed by agency from another state with written consent of Secretary, or if child is adopted pursuant to decree, judgment, or final order of adoption issued by court or other governmental authority with appropriate jurisdiction in foreign country when child has been approved for U.S. citizenship, or as otherwise provided by federal law pursuant to KRS 199.585(1). (KRS 199.470[4]). Court may order report and background check pursuant to KRS 199.510.

Jurisdiction vested in circuit court. (KRS 199.470[1]). Action is in personam. (395 S.W.2d 588).

Venue is county of petitioner's residence. (KRS 199.470[1]).

Petition.

Husband or wife of petitioner must join, unless petitioner is married to biological parent of adoptee unless requirement waived by court. (KRS 199.470[2]).

Following persons must be made defendants: (a) Adoptee; (b) biological living parents of child under 18 if child is born in lawful wedlock or if child born out of wedlock, its mother and its father if: (i) Father is known and identified by mother by affidavit, (ii) prior to entry of final order in termination proceeding he has asserted paternity in action, to custodial agency, or to petitioner within 60 days after birth, (iii) his name is affixed to birth certificate, (iv) he has commenced judicial proceeding claiming parental rights, (v) he has contributed financially to support child, or (vi) he has married mother of child or lived openly with child or with mother of child; however, neither parent, if parental rights have been terminated; (c) child's guardian, if any; (d) if custody of child has been transferred to cabinet or other person, agency or institution, then it must be named. (KRS 199.480[1]). If either or both biological parents are defendants, no guardian ad litem need be appointed. (KRS 199.480[3]). If proposed adoptee is 18 or over, he or she alone need be made defendant. (KRS 405.390). Service on all necessary defendants same as in other civil cases (CR 4; see category 5 Civil Actions and Procedure, topic 5.20 Process), except child under 14 in custody of cabinet, agency, institution, or individual, shall be served by serving Cabinet. (KRS 199.480[2]).

Petition must contain allegations regarding name, birth date and place, mailing address, and residence of petitioner and adoptee, date of marriage of petitioner, relationship of child to petitioner, name by which adoptee to be known after adoption, description of adoptee's property, name and address of legitimate adoptee's living parents, or of mother, if illegitimate, and father if paternity legally established or by affidavit, and of child's guardian. Certified copies of any orders terminating parental rights must be filed with petition. Any consents must be filed prior to entry of adoption judgment. Copy of any placement approval by Secretary of Cabinet or Secretary's designee must be filed with petition. (KRS 199.490).

Proceedings.

Circuit clerk forwards two copies of petition to Cabinet for investigation and report, which must be rendered within 90 days from placement of child or 90 days after petition filed, whichever is longer, unless period is extended by court. If Cabinet is party defendant, its reports, if it files no other pleadings, are considered answer to petition. (KRS 199.510).

Hearing is private. (KRS 199.515).

Decree.

The court must not enter judgment of adoption of a minor child unless it finds that facts stated in petition are established; all legal requirements, including jurisdiction, have been met; petitioners are of good moral character and good reputation in community, and are able properly to maintain and educate child; that child is suitable for adoption; and that child's best interests would be promoted. (KRS 199.520).

If petition for adoption denied, child may be returned to custody of Cabinet, individual, institution, or agency (if any) previously having charge of it; otherwise court must certify case to juvenile session of district court for appropriate action, and district court must advise Cabinet of pendency of such action. (KRS 199.550).

Appeal.

Party to adoption proceeding aggrieved by final order may appeal to court of appeals as in other equity actions. (KRS 199.560).

Record.

Files and records of court in adoption proceedings are not open to copy or inspection by persons other than parties to such proceedings, their attorneys, or representatives of Cabinet, except upon order of court expressly permitting inspection. No person having charge of such records may furnish any copy thereof or disclose names of any parties appearing therein except on order of court. (KRS 199.570[1]). Upon entry of final order, record may be opened to adult adopted person only, but only with written consent of biological parents and written order of court, or if biological parents are deceased or cannot be located, by written order of court. (KRS 199.570[1]; 199.572). Replacement birth certificate shall show residence of adoptive parents as birthplace of child but, if requested by adoptive parents, replacement certificate shall contain location of birth, hospital and name of doctor or midwife. (KRS 199.570[3]). Health history and nonidentifying background of biological parents and blood relatives, if known, shall be given to court and adoptive parents not later than date of adoption, and to adult adopted person if requested in person or in writing. (KRS 199.520[4]). Cabinet is to make diligent effort to notify adoptive parent, if adopted person is minor, adult adopted person, or adult adoptable person of information received from biological parent, biological sibling, or provider of medical services which has affected or may affect physical or mental health of genetically related persons. (KRS 199.525[1]). Cabinet shall submit such health history to clerk of circuit court, who shall place health history in locked adoption case file. (KRS 199.525[2]; 199.570[1][b]).

Name.

Judgment of adoption changes name of child to conform to prayer of petition, without reference to former name. (KRS 199.520[1]).

Effect of Adoption.

Adoptee is considered natural child of adoptive parents as if born of them for purposes of inheritance, succession and other considerations. Except where biological parent is spouse of adoptive parent, child has no legal relationship to its biological parents. (KRS 199.520[2]). Adoptee cannot inherit from or through blood relatives. (406 S.W.2d 151).

Setting Aside Adoption.

Adoption may be annulled on petition filed within five years after judgment and on proof that adoptee reveals traits of ethnological ancestry different from those of adoptive parents, of which latter had no information prior to adoption; no attack may be made based on procedure or substance of adoption suit after one year from entry of judgment of adoption. (KRS 199.540).

Surrogate Parenting Contracts.

No person, agency, institution, or intermediary may be party to contract compensating woman for her artificial insemination and subsequent termination of parental rights to child born as result of such insemination; contract is void. (KRS 199.590[4]).

Interstate Compact on Placement of Children has been adopted. (KRS 615.030).

14.02 ALIMONY:

See topic 14.05 Dissolution of Marriage, subheads Temporary Maintenance for Spouse, Permanent Maintenance for Spouse.

14.03 COMMUNITY PROPERTY:

System does not obtain in Kentucky. See topic 14.05 Dissolution of Marriage.

14.04 DESERTION:

See topics 14.05 Dissolution of Marriage, Husband and Wife; categories 13 Estates and Trusts, topic Descent and Distribution; Property, topic Dower.

14.05 DISSOLUTION OF MARRIAGE:

This subject is covered in KRS c. 403. Absolute divorce is now called dissolution of marriage. Kentucky statute based in part on Uniform Marriage and Divorce Act.

Grounds for Dissolution of Marriage.

Sole basis for dissolution is irretrievable breakdown of marriage relationship. (KRS 403.110[5]; 403.170[3]). Determination whether marriage is or is not irretrievably broken is judicial function based on evidence and not mere agreement of parties. (564 S.W.2d 220). For grounds for declaration of invalidity of marriage, or annulment, see topic 14.11 Marriage, subhead Annulment.

Grounds for Legal Separation.

Judgment for separation or divorce from bed and board may be rendered for any cause that allows divorce or for any other cause that court in its discretion deems sufficient. (KRS 403.050).

Citizenship Requirements.

None.

Residence Requirements.

One of parties, at time action is commenced, must be resident of state and have been resident for 180 days next preceding filing of petition. (KRS 403.140[1]). Being stationed in state while a member of armed services may constitute residence (KRS 403.140[1]), but mere domicile or legal residence is insufficient (300 Ky. 237, 188 S.W.2d 439). Temporary absence from state does not defeat requirement otherwise met. (663 S.W.2d 219). Fact of sufficient residence must be proved by testimony of one or more credible witnesses, who may be petitioner or respondent. (KRS 403.025).

Jurisdiction.

Family court division of circuit court created to oversee all aspects of dissolution, custody, and property division. (KRS 23A.110). Courts having general equity jurisdiction may grant decree of dissolution of marriage or legal separation and no jury may be impaneled. (KRS 403.010). Court of appeals has no jurisdiction to reverse judgment dissolving marriage. (KRS 22A.020[3]).

In connection with jurisdiction as affecting validity in other states of Kentucky divorce, see 181 U.S. 155; 325 U.S. 226. See also 211 Ky. 799, 278 S.W. 121, and 325 U.S. 279.

Venue.

Action for maintenance or dissolution must be brought in county where husband or wife usually resides. (KRS 452.470).

Process.

Petition for dissolution may be joint. (KRS 403.150[3]). If petition filed by one party, service must be in accordance with provisions of Civil Rules (KRS 403.150[4]), by personal service, constructive service or warning order (CR 4).

Pleading.

Action is commenced by filing verified petition for dissolution of marriage or legal separation. Petitioner, or petitioners, must allege that marriage is irretrievably broken and set forth: age, occupation, social security number, residence and length of residence in state of each party; date of marriage and its place of registry; fact that parties are separated and date of separation; names, ages and addresses of any living infant children of marriage and whether wife is pregnant; any arrangements as to custody, visitation, and support of children and maintenance of spouse; and relief sought. If either party alleges domestic violence and abuse (as defined in KRS 403.720), petitioner must certify existence and status of any domestic violence protective orders. (KRS 403.150[2]).

A recommended form for petition is as follows:

Form

. . . . Circuit Court

Mary Doe Petitioner

vs. Petition for Dissolution of Marriage

Henry Doe Respondent

IN RE: The marriage of Mary Doe and Henry Doe (and custody and support of two infant children, if applicable)

Petitioner, Mary Doe, for her cause of action herein, states as follows:

1. (facts as to 180 day residency)

2. (facts as to age, occupation and address of petitioner)

3. (facts as to age, occupation and address of respondent, or joint petitioner who is denominated as respondent)

4. (facts as to date of marriage, etc.)

5. (facts as to separation, etc.)

6. (facts as to living infant children and pregnancy)

7. (facts as to arrangements for custody, etc. of children and for maintenance of a spouse, and if no arrangement made, statement to that effect)

8. The marriage of Mary Doe and Henry Doe is irretrievably broken.

9. (facts concerning property and ability of one spouse to provide for support and maintenance, if desired).

10. (facts concerning domestic violence and abuse, if applicable).

WHEREFORE, Petitioner, Mary Doe, demands (or Petitioner and Respondent demand):

A. Dissolution of marriage of Petitioner and Respondent.

B. (Prayer concerning custody of infant children)

C. That marital property be legally divided between Petitioner and Respondent in just proportions.

D. (Prayer for child support and maintenance both temporary and permanent if desired), as the Court may deem reasonable.

E. (Prayer for restoration of name if desired)

F. (Prayer for costs and reasonable attorney's fee) and for all other orders and relief to which Petitioner (or Petitioner and Respondent) may be entitled.

....

signature of attorney for Petitioner

....

signature of Petitioner

[Jurat for petitioner's signature, or signatures of petitioner and respondent if both parties join, see category 10 Documents and Records, topic Acknowledgements.]

Response, if filed may also be verified (KRS 403.150[4]) and only defense to action is denial that marriage is irretrievably broken (KRS 403.170[2]; 403.150[5]).

Petitioner or attorney must file with petition information on forms supplied by Office of Vital Statistics in Cabinet for Health and Family Services. (KRS 213.116[4]).

Practice.

If minor children who are issue of marriage exist, no testimony (other than temporary motions) until 60 days have elapsed from first of date of service of summons or appointment of warning order attorney, or filing either entry of appearance or responsive pleading. (KRS 403.044).

Uncontested allegation that marriage is irretrievably broken may be considered by court upon hearing (KRS 403.170[1]) or upon findings and recommendation of Commissioner (CR 53). In contested case court shall consider all relevant factors in hearing or hearings, may order conciliation conference, and shall determine whether marriage is irretrievably broken. (KRS 403.170[2]). No decree can be entered that marriage is irretrievably broken until parties have lived apart, or under same roof without sexual cohabitation, for 60 days. (KRS 403.170[1]). Finding of irretrievable breakdown is determination that there is no reasonable prospect of reconciliation. (KRS 403.170[3]).

When wife pregnant at time petition filed, court may continue case until pregnancy terminated. (KRS 403.150[7]).

Judgment or Decree.

Decree of dissolution of marriage and decree of legal separation are final when entered in accordance with Civil Rules. (KRS 403.130[1]).

Decree of legal separation operates as to property thereafter acquired, and as to personal rights and legal capacities of parties, as decree of dissolution of marriage, except that neither may marry again during lifetime of other, and legal separation does not bar curtesy, dower or distributive right, and it may be revised or set aside at any time by court rendering it. (KRS 403.050, 403.042).

Decree of legal separation may be converted to decree of dissolution of marriage after one year on motion of either party. (KRS 403.230[1]).

Temporary Maintenance for Spouse.

Temporary maintenance (alimony) is available on motion of either party with supporting affidavit when court has personal jurisdiction over both parties. (KRS 403.160[1]). Temporary injunctions or restraining order pursuant to civil rules may be sought. (KRS 403.160[3]). Temporary order or temporary injunction terminated by final decree. (KRS 403.160[6]). For grounds for temporary maintenance, see subhead Permanent Maintenance for Spouse, infra.

Allowance for Prosecution of Suit.

Court may, after considering financial resources of both parties, assess reasonable amount of costs and attorney's fees. Attorney's fees for services rendered before, during and after action may be granted directly in name of and collected directly by attorney. (KRS 403.220).

Permanent Maintenance for Spouse.

If dissolution action was based upon constructive service of absent spouse, permanent alimony may be sought upon motion with supporting affidavit after final decree. (KRS 403.200[1]). Maintenance or support once granted may be modified upon showing of changed circumstances so substantial and continuing as to make terms unconscionable. (KRS 403.250[1]). Unless otherwise expressly agreed or provided in decree, death of either party or remarriage of party receiving maintenance terminates obligations for future payments. (KRS 403.250[2]).

Grounds for maintenance are: insufficient property, including marital property, available to provide for reasonable needs; and inability of spouse to support himself through appropriate employment, or condition or circumstances of child for whom spouse is custodian make it inappropriate for spouse to be required to seek employment outside home. (KRS 403.200[1]). Court to grant maintenance for amounts and for periods of time as court deems just after considering: financial resources available to spouse seeking maintenance; time necessary to acquire sufficient education or training for appropriate employment; standard of living during marriage; duration of marriage; age, and physical and emotional condition of spouse seeking maintenance; and ability of spouse from whom maintenance is sought to meet his needs while meeting those of spouse seeking maintenance. (KRS 403.200[2]). Fault is not a ground for granting maintenance but may be considered in determining amount of maintenance granted. (498 S.W.2d 134).

Division of Property of Spouses.

Written separation agreement between parties is encouraged, is binding upon court, except provisions for custody, support, and visitation of children, and will be enforced unless court, after considering economic circumstances of parties and other relevant evidence produced by parties, finds its provisions unconscionable. Provisions may be set forth verbatim or by reference in decree of dissolution or legal separation. (KRS 403.180). KRS 403.190 sets forth factors for court-ordered declaration of separate property of parties and division of “marital property.” Fault may still be factor in division, although statute provides marital misconduct not to be regarded. (460 S.W.2d 821; KRS 403.190[1]).

Change of Wife's Name.

If no children born of marriage, wife's maiden name must be restored by court. If child or children born, name may be restored on her motion. (KRS 403.230[2]).

Custody of Children.

Uniform Child Custody Jurisdiction and Enforcement Act adopted. (KRS 403.800 to 403.880). See Part III, Uniform and Model Acts section of this Digest. Matters relating to child custody may be subject of separate action in court of competent jurisdiction or may be considered during dissolution of marriage proceeding upon inclusion of demand in petition. (KRS 403.140[1][d]). Separate proceeding for custody is instituted upon verified petition and action is designated “In re the Custody of (name or names of infant children).” (KRS 403.130[2]). Custody matters to be determined in accordance with best interests of each child with equal consideration to each parent and to de facto custodian, but court to consider, among other relevant factors: Wishes of parent or parents and any de facto custodian; wishes of child as to his custodian; interaction and interrelationship of child with parent or parents, siblings and other persons; child's adjustment to home, school and community; mental and physical health of all concerned; information, records and evidence of domestic violence as defined in KRS 403.720; and child's relationship with and parent's intent in placing child with defacto custodian. (KRS 403.270). Court may not consider conduct of proposed custodian which is not likely to affect child adversely. (KRS 403.270[3]). Custodian's abandonment of family residence shall not be considered when abandonment was due to threatened or actual physical harm to that party from spouse. (KRS 403.270[4]). Joint custody to parents authorized if in best interests of child. (KRS 403.270[5]). Temporary custody order may be sought (KRS 403.280[1]) and court may order investigation by friend of court or child agency (KRS 403.300). Child custody proceedings given priority on court dockets. (KRS

403.310[1]). Parent not granted custody is entitled to reasonable visitation rights unless court, after hearing, finds such rights would seriously endanger child's physical, mental, moral or emotional health, and court empowered to modify visitation rights in accordance with child's best interests. (KRS 403.320). Custody decree, once entered, shall not be modified for two years except upon court's belief, supported by affidavits, of serious danger to child's physical, mental, moral or emotional health or custodian appointed under prior decree has placed child with de facto custodian (KRS 403.340[1]), or pursuant to Uniform Child Custody Jurisdiction Act (KRS 403.340[2]). Criminal penalties relating to custody are set forth in KRS 509.070.

Allowance for Support of Children.

Separate proceeding for support may be initiated by petition (KRS 403.211; 403.130[2]) or by motion in dissolution or separation proceedings (KRS 403.160[2]). State guidelines for child support awards mandated by Title I of Family Support Act of 1988, 42 USC § 667, set forth in KRS 403.212. Child support obligations, unless otherwise agreed in writing or otherwise provided in decree and except for arrearages, terminate upon emancipation of child, but if child turns 18 and emancipated because of age, not because married while high school student, support required while high school student, but not beyond completion of year in high school when child turns 19 (see topic 14.10 Infants) but not by death of parent obligated to support child. When parent obligated to provide support dies, amount of support may be modified, revoked, or commuted to lump sum payment, to extent just and appropriate in circumstances. (KRS 403.213[3]).

Service of process may be had under long-arm statute upon person whose marital domicile is in state if he removes himself from state to avoid support obligations. (KRS 454.275).

Remarriage.

Decree of dissolution of marriage authorizes either party to marry again. (KRS 403.010). Decree of legal separation bars remarriage of both parties during life of other. (KRS 403.050).

Foreign divorce is recognized and enforced but Kentucky can always examine foreign decree for necessary jurisdiction. (211 Ky. 799, 278 S.W. 121).

Separation agreements are encouraged, enforced in accordance with terms if not found unconscionable, and may be either set out in full or incorporated by reference in decree of dissolution of marriage. (KRS 403.180). See subhead Division of Property of Spouses, supra.

Antenuptial Contracts.

See topic 14.09 Husband and Wife.

14.06 DIVORCE:

See topic 14.05 Dissolution of Marriage.

14.07 [RESERVED]

14.08 GUARDIAN AND WARD:

Note: District courts have jurisdiction of guardianships. Venue is county of residence or where property located. Three subheads, Minors, Selection of Guardian, and Appointment of Guardian, infra, are directed to guardianships of persons under 18; some general principles (such as jurisdiction resting in district court) apply to all guardianships. Subhead Disabled Persons is directed to such persons. Remaining subheads, infra, in this topic are general and apply to all guardianships.

Uniform Probate Code not adopted.

Minors.

District courts have jurisdiction over appointment and removal of guardians, limited guardians and conservators for minors and management and settlement of their accounts. (KRS 387.010[1]). Guardian may be appointed to care for person and financial resources of minor. (KRS 387.010[3]). Limited guardian may be appointed to care only for person of minor. (KRS 387.010[4]). Conservator may be appointed to care for financial resources of minor. (KRS 387.010[5]). If minor resides in Kentucky, jurisdiction exercised in county of minor's residence or, in case of testamentary guardianship, in county where will probated. (KRS 387.020[2]). If minor nonresident, jurisdiction in county where minor has real or personal property located, and if property located in more than one county, district court which first takes proceedings for appointment of guardian, limited guardian or conservator retains jurisdiction. (KRS 387.020[3]).

Selection of Guardian.

Last surviving parent of minor may by will nominate guardian, or alternatively limited guardian, or conservator, or both. (KRS 387.040). Testamentary guardian or conservator of estate must, however, be also appointed by proper order of district court. (KRS 387.070).

Minor 14 years of age or older may nominate own guardian, limited guardian or conservator provided compliance with certain prescribed formalities (KRS 387.050), and guardian appointed before ward attains age of 14 may be superseded by guardian appointed on nomination of ward after attaining that age (141 Ky. 278, 132 S.W. 541).

In appointing guardian, limited guardian, or conservator, district court must appoint any person or entity whose appointment is in best interest of minor, taking into consideration: (1) Ability of person or entity to manage and preserve minor's estate, and (2) person or entity nominated by will of last surviving parent or person nominated by minor if 14 years of age or older. (KRS 387.032).

Eligibility and Competency.

Any interested person or entity may petition for appointment of guardian. (KRS 387.025). Any guardian will be removed if moves out of Kentucky, becomes incapable of or fails to discharge duties, or district court deems removal in best interest of ward. (KRS 387.090[1]). As to powers of nonresident guardians or conservators, see subhead Foreign Guardian or Conservator, infra. Exactly the same provisions are made for appointment of public guardians as in case of public administrators (see category 13 Estates and Trusts, topic 13.08 Executors and Administrators). (KRS 395.380).

Appointment of Guardian.

Any interested person may petition court for appointment of guardian or limited guardian for unmarried minor or for appointment of conservator for minor owning real or personal property. (KRS 387.025[1]-[2]). Petition must set forth name, address and date of birth of minor; name and address of minor's spouse, if any; name and address of minor's parents, or if minor has no living parent, names and addresses of minor's adult next of kin; name and address of individual or facility having custody of minor; facts and reasons supporting need for guardianship, limited guardianship, or conservatorship for minor; description and approximation of value of minor's real and personal property and other financial resources; name and address of petitioner; name and address of petitioner's attorney, if any; and name and address of person or entity desiring appointment as guardian, limited guardian, or conservator. (KRS 387.025[3]). Petition must be accompanied by verified application of person or entity desiring appointment setting forth name, address, and age of applicant; applicant's relationship to minor, if any; whether applicant has ever been convicted of crime; and applicant's qualifications to serve as guardian, limited guardian, or conservator. (KRS 387.025[4]). Duplicate copy must be mailed by clerk to Department of Revenue. Court must appoint time for hearing petition and application; notice of hearing must be given minor if more than 14 years of age and to each person or entity required to be named in petition not less than five days prior to hearing. (KRS 387.025[5]). District court, after hearing, issues letters of appointment. (KRS 387.070[1]).

Qualification.

Guardian or conservator may not act until he has given bond to state, with surety approved by court, for faithful performance of trust, except for limited guardians, or if parent's will waives surety unless court deems imprudent under circumstances, or if court directs assets be deposited in restricted account pursuant to KRS 387.122. (KRS 387.070).

Inventory.

Within 60 days after appointment, guardian or conservator must file inventory of ward's estate coming into his hands, supplementing it as to additional property within like period, if any comes to his knowledge. (KRS 387.100).

Powers and Duties.

Guardian or limited guardian has powers and responsibilities of parent regarding ward's support, care and education, but not personally liable for ward's expenses and not liable to third persons by reason of relationship for acts of ward. (KRS 387.065[1]). Guardian or limited guardian must take custody of person of ward and establish ward's place of abode within Kentucky and must take reasonable care of ward's personal effects. (KRS 387.065[2]). Guardian or limited guardian may receive money payable for support of ward, consent to medical care for ward, consent to ward's marriage, adoption or military enlistment and expend funds of ward's estate for support of persons legally dependent on ward. (KRS 387.065[3]). Guardian, limited guardian or conservator may expend without court authorization (unless limited by court) income or principal of estate for support, care and education of ward (unless parent legally obligated and able to supply). (KRS 387.065[4]-[6]). Guardian or conservator may also apply income and principal for payments of taxes, claims and expenses of guardianship and in accordance with 387.065 for support, care and education of ward or ward's dependent. (KRS 387.125[1]). Guardian or conservator may sell ward's personal property without court authorization but must comply with provisions regarding fiducial sales of property in KRS c. 389A. (KRS 387.125[3]). Guardian or conservator may institute or defend actions, claims, or proceedings for protection of ward's estate. (KRS 387.125[6]). Guardian or conservator may lease real property for term no longer than seven years unless otherwise approved by court. (KRS 387.125[7]). See KRS 387.135 and 387.137 for limited guardian and conservator powers and duties as reflected above.

At age of 18, guardian or conservator must distribute funds to ward unless ward then disabled or partially disabled. (KRS 387.065[8]; 387.137).

Guardian may act for ward in cases where application made to dispense with administration in certain cases of small estates. (KRS 395.480). See category 13 Estates and Trusts, topic 13.08 Executors and Administrators.

Kentucky guardians may not remove ward's property from Commonwealth without obtaining permission from district court of county in which qualified. (KRS 387.200).

Investments.

See KRS c. 386; and category Estates and Trusts, topic Trusts.

Securities in Name of Nominee.

See category 13 Estates and Trusts, topic 13.14 Trusts, subhead Securities in Name of Nominee.

Real Estate.

Guardian or conservator holding funds for investment may invest in real estate upon approval of district court (KRS 386.020[1][h]); may lease real property for term no longer than seven years unless otherwise approved by district court (KRS 387.125[7]); may sell real property by proceeding under KRS 389A.010 to 389A.045 (KRS 387.125[3]). Without previous judicial proceeding or judgment, interest in real property held by fiduciary for ward may be sold by private sale subject to court approval. (KRS 389A.032).

Liabilities of Guardian.

Guardian, conservator and sureties liable for waste. (KRS 387.080[2]). Other liabilities same as those of executors and administrators (q. v.). Guardian liable up to $2,500 for unemancipated child's willful defacing of property if joined as defendant subject to cumulative limit of $10,000. (KRS 405.025). Neither limit applies for motor vehicle negligence liability imputed to person signing driver's license application. (KRS 405.025[2]; 186.590).

Accounts.

Guardian or conservator must file accounts of execution of guardian's or conservator's trust. Accountings subject to provisions governing fiduciary accountings (KRS 395.610 to 395.657; 395.990) except (1) Accounting of guardian or conservator must be filed one year after appointment of guardian or conservator, and annually thereafter unless ward's net estate is $5,000 or less, in which case accounting must be made on biennial basis, and (2) each accounting for estates with net value over $5,000 must include plan for preserving and maintaining ward's estate (KRS 387.175).

Termination of Guardianship.

Guardian, limited guardian, or conservator may be removed by district court if becomes insane, moves out of Kentucky, becomes incapable of discharging trust, fails to discharge duties or court deems removal in best interest of ward. (KRS 387.020; 387.090[1]). Guardian may resign trust on application. (KRS 387.090[2]; 395.325).

Disabled Persons.

District courts have exclusive jurisdiction over all proceedings involving determination of disability, modification of orders, appointment and renewal of guardians and conservators, and management and settlement of accounts of incompetent persons. (KRS 387.520[1]). Venue per KRS 387.520(2) & (3).

District court can appoint bonded curator for any person deeming himself unfit to manage his property or business because of age or physical disability and weakness. (KRS 387.320).

Petition for appointment of limited guardian, guardian, limited conservator or conservator for individual allegedly disabled, called “respondent”, may be filed by interested party or entity or by individual needing guardianship or conservatorship. Petition must set forth: Petitioner's relationship; interest; name and address and name and address of petitioner's attorney, if any; name and address; date of birth, if known; interest; name, place of residence, date of birth, and nature or degree of disability of respondent; facts and reasons supporting need for guardianship and conservatorship; names and addresses of respondent's next of kin, if known; description and approximate value of respondent's financial resources including government benefits, insurance settlements, and anticipated yearly income, if known; name, address, qualifications, and relationship, if any, to respondent of individual proposed as guardian or conservator; and name and address of any person or entity appointed by respondent as respondent's attorney-in-fact under durable power of attorney as defined in KRS 386.093(1), or as respondent's surrogate to make health care decisions under advanced directive. (KRS 387.530). Prior to hearing on petition, there must also be filed, by either employee of licensed facility where respondent resides or by court-appointed person or agency, “interdisciplinary evaluation report” containing specified information. (KRS 387.540). Court must appoint time for hearing within 30 days of application; notice of hearing must be given petitioner, respondent, their attorneys, all persons named in petition, and proposed guardian or conservator at least 14 days prior to hearing. (KRS 387.550). At hearing convened to determine disability of respondent, respondent has right to court-appointed counsel (KRS 387.560[1]) and trial by jury (KRS 387.570[1]).

Court may appoint as limited guardian, guardian, limited conservator or conservator any suitable person or any entity, public or private, capable of conducting active guardianship or conservatorship program. Unless no other suitable person is available and willing, court shall not appoint any public or private entity directly providing services to respondent. (KRS 387.600[1]). Any person desiring appointment shall file verified application, stating name, address, qualifications and relationship to respondent. (KRS 387.530[2]). Prior to appointment, court must make reasonable effort to question respondent concerning his preference and any preference indicated shall be given due consideration. If respondent has attorney in fact, then that must be treated as indication of preference to have attorney in fact appointed and said preference shall be given due consideration. Court must appoint person or entity best qualified and willing to serve. (KRS 387.600[2]).

Foreign guardian or conservator of ward not Kentucky resident may, by application to district court having jurisdiction, be authorized to sue for, recover and remove to ward's domicile, ward's personal estate in Kentucky. (KRS 387.185).

Gifts to Minors.

See topic 14.10 Infants; category 6 Courts and Legislature, topic 6.04 Statutes.

Uniform Fiduciaries Act adopted with substantial modifications. See KRS c. 386.

Uniform Simplification of Fiduciary Security Transfers Act not adopted.

Uniform Veterans' Guardianship Act adopted. (KRS 388.190 to 388.390).

Compensation.

Guardians, limited guardians, and conservators receive reasonable compensation for services rendered and reimbursements for reasonable expenses. Compensation shall not exceed fees provided to trustees of estates as provided in KRS 386.180. (KRS 387.111).

14.09 HUSBAND AND WIFE:

See also categories 13 Estates and Trusts, topic Descent and Distribution; Property, topics Curtesy, Deeds, Dower, Real Property.

During marriage, neither spouse has any interest in property of other owned at time of marriage or acquired after marriage. (KRS 404.010[1]). As to marriage previously contracted, law in force at time material to inquiry should be consulted. (104 Ky. 48, 46 S.W. 524; 104 Ky. 77, 47 S.W. 195).

Disabilities of Married Women.

Last of specific disabilities (relating to ability to convey real property and making promissory notes) removed effective June 21, 1974.

Separate Property.

Wife's estate is liable for her debts and responsibilities contracted or incurred before marriage, and for such contracted after marriage, except as indicated in cc. 404 and 392. (KRS 404.010[2]; 267 Ky. 816, 103 S.W.2d 269).

A married woman may acquire and hold property, real and personal, by gift, devise, descent or purchase, and may in her own name, as if she were unmarried, sell, encumber and dispose of her personal property (KRS 404.020[1]).

Husband is not liable for wife's debt or responsibility contracted before or after marriage, except to extent that he has received property from or by her by virtue of marriage, and except, further, that husband is liable for necessaries furnished wife after marriage. (KRS 404.040). However, husband entitled to credit for deceased wife's debt in determining distributive shares of estate for tax purposes. (KRS 140.090[2]). Otherwise neither consort is liable, by virtue of marriage, for other's obligations. Husband is personally liable for expenses of wife's funeral. (241 Ky. 322, 43 S.W.2d 1017).

Beneficial interest of married woman in life insurance policy or proceeds thereof inures to her separate use and that of her children, independently of her husband or his creditors. (KRS 304.14-340[1]).

Contracts.

Husband and wife may contract with each other as with other persons. (KRS 404.010; 404.020).

Married woman may make contracts, sue and be sued, as single woman, and may convey her own property to her husband without circumlocution. (KRS 404.020[1]; 292 Ky. 723, 167 S.W.2d 847). She may have power and right to rent out her real estate, and collect, receive and recover in her own name rents thereof, and make contracts for improvement thereof. (KRS 404.020).

A gift, transfer or assignment of personal property between husband and wife is not valid as to third persons unless in writing and acknowledged and recorded as required in case of chattel mortgages. (KRS 404.020[2]; 205 Ky. 450, 266 S.W. 43). This applies to intangibles. (285 Ky. 125, 147 S.W.2d 67).

Wife may, without consent of husband, take out insurance on life of husband or children. Premiums deemed to have been part of her separate estate. (KRS 304.14-340[2]).

Antenuptial contracts are enforceable and favored (798 S.W.2d 941; 798 S.W.2d 928; 236 Ky. 809, 34 S.W.2d 442) if in writing (KRS 371.010[5]), full disclosure has been made of extent of property owned by each party (711 S.W.2d 860) and other principles of contract law satisfied.

Actions.

A married woman may sue or be sued as though unmarried (KRS 404.060[1]), and may bring or defend certain actions for her husband (KRS 404.060[2] & [3]). She may sue her husband on contract (143 Ky. 94, 136 S.W. 127) and for injury to her separate property (215 Ky. 154, 284 S.W. 1042), and for personal injuries (262 S.W.2d 480). Presumably same rights and inhibitions attach to husband. Spouse and child abuse actions recognized with equitable remedies available. (KRS 403.715 to 403.785). Married woman is liable for her own torts as if unmarried.

Agency.

No reason is perceived why either husband or wife may not act as agent or attorney in fact for the other. (See KRS 404.030.)

Conveyance or Encumbrance of Property.

Either spouse may sell, convey or encumber his or her lands and chattels real, but right of other spouse to curtesy or dower is not affected thereby unless he or she joins in instrument or releases right by separate instrument. (KRS 404.030). As to sale or mortgage of property with one spouse free of dower or curtesy right of other, see category 21 Property, topic 21.08 Dower. Gift or assignment of personal property must be recorded to bind third parties. (KRS 404.020[2]).

Desertion and Nonsupport.

It is felony punishable by imprisonment from one to five years or by fine not to exceed $10,000 for parent intentionally to desert minor in circumstances endangering life or health of minor. (KRS 530.040; 532.060[2][d]). Persistent failure to provide support which person can reasonably provide and which he has duty to provide by virtue of court or administrative order to minor or other child adjudged mentally disabled or indigent spouse may be punished either as misdemeanor, or in flagrant cases, as felony with imprisonment up to five years. (KRS 530.050; 532.060[2][d]).

Revised Uniform Reciprocal Enforcement of Support Act repealed 1998.

Uniform Interstate Family Support Act adopted. (KRS 407.5301 to 407.5902).

Civil remedy available to deserted wife is by action for support. See topic 14.05 Dissolution of Marriage. As to effect of desertion on right of inheritance see category 13 Estates and Trusts, topic 13.07 Descent and Distribution.

Community Property system does not apply in Kentucky. Uniform Disposition of Community Property Rights at Death Act adopted. (KRS 391.210 to 391.260).

14.10 INFANTS:

Minors of both sexes attain their majority at age of 18, except for purchase of alcoholic beverages and for care of disabled children. (KRS 2.015). Until then, their parents are entitled to their services or their earnings, unless they have been emancipated. (KRS 405.010; 198 Ky. 330, 248 S.W. 892).

When any deposit is made by minor in his name, bank may pay him amount deposited. (KRS 287.380).

An infant is liable for necessaries.

Voting age is 18. (Ky. Const. § 145).

Emancipation.

Marriage does not remove disability of infancy (160 Ky. 432, 169 S.W. 891), but married infant may be plaintiff or defendant in action without appointment of guardian ad litem or necessity of bringing suit by guardian or next friend. Judgment may be rendered against married infant. (CR 17.02).

Disabilities.

Usual common-law disabilities apply. KRS 389A.010 establishes provisions for sale of realty of persons under disability.

Ratification of Contracts.

Common law rules govern infants as to their capacity to contract and their right to disaffirm contracts, provided, however, that war veterans, under 18 years of age, borrowing money from the federal government, under federal law enacted for their benefit, are bound by their contracts making and securing such loans. In such cases the borrower and his spouse, though under 18 years old, are deemed of full age. (KRS 384.090). Minors may borrow money from banks for educational purposes; instrument must have approval of parent or guardian and of financial officer of institution of learning. (KRS 286.3-385).

Actions.

Unmarried minors may sue by guardian or next friend. If sued, defense must be made for them by guardian or guardian ad litem, and no judgment may be rendered against an infant until such defense is made or a report filed showing inability to make defense after careful examination of case. (CR 17.03). Service under CR 5.01 shall be made on person bringing or defending action. (CR 17.03). Court has discretion to require parent or guardian of infant defendant to pay attorney's fees and costs. (KRS 405.027). Parents of child may jointly maintain action for loss of services or earnings of infant child as result of injury wrongfully or negligently inflicted upon child. (KRS 405.010).

Support of Minor.

Both parents of child have duty of nurture and education of infant and of dependent children over age 18 with permanent physical or mental disability, but father is primarily liable for nurture and education of his infant children and for any unmarried child over 18 so long as child is full-time high school student, but not beyond completion of school year during which child reaches age 19. (KRS 405.020[1]). Generally, legal obligation to support terminates when child reaches 18. (KRS 403.213[3]; 413 S.W.2d 887). See topic 14.05 Dissolution of Marriage, subhead Allowance for Support of Children. Age limitation does not void contract for support of child over 18. (418 S.W.2d 740).

Parental Responsibility.

Parent liable up to $2,500 (cumulative total $10,000) for unemancipated child's willful defacing of property if joined as defendant. (KRS 405.025[1]). Payment will not bar criminal proceedings against minor for balance not paid by parent or guardian. (KRS 405.025[1]). Person who signs application for motor vehicle operator's license for infant liable jointly and severally with infant for negligence. (KRS 186.590). Parental immunity from infants' claims in tort is largely abandoned. (465 S.W.2d 921).

Adoption.

See topic 14.01 Adoption.

Termination of Rights.

Parental rights of either or both legitimate parents may be terminated for neglect, abandonment or abuse. (KRS 625.050 to 625.120).

Uniform Transfers to Minors.

1983 Uniform Transfers to Minors Act adopted (KRS 385.012 to 385.252) with minor variations and designation of age 18 for “minor” to become “adult” in KRS 385.012(1).

Uniform Securities Ownership by Minors Act not adopted.

Interstate Compact for Placement of Children has been adopted. (KRS 615.030).

14.11 MARRIAGE:

Males and females under age 18 but over age 16 cannot lawfully marry, except, with permission of parents, surviving parent or guardian, or in cases of pregnancy, with consent of district court. In no case, except that of pregnancy which requires permission of district court, may males and females under age of 16 marry. (KRS 402.020[1][f]).

Consent Required.

When either contracting party is under 18 years of age but over 16 years of age, and not before married, no license may issue without written consent of such party's father, mother, or custodian, personally given or certified in writing and attested by two subscribing witnesses and proved by oath of one of such witnesses. No license shall issue if either party to marriage is under age of 16, unless in case of pregnancy district court orders issuance of license. (KRS 402.210). Pregnant female under 18 unable to obtain consent of parent or guardian may apply to District Court for permission to marry which may be granted in judge's discretion. (KRS 402.020[1][f][3]).

Medical Examination.

None required.

License.

No marriage may be solemnized without license, issued by county clerk of county where female resides at time, except that it may be issued by any county clerk when she is 18 years or over or widow, and it is issued on her application in person or by writing signed by her. (KRS 402.080).

Waiting Period.

None required. (Notice or publication of banns not required.)

Ceremonial marriage may be solemnized only by ministers or priests of any denomination in regular communion with any religious society, judges and justices of court of justice, retired judges and justices of court of justice except those removed for cause or conviction of felony, county judges/executive and such justices of peace and fiscal court commissioners as governor or county judge/executive may authorize. (KRS 402.050[1]). But where either party belongs to religious society having no officiating priest or minister whose usage is to solemnize marriage at usual place of worship, marriage may be solemnized by consent given in presence of such society. (KRS 402.050[1][c]). At least two persons, in addition to parties and person solemnizing marriage, must be present at every ceremony. (KRS 402.050[2]).

Reports of Marriages.

Person solemnizing marriage must, within one month, return license to county clerk of county where license issued, with certificate of marriage over his signature, giving date and place of marriage and names of at least two of persons present. (KRS 402.220). County clerk must keep record of marriages and index thereto. (KRS 402.230).

Record.

See category 10 Documents and Records, topic 10.04 Records, subhead Vital Statistics.

Common law marriages contracted in Kentucky are not generally recognized as valid, but they are so considered for the purposes of recovery and distribution under special provisions of Workers Compensation Act. (243 Ky. 694, 49 S.W.2d 571; 275 Ky. 559, 122 S.W.2d 137). Common law marriages contracted elsewhere are recognized if valid in State where contracted, unless marriage is between members of same sex. (KRS 402.040; 245 Ky. 399, 53 S.W.2d 725).

Proxy Marriages.

Not authorized.

Marriages by Written Contract.

Not authorized.

Prohibited Marriages.

Following marriages are prohibited and declared void: (1) Between persons who are nearer of kin to each other by consanguinity than second cousins, whether of whole or half blood (KRS 402.010); (2) with person who has been adjudged mentally disabled (KRS 402.020[1][a]); (3) where there is husband or wife living, from whom person marrying has not been divorced (KRS 402.020[1][b]); (4) when not solemnized or contracted in presence of authorized person or society unless either party believed such authority existed (KRS 402.020[1][c]); (5) between members of same sex (KRS 402.020[1][d]); (6) between more than two persons (KRS 402.020[1][e]); (7) of male or female under 18 years of age, but over 16 years of age, except with consent of parent or guardian, or in case of pregnancy, with consent of district court judge, pregnancy is only instance where marriage of persons under age of 16 is recognized, and then, only with district court order. (KRS 402.020[1][f]).

Severe penalties for violation of above prohibitions. (KRS 402.990).

Issue of all illegal or void marriages are considered as if born in lawful wedlock. (KRS 391.100). Issue of bigamous marriage is legitimate. (266 Ky. 176, 98 S.W.2d 483).

Foreign Marriages.

Marriage valid in state where solemnized is valid in Kentucky unless marriage is between members of same sex. (KRS 402.040).

Annulment.

Circuit courts exercising equity jurisdiction may decree a marriage invalid or void in following circumstances: (a) Party lacked capacity to consent to marriage at time marriage was solemnized because of mental incapacity or deformity, or influence of alcohol, drugs or other incapacitating substances, or party induced to enter into marriage by force or duress or by fraud involving essentials of marriage; (b) party lacks physical capacity to consummate marriage by sexual intercourse, and other party did not at time marriage was solemnized know of incapacity; (c) marriage is prohibited; or (d) at instance of next friend where person was under 18 but over 16 years of age at time of marriage, and consent of father, mother, guardian, or other person having charge of care not obtained, or if under 16 marriage not conducted with permission of district court. (KRS 403.120[1]; 402.030).

Actions for annulment must be brought within 90 days after petitioner obtains knowledge of conditions described in (a) or (b) above, within one year after petitioner obtains knowledge that marriage was prohibited when solemnized (KRS 403.120[2]), and before cohabitation following 18th birthday (KRS 402.030). Where doubt is felt concerning validity of marriage, court may on petition of either party affirm or avoid it except party over age cannot bring petition against party underage. (KRS 402.250).

Issue of illegal or void marriages are considered to be born in lawful wedlock. (KRS 391.100).

Antenuptial Contracts.

See topic 14.09 Husband and Wife.

15 HEALTH

15.01 ABORTIONS:

Abortions, including consent and pre-procedure education, regulated at KRS 311.710 to 311.830. Abortion facility license required by KRS 216B.0431.

15.02 ADMINISTRATION:

Health laws grouped generally under KRS cc. 210 to 224A. Cabinet for Health and Family Services has general supervision and administration of health laws. Offices located at 275 E. Main Street, Frankfort, Kentucky 40621; (502) 564-7042. See http://www.chfs.ky.gov. Health professions regulated by separate licensing boards. (See KRS cc. 309 to 355B.)

15.03 DISEASES:

Communicable Diseases.

Response to diseases regulated generally at KRS c. 214. Physicians and every head of family required to report diseases designated by Cabinet for Health and Family Services. (KRS 214.010). Reportable diseases found at http://chfs.ky.gov/dph/diseases. AIDS information regulated at KRS 214.600 to 214.995.

Occupational Diseases.

See category 11 Employment, topic 11.02 Labor Relations, subheads Occupational Diseases and Workers' Compensation Act.

Minors have authority to give consent to treatment for venereal disease, pregnancy, alcohol or other drug abuse or addiction. (KRS 214.185).

15.04 DURABLE POWER OF ATTORNEY:

See category 21 Property, topic 21.15 Powers of Attorney. For mental health advance directives, see category 13 Estates and Trusts, topic 13.16 Wills, subhead Living Wills.

15.05 FOOD, DRUGS, DEVICES AND COSMETICS:

Preparation, sale and distribution of food, for humans and animals, drugs, including those defined under national pharmacopoeia, and cosmetics, other than soap, regulated by Dept. of Public Health. (KRS 217.002 to 217.216). See http://chfs.ky.gov/dph/info/phps/food.htm.

State Board of Pharmacy supervises drugs in licensed pharmacies. (KRS 217.215). See http://pharmacy.ky.gov.

Food establishments regulated by state and local authorities. (KRS 217.280 to 217.390).

Medical use of marijuana not recognized. See KRS 218A.1421 to 218A.1423.

Controlled substances are regulated and classified by Cabinet for Health and Family Services. See KRS 218A.010 to 218A.350.

15.06 FRAUD AND ABUSE:

Health and Family Services Cabinet administers Medicaid fraud and abuse controls. (KRS 205.8451 to 205.8483). Self-referrals and fraudulent acts pertaining to Medicaid or Medicare prohibited. (KRS 205.8461 and 216.2950). Public assistance fraud and false statements additionally prohibited by KRS 194A.505.

15.07 HEALTH INSURANCE BENEFITS:

Health benefit plans offered by insurers, provider-sponsored networks, health maintenance organizations, insurance purchasing outlets and non-preempted self-insured arrangements are governed by Kentucky Insurance Code. (KRS 304.17A-005 to 304.17A-846). Limited health service benefit plans regulated additionally by KRS 304.17C-010 to 304.17C-110. Group and blanket health insurance regulated additionally by KRS 304.18-010 to 304.18-180. Health maintenance organizations regulated additionally by KRS 304.38-010 to 304.38-230. Limited health service organizations regulated additionally by KRS 304.38A-010 to 304.38A-110. See category 16 Insurance.

Health plan discrimination against willing providers prohibited by KRS 304.17A-270 and 304.17C-020; 538 U.S. 329.

See category 16 Insurance, topic 16.01 Insurance Companies.

15.08 LICENSURE AND CERTIFICATION:

Health facilities (including nursing pools) licensed and regulated generally by Health and Family Services Cabinet. (KRS cc. 216 and 216B). Generally, private offices/clinics of physicians, dentists, and other practitioners of healing arts are exempted from licensure and regulation. (KRS 216B.020[20]). Kentucky Board of Emergency Medical Services licenses, inspects and regulates ambulance services and first response providers. (KRS 311A.030). License for nursing home administrators required by KRS c. 216A.

Certificate of need (CON) required to: establish health facility; make capital expenditure or acquire major medical equipment costing more than adjustable threshold; change bed capacity of health facility; make substantial change in pending or approved project; add health service for which state health plan provides review criteria; alter geographic area or specific location of health facility; or transfer CON for establishing new health facility or replacing licensed health facility. (KRS 216B.010 to 216B.990). CON Office within Health and Family Services Cabinet administers law. Offices located at 275 East Main St., Frankfort, Kentucky 40621. (502) 564-9589; see http://www.chfs.ky.gov/con.

Managed Care Organizations regulated by Kentucky Department of Insurance. See category 16 Insurance.

Health professions licensed and regulated by separate profession-specific boards. See KRS cc. 309 through 335B.

15.09 LIVING WILLS:

See category 13 Estates and Trusts, topic 13.16 Wills, subhead Living Wills.

15.10 ORGAN DONATIONS:

Uniform Anatomical Gift Act (1987) adopted. (KRS 311.165 to 311.247).

15.10A PATIENTS' BILL OF RIGHTS:

Rights of Long-Term Care Residents (modeled after federal Medicare requirements) set forth at KRS 216.515 and 216.520.

Paying patients entitled to receive, within 30 days of discharge or 15 days from request, free copy health facility's itemized statement of services rendered and charges incurred. All patients entitled to explanation of charges (KRS 216B.250), and free copy of medical record (KRS 422.317).

Patient Grievance Procedures.

Long-term care facilities must give residents 30 days' prior notice of transfer or discharge, including appeal rights. Shorter notice permitted when urgent action required to address medical needs, when resident endangers himself or others, or when resident has been in facility less than 30 days. See 900 KAR 2:050 and 2:060. Assisted-living communities must have grievance policies addressing confidentiality of complaint issues and processes for resolving grievances. (KRS 194A.713[14]).

Medicaid recipients entitled to notice and hearing before discontinuing payment for covered services. See 907 KAR 1:563.

15.11 [RESERVED]

15.12 PUBLIC HEALTH:

Medicaid administered by Health and Family Services Cabinet. (KRS c. 205). Effective 7/1/2006, Medicaid applies multiple benefit levels with varying co-payments and deductibles. See http://chfs.ky.gov/dms..). KY Health Choices is Kentucky Medicaid program. See http://kyhealthchoices.fhsc.com. Also see topic 15.10A Patients' Bill of Rights, subhead Patient Grievance Procedures.

Diseases.

Reporting, consent to testing and confidentiality of communicable diseases regulated at KRS c. 214. Reportable diseases listed at http://chfs.ky.gov/dph/epi/reportablediseases.htm.

Minors have authority to give consent to treatment for venereal disease, pregnancy, alcohol or other drug abuse or addiction. (KRS 21.185).

Occupational Diseases.

See category 11 Employment, topics 11.02 Labor Relations, subhead Occupational Diseases; 11.03 Workers' Compensation Law.

15.13 SMOKING REGULATIONS:

Sale and distribution of tobacco products regulated at KRS 438.300 to 438.350. Smoking on school premises, except in areas designated for adult employees, is misdemeanor. (KRS 438.050). Governor, by executive order, and local governments authorized to adopt policies for smoking in governmental office buildings and work places. (KRS 61.165). Check local governments (e.g., Louisville and Lexington) for restrictions set by local ordinance. Employment discrimination based on smoking status prohibited. (KRS 344.040).

16 INSURANCE

16.01 INSURANCE COMPANIES:

Regulation.

Insurance Code comprised of 56 topical subtitles is codified in c. 304 of KRS. Assessment or cooperative insurance is generally dealt with separately in KRS c. 299.

Supervision by Commissioner who is head of Department of Insurance. (KRS 304.2-020). Commissioner's address is 215 West Main Street, Frankfort, Kentucky 40601. Information may be obtained by writing Department of Insurance, P.O. Box 517, Frankfort, Kentucky 40602 or from 800-595-6053 or on website at http://insurance.ky.gov.

Rates of all types of insurance, except life insurance, annuities, wet marine and transportation insurance, accident and health insurance, reinsurance, assessment or cooperative insurance, individual and group workers' compensation self-insurance, title insurance and liability self-insurance groups (KRS 304.13-021) shall be determined in competitive market by insurer (KRS 304.13-051). Rates in noncompetitive market, as determined by order of Commissioner (KRS 304.13-041), shall be made by insurer in accordance with rate standards of KRS 304.13-031. Health insurers that deliver, issue, or renew health benefit plan to groups with 51 or more employees or eligible members shall file rating methodology with Commissioner and Attorney General (KRS 304.17A-095[1][b]). Life insurers' rates regulated by KRS 304.15-340, except adjusted premiums for policies issued after Jan. 1, 1989 governed by KRS 304.15-342. Title insurers' rates regulated by KRS 304.22-020. Standard Nonforfeiture Law for Individual Deferred Annuities adopted. (KRS 304.15-315). Employer-organized association groups authorized by KRS 304.17A-320 may self-insure against health risks for sickness, accident or bodily injury. Regulated by Commissioner. (KRS 304.17A-800 to 304.17A-846).

Annual statements must be filed by each authorized insurer (as defined in KRS 304.1-100) before Mar. 1 of each year for affairs of year ending Dec. 31 preceding. Requirements for original certificate of authority to operate as insurer enumerated. (KRS 304.3-150).

Policies.

Approval.

Policies and forms for annuity contracts, applications (where required and which will be part of issued policy or contract), printed riders or endorsements and renewal certificates must be filed with Commissioner and approved before delivery or issuance for delivery in state. (KRS 304.14-120[1]). Health insurance filings must be made under KRS 304.17A. Exceptions for surety bonds, specially rated inland marine risks or to certain unique policies, riders, endorsements or forms. Filing may be made by rating organizations for certain insurers. (KRS 304.14-120[1]).

Standard or uniform provisions are required for policies of all kinds in KRS 304.14-150 and for policies, contracts and certificates of different kinds of insurance in subtopic of Code devoted thereto.

Additional policy provisions and contents allowed. (KRS 304.14-160).

Discrimination.

Insurers other than life or health prohibited from unfair discrimination among persons having substantially like insuring risks, exposure factors or expense elements. (KRS 304.12-080[1]). Insurer may not use fact that insured or applicant incurred bodily injury as result of domestic violence as sole reason for rating or underwriting decisions, refusing to insure or imposing limitations on coverage. (KRS 304.12-211). Particular discrimination provisions apply to life insurers (KRS 304.12-080[2]) and health insurers (KRS 304.12-080[3]). Testing and underwriting procedures prescribed for HIV infection and related matters. (KRS 304.12-013).

Rebates, discounts, abatements, credits or reductions of premium stated in policy, special favors and advantages prohibited except as provided for in applicable filing with Commissioner. (KRS 304.12-090).

Liens.

No separate provision in code.

Agents and Brokers.

Agents, consultants, administrators, managing general agents, insurance producers, surplus lines brokers, life settlement brokers or providers, and adjusters licensed and regulated by KRS 304.9-010 to 304.9-485. Reinsurance intermediaries licensed and regulated by KRS 304.9-700 to 304.9-759. Surplus lines brokers further licensed and regulated in subtitle relating to surplus lines. (KRS 304.10-010 to 304.10-210). Requirements for license renewal set forth in KRS 304.9-260. Agents of HMOs and liability self-insurance groups licensed pursuant to KRS 304.38-110 and 304.48-100.

Acceptance of license deemed irrevocable appointment of Secretary of State as agent for service of process. (KRS 304.9-370).

Agent.

To obtain license, applicant must be 18 years of age or over, resident of state or eligible nonresident, trustworthy, reliable and of good reputation, have completed 40 hour course of study prescribed by Commissioner and passed written examination, unless exempt from examination by KRS 304.9-107 or 304.9-170, have paid fees set by Commissioner, and provide evidence of liability insurance or penal bond in minimum amount of $20,000 per erroneous act or failure to act or agreement to assume responsibility by insurer for whom he is exclusive agent. (KRS 304.9-105). Agent must become appointed agent of insurer and have appointment approved by Commissioner before he can claim to be agent or representative of particular insurer except as otherwise specified. (KRS 304.9-270). Once licensed, agent must remain resident of state unless requirement waived in accordance with statute, not use license principally for purpose of writing controlled business and be appointed agent by authorized insurer. (KRS 304.9-100; 304.-9-120 to 304.9-140). Continuing education requirements apply to certain individuals who hold licenses or lines of authority. (KRS 304.9-295). Nonresidents may be licensed as life insurance agents under conditions specified in KRS 304.9-140. Business entity acting as agent must be licensed as agent, fulfill statutory requirements and principals named in application must meet requirements for individual licenses. (KRS 304.9-130). Temporary licenses available under certain conditions. (KRS 304.9-300; 304.9-310). Agent under KRS 304.9-120, except life and health agents, must maintain accessible place of business in state where his licenses and licenses of those employed by him must be displayed and where he must maintain complete records of transactions available to Commissioner. (KRS 304.9-390). License and renewal fees established by administrative regulation. (KRS 304.4-010; 806 KAR 4:010). License as insurance producer not required for certain enumerated activities. (KRS 304.9-090).

Insurer terminating appointment, employment, contract or other business relationship with licensee for reasons specified in KRS 304.9-280(2 and 3) must notify Commissioner within 30 days. Commissioner may place on probation, suspend, impose conditions upon continuance of license, revoke, or refuse to issue or renew any license and may impose civil penalty for specified causes. (KRS 304.9-440; 304.9-465).

Managing General Agent.—To obtain license, resident applicant must hold general insurance agent's license and be appointed by each authorized insurer represented. Nonresident applicant must hold nonresident agent license with property and casualty lines of authority and be appointed by each insurer represented. Nonresident managing general agents subject to same restrictions as nonresident agents. If any unauthorized insurers are represented, applicant must also hold surplus lines broker license. License and renewal fees set by administrative regulation. (KRS 304.9-085; 304.4-010; 806 KAR 4:010[1 to 3]). License as insurance producer not required for certain enumerated activities. (KRS 304.9-090).

Specialty license authorizes employee or representative of license holder to participate in any aspect of selling of specified insurance without being licensed, registered or otherwise identified. (KRS 304.9-485).

Consultant must be competent, trustworthy under highest fiduciary standards, financially responsible, of good reputation and have insurance policy coverage with aggregate liability of $100,000, and deposit $20,000 as bond with Commissioner. If consultant is individual, consultant must be 18 years of age or over, have five years experience as licensed agent with respect to kinds of insurance to be covered by license or have other special training or experience, have thorough knowledge of insurance covered, and pass written examination. If consultant is business entity, it must submit National Association of Insurance Commissioners Uniform License Application and designate individuals authorized to act for business entity under consultant license. (KRS 304.9-320; 304.9-330; 304.9-133). License and renewal fees set by administrative regulation. (KRS 304.4-010; 806 KAR 4:010). Reinsurance intermediary broker licensing requirements at KRS 304.9-705.

Administrator.

Persons who collect premiums for or settle or adjust claims on life, health, annuity, or benefit plans required to hold current license. Applicants must be 21 or over, competent, trustworthy, reliable, of good reputation, have attained educational level acceptable to Commissioner and be financially responsible. Licenses renewed biennially. (KRS 304.9-051 and 304.9-052). Firm or corporation may be licensed as administrator if persons authorized to act meet requirements for individual licenses. Administrators may only act under written agreement with insurer and hold funds of insurer in fiduciary capacity. (KRS 304.9-371 to 304.9-377).

Advisory organization, statistical agent or form provider must obtain license as provided. (KRS 304.13-091). Advisory organization may perform enumerated activities. (KRS 304.13-121). Statistical agent may perform enumerated activities. (KRS 304.13-163). Advisory organization must file all statistical plans, prospective loss costs and supplementary information with Commissioner prior to becoming effective. (KRS 304.13-165).

Broker.

License may be issued to any Kentucky resident or designated nonresident who has current agent's license for property and casualty, has been deemed competent and trustworthy in surplus lines by Commissioner, gives evidence of financial responsibility for errors and omissions of $1,000,000 per occurrence and $2,000,000 in aggregate, and who posts bond in penal sum of $50,000. (KRS 304.10-120; 304.10-140). Brokers shall maintain and keep available to Commissioner in their offices full records of each surplus lines coverage procured for five years after issuance (KRS 304.10-160) and shall file within 30 days of end of each calendar quarter verified statement of all surplus lines transacted in previous quarter (KRS 304.10-170). License and renewal fees set by administrative regulation. (KRS 304.4-010; 806 KAR 4:010).

Life settlement provider or broker must obtain license by attending training and passing exam unless exception applies, and file with Commissioner evidence of financial responsibility of $500,000 per occurrence and $1,500,000 aggregate. (KRS 304.15-700). Life settlement transactions completed through independent escrow agent. (KRS 304.15-718).

Process Agent.

Secretary of State designated irrevocable attorney for receipt of process for each authorized foreign or alien insurer, domestic reciprocal insurer, domestic Lloyd's insurer and each qualified self-insurer. (KRS 304.3-230). Service upon unauthorized insurers shall be upon Secretary of State. (KRS 304.3-230[3]; 304.11-040). Service upon authorized domestic insurers is same as upon domestic business corporation. (KRS 304.3-230[4]; 271B.5-040).

Investments for domestic insurers regulated by subtitle 7 of KRS c. 304. Investments of foreign insurers shall be as permitted by laws of domicile if of quality substantially equal to quality required of domestic insurers. (KRS 304.7-330). To extent authorized by Commissioner by administrative regulation, licensed agent, producer, broker or insurer has power to engage in any insurance activity that financial institutions chartered by or subject to federal jurisdiction are authorized to engage in. (KRS 304.2-105).

Foreign Insurance Companies.

Right to do business in state contingent upon issuance of certificate of authority (KRS 304.3-070) by Commissioner; qualifications for issuance of certificate generally same as for domestic insurers but foreign insurer must have been issuing own policies as authorized insurer in domicile for at least three years, or be wholly owned subsidiary of insurer previously authorized in Kentucky, or be successor in interest to authorized insurer, or be organized solely for purpose of insuring against special hazards to property or liability for which adequate provision is not made by previously authorized insurers (KRS 304.3-090). Commissioner may suspend certificate of authority for specified acts or omissions of insurer. (KRS 304.3-200).

Foreign or alien applicant must include in application, in addition to information required of domestic insurers on forms supplied by Commissioner, name and address of person to whom lawful process to be forwarded, certificate of public insurance supervising official of its state or country of domicile showing that it is authorized or qualified to transact in such state or country kinds of insurance proposed in Kentucky, certificate as to deposit for maintenance of action (alien only), and certificate as to deposit in state, or approval of Commissioner for deposit out of state, of eligible assets equal to minimum required capital stock or minimum required basic surplus. (KRS 304.3-150[7] to [10]; 304.3-060[4]; 304.3-140[3]).

Fee for issuance and renewal of certificate of authority set by administrative regulation (KRS 304.4-010; 806 KAR 4:010); restrictions provided on amount and character of real estate and mortgage investments for domestic insurers applicable to foreign and alien insurers if allowable by laws of domiciliary jurisdiction (KRS 304.7-330).

Conduct of insurance business in state without required certificate of authority bars maintenance of actions in state courts, either directly or indirectly, to enforce any right, claim or demand arising therefrom but does not relieve insurer of liability to defend (KRS 304.3-060[4]) and renders insurer liable for premium tax equal to 2% of gross premiums charged and penalty of 25% if not paid before Mar. 1 of year after year of collection (KRS 304.11-050). Commissioner empowered to institute action through Attorney General to enjoin business without certificate of authority. (KRS 304.11-030[4]).

No separate reports required of foreign or alien insurers; no separate requirements set for withdrawal.

Taxation of Foreign Insurers.

Based on report on or before Mar. 1, annual premium tax of 1.5% levied on foreign life companies except fraternal assessment (KRS 136.330) and of 2% on foreign stock, other than life, and foreign mutual companies, other than life, cooperative, or assessment fire insurance companies (KRS 136.340 to 136.350). Fire insurers pay additional tax of ¾ of 1% of premiums. (KRS 136.360). Health insurance contract or contracts for state employees not subject to tax under KRS 136.340 and 136.350. Estimated payments due June 1 and Oct. 1 in addition to Mar. 1 if yearly amounts of tax, including tax on workers compensation premiums, exceeds $5,000 and penalty provided if not paid when due. (KRS 136.377).

Retaliatory Laws.

Code includes requirement that Commissioner impose obligations, prohibitions, or restrictions of whatever kind upon foreign or alien insurer or upon its agents or representatives doing business or seeking to do business in state equivalent to discriminatory or onerous requirements imposed upon Kentucky domestic insurers in domiciliary jurisdiction of foreign or alien insurer. (KRS 304.3-270; 91A.080[5]).

Premium Tax.

For taxation of foreign and alien insurers, see subhead Foreign Insurance Companies, supra. Every domestic life insurance company must make irrevocable selection to be taxed under KRS 136.320 or 136.330. (KRS 136.335). Domestic life insurers taxed at rates of 1 mill plus 30¢ on each $100 of taxable capital, 1 mill on each $100 of taxable reserves, and $1.50 on each $100 of premium receipts. (KRS 136.320[3]-[7]; 136.330). Annual 2% premium tax applies to other domestic insurance companies with ¾ of 1% additional tax imposed upon fire insurers. (KRS 136.340 to 136.360). Health insurance contract or contracts for state employees not subject to tax under these sections. In addition to any such premium taxes, every domestic, foreign, or alien insurer (other than life or health insurers) must collect surcharge of $1.50 per $100 of premiums on coverage to policyholders, to be reported and remitted by insurer to Department of Revenue on 20th of each month; rates adjusted as of Jan. 1 in even years. (KRS 136.392). Local governments may elect to impose license fees or taxes on privilege of engaging in business of insurance and Commissioner shall impose equal premium tax on foreign insurers if foreign state retaliates against Kentucky insurer because of this provision. (KRS 91A.080[5]).

Privilege Tax.

Fees for annual, additional and supplemental statements set by administrative regulation. (KRS 304.4-010; 806 KAR 4:010). No other privilege taxes levied.

Uniform Insurers Liquidation Act substantially adopted with numerous variations, omissions and additional matters. Insurers rehabilitation and liquidation covered by KRS 304.33-010 to 304.33-600.

No-Fault Insurance.

Plan adopted. (KRS 304.39-010 et seq.). See category 23 Transportation, topic 23.01 Motor Vehicles, subhead No-Fault Insurance.

Plain Language.

Policies must be legible and intelligible, meeting requirements of KRS 304.14-430 to 304.14-450 and related regulations. (KRS 304.14-420). See subhead Policies, supra; category Business Regulation and Commerce, topic Consumer Protection.

16.02 SURETY AND GUARANTY COMPANIES:

Such companies are subject to general provisions of corporation statutes (KRS c. 271B) to general provisions of insurance code relating to domestic and foreign insurers (KRS 304.21-010), and to subtitle of insurance code regulating surety insurance contracts (KRS c. 304, subtitle 21).

Commissioner to send certified list of all insurers granted certificate of authority to transact surety business in state to county clerk of each county, and such lists, updated annually, to be maintained as public records in such clerks' offices. (KRS 304.21-020).

Bonds of corporate surety companies authorized to transact surety business in state are sufficient to meet requirements for all forms of undertakings, recognizances, guaranties and other obligations. (KRS 304.21-050). Insurer executing surety contract estopped to deny its corporate power to execute contract or assume liability. (KRS 304.21-080).

See category 5 Civil Actions and Procedure, topic 5.04 Bonds.

See also category 2 Business Organizations, topic 2.03 Corporations, subhead Shareholders' Actions.

17 INTELLECTUAL PROPERTY

17.01 TRADEMARKS AND TRADENAMES:

KRS 365.561 through 365.613 (“1994 Act”) (effective July 15, 1994) repealed prior law, except as to matters arising before or pending on effective date of 1994 Act and provided system of state trademark registration and protection substantially consistent with Federal Lanham Act. (Acts 1994, c. 468, § 19). Federal Lanham Act is persuasive authority for interpreting and construing 1994 Act. (KRS 365.561).

Common Law Protection.

Nothing in 1994 Act adversely affects rights or enforcement of common-law rights in marks acquired in good faith. (KRS 365.611). Principles of unfair competition allow user of name or mark to enjoin or limit use of similar name or mark if such use leads to likelihood of consumer confusion. (74 S.W.3d 759).

Who May Acquire Trademark.

Juristic person (defined to include firm, partnership, corporation, union, association, or other organization capable of suing or being sued) or natural person, and legal representatives, successors, or assigns of such person, may apply for and obtain registration. (KRS 365.563[5]-[7]).

What May Be Used.

Any word, name, symbol, or device may be used as trademark or service mark to identify, distinguish, and indicate source of goods or services including, but not limited to, distinctive package or container of any kind, or any combination: (1) Used in any manner on goods or on containers or displays associated with goods or on tags or labels affixed to goods or, if nature of goods makes placement on goods impracticable, then on documents associated with goods or their sale; or (2) used or displayed in sale or advertising of services. (KRS 365.563). Mark must not consist of: (1) Immoral, deceptive, or scandalous matter; (2) matter which may disparage or falsely suggest connection with persons (living or dead), institutions, beliefs, or national symbols, or bring them into contempt or disrepute; (3) flag or coat of arms or other insignia (or any simulation thereof) of U.S., any state or municipality, or any foreign nation; (4) name, signature, or portrait of living individual without written consent; (5) merely descriptive or deceptively misdescriptive or primarily geographically descriptive or primarily surname; or (6) matter so resembling mark used previously as to be likely to cause confusion or mistake or to deceive. (KRS 365.567). “Use” prerequisite to registration is bona fide use in ordinary course of trade. (KRS 365.563[8]).

No false brand may be used on anything sold or offered for sale with intent to deceive purchaser. (KRS 365.100).

Registration.

File verified application at following address: Secretary of State, Trademark Division, P.O. Box 718, Frankfort, Kentucky 40602-0718; telephone (502) 564-2848. Application must be made on prescribed form with specimen of mark as actually used in triplicate, setting forth: (1) Name and business address; (2) state of incorporation (if any), or if partnership, state in which organized and names of general partners; (3) goods or services on or in connection with which mark is used, and mode or manner in which mark is used in connection with goods or services; (4) class of goods or services; (5) date of first use anywhere; (6) date of first use in Kentucky; and (7) statement that applicant is owner of mark, that mark is in use in Kentucky, and that, to applicant's knowledge, no other person has right to use mark in identical or similar form or has federal or Kentucky registration of mark in identical or similar form. Application fee is $10 per class of goods/services payable to Kentucky Secretary of State. Application must be signed by applicant or person authorized to sign on applicant's behalf. (KRS 365.571).

Upon filing, Secretary of State's office examines application and may request additional pertinent information or request amendments to application, or may require applicant to disclaim exclusive rights in un-registrable component of mark otherwise registrable; applicant may voluntarily disclaim component of mark sought to be registered. Disclaimer does not affect rights in disclaimed matter if disclaimer has acquired distinctiveness (secondary meaning). If applicant is not entitled to registration, Secretary will advise and state reasons therefor; applicant shall have reasonable period of time to reply or amend application. Examination procedure continues until Secretary finally refuses registration or applicant fails to reply or amend within specified time period. Upon Secretary of State's final refusal of registration, applicant may appeal to Franklin Circuit Court, which may order Secretary to register mark. Franklin Circuit Court's final decision appealable. Concurrent applications pertaining to identical or confusingly similar marks for same or related goods or services are accorded priority by order of filing. Rejected applicants can bring action to cancel registration on grounds of prior or superior rights to mark. (KRS 365.573). Certificate issued by Secretary of State is admissible in any Kentucky court as evidence of registration. (KRS 365.577).

State registration sufficient to support finding that mark is valid and protectable; same deference given to state registration as given to federal registration. (359 F.Supp.2d 561).

Timber dealer may adopt brand by filing writing in prescribed form with county clerk of county in which his principal place of business is located, and posting copies thereof in designated places. (KRS 364.070).

Assignment.

Mark and registration or application is assignable with goodwill of business in which mark is used, or with that part of goodwill of business connected with use of and symbolized by mark. Assignment must be duly executed in writing and, upon payment of $5 recording fee, may be recorded with Secretary of State who will issue new certificate of registration for remainder of term in name of assignee. Assignment is void as against subsequent purchaser for valuable consideration without notice unless recorded within three months after date of assignment or prior to subsequent purchase. Registrants and applicants may record certificate of change of name of registrant or applicant upon payment to Secretary of $5 recording fee. Written and duly executed instruments relating to registered mark or pending application (e.g., licenses, security interests, or mortgages) may be recorded by Secretary. Recordation of such instruments constitutes rebuttable presumption of execution of assignment or other instrument. Photocopies are acceptable for recording if certified by any party thereto or successor as true and correct copy of original. (KRS 365.583).

Protection Afforded.

Term of registration is five years. Registration is renewable for additional five-year terms upon application filed within six months prior to expiration of term, including verified statement that mark has been and is still in use, specimen showing actual use of mark, and payment of $5 renewal fee to Secretary. Registration in effect prior to effective date of statute continues in effect for remainder of unexpired term. Secretary of State has responsibility to notify registrants (at last-known address) of necessity of renewing registrations at least six months prior to expiration date. (KRS 365.581).

Infringement.

Owner of registered mark can enjoin manufacture, use, display, or sale of counterfeits or imitations thereof. Court may award profits or damages, and order that counterfeits or imitations be delivered up for destruction. In cases where party commits wrongful acts with knowledge of prior registration or in bad faith, court may award to prevailing party treble profits or damages plus reasonable attorneys' fees. (KRS 365.603).

No person shall knowingly use or attempt to use timber dealer's brand without written consent of owner of brand. (KRS 364.080).

Criminal penalties apply for violation of KRS 365.100, which forbids use of false brand on items sold with intent to deceive, and for violation of KRS 365.110, which forbids dealer or merchant from applying to any package label bearing brand or name of any manufacturer without written authority of manufacturer. (KRS 365.990). Person who manufactures, uses, displays, advertises, distributes, offers for sale, sells, or possesses with intent to sell or distribute any item or service bearing counterfeit mark shall be guilty of counterfeiting and subject to criminal penalties. (KRS 365.241[2]). Counterfeit mark is: (1) Any unauthorized reproduction or copy of trademark, service mark, trade name, label, term, device, design or word adopted to identify goods or services; or (2) trademark, service mark, trade name, label, term, device, design or word adopted to identify goods or services affixed to any item without authority of owner. (KRS 365.241[1]).

Cancellation.

Secretary of State will cancel any registration: (1) Upon request of registrant or assignee of record; (2) if registration not renewed; (3) when court has found that mark has been abandoned, that registrant is not owner, that registration was improperly granted or fraudulently obtained, that mark is generic name of goods or services or portion thereof for which it has been registered, or that registered mark is so similar to mark federally registered by another prior to application date and not abandoned so as to be likely to cause confusion or mistake or to deceive; or (4) which court orders canceled on any other ground. (KRS 365.591).

Tradenames.

“Trade name” defined as any name used by juristic person (defined to include firm, partnership, corporation, union, association, or other organization capable of suing or being sued) or natural person to identify his business or vocation. (KRS 365.563[4]). No individual or general or limited partnership, business trust, corporation, or limited liability company may do business in Kentucky under assumed name, or any style other than his or its real name as defined in KRS 365.015(1) unless and until certificate of assumed name identifying real name and address of individual or entity is executed and filed: (1) With county clerk in county where individual maintains principal place of business or, (2) in case of business entity such as general partnership, limited partnership, business trust, corporation or limited liability company, with Secretary of State's office, copy stamped “filed” by Secretary of State then filed in county where entity maintains its registered agent, or if no registered agent for service of process is required, in county where entity maintains its principal office. (KRS 365.015[2]-[3]). For general partnership, certificate must be executed by at least one partner authorized to do so by partners. For limited partnership, it must be executed by general partner. For business trust, it must be executed by trustee. For corporation, it must be executed by any person authorized to act for corporation. For limited liability company, it must be executed by member or manager authorized to act. (KRS 365.015[2]). No certificate of assumed name filed with Secretary of State shall set forth assumed name which is not distinguishable upon records from any other name, previously filed and on record with Secretary of State. (KRS 365.015[2]). Assumed name is effective for five years from date of filing and may be renewed for successive terms upon filing renewal certificate within six months of expiration of term. (KRS 365.015[4]). Upon discontinuing use of assumed name, certificate may be withdrawn by filing certificate in office where original certificate was filed. (KRS 365.015[5]). General partnerships shall file amendment, signed by at least one partner authorized to do so by partners, to assumed name certificate to reflect change in identity of partners. (KRS 365.015[6]). Filing of certificate of assumed name shall not automatically prevent use of name by other persons. (KRS 365.015[7]). Certificate of assumed name filed by party to merger or conversion of partnership, limited partnership, business trust, corporation, or limited liability company shall remain in full force and effect as if originally filed by business organization surviving merger or conversion. (KRS 365.015[8]). Certificate of assumed name may be amended to revise real name or address of person or business organization. (KRS 365.015[9]). Certificate of assumed name, or its amendment or cancellation, shall be effective on date filed or at delayed effective date specified in document, but delayed effective date shall not be later than 90th day after date filed. (KRS 365.015[10]). Secretary of State shall receive fee of $20 for filing certificate, amendment or renewal, and county clerk shall receive $12 for recording up to three pages, plus $3 per each additional page. (KRS 365.015[11]; 64.012).

Contracts made without compliance with these provisions are not void. (218 Ky. 128, 290 S.W. 1028).

Criminal penalties for violation of KRS 365.015, including fine of $25 to $100 and imprisonment of ten to 30 days, or both. Each day of continuing violation constitutes separate offense. (KRS 365.990[1]).

17.02 TRADE SECRETS:

Uniform Trade Secrets Act, with 1985 Amendments, adopted without material variation effective July 13, 1990. See Part VI, Uniform and Model Acts Section. (KRS 365.880 to 365.900).

Common law protection available, at least against appropriation by persons in fiduciary relationship such as employee. (507 S.W.2d 166).

18 LEGAL PROFESSION

18.01 ATTORNEYS AND COUNSELORS:

Kentucky lawyer must be member in good standing of integrated State Bar. (SCR 3.030).

Jurisdiction over Admission.

Supreme Court has power to prescribe rules for admission to practice. (Const. § 116). Board of Bar Examiners is charged with responsibility of administering examination to qualified applicants. (SCR 2.000[3]).

Copies of rules and forms for making application to take bar examination may be obtained from clerk of Supreme Court, Room 235 State Capitol, Frankfort, Kentucky 40601; (502) 564-5444; http://www.courts.ky.gov.

Eligibility.

Applicant for admission to practice must be of good moral character and meet mental and emotional fitness requisite for attorney and take oath to support state and federal constitutions. (SCR 2.010). Application will be denied if submitted for primary purpose of using admission in state to obtain admission in, or circumvent admission requirements of, another state or District of Columbia. (SCR 2.013).

Provision is made by KRS 21A.130 and SCR 2.000 for appointment by Supreme Court of Board of Bar Examiners and by SCR 2.040 for appointment by Supreme Court of Committee on Character and Fitness, charged with duty of investigating each applicant and reporting thereon to Board.

Applicant for admission to bar by examination must file verified application with clerk of Supreme Court no later than Oct. 1 for succeeding Feb. examination or Feb. 1 for succeeding July. Application contains personal information, information concerning general and legal education, involvement in civil or criminal proceedings, history of applications for admission to bars of other states, and other information required by Board of Bar Examiners or Character and Fitness Committee. Fees for application and examination must accompany application in amount of $625; $675 if filed by attorney admitted to bar in another state; $200 fee for character investigation. (SCR 2.022). Any applicant whose application to bar of another state has been refused for any reason is ineligible to take bar examination in Kentucky unless refusal was based on failure to pass bar examination in that state. (SCR 2.020[5]). Character and Fitness Committee must advise Board of Bar Examiners three months prior to examination date of names and addresses of applicants for examination and ten days prior to bar examination certify to Board of Bar Examiners of names and addresses of applicants qualified to take bar examination. (SCR 2.040). Decision of Character and Fitness Committee on eligibility of applicant is final unless on motion of applicant made within 30 days after notice of decision was mailed. Supreme Court upon review of record may overrule decision. (SCR 2.060). Character and Fitness Committee may recommend conditional admission to Court. (SCR 2.042). Character and fitness determination valid for three years. Recertification after three years (from date of certification to date of examination) requires submission of form and $200 fee. (SCR 2.062).

Educational Requirements.

Applicant for bar examination must have graduated with J.D. or equivalent professional degree from law school approved by A.B.A. or Association of American Law Schools. (SCR 2.014). Prior to or at time of examination, each applicant must certify completion of course in ethics but in exceptional cases Character and Fitness Committee may waive requirement. (SCR 2.080[1]). No person shall sit for bar examination unless person has passed Multi-State Professional Responsibility Exam with scaled score of 75 or higher. (SCR 2.015). Similar criteria not required from applicants for admission on motion after admission and practice in another state. See subhead Admission Without Examination, infra.

Petition for Admission.

See subhead Eligibility, supra.

Examination.

Except as hereinafter stated, every applicant for admission must pass Multi-State examination administered by National Conference of Bar Examiners with scaled score of 132 or higher and must pass essay examination given by Board of Bar Examiners on 14 enumerated topics specified by Supreme Court with general average of 75% or higher. (SCR 2.080[4]). Applicant who has taken Multi-State examination in another jurisdiction within three years of application may transfer score of 132 or higher and need only take essay portion of examination. (SCR 2.080[4]). Applicant who fails bar examination may reapply for next scheduled bar examination on form provided by Board for fee of $75. Examination fee of $175 is also required of applicants who failed bar examination. (SCR 2.024). Essay examination subjects may include administrative law and procedure; conflict of laws; contracts; constitutional law; business entities;

criminal law and procedure; civil procedure; domestic relations; real and personal property; federal taxation; torts; Uniform Commercial Code; estates (wills and/or trusts); evidence; such other subjects as Board may select from questions proposed by National Conference of Bar Examiners. (SCR 2.080[1]). Special accommodations available for disabled applicants. (SCR 2.082). Certification of passing grade to Supreme Court, approval of recommendation for admission by Supreme Court, payment of bar association dues, $50 Certificate of Admission fee and administration of oath must precede issuance of certificate. (SCR 2.085, 2.120). Within 12 months after admission, each person admitted to bar must complete 12.5 hour new lawyer skills program, including two ethics credits (SCR 3.652[5]) unless person admitted for five years to bar of another state or person has attended mandatory new lawyer training program of at least 12.5 credits, including two ethics credits, offered by bar association of another state and approved by Director. (SCR 3.652[7]).

Clerkship in lawyer's office before admission is not required.

Admission Without Examination.

Any person who has been admitted to highest court of District of Columbia or another state and who has been engaged in active practice of law for five of seven years preceding application may be admitted to bar of Kentucky without examination provided that applicant meets all requirements for admission to bar as provided for in rules, including proof that district or state in which applicant has performed major portion of professional activities has comparable provisions for admission without examination. Active engagement in teaching of law considered active engagement in practice of law. Application for admission to be filed with clerk of Supreme Court together with fee of $1,200. (SCR 2.110).

Examination by Character and Fitness Committee is required pursuant to SCR 2.040.

Limited Certificate of Admission.

Attorney who is not member of bar of Kentucky but is member of bar in another state or District of Columbia and who performs legal services in state solely for employer, its parents, subsidiaries, or affiliates is required to file sworn statement with clerk of Supreme Court providing scholastic and professional information. Application fee of $1,000 and current dues to Kentucky Bar Association and statement of employer must accompany application. Upon approval, Court issues certificate of limited admission to practice law in state subject to duties and obligations of licensed members of bar and bar association but subject to restrictions that such persons may practice solely for employer and affiliates and may not appear as attorney of record in any court of state without regularly licensed co-counsel. (SCR 2.111).

Admission Pro Hac Vice.

Person licensed to practice in another state but not Kentucky permitted to practice case in state only if he consents to jurisdiction and rules of court governing professional conduct, pays per case fee of $100 to Kentucky Bar Association, submits to court certification from Kentucky Bar Association of receipt of fee, and engages licensed Kentucky attorney as co-counsel. Co-counsel's presence shall be necessary at all trials and at other times when required by court. (SCR 3.030[2]).

Attorneys associated with organized public defender programs or organized legal services programs sponsored, approved or recognized by Kentucky Bar Association may upon motion for restricted admission and submission of $100 fee, be allowed to practice with program for 18 months, or duration of employment, whichever shorter, if graduate of accredited law school, admitted to practice in highest court of another state, and able to evidence necessary moral character and fitness. (SCR 2.112).

Regulation and Licenses.

In addition to prescribing rules for admission, Supreme Court has power to promulgate rules governing its appellate jurisdiction, rules for appointment of commissioners and other court personnel, rules of practice and procedure for all judicial courts in state, and rules governing discipline of members of bar. (Const. § 116). Supreme Court has power to provide for organization, government and membership of state bar and to adopt rules and regulations to govern conduct and activity of state bar and its members. Pursuant to this authority, Court may authorize Kentucky Bar Association to conduct hearings, administer necessary oaths, take testimony under oath, compel attendance of witnesses, and compel production of records and other evidence incident to disciplining of members of bar. (KRS 21A.150, 21A.160). Rules adopted by Court pursuant to this authority are found in Supreme Court Rules. (SCR 3.010-3.830).

Disabilities.

Certain public officers are prohibited from engaging in private practice of law while in office, to wit: Governor and lieutenant governor (KRS 11.120); attorney general (KRS 15.015); all judges of Supreme Court, court of appeals, circuit courts, and district courts (Const. § 123). Certain clerks and other local officers are prohibited from maintaining law partnerships with attorneys or sharing office space with attorneys. (KRS 61.098).

No statute prohibits attorney from becoming surety for client, other than restrictions contained in Code of Professional Responsibility, principles of which have been recognized and accepted as sound statement of standard of professional conduct required of all members of bar. (SCR 3.130).

Liabilities.

Attorney employed to attend to professional business who neglects to attend to business after being paid for services, or who attends to business negligently is liable to client for damages and costs sustained by reason thereof, and if fee was paid, is liable for refund of fee. (KRS 411.165). Client security fund established and administered by bar association to provide partial indemnification for victims of fraudulent or dishonest acts by members of bar. (SCR 3.820). Binding arbitration available for claims of legal negligence involving claims of $10,000 or less. (SCR 3.800). Also see category 5 Civil Actions and Procedure, topic 5.08 Costs.

Compensation.

As to fees taxed as costs, see category 5 Civil Actions and Procedure, topic 5.08 Costs.

Contracts between attorney and client for part of recovery are champertous and void (KRS 372.060), but contracts for fee measured by amount or value recovered are recognized as valid (112 Ky. 712, 66 S.W. 751).

Fee agreements between attorney and client are generally not regulated, except as set forth in Kentucky Rules of Professional Conduct, see subhead Disbarment or Suspension, infra, and except in Workmen's Compensation cases. (KRS 342.320). No fee allowed against insolvent estate. (KRS 453.210). Procedures for arbitration of fee disputes between attorney and client and between attorneys are found in SCR 3.810. See category 9 Dispute Resolution, topic 9.02 Arbitration and Award.

Court in which case is pending will on timely application protect attorney from being discharged without payment of his proper fee, before allowing substitution of other counsel. (186 Ky. 713, 218 S.W. 258).

Lien.

Attorneys have lien on all claims, except those of state, put into their hands for suit or collection, or upon which suit has been instituted for amount of any fee which may have been agreed upon by parties or in absence of such agreement, for reasonable fee. If action is prosecuted to recovery, attorney shall have lien upon judgment recovered, legal costs excepted, for such fee. If records show name of attorney, defendant in action shall have notice of lien, but if parties, before judgment, in good faith compromised or settled their differences without payment of money or other thing of value, attorney shall have no claim against defendant for any part of fee. (KRS 376.460).

Attorney Ethics.

Kentucky Rules of Professional Conduct (SCR 3.130) are based on Model Rules of Professional Conduct adopted by American Bar Association. Significant variations from model rules include: Rule 1.6 adopted with non-uniform subparagraph (b)(3) authorizing disclosure of confidential information “to comply with other law or a court order”; Rule 3.3 adopted without subparagraph (a)(3); Rules 7.1 through 7.5 adopted with variations relating to lawyer advertising which is regulated and monitored by Attorneys Advertising Commission; Rule 8.3 (reporting professional misconduct) not adopted. Minor changes made to many other model rules to conform to local law and to eliminate potential ambiguity.

Disbarment or Suspension.

Disciplinary cases instituted by filing complaint with director of Kentucky Bar Association or by independent investigation by Inquiry Commission established by SCR 3.140. (SCR 3.160). Temporary suspension or probation authorized on petition of Inquiry Commission supported by affidavit indicating misappropriation of funds, conviction of Class A misdemeanor or mental disability or addiction affecting physical or mental fitness. (SCR 3.165). Automatic suspension upon conviction of felony. (SCR 3.166). Proof in disciplinary matters is taken before trial committee which files report with Board of Governors which makes findings of unprofessional conduct or not. (SCR 3.170-3.380). Findings and recommendations of Board of Governors forwarded to Supreme Court, where Attorney General acts as counsel for Bar Association. (SCR 3.390-3.450). Attorney licensed in Kentucky may be disciplined as result of professional disciplinary action taken in another jurisdiction. (SCR 3.435). When attorney has been suspended, disbarred or has abandoned his practice without notifying his clients, special commissioner may be appointed by Supreme Court to protect clients' interests. (SCR 3.395). Commissioner's power includes taking possession of attorney's files and records for purposes of inventory, evaluation, delivery to clients or new attorneys representing clients. (SCR 3.395[2]).

Unauthorized Practice.

Except in case of nonresident attorney admitted pro hac vice, it is misdemeanor to practice law, as defined in SCR 3.020, without license. (KRS 524.130). Supreme Court may prevent unauthorized practice by contempt proceedings, after written notice from Director of Kentucky Bar Association. (SCR 3.460). Appearance in small claims division of district court by officer or manager of corporation or partnership which is party to case is not unauthorized practice. (SCR 3.020). See category 6 Courts and Legislature, topic 6.01 Courts, subhead Small Claims Courts. Representation before any administrative tribunal or court by paralegal assistant under direction and supervision of lawyer pursuant to court rule or decision is not unauthorized practice of law. (SCR 3.700[3]).

Trust companies regularly engaged in drafting wills, deeds, trust instruments, and other legal documents, as agents or fiduciaries for compensation, and giving legal advice to makers of such documents, are engaged in unlawful practice of law. (393 S.W.2d 778). Lay corporate employees may not prepare mortgage for employer even though no compensation paid. (476 S.W.2d 177). Lay person's conduct of real estate closing does not constitute unauthorized practice of law. (113 S.W.3d 105).

Mandatory Continuing Legal Education.

Every attorney in practice more than one year other than incumbent judges shall attend annual minimum of 12.5 hours in approved continuing legal education courses. (SCR 3.661; 3.666). At least two of 12.5 hours must specifically address topics of legal ethics, professional responsibility or professionalism. (SCR 3.661). Members may carry forward any excess credits over 12.5 hours from two preceding years to satisfy minimum requirement for any educational year. (SCR 3.661[4]; SCR 3.666). Failure to meet CLE requirements is grounds for suspension from practice of law in Kentucky. (SCR 3.668[2]). Suspension procedures upon hearing before Supreme Court are set forth in SCR 3.669.

Specialty Certification Requirements.

Lawyer may communicate fact of practice in fields of law or fact of concentration of practice but lawyer may not use any form of "certified", "specialist", "expert", or "authority" in advertisement or statement regarding his or her practice unless: if admitted to patent practice with U.S. Patent and Trademark Office, may use "patent attorney"; if certified by appropriate government agency for admiralty practice, may use "admiralty" or "proctor on admiralty"; or if achieved certification from organization qualifying under 496 U.S. 91, may communicate fact so long as lawyer retains certification and good standing with organization. (SCR 3.130[7.40]).

Professional Corporations.

See category 2 Business Organizations, topic 2.03 Corporations, subhead Professional Corporations.

Legal Interns.

Legal internship program authorizes students who have successfully completed 2/3rds of academic hour requirements for first degree in law at approved law school to provide legal services to, and may appear in certain legal proceedings on behalf of, persons financially unable to employ counsel or Commonwealth or U.S. Attorney and may provide legal advice, counseling and negotiation services to college student pursuant to approved law school clinical program. Student prohibited from engaging as intern unless participating in legal aid program or clinical program of approved law school and until written approval for his participation has been filed with clerk of Supreme Court, clerk of circuit court in county where law school is located, and with clerk of each court for which student or graduate is to appear. (SCR 2.540).

19 MINERAL, WATER AND FISHING RIGHTS

19.01 MINES AND MINERALS:

Supervision.

Surface coal mining operations, including surface impacts of underground coal mines, oil shale mining, and clay mining are regulated by Dept. for Natural Resources in Energy and Environment Cabinet (#2 Hudson Hollow, Frankfort, Kentucky 40601; 502-564-6940; http://www.dnr.ky.gov).

Mine safety and blasting regulated by Office of Mine Safety & Licensing in Dept. for Natural Resources (1025 Capital Center Drive, Frankfort, Kentucky 40602; 502-573-0140; http://www.omsl.ky.gov).

Oil, gas and salt water wells regulated by Division of Oil and Gas Conservation in Dept. for Natural Resources (1025 Capital Center Drive, Frankfort, Kentucky 40601; 502-573-0147; http://www.dogc.ky.gov/).

Operation of Mines.

Underground and Surface Mines.

Construction and operation of underground and surface coal and clay mines, education, certification and annual recertification of miners, underground miners, mine foremen, assistant mine foremen, mine inspectors, electrical inspectors, mine safety inspectors, shotfirers and coal mine electricians, and specifications for equipment used in such mines provided in KRS cc. 350, 351 and 352. No person may be assigned work duties for purpose of mining coal unless he holds either certificate of competency and qualification issued by Division of Safety Analysis. Training and certification or miner trainee permit issued by office of Mine Safety and Licensing. (KRS. 351.102). License required for blasters. (KRS 351.315).

Surface mining statute requires persons wishing to engage in surface coal mining operations to obtain permit from Dept. (KRS 350.060) and to reclaim land (KRS 350.100; 350.405 to 350.485). See category 12 Environment, topic 12.01 Environmental Regulation.

Safeguarding of Employees.

Statutes provide for comprehensive safety regulations and various reports, which must be made to Office of Mine Safety and Licensing. Surface and underground mine safety analysts must hold current mine foreman's certificates, pass examination and have five years' applicable mine experience. (KRS 351.090). Mine safety analysts authorized to enter mine site, confer with foreman as to mine conditions and employee work practices, advise mine management, employee representatives, and Office of Mine Safety and Licensing concerning hazardous conditions, and recommendations, and assist in improving mine safety and work habits. (KRS 351.242). Mine analyst program to be coordinated with appropriate federal officials to avoid duplication of efforts. (KRS 351.242). Mine Safety Review Commission, attached to Energy and Environment Cabinet, established to conduct hearings, issue orders regarding licensee and its coal operation, and make recommendations to Office of Mine Safety and Licensing on fatalities or violations. (KRS 351.1041). Mine Equipment Review Panel, attached to Energy and Environment Cabinet, established to review and make recommendations to Office of Mine Safety and Licensing and Interim Joint Committee on Agriculture and Natural Resources regarding best available mine safety technologies. (KRS 351.1055). Miners must be paid their wages in lawful money twice each month. (KRS 352.540).

Inspection of Mines.

Each underground mine must be inspected at least three times per year; other mines to be inspected at least once every six months and more often if funds permit and whenever any danger to workmen may exist. (KRS 351.140). Duties of mine inspectors set out in KRS 351.140.

Oil, gas and salt water wells permitted and regulated under KRS c. 353. Well operators must submit operations and reclamation plans and must have surface owner's consent prior to drilling. (KRS 353.5901). Dept. may issue pooling order upon application of operators owning or controlling at least 51% of proposed pooled acreage. (KRS 353.630; 353.640). As to regulation of pipelines, see category 3 Business Regulation and Commerce, topic 3.08 Carriers.

Mineral Leases.

Lease of oil, gas, coal or mineral rights for longer than five years must be recorded. (KRS 382.080; see category 21 Property, topic 21.10 Landlord and Tenant).

Oil and Gas Leases.

Special provisions authorize the consolidation of oil and gas leases to be executed by guardians of minors (KRS 353.240 to 353.260), by guardians or conservators of wards (KRS 387.700[4]), and in cases where contingent future interests are involved, by trustees under court appointment (KRS 353.210 to 353.230; 353.300 to 353.380).

Taxes.

State tax equal to 4½% of market value of petroleum produced annually is imposed. (KRS 137.120). Tax collected through transporter of petroleum. (KRS 137.140).

Severance tax levied on coal at rate of 4½% of gross value of all coal severed and/or processed but not less than 50¢ per ton. (KRS 143.020). Certificate of registration must be obtained before severing or processing coal in state (KRS 143.030[1]) and cash bond or corporate surety bond may be required (KRS 143.050). Late payments of tax draw interest at rate revised annually to equal bankers' prime interest rate. (KRS 143.080; 131.010[6]; 131.183). Corporate officers personally liable for tax. (KRS 143.085). Nonpayment of tax, or falsified or altered certificate declared to be misdemeanor. (KRS 143.990).

Unmined coal, oil and gas reserves, and other minerals taxed as distinct property interest, with exceptions. (KRS 132.020; 132.820). See category 22 Taxation, topic 22.16 Real and Personal Property Taxes.

20 MORTGAGES

20.01 CHATTEL MORTGAGES:

Governed by Secured Transactions Article of Uniform Commercial Code. (KRS 355.9-101 to 355.9-710). As to special provisions governing retail credit sales contracts, see category 3 Business Regulation and Commerce, topic 3.23 Sales.

Special provisions are made with respect to chattel mortgages by Kentucky public utility corporations (KRS 382.340), and liens on motor vehicles (see category 23 Transportation, topic 23.01 Motor Vehicles, subhead Liens).

Forms.

See category 3 Business Regulation and Commerce, topic 3.09 Commercial Code.

20.02 COLLATERAL SECURITY:

See category 8 Debtor and Creditor, topic 8.14 Pledges.

20.03 MORTGAGES OF PERSONAL PROPERTY:

See category 3 Business Regulation and Commerce, topic 3.09 Commercial Code.

20.04 MORTGAGES OF REAL PROPERTY:

Lien theory prevails. Title remains in mortgagor. (250 Ky. 617, 63 S.W.2d 796).

Execution.

Mortgage is ordinary deed, containing clause of defeasance; it is executed and acknowledged in same manner as deed.

As to matters which must be set forth in order to entitle mortgage to be recorded, see infra, subhead Recording.

Where mortgagor is married, his or her spouse must join in mortgage in order to bar dower or curtesy rights and waive right of homestead therein.

Recording is not essential to validity of mortgage as between parties, but is essential in order to be effective against bona fide purchaser for value from, or creditors of, mortgagor.

Mortgage must be acknowledged or proved and recorded in county clerk's office of county where land is situated. Mortgage recorded without being so acknowledged or proved shall be deemed validly lodged for record. (KRS 382.270). See also category 10 Documents and Records, topic 10.04 Records.

Special provisions apply to recording mortgages executed by domestic public service corporations. (KRS 382.340).

Recording of a mortgage or deed of trust is forbidden unless: (1) It sets forth name, county and state of residence and post office address, including county, of person owning debt secured thereby or liable for taxes thereon (KRS 382.430); (2) states date and maturity of obligations theretofore or forthwith issued and secured thereby (KRS 382.330); and (3) sets forth name and address of person who prepared instrument with signature and mailing address of mortgagee (KRS 382.335). Amount of debt must be recited. (98 S.W.2d 936). Better practice is to include in instrument reference to immediate source of mortgagor's or grantor's title. See also category 10 Documents and Records, topic 10.04 Records, subhead Requisites for Recording. (KRS 382.110).

Master forms may be recorded containing standard covenants, conditions, obligations, powers, etc., which may be incorporated by book, page and date reference in later mortgages recorded in same county. Master form must be entitled "Master form recorded by [name]" but need not be acknowledged before admitted to record. (KRS 382.295).

Recording Tax and Fees.

No mortgage can safely be treated as legally recorded until recording tax of $4 required by KRS 142.010 is paid. In addition, clerk's fee for recording mortgage is minimum of $12 ($16 including tax) for first three pages and $3 for each page over three. (KRS 64.012). Clerk's fees for recording deeds of assignment and deeds of release are $12 plus $4 for marginal notation on each assigned or released mortgage. (KRS 64.012). Clerk may also require prepayment of postage for returning recorded mortgage. These fees include county clerk charge of up to $1 for each mortgage recorded, regardless of whether mortgage is returned by mail. Postage, if any, charged by clerks should be confirmed prior to recordation. (See also categories 10 Documents and Records, topic Records; and Taxation, topic Real Estate Conveyance Tax.)

As to future issues of bonds under "open-end" mortgages, required statement as to amount, date, maturity and description of additional obligations must be placed of record before such additional obligations are issued. (KRS 382.380).

Trust deeds are sometimes used instead of direct mortgage from debtor to creditor. Substantially same principles apply as in mortgages. (KRS 381.190).

Parol Evidence as to Character of Instrument.

Instrument in form of absolute conveyance, if intended merely as security for debt, will be treated as mortgage, and intention may be shown by parol without allegation of fraud or mistake. (148 Ky. 531, 146 S.W. 1094).

Future advances or indebtedness may be secured by mortgage. (279 Ky. 153, 130 S.W.2d 48). Any lender's future advances may be covered by mortgage if mortgage by its terms expressly so provides and states maximum additional indebtedness which may be secured. (KRS 382.520). See subhead Priorities, infra.

Lines of credit and revolving credit plans may be secured by mortgage that states parties so intend and specifies maximum principal amount of credit. (KRS 382.385).

Priorities.

"Race-Notice" Priority. Bona fide deeds of trust or mortgages take effect (in absence of notice, actual or implied) (176 Ky. 500, 195 S.W. 1124) in order in which acknowledged or proved and recorded. (KRS 382.280). Lien for delinquent taxes has priority over prior recorded mortgage. (KRS 134.420). Priority of lien under mortgage providing for future advances extends only to advances actually made. (560 S.W.2d 239).

Assignment.

Assignee must record mortgage assignment with county clerk within 30 days of assignment, but failure to record does not affect validity or perfection of mortgage lien. (KRS 382.365). Damages for failure to record mortgage assignment shall not exceed three times actual, plus attorneys' fees and court costs, but shall not be less than $500. (KRS 382.365). Assignments of obligations secured by mortgage or deed of trust may be recorded. Assignment must give name, residence, and post office address of assignee. (KRS 382.290; 382.430). Assignments of note by separate instrument must give date of note, brief description of note, and book and page number where corresponding lien is recorded. (KRS 382.290).

Release of lien can be recorded only by person appearing of record to be holder of the obligation secured by lien so released. All other releases declared void. (KRS 382.290).

Satisfaction.

See subhead Discharge of Lien, infra.

Discharge of Lien.

Liens of mortgages or trust deeds must be discharged within 30 days of satisfaction by deed of release, or by marginal entry record. (KRS 382.365). Action lies in district or circuit court against final lienholder or final assignee who does not file timely release of lien. Final lienholder or final assignee who fails to release, after notice of failure to release, may be liable to owner for up to $100 each day after 15 days of proper notice and $500 each day after 45 days of proper notice plus actual expenses, including attorney fees. Former lienholder or final assignee shall send copy of lien release by mail to last known address of property owner within seven days of release. Violation results in payment of $50 to fee owner plus actual expenses. (KRS 382.365). Release of mortgage releases any amendments to original mortgage. (KRS 382.297).

Foreclosure.

See subhead Enforcement, infra.

Enforcement.

Mortgage liens upon realty can be enforced only by decree in equity. (KRS 381.190). Common law foreclosure, or strict foreclosure, is forbidden, but mortgagee after default may take possession of abandoned mortgaged property for purpose of preserving and maintaining same, harvesting crops or letting same, all for account of mortgagor. (KRS 426.525).

Property must be appraised before judicial sale, and if it does not bring two-thirds of such appraised valuation, the owner may redeem within one year from sale by paying the purchaser the purchase money and 10% per annum interest thereon. In such event, purchaser entitled to immediate writ of possession and deed containing lien in favor of prior owner reflecting prior owner's right to redeem within year. Redemption right may itself be sold either at decretal sale or under execution issued for unpaid balance of judgment. (KRS 426.520 to 426.540).

Sales.

No sale of real estate by trustee under deed of trust or pledge to secure payment of debts shall be valid, nor pass title of property specified in such deed or pledge, unless sale thereof be made in pursuance of judgment of court of equity, or shall be made by assignee under voluntary deed of assignment, or grantor shall join in conveyance to purchaser. (KRS 381.190). Assignee for benefit of creditors, generally, has power to convey and pass all right and title to same which assignor had at date of deed of assignment. Sale must be made as court may direct. (KRS 379.090).

Deficiency Judgment.

In action to enforce mortgage, judgment may be rendered for sale of property and deficiency assessed against defendant personally if before court on personal service or entry of appearance. (KRS 426.005).

Amendment.

Recorded mortgage may be amended to correct clerical errors or omitted information by affidavit of amendment prepared by attorney, but amendment may not change any term, dollar amount or interest rate unless signed by mortgagor and secured party. Attorney preparing correction affidavit shall certify that notice of filing has been given to mortgagor by mailing copy of amendment to mortgagor. Subsequent release of mortgage releases amendments to original mortgage. (KRS 382.297).

Following is acceptable form of mortgage of land:

Form

This mortgage between. . . . . ., of the first part, and. . . . . ., of the second part whose address is. . . . . . (post office address for mortgagee necessary, including county of residence): Witnesseth that, in order to secure the payment of the debt hereinafter mentioned said first party both hereby sell and convey unto said second party all his interest in a certain lot of land in. . . . . . county, Kentucky, described as follows, to wit: (Describe land) being the same (or, a part of the same) land conveyed by. . . . . . to. . . . . ., by deed dated. . . . . ., and recorded in deed book. . . . . ., page. . . . . ., in the office of the clerk of the. . . . . . county court: (give next immediate source of title, whether by deed, will or inheritance, showing how title was derived by grantor). To have and to hold said land, with its appurtenances unto, said second party, his heirs and assigns forever, with covenant of general warranty and against all encumbrances; but this conveyance is upon the following conditions, to wit: The said first party has this day executed his. . . . . . promissory note of even date herewith to said second party, for the sum of. . . . . . dollars, with a final maturity date of. . . . . . . with interest payable semi-annually at. . . .%. Said second party resides in. . . . . county in the state of. . . . . and his post office address is. . . . . in such state. (Any or all the following additional agreements may be inserted here. The said parties further agree: (1) That if said first party shall for ten days fail to make any payment of interest at maturity thereof, or shall fail to pay any taxes or assessments on said land when due, or shall fail to keep said property insured as herein provided, said second party may, at his option, treat the whole debt secured by this mortgage as due and payable, and proceed to enforce the lien of this mortgage by suit; (2) said first party shall keep the improvements on said land insured for the benefit of said second party, in some solvent company for not less than $. . . . . ., and in case of failure so to do, said second party may so insure said improvements, and all premiums paid for such insurance shall become a part of the mortgage debt hereby secured, with interest from date of payment; (3) said first party shall punctually pay all taxes and assessments assessed against said property, and, in default of such payment, said second party may pay same, and all such payments shall become a part of the mortgage debt hereby secured, with interest from the date of such payments). Now, if said first party shall well and truly pay and discharge said indebtedness and interest at maturity, and shall well and truly keep and perform all the agreements herein set out, then this conveyance shall be void, otherwise, to remain in full force and virtue; In testimony whereof, witness the signature of said first party this. . . . . . day of. . . . . ., A. D., 20. . . . .

(signature)

(acknowledgment)

This mortgage has been prepared by. . . . . whose address is. . . . .

....

Signature of scrivener

21 PROPERTY

21.01 ABSENTEES:

Care of Property.

Provision is made for appointment of curator to protect and preserve estate of a person absent from his last known place of residence for one year and not known to have been living during that time. Such appointment is made by district court having jurisdiction to appoint personal representative for such absentee, if deceased. (KRS 395.410[2]). Application must be made by some relative, creditor or debtor of absentee, or by some person in possession of or interested in his property or rights. (KRS 395.430). Definite procedure is prescribed after required notice by newspaper publication and by letter to absentee at last known address. Curator must collect and safely keep assets of absentee, and he may pay debts, invest funds and, under order of court, sell perishable or other goods. (KRS 395.420[2]). He must give bond (KRS 395.410[3]) and render accounts to court (KRS 395.610). Appeal from order appointing curator is allowed as in case of appointment of administrators, but appeal does not suspend powers of curator. (KRS 395.440).

Uniform Unclaimed Property Act not adopted.

Process Agent.

For service of process on foreign and domestic corporations and other entities, see category 5 Civil Actions and Procedure, topic 5.20 Process.

Person Serving in or with U. S. Armed Forces or as Merchant Seaman.

Where such a person has provided no adequate power of attorney for another to act for him, and has been reported or listed as missing, interned or beleaguered, besieged or captured by an enemy, a conservator of his estate may be appointed by district court of county of his legal domicile or where such property is situated. (KRS 384.050; 384.070). As to adequacy and legal effect in such cases of existing power of attorney, see KRS 384.010 to 384.040. Conservator must give bond and has same powers as guardian of infant or conservator of mentally disabled person. (KRS 384.060).

Escheat.

Subject to specific exceptions, unclaimed real estate or tangible property of intestate decedent escheats to state after three years. (KRS 393.020). Unclaimed intangible property held by life insurance company (KRS 393.062) or held by or issued by business association escheats after three years. (KRS 393.064; 393.090). Unclaimed money paid into court (KRS 393.100) and funds held by federal government (KRS 393.068), escheat after five years; unclaimed parimutuel tickets escheat after two years. (KRS 393.095). Presumption of death after seven years. (KRS 393.050, 422.130). In instance of catastrophic event as defined by governor, presumption of death is time of catastrophic event. (KRS 422.132). Department of Treasury's administrative regulations prescribe content of and filing deadlines for reports to be filed by person holding abandoned property. (KRS 393.110). Escheated property may be reclaimed from state in certain circumstances. (KRS 393.140).

See categories 3 Business Regulation and Commerce, topic Banks and Banking, subhead Unclaimed Deposits; Citizenship, topic Aliens, subhead Escheat; Estates and Trusts, topic Descent and Distribution, subhead Escheat, also topic Wills, subhead Unclaimed Legacies.

21.02 ADVERSE POSSESSION:

Adverse possession of lands exists where the person in actual possession claims the property for himself against the world.

Character and Duration of Possession.

Subject to exceptions, adverse possession, if hostile, actual, open, notorious, exclusive, peaceable, and continuous for 15 years defeats action for its recovery (see category 5 Civil Actions and Procedure, topic 5.16 Limitation of Actions) and ripens into title in fee simple, but all these elements must concur. (KRS 413.010; 412 S.W.2d 869; 158 Ky. 316, 164 S.W. 964). Recreational use is not adverse. (KRS 411.190[8]).

When Notice Necessary.

Possession of street, alley or public easement in city or town or of public road in county does not become adverse until written notice of adverse claim is given. (KRS 413.050).

Easements.

Same principles apply as in case of the property itself in which easement is claimed.

Disabilities.

Adverse possession by joint tenant never presumed but may be established by proof of unequivocal nature. Other disabilities same as those which suspend running of limitations. See category 5 Civil Actions and Procedure, topic 5.16 Limitation of Actions.

21.03 [RESERVED]

21.04 CONVEYANCES:

See topic 21.06 Deeds.

21.05 CURTESY:

Husband has same right in deceased wife's real estate as widow has in estate of husband. (KRS 392.010; 392.020; 299 Ky. 538, 186 S.W.2d 16). See topic 21.08 Dower.

Release and Bar.

Same as Dower (q.v.).

Election between curtesy and testamentary provisions, see category 13 Estates and Trusts, topic 13.16 Wills.

Distributive share of husband in estate of wife, real or personal, see category 13 Estates and Trusts, topic 13.07 Descent and Distribution.

21.06 DEEDS:

Any interest in lands (but not a mere expectancy, 198 Ky. 256, 248 S.W. 530) not in adverse possession of another may be conveyed by deed, and no estate of inheritance or freehold or for term of more than one year may be conveyed except by deed or will. (KRS 382.010).

See topic Real Property for types of estates.

Execution.

Deed must be in writing and signed by grantor (KRS 371.010) and contain mailing addresses of grantor and grantee (KRS 382.135), statement indicating mailing address to which property tax bill for year of property transfer may be sent (KRS 382.135), statement of full consideration and sworn notarized certificate signed by grantor and grantee (or respective agents thereof) that consideration reflected in deed is full consideration paid (KRS 382.135). In case of transfer by gift, or with nominal or no consideration, sworn notarized certificate shall recite that transfer is by gift and set forth estimated fair cash value of property. Deed filing requirements shall not apply to deeds which: (1) Convey utility easements only; (2) transfer property through court action pursuant to divorce proceedings; (3) convey rights-of-way that involve governmental agencies; (4) convey cemetery lots; (5) correct errors in previous deeds conveying same property from same grantor to same grantee; or (6) convey real property to local airport board. In case of transfer by will or intestate succession, personal representative must file affidavit with county clerk of each county in which any property is located containing names and addresses of persons receiving property interests and full or fair estimated market value of interests received. (KRS 382.135). Acknowledgment is not essential to validity as between parties, but deed must be acknowledged or proved in order to be recorded. (See infra, subhead Recording.) In order to bar dower or curtesy, spouse of grantor must execute and acknowledge deed. For circumstances in which spouse must join, see topics 21.08 Dower, Curtesy; category 14 Family, topic 14.09 Husband and Wife.

Seal is not necessary in case of a deed by an individual (KRS 371.020), or of a corporation (KRS 271B.3-020).

Conveyance by Married Woman.

See category 14 Family, topic 14.09 Husband and Wife.

Conveyance by Attorney.

See topic 21.15 Powers of Attorney.

Short Covenants.

Covenant by grantor in deed that he will “warrant the property hereby conveyed” or words of like import, or words “with warranty” or “with general warranty” in any deed have same effect as if grantor had covenanted that he, his heirs and personal representatives would forever warrant and defend property unto grantee, his heirs, personal representatives, and assigns against claims and demands of all persons whatever. (KRS 382.030). Covenant by grantor that he will specially warrant property conveyed, or words of like import, or words “with special warranty” in any deed have same effect as if grantor had covenanted that he, his heirs and personal representatives, would forever warrant and defend property unto grantee, his personal representatives and assigns against claims and demands of grantor, and all persons claiming or to claim by, through or under him. (KRS 382.040).

Quitclaim Deed.

Conveyance which contains no covenant of warranty, and particularly conveyance made "without warranty," is mere quitclaim deed, conveying only such title as grantor actually has. (See 221 Ky. 593, 597, 299 S.W. 201).

Recording is not essential to validity of deed as between parties; but in order to be effective against bona fide purchasers for value without notice or creditors of vendor, deed must be acknowledged or proved and recorded or lodged for record in county clerk's office of county in which land, or greater part thereof, is situated; but deed recorded without being so acknowledged or proved shall be deemed validly lodged for record. (KRS 382.270; 382.110). Statute applies in favor of all subsequent creditors and such antecedent creditors as have secured some equity in property prior to recording of deed. (251 Ky. 377, 65 S.W.2d 83). As to requisites for recording, see category 10 Documents and Records, topic 10.04 Records.

Deed conveying life estate or greater interest must refer to next immediate source of title, with office, book and page of recordation, and date thereof. (See category 10 Documents and Records, topics 10.04 Records, 10.01 Acknowledgments.)

As to recording release of lien see KRS 382.360; 382.365. See also category 8 Debtor and Creditor, topic 8.13 Liens.

Recording Tax and Fees.

No deed is legally lodged for record until recording tax of $4 (KRS 142.010) is paid thereon (KRS 382.260).

In addition, tax of 50¢ for each $500 of value is imposed for privilege of transferring title to real property. Computation is made on actual purchase price or in case of gift, on property's fair market value. (KRS 142.050). Tax not imposed on transfers: (1) To U.S. or political subdivision if transfer is by gift or for nominal consideration or from U.S. or political subdivision; (2) to provide or release security of debt; (3) to correct previously recorded deed; (4) between husband and wife, or between former spouse as part of divorce proceeding; (5) on sale for delinquent taxes; (6) to partition property; (7) pursuant to merger or consolidation between and among corporations, partnerships, limited partnerships or limited liability companies; (8) any conversion of partnership, limited partnership, corporation, or limited liability company into partnership, limited partnership, corporation or limited liability company; (9) between subsidiary and parent corporation for no consideration, nominal consideration, or in sole consideration of cancellation of surrender of either corporation's stock; (10) under foreclosure proceeding; (11) between person and corporation, partnership, limited partnership or limited liability company in amount equal to portion of value of real property transferred that represents proportionate interest of transferor in entity to which property transferred, if transfer for nominal consideration; (12) between parent and child or grandparent and grandchild with nominal consideration; (13) by corporation, general partnership, limited partnership, registered limited liability partnership or limited liability company to person as owner or shareholder, upon dissolution of entity, in amount equal to portion of value of real property transferred that represents proportionate interest of person to whom property transferred, if transfer for nominal consideration; (14) between trustee and successor trustee; (15) between limited liability company and any of its members; (16) to trustee (as defined in KRS 386.800) to be held in trust or from trustee to beneficiary of trust if grantor is sole beneficiary of trust, grantor is beneficiary of trust and direct transfer from grantor of trust to all other individual beneficiaries of trust would have qualified for exemption pursuant to one of exemptions previously enumerated herein, or direct transfer from grantor of trust to all other individual beneficiaries of trust would have qualified for exemption pursuant to one of exemptions previously enumerated herein. (KRS 142.050[7-9]). Deed must recite full consideration or fair market value or facts which show why transfer tax not applicable. (KRS 382.135).

Clerk's fee for recording deed is minimum of $12 ($16 including tax) plus $3 per page for each page over three. (KRS 64.012). Clerk may also require prepayment of postage for returning recorded deed. (KRS 382.240). Many county clerks charge $1 for each deed recorded, regardless of whether deed is returned by mail. Postage, if any, charged by clerks should be confirmed prior to recordation. See also category 10 Documents and Records, topic 10.04 Records.

Operation and Effect.

See subhead Recording.

Full consideration must be stated on deeds to and from Commonwealth. (KRS 45.450).

Adjustment of Taxes.

Holder of legal title, holder of equitable title, and bailee or claimant in possession of property on assessment date (Jan. 1) shall each be liable for taxes assessed thereon; as between themselves, holder of equitable title has primary obligation to list property and pay taxes thereon whether or not property is in his possession at time of payment.

Amendment.

Party to deed, attorney who prepared deed or other person with personal knowledge may file with county clerk signed affidavit containing name, address and signature of preparer, to correct or supplement information regarding marital status of party to deed or information contained in or absent from acknowledgment, but for no other purpose. (KRS 382.337).

Following is sufficient form of deed; no special requirements apply for corporations or married persons:

Form

This Deed made this. . . . day of. . . . . ., 20. . . . between A. B. of (address), of the first part and C. D. of (address), of the second part. Witnesseth, That for and in full consideration of (State consideration showing what, if any, part thereof is unpaid, and stating that “to secure the payment of which a lien is hereby retained” if vendor's lien intended) the receipt whereof is hereby acknowledged, said first party does hereby sell and convey unto said second party a certain lot or parcel of land located in. . . . . County, Kentucky, described as follows, to wit: (Describe land) being the same (or a part of the same) property conveyed by. . . . . . to. . . . . . by deed dated. . . . . . and recorded in deed book. . . . . . page. . . . . . in the office of the clerk of. . . . . . County, Kentucky. (Give next immediate source of title, whether by deed, will or inheritance, showing how title was derived by grantor). To Have and to Hold, Said land, with its appurtenances, unto said second party, his heirs and assigns forever, with covenant of General Warranty; and said first party further covenants with said second party, his heirs and assigns, that said first party is lawfully seized of said land in fee simple, and has full right and power to convey the same, and that said land is free from all encumbrances except easements and restrictions of record and zoning laws affecting said property (list other encumbrances): In Witness Whereof, said first party has hereunto set his hand on the day and date first above written (signature of grantor). (Acknowledgment of signature of grantor—see category 10 Documents and Records, topic 10.01 Acknowledgments).

Certificate of Consideration: Being first duly sworn, the undersigned state that the consideration set forth in the foregoing Deed is true and correct and is the full consideration paid for the above described property. (Signature of each of the grantor and grantee or agent of each). (Acknowledgment of each signature—see category 10 Documents and Records, topic 10.01 Acknowledgments). This instrument prepared by (signature or facsimile signature and typewritten, printed or stamped name and address of scrivener of deed). Note to Clerk: This conveyance is exempt from transfer tax pursuant to KRS 142.050 (list provision).

21.07 DEEDS OF TRUST:

See category 20 Mortgages, topic 20.04 Mortgages of Real Property.

21.08 DOWER:

If spouse dies intestate, survivor has estate in fee of one-half of surplus real estate of which decedent, or anyone for use of decedent, was seized of estate in fee simple at death, and an estate for life in one-third of real estate of which decedent, or anyone for use of decedent, was seized of estate in fee simple during coverture but not at death, unless right to such interest has been barred, forfeited, or relinquished. Survivor also has estate in one-half of surplus personalty. (KRS 392.020). Lien theory of dower rejected. (480 S.W.2d 173). As to dower right on renunciation of will, see category 13 Estates and Trusts, topic 13.16 Wills, subhead Election.

Surviving husband has same rights in land of deceased wife. (KRS 392.010; 392.020). See topic 21.05 Curtesy.

Release.

Surviving spouse is not endowed of lands sold or mortgaged before marriage (though not conveyed) or sold after marriage by deed in which he or she joined, or to satisfy lien for purchase money, or any lien created before marriage, but his or her right to dower or curtesy attaches to surplus of land or of proceeds if such proceeds have not been disposed of by deceased spouse in his or her lifetime. (KRS 392.040).

Bar.

Absolute divorce bars dower. (KRS 392.090). It is not barred by sale of husband's land under execution.

Sale Free of Dower.

By proceedings in equity, married person may be empowered to sell or mortgage his or her land free of any dower or curtesy right of spouse who is confirmed mentally disabled person (KRS 392.140) or wife may be empowered to sell or mortgage her land free from any dower or curtesy right of husband who has been adjudged mentally disabled. (KRS 404.050. Compare prior law [K. S. 2131] in light of cases reported in 294 Ky. 122, 137, 171 S.W.2d 41, 49).

Election between dower and testamentary provision, see category 13 Estates and Trusts, topic 13.16 Wills.

21.09 ESCHEAT:

See topic 21.01 Absentees, subhead Escheat; categories 3 Business Regulation and Commerce, topic Banks and Banking, subhead Unclaimed Deposits; Citizenship, topic Aliens; Estates and Trusts, topics Descent and Distribution, subhead Escheat, Wills, subhead Unclaimed Legacies.

21.10 LANDLORD AND TENANT:

Kinds of Tenancy.

Statutes deal separately with tenancies at will, by sufferance, or for a term. (KRS c. 383).

Uniform Residential Landlord and Tenant Act not adopted statewide; KRS 383.500

authorizes cities, counties and urban-county governments to enact provisions of Uniform Residential Landlord and Tenant Act (as codified in KRS 383.505 to 383.715) in its entirety and without amendment.

Leases.

Lease of land for more than one year is subject to Statute of Frauds. (KRS 371.010). Delivery and acceptance by lessee necessary for validity. (477 S.W.2d 814).

However, recovery of reasonable rental allowed in absence of written contract. (KRS 383.090).

Security Deposits.

Except in cities, counties and urban-county governments which are under Uniform Residential Landlord and Tenant Act, no statutory provisions regulate security deposits.

Recording.

Lease of real property for longer period than five years must be acknowledged or proved and recorded or lodged for record in office of county clerk in which land, or greater part thereof, is situated, in order to be effective against bona fide purchaser for value without notice from, or creditors of, lessor. (KRS 382.080). Recording fee is $12 ($16 including tax under KRS 142.010) for first three pages, $3 for each page over three and $4 for each marginal notation. (KRS 64.012). These fees include county clerk charge of up to $1 for each lease recorded, regardless of whether lease is returned by mail. Clerk may also require prepayment of postage for returning recorded lease. (KRS 382.240). Postage, if any, charged by clerks should be confirmed prior to recordation. (KRS 64.012). See topic 21.06 Deeds; also category 10 Documents and Records, topic 10.04 Records, subhead Requisites for Recording. However, tenant's possession of leased premises is itself notice to all world, putting purchasers upon inquiry to ascertain nature and extent of tenant's rights even including option to renew lease or to purchase leased property. (200 Ky. 387, 255 S.W. 79; 203 Ky. 90, 261 S.W. 883).

Rents.

Even in absence of written contract, landlord entitled to reasonable satisfaction for use and occupation of his land. (KRS 383.090).

Assignment of lease or interest thereunder, by tenant at will or by sufferance, or tenant who has term less than two years, unless consented to in writing by landlord, operates as forfeiture to landlord, entitling him to reenter and take possession. (KRS 383.180).

Liabilities of Tenant.

Unless expressly provided to contrary by writing, tenant's agreement to repair or leave premises in repair does not bind him to erect buildings thereon, destroyed by fire or other casualty without his fault or neglect; nor is tenant, unless he otherwise contracts, liable for rent, during remainder of his term, of any leased building so destroyed. (KRS 383.170).

If tenant for life or years commits voluntary waste, he is subject to action of waste, in which treble damages may be recovered, and he can lose thing wasted. (KRS 381.350).

Rent may be recovered by distress, attachment, or action, and bears interest at 6% per annum from time it is due. (KRS 383.010).

Liens.

Landlord has superior lien on fixtures, household furniture and other personal property of tenant or undertenant from time possession is taken under lease, and where real estate is rented for farming or coal mining purposes, lien extends also to produce thereof. Landlord’s lien secures four months rent due or to become due, but not rent more than four months overdue; in case of lease for farming or coal mining purposes it secures rent due or to become due for one year but not rent more than 11 months overdue. If any such property is removed from leased premises, openly and without fraudulent intent, and not returned, landlord's lien continues for only 15 days from date of removal. Landlord may enforce lien against such property wherever found. Landlord's lien is subordinate to valid liens on property existing when it was brought on the premises. (KRS 383.070; 383.080).

Termination of Tenancy.

Usual common law principles apply, except where covered by Uniform Residential Landlord and Tenant Act. (KRS 383.695). Removal, transfer or abandonment of rented personal property to defraud landlord is misdemeanor. (KRS 434.225).

Tenant Holding Over.

Tenant for term of one year or more, who holds over after his term expires, may, within 90 days from expiration of his term, abandon leased premises or be evicted therefrom, but after 90 days lease renews itself by operation of law so as to bind both landlord and tenant for one year from original date of expiration, and so on from year to year until tenant abandons premises or is turned out of possession or makes new contract. (KRS 383.160).

Tenancy for less than one year, under like holding over continued for 30 days, is renewed for 60 days from original expiration, and so on from time to time until tenant abandons premises or is turned out of possession or makes new contract. (KRS 383.160).

Dispossession.

Summary remedies by writs of forcible entry and/or detainer are given for recovering possession of leased premises. (KRS 383.200 to 383.285).

Distress.

Summary remedies in nature of attachment for rent are given landlord for recovery of rent due or for securing rent to become due. (KRS 383.010 to 383.030).

21.11 LEASES:

See topic 21.10 Landlord and Tenant.

21.12 [RESERVED]

21.13 PERPETUITIES:

KRS 381.215 provides: “No interest in real or personal property shall be good unless it must vest, if at all, not later than twenty-one years after some life in being at the creation of the interest. It is the purpose of this section to enact the common law rule against perpetuities, except as hereinafter modified by KRS 381.215 to 381.223.” Exceptions: Trusts created as part of stock, bonus, pension, disability or death benefit, or profit sharing plan for benefit of employees. (KRS 381.217). Violation of rule is determined by actual rather than possible events (wait-and-see doctrine). (KRS 381.216).

Estates in fee simple determinable and possibilities of reverter are abolished, with certain limitations and exceptions set out in statutes. (KRS 381.218 to 381.222).

See category 13 Estates and Trusts, topic 13.14 Trusts.

Reasonable restraint upon alienation of real property may be imposed for reasonable time. (230 Ky. 141, 18 S.W.2d 957).

Accumulations are permitted, unless in violation of rule against perpetuities. (131 Ky. 609, 115 S.W. 739).

21.14 PERSONAL PROPERTY:

Tenancy by entireties recognized. (See 389 S.W.2d 904.)

21.15 POWERS OF ATTORNEY:

Attorneys in Fact.

Agency to contract for sale of land may be created by parol (191 Ky. 75, 229 S.W. 132; 147 Ky. 159, 143 S.W. 1027), but power of attorney to convey land must be in writing and acknowledged and recorded or lodged for record as deed in order for conveyance to be valid against subsequent purchasers and creditors. (KRS 382.370). As between principal and agent, contract for commission for sale or lease of real estate must be in writing. (KRS 371.010[8]).

No agency created by written power of attorney, given by one who at time of execution thereof, or thereafter became, member of U.S. Armed Forces, merchant seaman serving outside limits of U.S. or person outside said limits by permission, assignment or direction of any department or official of U.S. government in connection with any war activity, is revoked or terminated by death of principal as to agent or any other person who, without actual knowledge or actual notice of such death, acted in good faith in reliance on such power. No report or listing of principal as “missing” or “missing in action” constitutes or may be interpreted as constituting actual notice of death or of any facts indicating such death. (KRS 384.010 to 384.040).

Uniform Durable Power of Attorney Act not adopted.

Durable Powers.

General power of attorney may provide that it shall be exercisable notwithstanding subsequent disability or incapacity of principal, and, unless it states time of termination, notwithstanding lapse of time since execution of instrument, provided writing contains words, “this power of attorney shall not be effected by subsequent disability or incapacity of the principal, or lapse of time,” or “this power of attorney shall become effective upon the disability or incapacity of the principal,” or similar words expressing intent of principal. (KRS 386.093).

Health Care Powers.

Adult with decisional capacity may make written living will directive designating one or more adults as health care surrogate to make medical decisions. (KRS 311.621 to 311.643). See also category 13 Estates and Trusts, topic 13.16 Wills, subhead Living Will.

21.16 REAL PROPERTY:

All titles to land in Kentucky are allodial and, subject to the state's right of eminent domain and of escheat, owned entirely and absolutely by their respective owners. (KRS 381.020).

Any interest in or claim to land may be disposed of by deed or will, except that sale or conveyance of land at time in adverse possession of another is champertous and void. (KRS 382.010; 372.070). Any estate in lands may be made to commence in future by deed as by will.

(KRS 381.040). As to necessity and requirements of recording, see category 10 Documents and Records, topic 10.04 Records.

Presumption is in favor of conveyance in fee simple or such estate as grantor had. (KRS 381.060). Estates entailed at common law are converted into estates in fee simple. (KRS 381.070).

Unless different purpose is plainly expressed, deed or will containing limitation contingent upon person dying “without heirs” or “without children” or “issue,” or words of like import, must be construed as limitation to take effect when such person shall die, unless object on which contingency depends is then living, or, if child of his body, such child be born within ten months next thereafter. (KRS 381.080).

Court of equity may, in exercise of its equitable discretion, postpone decretal sale of contingent estate, where present sale would involve its sacrifice (143 Ky. 730, 137 S.W. 201), but sale under execution is authorized (KRS 426.190).

No sale of real estate by trustee under deed of trust for payment of debts is valid, nor does trustee's conveyance thereof pass title unless: (1) Made pursuant to judgment of court; or (2) made by assignee under voluntary deed of assignment (pursuant to KRS c. 379); or (3) maker of such deed of trust or pledge join with trustee in writing evidencing such sale (KRS 381.190).

Contracts for sale of standing trees or timber, to be enforceable, must be in writing signed by person to be charged, or his authorized agent. (KRS 371.100). Title to such trees or timber passes when marked with purchaser's brand. (KRS 364.120).

Rule in Shelley's Case is not recognized in Kentucky, being clearly superseded by KRS 381.090. (215 Ky. 14, 284 S.W. 109).

Joint tenancy is recognized but common law right of survivorship between joint tenants abolished. (KRS 381.120). One or more joint tenants of real property may partition interest in real property during lifetime by deed or other instruments unless property is not divisible. (KRS 381.120).

Tenancy by Entireties.

Unless expressly provided for in conveyance or devise to husband and wife, there is no mutual right to the entirety by survivorship between them, but they take as tenants in common. (KRS 381.050).

Foreign Conveyances or Encumbrances.

Kentucky law controls mode of execution and acknowledgment or proof, as well as validity and effect of a devise, conveyance or encumbrance of real property situated in this state, and recordability of any conveyance or encumbrance thereon, or probate of any will affecting Kentucky real property. (311 Ky. 59, 223 S.W.2d 374).

Condominiums are recognized and regulated by Horizontal Property Law. (KRS 381.805 to 381.910). Uniform Condominium Act not adopted.

Aliens.

See category 4 Citizenship, topic 4.01 Aliens.

See also topics 21.05 Curtesy, Deeds, Dower, Landlord and Tenant; categories 5 Civil Actions and Procedure, topic Partition; Debtor and Creditor, topic Homesteads; Documents and Records, topic Records; Family, topic Husband and Wife; Mortgages, topic Mortgages of Real

Property.

Uniform Simplification of Land Transfers Act not adopted.

22 TAXATION

—Scope —

Subject to exemptions provided, all real and tangible property having situs in Kentucky is taxable for public purposes and all taxes upon property of same class must be uniform. (Ky. Const. § 171). General Assembly may authorize local governmental units to impose and collect various taxes and license fees. (Ky. Const. § 181). Summaries of principal taxes administered by Department of Revenue arranged alphabetically by topic, following topic Administration.

22.01 ADMINISTRATION:

State Taxes.

Department of Revenue exercises all administrative functions for revenue and tax laws levied for state purposes. Information, forms and waivers, etc., may be obtained by contacting Department of Revenue, 501 High Street, Frankfort, Kentucky 40620; 502-564-4581; http://revenue.ky.gov.

County, School and Municipal Taxes.

Local governmental agencies impose and collect various taxes, including property (ad valorem) taxes, occupational license taxes on wages, salaries and net profits, and utility gross receipts taxes. For information concerning taxes in Louisville and Jefferson County, contact Metro Revenue Commission, 101 South 8th Street, Louisville, Kentucky 40202 (502-574-4860); http://www.louisvilleky.gov/Revenue, for information concerning taxes in Lexington and Fayette County, contact Lexington-Fayette Urban County Government Department of Revenue, 200 East Main Street, Lexington, Kentucky 40507 (859-258-3340); http://www./lfucg.com/Finance/Revenue/Index.asp.

Assessment.

Income taxes may be assessed following audit by Department of Revenue. (KRS 141.210[2]). Department of Revenue may issue jeopardy assessments upon specific grounds for any taxes reasonably believed due (KRS 131.150[1]), and may proceed to collect same through garnishment, attachment or other legal proceedings (KRS 131.150[2]). For inheritance taxes, see topic 22.12 Inheritance Tax, subhead Administration and Enforcement. For property taxes, see topic 22.15 Property Taxes, subhead Assessment.

Protest of Taxes Assessed by Department of Revenue.

Any assessment by Department of value of property or of additional taxes due set forth in written notice from Department becomes due and payable unless protested in writing by taxpayer within 45 days of date of notice. (KRS 131.110[1]).

Aggrieved taxpayer must within 45-day period file with Department of Revenue written protest with supporting statement, setting forth grounds for such protest and information upon which it is made. Upon written request, Department may extend time for filing supporting statement if it appears that delay is necessary and unavoidable, and its refusal to make such extension may be reviewed in same manner as in case of protested assessment. (KRS

131.110[1]). At time of filing both protest and supporting statement, taxpayer may request ruling on protest as filed, or request conference with Department, which conference must be granted in writing stating time set therefor. Taxpayer may appear at conference in person or by representative. Additional conferences may be held by mutual consent. (KRS 131.110[2]). After considering protest, Department must issue final ruling thereon, which must be mailed to taxpayer. (KRS 131.110[3]). Taxpayer may request final ruling anytime after filing timely protest and supporting statement. When requested, Department must issue final ruling within 30 days from receipt of request. (KRS 131.110[4]). After final ruling is issued, taxpayer may appeal to Board of Tax Appeals. (KRS 131.110[5]).

Board of Tax Appeals, consisting of three members appointed by governor, is vested with exclusive jurisdiction to hear and determine final rulings, orders, and determinations of any agency of state or county government affecting revenue and taxation. (KRS 131.340[1]). Any party aggrieved by any ruling, order, or determination of any state or county agency charged with administration of any taxing or licensing measure may appeal to Board by filing written complaint or petition of appeal with Board within 30 days from date agency's ruling is mailed. (KRS 131.340[3]). Department of Revenue may appeal local property assessment. (KRS 131.340[3, 4]). In such proceeding, Board forwards Department's certification of value of property to interested parties and Department's value becomes prima facie value for appeal. (KRS 131.340[5]).

Appeals to Board of Tax Appeals are de novo and conducted in accordance with procedure for administrative hearings in KRS c. 13B. (KRS 131.340[1]). Current procedures published in 802 KAR 1:010. Proceedings before Board must be officially reported, except appeals of unmined mineral assessments. (KRS 131.355[1]). Board may remand proceeding back to agency if other issues are necessary to full determination. (KRS 131.365[2]). In case of any appeal, any taxes, interest, or penalty paid but found by Board to be in excess of that legally due must be refunded to taxpayer. (KRS 131.365[4]).

Appeals from final orders of Board of Tax Appeals may be made to Franklin Circuit Court or to circuit court in county in which aggrieved party resides or conducts business, or in case appealed from county board of assessment, to circuit court of county where appeal originated. (KRS 131.370[1]). If appeal is from order sustaining assessment, collection of tax may be stayed by filing of supersedeas bond. (KRS 131.370[2]).

Penalties.

Uniform Civil Penalty Act set forth at KRS 131.180 provides following penalties unless otherwise provided for separate taxes: (1) Failure to make timely return or report, unless such failure due to reasonable cause (as defined in KRS 131.010[9]), carries 2% penalty every 30 days or fraction thereof not to exceed 20% of entire tax; (2) failure to withhold or collect any tax as required, or failure to timely pay tax computed as due on return or report or timely pay at least 75% of tax determined due by Department of Revenue, without reasonable cause, carries 2% penalty every 30 days or fraction thereof not to exceed 20% of tax; (3) failure to timely pay installment of estimated tax or underpayment of declaration of estimated tax, without reasonable cause, carries 10% penalty; (4) failure or refusal to make and file report or return or furnish any information requested in writing by Department of Revenue may result in assessment of tax up to twice amount estimated to be due plus 5% penalty for each 30-day period or fraction thereof that return or report not filed not to exceed 50% of tax assessed, however, penalty will not be less than $100 without reasonable cause for failure to file, even if subsequent filing results in no tax or refund; (5) failure or refusal to pay tax within 45 days of due date if not protested carries 2% penalty every 30 days or fraction thereof; (6) failure to obtain in timely manner any identification number, permit, license or other like document from Department, unless such failure is due to reasonable cause, carries penalty of 10% of any cost or fee required to be paid for such document; (7) deficiency due to negligence carries 10% penalty; (8) deficiency due to fraud carries 50% penalty; (9) tendering of check to Department is not paid when presented results in penalty equal to 10% of check unless failure to honor payment result of error by person other than taxpayer; (10) failure to make timely return or report or make timely payment, within time or in manner required by law where not otherwise specially provided, carries penalty equal to 2% of total tax due each 30 days or fraction thereof plus interest at bank prime rate.

Corporate officer or other person who becomes liable for payment of any tax must also be liable for all applicable penalties and interest (KRS 131.180[13]).

Real and Personal Property Tax.

Criminal: fraudulent evasion carries penalty of three times amount of tax. (KRS 132.570). Civil: $500 penalty for failure to furnish complete list of property (KRS 132.990[1]); 10% of tax with interest at rate adjusted annually to equal banks' prime rate plus 2% on previously-omitted property voluntarily listed (KRS 132.290[3]); 20% of tax with interest at rate adjusted annually to equal banks' prime rate plus 2% on previously-omitted property involuntarily listed (KRS 132.290[4]; 131.010[6]; and 131.183).

Inheritance and Estate Tax.

If tax is not paid within 18 months after death, interest is charged at rate equal to adjusted prime rate charged by banks, rounded to nearest full percent; 5% discount if tax paid in nine months from death. (KRS 140.210). Criminal: Fines from $50 to $500 or imprisonment up to 12 months in jail or both for violations. (KRS 140.990). Personal representatives or other persons subject to Uniform Civil Penalty Act for violations of inheritance and estate tax provisions. (See catchline Uniform Civil Penalty Act, supra.) (KRS 140.991; 131.180).

Income Tax.

Civil: failure to make payment on or before date prescribed carries interest as part of tax at rate determined annually as equal to bankers' prime rate on each installment until paid (KRS 141.985); violation of any income tax provision contained in KRS c. 141 subjects taxpayer to Uniform Civil Penalty Act, catchline supra. (KRS 141.990). Criminal: fine of $500-$5,000 or one to five years in penitentiary or both. (KRS 141.990; 131.180).

Sales and Use Tax.

Civil violation of any sales and use tax provision contained in KRS c. 139 subjects taxpayer to Uniform Civil Penalty Act, catchline supra. (KRS 139.980). Criminal: Fine not to exceed $250 or not more than 90 days in jail or both. (KRS 139.990).

Excise Taxes.

Covering motor carriers and dealers of gasoline and special fuels: subject to Uniform Civil Penalty Act, catchline supra. (KRS 138.290; 131.180).

Corporation Tax.

Corporation treated like individual unless otherwise specially provided. Corporation failing to pay assessment under KRS 136.120 to 136.200 is delinquent and incurs 10% penalty with interest at rate adjusted annually to equal banks' prime rate. (KRS 136.050). Corporations failing to file returns or make other payments required by KRS c. 136 penalized pursuant to KRS 136.990.

Taxpayer Bill of Rights.

Following rules apply to administration of taxes subject to jurisdiction of Department of Revenue: (1) Taxpayer has right to be represented by attorney or accountant in any Department proceeding (KRS 131.081[3]); (2) Department must perform audits and conduct conferences only at reasonable times and places (KRS 131.081[4]); (3) taxpayer and Department, if written notice provided to taxpayer, have right to record Department conferences (KRS 131.081[5]); (4) penalty and interest are waived if taxpayer's failure to file timely return or make payment is due to written advice from Department not subsequently invalidated (KRS 131.081[6]); (5) taxpayers have right to receive copy of any audit (KRS 131.081[7]); (6) taxpayer may enter into installment payment agreement upon written request or inability to pay (KRS 131.081[9]); (7) taxpayer is entitled to receive extension of time for Kentucky tax, provided IRS has given similar extensions; (8) taxpayer may seek damages in action filed before Kentucky Board of Claims for willful, reckless and intentional disregard of taxpayer's rights (KRS 131.081[14]); (9) taxpayers have right to privacy of Kentucky tax returns and reports (KRS 131.081[15]); and (10) no present or former Department of Revenue employee may without authorization inspect taxpayer's tax return information (KRS 131.041 to 131.081).

Uniform Federal Lien Registration Act Amended not adopted. Non-uniform federal lien act adopted at KRS 382.480 and 382.490.

22.02 ALCOHOL, BEVERAGES AND TOBACCO TAXES:

Alcoholic beverage taxes imposed pursuant to KRS c. 243.

Cigarette tax imposed pursuant to KRS c. 138.

Tobacco product tax imposed pursuant to KRS c. 138.

22.03 BUSINESS TAXES:

Financial Institutions State Franchise Tax.

See category 3 Business Regulation and Commerce, topic 3.01 Banks and Banking, subhead Reports and Tax on Deposits.

22.03A CONTROLLED DANGEROUS SUBSTANCES TAX:

Marijuana and Controlled Substance Tax.

Tax imposed on each offender engaging in manufacture, importation, transportation, distribution, acquisition, purchase, storage, use, cultivation, sale, or possession of certain quantities of marijuana and controlled substances pursuant to KRS 138.870 to 138.889. Tax stamps, labels or other tax indicia must be purchased from Department and affixed to marijuana and controlled substance to evidence payment of tax. (KRS 138.874).

22.04 CORPORATE TAXES:

Corporate Stock Tax.

See category 2 Business Organizations, topic 2.03 Corporations.

Corporation License Taxes.

See category 2 Business Organizations, topic 2.03 Corporations. Corporation license tax repealed effective for tax periods ending on or after Dec. 31, 2005.

22.05 EMPLOYMENT TAXES:

Unemployment Compensation Tax.

“Contributions” imposed by KRS c. 341. Act applies to any employing unit (as defined in KRS 341.060) that has, in any calendar quarter in either current or previous calendar year, paid for service in covered employment (as defined in KRS 341.050 with exemptions in KRS 341.055) wages of $1,500 or more. (KRS 341.070).

Definition of “covered employment” includes service in Kentucky and in interstate commerce performed by common law employees, corporate officers, other personal services provided by persons who do not have a substantial investment in non-transportation facilities, and some individuals employed by state agencies and some nonprofit organizations. Particular coverage provisions are coordinated with coverage of Federal Unemployment Tax Act. (KRS 341.050). Exemptions from “covered employment” include agricultural labor as defined in federal act, domestic service, most state agency employees, intrafamily service, most services performed for foreign governments and international organizations, student nurses, interns, insurance agents, minor newspaper carriers, minor unrelated services and student aid services in college or vocational schools. Particular exemption provisions are coordinated with federal act. (KRS 341.055).

Basic rate for employers is 3% (2.7% for employers who become subject to KRS c. 341 on or after Jan. 1, 1999) of wages paid until employer has been subject to tax for 12 consecutive calendar quarters as of computation date, then subject to reduction as and when justified by employer's benefit experience. There is no tax on employees. (KRS 341.030; 341.270).

Contributions must be remitted quarterly by employer, to Division of Unemployment Insurance. (KRS 341.260 and administrative regulations).

Nature and history of tax and status of lien securing it are discussed in 299 Ky. 224, 184 S.W.2d 963.

22.06 ENVIRONMENTAL TAXES:

Pollution Abatement Authority Tax.

Tax of not more than 2% of gross bill may be levied on every purchase of water service and sewer service in Kentucky. (KRS 224A.070[5]).

Contaminated and Radioactive Waste Materials Tax.

Excise tax of 10¢ per pound. (KRS 138.820).

Severance Tax.

Imposed at 4.5% on gross value of coal, natural gas and other natural resources severed or processed. (KRS 143.020; 143A.020).

22.07 ESTATE TAX:

Estate tax imposed is equal to amount of state death tax credit claimed on federal estate tax return, less inheritance tax assessed net of discount. (KRS 140.130).

22.07A GAMBLING AND ENTERTAINMENT TAXES:

Race tracks subject to license and excise taxes imposed pursuant to KRS 137.170, 138.510 and 138.480 in lieu of all other taxes to state or any subdivision thereof. (KRS 137.190).

22.08 GASOLINE AND SPECIAL FUELS TAXES:

Gasoline Tax.

Gasoline “received” in Kentucky taxed pursuant to KRS 138.220. Fuel tax refunds and credits allowed pursuant to KRS 138.341 to 138.358. License provision adopted to prevent avoidance of tax by motor carriers purchasing gasoline outside state. (KRS 138.660). Corporate officers personally liable for tax. (KRS 138.448).

Liquified petroleum gas tax imposed pursuant to KRS 234.320.

Motor carrier fuels tax imposed by KRS 138.660.

Special Fuels Tax.

Tax on fuels other than gasoline used to propel vehicles on public highways imposed by KRS 138.660 and 138.220.

22.08A GENERATION SKIPPING TAX:

None.

22.09 GIFT TAX:

None; but inheritance tax applies to gifts in contemplation of death or to take effect at or after death. (See topic 22.12 Inheritance Tax.)

22.10 HOTEL AND RESTAURANT TAXES:

Statewide transient room tax is imposed at 1% of rent for hotel and similar rooms. (KRS 142.400 to 142.408). Local tax imposed at various rates. (KRS 91A.390).

22.11 INCOME TAX:

Income tax is imposed by KRS c. 141 on individuals, business trusts, joint stock companies, fiduciaries, and corporations (except certain specialized corporations, e.g., banks, insurance companies, building and loan associations). Mandatory consolidated filing of consolidated return by “affiliate group” of one or more chains of includible corporations. (KRS 141.200; 141.208). Income of S corporation, limited liability company or general partnership not taxed to entity, but shareholders, members or partners taxed on their respective shares of income. (KRS 141.206).

Returns on calendar year basis due on or before Apr. 15 of following year; returns on fiscal year basis due on or before 15th day of fourth month following close of fiscal year. (KRS 141.160[1]). Returns for cooperatives under Internal Revenue Code §§ 521 and 1381 or KRS c. 272 on calendar year basis due Sept. 15; returns on fiscal year basis due on or before 15th day of ninth month following close of fiscal year. (KRS 141.160[3]). Forms of return may be obtained from Department of Revenue (KRS 141.160[1]), to which payment of tax must be made (KRS 141.220) by check or money order payable to Kentucky State Treasurer.

Persons reasonably expecting income in excess of $5,000 other than from wages subject to withholding, with estimated tax in excess of $500 from such sources, and gross income such as to require annual return, must file estimate, on or before Apr. 15, June 15, Sept. 15, or Jan. 15 (determined by period when minimum income first met), with part payment of estimated tax. (KRS 141.300).

Returns are required from single individuals and married couples with adjusted gross income of $5,000 or more, from blind and/or over 65 individuals with adjusted gross income of $5,000 or more, from married couples, both of whom are over 65, with combined adjusted gross income of $5,400 or more, from any individual with $5,000 or more of self-employment income, and from any nonresident of state with any gross income from Kentucky sources and total gross income of $5,000. (KRS 141.180).

Taxes are payable on filing of returns determined without regard to extensions. (KRS 141.220).

Individuals in military and public health service of U.S. may defer filing return or paying tax until 12 months after termination of service in area designated as combat zone by presidential proclamation without penalty or interest. (KRS 141.215 and 141.175).

Income Taxed—Individuals.

Tax is levied on “net income” determined pursuant to KRS 141.010 as follows: Beginning with “gross income” as defined in § 61 of federal Internal Revenue Code as of Dec. 31, 2006 (“IRC”) (except property placed in service after Sept. 10, 2001, only depreciation and expense deductions allowed under IRC Sec. 168 and 179 in effect on Dec. 31, 2001 shall be allowed, and including provisions of Military Family Tax Relief Act of 2003, P.L. 108-121); exclude income exempt from state taxation by state and U.S. constitution and federal statutes (KRS 141.010[10][a]); exclude federal and local retirement annuities accrued or accruing prior to Jan. 1, 1998 (KRS 141.021); exclude income from Railroad Retirement Act supplemental retirement annuities (KRS 141.010[10][b]); include interest income on state and local obligations of other states (KRS 141.010[10][c]); exclude picked-up employee pension contributions (KRS 141.010[10][d]); exclude social security and railroad retirement benefits subject to federal income tax (KRS 141.010[10][e]); exclude money received as damages from “Agent Orange” exposure from serving in Vietnam (KRS 141.010[10][h]); exclude amount less than or equal to $41,110 of total distributions from pension plans, annuity contracts, profit-sharing plans, retirement plans or employee-savings plans (KRS 141.010[10][i]); exclude distributive share of shareholder's net income from S corporation or qualified subchapter S subsidiary subject to franchise tax under KRS 136.505 or capital stock tax under KRS 136.300 (KRS 141.010[10][j]); exclude amount paid for health insurance or value of voucher used to provide health insurance for taxpayer, taxpayer's spouse and dependents (KRS 141.010[10][k]); exclude income received for services as precinct worker for training or working at poll (KRS 141.010[10][1]); exclude any amount paid during year for insurance for long-term care (KRS 141.010[10][m]); exclude capital gains attributable to property taken by eminent domain (KRS 141.010[10][n]); exclude any amount received by tobacco producer or quota owner from multistate settlement with tobacco industry (Master Settlement Agreement) (KRS 141.010[10][o]); exclude any amount received from secondary settlement fund (Phase II) created by tobacco companies to compensate tobacco growers and quota owners for expected losses due to national settlement (KRS 141.010[10][p]); exclude funds received from Commodity Credit Corporation under Tobacco Loss Assistance Program as result of reduction in tobacco quota allotment (KRS 141.010[10][q]); and exclude income of Armed Forces or National Guard members killed in line of duty, for year death occurred and prior year (KRS 141.010[10][t]) to arrive at “adjusted gross income” (KRS 141.010[10]). To arrive at “net income” deduct standard deduction allowed by KRS 141.081 or value of leasehold interest of property contributed to charitable organization used as temporary living quarters for homeless family, amount paid for vouchers used to provide health insurance and all deductions allowed in c. 1 of IRC applicable to Kentucky (as modified for depreciation by KRS 141.0101), except: (1) Deduction allowed for state income taxes paid, (2) deduction for value of distributive shares of estate of decedent unless deduction not claimed on inheritance tax return, (3) deduction for personal exemptions allowed under IRC § 151, and (4) deduction not allowed for dues to organization(s) determined to have violated civil rights laws of Kentucky (KRS 141.010[11]). Also deduct charitable contribution of property created by personal efforts of taxpayer if provisions of KRS 141.0201 are satisfied. (KRS 141.0201). Individuals domiciled in, or who maintain abode and spend more than total of 183 days of taxable year in state are taxed on their income from all sources but allowed credit for income taxes paid to other states on production of evidence of such payment. (KRS 141.070). Payments received by persons displaced by state-land acquisition programs are considered income for purposes of state's personal income tax law, corporation tax law or other state tax laws; such payments not considered as income or resources of any public assistance recipient and not deducted from amount of aid to which recipient otherwise entitled.

(KRS 56.620; 56.740).

Rate.

For taxable years 2005 and after, entire net income subject to tax at following rates: 2% on first $3,000; 3% on next $1,000; 4% on next $1,000; 5% on next $3,000; 5.8% on net income over $8,000 up to $75,000; and 6.0% on all over $75,000, less applicable credits. For taxable years beginning before Jan. 1, 2005, entire net income subject to tax at following rates: 2% on first $3,000; 3% on next $1,000; 4% on next $1,000; 5% on next $3,000; 6% on all in excess of $8,000, less applicable credits. (KRS 141.020[2]).

Exemptions.

In lieu of exemptions, tax credit is allowed in computing normal tax. Credits are: unmarried person, $20; married person filing separate return, $20, and additional $20 if return is separate, other spouse has no Kentucky gross income and is not dependent of another taxpayer; married persons filing joint return, $40; for each dependent, $20; additional $40 credit for taxpayer over 65 (or spouse over 65 without gross income and not dependent of another), additional $40 credit if taxpayer or spouse is blind; for fiduciary other than estate, $2; for estate, $20; for Kentucky National Guard member, additional $20. (KRS 141.020[3]).

Tax credits available for household dependent care services (20% of IRC amount) (KRS 141.067), and low income persons (graduated scale $0-$25,000) (KRS 141.066) and persons 133% below federal poverty level (KRS 141.066), and persons making investments in energy-efficient systems in homes (KRS 141.436) or energy star homes or manufactured homes (KRS 141.437). Individuals who are members, shareholders, or partners of “limited liability pass-through entity” which is subject to tax upon pass-through entity allowed credit against individual income tax payable to state, less $175, but any credit remaining from limited liability pass through entity tax is disallowed. (KRS 141.0401[3]). See subhead Income Taxed—Corporations and Limited Liability Pass Through Entities, infra.

Optional tax table may be developed by Department specifying classes of taxpayers eligible. (KRS 141.023).

Nonresidents carrying on business, trade, profession, occupation, or other activity in Kentucky or owning therein tangible property as has acquired business situs in Kentucky are taxed at same rates on net income derived therefrom, less credits reduced proportionately in ratio that nonresident's net income in Kentucky bears to his total net income from all sources. Formulas set for credits when spouse has no Kentucky income. However, exemption granted resident of foreign state that grants similar exemption to Kentucky resident on income earned in such state. (KRS 141.020).

Income Taxed—Corporations and Limited Liability Pass-Through Entities.

Corporations.

For tax years beginning on or after Jan. 1, 2007, every corporation (including domestic and foreign corporations) doing business in Kentucky except financial institutions (other than banker's banks under KRS 287.135), state and federal savings and loan associations making loans to members only, banks for cooperatives, production credit associations, insurance companies, including farmers' and other mutual casualty insurers, corporations exempted from federal income tax by IRC § 501 and other religious, educational, charitable or like corporations not organized or conducted for pecuniary profit) shall pay tax on taxable net income at 4% of first $50,000 of taxable net income, 5% of next $50,000 of taxable net income, and 6% of taxable net income over $100,000. (KRS 141.040[6]). S corporations shall pay income tax on same items of income and in same manner as required for federal purposes, except to extent Kentucky law requires otherwise, but are subject to entity tax described below. (KRS 141.040[14][a]).

"Taxable net income" for corporations is determined pursuant to KRS 141.010 as follows: Begin with "gross income" as defined by IRC § 61 and as modified by KRS 141.0101, and: (1) Exclude income exempt from taxation by Kentucky constitution and federal laws, (2) exclude dividend income received after Dec. 31, 1969, (3) include interest income derived from obligations of other states, (4) exclude 50% of gross income derived from disposal of coal covered by IRC § 631(c), (5) include for lessors income tax payments made by lessees and exclude such payments from gross income of lessees, (6) include amount calculated under consolidated or combined return provisions of KRS 141.205, (7) ignore provisions of IRC § 281, (8) exclude income from "safe harbor leases", (9) exclude any amount received by tobacco producer or quota owner from multistate settlement with tobacco industry (Master Settlement Agreement), (10) exclude any amount received from secondary settlement fund (Phase II) created by tobacco companies for losses from national settlement, and (11) exclude funds received from Commodity Credit Corporation for Tobacco Loss Assistance Program resulting from reduced tobacco quota allotment to obtain Kentucky gross income. (KRS 141.010[12]). Further deduct value of leasehold interest of property contributed to charitable organization used as temporary living quarters for homeless family and all deductions allowable to corporations under c. 1 of IRC as modified by KRS 141.0101, except for: (a) State taxes paid to other states or District of Columbia, Puerto Rico or any territory or possession of U.S. or any foreign country, (b) deductions allowed by IRC §§ 243, 244, 245 and 247, (c) provisions of IRC § 281, (d) exclude deductions allocable to income either exempt or not taxed in state, (e) expenses related to "safe harbor leases", (f) deduction for dues to organizations determined to have violated civil rights laws of Kentucky, and (g) deductions prohibited by KRS 141.205 to arrive at "net income". (KRS 141.010[13]). For taxable years beginning after Dec. 31, 1993, amounts of depreciation and election to expense deductions, basis of assets, and gain or loss from sale or other disposition of assets is same for Kentucky purposes as determined under c. 1 of IRC. (KRS 141.0101[13]). For property placed in service before first day of first taxable year beginning after Dec. 31, 1993, and owned by taxpayer on first day of first taxable year beginning after Dec. 31, 1993, special transition rules apply for including net difference between adjusted Kentucky basis and adjusted federal basis in gross income. (KRS 141.0101[12]-[14]). For tax years ending on or after Dec. 31, 1995 through Dec. 31, 2004, corporation subject to tax in Kentucky may elect to file consolidated Kentucky corporation income tax return if corporation is member of affiliated group as defined in IRC § 1504(a) and return includes all members of affiliated group. (KRS 141.200). Election is binding on both Department and affiliated group for eight years. (KRS 141.200[3][d]). Net taxable income apportioned between Kentucky and other states based substantially on Uniform Division of Income for Tax Purposes Act (KRS 141.120, see Part VI of this volume) is "taxable net income"; apportionment factor weighs sales, property, and payroll in ratio of 2:1:1 (KRS 141.120[8]).

Corporations and Limited Liability Pass Through Entities.

Annual limited liability entity tax shall be paid by every corporation and every "limited liability pass-through entity" doing business in Kentucky on all "Kentucky gross receipts" or "Kentucky gross profits". (KRS 141.040[6]). Entities subject to tax, in addition to C corporations, are all partnerships, S corporations, LLCs, LLPs, LPs and similar entities not taxed for federal purposes at entity level but pass proportionate share of income, deductions, gains, losses, credits, and other tax attributes to their partners, members, shareholders, or owners and provide protection from general liability to them for actions of entity. (KRS 141.010[26-28]). Tax is greater of $175 or lesser of tax upon entity's "Kentucky gross receipts" (based upon sales factor in KRS 141.120[8][c]; KRS 141.0401[1]) or entity's "Kentucky gross profits" (as defined in KRS 141.0401[1]; KRS 141.0401[2][a]).

Limited liability entity tax for gross receipts shall be: $0.00 if entity's gross receipts from all sources are less than $3,000,000; if entity's gross receipts from all sources are greater than $3,000,000 but less than $6,000,000, limited liability entity tax is $0.75095 per $100 of entity's

Kentucky gross receipts, reduced by $2,850 multiplied by fraction, numerator of which is $6,000,000 less amount of entity's Kentucky gross receipts and denominator of which is $3,000,000; if entity's gross receipts from all sources are equal to or greater than $6,000,000, limited liability entity tax is $0.095 per $100 of Kentucky gross receipts. (KRS 141.0401[2][b][1]).

Limited liability entity tax for gross profits shall be: $0.00 if entity's gross profits from all sources are less than $3,000,000; if entity's gross profits from all sources are greater than $3,000,000 but less than $6,000,000, limited liability entity tax is $0.75 per $100 of entity's Kentucky gross profits, reduced by $22,500 multiplied by fraction, numerator of which is $6,000,000 less amount of entity's Kentucky gross profits and denominator of which is $3,000,000; if entity's gross profits from all sources are equal or greater than $6,000,000, limited liability entity tax is $0.75 per $100 of Kentucky gross profits. (KRS 141.0401[2][b][2]).

Credit for Corporations.

Corporations allowed credit equal to amount of tax upon entity based upon Kentucky gross receipts or Kentucky gross profits (less $175) against corporate income tax imposed by KRS 141.040 to extent of tax paid, but any surplus credit will be disallowed. (KRS 141.0401[3]).

Credits and Exemptions.

Credit of $100 is allowed to any employer for employment of each person who has been classified as unemployed by Cabinet for Health and Family Services for at least 60 days prior to employment by employer, provided that person remains employed for at least 180 consecutive days during taxable year in which credit is claimed. (KRS 141.065).

Approved companies entering into tax incentive agreements with Kentucky economic development authority relating to new business investments are entitled to certain tax credits (or for some approved companies, amounts applied as estimated tax payments) against Kentucky income, limited liability entity and sales and use tax and assessments on employees' income taxes. (KRS 154.22-050 to -070; 154.23-050; 154.23-055; 154.24-110; 154.25-040; 154.26-090; 154.27-070; 154.27-080; 154.28-090, 154.28-110; 141.347; 141.400, 141.416, 141.421). Approved companies entering into service and technology agreements with Kentucky depressed counties economic development finance authority are entitled to tax credit (or estimated tax payment) against Kentucky income tax. (KRS 154.24-110, -120; 141.407).

Certain certificated air carriers that have made investment in state entitled to general tax credit. (KRS 144.125). 50% credit available for investment in qualifying waste recycling and composting equipment. (KRS 141.390). Nonrefundable tax credit equal to 5% of qualified costs for construction of research facilities. (KRS 141.395).

Qualified farming operations allowed accelerated-depreciation deductions for new buildings and equipment purchased to enable participation in certain networking projects and to establish or expand secondary food-producing facilities in Kentucky. (KRS 141.0101[15]). Qualified farm operation also entitled to certain nonrefundable credits against Kentucky income tax on any income generated by qualified farming operation's participation in networking project. (KRS 141.412).

Credits allowed for investments in energy-efficient systems for single family or multifamily residential rental unit (KRS 141.436) and purchase or sales of energy star homes or manufactured homes (KRS 141.437).

Withholding of Employee Income Taxes.

Employers subject to withholding provisions similar to those in Federal law. (KRS 141.310 to 141.345; 141.350 to 141.370; 141.340). Officers of corporation, managers of LLC, partners of LLP, and general partners of LLLP are personally and individually liable for tax required to be withheld. (KRS 141.340). Bond up to $50,000 may be required. (KRS 141.310). Department may require payment by electronic fund transfer if: average payment per period is $10,000 or more for each tax required to be collected or remitted; payment for each tax required to be collected or remitted is made on behalf of 100 or more taxpayers; or, aggregate of funds to be remitted on behalf of others is $10,000 or more for each tax required to be collected or remitted. (KRS 131.155).

22.12 INHERITANCE TAX:

Inheritance tax is governed by KRS c. 140, salient features of which are as follows:

Taxable Property.

Tax at progressive rates levied on transfer of property, having Kentucky situs, which passes by will or by intestacy laws of state, or by sale or gift in contemplation of death, including: (1) All property in state's jurisdiction belonging to its inhabitants; (2) all tangible personal property of such inhabitants, wherever located, that has not acquired situs for taxation outside Kentucky; (3) all intangible property of any nature, belonging to persons domiciled in Kentucky except partnership property located in another state and subject to inheritance or estate tax in that state; (4) all intangible property of any nature, belonging to nonresidents, which has acquired business situs in Kentucky; (5) all real property or interest therein within Kentucky; (6) all tangible personal property, having acquired situs in Kentucky and not taxable elsewhere, belonging to nonresidents (KRS 140.010); (7) proceeds of life insurance policies payable on death of assured, resident in Kentucky, whether payable to assured or his estate, or some other designated beneficiary, except that such proceeds payable to designated beneficiary or beneficiaries including testamentary or inter vivos trustee other than assured or his estate, or to trust for benefit of such beneficiaries (409 S.W.2d 518), and proceeds of any life insurance policy issued by or through Federal Government, or pension or annuity payments made to surviving spouse under Fed. R.R. Retirement Act, are tax-free (KRS 140.030[2]); (8) obligations of contractual nature due from one dying resident in Kentucky, "payable at or after death," unless affirmatively shown that decedent, during life, received substantially equivalent consideration therefor (KRS 140.030[1]); (9) property having Kentucky situs, transferred by decedent (whether resident or nonresident) in contemplation of death or to take effect in possession or enjoyment at or after death, including transfers under which transferor retains: (a) Possession or enjoyment of property so transferred or its increase, (b) power to designate persons to take property or its income, except in case of bona fide sale for adequate consideration, or (c) property conveyed in trust, over which settlor has power of revocation exercisable by will (KRS 140.020); (10) property passing by survivorship between joint tenants or tenants by entireties (KRS 140.050).

Tax imposed when any person or corporation subject to tax becomes beneficially entitled in possession of or expectancy to any property or income thereof by such transfer. (KRS 140.010).

Rates and exemptions vary according to following classification of beneficiaries (see KRS 140.070 for description of beneficiary classification and applicable tax rate, and KRS 140.080 for applicable exemption by classification):

Class A includes parent, surviving spouse, child by blood, stepchild, child adopted during infancy, child adopted during adulthood who was reared by decedent during infancy and grandchild who is issue of child by blood, issue of stepchild, issue of child adopted during adulthood who was reared by decedent during infancy, issue of child adopted during infancy, brothers, sisters, half-brothers, or half-sisters. Inheritance tax being phased-out for Class A beneficiaries effective July 1, 1998 for decedents dying after June 30, 1998. Exemptions, if decedent died prior to July 1, 1995 are: Surviving spouse total inheritable interest; infant child by blood or adoption, or child by blood or adoption, who has been declared mentally disabled, $20,000; any other member of class, $5,000, except brothers, sisters, half-brothers, half-sisters,

$1,000. During phase-out, Class A beneficiaries entitled to exemption equal to greater of pre-July 1, 1995 exemption or phase-out percentage of inheritable interest. Phase-out percentage based on date of death. For decedents dying: from July 1, 1995 through June 30, 1996, 25%; from July 1, 1996 through June 30, 1997, 50%; from July 1, 1997 through June 30, 1998, 75%; on or after July 1, 1998, 100%.

Tax Rates: 2% on amount by which amount or value of transfer exceeds exemption, if any, applicable and does not exceed $20,000; 3% on next $10,000 or part thereof (excess over $20,000 up to $30,000); 4% on next $15,000 or part thereof (excess over $30,000 up to $45,000); 5% on next $15,000 (excess over $45,000 up to $60,000); 6% on next $40,000 (excess over $60,000 up to $100,000); 7% on next $100,000 (excess over $100,000 up to $200,000); 8% on next $300,000 (excess over $200,000 up to $500,000); 10% on all over $500,000.

Class B includes nephew, niece, nephew or niece of the half blood, son-in-law, daughter-in-law, aunt or uncle or great-grandchild who is grandchild of child by blood, of stepchild or of child adopted during infancy. Exemption, $1,000. Rates: 4% on first $10,000 or part thereof; 5% on next $10,000 or part thereof (excess over $10,000 up to $20,000); 6% on next $10,000 or part thereof (excess over $20,000 up to $30,000); 8% on next $15,000 or part thereof (excess over $30,000 up to $45,000); 10% on next $15,000 or part thereof (excess over $45,000 up to $60,000); 12% on next $40,000 or part thereof (excess over $60,000 up to $100,000); 14% on next $100,000 or part thereof (excess over $100,000 up to $200,000); 16% on excess over $200,000.

Class C includes any educational, religious or other institutions, societies or associations, or any cities, towns or public institutions not qualifying for complete exemption (see subhead Exempt Transfers, infra) and all persons not included in Class A or Class B. Exemption, $500. Rates: 6% on first $10,000 or part thereof; 8% on next $10,000 or part thereof (excess over $10,000 up to $20,000); 10% on next $10,000 or part thereof (excess over $20,000 up to $30,000); 12% on next $15,000 or part thereof (excess over $30,000 up to $45,000); 14% on next $15,000 or part thereof (excess over $45,000 up to $60,000); 16% on excess over $60,000.

Exempt Transfers.

Following transfers are entirely exempt: Transfers to educational, religious or other institutions, societies or associations whose sole object and purpose are to carry on charitable, educational or religious work; transfers in trust for any charitable purpose; transfers to cities, towns or public institutions in Kentucky for public purposes. (KRS 140.060).

Tax does not apply to any gratuity pay, death compensation or other award or benefit paid by federal government to surviving spouse or heirs of person by reason of his service in U.S. armed forces. (KRS 140.015).

Tax also does not apply to value attributable to employer's contributions receivable by beneficiary from employees' trusts meeting requirements of IRC § 401(a), or from retirement annuity contracts purchased under plan described in IRC § 403(a), or from retirement annuity contract purchased for employee by employer which is an IRC § 170(b)(1)(A)(ii) or (vi) organization exempt from tax under IRC § 501(a), or under Ch. 73 of tit. 10 of U.S. Code or to value of annuity receivable by beneficiary (other than executor) under individual retirement account (IRC § 408[a]), individual retirement annuity (IRC § 408[b]), or retirement bond (IRC § 409[a]). (KRS 140.063).

Administration and Enforcement.

Department of Revenue supervises collection, has power to sue in Kentucky or elsewhere, requires necessary reports from representatives or beneficiaries.

On request of interested party, district court must appoint appraiser for succession tax purposes. Appraiser, after notice and hearing, must file report of appraisement in court and copy with Department of Revenue. His compensation may not exceed 1/10 of 1% of appraised value. (KRS 140.170).

After investigation, Department of Revenue may change value of the property subject to succession taxes and advise representatives of estate thereof. (KRS 140.170).

Succession taxes must be assessed at full and fair cash value of property transferred. Personal representatives, trustees and beneficiaries personally liable for inheritance taxes to extent of property so transferred coming into their hands (KRS 140.190) and representatives or trustees may not deliver any bequest or distributive share before collecting tax thereon (KRS 140.220). Effective July 14, 2000, tax waivers no longer required for transfer of stock of either resident or nonresident decedent, regardless of place of transfer, or domicile of corporation. Where waiver not required for transfer of stock of nonresident decedent, Kentucky corporation may make transfer upon receipt of affidavit (Revenue Form 803) from personal representative.

Deductions.

In computing estate value to determine amount or value particular beneficiaries entitled to receive, only following deductions allowed: (1) Decedent's debts other than those secured by property outside Kentucky's tax jurisdiction and those barred by limitation; (2) taxes accrued and unpaid on decedent's property other than taxes on property outside Kentucky's tax jurisdiction; (3) death duties paid to foreign countries; (4) federal estate taxes paid, in proportion assessed on property in Kentucky; (5) special assessments which are lien on property taxable in Kentucky; (6) funeral, monument and cemetery lot maintenance expenses actually paid, not exceeding $5,000; (7) commissions of executor or administrator in amount actually allowed and paid; (8) costs of administration, including reasonable attorney's fees. (KRS 140.090).

Valuation Date.

Value of assets determined for estate and inheritance tax purposes as of date of death. (KRS 140.010; 140.100[2]).

Valuation of Particular Transfers.

Present value of future, contingent or limited estates or interests is determined according to specified U.S. mortality tables, applying rate of 4% per annum. (KRS 140.100[2]).

When annuity or life estate terminated by death and tax thereon not fixed, its value for taxation is amount of annuity or income actually paid or payable to annuitant or life tenant while entitled thereto. Tax on such annuities and life interests must be paid out of corpus unless otherwise provided by “terms of the will.” (KRS 140.100[3]). (*Query:* As to constitutionality of tax on remainderman measured by amount life tenant consumed while living.)

Contingent or defeasible estates in expectancy taxed at applicable rate based on “the happening of the most probable contingencies or conditions named in the will, deed, trust agreement.” Provision made for refund if property ultimately should vest in persons taxable at lower rate or exempt from taxation. (KRS 140.110).

When Due; Interest.

Tax becomes due at death of decedent, payable within 18 months. (KRS 140.210).

If tax paid within 18 months no interest charged; if paid within nine months discount of 5% allowed. If tax not paid within 18 months, interest accrues at tax interest rate equal to adjusted prime rate charged by banks, rounded to nearest full percent until May 1, 2008. After

May 1, 2008, interest accrues at tax interest rate plus 2%. Bond required of fiduciary not paying tax in 18 months. (KRS 140.210; 131.010[5] and [6]; 131.183).

Returns and Reports.

Return, if required, must be filed with Department of Revenue within 18 months after death of decedent, or at time of payment of tax, whichever is earlier. (KRS 140.160). Where real estate of decedent transferred to another person so as to become subject to tax, executor, administrator or trustee must inform Department of Revenue within six months after his appointment, or, if fact not then known to him, within one month after it becomes known. (KRS 140.180).

Foreign Representative.

If no administration in Kentucky, foreign executor or administrator, or foreign grantee of property which is subject of taxable transfer by decedent, may apply directly to Department of Revenue for ascertainment of tax without necessity of local administration. If tax not adjusted within six months after decedent's death, proper district court, on application of Department of Revenue, must appoint administrator in Kentucky. (KRS 140.270).

Taxable Transfers.

Every transfer by grantor or donor of material part of estate, without adequate valuable consideration within three years prior to death, or made in nature of final disposition of estate, is prima facie deemed made in contemplation of death and therefore taxable. (KRS 140.020).

Property passing by exercise of power of appointment, or by failure to exercise such power, taxable as though person taking had inherited from donee of power. Transfer of property by power of appointment may be taxed either upon creation of power or upon exercise of power. (525 S.W.2d 68). Provision made for regulating exemptions allowed as deductions (KRS 140.040), unless rebutted by probative evidence of value. (427 S.W.2d 240).

Joint deposits, including certificates of deposit, in bank and real or personal property held in joint names of two or more persons or held as tenants by entirety, with remainder to survivor, taxable at death of one of them, to extent of such decedent's interest therein, computed as if absolute owner of equal fractional interest therein. (KRS 140.020[3]; 140.050).

Credit allowed where property transferred to decedent within five years of death and tax paid thereon. (KRS 140.095).

Under reciprocal arrangements, Department of Revenue, on finding that intangible personal property of nonresident decedent physically located in Kentucky, must communicate such information to proper taxing officials of state of decedent's domicile (KRS 140.270), and another state, in which nonresident was domiciled at death, may by suit in Kentucky enforce its claim for death taxes due it from such nonresident's estate (KRS 140.280).

Reciprocal agreements with other states having same legislative policy may be made to accomplish following results: (1) Immunity from taxation in Kentucky of intangible property of nonresident decedent (domiciled in United States) held by Kentucky trustee if jurisdiction of decedent's domicile grants similar immunity to estates of deceased residents of Kentucky; (2) immunity from taxation in Kentucky of intangible personal property of deceased resident of Kentucky held in trust in another jurisdiction if such jurisdiction levies succession tax but grants immunity in respect of intangible property of its resident decedents held by Kentucky trustee. In either event immunity from taxation in Kentucky conditioned on evidence presented that tax has been or will be paid to such other jurisdiction. (KRS 140.275).

Interstate Co-operation.

When domicile is in dispute, compromise may be made by Department of Revenue. (KRS 140.285).

Uniform Act on Interstate Arbitration of Death Taxes.

Not adopted.

Uniform Act on Interstate Compromise of Death Taxes.

Not adopted.

22.12A MINES, MINERALS AND FISHERIES TAXES:

Coal Severance Tax.

See category 19 Mineral, Water and Fishing Rights, topic 19.01 Mines and Minerals, subhead Taxes.

22.12B MOTOR CARRIER FUELS TAX:

See topic 22.08 Gasoline and Special Fuels Taxes, subhead Motor Carrier Fuels Tax.

22.13 [RESERVED]

22.14 MOTOR VEHICLE TAXES:

Motor Vehicle Usage Taxes.

Tax at rate of 6% of “retail price” (see next paragraph), minimum $6, levied on use in Kentucky of every motor vehicle unless exempted. (KRS 138.460[1], [7]). Dealer owning loaner or rental motor vehicles may pay tax at 6% or $25 monthly. (KRS 138.4605). Tax collected by county clerk upon original titling registration in state or transfer of ownership of vehicles previously registered. (KRS 138.460[2]). Credit given for similar taxes paid in other states that give similar credit for substantially identical taxes paid in Kentucky. (KRS 138.460[6]). Refund available if new vehicle replaced or purchase price refunded within 60 days by selling dealer or within 90 days by manufacturer or as result of formal arbitration or litigation or in case of manufacturer when ordered to do so by dispute resolution system established under KRS 367.865 or 16 C.F.R. 703 because of malfunction or defect. (KRS 138.460[8]-[11]). Exemptions from tax provided for: (a) Vehicles titled or registered to U.S., Kentucky, or any political subdivision thereof; (b) vehicles titled or registered to educational or charitable institutions; (c) motor vehicles previously titled in Kentucky on or after July 1, 2005, or registered and titled in any state or by federal government when being sold or transferred to licensed dealers for resale; (d) vehicles sold by licensed and registered dealers to nonresident members of Armed Forces stationed in Kentucky; (e) commercial vehicles with capacity of more than nine passengers owned by nonresident and used primarily in interstate commerce and registered under KRS 186.145; (f) vehicles titled in Kentucky on or after July 1, 2005, or previously registered in Kentucky, transferred between husband and wife or parent and child, stepparent and stepchild, or grandparent and grandchild; (g) transfers when only business name has changed; (h) transfers between proprietorship, corporation, and limited liability company, within six months of time business incorporates, organizes, or dissolves; (i) transfers under will, court order, or by descent and distribution, if vehicles titled in Kentucky on or after July 1, 2005, or were previously registered in Kentucky; (j) transfers without consideration or in sole consideration of cancellation or surrender of stock between subsidiary corporation and parent or between limited liability company and any of its members; (k) interest of partner in vehicle when other interests transferred to him; (l) vehicles repossessed by secured party if held for resale only; (m) vehicles transferred to insurance company in settlement of claim if junked or held for resale only (KRS 138.470); (n) vehicles and farm trucks with declared gross weight of 44,001 pounds or greater and registered under KRS 186.150; and (o) carriers operating under charter bus certificate.

"Retail price" of motor vehicles subject to tax determined as follows: for new vehicles, dealer demonstrator vehicles, previous model year vehicles, and certain U-Drive-It vehicles, retail price is total consideration given at time of purchase or thereafter, including any trade-in allowance as attested to by affidavit. If affidavit not available to establish total consideration given, retail price is 90% of manufacturer's suggested retail price with all equipment and accessories and including transportation charges, not including that portion of vehicle attributable to equipment or adaptive devices necessary to facilitate or accommodate operator or passenger with physical disabilities, but with no allowance for value of trade-in vehicle; for used vehicles being registered for first time in Kentucky by new resident, retail price is average trade-in value appearing in automotive reference manual prescribed by Department of Revenue if model appears, or $100 for vehicles no longer listed; for used vehicles and certain U-Drive-It vehicles sold in Kentucky, retail price is total consideration given, excluding any trade-in allowance; and trucks with gross weight in excess of 10,000 pounds retail price is 81% of manufacturer's suggested retail price with all equipment and accessories and including transportation charges. (KRS 138.450[12]; McGaren, Jefferson Cir. Ct. No. 99-CI-01392[2001]).

22.15 [RESERVED]

22.16 PROPERTY TAXES:

Real and Personal Property Taxable.

Subject to exemptions hereinafter noted, all property having a situs in Kentucky is taxable. (Ky. Const. § 171).

Taxable situs of property generally is thus fixed: (1) Real property in county, city and taxing district where located. (KRS 132.220;132.200). (2) Tangible personal property, in county, city and taxing district where it has acquired taxable situs. (KRS 132.220;132.200). Temporary location for transient purposes does not fix taxable situs. (134 Ky. 99, 119 S.W. 749; 181 Ky. 675, 205 S.W. 789). (3) Intangible personal property of Kentucky corporations not taxable if business situs acquired outside Kentucky. (KRS 132.190[2]).

Resident is any person who has taken up place of abode within state with intention of continuing to abide in state. Any person who had actual place of abode in state for most of 12 month period preceding date assessment is to be made is deemed resident. (KRS 132.010[5]).

Exemptions.

Following classes of property are exempt from all taxation: public property used for public purposes; real property owned and occupied by, and personal property owned by, religious institutions; nonprofit burial grounds; charitable institutions; nonprofit educational institutions of which income devoted solely to education, public libraries, their endowments and maintenance income; household goods used in home; crops grown by producer in year assessment is made; first $6,500 of value of real property maintained as permanent residence by owner who is 65 years of age or older or totally disabled (Ky. Const. § 170); bonds of state, counties, municipalities, taxing and school districts (Ky. Const. § 171); revenue bonds issued under KRS 40.330 and KRS 40.335 and interest thereon (KRS 40.335); intangible personal property unless otherwise taxed (KRS 132.208); and intangible property of financial institutions paying tax upon capital stock (KRS 136.290; 136.300). Personal property placed in warehouse or distribution center for out of state distribution within six months exempt. (KRS 132.097; 132.099).

Following classes of property are subject to taxation for state purposes only and are not taxable by counties, cities, school or other taxing districts (KRS 132.200 unless otherwise noted): (1) Farm implements and farm machinery owned or leased to person actually engaged in farming and used in farm operation; (2) livestock, ratite birds and domestic fowls; (3) capital stock of savings and loan associations; (4) machinery actually engaged in manufacturing and products in course of manufacture (which includes printing, publishing and distributing newspaper or operating job printing plant), and raw material actually on hand at plant for purpose of manufacture; (5) commercial radio, television and telephonic equipment except for telephone and cellular communications towers; (6) unmanufactured agricultural products on hand at plants of manufacturing concerns or in possession of producer or any agent of producer to which such products have been conveyed or assigned for purpose of sale (cities and counties but not other taxing districts may tax other unmanufactured agricultural products); (7) all privately-owned leasehold interests in industrial buildings owned and financed by tax-exempt governmental unit or by other tax-exempt statutory authority through revenue bonds except that local tax exemption does not apply to value of leasehold interest created through private financing; (8) certified pollution control facilities; (9) certified alcohol production facilities; (10) tangible personal property located in foreign trade zone established pursuant to 19 U.S.C. § 81; (11) historic motor vehicles as defined in KRS 186.043; (12) certified fluidized bed energy production facilities; (13) unregistered motor vehicles held in licensed dealer inventory on assignment under KRS 186A.230; (14) machinery and equipment used to recycle waste materials; (15) new farm machinery and other equipment held in retailer's inventory for sale under floor plan financing arrangement by “retailer”; (16) new boats and new marine equipment held in registered dealer's inventory under floor plan financing arrangement; (17) financial institution deposits (KRS 132.030); (18) aircraft and federally documented vessels not used to transport persons or property for hire if approved by local taxing authority; (19) nonferrous metals conforming to specifications set by N.Y. Mercantile Exchange and located or stored in commodity warehouse; (20) biotechnology products held in warehouse for distribution by manufacturer or its affiliate; (21) qualifying voluntary environmental remediation property for three years following issuance of covenant not to sue; and (22) “taxable capital” and “taxable reserves” of domestic life insurance companies except that county and city where principal office is located may impose tax of 15¢ per $100 of taxable capital (KRS 136.320).

Property of Kentucky Educational Savings Plan Trust and income therefrom exempt from all taxation by state and subdivisions and investment income earned on any contributions paid by any participant and used for higher education is exempt from Kentucky income tax. (KRS 164A.370).

Funds of fraternal benefit societies organized or licensed under KRS c. 304.29-010, et seq. exempt from all state, county, district, municipal and school taxes; real estate and office equipment not so exempt. (KRS 304.29-241).

Unmanufactured agricultural products, other than those specified in (6) above, are subject to local taxation by cities and counties each at rate not exceeding 1½¢ on each $100 of all unmanufactured tobacco and not exceeding 4½¢ on each $100 of all other unmanufactured agricultural products not at plant for manufacturing purposes. (KRS 132.200; 132.020).

State Tax Rates.

Except as otherwise provided, rates are 31½¢ per $100 of value of all real property directed to be assessed for taxation and 45¢ per $100 of value of all other property directed to be assessed for taxation. (KRS 132.020). Real property rate must be reduced to compensate for any increase over 4% in aggregate assessed value (excluding assessments from new property, property subject to tax increment financing and leasehold property owned and financed by tax-exempt governmental unit) of real property over preceding year's assessment; rate must be increased to compensate for any decreased assessment so that revenue produced will remain steady. (KRS 132.020[6] and [8]). Special tax rates (all set forth in KRS 132.020, except as otherwise noted) as exceptions to above are provided as follows: 1½¢ per $100 of all tobacco; 1½¢ per $100 of value of privately-owned leasehold interests in industrial revenue bond developments owned and financed by tax-exempt governmental units except that rate does not apply to value of leasehold interest created through private financing; 1½¢ per $100 of qualifying voluntary environmental remediation property after obtaining covenant not to sue, for three years, 1½¢ per $100 of unmanufactured agricultural products; 15¢ per $100 of aircraft and federally documented vessels not used to transport persons or property for hire; 1/10 of 1¢ per $100 of farm implements and farm machinery used in farm operations; 1/10 of 1¢ per $100 of livestock and domestic fowls; 1/10th of 1¢ per $100 upon tangible personal property located in foreign trade zone established pursuant to 19 U.S.C. § 81; 15¢ per $100 of machinery actually engaged in manufacturing, and commercial radio, television and telephonic equipment used directly in broadcasting to antenna, and certified pollution control facilities; 1/10th of 1¢ per $100 of certified alcohol production facilities and fluidized coal energy production facilities; 25¢ per $100 of value of historic motor vehicles as defined in KRS 186.043; 5¢ per $100 of finished goods, raw material and work in process inventory; 5¢ per $100 of retailer's inventory; 1/10 of 1¢ per $100 on deposits in financial institutions (KRS 132.030); see category 3 Business Regulation and Commerce, topic 3.01 Banks and Banking, subhead Reports and Tax on Deposits; 28¢ per $100 of taxable capital for calendar year 2002, 14¢ per $100 of taxable capital for calendar year 2003, and 1/10 of 1¢ per $100 of taxable capital for calendar year 2004, and 1/10 of 1¢ per $100 of “taxable reserves” of domestic life insurance companies in lieu of all other state taxes (KRS 136.320); 10¢ per $100 of assessed value on railroads operating solely within Kentucky (KRS 132.020[11]). Motor vehicles are subject to centralized ad valorem tax system using rates equalized on Jan. 1, 1983 assessments in various counties. (KRS 132.487). County clerks are to collect motor vehicle ad valorem tax at time of annual registration renewal or transfer on all vehicles registered by them. (KRS 134.800; 186.021).

Local Tax Rates.

For cities, counties and special taxing districts and other municipalities for other than school purposes, maximum rates for property taxes vary by population as follows: for cities with populations of 15,000 or more, rate not to exceed $1.50 per $100, for populations of 10,000 to 14,999, rate not to exceed $1 per $100, for populations under 10,000, rate not to exceed 75¢ per $100, and for counties and taxing districts, rates not to exceed 50¢ per $100. (Ky. Const. 157). Most cities, counties and districts do not charge taxes equal to these maximum rates and by statute are prohibited from doing so. (KRS 132.023; 132.027). Any levy of tax rate that increases revenue for agency other than state, other than through net assessment growth, is subject to recall vote on petition. (KRS 132.017). Special rates applied by state law of: 1½¢ per $100 of nonexempted (see item [6] in subhead Exemptions, supra) unmanufactured tobacco and 4½¢ per $100 of other nonexempted unmanufactured agricultural products (KRS 132.200); 15¢ per $100 of “taxable capital” of domestic life insurance companies for county and city purposes but not school or other district purposes (KRS 136.320). Cities and counties may enact additional tax to fund specific projects upon public vote in favor of each project and tax. (KRS 65.125).

Assessment.

All property not exempt by state constitution must be assessed at 100% fair cash value (Const. § 172; 391 S.W.2d 694), except general assembly may provide for assessment of land used for agricultural and horticultural purposes according to land's value for such use (Ky. Const. § 172A). Owners of agricultural and horticultural lands, as defined in KRS 132.010[9-11], that have been devoted exclusively to agricultural or horticultural use for at least five successive years may petition for valuation for taxing purposes at agricultural or horticultural value and defer taxation on higher value. (Ky. Const. § 174; KRS 132.450[2][3]). Owners who have petitioned for and have been granted zoning classification other than agricultural or horticultural may not petition. Corporate owners, except those organized primarily for agricultural or horticultural purposes are excluded from provisions. When land valued and taxed as agricultural or horticultural land is converted to any other use, that portion of land upon which use is changed is subject to tax for succeeding year at its fair cash value. (KRS 132.454).

Unmined coal, oil and gas reserves and any other mineral or energy resources owned, leased or otherwise controlled separately from surface real property are assessed by Department at no more than fair market value in place as separate and distinct interest, unless resources entirely owned by surface owner not engaged in severance, extraction, processing or leasing of resources, and surface used primarily for raising crops. (KRS 132.820).

Provisions made for local governments to grant, on application, assessment moratorium for up to five years to encourage repair, rehabilitation, restoration or stabilization of existing improvements on property. (KRS 99.600; 99.605; 132.452).

Real property generally is assessed by property valuation administrators in each county. Department of Revenue assesses unmined coal and other minerals in place. (KRS 132.820). Provision is made for public review of real property tax rolls during period in early May each year following public notice (KRS 133.045) and for review or correction at instance of taxpayer or of taxing authorities (KRS cc. 132, 133). Department of Revenue generally assesses personal property and has large powers of supervision and correction as to real property, and also as to countywide assessments. (KRS c. 133). It also has exclusive right to assess properties of certain kinds of corporations and public utilities as hereinafter pointed out. See infra, subhead Public Service Corporation Property Tax.

Jan. 1 is assessment date for state, county and school district taxes on all forms of property. (KRS 132.220). Cities have their own procedures for assessment and collection of taxes, with different taxing dates for cities of different classes, but any city may use assessments made by county property valuation administrator or Department of Revenue of property located within its limits except for levy and collection of ad valorem taxes on motor vehicles for which cities shall use assessment required by KRS 132.487(5). (KRS 132.285).

Holder of first freehold estate must list real property with county property valuation administrator for assessment between Jan. 1 and Mar. 1; persons having interest in intangible and tangible personal property must list such property with county property valuation administrator or with Department of Revenue between Jan. 1 and May 15 in each year (KRS 132.220), except in cases of returns to and assessments by Department of Revenue. See infra, subhead Public Service Corporation Property Tax. Property valuation administrator maintains and certifies lists of real property additions and real property deletions to property tax rolls for each taxing district. (KRS 132.015).

Provision is made for compulsory retrospective assessment of omitted property by proceedings instituted by Department of Revenue in county where omitted property is liable to assessment. (KRS 132.330 to 132.350). Appeals from assessment on omitted property may be taken by either party to circuit court of county and thence to court of appeals. (KRS 132.340).

Omitted property is subject to interest on tax at rate adjusted annually to equal banks' prime rate plus 2% from date tax would have been delinquent had property been listed, plus penalty of 10% if voluntarily listed, or 20% if not voluntarily listed. Omitted property is subject to retroactive assessment for five years from date when it became omitted. When property is assessed retroactively by action, an additional penalty of 20% of original tax, interest and penalty, may be imposed. (KRS 132.290; 131.010).

Review of Assessment.

Real Property.

When it appears to Department of Revenue that assessment in any district is not in compliance with law, it may order re-assessment of all or part of property in such district. (KRS 132.660). Department of Revenue may reopen assessments of personal property within five years after due date of return to determine if assessment was at fair cash value. (KRS 132.360).

Taxpayer aggrieved by property valuation administrator's assessment on real property may appeal by requesting conference with administrator or deputy. If taxpayer still aggrieved, appeal may be made to board of assessment appeals by letter or written petition filed with county clerk no later than one workday following end of inspection period. Appeal from Board may be taken to Kentucky Board of Tax Appeals unless taxpayer failed either to appeal to county board of assessment appeals or appear before board either in person or by designated representative. (KRS 133.120). See topic 22.01 Administration, subhead Board of Tax Appeals.

Appeals from Department assessments of unmined coal, oil and gas reserves, and any other mineral or energy resources owned, leased or otherwise controlled separately from surface real property, are made pursuant to KRS c. 131. Taxpayer must pay taxes on taxpayer's opinion of value and protest assessment in manner similar to public service franchises. (KRS 132.820[5]). See subhead Public Service Corporation Property Tax, catchline Review of Assessment by Department of Revenue, infra.

Personal Property.

Taxpayer aggrieved by Department of Revenue's reassessment of personal property may protest to Department of Revenue within 45 days and use administrative remedy procedures available under KRS 131.110 and 131.340. (KRS 132.360).

Payment.

Taxes are due annually on Dec. 3 following assessment, except in case of assessments made by Department of Revenue, as to which see infra, subhead Public Service Corporation Property Tax. If paid by Nov. 1 before due date, discount of 5% is allowed. If not paid by Jan. 1 following due date 2% penalty on unpaid tax is added. After Feb. 1 in same years penalty is 10% of the tax. If tax collection schedule is delayed, department of revenue may revise collection schedule. **(KRS 134.015).** Penalties and costs are provided for further delays. (KRS 134.119).

Officer authorized to collect payment shall accept payment of tax or tax claim from person authorized by owner to make payment, or from persons with specified interest in property. (KRS 12.119[3]; 134.121). On receiving payment, receiving officer must, on request of payer, issue certificate of transfer of tax claim. Such certificate confers on holder same priority of lien and rights of enforcement as other holders of third-party tax claims. (KRS 132.119[3]; 134.121).

Appropriate agency can authorize refunds or credits within two years from payment date for ad valorem taxes provided taxpayer follows appropriate administrative remedy provision. (KRS 134.590).

Collection.

Sheriff is collector of state, county, consolidated local government, and district property taxes, unless otherwise provided, and commences collection of tax bills until tax claims filed with county clerk. (KRS 134.119; 134.122[1]). In addition to methods of enforcing collection of tax claims hereinafter described, KRS c. 135 provides other procedures for collection of public claims by action.

Lien.

Property taxes of state and of each county, city or other taxing district constitute lien on property assessed for 11 years following date when they became delinquent. Lien is for amount of delinquent taxes, with interest, penalties, costs, etc., and has priority over any other obligation or liability to which property may be subjected, except for sale to bona fide purchaser. (KRS 134.420). Except as otherwise provided for specific taxes, all state, county and district taxes are collected locally become delinquent on Jan. 1 following due date. (KRS 134.015). Lien for other taxes administered by Department created when taxpayer neglects or refuses to pay after demand and lien attaches to all property but lien does not have priority over subsequent perfected purchase money security interest. (925 S.W.2d 185; KRS 131.515[1]). Lien remains in force for ten years from date notice of tax lien filed by Department of Revenue with appropriate county clerk. (KRS 131.515[2]).

Inchoate lien on real estate to secure state, county and district taxes exists from date when assessment thereof should have been made; lien is perfected by subsequent proceedings for assessment and ascertainment of taxes due, but in case of retrospective assessments rights of bona fide purchasers except of real property acquired in meantime are not prejudiced. (KRS 134.420). Same principle applies generally in case of city taxes. (Compare KRS 91.560; 91A.070).

Sale.

When tax becomes delinquent collector is authorized to first distrain personal property of delinquent taxpayer and sell it for cash. (KRS 134.119[5]).

On consummating sale of tax claim to third-party purchaser, collecting officer must issue to purchaser certificate of delinquency that, to full amount of interest, penalties and costs continues to be personal debt of delinquent taxpayer, and lien of tax continues. (KRS 134.128; 134.504). Persons paying more than five certificates of delinquency in state, or more than three certificates in any county, or investing more than $10,000 in certificates in any one year, must obtain from Department of Revenue certificate of registration. (KRS 134.129). Recovery of attorneys' fees and costs limited prior to filing of private action. Private purchaser must comply with provisions for notice to delinquent taxpayer. (KRS 134.452; 134.490[3]).

No action to enforce certificate of delinquency may be brought until one year after issuance thereof and any such action must be brought within 11 years after expiration of one year period. After one year period has expired owner of certificate may bring personal action thereon against delinquent taxpayer, bring proceedings to enforce lien of tax claim or sue in personam for personal judgment and in rem for enforcement of statutory lien. (KRS 134. **546**).

Prior to sale of property in lien under certificate of delinquency, tax claims collected thereby bear interest from date of issuance until collected, at rate of 12% simple interest per annum. (KRS 134.135).

Redemption.

Where property is sold pursuant to a judgment of foreclosure of lien, appraisal is required and there is right of redemption. (KRS 134.546[5]). If taxing authority acquires real estate, property may be redeemed at any time before Department of Revenue gives deed to purchaser, by paying to county court clerk amount due at time property acquired, plus subsequent costs and 12% per annum interest. (KRS 134.549[3]).

Public Service Corporation Property Tax.

Every corporation, association, partnership or person performing any public service, in addition to other taxes imposed, must annually pay tax on its operating property to state and (except as hereinafter stated) local tax thereon to county, city, town and taxing district wherein it exercises franchise to conduct any public service business. (KRS 136.120[1]).

Valuation and Assessment.

Department of Revenue has sole power to value and assess annually all property, including franchise, of every corporation, association or person performing any public service. (KRS 136.120[3]; 136.115[2]).

Property of all such taxpayers must be classified by Department as operating (including operating tangible and franchise), non-operating tangible and non-operating intangible. (KRS 136.120[2]; 136.115[2]). Non-operating intangible property within taxing jurisdiction of Kentucky is taxable for state purposes only at same rate as intangible property of franchise taxpayers not performing public services. Tangible property, whether operating or non-operating, is subject to state and local taxes at same rate as tangible property of other taxpayers not performing public services. (KRS 136.120[2]). For rates, see subheads State Tax Rates and Local Tax Rates, supra.

Department determines fair cash value of operating property of public service corporation as unit. In case of public service corporation with property or routes only in Kentucky, operating property is allocated within Kentucky as provided below. In case of public service corporation with property or routes in and outside of Kentucky, fair cash value of operating property is apportioned to Kentucky based on average of property factor (which must reflect amount of operating property in Kentucky compared to operating property everywhere) and business factor (which must reflect use of operating property in Kentucky compared to use of operating property everywhere). (KRS 136.160). Operating property so apportioned to Kentucky is allocated within Kentucky among local taxing authorities in proportion to location of operating property and length of lines or routes. (KRS 136.170).

Non-operating tangible and non-operating intangible property of such taxpayers is valued by Department of Revenue as if such property were being valued by property valuation administrator in county where property has taxable situs. (KRS 136.160[3]). Assessed value of non-operating tangible property is allocated to local taxing authority where property situated. (KRS 136.170).

Special provision made for taxation of watercraft owned by water transportation companies. (KRS 136.1801 to 136.1806).

Review of Assessment by Department of Revenue.

Department of Revenue, immediately after fixing value of operating property and other property of public service corporation for taxation, must notify corporation of valuation and amount of assessment for state and local purposes. (KRS 136.180[1]). Pending outcome of any appeal, taxpayer must pay tax based on taxpayer's estimate of true value; upon final determination of valuation, taxpayer must pay any additional tax plus interest from date tax would have been due if no appeal taken. (KRS 136.180[2]).

When valuation of operating property and other property of public service corporation is finally determined, Department must immediately certify unless otherwise specified to county clerk of each county in which any portion of operating property or non-operating tangible property assessment of corporation is liable to local taxation amount of property liable for local tax. (KRS 136.180[1]). County clerk must file certificate of valuation and certify to proper collecting officer of county, city or taxing district amount for collection. (KRS 136.180[5]). For local taxes on property of railroad or railway companies operating solely in Kentucky, Department also to compute annually multiplier to be applied against local tangible property tax rates. Multiplier equals statewide locally taxed business tangible property divided by total statewide business personal property. (KRS 136.180[3]). For determining local taxes to be collected for railroad carlines, Department to calculate annually aggregate local rate for each local taxing district. Rate is statewide tangible tax rate multiplied by fraction with numerator being commercial and industrial tangible property assessment subject to full local rates and denominator being total commercial and industrial tangible personal property assessment. (KRS 136.180[4]).

Reports.

Every public service corporation must annually, between Dec. 31 and Apr. 30, make and deliver to Department of Revenue at Frankfort report in form prescribed by department, showing such facts as listed in KRS 136.130 or as Department may request. (KRS 136.130[1]). Report must cover 12 months ending Dec. 31, but Department may change date of report to conform to any change in date established by federal regulations. (KRS 136.130[2]). If corporation is in hands of receiver or other person by order of court, report must be made by receiver or other person. (KRS 136.130[3]). Department of Revenue may grant public service company 30 day extension to file if good cause exists, taxpayer's request is before due date, and taxpayer reports any change in property of $50,000 or more. (KRS 136.130[5]-[6]).

Public service corporation operating and conducting business in and out of Kentucky subject to additional reporting requirements. (KRS 136.140).

In case of failure to report, Department may ascertain required facts and values in such manner and by such means as it deems proper, at cost of corporation in default. (KRS 136.150).

Substantial penalties prescribed for willful failure or refusal to make required reports or for delinquency in payment of taxes. (KRS 136.990).

Local Taxes.

Operating property of public service corporation, whether domestic or foreign, is taxable in each county, city or district where operating property is located or through or into which its lines or routes pass or are operated, in proportion that operating property or length of lines or routes in such county, city or district bears to total operating property or length of lines in Kentucky. (KRS 136.170). Railroad bridges spanning any river constituting state boundary are localized for taxation in county or city where located. (KRS 136.200).

Real Estate Conveyance Tax.

Tax of $4 is collected by county clerk in addition to other taxes and fees described herein upon recording of filing of each power of attorney to convey real or personal property, on each mortgage, financing statement or security agreement, on each conveyance of real property and on each lien or conveyance of coal, oil, gas or other mineral right or privilege. (KRS 142.010). In addition, tax of 50¢ for each $500 of value is imposed for privilege of transferring title to real property. Computation is made on actual purchase price or in case of gift on property's fair market value. (KRS 142.050). Tax not imposed on transfers: (1) To U.S., state or political subdivision for no consideration or nominal consideration; (2) to provide or release security of debt; (3) to confirm or correct previously recorded deed; (4) between husband and wife or between former spouses as part of divorce proceeding; (5) on sale for delinquent taxes or assessments; (6) to partition property; (7) pursuant to merger of corporations, partnerships or limited liability companies; (8) pursuant to conversion of general partnership into limited liability company; (9) between subsidiary and parent corporation for no consideration, nominal consideration or in sole consideration of cancellation or surrender of either corporation's stock; (10) under foreclosure proceeding; (11) between person and corporation, general partnership, limited partnership, registered limited liability partnership, or limited liability company in amount equal to portion of value of real property transferred that represents proportionate interest of transferor of property in entity to which property transferred, if transfer for nominal consideration; (12) between parent and child or grandparent and grandchild for nominal consideration; (13) by corporation, general partnership, limited partnership, registered limited liability partnership, or limited liability company to person as owner or shareholder upon dissolution of entity in amount equal to portion of value of real property transferred that represents proportionate interest of individual transferee, if transfer for nominal consideration; (14) to trustee (as defined in KRS 386.800) to be held in trust or from trustee to beneficiary of trust if grantor is sole beneficiary of trust, grantor is beneficiary of trust and direct transfer from grantor of trust to all other individual beneficiaries of trust and direct transfer from grantor of trust to all other individual beneficiaries of trust would have qualified for exemption pursuant to one of exemptions previously enumerated herein, or direct transfer from grantor of trust to all other individual beneficiaries of trust would have qualified for exemption pursuant to one of exemptions previously enumerated herein; (15) between trustee and successor trustee; (16) between limited liability company and any of its members. (KRS 142.050[7][8]). No deed may be considered legally lodged for record until tax has been paid thereon. (KRS 382.260).

22.17 SALES AND USE TAXES:

Sales Tax.

Tax of 6% of gross receipts is imposed on all retailers making “retail sales” and rentals or leases of tangible personal property and provision of lodging, sewer, natural gas distribution, transmission or transportation services, and communications services, not including pay telephone service, but including ring tone sales. (KRS 139.200). Tax collected by retailer from purchaser and constitutes debt of retailer to state. (KRS 139.340).

Use Tax.

Complementary use tax of 6% is imposed on tangible personal property purchased outside Kentucky for storage, use, or consumption in state (KRS 139.310) unless sales tax at least equal to that in Kentucky has been paid and taxing state grants similar credit for sales tax paid to Kentucky (KRS 139.510). Use tax payable by “U-Drive-It” certificate holder (KRS 281.014[3]; 281.615) regularly engaged in renting or leasing motor vehicles to retail customers may be paid at rate of 6% of fair market rental of vehicle, but not less than actual charges, and tax may be passed on to customers (KRS 138.463).

Exemptions from Sales and Use Taxes.

Excluded from computation of amount of taxes are receipts from sale, storage, use, or consumption of: (1) Gasoline and special fuels taxed under KRS c. 138, motor vehicles taxed under KRS 138.460, and labor or services used in installing or applying property (KRS 139.470[19][21]; 139.010[4][c]); (2) sales or leases for resale or sublease or of lodgings supplied for continuous period of 30 days or more (KRS 139.200[2]); (3) property purchased for resale or for shipment or use solely outside state (KRS 139.200; 139.010[25]; 139.010[33][b][2]); (4) tangible personal property that Constitution or laws of U.S. or Constitution of Kentucky prohibit being taxed, such as sales or use by federal government, sales in or use in interstate or foreign commerce (KRS 139.470[1]); (5) returnable and nonreturnable containers when sold without contents to persons who fill and re-sell containers with contents (KRS 139.470[2][a]); (6) returnable containers when sold with contents in retail sale of contents or when resold for refilling (KRS 139.470[2][b]); (7) tangible personal property for performance of lump-sum, fixed fee contract for public works executed prior to Feb. 5, 1960 (KRS 139.470[3]; 139.060); (8) occasional sale (KRS 139.470[4]); (9) tangible personal property sold to common carriers for use outside state (KRS 139.470[5]); (10) tangible personal property sold through coin-operated bulk vending machines for 50¢ or less by retailer primarily engaged in making such sales (KRS 139.470[6]); (11) property or services sold to or used solely in governmental functions by any agency of state government or any county, city or local government district (KRS 139.470[7]); (12) natural gas, electricity, fuel oil, bottled gas, coal, coke, wood, or sewer services or water sold to Kentucky residents for use in heating, water heating, cooking, lighting, or other residential uses (KRS 139.470[8]); (13) any rate increase for school taxes or other charges or surcharges added to total amount of residential telephone bill (KRS 139.470[9]); (14) prescription medicines, over-the-counter drugs purchased for human use for which prescription is issued, medical oxygen and oxygen delivery equipment purchased for home use, insulin and diabetic supplies, colostomy, urostomy and ileostomy supplies, prosthetic devices purchased by health care provider for use in treatment of specific individual or purchased by individual with prescription prosthetic devices designed for specific individual, mobility enhancing devices purchased with prescription and durable medical equipment, including hospital beds, purchased with prescriptions (KRS 139.472); (15) tangible personal property sold to out-of-state agency, organization, or institution exempt from sales and use tax in its state of residence when that agency, organization or institution gives proof of its tax exempt status to seller and seller maintains file of such proof (KRS 139.470[10]); (16) newspaper inserts or catalogs purchased for use outside Kentucky and delivered outside Kentucky by retailer's vehicle, common carrier or U.S. Postal Service (KRS 139.470[13]); (17) metal retail fixtures manufactured in state for use outside state and shipped by retailer's vehicles, U.S. Postal Service, contract carrier or common carrier (KRS 139.470[15]); (18) uranium, unenriched or enriched, purchased for use and delivery outside Kentucky (KRS 139.470[16]); (19) rolling stock and locomotives, including materials necessary for operation (KRS 139.480[1]); (20) coal for manufacture of electricity (KRS 139.480[2]); (21) all energy or energy-producing fuels used in course of manufacturing, processing, mining or refining to extent cost of energy or fuels exceeds 3% of cost of production (KRS 139.480[3]); (22) livestock of kind products of which ordinarily constitute food for human consumption if sale made for breeding or dairy purposes and either by or to person regularly engaged in business of farming (KRS 139.480[4]); (23) poultry for breeding or egg business (KRS 139.480[5]); (24) farm workstock for use in farming operations (KRS 139.480[6]); (25) seed for farming, feed for livestock and poultry (KRS 139.480[7]); (26) sale of water used in raising equine as business (KRS 139.470[14]); (27) machinery used directly in manufacturing or processing production process for new and expanded industry incorporated for first time into plant facility in state (processing production includes: processing and packaging of raw materials, in-process materials, and finished products; processing and packaging of farm and dairy products for sale; and extraction of minerals, ores, coal, clay, stone, and natural gas) and replacement machinery that will increase consumption of recycled materials at facility by 10% or more, perform different function, manufacture different product, or has greater productive capacity measured in units of production (KRS 139.480[10]; 139.010[13] and [14]); (28) farm machinery and repair and replacement parts thereof used exclusively in farming operations but not including motor vehicles (KRS 139.480[11]); (29) certified pollution control facilities defined in KRS 224.01-300 and, through June 30, 1994, all materials, supplies, repair and replacement parts for such facilities used in steel making process (KRS 139.480[12]); (30) tombstones and other grave markers (KRS 139.480[13]); (31) on-farm facilities and components for grain or soybean storing, drying, processing, or handling (KRS 139.480[14]); (32) gasoline and other fuels used to operate farm machinery, on-farm grain or soybean drying facilities, on-farm poultry or livestock facilities, on-farm ratite facilities or on-farm facilities (KRS 139.480[16]); (33) textbooks and course materials used in course of study in nonprofit educational institution (KRS 139.480[17]); (34) property certified as alcohol-production facility (KRS 139.480[18]); (35) aircraft, repair and replacement parts and supplies used in interstate commerce for conveyance of property or passengers for hire (KRS 139.480[19]); (36) property used in constructing or modifying blast furnaces (through June 30, 1994) (KRS 139.480[21]); (37) food or food products purchased for human consumption with federally-issued food stamps (KRS 139.480[22]); (38) property certified as fluidized bed energy production facility (KRS 139.480[20]); (39) charges for admission to historical sites designated in national register by U.S. Department of Interior operated by nonprofit organization and of sales of materials, supplies, and services to nonprofit organization used to restore, maintain, or operate such historical site (KRS 139.482); (40) ships and vessels, including property used in repair or construction of, supplies and fuel consumed in operation of and supplies consumed by crew members aboard ships and vessels used primarily in transportation of property and conveyance of persons for hire (KRS 139.483); (41) most grocery store sales of food and food ingredients for human consumption, but candy, alcoholic beverages, soft drinks and sodas, dietary supplements, prepared foods, and foods sold through nonmechanical self-service vending systems not included within this exemption (KRS 139.485); (42) sales of property or services to educational, charitable or religious bodies if used solely for such purposes and sales of food to students in school cafeterias and lunchrooms or sales other than athletic tickets by nonprofit, school-sponsored organizations (KRS 139.495); (43) first $1,000 in any year of sales by individuals and nonprofit organizations incident to garage or yard sales or fund-raising events so long as sales are made by individuals or nonprofit organizations not engaged in business of selling (KRS 139.496); (44) sale or use of horses, or interest or shares in horses, provided purchase or use is made for breeding purposes only; trading by owners of stallion services; sale of horses less than two years of age at time of sale, provided sale is made to nonresident of Kentucky; boarding of horses within state; and temporary use of horses for racing, exhibiting, or performing (KRS 139.531); (45) lease or rental of films to commercial theaters charging sales tax on admission charges (KRS 139.484); (46) on-farm facilities used exclusively for raising poultry or livestock (KRS 139.480[15]); (47) certain tangible personal property used at plant facility to manufacture or process goods which will be for sale (KRS 139.470[11]); (48) industrial machinery as defined by KRS 139.486(1), delivered for use outside Kentucky (KRS 139.486[2, 3]); (49) machinery and equipment used to recycle waste materials (KRS 139.480[23]); (50) farm chemicals used in production of crops as business, or in raising and feeding of livestock or poultry, products of which ordinarily constitute food for human consumption (KRS 139.480[8]); (51) ratite birds, eggs to be used in agricultural pursuit for breeding and production of ratite birds, feathers, hides, breeding stock, eggs, meat, and ratite by-products and certain items used in ratite breeding (KRS 139.480[24]); (52) embryos and semen used in reproduction of livestock that ordinarily constitutes food for human consumption, if sale is made to person engaged in farming (KRS 139.480[25]); (53) llamas and alpacas to be used as beasts of burden or in agricultural pursuits, and feed, feed additives, insecticides, fungicides, herbicides, etc., and on-farm facilities used therein (KRS 139.480[26]); (54) baling twine and wire for baling hay and straw (KRS 139.480[27]); (55) buffaloes to be used as beasts of burden or in agricultural pursuit (KRS 139.480[29]); (56) aquatic organisms sold directly to or raised by person regularly engaged in business of producing agriculture products (KRS 139.480[30]); (57) cervidae permitted by KRS c. 150 used in agricultural pursuits, and feed, feed additives, chemicals, and on-farm facilities, used therein (KRS 139.480[31]); (58) water sold to person regularly engaged in business of farming and used to produce crops, produce milk for sale, or raise and feed livestock or poultry or ratites, llamas, alpacas, buffalo cervids, or aquatic organisms (KRS 139.480[28]); (59) feed, including pre-mixes and feed additives, for livestock or poultry which ordinarily constitute food for human consumption (KRS 139.480[9]); (60) repair or replacement parts for vehicles used exclusively in interstate commerce with declared gross weight of 44,001 pounds or more or vehicle operating under charter-bus certificate (KRS 139.480[32]); (61) amounts received from tobacco buydown (KRS 139.470[17]); (62) sale of property returned by purchaser when full sales price is refunded in cash or credit (KRS 139.470[18]); (63) amount of tax imposed by United States on retail sales, not including manufacturer's excise or import duty (KRS 139.470[20]); (64) sale of semi-trailer as defined in KRS 189.010(12) and trailer as defined in 189.010(17) (KRS 139.470[22]); (65) food donated to nonprofit organization for distribution to needy (KRS 139.480[33]); (66) water use fees paid or passed through to Kentucky River Authority by facilities using water from Kentucky River basin under KRS 151.700 to 151.730; and (67) gross receipts from first $50,000 of admissions to county fairs held in Kentucky by non-profit county fair boards.

Morticians, undertakers, and funeral directors are consumers of caskets and vaults used in their service, tax to be paid when purchased by morticians, undertakers, or funeral directors. (KRS 139.5313).

Registration Requirements.

Retailer selling tangible personal property for storage, use or other consumption in this state must register with department and make application for permit. (KRS 139.390; 139.240).

Credits.

Credit for sales taxes available for certain certificated air carriers that have made substantial investment in state. (KRS 144.120).

Motion-picture company filming in Kentucky during any 12 month period is entitled to refundable tax credit equal to sales and use tax paid for purchases made in connection with filming or production, provided reporting procedures complied with. (KRS 139.538). Approved companies entering into tax incentive agreements with Commerce Cabinet are entitled to credits against sales taxes otherwise due. (KRS 139.536; 148.857 to 148.860).

Returns are filed with Department of Revenue on or before 20th day of month following each calendar month. Seller, retailer, or other person purchasing tangible personal property which is subject to tax that has not been paid, must file return. Taxes are payable monthly and remitted with return. (KRS 139.540; 139.550; 139.580). Department may require payment by electronic fund transfer if average tax liability per period is $10,000 or more, payment is made on behalf of 100 or more taxpayers, or aggregate sales tax to be remitted on behalf of others is $10,000 or more. (KRS 131.155). Department may audit returns and must assess any tax deficiency within four years of date return was filed. (KRS 139.620).

Company Officers Personally Liable.

Officers of corporation, managers of LLC, partners of LLP, and general partners of LLLP are personally and individually liable for taxes imposed. (KRS 139.185).

For Regulations governing Sales and Use Tax write Department of Revenue, Frankfort, Kentucky 40620 or go to web site of Legislative Research Commission (http://www.lrc.ky.gov) through web site of Department of Revenue (http://revenue.ky.gov/laws).

Utilities gross receipts are subject to tax if imposed by school district in which utilities are furnished; limited exemption applies to sales of energy or energy-producing fuels used in manufacturing, processing, mining, or refining. (KRS 160.613).

22.17A SPECIAL FUELS TAX:

See topic 22.08 Gasoline and Special Fuels Taxes, subhead Special Fuels Tax.

22.18 STAMP AND SEAL TAXES:

Stamp Tax.

No stamps required by state law on any written instruments, but stamps required on containers or packages of beer, wines, spirituous liquors, cigarettes, etc. See topic 22.17 Sales and 22.19 Use Taxes.

22.18A TAX LIENS:

Uniform Federal Lien Registration Act Amended.

See topic 22.01 Administration, subhead Uniform Federal Lien Registration Act Amended.

22.19 USE TAXES:

See topic 22.17 Sales and 22.19 Use Taxes.

23 TRANSPORTATION

23.01 MOTOR VEHICLES:

Commercial vehicles regulated by Department of Vehicle Regulation within Transportation Cabinet, 200 Mero Street, Frankfort, Kentucky 40622. (KRS 186.005[1]). Motor vehicles other than commercial vehicles regulated by Transportation Cabinet, 200 Mero Street, Frankfort, Kentucky 40622 and by Justice and Public Safety Cabinet, 125 Holmes Street, Frankfort, Kentucky 40601. (KRS 186.005[1]). Commercial and noncommercial motor vehicles alike are registered by county clerks under regulations promulgated by Department or one or other of cabinets. (KRS 186.020).

Vehicle license required, renewable annually during driver's birth month for all motor vehicles under 6,000 lbs., including motorcycles, and on or before Apr. 1 for commercial vehicles in excess of 6,000 lbs., provided that apportioned vehicles will be registered on staggered basis to be established by regulation. (KRS 186.020; 186.170; 186.050; 186.151; 186.170; 186A.035). License required for trailers, semi-trailers, manufactured homes and recreational vehicles, other than those regulated by Motor Carrier Act (for which license may be required under KRS c. 281), or privately owned trailers used for transporting boats, luggage, personal effects, or farm products, supplies or equipment (KRS 186.650 to 186.700). Number plate must be displayed at rear except for semitrailer-tractor for which display upon front required. (KRS 186.170). County clerks prohibited from renewing or transferring registration for motor vehicle if ad valorem tax thereon is due and not paid. (KRS 185.021). See category 22 Taxation, topic 22.13 Motor Vehicle Taxes. County clerks prohibited from renewing or issuing registration if motor vehicle is not insured in accordance with KRS 304.39-080. (KRS 186.021). If insurance for vehicle is canceled or not renewed, and owner does not provide proof of insurance after notice from department, vehicle registration is revoked. (KRS 186A.040). In such case, owner must pay fee and show proof of insurance to have registration reinstated. (KRS 186.180).

Separate registration requirements if vehicle owned or leased by U.S. or local governmental unit. (KRS 186.060; 186A.080).

No special statutory provision for members of armed forces.

Mobile homes, manufactured homes and recreational vehicles dealers and manufacturers must be licensed or certified by licensure and certification boards. (KRS 227.620; 227.565).

Operator's Licenses.

Applicant between ages of 16 and 18 must have held instruction permit and intermediate license. (KRS 186.450). To obtain instruction permit, one must be at least 16, parent or guardian sign application if under 18, and must pass examination prescribed by KRS 186.480. (KRS 186.450). Instruction permit valid for three years. (KRS 186.450). Persons under 18, who are enlisted in U.S. armed forces or state national guard and have held instruction permit for 180 days, may apply for operator's license. (KRS 186.145). Persons between 18 and 21 do not need intermediate license but must possess instruction permit for 180 days before applying for operator's license; person over 21 must possess instruction permit 30 days before applying for operator's license. (KRS 186.450). Persons under 18 with instruction permit must be accompanied by person with valid operator's license, age 21 or older, in seat beside operator, and shall not operate vehicle between midnight and 6 a.m. and shall not operate vehicle when accompanied by more than one unrelated person who is under 20. (KRS 186.450). To obtain intermediate license, person must be 16½ years old, have held instruction permit for 180 days without violations under KRS 186.450, present statement to state police from parent or guardian that applicant has completed at least 60 hours of supervised driving, including at least ten hours at night, while accompanied by person over 21 with valid operator's license, and complete exam required under KRS 186.480. (KRS 186.452). Intermediate license valid for two years and may be renewed. (KRS 186.452). Persons under 18 with intermediate license shall not operate vehicle between midnight and 6 a.m. and shall not operate vehicle when accompanied by more than one unrelated person who is under 20. (KRS 186.452). Person under 18 may apply for operator's license if applicant has completed driver training program under KRS 186.410(4) and has held intermediate license for at least 180 days without conviction under KRS c. 189 or violation or moving violation for which points are assessed, or conviction for moving violation under KRS c. 189 for which points assessed, or conviction for violation of KRS 189A.010(1) or conviction under

KRS 186.450(3), (4) or (5) (KRS 186.454).

Operator's licenses issued initially for time until operator reaches age 21 and then licenses are renewable every four years within birth month. (KRS 186.410; 186.531[1][g]). Fee, $8 or $18 for combination motor vehicle—motorcycle license, $12 for four-year motorcycle renewals. (KRS 186.410; 186.531).

Examination of initial applicants by state police required, but persons holding valid license from another state which grants reciprocity to Kentucky licensees exempt from new examination. (KRS 186.480).

Except in cases of hardship, any person under age of 18 not high school graduate or not successfully participating in school or not being schooled at home not eligible for license (KRS 186.440[3]); 16 and 17 year old students who drop out of school or are academically deficient may have their licenses revoked or denied (KRS 159.051; 186.560[10]). Students under 18 who apply for instruction permit must prove they are high school graduates or are still in school. (KRS 186.440[3]).

Any person who fails to attend certain drivers' training courses within one year of being issued initial license will have driving privilege suspended until driver attends traffic school. (KRS 186.410).

Manufacturer or dealers license required.

Drivers of commercial motor vehicles, as defined in 49 U.S.C. § 2716 and as supplemented by regulations of Transportation Cabinet, to include vehicles designed to transport 16 or more persons, certain hazardous materials and others having vehicles defined in federal law, required to have one but not more than one license. (KRS 281A.020).

Members of armed forces exempt when operating official vehicle in course of service if furnished with operator's permit by U.S. (KRS 186.420).

Commercial Drivers' Licenses.

No person who drives commercial motor vehicles may have more than one driver's license. (KRS 281A.060). Holder of commercial driver's license considered to hold valid Kentucky license issued per KRS 186.412. (KRS 281A.170[6]). Circuit clerk issues commercial drivers licenses. (KRS 186.412[2]). Commercial vehicle is motor vehicle which is designed to carry property and meets weight standards set by 49 U.S.C. § 2716 and Transportation Cabinet; designed to carry 16 or more passengers including driver; transporting of hazardous materials; or any other vehicle Transportation Cabinet requires to be operated by licensed commercial driver. (KRS 281A.010[8]). School bus operators must have commercial driver's license with school bus endorsement as described in KRS 281A.175. (KRS 189.540[3]). KRS 281A does not apply to: emergency equipment operators; military personnel operating vehicles in pursuit of military purpose; drivers of farm vehicles not otherwise used in commercial operations and are used to transport agricultural products, farm machinery or farm supplies within 150 miles of owner's farm and used by farmer or his employees or family members; and self-powered recreational vehicles. (KRS 281A.050). Qualification for license: resident of Kentucky, holds valid operator's license issued per KRS 186.412, has passed state police administered maximum federal knowledge and skill tests for driving commercial vehicles and drivers license not suspended, revoked in any state. (KRS 281A.130 and 281A.160). Person may drive commercial motor vehicle in Kentucky if person has currently valid commercial driver's license issued by any state, Canada or Mexico. (KRS 281A.240). Commercial license issued with classification, endorsements and restrictions. (KRS 281A.170). Commercial license normally expires after four years for resident and one year for nonresident. (KRS 281A.170[4]). License issued to those 21 or over; if issued to person 18-21 certain restrictions apply, such as license marked with “I” restriction limiting driver to Kentucky intrastate commerce and depending on class of vehicle. (KRS 281A.120; 281A.170[4]). Purpose of KRS c. 281A is to implement Federal Commercial Motor Vehicle Safety Act of 1986.

Motorcycle License.

Operation of motorcycle on public highways prohibited except when operator is in possession of valid motorcycle operator's license. (KRS 189.285). Protective headgear required for persons under age 21, persons operating motorcycle under instruction permit and persons operating motorcycle under motorcycle or motor vehicle-motorcycle license held for less than one year. (KRS 189.285; 189.865). Instruction permit and intermediate license required for person under 18 before obtaining operator's license. (KRS 186.450; 186.452).

Moped License.

Mopeds may not be operated on public highways without operator's license.(KRS 186.410).

All-Terrain Vehicle.

All-terrain vehicles may not be operated on public highways unless engaged in agricultural, construction, road maintenance or snow removal activities. (KRS 189.010, 189.515). Persons operating all-terrain vehicles on public highways must possess valid operator's license. (KRS 189.515).

Titles.

Registration of vehicle ownership must be made with county clerk in county of residence (or in county of principal operation if owned by nonresident or by other than individual) before operation of vehicle on public highways permitted. (KRS 186.020). Owner must apply to Department of vehicle regulation, through county clerk in appropriate county for certificate of title in his name. (KRS 186A.065; 186A.120-186A.170). Reciprocity for registration and fee exemptions provided nonresidents operating vehicles properly registered in another state (KRS 186.140) and for motor carriers (KRS 281.835). Persons moving to state must register vehicle in state within 15 days. (KRS 186.020; 186.150; 186A.095). Registration and titling of new motor vehicles requires delivery to clerk of bill of sale and/or manufacturer's certificate of origin. (KRS 186.020; 186A.115[3] [a]). Registration and titling of motor vehicles previously registered in another state requires delivery to clerk of proof of insurance, certificate of title or bill of sale and registration receipt. (KRS 186.020; 186A.115[3] [c]). Individual serving in military outside U.S. shall renew vehicle registration within 30 days of return to U.S. if vehicle stored on military base and registration expired during absence from U.S. (KRS 186.020[6]). For sale of vehicles titled and registered in state, see subhead Sales, infra.

Last registered owner of vehicle deemed to be owner for purpose of enforcing regulatory statutes. (KRS 189.228; 189.752). KRS c. 186A rather than general law of sales, govern issue of who owns motor vehicle for insurance purposes. (762 S.W.2d 414). Copy of registration receipt shall be kept in owner's possession and, except for motorcycles, copy must be kept in vehicle for inspection. (KRS 186.170).

Sales.

Delivery of title and, in some cases, notarized affidavit setting forth total and actual consideration paid for motor vehicle to county clerk necessary to evidence sale of vehicle previously registered in state to new owner. (KRS 186.190; 138.450; 138.460; 186.200). Upon presentation and payment of $6 fee, clerk issues registration transfer. (KRS 186.190; 186.200). Registration receipt and bills of sale must be accompanied by completed assignment and warranty of title and application for new title. (KRS 186A.215). Retail installment sales regulated in detail. Finance charges limited and buyer permitted to anticipate payments. (KRS 190.090 to 190.140).

As to tax on sales of motor vehicles, see category 22 Taxation, topics 22.17 Sales and 22.19 Use Taxes and 22.13 Motor Vehicle Taxes, subhead Motor Vehicle Usage Taxes.

Previous owner-user's name must be supplied to prospective purchaser by dealers or salesmen. (KRS 190.080[2]).

Odometer tampering prohibited. (KRS 190.260 to 190.320).

Liens.

Perfection and discharge of security interests in motor vehicles is governed by motor vehicle registration and conveyance statutes. (KRS cc. 186, 186A and 382). Other aspects of security interest governed by Uniform Commercial Code. (KRS c. 355.9-101 et seq.). Revised Article 9 and conforming amendments to sections of KRS cc. 186 and 186A became effective on July 1, 2001. No security interest in motor vehicle shall be recorded until vehicle has been properly registered. (KRS 382.675). Except when vehicle is in dealer's inventory (344 S.W.2d 383), perfection, assignment and discharge of security interest (and other liens) on motor vehicles are effected solely by notation on certificate of title by county clerk in county of debtor's residence, or if debtor is nonresident, in county in which vehicle is principally situated or operated. (KRS 186A.190[1 and 2]). If debtor is other than natural person, KRS 186A.190(2) governs determination of county of residence for purpose of statute. Secured party perfects security interest by submitting standard form of title lien statement to county clerk along with required fees and either application for first title for vehicle or dealer's existing certificate of title. (KRS 186A.195). Clerk enters secured party's name, mailing address and zip code along with date lien noted into automated title system so that title when issued by Department of Vehicle Regulation carries information on up to two liens. (KRS 186A.190 and 186A.195). County clerk entitled to charge $12 per motor vehicle for noting security interest on certificate of title. (KRS 186A.190[7]; 64.012). Clerk retains original of lien statement and sends copy to secured party. (KRS 186A.190[8]). Original perfection effective for seven years. (KRS 186A.190[1]). Perfected security interests in motor vehicles may be assigned by filing statement of assignment with county clerk in county where lien statement filed (KRS 186.045) and paying fee of $8 (KRS 64.012). County clerk shall not permit transfer of motor vehicle on which lien exists. (KRS 186.230). On termination of lien or security interest, secured party has obligation to file authenticated termination statement within ten days with clerk, with copy to debtor, and clerk discharges security interest by notation on title. (KRS 186.045). Secured party subject to penalty up to $250 if individual or $500 if corporation for each offense for failure to file termination statement within ten days. (KRS 186.045[2]; 186.990[1]); 534.040[2]; 534.050[1]). Security interest on certificate of title deemed perfected at time security interest attaches if secured party tenders required fees and title lien statement within 20 days of attachment. (KRS 186A.195[5]). Secured party allowed 20 days to obtain current certificate of title for vehicle previously titled in name of debtor. (186A.200[1]).

Identification Marks.

Felony to alter or remove serial numbers or other identification marks of maker; unlawful to deal with or possess car so altered. (KRS 186A.305 to 186A.315; 186A.990[3]).

Operation Prohibited.

Motor vehicles may not be operated anywhere in state by persons under influence of alcohol or other substance which impairs driving ability. (KRS 189A.101[1]). Motor vehicle may not be operated anywhere in state while blood alcohol concentration, as determined by blood or breath tests, is 0.08 or greater, or 0.02 or greater for persons under 21. (KRS 189A.010[1]; KRS 189A.005[1]). Presence of alcohol concentration less than 0.05 raises presumption that operator is not under influence of alcohol. Presence of 0.05 or greater, but less than 0.08, raises no presumption that operator is, or is not, under influence. (KRS 189A.010[3]). Presence of 0.15 or more by weight of alcohol in blood requires minimum four hour detention following arrest. (KRS 189A.110). Penalties for first offense within five year period can include fines to $500 or imprisonment to 30 days, or both (KRS 189A.010[5]), pretrial suspension of operator's license (KRS 189A.060) and revocation of license for 120 days (KRS 189A.070). Motor vehicles may not be operated on public highways by person not holding valid operator's license. (KRS 186.410; 186.990[3]). Additional $20 fine shall be collected for deposit into brain injury trust fund established pursuant to KRS 211.476. (KRS 189A.010[12]). Operator's license shall be revoked or denied: (1) For not less than five years upon conviction for murder or manslaughter resulting from operation of motor vehicle; (2) for six months for first offense and for one or two years for second and subsequent offenses, for perjury or making false affidavit on forms relating to operation of motor vehicles or vehicle regulation, hit and run driving, motor vehicle theft, second and subsequent failures to obtain and maintain liability and no-fault insurance coverage, or conviction of fraudulent use of driver's license, or conviction of operating motor vehicle, motorcycle, or moped without operator's license; or, (3) if person is under 18 years old and has dropped out of school or is academically deficient. (KRS 186.560). Various prohibitions in addition to size and weight limits (see subhead Size and Weight Limits, infra), apply to operation of vehicles with chains, lugs, solid tires and regrooved or recut tires. (KRS 189.190 to 189.205).

Implied consent law adopted whereby operator, or person in physical control of vehicle, deemed to have agreed to one or more tests of alcohol or drug content. First instance of refusing to take test results in revocation of license for six months. (KRS 189A.103; 189A.107).

Equipment Required.

Regulated by KRS 189.080-189.140. Use of seat belts is required (KRS 189.125[6]) for failure of which driver is subject to $25 fine (KRS 189.990[25]). Use of child restraint system for children 40 inches in height or less or booster seat for children under age seven who are between 40 and 50 inches in height is required (KRS 189.125[3]); failure to use child restraint system punishable by $50 fine and failure to use booster seat punishable by $30 fine after July 1, 2009 (KRS 189.990[24]).

Size and Weight Limits.

Regulated by KRS c. 189.

Lights Required.

Regulated by KRS 189.040; 189.050.

Inspection.

Inspection required by certified inspector (designated by county sheriff) of every vehicle, except new motor vehicles sold by licensed dealer, brought into state before application for new registration and certificate of title may be submitted to county clerk. (KRS 186A.115).

Trucks and semi-trailers are subject to special regulations as to speed, size and load limits. See KRS c. 189.

Accidents.

Operator of any vehicle involved in accident resulting in injury to or death of any person or resulting in damage to another vehicle or other property has duty to stop, notify law enforcement officer, ascertain extent of injury or damage, render reasonable assistance to injured person or persons, and provide, if requested, registration information on vehicle and names of owner, occupants and operator, and render written report of accident to Justice Cabinet, Department of State Police within ten days if accident involved personal injury or death or property damage exceeding $500. (KRS 189.580; 189.635). If operator of vehicle incapacitated, another occupant in vehicle at time of accident capable of making report shall do so. State police may require operator to render supplemental reports and may require witnesses of accidents to render reports. (KRS 189.635). Failure to comply with statutory requirements is violation punishable by fine. (KRS 189.990[1]). Law enforcement officers investigating scene of accident are required to file written report of accident within ten days after investigation. (KRS 189.635).

Parking lot operators are liable as bailees for hire for safekeeping of automobiles, and may not contract to avoid liability. (KRS 189.700 to 189.720).

Owner's Liability.

The owner of a car is not liable for the negligence of others unless he was present in the car or the car was operated by his servant or agent within the scope of authority and duty, except that joint and several liability with a minor under 18 for the negligence of such minor is imposed on: (1) An owner who causes or knowingly permits such minor to drive his motor vehicle on a highway; (2) any person giving or furnishing a motor vehicle to such minor; and (3) a parent, guardian or employer of such minor who signed on behalf of such minor an application on which he was licensed. (KRS 186.590). The “family purpose doctrine” is applied in Kentucky. (235 Ky. 749, 32 S.W.2d 324).

Guests.

Owner or operator is liable for injury to or death of guest resulting from negligence in operation. (243 Ky. 534, 49 S.W.2d 347).

Proof of Financial Responsibility.

See subhead No-Fault Insurance, infra, for description regarding mandatory insurance coverage. Motor vehicle operators license may be suspended for nonpayment within 60 days of final judgment rendered by court in Kentucky or other state upon cause of action arising out of ownership, maintenance or use of motor vehicle unless judgment creditor consents in writing that operator be allowed to maintain license. (KRS 187.400 to 410).

Insurance.

See subhead No-fault Insurance, infra, for description regarding mandatory liability insurance coverage. All liability policies issued in state must have uninsured motorist coverage unless insured affirmatively rejects such coverage in writing. (KRS 304.20-020). County clerks may not register or renew registration for vehicles which are not covered by mandatory insurance or other security. (KRS 186.021). Insurance companies required to notify Department of Vehicle Regulation monthly of cancellations or nonrenewals of insurance coverages during previous month except those whose nonrenewal was at end of policy with term of six months or longer and who failed to make payment for renewal of policy. (KRS 304.39-085). Insurance companies must between first and fifteenth of month send to Department of Vehicle Regulation list of vehicle identification numbers of each personal motor vehicle covered by liability insurance issued by insurer. (KRS 304.39-085). On notification of cancellation or nonrenewal of mandatory coverage, insured must provide proof of new insurance to Department of Vehicle Regulation or county clerk within 30 days or face fine up to $1,000, revocation of vehicle registration and 90 days in jail, and for second or subsequent offense, revocation of operator's license, fine of at least $1,000 and not more than $2,500 and 180 days in jail. (KRS 186A.040; 304.99-060).

No-Fault Insurance.

Comprehensive no-fault insurance plan, based on Uniform Motor Vehicle Accident Reparations Act, adopted effective July 1, 1975 to provide “basic reparation benefits” to insured for net losses suffered by him and his additional insureds for personal injuries and limiting right to sue for general damages. Claims for property damage are excluded from no-fault insurance plan. (KRS 304.39-010 to 304.39-340).

Specific sections of chapter in insurance code provide as follows: All operators and users of motor vehicles, other than motorcycle operators and passengers who are exempted from mandatory coverage of law, are deemed to have consented to certain limitations upon their tort rights unless they have affirmatively rejected benefits of Act in writing. (KRS 304.39-060; 304.39-040).

Motor vehicle registrants are required to procure insurance coverage of not less than $25,000 for all damages arising out of bodily injury sustained by one person and not less than $50,000 for all damages arising out of bodily injury sustained by all persons in one accident and $10,000 for all damages arising out of destruction of property or $60,000 coverage for all damages of any kind arising out of one accident. (KRS 304.39-080; 304.39-110). Self insurance may be provided in lieu of policy in certain circumstances. (KRS 304.39-080; 187.600).

General damages not recoverable by suit unless accident results in medical expenses which exceed $1,000, or injury or disease consists in whole or in part of permanent disfigurement, fracture to bone, compound, comminuted, displaced or compressed fracture, loss of body member, permanent injury within reasonable probability, permanent loss of bodily function, or death. (KRS 304.39-060). Two year statute of limitation applies to bring suit for general damages when suit allowed. (KRS 304.39-230). See category 5 Civil Actions and Procedure, topic 5.16 Limitation of Actions, subheads Two Years and One Year. Insurers required to offer up to $40,000 in added reparations benefits coverage, deductibles to basic reparations benefits in amounts of $250, $500, and $1,000, and under insured motorist coverage in amount equal to bodily injury liability purchased.

Procedures.

Act establishes assigned claims plan to provide basic reparation benefits to specified persons and procedure for operation of such plan; establishes procedure for payment of basic reparation benefits; provides penalties for late payments; prohibits assignment of benefits except under specified conditions; provides procedure for exchange of medical and other evidence with respect to claims; establishes Kentucky Insurance Arbitration Association for purpose of loss shifting; grants Executive Director certain regulatory powers; provides penalties for failure to procure insurance required by Act; and requires 10% premium rate reduction for one year.

Foreign vehicle registered in home state or country, displaying license plates and operated by one holding certificates of registration required by home state exempt from registration for not exceeding reciprocal period. (KRS 186.140).

Vehicle properly registered in another state operating into or through Kentucky in interstate commerce under certificate or permit issued by Interstate Commerce Commission is exempt from registration fees and weight and excise taxes, provided state of owner's principal place of business grants Kentucky operators a like exemption and reciprocity agreement has been entered into between foreign state and Kentucky. (KRS 281.835).

Nonresident operator, over age of 16, duly licensed in his home state and having license in his immediate possession may operate vehicle, including motorcycle or moped, for up to one year in this state without having Kentucky instructor's permit or operator's license if home state extends reciprocal privilege. Nonresident enrolled in Kentucky college may drive in state on license issued by person's state of domicile. Non-U.S. citizen visiting for less than one year may drive on license issued by country of domicile. (KRS 186.430).

Direct Actions.

Action against insurer by injured person not allowed, until after judgment obtained against insured (330 S.W.2d 412; KRS 426.381), but judgment against uninsured motorist is not required before recovery on uninsured motorist coverage (477 S.W.2d 811).

Actions Against Nonresidents.

Secretary of State is made agent for service of process in suits brought in Kentucky courts against nonresident operator or owner of motor vehicle arising out of accident or collision or damage caused in Kentucky thereby. (KRS 188.020-188.060; 434 S.W.2d 316).

Motor Vehicle Carriers.

Commercial vehicles and common carrier must have certificate of convenience and necessity, and contract carriers of persons and property in intrastate commerce, and in interstate commerce, insofar as permitted by U.S. Constitution, are subject to regulation and control of Department of Vehicle Regulation within Transportation Cabinet. (KRS 281.610; 281.695; 186.005).

Contract carrier must have permit, and common necessity. Each certificate and permit must be renewed annually before Jan. 1, with $25 fee. (KRS 281.011; 281.615; 281.650). Carrier must furnish bond, insurance policy or certificate of insurance insuring each vehicle owned or leased by carrier, in a liability amount based on capacity of vehicle and type of commodity carried. (KRS 281.655). (Carrier may be exempted from this requirement on showing of financial responsibility.)

Rates, fares and charges of carriers must be reasonable, and service must be adequate. (KRS 281.675). Common carrier must maintain on file with Department, schedule of rates, fares, charges, and classifications, and time schedule, if any, of vehicles operated under certificate. Copies must be available for inspection at designated public places. Similar provision exists with respect to contracts of contract carriers. (KRS 281.680). Common carriers must adhere to schedule on file; contract carriers must not discriminate in charges. (KRS 281.685).

Nonresident carriers must appoint agent for service of process in Kentucky before operating in state and keep information as to agent current with Department. (KRS 281.710). Department furnishes license plates appropriate to operation. (KRS 281.720). Act prescribes maximum working hours for drivers which may, but need not be, identical with federal regulations adopted by U.S. Department of Transportation. (KRS 281.730).

In order to prevent avoidance of state gasoline tax, provision is made for licensing of motor carriers, amount being based on mileage in state. (KRS 138.655 to 138.7291). Certificate holders and permit holders prohibited from advertising under any names other than names in which certificates or permits issued. (KRS 281.802). Persons advertising services for intrastate transportation of household goods must include certificate or permit number issued by bureau of vehicle regulation in advertisement. (KRS 281.802).

Kentucky state police may issue motor carrier safety ratings and may require maintenance of satisfactory safety rating. (KRS c. 281).

Commercial Drivers' Licenses regulated in detail, see subhead Operator's Licenses, catchline Commercial Drivers' Licenses, supra.

Motor Vehicle Fees and Taxes.

Annual registration fees for motor vehicles are as follows (county clerk's fee, $1 additional) (KRS 186.050): motorcycles $9, plus $7 for each sidecar attachment thereto; passenger vehicles (not more than nine passengers), farmers' trucks, gross weight 80,000 lbs. or less, school and church buses, and certain other vehicles, $11.50; commercial vehicles (excluding those engaged in hauling passengers for hire and operating under certificates of convenience and necessity) registration fees ranging from $11.50 to $1,260, according to gross weight. All registration fees 50% greater if vehicle not equipped wholly with pneumatic tires. Reduced fee for certain vehicles having gross weight over 18,000 lbs. In addition to county clerk's fees, registration fees for trailers drawn by vehicles licensed under KRS 186.050(1) (generally passenger vehicles) and camping trailers, travel trailers, etc., $4.50; all other trailers, $19.50; no fee for privately-owned trailers used to carry boats, luggage, farm products, etc.

For motor vehicles required to be titled, application for certificate of title must be accompanied by $9 fee; $15 fee for all-terrain vehicles (KRS 186A.130) unless title is needed in less than five working days in which case fee is $25 (KRS 186A.170[1]; 186A.130[3]).

Fee for manufacturer or dealers plate is $25 and $14.50 for additional plates. (KRS 186.070).

Proportional registration of commercial vehicles authorized under interstate agreements for vehicles operated in Kentucky and in other states. (KRS 186.050[13]).

Tax on Sale or Use of Motor Vehicles.

See category 22 Taxation, topics 22.17 Sales and 22.19 Use Taxes and 22.13 Motor Vehicle Taxes, subhead Motor Vehicle Usage Taxes.

Gasoline Tax.

See category 22 Taxation, topic 22.08 Gasoline and Special Fuels Taxes, subhead Gasoline Tax.

Lemon Law.

See category 3 Business Regulation and Commerce, topic 3.12 Consumer Protection.

1
LOUISIANA LAW DIGEST

—Scope —

Revised for 2010 edition by

PHELPS DUNBAR LLP, of New Orleans and Baton Rouge.

(References are to title and section or title and chapter of the Louisiana Revised Statutes of 1950 unless otherwise indicated; C.C. indicates Revised Civil Code, 1870; C.C.P. indicates Code of Civil Procedure; C.Cr.P. indicates Code of Criminal Procedure; C.E. indicates Code of Evidence; Ch. C. indicates Children’s Code; citations are to articles of the Codes. Subsequent statutes are cited by year and number of Act. Const. indicates the Constitution of the State of Louisiana of 1974, effective January 1, 1975 unless otherwise noted. Certain provisions of the Constitution of 1921 are continued as statutes. Parallel citations to the Southern Reporter begin with 104 La. and 9 La. App. See also category 6 Courts and Legislature, topic 6.04 Statutes.)

Note: Revision includes Acts 1-542 of 2009 Regular Session effective Aug. 15, 2009, unless otherwise indicated. Legislature meets annually but sessions in odd-numbered years are reserved for fiscal matters with limitations on number of non-fiscal matters that may be introduced by each legislator.

1 INTRODUCTION

1.01 GOVERNMENT AND LEGAL SYSTEM:

The State of Louisiana is a constituent state of the United States of America. For further discussion of the U.S. federal system, see Introduction to the Federal Government of the United States at the beginning of this volume. A great many laws are promulgated by the federal government of the United States and are not reflected in the topics below. See the Introduction to this volume for references to the federal law topics covered.

Unlike the other 49 constituent states of the United States, Louisiana has a civil law system with roots in Roman, Spanish and French law. For information on the courts and legislature of Louisiana, see category 6 Courts and Legislature.

1.02 [RESERVED]

1.03 HOLIDAYS:

Legal holidays, in addition to Sundays, are: Jan. 1, Jan. 8, 3d Mon. in Jan., Jan. 19, 3d Mon. in Feb., Good Friday, last Mon. in May, June 3, July 4, Aug. 30, first Mon. in Sept., 2d Mon. in October; Nov. 1, Nov. 11, 4th Thurs. and Fri. in Nov., Dec. 25; day of national or state observance of Martin Luther King, Jr.'s birthday; inauguration day in Baton Rouge; Mardi Gras in parishes of East Baton Rouge, Orleans, Plaquemines, St. Bernard, Jefferson, St. Charles, Lafayette, St. Tammany, Iberia, St. Martin, Ascension, St. James, Washington, St. John the Baptist, Calcasieu, Jefferson Davis, St. Landry, Evangeline, Cameron, Assumption, Acadia, Vermilion, St. Mary, Iberville, Pointe Coupee, Lafourche, West Baton Rouge Allen and East and West Feliciana (La.R.S. 1:55, as am'd Act 279 of 1999), and in all municipalities where so declared. Sat. is holiday in parish of Orleans, city of Baton Rouge, and all parishes of 2nd and 6th congressional districts except Ascension and in Calcasieu and Jefferson Davis parishes. For banking holidays, see category 3 Business Regulation and Commerce, topic 3.01 Banks and Banking. Offices of clerks of district, parish and city courts are closed on Jan. 1, 3rd Mon. of Feb., Good Friday, Memorial Day, last Mon. of May, July 4, Labor Day, Nov. 1, Nov. 11, 4th Thurs. and Fri. of Nov., Christmas Eve Day, Christmas Day, and New Year's Eve Day. (La.R.S. 1:55[E], as am'd Act 607 of 1986). Offices of clerks of district, parish and city courts shall close their offices on all legal holidays provided in statute and any legal holidays proclaimed by governor under his statutory authority. (La.R.S. 1:55[E][1][b], as am'd Act 474 of 2004). Martin Luther King's Birthday observance day, and offices of clerks of city courts and parish courts may be closed on that day with approval of chief judge. (La.R.S. 1:55[E][1][c], added Acts 495, 534 and 698 of 1993). Mardi Gras Day and Martin Luther King's Birthday are holidays for clerk of city court of Hammond and clerk of city court for Sulphur, Ward Four. (La.R.S. 1:55[E], as am'd Act 153 of 1986 and Act 333 of 1992). Mardi Gras is legal holiday for clerks of court in parishes of East and West Feliciana, East Baton Rouge, Iberville, Pointe Coupee, West Baton Rouge, St. John the Baptist, St. Charles, Lafourche, St. Mary, Assumption, Terrebonne, St. Martin, Ascension, St. James, St. Tammany, St. Bernard, Jefferson Davis, Livingston, Acadia, Vermilion, Calcasieu, Orleans and Tangipahoa. (La.R.S. 1:55[E][1][a][iii], am'd Act 22 of 1996 First Ex. Sess.). In parishes of St. James and St. John, district court clerks must close office on any day proclaimed legal holiday by governor, except Inauguration Day every four years and General Election Day every two years. (La.R.S. 1:55[E][1][d], added Act 409 of 2003). Clerks may close in emergency situations with prior judicial approval and subsequent official notice. (La.R.S. 1:55[E][2], added Act 464 of 1984). No court is required to be open if corresponding clerk of court's office is closed. (La.R.S. 1:55[E][5], added by Act 734 of 2006). Specified business operations and sale of certain consumer goods on Suns. are prohibited, with certain exemptions. (La.R.S. 51:191-194, as am'd Act 586 of 1985). Birthday of Martin Luther King, Jr. is state employee holiday. (La.R.S. 1:55[B][1], as am'd Act 740 of 2004). In city of Sulphur, second Mon. in Oct. is legal holiday for city court. (La.R.S. 1:55[B][1][b] and [b][iii], as am'd Act 257 of 1999). Fri. of Cattle Festival in Abbeville (Vermilion Parish) is legal holiday for purpose of authorizing clerk of 15th Judicial District Court and clerk of City Court of Abbeville to close their offices on that day, unless there is election which requires their offices to remain open. (La. R.S. 1:55[E][1][e], as am'd Act 788 of 2008).

No election may be held on Christmas Day, Holy Saturday, Easter, Yom Kippur, Rosh Hashanah, or Passover. (La.R.S. 18:1951, am'd Act 168 of 1972).

Holidays Falling on Sunday.

If Dec. 25, Jan. 1 or July 4 is Sunday, next day is a holiday.

Holidays Falling on Saturday.

If Dec. 25, Jan. 1 or July 4 falls on Sat., preceding Fri. is holiday.

1.04 OFFICE HOURS AND TIME ZONE:

Louisiana is in the Central (GMT -06:00) time zone. Office hours are generally from 8:30 a.m. to 5 p.m.

2 BUSINESS ORGANIZATIONS

2.01 AGENCY:

The rights and liabilities of principal and agent are, in general, similar to those at common law, although in Civil Code, agents are called mandataries and contract of agency is called mandate, type of legal representation of another. Civil Code provisions on mandate comprehensively restated in Act 261 of 1997 (eff. Jan. 1, 1998), amending and reenacting C.C. arts. 2985 through 3032. Form of conditional mandate or procuration is recognized. (La.R.S. 9:3890, added Act 1083 of 1999).

Who May Act as Agents.

Emancipated minors may be appointed agents. (C. C. 3001). Married women may act as mandataries. (C. C. 1787).

2.02 ASSOCIATIONS:

A corporation unauthorized by law or by an act of Legislature may acquire and possess estates and have common interests. (La.R.S. 9:1051).

Co-operative associations, with or without capital stock, may be incorporated for marketing of sea food products and by-products. (La.R.S. 12:451 et seq.).

Associations of producers of agricultural products, for the purpose of promoting the intelligent and orderly marketing of agricultural products through cooperation and to make distribution as direct as can be efficiently done between producer and consumer, are permitted. (La.R.S. 3:121 et seq., as am'd Acts 87-91 of 1966).

Transfers.

Where property is acquired by one or more persons acting for and in the name of an unincorporated association for religious, charitable or educational purposes, upon due incorporation of association, a transfer made by said persons, or survivors in case of death of one or more, to incorporated association vests title as fully as if made by all, free of claims of heirs of decedent or decedents. In case of death of said persons before formal transfer, title vests in said association provided it had possession as owner during life time of said trustees or subsequently for ten years. (La.R.S. 12:207). Unless part of incorporation of association which is governed by La.R.S. 12:207, or otherwise provided by its organizational documents, unincorporated nonprofit associations may donate, sell and encumber immovable property upon authorization by majority of members voting at special meeting. (La.R.S. 9:1051).

Actions.

An unincorporated association has the right to sue in its own name, and appears through its president or other authorized officer. (C.C.P. 689). It may be sued in its own name alone, but its members may be sued jointly with it. (C.C.P. 738).

Professional Associations.

See topic 2.03 Corporations, subhead Professional Corporations.

2.03 CORPORATIONS:

By Act 105 of 1968, Ch. 1 ("Business Corporations Law," §§ 1-72), Ch. 2 ("Non-Profit Corporation Law," §§ 101-155) and Ch. 3 ("Foreign Corporations Law," §§ 201-245), of Title 12, were repealed, and Ch. 1 ("Business Corporation Law," §§ 1-178), Ch. 2 ("Non-Profit Corporation Law," §§ 201-269) and Ch. 3 ("Foreign Corporation Law," §§ 301-321) were adopted with an effective date of Jan. 1, 1969.

Conversions.

Any domestic LLC, business corporation, partnership in commendam or partnership may convert to another type of domestic business entity by submitting prescribed conversion application to Secretary of State, so long as owner or member does not become personally liable without his consent for obligations of new entity. (La.R.S. 12:1601-1606, added by Act 153 of 2006, eff. June 2, 2006).

Limited Liability Companies.

See topic 2.06 Limited Liability Companies.

General Supervision.

There is no corporation commission or commissioner having general supervision over business corporations in Louisiana, except that office of Secretary of State serves in this capacity to a limited extent. Filings with Secretary of State may be by electronic means or by fax. (La.R.S. 12:2, added by Act 342 of 1999).

Purposes.

Any lawful business purposes, except banking and insurance in all of their several forms, operating homesteads or building and loan associations, practicing law (except as provided in T. 12, c. 8), and business governed by special laws or prohibited by law. (La.R.S. 12:22).

Name.

Name shall contain word "Corporation," "Incorporated," "Limited" (or abbreviations thereof), "Company" or "Co." (not preceded by "and" or "&"), unless railroad, telegraph or telephone company, and must be distinguishable from reserved or actual name of any other corporation, domestic nonprofit corporation or foreign corporation, or tradename registered with Secretary of State, except in specified cases including that charter of otherwise similar corporation has been revoked, or consisting of words deceptively or falsely suggesting charitable or nonprofit nature. (La.R.S. 12:23, as am'd Act 296 of 1997). Name cannot include "bank," "banking," "banker," "savings," "safe deposit," "trust," "trustee," "building &/and loan," "homestead," "assurance," "casualty," "redevelopment corporation," "electric cooperative," "insurance" (except independent insurance agency), or "credit union." Name also may not include "doing business as" or "d/b/a". Secretary of State must obtain evidence that ten day written notice of application for certificate of incorporation has been given to State Board of Registration for

Professional Engineers and Land Surveyors, if name includes “engineer,” “Engineering,” “surveyor” or “surveying.” Name of intended corporation may be reserved upon request with Secretary of State for fee of $10. (La.R.S. 12:23, as am’d Act 983 of 1993). Although no statutory provision so provides, telephone or written request for availability of name is usually honored by office of Secretary of State.

Term.

Duration of corporation is perpetual unless otherwise specified in articles. (La.R.S. 12:24).

Incorporators.

One or more natural or artificial persons capable of contracting may form corporation. There are no requirements as to citizenship or residence of incorporators. (La.R.S. 12:21).

Articles of incorporation, either acknowledged or by authentic act (see category 10 Documents and Records, topic 10.01 Acknowledgments), must be in English language and signed by each incorporator or by agent duly authorized by document attached to articles.

Articles must contain (a) Name of corporation; (b) purpose(s) or statement that purpose is to engage in any lawful activity for which corporations may be formed under T. 12, c. 1; (c) duration, if other than perpetual (but see subhead Term, supra); (d) aggregate number of shares; (e) if only one class of shares, par value or a statement that all shares are without par value; (f) if shares are divided into classes, number and par value (or a statement that shares are without par value) of shares of each class; designation of each class and each series of each preferred or special class; preferences, limitations and relative rights of each class and variations between series; authority of board to amend articles to fix preferences, limitations and relative rights of each class and to establish and fix variations of rights between series of any preferred and special class and any of these powers may be made dependent upon facts ascertainable outside articles, so long as process of determination is made clear in articles; and (g) full name and post office address of each incorporator. (La.R.S. 12:24, as am’d Act 914 of 1997).

Articles may contain (a) Preemptive rights of shareholders or any class of shareholders (La.R.S. 12:72 shall be deemed included in articles if articles provide: “Shareholders shall have preemptive rights.”); (b) powers or rights of corporation, directors, shareholders or any class of shareholders; (c) provisions, under certain limitations, for reversion of unclaimed dividends (cash, property or share) and reclassification shares; (d) limitations on personal liability of officers or directors, except as to breach of duty of loyalty, bad faith, intentional wrongdoing, personal benefit and the like; and (e) any other provision not prohibited by law. (La.R.S. 12:24, as am’d Act 261 of 1987). Actions alleging violation of preemptive rights must be brought within five years of issuance of shares to which those rights apply. (La.R.S. 12:72[B], added by Act 44 of 1991, eff. June 23, 1991).

Filing of Articles of Incorporation.

Articles must be filed with Secretary of State with initial report (required by La.R.S. 12:101) and may be delivered in advance for filing as of specified date and time within 30 days after delivery (La.R.S. 12:25). Initial report (La.R.S. 12:101) must be signed by each incorporator or his agent (authorization to be annexed to report) and must set forth (a) Location and post office address of registered office; (b) full name and post office address of each registered agent; and (c) names and post office address of each director, if selected, otherwise supplemental report, in similar form, must be filed when directors are selected. If they are in compliance with corporation code, Secretary of State shall record articles and initial report, and issue certificate of incorporation. Corporate existence commences with issuance of certificate; however, if articles are filed within five days (exclusive of legal holidays) of execution of articles (by acknowledgment or authentic act), corporate existence commences as of time of execution. Original of articles and initial report, or copies certified by Secretary of State, with copy of certificate of incorporation, must be filed with recorder of mortgages of parish of registered office within 30 days of filing of articles with Secretary of State. (La.R.S. 12:25, as am'd Act 88 of 1983). If articles of incorporation or initial report should be inaccurate, or defectively executed or acknowledged, corrected articles or report may be filed. (La.R.S. 12:35, added Act 442 of 1982). Internet filings are authorized. (La.R.S. 12:2, as am'd Act 256 of 2006).

Addresses in initial report must be location and municipal address, if any, not post office box only. (La.R.S. 12:101, as am'd Act 459 of 1976).

Corporation incorporated in one jurisdiction including Louisiana and foreign jurisdictions may change jurisdiction of its incorporation while maintaining its corporate existence. (La.R.S. 12:164, as am'd Act 466 of 1983).

Fees must be paid in advance to Secretary of State as follows: $50 for filing and recording articles of incorporation, or amendments thereto; or dissolutions, reinstatement or merger proceedings; fee includes all certificates and certified copies required for filing with appropriate clerk of court. Additional certified copies and certificates furnished upon request at cost of $10, or certificate only for $5. (La.R.S. 12:171, as am'd Act 235 of 1983). Any other certificate is $5, except resignation or appointment of registered agent, change of registered office or appointment of officers and directors ($10); or annual report ($12). (La.R.S. 12:171).

Paid in Capital.

If provided for in articles, corporation cannot incur debts or transact business except incidental to organization, obtaining of subscriptions or payment for shares, until paid-in capital is paid in full. (La.R.S. 12:26).

Amendment of Articles.

Two-thirds vote of voting power present, or such larger or smaller vote, not less than a majority of voting power present or total voting power, as articles may require, is necessary for amendment of charter, including reclassification of stock. If amendment would adversely affect rights of stockholders of any class or series, such stockholders are entitled to vote as a class on amendment, whether or not they are entitled to vote under articles of incorporation, and same proportionate vote of such stockholders as of stockholders having right to vote is required to pass amendment, in addition to required vote of stockholders having right to vote. Unless otherwise provided in articles, shareholders' rights are not adversely affected unless amendment (otherwise as permitted by articles): (a) Alters or abolishes preferential rights; (b) creates, alters or abolishes any redemption rights; (c) alters or abolishes pre-emptive rights; (d) creates or alters (other than abolish) restrictions on stock transfer; (e) excludes or limits voting rights, except for limitation by voting rights of new shares being authorized on an existing or new class; and (f) alters or abolishes dividend rights, except by rights of new shares being authorized of an existing or new class. (La.R.S. 12:31, as am'd Act 849 of 1990).

After adoption of amendment, articles of amendment shall be executed by president or vice-president or other person authorized by shareholders (a copy of which resolution or consent shall be annexed to articles) and by secretary or treasurer or any assistant secretary or assistant treasurer, and must be acknowledged by president, vice-president or other authorized person, or be in form of an authentic act. Articles must contain amendment, date and manner of adoption, number of shares of each class or series represented at meeting and voting for and against (La.R.S. 12:32); in case of reclassification of stocks, (a) number of shares of par value and par value thereof and number having no par value, and (b) if shares are divided into classes, number of shares of each class, par or no par value of shares of each class, designation of each class and series of each preferred or special class, preferences, etc. of each class and series, and authority of board of directors to amend articles to fix rights, preferences and limitations of shares and variations of rights between series of preferred or special classes. Directors may also act with respect to numbers of shares issued and related matters. (La.R.S. 12:33, am'd Act 612 of 1989). Following reclassification, aggregate allotted value of issued shares cannot exceed stated capital. (La.R.S. 12:54).

Articles of amendment or multiple original thereof, must be filed with Secretary of State and multiple original or copy certified by Secretary of State must be filed in mortgage office of parish of registered office. (La.R.S. 12:32). See subhead Filing of Articles of Incorporation, supra, for similar provisions for predelivery of Articles of Amendment and effective date thereof.

Powers.

Corporation may perform any act necessary or proper to accomplish its purposes as expressed or implied in articles, or incidental thereto, which are not repugnant to law. (La.R.S. 12:41). Corporations are specifically authorized to have a seal, to have perpetual existence (unless otherwise provided in articles, but see subhead Term, supra), to sue and to be sued, to acquire, hold, use and alienate or encumber property of any kind including own shares (unless otherwise provided in articles or by law), and shares, memberships or other interests of other businesses; to make contracts and guarantees; borrow and lend money, conduct business in this state or elsewhere, make by-laws, elect officers and establish pension plans, stock bonus and like plans, provide indemnity and insurance (La.R.S. 12:83), make donations, and do any lawful business in time of war or national emergency. (La.R.S. 12:41, as am'd Act 914 of 1997).

Corporations, domestic or foreign organized to develop and transmit electric power, have right to expropriate for rights of way, power plant sites and necessary buildings (La.R.S. 19:2) and to mortgage transmission lines and extensions though not completed (La.R.S. 45:124, 125).

By-laws.

Unless specified in articles, board of directors may make and alter by-laws, not inconsistent with articles or law, subject to shareholders' power to change or repeal such by-laws. Emergency by-laws may be adopted by board of directors under specified conditions. (La.R.S. 12:28).

Stock.

Corporations have power to create two or more kinds of stock of such classes and series with such designations, limitations, conversion rights, preferences, and voting powers or restrictions or qualifications as shall be stated in articles of incorporation. Stock may be with or without par value. Unless otherwise provided in articles, corporation may issue fractional shares, and board of directors may issue script for fractional shares. (La.R.S. 12:51). Unless articles provide otherwise, corporation may issue convertible securities and stock purchase rights. (La.R.S. 12:56). Corporation may purchase or redeem its shares out of surplus or out of stated capital. (La.R.S. 12:55, as am'd Act 175 of 1988).

Stock certificates must be signed by president and secretary or by such officers as articles or by-laws provide. Certificate must state: (a) State or incorporation; (b) name of registered holder; (c) number and class of shares; (d) par value or statement that shares have no par value; (e) name of corporation; (f), if shares of more than one class authorized, rights, voting powers, preferences and restrictions granted to or imposed upon shares of each class, and authority of board of directors to establish other series and fix relative rights, preferences and limitations of shares of any class or series; (g) if for fractional shares, limitations and restrictions thereon (other than voting rights), or that corporation will furnish upon request a summary thereof. If articles or by-laws restrict transfer of shares, reference to such restriction must be stated on certificate, or summarized, or referred to with information as to where such may be inspected. Where certificate is countersigned by transfer agent and a registrar, signature of corporation's officers may be facsimile. (La.R.S. 12:57).

Issuance of Shares.

Par value shares may be issued initially for consideration expressed in dollars, not less than par value, as fixed by board. No-par shares may be issued for consideration expressed in dollars as fixed by board, or by majority vote of voting power present if provided in articles, or by incorporators as to initial shares. Consideration must be paid in cash, property or services actually rendered and shares shall not be issued for check (unless certified) or note of purchaser until actually paid. (La.R.S. 12:52, am'd Act 436 of 1974).

Control Share Acquisitions.

Limitations on voting power of persons acquiring control shares as defined imposed. Unless articles of incorporation provide otherwise, person acquiring control shares has only voting rights guaranteed by statute, which are in turn determined by resolution voted upon by all disinterested shareholders. Special shareholders meeting may be called to consider such resolution. If acquiring person is accorded full voting rights, other shareholders may have dissenters' rights to fair cash value of their shares, defined as highest price paid per share by acquiring person in control share acquisition. (La.R.S. 12:135-140.2, as am'd Act 613 of 1990). "Safeguard period" defined and regulated. (La.R.S. 12:130-130.2, added Act 914, eff. July 23, 1991). Foreign corporations are subject to similar, but not identical, procedures.

Transfer of Stock.

See category 3 Business Regulation and Commerce, topic 3.09 Commercial Code.

Uniform Securities Ownership by Minors Act not adopted.

Uniform Simplification of Fiduciary Security Transfers Act adopted. (La.R.S. 9:3831-3840).

Stock Transfer Tax.

No State tax.

Stockholders.

Shareholders have only such preemptive rights as fixed in articles. (La.R.S. 12:72). Unless as otherwise provided in articles and referred to in certificates, each share shall be in all respects equal to every other share. (La.R.S. 12:51).

Stockholders' Liabilities.

Subscriber to or holder of shares not liable to corporation or its creditors other than to comply with terms of subscription. Shareholders who knowingly or without reasonable care consented to or voted for issuance of shares for property or services which were grossly overvalued, are liable to corporation for benefit of creditors or shareholders. Shareholder may be liable up to amount of an unlawful dividend or distribution of assets received by him. (La.R.S. 12:93).

Stockholders' Meetings.

Unless otherwise provided in articles or by-laws, annual and special meetings of shareholders may be held anywhere within or without state, and notice of time, place and purpose of meeting must be given at least ten days but not more than 60 days prior to meeting date. Notice may be waived in writing. If more than 18 months elapse without annual meeting, any shareholder may call meeting at registered office. Special meetings may be called at any time by president or board of directors. On written request of one-fifth of total voting power (or such greater or lesser proportion as fixed in articles or by-laws), secretary must call a special meeting at registered office not less than 15 nor more than 60 days after receipt of such request. Secretary or transfer agent must certify list of shareholders entitled to vote as of record date. (La.R.S. 12:73). Cumulative voting is allowed where articles so provide. (La.R.S. 12:75). Shareholder may vote by written proxy filed with secretary before meeting, which proxy is not revoked by shareholder's death unless written notice thereof is received by officer maintaining list of shareholders before exercise of proxy. Unless otherwise provided, proxy may be revoked at will and validity ceases 11 months after date of execution. No proxy shall be valid in excess of three years from date of execution. (La.R.S. 12:75). Statute provides for non-exclusive methods by which proxies may be granted. (La.R.S. 12:75[C][6], added Act 983 of 1993).

Voting trusts are authorized for period not exceeding 15 years extendable for ten years. (La.R.S. 12:78).

Directors.

There must not be less than one natural person who is director. If not fixed in articles or by-laws, number of directors shall be number elected from time to time by shareholders or named in initial report. (La.R.S. 12:81[A], as am'd Act 523 of 2004). Number, classification, qualifications, compensation, terms of office (not to exceed five years), manner of election, time and place of meetings, and powers and duties of directors may be fixed in by-laws. Upon vacancy, remaining directors, even if not constituting quorum, may fill vacancy for unexpired term; however shareholders may fill vacancy at special meeting called prior to action by directors. There are no requirements as to share ownership by directors or as to citizenship or residence of directors. If not provided in articles or by-laws, directors serve term of one year and until their successors are chosen and qualified. (La.R.S. 12:81, as am'd Act 914 of 1997).

Directors' Meetings.

Meetings of directors may be held within or without state, as decided by majority vote. Notice of meeting must be given as provided in by-laws. Majority of board is necessary for a quorum.

Director may vote by proxy if, but not unless, it is so provided in articles, but proxy may be given only to a shareholder or another director. (La.R.S. 12:81).

Powers and Duties of Directors.

All corporate power is vested in and business and affairs of corporation are managed by board of directors. Board of directors may designate committees, consisting of one or more directors, who may exercise powers to extent provided in resolution, articles or by-laws. Directors may take any action by unanimous consent signed by all directors or all members of committee. (La.R.S. 12:81, as am'd Act 914 of 1997).

Liabilities of Directors and Officers.

Directors and officers stand in a fiduciary relationship to corporation and shareholders. Officers and directors may be liable (a) if corporation transacts business before paid in capital is received; or (b) if, knowingly and without reasonable care, they consent to issuance of shares in violation of law, or for property or services grossly overvalued. If directors knowingly, or without reasonable care, consent to unlawful dividend or distribution of assets, or to unlawful redemption of shares, they may be liable to corporation and its shareholders. (La.R.S. 12:92[D]). Directors may rely in good faith on records of corporation, upon reports presented by corporation's officers or directors, by any committee of board of directors, or by certain experts selected with reasonable care by board or any committee or any officer having authority to make such selection. (La.R.S. 12:92[E], am'd Act 612 of 1989, eff. July 6, 1989). Directors may be indemnified by corporation, and indemnity may be through wholly-owned subsidiary, not regulated by Commissioner of Insurance. (La.R.S. 12:83, as am'd Act 561 of 1986, eff. July 2, 1986). Any action against directors and officers for breach of their duties short of intentional conduct must be brought within one year of alleged act of one year of date alleged act is discovered or should have been discovered; if intentional conduct, respective periods are two years. (La.R.S. 12:96, added Act 1101 of 1997, eff. July 14, 1997). Under separate statute applicable to officers, directors and other similar individuals within all business organizations, suits for negligent or grossly negligent conduct must be brought within one year of act or its discovery, or when it should have been discovered, but no more than three years from act itself; for intentional conduct, similar two-year period but not more than three years from act itself. (La.R.S. 12:1501-1502, added Act 1126 of 2001). Directors and officers are not personally liable for monetary damages to corporation or its shareholders for conduct of their duties unless gross negligence as defined is established. (La.R.S. 12:91, as am'd Act 1253 of 1999, eff. July 12, 1999).

Officers.

Board of directors must elect a president, secretary, and treasurer and may elect one or more vice-presidents. Unless otherwise provided in articles, no officer need be a director and any two offices may be combined in one person. If officers are listed in articles or amendment thereto, municipal address, not post office box only, must be included for each officer.

Officers and agents shall have such authority and perform such duties as may be prescribed in by-laws, or determined from time to time by board of directors.

Any officer or agent may be removed by board of directors without prejudice to his contract rights.

Articles may provide for election of certain or all of officers by certain class of shareholders or directors.

President, vice-president or manager of any domestic or foreign corporation doing business in this state has power, in name of corporation, to authorize institution of any suit, to direct issuance of conservatory writs and to bond property in custodia legis and may, on behalf of corporation, execute any bond in connection with any legal proceedings and make any affidavit required by law or rules of court; but this authority may be modified, limited or denied by articles or by-laws or by resolution of board of directors. (La.R.S. 12:82, as am'd Act 102 of 1989).

Liabilities of Officers.

See subhead Liabilities of Directors and Officers, supra.

Reports.

An initial report is required. (See subhead Filing of Articles of Incorporation, supra.)

Annual report must be filed with Secretary of State on or before anniversary date of incorporating in Louisiana. Report must be signed by officer, director or agent, and state: (a) Post office address and municipal address or location of registered office; (b) name and post office address and municipal address or location of registered agents; (c) name and post office address of each director and officer; (d) number of issued shares of each class; and (e) name, address, telephone number, and e-mail address, if available, of person submitting report. (La.R.S. 12:102, am'd Act 365 of 2003).

Upon request of any stockholder of record, corporation must, once in every calendar year, send to such stockholder a verified report containing above information contained in last annual report preceding said request, together with a condensed balance sheet (showing inter alia and separately amount of stated capital, capital surplus and earned surplus). (La.R.S. 12:102). Penalty of $50, recoverable by stockholder, is imposed on officers neglecting to send such report within 15 days after receiving said request, for every day that they neglect to do so. (La.R.S. 12:172).

For failure to make and file an initial report, annual report, or articles, with Secretary of State within 15 days after written request by Secretary of State a penalty of $50, recoverable by Attorney General or District Attorney, is imposed on corporation for every day that it neglects to file such report. (La.R.S. 12:172).

Registered Office.

Every corporation must continually maintain an office in state, to be known as registered office, location and post-office address or which must be stated in initial report. Registered office may be changed by vote of directors, in which case notice of change must be filed with Secretary of State and mortgage office of parish of new registered office within 30 days; and if notice is not filed within 30 days after registered office is vacated, office of Secretary of State is considered as registered office of corporation. If office is changed to another parish, notice must be filed in mortgage office of both parishes. Registered office is considered as domicile of corporation. (La.R.S. 12:104).

Books and Records.

Corporation must keep at its registered office or at its principal place of business in or outside of state (a) books and accounts showing amounts of its assets and liabilities, receipts and disbursements, and gains and losses, and (b) records of proceedings of shareholders, directors, and committees of board; and must keep, at above stated offices or office of its transfer agent, a share register or stock certificate record showing names of shareholders, their addresses, number and classes of shares held by each, and certificate date.

Upon at least five days written demand, any one or more shareholders, except business competitor, who are holders in aggregate of at least 5% of all outstanding shares for at least six months, are entitled to examine for any proper or reasonable purpose, any and all of records and accounts of corporation. If shareholder is interposed for business competitor, or owns stock or is otherwise interested in business competitor, he or it must own not less than 25% of all outstanding shares for period of six months before exercise of privilege.

Right of inspection may be conferred upon holders of bonds, debentures and other obligations, subject to restriction by articles, by-laws, or majority of voting power of shareholders. (La.R.S. 12:103, as am’d Act 841 of 1984, eff. July 13, 1984).

Registered Agent.

Corporation must maintain at least one registered agent which may be individual resident of this state, partnership authorized to practice law in this state, professional law corporation, or business corporation or foreign corporation authorized to do business in this state. Name and post office address of agent must be stated in initial report along with notarized affidavit of agent accepting designation as agent. Notice of change of registered agent, or name of corporate or partnership registration agent (within 30 days), must be filed with Secretary of State and mortgage office of parish of corporation’s domicile, by either corporation or agent. Upon resignation of agent, within 30 days corporation must file with Secretary of State and mortgage office, certificate executed by president, secretary, or vice-president, stating name and post office address of successor agent. (La.R.S. 12:104, as am’d Act 99 of 1988).

Revocation of Articles and Franchise.

If corporation fails to designate and maintain registered office or registered agent for 90 days, or fails to file annual report for three consecutive years, Secretary of State must revoke articles of incorporation and franchise, with 30 days prior notice to corporation. Corporation status may not be revoked if corporation brings itself into good standing. (La.R.S. 12:163[C], as am'd Act 298 of 1997). Attorney General may seek similar relief if franchise was procured through fraud, or corporation has abused authority, or was not authorized to be formed under appropriate statute. Reinstatement of corporate status is possible under certain conditions. (La.R.S. 12:163, as am'd Act 88 of 1983 and Act 714 of 1984).

Sale or Transfer of Corporate Assets.

Voluntary sale, lease, exchange, or other disposition of all or substantially all of a corporation's assets may be authorized only by a two-thirds (or such lesser proportion, not less than a majority of voting power present or total voting power, as articles may provide), if corporation is not insolvent, or by vote of two-thirds of entire board of directors, if corporation is insolvent. Notice to shareholders of meeting must state: "Dissenting shareholders who comply with the procedural requirements of the Business Corporation Law of Louisiana will be entitled to receive payment of the fair cash value of their shares if the transaction to be considered is effected upon approval by less than 80% of the corporation's total voting power." Suit to enjoin such sale must be brought within 90 days after corporate action authorizing such disposition. (La.R.S. 12:121, as am'd Act 849 of 1990).

Dividends.

Board of directors may declare dividends in cash, property or shares out of surplus (except earned surplus reserved by board, La.R.S. 12:62B), except (1) when insolvent or would thereby become insolvent, or (2) when such would be contrary to restrictions in articles. If no surplus is available, dividends may be paid out of net profits for current or preceding fiscal year, under certain restrictions. No dividend may be paid in shares other than with treasury shares, without transfer to stated capital from surplus of (1) an amount not less than aggregate par value of shares issued, and (2) an amount determined by directors in respect to no-par shares issued. Dividends in shares of a class may not be paid to shareholders of another class unless permitted by articles or authorized by a majority of voting power present of holders of shares of class in which payment is to be made. (La.R.S. 12:63).

Unclaimed Dividends.

See subhead Articles of Incorporation, supra; also category Property, topic Absentees.

Merger or Consolidation.

Merger, consolidation or share exchange with surviving corporations may be achieved as follows: (1) Board of directors of each business, nonprofit or foreign corporation which desires to merge or consolidate shall either enter into agreement of merger or consolidation signed by majority of directors of each corporation, or adopt resolution approving agreement of merger or consolidation, and if agreement prescribes changes in articles of surviving corporation, agreement must comply with La.R.S. 12:54A (see subhead Amendment of Articles, supra) to extent applicable; (2) agreement must be approved by shareholders of foreign corporation in accordance with law under which such was formed; (3) agreement must be approved by two-thirds (or by such larger or smaller proportion, not less than majority of voting power present or total voting power, as articles may provide) of voting power of shareholders present at any annual or special meeting, for which notice has been given, which notice must, if applicable, state: "Dissenting shareholders who comply with the procedural requirements of the Business Corporation Law of Louisiana will be entitled to receive payment of the fair cash value of their shares if the merger or consolidation is effected upon approval by less than 80% of the corporation's total voting power", and to which notice must be annexed copy or summary of agreement; and if such prescribes change in articles of surviving corporation, which change, if in form of amendment, would entitle class or series of shares to vote as class, agreement must also be approved by such vote by shareholders of such class or series as would be required for amendment; (4) secretary or assistant secretary of each corporation must certify on agreement fact of approval by shareholders, and approved and certified agreement must be signed and acknowledged by president or vice-president of each corporation; (5) approval of shareholders of surviving corporation is not required if articles of surviving corporation are not amended, if shares of such corporation to be issued or delivered do not exceed 15% of shares of same class outstanding prior to agreement, and in certain other instances, and secretary or assistant secretary must certify on agreement that approval is not required and reasons therefor; (6) adopted, certified and acknowledged agreement or, in lieu thereof, certificate of merger or consolidation must be filed with Secretary of State who, after payment of all taxes, fees and charges, shall record same, endorsing thereon date and, if requested, hour, of filing, and issue certificate of merger or consolidation. Agreement certificate may be delivered in advance to Secretary of State for filing as of specified date within 30 days of delivery. Duplicate original of certificate of merger or consolidation must be filed with mortgage office in each parish in which corporate party has its registered office, and in conveyance records of each parish in which corporate party has immovable property, title to which is transferred as result of agreement. (La.R.S. 12:111-112, added Act 849 of 1990). Share exchange with surviving corporation governed by statute. (La.R.S. 12:116, added Act 849 of 1990).

Parent corporation owning at least 90% of outstanding shares of each class of a subsidiary corporation may (a) merge itself into such subsidiary by filing with Secretary of State a certificate signed and acknowledged by its president or vice-president and secretary or assistant secretary, setting forth a copy of resolution of board of directors and date thereof, and stating that resolution has been approved by parent's shareholders in manner and by vote prescribed in La.R.S. 12:112C or that no approval is required by virtue of La.R.S. 12:112(E); or, (b) merge subsidiary into itself by filing with Secretary of State certificate signed by such officers setting forth copy of resolutions of board of directors effecting such merger and date of adoption thereof. Duplicate original certificate issued by Secretary of State must be filed in mortgage office of each parish in which corporate party has its registered office and in conveyance office of each parish where corporations own immovable property. Copy of certificate must, within 20 days of filing with Secretary of State, be mailed to each minority shareholder of each subsidiary. Surviving corporation's name may be changed by merger resolution.

In case of consolidation into new corporation, articles and initial report are in usual form except corporations consolidating shall be named as incorporators, articles and report must be signed and acknowledged by president or vice-president and secretary or assistant secretary of each corporation, and articles must state shares, obligations, cash or other consideration to be delivered to shareholders or manner of converting shares into securities of new corporation.

"Business combinations" as defined are subject to special vote of 80% of voting stock and two-thirds of votes of those other than "interested shareholder" as defined. (La.R.S. 12:132-134, added Act 841 of 1984, eff. July 13, 1984).

Merger or consolidation are effective when agreement, certificate, or articles and initial report are filed with Secretary of State and upon compliance with laws under which any foreign corporation is formed, or upon later effective date, not exceeding 30 days, stated in agreement or certificate. (La.R.S. 12:111-115).

Commissioner of Insurance must approve merger, consolidation or acquisition of control of domestic insurer. (La.R.S. 22:731, as am'd Act 767 of 1975).

Dissolution.

Voluntary dissolution, conducted with or without court supervision, must be authorized by majority vote of voting power of shareholders present, or by such larger vote as articles require. If without supervision of court, shareholders may appoint liquidators but appointment is not effective until notice is published at least once in local newspaper (copy thereof with affidavit of publisher must be filed with Secretary of State), and certificate, signed and acknowledged by president or vice-president and secretary or assistant treasurer must be filed with Secretary of State, which certificate must also be filed with mortgage office of parish of corporation's registered office. If shareholders do not approve liquidation out of court, corporation must file petition with court which shall name liquidator. (La.R.S. 12:141-142, as am'd Act 849 of 1990). If corporation is not doing business, owes no debts and owns no immovable property, it may be dissolved by filing of affidavit with Secretary of State executed by shareholders, or by incorporator if no shares have been issued. Filing shareholders or incorporator become personally liable for claims against corporation. Secretary of State must reinstate corporation so dissolved only upon court order so directing him. (La.R.S. 12:142.1, as am'd Act 170 of 2006).

On petition of Attorney General, district court may order dissolution of corporation which has violated anti-trust law. (La.R.S. 51:139, as am'd Act 366 of 1975).

Shareholder(s) owning not less than 20% of outstanding shares for six months, a majority of directors, a judgment creditor when execution has been returned "nulla bona," or a receiver, may institute involuntary proceedings on specified grounds including: (a) Corporate assets are insufficient to pay liabilities; (b) objects of corporation have failed; (c) liquidation would be beneficial to shareholders; (d) management is deadlocked; (e) shareholders are deadlocked, but only if irreparable injury to corporation or shareholders is being suffered or is threatened and court determines dissolution is warranted after due regard for rights of other shareholders, employees and public; (f) corporation has failed to commence business for one year following incorporation or suspended business for one year; (g) corporation has committed gross and persistent ultra vires acts; (h) corporation articles and franchise have been annulled, vacated or forfeited by judgment under La.R.S. 12:163; or (i) receiver has been appointed. Provision is also made for dissolution of corporation having only two shareholders, each owning one half the shares and those shareholders are engaged in joint venture between themselves and corporation. (La.R.S. 12:143, as am'd Act 269 of 1985).

Proceedings for dissolution take effect when appointment of liquidator by shareholders becomes operative or when court has appointed liquidator. (La.R.S. 12:141).

When proceeding for dissolution takes effect, all rights, powers and duties of officers and board of directors are vested in liquidator or liquidators appointed by shareholders or court, and authority and duties of officers and directors of corporation cease except as, in opinion of liquidator or liquidators, it is necessary that they be continued. (La.R.S. 12:141). At any time before corporate existence ceases, voluntary dissolution may be terminated by such vote of shareholders as was required to commence proceedings, and certificate must be filed with Secretary of State and Recorder of Mortgages, and with court, if under supervision thereof, and notice must be published as aforesaid. (La.R.S. 12:149).

Liquidator for out of court dissolution must prepare annual report of assets and liabilities, disposition of assets and anticipated tax year of final accounting and distribution, which must be made available to any shareholder on request. (La.R.S. 12:145, am'd Act 312 of 1976).

Tender Offers.

Board of directors, when evaluating tender offer or offer to make tender or exchange offer or to effect merger or consolidation, may consider factors other than consideration being offered. (La.R.S. 12:92[G]). See also subheads Control Share Acquisitions and Merger or Consolidation, supra.

Insolvency and Receivers.

See category 8 Debtor and Creditor, topic 8.16 Receivers.

Close Corporations.

No special statutory provisions.

Appraisal.

Prior to or at meeting of shareholders, dissenting shareholder must file written objection (and must vote against such action) to authorization by shareholders for sale, lease or exchange of all of corporation's assets, or for merger or consolidation, unless authorization was by vote of at least 80% of total voting power, except right of dissent does not exist in case of (1) Sale under court order; (2) sale for cash with distribution to shareholders within one year; or (3) with respect to action on merger or consolidation, by shareholders holding shares of any class which were either listed on a national exchange or held by less than 2,000 stockholders unless articles provide otherwise or shares of such shareholders were not converted by merger or consolidation solely into shares of surviving or new corporation. If merger is pursuant to La.R.S. 12:112H (short form merger by parent corporation) subsidiary's shareholders may dissent without regard to proportion of voting power approving merger.

Procedures are established for deposit in escrow of certificates and to enforce shareholder's right to receive payment for shares; however, court may not enter order staying proposed corporate action (but see subhead Sale or Transfer of Corporate Assets, supra). (La.R.S. 12:131, as am'd Act 433 of 1975).

Business development corporations to promote prosperity of State of Louisiana are authorized and are formed generally in same manner as business corporations. (La.R.S. 51:1101 et seq.).

Act 49 of 1969 authorizes formation of industrial development corporations as defined in federal Small Business Investment Act of 1958.

Nonprofit corporations are regulated by T. 12, c. 2. Model Non-Profit Corporation Act not adopted. Same fees as listed for ordinary corporations. (La.R.S. 12:263, as am'd Act 235 of 1983). Nonprofit corporation may reincorporate as business corporation by following requisite procedures. (La.R.S. 12:165, added Act 642 of 1986). Annual reports are required for nonprofit corporations. ($5 filing fee must accompany annual report, except for churches. (La.R.S. 12:205.1, as am'd Act 22 of 1990). Charter may be revoked for failure to file required reports. (La.R.S. 12:262.1, added Act 309 0f 1995). Change of name, office or agent may be accomplished by inclusion in annual report, but notice of change of office must be recorded in both new and old parish. (La.R.S. 12:236, added Act 333 of 1991). Articles of incorporation must include location and address of registered office, not simply post office box; names and addresses of registered agents, not simply post office box; and names, addresses and terms of office of initial directors, not simply post office box. (La.R.S. 12:203[B], as am'd Act 291 of 1997).

Nonprofit public corporations for development of trade and business in municipalities and parishes are authorized. (La.R.S. 51:1151 et seq.).

Quasi-public nonprofit corporations may be created. (La.R.S. 12:202, as am'd Act 122 of 1979).

Real estate investment trusts are authorized. (La.R.S. 12:491-493, as am'd Act 526 of 1977).

Professional Corporations.

Professional law corporations may be organized pursuant to General Business Corporation Law, subject to statutory limitation, and authority of Supreme Court to regulate practice of law. (La.R.S. 12:801-815, am'd Act 535 of 1985). Professional medical corporations may be organized pursuant to Business Corporation Law, subject to specified modifications and limitations, and subject to regulation by Louisiana State Board of Medical Examiners. (La.R.S. 12:901-915, as am’d Act 172 of 1979). Professional dental corporations may be organized pursuant to Business Corporation Law, subject to special modifications and limitations and subject to regulation by Louisiana State Board of Dentistry. (La.R.S. 12:981-995, am’d Act 400 of 1979). Professional accounting corporations may be organized pursuant to Business Corporation Law, subject to special modifications and limitations and subject to regulation by Louisiana State Board of Certified Public Accountants. (La.R.S. 12:1001-1015, am’d Acts 82 and 83 of 1972). Professional Nursing Corporations may be organized pursuant to Business Corporation Law, subject to special modifications and limitations and regulation by State Board of Nurse Examiners. (La.R.S. 12:1071-1085, added Act 730 of 1977). Professional Architectural Corporations are permitted subject to regulation by Board of Architectural Examiners. (T. 12 §§ 1086-1101, added Act 225 of 1979). Professional optometry corporations are permitted subject to regulation by Board of Optometry. (La.R.S. 12:1110 to 1124, added Act 404 of 1980). Professional psychology corporations are permitted subject to regulation by State Board of Examiners of Psychologists. (La.R.S. 12:1111-1125, added Act 523 of 1980). Professional architectural-engineering corporations are permitted subject to regulation by State Board of Architectural Examiners and State Board of Registration for Professional Engineers and Land Surveyors. (La.R.S. 12:1171-1181, added Act 465 of 1983). Business corporation may convert to professional corporation upon compliance with statutory requirements governing particular professional corporation. (La.R.S. 12:173, as am’d Act 182 of 1989).

Homesteads and Savings and Loan Corporations.

Laws relating to incorporation, powers, capitalization, membership, records, reports, liabilities, regulation, operation, merger and dissolution of homestead and savings and loan associations has been recodified. (T. 6, c. 9). See category 3 Business Regulation and Commerce, topic 3.01 Banks and Banking.

Foreign corporations may not transact business in state without obtaining certificate of authority from Secretary of State. (La.R.S. 12:301). Foreign corporation is not considered to be transacting business in state by maintaining or defending suits; holding directors’ or shareholders’ meeting; maintaining bank accounts; maintaining offices or agencies for transfer of its securities; soliciting or procuring orders if such must be accepted outside state; creating evidence of debt, mortgages or liens; collecting debts; transacting interstate or foreign commerce; conducting isolated transactions; acquiring or disposing of property not as part of regular business activity; or, if a foreign bank (state or national bank), mutual savings bank or fund society, insurance company, or other such entity, when acquiring loans, secured or unsecured, maintaining depository or pledgeholder agreements, servicing loans, or acquiring property by foreclosure or in lieu of foreclosure and disposing thereof. Above listing not exclusive. (La.R.S. 12:302, as am’d Act 751 of 1972).

Foreign corporation must file application in duplicate (triplicate if banking corporation) with, and on form prescribed by, Secretary of State stating: (1) Name of corporation and state or country of incorporation as well as federal tax identification number (its absence does not invalidate application), along with certificate of good standing from incorporating state (not certified copy of articles or certificate of incorporation), with original signature and dated within 90 days of submission for certificate of authority (La.R.S. 12:304[A] and [C], as am’d Act 335 of 1991); (2) if name of corporation does not conform to requirements (La.R.S. 12:303, as am’d Act 88 of 1983), name of corporation with word, abbreviation or distinguishing term which it elects to add thereto for use in this state; (3) address of principal office in state or country of incorporation and of principal business office outside this state; (4) address of principal business establishment and registered office in this state and name of its registered agent in this state at such address; (5) nature of business to be transacted in this state if it does not propose or is not permitted to transact in this state business of every nature authorized by its articles; (6) names and addresses of its directors and officers; (7) other information required by Secretary of State (La.R.S. 12:304, as am’d Act 266 of 1985). Secretary of State must obtain evidence that ten day written notice of application for certificate of incorporation has been given to State Board of Registration for Professional Engineers and Land Surveyors, if name includes “engineer,” “engineering,” “surveyor” or “surveying.” Copy of articles or certificate of incorporation, authenticated by proper officer of state or country of incorporation, must be filed with application. (La.R.S. 12:304, as am’d Acts 477 and 685 of 1974). Foreign corporation authorized to do business in state with no business establishment in state is deemed to have principal business establishment at address of its registered agent in state. (La.R.S. 12:304[A][4], as am’d Act 983 of 1993).

Fee to be paid Secretary of State is same as that for domestic corporations. (See subhead Fees, supra.) Corporation must pay authorization tax based upon proportion of authorized capital stock which its gross assets employed in this state bear to total gross assets, (1) of $50 if either (a) aggregate par value of such proportion of authorized shares with par value exceeds $25,000, or (b) number of such proportion of authorized shares without par value exceeds 10,000; or (2) $10 otherwise. (La.R.S. 12:316).

Unless certificate of authority obtained, foreign corporation transacting business in this state may not present judicial demand before any court of this state, but is not prevented from defending any action, suit or proceeding in this state. Attorney General may file suit against corporation transacting business without certificate of authority, for all fees and taxes which would have been imposed by law if it had qualified, plus all penalties. (La.R.S. 12:314).

Corporation must file annual report stating: (1) Name; (2) address of registered office in this state, if changed since last report, (3) address of its principal office in state or country of incorporation, and its principal office outside this state, if changed since last report; (4) name of registered agent, if changed since last report; (5) names and addresses of officers and directors; and (6) municipal address of present business establishment. Report must be filed with Secretary of State on or before anniversary date of qualifying to transact business, except first annual report shall be filed on or before anniversary date of qualifying to transact business in Louisiana in year next succeeding calendar year in which certificate of authority was issued. (La.R.S. 12:309, as am’d Act 103 of 1992, eff. June 5, 1992).

Corporation must maintain resident agent to receive service of process and registered office which may be same as its business office. Corporation must keep at its business office in or outside this state, or if no such business office exists, at its principal place of business, wherever located, records showing properties and business transactions in this state (including accounts of assets and liabilities, receipts and disbursements, and gains and losses, and, if subject to severance taxes, a complete account of its severances in this state). (La.R.S. 12:308, as am’d Act 526 of 1982). Resignation of agent and notice of resignation governed by statute. (La.R.S. 12:308[D], as am’d Act 366 of 2003).

Control share acquisitions are governed by legislation similar to that in place for domestic corporations. (La.R.S. 12:140.11 through 140.17, added Act 173 of 1988, eff. June 29, 1988).

Corporation may withdraw by procuring certificate of withdrawal upon filing with Secretary of State an application in duplicate originals executed by designated officers on form prescribed by Secretary of State, stating: (1) Name and state or country of incorporation; (2) that corporation is not transacting business in state; (3) that corporation surrenders its authority to transact business in state; (4) that corporation revokes authority of resident agent in this state, and consents to service of process upon Secretary of State in any action arising out of any business transacted in state; (5) address for mailing by Secretary of State of any process served on corporation; (6) such other information as required by Secretary of State. Upon approval of application, and payment of all fees, charges, taxes, etc., as evidenced by certificates of Collector of Revenue and of Administrator of Division of Employment Security, Department of Labor, Secretary of State issues certificate of withdrawal. (La.R.S. 12:312). Termination of withdrawal proceedings may be effected by requisite notice to Secretary of State. (La.R.S. 12:312.1, added Act 647 of 1986). Advance fee of $50 for recordation is required. (La.R.S. 12:316, added Act 649 of 1986).

Secretary of State may revoke certificate of authority for enumerated causes. (La.R.S. 12:313, as am'd Act 717 of 1984, eff. July 12, 1984). Errors in certificate of authority may be corrected by certificate of correction. (La.R.S. 12:307.1, added Act 268 of 1985). Amended certificates may be obtained, but must contain evidence of any name change issued by incorporating jurisdiction. (La.R.S. 12:307[B], as am'd Act 335 of 1991).

On petition of Attorney General, district court may order ouster of corporation from state and liquidation of property and affairs if in violation of anti-trust laws. (La.R.S. 51:139, as am'd Act 366 of 1975).

Franchise Tax.

Tax accrues on first day of calendar or fiscal year used by corporation. Every domestic and every foreign corporation, exercising its charter, or qualified to do business or actually doing business in this state, or owning or using any part or all of its capital, plant, or any other property in this state, as further defined in La.R.S. 47:601, must by 15th day of third month, following month in which tax accrues, make verified report and pay to Collector of Revenue tax of $3 for each $1,000 of capital stock, surplus, undivided profits and borrowed capital, if any, on excess over $300,000; $1.50 for each $1,000 below $300,000. (La.R.S. 47:601, and § 609, as am'd Act 59 of 1986, eff. Jan. 1, 1987). Collector may grant extensions by virtue of federal extensions. (La.R.S. 47:612, as am'd Act 104 of 1985). Minimum tax, $10. Basis for computation in case of domestic or foreign corporation is determined by taking arithmetical average of: (1) Ratio that net sales in Louisiana and other revenue attributable to Louisiana bears to total net sales in regular course of business and other revenue, and (2) ratio of value of property in Louisiana to value of all property. Minimum tax is $10, and in no case may tax be based on amount less than assessed value of property in state. Penalty for willfully false or fraudulent return is 50% of tax. Delinquency penalty is 5% of tax for each 30 days, not to exceed 25% of tax. Attorney's fee of 10% of tax, interest and other penalties is allowed, and interest at 6% per annum runs from date tax is due until paid. Recordation in mortgage records by Collector of Revenue of statement of delinquent tax operates as first lien, privilege and mortgage on all property of corporation. Corporations exempt are: Labor, agricultural and horticultural corporations; mutual savings banks, national banking corporations and certain state banks; building and loan associations; fraternal beneficiary societies, orders or associations; nonprofit cemetery companies; religious, charitable, scientific, literary and educational corporations; business leagues, chambers of commerce, real estate boards or boards of trade; civic leagues; nonprofit clubs; local benevolent life insurance associations; ditch or irrigation companies; mutual or cooperative telephone companies; insurance corporations paying premium tax under T. 22; farm associations and their related financing organizations; voluntary employees' beneficiary associations; local teachers' retirement fund associations. (La.R.S. 47:608, as am'd Act 103 of 1985). Bank holding companies and public utility holding companies may deduct certain investments in subsidiaries. (La.R.S. 47:601-616, am'd Act 119 of 1973). Exemption may be provided for new industrial establishments or new corporate headquarters located in state. (La.R.S. 47:3202-3205, as am'd Act 3 of 1985).

Natural gas pipe line companies pay additional annual franchise tax of 1% of gross receipts. (La.R.S. 47:1031-1040).

Forms for franchise tax reports may be obtained from Secretary of State on request.

Business License Tax.

See category 3 Business Regulation and Commerce, topic 3.18 Licenses, Business and Professional.

Income Tax.

See category 22 Taxation, topic 22.10 Income Tax.

Deeds.

See category 21 Property, topic 21.06 Deeds.

Forms for Domestic Corporation.

There are no prescribed forms.

Forms for Foreign Corporation.

Printed forms of applications for certificates of authority and withdrawal are furnished, without charge, by Secretary of State, Baton Rouge, on application therefor.

Model Non-Profit Corporation Act.

Not adopted. See subhead Nonprofit Corporations, supra.

Unincorporated Associations.

Dissolution of unincorporated associations, confirmation of their purpose and disposition of their assets is regulated. (La.R.S. 12:501-520, as am'd Act 877 of 2008).

2.04 [RESERVED]

2.05 JOINT STOCK COMPANIES:

No special provisions of law.

Professional Corporations.

See topic 2.03 Corporations, subhead Professional Corporations.

2.06 LIMITED LIABILITY COMPANIES:

Conversions.

Any domestic LLC, business corporation, partnership in commendam or partnership may convert to another type of domestic business entity by submitting prescribed conversion application to Secretary of State, so long as owner or member does not become personally liable without his consent for obligations of new entity. (La.R.S. 12:1601-1606, added by Act 153 of 2006, eff. June 2, 2006).

Recognized and governed by La.R.S. 12:1301-1369, added Act of 1992, eff. July 7, 1992, as supplemented by Act 475 of 1993, eff. June 9, 1993, which also amended C.C. 2352 and 2636 and La.R.S. 9:3431, 3434, 3435 and 3445; and as am'd by Act 847 of 1995. Such companies may be dissolved by affidavit filed with Secretary of State, if company is no longer doing business and owes no debts. (La.R.S. 12:1335.1, as am'd Act 102 of First Ex. Sess. of 1998, eff. May 5, 1998). Such companies are included in standard procedural provisions as to service of process, venue, procedural capacity, long-arm service and the like. (C.C.P. Arts. 42, 690, 691, 692, 739, 740, 5091 as am'd Act 145 of 1999; C.C.P. Art. 1266, added by Act 145 of 1999). Officers and directors of limited liability companies are not personally liable for monetary damages to company or its shareholders for conduct of their duties unless gross negligence as defined is established. (La.R.S. 12:1314, as am'd Act 1253 of 1999, eff. July 12, 1999). Annual reports are required of both domestic and foreign LLCs, fee $25. (La.R.S. 12:1308.1, 1350.1, 1364). For statute of limitations on negligent or intentional misconduct claims, see topic 2.03 Corporations, subhead Liabilities of Directors and Officers. Resignation of agent and notice of same regulated by statute. (La.R.S. 12:1308[E] and § 1350[D], as am'd Acts 367 and 368 of 2003). Change of agent also regulated by statute. (La.R.S. 12:1308, as am'd Act 543 of 2004).

2.07 [RESERVED]

2.08 PARTNERSHIPS:

Conversions.

Any domestic LLC, business corporation, partnership in commendam or partnership may convert to another type of domestic business entity by submitting prescribed conversion application to Secretary of State, so long as owner or member does not become personally liable without his consent for obligations of new entity. (La.R.S. 12:1601-1606, added by Act 153 of 2006, eff. June 2, 2006).

General.

Partnership is juridical person created by contract and distinct from its partners which may include all persons, trustees, succession representatives and unincorporated associations. (C. C. Art. 2801). Unless otherwise stipulated, partners participate equally in profits, commercial benefits and losses, but if agreement stipulates as to participation in only one of profits, benefits, losses or distribution of assets other than capital contribution, partners participate equally in all categories. (C. C. Arts. 2803 and 2804). Name does not have to include name of any partner. (C. C. Art. 2805). With written agreement, immovable property may be acquired by partnership, and such is effective as to third persons if partnership contract is filed with Secretary of State. (C. C. Art. 2806). Unanimous consent is required to amend agreement, to admit partners, or to terminate or permit withdrawal, if partnership is constituted for term. (C. C. Art. 2807). Majority, or as stipulated, may manage partnership. (C. C. Art. 2808). Partner is liable for his virile share of debts but may plead discussion of partnership assets. (C. C. Art. 2817).

Withdrawal.

Partner ceases to be member upon death, interdiction, relief under c. 7 of Bankruptcy Code or confirmation of plan of liquidation or appointment of trustee for his estate under c. 11 of Bankruptcy Code, seizure without release of his interest under Art. 2819, expulsion or withdrawal, or as provided in agreement. (C. C. Art. 2818, as am'd Act 827 of 2004). Unless otherwise provided in agreement, majority of partners must agree to expulsion for just cause. (C. C. Art. 2820).

For just cause, partner may withdraw from partnership constituted for term (C. C. Art. 2821) and must give reasonable notice if there is no term (C. C. Art. 2822).

Termination.

Unless provided by law, partnership terminates by unanimous consent, judgment of termination, relief to partnership under C. 7 of Bankruptcy Code, reduction to one member, expiration of term, attainment or impossibility of object, or in accordance with partnership agreement. (C. C. 2826, as am'd Act 797 of 1981 and Act 273 of 1982).

Unless otherwise provided in agreement, partnerships are liquidated in same manner and according to same rules as corporations. (C. C. Art. 2834).

Limited Partnership.

Partnerships in commendam consist of one or more general partners and one or more limited partners. (C. C. Art. 2837). Name of partnership must include “limited partnership”, “partnership in commendam” or other identification, and must not imply that limited partner is general partner. (C. C. Art. 2838). Limited partner becomes liable as general partner if he permits his name to be used in manner implying he is general partner, or if he knew or should have known of such use and did not take reasonable steps to prevent use, but not if name had been included in name of predecessor business entity. (C. C. 2839, as am’d Act 429 of 1984). Agreement must describe contribution of limited partner, its agreed value or method of determination, and time or circumstance when contribution is to be made. (C. C. Art. 2840). Written agreement must be filed with Secretary of State. (C. C. Art. 2841). Limited partner must restore any distribution that renders partnership insolvent. (C. C. Art. 2842). Limited partner becomes liable as general partner if he participates in management or administration or conducts any business with third persons on behalf of partnership. (C. C. Art. 2844). Limited partner does not incur such liability for one or more of following kinds of activity: Consulting with and advising partner on business matters, or acting as surety for partnership, or approving or disapproving amendment of agreement, or acting as employee, officer, director, shareholder of corporate general partner (C. C. 2845 and 2846, as am’d Act 429 of 1984), or voting for continuation, dissolution or liquidation of partnership, alienation, lease or encumbrance of all or substantially all of partnership assets, or incurrence of indebtedness, other than in ordinary course of business, change in nature of business, or admission, expulsion, withdrawal of partners or selection or removal of managing partners. (C. C. Art. 2847). Limited partnership terminates by retirement from partnership, or death, interdiction or dissolution of sole or any general partner, unless partnership is continued with consent of remaining general partners under right in contract of partnership or if, within 90 days after such event, all remaining partners agree in writing to continue partnership and to appointment of one or more general partners if necessary or desired. (C.C. 2826, as am’d Act 273 of 1982).

Registered Limited Liability Partnerships.

Defined and regulated by La.R.S. 9:3431-3433 and 3441-3447, added Act of 1992, eff. July 7, 1992 and by C.C. 2352 and 2636; La.R.S. 9:3431, 3434, 3435 and 3445, all as am’d, Act 475 of 1993, eff. June 9, 1993 and Act 847 of 1995).

Joint Venture.

Joint venture for exploration, development or operation of mineral rights does not create partnership absent express agreement.

Registering.

Secretary of State maintains Central Registry for Contracts of Partnership, in which original or certified copy of agreement must be filed to affect third persons. (La.R.S. 9:3402). To be filed, agreement must contain name of partnership, municipal address of its principal place of business, and name and address of each general and limited partner. (La.R.S. 9:3403, as am’d Act 100 of 1988). Amendments must also be filed in same manner. (La.R.S. 9:3404). Secretary of State issues certificate of registry. (La.R.S. 9:3405). Original or certified copy of agreement and copy of certificate of registry must be filed with recorder of mortgages of principal place of business. (La.R.S. 9:3406). Documents may be delivered for registry prior to effective date with specified date and hour for registry. (La.R.S. 9:3407). Filing within five days after execution, exclusive of holidays, is deemed filed for registry as of date of execution. (La.R.S. 9:3408).

Claims of Mismanagement.

For statute of limitations on negligent or intentional misconduct claims, see topic 2.03 Corporations, subhead Liabilities of Directors and Officers.

Annual Reports.

Partnerships that have written agreement of partnership are required to file annual report with secretary of state and pay annual fee of $25. (La.R.S. 9:3409, 3410, 3428, added Act 989 of 1997).

Foreign Partnerships.

Any partnership formed under any law other than Louisiana may only enjoy rights, privileges and juridical status of Louisiana partnership by registering with Secretary of State statement showing its name, jurisdiction of formation, designated agent for service of process with municipal address, name and address of at least one general partner who gives consent as to service of process, principal place of business outside this State, principal place of business within this state (if any), whether partnership intends to own immovable property in state, and whether any partner seeks to have limited liability recognized in Louisiana. Statement must be accompanied by certificate of partnership or articles of partnership and amendments, and affidavit of general partner certifying correctness of information, genuineness of documents and his authority. (La.R.S. 9:3422, as am'd Act 338 of 1986). To own immovables, or have limited partners, copy of partnership agreement need not be filed but must be provided within 30 days of request by secretary of state. (La.R.S. 9:3423, as am'd Act 479 of 1987). Failure to maintain agent for service of process constitutes designation of Secretary of State. (La.R.S. 9:3424). Amendments to articles should be filed and termination of registration may be made by authorized partner. (La.R.S. 9:3426 and 3427, as am'd Act 340 of 1986). Annual report must be filed, for fee of $25. (La.R.S. 9:3410[B][3], as am'd Act 1186 of 2001).

3 BUSINESS REGULATION AND COMMERCE

3.01 BANKS AND BANKING:

See also topic 3.09 Commercial Code.

General supervision over banks is exercised by Commissioner of Financial Institutions. (La. Banking Law, La.R.S. 6:1 et seq., Act 719 of 1984, effective Jan. 1, 1985).

Stock.

The shares of any state bank may be divided into classes, with voting powers, preferences, rights or restrictions as provided in articles as approved by commissioner. (La.R.S. 6:251).

Fees.

Semiannual assessment is levied against each institution by Commissioner. (La.R.S. 6:331).

Capital Requirement.

Subscribed capital requirements as follows: $500,000; commissioner may require greater amount of capital if he reasonably deems it necessary for safe, sound and proper operation of bank; requirement inapplicable to bank organized solely to effect merger with existing bank. (La.R.S. 6:215).

Cash Reserves.

Must maintain cash reserves as specified by Commissioner following requirements of Federal Reserve System. (La.R.S. 6:301).

Deposits.

State banks may offer any type of deposit account, interest bearing or not, consistent with provisions of La. Banking Law, rules and regulations of commissioner, and federal rules and regulations, including individual and joint deposits, minor's deposits, and deposits in trust. (La.R.S. 6:242 and §§ 311-317). See also subhead Decedents' Property, infra.

Control and disposition of safety deposit boxes in name of two or more persons, and of associations, corporations, trusts or agents, are specified. (La.R.S. 6:320-326, am'd Act 357 of 1989).

Unclaimed Deposits.

Deposits uncalled for and unnoticed by depositor for five years must be reported to Collector of Revenue, and must be delivered to him after time specified. Revised Uniform Unclaimed Property Act adopted in 1997. (La.R.S. 9:151-180).

Decedents' Property.

No bank, banker, trust company, warehouseman or other depositary and no person, corporation or partnership having on deposit any monies, credits, or other things of value for a person deceased and no corporation, the stock or registered bonds of which were owned by person deceased may deliver or transfer such monies, credits, stocks, bonds or other things to any heir or legatee of such deceased person, unless the tax thereon has been paid or unless it has been judicially determined that no taxes are due. Otherwise person or corporation so making delivery or transfer is liable for tax unless made prior to written notice of death, or made to succession representative submitting certified copies of letters issued by a court of competent jurisdiction, or to surviving spouse, heirs or legatees pursuant to certified copy of judgment, or of contents of safety deposit box, whether listed or not, to aforesaid persons under same conditions. (La.R.S. 47:2413, am'd Act 704 of 1975). Every executor must cause an inventory to be taken and no monies, securities, property and effects of deceased may be delivered to said executor until inventory has been made and filed in court in proceedings in which he is acting as executor. (La.R.S. 47:2413). However, bank, credit union, homestead association, or other depository may pay to surviving spouse up to $10,000 out of deposits of deceased spouse without court order or judgment and without determining whether or not inheritance tax is due. Surviving spouse must give affidavit that total funds withdrawn from all depositories does not exceed $10,000. Receipt of surviving widow is full release and discharge of bank or depository from liability for amount paid. (La.R.S. 9:1513, 1514, am'd Act 54 of 1984). Bank or other depository may pay funds to surviving spouse solely in name of surviving spouse but must notify collector of revenue within seven days of payment. (La.R.S. 9:1513C, added Act 316 of 1976).

Bank may transfer deposit of deceased person to heirs or succession representative on written receipt and production of certified copy of letters or of judgment of court of competent jurisdiction putting heirs in possession. (La.R.S. 6:325).

Alternative Deposits.

In case of joint deposits under names of two or more persons, funds of which are payable to either or any of depositors, a bank is not liable for paying balance to any of surviving depositors, but if bank has received notice in writing of death of any such account owner it shall thereafter report payments made out of account within one week after payment is made. (La.R.S. 6:312, am'd Act 118 of 1988).

Deposits in Trust.

When a depositor in trust for another dies, and bank is without notice of existence and terms of the trust, bank may pay the funds therein to person for whom deposit was made. (La.R.S. 6:314).

Adverse claimant to deposit without court order or bond need not be recognized by bank, except where depositor is fiduciary for claimant, who shows by affidavit reasonable cause to apprehend misappropriation by fiduciary. (La.R.S. 6:315).

Uniform Common Trust Fund Act has not been adopted.

Withdrawals.

State banks may pay deposits of customers in accordance with terms of deposit contract. (La.R.S. 6:325). Deposits of minors may be withdrawn by minor or other person in accordance with terms of written instructions given at time of opening account. (La.R.S. 6:313).

Checks.

See topic 3.09 Commercial Code.

Any person who, with intent to defraud, obtains money, credit, goods or anything of value by drawing or uttering a check or draft on a bank or depositary, knowing there are not sufficient funds therein to pay same, is guilty of a misdemeanor. (La.R.S. 14:71).

Parties in consumer credit transaction may agree to additional charge to consumer's account if consumer tenders NSF check in payment of such account, not to exceed 5% of check amount of $15, whichever is smaller. (La.R.S. 9:3529, added Act 473 of 1981).

Forgeries.

See topic 3.09 Commercial Code.

Holidays for financial institutions are: Sundays; New Year's Day; Independence Day; Labor Day; Thanksgiving Day; and Christmas Day. Whenever Dec. 25, Jan. 1, July 4, or Nov. 11 falls on Sun., next day is holiday; whenever they fall on Sat., preceding day is holiday; but in either event banks may choose to remain open. Financial institution at its option may be open or closed on Sat. Optional holidays due to severe weather conditions are allowed. (La.R.S. 6:128, am'd Act 281 of 1991). See also category 1 Introduction, topic 1.02 Holidays, but specific banking provisions are "entire and exclusive" with reference to any other statutory authorities.

Set-Off.

La. Banking Law establishes statutory right of set-off in favor of banks supplementing any rights bank may have pursuant to contract with customer or under UCC 9. (La.R.S. 6:316, am'd Act 137, effective Sept. 1, 1989). Statutory set-off does not apply to funds in IRA or other tax-deferred account. (La.R.S. 6:316[A]).

Collections.

See topic 3.09 Commercial Code.

Investments are regulated by La.R.S. 6:241, 242 (am'd Act 134 of 1989), and 243 (am'd Act 55 of 1986).

"Savings Bank"

La. Banking Law suppressed classification of banks as "savings banks". (La.R.S. 6:1 et seq., Act 719 of 1984 effective Jan. 1, 1985). State savings and loan associations may use terminology "savings bank" as part of corporate name. (La.R.S. 6:712, am'd Act 163 of 1986).

Holding Companies.

Eff. Jan. 1, 1985, holding companies may own or control more than one banking institution. Bank holding company is defined as any company directly or indirectly owning or controlling 25% or more of any class of voting shares of any bank, or which controls election of majority of bank directors, or for whose shareholders 25% or more of bank's voting stock is held in trust. Bank holding companies also limited in acquisition of "nonbank banks" (La.R.S. 6:521, added Act 108 of 1985) and with regard to minority shareholders' rights in acquisitions of more than 10% of stock must make same offer to all shareholders (La.R.S. 6:517, as am'd Act 127 of 1985).

Mergers.

Authorization and procedures for mergers and consolidations are provided by law, subject to shareholder approval. Effective date of merger, recognition of surviving bank, rights of dissenting shareholders and other matters are provided for in La.R.S. 6:351-355, 376 (am'd Act 17 of 2003). Commissioner may authorize acquisition, merger or consolidation of impaired financial institution. (La.R.S. 6:970-974, am'd Act 975 of 1986).

Branches.

State banks may establish branches anywhere in state with approval of Commissioner. (La.R.S. 6:501 et seq., am'd Act 39 of 1988).

Interstate Banking.

Beginning Jan. 1, 1989, national reciprocal interstate banking is permitted. (La.R.S. 6:533, am'd Act 686 effective July 7, 1989).

Financial Service Center Banks may be organized in state and are authorized to extend credit outside state without limitation regarding amount of interest charged. (La.R.S. 6:541-548, added by Act 808 of 1987).

Savings and Loan Associations.

Organization, powers, investments, loans and other actions of savings and loan associations are specified in La. Savings and Loan Association Law and regulated by Commissioner of Financial Institutions. (La.R.S. 6:701 et seq.).

Credit Unions.

Organization, powers, investments, loans and other actions of credit unions are specified and regulated by Commissioner of Financial Institutions. (La.R.S. 6:641 et seq.).

Foreign building and loan associations are permitted to conduct business only in accordance with laws governing local associations, but no foreign association can do business until it procures from Commissioner of Financial Institutions a certificate of authority and public necessity to do so. To procure such authority, foreign association must first deposit with State Treasurer $100,000 in cash or in bonds of the U.S., or Louisiana and file with Commissioner of Financial Institutions a certified copy of its charter, constitution and by-laws and other rules and regulations showing its manner of doing business, together with statement such as is required annually from local building and loan associations and a written instrument agreeing that citations or other legal process may issue against it from any parish in this state and be served on Commissioner either personally or by leaving a copy thereof at an office of Commissioner. Commissioner must mail copy of any paper served on him to home office of such association. Issuing of certificates of authority and public necessity is discretionary with Commissioner and depends upon needs of community and service to public interest. Foreign building and loan associations need not so qualify to participate in mortgages with local banking institutions or to purchase mortgages pursuant to commitments made with local banking institutions or to purchase mortgages if original loan was made by local banking institution. (La.R.S. 6:891-898).

See also topic 3.23 Sales.

3.02 BILLS AND NOTES:

See topic 3.09 Commercial Code.

Holidays.

Promissory notes, bills of exchange and commercial paper, maturing on Sunday, holiday or half holiday, required by law or commercial usage to be protested, are due on first day (not a Sunday or legal holiday or half holiday) succeeding day of maturity. In computing delay allowed for giving notice of non-acceptance or nonpayment holidays and half holidays do not count, and if day following protest is holiday or half holiday, next day is computed as first day after protest. For purposes of protecting or otherwise holding liable any party to bill, check or note which is not paid before 12 o'clock noon on any half holiday, a demand or acceptance or payment may be made and notice of protest given on next succeeding secular or business day. Person receiving and collecting check, bill or note, due on half holiday, is not guilty of neglect and does not incur liability in not presenting same on that day. Payment certification or other transaction by bank in this state, otherwise valid, is not rendered invalid because done on holiday or half holiday. (La.R.S. 30:3-806).

Special Requirements.

A note secured by real estate or chattel mortgage must be paraphed by the notary before whom the act of mortgage was executed, but the notarial paraph for identification does not destroy negotiability.

Where a lost instrument is made foundation of a suit or defense, loss must have been publicly advertised within a reasonable time thereafter unless a commercial bond has been furnished in amount equal to face value of note plus 25% thereof. (C. C. 1832, as am'd Act 331 of 1984, eff. Jan. 1, 1985). When note secured by mortgage on immovable property has been lost or destroyed, holder in action to cancel mortgage may prove demand by affidavit without hearing in open court, unless court directs otherwise. (La.R.S. 9:2782.2, added Act 963 of 1986).

Judgment notes are not recognized.

Attorney's fees clauses are enforceable. Consumer Credit Law limits attorney's fees to 25% of unpaid debt. (La.R.S. 9:3530).

Special Defenses.

See topic 3.12 Consumer Protection.

3.03 BILLS OF LADING:

See topic 3.08 Carriers.

3.04 BILLS OF SALE:

Not required.

3.05 BLUE SKY LAW:

See topic 3.24 Securities.

3.06 BROKERS:

Real estate brokerage and operation is regulated by statute requiring license, bond and supervision by state board. (T. 37, c. 17). Licenses required for those engaged in other brokerage business, graduated according to volume of business done in preceding year. See topic 3.14 Factors, subhead Business License Tax.

See also topic 3.09 Commercial Code.

3.07 BULK SALES:

See category 8 Debtor and Creditor, topic 8.08 Fraudulent Sales and Conveyances.

3.08 CARRIERS:

Carriers are supervised, controlled and regulated by Public Service Commission, which has charge of rates also.

Duties and Liabilities.

Carriers are bound to provide for the safekeeping and preservation of the things entrusted to them (C. C. 2751), and are liable for things shipped or received for shipment (C. C. 2752) and for loss or damage of things entrusted to their care unless they can prove loss or damage caused by accident or uncontrollable events (C. C. 2754).

Carrier may be sued at point of delivery or shipment or at domicile of carrier for all freight which it may fail, refuse or neglect to deliver or for damages done thereto. (La.R.S. 13:3231).

Every claim for loss or damage to property or freight must be adjusted and paid within 30 days in case of shipments wholly within state and within 60 days in case of shipments from without state, after filing claim with agent at point of destination of shipment. (La.R.S. 45:1097-1098). But see Act 70 of 1972, which requires settlement of all claims for damage to goods resulting from transporting property within 60 days after filing claim. (La.R.S. 45:1097).

Limitation of liability and discrimination are governed by the usual rules.

Privilege is given carrier for freight money, taxes, storage, etc., and if articles carried are destroyed or lost without fault of carrier he has privilege on insurance money, provided he gives notice to owner within 30 days after loss or before insurance is paid. (C. C. 3217).

Improper disclosures concerning shipments prohibited. (La.R.S. 45:1091, 1092).

Unclaimed freight can be sold. (La.R.S. 45:1101-1103).

Bills of Lading.

See topic 3.09 Commercial Code.

3.09 COMMERCIAL CODE:

Revised Art. 9 of Uniform Commercial Code has not been adopted in its entirety. Legislature has enacted commercial laws incorporating Arts. 1, 3, 4, 5, 7 and 8 (T. 10, as am'd Act 533 of 2006), and Art. 9 (T. 10, c. 9 enacted Act 528 of 1988, am'd Act 135 of 1989 effective Jan. 1, 1990) of U.C.C. with following material variances (Articles of U.C.C. are referred to in Commercial Law as Chapters):

Chapter 3—Commercial Paper:

Section 3-105: Subsection (2) amended to read "A promise or order is conditional if the instrument . . . . .";

Section 3-112: Subsection (c) amended to add ". . . . ., or to furnish financial information, or to do or refrain from doing any other act for the protection of the obligation expressed in the instrument not involved in the payment of money on account of the indebtedness evidenced by the instrument; or . . . . . ." ;

Section 3-116: Subsection (b) amended to read "(b) if not in the alternative, is payable to all of them and may be negotiated or discharged only by all of them, but may be enforced by any one of them, the others being considered necessary parties only in accordance with Article 643 of the Louisiana Code of Civil Procedure."

Section 3-118: Subsection (c) replaced by the text of N.I.L. § 17(7);

Section 3-122: Subsection (4) separated and made a new Section 3-123;

Section 3-201: Word "security" is deleted from Subsection (2). Donative transfers inter vivos of negotiable instruments, otherwise governed by special form requirements of Civil Code, are governed by standard provisions of Art. 3 of Uniform Commercial Code. (La.R.S. 10:3-201 [4], added Act 452 of 1982);

Section 3-207: "Minor" used instead of "infant" in Subsection (1), and phrase "the declaration of a constructive trust" is deleted from Subsection (2);

Section 3-305: "Minority" used instead of phrase "infancy and emancipated minority" in Subsection (1) and Subsection (2) (b) amended to read ". . . . . as renders the obligation an absolute nullity";

Section 3-416: Subsection (6) deleted for possible conflict with Louisiana law (Cf. 13 Tul. L. Rev.);

Section 3-419: Subsections (1) and (2) amended to read: "(1) When a drawee to whom an instrument is delivered for acceptance refuses to return it on demand; or when a person to whom an instrument is delivered for payment refuses on demand either to pay or to return it; or when a person pays an instrument on a forged endorsement, he is liable to the true owner. (2) In an action against a drawee under subsection (1) the measure of the drawee's liability is the face amount of the instrument. In any other action under subsection (1) the measure of liability is presumed to be the face amount of the instrument." Subsection (3) amended to delete phrase "in conversion" and omit reference to Sections 3-205 and 3-206;

Section 3-501: Incorporates 1966 Amendment of U.C.C.

Section 3-602: Amended to read "A discharge of any party provided by this Chapter is not effective . . . . .";

Sections 3-802, 3-803 and 3-804: Deleted;

Section 3-806: Added to retain provisions as to holidays, see topic 3.02 Bills and Notes, subhead Holidays;

Section 3-807: Added to read "A non-negotiable bill of exchange, promissory note, or other non-negotiable obligation for the payment of money, made within Louisiana, shall not be received as evidence of a debt when the whole sum is expressed in figures unless it is accompanied by proof that it was given for the sum therein expressed. The cents or fractional parts of a dollar may be in figures.";

Chapter 4—Bank Deposits:

Section 4-105 of Commercial Laws amended to include within definition of “bank” savings and loan association and credit union when performing banking functions in check collection process only. (La.R.S. 10:4-105[g], added Act 137 of 1981).

Section 4-402: Last three sentences of U.C.C. deleted to conform with Louisiana jurisprudence, 123 So. 126;

Section 4-405: “Interdiction” used instead of “incompetence”;

Chapter 5—Letters of Credit:

Note: Comprehensive amendments to c. 5 relative to letters of credit, were enacted by Act 171 of 1991, eff. Jan. 1, 2000.

Section 5-103: Second sentence of Subsection 1(a) amended to read: “A credit shall clearly state whether it is revocable or irrevocable and in the absence of such statement shall be presumed to be irrevocable.” Subsection (3) omits definitions of “Contract for Sale”;

Section 5-107: Subsection (4) amended to read “Unless otherwise specified and subject to the provisions of R.S. 10:5-109 . . . . .”;

Section 5-109: Subsection 1(a) amended to delete “for sale or other transaction”;

Section 5-112: “Except” clause deleted from second sentence of Subsection (1);

Section 5-114: Phrase “for sale or other contract” deleted in Subsection (1), (2), and Subsections (4) and (5) were deleted:

Chapter 7—Documents of Title:

Section 7-101: Title changed to read: “Commercial Laws—Documents of Title”. Word “depositary” instead of “bailee” is used in this section and other sections of Chapter 7.

Section 7-102: Definition of “receipt of goods” added as subsection (1)(h).

Section 7-102: Subsection (3) left blank as § 7-102(3) of U.C.C. is deleted.

Section 7-204: Subsections (3) and (4) left blank as corresponding subsections of U.C.C. deleted.

Section 7-205: “in good faith” substituted for “in the ordinary course of business”.

Section 7-209: Changed to read: “(1) A warehouseman has a lien on the goods covered by a warehouse receipt or on the proceeds thereof in his possession for charges for storage or transportation, demurrage and terminal charges, insurance, labor, or charges present or future in relation to the goods, and for expenses necessary for preservation of the goods or reasonably incurred in their sale pursuant to law. If the person on whose account the goods are held is liable to the warehouseman for like charges or expenses in relation to other goods and it is stated in the receipt that a lien is claimed for such charges and expenses, the warehouseman also has a lien against the goods covered by the receipt for such other charges and expenses whether or not the other goods have been delivered by the warehouseman. But as to a person to whom a negotiable warehouse receipt is duly negotiated a warehouseman’s lien is limited to charges in an amount or at a rate specified on the receipt or if no charges are so specified then to a reasonable charge for storage of the goods covered by the receipt subsequent to the date of the receipt.

(2) The warehouseman may also reserve a security interest against the depositor for a maximum amount specified on the receipt for charges other than those specified in Subsection (1), such as for money advanced and interest. Such a security interest is governed by the chapter on Secured Transactions (Chapter 9). (La.R.S. 10:7-209, am'd Act 135 of 1989 effective Jan. 1, 1990).

(3)(a) A warehouseman's lien for charges and expenses under Subsections (1) or (2) is also effective against any person who so entrusted the depositor with possession of the goods that a pledge of them by him to a good faith purchaser for value would have been valid but is not effective against a person as to whom the document confers no right in the goods covered by it under Section 7-503.

(b) A warehouseman's lien on household goods for charges and expenses in relation to the goods under Subsection (1) is also effective against all persons if the depositor was the legal possessor of the goods at the time of deposit. 'Household goods' means furniture, furnishings and personal effects used by the depositor in a dwelling.

(4) A warehouseman loses his lien on any goods which he voluntarily delivers or which he unjustifiably refuses to deliver."

Section 7-403: In subsection (1)(b), following words are deleted: "but the burden of establishing negligence in such cases is on the person entitled under the document".

Section 7-502: In subsection (1)(c), words "agency or estoppel" are deleted.

Section 7-504: Subsections (2), (3) and (4) of U.C.C. section are deleted.

Section 7-509: Words "contract to sell" substituted for "contract of sale".

Section 7-601(2): Word "concursus" substituted for "interpleader".

Chapter 8—Investment Securities. (La.R.S. 10:8-101 am'd Act 135 of 1989 to include 1977 official Amendments, effective Jan. 1, 1990):

Section 8-101: Title changed to read "Commercial Laws—Investment Securities".

Section 8-204: Art. 8-204 of U.C.C. is modified slightly to require that restrictions comply with Corporate Code. (La.R.S. 12:57 and 210).

Section 8-501: Added to provide that law does not enlarge powers of infants or other persons lacking full legal capacity.

(Arts. 6 and 10 of U.C.C. omitted.)

Chapter 9—Secured Transactions (last am'd by Act 128 of 2001, eff. July 1, 2001).

Section 9-101—Title changed to read: "Commercial Law—Secured Transactions".

Section 9-102—Consignments added to subsection (1); definitions added in subsection (4) to reflect La. terminology.

Section 9-103—Adds rules applicable to deposit accounts in subsection (7).

Section 9-104—Defines exception applicable to transfers by government agencies with cross-reference to La.R.S. 39:1421(a) and (2). Subsections (h), (k) and (l) deleted. Subsection (m) added to except application as to public utility corporations.

Section 9-105—Subsection (N) deleted. References to Article 2 deleted in Subsection (3).

Section 9-111—Reference to Article 6 deleted.

Section 9-113—Deleted.

Section 9-114—Substantially rewritten to conform to La. law on consignment.

Section 9-206—Reference to Article 2 in subsection (2) deleted.

Section 9-207—Subsection (2)(c) deleted.

Section 9-305—Adds specific rules for perfection of security interest in life insurance, beneficiary interest under trust, and in deposit account established with third party.

Section 9-312—Subsection 2 deleted.

Section 9-313—Differences in subsection (2) relate to La. property law. See topic Real Property. Subsection (4)(c) deleted.

Section 9-315—Definition of "product" added.

Section 9-401—If filing is necessary to perfect security interest under La.R.S. 10:9-103, filing with Clerk of Court of any parish, or Recorder of Mortgages in Orleans Parish, will suffice.

Section 9-402—Form of financing statement reads as follows:

Name of debtor (or assignor) ____________________

Address ____________________

Social Security number/taxpayer identification number ____________________

Name of secured party (or assignee) ____________________

Address ____________________

(1) This financing statement covers the following types (or items) of property:

(Describe) ____________________

(2) (Check if applicable) The above goods are fixtures on (or where appropriate substitute either "The above minerals or the like (including oil and gas) or accounts will be financed at the wellhead or minehead of the well or mine located on ______)" real estate described on an attachment hereto.

(If the debtor does not have an interest of record) The name and social security number or taxpayer identification number, as applicable, of a record owner of the real estate concerned is ____________________

(3) (If products of collateral are claimed) Products of the collateral are also covered.

____

Signature of Debtor

(Use Whichever

is Applicable) (or use “Assignor” if applicable)

____

Signature of Secured Party

(or use “Assignee” if applicable)

Subsection (6) deleted. In subsection, note that La. requires social security number or taxpayer identification number.

Section 9-403—La. filing rules contemplate filing with clerks and transmission to Secretary of State, who shall maintain master index of all financing statements, continuation statements, assignment, releases, termination statements, and other statements. (La.R.S. 10:9-403[6], Act 528 of 1988, am’d Act 135 of 1989).

Section 9-409—Added authorizing Secretary of State to prescribe forms to be used for filing.

Section 9-508—Self-help repossession generally prohibited in La.

Section 9-505—Subsection (1) deleted.

Section 9-408—Adds special provisions applicable to use of executory process to enforce security interest.

Sections 9-601 through 9-605 contain La. transition rules (La.R.S. 10:9-601 —9-605, added Act 135 of 1989, am’d Act 598 of 1989).

1973 Official Amendment adopted.

1977 Official Amendments not adopted, except as noted above.

Uniform Commercial Code Art. 9 has been enacted effective July 1, 1989. (T. 10, c. 9, enacted Act 528 of 1988). Comments and explanatory notes to be prepared during interim period by Louisiana State Law Institute, and additional technical corrections bill is expected to be enacted before effective date.

3.10 CONDITIONAL SALES:

See topic 3.23 Sales.

3.11 CONSIGNMENTS:

See topic 3.14 Factors.

3.12 CONSUMER PROTECTION:

Unsolicited merchandise deemed gift to recipient, who may enjoin sender from billing or requesting payment. (La.R.S. 51:461, added Act 10 of 1970). Member of organization making retail sales to its members may notify organization of termination of his membership, and merchandise delivered after 30 days following receipt of notice by certified letter is deemed a gift; however, provision does not relieve member from liability to organization for breach of contract. (La.R.S. 51:462, added Act 10 of 1970). Advertising, promotion and sale of time share plans are regulated. (La.R.S. 9:1131.1-1131.27, added Act 552 of 1983).

Any person who signs purchase agreement in excess of $150 with itinerant door-to-door salesman (no fixed place of business and peddles from house to house) can withdraw within three days of signing agreement counting from day after agreement was signed. (La.R.S. 9:2711).

Louisiana Consumer Credit Law (Act 454 of 1972), effective Jan. 1, 1973, regulates all types of consumer credit transactions. (La.R.S. 9:3510-3568, as am'd Act 365 of 1983). Law establishes maximum charges on consumer loans, consumer credit sales, negotiable instruments after negotiation or if instrument is not negotiated within 35 days of date of making, negotiable instruments after maturity, revolving charge accounts, revolving loan accounts with lender credit cards, delinquency charges, and deferral charges. (La.R.S. 9:3519-3526, as am'd Acts 501 and 502 of 1980). Parties in consumer credit transaction may agree to additional charge to customer's account if consumer tenders NSF check in payment of such account, not to exceed 5% of check amount or $15, whichever is smaller. Such charge is in addition to other authorized delinquency charges under Consumer Credit Act. (La.R.S. 9:3526.1, added Act 473 of 1981). Law provides for consumer prepayment of unpaid balance at any time without penalty and with rebate of unearned finance or credit service charges. (La.R.S. 9:3528-3529, as am'd Act 365 of 1983). Law provides for limitation of attorney's fees to 25% of unpaid debt on default, prohibits use of multiple agreements to obtain higher credit service charges, requires negotiable instruments to bear legend "negotiable paper" on face thereof, makes promissory notes in connection with home solicitation sales non-negotiable, requires 30 days notice in specified form to consumer of assignment of negotiable instrument before original assignee may become holder in due course, provides for refinancing scheduled payment which is twice as large as average of earlier payments without penalty which must be designated as "balloon payment", and prohibits referral sales agreements with consumer. (La.R.S. 9:3530-3537, as am'd Acts 333, 554 and 808 of 1985; § 3535 repealed, Act 66 of 1985). Law regulates home solicitation sales with provisions for cancellation by consumer, for form of sales agreements, and requirements on part of consumer. (La.R.S. 9:3538-3541). Law regulates credit life insurance, credit health and accident insurance, and property insurance required by extender of credit in consumer credit transaction, and effective Jan. 1, 1975, regulates premiums that may be charged for insurance. (La.R.S. 9:3542-3549). Law provides remedies and penalties, including nonenforcement or modification of agreements containing "unconscionable" clauses, refund of service or finance charges and three times such charges plus attorney's fees if violation of law was intentional or not in good faith, correction of violation if violation was in good faith, correction of self-discovered violations, and criminal penalties. (La.R.S. 9:3551-3553). Law is administered by Commissioner of Financial Institutions, who licenses all persons, except supervised financial organizations, making supervised loans defined as loans in which finance charge exceeds 10% simple interest per annum. (La.R.S. 9:3557-3561). Collection practices are regulated including contact between lender and persons other than consumer, and number of contacts between lender and consumer. (La.R.S. 9:3562). Law requires persons making consumer credit sales, consumer leases or consumer loans, etc., to file notification in specified form prior to Jan. 31 of each year and pay fee of at least $10. (La.R.S. 9:3563-3565, as am'd Act 808 of 1985). Extenders of credit prohibited from discriminating against persons because of race, color, religion, national origin, sex or marital status, or from requiring any major or emancipated minor to meet credit qualification standards not required of other persons similarly situated. (La.R.S. 9:3583 as am'd Act 161 of 1978).

Unfair Trade Practices and Consumer Protection Law (Act 759 of 1972. La.R.S. 51:1401-1418) makes unlawful unfair methods of competition and unfair or deceptive acts or practices in conduct of any trade or commerce (La.R.S. 51:1405), establishes Governor's

Consumer Protection Division (La.R.S. 51:1403) which may make rules and regulations interpreting provisions of act subject to approval of Permanent Advisory Board on Consumer Protection and Attorney General (La.R.S. 51:1405), and authorizes Attorney General to enforce Act (La.R.S. 51:1404). Exemptions are provided to transactions regulated by certain other regulatory agencies, publishers, owners, etc. of advertising media under certain circumstances, a seller of a product and service using advertising or promotional material supplied by manufacturer or other person from whom seller purchases product or service unless seller refuses to provide to Attorney General name and address of such manufacturer or other person and seller must agree to cease disseminating advertisement or promotional material, and conduct which complies with T. 15 U.S.C., § 45(a)(1). (La.R.S. 51:1406). Provision is made for action by any person for violation of act to recover actual damages, and if violation was with knowledge after notice by Director of Division or Attorney General, court must award treble damages plus attorney's fees and costs. If such action is groundless and brought in bad faith, court may award attorney's fees and costs to defendant. Action must be brought within one year of date of transaction or act giving rise to right of action. (La.R.S. 51:1409). Director of Division and Attorney General are authorized to accept voluntary compliance which must be filed in district court in parish of violator's domicile, to make investigative demands and depositions enforceable by court action and use other procedures provided by Constitution and laws of State. (La.R.S. 51:1410-1415). Provision is made for a $5,000 civil penalty for violation of an injunction issued under law. (La.R.S. 51:1416). District attorneys may enforce act under supervision of Attorney General. (La.R.S. 51:1417). Law is made applicable to all consumer transactions which are evidenced by a writing signed by consumer in state or when a merchant negotiates in state or by mail, telephone or otherwise for a transaction with a consumer. (La.R.S. 51:1418).

Design and construction of mobile homes, and licensing of dealers provided for. (La.R.S. 51:911, as am'd Act 589 of 1979).

Residential Truth in Construction Act requires contractor to deliver specified Notice of Lien Rights to owner or agent for execution before construction. (La.R.S. 9:4851-4855, added Act 237 of 1976).

Banks and other credit companies are prohibited from disseminating specific information as to credit transactions except pursuant to subpoena duces tecum or other order but only after giving immediate notice by certified or registered mail to person, and except provision of general information to credit reporting company or another business entity having legitimate business need for information. (La.R.S. 9:3571, added Act 252 of 1976).

Fraudulent sale of kosher food is prohibited. (La.R.S. 40:608.2, added Act 722 of 1977)

Promotional contests involving sales presentations are regulated. (La.R.S. 51:1721-1722, added Act 527 of 1983).

Rental referral agencies are regulated by La.R.S. 51:1700-1704.

Dance studios are regulated by La.R.S. 51:1551-1566. (Act 533 of 1979).

Sale of bedding and upholstered furniture is regulated. (La.R.S. 40:1191-1208).

Work-at-home solicitation is regulated. (La.R.S. 51:1711, added Act 830 of 1980).

Plain Language Law.

No "Plain Language Law" adopted.

3.13 CONTRACTS:

See also topic 3.09 Commercial Code.

Louisiana law of contracts is not derived from Common Law, rather it is derived from French Civil Code. Title IV of Louisiana Civil Code, dealing with “Conventional Obligations” contains provisions relating to: General principles (C.C. 1756-1759); natural obligations (C.C. 1760-1762); kinds of obligations (C.C. 1763-1820); transfer of obligations (C.C. 1821-1830); proof of obligations (C.C. 1831-1853); extinction of obligations (C.C. 1854-1905); contracts generally (C.C. 1906-1917); contractual capacity (C.C. 1918-1926); consent (C.C. 1927-1947); vices of consent (C.C. 1948-1965); cause (C.C. 1966-1970); object and matter (C.C. 1971-1977); third party beneficiaries (C.C.. 1978-1982); effects of contracts (C.C. 1983-2012); dissolution (C.C. 2013-2024); simulations (C.C. 2025-2028); nullity (C.C. 2029-2035); revocatory and oblique actions (C.C. 2036-2044); and interpretive rules (C.C. 2045-2057). For specific types of contracts, see appropriate topics.

Venue for actions on contract in parish of execution of contract or where work was performed or was to be performed. (C.C.P. 76.1, added Act 217 of 1991). In public contracts as defined, provisions as to choice of law and choice of forum other than Louisiana are null; contracting party may waive prohibition, but laws of same session (1992) are in conflict on issue of waiver. (La.R.S. 38:2196, added Act 75 of 1992, eff. June 5, 1992; La.R.S. 9:2778, added Act 582 of 1992, eff. June 30, 1992).

3.14 FACTORS:

Any factor, broker, commission merchant, middleman or other person or corporation acting as commission merchant, or undertaking to sell for another any goods, wares, merchandise, sugar, cotton, rice, or any other agricultural produce, must render a true and correct account of the sales thereof within fifteen days of the date of said sales, which statement must give the name and address of the person or corporation to whom sold and dates of said sales. (La.R.S. 51:5). Cotton merchants purchasing from farmers must register with Commissioner of Agriculture and provide bond of $50,000. (La.R.S. 3:700 et seq., as am’d Act 888 of 1985).

Bond.

Commission merchants who sell in this state on commission or buy as agent or broker any farm products, fish, oysters, shrimp, crabs, game or fur skins must furnish bond to Commissioner of Agriculture, etc., in the sum of $1000. (La.R.S. 51:1-4).

False Statements, Etc.

It is misdemeanor to render a false statement or account of a sale of cotton or other agricultural product, or falsely to represent that such products are held for future sale when sold, or when they are held on consignment, to sell, without rendering a complete account, showing price, grade, and name and address of purchaser, or with intent to defraud consignor, to make a false charge, report of condition, or statement. (La.R.S. 3:500).

Lien.

Factor has lien on movables entrusted to him for sale and on proceeds and unpaid purchase money, which is prior to lien of attachment. If factor becomes insolvent, consignor may reclaim goods consigned or if sold has lien on unpaid price thereof. (C. C. 3247-8).

Recordation of Contracts.

There are no provisions as to filing or recording consignment agreements or notices of factors’ liens.

Business license tax levied on all factorage, brokerage or commission businesses ranges from a minimum of $30 when the gross annual commissions are less than $5,000 to a maximum of $4,000 when such commissions are $500,000 or more, twenty-two classes being provided for. (T. 47, c. 3).

3.15 FRANCHISES:

No special legislation. Uniform Franchise and Business Opportunities Act not adopted.

3.16 FRAUDS, STATUTE OF:

See also topic 3.09 Commercial Code.

No statute as such. Analogous provisions are:

Transfer of immovable property must be in writing; but if a verbal sale or other disposition of such property be made, it is good against the vendor and vendee who confesses it when interrogated on oath, provided actual delivery has been made of the immovable. (C. C. 1832, 1839).

Sale of movables verbally is valid, but all verbal agreements relative to movable property, and all verbal contracts for payment of money where value is in excess of $500 may be proved by two or more witnesses, or one witness and other corroborative circumstances. (C. C. 1846).

Parol evidence is not received to prove any promise to pay: (1) debt of third person or (2) debt extinguished by prescription. (C. C. 1847).

3.17 [RESERVED]

3.18 INFORMATION TECHNOLOGY, INTERNET AND NEW MEDIA:

E-Commerce.

Uniform Electronic Transactions Act in force as of July 1, 2001. (La.R.S. 9:2601-2690).

3.193.16 [RESERVED]

3.17 INTEREST:

Legal rate is two points over coupon issue yield equivalent as calculated by commissioner of financial institutions. (C.C. 2924, as am’d Act 275 of 1997).

Maximum rate which may be contracted for is 12% (C. C. 2924 as am’d Act 142 of 1982), except that domestic and foreign corporations, limited partnerships, foreign limited partnerships and partnerships in commendam, may agree to pay any rate of interest (La.R.S. 12:603, as am’d Act 210 of 1977). Any person borrowing funds for commercial or business purposes may agree to pay interest in excess of maximum conventional rate otherwise applicable and to pay interest on interest (La.R.S. 9:3509, added Act 665 of 1981 and C.C. 2924, as am’d Act 458 of 1984), and may agree that interest rate may vary from time to time without making condition potestative or destroying negotiability (La.R.S. 9:3509.1, added Act 361 of 1982).

Simple conventional interest on loans secured in whole or part, directly or indirectly, by immovable property, may not exceed 12% per annum. (La.R.S. 9:3503, as am’d Act 205 of 1979). Interest on obligations secured directly or indirectly, in whole or part, by mortgage on immovable property insured by Federal Housing Administration, may be enforced pursuant to § 245 of National Housing Act. (La.R.S. 9:3508, added Act 582 of 1979). Similar exemption provided for Veterans' Administration loans and FHA loans. (La.R.S. 9:3504, as am'd Act 764 of 1979). Wrap-around mortgages are also exempt if nominal interest in wrap-around does not exceed lawful rate for conventional loans. (La.R.S. 9:3508, as am'd Act 764 of 1979). Graduated payment mortgages are also exempt if interest rate is not greater than lawful rate and if unpaid principal does not increase as result of deferred interest, exclusive of taxes, insurance and other non-finance charges, to amount greater than 150% of original face amount of note and mortgage. (La.R.S. 9:3504, as am'd Acts 424 and 767 of 1982). Obligation secured by mortgage on immovable (real) property, when mortgagee is former owner of property, may bear rate of interest agreed upon by parties within maximum limitations permitted for federally insured financial institutions, but subject to ceiling of 17%; no defense of usury if so authorized. (La.R.S. 9:3504, added Act 261 of 1982). Adjustable rate mortgages as defined are also exempt from laws on usury and interest on interest. (La.R.S. 9:3504 [D], added Act 424 of 1982). Retail installment contract may include finance charge not in excess of specified rates between 1.5% and 2.25% based on model year of motor vehicle. (La.R.S. 6:957, as am'd Act 110 of 1980).

Discount.

Any rate of interest can be collected by way of discount provided that interest from maturity may not exceed 8%. This does not apply, however, to banks of state or to consumer credit transactions as defined by Consumer Credit Law. (C. C. 2924, am'd Act 454 of 1972).

Judgments.

Legal interest attaches from date of judicial demand on all judgments sounding in damages "ex delicto" (La.R.S. 13:4203), except as to state, its agencies and political subdivisions, as to which it is 6% (La.R.S. 13:5112, as am'd Act 509 of 1985). Interest may run from date sum of money or damages for delay of performance is due. (C.C. 2000, as am'd Act 137 of 1985).

Compound interest is not permitted, unless amount is added to principal and a new contract made except as provided by Consumer Credit Law, for agricultural purposes, in matters preempted by federal law or regulation, or as provided in regulations of state commissioner of financial institutions. Original stipulation for compound interest invalid. (C. C. 1939, as am'd Act 822 of 1981 and Act 673 of 1982).

Small Loans.

See subhead Consumer Credit Law, infra.

Consumer Credit Law (Act 454 of 1972) specifies maximum loan finance charges for consumer loans, revolving charge accounts, and credit card accounts (La.R.S. 9:3519-3524), maximum delinquency and deferral charges (La.R.S. 9:3525-3526), privilege to consumer to prepay without penalty and with rebate of unearned loan or credit service charges (La.R.S. 9:3527-3529), and provides that insurance costs must be included in computation of maximum finance charges (La.R.S. 9:3542). See topic 3.12 Consumer Protection.

Consumer Credit Opportunity Law.

Extenders of credit prohibited from discriminating against natural persons solely because of race, color, national origin, sex or marital status, and from requiring natural persons to meet credit qualifications not required of other persons similarly situated. (La.R.S. 9:3581 et seq., added Act 705 of 1975.)

Credit Cards.

Any seller or issuer of credit cards honored by seller engaged in extension of consumer credit on open account may impose, after 25 days following receipt of statement by consumer, a finance charge not exceeding 1½% per month on all amounts unpaid from month to month. (Act 313 of 1970).

Credit union may charge rate as provided in by-laws and approved by commissioner of financial institutions, on loans to members. (La.R.S. 6:654, as am'd Act 436 of 1982).

Usury.

Person paying usurious interest may recover same by suit within two years after payment. (C. C. 2924). Entire interest forfeited if over lawful rate. (La.R.S. 9:3501: 274 So.2d 150).

Consumer Credit Law (Act 454 of 1972) permits recovery of finance charges and three times such finance charges plus attorney's fees if extender of credit violated law intentionally or was not in good faith. Action must be brought within 60 days of final payment of consumer credit contract or within one year of date of violation in case of a revolving loan or revolving charge account. (La.R.S. 9:3552). Violation of law is a misdemeanor. (La.R.S. 9:3553).

Defense of usury may not be invoked by domestic or foreign corporation organized for profit, limited partnership and partnership in commendam or in certain instances by those receiving loans for commercial or business purposes. (La.R.S. 12:703, as am'd Act 458 of 1984).

3.18 [RESERVED]

3.19 LICENSES, BUSINESS AND PROFESSIONAL:

Large number of occupations and businesses are licensed, and occupational license tax collected, by local governments. Local governmental occupational taxes may include attorneys. (La.R.S. 47:341-363, as am'd Act 1017 of 1986). State occupational license taxes repealed by Act 567 of 1981, effective Jan. 1, 1982. Detailed information as to local licenses available from various parishes, cities and towns. Persons engaged in rendering financial planning and management service for individuals must be licensed by Director of Division of Occupational Standards. (Added Act 423 of 1970). Contractors are licensed by State Licensing Board for Contractors. (La.R.S. 37:2151 et seq., am'd Act 82 of 1976).

Commercial Travelers.

No license is imposed on traveling salesmen representing jobbers or wholesalers, who do not carry with them goods for sale, but only take orders therefor, and deliver said orders to their employer, at store or permanent place of business to be filled in the manner usual to the jobbing or wholesale trade. (La.R.S. 47:368). Salesmen displaying samples at a display room, however, must be licensed. (La.R.S. 47:372, am'd Act 218 of 1972).

The following special licenses are levied:

A tax of 2% of gross receipts from intrastate business is imposed on "public utilities," excluding, however, persons engaged in any business or operations on navigable waters. (La.R.S. 47:1001-1010).

Traffic in liquor is subject to tax on liquor sold, and manufacturers and dealers require licenses or permits for which various fees are charged. (La.R.S. 26:71; La.R.S. 26:791-797, added Act 128 of 1972). For regulations, write Collector of Revenue, Baton Rouge. There is an additional graduated tax for Parish of Orleans. (La.R.S. 26:492).

Traffic in beer and wine is subject to tax on beverages sold and dealers must obtain licenses or permits. (La.R.S. 26:271, 341). In Parish of Orleans there is an additional state license of varying proportions. (La.R.S. 26:492).

Traffic in bottled soft drinks is subject to a tax on selling price and a requirement that dealers obtain licenses. (La.R.S. 47:881-908).

Automobile service clubs must be licensed by Insurance Commissioner. (La.R.S. 22:1751 et seq., as am'd Act 260 of 1975).

Poll takers required to register with Secretary of State. (La.R.S. 14:325, am'd Act 602 of 1972).

Persons engaged in business of selling checks must be licensed. (La.R.S. 6:1031 et seq., am'd Act 324 of 1972).

Cotton brokers must obtain certificate of authority from Commissioner of Agriculture and post $50,000 bond. (La.R.S. 3:700-705, am'd Act 888 of 1985).

Aircraft must be registered with Aircraft Registrar of Department of Transportation and dealers must be licensed with Registrar. (La.R.S. 2:1 et seq., added Act 889 of 1985).

Collection Agencies.

No legislation.

See also categories 16 Insurance, topic Insurance Companies; Taxation, topic Chain Store Tax.

3.20 MONOPOLIES, RESTRAINT OF TRADE AND COMPETITION:

Contracts, combinations, trusts, or conspiracies to restrain trade, fix or limit amount or quantity of any article, commodity, or merchandise to be manufactured, mined, produced or sold in state, or to influence trade in any manner so as to affect prices, are illegal. Penalty for violation is fine and imprisonment and in case of corporation revocation of charter or forfeiture of right to do business in state (La.R.S. 51:121 et seq., as am'd Act 366 of 1975).

Agreement or conspiracy to fix price of products of soil, such as fruit, nuts or vegetables is felony, punishable by fine or imprisonment or both. (La.R.S. 51:140-141).

Manufacturer or wholesale distributor of motor vehicles may not require that purchases be financed through designated finance company (La.R.S. 51:661-668). When commerce will be lessened or a monopoly created, no person shall sell or lease goods with agreement or understanding that purchaser or lessee shall not use goods of a competitor of vendor or lessor and no person shall sell commercial machines or equipment without providing a manual containing diagrams, instructions and parts lists sufficient to permit user to repair items where such refusal compels user to obtain repairs from seller. (La.R.S. 51:124 as am'd Act 669 of 1970).

Unfair sales of certain merchandise below cost are misdemeanors. (La.R.S. 51:421-427).

Cancellation or failure of renewal of franchise between refiner and retailer of motor gasoline requires 90 day notice except under specified circumstances; and retailer is not permitted to cancel franchise during its term unless retailer has failed to comply substantially with any essential and reasonable requirements of franchise or with any other condition, stipulation or provision of franchise, unless grounds for cancellation are such which do not require notice of cancellation or otherwise provided by law. Either party may obtain injunction, specific performance, damages and attorney's fees. Retailer may require refiner to re-purchase tires, batteries and other accessories, and may recover for loss of good-will if refiner has used 90 day cancellation. Action for cancellation or non-renewal must be brought within two years thereof. (La.R.S. 51:1451-1454, added Act 628 of 1974).

Marketing of agricultural, horticultural, floricultural, aquicultural, or vegetable products produced in this state, except milk and other specified products, is regulated through Commissioner of Agriculture. (La.R.S. 3:552.1 et seq., added Act 500 of 1978).

Certain noncompetition agreements are permitted in limited circumstances. (La.R.S. 23:921, am'd Act 639 of 1989).

Resale Price Agreements.

See category 17 Intellectual Property, topic 17.01 Trademarks and Tradenames.

Motion Picture Fair Competition Act adopted by Act 663 of 1977. (La.R.S. 37:2901-2905, as am'd Act 366 of 1980).

3.21 NEGOTIABLE INSTRUMENTS:

See topic 3.02 Bills and Notes.

3.22 RESTRAINT OF TRADE:

See topic 3.20 Monopolies, 3.22 Restraint of Trade and Competition.

3.23 SALES:

Three circumstances must concur to the perfection of the contract of sale, to-wit: the thing sold, the price and the consent. (C. C. 2439).

The sale of a thing belonging to another person does not convey ownership. (C.C. 2452).

Mortgage in favor of homestead or savings and loan or other associations subject to La.R.S. 6:701 et seq., may not be cancelled or removed from public records, or be in any manner affected by sale in succession, liquidation, insolvency, receivership, bankruptcy or partition proceedings, unless prior to application or petition for sale at least ten days written notice of sale is given to association by registered or certified mail. (La.R.S. 6:833, am'd Act 689 of 1977).

Lease purchase of specified mobile equipment having dealer cost of not less than $3,000 per unit, may be designated as lease without necessity of filing chattel mortgage. (La.R.S. 9:3509.2 added Act 208 of 1983).

Consideration.

The price of the sale must be certain, that is to say, fixed and determined by the parties. It ought to consist of a sum of money, otherwise it would be considered as an exchange. It ought to be serious, that is to say, there should have been a serious and true agreement that it should be paid. It ought not to be out of all proportion with the value of the thing; for instance the sale of a plantation for a dollar could not be considered as a fair sale; it would be considered as a donation disguised. (C. C. 2464).

Transfer of Title.

Sale is complete between the parties and the property is of right acquired by the purchaser as soon as there exists an agreement for the object and for the price thereof, although the object has not yet been delivered or the price paid. (C. C. 2456).

Option to buy or sell is contract whereby party gives to another right to accept offer to sell or buy thing within stipulated time; option must set forth thing and price, and meet formal requirements of sale it contemplates. (C.C. 2620). Agreement whereby one party promises to sell and other party promises to buy thing at later time, or upon happening of condition or upon performance of some obligation by either party, is bilateral promise of sale or contract to sell, and such agreement gives either party right to demand specific performance. (C.C. 2623). Contract to sell must set forth thing and price and must meet formal requirements of sale it contemplates. (C.C. 2623). Sum given by buyer to sell in connection with contract to sell is considered deposit on account of price, unless parties expressly provide otherwise. (C.C. 2624). If parties stipulate that sum given by buyer to seller is earnest money, then either party may recede from contract but buyer who recedes must forfeit earnest money or seller who recedes must return earnest money plus equal amount. (C.C. 2624). When earnest money has been given and party fails to perform for reasons other than fortuitous event, that party will be regarded as receding from contract. (C.C. 2624).

Risk of loss of thing sold owing to fortuitous event is transferred from seller to buyer at time of delivery, even when seller has delivered nonconforming thing, unless buyer acts in manner required to dissolve contract. (C.C. 2467).

Obligations of Seller.

The seller is bound to two principal obligations, that of delivering and that of warranting the thing he sells. The warranty has two objects: the first is the buyer's peaceable possession of the thing sold, and the second is the hidden defects of the thing sold, or its redhibitory vices. Seller also warrants thing sold is fit for its intended use. (C.C. 2475).

If the seller, knowingly and dishonestly, has sold the property of another person, he shall be obliged to reimburse to the buyer cost of all improvements. (C.C. 2509).

Whether seller is bound in warranty, or not, by agreement, buyer becomes subrogated to seller's rights and actions in warranty. (C. C. 2503).

Product liability issues governed by Louisiana Products Liability Act (LPLA) enacted in 1988, La.R.S. 9:2800.51 through 2800.60. Terms are defined; theories of recovery limited to only four, viz., product is unreasonably dangerous in design, manufacture, inadequate warning or because of nonconformance to express warranty; reasonably anticipated use and reasonably anticipated alteration defined and applied; learned intermediary defense provided.

Neither warranty of fitness, strict liability nor liability of any kind without negligence applies to physicians, hospitals and blood banks in supplying human blood and blood components or transplantation of human or animal tissue containing viral diseases undetectable by appropriate laboratory tests. (La.R.S. 9:2797, as am'd Act 204 of 1982; C. C. 2322.1, added Act 611 of 1981).

Provision in contract for sale of equipment or machinery to be incorporated in construction project, as defined, which excludes consequential damages is null. Construction project definition excludes industrial or agricultural projects such as shipbuilding, energy conversion or generation, forestry, paper, sugar or chemical production, fixed platform fabrication, or various mineral activities. (La.R.S. 9:2775, as am'd Act 564 of 1984).

Warranties.

If new motor vehicle does not conform to express warranty and consumer so reports and makes vehicle available for repair, manufacturer must repair. After four or more unsuccessful attempts at repair, manufacturer must at its option either replace with comparable vehicle or refund entire purchase price less reasonable use allowance. (La.R.S. 51:1941-1946, added Act 228 of 1984).

Right of dissolution of contract of sale is an accessory of credit representing the price, and if held by several persons all must join in suit for dissolution, but any one can become subrogated to rights of person refusing by paying amount due him. (C. C. 2561).

Formalities Required.

Movables may be sold by oral contract, bill of sale not necessary to pass title. All sales of immovables must be in writing, and, in order to have effect against third persons, must be recorded. (C.C. 2440, 2442).

Printed Contracts.

No statutory requirement as to type size in printed contracts.

Lesion.

If corporeal immovable has been sold for less than half of its true value, vendor may, at any time within four years, rescind sale for this reason alone. (C. C. 2589, et seq., as am'd Act 841, eff. Jan. 1, 1995).

The vendor may reserve the right of redemption of immovable within period not longer than ten years by return of purchase price. (C. C. 2567 et seq.).

Consumer Protection.

See topic 3.12 Consumer Protection.

Conditional sales of railroad or street railroad equipment, or rolling stock, are valid as against third persons, if evidenced by instruments duly acknowledged and recorded, provided each locomotive, engine or car so sold has the name of the vendor, lessor, or bailor plainly marked on each side thereof, followed by the word owner, lessor or bailor, as the case may be. Conditional sales of tank cars valid without above requirements. (La.R.S. 45:611-612, 1241-1244).

"Endless Chain".

Sales of merchandise by "endless chain" plan constitute misdemeanor unless permit of Louisiana Securities Commission first obtained. (La.R.S. 51:361-371).

"Bankrupt," etc., Sales.

So-called insurance bankruptcy, removal, etc., sales must be licensed by mayor. False statement in application punishable by fine and/or imprisonment. No goods may be ordered in contemplation of selling same at, or during such sale. (La.R.S. 51:31-41)

"Bond for deed" sales of encumbered property are unlawful without first providing written guarantee, recorded in mortgage office, by lienholder to release property on payment by purchaser of stipulated mortgage release price. Payments by purchaser must be made to bank designated as escrow agent. Vendor cannot require promissory note to represent purchase price. (La.R.S. 9:2941-2947). Buyer under "bond for deed" contract is deemed owner for purposes of homestead exemption from property taxes. (C.C. 447[B], added Act 640 of 1995).

Bulk Sales.

See category 8 Debtor and Creditor, topic 8.08 Fraudulent Sales and Conveyances.

Retail Credit Sales.

No act adopted regulating such sales except with reference to motor vehicles.

Sales of Motor Vehicles.

See category 23 Transportation, topic 23.01 Motor Vehicles.

3.24 SECURITIES:

Art. VIII of Uniform Commercial Code has been adopted as “Commercial Laws—Investment Securities.” (La.R.S. 10:8-101 et seq., added Act 165 of 1978). See topic 3.09 Commercial Code.

Sales of securities are governed by Louisiana Securities Law. (La.R.S. 51:701 et seq., as am’d Act 722 of 1985). Issuance of securities by public entities is regulated by special statute. (La.R.S. 39:1431-1437, added Act 34, 1st Ex.Sess., 1983).

Supervision is by Commissioner of Financial Institutions, who is also Commissioner of Securities.

Regulatory Powers of Supervising Authority.

Commissioner regulates security dealers and salesmen, and investment advisors, including suspension or revocation of their registration, regulates registration of securities by qualification or notification, unless security or transaction is exempt, including issuance of stop orders denying effectiveness or suspending or revoking effectiveness of any registration, may disqualify exemption from regulation of specified securities, may adopt rules or regulations exempting transactions, and has other authority with respect to administration of Law including investigations, issuance of subpoenas, and conduct of hearings. (La.R.S. 51:703-711, as am’d Act 722 of 1985).

Prerequisites to Sales or Offerings.

See subhead Regulatory Powers of Supervising Authority, supra.

Securities to Which Act Applicable.

“Security” means any note, stock, treasury stock, bond, debenture, evidence of indebtedness, certificate of interest or participation in any profit-sharing agreement, collateral-trust certificate, preorganization certificate or subscription, transferable share, investment contract, voting-trust certificate, certificate of deposit for security, fractional undivided interest in oil, gas, or other mineral rights, any put, call, straddle, option, or privilege on any security, certificate of deposit, or group or index of securities (including any interest therein or based on value thereof); or, in general, any interest or instrument commonly known as “security”, or any certificate of interest or participation in, temporary or interim certificate for, receipt for, guarantee of, or warrant or right to subscribe to or purchase, any of foregoing.

“Security” does not mean: Any insurance or endowment policy or annuity contract nor any variable annuity contract as provided for and regulated under T. 22 and issued by life insurance company licensed to do business in state of Louisiana; currency, or any note, draft, bill of exchange, loan participation or bankers acceptance, or any other evidence of indebtedness issued by bank other than shares of such institution; or any right, interest, or instrument or class or type of right, interest, or instrument which Commissioner, by rule or regulation, excludes from definition of security.

Exempt Securities.

Registration requirements do not apply to any of following securities: (1) Any security, issued or guaranteed by U.S., any state, any political subdivision of a state, or any agency, authority, public corporation, or other instrumentality of one or more of foregoing, including any underlying or separate security which secures any of foregoing securities. Pursuant to Secondary Mortgage Market Enhancement Act of 1984, La.R.S. 51:708(1) does not apply to securities issued by any person, trust, corporation, partnership, association, business trust, or business entity created pursuant to or existing under laws of U.S. or any state which is offering securities pursuant to § 106(a)(1) or (2) of that Act; (2) any security issued or guaranteed by Canada, any Canadian province, any political subdivision of any such province, any agency or corporate or other instrumentality of one or more of foregoing, or any other foreign government with which U.S. currently maintains diplomatic relations, if security is recognized as valid obligation by issuer or guarantor; (3) any security issued by or guaranteed by any bank organized under laws of U.S., or any bank, savings institution, or trust company organized and supervised under laws of Louisiana, including any interest or participation in any common trust fund or similar fund maintained by any such bank exclusively for collective investment and reinvestment of assets contributed thereto by such bank in its capacity as trustee, executor, administrator, or guardian; (4) any security issued by and representing interest in or debt of, or guaranteed by, any federal savings and loan association or any building and loan or similar association organized under laws of Louisiana and authorized to do business in this state; (5) any security issued by bona fide agricultural cooperative; (6) any security issued or guaranteed by any federal credit union or any credit union, industrial loan association, or similar association organized and supervised under laws of Louisiana; (7) any security issued or guaranteed by any railroad, other common carrier, public utility, or holding company which is subject to jurisdiction of Interstate Commerce Commission and other conditions; (8) securities listed or approved for listing upon notice of issuance on New York Stock Exchange or American Stock Exchange or security designated or approved for designation as national market system security by National Association of Securities Dealers, Inc. or any other stock exchange or market system approved by Commissioner, and all securities senior or equal in rank to such securities, any security represented by subscription rights which have been so listed, or any warrant or right to purchase or subscribe to any of foregoing, but Commissioner, in public interest, may disqualify some or all securities listed on such stock exchange or market system from the exemption; (9) promissory notes maturing in not more than nine months from date of issuance, provided that said securities are not offered for sale by means of advertisements publicly disseminated in news media or through mails; (10) notes issued in connection with acquisition of real or personal property or renewals thereof, if such notes are issued to sellers of and are secured by all or part of real or personal property so acquired; (11) any security of issuer if it has class of securities registered under § 12 of Securities Exchange Act of 1934 which has been so registered for three years immediately preceding offering date, under specified conditions. (La.R.S. 51:708, as am'd Act 722 of 1985).

Exempt Transactions.

T. 51, § 109 exempts transactions involving judicial sales, transactions involving certain pledgees, transactions not involving issuer, underwriter or affiliate of issuer, transactions by certain affiliates, transactions pursuant to or exempted from Securities Act of 1933 subject to approval by Commissioner, transactions involving stock dividends or other distributions not involving any consideration other than sales of fractional interests, transactions involving sale of securities to banks, savings institutions, trust companies and other institutions and dealers, transactions involving exchanges with existing security holders of issuer or subsidiary under specified conditions, stock option bonus or other plans involving no consideration other than services, qualified employee stock purchase plans, offers but not sales of securities for which registration statement has been filed under Securities Act of 1933, transactions incident to judicially approved reorganization, transactions involving certain mergers and other reorganizations, and between certain parent and subsidiary corporations, transactions in connection with certain pooled income funds, and other transactions exempted by Commissioner, including Private Offering Exemptions in Rule 1 of Art. D, Reg. 1 of Commissioner. (La.R.S. 51:709, as am'd Act 722 of 1985).

Registration of Securities by Notification.

Specified types of securities may be registered by notification with Commissioner by filing registration statement prescribed by Commissioner which may include Form A, Uniform Application, and other documents and information or copy of prospectus filed with Securities and Exchange Commission. (La.R.S. 51:705[D], as am'd Act 722 of 1985).

Registration of Securities by Qualification.

Securities not entitled to registration by notification must be registered by qualification with Commissioner by filing registration statement prescribed by Commissioner which may include Form A, Uniform Application, and other specified information and documents or, under specified conditions, copy of registration statement and other information filed with Securities and Exchange Commission together with Form A, Uniform Application. (La.R.S. 51:705[B], as am'd Act 722 of 1985).

Small Issues and Nonprofit Issuer Registration.

Limited registration statements are provided for small issues (up to $1,000,000 as permitted by Commissioner) and nonprofit issues. (La.R.S. 51:705, as am'd Act 722 of 1985).

Registration Fees.

Generally 1/10 of 1% of aggregate price of securities, but not less than $100 and not more than $1,000, plus $250 for expenses of Commissioner.

Take-Over Offers.

See category 2 Business Organizations, topic 2.03 Corporations, subhead Tender Offers.

Registration of Broker-Dealers, Agent-Salesmen and Investment-Advisors.

Broker-dealers, agent-salesmen, investment-advisors and loan brokers must be registered with Commissioner by filing verified application. Dealers and salesmen must pass written examination. (La.R.S. 51:703, as am'd Act 722 of 1985).

Bonds.

Broker-dealers must post surety bonds up to $10,000 unless waived by Commissioner. (La.R.S. 51:703, as am'd Act 722 of 1985).

Records.

Dealers, salesmen and investment advisors must keep records of all security transactions as required by Commissioner. (La.R.S. 51:703, as am'd Act 722 of 1985).

Liabilities.

Any person who (a) offers or sells a security in violation of section requiring registration of broker-dealer or agent-salesmen, section requiring registration of security or sections requiring registration by qualification or notification, except sales of exempt securities or exempt transactions; (b) offers or sells a security in violation of Act or a security the registration of which was revoked or suspended; or (c) offers or sells a security by means of an untrue statement of a material fact or by omitting to state a material fact, is liable to purchaser for consideration paid, interest, costs and attorney fees, less income received from security. Liability may extend to persons controlling seller, partners, officers or directors of seller, employees and broker-dealers or agents materially aiding in sale. Suit must be brought within two years after contract of sale. (La.R.S. 51:712-714, as am'd Act 722 of 1985).

Uniform Simplification of Fiduciary Security Transfers Act adopted. (La.R.S. 9:3831-3840).

Uniform Securities Ownership by Minors Act not adopted.

3.25 STATUTE OF FRAUDS:

See topic 3.16 Frauds, Statute of.

3.26 [RESERVED]

3.27 WAREHOUSEMEN:

Art. VII of Uniform Commercial Code has been adopted as "Commercial Laws—Documents of Title". (La.R.S. 10:7-101 et seq., added Act 164 of 1978). See topic 3.09 Commercial Code.

Licensing.

Before transacting business, a proprietor lessee, or manager of a warehouse must procure from district court of parish where warehouse is situated a certificate that he is transacting business as public warehouseman under laws of state, which shall be issued upon written petition stating locality, name of warehouse or warehouses, name of each person individually or member of firm interested as owner or principal in its management, or names of president, secretary and treasurer if a corporation. Said certificate revocable by court upon summary proceedings upon written complaint to court setting forth particular violation. Bond must be given with good and sufficient security approved by court for $5,000, or $25,000 in municipality of 50,000 or more population, which must be renewed every two years from date of approval. When one bond of $25,000 has been furnished no further bond need be furnished to qualify in another parish or municipality. There is penalty for every day business is carried on without certificate. In addition, warehouseman who violates any provisions of law is guilty of criminal offense. (La.R.S. 54:111-117).

Reports.

Operator of warehouse must file with Supervisor of Public Accounts detailed monthly reports on or before fifteenth day of month and may not engage in business of selling or distributing any goods subject to excise, license or privilege taxes. (La.R.S. 54:182).

4 CITIZENSHIP

4.01 ALIENS:

Aliens, except enemy aliens (La.R.S. 42:32 as am'd Act 472 of 1974), are not subject to restrictions.

See, however, category Employment, topic Labor Relations.

5 CIVIL ACTIONS AND PROCEDURE

5.01 ACCORD AND SATISFACTION:

Compromise is contract under which parties, through concessions made by one or more of them, settle dispute or uncertainty concerning obligation or other legal relationship. (C. C. 3071, as am'd Act 138 of 2007). Compromise must be either in writing or recited in open court in form susceptible of being transcribed from record of proceedings. (C. C. 3072, as am'd Act 138 of 2007). When compromise effects transfer or renunciation of rights, parties must have capacity prescribed for such action and contract must meet form requirements for such action. (C. C. 3073, as am'd Act 138 of 2007). Civil consequences of act giving rise to criminal action may be compromised, but criminal action is not extinguished thereby. (C. C. 3074, as am'd Act 138 of 2007). Compromise may relate to patrimonial effects of person's civil status but status cannot be changed by compromise. (C. C. 3074, as am'd Act 138 of 2007). Compromise entered into by one of multiple persons with interest in same matter does not bind others, nor can it be raised by them as defense, unless compromised matter is solidary obligation among them. (C. C. 3075, as am'd Act 138 of 2007). Compromise resolves only those disputes parties intended to resolve, including necessary consequences of what they express. (C. C. 3076, as am'd Act 138 of 2007). Compromise does not affect rights subsequently acquired by party, unless expressly included. (C. C. 3078, as am'd Act 138 of 2007). Compromise may be made when claimant of disputed or unliquidated claim accepts payment that other party tenders with express written condition that acceptance of payment will extinguish obligation. (C. C. 3079, as am'd Act 138 of 2007). Compromise precludes parties from bringing subsequent action based on compromised matter. (C. C. 3080, as am'd Act 138 of 2007). Compromise does not effect novation of antecedent obligation; when party fails to perform compromise, other party may act either to enforce it or to dissolve it and enforce original claim. (C. C. 3081, as am'd Act 138 of 2007). Compromise may be rescinded for error, fraud or other grounds for annulment of contracts, but not on grounds of error of law or lesion. (C. C. 3082, as am'd Act 138 of 2007). Compromise effected prior to filing suit suspends running of prescription of settled claims; if compromise is rescinded or dissolved, prescription on settled claim begins to run again from time of rescission or dissolution. (C. C. 3083, as am'd Act 138 of 2007).

Content of compromise may be unenforceable if it conceals public hazard or information related to it, unless information is trade secret. (C.C.P. 1426, as am'd Act 49 of 1995, eff. in prospective manner only Aug. 15, 1995).

Dation en paiement (giving in payment) is an act by which debtor gives a thing to creditor in payment of a sum due (C. C. 2655); delivery is essential (C. C. 2656); made by insolvent husband to wife to replace her dotal and paraphernal effects is valid as against other creditors and is favored by law (22 La. Ann. 327).

Pleading.

Defense need not be specially pleaded as separate defense; rather, it should be pleaded by use of peremptory exception of res judicata. (C.C.P. 927, as am'd Act 824 of 2008, eff. Jan. 1, 2009).

5.02 ACTIONS:

Actions are divided into personal, real and mixed. (C.C.P. 422).

Personal action is one brought to enforce obligation against obligor personally and independently of property which he possesses. This action is grounded on one of four causes which give rise to personal obligations, which are contracts, quasi contracts, offenses and quasi offenses. (C.C.P. 422).

Real actions are those brought to enforce rights in, to, or upon immovable property. Three principal real actions are petitory, possessory and hypothecary. Petitory action is brought by person not in possession claiming title to real estate against person who is in possession of property or claims ownership adversely. (C.C.P. 3651, 3652). Possessory action is brought by person who claims to be restored to or maintained in possession of real estate against party who has evicted him or disturbed his possession. (C.C.P. 3655, 3656). Hypothecary action is brought by creditor against property which has been hypothecated to him by his debtor, in order to have it seized and sold for payment of his debt. (C.C.P. 3721-3743). Mortgagee may sue any person who, without mortgagee's consent, buys, sells or otherwise converts mortgaged immovables. (La.R.S. 9:5382, am'd Act 107 of 1980).

Equity.

All actions are brought in the same courts and no distinction is made between law and equity. Louisiana has never adopted a separate court of equity.

Conditions precedent to bringing an action differ according to the nature of the action. Plaintiff is not required to make amicable demand upon debtor unless required by particular statute. (C.C.P. 421). His failure to do so can only affect his right to claim costs of court.

An action is commenced by filing a petition to a court of competent jurisdiction. (C.C.P. 421). See topic 5.17 Pleading; also topic 5.20 Process.

Parties.

An action can only be brought by one having a real and actual interest which he asserts. (C.C.P. 681). Necessary and indispensable parties are defined and factors for their characterization are provided. (C.C.P. 641-646, as am'd Act 662 of 1995). Persons other than those made parties to original action may be made parties to reconventional (counterclaim) demand, whether this be permissive or compulsory joinder. (C.C.P. 1064, as am'd Act 858 of 1995).

Class Actions.

Effective July 1, 1997 and applicable only to actions filed on or after effective date, class action provisions amended to track closely Rule 23 of Federal Rules as it stood in 1997. Prerequisites to any class action are (1) numerosity such that joinder is impracticable; (2) common questions of law or fact; (3) claims or defenses of representatives are typical; (4) representatives will fairly and adequately represent class; and (5) class definition may be made objectively in terms of ascertainable criteria, such that court may determine constituency of class for purposes of conclusiveness of any rendered judgment. (C.C.P. 591, as am'd Act 839 of 1997, eff. July 1, 1997). Three forms of federal class actions are recognized, viz., limited fund or inconsistent adjudication class under FRCP 23(b)(1); class appropriate for final injunctive or declaratory relief under FRCP 23(b)(2); and class concerning common questions of law or fact that predominate over individual, making class action superior vehicle to resolve controversy, as under FRCP 23(b)(3). (C.C.P. 591, as am'd Act 839 of 1997, eff. July 1, 1997). Fourth type of class action is also recognized, when parties to settlement request certification under third category above, even though requirements are not otherwise met. (C.C.P. 591[B][4], as am'd Act 839 of 1997, eff. July 1, 1997). Provisions consistent with Federal Rules of Civil Procedure for certification procedure, case management, judgment settlement and the like. Specific provisions on suspension of statute of limitation while class action request is pending or while action after certification is pending; specific provisions for derivative actions. (C.C.P. 592 through 596, 611 through 617, as am'd Act 839 of 1997, eff. July 1, 1997). Court is required to give written findings of fact and reasons for judgment when certifying or declining to certify class, provided request is made within ten days of ruling, and such rulings are appealable either suspensively (suspending effect of judgment) or devolutively (not suspending judgment). (C.C.P. 592, as am'd Act 205 of 2005, eff. Jan. 1, 2006).

Intervention.

Any third party may intervene in a suit when he has an interest in the success of either party to the suit or an interest opposed to both. (C.C.P. 1091).

Interpleader.

Concursus proceeding may be invoked to require persons having competing or conflicting claims to money, property, or mortgages or privileges on property to assert their respective claims against all other parties to proceeding. (C.C.P. 4651).

Third Party Practice.

Defendant in principal action or in reconvention may implead any person, including a co-defendant who may be liable to him for all or part of principal demand. As to demands connected to principal demand, third party defendant may reconvene against plaintiff or third party plaintiff and plaintiff may assert demand against third party defendant. Co-party may bring cross-claim against any other co-party. (C.C.P. 1071 et seq., added Act 63 of 1983).

Joinder.

Separate actions may be cumulated or joined in same demand, provided one of them does not preclude, or is not inconsistent with, another and each action is brought in proper venue. (C.C.P. 461-463).

Severance.

Where defendants are sued on the same cause of action, severance is within the discretion of the trial judge. (C.C.P. 465).

Splitting cause of action is not permitted; that which is not demanded in the first action will be held to be waived. (C.C.P. 425).

Consolidation of suits before same court and involving common issues may, in discretion of court, be ordered. (C.C.P. 1561).

Abatement and Revival.

Death of party does not abate action unless it is strictly personal to him. (C.C.P. 428). Legal successor is substituted for deceased party by motion. (C.C.P. 801-804). Succession representative may bring “survival action” for damages of deceased tort victim if statutory representatives do not survive him. (C.C. 2315.1, as am’d Act 675 of 1987).

Abandonment.

Where plaintiff, at any time before final judgment, allows three years to elapse without taking any steps to prosecute his demand, he is considered as having abandoned same. Rule does not apply to succession proceeding: (1) Which has been opened, (2) in which representative has been appointed, or (3) in which testament has been probated. Provision operative without formal order, but court may authorize contradictory hearing before dismissal. Supporting affidavit of inactivity must be filed, and motion must be served by sheriff on plaintiff, who has 30 days from service to move to set aside dismissal. Discovery is deemed to be step that defeats showing of inactivity. Time period to file motion to set aside dismissal and then to appeal denial of motion, and time period to appeal dismissal without filing motion are established. (C.C.P. 561, as am’d Act 545 of 2003). Special five-year period for abandonment applies if Hurricane Katrina or Rita is shown to have been cause of failure to take steps in prosecution and action was not already abandoned prior to Aug. 26, 2005. (C.C.P. 561[A], as am’d Act 361 of 2007).

Trials.

Separate trials of liability and damages are permitted. (C.C.P. 1562, added Act 534 of 1983). Preference in scheduling may be given to party over 70 or terminally ill. (C. C. P. 1573, added Act 106 of 1990).

Jury Trials.

Jury trial may be had in civil matters when either party timely prays therefor not later than ten days after service of last pleading directed to such issue. Jury trial not available in: (1) Suit where no individual petitioner's cause of action exceeds $50,000; (2) suit on unconditional obligation to pay specific sum of money unless defense is forgery, fraud, error or failure of consideration; (3) summary, executory, probate, partition, mandamus, habeas corpus, quo warranto, injunction, concursus, worker's compensation, emancipation, tutorship, interdiction, curatorship, legitimacy, filiation, annulment or divorce proceeding; (4) proceeding to determine custody, visitation, alimony or child support; (5) proceeding to review action by administrative or municipal body; (6) other cases where jury trial is specifically denied by law, such as those against political subdivisions (which, however, may choose to waive prohibition). (C.C.P. 1732 as am'd Act 1363 of 1999; La.R.S. 13:5101 et seq; La.R.S. 13:5105[c], as am'd Act 598 of 1995; La.R.S. 13:5105[D], as am'd Act 63 of 1996 First Ex. Sess.). Bond for jury costs must be provided no later than 60 days before trial. (C.C.P. 1734[A], as am'd Act 28 of 2005). Parties may stipulate that fewer than all issues are to be tried by jury (C.C.P. 1736, as am'd Act 534 of 1983), and separate trials of liability and quantum may be ordered (C.C.P. 1562, as am'd Act 534 of 1983). Court may order, with consent of all parties, that separate trial on damages precede trial on liability. (C.C.P. 1562, as am'd Act 289 of 1985). Similarly, separate trial on insurance coverage may be held unless material factual dispute as to insurance coverage duplicates issue relative to liability or quantum; separate trial of insurance coverage is to court alone. (C.C.P. 1562[D], added Act 72 of 1992). Peremptory challenges to jurors must be made in side bar conference. (C.C.P. 1766 [D], added Act 703 of 1990). Ordinary jury is 12 unless parties stipulate six. (C.C.P. 1761, as am'd Act 534 of 1983). If jury is 12, nine must concur unless parties stipulate otherwise; if jury is six, five must concur unless parties stipulate otherwise. (C.C.P. 1797, as am'd Act 534 of 1983). Directed verdicts and judgments n.o.v. are permitted, and jury verdict may take form of general verdict, special verdict or general verdict accompanied by answers to interrogatories. (C.C.P. 1810-1813, as am'd Act 534 of 1983). Additur and remittitur are also permitted. (C.C.P. 1814, added Act 173 of 1989). Court may on its own motion or motion of any party grant mistrial after hearing on issue. (C.C.P. 1631[C], added Act 411 of 1995). Jury's findings are not binding on appellate court (see topic 5.03 Appeal and Error), and thus jury trial use is more limited than in other states. Compulsory reconventional demand (counterclaim), triable by jury may be so tried even if main demand is not triable by jury. (C.C.P. 1731, as am'd Act 661 of 1995).

Jurors may have copies of instructions in deliberation room, and may take notes and have those in deliberation room as well. (C.C.P. 1792 and 1794, as am'd Act 668 of 1997).

Limitation of.

See topic 5.16 Limitation of Actions.

Small Claims.

See category 6 Courts and Legislature, topic 6.01 Courts.

Administration.

See category 13 Estates and Trusts, topic 13.08 Executors and Administrators.

Direct Actions.

See category 23 Transportation, topic 23.01 Motor Vehicles, subhead Direct Actions.

5.03 APPEAL AND ERROR:

Appellate jurisdiction of Supreme Court extends only to: (1) Cases in which law or ordinance has been declared unconstitutional and (2) cases in which defendant has been convicted of capital offense and death penalty has actually been imposed. (Const., art. 5, § 5, as am'd Act 844 of 1980, voter approved Nov. 11, 1980). When constitutionality of statute is at issue, attorney general must be given notice. (La.R.S. 13:4448, added Act 1004 of 1985).

Courts of Appeal.

Except as otherwise provided, appeal lies to courts of appeal in all cases of which Supreme Court is not given exclusive appellate jurisdiction. Appeal from family, juvenile, parish and city courts as well as district courts lies to courts of appeal. Appeal from justice of peace courts lies to parish court or if none, district court of parish where justice of peace court is situated. All appeals are heard on record made up in trial court, with exception of appeals from justice of peace courts, which are tried de novo without further appeal allowed. (C.C.P. 5001-5002, as am'd Act 46 of 1979; Const., art. 5, § 10).

How Taken.

Appeal may be taken either by motion in open court, by written motion or by petition. (C.C.P. 2121). District court judges must act on requested order of appeal within seven days after submission and city court judges must act within three days of submission. (La.R.S. 13:4207, as am'd Act 82 of 2007).

Time for Taking.

Limitation for taking suspensive appeal from judgment of district court is 30 days from either: (1) Expiration of delay for applying for new trial (seven days from signing of judgment or, when notice of judgment is required by C.C.P. Art. 1913, from mailing of notice of judgment exclusive of legal holidays); (2) refusal to grant new trial where notice thereof not required; or from (3) date of mailing of notice of refusal to grant new trial or judgment NOV, when notice required. (C.C.P. 1914[C], as am'd Act 657 of 1995; C.C.P. 2123). Usual limitation for taking devolutive appeal is 60 days from applicable date as above; appellees seeking to have judgment modified, revised or reversed as to any other party may take appeal within usual delays or within ten days of mailing by clerk of first devolutive appeal in case, whichever is later. (C.C.P. 2087, as am'd Act 174 of 1977). When one party has filed motion for new trial or motion for judgment NOV, delays for appeal do not begin for any party until they run for party requesting such post-judgment relief. (C.C.P. 2087, as am'd Act 658 of 1995). Appeal periods are suspended if case is removed to federal court and resume upon remand. (C.C.P. 2087[D] and 2123[C], as am'd Act 609 of 1997).

Appeals from parish, city or justice of peace courts, whether suspensive or devolutive, must be taken within ten days from judgment or from service of notice of judgment where necessary. (C.C.P. 5003, added Act 46 of 1979).

Person who could have intervened in trial court may appeal, whether or not any other appeal has been taken. (C.C.P. 2086).

Perfecting appeal divests trial court of jurisdiction except for certain ministerial matters, including converting suspensive appeal to devolutive appeal for failure to post supersedeas bond. (C.C.P. 2088, as am'd Act 658 of 2008).

Appeals taken before disposition of all posttrial motions are premature, but become effective upon denial of such motions. (C.C.P. 2087[D], 2123[C], added Act 1056 of 1997).

Unpublished opinions of supreme court and courts of appeal must be posted on court's website and may be cited as authority using case name and docket number. (C.C.P. 2168, added Act 644 of 2006).

Stay of Proceedings.

Suspensive appeal stays execution; devolutive appeal does not. (C.C.P. 2123, 2124).

No suspensive appeal allowed from judgment appointing or removing tutor or curator of minor, interdict or absentee or of a vacant succession or other administrator of succession nor from judgment relating to custody or alimony. (C.C.P. 2122, 4068, 2974, 3943, 4548).

Only suspensive appeal may be taken from judgment granting or refusing annulment of marriage, separation or divorce. (C.C.P. 3942).

If Supreme Court denies application for writ of certiorari, or denies application for re-hearing of its own decision, it may stay execution of appellate court judgment pending timely application for certiorari or appeal to U. S. Supreme Court. (C.C.P. 2166 and 2167, as am'd Act 163 of 1982).

Bond.

Security to be furnished for suspensive appeal from: (1) Money judgment shall be equal to amount of judgment, including interest allowed by judgment to date security is furnished; (2) judgment distributing fund in custodia legis shall be sufficient to cover costs; (3) all other judgments shall be amount sufficient to satisfy judgment and damages resulting from suspension of execution. Where amount of judgment exceed $150 million (except for litigation related to Tobacco Master Settlement Agreement or cases in which state is judgment creditor), court may fix security in amount sufficient to protect rights of judgment creditor while preserving favored status of appeals. (C.C.P. 2124, as am'd Act 450 of 2001, eff. June 19, 2001). No security is required for devolutive appeal. (C.C.P. 2124, am'd Act 307 of 1989; see also La.R.S. 23:1351, as am'd Act 707 of 1979). Security may be by bond or by encumbrance of immovable property. (C.C.P. 5121.1, added Act 200 of 1984).

Scope of Review.

All appeals to Supreme Court are on both law and facts except in criminal cases or otherwise provided by Constitution. (Const., art. 5, § 5). Appeals to Court of Appeals are on both law and fact except as limited to law by Constitution or as provided by law with regard to administrative agency decisions. (Const., art. 5, § 10).

Judgment on Appeal.

Appellate court may render any judgment which is just, legal, and proper on record. (C.C.P. 2164). In civil matters only, when judgment of district court is reversed or modified, and one of three judges dissents, case must be heard by panel of at least five judges and majority must concur to render judgment. (Const., art. 5, § 8, as am'd Act 844 of 1980, voter approved Nov. 11, 1980).

Rehearing.

Within 14 days of rendition of judgment by appellate court or Supreme Court in criminal matter, or within 14 days of mailing of notice of judgment of Court of Appeal in civil matter, rehearing may be requested. (C.Cr.P. 922, C.C.P. 2166, as am'd Act 451 of 1983).

Abandonment of appeal takes place when parties fail to take step in prosecution or disposition for period of one year. (C.C.P. 561, 2165; Unif. Rules, Cts. of App., VII).

Fees.

Filing fee in civil cases before Supreme Court is $165. (La.R.S. 13:126, as am'd Act 104 of 1986). Filing fee in courts of appeal for filing record of appeal is $100; for writ application, $50;

for rehearing application, $70. (La.R.S. 13:352, as am'd Act 104 of 1986).

5.04 BONDS:

All bonds required either by law or by order of court to be furnished in any judicial proceeding may be made payable to the clerk of court. Personal surety may furnish immovable property in parish where proceeding was brought, as security for bond for civil court costs including jury costs; surety must present to clerk assessment certificate, homestead exemption waiver, and mortgage executed in clerk's favor. (La.R.S. 13:843.2, added Act 413 of 1983).

When litigant has furnished a bond that is insufficient in amount or incorrect by reasons of errors or omissions, he may correct such insufficiency, error or omission and furnish new or additional bond; any new bond so furnished and any supplementary or additional bond has the same effect as to principal and surety as the original bond. (C.C.P. 5124). Adverse party may rule party furnishing bond into court to show cause why bond should not be deemed insufficient or invalid. (C.C.P. 5123).

If original bond is found insufficient or invalid, party furnishing same has right within four judicial days thereafter to furnish new or supplemental bond. Should new bond be found insufficient or invalid, party furnishing it is entitled to furnish second new or supplemental bond within four days. If that bond is insufficient or invalid, party furnishing it may not correct defects. (C.C.P. 5124-5126).

Sureties.

Bond may not be accepted unless each surety thereon makes oath that he is worth over and above his debts and obligations in assets that can be subjected to levy under execution the amount for which he has bound himself, and unless principal makes oath that he is informed and believes that this is the case; this does not apply to surety companies authorized to do business in the state. When party furnishing bond is plaintiff, a cash bond may be furnished in lieu of other security. (C.C.P. 5121-5122).

Sureties on all bonds must pay where principal fails to pay promptly or within 30 days from amicable demand in writing, or be penalized with 10% attorneys' fees, if suitor recovers full amount claimed. (La.R.S. 9:3902).

No bond is required for notary who is attorney. (La.R.S. 35:72, as am'd Act 943 of 1988, eff. Aug 1, 1988).

Enforcement.

Any person in interest may sue upon a bond furnished in a judicial proceeding. (C.C.P. 5121). Debtor and surety may be joined in the same suit. (C. C. 3051).

5.05 CERTIORARI:

The Supreme Court, courts of appeal, and each of the judges thereof, subject to review by the court of which he is a member, and each district judge throughout the state may in aid of their respective jurisdictions, original, appellate, or supervisory, issue writs of certiorari. (Const., art. 5, § 2).

Supreme Court may issue writ of certiorari to any state court in aid of its supervisory jurisdiction. (Const., art. 5, § 5).

Each Court of Appeal has power to certify to Supreme Court any question of law arising in any case pending before it, and thereupon Supreme Court may either give binding instructions or decide case upon whole record. (Const., art. 5, § 11). This power is rarely used.

Proceedings.

Party wishing to obtain the writ addresses his sworn petition to the higher tribunal stating the reasons for which he seeks the writ annexing thereto certified copy of inferior judge's order or ruling, judge's reasons therefor, and pleadings, and copy of petition must be mailed to inferior judge and adverse parties. (La. Sup. Ct. Rule X). Thirty-day period from final action of appellate court to seek writ of certiorari, or ten days from clerk's notice of filing such application by another party, whichever is later. (C.C.P. 2166, as am'd Act 587 of 2001).

Stay.

If Supreme Court denies application for writ of certiorari, it may stay execution of appellate court judgment pending timely application for certiorari or appeal to U. S. Supreme Court. Similar authority if it denies application for re-hearing of own decision. (C.C.P. 2166 and 2167, as am'd Act 163 of 1982).

5.06 CHARITABLE IMMUNITY:

See topic 5.09 Damages.

5.07 COMMISSIONS TO TAKE TESTIMONY:

See topic 5.11 Depositions and Discovery.

5.08 COSTS:

In New Orleans all costs must be paid in advance before the services required are performed. Elsewhere a deposit in an amount established by local rules is required at time of filing suit.

Unless the judgment provides otherwise costs are paid by the party cast. (C.C.P. 1920).

Appellate court may tax costs of both courts or any part thereof against any part. (C.C.P. 2164).

Security for Costs.

The defendant can require security for costs, the amount to be fixed by the court, and should the plaintiff fail to furnish security as ordered by the court his suit will be dismissed as in case of nonsuit. In parishes outside of Orleans, the demand must be made before pleading. (La.R.S. 13:1215).

Forma Pauperis.

Bond for costs or current payment of costs may be dispensed with in case of poverty of litigant. (C.C.P. 5181-5188).

5.09 DAMAGES:

Generally, Louisiana courts award damages recognized by common law. However, punitive or exemplary damages are not awarded except under specific statutory provisions therefor. Such damages are awardable: (1) Upon proof that injuries upon which action is based were caused by wanton or reckless disregard for rights and safety of others by defendant whose intoxication while operating vehicle was cause in fact of resulting injuries (C.C. 2315.4); (2) upon proof that injuries were caused by wanton and reckless disregard for rights and safety of claimant through criminal sexual activity which occurred when victim was 17 or younger, regardless of whether dependent was prosecuted for act (C.C. 2315.7, added Act 831 of 1993, eff. June 22, 1993); or (3) upon proof that sale or distribution of illegal controlled substance or participation in its marketing was in wanton or reckless disregard for rights, health, and safety of others (La.R.S.

9:2800.76, added Act 719 of 1997). Damages may include loss of consortium, service and society, recoverable by same persons who would have had cause of action for wrongful death of injured person (mutually exclusive preferred classes in order of: [1] Surviving spouse or children; [2] parents; [3] siblings; [4] grandparents). Father or mother who have abandoned child, as defined, has no such action. (C.C. 2315, 2315.1, 2315.2, latter two provisions as am'd Act 1317 of 1997, eff. July 15, 1997 and applicable only to causes of action arising on or after that date). They may also include, as to specific relatives and under specific conditions, damages for experiencing harm to others. (C.C. 2315.6, added Act 782 of 1991). Damages include sales taxes paid by owner on repair or replacement of property damaged. (C.C. 2315, as am'd Act 478 of 2001). Contractual provisions for liquidated damages are enforceable, except that they may be held to increase interest charges on contracts to pay money to extent of violating law of usury. Except in proceedings on contracts, promissory notes, open accounts, other negotiable instruments, for alimony or child support, on tax claim or in garnishments, specific amount of damage may not be pleaded. (C.C.P. 893, 1032 and 1703, as am'd Act 443 of 1988, eff. Jan. 1, 1989).

Sovereign Immunity.

No immunity for state, state agency, nor political subdivision from suit and liability in contract or injury to person or property. (Const., Art. 12, § 10). However, by series of special legislative provisions, public defendants enjoy special treatment in personal injury matters, viz., structured payment plans (La.R.S. 13:5114, added Act 450 of 1985); limited vicarious liability based on employment relationships (La.R.S. 42:1441.1-1441.4, added Act 451 of 1985); limitation on amount awardable to $500,000 except medical care and loss of earnings, with limitation considered to be for all claims for given injury or death, regardless of number of claimants (La.R.S. 13:5106 and 5109, as am'd Act 1 of 2005, eff. May 27, 2005); and limitations on strict liability rules (La.R.S. 9:2800, added Act 454 of 1985).

Charitable Immunity.

Immunity denied. (289 So.2d 88). No person rendering care gratuitously and in good faith at scene of emergency, or who moves injured person to place of medical care, is liable for damages, but immunity does not apply when damages result from business relationship, intentional or gross negligence, and immunity is personal to assisting person. (La.R.S. 9:2793, added Act 600 of 1975). No nurse, physician, dentist or surgeon who renders gratuitous service at scene of emergency is liable for any act or omission in rendering such service. Any person volunteering under auspices of designated relief agencies or employed by them, and any health care provider, rendering emergency post-hurricane services or care similarly immune, unless there is gross negligence or wanton misconduct. (La.R.S. 9:2793.3, added Act 331 of 2007). There are numerous other qualified immunities, so that actions are permitted only upon showing of gross negligence or wanton conduct. (La. R.S. 9:2793.9, as am'd Act 318 of 2008, religious organizations assisting after hurricanes); (La. R.S. 9:735.2, as am'd Act 480 of 2008, health care providers anywhere in state during declared emergency); (La. R.S. 9:735.3 and 37:1731.1 added Acts 538 and 539 of 2008, similar subject).

Dram Shop Liability.

Liability denied. Holder of liquor permit or his employees is not liable to person of legal age for injury or death to him or others caused by intoxication. Social host is similarly treated. (La.R.S. 9:2800.1, added Act 18 of 1986, eff. June 6, 1986).

Firearms.

Liability generally denied. (La.R.S. 9:2800.60, added Act 1299 of 1999, eff. July 12, 1999).

Long-Term Food Consumption.

Leading to obesity, weight gain or health condition, denied. (La.R.S. 9:2799.6, added Act 158 of 2003, eff. June 2, 2003).

Medical malpractice damages may be limited upon qualification with Patients' Compensation Fund, and there are special provisions with respect to future medical care expenses and settlements in that regard. Actions for such damages must be brought first before medical malpractice review panel. (La.R.S. 40:1299.39 et seq., as am'd Act 306 of 2004). Blood and tissue bank services are subject to special regulation, and are not considered as selling product or subject to strict liability rules. (C.C. 2322.1 and T-9, § 2797, as am'd Act 1091 of 1990).

No-Fault Insurance.

See category 23 Transportation, topic 23.01 Motor Vehicles, subhead No-Fault Insurance.

Uniform Contribution Among Tortfeasors Act.

Not adopted.

Comparative Negligence Rule.

C.C. Arts. 2103, 2323 and 2324, and C.C.P. Art. 1811 provide for "pure" comparative negligence. As amended in 1996, C.C. Arts. 2323 and 2324 provide in most cases for several rather than solidary liability with each wrongdoer liable only for his percentage of fault, regardless of immunity or insolvency of others. Same percentage of fault is applicable to subrogee, when it has been applied to subrogor. (C.C. 2324.2, added Act 771 of 1989, eff. July 9, 1989).

Complete bar of recovery is applicable, however, when person seeking damages had blood alcohol content of 0.08% or more while operating car, boat or aircraft and was more than 25% negligent as result and that negligence was contributing factor. (La.R.S. 9:2798.4, as am'd Act 394 of 2004).

See categories 3 Business Regulation and Commerce, topic Interest, subheads Maximum Rate, and Discount; Estates and Trusts, topic Death, subhead Action for Death.

5.10 DECLARATORY JUDGMENTS:

See topic 5.15 Judgments.

5.11 DEPOSITIONS AND DISCOVERY:

Rules governing depositions and discovery have been adopted from pertinent provisions of Federal Rules of Civil Procedure. Articles comprise C.C.P. 1429-1456.

Discovery through depositions may be obtained regarding any matter not privileged which is relevant to subject matter involved in pending action, whether it relates to claim or defense of party seeking discovery or to claim or defense of any party, including existence, description, nature, custody, condition, and location of any books, documents, or other tangible things and identity and location of persons having knowledge of any discoverable matter. It is not ground for objection that information sought will be inadmissible at trial if information sought appears reasonably calculated to lead to discovery of admissible evidence. (C.C.P. 1422).

Attorney of record representing party may not be deposed except under extraordinary circumstances, and then only by court order after contradictory hearing. (C.C.P. 1452, as am'd Act 767 of 1981).

Objections during deposition must be stated concisely in non-argumentative and non-suggestive manner, and counsel must cooperate with and be courteous to each other and witness and otherwise conduct themselves as if they were in open court, and they are subject to contempt power of court. (C.C.P. 1443, as am'd Act 365 of 2004).

Outside of State for Use within State.

All provisions relative to taking of depositions upon oral examination or depositions upon written interrogatories apply equally whether deposition is to be taken in state or in another state, except that compulsory process for appearance of deponent is governed by law of place where deposition taken. (C.C.P. 1435).

Depositions de bene esse may be taken upon giving reasonable notice in writing to every other party to the action. Notice should state time and place for taking deposition, and name and address of each person to be examined. After notice is served, upon motion seasonably made by any party or by person to be examined and upon notice and for good cause shown, court in which action is pending may make an order that deposition shall not be taken or that it may be taken only at some designated time or place other than that stated in notice, or that it may be taken on written interrogatories, or that certain matters shall not be inquired into, or that scope of examination shall be limited to certain matters, or that examination shall be held with no one present except parties to action and their officers or counsel, or that after being sealed, deposition shall be opened only by order of court, or that secret processes, developments, or research need not be disclosed, or that parties shall simultaneously file specified documents of information enclosed in sealed envelopes to be opened as directed by court; or court may make any other order which justice requires to protect party or witness from annoyance, embarrassment, oppression or undue expense.

The officer before whom the deposition is to be taken must put the witness on oath and must personally, or by someone acting under his direction and in his presence, record the testimony of the witness. Such officer may be shorthand or court reporter, or notary. Testimony must be taken stenographically and transcribed unless parties agree otherwise. All objections made at time of examination to qualifications of officer taking deposition, or to manner of taking it, or to evidence presented, or to conduct of any party, and any other objection to proceedings must be noted by officer upon deposition. Evidence objected to must be taken subject to objections. In lieu of participating in oral examination, parties served with notice of taking deposition may transmit written interrogatories to officer who must propound them to witness and record answers verbatim.

When the testimony is fully transcribed, the deposition must be submitted to the witness for examination and must be read to or by him unless such examination and reading are waived by the parties. Any changes in form or substance which the witness desires to make must be entered upon the deposition by the officer with the statement of the reasons given by the witness for making them. The deposition must then be signed by the witness unless the parties by stipulation waive the signing, or the witness is ill or absent from the parish or county where the deposition was taken and cannot be found, or refuses to sign. If the deposition is not signed by the witness, the officer must sign it and state on the record the fact of the waiver, or of the illness or absence of the witness, or the fact of the refusal to sign, together with the reason, if any, given therefor. Video deposition is exempt from reading and signing requirements. (C.C.P. 1445, as am'd Act 295 of 1990).

The officer must certify on the deposition that the witness was duly sworn by him and that the deposition is a true record of the testimony given by the witness. He must then securely seal the deposition in an envelope, endorsed with the title of the action and marked "Deposition of (here insert name of witness)" and promptly send it by registered or certified mail to party at whose request deposition was taken, who shall become custodian of deposition. Original deposition shall not be filed in record, but made available to all other parties for inspection or copying. (C.C.P. 1426, 1433, 1434, 1436, 1445, and 1446, as am'd Act 388 of 1989, eff. June 30,

1989).

Depositions upon written interrogatories may be taken after commencement of action by any party of any person including party. Party desiring to take deposition upon written questions shall serve them upon every other party with notice stating name and address of person who is to answer them, if known, and if name is not known, general description sufficient to identify him or particular class or group to which he belongs, and name or descriptive title and address of officer before whom deposition is to be taken. Deposition upon written questions may be taken of public or private corporation or partnership, or association, or government agency in accordance with provisions of C.C.P. 1442. Within 30 days after notice and written questions are served, party may serve cross-questions upon all other parties. Within ten days after being served with cross-questions, party may serve redirect questions upon all other parties. Within ten days after being served with redirect questions, party may serve recross-questions upon all other parties. Court may, for cause shown, enlarge or shorten time periods stated above. (C.C.P. 1448).

Copy of notice and copies of all questions served shall be delivered by party taking deposition to officer designated in notice, who shall proceed promptly to take testimony in response to questions and to prepare, certify, and file or mail deposition, attaching thereto copy of notice and questions received by him. When deposition is filed party taking it shall promptly give notice thereof to all other parties. (C.C.P. 1449).

When answer to interrogatory may be derived from business records as easily by serving party as by party served, it is sufficient answer to specify and make available those records, with sufficient particularity to permit serving party to locate information. (C.C.P. 1460, as am'd Act 450 of 1982).

Depositions may be taken by telephone or other remote electronic means if ordered by court or agreed upon by every party to suit. (C.C.P. 1436.1, as am'd Act 545 of 2003).

Interrogatories and their answers, document requests and responses, and requests for admissions and responses need not be filed in record except in limited circumstances. (C.C.P. 1474, as am'd Act 388 of 1989, eff. June 30, 1989).

Discovery of written report of expert and time limitations upon such requests are provided. (C.C.P. 1425 as am'd Act 545 of 2003). Drafts of expert reports and communications with testifying expert that would reveal attorney's mental impressions or trial strategy are privileged. (C.C.P. 1425, as am'd Act 140 of 2007).

Perpetuating Testimony.

Person who desires to perpetuate his own testimony or that of another person, regarding any matter that may be cognizable in any court of this state may file verified petition in court in which anticipated action might be brought stating that petitioner expects to be party to action, cognizable in court of this state but is presently unable to bring it or cause it to be brought, subject matter of expected action and his interests therein, facts that he desires to establish by proposed testimony and his reasons for desiring to perpetuate it, names or description of persons he expects will be adverse parties and their addresses so far as known, names and addresses of persons to be examined and substance of testimony which he expects to elicit from each, and shall ask for order authorizing petitioner to take depositions of persons to be examined named in petition, for purpose of perpetuating their testimony. (C.C.P. 1429).

Petitioner shall thereafter serve notice upon each person named in petition as expected adverse party, together with copy of petition, stating that petitioner will apply to court, at time and place named therein, for order described in petition. Notice must be served at least 20 days before hearing, but if such service cannot be made with due diligence, court may make such order as is just for service by publication or otherwise, and shall appoint for persons not served attorney who shall represent them, and in case they are not otherwise represented, shall cross-examine deponent. If any expected adverse party is minor or incompetent, court shall appoint attorney to represent him. (C.C.P. 1430).

If court is satisfied that perpetuation of testimony may prevent failure or delay of justice, it shall make order designating or describing person whose deposition may be taken and specifying subject matter of examination and whether deposition shall be taken upon oral examination or written interrogatories. (C.C.P. 1431). If court is satisfied there is substantial possibility that person whose testimony is sought will die or be too incapacitated to testify before contradictory hearing can be held, it may grant perpetuation of testimony ex parte. (C.C.P. 1430.1, added Act 53 of 1989).

In Aid of Execution of Judgment.

Deposition of third party who may have financial records of judgment debtor may be allowed by court to aid in execution of judgment. (C.C.P. 1433, 1469.2, 2451.1, as am'd and added Act 1000 of 1990).

Production of Documents.

Party may request production of documents for inspection, and party who produces them must do so as they are kept in usual course of business, organized to correspond with categories of request. (C.C.P. 1462, as am'd Act 451 of 1982). Specific provisions govern requests for production of medical records. (C.C.P. 1465.1, added Act 823 of 1993; La.R.S. 13:3715.1, 3715.3, 3734[E] and [F]; C.F. 510[E], all as am'd Act 988 of 1993). No order compelling production of medical records may be granted without certification that copy of proposed order or subpoena has been delivered to custodian of records or his attorney. (C.C.P. 1469.1, added Act 1046 of 1986). Subpoenas to permit inspection of tangible things permitted. (C.C.P. 1463[B], added Act 410 of 1995). Provisions exist for use of privilege logs and with respect to inadvertent disclosures of privileged information. (C.C.P. 1424[C] and [D], added Act 140 of 2007). Provisions also exist for subpoena of and production of electronically-stored information. (C.C.P. 1354, 1355, 1461 – 1462, 1471, as am'd Act 824 of 2008, eff. Jan. 1, 2009).

Before Whom Taken.

Depositions must be taken before an officer authorized to administer oaths, who is not an employee or attorney of any of the parties or otherwise interested in the outcome of the case. (C.C.P. 1434).

Compelling Attendance of Witnesses.

A witness who is a resident of this state may be required to attend an examination to take his deposition only in the parish in which he resides or is employed or transacts his business in person, or at such other convenient place as may be fixed by order of court. A nonresident witness, temporarily in this state, may be required to attend an examination to take his deposition only in the parish that he is served with a subpoena, or at such other convenient place which may be fixed by order of court. (C.C.P. 1436). If witness resides out of this state, the law of the place where the deposition is to be taken will govern the compulsory process to require the testimony and appearance of such witness. (C.C.P. 1435).

Foreign Depositions Act has been adopted. (La.R.S. 13:3821-3824). Additional sections have been added to provide for taking of depositions in another state, territory, district or foreign jurisdiction in a pending action in this state or in a matter cognizable by court of this state, by notice, letter rogatory, or manner stipulated by parties; and, with respect to actions pending in foreign jurisdictions, for compelling of attendance of witnesses or production of documents. (La.R.S. 13:3823, 3824, added Act 37 of 1966).

Form of notary's return (not statutory) usually used where deposition is upon written interrogatories is as follows:

Form

United States of America.

State of . . . . . .

County of . . . . . .

No. . . . . . .

John Doe

. . . . . .District Court for the

vs.

Parish of . . . . . .

Richard Roe.

State of Louisiana.

Answers of . . . . . . of . . . . . ., State of . . . . . ., a witness on behalf of . . . . . ., to Interrogatories and Cross-Interrogatories propounded to him.

I.

In answer to Interrogatory No. 1, the witness says: (Here insert his answers). (Same with each Interrogatory and Cross-Interrogatory).

. . . .

(Witness signs here).

(If there are more than one witness, the answers to the interrogatories and cross-interrogatories are given for each in the form above indicated).

(At the conclusion of the depositions the following return is made by the Notary):

To the Honorable, the . . . . . . District Court for the Parish of . . . . . ., State of Louisiana.

I, ..., a Notary Public duly commissioned and qualified in and for the Parish of . . . . . ., State of . . . . . ., authorized by the laws of said State to administer oaths and to take the depositions of witnesses, hereby certify that I caused to appear before me on the . . . . . . day of . . . . . ., (year) . . . ., ..., the witness for the . . . . in the above cause; that said witness was by me first duly sworn to testify the truth, the whole truth and nothing but the truth in answer to the interrogatories propounded to him; that the attached interrogatories and cross-interrogatories were thereupon propounded to said witness by me, said authority, his answers thereto being reported in my presence in shorthand and thereafter transcribed in typewriting; that the transcript thereof was then read over by the said witness and sworn to and subscribed by him in my presence; that the foregoing pages contain a true and correct transcript of the deposition of said witness as thus given.

I further certify that I am not of counsel or related to any of the parties to this cause, or in the employ of any of them, and that I am in nowise interested in the result of said cause.

In Witness Whereof, I have hereunto affixed my hand and set my seal of office at . . . . . ., Parish of . . . . . ., State of . . . . . ., on this . . . . . . day of . . . . . ., (year) . . . .

. . . .

Notary Public

Use of Deposition.

At trial or upon hearing of motion or interlocutory proceeding, any part or all of deposition, so far as admissible under rules of evidence applied as though witnesses were then present and testifying, may be used against any party who was present or represented at taking of deposition or who had reasonable notice thereof for purpose of contradicting or impeaching testimony of deponent as witness. Deposition of officer, director or managing agent or person designated to testify on behalf of public or private corporation, partnership, or association or government agency which is party, may be used by adverse party for any purpose. Deposition of witness whether or not party may be used by any party for any purpose if court finds that witness is dead, or that witness is at greater distance than 100 miles from place of trial or hearing, or is out of state, unless it appears that absence of witness was procured by party offering deposition, or that witness is unable to attend or testify because of age, illness, infirmity or imprisonment, or that party offering deposition has been unable to procure attendance of witness by subpoena; or upon application and notice that such exceptional circumstances exist as to make it desirable, in interest of justice and with due regard to importance of presenting testimony of witnesses orally in open court, to allow deposition to be used. If only part of deposition is offered in evidence by party, adverse party may require him to introduce any other part which in fairness should be considered with part introduced and any party may introduce any other parts. Substitution of parties does not affect right to use depositions previously taken. When action in any court of state or of U.S. or of any state has been dismissed and another action involving same subject matter is afterward brought between same parties or their representatives or successors in interest, all depositions lawfully taken and duly filed in former action may be used in latter as if originally taken therefor. (C.C.P. 1450).

Non-stenographic Recordation of Testimony.

Testimony at deposition may be recorded by other than stenographic means, in which event notice shall designate manner of recording, preserving and filing deposition, and may include other provisions to insure that recorded testimony will be accurate and trustworthy. If order is made, party may nevertheless arrange to have stenographic transcription made at his own expense. Videotaped deposition may be taken and used just as any other deposition, without court order, but certified shorthand reporter must also be present unless waived by all parties. (C.C.P. 1440, as am'd Act 295 of 1990).

Deposition of an Organization.

Party may in his notice name as deponents public or private corporation or partnership or association, or government agency and designate with reasonable particularity matters on which examination is requested. Organization so named shall designate one or more officers, directors, or managing agents, or other persons who consent to testify on its behalf, and may set forth, for each person designated, matters on which he will testify. Person so designated shall testify as to matters known or reasonably available to organization. This does not preclude taking of deposition by other procedures as authorized by rules. (C.C.P. 1442).

Special Notice.

Leave of court is not required for taking of deposition by plaintiff if notice states that person to be examined is about to go out of state and will be unavailable for examination unless his deposition is taken before expiration of 15-day period ordinarily required, and sets forth facts to support statement. Plaintiff's attorney shall sign notice, and his signature constitutes certification by him that to best of his knowledge, information, and belief, statement and supporting facts are true. If party shows that once he was served with notice under this article he was unable, through exercise of diligence to obtain counsel to represent him at taking of deposition, deposition may not be used against him. (C.C.P. 1439).

Protective Orders.

Under authority of C.C.P. 1426, protective orders are available for specific listed circumstances. However, such orders may not be issued to limit discovery or seal records relating to public hazard or information permitting public to protect against such hazard, unless information is trade secret. (C.C.P. 1426, as am'd Act 49 of 1995, eff. in prospective manner only Aug. 15, 1995).

5.12 EQUITY:

See topic 5.02 Actions.

5.13 EVIDENCE:

Witnesses.

Subject to testimonial privileges generally, and specifically as to husband-wife privilege, attorney-client privilege, physician-patient privilege, priest-penitent privilege, informant-prosecuting attorney privilege, accountant-client privilege, trade secrets and political vote privilege, contained in c. 5 of La. Code of Evidence. Attorney-client and work product privileges extend to prosecutors and attorneys engaged by political subdivisions, in both criminal and civil cases. (C.E. 507 and 508, as am'd Act 23 of 2007).

Specific exception to hearsay rule recognized, permitting introduction of statement offered against party who has engaged or acquiesced in wrongdoing intended to and which did procure unavailability of declarant as witness. (C.E. 805[B][7], added Act 7 of 2009).

A witness either residing or employed in this state may be subpoenaed to attend a hearing or trial held anywhere in the state, but no subpoena issues if witness resides and is employed outside parish and more than 25 miles from court where hearing or trial conducted, unless by order of court accompanied by deposit with court of statutory witness fees and expenses. (C.C.P. 1352, as am'd Act 23 of 1961; La.R.S. 13:3661, as am'd Act 145 of 1991). Live testimony of witness by video link may be ordered under appropriate safeguards if witness is beyond court's subpoena power or for other compelling reasons. (C.C.P. 1633.1, added Act 140 of 2007).

Testimony of proffered experts is regulated and pre-trial hearings to determine suitability are available. (C.C.P. 1425, as am'd Act 787 of 2008, eff. Jan. 1, 2009).

Legislators and legislative personnel cannot be compelled to be witnesses, except in felony cases, during legislative session and at other specified times. (La.R.S. 13:3667.1, am'd Act 177 of 1974, La. R.S. 13:4163, as am'd Act 865 of 2008). Governor cannot be compelled to be witness except under narrow circumstances. (La.R.S. 13:3667.2, added Act 591 of 1977).

Communications to recognized religious authorities relating to matrimonial rights or status may be privileged. (La.R.S. 13:3734.2, added Act 127 of 1983).

Communications to crime-stoppers organizations relative to alleged criminal activities are privileged. (La.R.S. 15:477.1, added Act 790 of 1985).

Witnesses to authentic acts as relates to contracts executed before a notary public must be at least 14 years of age. (C. C. 2234).

Witnesses to wills must be at least 16 years of age and cannot be insane, blind or persons declared incompetent by criminal laws. Deaf persons also cannot be witnesses to wills, except as to statutory wills under La.R.S. 9:2442 and 2444. (C. C. 1591-93, as am'd Act 711 of 1979 and Act 198 of 1983).

See also topic 5.11 Depositions and Discovery.

Presumptions.

Portions of Code of Evidence provide with respect to treatment of presumptions in civil proceedings. (C.E. 301 to 308, added Act 577 of 1997).

5.14 INJUNCTIONS:

Injunctions are granted generally for all causes for which injunctions are allowed in other jurisdictions. (C.C.P. 2298, 3601, 3663, 3944). Temporary restraining order may not be used in place of preliminary injunction to arrest seizure and sale of property. (C.C.P. 2752, as am'd Act 812 of 1988).

The sheriff may be enjoined from paying plaintiff the proceeds of property seized if a third person opposes said payment, alleging he is entitled to be paid in preference to plaintiff. (C.C.P. 2299, as am'd Act 23 of 1961).

If property be seized and a third person claims ownership, such third person may obtain an injunction preventing judicial sale before adjudication of claim of ownership. (C.C.P. 1092, as am'd Act 92 of 1962).

If sale of property by executory process or following seizure under writ of fieri facias, is enjoined, court may award damages, including attorney's fees. (C.C.P. 2751, as am'd Act 302 of 1981; C.C.P. 2298, as am'd Act 301 of 1981).

Courts shall generally issue injunctions in all cases where irreparable injury, loss or damage may otherwise result, or in cases specially provided by law. (C.C.P. 3601, as am'd Act 34 of 1969).

Procedure.

No injunction may issue without notice to the opposite party or parties and an opportunity given for hearing. (C.C.P. 3602).

Upon an application being made to the court for a preliminary writ of injunction, court may order the defendant to show cause on a date and hour fixed not less than two nor more than ten days after service of the order, why a preliminary writ should not issue; but if it appear by verified petition or affidavit to the court that immediate and irreparable injury, loss or damage will result to applicant before notice can be served and hearing had, and upon certification by applicant's attorney of efforts to give notice to adverse party, court may in its discretion issue temporary restraining order upon applicant furnishing bond in such amount as court may fix. Such temporary restraining order must be filed in clerk's office and entered of record. It is effective only from time of service or of actual knowledge of issuance thereof; and must by its terms expire within time prescribed by court, not to exceed ten days, unless extended for like periods, or extended for longer period with consent of restrained party. (C.C.P. 3602-3605, as am'd Act 204 of 1985). However, temporary restraining order issued in conjunction with rule nisi for preliminary injunction prohibiting spouse from disposing or encumbering community property, or harming other spouse or child, or removing child from jurisdiction of court, in suit for separation or divorce remains in force until hearing is held on rule for preliminary injunction. (C.C.P. 3604, as am'd Act 770 of 1982). Matter of issuance of preliminary injunction must then be fixed for hearing and party obtaining temporary restraining order must then proceed with application for preliminary injunction, or if he fails to do so court will dissolve restraining order. Upon two days' notice to party obtaining temporary restraining order or preliminary injunction or upon such shorter period as court may prescribe, opposite party may appear and move for dissolution or modification of such order. (C.C.P. 3606 and 3607). Upon hearing for preliminary injunction or dissolution or modification of temporary restraining order or preliminary writ of injunction court may hear such application upon verified pleadings and supporting affidavits or may take proof as in ordinary cases. If proof is by affidavit applicant must deliver true copies of supporting affidavits to defendant at least twenty-four hours before time fixed for hearing or such shorter time as court may order. Defendants must also deliver true copies of affidavits to be used by them before time fixed for hearing. Additional affidavits may be allowed by court. (C.C.P. 3609).

Person seeking protection from domestic abuse, stalking or sexual assault may file pleadings without prepayment of costs or being cast with court costs or costs for service or subpoena, for issuance of TRO injunction or restraining order. (C.C.P. 3603.1, added Act 430 of 2001).

Bond.

A preliminary injunction or temporary restraining order will not issue except on applicant furnishing bond (unless bond is dispensed with by law) in such amount as court fixes. (C.C.P. 3610).

Disobedience of or resistance to any lawful restraining order or writ of injunction may be punished as a contempt of court. (C.C.P. 3611).

Appeal.

There is no appeal from order relating to temporary restraining order. Appeal may be taken as matter of right from order or judgment relating to preliminary or final injunction, but such order or judgment shall not be suspended during pendency of appeal unless court in its discretion so orders. Any appeal from order or judgment related to preliminary injunction must be taken and bond furnished within 15 days. (C.C.P. 3612).

Suspensive appeal is allowed from any restraining order or injunction restraining enforcement of any Constitutional provision or act of Legislature. (La.R.S. 13:4431).

Labor Disputes.

Issuance of temporary restraining orders and preliminary injunctions in labor disputes is drastically limited. (La.R.S. 23:841-849).

5.15 JUDGMENTS:

Interlocutory judgments do not determine the merits; they are pronounced on preliminary matters in the course of the proceedings. Definitive or final judgments are such as determine merits in whole or in part, and have force of res adjudicata. (C.C.P. 1841). Certain interlocutory partial judgments may be appealable under procedure similar to FRCP Rule 54(b). (C.C.P. 1915, as am'd Act 545 of 2003).

If, after case has been set for trial, plaintiff does not appear, defendant may obtain judgment of dismissal, and the court determines whether the dismissal is with or without prejudice. (C.C.P. 1672). Court may also, on own motion, dismiss action without prejudice when all parties thereto fail to appear on trial day; in event of such dismissal and claim of pending settlement, either party may reinstate action within 60 days if settlement does not occur. (C.C.P. 1672[A][2], added Act 1058 of 1997).

In case of jury trial court must give judgment within three legal days if general verdict returned, but if special verdict returned, court is allowed same time for deliberation as in trial without jury. (C.C.P. 1916).

In cases taken under advisement, notice of rendition of interlocutory order or judgment must be mailed by clerk, regardless of written request therefor. (C.C.P. 1914, as am'd Act 61 of 1983). Notice of signing of default judgment against defendant on whom there was no personal service or on whom there was service through secretary of state and who filed no exceptions or answer, shall be served on defendant or secretary of state by sheriff. (C.C.P. 1913[A], as am'd Act 700 of 1992).

Directed verdicts are available in jury trials, or by equivalent motion to dismiss in judge trials, in general accord with Federal Rules of Civil Procedure interpretations. (C.C.P. 1810). Judgments notwithstanding verdict also available as alternative to request for new trial. (C.C.P. 1810.1, added Act 41 of 1982). Remittitur or additur is permitted, but only if issue of quantum is clearly separable from other issues in case. (C.C.P. 1814, added Act 178 of 1989).

Judgment must be signed by judge except as otherwise provided by law. (C.C.P. 1911, am'd Acts 87 of 1974).

Judgment signed by judge on separate trial of issue of liability is final, appealable judgment. (C.C.P. Art. 466, added Act 598 of 1980).

Delay for applying for new trial is seven days, exclusive of legal holidays. Delay commences to run on day after clerk has mailed or sheriff served notice of judgment. (C.C.P. 1974, as am'd Act 1263 of 1999, eff. Jan. 1, 2000).

All judgments affecting real estate must specifically describe such real estate. (C.C.P. 1919). If owner of immovable property has name similar to that of judgment debtor, he may file affidavit of distinction. (La.R.S. 9:5501, added Act 839 of 1985). Money judgments should include birth date of parties against whom judgment rendered and last four digits of their social security number, if known, but failure to include such information not ground of invalidity. (C.C.P. 1922, as am'd Act 511 of 2007, eff. June 18, 2007).

Judgments may be amended at any time by trial court to alter phraseology or to correct errors of calculation. (C.C.P. 1951).

Default Judgments.

If defendant has not appeared and filed pleadings within time allowed therefor (see topic 5.17 Pleading), a judgment by default may be entered by oral motion in open court or written motion mailed to court. Judgments by default in district court may be confirmed after two days, exclusive of holidays, after being entered, and final judgment obtained upon production of proper proof. Judgments by default, on promissory note, other negotiable instrument, or open accounts, can be confirmed by affidavit of correctness thereof. (C.C.P. 1701, 1702, 4896). Preliminary default before confirmation is not required in city court or parish court when amount in dispute is $3,000 or less. In those proceedings and in district court proceedings, when sum is due on open account, negotiable instrument or other conventional obligation, deficiency judgment derived therefrom, or when amount sought is that authorized under R.S. 9:2782 for NSF check, hearing in open court not required. Plaintiff submits proof required and proposed judgment; within 72 hours, judge must sign judgment or set down for hearing. (C.C.P. 4902, as am'd Act 456 of 1982; C.C.P. 4903, added Act 456 of 1982; C.C.P. 1702, as am'd Act 285 of 1986). In such cases, detailed certification of compliance with procedure is required. (C.C.P. 1702.1, added Act 507 of 1984). When demand is based on claim of personal injury, sworn narrative report of physician or dentist may be offered in lieu of testimony. (C.C.P. 1702, as am'd Act 354 of 2008, eff. June 21, 2008). When defendant in action for divorce, by sworn affidavit before any notary public, acknowledges receipt of petition and waives citation, service, all delays, trial notice and appearance, judgment by default may be entered on day affidavit is filed and confirmation may take place without hearing in open court. (C.C.P. 1701 and 1702, as am'd Act 219 of 1986). In certain actions for divorce (passage of certain time after separation), judgment is without hearing unless ordered by judge. (C.C.P. 1702[E], added Act 271 of 1987). When default is to be confirmed against state or its political subdivisions, notice of entry of default judgment must be given before confirmation. (C.C.P. 1704[C] and [D], added Act 155 of 1986, eff. June 28, 1986). Necessary proof of service on defendant may be made by showing transmittal by U.S. mail or by commercial courier service. (La.R.S. 13:3205, as am'd Act 140 of 2007).

Declaratory Judgments.

Uniform Declaratory Judgments Act has been enacted. (C.C.P. 1871-1883).

Confession of Judgment.

Judgment may not be confessed prior to maturity of obligation, except for purpose of executory process. (La.R.S. 9:3590, added Act 518 of 1978).

Rule for Judgment.

At any time after answer filed, plaintiff may by motion, submit to court question of right to summary judgment or judgment on the pleadings. No appeal lies from dismissal of motion. These proceedings do not lie in actions for divorce, separation or annulment of marriage, or in any case where community, paraphernal or dotal rights are involved in action between husband and wife, except in special case of divorce after judgment of separation when all parties are represented by counsel. (C.C.P. 969, as am'd Act 219 of 1986). Summary judgment may be rendered on liability alone even when there is genuine issue as to damages. (C.C.P. 966, as am'd Act 89 of 1984).

Recordation.

The effect of the recordation of a judgment expires in ten years from the date upon which it is recorded. They must be reinscribed within this period. If not, they will become junior to all such judgments, mortgages or liens as may have been inscribed between the time of the original inscription and the date of the reinscription of the judgment in question.

Lien.

A judgment is not a lien on real estate until it is recorded as a mortgage, but when so recorded it becomes a lien on all real property of the judgment debtor in the parish in which it is recorded. (C.C. 3322). It is not a lien on personal property until a levy thereon under execution.

Revival.

Money judgment is prescribed ten years after signing by trial court, or from rendition by appellate court, unless revived. Any party interested in judgment may, at any time before it is prescribed, have it revived by ex parte motion in suit in which judgment was rendered, accompanied by affidavit as defined; debtor may have revival annulled upon proof of payment. (C.C. 2031, as am'd Act 806 of 2003). Revival continues judgment in force for ten years, and judgment may be revived as often as desired. (C.C. 3547, C.C.P. 2031).

Satisfaction of Judgment.

No particular form is used. As a general rule, counsel for plaintiff makes the notation “docket satisfied.” giving the date and signing his name on the page of the entry of the particular case in the clerk’s docket, whereupon the clerk issues a certificate of satisfaction of docket, which upon production to the recorder of mortgages is sufficient authority for the cancellation of the inscription of the judgment on the mortgage records. Judgment may be cancelled in part by following statutory procedure. (La.R.S. 9:5166, as am’d Act 476 of 2004).

Foreign Judgments.

Judgments rendered in different courts of the United States import full proof in courts of this state if copy of them which is offered be certified by judge of court of record of district or political subdivision in which judgment is kept, authenticated by seal of court, or certified by public officer having seal of office in such place, authenticated by his seal. (C.C.P. 1395, 28 U.S.C.A. § 1738).

When judgments derive from foreign state or country, they may be authenticated by certificate of secretary of embassy, legation, consul or consular agent, or other officer of U.S. Foreign Service stationed there, authenticated by his seal. (C.C.P. 1395).

Judgments Against State.

Any single money judgment against state up to $100,000 may be satisfied from Final Judgments Fund with attorney general’s approval, following procedure in statute. Interest on judgment ceases to accrue upon tender by state or 30 days after judgment if final, whichever is earlier, if judgment creditor pursues this remedy. (La.R.S. 13:5131-5, as am’d Act 575 of 1982). Confirmation of default judgment against state or political subdivisions cannot be made until 15 days after notice of entry of default judgment. (C.C.P. 1704[C] and [D], added Act 155 of 1986, eff. June 28, 1986).

Uniform Enforcement of Foreign Judgments Act has been adopted as supplementary method to enforce foreign judgments. (La.R.S. 13:4241-4247, added Act 464 of 1985).

Offer of Judgment.

Procedure somewhat similar to FRCP 68 available, permitting either party as settlement device to offer to permit judgment to be entered prior to trial. If claimant rejects and receives more than 25% below offered amount, or if defendant rejects, and more than 25% above offered amount is awarded at trial, rejecting party is liable for costs (not including attorney fees) after rejection of offer. (C.C.P. 970, as am’d Act 354 of 1997).

5.16 LIMITATION OF ACTIONS:

See also category 3 Business Regulation and Commerce, topic 3.09 Commercial Code.

As to prescription by which ownership of property is acquired, see topic Adverse Possession.

Periods of prescription which operate to release debts are as follows:

One Year Period.

Following actions are prescribed after one year: All delictual (tort) actions, prescription to commence from day injury or damage is sustained, except those arising from crimes of violence as defined in c. 1 of Title 14 (Criminal Code), which are subject to prescription of two years under C.C. Art. 3493.1, added by Act 832 of 1999; and when damage is to real property, prescription to commence from day owner of property acquired, or should have acquired, knowledge of damage.

Prescription runs against absentees and incompetents, including minors and interdicts, unless there is legislatively-established exception. (C.C. 3492-3, 3468, as am'd Act 173 of 1983, eff. Jan. 1, 1984). There is such exemption as to minors and interdicts in product liability cases. (C.C. 3492, as am'd Act 621 of 1992). Actions for injury or death against any physician, chiropractor, dentist, psychologist, optometrist, nurse, licensed midwife practitioner, community blood or tissue center or hospital duly licensed by state, must be brought within one year of occurrence or of discovery of injury but not later than three years after occurrence. (La.R.S. 9:5628, as am'd Acts 818 and 983 of 1995). Similar provision and time periods for accountants and attorneys (La.R.S. 9:5604 and 5605, added Act 683 of 1990), and for insurance agents, brokers, solicitors or similar licensees (La.R.S. 9:5606, added Act 764 of 1991). Moreover, special prescriptive period of three years established for all claims against attorneys and accountants arising from conduct prior to that date. (T. 9, 5604, 5605, as am'd Act 611 of 1992). Similar statute applies to claims against non-attorney notaries. (La.R.S. 35:200, as am'd Act 77 of 2004, eff. May 28, 2004 and declared applicable to prior acts with grace period provisions). Action in redhibition (rescission of sale) against "good faith" seller of residential immovable property is prescribed in one year from delivery. (C.C. 2534, as am'd Act 172 of 1995). Claims against corporate officers, directors and similarly-situated persons managing business organizations for negligent or grossly negligent mismanagement prescribed by one year from act, or one year from when it was discovered or should have been discovered, but in no event more than three years from act. (La.R.S. 12:1501-1502, added Act 1126 of 2001).

Two Years Period.

Actions by or against common carriers for collection or recovery of freight charges or for loss of or damage to freight are prescribed by two years from date of shipment. (La.R.S. 45:1100).

Action for first-party coverage under insurance policy is subject to two-year period, and policies must so provide. (La.R.S. 22:629, 691, as am'd Act 43 of 2007).

Action for violation of building restrictions must be brought in two years. (C. C. Art. 781, added Act 170 of 1977).

Informalities of legal procedure connected with sale at public auction of real or personal property made by sheriff, auctioneer or other person authorized by court so to sell are prescribed against after lapse of two years, or five years where minors or interdicts were part owners. (C. C. 3543).

Two years limitation may be applicable to action to remove building encroaching on public way. (La.R.S. 9:5627, added Act 350 of 1979).

Actions under uninsured motorist provisions must be brought in two years from date of accident. (La.R.S. 9:5629).

Action by heir or legatee not recognized in judgment of possession must be brought in two years from finality of judgment of possession against any third person acquiring interest in immovable by onerous title from person recognized as heir or legatee. (La.R.S. 9:5630-5631, added Act 721 of 1981).

Action by beneficiary against trustee is subject to two-year preemptive period, or in some instances three-year preemptive period. (La.R.S. 9:2234, as am'd Act 966 of 1999, eff. July 9, 1999).

Actions against succession representatives, tutors and curators for defective sale or mortgage of property must be brought within two years of sale or mortgage if sale or mortgage was court approved. (La.R.S. 9:5632, added Act 374 of 1990, eff. July 10, 1990).

Delictual actions for damages resulting from crimes of violence as defined by c. 1 of Title 14 (Criminal Code) must be brought within two years of day injury or damage was sustained. (C.C. 3493.1, added by Act 832 of 1999). Claims against corporate officers, directors and similarly-situated persons managing business organizations for intentional mismanagement prescribed by two years from act, or two years from when it was discovered or should have been discovered, but in no event more than three years from act. (La.R.S. 12:1501-1502, added Act 1126 of 2001).

See also categories 3 Business Regulation and Commerce, topics Securities, subhead Liabilities; Monopolies, Restraint of Trade and Competition; and Transportation, topic Motor Vehicles, subhead Financial Responsibility.

Three Years Period.

The following actions are prescribed by three years: (1) Action for recovery of compensation for services rendered, including payment of salaries, wages, commissions, tuition fees, professional fees, fees and emoluments of public officials, freight, passage, money, lodging and board; (2) action for arrearages of rents and annuities; (3) action on money lent; (4) action on open account ([1], [2], [3], and [4], C.C. 3494, as am'd Act 147 of 1984, eff. June 25, 1984); (5) action by succession creditors against other creditors or legatees (C.C. 1188, 1431); (6) tax inscriptions (La.R.S. 33:3746); (7) action for refund of overpaid taxes (La.R.S. 47:263, 1623); (8) action by client against attorney for return of papers delivered to him for purposes of law suit (C.C. 3496, as am'd Act 173 of 1983); (9) action to recover underpayments or overpayments of royalties from mineral production, except for state-owned properties (C.C. 3494[5], added Act 1031 of 1986); (10) action for contributions made to education or training of spouse, reckoned from date of signing of divorce judgment or declaration of nullity. (C.C. 120, added Act 1008 of 1990, eff. Jan 1, 1991). This prescription runs from day payment is exigible and accrues to past due payments even if there is continuation of labor, supplies or other services, as applicable. (C.C. 3495, as am'd Act 173 of 1983). Prescription runs against absentees and incompetents, including minors and interdicts, unless there is legislatively-established exception. (C.C. 3468, as am'd Act 173 of 1983). All changes effected by Act 173 of 1983 eff. Jan. 1, 1984.

Four Years Period.

Four years' prescription applies to special actions—as action of minor against tutor respecting acts of tutorship; action of lesion (C. C. 340, 1876) as well as to redhibition (rescission of sale) actions as to residential or commercial immovable property if not subject to shorter time (C.C. 2534, as am'd Act 266 of 1997, with one-year grace period from Aug. 15, 1997).

Five Years Period.

The following actions are prescribed by five years: (1) Action for annulment of testament; (2) action for reduction of excessive donation; (3) action for rescission of partition and warranty of portions; (4) actions on negotiable instruments and on promissory notes whether negotiable or not, which prescription commences from day payment is exigible (C.C. 3497 and 3498, as am'd Act 901 of 1993, eff. July 1, 1993); (5) action for arrearages of alimony and child support (C.C. 3497.1, added Act 147 of 1984, eff. June 25, 1984); (6) actions against professional engineer, surveyor, architect, interior designer or real estate developer (La.R.S. 9:5607, as am'd Act 732 of 2006); (7) action for damages for harvesting of timber without consent of owner. (C.C. 3497, La.R.S. 3:4278.1[G] and 3:4278.2[G], all as am'd Act 107 of 2009). Prescription suspended in favor of minors during minority, but otherwise runs against absentees and interdicts. (C.C. 3497, 3468, as am'd Act 173 of 1983, eff. Jan. 1, 1984).

Public sale by sheriff of lands of record as owned by foreign corporation, made under attachment carried on in parish where lands are situated and maintained by judgment of court, and sale recorded in conveyance records of said parish, is valid by prescription after five years from date of recordation. Running of prescription may be interrupted by filing of suit for property. (La.R.S. 9:5641, 5642).

Actions against contractor and/or surety on public works prescribe in five years from date of substantial or acceptance, whichever is first, or default. (La.R.S. 38:2189, as am'd Act 250 of 1975).

Will must be probated within ten years of death of testator or testatrix or within five years of judicial opening of succession, whichever first occurs. (La.R.S. 9:5643 and C.C.P. 2893, both as am'd Act 316 of 1981).

Action to recover for asbestos abatement prescribes five years after completion of work or discovery of manufacturer, whichever is later. (La.R.S. 9:5644, added Act 728 of 1985).

Action to make executory arrearages in spousal support or installment payments awarded for contributions made to education or training of spouse is prescribed by passage of five years. (C.C. 3497.1, as am'd Act 605 of 1997, eff. July 3, 1997).

Action to set aside sale of immovable on ground of lack of authorization of agent signing deed or lack of filing of documents evidencing existence of unincorporated association is prescribed by five years. (La. R.S. 9:5681, as am'd Act 367 of 2008).

Action to set aside document or instrument on ground that power of attorney was unauthorized or invalid is prescribed by five years. (La. R.S. 9:5682, as am'd Act 371 of 2008).

Seven Years Period.

Actions against any person performing land surveying, architectural or construction services are subject to seven-year preemptive period. (La.R.S. 9:2772, as am'd Act 1024 of 1999).

Ten Years Period.

All personal actions, except those above enumerated, are prescribed by ten years. (C. C. 3499, as am'd Act 173 of 1983, eff. Jan. 1, 1984). Money judgment is prescribed by ten years unless prescribed earlier by law of state where rendered. May be revived for ten additional years by action commenced before lapse of prescriptive period. (C. C. 3501, as am'd Act 173 of 1983, eff. Jan. 1, 1984). Judgments in favor of state and effect of their recordation prescribe in ten years. (La.R.S. 9:5685, as am'd Act 848 of 2008). Except as otherwise provided by law, action for rescission or nullity of agreement or contract is prescribed in ten years. (C. C. Art. 2221, as am'd Act 308 of 1980). Action against contractor or architect for construction, renovation or repair of defects in buildings and other works is prescribed in ten years. (C.C. 3500, as am'd Act 173 of 1983, eff. Jan. 1, 1984).

Title in religious groups receiving and using conditional donation in keeping with condition is quieted after ten years uninterrupted possession and such use. (La.R.S. 9:2321, am'd Act 205 of 1984).

Will must be probated within ten years of death of testator or testatrix or within five years of judicial opening or succession, whichever first occurs. (La.R.S. 9:5643 and C.C.P. 2893, both as am'd Act 316 of 1981).

Actions against persons for sexual abuse or physical abuse resulting in permanent impairment or permanent physical injury or scarring of minor subject to ten-year limitation which does not begin to run until minor reaches majority. (C.C. 3498.1 as am'd Act 503 of 1995).

Actions to make executory arrearages of child support are subject to liberative prescription period of ten years. (C.C. 3501.1, added Act 605 of 1997, eff. July 3, 1997).

Thirty Years Period.

Action for recognition of right of inheritance and recovery of whole or part of succession is subject to prescription of 30 years, running from day of opening of succession. (C.C. 3502, as am'd Act 173 of 1983, eff. Jan. 1, 1984).

What Law Governs.

When Louisiana substantive law applies, Louisiana prescription and peremption rules apply. When another state's law applies to merits, Louisiana prescription and peremption rules apply except (1) if action is barred under Louisiana law, it is dismissed unless it would not be barred under chosen substantive law and maintenance of action is warranted by compelling considerations of remedial justice or (2) if action is not barred under Louisiana law, it will be maintained unless it would be barred under chosen substantive law and maintenance of action in Louisiana is not warranted by Louisiana policies and its relationship to parties nor by any compelling considerations of remedial justice. (C.C. 3549).

Waiver of Prescription.

The right to plead prescription cannot be renounced until it is acquired. (C. C. 3449).

Interruption of Period of Prescription.

Citation upon, or acknowledgment by, one debtor in solido interrupts prescription as to all. Citation upon heir of debtor in solido does not interrupt prescription as to other heirs or co-debtors. (C. C. 3503, as am'd Act 173 of 1983, eff. Jan. 1, 1984). Citation of principal interrupts prescription as to surety. (C. C. 3504, as am'd Act 173 of 1983, eff. Jan. 1, 1984). Filing of suit in court of competent jurisdiction and proper venue interrupts prescription, but when suit filed in incompetent court, or in improper venue, prescription is interrupted only as to defendants served with process within prescriptive period. (C. C. 3462, added Act 187 of 1982). Payment by debtor of interest or principal of obligation constitutes acknowledgment of all other obligations including notes of co-debtors in solido pledged to secure that obligation. (La.R.S. 9:5807, am'd Act 119 of 1975).

Revival of Barred Debts.

A debt barred by limitations may be revived only by written acknowledgment. (C. C. 2278).

Contractual limitations shortening the time within which action must be brought are permitted. (C. C. 3471, added Act 187 of 1982).

Pleading.

Prescription must be pleaded, which may be done at any stage of proceedings before final judgment. (C. C. 3452; C.C.P. 927[B], as am'd Act 824 of 2008, eff. Jan. 1, 2009). If plea is made in appellate court, plaintiff may demand remand to trial court for trial of exception. (C.C.P. 2163). Creditor or other interested person may plead prescription although debtor has renounced it. (C. C. 3453).

Peremption is period of time fixed by law for existence of right which, if not timely exercised, is extinguished upon expiration of peremptive period. Peremption need not be pleaded, as it may be supplied by court on own motion any time prior to final judgment. Peremption may not be renounced, interrupted or suspended. (C. C. 3458-3461, added Act 187 of 1982).

See also category 8 Debtor and Creditor, topic 8.08 Fraudulent Sales and Conveyances.

5.16A PARTITION:

See also category 21 Property, topic 21.16 Real Property.

No one can be compelled to hold property with another, unless the contrary has been agreed upon; any one has a right to demand the division of a thing held in common, by the action of partition. (C. C. 1289 and 807, latter added Act 990 of 1990, eff. Jan. 1, 1991). Stipulation never to partition is invalid. (C. C. 1297). Can agree not to partition for limited time, not over 15 years. (C.C. 1300; La.R.S. 9:1702, added Act 477 of 1987; C.C. 807, added Act 990 of 1990, eff. Jan. 1, 1991). No prescription to action of partition. (C. C. 817, added Act 990 of 1990, eff. Jan. 1, 1991). Mineral servitudes and royalties are subject to partition. (T. 31, art. 172, et seq.). Property held in indivision may be partitioned at demand of person having share in full ownership, though there may be other shares in naked ownership and usufruct. Person having only share in naked ownership or only in usufruct does not have this partition right, though naked owner and usufructuary of same share may combine in demand and be treated as full owner of that share. (C.C. 543, as am’d Act 535 of 1983).

Partition is voluntary or judicial; voluntary when made by consent; judicial when made by authority of court. (C. C. 809).

Whenever a party to a partition is an unrepresented absentee, minor or mental incompetent, or the interested parties cannot agree, the partition must be judicial. (C.C.P. 4602).

It is also definitive or provisional; definitive means permanent and irrevocable; provisional when made provisionally of certain things before the rest can be divided, or of everything when parties are not in situation to make an irrevocable partition. (C. C. 1295).

Each coheir may demand in kind his share of the movables and immovables belonging to the succession, unless creditors have made seizure or opposition, or a majority of the coheirs are of opinion that a sale of the property is necessary. (C. C. 811).

Judicial partition may be made in kind or by sale, latter after notice to counsel of record, curators and persons appearing in proper person. (C.C.P. 4607, as am’d Act 832 of 1990). Suit must be brought where property is situated. (C.C. 1290; C.C.P. 80). Petition for partition of property in succession must be filed in succession proceeding. (C.C.P. 3461). Appraisement may be ordered by judge. (C.C.P. 4604). If it is found that property is not conveniently divisible, sale may be ordered. (C. C. 811). If it is possible to divide in kind, notary is appointed by judge to proceed with partition. (C. C. 1345). Notary must give written notice to all interested parties within 15 days of his appointment. (C. C. 1347). Property is then made up in equal lots (C. C. 1364) and drawn for by parties (C. C. 1367). Record of these proceedings is homologated by court after ten days from service of rule to show cause on all other parties and no opposition filed. (C.C.P. 4609-4610).

Rescission.

Partitions may be rescinded for lesion (or inequality) of more than one-fourth of the true value. (C. C. 814).

5.17 [RESERVED]

5.18 PLEADING:

Petition.

Actions in district courts are commenced by petition with caption setting forth name of court, title and number of action, designation of pleadings and names of first party on both sides with indication of other parties (C.C.P. 853), stating articulately in numbered paragraphs facts which constitute cause of action (C.C.P. 854), and concluding with prayer for relief desired or alternative relief (C.C.P. 891) and signed by attorney filing same, showing his address (C.C.P. 863). Petition must include names, surnames and domiciles of parties and concise statement of all causes of action arising out of material facts that are subject matter of litigation, along with street address for receipt of service of all items involving litigation. (C.C.P. 891, as am'd Act 48 of 1991). Petition may not include specific amount of damages, except in claims on contracts, notes, tax claims, garnishments, open accounts or alimony and child support. (C.C.P. 893, am'd Act 724 of 1989, eff. July 8, 1989). If specific amount of damages is necessary to establish jurisdiction of court, right to jury trial, lack of possible federal diversity jurisdiction or for other purposes, general allegation to that effect is required. (C.C.P. 893, as am'd Act 334 of 2004).

Pleading requirements generally are relaxed in justice of peace courts, city and parish courts, with exception that pleadings must be in writing in parish court where amount in dispute is more than $1,000 and in city court where amount in dispute is more than $500. (C.C.P. 4901-4902, 4911).

Petitions for damages resulting from medical malpractice must first have been submitted to medical review panel, and may not contain prayer for specific amount of damages. (La.R.S. 40:1299.41 et seq.).

Citation issued by the clerk of court, under seal, is served by sheriff. (C.C.P. 1291). Citation must be accompanied by certified copy of petition.

Answer.

Fifteen days (ten days, or 15 days if served through Secretary of State, in justice of peace courts, in parish court where amount in dispute is more than $1,000 but less than $3,000, and in city court where amount in dispute is more than $500 but less than $3,000; C.C.P. 4915, added Act 46 of 1979), after service of citation are allowed for filing pleadings by defendant. If service is made upon nonresident under La.R.S. 13:3201, default judgment may not be entered until 30 days after filing of affidavit of service by mail or delivery to defendant. (La.R.S. 13:3205). Defendant must admit or specifically deny each material allegation of fact and must specially plead any affirmative defenses. (C.C.P. 1001-1006).

In suits on open accounts, promissory notes or other negotiable instruments, if no answer be filed, ex-parte affidavit to correctness of account is sufficient to obtain judgment. (C.C.P. 1702).

Defendant may make a demand in reconvention as to any cause of action he may have against plaintiff, regardless of connexity; and must make such demand or face his judicator bar if demand arises out of subject matter of principal demand. (C.C.P. 1061, as am'd Act 521 of 1990, eff. Jan. 1, 1991). He may include plea of compensation or setoff (C.C.P. 1062), and may bring in third persons, such as warrantors, who may be liable to him on principal demand. (C.C.P. 1111, 1112). He may also intervene, to join with plaintiff, or defendant, or to oppose both (C.C.P. 1091 et seq.); or party may cross-claim against co-party (C.C.P. 1071 et seq., added Act 63 of 1983).

Declinatory exceptions (C.C.P. 925), and dilatory exceptions (C.C.P. 926) must be filed at same time either prior to or in answer and prior to or along with filing of any pleading seeking relief other than enrollment or withdrawal as counsel of record, extension of time to plead, security for costs or dissolution of attachment issued on ground of nonresidence of defendant, or prior to confirmation of default judgment. (C.C.P. 928, as am'd Act of 983 of 1999, eff. July 1, 2000). Peremptory exceptions (C.C.P. 927) may be pleaded at any stage of proceeding prior to submission of case for decision, and may be filed with declinatory exception or with dilatory exception, or both (C.C.P. 928, as am'd Act 60 of 1983). When exception is filed prior to trial, it will be tried prior to or at trial. (C.C.P. 929, as am'd Act 1055 of 1997). If exception is filed prior to answer and then denied, answer must be filed within ten days of denial. (C.C.P. 1001). Exceptions may be granted in whole or in part. (C.C.P. 932, 933, 934, as am'd Act 545 of 2003).

Reply.

When defendant alleges new facts in his answer these are considered as denied by plaintiff; neither replication nor rejoinder is permitted. (C.C.P. 852).

Amendment.

Without leave of court, by plaintiff before service of answer, and by defendant within ten days of service of answer. Otherwise, leave of court or consent of adverse party must be obtained. (C.C.P. 1151).

Demand for Judgment on Pleadings.

Judgment may be asked for on face of pleadings by rule, except in matters of divorce, separation from bed and board, annulment of marriage, or in any case where the community, paraphernal or dotal rights of a married woman may be involved. (C.C.P. 965-969).

Demand for Summary Judgment.

Any party may move for summary judgment, on ground there is no genuine issue of fact, based upon pleadings, depositions, admissions and affidavits, if any. Summary judgment not allowed in those same matters in which judgment on the pleadings not allowed. (C.C.P. 966, 967, 969). By 1996 amendments to C.C.P. 966, summary judgments are said to be favored and motions for them are to be construed to secure just, speedy and inexpensive determination of every action. (C.C.P. 966, as am'd Act 9 of 1996 First Ex. Sess.). Pending motion must be ruled upon at least ten days before trial and motion itself and supporting affidavits must be filed 15 days before hearing. (C.C.P. 966, as am'd Act 867 of 2003). If opposing party serves opposing affidavits, they must be served eight days before hearing unless local rules of court are contrary. (C.C.P. 966[B], as am'd Act 867 of 2003). Summary judgment, having effect of partial final judgment, may be granted on liability alone although there is genuine issue as to quantum. (C.C.P. 966, as am'd Act 89 of 1984). Summary judgment may also be rendered dispositive of particular issue, theory of recovery, cause of action, or defense, in favor of one or more parties, even though granting does not dispose of whole case. (C.C.P. 966[E], as am'd Act 483 of 1997, eff. July 1, 1997). Affidavits may include those of experts and must show affirmatively that affiant is competent to testify on matters within affidavit. (C.C.P. 967, as am'd Act 545 of 2003).

Documents.

It is not necessary that a document on which a demand is founded be filed, and when annexed it is not necessary to serve copy. (C.C.P. 1311).

Claims.

If suit is to be brought, information should be furnished as to names and residences of plaintiff and defendant and facts that make up cause of action, e.g., in case of goods sold and delivered, itemized statement of account, giving dates, details of goods and amounts. In case of open account, affidavit of correctness thereof, before any competent officer, should be furnished, as such affidavit constitutes prima facie proof and is sufficient for judgment by default. (C.C.P. 1702). Provisions for proof of contents of lost or damaged instruments are made. (La.R.S. 13:3740 and 3741, added Act 172 of 1986).

Small Claims.

See category 6 Courts and Legislature, topic 6.01 Courts.

Frivolous Claims.

Pleadings and discovery requests deemed to be improper as defined are subject to potential sanctions after hearing, as to counsel or party or both. (C.C.P. 863 and 1420, as added Act 442 of 1988, eff. Jan. 1, 1989). Provision is similar to F.R.C.P. Rule 11, but contains “grace period” for withdrawal of pleadings filed within 60 days of expiration of statute of limitations and also requires hearing before imposition of sanctions.

Filing by Facsimile Transmission.

Filing any paper in civil action by facsimile transmission is permitted, so long as filing by hard copy within five days and $5 transmission fee over and above filing fee. (La.R.S. 13:850, added Act 463 of 1991).

Motion to strike may be filed at any time; former ten-day requirement repealed. (C.C.P. 964, as am’d Act 1055 of 1997). Special motion to strike recognized to test whether conduct is protected by First Amendment. (C.C.P. 971, as am’d Act 232 of 2004).

5.19 PRACTICE:

In civil matters, practice is governed by the Code of Civil Procedure and the various statutes.

Procedure to be followed by state administrative agencies in adoption of rules and in making administrative decisions and rules governing review thereof are set forth in La.R.S. 49:951-968.

Discovery.

Parties are granted right to various discovery devices, pursuant to Code of Civil Procedure. (C. C. P. 1421-1474). Discovery devices include depositions upon oral examination and upon written interrogatories, interrogatories to parties, motions for production or inspection, and physical and mental examination of parties. Interrogatories propounded to another party are limited to 35 and then additional 35 by ex parte motion during entire proceeding, including subparts. Lesser number may be imposed by local rule; greater number requires leave of court. (C.C.P. 1457, as am’d Act 1315 of 1997).

Depositions.

See topic 5.11 Depositions and Discovery.

Demand for Admission of Facts.

Parties have right to demand sworn written admissions of facts and genuineness of documents. Failure to deny facts or genuineness of documents, within 15 days usually, constitutes admission thereof, and subsequent proof of facts denied or genuineness denied subjects party denying same to payment of reasonable expenses for making proof, including attorney’s fees, unless good reasons existed for denial or admission sought was not of substantial importance. (C. C. P. 1466-1468, 1472).

Direct Actions Against Insurer.

See category 23 Transportation, topic 23.01 Motor Vehicles, subhead Direct Actions.

Small Claims.

See category 6 Courts and Legislature, topic 6.01 Courts.

See also topics 5.02 Actions, Appeal and Error, Depositions and Discovery, Injunctions, Judgments, Pleading, Process; category 8 Debtor and Creditor, topics 8.02 Attachment, 8.05 Executions, 8.09 Garnishment.

5.20 PROCESS:

Governed by rules in Louisiana Code of Civil Procedure and La.R.S. 13:3471 et seq.

It is ordinary, executory and summary.

Ordinary when citation takes place and all delays and forms of law observed. Executory when seizure is obtained against property of debtor, without previous citation, by virtue of act or title importing confession of judgment. Summary when carried on with rapidity, and without observance of formalities required in ordinary cases, as when courts provide for administration of vacant successions; child custody, support, alimony and visitation matters; determination and award of attorney fees; and property of minors and absent heirs. (C.C.P. 851, 2591, 2592, 2631).

Summary proceedings may be used for trial or disposition of following matters only: (1) Incidental question arising in course of litigation; (2) application for new trial; (3) issue which may be raised properly by exception, contradictory motion, or rule to show cause; (4) action against surety on judicial bond after judgment has been obtained against principal, or against both principal and surety when summary proceeding against principal is permitted; (5) homologation of judicial partition, of tableau of distribution or account filed by legal representative, or of report submitted by auditor, accountant, or other expert appointed by court; and opposition to any of foregoing, to appointment of legal representative, or to petition for authority filed by legal representative; (6) habeas corpus, mandamus, or quo warranto proceeding; (7) determination of rank of mortgages and privileges on property sold judicially, and of order of distribution of proceeds thereof; (8) child support, custody, and visitation for minor child; support for spouse; injunctive relief; use and occupancy of family home; use of community or personal property; and support between ascendants and descendants; (9) annulment of probated testament; and (10) other matters permitted by law. (C.C.P. 2592, as am’d Act 1009 of 1990, eff. Jan. 1, 1991). Also, intervention in executory proceedings when third person claims mortgage or privilege on property seized and seeks to assert his right to share in distribution of proceeds of sale (C.C.P. 2643, as am’d Act 92 of 1962); in proceeding for failure to pay tax and judgment prohibiting further pursuit of business (La.R.S. 47:401); ejectment proceedings against tenants (C.C.P. 4732).

Generally no process can be had on legal holidays, except for the issuance of conservatory writs, such as attachment, sequestration, provisional seizures, injunction. (C.C.P. 288, 323). See category 1 Introduction, topic 1.02 Holidays.

Service of process must be requested within 90 days of filing, unless waived by defendant, or suit is subject to involuntary dismissal. (C.C.P. 1201[C], added Act 518 of 1997, eff. Jan. 1, 1998).

Who May Serve.

Citations and all other legal process, whether issued by clerk, sheriff or constable, must be served by sheriffs and constables throughout state, except if sheriff is interested party, if office of sheriff is vacant or if sheriff is disqualified by law in which case process is served by constable or by officer appointed by court. (T. 13; §§ 3471, 3476, as am’d Act 159 of 1979). When sheriff has not served within five days of receipt or is unable to serve or with respect to certain summary proceedings or related subpoenas, court may appoint any person over age of majority residing within state to serve. (C.C.P. 1293, as am’d Act 704 of 2006, eff. June 29, 2006).

Service on individual is made when proper officer tenders citation or other process to individual or leaves same at individual's dwelling house or usual place of abode with person of suitable age and discretion residing in domiciliary establishment. (C.C.P. 1232, 1234, as am'd Act 355 of 1985). Service on representative, such as attorney, may be made on secretary, as defined, in attorney's office. (C.C.P. 1235, as am'd Act 45 of 1991). Personal service on individual who is named in several capacities is sufficient for all such capacities, if clearly alleged. (C.C.P. 1237, added Acts 851 and 1237 of 1995). Service on incarcerated person regulated by statute. (C.C.P. 1235.1, as am'd Act 744 of 2004).

Curator ad hoc may be appointed upon whom service may be made for an absentee. But an absentee may by notarial act deposited with sheriff provide for additional legal mode of service on himself.

Process against domestic or foreign corporation may be served on either of its agents for service of process. (See category 2 Business Organizations, topic 2.03 Corporations.) In case of failure to designate such agents, or in case of vacancy or inability to serve, process may be served on any officer, director or resident agent named in articles or in last report to Secretary of State, or on any employee of suitable age and discretion found in corporation's registered office or in any place where it is doing business. If officer whose duty it is to make service is unable, after diligent search, to locate any of such persons, service may be made by registered mail or on Secretary of State or some other person designated by him, who must forward papers to corporation at its last known address. (C.C.P. 1261, as am'd Acts 859 and 1237 of 1995, 1262; La.R.S. 12:104). Fee of $10 for service on Secretary of State. (La.R.S. 49:225, as am'd Act 314 of 1985).

Service on Foreign or Domestic LLC.

When officer making service on foreign or domestic LLC certifies inability to serve, service may be made on secretary of state, who then forwards citation to LLC at last known address. (C.C.P. 1267, added Act 407 of 2001).

Service on State and Political Subdivisions.

In suits against State or State agency, process may be served on attorney general or person in his office over 16 and on agency head. In suits against political subdivisions, service may be obtained on person designated and registered with Secretary of State as agent for service of process and in absence of such designation, on district, parish or city attorney or other proper person depending upon identity of named defendant. (La.R.S. 13:5107, as am'd Act 586 of 1983).

Service on Nonresidents.

Process on nonresidents (individuals, partnerships, associations and other legal or commercial entities not domiciled in state, and foreign corporations), who transact any business in state, contract to supply services or things in state, cause injury or damage by act or omission in state, cause injury or damage through act or omission outside of state if he regularly does business or engages in other persistent course of conduct or derives revenue in this state, has interest in real right or immovable in this state, who is charged with nonsupport of child, parent, spouse or former spouse domiciled in this state with whom nonresident formerly resided in this state, against whom parentage and support of child is alleged, when child was conceived by nonresident while in this state, or manufactured product or component which caused injury in this state, if product's finding its way into this state could have been foreseen, and in divorce proceedings and summary proceedings, may be served with process by counsel for plaintiff by mailing certified copy of citation and petition to defendant by certified or registered mail, or by actual delivery to defendant by individual authorized by court or authorized by law of place where service is made with respect to service of process of any of its courts of general, limited, or small claims jurisdiction. (La.R.S. 13:3201 et seq., as am'd Act 619 of 2003). Catchall provision permits exercise of personal jurisdiction over nonresident on any basis consistent with state or federal constitution. (La.R.S. 13:3201[B], added Act 418 of 1987). Service on nonresident motorist may be made through secretary of state. (La.R.S. 13:3474 and 3475, as am'd Act 151 of 1990). In certain instances, including under long-arm statute and with respect to foreign insurers, transmission of process by claimant or by secretary of state through commercial courier is authorized. (La.R.S. 13:3204, 3471; La.R.S. 22:985, as am'd Act 395 of 1999).

Same method of service may be used with respect to nonresident who resided in state and who owes support to child or spouse or former spouse domiciled in state. (La.R.S. 13:3201[f], added Act 734 of 1977).

Service on minor, if emancipated, is made through personal or domiciliary service on minor; if unemancipated, through personal or domiciliary service on his legal representative. If unemancipated minor is legitimate issue of living parents not divorced nor judicially separated, father or, in event of his absence or mental incompetency, mother, is party through whom service is made. If one or both parents are dead, parents are divorced or judicially separated, or minor is illegitimate, service is made through court-appointed tutor. When minor has no tutor and action is brought against him, court will appoint attorney to represent him. (C.C.P. 731, 732, 1235, 5091). See category 14 Family, topics 14.07 Guardian and Ward and 14.10 Infants.

Service on incompetent person, who has been interdicted, is made through personal or domiciliary service on his curator. If incompetent person has no curator, but is interdicted or committed to or confined in mental institution and action is brought against him, court will appoint an attorney as his legal representative. (C.C.P. 733, 1235, 5091). See category 14 Family, topic 14.07 Guardian and Ward.

Service on partnership is made by personal service on partner. Personal service on any employee of suitable age and discretion will constitute service on partnership, if officer attempting to make service certifies that he was unable to serve partner after diligent efforts to do so. (C.C.P. 1263).

Service on foreign corporation may be made as follows: (a) On any agent whom the corporation may have designated as agent for the service of process—wherever found; (b) if such agent cannot be found, upon any regularly employed agent or employee of the corporation, of suitable age and discretion in any office which corporation may have established and maintains in this state; (c) if corporation has failed to appoint and maintain agent for service of process, or such agent cannot be found, and said corporation has not established and maintained an office in state, service may be ordered to be made on Secretary of State; (d) by personal service on its "counsel of record"; (e) by certified mail under La.R.S. 13:3204 if subject to long-arm statute. (C.C.P. 1261, as am'd Act 37 of 1988; 1262; La.R.S. 12:104; La.R.S. 13:3471).

Service of process upon foreign insurer transacting business in state without authority, may be made upon Secretary of State. (La.R.S. 22:1253).

Service on unincorporated association is made by personal service on appointed agent, if any, or in his absence, on managing official at any place where business of association is regularly conducted. In absence of all managing officials, service may be made by personal service on any member of association. (C.C.P. 1264).

Service by Publication.

There is no provision for service by publication, except in case of monition to clear title. (La.R.S. 13:4941-4951).

Service on physician may be made when physician is not party to action by service on any clerical employee. (C.C.P. 1236, added Act 778 of 1975).

Service on Attorney.

After civil action is begun, service may be made on attorney of record. (C.C.P. 1313; including service of judgment debtor rule C.C.P. 2453, as am'd Act 12 of 2006). Subsequent to service of original petition, any pleadings, documents or notices may be served by mail or delivery to attorney of record and may also be made by delivering copy by means of telephonic facsimile communication device, which shall then be shown by certificate filed in record. (C.C.P. 1313, as am'd Act 1263 of 1999, eff. Jan. 1, 2000; La.R.S. 13:3471[8], added Act 524 of 1989). Service may also be made on attorney under C.C.P. 5091 if service cannot be made on nonresident by registered or certified mail or actual delivery. (La.R.S. 13:3204[B], as am'd Act 205 of 1995). But service can no longer be made on counsel of record after final judgment disposing of all litigated issues. (C.C.P. 1314, as am'd Act 268 of 1997).

Long Arm Statute.

See subhead Service on Nonresidents, supra.

Proof of Service.

Sheriff endorses on copy of citation date, place and method of service, and signs and returns copy to clerk of court. If service is made on nonresident under La.R.S. 13:3204, individual serving process must file affidavit showing method of mailing and annexing return receipt, or showing date, place and manner of delivery if process actually delivered to defendant.

Nonresident Motorist.

See category 23 Transportation, topic 23.01 Motor Vehicles.

5.21 REPLEVIN:

No such writ.

5.22 SEQUESTRATION:

The conservatory writ, sequestration, is a mandate of court, ordering the sheriff to take into his possession and keep a thing of which another person has the possession, until after the decision of a suit, in order that it be delivered to him who shall be adjudged entitled to have property or possession of that thing.

Grounds for Issuance of Writ.

Sequestration may be issued when one claims the ownership or right to possession of property, or a mortgage lien or a privilege thereon, if it is within the power of the defendant to conceal, dispose of or waste the property or the revenues therefrom, or remove the property from the parish, during the pendency of the action. (C.C.P. 3571, 3663).

Sequestration also provided with regard to leased movables upon default of lessee. (La.R.S. 9:3261-3271).

Proceedings.

Except when ordered by court by its own motion, writ of sequestration is secured by filing petition, accompanied by affidavit, and bond. Affidavit must show facts necessary to establish one or more of grounds for issuance of writ. (C.C.P. 3501).

Property Subject to Sequestration.

All species of property, real or personal, as well as revenue proceeding from same, may be sequestered. (C.C.P. 3571; La.R.S. 9:3261-3271).

Release of Property.

Defendant may secure release of property by furnishing security for the satisfaction of any judgment that may be rendered against him. (C.C.P. 3507, La.R.S. 9:3261-3271). Written agreement to hold seizing authority harmless for wrongful seizure may be substituted for security at discretion of sheriff, if property is not seized to enforce mortgage, lien or privilege. (C.C.P. 3507.1, added Act 593 of 1985).

Delivery of Property to Plaintiff.

If defendant does not file bond within ten days, plaintiff may, by filing similar bond, secure delivery of the property to himself. (C.C.P. 3576, La.R.S. 9:3261-3271).

Sale of Property.

Perishable property may be sold without advertisement or appraisement. (C.C.P. 2333).

5.23 SERVICE:

See topic 5.20 Process.

5.24 STAY OF EXECUTION:

See topics 5.03 Appeal and Error, Injunctions; category 8 Debtor and Creditor, topic 8.05 Executions.

5.25 SUBMISSION OF CONTROVERSY:

No statutes authorize submission of controversy to court on agreed statement of facts but courts generally allow such submission.

5.26 VENUE:

Ordinarily, suits must be brought in the court having jurisdiction over defendant's domicile. (C.C.P. 42). Action for revendication of real estate, or for seizure and sale of real estate under an act of hypothecation importing confession of judgment, or for enforcing legal or judicial mortgage against third possessors, or actions for sequestration may be brought either where any portion of the property is situated or at defendant's domicile. (C.C.P. 72, as am'd Act 1055 of 1997, 42). Actions for labor performed or supplies or materials furnished, or for improvements made upon any real estate, may be brought in court having territorial jurisdiction of the property or at defendant's domicile. (La.R.S. 13:3233).

Venue of actions against a qualified foreign corporation or foreign LLC is parish of primary business office as designated in application to do business or absent such designation, in parish of its primary place of business (C.C.P. 42, as am'd Act 23 of 2001) principal business establishment is located or in parish designated as principal business establishment in application to do business in state (C.C.P. 42, as am'd Act 487 of 1990) and against unqualified foreign corporation, in parish of plaintiff's domicile or in parish where process may be served upon it. Venue of actions against foreign or alien insurer is East Baton Rouge Parish. (C.C.P. 42, as am'd Act 545 of 2003).

In matters relating to succession, where succession opened. In matters relative to partition of real property, where property situated. In matters relative to partnership, while continuing, where it is established, or if there are several establishments, where obligation was entered into. In matters relative to failure, in court where failure declared. In matters relative to warranty, in court of principal action. Where defendants are foreigners, or have no known place of residence in the state, where they are found. Where defendants are joint or solidary obligors, at domicile of any one of them. (C.C.P. 73, am'd Act 117 of 1989). Against sureties on official bonds, in parish in which bond was filed. Actions involving real estate (immovable property), where property is situated or at defendant's domicile. (C.C.P. 42, 71-79, 80, as am'd Act 195 of 1989). Actions involving matters over which business office had supervision, where business office located or at defendant's domicile. (C.C.P. 77, as am'd Act 117 of 1989). Actions to revoke donation of immovable property or relative to lease of immovable property, where property is situated. (C.C.P. 80, am'd Act 893 of 1989 and Act 541 of 1989). To obtain child custody, in parish where either party is domiciled or parish of last matrimonial domicile. To change or modify custody, or to modify support award, in parish where person awarded custody or support is domiciled or parish where original decree was rendered. (C.C.P. 74.2). Motion for change of venue permitted in custody and support proceedings for limited post-hurricane period if party has changed domicile in state post-hurricane and other party has resided out of state service before hurricane. (C.C.P. 74.2[F], added Act 99 of 2007). For political subdivisions to enforce collection of open account, parish of its location, parish where services were rendered or any other parish permitted by law. (La.R.S. 13:3241, added Act 333 of 1986). Actions on contract may be brought in parish where executed or parish where any work was performed or was to be performed. (C.C.P. 76.1, added Act 217 of 1991). Actions to partition community property, resolve claims arising from either former matrimonial regime or from co-ownership of former community property may be brought as incident to action which would result in termination of regime or in parish where immovable property is situated or, as to movable property, in parish of domicile of either spouse. (C.C.P. 82, as am'd Act 1055 of 1997). Venue for suits against faculty or staff of Louisiana State Medical School, Louisiana State Health Sciences Center or LSU Board of Supervisors alleging administrative or supervisory negligence relative to medical care is only in parish where care was provided. (La.R.S. 13:5104[D], added Act 127 of 1st Ex. Sess. of 2000).

Venue for divorce or annulment is non-waivable and must be either in parish where either party is domiciled or in parish of last matrimonial domicile. (C.C.P. 3941, as am'd Act 1009 of 1990, eff. Jan. 1, 1991).

Venue for action to collect open account and for motion for judgment debtor examination may be in parish where open account was created, where services were performed or in parish of debtor's domicile. (C.C.P. 74.4, added Act 433 of 2007). Venue for action on promissory note is parish where note was executed or parish of domicile of debtor. (C.C.P. 74.4, as am'd Act 357 of 2008, eff. June 21, 2008).

Venue for all suits filed against state, state agency or state officer or employee for conduct arising out of official duties or within course and scope of employment must be in E. Baton Rouge Parish or in parish in which cause of action arises. (La.R.S. 13:5104[A], as am'd Act 13 of 2009).

Suits on fire, life, marine, medical protective, accident, sick benefit insurance or vehicle collision insurance policies may be brought at domicile of insured or where loss occurred; or in case of life insurance, at domicile of deceased or his beneficiary; or in case of accident insurance, at domicile of insured or in parish where accident occurred, or in parish where accident policy was written; and in case of sick benefits, at place where claimant resides at time of his sickness. These rules apply to suits on policies of fraternal orders and mutual benefit societies. (C.C.P. 45, 76).

Nonresident owners of plantations may be sued for wages due laborers and others, in the parish in which the work was performed. (La.R.S. 23:637).

Steamboats, railroads, and other public carriers doing business in Louisiana may be sued for non-delivery of freight at point of delivery or at point of shipment or domicile of carrier. (La.R.S. 13:3231).

If cause of action arose from a trespass or an offense or quasi-offense action may be brought in parish where wrongful conduct occurred or damages sustained. (C.C.P. 74).

District courts in all parishes bordering on Gulf of Mexico have concurrent jurisdiction to enforce statutes for protection of aquatic life. In case of illegal operation of vessel registered in any such parish, venue is proper in such parish against vessel and all persons subject to prosecution for such operation. (La.R.S. 13:3240, added Act 82 of 1975).

Choice of venue outside Louisiana not permitted in construction contracts, sub-contracts, and purchase orders for public and private works projects. (La.R.S. 9:2779, added Act 217 of 1991). Such choice also limited in employment contracts. (La.R.S. 23:921[A], as am’d Act 58 of 1999).

Change of venue may be sought where action is brought in an improper venue (C.C.P. 121), when a party cannot obtain a fair trial (C.C.P. 122) or for forum non conveniens (C.C.P. 123). Limited forum non conveniens transfers available between city and district courts. (C.C.P. 124 and 4854, added Act 600 of 1985). Change of venue may be granted upon showing that action is predicated solely on acts or omissions outside state. (C.C.P. 123, as am’d Act 536 of 1999, eff. June 30, 1999).

6 COURTS AND LEGISLATURE

6.01 COURTS:

United States District Courts.

(28 U.S.C. § 98).

Middle District.

Clerk’s office: Baton Rouge 70801. Composed of parishes of Ascension, East Baton Rouge, East Feliciana, Iberville, Livingston, Pointe Coupee, St. Helena, West Baton Rouge and West Feliciana.

Court sits at Baton Rouge.

Eastern District.

Clerk’s office: New Orleans 70130. Composed of parishes of Assumption, Jefferson, Lafourche, Orleans, Plaquemines, St. Bernard, St. Charles, St. James, St. John the Baptist, St. Tammany, Tangipahoa, Terrebonne and Washington.

Court sits at New Orleans.

Western District.

Clerk’s Office: Shreveport 71102.

Alexandria Division is composed of parishes of Avoyelles, Catahoula, Grant, La Salle, Rapides, and Winn.

Lafayette Division is composed of parishes of Acadia, Iberia, Lafayette, St. Martin, St. Mary, and Vermilion.

Lake Charles Division is composed of parishes of Allen, Beauregard, Calcasieu, Cameron, Jefferson Davis and Vernon.

Monroe Division is composed of parishes of Caldwell, Concordia, East Carroll, Franklin, Jackson, Lincoln, Madison, Morehouse, Ouachita, Richland, Tensas, Union and West Carroll.

Opelousas Division is composed of parishes of Evangeline and St. Landry.

Shreveport Division is composed of parishes of Bienville, Bossier, Caddo, Claiborne, De Soto, Natchitoches, Red River, Sabine and Webster.

Deposit is required in each district on commencing action in civil causes.

Supreme Court of Louisiana.

Supreme Court has general supervisory jurisdiction over all inferior courts. It has exclusive original jurisdiction in all disciplinary proceedings. See also category 5 Civil Actions and Procedure, topics 5.03 Appeal and Error, 5.05 Certiorari.

Court sits at New Orleans.

Parish, City and Justice of Peace Courts.

These courts of limited jurisdiction, often concurrent with district courts, are subject to bewildering array of caps on jurisdiction by monetary amount or by subject matter. Moreover, they are often subject of conflicting legislation within legislative session as a legislator attempts to amend provisions relative to court within his or her district but will necessarily restate jurisdiction of courts in other districts as he or she attempts to accomplish that purpose. As of Jan. 1, 2007, it would appear that following statements of limitations on jurisdictions are accurate, but there is no substitute for consulting C.C.P. Arts. 4841 et seq., 4901 et seq., and 4911 et seq. if issues arise.

With numerous exceptions, jurisdiction of parish courts concurrent with district courts is limited to actions in which amount in dispute does not exceed $20,000 (C.C.P. 4842); that of city courts, $15,000 (C.C.P. 4843, as am'd Act 379 of 2006); and that of justice of peace courts, $3,500 (C.C.P. 4911). Higher limitations are applicable in number of city courts, by name or by population. $20,000 limit is applicable to City Courts of Baton Rouge and Houma. (C.C.P. 4843[D], as am'd Act 379 of 2006). $25,000 limit is applicable to City Courts of Abbeville, Baker, Bogalusa, Bunkie, Eunice, Kaplan, Lake Charles, Marksville, Monroe, Natchitoches, New Orleans, Opelousas, Plaquemine, Port Allen, Ruston, Shreveport, Sulphur, Winnsboro and Zachary. (C.C.P. 4843[E] and [H], as am'd Acts 379, 575, 680 and 681 of 2006). $30,000 limit is applicable to City Courts of Hammond, Jennings, and Oakdale. (C.C.P. 4843[F], as am'd Act 44 of 2008). $35,000 limit is applicable to City Courts of Leesville, Minden, Springhill, and Slidell. (C.C.P. 4843[G], as am'd Act 379 of 2006). Within City Court of Slidell, there is small claims division with same monetary jurisdictional amount as justice of peace courts, but no class actions. (La. R.S. 13:5202[E], as am'd Act 195 of 2008). In City Courts of Alexandria and Pineville, civil jurisdiction limit concurrent with district courts is monetary amount or property value that does not exceed amount provided in C.C.P. 1732(1) for purposes of demanding jury trial (presently $50,000). (C.C.P. 4843[M], added by Acts 365, 680 and 681 of 2006). City courts in territorial jurisdiction of greater than 50,000 population have concurrent jurisdiction with district courts as to actions by political subdivisions for abatement of violations of law or ordinance, regardless of amount. (C.C.P. 4843[B]). Parish and city courts have jurisdiction in eviction actions limited to rentals up to $150 per day, $500 per week, $3,000 per month and $36,000 per year. (C.C.P. 4844). Justice of peace courts have concurrent jurisdiction with district court in cases in which amount in dispute does not exceed $5,000; if greater demand in amended or supplemental pleading, court must transfer action. (C.C.P. 4911 and 4912, as am'd Act 338 of 2008). Justice of peace courts also have jurisdiction over eviction suits concerning leased residential premises regardless of amount involved and eviction suits concerning leased commercial premises and leased farmlands where monthly rental does not exceed $3,500 per month, regardless of amount of rent due or rent for unexpired term of lease and up to $3,500 in disputes over movable property. (C.C.P. 4912, as am'd Act 43 of 2005). Parish and city courts have jurisdiction over incidental actions of any amount. (C. C. P. Arts. 4831-4847, as am'd Act 823 of 1982 and Act 448 of 1987). Parish courts have no jurisdiction over case where action is against officer or employee of state, state agency, or political subdivision arising out of discharge of official duties or within course and scope of employment. (La.R.S. 13:1444[7], added Act 823 of 2004, eff. July 12, 2004). In parish and city courts, procedure is essentially same as that for district courts. (C.C.P. 4901-4903, as am'd Act 156 of 1986). However, parish and city courts may permit oral pleading by rule when amount in dispute is $2,000 or less. (C.C.P. 4901, as am'd Act 249 of 1987).

City courts may establish small claims divisions which are not courts of record. Civil subject matter jurisdiction over cases up to $3,000 (La.R.S. 13:5202[A], as am'd Act 312 of 1999) or in some instances up to jurisdictional limit of justice of peace courts. (La. R.S. 13:5202[E], as am'd Act 195 of 2008). Neither depositions nor interrogatories are permitted in such divisions, and no more than ten parties plaintiff may join in action and no class actions are permitted. (La.R.S. 13:5202[A], as am'd Act 312 of 1999).

In addition to amount limitations, these courts do not have jurisdiction in actions: (1) Involving title to immovables, (2) right to public office or position, (3) in which plaintiff asserts civil or political rights under federal or state constitutions, (4) claims for annulment, divorce, separation of property or alimony, (5) succession, interdiction, receivership, liquidation, habeas corpus, or quo warranto proceedings, (6) in which state or political subdivision is defendant, (7) involving tutorship, curatorship, emancipation and partition, and (8) other actions as provided by law. (C. C. P. Art. 4847, as am'd Act 361 of 1990, eff. Jan. 1, 1991).

In addition, justice of peace courts do not have jurisdiction over executory proceedings, adoption, tutorship, emancipation or partition proceedings, nor may issue injunctive orders except to arrest execution of its own writ or to enforce execution of judgment of justice of peace court or made executory by it. (C. C. P. Art. 4913, as am'd Act 545 of 1991). Parish courts have concurrent jurisdiction with district courts in proceedings for injunctive relief brought by political subdivision to enjoin law violations. (C.C.P. 4845.1, added Act 152 of 1986, eff. June 28, 1986). They have criminal jurisdiction parishwide as committing magistrates as defined. (La.R.S. 13:2586[C][1], as am'd Act 359 of 2004). They retain jurisdiction over rendered judgments for purposes of enforcement. (La.R.S. 13:2586[E], added Act 359 of 2004).

Justice of peace courts do not have jurisdiction in rem or quasi in rem. (C. C. P. Art. 4913, as am'd Act 156 of 1986).

Principal actions in which defendants have right to jury trial may be transferred to district court, but jury trial is waived with respect to incidental actions filed in these courts. (C. C. P. Art. 4872, as am'd Act 46 of 1979).

In all justice of peace cases, and in district courts with concurrent jurisdiction, claim may be stated orally to clerk and no written pleadings are required except in executory proceedings or for attachment or sequestration for which affidavit is required. Court may require completion of forms or execution of affidavits. All exceptions must be included in answer to be filed within ten days of service of citation, or 15 days if served through Secretary of State. Failing answer, judgment of default may be entered without prior default. In actions on open accounts, promissory notes, negotiable instruments or other conventional obligations, prima facie proof may be by affidavit. Notice of judgment necessary when defendant was not served personally and made no appearance, in cases taken under advisement, or court does not sign judgment immediately and party requests notice. Delay for applying for new trial is three days exclusive of holidays, but this procedure is not allowed in justice of peace courts.

Appeals from parish and city courts are to court of appeal. Appeals from justice of peace courts are to parish court, and, if none, to district court, in which case is tried de novo and from which there is no further appeal except for supervisory jurisdiction by court of appeals. Delay for appeal is ten days from date of judgment or service of required notice, or from denial of motion for new trial for city and parish courts and 15 days for justice of peace courts. (C.C.P. 4924 and 5002, as am'd Act 156 of 1986).

Courts for the Parish of Orleans—City of New Orleans.

Court of Appeal.

Fourth Circuit Jurisdiction: Appellate only extending to: (1) All civil matters, (2) all matters appealed from family and juvenile courts, and (3) all criminal cases triable by jury, except those in which defendant has been convicted of capital offense and death penalty has actually been imposed for which appellate jurisdiction is in Supreme Court. Criminal appellate jurisdiction limited to questions of law. Civil appellate jurisdiction extends to law and facts, except as limited to questions of law by Constitution or as provided by law in review of administrative agency determinations. Covers Parishes of Orleans, Plaquemines and St. Bernard; domiciled in New Orleans. (Const. art. 5, §§ 5 and 10, as am'd Act 843 of 1980, voter approved Nov. 11, 1980; La.R.S. 13:312, as am'd Act 3 of 1981, eff. May 1, 1982). See category 5 Civil Actions and Procedure, topic 5.03 Appeal and Error, subhead Courts of Appeal.

Civil District Court.

Jurisdiction: Exclusive general and original probate jurisdiction, and original civil jurisdiction in all cases where amount in dispute or fund to be distributed shall exceed $100, exclusive of interest, and exclusive jurisdiction in suits involving immovable property, right to office or other public position, civil or political rights, probate and succession matters, when state or political corporation or subdivision or a succession is a defendant, and of appointment of receivers and liquidators. (Const., art. 5, § 16). See subhead Parish, City and Justice of Peace Courts, supra. Civil District Court and Criminal District Court are to be merged into new 41st Judicial District Court eff. May 3, 2010.

Criminal District Court.

Exclusive jurisdiction for trial and punishment of all crimes, misdemeanors, offenses committed within Parish of Orleans; and appellate jurisdiction in all cases tried before Juvenile Courts, or Recorders Courts of New Orleans.

City Courts.

First and Second City Courts sit in New Orleans. See subhead Parish, City and Justice of Peace Courts, supra.

Municipal Court.

Four municipal judges sit as committing magistrates and to try violations of city ordinances other than traffic ordinances.

Traffic Court.

Four judges sit as committing magistrates and to try violations of ordinances regulating traffic upon city streets.

Juvenile court has jurisdiction of trial of all children under 17 years of age alleged to be in need of supervision or of care, or when charged with crime, except certain serious crimes enumerated in Const. art. 5, § 19 and triable under adult procedure or transferrable to adult court. (C.J.P. art. 15).

Appeal lies to appropriate court of appeal, but no appeal shall lie from judgment refusing to adjudicate child to be delinquent. (C.J.P. arts. 97-8). Appeals must be taken within 15 days of judgment. (C.J.P. art. 99). Appeal does not stay judgment unless trial or appellate court directs otherwise. (C.J.P. art. 103).

Courts Outside of New Orleans.

Courts of Appeal.

State is divided into five circuits, each subdivided into election districts, as follows:

First Circuit.

1st Dist.: Parishes of Ascension, Assumption, Iberville, Lafourche, Pointe Coupee, St. Mary, Terrebonne and West Baton Rouge (four judges elected from 1st Dist., two district-wide, one from subdistrict composed of parishes of St. Mary, Lafourche, and Terrebonne and one from subdistrict composed of other five parishes; La. R.S. 13:312, as am'd Act 369 of 2008, eff. Jan. 1, 2009); 2d Dist.: Parish of East Baton Rouge; 3d Dist.: Parishes of East Feliciana, Livingston, St. Helena, St. Tammany, Tangipahoa, Washington and West Feliciana. Court domiciled in Baton Rouge.

Second Circuit.

1st Dist.: Parishes of East Carroll, Franklin, Madison, Morehouse, Quachita, Richland, Tensas and West Carroll, divided in two subdistricts for election purposes; 2d Dist.: Bienville, Bossier, Caldwell, Claiborne, Jackson, Lincoln, Union, Webster and Winn; as of Dec. 31, 2016, divided into two subdistricts for election purposes (Bossier and Webster in one, all rest of parishes in other); 3d Dist.: Parishes of Caddo, DeSoto and Red River, divided in two subdistricts for election purposes. (La.R.S. 13:312, as am'd Act 1069 of 1992, eff. July 14, 1992). Court domiciled in Shreveport.

Third Circuit.

1st Dist.: Parishes of Avoyelles, Catahoula, Concordia, Grant, LaSalle, Natchitoches, Rapides, and Sabine. 2d Dist.: Parishes of Allen, Beauregard, Calcasieu, Cameron, Jefferson Davis and Vernon. 3d Dist.: Parishes of Acadia, Evangeline, Iberia, Lafayette, St. Martin, St. Landry and Vermilion. Court domiciled in Lake Charles.

Fourth Circuit.

1st Dist.: Parish of Orleans; 2nd Dist.: Parish of Plaquemines; 3rd Dist.: Parish of St. Bernard. Court domiciled in New Orleans.

Fifth Circuit.

1st Dist.: Parish of Jefferson; 2nd Dist.: Parish of St. James and that portion of Parish of St. John the Baptist east of Mississippi River; 3rd Dist.: Parish of St. Charles and that portion of Parish of St. John the Baptist west of Mississippi River. (La.R.S. 13:312, as am'd Act 3 of 1981, eff. May 1, 1982). Court domiciled in Gretna.

Jurisdiction: Appellate only extending to: (1) All civil matters, (2) all matters appealed from family and juvenile courts, and (3) all criminal cases triable by jury, except those in which defendant has been convicted of capital offense and death penalty has actually been imposed for which appellate jurisdiction in Supreme Court in that instance. Criminal appellate jurisdiction limited to questions of law. Civil appellate jurisdiction extends to law and facts, except as limited to questions of law by Constitution or as provided by law in review of administrative agency determinations. (Const. art. 5, §§ 5 and 10, as am'd Act 843 of 1980, voter approved on Nov. 11,

1980).

Sessions of Courts of Appeal are generally held at their respective domiciles only. In few instances, parishes within multiple-parish judicial districts are "split" into different appellate circuits.

District Courts.

Original jurisdiction in all civil and criminal matters except as otherwise provided. They have unlimited and exclusive original jurisdiction in all felony cases, and in cases involving immovable property, and in all probate and succession matters, and in all cases where state, parish, municipality or other political corporation, or a succession, is a party defendant, in all cases involving right to office or other political position, civil or political rights, and of all proceedings for appointment of receivers or liquidators to corporations or partnerships. (Const., art. 5, § 16).

"Specialized divisions" of district courts are permitted by court rule, adopted by majority vote of judges (for no more than three years if without division's consent) having criminal, civil, drug, DWI, mental health, juvenile, violent crime or homicide jurisdiction so long as seniority is "respected" along with requirement for random allotment of cases. (La.R.S. 13:587.4, added Act 215 of 2009).

District courts have concurrent original jurisdiction with courts of limited jurisdiction as follows: (1) With parish courts, in cases where amount in dispute or value of property involved does not exceed $5,000 (C.C.P. 4842) and in proceedings instituted by political subdivisions for injunctive relief with respect to acts which may violate applicable law (C.C.P. 4845.1, added Act 152 of 1986, eff. June 28, 1986); (2) with city courts other than those which have chosen higher levels, where amount in dispute or value of property involved does not exceed $10,000 (C.C.P. 4843, as am'd Act 770 of 1985); and (3) with justice of peace courts, where such amount or value does not exceed $1,200 (C.C.P. 4844, as am'd Act 823 of 1982).

Effective May 3, 2010, there will be 42 judicial districts, parishes included are as follows (though in few instances parishes in same judicial district are appealable to different appellate courts):

First District: Caddo.

Second District: Claiborne, Bienville and Jackson.

Third District: Lincoln and Union.

Fourth District: Quachita and Morehouse.

Fifth District: West Carroll, Richland and Franklin.

Sixth District: East Carroll, Madison and Tensas.

Seventh District: Catahoula and Concordia.

Eighth District: Winn.

Ninth District: Rapides.

Tenth District: Natchitoches.

Eleventh District: Sabine.

Twelfth District: Avoyelles.

Thirteenth District: Evangeline.

Fourteenth District: Calcasieu.

Fifteenth District: Acadia, Lafayette and Vermilion.

Sixteenth District: St. Mary, Iberia and St. Martin.

Seventeenth District: Lafourche.

Eighteenth District: Iberville, West Baton Rouge and Pointe Coupee.

Nineteenth District: East Baton Rouge.

Twentieth District: East Feliciana and West Feliciana.

Twenty-first District: Tangipahoa, Livingston and St. Helena.

Twenty-second District: Washington and St. Tammany.

Twenty-third District: Ascension, Assumption and St. James.

Twenty-fourth District: Jefferson.

Twenty-fifth District: Plaquemines.

Twenty-sixth District: Bossier and Webster.

Twenty-seventh District: St. Landry.

Twenty-eighth District: La Salle.

Twenty-ninth District: St. Charles.

Thirtieth District: Vernon.

Thirty-first District: Jefferson Davis.

Thirty-second District: Terrebonne.

Thirty-third District: Allen.

Thirty-fourth District: St. Bernard.

Thirty-fifth District: Grant.

Thirty-sixth District: Beauregard.

Thirty-seventh District: Caldwell.

Thirty-eighth District: Cameron.

Thirty-ninth District: Red River.

Fortieth District: St. John the Baptist.

Forty-first District: Orleans (eff. May 3, 2010).

Forty-second District: DeSoto.

Parishes

Acadia Parish: Fifteenth District; court sits at Crowley.

Allen Parish: Thirty-third District; court sits at Oberlin.

Ascension Parish: Twenty-third District; court sits at Donaldsonville.

Assumption Parish: Twenty-third District; court sits at Napoleonville.

Avoyelles Parish: Twelfth District; court sits at Marksville.

Beauregard Parish: Thirty-sixth District; court sits at DeRidder.

Bienville Parish: Second District; court sits at Arcadia.

Bossier Parish: Twenty-sixth District; court sits at Benton.

Caddo Parish: First District; court sits at Shreveport.

Calcasieu Parish: Fourteenth District; court sits at Lake Charles.

Caldwell Parish: Thirty-seventh District; court sits at Columbia.

Cameron Parish: Thirty-eighth District; court sits at Cameron.

Catahoula Parish: Seventh District; court sits at Harrisonburg.

Claiborne Parish: Second District; court sits at Homer.

Concordia Parish: Seventh District; court sits at Vidalia.

DeSoto Parish: Forty-second District; court sits at Many.

East Baton Rouge Parish: Nineteenth District; court sits at Baton Rouge.

East Carroll Parish: Sixth District; court sits at Lake Providence.

East Feliciana Parish: Twentieth District; court sits at Clinton.

Evangeline Parish: Thirteenth District; court sits at Ville Platte.

Franklin Parish: Fifth District; court sits at Winnsboro.

Grant Parish: Thirty-fifth District; court sits at Colfax.

Iberia Parish: Sixteenth District; court sits at New Iberia.

Iberville Parish: Eighteenth District; court sits at Plaquemine.

Jackson Parish: Second District; court sits at Jonesboro.

Jefferson Parish: Twenty-fourth District; court sits at Gretna.

Jefferson Davis Parish: Thirty-first District; court sits at Jennings.

Lafayette Parish: Fifteenth District; court sits at Lafayette.

Lafourche Parish: Seventeenth District; court sits at Thibodaux.

LaSalle Parish: Twenty-eighth District; court sits at Jena.

Lincoln Parish: Third District; court sits at Ruston.

Livingston Parish: Twenty-first District; court sits at Livingston.

Madison Parish: Sixth District; court sits at Tallulah.

Morehouse Parish: Fourth District; court sits at Bastrop.

Natchitoches Parish: Tenth District; court sits at Natchitoches.

Orleans Parish: Forty-first District (eff. May 3, 2010); court sits at New Orleans.

Ouachita Parish: Fourth District; court sits at Monroe.

Plaquemines Parish: Twenty-fifth District; court sits at Pointe-a-la-Hache.

Pointe Coupee Parish: Eighteenth District; court sits at New Roads.

Rapides Parish: Ninth District; court sits at Alexandria.

Red River Parish: Thirty-ninth District; court sits at Coushatta.

Richland Parish: Fifth District; court sits at Rayville.

Sabine Parish: Eleventh district; court sits at Many.

St. Bernard Parish: Thirty-fourth District; court sits at Chalmette.

St. Charles Parish: Twenty-ninth District; court sits at Hahnville.

St. Helena Parish: Twenty-first District; court sits at Greensburg.

St. James Parish: Twenty-third District; court sits at Convent.

St. John the Baptist Parish: Twenty-ninth District; court sits at Edgard.

St. Landry Parish; Twenty-seventh District; court sits at Opelousas.

St. Martin Parish: Sixteenth District; court sits at St. Martinville.

St. Mary Parish: Sixteenth District; court sits at Franklin.

St. Tammany Parish: Twenty-second District; court sits at Covington.

Tangipahoa Parish: Twenty-first District; court sits at Amite.

Tensas Parish: Sixth District; court sits at St. Joseph.

Terrebonne Parish: Thirty-second District; court sits at Houma.

Union Parish: Third District; court sits at Farmerville.

Vermillion Parish: Fifteenth District; court sits at Abbeville.

Vernon Parish: Thirtieth District; court sits at Leesville.

Washington Parish: Twenty-second District; court sits at Franklinton.

Webster Parish: Twenty-sixth District; court sits at Minden.

West Baton Rouge Parish: Eighteenth District; court sits at Port Allen.

West Carroll Parish: Fifth District; court sits at Oak Grove.

West Feliciana Parish: Twentieth District; court sits at St. Francisville.

Winn Parish: Eighth District; court sits at Winnfield.

Parish Courts.

In Jefferson Parish, First Parish Court has jurisdiction east of Mississippi River and Second Parish Court has jurisdiction west of Mississippi River. First and Second Parish Courts of Jefferson Parish do not have jurisdiction over specifically listed types of cases, including actions against officer or employee of state, state agency or political subdivision arising out of discharge of official duties or within course and scope of employment. (La.R.S. 13:2562.4, as am’d Act 121 of 2004, eff. June 4, 2004). Parish Court for Parish of Ascension may sit in Donaldsonville, Gonzales and Sorrento.

See subhead Parish, City and Justice of Peace Courts, supra.

Justice of Peace Courts.

Any parish, other than Orleans, may be divided into not more than six nor less than three justice of peace wards.

See subhead Parish, City and Justice of Peace Courts, supra.

Mayor’s Courts.

Mayors or other municipal officers have been vested with jurisdiction over violation of municipal ordinances.

Juvenile Courts.

Juvenile jurisdiction is vested in special juvenile or family courts, created by law for Caddo, Orleans, Jefferson and East Baton Rouge parishes; or in district courts in other parishes. (Ch. C. art. 302). Court exercising juvenile jurisdiction has jurisdiction of trial of all children under

17 years of age alleged to be in need of supervision or of care, or when charged with crime except certain serious crimes enumerated in Const. art. 5, § 19 and triable under adult procedure or transferable to adult court. (Ch. C. art. 303).

Appeal lies to appropriate court of appeal, but no appeal shall lie from judgment refusing to adjudicate child to be delinquent. (Ch. C. arts. 330-331). Appeals must be taken within 15 days of judgment. (Ch. C. art. 332). Appeal does not stay judgment unless trial or appellate court directs otherwise. (Ch. C. art. 336).

Small Claims Courts.

See subheads Courts for the Parish of Orleans—City of New Orleans, catchline City Courts: Courts Outside of New Orleans, catchlines Justice of Peace Courts, and City Courts.

6.02 LEGISLATURE:

Regular sessions convening in even-numbered years beginning in 2004 are general in nature and convene at noon on last Mon. in Mar. for 60 legislative days during 85 calendar days. Regular sessions convening in odd-numbered years after 2004 are fiscal only in nature and convene at noon on last Mon. in Apr. for 30 legislative days during 45 calendar days. In fiscal sessions, limited number of bills on non-fiscal matters may be introduced by each legislator. No measure levying new tax or increasing existing tax may be enacted during regular session in even-numbered year after 2004. There are provisions for extraordinary or emergency sessions. (Const., art. 3, § 2).

Lobbyists.

Regulated by La.R.S. 24:51-55.

6.03 REPORTS:

The decisions of the Supreme Court of Louisiana are to be found in the following reports: Martin, twenty volumes. Old and New Series Louisiana, nineteen volumes. Robinson, twelve volumes. “Louisiana Annual Reports.” 1-52 “Louisiana Reports” beginning vol. 104 and running consecutively through Volume 263 in 1972, when official volumes were discontinued. These decisions are now printed in Southern Reporters.

Decisions of Courts of Appeal are to be found in Orleans Court of Appeal Reports (Vols. 1 to 14) and Louisiana Courts of Appeal Reports (Vols. 1 to 19). Current appellate decisions (1928 to present) are printed in Southern Reporters.

The decisions of the Courts of Appeal are to be found in the Orleans Court of Appeal Reports (Vols. 1 to 14) and Louisiana Courts of Appeal Reports (Vols. 1 to 19). Southern Reporter contains decisions from 1928 on.

Louisiana decisions are also reported in Southern Reporter.

Digests.

Louisiana Digest (West Pub. Co.), with pocket parts, covers reported Louisiana decisions.

6.04 STATUTES:

The Revised Statutes of 1950, Revised Civil Code, Code of Civil Procedure and Code of Criminal Procedure, are official. West Publishing Company publishes an unofficial edition of the foregoing, entitled West’s Louisiana Statutes Annotated.

Uniform Acts which have been adopted are: Anatomical Gift (1968); Blood Tests to Determine Paternity (1972); Child Custody Jurisdiction (1978); Child Custody Jurisdiction and Enforcement (2006, eff. Aug. 15, 2007); Controlled Substances (1972); Declaratory Judgments (1948); Disposition of Unclaimed Property, Revised (1972); Electronic Transactions (2001); Enforcement of Foreign Judgments (1985); Federal Tax Lien Registration (1966); Fiduciaries (1924); Foreign Acknowledgments (1916); Foreign Depositions (1922); Foreign Executed Wills (1912); Foreign Probated Wills (1916); Insurers Liquidation (1948); Judicial Notice of Foreign Laws (1960); Management of Institutional Funds (1976); † Principal and Income (Revised) (1964); Proof of Statutes (1922); Reciprocal Enforcement of Support (1952; 1966); Simplification of Fiduciary Security Transfers (1960); To Secure the Attendance of Witnesses From Without a State in Criminal Proceedings (1936); † Trade Secrets (La.R.S. 31:1431-1439, added Act 462 of 1981, deleting § 3[b] of Uniform Act); Transfers to Minors (1988); Unauthorized Insurers (1940); Veterans' Guardianship (1932); Vital Statistics (1942).

See also category 3 Business Regulation and Commerce, topic 3.09 Commercial Code.

† Adopted with significant variations. See appropriate topics.

For text of Uniform Acts falling within the scope of the Martindale-Hubbell Law Digests see Uniform and Model Acts section.

6.05 UNIFORM LAWS:

For list of Uniform Acts in force in this state see topic 6.04 Statutes. For text of Uniform Acts within the scope of the Martindale-Hubbell Law Digests see Uniform and Model Acts section.

7 CRIMINAL LAW

7.00A BAIL:

See topic 7.01 Criminal Law.

7.01 CRIMINAL LAW:

A Criminal Code (Tit. 14) and a separate Code of Criminal Procedure, as supplemented by Ancillaries (Tit. 15) are in effect.

Indictment or Information.

Prosecution for capital crime must be on presentment or indictment by grand jury. Prosecution for other offenses may be by indictment or by information filed in open court or office of clerk. (Code Criminal Procedure, arts. 382-384). Under certain circumstances, attorney for witness before grand jury may be present. (C.Cr.P. 433(A), as am'd Act 725 of 1986). In capital case, jury need not be sequestered if there is joint motion that it should not be. (C.Cr.P. 791[B], as am'd Act 1172 of 1995). Time periods for bill of information or indictment as follows: 45 days after arrest for misdemeanor, 60 days for felony and 120 days for crime punishable by death or life imprisonment. (C.Cr.P. 701[B], as am'd Act 295 of 2007).

Bail.

A person accused of crime is entitled to bail in all cases except where he is charged with a capital offense and proof of his guilt is evident or presumption thereof great. Bail is permitted after conviction where a maximum sentence of five years or less is imposed and court may grant bail if more than five years. (Const., art. 1, § 18; Code Criminal Procedure, arts. 312-314). Defendant arrested for crime of violence under La. R.S. 14.2(B) may not be released on own recognizance (C.Cr.P. 334.2 added Act 66 of 2008).

If mental capacity is put at issue, lack of sufficient capacity must be proven by clear and convincing evidence. (C.Cr.P. 648[A], as am'd Act 755 of 1990).

Change of Venue.

Criminal court may first select jury in another parish to which it might transfer venue in capital cases, and then transfer after selection. (C.Cr.P. 623.1, added Act 82 of 1991).

Capital Sentencing.

Sentencing in capital case is through separate hearing, in which jury must be instructed that governor has constitutional authority to alter sentence of death or life imprisonment. (C.Cr.P. 905.2, as am'd Act 551 of 1995, contingent upon voter approval of constitutional amendment in late 1995). Following plea or conviction in capital case, court may order upon joint motion entry of sentence of life imprisonment and not hold sentencing hearing. (C.Cr.P. 557 and 905, as am'd Act 434 of 1995).

DNA Testing.

Procedure for post-conviction DNA testing available with four years of sentencing. (C.Cr.P. 924, 926.1 and 930.3[7], as am'd Act 1020 of 2001).

DNA Search Warrants.

Judge may issue warrant authorizing search of person to obtain DNA samples. (C.Cr.P. 163.1, added Act 38 of 2005).

Extradition.

Judge may permit bail for person awaiting extradition unless charged offense is punishable by death or life imprisonment under laws of state of commission of crime, or unless offender is charged with parole or probation violation, or is escapee. (C.Cr.P. Art. 271, as am'd Act 617 of 2008).

Fax Filing.

Filings by facsimile permitted in criminal cases if permitted by policy of clerk of court. (C.Cr.P. 253[B], added Act 319 of 2001).

Interstate Compact for Supervision of Parolees is in effect. (La.R.S. 15:574.14).

Self-defense.

There is presumption that person lawfully inside dwelling, business or vehicle holds reasonable belief that use of force is necessary to prevent unlawful entry or to compel intruder to leave under defined circumstances; person not engaged in unlawful activity who is in place he has right to be has no duty to retreat before using force and may "stand his ground and meet force with force." (La.R.S. 14:19-20, as am'd Act 141 of 2006).

Trial.

Jurors in criminal cases may take notes and have them in jury room, and shall be given copy of court's instructions, all if state and defendant have so agreed in open court outside presence of jury. (C.Cr.P. 793, 801, as am'd Acts 310 and 465 of 2001). Peremptory challenges based on race or gender are prohibited. (C.Cr.P. 795, as am'd Act 669 of 2008). Employees of crime labs, coroners, forensic pathologists and like may testify by live video with 30 days' advance notice. (La.R.S. 15:502, added Act 272 of 2009).

8 DEBTOR AND CREDITOR

8.01 ASSIGNMENTS:

See category 3 Business Regulation and Commerce, topic 3.09 Commercial Code. Uniform Commercial Code Art. 9 enacted effective Jan. 1, 1990. (Act 528 of 1988; am'd Act 135 of 1989).

Both corporeal objects and incorporeal things (e.g., a debt, inheritance, etc.) may be sold or assigned, as may also a thing yet to come but not in existence (e.g., unborn issue of an animal) or an uncertain hope. (C. C. 2449-51).

Form and Requisites.

There are no formal requisites for an assignment. Title to movables may be transferred by oral or written contract, although sales of immovables must be in writing and must be recorded in order to have effect against third persons. (C. C. 2440-2).

Accounts receivable may be assigned without notice to debtor where assignor has filed in conveyance office of parish in which assignor has place or places of business specified notice of assignment setting forth intention to assign accounts receivable to certain assignee. (La.R.S. 9:3101-3111, am'd Acts 37 of 1985, 242 of 1988 and 77 of 1989, latter eff. June 6, 1989). Future accounts receivable may also be assigned. (La.R.S. 9:3102[D], added Act 319 of 1983).

Transfer of title to credits, rights, or other choses in action has the effect of delivery as between the transferrer and transferee. (C. C. 2642). By "title is meant the material evidence, written or other, of the incorporeal right, such as can serve as evidence of the right in a court of justice. (129 La. 382, 386, 56 So. 324). But the transferee is only possessed as regards third persons after notice has been given to the debtor of the transfer having taken place or after the acceptance of the transfer by the debtor in an authentic act. Partial transfer and assignment is effective as to debtor without notice. (C.C. 2643, as am'd Act 97 of 1985).

The sale or transfer of a credit includes everything which is an accessory to the same; as suretyship, privileges and mortgages. (C. C. 2645).

Assignment of Wages.

Voluntary assignment, sale or transfer of earnings is permitted, but not enforceable against employer without his consent except in certain instances. (La.R.S. 23:731, as am'd Act 204 of 1983).

8.02 ATTACHMENT:

Actions in Which Allowed.

Attachment is a conservatory writ and may be obtained in any action for a money judgment. (C.C.P. 3542).

In Whose Favor Writ May Issue.

Attachment may be obtained by any plaintiff, including a nonresident or foreign corporation.

Against Whom Writ May Issue.

Attachment may issue against resident or nonresident.

Claims on Which Writ May Issue.

Attachment may issue on an unmatured claim or a claim which is not payable in the state.

Grounds.

Attachment may be granted on ground that debtor: (1) Has departed from state permanently, or is about to do so before judgment can be obtained and executed against him; (2) is nonresident who has no agent for service of process within state; (3) conceals himself with intention to avoid citation; (4) with intent to defraud creditors, or to give unfair preference to some of them, has mortgaged, assigned or otherwise disposed of his property, or part thereof, or is about to do so; (5) has converted his property into money or other evidences of debt, with intent to place it out of reach of creditors, or is about to do so. (C.C.P. 3541).

In case of an unmatured claim, attachment may issue on any of the aforementioned grounds or on the ground that the debtor is about to remove his property out of the state before the debt becomes due. (C.C.P. 3543).

In case of a money demand against a nonresident, attachment lies regardless of nature or origin of claim, liquidated or unliquidated character or certainty or uncertainty of amount demanded. (C.C.P. 3542).

Attachment on ground of nonresidence lies against a foreign corporation which has not qualified in the state, but not against one which has qualified. (152 La. 1075, 95 So. 227).

Property Subject to Seizure.

A creditor may obtain a seizure against all property belonging to the debtor, whether same be in debtor’s possession or in that of third person. (C.C.P. 3503, 2411).

Proceedings.

Attachment issues upon filing of petition showing grounds for writ, with verification or affidavit by creditor, his counsel or agent. (C.C.P. 3501). Caveat: Fuentes v. Shevin, 407 U.S. 67, 92 S. Ct. 1983, 32 L. Ed. 2d 556 (1972), held notice and an opportunity to a hearing prior to seizure of property constitutionally essential under due process clause.

Attachment may be obtained by leave of court on affidavit and giving bond, provided the usual petition is filed on the next day. (C.C.P. 3502).

Bond.

Creditor must file bond equal to debt, exclusive of interest and costs; except that bond need not exceed $250, unless court orders otherwise, where nonresidence is sole ground of attachment. (C.C.P. 3544).

Issuance of Writ.

Writ may issue on legal holiday (C.C.P. 288), and whether or not debt is liquidated or has matured. (C.C.P. 3542, 3543).

Levy on personal property is made by sheriff taking physical possession of same; on real property by placing keeper on property or, by service of notice of seizure upon owner, filing of notice with recorder of mortgages for parish and entry of data regarding the filing with recorder of mortgages and description of property in sheriff’s seizure book. (La.R.S. 13:3851-3861, as am’d Act 32 of 1960).

Release.

Defendant may secure release of attachment by filing bond in amount exceeding by one-fourth the value of property attached or the amount of the claim, whichever is less. (C.C.P. 3507, 3508).

Sale.

Property attached, except perishables, may be sold only under execution after judgment. (C.C.P. 3510).

Preferences between attachments are in order of dates of service of writs.

Dissolution.

Attachment may be dissolved on rule to show cause. (C.C.P. 3506).

Third Party Claims.

Third person may intervene to protect interest in property attached. If such person claims ownership of property, sale may be enjoined; if he claims a prior lien, sale is not enjoined but rights of parties are referred to proceeds of sale. (C.C.P. 1092, 1094, 1098, 2592, 2643).

Vacation or Modification.

If value of property seized under attachment exceeds what is reasonably necessary to satisfy plaintiff's claim, defendant may secure release of excess.

8.03 [RESERVED]

8.04 CREDITORS' SUITS:

Not known in Louisiana.

8.05 EXECUTIONS:

Execution of judgments belongs to the courts by which the causes have been tried in the first instance. (C.C.P. 2251). It is the duty of the party wishing to avail himself of the judgment to procure its execution.

Exemptions.

See topic 8.06 Exemptions.

Time for Issuance.

Execution may issue only properly when delay for suspensive appeal has elapsed; recordation of judgment prior to that time does not begin execution proceedings. (C.C.P. 2252, as am'd Act 523 of 1985).

Holidays.

Sheriff may not execute writ, mandate or order on legal holiday, except attachment, sequestration, fieri facias, executory process or injunction.

Definitive judgments rendered on appeal may be executed as soon as a certified copy is filed in the trial court. (C.C.P. 2251). No execution can issue on a judgment after a suspensive appeal has been taken and an appeal bond furnished. (C.C.P. 2123, 2126). Execution issued before the expiration of delays within which a suspensive appeal may be taken is irregular, and if a suspensive appeal is subsequently taken, the writ and seizure made thereunder may be vacated and avoided. In such a case the party causing the writ to issue bears the cost of issuing said writ and also subjects himself to a possible action in damages. If no suspensive appeal is taken within the prescribed delays, irregularity in the writ is cured. (C.C.P. 2252).

Application for execution is made to the clerk of court. (C.C.P. 2253).

Deposition of third party holding financial records may be allowed by court in aid of execution of judgment. (C.C.P. 1433, 1469.2 and 2451.1, as am'd and added Act 1000 of 1990).

Writs of execution differ according to the nature of the judgment to be executed. (C.C.P. 2253). Where judgment directs delivery of an estate, clerk issues a writ of possession by which the sheriff is charged with placing successful party in possession. If party condemned to quit real property refuses to go, sheriff must proceed to carry out the order using force if necessary. (C.C.P. 2501). If judgment orders delivery of a thing and if the thing is concealed or carried out of the jurisdiction, or if judgment orders the doing or refraining from something specified other than delivery of a thing, and party condemned refuses or neglects to comply, party in whose favor judgment was rendered may obtain on contradictory motion an order to distrain property of the debtor, an order adjudging debtor in contempt, or a judgment for damages. (C.C.P. 2502). Where judgment orders payment of a sum of money, judgment creditor may obtain from the clerk a writ of fieri facias. (C.C.P. 2253, 2291). This writ directs sheriff to seize property of debtor and to sell same to satisfy judgment. (C.C.P. 2291). If immovable property is seized, notice must be served on occupants of property. (C.C.P. 2293, as am'd Act 877 of 2004). It may be accompanied by garnishment against third person. (C.C.P. 2411). If garnishee responds affirmatively as to employment of judgment debtor, and debtor does not oppose garnishment proceedings, judgment creditor must obtain garnishment judgment within 180 days of filing of garnishee's answer or all effects of garnishment close and judgment creditor must re-serve garnishee with proceedings. (C.C.P. 2411[B][2], added Act 18 of 2004). If sale is enjoined as wrongful, court may award damages, including attorney's fees. (C.C.P. 2298, as am'd Act 301 of 1981).

The sheriff is charged with the duty of executing. (C.C.P. 321).

Levy on personal property is made by sheriff taking physical possession of same. Notice of seizure must be served on judgment debtor, attorney of record, or attorney appointed by court. (C.C.P. 2293). Repossession of motor vehicles without judicial process is available by following specific procedures and with required notice in debt instrument. (La.R.S. 6:965, 966, 966.1, as am'd and added Act 191 of 2004, eff. Jan. 1, 2005). Levy on real property is made constructively by service of notice of seizure on defendant, recordation of notice in mortgage office and entry on sheriff's records. (La.R.S. 13:3851-3880).

Return.

Execution from a court of record must be returned within one year from its issuance, unless property has been seized within such period. (C.C.P. 2294).

Priorities.

Seizing creditors obtain privilege according to order of their seizures. (C.C.P. 2292).

Intervention may be asserted by a third person claiming ownership of property seized or liens superior or inferior to lien of the seizing creditor. (C. C. P. 1092, as am'd Act 92 of 1962).

Advertisement and Sale.

Three days exclusive of holidays after giving notice of seizure, sheriff must proceed to advertise. (C.C.P. 2331). Perishable property may be sold without advertisement or appraisement. (C.C.P. 2333).

Sales of real estate must be advertised at least twice; sales of personal property must be advertised at least once. (C.C.P. 2331). Description by lot and subdivision, or by municipal number, or by section, township and range, and reference to conveyance recordation, is legally sufficient. (La.R.S. 43:211, added Act 46 of 1986, eff. Jan. 1, 1987). Property must be appraised and sold at public auction. (C.C.P. 2332). If sale does not bring two-thirds of appraised value, there must be second offering and sheriff must readvertise sale in same manner as new sale, and with same delays, and property must be sold for whatever it brings in cash. (C.C.P. 2336). If property seized is subject to security interest in which debtor has waived right of appraisal and judgment is limited to collateral for amount of judgment, no appraisal need occur prior to sale. (C.C.P. 2332, 2336, as am'd Act 588 of 2001). Whether new sale or second sale, highest bid must be sufficient to discharge costs, and all mortgages, liens and privileges superior to that of seizing creditor. (C.C.P. 2337).

Redemption.

There is no right of redemption of property sold under execution.

Seizure of Rights of Action.

Creditor may seize rights and interest of a litigant in pending law suit by serving notice on parties to the action, by which seizing creditor acquires a lien or preference on whatever is realized by the debtor out of the suit. (La.R.S. 13:3864-3868).

Supplementary Proceedings.

On proper petition, the court may order an examination of a judgment debtor concerning his property. Failure to submit to examination or answer proper questions may be punished as contempt. (C.C.P. 2451-2456).

See also category 5 Civil Actions and Procedure, topic 5.14 Injunctions.

8.06 EXEMPTIONS:

The following are exempt from seizure: The tools, instruments, and books necessary to trade, calling or profession of debtor, whereby he makes all or part of livelihood; rights of personal servitude, of use or habitation of usufruct of the estate of minor child, and income from dotal property; wedding or engagement rings up to value of $5,000; clothing, bedding, linen, china, non-sterling silverware, glasses, living, bedroom, dining room suites, heating and cooling equipment, one noncommercial sewing machine, equipment for required therapy, washers, dryers, cooking stove, kitchen utensils, pressing irons, refrigerator, freezer, and one cow used by debtor or family; family portraits, arms and military accoutrements; musical instruments played or practiced on by debtor or family; and poultry and fowl for family use. (La.R.S. 13:3881, as am'd Act 532 of 1985). Exemptions with respect to tangibles do not apply as to chattel mortgages and certain repairmen's liens, so long as property is properly described. (La.R.S. 13:3885, as am'd Act 56 of 1983, and La.R.S. 9:4501 and 4502, as am'd Acts 93 and 94 of 1979). Exemption for tools and instruments of trade does not extend to motor vehicles and trailers, except for $7,500 in equity value for one vehicle per household, used by debtor and his household, and for one additional vehicle of such value if equipped to and used for transportation of disabled debtor or family member. (La.R.S. 13:3881, as am'd Act 753 of 2006). Also exempt is one firearm with value not over $500. (La.R.S. 13:3881, as am'd Act 470 of 2003).

The foregoing exemptions do not apply in favor of a lessee as against his lessor. (30 La. Ann. 157). As to exemptions from lessor's lien see topic Landlord and Tenant.

In c. 11 bankruptcy cases, exempt property is only that property and income exempt under law of this state and § 522 of Bankruptcy Code. Property upon which debtor has voluntarily granted lien is not exempt from seizure or forced sale under process of law, to extent of balance due on debt secured thereby. (La.R.S. 13:3881 [B], as am'd Act 670 of 1982).

Creditor may seize beneficiary's interest in trust only (1) when it is subject to voluntary alienation by beneficiary or (2) to extent beneficiary has donated property to trust, directly or indirectly. (La.R.S. 9:2004, as am'd Act 253 of 1997).

See topic 8.10 Homesteads.

Debts Against Which Exemptions Not Allowed.

Personal property exemptions are not available against claims for taxes or assessments levied pursuant to law, debts contracted for purchase price of exempt property, moneys due for rent or claims secured by chattel mortgage or pledge of the exempt property.

Waiver of Exemption.

Personal property exemption may be waived in writing.

Earnings.

75% of disposable earnings for any week are exempt, as defined to classify disposable earnings as that portion remaining after deductions in usual course of business for retirement and insurance coverages and debts to employer; minimum exemption of 30 times federal minimum hourly wage in effect at time earnings are payable or multiple or fraction thereof if pay period is greater or less than one week. (La.R.S. 13:3881, as am'd Act 155 of 1991).

Insurance.

The proceeds or avails or dividends (up to certain monetary limit) of all life, including fraternal and co-operatives, health and accident insurance, annuity insurance and endowment insurance are exempt from all liability for any debt, except for debt secured by a pledge of policy, or any rights under such policy that may have been assigned; or any advance payments made on or against such policy. (La.R.S. 22:646, 647 as am'd Act 910 of 1990). Widow or heirs who have renounced succession may, nevertheless, claim proceeds of policies. If no heirs, expenses of funeral, last illness and administration must be paid from proceeds.

Pensions, Annuities, etc.

All pensions and all proceeds of and payments under annuity policies, individual retirement accounts, Keogh plans, simplified employee pension plans and others qualified under Internal Rev. Code (IRAs, Keoghs, Roth IRAs and like to extent that contributions thereto were tax exempt, plus interest or dividends) are exempt from all liability from debt except for alimony and child support. (La.R.S. 13:3881[D][3], as am'd Act 60 of 2004). Federal earned income tax credits are also exempt, except as to state revenue department or for child support payments in arrears. (La.R.S. 13:3881[A][6], added Act 468 of 2004, eff. June 24, 2004). But no contribution to such fund is exempt if made within one year of filing for bankruptcy or within one year of filing of writ of seizure against such plan. (La.R.S. 20:33[1], as am'd Act 362 of 1983). All gratuitous payments made by employers to employees or former employees, or their widows, heirs or beneficiaries, are also exempt from all but alimony and child support obligations. (La.R.S. 20:33[2]).

Homestead Exemption.

See topic 8.10 Homesteads.

8.07 FORECLOSURE:

See topic 8.13 Liens; category 20 Mortgages, topic 20.04 Mortgages of Real Property.

8.08 FRAUDULENT SALES AND CONVEYANCES:

Annulment.

Obligee has right to annual act of obligor, or result of failure to act of obligor, made or effected after right of obligee arose, that causes or increases obligor's insolvency. (C.C. 2036, eff. Jan. 1, 1985). Obligor deemed insolvent when total of liabilities exceeds total of fairly appraised assets. (C.C. 2037, eff. Jan. 1, 1985). Obligee may annul onerous contracts under certain conditions. (C.C. 2038, eff. Jan. 1, 1985). Obligee may attack gratuitous contract made by obligor whether or not other party to contract knew that contract would cause or increase obligor's insolvency. (C.C. 2039, eff. Jan. 1, 1985). Action of obligee must be brought within one year from time he learned or should have learned of act or failure to act, but not more than three years from act. (C.C. 2041, eff. Jan. 1, 1985). Obligee may not annul contract of obligor in regular course of business. (C.C. 2040, eff. Jan. 1, 1985). Obligee must join obligor and third persons, who can plead discussion of obligor's assets. (C.C. 2042, eff. Jan. 1, 1985). If obligor establishes right to annul, such right is exercised only to extent that it affects obligee's rights. (C.C. 2043, eff. Jan. 1, 1985). Obligee may exercise obligor's right when he refuses to do so, unless it is strictly personal, if obligor causes or increases insolvency by his refusal. (C.C. 2044, eff. Jan. 1, 1985).

Bulk Sales.

Only limited bulk sales provisions in force, applicable to sale of motor vehicle dealership. (La.R.S. 9:2961, added Act 961 of 1992). Prior, more expansive provisions were repealed by Act 377 of 1991 (formerly La.R.S. 9:2961-2968).

See also category 22 Taxation, topic 22.15 Property Taxes, subhead Payment.

8.09 GARNISHMENT:

Caveat: Fuentes v. Shevin, 407 U.S. 67, 92 S. Ct. 1983, 32 L. Ed. 2d 556 (1972), held notice and an opportunity to a hearing prior to seizure of property constitutionally essential under due process clause.

Garnishment process may be issued in aid of attachment, if the attaching creditor has reason to believe that a third person has possession of money or other property belonging to the defendant. The process, with appropriate interrogatories must be served on the third person. (C.C.P. 2412). Special garnishment proceedings apply as to employees of executive branch of state government. (C.C.P. 2412, as am'd Act 886 of 1999). Notice of filing of garnishment must be provided to debtor. (C.C.P. 2412[A], as am'd Act 741 of 2004).

Garnishment process may also be used in aid of execution of a judgment under a writ of fieri facias. (C.C.P. 2411).

Reply of Garnishee.

Within 15 days (five days in City Court) after service of citation and interrogatories, the garnishee must file sworn answers thereto, otherwise there is prima facie case made against him that he is indebted to defendant for amount of claim plus costs, and interest. (C.C.P. 2412, 2413). Interrogatories served on garnishee must include questions which when answered will inform court as to whether defendant debtor is employed by garnishee, his wage rate, manner paid, and other judgments or garnishments; if no longer employed, where and by whom debtor is presently employed and residing, if known to garnishee. (La.R.S. 13:3924, as am'd Act 532 of 1982). If garnishee responds affirmatively as to employment of debtor, and debtor does not oppose proceedings, creditor must obtain garnishment judgment within 180 days of filing of garnishee's answer or all effects of garnishment cease and creditor must re-serve garnishee with proceedings. (C.C.P. 2411[B][2], added Act 18 of 2004).

Traverse of Reply.

The reply of the garnishee may be traversed by the attaching creditor and the issue raised is tried by the court. (C.C.P. 2414). Traverse of reply of garnishee must be made within 15 days after service of notice of reply on party issuing garnishment. (C.C.P. 2414).

Seizure.

If garnishee declare in his reply that he has property, etc., of debtor in his possession, the court can order that it be turned over to sheriff or constable, as the case may be.

Wages, salary, etc., may be garnished, in which case the court, after a hearing, fixes the portion which is exempt (see topic 8.06 Exemptions) and provides for payment to the garnishing creditor out of the balance. Indebtedness to employer may be given priority over garnishment. (La.R.S. 13:3921-3927). No person lending money at more than 10% per annum may garnish any legally exempt salary or wages of debtor in attempt to force payment of debt, under penalty of imprisonment. (La.R.S. 20:32). Worker may not be discharged because of single garnishment, and has remedy for reinstatement and back pay. Worker may be discharged if earnings are subjected to three or more garnishments for unrelated debts in two-year periods, other than garnishment resulting from accident or illness causing loss of ten or more consecutive days at work. (La.R.S. 23:731, as am’d Act 204 of 1983).

See topic 8.06 Exemptions, subhead Earnings.

8.10 HOMESTEADS:

Constitution of 1974.

Legislature required to provide for exemption from seizure and sale, as well as waivers and exclusions, to at least $15,000 in value of a homestead, as provided by law. (Const., art. 12, § 9).

There is exempt from seizure and sale by any process whatever, except as hereinafter mentioned, homestead bona fide owned by debtor and occupied by him, consisting of land, not exceeding 160 acres, buildings and appurtenances, whether rural or urban, to total value of not more than $15,000. If homestead exceeds $15,000 in value, beneficiary is entitled to that amount in case sale of homestead under legal process realizes more than that sum; if sale does not realize more than that sum, above costs and expenses, it is void. Benefit of exemption may be claimed by surviving spouse or minor child or children. (La.R.S. 20:1, as am’d Act 446 of 1977).

See also category 14 Family, topic 14.09 Husband and Wife.

Registration.

Sworn declaration must be recorded in order to be valid. (La.R.S. 20:1, as am’d Act 446 of 1977).

Debts Excluded from Exemption.

Property exempted as homestead cannot be sold to enforce any judgment, execution, or decree except for: (1) Purchase price of property or any part of such purchase price; (2) labor, money and material furnished for building, repairing or improving homesteads; (3) liabilities incurred by any public officer of fiduciary, or any attorney at law, for money collected or received on deposit; (4) taxes or assessments; (5) rent which bears a privilege on said property; (6) amount due homestead or building and loan association for loan made on security of the property; (7) amount due for money advanced on security of mortgage on the property. If at time of loan mentioned in (6) or granting of mortgage mentioned in (7) borrower or mortgagor was married and not separated from bed and board of spouse, homestead is bound only if latter consented to loan or mortgage. (La.R.S. 20:1, as am’d Act 446 of 1977).

Waiver.

Any person entitled to a homestead may waive the same by signing a written waiver thereof; provided that if such person be married and not separated from bed and board from the other spouse, the waiver is not effective as to community property unless signed by latter. If homestead is separate property of one spouse, that spouse may waive exemption in mortgage granted on homestead without necessity of obtaining waiver from non-owning spouse. (La.R.S. 20:1[D], as am'd Act 481 of 2004). Right to sell homestead property shall be preserved, but no sale shall impair rights of creditors thereon. All such waivers must be recorded in mortgage records of parish where homestead is situated. Such waiver may be either general or special and has effect from time of recording. (La.R.S. 20:1, as am'd Act 446 of 1977).

8.11 JUDGMENT NOTES:

Not recognized.

8.12 LEVY:

See topics 8.02 Attachment, 8.05 Executions.

8.13 LIENS:

Equitable liens are unknown in Louisiana. Liens and privileges exist only when specially granted by law.

Liens or privileges are given by law on both movables and immovables, to certain classes of creditors, those in the same class being paid pro rata in case of deficiency of assets.

Except as result of judicial sales in executory proceedings or execution of judgments, lien or privilege is not cancelled, removed from public record, or affected by private or public sale in any succession, liquidation, insolvency, bankruptcy, receivership or partition proceeding. (La.R.S. 9:5031, as am'd Act 894 of 1981).

Attorney's Lien.

See category 18 Legal Profession, topic 18.01 Attorneys and Counselors.

Banker's Lien.

See category 3 Business Regulation and Commerce, topic 3.01 Banks and Banking.

Carrier's Lien.

See category 3 Business Regulation and Commerce, topic 3.08 Carriers.

Chattel Mortgage Lien.

See category 20 Mortgages, topic 20.01 Chattel Mortgages.

City of New Orleans has a lien on immovable property for charges incurred by it in cutting weeds and noxious growths upon any lot or sidewalk. Notice must be served upon owner for ten days before city can cut said weeds, or if owner is unknown notice may be given by advertisement for two days. (1918, act 136). Said city also has a lien on immovable property abutting on a street for the paving of said street or the sidewalks thereof.

Collateral Security.

See topic 8.15 Pledges.

Liens on Homestead.

See topic 8.10 Homesteads.

Judgment Lien.

See category 5 Civil Actions and Procedure, topic 5.15 Judgments.

Landlord's Lien.

See category 21 Property, topic 21.10 Landlord and Tenant.

Liens on Exempt Property.

See topic 8.06 Exemptions.

Liens on movables are given as follows: To the overseer of a plantation, for salary for the current year, on the crop and its proceeds; to those furnishing necessary supplies to a plantation for the current year, for the cost thereof, on the crop and its proceeds; to workmen, for repairs made to movables, for the charges for such repairs, but only so long as possession of such movables is retained; to lessors of immovables and to laborers, for wages, on crops of the current year, and on furniture and implements of farming; to pledgees, for the amount for which pledged, on pledges in their possession; a depositor or bailor, for the amount thereof, on the sales price of the movable deposited, if the same be sold; to one expending money for preservation of a movable, on the thing preserved, for the money so expended; to the seller, for unpaid purchase price, on the movable sold while it is in possession of the purchaser; to an innkeeper, for his charges, on the movables of the guest, while they are on the premises; to a carrier for his charges, on the movable carried, while in possession of the carrier, and also on proceeds of insurance of the movable carried. (C. C. 3217).

In general, liens on movables exist until the debt is satisfied or extinguished by prescription, except as otherwise stated.

Other liens are granted to: (a) cleaners or storers of carpets (La.R.S. 9:4681-4686); (b) drayman or hauling company (La.R.S. 9:4601, as am'd Act 296 of 1985); (c) furnisher of feed for livestock used by contractor or subcontractor in construction or repair of public roads, under contract of over $500 (La.R.S. 9:4921-4923); (d) furnisher of feed or medicine for race horses (La.R.S. 9:4661) or veterinarian who provides medical services (La.R.S. 9:4661, as am'd Act 843 of 1985); (e) lumber workers (La.R.S. 9:4621-4622); (f) moss gatherers (La.R.S. 9:4641); (g) saw mill and planing mill employees (La.R.S. 9:4621-4622); (h) sugar mill employees (La.R.S. 9:4721); (i) threshermen (La.R.S. 9:4521-4523, am'd Act 202 of 1972); (j) vendors of cotton seed (La.R.S. 9:4542); and (k) vendors and producers of agricultural and dairy products (C. C. 3227; La.R.S. 9:4541 and § 5021), makers or repairers of movable goods, including marine vessels, trailers to transport them, and equipment or motors used on them. (La.R.S. 9:4502[A][1], as am'd Act 179 of 2004); (l) operators of self-service storage facilities for payment of rent and other charges for storage of movables on premises (La.R.S. 9:4756-4760, added Act 506 of 1981). No lien applicable to fresh or frozen food products. (La.R.S. 9:4544 as am'd Act 609 of 1978). Some efforts at uniformity between Louisiana provisions and UCC provisions on security devices on movable property have been made. (La.R.S. 10:9-102 et seq., as am'd Act 303 of 2004).

Ship or vessel liens are given for damage caused by neglect or fault of operator thereof where injury occurs within territorial jurisdiction of State of Louisiana. (La.R.S. 34:801-817).

Vendor of property destroyed by fire has lien on funds due or to become due under insurance policies. To protect lien, written notice of claim and statement of amount due under oath must be given insurer before payment. (La.R.S. 9:4581-4582)

Garages.

Any person operating garage or place where automobiles or other machinery are repaired, or parts made therefor, regardless of whether automobile, etc., be physically in such establishment during making of such repairs or of parts therefor, or regardless of by whom same be attached, has lien upon automobile, truck or machinery for repairs made or parts furnished and for labor performed upon same, for period of 120 days, and is entitled to enforce this lien and privilege by writ of sequestration without furnishing security. If estimate was given, written authorization must be obtained to exceed estimate. This lien and privilege is superior to all other privileges except vendor's lien and privilege, chattel mortgage previously recorded, or bona fide purchasers to whom possession has been given and by whom price has been paid without notice of privilege. (La.R.S. 9:4501, as am'd Act 949 of 1988). If vehicle subject to superior privilege is seized and sold, proceeds over amount necessary to satisfy debt secured by superior privilege are payable to repairman. (La.R.S. 9:4501[C], added Act 949 of 1988).

Hospital Lien.

Hospitals providing services to an injured person have a lien on total amount of any recovery by person from another person on account of such injury, or on net amount payable to an insurance company under a contract providing for indemnity or compensation to injured person. Lien is subject to privilege of attorney. Lien becomes effective by giving written notice by certified mail, return receipt requested, to injured party, to his attorney, to person liable, to insurance company insuring person liable, and to insurance company obligated to pay indemnity or compensation to injured person. Any person who receives a notice before payment of any sums, subject to lien, to injured person, his attorney, heirs, or legal representative, is liable to hospital for amount of its lien but not in excess of amount paid. (La.R.S. 9:4751-4755). Physicians and chiropractors have similar right for expenses of care under workers' compensation. (La.R.S. 23:1142, as am'd Act 107 of 1986).

Mechanics' Liens.

See subhead Liens on Immovables—Private Works Act, infra.

Liens on Immovables—Private Works Act.

Effective Jan. 1, 1982, following persons have privilege on immovable to secure obligations of owner arising out of work on immovable: (1) Contractors, for price of their work; (2) laborers or employees of owner, for price of work performed at site; (3) sellers, for price of movables sold to owner which become component parts of immovable, or are consumed at site, or consumed in machinery or equipment used at site; (4) lessors, for rent of movables used at site and leased by written contract; and (5) registered or certified surveyors, engineers or licensed architects employed by owner, for price of professional services rendered in connection with work. (La.R.S. 9:4801, as am'd Act 724 of 1981). Following persons have claims against owner and contractor to secure payment of obligations arising out of performance of work under contract (and these claims against owner are also secured by privilege on immovable on which work is performed): (1) Subcontractors, for price of their work; (2) laborers or employees of contractors or subcontractor, for price of work performed at site; (3) sellers, for price of movables sold to subcontractor or contractor that become component parts of immovable, or are consumed at site or in machinery or equipment used at site; (4) lessors, for rent of movables used at site and leased to subcontractor or contractor by written contract (La.R.S. 9:4802, as am'd Act 724 of 1981); and (5) prime consultant registered or certified surveyors or engineers, or licensed architects, or their professional subconsultants (La.R.S. 9:4802[A][5], added Act 41 of 1989, eff. June 15, 1989). Owner is relieved of these claims and securing privileges when bond has been given and maintained by contractor as required by law (La.R.S. 9:4812) and proper notice of contract and bond has been given (La.R.S. 9:4811). To be entitled to assert claim, lessor of movable must deliver copy of lease to owner and contractor within ten days of time movables are first placed on site. (La.R.S. 9:4802[G], as am'd Act 724 of 1981).

Work Performed by General Contractor.

Written notice of contract between general contractor and owner should be filed before work begins, identifying parties, immovable, price of work and when payment is to be made. Sufficient description by lot, square, subdivision, township and range required; street or mailing address alone is insufficient. (La.R.S. 9:4831[C], as am'd Act 589 of 1983). Privilege is not available without such notice when price exceeds $25,000. (La.R.S. 9:4811, as am'd Act 724 of 1981). Bond is also required, in following amounts: (1) If price is $10,000 or less, 100% of price; (2) if price is between $10,000 and $100,000, 50% of price but not less than $10,000; (3) if price is between $100,000 and $1,000,000, 1/3 of price but not less than $50,000; and (4) if price is more than $1,000,000, 25% of price but not less than $333,333. Bond includes both payment and performance, unless latter is expressly excluded. (La.R.S. 9:4812, as am'd Act 724 of 1981). Up to total amount of bond, liability of surety is unconditional, without benefit of discussion or division. Priorities of payment established in statute if amounts due exceed bond. Action must be brought against surety within one year after expiration of time specified in La.R.S. 9:4822 for claimants to file statement of claim or privilege. (La.R.S. 9:4813, as am'd Act 724 of 1981).

Claims and Privileges.

Privileges are effective as to third persons when notice of contract is filed or when work is begun, as statutorily defined. Third persons may conclusively rely upon affidavit made by engineer, surveyor, architect or building inspector employed by government or lending institution, of inspection of immovable at specified time showing no work had begun, provided affidavit is filed before or within four business days after execution of affidavit. (La.R.S. 9:4820, as am'd Acts 904 and 999 of 1988).

Privileges granted by Private Works Act rank among themselves and as to other mortgages and privileges as follows: (1) Privileges for ad valorem taxes or local assessments for public improvements against property are first; (2) privileges of laborers or employees of owner, contractor and subcontractor rank next and equally with each other; (3) bona fide mortgages or vendor's privileges effective as to third persons before privileges granted by Private Works Act rank next in accordance with their respective rank as to each other; (4) privileges of sellers, lessors and subcontractors rank next and equally with each other; (5) privileges of contractors, surveyors, engineers and architects rank next and equally with each other: (6) other privileges and mortgages rank next in accordance with their respective rank as to each other. (La.R.S. 9:4821, as am'd Act 724 of 1981).

Preservation of Claims and Privileges.

If notice of contract is filed, persons claiming privilege have 30 days after filing of notice of termination of work or its substantial completion to file statement of claim and deliver to owner copy of statement of claim, except contractor, who has 60 days. (La.R.S. 9:4822[A], as am'd Act 685 of 1988, eff. Jan. 1, 1989). If notice of contract is not filed, claimants must file statement of claims within 60 days of filing notice of termination of work or of substantial completion or abandonment of work, if notice of termination is not filed. (La.R.S. 9:4822[C], as am'd Act 724 of 1981). Contents of statement of claims and definition of termination of work and substantial completion are provided in Act.

Extinguishment of Claims and Privileges.

Privileges granted by Private Works Act, and claims against owner or contractor, are extinguished if not timely and properly preserved as provided in statute, or if claimant fails to institute action against owner for enforcement within one year after expiration of time given in statute for filing statement of claim or privilege to preserve it. (La.R.S. 9:4823, as am'd Act 724 of 1981). Effect of filing claim ceases as to third persons unless notice of lis pendens is filed within one year of claim. (La.R.S. 9:4833, as am'd Act 711 of 1985). Extinguishment of claim against owner does not extinguish statutory claims against contractor. If surety on bond is surety for owner, filing of bond extinguishes privilege but does not affect owner's personal liability. If contractor files bond, both privilege and personal liability of owner to particular claimant are extinguished. (La.R.S. 9:4823 [D] and [E], as am'd Act 724 of 1981).

Enforcement.

Owner or other interested party may convoke concursus proceeding and cite all persons who have preserved claims, and must cite owner, contractor and surety if not otherwise parties, to establish validity and rank of claims and privileges. (T. 9. § 4841, as am'd Act 724 of 1981). In such proceeding, proof of delivery at site by claimant asserting sale of movables is prima facie evidence that movables became component parts of immovable, or were used on immovable, or in machinery or equipment used at site in performing work. (La.R.S. 9:4842, as am'd Act 724 of 1981).

A contractor or subcontractor who defaults on any contract for the construction, erection or repair of any building, structure or other improvement, and who has applied any money received on account on said contract other than to the settlement of bills for material and labor furnished thereunder, is guilty of a misdemeanor. (La.R.S. 14:202).

Wells.

Person performing labor or services in drilling well in search for oil, gas or water, or in operation of oil, gas or water well, or in construction, operation or repair of any flow lines or gathering lines connected to well or pipeline owned by well operator, or doing any trucking, towing, dredging or making any repairs, or furnishing fuel, material or supplies used on or in connection with drilling of well, has lien and privilege for amount which is due him, cost of preparing and recording lien and 10% attorney's fees, on well and lease, on all oil produced therefrom and stored on lease and on all machinery, appurtenances, appliances, structures, etc., thereto attached for drilling, equipment and operation of such lease. Laborer's lien primes that of furnisher of materials or supplies. (La.R.S. 9:4861, as am'd Act 949 of 1984). Notice setting forth nature and amount must be filed in mortgage records of parish where property is located within 180 days after last day of performance of labor or service or from date of delivery of materials and supplies. Such lien is superior to all other liens and mortgages, except taxes or bona fide vendor's privilege or other mortgages or liens existing and recorded when work has begun. (La.R.S. 9:4862, as am'd Act 191 of 1986). Lien prescribes one year from date of recordation. (La.R.S. 9:4865). Sequestration without bond granted on oath to amount due. (La.R.S. 9:4866). Owner has right to bond lien by depositing with clerk of court in parish in which lien is recorded bond with surety, or federally insured certificate of deposit, for amount equal to claim, 10% attorney's fees, plus one-fourth. (La.R.S. 9:4867, as am'd Act 519 of 1985).

Railroad Supplies.

Any person who has furnished supplies, materials or labor that entered into the construction, maintenance or repair of the permanent roadbed and structure of a railroad, has a lien and privilege upon the roadbeds, tracks, rights of way and franchises of such railroad. (La.R.S. 9:4901). This lien exists without necessity of recordation and exists for period of 12 months from date of delivery of such materials or supplies, or performance of such labor, and has preference over all liens, mortgages or encumbrances of any character whatsoever. (La.R.S. 9:4902, 4903).

Contracts for public works, where over $1,000 require bond for 50% of contract price with surety approved by official representative, and must be recorded in office of recorder of mortgages not later than 30 days after work begins. (La.R.S. 38:2241). Carriers of materials and supplies may also be entitled to lien. (La.R.S. 38:2241, as am'd Act 344 of 1975 and Act 244 of 1985). Acceptance shall be executed by architect or engineer upon completion and may be executed upon substantial completion. (La.R.S. 38:2244.1). Materialmen, suppliers or workmen having direct contractual relationship with subcontractor and not with contractor must give written notice of claim to contractor, or file sworn statement of amount due with said authority and record same in office of recorder of mortgages within 45 days after recordation of acceptance or notice of default. (La.R.S. 38:2247, as am'd Act 16 of 1962). Architects, engineers and lessors of movable property engaged by contractor or subcontractor may also assert lien. (La.R.S. 38:2242, as am'd Act 158 of 1986). Where notice of concursus proceedings is served on debtor recording statement he must object to solvency of surety within ten days or said public authority is relieved of personal liability. (La.R.S. 38:2244). Hold harmless or indemnity agreements in public contracts in favor of public bodies are restricted. (La.R.S. 38:2216, am'd Act 333 of 1989, eff. June 27, 1989). See also category 5 Civil Actions and Procedure, topic 5.16 Limitation of Actions, subheads One Year Period, Five Years Period.

Form for Claim or Recordation.

The statutes do not describe any particular form to be used in making claim for and recording a mechanic's lien. The following may be used, although the wording thereof must necessarily be altered to suit the case:

Form

State of . . . . . .

County (or Parish) of . . . . . .

Personally before me, the undersigned authority, a Notary Public, in and for the County (or Parish) of . . . . . ., State of . . . . . ., duly commissioned and qualified, there came and appeared . . . . . ., of . . . . . ., State of . . . . . ., who being first duly sworn did depose and say:

That under a contract entered into by affiant with . . . . . ., who is a contractor and is engaged in the construction of a building located on a certain parcel of land owned by . . . . . ., consisting of Lot No. . . . . . ., in Square No. . . . . . ., bounded by . . . . . ., ..., ..., and . . . . . . Streets, in the City of . . . . . ., County (or Parish) of . . . . . ., State of . . . . . ., affiant sold and delivered to said contractor on the above described premises certain materials of the value of . . . . . . dollars, all as shown in detail on the statement of account annexed hereto and made a part hereof, which said statement describes in detail the materials furnished and the dates of delivery and the prices thereof; that said materials were actually used in the construction of the aforesaid building which is the property of the owner of said parcel of land; that the full amount shown on said statement is justly due and owing to affiant and that nothing has been paid on account thereof.

Sworn to and subscribed this . . . . . . day of . . . . . ., (year) . . . . . .

. . . .

Notary Public.

To be sufficient, description of property may not consist of street or mailing address alone, but should include lot, square, subdivision, and in some instances, township and range.

Real Estate Mortgage Lien.

See category 20 Mortgages, topic 20.04 Mortgages of Real Property.

Owners Association Lien.

Residential and commercial owners association with respect to lots in subdivision may record sworn detailed statement of charges, expenses and dues imposed upon lot in accordance with recorded restrictions, servitudes and obligations affecting subdivision. Such preserves lien for period of five years after date of recordation. (La.R.S. 9:1145-1148, added Act 583 of 1979).

Tax Lien.

See category 22 Taxation, topic 22.15 Property Taxes, subhead Tax Liens.

Vendors of immovables have a lien thereon for unpaid purchase money, which must be recorded in order to affect third persons. (C. C. 3271). Lien is not extinguished nor subordinated to other mortgages or liens when obligation is assumed by new obligor, notwithstanding release of original obligor. (La.R.S. 9:5384, as am'd Act 585 of 1980).

Creditors of successions and particular legatees have for three months after decedent's death a privilege as to property of successions of such decedents when heirs or residuary legatees accept the successions without administration. Creditors of the heirs or residuary legatees who so accept the successions have a like privilege over property of the heirs of residuary legatees, other than property received from the succession. (T. 9. §§ 5011, 5012).

To affect real property, affidavits supporting these privileges must be recorded in mortgage records of parish where realty is situated within three months of decedent's death, and they are pre-empted unless suit thereon be filed within three months of rendition of judgment of possession, or if no succession opened, within three months of recordation of privilege. Both privileges are subordinate to pre-existing mortgages or other privileges. (La.R.S. 9:5013-5016).

Registration.

Privileges on movables are valid without registration unless otherwise specifically provided. Privilege on immovable must be recorded in parish where immovable is located in order to affect third persons. (C. C. 3273-4). Recorded lien having effect of money judgment must have last four digits of social security number of debtor if known, but failure to include those digits does not affect validity of lien. (C.C.P. 1922, as am'd Act 11 of 2007, eff. June 18, 2007).

Redemption.

There is no right of redemption of property sold under foreclosure of a lien.

8.14 MECHANICS' LIENS:

See topic 8.13 Liens.

8.15 PLEDGES:

See also category 3 Business Regulation and Commerce, topic 3.09 Commercial Code.

Every lawful obligation may be enforced by the auxiliary obligation of pledge.

If the principal obligation be conditional, that of the pledge is confirmed or extinguished with it; and if the obligation is null, so also is the pledge. (C. C. 3136-38).

Except as hereinafter stated, it is essential to a contract of pledge that the creditor be put in possession of the thing given to him in pledge and consequently, that actual delivery of it be made to him. (C. C. 3152).

Debtor may pledge claim against another person by transferring it in act of pledge and delivering to creditor note or instrument proving its existence, without endorsement. (C. C. 3156, as am'd Act 315 of 1981).

The pledge invests the creditor with the right of causing his debt to be satisfied by privilege and in preference to other creditors out of the product of the pledged property. (C. C.

3157).

Except in the case of a pledge of notes, bills of exchange, bills of lading, stocks, bonds, or other written obligations, it is required that the pledge, to be valid against third persons, should be proved by a written instrument, in which shall be stated the amount of the debt intended to be secured and the situation and nature of the thing given in pledge. (C. C. 3158).

Claims, credits, obligations and incorporeal rights in general, evidenced by written instrument or muniments of title, may be pledged in same manner as other property, and pledge is valid as to all persons without delivery of claim, credit, obligation or incorporeal right to pledgee. To obligate obligor to pay amount due thereunder to pledgee, notice of pledge must be given in writing to obligor or be acknowledged in writing by him. (La.R.S. 9:4321-4323).

In the case of promissory notes, bills of exchange, bills of lading, stocks, bonds or written obligations of any kind, it is sufficient that the debtor should deliver to the creditor the notes, bills of exchange, bills of lading, etc., without any further formalities. (C.C. 3158, am’d Act 137 of 1989, effective Sept. 1, 1989). Additional alternative methods of pledging promissory notes, and of pledging nonnegotiable instruments, are also available. (La.R.S. 9:4330-4334, added Act 243 of 1988, am’d Act 348 of 1989).

See also category 3 Business Regulation and Commerce, topic 3.09 Commercial Code.

Rents, royalties, overriding royalties, bonuses and other payments and rights accrued, accruing or to accrue under mineral leases and other contracts relating to minerals may be pledged by written instrument identifying right pledged, lands affected, and debt and/or future obligations secured, and pledge is valid as to all persons without delivery. To have effect other than between immediate parties, pledge must be recorded in mortgage records where land is situated. To obligate lessee or obligor to pay to pledgee, certified copy of instrument of pledge, if by authentic act, or multiple original, if by private act, must first be delivered to lessee or obligor, or lessee or obligor must first acknowledge notice of pledge in writing. No transfer assignment or termination of right of pledgee under a pledge is binding upon any person dealing with pledgee until 30 days after delivery to him of certified or duplicate copy of such act. (T. 31, arts. 197-205, as am’d Act 269 of 1979).

Pledge or assignment of rents or lease or both may be made by lessor in act of mortgage or separate written instrument which becomes operative as to debtor upon written notification by assignee, and, if such relates to immovable property, it has effect upon registry of original or certified copy in conveyance office where property is located. (La.R.S. 9:4401, as added Act 321 of 1980).

Warehouse Receipts.

See category 3 Business Regulation and Commerce, topic 3.09 Commercial Code.

Fruits of the pledge are deemed part of the pledge and remain in the hands of the pledgee. He cannot, however, appropriate them to his own use. He is bound to give an account of them to the debtor, or to deduct them from what may be due him. (C. C. 3168).

Remedies of Pledgee.

Independently of a contract, the pledgee cannot in case of failure of payment, dispose of the pledge until he has obtained a judgment against the pledgor in the ordinary course of law. But the pledgor may authorize the sale or other disposition of the property pledged, in such manner as may be agreed upon, without the intervention of the courts. (C. C. 3165). It cannot, however, be agreed that in case of failure to pay the debt the pledge shall belong to the pledgee. (150 La. 482, 90 So. 769).

Purchase of Pledge.

While it is not entirely clear how far the pledgee may go with respect to purchasing the pledge, it would seem that he may purchase at sale by his agent at public place after due notice to pledgor.

8.16 RECEIVERS:

Are appointed by district courts of state, after trial, to take charge of property and business of corporations, domiciled in this state, and of property of foreign corporations located in this state, in cases and under following conditions: When requested by stockholders owning 20% of entire outstanding shares for more than six months when management or shareholders are deadlocked; by any shareholder or creditor when officers or directors grossly mismanaging affairs of corporation or committing gross and persistent ultra vires acts; at instance of stockholder or creditor, when property abandoned and no one authorized to take charge of and conduct corporation's affairs; at instance of any creditor having judgment, when corporation is insolvent or when execution has issued on judgment and has been returned nulla bona; at instance of creditor when property seized under judicial process by fraud or collusion between officers, directors, stockholders and any creditor; at instance of stockholder when majority of stockholders are violating rights of minority shareholders and endangering their interests; or, if a foreign corporation, upon above grounds, or on application of a duly appointed liquidator or receiver of state or country of incorporation. (La.R.S. 12:151 and 317).

Jurisdiction.

State district court in parish where domestic corporation has its registered office or where foreign corporation has designated registered office in state or where property of foreign corporation is situated if it has no designated registered office, has jurisdiction to appoint receiver for such corporation. (C.C.P. Art. 42).

Proceedings.

Application for appointment of a receiver is made by petition to proper court as above. Court may enjoin corporation, its directors, officers, stockholders and agents from disposing of corporate property or changing status of its affairs pending trial of matter. Court may appoint temporary receiver and stay other proceedings against corporation's property. Matter is determined by court in a summary manner without intervention of a jury. (La.R.S. 12:753).

Eligibility and Competency.

Receiver may be shareholder, director or officer, but cannot be a person of specified relationships with court and judge. (La.R.S. 12:144, 151).

Qualification.

Receiver must give such bond for faithful performance of his duties as is fixed by court. (La.R.S. 12:151).

Powers and Duties.

Receiver has powers of judicial liquidator (La.R.S. 12:146 C) and court may authorize any receivers of any corporation, in order to carry on business of corporation, to borrow or obtain money on certificates of indebtedness to be taxed as costs of court. Sum so obtained shall bear a privilege on all of property real or personal and income of corporation to be paid by preference and priority over all other creditors of corporation—save a mortgage on immovable property and vendor's privileges antedating certificates. (La.R.S. 12:152).

Compensation.

Not specified.

Discharge.

Procedure not specified.

8.17 REDEMPTION:

See topics 8.05 Executions, Liens; categories 20 Mortgages, topic Mortgages of Real Property; Taxation, topic Property (Ad Valorem) Taxes, subhead Redemption.

8.18 SUPPLEMENTARY PROCEEDINGS:

See topic 8.05 Executions.

8.19 TRUSTEE PROCESS:

See topic 8.09 Garnishment.

8.20 USURY:

See category 3 Business Regulation and Commerce, topic 3.19 Interest.

9 DISPUTE RESOLUTION

9.01 ALTERNATIVE DISPUTE RESOLUTION:

Mandatory Dispute Resolution.

Not generally required, except in few instances (e.g., workers' compensation).

Voluntary Dispute Resolution.

Encouraged and available, particularly in family matters. See topic 9.02 Arbitration and Award. Specific provisions governing voluntary alternative dispute resolution may be found in La.R.S. 9:4101 through 4112, added Act 1451 of 1997.

9.02 ARBITRATION AND AWARD:

With the exception of matrimonial cases (C. C. 140, 2427), any controversy, whether suit has begun or not, may be submitted to arbitration. (C.C. 3099-3132, as am'd Act 571 of 1985). Statute of limitations tolled as to any matter so submitted until termination of authority of arbitrators. (C.C. 3105, as am'd Act 782 of 1984).

Uniform Arbitration Act not adopted.

Contracts to Arbitrate Future Disputes.

Any provision in any written contract to settle by arbitration a controversy arising out of contract or refusal to perform whole or part thereof is valid, irrevocable and enforceable except upon such grounds as exist at law and equity for the revocation of any contract. Any proceeding brought in violation of arbitration agreement may be stayed by court in which proceeding is pending upon application of one of the parties. Party aggrieved by alleged failure to perform may petition any court having jurisdiction over the parties and upon a finding that the making of arbitration agreement or failure to perform same is not an issue shall order parties to proceed in accordance with terms of contract. (La.R.S. 9:4201-4203).

Powers of Arbitrators.

Arbitrators may summon in writing any person to attend before them or as a witness and in a proper case to bring any book, record or paper deemed material as evidence. If persons refuse or neglect to attend, court may compel attendance. Arbitrators may also petition court for taking of depositions. (La.R.S. 9:4206-4207).

Award and Enforcement Thereof.

Award must be in writing and signed by arbitrators or majority of them. Within one year after award made any party may apply to court for order confirming award. Notice of application in writing must be served upon adverse party or his attorney five days before hearing thereof. The award may be vacated or modified by court and court may direct a rehearing by arbitrators where award vacated. (La.R.S. 9:4209-4211).

Judgment on award is docketed as if it were rendered in an action and has the same force and effect and is subject to all provisions of law relating to a judgment in an action. It may be enforced as ordinary judgment. Appeals may be taken as in ordinary action. (La.R.S. 9:4212, 4214-4215).

Foregoing provisions do not apply to contract of employment of labor or contract for arbitration controlled by valid legislation of the U. S. not subject to above provisions. (La.R.S. 9:4216).

9.02A MANDATORY DISPUTE RESOLUTION:

See topic 9.01 Alternative Dispute Resolution.

10 DOCUMENTS AND RECORDS

10.01 ACKNOWLEDGMENTS:

Uniform Acknowledgments Act has been adopted with slight variations and sections 4, 5 and 6 omitted. (La.R.S. 35:511-513). Uniform Foreign Acknowledgments Act has been adopted with slight variations. (La.R.S. 35:551-555).

May be taken by following officers:

Within state: Notary public or recording officer. Fee varies from $1 to $5.

Without state but within United States, its Territories and District of Columbia: Judge; justice of the peace; notary public; any officer authorized to take acknowledgments where he acts. (La.R.S. 35:5, as am'd Act 320 of 1980, § 513).

Without United States: Ambassador, minister, envoy or chargé d'affaires, secretary, of legation, consul general, consul, vice consul or commercial agent of U.S., in country to which he is accredited; any officer of U.S., notary public or commissioner or other agent of Louisiana authorized to take acknowledgments, if such officer has official seal, and is commissioned or accredited to act where acknowledgment is taken. (La.R.S. 35:9 as am'd Act 240 of 1980). Commissioned officer of U.S. Army, Navy, Marine Corps or Coast Guard may take acknowledgments in foreign country.

The authentic act, which is full proof of the agreement contained in it against the contracting parties and their heirs or assigns, is, as relates to contracts, that which has been executed before a notary public or other officer authorized to execute such functions in the presence of two witnesses, aged at least 14 years, or of three witnesses if a party be blind. If a party does not know how to sign, the notary must cause him to affix his mark to the instrument. (C. C. 1833, 1835). Forms of authentic acts will be found under categories Mortgages, topics

Chattel Mortgages, Mortgages of Real Property; Property, topic Deeds. Typed or hand-printed name of each person signing act must be placed in legible form below signature, but its absence does not affect validity of act. (C.C. 1833, as am'd Act 965 of 2003, eff. Jan. 1, 2005).

All acts passed before any notary public or commissioner for State of Louisiana and two witnesses in District of Columbia, or any state of U.S., other than Louisiana, and any commissioned officer of U.S. Army, Navy, Marine Corps or Coast Guard have same force and effect as authentic acts executed in this state. (La.R.S. 35:6, 7, 453).

Every instrument executed before any ambassador, minister, chargé d'affaires, secretary of legation, consul general, consul, vice-consul, or commercial agent has the full force and effect of an authentic act executed in Louisiana; it is not necessary that officer be assisted by two witnesses, attestation, seal and signature of the officer of themselves being sufficient. (La.R.S. 35:9).

Married women acknowledge as though single; separate examination not necessary. (La.R.S. 35:512).

Requisites of Certificate.

Officers are not required to state the date of expiration of commissions in certificates of acknowledgment.

No requirement that seal be affixed by Louisiana officer nor, except as hereinbefore indicated, by officer outside of state.

Authentication.

No authentication is required for certificates of acknowledgments taken in this state, in foreign country by officers above mentioned, or in United States by notaries public for Louisiana. Where acknowledgment is taken in Louisiana for use elsewhere and authentication is required, clerk of district court in parish of notary's qualification authenticates his certificate. Fee, $1. Secretary of State will also authenticate notary's qualification (fee $2). If for use in foreign country, certification of clerk of court may, however, be required.

Effect.

An instrument acknowledged or proved according to law may be admitted to record or read in evidence without further proof. (C. C. 1836, 1841).

Forms of Acknowledgment.

The following is the usual form used within the State of Louisiana:

Forms

State of Louisiana:

Parish of . . . . . .:

Be it known, That on this . . . . . . day of the month of . . . . . ., (year) . . . . . ., before me, the undersigned authority, personally came and appeared . . . . . ., to me personally known and known by me to be the person whose genuine signature is affixed to the foregoing document, who signed said document before me and in the presence of the two witnesses whose names are thereto subscribed as such, being competent witnesses, and who acknowledged, in my presence and in the presence of said witnesses, that he signed the above and foregoing document as his own free act and deed and for the uses and purposes therein set forth and apparent.

In witness whereof, the said appearer has signed these presents and I have hereunto affixed my hand and seal, together with the said witnesses on the day and date first above written.

(This acknowledgment must be signed by the party making the same, by the two witnesses to the execution of the document and by the officer.)

The forms provided by the Uniform Acknowledgments Act and the Uniform Foreign Acknowledgments Act may be used.

Form of Proof by Witness

State of . . . ., County (or Parish) of . . . .

Personally before me, the undersigned authority, a Notary Public in and for the County (or Parish) of . . . . . ., State of . . . . . ., there came and appeared . . . . . ., a subscribing witness to the foregoing document, well known to me, Notary, who being first duly sworn, did depose and say:

That he knows . . . . . ., the individual described in and who executed the foregoing document; that he was present and saw said . . . . . . execute the same, and that he thereupon, at the same time, subscribed his name as witness thereto.

. . . .

Affiant.

Sworn to and subscribed before me, this . . . . . . day of . . . . . ., (year) . . .

. . . .

Notary Public.

Alternative to Acknowledgment or Proof.

No statutory provision.

10.02 AFFIDAVITS:

Affidavits may be executed before any officer authorized under the law of the place where taken to administer oaths.

Persons serving in or with armed forces or Coast Guard may execute affidavits before any commissioned officer in active service of armed forces or Coast Guard. (La.R.S. 35:7).

Jurat.

No requirement as to necessity of seal of officer or of statement of date of expiration of officer's commission.

Authentication.

No requirement for authentication where affidavit is to be used in jurisdiction other than that in which taken.

Use of Affidavit.

An ex parte sworn statement cannot, generally speaking, be used in evidence.

Form

State of . . . . . ., Parish (or County) of . . . . . .

Personally before me, the undersigned authority, a Notary Public in and for the Parish (or County) of . . . . . ., State of . . . . . ., duly commissioned and qualified, there came and appeared . . . ., who, being first duly sworn, did depose and say:

(Insert statement of Affiant).

. . . .

(Signature of Affiant).

Sworn to and subscribed before me this . . . . . . day of . . . . . ., (year) . . . .

. . . .

Notary Public.

Alternative to Affidavit.

No statutory provision.

10.03 NOTARIES PUBLIC:

Qualification.

Any resident citizen or alien of state knowledgeable of English language and not interdicted, 18 years of age or over, may be appointed notary public in and for parish of his residence or of principal office. (La.R.S. 35:191, as am'd Act 856 of 2008). Notary Public having principal office in parish other than residence may qualify in both parishes if he meets requirements of each parish. (La.R.S. 35:671, added Act 654 of 1975). After submission of appropriate application and appointment by Governor and before receiving commission, notary must take oath and must furnish bond in favor of Governor for $5,000, said bond to be conditioned for faithful performance of all duties required by law of notary. (La.R.S. 35:191, as am'd Act 856 of 2008).

Person licensed to practice law in Louisiana who is notary in any parish may exercise functions of notary in every parish. (La.R.S. 35:191[P], as am'd Act 904 of 2008). Non-lawyer notaries generally limited to parish of their appointment, but number of special provisions authorize such persons to exercise functions in adjacent parishes. (La.R.S. 35:191[A] through [T], as am'd Act 157 of 2007). Non-lawyer notaries who pass state-administered examination after June 13, 2005 have statewide jurisdiction. (La.R.S. 35:191, as am'd Act 793 of 2006).

Ex officio notaries with powers limited to administering oaths and receiving sworn statements may be appointed in certain departments such as Public Safety and Justice. (La.R.S. 35:391-401, as am'd Act 36 of 1991). Acts performed beyond those limited powers are null, but prohibition does not apply to ex officio notaries who are clerks of court or their deputies acting with course and scope of their employment or with reference to vehicle titles or acknowledging signatures on authentic acts. (La.R.S. 35:392.1[B], as am'd Act 64 of 2005, eff. June 16, 2005).

Disbarred or suspended attorney is not qualified or eligible nor is he allowed to exercise function of notary public. (La.R.S. 35:14, added Act 301 of 1976).

Non-attorney notaries must use assigned identification number on documents and attorney notary must use bar roll number, and clerk of court may not accept documents without these numbers after Jan. 1, 2005. (La.R.S. 35:12, 191, 202, 215, 216 and 409, as am'd and added, Act 1142 of 2003, eff. Jan. 1, 2004). Requirement does not extend to documents filed in civil or criminal suit records. (La.R.S. 35:12[D], as am'd Act 62 of 2004).

Unauthorized exercise of notary powers is subject to complaint and sanction. (La. R.S. 35:601-604, added Act 904 of 2008).

Authentication.

See topic 10.01 Acknowledgments.

Seal.

No requirement that notary have seal except that applicant for commission as notary public for Parish of Orleans must produce to Governor for deposit in office of Secretary of State "the impress of his official seal." (La.R.S. 35:255). Acts of foreign notaries also need not be certified under hand and official seal of notary; such acts have same effect without further proof of signatures as if made before Louisiana notary. (La.R.S. 35:5, as am'd Act 313 of 1981).

Powers and Duties.

Notaries public have power, within their several parishes, to make inventories, appraisements, partitions, to receive wills, make protests, matrimonial contracts, conveyances, and generally all contracts and instruments of writing; to hold family meetings and meetings of creditors; to receive acknowledgments of instruments under private signature; to affix the seals upon the effects of deceased persons, and to raise the same; and all acts executed by them, in conformity with the provisions of art, 2234 of the civil code, shall be authentic acts. Oaths and acknowledgments, in all cases, may be taken or made by or before any notary public duly appointed and qualified in this state. Notaries have power to receive wills in which they are named as administrator, executor, trustee, attorney for administrator, executor or trustee, attorney for heir legatee, or for estate. (La.R.S. 35:2, as am'd Act 427 of 1982).

Notarial acts must be made and executed in any place within jurisdictional limits of notary. (La.R.S. 35:10, as am'd Act 460 of 1974).

Notaries must include social security number or employer identification number in act conveying, leasing or encumbering immovable property, but absence of number does not affect validity. (La.R.S. 35:17, as am'd Act 322 of 1991, eff. Jan. 1, 1992). Notaries must include in their acts christian names and surnames of parties in full, together with permanent mailing addresses. (La.R.S. 35:12, as am'd Act 455 of 2004).

They must not pass or execute any act for the sale, transfer or exchange of any real estate unless the taxes due on the same be first paid, to be shown by tax collector's receipt or certificate for that purpose. (La.R.S. 9:2901, 2921, 2922).

Notary must file with assessor a copy of act of sale of Orleans property within 15 days. (La.R.S. 35:281 as am'd Act 43 of 1964).

Recordation.

Notaries must record every deed of sale, donation or any sort of conveyance of immovable property within 48 hours in the parish of Orleans and within 15 days in other parishes. Before passing any act or deed of sale, they must demand a certificate from the register of conveyance, if in the parish of Orleans, showing that the vendor has not alienated in any other way the property to be sold. (La.R.S. 9:2928; C.C. 2255). Authentic acts by an Orleans notary relating to real property outside Orleans Parish, and all acts, contracts and instruments, except chattel mortgages, filed with recorder of mortgages or register of conveyances in Orleans Parish must be filed first with custodian of notarial records in Orleans Parish who is entitled to a fee of $5 per instrument. (La.R.S. 35:323 as am'd Act 663 of 1984).

Keeping of Records.

In city of New Orleans, notaries must keep their records in a brick building and when notary officially ceases to be such, either by death, removal or otherwise, his records must be deposited and preserved in central office of notarial records of city of New Orleans. At end of each calendar year, Orleans notaries must index, bind, and deposit with Custodian of Notarial Records original of authentic acts affecting Orleans real estate and passed before them during that year and registered or recorded in Conveyance and Mortgage Offices: such deposit to be made not later than July 1 of following year, commencing July 1, 1967. Custodian shall charge $5 for each act deposited. (La.R.S. 35:323, as am'd Act 663 of 1984). In all other parishes, notaries must deposit at once their records in office of clerk of district court in parish. (C.C. 2251, 2252, 3370).

Territorial Extent of Powers.

Limited to particular parish or parishes for which appointed. (La.R.S. 35:2). Notaries admitted to practice of law have statewide jurisdiction. (La.R.S. 35:191[P], added Act 125 of 1984).

Certificate of Authority.

See topic 10.01 Acknowledgments, subhead Authentication.

Officers of the U. S. Armed Forces.

Every mortgage, sale, lease, transfer, assignment, power of attorney, oath, affirmation, or affidavit executed by a member of armed forces or Coast Guard of U.S. before a commissioned officer in active service of armed forces or Coast Guard shall have same force and effect as if made or executed before a notary in Louisiana. Instrument must bear signature of such officer, proper designation of his rank and branch of service or subdivision thereof. Such instruments and testaments and trusts executed before any judge advocate under 10 U.S.C. § 801 or Defense Department or Coast Guard civilian attorney have same force as if executed before notary in Louisiana. (La.R.S. 35:7, as am'd Act 50 of 1991, eff. June 25, 1991).

Actions Against Notaries.

Actions against non-attorney notaries must be brought within one year of act or its discovery, but in no event more than three years from act. Time periods are peremptive rather than prescriptive, but do not apply in cases of fraud. (La.R.S. 35:200, as am'd Act 77 of 2004, eff. May 28, 2004).

10.04 RECORDS:

All matters relating to real estate, including liens, and chattel mortgages must be recorded in office of Recorder of Mortgages or Register of Conveyances in the parish where the property is situated to affect third persons. General provisions governing recordation and consequences of recordation may be found in C.C. 3338-3368, added Act 169 of 2005, eff. Jan. 1, 2006. Authentic acts by Orleans notary relating to real property outside Orleans Parish, and all acts, contracts and instruments, except chattel mortgages, filed with recorder of mortgages or register of conveyances in Orleans Parish must be filed first with custodian of notarial records in Orleans Parish who is entitled to a fee of $5 per instrument. (La.R.S. 35:323). *For list of Parishes and Parish Seats see first page for this state in Volume containing Practice Profiles Section.*

Fees of clerk of court, who is ex officio registrar and recorder, are as follows (except in parish of Orleans): For filing any document of record, $25 per book for first page and $10 each subsequent page per book up to ten pages, and for documents that exceed ten pages, $25 for first page and $8 for each subsequent page; for indexing all documents filed for record for each name after first name that is required to be indexed, $5 per name; for notarizing acknowledgments of acts executed under private signature, with seal and certificate, $5; for canceling real estate mortgage with original note, $10; for making copies of all official documents, no more than $2 per page; for attesting any record or copy thereof, $5; for canceling lien for paving or installation of sewerage system, $10. (La.R.S. 13:844, as am'd Act 769 of 2001).

Fees for filings in conveyance office are generally $5 for each page of act in full, plus $2 for each additional lot in sale, except $6 for each page of leases and application for redemption from state Land Office, $7 for process verbal of sheriff's sale, $10 per page for Department of Highways sale and expropriation, and $15 for resubdivision or rezoning order. Fees for filing in mortgage office are $6 for mortgages, vendor's liens, assumptions and assignments, plus $2 for each additional description; $6 for materialman's lien plus $1 for each statement; $6 for recording one page judgment plus $1 for each additional page; $5 per page for charters, partnership filings, marriage contracts, powers of attorney, UCC financial statement, bond mortgages and indentures, donations or revocations, and other documents; $4 for chattel mortgages plus $2 for each 100 words over 100 words; $4 for acceptance or default of contracts plus $1 per additional page; $6 for federal tax lien or discharge.

All above fees may be increased up to 10% by clerk at his discretion. (T. 13, 841[D] and 844[F], added Act 317 of 1986).

Inter vivos donations of immovables must be registered within time prescribed for registry of mortgages in conveyance records of parish where immovable is situated. (La.R.S. 9:2371; C. C. 1554, as am'd Act 798 of 1981).

Servitudes.

Servitude or right of way agreement obtained after Aug. 1, 1970, for installation of facilities, is effective only with regard to grantor, grantee and their heirs, successors and assigns, unless a plat, sketch or aerial photograph showing approximate location of facility is recorded with agreement in conveyance records of parish in which property is located. (La.R.S. 9:2726).

See also category 19 Mineral, Water and Fishing Rights, topic 19.01 Mines and Minerals.

Torrens Act.

Not adopted.

Transfer of title of decedent, whether resident or nonresident, is accomplished by judgment of district court in probate proceedings sending heir or devisee into possession, a copy of which judgment, certified by clerk of court, is registered in conveyance records of parish where real estate is situated.

Vital Statistics.

Births, deaths, marriages and other records are prepared locally and filed with State Registrar, Division of Vital Statistics, Department of Health and Human Resources, 325 Loyola Avenue, New Orleans, Louisiana 70112. Copies of records are available from that office for following fees: $6 for certified copy of original birth certificate or "long form" copy; $5 for issuance of regular death certificate; $10 for filing of delayed death or birth certificate; $5 for certified copy of marriage, delayed birth or death certificate, and $5 for marriage license. Instructions and forms will be provided by that office for filing delayed certificate of birth. (La.R.S. 40:32-79, as am'd Act 347 of 1985).

See also category 13 Estates and Trusts, topic 13.16 Wills, subhead Central Registry for Wills.

10.05 SEALS:

Seals are not required for the validity of contracts or any other written instruments in this state. They have no effect as importing consideration.

10.06 TORRENS ACT:

Not adopted.

10.07 VITAL STATISTICS:

See topic 10.04 Records.

11 EMPLOYMENT

11.01 EMPLOYER AND EMPLOYEE:

See topic 11.02 Labor Relations.

11.02 LABOR RELATIONS:

Age discrimination in employment is prohibited as to persons from 50 through 69 years of age. (La.R.S. 23:893 et seq., am'd Act 846 of 1985; § 976 repealed). Discrimination in compensation, terms, conditions or privileges of employment is prohibited, whether on basis of race, color, religion, sex or national origin, unless pursuant to affirmative action plan; claimant may seek general or special compensatory damage on that basis, as well as back pay, restoration of employment, related benefits, reasonable attorney's fees and court costs, but must pay attorney's fees, damages and costs if claim frivolous. (La.R.S. 23:1006, added Act 709 of 1983).

Employer: must pay in cash 4% interest on cash deposit required of employee (La.R.S. 23:891); must not coerce employee to refrain from joining labor organization (La.R.S. 23:824) and contract having such effect is void (La.R.S. 23:823); must not require employee to agree not to engage in competing business upon termination of employment except in limited situations (La.R.S. 23:921); on public buildings must employ bona fide citizens and qualified voters (La.R.S. 38:2185, 2186); must not, if employing twenty-five or more, adopt rule for discharge of employees or rejection of applications on any age limit under fifty years, except where system of old age pensions has been adopted by employer (La.R.S. 23:892, 893).

Servant attached to person or family may leave or be discharged without assigning cause. (C.C. 2747). Laborer on plantation or in manufacture cannot leave or be discharged before end of term of hiring without assigning good cause (C.C. 2748) and employer discharging without good cause must pay wages for full term (C.C. 2749).

Employer may not discharge employee for jury service. (La.R.S. 23:965, added Act 469 of 1974).

Persons denied employment solely because of assignment or garnishment of wages may recover reasonable damages. (La.R.S. 23:731, as am'd Act 204 of 1983).

Employers may not discriminate against persons who have asserted claims under state or federal workmen's compensation laws. (La.R.S. 23:1361, added Act 704 of 1980). Claims of such discrimination which are determined to be frivolous lead to reasonable damage awards, including attorney's fees and costs. (La.R.S. 23:1361[E], added Act 638 of 1993, eff. June 15, 1993).

Civil Rights Act for Handicapped prohibits discrimination against and denial of employment and other benefits to handicapped persons who have cause of action against any person engaging in discriminatory actions for all relief including compensatory damages, attorneys' fees and costs. Action must be brought within 180 days from date of discovery but not in excess of one year from date of discriminatory act. (La.R.S. 46:2251-2256, added Act 665 of 1980).

Employment of aliens is regulated. (La.R.S. 23:991, 992.1, 992.2 and 995, as am'd Act 894 of 1985).

Absent proof of bad faith as defined, employer is immune from civil liability for providing accurate information about current or former employee's job performance to prospective employer who inquires; similar immunity given to prospective employer if he hires person based on that information, against later claim for negligent hiring or retention. (La.R.S. 23:291, added Act 632 of 1995).

State has "whistle-blower" statute to protect employees against reprisals for revealing certain violations of law. (La.R.S. 23:967, added Act 1104 of 1997, eff. July 14, 1997).

Children.

Employment of minors is regulated. (La.R.S. 23:151-290). Minors not apprentices may not work in specified places or any place, or in any occupation, dangerous to life or limb or injurious to health or morals. Commissioner of Labor determines, after public hearing, which occupations are hazardous. (La.R.S. 23:161). Minors between ages of 12 and 14 may be employed under direct supervision of parent or legal guardian in business in which parent or legal guardian is owner or partner. (La. R.S. 23:162, as am'd Act 364 of 2008, eff. June 21, 2008).

Minors over 16 years old may enter into apprenticeship agreements approved by Department of Labor. (La.R.S. 23:381-391).

With written consent of parent, any minor may participate in theatrical or musical performance sponsored by nonprofit organization or public body, and, with consent of Louisiana Film Commission, may participate in commercial movies produced or filmed in state. (T 23, § 253).

Labor Unions.

Employees have right of self organization and are free to designate a representative of their own choosing to negotiate terms and conditions of their employment. (La.R.S. 23:822). Right to work as agricultural laborer cannot be denied on account of membership or nonmembership in any labor union, (La.R.S. 23:881-889).

No person is required, as condition of employment, to become or remain member of any union or to pay any dues, fees, assessments or other charges to union. (La.R.S. 23:981-987, added Act 97 of 1976).

Wages.

Public service corporations and employers of ten or more persons in manufacturing, boring for oil or mining must pay employees, except clerical force and salesmen, at least twice a month, pay days being two weeks apart as near as practicable. Term employee does not include individual employed in bona fide executive, administrative, supervisory or professional capacity. (La.R.S. 23:633).

Employer: must pay in current money on pay day full face value of checks, tickets, etc., redeemable wholly or partly in merchandise (La.R.S. 51:301-303); must pay employee on discharging him if employee so demands (La.R.S. 23:631-632); must not require employee to forfeit wages when discharged or quitting or assess fines against employee (La.R.S. 23:634-636).

Upon demand of employee after discharge or resignation, employer must pay wages (including fringe benefits) within three days, or be liable either for 90 days wages or wages to date of payment, whichever is lesser, and in event suit is filed after such period, all costs including reasonable attorney's fees. (La.R.S. 23:631 and 632, and § 640, as am'd Act 317 of 1977).

Employer may pay up to $6,000 to surviving spouse of employee, or to children if employee leaves no surviving spouse upon receipt of specified affidavit, provided no divorce proceeding is pending. (La.R.S. 9:1515, am'd Act 604 of 1992). Employer must give notice to Department of Revenue and Taxation and forward copy of release.

Act 65 of 1968 prescribes payment of prevailing wages in particular area (as determined by Commissioner of Labor) on all projects of state or its agencies, and local political subdivisions are authorized to adopt ordinances and resolutions governing contracts let by them (La.R.S. 38:2301).

Assignment of Wages.

See category 8 Debtor and Creditor, topic 8.01 Assignments.

Non-competition Clauses.

Clauses restricting competition of employees after termination are limited by statute. There are restrictions on choice of forum and choice of law clauses in such agreements. (La.R.S. 23:921, as am'd Act 58 of 1999). Sale of goodwill of business may be basis for time-limited non-competition provision applicable to seller or other interested party in transaction. (La.R.S. 23:921, as am'd Act 428 of 2003). No non-competition agreement is enforceable as to automobile salesmen. (La.R.S. 23:921[I], added Act 436 of 2006). Corporation and its shareholders, or partnership and its partners, or LLC and its members may agree—subject to geographical limitations and two-year time period—that individuals will not compete with juridical person. (La. R.S. 23:921, as am'd Act 399 of 2008).

Employee who is employed by franchisor may agree to non-competition clause up to two years after termination of employment, as to his employer or any of franchisees of employer. (La. R.S. 23:921[F], as am'd Act 711 of 2008).

Workers' Compensation.

Subject of compensation for injured employees is governed by T. 23, c. 10. Coverage is for all persons performing services arising out of and incidental to employment in course of employer's trade, business or occupation, but bona fide president, vice-president, secretary and treasurer owning not less than 10% of stock of corporation, sole proprietor, or partner, may waive provisions of Act. (La.R.S. 23:1035, as am'd Act 465 of 1979). Act also covers employees suffering disability or death resulting from occupational disease but such claims must be filed within one year of specific dates. (La.R.S. 23:1031.1, as am'd Act 1189 of 2001, eff. June 29, 2001). Degenerative disc disease, spinal stenosis, arthritis, mental illness and heart-related or perivascular disease are specifically excluded from definition of occupational disease. (La.R.S. 23:1031.1[B], as am'd Act 454 of 1989, eff. Jan. 1, 1990).

Employees performing work on private residential premises of householder and employees of private unincorporated farm when employee's net earnings are $1,000 or less and total net earnings of all employees on farm do not exceed $2,500 are not covered by compensation, when such work is not incidental to nor arises out of any trade, business or occupation of such householder or farmer. (La.R.S. 23:1035[B], as am'd Act 246 of 1995, eff. June 14, 1995). Householder not liable as employer or principal under Act, but any person engaged in business of supplying persons to do work on private residential premises is liable under Act. (La.R.S. 23:1035, as am'd Act 827 of 1981). Real estate brokers, petroleum landmen and musicians and performers are also exempt from coverage. (La.R.S. 23:1047, added Act 829 of 1982; 1048, added Act 318 of 2001; 1035[B], added Act 1100 of 2001). Part-time employees are defined, and average weekly wages calculated, according to number of hours actually worked; and benefits are based on that calculation. (La.R.S. 23:1021, am'd Act 1, 1st Ex.Sess., 1983 and Act 926 of 1985). Bona fide independent contractors as defined are exempt from Act. (La.R.S. 23:1021[6], as am'd Act 188 of 2004, eff. June 10, 2004).

Act may also apply as to employees working outside Louisiana. (La.R.S. 23:1035.1, added Act 583 of 1975). Worker may elect, pre-accident, Louisiana Act as exclusive remedy when (1) Act by its terms would apply and (2) worker was domiciled in Louisiana at time of accident or exposure to occupational disease. (La.R.S. 23:1035.1, as am'd Act 1014 of 2001).

In cases where Act applies, compensation is paid regardless of whether or not injury was caused by the negligence of employer. Compensation denied if employer proves injury caused by employee's willful attempt to injure himself or another, by intoxication, or if employee is initial physical aggressor in unprovoked physical altercation, unless excessive force is used in retaliation against initial aggressor. (La.R.S. 23:1081, am'd Act 1, 1st Ex.Sess., 1983 and Act 1018 of 2001). Upon proof of intoxication, causal relationship to injury is presumed unless employee disproves it. (La.R.S. 23:1081, as am'd Act 454 of 1989, eff. Jan. 1, 1990).

A principal contractor is liable to the employees of a subcontractor for compensation but is subrogated to any rights they may have against others. Such an employee may elect to secure compensation from his employer. (La.R.S. 23:1061-1063).

Employee may claim compensation without affecting his claim for damages against a third person causing the injury, and employer may sue such person for amount which he has paid or become obligated to pay as compensation. Any fault allocated to party immune due to employment status serves to reduce claim for reimbursement by employer or compensation insurer. (La.R.S. 23:1101[A], as am'd Act 15 of 1996 First Ex. Sess.). In any such action damages recovered must be apportioned between employer and employee, claim of employer having precedence. No compromise by employer or employee is binding upon and does not affect the rights of the others unless assented by him. (La.R.S. 23:1101, 1103).

If employee or dependent compromises with third person with written approval of employer or insurer, latter remains liable for compensation in excess of amount of compromise. Without such approval, employee or dependent forfeits right to any compensation from employer or insurer over amount of compromise; employee can regain right to excess compensation by paying over to employer out of compromise amount enough to reimburse compensation benefits paid to that time, up to limit of 50% of compromise amount. (La.R.S. 23:1102, am'd Act 1, 1st Ex.Sess., 1983). If, after intervention by employer or insurer, third-party defendant does not obtain approval of employer or insurer of settlement with employee, third-party defendant must reimburse employer or insurer for benefits paid. (La.R.S. 23:1102[C], as am'd Act 852 of 1984).

Compensation right is exclusive of all other rights against employer, or any principal or any officer, director, stockholder, partner or employee of employer or principal, unless not acting in course or scope of employment or partnership was formed to evade provisions of Act. (La.R.S. 23:1032 and 1101, as am'd Act 147 of 1976 and Act 454 of 1989, latter eff. Jan. 1, 1990).

Overruling contrary court decision, punitive damages also declared excluded by Compensation Act, with prospective effect from June 17, 1995. (La.R.S. 23:1032, as am'd Act 432 of 1995). Act does not apply to uncompensated officers and directors of nonprofit associations. (La.R.S. 23:1046, added Act 295 of 1976).

An employer must furnish all necessary medical and hospital services and medicines and replacement or repair of any prosthetic device damaged in accident and reasonable expense of burial not to exceed $7,500, with any funds left from that sum payable to "heirs of deceased employee." (La.R.S. 23:1203 and 1210, as am'd Act 967 of 2001). Physicians' and chiropractors' fees must be reasonable and agreed to by parties or approved by Director or court. Lien for their payment exists. (La.R.S. 23:1142, as am'd Act 107 of 1986). Reimbursement level for medical or hospital services, and for drugs and supplies, is controlled by schedule. (La.R.S. 23:1034.2, as am'd Act 938 of 1988, eff. Jan. 1, 1989). "Medical treatment schedule" for approval of procedures is also in place. (La.R.S. 23:1203.1, added Act 254 of 2009).

Compensation for either temporary or permanent total disability is 662/3% of wages during period of disability; such disability may be found only when employee cannot engage in any self-employment or gainful occupation for wages, regardless of its nature and specifically including any odd lot employment, sheltered employment or employment while working in any pain. (La.R.S. 23:1221[1] and [2], am'd Act 1, 1st Ex.Sess., 1983). Compensation termed "supplemental earnings benefits" is available to disabled workers who cannot earn 90% or more of wages at time of injury; these benefits amount to 662/3% of difference between average monthly wages at time of injury and such wages earned thereafter or which employee is able to earn. Such benefits are payable for up to 520 weeks, due in any week in which employee cannot earn 90% of prior wage amount. They terminate at end of any two-year period commencing after termination of temporary total disability, unless during that two-year period such benefits have been payable during at least 13 consecutive weeks. Such benefits also terminate when employee retires subject to minimum award of 104 weeks regardless of retirement or social security benefits. (La.R.S. 23:1221[3], as am'd Act 926 of 1985, eff. Jan. 1, 1986). Benefits also terminate if employee returns to work but fails required drug test at place of employment, except with respect to prescription medicine; medical benefits do not terminate for that reason. (La.R.S. 23:1221[3][g], added Act 522 of 2001). Compensation for loss of parts of body vary both as to percentage of wages and period of weeks, and are termed "partial disability benefits". Other losses not specified may be compensated by court up to 662/3% of wages during 100 weeks. Inguinal hernia is treated separately with requirement of notification to employer promptly and treatment by physician within 30 days after accident. (La.R.S. 23:1221[4], as am'd Act 945 of 1985).

No compensation is paid for the first week after the injury is received; except that in cases where disability from injury continues for six weeks or longer, after date of the accident, compensation for the first week must be paid after six weeks have elapsed. (La.R.S. 23:1224).

Benefits for permanent total disability may be reduced by benefits from employer-funded disability plans. (La.R.S. 23:1225[C], as am'd Act 616 of 2003). Supplemental earnings benefits or benefits for temporary or total permanent disability are not payable for any week in which employee receives unemployment compensation, and no benefits of any nature are payable if federal worker's compensation benefits are received. (La.R.S. 23:1225, as am'd Act 1, 1st Ex.Sess., 1983).

Compensation for death within two years after last treatment resulting from accident is by weekly payments varying according to number and relationship of beneficiaries and extent of dependency. Payments continue to spouse until death or remarriage but lump sum of two years payments due on remarriage. Payment to incapacitated child continues during incapacity. Payment to other dependent children continues until age 18, death, or marriage, but may continue to age 23 while a student in accredited educational institution. Payments to other dependents continue during dependency or until death. If there are no legal dependents entitled to benefits under any state or federal compensation system, each surviving parent is entitled to lump sum of $75,000. (La.R.S. 23:1231, 1232 and 1233, as am'd Act 703 of 2008).

Payments must be made at time and place of payment of wages, except the parties may agree to longer interval not exceeding one month, and court may approve interval of payment over one month. At option of employee, payments may be mailed to designated address. (La.R.S. 23:1201). Any voluntary payments during disability or to dependents, not due, may, subject to court's approval, be deducted. (La.R.S. 23:1206).

Maximum compensation to be paid for injuries between Sept. 1, 2009 and Aug. 31, 2010 is $546 and minimum is $146, based on average weekly wage of all employment subject to Employment Security Law, computed to nearest dollar. If wage of employee is less than minimum, he is entitled to average weekly wage. (La.R.S. 23:1202, as am'd Act 926 of 1985). For injuries occurring on or after July 1, 1983, maximum weekly compensation is fixed at 75% of average weekly wage in all state employment (as opposed to maximum of 662/3% of average weekly wage for injuries prior to that date). Minimum remains at 20% of average weekly wage figure, but minimum is not applicable to supplemental earnings benefits or partial disability benefits. (La.R.S. 23:1202, 1221, as am'd Act 1, 1st Ex.Sess., 1983).

Employer and employee may compromise and settle bona fide disputes by agreement under supervision of workers' compensation judge. (La.R.S. 23:1271-1273). Such agreement must have employer's consent as well as insurer and employee; lump sum payment, if any, must be in best interest of parties; and six months must have elapsed after termination of temporary total disability.

Compensation may be commuted in a lump sum by agreement of parties, if approved by court as reasonably complying with statutory provisions, but payments due may not be discounted at a greater rate than 8% per annum nor paid without approval of court, under penalty of liability for one and one-half times the statutory rate of compensation. (La.R.S. 23:1274). Commutation does not preclude employee from making further claim if disability extend beyond contemplated period. (198 La. 921, 5 So.2d 288).

Record keeping and voluntary arbitration functions, as well as general supervision of Act and safety and rehabilitation matters, are established in state Office of Worker's Compensation Administration and its director. When parties have dispute over claim, they may file proceedings with workers' compensation judge. Any dissatisfied party may seek relief from court of appeal. (La.R.S. 23:1310.2 et seq., added Act 938 of 1988, eff. Jan. 1, 1990). Initial mediation of claim is provided. (La.R.S. 23:1310.3, as am'd Act 348 of 1995, eff. June 16, 1995). See category 9 Dispute Resolution, topic 9.01 Alternative Dispute Resolution.

Claims for payments are barred unless parties agree to payments to be made or formal claim has been filed with state administrative office within one year after accident, death, development of injury or last payment. Such time period is three years in case of supplemental earnings benefits, to run from last benefit payment of any type. In all cases, claim must be filed two years after accident resulting in delayed development of injury. (La.R.S. 23:1209, as am'd Act 1, 1st Ex.Sess., 1983). Claims filed with state administrative office presumed timely if received on first legal day following expiration of due date. (La.R.S. 23:1209[B], added Act 884 of 1985). Medical benefit claims are subject to similar time limitations (one year from accident or three years from last payment). (La.R.S. 23:1209[B], added Act 926 of 1985). Failure to pay claims within designated periods of 14, 30 and 60 days after appropriate notice or finality of judgment subjects employer or insurer to varying penalties up to 24% and to reasonable attorney's fees, if such failure is arbitrary, capricious or without probable cause. (La.R.S. 23:1201.2, as am'd Act 1, 1st Ex.Sess., 1983).

Workers' compensation judge proceedings under Act are summary, and procedure for appeal is governed by C.C.P. (La.R.S. 23:1311-1320, as am'd Act 1, 1st Ex.Sess., 1983). For injuries after Jan. 1, 1990, workers' compensation judge system in place, with appeals to appellate court bypassing district court. Default judgments may be entered and confirmed. Fees payable by claimant to attorney must be approved by director or court and then constitute lien. They must not exceed 20% of amount recovered. (La.R.S. 23:1141 and 1143, as am'd Act 647 of 2004, eff. July 5, 2004). Final judgment may be modified by workers' compensation judge with approval of all parties, and workers' compensation judge shall review case at any time after six months of rendition of judgment and issue recommendation. (La.R.S. 23:1331, as am'd Act 1, 1st Ex.Sess., 1983). Motion for new trial recognized, and thereafter appeals follow Code of Civil Procedure and are made directly to appropriate intermediate appellate court. (La.R.S. 23:1310.5, as am'd Act 709 of 2003). Rehabilitation of injured employee may be ordered by hearing officer at expense of employer or insurer for up to 26 weeks, and may be extended for another 26 weeks; possibility of rehabilitation must be assessed prior to adjudication of permanent disability. (La.R.S. 23:1226, added Act 1, 1st Ex.Sess., 1983). Refusal to accept rehabilitation deemed necessary by judge results in 50% reduction in weekly benefits. (La.R.S. 23:1226[B][3][c], as am'd Act 341 of 2004, eff. June 18, 2004). Examination by vocational rehabilitation expert may be ordered on good cause shown. (C.C.P. 1464, as am'd Act 324 of 1991).

Nonresident employer, who comes within the Act and who does not carry compensation insurance or own real property in this state worth at least $100,000 must furnish evidence of current insurance or must deposit with State Treasurer securities in an amount approved by Louisiana Insurance Rating Commission or give bond to secure payment of compensation. (La.R.S. 23:1181-1182, as am'd Act 266 of 1987).

Workmen's Compensation Second Injury Fund available for reimbursement to employers hiring employees who have specified permanent, partial disability when employee sustains second injury. Workmen's compensation insurers and self-insured employers required to contribute specific percentage of gross premiums received or which would have been paid if insured at level fixed by governing board. (La.R.S. 23:1371, et seq., as am'd Act 188 of 1995, eff. June 12, 1995).

Groups of five or more employers may institute group self-insurance funds pursuant to requirements of Compensation Act. (La.R.S. 23:1192 et seq., as am'd Act 13 of 1991, eff. June 14, 1991).

Self-insured program is subject to initial certification by commissioner of insurance, for fee of $1,500; and to annual review, for fee of $300. (La.R.S. 22:1078[B], added Act 18, 1st Ex.Sess., 1983). Insurance coverage is mandatory absent self-insurance arrangements or special statutory exemptions, such as for municipalities. (La.R.S. 23:1168). State-operated fund is available. (La.R.S. 23:1391-1415, added Act 814 of 1991).

Unemployment Compensation.

An unemployed individual is eligible to claim benefits provided he registers for work at and continues to report to a state employment office; is able to and is available for work; has been unemployed for a waiting period of one week; and, has previously been paid during his base period (as defined in Act) wages for insured work equal to at least one and one-half time wages paid to him in that calendar quarter in which his wages were highest. (La.R.S. 23:1600, am'd Act 2 of 1st Ex.Sess., 1983). Unemployed individual who is otherwise eligible may not receive benefits for specified period for certain reasons, such as: Leaving former employment without good cause; being discharged for misconduct; failing to apply for or accept suitable work; becoming unemployed due to labor dispute; receiving or seeking unemployment benefits under laws of another state or U.S.; receiving payments under private retirement or pension plan; and making misrepresentations in order to obtain benefits. (La.R.S. 23:1601, as am'd Acts 566 and 596 of 1985).

11.03 WORKERS' COMPENSATION LAW:

See topic 11.02 Labor Relations.

12 ENVIRONMENT

12.01 ENVIRONMENTAL REGULATION:

General Supervision.

Department of Environmental Quality has jurisdiction of environmental protection pursuant to Louisiana Environmental Quality Act, including regulation of air quality, water pollution control, regulation of solid waste disposal, and regulation of hazardous wastes. (La.R.S. 30:1051-1150.79, as am'd Acts 306, 329, 347, 479, 781, 942 of 1986, La.R.S. 32:1501-1520, La.R.S. 33:7556, La.R.S. 36:231-239, 351-359, La.R.S. 40:5, as am'd Act 449 of 1979). Coastal Zone Management Program, Department of Natural Resources, designates various agencies, depending upon intended usage, to issue permits with respect to land use in coastal zone of state. (La.R.S. 49:213.1-213.22). Department of Wildlife and Fisheries regulates recreational and commercial hunting, fishing, trapping, and recreational boating. (La.R.S. 56:3-700.5, La.R.S. 36:601-610).

Prohibited Acts of Pollution.

Generally, all persons are prohibited from discharging contaminants into air and water, to transport, store, etc., radioactive materials, to cause pollution by solid wastes, or to transport, store or otherwise handle hazardous wastes, contrary to rules and regulations of Department of Environmental Quality. Underground injection of hazardous wastes is regulated by Department of Natural Resources. (La.R.S. 30:4.1 et seq., added Act 389 of 1981, am'd by Act 609 of 1985). Groundwater contamination is comprehensively regulated. (La.R.S. 30:2015.1, added Act 1166 of 2003, eff. July 2, 2003).

Enforcement.

Enforcement of regulations and laws concerning environmental affairs is generally by Department of Environmental Quality through civil suits for damages, cease and desist orders, compliance orders, or by attorney general with respect to criminal actions. Officials may conduct on-site investigations under some circumstances without advance notice or warrant. (La.R.S. 30:1061.1, added Act 655 of 1982, am'd by Act 97 of 1983). When order is final but not complied with, attorney general may institute ex parte petition in 19th Judicial District Court (East Baton Rouge Parish) to make order judgment of court and to make it executory. (La.R.S. 30:1073, as am'd Act 254 of 1988, eff. July 6, 1988). Appeals by aggrieved persons are only to 19th Judicial District Court (East Baton Rouge Parish) within 30 days of ruling or action. (La.R.S. 30:2050.21, as am'd Act 1143 of 1997).

Penalties may be assessed as follows: (1) When person willfully or knowingly discharges, emits, or disposes in contravention of statute, regulations or permit, substance which does or could endanger human life or health, conviction of felony and fine of up to $1,000,000 or cost of cleanup and $100,000 per day of violation plus costs or up to ten years at hard labor or both except for discharge of certain air contaminants; or discharges substance which does not endanger human life or health, conviction of misdemeanor and fine of up to $25,000 per day or imprisonment for not more than one year or both. Misdemeanor verdict is responsive to charge of felony. (La.R.S. 30:1073[F], as am'd 942 of 1986; § 1073[F][1] added by Act 942 of 1986). General penalty provisions for violation of Act or orders of commission include civil penalty up to $25,000 a day for each day of violation and each act of violation and conviction of misdemeanor, and up to $50,000 a day for failure to comply with cease and desist orders. (La.R.S. 30:18 and § 1073 [E] as am'd Act 320 of 1983). Any amounts paid as fines are credits toward any eventual judgment or settlement in civil suit for damages. (La.R.S. 30:1073, as am'd Act 318 of 1987, eff. July 6, 1987). Persons who violate hazardous waste control permits may also be punished by fines up to $100,000 per day or imprisonment at hard labor up to ten years, or both. (La.R.S. 30:1137 [G], as am'd Act 146 of 1982). Civil suits for damages resulting from violations may be brought by Department in name of state, but any amount paid as penalty for violation is credit toward judgment or settlement in that suit. (La.R.S. 30:1073 [B], as am'd Act 97 of 1983).

Careless transportation of hazardous materials is punishable both criminally and civilly. (La.R.S. 32:1519, added Act 327 of 1984). Upon showing of reckless disregard, punitive damages are awardable. (C.C. 2315.1, added Act 335 of 1984). "Hazardous waste site" includes entire contaminated area and may extend beyond facility's boundary. (La.R.S. 30:1148[C], added by Act 329 of 1986). Fuel containing hazardous waste regulated by Department of Environmental Quality (La.R.S. 30:1136[A][8], added by Act 781 of 1986).

Permits.

Permits with respect to environmental affairs are issued by Department. Persons may not import hazardous wastes and permits to dispose of hazardous wastes generated in foreign country may not be granted. (La.R.S. 30:1137.1, added Acts 260 and 694 of 1983).

Coastal Zone Management Program designates various agencies, depending upon intended usage, to issue permits with respect to lands in coastal zone of state, with coordination through Department of Natural Resources. (La.R.S. 49:213.1-213.12, as am'd Acts 512 and 705 of 1983).

Permits for surface mining of coal and transport, treatment, storage or disposal of hazardous wastes, necessary from Department of Natural Resources. (La.R.S. 30:901 et seq., am'd Acts 121 and 748 of 1980). Permits for transport, treatment, storage or disposal of hazardous waste necessary from Department of Natural Resources. (La.R.S. 30:1131-1149.50, as am'd by Acts 306, 781, and 942 of 1986).

Hazardous Waste Tax.

Tax by weight is imposed on disposal and storage of hazardous waste as defined. One-time tax of $2 per dry weight ton of hazardous waste content of Louisiana land was imposed as of July 1, 1984. For future waste disposal or storage more than 90 days for incineration at sea, tax of $10 per dry weight ton is imposed for waste disposed at sites on which generator's act or process produced waste and $20 per dry weight ton for waste disposed at other sites. Tax on "extremely hazardous waste" is $25 per dry weight ton, as defined. Tax on hazardous and extremely hazardous substances increases $1 per year until 1998. Reciprocal tax calculation imposed: Same tax as in generating state as minimum. (La.R.S. 30:1149.21, 1149.32 and La.R.S. 47:821-832, as am'd Act 655 of 1988, eff. July 1, 1988).

13 ESTATES AND TRUSTS

13.01 ADMINISTRATION:

See topic 13.08 Executors and Administrators.

13.02 ADVANCEMENTS:

See topic 13.07 Descent and Distribution, subhead Collation.

13.03 ALLOWANCES:

See topic 13.08 Executors and Administrators.

13.04 CLAIMS:

See topic 13.08 Executors and Administrators; category 5 Civil Actions and Procedure, topic 5.17 Pleading.

13.05 DEATH:

There is presumption of person's death after absence lasting five years or more. (C.C. 54). If absence commenced between Aug. 26, 2005 and Sept. 30, 2005 and was related to Hurricane Katrina or Rita, absent person is presumed to be dead after passage of two years (unless charged with felony). (C.C. 54, as am'd Act 258 of 2006, eff. Aug. 26, 2005).

Survivorship.

There is no presumption of survivorship. (C.C. 936-938 repealed by Act 1421 of 1997, eff. July 1, 1999). Absent proof of order of death, estate of each decedent devolves as if that decedent survived other decedent. (C.C. 31). This order of death may be altered or negated by testator in will by providing that property shall devolve as if testator had survived as to heir, legatee or trust beneficiary of trust. (C.C. 1521, as am'd Act 583 of 1985). Six-month survivorship clause in testament is permitted. (C.C. 1521, as am'd Act 825 of 2001).

Action for death lies in favor of surviving spouse and child or children of decedent or either such spouse or such child or children; if none, in favor of surviving parents or parent; if none, in favor of surviving brothers and sisters; if none of above, surviving grandparents, or any of them. Father or mother who has abandoned child, as defined, has no such cause of action. Action must be brought within one year. Damages are recoverable for death of decedent, and damages sustained by survivors bringing action, but are not limited by law. (C.C. 2315.1 and 2315.2, as am'd Act 1317 of 1997, eff. July 15, 1997 and applicable only to causes of action arising on or after that date). Succession representative may bring "survival action" for damages of deceased tort victim if statutory representatives do not survive him. (C.C. 2315.1, as am'd Act 675 of 1987). Surviving spouse, parent or child involved in killing of deceased may not bring action and does not exclude successive classes of beneficiaries. (C.C. 2315.5, as am'd Act 180 of 1991).

Death Certificate.

See category 10 Documents and Records, topic 10.04 Records, subhead Vital Statistics.

Uniform Anatomical Gift Act adopted. (T. 17; § 2351, et seq., am'd Act 311 of 1985).

See topic 13.16 Wills, subhead Living Will.

13.06 DECEDENTS' ESTATES:

See topics 13.07 Descent and Distribution, Executors and Administrators, Wills; category 8 Debtor and Creditor, topic 8.10 Homesteads.

13.07 DESCENT AND DISTRIBUTION:

When person dies and leaves no will, property descends to various persons by law depending upon classification of property as community or separate property of deceased. Community property of deceased is inherited by his descendants (C. C. 888, added Act 919 of 1981); or if he leaves no descendants, by his surviving spouse in full ownership (C. C. 889, added Act 919 of 1981). Descendants include persons born of marriage, those adopted and those whose filiation to parent has been established in manner provided by law, and their own descendants who may represent them if they died before deceased. (C. C. 3556[8], as am'd Act 919 of 1981). Separate property of deceased is inherited, in successive order if they survive him, by his descendants; his brothers or sisters or their descendants; his parents; his surviving spouse; his ascendants; and other collateral heirs. (C. C. 891-6, added Act 919 of 1981).

Share of community property inherited by descendants is subject to usufruct of surviving spouse. (C. C. 890, added Act 919 of 1981). See subhead Surviving Spouse, infra.

Employer may pay to surviving spouse of decedent (or if none, to major child) any wages, sick or annual leave or other benefits, provided neither spouse has instituted divorce proceedings prior to death. (La.R.S. 9:1515[A], as am'd Act 24 of 2005, eff. June 9, 2005).

Rights of each of these various classes of heirs are as follows:

Descendants succeed to property of their ascendants in equal portions and by heads if they are in same degree, and by roots if all or some of them succeed by representation. (C. C. 888, added Act 919 of 1981). They inherit both separate and community property to exclusion of other heirs, subject to usufruct rights of surviving spouse. In vitro human embryos have inheritance rights of children if subsequently they develop into unborn children later born in live birth. (La.R.S. 9:121-133, added Act 964 of 1986; C.C. 26, as am'd Act 125 of 1987, eff. Jan. 1, 1988).

Parents; Brothers and Sisters.

If deceased leaves no descendants but is survived by father, mother or both, and by brother or sister, or both, or descendants of last, brothers and sisters or their descendants succeed to separate property of deceased, subject to usufruct in favor of surviving parent or parents. If both parents survive deceased, usufruct is joint and successive. If deceased leaves neither descendants nor parents, his brothers or sisters or their descendants succeed to his separate property in full ownership to exclusion of other ascendants and other collaterals. (C. C. 892, added Act 919 of 1981). If deceased leaves neither descendants, nor brothers or sisters or their descendants, his parent or parents succeed to separate property to exclusion of other ascendants and other collaterals. (C. C. 892, added Act 919 of 1981).

Property that devolves to brothers or sisters is divided among them equally if they are all born of same parents. If they are born of different unions, it is equally divided between paternal and maternal lines of deceased: Brothers or sisters fully related by blood take in both lines and those related by half-blood take each in his own line. If there are brothers or sisters on one side only, they take entirety to exclusion of all relations in other line. (C. C. 893, added Act 919 of 1981).

Brothers and sisters of deceased, or their descendants, inherit in their own right or by representation, as regulated by laws referring to latter. (C. C. 881-7, added Act 919 of 1981).

Surviving Spouse.

Share of community, undisposed of by deceased, is inherited by surviving spouse if there are no descendants. (C. C. 889, added Act 919 of 1981). If deceased leaves descendants, his or her undisposed of share of community is inherited by such descendants. Community share inherited by descendants is subject to usufruct of surviving spouse, unless deceased has disposed of that share adversely to interest of surviving spouse. Usufruct terminates when surviving spouse contracts another marriage, unless confirmed by will for life or for shorter period. (C. C. 890, added Act 919 of 1981). Such usufruct is legal usufruct, and does not impinge on forced share of descendants. Deceased may by testament grant usufruct for life or for shorter period to surviving spouse over all or part of his separate property, regardless of inheriting heir. (C. C. 890, as am'd Act 445 of 1982). This usufruct is also legal usufruct, not impingement on legitime of forced heirs, but they may seek security under defined circumstances. (C.C. 573, as am'd Act 158 of 2004; C. C. 890, as am'd Act 445 of 1982; C.C. 1499, as am'd Act 548 of 2003). Property subject to such usufruct includes pension or retirement plan payments, if community property. (C.C. 890, as am’d Act 1075 of 1990, eff. July 27, 1990).

If deceased died rich leaving spouse in necessitous circumstances, marital portion in varying amounts may be available, subject to maximum of $1,000,000. (C.C. 2434, as am’d Act 289 of 1987).

Adopted Children.

See category 14 Family, topic 14.01 Adoption.

Children born outside of marriage may be filiated by subsequent marriage of parents if acknowledged by them as their children. They may be filiated by father or mother by act before notary and two witnesses. (C.C. 200, as am’d Act 480 of 1983). Such children may be acknowledged by declaration executed before notary and two witnesses or by registration of birth or baptism. Prior to declaration, party is entitled to notification by notary of certain rights and obligations. (La.R.S. 9:392, as am’d Act 6 of First Ex. Sess. of 1998, eff. July 1, 1998). And such children may prove their filiation in action brought within one year of death of parent or within 19 years after child’s birth, whichever first occurs. (C. C. 208 and 209, as am’d Act 527 of 1982). Judgments in such actions must be recorded by clerk in conveyance records and are effective against third persons from date of recordation. (La.R.S. 13:914.1, added Act 425 of 1982). Once filiation of such children is established in one of foregoing manners, they have same rights as children born of marriage of their parents. (C. C. 888, added Act 919 of 1981). Such establishment of filiation would have same effect as to other relations, such as ascendants and siblings and other collaterals.

Ascendants.

If deceased leaves neither descendants, nor brothers, sisters, or descendants from them, nor parents, nor spouse not judicially separated, his other ascendants succeed to his separate property. If ascendants in paternal and maternal lines are in same degree, property is divided into two equal shares, one of which goes to ascendants on paternal side, and other to ascendants on maternal side, whether number of ascendants on each side is equal or not. In this case, ascendants in each line inherit by heads. If there is in nearest degree but one ascendant in two lines, such ascendant excludes ascendants of more remote degree. (C. C. 895, added Act 919 of 1981). No representation is permitted in ascending line. (C. C. 883, added Act 919 of 1981).

Ascendants, to exclusion of all others, inherit immovables given by them to their children or their descendants of more remote degree who die without posterity. If immovable has been alienated, but price is still due in whole or part, ascendants have right to receive price. They also succeed to right of reversion on happening of any event which child or descendant may have inserted as condition in his favor in disposing of immovable. (C. C. 897, added Act 919 of 1981). Ascendants inheriting immovables take them subject to all mortgages which donee may have imposed on them, and ascendants exercising right of reversion are bound to contribute to payment of succession debts, in proportion to value of objects given. (C. C. 898, added Act 919 of 1981).

Collaterals.

If deceased leaves neither descendants, nor brothers, sisters, or descendants from them, nor parents, nor spouse not judicially separated, nor other ascendants, his other collaterals succeed to his separate property. Among collateral relations, nearest in degree excludes all others. If there are several in same degree, they take equally and by heads. (C. C. 896, added Act 919 of 1981).

Representation is fiction of law, effect of which is to put representative in place, degree and rights of person represented. (C. C. 881, added Act 919 of 1981). Representation takes place ad infinitum in direct line of descendants. It is permitted in all cases, whether children of deceased concur with descendants of predeceased child, or whether, all children having died before him, descendants of children are in equal or unequal degrees of relationship to deceased, but is limited with respect to claims of predeceased forced heirs to representation of those forced heirs who would not have been 23 at time of decedent's death. (C.C. 882, as am'd Act 147 of 1990, eff. July 1, 1990). There is no representation in ascending line. (C. C. 883, added Act 919 of 1981). In collateral line, representation is permitted in favor of children and descendants of brothers and sisters of deceased, whether they succeed in concurrence with uncles and aunts, or whether, brothers and sisters of deceased having died, their descendants succeed in equal or unequal degrees. (C. C. 884, added Act 919 of 1981).

In all cases in which representation is permitted, partition is made by roots; if one root has produced several branches, subdivision is also made by roots in each branch, and members of same branch take by heads. (C. C. 885, added Act 919 of 1981). Only deceased person may be represented. (C. C. 886, added Act 919 of 1981). One who has renounced his right to succeed to another may nonetheless enjoy representation with respect to that other. (C. C. 887, added Act 919 of 1981).

Afterborn Children.

Child in mother's womb is considered born for all purposes of its own interest: it takes all successions opened in its favor since its conception, provided it be capable of succeeding at moment of birth. Child legitimated by a marriage posterior to its conception takes only those successions which are opened since the marriage of the father and mother. (C. C. 954). Child must be born alive in order to inherit. (C. C. 955). Child conceived after death of decedent, who specifically authorized in writing surviving spouse to use his gametes, is deemed child of decedent for all purposes, provided birth occurs within three years of death of decedent. (La.R.S. 9:391.1, as am'd Act 495 of 2003).

Unworthy Heirs.

Unworthiness of heirs for designated reasons may be established according to C.C. 941-946 (as am'd Act 1421 of 1997, eff. July 1, 1999). Attorney may be appointed for minor or interdict to bring action to declare successor unworthy. (C.C. 942, as am'd Act 824 of 2001).

Death in Common Disaster.

See topic 13.05 Death, subhead Survivorship.

Collation of goods is the supposed or real return to the mass of the succession made by an heir of that which he has received in advance of his share. (C. C. 1227). Children or grandchildren coming to the succession of ascendants must collate what they have received by donation inter vivos and cannot claim legacies unless the donations and legacies have been made expressly as an advantage over other coheirs. (C. C. 1228). Collation is always presumed where it has not been expressly forbidden. (C. C. 1230). Dispensation from obligation of collating may be made in instrument in which gift is made, in later authentic act or in valid last will. (C.C. 1232 and 1501, as am'd Act 246 of 1986). One obliged to collate may renounce succession and retain gift. If, however, remaining amount of inheritance should not be sufficient for legitimate portion of other children, including in succession of deceased property which person renouncing would have collated, had he become heir, he shall then be obliged to collate up to sum necessary to complete such legitimate portion. (C. C. 1237). To make legitimate descendants liable to collation, they must appear in quality of heirs to succession of ascendants from whom they have received gift or legacy. (C. C. 1238). Collation is made in kind when gift itself is returned and by taking less when donee diminishes portion he inherits by value of gift. (C. C. 1252, 1253). If immovable has been given and is still in donee's possession, donee has choice of making collation in kind or by taking less, unless donor has prescribed otherwise. (C. C. 1255). But in case of movables, donee is bound to collate for them by taking less according to their value at time of donation. (C. C. 1283). Collation of money may be made in money or by taking less. (C.

C. 1285). Gifts not exceeding disposable portion of decedent's estate (see topic 13.16 Wills, subhead Forced Heirs) are not taken into consideration in determining distribution of estate where it was expressly provided by donor that they should be over and above forced portion of donee.

Forced Heirs.

See topic 13.16 Wills, subheads Forced Heirs, and Disinherison.

Escheat.

In default of blood or adopted relations, or spouse not judicially separated, estate of deceased belongs to state. (C. C. 902, added Act 919 of 1981).

See also topic 13.08 Executors and Administrators.

13.07A ESTATES: (in property)

See category 21 Property, topic 21.16 Real Property.

13.0813.09 [RESERVED]

13.10 EXECUTORS AND ADMINISTRATORS:

Opening and Acceptance of Succession.

Succession occurs at actual or presumed death of person. (C.C. 54, 934). Immediately at death, universal successors acquire ownership of estate and particular successors acquire ownership of things bequeathed to them. (C.C. 935). Prior to appointment of succession representative, only universal successor may represent decedent with respect to heritable rights and obligations. (C.C. 935). Possession of decedent continues in his successors, testate or intestate, and regardless of type of testate disposition. (C.C. 936). Rights of successor are themselves heritable and are transmitted to his own successors at his death, regardless of knowledge of original successor of his own rights. (C.C. 937). Prior to qualification of succession representative, successor may exercise ownership rights with respect to his own interest in thing in estate or in estate as whole; if these rights are exercised after qualification of representative, effect of such exercise is subordinate to administration of estate. (C.C. 938, as am'd Act 556 of 2001, eff. June 22, 2001).

Successor is not required to accept estate open in his favor, and successor may accept in part and renounce in part. (C.C. 947). Such actions cannot antedate death of decedent. (C.C. 949). Minor is deemed to accept succession opened in her favor, but proper legal representative may renounce, with court approval. (C.C. 948). Acceptance is valid only if successor knows of death of decedent of fact that he has rights as successor, though he need not know extent of those rights. (C.C. 950). Acceptance before successor has this knowledge is premature and absolutely null. (C.C. 951). Accepting successor is considered as having succeeded from moment of death, and renouncing successor is considered never to have had any rights. (C.C. 954). Successor who happens to be creditor may assert rights as creditor whether he accepts or renounces his rights as successor. (C.C. 956). Formal and informal acceptance are recognized. (C.C. 957-960). Renunciation must be express and in writing, though not by authentic act as was previously the law. (C.C. 963). Every accepting successor accepts under benefit of inventory, i.e., limited to value of property received. (C.C. 961). Successor is presumed to accept succession rights but may renounce and overcome that presumption. (C.C. 962). If intestate successor renounces, those rights accrete to persons who would have succeeded to them if successor had predeceased decedent. (C.C. 964). If testate successor renounces, and in absence of contrary testamentary disposition, those rights accrete to those persons who would have succeeded to them if legatee had predeceased decedent. (C.C. 965, as am'd Act 824 of 2001). These rights by accretion may also be renounced in whole or in part. (C.C. 966). Creditor may accept instead of renouncing successor with court approval when renunciation has been made to prejudice of creditor's rights. (C.C. 967).

Placing Heirs or Legatees in Possession.

Heirs of intestate may be recognized and sent into possession of his property without administration of his succession when none of creditors of succession has demanded its administration, on ex parte petition of: (1) Those of heirs who are competent, if all of these accept succession unconditionally; (2) legal representative of incompetent heirs if all of heirs are incompetent and legal representative has been appointed therefor; or (3) surviving spouse in community of deceased, if all of heirs are incompetent and no legal representative has been appointed for some or all of them. In such cases, surviving spouse in community of deceased may be recognized by court as entitled to possession of community property. (C.C.P. 3001 and 3004, am'd act 23 of 1961). When testament has been probated, court may send legatees into possession of their respective legacies without administration of succession, on their ex parte petition, when all of legatees are either competent or are acting through their qualified legal representatives, all competent residuary legatees accept succession unconditionally, and none of creditors of succession has demanded its administration. In such cases, surviving spouse in community of testator may be recognized by court as entitled to possession of community property. (C.C.P. 3031 and 3033). In either intestate or testate succession, creditors thereof may demand security from heirs, residuary legatees or surviving spouse for payment of claims (C.C.P. 3007, 3034) as may particular legatees for payment of their legacies (C.C.P. 3035). Judgment of possession should contain last known address of at least one of successors or surviving spouse, but its omission does not affect validity of judgment. (C.C.P. 3061, as am'd Act 641 of 2001).

Jurisdiction.

District courts have jurisdiction of opening of successions. (Const., art. 5, § 16).

Venue is in the parish: (1) of the domicile of the decedent; (2) if he had no domicile or residence in this state, where he owns real property, or if none, where he owns movable property. (C.C.P. 2811).

Preferences in Right to Administer.

When an administratorship or dative testamentary executorship is claimed, preference in appointment is given in order as follows: (1) best qualified among surviving spouse, competent heirs or legatees, or legal representatives of any incompetent heirs or legatees; (2) best qualified among nominees of those in (1) above; (3) best qualified among creditors of deceased or co-owner of immovable property with deceased. (C.C.P. 3098, as am'd Act 29 of 1993).

Attorney for Executor.

Designation of attorney for executor is binding on executor and heirs. (La.R.S. 9:2448, added Act 250 of 1986).

Eligibility and Competency.

A woman, whether married or single, may act as executrix or administratrix (La.R.S. 9:51) but a minor may not act in either capacity (C.C.P. 3097). An interdict, convicted felon or one who is unfit because of bad moral character is disqualified. Strangers are disqualified except when named testamentary executor. (C.C.P. 3097).

A nonresident who has appointed resident agent for service of all process related to succession may serve as executor or administrator, provided appointment is filed in succession proceedings. (C.C.P. 3097, as am'd Act 4 of 1964). Statute implies a foreign corporation may also serve, if permitted by charter, and appointment of resident agent be made.

Qualification of Representative.

After inventory has been taken, or sworn descriptive list of decedent's property filed, person who has been named administrator or dative testamentary executor gives bond, which must exceed by one-fourth value shown on inventory or on descriptive list. (C.C.P. 3151, 3153). If bond is secured by personal sureties, they must be residents of state though not of parish where security is given and must have unencumbered property in state amply sufficient to secure bond. (C.C.P. 3155.1, added Act 236 of 1986). Administrator or executor must then take oath for faithful performance of his duties. (C.C.P. 3158). Testamentary executor need not give bond unless required by provisions of will or petition of creditor, or heir or surviving spouse in community. (C.C.P. 3153).

Administrators of Vacant Successions.

A succession is defined as vacant when no one has claimed it or all heirs are unknown or have renounced succession. (C.C. 1095). When no qualified person has applied for appointment as administrator of a vacant succession within three months, court may appoint attorney-at-law as administrator. (C.C.P. 3121, as am'd Act 530 of 1974). Role of public administrator in parishes with over 100,000 population is fulfilled by state Department of Revenue and Taxation. (La.R.S. 9:1581; La.R.S. 36:458).

General Powers and Duties.

Succession representative is fiduciary with respect to succession, and shall have duty of collecting, preserving, and managing property of succession in accordance with law. He shall act at all times as prudent administrator and shall be personally responsible for all damages resulting from his failure so to act. (C.C.P. 3191, as am'd Act 4 of 1964). Upon order of court, they may sell succession property at public or private sale to pay debts or legacies (C.C.P. 3261-3264) without priority between real and personal property and may borrow funds and mortgage or encumber succession property with court approval. (C.C.P. 3228, as am'd Act 203 of 1995). Household goods as defined may be sold at appraised value without advertisement. (C.C.P. 3287, added Act 724 of 1985). Nonresident succession representative may execute power of attorney appointing resident to represent him in all acts of his administration provided power of attorney is filed in succession proceeding. (C.C.P. 3191 as am'd Act 4 of 1964). Succession representative may by power of attorney designate person to manage in his stead, and that person in turn may appoint substitute if power of attorney permits. (La.R.S. 9:1517, added Act 284 of 1985). Representative may bring "survival action" on behalf of deceased tort victim, when statutory representatives do not survive victim. (C.C. 2315.1, as am'd Act 675 of 1987).

Majority of heirs may be sent into possession of property prior to homologation (approval) of final tableau of distribution after contradictory hearing with administrator. (C.C.P. 3362, as am'd Act 209 of 1986).

"Independent administrator" may administer estate if designated by testator or if agreed upon by all successors, to function generally as succession representative would but without necessity of delay for objection, and without any action in or by court during process of administration. (C.C.P. 3396-3396.20, added Act 974 of 2001).

Uniform Fiduciaries Act adopted with slight variations. (La.R.S. 9:3801-3814; § 3803 repealed, Act 444 of 1960).

Uniform Principal and Income Act.

Revised Uniform Principal and Income Act forms basis of La. R.S. 9:2141 et seq.; however, certain departures are made where provisions of Uniform Act are not in conformity with general laws of Louisiana.

Uniform Simplification of Fiduciary Security Transfers Act adopted. (La.R.S. 9:3831-3840).

Uniform Anatomical Gift Act.

Adopted. (La.R.S. 17:2351, et seq.).

Claims against estates under administration should be presented for approval in writing to the executor or administrator. (C.C.P. 3241). No particular form of claim is necessary.

Succession representative to whom claim against succession has been submitted must within 30 days acknowledge or reject claim in whole or part. Failure of succession representative either to acknowledge or reject claim within 30 days of date it was submitted to him shall be considered rejection thereof. Acknowledgment of claim by succession representative shall (1) Entitle creditor to have his claim in succession representative's petition for authority to pay debts or in his tableau of distribution for payment in due course of administration; (2) create prima facie presumption of validity of claim even if it is not included in succession representative's petition for authority to pay debts or in his tableau of distribution; and (3) suspend running of prescription against claim as long as succession is under administration. (C.C.P. 3241-3245).

Should he decline to recognize the claim, the creditor may file suit against the succession representative and obtain a judgment, to be paid in the ordinary course of administration. (C.C.P. 3246). If there is no danger of the claim becoming prescribed, the creditor may, instead of filing suit, await the filing of an account by the executor or administrator and then assert his claim by way of opposition. (C.C.P. 3336).

Form.

No particular form required (C.C.P. 3241) except to suspend running of prescription as follows:

Form

To: . . . . . . duly qualified (administrator or executor) of the estate of . . . . . ., at . . . . . ., Louisiana:

This is to notify you that I, ..., domiciled at (give full address), am a creditor of the Succession of . . . . . ., in the amount of . . . . . . Dollars ($. . . . . .), representing (short statement of facts on which claim is based, and if based on written instrument, annex copy thereof, or if written instrument is lost or destroyed, a statement of such loss or destruction). (If claim secured, describe security and property affected thereby).

This formal proof of claim is (delivered to you personally) (mailed to you by certified or registered mail) on this . . . . . . day of . . . . . ., 20. . . ., in compliance with Article 3245 of the Louisiana Code of Civil Procedure.

. . . .

State of . . . . . .

Parish (or County) of . . . . . .

BEFORE ME, the undersigned authority, personally came and appeared . . . . . ., who, being duly sworn deposed and said that he has read the above and foregoing formal proof of claim against the Succession of . . . . . ., and that all the statements therein contained are true and correct.

. . . .

Sworn to and subscribed before me this. . . . . . day of . . . . . ., 20. . . .

. . . .

Notary Public

Payment of Claims.

No debts of the decedent can be paid without the authorization of the court. The administrator or executor presents to the court an account or tableau of distribution setting forth the payments and disbursements which he proposes to make. Court order is not required for publication of notice of filing of tableau of distribution. (C.C.P. 3303, as am'd Act 204 of 1986). All parties interested are notified by publication to show cause within seven days why account so filed should not be approved. (C.C.P. 3304, as am'd Act 280 of 1980). Opposition may be filed at any time before homologation and shall be tried as summary proceeding. (C.C.P. 3307, as am'd Act 23 of 1961). Judgment thereon is subject only to suspensive appeal. (C.C.P. 3308). If no oppositions are filed within seven days account is, upon production of satisfactory evidence by administrator or executor, approved and homologated, and funds ordered distributed in accordance therewith. (C.C.P. 3307, as am'd Act 280 of 1980). Dation en paiement (deed in lieu) is permissible for secured or unsecured debts. (La.R.S. 9:1471–1473, as am'd Act 564 of 1988).

Debts are preferred in following order: expenses of funeral; charges imposed by law; expenses of last sickness; wages of servants for one year past and the current year; amounts due to retail dealers, for provisions and supplies for the decedent and his family during the six months preceding death, or due to keepers of inns or boarding houses for the year preceding death; and salaries of clerks. (C. C. 3191).

Sales.

On petition of administrator or executor, the court may order private or public sale of movable or immovable property without priority, to pay debts or legacies. (C.C.P. 3271 and 3281). Private sales of movable property may be made ten days after only one advertisement; immovable property, seven days after latter of two advertisements. (C.C.P. 3282-3284, am'd Act 626 of 1972; La.R.S. 43:203, as am'd Act 627 of 1972). Sales of motor vehicles at appraised value in inventory list may be made without advertisement. (C.C.P. 3288, added Act 237 of 1986). Public sales are made in manner provided for judicial sales in execution of judgments. See category 8 Debtor and Creditor, topic 8.05 Executions.

Stocks and bonds may be sold at private sales under order of court. (C.C.P. 3285).

Leases.

Court may authorize lease of property limited to one year absent consent of heirs or legatees. Mineral leases may be authorized for more than one year but court must state minimum bonus and minimum royalty which must be not less than one-eighth. Notice must be published once in parish of succession proceedings and also in parish where property is located for mineral lease. Publication must be at least seven days prior to court authorization. (C.C.P. 3226 and 3229, am'd Act 131 of 1974).

Actions.

There is no suspension of the right to sue on claims against a decedent's estate. Action must be brought within three years after distribution of assets in order that claim may participate in assets distributed.

Suit against succession representative or his surety because of fault in course of administration must be brought within two years of date of judgment homologating final account: except in case of embezzlement or payment not in accordance with final account. Period not suspended by minority of claimant. (La.R.S. 9:5621).

Allowances.

Whenever surviving spouse or minor children of deceased person are left in necessitous circumstances, and do not possess in their own rights property to amount of $1,000, surviving spouse or legal representatives of children are entitled to demand and receive from succession of deceased, sum, which added to amount of property owned by them, or either of them, in their own right, will make up sum of $1,000, which amount must be paid in preference to all other debts, except those secured by vendor’s privilege, conventional mortgages, and expenses incurred in selling property. Surviving spouse shall have and enjoy usufruct of amount so received from deceased’s succession, until remarriage or death, which amount afterwards vests in and belongs to children or other descendants of deceased. (C. C. 3252, as am’d Act 711 of 1979).

If either husband or wife die rich, leaving survivor in necessitous circumstances, latter has a right to take out of succession of deceased what is called marital portion; that is, one-fourth of succession in full ownership if there be no children, and same portion in usufruct only, when there are not more than three children; and if there be more than three children, survivor, whether husband or wife, shall receive only child’s share in usufruct, and is bound to deduct from this portion legacy left by deceased to spouse and payments due spouse as result of death. During administration, court may provide for fixed allowance of marital portion. (C. C. Arts. 2432-2437, as am’d Act 710 of 1979). Marital portion is limited to $1,000,000. (C.C. 2434, as am’d Act 289 of 1987).

Marital portion may be placed in trust. (La.R.S. 9:1851-1854, added Act 67 of 1977).

Decedents’ Property.

See same subhead under category Business Regulation and Commerce, topic Banks and Banking.

Accounts of administration must be rendered annually and at other times ordered by court. (C.C.P. 3331). Ten days notice of hearing on final account must be given by service of copy of account and notice of prospective homologation upon each heir or residuary legatee, which notice, except for final account, may be served by ordinary mail and final account may be served by certified or registered mail. (C.C.P. 3335, as am’d Act 36 of 1966).

Compensation.

Executor allowed reasonable amount as is provided in testament in which he is appointed; administrator allowed such reasonable amount as is provided by agreement between administrator and surviving spouse, and all competent heirs or legatees of deceased. In absence of specified testamentary amount or agreement with survivors, executor or administrator is entitled to fee of 2½% on value of estate, as appraised in inventory. (C.C.P. 3351, as am’d Act 281 of 1982).

If there are two or more executors or administrators, commission is apportioned among them as court directs. (C.C.P. 3352).

A testamentary executor who is legatee receives commission unless will provides to contrary. If legacy and compensation of executor together exceed disposable portion, executor shall receive only disposable portion. (C.C.P. 3353).

When Administration Unnecessary.

See subhead Small Estates, infra.

Small Estates.

When Louisiana domiciliary dies intestate leaving property in Louisiana having gross value of $75,000 or less (eff. Jan. 1, 2010); it is not necessary to open judicially succession if there is no immovable property other than “small succession immovable property” as defined, including cemetery plots and sole heirs are descendants, ascendants, brothers, sisters or descendants thereof, or surviving spouse. (C.C.P. 3421, as am’d Act 81 of 2009; C.C.P. 3431, as am’d Act 81 of 2009). Competent major heirs and surviving spouse, if any, may submit to inheritance tax collector their affidavit setting forth date of death; domicile at death; fact of intestacy; fact of no immovable property; deceased’s marital status; names and addresses of surviving spouse and heirs and relationship of latter; and, brief description of property left by deceased showing value of each item thereof at date of death. (C.C.P. 3432). Affidavit is full and sufficient authority for transfer of stocks and bonds and payment or delivery of any money or property, described therein, by any corporation, person, bank or depositary, free of claim by collector. (C.C. Art. 3434, as am’d Act 81 of 2009). Public administrators may administrate small successions under defined procedure. (C.C.P. 3431, as am’d Act 701 of 1990). See also category 3 Business Regulation and Commerce, topic 3.01 Banks and Banking, subhead Decedents’ Property.

Distribution If Abroad.

No express statutory provision.

Foreign and Ancillary Administration.

See topic 13.16 Wills, subhead Foreign Wills.

13.11 [RESERVED]

13.12 INTESTACY:

See topic 13.07 Descent and Distribution.

13.13 [RESERVED]

13.14 PROOF OF CLAIMS:

See topic 13.08 Executors and Administrators; category 5 Civil Actions and Procedure, topic 5.17 Pleading.

13.15 TRUSTS:

Kinds Recognized.

Donations inter vivos or mortis causa in trust for educational, charitable, literary, or religious purposes may be made. Trustees, on acceptance, may incorporate and have, in addition to power especially given in trust instrument, general authority of administration. In event of failure of trustee, Governor appoints substitute, who is subject to all duties and limitations as provided in instrument creating trust. (La.R.S. 9:2271-2279).

Louisiana Trust Code (La.R.S. 9:1721-2252) authorizes express private trusts, whether inter vivos or testamentary, which (unless trust instrument which stipulates a term provides an earlier termination) terminate: (1) At death of last surviving income beneficiary or 20 years from death of settlor, whichever is last to occur, if at least one settlor and one income beneficiary are natural persons; (2) at death of last surviving income beneficiary or 20 years from creation of trust, whichever is last to occur, if none of settlors is a natural person but at least one income beneficiary is a natural person; (3) at expiration of 20 years from death of last settlor, if at least one settlor but none of income beneficiaries is a natural person; or (4) at expiration of 50 years from creation of trust if neither settlors nor income beneficiaries are natural persons. (La.R.S. 9:1831, as am'd Act 164 of 1987). Heirs, legatees or assignees of designated beneficiary are not considered beneficiaries for purpose of fixing maximum allowable term. (La.R.S. 9:1801, as am'd Act 110 of 1989). If trust instrument stipulates longer term than permitted, trust enforced to maximum allowable term. (La.R.S. 9:1832). If no term stipulated, trust terminates upon death of last natural income beneficiary, but if income beneficiary is not natural person, then 20 years from death of last natural settlor, or 20 years from creation of trust if none of settlors is natural person. (La.R.S. 9:1833).

Legitime, or forced portion (see topic 13.16 Wills, subhead Forced Heirs), may be placed in trust under certain restrictions. (La.R.S. 9:1841-1845, and 1847, as am'd Act 967 of 1999). Trust may be created upon proceeds of life insurance. (La.R.S. 9:1881). Class trusts in favor of some or all of direct descendants or collateral descendants of whatever degree may be created, and if trust instrument so provides, interest to each beneficiary shall be held in separate trust after class has closed. (La.R.S. 9:1891 as am'd Act 682 of 1997, §§ 1892-1906). Membership in class trusts may be by representation. (La.R.S. 9:1892-1895, as am'd Act 582 of 1985 and Act 284 of 1988). Employers may create trusts for benefit of employees for any term or for indefinite terms. (La.R.S. 9:1921-1922). Mixed private and educational, charitable or religious trusts are permitted. (La.R.S. 9:1951). Public trusts, with state, parish, municipality or subdivision thereof as beneficiary, are authorized. (Act 135 of 1970). Marital portion under C. C. 238, whether in full property, usufruct or any portion thereof, may be placed in trust. (La.R.S. 9:1851-1854, as added Act 67 of 1977).

Creation.

Testamentary trust must be created in one of forms prescribed for donations mortis causa. (La.R.S. 9:1751). Inter vivos trust may be created only by authentic act or by act under private signature executed in presence of two witnesses and duly acknowledged by settlor or attesting witness. (La.R.S. 9:1752). No particular language is required and instrument may incorporate by reference terms of an existing trust. (La.R.S. 9:1753 and 1754). If trust affects immovable property, it or extract of it must be filed in public records. (La.R.S. 9:2092, as am'd Act 257 of 1995). If extract is recorded, failure of instrument to be in proper form is not effective against third parties, who are immune from claims based on that failure. (La.R.S. 9:2092[B][2], as am'd Act 491 of 2004). See also category 14 Family, topic 14.07 Guardian and Ward, subhead Management of Property.

Complete or Partial Refusal.

Beneficiary may refuse all or any part of interest in trust. Settlor may stipulate effect of refusal, and if he does not, Trust Code provides for its effect. (La.R.S. 9:1988, 1990, as am'd Act 79 of 1983).

Substitute Beneficiary.

Must be in being and ascertainable on date of creation of trust, though class may be substitute beneficiary. Trust instrument may provide that interest of principal beneficiary who is descendant of settlor and dies intestate without issue during trust or at termination will vest in one or more of settlor's descendants in being and ascertainable at death of such principal beneficiary (La.R.S. 9:1975, as am'd Act 455 of 1982). When testamentary trust designates as principal beneficiary person who is descendant, sibling or descendant of sibling of settlor, and that person does not survive settlor, descendants by roots of that person are principal beneficiaries in his place unless testament provides otherwise. (La.R.S. 9:1809, added Act 480 of 2003). Except as to legitime, same provision may be made even as to such person who provides otherwise in his testament. (La.R.S. 9:1973, as am'd Act 254 of 1997). Trust instruments may provide for successive substitutions. (La.R.S. 9:1973, as am'd Act 111 of 1989). Interest of beneficiary may be conditioned upon surviving settlor for short period of time specified by C.C. 1521. (La.R.S. 9:2011, as am'd Act 413 of 1995).

Appointment of Trustee.

One or more trustees, alternates or successors may be designated in instrument, or, in absence of designation, may be appointed by court. (La.R.S. 9:1785). Provisional trustee may be appointed by court upon application of interested person or upon court's own motion. (La.R.S. 9:1786). Trustee, in his capacity as such, can be beneficiary of another trust. (La.R.S. 9:1801, as am'd Act 110 of 1989).

Eligibility and Competency.

Trustee may be natural persons having full capacity to contract who are citizens or resident aliens of U.S., or federally insured depositories organized under state or federal law, subject only to restrictions for national banks or trust company organized under Louisiana law. Trustee may also be settlor or beneficiary or both. (La.R.S. 9:1783[A][1], as am'd Act 521 of 2004). With respect to trust for mixed private and charitable purposes, trustee may also be nonprofit corporation or trust for educational, charitable, or religious purposes that is designated as income or principal beneficiary. (La.R.S. 9:1783, as am'd Act 215 of 1995).

Qualifications.

Unless dispensed with by instrument, individual trustee must furnish security. (La.R.S. 9:2171). Upon application of interested person, court may compel trustee to furnish security (La.R.S. 9:2172) or may increase, diminish or dispense with security (La.R.S. 9:2173).

Removal of Trustee.

Trustee may be removed in accordance with trust instrument or by court for sufficient cause shown. (La.R.S. 9:1789, as am'd Act 627 of 1968). After removal, trustee must deliver property but retains right to preserve property until delivery. (La.R.S. 9:2069, added Act 358 of 1995).

General Powers and Duties.

Trustee must administer solely in interest of beneficiary (La.R.S. 9:2082) and exercise care and skill of man of ordinary prudence (La.R.S. 9:2090). He cannot be principal officer of corporation in which trust funds are invested, or of other legal entity in which those funds are invested, unless settlor authorizes it. (La.R.S. 9:2097, as am'd Act 251 of 1997). Unless otherwise provided by trust instrument, trustee may divide trust into two or more separate trusts. (La.R.S. 9:2030, added Act 344 of 1995).

Investments.

Unless instrument provides otherwise, trustee is not limited in investments except by prudent man rule. If authorized or directed to invest in U.S. government securities, trustee may invest in money market mutual fund of such securities, unless instrument specifies otherwise. (La.R.S. 9:2127, as am'd Act 178 of 1986).

Sales.

Unless provided otherwise by instrument, trustee may sell trust property (and settlor cannot forbid sale of realty for period beyond 15 years from his death); may enter into leases of trust property, either as lessor or lessee, for term in excess of term of trust; may mortgage or pledge trust property; and may compromise, arbitrate and abandon claims. (La.R.S. 9:2118-2121). Corporate or individual trustee may not buy or sell property in which trustee has interest, or to himself as trustee of another trust, unless with court approval after contradictory hearing. (La.R.S. 9:2085, as am'd Act 359 of 1990, eff. July 10, 1990).

Modification.

If, subsequent to creation of a trust, circumstances change so that literal compliance with terms of trust is impractical, impossible or illegal, court may direct trust to be administered in manner to accomplish most effectively general purpose of trust. (La.R.S. 9:2331-2337). Proper court may also order termination of trust under certain circumstances, including when trust estate is less than $25,000. (La.R.S. 9:2026, as am'd Act 665 of 1991). Proper court may permit termination or modification of trust, or deviation from provisions concerning its administration if its continuance or compliance with its provisions would defeat or substantially impair its purposes. (La.R.S. 9:2026, 2064, as am'd Act 252 of 1997).

Uniform Management of Institutional Funds Act adopted. (La.R.S. 9:2337.1 et seq.).

Securities in Name of Nominee.

Trustee may hold stock in name of nominee but is liable for loss resulting from nominee's acts. (La.R.S. 9:2124). Unless otherwise provided in trust instrument, corporate trustee may deposit securities in clearing corporation. (La.R.S. 9:2124.1, added Act 346 of 1983).

Legacies to Inter Vivos Trust.

Unless restricted or denied by instrument, settlor or other person may add to trust estate by donation inter vivos or mortis causa, with approval of trustee. (La.R.S. 9:1931-1936). When trust anticipates future annual additions and refers to annual exclusion from federal gift tax, dollar limitation is amount of exclusion in effect in year in which donation is made to trust. (La.R.S. 9:1937, added Act 423 of 1982).

Accounting.

Trustee must render to beneficiary annual accounts and a final account showing receipts, disbursements and itemization of property at end of year. (La.R.S. 9:2088). Trustee required to furnish information requested by beneficiary and permit beneficiary or authorized person to examine accounts. (La.R.S. 9:2089).

Compensation.

Unless otherwise provided in instrument or waived, trustee entitled to reasonable compensation. (La.R.S. 9:2181).

Common Trust Funds.

Unless otherwise provided in instrument, and with consent of co-trustees, trustee may establish common trust funds. (La.R.S. 9:2128, as am'd Act 159 of 1974).

Designation of Attorney.

Designation of attorney for trust in instrument is binding. In absence of designation or if named attorney is incapable of acting, beneficiaries may select attorney unless trustee is natural person qualified under La.R.S. 9:1783, and then trustee may select attorney. (La.R.S. 9:241, as am’d Act 622 of 1983).

Revised Uniform Principal and Income Act forms basis of La. R.S. 2141 et seq.; however, certain departures are made where provisions of Uniform Act are not in conformity with general laws of Louisiana. Trust instrument can grant trustee equitable discretion in apportionment of receipts and expenditures. (La.R.S. 9:2142, as am’d Act 114 of 1989).

Designation of Registered Agent.

Certain trusts may appoint, as registered agent for service of process, individual who is resident, or state, or partnership or profession law corporation authorized to practice law in state. (La. R.S. 9:2242, added Act 325 of 2008).

Gifts to Minors.

See category 14 Family, topic 14.10 Infants.

Uniform Fiduciaries Act adopted with slight variations. (La.R.S. 9:3801-3814, § 3803 repealed, Act 444 of 1960).

Uniform Simplification of Fiduciary Security Transfers Act adopted. (La.R.S. 9:3831-3840).

Accumulations.

In absence of contrary stipulations in instrument, trustee required to distribute income at least every six months. (La.R.S. 9:1962). Settlor may stipulate distribution of income or place discretion in trustee (La.R.S. 9:1961, 1963, 1964, as am’d Act 767 of 1997), except with respect to legitime in trust where income must be paid to forced heir at least once each year (La.R.S. 9:1841).

Perpetuities.

See category 21 Property, topic 21.12 Perpetuities.

13.16 WILLS:

Note: In Louisiana the expression “donation mortis causa” is used solely with respect to testamentary gifts, the “donation mortis causa” of the common law not being recognized. See 105 La. 705, 30 So. 233.

Testamentary Capacity.

To make a donation mortis causa one must be able to comprehend generally nature and consequences of disposition he is making. (C.C. 1477, as am’d Act 363 of 1991). Married woman may make donation mortis causa of real or personal property.

A minor over sixteen years can make a will as though a person of full age. (C. C. 1476). Other provisions relative to capacity to give and receive inter vivos and mortis causa, as well as procedure for proof of undue influence, are contained in C.C. 1470-1483, as am’d Act 363 of 1991.

Forced Heirs.

Law reserves to certain descendants of owner of property, who are termed “forced heirs”, certain portion of estate, termed “legitime”, of which they cannot be deprived by donations, inter vivos or mortis causa, unless there is just cause to disinherit them. In case there are forced heirs, only following portions of estate may be disposed of by will or donation: Three-fourths if there is one child under age of 23 or one child of any age, who, because of mental incapacity or physical infirmity, is permanently incapable of taking care of his person or property; one half if there are two or more such children. (C.C. 1493, am'd Act 77 of 1996 First Ex. Sess.). Limited representation of such heirs permitted, if predeceased and would have satisfied these criteria at time of decedent's death. Legitime is diminished by renunciation of forced heir; part of those who renounce becomes part of disposable portion; legitime of other heirs not affected. (C.C. 1500, am'd Act 77 of 1996 First Ex. Sess.). If heir is disinherited or declared unworthy of succeeding, legitime is determined by number of other forced heirs of deceased living or represented. (C.C. 1500, as am'd Act 77 of 1996 First Ex. Sess.). Dispositions in excess of portions above stated are reduced accordingly. (C.C. 1493-5, 1502). Rights of forced heirs are granted to adopted persons, who also retain their intestate rights to their blood relatives. (C.C. 199).

Decedent may delegate authority to executor to allocate specific assets to satisfy legacy expressed in terms of quantum or value, in order to satisfy forced portion. (C.C. 1302, 1573, 1725 as am'd Act 448 of 1982).

To determine the reduction to which donations inter vivos or mortis causa are liable, an aggregate is formed of all the property belonging to the donor or testator at the time of his decease; to that is fictitiously added all property disposed of by donation inter vivos, according to its value at the time of the donor's decease in the condition in which it was at the period of the donation. The debts due by the estate are deducted from this aggregate amount and the disposable quantum is calculated on the balance, taking into consideration the number of forced heirs. Life insurance proceeds on life of donor and premiums paid therefor are not included in calculation, but if payable to forced heir, are to be credited in satisfaction of his forced share. (C.C. 1505, as am'd Act 77 of 1996 First Ex. Sess.). Donations inter vivos made more than three years prior to death of donor are not included in calculation. (La.R.S. 9:2372, as am'd Act 402 of 1995, eff. Jan. 1, 1996). Donations inter vivos to spouse of previous marriage during existence of that marriage are not included in calculation. (La.R.S. 9:2373). Benefits payable by reason of death, disability, retirement or termination of employment under plans of deferred compensation adopted by public employer, or under plans qualified under §§ 401 or 408 of Internal Revenue Code, and employer and employee contributions under such plans, are not included in calculation, but any such amounts payable to forced heir are to be credited in satisfaction of his forced share. (C.C. 1505, as am'd Act 77 of 1996 First Ex. Sess.). Payments under IRA to beneficiary similarly excluded, but if payable to forced heir are credited against his forced share. (La.R.S. 9:2448, added Act 600 of 1986).

Testamentary bequests are all reduced pro rata in the absence of any provision to the contrary in the will after which donations inter vivos are reduced until legitime is made up, last donation in point of time being taken first (C.C. 1507, 1508, as am'd Act 77 of 1996 First Ex. Sess.). Donated property returned in kind by donee remains subject to real rights created by operation of law or onerous title. Action for return of property extends only to donees and their successors by gratuitous title. Heirs do not have right to claim immovable which has been donated and then alienated by onerous title by donee and if donee retains possession, can only regain property subject to real rights conventionally or legally created. (C.C. 1264, 1270, 1281, 1516, 1517, 1518, as am'd Act 869 of 1984, and C.C. 1568, as am'd Act 527 of 1985). Donation of movable is completely null if donor divests himself of all his property, not leaving enough for own subsistence; similar donation of immovable is null, unless donee alienates immovable by onerous title. In latter case, donor retains right to seek value of donation against donee. (C.C. 1498, as am'd Act 77 of 1996 First Ex. Sess.).

Louisiana forced heirship rules apply to immovable property in state unless deceased was domiciled outside state at time of death and left no forced heirs domiciled in this state at time of death. (C.C. 3533, as am'd Act 257 of 1997).

Disinherison.

Although all other heirs may be excluded by mere omission or disinherison without cause, a forced heir may be deprived of the legitime only by specific disinherison for legal cause.

A child may be disinherited and deprived of his or her legitime if he or she has: (1) Struck or raised his hand to strike the parent, or has actually struck parent, but mere threat is not sufficient; (2) been guilty, towards parent, of cruelty, of crime or grievous injury; (3) attempted to take life of either parent; (4) accused parent, without any reasonable basis, of crime punishable by life imprisonment or death; (5) used any act of violence or coercion to hinder parent from making will; (6) being minor, married without consent of his or her parents; (7) been convicted of felony for which law provides that punishment could be life imprisonment or death; (8) known how to contact parent but failed to do so without just cause for two years after majority, unless child is in armed services. (C.C. 1621, as am'd Act 573 of 2001, eff. June 22, 2001).

Ascendants other than parents may disinherit their descendants for any of above causes but the sixth. (C.C. 1622, as am'd Act 573 of 2001, eff. June 22, 2001).

A disinherison to be valid must be made in one of the forms prescribed for testaments, and the testator must express for what reasons he disinherits the heir in question. Disinherited heir must prove cause for disinherison did not exist, or prove reconciliation after it occurred, to avoid its effects. Proof of reconciliation must be by clear and convincing evidence, but not necessarily written. (C.C. 1624, as am'd Act 573 of 2001, eff. June 22, 2001).

See topic Descent and Distribution for provisions relative to proof of unworthiness of intestate heirs.

Formalities of Execution.

There are only two types of testaments: olographic and notarial. (C.C. 1574, as am'd Act 1421 of 1997, eff. July 1, 1999). Forms previously recognized (public and private nuncupative, mystic) were abolished by Act 1421 of 1997, eff. July 1, 1999. Such testaments and their provisions, legacies and appointments are valid if executed prior to Jan. 1, 1998. (T. 9, 2440, added Act 1421 of 1997, eff. July 1, 1999, as am'd Act 74 of 2003). If legal effect of term in testament has been changed after testament was written, court may consider law in effect at time of writing to ascertain testator's intent. (C.C. 1611, as am'd Act 560 of 2001, eff. June 22, 2001).

Olographic testament is that which is written by testator himself. In order to be valid, it must be entirely written, dated and signed in handwriting of testator. (C.C. 1575). Although date may appear anywhere in testament, testator must sign at end of testament; if anything is written below signature, testament is not invalid and such writing may be considered by court in its discretion as part of testament. (C.C. 1575, as am'd Act 824 of 2001). Date is sufficient if day, month and year are reasonably ascertainable from information in testament, as clarified by extrinsic evidence, if necessary. (C.C. 1575, as am'd Act 824 of 2001).

Notarial testament must be prepared in one of five forms, each slight variation of same basic form dependent upon capabilities of testator. These variations are as follows:

1. If testator knows how to sign his name and to read, and is physically able to do both, testament shall be prepared in writing and dated and executed in following manner. In presence of notary and two competent witnesses, testator declares or signifies to them that instrument is his testament and signs his name at the end of testament and on each other separate page. In presence of testator and each other, notary and witnesses sign following declaration or one substantially similar:

In our presence the testator has declared or signified that this instrument is his testament and has signed it at the end and on each other separate page, and in the presence of the testator and each other we have hereunto subscribed our names this _______ day of _________,

______.

2. If person knows how to sign his name and read, and is physically able to read but unable to sign his name due to physical infirmity, procedure is as follows. In presence of notary and two competent witnesses, testator declares or signifies to them that the instrument is his testament, that he is able to see and read but unable to sign because of physical infirmity, and affixes his mark where his signature would otherwise be required; if he is unable to affix his mark, he may direct another person, even the notary or a witness, to assist him in doing so, or to sign his name in his place. In presence of testator and each other, notary and witnesses sign following declaration or one substantially similar:

In our presence the testator has declared or signified that this is his testament, and that he is able to see and read and knows how to sign his name but is unable to do so because of a physical infirmity; and in our presence he has affixed, or caused to be affixed, his mark or name at the end of the testament and on each other separate page, and in the presence of the testator and each other, we have subscribed our names this _______ day of _________, ______.

3. If person does not know how to read, or is physically impaired to extent that he cannot read, whether or not he is able to sign his name, procedure for execution of notarial testament is as follows. Written testament must be read aloud in presence of testator, notary and two competent witnesses. Witnesses and notary, if he is not the reader, follow on copies of testament. After reading, testator declares or signifies to them that he heard reading and that instrument is his testament. If he knows how and is able to do so, testator signs name at end of testament and on each other separate page. In presence of testator and each other, notary and witnesses sign following declaration or one substantially similar:

This testament has been read aloud in our presence and in the presence of the testator, such reading having been followed on copies of the testament by the witnesses [and the notary if he is not the person who reads it aloud,] and in our presence the testator declared or signified that he heard the reading, and that the instrument is his testament, and that he signed his name at the end of the testament and on each other separate page; and in the presence of the testator and each other, we have subscribed our names this _______ day of _________, ______.

If testator does not know how to sign his name or is unable to sign because of physical infirmity, he must so declare or signify and then affix his mark, or cause it to be affixed, where his signature would otherwise be required; and if he is unable to affix mark, he may direct another person, even the notary or another witness, to assist him or to sign his name in his place. In this instance, required declaration must be modified to recite in addition that testator declared or signified that he did not know how to sign his name or was unable to do so because of physical infirmity; and that he affixed, or caused to be affixed, his mark or name at the end of the testament and on each other separate page.

4. If person knows how to and is physically able to read braille, notarial testament shall be executed as follows. In presence of notary and two competent witnesses, testator must declare or signify that testament, written in braille, is his testament, and then signs his name at end of testament and on each other separate page. In presence of testator and each other, notary and witnesses then sign following declaration or one substantially similar:

In our presence the testator has signed this testament at the end and on each other separate page and has declared or signified that it is his testament; and in the presence of the testator and each other we have hereunto subscribed our names this _______ day of _________, ______.

If testator is unable to sign his name because of physical infirmity, he must so declare or signify and then affix, or cause to be affixed, his mark where his signature would otherwise be required; and if he is unable to affix his mark he may direct another person, even the notary or a witness, to assist him or to sign his name in his place. In this instance, required declaration must be modified to recite in addition that testator declared or signified that he was unable to sign his name because of physical infirmity; and that he affixed, or caused to be affixed, his mark or name at end of testament and on each other separate page. Declaration in notarial testament in braille form must be in writing, not in braille.

5. If a person has been legally declared physically deaf, or deaf and blind, and is able to read sign language, braille or visual English, notarial testament must be prepared, dated and executed in the following manner. In presence of notary and two competent witnesses, testator declares or signifies to them that instrument in his testament and then signs his name at end of testament and on each other separate page. In presence of testator and each other, notary and witnesses then sign following declaration or one substantially similar:

The testator has signed this testament at the end and on each other separate page, and has declared or signified in our presence that this instrument is his testament, and in the presence of the testator and each other we have hereunto subscribed our names this _______ day of _________, ______.

If testator is unable to sign his name due to physical infirmity, testament shall then be dated and executed in following manner. In presence of notary and two competent witnesses, testator declares or signifies by sign or visual English to them that the instrument is his testament, that he is unable to sign because of physical infirmity, and then affixes his mark at end of testament and on each other separate page. In presence of testator and each other, notary and witnesses then sign following declaration or one substantially similar:

The testator has declared or signified by sign or visual English that he knows how to sign his name but is unable to sign his name because of a physical infirmity and he has affixed his mark at the end and on each other separate page of this testament, and declared or signified in our presence that this instrument is his testament and in the presence of the testator and each other we have hereunto subscribed our names this _______ day of _________, ______.

Either attestation clause shown above shall be prepared in writing.

Witnesses.

Person cannot be witness to testament if insane, blind, under 16 or unable to sign his name. (C.C. 1581). Person who is competent but deaf or unable to read cannot be witness to notarial testament which calls for reading aloud and following on copies of testament. (C.C. 1579, 1581). Fact that witness or notary is legatee does not invalidate testament; legacy to such person is invalid, but if witness would be intestate heir, witness may receive lesser of intestate share or legacy. (C.C. 1582). Spouse of legatee at time of execution of testament may not be witness, but if that occurs, testament is not invalid but legacy to such spouse is null. If legatee in legacy declared null for that reason is intestate heir, legatee may receive smaller of intestate share or legacy, with any restrictions on legacy remaining in effect. (C.C. 1582.1, as am'd Act 231 of 2004, appl. only to testaments executed on or after Jan. 1, 2004). Designation of succession representative or trustee, or attorney for either, is not legacy. (C.C. 1583).

Revocation and Annulment.

Testator may revoke testament at any time, and this right may not be renounced. (C.C. 1606). Revocation of entire testament occurs when testator: (1) physically destroys testament, or has it destroyed at his direction; (2) so declares in one of forms prescribed for testaments or in authentic act; or (3) identifies and clearly revokes testament by writing that is entirely written and signed by testator in his own handwriting. (C.C. 1607). Revocation of legacy or other testamentary disposition occurs when testator: (1) so declares in one of forms prescribed for

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testaments; (2) makes subsequent incompatible testamentary disposition or provision; (3) makes subsequent inter vivos disposition of thing that is object of legacy and does not reacquire it; (4) clearly revokes provision or legacy by signed writing on testament itself; or (5) is divorced from legatee after testament is executed and at time of his death, unless testator provides to contrary. (C.C. 1608). Revocation of testament or of legacy other than by physical destruction, subsequent inter vivos disposition or divorce is not effective if revocation itself is revoked prior to testator's death. (C.C. 1609). Any other modification of testament must be in one of forms prescribed for testaments. (C.C. 1610).

Probate.

Proceeding to open succession shall be brought in district court of parish where deceased was domiciled at time of his death. If deceased was not domiciled in this state at time of his death, his succession may be opened in district court of any parish where immovable property of deceased is situated, or movable property of deceased is situated if he owned no immovable in state at time of his death. (C.C.P. 2811). Olographic testament must be acknowledged and proved by declaration of two credible persons, who must attest that they recognize testament as being entirely written, dated and signed in testator's handwriting. Testimony of such persons may be given in form of affidavit executed after death of testator, unless court orders person to appear and testify; such affidavits to be filed in probate proceedings; affidavit procedure not permitted when genuineness of will is judicially contested. (C.C.P. 2883, as am'd Act 594 of 1983). Notarial testaments cannot be executed until they have been proved by declaration on oath of notary and one witness to will or both witnesses to will. If notary or any witnesses be dead or absent or cannot be located, will may be proved by declaration on oath of notary, witness or witnesses living and in state. If notary or none of witnesses living in state or are incapacitated, will may be proved by declaration on oath of two credible persons that they recognize testator's signature or signature of notary or of the two witnesses. Such declarations may be made in form of affidavits and filed in proceedings unless court requires attendance in person. (C.C.P. 2887, as am'd Act 106 of 1980). With leave of court, petitioner may take deposition of witnesses. (C.C.P. 2889, as am'd Act 26 of 1985). When probate is by affidavit, process verbal ordinarily required may be dispensed with. (C.C.P. 2890, as am'd Act 393 of 1984). Videotape may be admitted of execution and reading of testament in later probate proceeding or annulment proceeding as evidence of proper execution of testament, intentions of testator, mental state or capacity of testator, authenticity of testament or other matters deemed relevant by court. (C.C.P. 2904, added Act 79 of 2005).

Probate proceedings are usually instituted by the executor or the universal legatee and may be ex parte. There is no requirement that heirs or legatees be cited.

Time for Probate.

Will must be probated within five years of judicial opening of succession. (La.R.S. 9:5643 and C.C.P. 2893, both as am'd Act 247 of 1986).

Legacies are universal (C.C. 1585), general (C.C. 1586) and particular (C.C. 1587). Universal legacy is disposition of all of estate, or balance of estate remaining after particular legacies. (C.C. 1585). Such legacy may be made jointly for benefit of more than one legatee without changing its nature. (C.C. 1585). General legacy is disposition by which testator bequeaths fraction or certain proportion of estate, or fraction or certain proportion of estate remaining after particular legacies. (C.C. 1586). In addition, disposition of property expressly described by testator as all, or fraction or certain proportion of one of following categories of property, is also general legacy: separate or community property, movable or immovable property, or corporeal or incorporeal property; list is exclusive. (C.C. 1586). Particular legacy is legacy which is neither universal nor general. (C.C. 1587). Legacy to more than one person is either joint or separate; it is separate when testator assigns shares and joint when he does not. (C.C. 1588). Nevertheless, testator may make legacy joint or separate by expressly designating it as such. (C.C. 1588).

Prohibited Substitutions.

Dispositions not in trust by which thing is given in full ownership to first donee (called institute) with charge to preserve and deliver it to second donee (called substitute) at death of institute are null as to both donees. (C.C. 1520, as am'd Act 825 of 2001).

Proof of Suggestion or Captation.

With repeal of C.C. 1492 eff. July 1, 1990, prohibition against evidence of hatred, anger, suggestion or captation causing legacies is removed. Standard and quality of proof in such cases is governed by C.C. 1478-1483, as am'd Act 363 of 1991.

Unclaimed Legacies.

See category 21 Property, topic 21.01 Absentees, subhead Monies Due Absentee.

Lapse of Legacies.

Legacy lapses when: (1) legatee predeceases testator; (2) legatee is incapable of receiving legacy at death of testator; (3) legacy is subject to suspensive condition, and condition can no longer be fulfilled or legatee dies before its fulfillment; (4) legatee is declared unworthy; (5) legacy is renounced, but only to extent of renunciation; (6) legacy is declared invalid; or (7) legacy is declared null, as for example, for fraud, duress or undue influence. (C.C. 1589). Testamentary accretion occurs when legacy lapses, according to testamentary provision or in absence of such provision, according to law. (C.C. 1590). According to law, when particular or general legacy lapses, accretion takes place in favor of successor who, under testament, would have received thing if legacy had not been made. (C.C. 1591). When legacy to joint legatee lapses, accretion takes place ratably in favor of other legatees (C.C. 1592), except if legatee is child or sibling of testator, or descendant of either, then to extent that legatee's interest in legacy lapses other than by renunciation, accretion takes place in favor of his descendants by roots who were in existence at time of decedent's death (C.C. 1593). Provisions of that article do not apply to legacy that is declared invalid or is declared null for fraud, duress or undue influence. (C.C. 1593). Legacy which lapses because of renunciation accretes to those of his descendants by roots who were in existence at time of decedent's death. (C.C. 965). All legacies which lapse, and are not disposed of according to these preceding provisions, accrete ratably to universal legatees (C.C. 1595), and in absence of universal legatees, such legacies devolve by rules of intestacy (C.C. 1596). There are specific articles governing loss, extinction or destruction of item bequeathed (C.C. 1597), for rights of legatees to civil fruits and products of legacy (C.C. 1598), and for preferences in payment of various legacies (C.C. 1599-1602).

If decedent dies testate and successor is declared unworthy, rights devolve according to testamentary accretion provisions as if unworthy successor had predeceased testator. (C.C. 946, as am'd Act 824 of 2001).

Legacies to Inter Vivos Trusts.

See topic 13.15 Trusts, subhead Legacies to Inter Vivos Trust, supra.

Foreign Wills.

Uniform Foreign Executed Wills (La.R.S. 9:2401) and Foreign Probated Wills (La.R.S. 9:2421-2425) Acts have been adopted. Changes of verbiage in the latter act do not appear to change the requirements in any material respects.

Simultaneous Death.

See topic 13.05 Death, subhead Survivorship.

Testamentary Trusts.

See topic 13.15 Trusts.

Central Registry for Wills.

Secretary of State has central registry for name, address and social security number of testator and location of testament. Registry is optional and to be in strict confidence. Fee for registration $10. Fee for information $10, available to any person presenting satisfactory evidence of death of testator. (La.R.S. 9:2446-2447, added Act 222 of 1981).

Living Will.

Declaration to authorize withdrawal or withholding of life-sustaining procedures in terminal and irreversible condition is recognized in form prescribed. (La.R.S. 40:1299.58, am'd Act 187 of 1985).

14 FAMILY

14.01 ADOPTION:

Any adult or child may be adopted. Age of adopter, procedure and other essentials differ according to age of adoptee.

Adoptees Over Seventeen.

Any person 18 years of age or over may adopt any person over age of 17. Adoption may be simply by authentic act with concurrence of spouse or adopter and spouse of adoptee if adopter is spouse or surviving spouse of parent of adoptee. (C.C. 212, as am'd Act 351 of 2008, eff. Jan. 1, 2009). In all other instances of adult adoption, court proceedings are required. (La. R.S. 9:463-465, as am'd Act 351 of 2008, eff. Jan. 1, 2009). Special provisions are made where parental authority has ceased. (La.R.S. 9:425 and 427, as am'd Act 303 of 1988, eff. July 7, 1988). Act is then recorded by clerk of court (in Parish of Orleans by register of conveyance) in special book kept for that purpose. Name of adoptee may be changed in act of adoption.

Adoptees Under Seventeen.

Any single person 18 years of age or older, or married couple jointly, may petition to adopt child. Intrafamily adoptions are specifically provided for and include as prospective adopters second cousins, third cousins, stepparents and stepgrandparents. (Ch. C. art. 1243, as am'd Act 111 of 2007).

Consent or legal surrender by legitimate parents is required, except when court has adjudged abandonment by one parent and the other legitimate parent consents in writing to his or her spouse's petition for adoption (La.R.S. 9:422), or when spouse of legitimate parent having legal custody of adoptee, or grandparent with legal custody, petitions for adoption and the other legitimate parent has refused or failed to pay decreed support of adoptee for one year, or is a nonresident and has failed to support adoptee for one year after adverse judgment of custody or has failed to visit or communicate with child for two years (La.R.S. 9:422.1, as am'd Act 887 of 1985). Detailed provisions for voluntary surrender for private adoption are contained in La.R.S. 9:422.3-422.14 (as am'd Act 702 of 1987, eff. July 9, 1987). Surrendering parents must provide adoptive parents with certain non-identifying medical genetic information. (La.R.S. 9:422.13, added Act 717 of 1981). Father of illegitimate child may establish right to oppose adoption of child by acknowledging child as his by signing birth certificate or executing authentic act of acknowledgment and recording it prior to act of surrender, decree of abandonment or judgment terminating mother's rights. (La.R.S. 9:422.14, am'd Act 725 of 1985). Voluntary surrender can only be made by domiciliary of state, or to domiciliary of state if surrendering party is non-domiciliary. (La.R.S. 9:422.5, as am'd Act 473 of 1987, eff. Jan. 1, 1988).

Jurisdiction and venue is in either court of domicile of petitioner or that of parent or legal custodian or in parish of surrender of adoptee or of declaration of abandonment or termination of parental rights. (La.R.S. 9:423, as am'd Act 426 of 1983).

Petition with all exhibits must be served by registered mail on Department of Health and Human Resources and on agency having legal custody of child. Petition must also be served on each of living parents unless child legally surrendered or declared abandoned by court of competent jurisdiction. Petition must state: (1) Name, address, age, occupation and marital status of each petitioner; (2) name of child; (3) place and date of child's birth; (4) name and address of parent or legal custodian; (5) how child entered petitioners' home; (6) relationship between petitioner and child and other information. (La.R.S. 9:424-425).

Proceedings.

Department of Health and Human Resources submits confidential report of its findings concerning health, character and suitability of child and health, character and financial fitness of petitioner. When petitioner is spouse of legitimate parent of child and child has lived in home of petitioner for period of at least six months, department need only report on availability of child for adoption; but where child in that situation is 13 or over, department shall also investigate physical and mental condition of child and suitability of petitioner's home for adoption. (La.R.S. 9:427, as am'd Act 387 of 1983). Court appoints time and place for hearing, and judge upon examining report and interrogating parties may grant or refuse interlocutory decree. (La.R.S. 9:427-428).

Final decree of adoption may be petitioned for after child has lived with adopter for at least one year but not less than six months after interlocutory decree granted. Procedure to obtain final decree same as for interlocutory decree and a second confidential report must be submitted by Health and Human Resources Department. Petition for final decree must be filed within two years of interlocutory decree or latter becomes null and void. In certain limited situations, final decree may be rendered at first hearing. (La.R.S. 9:431-432, 434, as am'd Act 410 of 1983).

Name of adoptee under 17 may be changed in decree, surname to be same as adopter. (La.R.S. 9:435). See also subhead Adoptees Over Seventeen, supra.

Effect of Adoption.

Children lawfully adopted and their issue become forced heirs of their adoptive parents but retain their rights as heirs of their blood relatives to same extent as other children. See C.C. 199 and category 13 Estates and Trusts, topic 13.16 Wills, subhead Forced Heirs. They inherit from relatives of adoptive parents as if child of latter. Blood relatives, subject to certain exceptions, are divested of all rights of inheritance and relieved of legal duties with regard to adopted issue.

Voluntary Registry Act.

State has voluntary registry act permitting adopted person, biological mother and biological father (if he has legitimated or formally acknowledged child or signed voluntary abandonment and release for child's adoption) to file information affidavit with state agency seeking to be matched with persons filing similar affidavit, i.e., adoptee with biological parent or biological parent with adoptee. No such registration permitted until 25 years from birth of adoptee. If both adoptee and younger sibling adopted by same parents, then no such registration until adoptee is over 25 and sibling is over 18. If requesting affidavits match, state agency puts parties into contact with each other. Mandatory counselling session upon filing of affidavit. (La.R.S.

40:91-99, added Act 40 of 1982).

Interstate Compact on Adoption and Medical Assistance adopted. (La.R.S. 46:1795, added Act 810 of 1985).

14.02 ALIMONY:

See topic 14.06 Divorce.

14.03 COMMUNITY PROPERTY:

See topic 14.09 Husband and Wife.

14.04 DESERTION:

See topics 14.06 Divorce, 14.09 Husband and Wife.

14.05 DISSOLUTION OF MARRIAGE:

See topic 14.06 Divorce.

14.06 DIVORCE:

Termination of Marriage.

Marriage terminates only upon death of either spouse, divorce, judicial declaration of nullity or issuance of court order authorizing spouse of person presumed dead to remarry, as provided by law. (C.C. 101, as am’d Act 1009 of 1990, eff. Jan. 1, 1991).

Grounds for Divorce.

Except in case of covenant marriage and marriages in which there are minor children or documented child or spouse abuse, divorce shall be granted upon rule to show cause filed by spouse when either spouse has filed petition for divorce and upon proof that at least 180 days have elapsed from service of petition or from written execution of written waiver of service, and that spouses have lived separate and apart continuously for at least 180 days prior to filing of rule. (C.C. 102, as am’d Act 743 of 2006, eff. Jan. 1, 2007). Period living separate and apart as ground for divorce is 365 days if there are minor children of marriage or spouse or child abuse. (C.C. 103.1, added Act 743 of 2006, eff. Jan. 1, 2007). Divorce shall also be granted upon petition of spouse and proof that: (1) Spouses have been living separate and apart continuously for period of six months or more on date petition is filed; or (2) other spouse has committed adultery; or (3) other spouse has committed felony and has been sentenced to death or imprisonment at hard labor. (C.C. 103, as am’d Act 918 of 1991). Cause of action for divorce is extinguished by reconciliation of parties. (C.C. 104, added Act 1009 of 1990, eff. Jan. 1, 1991). Matters incidental to divorce proceedings may also be determined therein, such as custody, visitation, support for child or spouse, injunctive relief, use and occupancy of family home or other property. (C.C. 105, added Act 1009 of 1990, eff. Jan. 1, 1991).

In case of covenant marriage, which parties may agree to enter after required counselling, grounds for divorce are more restrictive and separation from bed and board is available prior to divorce. (La.R.S. 9:224, 225, 234, 245, as am’d Act 1380 of 1997, eff. July 15, 1997; and La.R.S. 9:272 through 275, as am’d Act 249 of 2006).

Effect of Divorce.

Judgment of divorce terminates community property regime retroactively to date of filing of petition in action in which judgment of divorce is rendered, but without prejudice to rights of third parties validly acquired in interim. (C.C. 159, as am’d Act 1009 of 1990, eff. Jan. 1, 1991).

No Judicial Separation from Bed and Board.

With revisions effected by Act 1009 of 1990, eff. Jan. 1, 1991, judicial separation is no longer available, except with respect to covenant marriages. Divorce proceedings as outlined above take place of former judicial separation proceedings.

Residence Requirements.

For purposes of divorce action, if spouse has established and maintained residence in state for period of six months, there is rebuttable presumption of domicile in state in parish of such residence. (C.C.P. 10 [A][7], as am'd Act 1009 of 1990, eff. Jan. 1, 1991).

Jurisdiction over divorce proceedings is vested in district courts. (Const., art. 5, § 16). No devolutive appeal is allowed; suspensive appeal must be taken within 30 days after judgment. (C.C.P. 3942).

Hearings in divorce proceedings, and with respect to incidental matters, may be in chambers upon showing of good cause and with mutual consent. (La.R.S. 9:314, am'd Act 1009 of 1990, eff. Jan. 1, 1991). Judgment dismissing divorce petition under C.C. 102 shall be rendered upon joint application of parties and payment of costs, or upon contradictory motion of plaintiff. (C.C.P. 3958, added Act 628 of 1993).

Absent Defendant.

In any action for divorce where defendant is absent from the state or his or her whereabouts are unknown or in case of reconvention when plaintiff is absent and in actions for divorce based on a judgment for separation when the adverse party was absent from the state or his or her whereabouts were unknown, the court having jurisdiction over the cause must, upon application by plaintiff, appoint an attorney at law to represent such absent party and all proceedings must be had contradictorily with said attorney at law and any judgment may be rendered against the attorney which might be rendered against his principal if he were present in person in open court. (C.C.P. 5091, 5098).

Order to Obtain Property.

After filing of petition for divorce, court may grant to either spouse order or injunction without bond requiring sheriff or police to accompany petitioning spouse to marital domicile or elsewhere to obtain personal property such as wearing apparel of spouse or children, food and eating utensils, and other items deemed necessary by court for safety and well-being of petitioner and children. (La.R.S. 9:373-374, added Act 1009 of 1990, eff. Jan. 1, 1991).

Spousal Support.

In proceeding for divorce or thereafter, court may award interim, periodic support to party or final, periodic support to party in need of support and free from fault prior to filing of proceeding to terminate marriage, based on various factors including ability to pay, health, education status and the like. (C.C. 111 and 112, as am'd Act 749 of 2006, eff. June 30, 2006). This spousal support replaces concept of alimony. Court must consider all relevant factors in determination of level of support, including needs of parties; income and means of parties, including liquidity; financial obligations of parties; earning capacity; effect of child custody on earning capacity; time necessary for claimant to acquire appropriate education, training or employment; health and age of parties; duration of marriage; and tax consequences. (C.C. 112[A], as am'd Act 1078 of 1997, eff. Jan. 1, 1998). Support is limited to one third of obligor's net income. (C.C. 112[B], as am'd Act 1078 of 1997, eff. Jan. 1, 1998). Interim periodic allowance may be awarded, but shall not extend beyond 180 days from rendition of divorce judgment, except for good cause shown. (C.C. 113, as am'd Act 1078 of 1997, eff. Jan. 1, 1998). Award of periodic support may be modified upon change of circumstances and terminated if no longer necessary, but subsequent marriage of obligor spouse is not change of circumstances. (C.C. 114, as am'd Act 1078 of 1997, eff. Jan. 1, 1998). Obligation of spousal support is extinguished upon remarriage of obligee, death of either party or judicial determination that obligee has cohabited with another person of either sex in manner of married persons. (C.C. 115, as am'd Act 1078 of 1997, eff. Jan. 1, 1998). Obligation of final spousal support may be modified, waived or extinguished by judgment, by authentic act or by act under private signature acknowledged by obligee. (C.C. 116, as am'd Act 1078 of 1997, eff. Jan. 1, 1998). Right to claim after divorce obligation of spousal support is subject to preemptive period of three years, running from latest of (1) day judgment of divorce is signed or (2) day judgment terminating prior judgment of spousal support is signed, if that judgment was in action commenced either before signing of judgment of divorce or within three years of it or (3) day last payment was made, when obligation is initially performed by voluntary payment within periods described in (1) or (2) above and no more than three years has elapsed between payments. (C.C. 117, as am'd Act 1078 of 1997, eff. Jan. 1, 1998). Except for good cause shown, judgment awarding, modifying or revoking interim spousal support allowance is retroactive to date of judicial demand. (La.R.S. 9:321, as am'd Act 1078 of 1997, eff. Jan. 1, 1998). Judgment or order for spousal or child support shall not be recorded; if record, shall be cancelled and does not have effect of judicial mortgage. (La.R.S. 9:322, as am'd Act 1078 of 1997, eff. Jan. 1, 1998). Judgment decreeing support due and executory may be recorded and shall be judicial mortgage. (La.R.S. 9:323, as am'd Act 1078 of 1997, eff. Jan. 1, 1998). When judgment is rendered to make past due alimony executory, court must award attorney fees and costs to prevailing party, except for good cause shown. (La.R.S. 9:375). Order for past due alimony is retroactive to filing date of petition unless good cause shown. (La.R.S. 9:310, added Act 166 of 1984). Award for support not to be changed unless party shows change of circumstances of one party, which is not established by judgment for past due support. (La.R.S. 9:311, as added Act 41 of 1985).

Division of Property of Spouses.

See subhead Property, infra.

Property.

Divorce carries with it separation of goods and effects. (See topic 14.09 Husband and Wife.) After filing of petition for divorce, and contradictory hearing, either spouse may be awarded occupancy of family home, if community property, and use of community movables or immovables pending partition of community property, based upon relative economic status of parties and best interest of family. Court may also award spouse given custody of children of marriage use and occupancy of family residence, even if it is separate property of other spouse, based on economic status of parties and best interest of family. (La.R.S. 9:374, added Act 1009 of 1990, eff. Jan. 1, 1991). Such award is made pending partition of community property or for 180 days after termination of marriage, whichever first occurs. (La.R.S. 9:374[A], as am'd Act 965 of 1995). Such award or actual use does not require payment of rent to other spouse. Party against whom divorce has been pronounced loses all advantages or donations other party may have conferred by marriage contract or since, and party at whose instance judgment has been obtained preserves all those to which such party would have been entitled; and this takes place even if such donations were reciprocally made, but rule does not apply in cases of mutual fault. (C.C. 141, as am'd Act 99 of 1990).

Custody of Children.

In divorce proceeding or thereafter, court shall award custody of child in accordance with best interest of child. (C.C. 131). If parents agree, court shall award custody in accordance with their agreement unless best interest of child dictates otherwise. (C.C. 132). In absence of agreement, or if agreement is not in child's best interest, award shall be joint unless sole custody in one parent is shown by clear and convincing evidence to serve best interest of child. (C.C. 132). If award of joint custody or sole custody to either parent would result in substantial harm to child, court shall award custody to another person with whom child has been living in wholesome and stable environment, or to any other person able to provide such environment. (C.C. 133).

Court must consider all relevant factors in determining best interest of child; representative list is given in statute. (C.C. 134). Custody hearing may be closed to public. (C.C. 135). Child custody mediation procedures authorized and qualifications for mediators fixed by statute. (La.R.S. 9:331 et seq., as am'd Act 287 of 1995). Custody parent may re-locate child but only after court authorization after hearing or upon showing of written consent of non-custody parent. (La. R.S. 9:355.3, as am'd July 3, 2008).

Uniform Child Custody Jurisdiction and Enforcement Act enacted. (La.R.S. 13:1801-1842, eff. Aug. 15, 2007).

Reasonable visitation rights are awardable to non-custody parent, unless after hearing court finds visitation would not be in child's best interest. (C.C. 136[A]). Other relatives and stepparents and stepgrandparents may seek visitation rights under extraordinary circumstances, to be determined by statutory list of factors to determine best interest of child with respect to such request. (C.C. 136[B], as am'd Act 57 of 1995). Procedure for restoration of parental rights if previously terminated exists. (Children's Code Arts. 1051-1053, 1146[E]).

Non-suspensive appeals are permitted from custody and visitation orders. (C.C.P. 3943, as am'd Act 261 of 1993).

In child custody matters, evaluation of party or of child by mental health professional may be ordered. (La.R.S. 9:331, as am'd Act 261 of 1993). Mediation of differences between parties may be ordered. (La.R.S. 9:332, as am'd Act 261 of 1993). Award of joint custody is outlined by statute; joint custodians are obligated to confer with respect to best interest of child. (La.R.S. 9:335 and 336, as am'd Act 261 of 1993). Violations of custody or visitation orders may be found and punished, including with restrictions on visitation. (La.R.S. 9:341-343, as am'd Act 261 of 1993). If visitation periods are missed due to defined military active duty, compensatory visitation may be granted. (La.R.S. 9:348, added Act 110 of 2006). Law declares that child has right to time with both parents and visitation schedules must be respected; court proceeding authorized if violations occur and attorney fees may be awarded to prevailing party. (C.C. 136.1, added Act 671 of 2008; La. R.S. 9:346, as am'd Act 671 of 2008).

Access to records and information pertaining to minor child not denied to parent solely because he or she is not child's custodial or domiciliary parent. (La.R.S. 9:351, as am'd Act 261 of 1993).

Interim support allowance for child may be allowed when demand for final support is pending. (C.C. 141). Child support allowances can be modified upon proof of change of circumstances. (C.C. 142). If child support is in specific amount per child, award terminates when child reaches majority or is emancipated unless child is full-time student in good standing at secondary school, is not 19 and is dependent upon either parent; if award is in aggregate for several children, termination occurs when youngest child reaches age of majority and is not in conditions described above. (La.R.S. 9:315.22, added Act 261 of 1993). Statutes specify certain obligations, such as health care insurance. (La.R.S. 9:315.4). If child receiving support suffers from developmental disabilities, obligation of support continues to 22nd birthday. (C.C. 230, as am'd Act 408 of 2001).

Provisional custody by mandate may be given by parents acting jointly or by single custodial parent, limited to one year's duration at a time. (La.R.S. 9:951-954, as am'd Act 235 of 1995).

Maintenance of Children.

Parents, by the very act of marrying, contract together the obligation of supporting, maintaining and educating their children, and the children's right to such support, maintenance and education is not affected by separation or divorce. (C. C. 135, 227).

When judgment is rendered to make past child support executory, or to enforce visitation order, court must award attorney fees and costs to prevailing party, except for good cause shown. (La.R.S. 9:375, added Act 1009 of 1990, eff. Jan. 1, 1991).

Failure to pay child support may result in revocation of hunting and fishing licenses (La.R.S. 9:315.30-315.38, added Act 751 of 1995) and also by liens on motor vehicles (La.R.S. 9:4790 and T. 32:708.1, added Act 772 of 2006).

Duration of Temporary Restraining Order.

In suit for divorce, temporary restraining order issued in conjunction with rule nisi for preliminary injunction prohibiting spouse from disposing of or encumbering community property or harming other spouse or child, or removing child from jurisdiction of court, remains in force until hearing on rule nisi. (C.C.P. 3604, as am'd Act 770 of 1982).

Protective Orders in Domestic Abuse Situations.

Protective orders and other relief are available in cases of domestic abuse as defined, not including negligent injury and defamation, whether proceeding for separation or divorce has been filed or not. (La.R.S. 46:2121-2125 and §§ 2131-2139, as am'd Acts 406 and 407 of 1983). If TRO is granted, hearing on rule to show cause for further relief must take place within 21 days, unless further 15-day continuance is sought and granted. (La.R.S. 46:2135 and Ch. C. 1569, as am'd Act 427 of 2009).

Remarriage.

Where divorce is granted on ground of adultery, guilty party is now permitted to marry his or her accomplice. (Act 625 of 1972, repealing C. C. 161).

Annulment of Marriage.

See topic 14.11 Marriage.

14.07 DOMICILE

Domicile is governed by articles of Civil Code. Domicile of natural person is place of his habitual residence. (C. C. 38, as am'd Act 801 of 2008, eff. Jan. 1, 2009). Natural person may reside in several places but may not have more than one domicile; in absence of habitual residence, any place of residence may be considered one's domicile at option of persons whose interests are affected. (C. C. 39, as am'd Act 801 of 2008, eff. Jan. 1, 2009). Spouses may have either common domicile or separate domiciles. (C. C. 40, as am'd Act 801 of 2008, eff. Jan. 1, 2009). Domicile of unemancipated minor is that of parent or parents with whom minor usually resides; if child is subject of custody order, domicile is that of custody parent or if under tutorship, domicile is that of tutor. (C. C. 41, as am'd Act 801 of 2008, eff. Jan. 1, 2009). Domicile of full interdict is that of curator; limited interdict retains own domicile, unless otherwise provided in judgment of interdiction. (C. C. 42, as am'd Act 801 of 2008, eff. Jan. 1, 2009). Domicile of any person under continued or permanent tutorship is that of tutor. (C. C. 43, as am'd Act 801 of 2008, eff. Jan. 1, 2009). Domicile is maintained until acquisition of new domicile, which occurs for natural person when he moves residence to another location with intent to make that location his habitual residence, which may be established by various forms of evidence. (C. C. 44-45, as am'd Act 801 of 2008, eff. Jan. 1, 2009). Person holding temporary position away from his domicile retains his domicile unless he demonstrates contrary intent. (C. C. 46, as am'd Act 801 of 2008, eff. Jan. 1, 2009). Special provision for military personnel for procedural purposes is provided. (C. C. P. 11, added Act 801 of 2008, eff. Jan. 1, 2009).

14.08 GUARDIAN AND WARD:

Persons Entitled to Tutorship.

During marriage father is administrator of minor's estate and mother when father is mentally incompetent, committed, interdicted, imprisoned or an absentee. (C.C. 221; C.C.P. 4501, as am'd Act 467 of 2003; C.C.P. 4502, as am'd Act 566 of 1975). Parents enjoy usufruct of minor's estate but right does not extend to donations to child unless specifically so provided in donation. (C.C. 226, as am'd Act 714 of 1985). Mother is tutrix of illegitimate child not acknowledged by father or acknowledged by him without her concurrence. If both have acknowledged, court selects one as tutor. (C.C. 256, as am'd Act 215 of 1983). Parents of mother are considered first on death of mother of illegitimate who has not been acknowledged by father. (C. C. Art. 536, as am'd Act 536 of 1979).

Upon death of either parent, tutorship of minor children belongs of right to surviving parent, but survivor must qualify as provided by law. (C.C. 248, as am'd, Act 30 of 1960). Father or mother dying last, or parent who is curator of spouse, can appoint a tutor by will or by having made a declaration before death, executed before a notary public and two witnesses. (C.C. 257). Judge may for good reasons refuse to confirm tutorship given by surviving father or mother and appoint someone else in his or her stead. (C.C.P. 4062). When tutor has not been appointed by father or mother dying last, or if tutor is not confirmed or is excused, tutor appointed from among qualified ascendants in direct line, collaterals by blood within third degree and surviving spouse of minor's father or mother dying last. (C.C. Act 263, as am'd Act 429 of 1976). If there is no ascendant, nearest of kin in collateral line is entitled to tutorship. (C.C. 267).

A minor not emancipated is placed under a tutor after dissolution of marriage of his parents or their separation from bed and board. (C. C. 157 and 246). During marriage, fathers and mothers have enjoyment of estate of their children; but in such case property belonging to children cannot be sold or mortgaged or any other step taken in regard to it, except with same formalities as are prescribed in case of minors represented by tutors, father during marriage occupying place and being clothed with powers of tutor. (C.C.P. 4501).

The party who is entrusted with care of children, in case of divorce or separation, is of right their natural tutor, as though the other party had died. When parents have been awarded joint custody, they are natural co-tutors of child with equal authority and solidary responsibility, unless modified by their own agreement with court approval. (C. C. 250, as am'd Act 695 of 1983). Either parent in joint custody situation may appoint tutor of children's property; if both appoint, tutor appointed by parent administers portion of children's estate attributable to appointing parent; court decides which shall administer other portions. (C.C. 258, as am'd Act 680 of 1992).

Eligibility.

The following persons cannot be tutors: Minors, except father and mother; persons interdicted, or shown on contradictory hearing to be mentally incompetent, a convicted felon (except father and mother), indebted to minor (not applicable to father and mother); adverse party to suit with minor (other than father and mother); or person contradictorily proved to be incapable because of physical or mental condition, or bad moral character. (C.C.P. 4231, as am'd Act 741 of 2001). Although criminal convictions generally do not disqualify father and mother, natural parent is disqualified if convicted of felony involving theft or misappropriation of funds, crime of violence, sex offense or any other crime against individual under 18. (C.C.P. 4231[C], added Act 741 of 2001).

Appointment, recognition or confirmation of tutors must be made by the judge of the parish where the surviving parent or parent awarded custody of the minor is domiciled, and in other cases where the minor has his domicile, if he has a domicile in the state, or if he has no domicile in the state, by the judge of the parish where any real estate of is situated, or if none, where movable property is situated. If parents are awarded joint custody of minor, they must petition jointly for appointment as co-tutors in district court of parish in which divorce or separation proceedings were instituted or in parish of domicile of minor if specified in joint custody agreement. (C.C.P. 4031, as am'd Act 764 of 1990). When minor is without tutor, any person who has claim against him may apply to competent judge to request that attorney at law be appointed to represent minor. (C.C.P. 4232).

Tutorship of mentally retarded person may be continued beyond age of majority until revoked by court of domicile. Title of such a proceeding is "Continuing Tutorship of (Name of Person), A Mentally Retarded Person." (C.C. art. 356, as am'd Act 714 of 1974).

Bonds.

All tutors may give bond in lieu of special or general mortgage. If not natural tutor, bond must be of duly authorized surety company, or covered by Louisiana state, political subdivision or municipal, or U.S. bonds or domestic loan or homestead association shares properly insured deposited as directed by court, certificates of deposit of approved banks, or by at least two personal sureties signing in solido each of whom is state resident and owns unencumbered property in state sufficient to secure bond. (C.C.P. 4132, am'd Act 136 of 1985). Judge fixes amount and may allow substitution of securities. (C.C.P. 4136).

A parent, qualified as tutor or not, may secure his obligations to his minor child by general or special mortgage or by bond of type authorized for other sureties, or by bond in addition to legal mortgage if so ordered. (C.C.P. 4134, 4135). Special mortgage must include date of birth of minor, but lack of date does not invalidate mortgage. (C.C.P. 4133, as am'd Act 62 of 2005). Bond may be increased or diminished; but when only asset of minor is contested damage claim, court may postpone furnishing of security until claim is recovered. (C.C.P. 4131, as am'd Act 146 of 1985). With court authorization, legal mortgage may be subordinated to conventional mortgage. (C.C.P. Art. 4137, added Act 389 of 1980).

Where no person will accept tutorship and give bond, court may dispense with bond. (C.C.P. 4463). Court may also disperse with bond requirement in small tutorship proceedings (property with gross value of $20,000 or less). (C.C.P. 4463, as am'd Act 45 of 1990).

Inventory.

Applicant for tutorship must have an inventory of minor's property made within ten days after signing of court order. Itemized description of property, sworn to, may take place of formal inventory. (C.C.P. 4101, as am'd Act 344 of 1983).

Management of Property.

Matters affecting minor's interest submitted for determination to court by tutor contradictorily with undertutor or, with undertutor's concurrence, by ex parte order. (C.C.P. 4271). Ability to invest, reinvest or withdraw funds limited and subject to court approval in most instances. (C.C.P. 4270, 4272, as am'd Act 122 of 1995). Tutor may place some or all of minor's property in trust if authorized by court. (C.C.P. Art. 4269.1, added Act 276 of 1980). Whenever court renders monetary judgment or judgment of possession of property in favor of minor, it may include orders to insure that funds or property are used for minor's benefit and may also include structured settlement. (C.C.P. 4521, as am'd Act 716 of 2008). Natural tutor who is surviving or sole custody parent of minor child or mother of illegitimate child, may bring tort suit without necessity of formal qualification as tutor. (C.C.P. 4061.1, added Act 155 of 2003).

Sales.

Tutor may sell minor's property at public or private sale by petitioning court, and, in absence of concurrence by under-tutor, by taking rule on under-tutor. (C.C.P. 4271, 4301-4342).

Leases.

Court may authorize lease of minor's property, limited to term of tutorship. (C.C.P. 4268, am'd Act 133 of 1974).

Accounts.

Tutor must render an annual account of his administration and at other times ordered by the Court, and a final account after expiration of or upon revocation of his tutorship. (C.C.P. 4391, 4392).

Agreements Between Tutor and Minor.

Every agreement which may take place between tutor and minor arrived at age of majority, is null and void unless same was entered into after rendering of a full account and delivery of vouchers, whole being made to appear by receipt of person to whom account was rendered ten days previous to agreement. (C. C. 339).

Absence of Tutor.

A tutor who is a nonresident or who is about to leave the state permanently must execute a power of attorney appointing a resident to represent him and this power of attorney must be filed in the tutorship proceeding. Agent may be authorized by the absent tutor to represent him in all matters relating to tutorship. A resident tutor who will be temporarily absent may similarly appoint such an agent. (C.C.P. 4273 as am'd Act 4 of 1964).

Investments.

See category 13 Estates and Trusts, topic 13.15 Trusts.

Fees allowed tutors are fixed by court not to exceed 10% of annual revenues from minor's property, unless increased by court on proper showing. (C.C.P. 4274, as am'd Act 36 of 1966)

Uniform Veterans' Guardianship Act has been adopted. (La.R.S. 29:351-373, as am'd).

Interdiction provisions revised effective July 1, 2001 by Act 25 of 1st Ex. Sess. of 2000. Court may order full interdiction of natural person of age of majority, or emancipated minor, who due to infirmity cannot consistently make reasoned decisions regarding care of his person and property, or cannot communicate those decisions, and whose interests cannot be protected by less restrictive means. (C.C. 389). Court may order limited interdiction of such persons unable to deal with person or property or any aspect of either. (C.C. 390). When petition for interdiction is pending, court may order time-limited temporary or preliminary interdiction when there is substantial likelihood that grounds for interdiction exist and substantial harm to health, safety or property of potential interdict is imminent. (C.C. 391, 397).

If interdiction occurs, court appoints curator and undercurator to represent interdict in juridical acts and to care for person or affairs of interdict. (C.C. 392, 393). Interdiction does not affect validity of juridical act made by interdict prior to effective date of interdiction. (C.C. 394). Person fully interdicted lacks capacity to make juridical act. (C.C. 395, as am'd Act 1008). Limited interdict lacks capacity to make or revoke donation inter vivos and is presumed to lack capacity to make or revoke disposition mortis causa as to property under authority of curator, subject to rebuttal of presumption. (C.C. 395, as am'd Act 1008). Judgment of interdiction does not remove capacity to make or revoke testament, but person asserting that interdicted individual has such capacity must overcome presumption that he does not by clear and convincing evidence. (C.C. 395, 1482). Judgment of interdiction has effect retroactive to date of filing seeking such relief.

(C.C. 396). Court may modify or terminate judgment of interdiction for good cause, and interdiction terminates upon death of interdict or by court judgment. (C.C. 397).

Person whose petition for interdiction is denied is liable for damages caused to defendant if petitioner knew or should have known at time of filing that any material allegations regarding ability of defendant consistently to make reasoned decisions or to communicate those decisions was false. (C.C. 399).

Neither curator nor undercurator is personally responsible to third person for delictual obligation of interdict in his charge solely by reason of his office. (C.C. 2319).

Code of Civil Procedure contains provisions relative to content of petition for interdiction (C.C.P. 4541), venue of such actions (C.C.P. 4542), service of process (C.C.P. 4543), appointment of attorney if none appears after service (C.C.P. 4544), appointment of examiner if court deems that necessary and appropriate (C.C.P. 4545), prompt scheduling of hearing and its content (C.C.P. 4546, 4547), requirement that proof of grounds for interdiction be by clear and convincing evidence (C.C.P. 4548), content of judgment (C.C.P. 4551), post-judgment proceedings and appeal (C.C.P. 4553, 4555) and ancillary interdiction proceedings (C.C.P. 4556). Code of Civil Procedure also contains qualifications for curator and undercurator (C.C.P. 4561) and their duties (C.C.P. 4565), as well as details of management of affairs of interdict (C.C.P. 4566). Curator and undercurator may be removed for good cause shown. (C.C.P. 4568).

Under specified conditions, including consent of interdict’s spouse and heirs of first degree, curator may continue to make donations in limited amounts to descendants to continue interdict’s policy of making gifts prior to interdiction, up to limit of $10,000 annually to each (La.R.S. 9:1022, as am’d Act 143 of 1991), and may make donations to charitable and nonprofit organizations (La.R.S. 9:1023, added Act 68 of 1979, and § 1031) or to collaterals or their descendants when interdict has no spouse or direct descendants (La.R.S. 9:1024, added Act 299 of 1991, eff. July 3, 1991).

Foreign Tutors.

Upon producing proof of appointment, tutors or guardians of minors residing out of Louisiana are entitled to sue for and recover any property, rights or credits belonging to minors in this state, upon producing satisfactory evidence of appointment as aforesaid, without being under necessity of qualifying as tutors according to laws of Louisiana, when no tutor has been appointed in Louisiana. (C.C.P. 4431, 4433). They cannot, however, remove from state property of any minor unless foreign tutor petitions and obtains judgment of court of parish where property is situated upon certain stated conditions. (C.C.P. 4432, as am’d Act 36 of 1966).

Uniform Fiduciaries Act adopted with slight variations. (La.R.S. 9:3801-3814, § 3803 repealed by Act 444 of 1960).

Uniform Simplification of Fiduciary Security Transfers Act adopted. (La.R.S. 9:3831-3840).

Uniform Child Custody Jurisdiction Act adopted. (La.R.S. 13:1700-1724, added Act 513 of 1978).

14.09 HUSBAND AND WIFE:

Matrimonial regime governing ownership and management of property of spouses may be legal, contractual or partly legal and partly contractual. Legal matrimonial regime is that specified by law in C. C. Arts. 2325 et seq., as am’d Act 565 of 1980. (See subhead Community Property, infra.)

Antenuptial Contracts.

Matrimonial agreement establishing separate regime or modifying or terminating legal regime may be executed by spouses as to all matters not prohibited by public policy, either before marriage, or during marriage, to subject themselves to legal regime, and during marriage may terminate or modify regime upon approval of court upon joint petition, or within first year of moving into and acquiring domicile in state. (See also subhead Separate Property, infra.) Such agreements may not renounce or alter marital portion or established order of succession; nor may spouses limit as to third persons right that one spouse alone has under legal regime to obligate community or to alienate, encumber or lease community property. Agreement must be by authentic act or act under private signature and duly acknowledged, and is effective as to third persons when filed in parishes in which immovable property is situated and parishes of domicile as to movable property. Unless fully emancipated minor cannot enter matrimonial agreement without concurrence of father and mother, or parent having legal custody, or tutor. (C. C. Arts. 2325-2333).

Divorce.

Judgment of divorce terminates community property regime retroactive to date of filing of action. (C.C. 159, as am'd Act 1009 of 1990, eff. Jan. 1, 1991).

Disability of Married Women.

All disabilities are removed in so far as separate property of the wife is concerned. (La.R.S. 9:101-105; La.R.S. 6:28). Woman, at her option, may use maiden name, present spouse's name or hyphenated combination of two; woman who is widowed, divorced or remarried may use maiden name, surname of her deceased or former spouse, surname of her present spouse, or any combination thereof. (La.R.S. 9:292, as am'd Act 118 of 2004).

Separate property of spouse consists of property acquired prior to establishment of community property regime, acquired by spouse with separate things or with separate and community things when value of community things is inconsequential, acquired individually by inheritance or donation, acquired as damages from other spouse for breach of contract or fraud or bad faith in management of community, acquired as damages of indemnity in connection with management by spouse of separate property, and acquired as result of voluntary partition of community during existence of community property regime. (C. C. 2341, as am'd Act 921 of 1981). Declaration of separate property may be contested by other spouse unless he concurs in act, and by creditors, but where there has been declaration, transfer by onerous title may not be set aside. (C. C. Art. 2342). Donation of interest in community to other spouse transforms interest into separate property of donee, and, unless otherwise provided in act of donation, equal interest of donee becomes separate property and natural and civil fruits and minerals produced from or attributed to property given as well as bonuses, delay rentals, royalties and shut-in payments arising from mineral leases, become donee's separate property. (C. C. 2343, as am'd Act 921 of 1981). Personal injury damages are also separate property of spouse, but portion of damages attributed to expenses incurred by community as result of injury, or in compensation of loss of community earnings except that accrued after termination of community, is community. (C. C. Art. 2343).

Separate property regime is established by agreement excluding legal regime or by judgment of separation. (C. C. Art. 2370). Each spouse enjoys and disposes of separate property without concurrence of other spouse. (C. C. Art. 2371). Spouse is solidarily liable with other spouse for family necessities. (C. C. Art. 2372). Except as provided by agreement, each spouse contributes to expenses in proportion to his means. (C. C. Art. 2373).

Spouse may obtain judgment of separation of property if community is threatened by fraud, fault, neglect or incompetence of other spouse or disorder of affairs of other spouse, which judgment is retroactive to day of filing of petition without prejudice to rights acquired in interim. (C. C. Arts. 2374 and 2375). Creditors may intervene to object to separation or modification of regime on grounds of fraud and may file action in one year to annul judgment. (C. C. Art. 2376). Partition of community property may be sought by incidental demand in separation proceeding. (C.C. 150, added Act 225 of 1986).

When federal law or provisions of statutory pension or retirement plan preclude classifying property as community that would have been so classified under Civil Code, spouse of person entitled to that property shall be allocated ownership of other community property equal in value to such property prior to division of rest of community property. (La.R.S. 9:2801.1, added Act 642 of 2001).

Community Property.

Unless modified or terminated by agreement, legal regime of community of acquets and gains applies to spouses domiciled in this state. (C. C. Art. 2334). Each spouse owns present undivided one-half interest in community. (C. C. Art. 2336). Spouses may without court approval voluntarily partition community property in whole or in part during existence of community regime; things acquired by such partition are separate property. (Partition effective against third persons when filed for registry as provided in C. C. 2332. (C. C. 2336, as am'd Act 282 of 1982). Spouse may not alienate, encumber or lease to third person undivided interest in community or particular thing thereof prior to termination of community, (C. C. Art. 2337). Community property is that acquired during community through effort, skill or industry of spouse, or acquired with community things or with community and separate things unless classified as separate property by C. C. Art. 2341, or donated to spouse jointly, or natural and civil fruits of community, or for damages to community property, or all other property not classified as separate. (C. C. Art. 2338). Natural and civil fruits of separate property, minerals produced from or attributable to separate property, and bonuses, delay rentals, royalties and shut-in payments from mineral leases, are community unless reserved by spouse by declaration by notarial act or private act duly acknowledged which is effective as to fruits of immovables when registered in conveyance records of parishes where property is located, and in parish of domicile as to movables, with copy provided to other spouse prior to filing of declaration. (C.C. 2339, as am'd Act 855 of 2008). There is rebuttable presumption that things are community. (C. C. Art. 2340). One spouse may transfer separate property to other, with stipulation that it shall become community. Transfer by onerous title must be in writing, and by gratuitous title must be by authentic act. By such transfer, property is transformed into community property. (C. C. 2343.1, added Act 921 of 1981). Separate or community obligation may be satisfied from community property and from separate property of spouse incurring obligation. (C. C. Art. 2345). Each spouse may manage, control or dispose of community things unless otherwise provided by law. (C. C. Art. 2346). Concurrence of spouses is required with respect to alienation, encumbrance or lease of family home and furniture and furnishings therein, community timber, all of assets of community enterprise, and movables issued or registered by law in names of spouses jointly. (C. C. Art. 2347). Spouse may expressly renounce right of concurrence and management of community enterprise, which may be irrevocable for stated term not to exceed three years. (C.C. 2348, as am'd Act 554 of 1984, eff. Jan. 1, 1985). Renunciation of right to concur may include future-acquired property within applicable time limit. (C.C. 2348, as am'd Act 622 of 1984, eff. Jan. 1, 1985). Spouse may nonetheless reserve right of concurrence as to specifically described community immovable property. (C. C. 2348, as am'd Act 132 of 1981). Donation of community requires concurrence of spouses except for usual or customary gifts of value commensurate with economic position of spouses. (C. C. Art. 2349). Spouse who is sole manager of enterprise may alienate, encumber, or lease movables unless issued in name of other spouse or as required by law. (C. C. Art. 2350). Spouse has exclusive right to manage, alienate, encumber, or lease movables issued or registered in his name as provided by law. (C. C. Art. 2351). Spouse who is partner has exclusive right as to management, etc., of partnership interest. (C. C. Art. 2352). Alienation, encumbrance or lease of community without required concurrence is relatively null. (C. C. Art. 2353). Spouse is liable for loss or damage caused by fraud or bad faith in management of community. (C. C. Art. 2354). By summary proceedings, court may authorize one spouse to act alone if in best interests for family and other spouse is unable or arbitrarily refuses to concur. (C. C. Art. 2355).

Community terminates on death of spouse, or by judgment of divorce, or separation from bed and board, or separation of property. (C. C. Art. 2356). Community property is divided at termination, and may include goodwill of business as defined. (La.R.S. 9:2801.2, added Act 837 of 2003). Obligations of spouse may be satisfied from property of former community after termination, and spouse is liable for obligations of other spouse up to value of community disposed of for purposes other than satisfaction of community obligations. (C. C. Art. 2357). By written act spouse may assume responsibility for one-half of each community obligation incurred by other spouse, and may dispose of community without incurring further responsibility for obligations incurred by other spouse. (C. C. Art. 2357.1). Reimbursement by one spouse to other may be had on termination of community. (C. C. Art. 2358). Reimbursement shall be made from patrimony of spouse who owes reimbursement. (C.C. 2358.1, added Act 1991 of 1990). Obligations for common interest of spouses or for other spouse is community obligation. (C. C. Art. 2360). There is presumption that obligations incurred during regime are community. (C. C. Art. 2361). Alimentary obligations under law are deemed community. (C. C. Art. 2362). Separate obligations are those incurred before or after regime, or during but not for common interests or for other spouse, those resulting from intentional wrongs not for benefit of community, and those incurred for separate property of spouse to extent such does not benefit community, family or other spouse. (C. C. Art. 2363). On termination of community, spouse is entitled to one-half of value of community property or “former community property” after termination but before actual partition of property used to satisfy separate obligation of other spouse or to acquire, use, improve or benefit separate property of other spouse (C. C. Arts. 2364, as am’d Act 204 of 2009 and 2366), and one-half of value of separate property used to satisfy community obligations to extent of community assets unless for ordinary and customary marriage expenses and support, maintenance and education of children in which case reimbursement is not limited to community assets (C. C. Art. 2365). Spouse is entitled to one-half of value of separate property used for acquisition, use, improvement or benefit of community or separate property of other spouse (C.C. 2367 and 2367.1, as am’d Act 204 of 2009), and one-half of enhanced value of separate property of other spouse as result of uncompensated labor or industry of spouses (C. C. Art. 2368). Special rules of accession and reimbursement apply when community assets are used to make improvements on separate property and vice versa. (C.C. 2367.1 and 2367.2, added Act 933 of 1984). Spouses owe each other accounting, which right prescribes in three years from termination of community. (C. C. Art. 2369). After termination of community property regime, provisions governing co-ownership apply unless there is contrary provision of law or juridical act. (C.C. 2369.1, added Act 991 of 1990). Principles governing management of former community property are provided. (C.C. 2369.2 through 2369.8, eff. Jan. 1, 1996). If spouses are unable to agree on partition of community property or settlement of claims between them, either spouse on termination of matrimonial regime may institute proceeding to make that determination. In proceeding, each party files descriptive list of all assets and liabilities; other party must traverse or concur in other’s list; court may appoint experts to assist in assessing value; court then partitions property and liabilities according to value at time of trial. If party fails to file list, other party may file rule to show cause why its list should not be deemed to constitute judicial determination of assets and liabilities; court may grant request or extend time for filing by other party. (La.R.S. 9:2801[1][a], as am’d Act 35 of 1997). Partition proceedings may include value of “goodwill” in any community-owned corporate, commercial or professional business, but that valuation does not include goodwill attributable to any personal quality of spouse who is awarded business. (La.R.S. 9:2801.2, as am’d Act 177 of 2004). In those few parishes that have family courts, those courts have exclusive jurisdiction of such actions. (La.R.S. 13:1415, added Act 35 of 1997). Allocation of liability to one spouse requires that spouse to discharge that obligation. If allocation is inequitable, difference may be made up by present or deferred payment of money. In certain circumstances, allocation by lot is permitted or court may order private sale. Partition by licitation is permitted only as last resort. (La.R.S. 9:2801, added Act 439 of 1982).

When petition for divorce has been filed, either spouse may obtain judgment decreeing separation of property by rule and upon proof of living separate and apart without reconciliation for 30 days from date of or prior to filing of divorce petition. (C.C. 2374, as am’d Act 627 of 1993).

Even absent filing of divorce petition, judgment decreeing separation of property may be had on petition of either spouse when spouses have lived separate and apart continuously for six months. (C.C. 2374[D], added Act 25 of 1993).

Contracts.

A married woman, whether a resident of this state or not, is competent to contract debts, purchase, sell and mortgage and to bind and obligate herself personally, and with reference to her separate property; to sell, alienate or otherwise dispose, and to mortgage and pledge, or otherwise encumber, her separate property for the benefit of herself, her husband, or any other person, and to bind herself, personally, as surety for her husband or any other person. (La.R.S. 9:101-103). She may also open bank accounts, deposit funds therein and withdraw the same by check as though unmarried. (La.R.S. 6:28).

See also category 3 Business Regulation and Commerce, topic 3.19 Interest, subhead Consumer Credit Opportunity Law.

Actions.

A married woman has the right to appear in court and to sue and to be sued and joinder of her husband is not necessary. (La.R.S. 9:102). Spouses may not use each other except for causes of action pertaining to contracts, matrimonial regimes, restitution of separate property, divorce, declaration of nullity, spousal or child support and child custody. (La.R.S. 9:291, as am'd Act 1009 of 1990, eff. Jan. 1, 1991).

Desertion and Non-support.

Desertion or intentional non-support by husband of destitute wife or by either parent of destitute minor children constitutes criminal neglect, punishable by fine of not more than $500, or imprisonment for not more than six months. Court may direct fine to be paid to wife or tutor or custodian of minor, or may order defendant to pay weekly alimony and enter into recognizance with surety conditioned for payment thereof. Failure to pay such alimony may be punished as contempt and amount of fine ordered paid to wife, tutor or custodian of minor. (La.R.S. 14:74, 75, as am'd Act 116 of 1975).

Uniform Reciprocal Enforcement of Support Act adopted with immaterial variations. (Civil enforcement by juvenile courts of state. (La.R.S. 13:1641-1699, as am'd Act 288 of 1966 to conform with recommendation of National Conference).

See also category 13 Estates and Trusts, topic 13.07 Descent and Distribution.

14.10 INFANTS:

Age of majority, 18 for both sexes. (C. C. 29, am'd Act 125 of 1987). Tutorship of mentally retarded person may be continued beyond age of majority until revoked by court of domicile. (C. C. 355 and 358, as am'd Act 216 of 1979). In such cases, retarded person is permanent minor, except that after age 18, unless formally interdicted, person has legal capacity of minor granted emancipation conferring power of administration. (C.C. 359, as am'd Act 714 of 1974). Name changes governed by law. (La.R.S. 13:4751, as am'd by Act 201 0f 1995).

Parental rights of abused or neglected child may be terminated in proceedings brought by district attorney. (La.R.S. 13:1600-1605, as am'd Act 400 of 1985).

Contract for surrogate motherhood (agreement of person not married to contributor of sperm to carry child to term and then surrender it) prohibited. (La.R.S. 9:2713, added Act 583 of 1987).

Adoption.

See topic 14.01 Adoption.

Emancipation.

There are three kinds of emancipation: judicial emancipation, emancipation by marriage, and limited emancipation by authentic act. (C. C. 365, as am'd Act 786 of 2008, eff. Jan. 1, 2009). As to judicial emancipation, court may order for good cause full or limited emancipation of minor 16 or older, which confers on person emancipated all effects of majority; limited judicial emancipation confers effects of majority specified in judgment. (C. C. 366, as am'd Act 786 of 2008, eff. Jan. 1, 2009). As to emancipation by marriage, minor is fully emancipated by marriage, and termination of marriage does not affect that emancipation; such emancipation may not be modified or terminated. (C. C. 367, as am'd Act 786 of 2008, eff. Jan. 1, 2009). As to limited emancipation by authentic act, such act confers on minor 16 or older capacity to make kinds of juridical acts specified in authentic act, which must be executed by minor and parents of minor (if parental authority exists) or by tutor of minor; all other effects of minority continue after execution of authentic act. (C. C. 368, as am'd Act 786 of 2008, eff. Jan. 1, 2009). Judicial emancipation is effective when judgment is signed; emancipation by marriage is effective upon marriage; limited emancipation by authentic act is effective when act is executed. (C. C. 369, as am'd Act 786 of 2008, eff. Jan. 1, 2009). Court may modify or terminate its judgment of emancipation for good cause, with specified consequences. (C. C. 370, as am'd Act 786 of 2008, eff. Jan. 1, 2009). Parties to limited emancipation by authentic act may modify that emancipation by subsequent authentic act, or court may do so for good cause. (C. C. 371, as am'd Act 786 of 2008, eff. Jan. 1, 2009). Parents are no longer responsible for damage occasioned by minor child who has been emancipated by marriage or by judgment of full emancipation, nor are they responsible for such damage with respect to limited judgment of emancipation that expressly relieves parents of that liability. (C. C. 2318, as am'd Act 786 of 2008, eff. Jan. 1, 2009). Pleadings and procedure for seeking judicial emancipation are provided. (C. C. P. 3392-3398, as am'd and added Act 786 of 2008, eff. Jan. 1, 2009).

Parental Responsibility.

Father and mother, and after death of either, survivor, are responsible for damage occasioned by minor. (C.C. 2318, as am'd Act 578 of 1984; also 308 So.2d 270).

Contracts of minors not emancipated are valid if made with the intervention of their tutors and the assent of a family meeting where such is required. When the minor has no tutor or one who neglects to supply him with necessaries for his support a contract or quasi contract for providing him with what is necessary for those purposes, is valid. (C. C. 1922, 1923, eff. Jan. 1, 1985).

Minors may consent to medical treatment without parental authorization. (La.R.S. 40:1095-6, added Acts 182 and 183 of 1972).

Minors may deposit money in bank and draw the same out (La.R.S. 6:278) and may subscribe for, transfer stock or shares in any building, loan, or homestead association or society, as if he or she had attained age of 18 years, provided that, in case of minor less than ten years, parents or survivor may act without tutorship proceedings (La.R.S. 6:765).

Uniform Transfers to Minor Act adopted (eff. Jan. 1, 1988).

Uniform Securities Ownership by Minors Act not adopted.

Actions.

Tutor appointed by court of this state is proper plaintiff to sue to enforce right of unemancipated minor, when (1) One or both parents are dead; (2) parents are divorced or judicially separated; or (3) minor is illegitimate child. Father, as administrator of estate of his minor child, is proper plaintiff to sue to enforce right of unemancipated minor who is legitimate issue of living parents who are not divorced or judicially separated. Mother, as administratrix of estate of her minor child, is proper plaintiff in such action, when father is mentally incompetent, committed, interdicted, imprisoned or absentee; with judicial permission, mother may represent minor when father fails or refuses to do so. (C.C.P. 683, as am'd Act 106 of 1992, eff. June 5, 1992). Suit against minor is brought against same parties under same conditions, or if none, against appointed attorney. (C.C.P. 732, as am'd Act 106 of 1992, eff. June 5, 1992).

Sale of minor's property, see topic 14.07 Guardian and Ward.

Uniform Child Custody Jurisdiction Act adopted. (La.R.S. 13:1700-1724, added Act 513 of 1978).

Comprehensive Children's Code adopted by Act 235 of 1991 and am'd by Act 251 of 1995, eff. Jan. 1, 1996).

Filiation of children, paternity and maternity actions governed by C.C. 178-211, as amended Act 192 of 2005, eff. June 29, 2005.

14.11 MARRIAGE:

Marriage is legal relationship between man and woman created by civil contract. (C.C. 86, as am'd Act 886 of 1987, eff. Jan. 1, 1988). Purported marriage between persons of same sex in other states is declared to be violative of strong public policy of state and is not recognized for any purpose. (C.C. 89, 3520, as am'd Act 890 of 1999).

Requirements for contract of marriage are: (1) Absence of legal impediment; (2) marriage ceremony; and (3) free consent of parties, expressed at ceremony. (C.C. 87, as am'd Act 886 of 1987, eff. Jan. 1, 1988). Legal impediments are existence of valid marriage (C.C. 88), and certain degrees of relationship, such as ascendants and descendants and collaterals within fourth degree, whether of whole or half blood (C.C. 90). Persons of same sex may not contract marriage with each other. (C.C. 89).

Covenant marriage may be entered after required counselling, and grounds for divorce in such marriage are more restrictive than in non-covenant marriages; separation from bed and board is available prior to actual divorce. (La.R.S. 9:272 through 275, added Act 1380 of 1997, eff. July 15, 1997, and also applicable by election of parties to preexisting marriages).

Minimum Age for Marriage.

Ordained ministers of gospel and judges or magistrates entrusted with power of celebrating marriages are prohibited to marry minor without written consent of both parents or judicial authorization. (La.R.S. 9:211, added Act 886 of 1987, eff. Jan. 1, 1988).

Consent Required.

Minors of either sex must have received consent of both parents or survivor of them, and if both dead, consent of tutor. (La.R.S. 9:211, added Act 886 of 1987, eff. Jan 1, 1988). But marriage between minors is not void or voidable because contracted without such consent. (C.C. 87, as am'd Act 886 of 1987, eff. Jan. 1, 1988).

Licenses to celebrate marriages in the Parish of Orleans are issued by state registrar of vital records and judges of city courts, and in other parishes, by clerks of court. License application must contain social security number or statement that no such number has been issued. (La.R.S. 9:224[A][6], added Act 8 of First Ex. Sess. of 1998, eff. Apr. 24, 1998). Licenses for marriage may be issued in any parish, regardless of place of ceremony or domicile of parties. (La.R.S. 9:222, as am'd Act 81 of 1990). However, marriage celebrated without issuance of license is valid and not subject to annulment, only penalty being assessed against the officiant. (C.C. 87). Within his respective jurisdiction, any judge may celebrate any marriage for which lawful license has been issued, regardless of parish of issuance. (La.R.S. 9:203).

Medical examination of male and female within ten days of application for license, with physician's certificate that examinee is free of venereal diseases, and presentation of birth certificate or equivalent, are conditions precedent to issuance of license. (La.R.S. 9:226, 230).

Ceremonial Marriage.

Ceremony is necessary to constitute valid marriage. (C.C. 87).

Marriages may be celebrated by registered minister of gospel or priest of any religious sect, by justices of Supreme Court at any place within state, by judges of court of appeal at any place within their circuit, by district judges at any place within their district, and by judges of city, family and juvenile courts at any place within parish where court is situated, even if judge is retired. Justices of Peace may celebrate marriages within parish where their office is situated, except that such officers, in parishes of DeSoto, Bossier, Caddo, Bienville, Webster or Red River may celebrate marriages in any of those parishes. (La.R.S. 9:203, as am'd Act 60, 1st Ex. Sess., 2002).

Marriage must be celebrated in presence of two witnesses of full age and act of celebration must be made and signed by person who celebrates same, parties and witnesses. (C.C. 87, 91; La.R.S. 9:244). These requirements are directory only. (C.C. 91).

Delay of 72 hours between issuance of license and marriage ceremony is required; may be waived upon certificate issued by certain authorized judges. (La.R.S. 9:241). Officiant of marriage authorized to conduct ceremony in Orleans Parish may waive 72-hour delay for nonresidents. (La.R.S. 9:242[B], added Act 255 of 2003, eff. June 6, 2003).

Name.

Marriage does not change name of either spouse; married person may use surname of either or both spouses. (C.C.P. 3947, added Act 836 of 1987). In voter registration, woman may use hyphenated surname. (La.R.S. 18:111[B], as am'd Act 317 of 1988).

Record.

See category 10 Documents and Records, topic 10.04 Records, subhead Vital Statistics.

Common Law Marriages.

Marriage by private agreement, express or implied, not recognized in this state. (C.C. 87).

Marriages by procuration are not allowed. (C.C. 92).

Nullity and Annulment.

Marriage is absolutely null if contracted without ceremony, by procuration or in violation of impediment. Judicial declaration not required, but action to recognize nullity may be brought by any interested person. (C.C. 94, as am'd Act 886 of 1987, eff. Jan. 1, 1988). Marriage is relatively null when consent of one of parties is not freely given, and such marriage may be declared null upon application of party whose consent was not freely given. Marriage may not be declared null if that party confirmed marriage after recovering his liberty or regaining his discernment. (C.C. 95, as am'd Act 886 of 1987, eff. Jan. 1, 1988).

Absolutely null marriage produces civil effects in favor of party who contracted it in good faith, for as long as party remains in good faith. When cause of nullity is one party's prior undissolved marriage, civil effects continue in favor of other party, regardless of whether latter remains in good faith, until marriage is pronounced null or latter party contracts valid marriage. Marriage contracted by party in good faith produces civil effects in favor of child of parties. (C.C. 96, as am'd Act 886 of 1987, eff. Jan. 1, 1988). Relatively null marriage produces civil effects until it is declared null. (C.C. 97, as am'd Act 886 of 1987, eff. Jan. 1, 1988). In proceeding seeking declaration of nullity, court may award party incidental relief afforded in divorce proceeding, such as custody, support and visitation. (C.C. 151 and 152, added Act 108 of 1993, eff. Jan. 1, 1994).

Foreign Marriages.

Marriage valid by law of state where contracted is valid in Louisiana, unless parties were domiciled in Louisiana at time of marriage and marriage was prohibited by Louisiana law.

Marital Portion.

If spouse dies leaving survivor in necessitous circumstances, marital portion in varying amounts may be due, but subject to maximum of $1,000,000. (C.C. 2434, as am'd Act 289 of 1987).

14.12 MARRIED WOMEN:

See topics 14.09 Husband and Wife, Marriage; categories 5 Civil Actions and Procedure, topic Evidence, subhead Witnesses; Debtor and Creditor, topic Homesteads; Documents and Records, topic Acknowledgments; Estates and Trusts, topics Executors and Administrators, Wills; Property, topic Dower.

15 HEALTH

15.00A INSURANCE COMPANIES:

Note.

By virtue of Act 415 of 2008, eff. Jan. 1, 2009, Insurance Code was internally reorganized and re-numbered without substantive change. Statutory references below reflect new numbering system and organization.

Rates must be filed with Commissioner of Insurance. (La.R.S.22:1451-1487, as am'd Act 415 of 2008, eff. Jan. 1, 2009).

Supervision.

Office of Commissioner of Insurance exercises regulatory authority over domestic insurers offering health and accident insurance, including approval of policy language and adherence to statutorily-mandated coverages. (La.R.S. 22:1-49, as am'd Act 415 of 2008, eff. Jan. 1, 2009).

Rates must be filed with Commissioner of Insurance. (La.R.S.22:1451-1487, as am'd Act 415 of 2008, eff. Jan. 1, 2009).

Group Plans.

Group policies are permitted, and are also subject to regulation by Commissioner of Insurance. (La.R.S. 22:978, as am'd Act 415 of 2008, eff. Jan. 1, 2009).

Persons Covered.

Coverage of certain individuals, such as physically or mentally handicapped children, vo-tech students and unmarried students, is statutorily mandated. (La.R.S. 22:971-1048, as am'd Act 415 of 2008, Jan. 1, 2009).

Mandated Coverages.

There are numerous statutorily mandated coverages, such as for alcoholism and drug abuse (La.R.S. 22:1025); cleft lip and cleft palate (La.R.S. 22:1026); pap smear testing and mammography (La.R.S. 22:1028); certain immunizations (La.R.S. 22:1030); and attention deficit/hyperactivity disorder (La.R.S. 22:1031).

Penalties and Attorney's Fees.

Penalties in amount equal to unpaid sum and attorney's fees are payable for arbitrary failure to pay claim within 30 days of receipt of appropriate proof. (La.R.S. 22:1821, as am'd Act 415 of 2008, eff. Jan. 1, 2009).

High-Risk Pool.

State-funded insurance pool for limited number of uninsurable persons exists. (La.R.S. 22:1201 et seq.).

Third-party administrators are regulated by Commissioner of Insurance. (La.R.S. 22:1641 et seq.).

16 INSURANCE

16.01 INSURANCE COMPANIES:

Title 22 is the Louisiana Insurance Code. When Insurance Code is silent, Business Corporation Code applies. (La.R.S. 22:69, added Act 715 of 1981).

General supervision of the insurance business is vested in the Commissioner of Insurance. (La.R.S. 22:2). He must make examinations at specified intervals of all insurers doing business in the state. (La.R.S. 22:1981 as am'd Act 415 of 2008, eff. Jan. 1, 2009). Expenses of these inspections are borne by companies. (La.R.S. 22:1985). Self-insured health and accident plans are subject to special regulation. (La.R.S. 22:451-467, as am'd Act 415 of 2008, eff. Jan. 1, 2009). Attorney general is charged with providing legal representation to Commissioner, and may also seek writ of mandamus to force Commissioner to take certain actions. (La. R.S. 22:45).

Domestic insurer must obtain approval of Commissioner before applying for admission to another state. (La.R.S. 22:70, as am'd Act 415 of 2008, eff. Jan. 1, 2009).

Insurance Holding Company System Regulatory Law adopted by Act 794 of 1991.

Name.

Names deceptively similar to those of other companies are specifically forbidden. (La.R.S. 22:62).

Reports.

Every insurer authorized to do business in the state must, before Mar. 1, file a true statement of its condition, transactions and affairs as of the preceding Dec. 31. Such statements must be made on forms furnished by Commissioner of Insurance. (La.R.S. 22:571). All insurers must also file a report for license tax purposes prior to each March 1 certifying to amount of annual gross premiums received during preceding year. (La.R.S. 22:792).

Owner of more than 10% of shares of domestic insurer or officer of domestic insurer must file reports with Commissioner of Insurance. Unfair profits derived from purchase and sale or sale and purchase within six months may be recovered by company. (La.R.S. 22:715-723, as am'd Act 415 of 2008, eff. Jan. 1, 2009).

Policies.

Insurance Code sets forth a number of matters that must be included in life insurance policies, (La.R.S. 22:931); in annuities and endowment contracts (La.R.S. 22:951-952; 22:961); group life insurance policies (La.R.S. 22:907); health and accident policies (La.R.S. 22:973-975); industrial insurance policies (La.R.S. 22:141-150); and fraternal benefit contracts (La.R.S. 22:281 et seq.). Life insurance policies must state that insured has ten days to examine policy, during which he may return policy and receive refund of any premium advanced by him. Provisions inapplicable to non-renewable trip-travel insurance policies. (La.R.S. 22:931). Fire insurance companies must use Louisiana standard form of fire insurance policy which is set forth in Code. (La.R.S. 22:1311). Policies equalling or exceeding standard fire policy may be used in lieu of it, or standard fire policy may be attached in its entirety to another policy. (La.R.S. 22:1313). Clauses in fire policies requiring additional insurance or coinsurance are prohibited in certain cases. (La.R.S. 22:1317). All basic policy forms, other than surety bond forms, must be filed with and approved by Commissioner of Insurance. (La.R.S. 22:861). Louisiana Insurance Underwriting Association, composed of all insurers writing Louisiana property insurance, empowered to issue fire and extended coverage insurance for property in coastal areas. (La.R.S. 22:2322-2347).

In homeowners and fire insurance policies, prominent disclosure of separate deductibles for hurricanes, windstorms or named storms is required. (La.R.S. 22:1319, 1322, as am'd Act 36 of 2009, eff. Jan. 1, 2010). Such deductibles are to be applied on annual rather than per storm basis, although insurer may allocate that single deductible among storm losses when there are multiple storms (eff. Jan. 1, 2010). (La.R.S. 22:1337, added Act 134 of 2009). Insurer may not refuse to issue auto policy with collision or comprehensive coverage on newly-purchased vehicle, at time of purchase from dealer, based solely on named storm in Gulf of Mexico. (La.R.S. 22:289.1, added Act 324 of 2009).

Insurers are prohibited from paying benefits to person criminally responsible for death, disablement or injury of individual insured or person judicially determined to have participated in intentional, unjustified killing of insured. (La.R.S. 22:901). Life insurers may not prohibit assignment to viatical settlement provider of policy otherwise assignable. (La.R.S. 22: 876). Every individual or group life insurance policy delivered or issued for delivery in state, other than industrial life or service insurance, must allow election by beneficiary of option to receive benefits in lump sum payment. (La.R.S. 22:931, 942). Exclusions in group life insurance policies regulated by statute as well as minimum required payments when those exclusions are applicable. (La.R.S. 22:943).

Liability insurers are subject to direct action by party injured by insured's conduct and must be joined with insured as defendant except in exceptional cases (insolvency or bankruptcy of insured, inability to serve process on insured, immunity of insured or when insured is deceased). (La.R.S. 22:1269).

See also category 3 Business Regulation and Commerce, topic 3.12 Consumer Protection.

Proof of Loss and Penalties.

All insurers must furnish upon written request forms of proof of loss. If death claims under life policies are not paid within 60 days after receipt of proof of death and insurer has no just cause for not paying, amount due shall bear 8% per annum interest until paid. (La.R.S. 22:1811). Health and accident benefit claims must be paid within 30 days of receipt of proof of claim under penalty of insurer paying double the benefits due, plus reasonable attorney's fees unless reasonable grounds exist for not doing so. (La.R.S. 22:1821). Any court of competent jurisdiction in parish of insured's domicile (except justice of peace courts) may hear claims for penalties. (La.R.S. 22:1821). All other types of claims must be settled within 30 days after proof of loss, and are subject to penalty of 50% on amount found to be due from insurer to insured or $1,000, whichever is greater, plus reasonable attorney's fees, when failure to pay claim is found to be arbitrary, capricious or without probable cause. (La.R.S. 22:1892). On fire claims, payment period is suspended during official arson investigation. Louisiana Insurance Guaranty Association, composed of specified types of insurers, empowered to assess members specified amounts in order to pay unpaid claims of insolvent insurers. (La.R.S. 22:2051-2070). "Innocent insured" is not prohibited from receiving proportionate share of fire loss when loss is caused by conduct of another insured. (La.R.S. 22:854).

Payment of Cash Surrender Values.

Delay of six months may be invoked in payment of cash surrender values, but interest must be paid after first 30 days. (La.R.S. 22:936).

Rates.

Rates formerly set by Louisiana Insurance Rating Commission, which was abolished by Act 459 of 2007, eff. Jan. 1, 2008.

Discrimination.

Unfair discrimination in favor of particular individuals or persons, or between insureds or subjects of insurance having substantially like insuring risk and exposure factors, or expense elements, in the terms and conditions of any contract, or in the rate of premium charged therefor, or in the benefits payable is specifically forbidden. (La.R.S. 22:1964).

Rebates of premiums on life insurance, annuity or health and accident insurance, other than as provided for in such policy, which are made as an inducement to such insurance, and the giving, selling or purchasing or so offering anything of value whatsoever not specified in the contract as an inducement to such insurance are specifically prohibited. (La.R.S. 22:1964).

Agents and Brokers.

Insurance agents, brokers and solicitors must be authorized and licensed by Commissioner of Insurance. (La.R.S. 22:1541 et seq.). In addition to licensing requirements, a new applicant for license as a general life, health or accident insurance agent must submit to written examination by Commissioner of Insurance (La.R.S. 22:1545), but temporary license may be issued to agent of combination life insurer. (La.R.S. 22:1553). Nonresident may be licensed provided that state in which such person lives accords same privilege to Louisiana citizen. (La.R.S. 22:1548).

No person may act as agent or representative for companies not authorized to do business in Louisiana. (La.R.S. 22:1562).

All insurance contracts including those issued as result of agent accepting application or producing policy either as casualty insurance assigned risk under La.R.S. 22:1475 et seq., or for Louisiana Insurance Underwriters Association under La.R.S. 22:2321 (other than life, health and accident or annuity insurance), covering any property or insurable interests or business activities within state, must be counter-signed by resident agent, who must receive commission, but agent may give power of attorney to licensed solicitor to sign when it is impossible or impracticable for agent to sign, or may authorize insurer to countersign by applying or imprinting agent's name or agent may apply or imprint his name in lieu of manually signing policy. Commissioner may approve waiver of countersigning for replacement policies. Agents cannot countersign policy in blank. Agents may not divide profits with unlicensed persons. (La.R.S. 22:1557).

Companies may not pay adjuster any fee in excess of regularly fixed salary. (La.R.S. 22:1451).

Process Agent.

Domestic Insurers must appoint registered agents for service of process. (La.R.S. 22:62). Foreign Insurers must appoint Secretary of State agent for service of process (La.R.S. 22:335). Transacting of business in state by foreign or alien insurer without certificate of authority or delivery of policy of such insurer to Louisiana resident is equivalent to appointment by such insurer of Secretary of State to be its agent for service of process. (La.R.S. 22:442).

Investments are governed by §§ 581-596 of Tit. 22.

Foreign Insurance Companies.

Any foreign or alien insurer, including reciprocals, Lloyds and fraternals, but excluding nonprofit funeral insurance and life, health and accident insurers on the cooperative or assessment plan, may be admitted to transact business in this state. (La.R.S. 22:331 et seq.). To qualify, company must file with Commissioner of Insurance: (1) application setting forth its name, location of home office, type of insurer, organization date, kinds of insurance it proposes to transact in state and such other information as Commissioner of Insurance deems necessary; (2) copy of its charter or articles of incorporation certified by proper official of its domicile; (3) copy of its by-laws or constitution certified by its proper officers; (4) copy of the applications and insurance contracts it proposes to write in this state; (5) copy of its last annual statement; (6) copy of the last report of examination certified by a proper supervisory official; (7) certificate from proper official of its domicile that it is duly incorporated or organized and is presently authorized to write kinds of insurance which it proposes to write in this state; (8) instrument appointing Secretary of State agent for service of process; (9) such other documents as Commissioner of Insurance may require. (La.R.S. 22:332). To receive certificate of authority, insurer must also meet minimum capital and surplus requirements for similar domestic insurers, have its funds invested in accordance with laws of its domicile, make required deposit with State Treasurer and file a certificate from proper official of its domiciliary state showing that a deposit has been made there of not less than $100,000 as authorized by law of domiciliary state (La.R.S. 22:333). See also subhead Reports, supra.

Commissioner of Insurance has power to refuse, suspend or revoke certificate of authority after 30 days notice of a foreign or alien insurer on finding that violations of Code exist. (La.R.S. 22:337).

Unauthorized insurer cannot file actions or proceedings in state courts to enforce right, claim or demand arising out of business transacted in state unless placed on “approved list” by Commissioner. (La.R.S. 22:1908-1909).

See also category 5 Civil Actions and Procedure, topic 5.20 Process.

Unauthorized Insurers False Advertising Process Act adopted to subject foreign insurers to jurisdiction of Commissioner and courts of this state in connection with false advertisements and for service of process upon such insurers through Secretary of State. (La.R.S. 22:1941-1946).

Reciprocity.

Domestic companies are forbidden to insure lives in other states without qualifying in such states where such states require their companies to qualify in Louisiana to insure lives there. (La.R.S. 22:1905).

Retaliatory Law.

Where laws of any other state impose on insurers of this state doing business in such state taxes, fines, penalties or other obligations additional to or in excess of those imposed by Louisiana upon insurers organized under the laws of other states, the same taxes, fines, penalties and other obligations are imposed upon all insurers of such state doing business in Louisiana. (La.R.S. 22:836).

Taxes.

Insurance business is subject to license tax based on annual gross premiums, as follows: on companies issuing life, accident, health, service, endowment or annuity policies, $140 per gross annual premiums of $7,000 or less and $225 for each additional $10,000 or fraction thereof (La.R.S. 22:842). License taxes are to be remitted on quarterly basis to Commissioner of Insurance. (La.R.S. 22:845).

If insurer invests one-sixth or more of its total assets in bonds of state or its subdivisions, or in mortgages on property in state, or on loans to Louisiana residents or corporations, or in stock of domestic homestead, building and loan associations, tax is only one-third of above amounts. (La.R.S. 22:832).

Surcharge of not more than 20% of premiums is levied through malpractice liability insurers for Patient's Compensation Fund. (La.R.S. 40:1299.44, as am'd Act 183 of 1976).

Workmen's compensation insurers must contribute 1% of gross premiums to Second Injury Fund. (La.R.S. 23:1377, added Act 165 of 1974). Such insurers are also subject to assessment of percentage of compensation benefits actually paid to fund operation of state Office of Worker's Compensation Administration, precise amount to be determined by regulations issued by director of office. (La.R.S. 23:1291.1, added Act 29, 1st Ex.Sess., 1983).

Municipal and parochial corporations in state are authorized to impose a license tax based on gross annual premiums. (La.R.S. 22:843). There is an additional tax of 1¼% per annum on gross annual premiums of fire insurers, proceeds of which are used to pay salary and expenses of state fire marshal. (La.R.S. 22:835). There is an additional tax of ¼% on annual premiums received for fire insurance covering property in this state. (La.R.S. 22:837).

Legal reserve of life insurance companies organized under laws of Louisiana is exempt from taxation. (Const., art. 7, § 21).

Direct Actions Against Insurer.

See category 23 Transportation, topic 23.01 Motor Vehicles, subhead Direct Actions.

See also category 2 Business Organizations, topic 2.03 Corporations.

Uniform Insurers Liquidation Act.

Adopted. (La.R.S. 22:2038-2044).

16.02 SURETY AND GUARANTY COMPANIES:

See topic 16.01 Insurance Companies.

17 INTELLECTUAL PROPERTY

17.01 TRADEMARKS AND TRADENAMES:

Whenever any individual, firm, partnership, corporation, association, union or other organization has adopted or used any trademark, service mark, trade name to identify goods made or sold by him, to identify services of one person, or to identify his business, vocation, or occupation, it is unlawful to counterfeit or imitate label, etc. Trademark may be registered by filing with Secretary of State application in form prescribed by Secretary of State containing specified information and payment of fee of $25, together with fee of $2 per page and $10 for certification of documents. Registration is effective for ten years and may be renewed for ten years by filing application with payment of fee of $25. (La.R.S. 9:211-224). Reservation may be made for 60 days by payment of $5 fee.

A manufacturer or seller of beverages or food in containers identified by any mark or device, may file a description of such device with the clerk of the civil district court in the parish of his principal place of business, and print the same once a week for five consecutive weeks in a newspaper published in the same parish, to protect the mark or device. When these requirements have been complied with, it is a misdemeanor or refill such containers, or to mutilate such marks or devices, or to use the same in any manner. (La.R.S. 51:241-243).

Assignment.

Trademark may be assigned with good will of business by written instrument recorded with Secretary of State for fee of $25. (La.R.S. 51:217, as am’d Act 235 of 1983).

Tradenames.

Partnership or person doing business under fictitious name must file with register of conveyances in New Orleans or with clerk of court in other parishes a certificate giving full names and addresses of partners or person so doing business, and pay fee of 25¢. Failure to do so is a misdemeanor. (La.R.S. 51:281-284).

17.02 TRADE SECRETS:

Uniform Trade Secrets Act adopted in 1981, Act 462, but with deletion of § 3(b) from Uniform Act.

Actual or threatened misappropriation of trade secrets as defined may be enjoined. (La.R.S. 51:1432). In addition to or in lieu of injunctive relief, complainant may recover damages for actual loss, or for unjust enrichment. (La.R.S. 51:1433). Attorney’s fees may be awarded to prevailing party. (La.R.S. 51:1434). Court must preserve secrecy of alleged trade secret by reasonable means. (La.R.S. 51:1435). Action for misappropriation must be brought within three years after misappropriation is discovered or by exercise of reasonable diligence should have been discovered; continuing misappropriation is considered single claim. (La.R.S. 51:1436). Statutory provisions replace conflicting tort, restitutionary and other state laws pertaining to civil liability for misappropriation of trade secret. (La.R.S. 51:1437). Chapter of statutes is to be applied and construed to effectuate its general purpose to make uniform law with respect to trade secrets among states enacting it. (La.R.S. 51:1438).

18 LEGAL PROFESSION

18.01 ATTORNEYS AND COUNSELORS:

The Supreme Court has, by rule, integrated the bar of Louisiana and thus all practicing attorneys must be members of Louisiana State Bar Association. Mandatory CLE requirements have been in place since 1988.

Admission.

A committee of the Supreme Court has charge of admissions to the bar.

Attorney Ethics.

ABA Model Rules of Professional Conduct not officially adopted, but Louisiana rules are very similar. (T. 37, c. 4 App., following § 218).

Eligibility.

Applicant must, in addition to passing state bar examination, be citizen or resident alien of U.S., 18 years of age, and of good moral character and must have graduated from law school that is approved by American Bar Association. Applicant must file his application, on prescribed form, with Committee on Bar Admissions, along with required fee, at least 45 days prior to examination. Application must be prepared in applicant's own handwriting and must be executed under oath.

Examination.

Committee on Bar Admissions conducts Bar examinations semi-annually and designates dates and places of examinations. Multi-State Bar Examination is not used except commencing Aug. 1, 1984, all applicants must pass Multi-State Professional Responsibility Examination.

Registration as Law Students.

No statutory requirement.

Foreign Attorneys.

An applicant who is a member of bar of another state must meet same conditions as are imposed on other applicants.

Admission Pro Hac Vice.

Subject to certain limitations, members of bars of other states may appear temporarily in courts of Louisiana.

Licenses.

Supreme Court issues licenses to successful applicants to Bar. License fee is $25. Practitioners of less than three years must pay $40 per year to Louisiana State Bar Association. Practitioners of more than three years must pay $100 per year.

Suretyship.

Attorney may act as surety except on bail bonds. (La.R.S. 15:88).

Lien.

Attorneys have privilege, and are ranked second among privileged creditors, for law charges in succession proceedings. (C. C. 3254, 3276). By written contract, attorney may acquire fee or interest in subject matter in claim or suit, in which contract attorney and client may stipulate that neither may settle or otherwise dispose of suit without written consent of other, and any settlement or other disposition without such consent is null and void if contract is filed with clerk of court in parish where suit is pending, or is to be brought, or where client is domiciled. (La.R.S. 37:218, as am'd Act 670 of 1975).

Fees.

Where parties agree in writing that debtor shall be liable for creditor's attorney's fees in fixed or determinable amount, creditor is entitled to that amount as part of damages. (C.C. 1935, as am’d Act 483 of 1983).

Unauthorized Practice.

No person shall practice law unless an active member in good standing of Louisiana State Bar Association.

It is not “practice of law” for partnership, corporation or other legal entity to assert claim, not exceeding $5,000 or defense pertaining to open account or promissory note, or suit for eviction of tenants, on its own behalf in courts of limited jurisdiction through duly authorized partner, officer or representative. (La.R.S. 37:212 [C], as am’d Act 673 of 1992).

Trustee in discussing creation of trust with any settlor may not influence selection of attorney. (La.R.S. 9:2241, as am’d Act 622 of 1983).

Discipline.

Supreme Court has exclusive original jurisdiction over disciplinary proceedings against a member of bar. (Const., art. 5, § 5).

Attorneys are prohibited from paying money or giving any other thing of value to any person for purpose of obtaining representation of any client. (La.R.S. 37:219, added Act 759 of 1977).

Professional Corporation.

See category 2 Business Organizations, topic 2.03 Corporations, subhead Professional Corporations.

19 MINERAL, WATER AND FISHING RIGHTS

19.01 MINES AND MINERALS:

Louisiana Mineral Code (T. 31, art. 1, et seq., as am’d Act 660 of 1983), consolidates laws applicable and related to mineral law. Code covers landowner’s rights in minerals (arts. 4-16), nature of mineral rights and capacity, authority and formalities necessary for their creation (arts. 18-20), nature, prescription and use of mineral servitude (arts. 21-79, as am’d Act 589 of 1975), nature, creation, extinction, prescription and alternation of mineral royalty (arts. 80-104), executive rights to grant mineral leases (arts. 105-113), nature and creation of mineral leases, and obligations of lessor, obligations of lessee, transactions involving lessee’s interest, termination and remedies for violation of lease, leases involving outstanding mineral rights, and privilege of lessor (arts. 114-148), effect of expropriation upon mineral rights (arts. 149-152, as am’d Act 348 of 1980; La.R.S. 41:1338, added Act 371 of 1980), effect of possession and acquisitive possession (arts. 153-163), creation, ownership and partition of mineral rights and consequences of co-ownership, and effect of partition of land upon mineral rights (arts. 164-187, as am’d Act 1047 of 1986 and Act 647 of 1988), rights of usufructuaries in minerals (arts. 188-196, as am’d Act 589 of 1975 and Act 245 of 1986), pledge or mortgage of mineral rights (arts. 197-205), cancellation of extinguished mineral rights from public records (arts. 206-209), and protection of purchasers of production and method of compelling payment for production (arts. 210-212.31, as am’d Act 660 of 1983). Owners of mineral production payments and royalty owners who claim refusal of mineral lessees to make timely payments must give written notice to obligor of such failure as prerequisite to judicial demand. Obligor has 30 days after receipt in which to pay. Failure without reasonable cause given may double amount otherwise due. (La.R.S. 31:212.21 through 212.23, added Act 249 of 1982). When mineral lease is extinguished prior to expiration of primary term, former lessee must, within 90 days after extinguishment, record act evidencing expiration in official records of all parishes where lease is recorded. Failure to do so causes lessee to be liable to person in whose favor right or lease expired for all damages incurred therefrom and reasonable attorney's fee. (La.R.S. 31:206-207, as am'd Act 358 of 1982).

Lessee is required to provide complete address in lease. If he does not keep address information current, lessor may constitute Secretary of State as lessee's agent. (La.R.S. 30:112, added Act 303 of 1984). Lessee must notify lessor within 90 days after cessation of production that lease has terminated. (La.R.S. 30:102, added Act 559 of 1984).

Option exists to file simplified notice of mineral lease in public records rather than entire lease. (La.R.S. 44:104[E], as am'd Act 8 of 2007, eff. June 18, 2007).

Mineral Code also provides regulation of lignite and coal development and mining plans. (La.R.S. 30:11, 61, 115, 178, 191, 195 and 213, as am'd Act 203 of 1983).

An agreement by owners of mineral rights for joint exploration and production of minerals must be filed in conveyance records of parishes where land is located, to bind third parties. Declaration signed by parties or by general operator or agent of parties may be filed in lieu of agreement, but declaration must state where agreement can be found; by paying fee, any person may require agreement to be recorded in full. (La.R.S. 9:2731-2733, as am'd Act 325 of 1985).

Effective Jan. 1, 1984, payors of royalties must provide specified statutory information when royalty checks are issued, including lease identification number, date of sales, total sales, owner's final realizable price per barrel or MCF, total amount of taxes and like. (La.R.S. 31:212.31, added Act 660 of 1983).

Mortgage of mineral rights may designate keeper or method of selection of keeper in event of seizure of property. Mortgage may specify compensation of keeper, reducable for court, and keeper has full power of administration, including operations, of property. (La.R.S. 9:5106-5110, added Act 546 of 1974).

State Mineral Board is agency to receive, sell and otherwise contract with regard to royalties in kind. (La.R.S. 30:142 and 143, as am'd Act 592 of 1979). Commissioner authorized to establish production incentive fund and to make production incentive or bonus payments to producers of 7½% of gross value received by applicant up to 750 barrels per day. (La.R.S. 31:701, et seq., added Act 501 of 1974).

Upon request of owner, an electric log filed with Commissioner of Conservation remains confidential for a period of one year for wells shallower than 15,000 feet, or two years for wells 15,000 feet deep or deeper, which periods may be extended for a like period. No release by Commissioner to third persons is required of logs of offshore wells. (La.R.S. 44:1, am'd Act 4 of 1973, Ex. Sess.).

Certain indemnity or "hold harmless" clauses in contracts pertaining to drilling are declared null, to extent such clause requires defense or indemnification when there is negligence or fault (strict liability) on part of indemnitee, its agent or employee, or independent contractor directly responsible to indemnitee. Such clauses in operating or farmout agreements as defined are not prohibited. (La.R.S. 9:2870[D], as am'd Act 237 of 1982). Public utilities, forestry industry and companies who drill with Frasch Process are exempt from provisions, as are instances of liability for radioactive exposure and arising out of containment of well blowouts. Master or general service agreements, or blanket contracts, providing for future indemnity are specifically prohibited. Act does not apply to contracts providing indemnity executed prior to Sept. 11, 1981. (La.R.S. 9:2780, as am'd Act 33 of 1981 First Extraordinary Session).

Conservation of oil and gas resources and regulation in case of overproduction are provided for and regulated by State Dept. of Conservation.

It is a misdemeanor to prospect for oil and state lands without consent of State Mineral Board (La.R.S. 30:212) or on private property without consent of owner (La.R.S. 30:217).

The Natural Resources and Energy Act of 1973 authorizes Commissioner of Conservation to develop programs and regulations for equitable distribution of energy supplies in state, for conservation of energy and prevention of waste thereof, and for mandatory allocation of use of fuels. Commissioner is authorized to supervise, regulate and control production, transportation, distribution, sale and use of intrastate natural gas, except ethane and heavier hydrocarbons and synthetic gas from coal, lignite or petroleum coke. Priorities are established for use of fuels. Intrastate natural gas transporters may be required to use uniform system of accounting, and to transport natural gas of others. Commissioner may regulate rates, charges and services of intrastate natural gas transporters, who may expropriate private property if issued a certificate of transportation by Commissioner. Intrastate gas transporters may be ordered by Commissioner to improve their facilities, may not abandon facilities without approval of Commissioner, and may be required to obtain approval of Commissioner before construction or extension of facilities. Approval of Commissioner is required for connection of an intrastate natural gas system with another pipeline system. Commissioner is authorized to plan, construct, finance, lease, and sublease pipeline systems, expropriate mineral leases, gas supplies and reserves, oil refineries, minerals, mineral rights and pipelines; and allocate or ration all natural gas and other hydrocarbons received as “in kind” royalties by private land and mineral owners and by state. Upon declaration by Governor of a state of emergency as result of extreme shortages of natural gas under specified circumstances, Commissioner must establish a plan for statewide emergency conservation, allocation, rationing, and storage of intrastate natural gas, with specified priorities. Commissioner may supervise, regulate and control minimum sales prices of intrastate natural gas direct to industrial users and public utilities except sales by utilities to other users, if contract involves more than one billion cubic feet within a 12 month period or a lesser volume determined by Commissioner. Natural gas companies are required to file schedules showing prices for sales of intrastate natural gas and 30 days notice of changes must be given to Commissioner and public. Reports must be filed with Commissioner in prescribed form. Commissioner may investigate violations and failure to comply with a subpoena of Commissioner is subject to a fine of $1,000 and/or one year imprisonment. A rehearing may be applied for within 30 days after issuance of an order by Commissioner and if such is applied for and denied, party may file for a review by district court having jurisdiction by filing a petition within 60 days after denial of rehearing or date when application for rehearing may be deemed to have been denied by failure of Commissioner to act upon application within 30 days of its filing. Review by court may cover only objections contained in application for rehearing filed with Commissioner. Act also provides for a Louisiana Energy Commission, and provides for application of act to intrastate liquefied petroleum gas. (La.R.S. 30:501-692, am’d Act 250 of 1985).

Development of geothermal resources is regulated by Department of Natural Resources. (La.R.S. 30:800-809, added Act 134 of 1976).

Natural Gas Pricing Act is administered through assistant secretary of office of Conservation, Department of Natural Resources. (La.R.S. 30:1002-1007, as am’d Act 594 of 1978). Right of action is provided in favor of former purchaser/recipient deprived of natural gas by compulsory reallocation (except by emergency declared by governor) against ultimate industrial users and/or ultimate local distributor knowingly availing themselves of reallocated natural gas. (La.R.S. 30:411-414, added Act 674 of 1977).

Taxes.

General severance tax is imposed on oil at rate of 12.5% of value, as defined in section, at time and place of severance, subject to reduction as to wells of limited production (La.R.S. 47:633[7] as am’d Act 2 of 1994); oil severance tax from certified stripper wells suspended in any month in which average monthly price is less than $20 per barrel (La.R.S. 47:633[7][c][i][bb], added Act 2 of 1994, eff. June 1, 1994); on distillate, condensate or similar resources at rate of

12.5% of gross value at time and place of severance; on natural gasoline, casinghead gasoline, other natural gas liquids, ethane, and methane recovered after separation of oil, distillate, or condensate at 10¢ per barrel of 42 gallons: on butane and propane recovered through processing gas at rate of 5¢ per barrel of 42 gallons (La.R.S. 47:633[8], am'd Act 6 of 1973. Ex. Sess.): on gas at rate of 10¢ per 1,000 cubic feet, at rate of 3¢ per 1,000 cubic feet if produced from a well determined by Department of Conservation and Collector of Revenue to have a specific limited production generally determined by a casinghead pressure of 50 pounds per square inch or less, at rate of 13/10¢ per 1,000 cubic feet if well is incapable of producing 250,000 cubic feet of gas per day (La.R.S. 47:633[9], as am'd Act 387 of 1990); on sulphur at rate of $1.03 per 2,240 lbs.: on salt at rate of 6¢ per 2,000 lbs.; on coal at rate of 10¢ per 2,000 lbs.: on lignite at rate of 10¢ per 2,000 lbs.; on ores at rate of 10¢ per 2,000 lbs.; on marble at rate of 20¢ per 2,000 lbs.; on stone at rate of 3¢ per 2,000 lbs.; on gravel at rate of 6¢ per 2,000 lbs.; on sand at rate of 6¢ per 2,000 lbs.; on shells at rate of 4¢ per 2,000 lbs.; and on salt content in brine or solution when used in manufacture of other products and not marketed as salt at rate of ½¢ per 2,000 lbs. (La.R.S. 47:631 et seq., as am'd Act 10 of 1st Ex. Sess. of 1984).

Credit may be allowed for severance taxes by amount of first use taxes paid by taxpayer. (La.R.S. 47:647, as am'd Act 394 of 1979).

Exemption from all severance tax is provided as to oil or gas new discovery wells as defined, spudded after Sept. 30, 1994 and completed between that date and Sept. 30, 1996; suspension of tax lasts 24 months or until recovery of payout of well cost, whichever first occurs. (La.R.S. 47:648.1-648.4, added Act 2 of 1994, eff. June 1, 1994).

Royalties and severance tax under present or future state leases may be suspended as to production by tertiary recovery projects. (La.R.S. 30:127.1, added Act 644 of 1983; La.R.S. 47:633.4, added Act 643 of 1983).

Owners of oil, gas or mineral property as defined are immune from liability to any person who unlawfully enters that property, in absence of showing of gross negligence or intent to injure. (La.R.S. 9:2800.4[A][1] and [A][4], and 2800.4[E], as am'd and added Act 889 of 1993).

See also category 12 Environment, topic 12.01 Environmental Regulation.

20 MORTGAGES

20.01 CHATTEL MORTGAGES:

For general provisions as to both chattel mortgages and mortgages on real property, see topic 20.04 Mortgages of Real Property.

For chattel mortgages on vehicles, see also category 23 Transportation, topic 23.01 Motor Vehicles. Uniform Commercial Code Art. 9 enacted (Act 528 of 1988, am'd Act 135 of 1989) effective Jan. 1, 1990. See category 3 Business Regulation and Commerce, topic 3.09 Commercial Code. For mortgage of movables used in commercial and industrial activity, see topic 20.04 Mortgages of Real Property, subhead Conventional Mortgages.

Requisites of Instrument.

Chattel mortgage must be in writing setting out full description of property mortgaged so that it can be identified, and stating when obligation shall mature. Property mortgaged must be accurately described and its location must be stated, but failure to state location does not affect validity of mortgage if model or serial number given. (La.R.S. 9:5352, as am'd Act 701 of 1987 and Act 920 of 1988). Mortgage may limit recourse against mortgagor. (C. C. Art. 3291, as am'd Act 238 of 1980).

Sufficiency of Description of Property.

Mortgage on lumber, logs, staves, cross-ties, tiles, bricks, loose cotton, cotton seed and its by-products, livestock, poultry, stocks of merchandise, furniture, fixtures, equipment, inventory, or other things in bulk but changing in specifics, with location set out, is valid, and proper description in bulk is sufficient for all purposes. (La.R.S. 9:5351, am'd Act 312 of 1972 and Act 920 of 1988, § 5352; La.R.S. 32:710, as am'd Act 419 of 1983).

Recording.

Chattel mortgage is valid as between parties as of date of their signing written act of mortgage. Instrument must be notarized, but need not be witnessed or be signed in presence of notary public. Executory process foreclosure requires instrument be passed by authentic act executed before notary public and two witnesses or by private act duly acknowledged by party or subscribing witness before notary public. In order to affect third persons either multiple original of mortgage or notice of security interest must be recorded in office of recorder of mortgages in parish in which mortgagor has place of business. (La.R.S. 9:5353, as am'd Act 920 of 1988). Lien is effective from filing for recordation, which filing is notice to all persons in state. However, holders of chattel mortgages cannot enforce their rights against bona fide purchasers from dealers, wholesalers or retailers duly licensed to sell type of merchandise covered by mortgage. Lien primes all mortgages, liens, privileges or preferences arising subsequent to recordation. (T. 9. §§ 5353-5355, as am'd Act of 189 of 1986 and Act 920 of 1988). Certified copy of mortgage may be recorded in lieu of original. (La.R.S. 9:5353, as am'd Act 703 of 1975). See also category 10 Documents and Records, topic 10.04 Records, subhead Fees.

Recorded collateral chattel mortgage on changing inventory primes vendor's privilege arising from sale to dealer after recordation of such mortgage except as to bona fide retail purchaser. (La.R.S. 9:5354.1, as am'd Act 283 of 1985 and Act 920 of 1988). Special rules of recordation and effectiveness govern chattel mortgages on mobile homes. (La.R.S. 9:1149.1 et seq., as am'd Act 574 of 1984).

Holders of Foreign Security Interests.

Ordinarily holders of security interests created out-of-state must file such interest of record in East Baton Rouge Parish within 60 days of notice that property transferred into state. If such interest is created on movable property subject to titling under foreign motor vehicle statute, recordation requirement does not apply, provided certificate of title has been issued and clearly shows creation of such security interest in state where title was issued. (La.R.S. 9:5353 [G], as am'd Act 920 of 1988, 5353 [J], 5354).

Reinscription.

Chattel mortgage or notice of security interest must be reinscribed before expiration of one year after date of last installment provided for in mortgage, or five years after date of execution, whichever is later, or ten years as to collateral chattel mortgages; and thereafter every two years. Fee $2. (La.R.S. 9:5356, am'd Act 920 of 1988).

Floating Stock.

Stocks of merchandise in retail, wholesale and manufacturing establishments, furniture, fixtures, equipment, inventory, or other things in bulk, but changing in specifics, may be subject of chattel mortgage; however, effect of mortgage ceases as to articles disposed of by mortgagor up to time of foreclosure, but attaches to purchases made to supply their place. (La.R.S. 9:5351, 5352, am'd Act 920 of 1988).

Incorporeal Rights.

Chattel mortgage may provide lien on incorporeal rights incidental or accessory to mortgaged property or its use, such as proceeds from sale, lease, insurance loss or condemnation. (La.R.S. 9:5386, added Act 985 of 1988).

Attachment of Mortgaged Property to Immovable.

When movable property previously mortgaged is located on immovable property in such manner as to make it immovable, it nevertheless remains movable in so far as such mortgage is concerned and shall not pass by sale of immovable, and no sale or mortgage of immovable property affects or impairs lien of chattel mortgage or remedies for its enforcement. (La.R.S. 9:5357, as am’d Act 728 of 1978; see also La.R.S. 6:1862 as am’d Act 728 of 1978).

Removal of Property.

It is a misdemeanor for the owner of mortgaged movable property to remove it from the parish where it was located at the time the mortgage was executed without the consent of the mortgagee. (La.R.S. 9:5359).

Purchaser from nonresident of his parish takes subject to the mortgage, and unless he obtains from the seller an affidavit that the property is not mortgaged he is liable to mortgagee for debt secured by property. (La.R.S. 9:5362 as am’d Act 731 of 1988).

Satisfaction may be entered of record by mortgagee or holder of mortgage note, or release may be granted in form used for release of mortgage on immovable. (See topic 20.04 Mortgages of Real Property.) Fee of recorder, $1. (La.R.S. 9:5356).

Cancellation.

Except as to judicial sale, no chattel mortgage may be cancelled, removed from public records or affected by public or private sale in any succession, liquidation, insolvency, receivership, bankruptcy or partition proceeding. (La.R.S. 9:5251, added Act 356 of 1980).

Foreclosure.

A chattel mortgage is ordinarily foreclosed in same manner as conventional mortgage on real estate and same rules apply with respect to deficiency (La.R.S. 9:5363); however, special streamlined procedures are available to certain creditors as to certain chattels other than household goods (La.R.S. 6:965-967, added Act 235 of 1992, eff. Jan. 1, 1993 but not effective in Orleans Parish). See topic 20.04 Mortgages of Real Property. Foreclosure by executory process is permitted whether mortgage is by authentic act or by act under private signature duly acknowledged (La.R.S. 9:5363), and whether transfer or negotiation of bearer paper is by authentic act or by act under private signature duly acknowledged (La.R.S. 13:4102, added Act 178 of 1982). Party enforcing right to seizure and sale of motor vehicle located out of state may use procedural laws of that state or of Louisiana. If he does so, he may at his option return vehicle to Louisiana and sell it at private sale without appraisal if permitted by mortgage instrument. Such sale satisfies debt and does not permit deficiency judgment. (C.C.P. 2725, as am’d Act 106 of 1986). Repossession of certain movables without judicial process is permitted but regulated by statute. (La.R.S. 6:965, 966, 966.1, as am’d and added Act 191 of 2004, eff. Jan. 1, 2005). Ex parte repossession of mobile homes permitted if home has been abandoned, mortgagor has not paid minimum of two consecutive monthly payments, and petition in court of competent jurisdiction has been filed seeking ex parte order authorizing secured party to proceed. Bond must be posted, affidavit of abandonment completed, and satisfactory proof of mortgage must be shown. Ten-day notice on front door of mobile home prior to repossession as well as newspaper advertisement. Mortgagor may waive some of these requirements. (La.R.S. 9:5363.1, added Act 367 of 1983).

Redemption.

There is no right of redemption.

Form.

There is no statutory form of mortgage. Following is sufficient:

Form

(Caption: "Collateral Chattel Mortgage" in ten bold type, if appropriate)

United States of America: State of Louisiana: Parish of . . . . . .: Before me, ..., a notary public duly commissioned and qualified within and for the parish of . . . . . ., State of Louisiana, and in the presence of the witnesses hereinafter named and undersigned, personally came and appeared . . . . . ., resident of . . . . . ., who declared and acknowledged to me notary, that . . . . . . justly, truly and legally indebted unto . . . . . . in the just and full sum of . . . . . . dollars, lawful money of the United States of America; and for the reimbursement of which sum, and as evidence of said indebtedness . . . . . . made and subscribed . . . . . . certain . . . . . . promissory note . . . . . . for the sum of . . . . . . dollars, made payable to the order of . . . . . . as follows: . . . . . . and bearing interest at the rate of . . . . . .% per annum from . . . . . until paid, interest payable annually, interest and principal payable at . . . . ; which said promissory note . . . . . . after having been paraphed "Ne Varietur" by me, notary, of even date herewith, to identify . . . . . . herewith . . . . . . been delivered to . . . . . ., who . . . . . . present, accept . . . . . . this act of mortgage and acknowledge . . . . . . due receipt of said note . . . . . . And now, in order to secure the full, punctual, and final payment of said note . . . . . . at maturity together with all interest accrued thereon, and furthermore, to secure the payment and reimbursement of any and all attorney's fees, costs, charges and expenses that may be incurred or paid, in the event that it becomes necessary to place said note . . . . . . at maturity in the hands of an attorney at law for collection, by suit or otherwise, which attorney's fees are hereby fixed at the sum of . . . . . .% of the aggregate amount due on said note, the said . . . . . . do . . . . . . by these presents specially mortgage, affect and hypothecate unto and in favor of the said . . . . . ., and to inure to the benefit of any future holder or holders of said note . . . . . . the said . . . . . . being here present and accepting the following described property to-wit: (insert description sufficient to identify property, giving statement of location). Being the same property which the present mortgagor acquired . . . . . . The said property to remain mortgaged, affected and hypothecated until the full and final payment of the said note . . . . . . in principal, interest, attorney's fees, costs, charges and expenses aforesaid. And the said mortgagor . . . . . . do . . . . . . by these presents hereby bind and obligate . . . . . . heirs and assigns not to sell, alienate, deteriorate, encumber the said property herein mortgaged to the prejudice of this mortgage; nor to remove said property out of this parish without the written consent of the mortgagee. And the said mortgagor . . . . . . further declare . . . . . . that . . . . . . consent . . . . . . agree . . . . . . and stipulate that in the event such promissory note . . . . . . not paid at maturity, it shall be lawful for the said mortgagee . . . . . ., and . . . . . . do . . . . . . hereby authorize the said mortgagee . . . . . ., or any future holder or holders of said note . . . . . ., to cause all and singular the property hereinbefore described and mortgaged to be seized and sold under executory or other legal process, issued by any court of competent jurisdiction, without appraisement to the highest bidder paying cash, in the manner and form provided by and pursuant to the provisions of the laws of the state; the said mortgagor . . . . . . hereby confessing judgment in favor of the said mortgagee . . . . . . of any future holder or holders of said note . . . . . . for the full sum thereof in principal, interest, attorney's fees, costs, charges and expenses of whatsoever nature; and hereby expressly waiving (1) the benefit of appraisement of said property in the event of its seizure and sale under judicial process, as required by Arts. 2332, 2336, 2723 and 2724, Louisiana Code of Civil Procedure; (2) the three days delay and notice to the debtor required by Arts. 2639 and 2721, Louisiana Code of Civil Procedure; (3) the notice of seizure required by Arts. 2293 and 2721, Louisiana Code of Civil Procedure; (4) the three days delay required by Arts. 2331 and 2722, Louisiana Code of Civil Procedure; and (5) the benefits of the other provisions of Arts. 2331, 2722 and 2723, Louisiana Code of Civil Procedure, not specifically mentioned above. Mortgagee or his agent may act as consent keeper and the sheriff, constable or justice of the peace making the seizure shall be released from liability on account thereof. And the said mortgagor . . . . . . hereby specially declared that . . . . . . the true and lawful owner . . . . . . of the movable property hereinabove described and mortgaged, and that same has not been heretofore alienated by the present mortgagor. According to certificate of the clerk of court and ex-officio recorder in and for the parish of . . . . . . (in parish or Orleans, “recorder of mortgages for the parish of Orleans”) annexed hereto it appears that said property is clear of all encumbrances (or certificate may be waived as follows: “The parties hereto waive the mortgage certificate in the name of the mortgagor and exonerate me, notary, from all responsibility for the non-production of same and its nonannexation to this act”). Thus done and passed at . . . . . ., in the parish of . . . . . ., State of Louisiana, on this . . . . . . day of . . . . . ., A. D. 20. . . . . ., in the presence of . . . . . . and . . . . . ., two competent witnesses, who sign these presents with appearers and me, notary, after due reading of the whole.

Witnesses:

. . . .

. . . .

. . . .

. . . .

. . . . .Notary Public.

The following is the form of paraph to be written across the face of the note by the notary public:

Ne Varietur—For identification with an Act of Chattel Mortgage passed before me this . . . . . . day of . . . . . ., 20. . . . . ., at . . . . . ., State of . . . . . .

. . . .

Notary Public.

Above form should be modified if used as collateral mortgage to state maximum amount of future advances.

The usual security clauses contained in real estate mortgages (see topic 20.04 Mortgages of Real Property) may be included.

For form where mortgagor is a corporation and form of sale and mortgage, see category 21 Property, topic 21.06 Deeds.

Statutory form of notice of security interest is as follows (La.R.S. 9:5353[C], as am’d Act 920 of 1988):

FORM

“Notice of Security Interest

Date____________________

(Mortgagor) has granted a Louisiana chattel mortgage/Louisiana collateral chattel mortgage. The obligation secured by the mortgage is in favor of . . . . and payable at ________ and matures on . . . .

or is otherwise described as follows:

____

____

The chattel mortgagor's domicile, registered office, or principal place of business, as applicable, is

____

(Street Address)

____

(City)

____

(Parish)

The chattels mortgaged are generally described as follows:

____

(Specific Items)

____

(Inventory)

____

(Masses or Assemblages)

____

(Other)

The holder of the obligation at the time of the filing of this notice is ____________ whose business address is

____

(Street Address)

____

(City)

____

(Parish and/or County)

____

(State)

____

(Chattel Mortgagor)

____

Holder of Obligation

Secured by Chattel Mortgage

or Collateral Chattel Mortgage"

Notice is not required to be notarized or witnessed.

20.02 COLLATERAL SECURITY:

See category 8 Debtor and Creditor, topic 8.15 Pledges.

20.03 MORTGAGES OF PERSONAL PROPERTY:

See topic 20.01 Chattel Mortgages.

20.04 MORTGAGES OF REAL PROPERTY:

Mortgage Defined.

Generally, mortgage is nonpossessory right created over property to secure performance of obligation. (C.C. 3278). Mortgage gives mortgagee, upon failure of obligor to perform obligation that mortgage secures, right to cause seizure of property and sale in manner provided by law and to have proceeds applied to satisfaction of obligation in preference to claims of others. (C.C. 3279). Mortgage is indivisible real right that burdens entirety of mortgaged property and follows property into whatever hands it may pass. (C.C. 3280).

Limited Nature.

Mortgage may be established only as authorized by legislation. (C.C. 3281).

Accessory Nature.

Mortgage is accessory to obligation it secures. Mortgagee may thus enforce mortgage only to extent that he may enforce obligation it secures. (C.C. 3282).

Kinds of Mortgages.

Mortgage is conventional, legal or judicial, and with respect to manner in which it burdens property, is general or special. (C.C. 3283). Conventional mortgage is established by contract; legal, by operation of law; and judicial, by law to secure judgment. (C.C. 3284). General mortgage burdens all present and future property of mortgagor; special mortgage burdens only certain specified property of mortgagor. (C.C. 3285).

Mortgageable Property.

Only things susceptible of mortgage are: (1) corporeal immovable with its component parts; (2) usufruct of corporeal immovable; (3) servitude of right of use; (4) lessee's rights in lease of immovable; and (5) property made susceptible of conventional mortgage by special law, such as chattel mortgages, railroad property and ships under construction. (C.C. 3286, as am'd Act 649 of 1992, eff. July 1, 1993; La.R.S. 9:5521-5537).

Conventional Mortgages.

Conventional mortgage may be established only by written contract, but no special words are required. (C.C. 3287). Contract must state precisely nature and situation of each of immovables or other property; amount of obligation; and must be signed by mortgagor. (C.C. 3288). Contract need not be signed by mortgagee, whose consent is presumed and whose acceptance may be tacit. (C.C. 3289). Conventional mortgage may be established only by person having power to alienate property so mortgaged. (C.C. 3290). Special mortgage given by contract over property mortgagor does not own is established when property is acquired by mortgagor; general conventional mortgage is permitted only when expressly provided by law. (C.C. 3291). Conventional mortgage may be established to secure performance of any lawful obligation, even one for performance of act, and conventional mortgage may have term and be subject to condition. (C.C. 3293).

Future Property.

Mortgage may secure obligations that may arise in future. Mortgage has effect between parties from time it is established and as to third persons from time contract of mortgage is filed for registry. Promissory note or other evidence of indebtedness secured by mortgage of future property need not be paraphed for identification with mortgage, nor need it recite that it is secured by mortgage. Mortgage continues until terminated by mortgagor if obligation no longer exists, or upon extinguishment in some other lawful manner. (C.C. 3298, as am'd Act 779 of 1992).

Extinction.

Mortgage is extinguished: (1) by extinction or destruction of thing mortgaged; (2) by confusion as result of obligee's acquiring ownership of thing mortgaged; (3) by prescription of obligations mortgage secures; (4) by discharge through execution or other judicial proceeding in accordance with law; (5) by consent of mortgagee; (6) by termination of mortgage as provided by law; and (7) when all obligations, present and future, for which mortgage is established have been incurred and are extinguished. (C.C. 3319). Holder of note or mortgage servicing agent for residential mortgages has obligation to provide documents and instructions for cancelling mortgage upon full payment. (La.R.S. 9:5167.2, as am'd Act 294 of 2004). Erasure of mortgage upon presentation of release required by statute is available. (La.R.S. 9:5169.1, added Act 480 of 2004).

Legal mortgages exist in favor of minors, persons interdicted and absentees, against property of their tutors and curators to secure fidelity of their administration. This mortgage results from recordation of bond given by tutor or curator, as case may be, or when no bond is given from recordation of abstract of inventory of property and effects of minor, interdict or absentee. (C.C.P. 4061, 4101, 4134). Forfeitures of property bonds to secure appearance of criminal defendants have effect of mortgage. (La.R.S. 15:85.1, added Act 342 of 1983).

Judicial mortgage, resulting from the recordation of a judgment, operates against all property mortgageable under C.C. 3286 of judgment debtor which he may own at time of recordation, or may subsequently acquire. (C.C. 3300, 3302, 3303).

The recordation of a foreign judgment will not operate as a mortgage unless or until that judgment has been made executory by a tribunal of this state. (C.C. 3305). Judgments of federal district courts in Louisiana, or those of other districts registered in accordance with 28 USC § 1963, do operate as judicial mortgages without being made executory. (La.R.S. 13:4204, as am'd Act 986 of 1988).

Recordation.

Mortgage must be recorded in the office of the recorder of mortgages for the parish wherein the property lies, in order to be effective against third persons, unless parties agree in writing that recordation shall not occur. (C.C. 3370, as am'd Act 666 of 1987). If debtor has immovable property lying in more than one parish, inscription must be made in office of recorder of mortgages for each parish. (C. C. 3346-7). For recording fees, see category 10 Documents and Records, topic 10.04 Records. Disposition of original instrument after record is same as in case of deed. (See category 21 Property, topic 21.06 Deeds.) Mortgages must include social security number or employer identification number of mortgagor, but absence of number does not affect validity. (La.R.S. 9:5141, as am'd Act 322 of 1991, eff. Jan. 1, 1992). Clerk may not refuse to accept for recordation instrument which lacks social security number or taxpayer identification number, however. (La.R.S. 9:5141[D], added Act 39 of 1993).

Mortgage of movables used in commercial or industrial activity must be recorded in same manner as chattel mortgage. (La.R.S. 9:5369, added Act 235 of 1980 repealed effective July 1, 1989 by Act 528 of 1988, see category 3 Business Regulation and Commerce, topic 3.09 Commercial Code).

Mortgage inscription may be cancelled by presentation to mortgage office of original note or notes marked paid if notes are paraphed for identification with mortgage and other statutory procedures are followed. (La.R.S. 9:5167, as am'd Act 337 of 2007). If note is lost or destroyed, procedure for cancellation by use of affidavit exists. (La.R.S. 9:5168, as am'd Act 362 of 1991).

Except as to judicial sales in executory proceedings or execution of judgments, no conventional or judicial mortgage may be cancelled, removed from public records or affected by public or private sale in any succession, liquidation, insolvency, receivership, bankruptcy or partition proceeding. (La.R.S. 9:5251, as am'd Act 894 of 1981).

Priorities.

Among creditors the rank of mortgages is determined by the time of their recordation. (C. C. 3329). Regarding collateral mortgages, see La.R.S. 9:5550 et seq., added by Act 137 of 1989, effective Sept. 1, 1989.

Reinscription.

Except in the case of legal mortgages, and in certain other cases expressly provided by statute, mortgages maturing less than nine years from date, to preserve their effect as against third persons, must be reinscribed every ten years. Where obligations secured mature after nine years, reinscription is not necessary until six years after maturity of last obligation. (C. C. 3369).

Foreclosure.

Extra-judicial sale is not permitted. Mortgage must be foreclosed through courts in order to provoke sale. There are two modes of foreclosure: (1) Ordinary process and (2) executory process.

Ordinary process involves the filing of a suit with citation to the debtor and the usual delay for answering, followed by a judgment as in ordinary cases, the judgment recognizing the lien of the mortgage. Thereafter, a writ of fieri facias is issued and the property sold, the mortgage creditor being paid with preference out of the proceeds.

Executory process may be invoked when the mortgage has been granted in an authentic act, executed before a notary and two witnesses, in which the obligor declares and acknowledges the obligation, whether then existing or thereafter to arise, to which the mortgage relates. (C.C.P. 2631). Executory proceeding to enforce mortgage may be brought in parish where property located or of defendant's domicile. (C.C.P. 2633 as am'd Act 117 of 1989). Holder of mortgage note files in court a petition to which he attaches original note and certified copy of mortgage, whereupon court enters an order for issuance of executory process. (C.C.P. 2634). Notice of demand is served upon debtor (C.C.P. 2639), and if payment is not made within three days, writ of seizure and sale addressed to sheriff is issued, whereupon mortgaged property is seized. Notice of seizure is served on debtor, and three days thereafter property is advertised for sale. Advertisement is run once a week for 30 days, and property is then sold at public auction by sheriff, plaintiff being paid with preference out of proceeds. (C.C.P. 2721 et seq). Caveat: Fuentes v. Shevin, 407 U.S. 67, 92 S. Ct. 1983, 32 L. Ed. 2d 556 (1972), held notice and an opportunity to a hearing prior to seizure of property constitutionally essential under due process clause. But see Buckner v. Carmack, 272 So.2d 326, in which Louisiana Supreme Court distinguished Louisiana executory process from Fuentes condemnation.

Person desiring notification of seizure of specific immovable property must file request for such notice in mortgage records, stating legal description of property, name of owner and name of person desiring notice. $10 fee for such recordation. Desire for such notice will appear on mortgage certificate, and sheriff should then notify. But failure to notify does not invalidate sale or affect rights of seizing creditor. (La.R.S. 13:3886, added Act 615 of 1982).

Action to annul sale of immovable property by reason of any objection to form of proceedings or lack of authentic evidence must be filed before sheriff files proces verbal or filed sale in conveyance office. (La.R.S. 13:4112, added Act 681 of 1975).

If mortgage is legal, judicial, or conventional, foreclosing creditor may ignore any sale of property made by mortgagor and proceed as though mortgagor still had title and was in possession. (C.C.P. 3741).

Evidence in authentic form is required to support order for executory process in cases provided by law. By this is meant properly certified copy or duplicate original of act of mortgage, mortgage note properly paraphed by notary, certified copy of authorizing or ratifying resolution of corporate board of directors for mortgage on corporate property, certified copy of contract of partnership authorizing execution of mortgage, etc. (C.C.P. 2635 and 2626, as am'd Acts 177, 185 and 259 of 1982). Certain kinds of evidence need not be submitted in authentic form: Evidence as to proper party defendant, or necessity for appointing attorney to represent unrepresented defendant, or agreement to extend or modify obligation to pay, or written notification of default, or name change, merger, purchase and assumption of financial institution, or name change or death of any party, or breach of condition in mortgage, or of advances made by holder of collateral mortgage note or note for future advances. (C.C.P. 2637, as am'd Act 161 of 1989, eff. June 22, 1989). If mortgage is collateral mortgage, existence of actual indebtedness may be shown by petition with evidence of handnotes attached. (C.C.P. 2637, as am'd Act 185 of 1983). Authentic evidence requirements also not applicable to holders of bearer paper with reference to transfer, assignment, pledge or negotiation of such paper. (La.R.S. 13:4102, added Act 178 of 1982). Proper form for certifying copies when required may be found in La.R.S. 13:4102. (Added Act 178 of 1982). Signatures of endorsers, guarantors and others on instruments secured by mortgage are presumed genuine, and written evidence of assignment, pledge, or transfer of instrument shall be deemed authentic for purposes of executory process. (La.R.S. 9:4422, added Act 292 of 1989).

If defendant in executory proceeding arrests seizure and sale of property by injunction and court determines seizure to be wrongful, damages may be awarded, including attorney's fees. (C.C.P. 2751, as am'd Act 302 of 1981). Security must accompany request to enjoin seizure and sale except in specified instances. (C.C.P. 2753, as am'd Act 341 of 1983).

Except as provided in articles of partnership, person authorized to execute mortgage on behalf of partnership may, for purposes of executory process, execute confession of judgment in act of mortgage without execution of articles of partnership by authentic act. (C. C. 2814, as am'd Act 888 of 1981).

In an application for executory process against property mortgaged by a corporation, a copy of resolution of board of directors authorizing execution of mortgage signed and certified by secretary or such copy attached to original act of mortgage and certified by notary before whom act was passed, or by custodian of notarial records in Orleans Parish or Clerk of Court in parishes other than Orleans, is sufficient evidence of authority of officer or agent to execute same and no authentic or further proof of such authority or of existence of corporation or board of directors or of personnel or authority of board to grant such authority is necessary. (La.R.S. 13:4103, as am'd Act 489 of 1986; C.C.P. 2636).

When debtor's succession is not under administration or has not been accepted by heirs, mortgage creditor may proceed in rem contradictorily with heirs or against an attorney at law appointed by court to represent the succession. (C.C.P. 2672-2674).

Person designated by parties in mortgage instrument or in another acknowledged instrument, or by mortgagee or agent if so provided in such instrument, shall be designated keeper of property, but owner of home and of property containing not more than four dwelling units must be designated keeper during his occupancy. (La.R.S. 9:5136-5140.1, as am'd Act 226 of 1977).

Deficiency Judgment.

Creditor may obtain deficiency judgment either by converting executory proceeding into ordinary proceeding or by separate suit. (C.C.P. 2772).

When seizing creditor takes advantage of waiver of appraisement contained in act of mortgage and proceeds of sale are insufficient, debt nevertheless stands discharged. (La.R.S. 13:4106).

Redemption.

There is no right of redemption after foreclosure sale.

Deeds of trust are not permitted in Louisiana, except that a mortgage may be given to secure the payment of two or more bonds, notes, or other obligations and in such mortgage a trustee for the holders of the obligations may be named as mortgagee and vested with full power to enforce the mortgage for the benefit of the holders of the obligations. (La.R.S. 9:5301-5302). Such mortgage may also pledge incorporeal movables such as credits and other claims. The provisions of law relative to substitutions, fidei commissa and trust dispositions shall not affect such mortgages. Such mortgage may provide that the trustee shall not be obliged to foreclose unless the holders of a designated portion of the obligations specified in the mortgage shall request the trustee to act. Such mortgage may be enforced by seizure and sale or otherwise as trustee deems expedient. The interest of the holders of the obligations is in common and indivisible, and in the event of foreclosure and sale of the mortgaged property, they are entitled to participate pro rata in the proceeds. (La.R.S. 9:4303-4307).

Form of Mortgage.

It is advisable that a Louisiana notary or commissioner should prepare a mortgage, or that preparation should be in charge of local counsel. The following form is in use:

Form

United States of America: State of Louisiana: parish of Orleans: city of New Orleans. Be it known, That on this . . . . . . day of the month of . . . . . . in the year of our Lord 20. . . . . ., before me, ..., a notary public, duly commissioned and qualified, in and for this city and the parish of Orleans, therein residing, and in the presence of the witnesses hereinafter named and undersigned, personally came and appeared: (state name of party) hereinafter referred to as "Mortgagor," of full age of majority and a resident of the Parish (or County) of . . ., State of . . . . . ., who, being first duly sworn, did depose and say:

(Here give the marital status required by La.R.S. 35:11 following forms suggested in title Deeds, q.v.).

Which said appearer declared and acknowledged that he is justly and truly indebted unto . . . . . ., of full age of majority and a resident of the parish (or county) of . . . . . ., State of . . . . . ., hereinafter referred to as "Mortgagee," in the full and true sum of . . . . . . dollars, for the reimbursement whereof he has made and subscribed his one certain promissory note for the sum of . . . . . . dollars, to the order of and endorsed in blank by himself, dated . . . . . . and made payable at the . . . . . ., ... after date, with interest thereon at the rate of . . . . . . per cent, per annum from . . . . . . until paid, interest payable annually, which said note, after having been paraphed "Ne Varietur" by me, notary, to be herewith identified, has been delivered unto . . . . . ., mortgagee, who hereby acknowledges receipt of said note.

If on default it shall become necessary to place said note in the hands of an attorney at law for collection, or to recover the amount due on said note, or any part thereof, or any other amount due by the mortgagor under the terms thereof, through legal proceedings of any character, the said mortgagor binds himself to pay the fees of the attorney at law who may be employed for that purpose, which fees are hereby fixed at the sum of . . . . . . per cent, of the amount due on said note.

Now, in order to secure the full and punctual payment of said note and interest when same shall be due, together with said attorney's fees, and to secure the faithful performance of all of the obligations hereinafter mentioned and the reimbursement and payment of premiums of insurance, taxes and assessments and interest due thereon, and all costs and charges hereinafter specified, the said mortgagor declared that he does, by these presents, mortgage, affect and specially hypothecate, in favor of the said mortgagee and to inure to the use and benefit of any and all holder or holders of said promissory note, the said mortgagee being here present and accepting, the following described property, to-wit: (Here insert description of property with reference to acquisition, that is, "being the same property that was acquired by purchase by . . . . . ., Mortgagor, from . . . . . ., as per act passed before . . . . . ., Notary Public, dated . . . . . ., registered in the Conveyance Records of . . . . . . Parish, Louisiana, in Book . . . . . ., Folio . . . . . .").

The said property so to remain mortgaged and hypothecated until the full and final payment of the aforesaid promissory note in capital and interest and of all amounts secured by this mortgage, the said mortgagor binding himself and his heirs not to sell, alienate or encumber the same to the prejudice of these presents.

The mortgagor hereby confesses judgment in favor of said mortgagee for the full amount thereof, principal and interest, together with all fees, costs, charges, expenses, insurance premiums, taxes and assessments that may become due, in accordance with the terms hereof, and consents, agrees and stipulates that in the event the said promissory note is not punctually paid at its maturity, either fixed or determined as hereinafter provided, or in the event any sum due hereunder is not punctually paid when due, it shall be lawful for and he does hereby authorize the said mortgagee to cause all and singular the said hereinabove described and herein mortgaged property to be seized and sold under executory or other legal process, issued by any competent court, without appraisement, mortgagor hereby expressly waiving (1) the benefit of appraisement of said property in the event of its seizure and sale under judicial process, as required by Arts. 2332, 2336, 2723 and 2724, Louisiana Code of Civil Procedure; (2) the three days delay and notice to the debtor required by Arts. 2639 and 2721, Louisiana Code of Civil Procedure; (3) the notice of seizure required by Arts. 2293 and 2721, Louisiana Code of Civil Procedure; (4) the three days delay required by Arts. 2331 and 2722, Louisiana Code of Civil Procedure; and (5) the benefits of the other provisions of Arts. 2331, 2722 and 2723. Louisiana Code of Civil Procedure, not specifically mentioned above; and does further agree that in the event of any such sale the property may be sold at the option of the mortgagee either as a whole or in such lots and parcels as the said mortgagee may elect.

The said mortgagor declared that he does agree and stipulate as follows:

First: To keep the buildings and improvements on the above described and herein mortgage property constantly insured against loss by fire in an amount not less than . . . . . . dollars, until the full and final payment of said note, and all amounts due hereunder, in companies acceptable to the mortgagee, and to transfer such insurance and deliver the policies to the mortgagee, hereby authorizing said mortgagee to cause said insurance to be effected upon his default.

Second: To pay, punctually when due, all taxes and assessments which may be levied on said mortgaged property, hereby authorizing said mortgagee to pay same on mortgagor’s default.

Third: In the event the mortgagor fails to effect the insurance above provided, or to transfer and deliver same as above stipulated, or fails to pay taxes or assessments as above provided, and the mortgagee effects such insurance and pays the premiums due therefor, or pays the taxes or assessments above referred to, the amounts so paid by mortgagee shall immediately become due and payable by the mortgagor to the mortgagee, with interest at the rate of eight (8%) per cent, per annum until paid, and such amounts with interest as aforesaid shall, up to the sum of . . . . . . dollars, be deemed a part of the debt secured by this Act of Mortgage; Provided, however, that none of the above provisions shall be construed as obliging the mortgagee to effect such insurance or pay the premiums therefor, or pay the taxes or assessments above referred to, or as making the mortgagee liable for loss, damage or injury, in the event the mortgagee fails so to do.

Fourth: In the event of the happening of any one or more of the following events, termed events of default, to wit: (a) Default in the payment of the principal or interest of said note when due; (b) Default in the performance by mortgagor of any one of the above covenants and agreements relating to procuring and transferring of insurance, delivery of policies, and payment of taxes or assessments; (c) Application by the mortgagor for a respite; (d) Voluntary application by the mortgagor to be adjudicated a bankrupt; (e) Institution of proceedings against mortgagor to have him declared an involuntary bankrupt; (f) Institution of proceedings against mortgagor looking to the appointment of a receiver or syndic; (g) Seizure of the property herein mortgaged, or any portion thereof, under a writ of attachment, or fieri facias, or other legal process; then, the whole indebtedness hereby secured shall, at the option of the mortgagee, at once become due and exigible.

The failure of the mortgagee to exercise any option to declare the maturity of the principal debt, or any other sums hereby secured, shall not be taken or deemed a waiver of right to exercise such option or declare such maturity as to such past or any subsequent violation of any of said covenants or stipulations.

All covenants by mortgagor in favor of mortgagee and all rights hereby conferred on mortgagee shall enure to the benefit of any present or future holder or holders of said note.

The mortgagor does hereby waive, in favor of the mortgagee, as regards the property hereinabove described and hereby mortgaged, any and all homestead exemptions to which he is or may be entitled under the Constitution and Laws of the State of Louisiana.

And now, to these presents, came and intervened Mrs. . . . . . ., wife of said mortgagor, being duly authorized by her said husband, who declared that she hereby joins her said husband in the waiver of homestead exemptions hereinabove stipulated.

According to the certificates of the Register of Conveyances and Recorder of Mortgages (outside the Parish of Orleans, the Clerk of Court and Ex-Officio Register of Conveyances and Recorder of Mortgages, it being noted, however, that Clerks of Court are not required by law to issue Conveyance Certificates and that some Clerks make a practice of not so doing and that it is not essential to the Act outside the Parish of Orleans that a Conveyance Certificate be annexed), in and for the Parish of . . . . . ., State of Louisiana, annexed hereto, it appears that said property has not been heretofore alienated by the present mortgagor, and is free of all encumbrances (except such alienations or encumbrances as may be listed on the Conveyance and Mortgage Certificates which should be enumerated here). [Or certificates may be waived. See topic Chattel Mortgages].

All State and City (or Parish) taxes up to and including the taxes due and exigible in the year of . . . . . . are paid, as per tax researches annexed hereto.

Thus done and passed at . . . . . ., in the Parish (or County) of . . . . . ., State of . . . . . . on the day and in the month and year first hereinabove written, in the presence of . . . . . . and . . . . . ., competent witnesses, who have hereunto signed their names with the said appearers and me, Notary, after due reading of the whole.

Witnesses:

. . . .

. . . .

. . . .

Mortgagor.

. . . .

Wife of Mortgagor.

. . . .

Mortgagee.

. . . .

Notary Public.

Names of parties, witnesses and notary must be printed or typed under their respective signatures. See also category 21 Property, topic 21.06 Deeds, subhead Community Property.

Municipal address of property, if any, must be recited in description of property, along with social security number of employer tax identification number of mortgagor. (La.R.S. 35:17).

Mortgages of specified rural property must contain prepayment clause pursuant to La.R.S. 9:5321-5326, as am'd Act 308 of 1983.

Any of the security clauses and the homestead waiver contained in the above form may, of course, be omitted, as the parties may desire.

The following is the form of paraph to be written across face of mortgage note by Notary Public:

Ne Varietur—For identification with an Act of Mortgage passed before me this . . . . . . day of . . . . . ., 20. . . ., at . . . . . ., State of . . . . . .

. . . .

Notary Public.

Where mortgagor is a corporation, describe officer executing instrument as indicated in category Property, topic Deeds, and make other variations required by the situation.

Act of Sale and Mortgage.

For form see category 21 Property, topic 21.06 Deeds.

Assignment of Mortgage.

Transfer of note secured by mortgage carries the mortgage with it, but endorsement of note must be evidenced by authentic act to preserve right to invoke executory process. No transfer, assignment or termination of right of mineral right is effective upon person dealing with mortgagee until 30 days after delivery to third person of certified or duplicate original copy of said act. (T. 31, art. 205).

Satisfaction of Mortgage.

Following form of full and complete release of mortgage is in general use:

Form

State of . . . . . .

Parish (or County) of . . . . . .

Personally before me, the undersigned authority, a Notary Public in and for the Parish (or County) of . . . . . ., State of . . . . . ., there came and appeared . . . . . ., of full age of majority and a resident of . . . . . ., State of . . . . . ., who exhibited to me, Notary, as fully paid, cancelled and acquitted, a promissory note drawn and subscribed by . . . . . ., to the order of and endorsed by . . . . . ., for the sum of . . . . . . dollars, dated the . . . . . . day of . . . . . ., 20. . . ., identified by . . . . . ., Notary, on the . . . . . . day of . . . . . ., 20. . . ., with an Act of . . . . . ., passed before him on said date and secured by mortgage granted in said Act upon the property more fully described in said Act.

And the said appearer declared that the said described note having been fully paid, he does hereby, as the last holder thereof, grant a full release of the above recited mortgage which secured its payment, hereby authorizing and requesting the Recorder of Mortgages (or outside New Orleans, the Clerk of Court and Ex-Officio Recorder of Mortgages) for the Parish of Orleans, State of Louisiana, to cancel and erase entirely on his records the inscription of said mortgage as the same appears recorded in his office in Book . . . . . ., Folio . . . . . .

Whereupon, I, the said Notary, have canceled the signatures and notarial paraph on the said note and have annexed said note to the margin hereof for future reference.

Thus done and passed at . . . . . ., State of . . . . . ., on the . . . . . . day of . . . . . ., in the presence of . . . . . . and . . . . . ., the undersigned competent witnesses, who have signed hereto with the said appearer and with me, Notary, after due reading of the whole.

Witnesses:

. . . .

. . . .

. . . .

Appearer.

. . . .

Notary Public.

If a portion, represented by a note, of the mortgage indebtedness has been paid, and a partial release is to be granted as to all of the mortgaged property, substitute in the foregoing form, at the appropriate place, the following:

"And the said appearer declared, that the said described note having been paid, he does hereby, as last holder thereof, release the above recited mortgage so far as securing the payment of said note only, but no further, hereby authorizing and requesting the Recorder of Mortgages (or outside of New Orleans, Clerk of Court and Ex-Officio Recorder of Mortgages) for the Parish of . . . . . ., State of Louisiana, to make mention of the partial release of mortgage herein granted as aforesaid, on the margin of the record of said mortgage in his office, in Book . . . . . ., Folio . . . . . ."

If a portion of the note evidencing the mortgage indebtedness has been paid, omit the words "as fully paid, cancelled and acquitted" and substitute at the appropriate place the following:

"And the said appearer declared, that the sum of . . . . . . dollars having been paid on the principal of the above described note, he does hereby, as last holder thereof, release the above recited mortgage so far as securing the payment of said amount thus paid only, but no further, hereby authorizing and requesting the Recorder of Mortgages (or Clerk of Court and Ex-Officio Recorder of Mortgages) for the Parish of . . . . . ., State of Louisiana, to make mention of the partial release of mortgage herein granted as aforesaid, on the margin of the record of said mortgage, in his office, in Book . . . . ., Folio . . . . . .

"Whereupon, I, the said Notary, have paraphed said note for identification with this Act of Partial Release, and have delivered same to said appearer, who hereby acknowledges receipt thereof."

If only a portion of the mortgaged property is to be released, omit the words "as fully paid, cancelled and acquitted," if there has been only a payment on account of the mortgage note, and substitute, at the appropriate place, the following:

"And the said appearer declared that the sum of . . . . . . dollars having been paid on account of said note (or, if an entire note has been paid, say 'the said described note having been paid'), he does hereby, as last holder thereof, release the above recited mortgage so far as same bears upon the following described property, to-wit: (Insert description of property to be released from mortgage)

but no further, hereby authorizing and requesting the Recorder of Mortgages (or Clerk of Court and Ex-Officio Recorder of Mortgages) for the Parish of . . . . . ., State of Louisiana, to make mention of the partial release of mortgage herein granted as aforesaid, on the margin of the record of the said mortgage in his office, in Book . . . . . ., Folio . . . . . .”

If the note has been only partly paid, the following clause should be added and the note paraphed as above indicated:

“Whereupon, I, the said Notary, have paraphed said note for identification with this Act of Partial Release and have delivered same to said appearer, who hereby acknowledges receipt thereof.”

In this case the form of paraph to be written across the face of the note by the notary is as follows:

Ne Varietur—For identification with an Act of Partial Release of Mortgage passed before me this . . . . . . day of . . . . . ., 20. . . ., at . . . . . ., State of . . . . . .

. . . .

Notary Public.

See also subhead Assignment of Mortgage, supra.

Chattel Mortgages.

See topic 20.01 Chattel Mortgages.

See also categories 3 Business Regulation and Commerce, topic Sales; Property, topic Powers of Attorney, subhead Conveyance or Mortgage by Attorney.

21 PROPERTY

21.01 ABSENTEES:

Curator of Absentee’s Property.

Absent person is one who has no representative in state and whose whereabouts are unknown and cannot be ascertained by diligent effort. If such person owns property, court may upon petition of interested party and showing of necessity, appoint curator to manage property. (C.C. 47, as am’d Act 989 of 1990, eff. Jan. 1, 1991; La.R.S. 9:3421-3445, added Act 989 of 1990, eff. Jan. 1, 1991). Such curator has power of both administration and disposition over property, as provided by law (La.R.S. 9:3437 through 3440, added Act 989 of 1990, eff. Jan. 1, 1991); but when absentee is spouse in community, curatorship is limited to separate property (C.C. 48, as am’d Act 989 of 1990, eff. Jan. 1, 1991).

Legal Capacity of Absentee.

Creation of curatorship does not deprive absentee of juridical capacity, but his own acts of disposition of immovable property are not effective toward curator or third persons unless filed in public records of parish of location of immovable property. (C.C. 49, as am’d Act 989 of 1990, eff. Jan. 1, 1991).

Termination.

Such curatorship terminates when absentee appoints person to represent him in state, when his whereabouts are known, or when he dies. (C.C. 50, as am'd Act 989 of 1990, eff. Jan. 1, 1991). Curatorship also terminates when judgment of declaration of death is rendered, due to presumption of death due to long absence. (C.C. 51, as am'd Act 989 of 1990, eff. Jan. 1, 1991).

Accounting.

Upon termination of curatorship, curator must account for management and restore property to formerly absent person or his successors. (C.C. 52, as am'd Act 989 of 1990, eff. Jan. 1, 1991). When curator acquires knowledge of termination of curatorship, he must file notice to that effect in curatorship proceeding; acts of administration or disposition after termination are valid until filing of that notice. (C.C. 53, as am'd Act 989 of 1990, eff. Jan. 1, 1991).

Declaration of Death.

Person satisfying definition of absentee for five years is presumed dead, and upon petition by interested party, court shall render declaration of such death and determine effective date of death. (C.C. 54, as am'd Act 989 of 1990, eff. Jan. 1, 1991). Such declaration opens succession as of date of death so determined, and property devolves under applicable law of succession. (C.C. 55, as am'd Act 989 of 1990, eff. Jan. 1, 1991). If person reappears, he is entitled to recover his property that still exists in condition in which it is found, from those who took it as his successors, or from their transferees by gratuitous title; and he may also recover net proceeds of things alienated and for diminution of value of things resulting from their encumbrance. (C.C. 57, as am'd Act 989 of 1990, eff. Jan. 1, 1991).

Management of Community.

When spouse is absentee, other spouse may be authorized by court to manage, alienate or lease community property that otherwise absentee would have exclusive right to administer. (C.C. 2355.1, added Act 989 of 1990, eff. Jan. 1, 1991).

Presumption of Death.

When person has disappeared under circumstances such that death seems certain, his death is considered to have been established even though his body has not been found. (C.C. 30, added Act 989 of 1990, eff. Jan. 1, 1991).

Attorney for Absentee.

If absent defendant has not been served with process or has not made general appearance, court will appoint attorney to represent such absent person. (C.C.P. 5091).

Monies Due Absentee.

Holder of money or other abandoned property must report such property to Secretary of Department of Revenue and Taxation and deliver it to him after time specified. Revised Uniform Unclaimed Property Act adopted. (La.R.S. 9:151-180).

Estates of Military Personnel.

Property of military personnel missing under circumstances strongly indicating death and whose "death" has been accepted by military authorities may be turned over to heirs forthwith. (La.R.S. 9:1441).

Partition by Co-Owner.

Owner of undivided interest in immovable property may sue for partition against absentee or unknown co-owner, with court appointing attorney to represent such co-owner. (C.C.P. 4623).

21.02 ADVERSE POSSESSION:

Adverse possession is termed “acquisitive prescription” in Louisiana.

Immovables.

Continuous and uninterrupted possession of an immovable for ten years under just title acquired in good faith will establish ownership, even as against absentees and incompetents, including minors and interdicts. (C.C. 3474, added Act 187 of 1982). Such possession for 30 years establishes ownership without need of title and regardless of good faith. No prescription as between husband and wife, parents and children during minority, tutors and minors during tutorship, and curators and interdicts during interdiction. (C.C. 3469, added Act 187 of 1982).

Movables.

Uninterrupted possession of a movable for three years in good faith and under just title establishes ownership. Such possession for ten years establishes ownership without need of title or good faith. (C. C. 3490, 3491).

Easements.

Apparent servitudes may be acquired by ten years peaceful and uninterrupted possession in good faith and just title, and by 30 years uninterrupted possession without title or good faith. (C. C. 742, as am’d Act 514 of 1977).

21.03 [RESERVED]

21.04 CONVEYANCES:

See topic 21.06 Deeds.

21.05 CURTESY:

Unknown to the law of Louisiana. See category 13 Estates and Trusts, topic 13.07 Descent and Distribution, subhead Surviving Spouse.

21.06 DEEDS:

There is no statutory form of deed in Louisiana. See topic Real Property for types of estates.

Execution.

A deed, or act of sale of real estate, must be signed by the vendor, and, as a matter of practice, is usually signed by the vendee. The vendee’s signature, however, is not essential, as an act of ownership is sufficient evidence of acceptance. The act should contain, first, the date and place where passed; the names, surnames and qualities of the contracting parties; their marital status; description of property; price of transfer, and terms and conditions, if sale be on credit. To prove itself it should be in authentic form, that is, passed before notary public and two witnesses. Names of parties, witnesses and notary must be printed or typed under their respective signatures. (La.R.S. 35:12, am’d 1954, act 430).

Deed must contain total sales price, amount of mortgage, correct names and addresses of vendor and vendee, and municipal or street address of property. (La.R.S. 47:2328; La.R.S. 35:17). Deed must also contain name and address of person who is responsible for property taxes and assessments. (La.R.S. 9:2721, as am’d Act 949 of 1999).

See categories 8 Debtor and Creditor, topic Homesteads; Family, topic Husband and Wife, subhead Community Property.

Conveyance by Attorney in Fact.

See topic 21.15 Powers of Attorney, subhead Conveyance or Mortgage by Attorney.

Tax Certificates.

Any party to act of conveying real property outside limits of municipal corporation having population of over 300,000, may obtain certificate showing whether state, parish, municipal and levee district taxes have been paid, and certificate is conclusive evidence of payment when annexed to act. (La.R.S. 9:2901-2904, as am'd Act 651 of 1978). In cities of over 300,000 population similar certificates evidencing full payment of paving or local improvement assessments must also be attached, but future installments may be assumed by purchaser. (La.R.S. 9:2921-2927). In such cities, state, parish, municipal and levee district taxes for the year in which transfer takes place, may be assumed by purchaser when same could not be paid on date of transfer. (La.R.S. 9:2925).

Recording.

In order to operate as notice to third persons, instrument must be recorded in office of register of conveyances in parish where property is situated. (C. C. 2442; La.R.S. 9:2721). For recording fees see category 10 Documents and Records, topic 10.04 Records.

The record of an act under private signature purporting to be a sale or exchange of real property has no effect against creditors or bona fide purchasers unless previous to being recorded it is acknowledged by the party or proved by the oath of one of the subscribing witnesses and the certificate of such acknowledgment is signed by the parish recorder, a notary, or a justice of the peace and recorded with the instrument. (C. C. 2253, 3367).

Forms.

For warranty deed the following may be used:

Form

UNITED STATES OF AMERICA

State of . . . . . .

Parish (or County) of . . . . . .

Be It Known, That on this . . . . . . day of the month of . . . . . ., in the year . . . . . .,

Before me, ..., a Notary Public duly commissioned and qualified in and for the Parish (or County) of . . . . . ., State of . . . . . ., therein residing, and in the presence of the witnesses hereinafter named and undersigned,

Personally came and appeared:

. . . . . . (State name of vendor), of full age of majority and a resident of . . . . . ., State of . . . . . ., who, being first duly sworn, did depose and say:

(Here give marital status and permanent mailing address as required by La.R.S. 35:11 and La.R.S. 35:12 in somewhat following form: "that he has never been married"; or "that he has been married but once and then to . . . . . ., who is now living and residing with him in the City of . . . . . ., State of . . . . . . at . . . . . .," or "from whom he was divorced by judgment of the . . . . . . Court in the proceedings entitled . . . . . . and bearing the docket number . . . . . . of said court on the . . . . . . day of . . . . . ., 20. . . ."; or "that he has been married twice, by first marriage to . . . . . ., who died on the . . . . . . day of . . . . . ., 20. . . ., and by second marriage to . . . . . ., from whom he is living separate and apart"; or whatever marital status may be, giving in all cases Christian and family name of other spouse).

and who declared that he does, by these presents, grant, bargain, sell, transfer, assign, setover, abandon and deliver, with all legal warranties and with full substitution and subrogation in and to all the rights and actions of warranty which he has or may have against all preceding owners and vendors, unto . . . . . . (State name of vendee and give marital status and address as in case of vendor), here present, accepting and purchasing for himself, his heirs and assigns, and acknowledging due delivery and possession thereof, all and singular the following described property, to-wit: (Here insert description of property with reference to acquisition).

To Have and to Hold the above described property unto the said purchaser, his heirs and assigns forever.

This sale is made and accepted for and in consideration of the price and sum of . . . . . . Dollars, which the said purchaser has well and truly paid in ready and current money to the said vendor, who hereby acknowledges the receipt thereof and grants full acquittance and discharge therefor.

According to the certificates of the Register of Conveyances and Recorder of Mortgages (outside the Parish of Orleans, the Clerk of Court and Ex-Officio Register of Conveyances and Recorder of Mortgages, it being noted, however, Clerks of Court are not required by law to issue Conveyance Certificates and that some Clerks make a practice of not so doing, and that it is not essential to the Act outside the Parish of Orleans that a Conveyance Certificate be annexed), in and for the Parish of . . . . . ., State of Louisiana, annexed hereto, it appears that said property has not been heretofore alienated by the present Vendor, and is free of all encumbrances (except such alienations or encumbrances as may be listed on the Conveyance and Mortgage Certificates which should be enumerated in the Act itself).

All State and City (or Parish) taxes up to and including the taxes due and exigible in the year of . . . . . . are paid, as per tax researches annexed hereto.

Thus Done and Passed at . . . . . ., State of . . . . . ., on the day and in the month and year first hereinabove written, the presence of . . . . . . and . . . . . ., the undersigned competent witnesses who have signed these presents together with said appearers and me, Notary, after due reading of the whole.

Witnesses:

. . . .

. . . .

. . . .

Vendor.

. . . .

Vendee.

. . . .

Notary Public.

Description of property must include municipal number, if any. (La.R.S. 35:16, added Act 444 of 1979).

When grantor is a corporation, after name and residence of officer executing deed, insert: "who declared that he is . . . . . . of . . . . . ., a corporation organized under the laws of the state of . . . . . ., domiciled in . . . . . ., and that he appears and acts herein for and on behalf of said . . . . . ., hereinafter sometimes called 'vendor,' being duly authorized hereunto under and by virtue of a resolution of the board of directors of vendor, passed at a meeting held on . . . . . ., 20. . . ., a duly certified copy whereof is annexed hereto and made a part hereof; which said appearer, acting in his capacity aforesaid, declared that vendor does, by these presents, grant, etc." (continuing as in preceding form).

If certificates and tax researches are waived, the following clause may be used in the appropriate place: "The parties hereto waive the production of mortgage, conveyance and other certificates and relieve me, Notary, from any and all responsibility in connection therewith."

Quitclaim deed may be in same form as warranty deed, except that for words of alienation in such deed substitute "remise, release, sell, convey and quitclaim, without any warranty whatsoever, not even for the return of the purchase price."

Act of Sale and Mortgage.

The following form is frequently used:

(Preamble same as in warranty deed above) who declared to me, notary, that he does by these presents, grant, bargain, sell, convey, transfer, assign, set over, abandon and deliver, with all legal warranties and with full substitution and subrogation in and to all the rights and actions of warranty which he has or may have against all preceding owners and vendors, unto (name, address, domicile and marital status of vendee), here present, accepting and purchasing for himself, his heirs and assigns, and acknowledging due delivery and possession thereof, all and singular the following described property, to-wit: (description of property).

To have and to hold the above described property unto the said purchaser, his heirs and assigns forever.

This sale is made and accepted for and in consideration of the price and sum of . . . . . . dollars, in part payment whereof said vendee has paid in ready and current money the sum of . . . . . . dollars to the said vendor, who hereby acknowledges the receipt thereof and grants full acquittance and discharge therefor, and for the balance of said purchase price, to-wit: the sum of . . . . . . dollars, the said purchaser has furnished . . . . . . promissory note . . . . . ., each for the sum of . . . . . ., dated . . . . . . and payable . . . . . ., bearing interest at the rate of . . . . . . per cent per annum from . . . . . . until paid, which said note . . . . . . after having been paraphed "Ne Varietur" by me Notary, to be identified herewith . . . . . . delivered to the said vendor, who hereby acknowledges the receipt thereof. (The remaining portion of the act may be drafted following the form under Mortgages, except, of course, it is not necessary to repeat the description of the property. Retention of vendor's lien may be expressed by inserting immediately before the words, "the said mortgagor declared that he does by these presents, mortgage, affect and specially hypothecate," the words, "vendor's lien and privilege are retained, and").

Community Property.

See category 14 Family, topic 14.09 Husband and Wife. Wife must sign mortgage in all parishes in order to waive homestead exemption from seizure of $15,000. (Const. of 1921, art. 11, §§ 1-4; Const., art. 11, § 9, and art. 14, § 34). See also category 8 Debtor and Creditor, topic 8.10 Homesteads.

21.07 DEEDS OF TRUST:

See category 20 Mortgages, topic 20.04 Mortgages of Real Property.

21.075 DONATIONS:

Donations inter vivos (between living persons) are governed by articles of Civil Code, in part because such donations might possibly be relevant to calculation of forced portion of certain heirs. These articles were revised by Act 204 of 2008, eff. Jan. 1, 2009, although without major change. Donations inter vivos must adhere to forms specified in Civil Code. (C. C. 1467, as am'd Act 204 of 2008, eff. Jan. 1, 2009). Donation inter vivos is defined as contract by which person gratuitously divest himself at present and irrevocably of thing given in favor of another, who accepts it. (C. C. 1468, as am'd Act 204 of 2008, eff. Jan. 1, 2009). Donations inter vivos may be purely gratuitous, with no other motive than to bestow gratuity, or they may be burdened with obligation on donee that results in material advantage to donor, or they may be made to recompense for services rendered that are susceptible of being measured in money. (C. C. 1523, 1524, as am'd Act 204 of 2008, eff. Jan. 1, 2009). Generally, donations inter vivos must be in authentic act (executed before notary and two witnesses) identifying donor, donee and property (C. C. 1531, as am'd Act 204 of 2008, eff. Jan. 1, 2009), but manual delivery of corporeal movables is exempt from form requirement and incorporeal movables may also be donated in form necessary for their endorsement or delivery. (C. C. 1533, 1540, as am'd Act 204 of 2008, eff. Jan. 1, 2009). Donations burdened with obligation or in recompense for services rendered also do not require authentic form unless cost of performing obligation or amount of past services rendered is less than two-thirds value of thing donated. (C. C. 1523, 1524, as am'd Act 204 of 2008, eff. Jan. 1, 2009). Donation may contain charges or conditions, so long as not contrary to law or good morals. (C. C. 1525, as am'd Act 204 of 2008, eff. Jan. 1, 2009). Donation can only have as its object present property of donor, and is null as to any future-acquired property. (C. C. 1526, as am'd Act 204 of 2008, eff. Jan. 1, 2009). Donation is null if made on condition fulfillment of which depends solely on will of donor. (C. C. 1527, as am'd Act 204 of 2008, eff. Jan. 1, 2009). Donation is null if burdened with obligation imposed on donee to pay debt and charges other than those existing at time of donation, unless debt or charges are expressed in act of donation. (C. C. 1528, as am'd Act 204 of 2008, eff. Jan. 1, 2009). Donor may stipulate that thing given be returned to him, either if he survives donee or if he survives donee and descendants of donee. (C. C. 1529, as am'd Act 204 of 2008, eff. Jan. 1, 2009). If property given is so returned, it returns free of any alienation, lease or encumbrance made by donee or his successors, but this rule is inapplicable to good faith transferees for value; in that instance, donee or his successors are responsible for value of loss suffered by donor. (C. C. 1530, as am'd Act 204 of 2008, eff. Jan. 1, 2009). Donation is ineffective until accepted by donee (not his heirs or creditors) during lifetime of donee and donor, which acceptance may be in act of donation or thereafter in writing; corporeal possession of donated corporeal movable constitutes acceptance. (C. C. 1534, 1536, 1537. as am'd Act 204 of 2008, eff. Jan. 1, 2009). Donation may be revoked for statutory grounds of ingratitude on part of donee (attempting to take life of donor and being guilty toward donor of cruel treatment, crimes or grievous injuries), or for non-fulfillment of condition or non-performance of other charges on donation. (C. C. 1559-1569, as am'd Act 204 of 2008, eff. Jan. 1, 2009).

21.08 DOWER:

As it exists at common law is unknown in Louisiana. See category 13 Estates and Trusts, topic 13.07 Descent and Distribution, subhead Surviving Spouse.

21.09 ESCHEAT:

See topic 21.01 Absentees; categories 3 Business Regulation and Commerce, topic

Banks and Banking, subhead Unclaimed Deposits; and Estates and Trusts, topic Descent and Distribution, subhead Escheat.

21.10 LANDLORD AND TENANT:

Lease is synallagmatic contract by which one party (lessor) binds himself to give other (lessee) use and enjoyment of thing for term in exchange for rent that lessee binds himself to pay. Consent of parties as to thing and rent is essential but not necessarily sufficient for contract of lease. (C.C. 2668, as am'd Act 821 of 2004, eff. Jan. 1, 2005). Leases of movables governed by Lease of Movables Act, providing comprehensively for definition and regulation of financed leases as defined; permissible charges; remedies after default, including limited self-help repossession; insurance and miscellaneous requirements. (La.R.S. 9:3301-3342, as am'd Act 592 of 1985, eff. July 13, 1985). Contract to enter into lease at future time is enforceable by either party if there was agreement as to thing leased and rent, unless parties understood that contract would not be binding until reduced to writing or until its other terms were agreed upon. (C.C. 2670, as am'd Act 821 of 2004, eff. Jan. 1, 2005).

Essential Elements of Lease.

All things, corporeal or incorporeal, that are susceptible of ownership may be object of lease, except those that cannot be used without being destroyed by that very use, or those lease of which is prohibited by law. (C.C. 2673, as am'd Act 821 of 2004, eff. Jan. 1, 2005). Lease of thing that does not belong to lessor may nevertheless be binding on parties to lease. (C.C. 2674, as am'd Act 821 of 2004, eff. Jan. 1, 2005). Rent may consist of money, commodities, fruits, services or other performances sufficient to support onerous contract. (C.C. 2675, as am'd Act 821 of 2004, eff. Jan. 1, 2005). Rent shall be fixed by parties in sum certain or determinable, or by third person designated by them. (C.C. 2676, as am'd Act 821 of 2004, eff. Jan. 1, 2005). When parties to agricultural lease agree that rent will consist of portion of crops, that portion is considered at all times property of lessor. (C.C. 2677, as am'd Act 821 of 2004, eff. Jan. 1, 2005). Lease shall be for term, duration of which may be agreed to by parties or supplied by law; term may be fixed or indeterminate; it is fixed when parties agree on termination date or termination upon occurrence of designated event; it is indeterminate in all other cases. (C.C. 2678, as am'd Act 821 of 2004, eff. Jan. 1, 2005). Term may not exceed 99 years; if longer term provided, it is reduced to 99 years. (C.C. 2679, as am'd Act 821 of 2004, eff. Jan. 1, 2005). If parties have not agreed on term, then law provides that agricultural leases are year to year, any other lease of immovable or of movable to be used as residence are month to month, and lease of any other movables are day to day. (C.C. 2680, as am'd Act 821 of 2004, eff. Jan. 1, 2005).

Form of Leases.

Lease may be oral or written; lease of immovable not effective against third persons until filed in public records. (C.C. 2681, as am'd Act 821 of 2004, eff. Jan. 1, 2005). Extract of lease may be recorded rather than entire lease; extract must include names and signatures of lessor and lessee, date of execution, brief description of leased premises, term, and reference to renewal or purchase options, if any. (La.R.S. 9:2721, as am'd Act 974 of 1992; La.R.S. 44:104 as am'd Act 8 of 2007, eff. June 18, 2007). Property description must include municipal number, if any. (La.R.S. 35:17, added Act 578 of 1985).

Obligations of Lessor and Lessee.

Principal obligations of lessor are: (1) Delivery of thing to lessee; (2) maintenance of thing in condition suitable for purposes for which it was leased; and (3) protection of lessee in peaceful possession for duration of lease. (C.C. 2682, as am'd Act 821 of 2004, eff. Jan. 1, 2005). Principal obligations of lessee are: (1) Payment of rent in accordance with agreed terms; (2) use of things as prudent administrator in accordance with purpose for which it was leased; and (3) return of thing at end of lease in condition that is same as it was when delivered, except for normal wear and tear or as otherwise provided by law. (C.C. 2683, as am'd Act 821 of 2004, eff.

Jan. 1, 2005). Elaborations of these obligations are provided by statute. (C.C. 2684-2688, as am'd Act 821 of 2004, eff. Jan. 1, 2005). Lessor is bound to pay all taxes, assessments and other charges that burden thing leased, except those arising from use of thing by lessee. (C.C. 2689, as am'd Act 821 of 2004, eff. Jan. 1, 2005). Lessee of dwelling liable for reasonable attorney fees for failure to pay rent within 20 days following delivery of written demand. (La.R.S. 9:3259, added Act 478 of 1978).

Alterations, Repairs and Additions.

During lease, lessor may not make any alterations in thing leased. (C.C. 2690, as am'd Act 821 of 2004, eff. Jan. 1, 2005). Lessor is bound to make all repairs that become necessary to maintain thing in condition suitable for purpose for which it was leased, except those for which the lessor is responsible. (C.C. 2691, as am'd Act 821 of 2004, eff. Jan. 1, 2005). Lessee is bound to repair damage to thing caused by his fault or that of persons who are on premises or using thing with his consent, and to repair any deterioration resulting from his or their use to extent it exceeds normal or agreed use of thing. (C.C. 2692, as am'd Act 821 of 2004, eff. Jan. 1, 2005). If during lease repair is required that cannot be postponed until end of lease, lessor has right to make repair even if loss or inconvenience is caused; reduction in rent or dissolution may be obtained by lessee. (C.C. 2693, as am'd Act 821 of 2004, eff. Jan. 1, 2005). If lessor fails to make necessary repairs in reasonable time, lessee may cause them to be made and seek reimbursement. (C.C. 2694, as am'd Act 821 of 2004, eff. Jan. 1, 2005).

Lessor's Warranties.

Lessor warrants suitability for purpose leased and absence of vices and defects that would prevent its use for that purpose. (C.C. 2696, as am'd Act 821 of 2004, eff. Jan. 1, 2005). Lessee may, by stipulation in lease, exempt lessor from liability for unknown defects. (La.R.S. 9:3221). Warranty includes defects not known to lessor; but if lessee knows of them and fails to notify lessor, lessee's recovery for breach of warranty may be reduced accordingly. (C.C. 2697, as am'd Act 821 of 2004, eff. Jan. 1, 2005). Warranty extends in residential lease to all persons residing in leased premises. (C.C. 2698, as am'd Act 821 of 2004, eff. Jan. 1, 2005). Warranties may be waived, but only by clear and unambiguous language brought to attention of lessee. (C.C. 2699, as am'd Act 821 of 2004, eff. Jan. 1, 2005). Lessor also warrants peaceful possession as defined (C.C. 2700, as am'd Act 821 of 2004, eff. Jan. 1, 2005), but that does not extend to protection against disturbance caused by person who does not claim right to leased thing (C.C. 2702, as am'd Act 821 of 2004, eff. Jan. 1, 2005).

Payment of Rent.

Details of due dates for rent, penalties for nonpayment, abatement of rent for unforeseen loss of crops in agricultural lease, and loss of crop rent are provided by statute. (C.C. 2703-2706, as am'd Act 821 of 2004, eff. Jan. 1, 2005).

Lessor's Security Rights.

To secure payment of rent and other obligations arising from lease of immovable, lessor has privilege on lessee's movables found in or on leased property; in agricultural lease, lessor's privilege also encompasses fruits produced by land. (C.C. 2707, as am'd Act 821 of 2004, eff. Jan. 1, 2005). Lessor's privilege extends to movables of any sublessee but only to extent that sublessee is intended to sublessor at time lessor exercises his right. (C.C. 2708, as am'd Act 821 of 2004, eff. Jan. 1, 2005). Lessor may also lawfully seize movable of third person if located in or on leased property, unless lessor knows that movable is not property of lessee; third person may recover movable by establishing his ownership, but if he fails to do so, movable may be sold as if it belonged to lessee. (C.C. 2709, as am'd Act 821 of 2004, eff. Jan. 1, 2005). Lessor may seize movables on which he has privilege while they are in or on leased property, and for 15 days after they have been removed if they remain property of lessee and can be identified. (C.C. 2710, as am'd Act 821 of 2004, eff. Jan. 1, 2005).

Transfer of Interest by Lessor or Lessee.

Transfer of leased thing does not terminate lease unless contrary has been agreed upon between parties. (C.C. 2711, as am’d Act 821 of 2004, eff. Jan. 1, 2005). Third person who acquires immovable subject to unrecorded lease is not bound by that lease; in absence of contrary lease provision, lessee has action against lessor for any loss suffered as result of transfer in those circumstances. (C.C. 2712, as am’d Act 821 of 2004, eff. Jan. 1, 2005). Lessee has right to sublease, or assign or encumber his rights, unless expressly prohibited in lease. (C.C. 2713, as am’d Act 821 of 2004, eff. Jan. 1, 2005).

Termination and Dissolutions.

If leased thing is lost or totally destroyed, without fault of either party, or if it is expropriated, lease terminates and neither party owes damages to other. (C.C. 2714, as am’d Act 821 of 2004, eff. Jan. 1, 2005). If without fault of lessee, property is partially destroyed, lost or expropriated, diminution in rent or dissolution of lease may be available. (C.C. 2715, as am’d Act 821 of 2004, eff. Jan. 1, 2005). Lease granted by usufructuary terminates upon termination of usufruct; lessor is liable to lessee for any damages incurred by termination if lessor failed to disclose status as usufructuary. (C.C. 2716, as am’d Act 821 of 2004, eff. Jan. 1, 2005). Lease does not terminate by death of lessor of lessee or by cessation of existence of juridical person that is party to lease. (C.C. 2717, as am’d Act 821 of 2004, eff. Jan. 1, 2005). Lease in which parties have reserved right to terminate before end of term may be so terminated by giving required notice. (C.C. 2718, as am’d Act 821 of 2004, eff. Jan. 1, 2005). Lease may be dissolved if either party fails to live up to obligations of lease. (C.C. 2719, as am’d Act 821 of 2004, eff. Jan. 1, 2005). Leases with fixed term terminates upon expiration of term, without need of notice, unless reconduction or extension occurs as provided by law. (C.C. 2720, as am’d Act 821 of 2004, eff. Jan. 1, 2005). Lease is reconducted (extended) under certain circumstances. (C.C. 2721-2725, as am’d Act 821 of 2004, eff. Jan. 1, 2005).

Amendment to provision of lease that is made without intent to effect novation does not create new lease. (C.C. 2726, as am’d Act 821 of 2004, eff. Jan. 1, 2005).

Leases with Indeterminate Term.

Lease with indeterminate term, including reconducted lease, terminates by notice to that effect given to other party. (C.C. 2727-2728, as am’d Act 821 of 2004, eff. Jan. 1, 2005).

Security Deposit Return.

Landlord or successor must return any security deposit to lessee within one month of termination, unless all or part retained to remedy lessee’s default. (La.R.S. 9:3251-3254, as am’d Act 578 of 1985).

Seizure of Property for Rent.

When lessor sues for rent whether same is due or not, he may obtain sequestration of such property without security, and it is sufficient for him to swear that it is within lessee’s power to conceal, dispose of, or waste the property or revenues therefrom, or remove same from the parish, and thereby destroy the privilege. (C.C.P. 3571, 3572, 3575). The lessee is permitted to obtain release of sequestered property by furnishing security equal to 1¼ value of property, or 1¼ amount of claim whichever is the lesser. (C.C.P. 3507). Perishable property may be sold without advertisement or appraisement. (C.C.P. 2333, 3513). If rent paid when due, lessor must pay costs of sequestration proceeding. (C.C.P. 3572).

Dispossession.

Lessor, desiring to obtain possession of leased premises on termination of lease by limitation, nonpayment of rent or other breach, must demand in writing that tenant remove within five days from delivery of notice. If lease has no definite term, notice must be given five days before termination. If lease is for definite term, notice must be given 30 days before end of term. (C.C.P. 4701). Lessee may waive notice requirements in writing in lease, and if so, lessor may institute eviction proceedings without notice. (C.C.P. 4701, as am'd Act 713 of 1981). If tenant refused to comply with notice, or has waived requirement of notice, lessor may cause him to be cited summarily to show cause, within two days after service of rule, why he should not be condemned to deliver up possession. (C.C.P. 4731, 4732). Upon reasonable belief that premises are abandoned as defined, lessor may take possession after notice and before court order. (C.C. 4731, as am'd Act 684 of 1991). If on trial of rule, tenant is adjudged to deliver up possession but does not comply within 24 hours thereafter, justice or judge who rendered judgment must forthwith issue his warrant directed to constable, marshal or sheriff, commanding him forthwith to deliver to lessor full possession by clearing premises of any property therein, in presence of two witnesses. On obtaining warrant, officer may, if necessary, break open doors, windows or gates of leased premises in order to put lessor in possession. (C.C. 2713, as am'd Act 289 of 2001; C.C.P. 4733, 4734; La.R.S. 9:3322, as am'd Act 344 of 1990).

Uniform Residential Landlord and Tenant Act.

Not adopted.

21.11 LEASES:

See topic 21.10 Landlord and Tenant.

21.12 [RESERVED]

21.13 PERPETUITIES:

The Louisiana law does not countenance the suspension of absolute ownership of or of the power to alienate real or personal property. The creation of future estates is not permitted, but all estates must vest immediately. (C. C. 1520). Private educational, charitable or religious trusts and mixed educational, charitable and religious and private trusts are authorized. (La.R.S. 9:1721 et seq.). A trust instrument may provide for substitute principal beneficiaries, including a class, if principal beneficiary should die intestate and without descendants. (La.R.S. 9:1972-1977, am'd Act 160 of 1974).

21.14 PERSONAL PROPERTY:

Tenancy by the entirety in personalty not permitted by laws of Louisiana. (C. C. 494). Leases of movable (personal) property are governed by special provisions. (La.R.S. 9:3302 et seq., as am'd Act 213 of 1986). Civil Code articles govern classification of property as movable (personal) or immovable (real). (C.C. 466, 508, as am'd Act 632 of 2008, eff. July 1, 2008).

21.15 POWERS OF ATTORNEY:

A mandate, procuration or power of attorney is an act by which one person gives power to another to transact for him and in his name, one or several affairs. (C. C. 2985).

The object of the mandate must be lawful, and the power conferred must be one which the principal himself has a right to exercise. (C. C. 2987).

The procuration is gratuitous unless there has been a contrary agreement. (C. C. 2991).

A power of attorney may be given, either by a public act or by a writing under private signature, even by letter. It may also be given verbally, but of this testimonial proof is admitted only conformably to the rules applicable to ordinary contracts. (C. C. 2992).

It may be either general for all affairs or special for one affair only. (C. C. 2994). Person may by power of attorney nominate curator of his person, his property or both, should he later be interdicted. Court must appoint person so nominated unless otherwise disqualified or deemed not in best interest of interdict. (C.C.P. 4550, as am'd Act 304 of 1981).

The power must be express and special for the following purposes: to sell or to buy; to incumber or hypothecate; to accept or reject a succession; to contract a loan or acknowledge a debt; to draw or indorse bills of exchange or promissory notes; to compromise or refer a matter to arbitration; to make health care decisions; to make transaction in matters of litigation; and in general where things to be done are not merely acts of administration, or such as facilitate such acts. Neither property nor its location need be specifically described. (C. C. 2997, as am'd Act 184 of 1990).

Action to set aside document containing statement that power of attorney is attached thereto, on ground that executing party was without authority or that power of attorney is otherwise invalid, is prescribed by ten years from date on which document was recorded, even though power of attorney is not actually attached to recorded document. (La.R.S. 9:5682, added Act 481 of 1982).

Expiration of Agency.

Power of attorney terminates: When revoked by principal, when agent resigns or renounces power, upon death of principal or agent, upon issuance of order of relief in bankruptcy in favor of principal or agent, upon interdiction of agent, upon qualification of curator after interdiction of principal, upon occurrence of resolutory condition stipulated in power, or when purpose for which power given is destroyed or disposed of by principal. Unless otherwise provided by its terms, power is not terminated by principal's incapacity, disability or other condition making express revocation impossible or impractical. Persons entitled to protection of public records may rely upon recorded power until terminated of record. (C. C. 3027, as am'd Act 303 of 1981).

If principal die or lose civil rights, acts done by agent before knowledge of such fact are valid and bind principal. (C. C. 3032).

Express mandate from one spouse to another authorizing transactions with specified creditor may be revoked only by delivery of written revocation. (La.R.S. 9:3850, added Act 511 of 1978).

Conveyance or Mortgage by Attorney.

An act of sale or mortgage of real estate may be executed by an attorney in fact. The power of attorney in such a case must be express (C. C. 2997), but need not be either by authentic act or by act under private signature duly acknowledged, and may be given any sort of writing, even by letter (C. C. 2992). Nevertheless it is customary to grant such a power of attorney by authentic act or act under private signature duly acknowledged. A suggested form of such authentic act is as follows:

Form

UNITED STATES OF AMERICA

STATE OF . . . .

COUNTY OF . . . .

BE IT KNOWN, That on this . . . . . . day in the month of . . . . . ., in the year . . . . . ., BEFORE ME, ..., a Notary Public duly commissioned and qualified in and for the State and County aforesaid, therein residing and in the presence of the witnesses hereinafter undersigned,

PERSONALLY CAME AND APPEARED:

. . . . . ., of full age of majority and a resident of the City of . . . . . ., County of . . . . . ., State of . . . . . ., who declared that he has made and appointed and does by these presents make, nominate, ordain, authorize, constitute and appoint, and in his place and stead depute and put . . . . . . to be appearer's true and lawful attorney in fact, giving and by these presents granting unto the said attorney full power and authority for appearer, and in appearer's name and behalf, and to appearer's use

(Here are included powers granted. Power to sell or mortgage real estate must be specifically granted and description of real estate must be set forth in Power of Attorney)

and generally to do and perform all and every other act, matter and thing whatsoever as shall or may be requisite or necessary in the premises, as in the sole discretion of said attorney may seem requisite or proper, all as fully, amply and effectually, and to all intents and purposes with the same validity as if all and every such act, matter, or thing, were or had been particularly stated, expressed and especially provided for, or as appearer could or might do if personally present; also with full power of substitution and revocation; and the said appearer hereby agrees to ratify and confirm all and whatsoever the said attorney shall lawfully do or cause to be done by virtue of this Act of Procuration.

Thus done and passed in my notarial office in the City of . . . . . ., County of . . . . . ., State of . . . . . ., on the day and date aforesaid, in the presence of the undersigned competent witnesses, who hereunto sign their names as such, together with the said appearer and me Notary, after due reading of the whole.

WITNESSES:

. . . .

. . . .

. . . .

APPEARER

. . . . . .

NOTARY PUBLIC

21.16 REAL PROPERTY:

This state does not recognize any of common law estates, such as tenancy in common, joint tenancy, tenancy by entirety, and the like, law being in this respect based on French civil law and not English common law. "Real property" is referred to in this state as "immovable property" in keeping with civilian background of state.

There is, however, in this state a species of ownership which is similar to the common law life estate. That is the usufruct that a person has on property, of which the naked ownership is vested in another. Where two or more persons own in common, such ownership is termed as ownership in indivision or in joint ownership.

Ownership in Indivision.

Ownership of same thing by two or more persons is ownership in indivision. In absence of other provisions of law or juridical act, shares of all co-owners are presumed to be equal. (C.C. 797, added Act 990 of 1990, eff. Jan. 1, 1991). Co-owners share fruits and products of things held in co-ownership in proportion to their ownership; when such fruits or products are produced by co-owner, others are entitled to shares after deduction of costs of production. (C.C. 798, added Act 990 of 1990, eff. Jan. 1, 1991). Co-owner is liable to other co-owners for any damage to thing held in indivision through his fault. (C.C. 799, added Act 990 of 1990, eff. Jan. 1, 1991). Co-owner may take necessary steps for preservation of thing without concurrence of any other co-owner. (C.C. 800, added Act 900 of 1990, eff. Jan. 1, 1991). Use and management of thing is determined by agreement of all co-owners. (C.C. 801, added Act 990 of 1990, eff. Jan. 1, 1991). Co-owner may freely lease, alienate or encumber his share, but consent of all co-owners is required for similar actions as to entire thing. (C.C. 805, added act 990 of 1990, eff. Jan. 1, 1991). Reimbursement of expenses of one co-owner in proportion to shares of other owners is required. (C.C. 806, added Act 990 of 1990, eff. Jan. 1, 1991).

Partition.

No one may be compelled to hold thing in indivision with another unless contrary has been provided by law or juridical act, and any co-owner has right to demand partition of thing held in indivision; partition may be excluded by agreement for up to 15 years. (C.C. 807, added Act 990 of 1990, eff. Jan. 1, 1991). Partition may not be obtained when use of thing is indispensable for enjoyment of another thing owned by one or more of co-owners. (C.C. 808, added Act 990 of 1990, eff. Jan. 1, 1991). Mode of partition may be determined by agreement of all co-owners, but in absence of such agreement, co-owner may demand judicial partition. (C.C. 809, added Act 990 of 1990, eff. Jan. 1, 1991). Partition may be in kind, by licitation or by private sale. (C.C. 810-811, added Act 990 of 1990, eff. Jan. 1, 1991). When property is susceptible of partition by licitation or private sale under C.C. 811, co-owners with aggregate interest of 15% or less may petition court for private sale at which they may buy property according to their pro rata share at price determined by court-appointed appraiser. (La.R.S. 9:1113, added Act 156 of 2003, eff. June 2, 2003). Real rights are not affected by partition in kind or by licitation; when thing is partitioned in kind, real right burdening share of co-owner attaches to part of thing allotted to him. (C.C. 812-813, added Act 990 of 1990, eff. Jan. 1, 1991). Extrajudicial partition may be rescinded on account of lesion if value of part received by co-owner is less by more than one fourth of fair market value of portion he should have received. (C.C. 814, added Act 99 0 of 1990, eff. Jan. 1, 1991). Action for partition is not subject to any prescriptive period. (C.C. 817, added Act 990 of 1990, eff. Jan. 1, 1991).

Building restrictions are governed by C. C. 775-783, added Act 310 of 1980). Building restrictions terminate as provided in act which establishes them. In absence of such provision, restrictions may be wholly or partially amended or terminated by agreement of owners representing more than one-half of land area affected if restrictions have been in effect for 15 years or more, or by agreement of owners representing two-thirds of affected land area and two-thirds of number of owners of affected land if restrictions have been in effect for more than ten years. (C.C. 780, as am’d Act 129 of 1983).

Civil Rights Act for Handicapped prohibits discrimination against handicapped persons with respect to all forms of real estate transactions. Handicapped persons may bring action for all relief including compensatory damages, attorneys’ fees and costs. Action must be brought within 180 days from date of discovery but not in excess of one year from date of discriminatory act. (La.R.S. 46:2251-2256, added Act 665 of 1980).

Condominiums are permitted under Louisiana Condominium Act. (La.R.S. 9:1121-1142, as am’d Act 552 of 1983).

Real estate investment trusts are authorized. (La.R.S. 12:491-493).

See also topics 21.05 Curtesy, Deeds, Dower, Landlord and Tenant; categories 2 Business Organizations, topic Associations; Business Regulation and Commerce, topic Consumer Protection; Civil Actions and Procedure, topic Partition; Debtor and Creditor, topic Homesteads; Family, topic Husband and Wife; Mortgages, topic Mortgages of Real Property; Documents and Records, topic Records.

21.17 TRUST DEEDS:

See category 20 Mortgages, topic 20.04 Mortgages of Real Property.

22 TAXATION

—Scope —

General supervision is in Collector of Revenue (La.R.S. 47:651) and in Louisiana Tax Commission as to property taxes (La.R.S. 47:1837, as am'd Act 385 of 1977). Taxpayer's Bill of Rights exists. (La.R.S. 47:15, added Act 136 of First Ex. Sess. of 1998, eff. May 5, 1998.

22.01 ADMINISTRATION:

New Industry Exemption.

Upon recommendation of State Board of Commerce and Industry, Louisiana Tax Commission may enter into contracts with new manufacturing establishments under certain conditions, granting exemption from corporation franchise tax, corporation income tax, sales and use tax, and other taxes imposed on like business. (La.R.S. 47:3201-3206, as am'd Act 381 of 1976).

Various Business Tax Credits.

Movie production company entitled to tax credit for employing Louisiana residents in production; 10% of total aggregate payroll when total production costs in Louisiana are between $300,000 and $1 million, and 20% of that payroll when over $1 million; applicable to any corporate income or franchise tax. (La.R.S. 47:1125.1, added Acts 1 and 6, 1st Ex. Sess., 2002, eff. July 1, 2002). Tax credits recognized for certain "green job industries" as defined, contingent upon state's receipt of certain funds from U.S. Dept. of Energy. (La.R.S. 47:6035, added by Act 520 of 2009).

Penalties.

With reference to taxes imposed in T. 47, Subtitle II, §§ 21-1700 (income, sales, occupational license, vehicle registration license, corporation franchise, general severance, reforestation severance, royalty gas excise tax, petroleum products, tobacco, soft drinks, alcoholic beverages, utilities, chain store, power use and gift taxes), interest is added to delinquent taxes at rate of 1¼% per month from due date until paid. (La.R.S. 47:1601, as am'd Act 853 of 1982). For failure to timely file returns for such taxes, penalty of 5% per month not to exceed 25% is added. (La.R.S. 47:1602). If return is filed with less than full remittance, penalty is assessed only on amount not paid. (La.R.S. 47:1602, as am'd Act 43 of 1986, eff. Oct. 1, 1986). Delinquencies bearing penalties under $5,000 not due to negligence of taxpayer may be waived by secretary of Revenue Department; over that amount, approval of tax appeal board required. (La.R.S. 47:1603, as am'd Act 43 of 1986, eff. Oct. 1, 1986). Additionally, fine of not more than $500 or imprisonment for not more than six months may be imposed if income tax return is not filed within 90 days after final date for filing. (La.R.S. 47:107). For failing to file return or for making incorrect return under circumstances indicating willful negligence or intentional disregard of rules and regulations, but with no intent to defraud, there is additional charge of 5% of tax due or $10, whichever is greater. (La.R.S. 47:1604.1). If return is false, fraudulent or grossly incorrect under circumstances indicating intent to defraud, penalty of 50% of tax found due is charged. (La.R.S. 47:1604). Wilful failure to report or wilful false return can result in criminal penalties of $1,000 or imprisonment for not more than one year or both. (La.R.S. 47:1642). If tax is collected by distraint procedure, there is additional $10 penalty. (La.R.S. 47:1601-1605.1).

Proposed Settlements.

In disputes with Revenue Department over taxes, written settlement offers may be submitted to secretary, who has 90 days to respond; if no response is timely received, interest running on disputed amount is abated from date of offer to time response is received. (La.R.S. 47:1576.1, added Act 119 of 2006, eff. June 2, 2006).

Ad valorem taxes bear interest at rate of 10% per annum from date such taxes are due until paid. (La.R.S. 47:2101, as am'd Act 615 of 1974).

Unemployment compensation taxes bear interest at rate of 1% per month from due date and penalty on both contributions and interest of 5% for each month, not to exceed aggregate penalty of 25%. (La.R.S. 23:1543).

Parishes, municipalities and other taxing authorities impose various other penalties with respect to specific taxes levied by them.

Suits for Refund of Tax Paid Under Protest.

Suits for refund of taxes paid under protest, after appropriate notice to collector, may be brought only in state court. (La.R.S. 47:1576[B] and [C], as am'd Act 245 of 1983).

22.02 ALCOHOL, BEVERAGES AND TOBACCO TAXES:

Alcoholic beverages tax is imposed by La.R.S. 26:341-741. Surcharge imposed by Act 7 of 1st Ex. Sess. of 1984 repealed by Act 855 of 1985.

Soft Drink and Syrup Tax.

Tax of 2¾% of wholesale price of bottled soft drinks, and soft drink syrups, reduced to 2½ % on July 1, 1981. Tax is collected by means of stamps or crowns affixed to taxable articles. (La.R.S. 47:881, as am'd Act 788 of 1980). Unadulterated fruit juices exempt from tax. (La.R.S. 47:882 and 883, am'd Act 116 of 1973).

Tobacco tax is imposed by La.R.S. 47:841-869, as am'd Act 21 of 2002, eff. July 1, 2002.

22.03 BUSINESS TAXES:

Business License Taxes or Fees.

See categories 3 Business Regulation and Commerce, topics Factors, Licenses, Business and Professional; Insurance, topic Insurance Companies.

Chain Store Tax.

Chain stores operating in Louisiana are subject to an annual graduated license tax by parishes and/or municipalities at a rate fixed by total number of units in chain, whether or not located in parish, municipalities or Louisiana, at following rates: not more than 10 stores, $10 per store; 11 to 35 stores, $15 per store; 36 to 50 stores, $20 per store; 51 to 75 stores, $25 per store; 76 to 100 stores, $30 per store; 101 to 125 stores, $50 per store; 126 to 150 stores, $100 per store, 151 to 175 stores, $150 per store; 176 to 200 stores, $200 per store; 201 to 225 stores, $250 per store; 226 to 250 stores, $300 per store; 251 to 275 stores, $350 per store; 276 to 300 stores, $400 per store; 301 to 400 stores, $450 per store; 401 to 500 stores, $500 per store; more than 500 stores, $550 per store. (La.R.S. 47:10, added Act 487 of 1975).

22.04 CORPORATE TAXES:

Corporation Franchise Tax.

See category 2 Business Organizations, topic 2.03 Corporations. Statute of limitations on actions by state concerning returns suspended if there is failure to file return. (La.R.S. 47:1580[C], added Act 1348 of 1997, eff. July 15, 1997 and applicable to tax periods beginning after Dec. 31, 1997).

22.05 EMPLOYMENT TAXES:

Unemployment compensation tax is imposed on employers who in any calendar quarter paid wages of $1,500 or more or who employed at least one individual for some portion of a day in any 20 different calendar weeks and others who elect to come within act. (La.R.S. 23:1472). Tax rate varies based upon employer’s reserve ratio and fund factor. (La.R.S. 23:1536). Employees are not required to contribute. All Louisiana employers, regardless of number of employees, must make initial report of status and number of employees and must also give notice of termination or change of business. Employers subject to tax must make quarterly returns and pay tax to Administrator of Employment Security, Department of Labor, Baton Rouge. Checks in payment should be made payable to “Office of Employment Security.”

22.06 ENVIRONMENTAL TAXES:

Hazardous Waste Tax.

Tax by weight is imposed on disposal and storage of hazardous waste as defined. One-time tax of $2 per dry weight ton of hazardous waste content of Louisiana land was imposed as of July 1, 1984. For future waste disposal or storage more than 90 days for incineration at sea, tax of $30 per dry weight ton is imposed for waste disposed at sites on which generator’s act or process produced waste and $60 per dry weight ton for waste disposed at other sites. Tax on “extremely hazardous waste” as defined is $100 per dry weight ton. Reciprocal tax imposed: Same tax as in generating state as minimum tax on transportation of such materials also imposed. (La.R.S. 30:1149.21 and La.R.S. 47:821-823, am’d Act 391 of 1990, eff. Aug. 1, 1990).

22.07 ESTATE TAX:

See topic 22.07A Estate Transfer Tax.

22.07A ESTATE TRANSFER TAX:

Estate Tax.

Estate transfer tax fixes an additional tax to maximum amount of credit allowed by U.S. Internal Revenue Code for state death taxes in determination of federal estate taxes, so that difference between such credit and amount of state inheritance tax (if less) must be paid to state. (La.R.S. 47:2431, et seq., as am’d Act 315 of 1972 and Act 202 of 1973). Estate transfer tax return must be filed where estate tax transfer tax is due or where value of net estate amounts to $60,000 or more, within nine months after date of death or prior to filing federal return, whichever comes first. (La.R.S. 47:2436, am’d Act 202 of 1973).

Apportionment Against Inter Vivos Dispositions.

Estate tax apportionment law enacted. (La.R.S. 9:2431-2438).

Interstate Co-operation.

No statutory authorization.

Manufacturers tax credit for gas consumption allowed at rate of 2¢ per 1,000 cubic feet in excess of 25,000 cubic feet, to certain manufacturers and municipalities using gas in operation of a manufacturing establishment. (La.R.S. 47:7, am’d by Act 117 of 1976).

22.08 GASOLINE AND SPECIAL FUELS TAXES:

Gasoline tax is imposed by La.R.S. 47:711-727, 714.1, am’d Act 11 of 1st Ex. Sess. of 1984, 771-788 and 1681 et seq.

Special fuels tax is imposed by La.R.S. 47:801-815, as am’d Act 475 of 1985. Gasohol as defined is exempt. (La.R.S. 47:802.1, added Act 793 of 1979).

22.09 GIFT TAX:

Gift tax is levied on all gifts inter vivos and on transfers for inadequate consideration to extent of value in excess of consideration. Annual exclusion: $10,000 per donee (La.R.S. 47:1205[A], as am’d Act 773 of 1985, eff. after Dec. 31, 1985); lifetime exemption: $30,000. Rate of tax: 2% on taxable gifts up to $15,000; 3% on taxable gifts exceeding $15,000. In years after Dec. 31, 1991, all gifts to spouse are exempt from gift tax. (Act 236 of 1987). Tax is computed on total of gifts, in excess of exemptions, during tax year and all preceding tax years, and tax for particular year is excess of tax so computed over gift taxes paid for previous years. Each donor and donee must make return to Collector of Revenue and tax thereon paid for gifts made during preceding calendar year on or before Apr. 15 of each year. Collector may accept federal extensions to extend time to file state return. (La.R.S. 47:1208, as am’d Act 104 of 1985). If donor fails to pay tax it is collectible from donee within 30 days after notice of assessment is served on him. (La.R.S. 47:1201-1212, am’d Act 569 of 1972). Gifts by either spouse to third parties is considered made half by each for purposes of gift tax. (La.R.S. 47:1205[C], added Act 201 of 1983). Valuation may be made by Collector according to IRS table for valuation of usufruct. (La.R.S. 47:1203[A][2], added Act 10 of 1994, eff. July 1, 1994).

22.10 [RESERVED]

22.11 INCOME TAX:

Income tax on individuals is imposed at following rates: 2% on amount by which net income exceeds credits and exemptions applicable but does not exceed $12,500; 4% on next $37,500 or part thereof (excess over $12,500 up to $50,000); 6% on excess over $50,000. (La. R.S. 47:32(A), as am’d Act 396 of 2008, eff. Jan. 1, 2009). State individual and joint income tax schedule cannot exceed rates set forth in La.R.S. 47:32 on Jan. 1, 1974; and federal income taxes paid must be allowed as a deduction (Const., art. 7, § 4), although federal income tax paid deduction may be, and has been limited by statute (La.R.S. 47:293, as am’d Act 24 of 2002, eff. for tax years beginning after Dec. 31, 2001). Nonresidents are taxed on income earned within or derived from Louisiana sources. (La.R.S. 47:32). Combined personal exemptions and standard deductions are: Single person $6,000 ($4,500 after Dec. 31, 1982); married joint return and qualified surviving spouse, $12,000 ($9,000 after Dec. 31, 1982); married separate return, $6,000 ($4,500 after Dec. 31, 1982), and head of household, $12,000 ($9,000 after Dec. 31, 1982); each allowable exemption for dependents, $1,000; taxpayer who is blind, sustained loss of one or more limbs, is mentally retarded or is deaf, additional $1,000; but beginning with taxable years after Dec. 31, 1982, combined personal exemption and standard deduction is deducted from lowest (2%) tax bracket and any excess is deducted from middle (4%) bracket. (La.R.S. 47:79, and 294 and 296, as am'd Act 1, 2d Extraordinary Session, 1983). $6,000 of annual retirement income received by persons 65 or over is exempt from state income tax. (La.R.S. 47:44.1, added Act 880 of 1981). All social security and railroad retirement income is exempt from state income tax. (La.R.S. 47:44.2, added Act 298 of 1984). Credit of $25 may be allowed per child for educational expenses (La.R.S. 47:297, added Act 209 of 1979), but this credit is regularly suspended by legislature. Exemptions of nonresidents apportioned in ratio of Louisiana income to all income. Net income of corporations is taxed at rate of 4% on first $25,000, 5% on next $25,000, 6% on next $50,000, 7% on next $100,000, 8% on excess of $200,000. (La.R.S. 47:32, as am'd Act 2 of 1977, First Extraordinary Session). Corporations are permitted credits for creation of new jobs for certain persons, with carryover provisions from Jan. 1, 1980. (La.R.S. 47:287.749 added Act 16 of 1st Ex. Sess. of 1986). Corporations are required to pay estimated tax for taxable year in specified installments if estimated tax for taxable year can reasonably be expected to be $1,000 or more. (La.R.S. 47:287.654, added Act 16 of 1st Ex. Sess. of 1986). Income received by individuals or corporations actively and primarily engaged in business of operating steamships as carriers of goods or passengers in interstate or foreign commerce or on high seas excluded from gross income and exempt. Withholding is required by every employer making payment of wages taxable by Louisiana, at rate of 1.5% of amount by which employee's wages exceed exemptions and credits unless employee provides employer with withholding exemption certificate in such form and pursuant to such regulations as prescribed by commissioner. (La.R.S. 47:112, as am'd Act 454 of 1974). Declaration of estimated tax is due from individuals whose income tax liability can reasonably be expected to exceed $200 after credit for withholding taxes. (La.R.S. 47:116, as am'd Act 502 of 1975). Partnerships must file information return. (La.R.S. 47:201, as am'd Act 459 of 1975).

Statute of limitations on actions by state concerning returns suspended if there is failure to file return. (La.R.S. 47:1580[C], added Act 1348 of 1997, eff. July 15, 1997 and applicable to tax periods beginning after Dec. 31, 1997).

Individual income tax returns are due May 15 if on calendar year basis and on 15th day of fifth month after close of fiscal year. Corporate income tax returns are due Apr. 15 if on calendar year basis and on 15th day of fourth month after close of fiscal year. (La.R.S. 47:103, as am'd Act 60 of 1986, eff. for tax years beg. after Jan. 1, 1986). Forms furnished by Collector of Revenue, to whom returns are made and taxes paid. Collector may accept extensions on federal returns as extension on state return. (La.R.S. 47:103[O], as am'd Act 104 of 1985).

Those required to file state income tax return are: (1) Individual having gross income for taxable year of $12,000 or more, regardless of tax table income; (2) individual having tax table income of $4,500 or more, if single, or married filing separate return; or (3) individual having tax table income of $9,000 or more, if married filing joint return or filing as head of household or qualifying widow or widower with dependent child. (La.R.S. 47:101[A], as am'd Act 630 of 1985). Beginning with taxable years after Dec. 31, 1982, individuals required to file tax returns are: Single or married filing separate return with tax table income of $4,500 or more; married filing joint return, head of household or qualified widow or widower with dependent child having income of $9,000 or more. (La.R.S. 47:292.1, as am'd Act 1, 2d Extraordinary Session, 1983).

Effective May 29, 1997, creation of no-return concept is authorized, permitting certain taxpayers subject to withholding to be exempt from filing personal income tax return. (La.R.S. 47:296.1).

Credits are authorized for federally-qualifying long-term care insurance premiums. (La.R.S. 47:297[M], added by Act 54 of 2002).

22.12 INHERITANCE TAX:

Inheritance tax repealed with respect to death occurring after June 30, 2004; procedures to obtain confirmation of no tax due regulated by statute, but no longer required for deaths after June 30, 2004. (C.C.P. 2953, as am'd Act 371 of 2007, eff. July 10, 2007).

22.12A MINES, MINERALS AND FISHERIES TAXES:

Severance tax is levied on timber at rate of 2¼% of value and on pulp wood at 5% of value as determined by Forestry and Tax Commissions. (La.R.S. 47:633, as am'd Act 460 of 1975). Tax of 6% in lieu of other taxes levied on forest products grown on lands reforested under contracts with Department of Conservation or Forestry Commission. (La.R.S. 56:1541-1543). Severance tax on salt water shrimp, 15¢ per barrel of 210 pounds of shrimp, providing out of state shipments, other than by common carrier, shall pay 50¢ per barrel of 210 pounds. (La.R.S. 56:505). Severance tax imposed on skins or hides taken from wild furbearing animals or alligators. (La.R.S. 56:251-276). See also category 19 Mineral, Water and Fishing Rights, topic 19.01 Mines and Minerals.

22.13 [RESERVED]

22.14 MOTOR VEHICLE TAXES:

Automobile Rental Tax.

Tax of 2½% of total amount of short-term (less than 29 days) automobile rental contract is imposed from Aug. 1, 1990 through June 30, 2000. (La.R.S. 47:550).

22.15 [RESERVED]

22.16 PROPERTY TAXES:

Taxable Property.

All real property situated in this state and all personal property having situs in this state is taxable unless specially exempted by law.

Notes, judgments, accounts and credits of nonresidents originating from business done in this state have taxable situs here. (La.R.S. 47:1702).

Effective Jan. 1, 1973, all ad valorem property taxes levied by State of Louisiana were repealed. Constitution of 1974 (art. 7, § 19) limits state taxation on property for all purposes to 5¾ mills per dollar of assessed valuation.

Rates of taxation, per dollar of assessed valuation, are limited or permitted by the Constitution as follows:

Municipal tax for all purposes, seven mills, but municipality which is exempt from payment of parish taxes or which under legislative authority, maintains its own schools, may levy up to ten mills; and rate may be increased upon majority vote for that purpose. (Const., art. 6, § 27). Additional special tax not exceeding one mill by municipalities of 75,000 or over to be used for three platoon police system authorized. Additional special tax not exceeding 1½ mills by municipalities of between 15,000 and 30,000 for municipal employees' benefits authorized except for policemen, firemen, and elective officers. This does not apply to City of New Orleans. (Const.

of 1921, art. 14, § 12, con't. as statute by Const., art. 14, § 16). Municipalities operating under home rule or special charters may levy tax on real property for constructing specified public works. (Const. Art. 6, § 36; Act 179 of 1975).

Parish Tax.

For general purposes Parishes may levy up to four mills per dollar, except that Orleans Parish may levy up to seven mills and Jackson Parish may levy up to five mills. Rates may be increased upon majority vote in election for that purpose. Except in Orleans, rate of parish tax is reduced by one-half on property in municipality having a population over 1,000 and which providing and maintaining a system of street paving. (Const., art. 6, § 26).

Special Adjustment.

Millages are adjusted upon re-assessment of properties in accordance with Art. 7, § 23 of Constitution.

Additional Taxes.

Political subdivisions may levy special taxes for public improvements if approved by majority vote. (Const., art. 6, § 32).

Delinquency and Lien.

Taxes on immovable property become delinquent after Dec. 31 of year for which levied, bearing interest thereafter at 10% per annum. (La.R.S. 47:2101). Lien expires three years after tax becomes delinquent. (La.R.S. 47:2111).

Exemptions.

(A) All public property; (B) property owned by non-profit corporation or association exclusively for religious, burial, charitable, health, welfare, fraternal or educational purposes and declared exempt from federal and state income tax, property of bona fide labor organizations, and property of lodge or club organized for charitable or fraternal purposes, of non-profit corporations promoting trade, travel and commerce, and of trade, business, industry or professional society or association, if such is owned by non-profit corporation or association organized under laws of Louisiana for that purpose, but property under (B) is not exempt if owned for commercial purpose unrelated to exempt purpose of corporation or association; (C) cash on hand or on deposit, stocks and bonds (except bank stocks, tax on which is paid by bank), obligations secured exclusively by Louisiana property and notes or other evidence thereof, loans by life insurance companies secured solely by their policies, legal reserve of domestic insurance companies, loans secured by homestead or building and loan association to its members secured only by stock of association, debts for merchandise or articles of commerce or for services, obligations of Louisiana or its political subdivisions, personal property used in homes or on loan in a public place, irrevocably dedicated burial places of individuals for themselves or their families, agricultural products owned by producer, agricultural machinery and other agricultural implements, animals on farm, property of agricultural fair associations, property of cultural, Mardi Gras carnival or civic activities without profit to owners, rights-of-way for state highways, boats using gasoline for fuel, commercial fishing vessels for human consumption, ships and oceangoing tugs, towboats and barges in international trade and domiciled in state ports (except for port dues and except as to vessels in coastal trade); (D) raw materials, goods, and other commodities imported into state from outside U.S. while on public property of port authority or docks of common carrier where such first entered state, or while imports (other than minerals and ores of same kind as mined or produced in state and manufactured articles) are held in original form in bales or other original packages, and raw materials held in bulk for new material inventory of manufacturers and processors solely for those purposes, or while held by an importer in original form and agricultural products in bulk (except those held by retailer as stock in trade); raw materials, goods and other commodities held for export to point outside of U.S.; property moving in inter-state commerce and stored while in transit through or over state for a final destination outside state; but property described in (D) must be reported to tax authorities, whether or not exempt; (E) motor vehicles used on Louisiana highways except for general or special taxes levied by municipalities or districts created by same unless exemption is allowed by municipalities; and (F) new manufacturing establishments or additions to manufacturing establishments by contract with State Board of Commerce and Industry with approval of governor, for an initial term of up to five years and a renewal term of up to five additional years. (Const., art. 7, § 21). Crop dusting aircraft are included in definition of agricultural equipment. (La.R.S. 47:1707, am'd Act 215 of 1980).

Homestead exemption is $7,500 of assessed valuation. (Const. art. 7, § 20, as am'd Act 844 of 1980 with voter approval, and Act 432 of 1981).

There is no exemption for members of armed forces.

Residential solar energy equipment may be exempted. (La.R.S. 47:1706, added Act 591 of 1978).

Assessment.

Property is assessed by percentage of fair market value specified at 10% for land, 10% for improvements for residential purposes, 25% for public service properties other than land, and 15% for other property. Agricultural, horticultural, marsh and timber land is assessed 10% of use value, and legislature may provide similarly for buildings of historic architectural importance. (Const. Art. 7, § 18, as am'd Oct., 1979). Tax Commission determines capitalization rate, not less than 12%, for determining use value of agricultural lands. (La.R.S. 47:2307A[3], as am'd Act 29 of 1981 First Extraordinary Session). Special assessment for five years may be allowed for structures in downtown, historic or economic development district. (La.R.S. 47:4311-4319, added Act 445 of 1983).

Corporations, with the exception of banks, are assessed directly on property, real and personal, owned by them.

Stock of state and national bank assessed to shareholders at domicile or location of bank at 15% of their value as determined by assessing authorities. Federal joint stock land banks assessed similarly at 15% of their value. All taxes so assessed must be paid by bank but it may collect same from shareholders or transferees. (La.R.S. 47:1967-1972).

Every taxpayer must file sworn list of his properties with tax assessor within 45 days after receipt of forms from assessor, or by Apr. 1, whichever is later, except for Jefferson Parish in which forms must be filed within 45 days after receipt from assessor. (La.R.S. 47:2324, as am'd Act 695 of 1981). Failure estops him from contesting assessment. (La.R.S. 47:1956).

Assessment rolls in parishes other than Orleans must be completed before July 1. Notice of completion is given by publication in newspaper, after which rolls are exposed in office of tax assessor for inspection and correction for 15 days. (La.R.S. 47:1987). Assessment rolls in Orleans Parish must be completed by Aug. 1 of tax year and exposed for inspection and correction for 15 days thereafter. (La.R.S. 47:1987, 1992).

Manufacturers, retailers and wholesalers whose gross merchandise sales exceed $15,000 must keep inventories of assets in state showing quantity, description and value as of Jan. 1, and record of purchases and sales, such records to be open for inspection by tax assessor or any other taxing authority. (La.R.S. 47:1961).

Assessors must place on assessment list all property subject to taxation, including merchandise or stock in trade on hand during preceding year. Inventory value of such merchandise is arrived at by computing cost or purchase price at point of origin, plus carrying charges to point of destination, and average value arrived at is basis for fixing assessable value. Crops, whether growing or gathered, are considered attached to the realty while in first hands. In assessing mercantile firms such value must be placed on stock in trade, cash and money at interest, as will represent fair average of capital employed. Nonresidents must keep in the state all books and papers pertaining to business transacted therein. (La.R.S. 47:1951-1961).

Holder of mortgage may demand separate assessment of mortgaged property. (La.R.S. 47:1963).

Louisiana Tax Commission may correct or change any assessment at any time before taxes are actually paid. (La.R.S. 47:1990).

Review of Assessment.

Objections to excessive valuation made by taxpayer during time rolls are open for inspection or correction are presented to board of reviewers for parish. (La.R.S. 47:1992, as am'd Act 75 of 1983). Appeals of determinations of board must be made to Louisiana Tax Commission. (La.R.S. 47:1992 and 1989, as am'd Acts 383 and 384 of 1977). Appeal lies from decision of tax commission to district court of parish of location of property or domicile of commission, but said suit must be instituted in 30 days. (La.R.S. 47:1989, as am'd Act 384 of 1977 and Act 609 of 1982). In Parish of Orleans public hearings during ten day period are had before Orleans Parish Board of Reviewers and revision by Louisiana Tax Commission must be completed by Oct. 15. (La.R.S. 47:1997).

Payment.

Dates of payments of ad valorem taxes vary throughout parishes. However, payment in all cases must be paid on or before Dec. 31 of year in which assessment made. If holder of mortgage requests, notice of delinquent taxes must be given an opportunity to pay taxes within 20 days after notice. (La.R.S. 47:2180.1, added Act 585 of 1984). Ad valorem taxes on movables involved in bulk sales are due ten days prior to transfer. (La.R.S. 47:2101, as am'd Act 853 of 1985).

Collection of tax imposed by state or political subdivision may not be restrained; tax declared illegal may be recovered by taxpayer. (La.R.S. 47:1989). Procedure provided for recovery of taxes paid under protest. (La.R.S. 47:1998, as am'd Act 272 of 1995, eff. July 1, 1995).

Following year in which taxes are due, collector must give notice to delinquent, advertise for sale of property in manner provided for judicial sales, and sell property on day of sale without appraisement, all as provided by law. (Const., art. 7, § 25).

Any delinquent ad valorem tax due to the state or to any political subdivision may be paid to said taxing authority in installments, and interest at the rate now or hereafter fixed by law must be collected on each installment separately at the time of the payment of such installment. (La.R.S. 47:2106).

Amount assessed by ordinance to cover improvements is due upon passage and if not paid within 30 days, parish may proceed against assessed property and owner for assessment plus 20% attorney's fees and interest to be fixed by police jury. (La.R.S. 33:3687, as am'd Act 484 of 1970).

Tax Liens.

Copy of assessment roll must be filed with Recorder of Mortgages for the Parish of Orleans by Oct. 15 of each year. In the other parishes copy of assessment roll must be filed in the office in which mortgage records of each parish are kept on or before Nov. 15 in each calendar year. (La.R.S. 47:1993). From the day the assessment roll is filed in the mortgage office it acts as a lien on each specific piece of real estate therein assessed. (La.R.S. 47:1993).

State, its subdivisions and municipalities have first lien and privilege on all personal property for payment of all taxes on personal property in all judicial or insolvency proceedings, receiverships or liquidation. (La.R.S. 47:2175).

Tax Sales.

No sale of property for taxes can be set aside for any cause except on proof of payment of taxes for which the property was sold, unless the proceeding to annul is instituted within six months from the service of notice of sale, which notice shall not be served until the time for redemption has expired, or within five years from the date of the recordation of the tax deed if no notice is given. (Const., Art. 7, § 25). Comprehensive procedures for tax sales are contained in La. R.S. 47:2121 et seq added Act 819 of 2008, eff. Jan. 1, 2009.

Redemption.

Real estate or immovable property sold for taxes can be redeemed within three years from date deed registered upon payment of tax, costs and 5% thereon, with interest at 1% per month. (Const., Art. 7, § 25 and La.R.S. 47:2171 et seq., as am'd Act 819 of 2008, eff. Jan. 1, 2009).

Municipal corporations may lease property acquired for taxes and, upon payment of all taxes, paving or local improvement assessments shall issue certificate of redemption. (La.R.S. 33:2864, am'd Act 74 of 1966).

Subrogation to Tax Lien.

After taxes become delinquent, any person may pay same and take subrogation therefor; but when payment is made by person not holding a bond or note secured by mortgage or privilege on the property, written consent of taxpayer must be filed with tax collector. Interest so acquired may be assigned, but written evidence of assignment must be filed with tax collector. Person subrogated can request sheriff in writing to sell the property for his account, and such sale is conducted same as a tax sale. (La.R.S. 47:2105).

Drainage Taxes.

An acreage tax of 25¢ may be imposed on land in a drainage district to defray organization expenses of district. (La.R.S. 38:1619). When plan for reclamation has been approved by district court, board of commissioners of district may levy a tax on all lands in district to which benefits have been assessed to pay cost of carrying out of improvements shown on plan. (La.R.S. 38:1602-1675).

Gravity drainage or subdrainage district may levy an acreage tax not exceeding 50¢ per acre per year. (La.R.S. 38:1770).

Such districts may levy acreage tax not exceeding 35¢ per acre per year for maintaining, improving and repairing gravity drainage systems. (La.R.S. 38:1901).

Garbage tax of 5 mills on dollar per year may be levied on all taxable property in a garbage district to provide and maintain garbage collection and disposal service. (La.R.S. 33:8001-4).

Irrigation tax not in excess of 10¢ per acre per year, may be imposed on land in irrigation district. (La.R.S. 38:2116).

Levee Taxes.

Tax of ¼ mill may be levied on property to cover costs of land and improvements used or destroyed for levee purposes. (Const., of 1921, art. 16, § 6 con't. as statute). Tax of 5 mills may be levied on all taxable property in alluvial portions of levee districts for constructing and maintaining levees. Board of Levee Commissioners of Orleans Levee District may levy tax not in excess of 2½ mills. These taxes may be increased by vote of taxpayers. (Const., art. 6, § 39).

Real Estate Conveyance Tax.

None.

22.17 SALES AND USE TAXES:

Louisiana levies 4% tax on sales at retail, use, consumption, distribution, lease or rental and storage for use and consumption, in state of tangible personal property and sale of services in state. (La.R.S. 47:302, 321). Sale at retail does not include capital expenditure for new research equipment by biotechnology company as defined. (La.R.S. 47:301[10][a][v], added by Act 3, 1st Ex. Sess., 2002, eff. July 1, 2002). Sale at retail also does not include certain purchases by motion picture production company. (La.R.S. 47:301[10][a][v], added by Act 5, 1st Ex. Sess., 2002, eff. July 1, 2002). Telecommunications services as defined are subject to tax, but not to advance collection requirement. (La.R.S. 47:301, 306, 332 and 1003, as am'd Act 388, eff. Aug. 1, 1990). State tax is collected in advance by supplier of retail dealer. (La.R.S. 47:306, as am'd Act 867 of 1985). Electricity generation tax repealed by Act 9 of 1973. Ex. Sess., eff. Jan. 1, 1974. Additional sales and use taxes are locally imposed by several parishes.

Exemptions include gasoline, steam, water (not including water in bottles, etc.), electric power or energy and any materials and energy sources used to generate electric power for resale or used by industrial manufacturing plant for self-consumption or cogeneration, newspapers, fertilizer and containers for farm products sold to farmers, natural gas; all energy sources when used for boiler fuel except refinery gas; new trucks, automobiles and aircraft withdrawn from stock by new vehicle and aircraft dealers for use as demonstrators; drugs prescribed by physician or dentist; orthotic and prosthetic devices and wheelchairs prescribed by physicians or licensed chiropractors for personal consumption or use; ostomy, ileostomy, or colostomy device or similar devices; patient aids and medical devices prescribed by physician or licensed chiropractor for home use; food sold for preparation and consumption in home; sales of tangible personal property, admission fees and parking fees associated with charitable events, and newspapers published by religious organizations (T. 47, 305.14[A][1], as am'd Act 39 of 1994); package food requiring further preparation by purchaser; sales of meals to staff and students of educational institutions, hospitals, mental institutions, to boarders in rooming houses and occasional meals consumed on premises of educational, religious or medical organizations, though not sales to outsiders or general public; materials, fuel and equipment used for crawfish production (La.R.S. 47:305, as am'd Act 364 of 1987). Services, installation and repair of cable television paid by subscriber are exempt. (La.R.S. 47:305.16, added Act 593 of 1974). Sales to "Boys State" and "Girls State" are exempt. (La.R.S. 47:301, as am'd Act 20 of 1996). Sales to churches and synagogues are exempt. (La.R.S. 47:301[8][d], added Act 28 of 1996). Qualified exemptions are granted to certain farm products, farm equipment up to $50,000, livestock at certain public sales, claimed racehorses, pesticides, fertilizers and containers used for farm products, new automobiles, insulin, new aircraft and component parts for ships, vessels, barges, drilling ships, drilling barges, commercial fishing vessels of 50 tons load displacement and over built in Louisiana and for proceeds of their sale. (La.R.S. 47:305, as am'd Acts 145, 787, and 179 of 1979; La.R.S. 47:305.1, as am'd Act 56 of 1982). Credit may be allowed for tax paid on sale and use of article in another state. (La.R.S. 47:303). State and local sales and use tax is not applicable to sale at retail, purchase, lease or importation of motor vehicles to be stored, used or consumed for lease or rental, so long as lease is at reasonable market rates (La.R.S. 47:305.36, added Act 415 of 1982), nor is state sales and use tax applicable to diesel fuel and butane used or consumed for farm purposes (La.R.S. 47:305.36, added Act 820 of 1982). Demonstrator trucks, automobiles and airplanes are exempt. (La.R.S. 47:305[8], added Act 516 of 1977). Taxes are not imposed on sales of monetized bullion having total value of $1,000 or more, or with respect to aircraft, equipment and parts purchased by commuter airlines domiciled in state. (La.R.S. 47:305.21, as am'd Act 637 of 1979). New vehicles furnished by dealers to schools and colleges on free loan basis for use in driver education programs are exempt. (La.R.S. 47:305.25, added Act 507 of 1978). Antique airplanes privately owned and not used commercially are exempt from all taxes (La.R.S. 47:6001, added Act 567 of 1980), as are repairs and repair materials on drilling rigs and equipment used exclusively for exploration and development of minerals outside Louisiana territorial waters on Outer Continental Shelf (La.R.S. 47:305, added Act 31 of 2002, eff. July 1, 2002).

Sales and use taxes do not apply to vessels leased for mineral production beyond territorial limits of state, or for providing of services for such production (La.R.S. 9:305.17, added Act 818 of 1975), or to property purchased for use in offshore areas, exact location of which is unknown at time of purchase (La.R.S. 47:305.10, as am'd Act 631 of 1985).

Refund of sales tax permitted on tangible personal property destroyed in a natural disaster. (La.R.S. 47:315.1, am'd Act 60 of 1973).

Certain sales and purchases by blind persons are exempt. (La.R.S. 47:305.15, added Act 61 of 1973).

Sales and use taxes do not apply to capital mass transit equipment and to gasohol containing mixture of at least 10% alcohol if distilled in state from agricultural commodities and dyed color designated by Department of Revenue and Taxation. (La.R.S. 47:305.27-28, as am'd Act 443 of 1985).

State and local sales and use taxes do not apply to purchases by state or any of its political subdivisions. (La.R.S. 47:301[8][a] and [e], as am'd Act 1029 of 1991, eff. Sept. 1, 1991). State sales and use taxes also do not apply to sale, use, storage or lease of energy conservation property as defined. (La.R.S. 47:305.31, added Act 516 of 1981), nor to purchase of construction materials for operation of nonprofit retirement centers as defined (La.R.S. 47:305.33, added Act 876 of 1981), nor to purchases made by waterworks districts (La.R.S. 47:305.34, added Act 883 of 1981). State sales and use taxes do not apply to purchases over $100 by public housing authorities. (La.R.S. 47:305.35, added Act 891 of 1981). Neither state nor local sales and use taxes apply to retail sale, use, consumption, distribution or storage for consumption of items of intangible personal property by sheltered workshop for mentally retarded. (La.R.S. 47:305.38, added Act 242 of 1982). State sales and use taxes do not apply to direct consumer purchases of butane, propane or other liquefied petroleum gases for private residential purposes of cooking and heating (La.R.S. 47:305.39, as am'd Act 622 of 1985, eff. July 1, 1986), nor to diesel fuel and butane, propane or other liquefied petroleum gases used for farm purposes (La.R.S. 47:305.37, as am'd Act 621 of 1985, eff. July 1, 1986 and Act 511 of 1985). Such taxes do not apply to commercial fishing boat operators and owners. (La.R.S. 47:305.20[A], added Act 687 of 1984). Such taxes also do not apply to purchases of specialty items of carnival and other nonprofit organizations (La.R.S. 47:305.40, added Act 439 of 1985); or to admission ticket sales by dance, drama or performing arts groups (La.R.S. 47:305.40, added Act 513 of 1985). Ducks Unlimited chapters, and other organizations dedicated to conservation of migratory waterfowl on North American continent, are exempt from state and local tax. (La.R.S. 47:305.40, added Acts 512 and 835 of 1985). Chemical supplies used in printing are similarly exempt. (La.R.S. 47:305.40, added Act 847 of 1985). Supplies and equipment reasonably necessary for operation of "free hospital" as defined are also exempt. (La.R.S. 47:301[7], [10], [18], [21], added Act 5 of 1994, eff. July 1, 1994). Many exemptions are periodically suspended by Legislature. (La.R.S. 47:302, 331, as am'd Act 20 of 1994, eff. July 1, 1994).

Activities in domed stadiums and other publicly-owned facilities also enjoy limited exemptions from sales tax for admission tickets, parking and facility tours. (La.R.S. 39:467-468, added Act 2 of 1985).

Board of Appeals for Local Sales and Use Taxes has jurisdiction of all appeals for tax assessments or refunds. Request for review must be filed within 30 days of assessment. (La.R.S. 33:2890.1 et seq., added Act 737 of 1985).

Refunds are authorized within three years of sale, lease or rental of corporeal movable property paid for or under Medicare. (La.R.S. 47:315.2, added Act 25 of 1994).

22.18 STAMP AND SEAL TAXES:

Stamp Tax.

None except on tobacco and soft drinks.

23 TRANSPORTATION

23.01 MOTOR VEHICLES:

General supervision by Department of Public Safety, Motor Vehicle Division, Baton Rouge, Louisiana 70806. Department of Highways has power to supervise, regulate and control traffic. (La.R.S. 32:2, 702, am'd Act 96 of 1972).

Vehicle License.

Private passenger vehicles are subject to an annual registration license tax which is collected by Department of Revenue, Motor Vehicle Division each two years in advance in even numbered years. Commissioner may provide for staggered registration. (La.R.S. 47:532, am'd Act 23 of 1974). Applicant for registration must declare insurance coverage and produce evidence if required. (La.R.S. 32:862, as am'd Act 510 of 1980). On private passenger vehicles purchased in odd numbered years, a proportionately reduced license tax is collected for operation of such vehicle during such odd numbered year. Amputees and blind veterans of Second World War and post-1950 military service, who are La. citizens and who receive veterans financial assistance in purchasing automobiles, are exempt from this tax. No other exemptions for Armed Forces. (La.R.S. 47:463, as am'd Act 318 of 1962). Street rods may be registered under special provisions. (La.R.S. 32:451-454, added Act 587 of 1980). Most other vehicles are subject to license tax which is collected annually. Certain farm equipment, municipal passenger coaches, and self-propelled off-road construction vehicles are exempt. (La.R.S. 47:479, as am'd Act 188 of 1972; La.R.S. 41:502, am'd Act 533 of 1972). Certificate, or photocopy, must be on display in vehicle or presented for inspection within five days. (La.R.S. 47:506, am'd Act 8 of 1975). License plates must be displayed at height not less than 12 inches from ground in clearly visible position. (La.R.S. 47:507). Every motor vehicle registered in state must be inspected for required safety equipment at least annually. (La.R.S. 32:1304, am'd Act 227 of 1983).

Operator's license required. Licenses are issued by Dept. of Public Safety, Drivers License Division. (La.R.S. 32:402). License valid until operator's birthday in fourth year from year of issuance unless revoked for cause. Licenses to operate vehicles other than passenger vehicles and two axle trucks must be renewed annually. (La.R.S. 32:412, am'd Act 311 of 1978). Person under 18 not licensed as chauffeur. Minors 15 years of age or over may obtain driver's license or power cycle license and minors 17 years of age or over may obtain Class B chauffeur's license only with consent of either parent or by tutor or other person having custody, and license may be denied on request of person having custody of minor. (La.R.S. 32:407, as am'd Act 48 of 1976). Parent must sign declaration of insurance coverage with respect to minor. (La.R.S. 32:871, as am'd Act 510 of 1980). Members of Armed Forces not required to have license if operating vehicle of such agency, have operator's license issued by such agency and are on official duty. (La.R.S. 32:420). Licensed driver charged with traffic violation may deposit license in lieu of bail bond. (La.R.S. 32:411, am'd Act 185 of 1976). Suspension of driving privileges may occur upon proof of certain level of intoxication; level is lower for those under 18. (La.R.S. 32:661.1 [C][1][c], added Act 20 of 1994, Third Ex. Sess.). Suspension may also occur for a year upon refusal to take blood alcohol test. (La.R.S. 32:667[B], as am'd Act 288 of 2009). Suspension of license may occur for infractions in operation of boats. (La.R.S. 32:414 and 32:667, as well as 32:415.1, 34:851.24 and 34:851.36, all as am'd or added by Act 513 of 2009).

Titles.

Certificates of title are issued by Commissioner. Application for certificate of title must be on form prescribed by Commissioner, sworn to before Notary Public or Commissioner's assistants, and must be accompanied by previous owner's certificate of title duly endorsed with sale and assignment or other satisfactory evidence of title. (La.R.S. 32:707).

Sales are effected by vendor endorsing sale and assignment on his certificate of title and delivering same to purchaser who must file application for new certificate of title within five days after delivery of vehicle. (La.R.S. 32:705, as am'd Act 186 of 1983, § 707). Any person transferring motor vehicle, whether by sale, lease or otherwise, must give written notice to Collector of Revenue on form provided by him within 15 days of transfer (La.R.S. 47:510, as am'd Act 362 of 1975) and must provide signed statement that odometer mileage is correct. (La.R.S. 32:726.1, added Act 564 of 1972). Retail installment contracts involving sale of motor vehicles subject to certain requirements (La.R.S. 6:951 et seq., as am'd Act 244 of 1983) and effective Jan. 1, 1973, additional requirements with regard to form and assignment of promissory notes similar to Consumer Credit Law. Motor vehicle manufacturers, distributors, dealers and lessors are regulated and licensed through Motor Vehicle Commissioner. (La.R.S. 32:1251-1259, as am'd Act 911 of 1985).

Warranties.

If new motor vehicle does not conform to express warranty and consumer so reports and makes vehicle available for repair, manufacturer must repair. After four or more unsuccessful attempts at repair, manufacturer must at its option either replace with comparable vehicle or refund entire purchase price less reasonable use allowance. (La.R.S. 51:1941-1946, added Act 228 of 1984). If motor vehicle does not conform to express warranty and consumer complies with foregoing provisions, reasonable attorney's fees must be awarded with judgment in his favor. (La.R.S. 51:1947, added Act 169 of 1985).

Liens and Encumbrances.

See category 8 Debtor and Creditor, topic 8.13 Liens, subhead Garages. Chattel mortgages on vehicles must be in writing either by authentic act or by private act duly authenticated and must set out obligations secured, exact sum and maturity, and full description of vehicle mortgaged, including following data insofar as it may exist with respect to particular vehicle; make, year, model, type of body, motor number, manufacturer's serial number, license number and year of Louisiana plates currently in effect on vehicle at date of mortgage and location of vehicle. Duplicate original must be recorded with Commissioner who must also receive at same time mortgager's certificate of title on which he enters notation of chattel mortgage. Effective date and priority of mortgage as against third persons is date of its execution by parties if mortgage is noted on certificate of title within 15 days by Commissioner and if not noted within 15 days, date of delivery to Commissioner. (La.R.S. 32:710, am'd Act 964 of 1985). Floor plan mortgages are allowed in specified manner.

Motor vehicles remain subject to chattel mortgages when located on immovable property but mobile homes may become immovable upon recordation of specified documents. (La.R.S. 32:710 [N] as am'd Act 728 of 1978).

Upon satisfaction of mortgage, mortgagee or any holder may present Certificate of Title to Commissioner, and request that he note on said certificate and his records a cancellation of notation of chattel mortgage. Commissioner shall comply if satisfaction appears genuine. (La.R.S. 32:708, as am'd Act 162 of 1976).

Chattel mortgages on vehicles are also governed in all other respects by laws applying to chattel mortgages generally. See categories 3 Business Regulation and Commerce, topic Commercial Code; Mortgages, topic Chattel Mortgages.

Operation Prohibited.

By person under 15 years of age (La.R.S. 32:416); by person under 17 between hours of 11 p.m. and 5 a.m. on Mon. through Thurs., and between 12 o'clock midnight and 5 a.m. on Fri. through Sun. (La.R.S. 32:416.1, as am'd Act 775 of 1981); of vehicle not registered, equipped, licensed or operated in accordance with law (La.R.S. 32:51-53); of vehicle or combination of vehicles exceeding size, weight and load limitations (La.R.S. 32:54). Vehicles operated in violation of law may be impounded. (La.R.S. 32:392). Transportation of hazardous materials is regulated. (La.R.S. 32:1501-1517, as am'd Acts 113, 497, and 549 of 1985; La.R.S. 40:1471, as added Act 721 of 1979). Vehicles in left lane on multi-lane highway may not be driven slower than vehicles in right lane, and may not be driven in left lane at all except when preparing for left turn, when passing another vehicle or when right lanes are congested. (La.R.S. 32:71, as am'd Act 190 of 2009).

Size and Weight Limits.

Regulated by La.R.S. 32:379-388, 462, as am'd Act 936 of 1985.

Equipment Required.

Regulated by La.R.S. 32:190, 190.1, 301-377, am'd by Act 113 of 1977.

Lights Required.

Regulated by La.R.S. 32:301-332.

Seat Belts.

State requires seat belts and their use for all passengers 13 or older and suitable similar restraints for those younger; $25 fine; limited comparative negligence effect. (La.R.S. 32:295.1, as am'd Act 166 of 2009).

Accidents.

Driver involved in accident causing injuries or death or property damage apparently exceeding $100 must, within 24 hours, forward report to Division of State Police, or, if accident occurred in incorporated city or town, to police department thereof. (La.R.S. 32:398). Driver must stop after all accidents and must render aid in any accident resulting in the death or personal injury of another. (La.R.S. 32:414).

Punitive damages are awardable if injuries are caused by wanton or reckless disregard of safety of others by defendant whose intoxication while driving motor vehicle is cause of those injuries. (C.C. 2315.1, added Act 511 of 1984).

Owner's Liability.

Family purpose doctrine not applied, but under C. C. 2318 father is liable for damages occasioned by negligent driving of automobile by his unemancipated minor child residing with him. C. C. 2318 imposes liability on mother after death of father and also on tutor. Liability of one spouse for conduct of other in operating automobile is covered by law relative to matrimonial regimes. Generally, if spouses have community regime, all obligations incurred by spouse are presumed to be community and can be discharged from community property or separate property of tortfeasor spouse. (C. C. 2357, 2360). Even if spouses have separate property regime, spouse is solidarily liable with other spouse who incurs obligation for necessaries for spouse or family. (C. C. 2372). There is no general owner-consent statute in this state imposing liability upon owner for negligent operation of vehicle with his consent.

Guests.

There is no statute restricting liability for injury to a guest.

Financial Responsibility.

Operator of every motor vehicle involved in accident in which any person is killed or injured or in which property of any person including himself is damaged in excess of $500 must, within ten days of accident, give evidence to Department of Public Safety of financial responsibility consisting of automobile liability policy having $10,000-$20,000 bodily injury coverage and $10,000 property coverage, or bond having $10,000-$20,000 bodily injury coverage and $10,000 property coverage. (La.R.S. 32:861, 871, as am'd Act 229 of 1985). Eff. Jan. 1, 2010, liability limits mandated are $15,000-$30,000 bodily injury coverage and $25,000 property coverage. (La. R.S. 32:861, as am'd Act 921 of 2008). On failure to do so, Department must suspend license of operator, impound license plate and all registrations of owner of vehicle involved unless security in sum determined by Department is furnished to it. (La.R.S. 9:863 as am'd Act 282 of 1983). Suspension lasts until security deposited, or until release from liability or final adjudication of nonliability filed with Department, or until one year has elapsed with no action for damages having been instituted. Knowing operation without such security in force, or allowing such operation by owner, is punishable by $500 fine upon conviction. (La.R.S. 32:865, added Act 926 of 1981, eff. Jan. 1, 1982). In addition, fee of $15 must be paid before any license may be reinstated. Nonresident involved in accident must meet above requirements or have operating privilege revoked and notice thereof sent to state in which nonresident resides if law of said state provides, as law of Louisiana does, for reciprocal suspension of licenses and registrations of residents failing to meet financial responsibility laws of other states. Nonresident and resident must also give proof of financial responsibility upon first conviction of driving while intoxicated, under influence of drugs, etc. (La.R.S. 32:871-878 and 896, as am'd Acts 273 and 510 of 1980). "No-pay, no-play" legislation prohibits recovery of first $15,000 of bodily injury and first $25,000 of property damage in automobile accident in certain circumstances by person who did not carry minimum required automobile liability insurance. (La.R.S. 32:866, as am'd Act 921 of 2008).

Liability coverage of lessee of motor vehicle must extend to leased motor vehicle as well as temporary substitute vehicle; if lessee purchases such coverage from lessor of vehicle, that purchased insurance becomes primary. (La.R.S. 22:861, as am'd Act 354 of 2007).

Automobile liability policies must pay to their insured who is legally entitled to recover from owner or operator of an uninsured vehicle or vehicle insured by insolvent insurer amount of damages, bodily or otherwise, in not less than limits of bodily injury liability provided by policy, and subrogation of liability insurer is provided for such amounts paid. Insured may reject such coverage or may demand increase of coverage up to limits of policy liability coverage. (La.R.S. 22:1406, am'd Act 623 of 1977). Action must be brought within two years of accident. (La.R.S. 9:5604, added Act 444 of 1977).

Insurance in limits of $15,000/$30,000/$25,000, or binder for same, or cash or security deposit with state treasurer is required for all self-propelled motor vehicles registered for operation upon highways and roads of state. (La.R.S. 32:861-864, as am'd Act 921 of 2008). Information on existence of such coverage available from Department of Public Safety for $15 fee. (La.R.S. 32:871, as am'd Act 496 of 1985).

No-Fault Insurance.

Not adopted.

Automobile Service Clubs.

Regulated by Insurance Commissioner. (La.R.S. 22:1751-1770, as am'd Act 260 of 1975).

Nonresident owner of vehicle duly licensed in home state and displaying proper license plates may operate vehicle in Louisiana if home state accords like privilege to Louisiana vehicles. Where no such reciprocal arrangement exists Commissioner may grant permission to nonresidents for occasional or casual trips in Louisiana. Nonresident regularly employed in or carrying on business in state and owning and operating motor vehicle in such business must register same like a resident. (La.R.S. 47:511, 512 and 513, as am'd Act 300 of 1974). If no reciprocal agreement exists, nonresident owner of truck must obtain 48 hour permit from commissioner and pay $25 fee. (La.R.S. 47:511.1, added Act 267 of 1975). Nonresident operator of vehicle cited for traffic violation need not post bond if state of his residence is party to Interstate Traffic Violations Compact. (La.R.S. 32:1426-1431).

Action against nonresident, arising out of accident while he or his authorized agent or employee is operating motor vehicle on highway, may be commenced by service of citation and copy of petition on Secretary of State, and sending notice of service together with copy of petition and citation to defendant by registered mail or certified with receipt requested. (La.R.S. 13:3474, 3475, as am'd Act 353 of 1977).

Direct Actions.

Injured person or his heirs or survivors have right of direct action against liability insurer, or against both insurer and its insured jointly and in solido, if policy issued or delivered in Louisiana or if accident or injury occurred in Louisiana and whether or not liability policy excludes such direct action. Venue of direct action suit lies either in parish where accident or injury occurred or under ordinary rules of venue. Insured must be joined with insurer in direct action, except in certain circumstances (insolvency or bankruptcy of insured, inability to serve insured or immunity of insured). (La.R.S. 22:655, as am'd Act 934 of 1988, eff. Jan. 1, 1989).

Unclaimed Vehicles: Storage and Disposition.

T. 32, § 521, am'd Act 461 of 1974.

Motor vehicle carriers regulated by Public Service Commission. (T. 45, c. 4). Must have special license, and when operated over fixed route must have certificate of public convenience and necessity. (La.R.S. 45:164). Fee of $10 per vehicle or combination must be paid between Jan. 1 and Feb. 1 of each year. (La.R.S. 45:169, as am'd Act 184 of 1977). Commission may enact rules, procedures, penalties, charge fees. (La.R.S. 45:169A, added Act 304 of 1972). Must file bond to indemnify passengers and others injured by operation. (La.R.S. 45:173-176). Liable for negligent damage to highways. Foreign vehicle operating on regular route must have state license and permit. (La.R.S. 47:513). Vehicle used as motor carrier may be operated only by licensed chauffeur. Person in charge of vehicle used in business of transporting passengers must be licensed as operator or chauffeur and vehicle must have "for hire" license plates. (La.R.S. 45:181).

License plates and registration certificate may not be issued to common carrier, contract carrier or charter carrier without certificate by Public Service Commission that carrier is entitled thereto. (La.R.S. 45:178-180).

Gasoline Tax.

See category 22 Taxation, topic 22.08 Gasoline and Special Fuels Taxes.

23.02 RAILROADS:

See category 3 Business Regulation and Commerce, topic 3.08 Carriers.

1

MAINE LAW DIGEST

—Scope —

Revised for 2009 edition by

PIERCE ATWOOD LLP, of Portland.

(References, unless otherwise indicated, are to titles and sections of Maine Revised Statutes Annotated of 1964. M.R.C.P. indicates the Maine Rules of Civil Procedure. M.R.E. indicates Maine Rules of Evidence. M.R. Probate P. indicates Maine Rules of Probate Procedure. M.R.A.P. indicates Maine Rules of Appellate Procedure. Parallel citations to the Atlantic Reporter begin with 77 Me.)

Note: Includes legislation passed through Apr. 18, 2008 of 2d Regular Session and 1st Special Session of 123rd Maine Legislature. Legislature meets annually: First Regular Session convenes on first Wed. of Dec. in even-numbered years after general election and usually lasts until third Wed. in June; Second Regular Session convenes on first Wed. after first Tues. in Jan. in following even-numbered year and usually lasts until third Wed. in Apr.

1 INTRODUCTION

1.01 GOVERNMENT AND LEGAL SYSTEM:

The State of Maine is a constituent state of the United States of America. For further discussion of the U.S. federal system, see Introduction to the Federal Government of the United States at the beginning of this volume. A great many laws are promulgated by the federal government of the United States and are not reflected in the topics below. See the Introduction to this volume for references to the federal law topics covered.

Like all but one of the United States, Maine has a common law legal system, with roots in English common law. For information on the courts and legislature of Maine, see category 6 Courts and Legislature.

1.02 [RESERVED]

1.03 HOLIDAYS:

Legal and bank holidays are: Jan. 1; 3d Mon. in Jan.; 3d Mon. in Feb.; 3d Mon. in Apr.; last Mon. in May, but if U.S. Government designates May 30th as date for observance of Memorial Day, 30th of May; July 4; 1st Mon. in Sept.; 2d Mon. in Oct.; Nov. 11; 4th Thurs. in Nov.; Dec. 25. If Jan. 1, July 4, Nov. 11 or Dec. 25 falls on Sun., following Mon. is not business day. (T. 4, §1051; T. 9-B, §145).

Legality of Transactions on Sunday.

Sales of motor vehicles on Sun. prohibited (T. 17, §3203) except for motor homes where person's primary business is buying and selling motor homes (T. 17, §3203-A). Operation of business, travel and recreation on Sun. governed by T. 17, §3204.

1.04 OFFICE HOURS AND TIME ZONE:

Maine is in the Eastern Standard (GMT -05:00) time zone. Office hours are generally from 9 a.m. to 5 p.m.

2 BUSINESS ORGANIZATIONS

2.01 AGENCY:

Rules of common law apply.

2.02 ASSOCIATIONS:

Actions.

Organized unincorporated society or association may sue in name of its trustees for time being, and may maintain action at law, though defendant or some of defendants are members of same society or association. (T. 14, §2).

Liabilities.

Members of unincorporated associations may be liable on contracts made by associated persons. (514 A.2d 807).

Partnerships.

See topic 2.07 Partnerships.

Professional Associations.

See topic 2.03 Corporations, subhead Professional Corporations.

2.03 CORPORATIONS:

Maine Business Corporation Act, T. 13-C, is based in large part upon Model Business Corporation Act (1984) prepared by American Bar Association. See Uniform and Model Acts Section. Reference to sections are to Model Act, with corresponding references to Maine Act, T. 13-C, in parentheses. New Act replaces Maine Business Corporation Act (T. 13-A), and applies to all corporations (with very minor exceptions) after July 1, 2003, except that validity of provisions, bylaws or articles adopted prior to effectiveness of Act must be determined under law in effect at time of adoption, or under New Act, whichever supports validity of such provisions.

General Supervision.

§1.30 adopted in substance (T. 13-C, §141), except Act specifically authorizes additional rulemaking by Secretary of State so long as not inconsistent with Act.

Purposes.

§3.01 adopted in substance. (T. 13-C, §301).

Close Corporations.

Defined as corporation with no more than 20 shareholders, whether or not entitled to vote. (T. 13-C, §102[20A]). Special provisions applicable to close corporations noted as appropriate herein.

Name.

§4.01 adopted in substance (T. 13-C, §401), except (1) name need not contain word “corporation”, “incorporated”, “company”, or “limited”, or abbreviation “corp.”, “inc.”, “co.”, or “ltd.” or similar words (T. 13-C, §401[1]); (2) name must be distinguishable from names of any corporation, nonprofit corporation, limited liability company, limited liability partnership or limited partnership created under Maine law or authorized to transact business (T. 13-C, §401[2]), or any Maine assumed, fictitious, reserved or registered name filing for any entity (T. 13-C, §401[2]), or any mark registered under T. 10-A unless person seeking to register owns such mark (T. 13-C, §401[2]); (3) to determine whether name is distinguishable, Secretary of State shall disregard words describing nature of entity (e.g., “inc.”), words “and” and “the”, and punctuation, capitalization or special characters; (4) name may not consist of obscene language, promote abusive or unlawful activity, or falsely suggest association with public institutions (T. 13-C, §401[3]); (5) statement that Act does not control use of fictitious names is deleted; and (6) foreign corporation authorized to do business in Maine which changes its name to one not qualifying under T. 13-C, §401 may not transact business in Maine before adopting qualifying fictitious name and re-applying for certificate of authority.

§4.03 adopted in substance (T. 13-C, §403), except (1) application to register foreign corporation name must include address for corporation's principal office and must include certificate of existence not more than 90 days old (T. 13-C, §403[2]); and (2) registration reserves name only for calendar year in which application filed, except that renewals may be filed for following year after Oct. 1st (T. 13-C, §403[3]). Fee for registration of name, see subhead Fees, infra.

Term of Corporate Existence.

§3.02 adopted in substance. (T. 13-C, §302).

Incorporators.

§2.01 adopted in substance. (T. 13-C, §201).

Articles of Incorporation.

§§2.02(a) and 8.03(a) adopted in substance (T. 13-C, §§202[1], 803[1]), except that (1) articles must set forth number of shares and rights thereof in each class, if two or more classes of shares (T. 13-C, §202[1][B]); (2) signed acceptance of clerk of corporation must be filed with or as part of articles of incorporation (T. 13-C, §202[5]); (3) articles must be set forth mailing address of corporation, if different from street address, and name of initial clerk (T. 13-C, §202[1][c]); (4) post office box address is not sufficient as street address (T. 13-C, §202[1][c]); and (5) articles are not obligated to regulate size of board (T. 13-C, §803[1]). §2.02(b) adopted in substance. (T. 13-C, §202[1]). §2.02(c) adopted in substance. (T. 13-C, §202[3]).

Filing of Articles.

§1.20 adopted in substance (T. 13-C, §121), except that documents submitted for filing may be signed by clerk (T. 13-C, §121[5][D]).

Incorporation Fee.

See subhead Fees, infra.

Filing Fees.

(1) $250 for application for authority to do business; (2) $200 for application for renewal

of registered name; (3) $150 for application for revival after dissolution and for application for reinstatement following administrative dissolution for (i) failure to file annual report, (ii) failure to pay annual report late filing penalty, (iii) failure to appoint or maintain clerk or registered office, and (iv) failure to notify that clerk or registered office have changed, or that clerk has resigned, or registered office has been discontinued; (4) $145 for articles of incorporation, for articles of nonprofit conversion, for articles of domestication, articles of domestication and conversion, and for articles of entity conversion; (5) $125 for application for assumed name; (6) $100 for articles of merger or share exchange or pre-clearance of any document to be filed and for certificate of resumption; (7) $90 for articles of charter surrender, and for application for withdrawal of authority; (8) $80 for restatement of articles of incorporation; (9) $70 for amended application for authority and for application for transfer of authority; (10) $75 for articles of dissolution and for articles of revocation of dissolution; (11) $50 for amendment of articles of incorporation, for articles of correction, and for failing to deliver annual report by due date (in addition to annual report filing fee); (12) $40 for application for excuse and for application for fictitious name; (13) $35 for notice of change of clerk, registered agent or registered office (or combination thereof), for change in address of foreign corporation's principal address, and for notice of change in name of current clerk or registered agent or change of registered office for each affected corporation not to exceed total of $100; (14) $30 for certificate of existence, authorization or fact; (15) $35 for notice of registration of clerk or registered agent; (16) $20 for application for use of indistinguishable name, application for reserved name, for notice of transfer of reserved name, application for registered name (per month, or portion of month), and for application for termination of assumed or fictitious name; (17) $20 for notice of change in name of current clerk or registered agent or change of registered office for each affected corporation in excess of $100; (18) no fee, for certificate of judicial dissolution; (19) $40 for application for fictitious name adopted by foreign corporation authorized to transact business in state because real name is unavailable; and (20) for any other filing required or permitted under Act, $35. Fees for annual reports or amended annual reports are (i) $85 for domestic corporations, and (ii) $150 for foreign business corporations. (T. 13-C, §123). *Note:* Certain filing fees in effect through June 30, 2008. Model Registered Agents Act and amendments to entity acts to rationalize annual filings effective July 1, 2008.

Organization.

§2.05 adopted in substance (T. 13-C, §205), except organizational meeting may be held before or after incorporation.

Paid in Capital Requirements.

None.

Amendment of Articles.

§10.01 adopted in substance. (T. 13-C, §1001). §10.02 adopted in substance. (T. 13-C, §1002).

§10.03 adopted substance. (T. 13-C, §1003), except that amendment must be approved by majority of all votes entitled to be cast on amendment; if any class is entitled to vote as class, by majority of all shares entitled to be cast by such class; articles may specify that lesser vote may be required, but such vote may not be less than majority of votes at meeting at which there exists quorum of at least majority of votes entitled to be cast on amendment by voting group in question; amendment may be approved by written consent of shareholders; if amendment approved by written consent of all shareholders whether or not entitled to vote, not resolution of board of directors proposing amendment is necessary. §10.04 adopted in substance. (T. 13-C, §1004). §10.05 adopted in substance. (T. 13-C, §1005). §10.06 adopted in substance. (T. 13-C, §1006). §10.07 adopted in substance (T. 13-C, §1007), except that restatement of articles of incorporation may omit statements as to incorporator or initial directors. §10.08 adopted in substance. (T. 13-C, §1008). §10.09 adopted in substance. (T. 13-C, §1009).

Bylaws.

§2.06 adopted in substance. (T. 13-C, §206). §2.07 adopted in substance. (T. 13-C, §207). §10.20 adopted in substance. (T. 13-C, §1020). §10.21 adopted in substance. (T. 13-C, §1021).

Stock.

Authorized Shares.

§6.01 adopted in substance (T. 13-C, §601), except unless otherwise specified in articles of incorporation or resolution of board of directors, following interpretive rules apply; (1) shares preferred as to dividends are (a) deemed cumulative preferred shares, (b) are not entitled to participate in dividends beyond amount of stated dividend preference, (c) are preferred on liquidation to extent of par or stated value of shares, if any; (2) shares preferred as to liquidation are not entitled to liquidation payments beyond amount of liquidation preference; (3) if preferred shares entitled to cumulative dividends are entitled to preferential payment upon liquidation, liquidation payment must include accrued but unpaid dividends, and (4) shares preferred as to dividend or liquidation are not entitled to vote. (T. 13-C, §601[4]).

Classes or Series of Shares.

§6.02 adopted in substance. (T. 13-C, §602).

Issued and Outstanding Shares.

§6.03 adopted in substance. (T. 13-C, §603).

Fractional Shares.

§6.04 adopted in substance. (T. 13-C, §604).

Subscription.

§6.20 adopted in substance. (T. 13-C, §621).

Issuance of Shares.

§6.21 adopted in substance (T. 13-C, §622), except shareholder approval requirement for convertible securities is deleted (T. 13-C, §622).

Share Dividends.

§6.23 adopted in substance. (T. 13-C, §624).

Options.

§6.24 adopted in substance. (T. 13-C, §625).

Certificates.

§6.25 adopted in substance (T. 13-C, §626), except share certificates may also be signed by clerk or officer designated in bylaws (T. 13-C, §626[4]).

Shares without Certificates.

§6.26 adopted in substance. (T. 13-C, §627).

Transfer of Stock.

§6.27 adopted in substance. (T. 13-C, §628).

Stock Transfer Tax.

None.

Preemptive Rights.

§6.30 adopted in substance (T. 13-C, §641), except that Act does not alter preemptive rights of any shares issued and outstanding on June 30, 2003.

Shareholders.

Meetings of Shareholders.

§7.01 adopted in substance (T. 13-C, §701), except that no annual meeting is required if directors are elected by written consent (unanimous written consent required if shareholders vote cumulatively in director elections).

Special Meetings.

§7.02 adopted in substance. (T. 13-C, §702).

Court-Ordered Meetings.

§7.03 adopted in substance (T. 13-C, §703), except that court-ordered meeting may be held if action by written consent in lieu of annual meeting not effective by certain date.

Action without Meeting.

§7.04 adopted in substance (T. 13-C, §704), except that: (i) Articles of incorporation may permit action by majority consent of shareholders, subject to requirements for notice to non-voting or non-consenting shareholders, (ii) unless otherwise fixed, record date is date signed written consent delivered to corporation or, if prior board action required, close of business on date of required board resolution, (iii) action by written consent effective when signed consents by sufficient number of shareholders delivered to corporation, and (iv) action by written consent not invalidated by failure to provide notice.

Notice of Meeting.

§7.05 adopted in substance (T. 13-C, §705), except meeting notice to shareholders of close corporation may be given no fewer than three days prior to meeting date.

Waiver of Notice.

§7.06 adopted in substance. (T. 13-C, §706).

Record Date.

§7.07 adopted in substance. (T. 13-C, §708).

Conduct of Meeting.

§7.08 adopted in substance. (T. 13-C, §708).

Shareholder List for Meeting.

§7.20 adopted in substance (T. 13-C, §721), except that for close corporation: (1) requirement for shareholder list may be satisfied by stock transfer books or records, and (2) list must be made available next business day after notice given of meeting, if less than ten days' notice of meeting was given (T. 13-C, §721).

Voting Entitlement of Shares.

§7.21 adopted in substance (T. 13-C, §722), except articles may grant voting rights on specified matters to holders of bonds, debentures or other corporate obligations, which voting rights may not be terminated without written assent of two-thirds (by aggregate face amount) of such obligations (T. 13-C, §722[1]).

Proxies.

§7.22 adopted in substance (T. 13-C, §723), except that terms of this section apply equally to proxies given by holders of bonds or other obligations who have been granted voting rights. (T. 13-C, §723[9]).

Shares Held by Nominees.

§7.23 adopted in substance. (T. 13-C, §724).

Corporation's Acceptance of Votes.

§7.24 adopted in substance. (T. 13-C, §725).

Shares Held by Minor.

If shares held by minor are voted by minor, legal representative or parents of minor, such minor may not thereafter disaffirm or avoid said vote. (T. 13-C, §726).

Quorum and Voting Requirements.

§7.25 adopted in substance (T. 13-C, §727), except that quorum cannot be less than one-third of shares entitled to vote on matter, and provisions of section do not apply to any mutual insurer (as defined under Maine statutes) (T. 13-C, §727).

Action by Single and Multiple Voting Groups.

§7.26 adopted in substance. (T. 13-C, §728).

Greater Quorum or Voting Requirements.

§7.27 adopted in substance. (T. 13-C, §729).

Voting for Directors, Cumulative Voting.

§7.28 adopted in substance. (T. 13-C, §730).

Voting Trusts.

§§7.30-.32 adopted in substance (T. 13-C, §§741-43), except (1) voting trusts and extensions thereof are valid without renewal for not more than 21 years (T. 13-C, §741); (2) purchaser of shares subject to voting agreement who purchased without knowledge thereof entitled to rescission (T. 13-C, §742); (3) shareholder agreement need not be valid for ten years; (4) action to enforce right of rescission where purchaser of shares did not know of voting agreement must be commenced within 180 days after discovery of agreement; and (5) if articles eliminate board of directors, then (unless otherwise agreed by shareholders: (a) shareholders of corporation deemed to have powers and duties of directors under Act; (b) when acting as directors, actions approved by shareholders are approved by vote of shares, not per-capita vote, and (c) any amendment to delete provision of articles eliminating board must be approved by at least majority of votes of each shareholder voting group.

Shareholders' Actions (Derivative Proceedings).

§§7.40-.47 adopted in substance (T. 13-C, §§751-758), except that votes of qualified directors, rather than independent directors, may result in dismissal of derivative proceeding.

Directors.

§8.01 adopted in substance. (T. 13-C, §801).

Qualifications of Directors.

§8.02 adopted in substance. (T. 13-C, §802).

Number and Election of Directors.

§8.03 adopted in substance (T. 13-C, §803), except that unless articles or bylaws provide otherwise, number of directors may be changed by resolution of directors or shareholders (except that decrease shall not have effect of shortening term of any incumbent director) (T. 13-C, §803[2]).

Election of Directors by Certain Classes of Shareholders.

§8.04 adopted in substance. (T. 13-C, §804).

Terms of Directors.

§8.05 adopted in substance (T. 13-C, §805), except that term of director elected to fill vacancy expires at time specified in articles if staggered terms.

Staggered Terms for Directors.

§8.06 adopted in substance. (T. 13-C, §806).

Resignation.

§8.07 adopted in substance (T. 13-C, §807), except resignation may be effective as of specified future event (T. 13-C, §807).

Removal by Shareholders.

§8.08 adopted in substance (T. 13-C, §808), except (1) director may be removed only at meeting called for that purpose, and with such purpose stated in meeting notice, (2) director may be removed only by vote of at least 2/3's of shares entitled to vote (if no cumulative voting), and (3) articles of incorporation may require greater or lesser shareholder vote than 2/3's for removal, including requiring unanimous vote, but not less than majority of shares cast on matter.

Removal by Judicial Proceeding.

§8.09 adopted in substance. (T. 13-C, §809).

Vacancy on Board.

§8.10 adopted in substance (T. 13-C, §810), except that bylaws may provide how vacancy to be filled.

Compensation.

§8.11 adopted in substance. (T. 13-C, §811).

Directors' Meetings.

General.

§8.20 adopted in substance. (T. 13-C, §821).

Action without Meeting.

§8.21 adopted in substance. (T. 13-C, §822).

Notice.

§8.22 adopted in substance (T. 13-C, §823), except that (1) special meetings of board may be called by chair of board, president, or if president is unable, by any vice president, any two directors, or any other person authorized by bylaws, and (2) secretary, clerk and/or person calling meeting shall provide notice and location of meeting (to be set by person calling meeting).

Waiver.

§8.23 adopted in substance (T. 13-C, §824), except for any meeting held without required call or notice, any defects are waived by director not attending unless written notice of objection is provided to corporation within ten days of such director learning of holding of meeting (T. 13-C, §824).

Quorum and Voting.

§8.24 adopted in substance. (T. 13-C, §825).

Committees.

§8.25 adopted in substance (T. 13-C, §826), except (1) each committee must have at least one member, and (2) members serve at pleasure of board of directors (T. 13-C, §826).

Liabilities of Directors.

Standards of Conduct.

§8.30 adopted in substance (T. 13-C, §831), except that: (i) Directors may, in considering best interests of corporation and shareholders, consider effects on employees, suppliers and customers of corporation, and communities in which offices or other establishments of corporation are located, and “all other pertinent factors”, and (ii) directors must disclose information to board or committee members material to discharge of their functions, except when it would be legal or ethical violation to do so. (T. 13-C, §831[6]).

Standards of Liability.

§8.31 adopted in substance. (T. 13-C, §832).

Director Liability for Unlawful Distributions.

§8.33 adopted in substance. (T. 13-C, §833).

Officers.

Required Officers.

§8.40 adopted in substance. (T. 13-C, §841).

Duties.

§8.41 adopted in substance (T. 13-C, §842), except that president's duties, unless otherwise designated by bylaws, include authority to institute or defend legal proceedings when board deadlocked, and all persons dealing with president may assume (unless there is reason to believe otherwise) president has authority to make contracts on corporation's behalf within corporation's ordinary course of business (T. 13-C, §842[2]).

Standards of Conduct.

§8.42 adopted in substance. (T. 13-C, §843).

Resignation and Removal.

§8.43 adopted in substance. (T. 13-C, §844).

Contract Rights.

§8.44 adopted in substance. (T. 13-C, §845).

Indemnification of Directors and Officers.

Definitions.

§8.50 adopted in substance (T. 13-C, §851), except definition of “disinterested director”.

Permissible Indemnification.

§8.51 adopted in substance. (T. 13-C, §852).

Mandatory Indemnification.

§8.52 adopted in substance. (T. 13-C, §853).

Advance for Expenses.

§8.53 adopted in substance (T. 13-C, §854), except that references to disinterested directors replaced by references to qualified directors.

Court-Ordered Indemnification.

§8.54 adopted in substance. (T. 13-C, §855).

Determination and Authorization of Indemnification.

§8.55 adopted in substance. (T. 13-C, §856).

Indemnification of Officers.

§8.56 adopted in substance (T. 13-C, §857), except that references to disinterested directors replaced by references to qualified directors.

Insurance.

§8.57 adopted in substance. (T. 13-C, §858).

Variation by Corporate Action, Application.

§8.58 adopted in substance. (T. 13-C, §859).

Directors Conflicting Interest Transactions.

Definitions.

Numerous deviations from Model Act, including addition of definitions for “control”, “material financial interest”, and “relevant time”, and deletion or amendment of other definitions. (T. 13-C, §871).

Judicial Action.

§8.61 adopted in substance (T. 13-C, §872), except that “fair transaction” is defined.

Director's Action.

§8.62 adopted in substance (T. 13-C, §873), except that: (i) Definition of “qualified directors” removed from section, (ii) deliberations and voting of qualified directors regarding director's conflicting interest transaction must not involve other directors, (iii) modification of disclosure requirements, and (iv) provision for authorization when qualified director's action not taken.

Shareholders' Action.

§8.63 adopted in substance (T. 13-C, §874), except that provision for authorization when qualified shareholder action not taken.

Business Opportunities.

Business opportunity of director not actionable if standards met. (T. 13-C, §881).

Clerk.

§5.01 adopted in substance (T. 13-C, §511), except that every domestic corporation must appoint natural person resident within Maine to be clerk of corporation. Model Registered Agents Act and amendments to entity acts to rationalize annual filings adopted effective July 1, 2008. Clerk: (1) is not officer, (2) is not liable for acts of corporation, (3) shall keep records of shareholders, records of shareholders' meetings, and (4) may certify all votes of shareholders and board of directors (T. 13-C, §511). Appointment of clerk is affirmation by corporation that clerk has consented to serve as such. (T. 5, §105). Clerk must be appointed by resolution of board of directors unless articles reserve such power to shareholders. (T. 13-C, §511). Clerk may resign by filing notice with Secretary of State. (T.5, §111). To change name or address of current clerk, filing with Secretary of State must be made, setting forth: (1) Name of corporation and (2) new name or address of clerk. (T.5, §108).

Service on Corporation.

Model Registered Agents Act and amendments to entity acts to rationalize annual filings adopted effective July 1, 2008. Clerk is corporation's agent for service of process, and if clerk does not exist or cannot with reasonable diligence be served, then service may be sent by registered or certified mail, return receipt requested, to president of corporation at principal office. (T.5, §113).

Purpose and Powers.

Purposes.

§3.01 adopted in substance. (T. 13-C, §301).

General Powers.

§3.02 adopted in substance (T. 13-C, §302), except that corporation may explicitly (1) cease corporate activities and surrender franchise, (2) form or acquire other corporations, (3) provide, for its benefit, life insurance on any director, officer, employee or shareholder, (4) reimburse and indemnify litigation expenses as provided for by Act, and (5) acquire and dispose of own shares.

Emergency Powers.

§3.03 adopted in substance. (T. 13-C, §303).

Ultra Vires.

§3.04 adopted in substance. (T. 13-C, §304).

Distribution to Shareholders.

§6.40 adopted in substance. (T. 13-C, §651).

Unclaimed Dividends.

See category 21 Property, topic 21.01 Absentees.

Sale or Transfer of Corporate Assets.

Disposition of Assets and Requiring Shareholder Approval.

§12.01 adopted in substance. (T. 13-C, §1201).

Shareholder Approval of Certain Dispositions.

§12.02 adopted in substance (T. 13-C, §1202), except that disposition must be approved by majority of shares entitled to vote (or greater number, if required by articles of incorporation or by board of directors); although articles of incorporation may specify lesser number of votes is required, in no case may disposition be approved by less than majority of votes cast at meeting at which quorum of at least majority of shares of that voting group entitled to vote (T. 13-C, §1202). Disposition requiring shareholder approval may be approved by written consent; if approved by all shareholders, whether or not entitled to vote, then resolution of board respecting disposition not necessary, and shareholders are not entitled to notice of or dissent from disposition. (T. 13-C, §1202).

Appraisal Rights.

Definitions.

§13.01 adopted in substance. (T. 13-C, §1301).

Appraisal Rights.

§13.02 adopted in substance (T. 13-C, §§1302-1305), except modifications to shares for which appraisal rights not available.

Assertion of Appraisal Rights.

§13.03 adopted in substance. (T. 13-C, §1306).

Notice of Appraisal Rights.

§13.20 adopted in substance (T. 13-C, §1321), except notice requirements when action by written consent of shareholders.

Notice of Intent to Demand Payment.

§13.21 adopted in substance (T. 13-C, §1322-A), except that appraisal rights preserved if action taken by majority consent.

Appraisal Notice and Form.

§13.22 adopted in substance (T. 13-C, §1323), except that notice must be accompanied by financial statements.

Perfection of Rights, Right to Withdraw.

§13.23 adopted in substance (T. 13-C, §1324), except that certificated shares must be deposited according to terms of notice.

Payment.

§13.24 adopted in substance. (T. 13-C, §1325).

After-Acquired Shares.

§13.25 adopted in substance. (T. 13-C, §1326).

Procedure if Shareholder Dissatisfied with Payment or Offer.

§13.26 adopted in substance. (T. 13-C, §1327).

Court Action.

§§13.30 and 13.31 adopted in substance. (T. 13-C, §§1331, 1332).

Books and Records.

Corporate Records.

§16.01 adopted in substance (T. 13-C, §1601), except corporation may hold records at registered office.

Inspection of Records by Shareholders.

§16.02 adopted in substance (T. 13-C, §1602), except shareholders' rights are subject to any reasonable restrictions on disclosure of financial information set forth in articles of incorporation or bylaws.

Scope of Inspection Right.

§16.03 adopted in substance (T. 13-C, §1603), except right to copy includes via photographic means.

Court-Ordered Inspection.

§16.04 adopted in substance. (T. 13-C, §1604).

Inspection of Records by Directors.

§16.05 adopted in substance. (T. 13-C, §1605).

Exception to Notice Requirement.

§16.06 adopted in substance. (T. 13-C, §1606).

Reports.

Financial Statements for Shareholders.

§16.20 adopted in substance (T. 13-C, §1620), except that (1) requirement applies to non-close corporations only, (2) financial statements must be prepared not later than five months after close of fiscal year, (3) financial statements must be mailed to shareholder upon written demand therefor, and (4) articles or bylaws may impose reasonable restrictions regarding disclosure of financial information as condition to such delivery to shareholder.

Annual Report of Domestic and Foreign Corporations.

§16.21 adopted in substance (T. 13-C, §1621), except that (1) annual report need not give total number of authorized or issued and outstanding shares, (2) annual reports must be delivered between Jan. 1st and June 1st of calendar year following year of report, (3) deposit in mail, postage prepaid, prior to filing deadline is timely, (4) if report rejected by Secretary of State, no penalty under Act if corrected and returned to Secretary of State within 30 days of return to corporation by Secretary of State, (5) domestic corporation transacting no business may file certificate and be excused from annual report filings for up to five years, (6) after filing of certificate of excuse, corporation may resume transaction of business upon vote of shareholders and filing certificate with Secretary of State, and (7) religious, charitable, educational and benevolent corporations exempt from annual report requirement.

Merger and Share Exchange.

§§11.01 and 11.02 adopted in substance. (T. 13-C, §§1101 and 1102).

Share Exchange.

§11.03 adopted in substance. (T. 13-C, §1103).

Action or Plan of Merger or Share Exchange.

§11.04 adopted in substance (T. 13-C, §1104), except (1) unless articles or board of directors require greater vote, approval of plan of merger or share exchange must be approved by majority of votes and majority of shares in each voting group entitled to vote thereon, if any, except that articles may allow approval by lesser vote, but not less than by majority of votes cast at meeting with quorum of at least majority of votes entitled to be cast, (2) approval not required if number of voting shares outstanding immediately after merger plus voting shares issuable as result of merger not in excess of 20% of total number of outstanding voting shares prior to merger, (3) approval not required if number of shares eligible to participate in distributions outstanding after merger (plus such shares issuable pursuant to merger, including through warrants) will not exceed 20% of total number of shares outstanding prior to merger, and (4) plan of merger or share exchange may be approved by written consent of shareholders, and if approved by written consent of all shareholders, whether or not entitled to vote, then vote of directors regarding merger or share exchange not necessary and shareholders not entitled to receive notice of or dissent from merger or share exchange.

Merger between Parent and Subsidiary or Subsidiaries.

§11.05 adopted in substance. (T. 13-C, §1105).

Articles of Merger or Share Exchange.

§11.06 adopted in substance (T. 13-C, §1106), except that articles of merger or share exchange must set forth types of entity and jurisdictions of parties to merger and date upon which merger is to be effective.

Effect of Merger or Share Exchange.

§11.07 adopted in substance (T. 13-C, §1107), except that when merger becomes effective, foreign surviving corporation is deemed to: (a) appoint Secretary of State agent for service of process in proceeding to enforce appraisal rights, and (b) agree to pay such shareholders any amounts due as result of such actions.

Abandonment of Merger or Share Exchange.

§11.08 adopted in substance (T. 13-C, §1108), except that statement of abandonment must include names, types of entities and jurisdictions of parties to merger or share exchange.

Required Vote of Shareholders.

For five years after date that shareholder acquires direct or indirect beneficial ownership of 25% or more of shares of domestic corporation, any “business combination” (including merger, share exchange, sale of more than 10% of assets, issuance of shares to such shareholder) with such shareholder or entity controlled by such shareholder must be approved by either: (1) board of directors of domestic corporation prior to such shareholder's share acquisition date, or (2) majority shareholder vote of all shareholders other than shareholder proposing to engage in business combination. (T. 13-C, §1109[1], [2]). Does not apply to (1) corporations not listed on national share exchange or registered with Securities and Exchange Commission; (2) 25% shareholders as of July 1, 2003, unless such shareholder increased percentage interest thereafter; (3) any shareholder who inadvertently becomes 25% holder, if divest to less than 25%; (4) shareholder in domestic corporation of incorporation electing not to be governed by this section in original articles of incorporation or whose shareholders, by vote of at least 662/3% of shares entitled to vote, adopt amendment to articles or bylaws expressly electing not to be governed thereby. (T. 13-C, §1109).

Right of Shareholders to Receive Payment for Shares Following Control Transaction.

Acquisition by any person or group of persons (“Controlling Person”) of voting power over at least 25% of shares entitled to vote triggers following rights and obligations: (1) Controlling Person must give notice of transaction within 15 days to all holders of voting shares (T. 13-C, §1110[3]); (2) upon request, corporation must provide Controlling Person with list of holders of voting shares for purpose of mailing notices, or must mail such notices on controlling shareholder's behalf (T. 13-C, §1110[3]; and (3) any other shareholder may demand payment from controlling shareholder for fair value of shares under statutory procedures within 30 days after notice given. Articles of incorporation may provide that statute does not apply and does not apply to corporations which are not: (1) registered or traded on national share exchange or registered with Securities and Exchange Commission, (2) persons who inadvertently become 25% shareholders, so long as they divest to less than 25% within 30 days after notice, (3) persons who become 25% owners because of corporation's purchase or redemption of shares, or (4) any corporation opting out of previous statutory enactment of provision.

Dissolution.

Dissolution by Initial Directors or Incorporators.

§14.01 adopted in substance (T. 13-C, §1401), except that articles of dissolution must set forth (1) that annual report filings have been made, (2) date dissolution was authorized, and (3) effective date of dissolution.

Dissolution by Board of Directors and Shareholders.

§14.02 adopted in substance (T. 13-C, §1402), except (1) approval by shareholders requires approval by majority of all votes entitled to be cast, and (2) articles of incorporation may allow for lesser vote, but not less than majority of meeting at which quorum exists equal to majority of shares entitled to vote (T. 13-C, §1402).

Dissolution by Written Consent of All Shareholders.

Dissolution may be approved by written consent of all shareholders entitled to vote, with no resolution of board of directors proposing resolution being necessary.

Articles of Dissolution.

§14.03 adopted in substance (T. 13-C, §1404), except filing must also set forth effective date of dissolution.

Revocation of Dissolution.

§14.04 adopted in substance. (T. 13-C, §1405).

Effect of Dissolution.

§14.05 adopted in substance (T. 13-C, §1406), except that in absence of authorized officers or directors, shareholder majority may transfer corporate property as liquidating trustees.

Known Claims Against Dissolved Corporations.

§14.06 adopted in substance (T. 13-C, §1407), except that liquidated claim known to corporation which is fully matured and not disputed in good faith is explicitly not barred (T. 13-C, §1407[3]).

Other Claims Against Dissolved Corporation.

§14.07 adopted in substance. (T. 13-C, §1408).

Grounds for Administrative Dissolution.

§14.20 adopted in substance (T. 13-C, §1420), except that secretary may also dissolve corporation for (1) failure to pay penalty for late filing of annual report and (2) knowing signature of false document by incorporator, director, officer or agent of corporation with intent to file with Secretary of State.

Procedure and Effect of Administrative Dissolution.

§14.21 adopted in substance (T. 13-C, §1421), except (1) name of corporation is protected for three years after dissolution, and (2) corporation may not engage in business in Maine while administratively dissolved (T. 13-C, §1421).

Reinstatement following Administrative Dissolution.

§14.22 adopted in substance (T. 13-C, §1422), except that corporation may apply for reinstatement within six years of effective date of dissolution.

Revival following Dissolution.

Secretary may grant revival to dissolved corporation for specific purpose and period upon application by interested party. (T. 13-C, §1425).

Judicial Dissolution on Grounds.

§14.30 adopted in substance (T. 13-C, §1430), except corporation may be dissolved because shareholders are so divided that corporation is suffering or will suffer irreparable injury or business can no longer be conducted to advantage of shareholders or because shareholder has abandoned business of corporation and failed within reasonable time to distribute its assets and dissolve. (T. 13-C, §1430).

Judicial Dissolution—Procedure.

§14.31 adopted in substance (T. 13-C, §1431), except that subpart (d) not adopted.

Receivership.

§14.32 adopted in substance (T. 13-C, §1432), except concept of custodianship is not adopted as separate from receivership (T. 13-C, §1432).

Decree of Dissolution.

§14.33 adopted in substance. (T. 13-C, §1433).

Relief other than Dissolution.

Any shareholder may intervene in action for dissolution brought by another shareholder to seek relief other than dissolution. (T. 13-C, §1434). Court may order: (1) purchase of shares of any shareholder at fair value, (2) provide for sale of property to third party, (3) direct or prohibit acts of corporation, directors, officers or other parties, (4) cancel or alter any provision of articles of incorporation or bylaws, (5) appoint receiver, or (6) cancel, alter or enjoin resolution or other act of corporation. (T. 13-C, §1434). Court may grant relief if relief would furnish greater protection of interests of creditors and shareholders than dissolution. (T. 13-C, §1434).

Deposit with Treasurer of State.

§14.40 adopted in substance. (T. 13-C, §1440).

Foreign Corporations.

§§15.01, 15.02 and 15.03 adopted in substance (T. 13-C, §§1501, 1502 and 1503), except that foreign corporation may transact business after filing application for authority to transact business with Secretary of State. Owning agricultural real estate in Maine may constitute transacting business within state, while engaging trustee for certain specified actions and owning and controlling subsidiary doing business in state do not. (T. 13-C, §1501). Civil penalty for transacting business without authority. (T. 13-C, §1502). Foreign corporation may apply for certificate of authority by filing application, certificate of existence dated not more than 90 days prior to application, and paying fee. (T. 13-C, §1503, see subhead Fees, supra.)

Amended Application for Authority.

§15.04 adopted in substance (T. 13-C, §1504), except that §1504(2) sets forth information to be included in amended application for authority (T. 13-C, §1504[2]).

Effect of Authorization to Transact Business.

§15.05 adopted in substance. (T. 13-C, §1505).

Corporate Name of Foreign Corporation.

§15.06 not adopted. If foreign corporation's name does not satisfy requirements of T. 13-C, §401, then must adopt fictitious name to transact business in Maine.

Registered Office and Registered Agent of Foreign Corporation, Resignation of Registered Agent.

§15.07 adopted in substance (T. 13-C, §1507), except that (1) registered agent must provide written consent to such appointment, (2) resigning registered agent must send notice to Secretary of State's office and corporation, (3) statutory provisions for changing registered agent (or name or address) by corporation set forth, and (4) initial registered agent of corporation, required to be set forth in application for authority (T. 13-C, §1507).

Service on Foreign Corporation.

§15.10 adopted in substance. (T. 13-C, §1510).

Withdrawal of Foreign Corporation.

§15.20 adopted in substance (T. 13-C, §1521), except additional item to be included in application for withdrawal specified (T. 13-C, §1521).

Automatic Withdrawal.

§15.21 adopted in substance. (T. 13-C, §1522).

Withdrawal upon Conversion to Nonfiling Entity.

§15.22 adopted in substance (T. 13-C, §1523), except additional items to be included in application of withdrawal specified (T. 13-C, §1523).

Transfer of Authority.

§15.23 adopted in substance (T. 13-C, §1524), except additional items to be included in application for authority are specified (T. 13-C, §1524).

Grounds for Revocation.

§15.30 adopted in substance (T. 13-C, §1531), except reference to “franchise taxes” deleted.

Procedure and Effect of Revocation.

§15.31 adopted in substance. (T. 13-C, §1532).

Appeal from Revocation.

§15.32 adopted in substance. (T. 13-C, §1533).

Filing and Annual Fee.

See subhead Filing Fees, supra.

Taxation of Corporate Property.

Same rules as apply to taxation of individuals except that personal property of manufacturing, mining, smelting, agricultural and stock raising corporations, and corporations organized for purpose of buying, selling and leasing real estate shall be taxed to corporation in place where situated except for personal property employed in trade, in erection of buildings or vessels, or in mechanic arts (taxed in place where employed) and for property owned, leased or controlled by mining company (taxed at mine site). (T. 36, §§602 & 603). Reimbursement from state available for property tax paid on certain business property. See category 22 Taxation, topic 22.13 Property Taxes, subhead Real and Personal Property Taxable.

Taxation of Corporate Stock.

None.

Franchise Tax.

Repealed.

Income Tax.

See category 22 Taxation, topic 22.10 Income Tax.

Corporate Unitary Income Tax.

To extent corporation has income derived from unitary business carried on by two or more members of affiliated group, Maine net income of such corporation is determined by apportioning that part of federal taxable income of entire group that derives from unitary business. (T. 36, §5102[8]).

In case of affiliated group of corporations engaged in unitary business, preferential corporate tax rates apply only to first $250,000 of Maine net income of entire group. (T. 36, §5200).

Corporate members of affiliated group engaged in unitary business must file combined report. (T. 36, §5220[5]).

Jurisdiction.

Foreign corporation not registered with Secretary of State but doing business in Maine subject to jurisdiction by Maine courts over act committed outside state. (404 A.2d 564).

Professional Corporations.

Maine Professional Service Corporation Act, T. 13, c. 22-A, effective July 1, 2003. Act based in large part on ABA Model Professional Corporation Act (1984), as amended.

Maine Nonprofit Corporation Act.

T. 13-B, effective Jan. 1, 1978.

Limited Liability Companies.

See topic 2.06 Limited Liability Companies.

2.04 [RESERVED]

2.05 JOINT STOCK COMPANIES:

Not specifically authorized by statute.

2.06 LIMITED LIABILITY COMPANIES:

Limited liability companies authorized effective Jan. 1, 1995. (T. 31, §§601-762).

2.07 [RESERVED]

2.08 PARTNERSHIPS:

Uniform Partnership Act (1997) adopted effective July 1, 2007. (T. 31, §§1001-1104).

Name.

Mercantile partnership must file certificate with city clerk setting forth names and residences of partners, and nature of business and name under which business is transacted. (T. 31, §1).

Limited Partnerships.

Uniform Limited Partnership Act (2001) adopted effective July 1, 2007. (T. 31, §§1301-1461).

Limited Liability Partnerships.

Authorized in Maine Limited Liability Partnership Act. (T. 31, §§801-876).

3 BUSINESS REGULATION AND COMMERCE

3.01 BANKS AND BANKING:

Uniform Commercial Code and Consumer Credit Code adopted. Revised Art. 3 (designated Art. 3-A in Maine) has been adopted with minor variation from Uniform Act. (T. 11, §§3-1101-3-1605). Art. 4A of Uniform Commercial Code has been substantially adopted with technical modifications to conform to Maine statutory conventions. (T. 11, §§4-1101-4-1507). Conforming amendments also adopted with technical modification. (T. 11, §1-105[2]). Art. 4 also adopted. (T. 11, §§4-101-4-504). See topics: Commercial Code, Consumer Credit.

Regulated by T. 9-B. All state financial institutions are supervised by Bureau of Financial Institutions. (T. 9-B, §§111, 121, 131). Superintendent has authority to prohibit officer or director of financial institution from participating in banking industry. (T. 9-B, §232).

Title 9-B organized as follows: (1) General Provisions, (2) Bureau of Financial Institutions, (3) Organization and Structure of Financial Institutions, (4) Powers and Duties of Financial Institutions, (5) Savings Banks (repealed), (6) Trust Companies (repealed), (7) Savings and Loans (repealed), (8) Credit Unions, (9) Industrial Banks, (10) Other Financial Entities, (11) Specialty or Limited Purpose Financial Institutions, (12) Foreign Banks.

Note: In 1997 Legislative Session, Maine Legislature enacted Universal Bank Charter with goal of creating single, universal bank charter.

With respect to newly-formed state-chartered institutions, differentiation between trust companies, savings banks or savings and loan associations will no longer exist. Rather, all institutions will be referred to as “universal banks”. However, there will be no reduction in powers for existing trust companies, savings banks or savings and loan associations.

Notwithstanding generic powers of newly formed financial institutions under Maine law, Universal Bank Charter does provide for several “specialty” or “limited purpose” financial institutions set forth in Part 12 of Banking Code. Pursuant to 9-B M.R.S.A. §1211, non-depository trust company may be chartered to perform activities that are generally limited to trust or fiduciary matters. Pursuant to 9-B M.R.S.A. §1221, merchant bank may be chartered to perform lending and investing activities, as well as trust or fiduciary matters. Merchant banks are not permitted to engage in deposit activities. (T. 9-B, §1221). Uninsured bank may be chartered pursuant to 9-B M.R.S.A. §1231. Uninsured bank does not accept retail deposits and is not insured by FDIC. (T. 9-B, §1231).

Franchise Tax.

Financial institutions that have Maine net income or Maine assets and sufficient state presence are subject to franchise tax even if institution is treated for federal income tax purposes as partnership, S corporation, or entity disregarded as separate from its owner. (T. 36, §5206).

Deposits.

Form.

May be made in trust for another, made jointly in names of two or more persons with or without rights of survivorship, made in name of minor. (T. 9-B, §427).

Death.

Deposits of decedent under $1,000 may be paid to survivors or creditors without liability to executor or administrator if payment made more than six months after decedent's death and no personal representative has been appointed. (T. 9-B, §427 [8]). Financial institution may pay orders drawn by decedent prior to death from funds on deposit if presentation is made within 30 days of order and for subsequent periods, provided actual notice of death of drawer has not been received. (T. 9-B, §427[11]).

Demand Deposits.

Financial institutions may accept demand deposits from individuals and others. (T. 9-B, §421-A).

Deposits by Minor.

Deposits in name of minor are property of minor and financial institution has discretion to pay such deposits to minor or his guardian. (T. 9-B, §427).

Fiduciary Deposits.

Whenever deposit is made by fiduciary, it is conclusively presumed, in all dealings between institution and fiduciary or any other persons, that fiduciary has power to invest money in institution, and to withdraw and transfer same. Receipt or acquittance of such fiduciary fully exonerates and discharges institution from all liability to any person having any interest in such deposit and institution does not have duty to see to proper application of trust property. (T. 9-B, §427). In absence of notice of terms of trust, upon death or disability of fiduciary, bank may pay either to fiduciary's executor, administrator, conservator or guardian, or to substituted fiduciary, or to beneficiary (or to parent, guardian or person standing in *loco parentis* to beneficiary who is under age 15). Foregoing is subject to §6-111 of Uniform Probate Code. (T. 9-B, §427; T. 18-A, §6-111).

Insurance.

All state financial institutions shall take any action necessary to have deposits or accounts insured by FDIC. (T. 9-B, §422).

Joint Deposits.

Subject to §6-112 of Uniform Probate Code, financial institution is released from further liability if it makes payment to either depositor, whether other is living or not, or to legal representative of survivor of such depositors if proofs of death are presented showing that decedent was last surviving party or if there is clear and convincing evidence that no rights of survivorship were intended when account was created. (T. 9-B, §427). Joint deposits become property of surviving party or parties, unless clear and convincing evidence of different intention at time account was created. (T. 9-B, §427; T. 18-A, §6-104). Joint deposits may be pledged in whole or in part by those authorized to make withdrawals therefrom, unless contrary to specific terms of deposit or account. (T. 9-B, §427).

Transfer.

Deposit or accounts are transferable by written assignment in form approved by institution accompanied by delivery of evidence of deposit or account (generally does not apply to creation, perfection or enforcement of security interest in deposit or account). (T. 9-B, §427).

Unclaimed Deposits.

Definition and disposition of abandoned funds controlled by Uniform Unclaimed Property Act. (T. 33, §§1951-1980).

Branch Banking.

Subject to certain conditions, branch offices may be established anywhere in state. (T. 9-B, §331). All or any part of business of financial institution may be transacted in branch office. With certain exceptions, financial institution may not establish branch or agency office without prior approval of superintendent. Where no approval is needed, institution must give notice to superintendent at least ten days prior to proposed action. Where approval is needed, at least 30 days prior to establishment of branch, institution must notify superintendent of proposed action. Complete application for branch establishment may be required only when superintendent request complete application. Within 30 days of notice, any interested person may request that superintendent require complete application. If no application requested within 30-day period, branch is deemed approved. Financial institution's governing body is responsible for determining scope of operations of each branch, including services to be provided and days and hours of operation. Customers must be provided reasonable advance notice of reduction in services or hours of operation. (T. 9-B, §§332, 336). Prohibited branches governed by T. 9-B, §339-A.

Satellite facilities are governed by T. 9-B, §334.

Collections.

Uniform Commercial Code adopted. (T. 11, §§4-101-4-504).

Set-Off.

Bank cannot set off past due indebtedness against deposit intended to be held in trust, if intention communicated to bank or circumstances such as to charge bank with knowledge of intention. (98 Me. 448, 57 A. 799).

Industrial banks authorized. Individual loan must not exceed 4% of total capital and reserves for direct loans and 15% of total capital and reserves for indirect loans. Limitation inapplicable to obligations of U.S. and of Maine. (T. 9-B, §918[1]).

Banking emergency may be proclaimed by Governor and thereupon superintendent may regulate and restrict payments by banks. (T. 9-B, §§151-152).

Uniform Common Trust Fund Act enacted with substantial variation. (T. 18-A, §§7-501-7-503). Applies to fiduciary relationships in existence on Sept. 1, 1951 or thereafter established. (T. 18-A, §7-503). Nonuniform variations to §1 of Uniform Act include authorization of common trust funds for purpose of furnishing investments to affiliated banks; definition of “common trust fund” to include any trust or fund maintained by bank or trust company exclusively for collective investment or reinvestment of money contributed thereto by bank or trust company, or affiliate thereof, as fiduciary, including trustee of any employee benefits trust or fund; definition of “fiduciary” to include trustees, executors, administrators, guardians and custodians under Uniform Transfers to Minors Act. (T. 18-A, §7-501). Nonuniform variations to §2 of Uniform Act include: adoption of Maine-specific notice and service provisions and placement of jurisdiction in Superior Court or probate court, in county where accountant has its principal place of business, as proper forum for accountant petitioning for court approval of its accounting. (T. 18-A, §7-502). §§3 through 6 of Uniform Act not enacted in Maine.

Foreign Banks.

Foreign bank or foreign bank holding company may establish or acquire more than 5%

interest in Maine financial institution or financial institution holding company or any financial institution holding company controlling, directly or indirectly, Maine financial institution only with prior approval of Superintendent of Banking. (T. 9-B, §§1013, 1015). Exceptions to prior approval requirement may exist when Maine financial institution holding company acquires or establishes subsidiary to engage in any activity or financial institution holding company controlling Maine financial institution acquires or establishes subsidiary in Maine to engage in any activity, if certain conditions are met. (T. 9-B, §1015). Foreign bank or trust company may serve in fiduciary capacity to extent that Maine banks are permitted to serve as fiduciaries in state in which such foreign bank is organized. Such foreign bank must designate Secretary of State as attorney for service of process and otherwise qualify in manner of other foreign corporations, and must file certificate within 90 days of application from official supervising banks where foreign bank was organized indicating that it is duly authorized, that it has authority to act in fiduciary capacity for which it is qualifying and that foreign state grants similar authority to banks of this State. (T. 18, §§4161-4162).

Mutual Financial Institution Conversions.

Conversion of mutual financial institution into mutual holding company governed by T. 9-B, §§1051-1056.

Community Development Credit Union.

Community development credit unions were developed in 1997 to promote economic revitalization for low income wage earners. (T. 9-B, §§131, 817, 827).

Uniform Trust Code.

Adopted. (T. 18-B, §§101-1104).

3.02 BILLS AND NOTES:

Uniform Commercial Code adopted. See topic 3.09 Commercial Code.

Uniform Consumer Credit Code adopted. See topic 3.09A Consumer Credit.

Judgment Notes.

Confessions of judgment authorized in consumer credit transaction agreement are void. (T. 9-A, §3-306). See topic 3.09A Consumer Credit.

Attorney Fees.

Provision requiring maker to pay all expenses attendant to enforcing payment of note is not against public policy. (154 A.2d 161). No statutory provisions.

3.03 BILLS OF LADING:

See topic 3.07 Carriers.

3.04 BILLS OF SALE:

No specific statutory provisions. See generally topic Sales.

3.05 BLUE SKY LAW:

See topic 3.24 Securities.

3.06 BROKERS:

Brokers and producers generally regulated under various statutes and administrative regulations. See topic 3.18 Licenses, Business and Professional.

Insurance Producers.

Insurance producers licensed by Superintendent of Insurance.

Real Estate Brokers.

Licensed by Real Estate Commission. (T. 32, §§13003, 13061).

Salvage Brokers.

Person, firm or corporation engaged in buying, selling, distributing or warehousing distressed merchandise, whether or not in combination with other merchandise, which does not operate food salvage establishment must obtain license from Commissioner of Agriculture, Food and Rural Resources. (T. 22, §§2152, 2167).

Misc. Brokers.

Securities broker-dealers, sales representatives, advisers and investment adviser representatives licensed by Securities Administrator. (T. 32, §§10301-10314). See topic 3.24 Securities.

Brokers of agricultural commodities licensed by Commissioner of Agriculture, Food and Rural Resources. (T. 7, §§451-460).

Uniform Commercial Code adopted. See topic 3.09 Commercial Code.

3.07 [RESERVED]

3.08 CARRIERS:

Minimally regulated at state level. Some municipal regulations. Ferries subject to regulation and control of Public Utilities Commission. (T. 35-A, §§102, 103).

See also category 23 Transportation, topic 23.01 Motor Vehicles, subhead Motor Vehicle Carriers.

Uniform Commercial Code adopted. See topic 3.09 Commercial Code.

Bills of Lading.

Uniform Commercial Code governs. (T. 11, §§7-101-7-603). Optional phrase in §7-403 omitted. For other options and deviations from U.C.C., see topic 3.09 Commercial Code.

Liens.

Uniform Commercial Code governs. (T. 11, §§7-307, 7-308).

Unclaimed Baggage and Merchandise.

Freight and baggage transported by carrier which remains unclaimed for six months after arrival may be sold at auction. Public notice required. (T. 33, §§1701-1702). Common carriers may sell unclaimed perishable goods or livestock after complying with statutory notice requirements. (T. 33, §§1703-1704).

Hazardous Substances and Materials.

Transportation of hazardous substances subject to certain provisions of Uniform Hazardous Substances Labeling Act. (T. 7, §§501-513). That act does not apply to carriers who, while lawfully transporting hazardous substance, permit Commissioner of Agriculture, Food and Rural Resources upon request, to copy all records showing transactions in and movement of articles. (T. 7, §509). Transportation of hazardous materials also subject to hazardous material control law pursuant to which 49 C.F.R. parts 107, 171-174, 177-180, 387 and 397 have been adopted by reference. (T. 25, §§2101-2106-A; Dept. of Pub. Safety, Bureau of State Police Reg. c. 6). See also subhead Railroads, infra.

Disputed Title.

Common carrier authorized to delay transportation of property for up to five days if title to such property is claimed by person other than consignor or consignee. (T. 33, §1751).

Taxation.

Certain common carriers may claim refund of fuel tax. (T. 36, §§2909, 3215).

Railroad Crossings.

Vehicles transporting certain hazardous materials and passenger buses required to stop at railroad crossings. (T. 29-A, §2076[3]).

Railroads.

State may after hearing acquire railroad line for sale, lease or contract to operator by obtaining federal regulatory approvals or by eminent domain, to ensure safe, efficient, reliable service. (T. 23, §§7101-7156).

Applications for financial assistance from state or for permission to acquire or construct additional rail lines governed by T. 23, §7320.

Transport of Hazardous Materials.

Any person transporting by rail more than 25 tons of certain hazardous materials at one time required to register annually and pay fee of 15¢ per ton of hazardous materials transported during period of registration, payable quarterly, or $25,000 payable at time of registration. (T. 38, §1319-I).

Major Modifications of Rail Service.

Any railroad which files I.C.C. petition or proposal concerning sale, merger, abandonment or embargo of any rail line in Maine shall concurrently file copy of same with Department of Transportation. Any person or entity which proposes to acquire or construct additional railroad line in Maine or provide rail service over extended or additional railroad line, and which files petition or proposal with I.C.C. to do so shall file copy of same with Department of Transportation. (T. 23, §7104).

3.09 COMMERCIAL CODE:

Uniform Commercial Code adopted effective Dec. 31, 1964. (T. 11, §§1-101-10-108). Arts. 1, 2, 4, 6 and 7 based on 1962 Official Text which is printed in Uniform and Model Acts section. Art. 6, Bulk Transfers, repealed effective June 30, 1992. Art. 2A, Leases, based on 1987 and 1990 Official Text, effective June 30, 1992. (T. 11, §§2-1101-2-1531). Art. 3, Commercial Paper (1962 Official Text), repealed and replaced by Revised Art. 3, Negotiable Instruments (designated Art. 3-A in Maine) (T. 11, §§3-1101-3-1605), effective Oct. 13, 1993. Maine′s Art. 3-A is substantial enactment of Uniform Art. 3 with minor variations. Art. 4-A, Funds Transfers, based on 1989 Official Text, effective June 30, 1992. (T. 11, §§4-1101-4-1507). Art. 5, Letters of Credit (designated Art. 5-A in Maine) is based on 1994 Official Text, effective Sept. 19, 1997. (T. 11, §§5-1101-5-1117). Art. 8, Investment Securities (designated Art. 8-A in Maine) is based on 1994 Official Text, effective Sept. 19, 1997. (T. 11, §§8-1101-8-1116). Art. 9, Secured Transactions, is based on 1972 Official Text, effective Jan. 1, 1978 (T. 11, §§9-101-9-507); effective July 1, 2001, Art. 9 is replaced by Art. 9-A, based on 1999 Uniform Draft. (11 MRS §§9-1101-9-1709). Art. 10, Transition Provisions, similar to Art. 11 of Official Text. (T. 11, §§10-101-10-108).

Address of Secretary of State.

Secretary of State, 148 State House Station, Augusta, ME 04333-0148.

Options in Official Text have been exercised as follows: §2A-216, alternative C adopted; §3-121, alternative A adopted; §4-106, optional phrase adopted; §4-202(1)(b), optional phrase adopted; §4-212, optional paragraph adopted; §7-204, optional subsection (4) for reference to local statutes omitted; §7-403(1)(b), optional phrase omitted.

Variances from 1962 Official Text.

In addition to purely formal changes made to conform to standard Maine legislative drafting practices, following variances and additions to 1962 Official Text are found in Maine statute: §1-102, subsection (5) deleted; §1-109 omitted; §1-201(30), cross reference to §1-102 deleted; §1-201(33), “or his nominee” inserted; §1-201(46) omitted; §1-207(2), adds accord and satisfaction does not apply to renumbered subsection (1); §1-209, 1966 Official Optional Amendment not adopted; §2-107(1), “timber” deleted; §2-107(2), “or of timber to be cut” inserted before “is a contract”; §2-108 added which reads: “The procurement, processing, distribution or use of whole blood, plasma, blood products, blood derivatives and other human tissues such as corneas, bones or organs for the purpose of injecting, transfusing or transplanting any of them into the human body is declared to be, for all purposes, the rendition of a service by every person participating therein and, whether or not any remuneration is paid therefor, is declared not to be a sale of such whole blood, plasma, blood products, blood derivatives or other tissues, for any purpose, subsequent to October 1, 1969.”; §2-313(1)(b), second sentence has been inserted which reads: “In the case of consumer goods sold by a merchant with respect to such goods, the description affirms that the goods are fit for the ordinary purposes for which such goods are used”; §2-313(1)(c), “whole of the” deleted; §§2-314(1) and 2-314(3), “by section 2-316” in lieu of “(Section 2-316)”; §2-316(5) provides that disclaimer of warranties of merchantability or fitness for particular purpose unenforceable as to consumer goods, including mobile homes; §2-316(5)(a) provides that violation of §§2-314, 2-315 or 2-316 arising from retail sale of consumer goods and services constitutes violation of Unfair Trade Practices Act; §2-318, lack of privity no defense in any action against manufacturer, seller or supplier of goods for breach of warranty, if plaintiff was person whom defendant might reasonably have expected to use, consume or be affected by goods; §2-607, subsection (7) added stating that subparagraph (3), paragraph (a) shall not apply where remedy is for personal injury resulting from any breach; §2-702, 1966 Official Amendment adopted; §2-725, following paragraph added to subsection (2): “A cause of action for personal injuries arising under this Article for breach of warranty occurs when the injury takes place and is governed by the limitation of action period under Title 14 section 752”; Revised Art. 3 and conforming amendments thereto adopted; §4-106, optional language adopted; §4-202, optional language adopted; §4-204, 1962 Official Text Amendment adopted; §4-212, optional subsection (2) adopted; §7-209, 1966 Official Amendment not adopted. Conforming amendments to repeal of Art. 6 have been made.

Variations from 1972 Official Text.

In addition to purely formal changes made to conform to standard Maine legislative drafting practices and changes resulting from adoption of Art. 8 (as revised by 1994 revision project), following variances and additions to 1972 Official Text are found in Maine statute: §9-102(1), after “provided in” add “section 9-103 on multiple state transactions in”; §9-103(1)(d)(iii) substitute “section 9-307, subsection (3)” for “(subsection (2) of Section 9-307).”; §9-103(3)(a) after “trailers” insert “mobile homes” before “rolling stock”; §9-103(3)(b) after “located,” add “when the last event occurs on which is based the assertion that the security interest is perfected or unperfected”; §9-103(6) omitted; §9-104(a), after “United States” add “such as the Ship Mortgage Act, 1920”; §9-104(e), insert following after “agency”: “other than an Indian tribal government”; §9-104(k), after “part of ” add “any of the following:”; §9-109(4), add following sentence before last sentence: “ ‘Inventory’ includes timber to be cut.”; §9-111, repealed in conformity with repeal of Art. 6; §9-203(4) reads: “A transaction, although subject to this Article, is also subject to the applicable provisions of Title 9-A, or to Title 30, sections 3961 and 3965, and in the case of conflict between the provisions of this Article and any such statute the provisions of such statute control. Failure to comply with any applicable statute has only the effect which is specified therein.” §9-301(2), time for filing with respect to purchase money security interest is 20 days after debtor receives possession of collateral; §9-302, 1977 conforming amendment adopted; §9-302(1)(d), reads: “A purchase money security interest in consumer goods where the amount financed, as defined in Title 9-A, section 1-301, subsection 5, is less than $2,000, but fixture filing is required for priority over conflicting interests in fixtures to the extent provided in section 9-313.”: §9-302(3)(b), omits “of this state” and lists “Title to motor vehicles, Title 29, Chapter 7” in lieu of bracketed material; §9-304, 1977 conforming amendment adopted; §9-305, 1977 conforming amendment adopted; §9-306(2), after “Article” insert “or Article 8” before “otherwise provides”; §9-306(3), after “section” in last sentence, insert “and in Article 8” before “a security interest”; §9-307(1), insert after “business,” “other than a person buying timber, logs or pulpwood from a person engaged in timbering operations or from a person dealing in timber, logs or pulpwood and”; §9-307(2), repealed; §9-309, 1977 conforming amendments adopted; §9-312, 1977 conforming amendment adopted; §9-312(4), substitute “20 days” for “ten days”; §9-401(1), in subsection (1)(a), insert “or is crops growing or to be grown,” after “Section 9-103,” and “concerned” after “real estate,” after subsection (1)(a), insert subsection (1)(a-1) reading as follows: “(a-1) When the collateral is farm products, a filing may be made with the Secretary of State in accordance with procedures adopted under Title 5, section 90-A.” §9-401(1)(b), bracketed material reads: “Secretary of State”; §9-401(6), omitted; §9-402(1), at end of first sentence insert”; provided that, for purposes of this section, if the collateral is a mobile home as defined in Title 10, section 1402, subsection 2, the description of collateral shall include the location designated by the debtor in the security agreement as the place at which the mobile home is, or is to be, located.”; third sentence, after “subject to” add section 9-103, subsection (5), “or covers crops growing or to be grown”; 9-402(1) last sentence, insert “legible” before “carbon”; 9-402(2), delete “(subsection 7)”, add second sentence which reads: “The secured party is not required to file a new financing statement to perfect or continue to perfect a security interest after such change of name, identity or corporate structure of the debtor”; §9-402(3), insert “Mailing” before “address,” in item 3, delete “and this financing statement is to be filed [for record] in the real estate records”; §9-402(5), after “Section 9-103” add “or covering crops growing or to be grown”; and delete “must recite that it is to be filed [for record] in the real estate records” and “[sufficient if it were contained in a mortgage of real estate to give constructive notice of the mortgage under the law of this state]”; §9-402(6)(c), delete “other than a recital that it is to be filed in the real estate records”; §9-402(7), delete sentence beginning “Where the debtor so changes his name . . .”; §9-403(3), insert “and if the continuation statement covers timber to be cut, minerals or the like, including oil and gas, or accounts subject to section 9-103 subsection (5), or crops growing or to be grown or fixtures, it shall contain the name of the record owner.” after “the original statement is still effective,”; insert “Unless an assignment is a matter of record,” before “a continuation statement signed by a person”; §9-403(4), insert at end of last sentence, “In addition, if the financing statement is filed in the office of a register of deeds and contains the name of a record owner of real estate, the filing officer shall also index the statement according to the name of the record owner of the real estate. The index may be made up of the statements themselves, copies thereof, separate cards or otherwise.”, delete “In addition” from beginning of second sentence; §9-403(5), fee for filing, indexing and furnishing filing data for original financing statement filed on or after July 1, 1993 is $20, except that filing fee at registry of deeds is $13 for first page and $2 for each page thereafter (T. 33, §751), with $3 surcharge for each document recorded (T. 33, §752). Fee for filing, indexing and furnishing filing data for continuation statement or any amendment to continuation statement shall be $10, except that filing fee at registry of deeds is same as if original were filed on or after July 1, 1993; §9-403(7) in its entirety is as follows: “When a financing statement, continuation statement, termination statement, statement of assignment or a statement of release covers timber to be cut or covers minerals or the like, including oil and gas, or accounts subject to sections 9-103, subsection (5), or covering crops growing or to be grown, or is filed as a fixture filing, the filing officer shall index it under the names of the debtor and any owner of record shown on the financing statement in the same fashion as if they were the mortgagors in a mortgage of the real estate described, and under the name of the secured party as if he were the mortgagee thereunder.”; §9-404(1) in its entirety is as follows: “(1) The following provisions apply to the sending or filing of termination statements: (a) With respect to financing statements filed prior to April 1, 1970: Whenever there is no outstanding secured obligation and no commitment to make advances, incur obligations or otherwise give value, the secured party must within 30 days from the date on which the foregoing first occurs send the debtor a statement that he no longer claims a security interest under the financing statement, which shall be identified by file number. A termination statement signed by a person other than the secured party of record must include or be accompanied by the assignment or a statement by the secured party of record that he has assigned the security interest to the signer of the termination statement. The fee for filing and indexing such an assignment or statement thereof shall be $3. If the affected secured party fails to send such a termination statement he shall be liable to the debtor for $10, and in addition for any loss caused to the debtor by such failure. (b) With respect to financing statements filed on or after April 1, 1970: Whenever there is no outstanding secured obligation and no commitment to make advances, incur obligations or otherwise give value, the secured party must within 30 days from the date on which the foregoing first occurs, file a termination statement stating that the secured party no longer claims a security interest under the financing statement, which must be identified by file number. A termination statement signed by a person other than the secured party of record must include or be accompanied by the assignment or a statement by the secured party of record that the secured party has assigned the security interest to the signer of the termination statement. The fee for filing and indexing such an assignment or statement thereof is $3. If the affected secured party fails to file such a termination statement, the secured party is liable to the debtor for $25, and in addition for any loss caused to the debtor by such failure.”; §9-404(3), fee for filing and indexing termination relating to financing statement filed after Apr. 1, 1970 and prior to July 1, 1993, is $10 if acknowledgment copy of UCC-1 form is used and $15 if terminated by filing UCC-3 amendment form; no fee for filing and indexing termination statement with respect to financing statement filed on or after July 1, 1993. Fee for termination of financing statement that was filed prior to Apr. 1, 1970 is $2. Register of deeds receives fee of $13 for first record page and $2 for each additional record page with respect to filing and indexing termination statement (T. 33, §751), plus $3 per document surcharge (T. 33, §752); §9-405(1), uniform fee for filing, indexing and furnishing filing data for financing statement indicating assignment is $5, except that filing fee at registry of deeds is $8 for first page plus $3 per document surcharge and $2 for each page thereafter; §9-405(2), reads as follows: “A secured party may assign of record all or a part of his rights under a financing statement by filing in the place where the original financing statement was filed of a separate written statement of assignment signed by the secured party of record and setting forth the name of the secured party of record and the debtor, the file number and the date of filing of the financing statement and the name and address of the assignee and containing a description of the collateral assigned. A copy of the assignment is sufficient as a separate statement if it complies with the preceding sentence. On presentation to the filing officer of such a separate statement, the filing officer shall mark such separate statement with the date and hour of the filing. He shall note the assignment on the index of the financing statement, or in the case of a fixture filing, or a filing covering timber to be cut, or covering minerals or the like, including oil and gas, or accounts subject to section 9-103, subsection (5), or covering crops growing or to be grown, he shall index the assignment under the name of the assignor as grantor and, he shall index the assignment of the financing statement under the name of the assignee. The uniform fee for filing, indexing and furnishing filing data about such a separate statement of assignment shall be $3. Notwithstanding the provisions of this subsection, an assignment of record of a security interest in a fixture contained in a mortgage effective as a fixture filing, section 9-402, subsection (6), may be made only by an assignment of the mortgage in the manner provided by the laws of this State other than this Title." §9-406, insert "Unless an assignment is a matter of record, a statement of release signed by a person other than the secured party of record must be accompanied by a separate written statement of assignment signed by the secured party of record and complying with section 9-405, subsection (2), including payment of the required fee," in place of third sentence; uniform fee for filing and noting statement of release is $3 in all cases; §9-407(1), substitutes "statement of release" for "statement or release"; §9-407(2) reads as follows: "Upon the written request of any person, the filing officer shall issue an information request report, in such form as the Secretary of State may approve, showing whether there is on file on the date and hour stated therein any presently effective financing statement naming a particular debtor and any statement of assignment thereof and if there is, giving the date and hour of filing of each such statement and the names and addresses of each secured party therein. The uniform fee for an information request report is $5, plus $.50 for each page of the report after the first page. Upon request the filing office shall furnish a copy of any filed financing statement, continuation statement, termination statement, statement of assignment or statement of release for a fee of $2 plus $.50 for each page of the copy after the first page."

"Notwithstanding this subsection, if the filing officer is a municipal clerk or a register of deeds, issuance of the certificate of information is discretionary.

"Upon reasonable request and within the existing ability of the office of the Secretary of State to respond, the filing officer shall furnish to any municipal clerk, without charge and for municipal purposes only, a copy of any filed financing statement, continuation statement, termination statement, statement of assignment or statement of release. The uniform fee for certification is $5 for a short-form certificate and $10 for a specially worded certificate."; §9-409, insert following section; "The Secretary of State may provide an expedited service for the processing of documents in accordance with this Part. If the service is provided, the Secretary of State shall establish by rule a fee schedule and governing procedures in accordance with the Maine Administrative Procedure Act. All fees collected as provided by this section must be deposited into a fund for use by the Secretary of State in providing an improved filing service."; §9-410, insert following section: "The Secretary of State may provide public access to the database of the Department of the Secretary of State through a dial-in modem, public terminals and electronic duplicates of the database. If access to the database is provided to the public, the Secretary of State may promulgate rules in accordance with the Maine Administrative Procedure Act to establish a fee schedule and governing procedures."; §9-411, insert following section: "*1. Informational publications.* The Secretary of State may establish by rule in accordance with the Maine Administrative Procedure Act (Section 8001 et seq. of title 5) a fee schedule to cover the cost of printing and distribution of publications and to set forth the procedures for the sale of these publications.

"2. Fund; fees deposited. All fees collected pursuant to this section must be deposited in a fund for use by the Secretary of State for the purpose of replacing and updating publications offered in accordance with this Part and for funding new publications."; §9-412, insert following section: "The Secretary of State may accept electronic filings of federal tax liens. The Secretary of State may establish by rule in accordance with the Maine Administrative Procedure Act (Section 8001 et seq. of title 5) the procedures and standards for electronic filings of federal tax liens." §9-413, insert following section: "The Secretary of State has the power and authority necessary to administer this Part and perform the duties imposed. These powers include, without limitation, the power to:

(1) Make rules consistent with this Part;

(2) Prescribe forms for all documents required or permitted to be filed with the Secretary of State and to refuse to file documents not utilizing the prescribed forms to the extent

possible; and

(3) Refuse to file any document that is not clearly legible or may not be clearly reproducible photographically."; §9-504(1), insert "or lease" after "for sale" and "selling,"; §9-504(2), delete "contract rights" preceding "chattel paper"; §9-504(3), insert ", except in the case of consumer goods," after "shall be sent by the secured party to the debtor, if"; §9-505(2) reads: "In any other case involving consumer goods or any other collateral, a secured party in possession may, after default, propose to retain the collateral in satisfaction of the obligation. Written notice of such proposal shall be sent to the debtor if he has not signed after default a statement renouncing or modifying his rights under this subsection. In the case of consumer goods, no other notice need be given. In other cases, notice shall be sent to any other secured party from whom the secured party has received, before sending his notice to the debtor or before the debtor's renunciation of his rights, written notice of a claim of an interest in the collateral. If the secured party receives objection in writing from a person entitled to receive notification within 21 days after the notice was sent, the secured party must dispose of the collateral under §9-504. In the absence of such written objection, the secured party may retain the collateral in satisfaction of the debtor's obligation."

Variations from 1989 Official Text: §4A-205(a)(2) and (3) (designated §4-1205[1][b] and [c] in Maine code) reads as follows: "(b) If the funds transfer is completed on the basis of a payment order that erroneously instructed payment to a beneficiary not intended by the sender or that was an erroneously transmitted duplicate of a payment order previously sent by the sender, the sender is not obliged to pay the order and the receiving bank is entitled to recover from the beneficiary any amount paid to the beneficiary to the extent allowed by the law governing mistake and restitution.

(c) If the funds transfer is completed on the basis of a payment order erroneously instructing payment in an amount greater than the amount intended by the sender, the sender is not obliged to pay the order to the extent the amount received by the beneficiary is greater than the amount intended by the sender. In that case, the receiving bank is entitled to recover from the beneficiary the excess amount received to the extent allowed by the law governing mistake and restitution." §4A-302(3) (designated §4-1302 in Maine code) reads as follows: "(3) Unless subsection (1), paragraph (b) applies or the receiving bank is otherwise instructed, the bank may execute a payment order by transmitting its payment order by first class mail or by any reasonable means. If the receiving bank is instructed to execute the sender's order by transmitting its payment order by a particular means, the receiving bank may issue its payment order by the means stated or by any equivalent means." Conforming technical amendment to Art. 1 adopted.

Variations from 1987 and 1990 Official Text: In addition to formal changes made to conform to standard Maine legislative drafting practices, following variances and additions to 1987 and 1990 Official Text are found in Maine statute: §2A-103(e), end with "$25,000"; §2A-103(h), after "lease contract" add "including mobile homes"; §2A-104, subsection (1)(a) reads: "Certificate of title statute of this State;"; §2A-109, in subsection (1), substitute "when the party represents that that party is insecure" for "when he [or she] deems himself [or herself] insecure"; §2A-201, in subsection (4)(a), substitute "specifically' for "specially"; §2A-209(1), after "claims arising therefrom." add "In a finance lease that is a consumer lease, supplier's ability to disclaim, exclude or modify any implied warranties of merchantability and fitness of a particular purpose or to exclude and modify the consumer's remedies for breech of those remedies is subject to §2A-316, subsection (5)"; §2A-214(5), add "In a consumer lease that is not a finance lease, the lessor's ability to disclaim, exclude or modify any implied warranties of merchantability and fitness for a particular purpose or to exclude or modify the consumer's remedies for breach of those warranties is subject to and governed by the terms and provisions of §2A-316, subsection (5)"; §2A-216, Alternative C adopted; §2A-221, delete text after "the lease contract is avoided;" add "and (2) After delivery in a consumer lease, if the goods are lost or destroyed: (a) If the lessee is not in default under the lease, the lessee may provide substitute goods of at least equal kind and quality satisfactory to the lessor and continue the lease. Permission to substitute goods may not be unreasonably withheld by the lessor. Any insurance proceeds paid with respect to the goods must be applied to the purchase of the substitute goods; or (b) At the consumer's option, any insurance proceeds must be paid to the lessor and, in such an instance, the lessee remains liable only for the insurance deductible plus any amounts otherwise due to the lessor because of any prior default by the lessee under the terms of the lease."; §2A-303(8), at end add "The lessor's remedies with regard to a prohibited transfer or a transfer that results in default are subject to the duty of the lessor to mitigate damages."; §2A-510(2), delete "But" at beginning of second sentence and add the word "shall" after "the aggrieved party" and substitute word "reinstate" for "reinstates"; §2A-511(1), in first sentence, word "to" is used instead of word "or" after "reasonable instructions received from the lessor", probably an error; §2A-516(3)(a), insert "Except in the case of a consumer lease," before "within a reasonable time", delete word "over" after word "remedy"; §2A-516(3)(b), delete word "except" before "in the case of a consumer lease," delete all text after "within a reasonable time after the lessee receives" and insert "discovers or should have discovered any default, the lessee shall notify either the lessor or any assignee of the lessor. By notifying one of these parties the lessee preserves any remedy against any of the parties; and"; §2A-524(1), delete "After default by the lessee under the lease contract of the type described in §2A-523(1) or §2A-523(3)(a) or, if agreed, after other default by the lessee, the lessor may" at beginning of section and add "A lessor aggrieved under section 2-1523, subsection (1) [§2A-523(1)] may"; §2A-525(3), substitute "if possible" for "if it can be done"; §2A-528, in title of section delete words "failure to pay" and "other default"; §2A-529(5), delete all text before "a lessor who is held not entitled" and insert "After a lessee has wrongfully rejected or revoked acceptance of goods, has failed to pay rent then due or has repudiated (section 2-1402) [§2A-402]". Revised Art. 3 (designated Art. 3-A in Maine) and conforming amendments to other Arts. adopted. In 2004, following additions were made to Art. 3-A: §3-A-1103(2) in list following "Consideration" add "Demand Draft"; §3-A-1104(6) add subsection (c) "A demand draft."; add §3-A-1104(11), reading as follows: " 'Demand draft' means a writing not signed by a customer that is created by a 3d party under the purported authority of the customer for the purpose of charging the customer's account with a bank. A demand draft must contain the customer's account number and may contain any or all of the following: (a) The customer's printed or typewritten name; (b) A notation that the customer authorized the draft; and (c) The statement "No Signature Required" or words to that effect. 'Demand draft' does not include a check purportedly drawn by and bearing the signature of a fiduciary, as defined in section 3-1307, subsection 1, paragraph (1)."; add §3-A-1416(1) add subsection (f) "If the instrument is a demand draft, creation of the instrument according to the terms on its face was authorized by the person identified as the drawer."; §3-A-1416(5) is added "If the warranty in subsection (1), paragraph (f) is not given by a transferor under applicable conflict of laws rules, then the warranty is not given to that transferor when that transferor is a transferee."; §3-A-1417(1) add subsection (d) "If the draft is a demand draft, creation of the demand draft according to the terms on its face was authorized by the person identified as the drawer."; §3-A-1417(7) is added "A demand draft is a check, as provided in section 3-1104, subsection (6)." §3-A-1417(8) is added "If the warranty is subsection (1), paragraph (d) is not given by a transferor under applicable conflict of laws rules, then the warranty is not given to that transferor when that transferor is a transferee." Following additions were made to Art. 4: §4-103(3) in list following "Check" add "Demand draft"; §4-207-A(1) add subsection (f) "If the item is a demand draft, creation of the item according to the terms on its face was authorized by the person identified as the drawer."; §4-207(6) added "If the warranty in subsection (1), paragraph (f) is not given by a transferor or collecting bank under applicable conflict of laws rules, then the warranty is not given to the transferor when that transferor is a transferee nor to any prior collecting bank of that transferee."; §4-207-B(1) add subsection (d) "If the draft is a demand draft, creation of the demand draft according to the terms on its face was authorized by the person identified as the drawer."; §4-207-B(7) is added "A demand draft is a check, as provided in 3-1104, subsection (6)."; §4-207-B(8) is added "If the warranty in subsection (1), paragraph (d) is not given by a transferor under applicable conflict of laws rules, then the warranty is not given to the transferor when that transferor is a transferee."

Variations from 1994 Official Text.

Only purely formal changes have been made to conform to standard Maine legislative drafting practices.

Variations from 1999 Uniform Draft.

Effective July 1, 2001, Maine has adopted 1999 Model Revised Art. 9, Secured Transactions. In addition to purely formal deviations from 1999 Uniform Draft, Maine statute contains following significant deviations: §9-507(3), effect of change of name of debtor. Financing statement filed under former name of debtor remains effective, but continuation in former name does not perfect as to new collateral; §9-508(2), effect of change of corporate structure, merger, etc. Old financing statement under old name remains effective if (a) corporate change has not changed proper office in which to file, and (b) public records relating to merger or other corporate change are located in same office as “registered organization” documents of original debtor. Otherwise, uniform four-month rule applies; §§9-208 and 9-209. Creditor's time period to release liens in certain intangible collateral increased from ten days to 20 days; §9-210. Creditor's time to respond to request for accounting increased from 14 to 20 days; §9-309. Automatic perfection for purchase money security interests in consumer goods capped at purchase price of $10,000; §9-626. Maine adopted “absolute bar” rule as affirmative nonuniform legislation for consumer transactions. Any failure to comply with Art. 9 provisions relating to collection, enforcement, disposition or acceptance excuses consumer debtor and secondary obligor from any liability for deficiency; §9-513(2). Creditor's time period to release UCC-1 filings on paid off loans extended from 30 days to 60 days; §9-512. Amendments to fixture filings in county registry of deeds should include name of debtor and secured party. Cross-reference to affected filing should be by book and page only.

Filing Fees.

See category 10 Documents and Records, topic 10.04 Records, subhead Filing Under Commercial Code.

Forms.

See Uniform and Model Acts of Law Digest, Commercial Code Amendments.

See also topics: Banks and Banking, Bills and Notes, Brokers, Carriers, Contracts, Factors, Frauds, Statute of, Sales, Securities, Warehousemen; categories Business Organizations, topic Corporations; Civil Actions and Procedure, topic Limitation of Actions; Debtor and Creditor, topics Assignments, Fraudulent Sales and Conveyances, Liens, Pledges; Documents and Records, topics Records, Seals; Mortgages, topic Chattel Mortgages.

3.09A CONSUMER CREDIT:

Uniform Consumer Credit Code (1974 Act) adopted effective Jan. 1, 1975.

Maine Consumer Credit Code, T. 9-A, §§1-101-12-107, follows substance, purpose and scope of Uniform Consumer Credit Code. Code is administered by Office of Consumer Credit Regulation. Major changes in organization and numerous material deviations from text of Uniform Code have been made. Because of number of deviations from Official Text, it is not feasible to specifically list such deviations here.

Maine Act organized as follows:

Art. I.—General Provisions and Definitions.

Art. II.—Finance Charges and Related Provisions.

Art. III.—Regulation of Agreements and Practices.

Art. IV.—Insurance.

Art. V.—Remedies and Penalties.

Art. VI.—Administration.

Art. VII.—Repealed.

Art. VIII.—Truth-in-Lending.

Art. IX.—Consumer Credit Transactions Secured by First-Lien Mortgages.

Art. X.—Credit Services Organizations.

Art. XI.—Rental-Purchase Practices.

Art. XII.—Legal Funding Practices.

Disclosure of consumer credit terms covered by T. 9-A, §§8-201-8-209.

Legal funding practices covered by T. 9-A, §§12-101-12-107.

Portions of Maine Insurance Code, T. 24-A, are incorporated in Article IV of Consumer Credit Code, replacing provisions of Uniform Code.

3.103.11

3.12 CONSUMER PROTECTION:

In addition to Maine Consumer Credit Code discussed under topic Consumer Credit, following consumer protection legislation exists in Maine:

Fair Credit Reporting Act.

T. 10, §§1311-1330, regulates consumer reporting and investigative consumer reporting as well as disclosure of information to consumers by consumer reporting agencies, and provides procedures for correcting inaccurate or misleading information.

Financial Planner's Disclosure.

Financial planner required to disclose to consumer any direct or indirect interest he has, or any potential financial gain he stands to make, if consumer makes recommended investment. (T. 32, §§9751-9754).

Home Solicitation Sales.

T. 32, §§4661-4671, allows consumer to avoid contract entered into as result of salesman's direct contact with consumer by means of personal visit or telephone call or otherwise without consumer soliciting contract or call. Contract must be written, signed by both parties, and contain date of transaction, terms of sale, mailing address of seller's permanent place of business, statement of limitation and consumer's right to avoid transaction. Contract must be provided to consumer immediately following signature. Contract may be avoided by written notice and consumer may demand within 20 days of such notice that seller take possession of any goods, at consumer's residence, and if seller fails to do so within 20 days, goods become property of consumer. In making sale, seller may not misrepresent material fact, create false impression or make false promises. Certain transactions are excluded. (T. 32, §4668). Violations are Class D or Class E crimes. (T. 32, §§4662, 4664-A, 4666). See subhead Unfair Trade Practices Act, infra.

New Housing.

Judicially recognized implied warranty of habitability from builder-vendor to initial purchaser. (407 A.2d 294).

Home Construction Contracts.

Any home construction contract for more than $3,000 in materials or labor must be in writing and signed by contractor and homeowner or lessee. Homeowner or lessee must receive copy of executed contract, which must contain certain specified information and provisions, prior to any work performance. (T. 10, §1487).

Change orders must be in writing, signed by both parties, detail changes in original contract that result in revised contract price, and state previous and revised contract price. (T. 10, §1488).

Exemptions from requirements of T. 10, §§1487, 1488 permitted only if contractor specifically informs homeowner or lessee of rights and parties mutually agree to nonconforming contract or change order. (T. 10, §1489).

Penalties.

Any violation is prima facie evidence of violation of Unfair Trade Practices Act, and is civil violation subject to forfeiture of not less than $100 or more than $1,000. Two years limitation period applies, running from date of occurrence of violation. (T. 10, §1490).

Debt Collection.

Debt collection businesses regulated by T. 32, §§11001-11054.

Credit Cards.

T. 9-A, §§8-301 and 8-302 prohibit issuance of credit cards except in response to request or application therefor and limit liability of card holder for unauthorized use of credit card to maximum of $50. Such limitations applicable only if card is accepted credit card, issuer gave adequate notice of potential liability, issuer has provided cardholder with description of means by which issuer may be notified of loss or theft of card, unauthorized use occurs before card holder has notified issuer, and issuer has provided method whereby user of card can be identified as person authorized to use it. If above conditions are not met, holder not liable for any unauthorized use. Maximum monthly finance charge is finance charge set forth in agreement between consumer and creditor. (T. 9-A, §2-402). Maine Consumer Credit Code—Truth in Lending Act regulates various aspects of credit cards, including determination of finance charges and annual percentage rate, disclosure requirements, and billing. (T. 9-A, §§8-101-8-404). When travel agent furnishes travel services to consumer, provider of travel services may not impose surcharge on travel agent or reduce travel agent's commission as result of consumer's use of credit card. (T. 10, §1142).

Manufacturer's Rebate.

Any person advertising availability of manufacturer rebate form must make forms available to consumer at time of sale. (T. 10, §§1231-1233).

Solar Energy Equipment Warranty Act.

T. 10, §§1491-1494, establishes warranty for sale and installation of solar energy equipment. Violations punishable by fine. In addition, violation of Act constitutes violation of Unfair Trade Practices Act. (T. 5, §§206-214).

Unfair Trade Practices Act.

T. 5, §§206-214 prohibits unfair and deceptive trade practices, and provides for enforcement by Attorney General's department and private enforcement by injured consumers.

“Unsolicited goods” statute adopted whereby person who receives unsolicited merchandise may refuse delivery or deem it gift and use it or dispose of it in any manner without obligation to sender. (T. 33, §1101).

Uniform Deceptive Trade Practices Act.

Adopted. See T. 10, §§1211-1216.

See topics 3.19 Interest, 3.21 Sales, 3.09A Consumer Credit.

Warranties on New Motor Vehicles.

Business practices between consumers and automobile manufacturers governed by motor vehicle “lemon law”. (T. 10, §§1161-1165). Under Maine Lemon Law, manufacturer, its agent or authorized dealer must make repairs necessary to conform vehicle to express warranties if consumer reports nonconformity during term of express warranties, within three years of delivery date, or during first 18,000 miles, whichever is earlier. If, after reasonable number of attempted repairs, vehicle is still nonconforming, manufacturer must replace vehicle or make refund to consumer. Consumer may reject replacement and receive instead refund. (T. 10, §1163). See category 23 Transportation, topic 23.01 Motor Vehicles, subhead Sales.

Warranties and Disclosures on Used Motor Vehicles.

Sales of used motor vehicles governed by Used Car Information Act. Dealer must provide written statement warranting that used vehicle successfully passed inspection and disclosing numerous other matters specified by statute. (T. 10, §§1471-1478). See category 23 Transportation, topic 23.01 Motor Vehicles, subhead Sales.

Audiotext Service Charges.

Regulation of charges, and disconnections from failure to pay such charges, from use of telephone informational services, including 900 numbers. (T. 35-A, §§801-808).

Rent-to-Own Arrangements.

Governed by T. 9-A, §§11-101-11-122.

Plain Language.

Consumer loan and lease agreements between resident consumers and supervised lenders and lessors in Maine must be “written in a clear and coherent manner using words with common and everyday meanings” and “appropriately divided and captioned by its various sections.” Not applicable to loans exceeding $100,000, or to leases in which capitalized cost of leased property exceeds $100,000, or to language or arrangements otherwise required by law. Certification of compliance available from Office of Consumer Credit Regulation, or, in case of agreements from supervised financial organizations, Bureau of Financial Institutions. Application fee $25. Certification bars legal proceeding against lender. Consumer lease is lease of goods to consumer for personal, family or household purposes, which is for term exceeding four months and which is not made pursuant to lender credit card. (T. 10, §§1121-1126).

Automated Telephone Solicitations.

Prohibited except for one call or facsimile per day between hours of 9 a.m. and 5 p.m. Number blocking also prohibited. Regulated by T. 10, §§1498-1499-B.

Cable Television.

Various consumer protections and rights are provided under T. 30-A, §3010 including right to credit or refund for service interruption of six or more consecutive hours in 30-day period.

Commodities.

T. 10, §§2621-2630 regulates sale of commodities including misrepresentation of quantity, method of sale, pricing, delivery tickets required for sales from bulk, information required on packages, advertising and conformity to national method of sale, packaging and labeling regulations.

Weighing and Measuring Devices.

Weighing and measuring equipment used by dealers or repairmen must be tested and calibrated annually by state sealer. (T. 10, §2654). Retail vehicle tank metering devices may be tested by certain registered repairmen. (T. 10, §2654-A).

Motor Vehicle Dealers, etc.

Conduct of motor vehicle dealers, manufacturers, brokers, factory branches, factory representatives, distributors, wholesalers, etc. is regulated by T. 10, §§1171-1187. Manufacturers and distributors of motorcycles and recreational vehicles are exempt from manufacturer licensing requirements. (T. 10, §1171-B).

Telefacsimile Transmission.

Unsolicited transmission of telefacsimile message seeking charitable contributions or promoting purchase or rental of real property, goods or services is prohibited. Violation constitutes unfair trade practice. (T. 10, §1496).

Transient Sales.

Transient sellers of consumer merchandise regulated by T. 32, §§14701-14716. All transient sellers must acquire license from Department of Professional and Financial Regulation and make security deposit (unless waived in accordance with statute).

Business Opportunities.

Mandatory disclosure and registration requirements for seller of business opportunity. (T. 32, §§4691-4700-B).

Electronic Mail Solicitation.

Transmission of unsolicited commercial email to two or more recipients within state is unfair trade practice prohibited by T. 5, §207. (T. 10, §1497).

Unsolicited commercial email other than sent at request of recipient, sent to two or more recipients within state with whom sender does not have existing business relationship for purposes of: (1) offering real property, goods or services for sale or rent; (2) conveying information on real property, goods or services to solicit sales or purchases; (3) conveying information on extension of credit; or (4) promoting or soliciting charitable contributions.

Unsolicited commercial email does not include email with advertisement sent by email service provider if email service provider offers recipient free email service in exchange for allowing such advertisement.

3.13 CONTRACTS:

Uniform Commercial Code adopted with variations. (T. 11, §§1-101-10-108).

See topics 3.09 Commercial Code, Consumer Credit, Consumer Protection, Frauds, Statute of, Sales; categories 10 Documents and Records, topic Seals; Family, topic Infants.

3.14 FACTORS:

Governed by Uniform Commercial Code. See topic 3.09 Commercial Code.

License Requirements.

None.

3.15 FRANCHISES:

Uniform Franchise and Business Opportunities Act.

Not adopted.

Alcoholic Beverages.

Franchises for wholesale sales of malt liquor, wine and low-alcohol spirits governed by T. 28-A, §§1401-1408 and 1451-1465.

Business Opportunities.

Sales of business opportunities governed by T. 32, §§4691-4700-B.

Cable Television.

Municipalities responsible for franchising and regulating cable television systems pursuant to guidelines set forth in T. 30-A, §§3008, 3010.

Motor Fuel.

Franchises for motor fuel dealerships governed by T. 10, §§1451-1457.

Motor Vehicles.

Franchises for motor vehicle dealerships governed by T. 10, §§1171-1190-A.

Farm Machinery.

Franchises for farm equipment and machinery dealerships governed by T. 10, §§1285-1298.

Power Equipment, Machinery and Appliances.

Franchises for power equipment, machinery and appliances governed by T. 10, §§1361-1370.

3.16 FRAUDS, STATUTE OF:

No action maintainable to charge executor or administrator on special promise to answer damages out of his own estate; to charge any person upon any special promise to answer for debt, default or misdoings of another, or upon agreement made in consideration of marriage, or that is not to be performed within one year from making thereof, or upon any contract to pay debt after discharge therefrom under bankruptcy law of U.S., or assignment or insolvency laws of this state, unless made in writing and signed by party to be charged thereby, or by some person thereunto lawfully authorized. (T. 33, §51). No action shall be maintained on any contract made by minor unless he, or some person lawfully authorized, ratified it in writing after he arrived at age of 18 years, except for necessaries or real estate of which he has received title and retains benefit. (T. 33, §§51-53).

Any minor 16 or over who takes loan from New England Higher Education Assistance Foundation is of full legal capacity for such purpose. (T. 33, §52).

Agreements as to Wills.

Uniform Probate Code adopted, effective Jan. 1, 1981. (T. 18-A, §§1-101-9-404). Rule requiring certain contracts to be in writing in order to support action thereon has been extended to any agreement to give, bequeath or devise by will any property, whether real, personal or mixed. (T. 33, §51[7]).

Agreements as to Business.

Any agreement to refrain from carrying on or engaging in any trade, business, occupation or profession for any term of years, or within any designated territory, or both, is unenforceable unless the agreement or some memorandum thereof is in writing and signed by the person to be charged. (T. 33, §51[8]).

Contracts of Sale.

Any contract for sale of lands, tenements or hereditaments, or of any interest in or concerning them is unenforceable unless contract thereof is in writing and signed by party to be charged. (T. 33, §51[4]).

Part performance by person seeking to enforce unwritten contract may take it out of statute of frauds on ground of equitable estoppel based on equitable fraud. (351 A.2d 845).

Uniform Commercial Code adopted and governs contracts for sale of personal property. (T. 11, §§1-206 and 2-201).

Commercial Code.

See topic 3.09 Commercial Code.

3.17 [RESERVED]

3.18 INFORMATION TECHNOLOGY, INTERNET AND NEW MEDIA:

Personal Privacy and Governmental Information.

Governmental and other public entities that have Internet sites must post privacy policies. (T. 1, §§541-542).

3.193.16

3.17 INTEREST:

Maximum legal rate on loan made by financial institution, in absence of agreement in writing establishing different rate is 6% per year. (T. 9-B, §432). Maximum rate in consumer credit transactions established under Consumer Credit Code, T. 9-A. Finance charge in consumer loans other than open end credit, calculated according to actuarial method, may not exceed equivalent of following: Total of (i) 30% per year on that part of unpaid balance of amount financed that is $2,000 or less, (ii) 24% per year on that part of unpaid balance of amount financed that is more than $2,000 but does not exceed $4,000, and (iii) 18% per year on that part of unpaid balance of amount financed that is more than $4,000. (T. 9-A, §2-401). Finance charge in consumer credit sales other than open end credit, calculated according to actuarial method, may not exceed equivalent of greater of either of following: (a) Total of (i) 30% per year on part of unpaid balance of amount financed that is $1,000 or less, (ii) 21% per year on part of unpaid balance of amount financed that is more than $1,000 but does not exceed $2,800, and (iii) 15% per year on part of unpaid balance of amount financed that is more than $2,800; or (b) 18% per year on unpaid balance of amount financed. Nor may finance charge on certain home improvement credit transactions exceed 18%. Certain minimum charges may be made. (T. 9-A, §2-201; Rule 220). Note payable at future date with interest greater or less than 6% draws such interest until maturity but after maturity draws 6% unless rate after maturity provided for therein. (67 Me. 540). Interest is allowable on account only by agreement or after demand (22 Me. 116) but is recoverable on balance of account stated from date of settlement (32 Me. 256). Interest not allowed on money collected until demand. (24 Me. 343). Compound interest not allowed unless expressly stipulated for. (90 Me. 206, 38 A.138; 91 Me. 340, 40 A. 132). Finance charge on transaction to finance or refinance acquisition of, or secured by, manufactured housing, not involving security interest in real estate may not exceed greater of: (a) Rate 2% greater than maximum rate established by federal regulations under VHA, 38 USC §1819(f) or (b) 18% per year. However, in event no specific maximum rate is established by federal regulation, this provision will not apply. (T. 9-A, §2-201[10], §2-401[8]). Finance charge on consumer credit sale of motor vehicle sold on or after Jan. 1, 1994 may not exceed 18% per year on unpaid balance of amount financed. (T. 9-A, §2-201[9-A]). Balloon payments in consumer credit transaction other than open end credit governed by T. 9-A, §3-308. See topic 3.09A Consumer Credit.

Judgments.

Interest after judgment equals weekly average one-year constant maturity Treasury yield, as published by Board of Governors of Federal Reserve System, for first calendar week of month prior to date from which interest is calculated, plus 7%. (T. 14, §1602-A). Interest before judgment equals weekly average one-year constant maturity Treasury yield, as published by Board of Governors of Federal Reserve System, for first calendar week of month prior to date from which interest is calculated, plus 1%, except cases involving contract or note containing provision relating to interest. (T. 14, §1602).

Small Loans.

See topic 3.09A Consumer Credit and supra, this topic.

Usury.

See topic 3.09A Consumer Credit and Introductory Paragraph, supra, this topic.

3.18 [RESERVED]

3.19 LICENSES, BUSINESS AND PROFESSIONAL:

Licenses are required for numerous businesses and occupations. (T. 32). Following is partial list of business and professional activities that are licensed.

Types of Licenses.

Transient sales of consumer merchandise are governed by T. 32, §§14701-14716. Every person, including self-employed, or those who employ one or more transient sellers of consumer merchandise must acquire license from Department of Professional and Financial Regulation. (T. 32, §§14702-14703). Transient seller must disclose by prescribed form license number and permanent business address in advertisements and on receipts. (T. 32, §14704). Registration must be renewed annually. (T. 32, §14707). Security deposit of $10,000 or anticipated yearly gross revenues in state, if less, must be made with Department; deposit may be by bond and may be waived by Department, with advice of Attorney General of state, on application. (T. 32, §§14708-14709). Towns and municipalities may also regulate transient sales of consumer merchandise. (T. 32, §14705).

Traveling circus, amusement show and amusement device must have state license. Fee for circus outdoors or under tent, $500; for circus indoors, $300; for amusement show, carnival, thrill show, ice show, rodeo or similar performance indoor or outdoor, $300; for each amusement device, $50; for circus produced by nonprofit charitable organization, license required but no fee. (T. 8, §502).

Food establishments, except for eating establishments and certain storage facilities, must be licensed by Commissioner of Agriculture, Food and Rural Resources. (T. 22, §2167).

Eating establishments must be licensed by Department of Human Services. (T. 22, §2492).

Debt collection businesses must pay $400 biennially and be licensed by Superintendent of Consumer Credit Protection. If licensee desires to carry on business in more than one place, licensee must obtain branch office license, which costs $200 per branch, for each additional branch. (T. 32, §11031).

Social workers must be licensed by State Board of Social Worker Licensure. (T. 32, §7051).

Chiropractors must be licensed by Board of Chiropractic Examination and Registration. (T. 32, §551).

Collection Agencies governed by T. 32, §§11001-11054. License and bond required for collection of consumer debt.

Massage therapists must be licensed by Department of Professional and Financial Regulation. (T. 32, §§14301-14311).

Money transmitters must be licensed by Director of Office of Consumer Credit Regulation. (T. 32, §§6101-6129).

Domestic or foreign professional corporation may render professional services in Maine only through individuals licensed or authorized in this state. (T. 13, §734).

Nursing home administrators governed by T.32, §§61-68.

Emergency medical service providers, including ambulance service, ambulance, nontransporting emergency medical service, emergency medical services person, emergency medical dispatch center and emergency medical dispatcher, governed by T. 32, §§81-95.

Architects governed by T. 32, §§210-228.

Auctioneers governed by T. 32, §§284-299.

Dentists, dental hygenists, denturists and dental radiographers governed by T. 32, §§1061-1100-S.

Engineers governed by T. 32, §§1251-1362.

Funeral directors and embalmers governed by T. 32, §§1400-1507.

Nurses and nursing governed by T. 32, §§2101-2258-A.

Occupational therapists governed by T. 32, §§2271-2286.

Oil and solid fuel burner installation governed by T. 32, §§2311-2406.

Optometrists governed by T. 32, §§2411-2446.

Osteopathic physicians governed by T. 32, §§2561-2600-A.

Physical Therapists governed by T. 32, §§3111-3118.

Practice of medicine and surgery governed by T. 32, §§3263-3300-A.

Plumbers governed by T. 32, §§3301-3307.

Podiatrists governed by T. 32, §§3551-3656.

Psychologists governed by T. 32, §§3811-3837-A.

Public accountants governed by T. 32, §§12201-12280.

Real estate brokers governed by T. 32, §§13001-13283.

Pharmacists governed by T.32, §§13301-13825.

3.20 MONOPOLIES, RESTRAINT OF TRADE AND COMPETITION:

Contract, combination in form of trust or otherwise, or conspiracy in restraint of trade or commerce is class C crime. (T. 10, §1101). Monopolization, attempt to monopolize and combination or conspiracy to monopolize is class C crime. (T. 10, §1102). No person engaged in commerce may acquire, directly or indirectly, whole or any part of stock, other share capital, or assets of another person also engaged in commerce in Maine where effect of such acquisition may substantially lessen competition or create monopoly. (T. 10, §1102-A). Up to $100,000 civil penalty may be assessed against violator of §1101 or §1102. (T. 10, §1104). Action to recover civil penalty from alleged violator bars criminal prosecution based on same conduct and vice versa. (T. 10, §1104).

Persons, corporations, etc., manufacturing, producing, refining or mining article or product which enters into general use and consumption may not form trust or enter into combination contrary to public policy. (T. 13, §171).

Unfair Sales.

Retailer may not, with intent to injure competitors or destroy competition, advertise, offer to sell or sell at retail any article of merchandise at less than cost. Similar restriction is imposed on wholesalers with respect to sales, etc., at wholesale. (T. 10, §§1204-A, 1207).

Unfair Trade Practices Act.

Unfair methods of competition and unfair or deceptive acts or practices in conduct of trade or commerce are unlawful. Act construed in accordance with interpretations given by Federal Trade Commission and federal courts to §5(a)(1) of Federal Trade Commission Act. (T. 5, §207). Actions permitted under laws as administered by regulatory boards or officers acting under statutory authority are exempt, provided that business activities are subject to regulation by state or federal agency and specific activity that would otherwise constitute violation is authorized, permitted or required by such agency, applicable law or regulation or other regulatory approval. (T. 5, §208). Attorney General may promulgate rules and regulations and enforces Act. Actions by injured consumers authorized. Right to trial by jury. (T. 5, §§206-214).

Uniform Franchise and Business Opportunities Act.

Not adopted. See topic 3.15 Franchises.

Business Opportunities.

See topic 3.15 Franchises.

Franchises.

See topic 3.15 Franchises.

Cooperative marketing associations or corporations organized for sole purpose of marketing fish, fish products or agricultural products of state are not to be deemed illegal. (T. 13, §171).

Cooperative agreements among hospitals for sharing, allocation or referral of patients, personnel, instructional programs, support services and facilities or medical, diagnostic or laboratory facilities or procedures or other services traditionally offered by hospitals, and are not to be deemed illegal when properly certified. (T. 22, §§1841-1852).

3.213.22

3.23 SALES:

Uniform Commercial Code adopted. (T. 11, §§2-101-2-725). See topic 3.09 Commercial Code.

Contracts of Sales.

See topics 3.09 Commercial Code, 3.16 Frauds, Statute of.

Bills of Sale.

See topic 3.09 Commercial Code.

Product Liability.

Seller of goods in defective condition unreasonably dangerous to user or consumer may be liable for physical harm caused by such defect. (T. 14, §221). Lack of privity is no defense. (462 A.2d 1144).

Retail Credit Sales.

See category 23 Transportation, topic 23.01 Motor Vehicles, subhead Sales.

Consumer Protection.

See topic 3.10 Consumer Protection.

Bulk Sales.

See topic 3.09 Commercial Code; category 8 Debtor and Creditor, topic 8.07 Fraudulent Sales and Conveyances.

Sale of Business Opportunities.

Mandatory disclosure and registration requirements for seller of business opportunity. (T. 32, §§4691-4700-B).

Sales of Motor Vehicles.

See category 23 Transportation, topic 23.01 Motor Vehicles.

3.24 SECURITIES:

Maine Uniform Securities Act.

Governs securities, broker-dealers, agents and investment advisers. (T. 32, §§16101-16702). This Act is substantially same as Uniform Securities Act 2002. Maine Uniform Securities Act is effective as of Dec. 31, 2005. (See Uniform and Model Acts Digest for text.)

Uniform Commercial Code adopted. See topic 3.09 Commercial Code.

Supervision.

Securities Administrator, Department of Professional and Financial Regulation, Office of Securities, 121 State House Station, Augusta, Maine 04333.

Regulatory Powers of Supervising Authority.

Securities Administrator may issue stop order denying effectiveness to or suspending or revoking effectiveness of any registration if requirements of Act are not met. (T. 32, §16604).

Prerequisites to Sales or Offering.

Unlawful for any person to sell or to offer to sell any security in Maine, except: (i) Securities exempt under Act, (ii) securities sold in transactions exempt under Act, or (iii) federal covered securities, unless such security is registered in Maine. (T. 32, §16301). Unlawful for any person to transact business in Maine as broker-dealer, investment adviser, or investment adviser representative, except in transactions exempt under Act, unless such person is registered under Act. (T. 32, §16401).

Securities to Which Act Applicable.

Means any note, stock, treasury stock, security future, bond, debenture, evidence of indebtedness, certificate of interest or participation in any profit-sharing agreement, collateral-trust certificate, preorganization certificate or subscription, transferable share, investment contract, investment in viatical or life settlement contract, voting-trust certificate, fractional undivided interest in oil, gas or other mineral rights, certificate of deposit for security, certificate of interest or participation in oil, gas or mineral title or lease or in payments out of production under such title or lease, or, in general, any interest or instrument commonly known as “security” or any certificate of interest or participation in, temporary or interim certificate for, receipt for, guarantee of, or warrant or right to subscribe to or purchase, any of foregoing. (T. 32, §16102[28]). Variable annuities expressly excluded from definition. (T. 32, §16102[28][B]). Limited partnership and limited liability company interests are included to extent such interests otherwise qualify as investment contracts. (T. 32, §16102[28][E]).

Exempt Securities.

For exempt securities, see §201 of Uniform Securities Act in Uniform and Model Acts Digest. Maine also exempts securities issued by bank holding companies. (T. 32, §16201[3][B]).

Exempt Transactions.

For exempt transactions, see §202 of Uniform Securities Act in Uniform and Model Acts section. Maine Uniform Securities Act's equivalent of §202(14)(A) replaces “25 purchasers” with “10 purchasers,” (T. 32, 16202[14][A]). Act exempts transactions by Maine issuer or issuer with principal place of business in Maine for sales through private placement to up to 25 purchasers, upon filing of notification form with Securities Administrator, provided that no general solicitation or advertising is made in connection with sale or offer to sell, no commission or remuneration is paid other than to licensed broker dealer and issuer believes all purchasers are purchasing for investment subject to certain exceptions. (T. 32, §16202[15]). Act also exempts sales of viatical or life settlement contracts, upon compliance with certain requirements. (T. 32, §16202[25]).

Registration of Securities.

Provisions made for registration by coordination and registration by qualification, under various circumstances, following closely Uniform Securities Act. (T. 32, §§16302-16304).

Registration of Brokers.

Unlawful to transact business as broker-dealer, agent, investment adviser or investment adviser representative unless registered. (T. 32, §§16401-16405). Provisions made for qualification, forms, etc. similar to Uniform Securities Act. Consult Act. Registration effective for one year, Jan. 1 to Dec. 31, is renewable yearly by filing. (T. 32, §16406).

Post-Licensing Requirements.

See §411 of Uniform Securities Act in Uniform and Model Acts Digest. (T. 32, §16411). Act contains additional provisions regarding data storage and privacy. (T. 32, §§16411[3] & 16411[9]).

Liabilities.

Criminal penalties and civil liabilities provided for. (T. 32, §§16508-16509).

Filing Fees.

Notice filings with respect to federal covered securities as defined in §18(b)(2) of federal Securities Act of 1933, including renewals: $1,000. (T. 32, §16302[1]).

Notice filings for federal covered securities under §18(b)(4)(D) of federal Securities Act of 1933: $300, with additional late filing fee of $500 if filed after 15 days of first sale. (T. 32, §16302[3]).

Securities registration filing: $1,000 for each class of security, except securities registered by qualification for which total proceeds will not exceed $1,000,000: $300. (T. 32, §16305[2]).

Post effective amendments to increase amount of securities offered, $300. (T. 32, §16305[10]).

Following fees are as set by Securities Administrator, up to following maximums:

Initial or renewal broker dealer registration, $500. (T. 32, §16410[A]).

Initial or renewal agent representation or change of registration as agent, $200. (T. 32, §16410[B]).

Initial or renewal investment advisor registration, $500. (T. 32, §16410[C]).

Initial or renewal investment advisor representative registration, $200. (T. 32, §16410[D]).

Initial and annual notice fee for federal covered investment advisor, $500. (T. 32, §16410[E]).

Initial or renewal of branch office in Maine of any broker-dealer or investment adviser, $200. (T. 32, §16410[F]).

Uniform Securities Ownership by Minors Act not adopted.

Commodities.

Sale of commodities, commodity contracts or commodity options regulated by T. 32, §§11201-11313.

3.253.26

3.27 WAREHOUSEMEN:

Uniform Commercial Code adopted. See topic 3.09 Commercial Code.

4 CITIZENSHIP

4.01 ALIENS:

Property.

Aliens may take, hold, convey and devise real estate or any real estate interest. (T. 33, §451).

Knowingly employing illegal alien is state Class E crime. (T. 26, §871). Illegal aliens may not receive unemployment benefits. (T. 26, §1192[11]). Superior Court has sole jurisdiction over applications for naturalization. (T. 14, §6451).

Employers of H-2B foreign laborers engaged in logging must provide proof of employer's ownership of logging equipment used by laborer. (T. 26, §872).

5 CIVIL ACTIONS AND PROCEDURE

5.01 ACCORD AND SATISFACTION:

Common law rules apply.

Acceptance of money or other valuable consideration, however small, in full satisfaction of demand, bars subsequent action thereon. (T. 14, §155). Defense available only when actual performance accepted. (101 Me. 63, 63 A. 298).

Compromise.

No settlement, general release or statement by injured person in hospital or sanitarium made within 30 days of injury admissible in evidence at trial of action to recover damages except as obtained by police officers or motor vehicle inspectors in performance of duties, by family members or by or for injured person's attorney. Such settlements and general releases null and void. This does not apply to agreements entered into under Workmen's Compensation Law and approved by Workers' Compensation Board. (T. 17, §3964).

Pleading.

In pleading to a preceding pleading, party must affirmatively set forth accord and satisfaction. (M.R.C.P. 8[c]).

Uniform Commercial Code adopted, but §1-207 does not alter common law doctrine of accord and satisfaction. (484 A.2d 1008).

5.02 ACTIONS:

Supreme Judicial Court has promulgated Maine Rules of Civil Procedure (cited M.R.C.P.) governing commencement and prosecution of civil actions in District Courts and Superior Courts and appeals to Supreme Judicial Court sitting as Law Court. These rules in general conform to Federal Rules of Civil Procedure with significant alterations that are needed for adaptation to state practice and some changes believed advisable for Maine courts.

Equity.

See subhead Forms of Action, infra.

Forms of Action.

One form of civil action; formal distinction between law and equity abolished. (M.R.C.P. 2).

Conditions Precedent.

Maine Tort Claims Act.

Notice of claim must be filed within 180 days after cause of action accrues except for good cause shown. (T. 14, §8107). Suit must be filed within two years of accrual, except that if claimant is minor when action accrues, action may be brought within two years of minor's attaining 18 years of age. (T. 14, §8110).

Maine Health Security Act.

Claimant must serve notice of claim for professional negligence upon defendant and court. (T. 24, §§2853, 2903[1][A]). Claimant must submit claim to prelitigation screening panel. (T. 24, §§2851, 2903[1][B]).

Insurance Subrogation.

Insurer must serve notice on insured of intent to commence suit in name of insured at least ten days prior to asserting claim. (M.R.C.P. 17[c]).

Commencement.

Action may be commenced by (1) service of summons and complaint, or (2) filing complaint with court. Method 1 requires filing of complaint within court 20 days after service. Method 2 requires filing of return of service within 90 days after filing of complaint. (M.R.C.P. 3).

Parties.

Action must be brought in name of real party in interest. (M.R.C.P. 17[a]). Executor, administrator, guardian, bailee, trustee of express trust, one who has contracted for benefit of third party, or one authorized by statute may sue in own name. (M.R.C.P. 17[a]). Insurer who has paid part or all of claim may sue in insured's name after serving notice of action on insured ten days before bringing action and attaching notice and return to complaint. (M.R.C.P. 17[a],[c]). Person subject to process must be joined as party if (1) complete relief cannot be accorded in person's absence or (2) person claims interest in subject matter and disposition in person's absence may (i) impair or impede person's ability to protect that interest, or (ii) leave any other party at risk of multiple or inconsistent obligations. (M.R.C.P. 19[a]). If person has not been joined, court shall order joinder. (M.R.C.P. 19[a]). If person refuses to join as plaintiff, person may be made defendant. (M.R.C.P. 19[a]). If person cannot be joined, court may dismiss action if equity and good conscience require. (M.R.C.P. 19[b]). Pleading asserting claim for relief must identify known persons described above who are not joined and explain why not joined. (M.R.C.P. 19[c]). Misjoinder not ground for dismissal; parties may be dropped or added by order of court on own or any parties' motion. (M.R.C.P. 21).

Class Actions.

Prerequisites to class action are: class so numerous that joinder of all members is impractical; questions of law or fact common to class; claims or defenses of representative parties typical of claims or defenses of class; representative parties will fairly and adequately protect interests of class. (M.R.C.P. 23[a]).

If above are satisfied, class action is maintainable if: prosecution of separate actions would create risk of inconsistent adjudication which would establish incompatible standards of conduct for party opposing class; adjudications as to individual members would dispose of others' interests or substantially impair ability to protect their interests; or party opposing class has acted or refused to act on grounds generally applicable to class; or common questions of law or fact predominate so that class action is superior to other actions. (M.R.C.P. 23[b]).

Court must determine whether class is maintainable as soon as practicable after commencement of action. (M.R.C.P. 23[c][1]). Court shall direct best notice practicable under circumstances, including individual notice to all members identifiable through reasonable effort. (M.R.C.P. 23[c][2]). Notice must advise members that: court will exclude individual from class if individual requests by specific date; judgment whether favorable or not will apply to all members who do not request exclusion; and any member may appear through own counsel. (M.R.C.P. 23[c][2]).

Class action shall not be dismissed or compromised without approval of court and notice to all members as court directs. (M.R.C.P. 23[e]).

Intervention.

Of right upon timely application when statute confers unconditional right to intervene or when applicant claims interest in subject of action and applicant is situated so that disposition of action may impair or impede applicant's ability to protect that interest, unless interest is adequately represented by existing parties. (M.R.C.P. 24[a]). Permissive upon timely application when applicant's claim or defense and main action have question of law or fact in common. (M.R.C.P. 24[b]). Must be made by motion served upon parties. (M.R.C.P. 24[c]).

Interpleader.

Stakeholder may bring action of interpleader against two or more claimants, and defendant stakeholder may bring in claimant not party to action. (M.R.C.P. 22). Stakeholder may deposit fund with court or commit to escrow upon agreement of parties and be dismissed from action. (609 A.2d 711; 297 A.2d 87).

Third Party Practice.

Any time after commencement of action defendant may cause complaint and summons to be served on person not party who is or may be liable to defendant for all or part of plaintiff's claim against defendant. (M.R.C.P. 14[a]). Plaintiff may do same for counterclaim. (M.R.C.P. 14[b]). Third party defendant may assert against plaintiff any defenses which third-party plaintiff has to plaintiff's claim. (M.R.C.P. 14[a]). Plaintiff must assert any claim against third-party defendant arising out of transaction or occurrence that is subject matter of plaintiff's claim against defendant. (M.R.C.P. 14[a], 13[a]). Any party may move for severance, separate trial, or dismissal of third-party claim. (M.R.C.P. 14[a]).

Joinder of Causes of Action.

Joinder of any claims against opposing party permissible whether legal or equitable. (M.R.C.P. 18[a]). Party must make all claims arising out of same aggregate of operative facts. (570 A.2d 1205). Defendant must bring all claims as counterclaims against opposing party if claim arises out of transaction or occurrence that is subject matter of opposing party's claim and does not require presence of third parties of whom court cannot acquire jurisdiction. (M.R.C.P. 13[a], 586 A.2d 1263).

Splitting Causes of Action.

Court may order separate trials for convenience, to avoid prejudice, or to prevent delay. (M.R.C.P. 20[b], 42[b]).

Consolidation of Actions.

Pending actions involving common question of law or fact may be consolidated. (M.R.C.P. 42[a]).

Severance of Actions.

See subhead Splitting Causes of Action, supra.

Stay of Proceedings.

Grant of stay rests in sound discretion of court. (395 A.2d 453).

Abatement and Revival.

No personal action is lost by death of either party, but survives for personal representative. (T. 18-A, §3-817). Upon death of party, motion for substitution must be made within 90 days after suggestion of death is made on record by service of statement of fact of death. (M.R.C.P. 25[a][1]). Court may allow action to continue upon motion for substitution in cases of incompetency or transfer of interest. (M.R.C.P. 25[b], [c]). Real action does not abate upon death or marriage of party. (M.R.C.P. 80A[e]).

Limitation of.

See topic 5.16 Limitation of Actions.

Small Claims.

See category 6 Courts and Legislature, topic 6.01 Courts.

Termination of Actions.

Plaintiff may voluntarily dismiss by filing notice of dismissal before service by adverse party of answer or motion for summary judgment, whichever first occurs. (M.R.C.P. 41[a][1]). Action may be dismissed by filing stipulation of dismissal signed by all parties, unless receiver appointed. (M.R.C.P. 41[a][1]). Otherwise, action may only be dismissed upon order of court upon terms and conditions deemed proper. (M.R.C.P. 41[a][2]). No settlement of action on behalf of infant by next friend or defended on infant's behalf by guardian or guardian ad litem shall be valid unless approved by court. (T. 14, §1605, M.R.C.P. 17A).

Prohibited Actions.

Breach of promise to marry. (T. 14, §854). Alienation of affections. (T. 14, §301). Wrongful birth of healthy child. (T. 24, §2931).

Administration.

See category 13 Estates and Trusts, topic 13.08 Executors and Administrators.

Direct Actions Against Insurer.

See category 23 Transportation, topic 23.01 Motor Vehicles, subhead Direct Actions.

5.03 APPEAL AND ERROR:

See also topic 5.19 Practice.

Appeals to Supreme Judicial Court.

Any judgment, order, or ruling by District, Superior or Probate Court is reviewable by Supreme Judicial Court sitting as Law Court, except District Court forcible entry and detainer cases, small claims cases, and appeals of involuntary hospitalization under T. 34-B, §3864 can be reviewed by appeal to Superior Court. (T. 14, §1901; M.R.C.P. 80D; M.R.A.P. 1). Cases may be reported to Supreme Judicial Court. (M.R.A.P. 24). In addition, questions of law may be certified by federal court to Supreme Judicial Court. (M.R.A.P. 25). Procedure on appellate review by Law Court is governed in general by M.R.A.P. 2-20. Appeals from final decision of Public Utilities Commission on questions of law or nonfinal decisions as to reasonableness of charge or constitutionality of commission ruling are also directly appealable to Supreme Judicial Court. (M.R.A.P. 22). Parties in interest may seek review by Law Court of decisions of Appellate Division of Workers' Compensation Commission, Workers' Compensation Board or one of its hearing officers, but Law Court's review is discretionary. (M.R.A.P. 23; T. 39-A, §322).

Extent of Review.

Supreme Judicial Court, sitting as Law Court may review facts and set aside findings only if clearly erroneous. (752 A.2d 595).

Time for Taking Appeal.

Appeal is taken by filing notice of appeal within 21 days after entry of judgment appealed from unless shorter time is provided by law. (M.R.A.P. 2). Appeal from Worker's Compensation Board or hearing officer must be made within 20 days after receipt of notice of filing of decision. (M.R.A.P. 23; T. 39-A, §322).

Appeals to Superior Court.

Appeals from District Court must be taken within 30 days. (M.R.C.P. 76D, T. 14, §1901).

Extent of Review.

Superior Court reviews facts and sets aside findings only if clearly erroneous. (M.R.C.P. 76D). De novo jury trials can be held on forcible entry and detainer action appeals from District Court. (M.R.C.P. 80D[f][2]). De novo hearings are also held in Superior Court on appeals from assessments of State Tax Assessor. (T. 36, §151).

Appeals from Juvenile Court.

Appeals from order in juvenile court to Superior Court must be taken within five days or such time as Supreme Judicial Court provides by rule. (T. 15, §3402[5]).

Appeals (trial de novo) from Probate Court.

Appeals from probate court must be taken to Supreme Judicial Court (T. 18-A, §1-308) within 21 days after decree (M.R.A.P. 2).

Appeals from State Agency Decisions.

Review of final agency action or failure of agency to act proceeds by filing petition for review in Superior Court within 30 days after receipt of notice if taken by party to agency proceeding; within 40 days by other aggrieved parties; and within six months of expiration of time within which agency should have acted for failure to act. (T. 5, §11002). In appeal from tax assessor's decision, taxpayer and assessor not bound by factual evidence presented in agency proceeding. (T. 36, §151).

Appeals from Other Governmental Action.

Review of other governmental action or failure to act proceeds by filing of complaint in Superior Court within 30 days after action or refusal to act, unless otherwise specified by statute. Complaints on failure to act must be brought within six months after time in which action should reasonably have occurred. (M.R.C.P. 80B).

Appeal Bond.

Neither bond for costs nor supersedeas bond required. (M.R.C.P. 62).

Stay of Proceedings to Enforce Judgment.

No execution upon judgment until 30 days after entry or until time for appeal has expired. (M.R.C.P. 62[a]). Taking of appeal operates as automatic stay of execution. (M.R.C.P. 62[e]).

5.04 BONDS:

In action on bond in a penal sum, when jury finds condition broken, they estimate plaintiff's damages, and judgment is entered for penal sum, but execution is issued for such damages and costs. (T. 14, §6601).

Sureties.

Surety bonds are authorized in civil and criminal cases if duly executed by surety company authorized to do business in Maine. (T. 4, §1054).

Limitation of Actions.

Actions against sureties on bonds in criminal cases must be brought within one year after default of principal. (T. 14, §754).

Sureties on official bonds may appear and defend in suits against their principals, whenever such sureties may ultimately be liable upon such bonds. (T. 14, §6602).

Suits on probate bonds of any kind payable to the judge may be originally commenced by any person interested in estate or other matter for which bond was given, either in probate court in which bond was filed or in superior court of that county. (T. 18-A, §8-309).

5.05 CERTIORARI:

Writ of certiorari not available. Proceedings in nature of certiorari may be brought to review action of government agency. (M.R.C.P. 80B, 81[c]).

5.06 CHARITABLE IMMUNITY:

See topic 5.09 Damages.

5.07 [RESERVED]

5.08 COSTS:

Filing fees, fees for service of process, witness fees, and travel expenses allowed to prevailing party in action unless court otherwise directs. (T. 14, §1502-B; M.R.C.P. 54). Court may also allow reasonable costs for expert witness fees and expenses, cost of medical reports, visual aids and costs of depositions. (T. 14, §1502-C). Clerk shall tax costs under T. 14, §1502-B; other costs determined at hearing. (T. 14, §1502-D). Court may waive all or part of costs if they cause significant financial hardship on any party. (T. 14, §1502-D).

Attorney General recovers litigation costs, including court costs, reasonable attorney fees, and reasonable expert witness fees, when prevailing in certain proceedings. (T. 14, §1522).

5.09 DAMAGES:

Common law generally prevails as to compensatory damages. Punitive damages allowed at jury's discretion only if defendant acts with actual malice (i.e., ill will) or where conduct is so outrageous that malice can be implied. Reckless disregard for circumstances is insufficient to establish implied malice. Proof of malice must be by clear and convincing evidence. (494 A.2d 1353). Statutes allow double, treble or other exemplary damages in number of cases for waste by part owners, life tenants, etc., and for willful injury to ornamental grounds, trees, agricultural products, etc. (T. 14, §§7551, 7552, 7552-A, 7556, 7560). Except for demand for liquidated damages, demand in any civil case cannot include dollar amount or figure; prayer must be for damages reasonable in premises. (T. 14, §52).

Charitable Immunity.

Doctrine prevails unless charity insured in which case liability limited to amount of policy. (T. 14, §158). Directors, officers, volunteers of charitable organizations are immune from civil liability in negligence actions arising from acts or omissions occurring within course and scope of charitable organization's activities. (T. 14, §158-A). Such immunity, however, is waived when plaintiff's cause of action arises out of operation of vehicle, vessel or aircraft, if such vehicle is insured. Where such waiver is triggered, plaintiff may at minimum recover value of policy limit of insurance covering vehicle. (Id.).

Comparative Negligence Rule.

Modified comparative negligence adopted 1965. (T. 14, §156). Negligent plaintiff can recover providing that less at fault than defendant. Uniform Comparative Fault Act not adopted. When one codefendant settles and releases claim with plaintiff, codefendant's release is binding on all parties and no other codefendant may seek contribution from settling codefendant. Defendants, however, may seek discovery from and prove amount of settling codefendant's proportionate share of damages, which plaintiff is precluded from recovering. (T. 14, §§156, 163).

Sovereign Immunity.

Maine Tort Claims Act removes defense of sovereign immunity for certain tort claims, provides procedures for making claims and limits recovery to $400,000 for all claims arising out of single occurrence. (T. 14, §§8101-8118).

Uniform Contribution Among Tortfeasors Act (Revised) not adopted.

See category 13 Estates and Trusts, topic 13.02 Death, subhead Actions for Death.

5.10 [RESERVED]

5.11 DEPOSITIONS AND DISCOVERY:

Governed by Maine Rules of Civil Procedure. These rules in general conform to Federal Rules of Civil Procedure. See topic 5.19 Practice.

Within State for Use Within State.

Generally conforms to Federal Rules of Civil Procedure. Absent leave of court, ten days written notice must be given to all parties prior to deposition. Court on ex parte application and for good cause shown may prescribe shorter notice. (M.R.C.P. 30[b][1]).

Within State for Use Elsewhere.

Upon application, certified by member of Maine bar, to clerk of courts in county where deponent resides or is employed or transacts business in person, party may take deposition in Maine upon oral examination pursuant to laws of foreign jurisdictions for use therein. (M.R.C.P. 30[h]). Contents of application prescribed. (M.R.C.P. 30[h][3]). Parallel rule for depositions upon written questions. (M.R.C.P. 31[d]).

Outside of State for Use Within State.

Depositions may be taken within another state, or within a territory, or in a foreign country (1) on notice before a person authorized to administer oaths therein, (2) before a person appointed or commissioned by court, or (3) pursuant to a letter rogatory. (M.R.C.P. 28[b]).

Before Whom Taken.

Within state, notary public or person appointed by court. (M.R.C.P. 28[a]). Outside state, see subhead Outside of State for Use Within State, supra.

Compelling Attendance of Witness.

A resident of Maine who is not party or officer of party may not be required to travel to attend examination outside county where he resides or is employed or transacts his business in person, or distance of more than 100 miles one way, whichever is greater unless court otherwise orders. Nonresident may be required to attend in county where he is served or within 100 miles therefrom or at other convenient place fixed by court. (M.R.C.P. 45[c][3]).

Examination of Witnesses.

Governed by M.R.C.P. 30(c). Substantially similar to Federal Rules.

Discovery.

Substantially identical to Federal Rules. If party proposes to take more than five depositions, court approval must be obtained. (M.R.C.P. 30[a]). Total length of single deposition limited to eight hours. (M.R.C.P. 30[d][2]). Good faith discovery conference required to attempt resolution of disputes without court involvement. Written motions prohibited unless ordered by court. (M.R.C.P. 26[g]).

Demand for Admission of Facts.

Substantially identical to Federal Rules. Request must be set forth above response. (M.R.C.P. 36).

Interrogatories.

Substantially identical to Federal Rules. More than one set of interrogatories may be served upon another party absent leave of court, but not more than total of 30 interrogatories may be served. (M.R.C.P. 33[a]).

5.12 [RESERVED]

5.13 EVIDENCE:

Rules of Evidence.

Pursuant to rule-making authority given it in 1974 under T. 4, §9-A, Supreme Judicial Court has adopted, prescribed and promulgated Maine Rules of Evidence (cited M.R.E.) effective Feb. 2, 1976. Rules, subject to legislative abrogation, supersede all conflicting laws. These rules in general conform to federal rules of evidence with significant variations reflecting legal principles in accord with public policy of State of Maine. See also subhead Witnesses, infra; topic Depositions and Discovery.

Witnesses.

Every person is competent to be witness except as otherwise provided. (M.R.E. 601[a]). Person disqualified to be witness if incapable of expression concerning matter so as to be understood by judge and jury either directly or through interpretation by one who can understand witness, or is incapable of understanding duty to tell truth. (M.R.E. 601[b]). Personal knowledge required for nonexpert witnesses. (M.R.E. 602). Oath or affirmation required. (M.R.E. 603).

Parties are competent to testify in their own behalf, and husband or wife of either party may be witness. (T. 16, §53). Judge presiding at trial may not testify as witness. (M.R.E. 605). Member of jury may not testify as witness in case in which he is sitting as juror. (M.R.E. 606).

Husband or wife of accused is competent witness in criminal cases except in regard to marital communications (T. 15, §1315) construed to mean spouse is competent to testify, but may assert privilege with respect to confidential marital communications (284 A.2d 91).

Privileged Communications.

Lawyer-client privilege. (M.R.E. 502). Physician and psychotherapist-patient privilege. (M.R.E. 503). Husband-wife privilege. (M.R.E. 504). Religious privilege, (M.R.E. 505). Political vote privilege. (M.R.E. 506). Trade secret privilege. (M.R.E. 507). Governmental privileges. (M.R.E. 508). Privilege to refuse to disclose identity of informer. (M.R.E. 509). Confidentiality of communications between licensed social workers and clients. (T. 32, §7005). Statutory privilege for school social workers and counselors. (T. 20-A, §4008). Privileged communications to sexual assault counselors. (T. 16, §53-A). Privileged communications to victim advocate. (T. 16, §53-B).

Privileged communications to governmental victim witness advocates or coordinators. (T. 16, §53-C). Statutory confidentiality may be abrogated in relation to required reporting, cooperation with government agency or guardian ad litem in investigation or other child protective activity or giving evidence in child protection proceeding. (T. 22, §4015).

Communications or Transactions with Persons Since Deceased or Incompetent.

Statements constituting hearsay, as defined in M.R.E. 801, may be admissible under exceptions provided in M.R.E. 804. Hearsay statement by person under 16 or with developmental disability describing any incident involving sexual act or sexual contact performed with or on minor by another shall not be excluded as evidence in criminal proceeding if court finds person's mental or physical well-being will more likely than not be harmed if person were to testify in open court and statement is made under oath subject to all rights of confrontation, has been recorded by court-approved means and is made in presence of judge. (T. 15, §1205).

In all criminal trials accused shall, at his own request but not otherwise, be competent witness. Accused shall not be compelled to testify on cross-examination to facts that would convict or furnish evidence to convict him of any other crime than that for which on trial. Fact accused does not testify in own behalf shall not be taken as evidence of guilt. (T. 15, §1315).

Self-incrimination.

No defendant can be compelled to testify in any action when pleadings imply or charge criminal offense, traffic infraction or civil violation for possession of marijuana. If he offers himself as witness, he waives his privilege of not incriminating or testifying against himself, but his testimony cannot be used in evidence against him in any criminal prosecution, traffic infraction proceeding or civil proceeding for possession of marijuana, involving same subject matter. (T. 16, §201).

Compelling Attendance.

See topic 5.10 Depositions and Discovery.

Uniform Rendition of Prisoners as Witnesses in Criminal Proceedings Act enacted. (T. 15, §1461-1471).

5.14 INJUNCTIONS:

Availability of injunction as remedy governed generally by common law.

Jurisdiction.

District, Superior and Law Courts can issue injunctions.

Prerequisites.

Temporary restraining orders may be granted without notice to adverse party if made to appear clearly from specific facts shown by affidavit or verified complaint that immediate and irreparable injury will result unless it is granted before notice can be served and hearing held. Applicant's attorney must certify to court efforts, if any, made to give notice and reasons supporting claim that no notice should be required. Preliminary injunction granted only upon notice to adverse party. Application for preliminary injunction may be included in complaint or motion. Every restraining or injunctive order must set forth reasons for issuance, be specific in terms, and describe in reasonable detail and without reference to any other document act or acts to be restrained. (M.R.C.P. 65).

Procedure relating to temporary restraining orders and preliminary injunctions governed by Rule 65 of Maine Rules of Civil Procedure. This rule generally conforms to Rule 65 of Federal

Rule of Civil Procedure. See topic 5.19 Practice.

Bond.

No restraining order or preliminary injunction will issue except upon applicant giving security in such sum as court deems proper, provided, however, that for good cause shown and recited in order, court may waive security. Surety upon bond or undertaking under this rule submits to court's jurisdiction and irrevocably appoints clerk of court as surety's agent. Surety's liability may be enforced on motion without necessity of independent action. Motion and its notice may be served on clerk of court who mails copies forthwith to persons giving security. (M.R.C.P. 65[c]).

Temporary Injunction.

See subheads Prerequisites and Procedure, supra.

There are several statutory grants of right to seek injunction including state enforcement of laws (1) regulating professions such as, among others, occupational therapists (T. 32, §2276[3]) and physical therapists (T. 32, §3118[2]); (2) protecting consumers (T. 5, §209); (3) protecting defined environmental areas such as, among others, Allagash Wilderness Waterway (T. 12, §1884), Saco River Corridor (T. 38, §967); and (4) protecting health, safety or general welfare of persons or property arising from discharge, emissions or deposit of any materials into any waters, air or land of state constituting substantial and immediate danger (T. 38, §348). Actions for injunctions relating to land use violations governed by Rule 80K of Maine Rules of Civil Procedure.

Statutory grants of right of private party to seek injunctions are provided in areas of: commercial relations involving, among others, trademark and tradenames (T. 10, §1530) and sale of business opportunities (T. 32, §4700); and labor relations (T. 26, §5). Some statutory grants of right to seek injunction contain provisions relating to procedure such as availability of ex parte orders and dissolution of injunctions.

5.15 JUDGMENTS:

See also topic 5.19 Practice.

Judgments entered forthwith by clerk upon general verdict of jury or otherwise upon court order. In general, judgments issue in same manner as Federal Courts. (M.R.C.P. 58). Docketing of orders or judgments is governed by M.R.C.P. 79(a).

See also topic 5.02 Actions.

Actions.

Venue for civil actions on judgment rendered by any court of record in State may be brought in county where it was rendered or in county in which either party resides. (T. 14, §503).

Liens.

Filing of execution in registry of deeds or, with respect to certain real property, in Secretary of State's Office creates lien in favor of judgment creditor. Notice by certified or registered mail to judgment debtor on or before 20th day after filing or recording required. Lien continues for 20 years and may be renewed once. If, upon receipt of written notice that property is exempt, creditor fails to discharge lien within 15 days, debtor may recover damages, costs and attorney's fees. (T. 14, §4651-A).

Declaratory Judgments.

Uniform Act adopted. (T. 14, §§5951-5963).

Vacation or Modification.

M.R.C.P. 60 entitled “Relief from Judgment or Order” governs method for relief from judgment and is very similar to Federal Rules.

Default Judgments.

M.R.C.P. 55 entitled “Default” governs entries of default and default judgments and is similar to Federal Rule of Civil Procedure 55.

Defendant living out of state, defaulted in action without appearance or other service than newspaper publication, may within six months after levy of execution on his real estate or sale of right of redemption, bring action for relief from judgment and may redeem from such levy or sale within three months after relief is denied, or after final judgment in action if relief is granted. If such judgment is in his favor amount thereof must be allowed toward such redemption notwithstanding conveyance of such estate by creditor. (T. 14, §2351).

Judgments by Confession.

Bill in equity is never taken pro confesso against infant defendant. (65 Me. 352).

Judgments by Consent.

Consent judgments cannot be modified or vacated absent claim of fraud or mistake by consenting party. (444 A.2d 361 [Me.], cert. denied, 459 U.S. 831).

Revival.

Writ of scire facias was abolished in M.R.C.P. 81(c).

Summary Judgments.

M.R.C.P. 56 governing summary judgments is similar to Federal Rule of Civil Procedure 56 except motion and opposition must be supported by statement of material facts. (M.R.C.P. 56).

Judgments on Pleadings.

M.R.C.P. 12(c) governing motions for judgment on pleadings is similar to Federal Rule of Civil Procedure 12(c).

Offer of Judgment.

M.R.C.P. 68 is similar to Federal Rule of Civil Procedure 68.

Assignments.

When judgment has been assigned for valuable consideration, and bona fide, in writing, and levy of execution issued on such judgment has been made, and creditor dies after levy, assignee may bring action in court issuing execution, requiring debtor to show cause why another executor should not issue on same judgment, in name and/or benefit of said assignee. (T. 14, §2020). If such judgment is not discharged, assignee may bring civil action in his or her own name. (T. 14, §2021).

Confession of Judgment.

Negotiability of instrument is not affected by term authorizing confession of judgment on instrument if it is not paid when due. (T. 11, §3-1104[1][c][ii]).

Satisfaction.

No form of satisfaction is prescribed. The following may be used: “Judgment and costs fully paid and satisfied. No further action by either party for the same cause.”

Judgment Notes.

No statutory provisions.

Uniform Enforcement of Foreign Judgments Act adopted. (T. 14, §§8001-8008).

5.16 LIMITATION OF ACTIONS:

Civil actions must be brought within following periods:

Six years: General statute of limitations is six years. Exceptions to six year statute are listed in following paragraphs. (T. 14, §752).

No limit: Actions for sexual abuse of minor under age of 16 may be commenced at any time after cause of action accrues. (T. 14, §752-C).

Twenty years: Any real action (T. 14, §801); or action on witnessed promissory note or on contract or liability under seal or on bills, notes, or other evidences of debt issued by bank (T. 14, §751). Rebuttable presumption that judgment of U.S. court or state court of record, or justice of the peace in this state paid and satisfied after 20 years. (T. 14, §864). See also category 13 Estates and Trusts, topic 13.06 Descent and Distribution.

Fifteen years: Actions against validity of governmental taking of real estate for nonpayment of property taxes recorded after Oct. 13, 1993 must be commenced within 15 years following expiration of period of redemption. For tax liens recorded on or before Oct. 13, 1993, action must be commenced within 15 years following expiration of period of redemption or no later than July 1, 1997. (T. 36, §946-A).

Four years: Actions for malpractice or professional negligence against duly licensed architects or engineers must be commenced within four years of discovery but in no event more than ten years after substantial completion of construction contract or of services unless valid contract provides for other limitation period. (T. 14, §752-A).

Actions for professional negligence against duly licensed land surveyors must be commenced within four years of discovery, but in no event more than 10 years after completion of services provided or contract for services. (T. 14, §752–D).

Three years: Actions for professional negligence against health care providers and practitioners. Actions by minors must be brought within six years after cause of action accrues or within three years after minor reaches age of majority, whichever first occurs. Cause of action accrues on date of act or omission giving rise to injury, unless cause of action involves leaving foreign object in body, in which case cause of action accrues when plaintiff discovers or reasonably should have discovered harm. (T. 24, §2902).

No action for professional negligence against health care providers and practitioners may be brought until written notice of claim served upon person accused. (T. 24, §2903). Statute of limitations tolled from date upon which notice of claim served or filed with Superior Court until 30 days following day upon which claimant receives notice of findings of panel. (T. 24, §2859).

Two years: For assault and battery, false imprisonment, libel, slander. (T. 14, §753). Actions for wrongful death. (T. 18-A, §§2-804[b]). Actions for claims against governmental entity or its employees under Maine Tort Claims Act, except if claimant is minor, action may be brought within two years of minor reaching majority. (T. 14, §8110). However, notice of claim must be filed within 180 days unless claimant is minor. (T. 14, §8107). If claimant is minor, claim must be filed within 180 days of minor reaching majority. (T. 14, §8107). Actions for claims against ski area or tramway owners or operators, as defined under T. 32, c. 133 arising out of participation in skiing, or hang gliding or use of tramway therewith. (T. 14, §752-B). Action for damages caused by intoxicated individual brought against person who served alcohol. However, notice of claim must be given within 180 days. (T. 28-A, §§2514, 2513). Action by debtor against creditor for unlicensed consumer lending of open-end credit. (T. 9-A, §5-201[2]). See also category 11 Employment, topic 11.01 Labor Relations, subhead Workers' Compensation Act.

One year: For escape; action against bail, bondsmen of poor debtor or person adjudged trustee. (T. 14, §§851, 754). Action by debtor against creditor for unlicensed consumer lending of loans other than open-end credit line. One year commences on date of last scheduled payment under loan agreement. (T. 9-A, §5-201[2]).

Nine months: All claims against decedent's estate which arose before death of decedent are barred unless presented within earlier of nine months of decedent's death or four months following notice by publication. All claims against decedent's estate which arise at or after decedent's death are barred unless presented within later of nine months after decedent's death or four months after claim arose. (T. 18-A, §§3-803, 3-109).

New Action.

When a summons fails of service or return by unavoidable accident, or officer's negligence, or the action is defeated for any matter of form, or by death of either party, plaintiff or his executor or administrator may commence a new action on same demand within six months. (T. 14, §855). No statute of limitations running on cause of action belonging to decedent which has not been barred as of date of death shall bar cause of action sooner than four months after death. (T. 18-A, §3-109).

In actions upon mutual accounts, time runs from last item proved. (T. 14, §852).

In actions against attorneys, action accrues upon act or omission regardless of aggrieved party's lack of knowledge, except for negligence in drafting wills or rendering title opinions. (T. 14, §753-B).

Actions are deemed commenced when summons and complaint are served or when complaint is filed with court, whichever occurs first. (T. 14, §553).

Uniform Commercial Code.

Adopted. T. 11, §2-725 provides four year statute of limitations for breach of any contract for sale. Action accrues when breach occurs, regardless of aggrieved party's lack of knowledge. (T. 11, §2-725).

Disabilities.

If person entitled to bring action is minor, insane, imprisoned or outside limits of United States when cause of action accrues, action may be brought within time limited by statute after disability is removed. (T. 14, §853). In case of real action, extension is for ten years after disability removed. (T. 14, §807).

Concealment by Defendant.

If person, liable to any action, fraudulently conceals cause thereto, or if fraud is committed which entitles any person to action, action may be commenced at any time within six years after person entitled thereto discovers he has just cause of action, except in cases of fraudulent transfer. (T. 14, §859). Concealment can occur by action or by omission if fiduciary relationship exists. (819 A.2d 1014, 1025-26).

Absence or Insolvency.

If party is out of state when action accrues against him, time runs from when he comes into state; if action accrues before he leaves state, time he is absent if therefrom is not reckoned; if person is adjudged insolvent after action, provable in insolvency, accrues against him, time of insolvency proceedings is not to be reckoned. (T. 14, §866). See also category 21 Property, topic 21.01 Absentees.

Causes Arising Outside the State.

No action may be brought by any person whose cause of action has been barred by laws of any state, territory or country while all parties have resided therein. (T. 14, §866).

Revival of Barred Debts.

Claims barred by statute of limitations can be revived by written acknowledgment, signed by party to be charged, or by part payments on account. (T. 14, §§860, 863).

Contractual limitations are permitted; but life insurance company may not limit time from bringing action against it to less than three years. (T. 24-A, §2525).

Pleading.

Statute of limitations is affirmative defense, which must be pleaded in order to be available. (M.R.C.P. 8[c]).

5.16A PARTITION:

Persons seized of, or having right of entry into, real estate in fee simple or for life, as tenants in common or joint tenants may be compelled to divide same by civil action for partition. (T. 14, §6501). Person interested and not named in petition, and not so notified as to enable him to appear earlier, may, in court's discretion, be permitted to appear and defend at any time before final judgment. (T. 14, §6504). If judgment is for partition, court appoints three or five commissioners to make same. (T. 14, §6511).

Maine has statutory partition (T. 14, §6501 et seq.) and equitable partition (T. 14, §6051[7]). Persons seized of or having right of entry into real estate in fee simple or for life, as tenants in common or joint tenants and those in possession or having right of entry for term of years, as tenants in common, may bring civil action for partition. (T. 14, §§6501-02).

Jurisdiction and Venue.

Action for partition may be brought in Superior or District Court in county where real estate is situated. (T. 14, §6502).

Proceedings.

Complaint must clearly describe estate, state proportion claimed and give names and residences of tenants in common (T. 14, §6502), and must state “TITLE TO REAL ESTATE IS INVOLVED” directly beneath designation of pleading. (M.R.C.P. 10[a]). Service of process shall be made as in other civil actions and notice by publication shall be given to tenants whose identity or whereabouts are unknown. (T. 14, §6503). Person interested and not named in complaint may, in discretion of court, be permitted to appear and defend. (T. 14, §6504).

Partition in Kind or Sale.

Statutory partition provides for division of real estate. (T. 14, §6501). If parcel of greater value than party's share or cannot be divided, may be assigned to one party by his payment to other party. (T. 14, §6515). Equity partition allows sale. (430 A.2d 37, 39).

5.17 [RESERVED]

5.18 PLEADING:

Pleading is governed by Maine Rules of Civil Procedure which are patterned after Federal Rules. See topic 5.19 Practice.

Proof of Claims.

For purpose of bringing suit copy of original documents sufficient; if claim on open account, should be itemized and include dates, full and exact names of parties and residences, together with statement of nature of claim; location of real estate and personal property helpful for attachment.

Small Claims.

See category 6 Courts and Legislature, topic 6.01 Courts.

5.19 PRACTICE:

Practice is governed by Maine Rules of Civil Procedure. These rules in general conform to Federal Rules of Civil Procedure.

Maine Administrative Procedure Act, T. 5, §§8001-11008, governs rule making, advisory rulings, adjudicatory proceedings, and judicial review with respect to agencies as defined by T. 5, §8002(2).

Direct Actions Against Insurer.

See category 23 Transportation, topic 23.01 Motor Vehicles, subhead Direct Actions.

Small Claims.

See category 6 Courts and Legislature, topic 6.01 Courts.

See also topics 5.02 Actions, Appeal and Error, Depositions and Discovery, Injunctions, Judgments, Pleading, Process; category 8 Debtor and Creditor, topics 8.02 Attachment, 8.05 Executions, 8.09 Garnishment.

5.20 PROCESS:

M.R.C.P. 4, 4A and 4B, based on Federal Rules of Civil Procedure form basis for procedural rules and method of service of process in commencement of civil action. Civil actions are commenced by service of summons and complaint or by filing complaint with court. See topic 5.19 Practice.

General Requisites.

Summons must bear signature or facsimile signature of clerk, be under seal of court, contain court name and parties' names, be directed to defendant, state plaintiff's attorney's name and address, and time within which defendant must answer, and must notify defendant that if he fails to answer, judgment by default will be rendered against him for relief demanded in complaint. (M.R.C.P. 4[a]). Complaint must contain caption setting forth name of court and county, title of action, docket number and word “complaint.” (M.R.C.P. 10[a]). Title of action shall include all parties' names. Complaint must be dated. If claim involves title to real estate, words “TITLE TO REAL ESTATE IS INVOLVED” must be included beneath designation. All claims must be made in separate numbered paragraphs. (M.R.C.P. 10[b]).

By Whom Issued.

Summons may be procured in blank form from Clerk of Courts and filled out by plaintiff's attorney. (M.R.C.P. 4[b]).

Service by Mail.

Service may be made by mailing copy of summons and complaint to person to be served together with two copies of notice and acknowledgment form and return envelope, postage prepaid, addressed to sender. If sender does not receive acknowledgment of service under this paragraph within 20 days after date of mailing, service of summons and complaint must be made in person as permitted by Rule 4 or by statute. (M.R.C.P. 4[c][1]).

Who May Serve.

Service is made by Sheriff or Deputy Sheriff within county or by some person specially appointed by court for that purpose. (M.R.C.P. 4[c][2]).

Personal Service on Individual.

Service can be made either by delivering copy of summons and complaint to defendant personally or by leaving them at usual place of abode with some person of suitable age residing there or by delivering copy of summons and complaint to agent authorized by appointment or by law to receive service of process. If service cannot be made as described above, court may allow service by leaving copy of summons and complaint at defendant's usual place of abode or by publication. (M.R.C.P. 4[d][1]).

Personal Service on Minor.

Service made on minor and also on guardian, if within state, and if not, to father or mother or other person with whom minor resides or as provided by court order. (M.R.C.P. 4[d][2]).

Personal Service on Incompetent Person.

Service made on guardian or competent member of family with whom incompetent resides or if living in institution, to director of institution, or as provided by court order and also on incompetent unless otherwise ordered. (M.R.C.P. 4[d][3]).

Personal service upon county, town, city, U.S. or other public corporation other than State of Maine—upon officers designated in Rule. (M.R.C.P. 4[d][4-7]).

Model Registered Agents Act.

Act, T. 5, §§101-120, provides for service of process on registered agents of represented entities. Service on party other than clerk of registered agent is allowed if entity previously filed clerk or registered agent with Secretary of State but no longer has one, or clerk or registered agent cannot be served with reasonable diligence, if done by registered or certified mail, return receipt requested, addressed to governors of entity by name at principal place of business. If service cannot be made in that manner, hand delivery permitted to manager, clerk, or person in charge at any regular place of business, if person served is not plaintiff in action. Service must be in form of written document, unless in other form as agent has stated it will accept in listing under T. 5, §106. Service may be perfected by other means prescribed by law. (T. 5, §113). Appointment of clerk or registered agent does not by itself create basis for jurisdiction or venue.

(T. 5, §115).

Personal Service on Partnership.

Service must be made on all partners by delivering copy of summons and complaint to any general partner or managing or general agent of partnership, or by leaving copies at office or place of business of partnership within state, or to any agent, attorney in fact or other person authorized by Rule or Statute. (M.R.C.P. 4[d][10]).

Personal Service on Domestic Corporation.

Service is made: (a) On any officer, director or general agent; or, if none found, on any person in actual employment of corporation; or, if none found, on Secretary of State, provided plaintiff's attorney also sends copy of summons and complaint to corporation by registered or certified mail, addressed to corporation's principal office as reported on latest annual return; or (b) on any agent or attorney in fact authorized by appointment or statute to accept service, provided that further notice required by statute shall also be given. (M.R.C.P. 4[d][8]).

Personal Service on Association.

Service must be made on all members.

Personal Service on Foreign Corporation.

Service on any officer, director or agent within state or at any office or place of business of corporation within state or by service on any agent or attorney authorized by appointment or statute to accept service. (M.R.C.P. 4[d][9]).

Personal Service in Action for Guardianship or Conservatorship.

Service must be made at least 14 days before hearing. (T. 18-A, §§5-309, 5-405). Ward served in person. (T. 18-A, §5-309). Spouse, domestic partner, adult children and parents served by certified mail. (T. 18-A, §§5-309, 5-405).

Service on State of Maine.

Service made by delivering copy of summons and complaint to Attorney General or deputies either personally or by registered or certified mail, return receipt requested, and in actions attacking validity of order of staff officer or agency not made party by also sending copy of summons and complaint by ordinary mail to such officer or agency. (M.R.C.P. 4[d][11]).

Service on State Officer or Agency.

Service made either by method prescribed for personal service on individual or method prescribed for service upon U.S., and copy of summons and complaint by ordinary mail to State Attorney General. (M.R.C.P. 4[d][12]).

Service on Trustees of Express Trust.

Service made in any action for claim of relief against trust, except action by beneficiary, by delivering copy of summons and complaint to any trustee or by leaving same at office or place of business of trust within state, or by delivering copy of summons and complaint to any agent or attorney in fact authorized by appointment or statute to receive service on behalf of trust, provided any further notice required by statute shall be given. (M.R.C.P. 4[d][13]).

Personal Service Outside the State.

Service in same manner as if such service were made within state, by any person authorized to serve civil process by laws of place of service, or by person specially appointed to serve. Affidavit of person making service filed with court stating time, manner and place of service. (M.R.C.P. 4[e]).

Service outside state by mail allowed where service cannot, with due diligence, be made personally within state. Service may be made by registered or certified mail, return receipt requested, with instructions to deliver to addressee only, in following cases where pleading demands: (1) Judgment affecting interest or title in real or personal property within state; or (2) judgment for divorce or annulment. (M.R.C.P. 4[f]).

Service by Publication.

Court, on motion and showing that service cannot, with due diligence, be made by another prescribed method may order service by publication in following instances: (1) actions affecting title to property within state; or (2) divorce or annulment actions.

Notice must be published once a week for three successive weeks in designated newspaper of general circulation in county where action is pending. In addition, service is made by mail to defendant's last known address of copy of order as published. First publication of summons is made within 20 days after order allowing it is granted. Service is complete on 21st day after first publication. Plaintiff files with court affidavit that publication has been made (M.R.C.P. 4[g]).

Long Arm Statute.

Jurisdiction of state courts may be founded upon: (1) transaction of any business in state; (2) doing or causing tortious act to be done or causing consequences of tortious act to occur within state; (3) ownership, use or possession of any real estate situated in state; (4) contracting to insure any person, property or risk located within state at time of contracting; (5) conception resulting in paternity; (6) contracting to supply services or things within state; (7) maintaining domicile in state subject to marital or family relationship out of which arises claim for divorce, alimony, separate maintenance, property settlement, child support or child custody, or commission in state of any act giving rise to such claim; (8) acting as director, manager, trustee or other officer of corporation incorporated in or having its principal place of business in state; (9) maintaining any other relation to state or to persons or property which affords basis for jurisdiction by courts of state consistent with Constitution of U.S. Service of process upon person subject to jurisdiction of courts of state by operation of long arm statute may be made by personal service of summons on defendant outside state. (T. 14, §704-A). Extended personal jurisdiction for interstate child support actions. (T. 19-A, §2961). Long-arm statute provides only for exercise of specific jurisdiction. (246 F.Supp. 2d 64, 68).

Proof of Service.

Person serving shall make proof of service on original process or paper attached thereto for that purpose. Plaintiff's attorney files proof of service with court within time during which person served must respond to process. (M.R.C.P. 4[h]).

Uniform Child Custody Jurisdiction and Enforcement Act (service requirements). (T. 19-A, §§1731-1783).

Uniform Interstate Family Support Act adopted. (T. 19-A, §§2801 et seq.).

Expedited Process for Commencement of Paternity Actions (service requirements). (T. 19-A, §§1601-1616).

Special Proceedings.

Refer to c. XI of Maine Rules of Civil Procedure for special rules for form of process in following actions: divorce and annulment (M.R.C.P. 80); real actions (M.R.C.P. 80A); review of governmental action (M.R.C.P. 80B); review of final agency action (M.R.C.P. 80C); forcible entry and detainer (M.R.C.P. 80D); administrative inspection warrants (M.R.C.P. 80E); traffic infractions (M.R.C.P. 80F); license revocation or suspension (M.R.C.P. 80G); civil violations (M.R.C.P. 80H); search warrants for Schedule Z drugs (M.R.C.P. 80I); warrants for surveys and tests (M.R.C.P. 80J); land use violations (M.R.C.P. 80K); jury trial de novo in small claims appeals to Superior Court (M.R.C.P. 80L).

Nonresident Motorists.

See category 23 Transportation, topic 23.01 Motor Vehicles.

5.21 REPLEVIN:

Goods unlawfully taken or detained from the owner or person entitled to the possession thereof, and goods attached on mesne process or taken on execution claimed by a person other than the defendant in the suit in which they are attached or taken, may be replevied by such owner or person. (T. 14, §7301).

Proceedings.

Action for replevin must be commenced by filing complaint, together with motion for approval of replevin and replevin bond. Motion shall be supported by affidavit setting forth facts which demonstrate that there is reasonable likelihood that plaintiff will prevail in replevin action. (M.R.C.P. 64). Replevin bond must have sufficient sureties, in double actual value of goods to be replevied. (T. 14, §7303). Order of replevin (unless ex parte) will be entered only after notice to defendant and hearing. (M.R.C.P. 64).

Repossession.

For ex parte replevin orders, defendant on two day's notice to plaintiff may move for return of replevied property. Court then holds hearing on replevin where plaintiff bears burden of proof. (M.R.C.P. 64[i]).

If defendant is entitled to return of replevied goods, court shall order plaintiff to return goods plus pay costs and damages from taking. (T. 14, §7304). Beasts distrained to obtain satisfaction for damages claimed to be done by them may also be replevied. (T. 14, §7401).

5.22 SEQUESTRATION:

Lessee has right of sequestration for goods identified in lease if lessee is unable to effect cover or effort will be unavailing. (T. 11, §2-1521[3]). Creditor process includes sequestration with respect to bank accounts. (T. 11, §4-1502[1]).

5.235.24

5.25 SUBMISSION OF CONTROVERSY:

When questions presented by appeal to law court can be determined without examination of all pleadings, evidence and lower court proceedings, parties may prepare and sign statement of case. (M.R.A.P. 5[f]). In cases where all parties appearing request, superior court may report any action to law court for determination where there is agreement as to all material facts and question of law is of sufficient importance. Any such action will be heard and determined in manner provided in case of appeals. (M.R.A.P. 24[d]).

5.26 VENUE:

Personal and transitory actions, and actions by trustee process except foreign attachment, shall be brought, when parties live in state, in county where any plaintiff or defendant lives, and when no plaintiff lives in state, in defendant's county, or in either case, in county where cause of action took place. Corporations may sue and be sued in county in which they have established place of business, or in which plaintiff or defendant, if natural person, lives. There are special provisions relative to actions on sheriff's and coroner's bonds, judgment debts and actions by or against counties, towns, parishes or school districts. Action may be dismissed for improper venue with double costs to defendant. (T. 14, §§501-507; T. 4, §155).

Change of Venue.

Presiding Justice of Superior Court or Chief Justice of Superior Court may transfer any civil action or proceeding from Superior Court in one county to another county. Transfer may also be by consent of all parties to civil proceeding with prior consent of Chief Justice of Superior Court. (T. 14, §508). In District Court, transfer may be made by court on motion or its own initiative for convenience or in interest of justice. (T. 4, §155).

Contract Provisions.

No statute or case law.

Mandatory Venues.

Certain actions may be brought in designated venues:

Administrative Appeals.

In Superior Court for county where petitioners reside or have principal place of business, agency has principal place of business, or subject activity or property is located. (T. 5, §11002).

Forcible Entry and Detainer.

In division of District Court where property is located. (T. 4, §155).

Attachment.

If brought in District Court, must be in division in which plaintiff, defendant or subject property resides. (T. 4, §155).

Divorce, Separation, Annulment or Support.

In division of District Court where either plaintiff or defendant resides. (T. 4, §155).

Domestic Abuse.

Division of District Court in which either plaintiff or defendant resides. (T. 19-A, §4003).

Enforcement of Money Judgment.

Against resident in division of District Court where debtor resides or keeps place of business; against nonresident individual in division where debtor is commorant; against nonresident corporation in any division in which civil summons could be served on debtor or in which action resulting in judgment could have been brought; except that enforcement of consumer debt judgment must, at creditor's option, be in division where debtor resides or transaction took place. (T. 14, §3121-A[1]). If civil order of arrest issues or motion for contempt is filed, action must be transferred to division in which debtor resides. (T. 14, §3121-A[2]).

Guardianship for Incapacitated Person.

In place where incapacitated person resides; if court has ordered institutionalization, then also may be brought in court issuing such order. (T. 18-A, §§5-302, 5-313).

Protective Proceeding for Disabled Person.

In place where disabled person resides or, if nonresident, where he has property. (T. 18-A, §5-403).

Guardianship for Minor.

Where minor resides. (T. 18-A, §§5-205, 5-211).

Protective Proceeding for Minor.

Where minor resides or, if nonresident, where he has property. (T. 18-A, §5-403).

Protective Petition for Children.

In District Court where child legally resides or child is present. (T. 22, §4031).

Motor Vehicle Dealer Complaint about Location of New Dealership by Manufacturer.

In Superior Court for county in which plaintiff dealership is located. (T. 10, §1174-A).

Partition or Quiet Title of Real Estate.

In District or Superior Court for county in which real estate is located. (T. 14, §§6502, 6651).

Replevin.

If goods are worth less than District Court jurisdictional maximum, then in division for county where goods are detained; if value exceeds jurisdictional maximum, then in Superior Court for county where goods are detained. (T. 14, §7302).

Arbitration Award Order Application.

In Superior Court specified in arbitration agreement or in court where prior hearing was held; otherwise in Superior Court for county where adverse party resides or has place of business or, if nonresident, in court of any county; subsequent applications to court hearing initial application. (T. 14, §5944).

6 COURTS AND LEGISLATURE

6.01 COURTS:

United States District Court.

Clerk's offices: Portland 04101, Bangor, 04401. Maine constitutes one judicial district. Court held at Portland and Bangor. Cases arising in counties of Androscoggin, Cumberland, Knox, Lincoln, Oxford, Sagadahoc and York to be filed and ordinarily tried at Portland. Cases arising in counties of Aroostook, Franklin, Hancock, Kennebec, Penobscot, Piscataquis, Somerset, Waldo and Washington to be filed and ordinarily tried in Bangor.

Supreme Judicial Court.

Clerk's office: Portland, 04112-0368. As Law Court, it is highest court. Seven members. Law Court's jurisdiction is of cases on appeal from inferior courts including certain interlocutory rulings, questions of law arising on reports of cases or on agreed statement of facts, cases presenting question of law, cases requesting equitable relief, motions to dissolve injunctions, and questions arising in nature of habeas corpus, mandamus and certiorari. (T. 4, §57). Federal Court may certify questions of law to Law Court. (T. 4, §57, M.R.A.P. 25).

Superior Court.

Established by Laws 1929, c. 141, has exclusive jurisdiction in all matters that were within jurisdiction of Supreme Judicial Court or any of Superior Courts prior to Jan. 1, 1930, except those powers exercised by Supreme Judicial Court sitting as Law Court and except matters within jurisdiction of District Court or concurrent jurisdiction of Supreme Judicial Court under T. 14, §5301. (T. 4, §105).

Place of sitting.

Androscoggin County: court sits at Auburn.

Aroostook County: court sits at Caribou and Houlton.

Cumberland County: court sits at Portland.

Franklin County: court sits at Farmington.

Hancock County: court sits at Ellsworth.

Kennebec County: court sits at Augusta.

Knox County: court sits at Rockland.

Lincoln County: court sits at Wiscasset.

Oxford County: court sits at South Paris.

Penobscot County: court sits at Bangor.

Piscataquis County: court sits at Dover-Foxcroft.

Sagadahoc County: court sits at Bath.

Somerset County: court sits at Skowhegan.

Waldo County: court sits at Belfast.

Washington County: court sits at Machias.

York County: court sits at Alfred.

Probate Courts.

In each county there is a court of probate with judge and register.

Probate court has jurisdiction of administration of estates of deceased persons, wills, guardianships, adoptions, name change, and such other matters as may be conferred by law. It has concurrent jurisdiction in equity with Supreme Judicial Court of all matters relating to administration of deceased persons, to wills and to trusts which are created by will or other written instrument. (T. 4, §§251-252).

State District Courts.

State is divided into 29 Divisions over which 13 District Courts have same civil and criminal jurisdiction as that exercised by municipal courts and trial justices which were in existence on effective date of creating act. Jurisdiction of District Courts is governed by T. 4, §152. District Courts have exclusive jurisdiction over: (1) mental health commitment hearings under T. 34-B, §3801, et seq.; (2) mental retardation certification hearings under T. 34-B, §§5461-5481; (3) habitual truancy actions under T. 20-A, §§3271-3273 and §§5051-A-5054; and (4) small claims actions under T. 14, §§7481-7487; District Court also has exclusive jurisdiction in actions for divorce (T. 19-A, §§901-908), judicial separation (T. 19-A, §§851-852), and annulment (T. 19-A, §752), as well as domestic relations matters permitted under T. 19-A. In addition, District Courts have original jurisdiction concurrent with Superior Court over: (1) all civil actions when no equitable relief is demanded except where exclusive jurisdiction is vested in Superior Court by statute; (2) all civil actions to enforce liens under T. 10, §3251, et seq. and T. 35-A, §706 and District Courts must determine amount under T. 10, §3258; (3) actions to quiet title to real estate under T. 14, §§6651-6658; (4) actions to quiet title to real estate under T. 36, §946; (5) actions for breach of implied warranty and covenant of habitability under T. 14, §6021; (6) actions to foreclose mortgages under T. 14, §6321, et seq.; (7) actions for restitution under T. 5, §213 (unfair trade practices); (8) actions for illegal evictions under T. 14, §6014; (9) actions for foreclosures of mortgages and for redemption; (10) actions to compel specific performance, to cancel and to compel discharge of written contracts upon full performance or payment; (11) actions for relief from fraud, duress, unjust enrichment, trust, accident or mistake; (12) actions for nuisance or waste; (13) actions concerning partnerships or between partners or part owners of real or personal property; (14) civil actions for redelivery of goods not able to be replevied or for reaching property not able to be attached, not able to be taken on execution, or conveyed in fraud of creditors; (15) actions concerning vested or contingent interests in or liens on specific property, seeking partitions of real property by sale, or otherwise affecting title to real property; (16) actions to compel compliance with court orders; (17) actions seeking equitable relief through equitable defense, counterclaim, cross-claim or responsive pleading or reply under M.R.C.P.; (18) actions to enforce access to health care under T. 22, §1715; (19) proceedings for equitable relief and impose penalties involving violations of environmental ordinances, regulations or laws; (20) actions to revoke or suspend license on complaint of issuing agency or Attorney General; (21) appellate review of revocation of occupational or professional license by occupational licensing boards and commissions taken under T. 10, §8003; and (22) receipt of guilty pleas in criminal cases with maximum imprisonment terms of one year or more. District Courts also have original jurisdiction concurrent with Probate Court to grant equitable relief in proceedings involving consent to minor's abortion. (T. 4, §152; T. 22, §1597-A). Chief Judge sets trial terms, although court in continuous session. Appeal is to Supreme Judicial Court sitting as Law Court except from forcible entry and detainer, small claims decisions, and involuntary hospitalizations where appeal is to Superior Court. (T. 14, §1901).

Districts.

13 districts are as follows with place for holding court shown in parentheses after name of each division:

First District: divisions of Eastern Aroostook (Caribou); and Western Aroostook (Madawaska, Fort Kent, and Van Buren).

Second District: divisions of Central Aroostook (Presque Isle) and Southern Aroostook (Houlton).

Third District: divisions of Southern Penobscot (Bangor) and Western Penobscot (Newport).

Fourth District: divisions of Northern Washington (Calais) and Southern Washington (Machias).

Fifth District: divisions of Central Hancock (Ellsworth), Southern Hancock (Bar Harbor) and Waldo (Belfast).

Sixth District: divisions of Bath-Brunswick (Bath, West Bath, or Brunswick), Lincoln (Wiscasset) and Knox (Rockland).

Seventh District: divisions of Northern Kennebec (Waterville) and Southern Kennebec (Augusta).

Eighth District: division of Southern Androscoggin (Lewiston).

Ninth District: divisions of Southern Cumberland (Portland) and Northern Cumberland (Bridgton).

Tenth District: divisions of Eastern York (Biddeford or Saco), Western York (Sanford) and Southern York (York).

Eleventh District: divisions of Northern Androscoggin (Livermore Falls), Northern Oxford (Rumford) and Southern Oxford (South Paris).

Twelfth District: divisions of Somerset (Skowhegan) and Franklin (Farmington).

Thirteenth District: divisions of Piscataquis (Dover-Foxcroft), Northern Penobscot (Millinocket) and Central Penobscot (Lincoln). (T. 4, §154).

Court Alternative Dispute Resolution Service established to provide mediation in Superior and District Courts. (T. 4, §18-B). Administers land use mediation program. (T. 5, §3341).

Small Claims Courts.

Governed by T. 14, §§7481-7487, small claims are any right of action cognizable by court, not involving title to real estate, in which debt or damage claimed does not exceed $4,500 exclusive of interest and costs. Procedure governed by rules of procedure adopted by law court. Alternative, not exclusive, proceeding. District court has jurisdiction. District court has power to grant monetary and equitable relief. Equitable relief limited to orders to return, reform, refund, repair or rescind. Small claim must be brought in district court division where transaction occurred, where defendant resides, where defendant has place of business or, if defendant is corporation or partnership, where registered agent resides. Judgment obtained is res judicata as to amount in controversy. Appeal of adverse decision only recourse.

Disclosure of Juror Information.

Governed by T. 14, §§1254-A-1254-B, records and information used in connection with juror selection are confidential except as described in §1254-B.

6.01A JUSTICES OF THE PEACE:

Chief Judge may authorize any attorney at law licensed to practice in state to receive complaints, issue process for arrest, issue search warrants, endorse commitment certificates, who shall be called justice of peace. (T. 4, §161).

6.02 LEGISLATURE:

Meets annually: First Regular Session convenes on first Wed. of Dec. in odd-numbered years and usually lasts until third Wed. in June; Second Regular Session convenes on first Wed. after first Tues. in Jan. in even-numbered years and usually lasts until third Wed. in Apr. Times for adjournment may be extended. Proposed legislation is considered during First Regular Session. Consideration of legislation is limited for legislators to emergency and financial matters during Second Regular Session. (Const. Art. IV, Pt. 3, §1; T. 3, §2).

Special Sessions.

May be convened by Governor or by President of Senate and Speaker of House with consent of majority of members of each political party. Special sessions typically last three to four days. (Const. Art. V, Pt. 1, §13; Art. IV, Pt. 3, §1).

Referendum and Initiative.

Constitution provides for both. (Const., Art. IV, Pt. 3, §§17-22).

Lobbyists.

Regulated by T. 3, §§311-326.

6.03 REPORTS:

Cases decided by Supreme Judicial Court, sitting en banc as a law court are reported in Maine Reports, beginning with vol. 1. First nine generally cited as Greenleaf's Reports. Maine decisions are also reported in the Atlantic Reporter. Maine Reports discontinued as of 1966; replaced by Maine Reporter which collects cases decided by Supreme Judicial Court as reported in Atlantic Reporter.

Digest.

Maine decisions are digested in the Atlantic Digest and in Lawrence's Maine Digest, which has been brought down through Vol. 146 (1950-51) of the Maine Reports by a Vol. III published in Dec., 1953. Also in West's Maine Digest. See also topic 6.04 Statutes.

6.04 STATUTES:

Latest revision is 1964 Maine Revised Statutes Annotated. Subsequent acts are in session laws.

Uniform Acts adopted are: Arbitration (1967) (T. 14, §§5927-5949); Attendance of Witnesses from Without a State in Criminal Proceedings (1939) (T. 15, §§1411-1415); Bus. Corp. (2003) (T. 13-C, §§101-1702); Child Custody Jurisdiction and Enforcement Act (1979) (T. 19-A, §§1701-1725); Civil Liability for Support (1955) (T. 19-A, §§3501-3506); Commercial Code (1964) (T. 11, §§1-101-9-507); Commercial Code for Investment Securities (1998) (T. 11, §§8-1101—8-1511); Commercial Code for Letters of Credit (1998) (T. 11, §§5-1101—5-1117); Common Trust Fund (1979) (T. 18-A, §§7-501-7-503); Condominium (1983) (T. 33, §§1601-201 to 1604-118); Conservation Easement (1985) (T. 33, §§476-479-B); Consumer Credit Code (1975) (T. 9-A, §§1-101-12-107); Criminal Extradition (1929) (T. 15, §§201-229); Deceptive Trade Practices (1969) (T. 10, §§1211-1216); Declaratory Judgments (1941) (T. 14, §§5951-5963); Determination of Death (1983) (T. 22, §§2811-2813); Disclaimer of Property Interests (1979) (T. 18-A, §2-801); Disclaimer of Transfers by Will, Intestacy or Appointment (1975) (T. 18-A, §2-801); Disclaimer of Transfers Under Nontestamentary Instruments (1975); Division of Income for Tax Purposes (1989) (T. 36, §§5210-5211); Durable Power of Attorney (1991) (T. 18-A, §§5-501-5-506); Electronic Transactions (1999) (T. 10, §§9401-9419); Enforcement of Foreign Judgments (1975) (T. 14, §§8001-8008); Environmental Covenants (T. 38, §§3001-3013); Federal Lien Registration (1988) (T. 33, §§1901-1907); Foreign Money-Judgment Recognition (1999) (T. 14, §§8501-8510); Fraudulent Transfer (1986) (T. 14, §§3571-3582); Guardianship and Protective Proceedings (1979) (T. 18-A, §§5-101 et seq.); Health-Care Decisions (1995) (T. 18-A, §§5-801-5-817); Interstate Arbitration of Death Taxes (1949) (T. 36, §§3911-3924); Interstate Compromise of Death Taxes (1949) (T. 36, §3981); Interstate Family Support (1993) (T. 19-A, §§2801-3401);

Joint Obligations (Model) (1966) (T. 14, §§11-17); Judicial Notice of Foreign Law (1939) (T. 16, §§401-406); Jury Selection and Service (1970) (T. 14, §§1211-1219); Limited Partnership (1969, adopted 2001) (T. 31, §§1301-1346); Management of Institutional Funds (1993) (T. 13, §§4100-4109); Motor Vehicle Certificate of Title and Anti-theft (1969) (T. 29, §§2350-2461); Partnership (1973, adopted 1997) (T. 31, §§1001-1105); Paternity (1967) (T. 19-A, §§1551-1570); Photographic Copies of Business and Public Records as Evidence (1963) (T. 16, §456); Premarital Agreement (1987) (T. 19-A, §§601-611); Principal and Income (1997) (T. 18-A, §§7-701-7-773); Probate Code (1979) (T. 18-A, §§1-101-9-404); Prudent Investor (1996) (18-A MRSA 7-302); Recognition of Acknowledgments Act (1969) (T. 4, §§1011-1019); Rendition of Prisoners as Witnesses in Criminal Proceedings (1967) (T. 15, §§1461-1471); Revised Anatomical Gift (2008) (T. 22, §§2941-2965); Rules of Evidence (1979); Securities Act (2005) (T. 32, §§16101-16702); Simultaneous Death (1979) (T. 18-A, §2-805); State Administrative Procedure (Model) (1977) (T. 5, §§8001-11008); Testamentary Additions to Trusts (1963) (T. 18-A, §2-511); Trade Secrets (1987) (T. 10, §§1541-1545); Transfer on Death Security Registration (1997) (T. 18-A, §§6-301—6-312); Transfers to Minors (1988) (T. 33, §§1651-1674); Trust Code (T. 18-B, §§101-1104); Trustees' Powers (1981) (T. 18-A, §§7-401-405); Unclaimed Property (1998) (T. 33, §§1951-1980) (see category 21 Property, topic 21.01 Absentees).

Uniform Commercial Code adopted. See category 3 Business Regulation and Commerce, topic 3.09 Commercial Code.

For text of Uniform Acts falling within the scope of the Martindale-Hubbell Law Digest see Uniform and Model Acts section.

7 CRIMINAL LAW

7.00A BAIL:

See topic 7.01 Criminal Law.

7.01 CRIMINAL LAW:

Maine Criminal Code effective May 1, 1976. (T. 17-A, §§1-1357).

State laws relating to crimes and criminal procedure conform to principles of common law. Statutes deal with particular crimes.

Most crimes classified as A, B, C, D or E and maximum sentence of fine or imprisonment is based on class.

Indictments.

All criminal prosecutions must be on indictment by grand jury, except for contempt of court, or when prosecution utilizing charging instrument other than indictment is expressly authorized by rule of court, or in proceedings before district court, district court acting as juvenile court and courts martial. (T. 15, §701).

Bail.

No person before conviction shall be bailable for any capital offense when proof is evident or presumption great. (Me. Const., Art. I, §10). Eligibility for bail and procedures relevant thereto governed by Maine Bail Code. (T. 15, §§1001-1105).

Uniform Criminal Extradition Act adopted with numerous variations. (T. 15, §§201-229).

Uniform Rendition of Prisoners as Witnesses in Criminal Proceedings Act

enacted. (T. 15, §1461-1471).

Interstate Compact for Adult Offender Supervision enacted. (T. 34-A, §§9871-9888).

Interstate Compact for Juveniles enacted. (T. 34-A, §§9901-9913).

Firearms.

Bringing firearm into courthouse is Class D crime. (T. 17, §1058).

8 DEBTOR AND CREDITOR

8.01 ASSIGNMENTS:

Common law requirements govern assignment of rights, debts or choses in action except where governed by statute.

Uniform Commercial Code adopted, contains statutory provisions on this topic. See category 3 Business Regulation and Commerce, topic 3.09 Commercial Code. Any assignment, pledge or other transaction (regardless of form) intended to create a security interest in personal property, including goods, documents, instruments, chattel paper, accounts receivable or contract rights governed by Uniform Commercial Code. Art. 9 also governs sale of accounts receivable, contract rights or chattel paper. See category 3 Business Regulation and Commerce, topic 3.09 Commercial Code.

Instrument Transferring Title.

No special requirements. Witnesses and acknowledgments not required but acknowledgment required if instrument recorded although financing statements under Uniform Commercial Code need not be acknowledged. (T. 33, §203).

Filing and Recording.

No requirements other than for wages, except as imposed by Commercial Code (T. 11), and trademarks law (T. 10, §1525).

Notice.

Consumer authorized to pay original creditor until she receives notification of assignment of rights to payment pursuant to consumer credit transaction which clearly identifies rights assigned. (T. 9-A, §§3-203, 9-306). See category 3 Business Regulation and Commerce, topics 3.09A Consumer Credit and 3.09 Commercial Code. Insurer assuming or transferring obligations or risks on contracts of insurance in some circumstances must give statutory notice to or obtain prior approval of policyholders. (T. 24-A, §§761-766).

Form.

No statutory form of assignment. Assignments of estates in land must be in writing. (T. 33, §162).

Licenses.

Many state issued licenses not assignable. Reference should be made to statutes governing particular licenses.

Assignment of Prizes.

Right to Tri-State Lotto prize over $5,000 not assignable, except payment of prize drawn may be paid to another person as provided in §416-A. (T. 8, §416).

Assignment of Wages.

No assignment of wages valid against any person other than parties thereto, unless such assignment recorded by clerk in office of Secretary of State; and no such assignment shall be valid against employer unless he has actual notice thereof. (T. 26, §627).

Assignment of wages for child support obligation has absolute priority over previously recorded court ordered assignments in satisfaction of money judgment. (T. 26, §627). Creditor may not take assignment of earnings of consumer for payment or as security for payment of debt arising out of consumer credit transaction. (T. 9-A, 3-305). Assignment in violation of this section unenforceable by assignee of earnings and revocable by consumer. Assignments of unemployment compensation benefits are void, except as to amounts deducted or collected under T. 26, c. 13. (T. 26, §1044). Claims for workers' compensation are not assignable except for payment of support or reimbursement of general assistance. (T. 39-A, §106).

8.02 ATTACHMENT:

See generally M.R.C.P. 4A; T. 14, §§4101-4613.

Actions in Which Allowed.

All civil actions. (M.R.C.P. 4A; T. 14, §4151).

Courts That May Issue Writ.

Real and/or personal property may be attached on writ issued by Superior Court or District Court. (T. 14, §§4151, 4452).

In Whose Favor Writ May Issue.

May issue in favor of resident, nonresident or foreign corporation.

Against Whom Writ May Issue.

Against any resident of the state or against any nonresident having property in the state. Quasi in rem jurisdiction affecting only property attached can be based upon attachment of property within state. Attachment not available before judgment in action against consumer for debt arising from consumer credit transaction as defined by T. 9-A, §1-301(12). (M.R.C.P. 4A[a]).

Proceedings to Obtain.

No property, including real estate, may be attached unless such attachment is for specified amount approved by court. (M.R.C.P. 4A[c]). Except as provided in M.R.C.P. 4A(g), order may be entered only after notice to defendant, hearing and finding by court that it is more likely than not that plaintiff will recover judgment, including interest and costs, equal to or greater than aggregate sum of attachment and any insurance, bond or other security and any property or credits attached by other writ of attachment or by trustee process. Attachment of property must be within 30 days of order approving attachment. (M.R.C.P. 4A[c]). Motion for approval of attachment to be supported by affidavits. (M.R.C.P. 4A[c], [i]). Defendant opposing motion for approval of attachment must file opposition within 21 days after filing of motion, unless another time is set by court. (M.R.C.P. 4A[c], M.R.C.P. 7[c]).

M.R.C.P. 4A(g) provides that order approving attachment may be entered ex parte only if court finds: (1) it is more likely than not plaintiff will recover judgment equal to or greater than aggregate sum of attachment and any insurance, bond or other security, and any property or credits attached by other writ of attachment or by trustee process, and either (2) clear danger that if notified in advance defendant will remove property from state or will conceal it or will otherwise make it unavailable to satisfy judgment or (3) immediate danger that defendant will damage or destroy property. Motion for ex parte attachment must be supported by affidavit. Such affidavit shall be upon affiant's own knowledge, information or belief. (M.R.C.P. 4A[i]). Attachment must be recorded.

Approval of Limited Attachment or Substituted Security.

Upon appropriate showing by party whose property is to be attached, court will specify that attachment to issue solely against particular property or credits. If, at hearing on motion to approve attachment, party whose property is to be attached tenders cash or bond equal to amount of attachment to be approved, and deposits or files same with court, court may order any prior attachment dissolved and no further attachment shall issue absent showing that cash or bond has become inadequate or unavailable as security. (M.R.C.P. 4A[d]).

Civil Judgment.

Nonexempt real or personal property may be attached following entry of civil action judgment and prior to issuance of writ of execution upon judgment by filing attested copy of court order in registry of deeds for county in which property is located or proper place pursuant to T. 11, §9-A. Such filing constitutes perfection of attachment. Party whose property is so attached must be immediately notified by certified letter mailed by attaching party to last known address. (T. 14, §4151).

Levy.

Within five days after attachment of real estate, officer must file in registry of deeds in county where some part of estate lies an attested copy of his return relative to such attachment with value of property he is commanded to attach. (T. 14, §4454).

If attachment is of personal property, officer must take possession by removing the property or putting in a keeper. (T. 14, §4152).

Optional Method.

Any interest in real or personal property, not exempt from attachment, may be attached by filing in registry of deeds for county in which property is located or proper place pursuant to T. 11, §9-A attested copy of court order approving real or personal property attachment provided filing is made within 30 days of court order approving attachment (T. 14, §4154).

Indemnity.

Officer may require indemnity before levying.

Attachment Bond.

Any attachment made on an original writ, issued upon judgment by default against absent defendant, continues for one year and 60 days after judgment is rendered, when no bond is given; and when bond is given it continues for 60 days after such bond is filed with clerk of court. Bond must be deposited with clerk of court, who decides upon sufficiency of its sureties, subject to appeal. (T. 14, §§4701, 4702).

Priorities.

Creditor first attaching may exhaust the amount covered by his attachment; but subsequent creditors may petition court for permission to defend prior suits. (T. 14, §201).

Sale.

Personal property may be sold by consent of debtor and creditor, proceeding as if it were a sale on execution. (T. 14, §4351).

Perishable goods may be sold without consent of debtor before or after entry of actions. Procedure for sale set forth in the statutes. (T. 14, §4352). Upon motion of either party, court may order personal property to be sold and proceeds held as security for claim involved. (T. 14, §4353).

Duration of Attachment.

Attachment of real or personal property continues during time within which appeal may be taken from judgment and during pendency of appeal. When judgment becomes final by expiration of time for appeal, by dismissal of appeal, or on certificate of decision from Superior Court or Law Court, attachment continues for 60 days, with some exceptions. (T. 14 §§1601, 4601; M.R.C.P. 62[f]). In addition to other provisions of law, attachments of real or personal property may be enforced and duration extended as provided by T. 14, §§3131, 3132 and 4651.

Release of Property.

Attachments are dissolved: (1) when judgment for defendant is final by expiration of time for appeal; (2) by dismissal of appeal or on certification of decision from law court; (3) by decree of insolvency on debtor's estate before levy or sale on execution; (4) by insolvency proceedings commenced within four months as provided in insolvency law; (5) by reference of action and all demands between parties thereto by rule of court and judgment on report of referees; (6) by amendment of complaint, by consent of parties, so as to embrace larger demand than it originally did, and judgment for plaintiff thereon, unless record shows that no claims were allowed plaintiff not originally stated in complaint; (7) by delivery to officer of bond to plaintiff in penal sum not exceeding amount of attachment, with approved sureties, conditioned that within 30 days after judgment, or after adjournment, defendant will pay plaintiff or his attorney amount of judgment, with costs, such bond to be approved as to penal sum and sureties by plaintiff or court; and (8) by lapse of 60 days after final judgment without enforcement. (T. 14, §§4601, 4602, 4613). Ex parte attachment may be dissolved or modified without submitting to personal jurisdiction upon motion by defendant on two days notice; plaintiff has burden of justifying any finding which defendant has challenged by affidavit. (M.R.C.P. 4A[h]).

Third Party Claims.

Attachment may be made by party bringing counterclaim, crossclaim, or third-party complaint in same manner as upon original claim. (M.R.C.P. 4A[e]).

8.03 [RESERVED]

8.04 CREDITORS' SUITS:

A remedy in equity is given to reach and apply to debts, any property or interest of a debtor that cannot be attached on writ or taken in execution in a suit at law or any property or interest conveyed in fraud of creditors. (T. 14, §6051[11]).

See topic 8.07 Fraudulent Sales and Conveyances.

8.05 EXECUTIONS:

May be issued on judgments of Superior Court or District Court after 24 hours from time judgment has become final by expiration of time for appeal, dismissal of appeal, or on certificate of decision from law court, unless court has, pursuant to rule, ordered earlier execution, and is returnable within three years. No first execution may be issued after one year from time judgment has become final as above, except where judgment is rendered on default against defendant absent from state, in which case first execution may be issued within not less than one nor more than two years from time of judgment. (T. 14, §§4651-4652). Where judgment rendered against absent defendant in personal action who has no actual notice, execution may not issue until one year after entry of judgment unless plaintiff gives defendant bond in double amount of damages and costs, conditioned to repay to defendant any part of judgment from which he may ultimately be relieved. (T. 14, §4701). Alias or pluries executions may be issued within ten years after day of issuance of preceding execution and not afterwards. (T. 14, §4653).

Where execution not issued within time prescribed, order on motion may be issued against defendant to show cause why execution should not issue. (T. 14, §4654).

Exemptions.

See topic 8.06 Exemptions.

Stay.

Except as indicated above, there is no stay of execution in the absence of appeal. Execution may be ordered immediately for cause shown pending appeal or post trial motion as long as no representation is made that party intends to appeal or make such motion. (M.R.C.P. 62[c]). See category 5 Civil Actions and Procedure, topic 5.03 Appeal and Error.

Lien.

Filing of execution with registry of deeds (real estate) or proper places for perfecting security interest in personal property pursuant to T. 11, §9-A, within three years after issuance of execution, creates lien in favor of judgment creditor, and is in amount sufficient to satisfy judgment together with interests and costs. Lien becomes void and loses its status as perfected security interest unless judgment creditor notifies judgment debtor by certified or registered mail sent to last known address on or before 20th day after filing or recording of existence of lien. (T. 14, §4651-A).

Levy by Appraisal.

Real estate that is attachable may be taken on execution, by causing it to be appraised by three disinterested persons, one chosen by creditor, one by debtor (or by creditor if debtor after reasonable time neglects to do so), and one by officer having execution for service. Such appraisers must state value of estate appraised and describe it in return made and signed by them on back of execution or annexed thereto. (T. 14, §§2001-2003).

Levy by Sale.

Real estate may be taken on execution and sold at public auction to highest bidder. (T. 14, §§2201-2209). Equity of redemption may be levied on and sold. (T. 14, §2252).

Return.

On levy by execution officer, in return, shall state substantially time when land was taken on execution and give information about appraisers and appraisal. (T. 14, §2005). Officer who sells executed property must file return that describes each article sold and price at which it sold. (T. 14, §4758).

Priorities.

Proceeds of sale of executed property are applied to discharge multiple judgments in order which writs of execution or attachment were served. (T. 14, §5001).

Claims of Third Persons.

Personal property, subject to claim of third person, may be attached, held and sold as if unencumbered. (T. 14, §§4251-4256). Procedure is same as in case of attachment. See topic 8.02 Attachment.

Satisfaction.

Proceeds of sale of executed property applied to pay changes and satisfy execution. Residue, if any, to other creditors who have attached property, and then to debtor. (T. 14, §§4759, 5001).

Sale.

All attachable real or personal property, not exempted by statute, may be sold on execution. (T. 14, §4751). All personal property taken on execution must be held by officer at expense of debtor for four days and sold within 14 days of seizure. (T. 14, §4752). Officer shall post notice of time and place of sale at least 48 hours prior to sale. (T. 14, §4753).

Redemption.

Real estate levied or sold upon execution may be redeemed at any time within one year from the date of the levy of sale. (T. 14, §2251). Personal property sold on execution can not be redeemed, except in cases of (1) sales of mill or building sold as chattels personal, in which case such property may be redeemed at any time within one year after sale (T. 14, §4760); and (2) franchise sold on execution, which may be redeemed at any time within three months (T. 14, §4854).

Supplementary Proceedings.

Judgment creditor may subpoena judgment debtor to appear before judge of District Court to determine judgment debtor's ability to satisfy judgment. Subpoena must set forth time and place for disclosure hearing; order to produce any documents requested by judgment creditor; warning that failure to obey subpoena may result in arrest; and notification of debtor's right to be heard on ability to pay. (T. 14, §3122). Debtor may be subpoenaed to disclose not more than once every six months, or by court order. (T. 14, §3124). Failure of debtor to appear can result in issuance of civil order of arrest. Under such order, debtor arrested and brought to disclosure hearing. (T. 14, §§3134-3135). Failure to comply with any court order can result in citation for contempt. (T. 14, §3136). At hearing, debtor must disclose assets and sources of income. Court has broad power to order installment payment plan from assets, subject to certain maximum amounts, and to modify same. (T. 14, §§3126-A-3130). Court may order third party to withhold funds of debtor, subject to notice and hearing requirements. (T. 14, §3127-A). Court can order provisional installment payment pending sale of property. (T. 14, §3130). Court can order nonexempt property turned over to creditor in satisfaction; court may order sale of property not divisible if value exceeds debt or if debtor and creditor cannot agree. (T. 14, §3131). Court may order lien on debtor's interest in nonexempt personal property (T. 14, §3132); and upon two or more successive defaults in installment payment plan or failure to appear in response to hearing, subpoena may order debtor's employer to pay creditor directly (T. 14, §3127-B). Employer must respond by form answer served upon employer and withhold previously ordered installment amounts. (T. 14, §3127-B). If debtor fails to comply with any order, creditor may complain in writing and court may punish by contempt. (T. 14, §3136). Employer may not discharge employee because of such order. (T. 14, §3127-B). All property sold under court order must be accounted for by affidavit of judgment creditor to court. (T. 14, §§3130-3131). Fees and costs of service to be added to judgment. (T. 14, §3126).

8.06 EXEMPTIONS:

In addition to homestead exemption (see topic 8.10 Homesteads), there are a large number of personal property and other exemptions from attachment and execution, specified with particularity and in many cases limited in amount. (T. 14, §§4421-4426). Exemptions apply except to extent property fraudulently conveyed by debtor. (T. 14, §4422). Corporation may not claim any personal property exemption.

Substitution.

There is no provision authorizing debtor who does not own articles specifically exempted to hold other articles or money exempt in place thereof.

Debts Against Which Exemptions Not Allowed.

Debtor's interest in property other than residence generally not exempt from claims secured by purchase money security interests in such property. (T. 14, §4425).

Pensions.

Interest of employee in any group annuity or pension trust effected by employer is exempt from attachment, execution levy, trustee process or other legal or equitable process. (T. 24-A, §2432).

Homestead Exemption.

See topic 8.10 Homesteads.

See also topic 8.09 Garnishment.

Abuse of Process.

If, upon receipt of written notice that property is exempt, creditor fails to discharge lien within 15 days, debtor may recover damages, costs and attorney's fees. (T. 14, §4651-A).

8.07 [RESERVED]

8.08 FRAUDULENT SALES AND CONVEYANCES:

Equitable action applies to property fraudulently conveyed. (T. 14, §6051). Attachments and levies may be made on land fraudulently conveyed by debtor. (T. 14, §2014). Deceptive business practices punishable by fine or imprisonment. (T. 17-A, §901).

Uniform Fraudulent Transfer Act.

Adopted. (T. 14, §§3571-3582). Material variances from Uniform Act: Action must be brought within six years after transfer made or obligation incurred. (T. 14, §3580). Creditor's damages limited to double value of property concealed or transferred. (T. 14, §3578).

Uniform Commercial Code.—Adopted. (T. 11, §§1-101-10-108). Maine has repealed §§6-101-6-110 (Bulk Transfers). See category 3 Business Regulation and Commerce, topic 3.09 Commercial Code.

8.09 GARNISHMENT:

Garnishment, by that name, does not exist; but trustee process has same effect. Garnishment allowed for spouses and ex-spouses of retired military personnel by order of court to satisfy child support order and spousal support order. (T. 19-A, §2604).

Trustee Process.

In connection with commencement of any personal action except actions only for specific recovery of goods and chattels, for malicious prosecution, for slander by writing or speaking, or for assault and battery, trustee process may be used in superior court or district court, except that no person shall be adjudged trustee for any amount due from him as defendant's earnings. (T. 14, §2601; M.R.C.P. 4B). Trustee process not available before judgment in action against consumer for debt arising from consumer credit transaction as defined in T. 9-A, §1-301(12). (M.R.C.P. 4B[a]).

Venue.

Action brought in county in which any trustee resides. In divorce action, action must be brought in county in which court has jurisdiction over parties. (T. 14, §2604).

Service.

Service of summons to trustee is in like manner and with same effect as other process (see category 5 Civil Actions and Procedure, topic 5.20 Process). Service of trustee process on financial institution or credit union effected either by personal service by lawful means upon office designated in registry maintained for this purpose by Secretary of State as provided in T. 5, §90-C. (T. 14, §2608-A). Among other things, trustee summons shall contain specified amount for which goods or credits of defendant are attached on trustee process and state name of justice or judge who entered order approving trustee process and date thereof. (M.R.C.P. 4B[b], [c]).

Who May Be Made Trustees.

Corporations may be made trustees. (T. 14, §2608). Financial institutions or credit unions may be made trustees. (T. 14, §2608-A). Executors and administrators may be made trustees (T. 14, §2619) and also persons receiving fraudulent conveyances of personal property (T. 14, §2629).

No person may be adjudged trustee by reason of: (1) Any negotiable paper accepted, made or endorsed by him unless held under fraudulent conveyance void as to defendant's creditors; (2) anything received or collected by him as officer, by force of legal process; (3) money in his hands as public officer; (4) money or other thing due on contingency; (5) any debt due from him on judgment while he is liable to execution thereon; (6) any amount due from him to principal defendant, as wages for his personal labor, or that of his wife or minor children. Moreover, wages of minor children and of women are not, in any case, subject to trustee process on account of any debt of parent or husband; (7) when service was made by leaving copy and payment made on negotiable security given before actual notice (or reasonable ground of belief) of such service; (8) any amount due for board furnished a member of legislature while in attendance thereon; (9) renting by bank or trust company of safe deposit box or on account of contents thereof; (10) any money deposited with him in a broker's trust account, except to extent provided in T. 32, §13178. (T. 14, §2602).

Duties of Trustee.

Trustee must appear and file written disclosure within 20 days after service and submit to examination under oath upon which and such other evidence as is introduced he is either charged for specified amount, or discharged. (M.R.C.P. 4B[e]). Person summoned as trustee who fails to appear and answer must be defaulted and adjudged trustee to extent that such person holds goods, effects or credits of principal defendant otherwise available to satisfy unsatisfied portion of final judgment. Additional remedies including assessment of costs or contempt available for trustee's failure to disclose. (T. 14, §2614).

Unmatured Claims.

Money or other thing due absolutely may be attached before it has become payable but trustee is not required to pay before time fixed by contract. (T. 14, §2628).

Setting Off Taxes.

Any municipal corporation summoned as trustee may set off taxes due it from the principal defendant. (T. 14, §2609).

Proceedings To Obtain.

No trustee summons may be served unless attachment on trustee process for specified amount has been approved by order of court. No order of approval unless notice to defendant, hearing and finding that is more likely than not that plaintiff will recover judgment, including interest and costs, in aggregate sum equal to or greater than amount of trustee process and any insurance, bond or other security, and any property or credits attached by writ of attachment or other trustee process available to satisfy judgment. Action may be commenced only by filing complaint with motion for approval of attachment on trustee process. Process must describe principal defendant with reasonable certainty and be received at time and manner affording trustee reasonable opportunity to act. (T. 14, §2603). Motion for ex parte order shall be accompanied by certificate of plaintiff's attorney of amount of insurance, bond, or other security, and other attachment or trustee process available to satisfy judgment. Motion and affidavits with notice of hearing thereon shall be served upon defendant at same time and in same manner that summons and complaint are served. Trustee process shall be served within 30 days after date of order approving such process. Defendant opposing motion for approval of attachment on trustee process shall file opposition within 21 days after filing of motion, unless another time is set by court. (M.R.C.P. 4B[c], M.R.C.P. 7[c]).

Order approving trustee process may be entered ex parte when court finds: (1) that it is more likely than not plaintiff will recover judgment in amount equal to or greater than aggregate sum of trustee process and any insurance, bond or other security, and property or credits attached by writ of attachment or other trustee process, available to satisfy judgment and, either (2) clear danger that if notified in advance defendant will withdraw goods and credits from state or will conceal or otherwise make them unavailable to satisfy judgment or (3) there is immediate danger that defendant will dissipate credit or damage goods. (M.R.C.P. 4B[i]). Motion for ex parte order shall be supported by affidavit and attorney's certificate as to insurance, bond, or other security and any other attachment or trustee process. (M.R.C.P. 4B[i]). Affidavit shall be on affiant's own knowledge, information and belief. (M.R.C.P. 4B[i]).

Approval of Limited Attachment on Trustee Process or Substituted Security.

Upon appropriate showing by party whose property to be attached by trustee process, court shall specify that attachment to issue solely against particular goods or credits. If, at hearing on motion, party whose property to be attached tenders cash or bond equal to amount of attachment to be approved, and deposits or files same with court, court may order any prior attachment dissolved and no further attachment shall issue absent showing that cash or bond has become inadequate or unavailable as security. When two or more defendants alleged to be jointly and severally liable, one or more of defendants may tender cash or bond to satisfy total amount plaintiff entitled to recover against all defendants. (M.R.C.P. 4B[d]).

Practice.

On two days notice to plaintiff, defendant whose goods or credits have been attached on trustee process pursuant to an ex parte order may appear, without submitting to personal jurisdiction, and move dissolution or modification of trustee process. Plaintiff has burden of justifying any finding in ex parte order that defendant has challenged by affidavit. (M.R.C.P. 4B[j]).

Bank Accounts.

Maximum of $100 of demand bank accounts of defendant held by any one trustee are exempt from ex parte trustee process. (M.R.C.P. 4B[i]).

Duration of Attachment on Trustee Process.

Attachment on trustee process continues during time within which appeal may be taken from judgment and during pendency of appeal. When judgment for plaintiff becomes final by expiration of time for appeal, by dismissal of appeal, or on certificate of decision from Superior Court or Law Court, attachment continues for 60 days. (T. 14, §§1601, 4601; M.R.C.P. 62[f]). But compare T. 14, §2956 which states that when person adjudged trustee, if goods, effects and credits in his hands not demanded by virtue of execution within 30 days after final judgment, attachment is dissolved and they are liable to another attachment.

8.10 HOMESTEADS:

Limitation of Value.

Except for person 60 years or older or person unable to engage in substantial gainful employment because of disability that has lasted or can be expected to last at least 12 months or result in death, not to exceed $47,500 in real or personal property that debtor or dependent of debtor uses as residence or in cooperative that owns property that debtor or dependent of debtor uses as residence, or in burial plot for debtor or dependent of debtor; except that if minor dependents of debtor have their principal place of residence with debtor, debtor's interest may not exceed $95,000, and except that if debtor's interest is held jointly with any other person debtor's interest may not exceed lesser of $47,500 or product of debtor's fractional share multiplied by $95,000. If debtor or dependent of debtor is 60 years old or older or physically or mentally disabled and unable to engage in substantial gainful employment debtor's interest may not exceed $95,000 or lesser of $95,000 and product of debtor's fractional interest multiplied by $190,000. (T. 14, §4422).

Limitation of Area.

No provision.

Debts or Liabilities Against Which Exemption Not Available.

Claims secured by real estate mortgages on or security interests in residence or claims of certain lien creditors who perform labor or furnish labor or materials. (T. 14, §4425).

Designation of Homestead.

No provision.

Claim of Exemption.

No provision.

Waiver of Exemption.

No statutory provision for form of release. Ordinary form of deed with joinder of spouse containing clause: “relinquishing and conveying all rights by descent and all other rights in the premises conveyed” releases homestead rights.

Loss of Exemption.

No provision.

Alienation or Encumbrance.

No provision.

Proceeds of Sale.

Proceeds from sale of exempt property exempt for six months from date of receipt for purpose of reinvesting in residence. (T. 14, §4422).

Rights of Surviving Spouse and Family.

Surviving spouse domiciled in Maine or minor and dependent children entitled to homestead allowance of $10,000. (T. 18-A, §2-401).

8.118.12

8.13 LIENS:

Enforcement.

Statutory liens enforced by attachment. Liens on houses, buildings, appurtenances, wharves, piers and lots may also be enforced in action in Superior or District Court where liened property is situated provided action is commenced within 120 days after last of labor or services are performed or labor, materials or services are so furnished (T. 10, §3255), absent 90-day extension where owner dies, is adjudicated bankrupt or warrant of insolvency issues against estate within 120 days and before commencement of action. (T. 10, §3256). Land rent is lien on buildings. (T. 10, §3452).

Liens on Vessels.

Labor and materialmen have lien upon materials until they become part of new vessel, and upon vessel for four days after it is launched, or for four days after completion of contract under which such labor or materials are furnished. Domestic vessels are subject to lien to any part owner or other person to secure payment for labor and materials necessary for their repair, provisions, stores and other supplies necessary for their employment, use of wharf, dry dock or marine railway, or for advances made for same. Last named lien continues two years and is enforced by proceedings in U.S., but not in state, courts. (T. 10, §§3851-3852).

Miscellaneous Liens.

Persons engaged in following occupations have lien for their services upon product of their labor or materials: (1) Digging, hauling, or furnishing lime rock; (2) cutting or dressing granite in any quarry; (3) mining, quarrying, or manufacturing slate in any quarry (T. 10, §3651); (4) furnishing labor or wood for manufacturing or burning bricks (T. 10, §3201); (5) cutting, peeling, yarding or hauling hemlock bark, cord wood or pulp wood or cooking for persons so engaged (T. 10, §3606); (6) cutting, hauling, rafting or driving logs or lumber, shoeing horses or oxen, or repairing property employed in such cutting, etc., or cooking for persons so engaged (T. 10, §3601); (7) cutting cord wood or any wood used in the manufacture of pulp (T. 10, §3606); (8) manufacturing, cutting wood for, and hauling last blocks, railroad ties or ship knees, spool timber, and cooking for persons so engaged (T. 10, §3607); (9) furnishing corn or other grain or fruit for canning or other preservation (T. 10, §3301); (10) laborer in any tannery on any hides and skins or in any capacity about establishment (T. 10, §3551); (11) owners of stallions have lien on colts foaled in State to secure payment of service fee for use of stallion in begetting same, continuing until colt is six months old (T. 10, §3351); (12) persons furnishing pasturage, food and shelter to animals (T. 10, §3352); (13) marina and boatyard storage facility owner on property stored at facility for rent, labor and other charges (T. 10, §1383); (14) there is lien for taxes on all real estate and upon personal property of nonresidents (T. 36, §§552, 602); (15) persons harvesting or pressing hay have lien for their labor (T. 10, §§3401-3402); (16) persons furnishing monumental work under contract have lien continuing two years, to be enforced by attachment (T. 10, §3701); (17) persons who perform labor or furnish materials, constructing, altering or repairing wharves or perform services as architects, surveyors or engineers (T. 10, §3251); (18) also on mortgages and mortgaged estates for costs of foreclosure; (19) on stray animals for damages done (T. 33, §1060); (20) on wagons, carts, sleighs and other vehicles, and aircraft and parachutes, for labor in manufacturing or repairing, which takes precedence of all other claims (T. 10, §3801); (21) on land on which services have been rendered by landscape gardeners (T. 10, §3501); (22) on watches, clocks, jewelry, cleaned, repaired or pressed clothes, electric motors, small motors 20 horsepower or less, radios, other electronic equipment, appliances, and musical instruments for labor and materials expended thereon (T. 10, §§3951-3953); (23) for providing hospital care (T. 10, §3411); (24) producer of potatoes upon processed forms thereof for his labor, care and expense of growing and harvesting (T. 10, §§3321-3331); (25) employee may have lien on employer's real estate or personal property for wages or medical benefits lost due to employer's failure to implement agreed health plan (T. 26, §629-B); (26) State, upon commercial real estate for costs incurred in abatement, cleanup or mitigation of hazardous substance (T. 38, §1371); (27) sanitary district for unpaid sewer and drainage service assessments (T. 38, §§1205, 1208); (28) water utility against landlord of multi-unit residential rental property on property for cost of water utility services (T. 35-A, §6111-A); (29) real estate licensees (T. 10, §3251); (30) upon shares and dividends of credit union member to extent of any loan made to and any dues or charges payable by that member and upon shares and dividends of nonmember if such credit union is designated community development credit union pursuant to (T. 9-B, §§817, 827); (31) operator of self-service storage facility on all personal property stored within leased space, for rent, labor or other changes (T. 10, §1374); (32) on contents of safe deposit box for use of any safe or box in vaults of any bank or safe deposit company (T. 10, §3751).

Mechanics' Liens.

Person who performs labor or furnishes labor or materials including repair parts of machines used, or performs services as surveyor, architect, real estate licensee, engineer, owner-lessor, or owner-supplier of equipment used in erecting, altering, moving or repairing house, building or appurtenances, public building, wharf or pier, or in selling any interest in land, improvements or structures, by virtue of contract with or by consent of owner, has lien thereon, and on land on which it stands, and on any interest such owner has in same, to secure payment thereof, with costs. If owner of building has no legal interest in land on which building is erected, lien attaches to building. (T. 10, §3251). To preserve such lien claimant must within 90 days from time he ceases to labor, furnish materials or perform services file with registry of deeds of county or registry district in which premises are located true statement under oath in form prescribed by statute of amount due, with all just credits given, together with description of property intended to be covered by lien sufficiently accurate to identify it and names of owners if known, and provide copy of statement to owner or owners by ordinary mail, except where labor, materials, or services are furnished by contract with owner of property affected (T. 10, §3253), and bring suit within 120 days after last of labor is performed or materials furnished. If claimant is real estate licensee, claimant must also notify by certified mail bona fide purchaser before she takes title to premises. (T. 10, §3255). If labor or materials were not furnished by contract with owner of property, claimant may not serve complaint and summons on owner until 30 days after date of filing and any deadline for filing return of service on owner is tolled for 30 days. Lien may be enforced only to extent of balance due person with whom owner directly contracted, but defense is available only with respect to sums paid by owner to person with whom he directly contracted where payment was made prior to commencement of action to enforce lien or written notice in statutory form to owner from person performing or furnishing labor, materials or services. Defense does not apply where labor, materials or services are performed or furnished for business, commercial or industrial purposes unless owner resides on premises affected. Any person who is bona fide purchaser for value of house, building or appurtenances, public building, or wharf or pier or building thereon, takes title free of mechanic's lien unless before purchaser takes title person performing or furnishing labor, materials or services has filed statement under oath (T. 10, §3253) or notice (T. 10, §3255) in office of registry of deeds of county or registry district in which premises are located (T. 10, §§3251-3265). Lien may be enforced by labor organization on behalf of its members; such action may not be dismissed or compromised without court approval. (T. 10, §§3266-3269).

Public Works.

The State Highway Commission has authority to require a bond for protection of persons who furnish labor and materials for construction of state and state-aid highways. (133 Me. 389, 179 A. 297).

Uniform Commercial Code adopted. (T. 11, §§1-101-10-108). See category 3 Business Regulation and Commerce, topic 3.09 Commercial Code.

Uniform Federal Lien Registration Act adopted. (T. 33, §§1901-1907).

Attorney's Lien.

No provision.

Collateral Security.

See topic 8.14 Pledges.

Execution Lien.

See topic 8.05 Executions.

Judgment Lien.

See category 5 Civil Actions and Procedure, topic 5.15 Judgments.

Liens of Exempt Property.

See topic 8.06 Exemptions.

Landlord's Lien.

See category 21 Property, topic 21.10 Landlord and Tenant.

Real Estate Mortgage Lien.

See category 20 Mortgages, topic 20.04 Mortgages of Real Property.

Liens on Homestead.

See topic 8.10 Homesteads.

Tax Lien.

See category 22 Taxation, topic 22.13 Property Taxes, subhead Lien.

8.14 [RESERVED]

8.15 PLEDGES:

Whoever has a lien on or a pledge of any personal property in his possession not covered by Uniform Commercial Code may enforce it by sale in manner provided in contract creating such lien or pledge or in manner provided by statute. (T. 10, §4001).

Remedies of Pledgee.

After trial and final adjudication, court may order sale of property with proceeds to amount owed paid to pledgee and balance, if any, to pledgor. (T. 10, §4008).

Uniform Commercial Code adopted. See category 3 Business Regulation and Commerce, topic 3.09 Commercial Code.

8.16 RECEIVERS:

Jurisdiction.

Superior Court holds general equitable power to appoint receiver. (T. 14, §6051). May also be appointed as matter of right under contract. (575 A.2d 731). Other specific statutory authority to appoint receiver includes: appointment of long-term care receiver (T. 22, §§7931-7938); appointment of receiver of facilities and providers of services funded in whole or in part by Department of Human Services (T. 34-B, §§13001-13008); and appointment of receiver to administer estate of missing and absent persons. See category 21 Property, topic 21.01 Absentees.

Proceeding.

Accompanied by motion in connection with civil action. Available pendente lite.

Statutory procedure repealed with enactment of corporate law. Equitable receivership available. Corporate law has procedure for judicial dissolution. (T. 13-C, §§1430-1434).

9 DISPUTE RESOLUTION

9.01 ALTERNATIVE DISPUTE RESOLUTION:

Mandatory (Alternative) Dispute Resolution.

Actions in Superior Court.

Parties to civil actions in Superior Court must participate in alternative dispute resolution within 120 days of pretrial schedule order. Exemptions for divorce and annulment, forcible entry and detainer, small claims, mortgage foreclosures and other secured transactions and review of governmental actions, personal injury claims under $30,000, and actions where parties have participated in statutory or voluntary prelitigation screening or dispute resolution process. (M.R.C.P. 16B).

Agricultural Cooperatives.

Agricultural marketing and bargaining matters remaining in dispute between handlers of agricultural commodities and qualified associations 30 days prior to contract date must be submitted by parties to required mediation. Any time prior to commencement of required mediation, handler and qualified association may mutually agree to obtain or may unilaterally obtain mediator's services. At end of mediation, mediator shall promptly prepare report, recommending either resumption of bargaining for period of time not to exceed two days or submission of all matters still in dispute to arbitration. (T. 13, §1958-B).

Public Works Construction.

Dispute between State and public works contractor that cannot be settled must be submitted to alternative dispute resolution (ADR) or binding arbitration. If unsatisfied with ADR, State or contractor may submit dispute to binding arbitration. Mandatory ADR does not apply to public improvements under Department of Transportation's supervision. (T. 5, §1749).

Motor Vehicle Disputes.

All motor vehicle manufacturers shall submit to arbitration if requested by consumer within three years from date of original delivery to consumer of motor vehicle or within terms of express warranties, whichever occurs first. (T. 10, §1169).

Voluntary Dispute Resolution.

Court Alternative Dispute Resolution Service provides alternative dispute resolution. (T. 4, §18-B).

Referee in Personal Actions.

All controversies which may be subject of personal action may be submitted to one or more referees by articles of agreement acknowledged before notary public, report of referee to be rendered to court agreed upon in articles of submission. Such submission may not be revoked except by mutual consent. Award may be by majority of referees. Court may accept, reject or recommit report. Either party may appeal such judgment. (T. 14, §§1151-1155).

Environmental Enforcement Actions.

If Department of Environmental Protection brings enforcement action in District Court, either party may request mediation any time before alleged violator appears to answer department's complaint. (T. 38, §347-A[4][E]).

Radiation Protection Act.

All parties to dispute under Act may agree to submit to arbitration or other ADR; governor of each party state shall appoint arbitrator. (T. 22, §679-A). Act incorporates Texas Low-Level Radioactive Waste Disposal Compact, Art. IV, §4.05(7).

State Employee Labor Relations.

Act provides for mediation procedures if either party to controversy requests such services prior to arbitration or on motion of Maine Labor Relations Board (MLRB). If parties unable to effect settlement through mediation, they may jointly agree to call upon MLRB for fact-finding services. If parties have not resolved controversy after fact-finding, either party may petition MLRB to initiate compulsory final and binding arbitration. (T. 26, §979-D).

Workers' Compensation.

Workers' Compensation Board recognizes as valid and binding any provisions in collective bargaining agreements calling for ADR, including mediation and binding arbitration. (T. 39-A, §110).

See topic 9.02 Arbitration and Award.

Alternative Dispute Resolution Jurisdictional Bodies/Commissions.

Maine Supreme Judicial Court issued following Rules for Referral of Cases to the Court Alternative Dispute Resolution Service (CADRES):

Mandatory Mediation Referrals.

Following cases are referred to CADRES for mediation unless court grants waiver: (1) all contested domestic relations matters except for protection from abuse cases, paternity cases filed by DHS, and child protective cases; (2) all small claims matters; (3) all requests for environmental enforcement mediation pursuant to T. 38, §347-A; (4) all request for land use mediation pursuant to T. 5, §3341.

Discretionary Mediation Referrals.

Court may refer any contested civil action for mediation by mediator agreed to by parties or, in absence of agreement, to CADRES.

9.02 ARBITRATION AND AWARD:

Judgment on Award.

Upon party's application, court shall confirm award, unless within time limits grounds are urged for vacating or modifying or correcting award. (T. 14, §5937). In order for court to confirm arbitration award, it must be sufficiently clear and definite so that it is susceptible to enforcement and those called to enforce it are not misled nor called upon to pay more than is due. (478 A.2d 683).

Enforcement.

Upon granting of order confirming, modifying or correcting award, judgment or decree shall be entered in conformity therewith and be enforced as any other judgment or decree. (T. 14, §5940).

Mandatory Arbitration.

Disputes between: (1) alcoholic beverage manufacturers and wholesalers over value of franchise upon cancellation, nonrenewal, amendment or transfer (T. 28-A, §1457[2]); (2) contractors and State of Maine on public works projects except DOT projects (T. 5, §1749).

Powers of Arbitrators.

If arbitration agreement fails to provide method of appointing arbitrators or if agreed method fails or cannot be followed, or when arbitrator appointed fails or is unable to act and his successor has not been duly appointed, court on application of party shall appoint one or more arbitrators. Arbitrator so appointed has all powers of one specifically named in agreement. (T. 14, §5929).

Rescission and Modification or Correction.

Upon application of party, court shall vacate award where: (1) Award was procured by corruption, fraud or other undue means; (2) there was evident partiality by arbitrator, corruption, or misconduct prejudicing rights of any party; (3) arbitrators exceeded their powers; (4) arbitrators refused to postpone hearing upon sufficient cause being shown, refused to hear evidence material to controversy, or otherwise conducted hearing to prejudice substantially rights of party; (5) there was no arbitration agreement and issue was not adversely determined in proceeding to compel or stay arbitration and party did not participate in arbitration hearing without raising objection; or (6) award was not made within time fixed by agreement or, if not so fixed, within such time as court has ordered, and party has not waived objection. Fact that relief was such that it could not or would not be granted by court of law or equity is not ground for vacating or refusing to confirm award. (T. 14, §5938). Upon application made within 90 days after delivery of copy of award to applicant, court shall modify or correct award where: (1) There was evident miscalculation of figures or evident mistake in description of any person, thing or property referred to in award; (2) arbitrators have awarded upon matter not submitted to them and award may be corrected without affecting merits of decision upon issues submitted; or (3) award is imperfect in matter of form, not effecting merits of controversy. (T. 14, §5939).

Uniform Arbitration Act Adoption/Deviation.

Adopted. (T. 14, §§5927-5949). Restricted to contracts entered after Oct. 6, 1967. Act does not apply to automobile liability insurance policy provision for arbitration of claim under uninsured motorist coverage.

10 DOCUMENTS AND RECORDS

10.01 ACKNOWLEDGMENTS:

Uniform Recognition of Acknowledgments Act adopted. (T. 4, §§1011-1019). In addition, certificate of acknowledgment taken in state other than Maine is presumed to be in form prescribed by laws of such state if it contains words “notary public”, name of notary public, and name of state in which acknowledgment was taken. (T. 4, §1014-A).

Acknowledgments may be taken by following officers (T. 33, §203):

Within state: Notary public, attorney admitted to practice in Maine.

Outside state but within U.S.: Clerk of court of record having seal, notary public, or commissioner appointed by Maine Governor for purpose or commissioner authorized in state where acknowledgment taken.

Outside U.S.

Minister, consul or vice-consul of U.S. or notary public in any foreign country.

Persons in U.S. Armed Forces may acknowledge before any officer of rank of Lieutenant or higher in Army, U.S. Marine Corps or Air Force or Ensign or higher in Navy or Coast Guard. (T. 33, §203).

General Requirements as to Taking.

Notary public may not perform notarial act for notary public's spouse, parent, sibling, child, spouse's parent or child's spouse with certain exceptions provided by statute. (T. 4, §954-A). Notary public may not take acknowledgment of instrument by or to bank or corporation of which notary is stockholder, director, officer or employee if notary is party to such instrument. (T. 4, §954, T. 33, §203).

General Requirements of Certificate.

Notaries public required to maintain and affix seal of office; not required to state date of expiration of commission. (T. 4, §951).

Married women acknowledge like other persons; no special requirements.

Attorneys-in-Fact.

No special requirements.

Corporations.

Unless notary is party to instrument to be notarized, notary who is stockholder, officer, employee or agent of corporation may acknowledge instrument. Such notary may administer oath to any other stockholder, officer, employee or agent of such corporation. (T. 4, §954, T. 33, §203).

Authentication.

No statutory provisions.

Acknowledgments may also be accomplished in manner provided by Uniform Recognition of Acknowledgments Act. (T. 33, §203; T. 4, §§1011-1019).

Effect of Acknowledgment.

Instruments to be recorded in registry of deeds must be acknowledged, except those issued by court, plans, notices of foreclosure, financing statements as provided in T. 11, §9-401 and notices of liens for internal revenue taxes and certificates discharging such liens. (T. 33, §203).

Proof by Subscribing Witness.

When grantor or lessor dies or leaves state without acknowledging her deed, its execution may be proved by subscribing witness before any court of record in state. (T. 33, §301).

Forms.

Short Forms of Acknowledgment set forth in Uniform Recognition of Acknowledgments Act are authorized by statute. (T. 4, §1016). Following form is also in common use:

Corporation acknowledgment:

State of . . . . . ., County of . . . . . ., ss.: (Date.)

Then personally appeared the above-named (name of officer who signed the document, with his title and name of corporation) and acknowledged the foregoing instrument to be his free act and deed in his said capacity and the free act and deed of said corporation.

Before me, ...

(Notary Public).

Validating Acts.

Records of deeds and other instruments made prior to Jan. 1, 1990, containing defective acknowledgments are validated under T. 33, §352. See also T. 33, §203.

Alternative to Acknowledgment or Proof.

Alternatives to acknowledgment under certain circumstances are provided under T. 33, §§301-306.

10.02 AFFIDAVITS:

Affidavits may be taken by a notary public or any other officer authorized to administer oaths, including officers of Armed Forces in special cases. (T. 4, §§1011, 1056). Attorneys at law duly admitted and eligible to practice in courts of State have all powers of notaries public. (T. 4, §1056).

Affidavits supporting motion for attachment must be on personal knowledge, information or belief, and affiant must state that he believes every statement made on information or belief to be true. (M.R.C.P. 4A[i]).

Form.

The certificate or caption of an affidavit may be in the following form:

Form

State of Maine,

County of . . . . . ., ss.

Be it known, that on this . . . . . . day of . . . . . ., before me, A. B., a notary public for the State of Maine, residing in the . . . . . . of . . . . . ., in said county, duly commissioned and sworn, and by law authorized to administer oaths and affirmations, personally appeared . . . . . ., of . . . . . ., to me well known, and known to be the person he represents himself to be, who being by me duly sworn, did make the following (or foregoing) affidavit by him subscribed.

In testimony whereof I have hereunto set my hand and affixed my seal of office the day and year first above written.

(Seal).

(Official Signature).

(If the officer has a seal he must affix it to the certificate).

Alternative to Affidavit.

No statutory provisions.

10.03 NOTARIES PUBLIC:

Qualification.

Maine resident 18 years of age. Oath must be taken before Dedimus Justice. All attorneys admitted to practice in Maine have powers of notaries public and are authorized to do all acts which may be done by notaries public. (T. 4, §1056).

Authentication.

See topic 10.01 Acknowledgments, subhead Authentication.

Seal.

Notary public may keep official seal bearing name exactly as it appears on notary's commission, words “Notary Public” and “Maine” (or abbreviation, “Me.”). (T. 4, §951).

Powers and Duties.

When authorized by the laws of Maine or of any other state or country to do any official act, notary may administer any oath necessary to completion or validity thereof. (T. 4, §951).

Notary may on behalf of any person interested, present any bill of exchange or other negotiable paper for acceptance or payment to any party liable therefor; notify indorsers or other parties thereto; record and certify all contracts usually recorded or certified by notaries; and in general, do all acts which may be done by notaries public according to the usages of merchants, and authorized by law; he shall note all mercantile and marine protests when requested and shall record all such protests by him noted and done in his official capacity. (T. 4, §§952, 953). Resident notaries public may solemnize marriages in Maine. (T. 19-A, §655).

Notary public shall not perform notarial act if any interest may affect impartiality except specified instances. (T. 4, §§954, 954-A).

Notary shall maintain records of all notarial acts performed. (T. 4, §955-B).

Territorial Extent of Powers.

Notaries may act officially anywhere in Maine.

Expiration of Commission.

Notary not required to give date commission expires.

Fees.

No fixed schedule of fees, except charge of $1.50 in course of lawsuit for notification of parties, making of certificate and recording proceedings. (T. 4, §958).

Officers of U.S. Armed Forces.

Have notarial powers provided in Uniform Recognition of Acknowledgments Act. (T. 4, §§1011 et seq.).

10.04 RECORDS:

Deeds of real estate, life estates, entailed estates, and leases for more than two years or for indefinite term, must be recorded in registry for county in which land lies to be valid against any person but lessor or grantor, heirs and devisees, and persons having actual notice thereof. Memorandum of lease may be recorded in lieu of lease. (T. 33, §201). No time for recording fixed. Uniform Commercial Code adopted, T. 11, §§1-101—10-108, see category 3 Business Regulation and Commerce, topic 3.09 Commercial Code. Recorded deed, lease or other written instrument relating to real estate takes precedence over unrecorded attachment and seizures on executions. (T. 14, §4454, T. 33, §201).

Recordable Instruments.

See introductory paragraph, supra.

Place of Recording.

See introductory paragraph supra, and subhead Filing Under Commercial Code, infra. *For list of Counties and County Seats, see first page for this State in Volume containing Practice Profiles section.* Oxford County and Aroostook County have two registry districts; territorial definition of Oxford County registry districts in T. 33, §702, Aroostook County districts in T. 33, §703.

Requisites for Recording.

Deeds and other written instruments, excepting plans, notices of foreclosure of mortgages, instruments issued by court of competent jurisdiction and duly attested by proper officer thereof and financing statements as provided in T. 11, §9-401, before being recorded must be acknowledged by persons executing same or one of them or by attorney executing same. (T. 33, §203). Instrument acknowledged in accordance with Uniform Recognition of Acknowledgments Act accepted. (T. 33, §203).

Recording Fees.

At registry of deeds, $13 first page; $2 each subsequent page. Additional fees may be charged if recording requires indexing of more than four names or references more than one previously recorded instrument. (T. 33, §751).

Recording Taxes.

See category 22 Taxation.

Foreign Conveyances and Encumbrances.

See category 21 Property, topic 21.16 Real Property, subhead Foreign Conveyances or Encumbrances.

Effect of Record.

Maine has race-notice system. Duly recorded conveyances of right, title and interest are effectual against prior unrecorded conveyances as if they purported to convey actual title. (T. 33, §201).

Torrens system has not been adopted.

Transfer of Decedent's Title.

Prior to Jan. 1, 1981, if deceased died testate, register of probate will record abstract of portions of will covering real estate in registry of deeds of all counties in which deceased owned real estate, provided will or petition for probate indicates location of real estate. If deceased died intestate, no documents filed in registry of deeds. Probate records must be examined. Executors and administrators not required to file any documents with register of deeds. Since Dec. 31, 1980, register of probate will file certificate and abstract in registry of deeds. (T. 18-A, §1-504). Personal representatives convey by deed of distribution or deed of sale, both statutorily prescribed. (T. 18-A, §3-715, T. 33, §§775[3-A]—[3-D]). Foregoing applies to real estate of nonresident decedent, but in such case ancillary administration is necessary and if decedent died testate copy of will must be recorded in this state. (See category 13 Estates and Trusts, topic 13.16 Wills.)

Filing Under Commercial Code.

Proper place to file to perfect security interest is as follows: (a) When collateral is timber to be cut or minerals or like, including oil and gas, or accounts resulting from sale of minerals or like, including oil and gas, at wellhead or minehead, or unharvested crops, or when financing statement is fixture filing and collateral is goods which are or are to become fixtures, then in appropriate registry of deeds; (b) when collateral is farm products, in Secretary of State's office pursuant to T. 5, §90-A; or (c) in all other cases, in Secretary of State's office. To perfect security interest in any collateral, including fixtures, of transmitting utility file in Secretary of State's office. (T. 11. §9-401).

Fee for filing with Secretary of State original financing statement (UCC-1) $20; continuation, partial release, assignment or amendment (UCC-3) $10; termination if UCC-1 filed prior to July 1, 1993 and UCC-1 acknowledgment copy used $10; if UCC-1 filed prior to July 1, 1993 and UCC-3 used $15; if UCC-1 filed on or after July 1, 1993 no fee. Fee for filing with registry of deeds $13 first page, $2 each additional page.

Vital Statistics.

Reports of births, deaths and marriages must be made to town or city clerk. (T. 22, §§2701-2846). Domestic partners may register with State of Maine Office of Health Data and Program Management. (T. 22, §2710). Copies of birth, death and marriage certificates may be obtained from town or city clerk or from State of Maine Office of Health Data and Program Management, Augusta, Maine 04333. Fee $10, each additional copy $5 if custodian satisfied that applicant has direct, legitimate interest. (T. 22, §§2701, 2706, T. 30-A, §2652). State of Maine Office of Health Data and Program Management also maintains voluntary acknowledgments of paternity. (T. 22, §2701). Adopted person may obtain birth certificate from State Register of Vital Statistics. (T. 22, §2768).

Penalties.

Knowing possession or use of false or altered certificate constitutes Class E crime. (T. 22, §2708). Refusal to provide information or register vital statistics constitutes Class E crime. (T. 22, §2708).

Establishing Birth Record.

Record relating to birth may be corrected by filing with town or city clerk affidavit of person required by law to furnish information for original record or of one or more credible persons having knowledge of case. (T. 22, §2705). Individual having no recorded birth certificate may establish birth record by submitting to town or city clerk record made at time of birth or testimony of individuals familiar with facts. (T. 22, §2764).

Lis Pendens.

No statutory provision or court rule.

10.05 SEALS:

Seals required as by common law. Recital that instrument is sealed by or bears seal of person signing, or is given under hand and seal of person signing, or is intended to take effect as sealed instrument is sufficient to give effect of sealed instrument, except on stock certificates or if otherwise required by law on public documents. (T. 1, §72). Statute of limitations for personal action on contracts or liabilities under seal is 20 years after cause of action accrues, except as governed by Commercial Code. (T. 14, §751).

Corporate Seals.

Seal of corporation may, but need not, be affixed to document and its absence will not impair its validity. (T. 13-A, §121).

Uniform Commercial Code adopted. See category 3 Business Regulation and Commerce, topic 3.09 Commercial Code.

11 EMPLOYMENT

11.01 [RESERVED]

11.02 LABOR RELATIONS:

Unlawful for employer to charge fee for application for employment. Penalty of not more than $500 per violation. (T. 26, §594). Every employer must pay all wages earned by each employee at regular intervals of not more than 16 days. Each payment must include all wages earned to within eight days of payment date. Employee who is absent from work at time fixed for payment must be paid on demand after that time. Wages must be paid on established day or date at regular intervals made known to employees. When interval is less than maximum allowed, interval may not be increased without written notice to employees at least 30 days in advance of increase. (T. 26, §621-A). Employer must keep record showing date and amount paid to each employee under §621-A. Every employer shall keep daily record of time worked by each employee, unless employee is paid salary that is fixed without regard for number of hours worked. (T. 26, §622). Employer must give advanced notice of pay rate decrease, unless decrease follows temporary increase or is made under collective bargaining agreement. (T. 26, §621-A). Employer cannot exempt itself from §621-A or 622 by contract, except with following exceptions. §§621-A and 622 do not apply to family members and salaried employees as defined in §663. They do not apply to employee of cooperative corporation or association if employee is stockholder, unless employee requests association or corporation to pay employee in accordance with §621-A. (T. 26, §623). Violation is punishable by fine of not less than $100 nor more than $500 per violation. Judgment for unpaid wages includes reasonable interest, liquidated damages in amount double recovered wages, and costs of suit, including reasonable attorney's fee. Remedies for unpaid wages do not become available to employee except as follows. If wages are clearly due without bona fide dispute, remedies are available to employee eight days after due date for payment. If there is bona fide dispute at time payment is due, remedies become available to employee eight days after demand when wages are, in fact, due and remain unpaid. (T. 26, §626-A). Unlawful for employer to allow any agreement that permits employee compensation (unless earned in agriculture or in private home) to be returned to employer for any reason other than payment of loan, debt or advance, payment of merchandise purchased from employer, employee-paid benefits, or rent or utility-related expense of company-owned building. (T. 26, §629). Employee leaving employment shall be paid in full within defined reasonable time after demand. Any loan or future earnings advance may be deducted if employee signs statement. (T. 26, §626). Employer, upon written demand, must state reasons for termination within 15 days or suffer $50-$500 penalty. Employee may bring action to enforce this law, and employer may also be required to reimburse employee for costs of suit and attorney fees, if employee is successful. (T. 26, §630). Employee has right to review personnel file and can collect costs of suit (including reasonable attorney's fee) for enforcing such right. Records in personnel file may be maintained in any form including paper, microfiche, or electronic form. Employer shall take adequate steps to ensure confidentiality of these records. Employer maintaining records in form other than paper shall have available to employee, former employee, or duly authorized representative equipment necessary to review and copy personnel file. (T. 26, §631). Employer recovery of overcompensation limited to 10% of subsequent net pay without employee's written permission except that overcompensation can be fully deducted from any wages due voluntarily terminated employee. (T. 26, §635).

Severance Pay.

Industrial or commercial employers of 100 or more, in certain circumstances, liable for severance pay on relocation or termination of business at rate of one week's pay for each year of employment. “Employer” defined to include parent corporation of corporate subsidiary. (T. 26, §625-B).

Former employees of certain terminated employers within state entitled to wages for maximum of two weeks for work performed out of Maine Wage Assurance Fund. (T. 26, §632). Employer bears no liability under this section for severance pay to employee if employee is covered by contract providing for severance pay that is equal to or greater than severance pay required by §625-B.

Wage rates for women must be the same as those paid to men for comparable work in same establishments. (T. 26, §628).

Minimum wage is set at $7.00 per hour (increased to $7.25 per hour starting Oct. 1, 2008 and increased to $7.50 per hour starting Oct. 1, 2009), unless federal minimum wage exceeds Maine's rate, in which case Maine's rate matches federal minimum wage, up to maximum of $1 above Maine statutory rate. Tip credits may not exceed 50% of minimum wage. Employers cannot require tip pooling. (T. 26, §664).

Mandatory Overtime.

Employers are prohibited from requiring employees to work more than 80 hours of overtime in any consecutive two-week period, with exception of work that is required due to emergency declared by Governor, that is essential to public or necessary to protect public health or safety, that is performed by individuals who are exempt from definition of employee found in §663, seasonal employees and medical interns, and employees engaged in shut-down for annual maintenance, construction, or repair of production machinery and equipment (limited to four consecutive weeks).

Overtime rate for all hours actually worked in excess of 40 hours is 1½ times regular hourly rate except in certain enumerated employments. (T. 26, §664).

Minors under 18 years of age, enrolled in school, cannot work more than 50 hours per week, ten hours per day or six consecutive days when school is not in session; when school is in session, minor cannot work more than 20 hours per week or four hours per day (with exception for authorized school closure or last school day of week). Minors under 16 years of age can work maximum of 40 hours per week, eight hours per day or six consecutive days when school is not in session; 18 hours per week, three hours per day or six consecutive days when school is in session. Hours of employment are limited. Restrictions not applicable to persons holding high school diploma, equivalency certificate or emancipated minor. Seasonal theatrical and film acting employment and some agricultural and fishing employment are excepted on approval by Superintendent of Schools. (T. 26, §774).

Employment of minors prohibited in certain hazardous occupations when under 18 years of age and in certain other occupations when under 16 and 14 years of age. Employment of minors under 16 and 15 years of age permissible in certain establishments such as amusement parks and establishments selling frozen dairy products. Minors prohibited from employment in places having nude entertainment. (T. 26, §§771-773).

Employer must post in accessible place printed notice of labor laws and must keep time record for every minor under 18 years of age in most occupations or suffer $50-$2,500 penalty. (T. 26, §§701-704).

Work permits required in some cases. (T. 26, §§775-785).

Violation of sections pertaining to restricted employment of minors and work permits punishable by fines of not less than $250 nor more than $50,000 per violation. (T. 26, §781).

Assignment of Wages.

See category 8 Debtor and Creditor, topic 8.01 Assignments.

Medical or eye examinations required of employee or applicant by employer must be paid for by employer. Violation punishable by fine of not more than $50 per violation. (T. 26, §592).

Drug Testing.

Substance abuse testing of applicants and employees by employers governed by T. 26, §§681-690. Applies to hiring of employees to work outside of State if contract governed by Maine law. (T. 26, §681).

Labor Disputes.

Blocking delivery of certain necessary supplies or equipment to any enterprise prohibited. Violation punishable by fine of up to $250 or imprisonment up to 30 days or both. (T. 17, §3606). Hiring professional strikebreakers illegal. Violation punishable by fine of not more than $300 per violation or imprisonment up to 180 days or both. (T. 26, §§851-856). Employment interviews and medical examinations of job applicants prohibited at employer work site during labor dispute. Violation punishable by fine of not more than $10,000 for each day violation continues. Possession of firearms at off-site interview locations, except by certain authorized security guards, is Class D crime. (T. 26, §595). During strike, employer must notify insured employees before canceling group health insurance policy. (T. 26, §634).

Employee rest breaks of 30 consecutive minutes must be given by employer of more than two people on duty simultaneously after six consecutive hours of work, except if otherwise agreed upon. (T. 26, §601). Violation is punishable by fine of $100-$500 per violation. (T. 26, §602).

Labor Unions.

Collective bargaining fully recognized; no “right to work” law. As to state employees, regulated by T. 26, §§979-979-S. As to municipal employees, regulated by T. 26, §§961-974.

Fair Employment Practice Act.

Unlawful for any employer, employment agency or labor organization to refuse to hire or to discriminate against any individual on account of race, color, sex, sexual orientation, physical or mental disability, religion, ancestry, age or national origin, because of previous assertion of claim or right under workers' compensation laws, or because of previous actions taken by individual under Whistleblower's Protection Act, with respect to compensation, hire, promotion, tenure, terms, conditions or privileges of employment or related matters, except where based on bona fide occupational qualifications. (T. 5, §§4571-4576). Definition of “disability” differs from federal law. Word “sex” includes pregnancy and medical conditions which result from pregnancy. (T. 5, §4572-A). Unlawful for any employer to require or permit, as condition of employment, any employee to retire at or before specified age or after completion of specified number of years of service. (T. 5, §§4574-4575).

Sexual Harassment Program.

Employers to implement sexual harassment program including training for employees in workplaces with 15 or more workers. (T. 26, §§806-807). All employers must post and distribute annually information on illegality of sexual harassment and on complaint process. (T. 26, §807).

Family Medical Leave.

Unless employed at permanent work site with fewer than 15 employees, any employee employed by same employer for 12 consecutive months is entitled to up to ten work weeks of family medical leave, paid or unpaid, in any two years. Thirty days notice required unless precluded by medical emergency. (T. 26, §§843-848). Employer must grant leave, with or without pay, for serious health condition of employee, birth of employee's child or employee's domestic partner's child, adoption of child by employee or employee's domestic partner, serious health condition of employee's child, parent, spouse, sibling, domestic partner or domestic partner's child, organ donation by employee, or death or serious health condition of employee's spouse, domestic partner, parent, sibling or child incurred while on active duty in military. (T. 26, §843). Leave may be taken intermittently for serious health condition or organ donation. (T. 26, §844).

Family Sick Leave.

Employers who provide paid leave must allow employees to use paid leave to care for ill immediate family member. (T. 26, §636). Employers may limit number of paid leave hours taken under §636, but must allow at least 40 hours per year. (T. 26, §636).

Family Military Leave.

Employers with 15 or more employees must allow employee up to 15 days of unpaid leave upon request if employee's spouse, domestic partner, or child is deployed for military service lasting more than 180 days. (T. 26, §814).

Work-Related Manslaughter.

Person is guilty of manslaughter if, while in direct and personal management or control of employment, place of employment or employee, such person intentionally or knowingly violates state or federal occupational safety or health standard, and violation causes death of employee, if death was reasonably foreseeable consequence of violation. (T. 17-A, §203).

Discrimination for tobacco use outside employment prohibited. (T. 26, §597).

Workers' Compensation Act.

(T. 39-A, §101 et seq.).

Administration of Act.

Workers' Compensation Board responsible for general supervision of administration of Act, management of Board employees and rule making. (T. 39-A, §151). Seven member board comprised of three management and three labor members and one executive director; appointed by governor, reviewed by joint standing committee of legislature, confirmed by legislature. (T. 39-A, §151). Executive director, responsible for day-to-day operations, serves at governor's pleasure. (T. 39-A, §151).

Trouble Shooter Program.

Trouble shooters attempt to prevent or resolve disputes through facilitating communication between and providing information for all parties who have impact on workers' compensation system. (T. 39-A, §153[2]).

Mediation.

Mandatory upon filing notice of controversy or other indication of controversy. (T. 39-A, §313).

Arbitration.

Available if parties mutually agree in writing. (T. 39-A, §314).

Independent Medical Examinations.

Board establishes list of approved medical examiners. (T. 39-A, §312). To be eligible, during previous year medical examiner may not have examined employee at request of insurance company, employer or employee. Board assigns medical examiner and findings are adopted unless clear and convincing contrary evidence in record. Medical examiner may not be employee′s health care provider and may not have treated employee for injury in question.

Hearings.

Hearing officers appointed by and serve at pleasure of Board. (T. 39-A, §152). Hearing officer's decisions reviewable by Board upon motion of hearing officer if issue of significance to workers' compensation system. (T. 39-A, §320). Any party may appeal hearing officer or Board decision to Law Court. Law Court has discretion to decline to hear appeal. (T. 39-A, §322).

Obligation of Employer.

Every employer must secure payment of compensation through insurance contract, self-insurance, or group self-insurance. (T. 39-A, §§401-407). Certain employers engaged in domestic services or agricultural industry excepted. (T. 39-A, §401[1]). Failure to secure coverage may subject employer to class D criminal charges, $10,000 civil penalty and suspension of authority to do business. (T. 39-A, §§401[3], 324[3]).

Effect on Employees of Employer's Compliance.

Employee of complying employer, except illegally employed minor, waives right to common law action against employer, and employer is exempt from, all actions involving personal injuries arising out of and in course of employment, or for death resulting from those injuries. (T. 39-A, §104, 408).

Notice of injury must be given to employer stating time, place, cause, and nature of injury, together with address of person injured, within 90 days of injury, or there can be no proceedings under act. (T. 39-A, §301). But want of notice does not bar proceedings under act, if employer or his agent had knowledge of injury. Any time during which employee is unable by reason of physical or mental incapacity to give said notice or fails to do so on account of mistake of fact, is not included in 90-day period. In case of death of employee within 90-day period, there is allowed for giving said notice three months after such death. (T. 39-A, §302).

Reports by Employers.

Employer who has received notice of, or has knowledge of, injury causing loss of time or requiring services of physician must, within seven days thereafter, report to Board such injury, average weekly wage of injured employee and such other particulars as Board requires, and must also report employee's resumption of employment and wages or earnings at time. (T. 39-A, §303).

Reports by Employees.

In addition to notice of injury requirements employees receiving compensation under Act who return to employment or engage in new employment after injury must make written report of such employment to Board and to previous employer within seven days of return to work, including name of employee, his employer and amount of weekly wage received or to be received. (T. 39-A, §308).

Scope of Coverage/Definition of Employee.

Employees eligible to elect coverage under compensation laws include person who regularly operates business, practices trade, profession, or occupation, whether individually, in partnership, or as member of limited liability company, regardless of authority to hire others. Election of coverage requires payment of compensation and other benefits under worker's compensation insurance policy. Except for persons engaged in harvesting forest products, employees who are also parent, spouse, domestic partner, or child of either sole proprietor, partner employed by partnership, or member of limited liability company, may waive benefits under worker's compensation laws. Waiver must be in writing and must not be condition of employment. (T. 39-A, §102).

Statute of Limitations.

Employee's claim for compensation is barred unless agreement or petition is filed within two years of injury or if employee is paid by employer or insurer without employer or insurer filing notice of controversy, within two years of such payment. Time during which employee is physically or mentally incapacitated to make such claims is not included in said period. In case of death of employee, there must be allowed for filing said petition one year after such death. No petition of any kind may be filed more than six years following date of latest payment under Act. (T. 39-A, §306).

Status of Claims.

Employee may not waive rights to compensation under Act. Claims for compensation are not assignable or subject to attachment or liable in any way for debts of the claimant except certain support or general assistance obligations. (T. 39-A, §106). Such claims have preference over unsecured debts of the employer. (T. 39-A, §108).

Total or Partial Incapacity.

While incapacity for work is partial, employer must pay employee 80% of difference between before injury and after injury after-tax weekly wage. (T. 39-A, §213). While incapacity for work is total, employer must pay employee 80% of after-tax weekly wage. (T. 39-A, §212). For either partial or total incapacity, maximum benefit is greater of $441 or 90% of state average weekly wage. (T. 39-A, §211). Compensation paid for duration of disability if injury is in excess of 15% to body. In all other cases, maximum duration of benefits 260 weeks. (T. 39-A, §213). Benefits may be terminated if employee refuses bona fide job offer. (T. 39-A, §214). 15% threshold and 260 week limit may be adjusted annually. (T. 39-A, §213).

Permanent Impairment.

Does not include conditions not directly caused, aggravated, or accelerated by work injury. (T. 39-A, §213).

Death.

If death results from injury, employer must pay dependents who were wholly dependent on employee's wages for support, 80% of employee′s after-tax weekly wage for 500 weeks. Maximum weekly benefit is greater of $441 or 90% of State average weekly wage. If dependent spouse dies or becomes dependent of another, benefits cease upon payment to spouse of balance of benefits up to $500. Remaining weeks of payment are payable to other dependents of employee. If dependent was only partially dependent on employee's wages for support, payment will be reduced proportionately. If, at expiration of 500 week period, any dependent person is less than 18 years old, benefits must continue until that person reaches age of 18. If dependent child reaches age 18 and is either physically or mentally incapacitated, benefits continue until child dies or is no longer incapacitated from earning living. (T. 39-A, §215).

Medical, Surgical and Other Aids.

Reasonable and proper medical, surgical and hospital services, nursing, medicines and mechanical, surgical aids, as needed, must be paid for by employer. Board to establish reimbursement schedules, except that MaineCare must be reimbursed 100%. (T. 39-A, §§206 and 209).

Benefit Payment.

First payment due within 14 days of when employer has notice of injury or death. Subsequent payments due weekly. If no ongoing dispute and payment 30 days late, $50 per day added to amount owed to employee. Memorandum of payment must be sent to Board upon making first payment. Payments may be reduced or discontinued if employee returns to work or receives pay increase. If employee has not returned to work, and no order or award of compensation or compensation scheme has been entered, payments may be reduced or discontinued by providing employee with 21 days written notice. If payment scheme already entered, benefits may only be reduced or discontinued upon Board order; payments must continue during appeal process until all appellate proceedings completed and order entered by Board. (T. 39-A, §205).

Settlement of Claims.

By permission of Board, lump sum settlement may be approved six months after date of injury. Such settlement releases employer and insurance carrier from all further claims. (T. 39-A, §352).

Injuries Outside of State.

Remedies under Act are exclusive as regards injuries occurring outside of State to worker hired within State unless contract specifically provides otherwise. (T. 39-A, §102[11][A][2]).

Occupational Diseases.

Certain occupational diseases come within provisions of Act. (T. 39-A, §§328-A, 601-

615). Special provisions apply to asbestosis. (T. 39-A, §614). Information regarding identity and risks of chemicals in work place must be provided to employees. (T. 26, §§1709-1725).

Workers' Compensation Rating System.

See category 16 Insurance, topic 16.01 Insurance Companies, subhead Workers' Compensation Rating System.

Unemployment Compensation.

Available to employees of certain employers as defined in T. 26, §1043.

If eligible, employee may receive compensation for total unemployment ranging from minimum of $12 per week to maximum of 52% of employee's annual average weekly pay, plus $10 weekly supplement for each unemancipated dependent child up to 50% of employee's individual weekly benefit. (T. 26, §1191). Partial unemployment benefits also available for amount of weekly benefit minus weekly earnings in excess of $25. (T. 26, §1191). Conditions of eligibility prescribed by statute, generally requiring filing claim, registering for work, being able, and available for full-time work or part-time work (in some cases), serving waiting period of one week of total or partial unemployment, and having earned wages. (T. 26, §1192). Disqualification for benefits results if employee voluntarily left work without good cause attributable to that employment, refuses to accept work, falsifies his application, is absent from work due to incarceration for conviction of criminal offense, or was discharged for misconduct or crime, or if unemployment due to work stoppage because of certain labor disputes or is receiving certain pension pay, wages, terminal pay, vacation pay or holiday pay. Employee not disqualified if decision to leave voluntarily caused by illness, spousal transfer, acceptance of another job which fails to materialize or domestic abuse if employee makes reasonable efforts to preserve employment. (T. 26, §1193).

Retraining of Dislocated Workers.

Provision providing financial support for certain dislocated workers repealed but grandfathered for those enrolled in training programs prior to Mar. 31, 1995. (T. 26, §§1043, 1196).

Occupational Safety and Health Act.

All state, county, municipal, school district and other political corporation employers are subject to rules and regulations for working conditions formulated by Board of Occupational Safety and Health. Violations punishable by fine. (T. 26, §§561-571). All agricultural workers in state entitled to be reasonably free of hazards to their safety and health. (T. 26, §§580-581).

Employment Leave for Victims of Violence.

Employers, both public and private, must grant reasonable and necessary leave for work with or without pay for employees to prepare for and attend court proceedings, receive medical treatment, or obtain services to remedy crisis caused by domestic violence, sexual assault, or stalking. Employer need not grant leave if employer would sustain undue hardship from victim's absence or if request for leave is not communicated to employer within reasonable time under circumstances or if request for leave is impractical, unreasonable, or unnecessary based on facts then made known to employer. Department of Labor may assess civil penalties of up to $200 for each violation of this section, if notice of violation was given to employer and department within six months of occurrence. (T. 26, §850).

12 ENVIRONMENT

12.01 ENVIRONMENTAL REGULATION:

Legislation.

Governed by T. 38, §§341-A-2313; T. 7, §§601-625; T. 12, §§681-689, 900-908, 4807-4807-G; T. 30-A, §§4301-4360, 4401-4407, 4451-4453, 4454-4457, 4461-4469; T. 37-B, §§791-806.

General Supervision.

Department of Environmental Protection (DEP), comprised of Commissioner of Environmental Protection and ten-member Board of Environmental Protection (BEP), is vested with general supervisory powers over air, water, solid and hazardous waste, land development site selection and control, and mining and rehabilitation of land. (T. 38, §§341-A, 361-A, 541, 581, 1301, 1317, 1361, 1401, 1601, 1651, 1841, 2301). State House Station 17, Augusta, ME 04333.

Prohibited Acts of Pollution.

No person or entity may discharge pollutants, including oil and hazardous matter, into any stream, river, pond, lake, ground, surface or tidal waters or into ambient air nor install or operate surface or subsurface waste water disposal system without first obtaining license. (T. 38, §§413, 543, 568, 590, 1317-A). Transportation, possession, cultivation, distribution, or sale of invasive aquatic plants is prohibited. (T. 38, §419-C). Discharges of certain dioxins and furans in detectable quantities prohibited. (T. 38, §420). Sale or distribution of arsenic-treated wood products for most residential uses barred. (T. 38, §§1681-1683). Discharges of oil and petroleum products prohibited, although DEP may license discharges of waste contaminated with oil under certain circumstances, if treated. (T. 38, §543). No person may discharge air contaminants that contribute to violation of established air quality standards. (T. 38, §591). Air and water discharges of mercury in excess of state standards prohibited. (T. 38, §§420, 585-B). Facilities discharging mercury into waters must have pollution prevention plan. (T. 38, §§413, 420). Maine is signatory to New England Interstate Water Pollution Control Compact, and member of Interstate Commission. (T. 38, §491-A). With certain exceptions, taking, possessing, selling, transporting, harassing, and baiting of endangered and threatened species prohibited. (T. 12, §7756).

Enforcement.

DEP and Attorney General may enforce violations of laws and regulations administered by DEP. (T. 38, §§347-A, 348). Enforcement actions may be resolved by administrative consent with approval of Attorney General and BEP, civil or criminal prosecution by Attorney General, administrative enforcement or civil prosecution by DEP with Attorney General's approval. (T. 38, §347-A). Municipalities may enforce state sludge spreading and storage permits under some circumstances. (T. 30-A, §4452, T. 38, §1305).

Penalties.

Civil penalties for violations of Maine environmental laws other than hazardous waste violations range from $100 to $10,000 per violation per day. Hazardous waste civil penalties are capped at $25,000 per violation per day. If economic benefit resulting from violation exceeds these penalties, penalty may be increased to amount up to twice economic benefit per day of violation. Supplemental environmental projects may be performed in lieu of other civil fines under some circumstances. Criminal penalties range from $2,500 to $25,000 per violation per day and may include up to one year in jail. (T. 38, §349). Criminal penalties for some hazardous waste violations can include fines of $50,000 per day. (T. 38, §1319-T).

Permits.

Required for: discharges of waste to waters of State (T. 38, §§413, 414, 414-A, 423, 432-D); installation of plumbing or subsurface waste water disposal system (T. 30-A, §4215); air emissions (T. 38, §590); certain activities in or adjacent to sand dunes, coastal wetlands, fragile mountain areas, freshwater wetlands, great ponds, rivers, streams, brooks, significant wildlife habitats (T. 38, §480-C); construction of projects of state or regional significance that may substantially affect environment (T. 38, §483-A); medium borrow pits (T. 38, §490-C [notice of intent]); certain rock quarries (T. 38, §490-Y [notice of intent]); certain activities in shoreland zone (T. 38, §438-A); construction of projects that include one acre or more of disturbed area (T. 38, §420-D); log storage or transport of logs or pulpwood from islands to mainland (T. 38, §418); lead-based paint activities including assessments and deleading (T. 38, §§1291-1297); solid waste facility construction, alteration and operation (T. 38, §1306); handling hazardous waste or operating hazardous waste facility site (T. 38, §1319-R); operation, installation or replacement of oil storage and terminal facilities (T. 38, §§545, 563); acquisition of controlling stock or substantial assets of business engaged in solid waste hauling (T. 38, §2111 [notice of intent]); sale, lease, or development of land or dwelling in subdivision (T. 30-A, §4406); forestry harvesting operations (T. 12, §8883-B [notice of intent]); asbestos or lead abatement activities (T. 38, §§1273, 1292); mooring in Maine waters of oil tankers not waiting for scheduled loading or unloading of cargo (T. 38, §560).

Hazardous Substance Sites.

Forfeiture of Property.

All real estate used or intended to be used, and all money, negotiable instruments and securities intended to be used in violation of hazardous substance provisions subject to forfeiture to State. (T. 38, §1370).

Lien on Real Estate.

All costs incurred by State for abatement, cleanup or mitigation of hazards due to uncontrolled substance site, including interest and penalties, shall be lien against real estate of responsible party. Lien on real estate encompassing site shall have priority over all encumbrances filed after July 7, 1987. Lien on other real estate shall have priority over all encumbrances filed after creation of lien under this section. (T. 38, §1371).

State Acquisition of Property.

State may acquire property necessary to conduct remedial actions in response to threat at uncontrolled substance site. (T. 38, §1364).

Petroleum.

Installation of underground and aboveground oil storage facilitiesprohibited near drinking water supply. (T. 38, §§1391-1399). Note: Sale, distribution, or blending of gasoline containing MTBE prohibited, with exceptions for emergencies. (T. 38, §585-I).

Water Classification Program.

All Maine waters classified in accordance with standards established by legislature. Quality classification of body of water determines allowable levels of pollutant discharges, and extent to which other activities tending to degrade of water quality may be undertaken. (T. 38, §§464-470).

Greenhouse Gas Action Plan requires DEP to create climate action plan to reduce greenhouse gas emissions to meet statewide goals. (T. 38, §§574-578). Maine is part of Regional Greenhouse Gas Initiative. (T. 38, §§579-580-C).

13 ESTATES AND TRUSTS

13.01 ADMINISTRATION:

See topic 13.08 Executors and Administrators.

13.0213.04

13.05 DEATH:

Presumption of Death.

Person is presumed dead when absent and unheard of for five years. Death is presumed to have occurred at end of five year period. (T. 18-A, §1-107[3]). See also category 21 Property, topic 21.01 Absentees.

Survivorship.

Uniform Simultaneous Death Act adopted. Differs from Uniform Act in that 2d section is limited to testamentary dispositions and does not apply to all dispositions as does 2d section of Uniform Act. (T. 18-A, §§2-805).

Actions for Death.

If injuries cause immediate death, or death without conscious suffering, an action may be maintained within two years by and in name of personal representative of deceased person for benefit of widow or widower and children, or if neither, of heirs. Damages awarded may include all pecuniary injuries resulting from such death to persons for whose benefit action is brought, reasonable expenses of medical, surgical and hospital care and treatment, reasonable funeral expenses and, in addition, amount not exceeding $500,000 for loss of consortium, including damages for emotional distress. In addition, jury may award punitive damages not exceeding $75,000, provided action is commenced within two years after decedent's death. (T. 18-A, §2-804[b]). Where death follows period of conscious suffering as result of personal injury, tortfeasor is liable for both: (1) Damages for death, recoverable for benefit of widow or widower and children plus reasonable expenses, and also (2) damages recoverable at common law (which cause of action survives—see category 5 Civil Actions and Procedure, topic 5.02 Actions). But there can be only one recovery for same injury. (T. 18-A, §2-804[c]). No settlement on behalf of minor children is valid unless approved by court.

Death Certificate.

See category 10 Documents and Records, topic 10.04 Records, subhead Vital Statistics.

Uniform Anatomical Gift Act.

Revised Uniform Anatomical Gift Act adopted. (T. 22, §§2941-2965). See also topic 13.16 Wills.

Uniform Determination of Death Act.

Adopted 1983. (T. 22, §§2811-2813).

Living Wills.

See topic 13.16 Wills.

13.06 [RESERVED]

13.07 DESCENT AND DISTRIBUTION:

Uniform Probate Code, including 1975 Official Amendments, adopted. (T. 18-A, §§1-101-9-904). 1977 and 1979 Official Amendments not adopted. UPC Article VII incorporated into Maine Uniform Trust Code, effective July 1, 2005. (T. 18-B, §§201-04, 1010).

See also topic 13.08 Executors and Administrators.

Part of intestate estate not passing to surviving spouse, or surviving registered domestic partner under §2-102, or entire estate if there is no surviving spouse, passes as follows: (1) To issue of decedent, to be distributed per capita at each generation; (2) if no surviving issue, to decedent's parent or parents equally; (3) if no surviving issue or parent, to issue of parents or either of them to be distributed per capita at each generation; (4) if no surviving issue, parent or issue of parent, but decedent is survived by one or more grandparents or issue of grandparents, half of estate passes to paternal grandparents if both survive, or surviving paternal grandparent, or to issue of paternal grandparents if both are deceased to be distributed per capita at each generation; other half passes to maternal relatives in same manner; but if there be no surviving grandparent or issue of grandparents on either paternal or maternal side, entire estate passes to relatives on other side in same manner as half; (5) if no surviving issue, parent or issue of parent, grandparent or issue of grandparent, but decedent is survived by one or more great-grandparents or issue of great-grandparents, half of estate passes to paternal great-grandparents who survive, or to issue of paternal great-grandparents if all are deceased, to be distributed per capita at each generation; other half passes to maternal relatives in same manner; but if no surviving great-grandparent or issue of great-grandparent on either paternal or maternal side, entire estate passes to relatives on other side in same manner as half. (T. 18-A, §2-103).

Community Property Options in Official Text have not been adopted.

Variations from Official Text.

§2-801(b) substitute “nine months” for “six months”, §2-803 optional provision adopted. §3-108 amended to provide that for decedents dying on or after Jan. 1, 1981, no informal probate or appointment proceeding, other than proceeding to probate will previously probated at testator's domicile and appointment proceedings relating to estate in which there has been prior appointment, may be commenced more than 3 years after decedent's death, with certain exceptions. For decedents dying before Jan. 1, 1981, period is no more than 20 years after decedent's death, with certain exceptions. Limitations do not apply to construction of probated wills or determination of heirs of intestate. Optional provision of 1979 Official Amendments (provision [b]) not adopted. (T. 18-A, 3-108). §3-914 unclaimed assets disposed of according to Unclaimed Property Act. (T. 33, §§1801-1820, 1851-1875).

Surviving spouse or registered domestic partner takes as follows: (1) If no surviving issue or parent of decedent, entire intestate estate; (2) if no surviving issue but decedent is survived by parent or parents, first $50,000, plus ½ of balance of intestate estate; (3) if there are surviving issue all of whom are issue of surviving spouse or registered domestic partner also, first $50,000, plus ½ of balance of intestate estate; (4) if there are surviving issue one or more of whom are not issue of surviving spouse or registered domestic partner, ½ of intestate estate. (T. 18-A, §2-102). “Registered domestic partner” defined as one of two unmarried adults registered in accordance with T. 22, §2710, domiciled together under long-term arrangements evidencing indefinite duration of commitment for each other's welfare.

Half blood inherits as whole blood. (T. 18-A §2-107).

Posthumous Children or Other Issue.

Relatives of decedent conceived before his death but born thereafter inherit as if they had been born in decedent's lifetime. (T. 18-A, §2-108).

Illegitimates.

Person born out of wedlock is child of mother; that person is also child of father if: (i) Natural parents participated in marriage ceremony before or after birth of child, even though attempted marriage is void; or (ii) father adopts child into his family; or (iii) father acknowledges in writing before notary public that he is father of child, or paternity is established by adjudication before death of father or is established thereafter by clear and convincing proof, but paternity so established is ineffective to qualify father or his kindred to inherit from or through child unless father has openly treated child as his and has not refused to support child. (T. 18-A, §2-109). Persons born out of wedlock are included in class gift terminology in wills and trusts as child of father if person is openly and notoriously so treated by father or is so recognized by testator or settlor. (T. 18-A, §2-611).

Adopted Children.

See category 14 Family, topic 14.01 Adoption.

Determination of Heirship.

No provision.

Advancements.

If person dies intestate as to all his estate, property which he gave in lifetime to heir treated as advancement against latter's share of estate only if declared in contemporaneous writing by decedent or acknowledged in writing by heir to be advancement. For this purpose property advanced is valued as of time heir came into possession or enjoyment of property or as of time of death of decedent, whichever first occurs. If contemporaneous writing by decedent established value of property advanced, that value shall apply. If recipient of property fails to survive decedent, property is not taken into account in computing intestate share received by recipient's issue, unless declaration or acknowledgment provides otherwise. (T. 18-A, §2-110).

Renunciation.

Uniform Disclaimer of Transfers by Will, Intestacy or Appointment Act adopted, as part of Uniform Probate Code. (T. 18-A, §2-801).

Election.

Surviving spouse of person who dies domiciled in Maine has right of election to take 1/3 of “augmented estate”. (T. 18-A, §§2-201-2-207).

Escheat.

If decedent left neither surviving spouse nor kindred, real and personal property escheats to state. (T. 18-A, §2-105).

Uniform Transfer on Death Security Registration Act 1997, c. 627, §1, effective June 30, 1998. (T. 18-A, §§6-301—6-312).

13.07A ESTATES: (in property)

See category 21 Property, topic 21.16 Real Property.

13.0813.09

13.10 EXECUTORS AND ADMINISTRATORS:

Uniform Probate Code, including 1975 Official Amendments, adopted. (T. 18-A, §§1-

101-9-904). 1977 and 1979 Official Amendments not adopted.

Uniform Fiduciaries Act not adopted.

Uniform Principal and Income Act of 1997 adopted. (T. 18-A, §§7-701-7-773).

Uniform Simplification of Fiduciary Security Transfers Act repealed.

Revised Uniform Anatomical Gift Act adopted. (T. 22, §§2941-2965).

13.1113.14

13.15 TRUSTS:

There can be no trust concerning lands, except trusts arising or resulting by implication of law, unless created or declared by some writing signed by party or his attorney. (T. 33, §851). Title of a purchaser for a valuable consideration or a title derived from levy of an execution cannot be defeated by trust unless purchaser had notice thereof. Record of instrument creating trust in registry where land lies is regarded as such notice. (T. 33, §852). Where real estate is conveyed in mortgage or in trust to two or more persons with power to appoint a successor to one deceased, it is held in joint tenancy unless otherwise expressed. See also category 21 Property, topic 21.12 Perpetuities.

Uniform Probate Code, including 1975 Official Amendments, adopted. (T. 18-A, §§1-101-9-904). 1977 and 1979 Official Amendments not adopted.

Variations from Official Text.

§7-101 registration of trusts permissive not mandatory. UPC §7-104 omitted; new §7-104 providing for jurisdiction over unregistered trusts. §7-407 prohibitions and requirements applicable to trusts which are private foundations.

Common trust funds provided for. (T. 18-A, §§7-501-7-503).

Transfers to Minors.

Uniform Transfers to Minors Act adopted. (T. 33, §§1651-1674).

Uniform Simplification of Fiduciary Security Transfers Act repealed.

Uniform Disclaimer of Transfers by Will, Intestary or Appointment Act adopted, as part of Uniform Probate Code. (T. 18-A, §2-801).

Uniform Disclaimer of Transfers under Nontestamentary Instruments Act adopted, as part of Uniform Probate Code. (T. 18-A, §2-801).

Uniform Prudent Investor Act adopted. (T. 18-A, §§7-301—7-302). UPIA incorporated into Maine Uniform Trust Code, effective July 1, 2005. (T. 18-B, §§901-908).

Uniform Principal and Income Act of 1997 adopted. (T. 18-A, §§7-701-7-773).

Uniform Fiduciaries Act not adopted.

Uniform Trustees Powers Act adopted. (T. 18-A, §§7-401-7-406). UTPA incorporated into Maine Uniform Trust Code, effective July 1, 2005. (T. 18-B, §§815, 816, 1012).

Uniform Trust Code adopted, effective July 1, 2005. (T. 18-B).

Perpetuities.

See category 21 Property, topic 21.12 Perpetuities.

13.16 WILLS:

Uniform Probate Code, including 1975 Official Amendments, adopted. (T. 18-A, §§1-101-8-401). 1977 and 1979 Official Amendments not adopted.

Community Property Options in Official Text have not been adopted.

Variations from Official Text.

§2-801(b) substitute “nine months” for “six months”, §2-803 optional provision adopted. §3-108 amended to provide that for decedents dying on or after Jan. 1, 1981, no informal probate or appointment proceeding, other than proceeding to probate will previously probated at testator's domicile and appointment proceedings relating to estate in which there has been prior appointment, may be commenced more than three years after decedent's death, with certain exceptions. For decedents dying before Jan. 1, 1981, period is no more than 20 years after decedent's death, with certain exceptions. Limitations do not apply to construction of probated wills or determination of heir of intestate. Optional provision of 1979 Official Amendments (provision [b]) not adopted, (T. 18-A, 3-108). §3-914 unclaimed assets disposed of according to Unclaimed Property Act. (T. 33, §§1801-1820, 1851-1875).

Uniform Disclaimer of Transfers by Will, Intestacy or Appointment Act adopted. (T. 18-A, §2-801).

Uniform Health-Care Decision Act adopted 1995. Competent person at least 18 years old or emancipated minor may execute, in presence of two witnesses, advance health care directive regarding all facets of his or her health care including provision, withholding or withdrawal of life-sustaining treatment and artificially administered nutrition and hydration. Such person, by executing power of attorney for health care in presence of two witnesses, may also designate agent to make any decision principal could have made regarding principal's health care. Statutory form may be used to create directive. Form addresses, in addition to health care issues, principal's intention to donate bodily organs and tissues after death and permits principal to designate physician having primary responsibility for principal's health care. (T. 18-A, 5-801-5-817).

Uniform Rights of the Terminally Ill Act, T. 18-A, §§5-701-5-714, repealed 1995.

Execution.

Except as provided for holographic wills, every will must be signed by testator, or in testator's name by some other person in testator's presence and by his direction, and signed by at least two people who either witnessed signing or testator's acknowledgment of signature of will. (T. 18-A, §2-502).

Holographic Wills.

Maine recognizes holographic will, whether or not witnessed, if signature and material provisions are in handwriting of testator. (T. 18-A, §2-503).

Self-proved Will.

§2-504 of Probate Code sets out attestation clause to be used to make will self-proving.

(T. 18-A, §2-504).

Living Wills.

See subhead Uniform Health-Care Decision Act, supra.

14 FAMILY

14.01 ADOPTION:

(T. 18-A, §§9-101-9-404).

Any person may be adopted, regardless of age. (T. 18-A, §9-301).

Consent Required.

Written consent by: Adoptee if 14 years or older; legal custodian or guardian, except that Judge of Probate may overrule unreasonable lack of consent; each living parent; and if no living parent, guardian or legal custodian. (T. 18-A, §9-302). Consent, not required from putative father or legal father who is not biological father, who received notice and failed to respond, or waived his right to notice; parents whose parental rights have been terminated; parents who have executed surrender and release; or parents of adoptee aged 18 years or older. Petition for adoption must be pending before consent is executed. (T. 18-A, §9-302).

Conditions Precedent.

Court may require that child live for one year in home of proposed adopter under supervision of Dept. of Human Services or licensed adoption agency before adoption is granted. (T. 18-A, §9-304).

Jurisdiction.

Judges of probate court have jurisdiction of adoption proceedings.

Venue.

If adoptee is placed by licensed child-placing agency or Department, petition must be filed in county in which petitioner resides; adoptee resides or was born; or in which placing agency is located. For non-agency/nondepartmental adoptions, county in which adoptee resides; or county in which petitioner resides. (T. 18-A, §9-104).

Petition.

Forms are supplied by probate court of county having jurisdiction.

Proceedings.

Upon filing of petition for adoption of minor, court shall direct State Dept. of Human Services or licensed child-placing agency to conduct study of whether child is proper subject for adoption and whether proposed home is suitable and report to court regarding same within 60 days. (T. 18-A, §9-304). Court may waive requirement of study and report if (1) court has report with sufficient current information or (2) petitioner is blood relative of child to be adopted. Court shall request background check for prospective adoptive parent who is not biological parent of child. Dept. of Human Services may perform similar background check any time before petition for adoption is filed. Court has discretion to waive background check if there was previous one performed by court or Dept. of Human Services within reasonable time. Each such prospective adoptive parent shall be fingerprinted. (T. 18-A, §9-304). Certified copy of birth certificate must accompany petition. (T. 18-A, §9-304). Adoption papers on or after Aug. 8, 1953 are confidential, subject to release by Probate Judge. (T. 18-A, §9-310). State Registrar maintains voluntary contact file for adoptees and natural parents. (T. 22, §2706-A). Adoption Assistance Compact protects interests of some children whose adoptive parents move out of state or who are adopted by residents of another state. (T. 22, §4171).

Decree.

If judge determines that adoption is in adoptee's best interests, court enters decree that includes adoptee's new name. Decree must order that from that date adoptee is petitioner's child, and must be accorded status set forth in §9-105. If court determines that it is in adoptee's best interests, court may require that adoptee and petitioner's names remain confidential. (T. 18-A, §9-308).

Grandparent Notification.

Department of Human Services must notify child's grandparents when child is placed for adoption if Department has received notice that grandparents were granted visitation or access rights. (T. 18-A, §9-308).

Name.

Certified copy of proposed adopted child's birth record submitted with adoption petition. After adoption, register of probate files certificate of adoption with State Registrar of Vital Statistics. (T. 18-A, §9-304).

Effect of Adoption.

Adopted person is child of adopting parent and not of natural parents except that adopted child will also inherit from natural parents and their respective kin if adoption decree so provides, and except that adoption of child by spouse of natural parent has no effect on relationship between child and either natural parent. (T. 18-A, §2-109[1]).

Setting Aside Adoption.

Judge of Probate may, after notice and hearing, annul adoption on petition of two or more persons showing that adoption was obtained by fraud, duress, or illegal procedures or court finds other good cause consistent with adoptee's best interests. (T. 18-A, §9-315).

Foreign Adoption.

Adoption of a child in any other state according to laws of that state has same force and effect in Maine as to inheritance and all other rights and duties as if in this state. Decree of finalized adoption from foreign country may serve as basis for Maine decree of adoption. (T. 18-A, §9-312).

Private Adoptions Involving Interstate Placements.

Any person or agency bringing child into state for purposes of adoption or taking child out of state for purposes of adoption must obtain from Dept. of Human Services certification of compliance with T. 22, c. 1153 or 1154, as applicable. (T. 18-A, §9-311). Provisions of Interstate Compact for Placement of Children, T. 22, §§4251-4269, if in effect and ratified by other state involved, apply to proceedings under T. 22, c. 1071; otherwise, provisions of Interstate Compact on Placement of Children, T. 22, §§4191-4247, apply to proceedings under T. 22, c. 1071. (T. 22, §4007).

14.0214.04

14.05 DISSOLUTION OF MARRIAGE:

See topic 14.06 Divorce.

14.06 DIVORCE:

(T. 19-A, §§901-1051).

Family Division of District Court.

Supplementing jurisdiction of district courts, Case Management Officers (CMO) are authorized to hear, dispose of and enter uncontested orders and judgments with respect to divorce, judicial separation, parental rights and responsibilities, paternity and child support actions. (Admin. order Dist. Ct. 98-3, 98-4; T. 4, §183[1]; Fam. Div. R. of Me. Dist. Ct. I[B]-[C] and III[I]). CMOs' management and maintenance orders are effective when entered on docket and remain so until amended or entry of final order. (Fam. Div. R. of Me. Dist. Ct. III[G]).

Grounds for Divorce.

Divorces may be granted by district courts on following grounds: adultery; impotence; extreme cruelty; utter desertion continued for three consecutive years next prior to commencement of action; gross and confirmed habits of intoxication from use of intoxicating liquors or drugs; nonsupport, when one spouse being of sufficient ability to provide for other, grossly, wantonly, or cruelly refuses or neglects to provide suitable maintenance for complaining spouse; cruel and abusive treatment; irreconcilable differences; or where one party judicially determined to be incapacitated. (T. 19-A, §§901-902). If divorce is sought on grounds of cruel and abusive treatment, plaintiff must not only show cruel and abusive conduct on part of spouse, but must also prove that such conduct caused plaintiff physical or mental injury or that continuation of marriage relationship would jeopardize physical or mental health. (161 Me. 289, 211 A.2d 583) Where irreconcilable differences are alleged, and other party denies it, court may order both to see professional counselor. (T. 19-A, §902). Court may not grant divorce when parties seek to procure divorce for fraudulent purposes. (T. 19-A, §901).

The running of the period necessary for divorce on the ground of desertion is not necessarily stopped by a mere visit of one of the parties to the other if no cohabitation took place. (88 Me. 120, 33 A. 781).

Grounds for Legal Separation.

District Court has jurisdiction to enter separation decree: (1) Upon petition of married person who lives apart or who desires to live apart from spouse for period in excess of 60 continuous days; or (2) upon joint petition of married couple who live apart or who desire to live apart for period in excess of 60 continuous days. (T. 19-A, §851).

No judicial separation decree shall be granted where parties seek to procure decree for fraudulent purposes. (T. 19-A, §851). Courts will refer parties to mediation prior to contested hearing where parties have minor children. (T. 19-A, §§851, 251).

Residence Requirements.

Plaintiff is resident of this State and parties were married in this State; plaintiff is resident of this State and parties resided in this State when cause of divorce accrued; plaintiff has resided in this State in good faith for six months before action is commenced; or defendant is resident of state. (T. 19-A, §901). Any member of Armed Forces on active duty stationed in Maine or spouse may file complaint for separation, support or annulment without otherwise meeting residency requirements. (T. 19-A, §102).

Jurisdiction.

Except as otherwise expressly provided, District Court has original jurisdiction of all actions. (T. 19-A, §103).

Venue of matrimonial actions is in county or judicial division where either party resides. (T. 4, §155; T. 19-A, §851). With judicial separation, if petitioner has left county or judicial division in which parties lived together and respondent still lives in that county or judicial division, then petitioner must file in that county. (T. 19-A, §851).

Process.

Subject to special provisions of M.R.C.P. 80, divorce actions are commenced like other civil actions. Attachment and trustee process may be used in connection with commencement of action. Service may be made upon defendant by registered or certified mail. (M.R.C.P. 4[f]). If service cannot be made by other prescribed method, service is by publication. (M.R.C.P. 4[g]).

Pleading.

Defendant may counterclaim for divorce, annulment, separate support, or determination of parental rights and responsibilities. (M.R.C.P. 80[b]).

Practice.

Court may at any time refer parties to mediation on any issues. Mediation is mandatory in contested divorces involving minor children, unless no issues of fact exist and all unresolved issues are questions of law. (T. 19-A, §251).

Judgment or Decree.

Trial court may, upon motion, grant final judgment of annulment or divorce during pendency of appeal period provided no cause for delay exists and rights of parties will not be prejudiced. (T. 19-A, §§752, 906).

Divorce is denied where parties seek to procure divorce for fraudulent purposes. (T. 19-A, §901).

Condonation not absolute defense, but discretionary with court. Recrimination is comparative not absolute defense. (T. 19-A, §902).

Decree is absolute; there is no interlocutory judgment or decree.

Temporary Support.

Court may, while action is pending, make provision for either spouse's separate support. (T. 19-A, §904).

Spousal Support.

Court may decree to either spouse alimony payable out of estate of other, and may order spouse to pay for defense or prosecution of alimony hearings. Court may order one spouse's real estate, or rents and profits therefrom, to be assigned to other spouse for life. In lieu of alimony, court may decree specific sum to be paid. Court may, at any time, alter, amend, or suspend decree for alimony or for specific sum, but court may not increase alimony if divorce decree prohibited increase. Pending petition to enforce alimony decree, or decree for payment of money instead thereof, for support of minor children, for support pending action or for payment of counsel fees, or for alteration of decree as to support or custody of children, court may order either spouse to pay to other spouse, or to counsel for other spouse, sufficient money for prosecution or defense thereof. (T. 19-A, §952). On motion to enforce alimony decree or other support order, court may issue summary process and find defaulting party guilty of contempt and may order execution and judgment, garnishment, attachment or any other method of enforcement permissible in civil action. (T. 19-A, §§952, 2601-2668). Rebuttable presumption that general spousal support may not be awarded if parties were married less than ten years. If parties were married for ten years but less than 20 years, rebuttable presumption that general support may not exceed one-half length of marriage. (T. 19-A, §951-A).

Division of Property of Spouses.

Court has broad powers over disposition of marital property. All property acquired subsequent to marriage and prior to judicial separation or divorce is presumptively marital property unless otherwise shown. If divorce decree fails to dispose of marital property, omitted property deemed held by both parties as tenants in common. Either party may move court at any time to set aside or divide property. All rights in real estate acquired by divorce decree effectual against any person when decree or abstract thereof is filed in registry of deeds for county or registry district where real estate situated. Claim of nonowner spouse to real estate as “marital property” does not affect owner spouse's title until nonowner spouse records in appropriate registry of deeds either: (1) Copy of divorce complaint, (2) clerk's certificate of divorce complaint, or (3) divorce decree or abstract thereof. Parties must submit abstracts necessary to implement decree with any final decree submitted to court or decree shall name party responsible for preparing abstract and parties shall pay required filing fee. Recording of said decree or abstract has effect of quitclaim deed. When divorce granted out of state, plaintiff or plaintiff's attorney must record duly authenticated copy of decree in registry of deeds in each of counties where real estate is situated. (T. 19-A, §953).

Change of Name.

Court may allow either spouse to change that person's own name. (T. 19-A, §1051).

Custody of Children.

When parents are living apart court may award allocated parental rights and responsibilities, shared parental rights and responsibilities or sole parental rights and responsibilities, according to child's best interest. If party has requested shared primary residential care and court denies it, court shall state why it is not in child's best interest. (T. 19-A, §§1653-1654). Maine has adopted Uniform Child Custody Jurisdiction and Enforcement Act. (T. 19-A, §§1731-1783).

Allowance for Support of Children.

Court may order either parent of minor child to contribute reasonable and just sums as child support payable weekly, bi-weekly, monthly or quarterly. Court shall also order either parent to provide child support beyond child's 18th birthday if child is attending secondary school. (T. 19-A, §1653). Support guidelines based on child support table adopted by Department of Human Services creates rebuttable presumption of amount to be paid. (T. 19-A, §2005).

Remarriage.

No restrictions on marriage of persons who have been divorced.

Foreign Divorces.

Divorce decree out of state according to law of state where rendered by court having jurisdiction of cause and of both parties, is valid in Maine except where residents of this state go out of it for purpose of obtaining divorce for causes which occurred here while parties resided here and which do not authorize divorce in this state. (T. 19-A, §907).

Separation Agreements.

Marital settlement agreement that is not incorporated by reference in final judgment of divorce may nevertheless be valid if fair and not contrary to public policy. (71 A.2d 514).

Antenuptial Contracts.

See topic 14.09 Husband and Wife.

14.07 [RESERVED]

14.08 GUARDIAN AND WARD:

Uniform Probate Code, including 1975 Official Amendments, adopted. (T. 18-A, §§1-101-9-404). 1977 and 1979 Official Amendments not adopted.

Change of Name.

Upon petition of adult or legal guardian of minor, judge of probate may change name of that person.

Additions to Official Text.

Under §5-105 limited guardians may be appointed by court with fewer than all powers and duties of guardians.

T. 18-A, §5-303(b) requiring appointment of visitor, guardian ad litem or attorney if incapacitated person not already represented, and requiring appointment of attorney if incapacitated person contests any aspect of guardianship proceeding. T. 18-A, §5-310-A governs appointment of temporary guardian, requiring post-appointment expedited hearing. T. 18-A, §5-407 requires appointment of attorney for incapacitated person, if not already represented who wishes to contest any aspect of conservatorship proceedings. T. 18-A, §5-408-A governs appointment of temporary conservator, requiring post-appointment expedited hearing if incapacitated person contests any aspect of temporary conservatorship.

Person with substantial interest in nursing care or boarding facility (T. 22, §§1817 and 7801) may act as guardian for resident of such facility only if person is also: spouse, domestic partner, adult child, person who served as guardian, permanent guardian or legal custodian of incapacitated person when incapacitated person was child, if person actively serving in capacity immediately before incapacitated person's 18th birthday, parent, or relative with whom incapacitated person resided for more than six months prior to filing of petition for appointment of incapacitated person (T. 18-A, §5-311[c]).

Delegation of Guardian's Authority.

Parent or guardian of minor or incapacitated person, by properly executed power of attorney, may delegate to another person, for period not exceeding six months, his or her powers regarding care, custody or property of minor or incapacitated person, except power to consent to marriage or adoption. (T. 18-A, §5-104). Power delegated that would otherwise expire will automatically be extended for parent or guardian who is member of U.S. Armed Forces Reserve and under order to active duty for more than 30 days until 30 days after active duty order ends or court so provides. (T. 18-A, §5-104[b]).

Guardian ad litem shall use standard of best interest of child as set forth in T. 19-A, §1653. Guardian appointed after Oct. 1, 2005 must meet specifications established by Supreme Judicial Court. (T. 18-A, §1-112).

Best Interest of Child.

Court considers following factors: wishes of parties, reasonable preference of child, child's primary caregiver, attachment between party and child, interaction between child and others, child's adjustment to community, length of time child has lived in stable environment, permanence of proposed home, health of individuals involved, child's culture, capacity to continue child's culture, effect on child of domestic violence, other relevant factors. (T. 18-A, §5-101).

Uniform Fiduciaries Act not adopted.

Uniform Simplification of Fiduciary Security Transfers Act repealed.

14.09 HUSBAND AND WIFE:

Disabilities of Married Women.

Married woman has, in general, same rights and liabilities as man. All disabilities of coverture have been removed.

Separate Property.

A married person may hold any property, real or personal, as that person's separate property. (36 Me. 64; T. 19-A, §§801-802).

Contracts.

A married woman may contract with her husband or any other person as though unmarried and may become bound as surety.

Antenuptial Contracts.

Maine Uniform Premarital Agreement Act (T. 19-A, §§601-611), differs from Uniform Act in that Maine Act does not include severability provisions of Uniform Act, §17, and provides that premarital agreement is void 18 months after parties to agreement become biological or adoptive parents, unless written amendment executed stating agreement remains in effect or altering agreement. Latter provision does not apply to premarital agreements executed on or after Oct. 1, 1993. (T. 19-A, §606).

Actions.

A married woman may sue or be sued without joinder of her husband. She cannot, however, be arrested on mesne process or execution. (T. 19-A, §805).

Either spouse may sue other in tort. (412 A.2d 71). Wife may bring bill in equity against her husband for recovery, conveyance, transfer, payment or delivery to her of any property exceeding $100 in value, standing in his name, of which he has legal title, or which is in his possession or under his control but which belongs to wife; and husband has same rights against his wife. (T. 19-A, §806; 118 Me. 337, 108 A. 105).

Agency.

Either spouse may act as attorney in fact for the other.

Conveyance or Encumbrance of Property.

Married person, widow or widower may convey separate property, real or personal, without joinder or consent of spouse, except that real estate conveyed to person by his or her spouse cannot be conveyed without joinder of spouse, unless such real estate was conveyed to him or her as security for or in payment of bona fide debt due to him or her from spouse. (T. 19-A, §801, 92 A. 489).

Conveyance by one spouse in which other does not join releases any rights and interests by descent which latter may have in property conveyed unless latter files required notice of claim in registry of deeds where land is located within statutorily prescribed time. (T. 33, §§470-475). Signature of nonowner spouse not required on conveyance for value dated after Dec. 31, 1980, unless nonowner spouse has filed claim in registry of deeds during divorce proceeding. (T. 33, §480). See also topic 14.06 Divorce.

Desertion.

No statutory provision regarding desertion. See provision regarding judicial separation. (T. 19-A, §851).

T. 19-A, §§2801-3401 enacted Uniform Interstate Family Support Act without repealing 1968 Uniform Reciprocal Enforcement of Support Act. Uniform Civil Liability for Support Act (T. 19-A, §§3501-3506) adopted. Civil enforcement by action in district or superior court. (T. 19-A, §§2601-2608).

14.10 INFANTS:

Age of majority is 18 for both sexes. (T. 1, §§72, 73).

Child protection proceedings governed by Child and Family Services and Child Protection Act. (T. 22, §§4001-4099-C). District court charged with administration of Act. Extensive case management procedures for child protection proceedings under Act enacted by order of Supreme Judicial Court, dated June 1, 1999. (Docket No. SJC-407). Safe Haven Providers can accept abandoned children. Providers subject to confidentiality requirements concerning identity of person delivering child. Providers have limited immunities. (T. 22, §4018).

Emancipation.

Infant is emancipated by marriage. However, married person, widow or widower of any age may dispose of real and personal estate by will and may own, manage, mortgage and convey real or personal property. (T. 19-A, §§801-802).

Disabilities.

Disability of nonage lifted at age 18. (T. 1, §72). Drinking age 21. (T. 28-A, §§2, 2051).

Ratification of Contracts.

No action can be maintained against any minor on any contract made by him, unless he, or some person lawfully authorized, ratified it in writing after he arrived at the age of 18 years, except for necessaries or real estate of which he has received the title and retains the benefit and except with respect to contracts furthering his higher education. (T. 33, §52).

Actions.

Infants must sue by prochein ami, or guardian ad litem. (41 Me. 458). Infants defend by guardian, and not by prochein ami. (T. 18-A, §5-209). Abrogation of parental immunity in tort. (409 A.2d 634).

Support of Minor.

Parents obligated to support children in need. (T. 19-A, §1504).

Parental Responsibility.

Parents jointly liable with minor (7 through 17) who lives with parents for willful or malicious damage up to $800 if child would have been liable as adult. (T. 14, §304). Parent or guardian of minor or incapacitated person, by properly executed power of attorney, may delegate to another person, for period not exceeding six months, his or her powers regarding care, custody or property of minor or incapacitated person, except power to consent to marriage or adoption. (T. 18-A, §5-104). Power delegated that would otherwise expire will automatically be extended for parent or guardian who is member of National Guard or U.S. Armed Forces Reserve and under order to active duty for more than 30 days until 30 days after active duty order ends or court so provides. (T. 18-A, §5-104[b]).

Adoption.

See topic 14.01 Adoption.

Uniform Transfers to Minors Act adopted (T. 33, §§1651-1674), repealing Maine Uniform Gifts to Minors Act. In addition to purely formal changes made to conform to standard Maine legislative drafting practices, Maine statute contains following variances and additions to 1983 Official Text: §1(11), "minor" means individual who has not attained 18 years of age; §7(b), delete "must be made" and add "shall be paid"; §18(c), after "written notice" add "of resignation"; §20(1), delete "21" and add "18", and after "Section 4 or 5" add "unless the transferor has specified in writing in the transferring instrument that the transfer shall not occur until the minor attains a later age, not to exceed 21 years of age. The following words or their substantial equivalent must appear in the transferring instrument: " 'The custodian shall transfer __________ (description of property) to _____ (name of minor) when _____ (he or she) reaches the age of __ (age at which transfer will occur)' " (T. 33, §1660); §22(a), after "as" delete "now"; §24 not adopted; §25 not adopted; §26 not adopted; §27 not adopted.

14.11 MARRIAGE:

Consent Required.

If either party is under 18, certificate cannot issue without written consent of parent, guardian or person to whom court has given custody. In absence of person qualified to give such consent, judge of probate in county in which minor resides may grant consent to issue license. Judge of probate shall issue decision within 30 days of receiving notification of intention to marry. (T. 19-A, §652).

Notice of intention to marry must be filed with town clerk, as follows: if both parties are residents of state, at residence of at least one party; if only one is resident, at such party's residence; if both are nonresidents, at any municipal office and nonresidents free to marry anywhere in state once license issued. (T. 19-A, §651). Once intentions filed, marriage license may be issued immediately. (T. 19-A, §652). Parties must submit application for recording notice of intention to marry, including signed certification that information recorded is correct and applicants are free to marry under Maine law. Applicants' signatures must be acknowledged before official authorized to take oaths. Application open for public inspection in clerk's office. Certificate of genetic counseling from physician must be filed with notice of marriage intentions between first cousins. (T. 19-A, §701). Notice may be filed by either party to proposed marriage. While statute does not require personal appearance many clerks require one of applicants to appear either at time of filing or at time of issuance of certificate. (T. 19-A, §651).

Prior Marriages.

Previously married person recording notice of intention to marry must file certificate or certified copy of divorce decree or annulment of last marriage or death record of last spouse. (T. 19-A, §651).

Medical Examination.

None required.

License.

Certificate is delivered to person performing ceremony before same is begun. Certificate must be signed by person performing ceremony, both parties to intended marriage and two witnesses. Certificate is void if not used within 90 days after filing notice of intention to marry. (T. 19-A, §§652, 654).

Waiting Period Generally.

No waiting period. Once marriage intentions filed, marriage license may be issued immediately. (T. 19-A, §652).

Waiting Period Following Divorce.

Remarriage only after Maine divorce final. Divorce not final until 21 day appeal period expires or parties execute certified waiver of appeal right. (M.R.A.P. 2).

Ceremonial Marriages.

Ceremony may be performed by Justices, judges, lawyers admitted to Maine bar, and notaries public residing in this state, as well as ordained minister of gospel, cleric or person licensed to preach by association of ministers, religious seminary or ecclesiastical body, whether resident or nonresident of State and whether or not citizen of U.S. (T. 19-A, §655).

Ceremony must be performed in presence of at least two witnesses besides person officiating. (T. 19-A, §655).

Marriage solemnized before known resident of state professing to be duly authorized is not invalid because of lack of authority, nor is marriage invalidated by omission or informality in entering intention of marriage; provided marriage is in other respects lawful and is consummated with full belief of either party that they are lawfully married. (T. 19-A, §657).

Reports of Marriages.

Person performing ceremony must make record of marriage and forward original certificate to clerk who issued same within seven days following date such marriage was solemnized. (T. 19-A, §654).

Record.

See category 10 Documents and Records, topic 10.04 Records, subhead Vital Statistics.

Common Law Marriages.

Not recognized. (254 A.2d 46).

Domestic Partner.

Defined as one of two unmarried adults who are domiciled together under long-term arrangements that evidence commitment to remain responsible indefinitely for each other's welfare.

Proxy Marriages.

No provision.

Marriages by Written Contract.

No provision.

Prohibited Marriages.

No man shall marry his mother, grandmother, daughter, granddaughter, sister, brother's daughter, sister's daughter, father's sister, mother's sister, daughter of his father's brother or sister or daughter of his mother's brother or sister; corresponding prohibitions as to marriage by woman. First cousins may marry only after filing certificate of genetic counseling signed by physician. (T. 19-A, §701). Persons of same sex may not contract marriage. (T. 19-A, §701).

No person impaired by reason of mental illness or mental retardation to extent that he lacks sufficient capacity to make responsible decisions concerning his person or property is capable of contracting marriage. Polygamous marriages are void. (T. 19-A, §701).

Foreign Marriages.

Any marriage performed in another state that would violate provisions of T. 19-A, §701 if performed in this State is not recognized in this State and is considered void if parties take up residence in this State. (T. 19-A, §701).

Annulment.

When the validity of a marriage is doubted either party may file a complaint for annulment and court may decree it annulled or affirmed. (T. 19-A, §752). Marriages prohibited in §701 if solemnized in this State, are absolutely void without legal process. (T. 19-A, §751). Marriage may be annulled when either party has husband or wife of prior marriage still living, but if second marriage was contracted in good faith believing prior husband or wife dead, or that former marriage was void or divorce decreed, that fact is stated in decree and issue of such marriage begotten before commencement of suit are legitimate issue of party capable of contracting. (T. 19-A, §752). No time specified by statute within which annulment for nonage must be brought.

Antenuptial Contracts.

See topic 14.09 Husband and Wife.

15 HEALTH

15.0115.04

15.05 FOOD, DRUGS, DEVICES AND COSMETICS:

Label requirements for prescription drugs established by T. 22, §§2682, 3174.

MaineCare prescription drug discount program established by T. 22, §§254; 258. Prescription drug program for qualified Maine residents established by T. 22, §2681. Elderly low-cost drug program established by T. 22, §254-D. Purchase of prescription drugs from out of country program established by T. 22, §254-C. Prescription drug price information required to be made available by pharmacist. (T. 32, §13797).

15.05A HEALTH INSURANCE:

Health Insurance Coverage for Domestic Partners.

Individual or group contracts issued by nonprofit hospital or medical service organization and individual, group or blanket health insurance policies or contracts issued by insurer or HMO must make benefits available for domestic partners under same terms and conditions as benefits are provided to spouses. (T. 24-A, §§2319-A, 2741-A, 2832-A, 4249).

Health Maintenance Organizations.

HMOs governed by T. 24-A, §4201, et seq.

Health Insurance Coverage for Small Businesses and Self-Employed Persons.

Governed by T. 24-A, §6901 et seq.

15.05B NURSING:

Licensure, competency, training and discipline of nurses governed by T. 32, §2101, et seq.

15.0615.12

15.13 SMOKING REGULATIONS:

Smoking in Public Places.

Regulated by T. 22, §1542. Smoking prohibited in enclosed public areas and rest rooms made available to public with stated exceptions.

Smoking in Workplace.

Regulated by T. 22, §1580-A. Each employer must maintain and enforce posted smoking policy. Policy must prohibit smoking except in designated smoking areas, and may prohibit smoking entirely. Statute does not apply to any veterans service organization or club not open to public and in operation prior to Jan. 1, 2004, if: (1) Smoking policy has been mutually agreed upon by employer, and all employees; (2) there is written policy ensuring that only employer, employees, members and their guests are allowed entry to premises; and (3) it is confirmed through vote meeting specific criteria set forth in statute and taken at least once every three years that majority of members voted to allow smoking. (T. 22, §1580-A).

Smoking in Hospitals.

Regulated by T. 22, §1580-B. Smoking prohibited in enclosed area of hospital, except that hospital may establish enclosed and adequately ventilated smoking area for patients. Hospital may prohibit smoking entirely. (T. 22, §1580-B).

Smoking in Vehicles with Children Present.

Smoking prohibited with person under age 16 present. (T. 22, §1549).

16 INSURANCE

16.01 INSURANCE COMPANIES:

Regulated by T. 24, §§2301–2987 and T. 24-A, §§1-6971.

Supervision by Superintendent of Insurance.

Rates governed by T. 24-A, §§2301-2387-B.

Interstate Insurance Product Regulation Commission.

Maine entered Interstate Insurance Product Regulation Compact. Compact established Commission with power to develop uniform standards for insurance product lines and to review and approve products satisfying standards, once requisite number of states join Compact. (T. 24-A, §§2471-2487).

Annual statement filed with Superintendent of Insurance.

Annual audit of insurers required and annual audited financial report must be filed with Superintendent of Insurance. (T. 24-A, §221-A).

Policies.

General requirements of T. 24-A, §§2401-2453 apply to all policies. Simplification of policy language and approval by Superintendent of Insurance. (T. 24-A, §§2438-2445). T. 24-A, §§2501-2556 govern life insurance and annuity contracts. T. 24-A, §§2601-2630 govern group life insurance. T. 24-A, §§2670-2680 set forth Preferred Provider Arrangement Act. T. 24-A, §§2691-2697 govern individual and group health insurance. T. 24-A, §§2701-2763 govern health insurance contracts. T. 24-A, §§2771-2774 govern licensure of medical utilization review entities. T. 24-A, §§2801-2847-P govern group and blanket health insurance. T. 24-A, §§2848-2850-D govern continuity of health coverage. T. 24-A, §§2851-2865 govern consumer credit insurance. T. 24-A, §§2881-2888 govern group legal services insurance. T. 24-A, §§2901-2910-A govern casualty insurance. T. 24-A, §§2911-2924 govern cancellation of auto insurance. T. 24-A, §2927 and T. 24-A, §1420-F(L) govern personal automobile insurance and rental vehicle coverage. T. 24-A, §§2931-2940 govern mass marketing of casualty and property insurance. T. 24-A, §§2951-2953 govern group property and casualty insurance. T. 24-A, §§3001-3007 govern standard fire insurance policies. T. 24-A, §§3020-3022 govern deposit notes. T. 24-A, §§3030-3034 govern lien of mortgagees on policies. T. 24-A, §§3048-3058 govern cancellation of property insurance. T. 24-A, §3059 governs insurer's valuation of property. T. 24-A, §§3101-3105 govern surety insurance contracts. T. 24-A, §3201 governs title insurance. T. 24-A, §§3901-3909 set forth Maine Individual Reinsurance Association. T. 24-A, §§4201-4252 govern health maintenance organizations. T. 24-A, §§5001-5015 govern Medicare supplement insurance. T. 24-A, §§5051-5057 govern nursing home care and long-term care insurance. T. 24-A, §§5071-5081 govern long-term care insurance.

Insurance Information and Privacy Protection Act.

Guidelines for insurers collection, use and disclosure of information gathered in connection with insurance transactions. (T. 24-A, §§2201-2220).

Unfair Claims Practices.

Claim settlement practices of insurers, except health, life and workers compensation, regulated by statute, enforceable by Superintendent of Insurance and private civil action. (T. 24-A, §§2164-D, 2436-A). Retrospective denials of previously paid claims limited by statute. (T. 24-A, §4303). Health plan insurance contracts may not contain clauses that purport to reserve absolute discretion to carrier to interpret insurance contract terms or provide standards of interpretation or review that are inconsistent with Maine law. (T. 24-A, §4303).

Late Payment.

Claims must be paid or disputed or additional information requested within 30 days (60 days for fire policies) after proof of loss is received by insurer and ascertainment of loss is made by agreement or arbitration. Claim for attorney's fees and interest accrues for insurer's failure to pay timely undisputed claim. (T. 24-A, §2436).

Discrimination.

Rate discrimination is prohibited. (T. 24-A, §§2159, 2162, 2736-C). Discrimination prohibited against blind persons (T. 24-A, §2159-A), or mentally or physically disabled (T. 24-A, §2159-A), or persons infected with HIV (T. 24-A, §§2159, 2452, 2526-A, 2629, 2750, 2846, 4120, 4121-A, 4229) or on basis of genetic information or testing for health insurance or unfair discrimination for life, disability or long-term care (T. 24-A, §2159-C). Nonprofit hospitals and medical service organizations, health insurers, and HMOs, must provide benefits for domestic partner of insured. (T. 24-A, §§2741-A, 2832-A, 4249). Discrimination against victims of domestic abuse is prohibited. (T. 24-A, §2159-B).

Maternity Benefits.

Health insurance plans must provide same maternity benefits for unmarried women as for married policyholders with maternity coverage (T. 24-A, §2741), coverage on expense incurred basis must begin at moment of birth (T. 24-A, §2743).

Tie-In Sales.

Prohibition against tying purchase of desired type of insurance or contract for credit to additional insurance purchases. (T. 24-A, §§2168-A–2168-B).

Rebates.

Prohibition against rebate as inducement to purchase insurance. (T. 24-A, §§2160, 2162). Exceptions from this prohibition. (T. 24-A, §§2161–2162).

Dividends.

Prohibition against making payment of policy dividend conditioned upon renewal of policy. (T. 24-A, §2162-A).

Liens.

Priority liens on policies regulated by T. 24-A, §§2729-A, 2836, 2910-A, 4243.

Producers, Agents and Brokers.

Regulated by T. 24-A, §§1401-1498 and 1901-1912. Producers, agents, managing general agents, brokers, consultants, adjusters and insurance administrators must be licensed by Superintendent of Insurance.

Market Assistance Plan.

Insurance Superintendent can request insurer voluntarily to participate in market assistance plan, providing insurance at agreed-upon rate to persons or groups unable to obtain coverage. (T. 24-A, §2325-A).

Mandatory Property and Casualty Insurance Market Assistance Program.

If number of participants in market assistance plan is determined insufficient or sufficient number of risks has not been written through plan, Insurance Superintendent may establish mandatory property and casualty insurance market assistance plan. (T. 24-A, §2325-B).

Process Agent.

As condition to transacting business within state, resident agent must be irrevocably appointed to receive process. (T. 24-A, §421).

Investments.

Regulated by T. 24-A, §§1101-1161.

Conversion of Nonprofit Hospital Service Plan Providers to Domestic Stock Insurers.

Regulated by T. 24, §2301; T. 5, §194.

Foreign insurance companies must meet same reserve requirements as domestic insurers and can sell only types of insurance authorized for domestic insurers. (T. 24-A, §406). Must maintain deposit in state in amount not less than $100,000 actual market value, or in lieu thereof provide Superintendent of Insurance certificate from official of some other state to effect that such deposit is maintained in that state. (T. 24-A, §412). Application for certificate of authority is filed with Superintendent of Insurance, and must be accompanied by certificate of insurance department of its state of domicile, showing that it is authorized to transact kinds of business in that state or country of domicile, that it proposes to transact in Maine. (T. 24-A, §413). Fee for filing this application is $1,000. (T. 24-A, §601).

Retaliatory Laws.

If any state imposes taxes, licenses, or fees (except agent, producers or brokers licensing fees and other administrative fees) on Maine insurers which are greater than those imposed on domestic insurers, same are imposed upon insurers from such state. (T. 24-A, §428).

Premium tax at the rate of 2% is imposed on all gross direct premiums on contracts written on risks located or resident in state, deducting therefrom return premiums and dividends paid to policyholders. Fire insurance companies subject to additional tax of 1.4% of gross direct premiums for fire risk insurance written in state less return premium thereon and policyholder dividends. Tax collected quarterly. (T. 36, §§2513, 2513-A, 2519; 2521-A; T. 25, §2399). Large domestic disability insurers subject to different tax structure. (T. 36, §2513). Premium tax rate of 2% upon all gross direct premiums written on risks located or resident in State for workers' compensation insurance, less return premiums and dividends paid. (T. 36, §2523). Surplus lines insurers tax rate is 3% per year on all gross direct premiums. (T. 36, §2513). Health access surcharge is 1.8% on all paid claims. (T. 24-A, §6913-A).

Direct Actions Against Insurer.

See category 23 Transportation, topic 23.01 Motor Vehicles, subhead Direct Actions.

Insurance Inspections.

Furnishing or failure to furnish insurance inspection will not subject insurer to liability for damages for injury, death or loss occurring as result of act or omission in course of inspection. (T. 14, §167).

Insurance and Banking.

Authorized financial institutions and credit unions or affiliates thereof may act as insurance agent, broker or consultant and may employ, affiliate with or hire as third party agent licensed insurance producer or agency, broker or consultant. (T. 9-B, §448, T. 24-A, §1443-A). Supervised lenders may become licensed and may act as insurance agency, broker or consultant for sale of insurance products. (T. 9-A, §§4-401, 4-402). Financial institutions and credit unions have power to engage in any activity that federally chartered financial institutions and credit unions have under federal law. (T. 9-B, §§416, 828, T. 24-A, §212-A).

Risk Retention Groups.

Regulated by T. 24-A, §§6091-6104.

Workers' Compensation Rating System.

Regulated by T. 24-A, §§2381-2387-B.

16.02 SURETY AND GUARANTY COMPANIES:

Any insurer duly authorized to transact surety insurance in Maine may be accepted as surety upon bond of any person or corporation required by laws of state to execute a bond. If such insurer furnishes satisfactory evidence of its ability to provide all security required by law, no additional security may be exacted, but other surety or sureties may in discretion of official authorized to approve such bond be required, and such surety company may be released from its liability upon same terms and conditions as are by law prescribed for release of individuals. (T. 24-A, §3102). Insurer must attach power of attorney to every bond it executes through attorney-in-fact in this state, unless bond is executed by officer of insurer. (T. 24-A, §3105).

Foreign surety companies are entitled to do business in the state only on compliance with statutory provisions. Among other things such a company must appoint agent in this state for service of process. (T. 24-A, §421).

17 INTELLECTUAL PROPERTY

17.01 TRADEMARKS AND TRADENAMES:

Any person who adopts and uses mark in connection with goods and services in this state, subject to limitations set forth, may register trademark. (T. 10, §1522).

What May Be Used.

Mark used in connection with goods or services of applicant may not be registered if deceptive, or if it falsely suggests connection to persons or institutions, consists of U.S. or state insignia, comprises name of living individual who has not provided consent, consists of or comprises language that is obscene, contemptuous, profane or prejudicial, inappropriately promotes abusive or unlawful activity. Additionally, mark may not be registered if it is confusingly similar to another mark or trade name previously used in Maine and not abandoned, unless owner or holder of said mark or trade name files written consent to registration of applicant’s mark with Secretary of State. In addition, mark may not be registered absent proof of acquired distinctiveness if merely descriptive or deceptively misdescriptive of goods or services, primarily geographically descriptive or deceptively misdescriptive (except in certain cases) or primarily merely surname. (T. 10, §1522).

Registration.

Application must be made to Secretary of State, accompanied by specimen of mark in triplicate and $60 fee for first class, $10 for each additional class payable to Treasurer of State. Application must be signed and verified by applicant. (T. 10, §1522). Application must set forth name and address of applicant, manner in which mark is used in connection with goods and services, class of goods and services, date first used and statement that to best of applicant's knowledge and belief applicant is owner of mark.

Renewal.

Term of trademark registration is ten years and may be renewed by filing application for renewal six months prior to ten year expiration date. Renewal fee of $60 payable to Treasurer of State must accompany renewal application. (T. 10, §1524).

Assignment.

Assignable by written instrument, which may be recorded with Secretary of State upon payment of $40 to Treasurer of State. (T. 10, §1525).

Infringement.

Registered mark, or any copy thereof, may not be used, or reproduced, etc., in connection with sale of goods and services, without consent of registrant. (T. 10, §1529).

Remedies.

Injunctive relief available. Infringer liable to owner of registered mark for actual damages or statutory damages in lieu of actual damages or profits not to exceed $2,000. Court awards prevailing party costs, and, in exceptional cases, attorneys fees; common law, and criminal remedies may also be available. (T. 10, §§1531, 1532).

Dilution.

Likelihood of injury to business reputation or of distinctive quality of registered or common law mark is grounds for injunctive relief notwithstanding absence of competition between parties or absence of confusion as to source of goods or services. (T. 10, §1530).

Tradenames.

Corporate name must be distinguishable from other corporate, LLC, LLP, limited partnership, or limited liability limited partnership names; assumed, fictitious, reserved and registered names for all entities; and state marks registered under T. 10, §1522. (T. 13-C, §401; effective July 1, 2003).

17.02 TRADE SECRETS:

Uniform Trade Secrets Act adopted. (T. 10, §§1541-1548).

Commercial Feeds.

Commercial Feed Law (T. 7, §§711-724) makes it Class E crime to use for one's own advantage or to reveal trade secrets concerning commercial feeds obtained pursuant to law (T. 7, §722).

Community Right-to-Know Act.

Exceptions to Right-to-Know Act (T. 22, §§1696-A–1696-F) prohibiting disclosure of trade secrets (T. 22, §§1696-D, 1696-F).

Environmental Laws.

Limited exceptions from certain reporting requirements for trade secrets and prohibitions against using or revealing trade secrets obtained pursuant to various environmental laws. (T. 7, §§508[2], 606[2][C]; T. 38, §1310-B).

18 LEGAL PROFESSION

18.01 ATTORNEYS AND COUNSELORS:

State bar is not integrated.

No distinctions between attorneys and counselors.

Bar Associations.

Each county has a bar association. There is also a state bar association.

Bar Rules.

Maine Bar Rules, including Code of Professional Responsibility, promulgated by

Supreme Judicial Court.

Board of Overseers of Bar appointed by Supreme Judicial Court to oversee conduct and discipline of attorneys admitted to practice.

Jurisdiction over admission is in the Supreme Judicial Court.

Registration As Law Student.

No Requirement.

Eligibility.

Applicant for admission to Maine Bar must have graduated with bachelor's degree from accredited college or university or successfully completed at least two years' work as candidate for that degree at accredited college or university and (i) graduated from American Bar Association accredited law school; (ii) graduated from law school accredited by U.S. jurisdiction in which it is located, then admitted to practice by examination in one or more jurisdictions within U.S. and actively practiced there for at least three years; (iii) graduated from foreign law school with legal education equivalent to that provided by ABA accredited law schools; or (iv) successfully completed two thirds of requirements for graduation from ABA accredited law school and then pursued study of law in office of attorney within state for at least one year. (T. 4, §803).

Petition for Admission.

Applicant may register with board of examiners by filing application obtained from board, together with fee during following time periods: for Feb. examination, between preceding Oct. 15 and preceding Dec. 20; for July examination, between preceding Mar. 15 and preceding May 20. Applicant must also submit proof of good moral character. (Me. Bar Admission Rules 5, 6, 9).

Examination.

Conducted by Board of Bar Examiners each Feb. and July at locations announced by Board. (Me. Bar Admission Rule 10). $20 fee for requesting application forms. $500 application fee for applicant admitted for one year or more in any other jurisdiction. $600 application fee for applicant seeking admission under Rule 11A. $450 application fee for all other applicants. (Me. Bar Admission Rule 6). Multi-state Bar Examination comprises 4/11ths of examination score; general examination, which may include questions from Multi-state Essay Examination, comprises 7/11ths of score. General examination topics include: Maine Rules of Civil and Criminal Procedure, Maine Rules of Appellate Procedure, Maine Rules of Evidence, Maine Code of Professional Responsibility. Examination also may include numerous other topics. (Me. Bar Admission Rule 10). Each person admitted after July 1, 2006, required to have obtained scale score of 80 on Multistate Professional Responsibility Examination. (Me. Bar Admission Rule 11).

Applicant who has (i) been admitted by examination to practice in one or more other U.S. jurisdictions and who has been in active practice of law for at least three of preceding five years or (ii) taken Multi-state Bar Examination within the 61 months prior to current administration of examination, may elect to take only first day of examination. Applicant who has achieved “useable” Multi-state Bar Examination score may be admitted on basis of further modified written examination under certain conditions. (Me. Bar Admission Rule 10).

Clerkship.

Not Required.

Admission Without Examination.

Applicants who are licensed to practice in New Hampshire or Vermont may be admitted without examination if certain conditions are met. (Me. Bar Admission Rule 11A).

Admission Pro Hac Vice.

Attorney of another state may be admitted temporarily on motion. (T. 4, §802).

Licenses.

Annual registration fee depending on length of time admitted and active status, payable to Board of Overseers of Bar.

Privileges.

Lawyer-client privilege recognized. (M.R.E. 502).

Disabilities.

None.

Liabilities.

See category 5 Civil Actions and Procedure, topic 5.07 Costs.

Compensation.

Fees governed by Me. Bar Rules 3.3, 8 & 9. Fees may not be “excessive”. (Me. Bar Rule 3.3[a]). Contingent fee agreement must be in writing in duplicate, and signed by attorney and by each client. Contingent fees not permitted in criminal cases, divorce, annulment or separation proceedings or where method of determination of attorney's fees is expressly provided by statute or regulation. (Me. Bar Rule 8).

Disbarment or Suspension.

Any person may submit written complaint alleging attorney misconduct to Board of Overseers of the Bar. Complaint investigated by Bar Counsel who makes initial determination of whether sanctionable misconduct exists. If complaint is not dismissed by Bar Counsel due to lack of sanctionable misconduct, Bar Counsel will present complaint to Grievance Commission appointed by Board. If disciplinary panel of Grievance Commission finds serious misconduct, panel will either issue public reprimand or direct Bar Counsel to commence disciplinary proceedings before single justice of Supreme Judicial Court. Public reprimands are reviewable by such single justice. Board has burden of proof in disciplinary proceedings before single justice who hears such proceedings de novo. Bar counsel may also seek determination by Board whether attorney is incapacitated from continuing practice by reason of mental infirmity or addiction to drugs or intoxicants. (Me. Bar Rule 7-7.3).

Champerty.

Person guilty of champerty if, with intent to collect by civil action claim, account, note or other demand due, or to become due to another person, he gives or promises anything of value to such person. This provision does not apply to agreements between attorney and client to prosecute civil action on contingent fee basis. (T. 17-A, §516).

Unauthorized Practice.

Persons not admitted to bar forbidden to practice. Prohibition does not apply to person representing self in court or to range of other narrow exceptions. Unauthorized practice of law is Class E crime. Under rules of Supreme Judicial Court, senior law student attending ABA approved law school may appear in state courts on behalf of state agencies or under supervision of organizations providing legal services to indigent. (T. 4, §807).

Mandatory Continuing Legal Education.

Registered attorneys shall complete 11 credit hours of approved continuing legal education each calendar year with at least one credit hour primarily concerned with ethics or professional responsibility. (Me. Bar Rule 12).

Specialty Certification Requirements.

Lawyer not permitted to publicly represent or imply that she is recognized, designated, or certified specialist, except (1) lawyer admitted to practice before U.S. Patent and Trademark Office may use designation “Patents”, “Patent Attorney”, or “Patent Lawyer”; (2) lawyer engaged in trademark practice may use designation “Trademarks”, “Trademark Attorney”, or “Trademark Lawyer”; and (3) lawyer engaged in admiralty practice may use designation “Admiralty”, “Procter in Admiralty”, or “Admiralty Lawyer”. However, lawyer may communicate that his practice is limited to particular fields. (Me. Bar Rule 3.8).

Professional Association (or Corporation).

See category 2 Business Organizations, topic 2.03 Corporations, subhead Professional Corporations.

Attorney Ethics.

Derived from ABA Model Rules of Professional Conduct, California Rules of Professional Conduct. (Me. Bar Rule 3). Lawyers who have direct supervisory authority over another lawyer shall make reasonable efforts to ensure that other lawyer conforms to Code of Professional Responsibility. (Me. Bar Rule 3.13).

19 MINERAL, WATER AND FISHING RIGHTS

19.01 MINES AND MINERALS:

Operation of Mines.

No person may engage in metallic mining activity without obtaining approval from Department of Environmental Protection. (T. 38, §§482, 483-A, 485-A). All mining activity must include safety and reclamation provisions for affected land or otherwise comply with approval. Department may require bond to assure compliance with T. 38, c. 3. Persons engaged in mining activity must reclaim affected land in accordance with approved plan. (T. 38, §490). Persons expending more than $25,000 in one calendar year for mineral exploration must register with state geologist. (T. 12, §550). Separate provisions for borrow pits over five acres and rock quarries over one acre. (T. 38, §§490-A-490-M, 490-W-490-EE).

Prohibitions.

Possession, use, storage, or transportation of explosives without permit. (T. 25, §2473). Installation, construction, or establishment of aboveground flammable liquid storage facility without permit. (T. 25, §2483). Engaging in mining or advance exploration activity without approval. (T. 38, §§482, 483-A). Mining of uranium or thorium. (T. 38, §489-B).

State Owned Lands.

The Bureau of Geology and Natural Areas and agencies having jurisdiction over state-owned lands have jurisdiction over mineral exploration and development activities on state-owned lands including permits, fees and leases. (T. 12, §§549-549-C).

Safeguarding Employees.

No provisions.

Inspection of Mines.

Provision contained at T. 38, §§347-C, 490-G (borrow pits), and 490-AA (rock quarries).

Oil and Gas.

Provision contained at T. 12, §549-B.

Taxes.

See category 22 Taxation.

19.01A WATER RIGHTS:

Groundwater Rights.

Person liable for groundwater withdrawal in excess of beneficial domestic use if interferes with preexisting beneficial domestic use of groundwater by landowner or lawful occupant. (T. 38, §404). Groundwater withdrawal projects subject to Department review of effects on waters of State. (T. 38, §484).

Surface Water Rights.

Unreasonable use of person's land that results in altering flow of surface water in way that would unreasonably injure or interfere with reasonable use of another's land constitutes nuisance. (T. 17, §2808).

Hydropower Projects.

Construction or reconstruction of hydropower project requires approval of Department of Environmental Protection. (T. 38, §633).

Dams.

State may regulate water levels and flow requirements. (T. 38, §840).

Intertidal lands impressed by public trust for fishing, fowling and navigation. (T. 12, §§573; 557 A.2d 168).

20 MORTGAGES

20.01 CHATTEL MORTGAGES:

Uniform Commercial Code and Consumer Credit Code adopted. See category 3 Business Regulation and Commerce, topics: Commercial Code, 3.09A Consumer Credit.

Filing.

See category 3 Business Regulation and Commerce, topic 3.09 Commercial Code, subhead Variations from 1972 Official Text, §9-401(1).

Forms.

Forms of Chattel Mortgages or Security Agreement vary widely according to circumstances of transaction. Therefore, it is not feasible to provide standard form here. Commercial Code forms at end of this digest are in use.

Consumer Credit Code.

Maine has adopted Uniform Consumer Credit Code, several provisions of which affect Chattel Mortgages. See category 3 Business Regulation and Commerce, topic 3.09A Consumer Credit.

20.02 COLLATERAL SECURITY:

See category 8 Debtor and Creditor, topic 8.14 Pledges.

20.03 MORTGAGES OF PERSONAL PROPERTY:

See topic 20.01 Chattel Mortgages.

20.04 MORTGAGES OF REAL PROPERTY:

Supreme Judicial Court, Superior Court and District Courts have concurrent original full equity jurisdiction as to mortgages and redemption thereof. Title theory applies.

Funding.

Mortgage lenders must disburse loan proceeds to settlement agent at or before closing for non-rescindable loans and before noon of first business day after rescission period for rescindable loans. (T. 33, §524).

Execution and Recording.

Mortgages executed and recorded like other deeds and for same fees.

Conditions usually set forth in mortgage deed itself, but may be made by absolute conveyance with bond or other separate instrument of defeasance to mortgagor executed at same time as part of same transaction. (T. 33, §501).

Recording Fees.

See category 10 Documents and Records, topic 10.04 Records.

Taxes.

See category 22 Taxation.

Trust deeds not in ordinary use.

Future Advances.

Mortgage may cover future advances if it states it secures future advances and specifies total amount of obligations it may secure. Subsequent lienor may limit priority of future advances by notice to mortgagee; mortgagor may limit amount of advances by notice to mortgagee. (T. 33, §505 applies to mortgages recorded on or after Jan. 1, 1994.)

Priorities.

If mortgagee institutes foreclosure proceedings, owner of subsequent mortgage can get assignment of prior mortgage and debt by paying amount owed and foreclosure costs. (T. 14, §6205). Interest of prior mortgagee with superior priority not affected by foreclosure by junior mortgagee. (T. 14, §6321). Subject to certain conditions (see subhead Future Advances, supra), with respect to any mortgage recorded on or after Jan. 1, 1994 which secures future advances, future advances have priority of original mortgage. (T. 33, §505).

Subordination Agreements.

May use subordination agreements to control order of priority.

Assignment.

Word “assign” is sufficient to transfer mortgage of real estate without words “sell, transfer and convey”. (T. 33, §770).

Possession of Mortgagee.

Mortgagees may enter or recover possession before or after breach of condition, unless agreement to contrary. If mortgage is afterwards redeemed, must account for clear rents and profits from time of taking possession, and these amounts must be deducted from sum due on mortgage. (T. 33, §502).

Release.

Can discharge mortgage by deed of release. Ordinary quitclaim deed of premises specifying that object is to release premises from incumbrance of mortgage sufficient. (104 Me. 527, 72 A. 491).

Satisfaction and Discharge.

Must discharge mortgage by written discharge acknowledging satisfaction thereof and signed and acknowledged by mortgagee, or mortgagee's duly authorized officer or agent, personal representative or assignee. (T. 33, §§551, 553-A). When recorded, discharge has same effect as release deed. If owner and servicer of mortgage, after full performance of condition of mortgage, fails to record valid and complete release of mortgage within 60 days, mortgage owner and servicer are jointly liable to mortgagor for exemplary damages of $200 per week after expiration of 60 days, up to aggregate maximum of $5,000 for all aggrieved parties or actual loss sustained by aggrieved party, whichever is greater. (T. 33, §551). Owner and servicer also liable for court costs and reasonable attorney's fees in any successful action to enforce liability. With regard to mortgage securing open-ended line of credit, 60 day period begins upon delivery by mortgagor of written statement to terminate line of credit and full payment of balance. (T. 33, §551). All discharges must be recorded by written instrument and acknowledged as required of other instruments to be recorded. No discharges permitted by entry in margin of instrument to be discharged. (T. 33, §551). If mortgagee fails to discharge mortgage on residential, owner-occupied, one to four family dwelling, 30 days after delivery to mortgagee of payment, attorney licensed to practice in Maine may discharge mortgage by executing and recording affidavit in registry of deeds containing specific information. (T. 33, §553-A).

Foreclosure.

Foreclosure of mortgage on real property by possession and sale of property no longer allowed. Foreclosure proceedings by civil action in Superior Court or District Court available. (T. 14, §§6321-6325).

Acceptance by mortgagee of anything of value on account of mortgage debt from mortgagor or one claiming under him, except income from mortgaged premises while in possession, after foreclosure is begun and before expiration of time for redemption constitutes a waiver of foreclosure proceeding unless written agreement to contrary. (T. 14, §6321). With respect to mortgages on mortgagor's primary residence, mortgagee may not accelerate maturity of obligation or otherwise enforce mortgage without first providing notice and 30-day period to cure. (T. 14, §6111). Real estate mortgagee not precluded from foreclosing on mortgage deed even though separate action on note evidencing debt is barred. (800 A.2d 702).

Foreclosure purchaser must be licensed by State and is subject to regulation under Foreclosure Purchasers Act. (T. 32, §§6191-6200).

Sale.

Express provision for “Statutory Power of Sale” may be included or incorporated by reference in mortgages granted by corporations, partnerships, limited liability companies and trusts. (T. 14, §6203-A; T. 33, §501-A). For mortgage executed on or after Oct. 1, 1993, mortgage must state it is given primarily for business, commercial or agricultural purpose for power of sale to be used. (T. 14, §6203-A). Special restrictions if mortgage given by trust. (T. 14, §6203-A).

Deficiency Judgments.

To bring action for deficiency after exercise of power of sale, holder of mortgage must notify mortgagor in writing of intention to foreclose and of liability for deficiency 21 days before date of sale and sign affidavit of mailing of such notice within 30 days after foreclosure sale. (T. 14, §6203-E.). After public sale pursuant to T. 14, §§6321-23, any deficiency shall be assessed against mortgagor and court will issue execution therefore. (T. 14, §6324).

Redemption.

Redemption period for foreclosure by civil action of mortgages executed on or after Oct. 1, 1975 is 90 days from date of judgment of foreclosure and sale. For mortgages executed prior to Oct. 1, 1975, period of redemption is one year from date of judgment. (T. 14, §6322).

Escrow Accounts.

If funds held in escrow by lender for payment of taxes or insurance premiums, lender must pay interest. (T. 9-A, §3-312; T. 9-B, §429). Mortgage deed must contain provisions for payment of interest on escrow accounts if mortgage on one- to four-unit owner-occupied residential property and loan requires payment into escrow account. (T. 33, §504).

Form.

Statutory short form adopted. (T. 33, §§761, 775).

Forms

Mortgage Deed:

A. B. of . . . . County, ..., (being unmarried) for consideration paid, grant to C. D. of . . . .,. . . . . . . County, ..., with mortgage covenants, to secure the payment of . . . . dollars in . . . . years . . . . with . . . . per cent interest per annum, payable in . . . . installments, as provided in . . . . note of even date, the land in . . . .,. . . . . County . . . .

(description and encumbrances, if any)

This mortgage is upon the statutory condition, for any breach of which the mortgagee shall have the remedies provided by law.

E. F., spouse of the Grantor, releases all rights in the premises being conveyed.

Witness . . . . hand and seal this . . . . day of . . . . (here add acknowledgment)

Assignment of Mortgage:

C.D., holder of a mortgage from A.B. to C.D., dated . . . . . ., recorded . . . . in the . . . . County Registry of Deeds, Book . . . . . ., Page . . . . . ., assign said mortgage and the note and claim secured thereby to E.F.

Witness . . . . hand and seal this . . . . day of . . . . (here add acknowledgment)

Partial Release of Mortgage:

C.D., the holder of a mortgage by A.B. to C.D., dated . . . . ., recorded . . . . in the . . . . County Registry of Deeds, Book . . . . ., Page . . . . ., for consideration paid, release to A.B., all interest acquired under said mortgage in the following described portion of the mortgaged premises:

(description)

Witness . . . . hand and seal this . . . . . day of . . . . . (here add acknowledgement)

Discharge of Mortgage:

C.D., holder of a mortgage from A.B. to C.D., dated . . . . ., recorded . . . . in the . . . . . County Registry of Deeds, Book . . . . ., Page . . . . ., acknowledge satisfaction of the same.

Witness . . . . hand and seal this . . . . . . day of . . . . . (here add acknowledgment)

Chattel Mortgages.

See topic 20.01 Chattel Mortgages.

21 PROPERTY

21.01 ABSENTEES:

Care of Property of Absentee.

If a person entitled to or having interest in property in Maine, or to whom debts or obligations are owing from persons within state, has disappeared or absconded from place where he was last known to be, his whereabouts are unknown, and he has no agent in Maine, or if such person has disappeared without providing for his wife and minor children dependent on him for support and it is not known where he is or he is known to be outside of state, receiver may be appointed by probate court to take charge of his property, collect debts due to him, sell, lease or invest his property, pay charges for support of wife and minor children and pay debts of such absentee. (T. 18-A, §§8-101-8-110). If absentee appears within eight years after date of disappearance receiver shall account for and deliver to absentee remainder of property. (T. 18-A, §8-112). Eight years after absentee's disappearance, his interest in property ceases and it must be distributed as though he had then died intestate. (T. 18-A, §§8-112-8-113). If, however, receiver is not appointed within seven years after absentee's disappearance, time limited to accounting for, or for distribution of absentee's property, or for barring actions related thereto, is one year after date of receiver's appointment. (T. 18-A, §8-114).

See also category 13 Estates and Trusts, topic 13.02 Death.

Process Agent.

Model Registered Agents Act has been adopted, effective July 1, 2008. (T. 5, c. 6A, §§101-120-D). Following persons and entities are required to appoint agent for service of process, or are subject to service of process made on state official, as condition to being licensed to do business or appointed in fiduciary capacity: Foreign consumer creditors (T. 9-A, §1-203), out-of-state credit unions with branch in Maine (T. 9-B, §816), foreign corporations (see category 2 Business Organizations, topic 2.03 Corporations) (T. 13-C, §1510-A), domestic limited partnerships and nonresident general partners thereof (T. 31, §§1314-A, 1317-A, 1318), foreign limited partnerships (T. 31, §§494, 1416), domestic limited liability companies and nonresident members or managers thereof (T. 31, §§607-A, 722-A, 723), domestic limited liability partnerships (T. 31, §807-A), foreign limited liability partnerships (T. 31, §§861-A, 862), domestic nonprofit corporations and nonresident directors thereof (T. 13-B, §§304-A, 306-A, 307), foreign nonprofit corporations (T. 13-B, §§1209, 1212-B) foreign fiduciaries (T. 18, §4162), foreign insurance companies, agents, brokers, adjusters and consultants (T. 24-A, §§421, 2104), foreign public accountants (T. 32, §12263), foreign surety companies (T. 24-A, §421), sellers or promoters of business opportunities (T. 32, §4700-A), investment advisers, investment adviser representatives, broker-dealers and sales representatives of securities (T. 32, §10305), employers of transient sellers of consumer merchandise (T. 32, §4689), unit owners subject to Unit Ownership Act (T. 33, §569), nonresident polygraph examiners (T. 32, §7165), foreign electric utilities (T. 35-A, §3140).

Escheat.

Unclaimed estate passes to state. (T. 18-A, §2-105).

Unclaimed Property.

Uniform Unclaimed Property Act (1995 Act) has been adopted, effective July 1, 1998. (T. 33, §§1951-1980). Where Maine law deviates from Uniform Act, Maine comments are provided to explain deviation. Effective July 1, 1998, Maine's prior Unclaimed Property Act, T. 33, §§1801-1875, has been repealed.

See category 13 Estates and Trusts, topic 13.06 Descent and Distribution, subhead Escheat.

In case of partition of real estate, if any interested party has been out of state for one year before action was commenced and does not return before judgment, having no agent therein, court shall appoint agent to act for him. (T. 14, §6505).

Review of Default Judgment Against Absentee.

See category 5 Civil Actions and Procedure, topic 5.15 Judgments.

Executions.

Execution shall not be issued upon default judgment in personal action against absent defendant until one year after entry of judgment unless bond is given. (T. 14, §4701, M.R.C.P. 62).

21.02 ADVERSE POSSESSION:

Acquisition of title through possession of real estate inconsistent with title of another.

Character of Possession.

Possession must be actual, open, notorious, hostile, under claim of right, continuous and exclusive. (T. 14, §§810, 816; 652 A.2d 90). If possession of land by mistake as to boundary line is open and notorious, hostile nature of claim is established if all other elements of adverse possession present. (T. 14, §§810-A; 2006 Me 24, 893 A.2d 599).

Duration of Possession.

20 years. (T. 14, §801). No action may be commenced after 40 years. (T. 14, §815).

Easements.

May acquire by adverse use, but owner can prevent by giving public notice. (T. 14, §812).

Disabilities.

Person who is minor, mentally ill, imprisoned or absent from U.S., or one claiming under him, may bring action within ten years after disability removed. (T. 14, §807).

21.03 [RESERVED]

21.04 CONVEYANCES:

See topic 21.06 Deeds.

21.05 CURTESY:

Curtesy is abolished. (T. 18-A, §2-113).

As to distributive share of surviving spouse in estate of deceased spouse, see category 13 Estates and Trusts, topic 13.06 Descent and Distribution.

21.06 DEEDS:

Execution.

Must be signed and delivered in order to pass title to real estate. Grantee's full mailing address must be included, but error in or omission thereof will not affect validity or recordability of deed. (T. 33, §§456, 457). Instrument to be recorded must include printed or typed name of each party signing, including person taking acknowledgment. (T. 33, §651-A). Witnesses desirable and usual, but not required by statute. Trusts created under Maine State law not recognized as entities capable of holding or conveying title to real property in their own names; rather, real property is deemed received or conveyed by trustee or trustees. (T. 33, §851-A). See topic Real Property for types of estates, see category 14 Family, topics 14.09 Husband and Wife, and Divorce for circumstances in which spouse must join. Seal not required.

Effect of Release.

Deed or other instrument executed after Sept. 18, 1999, that includes following language: “[name] (wife or husband) of said Grantor, joins as Grantor and releases all rights by descent and all other rights” or similar language, within testimonium clause, conveys any and all interest of joining spouse to property described in deed or other instrument, even if joining spouse is not named in granting clause. (T. 33, §722-A).

Recording.

To be valid as against any person other than parties thereto, persons claiming under them or those having actual notice thereof, deed for conveyances of estate in fee simple, fee tail or for life, or leases for more than two years or for an indefinite term must be recorded in registry of deeds for county where land lies. (T. 33, §201).

Deed must be duly acknowledged by at least one grantor or by his attorney executing same to be recorded (T. 33, §203); if grantor dies or leaves state without acknowledging, execution may be proved by subscribing witness to have deed recorded (T. 33, §301). Instrument acknowledged according to Uniform Recognition of Acknowledgments Act accepted. (T. 33, §203).

In all cases, certificate of acknowledgment must be indorsed on or annexed to deed. (T. 33, §306).

Recording Fees.

See category 10 Documents and Records, topic 10.04 Records.

Operation and Effect.

Deeds offered for recording must be accompanied by declaration in duplicate signed by parties or authorized representatives under penalties for perjury and indicating taxpayer identification numbers of grantor and grantee, declaring consideration for property transferred. (T. 36, §4641, et seq.). If transfer declared not subject to tax, must state reason therefor. (See T. 36, §4641-C for specific exemptions.) Declaration must include tax map and parcel number, or indicate no map exists, and evidence of compliance with withholding tax. Certain deeds exempt. (T. 36, §4641-D).

Taxes.

See category 22 Taxation, topic 22.13 Property Taxes, subhead Real Estate Transfer Tax. Exceptions to real estate transfer tax requirement: (1) Conveyances by or to U.S., State of Maine, or any of their instrumentalities, agencies or subdivisions, but only governmental entity exempt (except in case of certain deeds to Department of Transportation from nonprofit land conservation organizations in which case both parties exempt); (2) mortgage or mortgage discharge; (3) partial release of mortgage deed; (4) deed in lieu of foreclosure; (5) deed which, without additional consideration, confirms, corrects, modifies or supplements previously recorded deed; (6) deed dated or acknowledged prior to Oct. 1, 1975 and offered for recording after that date; (7) deed of distribution made pursuant to T. 18-A; (8) deed without actual consideration between husband and wife, or parent and child, and deeds between spouses in divorce proceedings; (9) tax deeds; (10) certain deeds of partition; (11) certain deeds pursuant to mergers; (12) certain deeds between parent corporation and its subsidiary; family corporation and its stockholders; partnership and its partners; or limited liability company and its stockholders; (13) deed pursuant to U.S. Bankruptcy Code; (14) certain deeds to and from trustee of trust; (15) certain deeds to charitable conservation organizations; (16) deed to limited liability company, when grantor or grantee owns interest in limited liability company in same proportion as grantor's or grantee's interest in or ownership of real estate being conveyed; (17) any transfer of real property, if it consists of mere change in identity or form of ownership of entity. (T. 36, §§4641-C, 4641-D).

Forms.

Statutory short forms adopted. (T. 33, §§761-775).

Forms

Warranty Deed:

A. B. of . . . . County, ..., (being unmarried), for consideration paid, grant to C. D. of . . . ., ... County, ..., with Warranty Covenants, ... the land in . . . ., ... County, Maine.

(description and encumbrances, if any)

E. F., spouse of said grantor, releases all rights in the premises being conveyed.

Witness . . . . hand and seal this . . . . day of . . . . (here add acknowledgment)

Quitclaim Deed With Covenant:

A. B. of . . . ., ... County, ..., (being unmarried) for consideration paid, grant to C. D. of . . . ., ... County, ..., with quitclaim covenant the land in . . . ., ... County, ...

(description and encumbrances, if any)

E. F., spouse of said grantor, releases all rights in the premises being conveyed.

Witness . . . . . . hand and seal this . . . . day of . . . . (here add acknowledgment)

Quitclaim Deed Without Covenant or Release Deed:

A. B. of . . . ., ... County, ..., (being unmarried) for consideration paid, release to C. D. of . . . ., ... County, ..., the land in . . . ., ... County, ...

(description)

E. F., spouse of said grantor, releases all rights in the premises being conveyed.

Witness . . . . hand and seal this . . . . day of . . . . (here add acknowledgment)

21.07 [RESERVED]

21.08 DOWER:

Dower is abolished. (T. 18-A, §2-113).

Election.

See category 13 Estates and Trusts, topic 13.06 Descent and Distribution.

21.09 ESCHEAT:

See topic 21.01 Absentees, subhead Escheat; categories 3 Business Regulation and Commerce, topic Banks and Banking, subhead Unclaimed Deposits; Estates and Trusts, topic Descent and Distribution, subhead Escheat.

21.10 LANDLORD AND TENANT:

Tenant entitled to exclusive possession in absence of agreement to contrary. (83 Me. 550, 22 A. 469). In written and oral leases of dwelling unit, landlord deemed to warrant dwelling fit for human habitation. If warranty broken, tenant may file complaint against landlord, containing allegations specified by statute, in District or Superior Court. (T. 14, §6021). If court finds allegations true, it may, in addition to other remedies: (1) order landlord to repair unsafe or unhealthful conditions, (2) order rebate by landlord or deduction from amounts tenant owes of rent paid in excess of fair value of use and occupancy for period beginning with receipt by landlord of actual notice of condition, (3) authorize tenant to vacate temporarily without payment of rent to allow repairs, and (4) enter further orders as court deems necessary; court may not award consequential damages. (T. 14, §6021). Written agreement in which tenant accepts specified conditions for reduction in rent or other fair consideration is binding, but any other agreement by tenant to waive foregoing rights is void. (T. 14, §6021).

Landlord cannot force tenant of dwelling to waive certain rights granted by statute through rules or provisions in lease. Provisions which absolve landlord from liability for negligence, require tenant to pay landlord's legal fees to enforce rental agreement, require tenant to give lien on property or require tenant to acknowledge fairness of agreement or rules, are unenforceable and unfair and deceptive trade practice in violation of T. 5, §207. Applies to rental agreements entered into or renewed on or after Nov. 1, 1991. (T. 10, §9097-A; T. 14, §6030).

Subletting without authority voids lease at option of landlord. (85 A. 404). Landlord may file petition for protection of rental property or tenants from harm posed by tenant. (T. 14, §6030-A).

Landlord or other lessor of residential property with one or more units who repairs, renovates or remodels building built before 1978 must give notice of environmental lead hazard risk 30 days prior to commencing activity (may be waived by posting sign and receiving written waiver from adult tenants). (T. 14, §6030-B).

Landlord of residential property used by tenant or lessee as primary residence must provide standard energy efficiency disclosure statement to prospective tenant or lessee for signature prior to entering rental or lease agreement. (T. 14, §6030-C).

Uniform Commercial Code Art. 2A adopted. (T. 11, §2-1101 et seq.).

Kinds of Tenancy.

Maine recognizes tenancies for term of years, periodic tenancies for month to month or year to year and tenancies at will.

Leases.

No estate in lands greater than a tenancy at will can be created unless in writing. (T. 33, §162). Leases for more than two years or for indefinite period must be acknowledged and recorded in district where land lies to be valid against third persons without actual notice. (T. 33, §201).

Security Deposits.

For residential rental unit may not exceed two months rent. (T. 14, §6032). Landlord may not commingle security deposits with assets and must hold deposits in account beyond claims of creditors. (T. 14, §6038). Landlord must return portion of security deposit due with statement of reasons for any portion retained within time, not to exceed 30 days, specified in written lease or within 21 days after termination of tenancy at will or surrender and acceptance of premises (T. 14, §6033); willful and wrongful retention of security deposit entitles tenant to double amount of withheld deposit plus attorneys' fees and court costs (T. 14, §6034). Landlord may retain security deposit to cover costs of storing and disposing of unclaimed property, nonpayment of rent or nonpayment of utility charges. (T. 14, §6033). Landlord may sell property abandoned by tenant, subject to procedures of T. 14, §6013, apply proceeds to any rental arrearage, damages and costs of storage, and remit balance to State. When landlord's interest in rental unit terminates, must transfer security deposits and supply accounting to successor in interest and provide to tenant notice of transfer, name and address of transferee and copy of accounting provided to transferee, or may return funds to tenant after any lawful deductions. If landlord's interest is terminated by sale, accounting and transfer of funds must occur no later than closing. (T. 14,

§§6035, 6038). Landlord has obligation to mitigate damages caused by defaulting tenant. (T. 14, §6010-A). Exemptions for conflicting provisions in federally guaranteed mortgages and owner-occupied buildings of five or fewer units. (T. 14, §6037).

Landlord must provide tenant with written receipt for each rental payment and each security deposit payment received partially or fully in cash, unless tenancy for dwelling unit in owner-occupied building of five dwelling units or fewer. (T. 14, §§6022, 6023).

Surety Bond in Lieu of Security Deposit.

Residential landlord may offer tenant option of purchasing surety bond in lieu of security deposit, but may not require or be required to consent to tenant purchase of surety bond, subject to similar provisions governing security deposits along with certain notice and claim provisions. (T. 14, §6039).

Recording.

Lease considered recorded for all purposes if memorandum of lease recorded which is executed and acknowledged by one lessor, names all parties to lease, describes property, states date and term and gives any provisions concerning renewals, extensions or options to purchase; need not describe rent. (T. 33, §201). For recording fees see category 10 Documents and Records, topic 10.04 Records.

Rent.

Actions for arrears of rent subject to six-year statute of limitations. (T. 14, §752). Court must deduct from amount of rent due difference between rent and fair value of use and occupancy for period during which landlord fails to remedy condition which renders premises unfit for human habitation if tenant gives written notice of such condition, did not cause condition and rental payments were current when notice given. Rebuttable presumption that rental price is fair value of premises free from condition rendering it unfit for human habitation. (T. 14, §6010). Landlord must mitigate damages upon tenant's default by making reasonable efforts to re-rent. (T. 14, §6010-A). Penalty for late payment of rent for residential unit (more than 15 days past due) limited to 4% of one month's rent and cannot be assessed unless tenant had written notice at lease term commencement. (T. 14, §6028). Can increase rent for residential units only after 30 days' written notice to tenant; cannot waive this requirement. (T. 14, §6015).

Utility may not demand payment from tenant for service to tenant because of landlord's failure to pay for that service and may disconnect service only after affording tenant notice and opportunity to assume payment responsibility. If tenant assumes responsibility and pays for utility services, can deduct amount paid from any rent due landlord. (T. 14, §6024-A; T. 35-A, §706).

Landlord may not charge additional rent or utilities to person providing in-home and community support services to tenant. Landlord may request letter from Department of Health and Human Services to verify tenant's eligibility. (T. 22, §7309).

Lien.

When lease of land made to erect buildings thereon, such buildings and all interests of lessee are subject to lien and liable to be attached for rent due. If attachment made within six months after rent becomes due, effective against any transfer by lessee. (T. 10, §3451).

Termination of Tenancy.

Tenancies at will must be terminated by 30 days written notice by either party, except seven days written notice may be given by landlord where he can show tenant or invitee has caused intentional and substantial damage to premises, permitted nuisance within premises or violated law regarding tenancy, or where payment of rent is seven or more days in arrears. Seven day notice must indicate specific ground claimed for issuing notice and, where rent arrearage is claimed, must state that payment of full amount due before expiration of notice negates notice. (T. 14, §6002). After three good faith attempts to serve tenant, service of seven-day notice can be accomplished by leaving notice at tenant's last and usual place of abode and mailing to tenant's last known address. (T. 14, §6002). Parties may consent to termination on other terms. 30 days notice must be made to expire on rent day unless tenant in arrears. When tenancy terminated, tenant liable to forcible entry and detainer unless has paid, after service of notice, rent that accrued after termination of tenancy. (T. 14, §6002). Tenants holding under lease or contract subject to process of forcible entry and detainer at expiration or forfeiture of term, without notice, if begun within seven days from expiration or forfeiture of term. (T. 14, §6001). Evictions other than by forcible entry and detainer illegal; tenant can recover costs, attorneys fees and greater of actual damages or $250. (T. 14, §6014).

Distress.

No statutory provisions for distress for rent; it has been practically superseded by attachment.

Uniform Residential Landlord and Tenant Act not adopted.

21.11 LEASES:

See topic 21.10 Landlord and Tenant.

21.12 [RESERVED]

21.13 PERPETUITIES:

Common law rule against perpetuities applies, except as modified in certain major respects by T. 33, §§101-106.

Employee trusts removed from the operation of the rules against perpetuities and restraints on alienation. (T. 26, §841). See also category 13 Estates and Trusts, topic 13.11 Trusts.

21.14 PERSONAL PROPERTY:

No statutory provision for tenancy by entirety in personalty. Corporate securities held in name of two or more people as joint tenants or with right of survivorship shall be deemed to be held in estate in joint tenancy as at common law. (T. 33, §901).

21.15 POWERS OF ATTORNEY:

Attorneys in Fact.

No special formalities of execution required.

Deeds or mortgage of real estate may be executed by attorney in fact acting under power of attorney under seal which should be recorded in county in which land is situated.

Uniform Durable Power of Attorney Act.

Adopted with variations. (T. 18-A, §§5-501 to 5-509). Durable financial power of attorney, whereby principal designates another to make decisions concerning principal's financial property, must be notarized and contain specific and extensive disclosures. (T. 18-A, §5-508). Such disclosures, however, are not required with respect to most commercial transactions. Durable health care powers of attorney, whereby principal designates another to make medical and health treatment and care decisions, must be signed by principal, or another at principal's discretion and witnessed by two other individuals and may only be revoked or terminated with prior court approval. (T. 18-A, §5-506). Principal's agent has all rights of principal regarding use and disclosure of individually identifiable health information of principal. (T. 18-A, §5-506[d]).

21.16 REAL PROPERTY:

No estate in lands greater than tenancy at will and no trust in lands can be created unless by written instrument except trusts resulting by implication of law. (T. 33, §§162, 851).

Conveyances not in mortgage and devises of land to two or more persons create estates in common, unless otherwise expressly stipulated. Joint tenancy may be created, but intention must be clearly shown. Deeds naming two or more grantees as joint tenants construed as vesting fee simple estate in them with survivorship. Owner may create joint tenancy between himself and one or more other persons by a conveyance to himself and such persons with appropriate language expressing intent. (T. 33, §159). Person seized of land as tenant in tail may bar entail by conveyance in fee thereby extinguishing any remainder or reversion expectant thereon. (T. 33, §156). Deed of release or quitclaim conveys grantor's estate. (T. 33, §161).

Tenancies by entirety not recognized. (88 Me. 17, 33 A. 652).

Rule in Shelley's Case abolished. (T. 33, §158).

Foreign Conveyances or Encumbrances.

Conveyance or encumbrance executed and acknowledged in conformity with law of state where executed is valid in Maine; see Uniform Recognition of Acknowledgments Act. (T. 4, §§1011-1019).

Condominiums.

Uniform Condominium Act adopted, but numerous variations. (T. 33, §§1601-101—1604-118). For condominiums created prior to 1983, see Unit Ownership Act. (T. 33, §§560-587).

Trespass.

Landowner who intends to prohibit access to his or her land without permission or prohibit access for particular purpose may do so by posting land with paint markings at prominent locations. Prohibition may be depicted by words or symbols. Persons entering property posted in this manner, without permission, are guilty of criminal trespass. (T. 17-A, §§402, 404).

See also topics 21.05 Curtesy, Deeds, Dower, Landlord and Tenant; categories 5 Civil Actions and Procedure, topic Partition; Debtor and Creditor, topic Homesteads; Family, topic Husband and Wife; Mortgages, topic Mortgages of Real Property.

22 TAXATION

22.01 ADMINISTRATION:

Property taxation is dealt with in T. 36, §§201-1611.

State Tax Assessor has general supervision of administration of assessment and taxation laws. (T. 36, §§112, 201, 301). Taxes on real estate and personal property are assessed and collected independently if within city or town and if within unorganized territories by State Bureau of Revenue Services and State Tax Assessor respectively. (T. 36, §§302, 703, 709, 709-A, 801, 1602). Taxes on telecommunications personal property owned or leased by telecommunication business assessed and collected by State Tax Assessor and by municipal assessor for persons not a telecommunications business. (T. 36, §457). Municipalities meeting assessment standards promulgated by State Tax Assessor have option of joining other municipalities in primary assessing area. (T. 36, §303). Assessment is by local boards of assessors, or municipal officers or assessors. (T. 36, §§703, 709, 709-A, 1602). State and county taxes are apportioned among cities and towns and share of state and county tax of each city and town is included in assessment of city or town taxes. (T. 36, §§208, 251-52, 383, 507, 709, 714).

Penalties.

Following penalties imposed under Title 36:

Failure to File Return When Due.

If return filed before or within 30 days after taxpayer receives formal demand that return be filed or if return is not filed but tax due is assessed by assessor before taxpayer receives from assessor formal demand that return be filed, penalty of $25 or 10% of tax due (whichever greater). If return not filed within 30 days after demand, penalty of 100% of tax due. If return not filed and jeopardy assessment issued, penalty of 100% of tax due. (T. 36, §187-B).

False Return.

If return is materially incorrect due to negligence or intentional disregard of law (without intent to defraud), penalty of $25 or 25% of deficiency (whichever greater). If due to fraud with intent to evade tax, penalty of $75 or 75% of deficiency (whichever greater). (T. 36, §187-B).

Failure to Pay.

If taxpayer fails to pay on or before due date any amount shown as tax on any required return, penalty of 1% of unpaid tax for each month during which failure continues up to maximum of 25% of unpaid tax. If taxpayer fails to make and file any required return when due and assessment is made and tax assessed has not been paid by date specified in assessment, penalty of 1% of unpaid tax for each month or fraction of month during which failure continues, calculated retroactively from original due date of unfiled return, up to maximum of 25% of unpaid tax. For failure to pay assessment for which no further review available, penalty of 25% of tax due, if payment not within ten days of demand for payment. (T. 36, §187-B).

Substantial Understatement.

If return results in underpayment of tax, any portion of which is due to “substantial understatement”, (without negligence, intentional disregard of tax laws or fraud), penalty imposed of $5 or 1% of that portion of underpayment (whichever is greater) for each month or fraction of month during which failure to pay that portion of underpayment continues, up to maximum of $25 or 25% (whichever is greater). “Substantial understatement” is defined by statute. Similar penalties apply to request for excessive refund. (T. 36, §187-B).

Insufficient Funds.

Penalty of $20 or 1% of payment amount (whichever greater). (T. 36, §187-B).

Electronic Funds Transfers.

Penalty of lesser of 5% of tax due or $5,000 imposed for failure to remit taxes by electronic funds transfer when required to do so by assessor. (T. 36, §187-B). In addition to particular penalties, State imposes additional interest charge for each month. Penalties waived or abated under some circumstances. (T. 36, §187-B).

22.02 ALCOHOL, BEVERAGES AND TOBACCO TAXES:

Excise Tax on Malt Liquor, Wine and Low-Alcohol Spirits.

Imposed by T. 28-A, §1652.

State Liquor Tax.

Imposed by T. 28-A, §1651.

Cigarette Tax.

Imposed by T. 36, §§4361-4384.

Tobacco Products Tax.

Imposed on tobacco products other than cigarettes by T. 36, §§4401-4404-C.

22.03 BUSINESS TAXES:

Franchise Tax.

Imposed on certain financial institutions (including certain pass-through entities) by T. 36, §§5206-5206-G.

22.04 [RESERVED]

22.05 EMPLOYMENT TAXES:

Unemployment compensation tax termed “contributions”, is imposed on every employer who or which, during current or preceding calendar year, has paid wages of $1,500 or more or has had in employment one or more individuals for some portion of day in each of 20 different weeks. Standard rate of tax is 5.4% of wages paid by him, but rate may be varied in accordance with experience record of employer. “Wages” defined as first $12,000 paid in calendar year to individual for personal services. Employees are not liable for tax and employers may not deduct any part of their own “contributions” from wages. Returns must be made and tax shown thereby paid quarterly to State Bureau of Employment Security. (T. 26, §§1043, 1081, 1221).

22.06 ENVIRONMENTAL TAXES:

Recycling Assistance Fee.

Imposed by T. 36, §4832 on retail sale of new tires and lead-acid batteries.

22.07 ESTATE TAX:

Note.

Estate tax applicable for estate of person whose death occurs after Dec. 31, 2004. (T. 36, §§4061-4079). In certain cases, estates of veterans and armed service personnel, up to specified value, exempt from taxation. (T. 36, §653).

Maine estate tax equal to credit for state death taxes under federal Internal Revenue Code as of Dec. 31, 2000. Thus, for purposes of Maine estate tax, exempt amount is $950,000 in 2005, and $1 million in 2006 and later years. Phase-out of state death tax credit under Economic Growth and Tax Relief Reconciliation Act of 2001 is disregarded. (T. 36, §§4062-4064).

Apportionment Against Inter Vivos Dispositions.

No apportionment statute.

Interstate Co-operation.

Uniform Act on Interstate Arbitration of Death Taxes adopted. (T. 36, §§3911-3924). Uniform Act on Interstate Compromise of Death Taxes adopted. (T. 36, §§3981-3985). Uniform Division of Income for Tax Purposes Act adopted. (T. 36, §§5210-5212).

22.07A EXCISE TAXES:

Maine imposes excise taxes on certain activities, which include following:

Aircraft, House Trailers and Motor Vehicles.

Imposed by T. 36, §§1481-1491.

Commercial Forestry Excise Tax.

Imposed by T. 36, §§2721-2728.

Mining Excise Tax.

Imposed by T. 36, §§2851-2866. Such tax is in lieu of property tax.

Railroad Excise Tax.

Imposed by T. 36, §§2621, 2623-2625.

Watercraft Excise Tax.

Imposed by T. 36, §§1501-1506.

22.08 GASOLINE AND SPECIAL FUELS TAXES:

Gasoline Tax.

Imposed by T. 36, §2901-2913.

Special Fuel Tax.

Imposed by T. 36, §§3201-3219-A.

Refund for Common Carriers.

Persons engaged in furnishing common carrier passenger pursuant to T. 29-A, §552, entitled to certain internal combustion engine fuel tax reimbursement. (T. 36, §§2909, 3215).

22.09 GIFT TAX:

None.

22.10 [RESERVED]

22.11 INCOME TAX:

T. 36, §§5101-5403 imposes an income tax on individuals, trusts and estates and corporations, and franchise tax on financial institutions.

Tax applies to entire taxable income of resident individuals, taxable income of nonresident individuals derived from sources within state, Maine net income of corporations, and Maine net income and Maine assets of financial institutions. Compensation paid by U.S. for service in armed forces of U.S. performed by nonresident does not constitute income derived from sources within state. Taxable income of estates and trusts taxed at rates set for single individuals. (T. 36, §§5111, 5160).

Taxable income of residents is federal adjusted gross income less deductions and exemptions provided and subject to statutory modifications. (T. 36, §§5121, 5122, 5125, 5126). State Tax Assessor has authority to adjust taxpayer's federal taxable income figure for Maine income tax purposes by disallowing deductions taken by taxpayer at federal level. (2003 Me 27, 817 A.2d 862). All resident individuals are entitled to standard deduction tax credit, amount depending on filing status. (T. 36, §5124-A). Resident individuals are allowed personal exemption tax credits for each exemption to which entitled for taxable year for federal tax purposes. Amount subject to annual adjustment. (T. 36, §5126).

Taxes are returned and paid at same time as federal income taxes. Payments are made to State Tax Assessor. (T. 36, §5227).

Minimum tax imposed. (T. 36, §5203-C).

Requirement to pay estimated tax is waived for every person with income tax liability of less than $1,000 for prior or current tax year. (T. 36, §§5228-5234).

Corporate rate assessed against Maine net income is 3.5% for income not over $25,000; $875 plus 7.93% of excess over $25,000 for income $25,000 to $75,000; $4,840 plus 8.33% of excess over $75,000 for income $75,000 to $250,000; and $19,418 plus 8.93% of excess over $250,000 for income $250,000 or more. (T. 36, §5200). Individual tax rate dependent upon filing status. (T. 36, §5111).

Corporate Unitary Income Tax.

See category 2 Business Organizations, topic 2.03 Corporations, subhead Income Tax.

22.12 INHERITANCE TAX:

No longer applicable.

22.12A MINES, MINERALS AND FISHERIES TAXES:

Mahogany Quahog Tax.

Imposed by T. 36, §§4711-4718.

22.12B PRODUCE AND FOOD TAXES:

Blueberry Tax.

Imposed by T. 36, §§4301-4317.

Potato Tax.

Imposed by T. 36, §§4601-4606.

22.1322.15

22.16 PROPERTY TAXES:

Real and Personal Property Taxable.

All real estate and personal property is taxable except as is specifically exempted by law. (T. 36, §§502, 651-656). Personal estate, for purposes of taxation, includes all tangible goods and chattels wheresoever they are and telecommunications personal property is subject to state, but not local tax. (T. 36, §§457, 601). All property not exempt is subject to tax as of each Apr. 1. (T. 36, §502).

Exemptions from taxation with respect to certain classes of property include certain business property placed in service after Apr. 1, 2007, public property, property affected with public use, certain pollution control facilities, public obligations, property used for religious, literary, scientific or benevolent and charitable purposes, property of posts of veteran organizations, American National Red Cross, certain fraternal organizations, chambers of commerce or boards of trade, all items of individually owned personal property (with certain exceptions), household furniture, wearing apparel, tools, musical instruments, etc., domestic animals and fowls, agricultural products, certain property of members of the armed forces in active service, war veterans and their widows or blind persons, mines property in interstate transportation held by common carrier, vessels and pleasure boats, vehicles exempt from excise tax, registered snowmobiles, certain farm machinery, pollution control facilities and stock in trade obtained as trade-in. Excise tax on mining of metallic minerals in lieu of property tax. Various statutory restrictions apply. (T. 36, §§651-656, 691-700-B, 2854).

Industrial inventories, stock in trade, agricultural produce and forest products and livestock exempt from municipal property taxation. Stock in trade includes certain unoccupied manufactured homes. (T. 36, §655).

Reimbursement.

Certain business property placed in service after Apr. 1, 2007 exempt. (T. 36, §§691-700-B). For certain business property placed in service between Apr. 1, 1995 and Apr. 1, 2007 for which taxpayers have been reimbursed under business equipment tax reimbursement program, taxpayers may continue to seek reimbursement from state. Reimbursement made at 100% for first 12 years, then decreased incrementally to 50% for year 18 and subsequent years. Taxpayers may claim reimbursement from state for property taxes paid to local taxing jurisdictions with respect to certain qualified business property used in storefront retail. 100% of tax reimbursed for first 12 years, then decreased incrementally each year until minimum 50% reimbursement reached in year 18 and subsequent years. (T. 36, §§6651-6663).

Assessment.

Real estate is assessed to owner or person in possession thereof on Apr. 1 in place where it is situated. (T. 36, §§502, 553). Real property of unknown owner is assessed as other property, except owner is indicated as “unknown”. (T. 36, §557-A). Abuttors receive copy of notice required to run for three consecutive weeks in newspaper of general circulation in county where property is located, describing property and fact of assessment to unknown owner. (T. 36, §557-A). Forest land may be taxed on basis of potential for annual wood production. (T. 36, §§571-584-A). Where value of recreational use lease of land exceeding 100 acres exceeds value of tree growth extractable on sustained basis, land is not considered used for growth of forest products and is removed from taxation applicable thereto. (T. 36, §574-A). Farms, open spaces and working waterfront land may be taxed in accordance with current use. (T. 36, §§1101-1120). Personal property within state or owned by residents of state and located without state, except in certain specified cases set forth in statute, is assessed to owner in town where owner resides on Apr. 1 (T. 36, §§602, 603). Machinery and other personal property brought into state after Apr. 1 and prior to Dec. 31 by any person upon whom no personal property tax was assessed on Apr. 1

must be taxed as other personal property in town in which used for first time. (T. 36, §611).

Buildings, camper trailers, and mobile homes (except stock in trade) affixed to leased land or land not owned by owner of buildings are considered real estate for purposes of taxation and taxed in place where said land is located. (T. 36, §551).

Before making assessment, assessors may give notice, in writing, by mail or other reasonable means directed to last known address to all persons liable to taxation to furnish lists of all estates, real and personal, of which they were possessed on Apr. 1. If notice is given by mail, failure to make such return precludes right to seek abatement and any appeal unless taxpayer shows that taxpayer was unable to make return at time appointed. (T. 36, §706). Failure to answer proper inquiries as to nature, situation and value of taxable property precludes right to appeal. (T. 36, §706).

Property in unorganized territory of State assessed by Bureau of Revenue Services. (T. 36, §302).

Payment.

Time for payment is set by municipality by meeting. (T. 36, §505). Property taxes generally are payable to particular municipality care of tax collector. (T. 36, §§505, 709, 709-A). Municipalities by meeting may provide discount for early payment. (T. 36, §505).

Professional Assessment Firms.

Guidelines to be established by State Tax Assessor. Each firm must employ at least one certified Maine assessor. (T. 36, §330).

Omitted Assessments and Reassessments.

Whenever within three years from last assessment any estates liable to taxation have been omitted from assessment, or any tax is invalid or void for error in assessment, assessors for time being may, by supplement to invoice and valuation and list of assessments, assess such estates their proportion of tax. Such supplemental assessments must be committed to collector for time being with certificate under hands of assessors stating that they were omitted and that powers in previous warrant are extended thereto, and collector has same power, and is under same obligation to collect them, as if they had been contained in original list; and all assessments are valid, even though by such supplemental assessment whole amount exceeds sum to be assessed by more than 5%. (T. 36, §713). Supplemental assessments also permitted for unorganized territories. (T. 36, §1331).

Review of Assessment.

Abatements may be made by assessors within one year from commitment if on assessor's own initiative or within 185 days upon written application stating grounds, or by municipal officers on written application stating grounds after one year but within three years or on their own initiative, but municipal officers cannot grant abatement for error in valuation. (T. 36, §841). Municipal officers, or State Tax Assessor for unorganized territory may, within three years, abate real and personal taxes for persons who cannot pay due to infirmity or poverty or if death, absence or insolvency make tax uncollectible. Municipal officer and State Tax Assessor may extend three year period for abatement. (T. 36, §841). Written application for abatement is deemed denied within 60 days after filing if no notice of decision issues and taxpayer does not consent in writing to extension of time within that period. (T. 36, §842). Appeal of decision of assessor or deemed denial is to local board of assessment review where municipality has adopted that board or to primary assessing area board of review if primary assessing area has adopted that board. (T. 36, §843). Appeal of decision of local board of assessment review is to Superior Court within 30 days, and in case of deemed denial taxpayer may appeal to Superior

Court within 30 days. (T. 36, §843). With respect to nonresidential property or properties with equalized value of $1,000,000 or greater (either separately or in aggregate) either party may appeal decision of local board of assessment review or primary assessing area board of assessment review to State Board within 60 days or after application is deemed denied. (T. 36, §843).

Unless municipality or primary assessing area has adopted board of assessment review appeal is to county commissioners within 60 days, except owner of nonresidential property with equalized valuation of $1,000,000 or more (either separately or in aggregate) has option to appeal to State Board. (T. 36, §844). County commissioners may establish County Board of Assessment Review to hear all appeals to county commissioners. (T. 36, §844). Appeals are deemed denied when decision is not made within 60 days of date application is filed and applicant has not agreed to delay. (T. 36, §§843, 844). Party may appeal denial to Superior Court in accordance with M.R.Civ.P. 80B. (T. 36, §844).

Appeals with regard to tree growth or farm and open space tax determinations may be made to State Board of Property Tax Review. (T. 36, §§583, 1118). State Board of Property Tax Review must hold hearing de novo for all appeals of assessments involving nonresidential property with value of $1,000,000 or greater (either separately or in aggregate). (T. 36, §273). State Board of Property Tax Review has its own procedural rules. To appeal assessment, taxpayer must first pay amount of taxes equal to taxes paid in preceding tax year (provided that amount does not exceed current amount due) or amount of taxes in current year not in dispute, whichever is greater. Payment requirements do not apply to property valued at less than $500,000. (T. 36, §§843-844).

Lien.

Real estate is subject to a lien to secure payment of all taxes legally assessed on real estate, and such lien takes precedence over all other claims on said real estate and interest therein and continues until said taxes are paid. (T. 36, §552). Personal property is subject to lien to secure payment of all taxes legally assessed on personal property and, when perfected, such lien takes precedence over all other claims on personal property, except in certain circumstances, and continues until taxes paid or lien otherwise terminated by law. (T. 36, §612).

Sale.

In case the tax on real estate remains unpaid on the first Monday in February next following the assessment, the collector must, at 9 a.m. on that day, sell at public auction, to the highest bidder, so much of such real estate or interest therein as is necessary to pay the tax with interest and all charges. Sale must be at office of collector or at place where last preceding annual municipal meeting was held. (T. 36, §§1071-1074).

In case of resident owners, notice of sale may be given by posting notices thereof at least six weeks, and not more than seven weeks, before date of sale. In case of nonresident owners, collector must publish notices in some newspaper published in county where such real estate lies three weeks successively, beginning at least six weeks before date of sale. If no newspaper is published in said county, notices must be published in like manner in the state paper. In all cases, collector must file with municipal clerk a copy of each notice with certificate thereon that he has given notice of intended sale as required by law. Such copy and certificate must be recorded by clerk. (T. 36, §1071).

After land is advertised, and at least ten days before day of sale, collector must notify owner, if resident, or occupant thereof, if any, of time and place of sale by delivering to him in person, or by registered mail with receipt demanded, or leaving at his last and usual place of abode, a written notice signed by him stating time and place of sale and amount of taxes due. In case of nonresident owner, such notice must be sent by mail to the last and usual address, if known to collector, at least ten days before day of sale. (T. 36, §1073).

When real estate is so sold for taxes, collector must, within 30 days after sale, lodge with municipal treasurer: (1) A certificate under oath, designating quantity of land sold, names of owners of each parcel, names of purchasers, and what part of amount due on each parcel was tax and what cost and charges; and (2) a deed to the purchasers of each parcel sold. The treasurer must put such deeds on file in his office and after (but not before) the expiration of two years from day of sale deliver each deed to grantee therein or his heirs, provided owner, mortgagee, or any person in possession or other person legally taxable therefor does not within such time redeem estate. (T. 36, §1076).

Personal property tax liens must be perfected against all lien creditors. Notice of lien need not conform to T. 11, §9-1516. Perfected lien is effective for five years, unless discharged. Generally, municipality and taxpayer have same rights and remedies as secured creditor and debtor, except with regard to T. 11, §§9-616, 1620-22, 1625. Collection procedure is optional and does not affect alternate collection procedures authorized by law. (T. 36, §612).

Redemption.

Any person to whom the right belongs may, at any time within two years from date of sale, redeem any real estate or interest therein sold for taxes by paying into the town treasury, for the purchaser, the full amount certified to be due, with interest on the whole at rate of 8% a year from date of sale. (T. 36, §1078).

Alternative Method of Enforcing Lien.

Officer to whom a tax has been committed for collection, may, after expiration of eight months and within one year of commitment, give to person against whom tax is assessed, or leave at his last and usual place of abode, or send by certified mail, return receipt requested, to his last known address, notice in writing signed by said officer stating amount of tax, describing real estate on which assessed, alleging that lien is claimed and demanding payment of tax within 30 days after service of notice. After expiration of said 30 days and within ten days thereafter said officer must record in registry of deeds of county or registry district where said real estate is situated, certificate signed by him setting forth amount of such tax, description of real estate on which assessed and allegation that lien is claimed on said real estate, that demand for payment of said tax has been made in accordance with statutes, and that said tax remains unpaid. At time of recording certificate, tax collector must file with municipal treasurer true copy of certificate and mail such copy by certified mail, return receipt requested, to each record holder of mortgage on said real estate, addressed to him at his last known address. (T. 36, §942). Special alternative procedures apply to time-share units. (T. 36, §942-A).

Filing of said certificate in registry of deeds creates tax lien mortgage on real estate described therein to town in which real estate is situated, having priority over all other mortgages, liens, attachments and encumbrances of any nature, and giving town all rights usually incident to mortgagee, except right of possession. If taxes, with interest and costs, are not paid within 18 months after filing of certificate, mortgage is deemed to have been foreclosed and right of redemption to have expired. Municipal treasurer shall notify party named in tax lien mortgage not less than 30 nor more than 45 days prior to foreclosing date by certified mail, return receipt requested, of impending automatic foreclosure. (T. 36, §943). If tax, interest and costs are paid within redemption period, mortgage may be discharged in manner provided for discharge of real estate mortgages. (T. 36, §943).

Special provision is made for redemption by the record owner, or the record holder of a mortgage or his assigns, in cases where the aforementioned notice was not given and also for waiver of automatic foreclosure, as provided above, and instituting an action of foreclosure before right of redemption has expired. (T. 36, §§943-945).

Discharge of tax lien given after redemption right expires terminates title derived by municipality one year after recording of such discharge. (T. 36, §943).

Special statutory provisions apply to the assessment and collection of taxes in plantations, unorganized territories and unincorporated places and on wild lands, and with respect to forest land, farm and open space land, aircraft and mobile homes, watercraft and commercial forestry excise tax. (T. 36, §§571-584-A, 1101-1121, 1181-1331, 1481-1491, 1501-1506, 1601-1610, 2721-2728).

Penalties, set forth in T. 36, §§891-1084, include provision for action and attachment by municipality, interest, and arrest and commitment to jail until payment.

Real Estate Transfer Tax.

Grantor and grantee each pay ½ tax upon transfer and receipt of title to real property at rate of $2.20 for each $500 or fractional part thereof, of value of property transferred. Tax applies to transfers of controlling interests in business organizations holding Maine real estate. Certain deeds and transfers exempt. (T. 36, §§4641-A, 4641-4641-N).

22.17 SALES AND USE TAXES:

Sales taxes

Are imposed by T. 36, §§1751-2113. Rate is 7% of value of liquor sold in licensed establishment, rental of living quarters, and prepared food; 10% of value of rental, for period of less than one year, of automobile; and 5% of value of all other tangible personal property. (T. 36, §1811). Value is measured by sale price. (T. 36, §1811). Rental of automobile for one year or more taxed at 5% of sum of (a) total monthly lease payment multiplied by number of payments, (b) amount of equity involved in any trade-in, and (c) value of any cash down payment. (T. 36, §1811). Tax is added to sales price. (T. 36, §1812).

Sales Subject to Tax.

All retail sales of tangible personal property, including certain non-custom computer programs. Sales tax is imposed on only net sales price of motor vehicle, aircraft, watercraft, chain saws, special mobile equipment, trailers or truck campers where sale involves trade-in. (T. 36, §1765).

Exemptions include: sales that Maine is prohibited from taxing by Maine or U.S. Constitution; sales to municipal, state or federal governments or their agencies, if wholly owned by them; food products considered grocery staples (including milk, meat, fruit and others but not including, for example, malt or vinous liquors, soft drinks, dietary substitutes, candy and confections and prepared food; ships' stores; medicines for humans sold on prescription; prosthetic devices, including certain hearing aids and eyeglasses; certain school, youth camp, hospital congregate care facility and nursing home meals; seed, feed, hormones, fertilizer, pesticides, insecticides, rodenticides, fungicides, weed killers, defoliants, litter, and medicines used in agricultural production; bait of commercial fisherman; fuel when used for domestic purposes including coal, oil, gas and first 750 kilowatts per month of electricity; certain motor fuels; sales of water for domestic purposes; sales of all fuel used in burning blueberry fields; sales of fuel and electricity used at manufacturing facility; sale of returnable containers when sold with contents; packaging materials; publications issued at average intervals not exceeding three months; certain sales of automobiles used in driver education programs; certain loaner vehicles; sales of automobiles to amputee veterans; sales or leases of motor vehicles, aircraft, semitrailers, truck bodies, camper trailers, truck campers, and watercraft to nonresidents; sales of certain vehicles purchased or leased by qualifying resident businesses; sales to certain research centers, schools and churches; rental charges by certain camps, schools, hospitals and nursing homes; certain rentals for continuous period of more than 28 days; sales to certain community mental health, mental retardation or substance abuse facilities; sales to incorporated private nonprofit residential child care institutions; sales of funeral services; sales to nonprofit youth organizations whose primary purpose is to provide athletic instruction in nonresidential setting, or to councils and local units of incorporated nonprofit national scouting organizations; certain sales of tangible personal property to construction contractors, which are to be physically incorporated in and become permanent part of real property for sale to any organization or government agency provided exemption under T. 36, §1760; sales to incorporated hospitals, incorporated nonprofit nursing homes and boarding care facilities licensed by Maine Department of Health and Human Services, and nonprofit certified home health care agencies; sales to local branches of incorporated international nonprofit charitable organizations that provide medical supplies and equipment to persons on free loan basis; sales to certain incorporated nonprofit medical clinics; sales to community action agencies; sales to incorporated nonprofit organizations where sole purpose is to fulfill wishes of children with life-threatening diseases when family or guardian is financially unable to do so; sales to emergency shelter and feeding organizations; sales of any water or air pollution control facility; resale of motor vehicles, special mobile equipment, livestock trailers or aircraft or isolated transaction involving sale of same except farm tractors and lumber harvesting vehicles or loaders by owner to corporation, partnership, LLC or LLP in which seller is majority owner; sale of replacement or repair parts of aircraft, used by scheduled airline, regulated by 49 U.S.C. §40101 et seq. and FAA regulations; machinery and equipment for use by purchaser directly and primarily in production of tangible personal property intended to be sold or leased for final use or consumption; machinery and equipment sold as part of sale-leaseback transaction by person that uses machinery or equipment as described in preceding exemption; machinery and equipment used by purchaser directly and exclusively in research and development in experimental or laboratory sense; machinery and equipment for production of digital television broadcasts; machinery and equipment for radio and television broadcasts (purchased after June 30, 2007); sales of machinery, equipment, instruments and supplies for use by purchaser directly and primarily in biotechnology applications; medical equipment and supplies used by diabetics; certain sales through coin operated vending machines; sales of tangible personal property for care of seeing eye dogs; sales of used mobile and modular homes; sales of new mobile and modular homes, exemption limited to 50% of value; sales of property, including automobiles, watercraft and certain aircraft purchased and used by present owner outside state, provided certain conditions are satisfied; residential facilities for medical patients and their families; sales to incorporated, nonprofit volunteer search and rescue organizations; sales of tangible personal property and taxable services by schools and by school-sponsored organizations where profits benefit those schools or organizations or are used for charitable purpose; sales of tangible personal property to incorporated nonprofit monasteries and convents for use in their operation and maintenance; sales to incorporated nonprofit organizations whose primary purpose is to provide support systems for single-parent families; sales to local branches of incorporated nonprofit organizations whose purpose is to construct low-cost housing for low-income people; sales to incorporated nonprofit organizations whose sole purpose is to create and maintain registry of Vietnam veterans; sales to incorporated nonprofit organizations whose primary purposes are to promote public understanding of hearing impairment and to assist hearing-impaired persons by dissemination of information, and referral and coordination of community resources for hearing-impaired; sales to credit unions organized under Maine law; sales to nonprofit ambulance corps and fire departments; sales to regional planning commissions and councils of government; sales of certain instrumentalities of interstate or foreign commerce; sales to incorporated nonprofit historical societies and museums; sales to licensed, incorporated nonprofit nursing schools and day-care centers; sales to certain church affiliated nonprofit residential homes for adults; sales to any nonprofit free public lending library; sales to incorporated nonprofit veterans' memorial cemetery associations; certain sales of railroad track materials; sales of items purchased with federal food stamps or WIC instruments; sales to incorporated nonprofit hospice organizations which provide program for physical and emotional needs of terminally ill patients; sales of self-help literature related to alcoholism or alcoholics anonymous groups; sales of tangible personal property to be physically incorporated in and become part of portable classroom for lease to certain schools; sales to certain educational organizations which provide educational programs designed to teach young people how to make decisions about drugs, alcohol and interpersonal relationships; sales to incorporated nonprofit animal shelters of tangible personal property used in maintenance or operation of those shelters; sales to nonprofit organizations whose primary purpose is to develop housing for low income people; sales of tree seedlings for use in commercial forestry; sales of tangible personal property, other than fuel or electricity, that becomes ingredient or component part of, or that is consumed or destroyed or loses its identity directly and primarily in either production of tangible personal property for later sale or lease, other than lease for use in this state, or production of tangible personal property pursuant to contract with U.S. Government or agency thereof; sales of meals or lodging to employees at their place of employment as credit towards wages; sales to certain nonprofit eye banks; sales of organic bedding materials for farm animals and hay; sale or delivery of kilowatt hours of electricity to net energy billing customers (as defined by Public Utilities Commission) for which no money is paid to electricity provider or to transmission and distribution utility; sales where property delivered to location outside of Maine or to U.S. Postal Service, common carrier or contract carrier hired to deliver property to location outside of Maine; sales of advertising or promotional materials printed on paper and purchased for purpose of subsequently transporting such materials outside state for use by purchaser solely outside state; certain sales of tangible personal property to qualified Pine Tree Development Zone Businesses; sales or leases of certain aircraft; sales of certain property to qualified community wind power generators; qualified snowmobile trail grooming equipment. (T. 36, §1760). Exemptions provided to entity based on charitable, nonprofit or other public purposes apply only if property sold is intended to be used by entity primarily in activity identified by exemption. (T. 36, §1760-C). Certain refunds and reimbursements of sales and use tax also available. (T. 36, §§2012-2019).

When and by Whom Payable.

Tax is levied on consumer. When added to sale price, tax is debt of purchaser to retailer, recoverable in same manner as purchase price. (T. 36, §1753). Tax collected by retailer is held in trust by retailer for State of Maine and is personal debt of retailer to State. (T. 36, §1953). Retailer files report of previous month's sales with State Tax Assessor on or before 15th of each month or with Assessor's permission at other intervals. (T. 36, §1951-A). Tax is due and payable at time of sale. (T. 36, §1952). Tax on sale or use of any vehicle is paid at time and place of registration, except where dealer has collected tax in full. (T. 36, §1952-A).

Use Tax.

Tax at same rate as sales tax on storage, use or other consumption in this state of tangible personal property purchased at retail sale. Person so storing, etc., is liable for tax until paid or until he has taken receipt from seller duly authorized by Assessor showing seller has collected sales or use tax, in which case seller is liable therefor. (T. 36, §§1861-1862).

Special Fuel Tax.

Imposed by T. 36, §§3201-3219-A.

22.17A SERVICE PROVIDER TAX:

Service provider taxes imposed by T. 36, §§2551-2559. Rate is 5% of value. (T. 36, §2552). Tax imposed on extended cable television and satellite services; certain support services; fabrication services; rental of video media and video equipment; rental of furniture, audio media and audio equipment pursuant to rental-purchase agreement as defined in T. 9-A, §11-105; telecommunications services; installation, maintenance or repair of telecommunications equipment; and private nonmedical institution services. (T. 36, §2552). Tax is levy on seller; if included on customer's bill, must be separate line item identified as service provider tax. (T. 36, §2552).

Exemptions provided in T. 36, §2557.

22.18 STAMP AND SEAL TAXES:

Stamp Tax.

None.

22.18A TAX LIENS:

Uniform Federal Lien Registration Act.

Adopted. (T. 33, §§1901-1907). Tax liens governed by T. 36, §§175-A, 552, 612 and other provisions.

23 TRANSPORTATION

23.01 MOTOR VEHICLES:

See T. 29-A.

Secretary of State, State House Station 29, Augusta, ME 04333, has general supervision of motor vehicle laws and regulations.

Vehicle license required annually. Number plates must be displayed front and rear and must be plainly visible and legible. (T. 29-A, §452). Manufacturer or dealer selling motor vehicle may attach to rear plate holder temporary plates good for 14 days or if purchaser is nonresident member of armed services, for 20 days. (T. 29-A, §462). Fuel use identification decals required on vehicles of specified size and use. (T. 29-A, §525).

Sales.

Maximum finance charge on consumer credit sale of motor vehicle sold after Jan. 1, 1994 is 18% per annum. (T. 9-A, §2-201[9-A]). Disclosure rules relative to manufacturer's suggested retail price, transportation charges and any charge for extra services or equipment not included in manufacturer's retail price. (T. 29-A, §953; T. 10, §§1191-1193). Business practices of motor vehicle manufacturers, distributors and dealers regulated. (T. 10, §§1171-1186). Business practices between manufacturer and consumer are governed, in part, by “lemon law”. (T. 10, §§1161-1169). Warranty and disclosure of information (e.g., “substantial collision damage”) required in used car sales. (T. 10, §§1471-1478).

Titles.

Certificate of title required at first registration and every change of registration, except for vehicles that are more than 15 years old. (T. 29-A, §§651-652). Certificate to show: Date issued, owner's name and address, lien holders, title number, description of vehicle (if new) and manufacturer's suggested retail price minus destination charge if used vehicle, manufacturer's suggested retail price if it appeared on original title certificate. (T. 29-A, §658).

Operator's License.

Noncommercial operator's license issued to persons under 65 years of age generally expires on sixth birthday following date of issuance, $30 fee required. Commercial operator's license issued to persons under 65 years of age expires on fifth birthday following date of issuance; $34 fee required. Operator's license issued to person 65 years of age or older expires on fourth birthday following date of issuance; $21 fee required ($28 commercial license). (T. 29-A, §1406). Persons 15 years of age or older may apply for instruction permit except that persons under 18 must complete driver education course. Instruction permit entitles driver to drive motor vehicle for 18 months when accompanied by licensed driver at least 20 years of age who has held valid drivers license for immediately preceding two years. Driver must be accompanied in passenger seat by person licensed to operate that class of vehicle. Persons under 21 cannot apply for license until six months have passed since issuance of instruction permit and person has completed minimum of 35 hours of driving, including five hours of night driving. (T. 29-A, §1304). Driver operating under instruction permit may not operate motor vehicle while using mobile telephone. (T. 29-A, §1304). Persons under 16 years of age not eligible for operator's license, but may apply for special restricted license. (T. 29-A, §1251). See catchline Special Restricted License, infra. Persons under age of 18 may acquire operator's license only upon successful completion of driver education course and examination. (T. 29-A, §1351). Persons of age 16 or over may acquire license on completion of written examination and physical examination demonstrating ability to operate vehicle. (T. 29-A, §§1251, 1301). At time operator first renews license after attaining age of 40 years, must take vision test. Operator must thereafter take vision test every second renewal until reaching 62. After reaching 62, operator must take vision test upon each renewal. (T. 29-A, §1303). Within 30 days of establishing Maine residency, new resident must apply for Maine license. (T. 29-A, §1251). Operators license must be specifically endorsed to permit operation of motorcycles. (T. 29-A, §1254). Reexamination of accident-prone, incompetent or unqualified drivers may be required. (T. 29-A, §§1308-1309). Members of U.S. armed forces on active duty, if otherwise qualified, may without payment of fee acquire license which remains valid until 30 days after discharge or release. (T. 29-A, §1255). Secretary of State may require physical examination by health care professional before issuing or renewing license. (T. 29-A, §1301). Secretary of State may revoke license upon notice that operator has been convicted of certain crimes. (T. 29-A, §2463). Applicant must show evidence of legal presence in U.S. (T. 29-A, §1301).

Special Restricted License.

Persons 15 years of age who complete driver education course may apply for special restrictive license for educational or employment need. (T. 29-A, §1256).

Provisional License.

Original driver's license issued to new applicant 21 years of age or older is provisional license for one year period. If person convicted of motor vehicle violation during provisional license period, mandatory suspension ranging from 30 to 90 days (depending upon whether any, and number of, prior offenses) shall be imposed. (T. 29-A, §2471). License to persons under 18 is intermediate license for 180 days. During 180 day period licensee may not operate motor vehicle between 12 a.m. and 5 a.m., operate motor vehicle while using mobile telephone, or carry passengers other than immediate family members unless accompanied by licensed operator who meets requirements of T. 29-A, §1304(1)(E). (T. 29-A, §1311). License issued to applicant under age of 21 is juvenile provisional license for period of two years following date of issue or until licensee attains age of 21 whichever is later. If person convicted of motor vehicle violation within two years of juvenile provisional license mandatory suspension ranging from 30 to 90 days. Juvenile provisional licensee who operates vehicle with any amount of alcohol in blood is subject to mandatory one year suspension for first offense and two year suspension for second offense. If first offense, license may be restored if one-half of suspension period expired and alcohol and drug program completed. If second offense, must serve full suspension period and complete drug and alcohol program before obtaining new license. Additional 180-day mandatory suspension if passenger was under 21. Persons under 21 must submit to chemical test if probable cause to believe person has operated motor vehicle with any amount of alcohol in blood. Failure to submit to such test carries mandatory 18 month suspension for first refusal and 30 month suspension for second and each subsequent refusal. (T. 29-A, §2472).

Liens.

Security interests in motor vehicles are listed on certificate of title. (T. 29-A, §701).

Identification Marks.

Unlawful to knowingly deal with, conceal or possess motor vehicle from which serial number or other identification has been removed or altered to conceal or misrepresent identity of vehicle. (T. 29-A, §2105). Name of owner or lessee of truck tractors must be displayed thereon in letters not less than 2½" in height. (T. 29-A, §1951).

Operation Prohibited.

By person under age of 21 with any amount of alcohol in blood or whose license has been suspended or revoked. (T. 29-A, §2472).

Size and Weight Limits.

Regulated by T. 29-A passim.

Equipment Required.

Regulated by T. 29-A passim. Child safety seat required for children under 40 pounds. If child between 40 and 80 pounds and under eight years, appropriate federally approved restraint system required; nonprofit, municipal or contracted transportation service providers exempt until Feb. 2005 except operator must ensure child is properly secured in seat belt. If child under 12 years and under 100 pounds, in rear seat if possible. All vehicle occupants must wear seatbelt. (T. 29-A, §2081).

Lights Required.

Regulated by T. 29-A, §§1904-1909, 2067). Motorcycles and motor driven cycles (moped) required to have lighted headlamp when in motion. (T. 29-A, §2062). Headlights must be on any time windshield wipers are in constant use. (T. 29-A, §2067).

Inspection at official inspection stations required annually and vehicle must carry official inspection sticker. Not applicable to vehicles owned and registered in another state, certain vehicles in transit, farm tractors, certain farm trucks, certain experimental motor vehicles, certain low speed vehicles, certain antique motor vehicles and certain commercial trailers and semitrailers. (T. 29-A, §§1751-1770).

Signals for turning, stopping, or decrease of speed given by signal light, mechanical device or hand: (1) Left turn, hand and arm extended horizontally; (2) right turn, hand and arm extended upward; (3) stop or decrease speed, hand and arm extended downward. (T. 29-A, §2071).

Parking.

Motor vehicle must not be parked on traveled portion of any public way when it is practicable to park or leave such vehicle off such way. Vehicle must not be parked on public way, unless at least ten feet on main traveled portion opposite such vehicle is left for free passage, and operator of any approaching vehicle has clear view of way for 300 feet beyond parked vehicle before approaching within 200 feet of such vehicle. Vehicle must not be parked on specific portions of public way that are included in limited access highway. (T. 29-A, §2068). Vehicle parked so as to interfere with snow removal or normal movement of traffic may be towed away at owner's expense. (T. 29-A, §2069).

Abandoned vehicles are regulated by T. 29-A, §§1851-1861. Vehicles considered abandoned if owner or lien holder fails to retrieve vehicle and pay all reasonable charges for towing, storage and authorized repair within seven days of notification by mail or publication.

Ownership of vehicle may pass to person on whose property abandoned vehicle is located. (T. 29-A, §1856). Rebuttable presumption that record owner was person who abandoned vehicle. Vehicle abandonment on public way is traffic infraction with fine of at least $250. (T. 29-A, §1858). Vehicle abandonment on island is Class E crime. (T. 29-A, §1860).

Accidents.

Driver of vehicle involved in accident resulting in personal injury or property damage in apparent amount of $1,000 or more must immediately give notice to state police officer, nearest state police office, sheriff's office, deputy sheriff, office of municipal police department, or municipal police officer. Failure to comply with reporting requirements is grounds for suspension of license and is Class E crime. (T. 29-A, §2251).

Owner's Liability.

No statutory provision, but general rule is that liability of owner must be based on agency or some retention of right of control of automobile. (See definition of owner in T. 29-A, §101.)

Guests.

There is no statute restricting liability for injury to gratuitous guest.

Proof of Financial Responsibility.

Every operator or owner of vehicle except governmental vehicles, dealer vehicles and registered vehicles for hire (T. 29-A, §1601) must maintain insurance or proof of financial responsibility in amount of $50,000 for bodily injury or death to any one person, $100,000 for bodily injury or death to two or more persons in one accident, $25,000 for injury to or destruction of property in one accident and $2,000 per person for medical payments, and must produce evidence of same upon demand to law enforcement officer (T. 29-A, §§1601-1605-A). Law enforcement officers required to demand proof of insurance or financial responsibility from persons stopped for moving violations or involved in accidents. Violation for failure to provide proof of financial responsibility to law enforcement officer dismissed if violator provides proof of insurance or financial responsibility in effect at time of violation prior to date for filing answer to complaint. Violation punishable by fine not less than $100 nor more than $500 and suspension of operator license and motor vehicle registration. (T. 29-A, §1601). Proof of financial responsibility must be required by Secretary of State of any person convicted of violating financial responsibility maintenance requirements. (T. 29-A, §1601[7-A]). Proof may be furnished by: (a) Filing with Secretary of State certificate of insurance company or surety company qualified to do business in this state that it has issued motor vehicle policy or bond carrying coverages as above stated; (b) deposit of money or securities in like amount; (c) in case of corporation, satisfying Secretary of State as to financial responsibility. (T. 29-A, §1605). Secretary of State may waive requirement of filing such proof at any time after three years from date of request for compliance. (T. 29-A, §1602). These provisions apply to nonresidents as well as residents and to accidents in other states by Maine residents. (T. 29-A, §1609). Operating license or registration of persons with certain previous convictions will be suspended until financial responsibility requirements are met. (T. 29-A, §1603).

Insurance.

Compulsory for registration (T. 29-A, §402). See subhead Proof of Financial Responsibility, supra.

Foreign vehicles, duly licensed in home state, are exempt from Maine license requirements, provided that no vehicle operated commercially at site in Maine or used in intrastate transport of persons, merchandise or materials may be exempt without written reciprocity agreement. (T. 29-A, §109). Nonresident-owned semitrailers, drawn by Maine registered power units, are allowed in intrastate commerce without Maine registration or reciprocity agreement. (T. 29-A, §109). Reciprocal and apportioned registrations authorized. (T. 29-A, §157). Within 30 days of establishing Maine residency, new resident must apply for Maine registration. (T. 29-A, §351).

Motor trucks or trailers traveling only in interstate commerce and owned in a state wherein an excise tax shall have been paid on said vehicle, which state grants to Maine-owned trucks or trailers an exemption, are exempt from excise taxes levied by this state. (T. 36, §1483).

International Registration Plan.

Maine is member of International Registration Plan. (T. 29-A, §§531-532).

Driver License Compact.

Maine is party state to Driver License Compact. (T. 29-A, §§1451-1471).

Nonresident Operator.

Same reciprocal provision as apply to foreign vehicles.

Action against nonresident arising out of operation of vehicle or aircraft in state may be commenced by service of process on Secretary of State. Notice of such service and copy of process must be sent to defendant by registered mail. (T. 29-A, §108).

Direct Actions.

No provision for direct actions against insurer.

Motor Vehicle Carriers.

Motor vehicles carrying passengers for hire or transporting freight, merchandise or household goods for hire within State must obtain operating authority license from Secretary of State. Vehicles used primarily for transportation of passengers for hire need not obtain separate license as freight or merchandise carrier. $25 fee must accompany permit application. (T. 29-A, §552). Motor vehicles used for conveyance of passengers and interchangeably for conveyance of passengers and property shall pay $35 fee. (T. 29-A, §501). Certain combination vehicles must obtain general commodity permits from Secretary of State. (T. 29-A, §2354). Motor vehicles transporting freight, merchandise or household goods must also display identification device prescribed by Secretary of State. Annual fee for such device, $8. (T. 29-A, §553). Motor vehicles required to be registered for rent, lease or livery must obtain insurance or indemnity bond, or provide evidence of self-insurance. Persons violating these provisions guilty of traffic infraction. (T. 29-A, §1612). Certain motor vehicles transporting freight or merchandise for hire are exempt from permit and vehicle identification requirements. (T. 29-A, §556). Transportation of hazardous materials is regulated. (T. 25, §§2102-A—2106-A; T. 29-A, §2076). Operating vehicle in excess of its registered weight is Class E crime, penalty imposed. (T. 29-A, §2356).

Motor Vehicle Taxes.

Sales and use tax, if applicable, and local excise tax must be paid prior to registration of vehicle. (T. 29-A, §409; T. 36, §1486).

Registration Fees.

Regulated by T. 29-A, §§470, 501.

Gasoline Tax.

See category 22 Taxation, topic 22.08 Gasoline and Special Fuels Taxes.

Lemon Law.

See category 3 Business Regulation and Commerce, topic 3.10 Consumer Protection, subhead Warranties on New Motor Vehicles.

23.01A COMMERCIAL CODE FORMS:

See Part III, Uniform and Model Acts, Commercial Code Amendments for National Article 9 Forms.

1

MARYLAND LAW DIGEST

—Scope —

Revised for 2010 edition by

VENABLE LLP, of Baltimore.

(References to numbered articles, unless otherwise indicated, are to Michie's Code. Beginning at First Extraordinary Session in 1973, Maryland General Assembly has proceeded to recodify state law into separate subject matter codes. As of close of 2008 legislative session, there had been enacted following separate codes: Agriculture, Business Occupations and Professions, Business Regulations, Commercial Law, Constitutions, Corporations and Associations, Correctional Services, Courts and Judicial Proceedings, Criminal Law, Criminal Procedure, Economic Development, Education, Election Law, Environment, Estates and Trusts, Family Law, Financial Institutions, Health-General, Health Occupations, Insurance, Labor and Employment, Natural Resources, Public Safety, Public Utility Companies, Real Property, State Finance and Procurement, State Government, State Personnel and Pensions, Tax-General, Tax-Property and Transportation. These codes are cited herein as “agric. art.,” “bus. occ. art.,” “bus. reg. art.,” “comm. law art.,” “const. art.,” “corps. art.,” “corr. serv. art.,” “courts art.,” “crim. law art.,” “crim. proc. art.,” "econ. dev. art.," “ed. art.,” “elec. law art.,” “env. art.,” “est. & tr. art.,” “fam. law art.,” “fin. inst. art.,” “health-gen. art.,” “health occ. art.,” “ins. art.,” “lab. emp. art.,” “nat. res. art.,” “pub. saf. art.,” “pub. util. comp. art.,” “real prop. art.,” “state fin. and proc. art.”, “st. gov't art.,” “st. pers. and pens. art.,” “tax-gen. art.”, “tax-prop. art.” and “trans. art.” They are being published by Michie Co. as separate volumes, superseding 1957 Edition of Annotated Code of Maryland. “R. P.” indicates Maryland Rules of Procedure (officially cited “Md. Rules”). [See category 5 Civil Actions and Procedure, topic Practice herein.] “Comar” indicates Code of Maryland Regulations. R. Prof. Con. indicates Rules of Professional Conduct as adopted by Court of Appeals. Session laws are cited by year and chapter number. Parallel citations to Atlantic Reporter begin with 64 Md.)

Note: This revision covers all legislation signed by Governor through July 1, 2009. Legislature meets annually for no longer than 90 days, beginning second Wed. in Jan., and by three-fifths vote may extend session not more than 30 days.

1 INTRODUCTION

1.01 GOVERNMENT AND LEGAL SYSTEM:

The State of Maryland is a constituent state of the United States of America. For further discussion of the U.S. federal system, see Introduction to the Federal Government of the United States at the beginning of this volume. A great many laws are promulgated by the federal government of the United States and are not reflected in the topics below. See the Introduction to this volume for references to the federal law topics covered.

Like all but one of the United States, Maryland has a common law legal system, with roots in English common law. For information on the courts and legislature of Maryland, see category 6 Courts and Legislature.

1.02 [RESERVED]

1.03 HOLIDAYS:

Legal holidays are Jan. 1, Jan. 15 (unless U.S. Congress designates another day for observance of Martin Luther King, Jr.'s Birthday), Feb. 12, 3d Mon. in Feb., Mar. 25, Good Friday, May 30, July 4, 1st Mon. in Sept., Sept. 12, Oct. 12, statewide general election days, Nov. 11, 4th Thurs. in Nov., Fri. after Thanksgiving Day, Dec. 25, special days appointed by Governor or President. (art. 1, § 27). Banking institutions may elect to remain open for business on Feb. 12, Mar. 25, Sept. 12, election days or specially proclaimed holidays. If state and federal governments observe legal holidays on different dates, bank may observe either or both. (fin. inst. art. § 5-705).

Banks may elect to remain closed on some or all Sats. (fin. inst. art. § 5-706).

Holiday Falling on Saturday.

For state employees, if holiday falls on Sat., preceding Fri. is holiday. (st. pers. and pens. art. § 9-204).

Holiday Falling on Sunday.

If holiday falls on Sun., following Mon. is holiday. (art. 1, § 27).

Legality of Transactions on Saturdays, Sundays and Holidays.

Uniform Commercial Code governs effect of holiday on commercial paper. (comm. law art. tits. 3 and 4). Acts done on holidays are not void. (85 Md. 547, 37 A. 222). Post-1967 contracts made on Sun. in Wicomico County are enforceable. (bus. reg. art. § 18-202). As to pre-1967 Sun. contracts, see 253 Md. 451, 253 A.2d 353.

For effect of holiday on computation of time, see category 5 Civil Actions and Procedure, topic 5.17 Pleading, subhead Time.

1.04 OFFICE HOURS AND TIME ZONE:

Maryland is in the Eastern (GMT -05:00) time zone. Office hours are generally from 9 a.m. to 5 p.m.

2 BUSINESS ORGANIZATIONS

2.01 AGENCY:

Common law rules apply to relation of principal and agent in absence of legislation.

For requirement that certificate be filed by agent or other person doing business under name other than his own, see category 17 Intellectual Property, topic 17.01 Trademarks and

Tradenames.

2.02 ASSOCIATIONS:

Formation.

Association is formed by articles of association, which is private compact between parties.

Rights and Powers.

Substantially same as those of corporation.

Liabilities.

Substantially same as those of corporation. (177 Md. 333, 9 A.2d 755). Money judgment is enforceable only against assets of association, not against assets of individual members. (courts art. §§ 11-105).

Professional Associations.

See topic 2.03 Corporations, subhead Professional Corporations.

Actions.

Unincorporated association or joint stock company having recognized group name may sue or be sued in such name in action affecting common property, rights and liabilities. No such action abates because of change in membership or dissolution. (courts art. § 6-406). Creditor of person engaged in mercantile, trading, or manufacturing business as agent or doing business or trading under any designation, title, or name other than person's own name who fails to file certificate required under § 1-406 of corp. & assoc. article, may bring action against person or name, title, or designation under which business is conducted and service on person shall be valid. (courts art. § 6-406.1). Associations and joint stock companies are sued, and process is served on them, under statutes relating to corporations. Judgment is enforceable only against assets of association, not against assets of individual member or shareholder. (courts art. § 11-105). See topic 2.03 Corporations; category 5 Civil Actions and Procedure, topics 5.20 Process, 5.26 Venue.

Dissolution.

No special provision.

Real Estate Investment Trusts.

See topic 2.04 Joint Stock Companies.

Limited Liability Companies.

See topic 2.03 Corporations.

2.03 CORPORATIONS:

Revision Commissions which undertook revision of Md. Corporation Law, subsequently enacted in 1951 and 1967, considered Model Business Corporation Act as proposed by Committee on Corporate Laws of Section of Corporation, Banking and Business Law of American Bar Association in 1950 and adopted (albeit in every instance with changes) a few details suggested by that Model Act; Md. General Corporation Law is, however, generally and substantially divergent from Model Act. Concept of corporate “distribution” as defined in § 1.40(6) of Revised Model Act has been substantially adopted in Md.

Law was substantially reorganized in 1975 recodification, effective July 1, 1975. References are to Corporations and Associations Article of Code unless otherwise indicated.

General Supervision.

State Department of Assessments and Taxation, 301 W. Preston St., Baltimore 21201, has general charge of corporations. For charter information, call (410) 767-1340. Charter information and other public corporate records can also be accessed at Department's website www.dat.state.md.us. Requests can also be emailed to charthelp@dat.state.md.us.

Purposes.

Generally, corporation may be formed for any one or more lawful purposes. If purpose makes corporation subject to special provision of law, it must comply therewith. (§ 2-101).

Name must indicate corporate status, as by containing word “company,” “corporation,” “incorporated” or “limited,” or abbreviation of one of such words; it must not contain word which indicates organization for purpose not contained in charter; it must not be same as or misleadingly similar to name of another domestic corporation, limited partnership, limited liability partnership, or limited liability company or registered or qualified foreign corporation, limited partnership, limited liability partnership, or limited liability company, or as name then reserved or registered with Dep't of Assessments and Taxation. (§ 1-502–505). Foreign corporation with name that is same or misleadingly similar to name of Md. corporation or one registered or qualified to do business in Md. may register or qualify and transact business under disclosed assumed name. (§ 2-106). Availability of name may be ascertained by inquiry to Dep't of Assessments and Taxation. If several names are to be checked, inquiry should be in writing.

Exclusive right to use of specified name may be reserved by person intending to organize Md. corporation, by Md. corporation proposing to change name, by foreign corporation intending to register or qualify to do business in Md., or by registered or qualified foreign corporation proposing to change name. Reservation is made by filing signed application and paying $25 fee to Dep't of Assessments and Taxation. Reservation lasts for 30 days and may be renewed or transferred (by filing notice of transfer executed by applicant). (§§ 1-505, 1-203). Corporation of another state may register its name, so long as it is not same or misleadingly similar to name of Md. corporation, limited partnership, limited liability partnership, or limited liability company or registered or qualified foreign corporation, limited partnership, limited liability partnership, or limited liability company with name already reserved or registered, by filing application and certificate of good standing in home state and paying $100 fee to Dep't of Assessments and Taxation. Registration is effective until close of calendar year and may be renewed annually by application filed with $100 fee between Oct. 1 and Dec. 31. (§§ 7-101, 1-506, 1-203). Tradenames “other than the person's own name” must be registered with Dep't. of Assessments and Taxation prior to commencement of operation of business. (§ 1, subtitle 5).

Term of Corporate Existence.

Perpetual unless otherwise provided by law or by charter. (§ 2-103). If existence is limited, corporation must comply with § 3-519 before existence expires.

Incorporators.

Any one or more adult individuals who need not be residents of state. (§ 2-102[a]).

Articles of Incorporation.

Articles must be signed by incorporators, either acknowledged before notary public or contain statement that incorporators acknowledge articles to be their act, and must include: (1) Name and address of each incorporator and statement that he is 18 or older and is forming corporation under general laws of state of Md.; (2) name of proposed corporation; (3) purposes for which corporation is formed or statement that corporation may engage in any lawful business or other activity; (4) address of principal office of corporation; (5) name and address of resident agent; (6) total number authorized shares, number and par value of shares each class or statement as to no par, aggregate par value of all shares of all classes having par value; (7) if shares divided into classes, description of each class with preferences, conversion and other rights, voting powers, restrictions, limitations as to dividends, qualifications and terms and conditions of redemption of each class; (8) number of directors and names of those who will act until successors are elected and qualify. Articles may include: (1) Any lawful provision defining, limiting and regulating powers of corporation, directors and stockholders or holders of any class of securities; (2) lawful restrictions upon transferability of shares of any class; (3) any provision authorized to be included in bylaws; (4) any provision which requires for any purpose greater proportion of votes than otherwise required by law; (5) any provision which requires for any purpose lesser proportion of votes than otherwise required by law, but not less than majority of votes entitled to be cast on matter; (6) provision which divides directors into classes and specifies terms; (7) provision for cumulative voting; (8) provision which varies in accordance with § 2-405.2(a) standards for liability of directors and officers of corporation for money damages; (9) provision allowing board to consider effects of potential acquisition of control on stockholders, employees, suppliers, customers, creditors and communities in which corporation has offices or establishments. (§§ 2-102[a], 2-104, 1-302[a]). Pursuant to §§ 1-208 and 2-405.3, any entity required to maintain resident agent must first obtain such person's written consent and file such consent with Department of Assessments and Taxation.

Filing of Articles.

Articles must be filed for record with Dep't of Assessments and Taxation. (§ 2-102). When Dep't accepts charter document it endorses date and time of acceptance, records document in its own records and issues certificate acknowledging acceptance and date and time thereof. (§ 1-202). Filings may be made by “facsimile device” except where sum of recordation and transfer taxes and filing fees exceeds $500. (§ 1-201). Fees and taxes must be paid by VISA or MASTERCARD when filing by fax. Dep't of Assessments and Taxation fax number is (410) 333-7097. Standard form of fax cover sheet available on request. Fax filings considered expedited service and require additional fees.

Errors in documents (including errors in execution) filed with Dep't of Assessments and Taxation may be corrected by filing certificate of correction identifying document by title, parties' names, date filed, and identifying error. Certificate of correction may not: (1) Alter board or stockholders resolution; (2) effect change that fails to comply with requirements of Md. General Corporation Law at time document to be corrected was filed; (3) change effective date of document; (4) alter any right or liability accrued before filing of certificate of correction, except those existing because of error when there has been no rightful and detrimental reliance on original document. Certificate of correction must be executed in same manner as document to be corrected is required to be executed, except that certificate of correction to articles of incorporation must be executed by incorporator or in manner provided in § 1-301. (§ 1-207).

Incorporation Tax or Fee.

Organization and capitalization fee payable by every domestic corporation (except those specifically mentioned below), at or before time of incorporation, at rates based on authorized capital stock, as follows: Not over $100,000, $20; between $100,000 and $1,000,000, $20 plus $1 for each $5,000 or fraction thereof over $100,000; between $1,000,000 and $2,000,000, $200 plus $10 for each $100,000 or fraction thereof over $1,000,000; between $2,000,000 and $5,000,000, $300 plus $15 for each $500,000 or fraction thereof over $2,000,000; over $5,000,000, $390 plus $20 for each $1,000,000 or fraction thereof over $5,000,000. Stock without par valued at $20 per share for purpose of organization and capitalization fee. Same rates apply in case of increase of capital stock, including increase through merger or consolidation. Minimum tax in case of merger or consolidation is $20. Organization and capitalization fee on corporations without capital stock, savings and loan associations and credit unions is $20. (§ 1-204). Fee payable to Dep't. of Assessments and Taxation.

Filing Fees.

Recording fee of $100 must be paid to Dep't of Assessments and Taxation at time of filing articles of incorporation. Not-for-profit entities must pay $150 non-refundable processing fee; $50 of $150 fee is credited to Maryland Not-For-Profit Development Center Program Fund. (econ. dev. art. §§ 1-203;5-1204). Filing fees for other documents governed by § 1-203. Processing articles, filed in person on expedited basis requires additional filing fee of $50. If certified copy of articles desired, fee is $20 for certification and $1 per page for each duplicate certified copy made at same time, fee is $1 per page for copy of any other paper recorded. Certified copies requested on expedited basis require additional fee of $20 per copy. Recording any document on expedited basis, including financing statements, is additional $50 fee. (§ 1-203). Filings by fax machine (see subhead Filing of Articles, supra) subject to regular fees plus charge for expedited basis.

License to Do Business.

Corporations as such do not require license to do business other than certificate of acceptance of charter or qualification as foreign corporation. License for type of business may be required. See subhead Filing of Articles, supra.

Organization.

Directors named in charter to act until first annual meeting hold organization meeting to adopt bylaws, elect officers and transact other business. (§ 2-109).

Paid-In Capital Requirements.

No requirement that any part of capital be paid in before organization or commencing business.

Amendment of Articles.

Procedure for amendment of articles of incorporation where stock is outstanding or subscribed for is for directors to pass resolution declaring amendment advisable and to call meeting of stockholders, who must approve same by affirmative vote of two-thirds of votes entitled to be cast on matter. (§§ 2-604, 2-104[b][5]). Articles of amendment must then be executed on behalf of corporation (see § 1-301) and filed with Dep't of Assessments and Taxation, and recording fee of $100 (and capitalization fee if authorized capital is increased) must be paid. (§§ 2-610, 1-203). Effectiveness of articles of amendment can be postponed for up to 30 days after filing and acceptance. (§§ 2-610.1, 2-611). For contents of articles of amendment, see § 2-607.

In case of non-stock corporation, charter or bylaws may provide for approval of amendment by any number of members. (§ 5-202[b][6]).

In case of stock corporation, if there are no shares outstanding or subscribed for entitled to vote, prior to first meeting incorporators may file amended charter; at or after first meeting, directors may amend. (§ 2-603). Unless prohibited in charter by reference to § 2-605, directors, without shareholder approval, may change corporate name or name or other designation or par value of any class or series of its stock and aggregate par value of its stock. (§ 2-605). Proposed amendment may be abandoned before effective date by majority of board and by notice to Dep't of Assessments and Taxation (if articles of amendment have been filed). (§ 2-612).

Increase or Decrease of Authorized Capital.

Authorized capital stock may be increased or decreased by articles of amendment adopted as outlined in preceding paragraphs with certain additional information. (§ 2-602[b]). Shares acquired by corporation, that are shares subject to redemption or convertible shares, are retired automatically and assume status of authorized but unissued stock. (§ 2-310). Open-end investment company, if authorized by charter, may increase authorized capital by action of directors and by filing articles supplementary with Dep't of Assessments and Taxation. (§§ 2-105[c]; 2-208.1).

Bylaws.

Every corporation must have bylaws for regulating government of corporation and for administration of its affairs. Bylaws may contain anything not inconsistent with law or charter. (§ 2-110). After organization meeting of board of directors, power to make, alter or repeal bylaws is vested in stockholders except to extent such power is vested in directors by charter or bylaws. (§ 2-109[b]).

Corporate Seal.

See category 10 Documents and Records, topic 10.05 Seals, subhead Corporate Seal.

Stock.

Corporation may create one or more classes of stock, with or without par value, and with such preferences, dividends, rights of redemption, voting powers, restrictions and qualifications as are deemed desirable. (§ 2-105).

Stock Certificates.

Each stockholder is entitled to certificate signed by chairman of board, president or vice-president and by secretary, assistant secretary, treasurer or assistant treasurer. It may but need not be sealed with corporate seal. Signatures may be manual or facsimile, and seal may be facsimile or other form. Certificate must state name of corporation, name of stockholder and class and number of shares represented. If more than one class of stock authorized, certificate must contain full statement or summary of designations and any preferences, conversion and other rights, voting powers, restrictions, limitations as to dividends, qualifications, and terms and conditions of redemption of each class (and differences between rights and preferences of series, if any, of preferred or special class) or state that corporation will furnish such information to any stockholder on request and without charge. (§ 2-210). For uncertificated shares, see subhead Stockholders, infra. Future services or obligation to pay may constitute payment for stock, convertible securities, warrants, or option. (§ 2-206). Stock certificate may not be issued until stock is fully paid. (§ 2-210). Shares issued for future services, labor, or payment may be escrowed or transfer may be restricted in other ways until performance. If there is no performance, shares may be cancelled in whole or in part. (§ 2-206). For uncertificated shares, see subhead Stockholders, infra.

Issuance of Stock.

Corporation may generally issue stock or securities convertible into stock that are authorized by charter, if issuance does not violate charter or bylaws. (§§ 2-201, 2-204[a]). When stock is outstanding, directors may not issue additional stock or convertible securities unless: (1) Charter permits directors to authorize issuance; (2) charter does not require stockholder approval and actual value of consideration received is at least equal to par or (in case of nonpar stock) stated capital for outstanding shares of same class or (in case of convertible securities) par or stated capital of stock which will result from conversion (if greater than par, stated capital or principal amount of convertible securities); or (3) issuance is submitted to and approved at meeting of stockholders; but issuance of stock as stock dividend and issuance as part of reclassification of stock or of consolidation or merger are excepted. (§ 2-204[b]-[e]). Before issuance, directors must, with certain exceptions, adopt resolution authorizing issuance, setting minimum consideration or formula for ascertainment thereof, describing any non-money consideration and stating its actual value or value below which it will not fall (which value is conclusive absent actual fraud). Stock so authorized may be issued as fully paid and nonassessable, even if value of consideration is less than par (stock may be issued without consideration). (§ 2-203).

Transfer of Stock.

Uniform Commercial Code adopted. (comm. law art. tit. 8). See category 3 Business Regulation and Commerce, topic 3.09 Commercial Code.

Record date for ownership of stock for fixing dividend, voting or other rights may be fixed by directors unless bylaws provide otherwise. Date shall be within 90 days of date of action, payment or allotment and, in case of stockholders' meeting, not less than ten days prior to meeting. Books may be closed against transfers for period not longer than 20 days preceding meeting of stockholders, dividend payment date or other action; and, in case of stockholders' meeting, closing must be at least ten days before date of meeting. If record date not set and transfer books not closed, record date for notice of or voting at stockholders' meeting is later of close of business on day notice mailed or 30th day before meeting; and record date for dividend or allotment is closing on day of declaratory resolution, provided payment may not be made more than 60 days thereafter. For adjourned meetings, see subhead Stockholders' Meetings, infra. (§ 2-511).

As to special provisions relating to transfer of stock of close corporations, see subhead Close Corporations, infra.

Uniform Securities Ownership by Minors Act not adopted.

Uniform Simplification of Fiduciary Security Transfers Act adopted. (est. & tr. art. §§ 15-301 to 15-311).

Stock Transfer Tax.

None.

Stockholders.

Absent charter or bylaw provision to contrary, corporation may authorize issuance of shares without certificates, provided stockholders upon request are sent written statement without charge containing information that must be placed on certificate pursuant to § 2-211. (§ 2-210[c]). Otherwise, every stockholder has right to stock certificate (§ 2-210), right to inspect bylaws, minutes of stockholders' meeting, any voting trust agreement deposited with corporation at its principal office in accordance with § 2-510(2) on file and annual statement of corporation, right also (unless corporation is open-end investment company) to obtain statement of all securities issued during 12 months preceding request (§ 2-512), and right to elect directors, adopt bylaws and all such other rights reserved to stockholders by charter or by statute or generally accorded to stockholders. Stockholders holding 5% of any class of stock for period of six months have right to inspect and copy stock ledger and books of account and to demand statement of affairs. (§ 2-513).

If authorized by charter or bylaws, board may, by resolution, adopt procedure permitting beneficial owner of stock to elect, by certification, treatment as record owner. Resolution must specify certain information, including class of shares affected, form and effect of certification, time limit for certification, if any, plus any other desirable provision. (§ 2-514).

For corporation incorporated on or after Oct. 1, 1995, unless charter provides otherwise, stockholder does not have preemptive rights with respect to: (1) Stock issued at initiation of enterprise; (2) stock issued for fair value in exchange for non-money consideration; (3) stock offered to stockholders and unsubscribed for; (4) treasury stock sold for fair value; (5) stock issued under articles of merger; (6) non-voting stock issued for fair value; (7) stock issued to officer or employee after two-thirds vote of stockholders; and (8) other issuance where preemptive rights impracticable. (§ 2-205[a]). Unless charter expressly grants such rights, stockholder does not have any preemptive right to subscribe to any additional issue of stock or security convertible into additional issue of stock. (§ 2-205[a]). For corporation incorporated before Oct. 1, 1995, stockholder has preemptive rights unless expressly changed or terminated by charter amendment (§ 2-205[b]). If stockholder is granted preemptive right, he or she may waive such right and, if in writing, such waiver is irrevocable even though not supported by consideration. (§ 2-205[c]).

Md. corporation operating under federal or state license may limit or restrict transferability of capital stock to, and ownership by, aliens and may restrict alien's right to vote stock when statute granting license limits ownership or control by aliens. (§ 5-703[b]).

Stockholders' Liabilities.

Stockholder who knowingly receives illegal distribution is liable for contribution to directors who are liable to corporation for that distribution. (§ 2-312[b]).

Stockholders' Meetings.

Unless charter provides otherwise meetings held at time or in manner and place specified in bylaws or fixed by directors pursuant to bylaws. If bylaws permit, annual meeting may be set by directors on any day within 31 day period specified in bylaws. At least ten days' notice to stockholders necessary. Must have annual meeting and such special meetings as president or majority of directors or other specified persons may call. Meetings may be held anywhere in U.S. or by means of remote communication. (§§ 2-501 to 2-504). If charter or bylaws so provide, annual meeting not required of corporation registered under Investment Company Act of 1940 unless election of directors by stockholders is required by that Act. (§ 2-501). If registered investment company is required to have meeting it must be held within 120 days of event requiring meeting under Investment Company Act of 1940, and special meeting called for that purpose is deemed annual meeting. (§ 2-501). Informal action by unanimous consent of stockholders is permitted, if consent is given in writing or by electronic transmission by each stockholder entitled to vote on matter and is filed in paper or electronic form with records of stockholders' meetings. (§ 2-505). Unless charter requires otherwise, holders of any class of stock, including common stock, entitled to vote generally in election of directors, may take action or consent to any action by delivering consent in writing or by electronic transmission of stockholders entitled to cast not less than minimum number of votes that would be necessary to authorize or take action at stockholders' meeting if corporation gives notice of action to each stockholder not later than ten days after effective time or date of action. (§ 2-505[b]). Meeting convened on date announced may be adjourned from time to time without further notice to date not more than 120 days after original record date. (§ 2-511[d]). Failure to hold annual meeting does not invalidate corporate existence or affect any otherwise valid corporate act. (§ 2-501).

Voting.

Each share entitled to one vote unless charter otherwise provides. (§ 2-507[a]). Fractional shares and scrip permitted. (§ 2-214). Cumulative voting in election of directors may be authorized in charter. (§ 2-104[b][7]). In absence of specific provision of law or charter, quorum requires presence in person or by proxy of majority of shares outstanding and entitled to be cast and majority of votes cast is sufficient to approve matter. (§ 2-506[a]). Corporations registered under Securities Exchange Act of 1934 with at least three outside directors, or corporations registered as open-end investment companies, absent specific provision in charter or bylaws (c) reach quorum when at least one-third of votes entitled to be cast at meeting of stockholders are present in person or by proxy. (§ 2-506[c]). Special provisions in case of non-stock corporation are contained in § 5-206. Voting by proxy is authorized, but proxy not valid more than 11 months after date unless containing specific provision contra. (§ 2-507[b]). Specific procedures established for authorizing proxies. (§ 2-507[c] and [d]). Proxy without interest is revocable. (110 Md. 468, 73 A. 281). Voting rights may be conferred by charter on any securities of corporation. (§ 2-105[a][7]).

Unless secretary is given written notice to contrary, where shares are registered in names of two or more persons, vote of one binds all, and if more than one vote, majority binds all; even-split vote causes shares to be voted proportionately unless additional vote is cast by court-appointed person. (§ 2-508[c]).

Directors.

Except in case of close corporation (see applicable subhead), business and affairs of corporation are managed under direction of board. (§ 2-401[a]). Powers of corporation, save those reserved by charter, bylaws or law, are exercised by or under direction of board. (§ 2-401[b]). Each corporation must have at least one director. (§ 2-402[a]). Number of directors may be increased or diminished by stockholders through amendment of bylaws, or by directors if bylaws so provide. (§ 2-402[b], [c]). No statutory requirements as to stock ownership, citizenship or residence of directors. (§ 2-403). Directors are elected by stockholders at annual meeting. (§ 2-404[b][1]). Unless charter or bylaws provide otherwise plurality of all votes cast at meeting where quorum present is sufficient to elect director. (§ 2-404[d]). Directors may be divided into classes, but no director may be elected for longer period than five years and terms of at least one class must expire each year. (§ 2-404[b][2]). Charter may provide that one or more directors or class of directors shall have more or less than one vote per director on any matter. (§ 2-408[d]). Unless contrary to charter, majority of shares entitled to vote may remove director with or without cause and elect successor except stockholders of any class or series entitled to elect separately one or more directors may elect successor to fill board vacancy resulting from removal of director elected by that class or series. Director elected by class or series, however, can be removed without cause only by vote of majority of shares of class or series. If there is cumulative voting and less than entire board is to be removed, director cannot be removed without cause over opposed votes sufficient to elect him. (§§ 2-406, 2-407[a][1]). Unless charter or bylaws provide otherwise, majority of remaining directors may fill vacancy on board not caused by increase in number of directors; majority of entire board may fill vacancy so created, except that if stockholders of any class or series are entitled to separately elect one or more directors, majority of remaining directors, or sole remaining director, elected by that class or series may fill any vacancy among directors elected by that class or series. (§ 2-407[b]).

Directors' Meetings.

Bylaws determine place and time of directors' meetings and notice required. Directors' meetings need not be held in state. Board or committee thereof may meet via conference telephone or other communications equipment. (§ 2-409). Informal action by unanimous consent is permitted if given in writing or by electronic transmission. (§ 2-408[c]).

Unless bylaws provide otherwise, majority of entire board is quorum. Notwithstanding bylaws, quorum may not be less than one-third of board or less than two directors, or if there is only one director, that will constitute quorum. Unless statute, charter or bylaws provide for greater proportion, action may be taken by majority of quorum. (§ 2-408). Director present at meeting presumed to have assented to action taken unless he (1) announces dissent at meeting, and (2) it is entered in minutes or written dissent is filed with secretary before adjournment or forwarded to secretary by certified mail, return receipt requested, bearing U.S. Postal Service postmark, within 24 hours. Director who votes in favor of action or fails to make dissent known at meeting cannot later dissent. (§ 2-410).

Powers and Duties of Directors.

Directors may exercise all powers of corporation except such as by law, charter or bylaws are reserved to stockholders. (§ 2-401[b]). Directors may elect executive or other committee of one or more directors and delegate to it any or all powers of directors except: (1) Power to authorize dividends or distributions on stock (except as provided in § 2-309[c]); (2) recommend action to stockholders, other than election of directors; (3) amend bylaws; (4) approve merger or exchange; and (5) classify or issue stock unless classification or issuance is pursuant to formula or plan adopted by board. (§ 2-411). Charter, bylaws, or any agreement to which corporation is party and which has been approved by board of directors may provide for establishment of standing committees, creation of committees upon occurrence of certain events, and composition, qualifications, voting rights and other rights of committee's members. (§ 2-411[e]).

Directors must perform duties in good faith, in manner reasonably believed in corporation's best interest and with care of ordinary prudent man in like circumstances. In performance of duties, director may rely on others (including officers, employees, lawyers and other professionals, experts and board committees), if director has reasonable belief in their competence and reliability. Director meeting these standards avoids liability save for unfair transaction in which director is interested and which is not ratified by disinterested majority of board or holders of majority of disinterested shares. (§ 2-405.1; courts art. § 5-348). See subhead Interested Director Transactions, infra.

Interested Director Transactions.

Contracts between corporation and (1) director; (2) other corporation sharing common director; or (3) other corporation controlled by director are not void or voidable because of interest, common directorship or presence and vote of interested director if majority of disinterested directors or majority of disinterested shareholders ratify contract or if transaction is fair. Interested directors and/or stock they or interested corporation own may be counted towards quorum at meeting ratifying transaction. Burden of proving fairness placed on person asserting fairness. Burden of proof inapplicable to fixing of compensation. (§ 2-419).

Liabilities of Directors.

Director who performs his duties in accordance with standard of care specified in § 2-405.1 has no liability by reason of being or having been director. (§ 2-405.1[c]; courts art. § 5-348). Charter may expand or limit liability of director to corporation for money damages but may not limit liability to extent that (i) he received improper benefit or profit, (ii) he is adjudicated to have been guilty of active and deliberate dishonesty which was material to cause of action or (iii) he was director of certain banking and/or financial institutions. (§ 2-405.2; courts art. § 5-349).

Directors who vote for or assent to illegal “distribution” as defined in §§ 1.40(6) and 6.40 of Revised Model Act are jointly and severally liable to extent of illegality, unless charter of corporation limits liabilities of directors as provided in § 2-405.1, supra. Director held liable to corporation for improper distribution is entitled to contribution from similarly liable directors and from stockholders who knowingly receive illegal distribution. (§§ 2-301, 2-309, 2-311, 2-312). See subhead Powers and Duties of Directors, supra.

Director or officer of corporation may not knowingly and willfully authorize or consent to issuance of unauthorized stock or convertible securities of corporation, or issuance of stock or convertible securities of corporation not in compliance with laws relating to issuance, nor may he authorize or consent to false entry concerning issuance into corporate books. (§ 2-216[a]). Violation is misdemeanor subject to criminal penalties. (§ 2-216[c]).

Indemnification.

Substance of Model Business Corporation Act, § 5 (1980 version) adopted with Md. amendments. Major variation: Termination of proceeding by conviction, nolo contendere plea or probation prior to judgment creates rebuttable presumption that director did not meet standard of care. (§ 2-418).

Officers.

Except in case of close corporation (see applicable subhead), corporation must have president, secretary and treasurer and may have one or more vice-presidents, assistant secretaries and assistant treasurers. (§ 2-412). If permitted by bylaws, person may hold more than one office but may not serve concurrently as president and vice-president. (§ 2-415[a]). Except in case of close corporation (§ 4-102), person holding more than one office may not act in more than one capacity to execute, acknowledge or verify instrument requiring execution, etc. of more than one officer (§ 2-415[b]). Directors choose and remove officers and fill vacancies, unless bylaws provide otherwise. (§ 2-413[a]).

Loans to Officers.

Corporation may lend to or guarantee obligation of officer or employee without interest and without security if, in board's judgment, corporation is benefited thereby or if loan is advanced against indemnification. (§ 2-416[a]).

Principal Office.

Corporation must have principal office in state, which must be named in charter, and in case of change of location, certified copy of resolution authorizing same must be filed for record with Dep't of Assessments and Taxation. (§ 2-108).

Resident Agent.

Corporation must have at least one resident agent who is either citizen actually residing in state or Md. corporation. Resolution authorizing change of resident agent or statement as to his change of address must be filed for record with Dep't of Assessments and Taxation. (§ 2-108). Entity may not designate resident agent without first obtaining that person's written consent and filing consent with Department of Assessments and Taxation. (§ 2-405.3).

General Powers of Corporations.

Unless otherwise provided by law or charter, corporation has following powers: (1) To have perpetual existence; (2) to sue and be sued; (3) to have, use and alter and abandon common seal; (4) to transact business within and without state; (5) to make contracts and guarantees, incur liabilities and borrow money; (6) to transfer and dispose of assets; (7) to issue bonds, notes, etc. and secure them by mortgage of assets; (8) to acquire, hold and deal with real and personal property; (9) to acquire, hold, use and dispose of stock or obligation of or interest in other corporation, association, partnership or individual; (10) to acquire (subject to statutory limitations) own stock and securities; (11) to invest surplus, lend and take and hold real and personal property as security; (12) to be promoter, partner, member, associate or manager of partnership, joint venture, trust or other enterprise; (13) to make gifts or contributions as authorized by directors in cash, other property, or stock or other securities of corporation and for use of governmental or charitable institution; (14) to elect officers and appoint agents, define duties and prescribe benefits thereof; (15) to adopt, alter and repeal bylaws; (16) to exercise powers set forth in charter or granted by law; and (17) otherwise to act consistent with law to promote its purposes. (§ 2-103).

Dividends may not be paid when corporation is insolvent or when payment will render it insolvent on application of standards of insolvency in § 6.40 of Revised Model Act. (§ 2-311).

Stock dividends may be issued on capitalization from surplus of par value of new shares, or, if stock is without par value, then upon capitalization from surplus of amount of stated capital to be fixed by directors, in either case plus such additional sums from surplus as directors may prescribe. Division of issued shares into greater number of shares of same class without any change in aggregate amount of stated capital is stock split, and division with change in aggregate amount of stated capital is stock dividend within meaning of this subsection. (§ 2-309).

Open-end mutual fund may redeem less than $1,000 in shares from stockholder if notice given. (§ 2-310.1).

Unclaimed Dividends and Stock Interests.

Governed by Md. version of Uniform Disposition of Abandoned Property Act. (comm. law art. tit. 17). See category 21 Property, topic 21.01 Absentees.

Sale or Transfer of Corporate Assets.

Corporation may transfer assets (§ 3-102[a][8]), but if transfer is of all or substantially all property and assets, transfer must be recommended by directors of transferor and approved by affirmative vote of two-thirds of its shares outstanding and entitled to vote (unless lesser percentage, but not less than majority, is prescribed by charter) and articles of transfer filed. (§§ 3-104, 3-105, 3-107, 3-109). But see subhead Corporate Take-Over, infra. Articles may provide number and names of directors or trustees, and titles of officers, of successor if persons serving in those positions will be changed. If articles provide, proposed consolidation, merger, share exchange or transfer of assets may be abandoned before effective date by majority vote of board of one corporate party to articles, or, unless articles provide otherwise, by majority vote of board of each corporate party to articles. Abandonment does not affect contracts by any corporate party to transaction. (§ 3-108). When articles filed, corporation must submit property certificate for each county where corporation owns interest in land, giving deed reference or other description and stating consideration paid for transfer. (§ 3-112; tax-prop. art §§ 12-104[a], 13-204). See category 10 Documents and Records, topic 10.04 Records, subheads Recording Fees and Tax on Recordation. Procedure is provided whereby stockholder may demand and receive payment of fair value of stock if corporation transfers all or substantially all assets as above. (§§ 3-201 to 3-213).

Books and Records.

Corporation must keep complete books and records of accounts and of transactions and minutes of proceedings of stockholders, directors and executive or other committees, if any. Books and records may be in written or other readily retrievable form; minutes must be recorded in writing, but may be kept in reproduced form. (§ 2-111). Stock ledger must be maintained. (§ 2-209). President or other officer named in bylaws must prepare annually full and true statement of affairs of corporation including balance sheet statement of operation, submit same at annual stockholders' meeting and file same within 20 days thereafter at principal office in state, or at any other office or agency specified in corporation's bylaws, in written form or format that can be readily converted into written form. (§ 2-313). Owner or owners of 5% of any class of stock who have held such stock for six months may inspect books and stock ledger and demand statement of corporation's affairs. (§ 2-513[a]). Stockholders in close corporation have broader rights of inspection. (§§ 4-403, 4-404).

Reports.

Every domestic corporation, business trust, limited liability company, limited liability partnership, or limited partnership, and every foreign corporation, foreign limited liability company, foreign limited liability partnership, or foreign limited partnership, subject to jurisdiction of state must file with Dep't of Assessments and Taxation, on or before Apr. 15 each year, report in such form and containing such information as may be required by regulations of Dep't. (tax-prop. art. § 11-101).

With annual report domestic or foreign corporation must pay report fee of $300, except that no report fee is required of charitable institutions and nonstock corporations. For savings and loan associations, banking institutions and credit unions, annual report fee is $300. (§ 1-203).

Businesses entering into contracts with state which exceed, in aggregate, $100,000 during any calendar year, are required to file certain information, including listing of beneficial owners of 5% or more of business. (state fin. & proc. art. § 13-221).

Corporate Bonds or Mortgages.

Corporation may issue bonds, notes and other obligations and secure same by mortgage or deed of trust of all or any part of assets. (§ 2-103[7]). Corporation's charter may confer voting or other rights on holders of bonds, notes or other securities. (§§ 2-104[b][1], 2-105[a][7]). Mortgage, pledge or creation of security interest in any or all assets may be made without stockholder approval or filing of articles of transfer, unless charter or bylaws provide otherwise. (§ 3-104[a][2]).

Merger, Consolidation and Share Exchange.

Md. corporations may merge or consolidate with or participate in share exchange (as successor or corporation whose stock is acquired) with other Md. corporation, with corporations of any other state, laws of which permit such transactions, or with Md. or foreign business trust. In addition, Md. corporations may merge into Md. or foreign limited partnerships with Md. or foreign limited liability companies. (§§ 1-101, 3-102). Procedure is for board to adopt resolution setting forth terms and conditions of transaction and declaring it advisable, to call meeting of stockholders, to secure approval of two-thirds (unless lesser percentage, not less than majority, is prescribed by charter) of shares of each corporation at duly called stockholder's meeting (§ 3-105) and to execute and file articles of consolidation, merger or share exchange with Dep't of Assessments and Taxation (§§ 1-301[a], 3-107, 3-109). But see subhead Corporate Take-Over, infra. Agreement of merger, consolidation, share exchange, shareholder or asset transfer may provide that vote is required even where board fails to recommend business combination or where board advised against business combination. (§ 3-105). Merging or consolidating corporation must submit property certificate for each county where it owns interest in land, and it may be required to pay recordation tax. See subhead Sale or Transfer of Corporate Assets, supra. (For rights of dissenting stockholders, see §§ 3-201 to 3-213.) Merger if no stock outstanding or not involving reclassification, change of rights of outstanding stock or amendment to charter of surviving corporation and not involving issuance of more than 20% of theretofore outstanding shares of same class does not require approval of stockholders of surviving corporation. (§ 3-105[a][5]). Merger of 90% owned subsidiary into parent where charter of parent not amended and where stock issued by successor has rights identical to rights of stock for which it is exchanged does not require approval of stockholders of either corporation and may be accomplished on vote of majority of all directors provided that minority shareholders of subsidiary have rights of dissenting stockholders. (§§ 3-105[a][1], 3-106). Unless waived by all stockholders, who, except for application of § 3-106, would be entitled to vote on merger, and if parent and subsidiary are both Maryland corporations, parent corporation must, at least 30 days before filing articles of merger, give notice of transaction to shareholders of record on that day or record date fixed not more than ten days prior thereto. (§ 3-106[d]). Certified copy of document effecting merger or consolidation must be filed with Dep't of Assessments and Taxation, and survivor must file property certificate under § 3-112 and informational certificate as to any merger or consolidation of foreign corporations owning property in Md. (§ 3-117). At time of filing articles of merger, consolidation or share exchange, parties must pay recording fee of $100 for each county in which any of consolidating or merged corporations or transferor corporation or corporation whose shares are acquired in share-exchange has principal office or owns interest in land. (§§ 1-203, 3-111, 3-112). If successor in consolidation, merger, or transferor in transfer of assets, or corporation whose stock is acquired in share exchange is Md. corporation, transaction is effective when Dep't of Assessments and Taxation accepts articles, unless articles specify later time (up to 30 days after articles accepted). (§ 3-113[a]). If consolidation or merger provides for increase in authorized capital stock, capitalization fee on increased capital must be paid. (§ 1-204[f][2]). See subhead Incorporation Tax or Fee, supra.

Corporate Take-Over.

Former take-over statute, §§ 11-703, 11-901 to 11-908, declared unconstitutional. (547 F.Supp. 522 [D.Md. 1982]). Tit. 11, subtit. 9 repealed as of July 1, 1986. 1983 special legislative session produced special voting requirements act as new subtit. 6, which provides that “business combination” may not be entered into without approval of: (1) 80% of outstanding shares; and (2) two-thirds of outstanding shares that are disinterested in business combination. This voting requirement is in addition to any other requirements contained in other statutes or corporation's charter. (§ 3-602).

Statute's focus is “business combination” with one who is “interested stockholder”. “Interested stockholder” is defined to include any person, other than corporation itself or any subsidiary, that is: (1) Beneficial owner, directly or indirectly, of 10% or more of voting power of corporation after date that corporation had 100 or more beneficial owners of its stock; or (2) affiliate or associate of corporation that, at any time within prior two years and after date that corporation had 100 or more beneficial owners of its stock, was beneficial owner, directly or indirectly, of 10% or more of voting power of corporation. (§ 3-601[j]). Person is not “interested shareholder” if board approved transaction putting shareholder over threshold immediately prior to transaction. “Business combination” includes: (1) Merger, consolidation or share exchange, except one that does not alter shareholders' contract rights or convert shares, with (a) any interested stockholder or (b) any other corporation that is, or would be after transaction, affiliate of one who was interested stockholder prior to transaction; (2) sale, lease, transfer or disposition in any 12 month period, other than in ordinary course of business or pursuant to dividend or other method affording substantially proportionate treatment to voting stockholders, to any interested stockholder or affiliate thereof, of assets of corporation or any subsidiary that have aggregate value of 10% or more of market value of corporation's outstanding stock or its net worth; (3) issuance or transfer by corporation or any subsidiary to any interested shareholder or affiliate thereof, of equity securities of corporation or any subsidiary having value of more than 5% of corporation's market value, except pursuant to exercise of warrants or purchase rights offered pro rata or on some similar basis to all stockholders; (4) adoption of any plan or proposal for liquidation or dissolution of corporation in which anything but cash will be received by interested stockholder or affiliate thereof; (5) any reclassification of securities or recapitalization or any merger, consolidation or share exchange with any subsidiary that has effect of increasing by 5% or more of total number of outstanding shares proportionate amount of outstanding shares of corporation or any subsidiary that is directly or indirectly owned by interested stockholder or affiliate thereof; and (6) receipt by any interested shareholder or affiliate other than corporation or its subsidiaries of benefits, directly or indirectly, of any loan, advance, guarantee, pledge or other financial assistance or any tax credit or other tax advantage provided by corporation or its subsidiaries. (§ 3-601[e]). Other significant definitions contained in statute.

Super-majority vote required by § 3-602 does not apply if: (1) Price and/or consideration received on both aggregate and per-share basis meet certain very detailed requirements that establish minimum price and form of payment; (2) certain standards are met with respect to past performance in payment of dividends; and (3) interested stockholder has not received certain types of benefits. (§ 3-603[b]). Further, under certain enumerated conditions, corporation's board of directors may elect to exempt corporation from super-majority requirements, or to qualify circumstances under which corporation would be subject to requirements. Depending on circumstances of such election, stockholder approval may be required, and articles supplementary, setting forth terms and method of adoption, must be filed with Dep't of Assessments and Taxation. (§ 3-603[c], [d]). In addition, unless corporate charter provides otherwise, super-majority requirements do not apply to close corporation, corporation having fewer than 100 shareholders, corporation registered under federal Investment Co. Act of 1940 as open end investment company, corporation registered under federal Investment Co. Act of 1940 as closed end investment company unless its board of directors adopts resolution to be subject to

§ 3-602 on or after June 1, 2000, corporation with interested stockholder that became interested stockholder inadvertently if such stockholder, as soon as possible, divests of shares to become disinterested stockholder and if it was not interested stockholder within preceding five years except by inadvertence, or corporation whose original articles of incorporation or charter amendment, as adopted after June 30, 1983, provide for exemption from scope of requirements. Any post June 30, 1983 vote to amend charter must meet 80% and two-thirds “disinterested stockholder” requirements of statute and is not effective until 18 months after stockholder vote. Such charter amendment may not apply to any business combination with stockholder who became interested on or before day of vote. (§ 3-603[e]). Unless exemption under § 3-603(c)(d) or (e) applies, corporation may not engage in business combination with interested stockholder for five years after most recent date on which interested stockholder became such. (§ 3-602[a]).

Shareholders' appraisal rights for transactions governed by super-majority requirements or exempted from requirements in accordance with § 3-603(b) are to be determined in accordance with minimum price requirements of § 3-603(b) (§ 3-202[b]).

Control Share Acquisition Statute.

“Control shares” of corporation acquired in “Control Share Acquisition” have no voting rights except to extent approved by holders of two-thirds of outstanding shares disinterested in transaction, even if charter would otherwise permit smaller proportion of votes to prevail. (§ 3-702[a][1][2]). Statute does not apply if corporation so provides by charter or bylaw provision adopted before acquisition. (§ 3-702[b]). “Control shares” are shares owned or controlled by acquiring person which would enable him to vote for election of directors in any one of following ranges of voting power: (i) One-tenth or more but less than one-third of all voting power, (ii) one-third or more but less than majority, or (iii) majority. Control shares do not include shares which person is entitled to vote solely by virtue of revocable proxy. (§ 3-701[d]). “Control Share Acquisition” means acquisition, directly or indirectly, of control shares either through ownership or through acquisition of power to direct exercise of voting power but does not include acquisition of shares: (i) Made before Nov. 4, 1988 or under contract made prior to that date, (ii) under laws of descent and distribution, (iii) under satisfaction of pledge or other security interest created in good faith and not for purpose of circumventing statute, (iv) under merger, consolidation or share exchange complying with law if target corporation is party thereto, or (v) within one-tenth or more but less than one-fifth of all voting power of outstanding shares of stock of corporation before June 1, 2000. (§ 3-701[e]). Control Share Acquisition also does not include any acquisition by acquiring person of ownership of or right to vote shares which would fall within any of ranges defined as control shares, if person's possession in that range has been previously authorized by stockholders or is entitled to one of exemptions mentioned above. (§ 3-701[e][3]). Shares acquired within 90 days or shares acquired under plan to make Control Share Acquisition are considered to have been acquired in same acquisition. (§ 3-702[e]). Statute does not apply to acquisition of control shares of: (i) Close corporations, (ii) corporations with less than 100 stockholders, (iii) corporation registered under Investment Company Act of 1940 as open end investment company or (iv) corporation registered under Investment Company Act of 1940 as closed end investment company unless its board of directors adopts resolution to be subject to subtitle on or after June 1, 2000, provided that resolution shall not be effective with respect to any person who has become holder of control shares before resolution's adoption. (§ 3-702[c]).

Any person proposing to make or who has made Control Share Acquisition may deliver “acquiring person statement” to corporation setting forth certain information specified by statute. (§ 3-703). Acquiring person may also request special meeting of stockholders to determine voting rights to be accorded control shares at time of delivery of acquiring person statement. Unless it determines that there is not adequate financing to make acquisition, board of directors is required to call special meeting of stockholders if acquiring person provides copy of any agreement for outside financing needed to make acquisition and agrees to pay expenses of holding meeting. (§§ 3-704 and 705). If special stockholders' meeting is required, board must provide acquiring person statement to stockholders with notice of meeting and statement setting forth position or recommendation of board or that it has no position or recommendation. (§ 3-706).

Unless charter or bylaws provide otherwise, if voting rights for control shares are not approved, corporation may redeem any or all control shares for 60-day period beginning on date of meeting at which voting rights are denied, except control shares for which voting rights have been approved in prior transaction. (§ 3-707). If acquiring person statement is not delivered to board of directors, 60-day period is extended to period beginning on 11th day after Control Share Acquisition is made and ending 60 days after statement is delivered. Redemption must be made at fair value, i.e., price is either determined as of date of last acquisition of control shares by acquiring person or is price in effect on date of meeting approving voting rights. (§ 3-707).

Unless charter or bylaws provide otherwise, before Control Share Acquisition has occurred, if voting rights for control shares are approved at stockholders' meeting and acquiring person is entitled to exercise or direct exercise of majority of all voting power, all stockholders of corporation other than acquiring person have right to require corporation to repurchase their stock for fair value, which may not be less than highest price per share paid by acquiring person in Control Share Acquisition. (§ 3-708).

Dissolution.

Corporation having stock outstanding may obtain voluntary dissolution after action by directors and affirmative vote of two-thirds (unless lesser percentage, not less than majority, is prescribed in charter) of stock outstanding and entitled to vote. (§ 3-403). Charter of closed-end investment company may provide that shareholder must vote even where board fails to recommend dissolution or advises against it. Notice of dissolution must be mailed to all known creditors and employees no less than 20 days prior to filing articles of dissolution. (§ 3-404). Articles of dissolution must be filed with Dep't of Assessments and Taxation (§ 3-406, 3-407) and recording fee of $100 paid (§ 1-203). Involuntary dissolution may be had upon petition in equity court: (1) By stockholders controlling 25% of votes for director election, when directors or stockholders are deadlocked; (2) by any stockholder who may vote in director election, when stockholder deadlock prevents director election at two consecutive annual meetings, or when acts of directors or controlling persons are illegal, oppressive, or fraudulent; or (3) for insolvency (see subhead Insolvency and Receivers, infra). (§ 3-413). Special provision applies to close corporation. (§ 4-602). Certain transfers of real property to stockholders made upon dissolution are exempt from transfer and recording taxes. Transfer exempt from taxes if it is to stockholder who is: (1) Original shareholder; (2) certain relative of original shareholder; or (3) person acquiring shares by gift or devise from original shareholder. (tax-prop. art. §§ 12-108[q], 13-207[a][10]).

Insolvency and Receivers.

In event of insolvency, stockholder or creditor may have equity court declare corporation dissolved and may procure appointment of receiver to liquidate corporation. (§§ 3-413[c], 3-415). In strong case, court of equity will appoint receiver to prevent fraudulent or gross mismanagement and wasting of corporate assets by officers and directors. (155 Md. 549, 142 A. 885).

Close Corporations.

Md. corporation is granted election to be treated as “close corporation.” Election must be made in original charter or in charter amendment approved by unanimous vote of stockholders. (§ 4-201). Subsequent election by charter amendment no longer to be treated as close corporation requires unanimous consent of stockholders. (§ 4-203). Close corporation must initially have one director, but may elect after organization to have no board of directors, in which case stockholders manage business and affairs by direct action and exercise all powers of directors. (§§ 4-301 to 4-303). Under unanimous stockholders' agreement contained in charter, bylaws or separate written instrument, stockholders may regulate any aspect of corporate affairs or of stockholder relations. Stockholder subsequently acquiring stock by gift or bequest from assenting party or with actual knowledge of agreement is bound by unanimous stockholders' agreement, and agreement may be enforced by equity court. (§§ 4-101[c], 4-401). Close corporation need have but one officer, who can execute documents in more than one capacity (§ 4-102); unless stockholder requests one, it may dispense with annual stockholders' meeting. (§ 4-402). Charter documents and stock certificates must disclose close corporation status. (§ 4-202). Unless stockholders have agreement regulating transfer of stock, statute invalidates transfer without unanimous stockholder consent. (§ 4-503[b]). Broader rights of stockholder inspection are provided than in general corporation law. (§§ 4-403, 4-404). In event of disagreement among stockholders, petition may be filed for judicial dissolution. (§ 4-602). Consolidation, merger, transfer of assets, acquisition of corporation's stock in share exchange, require approval of all stockholders. (§ 4-601).

Appraisal.

Stockholder who objects to consolidation, merger or sale of all or substantially all corporate assets, or to amendment of corporate charter altering contract rights of any outstanding stock and substantially adversely affecting his rights where right to do so not reserved in charter, or where his stock is to be acquired in share exchange, or where transaction is "business combination" governed by § 3-602 or § 3-603(b) (see subhead Corporate Take-Over, supra), is entitled to demand and receive fair value of his stock. (§§ 3-201 to 3-213). Statutory procedures must be strictly followed. Most important conditions precedent require that (1) written objection to proposed action be submitted at or prior to stockholders' meeting, within 30 days after notice or waiver of notice of merger of subsidiary into or with corporation owning 90% of stock, or within ten days after corporation gives notice of meeting taken outside of meeting by written consent of stockholders, and (2) written demand for payment be made on survivor or transferee corporation within 20 days of consolidation, merger, sale or charter amendment. See subhead Merger, Consolidation and Share Exchange, supra. (§ 3-203). Statutory provisions constitute exclusive remedy and preclude injunctive relief. (155 Md. 66, 141 A. 425). Objecting stockholder ceases to have rights of stockholder with respect to stock (except right to payment) and he receives no dividend as of date for determining fair value. (§§ 3-202, 3-204). Special provisions apply to appraisal rights in conjunction with "business combinations" governed by special voting requirements. (§§ 3-202, 3-602, 3-603[b]).

Foreign Corporations.

Foreign corporation seeking to do intrastate business in Md. must qualify with Dep't of Assessments and Taxation by certifying to Dep't its address and name and address of resident agent, provide acceptable proof of its good standing in jurisdiction where it is organized, and paying qualification fee of $100. (§§ 1-203, 7-203). Unless qualified to do intrastate business, foreign corporation shall register with Dep't before doing interstate business, by certifying to Dep't its address and name of resident agent and providing acceptable proof that it is in good standing in jurisdiction where it is organized; no charge. (§ 7-202). Foreign corporation not required to qualify, which owns income producing real or tangible personal property in Md. acquired other than by foreclosure, must register to do interstate business. (§ 7-202.1). Insurance companies subject to regulation under Md. insurance laws, railroads, federal credit unions and national banks (if main office is located in Md.) are exempt from registration and qualification requirements. (§ 7-201). Foreign corporation registered or qualified and subject to suit in Md. must maintain resident agent and mailing address, both of which have been certified to Dep't of Assessments and Taxation. Such certificate may certify address of principal office in state, and if so, corporation must certify subsequent change of address or discontinuation of office. Certificate must be signed by president or vice-president. (§ 7-205). Within 60 days after amendment to charter changing its name, merging, consolidating or dissolving, qualified or registered foreign corporation must file, with Dep't of Assessments and Taxation, officially certified statement showing action and date taken, and executed by official who has custody of record. (§ 7-206). Representative of successor corporation must also file affidavit indicating whether corporation merging out of existence or consolidating owns interest in land in Maryland.

Failure to Comply.

Penalties are provided for failure to register or qualify, including prohibition on maintenance of suit in state court and fines on corporation and on officers and agents. (§§ 7-301, 7-302). Failure to file certificate as to charter amendment subjects corporation to penalty of $5 plus $1 for each ten days or fractional part of ten days during failure to comply continues. (§ 7-303). Failure to qualify, register or file certificate or report does not affect validity of contract. (§ 7-305). Foreign corporation required to qualify or register may not benefit from any statute of limitations in action either arising out of contract made or liability incurred while doing business without having complied or instituted while doing business without having complied. (courts art. § 5-204).

Effect of Compliance.

Compliance with registration or qualification requirements does not of itself render foreign corporation subject to suit in state, nor may it be construed as consent to be sued where corporation would otherwise not be subject to suit (§ 7-210); however, by doing intrastate, interstate or foreign business in state, corporation assents to state laws (§ 7-105).

Reports.

Foreign corporation, limited liability company, limited liability partnership, or limited partnership doing business in state or owning property therein must file annual report. (tax-prop. art. § 11-101). Failure to file may lead to forfeiture of right to do intrastate business. (§ 7-304). See subhead Reports, supra.

Foreign corporation, savings and loan association, national banking association, or credit union subject to jurisdiction of state must pay to Dep't of Assessments and Taxation at time of filing annual report filing fee of $300. Nonstock corporation or charitable institution pays no fee. (§ 1-203).

Real Property.

No restrictions on right of foreign corporation to acquire or hold real property.

Foreign corporation may be sued in state, on any cause of action if it maintains principal place of business in state; otherwise on cause of action arising from acts enumerated in long-arm statute. (courts art. §§ 6-102, 6-103). See category 5 Civil Actions and Procedure, topic 5.20 Process, subhead Personal Service Outside the State.

Taxation.

Foreign corporations doing business in state are subject to income tax on income earned in state and are also subject to property tax, sales and use taxes and miscellaneous license taxes for certain types of business or occupations. Foreign corporations are not required to pay qualification tax or annual franchise tax, except public utilities such as railroad, telephone, telegraph, oil pipeline, gas and electric companies are subject to gross receipts tax. See category 22 Taxation, topic 22.06 Estate Tax, subhead Franchise Taxes, catchline Public Service Company Franchise Tax.

Surrender of Authority.

Registration or qualification of foreign corporation may be terminated by filing with Dep't of Assessments and Taxation application for termination, executed by president or vice-president and stating: (1) Name of corporation and address of any principal office in state; (2) name and address of resident agent; (3) that corporation is no longer transacting intrastate or interstate business in state, as case may be; (4) that corporation wishes to terminate qualification or registration to do such business, as case may be; and (5) that all required reports have been filed and all taxes have been paid. Certificates as to payment of taxes must accompany application. (§ 7-208).

Taxation of Corporate Property.

Same as taxation of property of individual, except that Dep't of Assessments and Taxation assesses tangible personal property and operating property of public utilities. (tax-prop. art. § 8-201). Appeal from assessment by Dep't, must be taken to Md. Tax Court within 30 days of mailing of final assessment; appeal bond required. (tax-gen art. § 13-510, tax-prop. art. § 14-514). Appeal from Tax Court to circuit court. (tax-gen art. § 13-532). Intangible property of corporations not taxed.

Taxation of Corporate Stock.

Corporate stock of domestic corporation (other than airline or air freight company) under jurisdiction of Public Service Commission subject to property tax assessed by Dep't of Assessments and Taxation. (tax-prop art. § 8-109[d]). See subhead Stock Transfer Tax, supra.

Franchise Tax.

See subhead Reports, supra. No annual franchise tax on capital of domestic or foreign corporations.

Domestic and foreign savings banks and savings and loan associations, trust companies, commercial banks and other financial institutions pay franchise tax on net earnings in lieu of income tax, but special exceptions exist for international financial transactions. See category 22 Taxation, topic 22.06 Estate Tax, subhead Franchise Taxes, catchlines Public Service Company Franchise Tax, Franchise Tax on Financial Institutions, Franchise Tax on Savings and Loan Associations. (tax-gen art. tit. 8). Utilities such as oil pipeline, gas and electric companies pay special franchise tax measured by gross receipts. (tax-gen art. tit. 8, subtit. 4). Gross receipts tax due and payable quarterly. (tax-gen. art. § 8-405).

See category 22 Taxation, topic 22.01 Administration, subhead Penalties.

See also subhead Incorporation Tax or Fee, supra.

Model Non-Profit Corporation Act not adopted, but see tit. 5 of corps. art., parts of which are modeled on Act.

Income tax applicable to corporations except those which pay franchise tax and small business corporations which have elected subchapter S treatment. See category 22 Taxation, topic 22.10 Income Tax.

Real Estate Investment Trusts.

Covered by tit. 8 of corps. art. See topic 2.04 Joint Stock Companies.

Professional Corporations.

Professional Service Corporation Act authorizes individual or group of individuals, duly licensed or otherwise legally authorized to render professional service, to incorporate and become shareholders of professional corporation. (§§ 5-101 to 5-134). Name in charter must contain Professional Corporation, Chartered, Professional Association, P.A., P.C., or CHTD. (§ 5-106[a]). If professional corporation ceases to render professional services, it must amend articles of incorporation to convert into general corporation. (§ 5-123). By charter amendment, stockholders of professional corporation may change status to general corporation. (§ 5-117.1). When amendment becomes effective, corporation may not conduct business allowed only by title 5 of corps. art.

Consumer Cooperative Corporation.

Md. Consumer Cooperative Act authorizes cooperative organized as stock or non-stock corporation, for purpose of acquiring, producing, manufacturing, furnishing, or distributing goods or services for mutual benefit of members. (§§ 5-5A-01 to 5-5A-30).

Deeds.

See category 21 Property, topic 21.06 Deeds.

Organized Crime.

Attorney General may bring civil proceeding to forfeit charter of Md. corporation or to revoke permit of foreign corporation where certain persons related to corporation are, with knowledge of president and majority of board of directors, involved in organized crime. (§ 1-405[b]).

Cooperative Housing Corporations.

Regulated by tit. 5, subtit. 6B.

Limited Liability Companies.

See topic 2.06 Limited Liability Companies.

2.04 [RESERVED]

2.05 JOINT STOCK COMPANIES:

No general legislation. See topic 2.02 Associations, subhead Actions. References are to Corporations Art. of Code unless otherwise indicated.

Limited Liability Companies.

See topic 2.03 Corporations.

Real Estate Investment Trusts.

Unincorporated trust or association in which real property is acquired, held, managed, administered, controlled, invested, or disposed of for benefit and profit of holders of transferable shares of beneficial interest is permitted. (tit. 8). Declaration of trust must be filed with Dep't of Assessments and Taxation; it must clearly indicate that trust is real estate investment trust and must include number of trustees, names of those persons who will serve as trustees until first meeting of shareholders, name and address of resident agent, number of shares authorized, and provisions for annual meeting and election (at least every three years). (§ 8-202). Declaration of trust may include provision allowing trustees to consider effects of potential acquisition of control on stockholders, employees, suppliers, customers, creditors and communities in which trust has offices or establishments. Unless waived by Comptroller, trust must file bond, cash or approved securities, to secure payment of taxes. (§ 8-204). Amendment of declaration of trust requires board to adopt resolution setting forth amendment, notice to shareholders, and affirmative vote or written consent of two-thirds of shares, unless declaration requires lesser vote or gives trustees power to amend to qualify under Internal Revenue Code. (§ 8-501).

Powers.

Real estate investment trust has perpetual existence and broad general statutory powers similar to those of corporation, not including, however, power to use and apply land for farming, agricultural, horticultural or similar uses. (§§ 8-301, 8-302[b]).

Requirements.

At least 75% of assets must be represented by real estate, mortgages or mortgage related securities, government securities, cash and cash equivalent items, including high-grade short term securities and receivables. (§ 8-302[a]). Declaration of trust may permit more than one class of beneficial shares. Trustees may classify or reclassify unissued beneficial shares after filing articles supplementary with Dep't of Assessments and Taxation. Certain information must be included on stock certificate if more than one class of stock is authorized. (§ 8-203). Trust must permit inspection of records at any reasonable time by Dep't. (§ 8-402).

Limited liability is provided for. (§ 8-601). Declaration of trust may include provision limiting liability to trust or shareholders for money damages. (courts art. § 5-350[c]). Corporate charter may include similar provisions. (§ 2-405.2).

Taxation.

Taxed as corporation, except that income tax imposed on corporation is imposed only on undistributed income, provided that trust complies with §§ 856 to 858 of Internal Revenue Code and at least 90% of taxable income, without regard to capital gains, is distributed within taxable year or before time prescribed for filing return; otherwise all net income taxable. Taxes are lien on property of trust. Distributions to beneficial owners are treated as investment income. (tax-gen art. §§ 10-304 to 10-308).

Merger.

Md. real estate investment trust may merge into Md. or foreign business trust or Md. or foreign corporation or such entities may merge into it. (§ 8-501.1). Procedure is for board of trustees to adopt resolution declaring transaction advisable and setting forth its terms and conditions, to submit proposal at duly called annual or special meeting of shareholders (§§ 2-501 to 2-504, 8-501.1), to secure approval of two-thirds of entitled votes except if declaration of trust provides that greater or lesser proportion, not less than majority, will suffice (§ 8-202[c]), and to execute and file articles of merger with Dep't of Assessments and Taxation (§§ 8-501.1, 3-109, 1-301). Declaration of trust may provide for vote where board fails to recommend merger or recommends rejection of merger. (§ 8-501). Dep't shall then prepare certificates of merger specifying name of each party to articles, name and principal place of business of successor, and time articles accepted by Dep't; certificates shall be forwarded to and recorded by clerk of court for each county where merging trust or corporation, other than successor, owns interest in land. (§ 8-501.1[j]). Objecting trust shareholders have same rights as objecting shareholder of Md. corporation. (§§ 3-201 to 3-213). Merging trust or corporation must submit property certificate for each county where it owns interest in land. Merger not involving reclassification, change of rights of outstanding shares or amendment of declaration of trust of successor trust, nor issuance or delivery of more than 20% of outstanding shares of same class does not require approval of shareholders of successor trust. (§§ 8-501.1, 1-101). Upon filing articles of merger, parties must pay recording fee of $100. (§§ 8-501.1, 1-203). If successor is Md. real estate investment trust, merger effective when Dep't accepts articles unless articles specify later date (up to 30 days permissible); if successor foreign corporation or business trust, or Md. business trust, merger effective when Dep't accepts articles or time specified by law of state where successor organized. (§ 8-501.1). See topic 2.03 Corporations, subhead Merger, Consolidation and Share Exchange.

Professional Associations.

See topic 2.03 Corporations, subhead Professional Corporations.

See also topics 2.02 Associations, 2.03 Corporations.

2.06 LIMITED LIABILITY COMPANIES:

Maryland Limited Liability Company Act adopted. (tit. 4A).

Name must contain either words “limited liability company” or abbreviation: “L.L.C.”, “LLC”, “L.C.”, or “LC”. Right to use name forfeited unless limited liability company files certificate every five years with State Department of Assessments and Taxation. (§§ 4A-208; 1, subtitle 5). Name may be reserved. (§§ 4A-209; 1, subtitle 5).

Purpose.

Any lawful business, purpose, investment, or activity, whether or not for profit, except acting as insurer. (§ 4A-201).

Formation.

Any person may execute and file Articles of Organization with State Department of Assessments and Taxation. (§ 4A-202). Articles of Organization must contain name, purpose, address of principal office in Md., and name and address of resident agent, and may contain any other lawful provision. (§ 4A-204). Certificate of Correction, see § 4A-205. Execution of Articles and Certificates, see §§ 2-405.3, 4A-206. Principal office and resident agent, see § 4A-210.

Limited Liability.

No person with interest in limited liability company is personally liable for obligations of limited liability company, solely by reason of interest. (§ 4A-301). Individual who renders professional service as employee is liable as if sole practitioner. (§ 4A-301.1).

Acts of Members.

Articles of Organization may provide for limited authority of members to act for company. Otherwise, each member is agent of company for purpose of its business. (§ 4A-401).

Operating Agreement.

May establish management, share of assets and earnings, assignment and new members, certificates of interest in company, and amendment of Operating Agreement. Operating Agreement need not be in writing. Unless otherwise provided, all members must agree to amendment of Operating Agreement. (§ 4A-402).

Voting.

Members vote in proportion to interests in profits; majority governs. (§ 4A-403).

Transactions by Member.

Unless otherwise provided, member may lend money and transact other business with company just as nonmember. (§ 4A-405).

Finance.

Contribution may be cash, property, services rendered, or promissory note or other binding obligation to contribute cash or property or to perform services. (§ 4A-501). Unless otherwise provided, profits and losses allocated in proportion to capital interest, and distributions made in proportion to right to share in profits. (§ 4A-503).

Membership and Interests.

Membership interest is personal property. (§ 4A-602). Assignment governed by §§ 4A-601 through 4A-607.

Merger governed by §§ 4A-701 through 4A-710. Unless otherwise provided in Operating Agreement, limited liability company may merge into other limited liability company, limited partnership, stock corporation, or business trust having transferable unit of beneficial interest, or vice versa. (§ 4A-701). Domestic limited liability company may also merge into foreign limited liability company and vice-versa. (§ 4A-701). Member who objects to merger has same rights as stockholder under tit. 3, subtit. 2. (§ 4A-705).

Derivative Actions.

Member may bring derivative action to same extent that stockholder may bring derivative action under corporation law. Members with authority to bring action must have refused to bring action or be unlikely to bring action. (§ 4A-801). If action is successful or plaintiff receives anything, court may award reasonable expenses, including attorneys' fees. (§ 4A-804).

Dissolution and Winding Up.

Dissolution occurs upon events specified in Articles of Organization or Operating Agreement, at time specified by unanimous consent of members, or at time of entry of decree of judicial dissolution, except as otherwise provided in operating agreement, or at time limited liability company has no members for 90 days. (§ 4A-902). Dissolution will not occur, within 90 days after there are no remaining members if last remaining members personal representative or successor agrees to continue company or new member is admitted under provision in Operating Agreement. (§ 4A-902). Dissolution causes winding up unless remaining member consents, or, if there is more than one remaining member, remaining members unanimously consent to continuation of limited liability company except after judicial decree of dissolution. (§ 4A-902). Limited liability company continues until terminated in accordance with § 4A-908. (§ 4A-901). Termination occurs on later of date Articles of Cancellation are filed or effective date of Articles of Cancellation. Limited liability company continues to exist for purpose of paying debts, collecting and distributing assets, and doing other acts required to wind up. (§ 4A-908). Upon winding up and termination, assets are distributed to creditors of limited liability company, and then to members in proportion to adjusted capital interests. (§ 4A-906).

Foreign limited liability companies generally governed by law of state of organization. (§ 4A-1001). Registration is required and must set forth name, state of organization, date of formation, general character of business in Md., name and address of resident agent in Md., statement appointing State Department of Assessments and Taxation as resident agent if needed, and address of office required to be maintained in state of organization or principal office, and acceptable proof that company is in good standing in jurisdiction where it is organized. (§ 4A-1002). Foreign limited liability company doing business in Md. without registering subject to penalty of $200, and each member and agent guilty of misdemeanor and subject to fine of $1,000. Unregistered foreign limited liability company doing business in Md. may not maintain suit unless above penalty paid and company or successor either complies with registration requirements, or is no longer doing business in Md. (§ 4A-1007). Following activities do not constitute doing business: being involved in suit or similar proceeding, holding meetings that concern internal affairs, maintaining bank accounts, conducting isolated transactions, foreclosing mortgages, acquiring title through default, holding such property, or selling such property. Owning other income-producing real or tangible personal property is considered doing business. (§ 4A-1009).

2.07 [RESERVED]

2.08 PARTNERSHIPS:

References are to Corporations Article of Code unless otherwise indicated.

Revised Uniform Partnership Act, 1997 version, adopted. (tit. 9A).

Limited Partnership.

Revised Uniform Limited Partnership Act, 1976 version, adopted with Md. amendments. (tit. 10).

Registration requirements for foreign limited partnerships became effective July 1, 1985. (§ 10-1104).

Intentional major variations from 1976 Uniform Act include following (all references are to Corporations Article):

“Consent” is defined as writing consenting to specified act or event. (§ 10-101[c]).

Certificate of cancellation is included within definition of “certificate.” (§ 10-101[b]).

“Foreign Limited Partnerships” include those formed under laws of foreign country. (§ 10-101[f]).

Name may only be reserved for 30 days. (§ 10-103).

Partnership books of Md. limited partnership must be kept at its principal office in Md. (§§ 10-104, 10-108, 9-402).

Limited partnerships may not act as insurers. (§ 10-106).

Limited partnership certificates are filed with Dep't of Assessments and Taxation, and must set forth limited partnership's name, address of principal office, name and address of resident agent, name and address of each general partner, latest date limited partnership to dissolve and any other matters partners determine to include. (§ 2-405.3).

Amendments must be promptly made in event of material inaccuracies. List of specific events requiring amendment deleted from Md. version. (§ 10-202). Typographical errors, errors in transcription and technical errors in limited partnership certificates may be corrected by filing certificates of correction. (§ 10-202.1). If amendment made within 30 days after general partner knew or should have known of inaccuracy, general partner not liable for inaccuracy. (§ 10-207[b]).

Unless partnership agreement provides otherwise, limited partnerships may merge with Md. or foreign limited partnerships, or limited liability companies, corporations having capital stock or business trusts having transferable units of beneficial interest. Unless partnership agreement provided otherwise, partnership shall approve proposed merger. (§ 10-208).

Certificate of cancellation must contain list of dates of each amendment. (§ 10-203).

Person erroneously believing himself to be limited partner is only liable to another who reasonably relies on that person's general partner status if person knew or should have known that certificate was never filed or that he was inaccurately referred to therein as general partner. (§ 10-304).

Unless otherwise provided, profits and losses, as well as distributions, are made on basis of value of contribution of each partner. (§§ 10-503, 10-504).

Withdrawing partner gets fair share of partnership interest without regard to right to share in distributions. (§ 10-604).

§ 607 rewritten to refer to limitations on return of contributions (rather than on distributions). (§ 10-607).

Assignment by partner of all interests in partnership interest does not create substitution of partner. (§ 10-702).

Upon death or disability of general partner, guardian, personal representative, or successor automatically becomes limited partner. General partner automatically becomes limited partner upon doing of certain acts. (§ 10-704).

“Cause” must be shown before court can wind up affairs of limited partnership. (§ 10-803).

Foreign limited partnership may not conduct any business in Md. which domestic limited partnership is prohibited from doing by Md. law. (§ 10-901).

Foreign limited partnership doing business but not registered in Md. may not sue in Md. unless it pays penalty for failure to register ($200) and either registers or proves it is no longer doing business in Md. (§ 10-907).

General partner or agent of unregistered foreign limited partnership doing business in Md. is guilty of misdemeanor and subject to fine up to $1,000. (§ 10-907).

Activities permissible without “doing business” in Md. are listed. Ownership of nonexempt income-producing real or tangible personal property in state is “doing business”. (§ 10-909). By doing business in Md. foreign limited partnership assents to Md. laws (§ 10-910), but registration by itself does not subject foreign limited partnership to suit in Md. nor operate as consent to be sued (§ 10-911).

Derivative actions are possible to same extent as for stockholders under Md. corporations law. (§ 10-1001). One is entitled to bring derivative action if partnership status devolved on him by operation of law. (§ 10-1002).

§§ 208, 209 and 605 (second sentence) of Uniform Act were not adopted.

Limited Liability Partnerships.

Md. Uniform Partnership Act amended to include limited liability partnerships. (1994, c. 494).

Formation.

Partnership formed under tit. 9 may register as limited liability partnership by filing with Dep't of Assessments and Taxation certificate setting forth name, purpose, address of principal office in Md., and name and address of resident agent. (§ 9A-1001[a]). Partnership qualifies as limited liability partnership when certificate filed or at such later time as specified in certificate. (§ 9A-1001[b]). Amendment to certificate must be in writing, filed with Dep't of Assessments and Taxation, and executed by authorized person. (§ 9A-1001[c], [d]). Registration may be withdrawn at any time by filing withdrawal notice executed by one or more authorized partners. (§ 9-1001[e]). Status of partnership not affected by admission or withdrawal of partners, provided business continues in same name without liquidation of partnership affairs. (§ 9-1001[f]). Principal office and resident agent, see § 9-1005.

Name must contain either words “limited liability partnership” or abbreviation: “L.L.P.” or “LLP” as last words or letters of name. (§ 9A-1003[1]). Name may be reserved. (§ 9-1004).

Limited Liability.

Partner in limited liability partnership not liable for debts and obligations of partnership arising from negligent or wrongful act or omission of another partner, employee, or agent of partnership occurring while partnership is limited liability partnership. (§ 9A-306[c]). Partner liable if negligent in appointing, supervising, or cooperating with other partner, employee, or agent. (§ 9A-306[c], [d][1]). Partner liable, in contract or tort, for debts and obligations of partnership relating to contracts made by partnership prior to registration as limited liability partnership, unless registration consented to in writing by other party to contract. (§ 9A-306[d][3]). Partnership and its assets remain liable for all partnership debts and obligations. (§ 9A-306[d][2]). Statute not intended to limit authority of regulatory body that licenses professionals.

Powers.

Partnership, including limited liability partnership, may conduct its business and have and exercise powers granted by tit. 9 in any state, territory, district or possession of U.S. or in any foreign country. (§ 9A-106[c]).

Choice of Law.

Legislature intends that legal existence of limited liability partnerships formed under tit. 9A be recognized outside state of Md. and that Md. laws governing limited liability partnerships transacting business outside Md. be granted protection of full faith and credit under U.S. Const. (§ 9A-106[c]). Internal affairs of partnerships, including limited liability partnerships, governed by Md. law. (§ 9-106[d]).

Foreign limited liability partnerships generally governed by law of state of organization. (§ 9A-106[b]). Registration is required and must set forth name, state of organization, general character of business in Md., name and address of resident agent in Md., statement appointing Dep't of Assessments and Taxation as resident agent if needed, and address of office required to be maintained in state of organization or principal office, and acceptable proof that partnership is in good standing in jurisdiction where it is organized. (§ 9A-1101[b]). Certificate of Correction, see § 9A-1104. Certificate of Cancellation, see § 9A-1105. Foreign limited liability partnership doing business in Md. without registering subject to penalty of $200 and each member and agent guilty of misdemeanor and subject to fine of $1,000. (§ 9A-1106[d]). Unregistered foreign limited liability partnership doing business in Md. may not maintain suit unless above penalty paid, and partnership or successor either complies with registration requirements, or is no longer doing business in Md. (§ 9A-1106[a]). Following activities do not constitute doing business: being involved in suit or similar proceeding, holding meetings that concern internal affairs, maintaining bank accounts, conducting isolated transactions, foreclosing mortgages, acquiring title through default, holding such property, or selling such property. Owning other income-producing real or tangible personal property is considered doing business. (§ 9A-1108).

3 BUSINESS REGULATION AND COMMERCE

3.01 BANKS AND BANKING:

Financial Institutions Article effective as of July 1, 1980. References are to article unless otherwise indicated.

Uniform Commercial Code adopted. (comm. law art. tit. 4). See topic 3.09 Commercial Code.

General Supervision.

Commissioner of Financial Regulation, 500 North Calvert Street, Suite 402, Baltimore, Maryland 21202, has supervision over state banking institutions, which are regulated under tits. 1 to 5. For powers and duties, see tit. 2, subtit. 1. Savings and loan associations are regulated. See category 2 Business Organizations, topic 2.03 Corporations.

Preferred Stock.

Commercial bank may, with approval of Bank Commissioner, issue preferred stock, which may be convertible into common stock except in certain instances. Preferred stockholders may be entitled to cumulative dividends not exceeding 6% per annum on par value of stock, and no dividends may be paid on common stock until cumulative dividends on preferred stock have been paid in full. (§ 3-302).

Deposits.

State banking institutions may receive deposits and pay interest thereon. (§§ 3-206, 3-207, 4-206). Savings banks may pay interest only out of profits. (§ 4-303[a]). Savings and loan associations may pay dividends or interest only from current earnings, earned surplus, expense fund or as otherwise provided by law. (§ 9-404). Provisions in multiple-party account agreements for certain transfers on death are non-testamentary. Funds in such accounts pass under agreement or, in absence of provision, to survivors. (§ 1-204, est. & tr. art. § 1-401). Common law altered. (§ 1-204).

Unclaimed Deposits and Property.

Except for demand, savings, or matured time deposits subject to court order, such deposits with banking and financial organizations and business associations, and share accounts or deposits with savings and loan associations inactive for four years, and sums payable on certified checks, drafts, certificates of deposit and money orders, and funds and personal property removed from safe deposit boxes after expiration of lease period, when unclaimed for four years and sums payable on traveler's checks unclaimed for 15 years, are governed by Uniform Disposition of Abandoned Property Act. For purposes of imposing service charge holder may consider money order dormant after one year. But deposits in banking organizations not considered abandoned if depositor has engaged in any credit, trust or other deposit transaction with organization within five years. Depositor must be issued notice by first class mail to last known address and has 30 days to respond. (comm. law art. tit. 17, subtit. 3).

Confidential Financial Records.

Banks, trust companies, savings and loan associations, credit unions, and other organizations that are chartered under Md. banking laws and subject to supervision of Bank Commissioner, may not disclose customer's financial records (checks, drafts, statements, credit items, debit items, and any information regarding loans) unless customer approves, or customer is deceased or disabled and representative or guardian is court-appointed, in response to certain requests by Dep't of Human Resources to confirm customer's eligibility for public assistance or institution received request, notice or subpoena for information from child support enforcement administration of the Dep't of Human Resources or Federal Parent Locator Service (§ 1-302) or in response to subpoena (§ 1-304). There is also exception for disclosure to adult protective services program in local department of social services if financial institution believes that customer has been subjected to financial exploitation. (§ 1-306). Willful violation is misdemeanor punishable by fine up to $1,000. (§ 1-305). Financial records may be examined by CPA during audit, by State's Attorneys in certain instances, by agent of supervisory agency, by other enterprises or consumer reporting agency during ordinary exchange of credit information, in published data (when customer cannot be identified), and in connection with mortgagee estoppel certificates and in connection with request by customer for extension of credit with affiliated financial institution. (§ 1-303).

Statements to Depositors.

Banking institutions, credit unions and savings and loan associations are required to furnish written information to customers concerning terms of interest-bearing accounts upon demand and when account is opened. (§§ 5-302, 6-501, 9-403).

Banks, savings banks, savings and loan associations must provide borrower with annual statement of escrow account balance. (comm. law art. § 12-109[b][3]).

Collections.

Uniform Commercial Code adopted. (comm. law art. tit. 4).

Trust companies are given additional powers. (§ 3-207).

Common trust funds may be formed by trust company to provide for collective investment of money held by it as fiduciary. (tit. 3, subtit. 5).

Uniform Common Trust Fund Act not adopted.

Savings institution may not have capital stock, but must be mutual association, unless organized as subsidiary savings bank pursuant to tit. 4, subtit. 9. (§ 4-401). Under limited circumstances, mutual association may be converted to capital stock association. (§§ 9-611, 9-612). Conversion of mutual association to credit union governed by tit. 9, subtit. 11. May own and let for hire vaults or safe deposit boxes and, in accordance with rental agreement, may permit deposits of property, and may, with prior approval of Bank Commissioner, exercise same corporate and fiduciary powers as trust company. (§ 4-206). May have checking accounts as well as savings accounts. (248 Md. 461, 237 A.2d 45).

Industrial Banks.

Special statutory provisions, administered by Commissioner of Consumer Credit, govern finder's fees, consumer loans under tit. 12, subtit. 8 of comm. law art., installment loans under § 12-103(c) of comm. law art., persons engaged in business of sales finance company, and mortgage loan lenders (tit. 11). Alternative lending authority provided by comm. law art. tit. 12, subtits. 9 and 10. See topic 3.17 Interest.

State Banks.

Except for such institutions not in business of accepting deposits or retaining funds in deposit accounts, state chartered banking institutions must be members of Federal Deposit Insurance Corporation. (§ 5-509). By authorization of Bank Commissioner and specified board, state banks may engage in additional activities and services or other practices under same conditions and restrictions as national banks. (§ 5-504). State bank may merge with, consolidate with, or transfer assets of Maryland savings and loan association under limited circumstances. (§ 3-702).

Foreign Banks.

Except as permitted by Tit. 5, Subtits. 9, 10 and 11, foreign bank or savings and loan association may not maintain office in state to solicit deposits or to conduct banking, savings or trust business and must obtain permit to operate office automated teller machines in state unless office automated teller machines are authorized under federal law or Title 5. (§§ 12-201, 12-207). Foreign bank or affiliated corporation may not become bank holding company. (§ 12-204). But foreign bank may carry on some functions of banking institution. (38 Op. Att'y Gen. 104). As to right of foreign trust company to act as fiduciary in Md., see categories 13 Estates and Trusts, topics Executors and Administrators, Trusts; Family, topic Guardian and Ward.

Out-of-State Bank Holding Companies.

Under Tit. 5, Subtit. 9, out-of-state bank holding company or subsidiary may acquire and hold all voting shares of single new bank in Md. if approved by Bank Commissioner, who must evaluate holding company's application under certain specific criteria. (§ 5-905). Under Subtit. 10, out-of-state bank holding company may establish branches in Md. if certain conditions are met. (§ 5-1003). Under Subtit. 11, out-of-state bank holding company may acquire one or more Md. savings and loan associations and convert them into commercial bank. Newly-created bank will operate with same rights and restrictions as Md. bank. (§ 5-1105[a]).

Credit Unions.

Regulated by Bank Commissioner under § 6-202. For powers, see tit. 6. All state chartered credit union accounts must be insured by credit union share guaranty corporation or by National Credit Union Administration Share Insurance Program. (§ 6-601). Credit unions may receive deposits from and make loans to members (§ 6-701, tit. 6, subtit. 5), may set own dividend rate (§§ 6-502; 6-312, tit. 6, subtit. 6).

Interest.

See topic 3.17 Interest.

Equal Credit Opportunity.

Illegal to discriminate on basis of sex, marital status, race, color, religion, national origin, age, handicap, geographic area, or neighborhood in extension of credit. (comm. law art. §§ 12-113, 12-701 to 12-708).

Mortgage brokers and bankers regulated, business restricted. (tit. 12, subtit. 5). Fees subject to restrictions. (comm. law art. §§ 12-801 to 12-809).

Taxation.

See category 22 Taxation, topic 22.06 Estate Tax, subhead Franchise Taxes, catchlines Franchise Tax on Financial Institutions, and Franchise Tax on Savings and Loan Associations. Credit unions exempt from taxation by State or local subdivision. (§ 6-103).

Prohibited Acts.

Include deceptive representations and advertisements, restrictions on financial dealings with competitors, and various other acts. (§ 5-807).

Automated Teller Machines.

Operator of automated teller machine installed after Jan. 1, 1995 must evaluate safety of proposed automated teller machine location and meet certain lighting requirements; must also provide written notice of basic safety precautions to customers. For automated teller machines installed prior to Jan. 1, 1995, compliance is optional until July 1, 1995, with certain exceptions. (§ 1-401).

3.02 BILLS AND NOTES:

Uniform Commercial Code adopted. (comm. law art. tit. 3). See topic 3.09 Commercial Code.

Special Requirements.

No special requirements as to recitals in notes of particular classes or based on particular considerations.

Judgment Notes.

Term authorizing confession of judgment if note not paid when due does not affect negotiability. (comm. law art. § 3-112[1][d]). But negotiability is lost if note authorizes confession of judgment before maturity. (158 Md. 587, 149 A. 270). If authorization permits confession of judgment before maturity, note not negotiable. (34 Md. App. 350, 367 A.2d 102). Confessed judgment clause invalid or prohibited in many consumer transactions, e.g., in door-to-door sale (comm. law art. § 14-302[4]), consumer loan (comm. law art. § 12-311[a][1]), or note given as part of retail credit account (comm. law art. § 12-507[b]). Confessed judgment clauses that waive consumer's right to assert legal defense not permitted in any contract related to consumer transaction. (comm. law art. § 13-301[12]). See topic 3.17 Interest, subhead Maximum Rate; category 5 Civil Actions and Procedure, topic 5.15 Judgments, subhead Judgment by Confession.

Attorney's fee clause enforceable (160 Md. 57, 152 A. 815) and note remains one for sum certain (comm. law art. § 3-106[1][e]).

Special Defenses.

See topics 3.12 Consumer Protection, subhead Assignments, 3.22 Sales, subhead Retail Installment Sales.

3.03 BILLS OF LADING:

See topic 3.08 Carriers.

3.04 BILLS OF SALE:

See topic 3.22 Sales.

3.05 BLUE SKY LAW:

See topic 3.24 Securities.

3.06 BROKERS:

Uniform Commercial Code adopted. (comm. law art. tits. 1 to 10). See topic 3.09 Commercial Code.

In absence of special agreement to contrary, broker employed to buy, sell, lease, or mortgage real estate, etc. or to procure loan entitled to commission when person procured enters into binding written contract acceptable to and signed by employer. (real prop. art. § 14-105). Broker also entitled to customary commission when he procures person ready, willing and able to purchase upon terms authorized and advises owner of fact and gives opportunity to complete sale. (127 Md. 512, 96 A. 642).

Licenses.

See appropriate categories, e.g., Insurance, topic Insurance Companies. For general requirements, see ins. art.

Bond.

None required.

Real Estate Brokers.

Real Estate Commission has supervision over licensing and activities of real estate brokers. Applicant for license must have three years experience as real estate salesman or be qualified to practice law and must pass written examination. (bus. occ. art. § 16-305). Licensee must prove completion of 12 hours of approved continuing education every two years to have license renewed unless Commission waives requirement; beginning in 1996, requirement increases to 15 hours. (bus. occ. art. § 16-315). Licensee participating in residential real estate transaction as seller's agent, buyer's agent, or cooperating agent must make written disclosure of representation of seller or lessor to prospective buyer or lessee not later than first scheduled face-to-face contact. (bus. occ. art. § 16-528).

Employment agency must obtain annual license from Commissioner of Division of Labor and Industry. (bus. reg. art. tit. 9). Entities directly providing part-time employment or which do not charge any fee to or do not require contract with applicants are excluded from definition of employment agencies. (bus. reg. art. § 9-101).

Insurance Agents and Brokers.

See category 16 Insurance, topic 16.01 Insurance Companies.

3.07 BULK SALES:

Uniform Commercial Code adopted. (comm. law art. tit. 6). See topic 3.09 Commercial Code.

See also category 2 Business Organizations, topic 2.03 Corporations, subhead Sale or Transfer of Corporate Assets.

3.08 CARRIERS:

Uniform Commercial Code adopted. (comm. law art. tits. 1 to 10). See topic 3.09 Commercial Code.

Carriers Regulated by Public Service Commission.

For details and extent of regulation, see pub. util. comp. art., tit. 9.

Rates.

Intrastate rates must be just and reasonable and must be approved by Public Service Commission. Commission may also fix rates. (pub. util. comp. art. § 4-102). Mass Transit Administration may fix rates for carriers under its jurisdiction. (trans. art. §§ 7-505; 7-506).

Discrimination in rates or service prohibited. (pub. util. comp. art. § 4-503).

Limiting Liability.

Carrier may limit liability by contract with shipper. (106 Md. 472, 67 A. 1099).

Bills of Lading.

Uniform Commercial Code adopted. (comm. law art. tit. 7). Criminal provisions for certain acts set out in comm. law art. §§ 18-201 to 18-207.

Motor Vehicle Carriers.

See category 23 Transportation, topic 23.01 Motor Vehicles.

3.09 COMMERCIAL CODE:

Uniform Commercial Code (see Uniform and Model Acts section) enacted in 1963 in its entirety with provision that it take effect on Feb. 1, 1964. It appeared as art. 95B prior to recodification effective July 1, 1975 as comm. law art. tits. 1 to 10. Section numbers of art. 95B and comm. law art. correspond to those of 1962 official text. Art. 6, § 102 is subject to amendment effective July 1, 2001. Art. 9, §§ 9-101 through 9-507 is repealed effective July 1, 2001 and replaced by new Art. 9.

1966 Official Amendments.

Not adopted except §§ 2-702(3), 3-501(3), 7-209(3).

1972 Official Amendments.

Adopted to take effect on Jan. 1, 1981.

1977 Official Amendments.

Adopted effective July 1, 1986.

1987 Official Text of Article 2A.

Adopted to take effect Jan. 1, 1995 (with conforming amendments to §§ 1-105, 1-201[37] and 9-113). (1994, c. 535).

1989 Official Amendments.

Adopted to take effect on July 1, 1991.

1990 Official Amendments to Article 2A.

Adopted to take effect Jan. 1, 1995. (1994, c. 535).

Intentional variations from official text of Uniform Commercial Code are as follows:

§ 1-102(5)(b) provides words of neuter gender refer to any gender.

§ 1-103 provides that age of majority as to capacity to contract is 18. See revisors note following comm. law art. § 10-104.

§ 2-314 defines seller to include manufacturer, dealer and/or retailer and abolishes privity in any action brought by buyer against said parties. Implied warranty also applies to leased goods.

§ 2-315 provides that implied warranty of fitness for particular purpose also applies in certain bailments and leases.

§ 2-316 is made inapplicable by § 2-316.1 to sales of consumer goods and services. Language used by seller of consumer goods or services to attempt to modify or exclude implied warranties is unenforceable, although seller may recover damages resulting from breach from manufacturer. Implied warranties may be modified or excluded for sale of certain used automobiles. Language used by manufacturer of consumer goods to limit or modify consumer's remedy for breach of manufacturer's express warranties is unenforceable unless he provides reasonable and expeditious means of performing warranty obligations. (§ 2-316.1).

§ 2-318 adds to buyer's household and house guests: “any other ultimate consumer or user of the goods or person affected thereby.”

§ 2-702(3) provides seller's right to reclaim is not subject to rights of lien creditor, see note to 1966 Official Amendments, supra.

§ 3-305 provides that holder in due course also takes instrument free from claims and defenses of maker of purchase money instrument obtained by certain time-share developers.

§§ 3-512 to 3-514 added to give holder of dishonored check right to send notice of dishonored check to drawer following ten days of nonpayment. Drawer of check is liable for collection fee of up to $25. (§ 3-512). These provisions provide alternative to any other right of recourse. (§ 3-514).

§ 4-406 as adopted deleted “or holds... to the customer” and changed “fourteen calendar days” to “14 business days”. (§ 4-406[2][b]).

§ 4A-206(a) as adopted omits “or other third-party communication system” from first sentence and inserts “funds-transfer” preceding “system” in every instance.

§ 6-106(4) provides for appointment of receiver to take custody of and distribute agreed purchase price paid into circuit court.

§ 6-107(3) amended to require delivery of notice to Comptroller of State in addition to other persons in text.

§ 6-108(3)(b) amended so that auctioneer must give notice to Comptroller of State in addition to creditors and those who assert claims against transferor.

§ 7-204(4) is omitted in its entirety.

§ 8-401(3) is additional subsection which provides options to issuer of uncertificated securities upon receipt of instruction requesting registration of pledge.

Options and alternatives in 1962 official text and Permanent Editorial Board's 1966 and 1972 recommendations for optional amendments have been exercised as follows:

§ 1-209: 1966 official optional amendment not enacted.

§ 2-318: 1966 official optional amendment alternative A adopted with addition to buyer's household and house guests of “any other ultimate consumer or user of the goods or person affected thereby.”

§ 3-121: alternative B adopted.

§ 3-501(3): 1966 amendment adopted.

§ 4-106: optional phrase omitted.

§ 4-202(1)(b): optional clause adopted.

§ 4-212: optional subsection (2) adopted.

§ 6-102(3): includes restaurants and sellers of alcoholic beverages.

§ 6-106: optional section adopted with variations in subsection (4) indicated under subhead Intentional Variations.

§ 6-107(2): optional paragraph (e) adopted.

§ 6-108(3): optional paragraph (c) adopted.

§ 6-109: optional subsection (2) omitted.

§ 7-204: optional subsection (4) omitted.

§ 7-209(3): 1966 amendment adopted.

§ 7-403(1)(b): optional clause adopted.

§ 9-201: refers to other statutes which also regulate loans and retail installment sales such as Consumer Loan Law, and Retail Installment Sales comm. law art. title 12, subtitles 3 and 6 and provides that, in event of conflict, those statutes prevail.

§ 9-311: refers to other statutes, which provide for central filing of, or require notation on certificate of title of, security interest.

§ 9-401(3): alternative subsection (3) not adopted.

§ 9-401(6) adopted.

§ 9-402(5): optional language relating to description of real estate not adopted.

§ 9-407: official text not adopted, see subhead Intentional Variations, supra.

§ 9-501: third alternative subsection (1) adopted with variations indicated under subhead Intentional Variations.

§ 10-104(2): optional subsection (2) adopted with reference made to est. & tr. art. §§ 15-301 to 15-311.

§ 11-101 adopted as § 10-105(2) with 1972 amendments effective Jan. 1, 1981.

§ 11-102 adopted as § 10-106.

§ 11-103 adopted as § 10-107.

§ 11-104 adopted as § 10-108.

§ 11-105 official text not adopted but similar provision adopted as § 10-109, see subhead Intentional Variations, supra.

§ 11-106 adopted as § 10-110.

§ 11-107 adopted as § 10-111.

§ 11-108 adopted as § 10-112.

§ 11-1302.1 added.

Place of Filing.

See subhead Intentional Variations, supra, § 9-401(1).

Filing Fee.

Set by § 9-525.

Recordation Tax.

Exempt from tax are liens or encumbrances upon vehicles and vessels which are filed with Motor Vehicle Administration or Department of Natural Resources, mechanics' liens, crop liens, certain purchase money deeds of trust or purchase money mortgages, assignments of mortgages or deeds of trust, judgments, releases, orders of satisfaction, certain Uniform Commercial Code security agreements, certain refinancing agreements where refinanced property is mortgagor's principal residence, certain supplemental and previously recorded instruments, certain railroad title transfers, and instruments transferring property between certain relatives, most transfers to state, state agencies or other political subdivisions are also exempt from recordation tax, participation agreement showing interest in note, mortgage or deed of trust based on prior recorded loan to mortgagor or grantor under deed of trust. Also exempt is any instrument transferring real property from cooperative housing corporation on its termination to owner of cooperative interest in corporation, under certain conditions. (tax-prop. art. § 12-108). Other filed financing statements subject to tax. (tax-prop. art. § 12-108). See category 10 Documents and Records, topic 10.04 Records, subhead Tax on Recordation.

See also topics: Banks and Banking, Bills and Notes, Brokers, Carriers, Contracts, Factors, Frauds, Statute of, Sales, Securities, Warehousemen; categories Business Organizations, topic Corporations; Civil Actions and Procedure, topic Limitation of Actions; Debtor and Creditor, topics Assignments, Fraudulent Sales and Conveyances, Liens, Pledges; Documents and Records, topics Records, Seals; Mortgages, topic Chattel Mortgages; Transportation, topic Motor Vehicles.

3.10 CONDITIONAL SALES:

See topic 3.22 Sales.

3.11 CONSIGNMENTS:

See topic 3.14 Factors.

3.12 CONSUMER PROTECTION:

References are to Commercial Law Article of Code unless otherwise indicated.

Consumer protection legislation generally administered by Division of Consumer Protection in Office of Attorney General, 200 St. Paul Place, Baltimore 21202, which may adopt rules, regulations and standards and may initiate its own investigation of any unfair or deceptive trade practice. (§§ 13-201 to 13-205).

Unfair or Deceptive Trade Practices.

Uniform Deceptive Trade Practices Act not adopted.

Unfair or deceptive trade practices, prohibited in sale, lease or bailment (or offer therefor) of consumer goods, realty or services, in extension of consumer credit, or in collection of consumer debts, whether or not any consumer is actually deceived or damaged, include: (1) False or misleading oral, written or visual representations; (2) untrue representations of sponsorship, character, quality or quantity; (3) deceptive failure to state material facts; (4) false disparagement; (5) offers without intent to sell or to fulfill demand (unless expressly limited); (6) false representations concerning price reduction or comparative price; (7) false statement of need for services or goods; (8) false statement of discount prices; (9) misrepresentation or concealment of material fact in connection with promotion or sale, merchant's subsequent performance, or violation of consumer protection act or order thereunder; (10) solicitation over telephone without first stating name and trade name, purpose of conversation, goods and services offered; (11) use of scheme in telephone sales that misrepresents solicitor's true status or purpose; (12) use of confessed judgment clause waiving consumer's right to assert legal defense in contract related to consumer transaction; (13) violations of various other provisions of tits. 10, 13 or 14 of comm. law art. or of Energy Conservation Building Standards Act, pub. util. comp. art., tit. 7, subtit. 4. Insurance and body shops are regulated by Automotive Crash Parts Act. (§§ 14-2301 to 14-2304).

Vacation Club Membership.

It is deceptive trade practice for sales agent to violate requirements of §§ 14-2401 to 14-2403. Contract to purchase vacation club membership, which includes plans that provide accommodations in certain time-share units, campgrounds, and condominiums, must contain following statement in at least 14-point bold-faced type which appears immediately before and on same page as signature of purchaser: “You may cancel this contract without penalty or obligation within 10 days from the date of this contract. If you decide to cancel this contract, you must provide notice of the cancellation in writing to (the sales agent) at (address of sales agent). Any attempt to obtain a waiver of your cancellation rights is unlawful. Cancellation entitles you to a refund of all moneys within 15 business days after receipt of notice of cancellation.” (§ 14-2402[d][1]).

Door-to-Door Sales.

It is unfair or deceptive trade practice to violate provisions of Maryland Door-to-Door Solicitations Act. (§§ 14-2601 to 14-2603). Act prohibits receipt of more than $200 through door-to-door solicitation of consumers. Solicitor must give consumer pledge form, inform consumer of his right to rescind pledge at any time and that pledge is not enforceable, notify consumer that solicitor may not accept at time of solicitation any money including amount of pledge that equals or exceeds $200, inform consumer of right to refund if requested within 30 days after contribution, provide disclosure statement prior to acceptance of solicitation, and, if requested, within 30 days of request mail to consumer at no charge financial statement of person for whom solicitation is made. (§ 14-2603). Pledge form must contain following information: (1) name of solicitor; (2) name and address of party on behalf of whom solicitation was made; (3) statement of purpose for which contribution will be used; (4) disclosure statement as provided in § 14-2601(f); (5) date and amount of door-to-door solicitation; (6) name and address of consumer; and (7) statement of consumer's right to rescind and method of rescission. Pledge is not enforceable contract. Request for refund must be by certified mail, return receipt requested. Refund must be made within ten days after receipt of request. (§ 14-2603[f]).

Other General Prohibitions and Requirements.

Certain referral sales plans are prohibited. (§ 13-304). Person may not notify another of prize, award or selection for receipt of thing of value, other than trading stamps, certain retail sales and certain games of skill competitions, or Md. State Lottery tickets, conditioned on purchase or submission to sales promotion unless retail price of prize offered does not exceed greater of $40 or lesser of 20% of purchase price of goods and services that must be purchased or $400. However, this limited exception does not apply to offer of prize requiring person either to pay any money to participate in or to submit to sales promotion effort, or to prize promotion involving award of prizes by chance. (§ 13-305). If gift offered in exchange for business is unavailable when properly claimed, offeror must give certificate and subsequently redeem with same or similar gift. (§ 13-306). Unless repair to home appliance is done under service contract or after quotation of flat price or firm estimate, bill itemizing hourly labor rate, time used and cost of parts is required. (§ 13-307). Electrical consumer product must bear mark of certified testing lab; and electrical extension cord must be labeled for maximum amperes safely conducted. Violations may be misdemeanors subject to fine. (§§ 13-308, 13-309). Sellers of reserved seat tickets, other than nonprofit organizations, must display seating plan showing obstructions. (§ 13-310). Seller may not condition sale upon buyer's entry into service contract. (§ 13-311). “Earn at home” ads for mass mailing campaigns illegal if money advances solicited or no compensation paid. (§ 13-314). It is deceptive trade practice to falsely represent certain food as halal. (§§ 14-3601 to 14-3604). May not manufacture or sell by any means children's product that contains lead. (§ 13-301; env. art. §§ 6-1301 to 6-1311). It is unfair or deceptive trade practice to violate Protection of Homeowners in Foreclosure Act (§ 13-301). Unfair or deceptive trade practices includes violation of health-occ. art § 7-405(e)(2)(II) regarding deposited bank funds for pre-need contracts. (§ 13-301).

Unit Pricing.

With certain exceptions (including described small businesses), one who sells, offers or displays consumer commodity at retail must disclose unit price, as defined, if consumer commodity is sold only by units or is prepackaged or retail-packaged and in one of following categories: (1) Foods, condiments, cooking oils, etc.; (2) paper products; (3) wrapping products; (4) soaps, detergents, cleansing aids, etc. Disclosure not required if seller is then disclosing as to 90% of commodities subject to disclosure. (§§ 14-101 to 14-104). Provision is made for public institution of compliance proceedings. (§ 14-106). “Unit price” is defined as retail price of item expressed in dollars and cents per unit. In addition to any units commonly in use in U.S., following units may be used if appropriate: per 100 square feet for item net quantity of which is expressed in square yards, square feet, square inches or any combination thereof.

Consumer Debt Collection.

Certain acts prohibited in collection or attempted collection of alleged debt: (1) Use or threat of force or violence; (2) threat of criminal prosecution, unless transaction involved criminal violation; (3) disclosure of or threat to disclose information known to be false affecting debtor's reputation for credit worthiness; (4) contacting debtor's employer before final judgment on delinquent debt, except as permitted by statute; (5) disclosure of or threat to disclose to person known to have no legitimate business need, other than debtor, debtor's spouse or minor debtor's parent, of information affecting debtor's reputation, whether or not for credit worthiness, except as permitted by statute; (6) communication with debtor or relative in abusive or harassing manner; (7) use of obscene or grossly abusive language in communication with debtor or relative; (8) attempt or threat to enforce right known to be nonexistent; or (9) use of communication falsely simulating legal or judicial process or falsely appearing to be issued by government or lawyer. Violator is liable for damages, including damages for emotional distress. (§§ 14-201 to 14-204). See topics 3.18 Licenses, Business and Professional, subhead Collection Agencies; 3.17 Interest, subhead Maximum Rate.

Bank or other financial institution may not offset property or money in savings or checking account for settlement of delinquent consumer debt, unless authorized by customer in writing or by order of court. (§§ 15-701, 15-702).

Late Fees.

Maryland limits amount of late fees that can be charged pursuant to consumer contract. (§ 14-1315).

Door-to-Door Sales.

It is unfair or deceptive trade practice for person engaged in door-to-door sale of consumer goods or services with purchase price of $25 or more, inclusive of interest and service charges, to: (1) Fail to furnish buyer with (a) fully completed receipt or copy of contract at time of execution, in same language used in oral sales presentation and giving date and name and address of seller, and (b) readily visible statement (as described) advising of right to cancel before midnight of third business day following transaction; (2) fail to furnish buyer at time of sale with completed notice of cancellation, in duplicate and in form specified; (3) fail to complete notice of cancellation with specified information; (4) include confession of judgment or waiver of certain rights; (5) fail to inform buyer orally at time of sale of right to cancel; (6) misrepresent buyer's right to cancel; (7) fail to honor valid notice of cancellation by buyer and, within ten business days, to refund payments, return goods traded in, and cancel any negotiable instrument or security interest; (8) negotiate or transfer evidence of indebtedness given by buyer before midnight of fifth business day following transaction; (9) fail, within ten business days of receiving buyer's notice of cancellation, to notify buyer of intent to repossess or abandon goods; (10) solicit sale or order without initially expressly revealing identity of solicitor, trade name, nature of goods or services offered (written information stating above information must be displayed); or (11) use scheme misrepresenting solicitor's true status or mission. (§ 14-302). Violation permits buyer to cancel sale by notifying seller in any manner. (§ 14-303). Violator is liable to affected person for damages and reasonable attorneys' fees; willful violator is guilty of misdemeanor and subject to fine and imprisonment. (§§ 14-304, 14-305). See also subhead Unfair or Deceptive Trade Practices, supra.

Telephone Solicitations.

Regulated by Maryland Telephone Solicitations Act. (§§ 14-2201 to 14-2205). Violation of this Act shall constitute unfair or deceptive trade under tit. 13, sub. 3 of comm. law art.

Consumer Products Guaranty Act.

Act requires certain disclosures to be made by person making available consumer goods or services with actual cash price of more than $10 and making guaranty. (§§ 14-403, 14-401). Act sets forth duties and defenses of guarantor. (§ 14-404, 14-405). Attorney General is authorized to enforce Act (§ 14-406), but policy of encouraging voluntary and informal settlement procedures is stated, and use of such procedures is promoted. (§ 14-407). Service contracts voluntary on buyer's part and designation of service representatives by guarantors specifically permitted. (§ 14-408).

Prescription Drugs.

On request by consumer in person or by telephone, licensed pharmacist must disclose current price of prescription drug sold by pharmacy. (health occ. art. § 12-502).

Pharmacist may substitute generically equivalent drug for prescribed brand name product, unless prescriber expressly directs otherwise if substitution is recognized in U.S. Food and Drug Administration's current list of approved drugs with therapeutic equivalence evaluations, consumer is charged less for substituted drug, and consumer is notified of change in writing. (health occ. art. § 12-504). Dep't of Health and Mental Hygiene must establish, revise and distribute formulary of equivalent drug products. (health occ. art. § 12-504).

Health Maintenance Organizations.

Advertising by HMOs must meet requirements of health-gen. art. § 19-714.

Assignments.

Any holder of consumer credit contract is subject to all claims and defenses which debtor has against seller; notice of this fact must be given in sales contract. (§ 14-1302).

False Advertising.

Person may not advertise falsely in conduct of business, trade or commerce or in provision of any service. To determine if advertisement is misleading, both representations and failure to reveal material facts are to be considered. Violator is subject to penalty of up to $500, recoverable by Attorney General for state in civil action brought after opportunity to defendant to show cause why action should not be commenced. Compliance with rules and regulations of and statutes administered by Federal Trade Commission or any unit of state government is defense. Statute does not apply to television or radio station broadcasting advertisement or to publisher of printed advertisement and does not modify private litigation rights. (tit. 11, subtit. 7). Under Truth in Music Advertising Act, may not advertise or conduct live musical performance or production through use of false, deceptive, or misleading affiliation between performing group and recording group. Attorney General may seek injunction against violation, and violations are subject to civil penalty of at least $5,000, but not more than $15,000 per violation. (§§ 11-501 to 11-504).

Layaway Sales Act.

Seller must: (1) Give buyer written contract, signed by all parties, containing certain required terms, and stating all agreements between parties; (2) hold for buyer, or agree to deliver on agreed date, conforming goods; (3) permit buyer to cancel within seven days after contract was entered, without penalty or obligation, and thereupon refund all payments and return goods traded in; (4) give written receipt for certain payments; (5) comply with request by buyer for statement of account within ten days; (6) deliver goods identical to those selected when buyer has made all payments in accordance with agreement. Buyer may cancel without obligation or penalty, and receive full refund of payment and return of goods traded in; (1) Within seven days after date of contracting, or (2) if seller violates any of above-listed requirements, at any time before buyer accepts goods. Otherwise, buyer may cancel at any time before delivery, but seller may then retain as liquidated damages lesser of 10% of price or amount paid before cancellation. Seller may cancel and retain those same liquidated damages if buyer defaults, which is defined as 15 days delinquency on scheduled payment; however, liquidated damages limitation does not apply if goods were specially ordered to buyer's specification. Seller may not increase layaway price, and must credit to buyer any reduction in price charged for goods made within ten days after execution of contract. Seller who makes sale in willful violation of subtitle is liable to buyer for penalty of three times amount paid by buyer, plus reasonable attorneys fees, in addition to refund provision above. (§§ 14-1101 to 14-1110). See topic 3.22 Sales, subhead Retail Installment Sales.

Credit Cards.

Revolving credit agreements regulated by § 12-903.

Vendors may not record address or telephone number. Also vendors are not permitted to record credit card number as condition of acceptance of personal check. However, vendor may request display of credit card for identification purposes. (§ 13-317).

Consumer credit reporting extensively regulated. (§§ 14-1201 to 14-1218).

Miscellaneous Special Provisions.

Special protection is afforded to consumers transacting for fine prints (§§ 14-501 to 14-505), gold and silver items (§§ 14-601 to 14-608), secondhand watches (§§ 14-701 to 14-706), used radios and televisions (§§ 14-801 to 14-803), kosher products (§ 14-901 to 14-909), automotive repair (§§ 14-1001 to 14-1009) and health club services (§§ 14-12B-01 to 14-12B-08). Contracts for sale of new vehicles must contain price, manufacturer's code or stock number and description of extra items or any charge not included in base price. (trans. art. § 15-311). Dealers offering mechanical repair contracts on vehicles must maintain adequate insurance reserves. (trans. art. § 15-311.1). Unfair and deceptive trade practice to change mileage on odometers. (comm. law art. § 13-301; trans. art. § 22-415). Unfair and deceptive trade practice to fail to correct nonconformity, defect or condition within 30 days of receipt by manufacturer of customer notification, or to replace vehicle or refund purchase price, under Automotive Warranty Enforcement Act: bad faith violations may result in award of up to $10,000 in damages to consumer. (§§ 14-1501 to 14-1504). Violation of this act shall constitute unfair or deceptive trade practice under tit. 13 of comm. law art. Prior waiver of certain rights to hearing or opportunity to be heard before replevin of property subject to security interest is invalid. (§ 14-1303). Unsolicited merchandise sent is considered unconditional gift to recipient, as is merchandise sent by membership sales organization after 30 days following execution of return receipt attached to member's notice of membership termination. Sender's continued billing may be enjoined at expense of losing party. (§ 14-1304). Unsolicited credit card not accepted until person in whose name card is issued signifies acceptance in writing or uses card; until acceptance, issuer bears risk of loss, theft or unauthorized use. (§ 14-1305). Duration of service contract is extended for certain days appliance is in custody of service contractor for upkeep or repair. (§ 14-1306). Credit card issuer must notify cardholder of subpoena for information. Notice sent to last address is sufficient. (§ 13-312). Certain insulating material offered for sale must meet minimum fire retardancy standards and report must be filed with state fire marshal. (§ 13-313). Certain attic fans must contain protective devices. (§ 13-315). Seller of ladder capable of conducting electrical current must affix to ladder warning to that effect. (§ 14-1307). Seller of color photographic film must enclose sufficient processing instructions to enable commercial processor to identify proper chemical and developing procedures. (§ 14-1308). Consumer protection provisions of Title 13 apply to consumer contracts under Maryland Uniform Computer Information Transactions Act. (§ 13-101.1).

Consumer Loans.

Under Md. Consumer Loan Law, upon full repayment of consumer loan lenders must furnish borrowers with written statement identifying loan transaction and stating that loan has been paid in full, mark all loan documents indelibly with words “paid” or “cancelled”, release any mortgage or security, and restore any pledge or certificate of title. (§ 12-308). Similar requirements apply to credit grantors. (§ 12-1024).

Enforcement and Penalties.

Except where other express provision governs, following procedures for enforcement are available: (1) Consumer subjected to violation may file written complaint with Consumer Protection Division; (2) Division must investigate and may refer complaint to Federal Trade Commission; (3) Division may seek cooperation of licensing authorities and contracting departments of state in connection with investigation of licensee or contractor; (4) Division may dismiss complaint if it determines there are no reasonable grounds for finding violation; (5) other rights and remedies of consumer not foreclosed. (§ 13-401). If Division finds reasonable grounds to believe violation has occurred, it may attempt conciliation; terms of conciliation agreement may be embodied in written assurance of discontinuance or settlement agreement, signed by Division and each party, which does not constitute admission of violation. If Division determines that violations are causing immediate, substantial and irreparable harm, Attorney General may seek ex parte or interlocutory injunction without conciliation. Failure to adhere to any such assurance or agreement is violation of Consumer Protection Act. (§ 13-402). After service of statement of charges upon alleged violator and public hearing, if Division determines there has been violation, it may issue cease and desist order and order for affirmative action by violator. Division may issue cease and desist order without first conducting hearing. (§ 13-403[d][1]). However, order must grant respondent opportunity to request hearing, which must be held within seven days from the date on which request is made. (§ 13-403[d][3] &[4]). It may also institute civil action to preserve status quo or to obtain compliance with order. (§ 13-403). Division may submit dispute to arbitration under Uniform Arbitration Act and may institute program for voluntary arbitration of consumer disputes. (§ 13-404). Attorney General has subpoena powers, and information obtained is inadmissible in later criminal proceedings against person providing evidence. (§ 13-405). Apart from procedure for public hearing and subsequent order, Attorney General may, on seven days notice to violator, institute action for injunction, in which court may enter any order necessary to prevent violation or to restore property acquired by violation or appoint receiver where there has been willful violation. (§ 13-406). Attorney General may recover costs of any action brought for use of state. (§ 13-409). Actions by state for recovery of civil penalty or for criminal fine or imprisonment are also possible. (§§ 13-410, 13-411). Above procedures are not exclusive. (§§ 13-407, 13-408).

Plain Language Law.

No plain language statute.

See also topics 3.17 Interest, 3.22 Sales.

3.13 CONTRACTS:

Uniform Commercial Code adopted. (comm. law art. tit. 1-10). See topic 3.09 Commercial

Code.

Unless Md. law provides otherwise, no unit of municipal (art. 23A, § 1A) or county government (art. 25, § 1A; art. 25B, § 13A) may raise defense of sovereign immunity on written contract executed by authorized official or employee. Punitive damages disallowed on county or municipal contracts. (art. 23A, § 1A; courts art. § 5-507[a]; art. 25, § 1A; courts art. § 5-508[a]; art. 25B, § 13A; courts art. § 5-510; art. 25A, § 1A; courts art. § 5-323). Claim on state, county or municipal contracts must be brought within one year from date claim arose or within one year of completion of contract giving rise to claim, whichever is later. (art. 23A, § 1A; art. 25, § 1A; art. 25A, § 1A; art. 25B, § 13A).

3.13A E-COMMERCE:

Electronic Transactions.

Maryland has adopted Uniform Electronic Transactions Act (comm. law art. § 21-101 et seq.), providing for legal recognition of electronic records, electronic signatures and electronic contracts under certain circumstances.

Computer Information Transactions Act.

Maryland has adopted Uniform Computer Information Transactions Act (comm. law art. § 22-102 et seq.), providing for uniform rules governing intangibles of transactions involving electronic commerce. Consumer protection provisions of Title 13 apply to consumer contracts under Title 22. (§ 13-101.1).

3.14 FACTORS:

Uniform Commercial Code adopted. (comm. law art. tits. 1 to 10). See topic 3.09 Commercial Code.

License Requirements.

Factor must procure traders' license in each county or Baltimore City where he opens or carries on fixed place of business. (bus. reg. art. § 17-1801 et seq.).

Consignment Agreements.

No statutory requirements with respect to filing or recording consignment agreements. Even so, in view of Uniform Commercial Code, comm. law art. § 2-326(3), prudent consignor should record “agency record” certificate or file financing statement. (comm. law art. § 2-326[3][c]).

Purchaser without notice that consignee is not authorized to sell and receive payment takes as against owner, though purchaser has notice that seller is only consignee. (comm. law art. § 11-804).

If goods or possessory document taken as security for preexisting debt, then he who takes them, even with knowledge that he takes from consignee, has interest held by pledgor, unless he takes with notice that consignee has no authority to pledge, in which case no interest whatever passes, and claim for setoff of debt due by consignee is not allowed against owner in favor of pledgee. (comm. law art. §§ 11-805, 11-806).

Consignee's Lien.

Consignee has lien on goods for money or negotiable instrument given to or for use of shipper or consignor, unless he has notice that such person is not true owner. (comm. law art. §

11-802). Consignee of agricultural products has lien for bona fide advance in money or goods to consignor on security of consignment. (comm. law art. § 11-808[c]).

Consignee holding possessory document considered true owner for purpose of contract with third person for sale or for deposit of goods as security for money or negotiable instrument, unless third person knows consignee not true owner. (comm. law art. § 11-803).

Conversion of consigned goods or proceeds by consignee or his agent or employee is misdemeanor punishable by fine up to $1,000 or imprisonment up to six months or both. Failure to pay over proceeds of sale, less commissions, within five days after receipt and after demand is prima facie evidence of conversion. (comm. law art. § 11-809).

Consignments of agricultural products give only special right to sell and deliver to bona fide purchaser for valuable consideration, and no mortgage, pledge or deposit passes title. (comm. law art. § 11-808).

Works of fine art become bailment property when delivered to art dealer on consignment and are not subject to claims, liens or security interests of creditors of art dealer. (comm. law art. §§ 11-8A-01 to 11-8A-04).

3.15 FRANCHISES:

References are to bus. reg. art. tit. 14 unless otherwise indicated.

Registration.

Any person offering to sell franchise in Md., or to Md. resident must be registered with Securities Commissioner. (§ 14-214[a]).

Application.

Registration application consists of offering prospectus which must contain following information about franchisor: (1) Names under which franchisor doing or intends to do business and of parent or affiliated company; (2) principal business address and that of State agent authorized to receive process; (3) business form; (4) identity and business experience of persons affiliated with franchisor; (5) statement noting whether any party identified in prospectus was convicted of felony or held liable for fraud, embezzlement, fraudulent conversion or misappropriation of property or is subject to order of SEC or securities administrator of any state denying registration to or revoking registration under securities decree or is subject to order of FTC or is subject to injunctive or restrictive order relating to business activity; (6) length of time franchisor has conducted business of type offered, granted franchises and granted franchises of different type; (7) recent financial statement and statement of any material changes; (8) copy of proposed franchise agreement; (9) franchise fee charged, proposed application of proceeds of fee and formula for fee if fees are not consistent; (10) list of all fees paid by franchisee; (11) termination, renewal, and option purchase clauses; (12) obligations of franchisee to purchase or lease from designated sources; (13) obligations of franchisee to purchase or lease in accordance with specifications or from approved suppliers; (14) terms of financing arrangements; (15) assignment of franchise agreement; (16) earning claims with supporting data; (17) arrangements with public figures; (18) information regarding presently operating franchises; (19) territory; (20) authorization for Commissioner to examine franchisor's financial records; (21) irrevocable consent to suit in Md. and appointment of Commissioner as attorney to receive service of process; and (22) such other information as Commissioner may require. (§ 14-216).

Books and Records.

Maintenance of complete set of books, records and accounts of sales required to sell. (§ 14-224).

Escrow or Bond.

Upon failure of franchisor to demonstrate to Commissioner that adequate financial arrangements have been made to fulfill franchisor's obligations to provide items included in offering, Commissioner may require escrow or impound fees paid by franchisee until obligations satisfied. (§ 14-217).

Exemptions.

Following may be exempted from registration: (1) Offer or sale by franchisee or by subfranchisor of entire area franchise for own account; (2) any transaction by executor, administrator, sheriff, receiver, bankruptcy trustee, guardian or conservator; (3) offer or sale of franchise substantially similar to franchise owned by offeree; and (4) other exemptions determined by Commissioner. (§ 14-214).

Filing Fee.

Application for registration filing fee is $500, for renewal is $250 and for amendment $100. All must be signed and verified by franchisor. (§§ 14-215, 14-219, 14-220). Registration becomes effective at noon of 30th business day after filing application (§ 14-218) and remains effective for one year. (§ 14-219).

Liability.

Person is liable to purchaser if franchise sold in violation of § 14-214 or by means of untrue statement of material fact or material omission. (§ 14-227[a]). Franchisee may sue in law or equity to recover damages (§ 14-227[b]) and franchisor subject to imprisonment up to five years or $10,000 fine or both (§ 14-228). No waiver of liability of franchisor allowed. (§ 14-226).

Material Change.

Franchisor must give Commissioner written notification by application to amend, of any material change in information contained in application. Effective date of amendment to be determined by Commissioner. (§ 14-220).

Offering Prospectus.

Proposed offering prospectus must state in 10-point type that registration does not constitute approval and must accompany application. (§ 14-216). Commissioner may accept application and prospectus required by federal government agency, government agency of another state, or approved by association of administrators of state franchise laws. (§ 14-215).

Powers of Commissioner.

Commissioner may: (1) Upon violation of tit.14, order franchisor to stop further sales and may bring suit in circuit court to enjoin violative acts and enforce compliance within three years after violative act; (2) make public or private investigations; and (3) publish information concerning violation. (§§ 14-207 to 14-210).

Prospective Franchisee.

Unlawful to sell any franchise subject to registration without first providing prospective franchisee, at earlier of (1) prospective franchisee's first personal meeting with franchisor to discuss sale of franchise, or (2) ten business days prior to execution of contract or payment of fee relating to sale of franchise, copy of prospectus with all related agreements. (§ 14-223).

Renewal.

Upon submitting to Commissioner registration renewal statement accompanied by prospectus at least 15 business days before expiration, registration may be renewed for additional one year periods. Effective date of renewal is noon of day on which registration was due to expire. (§ 14-219).

Stop Order.

Revocation of registration may occur if Commissioner finds any of following: (1) Noncompliance with regulations; (2) offer of franchise would constitute deceit or fraud on purchaser; (3) any person identified in application is convicted felon or subject to order or has civil judgment entered against him, as described in § 14-216, whose involvement in sale of franchise creates unreasonable risk to potential purchasers; (4) prospectus has material inaccuracy, is incomplete or contains false or misleading statement of material fact or material omission; (5) any person found to be engaging in false, fraudulent or deceptive practices in connection with offer of franchise; (6) financial condition of franchisor would affect ability to fulfill obligations to franchisee; and (7) noncompliance with escrow or bond requirements. (§ 14-221). Commissioner must notify applicant of entry of stop order, its basis, and that upon receipt of written request matter will be set for hearing within 15 days. Stop order may be vacated or modified. (§ 14-222).

3.16 FRAUDS, STATUTE OF:

All estates or interests in land, leasehold or freehold, except leasehold estates not exceeding one year, created by parol are at will only. Assignment of estate or interest in land must be in writing. (real prop. art. §§ 5-101 to 5-103).

Sales of land made by sheriff under fieri facias are within statute of frauds (194 Md. 51, 69 A.2d 797), but judicial sales are not (214 Md. 230, 133 A.2d 450; 39 Md. 299).

No action may be brought in following cases unless agreement, or note or memorandum thereof, in writing is signed by party to be charged or someone duly authorized by him: (1) Upon promise of personal representative to answer for damages out of his own estate (est. & tr. art. § 8-109[i]); (2) upon promise to answer for debt, default or miscarriage of another; (3) upon agreement made upon consideration of marriage; (4) upon agreement not to be performed within one year (courts art. § 5-901); or (5) upon contract for sale or disposition of land or interest therein (real prop. art. § 5-104). Writing must also show consideration for agreement, except in case (2) above, where consideration may be shown by parol. (courts art. § 10-907).

All declarations of trust and all assignments of beneficial interests in trusts respecting land must be in writing. (real prop. art. §§ 5-105, 5-106).

Contracts of Sale.

Uniform Commercial Code adopted. See topic 3.09 Commercial Code. Contract for sale of goods for price of $500 or more not enforceable unless there is sufficient writing, except when: (1) Contract is for specially manufactured goods with reasonable indication that goods are for buyer; (2) party against whom enforcement is sought admits contract formation; or (3) payment has been made and accepted, or goods have been received and accepted. Between merchants, written confirmation, sufficient to bind sender and received within reasonable time, satisfies requirement as against receiving party who has reason to know of its contents, unless receiving party sends written objection within ten days after receipt. (comm. law art. § 2-201).

Part Performance.

Part performance of substantial nature will take case out of Statute of Frauds and render contract enforceable. (183 Md. 334, 37 A.2d 843; 164 Md. 594, 165 A. 812). Contract must be clear and definite, and act done must likewise be clear and definite and directly referable to particular agreement. (291 Md. 224, 434 A.2d 1015; 314 Md. 689, 552 A.2d 1285).

3.17 INTEREST:

Constitution fixes legal rate at 6% unless otherwise provided by legislature. (Const. art. III, § 57). References are to sections of Commercial Law Art. of Code unless otherwise indicated.

Interest defined in various subtitles regulating loan and credit extension, see infra.

Maximum rate is 6% on unpaid balance unless otherwise provided (§ 12-102), but lender may charge 8% under written agreement (§ 12-103[a][1]). Loan secured by certificate of deposit may bear interest at rate not to exceed 2% above certificate's rate. (§ 12-103[a][2]). As practical matter, however, credit deregulation measures enacted by 1982 and 1983 sessions of General Assembly will be statutory provisions under which most lenders will extend credit.

1982 credit legislation, effective for loans made, renewed or refinanced after July 1, 1982, permits maximum 24% per annum simple interest on following transactions unless otherwise indicated: (1) Unsecured loans and loans secured by pledge of collateral other than savings account (§ 12-103[a][3]); (2) installment loans not secured by real property (§ 12-103[c]); (3) secondary mortgage loans (but origination fee may be charged in some instances) (§ 12-404[d]); (4) closed end credit accounts (24% on accounts made on or after July 1, 1982) (§ 12-505[a][3]); (5) open end retail accounts (may not exceed 2% per month) (§ 12-506[a][3]); (6) installment sales contracts for new and used motor vehicles under two years old (§ 12-609[f]); (7) installment sales contracts for other consumer goods (§ 12-610[3]); (8) loan renewals or extensions made by sales finance companies (§ 12-634[c] & [d]); loans by state-chartered credit unions made before Oct. 1, 1994 (fin. inst. art. § 6-507[a]). For consumer loans not exceeding $6,000 made, renewed or refinanced after July 1, 1982, maximum monthly rate varies with original principal amount and unpaid principal balance per schedule in § 12-306(a)(6). No maximum rate on loan to corporation or commercial loan in excess of $15,000, if not secured by residential real property, or in excess of $75,000, if secured by residential real property. (§ 12-103[e]). Lender who requires borrower to make false or misleading statement that loan is commercial loan is subject to treble damages. (§ 12-106.1). Qualified securities dealers who extend credit to customers may charge interest at any rate on debit balance if debit balance is payable on demand and if secured by securities. (§ 12-103[f]).

Interest is defined to include loan fees, service and carrying charges, discounts, time-price differentials, investigator's fees, points and origination fees. (§ 12-101[e]). Not considered as interest are certain types of late charges, certain prepayment penalties, governmental fees and charges, investigation and supervision fees on loans secured by inventory or accounts receivable, securities broker's service charge, and expenses charged by lender and not retained by lender for attorney's fees, governmental taxes and charges, loan insurance premiums and premiums paid for insuring life or health of borrower. Fees and charges otherwise includable as interest paid by developer to lender for purpose of making loans available to home buyers are not interest except such fees may be charged as interest if § 12-108 is applicable. (§ 12-105). Lender may not charge borrower or other person any point or fraction of point, except where loan is made under federal law and is secured by mortgage or deed of trust insured or guaranteed by federal agency, or where loan is to corporation or is commercial loan in excess of $15,000 not secured by residential real property, or in excess of $75,000 secured by residential real property (§ 12-108[a]), or except where permitted or required pursuant to federal or Md. law providing for program of mortgage purchases or by federal agency, including GNMA, FNMA, FHLMC, etc., or state or local agency under certain conditions. State and local loan programs subject to one point limit. (§ 12-108[b], [c]).

Extensive consumer protection measures apply regarding repossession and redemption of goods (§ 12-115); refinancings and consolidations of loans (§ 12-116); elimination of holder in due course status of assignee of consumer debt (§§ 12-117, 14-1302); charging of variable interest on loans not secured by real property (§§ 12-118,12-505.2, 12-610.2); prohibition of or restriction on balloon payments in certain transactions (§§ 12-103[a][3] & [c], 12-306[a][7], 12-

505.3, 12-634; fin. inst. art. § 6-507[b][5]). Computation of interest and fees allowed are regulated. (§§ 12-306, 12-307). Disclosure statement quoting statutes and providing certain information required. (§ 12-308). Criminal penalties apply to overcharges not due to accidental or bona fide error of computation, and to knowing and willful participation in violation by member, officer, director, employee, or agent of licensed lender. (§ 12-316). Lender may not retain any interest or compensation if excess interest, discount or other charge is willful. Treble overcharge in damages allowed for non-willful overcharges not corrected before next payment. (§ 12-313).

1983 credit legislation adds two new subtitles to comm. law art. without changing existing subtitles. (See discussion supra.) “Credit grantors” have option of extending credit either under one of new subtitles or under prior law, but each transaction must comply with all provisions of subtitle elected. (§§ 12-914, 12-1014). New provisions, which cover revolving credit transactions (Subtit. 9) and closed end credit transactions (Subtit. 10), employ term “credit grantor” to make clear application not only to banks and traditional lenders, but also to retailers and others who extend credit and make loans in course of business (§ 12-901). New subtitles cover all types of loans and borrowers, but certain consumer protections apply only to credit or loans extended to consumers for personal, household or family purposes.

Subtit. 9 governs extensions of credit such as bank and retail credit cards, credit card cash advances, overdraft or credit checking and lines of credit, including telephonic, electronic and automated teller transactions. (§ 12-902). Revolving credit plan may be secured by any collateral acceptable to credit grantor including real property, except that revolving line of credit accessible by use of credit card may not be secured by lien on residential real property. (§ 12-902). Interest rate is capped at 24% per year simple interest but may vary with index. (§§ 12-903, 12-904). Interest rate, as varied, may apply to purchases or loans made prior to date that rate changed. (§ 12-904). § 12-904(a) provides that charges contained in revolving credit plan agreement may vary according to index or formula that (1) is made readily available to and verifiable by borrower, (2) is beyond control of credit grantor, and (3) may be within control of borrower. Subsection (d) provides that if formula under (a)(3) is used to measure credit risk, periodic percentage rate of interest or finance charges (1) shall be lower for consumer borrower measured as more credit worthy and (2) if formula considers delinquency or arrearages, may not be raised unless consumer borrower is at least two months in arrears in payment. Balloon payments prohibited. (§ 12-903). Finance charge or interest may not be imposed if balance is paid in full within 25 days after end of billing period or, if there is no balance at beginning of billing period, on purchases added to account during billing period. (§ 12-903).

If credit agreement does not impose certain special fees, e.g., annual membership charge, transaction charge or minimum charge level, and if agreement provides, credit grantor may impose interest or finance charge from date of purchase. (§§ 12-903, 12-905). Sellers of goods or services are limited to imposing only one special fee, which must be foregone if interest is charged from date of purchase. (§§ 12-903, 12-905). Certain actual, verifiable fees incurred but not retained by credit grantor may also be charged to consumer borrower, and if credit grantor is depository institution that extends credit by demand deposit or overdraft loan arrangement, it may impose customary service charges. (§§ 12-905, 12-907). All credit grantors may allow deferral of scheduled payment and assess deferral charge. (§ 12-908).

Credit grantor may require consumer borrower to purchase certain property, title or credit loss insurance if loan is secured, but purchase of certain other types of insurance is consumer's option. Premiums are not considered interest or finance charges. (§ 12-909).

Non-consumer borrowers may be subject to higher interest rates on payments or portions thereof in default, and all borrowers may, under certain circumstances, be subject to late or delinquency charges which are not considered interest or finance charges. Assessment of such charges is regulated. (§ 12-910).

Credit grantor may impose different terms on debt arising out of purchases and that arising out of loans unpaid and, provided proper notice is given, may amend terms to alter amount of interest, fees or repayment due or method of computation. Upon proper notice, new terms may apply to any indebtedness that arose prior to date of change. (§§ 12-906, 12-912).

Licensing, investigatory, enforcement and penalty provisions of fin. inst. art. tit. 11, subtit. 3, and tit. 11, subtit. 5, continue to apply to subject institutions under 1983 enactment, unless credit grantor or extension of credit is exempt. (§ 12-915). Commissioner of Consumer Credit administers subtitle, but authority does not extend to depository institutions. (§ 12-916). Penalties for knowing or wilful violations are set forth (§§ 12-917, 12-918), but credit grantors are not liable for noncompliance if error is corrected within certain time and under certain conditions (§ 12-920). Statute of limitations for actions for violation of subtitle is six months after credit extension has been repaid in full. (§ 12-919).

If consumer borrower is in default, certain specific procedures must be followed for repossession, sale, redemption or application of proceeds, but requirements may not apply in certain cases of fraudulent or wrongful conduct by borrower or in event of prior repossession and redemption. (§ 12-921).

Subtit. 10, which governs closed end credit transactions, permits credit grantor to charge up to 24% simple interest per year, which rate may vary with same type of objective index described above. (§§ 12-1003, 12-1004). (But see § 12-306[a][6], enacted in 1982 session, which permits effective interest rate of up to 33% on certain closed end consumer loans.)

Credit grantor may charge certain other loan fees, finder's fees or other charges, provided that sum thereof does not exceed 10% of underlying loan, and may charge reasonable fees for services rendered or expenses incurred; provided, however, that such fees may be charged to consumer borrower only in certain instances. (But see § 12-1005[a].) Such fees and charges are not considered interest. (§ 12-1005). Certain other fees and costs may be assessed in event of default. (§ 12-1011).

If loan to consumer under Subtit. 10 is secured by collateral other than lien on residential real property, balloon payments at maturity are prohibited. If loan is secured by secondary lien on residential real property, balloon payment at maturity is permitted in certain circumstances. (§ 12-1003[c]).

Deferral of scheduled payments is permitted, as is fee therefor. (§ 12-1006). Credit grantor may require consumer borrower to purchase certain types of insurance in certain circumstances, but other types are optional with consumer. Premiums for such insurance are not considered interest. (§ 12-1007). Non-consumer borrowers may be required to pay certain higher interest rates on payments in default, and all borrowers may, under certain circumstances, be subject to late or delinquency charges (provided, however, that consumer loan agreement must so state). Such charges are not considered interest. (§ 12-1008).

Consumer borrower may prepay Subtit. 10 loan without penalty. (§ 12-1009). If consumer refinances, charge may be imposed. (§ 12-1010). For non-consumer loans, credit grantor may charge fees for extension, deferral, prepayment or refinancing. (§ 12-1012).

Subtit. 10, like Subtit. 9, supra, sets forth various provisions for licensing, regulation, enforcement, penalties and repossession. (§§ 12-1015—12-1021).

Lenders are subject to licensing, regulation enforcement and penalty assessment by Commissioner of Consumer Credit and Bank Commissioner as applicable. See specific comm. law art. provisions discussed supra, and fin. inst. art. tits. 11 and 12.

Disclosure statements setting forth principal, total finance charge as defined in federal Truth-in-Lending Act in dollars (if loan payable on demand, on per diem basis), rate in percent and payments in addition to interest must be furnished to borrower prior to execution of loan contract, unless loan under Md. Higher Education Loan Program, loan made to corporation or commercial loan in excess of $15,000, if not secured by residential real property, or in excess of $75,000, if secured by residential real property. (§ 12-106). Compliance with disclosure provisions of Federal Truth-in-Lending Act and regulations sufficient. (§ 12-106[b][3], [b][4]). Lenders receiving monthly payments on more than five loans secured by real property must notify each borrower at least annually of prior payments of principal, amount considered as interest, and amount of principal remaining unpaid. (§ 12-106[c]).

Bonds, notes and other written obligations to pay specified sum of money bear interest from date, if “with interest” or “with interest from date” be written therein or thereon; otherwise, from either date of demand or date of accrual of cause of action, in accordance with Uniform Commercial Code. (§§ 3-118[d], 3-122[4]).

Judgments and decrees generally bear interest at 10% from rendition. Money judgments for loan debt not secured by realty may carry contract rate until originally-scheduled maturity date. (courts art. §§ 11-106, 11-107, 11-301).

Open Accounts.

Interest does not run as matter of right, but may be allowed in such amount as is fair in discretion of jury, or court, if case is tried without jury. (213 Md. 509, 132 A.2d 582; 245 Md. 524, 226 A.2d 565).

Mortgage Secured Loans.

From Feb. 23, 1979 any loan secured by first mortgage or first deed of trust on residential real property or interest therein may carry interest at any rate if there is written agreement between lender and borrower setting forth rate, if there is no prepayment penalty, if not refinancing of loan secured by first mortgage or first deed of trust on any interest in residential real property (unless lender is banking institution, national bank association, federal savings bank, or federal or state savings and loan association or credit union, or other exceptions apply), and if lender does not require payment of any interest in advance except any points otherwise permitted. (§ 12-103[b]). Lender may charge interest at rate permitted by federal law if loan made in compliance with federal law, secured by mortgage or deed of trust, and insured or guaranteed in full or part by FHA, VA or other federal agency or instrumentality. (§ 12-103[d]). From June 1, 1974 lending institution lending on security of first mortgage or deed of trust or residential real property and maintaining escrow account must pay interest on such account at greater of regular passbook rate or 3%, unless lender uses direct reduction method; does not apply if loan purchased by out-of-state lender under certain federally insured mortgage programs if purchaser services loan itself. Lender or lender's assignee may not impose collection fee or service charge on maintenance of escrow account on first mortgage or first deed of trust. (§ 12-109.2). Lender imposing fees on borrower for settlement services or document review services performed by lender-designated attorney for loan on borrower's primary residence must make certain written disclosures. (§§ 12-119, 12-120).

Secondary Mortgage Loans.

Person making loans, not to corporate borrowers or for business purposes or commercial investment, where loan or deferred purchase price is secured in whole or part by mortgage, deed of trust, security agreement or other lien on Md. residential real property subject to lien of one or more prior encumbrances other than ground rent or leasehold interest, must be licensed under or exempt from licensing requirements of tit. 12, subtit. 3 of fin. inst. art. (§§ 12-401, 12-402). Interest ceiling is 24% per annum simple interest providing certain conditions are met. Lender may take interest in advance on full amount of loan for entire period; balloon payments permitted only on residential real property with mandatory postponement options given to borrower. (§§ 12-404, 12-404.1). In certain circumstances, consumer protection measures apply. (§§ 12-116, 12-117, 12-118). Loans regulated in extensive detail. Criminal penalties apply to wilful violation by lender, officer, employee or other person. (§ 12-414). See subhead Maximum Rate, supra. Subordinate mortgage loans made under credit grantor subtitles are not subject to these restrictions. (§§ 12-913.1, 12-1013.1).

Insurance premium loan carrying charges may not exceed 1.15% per 30 days, and initial service charge may not exceed $20. (ins. arts. 23-504, 23-304, 23-305).

Usury.

Defined as charging by lender of interest in amount greater than allowed by comm. law art. tit. 12, subtit. 1. (§ 12-101[k]). Person guilty of usury must forfeit three times excess of interest and charges collected above legal interest and charges or $500, whichever is greater. Usury cannot be claimed or pleaded if lender, within 30 days of execution of loan, gives notice and modifies contract rate to legal rate. (§ 12-114). Usury cannot be claimed or pleaded against assignee or holder for bona fide and legal consideration without notice of usury in creation or assignment of instrument (§ 12-112) or against anyone where loan has been satisfied for six months (§ 12-111). Usury law applies to loan document executed outside Md. if loan is to Md. resident and secured by property located in Md. (§ 12-114[c]).

Discrimination prohibited, with certain exceptions. (§§ 12-113, 12-305 [consumer loans]). Equal Credit Opportunity Act, administered by Commissioner of Consumer Credit except for actions relating to certain banks which are administered by State Bank Commissioner, prohibits discrimination on basis of sex, marital status, race, color, religion, national origin or age (assuming ability to contract). Violation of Federal Equal Credit Opportunity Act is violation under Maryland statute. (§§ 12-701 to 12-707).

See also topic 3.22 Sales, subheads Retail Installment Sales, Retail Credit Accounts, Sales Finance Companies.

3.18 [RESERVED]

3.19 LICENSES, BUSINESS AND PROFESSIONAL:

General license laws of state are contained in bus. reg. art. License laws relating to alcoholic beverages are contained in art. 2B. Clerks of circuit courts issue all traders' licenses (bus. reg. art. tit. 17, subtit. 18) and marriage licenses (fam. law art. § 2-405). License laws relating to grain dealers contained in agric. art. tit. 13. Most businesses and some occupations are required to obtain licenses. State licensing authorities may require individual applying for license to disclose whether individual has ever been convicted of controlled dangerous substance offense (i.e., drug offense) on or after Jan. 1, 1991, and if applicant has been so convicted, licensing authorities may (i) refuse to issue license to individual, or (ii) issue license subject to certain terms and conditions. (art. 41, §§ 1-501—1-507, crim. law art. § 5-810). Before any license may be issued or renewed, applicant must certify that he has paid all undisputed taxes and unemployment insurance contributions or has provided for payment in manner satisfactory to unit responsible for collection. (bus. occ. art. § 1-203).

Applicant for issuance or renewal of license or permit must certify that all taxes, including unemployment insurance contributions, have been paid. (bus. occ. art. § 1-203).

Accountants.

Licensing requirements contained in Business Occupations Article (bus. occ. art.), tit. 2.

Architects.

Licensing requirements contained in bus. occ. art., tit. 3.

Barbers.

Licensing requirements contained in bus. occ. art., tit. 4.

Certified Interior Designers.

Licensing requirements contained in bus. occ. art., tit. 8.

Cigarette Manufacturing.

Licensing requirements contained in bus. reg. art. §§ 16-201 to 16-207, 16-210, 16-212, 16-214 and tax. gen. art. 12-104, 12-201, and 13-825(h)(1).

Cosmetologists.

Licensing requirements contained in bus. occ. art., tit. 5.

Electricians.

Licensing requirements contained in bus. occ. art., tit. 6.

Foresters.

Licensing requirements contained in bus. occ. art., tit. 7.

Hearing Aid Dealers.

Licensing requirements contained in comm. law art. 14-2501 to 14-2506.

Heating, Ventilation, Air Conditioning and Refrigeration Contractors.

Licensing requirements contained in bus. reg. art. §§ 9A-101, 9A-302, 9A-306, and 9A-309.

Home Improvement Contractors.

Licensing requirements contained in bus. reg. art. tit. 8.

Individual Tax Preparers.

Registration requirements contained in bus. occ. art., tit. 21.

Landscape Architects.

Licensing requirements contained in bus. occ. art., tit. 9.

Lawyers.

Licensing requirements contained in bus. occ. art., tit. 10.

Mortician.

Licensing requirements contained in health occ. art. §§ 7-301 to 7-321.

Pilots.

Licensing requirements contained in bus. occ. art., tit. 11.

Plumbers.

Licensing requirements contained in bus. occ. art., tit. 12.

Private Detectives.

Licensing requirements contained in bus. occ. art., tit. 13.

Private Home Detention.

Licensing requirements contained in bus. occ. art., tit. 20.

Professional Engineers.

Licensing requirements contained in bus. occ. art., tit. 14.

Professional Land Surveyors.

Licensing requirements contained in bus. occ. art., tit. 15.

Real Estate Appraisers and Home Inspectors.

Licensing requirements contained in bus. occ. art. tit. 16.

Real Estate Brokers.

Licensing requirements contained in bus. occ. art., tit. 17.

Security Guard Agencies and Security Guard Certification.

Licensing requirements contained in bus. occ. art., tit. 19.

Security Systems Technicians.

Licensing requirements contained in bus. occ. art. §§ 18-301 to 18-311; bus. reg. art. § 8-301(d)(4) and (5).

Stationary Engineers.

Commercial Travelers.

Nonresident traveling salesmen, sample merchants and representatives of foreign mercantile or manufacturing concerns need no license to make sales to or solicit orders from licensed merchants. (bus. reg. art. § 17-804). With certain exceptions hawker's and peddler's license is required for sales to public. (bus. reg. art. tit. 17, subtit. 9).

Nonresident Businesses.

Nonresident home improvement contractors, heating, ventilation, air conditioning, and refrigeration contractors, construction contractors, and plumbers and gas fitters are required to pay license fees. (bus. reg. art. §§ 8-301, 8-303, 9A-301, 9A-305, 17-602, 17-603, 17-1503, 17-1504).

Gasoline dealers must be licensed (bus. reg. art. tit. 17, subtit. 18) and are subject to special regulation (bus. reg. art. tit. 10, subtit. 3 [Motor Fuel Inspection Law]). See also topic 3.20 Monopolies, Restraint of Trade and Competition, subhead Gasohol and Gasoline Products Marketing Act.

Mortgage bankers and brokers must be licensed and must file $50,000 surety bond with Bank Commissioner. (fin. inst. art. §§ 12-501 to 12-507).

Franchises.

Offer of franchise in Md. or to Md. resident must be registered with Securities Commissioner. (bus. reg. art. tit. 14). See topic 3.15 Franchises.

Fur Dealers.

Exempt from license if furs or pelts were taken legally from wild by that person. (nat. res. art., § 10-506[f]).

Residential service agency required to obtain license. (health gen. art. 19-4A-01 to 19-4A-10). Residential service agency is any nongovernmental business employing or contracting with individuals to provide home health care for compensation to unrelated sick or disabled individual in residence of that individual.

Collection Agencies.

Collection agencies licensed by Collection Agency Licensing Board, division of Office of Commissioner of Consumer Credit. (bus. reg. art. § 7-301). In addition to annual license fee of $400, surety bond of $5,000 must be posted. (bus. reg. art. §§ 7-302 to 7-304). Certain debt collection practices forbidden. See topic 3.12 Consumer Protection, subhead Consumer Debt Collection.

3.20 MONOPOLIES, RESTRAINT OF TRADE AND COMPETITION:

Art. 41 of Md. Declaration of Rights prohibits monopolies. Common law prohibits restraint of trade. (258 Md. 419, 266 A.2d 1). Md. Antitrust Act (comm. law art. tit. 11, subtit. 2) complements federal law governing restraints of trade, unfair competition and unfair, deceptive and fraudulent acts or practices (§ 11-202; 36 Md. L. Rev. 323), but permits suit by indirect purchasers (§ 11-209[b]). Enumerated activities are exempt. (§ 11-203). Attorney General may institute criminal and civil enforcement proceedings, and final judgment or decree in such proceedings (but not consent judgment or decree entered before testimony is taken) is prima facie evidence against defendant in private action for treble damages. (§§ 11-207, 11-209, 11-210). If Maryland brings criminal action under subtitle 2 of title 11, or U.S. brings criminal action under federal antitrust law, any civil action under § 11-209 related to subject matter of criminal action must be brought within one year after conclusion of criminal action or within four years after cause of action accrued, whichever is later. Certain conduct is specifically permitted. (§ 11-204[b]).

See also topic 3.12 Consumer Protection; category 17 Intellectual Property, topic 17.01 Trademarks and Tradenames.

Sales Below Cost.

No retailer or wholesaler may, with intent to injure competitor or destroy competition, advertise, offer to sell or sell at retail or wholesale any item of merchandise at less than cost as defined in Act. Circuit courts have jurisdiction to enjoin any act so prohibited. Act does not apply: (1) To bona fide clearance sales, if so advertised and goods so marked and sold; (2) to prompt sales necessary to forestall loss; (3) where merchandise is imperfect or damaged or is being discontinued, if so advertised, marked and sold; (4) to sales in final liquidation of business; (5) to sales for charitable purposes or to relief agencies; (6) to contract sales to departments of government or governmental institutions; (7) to sales by officer acting under order or direction of court; (8) where price is set in good faith to meet competition. (comm. law art. tit. 11, subtit. 4). Statutory formula for determining costs held unconstitutional as applied to merchant whose costs were less than formula. (197 Md. 586, 80 A.2d 267).

Cigarette Sales Below Cost Act contains special provisions governing retail and wholesale sales of cigarettes, which are not covered by general Md. Sales Below Cost Act. (comm. law art. tit. 11, subtit. 5).

Resale Price Agreements.

See category 17 Intellectual Property, topic 17.01 Trademarks and Tradenames.

Gasohol and Gasoline Products Marketing Act governs oral or written agreements between distributors of gasohol and gasoline products and retail dealers under which dealers obtain right to use trademark, tradename, service mark, etc. or to occupy premises. (comm. law art. tit. 11, subtit. 3). See also topic 3.18 Licenses, Business and Professional, subhead Gasoline Dealers.

3.21 NEGOTIABLE INSTRUMENTS:

See topic 3.02 Bills and Notes.

3.22 [RESERVED]

3.23 SALES:

References are to Commercial Law Article of Code unless otherwise noted.

Uniform Commercial Code adopted. (comm. law art. tit. 2). See topic 3.09 Commercial Code.

Sales Below Cost Act.

See topic 3.20 Monopolies, Restraint of Trade and Competition.

Contracts of Sale.

No statutory regulation as to type size in printed contracts generally; however, in retail installment sale agreements, certain matters must be printed in 12-point bold type or larger. See subhead Retail Installment Sales, infra.

Bills of Sale.

Uniform Commercial Code adopted.

Conditions or Warranties.

Uniform Commercial Code adopted. See topic 3.09 Commercial Code, subhead Intentional Variations, for limitations on attempts to exclude warranties. (§§ 2-316, 2-316.1).

Improvements to Real Property.

Unless properly excluded, there are implied warranties to original purchaser of newly constructed private dwelling unit for one year that improvements are free from faulty materials, constructed in workmanlike manner according to sound engineering standards and fit for habitation. In case of structural defects, warranty expires two years from date of completion, delivery, or taking of possession. (real prop. art. §§ 10-203 and 10-204).

Product Liability.

Manufacturer or supplier of dangerous or harmful product may be liable for negligence if it knows of danger and fails to warn user (198 Md. 414, 84 A.2d 81; 221 Md. 476, 158 A.2d 110), or if it represented unsafe product to be safe (221 Md. 105, 156 A.2d 442). Under Uniform Commercial Code, express or implied warranty extends from manufacturer, dealer and retailer to family, household and guests of purchaser and to any other ultimate consumer or user of goods or person affected thereby, if it is reasonable to expect person to use, consume or be affected and if person is personally injured by breach. (§§ 2-314, 2-318). Attempt by seller or manufacturer of consumer goods or services to modify or exclude express or implied warranties is unenforceable. (§ 2-316.1). Defenses available in tort action, such as contributory negligence and assumption of risk, may be asserted in breach of warranty actions. (See 260 Md. 190, 271 A.2d 744; 279 Md. 371, 368 A.2d 993; 397 Md. 108, 916 A.2d 257.)

§ 402A of Restatement (Second) of Torts providing for strict liability in tort for seller of defective and unreasonable dangerous consumer goods has been adopted by case law, 278 Md. 337, 363 A.2d 955.

Transfer of Title.

Uniform Commercial Code adopted.

Delivery.

Uniform Commercial Code adopted.

Stoppage in Transitu.

Uniform Commercial Code adopted.

Remedies of Seller and Buyer.

Uniform Commercial Code adopted.

Defenses Against Lender.

Licensed lender who knowingly participates in financing sale of goods or services used primarily for personal, family or household purposes is subject to all claims and defenses of borrower against seller arising from such sale. (§ 12-309).

Conditional Sales.

Uniform Commercial Code adopted. No recordation tax. No statutory requirement as to type size in printed contract. Absent specific agreement to contrary, person in lawful possession of property has right of possession superior to person with legal title by virtue of security interest pursuant to conditional sales contract or other security agreement. Such legal title no defense to charge of theft. (crim. law art. § 7-110).

Lease of chattels, designed to accomplish purposes of conditional sale, must be recorded as conditional sale contract. (190 Md. 182, 57 A.2d 796; 219 Md. 593, 150 A.2d 456).

Land Installment Contracts.

References are to Real Property Article of Code unless otherwise indicated. Executory agreement under which purchaser agrees to pay purchase price of improved or unimproved and subdivided real property to be used or improved and used as dwelling in five or more payments subsequent to any down payment and under which vendor retains title as security is governed by real prop. art., tit. 10, subtit. 1. There must be complete written contract signed by all parties. Purchaser must be given and give receipt in form specified for copy of instrument at or before signing. Purchaser must also be given and give receipt for copy signed by seller. Purchaser has unconditional right to cancel until he signs and receives copy signed by seller. Before purchaser signs and receives copy, seller must deliver receipt in form specified for any payment or deposit made by purchaser. (§§ 10-102[a] to [e]). Within 15 days after contract signed by both parties, vendor must record it among land records of county where property lies; otherwise purchaser may cancel. (§ 10-102[f]). Contract must contain information specified, and must recite certain information in tabular form. (§ 10-103[b]). Application of installment payments is prescribed (§ 10-103[c]), and vendor may not place or hold mortgage on property in amount greater than balance due under contract, nor may mortgage require payments in excess of contract installments (§ 10-103[d]). When contract recorded, property is deemed to be held by record owner of title, subject to rights of purchaser. (§ 10-104). When 40% of purchase price paid, or sooner if contract so provides, purchaser may demand grant of premises, on condition that he execute purchase money mortgage. Periodic principal and interest payments required by mortgage may not exceed land contract installments unless mortgagor consents. Deed and mortgage executed pursuant to purchaser's demand supersede land installment contract. (§ 10-105). Purchaser may cure default under contract before date designated in vendor's notice to terminate contract. (§ 10-106). Vendor must deliver statement of account to purchaser at least annually (in Jan.) or on demand no more than twice a year and when 40% of purchase price paid. (§ 10-107). Purchaser may enforce law by suit in equity, and may be awarded reasonable attorneys' fees. (§ 10-108). Special notice required for contract involving some subdivisions in Prince George's County. (§ 10-701).

Retail Credit Accounts.

References are to Commercial Law Art. of Code unless otherwise indicated. Retail credit accounts made in Md. must comply with comm. law art. See topic 3.17 Interest, subhead Maximum Rate, for summary of 1983 legislation dealing with open-end credit transactions. Account considered made in Md. regardless of situs if: (1) Seller offers or agrees in Md. to sell to resident buyer, (2) resident buyer accepts or offers to buy in Md., (3) oral or written solicitation to sell originates outside Md. but is forwarded to and received by resident buyer, or (4) verbal or written solicitation to buy originates in Md. from resident buyer and is forwarded to and received by outside retail seller. (§ 12-502[b]). Retail credit account may be established by seller or financial institution only on request of or with consent of buyer. (§ 12-503[a]). Discrimination on basis of sex, marital status, age (over 18) or geographic area or neighborhood is prohibited. Questionnaire may not refer to race, creed, color or national origin of applicant. (§ 12-503[b]). Alimony or child support received by buyer must be considered as income. (§ 12-503[c]). Seller or financial institution establishing account must confirm fact in writing in form specified. (§ 12-503[d]). Retail credit account agreement must be in writing and either be signed by buyer or reasonable attempt have been made to obtain buyer's signature; certain information must be contained in application form for account and supplied upon establishment of account. (§ 12-503[e]). Before first payment and within 40 days after each purchase, holder of account must inform buyer in writing of certain information (§ 12-503[f]), and certain other information must be supplied in writing within 40 days after each payment (§ 12-503[g]). Buyer under open-end account may request annually amount of finance charges collected by holder during preceding calendar year; holder must respond within 30 days. (§ 12-503[h]). Buyer whose credit balance on open-end account exceeds $1 must receive monthly statement; and if balance remains same after four consecutive monthly statements, holder must send buyer check or money order in full amount. (§ 12-506.1). Holder of account must disclose address and telephone number on each billing statement. (§ 12-503[i]). Maximum finance charges on open-end and closed-end accounts are prescribed. No membership or other fee except that specified in subtitle may be charged on open-end accounts. (§§ 12-504 to 12-506). Unintentional and good faith failure to comply with §§ 12-504 to 12-507 may be corrected within ten days after holder becomes aware of such failure. (§ 12-513[b]). Promissory note taken as part of retail credit account must refer to account and is subject, if assigned, to defenses of buyer against establisher of account; note may not contain confession of judgment. (§ 12-507). Account agreement may contain provision for payment of reasonable attorneys' fees only, fees to be set by court. (§ 12-508). Notwithstanding agreement to contrary between seller and issuer of credit card, seller may offer cash discount to cash customers. (§ 12-509). Buyer may inquire in writing about status of account, and holder of account must answer within 60 days or forfeit finance charges. (§ 12-510). Buyer may assert billing error in writing within 60 days of receipt of statement, and holder must acknowledge in writing within 30 days of buyer's inquiry and, within 60 days and before action to collect, make corrections and notify buyer thereof or send buyer statement of reasons why account is correct. Until holder complies, he may not communicate unfavorable credit information concerning buyer based on buyer's failure to pay disputed account. Failure to comply subjects holder to civil penalties as follows: if there is no billing error, holder forfeits finance charge in connection with disputed amount from date of buyer's inquiry; if there is billing error, holder is liable for damages resulting from failure to comply. (§ 12-511). Buyer cannot be charged fee for reply to account status inquiry or billing inquiry. (§ 12-511.1). Buyer cannot waive benefits of retail credit accounts law. (§ 12-512). General penalty for violation of law is forfeiture of finance charges (§ 12-513[a]), and knowing violation is misdemeanor punishable by fine up to $100 (first offense) or up to $500 (subsequent offense) (§ 12-515). Complaint of violation is filed with Commissioner of Financial Regulation, who may investigate and may hold hearing after ten days written notice to defendant. If Commissioner finds violation, he must issue cease and desist order, which is appealable under Md. Administrative Procedure Act. Commissioner may not issue cease and desist order against incorporated bank, savings institution or trust company, against savings and loan association or against federal or state-chartered credit union. (§ 12-514). See topic 3.17 Interest, subhead Maximum Rate, for discussion of additional regulation.

Retail installment sales of goods whose price is $25,000 or less are governed by comm. law art. tit. 12, subtit. 6, and tit. 12, subtit. 10. See topic 3.17 Interest, subhead Maximum Rate, for discussion of additional regulation. Bona fide C.O.D. transactions, and those regulated by Md. Layaway Sales Act (see topic 3.12 Consumer Protection) not governed by subtit. 6. (§ 12-601[1][3]). Seller or sales finance company may not make false, misleading or deceptive statement in advertisement relating to finance, delinquency or extension charges or to security interest, collateral, terms or conditions on which it will make or finance installment agreement. (§ 12-602). Discrimination on basis of sex, marital status, age (over 18), geographic area of residence or neighborhood of residence prohibited. (§ 12-603). Installment sale agreement must be evidenced by complete written instrument, signed by all parties before seller delivers goods. (§ 12-604). Seller must deliver exact copy of agreement to buyer at or before time buyer signs: he must also deliver copy signed by seller within 15 days after buyer signs, or agreement and instruments signed by buyer are void, and seller must refund all payments and deposits. Until buyer signs agreement and receives copy signed by seller, he has unconditional right to cancel and receive refund of payments and deposits made; during cancellation period, seller must deliver receipt for any payment or deposit, which receipt must be in form specified. (§§ 12-605[a]-[c]). Acknowledgment of delivery of copy of agreement must be printed in 12-point type or larger, and, if contained in agreement, must be printed immediately below signature and independently signed. (§ 12-605[d]). Agreement must contain specified information. (§ 12-606). If agreement does not contain information required by §§ 12-604 to 12-606, or if seller fails to deliver copy to buyer, or agreement contains finance charge in excess of applicable charge permitted by § 12-609 or 12-610 of comm. law art., tit. 12, subtit. 6, holder may not collect finance, delinquency or collection charges from buyer. (§ 12-630[a]). Certain provisions, including confession of judgment and assignment of wages, are prohibited. (§ 12-607). If instrument contains prohibited provision, provision is void, and holder may not collect any finance, delinquency or collection charge. (§ 12-630[d]). Special provisions apply to catalog sales. (§ 12-608). Detailed provisions prescribe maximum finance charges, additional charges allowable, charges which may be made for insurance, refunds of charges which must be made in certain instances, etc. (§§ 12-609 to 12-616, 12-619, 12-620, 12-623). If excessive finance charge is imposed by agreement, holder cannot collect any finance, delinquency or collection charge (§ 12-630[a]); however, unintentional and good faith failure to comply with §§ 12-609 to 12-612 may be corrected within ten days (§ 12-630[c]). If buyer is charged for insurance, holder or assignee must deliver copy of policy or certificate within 25 days after delivery of goods or within five days after assignment. (§ 12-613[c]). If buyer must make payment in addition to down payment before he has right to delivery, he may cancel before delivery or tender of goods by seller, and seller must refund at least 90% of all payments made within ten days. If buyer is entitled to delivery because of down payment and before any further payment but refuses to accept goods, all or part of down payment may be forfeited as provided in agreement. (§ 12-615). Person receiving payment on account of agreement must give receipt on request, or without request if payment is in cash. (§ 12-617[a]). Unless buyer receives written notice of assignment of agreement, he may pay or notify last known holder, and such payment or notice is binding on assignee. (§ 12-617[b]). Add-on contract is permitted. (§ 12-618). Notwithstanding provision in agreement to contrary, buyer may prepay without penalty, and holder must refund specified portion of finance charge. (§§ 12-612 [consumer goods], 12-620). Holder is required to deliver copy of agreement and statement of account within ten days after receipt of request from buyer; statement must be supplied free, except that fee of 50¢ may be charged for statement supplied within 60 days after prior statement. (§ 12-621). After buyer has paid all sums due and upon request, holder must deliver within 15 days to buyer, surety and each owner of collateral signed statement of discharge and instruments of release. (§ 12-622). Detailed provisions govern repossession. (§§ 12-624 to 12-627). Promissory note taken as part of installment sale must refer to agreement, and if assigned, is subject to defenses which buyer might assert against seller or sales finance company (except buyer's acknowledgment or receipt of copy of agreement is conclusive in favor of assignee without actual knowledge to contrary). (§§ 12-628, 12-630[b]). Buyer may not waive benefits of retail installment sales law. (§ 12-629). Complaint of violation is filed with and handled by Commissioner of Consumer Credit same as for violation of retail credit account law. Knowing violation of comm. law art. §§ 12-602 to 12-631 is misdemeanor punishable by fine up to $100 (first offense) or up to $500 (subsequent offense). (§ 12-636[a]). See topic 3.17 Interest, subhead Maximum Rate, for discussion of additional regulation.

Sales Finance Companies.

Person, other than banking institution, engaged in business of acquiring, investing in or lending money or credit on security of interests in: (1) Installment sale agreements made between others; (2) retail credit account transactions made between others; or (3) certain home improvement transactions made between others, must be licensed by Commissioner of Consumer Credit. (fin. inst. art. tit. 11, subtit. 4). Such licensee may renew or extend time for payment of any installment of or whole of installment sale agreement or may refund previously paid installment, if written agreement is signed and delivered as specified. (comm. law art. §§ 12-632, 12-633). Licensee may charge for renewal, extension, or refund up to specified maximum interest rates. (§ 12-634). Licensee must permit buyer to prepay without penalty and must refund unearned finance charges. (§ 12-635). Violation of comm. law art. §§ 12-632 to 12-635 is misdemeanor punishable by fine up to $500 or imprisonment up to six months or both. (§ 12-636[b]). See topic 3.17 Interest, subhead Maximum Rate, for discussion of additional regulation.

See also topic 3.17 Interest; categories 20 Mortgages, topic Chattel Mortgages; Transportation, topic Motor Vehicles, subhead Liens and Security Interests.

Consumer Protection.

See topic 3.12 Consumer Protection.

Bulk Sales.

Uniform Commercial Code adopted. (comm. law art. tit. 6). See also category 8 Debtor and Creditor, topic 8.08 Fraudulent Sales and Conveyances.

Sales of Motor Vehicles.

See category 23 Transportation, topic 23.01 Motor Vehicles.

Distress or Going Out of Business Sale.

Going out of business sales and other such sales governed by tit. 11, subtit. 11. (comm. law art. § 11-1101[c]). Inventory describing each item for sale, quantity of each, and regular and sale prices of each must be filed with Division of Consumer Protection of Attorney General's Office before conducting sale. (§ 11-1104). Anyone advertising such sale may not conduct sale for more than 60 days, order and receive any goods for purpose of selling them at sale, or sell goods not listed on inventory. (§ 11-1103).

3.24 SECURITIES:

Uniform Securities Act (see Uniform and Model Acts section) has been adopted in substance under title “Maryland Securities Act”. (corps. art. tit. 11). In 1997, Maryland revised Maryland Securities Act to conform to National Securities Market Improvements Act of 1996. Following additional material insertions, changes and omissions have been made to Uniform Act.

§ 201(c):

Registration of investment advisers and investment adviser representatives required. (corps. art. § 11-401[b]). Investment adviser defined in § 11-101(h). Act covers financial planning activitiesthat do not involve securities (i.e., art, bullion, collectibles). (corps. art. § 11-101[g][1]).

§ 202(a):

Provisions dealing with registrations of investment advisers. (corps. art. § 11-405[a]). Registration of broker-dealer does not automatically constitute registration of any agent.(corps. art. §§ 11-405, 11-406).

§ 202(b):

Applicant for initial or renewal registration as broker-dealer shall pay filing fee of $250. Applicant for initial or renewal registration or transfer of registration as agent shall pay filing fee of $35.Applicant for initial or renewal registration as investment adviser shall pay filing fee of $300. Applicant for initial or renewal registration or transfer of registration as investment adviser representativeshall pay filing fee of $50. (corps. art. § 11-407). Central Registration Depository exclusive method of agent registration, transfer and termination for Md. When application denied or withdrawn,Commissioner retains filing fee (corps. art. § 11-407).

§ 202(d):

Commissioner may require by rule or order minimum capital for registered broker-dealer and minimum financial requirements for investment advisor. (corps. art. § 11-409).

§ 302:

Prospectus required in connection with offers and sales of securities registered by notification. (corps. art. § 11-502[c]).

§ 303:

Privilege of coordination extended to securities qualified for exemption under federal regulations adopted under § 3[b] or 3[c] of the Securities Act of 1933. (corps. art. § 11-503[d]).

§ 304(d):

Use of prospectus in connection with sale of securities registered by qualification made mandatory. (corps. art. § 11-504[d]).

§ 305(b):

Filing fee is 0.1% of maximum aggregate offering price, with $500 minimum and $1,500 maximum, except that any filing made pursuant to exemption under Md. Securities Act requires $400 fee.Fee retained if application is withdrawn before effective date or stop-ordered. (corps. art. § 11-506).

§ 305(g):

Omitted.

§ 305(h):

Omitted.

§ 402(b)11:

Offer directed to not more than 35 persons in state during any 12 consecutive months (other than certain institutional investors) is exempt if seller reasonably believes all buyers are purchasingfor investment and if no advertisement or general solicitation is used, but Commissioner may, by rule or order, increase or decrease number of offerees permitted or waive conditions as to theirinvestment intent. (corps. art. § 11-602[9]). Exemption from registration by coordination with 17 C.F.R., Parts 230.505 and 506, permitted by rule. Manually-signed Form D must be filed within15 days of first sale. (COMAR 02.02.04.15). Separate transactional exemption by COMAR 02.02.04.12 requires filing of and compliance with Md. forms. Local issuer exemption with certainrestrictions permitted by COMAR 02.02.04.11.

Securities not originally registered in Md. may be offered or sold by or through registered broker-dealer if: (1) Offer or sale is not for benefit of issuer or 10% owner; (2) security is not part of unsold allotment taken for benefit of issuer or 10% owner; and (3) stop order or similar order or injunction is not in effect. (corps. art. § 11-602[13]). Securities traded under NASDAQ may be exempted from registration requirement. (corps. art. § 11-601[12]). Commission may exempt transactions exempted by SEC under §§ 3[b] or 4[2] of Securities Act of 1933. (corps. art. § 11-602[15]).

Supervision.

Securities Division, Office of the Attorney General, 200 St. Paul Place, Baltimore, Maryland 21202.

Subdivision offerings not specifically dealt with by Md. Securities Law.

Franchising.

Franchisors offering franchises in state must register with State Division of Securities and provide copy of registration to potential franchisees at earlier of first personal meeting or ten business days prior to execution of contract or payment of consideration. Civil and criminal penalties are provided for violations of Act. (bus. reg. art. tit. 14, subtit. 2).

Business Opportunity Act.

Sellers of products or services (other than one-time sale of business) intended to enable purchaser to start business (such as pyramiding arrangements, or transactions in which seller agrees to provide or assist purchaser in obtaining accounts or retail outlets, seller agrees to purchase buyer's products made using seller's supplies or services, or seller represents that buyer will derive income in excess of price paid to seller) must register with Division of Securities and provide copy of registration to potential buyer at earlier of first personal meeting or ten days prior to signing contract or accepting consideration. Civil and criminal penalties apply for violations. (bus. reg. art. tit. 14, subtit. 1).

Uniform Commercial Code adopted. (comm. law art. tits. 1 to 10). See topic 3.09 Commercial Code.

Uniform Simplification of Fiduciary Security Transfers Act adopted. (est. & tr. art. tit. 15, subtit. 3). Uniform Commercial Codes does not repeal act. (comm. law art. § 10-104).

Uniform Securities Ownership by Minors Act not adopted.

Maryland Uniform Transfer-on-Death Security Registration Act adopted. (est. & tr. art. §§ 16-101—16-112).

Tender Offers.

See category 2 Business Organizations, topic 2.03 Corporations.

3.25 STATUTE OF FRAUDS:

See topic 3.16 Frauds, Statute of.

3.26 TRUST RECEIPT SECURITY:

Uniform Commercial Code adopted. (comm. law art. tits. 1 to 10). See topic 3.09 Commercial Code.

3.27 WAREHOUSEMEN:

Uniform Commercial Code adopted. (comm. law art. tit. 7). See topic 3.09 Commercial Code.

Bonds.

None required.

Licenses.

Must procure annual license from clerk of court where located. Fee is $30 to $150 per year depending upon size of town or city in which warehouse is located. (bus. reg. art. §§ 17-1202, 17-2203).

Warehouse Receipts.

Uniform Commercial Code adopted. (comm. law art. tit. 7). Criminal provisions for certain acts set out in comm. law art. §§ 18-101 to 18-401.

Lien.

Uniform Commercial Code adopted.

Notice to Customer Storage Household Goods.

Every moving and storage firm and every warehouse used for storage of household goods, prior to rendering service and in application for service or in separate written statement (12-pt. type or larger), must notify customer that he should obtain insurance. Violation is misdemeanor punishable by fine up to $5,000 or 30 days in jail or both. (bus. reg. art. § 17-1204).

4 CITIZENSHIP

4.01 ALIENS:

Alien may not qualify as executor or administrator unless he is spouse of decedent, ancestor of decedent, descendent of decedent or sibling of decedent and permanent resident of U.S. (est. & tr. art. § 5-105[b]).

Property.

Aliens, not enemies, may own, sell, devise, dispose of, or otherwise deal with property in same manner as if they were citizens by birth. (real prop. art. § 14-101).

Distribution to heir or legatee who is nonresident of U.S. will not be made if it appears that nonresident will not have full benefit, use or control of property to which he is entitled. Instead, property will be ordered paid to board of education of county or Baltimore City for use of public schools. Provision is made for subsequent repayment without interest to claimant or legal representative. (est. & tr. art. § 9-108).

See also category 2 Business Organizations, topic 2.03 Corporations, subheads Stock, Stockholders.

5 CIVIL ACTIONS AND PROCEDURE

5.01 ACCORD AND SATISFACTION:

Uniform Commercial Code adopted. (comm. law art. tits. 1 to 10). See category 3 Business Regulation and Commerce, topic 3.09 Commercial Code.

Compromise.

Compromise of disputed claim is binding. (See 113 Md. 111, 77 A. 130; 116 Md. App. 346, 696 A.2d 482.) Compromise of undisputed claim by which less than full performance is accepted in full satisfaction is not binding even though evidenced by receipt in full, unless supported by collateral or new consideration or unless under seal. (58 Md. 67). This result may differ for certain contracts. (comm. law art. § 2-209).

Pleading.

Must be specially pled as affirmative defense. (R.P. 2-323[g][1]).

5.02 ACTIONS:

Equity.

Effective July 1, 1984, law and equity distinction abolished for purposes of pleadings, parties, court sittings and dockets but does not affect right to jury trial. (R. P. 2-301).

Forms of Action.

Md. Rules, effective July 1, 1984, provide for one form of action known as “civil action”. (R. P. 2-301). Special rules apply for ejectment ((12-101); eminent domain (12-201 to 12-213); foreclosure (14-201 to 14-210); habeas corpus (15-301 to 15-312); injunction (15-501 to 15-505); mandamus (15-701); mechanics' lien (12-301 to 12-308); and detinue and replevin (12-601 to 12-602).

Conditions Precedent.

Notice of claim must be given to certain municipal corporations and counties. See topic 5.16 Limitation of Actions, subhead Municipal Corporations. Arbitration is prerequisite to medical malpractice suit. See category 9 Dispute Resolution, topic 9.02 Arbitration and Award, subhead

Medical Malpractice. Prior notice of intention to file mechanics' lien is required before certain mechanics' lien actions. See category 8 Debtor and Creditor, topic 8.13 Liens, subhead Mechanics' Liens.

Commencement.

See topics 5.20 Process, 5.17 Pleading.

Parties.

Court rules permit great liberality in joining, adding or dropping parties. (R. P. 2-211 to 2-241).

Class Actions.

When there is common question of law or fact and joinder of numerous members of class is impracticable, one or more representatives with claims or defenses typical of those of class and who will fairly and adequately protect interests of all may sue or be sued on behalf of all. (R. P. 2-231[a]).

Intervention may be had upon timely motion as of right if applicant's interest is not adequately represented and applicant may be bound by judgment or if he would be adversely affected by disposition of property subject to control of court; otherwise where there is common question of law or fact. (R. P. 2-214[a]). Federal or state government, or political subdivision, or officer or agent of any of them, may be permitted to intervene as permitted when constitutional provision, charter provision, statute, ordinance, regulation, executive order, requirement or agreement challenged or relied upon as defense. (R. P. 2-214[b][2]). Special rules apply to intervention in juvenile causes. (R. P. 11-122).

Interpleader is available by complaint for interpleader, counterclaim or cross claim. Complaint must specify nature and value of property and may be accompanied by payment or tender of property into court. (R. P. 2-221).

Third Party Practice.

Defendant may bring in third party who is or may be liable to him for all or part of plaintiff's claim by serving summons, third party claim and copies of previous pleadings. If defendant files third party claim more than 30 days after time for filing answer, any other party may move to strike it or to sever it for separate trial, and court must grant motion unless there is showing late filing does not prejudice other parties. (R. P. 2-332).

Joinder of Causes of Action.

Joinder of causes of action liberally permitted. Plaintiff may join in one action, as either independent or alternate claims, as many claims as he may have against defendant. (270 Md. 397, 311 A.2d 776). Claims involving different plaintiffs or defendants may be joined whenever any question of law or fact is common to all and asserted right to relief arises out of same transaction or occurrence. (R. P. 2-212).

Splitting Causes of Action.

Cause of action may not be split. (212 Md. 526, 129 A.2d 827; 320 Md. 249, 577 A.2d 64).

Consolidation of Actions.

Court may consolidate actions involving common question of law or fact or common subject matter. (R. P. 2-503). By order of transferor court, action or any claim or issue in action may be transferred from one judicial circuit to another judicial circuit where action may have been brought and similar actions are pending. (R.P. 2-327[d]).

Severance of Actions.

Court has discretion to order severance at request of party or on its own initiative. (R. P. 2-503[b]).

Stay of Proceedings.

Court has discretion to order stay of proceedings pending determination of another proceeding that may affect issues raised. (254 Md. 541, 255 A.2d 73). Court may, upon motion of party or its own initiative, stay proceedings pending resolution of question of law. (R. P. 2-502).

Abatement and Revival.

Actions at law survive death of either party; actions in equity survive death of either party if court can grant effective relief in spite of death. (courts art. § 6-401). Slander actions abate upon death of either party unless appeal has been taken from judgment for plaintiff. (courts art. § 6-401).

Limitation of.

See topic 5.16 Limitation of Actions.

Small Claims.

See category 6 Courts and Legislature, topic 6.01 Courts, subhead District Courts.

Release of tort claim for personal injury signed within five days after injury is voidable within 60 days. (courts art. § 5-305.1). During first 15 days confinement in hospital, no attempt can be made to obtain settlement or general release from injured person, and any settlement or release so obtained cannot be used in evidence. (courts art. § 5-305.1). Personal injury release does not discharge subsequent tortfeasor who is not party to release, and whose responsibility for injuries is unknown at time of execution of release or who is not specifically identified in release. (courts art. § 5-305.1).

Termination of Actions.

Voluntary dismissal of action must be upon order of court unless notice is filed before adverse party files answer or stipulation of dismissal signed by all parties who have appeared is filed. (R. P. 2-506). If party has filed counterclaim before service of motion for voluntary dismissal, dismissal is not permitted over party's objection unless counterclaim can remain independently. Costs must be paid by dismissing party. (R. P. 2-506). Action may also be terminated by order of court for lack of jurisdiction or failure to prosecute. (R. P. 2-507).

Prohibited Actions.

Actions for breach of promise to marry, except in cases of pregnancy, are barred. (fam. law art. § 3-102). Actions for alienation of affections are barred. (fam. law art. § 3-103).

Administration.

See category 13 Estates and Trusts, topic 13.08 Executors and Administrators.

Direct Actions Against Insurer.

See category 23 Transportation, topic 23.01 Motor Vehicles, subhead Direct Actions.

5.03 APPEAL AND ERROR:

Court of Appeals and Court of Special Appeals are highest appellate courts. See category 6 Courts and Legislature, topic 6.01 Courts.

Rules of Court Govern Appeals.

Appeals for both Court of Appeals and Court of Special Appeals are governed by tit. 12 of courts art. and R. P. tit. 8. Certain interlocutory orders are appealable. (courts art. § 12-303).

Time Allowed for Taking.

Sole method of securing review by Court of Appeals is by direct appeal, or application for leave to appeal where allowed by law, pursuant to Maryland's Uniform Certification of Questions of Law Act, or by writ of certiorari. (R. P. 8-301). Petition for writ of certiorari may be filed: (1) If appeal to Court of Special Appeals taken, either before or after Court of Special Appeals has rendered decision, but not later than 15 days after mandate, or (2) not later than 30 days after entry of final judgment of circuit court acting in appellate capacity. (R. P. 8-302; courts art. § 12-305). Notice of appeal to Court of Special Appeals must be filed within 30 days from date of judgment or order appealed from. (R. P. 8-202). Court of Special Appeals may certify question of law or entire case to Court of Appeals. (R. P. 8-304). Appeal from final action of administrative agency shall be filed within 30 days from date of action appealed from or 30 days from sending or receipt of notice where such are required. (R.P. 7-203).

Method of Taking.

Appeal to Court of Special Appeals taken by filing notice of appeal in lower court. (R. P. 8-201). In civil cases other than juvenile causes, appeals from guardianships terminating parental rights, and prisoner applications seeking relief relating to confinement or conditions of confinement, and except where expedited appeal is elected under 8-207, information report must be filed by appellant within ten days of filing notice of appeal. Each appellee may file supplemental information report within seven days of service of appellant's report. (R.P. 8-205). Within 20 days after filing appellant's information report, court must enter order that appeal proceed without pre-hearing conference or that pre-hearing conference be held. (R. P. 8-206). Pre-hearing conference held to discuss settlement, dismissal, limitation of issues, contents of record and record extract, continuance of appeal, times for filing briefs, and other matters. Judge shall enter order reciting actions taken and agreements reached. Judge who conducts pre-hearing conference shall not sit on panel assigned to hear case. Both information report and pre-hearing conference are regarded as disclosed for settlement purposes only. (R. P. 8-206). Unless directed otherwise, lower court must transmit record to Court of Special Appeals within 60 days or 30 days in child in need assistance cases of date of order directing that appeal proceed without pre-hearing conference, or within 60 days or 30 days in child in need assistance cases from date of order following pre-hearing conference, or, in cases involving juvenile causes and prisoner applications seeking relief relating to confinement or conditions of confinement, within 60 days or 30 days in child in need assistance cases of filing notice of appeal. (R. P. 8-412). For appeal to Court of Special Appeals or Court of Appeals, all original papers (or certified copy if lower court retains originals) filed in lower court, docket entries and transcripts, constitute record, except papers parties stipulate shall be omitted. Upon determination and order of lower court that originals should be kept in lower court, clerk shall transmit certified copy of original papers. Parties may file agreed statement of case in lieu of pleadings and evidence with approval of lower court, where questions on appeal can be decided by Court without reviewing evidence. Parties are strongly encouraged to agree to such statement. (R. P. 8-413). In civil cases, appellant must prepare and file record extract unless otherwise ordered by court. Unless parties stipulate as to contents within 15 days after record is filed, appellant must serve appellee with designation of portions of record to be included in extract, and appellee has ten days to designate additional portions to be included. Appellant then has five days to designate and serve on appellee further additional portions. Extract must include judgment appealed from and other parts of record as are designated by parties. (R. P. 8-501).

Court of Special Appeals has expedited appeals procedure that may be chosen by agreement of both parties within 20 days of filing notice of appeal. Procedure involves limitations on length of brief and oral argument. (R. P. 8-207).

Where appeal is to Court of Appeals, record consists of record filed in Court of Special Appeals and record of, any proceedings in Court of Special Appeals. (R.P. 8-413[a]).

Within 40 days after filing of record in Court of Appeals or Court of Special Appeals, appellant must file brief; appellee must file brief within 30 days after filing of appellant's brief. Appellant may file reply brief any time within 20 days after filing of appellee's brief, but not later than ten days before argument. In Court of Appeals, 20 copies of each brief and record extract must be filed; in Court of Special Appeals, 15 copies of each brief and seven copies of each record extract must be filed unless ordered by court. Two copies of each brief and record extract must be served on each party. (R. P. 8-502).

Appeal Bond.

No requirement that bond be filed to cover costs. As to supersedeas bond, see subhead Stay of Proceedings, infra.

Stay of Proceedings.

With certain exceptions, appellant may stay execution of civil judgment by filing supersedeas bond or other security with clerk of lower court any time before satisfaction of judgment. (R. P. 8-422). If such bond has been filed, no further bond required during pendency of review by Court of Appeals. (R. P. 8-422[e]).

Extent of Review.

Ordinarily, appellate court will not decide question which was not decided by lower court, but appellate court may decide question not presented in lower court if decision is desirable for guidance of lower court or to avoid further appeals. (R. P. 8-131[a]). In cases tried without jury, appellate court may review both law and evidence, but judgment of trial court will not be set aside on evidence unless clearly erroneous, and due regard will be given to opportunity of trial court to judge credibility of witnesses. (R. P. 8-131[c]). In law actions tried with jury, verdict of jury is conclusive (245 Md. 540, 226 A.2d 556), and only factual question is whether there was sufficient evidence to warrant submitting case to jury (183 Md. 233, 37 A.2d 312).

Character of Hearing.

Review is on record of proceedings below. (180 Md. 651, 26 A.2d 812).

Judgment or Order on Appeal.

Clerk of Court issues mandate to lower court 30 days after filing of opinion or entering of order or judgment by Court. (R. P. 8-606).

5.04 BONDS:

Bonds required to be filed in any action are governed by Md. Rules. (R. P. 1-401 to 1-406). All bonds may be approved by clerk or, upon refusal, by court. (R. P. 1-402[b]). In lieu of sureties on bonds, court may accept other security for performance of bond. (R. P. 1-402[e]).

Sureties.

Surety companies authorized to do business in Md. accepted as sufficient surety. If any surety on bond of personal representative, guardian, trustee, clerk or register conceives himself in danger of suffering from suretyship, he may demand counter security. Granting order for additional security is in discretion of court. (est. & tr. art. 6-102, 15-115; R. P. 1-402, 1-403, 10-702, 13-107).

Surety on bond of fiduciary or public official may be relieved by application to court. (R. P. 1-403, 13-107).

Enforcement.

Where bond is to state, action may be in name of state for benefit of party in interest. (R. P. 1-402[c]).

5.05 CERTIORARI:

Where final judgment has been rendered by circuit court after appeal from district court and party shows by petition that review is necessary to secure uniformity of decisions or that special circumstances render it desirable and in public interest, Court of Appeals may grant review by issuing writ of certiorari. (courts art. § 12-305). Petition for writ of certiorari may be filed no later than 30 days after entry of judgment or disposition of post-trial motion. (R. P. 8-302[b]).

Except in certain instances (courts art. § 12-202), where case or proceeding is pending in or decided by Court of Special Appeals after appeal from circuit court, orphans' court, or Md. Tax Court, party may petition Court of Appeals for certiorari. Petition may be filed before or after decision but not later than time prescribed by Maryland rules. (courts art. § 12-201; R. P 8-302[a]). Court of Appeals may issue writ of certiorari on own motion in same cases. (courts art. § 12-201). Court of Appeals must grant certiorari if it finds, on vote of number of judges required by rule (not more than three), that review is desirable and in public interest. Writ may issue before or after decision of Court of Special Appeals. Reasons for denial of writ must be stated in writing. (courts art. § 12-203).

Court of Special Appeals may certify question of law or entire case to Court of Appeals which may accept by issuing writ of certiorari. (R. P. 8-304).

Writ of certiorari available to challenge actions of lower tribunal alleged to be unconstitutional or taken without jurisdiction. (R. P. 8-301 to 8-303; 273 Md. 486, 331 A.2d 55).

5.06 CHARITABLE IMMUNITY:

See topic 5.09 Damages.

5.07 COMMISSIONS TO TAKE TESTIMONY:

See topic 5.11 Depositions and Discovery.

5.08 COSTS:

Costs usually assessed against nonprevailing party. (R. P. 2-603; R. P. 3-603). Costs of appeal awarded to prevailing party unless court orders costs allocated among parties. (R. P. 8-607).

Specific provisions as to costs and fees are contained in courts art., tit. 7. §§ 7-101 to 7-104 govern proceedings in Court of Appeals and Court of Special Appeals; §§ 7-201 to 7-208 govern proceedings in circuit courts, including criminal proceedings; §§ 7-301, 7-302 govern proceedings in district courts. State Court Administrator fixes uniform costs and fees for Court of Appeals, Court of Special Appeals, and circuit courts, subject to approval of Bd. of Public Works. (§§ 7-102, 7-202). § 7-201(b) provides for waiver of costs in Circuit Court in cases of indigency. R. P. also contain provisions for waiver of costs. (R. P. 8-201[b]).

Security for Costs.

Not required.

Special Situations.

If court grants motion for order compelling discovery or for protective order and after opportunity for hearing determines that opposition to motion was without substantial justification, court shall require person whose conduct necessitated motion or party or attorney who advised action (or both) to pay reasonable expenses incurred in obtaining order, including attorney's fees, unless opposition was substantially justified or other circumstances make award of expenses unjust. (R. P. 2-433[c]). If court denies such motion and after opportunity for hearing determines motion was made without substantial justification, court shall require moving party or attorney to pay such expenses including attorney's fees, unless opposition was substantially justified or other circumstances make award of expenses unjust. (R. P. 2-433[c]). As sanction for failure to obey orders for discovery, or failure to make discovery pursuant to rules, court on motion after opportunity for hearing shall require responsible party or attorney (or both) to pay reasonable expenses caused by such failure, including attorney's fees, unless failure was substantially justified or that other circumstances make award of expenses unjust. (R. P. 2-433[a]). In civil action, if court finds conduct of any party in maintaining or defending any proceeding was in bad faith or without substantial justification, court may require offending party or its attorney (or both) to pay costs and reasonable expenses to offended party, including reasonable attorney's fees. (R. P. 1-341).

5.09 DAMAGES:

Common law generally prevails as to compensatory damages. In personal injury actions in which cause of action arose on or after July 1, 1986, $350,000 limit for noneconomic damages, including pain and suffering, impairment, disfigurement, loss of consortium. In personal injury and wrongful death actions in which cause of action arose on or after Oct. 1, 1994, $500,000 limit for noneconomic damages. Limitation on noneconomic damages will increase by $15,000 on Oct. 1 of each year beginning Oct. 1, 1995. “Noneconomic damages” in wrongful death actions includes mental anguish, emotional pain and suffering, loss of society, companionship, comfort, protection, care, marital care, filial care, parental care, attention, advice, counsel, training, guidance or education. (courts art. § 11-108). Statutory limit does not apply to wrongful death actions which arose before Oct. 1, 1994. (329 Md. 533, 620 A.2d 905). Punitive damages allowed in non-intentional tort actions only upon clear and convincing proof of actual malice. Degree of malice needed to recover punitive damages in other actions vary. (325 Md. 420, 601 A.2d 633).

Sovereign Immunity.

Limited waiver of state's sovereign immunity in tort claims to extent of insurance coverage. (st. gov't art. §§ 12-101 to 12-110). Limited waiver of immunity of both state and local governments for negligent use of motor vehicles. (trans. art. § 17-107[c]). Limited waiver of liability for local governments and their employees for tortious conduct. Local governments not liable for punitive damages, but may indemnify government employee subject to punitive damages award with certain exceptions. (courts art. § 5-303). For contract actions, see category 3 Business Regulation and Commerce, topic 3.13 Contracts.

Charitable Immunity.

Doctrine of charitable immunity presently prevails (249 Md. 233, 238 A.2d 863) but legislative and judicial exceptions exist. Immunity of hospitals and nursing homes exists only if insured for not less than $100,000 and only as to excess over insurance limits. (health-gen. art. § 19-354, courts art. § 5-632[c]). Agents of charitable organizations (and athletic clubs, civic leagues or organizations, cooperative housing corporation and homeowners' associations) immune from personal liability under some circumstances. (courts art. § 5-312). Insurer of charitable institution may not assert defense of charitable immunity for claim covered by insurance policy. (ins. art. § 19-103; 17 Md. L. Rev. 159). Defense of charitable immunity must be asserted as affirmative defense. (R.P. 2-323[g]).

Comparative Negligence Rule.

Not adopted.

Good Samaritan Law.

Enumerated persons are not liable for civil damages resulting from any professional act or omission not amounting to gross negligence committed in rendering free assistance: (1) At scene of emergency; (2) in transit to medical facility; (3) through communication with persons rendering emergency assistance. Person not enumerated in rendering free emergency assistance at scene of emergency not liable if he acts in reasonably prudent manner and relinquishes care when licensed or certified person is able to assume responsibility. (courts art. § 5-603). Limited immunity for health care provider and physician volunteers who work at charitable organizations that provide health care services. (courts art. § 5-606).

See category 13 Estates and Trusts, topic 13.05 Death, subhead Action for Wrongful Death.

No Fault Insurance.

See category 23 Transportation, topic 23.01 Motor Vehicles, subhead Insurance.

5.10 DECLARATORY JUDGMENTS:

See topic 5.15 Judgments.

5.11 DEPOSITIONS AND DISCOVERY:

Court of Appeals has adopted broad rules for taking of depositions, including rules for videotape or audiotape depositions. (R. P. 2-401 to 2-419). These rules may be availed of before (R. P. 2-404) or after (R. P. 2-411) filing suit. Depositions may be taken for purpose of discovery, for use as evidence or to perpetuate testimony.

Within State for Use Within State.

Depositions may be taken under Md. Rules, as detailed below.

Within State for Use Elsewhere.

Where mandate, writ or commission is issued out of court of record of foreign jurisdiction, or where upon notice or agreement, witness in Md. must be deposed, witnesses may be compelled to appear and testify in same manner and by same process and proceeding as for depositions taken for proceeding in Md. (courts art. § 9-401).

Maryland Uniform Interstate Depositions and Discovery Act.

Governs foreign subpoena issued by foreign jurisdiction for person to attend and give testimony, produce and permit inspection of documents, or permit inspection of premises. (courts art. §§ 9-401 to 9-404). Application to court for protective order or to enforce, quash or modify foreign subpoena must comply with Maryland rules and be submitted to Circuit Court for County in which discovery is to be conducted. (courts art. § 9-405).

Outside of State for Use Within State.

Md. Rules make provision for depositions outside state, as detailed below. See subheads Before Whom Taken; Compelling Attendance of Witnesses, infra.

De Bene Esse.

Depositions may be taken de bene esse. (R. P. 2-404).

Perpetuating Testimony.

Depositions may be taken to perpetuate testimony before or after filing suit. (R. P. 2-404, 2-411).

Pending Proceedings.

At any time after jurisdiction has been obtained over defendant or over property which is subject of proceeding, but not earlier than day for defendant's initial pleading, party may, upon proper notice without leave of court, take deposition of person, whether party or not, on oral examination, written questions or by telephone, for purpose of discovery or for use as evidence in proceeding or for both purposes. (R. P. 2-411, 2-417, 2-418). Leave of court is also required to depose person previously deposed in same action, unless further deposition is permitted under Rule 2-415(i) because substantive changes have been made to deposition transcript and to depose person in prison. (R. P. 2-411).

Before Proceedings.

Person who desires to perpetuate testimony may have deposition taken in Md. upon notice to persons against whom deposition is expected to be used. If deposition of minor or incompetent is to be taken, notice must be given to individual and parent, guardian or other person having care or custody of person or estate of individual. (R. P. 2-124[b], 2-404). Court within whose jurisdiction deposition is to be filed may, on motion of person taking deposition, authorize notice by publication, registered mail or otherwise on nonresident and may appoint attorney to represent nonresident at examination. Notice must be filed in circuit court of any county in which expected adverse party resides. (R. P. 2-404).

Before Whom Taken.

Within state, depositions taken before any person authorized to administer oath. Within any other state, territory, district or possession of U.S., depositions taken before officer authorized to administer oaths by laws of U.S. or place where deposition taken or before person appointed by court where action is pending. In foreign state or country, depositions taken: (1) On notice before any person authorized to administer oath in place where deposition is taken, either by laws of that place or by laws of U.S., or (2) before person commissioned by court, or (3) pursuant to letter rogatory issued by court. (R. P. 2-414).

No deposition may be taken before relative, employee, attorney or counsel of party, or relative or employee of attorney or counsel, or before person financially interested in proceeding, unless objection waived. (R. P. 2-414[d], [e]).

Parties may stipulate in writing to take depositions before any person at any time or place, on any notice and in any manner. (R. P. 2-401[g]).

Notices.

Ten days notice in writing to every other party to proceeding required for deposition on oral examination; but court may enlarge or shorten time. 30 days if deponent is required to bring documents or other tangible things. Notice must state time and place of deposition, and name and address of each person to be examined, or if name not known, general description sufficient to identify him or his class or group. If deposition to be video or audiotaped, notice must specify method of recording, and if video or audio deposition of expert is taken for use at trial, notice must so state. (R. P. 2-412).

Compelling Attendance of Witnesses.

Upon request of party entitled to issuance of subpoena, clerk must issue completed subpoena or provide blank form to be completed and returned for signing. (R. P. 2-510). Subpoena must be served at least ten days before date of deposition. (R. P. 2-412[a]). Subpoena commanding production of documentary evidence may be issued without order of court, but, on motion of person from whom discovery is sought and for good cause shown, court may pass order to limit scope of examination or protect person or party. (R. P. 2-403, 2-510). Subpoena commanding production of documentary evidence must be served at least 30 days before date of deposition. (R. P. 2-412[c]). Nonparty resident of Md. required to attend only in county where he resides or is employed or is engaged in business in person, or at other convenient place fixed by court. Nonparty, nonresident deponent may be required to attend only in county where personally served or within 40 miles from place of service or at other convenient place fixed by court. Where examination held out of state, witness compelled to attend and testify in accordance with law of place of examination. Party deponent, in addition to places provided above, may be required to attend in county where action pending. (R. P. 2-413).

Examination of Witnesses.

For deposition on oral examination, examination and cross-examination proceed as at trial. Scope of cross-examination need not be limited to scope of direct. Objections as to manner of taking deposition, form of questions or answers, oath of affirmation, conduct of parties, or other error that might be obviated or removed if objected to at occurrence waived unless timely made during deposition. Officer must put witness on oath and personally, or by one acting under his direction and in his presence, record testimony. Testimony must be transcribed unless parties agree or court orders otherwise to avoid expense, hardship, or injustice. (R. P. 2-415). In lieu of participating in oral examination, parties may transmit written interrogatories to officer, who must take responsive testimony and prepare, certify and file or mail deposition, attaching copy of notice and interrogatories. (R. P. 2-417).

Refusal to Answer.

Examination completed to extent practicable. Thereafter, on reasonable notice to affected parties, proponent may apply to court within whose jurisdiction deposition taken or to court where action pending for order compelling answer. (Similar procedure exists for refusal to answer written interrogatory.) Evasive or incomplete answer treated as failure to answer. (R. P. 2-432). Court may refuse to hear discovery dispute unless party certifies effort made to resolve dispute. (R. P. 2-431). When motion granted, court requires refusing deponent or party, or party or attorney advising refusal, or both of them to pay expenses of obtaining order, including attorney's fees if court finds that opposition to motion was without substantial justification, unless justice requires otherwise. When motion denied, court requires moving party or attorney or both to pay expenses of opposing motion, including attorney's fees, if court finds that motion was without substantial justification, or that other circumstances make award of expenses unjust. (R. P. 2-433[c]).

Signing and Certification of Deposition.

Deposition must be submitted to witness for correction and signing, absent waiver by witness and by parties. If witness desires to make corrections to transcript to conform it to testimony, changes must be made on separate sheet and attached by officer to transcript. If not signed by witness within 30 days, officer must sign and state on record why deponent has not signed. (R. P. 2-415).

Return.

Officer must attach to transcript certificate that deponent was duly sworn and that transcript is true record of testimony, and must seal deposition in envelope bearing title of proceeding and marked “Deposition of (name of deponent)”. Documents or things produced for inspection or offered as exhibits during examination shall, upon request of party, be marked for identification and returned with deposition; rule provides for substitution of copies for originals. On payment of reasonable charges, officer must furnish copy of deposition to any party or deponent. (R. P. 2-415).

Use of Depositions.

Part or all of deposition may be used at trial or on hearing of motion or in interlocutory proceeding, if admissible under rules of evidence, applied as if witness present and testifying, as follows: (1) Any party may use deposition and any correction sheets to impeach deponent as witness; (2) deposition of party or officer, director, or person designated to testify for party may be used by adverse party for any purpose; (3) deposition of witness may be used by any party for any purpose against other party present or represented at taking of deposition or having notice thereof, if court finds (a) that witness is dead, (b) that witness is out of jurisdiction (and absence not procured by party offering deposition), (c) that witness is unable to attend or testify because of age, physical or mental illness, infirmity or imprisonment, (d) that party offering deposition has been unable to procure attendance of witness by subpoena, or (e) upon motion and notice, that exceptional circumstances exist. Videotape depositions of treating or consulting physician, or expert witness, may be used for any purpose even if witness is available to testify, if deposition notice stated that deposition was for use at trial. If only part is offered, adverse party may require introduction of all other parts, which in fairness should be considered, and any party may introduce any other parts in accordance with Rule. (R. P. 2-419).

Form.

No statutory form. Following is sufficient:

Form

[Caption]

Pursuant to notice (or agreement or commission annexed), the deposition (upon oral examination) (upon written questions) of...... was taken at......, City of......, State of......, on the...... day of......, 20......, at...... o'clock A.M., before.......

Appearances: (insert names of counsel present)

Stipulations [optional]: It is stipulated and agreed by and between counsel for the respective parties that the reading and signing of this deposition by the witness is waived.

It is further stipulated and agreed that the filing of this deposition with the Clerk of the Court is waived.

* * * * *

......, being duly sworn to tell the truth, the whole truth and nothing but the truth, was examined and testified as follows:

* * * * *

(Signature of witness, unless waived)

State of......, City of......:

I,......, a...... in and for the State and City aforesaid, do hereby certify that the within named......, personally appeared before me at the time and place herein set out, and, after having been duly sworn by me according to law, was interrogated by counsel.

I further certify that the examination was recorded by me and then transcribed to the within typewritten matter in a true and accurate manner, and that the same is a true record of the testimony given by the witness.

[optional] I further certify that the stipulations contained herein were entered into by counsel in my presence.

I further certify that I am not of counsel to any of the parties, nor an employee of counsel, nor related to any of the parties, nor in any way interested in the outcome of this action.

(Signature and title of examining officer)

5.12 EQUITY:

See topic 5.02 Actions.

5.13 EVIDENCE:

See topic 5.11 Depositions and Discovery.

Witnesses.

Competency is governed by common law rules, except that incapacity to testify does not result from interest in action or from conviction of crime, except that conviction of perjury absolutely and forever disqualifies convicted person as witness. (courts art. §§ 9-101, 9-104). In criminal trial age of child may not be reason for precluding child from testifying. (courts art. § 9-103).

See also topic 5.11 Depositions and Discovery.

Privileged Communications.

Person may not be compelled to testify in violation of attorney-client privilege. (courts art. § 9-108). Privilege does not extend to facts learned by attorney but not communicated or confided by client. (227 Md. 8, 174 A.2d 768). Client may waive privilege. (132 Md. 397, 104 A. 40; 24 Md. App. 588, 335 A.2d 171). Confession or communication to minister, clergyman or priest of established church made in confidence by one seeking spiritual advice or consolation is privileged. (courts art. § 9-111). Client may waive privilege.

Communications to physician other than psychiatrist are not privileged. (249 Md. 200, 238 A.2d 875, cert. denied, 393 U.S. 928; 59 Md. App. 392, 475 A.2d 1235). Communications to psychiatrist, psychiatric-mental health nursing specialist or licensed psychologist relating to diagnosis or treatment of mental or emotional disorder are privileged, except in certain cases such as commitment proceedings, malpractice, or defective delinquent proceedings, and proceedings where mental condition is put in issue by way of claim or defense. Patient may waive privilege. (courts art. §§ 9-109, 9-109.1).

Subject to numerous exceptions similar to psychiatrist or psychologist privilege, communications between individual and licensed certified social worker are privileged. (courts art. § 9-121).

State secrets and information acquired by public officers are generally privileged. (177 Md. 168, 9 A.2d 235; 30 Op. Att'y Gen. 125).

Communications and materials made available to licensed certified public accountant by client are subject to privilege with limited exceptions. (courts art. § 9-110).

Persons employed by newspaper, journal, or radio or television station, press association, news agency, or wire service in news gathering or disseminating capacity do not have to reveal sources of news or information. (courts art. § 9-112). Court may compel disclosure from one otherwise protected by privilege if (i) information is relevant to significant legal issue, (ii) information could not be otherwise obtained from alternative source, and (iii) there is overriding public interest in disclosure. (courts art. 9-112[d]).

Husband and Wife.

Wives and husbands of parties litigant are competent and may be compelled to testify in civil and criminal cases (courts art. § 9-101[2]), but husband and wife are in no case competent to disclose any confidential communication made by one to other during marriage, nor can husband or wife be compelled to testify as adverse witness in criminal proceeding involving spouse, except in proceedings involving abuse of child under 18 or, in limited circumstances, if charge involves assault and battery in which spouse is victim. (courts art. §§ 9-105, 9-106). Spouse incompetency rule inapplicable when confidential communication constitutes threat or crime against other spouse. (37 Md. App. 180, 376 A.2d 1144).

There is rebuttable presumption that child is legitimate child of man to whom mother was married to at time of conception. Presumption may be rebutted by testimony of person other than mother or her husband. (fam. law art. § 5-1028).

Communications or Transactions with Persons Since Deceased or Incompetent.

Party to proceeding by or against personal representative, heir, devisee, distributee or legatee as such, or by or against incompetent person, may not testify concerning any transaction with or statement made by dead or incompetent person, personally or through agent since dead, unless called by opposite party, or unless testimony of dead or incompetent person has been given already in same proceeding concerning same transaction or statement. (courts art. § 9-116).

Children as Victims.

Abused child may testify outside courtroom via closed circuit television if judge determines that defendant's presence will cause child serious emotional distress such that child cannot communicate. (courts art. § 9-102). In juvenile or criminal proceeding, courts may admit into evidence out of court statements of child-victim in cases of child abuse, rape, or assault with intent to commit rape if those statements are made to licensed physician, psychologist, or social worker. (courts art. § 9-103.1).

Self-incrimination.

Witness may refuse to answer question on ground of self-incrimination and failure to testify in criminal proceeding on this basis does not create presumption against him. (courts art. § 9-107; Md. Decl. of Rts., art. 22). Chemical test may be administered, and results are admissible in prosecution for drunken driving under prescribed conditions. (courts arts. 10-302, 10-306). All persons driving on Md. roads deemed to have consented to take chemical test, but person may not be compelled to submit to such test. Such refusal is admissible in evidence at trial (courts arts. 10-305[c], 10-309). Persons involved in motor vehicle accidents resulting in death or life threatening injuries may be compelled to submit to alcohol testing by police officers at accident scene. (trans. art. § 16-205.1). Person undergoing alcohol testing must also be advised that additional criminal penalties may be imposed upon refusal of testing. (trans. art. § 16-205.1). Fact of refusal to submit to chemical test is admissible at trial only where material and relevant to matter other than defendant's guilt or innocence. (322 Md. 376, 587 A.2d 1102; courts art. §§ 10-302 to 10-309). Motor vehicle laws provide for suspension of operator's license if, inter alia, refusal made. (trans. art. § 16-205.1). See category 23 Transportation, topic 23.01 Motor

Vehicles, subhead Operator's License.

Character witness having adequate basis can give personal opinion as to character. (courts art. § 9-115).

5.14 INJUNCTIONS:

Injunctions governed by Md. Rules. (R. P. 15-501 to 15-505). Injunction may be issued by court in any type of case if specially prayed, and at any stage of proceeding upon application or court's own motion. (R. P. 15-502). Statute prohibits issuing injunction against certain acts in labor dispute (lab. emp. art. §§ 4-307 to 4-318), and rules cited do not apply to labor disputes or domestic relations cases (R. P. 15-502).

Prerequisites.

Ex parte injunction or temporary restraining order will be granted if it appears from facts shown by affidavit or verified pleading that immediate, substantial and irreparable injury will result before adversary hearing can be had; otherwise injunction will not issue unless adverse party has had prior notice and opportunity to be heard. (R. P. 15-504, 15-505). Injunction will not be refused on ground applicant has adequate remedy at law for damages unless adverse party gives bond or satisfies court that he has property to answer for damages. (R. P. 15-502[c]).

Procedure.

In civil action, pleadings and other proceedings are same as in any other action. Complaint must set forth sufficient grounds upon which claim for injunction is founded. (R. P. 2-301, 2-302, 2-305).

Bond frequently but not always required. Bond required for ex parte or interlocutory injunction except in cases of hardship or application by state agency. (R. P. 15-503). Bonds governed by R. P. 1-401 to 1-406.

Preliminary Injunction.

Preliminary injunction may be issued after adversary hearing but before determination on merits. (R. P. 15-501).

Temporary restraining order expires in ten days as to resident or 35 days as to nonresident, but upon application made before expiration, court may extend for like period. Party so enjoined may request hearing on two days notice. (R. P. 15-504).

5.15 JUDGMENTS:

Judgment by confession may be entered by clerk on filing by plaintiff of complaint, accompanied by written instrument authorizing confession of judgment for liquidated amount and supported by affidavit of plaintiff or someone on his behalf stating amount due and address of defendant. (R. P. 2-611).

Immediately on entering such judgment, clerk must issue notice informing defendant of entry and of latest time for filing motion to open, modify or vacate judgment. (R. P. 2-611). For requirements as to service, see topic 5.20 Process. Motion to vacate, open or modify judgment must be made within 30 days after service or summons (60 days if service made upon SDAT or out of state, 90 days if service made outside U.S.). (R. P. 2-611[c]; R. P. 2-321[a], [b]). Any motion must be heard promptly, and if court finds there is substantial and sufficient basis for actual controversy as to merits, court must order judgment opened, modified or vacated. (R. P. 2-611[d]).

If notice not served despite reasonable efforts to effect service, court must, after considering plaintiff's affidavit setting forth efforts to effect service, provide for notice to defendant in manner provided for by R. P. 2-122. (R. P. 2-611[b]).

Unless court orders otherwise, property cannot be sold in execution of confessed judgment and wages or debt are not to be remitted by garnishee to judgment creditor until expiration of time for debtor to move to open judgment and disposition of motion. (R. P. 2-611[e]).

Judgment by Consent.

Party may submit to judgment by consent. (R. P. 2-612).

Judgments on Pleadings.

No special provision for judgment on pleadings, except provisions for motion to dismiss. (R. P. 2-322).

Summary Judgment.

Plaintiff or defendant may at any time move for summary judgment on all or part of action on ground that there is no genuine dispute as to any material fact and he is entitled to judgment as matter of law. If motion filed before date of adverse party's initial pleading, it must be supported by affidavit; if filed later in proceeding, supporting affidavit is not required, but is good practice. Affidavit must show that affiant is competent to testify, must be made on personal knowledge and must set forth facts admissible in evidence. Response must state with particularity facts that are disputed. When motion for summary judgment is supported by affidavit or other statement under oath, party opposing motion must support response with affidavit or other written statement under oath to controvert any fact in motion. Upon hearing motion, court may grant or deny summary judgment or may enter order limiting issues at trial to matters genuinely in dispute. (R. P. 2-501). No summary judgment is available in actions for divorce, annulment or alimony. (R. P. 9-209).

Judgment non obstante veredicto is provided for by R. P. 2-532.

Declaratory Judgments.

Uniform Act adopted. (courts art. §§ 3-401 to 3-415).

Default Judgment.

If defendant fails to plead on time, order of default may be entered against him by court on written request of plaintiff. (R. P. 2-613). Defendant may move to vacate order within 30 days of entry by stating reasons for failure to plead and basis for defense to claim. Court must vacate if it finds substantial and sufficient basis for actual controversy as to merits and that it is equitable to excuse failure. (R. P. 2-613).

Docketing.

After jury verdict or court decision allowing only recovery of costs or specified amount of money or denying relief, clerk must enter judgment by record on file jacket, docket book or docket within file. After entry of judgment, clerk must record and index judgment except judgment denying relief without costs. (R. P. 2-601).

Vacation or Modification.

Any party may move for new trial within ten days after entry of judgment. (R. P. 2-533). Upon motion within ten days after entry of judgment, court may receive additional evidence or may amend judgment or its findings or statement of reasons. (R. P. 2-534). Motion to alter or amend judgment filed after announcement or signing by trial court of judgment but before entry of judgment on docket shall be treated as filed on same day, but after entry on docket. (R. P. 2-534). Court may exercise revisory power and control over judgment if motion filed within 30 days, and if action tried without jury, may take any action that could be taken under R. P. 2-534. Otherwise, court may exercise revisory power upon motion at any time in case of fraud, mistake or irregularity. (R. P. 2-535).

Lien.

(For special rules applicable to district court judgments, see category 6 Courts and Legislature, topic 6.01 Courts, subhead District Courts.) If money judgment is indexed and recorded, judgment of circuit court is lien on real and certain leasehold property in county (or Baltimore City) where rendered, from date of judgment. (courts art. § 11-402; R. P. 2-621). Circuit court judgment can be made lien in other county by sending certified copy of docket entries to clerk in that county; lien commences from date of filing such docket entries in that county. (courts art. § 11-402; R. P. 2-622). Judgment of Court of Appeals, Court of Special Appeals, another circuit court of state, court of U.S. or any court entitled to full faith and credit constitutes lien in any county from date of receipt of certified copy of judgment by clerk in that county, to same extent as judgment entered by court in which property located. (R. P. 2-621, 2-623). Leases from year to year and leases for terms of not more than five years and not renewable do not constitute liens on real property. (courts art. § 11-402). Execution or attachment may issue within 12 years from date of judgment or date of renewal. (R. P. 2-625). Renewal may be had at any time before expiration of judgment by filing notice of renewal. (R. P. 2-625). Execution upon judgment is not lien upon chattels until levy, and then only upon chattels included in levy. (courts art. § 11-403).

Revival.

Judgment for sum certain expires 12 years from date of entry or most recent renewal. At any time before expiration of judgment, judgment holder may file notice of renewal and clerk shall enter judgment renewed. (R. P. 2-625).

Assignment.

Assignee of judgment may file assignment in court where judgment entered or recorded, and following filing, assignment may be enforced in name of assignee. (R. P. 2-624).

Satisfaction.

Upon receiving all amounts due on judgment, judgment creditor must furnish debtor and clerk with written statement of satisfaction which must be filed by clerk. (R. P. 2-626[a]). If judgment creditor fails to comply with R. P. 2-626(a), debtor may file motion for order declaring judgment satisfied. (R. P. 2-626[b]).

Actions on Judgments.

Action may be brought on judgments including foreign judgment. (182 Md. 577, 35 A.2d 449).

Foreign Judgments.

Debt of record entered in court in U.S. or foreign country may be proved by official transcript of entire record under seal of custodian and court or office where record made. (courts art. § 10-601). Copy of authenticated foreign judgment filed with clerk of district court where judgment is $2,500 or less. (courts art. § 11-802).

Uniform Foreign Money-Judgments Recognition Act adopted. (courts art. §§ 10-701 to 10-709).

Uniform Enforcement of Foreign Judgments Act adopted. (courts art. §§ 11-801 to

11-807).

Judgment Notes.

See category 3 Business Regulation and Commerce, topic 3.02 Bills and Notes.

Judgments Arising from Use of Motor Vehicle.

See category 23 Transportation, topic 23.01 Motor Vehicles.

5.16 LIMITATION OF ACTIONS:

Uniform Commercial Code adopted. (comm. law art. tits. 1 to 10). See category 3 Business Regulation and Commerce, topic 3.09 Commercial Code.

Actions must be brought within following periods after respective causes of action accrue:

Twenty Years.

To recover possession of corporeal freehold or leasehold estate in land, time running from beginning of adverse possession. (courts art. § 5-103[a]). Landlord's claim to rent under lease or to reversion in property. (real prop. art. § 8-107). Claim for damages incurred from error in land survey must be brought within earlier of 20 years of survey or three years after error discovered. (courts art. § 5-112). See also subhead Improvements to Real Property, infra.

Twelve Years.

Action on any of following specialties must be filed within 12 years after cause of action accrues, or within 12 years from date of death of last to die of principal debtor or creditor, whichever sooner: (1) Promissory note or other instrument under seal; (2) bond, except public officer's bond; (3) judgment; (4) recognizance; (5) contract under seal; (6) any other specialty. Payment of principal or interest on specialty suspends operation of limitations for three years thereafter. Limitations do not apply to specialty taken for use of state. (courts art. § 5-102). Promissory note or other instrument must meet certain standards to be considered under seal. (275 Md. 151, 338 A.2d 275).

Ten Years.

See subhead Improvements to Real Property, infra.

Seven Years.

To recover lands for breach of condition subsequent or termination of fee simple determinable estate. (real prop. art. § 6-103). On claim for state, county or city taxes where other period not prescribed. (tax-gen. art. § 13-1103).

Five Years.

On public officer's bond (except state may sue on such bond at any time). (courts art. § 5-104).

Four Years.

On contract of sale of personal property under Uniform Commercial Code—Sales. (comm. law art. § 2-725). For collection of sales, amusement, fuel and use taxes, except that proof of fraud or gross negligence will remove bar of statute. (tax-gen. art. § 13-1102).

Three Years.

Any civil action at law for which another period not provided by Code. (courts art. § 5-

101). Prosecution for welfare and Medicaid fraud. (courts art. § 5-106[j] and [k]). Prosecution for certain vehicular homicide crimes. (courts art. § 5-106[o]). In action for wrongful death, three years from death, except if death caused by occupational disease, whereupon shorter of ten years from death or three years from time cause of death discovered. (courts art. § 3-904[g]; see also lab. emp. art. § 9-902[d], in case where Workmen's Compensation claim involved). Contempt-of-court action for default on court ordered spousal or child support. (courts art. § 5-111). Action to invalidate transfer of property between spouses by prejudiced creditors of transferor's spouse. (fam. law art. § 4-301[d]). Action for practicing, attempting to practice or offering to practice medicine without license. (courts art. § 5-106[r]). Actions under Maryland Tort Claims Act. (st. gov't art. § 12-106). See also subhead Improvements to Real Property, infra. Prosecution to impose civil fine for offense arising under Elections Law Article. (courts art. § 5-106[h]).

Prosecution under Fam. Law Art for unlawfully changing or receiving compensation in connection with adoption. (courts art. § 5-106[q]).

Action for tax-related offenses. (courts art. § 5-106[k]).

Prosecution for offense of discrimination on basis of sex in paying wages under Emp. Lab. Art. (courts art. § 5-106[p]).

Prosecution for offense under Md. Charitable Solicitations Act. (courts art. § 5-106[s]).

Stress sales or illegal sales, rentals, transfers, possession or receipt of regulated firearms. (courts art. § 5-106[t]).

Prosecutors related to computer crimes. (courts art. § 5-106[v]).

Prosecution for offenses by nursing home administrators. (courts art. § 5-106[x]).

Prosecution for violation of Insurance Act. (courts art. § 5-106[y]).

Prosecution for sexual abuse of minor student by person in authority. (courts art. § 5-106[z]).

Two Years.

Action for breach of express or implied warranties in sale of improvements to real estate. (real prop. art. § 10-204). Prosecutions for unlawful use of driver's license or fraudulent use of false name when applying for driver's license. (courts art. § 5-106[c]). Prosecution for violation of state election laws, Maryland Public Ethics Law, or criminal malfeasance, misfeasance, or nonfeasance by state or local official. (courts art. § 5-106[f]). Prosecution for abuse or neglect of vulnerable adult. (courts art. § 5-106[w]).

One Year.

Actions for libel, slander, or assault (courts art. § 5-105); prosecution for misdemeanor not punishable by confinement in penitentiary by statute (courts art. § 5-106[a]); prosecution for fine, penalty or forfeiture (courts art. § 5-107). Claims on municipal, county or state contracts must be brought within one year from date claim arose or within one year of completion of contract giving rise to claim, whichever is later. (st. gov't art. § 12-202). See category 3 Business Regulation and Commerce, topic 3.13 Contracts.

Nine Months.

Claims against estate of decedent must be presented within earlier of nine months after death or two months after notice sent to creditors in form required under est. & tr. art. § 7-103 notifying creditor that claim will be barred unless presented within two months after notice is sent. For deaths occurring on or after Oct. 1, 1992, claims must be presented by earlier of six months after decedent's death or two months after notice given. (est. & tr. art. § 8-103[a]).

Six Months.

Claim against estate based on conduct of or contract with personal representative barred unless action commenced within six months of date claim arose. (est. & tr. art. § 8-103[a], [c]). All other claims against estate of decedent dying after Oct. 1, 1992 must be presented within earlier of six months after death or two months after notice is sent. Where personal representative disallows claim in whole or part, claimant must file petition for allowance or commence action against personal representative or distributees within 60 days after mailing of notice of disallowance. (est. & tr. art. § 8-107).

Action or levy under Uniform Commercial Code—Bulk Transfers. (comm. law art. § 6-111).

Action for usury must be brought no later than six months after loan paid. (comm. law art. § 12-111; see category 3 Business Regulation and Commerce, topic 3.17 Interest, subhead Maximum Rate, for other limitations under various credit statutes).

Malpractice.

Generally, action for injury arising from professional services of health care provider must be brought within shorter of five year period from commission of injury or three year period from discovery thereof. If claimant under 11 at time injury committed, time period commences when claimant reaches age 11, unless action is for injury to reproductive system or injury caused by foreign object negligently left in claimant's body; in either of these cases, and claimant under 16 years old at time of injury, limitations period begins to run at age 16. Filing of claim with Health Care Arbitration Office constitutes filing of action. See category 9 Dispute Resolution, topic 9.02 Arbitration and Award, subhead Medical Malpractice. (courts art. § 5-109).

Securities Act.

Civil liability must be enforced by action commenced within three years after contract of sale, except that specified actions by buyer against seller must be brought within one year after violation or discovery thereof, but no later than three years after contract of sale. (corps. art. § 11-703[f]).

Improvements to Real Property.

Except for cause of action against manufacturer or supplier for personal injury or death caused by asbestos or for property damage to property owned by government or educational institutions, no cause of action for damages accrues, and person may not seek contribution or indemnity for damages, when death, personal injury or injury to property resulting from defective or unsafe condition of improvement to real property occurs more than 20 years after date entire improvement becomes available for intended use. When defendant is architect, professional engineer or contractor limit is ten years. Cause of action for such injury accrues when injury or damage occurs, and action must be filed within three years thereafter. Provisions do not apply if defendant is in actual possession and control of property when injury occurs. (courts art. § 5-108).

Death from Occupational Disease.

Action for damages for death arising from occupational disease must be filed within three years of discovery of facts from which it was or should have been known that occupational disease was proximate cause of death, but in any event not later than ten years from date of death. (courts art. § 5-113).

Actions Not Specifically Provided For.

Any civil action at law for which no specific period provided by Code is governed by general three-year statute. (courts art. § 5-101).

New Actions.

No provision for extending time to permit new action after previous action disposed of otherwise than on merits.

Foreign Causes of Action.

Normally limitations is matter to be determined by law of forum, and Md. statute applies to suit brought in state. (108 Md. 693, 71 A. 312). If product liability cause of action arose in foreign jurisdiction and cause of action barred there by reason of lapse of time, action cannot be brought in Maryland unless plaintiff is resident of Maryland. (courts art. § 5-115).

Disability or Absence of Plaintiff.

When cause of action subject to limitation under courts art. §§ 5-101 to 113 accrues in favor of minor or mental incompetent, he must file action within lesser of three years or applicable period of limitations after disability removed, except where statute of limitations has more than three years to run at time of removal. Imprisonment, absence from state or marriage do not extend statute. (courts art. § 5-201). Landlord under disability when 20 year period for rent or reversion expires has two years after removal of disability to assert rights. (real prop. art. § 8-107).

Absence or Concealment of Defendant.

Person absenting himself from state or removing from county to county after contracting debt to avoid creditors (but not if for reasons of convenience, and not if he leaves assets with trustee to pay creditors) does not have benefit of limitations contained in courts art. tit. 5. If debtor is out of state when cause of action accrues, time runs only from his return. (courts art. § 5-205). Person is not absent from State merely because he or she does not reside in Maryland. Person will be deemed absent from State, for limitation purposes, only if he or she cannot be reached by process of Court. (144 Md. App. 201, 797 A.2d 118).

Death.

For limitations on suits against personal representative, heirs or legatees, see subhead Nine Months, supra, and appropriate subheads under category Estates and Trusts, topic Executors and Administrators.

Fraud.

If knowledge of cause of action is kept from party by fraud of adverse party, cause of action accrues at time when party discovered, or by exercise of ordinary diligence should have discovered, fraud. (courts art. § 5-203).

Interruption of Statutory Period.

Time between filing and dismissal of petition of insolvent debtor not counted so as to defeat claim against him. (courts art. § 5-202).

Part payment or acknowledgment, oral or written, has following effect: (1) If statute has not run, time extended for three years from date of payment or acknowledgment; (2) if claim barred, it is revived for three years, except that express promise to pay is necessary to revive specialty debt. (177 Md. 43, 7 A.2d 186).

Contractual Limitations.

In sales contracts governed by U.C.C., parties may by original agreement reduce limitations to not less than one year, but may not extend limitations. (comm. law art. § 2-725 [1]).

Pleading.

Limitations must be pleaded as affirmative defense. (R. P. 2-323[g][15]).

Municipal Corporations.

No action against local government can be brought for unliquidated damages unless written notice of time, place and cause of alleged injury is presented in person or by certified mail, return receipt requested, within 180 days (after injury) to city solicitor of Baltimore City or county executive, county council, county commissioners or corporate authorities of municipal corporation (notice to be given to county solicitor or county attorney in Anne Arundel County, Baltimore County, Harford County, and Prince George's County, and notice to be given to county executive in Howard County and Montgomery County). Court may, upon motion and for good cause, entertain suit in absence of required notice, unless defendant shows its defense was prejudiced thereby. (courts art. § 5-304).

5.16A PARTITION:

Any joint tenant, tenant in common or concurrent owner may require partition, and if property cannot be divided without loss or injury to parties in interest, sale will be ordered. (real prop. art. § 14-107; R. P. 12-401). Right of petitioner does not depend on extent of his interest. (140 Md. 121, 117 A. 108). Tenancy by entireties cannot be severed by act of one spouse. (253 Md. 525, 253 A.2d 367).

Grounds.

It is sufficient that plaintiff desires division of property. (See real prop. art. § 14-107; 228 Md. 624, 180 A.2d 878.) Bill of Partition cannot be made to settle title disputes or serve as action for ejectment. (188 Md. 581, 53 A.2d 555; 60 Md. 139).

Jurisdiction and Venue.

Equity courts have inherent power to partition either personal or real property (212 Md. 565, 130 A.2d 737; 3 Bland 184), and circuit courts have statutory power to partition any real property interest, either legal or equitable. (real prop. art. § 14-107). However, jurisdiction to partition property is confined to cases where property interests are concurrent. (138 Md. 211, 114 A. 55). Suit should be brought in court in county where land lies. (courts art. § 6-203). Orphans' court has power to partition distributions. (est. & tr. art. § 9-107).

Proceedings.

Suit is instituted by bill in equity. Any person holding mortgage or other encumbrance or undivided interest in property may be made party. Unless all parties waive appointment of commissioners, court determining partition to be proper will commission not more than five nor less than three persons to value and divide property. (real prop. art. § 14-107; R. P. 12-401[c]). Commissioners' report must be served on all parties who have appeared, and exceptions thereto must be taken within ten days. (R. P. 12-401[c]). Upon confirmation of commissioners' report, court enters final decree of partition or orders sale and division of proceeds. In former case, decree operates as conveyance and no deed is necessary. In latter, deed is executed by person appointed by court. (real prop. art. § 14-107[c]). Personal representative or one or more heirs or legatees may petition orphans' court prior to closing of estate for partition of distribution. (est. & tr. art. § 9-107).

Partition in Kind or Sale.

Partition is in kind unless it appears that property cannot be divided without loss or injury to parties interested, when partition may be by sale. (est. & tr. art. § 9-107[b]; real prop. art § 14-107[a]). Co-tenant entitled to compensation for improvements made on land to extent enhanced value of property at time of sale. (29 Md. App. 521, 349 A.2d 655).

5.17 [RESERVED]

5.18 PLEADING:

Maryland adopted new rules of procedure effective July 1, 1984. See also topic 5.19 Practice.

Pleadings Permitted.

Pleadings allowed are complaint, answer, counter-claim, cross-claim, third-party complaint, and answer to counter-claim, cross-claim, or third-party complaint. Court may order reply to answer. (R. P. 2-302).

Complaint.

Clear statement of facts and demand for judgment for relief necessary to constitute cause of action. (R. P. 2-305). Must be divided into separately numbered paragraphs, each containing single set of circumstances to extent possible. Each cause of action must be set forth in separately numbered count. Relief in alternative may be demanded and request for such other or further relief as case may require is good practice. (R. P. 2-303).

Answer.

For each averment, defendant must specifically admit, deny, or state that defendant is without knowledge or information sufficient to form belief as to truth of averment. (R. P. 2-323[c]). When action in any count is breach of contract, debt or tort, and claim is for money only, party may answer that count by general denial of liability. (R. P. 2-323[d]).

Counterclaim.

Party against whom claim is asserted may plead as counterclaim any claim he has against any opposing party. Counterclaim may claim relief exceeding amount of, or different in kind from, initial claim. If counterclaim requires presence of additional parties, court will order them to be brought in if jurisdiction can be obtained. (R. P. 2-331).

Reply.

Replications are abolished. (R. P. 2-302).

Demurrer.

Demurrers are abolished. (R. P. 2-302).

Amended or Supplemental Pleadings.

Amendment freely permitted unless court directs otherwise. Party may file amendment by date set forth in scheduling order or, if there is no scheduling order, no later than 30 days before scheduled trial date. Thereafter, amendment may be filed only by leave of court. Within 15 days after service of amendment, any other party to action may file motion to strike. Comparison copy should be filed highlighting changes in amended pleading showing by lining through or enclosing in brackets material that has been stricken and by underlining or setting forth in bold-faced type new material. (R. P. 2-341).

Affidavits of Merits.

Affidavit used in summary judgment cases. (See topic 5.15 Judgments.) Supporting affidavit required in certain special cases, such as attachment. (R. P. 2-115[a]). When application made for ex parte injunction, either affidavit or verified pleading required. (R. P. 15-504). In divorce action involving alimony, maintenance, or support (including child support), current financial statements under affidavit must be filed by both parties. (R. P. 9-202). Financial statements must be filed in substantially same form as recommended form in rule. (R. P. 9-203).

Affidavits of Defense.

Not used except in summary judgment cases. See topic 5.15 Judgments.

Bill of Particulars.

Replaced by motion for more definite statement, which may be made when pleading to which answer is permitted is so vague or ambiguous that party cannot reasonably frame answer. Motion must point out defects complained of and details desired. (R. P. 2-322[d]).

Verification not required except where specifically required by statute or rule. (R. P. 1-301[f]). Where application made for ex parte injunction, either verification or affidavit required. (R. P. 15-504). Divorce pleading must be signed by party (R. P. 9-202), but verification not required.

Service of initial pleading is generally by sheriff. (R. P. 2-123). See topic 5.20 Process. Service of subsequent pleadings is generally upon party's lawyer, by delivery or Mail. (R. P. 1-321).

Filing.

Pleadings must be filed with clerk of court. (R. P. 1-322). Pleading after original pleading will not be accepted for filing unless accompanied by admission, waiver or certificate of service on opposite party or his attorney. (R. P. 1-323).

Time.

Defendant must answer within 30 days after service, with certain exceptions. Where service is made outside state, initial pleading due 60 days from completion of service if made within U.S. or 90 days if beyond. (R. P. 2-321). Motion or other pleading requiring ruling of court or compliance by party enlarges time to 15 days after disposition by court or compliance by party. (R. P. 2-321[c]). Responses to motions must be filed within 15 days of service, or within time allowed for party's original pleading, whichever is later. (R. P. 2-311). Counterclaim, cross-claim, or third party claim must be filed within 30 days after time for filing answer. Otherwise, any party may file motion to strike within 15 days of service of counterclaim, cross-claim or third party claim. Court must grant motion to strike unless there is showing that delay does not prejudice other parties. (R. P. 2-331; 2-332).

Computation.

To compute period of time after event, day of event not included; Sats., Suns. and legal holidays counted only when period of time allowed is more than seven days. When last day would fall on Sat., Sun. or legal holiday, period extends to first day thereafter not such a day. (R. P. 1-203[a]). To compute latest day for performance of act required by statute, rule of procedure or court order to be performed prescribed number of days prior to event, all prior days counted (including Sats., Suns. and legal holidays). Latest day included unless Sat., Sun. or legal holiday, in which case latest day is first preceding day not Sat., Sun. or legal holiday. (R. P. 1-203[b]).

Service by Mail.

Whenever party must do some act within prescribed period after service upon party of notice or other paper, and service is made by mail, three days will be added to prescribed period. (R. P. 1-203[c]).

Frivolous Claims.

Attorneys are prohibited from bringing or defending proceeding unless there is basis that is not frivolous. (r. prof. con. 3.1, R. P. Appendix). All courts have power to impose sanctions against party, attorney or both that maintain or defend proceeding in bad faith or without substantial justification. (R. P. 1-341).

Small Claims.

See category 6 Courts and Legislature, topic 6.01 Courts, subhead District Courts.

5.19 PRACTICE:

Civil and criminal practice in Court of Appeals, Court of Special Appeals, circuit and district courts is governed by Md. Rules. (R. P.).

Discovery.

Depositions may be taken by oral examination (R. P. 2-415[b]), by telephone (R.P. 2-418) or by written interrogatories (R. P. 2-417). Deposition may be recorded by videotape and audiotape. (R. P. 2-416). See topic 5.11 Depositions and Discovery. District court may order deposition, upon good cause shown, for party desiring to perpetuate own testimony or that of another party or witness (R. P. 3-431); otherwise, in district court actions, deposition may be taken only by written stipulation of parties (R. P. 3-401). Discovery and production of documents or electronically stored information for inspection and reproduction is provided for in rules. (R. P. 2-422, 3-421[a][3]). In district court, documents discoverable limited to written instruments upon which claim or defense founded, signed or recorded statement given to adverse party, and reports of experts. (R. P. 3-421[a][3]).

Interrogatories may be served at any time by any party upon any other party in circuit court cases. Except to demand supplementary answers to interrogatories previously filed, party may not, without leave of court, serve more than one set of interrogatories or more than 30 interrogatories (including subsidiary or incidental interrogatories). (R. P. 2-421[a]). Interrogatories must be answered in writing, under oath and signed within later of 30 days after service or 15 days after date on which answering party's initial pleading or motion is required. (R. P. 2-421[b]). Motion for order compelling discovery must be filed with reasonable promptness. (R. P. 2-432). Answers may be used as permitted by rules of evidence. Option to produce business records including electronically stored information in certain circumstances is provided. (R. P. 2-421). Limited written interrogatories are permitted in most cases before district court. (R. P. 3-421).

Demand for Admission of Facts.

Any party (except in district court) may serve upon any other party written request to admit genuineness of any relevant document or electronically stored information or truth of any relevant matters of fact. Copies of documents must be supplied. Facts or genuineness are deemed admitted unless denied or other response or objection made within later of 30 days of service of request or 15 days after date on which party's initial pleading or motion is required. After refusal to admit genuineness or truth, demanding party who proves genuineness or truth may apply for reasonable expenses and attorneys' fees incurred in making proof. Demanding party may move for determination by court of sufficiency of answers or objections, and appropriate orders and awards of expenses may be made by court. (R. P. 2-424).

Direct Actions Against Insurer.

See category 23 Transportation, topic 23.01 Motor Vehicles, subhead Direct Actions.

Small Claims.

See category 6 Courts and Legislature, topic 6.01 Courts, subhead District Courts.

See also topics 5.02 Actions, Appeal and Error, Injunctions, Judgments, Pleading, Process; categories 8 Debtor and Creditor, topics Attachment, Executions, Garnishment; Dispute Resolution, topic Arbitration and Award.

5.20 PROCESS:

Civil action commenced by filing complaint. (R. P. 2-101). Clerk issues summons for each defendant in state forthwith upon commencement of action and delivers it to sheriff or other person designated by plaintiff. (R. P. 2-112). Upon request of plaintiff, additional summons issues against any defendant. (R. P. 2-112).

General Requisites.

Summons should be authenticated with seal of court, it should be signed by clerk, and should contain name of court and assigned docket reference, name and address of party requesting summons, name and address of person to be served, date of issue, time within which summons must be served, time within which defendant must respond, notification that failure to respond within time allowed may result in judgment by default or granting relief sought, and time within which return of service must be made. (R. P. 2-114).

By Whom Summons Issued.

Clerk of court. (R. P. 2-112).

Who May Serve.

Sheriff. (R. P. 2-123). Competent person over 18 years of age, including attorney of record, but not party, may execute process. Person other than sheriff executing process must make appropriate return by affidavit. Employee of party may serve process. (R. P. 2-123, 2-126; 249 Md. 94, 238 A.2d 251).

Personal Service on Individual.

Service may be made by delivery of process to party to be served or to agent authorized by appointment or by law to receive process. (R. P. 2-124[b]).

Personal Service on Infant.

Same as on adult, except copy must be left with parent, guardian, or other person having care or custody of infant if there be such parent, guardian or other person within jurisdiction of court. (R. P. 2-124[c]).

Personal Service on Incompetent Person.

Same as on competent person, except copy should be left with person having care of person or estate of incompetent if there be such person within jurisdiction of court. (R. P. 2-124[c]).

Personal Service on Partnership.

Partners must be sued as individuals to reach individual assets, and each must be served as individual.

Personal Service on Corporation.

In case of either domestic or foreign corporation, process may be served on resident agent or president, secretary or treasurer. If corporation has no resident agent or good faith attempt to serve resident agent, president, secretary or treasurer is unsuccessful, process may be served upon manager, any director, vice president, assistant secretary or assistant treasurer, or if none of above, upon anyone with express or implied authorization to accept service. (R. P. 2-124[d]).

If corporation required to have resident agent has no resident agent, or if two attempts on different business days to serve process on resident agent are unsuccessful, process may be served upon Dep't of Assessments and Taxation. (R. P. 2-124[d]). Director of Dep't must forward copy to defendant at known mailing address or principal place of business. (courts art. § 6-307).

Unregistered insurance companies must consent to being sued by service on Commissioner. (ins. art. § 3-318, R. P. 2-121[d]). Nonresident individuals, partnerships or corporations must file irrevocable consent to service of process on secretary of Real Estate Commission with their applications for real estate brokers license; and division of fees or holding of deposits in any real estate transaction in state is deemed consent without filing. (bus. occ. art. §§ 16-514, 16-515).

Every applicant for registration of securities under Md. Securities Act and every issuer proposing to offer security in state through agent must file irrevocable consent appointing Securities Commissioner as attorney to receive process in any noncriminal suit, action or proceeding arising under state securities law. (corps. art. § 11-802).

Wherever insurance, surety or bonding company has accredited agent in state, it may sue or be sued on its policies, and service on agent is sufficient. (courts art. § 6-306).

Personal Service on Association.

Same as service on corporation. (R. P. 2-124[d]).

Personal Service on Joint Stock Company.

Same as service on corporation. (R. P. 2-124[d]).

Personal Service on Foreign Corporation.

Same as service on domestic corporation. (R. P. 2-124[d]).

Personal Service Outside the State.

Where personal jurisdiction is authorized by courts art. tit. 6 (see subhead Long Arm Statute, infra), defendant may be served where found, within or without state. (courts art. § 6-304). Service outside state is generally same as inside state and is governed by R. P. 2-121. Service may also be made in manner prescribed by court, or prescribed by foreign jurisdiction if reasonably calculated to give actual notice. (R. P. 2-121[a]).

Service by Mail.

In lieu of personal service, service within or without state may be by certified mail, requesting “Restricted Delivery - Show to whom, date, address of delivery.” (R. P. 2-121[a]).

Substituted Service.

Service upon Dep't of Assessments and Taxation, Insurance Commissioner, Securities Commissioner, Secretary of Real Estate Commission, with notice to defendant, is permitted depending upon circumstances. See subhead Personal Service on Corporation, supra.

Service on Defendant Who Seeks to Evade or Resists Service.

Evading domiciliary, resident or one who maintains principal place of business in state may be served upon court order by mailing summons, original pleading, and all papers filed with it to defendant at last known residence and delivering each to person of suitable age and discretion at place of business, dwelling house or usual place of abode of defendant. Affidavit that person has acted to evade service required. (R. P. 2-121[b]).

Where person resists service of civil process by threat or force, officer serving process must leave copy with responsible person at premises if possible, or post copy as near premises as practicable; such service effective as actual personal service. (courts art. § 6-303).

Service on Defendant Whose Whereabouts Are Known, In Rem or Quasi In Rem Proceeding.

Same as service for obtaining personal jurisdiction over defendant. (R. P. 2-122).

Service on United States or Its Officer, Employee or Agent is as prescribed in R. P. 2-124(m) and (n).

Service by Publication.

In in rem or quasi in rem proceedings where whereabouts of defendant unknown, service may be by mailing notice to defendant's last known address and: (1) Publication of notice, (2) posting of notice by sheriff at or near courthouse door, or (3) posting of notice by person authorized to serve process in accordance with Rule 2-123(a) on conspicuous place on land. (R. P. 2-122[a]). Mailing and publication or posting to be completed at least 30 days before defendant's initial pleading due. (R. P. 2-122). Plaintiff must file affidavit to satisfy court of good faith efforts to locate defendant. (R. P. 2-122[a]). Proof of publication is by certificate of publisher filed in proceeding. (R. P. 2-126[b]).

In cases for divorce, annulment, or alimony, same service shall be had as in other cases. (R. P. 9-202).

Long Arm Statute.

Court may exercise personal jurisdiction as to any cause of action over person domiciled in, served with process in, organized under laws of, or maintaining place of business in state. (courts art. § 6-102). Court may exercise personal jurisdiction over person who directly or by agent: (1) Transacts any business or performs any character of work or service in state; (2) contracts to supply goods, food, services or manufactured products in state; (3) causes tortious injury in state by act or omission in state; (4) causes tortious injury in or outside state by act or omission outside state, if person regularly does or solicits business, engages in any other persistent course of conduct in state or derives substantial revenue from goods, food, services or manufactured products used or consumed in state; (5) has interest in, uses or possesses real property in state; or (6) contracts to insure or act as surety for or on any person, property, risk, contract, obligation or agreement located, executed or to be performed within state at time contract is made, unless parties otherwise provide in writing. Where jurisdiction is based solely upon enumerated acts, person may be sued only on cause of action arising from enumerated acts. (courts art. § 6-103). Breadth of long arm statute is to permit personal jurisdiction to extent permitted by federal Constitution. (311 Md. 496, 536 A.2d 633; 277 Md. 220, 352 A.2d 818).

Domestic Relations Cases.

In cases arising out of marital relationship or involving child support, alimony, or counsel fees, where plaintiff resides in Md. at time suit filed, court may exercise personal jurisdiction over nonresident defendant who has been personally served according to rules of procedure, if: (1) Md. was matrimonial domicile of parties immediately before separation, or (2) obligation to pay child or spousal support or counsel fees arose under Md. law or under agreement executed by one of parties in Md. (courts art. § 6-103.1). Court may exercise personal jurisdiction over nonresident defendant alleged to be father in paternity proceeding if: (1) Mother resides in Md. when suit filed; (2) father is personally served with process; and (3) act of conception is alleged to have occurred in Md. (courts art. § 6-103.2).

Proof of Service.

Proof of personal service is by notation on sheriff's return or by affidavit filed with clerk. Proof of service by mail is by affidavit with original return receipt attached. Proof of service by publication is by certificate of publisher filed with clerk. (R. P. 2-126).

Nonresident Motorist.

Department of Motor Vehicles is designated as agent for nonresident driver with regards to subpoena, summons or other process issued in Action related to motor vehicle accident under certain circumstances. (courts art. § 6-313).

5.21 REPLEVIN:

Replevin procedure is governed by Md. Rules (R. P. 12-601 and 12-602).

Replevin is possessory action ex delicto founded on tortious detention or taking of personal property for which damages are allowed. (253 Md. 669, 253 A.2d 736; 201 Md. 433, 94 A.2d 639). It is appropriate remedy for person from whom goods have been obtained by fraud, including purchase by insolvent with no reasonable expectation of paying for goods. (69 Md. 276, 14 A. 666). It may be brought not only by owner, but also by one who has special property and right of possession, such as factor or bailee. (183 Md. 105, 36 A.2d 677). It is usual remedy for tenant to recover goods distrained upon by landlord where, for any reason, distraint is illegal.

Goods in custodia legis cannot be replevied. (9 G. & J. 220).

Proceedings.

District court has exclusive original jurisdiction, subject to right to demand jury trial. (courts art. §§ 4-401, 4-402). Action may be brought in county where defendant resides, is regularly employed or has place of business, or in county where goods sought to be replevied are located. (courts art. 6-201). Action is instituted by filing statement of claim, alleging that defendant unjustly detains property and claiming return of property. Statement may claim damages for detention. (R. P. 12-601). Statement may be accompanied by petition for injunctive relief. (courts art. § 4-401[6]). Clerk issues show cause order to defendant. Hearing on show cause order may be held no earlier than seven days after date of service upon defendant. If defendant fails to appear, property may be seized by sheriff. (R. P. 12-601). If court determines at hearing that plaintiff, with reasonable probability, is entitled to return of property claimed, writ of replevin issues upon filing by plaintiff of approved replevin bond. (R. P. 12-601). Replevin bond is in amount fixed by court, is payable to state for use of any person having interest in property sought, is conditioned for successful prosecution of action and return of property if adjudged and fulfillment of any judgment. (R. P. 12-601). Writ of replevin must specifically describe property to be replevied. (R. P. 12-601). Defenses to action of replevin include: (1) Defendant did not take property; (2) right to possession of property is in defendant; or (3) right of possession of property is in third party. (R. P. 12-601). If writ issues, defendant may plead, and case proceeds to trial. If writ is denied, action proceeds in detinue. (R. P. 12-602).

If demand for jury trial is filed, district court retains jurisdiction to conduct hearing on show cause order, enforce injunctions, and issue, renew and receive returns upon writ of replevin.

Action is transmitted to circuit court only after writ is returned that property sought is seized or eloigned and time for filing of defendant's notice of intention to defend (15 days after service of summons and statement of claim, R. P. 3-307[b]) has expired. (courts art. § 4-402[e][2]).

If property owner subject to statutory lien institutes replevin action and establishes right to writ issuance but for lien, court shall issue writ. At trial, court shall determine amount of lien claim, if any. If lienholder prevails at trial, award may include reasonable attorney's fees and property or lien amount. (comm. law art. § 16-208).

Repossession.

No provision for return of property to defendant prior to final judgment in his favor.

Claims of Third Persons.

Defendant may plead right to property in third person. At trial, burden is on plaintiff to show title and right of possession superior to that of defendant or third person. (226 Md. 136, 172 A.2d 494). Action on replevin bond shall be brought in name of state to use of equitable plaintiff. (R. P. 12-602).

Judgment or Order.

Verdict awards possession of property and must state separately value of property and amount of damages, if any, for detention. (R. P. 12-601).

5.22 SEQUESTRATION:

See category 8 Debtor and Creditor, topics 8.02 Attachment, 8.05 Executions.

5.23 SERVICE:

See topic 5.20 Process.

5.24 STAY OF EXECUTION:

See topic 5.03 Appeal and Error; category 8 Debtor and Creditor, topic 8.05 Executions.

5.25 SUBMISSION OF CONTROVERSY:

No special provision for submission of controversy on agreed-upon issues. Parties must file action and move for summary judgment. (R. P. 2-501).

5.26 VENUE:

References are to Courts Art. of Code unless otherwise indicated.

Individual.

Civil action must generally be brought in county or Baltimore City where defendant resides, carries on regular business, is employed or habitually engages in vocation. (§ 6-201[a]).

Special Cases, Additional Venue.

(1) Divorce—where plaintiff resides; (2) annulment—where plaintiff resides or marriage was performed; (3) replevin or detinue—where property is located; (4) action relating to custody, guardianship, maintenance or support of child—where father, alleged father, mother or child resides; (5) action for possession of real property—where land is located; (6) negligence action—where cause of action arose; (7) attachment on original process—where property is located or garnishee resides; (8) action for nondelivery or injury to goods against captain of vessel—where goods are received on board or are to be delivered. (§ 6-202).

Exceptions.

General rule does not apply to following actions, which must be brought as indicated: (1) Certain actions relating to interest in land (partition, enforcement of charge or lien, eminent domain, trespass, waste)—in county or Baltimore City that all or any portion of subject matter is located (if property lies in more than one county, court where proceedings first brought); (2) adoption proceeding—in county that petitioner is domiciled or has resided for at least 90 days, where licensed child placement agency having legal or physical custody of adoptee is located, where adoptee is domiciled (if he is related to petitioner by blood or marriage or is adult), or where equity court has continuing jurisdiction over custody of adoptee; (3) action to recover damages against railroad for injury to livestock—in county where injury occurred (§ 6-203); (4) administrative or judicial probate-in county where decedent was domiciled at time of death or, where decedent-not domiciled in Maryland, in county where petitioner believes is situs of largest part in value of decedent's property in Maryland at time of death (R. P. 6-111).

Multiple Defendants.

If no single venue is applicable to all defendants, all may be sued where any one could be sued or where cause of action arose. (§ 6-201[b]).

Nonresident or Absent Persons.

Nonresident individual may be sued in any county or Baltimore City. (§ 6-202[11]). Person absconding from county or leaving state before statute of limitations has run may be sued where found. (§ 6-202[12]). In local action where defendant cannot be found where subject matter is located, he may be sued in any county where general rule of venue permits. (§ 6-202[13]).

Domestic or foreign corporation is subject to same venue as is individual and may also be sued where it maintains its principal offices in state. (§ 6-201[a]). If corporation has no principal place of business in state, it may additionally be sued where plaintiff resides. (§ 6-202[3]). Suit on bond against corporate surety may additionally be brought where bond is filed or contract is to be performed. (§ 6-202[6]). Suit for damages against railroad company for injury to livestock must be brought where injury occurred. (§ 6-203[d]). Action by Attorney General to forfeit charter of Md. corporation or to revoke permit of foreign corporation for involvement in organized crime may be brought anywhere corporation is doing business. (corps. art. § 1-405[d]).

Actions in Rem or Local Actions.

See subhead Exceptions, supra.

Change of Venue.

In action at law in circuit court, including issues from orphans' court, appeal from Workmen's Compensation Commission, and action transferred from district court for jury trial, upon suggestion by affidavit of any party (and not of counsel) that he cannot have fair and impartial trial in county in which action is pending, or upon motion of any party where all judges in county are disqualified to sit under Maryland Constitution court must transmit record to court in some other county if court finds there is reasonable ground for suggestion. (R. P. 2-505). In criminal proceedings, upon suggestion in writing under oath of any party that he cannot have fair and impartial trial in court in which case is pending, court shall transmit case to another court having jurisdiction for trial, except that in non-capital cases, court shall transmit case only if it is satisfied that suggestion is true or that there is reasonable ground for it. Second removal may be obtained by same procedure. (R. P. 4-254).

When action is filed laying venue in wrong county, court shall, upon proper objection to venue, dismiss action, or transfer action to court in proper county if justice so requires. (R. P. 2-327[b]).

Waiver.

Failure to assert improper venue by way of motion to dismiss prior to filing of answer operates as waiver. (R. P. 2-322[a][2]).

6 COURTS AND LEGISLATURE

6.01 COURTS:

References are to Courts and Judicial Proceedings Article of Code unless otherwise indicated.

United States District Court.

Clerk's office: U.S. Court House, 101 W. Lombard St., Baltimore 21201.

Filing fees required: $350 in civil or admiralty cases; $299 minimum in bankruptcy cases ($1,039 for filing under c. 11).

State Courts.

Judicial power vested in Court of Appeals, Court of Special Appeals, circuit courts, orphans' courts, and district courts. (Const. art. IV, §§ 1, 14A; courts art. §§ 1-301, 1-401, 1-501, 1-601). In criminal cases juries are judge of law and facts except that courts may pass upon sufficiency of evidence necessary to sustain conviction. (Md. Decl. of Rts., art. 23). All courts authenticate, under their respective seals, by their clerks; except orphans' courts authenticate by registers of wills. (Const. art. IV, § 1; courts art. § 2-201, est. & tr. art. § 2-208).

Court of Appeals of Maryland.

Court of Appeals sits at Annapolis. There are seven judges, one from each of the seven appellate judicial circuits. (1994, c. 103, subject to ratification). (Const. art. IV, § 14).

Jurisdiction.

Jurisdiction includes: (1) To review by way of certiorari proceeding pending in or decided by Court of Special Appeals on appeal from circuit court, orphans' court or Md. Tax Court (see subhead Maryland Tax Court, infra) either (a) on its own motion, or (b) where party has filed petition for certiorari before or after decision of Court of Special Appeals but not later than 15 days after its mandate, with exception of cases in which Court of Special Appeals has denied or granted leave to appeal in post conviction, bail-related habeas corpus, or inmate grievance commission proceeding; where final judgment entered following guilty plea in circuit court; where circuit court issued order revoking probation; (2) to review by way of certiorari final judgment of circuit court on appeal from district court if review is necessary to secure uniformity or other special circumstances make review desirable and in public interest; (3) exclusive appellate jurisdiction with respect to question certified under Uniform Certification of Questions of Law Act; and (4) exclusive appellate jurisdiction over cases where death penalty imposed. (§§ 12-201 to 12-203, 12-305, 12-307; R. P. 8-306[c][1]). Court may answer questions of law certified by federal courts or appellate courts of any other state or by Court of Special Appeals and may certify questions of law to appellate courts of any state. (§§ 12-602, 12-603). Reasons for denial of writ of certiorari must be in writing. (§ 12-203).

Court of Special Appeals.

Court of Special Appeals sits at Annapolis in panels of three, but may order hearings en banc. There are 13 judges, six from state at large, and one each from seven special appellate judicial circuits. (§§ 1-402 to 1-403). Court may hold sessions at University of Maryland Law School or University of Baltimore Law School instead of Annapolis. (§ 1-403).

Jurisdiction.

Except for certified questions of law, criminal cases where death penalty imposed, and review by certiorari, Court of Special Appeals has exclusive initial appellate jurisdiction over any reviewable judgment, decree, order or other action of circuit court or orphans' court. (§ 12-308). Appeals subject to further review in Court of Appeals by certiorari, either before or after decision of Court of Special Appeals, if deemed desirable and in public interest by Court of Appeals. (§§ 12-201, 12-203). (See category 5 Civil Actions and Procedure, topic 5.05 Certiorari.) Court of Appeals may certify questions of law to highest court of any state. (§ 12-602). See subhead Maryland Tax Court, infra.

Circuit courts of counties have original and exclusive jurisdiction of cases in equity and at law of cases civil and criminal above jurisdiction of district court, jurisdiction of appeals from district court and certain administrative agencies, and concurrent jurisdiction at law with district court in cases involving $5,000 to $30,000 except where district court has exclusive jurisdiction regardless of amount. (§§ 1-501, 4-401, 4-402, 4-405). See subhead District Courts, infra. Original and exclusive jurisdiction is also given in most juvenile cases. (§§ 3-801[c], 3-804, 4-403). Circuit courts have jurisdiction over certain criminal offenses otherwise in jurisdiction of district courts if circuit court has jurisdiction over other offenses arising from same circumstances. (§ 4-302).

Circuits and Counties.

First Judicial Circuit: Worcester, Somerset, Dorchester and Wicomico Counties.

Second Judicial Circuit: Caroline, Talbot, Queen Anne's, Kent and Cecil Counties.

Third Judicial Circuit: Baltimore and Harford Counties.

Fourth Judicial Circuit: Allegany, Garrett and Washington Counties.

Fifth Judicial Circuit: Carroll, Howard and Anne Arundel Counties.

Sixth Judicial Circuit: Montgomery and Frederick Counties.

Seventh Judicial Circuit: Prince George's, Charles, Calvert and St. Mary's Counties.

Eighth Judicial Circuit: Baltimore City. (Const. art. IV, § 19).

Counties.

Allegany County: Fourth Circuit; court sits at Cumberland.

Anne Arundel County: Fifth Circuit; court sits at Annapolis.

Baltimore County: Third Circuit; court sits at Towson.

Calvert County: Seventh Circuit; court sits at Prince Frederick.

Caroline County: Second Circuit; court sits at Denton.

Carroll County: Fifth Circuit; court sits at Westminster.

Cecil County: Second Circuit; court sits at Elkton.

Charles County: Seventh Circuit; court sits at LaPlata.

Dorchester County: First Circuit; court sits at Cambridge.

Frederick County: Sixth Circuit; court sits at Frederick City.

Garrett County: Fourth Circuit; court sits at Oakland.

Harford County: Third Circuit; court sits at Bel Air.

Howard County: Fifth Circuit; court sits at Ellicott City.

Kent County: Second Circuit; court sits at Chestertown.

Montgomery County: Sixth Circuit; court sits at Rockville.

Prince George's County: Seventh Circuit; court sits at Upper Marlboro.

Queen Anne's County: Second Circuit; court sits at Centreville.

St. Mary's County: Seventh Circuit; court sits at Leonardtown.

Somerset County: First Circuit; court sits at Princess Anne.

Talbot County: Second Circuit; court sits at Easton.

Washington County: Fourth Circuit; court sits at Hagerstown.

Wicomico County: First Circuit; court sits at Salisbury.

Worcester County: First Circuit; court sits at Snow Hill.

Orphans' court in Baltimore City and each county except Montgomery and Harford have jurisdiction over matters related to administration of estates of deceased persons. (Const. art. IV, § 40; est. & tr. art. §§ 2-102, 2-103). Judges of circuit courts of Montgomery and Harford Counties sit as orphans' courts for those counties. (Const. art. IV, § 20). Judgment of orphans' court may be appealed to Court of Special Appeals. (§ 12-501). Except in Montgomery and Harford Counties, appeal from orphan's court may also be taken to circuit court as trial de novo. (§ 12-502).

Probate court has jurisdiction to determine title to personal property valued at not more than $50,000 includable in estate that is subject of proceeding before court. (est. & tr. § 1-301).

District Courts.

State is divided into 12 districts; each district contains one or more counties; there is at least one district judge resident in each county. (Const. art. IV, § 41B; §§ 1-602, 1-603). Administrative judge of district, with approval of chief judge, may appoint commissioners to issue warrants of arrest, to set bail and to release suspects on their own recognizance. (§ 2-607).

District court has exclusive original criminal jurisdiction where person at least 16 or corporation is charged with violating vehicle law or State Boat Act, or person at least 18 or corporation is charged with misdemeanor, or specified theft crime, violation of ordinance or rule or other act punishable by fine, imprisonment, or other penalty (if not felony), violation of bad check laws (whether felony or misdemeanor), violation of laws governing credit card offenses (whether felony or misdemeanor), violation of laws governing forgery and counterfeiting (whether felony or misdemeanor), violation of laws governing fraudulent insurance acts, violation of laws governing false workers' compensation claims, violation of laws governing identity theft, violation of laws governing homicide by motor vehicle or vessel while impaired or under influence, violation of laws governing animal cruelty, violation of laws governing certain crimes involving telecommunications or electronics, violation of laws requiring motorists to remain at accident scene, violation of laws governing financial crimes against “vulnerable” adults (§ 4-301), or violation of laws governing possession of child pornography (§ 4-301) or violation of mortgage lender law, concurrent original criminal jurisdiction with circuit court where penalty may be confinement for three years or more or fine of $2,500 or more and in certain felonies (§ 4-302[d]), and criminal jurisdiction to try juvenile case if juvenile court waives jurisdiction or offender elects and offense is otherwise within its jurisdiction (§ 4-303). Criminal defendant may demand jury trial if penalty may be imprisonment for more than 90 days; case then goes to circuit court. However, defendant may be denied jury trial if prosecutor recommends and judge agrees to maximum penalty of 90 days imprisonment and judge agrees not to increase bond if appeal taken. State may not demand jury trial. (§ 4-302[e]). District court has jurisdiction to conduct preliminary hearing in felony case. (§ 4-304).

With certain exceptions, it has exclusive original jurisdiction in following civil cases: (1) Action in tort or contract where claim does not exceed $30,000; (2) replevin action; (3) attachment before judgment where claim does not exceed $30,000; (4) action involving landlord and tenant, distraint or wrongful detainer; (5) grantee suit under real prop. art. § 14-109; (6) petition for injunction relating to property claimed in replevin action or action of distress prior to seizure; (7) petition for injunction filed by tenant in action under real prop. art. § 8-211 or local rent escrow law or by person in action under real prop. art. § 14-120; (8) petition for injunction filed by county or municipality including Baltimore City, for enforcement of local health, housing, fire, building, electric, licenses and permits, plumbing, animal control, and zoning codes; (9) proceedings for forfeiture or return of moneys involved in gambling or controlled dangerous substances seizure where amount involved, excluding interest and attorneys' fees, where recoverable, does not exceed $20,000; (10) proceedings for various municipal infractions and zoning violations, violations of certain ordinances of charter counties and Baltimore City, violations of certain Washington Suburban Sanitary Commission rules and regulations, violations of ordinance or regulation enacted by county without home rule for which civil penalty is provided, civil infraction authorized to be prosecuted by sanitary commission, certain subdivision violations, and violations of certain liquor laws; (11) proceeding for civil penalty for violation of § 5-1001 of nat. res. art., or regulations thereunder, involving prohibited disposal of used oil; (12) proceeding for civil penalty for violation of art. 41, § 2-101(c-1) relating to conservation of resources; (13) proceeding to enforce civil penalties for violations of lab. emp. art., Title 5, where amount involved not more than $20,000 (Maryland Occupational Safety and Health Law); (14) proceeding for civil penalty for violation of § 21-1122 or 21-1414 of trans. art., or regulations thereunder, involving loud car stereos and failure to pay tolls, respectively; (15) proceeding for civil infraction under § 21-202.1 of trans. art., involving traffic light violations; (16) proceeding for temporary peace order or peace order under courts art., Title 3, subtitle 15; (17) proceeding for condemnation and possession of abandoned property under Code of Public Local Laws of county, including Baltimore City, where estimated value of property does not exceed $30,000; and (18) proceeding for replacement motor vehicle under § 14-502(c) of commercial law article. (§§ 4-401, 4-402). Court has concurrent jurisdiction with circuit court over cases seeking protection from domestic violence and in such proceeding has power of court of equity. (§ 4-404). It has no other equity jurisdiction, no jurisdiction to render declaratory judgment and no jurisdiction to try title to realty. (§ 4-402). Its civil jurisdiction is concurrent with jurisdiction of circuit courts where amount in controversy exceeds $2,500 but does not exceed $30,000 exclusive of prejudgment or postjudgment interest, costs, and attorney's fees if attorney's fees are recoverable by law or contract. (§§ 4-401, 4-402). In class actions, separate claims of class members may be aggregated to meet $2,500 minimum controversy amount. (§§ 4-402[d], 4-405).

In civil cases, if amount in controversy does not exceed $10,000, party may not demand jury trial. Civil juries consist of six jurors. (§ 8-306).

District court has exclusive jurisdiction over small claims, defined as civil actions involving under $2,500, and certain landlord tenant actions where amount of rent claimed is under $2,500. (§ 4-405). Small claims actions governed by R. P. 3-701.

All sums referred to above in this subhead are exclusive of attorneys' fees recoverable by law or contract.

Appeal is taken to circuit court for county (or Baltimore City) in which judgment was rendered. Party in civil case or defendant in criminal case may appeal from final judgment by filing order for appeal with clerk of district court within 30 days. State may appeal from final judgment in criminal case upon allegation that trial judge failed to impose sentence specifically required by code. In civil case involving more than $5,000 or when parties agree, appeal is on record; otherwise appeal is de novo. (§§ 12-401, 12-403).

District court is court of record. (§ 1-601). Promptly after entry, clerk must record and index judgment, except judgment denying all relief without costs, in judgment records of court. (R. P. 3-601[d]). Judgment entered in Baltimore City recorded and constitutes lien upon judgment debtor's real estate in Baltimore City from date of entry of judgment if entered in Baltimore City, or from date of recording if received from another county. Outside Baltimore City, judgment constitutes lien upon real estate of judgment debtor in county only when certified Notice of Lien of Judgment has been recorded in circuit court in that county. (R. P. 3-621).

Jurisdiction uniform throughout state. (Const. art. IV, § 41A).

Maryland Tax Court.

Md. Tax Court, administrative rather than judicial body, consists of five judges, one from Eastern Shore, one from Western Shore, one from Baltimore City and two at large. (tax-gen. art. §§ 3-102, 3-106). Provided that all remedies before assessing or taxing authorities and other administrative bodies are exhausted, court has jurisdiction to hear de novo appeals in all tax cases and has power to modify or change any valuation, assessment, classification, tax or final order appealed from. (tax-gen. art. §§ 3-103, 13-523). Final order of tax court may be appealed to circuit court. (tax-gen. art. § 13-532).

6.02 LEGISLATURE:

Meets each year for no longer than 90 days, beginning second Wed. in Jan., and by three-fifths vote may extend session not more than 30 days. (Const. art. III, §§ 14-15). Governor may call extraordinary sessions up to 30 days. (Const. art. II, § 16; art. III, § 15). Referendum is provided for. (Const. art. XVI).

Lobbyists.

Lobbyist or person acting on behalf of lobbyist may establish political committee for purpose of promoting or defeating particular candidate or ballot question, and may use committee to make contributions for benefit of Governor, Lieutenant Governor, Attorney General, Comptroller, or member of General Assembly, or candidate for election to office of Governor, Lieutenant Governor, Attorney General, Comptroller, or member of General Assembly. (elec. law art. §§ 13-207 to 210). Contributions must be disclosed on mandatory semi-annual report. (st. gov't. art. §§ 15-704, 707).

6.03 REPORTS:

Judicial Reports of Md. are contained in Harris and McHenry's Reports, Vols. 1 to 4, from 1658 to 1799; Harris and Johnson, 7 Vols., from 1800 to 1826; Harris and Gill, 2 Vols., from 1826 to 1829; Gill and Johnson, 12 Vols., from 1829 to 1842; Gill's Reports, 9 Vols., from 1843 to 1851; and Md. Reports, from 1851 to date and Md. Appellate Reports from 1967 to date. There are also

3 Vols. of Bland's, and 4 Vols. of Md. Chancery Reports.

Unofficial Reports.

Md. decisions are reported in Atlantic Reporter, from 1885 to date.

Digests are: Norris, Brown & Brune, one vol., 1 H. and McH. to 12 G. and J., and 1 to 3 Bland; Stockett, Merrick & Miller, one vol., 1 Gill to 8 Md., and 1 to 4 Md. Chancery; Brantly, 2 Vols. covering 1 H. & McH. to 76 Md., supplement I covering 77 to 88 Md., and supplement II covering 89 to 105 Md.; Carter, 2 vols., 106 to 147 Md. (comprising supp. III to Brantly's); Tiffany, one vol. covering 148 to 157 Md. (comprising supp. IV to Brantly's), and one vol. covering 158 to 167 Md. (comprising supp. V to Brantly's); West Publishing Co. Key Number Digest from year 1658 to date.

6.04 STATUTES:

General laws of Md. are contained in Michie's Code, 1957, supplemented to include laws as enacted; however, since 1973 certain subject matter codes have been separately enacted and published by Michie Co. in volumes superseding 1957 edition of Code. See Key at beginning of Md. Law Digest. Session laws are also published each year after passage by legislature.

Code of Public Local Laws (1930) was final consolidated version of laws of all political subdivisions of state. Includes all such laws up to and including those passed at 1929 session of legislature. Following counties have adopted more recent official Codes incorporating both public local laws and, for home rule counties, local ordinances: Allegany; Anne Arundel; Annapolis; Baltimore County; Baltimore City; Calvert; Caroline; Carroll; Cecil; Charles; City of Cumberland; Dorchester; City of Cambridge; Frederick; Garrett; Harford; Howard; Kent; Montgomery; Prince George's; Queen Anne's; St. Mary's; Somerset; Talbot; Washington; Wicomico; Worcester.

Baltimore City Charter was last published in bound volume with Public Local Laws in 1949, but charter as revised in 1964 has been published in pamphlet form with amendments, most recently in 1993. Charters of certain counties are published with their respective Codes of Public Local Laws.

Baltimore City Code (1976 with 1983 Replacement Volume & Supp. 1993, 1994 Cum. Supp.) contains all general ordinances enacted by Mayor and City Council of Baltimore and in effect on June 1, 1983.

Administrative rules and regulations are published in Code of Maryland Regulations, supplemented by Maryland Register. (Md. Code Ann., State Government Art., Title 10, Subtitle 1, Title 7, Subtitle 2).

Uniform Acts promulgated by the National Conference of Commissioners on Uniform State Laws which have been adopted are: Acknowledgment (1941); Acknowledgment Act Amendment (1961); Anatomical Gift (1968); †Arbitration Act (1965); Attendance of Witnesses from Without the State in Criminal Proceedings (1955); Certification of Questions of Law (1972); Child Custody Jurisdiction (1975); †Commercial Code (1963; 1980); Computer Information Transactions (2000); Contribution Among Tortfeasors (1939 version) (1941); †Controlled Substances (1970); Criminal Extradition (1937); Declaratory Judgments (1945); †Determination of Death Act (1982); †Disclaimer of Property Interests (1978); Disposition of Unclaimed Property (1966) (MD title: Maryland Uniform Disposition of Abandoned Property); Electronic Transactions (1999); Enforcement of Foreign Judgments (1987); Estate Tax Apportionment (1964 Revised Act) (1965); Facsimile Signatures of Public Officials (1960); Federal Lien Registration Act (Revised Act, 1967); Fiduciaries (1929); Foreign Depositions (1922); Foreign Money-Judgments Recognition (1963); Fraudulent Conveyance (1920); Fresh Pursuit (1937); Insurers' Liquidation (1941); Inter-Party Agreement [Model] (1931); Interstate Arbitration of Death Taxes (1945);

Interstate Compromise of Death Taxes (1945); Interstate Family Support (1996); (MD Title: Maryland Uniform Interstate Family Support Act); Limited Partnership (1918), †1976 version (1981); Machine Gun (1933); Management of Institutional Funds (1973); Out-of-State Parolee Supervision (1937); Partnership (1916); Photographic Copies of Business and Public Records as Evidence (1951); †Post Conviction Procedure (1958); Preservation of Private Business Records (1957); †Principal and Income (1939; Revised Act, 1965); †Public Defender [Model] (1971; effective Jan. 1, 1972); Remedies for the Unauthorized Practice of Law [Model] (1961); †Securities (1962); Act for the Simplification of Fiduciary Security Transfers (1960); Simultaneous Death (1941); State Administrative Procedure [Model; 1961] (1957); Testamentary Additions to Trusts (1959); Trade Secrets Act (1989); Transfers to Minors (1989); Unclaimed Property Act (1981). Uniform Interstate and Deposition Discovery Act (2008).

Other Uniform Acts adopted are: Transfer-on-Death Security Registration Act (1994).

†Adopted with significant variations or modifications. See appropriate topics.

For text of Uniform Acts falling within scope of Martindale-Hubbell Law Digests, see Uniform and Model Acts section.

6.05 UNIFORM LAWS:

For list of Uniform Acts in force, see topic 6.04 Statutes. For text of Uniform Acts within scope of Martindale-Hubbell Law Digests, see Uniform and Model Acts section.

7 CRIMINAL LAW

7.00A BAIL:

See topic 7.01 Criminal Law.

7.01 CRIMINAL LAW:

Criminal law article of Code contains general criminal statutes. Criminal procedure article contains criminal procedure statutes. Common law applicable to local circumstances still in effect except as changed by statute. (Decl. of Rights art. 5). Local acts may relate to particular counties or cities only.

Indictment or Information.

Misdemeanor may be prosecuted on information. Felony may be prosecuted on indictment, or on information after finding of probable cause at preliminary hearing or waiver of hearing by defendant. Defendant must be notified of right to request hearing but waives by failing to request hearing within ten days after initial appearance. When felony prosecuted on indictment, hearing required only if court so orders. (crim. proc. art. § 4-102; crim. proc. art. § 4-103). District court has jurisdiction to conduct preliminary hearings. (courts art. § 4-304). Offenses within jurisdiction of district court, including certain felonies (see category 6 Courts and Legislature, topic 6.01 Courts, subhead District Courts) may be prosecuted on information. (R. P. 4-201).

Bail.

District court judges (crim. proc. art. § 5-205) and commissioners (courts art. § 2-607) authorized to make pretrial release determination, and determination may be made at district court level regardless of seriousness of offense. Chief judge of district court may provide for interim bail pending initial appearance. Denial of release by commissioner subject to review by district court judge. (R. P. 4-216[b], [f], [g]). Circuit court may revoke or amend pretrial release order of district court. (R. P. 4-216[g], [h]).

If crime charged is punishable by death or life imprisonment, pretrial release is discretionary; otherwise, accused entitled to release, and release on own recognizance permitted where court is of opinion that accused will appear in court as required. (crim. proc. art. § 5-101; R. P. 4-216). District court judges may not grant pretrial release to defendant charged with certain crimes of violence if defendant is on parole, probation, or mandatory supervision for another crime of violence. (crim. proc. art. § 5-202[c]). If court determines release on recognizance is unwarranted, conditions of release may be imposed, stated in writing or on record and based on enumerated factors. Condition may include release into custody of designated person, release under supervision of probation officer or other appropriate public official, restriction on travel or association or residence, or execution of bail bond, either unsecured, secured by greater of $25 or 10% of full penalty amount, or secured in full penalty amount or any other condition reasonably necessary to assure appearance of defendant, protect safety of alleged victim and assure that defendant will not pose danger to another person or to community. (crim. proc. art. § 5-205; R. P. 4-216[e]). Court may also require as condition of pretrial release that defendant be monitored by private home monitoring device. (crim. proc. art. § 5-201[b]). Accused is ineligible for release on personal recognizance and bail may be refused where accused is charged with certain enumerated serious crimes while already on bail arising from previous accusation of enumerated crime. (crim. proc. art. § 5-202[d]). Accused is ineligible for release and bail may be refused where accused has previously been convicted of certain enumerated crimes. (crim. proc. art. § 5-202[f]). Judge may authorize pretrial release of accused described in § 5-202(f) on suitable bail or certain other conditions. There is rebuttable presumption that accused described in § 5-202(f) will flee and pose danger to another person or community. (crim. proc. art. § 5-202[f][3]). If judge determines that neither suitable bail nor any condition will reasonably ensure that accused will not flee or pose danger to another person or community, judge shall order continued detention of accused. (crim. proc. art. § 5-202[f][2]). Accused may remain on bail pending appeal in discretion of trial court. (R. P. 4-348). Affidavit required of bail bondsman (R. P. 4-217[d][2]), and circuit court may license bondsmen (R. P. 16-817).

Capital Punishment.

Applies to offenses committed on or after July 1, 1978. (1978, c. 3, § 3). Separate sentencing proceeding determines punishment upon conviction of first degree murder, if state has given required written notice of intention to seek death sentence and of aggravating circumstances it relies on. Proceeding held before same jury which convicted defendant unless: (1) Defendant waives sentencing jury, or (2) defendant convicted upon plea of guilty, defendant convicted without jury, original jury has been discharged, or, review of original sentence of death by court of competent jurisdiction has resulted in demand for resentencing, in which case special sentencing jury must be impaneled. Fact finder considers enumerated aggravating and enumerated and other mitigating factors; death penalty is imposed if fact finder: (1) Determines beyond reasonable doubt that one of aggravating factors exists, (2) determines by preponderance of evidence that mitigating circumstances do not outweigh aggravating circumstances, and, if jury, is able to agree within reasonable time. Findings must be written in prescribed report and jury findings signed by jurors. (crim. law art. §§ 2-301, 2-302; R. P. 4-343). Automatic review of death sentence by Court of Appeals provided; trial judge must submit prescribed report including recommendation as to appropriateness of death sentence. (crim. law art. § 2-401; R. P. 4-343). Court of Appeals is no longer required in appeal of sentence of death to determine whether sentence is excessive or disproportionate to penalty imposed in similar cases. (crim. law art. § 2-401). State is prohibited from imposing death penalty against incompetent inmates (corr. serv. art. § 3-904), mentally retarded persons (crim. law art. § 2-202[b][2][ii]), and individuals under 18 when murder was committed (crim. law art. § 2-202[b][2][i]). Statute imposing death penalty has been held constitutional. (287 Md. 695, 415 A.2d 830). Defendant has choice of execution by intravenous administration of lethal substances or gas. (crim. law art. § 2-302[1]).

Criminal Injuries Compensation Act provides for awards to compensate victims of crime; prohibits collection of debts from certain claimants, and establishes legal protections for claimants from debt collection activities under certain circumstances. (crim. proc. art., tit. 11, subtit. 8). In addition, courts have authority to order convicted persons in certain cases to respond in restitution for victims' financial losses and medical expenses. Court may also order restitution for pecuniary or property losses paid or compensated for by third-party payor or medical expenses paid by governmental entity and reimbursement for funeral expenses for deceased criminal victims. Restitution to victim takes priority over third-party payor, unless third party payor has fully compensated victim, and governmental restitution. (crim. proc. art. § 11-606).

Criminal Offenders.

HIV testing—victim notification. (crim. proc. art. §§ 11-107 to 11-117).

Criminal Justice Information System established along with Criminal Justice Information Advisory Board to regulate collection and dissemination of criminal records. (crim. proc. art., tit. 10, subtit. 2).

Declaration of Victim's Rights Act provides that victims of crime have constitutional right to be treated with dignity throughout all phases of criminal justice process and have right to be informed of, and attend, and be heard at criminal justice proceedings. (crim. proc. art. §§ 11-101 to 11-104).

Domestic Violence Act of 1994 adopted through various provisions of crim. law art., courts & jud. proc. art., and fam. law art. (1994, c. 728).

Uniform Criminal Extradition Act adopted. (crim. proc. art. §§ 9-101 to 9-128).

Uniform Act to Secure Attendance of Witnesses from Without a State in Criminal Proceedings adopted. (courts art. §§ 9-301 to 9-306).

Uniform Controlled Substances Act adopted with numerous variations, omissions and additional material as Md. Controlled Dangerous Substances Act. (crim. law art. tit. 5).

Uniform Post Conviction Procedure Act adopted with numerous variations. (crim. proc. art., tit. 7). Complementary rules of procedure adopted. (R. P. 4-401 to 4-408).

Model Public Defender Act adopted with significant modifications. (art. 27A).

Organized Crime.

See category 2 Business Organizations, topic 2.03 Corporations. Attorney General may also bring civil proceeding to enjoin operation of business under enumerated circumstances, including where controlling person is involved in organized crime. (corps. art. § 1-405[c]).

Sentencing procedures for multiple jurisdiction cases contained in corr. serv. art. § 9-104.

Sentencing procedures for second-time offenders in crimes of violence contained in crim. law art. § 1-101; corr. serv. art. §§ 7-304, 7-401 and 7-301.

Victim and Witness Relocation Program established in art. 10, §§ 41B and 41D; st. gov't. art. § 9-1705; and crim. proc. art. § 11-104.

8 DEBTOR AND CREDITOR

8.01 ASSIGNMENTS:

Uniform Commercial Code adopted. (comm. law art. tit. 1-10). See category 3 Business Regulation and Commerce, topic 3.09 Commercial Code.

Generally speaking, rights, debts and choses in action are assignable. (R. P. 2-241[a][3]; 274 Md. 404, 335 A.2d 89).

Instrument Transferring Title.

No particular form of assignment is necessary. (206 Md. 168, 110 A.2d 661). In order for assignee of chose in action to sue in his own name, assignment must be in writing by person authorized to make assignment. If obligation is under seal, assignment should be under seal in order for assignee to sue in his own name (comm. law art. § 15-402[a]); and action against obligor requires assignor's certification before notary, in writing on obligation, that at time of assignment amount sued for was still owing. Assignee generally retains rights against assignor if he cannot recover from obligor, unless failure to recover is due to his own negligence or default. (comm. law art. § 15-402).

Filing.

Not required except in case of judgment, which may be filed in court where entered or recorded. (R. P. 2-624; R. P. 3-624).

Recording.

Not required.

Notice.

Not required except where required by any policy of insurance, or in cases of partial assignment (195 F. Supp. 222); until notified to pay assignee, debtor is authorized to pay assignor (comm. law art. § 9-318[3]).

Effect.

Assignee takes title and interest of assignor and is subject to same legal or equitable defenses as could have been made against assignor. (256 Md. 520, 261 A.2d 753). If assignment is in writing by person authorized to make same, assignee may in his own name sue or execute against obligor; otherwise assignee must proceed in name of assignor.

Assignment of Wages.

Assignment of wages not valid unless: (1) In writing, signed by assignor, acknowledged by him before notary public for county in which he resides and entered on same day by clerk of district court; (2) executed and acknowledged as aforesaid by assignor's spouse, if any; (3) including affidavit that assignor has not paid and will not pay, directly or indirectly, more than 6% per annum on any sum borrowed; (4) within three days from execution and acknowledgment, copy is served in same manner as summons on assignor's employer. Assignment of wages to be earned in whole or in part more than six months after making of assignment is void. Action for enforcement of invalid assignment may be enjoined on petition of assignor or employer. (comm. law art. §§ 15-301 to 15-305). Assignment of wages is void if as security for usurious contract or loan. (comm. law art. § 12-110).

Assignment of accounts receivable and sales of accounts receivable are governed by Uniform Commercial Code. (comm. law art. tit. 9).

Assignments of claims under workmen's compensation law are not valid until issuance and delivery of warrant or voucher. (lab. emp. art. § 9-732).

Assignment to Nonresident.

It is unlawful for creditor who is citizen of Md. to assign claim against Md. resident for purpose of having claim collected by attachment in foreign court or with intent to deprive debtor of exemptions from execution, unless creditor, debtor or person owing money to be attached is beyond jurisdiction of Md. courts. Violation is misdemeanor, and creditor is subject to fine not exceeding $50. Creditor is liable to debtor for debt collected by assignee outside Md. and for costs. Creditor also forfeits right to exempt his own wages or property from execution if writ of execution is issued against him for collection of these amounts. (comm. law art. §§ 15-501 to 15-503).

8.02 ATTACHMENT:

Actions in Which Allowed.

Attachment before judgment may issue in contract or tort action (courts art. §§ 3-303, 3-304), whether claim mature or unmatured (courts art. § 3-302), in court of law or equity (courts art. § 3-301).

Courts Which May Issue Writ.

Writ may be issued by court with jurisdiction, including district court. (courts art. §§ 3-301, 3-302, R.P. 2-115, 3-115).

In Whose Favor Writ May Issue.

Any plaintiff may obtain attachment. (courts art. §§ 3-301, 3-302).

Against Whom Writ May Issue.

Attachment may issue against any defendant as to whom sufficient grounds exist. (courts art. §§ 3-301, 3-303). Salary of state or local government employees or officers subject to attachment. (comm. law art. § 15-607).

Claims on Which Writ May Issue.

It is not necessary that claim sued on be mature. (courts art. § 3-305).

Grounds.

Attachment may issue on: (1) judgment or decree (courts art. § 3-301; R. P. 2-641; R. P. 3-641); or (2) before judgment if (a) debtor is nonresident (or corporation having no resident agent in state) and either court could exercise personal jurisdiction over debtor, or action involves claims to property in state which property is to be attached, or action is any other in which attachment is constitutionally permitted; (b) debtor has acted to evade service; (c) debtor has absconded or is about to abscond from state, or has removed or is about to remove from his place of abode within state with intent to defraud creditors; (d) debtor has or is about to assign, dispose of, conceal, or remove any or all of his property from state with intent to defraud creditors, or has fraudulently contracted or incurred debt or obligation that is subject of action; (e) debtor is deceased and adult nonresident heir is entitled to land or interest in land against which attachment is sought; or (f) debtor is not licensed under Maryland Home Improvement Law but is required to be, and action arises out of home improvement transaction.

Proceedings to Obtain.

(1) On judgment or decree, writ of execution will be issued by clerk of court upon written request by judgment creditor accompanied by instructions to sheriff specifying debtor's address, amount and date of judgment, property to be levied, its location and whether property is to be left

where found or removed (R. P. 2-641; R. P. 3-641); (2) on attachment before judgment, plaintiff must file following: (a) request for order directing issuance of writ, (b) complaint, (c) affidavit verifying facts set forth in complaint and stating grounds for entitlement to writ. Upon entry of order and filing of bond, clerk issues writ of attachment. (R. P. 2-115, 3-115). When writ directs levy of property, procedure follows R. P. 2-641 and 2-642, or R. P. 3-641 and 3-642. (R. P. 2-115[d], 3-115[d]). Plaintiff must have made reasonable efforts to notify defendant where request for attachment accompanies complaint and defendant cannot be served. (R. P. 2-115 [e]; R. P. 3-115[f]).

Attachment Bond.

Bond is required in amount of all costs, claims and damages that may be awarded defendant or claimant of property by reason of attachment. (R. P. 2-115[c]; R. P. 3-115[c]).

Levy and Property Subject.

All property of defendant wherever situated may be attached, including credits not yet due, property or credits of defendant in hands of another, and debt due defendant upon judgment or decree. (courts art. §§ 3-301, 3-305). Exceptions: proceeds of certain life insurance and annuity contracts (ins. art. § 16-111), fraternal order benefits (ins. art. § 8-431), and benefits under Workmen's Compensation Law prior to delivery of voucher (lab. emp. art. § 9-732).

Greater of $145 per week or 75% of disposable wages due are exempt. In Caroline, Kent, Queen Anne's, and Worcester counties, greater of 75% of disposable wages due or 30 times federal minimum hourly wage then in effect is exempt. Medical insurance payments deducted from wages by employer are exempt. (comm. law art. § 15-601.1). Preceding exemptions do not apply to attachment for income tax due state. (comm. law art. § 15-602[b]). Exemption of wages from income tax claim is $50 plus $15 for each exemption (per week). (tax-gen. art. 13-811[e][2]). Attachment on wages constitutes continuing lien on present and future wages until judgment, interest, and costs are satisfied. (comm. law art. § 15-602). Procedure instituted for employer to withhold wages subject to attachment. (comm. law art. § 15-603; R. P. 2-646, 3-646).

Wages of nonresidents are attachable to same extent as residents. (comm. law art. § 15-601[b]).

No levy can be made against property of estate, although security interests may be enforced in appropriate proceedings. (est. & tr. art. § 8-114).

With few exceptions, certificated securities may be attached only if actually seized or surrendered to issuer. Uncertificated securities registered in name of debtor or certificated securities surrendered to issuer may not be attached except by legal process at issuer's chief executive office. (comm. law art. § 8-317).

Debtor's rights in collateral may be attached. (comm. law art. § 9-311).

Creditors of husband may attach money or restrain by injunction payment of money deposited to wife's credit if prejudicial to their rights. (fam. law art. § 4-301).

Indemnity.

Sheriff directed to remove property from premises or to exclude others may require judgment creditor to file bond for expenses. (R. P. 2-641[c]; R. P. 3-641[c]).

Lien and Priorities.

Levy or laying of attachment creates inchoate lien on property, effects and credits of debtor in hands of garnishee or coming into hands of garnishee thereafter until trial. Lien is perfected by final judgment, and then relates back to time of levy or laying of attachment. (283 Md. 701, 393 A.2d 1356.) Several attachments take priority in order of levy; sheriff should levy on attachments in order in which they are placed in his or her hands, and courts will protect against levy in improper order. (91 Md. 613, 46 A. 960; 70 Md. 448, 17 A. 274).

Release of Property.

Attachment may be dissolved upon judgment for garnishee or dissolved by defendant's appearance and filing of bond in value of goods attached or plaintiff's claim, whichever is less, conditioned upon satisfaction of judgment for plaintiff. (R. P. 2-115; R. P. 3-115). Upon timely motion by defendant, property may be released from attachment if (1) complaint dismissed, (2) plaintiff fails to comply with attachment rules, (3) plaintiff fails to demonstrate probability of success on merits, (4) property of sufficient value to satisfy claim remains, (5) undue hardship to defendant who delivers alternate property of sufficient value, or (6) property is exempt. (R. P. 2-115[g]; R. P. 3-115[h]).

Sale.

Attached property before judgment must be retained while action pending unless otherwise ordered by court. At request of either party, court may direct sale of perishable property. (R. P. 2-115[i]; R. P. 3-115[j]). For procedure in sale, see topic 8.05 Executions.

Condemnation.

When judgment is entered in favor of plaintiff, court must order sale of attached property to extent necessary to satisfy judgment. If personal jurisdiction not obtained over defendant, judgment is in rem only against attached property and its entry and satisfaction will not bar another action for any unpaid balance of claim. (R. P. 2-115[k]; R. P. 3-115[1]).

Third Party Claims.

Claimant should file motion requesting attached property to be released. Notice must be given to judgment creditor and judgment debtor (if possible), who may file response to motion. Hearing on motion must be specifically requested. (R. P. 2-115[h], 2-643[e], [f]; R. P. 3-115[i], 3-643[e], [f]).

Vacation or Modification.

See supra subhead Release of Property.

8.03 [RESERVED]

8.04 CREDITORS' SUITS:

In practice, only creditors suits are for dissolution of corporation (corps. art. § 3-413[c]), appointment of receiver (comm. law art. §§ 15-101, 15-103), or to vacate fraudulent conveyances (comm. law art. §§ 15-210 to 15-214).

8.05 EXECUTIONS:

Court where judgment entered or properly recorded with clerk may issue writ of execution upon written request of judgment creditor. (R. P. 2-641, 3-641). Court may issue attachment on judgment or decree instead of any other form of execution. (courts art. § 3-301). Sheriff to whom any writ of execution is directed may seize and sell legal or equitable interest of defendant in real or personal property and distribute proceeds. (courts art. § 11-501).

Kinds of Execution.

Writ of fieri facias directs sheriff to seize chattels and lands of judgment debtor to satisfy judgment or decree. (See 243 Md. 224, 220 A.2d 922; 185 F.Supp. 867). Writ of possession used to compel persons in possession of lands to deliver possession to persons who purchased at execution or foreclosure sale. (See 270 Md. 715, 313 A.2d 453.) Attachment on judgment also considered form of execution. (231 Md. 105, 189 A.2d 103). See topic 8.02 Attachment.

Exemptions.

See topic 8.06 Exemptions.

Time for Issuance.

Execution may issue any time within 12 years from date of entry of money judgment or most recent renewal thereof. (R. P. 2-625, 3-625).

Stay.

Appellant may stay execution pending appeal by filing supersedeas bond; if bond filed on appeal to Court of Special Appeals, no further bond required pending appeal to Court of Appeals but either court may increase, decrease or fix amount of bond, enter order as to surety or security on bond, or enter order as to other security. (R. P. 8-422). See category 5 Civil Actions and Procedure, topic 5.03 Appeal and Error.

In proper case, court may enter injunction against execution (180 Md. 545, 26 A.2d 18); court has power to issue order staying execution upon its own judgment (110 Md. 47, 72 A. 461). Court may grant stay for discharged bankrupt. (171 Md. 280, 189 A. 281).

Lien.

No lien on chattels until levy and then only on chattels included in levy. (courts art. § 11-403). Recordation of money judgment itself constitutes lien on real estate within jurisdiction. (R. P. 2-621, 3-621). See category 5 Civil Actions and Procedure, topic 5.15 Judgments.

Levy on chattels is by actual seizure by sheriff or constable. (208 Md. 115, 117 A.2d 864; 74 Md. 602, 22 A. 1104). Levy on other property is by such seizure as character of property permits. Thus, levy on interest in real estate is by sheriff or constable going upon land, notifying defendant or tenant in possession of purpose of visit and making reasonably descriptive written schedule of property seized. (194 Md. 51, 69 A.2d 797). Levy upon growing crops is by proper notification to defendant and endorsement on levy. (88 Md. 601, 42 A. 201).

Return.

Following levy, sheriff must promptly file return with schedule. (R. P. 2-642[e], 3-642[e]).

Priorities.

Sheriff must serve writs in order in which they come into his hands, and must pay proceeds of sale to judgment creditors in same order. (224 Md. 138, 166 A.2d 916). But in case of land, priority of liens is in order in which judgments entered, and time of issuance and service of writs immaterial. (21 Md. 439; 8 G. & J. 35).

Claims of Third Persons.

In case of attachment on judgment, third person claiming property levied upon should file motion in court for release. If requested, court must promptly hold hearing on motion with notice to judgment creditor and debtor. (R. P. 2-643[e], [f]; 3-643[e], [f]).

Satisfaction.

Judgment creditor whose judgment has been satisfied shall furnish to judgment debtor and file with clerk written statement of satisfaction; if creditor fails to do so, debtor may file motion for order declaring judgment satisfied. In both cases, clerk shall enter judgment satisfied. (R. P. 2-626, 3-626).

Sale.

Sheriff can sell any legal or equitable interest or estate of defendant in any lands, tenements or hereditaments (courts art. § 11-501), and purchaser takes as good title as defendant had (real prop. art. § 14-103).

Sheriff must give prior notice of time, place and terms of sale. In case of sale of interest in property, notice must be posted on courthouse door or bulletin board in immediate vicinity of courthouse door and printed in newspaper in county where property located at least (1) ten days before sale of personal property, or (2) 20 days before sale of real property. Sheriff may recover costs of publication from defendant, or, if he is unable to pay, from plaintiff. (courts art. § 11-502). Sale may be set aside, upon petition of debtor, if selling price so grossly inadequate as to shock conscience. (282 Md. 631, 386 A.2d 784).

Redemption.

No right of redemption of property sold under execution.

Supplementary Proceedings.

On request of judgment creditor, filed no earlier than 30 days after entry of judgment, court where judgment was entered or recorded may order debtor to appear for examination before judge or examiner. Any other person may also be ordered to appear if court satisfied by affidavit or other proof that person has property of debtor, is indebted to debtor for sum certain or has knowledge of concealment, fraudulent transfer or withholding of assets belonging to debtor. (R. P. 2-633, 3-633).

8.06 EXEMPTIONS:

State constitution authorizes legislature to exempt reasonable amount of debtor's property from execution. (Const. art. III, § 44).

Selective Exemptions.

$6,000 cash or property of any kind if, within 30 days from date of attachment or levy by sheriff, debtor so elects. (courts art. § 11-504[b][5]).

Specific Exemptions.

In addition to property selected, also exempt are all wearing apparel, books, tools, instruments or appliances not to exceed $5,000 in value necessary for practice of any trade or profession except those kept for sale, lease or barter; all money payable in event of sickness, accident, injury, or death of any person (including compensation for loss of future earnings but excluding disability income benefits if judgment is for necessities contracted for after disability incurred); professionally prescribed health aids and debtor's interest, not to exceed $1,000 in value, in personal property; certain rights and interests in retirement plans. (courts art. § 11-504).

Bankruptcy Exemptions.

Md. debtor not entitled to claim federal bankruptcy exemption but may claim $5,000 in value of debtor's aggregate interest in any real or personal property. (courts art. § 11-504).

Debts Against Which Exemptions Not Allowed.

None of above exemptions applies to levy for nonpayment of taxes or impairs vendors lien for purchase money, tax lien of mortgage, deed of trust or other security interest or mechanic's lien. (courts art. § 11-507).

Exemptions do not apply to wage attachments, certain domestic relations orders, and certain creditors and assets of bankruptcy cases filed before Jan. 1, 1988. (courts art. §§ 11-504[e], 11-504[h][iii]).

Waiver of Exemption.

Wage exemptions, selective exemptions and specific exemptions above may not be waived. (comm. law art. §§ 15-601.1, 15-602[c]; courts art. § 11-504[d]).

Life or annuity policy proceeds, including cash surrender and loan values, where policy is made for benefit of or assigned to spouse, children or dependent relative, exempt from claims of creditors based on obligations created after June 1, 1945 except where debtor pledged policy as security for such debt. (ins. art. § 16-111; est. & tr. art. § 8-115). Money payable by fraternal benefit society exempt. (ins. art. § 8-341; est. & tr. art. § 8-115).

Wages.

Greater of $145 per week or 75% of net wages due are exempt (non-waiveable) except against claim of state for income taxes. In Caroline, Kent, Queen Annes, and Worchester counties, greater of 75% of net wages due or 30 times federal minimum hourly wage then in effect. Medical insurance payments deducted from employee's wages by employer are exempt. (comm. law art. § 15-601.1). Exemption from income tax claim is $50 plus $15 per exemption per week. (tax-gen. art. 13-811[e]). Wages are subject to lien and levy under nonsupport order. (fam. law art. §§ 10-120 to 10-126). See category 14 Family, topic 14.09 Husband and Wife, subhead Desertion or Nonsupport.

See also topic 8.02 Attachment, subhead Levy and Property Subject.

8.07 FORECLOSURE:

See topic 8.13 Liens; category 20 Mortgages, topics 20.01 Chattel Mortgages, 20.04 Mortgages of Real Property.

8.08 FRAUDULENT SALES AND CONVEYANCES:

Uniform Fraudulent Conveyance Act adopted. (comm. law art. §§ 15-201 to 15-214). Acts which constitute fraudulent sale or conveyance are set forth therein.

Preferences, payments and transfers which would be void or fraudulent under state insolvency laws or bankruptcy laws if made by natural person are to like extent void and fraudulent if made by corporation and may be set aside by its receiver. (corps. art. § 3-418[b]).

Remedies.

Statute makes provision for remedies for defrauded creditors. (comm. law art. §§ 15-209 to 15-211). Creditors may have sale or conveyance set aside by suit in equity. (156 Md. 65, 143 Atl. 644).

Bulk Sales.

Uniform Commercial Code adopted. (comm. law art. tit. 6). See category 3 Business Regulation and Commerce, topic 3.09 Commercial Code.

8.09 GARNISHMENT:

Property of debtor in hands of third person may be attached. Practice is to levy attachment upon property in hands of third person. (R. P. 2-645, 3-645). See topic 8.02 Attachment.

Rights and Duties of Garnishee.

Garnishee must file answer within 30 days after service of writ of garnishment, admitting or denying that garnishee is indebted to judgment debtor or has possession of property of judgment debtor, and specifying amount and nature of any debt and describing any property. Certain exceptions exist to 30 day time limit for filing answer in circuit court. (R. P. 2-321, 2-645[e], 3-645[e]). Garnishee may assert any defenses that garnishee may have to garnishment and any defenses judgment debtor could assert. After answering, garnishee may pay any garnished indebtedness into court and may deliver to sheriff any garnished property, which is then treated as if levied upon by sheriff. (R. P. 2-645[e]; R. P. 3-645[e]). If garnishee fails to file answer within specified time, judgment creditor may obtain default judgment against garnishee. (R. P. 2-645[f], 2-613; R. P. 3-645[f], 3-509). If garnishee files timely answer, judgment creditor has 30 days to file reply contesting answer. If timely reply not filed, all matters set forth in garnishee's answer are treated as established, and court may enter judgment upon request of judgment creditor, judgment debtor or garnishee. If timely reply is filed, matter proceeds as if original action between judgment creditor as plaintiff and garnishee as defendant, and is governed by rules applicable to civil actions. (R. P. 2-645[g]; R. P. 3-645[g]).

Judgment creditor may serve garnishee with interrogatories pursuant to R. P. 2-421 and 3-421; they must contain notice that unless answered within 30 days after service or within time for filing answer to writ, whichever is later, garnishee may be held in contempt of court and may require garnishee to pay reasonable attorney's fees and costs. (R. P. 2-645[h], 3-645[h]).

Judgment debtor may seek release of garnished property in accordance with R. P. 2-643, 3-643 before entry of judgment, provided that motion to exempt property from execution pursuant to R. P. 2-643(d), 3-643(d) must be filed within 30 days after service of writ of garnishment. (R. P. 2-645[i], 3-645[i]).

Judgment against garnishee is limited to value of property of judgment debtor established by judgment creditor to be in hands of garnishee, not exceeding amount owed under creditor's judgment against debtor and enforcement costs. (R. P. 2-645[j], 3-645[j]). Test of garnishee's liability is that he has property, funds or credits in his hands belonging to debtor for which debtor might maintain suit. (144 Md. 660, 125 A. 529).

Garnishment against property held in bank, trust company, savings bank or savings and loan by husband and wife jointly not valid unless both are judgment debtors, and garnishment against such property held by one party in trust for another not valid unless both are judgment debtors. (courts art. § 11-603).

Earnings.

See topic 8.06 Exemptions, subhead Wages.

8.10 HOMESTEADS:

Limited homestead exemption for executions by Maryland court officials and for bankruptcy proceedings under U.S. Bankruptcy Code. (11 U.S.C.A. § 522[d]; courts art. § 11-504[f]; 18 B.R. 132). See topic 8.06 Exemptions.

8.11 JUDGMENT NOTES:

See category 3 Business Regulation and Commerce, topic 3.02 Bills and Notes.

8.12 LEVY:

See topics 8.02 Attachment, 8.05 Executions.

8.13 LIENS:

Uniform Commercial Code adopted. (comm. law art. tits. 1 to 10). See category 3 Business Regulation and Commerce, topic 3.09 Commercial Code. References are to Commercial Law Art. of Code unless otherwise indicated.

Aircraft, Boats, Mobile Homes and Motor Vehicles.

Any person who, with consent of owner, has custody of aircraft, boat or motor vehicle and who, at request of owner, provides service to or materials for vehicle, has lien on vehicle for charges incurred for repair, rebuilding, storage, parts, accessories, etc. (§ 16-202). Surrender or delivery of property discharges lien against third person without notice of lien, but not against owner or third person with notice. (§ 16-204). Aircraft lien subordinate only to rights of holder of bill of sale, contract of conditional sale, conveyance or mortgage or assignment of mortgage. (§ 16-205[a]). Boat lien subordinate to preferred ship mortgages filed with Secretary of Transportation before boat is sold pursuant to § 16-207; boat lien subordinate only to security interest lawfully perfected, except for boat sold pursuant to § 16-207. (§ 16-205[c]). Motor vehicle lien subordinate only to security interest lawfully perfected, except for motor vehicle lien when vehicle is sold pursuant to § 16-207. (§ 16-205[b]). If owner disputes charge, he may institute judicial proceedings, which stay execution under lien; he may also repossess property on filing of corporate bond for double amount of charge claimed. (§ 16-206). If charges remain due and unpaid for 30 days and lienor is in possession, he may sell property at public sale after giving prescribed notice at convenient location between hours of 10 a.m. and 6 p.m. If lienor delivers vehicle or mobile home to third party for storage, and storage charges remain due and unpaid for 30 days, third party is deemed to hold perfected security interest and may sell vehicle or mobile home in same manner as lienor. (§ 16-207). For manner of perfecting security interest in motor vehicle or vessel, see categories 20 Mortgages, topic Chattel Mortgages, subhead Boats; Transportation, topic Motor Vehicles, subhead Liens and Security Interests.

Commercial Real Estate Brokers.

Liens established by real prop. art. §§ 14-301 to 14-313.

Hotel.

Keeper of hotel, motel, inn, or boarding house has lien on baggage and other property belonging to or under control of guest or boarder on premises, for charges due or to become due for price or value of food or accommodation, amount of any loan or advance, or amount provided by cashing check, draft, etc. If charges giving rise to lien are unpaid 15 days after they become due, he may sell property. (§ 16-502).

Person taking in boarders or lodgers has similar lien on furniture or other property on premises for contract price of room or board. (§ 16-503).

Hospital which furnishes medical or other services to patient injured in accident not covered by Workmen's Compensation Act has lien on 50% of recovery or sum which patient or heirs or personal representative collect in judgment, settlement or compromise of claim against another. Charges secured may not exceed those allowed by Workmen's Compensation Commission for services to persons under Act. Lien is subordinate to attorney's lien for professional services for collecting or obtaining damages. (§ 16-601). Clerk of circuit court maintains hospital lien docket, indexed in name of injured patient. (§ 16-605). Person making payment to patient without paying lien may be liable to hospital for one year from date of payment. (§ 16-603).

Artisans and Tradesmen.

Artisan, including laborer, mechanic, repairman, tradesman, or drycleaner and launderer who, with consent of owner, has possession of goods for repair or other work, has lien on goods for costs of work done. Goods may be sold at public or private sale if costs of work done remain due and unpaid 90 days after completion of work or retrieval date for drycleaner and launderer; alternatively, goods may be disposed of in any manner if costs giving rise to lien are due and unpaid nine months after laundered or drycleaned goods are due to be retrieved from storage. Artisan, drycleaner or launderer must post notice that unretrieved goods in above circumstances are subject to sale or disposal. (§§ 16-301, 16-302).

Condominium.

Assessments for common expenses may be enforced by imposition of lien pursuant to Md. Contract Lien Act. (real prop. art. § 11-110 [d]).

Livestock.

Owner or operator of livery stable or other establishment giving care or custody to livestock has lien for board and other expenses. (§ 16-401).

Veterinarian giving care or custody to animal or performing medical or other services to animal may notify owner that animal is ready for delivery and, if animal not claimed within 10 days after prescribed notice is given, may sell animal or turn it over to animal welfare agency or to responsible private person. If notice given pursuant to § 16-701(a), veterinarian or commercial boarding kennel operator, and custodian receiving animal, incur no liability upon sale or disposal of animal. (§ 16-701).

Waiver, Loss or Extinguishment.

Lienholder should retain possession of article or goods or may be held to have surrendered lien. (§ 16-204).

Enforcement of Liens.

Most liens on personal property enforced by public sale after certain time has elapsed and after sale has been appropriately advertised, as indicated under applicable subheads.

Mechanics' Liens.

Every building erected, and every building repaired, rebuilt or improved to extent of 15% of its value is subject to lien for payment of all debts contracted for work done and for materials furnished for or about same, including: digging wells, installing swimming pools, sodding, seeding or planting of shrubs, trees, plants, flowers, etc., and grading, filling, landscaping, paving, and provision of building or landscape architectural, engineering, or land surveying services, or interior design services that pertain to interior architectural construction are provided by certified interior designer, and leasing of equipment, with or without operator, for use for or about building or premises. (real prop. art. § 9-102).

Machines, wharfs, bridges subject to lien in same manner as buildings. (real prop. art. § 9-102[c]). Term “building” is defined to include any unit of nonresidential building leased or sold separately as unit, e.g., one store within shopping center. (real prop. art. § 9-101; see 293 Md. 575, 446 A.2d 55).

Lien for installation of water lines, sewers or streets in subdivided developments applies pro rata to developed lots and improvements. (real prop. art. § 9-102[b]).

Lien extends to ground covered and so much adjacent ground held by same owner as is necessary for ordinary purposes of such building. Boundaries of land appurtenant may be set by written contract between owner of land and fabricators filed with clerk of circuit court. (real prop. art. § 9-103[a], [b]).

If repairs or improvements are to single condominium unit in horizontal property regime, lien extends only to such unit. (real prop. art. § 11-118[a]).

If building is erected or repaired, rebuilt or improved to extent of 25% of its value, by tenant for life or for years, or by person employed by such tenant, lien applies to his interest. (real prop. art. § 9-103[c][2]).

If building not finished, lien attaches to extent of work done or material furnished. (real prop. art. § 9-103[c][1]).

If contract made with anyone except owners of lot or agent, written notice substantially similar to following must be given personally or by registered or certified mail to owner or his agent within 90 days after work done or materials furnished:

“NOTICE TO OWNER OR OWNER'S AGENT

OF INTENTION TO CLAIM A LIEN”

....

(SUBCONTRACTOR)

DID WORK OR FURNISHED MATERIAL FOR OR ABOUT THE BUILDING GENERALLY DESIGNATED OR BRIEFLY DESCRIBED AS................................... THE TOTAL AMOUNT EARNED UNDER THE SUBCONTRACTOR'S UNDERTAKING TO THE DATE HEREOF IS $........ OF WHICH $......... IS DUE AND UNPAID AS OF THE DATE HEREOF. THE WORK DONE OR MATERIALS PROVIDED UNDER THE SUBCONTRACT WERE AS FOLLOWS: (INSERT BRIEF DESCRIPTION OF THE WORK DONE AND MATERIALS FURNISHED, THE TIME WHEN THE WORK WAS DONE OR THE MATERIALS FURNISHED, AND THE NAME OF THE PERSON FOR WHOM THE WORK WAS DONE OR TO WHOM THE MATERIALS WERE FURNISHED).

I DO SOLEMNLY DECLARE AND AFFIRM UNDER THE PENALTIES OF PERJURY THAT THE CONTENTS OF THE FOREGOING NOTICE ARE TRUE TO THE BEST OF THE AFFIANT'S KNOWLEDGE, INFORMATION AND BELIEF.

....

(INDIVIDUAL ON BEHALF OFSUBCONTRACTOR)

ON BEHALF OF...............................

(SUBCONTRACTOR, IF NOT ANINDIVIDUAL)

(INSERT IFSUBCONTRACTOR IS NOT ANINDIVIDUAL)

(real prop. art. § 9-104).

If owner unavailable or dead (and successors not appearing in public records), notice may be effected by posting front of building in presence of competent witness. Notice effective when mailed, even if received after expiration of 90 day period. (See 287 Md. 348, 412 A.2d 996.)

Notice.

Filing of petition with clerk of court where land or any part thereof is located constitutes notice to purchaser that lien may be perfected. (real prop. art. § 9-102[e]).

Giving credit or receiving notes or other securities is not waiver of lien. (real prop. art. § 9-110).

Duration.

To establish lien, petition must be filed with clerk of circuit court where land is situated within 180 days after work or materials furnished. Petition must include: (1) Name and address of petitioner and owner; (2) nature of, amount of and time when work or materials furnished; (3) name of person for whom work or materials furnished; (4) sum claimed; (5) description of land and, if applicable, (6) statement of notification to owner pursuant to real prop. art. § 9-104. If petition filed against two buildings of same owner, petitioner must designate sum claimed on each building. (real prop art. § 9-105). Petitioner must also file affidavit.

Waiver.

Executory contract between contractor and subcontractor may not waive or require subcontractor to waive right to claim mechanic's lien. (real prop. art. § 9-113).

Upon filing of petition, court issues order directing owner to show cause within 15 days. Owner must appear at stated time or file answer and counteraffidavit before that time; otherwise, facts in petitioner's affidavit are deemed admitted. Court may make final order establishing or denying lien or it may enter interlocutory order upon finding of probable cause of petitioner's entitlement to lien. Order must: (1) Establish lien; (2) describe property; (3) state amount of lien; (4) state amount of bond owner may file to remove lien; (5) assign trial date within six months; (6) order may require petitioner to post bond. (real prop. art. § 9-106). If part of land is located in another county, petitioner may create lien there by filing certified copy of docket entries of court order. (real prop. art. § 9-107).

Upon foreclosure, if proceeds of sale are insufficient, each lien is satisfied in amount proportioned to amount it bears to total liens. (real prop. art. § 9-108).

Right to enforce lien expires at end of one year from filing of petition. During this time, claimant may file petition to enforce lien or execute on bond. (real prop. art. § 9-109).

Redemption.

No right of redemption of property sold under mechanic's lien.

Public Works.

Unless bond or other security is required by federal law or regulation or as condition of federal assistance, contractor constructing public work for state or subdivision not required by state to obtain bid bond or other security with bid or offer if contract price is expected to be $100,000 or less; performance bond not required if contract price is $100,000 or less. (state fin. and proc. art. § 13-216).

Revised Uniform Federal Tax Lien Registration Act adopted. (real prop. art. §§ 3-401 to 3-405).

Attachment Lien.

See topic 8.02 Attachment.

Attorney's Lien.

See category 18 Legal Profession, topic 18.01 Attorneys and Counselors.

Collateral Security.

See topic 8.15 Pledges.

Execution Lien.

See topic 8.05 Executions.

Judgment Lien.

See category Civil Actions and Procedures, topic Judgments.

Landlord's Lien.

See category 21 Property, topic 21.10 Landlord and Tenant.

Liens on Exempt Property.

See topic 8.06 Exemptions.

Liens on Homestead.

See topic 8.10 Homesteads.

Real Estate Mortgage Lien.

See category 20 Mortgages, topic 20.04 Mortgages of Real Property.

Tax Lien.

See category 22 Taxation, topic 22.10 Income Tax, subhead Lien.

Lien on Wages for Nonsupport.

See category 14 Family, topic 14.09 Husband and Wife, subhead Desertion or Nonsupport.

8.14 MECHANICS' LIENS:

See topic 8.13 Liens.

8.15 PLEDGES:

Uniform Commercial Code adopted. (comm. law art. tit. 1-10). See category 3 Business Regulation and Commerce, topic 3.09 Commercial Code. Generally, pledge of consigned goods conveys only rights of consignee. (comm. law art. §§ 11-805, 11-806).

Agricultural Products.

Every pledge of agricultural products by commission merchant to whom products were delivered for sale for use and benefit of grower or producer is null and void without consent of grower or producer. (comm. law art. § 11-808[b]).

Corporate Stock.

Stockholder of record of pledged shares may vote such shares absent agreement between pledgor and pledgee to contrary. (corps. art. § 2-508[b]).

Repledge.

It is misdemeanor to repledge or rehypothecate any stocks, bonds or other securities held as security for money lent or advanced to owner of securities, without consent of pledgor. (crim. law art. § 7-115).

Remedies of Pledgee.

Pledgee should retain possession of goods in order to maintain lien. (47 Md. 88). Pledgee may sell goods without judicial process after reasonable notice to debtor to redeem. (27 Md. 354).

Pawnbrokers.

Pawnbrokers must get license if acting as secondhand precious metal object dealers. (bus. reg. art. tit. 12, subtit. 2).

In Baltimore City, license, bond and other regulations affecting pawnbrokers are set out in Baltimore City Code, art. 2, §§ 11-1 to 11-19.

8.16 RECEIVERS:

Receivers are fiduciaries governed generally by provisions of est. & tr. art. tit. 15. Fiduciary does not include receiver for purposes of est. & tr. art. § 15-102, powers of fiduciary. Procedure may be governed by one of several subtitles of Md. Rules. R. P. tit. 10 applies to receivers of property of minor or disabled person. R. P. tit. 13 applies to trustees appointed by court and to receivers of property of minor or disabled person, and to receivers appointed under general authority of equity court to liquidate business or affairs of debtor or to receivers in certain statutory proceedings to dissolve corporations, but not to receivers in other specified statutory proceedings unless court orders compliance.

Banking institution may be taken into custody by Bank Commissioner, who may act as receiver. (fin. inst. art. tit. 5, subtit. 6). Receiver may be appointed for fraternal benefit society in certain instances. (ins. art. § 8-464). Federal Savings and Loan Insurance Corporation or Maryland Deposit Insurance Fund Corporation has absolute right to be appointed conservator or receiver of savings and loan association insured by it. (fin. inst. art. § 9-709). Trust company may act as receiver. (fin. inst. art. § 3-207[8]).

Where corporation is voluntarily dissolved, director, shareholder or creditor may petition equity court to take jurisdiction of liquidation, and court may continue directors as trustees or appoint one or more receivers. (corps. art. § 3-411). Where action is brought by shareholders for involuntary dissolution of corporation, court may appoint one or more receivers pending final determination upon whether to dissolve; if it appears that corporation should be dissolved, court must appoint one or more receivers to supervise liquidation. (corps. art. § 3-414). Where action is brought by shareholder or creditor to dissolve corporation on grounds it is unable to meet debts as they mature, and court determines that corporation is unable, court must appoint one or more receivers to supervise liquidation. (corps. art. § 3-415).

Jurisdiction.

Equity courts.

Proceedings.

Appointment is procured by petition to court. (R. P. 13-106).

Eligibility and Competency.

Receiver must be disinterested person as between parties. (67 Md. 222, 9 A. 632). Receiver and each attorney, accountant or appraiser he desires to employ must inform court whether he has had certain relationships with or interests in debtor or secured creditor. (R. P. 13-302).

Qualification.

Receiver governed by R. P. subtit. 13 must give bond in amount not exceeding probable value of estate less value of certain securities or money deposited in financial institution and land which fiduciary lacks power to sell or convey. (R. P. 13-107).

Powers and Duties.

Receiver does not have general powers of fiduciary set forth in est. & tr. art. § 15-102. R. P. subtitles 10 and 13 both prescribe duties for receivers. Statutory receiverships may carry particular powers or duties, e.g., corps. art. § 3-418, prescribing powers of receiver in voluntary or involuntary corporate dissolution proceedings.

Compensation.

No general statute as to compensation of receivers. Amount of compensation is within discretion of court. (169 Md. 501, 182 A. 273). Rate depends upon difficulty of work and value of estate involved.

Discharge.

Receiver will be discharged by court after purposes for which he was appointed have been realized and his accounts approved.

8.17 REDEMPTION:

See topics 8.05 Executions, Liens; categories 20 Mortgages, topic Mortgages of Real Property; Taxation, topic Property Taxes.

8.18 SUPPLEMENTARY PROCEEDINGS:

See topic 8.05 Executions.

8.19 TRUSTEE PROCESS:

See topics 8.02 Attachment, 8.09 Garnishment.

8.20 USURY:

See category 3 Business Regulation and Commerce, topic 3.17 Interest.

9 DISPUTE RESOLUTION

9.01 ALTERNATIVE DISPUTE RESOLUTION:

Mandatory Dispute Resolution.

Claims for medical injury against licensed or authorized health care providers exceeding concurrent jurisdiction of district court (currently $25,000) must be submitted to arbitration administered by Health Claims Arbitration Office. Limited judicial review is available to modify, correct or vacate award or assessment of costs thereunder. (courts art. §§ 3-2A-01 to 3-2A-09).

Uniform Arbitration Act governs enforcement of arbitration agreements, except those between employers and employees. (courts art. §§ 3-201 to 3-234). Arbitration provision in insurance contract with consumer is void and unenforceable. (courts art. § 3-206.1). This Act provides for stays of proceedings, orders to arbitrate, and limited judicial review of arbitration decisions.

See also topic 9.02 Arbitration and Award.

9.02 ARBITRATION AND AWARD:

Uniform Arbitration Act adopted. (courts art. §§ 3-201 to 3-234). Unless expressly provided by parties, Uniform Act does not apply to arbitration agreement between employers and employees. (courts art. § 3-206). Arbitration of labor disputes may be sought by Commissioner of Labor and Industry. (lab. emp. art. §§ 4-101 to 4-220). Arbitration of pending actions is governed by Uniform Act.

Form and Requisites of Submission.

Submission should be in writing. (courts art. § 3-206; R. P. 15-101).

Contracts to Arbitrate Future Disputes.

Prior to adoption of Uniform Arbitration Act in 1965, agreement to arbitrate was valid, but enforcement was difficult because of rule that unless agreement had been consummated by award, it would not bar suit at law or in equity. (147 Md. 161, 127 A. 746). Special statute provides for arbitration of labor disputes. (lab. emp. art. §§ 4-101 to 4-220).

Rescission.

Since adoption of Uniform Arbitration Act in 1965, party must observe agreement to arbitrate to same extent as any other contract. (courts art. § 3-206).

Powers of Arbitrators.

Arbitrators have only such powers as are specified in submission, and if they exceed those powers, award is void. (186 Md. 669, 48 A.2d 447).

Award and Enforcement Thereof.

Award is binding and conclusive upon parties, and suit may be instituted upon award. (courts art. § 3-202; 217 Md. 539, 144 A.2d 69). Application to arbitrator to correct or modify award must be made within 20 days after delivery of award to applicant. (courts art. § 3-222). Petition in court to correct or modify award must be filed within 90 days after delivery of award to applicant. (courts art. § 3-223). Petition to vacate award must be filed within 30 days after delivery of copy of award to petitioner. (courts art. § 3-224).

Judgment on Award.

In cases of arbitration of pending actions, judgment is entered by clerk after award is confirmed, modified or corrected by court. (R. P. 15-101, courts art. § 3-228). In cases of arbitration out of court, upon application of party, court must confirm award, unless within 90 days after award grounds are urged for vacating, modifying or correcting award. (courts art. §§ 3-223, 3-227). Judgment is entered upon order confirming, modifying or correcting award and may be enforced as any other judgment. (courts art. § 3-228).

International Commercial Arbitration Act adopted. (courts art. §§ 3-2B-01 to 3-2B-09). Circuit courts have jurisdiction to enforce agreements or orders calling for arbitration, to enter judgments on arbitration and to recognize and enforce awards rendered in foreign country. (courts art. §§ 3-203, 3-204).

Medical Malpractice.

All claims and actions against anyone licensed or authorized to provide health care services in Md., including licensed certified social worker-clinical, which exceed concurrent jurisdiction of district court (currently $25,000) must be submitted to arbitration administered by Health Claims Arbitration Office. Arbitration award may be rejected and judicial review sought. However, arbitration may be waived under certain circumstances. (courts art. §§ 3-2A-01 to 3-2A-09).

10 DOCUMENTS AND RECORDS

10.01 ACKNOWLEDGMENTS:

Uniform Acknowledgment Act adopted. (st. gov't art., Title 19, subtitle 1). Notarial Acts Before Commissioned Officers. (st. gov't art., Title 19, subtitle 2). Acknowledgments may be made as follows:

Within State.

Before: (1) Judge of court of record; (2) clerk or deputy clerk of court having seal; (3) notary public; (4) master in chancery. (st. gov't art., § 19-102).

Outside State but Within United States.

Before: (1) Clerk or deputy clerk of any federal court; (2) clerk or deputy clerk of any court of record; (3) notary public. (st. gov't art., § 19-103).

Outside United States.

Before: (1) Ambassador, minister, chargé d'affaires, counselor to or secretary of legation, consul general, consul, vice-consul, commercial attaché or consular agent of United States accredited to country where acknowledgment is made; (2) notary public of country where made; (3) judge or clerk of court of record of country where made. (st. gov't art., § 19-104).

Persons in or with U. S. Armed Forces.

Before any commissioned officer of any branch of U. S. Armed Forces by any person who is: (1) Member or spouse or dependent of member of such armed forces; (2) merchant seaman outside U.S.; (3) outside U.S. at direction of government in connection with activity pertaining to war in which U.S. is then engaged. No seal necessary. Place of execution need not be stated. Signature, serial number, rank and branch of service should appear. Retroactive so as to validate such acknowledgments previously made. (st. gov't art., § 19-111).

General Requirements as to Taking.

Officer taking acknowledgment should know or have satisfactory evidence that person making acknowledgment is person described in and who executed instrument. (st. gov't art., § 19-105).

General Requirements of Certificate.

Certificate of officer taking acknowledgment must contain officer's: (1) Signature; (2) official seal, if such exists; (3) title; and (4) if officer is notary public, date commission expires. (st. gov't art., § 19-108).

Married Women.

No special requirements. (st. gov't art., § 19-106).

Attorneys in Fact.

No special requirements as to acknowledgments by attorneys in fact, except that Uniform Acknowledgment Act prescribes form. (st. gov't art., § 19-107).

Corporation may acknowledge by president or vice-president or by its appointed attorney. (corps. art. § 1-303).

Foreign Acknowledgments.

Uniform Acknowledgment Act adopted. (st. gov't art., Title 19, subtitle 1).

Effect of Acknowledgment.

Instruments, except residential leases (real prop. art. § 4-101[a][2]), relating to real estate, mortgages and bills of sale will not be accepted for record unless acknowledged (real prop. art. § 4-101[a]). Acknowledgment does not entitle paper to be received in evidence without further proof, although certified copy of recorded paper may be offered in evidence without further proof (courts art. § 10-204).

Proof by Subscribing Witness.

No provision by which proof by subscribing witness may be substituted for acknowledgment.

Authentication.

No authentication necessary whether acknowledgment is made within or without state but in U.S. If acknowledgment is made outside U.S. before notary public or judge or clerk of court of record, certificate must be authenticated as provided in Uniform Acknowledgment Act. (st. gov't art., § 19-109). If required by law of place where acknowledgment is to be used, authentication of signature and seal of notary public or other official may be obtained from clerk of circuit court of county. Fee, $1. (courts art. § 2-212).

Forms.

In addition to forms set forth in Uniform Acknowledgment Act (st. gov't art., Title 19, subtitle 1), the following may be used:

Forms

Acknowledgment of Deed by Individual:

State of Maryland,...... County, to wit: I hereby certify, that on this......, in the year....., before the subscriber, (here insert style of officer taking acknowledgment), personally appeared (here insert name of the person making the acknowledgment), and acknowledged the foregoing deed to be his act. (Officer before whom acknowledgments are made must sign in his official capacity). (real prop. art. § 4-204[a]).

Acknowledgment of Deed by Corporation:

State of Maryland,...... County, to wit: I hereby certify, that on this......, in the year......, before the subscriber (here insert style of officer taking acknowledgment), personally appeared (here insert name of the person making the acknowledgment) who acknowledged himself to be the (here insert the word “Vice-” if appropriate) President of (here insert name of the corporation) (the “Corporation”) and that he, as such officer, being authorized so to do, executed the foregoing deed for the purposes therein contained by signing the name of the Corporation by himself as such officer [and certified that this conveyance is not part of a transaction in which there is a sale, lease, exchange or other transfer of all or substantially all of the property and assets of the Corporation]. (Bracketed material should be included unless instrument being acknowledged is a confirmatory deed filed in connection with articles of transfer or articles of merger.) (corps. art. § 3-114; real prop. art. § 14-113).

Acknowledgment of Deed by Husband and Wife:

State of...... County, to wit: I hereby certify, that on this...... day of......, in the year......, before the subscriber, (here insert official style of person taking acknowledgment), personally appeared (here insert name of husband), and (here insert name of married woman making acknowledgment), his wife, and did each acknowledge the foregoing deed to be their respective act. (real prop. art. § 4-204[b]).

Acknowledgment of Deed Taken Outside Maryland:

State of...... County, to wit: I hereby certify, that on this...... day of......, in the year......, before the subscriber, (here insert official style of officer taking acknowledgment), personally appeared (here insert name of person making acknowledgment), and acknowledged the foregoing deed to be his act. In testimony whereof I have caused the seal of the court to be affixed, (or have affixed my official seal), this...... day of......, A. D....... (Seal of court). (real prop. art.§ 4-204 [c]).

Alternative to Acknowledgment or Proof.

See topic 10.02 Affidavits, subhead Verification.

Validating Acts.

There have been numerous acts validating defective acknowledgments previously made in connection with transfer of real or personal property. In addition, acknowledgments of persons taken before commissioned officers of U.S. Armed Forces are validated. (st. gov't art., §§ 19-201 to 19-205).

Unless certain formal requisites of instrument recorded before Jan. 1, 1973 were challenged in judicial proceeding commenced by July 1, 1973, failure to comply with such formal requisites, including proper acknowledgment, has no effect. Unless same formal requisites of instrument recorded on or after Jan. 1, 1973 are challenged in judicial proceeding commenced within six months after it is recorded, failure to comply with formal requisites has no effect. (real prop. art. § 4-109).

10.02 AFFIDAVITS:

Within State.

Affidavit may be made before anyone authorized to administer oath (R. P. 1-304), such as notary public (st. gov't art., § 18-105) or judge. Fee may be up to $2 for original notarized act, and lesser amount for copies. (st. gov't art., § 18-112).

Outside State but Within United States.

Affidavits may be made before anyone authorized by law of place where made. Notary public of another state presumed authorized to take affidavit in absence of showing to contrary. (25 Md. 402).

Outside the United States.

Affidavits may be made before anyone authorized by law of place where made. (1 Bland 352).

Persons in or with U. S. Armed Forces.

See topic 10.01 Acknowledgments, which law is equally applicable to affidavits.

General Requirements as to Administration.

No particular requirements as to making affidavit. Oath is sufficient if made by affirmation (art. 1, § 9), or by requiring person to hold up hand in recognition of solemnity of act (art. 1, § 11). It is better practice, but not required, for affiant to sign affidavit. In proceedings governed by Md. Rules of Procedure, signing paper containing statement is sufficient if one of the following representations is included therein: Generally: “I solemnly affirm under the penalties of perjury that the contents of the foregoing paper are true to the best of my knowledge, information and belief.” Personal knowledge: “I solemnly affirm under the penalties of perjury and upon personal knowledge that the contents of the foregoing paper are true.” (R. P. 1-304).

General Requirements of Jurat.

Notaries required to have seal or stamp with which to authenticate. (st. gov't art., § 18-108). In practice, office of person before whom made should appear in certificate, and officer taking affidavit should affix seal if he or she has one. (See 52 Md. 483; 25 Md. 402.) Person administering oath must certify as to date of expiration of commission. (st. gov't art., § 18-108[c]).

Use of Affidavit.

Generally there is no right to use affidavit in evidence. (207 Md. 401, 114 A.2d 639).

Form

State of......, County of......, to wit: I hereby certify that on this...... day of...... in the year...... before me, the subscriber, (here insert style of officer taking affidavit) personally appeared (here insert name of person making affidavit) and made oath in due form of law that to the best of his knowledge, information and belief (here insert matters to be contained in affidavit). (Signature of affiant).

Subscribed and sworn to before me on the day and year first above written. (Signature of officer taking affidavit and seal).

Alternative to Affidavit.

See subhead Verification, infra.

Verification in lieu of affidavit or acknowledgment is allowed for corporate papers (corps. art. § 1-302) or documents perfecting security interest (comm. law art. § 9-402) filed with Dep't of Assessments and Taxation or papers filed with register of wills or orphan's court (est. & tr. art. § 1-102).

10.03 NOTARIES PUBLIC:

Qualification.

Must be at least 18 years old, of good moral character and integrity, approved by local state senator, live or work in that state, and, if living in Md., be resident of district of approving Senator or on approval by any Senator if Senatorial office representing Senatorial district and subdistrict in which applicant resides is vacant. Appointment is by Governor and commission is obtained from clerk of circuit court. (st. gov't art., §§ 18-101 to 18-103). Out-of-state individuals may be appointed notaries by Governor on approval of application by Secretary of State if individual resides in state which allows Maryland residents working in state to serve as notaries public in state; Secretary of State is irrevocably deemed to be out-of-state notary's agent for service of process. (st. gov't art., § 18-101[B]).

Authentication.

See topic 10.01 Acknowledgments, subhead Authentication.

Bond.

None required.

Seal.

Must have seal. (st. gov't art., § 18-108).

Powers and Duties.

Generally, notaries have power to authenticate official acts, deeds, conveyances, affidavits, etc., under notarial seal and to take acknowledgments in any county of Md. They have power to administer oaths, and certificate of notary under seal is sufficient evidence of notary having administered oath in character as notary public. Notary may take testimony and must keep record of official acts. (st. gov't art., §§ 18-101 to 18-112).

Territorial Extent of Powers.

State-wide; notary may act in county other than that for which appointed. (st. gov't art., § 18-109).

Expiration of Commission.

Certificate of acknowledgment should state date when commission expires. (st. gov't art., § 18-108[c]). Four year term. (st. gov't art., § 18-103[c]).

Certificate of Authority.

See topic 10.01 Acknowledgments, subhead Authentication.

Fees.

For original notarial act, not to exceed $2; and lesser amount for all other services. (st. gov't art., § 18-112.)

Officers of U. S. Armed Forces.

May take acknowledgments, administer oaths and perform other notarial acts for: (1) Person in Armed Forces within or without U.S.; (2) merchant seaman without U.S.; or (3) civilian employee of federal government on duty outside U.S. in connection with war. (st. gov't art., §§ 19-201 to 19-202).

10.04 RECORDS:

In Baltimore City, Clerk of Circuit Court has charge of land records; in counties, respective clerks of circuit courts for jurisdictions have charge of land records. (real prop. art. § 3-301). Microfilm copies are recorded with State Archivist, Annapolis. (real prop. art. § 3-303).

Uniform Commercial Code adopted. (comm. law art. tit. 1-10). See category 3 Business Regulation and Commerce, topic 3.09 Commercial Code, subheads Intentional Variations, Filing

Fee.

Recordable Instruments.

Deeds, mortgages and other instruments creating estate in land above seven years, mechanics' liens and similar documents affecting title to real or personal property must be recorded. (real prop. art. §§ 3-101, 9-105). Any instrument affecting property may be recorded. Recording of such instrument constitutes constructive notice from date of recording. (real prop. art. § 3-102).

Place of Recording.

Deeds and mortgages of land are recorded by county circuit court clerks, and in Baltimore City by Clerk of Circuit Court. They must be recorded in county or city where land affected lies; and if land lies in more than one jurisdiction, they must be recorded in each such jurisdiction. (real prop. art. § 3-103). *For list of counties and county seats, see first page for this state in Volume containing Practice Profiles Section.*

Requisites for Recording.

Clerk of Circuit Court may record instrument effecting change in ownership if instrument accompanied by certificate from collector of county taxes that applicable taxes have been paid, completed intake form including endorsement by assessment officer for county, and copy of instrument (along with any survey) for submission to Department of Assessments and Taxation. (real prop. art. § 3-104[a]). Transfer in certain counties requires prior payment of all public taxes, assessments and charges on property transferred and of all taxes on personal property in county due by transferor, if all county land owned by transferor is being transferred. (real prop. art. § 3-104[a], [b]). In Baltimore City, no document effecting transfer except leases for less than seven year term may be recorded until lien certificate procured from city and all liens shown as due on certificate are paid and affidavit of transfer provided. Exception to requirement of prepayment of personal property taxes is provided for grant by or on behalf of mortgagee, lien creditor, trustee of deed of trust, judgment creditor, trustee in bankruptcy, receiver or other court-appointed officer in insolvency or liquidation proceeding, for straw deed or supplementary instrument in certain counties. (real prop. art. § 3-104[c]). Property may be transferred on record in July, Aug. or Sept. without required payment of taxes by permitting attorney to file statement regarding maintenance of real estate tax escrow account. (real prop. art. § 3-104[c]). Other miscellaneous and special local requirements are set out in real prop. art. § 3-104, including provision which prohibits recordation of any deed, mortgage, or deed of trust in any county or Baltimore City, unless it bears certification of attorney at law that instrument has been prepared by attorney or under attorney's supervision, or certification that instrument was prepared by one of parties named in instrument. (real prop. art. § 3-104[f][1]). Except for security agreements filed in accordance with § 9-502 of Maryland Uniform Commercial Code, consideration payable, including amount of any mortgage or deed of trust assumed by grantee, or principal amount of secured debt incurred, must be described in recitals or acknowledgment of any instrument of writing or in affidavit under oath accompanying such instrument signed by party to such instrument. (tax-prop. art. § 12-104).

Payment of Taxes as Condition Precedent.

See subhead Requisites for Recording, supra.

Recording Fees.

For recording deeds, mortgages, financing statements, and other instruments required to be filed among land records and financing statement records, in Baltimore City and in any county having block index system and grantor-grantee index system, fee is $4 per page or portion thereof, with minimum charge of $10 per instrument, plus $1 for each name to be indexed and $1 for each additional block. In other counties, fee is $4 per page or portion thereof with minimum charge of $10 per instrument, and $1 per name indexed. For recording short releases of all kinds,

$3 plus $1 for each name to be indexed. (real prop. art. § 3-601[b]). Any printed recordable instrument must be printed in not less than eight-point type and in black letters on white paper of sufficient weight and thickness to be clearly readable; and any typewriting must be in black letters not less than elite type; and document must be readily subject to photostating, otherwise clerk may charge three times regular charge. (real prop. art. § 3-104[e]). Unless name of every signer of instrument is typed or printed directly above or below signature there is additional fee of $1. (real prop. art. § 3-104[d]).

Tax on Recordation.

Recordation Tax.

Recordation tax rates are applied to each $500 or fraction thereof of consideration payable or of principal amount of debt secured for instrument of writing. Consideration includes amount of any mortgage or deed of trust assumed by grantee or to which property conveyed is subject. Mayor and City Council of Baltimore City or governing body of county may set recordation tax rate. (tax-prop. art. § 12-103[a],[b]). Maryland state law no longer establishes county rates to be used in absence of action by such local bodies. (tax-prop. art. § 12-103). Exempt from tax are liens or encumbrances upon vehicles and vessels which are filed with Motor Vehicle Administration or Dep't of Natural Resources, mechanics' liens, crop liens, certain purchase money deeds of trust or purchase money mortgages, assignments of mortgages or deeds of trust, judgments, releases, orders of satisfaction, participation agreements showing interest in note, mortgages or deeds of trust based on prior recorded loan to mortgagor or grantor under deed of trust, certain Uniform Commercial Code security agreements, certain refinancing agreements where refinanced property is mortgagor's principal residence, certain supplemental and previously recorded instruments, and instruments transferring property between certain relatives. Also exempt from the tax are certain transfers of corporate property between related corporations, certain corporate or partnership conveyances of property upon dissolution, merger, consolidation, liquidation or termination, land installment contracts, options to purchase real property, deeds conveying title to real property where recordation was previously paid on contract of sale between same parties, transfers to certain public agencies, leases of seven years or less, and articles of merger or consolidation of foreign corporations, transfers from partnership to limited liability company, and transfers of title by individual(s) conducting real estate enterprise to limited liability company. (tax-prop. art. § 12-108). Counties and Baltimore City authorized to enact certain exemptions from recordation or transfer taxes on conveyance of owner-occupied residential property. (tax-prop. art. §§ 12-103[b], 13-408). Where instrument is filed with Dep't of Assessments and Taxation pursuant to corps. art. § 3-107, tax is, in case of single debtor that has place of business in state and in case of multiple debtors all of whom have principal place of business in same county in state, rate set by county in which debtors' principal place of business is located, in case of single debtor that has no place of business in state but resides in state and in case of multiple debtors none of whom has principal place of business in state but all of whom reside in same county in state, rate set by county in which debtors reside and in case of single debtor that has no place of business in state and does not reside in state and in case of multiple debtors not covered above, rate of $1.65 per $500 or fraction thereof. (tax-prop. art. § 12-103[d]).

Transfer Tax.

There is state transfer tax of 0.5% on consideration on instruments conveying title to real property or leasehold interests for more than seven years which are recorded. (tax-prop. art. § 13-203). Exemption is available for transfers to organizations with principal purpose of preservation of agricultural land. (tax-prop. art. § 13-207[b]). Also exempt are certain transfers of corporate property between related corporations, certain corporate or partnership conveyances of property upon dissolution, merger, consolidation, liquidation or termination, and deeds conveying title to real property where recordation was previously paid on contract of sale between same parties. (tax-prop. art. § 13-404). For sale of improved residential real property to individual who has never owned in state residential real property that has been individual's principal residence who will occupy property as principal residence, rate of transfer tax is 0.25% of consideration payable for instrument of writing and transfer tax shall be paid entirely by seller. (tax-prop. art. § 13-203). Land assessed for agricultural use and transferred for nonagricultural purposes subject to 5% agricultural transfer tax on consideration where land transferred is 20 acres or more; for transfer of less than 20 acres of agricultural land assessed for agricultural use or as unimproved agricultural land, rate of tax is 4%; and for transfer of less than 20 acres of agricultural land assessed as improved agricultural land or agricultural land with site improvements, rate of tax is 3%. (tax-prop. art. § 13-303). Tax declines 25% each consecutive year property tax paid on basis of nonagricultural use assessment. (tax-prop. art. § 13-303). Agricultural land transfer tax plus interest and lien in such amount imposed on transfers involving nonagricultural improvements if required notice of intent not filed. (tax-prop. art. § 13-305[c]). See category 22 Taxation, topic 22.15 Property Taxes, subhead Taxable Property, catchline Assessment. In addition to above, some counties impose transfer tax as follows: In Howard County, 1% of actual consideration (How. Co. Code, § 20.301); in Montgomery County, 1% of consideration on unimproved property, 0.25% of consideration on transfer of improved residential property if consideration is less than $40,000, 0.5% if consideration is $40,000 or more but less than $70,000 and 1% if consideration is $70,000 or more; 1% of consideration on transfer of improved nonresidential property; transfers of land assessed for farm use is at variable rates (Mont. Co. Code, §§ 52-21 to 52-27); in Prince George's County, 1.4% (P.G. Co. Code, § 10-188); in Baltimore County, 1.5% (Balto. Co. Code §§ 11-3-203); in Anne Arundel County, 1% (A.A. Co. Code, arts. 4, 11-111); in Kent County, 66% (Code of Pub. Local Laws of Kent Co. § 152-19); in Talbot County, 1% for consideration over $50,000 authorized (Talbot Co. Code § 172-18).

Division of Taxes.

In agreement for sale of property, it is presumed, in absence of agreement or law to contrary, that parties intended that federal and state stamp taxes and state and local transfer taxes be shared equally between grantor and grantee. This does not apply to mortgages or deeds of trust. (real prop. art. § 14-104).

Foreign Conveyances or Encumbrances.

Instrument conveying Md. property may not be recorded unless executed and acknowledged as required by laws of this state. See topic 10.01 Acknowledgments; category 21 Property, topic 21.06 Deeds.

Effect of Record.

Where two or more deeds or mortgages convey same lands or chattels real, one first recorded is preferred, if grantee accepted deed in good faith and without constructive notice by possession under unrecorded deed and for good and valuable consideration. (real prop. art. § 3-203). See category 21 Property, topic 21.06 Deeds.

Torrens Act not adopted.

Transfer of decedent's title to real estate is shown by orphans' court records and by deed executed by personal representative, indexed under decedent's name in grantor index. (est. & tr. art. § 9-105).

Filing under Commercial Code.

See category 3 Business Regulation and Commerce, topic 3.09 Commercial Code, subheads Intentional Variations (comm. law art. § 9-401[1][b]), Filing Fee.

Vital Statistics.

Reports of births and deaths must be filed with Secretary of Health and Mental Hygiene on forms supplied. Administrative head of institution where child is born must file birth certificate within 72 hours after birth and must satisfy special requirements in case of unwed mothers. (health-gen. art. § 4-208). Copies are maintained by health officers of counties or by Baltimore City Commissioner of Health. Secretary and courts maintain duplicate permanent records of marriages. Secretary receives and indexes reports of divorces and annulments from clerks of courts. Secretary furnishes certified or abridged copy of records of birth, death or of marriage performed after June 1, 1951; records of marriages may be, and records of early marriages or of divorces and annulments must be, certified by clerks of court. (health gen. art. tit. 4, subtit. 2).

Fees.

Certified or abridged copies or search report of birth, death or marriage certificates, $12 for each copy. (health gen. art. § 4-217[c]).

Establishing Birth Records.

Secretary of Health and Mental Hygiene has power to make rules governing registration and delayed registration of births. (health-gen. art. §§ 4-203, 4-210). Forms and instructions may be secured from Division of Vital Records, 6550 Reisterstown Road, Baltimore 21215.

Ordering Copies of Birth and Death Certificates.

Send request, together with $12 check or money order payable to Division of Vital Records, 6550 Reisterstown Road, Baltimore 21215. Request for birth certificate must include full name of person, birthdate, birthplace, father's full name and mother's maiden name. Request for death certificate must include deceased's full name and date and place of death. Applicant should state name, relationship and purpose for which record is intended. Fee is for search and one copy, if found, or statement that none is on record. Additional copies are $12 per copy.

Immunization Registry.

Dep't of Health and Mental Hygiene is required to develop and implement registry of child immunizations for all children in state between birth and age of six years. (health-gen. art. § 18-109).

10.05 SEALS:

Conveyance of real property before Jan. 1, 1973 required seal. On or after Jan. 1, 1973, seal not required. (real prop. art. § 4-109). Seal not required on will. (est. & tr. art. § 4-102).

Uniform Commercial Code adopted. (comm. law art. tit. 1-10). See category 3 Business Regulation and Commerce, topic 3.09 Commercial Code.

Corporate Seal.

Whenever corporate seal required on any document by Md. law, or whenever Md. corporation required by any law to affix corporate seal to document, requirement may be satisfied by placing word “seal” adjacent to signature. (corps. art. § 1-304). Corporate seal not required on deed or other instrument notwithstanding any provision to contrary in corporation's charter, bylaws, etc. (real prop. art. § 4-101). Mere presence of corporate seal on document does not make it sealed instrument, but extrinsic evidence is admissible to show whether use of seal was intended to make instrument a specialty. (23 F. Supp. 137). Each certificate which represents any corporate security may be sealed with actual corporate seal or facsimile of it or in any other form. (corps. art. § 2-212).

Effect of Seal.

Affirmation of seal on document is itself consideration (3 Md. 67), but in practice no one relies on seal alone to establish consideration. Contract specifically stated to be under seal is specialty, as to which period of limitations is 12 years instead of three years. (courts art. § 5-102). Inclusion of “seal” in preprinted form is sufficient to make instrument one under seal. (307 Md. 142, 512 A.2d 1044). Person entitled to sue or liable to be sued on instrument but for seal may sue or be sued notwithstanding such seal, on instruments executed on or after June 1, 1914. (art. 75, § 3).

10.06 TORRENS ACT:

Not adopted.

10.07 VITAL STATISTICS:

See topic 10.04 Records.

11 EMPLOYMENT

11.01 EMPLOYER AND EMPLOYEE:

See topic 11.02 Labor Relations.

11.02 LABOR RELATIONS:

References are to Labor and Employment Article of Code unless otherwise indicated.

Division of Labor and Industry within Dep't of Licensing, Labor and Regulation has jurisdiction over labor matters, except that Dep't of Employment and Training has jurisdiction over unemployment and certain training and manpower matters. (§ 2-102).

Hours of Labor.

Employer of child under 18 must have work permit. (§ 3-205). Child under 14 may not be employed, with some exceptions. (§ 3-209).

Child under 16 may not be permitted to work more than four hours on school day or 23 hours in school week; nor more than eight hours on nonschool day or 40 hours in nonschool week; nor between 9 P.M. and 7 A.M. between Memorial Day and Labor Day nor between 8 P.M. and 7 A.M. after Labor Day through day before Memorial Day. Bona fide work-study hours not counted toward permitted maximum hours of work. Commissioner of Labor and Industry may grant exception to hour restriction if: (1) Parents or guardian give written permission and (2) Commissioner determines there is no hazard to health or welfare of child or problem fulfilling school graduation requirements. (§ 3-211).

Child under 18 may not spend more than 12 hours in combination of school hours and work hours per day; child under 18 must have at least eight consecutive hours of nonwork, nonschool time each day; but Commissioner of Labor and Industry may grant exception to hourly restriction in certain circumstances. Child under 18 may not be permitted to work more than five hours without 30 minute nonwork interval unless child under 18 falls within specified exception. (§ 3-210).

Employer must post notices of maximum hours and scheduled hours for child labor. (§ 3-214).

Violation of Child Labor subtitle punishable by fine or imprisonment. (§ 3-216).

Wages.

Every employer including state and local governmental units of one or more employees must pay minimum wages unless employees are excluded. Beginning July 1, 1975, minimum wage for employee subject to Md. Wage and Hour Law, whether or not also subject to federal Fair Labor Standards Act, is highest minimum wage set forth in Fair Labor Standards Act. If employees are not subject to Federal Fair Labor Standards Act but are subject to Maryland Wage and Hour Law, employer may pay training wage, if applicable, authorized under Fair Labor Standards Act. (§ 3-413). Employees covered are entitled to one and one-half times hourly rate for hours worked in excess of 40 (§§ 3-415[a], 3-420). Excluded from minimum wage law are persons employed in: (1) Agriculture, under certain conditions; (2) managerial or professional capacities; (3) charitable or nonprofit organizations on gratuitous basis; (4) any business, if employee under 16 and working 20 hours or less a week; (5) outside or commission sales; (6) any business, if age 62 or over and working 25 or less hours a week; (7) canning, packing or processing food, poultry or seafood; (8) business of immediate family member; (9) motion picture and legitimate theatres; (10) restaurants, taverns, drive-ins, drug stores grossing $250,000 or less; (11) any business, if employed as part of public school special education training program for mentally, emotionally or physically handicapped; (12) organized camp in nonadministrative capacity. (§ 3-403). Certain classes of employees are exempt from overtime provisions; agricultural employees exempted by overtime provisions of federal Fair Labor Standards Act must receive one and one-half times hourly rate for hours worked in excess of 60. (§ 3-420).

In construction of public works where state funds constitute 50% or more of funds used or where local public body so resolves, wages paid must be not less than prevailing wages paid for similar work in locality. (state fin. and proc. art. §§ 17-201 to 17-205).

Every employer must establish regular pay periods and pay employees (except executive, administrative and professional employees) at least once every two weeks or twice a month in cash or by check. Employer must: (1) Notify employee when hired of pay rate and regular payday; (2) give notice of changes of payday or of decreases in pay rate at least one pay period in advance; (3) furnish each employee with statement of gross earnings and deductions (which deductions may be made only in specified instances); (4) upon termination of employment, pay employee all wages due for work prior to termination on or before regular payday. (§§ 3-503 to 3-505). Wages due do not include vacation provided policy received by employee at time of hire so specifies. (§ 3-504). Violations by employer subject to criminal or civil monetary penalties. False statements by employee subject to criminal fine. (§ 3-508). Commissioner of Labor and Industry may attempt to resolve violations by informal means of mediation and conciliation; may institute proceedings to collect moneys unlawfully withheld; such moneys are paid to employee without cost to employee. Commissioner authorized to enter into reciprocal agreements with labor departments of other states to collect moneys unlawfully withheld by out-of-state employers. (§§ 3-506 to 3-507).

Wages of employee, and health, welfare and pension contributions contracted for in place of wages, earned not more than three months prior to assignment for benefit of creditors by or institution of insolvency proceeding against employer are to be paid in full out of estate after payment of costs and expenses of administration of trust or insolvency proceeding which court approves. (comm. law art. § 15-102[b]).

See category 8 Debtor and Creditor, topic 8.01 Assignments, subhead Assignment of Wages.

Child Labor.

Child under 14 may not be employed or permitted to work. (§ 3-209). Child 14 or 15 may not be employed during school hours, and is prohibited from being employed in many occupations including manufacturing, mechanical, construction, industrial, airports, railroads or maritime, or any occupation found to be dangerous or injurious to health, morals, safety, or welfare unless child found to be incapable of profiting from further education, or unless enrolled in work-study or similar program where employment is integral part of such program, or where minor employed in purely office work or duties performed outside of rooms where goods are manufactured or produced, or if, after investigation, minor is issued exception by Commissioner if determined that work performed and area in which performed not hazardous. (§ 3-213).

Child under 18 may not be employed in many occupations including blast furnaces, commercial docks and wharves, certain occupations on commercial vessels, railroads, electrical work, manufacture or processing of alcoholic beverages, various manufacturing processes, except where enrolled in work-study or similar program where employment is integral part of such program, or where minor employed in purely office work performed outside of rooms where goods are manufactured or produced. (§ 3-213).

Special permit may be issued for minor of any age to be employed as model, performer, or entertainer. (§ 3-207).

Commissioner of Labor and Industry may temporarily suspend any or all child labor laws in event of emergency or major disaster proclaimed by governor. (§ 3-102[b]).

Hours of labor regulated for children under 18. See subhead Hours of Labor, supra.

Commissioner of Labor and Industry authorized to conduct reasonable inspections of any place of employment to ensure compliance. (§ 3-204).

Violation of Child Labor subtitle punishable by fine or imprisonment. (§ 3-216).

Person under 21 working in business where alcoholic beverages are sold subject to special provisions in Anne Arundel, Baltimore, Carroll, Dorchester, Kent, Queen Anne's and Prince George's Counties. (art. 2B, § 12-302).

Work permit must be issued to child under 18 and must be kept on file by employer. (§ 3-206).

Female Labor.

Labor laws apply equally to both sexes; wage and salary discrimination for work of comparable character on basis of sex prohibited. (§ 3-304). See subhead Discrimination, infra. Employers required to treat disabilities caused or contributed to by pregnancy or childbirth in same way as other temporary disabilities are treated. (st. gov't art. § 20-608).

Discrimination.

Unlawful for employer, employment agency or labor organization to discriminate against any individual on basis of race, color, religion, sex, age, national origin, marital status, sexual orientation, genetic information, refusal to submit to genetic test or make available results of genetic test, or physical or mental disability unrelated in nature and extent so as to preclude performance of employment. (st. gov't art. §§ 20-304, 20-606). Localities may have established other protected statuses. Unlawful to discriminate against one who opposed practices made unlawful by statute or participated in proceeding under law. Not unlawful: to discriminate based on bona fide occupational qualification, to establish dress and grooming standards directly related to job, for certain sectarian educational institutions to discriminate on basis of religion, or to observe terms of bona fide seniority system or employment benefit plan except as to hiring. (st. gov't art. § 20-603).

Enforcement action initiated when person files complaint with federal, local, or state Commission on Human Relations within six months of alleged violation of law, or on Commission's initiative. (st. gov't art. § 20-1004). If probable cause to believe discrimination has occurred is found, Commission investigates and attempts to eliminate discrimination by agreement. Individual may pursue claim, if there is initial finding by Maryland Commission on Human Relations (``MCHR'') that probable cause exists to believe that discrimination occurred and there is failure to reach agreement for remedy and elimination of discrimination, before Administrative Law Judge (``ALJ''). (st. gov't art. § 20-1005). ALJ is authorized to award relief including injunctive relief, reinstatement, back pay, and compensatory damages. (st. gov't art. § 20-1009). If MCHR finds that probable cause exists and there is failure to reach agreement for remedy and elimination of discrimination, complaining party may elect to have MCHR bring civil action in circuit court in county where alleged discrimination took place on complainant's behalf. (st. gov't art. § 20-1007). Similarly, MCHR may make election on its own behalf to pursue such claims. (st. gov't art. § 20-1007). In either event, MCHR may seek injunctive relief, reinstatement, back pay, and compensatory damages. (st. gov't art. §§ 20-1004, 20-1012). If compensatory damages are sought, trial by jury may be requested. Individual may bring civil action in circuit court of county where alleged discrimination occurred if less than two years have passed since alleged act of discrimination and if 180 days have passed since complainant filed charge of discrimination with federal, state, or local equal employment opportunity agency. (st. gov't art. § 20-1013). Complainant may be awarded injunctive relief, back pay, reinstatement, compensatory damages and punitive damages. (st. gov't art. § 20-1013). If complainant seeks compensatory or punitive damages, complainant would be entitled to request jury trial. Amount of compensatory damages recoverable in administrative action or in civil action brought by MCHR are subject to limitations based upon size of employer and range from $50,000 to $300,000. (st. gov't art. §§ 20-1009, 20-1012). Compensatory and punitive damages are similarly capped coverable in civil action brought by complainant directly. (st. gov't art. § 20-1009). Misdemeanor to make malicious unfounded complaint. (st. gov't art. § 20-1104).

Labor Unions.

Union's right to organize and to bargain collectively recognized. Yellow dog contracts against public policy and unenforceable. (§§ 4-302 to 4-304). No “right to work” law. Union must report to Commissioner of Labor and Industry by Jan. 10 all collective bargaining agreements which terminate during year. (§ 4-111).

Labor Disputes.

Anti-injunction law. (§§ 4-301 to 4-316). Division of Labor and Industry has limited power to mediate and arbitrate labor disputes and to hold consent elections and decertification elections. (§§ 4-201 to 4-220). Labor disputes arising within jurisdiction of Metropolitan Transit Authority may be submitted to arbitration board for final and binding arbitration. (trans. art. § 7-602). Employment, recruiting, or furnishing of professional strikebreakers unlawful. (§ 4-403).

Military Service.

State and local governments must afford employees who return from military service reemployment rights as per art. 64A, § 19B and art. 24, § 10-101.

Workers' Compensation Act (tit. 9 lab. & emp. art.) provides for creation of Workers' Compensation Commission and requires every employer having one or more employees subject to Act to be certified as self-insurer or to carry insurance in order to compensate employees for injuries or death incurred. (§ 9-402). Prior to issuance of license or permit by state or any county or municipality to employer for activity in which he may employ one or more employees, employer must file with issuing authority certificate of compliance with Title 9, issued by Workers' Compensation Commission, or must provide workers' compensation insurance policy or binder number. (§ 9-105).

To Whom Applicable.

Act applies to every person and every state or local public agency that has one or more employees subject to Act. Individual, including minor, is presumed to be covered employee while in service of employer under express or implied contract of apprenticeship or hire. To overcome presumption of covered employment, employer must establish independent contractor relationship under common law or that specific exemption under this subtitle applies. Further, covered employees are (1) all helpers of employees actually or constructively known to employer, whether paid by employer or employee; (2) every paid officer of corporation except officers of close corporation or certain officers of farm corporation and certain officers of professional service corporations who elect not to be covered and whose employer serves notice upon insurance carrier and Commission; (3) any full-time employer, partner or sole proprietor who elects to be covered and who serves notice upon insurance carrier and commission; (4) every employee of political subdivision, public agency or public official, whether elected or appointed, and every member of volunteer or auxiliary volunteer fire department, police department or civil defense corps; (5) every person performing services for remuneration in course of business of employer at time of injury, if such person does not maintain separate business in relation to this service, if service is not to public and if person is not himself employer subject to Act; (6) every person who regularly sells or distributes newspapers; (7) any regularly employed apprentice or trainee while receiving training or instruction related to employment outside regular working hours; (8) any person receiving remuneration from farmer or dairy farmer for services performed; (9) any person employed as domestic servant in private home and earning $750 or more in cash in any calendar quarter from any single household; (10) volunteer aids, student teachers and student interns; (11) any person on jury duty in nonfederal court. (§§ 9-201 to 9-236). Exempt employees include: (1) Any person employed for not more than 30 consecutive work days to do maintenance, repair and remodeling work at private home or at employer's place of business, if employer has no other employees subject to Act; (2) any person performing services in return for subsistence only, received from religious or charitable organization; (3) any person for whom rule of liability for injury or death is provided by laws of U.S.; (4) casual employees or persons employed wholly outside Md., with several exceptions; (5) any person riding in vanpool provided by employer if vanpool is insured, excluding driver of vehicle; (6) licensed real estate salespersons and associate real estate brokers, affiliated with licensed real estate broker under written agreement paid on commission basis only and qualifying as independent contractor for federal tax purposes; (7) certain owner operators of motor vehicles entering certain written agreements with motor carriers; (8) sole proprietor who does not elect to be covered employee. Nonresident employee and employer temporarily within state exempt if covered under similar law of other state, if other state law provides reciprocal exemption. (§§ 9-201-9-236). Act applies to officers and enlisted men of state militia while in “state active duty,” including members of Maryland Defense Force. (§ 9-215). Act also applies to any employer and his employees who jointly accept provisions of Act. (§ 9-215).

Notice of Injury and Claim.

Written notice of injury should be given to employer within ten days of accident or, in case of hernia or death, within 30 days. Employer should report accident and injury to Workers' Compensation Commission within ten days of receipt of notice. (§ 9-707). Claim should be filed by employee with Workmen's Compensation Commission within 60 days after date of accidental injury. Claim is barred if not so filed unless excused by Commission. (§ 9-709). Failure to file claim within two years constitutes complete bar, with some exceptions. In event of death, claim must be filed within 18 months from date of death. (§ 9-710). In cases of occupational disease, notice should be given within one year of date employee knows or has reason to believe that he is suffering from such disease, unless excused by Commission. Claim must be filed within two years unless waived by employer, except claim in case of pulmonary dust disease must be filed within three years. (§ 9-705). Claim for injury caused by ionizing radiation must be filed within two years of actual knowledge of injury. Claim must be on form prescribed by Commission. (§ 9-709). Employee may not be discharged solely because he files claim for compensation. (§ 9-1105).

Investigation.

Commission should investigate claim and, upon application of either party, hold hearing.

Hearing is before member of Commission. Commission must make or deny award within 30 days after mailing of notice of filing of claim or conclusion of hearing and send copy of decision to each party or party's attorney of record. Under certain conditions, Commission has power to modify decision. (§§ 9-714, 9-736).

Rates of Compensation for Injuries.

(1) Permanent total disability: 66.6% of average weekly wage, but not more than 100% of "average weekly wage of the State of Maryland" nor less than $25 per week (unless established weekly wages are less, in which event compensation is equal to weekly wages), subject to annual cost of living adjustment, during continuance of disability (§ 9-637); (2) temporary total disability: 66.6% of average weekly wage, but not more than 100% of "average weekly wage of the State of Maryland" nor less than $50 per week (unless established weekly wages are less, in which event compensation is equal to weekly wages), during continuance of disability (§ 9-621); (3) permanent partial disability: for awards of less than 75 weeks, employer or its insurer shall pay to covered employee compensation that equals 33.3% of average weekly wage of covered employee but does not exceed: (a) for claims arising from events occurring on or after Jan. 1, 2009, but before Jan. 1, 2010, 14.3% of average weekly wage; (b) for claims arising from events occurring on or after Jan. 1, 2010, but before Jan. 1, 2011, 15.4% of average weekly wage; and (c) for claims arising from events occurring on or after Jan. 1, 2011, 16.7% of average weekly wage. (§ 9-628); for awards equal to or greater than 75 weeks but less than 250 weeks, 66.6% of average weekly wages, but no more than 33.3% of average weekly wage of Md. (§ 9-629); for awards of 250 weeks or more, 66.6% of average weekly wages, but no more than 75% of average weekly wage of Md.; but in no case less than $50 per week (unless established weekly wages are less, in which case compensation is equal to weekly wages), period of compensation fixed by schedule based on character of injury (§ 9-627); (4) hernia: special provisions apply (§§ 9-633 and 9-634); (5) temporary partial disability: 50% of difference between average weekly wage and lower post-accident earning capacity, but not more than 50% of "average weekly wage of the State of Maryland" (§ 9-615). Compensation under (3) and (4) paid in addition to and consecutively with compensation under (2). Unpaid compensation under (1) (up to $45,000), and (4) survives death from cause not compensable under tit. 9 and is paid to surviving dependents, spouse or minor children. If compensable injury causes death within seven years from date of accident, benefits are payable in amounts and to persons specified, right to unpaid compensation surviving death of recipient. (§§ 9-678 to 9-682). Employee unable to perform previous work entitled to vocational rehabilitation for not more than 24 months, during which period he is compensated as if temporarily totally disabled. (§§ 9-670 and 9-674). In addition, employer must provide hospital, medical, surgical and similar services as required by Commission. (§ 9-660).

Subsequent Injury Fund established for payment of certain benefits to employees having permanent impairment and incurring subsequent disability by reason of compensable personal injury. Employers or their insurance carriers pay 5% on all awards against them for permanent disability or death approved on or after June 1, 1963 and before July 1, 1987, and 6½% on all awards approved on or after July 1, 1987. Fund held, managed and disbursed by State Treasurer. (§§ 9-802 and 10-214).

Loss or loss of use of both hands, or both arms, or both feet, or both legs, or both eyes or of any two thereof constitutes permanent total disability in absence of conclusive proof to contrary. (§ 9-636). Person having previously lost or lost use of hand, arm, foot, leg or eye may waive in writing right to compensation for preexisting partial disability upon subsequent accidental injury. (§ 9-657).

Rates of Compensation for Death.

(1) Without dependent persons: medical and hospital payments as required by Commission, and funeral expenses to maximum of $2,500 (plus assessment not to exceed $4,500, levied by Commission to supplement Uninsured Employers' Fund); (2) with wholly

dependent persons: hospital, medical and funeral payments and, in addition, 66.6% average weekly wage, but not less than $25 (unless established weekly wages are less) nor more than 100% of “average weekly wage of the State of Maryland”, for period of total dependency with aggregate amount to be not less than $45,000; (3) with partly dependent persons: hospital, medical and funeral payments and, in addition, 66.6% of average weekly wage, but not more than 66.6% of “average weekly wage of the State of Maryland”, for period of partial dependency with aggregate amount not to exceed $75,000 including payments made during period of total dependency. (§§ 9-681 to 9-682).

Where employer fails to secure payment of compensation for injured employees and dependents as provided in Act, employee may sue at common law, and in such suit, defenses of assumption of risk and contributory negligence and fellow servant doctrine are abolished. (§ 9-509[c]). Criminal penalties also provided for noncomplying individual employers and for officer responsible for general management of noncomplying corporate employer. (§ 9-1107[c]). Prosecution against employer for failing to maintain workers' compensation insurance must be brought within one year after (1) Commission finds, by order, that employer was uninsured, or (2) uninsured employer's fund makes payment. (courts art. § 5-106[a]).

Uninsured Employers' Fund created to provide for payment of awards against uninsured defaulting employers. Fund established and maintained by assessments levied by Director of Fund Board against applicable employers who have failed to secure required insurance or insured employers whose payment of compensation abated by death of claimant. Any member of limited liability corporation or any officer of corporation who has responsibility for general management of entity is jointly and severally liable for payment of award if knowingly failed to secure workers' compensation insurance. (§§ 9-1001 to 9-1010).

Occupational Diseases.

Any disease contracted as result of and in course of employment expressly included within Workers' Compensation Act and compensable thereunder. (§§ 9-101 and 9-502).

Employer's Liability Act.

Part of Workers' Compensation Act. See above.

Unemployment Compensation.

Unemployed individual, including part-time worker, eligible to receive benefits for 26 weeks if able to, available for, and actively seeking work, if he has registered and reports for work at employment office (with certain exceptions), if he has made claim, if he has been paid for two calendar quarters wages for insured work that total one and one-half times upper limit of division of high quarter wages as to which he qualifies and if he has been paid at least lower quarterly wage amount in line 1 of schedule of benefits in § 8-803 for insured work during his high quarter. (§§ 8-801 to 8-903). Employee of educational institution, governmental entity on behalf of such educational institution, or nonprofit organization temporarily unemployed because of established and customary unpaid sabbatical or vacation period disqualified. (§§ 8-901 through 8-903). Coverage includes domestic service, service not in course of employer's trade or business, agricultural labor, employment by governmental entities of state or its political subdivisions, except when performed by inmate of custodial or penal institution, certain services performed outside U.S., Canada, or Virgin Islands, and employment by certain educational institutions. (§§ 8-202 through 8-221). Weekly benefits range from $25 to $410 (for all claims filed establishing new benefit year beginning Oct. 1, 2010, maximum weekly benefit shall be $430), depending on amount of wages paid in high quarter of base period; additional allowances paid for up to five dependent children under 16 years of age verified by social security number or birth certificate. (§§ 8-803, 8-804). Individual disqualified for certain number of weeks or eligible only for partial benefits if unemployment due to voluntary quitting, gross misconduct, aggravated misconduct, disciplinary measures, stoppage because of labor dispute, if employee fails to apply for or accept suitable work, if he is receiving benefits under another unemployment insurance law or from pension, annuity or retirement payments or if he is receiving severance pay, except if claimant's job was abolished. (§§ 8-1001 to 8-1009). In event employer pays retirement benefit in form of lump sum payment due to layoff or shutdown of operations, or if within 30 days of receiving lump sum payment claimant provides secretary with proof that payment has been placed in qualified retirement plan, benefit amount not deductible from unemployment insurance benefits. (§§ 8-1001 to 8-1009). Extended benefits are available to eligible individuals who have exhausted regular benefits during certain periods of high national or state unemployment. Extended benefits limited in certain circumstances if claimant files interstate claims, is disqualified for regular benefits, or does not seek or accept suitable work. (§§ 8-1101 to 8-1108).

Occupational Safety and Health.

State act similar to federal. (§§ 5-102 to 5-205). Standards must be at least as stringent as federal. (§ 5-309). Enforcement by Commissioner of Labor and Industry. (§§ 5-201 to 5-217). Federal employers excluded. (§ 5-103).

Lie Detector Tests.

Employer may not require applicant or employee to submit to lie detector test as condition of employment or continued employment. (§ 3-702). All applications for employment must contain notice in § 3-702. Prohibition inapplicable to federal government or agency thereof, law enforcement agencies of state, counties, or municipal corporations and correctional officers of Baltimore City Jail and Baltimore County, Cecil County, Charles County, Harford County, St. Mary's County, and Washington County Detention Centers, employees of Anne Arundel County Department of Detention Facilities, Caroline County Department of Corrections, Washington County Detention Center and Calvert County Jail who have direct personal contact with inmates, and employees of or applicants for assignment to Internal Investigative Unit of Department of Public Safety and Correction Services. (§ 3-702).

Medical Information.

Applicant may not be required to answer any questions, written or oral, pertaining to any physical, psychological, or psychiatric illness, disability, handicap or treatment unless it bears direct, material and timely relationship to applicant's ability to perform job. (§ 3-701). Employer may not discharge or discriminate based upon information gained through employee's participation in group medical coverage but may use medical information which: (1) bears direct, material and timely relationship to employee's fitness for job or (2) substantially differs from that falsely provided by employee in job application. (§ 5-604). Employer who requires any employee, contractor, or other person to be tested for job-related reasons for use or abuse of any controlled dangerous substance or alcohol must have specimen tested at approved laboratory and must permit employee to request independent test of urine or blood sample. (health-gen. art. § 17-214). Laboratories must comply with federal cutoff standard for positive testing. Employer must provide to employee who tests positive copy of laboratory results, copy of employer's policy on substance or alcohol use or abuse, written notice of any intent to take disciplinary action or terminate employee, and copy of section permitting employees to request independent test of same sample, within 30 days from date test performed. In addition, employees must have medical review officer review positive test results. (health-gen. art. § 17-214).

See also category 3 Business Regulation and Commerce, topic 3.06 Brokers, subhead Employment Agency.

11.03 WORKERS' COMPENSATION LAW:

See topic 11.02 Labor Relations.

12 ENVIRONMENT

12.01 ENVIRONMENTAL REGULATION:

General Supervision.

Responsibility for execution of Md.'s environmental laws is primarily shared by two state departments, Dep't of the Environment (1800 Washington Blvd., Baltimore, 21230) and Dep't of Natural Resources (Tawes State Office Building, 580 Taylor Ave., Annapolis 21401). Former has authority in areas of air quality (env. art. tit. 2), noise (env. art. tit. 3), toxic, carcinogenic and flammable substances (env. art. tit. 6), water management (env. art. tit. 4), geothermal resources (env. art. tit. 5), controlled hazardous substances (env. art. tit. 7), radiation (env. art. tit. 8), water pollution (env. art. tit. 9), wetlands and riparian rights (env. art. tit. 16), deep and strip mining (env. art. tit. 15), and sanitary facilities (bodies politic and corporate created by municipalities to acquire, maintain and operate water, sewer, and/or solid waste systems) (env. art. tit. 9). Latter has general authority in areas of fish and fisheries (nat. res. art. tit. 4), forests and parks (nat. res. art. tit. 5), aquaculture (nat. res. art. tit. 4, subtit. 11A), and wildlife (nat. res. art. tit. 10). Responsibility for regulation of hazardous materials (health gen. art. §§ 22-501 to 22-508) and nuisance control rests with Dep't of Health and Mental Hygiene (201 W. Preston St., Baltimore 21201).

Maryland Environmental Service, body politic and corporate, provides water supply and waste purification recycling, and disposal services to public and private instrumentalities; it is unit within Dep't of Natural Resources and serves as staff for Hazardous Waste Facilities Siting Board. (nat. res. art. §§ 3-101 to 3-130).

Maryland Environmental Trust, charitable in nature, is established to encourage and promote conservation and environmental study and improvement and to motivate public to support environmental efforts. (nat. res. art. §§ 3-201 to 3-211).

Maryland Lead Paint Poisoning Commission is established to research lead poisoning prevention and remediation, to promulgate regulations to prevent lead poisoning, and to consult with Dept. of Environment on lead testing standards. (env. art. §§ 6-801 to 6-852).

Department of the Environment is responsible for development of program for response to emergency oil spillage in waters of State. (env. art. § 4-406).

Environmental Trust Fund is created, assets of which consist primarily of proceeds of environmental surcharge levied on each kilowatt hour of electric energy generated in state. Fund is administered by Secretary of Natural Resources to carry out provisions of Power Plant Siting and Research Program, basically designed to provide for required electric power production with minimum adverse environmental impact. (nat. res. art. §§ 3-301 to 3-307).

Maryland Clean Water Fund is created to identify, monitor and regulate discharge of effluents into waters of State, particularly into Chesapeake Bay. Fund will be administered by Dep't. of the Environment, and will be funded by application fees, permit fees and civil or administrative penalties. (env. art. § 9-320).

Drinking Water Loan Fund is created to provide financial assistance to local governments for water supply systems and related costs. (env. art. § 9-1605.1).

Maryland Clean Air Fund is created to fund activities related to identifying, monitoring, and regulating air pollution. (env. art. § 2-107).

Oil Contaminated Site Environmental Cleanup Fund is created to fund cleanup of sites and groundwater contaminated with oil and to help upgrade and replace underground storage tanks. (env. art. §§ 4-701 to 4-708).

Northeast Maryland Waste Disposal Authority is created to develop and implement plan for disposal of solid waste. (nat. res. art. § 3-903).

Federal-State Mine Reclamation Fund is created to promote reclamation of abandoned mines. Fund is administered by Dep't of Natural Resources and will be funded by federal grants. (nat. res. art. § 7-903).

Maryland Environmental Policy Act requires that all state agencies prepare environmental effects reports (impact statements) in conjunction with requests for legislative actions significantly affecting quality of environment. (nat. res. art. §§ 1-301 to 1-305).

Prohibited Acts of Pollution.

Air.

“Air pollution” is defined as presence in outdoor atmosphere of substances in such quantities and of such duration that they are or will with reasonable certainty be injurious to human, plant, or animal life or to property, or will unreasonably interfere with proper enjoyment of property of others. (env. art. § 2-101[b]). Dep't of the Environment required to promulgate primary and secondary ambient air quality standards identical to federal standards, except where none exist or upon request of local government bodies for more restrictive standards. Dep't may establish ambient standards for pollutants for which no national standards have been promulgated and shall promulgate emission standards limiting emissions from particular sources including requirements to assure continuous emission reduction. In areas where attainment of federal ambient air quality standards is achieved, emission standards shall be no more restrictive than necessary to attain and maintain such federal ambient standards, except such restriction does not apply for: (1) New source performance standards; (2) federal standards for prevention of significant deterioration; (3) national emission standards for hazardous pollutants; (4) emissions of substances for which no federal ambient standards promulgated; or (5) political subdivision that requests more restrictive standard. (env. art. §§ 2-301 to 2-304). Governor may issue executive order upon advice of Secretary of the Environment, proclaiming air pollution emergency and may, subject thereto, require immediate elimination of specifically identifiable sources of pollution. (env. art. § 2-105).

Federally required motor vehicle emission control devices may not be altered or removed, nor may vehicle be operated without such devices if originally so equipped except in certain circumstances. (trans. art. § 22-402.1). Dep't of the Environment is empowered to establish Low Emissions Vehicle Program, functionally equivalent to California program under certain conditions, but may not require sale or use of specific vehicle fuels other than those certified by EPA. (env. art. tit. 2, subtit. 7).

Noise.

Dep't of the Environment is responsible for developing environmental noise standards, developing plan to attain and maintain those standards, coordinating state programs, and keeping records on sound limits adopted. (env. art. §§ 3-103, 3-401). Noise control regulations that apply to Dep't of Transportation facilities are jointly adopted by Dep'ts of Transportation and the Environment. (env. art. § 3-401[d][2]). With certain exceptions, any county or municipality may adopt noise control regulations equal to or more stringent than state standards. (env. art. § 3-105). Specific laws require establishment of noise zones and plans to reduce or eliminate “impacted land use areas” by administrators of all licensed airports. (trans. art. tit. 5, subtit. 8).

Administrator of Motor Vehicle Administration adopted regulations establishing maximum sound level limits for operation of existing and new motor vehicles; emergency vehicles exempt. (trans. art. §§ 22-601, 22-604, 22-605). No person may operate, and no owner may permit operation of, vehicle in manner to exceed limits so established. (trans. art. §§ 22-602, 21-1117). No person may sell or lease any vehicle manufactured after July 1, 1974 with maximum sound level potential exceeding limits established for new vehicles; no vehicle manufactured after July 1, 1974 may be titled or registered in state unless, when first sold for purposes other than resale, it complies with limits set for new vehicles. (trans. art. § 22-606). Manufacturer, distributor, importer or agent must file, for each make and model sold in state, certificate with Motor Vehicle Administration that vehicle complies with noise control law. (trans. art. § 22-608). Every motor vehicle having internal combustion engine must be equipped with exhaust muffler system in good working order, and no muffler bypass device may be used. (trans. art. § 22-402). No person may modify exhaust system or other noise abatement device of vehicle to be operated in state so that noise exceeds that emitted by vehicle as originally manufactured; nor may person operate vehicle so modified in state. (trans. art. § 22-609). No person may sell or offer muffler or other device which, when installed, will permit operation with greater sound level emission than that emitted from vehicle as originally manufactured. Manufacturer of such device must file certificate that his products sold in state comply with noise control law. (trans. art. § 22-610).

Dep't of Natural Resources has published maximum sound level limits and enforcement regulations for operation of motor-driven off-highway vehicles in state parks, forests and other lands subject to Dep't jurisdiction and for operation generally of new motor-driven off-highway vehicles wherever operated. (nat. res. art. § 5-209). No person may sell or lease such vehicle if it is new and has maximum sound level potential exceeding limits. Manufacturers, distributor, importer or agent must file certificate under oath with Dep't of Natural Resources that each make and model sold in state complies with noise control law. (nat. res. art. § 5-209[d]). Dep't has published sound level limit regulations for operation of pleasure craft on state waters. (nat. res. art. § 8-704[f]).

Solid Waste.

It is unlawful to manage industrial waste in manner which pollutes waters of state. (env. art. § 9-224). Sewage sludge disposal is regulated by Dep't of the Environment (env. art. § 9-230 et seq.), which also administers sewage sludge utilization fund (env. art. § 9-244). Handling of hazardous waste, termed “controlled hazardous substances,” are closely regulated by env. art. tit. 7, subtit. 2, and rules and regulations thereunder. No one may store or dispose of, or transport for storage or disposal, controlled hazardous substances except in permitted facility and no one may falsify required information. (env. art. § 7-265). Transfer of hazardous material is regulated by env. art. tit. 7, subtit. 2, and rules and regulations thereunder.

Water.

It is unlawful to discharge any pollutant into waters of state unless in compliance with env. art. tit. 9 and rules and regulations thereunder. (env. art. § 9-322). Person discharging or permitting discharge of oil must report incident immediately to Dep't of the Environment regardless of whether appropriate federal authority is also notified. (env. art. §§ 4-405, 4-410 to 411). It is unlawful to distribute, possess, sell, apply, or offer to sell or apply any antifouling paints containing tributyltin with certain exceptions. (agric. art. §§ 5-901 to 5-906). Special provisions govern pollution control of Chesapeake, its tributaries and surrounding wetlands (env. art. tit. 5, subtit. 11 and nat. res. art. tit. 8, subtit. 18; agric. art. tit. 8, subtits. 6, 7), sediment and waste control in Severn and Patuxent River watersheds (env. art. tit. 4, subtit. 3), flood prevention, conservation, sediment and erosion protection and urban development in Patuxent River Watershed (nat. res. art. tit. 8, subtit. 13) and land clearing and construction in designated Atlantic coast beach erosion control district (nat. res. art. § 8-1102).

Enforcement.

Air Quality.

Upon violation of Air Quality Control Act, or any standard or regulation, Dep't of the Environment may serve upon alleged violator written notice by certified mail of violation specifying facts and law involved and either requiring violator to appear and show cause at hearing or ordering compliance within specified time. Appeal from order is directly to circuit court in accordance with art. 10 and Md. Rules. (env. art. §§ 2-602 to 2-604, 2-607). Dep't may seek injunctive relief, civil penalty, or criminal penalty. (env. art. §§ 2-609 to 2-610.1). Criminal penalties available for knowing violations. (env. art. § 2-609.1). Dep't may grant temporary fuel variance from rule, regulation or order. (env. art. §§ 2-501 to 2-505). Air Quality Control Act gives rise to no actionable rights, findings of fact or presumptions of law for benefit of any person other than state. (env. art. § 2-106).

Noise.

Sound level limits for various categories of land use set by Dep't of the Environment, and regulations promulgated by Dep't in connection therewith, are to be enforced by said Dep't, using facilities and services of appropriate local agencies to maximum extent possible. (env. art. § 3-403). Dep't must maintain two sound level meters at its own cost for use by qualified counties to assist in complying with noise standards. (env. art. § 3-403). All units of state government having jurisdiction over facility or engaging in activity which may result in emission of noise must comply with federal, state and interstate noise control requirements. (env. art., § 3-503). Regulations concerning noise control in areas near state and non-state owned airports are to be enforced by State Aviation Administrator or political subdivision in which airport is located. (trans. art. tit. 5, subtitle 8).

Solid Waste.

Upon finding that waters of state are polluted by discharge of sewage sludge or handling of industrial waste so as to create likelihood of menace to public health or comfort, Secretary of the Environment may issue order to cease polluting. (env. art. §§ 9-220 to 9-224). Upon issuance of such order, industrial facility that does not have disposal permit is required to obtain one. (env. art. § 9-224[c]). Failure to obey order results in civil penalty. (env. art. § 9-268). After notice and hearing, Dep't of the Environment may revoke or suspend permit for violation of controlled hazardous substance law. (env. art. § 7-257). Dep't of the Environment may also sue to enjoin violation. (env. art. § 7-263). Violations are punishable by civil and criminal penalties. (env. art. §§ 7-265 to 267).

Water Quality.

Upon violation of env. art. tit. 9 or any rule or regulation promulgated thereunder, Dep't of the Environment must serve upon alleged violator written complaint. Notice by publication permitted. Alleged violators have all rights of parties in contested case hearings under Administrative Procedure Act. Appeal from final decision is directly to circuit court in accordance with art. 10, and Md. Rules. (env. art. §§ 9-334 to 9-343). Civil and criminal penalties and injunctive relief available. (env. art. §§ 9-339, 9-342, 9-343). Upon violation of env. art. tit. 4 attorney general may prosecute violator. (env. art. § 4-502). All common law, equitable, and statutory rights in any person survive to allow suppression of nuisances or abatement of pollution. (env. art. § 4-403).

Private Action.

State, state agencies, political subdivisions and their agents, and private persons have standing to bring action for mandamus or equitable relief, including declaratory relief, against officer or agency of state or political subdivision for failure to perform nondiscretionary duty arising from environmental laws, or for failure to enforce such laws, including whether permit or order has been unlawfully issued or is being violated. Procedural and standing requirements imposed. Subtitle does not create new cause of action or authorize suit for money damages, but does not abrogate any previously existing actions. Court must approve compromise or discontinuance of suit, and may award costs including attorney and witness fees against plaintiff acting in bad faith. (nat. res. art. §§ 1-501 to 1-508).

Penalties.

Violation of Air Quality Control Act, or any standard or regulation thereunder, or any order of Dep't of the Environment, is civil offense carrying penalty of not more than $25,000 per day except that Secretary of Dep't of the Environment authorized to adopt rules and regulations specifying situation in which violator is subject to noncompliance penalty similar to § 120 of Clean Air Act. (env. art. §§ 2-610, 2-612). Also, Dep't may seek injunctive relief. (env. art. § 2-609). Dep't may settle any claim for penalty and remit 75% of any penalty paid where within three years violation has been removed or order met. (env. art. § 2-610[c]). Also, Dep't may impose administrative penalties of up to $2,500 per violation, not to exceed $50,000 total, but only upon providing alleged violator with written notice of proposed action and opportunity for informal meeting. (env. art. § 2-610.1). Criminal penalties available for knowing violations. (env. art. § 2.609.1). Any violator may submit plan for compliance and, if approved, will not be considered in violation so long as plan is followed. (env. art. § 2-611).

Violations of Solid Waste Law.

Violations of solid waste laws generally subject to same penalties as violations of Water Pollution Control laws, except for violations of sewage sludge requirements or laws concerning infectious waste in landfills, and laws concerning disposal of scrap tires. (env. art. §§ 9-268, 9-268.1). Violations of sewage sludge laws subject to civil penalties of $10,000 per day, not to exceed $50,000, and/or administrative penalties of $1,000 per violation, not to exceed $50,000 total. (env. art. §§ 9-269 to 9-270). For violations of hazardous waste laws, following are felonies punishable by fine not to exceed $100,000, five years imprisonment, or both: (1) Storing or disposing of any controlled hazardous substance, except in permitted facility; (2) transporting for treatment, storage or disposal of any controlled hazardous substance, except to permitted facility; (3) falsifying information required under law, regulations, or permit; and (4) authorizing, directing or permitting any of above offenses. (env. art. § 7-265). Knowing violations subject to $250,000 fine and/or 15 years imprisonment. Violations are punishable by administrative penalty of not more than $25,000 per day of violation, not to exceed $100,000 total. (env. art. § 7-266[b]). In addition, violations are punishable by civil penalty not to exceed $25,000. (env. art. § 7-266[a]). Except for knowing violations, violations are misdemeanors punishable by not more than $25,000 per day of violation and imprisonment not to exceed one year or both for first offense, and $50,000 per day of violation, imprisonment of not to exceed two years, or both after first conviction. (env. art. § 7-267).

Violation of Noise Control Law.

Willful violation of Environmental Noise Control Act or of regulation or order issued thereunder, is civil offense carrying penalty of not more than $10,000 per day. Dep't of the Environment may also seek injunctive relief. Secretary of the Environment may settle any claim and may remit 75% of penalty paid, where violator eliminates violation or satisfies order within one year. Any violator may submit plan for compliance and, if approved, will not be considered in violation so long as plan is followed. (env. art. §§ 3-405 to 3-407).

Violation of Water Pollution Control Law.

Violation of env. art. tit. 9, or of rule, regulation, order or permit issued pursuant thereto, makes violator liable to penalty of not more than $10,000 per day, recoverable in civil action. Violation is also misdemeanor punishable by fine of not more than $25,000 or by imprisonment for not more than one year or both; in addition, violator may be enjoined. Conviction for second or later offense is subject to fine of not more than $50,000 per day of violation or imprisonment not exceeding two years or both, and to injunction. Each day of violation is separate offense. Person knowingly making false statement in document or report filed or required to be maintained, or knowingly rendering monitoring device inaccurate, is subject, upon conviction, to fine not exceeding $10,000 or to imprisonment for not more than six months or both. In addition, Dep't of the Environment may assess civil penalty of $5,000 per day, not exceeding total of $50,000, after hearing and finding that violation exists. Refusal or failure to pay latter penalty subjects violator's real and personal property to lien in favor of state. (env. art. §§ 9-342, 9-343).

Dep't of Environment must charge and collect compensatory fee from person responsible for any oil spillage; and person is liable to third party for damage to real or personal property. (env. art. §§ 4-408, 4-409). Violation of licensing requirements for oil transfer facility is misdemeanor, punishable by fine up to $10,000 plus any accrued but unpaid license fees. (env. art. § 4-411[e]). Violation of prohibition against discharge of oil from ship or of duty to report oil discharge is misdemeanor, punishable by criminal penalties of $50,000 and/or one year imprisonment, and/or civil penalties of $25,000 per violation. (env. art. §§ 4-410, 4-417 to 4-418). Vessel discharging oil may be held in port until penalty is paid, and penalty is lien on vessel. (env. art. § 4-418). In addition, unless otherwise provided by statute, violation of env. art. tit. 4 is misdemeanor subject to fine of not more than $500 or imprisonment of not more than three months, or both. (env. art. § 4-501). Violators may also be subject to civil penalties of $10,000 per day of violation, up to total of $100,000. (env. art. § 4-417[d]).

Special penalties for sewage treatment plants of up to $5,000 (administrative) or $25,000 (civil) per month. (env. art. § 9-342.1).

Violation of law regulating antifouling paints is misdemeanor punishable by fine not exceeding $2,500. (agric. art. § 5-906).

Violation of Geothermal Resources Law.

Violator of requirements of subtitle 8A of nat. res. art. subject to civil penalty not exceeding $10,000. Also, Department may seek injunction through Attorney General. (env. art. § 5-608).

Permits.

Air Quality Control.

Persons responsible for installations (source capable of generating, causing or reducing emissions) must register with Dep't of Environment, except where installation is one for which permit to operate is obtained or where installation is of type specified as not required to obtain permit to construct. Where proposed changes will result in inaccuracy of registered information, re-registration is prerequisite. Change in ownership requires new registration within 30 days of ownership change. (Comar 26.11.02.02). Unless exempted by Dep't of Environment, owner or operator must report by telephone to Dep't onset and termination of occurrence of excess emissions lasting or expected to last for one hour or more from installation requiring permit to operate. Dep't may require written report. (Comar 26.11.01.07). No person may construct, modify or alter installation without first obtaining permit to construct from Dep't, unless it is on list of excepted installations. No person may cause or allow certain listed installations to be used or operated without first having obtained permit to operate from Dep't. Permit requirements do not apply to: Changes, repairs or maintenance which cannot change quality, nature or quantity of emissions; machinery and equipment normally used in mobile manner; boilers used exclusively for operation of steam engines related to farm and domestic use; generating stations constructed by electric companies; actual construction of buildings (apart from emission producing machinery they house); nor parking garages or parking lots. (env. art. §§ 2-401 to 2-403; Comar 26.11.02).

Solid Waste.

Permit required to install, materially alter or materially extend water supply system, sewerage system, or refuse disposal system installed, altered, or extended after July 1, 1988. (env. art. § 9-204). Sewage sludge utilization permit required (env. art. § 9-231). Facility permit and reports required for those who own, establish, operate or maintain controlled hazardous substance facilities. (env. art. § 7-232). Transporters, drivers and vehicles must be certified to transport controlled hazardous substances. (env. art. § 7-249). Permit required for hazardous material transfer facility. (env. art. §§ 7-102 to 7-103). Hazardous Waste Facilities Siting Program transferred to Dep't of the Environment from Dep't of Natural Resources. (env. art. §§ 1-406, 7-401 to 7-413).

Water Quality Control.

Oil transfer facility must be licensed by Dep't of Environment. (env. art. § 4-411). Vessel carrying or receiving more than 25 barrels of oil and discharging or receiving cargo of bulk oil in state must post bond of $500 per gross ton of vessel with Dep't of Environment. Failure to post bond is misdemeanor; vessels presenting evidence of financial responsibility to Dep't of Environment are exempt. (env. art. § 4-407). Person may not engage in specific commercial or industrial operation involving transfer, storage, separating, removing, treating or disposing of oil or other unctuous substance without meeting all county zoning and land use requirements and without permit from Dep't of Environment. (env. art. § 4-405).

Person may not construct defined facility (oil terminal and related facilities) in coastal area without permit from Dep't of Environment. (Coastal Facilities Review Act, env. art. tit. 14, subtit. 5).

Permit must be obtained from Dep't of Environment in situations which will result in discharge of pollutants, or increase in such discharge, into state waters, including underground waters. Administration may apply effluent and pretreatment standards for introduction of certain pollutants by industrial users into publicly owned treatment works. Owner or operator of any sanitary sewer system, combined sewer system, or wastewater treatment plant shall report to Dep't of Environment by phone within 24 hours of any sewer overflow or treatment plant bypass that results in direct or potential discharge of raw or diluted sewage into state waters. (env. art. §§ 9-322 to 9-332).

Well may not be drilled until Dep't of Environment issues permit. (env. art. § 9-1306). Certain types of temporary wells may be drilled without permit. (env. art. § 9-1306). Well drillers must be licensed. (env. art. § 13-301). Permit from Dep't of Environment required for appropriation or use of state waters, whether surface or underground, or for commencement of construction of structure which may appropriate or use such waters, other than use for domestic and farming purposes. (env. art. § 5-502). Permit from Dep't of Environment required for construction, reconstruction or repair of reservoir, dam or waterway obstruction, or for making change in waterway obstruction, or for changing course, current or cross section of construction and operation of certain agricultural drainage systems, stream or other nontidal waters. Exception for certain small ponds, certain streams, and removal or demolition of residential structures. (env. art. § 5-503). Permit from Dep't required for construction, reconstruction, change or addition to conduit, pipeline, cable, trestle, etc. in bed or waters of Potomac River. (env. art. § 5-504).

Permit from Dep't of Environment required to install or alter any water supply system, sewerage system, refuse disposal system for public use, refuse disposal system that is solid waste acceptance facility, and sewerage sludge utilization system. (env. art. §§ 9-204, 9-231). Dep't must approve plans for water and sewerage service before subdivided land is marketed or any permanent building is erected thereon. (env. art. § 9-206).

Waterworks, wastewater works and industrial wastewater works are classified, and qualifications of superintendents who are authorized to manage each class are set. Dep't of the Environment regulates superintendents for waterworks, wastewater works, and industrial wastewater works. (env. art. tit. 12).

Wetlands.

With limited exceptions, person may not dredge or fill on state wetlands without license from Board of Public Works. (env. art. § 16-202). Secretary of Environment may promulgate rules and regulations for dredging, filling, removing or otherwise altering or polluting private wetlands. (env. art. § 16-302). Person proposing to conduct activity on any wetlands not authorized by such rules and regulations must apply for permit from Secretary; Secretary must advise applicant of extent of state wetlands involved in proposed activity and must indicate method of compliance with license requirements above, hold hearing, and render decision. In granting permit, Secretary may impose conditions or limitations and may require bond. (env. art. tit. 16, subtit. 3). Permit is required to undertake any regulated activity in nontidal wetlands. Certain mitigation and best management practice requirements must be met. (env. art. tit. 5, subtit. 9).

Pesticides.

Distribution, sale, delivery or transportation of pesticides is subject to regulation by Secretary of Agriculture. (agric. art. tit. 5, subtitles 1, 2). Person desiring to distribute, sell, deliver or transport may be required to register pesticide annually. (agric. art. § 5-105). Certain applicators, including public agencies, and consultants must obtain permits and certificates, and places of business engaged in application and consulting must obtain licenses. (agric. art. §§ 5-206 to 5-210.5).

Geothermal resources defined as natural heat of earth higher than 120° fahrenheit, energy resulting from such heat, medium containing heat and minerals or other products obtained from naturally heated material but excluding hydrocarbon substances. Permit from Dep't of Environment required to conduct exploration for geothermal resources, and to appropriate, use, or construct facility for appropriation or use of resources. (env. art. tit. 5, subtit. 6).

Seismic Operations.

Permit from Dep't. of Environment required to conduct seismic operations in state and prohibiting use of explosives in seismic operations conducted on waters and tributaries of Chesapeake Bay. (env. art. § 14-107).

Appalachian States Low-Level Radioactive Waste Compact entered into. (env. art. §§ 7-301 to 7-306).

Asbestos removal may be performed only by businesses licensed by Dep't of Environment. (env. art. tit. 6, subtit. 4).

Lead paint abatement contracting, training, and inspecting may be performed only by businesses/persons accredited by Dep't of the Environment. (env. art. §§ 6-1001 to 6-1005).

Lead Poisoning Prevention Program established in 1993. Set up Commission to promulgate abatement regulations for residential rental properties constructed before 1950. (env. art. §§ 6-807 to 6-809). Such properties must be registered with Dept. of Environment. (env. art. §§ 6-811 to 6-813). Owners must test and abate lead hazards by first change in occupancy after Feb. 24, 1996 according to specified standards. (env. art. §§ 6-815 to 6-822). Owners must provide lead hazard information to new renters on execution of any lease after Feb. 24, 1996 and to old renters no later than May 23, 1996. (env. art. § 6-823). Owners must provide new tenants with copy of current inspection certificate. (env. art. § 6-820). Bases of owner liability statutorily defined. (env. art. §§ 6-826 to 6-841). Established Lead Poisoning Prevention Fund, funded by annual fees paid by affected properties and by penalties paid by violators to Dept. of Environment. (env. art. §§ 6-843 to 6-845). $10 per day administrative penalty for properties not registered. (env. art. § 6-849). $250 per day civil penalty for violation not cured within 20 days of notice. $15,000 civil penalty for knowing violation. (env. art. § 6-850).

Interstate Environment Compact repealed effective Oct. 1, 2000. (nat. res. art. § 3-501).

Ocean Beach Replenishment Fund established. (nat. res. art. §§ 8-1103 to 1104).

Susquehanna River Basin Compact entered into. (env. art. § 5-301). Potomac River Basin Compact repealed. (1987, c. 234).

Radon Testing.

Regulated by env. art. § 8-305.

13 ESTATES AND TRUSTS

13.01 ADMINISTRATION:

See topic 13.08 Executors and Administrators.

13.02 ADVANCEMENTS:

See topic 13.07 Descent and Distribution.

13.03 ALLOWANCES:

See topic 13.08 Executors and Administrators.

13.04 CLAIMS:

See topic 13.08 Executors and Administrators; category 5 Civil Actions and Procedure, topic 5.17 Pleading.

13.05 DEATH:

Uniform Absence as Evidence of Death and Absentees' Property Act repealed. See category 21 Property, topic 21.01 Absentees.

Definition.

Death occurs when, based on ordinary standards of medical practice, individual has sustained irreversible cessation of circulatory and respiratory functions or of all functions of entire brain (including brain stem). Definition is applicable for all purposes, including civil and criminal proceedings. Death must be pronounced before vital organs are removed for transplantation. (health gen. art. §§ 5-201 to 5-202). This statute represents Uniform Determination of Death Act with minor variations.

Survivorship.

Uniform Simultaneous Death Act adopted. (courts art. §§ 10-801 to 10-807). If descendant, ancestor or descendant of ancestor fails to survive decedent by 30 days he is deemed to have predeceased decedent for purposes of intestate succession. If time of death of decedent or of descendant, ancestor or descendant of ancestor, or of both, cannot be determined, person deemed not to have survived decedent by 30 days for purposes of intestate succession. (est. & tr. art. § 3-110). Legatee, other than spouse, who fails to survive testator for 30 days is deemed to predecease testator absent will provision creating contrary presumption. (est. & tr. art. § 4-401).

Action for Wrongful Death.

Only one action may be maintained against person whose wrongful act causes death of another. (courts art. § 3-904[f]). Where cause of action arose in Md., suit must be brought in names of all persons who are or may be entitled to damages (viz., wife, husband, parent and child of decedent or, if no such persons, then any person related to decedent by blood or marriage who was wholly dependent upon him), whether or not they join in action, names of those not joining being preceded by words: "to the use of...." (R. P. 15-1001). Such action must be commenced within three years after death unless death caused by occupational disease, in which case action must be commenced within ten years of death or three years after cause of death was discovered, whichever is shorter. (courts art. § 3-904[g]; see also lab. emp. art. §§ 9-901 to 9-903 regarding liability of third party other than employer). Action against estate of decedent must be commenced within six months after date of decedent's death, or within two months after representative delivers written notice to creditor, whichever is shorter (unless claim is covered by insurance) (est. & tr. art. §§ 8-104[d][e], 8-103[a]). For estates of decedents dying before Oct. 1, 1992, period is nine months after date of death, or within two months after representative delivers written notice to creditor, whichever is shorter. Where wrongful act causing death occurred outside state, substantive law of state of occurrence is applied. (courts art. § 3-903[a]). For death of spouse or minor child, damages are not limited to pecuniary loss but may include damages for mental anguish, emotional pain and suffering, and loss of society, companionship, care, guidance, etc. (courts art. § 3-904[d]). For death of unmarried child not minor (21 yrs. or younger or parent contributed 50% or more of support) damages not limited to pecuniary loss but may include damages for mental anguish, emotional pain and suffering, loss of society, companionship, guidance etc. (courts art. § 3-904[e]). Action for expenses and pain and suffering of person whose death was not instantaneous must be brought by his executor or administrator. (See 104 Md. 332, 65 A. 49.) Funeral expenses of decedent not exceeding $5,000 (amount allowed under est. & tr. art. § 8-106[b]) may be recovered. (est. & tr. art. § 7-401[y][2]). There is no other statutory limitation on amount of recovery for death.

Living Wills.

See topic 13.16 Wills, subhead Living Will.

Death Certificate.

See category 10 Documents and Records, topic 10.04 Records, subhead Vital Statistics.

Uniform Anatomical Gift Act adopted with amendments. (est. & tr. art. §§ 4-501 to 4-513).

13.06 DECEDENTS' ESTATES:

See topics 13.07 Descent and Distribution, Executors and Administrators, Wills; category 8 Debtor and Creditor, topic 8.10 Homesteads.

13.07 DESCENT AND DISTRIBUTION:

References are to Estates and Trusts Article of Code unless otherwise indicated.

Real property and personal property both pass directly to personal representative for administration and distribution (§ 1-301) as follows:

Entire estate, or if there be surviving spouse, excess over share of spouse (see subhead Surviving Spouse, infra), descends and is distributed as follows, each class of which member is living taking to exclusion of subsequent classes: (1) To surviving issue by representation; (2) to surviving parents equally or, if only one, to that one; otherwise, to issue of parents by representation; (3) one-half to surviving paternal grandparents equally or, if only one, to that one; otherwise, to issue of paternal grandparents by representation; and one-half to surviving maternal grandparents equally or, if only one, to that one; otherwise, to issue of maternal grandparents by representation; if pair of grandparents or their issue fail to survive, their one-half is distributable as provided for other one-half; (4) one-quarter to each pair of great-grandparents equally or to survivor of each pair or, if neither survives, to issue of pair by representation; if any pair of great-grandparents and issue fails to survive, its one-quarter is distributable as provided for other three-quarters; (5) to living stepchildren equally (and issue of deceased stepchildren by representation), if born to non-divorced legal spouse. (§§ 3-103, 3-104). “Issue” is defined as every living lineal descendant except lineal descendant of living lineal descendant. (§ 1-209). If parent of minor child abandoned child or willfully failed to contribute to support of such child for three years before death of such child, or for life of child, whichever is less, such parent is not entitled to distribution of such child's assets. (§ 3-112). If descendant, ancestor or descendant of ancestor fails to survive decedent by 30 days, he is deemed to have predeceased decedent and is not entitled to rights of heir. (§ 3-110). See topic 13.05 Death, subhead Survivorship.

Degrees of kindred computed by civil law method by counting from decedent up to common ancestor and then down to claimant. (§ 1-203).

Surviving spouse takes: One-half if there is minor surviving child; $15,000 and one-half of residue if there is surviving issue, but no surviving minor child, or if there is no surviving issue, but surviving parent; whole estate if there is no surviving issue or parent. (§ 3-102). Person cannot be surviving spouse if person: (1) Is validly and absolutely divorced from decedent, or if marriage validly annulled; (2) voluntarily appears in foreign proceeding where decedent obtained absolute divorce or annulment, even if not recognized in Md.; (3) was remarried after decedent obtained decree of divorce or annulment; or (4) was convicted of bigamy while married to decedent. (§ 1-202).

Half blood and whole blood relatives of same degree share alike. (§ 1-204).

Posthumous child of intestate takes as though born in his lifetime, but posthumous child of another cannot take in his own right. (§ 3-107).

Illegitimate children and their issue inherit from mother and from each other as though born in lawful wedlock. They inherit from father only if father has been adjudicated such, acknowledges in writing or openly and notoriously recognizes that he is such, or marries mother and orally acknowledges that he is such, or adopts child. (§§ 1-207, 1-208).

Artificial Insemination.

Child conceived by artificial insemination of married woman with her husband's consent is considered legitimate. Consent of husband presumed. (§ 1-206[b]).

Adopted children treated as natural children of adopting parents and not as children of either natural parent, unless adopted by spouse of natural parent. (§ 1-207). See category 14 Family, topic 14.01 Adoption.

Determination of Heirship.

No special proceedings.

Advancements.

Property given to heir during lifetime is treated as advancement only if declared or acknowledged by heir or donor in writing as such. Advancement to heir other than surviving spouse does not increase share of surviving spouse. (§ 3-106).

Family Allowance.

See topic 13.08 Executors and Administrators, subhead Allowances.

Election.

Dower and curtesy have been abolished. (§ 3-202).

Renunciation.

Md. Uniform Disclaimer of Property Interests Act adopted. (§§ 9-201 to 9-216). See topic 13.16 Wills.

Right to Estate.

Conviction or attainder does not work corruption of blood or forfeiture of estate. Estate of person who commits suicide descends or vests like that of person who died natural death. (§ 11-109).

Nonresidents.

As to distribution to nonresidents of U.S., see category 4 Citizenship, topic 4.01 Aliens.

Escheat.

If intestate leaves no surviving spouse or relations entitled to take, entire estate is paid to board of education of county or Baltimore City for use of public schools, or, if intestate was recipient of long-term care benefits under Maryland Medical Assistance Program at time of death, to Department of Health and Mental Hygiene. Provision is made for subsequent repayment without interest to relative or personal representative of relative within fifth degree. (§ 3-105).

Uniform Disposition of Unclaimed Property Act adopted. (comm. law art. tit. 17). See category 21 Property, topic 21.01 Absentees.

See also topic 13.08 Executors and Administrators.

13.07A ESTATES: (in property)

See category 21 Property, topic 21.16 Real Property.

13.0813.09

13.10 EXECUTORS AND ADMINISTRATORS:

References are to Estates and Trusts Article of Code unless otherwise indicated.

Upon death, legal title to all real and personal property passes directly to personal representative for administration and distribution. (§ 1-301). “Personal representative” means executor or administrator. (§ 1-101[p]). Title 6 of Maryland Rules contains rules governing opening and administration of estates and various forms to be used.

Letters of administration may be granted administratively by register of wills or judicially by orphans' court of county or city in which decedent was domiciled, or, if not domiciled in Md., where largest part of decedent's property in Md. is located. (§§ 5-101, 5-103; R. P. 6-111[a]).

Preferences in Right to Administer.

Preference given in granting administrations as follows: (1) Personal representatives named in will admitted to probate; (2) surviving spouse and children of intestate decedent; or surviving spouse of testate decedent; (3) residuary legatees; (4) relations entitled to share in estate in following order: children of testate decedent; grandchildren; parents; brothers and sisters; (5) other relations who apply; (6) largest creditor who applies; (7) any person having pecuniary interest who applies; (8) any other person. (§ 5-104).

Right to administer may be renounced but may not be delegated. (§ 5-105; 107 Md. 357, 68 A. 573). Renunciation may not be revoked except on showing good cause. (§ 6-314). Subject to priorities, persons entitled to serve may consent to another's serving. (R. P. 6-313, 6-314).

Personal representative of personal representative not entitled to administer estate of first decedent but must take action to protect it and to have new personal representative appointed. (§ 6-304).

Eligibility and Competency.

Qualifications same for executor or administrator. Trust company or corporation authorized by law to be personal representative can act. (§ 5-105[a]). No person under 18 years of age, mentally incompetent, convicted of serious crime or not citizen of U.S., unless spouse of decedent and permanent resident, can act. No full-time judge of state, federal or probate court, and no register of wills or clerk of court may serve unless surviving spouse or related to decedent within third degree. (§ 5-105[b]). Nonresident may act, but must file with register of wills instrument designating agent on whom process may be served. (§ 5-105[b]). See also category 3 Business Regulation and Commerce, topic 3.01 Banks and Banking.

Bond.

Penalty sum fixed by court or register of wills in amount not exceeding probable maximum value of personal estate less value of any posted collateral and any cash made subject to order of court. (§ 6-102[e]). Penalty sum may be increased or decreased at court's discretion for good cause at any time during administration. Surety may be corporation authorized to act as surety in Md. or individual approved by register. No bond save for taxes and debts of testator will be required if testator by will excuses bond or if all interested persons waive bond. For cause shown, additional bond may be required. National banking association and trust company not required to give bond. (§ 6-102). For form of bond see R. P. 6-312.

Oath.

No oath or affirmation required, only verification under penalties of perjury, which is required on petition for probate, inventories, accounts and other documents reciting facts. (§§ 1-102, 5-206).

Issuance of Letters.

After petition for probate acted upon and bond filed, certificate of letters of administration is issued by register of wills. (§§ 6-103, 6-104).

Removal.

Personal representative is subject to removal by Orphan's Court after hearing establishing misrepresentation of facts leading to appointment; wilful disregard of court order; incapacity or inability to effectively discharge duties and powers; mismanagement of property; failure to maintain designated agent for service of process; inexcusable failure to perform material duty. (§ 6-306). After notice and hearing, personal representative may exercise only powers of special administrator. (§§ 6-306[c], 6-403). Upon written application, any of personal representative's powers and duties may be suspended. (§ 6-301).

Special kinds of administration, such as c.t.a., d.b.n., ad colligendum, durante minoritate, pendente lite and ancillary, abolished effective Jan. 1, 1970. (§ 12-102). Upon petition, suitable person giving bond may be appointed special administrator to protect property pending appointment of personal representative or of successor personal representative. (§§ 1-101[t], 6-

401).

Public Administrators.

No such office.

Inventory and Appraisal.

Inventory of all real and personal property, tangible and intangible, including debts owed decedent, listing fair market value and any encumbrance, must be filed by personal representative within three months after his appointment. (§ 7-201). Listed corporate stocks, over the counter securities, debts owed decedent, including bonds and notes, and bank and savings and loan accounts may be appraised by personal representative. Other property must be appraised either by one or more official appraisers appointed by register or by one or more special appraisers employed by personal representative. (§ 7-202). Value assigned to any inventory item may be revised upon petition. (§ 7-204).

General Powers and Duties.

Personal representative is made fiduciary by statute and must take possession or control of decedent's real and personal estate and, after paying debts and taxes, must settle and distribute estate and file accounts within time provided. (§§ 7-101, 7-102). If conferred by will or statute, personal representative may exercise power without application to, approval or ratification by orphans' court. (§ 7-401). Unless limited by will or by court order, in addition to powers conferred by will, common law or statute, personal representative has broad general powers, including: to retain assets in form received from decedent; to perform contracts; to deposit funds in checking accounts, insured interest-bearing accounts or short term loan arrangements; to vote stocks; to hold securities in name of nominee; to insure estate property; to compromise obligations; to pay taxes and expenses; to sell or exercise stock subscriptions or options; to consent to or oppose reorganizations, dissolutions or liquidations; to convert sole proprietorship decedent was engaged in to limited liability company; to become limited partner in any partnership or member in any limited liability company, including single member limited liability company; to pay funeral expenses as provided in § 8-106; to employ auditors and investment advisors; to prosecute and defend legal actions; to continue unincorporated businesses for four months (which period can be extended by court order in proceeding in which all interested persons are parties); to incorporate any business of decedent; to exercise options in insurance contracts; to pay valid claims and discharge mortgages and security interests; to convey redeemable reversions to owners of leasehold estates; to grant releases of mortgages and security interests; to make partial and final distributions in cash or in kind during administration; to invest in, sell, mortgage, pledge, exchange or lease property; to borrow money; to extend or renew obligations owed to estate; and to designate self on any document as executor or administrator as case may be. (§ 7-401). Where power is not conferred by will or by § 7-401, order of court must be obtained. (§ 7-402). Good faith purchaser or mortgagee is protected and is not required to see to proper application of assets paid to personal representative. (§ 7-404).

Notice of appointment must be given to heirs and legatees, notifying persons who object to appointment or to probate of will to file objections within six months of appointment, unless extended by law; certificate of publication of such notice must be filed with register. (§ 7-103; R. P. 6-311). Within 20 days after appointment, personal representative must deliver to register text of published notice and list of names and addresses of heirs and legatees, to whom register will send copy of notice. (§ 7-104). Notice of appointment must be published once a week for three successive weeks in newspaper of general circulation in county of appointment. (R. P. 6-331).

Notice to creditors is contained in notice of appointment and must be published in local newspaper once a week for three successive weeks, notifying creditors to present claims within earlier of six months after decedent's death or two months after personal representative gives required notice by mail. For deaths before Oct. 1, 1992, notice must state that claims must be presented within earlier of six months after death (unless death occurred before Oct. 1, 1992 in which case nine months after death) or two months after notice. (§ 7-103; R. P. 6-311). Personal representative is required to make reasonably diligent effort to identify and locate creditors and give notice by mail. (R. P. 6-401).

Presentation of Claims.

Claims may be made by serving it upon personal representative, by filing with register and serving it upon personal representative, or by filing suit. (§ 8-104[c]; R. P. 6-413). Currently, creditors must file claim or commence suit within earlier of nine months after decedent's death or two months after personal representative gives required notice, or be barred from suing either personal representative or distributees, but period of limitation does not apply to actions covered by insurance to extent of insurance, nor to claims against Md. Automobile Insurance Fund. nor to foreclosure of lien claims. (§§ 8-103, 8-104). For estates of decedents dying before Oct. 1, 1992, period is nine months from decedent's death.

Proof of Claims.

Claimant should file with personal representative verified written statement of claim, including basis, name and address of claimant, amount claimed, date due if unmatured, nature of contingency, if any, and description of security, if any; or claimant may file verified written statement with register of wills, with copy to personal representative, in substantially following form (R. P. 6-413):

Form

[R. P. 6-413]

In the Estate of: ____________________

Estate No:________

Date:______________

CLAIM AGAINST DECEDENT'S ESTATE

The claimant certifies that there is due and owing by the decedent in accordance with the attached statement of account or other basis for the claim the sum of $________.

I solemnly affirm under the penalties of perjury that the contents of the foregoing claim are true to the best of my knowledge, information, and belief.

____

Name of Claimant

____

Signature of claimant or person authorizedto make verifications on behalf of claimant

____

Name and Title of Person Signing Claim

____

Address

____

____

Telephone Number

CERTIFICATE OF SERVICE

I hereby certify that on this ______ day of _____________ (month), ______ (year),

I delivered or mailed, first class, postage prepaid, a copy of the foregoing Claim to the personal representative,

____

(name and address)

____

Signature of Claimant

Approval or Rejection of Claims.

If personal representative intends to disallow claim, personal representative must notify each claimant who has filed verified statement of claim that it has been disallowed, in whole or in part, or that he will petition court for determination. Notice of disallowance must warn claimant to petition court for allowance or to commence suit against personal representative or distributees within 60 days or be barred. If personal representative takes no action on claim duly presented, claimant can petition orphans' court which can allow or disallow, in whole or in part, claim presented. (§ 8-107).

Payment of Claims.

Currently, six months after decedent's death, personal representative pays claims as allowed in order of priority. For estates of decedents dying before Oct. 1, 1992, period is nine months from decedent's death. Personal representative may pay barred claim only if permitted by will and may pay unbarred claim whether or not formal verified proof of claim filed. (§§ 8-102, 8-108). Personal representative is personally liable to unpaid claimant whose claim is allowed where personal representative made payments to others within six month period without requiring payees to give security or where he wilfully or negligently made payments depriving injured claimant of priority. (§ 8-108). Personal representative may give notice of meeting of all creditors to be held in not less than ten days for purpose of having claims approved in whole or in part under direction and control of court; personal representative's payment of such claims in accordance with court order is protected. (§ 8-109). Upon proof of unmatured claim, unless compromised, court will direct reservation and investment of sufficient amount. (§ 8-110). Secured claimant may receive payment in full if he surrenders security, or file claim and receive full amount less value of security, or foreclose security and file claim for deficiency, so long as he files within requisite nine or six-month period. (§ 8-111). Contingent claim must be filed within requisite nine or six-month period or be forever barred; if filed, it can be provided for by court order which reserves assets or which makes distributees liable to pay same. (§ 8-112). In allowing claim, personal representative may deduct counterclaim. (§ 8-113).

Priorities.

If assets insufficient to pay all claims, payment is in following order: (1) Fees due register of wills; (2) costs and expenses of administration; (3) funeral expenses not to exceed $3,500 except by special order of court; (4) commissions of personal representatives and licensed real estate salesmen and reasonable attorneys fees; (5) family allowance; (6) taxes due by decedent; (7) reasonable medical, hospital and nursing expenses of last illness; (8) rent owed by decedent for not more than three months in arrears; (9) wages, salaries or commissions for services performed within three months prior to decedent's death; (10) assistance paid under public assistance to adults program, as provided in § 5-407(D) of Human Services Article; and (11) all other claims. (§ 8-105). No preference as to claims of same class, nor as to matured claims over unmatured claims.

Sales may be made without application to, approval of, or ratification by court. (§ 7-401[n]). Sale need not be reported or confirmed, but details must be included in initial or subsequent administration account. (§§ 7-302, 7-303). Personal representative may sell redeemable ground rent after written notice from tenant of intention to redeem, without approval of court. (§ 7-401[r]).

Actions by Representative.

Representative may commence and prosecute any personal action at law or in equity which decedent might have commenced and prosecuted, except actions for slander. (§ 7-401[y]). If suit is for wrong resulting in death of decedent, personal representative may recover, in addition to other damages, amount not to exceed $2,000 for funeral expenses. (§ 7-401[y]). Similarly, representative may continue action by decedent pending at time of death, provided action survives decedent's death. (R. P. 2-241).

Actions Against Representative.

Personal representative may be sued in any action which could have been brought against decedent, except for slander. (§ 7-401[y]). Without filing claim, action may be commenced against estate within earlier of six months from decedent's death or two months after personal representative gives notice by mail. (§§ 8-103; 8-104[d]). For estates of decedents dying before Oct. 1, 1992, period is nine months from decedent's death. Other than action for personal injuries or wrongful death caused by decedent for which process had been served, actions must be brought within above time limits (unless claim is covered by insurance or by Md. Automobile Insurance Fund). (courts art. § 3-902[c]; est. & tr. art. §§ 8-103[e], 8-104[d], [e]). Action pending when decedent died may be continued against representative by motion of successor, opposing, or affected third party, without presentation as claim. (R. P. 2-241).

Allowances.

$5,000 to surviving spouse and $2,500 for each unmarried dependent child under 18 available in both testate and intestate estates, and exempt from inheritance tax. (§ 3-201). Upon receipt of allowance for unmarried child of decedent under 18 who is not also child of surviving spouse, surviving spouse shall distribute allowance as provided in § 13-501.

Election of surviving spouse to take statutory share in lieu of share left by will must be exercised within later of nine months after date of decedent's death or six months after first appointment of personal representative under will. (§ 3-206). In lieu of property left by will, surviving spouse may elect to take one-third share of net estate if there are surviving issue, or one-half if not. (§ 3-203). Net estate calculated without deduction for federal and Md. estate tax and penalties and interest thereon. (§§ 3-203, tax-gen. art. § 7-308).

Widow's Quarantine.

No provision.

Intermediate Accountings.

Unless time extended, personal representative must render account within nine months from date of appointment and every six months thereafter until estate closed by filing of final account, and at other times as ordered by court. (§ 7-305). For estates of decedents dying before Oct. 1, 1992 and on or after May 19, 1989, initial period is later of ten months after date of death or nine months of notice of appointment. Upon filing account, personal representative must file certificate that he has mailed or delivered notice of such filing to all interested persons. (§ 7-301).

Exceptions to account must be filed within 20 days of court's approval. (§ 7-501).

Final Accounting and Settlement.

Final account must be filed upon termination of appointment. (§ 7-305). Unless time extended for good cause, all assets must be distributed within time for rendering first account (within nine months of appointment). (§ 7-101[b]).

Consent Settlement.

No special provisions. After charges known, proposed distribution mailed or delivered by personal representative to interested distributees must be objected to within 30 days, or right to object is lost. (§ 9-104[e]). In event of objection, personal representative may apply to court to make distribution. (§ 9-112).

Distribution.

With some exceptions, shares of legatees abate in following order: (1) Property not disposed of by will; (2) residuary legacies; (3) general legacies other than (4), (5) or (6) hereof; (4) general legacy to dependents; (5) general legacy to creditor in satisfaction of just debt; (6) general legacy to surviving spouse; (7) specific and demonstrative legacies. (§ 9-103). Personal representative must give deed or assignment to evidence distribution in kind. (§ 9-105). No priority in abatement between real and personal property, and abatement in each class is apportioned. Upon petition, court may partition undivided interests of heirs or legatees in property of estate. (§ 9-107). Upon distribution, personal representative may, but need not, obtain release from distributee. (§ 9-111). Fiduciary must distribute assets having values at dates of distribution amounting to no less than amount of legacy as determined for federal tax purposes, except where will directs otherwise. (§ 11-107). For statutory form of personal representative's deed, see real prop. art. § 4-202(g). For distribution of legacies, see topic 13.16 Wills. For distributions to minors, see category 14 Family, topic 14.10 Infants, subhead Distributions.

Distribution if Abroad.

Where distributee is nonresident of U.S. and, because of local conditions, would not have benefit or use or control at its full value of funds distributable to him, court may order distribution to board of education of county or Baltimore City for use of public schools. Provision is made for subsequent repayment without interest to claimant or legal representative. (§ 9-108).

Closing of estate occurs automatically with approval of final account; termination of appointment may be accomplished by request in final account or by court order entered upon petition filed more than six months after appointment, with notice to all interested persons and, if requested within 20 days of notice, hearing. (§ 10-101). If no action involving personal representative is pending one year after close of estate, he is automatically discharged from ordinary liability to all interested persons. (§ 10-103).

Liabilities.

Personal representative is made fiduciary by statute and must settle and distribute estate in accordance with will and estates and trusts article as expeditiously and with as little sacrifice in value as is reasonable. (§ 7-101). Representative's liability to third parties arising from administration is that of agent for disclosed principal. (§ 8-109[a]). Representative is not individually liable on contracts (unless agreed to) or for torts (absent personal fault) connected with administration. (§ 8-109[b] and [c]).

Heir or legatee liable to creditor up to value of distribution if estate closed and claim not barred. (§ 10-102). See subhead Presentation of Claims, supra. Claim against heir or legatee for property improperly distributed barred after three years from death of decedent or one year from date of distribution, whichever is later. (§§ 9-106[b], 10-103[b]). Liability may exist for share of estate taxes under Md. Uniform Estate Tax Apportionment Act. (tax gen. art. § 7-308).

Compensation of Representatives.

Unless larger measure is provided by will, court may allow such commissions as it deems appropriate, but not to exceed 9% on property valued at $20,000 or less and $1,800 plus 3.6% of excess over $20,000 for property valued at greater than $20,000. (§ 7-601[b]). For estates of decedents dying before Jan. 1, 1992, fee simple real estate, (but not income thereon for estates of decedents dying on or after July 1, 1974 only), is excluded from estate in computation of commissions, but court may allow commissions not to exceed 9% on real estate sold by personal representative. (§ 7-601[d]). For estates of decedents dying on or after Jan. 1, 1992, fee simple real property is treated as property subject to administration upon which personal representative's compensation may be computed. (§ 7-601). Fees paid to broker are expense of administration and not deducted from commissions. (§ 7-601[d]). If will provides stated compensation additional compensation shall be allowed if provision is deemed insufficient by court. (§ 7-601[a]). Personal representative must give notice to all unpaid creditors and interested persons of commissions and counsel fees, including expenses of litigation, requested and basis for same and of right to hearing; any request for hearing must be filed within 20 days, otherwise court approval is final in absence of fraud, material mistake or substantial irregularity in proceeding. (§§ 7-502, 7-602, 7-603). For estates of decedents dying before July 1, 1989, 9% and 3.6% commission ceilings were 10% and 4%, respectively, but commissions were reduced by tax on commissions which has been repealed in estates of decedents dying after July 1, 1989.

Tax on Commissions.

Prior to repeal, all ordinary commissions allowed were subject to tax of 1% on first $20,000 of estate and one-fifth of 1% on balance or 10% of total commissions allowed, whichever was greater. Tax due and payable despite fact representative may waive commission or receive legacy in lieu thereof. Tax payable only once on same property. Repealed effective for estates of decedents dying after July 1, 1989. Commissions attributable to personal representative were accordingly higher than currently, i.e., 10% on first $20,000 of probate estate and 4% on balance.

Administration of Small Estates.

Provision is made for expeditious and inexpensive settlement of estates of decedents who die either testate or intestate, where probate assets do not exceed $30,000 in gross value. No bond generally required unless estate exceeds priority expenses. If death occurs before Oct. 1, 1992, claims must be presented by earlier of nine months from date of decedent's death or 30 days after personal representative gives notice by mail. For estates of decedents dying before Oct. 1, 1992, period is six months or 30 days. If administrative expenses, allowable funeral expenses of decedent and family allowances equal known assets of estate, it can be settled immediately without notice to creditors. (§§ 5-601 to 5-606). Rules of procedure and forms for administration of small estates are set forth in R. P. 6-201 to 6-222.

When Administration Unnecessary.

Life insurance company may pay proceeds of policy without administration where total estate including insurance does not exceed $1,000. (ins. art. § 16-110).

Small Estates.

See subheads Administration of Small Estates, When Administration Unnecessary, supra. Also see R. P. 6-201 et seq.

Foreign Executors or Administrators.

Foreign personal representative of nonresident decedent need not take out letters in Md. for any purpose, but may exercise all powers and sue and be sued, subject to any statute or rule as to nonresidents. (§§ 5-501, 5-502). Where real or leasehold property is in Md., foreign personal representative must publish notice to creditors and show name of agent for service of process as to each county or Baltimore City where property located, whereupon creditor has six months from date of first publication to file claim or, if death occurs on or after May 19, 1989, earlier of six months from date of decedent's death or two months after foreign representative gives notice by mail. (§ 5-503[b]). For estates of decedents dying before Oct. 1, 1992, period is nine months from date of decedent's death or two months after notice by mail. To fix inheritance tax, foreign representative files with register of wills, in county where it is believed largest part (in value) of property is located, authenticated copy of appointment and will, if any, and verified application which schedules property and its appraised value. (§ 5-504; R. P. 6-501).

Uniform Anatomical Gift Act adopted with amendments. (§§ 4-501 to 4-513).

Uniform Fiduciaries Act adopted. (§§ 15-201 to 15-211).

Uniform Principal and Income Act.

See topic 13.15 Trusts, subhead Revised Uniform Principal and Income Act. Prior Principle and Income subtitle repealed and replaced, effective Oct. 1, 2000, with Maryland Uniform Principal and Income Act reflecting 1997 revision of Uniform Principal and Income Act. Generally, default rules are set forth for fiduciaries to allocate receipts and disbursements between principal and income of estates and trusts. (§§ 15-101 to 15-530).

Uniform Act for the Simplification of Fiduciary Security Transfers adopted. (§§ 15-301 to 15-311). Uniform Commercial Code does not repeal this Act. (comm. law art. § 10-104).

Successor Corporate Fiduciaries Act. See §§ 15-1A-01 to 15-1A-05.

13.11 FIDUCIARIES:

See topics 13.08 Executors and Administrators, Trusts; categories 14 Family, topic Guardian and Ward; Property, topic Real Property.

13.12 INTESTACY:

See topic 13.07 Descent and Distribution.

13.13 [RESERVED]

13.14 PROOF OF CLAIMS:

See topic 13.08 Executors and Administrators.

13.15 TRUSTS:

References are to Estates and Trusts Article of Code unless otherwise indicated. Pensions and retirement funds are extensively regulated in ins. art. §§ 8-301 to 8-332.

Kinds.

Common law prevails. Express trusts, resulting trusts and constructive trusts are all recognized and enforced. (144 Md. 465, 125 A. 162).

Creation.

No special requirements except that express trust of real estate must be evidenced by writing signed by grantor. (7 Gill & J. 157).

Spendthrift trusts which secure income and principal against creditors are valid, but one may not create such a trust in his own favor. (116 Md. 655, 82 A. 831; 87 Md. 161, 39 A. 613). Maryland Discretionary Trust Act authorizes creation of trust for benefit of one who may someday become disabled or otherwise need state or federal assistance. (14-401 to 14-408).

Charitable trusts are recognized by statute and may be enforced by Attorney General or any interested person. (§ 14-301). Certain acts are prohibited in administration of charitable trusts. (§ 14-303). Procedure provided for modification of charitable remainder trusts to conform with Internal Revenue Code. (§ 14-304). For article on charitable trusts in Md., see 1 Md. L. Rev. 105.

Disclaimer of property interests, including future interests, governed by Uniform Disclaimer of Property Interests Act. (§§ 9-201 to 9-216). See topic 13.16 Wills.

Appointment of Trustee.

No special requirements. Practice is to appoint by deed or will without court involvement. Equity court will make appointment rather than allow trust to fail for want of trustee. (171 Md. 547, 190 A. 215). Court may also authorize transfer of estate from one trustee to another. (R. P. 10-711).

Eligibility and Competency.

No special requirements. Trustee may be individual or corporation authorized to act as fiduciary. Foreign trust company may act as trustee. (16 Op. Att'y Gen. 70). No judge of any state court or federal court and no register of wills or clerk of court may start to serve as trustee after Jan. 1, 1970 unless he is surviving spouse or related to grantor within third degree. (§ 14-104).

Qualification.

If appointed by court, trustee may be required to give bond; otherwise no such requirement. Court-appointed noncorporate trustee may be required to give bond even though excused by trust instrument. (R. P. 10-702).

Removal of Trustee.

Court of equity must remove trustee who: (1) Willfully misrepresents material facts resulting in appointment or other action by court; (2) willfully disregards order of court; (3) shows incapability to properly perform duties of office; or (4) breaches his duty of good faith or loyalty. Court may remove trustee who: (1) Negligently fails to file bond; (2) negligently fails to obey court order; or (3) fails to perform duties or to competently administer trust. (R. P. 13-701; est. & tr. art. § 15-112). Trustee may resign with court approval after filing account and providing notice to interested persons, or without court involvement if so provided in instrument and trustee is not otherwise under court order. (R. P. 10-711).

General Powers and Duties of Trustees.

Except as limited by trust instrument or court order, trustee has, in addition to powers existing at common law, power, without court approval, to invest in, sell, mortgage, exchange or lease any property, and other broad powers similar to those granted by statute to personal representative. (§ 15-102). See topic 13.08 Executors and Administrators, subhead General Powers and Duties. Separately recorded statement of fiduciary powers, as well as terms of any writing in existence, may be incorporated by reference into will or trust instrument. (§ 4-107).

Sales.

In absence of provision in instrument or court order to contrary, trustee has power to sell any property. (§ 15-102[c]). If power of trustee is questioned, court of equity may take jurisdiction of trust and order sale. (R. P. 14-301 to 14-306).

Investments.

Regulated by court rule and by statute. Prudent Investor Rule adopted. (1994, c. 602). If estate consists entirely of cash not in excess of $75,000, trustee subject to jurisdiction of court may apply for court order authorizing deposit in insured financial institution. (R. P. 10-705). In addition to powers conferred by statute or by trust instrument, trustee has broad powers without court approval to invest in any property and to deposit funds in checking accounts and in insured interest-bearing accounts. (§ 15-102). Code sets forth nonexclusive list of lawful investments. (§ 15-106). Otherwise, there is no authorized list of investments. Corporate trustee may invest fiduciary funds in no-load open-end or closed-end mutual fund even if trustee receives compensation from fund provided compensation is disclosed. (§ 15-106). See also category 14 Family, topic 14.07 Guardian and Ward, subhead Investments.

Uniform Management of Institutional Funds Act adopted. (§§ 15-401 to 15-409).

Securities in Name of Nominee.

Trustee subject to court jurisdiction must register securities in his name as fiduciary subject to order of court, except that he may register them in name of nominee if so authorized by trust instrument or by order of court. (R. P. 10-704). Trustee not subject to court jurisdiction may hold security in name of nominee. (§ 15-102[y]).

Uniform Fiduciaries Act adopted. (§§ 15-201 to 15-211).

Uniform Act for the Simplification of Fiduciary Security Transfers adopted. (§§ 15-301 to 15-311). Uniform Commercial Code does not repeal act. (comm. law art. § 10-104).

Common trust funds provided for. (fin. inst. art. tit. 3, subtit. 5).

Revised Uniform Principal and Income Act.

Former Act (adopted in 1962) repealed effective Oct. 1, 2000 and replaced with Maryland Uniform Principal and Income Act which reflects 1997 revision of Uniform Principal and Income Act. (§§ 15-501 to 15-530). Establishes default rules for fiduciaries administering trust or estate to allocate receipts and disbursements to or between principal and income.

Gifts to Minors.

See category 14 Family, topic 14.10 Infants.

Accounting.

Trustee liable at all times for account of his stewardship. (27 Md. 368, 92 Am. Dec. 637). Trustee administering estate under supervision of equity court must file inventory of assets within 60 days after appointment or assumption of jurisdiction and must file accounts once each year. (R. P. 10-707).

Compensation.

Whether appointed by court or by will or deed, trustee is entitled to 6% of income from real estate and 6.5% upon first $10,000 of other income, 5% upon next $10,000, 4% upon next $10,000, 3% upon any excess, plus annual commissions of four-tenths of 1% of first $250,000 of corpus, one-fourth of 1% of next $250,000, three-twentieths of 1% of next $500,000, and one-tenth of 1% of excess of corpus. Usual commissions are allowed for selling real property. In absence of special circumstances, one-half of 1% is allowed upon final distribution. Amount specified is subject to provisions to any valid agreement, and court having jurisdiction may increase or diminish for cause and may allow special compensation for services of unusual nature. For trust accounts, trustee which is bank, loan association or member of Md. bar may charge increased commissions if specified requirements are satisfied. (§ 14-103).

Discharge.

Trustee may be discharged upon completion of purposes for which trust created, but should secure release from beneficiaries. If appointed by court, trustee must be discharged by court order. (§ 15-111).

Accumulations.

Valid up to time limit fixed by rule against perpetuities. (See, e.g., 199 Md. 264, 86 A.2d 504.)

Statute of Uses repealed. Notwithstanding, executory interests and powers of appointment are valid, subject to rule against perpetuities. (real prop. art. § 2-116).

Perpetuities.

See category 21 Property, topic 21.12 Perpetuities.

Pour Over Trusts.

Life insurance, legacies and death benefits of any kind may be made payable to inter vivos or testamentary trusts. (§§ 4-411, 4-412, 11-105). See also topic 13.16 Wills, subheads Bequests and Devises to Inter Vivos Trusts, Bequests and Devises to Testamentary Trusts.

Termination of Small Trusts.

If trust has fair market value of less than $50,000, corporate trustee may terminate trust upon giving notice and receiving no objection to termination. (§ 14-107).

13.16 WILLS:

References are to Estates and Trusts Article of Code unless otherwise indicated. Maryland Rules, Title 6 refers to recently adopted Title 6 of Maryland Rules of Procedures affecting decedent's estates and are referred to as R.P. 6-101 et seq.

No will is valid unless, at time of acknowledgment or execution, testator was 18 years of age or older and was legally competent to make will. (§ 4-101).

Testamentary Disposition.

Generally, no limitations upon testator's disposition of his property. Testator may not create perpetuity, with certain exceptions. (§§ 11-102, 11-103). See category 21 Property, topic 21.12 Perpetuities.

Surviving spouse may elect statutory share. (§ 3-203). Pretermitted child, or issue thereof, entitled to statutory share in certain circumstances. (§ 3-301).

Married woman cannot by will deprive husband of rights given him by law in her property; and husband cannot by will take away wife's rights in his property. (95 Md. 56, 51 A. 823). See also subhead Election, infra.

Joint bank account is non-testamentary and is effective under fin. inst. art. § 1-204. (§ 1-401).

Execution.

Will must be in writing and signed by testator, or by some other person for him, in his presence and by his express direction, and must be attested and subscribed in presence of testator by two or more credible witnesses. (§ 4-102; 38 Md. 417). Will need not show addresses of witnesses, but petition for probate must state addresses of witnesses to will. (§ 5-201[f]).

Attestation Clause.

No attestation clause necessary, but existence eliminates necessity to prove execution by verified statement of person having personal knowledge. (§ 5-303). In practice, following is used:

Form

Signed, sealed, published and declared by the above-named testator as and for his last will and testament in the presence of the undersigned, who, at his request, in his presence and in the presence of each other, have hereunto subscribed our names as witnesses.

Holographic will valid if made outside U.S. by person serving in U.S. Armed Forces, but such is void after one year after testator's discharge unless testator has died or does not then possess testamentary capacity. (§ 4-103).

Nuncupative Wills.

Except for holographic wills, no nuncupative will is valid. (Official Comment to § 4-103).

Revocation.

Will can be revoked: (1) By provision in subsequent validly executed will (a) revoking prior will, either expressly or by necessary implication, or (b) expressly republishing existing earlier will revoked by intermediate will; or (2) by burning, cancelling, tearing or obliterating of same by testator or in his presence and by his direction and consent; or (3) by testator's subsequent marriage followed by birth, adoption or legitimation of child who survives testator; or (4) as to provisions in wills for spouse only, by final decree of absolute divorce or annulment. (§ 4-105). Revocation provisions of § 4-105 apply only to acts occurring on or after Jan. 1, 1970. (§ 12-102[d]). There is no revocation merely by subsequent birth, adoption or legitimation of child. (§ 3-301). Woman's will not revoked simply by subsequent marriage. (76 Md. 369, 25 A. 307).

Revival.

Will expressly revoked by subsequent will is not revived by revocation of subsequent will, unless prior will is still in existence and is republished with requisite formalities. (§ 4-106). If occurring prior to Jan. 1, 1970, revocation of subsequent will is evidence of intention to revive previous will and raises presumption that previous will is revived, which presumption may be strengthened or rebutted by evidence of attending circumstances and probable motive of testator. (20 Md. 357; 177 Md. 97, 8 A.2d 922).

Testamentary Gifts to Subscribing Witnesses.

Legacy to attesting witness is valid, and witness is competent to prove will. (114 Md. 336, 79 A. 600; Official Comment to § 4-102).

Bequests and Devises to Testamentary Trusts.

Pour over trusts valid. Legacy not invalidated because testamentary trust not in existence at time instrument creating legacy was executed if will creating testamentary trust was executed before death of testator creating legacy to trust and will is offered for probate prior to, or within nine months of testator's death and admitted to probate. Termination of trust does not invalidate legacy. (§ 4-412). See also topic 13.15 Trusts, subhead Pour Over Trusts.

Bequests and Devises to Inter Vivos Trusts.

Pour over trusts valid. Trust instrument may be amended or modified subsequent to date of testator's will without invalidating legacy. (§ 4-411). See also topic 13.15 Trusts, subhead Pour Over Trusts.

Testamentary Guardians.

See category 14 Family, topic 14.07 Guardian and Ward.

Deposit of will during testator's lifetime is permitted. (§ 4-201).

Probate.

Will must be probated administratively by register of wills or judicially by orphans' court of county or Baltimore City where decedent was domiciled, or, if not domiciled in Md. and if no probate elsewhere, then where petitioner believes largest part of decedent's property in Md. is located. (§§ 5-101, 5-103). Petition for probate is filed requesting either administrative probate or judicial probate. (§§ 2-206, 5-201, 5-203, 5-206). Probate information booklet can be obtained from Register of Wills. Most estates can be opened administratively, but judicial probate, with notice and hearing before appointment, may be required if requested or circumstances prevent administrative probate. (§ 5-402; R. P. 6-302). Small estates up to $30,000 of probate assets are governed by similar but more simplified procedures. (§ 5-601; R. P. 6-201).

Following Notice of Appointment, Notice to Creditors and Notice to Unknown Heirs published by three successive weekly insertions, interested persons (primarily heirs and legatees) have six months from date of death or two months from date of notice, whichever is earlier, to file objections to appointment or to probate of will. Creditors currently may present claims by earlier of six months after date of decedent's death or 30 days after personal representative delivers to creditor copy of published or other written notice that claims will be barred after 30 days. (§§ 7-103 to 7-103.1; R. P. 6-209, 6-311). For estates of decedents dying before Oct. 1, 1992, period is earlier of nine months after date of death or 30 days after notice by mail. Within 20 days of appointment, personal representative must deliver to register text of published notice and list of interested persons; thereupon, within five days, register must deliver or forward copy of notice by certified mail to each heir and legatee. (§§ 7-103, 7-104, 2-210; R. P. 6-316, 6-317).

Self-proved Wills.

In proceeding for administrative probate, witnesses to will need not appear before register if will has proper attestation clause or if verified statement is filed by person having personal knowledge of circumstances of execution, stating that named witnesses were in fact attesting witnesses. (§ 5-303; R. P. 6-152).

Contest.

Whether or not petition for probate has been filed, verified petition to caveat will may be filed at any time within six months following first appointment of personal representative under will, in which event judicial probate proceeding becomes mandatory. (§ 5-207; R. P. 6-431). Different will subsequently offered for probate may be challenged before later to occur of: (a) Three months after probate of subsequent will, or (b) six months after first appointment of personal representative under will. Action taken after administrative probate is binding as to all interested persons, unless request for mandatory judicial probate under § 5-402 is filed within six months of administrative probate or unless, upon request filed within 18 months of decedent's death, court finds that petitioner was previously unaware of later discovered will, or that he was not given notice, or that there was fraud, mistake or substantial irregularity in prior probate proceeding. (§ 5-304). Judicial probate proceeding may be reopened for reasons contained in § 5-304. (§ 5-407).

In terrorem clause penalizing interested person for contesting will is void if probable cause exists for instituting proceedings. (§ 4-413).

Legacies are payable within nine months of grant of letters unless time is extended for good cause. (§§ 7-101[b], 7-305). Unpaid legatees may petition orphans' court to require personal representative to account and pay legacies. (60 Md. 229). “Legatee” is defined as person entitled to any real or personal property under will and includes trustee but not beneficiary of trust. (§ 1-101[l]). Unless will otherwise provides, legatee other than spouse who fails to survive testator by 30 days is deemed to have predeceased testator absent will provision creating contrary presumption. (§ 4-401).

Renunciation.

Md. Uniform Disclaimer of Property Interests Act (est. & tr. art. tit. 9, subtit. 2) enables person to disclaim, in whole or in part, right of succession or transfer of any property and interest, including future interests and joint tenancies, arising under testamentary and nontestamentary instruments, or by intestacy. (§§ 9-201, 9-202). For disclaimer to have effect, disclaimer must: be in writing or other record, declare disclaimer, describe interest or power disclaimed, be signed by disclaimant, and meet all delivery or filing requirements. (§ 9-202). Delivery must occur by first-class mail, personal delivery, or any other method likely to result in receipt of disclaimer. (§ 9-209).

Effect of disclaimer takes place at instant that instrument creating interest becomes irrevocable. If intestate succession gave rise to interest, disclaimer takes effect as of death of intestate. Disclaimed interest will pass pursuant to provisions of instrument that created interest should instrument contain such provisions. If no such provisions exist in instrument and disclaimant is individual, disclaimed interest will pass as if disclaimant had died prior to distribution or, if disclaimed interest would be shared by descendents of disclaimant by any method of representation had disclaimant died prior to distribution, disclaimed interest passes only to descendants who survived distribution. (§ 9-203).

Interest existing on Oct. 1, 2004, as to which time for filing disclaimer has not expired, may be disclaimed after Oct. 1, 2004. (§ 9-213).

Unclaimed Legacies.

Personal representative may petition orphans' court to distribute unclaimed legacy to county board of education for use of public schools. (§§ 9-108, 9-112). Uniform Disposition of Unclaimed Property Act adopted. (comm. law art. tit. 17). See category 21 Property, topic 21.01 Absentees. See also topic 13.08 Executors and Administrators, subheads Distribution, Distribution if Abroad.

Lapse.

If legatee predeceases testator, legacy does not lapse, but goes directly to those persons who would have taken had legatee died, testate or intestate, owning property; it is not subject to deceased legatee's debts or to second administration. (§ 4-403). If will was executed prior to Jan. 1, 1970, legacy to person who predeceases testator will pass to legatee's intestate heirs. (§ 12-102[d]).

Children may be disinherited, but law does not favor such disposition; intention to disinherit pretermitted child, or issue thereof, must be expressly stated in will. (§ 3-301[b][4]; 8 Gill 46).

If will provides for existing child, but makes no provision for child subsequently born, adopted or legitimated by testator, any such child, or issue of any such deceased child, subsequently born, adopted or legitimated who survives testator and is not expressly excluded by terms of will is entitled to lesser of (1) same share of estate which he would have taken if testator had died intestate, or (2) aggregate value of all legacies to children and issue of any deceased child divided by number of children who survive testator and deceased children leaving issue entitled to share. Issue of pretermitted child who did not survive testator may take by representation. (§§ 3-301, 3-302).

Election.

Dower and curtesy are abolished. (§ 3-202). In lieu of share left by will, surviving spouse may elect to take statutory share by renunciation and election in writing filed in court within seven months after date of first appointment of personal representative under will unless time extended by court order. (§§ 3-203 to 3-208; 8-103). Right of election is personal, but court having jurisdiction may by order exercise such election for minor or person under disability. (§ 3-204).

Contribution.

In event of diminution of estate by widow's election and renunciation, legatees must contribute ratably to elective share. (§ 3-208). Where afterborn children share in estate, legacies of children and issue of deceased children must contribute proportionately. (§ 3-303).

Foreign Executed Wills.

Will executed outside Md. is valid if executed in conformity with law of Md., or of place of execution, or of testator's domicile. (§ 4-104). Will or copy should accompany petition for probate. (§ 5-201).

Foreign Probated Wills.

Copy of will recorded pursuant to laws of another state or country, duly authenticated by register or record keeper and under seal of court or office where recorded, is sufficient evidence of will. Foreign personal representative, without taking out ancillary letters, may exercise in Md. all powers of his office. (§§ 5-501, 5-502). Where estate has property in Md. subject to Md. inheritance tax, foreign personal representative must file with register of wills in county where largest part in value of property is believed to be located copy of his appointment and of any will (authenticated pursuant to 28 USCA § 1738), together with verified application describing all Md. property of estate, valuing it and giving basis for determined value. Register must fix inheritance tax. (§ 5-504). Until he pays or secures payment of inheritance tax and files receipt or evidence of security among permanent records of court, unpaid tax obligation is lien on property of estate; in accordance with tax gen. art. § 13-806. (§ 5-505). See topic 13.08 Executors and Administrators, subhead Foreign Executors or Administrators.

Living Will.

Living wills regulated by health-gen. art. tit. 5, subtit. 6. Any competent person at least 18 years old can execute written declaration to provide or withhold future health care or to appoint agent to make future health care conditions under specific circumstances. Written declaration must be dated, signed by or at direction of declarant, and witnessed by two people acting in good faith. At least one witness must not be entitled to any financial benefit from declarant's death. Oral declaration may be valid if made in presence of attending physician and documented as part of declarant's medical record. Written or oral advance directive becomes effective once attending physician and one other physician certify in writing that declarant is incapable of making informed decision. Unless specified, advance directive allows withholding of life-sustaining procedures, including artificial nutrition and hydration and cardiopulmonary resuscitation. (health-gen. art. § 5-602). Advance directive can contain mental health services that may be provided to individual if individual becomes incompetent and has need for such services during incompetency or as result of incompetency. (health-gen. art. § 5-602.1). Advance directive can contain statement giving consent to gift of all or any part of declarant's body for purpose specified by statute. (health-gen. art. § 5-604.1). Declaration may be revoked. (health-gen. art. § 5-604). Persons following declaration's procedures are exempt from liability. (health-gen. art. § 5-609). Declarations made in other states are effective to degree allowed under Maryland law if executed in compliance with laws of either Maryland or state where executed. (health-gen. art. § 5-617). Optional forms provided. (health-gen. art. § 5-603).

Simultaneous Death.

See topic 13.05 Death, subhead Survivorship.

Testamentary Trusts.

See topic 13.15 Trusts.

Uniform Anatomical Gift Act adopted with amendments. (est. & tr. art. §§ 4-501 to 4-513).

14 FAMILY

14.01 ADOPTION:

Family Law Article effective as of July 1, 1984. References are to article unless otherwise indicated.

Adoption procedure governed by Md. Rules. (R. P. 9-101 to 9-113).

Who May Adopt.

Any adult, even though single or unmarried. (§ 5-309). Married persons must act jointly unless separated under circumstances giving rise to divorce or annulment or petitioner's spouse is consenting natural parent of individual to be adopted or petitioner's spouse is incompetent. (§ 5-315).

Who May Be Adopted.

Any person, whether minor or adult although only minor can be placed under guardianship. (§ 5-307).

Consent Required.

Except when natural parents' rights terminated by valid judicial proceeding, consent must be obtained from: (1) Natural mother; (2) natural father; and (3) person to be adopted if ten years of age or older. Where natural parents' rights terminated by valid judicial proceeding, consent must be obtained from: (1) Executive head of child placement agency which has been awarded guardianship of individual and (2) person to be adopted if ten years of age or older. (§ 5-311). Consent may be revoked within 30 days after consent signed, except individual to be adopted may revoke consent before final decree is entered. (§ 5-311). Natural parent consent valid only if it contains notice of right to revoke consent. Consent of minor parent valid only if accompanied by affidavit of court-appointed attorney certifying that consent is knowingly and willingly given. (§ 5-314). Parental consent is not necessary where there is clear and convincing evidence of: (i) Abandonment of child (i.e., identity of child's natural parents unknown and no one has claimed to be child's natural parent within two months of alleged abandonment), (ii) adjudication in prior juvenile hearings that child is in need of assistance or neglected, abused or dependent child, or (iii) child has been continuously out of custody of natural parent and in custody of child placement agency for at least one year, conditions that led to separation from natural parent still exist or similar conditions of potentially harmful nature still exist, there is little likelihood that those conditions will be remedied at early date, and continuation of relationship between natural parent and child would diminish child's prospects for early integration in stable and permanent family. (§ 5-313).

Conditions Precedent.

Person to be adopted must be physically within Md. or subjected to jurisdiction of equity court. (courts art. § 6-203[e]).

Counseling.

In independent adoption, natural parents must be advised of right to independent legal counsel and adoption counseling. Court may order adoptive parents to pay reasonable fees. (§ 5-320).

Jurisdiction.

Circuit court sitting in equity, except for child who is under jurisdiction of any juvenile court and who previously has been adjudicated to be child in need of assistance. Family Division to be established in each circuit court, where feasible. (§ 1-201).

Venue.

Any court having continuous jurisdiction over person to be adopted, or court of county, or Baltimore City, in which: (1) Petitioner is domiciled; or (2) petitioner has resided for at least 90 days; or (3) licensed child placement agency having custody or control of person to be adopted is located; or (4) person to be adopted is domiciled, if he is related to petitioner by blood or marriage or is adult; or (5) equity court has continuing jurisdiction over custody of person to be adopted. (courts art. § 6-203[e]).

Petition.

Petition must be signed and verified by petitioner and spouse, if any, and must contain following: (1) Name, address, age, business or employment, and employer of petitioner and spouse, if any; (2) name, sex, date and place of birth of person to be adopted, and names, residences and ages of parents; (3) name, age and address of any children of both petitioner and spouse, and relationship to petitioner of person to be adopted; (4) statement of how person to be adopted was located; (5) if person to be adopted is minor, names and addresses of persons having legal or physical care, custody or control since birth, and period of time of such care; (6) explanation if spouse of petitioner does not join in petition; (7) explanation if consent required by law not filed with petition; (8) name of, address of and reference to proceeding appointing guardian, if any, with right to consent to adoption; (9) facts known to petitioner that may entitle person to be adopted or parent of such person to appointment of attorney by court; (10) any change of name desired; (11) if person to be adopted is minor who has been transported from another state to this State for purposes of placement for adoption, statement of whether there has been compliance with Interstate Compact on the Placement of Children (ICPC); (12) as to each petitioner, statement whether petitioner has ever been convicted of crime other than minor traffic violation and, if so, offense and date and place of conviction; (13) that petitioner is not aware that any required consent has been revoked; and (14) if placement pending final action on petition is sought in accordance with fam. law art., § 5-507(c), request that court approve proposed placement. Petitions for guardianship, terminating natural parental rights, are provided for. (R. P. 9-103; § 5–317).

Notice.

Petitioner must give notice of filing of petition to each person whose consent is required, unless their consent is filed with petition. (§ 5-322). Petitioner must also give notice of filing of petition to attorney who represented natural parent and attorney who represented minor child. (§ 5-322).

Proceedings.

Upon filing petition, court enters show cause order thereon unless all parties entitled to service have joined in petition. If parent of child to be adopted is under disability, attorney must be appointed and must make investigation of facts and report to court. Court may in any case conduct investigation or cause one to be made. (R. P. 9-105, 9-106; § 5-323). Court must hold hearing before entering final decree. (§ 5-324.1). Proceedings may be preceded by petition for guardianship, effect of which is to terminate natural parental rights, duties and obligations. (§ 5-317). Guardianship may be granted only after necessary investigations and hearings and with consent of each living natural parent of child, except as in cases of abandonment, neglect, or if it is in individual's best interests. (§ 5-313; 5-317). Court must hold such hearing on petition for adoption as justice requires, with such privacy as it directs. (R. P. 9-109).

Decree may be interlocutory or final, in discretion of court. Interlocutory decree has all effects of final decree unless and until revocation, which may be any time before final decree, except that custody shall not be granted under interlocutory decree for longer than one year. Interlocutory decree must be reviewed within one year of entry or amendment or extension thereof. (R. P. 9-108-9-111; § 5-308). Final decree may not be entered before the later of 30 days after birth of adopted person or expiration of time period for revoking required consent. (§ 5-324; R. P. 9-111). Attorney or firm may not represent both adoptive parent or child placement agency and natural parent. (§ 5-323).

Name.

Court may order change of name in decree. (R. P. 9-111).

Effect of Adoption.

Adopted person, whether minor or adult, becomes to all intents and purposes natural child of petitioner and is entitled to all privileges and subject to all obligations of child born in lawful wedlock to petitioner. Adopted person inherits through and as representative of adopting parent and lineal or collateral kindred of adopting parent in same manner as child by birth of adopting parent. In event of death of adopted child intestate, property passes in same manner as if adopted child had been born in wedlock to adopting parent. Natural parent is freed of all legal duties and obligations to adopted person and is divested of all rights with respect to such person. Adopted child loses all rights of inheritance from natural parents and their natural lineal or collateral relatives and vice versa, unless natural parent is married to adopting parent. Term “child,” “heir,” “issue,” “descendant” or equivalent in deed, grant, will or other instrument is held to include adopted child, unless contrary intent plainly appears by express terms, whether such instrument executed before or after interlocutory or final decree of adoption. If instrument executed before June 1, 1947, this provision applies to those adopted after that date. (§ 5-308; est. & tr. art. §§ 1-205, 1-207). Siblings separated by adoptive placement or foster care may be granted sibling visitation rights upon decree by court, after petition and hearing, if necessary, if visitation is in best interests of children. (§ 5-525.2).

Setting Aside Adoption.

Any party may appeal to Court of Special Appeals from either interlocutory or final decree. Final decree may be set aside for fatal jurisdictional or procedural defects, only if petition is filed within one year following entry of final decree. (§§ 5-325, 5-330).

Public Assistance.

Dep't of Human Resources may, in its discretion, continue support to parents who adopt child formerly under foster care. (§ 5-530). Regardless of income, individual approved by private or public adoption agency may apply for subsidy to local Dep't of Social Services if he seeks to adopt child legally free for adoption who has been determined by local Dep't of Social Services to require medical assistance, medical care or subsidy due to physical or mental disability, age, emotional disturbance, race, ethnicity or sibling relationships. (§§ 5-401 to 5-415). Subsidy may not be denied to eligible child with previously unknown condition and may not be discontinued because child is moved to another state. (§ 5-408[a], [d]). If adoptive parent dies or is incapacitated, subsidy may be continued to another adult who is qualified to assume responsibility for child and does so. (§ 5-408[e]). Adoptive parent is entitled to reimbursement by state for certain expenses for independent or interlocutory adoption of child if department determines that child should not be returned to biological parents, child cannot be placed with adoptive parents without providing assistance and except where it would be against best interest of child, previous adoption attempts were made without assistance and were unsuccessful. (§ 5-410.1).

Interstate Compact on the Placement of Children enacted. (§§ 5-601 to 5-611).

Mutual Consent Voluntary Adoption Registry established. Natural parents, adult adoptees and adult natural siblings may register willingness to have identifying information released to each other. (§§ 5-4C-01 to 5-4C-07).

Interstate Compact on Adoption and Medical Assistance adopted. (§§ 5-4A-01 to 5-4A-08).

14.02 ALIMONY:

See topic 14.06 Divorce.

14.03 COMMUNITY PROPERTY:

System does not obtain.

14.04 DESERTION:

See topics 14.06 Divorce, 14.09 Husband and Wife.

14.05 DISSOLUTION OF MARRIAGE:

See topic 14.06 Divorce.

14.06 DIVORCE:

Subject governed by Courts Article, Family Law Article and Maryland Rules 9-209, 9-210.

References are to Family Law Article unless otherwise indicated.

Grounds for absolute divorce are: (1) Adultery (neither plea of recrimination nor condonation is bar, but either is factor for court to consider); (2) desertion for at least 12 consecutive months prior to filing suit without reasonable expectation of reconciliation; (3) voluntary separation, without cohabitation, for 12 consecutive months prior to filing suit and with no reasonable expectation of reconciliation; (4) conviction of felony or misdemeanor and sentence of at least three years or indeterminate sentence in penal institution, 12 months of which have been served; (5) uninterrupted separation, without cohabitation, for two years prior to filing suit; (6) permanent and incurable insanity, proved by testimony of two or more physicians competent in psychiatry, provided that insane spouse has been confined in institution for at least three years prior to suit; (7) cruelty of treatment toward complaining party or minor child of complaining party, without reasonable expectation of reconciliation; (8) excessively vicious conduct toward complaining party or minor child of complaining party, without reasonable expectation of reconciliation. (§ 7-103).

Grounds for limited divorce, are: Cruelty or excessively vicious conduct to complainant or minor child; desertion; voluntary separation beyond any reasonable expectation of reconciliation. (§ 7-102). Court may require, as condition precedent, that parties participate in reconciliation efforts. (§ 7-102).

Domestic Violence Act of 1994 adopted. (1994, c. 728). See category 7 Criminal Law, topic 7.01 Criminal Law.

Evidence.

Order or decision (or compliance with order or decision) under domestic violence subtitle to fam. law art. (§ 4-501 et seq.) is not admissible in divorce proceeding (§ 7-103.1).

Residence Requirements.

When grounds arose outside Md., plaintiff or defendant must have resided in state for one year preceding suit (§ 7-101[a]); where ground is insanity, one party must have been actual resident of state for two years preceding suit (§ 7-103[A][6]).

Jurisdiction.

Equity courts have jurisdiction, but juvenile or criminal court may have concurrent jurisdiction. Family Division to be established in each circuit court, where feasible. (§ 1-201). Residence of either party gives court jurisdiction. (193 Md. 164, 66 A.2d 381). Court may exercise long arm jurisdiction over nonresident defendant in civil proceeding arising from marital relationship where defendant is personally served, and where: (1) Md. was matrimonial domicile of parties immediately before separation or (2) obligation to pay child or spousal support or counsel fees arose under Md. law or agreement executed by one of parties in Md. (courts art. § 6-103.1).

Venue.

Bill must be filed where plaintiff resides, or where defendant resides, is regularly employed or has place of business, or, in addition, in case of annulment, where marriage sought to be annulled was performed. (courts art. §§ 6-201[a] and 202[1], [2]; R. P. 9-201).

Process.

Same process as is had in other actions is had in divorce action (R. P. 9-202); service on nonresident whose whereabouts unknown may be by publication pursuant to R. P. 2-122. See category 5 Civil Actions and Procedure, topic 5.20 Process, subhead Service by Publication.

Pleading.

Bill must be signed by plaintiff in person and answer by defendant in person. Supplemental bill alleging grounds arising subsequent to original bill may be filed. In all actions in which alimony, maintenance, or support, including child support, is claimed, litigants must file current financial statements unless agreement on amount of alimony, maintenance or support is alleged to exist. (R. P. 9-202, R. P. 9-203).

Practice.

No final decree entered except upon oral testimony by plaintiff before examiner, master, or in open court. (§ 1-203[c]). In uncontested cases testimony taken before examiner or master unless court directs otherwise. (R. P. 2-541[b], 9-208). Divorce cannot be granted on testimony of plaintiff alone; corroboration by at least one other witness is necessary. (§ 7-101). Neither offer to reconcile, nor refusal by other spouse, is defense or bar to divorce. (§ 7-104).

Court may grant absolute divorce forever, legal separation forever or for limited time, and may grant legal separation when absolute divorce is prayed. (§§ 7-102, 7-103). Separation or settlement agreement may be incorporated into decree. (R. P. 9-210).

Temporary alimony may be awarded pending suit. (§ 11-102).

Allowance for Prosecution of Suit.

Court at any time may allow either spouse sum for expenses of litigation, including counsel fees, after considering financial need and justification for suit or defense. Reimbursement may be ordered for expenses already paid. (§ 11-110). See subhead Allowance for Support of Children, infra.

Permanent Alimony.

Court may award alimony to either spouse for limited period in decree granting limited or absolute divorce or annulment. (§ 11-101). Amount and duration in discretion of court after considering financial needs, ability to be self-supporting, time necessary to find suitable employment, standard of living during marriage, duration of marriage, monetary and nonmonetary contributions of each party to family, circumstances leading to separation, age and physical and mental condition, etc. (§ 11-106). Alimony may be awarded for indefinite period if spouse cannot reasonably be expected to become self-supporting or differences in standard of living will be unconscionably disparate. (§ 11-106). Decree may be modified from time to time. (§ 11-107). Right to alimony ceases on remarriage of recipient or death of either party. (§ 11-108). Separate agreement providing for final disposition of alimony is binding on court. (§ 11-101[c]).

Division of Property of Spouses.

Court granted power to make certain disposition of property (§§ 8-201 to 8-214); Md. court may exercise this authority after foreign divorce if one spouse domiciled in Md. when foreign proceeding commenced, and foreign court exercised no jurisdiction over that spouse or property at issue (§ 8-212). When granting annulment, divorce or separation as to personal property, court may order partition or sale of jointly owned property, but may only transfer ownership from one party to other when granting annulment or absolute divorce in certain circumstances (§§ 8-202; 8-205); court has same powers as to real property (§ 8-202). When granting absolute divorce, court shall determine value of “marital property” acquired during marriage other than by inheritance or gift (§§ 8-201[e], 8-203); court may grant monetary award as adjustment of equities of parties concerning marital property, based on enumerated factors, including monetary and nonmonetary contributions of each spouse (§ 8-205); military pensions must be considered as any retirement benefit (§ 8-203[b]). Court may allocate costs of maintaining health insurance coverage and require continuation of reinstatement of health insurance coverage. (§ 12-102). When granting separation or divorce, court may determine which property is “family home” (§ 8-201[c]) and “family use personal property” (§ 8-201[d]) as defined, and may make orders as to use or possession of such property regardless of how it is titled or owned. (§§ 8-206 to 8-208). This authority is to be exercised to continue familiar environment for children, to permit continued use of such property by parent with custody of children, and in consideration of best interests of children and parties. (§ 8-206). Authority may be exercised pendente lite. (§§ 8-207, 8-208). Decree subject to modification (§ 8-209), and may not be for more than three years without extension by court (§ 8-210). Rights under decree cease if spouse granted such rights remarries.

(§ 8-210). See category 13 Estates and Trusts, topic 13.07 Descent and Distribution, subhead Surviving Spouse.

Change of Wife's Name.

Request for change of name should be included in bill and in testimony. If requested, final decree must include restoration of spouse's former name, absent some illegal, fraudulent, or immoral intent. (§ 7-105).

Custody of Children.

Whether divorce is decreed or denied, court may determine who shall have custody and guardianship of children and support them, and may at any time annul, vary or modify order as to children. (§ 1-201). Court may award custody of minor child to either parent or joint custody to both parents. (306 Md. 290, 508 A.2d 964). Neither parent is presumed to have superior right to custody. (§ 5-203). Child 16 or over subject to custody decree may petition court to amend decree to change custody. (§ 9-103). Court may appoint attorney to represent children who does not otherwise represent either party to divorce or custody action. (§ 1-202). Grandparent may petition court for reasonable visitation rights. (§ 9-102). Court may not award custody to parent convicted of 1st or 2d degree murder absent good cause. (§ 9-101.2). If party to custody or visitation order unjustifiably denies or interferes with visitation rights, court may reschedule visitation, modify custody or visitation order to ensure compliance, and assess costs or counsel fees against interfering party. (§ 9-105). Court may require parties in action for divorce to participate in educational seminar designed to assist parents in minimizing disruption divorce causes in lives of their children. (§ 7-103.2).

Uniform Child Custody Jurisdiction Act enacted. (§§ 9.5-101 to 9.5-318).

Allowance for Support of Children.

Court may make allowance for support of children pending suit or thereafter and may change decree with respect thereto from time to time. (§§ 1-201, 12-101, 12-104). Each party is required to notify court and any support agency ordered to receive payments within ten days of change in address or employment. (§§ 12-101[c][1], 10-121, 10-131). Court shall use statutory child support guidelines in proceedings to establish or modify child support, pendente lite or permanent. (§§ 12-201 to 12-204). Except in certain circumstances, court shall immediately authorize service of earnings withholding order for all child support orders. (§ 10-122.1). Child Support Enforcement Administration may request, and court may order, employer or labor union to provide information and assistance to locate absent parent or to enforce parent's support liability. (§ 12-105). Court may issue withholding order on earnings of party defaulting in payment of court ordered child or spousal support. (§§ 10-120 to 10-135).

Remarriage.

No prohibition.

Foreign Divorces.

No statutory provision.

Absolute Divorce after Legal Separation.

Party who has obtained legal separation on ground of abandonment not estopped from subsequently obtaining absolute divorce although grounds insufficient to justify absolute divorce at time separation granted. (§ 7-103[e]; R. P. 9-202).

Separation Agreements.

Any deed, agreement or settlement between husband and wife respecting alimony, support, property rights or personal rights is binding and enforceable (§§ 8-101, 8-201[e]) and does not bar action for divorce, whether cause for divorce existed at time of or arose subsequent to time of execution, or whether at time of execution parties were living together or apart (§ 8-102). Where agreement makes provision for care, custody, education or maintenance of children, court may modify agreement in this respect. (§ 8-103). Court may also modify provisions as to support, or alimony between spouses unless there is express waiver by either spouse or agreement specifically provides otherwise. (§ 8-103).

Annulment of Marriage.

See topic 14.11 Marriage.

14.06A FOSTER CARE:

References are to Family Law Article of Code unless otherwise indicated.

Foster parents are entitled to receive full information from case worker at time of placement, during placement, and upon receipt of new information (except information that is confidential). Foster parents are also entitled to participate in decisions regarding child and have right to receive notice regarding termination of child's placement. (§ 5-504).

14.07 [RESERVED]

14.08 GUARDIAN AND WARD:

References are to Estates and Trusts Article of Code unless otherwise indicated.

Father and mother are joint natural guardians of their minor child. (fam. law art. § 5-203). Orphans' courts and circuit courts (in equity) have concurrent jurisdiction over minors. (§ 13-105). Family Division to be established in each circuit court, where feasible. (fam. law art. § 1-201). Circuit courts have exclusive jurisdiction over disabled persons. (§ 13-105). Court may appoint guardian of property of minor or disabled person. (§§ 13-201 to 13-222). If court determines that property or benefits require protection or management, or funds are necessary for support and welfare of minor, it appoints guardian of property of minor or disabled person. (§ 13-201). Court may appoint guardian of person of minor or disabled person. (§§ 13-702 to 13-710). If neither parent is serving and no testamentary appointment has been made, court may appoint guardian of person of unmarried minor. (§ 13-702). Consent to guardianship may be revoked within 30 days after consent signed. (fam. law art. § 5-317). For disabled person, guardian is within class specified in Health-General § 5-605(A)(2) as one who is able to make health care decisions for disabled person and one who is determined by court to be familiar with disabled person's values. (§§ 13-704 to 13-710). Special provisions apply to guardian of Veterans Administration beneficiary. (§§ 13-801 to 13-806). See also Md. Rules as to fiduciaries. (R. P. 10-101 to 10-712).

Selection of Guardian.

Court appoints guardian of property in following order of priority: (1) Foreign-appointed guardian or committee or other fiduciary; (2) person or corporation nominated by minor or disabled person who was over 16 and of mental capacity; (3) spouse; (4) parent(s); (5) person or corporation nominated by will of deceased parent; (6) children; (7) would-be heir; (8) nominee of institution providing care; (9) nominee of governmental agency paying benefits; (10) any other person deemed appropriate by court. (§ 13-207[a]). Guardian of person of unmarried minor may be appointed by will of surviving parent. (§ 13-701). Guardian of person of disabled person determined according to priorities listed in § 13-707.

Eligibility and Competency.

Nonresident person or trust company may act as guardian upon designation of person or trust company to receive service of process. (§§ 13-207[d], 13-707[d]). No employee or official of local social services, State Department of Human Resources or Office on Aging may be appointed guardian. (§ 13-207[e]).

Appointment of guardian is procured in equity by petition. (§ 13-201[a]). Appointment by orphans' court is procured in same manner or may be made by court upon its own initiative. (§§ 13-201, 13-702, 13-705; R. P. 10-101 to 10-712). Petition for adoption in circuit court may be preceded by petition for guardianship. (fam. law art. § 5-317).

Standby guardian of person or property of minor may be appointed by court upon petition by parent of minor when there is significant risk that petitioner will die or become incapacitated within two years of filing of petition. (§§ 13-901 to 13-908).

Inventory.

See subhead Accounts, infra.

Qualification.

No formalities. Bond not mandatory but may be required of natural person unless excused by appointing instrument or unless estate is less than $10,000. (§ 13-208).

Powers and Duties.

Guardian of property has broad general duties and powers with respect to administration and distribution of minor's or disabled person's property without application to court or court authorization or confirmation. (§§ 13-213, 13-214). Powers include power to sell, mortgage, lease, borrow money and other general fiduciary powers. (§§ 13-213, 13-214, 15-102; R. P. 10-703, 10-108[b]). Court may grant to guardian of person only those powers necessary to provide for demonstrated need of disabled person. (§ 13-708).

Investments.

If estate consists entirely of cash not in excess of $75,000, guardian may apply for court order authorizing deposit in insured financial institution. (R. P. 10-705). Unless limited by court order, guardian of property appointed by court has broad powers without court approval to invest in any property and to deposit funds in checking accounts and in insured interest-bearing accounts. (§§ 15-102, 15-106; R. P. 10-108[a], 10-703, 13-403). See also category 13 Estates and Trusts, topic 13.15 Trusts, subhead Investments.

Securities in Name of Nominee.

For fiduciary estates subject to court jurisdiction, order granting authority must be obtained from court. (R. P. 10-704[a][2]). Fiduciaries not subject to court jurisdiction may hold securities in name of nominee but fiduciary may be liable for wrongful act of nominee. (§ 15-102[x]). See category 13 Estates and Trusts, topic 13.15 Trusts, subhead Securities in Name of Nominee.

Real estate may be sold, invested, exchanged, leased or mortgaged without court order or confirmation. (§ 15-102[c]).

Liabilities of Guardian.

Liabilities and responsibilities are same as those of trustee or other fiduciary. (§§ 13-212, 13-216). Subject to provisions of Md. Rules, termination does not relieve guardian from liability. (§ 13-220[b][2]). Person involved in filing petition for appointment of guardian of person or participating in good-faith report, investigation or judicial proceeding relating thereto is immune from civil liability or criminal penalty. (§ 13-710[a]).

Accounts.

Equity court will require guardian it appoints to file inventory of assets within 60 days after appointment or assumption of jurisdiction and to file accounts once each year. (R. P. 10-705[d], 10-706, 10-707). Guardian appointed by orphans' court must file inventory with court 60 days after appointment and must file annual account with court. (R. P. 10-206). Upon death of guardian, guardian's personal representative must render account of ward's estate and apply for appointment of successor. (§ 13-220[c]). Guardian must submit final account and proposal upon termination of guardianship. (R. P. 10-710[f]; 10-712[f]). Guardian of person must file annual report with court stating address and health status of disabled, non-minor person, guardian's plan to maintain well-being of person, and need for continuance, cessation or alteration of guardianship. (§ 13-708[b][7]; 293 Md. 685, 447 A.2d 1244, cert. denied, 459 U.S. 1147).

Removal of Guardian.

Court must remove guardian and appoint successor, after notice and hearing, for reasons of misrepresentation leading to appointment, willful disregard of court order, incapacity or breach of duty of good faith; court may do so for reasons of negligence or failure to completely perform any fiduciary duty. (R. P. 13-701, 10-208, 10-712).

Termination of Guardianship.

Court, upon petition, notice and hearing, may terminate guardianship if it finds that minority or disability has ceased or that minor or disabled person is dead or for other good cause. (§§ 13-220, 13-221; R. P. 10-209).

Insane Persons.

Circuit courts have exclusive jurisdiction. (§ 13-105). Upon petition, notice and hearing, court appoints guardian for disabled person. (§§ 13-105, 13-201, 13-704). For provisions concerning admission of mentally disabled persons into institutions, and release therefrom, see health-gen. art. §§ 10-601 to 10-813.

Foreign Guardians.

Foreign guardian may represent ward in Md. and exercise all powers of office without being appointed by Md. court but must file designation of Maryland resident to receive process for him. (§§ 13-222, 13-707[d]).

Gifts to Minors.

See topic 14.10 Infants.

Uniform Fiduciaries Act adopted. (§§ 15-201 to 15-211).

Uniform Act for the Simplification of Fiduciary Security Transfers adopted. (§§ 15-301 to 15-311). Uniform Commercial Code does not repeal this Act. (comm. law art. § 10-104).

Permanency for Families and Children Act of 2005 adopted to specify rights in accordance with adoption or guardianship in accordance with Family Law Art. §§ 5-301 et seq., 5-3A et seq. and 5-3B et seq.

14.09 HUSBAND AND WIFE:

Husband and wife are both sui juris as between themselves and with respect to other persons.

Disabilities of Married Women.

All disabilities removed. (See fam. law art. § 4-201 et seq.; Md. Const., Declar. of Rights art. 46.)

Separate Property.

Property belonging to woman at time of marriage and all property she may acquire or receive after marriage is protected from debts of husband. (fam. law art. § 4-301[d]). Similarly, property of husband is his own and free from claims of wife or her creditors. (fam. law art. § 4-301[c]).

Contracts.

No restrictions on contracts made by married woman or husband, and they may contract with each other as freely as with third persons. (fam. law art. §§ 4-204, 4-205). Husband is no longer liable for debt or contract incurred or entered into by his wife on his credit. (fam. law art. § 4-302 repealed by c. 360, H.B. 38).

Antenuptial Agreements.

Settling or barring rights in real or personal property valid if full disclosure is made of worth or property to be waived or if waiving party has adequate knowledge of such worth. Absent disclosure or knowledge, if property rights waived are unfairly disproportionate to worth of property at time agreement is made, burden is on party relying on agreement to prove it was entered into voluntarily, freely and with full knowledge of effect and meaning. Substantial proof of valid waiver is receipt of independent legal advice by waiving party. (fam. law art. §§ 8-201 to 214, 298 Md. 552, 471 A.2d 705; 248 Md. 47, 234 A.2d 865).

Actions.

Married woman may sue or be sued in own name without restriction. (fam. law art. §§ 4-204, 4-205). In suit against married woman, no judgment or decree may be entered against her husband. (fam. law art. §§ 4-204 to 4-205). Husband not liable upon contract made by wife in own name and on own responsibility, or for tort committed by wife out of his presence and without his participation or sanction. (fam. law art. § 4-301). Common law action for criminal conversation abolished. (287 Md. 585, 414 A.2d 929).

Husband and wife may sue each other in contract. (fam. law art. §§ 4-204[5], 4-205[a]). Spousal immunity has been abrogated as to cases sounding in negligence (296 Md. 242, 462 A.2d 506) and intentional tort (376 Md. 461, 830 A.2d 450).

Agency.

One spouse may appoint other to act as agent or attorney. (fam. law art. § 4-204).

Conveyance or Encumbrance of Property.

Husband or wife may convey, transfer or encumber separate personal or real property without consent or joinder of other. (fam. law art. § 4-203; est. & tr. art. § 3-202). See category 21 Property, topic 21.06 Deeds, subhead Straw Deeds.

Desertion or Nonsupport.

Any person who without just cause willfully neglects to provide for support of his or her spouse or minor child, or deserts such child, is guilty of misdemeanor and may be prosecuted on information of State's Attorney. Before trial, with consent of traverser, or after conviction, court may, instead of imposing punishment or in addition thereto, make order for weekly payments to spouse or for child, which order constitutes lien on wages; and upon notice, employer must remit such amount to probation department, Child Support Enforcement Administration of Dep't of Human Resources or designated local agency. (fam. law art. § 10-201 et seq.). Except in certain circumstances, court shall immediately authorize service of earnings withholding order for all child support orders. (fam. law art. § 10-122).

Maryland Uniform Interstate Family Support Act (fam. law art. §§ 10-301 to 10-348).

Community property law inapplicable.

14.10 INFANTS:

Age of majority is 18 for both sexes. “Adult” is person 18 or over. “Minor,” as pertains to legal age and capacity, is person under 18. (art. 1, § 24). Person who has attained age of 18 years and who is enrolled in secondary school has right to support and maintenance until person dies, person marries, person is emancipated, person graduates from or is no longer enrolled in secondary school, or person attains age of 19 years. (art. 1, § 24). Alcoholic beverages may be sold only to persons 21 or older. (art. 2B, § 12-108).

Emancipation.

Upon marriage, minor obtains certain rights, such as right to join with spouse who has reached age of majority in deed, deed of trust, mortgage, lease, note or financing statement. (est. & tr. art. § 13-503[a]). Upon reaching age 15, minor may contract for annuity or life or health insurance, or for property, casualty and surety insurance on own property or interests, and minor not entitled to rescind, avoid, or repudiate contract, or any exercise of right or privilege because of his minority; however, neither minor nor minor's estate being administered by guardian is bound by unperformed agreement to pay insurance premium. (est. & tr. art. § 13-503[c]). Receipt from minor who is sole owner of or has right to withdraw funds from account in financial institution is valid release of institution from payment to minor on account. (est. & tr. art. § 13-504).

Disabilities existing at common law, such as those relating to capacity to contract, still prevail. (comm. law art. § 1-103).

Ratification of Contracts.

Contract not beneficial to infant is not merely voidable but void ab initio and may not be ratified. Contract beneficial to infant or uncertain as to benefit or prejudice is voidable at election of infant and may be ratified upon infant's coming of age. Ratification may be either by express confirmation upon coming of age or by some act, such as acceptance of benefits, which would make it inequitable not to bind infant. Voidable contract may be disaffirmed by minor (1) during minority, or (2) if not ratified, within reasonable time after majority, or by minor's privies in blood. (comm. law art. § 1-103; 49 F. Supp. 611 [D. Md. 1943]).

Medical treatment may be consented to by minor as if such minor is adult, so long as such minor is married or is parent or is seeking advice concerning drug abuse, alcoholism, venereal disease, pregnancy or contraception not amounting to sterilization, is examined for treatment, or to obtain evidence of sexual assault, or initial medical screening and physical examination on and after admission of minor into detention center, or if, in judgment of physician, obtaining of consent of other person would adversely affect person's life or health. (health-gen. art. § 20-102). Minor may not refuse treatment for drug abuse or alcoholism in inpatient alcohol or drug abuse treatment program certified under Title 8 of health-gen. art. for which parent or guardian has given consent. (health-gen. art. § 20-102[c-1]). Minor age 16 or older has capacity to consent to consultation, diagnosis, and treatment concerning mental or emotional disorder. (health-gen. art. § 20-104). This does not include capacity to refuse consultation, diagnosis, or treatment for mental disorder for which parent, guardian or custodian has given consent. (health-gen. art. § 20-104). Physician or psychologist treating consenting minor not liable civilly or otherwise solely by reason of lack of capacity of minor to consent as above, nor is parent, guardian, or custodian liable for costs of treatment. (health-gen. art. §§ 20-102, 20-104). Under some circumstances, physician or psychologist has option to inform spouse, parent, custodian or guardian of treatment given to minor. (health-gen. art. §§ 20-102, 20-103, 20-104). If head of treatment team is physician, physician must make this decision. (health-gen. art. § 20-104). Physician may not perform abortion on unmarried minor unless first giving notice to parent or guardian except if minor does not live with, and reasonable efforts have been unsuccessful to give notice to, parent or guardian, or such notice, in professional judgment of physician, may lead to physical or emotional abuse of minor. (health gen. art. § 20-103). Attorney General for Maryland, however, has opined that health gen. art. § 20-103 is unconstitutional and unenforceable. (75 Op AG No. 90-14). Amendment allowing physician to perform abortion upon mature minor or if in best interests of minor adopted. (health gen. art. § 20-103).

Actions.

Infants may sue by guardian or next friend and defend by guardian, or if no guardian, by attorney appointed by court in each case. (R. P. 2-202[b], [d]). Parent who is sole custodian of minor has exclusive right to sue for period of one year following accrual of cause of action. (R.P. 2-202[b]). Generally, any action brought by next friend may be settled by same, but, if next friend is not parent or person in loco parentis, settlement must be approved by parent or other person responsible for child or, if there is no such parent or person, by court in which suit is brought. (courts art. § 6-405). If minor or other person on behalf of minor recovers on tort claim $2,000 or more, person responsible for payment of money must make payment by check payable to order of designated person, “trustee under Title 13 of the Estates and Trusts Article... for [minor].” Trustee must deposit check in financial institution. Withdrawal is allowed only by minor upon attaining majority, by personal representative of deceased minor, or upon order of circuit court. (est. & tr. art. §§ 13-401 to 13-407).

Parental Responsibility.

Court may enter judgment of restitution against parent for damages that directly result from crime or delinquent act of their child. Restitution can be awarded if property of victim was stolen, damaged, destroyed, converted, or its value substantially decreased. Victim can also be awarded restitution for actual medical, dental, counseling, rehabilitation or funeral expenses; loss of earnings; or direct out-of-pocket loss. Court may award restitution to various governmental units for benefits paid to victim or expenses incurred as result of child's actions. Absolute limit for restitution is $10,000 for each child's act arising from single incident. Court cannot enter judgment of restitution against parent for acts of their child unless parent has been given reasonable opportunity to be heard and present evidence. (crim. proc. art. §§ 11-603, 11-604).

Adoption.

See topic 14.01 Adoption.

Custody.

See topic 14.06 Divorce, subhead Custody of Children.

Absent Parents.

See category 21 Property, topic 21.01 Absentees, subhead Absent Parents.

Distributions.

Any person, including personal representative or trustee, who is under duty to pay money or deliver tangible personal property to minor may pay or deliver to guardian. If none or none known (payor not under duty to inquire), he may pay or deliver not exceeding $5,000 (amount or value) per annum to parent or grandparent with whom minor resides. If none, he may pay or deliver not exceeding $5,000 to parent or other person in loco parentis or deposit it in financial institution in sole name of minor (withdrawable only on court order or upon attainment of majority). Person receiving for minor must apply money to support and education of minor and preserve any excess money or tangible chattels until majority. Payor need not see to proper application of money or property. (est. & tr. art. § 13-501). Personal representative, with approval of court, may distribute to minor who has no guardian by: (1) Depositing money in bank or insured savings and loan association subject to order of court; (2) transferring “custodial property” to custodian under Uniform Gifts to Minors Act; or (3) transferring tangible property to appropriate responsible person under conditions set forth in court order. If guardian has been appointed, personal representative may make payment to guardian upon filing of authenticated copy of authority. (est. & tr. art. § 9-109).

Revised Uniform Gifts to Minors Act repealed.

Uniform Transfers to Minors Act adopted. (est. & tr. art. §§ 13-301 to 13-324). Applies to transfers of custodial property made July 1, 1989 if purported to have been made under Uniform Gifts to Minors Act or instrument designates custodian under Uniform Gifts to Minors Act or Uniform Transfer of Property Act of other state. (est. & tr. art. § 13-321). Transfers of custodial property made before July 1, 1989 validated notwithstanding that transfer may not have been made under Uniform Gifts to Minors Act. (est. & tr. art. § 13-322). Act is not exclusive method for making transfers to minors. (est. & tr. art. § 13-323).

Uniform Securities Ownership by Minors Act not adopted.

Maryland Discretionary Trust Act adopted. (est. & tr. art. §§ 14-401 to 14-408).

Interstate Compact on Placement of Children enacted. (fam. law art. §§ 5-601 to 5-611).

Veterans.

War veteran or member of armed services who is minor may mortgage, buy or sell real estate, execute notes or perform other acts necessary to obtain benefits of Servicemen's Readjustment Act, and release claims. (est. & tr. art. § 13-503[b]).

Child Welfare Accountability Act of 2006 adopted as Family Law Art. 5-1301 et seq. to measure effectiveness of child welfare services, foster homes and other child protective supportive measures by state government.

14.11 MARRIAGE:

Consent Required.

Male or female under 16 may not marry. Male or female 16 or 17 may marry (i) with consent of parent or guardian, who must swear that person to be married is at least 16 years old. (fam. law art. § 2-301[a]).

License.

Marriage license obtained from clerk of circuit court for jurisdiction in which marriage is to be performed. (fam. law art. § 2-401). License fee is $10, but county may set additional fee. (fam. law art. § 2-404). County may discount marriage license fee if couple to be married has completed marriage preparation class within one year prior to marriage. Amount of discount shall be determined by each county. (§ 2-401.1).

Before clerk may issue license, one of contracting parties must appear personally, apply for license and be examined under oath, and license may not be delivered by clerk until after 48 hours from time of application therefor, unless otherwise ordered by judge of circuit court in jurisdiction in case where at least one party is bona fide resident of state. Notarized statement may be substituted for personal appearance before clerk where neither party is resident of county where marriage to be performed. Court may waive 48-hour provision on request of party who is member of U.S. Armed Forces or who is Maryland resident. (fam. law art. §§ 2-402, 2-405).

Application information to be provided by applicant(s) to clerk includes: (i) full name, place of residence, and age of each party; (ii) whether parties are related by blood or marriage and, if so, in which degree of relationship; (iii) marital status of each party; and (iv) whether either party married previously, and date and place of each death or judicial determination that ended any former marriage. (fam. law art. § 2-402[b]). If one party has been divorced, it is not necessary to submit copy of decree, but in practice divorced person must appear before clerk and answer questions before license will be issued.

If legal impediment to marriage exists, clerk must refuse to issue license until ordered by court to do so. (fam. law art. § 2-405[e]).

Ceremonial Marriage.

Marriage ceremony may be performed by: (1) any official of religious order or body authorized by rules and customs of that order or body to perform marriage ceremony; (2) any clerk; (3) any deputy clerk designated by county administrative judge of circuit court for county; or (4) judge. (fam. law art. §§ 2-406[a], 2-410). Person performing marriage must sign certificate and return one to married couple and one to clerk issuing marriage license. No provisions as to witnesses. Special rules for signing and disposition of marriage certificates for Society of Friends or Quaker marriages. (fam. law art. § 2-409).

Marriage must be performed within six months after issuance of license. (fam. law art. § 2-406[b]).

Reports of Marriages.

Person performing marriage must file certificate with clerk issuing license within five days after ceremony. (fam. law art. § 2-409[b]). Clerk must make report at set intervals to Secretary of Health and Mental Hygiene of all licenses, divorces, and annulments granted by court. (fam. law art. § 2-503).

Record.

See category 10 Documents and Records, topic 10.04 Records, subhead Vital Statistics.

Common law marriage not permitted, but if valid where contracted will be recognized. (20 Md. App. 369, 315 A.2d 816).

Proxy Marriages.

Not authorized.

Marriages by Written Contract.

Not authorized. (See 35 Md. 361.)

Prohibited Marriages.

Only marriage between man and woman is valid. (fam. law art. § 2-201). Marriage void within enumerated degrees of consanguinity or affinity. (fam. law art. § 2-202; 22 Md. 468). Prohibition on interracial marriage repealed.

Foreign Marriage.

Marriage valid where performed is valid in Md. (129 Md. 131, 98 A. 358).

Annulment.

Annulment procedure governed by Md. Rules. (R. P. 9-201—9-210). When court grants annulment or effects annulment by convicting one or both spouses of bigamy or of marrying within prohibited degree, clerk must make report to Secretary of Health and Mental Hygiene. (fam. law art. § 2-503).

Venue.

County where plaintiff resides, or where defendant resides, is regularly employed or has place of business, or, in case of annulment, county where marriage was performed. (courts art. §§ 6-201, 6-202).

Children.

Child born or conceived during marriage is presumed legitimate. (est. & tr. art. § 1-206[a]).

14.12 MARRIED WOMEN:

See topics 14.09 Husband and Wife, Marriage; categories 5 Civil Actions and Procedure, topic Evidence, subhead Witnesses; Debtor and Creditor, topic Homesteads; Documents and Records, topic Acknowledgments; Estates and Trusts, topics Executors and Administrators, Wills; Property, topic Dower.

15 HEALTH

15.04 UNIFORM HEALTH ACTS:

Uniform Anatomical Gift Act (revised)-Not adopted.

Uniform Health-Care Decisions Act-Not adopted.

Uniform Health-Care Information Act-Not adopted.

15.05 FOOD, DRUGS, DEVICES AND COSMETICS:

Covered under Maryland Food, Drug, and Cosmetic Act (health gen. art. §§ 21-201 to 263), which regulates labeling, advertising, representations, adulteration, and misbranding of food, drugs, medical devices and cosmetics.

15.06 [RESERVED]

15.07 HEALTH INSURANCE BENEFITS:

Health Maintenance Organizations.

Governed by Maryland Health Maintenance Organization Act (health gen. art. §§ 19-701 to 735), which regulates establishment and operation of health maintenance organizations.

Managed Care Organizations.

Governed by health gen. art. §§ 15-102.2 to 103.

Medicaid; Medical and Pharmacy Assistance Programs.

Governed by health gen. art. §§ 15-101 to 133.

Provider-Sponsored Organizations.

Covered by health gen. art. §§ 19-7A-01 to 04. Subtitle regulates licensing and provision of such services.

15.07A PHYSICIANS:

Licensing of physicians is covered under health occ. art. §§ 14-301 to 321. Disciplinary actions are governed by health occ. art. §§ 14-401 to 415; penalties are found in health occ. art. §§ 14-601 to 607.

Prohibited Referrals and Mandatory Disclosures.

Referrals and disclosures by health care providers are governed by health occ. art. §§ 1-301 to 307.

15.0815.12

15.13 SMOKING REGULATIONS:

Smoking in Public Places and in the Workplace.

Clean Indoor Act (health-gen. art. §§ 24-501 to 511), effective Feb. 1, 2008, prohibits individuals and employees from smoking in public places, including workplaces. It does not apply to certain retail tobacco shops, hotel and motel rooms (with some restrictions), certain facilities owned by tobacco manufacturers, importers, wholesalers, and distributors, and certain laboratories. Business may apply for exemption if business can establish that compliance would cause “undue financial hardship” or that other factors exist which “render compliance unreasonable.” (health-gen. art. § 24-509). All exemptions would expire no later than Jan. 31, 2011. (health-gen. art. § 24-509). Smoking prohibited in indoor workplaces. (lab. emp. art § 5-608).

16 INSURANCE

16.01 INSURANCE COMPANIES:

Insurance companies are under control of Maryland Insurance Administration, headed by Insurance Commissioner, 501 St. Paul Pl., Baltimore 21202. (ins. art. § 2-101). Effective 10/1/97, provisions relating to insurance have been recodified and transferred to new article, Insurance Article. References are to Insurance Article (“ins. art.”) unless otherwise indicated.

Approval of Insurance Commissioner required for certain purchases, mergers, or other acquisitions of domestic insurers or certain other persons. (§§ 7-301-7-600). Extraordinary dividends or distributions of certain insurers regulated. (§ 7-706).

Annual statements must be filed with Insurance Commissioner on or before Mar. 1, accompanied by fee of $125. (§§ 2-112, 4-116). Late fee of $100 per day applies up to and including Mar. 10 ($150 per day thereafter). Audited financial report for year ending Dec. 31 due on or before June 1. Late fee of $100 per day applies up to and including June 1-June 10 (both inclusive) ($150 per day thereafter). Extension for good cause shown granted for ten days for either annual statement or audited financial report. (§ 4-116[a]).

Policies.

Extensive statutory provisions govern policy forms for all types of insurance. Forms must be filed with and approved by Insurance Commissioner. See ins. art., Title 11 and subdivisions thereof for various types of insurance. Variable life insurance and annuity contracts are authorized.

Rates.

All rates for surety, fidelity, casualty, liability, compensation, property, marine, inland marine, title, fire and allied lines must be approved by Insurance Commissioner. Rating organizations must obtain license from Commissioner. Provision made for review by courts of any order or decision of Commissioner. (§§ 2-202, 2-209, 11-205). Commissioner has authority to review affairs and financial condition of such entities. (§ 2-205).

Certificate of Authority.

Domestic and foreign insurers must meet certain requirements as to capital, surplus, deposit of securities; they must file articles of incorporation and bylaws with all amendments; they must annually obtain certificate of authority from Commissioner. (§§ 4-101—4-116). Fee for original certificate of authority is $1,000; annual renewal fee for foreign insurers and domestic insurers with executive office in state is $500. Fee for annual renewal for domestic insurers with executive office outside state $2,500 to $11,000, except for those with out-of-state executive office prior to 1/1/29. Fee for reinstatement of certificate of authority is $500. Fee for filing articles of incorporation is $25. Fee for filing bylaws or amendments is $10. (§ 2-112[a]).

Accounting records and most assets of domestic companies must be kept within state. (§ 4-115).

Discrimination unlawful, with certain exceptions. (§ 27-208).

Rebates unlawful, with certain exceptions. (§§ 27-209, 27-212).

Insurance fraud involving value of $300 or more is felony subject to fine of $500 to $10,000 (or three times value of claim, whichever is larger), and subject to imprisonment up to 15 years, or both. (§§ 2-401—2-408).

Liens.

No provision for lien on policies.

Agents, Solicitors and Brokers.

Insurance agents and solicitors must have annual certificates of qualification, brokers must give bond, and continuing education required for renewal of certificate. (§ 10-101, see Title 10, subtitle 1 generally). Holder of insurance license must timely inform Commissioner of change in trade name. (§ 10-113). Out-of-state broker may negotiate insurance on subjects of insurance in Md. on same terms and on payment of same fees as law of such other state imposes on citizens of Md. engaged in like business in such state unless Commissioner adopts use of uniform application and renewal forms. (§§ 10-119, 10-119.1).

Persons authorized by certificate of qualification issued by Insurance Commissioner and designated Managing General Agents may under certain conditions manage all or part of insurance business of insurer. (§ 8-201, see Title 8, subtitle 2, generally). Those activities expressly prohibited by managing agents are detailed in § 8-209.

Surplus line broker or insured who obtains insurance from unauthorized insurer must file report with Insurance Commissioner. (§§ 3-301—3-327).

Applicant for certificate of qualification as agent or broker must pass written examination, with certain exceptions, and be otherwise qualified in terms of character, study programs and experience. (§§ 10-105, 10-103). Upon denial of application, applicant may have hearing before Commissioner and appeal to courts. (§§ 2-210—2-215).

License of insurance producer may be suspended or revoked and penalty may be imposed for cause after notice and hearing with right of appeal to courts. (§§ 10-126, 2-210, 2-215).

Certificate fee for agent is $30 and $30 annual renewal fee; for surplus broker it is $100 and $200 for biennial renewal.

Lloyds Underwriters may not organize or do business in Md., but insurers may, if otherwise permitted, place surplus line coverages in and cede reinsurance to foreign or alien Lloyds organizations. (§ 4-102[d][2]).

Process Agent.

Each insurer, each surplus line broker, and each fraternal benefit society, before being authorized to do business in Md., must irrevocably appoint Insurance Commissioner as agent to receive service of process. (§§ 4-107, 3-318[b], 3-319[d], 8-407). Process may also be served on domestic insurer as on other domestic corporation. (corps. art. § 1-401; R. P. 2-124[d]). See category 5 Civil Actions and Procedure, topic 5.20 Process, subhead Personal Service on Corporation.

Insurance, surety or bonding company having accredited resident agent in Md. may be sued on its policies through service on such resident agent. (courts art. § 6-306).

Unauthorized or alien insurer who solicits or issues contracts to Md. residents, or who otherwise transacts insurance business in Md. is deemed to appoint Insurance Commissioner as agent to receive service of process. (§ 4-206; see also courts art. § 6-103 [b][6]).

Investments.

Life insurance companies must invest amount not less than required minimum paid-in capital stock in cash, or in bonds of or guaranteed by U.S., or in bonds of Md. or of any other state, or in Md. municipal bonds, and they must invest amount not less than entire reserves as defined in § 5-511(b) in various other restricted classes of reserve investments. (§§ 5-501—5-511). Insurers other than life insurers must invest amount not less than required minimum paid-in capital stock and surplus, not less than 60% in bonds of or guaranteed by U.S. or in Md. state or Md. municipal bonds and balance in bonds of any other state, or in certain Md. mortgages or deeds of trust or in certain ground rents; and they must invest amount not less than 50% of unearned premium and loss reserves in certain other classes of reserve investments. (§ 5-607, see generally §§ 5-601—5-609). Investments of foreign or alien insurers may be as permitted by law of domicile but must be of quality substantially as high as is required of domestic insurers. (§§ 5-502, 5-602).

Reinsurance.

Domestic insurer may reinsure all or any part of particular risk and, with approval of Commissioner, may reinsure all or bulk of insurance in force. (§§ 5-903, 3-124, 3-125). Licenses and activities of reinsurance companies regulated. (§§ 8-501—8-520).

Liability Insurance.

All liability insurance policies issued in Md. must provide that bankruptcy or insolvency of insured shall not release insurer from liability. (§ 19-102). All liability policies issued to charitable institutions must provide that insurer shall be estopped from asserting defense of charitable immunity as to any claim covered by policy. (§ 19-103).

Compulsory motor vehicle liability insurance and certain no-fault coverage is in effect. (trans. art. § 17-101; art. 48A, §§ 19-501—19-514). See category 23 Transportation, topic 23.01 Motor Vehicles, subhead Insurance.

Mutual insurance companies regulated by §§ 3-101 to 3-128.

Fraternal benefit societies regulated by §§ 8-401—8-468. See also subhead Foreign Insurance Companies, infra.

Health maintenance organizations, regulated by health-gen. art. tit. 19, subtit. 7, are authorized by Insurance Commissioner and subject to supervision of Commissioner and Dep't of Health and Mental Hygiene. They are not generally subject to insurance law and do not pay taxes on premiums. However, several provisions within title 15 of Insurance Article are applicable to health maintenance organizations. (health-gen. art., 19-706).

Health Insurance.

Extensive health insurance reforms set forth in courts & jud. proc. art. § 3-2A-02; health-gen. art. §§ 19-706, 19-1501 through 19-1516, 19-714, 19-716, 19-729; health-occ. art. § 1-209. Maryland Health Care Commission established to: (1) develop health care cost containment strategies; (2) promote development of health regulatory system that provides access to quality health care services at reasonable cost; (3) facilitate public disclosure of medical claims data; (4) develop medical care database, resource management systems, and uniform set of benefits to be included in comprehensive standard health benefit plan; (5) develop payment system for health care services; and (6) establish standards for operation and licensing of electronic claims clearinghouses. (health-gen. art. § 19-1502).

Nonprofit health service plans regulated. (§§ 1-202, 5-101, 5-102). Certain educational and religious organizations and community foundations may make annuity agreements with donors.

Except as otherwise provided, health insurance plan issued by nonprofit health center, health insurer or group or blanket health insurer may not contain non-duplicative provisions or coordinating coverage provisions with individually issued specified disease or intensive care policy. (§ 15-104).

Group Health Insurance contracts must offer option to continue coverage to surviving or divorced spouse and dependent children, and to employees who are involuntarily terminated. (§§ 15-404, 15-407—15-409). Employers must offer dependent coverage to eligible employees and to all eligible dependents of all eligible employees but need not contribute to premiums. (§ 17-209). Carriers must establish annual open enrollment period for self-employed individuals for at least 30 consecutive days in each six-month period. (§§ 15-411, 15-210).

When insurer intends to withdraw product from state market, must give Commission 90 days' notice; 180 days' notice required before insurer withdraws completely. (§ 27-606).

Coverage of preexisting conditions and long-term care benefits regulated by §§ 16-214, 15-208, 642 to 649.1, 701. Maryland Partnership for Long-Term Care Program provides long-term care benefits for enrollees. (health-gen. art. §§ 15-401 to 15-407, 647).

Health insurance for women with breast implants regulated by § 15-105.

AIDS Insurance Assistance Program established to help HIV-positive individuals retain insurance coverage. (health-gen. art. §§ 15-201 to 15-205).

Coverage for mental illness regulated by health-gen. art. § 19-703.

Medical Mutual Liability Insurance Society, non-stock corporation to issue policies of insurance against medical malpractice, funded initially by one-time tax on all physicians for privilege of practicing in state, established by 1975 legislative session, c. 544. (§§ 24-201—24-210).

Policies insuring health care providers (courts art. § 3-2A-01) must be consistent with title 3, subtitle 2A of courts art., and must authorize insurer to settle claims within policy limits if paid solely by insurer. Insurer may make payments to claimants, within policy limits, before disposition of claim without admission of liability, damages or other prejudice. (§ 19-104).

Purchase of voting security or entering into agreement to merge or consolidate with or otherwise acquire control of foreign nonprofit health service plan or HMO authorized to do business in Maryland requires approval of Insurance Commissioner under certain circumstances and is regulated under Title 7, subtitles 3 and 4, §§ 7-109, 7-502, 7-306, and health-gen. art. § 19-711.3.

Legal Mutual Liability Insurance Society of Md. authorized. Effective upon finding by Insurance Commissioner, after consultation with state bar association, that substantial number of attorneys are or within six months will be unable to obtain malpractice insurance, lack of which affects Md. residents' ability to obtain adequate legal representation, creates mutual liability insurance company to indemnify person suffering injury resulting from rendering or failure to render legal services. Participation voluntary. (§§ 24-101—24-105).

Maryland Credit Union Insurance Corporation, under supervision of Bank Commissioner, insures all state-chartered credit union accounts after July 1, 1976. Foreign credit unions which are authorized to do business in Md. and have principal place of business in Md. may also be members. (fin. inst. art. §§ 7-101 to 7-117).

Insurance premium finance companies are regulated by §§ 23-101—23-506.

Risk Retention Groups.

Formed pursuant to Federal Liability Risk Retention Act and regulated by §§ 25-101-25-111.

Foreign Insurance Companies.

Foreign insurers may not engage in insurance business in Md. or maintain office or representative to solicit or service any kind of insurance in Md. unless expressly authorized by certificate of authority issued by Insurance Commissioner. Foreign insurer must meet capital and surplus requirements and must file with application for initial certificate of authority: (1) Copy of articles of incorporation with all amendments; (2) copy of bylaws with all amendments; (3) latest annual statement; (4) report of last examination certified by insurance supervisory official of domicile; (5) certificate of supervisory official of domicile that company is authorized to transact kinds of insurance proposed to be transacted in Md.; (6) certificate of supervisory official of domicile that company has deposited $100,000 in trust for protection of policyholders; (7) power of attorney authorizing Insurance Commissioner to receive service of process; (8) for alien insurer, copy of appointment of authority of U.S. manager. (§§ 4-108[3], 4-101—4-118). Similar provisions apply to foreign fraternal benefit societies. (§ 8-424). No insurer may be authorized to do business in Md. if it has or uses name confusingly similar to name of insurer already authorized. (§ 4-102). Foreign insurer authorized to do business in Md. may become domestic insurer by complying with laws relating to formation and organization of domestic insurer and designating place in Md. as principal place of business. (§ 3-126).

Retaliatory Law.

If by laws of any other state, taxes, licenses and other fees, in aggregate, and fines, penalties, deposit requirements or other material obligations, prohibitions or restrictions, additional to or in excess of those imposed by Md. laws on insurance companies of such other state, are imposed on insurance companies of Md. doing business or seeking to do business in such state, like obligations or prohibitions are imposed by Md. upon insurance companies of other state doing business in Md. Excepted from retaliation are personal income taxes, ad valorem taxes and special purpose assessments as to anything other than property insurance. (§ 6-301, see generally Title 6, subtitle 3).

Premium Tax.

Every insurance company must pay tax on new and renewal gross direct premiums allocable to state and written during preceding calendar year at rate of 0% of consideration for annuities and 2% of all other premiums (except property insurance written by domestic mutual insurance companies and wet marine and transportation contracts). Tax rate on premiums for property insurance written by domestic mutual insurance companies is 1%. Unauthorized insurers other than certain wet marine and transportation insurers must pay tax of 3% on gross premiums. (§§ 4-209, 6-102—6-104). Following deductions from gross direct premiums allocable to state are allowed, to extent allocable to taxable premiums: (1) Returned premiums (not including surrender values); (2) dividends paid or credited to policy-holders, or applied to purchase additional insurance or to shorten premium paying period; (3) returns or refunds made or credited to policy-holders because of retrospective ratings or safe driver rewards. (§§ 6-102—6-104). For all taxable years beginning after June 30, 1976 declaration of estimated tax must be filed with Insurance Commissioner on or before Apr. 15 of current taxable year, and 25% must be paid with each quarterly declaration. (§ 6-106).

“Insurance company” means: (1) Person engaged as principal in writing insurance, surety, guaranty or annuity contracts (except nonprofit hospital service plan corporations and fraternal beneficiary associations), including mutual insurance companies (except domestic mutual fire insurance companies), title insurance and credit indemnity companies, and (2) attorneys-in-fact for reciprocal exchanges or interinsurers. “Premiums” includes consideration for surety, guaranty and annuity contracts, dividends on life insurance policies which have been applied to purchase additional insurance or to shorten premium paying period, and so much of gross receipts of title insurance companies as is derived from business of insurance or guaranty, but does not include premiums payable weekly on policies covering weekly disability benefits. (§§ 1-101, 6-101, 6-102, 6-104).

Domestic insurance companies are entitled to tax credit for annual franchise tax, and in addition, life insurance companies having home offices in state are entitled to credit for fees paid to Insurance Commissioner for valuing life insurance policies, not to exceed 15% of total amount of taxes. (§ 6-107).

Every insurance company subject to tax must file with Insurance Commissioner, on or before Mar. 15 in each year, report of new and renewal gross direct premiums written during preceding calendar year. (§§ 6-107, 6-113). Tax remaining, after crediting amount paid with declaration under § 6-106, must be paid to Insurance Commissioner at time for filing report and, if not paid, company is subject to penalty of 5% and interest at monthly rate of 1/12 of adjusted annual federal rate (in effect on Jan. 1 of tax year) established by Secretary of Treasury pursuant to § 6621 of IRC, from date when report was due. (§§ 6-107, 6-108).

Additional assessments after reports are filed are provided for. (§ 6-109). Companies may appeal from additional assessments to tax court. (§ 6-110).

As to premium tax payable by brokers, see subhead Agents, Solicitors and Brokers, supra.

Privilege Tax.

See subhead Certificate of Authority, supra.

Direct Actions Against Insurer.

See category 23 Transportation, topic 23.01 Motor Vehicles, subhead Direct Actions.

Rehabilitation and Liquidation.

Special delinquency proceedings constitute sole method of liquidating, rehabilitating, reorganizing or conserving insurer. (§§ 9-201—9-225).

Maryland Insurance Guaranty Association, to which all licensed insurers in lines other than life and health insurance, mortgage guaranty insurance, and annuities must belong, obligated to pay certain claims against insolvent insurers. (§§ 9-303—9-316).

Unclaimed funds held and owing by insurance company are governed by Uniform Disposition of Unclaimed Property Act. (comm. law art. tit. 17).

Uniform Insurer's Liquidation Act adopted with modifications. (§§ 9-201, 9-203, 9-207, 9-218 to 9-220, 9-226, 9-227).

No-Fault Insurance.

See category 23 Transportation, topic 23.01 Motor Vehicles, subhead Insurance, catchline No-Fault Insurance.

16.02 SURETY AND GUARANTY COMPANIES:

See also topic 16.01 Insurance Companies.

Organization.

Surety and guaranty companies may be incorporated under general corporation laws, upon complying with applicable provisions of insurance law (§§ 21-101, 21-102, 9-407). Minimum capital stock is $250,000.

Assets; Reserves; License.

Stock company must have surplus assets, in excess of capital stock, of $375,000 to obtain original certificate and must thereafter maintain surplus assets of at least $250,000. Mutual company writing assessable policies must have assets totalling at least $250,000 and exceeding by $125,000 required reserves and other liabilities. (3-101—3-128). Company must obtain license or certificate from Insurance Commissioner before doing business in Md. (§ 4-101). It must also maintain certain designated reserves. (§ 5-205).

Rights and Powers.

Surety or guaranty company can execute any bond, undertaking or recognizance and guarantee performance of any act, duty or obligation or refraining from any act as required by any law, rule or regulation of any municipality, board, body, department, court, judge or public officer. (§ 21-101[a] to [c]).

Foreign companies may do business in Md., unless state of incorporation prohibits Md. company from doing business in that state. (§§ 4-101—4-118).

Taxation.

Subject to same taxation as other businesses, except income tax, and also to annual tax of 2% on all new and renewal gross direct premiums. (§§ 6-102—6-103).

17 INTELLECTUAL PROPERTY

17.01 TRADEMARKS AND TRADENAMES:

Trademark or service mark may be adopted and used by any person, including any individual, firm, partnership, corporation, association, union or other organization. (bus. reg. art. § 1-401).

What May Be Registered.

Any word, name, symbol or device to identify goods made or sold by person and to distinguish them from goods made or sold by others, except that which: (1) Is immoral, deceptive or scandalous; (2) disparages, falsely connects or brings into contempt or disrepute persons, living or dead, institutions, beliefs or national symbols; (3) comprises or simulates flag, coat of arms or other insignia of U.S., or of any state, municipality or foreign nation; (4) consists of or comprises name, signature or portrait of living individual, without his written consent; (5) is merely descriptive or geographically descriptive or deceptively misdescriptive or merely surname, unless mark has become distinctive as evidenced by five years continuous use prior to application (although still subject to attack in litigation [214 Md. 325, 135 A.2d 289]); or (6) so resembles mark registered in Md. or mark or tradename previously used in Md. and not abandoned as to be likely to confuse, deceive or cause mistake. (bus. reg. art. § 1-404).

Registration.

Application filed in office of Secretary of State, on form furnished, to be accompanied by filing fee of $50 and three specimens or reproductions of trademark or service mark. Application should include following information: (i) name and business address of applicant, and if corporation, state of incorporation; (ii) goods or services in connection with which mark used; (iii) way applicant uses mark with goods or services; (iv) class under bus. reg. art. § 1-405 to which goods or services belong; (v) date when mark first used anywhere and in Maryland; and (vi) statement that applicant is owner of mark and no other person has right to use either identical, or substantially similar, mark in Maryland. (bus. reg. art. § 1-406). Certificate of registration, when issued, includes information required by application and is effective for ten years; it may be renewed within six months prior to expiration, upon filing form and paying $50 renewal fee. Successive ten year renewal permitted. (bus. reg. art. §§ 1-409, 1-410).

Assignment recorded upon payment of $10 fee to Secretary of State. Assignment void against subsequent purchaser for value without notice unless recorded within three months after date thereof or prior to subsequent purchase. (bus. reg. art. § 1-411).

Cancellation occurs upon failure to renew, or voluntary request, or court order, or upon finding by court of abandonment, nonownership, improper grant, fraud or confusing similarity with prior mark registered in U.S. Patent Office. (bus. reg. art. § 1-412).

Protection Afforded.

Certificate of registration admissible in evidence as proof of registration in court action or proceeding in state. (courts art. §§ 10-101 to 10-103, 10-204).

Infringement.

Any person who: (1) Uses without consent any reproduction, counterfeit or colorable imitation of registered mark, where such use is likely to cause confusion, mistake or deception as to origin of goods, or (2) knowingly reproduces, counterfeits or colorably imitates registered mark and applies same to labels, signs, packages, wrappers or advertisements in connection with sale or distribution of goods or services in state may be enjoined and is potentially liable in civil action by owner for all profits derived and damages suffered. Courts may order any such counterfeits or imitations to be delivered to officer of court or to plaintiff or to be destroyed. (bus. reg. art. § 1-414).

Tradenames.

For definition, see bus. reg. art. § 1-401. Tradenames not registered with Secretary of State. (bus. reg. art. § 1-404[d]). Anyone doing mercantile trading or manufacturing business as agent or doing business under name not his own, must, prior thereto, file with Department of Assessments and Taxation certificate in form prescribed in statute. Fee for filing tradename is $10 plus $1 for each name to be indexed and $12 for each amendment, cancellation, or renewal certificate. (corps. art. § 1-406). Failure to file such certificate renders owner liable to suit by any creditor in name under which business is conducted, and all property possessed, used or acquired in business is liable to seizure and sale under execution. Willful execution and filing of false certificate punishable by fine of up to $1,000, imprisonment of up to one year or both. (corps. art. § 1-406[h]).

It is unlawful and punishable by fine for any person, corporation, association, etc., with intent to defraud, to trade or transact business in state under name, tradename or title same as or similar to that used first by other person, corporation, etc. This does not apply to individuals possessing similar names. (bus. reg. art. § 1-415).

Gasoline Products Marketing Act.

See category 3 Business Regulation and Commerce, topic 3.20 Monopolies, Restraint of Trade and Competition.

17.02 TRADE SECRETS:

Uniform Trade Secrets Act has been adopted in substance under title “Maryland Uniform Trade Secrets Act” (comm. law art. § 11-1201-1209) with following change.

§ 7: Act does not waive or limit any common law or statutory defense or immunity possessed by state personnel as defined under st. gov't art. § 12-101. (comm. law art. § 11-1207[b][2]).

18 LEGAL PROFESSION

18.01 ATTORNEYS AND COUNSELORS:

Business Occupations Article effective as of Oct. 1, 1989. References are to this article unless otherwise indicated.

Jurisdiction over admissions exercised by Court of Appeals and State Board of Law Examiners, consisting of seven lawyers appointed by Court of Appeals. (§§ 10-201 to 10-202). Court has promulgated Rules Governing Admission to Bar of Md. (hereafter “Rule”). Board of Law Examiners has adopted Board Rules (hereafter “Board Rule”).

Eligibility.

Applicant must be 18 years of age and citizen of U.S. before admission but need not be 18 years old or citizen in order to take examination. (§§ 10-207 and 10-209). Candidate must furnish proof of good character and reputation, which is investigated by character committee of practicing lawyers appointed by Court of Appeals. (Rule 5).

Registration As Law Student.

At any time after pre-legal studies, person may file application for admission to bar for purpose of determining if there are any current impediments to applicant's admission. (Rule 2[c][1]).

Educational Requirements.

Candidate must have successfully completed academic work necessary to meet minimum requirements for admission to ABA-approved law school, and must have degree of juris doctor or equivalent from law school. (§ 10-207; Rules 3, 4). Rule 4(b) permits waiver in special cases. Candidate must also complete course on legal professionalism, as required by Rule 11. *Note:* This rule expires on Dec. 31, 2010.

Petition for Admission.

Admission is by petition to Court of Appeals; but petition is on printed form and is purely formal matter once candidate has passed examination and been approved by character committee, unless exceptions are made by any citizen during 30-day period set forth in conditional order of admission. (§ 10-208, Rules 10, 12).

Examination.

State Board of Law Examiners conducts and marks examinations, which are held twice a year. Time and place are fixed by Board. (Rule 7). Examinations are held in Feb. and July during two consecutive days. Exam consists of Multistate Bar Examination (MBE) and essay test on: Agency, business associations, commercial transactions, constitutional law, contracts, criminal law and procedure, evidence, family law, Md. civil procedure, professional responsibility, property and torts. Essay portion is weighted twice as much as MBE in computation of total score. Candidate must achieve total score of 406 or greater in order to pass examination. Neither essay score nor MBE score may be carried over. (Board Rules 4, 5).

Clerkship.

None required.

Special Admission.

Members of bar of any state, district or territory of U.S., who for five out of past seven years, or for total of ten years at any time, have been regularly engaged as practitioners in jurisdiction or jurisdictions in which applicants were admitted to practice, judges of courts of record, or full time teachers of law at law school approved by ABA, may be admitted after examination and proof that they are of good character and reputation and that they intend to practice and to have office for practice of law or to teach law full time in Md. at law school approved by ABA and after examination as to state law. (§ 10-210; Rule 13; Board Rule 6). Petitioner must complete course on legal professionalism, as required by Rule 11. *Note:* This rule expires on Dec. 31, 2010. (Rules 13[p], 11).

Mandatory Continuing Legal Education.

No requirements at present.

Admission Pro Hac Vice.

Upon granting of written motion filed by attorney of record admitted to practice in Md., nonresident attorney may be specially admitted for limited purpose of appearing and participating as co-counsel with movant in any case pending in any state court, agency or commission. Attorney whose special admission is moved must certify number of times he had been specially admitted during preceding 12 months. Specially admitted attorney may participate in court, agency or commission proceedings only if accompanied by Md. counsel, unless latter's presence waived by presiding judge or officer. (§ 10-215; Rule 14). No documents will be accepted by federal district court unless signed by resident counsel except in pro se proceeding. (U.S. Dist. Ct. Local R. 102).

Licenses.

No license requirement other than admission to practice by Court of Appeals. No annual license fee, but annual payments into Client Protection Fund and Disciplinary Fund required. Amounts set each year by Court of Appeals. (§ 10-311; R. P. 16-811; 16-702).

Privileges.

No special privileges other than right to practice law in all courts of state. Attorney not exempt from jury service. (courts art. § 8-209).

Disabilities.

Attorney or solicitor may not be surety on appeal or injunction bond or security for costs, but may be surety on attachment bond. (52 Md. 614).

Liability.

Attorney is liable for damage which results from his failure to execute business entrusted to him with ordinary care and diligence and with fair average degree of professional skill and knowledge. (181 Md. 606, 31 A.2d 312). See category 5 Civil Actions and Procedure, topic 5.08 Costs.

Client Protection Fund has been authorized by statute and established by rule of Court of Appeals to reimburse losses caused by defalcations of attorney. (§§ 10-310 to 313; R. P. 16-811).

Attorney Trust Accounts.

Each lawyer or law firm must maintain account for deposit of trust money. (§§ 10-301 and 302). Attorney trust account must be maintained at approved financial institution in interest or non-interest bearing account. (§ 10-302). Trust monies too small or being held for too short time period to generate at least $50 interest or such larger amount attorney judges is necessary to equal cost of administering account, must be pooled by attorney and interest earned must be paid quarterly to Maryland Legal Services Corporation. (§ 10-303). Any lawyer willfully violating is guilty of misdemeanor and on conviction is subject to disciplinary proceedings under Rules and fine not over $5,000 or imprisonment not over five years or both. (§ 10-307; 280 Md. 21, 371 A.2d 129).

Malpractice Insurance.

Legal Mutual Liability Insurance Society of Md. authorized to provide legal malpractice insurance whenever Insurance Commissioner, after consulting with state bar association, determines that substantial number of attorneys unable to procure such insurance. (§§ 24-101—24-109). See category 16 Insurance, topic 16.01 Insurance Companies.

Compensation.

Right to compensation and amount depend upon contract, express or implied, and may be recovered in quantum meruit. Contingent fees are allowed except in domestic relations and criminal matters. (R. Prof. Conduct 1.5).

Lien.

Attorney has lien on actions, suits and proceedings of attorney's client from time they are commenced and on judgments and awards entered in favor of attorney's client. Lien extends to attorney's fees and compensation specially agreed on with client, if services for such fees and compensation produced funds to which lien is applicable. Attorney's lien is not subordinate to any other lien or claim except prior lien based on salaries or wages due to employees for work which is related to or part of award, order, decree or judgment, or lien against client for state taxes due. (§ 10-501).

Resignation.

Application to resign may be submitted only to Court of Appeals and must be in writing, giving reasons. No resignation allowed when attorney subject of investigation or when disciplinary proceedings pending. Resignation effective upon entry of order accepting it by Court of Appeals. (R. P. 16-775). Reinstatement possible. (R. P. 16-781).

Disbarment.

Attorney Grievance Commission administers discipline and inactive status of attorneys under R. P. 16-711. Disciplinary Fund finances operation of grievance system. Appointed Bar Counsel is chief executive of system and receives and records every complaint. (R. P. 16-712, 16-724). Warning, reprimand, charges, or recommendation of Conditional Diversion Agreement may result. (R. P. 7-734). Attorney being investigated or proceeded against may consent to disbarment by filing joint petition with Bar Counsel and signing affidavit stating his recognition that he could not successfully defend disciplinary proceedings. Reinstatement is possible. (R. P. 16-772, 16-781).

Unauthorized Practice.

No person may practice law without having been admitted to bar, except officer of corporation, employee designated by officer of corporation, partner in business partnership, employee designated by partner, or employee designated by owner of sole proprietorship, or member of limited liability company or employee designated by member of limited liability company may appear on behalf of corporation in civil suit in district court involving claim not exceeding $2,500 and not based on assignment to corporation of interest of another. (§ 10-206). Attorney admitted to highest court of another state permitted to act as corporate house counsel in Md., but is limited to giving advice to corporation, and may not appear in court or before state agency or commission unless attorney is specially admitted. (§ 10-206). Practice of law is deemed to include giving of advice in administration or probate of estates in orphans' courts. (§ 10-101). Model Act Providing Remedies for Unauthorized Practice of Law has been adopted with amendment providing role for Bar Counsel. See subhead Disbarment, supra. (§§ 10-401 to 10-407).

Engaging in unauthorized practice of law punishable by fine not exceeding $5,000. Officer, director, partner, trustee, agent, or employee who acts to enable corporation, partnership or association to engage in unauthorized practice of law subject to fine not exceeding $5,000 and/or imprisonment not exceeding one year. (§ 10-606).

Professional Association (or Corporation).

Professional Service Corporation Act authorizes lawyer or group of lawyers to incorporate. (corps. art. §§ 5-101 to 5-134).

Attorney Ethics.

Maryland has adopted modified version of American Bar Association Model Rules of Professional Conduct. (R. P. 16-812, R. P. Appendix).

19 MINERAL, WATER AND FISHING RIGHTS

19.01 MINES AND MINERALS:

Laws administered by Bureau of Mines, part of Dep't of Natural Resources. (env. art. § 15-201). Main office of Bureau must be in Garrett or Allegany County. (env. art. § 15-201). Land Reclamation Committee advises with respect to open-pit mining. (env. art. § 15-204).

Operation of Mines.

Rules and regulations governing mining activity set out in env. art. §§ 15-401 to 15-406.

Strip mining governed by regulations set out in env. art. §§ 15-501 to 15-513.

Surface mining of minerals other than coal governed by regulations set out in env. art. §§ 15-801 to 15-834.

Deep mining regulated by env. art. §§ 15-601 to 15-618.

Safeguarding of Employees.

Many provisions throughout nat. res. art. tit. 7 for safeguarding employees. Person may not work in mine without supervision until he has satisfied operator that he can work without endangering lives of fellow workers. Each miner must examine his working place and keep it in safe condition; he must immediately cease work and leave his place if he finds it has become dangerous, installing plain danger signal to warn others. Miners must notify foreman of dangerous or unsafe condition known to them. Acts endangering lives or health of employees or security of mine property are forbidden. Bureau of Mines may define special duties relating to security of life or property, and each employee must observe such duties. Operator must direct attention of each worker to general and special rules and regulations and to any exit and escapeway of mine in which he works. (env. art. § 15-404).

Inspection of Mines.

Bureau of Mines may inspect mines and issue orders to require correction of danger or removal of persons or closing of mine. (env. art. § 15-311).

Oil and Gas.

Dep't of Natural Resources enforces provisions relating to drilling, production and underground storage of oil and gas in state. (env. art. §§ 14-101 to 14-103). Person may not drill any well or dispose of any product of well without permit from Dep't. (env. art. § 14-104). Drilling for oil or gas in waters of Chesapeake Bay or any of its tributaries is prohibited except under certain circumstances, and explosives may not be used in seismic operations on Bay or its tributaries. (nat. res. art. § 8-817, env. art. §§ 14-106 to 14-109). Wells can be no closer than 1,000 feet to property boundary line or 500 feet to boundary property line for coal bed methane except: (1) Under special circumstances after hearing, or (2) by agreement with owners of oil and gas on adjacent land. Dep't prescribes distances between wells. (env. art. § 14-112). Owner or operator of gas well may not willfully take gas unless it is metered by standard metering system. (env. art. § 14-119). Special statutory provisions govern underground storage of natural and artificial gas and petroleum products in Prince George's County. (env. art. §§ 14-201 to 14-209). Md. has joined Interstate Oil and Gas Compact. (env. art. §§ 14-401 to 14-404). Special provisions govern leasing of state oil and gas resources. (nat. res. art. §§ 5-1701 to 5-1703).

Mine Railroads.

Such corporations can condemn rights of way and construct necessary railroads not more than ten miles in length. Legislature may at any time regulate, modify or change control, use, and estate of any railroad constructed by such corporation in manner deemed equitable to corporation and necessary to accommodation of public travel or use of railroad. (Formerly art. 23, §§ 168 to 178, deemed apparently obsolete by Legislature and transferred to Session Laws to avoid inadvertent substantive effect its repeal might have.)

Abandoned Mine Drainage Control Act is set out in env. art. §§ 15-701 to 15-706.

Abandoned Mine Reclamation Act is set out in env. art. §§ 15-1101 to 15-1109.

Interstate Mining Compact enacted and entered into. (env. art. §§ 15-901 to 15-902).

20 MORTGAGES

20.01 CHATTEL MORTGAGES:

Chattel mortgages generally obsolete, replaced by use of security agreements and financing statements governed by UCC. UCC governs chattel mortgage used as security device. (comm. law art. tit. 9). Revised art. 9 has been adopted by Maryland. See category 3 Business Regulation and Commerce, topics 3.09 Commercial Code, 3.22 Sales, subhead Retail Installment Sales.

Chattel mortgage is transfer of legal title in designated personal property as security for debt or obligation. Until discharged, it is lien upon property, and, if properly recorded, is good against subsequent lienors. (comm. law art. § 9-317).

What May Be Mortgaged.

Any chattels. (98 Md. 645).

Motor Vehicles.

See category 23 Transportation, topic 23.01 Motor Vehicles, subhead Liens and Security Interests.

Boats.

Security interest in vessel perfected by notation on certificate of title. Owner creating interest must deliver existing certificate together with application for new certificate to Dep't of Natural Resources; secured party must pay $15 fee. Dep't then issues new certificate to secured party. Interest perfected as of time of creation if delivery and payment made to Dep't within 30 days; otherwise interest perfected upon delivery and payment. Upon satisfaction of debt, secured party must send certificate of title and release to owner and copy of release to Dep't within 15 days; upon request of owner, and receipt of certificate of title and release, new certificate is issued to owner. Assignee of secured party's interest should procure new certificate. Special rules apply to vessel subject to security interest brought into state. (nat. res. art. §§ 8-728 to 8-736).

Fixtures.

Uniform Commercial Code adopted. For priorities in relation to fixtures, see comm. law art. § 9-334.

Filing.

See category 3 Business Regulation and Commerce, topic 3.09 Commercial Code.

Recording.

Uniform Commercial Code adopted. To perfect assignment of security interest in mortgage, transfer must be recorded in land records. (real prop. art. § 7-101[b]). As to recording fee, see categories 3 Business Regulation and Commerce, topic Commercial Code; Documents and Records, topic Records. As to recording tax, see subhead Taxation, infra.

Satisfaction or Discharge.

Uniform Commercial Code adopted. (comm. law art. § 9-512).

Foreclosure by Court Proceedings.

Uniform Commercial Code adopted. Court foreclosure rarely used. (R. P. 14-201 to 14-210). For description of foreclosure by court proceeding, see topic 20.04 Mortgages of Real Property.

Sale by Mortgagee.

Uniform Commercial Code adopted. In all mortgages of personal property situated in state, foreclosure may be under: (1) Power of sale, i.e., clause in mortgage authorizing mortgagee or other person named to sell mortgaged property; (2) assent to decree, i.e., provision in mortgage whereby mortgagor assents to passing of decree for sale of property; or (3) court order where mortgage contains neither power of sale nor assent. In case (1) or (2), record holders of at least 25% of mortgage debt must consent or apply for sale. (R. P. 14-202, 14-205).

Where foreclosure is under power of sale or assent to decree, person named in mortgage to make sale must do so under supervision of court of equity for county or Baltimore City where property lies and must: (1) Docket suit if under power of sale, or file petition to foreclosure if under assent to decree and file mortgage or certified copy as exhibit; (2) give bond approved by court or clerk; (3) publish notice of time, place and terms of sale; (4) send notice by certified mail to mortgagor, present record owner and, under some circumstances, subordinate mortgagee, not less than ten nor more than 30 days before sale. Sale must be ratified and confirmed by court. (R. P. 14-203, 14-206, 14-207).

Where mortgage contains neither power of sale nor assent, procedure similar to assent except process, answer, and hearing required as in equity. Court may decree sale if payment not made in reasonable time provided. (R. P. 14-205).

Where sale does not fully satisfy mortgage debt and interest, plaintiff may, within three years after final ratification of sale, apply for and obtain decree in personam for balance due. (R. P. 14-205; comm. law art. §§ 9-607, 9-608).

Redemption.

Uniform Commercial Code adopted. No right of redemption after bona fide sale. (224 Md. 408, 423-24, 168 A.2d 358 cert. denied 368 US 830).

Foreign Mortgages.

Uniform Commercial Code adopted.

Taxation.

See category 10 Documents and Records, topic 10.04 Records, subhead Tax on Recordation. Purchase money mortgages, assignments of mortgages, and security agreements on vehicles or vessels which are filed with Motor Vehicle Administration or Dep't of Natural Resources are exempt from recordation tax. (tax-prop. art. § 12-108[b]).

Form of Security Agreement.

See Uniform and Model Acts section of Law Digest for model form.

Form of Financing Statement.

Only original need be filed. Financing statement filed only at State Department of Assessments and Taxation. (comm. law art. §§ 9-501, 9-502). No official form. See Uniform and Model Acts section of Law Digest for model form.

Form of Statement of Continuation, Partial Release, Assignment, or Termination.

No official form. Continuation statement must identify original statement by file number. (comm. law art. §§ 9-510, 9-512, 9-515). Revised art. 9 adopted for assignments. (comm. law art. § 9-514). Revised art. 9 adopted for termination statements. (comm. law art. § 9-513).

20.02 COLLATERAL SECURITY:

See category 8 Debtor and Creditor, topic 8.15 Pledges.

20.03 MORTGAGES OF PERSONAL PROPERTY:

See topic 20.01 Chattel Mortgages; category 3 Business Regulation and Commerce, topic 3.09 Commercial Code.

20.04 MORTGAGES OF REAL PROPERTY:

References are to Real Property Article of Code unless otherwise indicated.

Mortgage is transfer of legal title to mortgagee as security for indebtedness. Mortgagor retains only equitable interest in property or equity of redemption. Equity of redemption passes to personal representatives of intestate. (est. & tr. art. § 1-301).

Heirs, devisees, personal representatives or assigns take all rights of mortgagor. (§ 1-103). Equity of redemption is subject to dower and curtesy as to estates of persons dying before Jan. 1, 1970. It is liable for debts and may be seized and sold in execution. (courts art. § 11-501).

Deed of real estate absolute on its face is considered mortgage if there is defeasance in writing, but such defeasance must be recorded with deed. (§ 7-101[a]).

Execution.

Mortgage or deed of trust executed prior to July 1, 1974 must be signed, sealed and acknowledged; on or after July 1, 1974, seal or attestation not required if mortgage or deed of trust is in accordance with codified Statute of Frauds. (§ 4-101). Mortgage or deed of trust is invalid (except as between parties thereto) unless there is endorsed or attached oath or affirmation of mortgagee or secured party that consideration recited is true and bona fide. No purchase money mortgage or deed of trust (except where mortgage or deed of trust is given to seller in transaction to secure payment of all or part of purchase price) is valid, either as between parties thereto or as to any third parties, unless there is endorsed thereon or attached thereto oath or affirmation of secured party stating that actual sum of money advanced at closing transaction by secured party was paid over and disbursed by secured party to either borrower or person responsible for disbursement of funds at closing at time no later than complete execution and delivery of mortgage or deed of trust by borrower; lender may, however, deliver net proceeds if certain conditions met. Affidavit is required for only that part of loan that is purchase money, and if affidavit not given, mortgage or deed of trust is invalid only to extent of part of loan that was purchase money. Such affidavits are not applicable on or after July 1, 1974 to mortgages or deeds of trust where loan is business loan and usury laws (comm. law art. § 12-103[e]) permit any rate of interest (§ 4-106).

Effective date of mortgage or deed of trust is date of delivery, which is presumed to be date of last acknowledgment, if any, or date stated in mortgage, whichever is later. (§ 3-201).

Recording.

Mortgage or deed of trust, when recorded, takes effect from its effective date as against mortgagor, his personal representatives, all purchasers with notice and all creditors of mortgagor with or without notice. (§ 3-201). Deed includes any deed, grant, mortgage, deed of trust, lease, assignment and release, pertaining to land or property, including interest in rents and profits from rents. (§ 1-101[c]). Interest created by deed granting, assigning, or otherwise transferring interest in rents or profits arising from property is perfected upon recordation regardless of terms of assignment and without assignee being required to take any further affirmative action. (§ 3-204).

Every mortgage, deed of trust or other instrument which also affects personal property shall be recorded among land records only. If interested party requests, index of financing records provided for in Uniform Commercial Code shall include notation that instrument has been recorded among land records, and instrument shall be indexed in general alphabetical index for land records. Such notation and indexing shall have same effect as if instrument were recorded in full among financing records. (§ 3-301).

Recording Fees.

In Baltimore City and in all counties, fee (i) $10 for release nine pages or less; (ii) $20 for any other instrument nine pages or less; (iii) $20 for instrument, other than as provided in (i), regardless of length, involving solely principal residence; (iv) $75 for any other instrument ten pages or more. (§ 3-601). Deed includes any deed, grant, mortgage, deed of trust, lease, assignment and release, pertaining to land or property, including interest in rents and profits from rents. (§ 1-101[c]). Interest created by deed granting, assigning, or otherwise transferring interest in rents or profits arising from property is perfected upon recordation regardless of terms of assignment and without assignee being required to take any further affirmative action. (§ 3-204).

Taxes.

See category 10 Documents and Records, topic 10.04 Records, subhead Tax on Recordation. Exempt from recordation tax are security agreements on vehicles and vessels which are filed with Motor Vehicle Administration or Department of Natural Resources, mechanics' liens, crop liens, certain purchase money deeds of trust or purchase money mortgages, assignments of mortgages or deeds of trust, judgments, releases, orders of satisfaction, participation agreements showing interest in note, certain Uniform Commercial Code security agreements, certain refinancing agreements where refinanced property is mortgagor's principal residence, certain instruments transferring property between spouses or former spouses in accordance with property settlement or divorce decree, certain supplemental and previously recorded instruments, and instruments transferring property between certain relatives. Also exempt from tax are certain transfers of corporate property between related corporations, certain corporate or partnership conveyances of property upon dissolution, liquidation or termination, land installment contracts, options to purchase real property, deeds conveying title to real property where recordation was previously paid on contract of sale between same parties, transfers to certain public agencies, leases of seven years or less, certain articles of merger, articles of consolidation, transfers of property from individual(s) conducting real estate enterprise to limited liability company transfers of property from partnership to limited liability company if members of limited liability company and their allocation of profits and losses are identical to partners of converting partnership, and if land to be used for certain environmental purposes. (tax-prop. art. § 12-108).

Trust Deeds.

Deed of trust may be used as substitute for mortgage. See subheads Execution, supra, Future Advances, infra.

Future Advances.

Mortgage executed prior to July 1, 1974 is lien for principal sum which appears on face of mortgage and is particularly mentioned and expressed to be secured thereby at time of executing same. Mortgage executed on or after July 1, 1974 is lien for principal sum which appears on face of mortgage and is particularly mentioned and expressed to be secured thereby, without regard to when advanced or readvanced. If after date of mortgage any sum is advanced or readvanced, priority for sum dates from date of mortgage regardless of whether advance or readvance was obligatory or voluntary under terms of mortgage. (§ 7-102).

Mortgage or deed of trust executed on or after July 1, 1974 is lien on property for principal sum of money up to aggregate principal sum appearing on face and expressed to be secured thereby, without regard to whether or when advanced or readvanced except that there is no necessity for recitation of principal sum for mortgages or deeds of trust to guarantee party secured against loss from being obligee of third party, or to indemnify party secured against loss from being endorser, guarantor, or surety, or secure guarantee or indemnity agreement. Where any sum of money is advanced or readvanced subsequent to date of mortgage or deed of trust, priority for such sum of money shall date from date of mortgage or deed of trust as against rights of intervening purchasers, mortgagees, trustees under deeds of trust or lien creditors, regardless of whether advance or readvance was obligatory or voluntary under terms of mortgage or deed of trust. (§ 7-102; see § 15-102[11]).

After-Acquired Property.

Only under certain circumstances will mortgage of after-acquired property be valid in Md. After-acquired property clause will be strictly construed and property must clearly fall within provision. (144 Md. 654, 125 A. 401; 55 F.2d 211; 217 Md. 337, 143 A.2d 62; 19 Md. L. R. 294).

Priorities.

Recorded mortgage or deed of trust takes effect from its effective date as against mortgagee or trustee of any mortgage or deed of trust executed and delivered subsequent to such effective date unless subsequent mortgagee or trustee: (1) Has accepted delivery of such mortgage or deed of trust in good faith, without constructive notice through possession, and for good and valuable consideration, and (2) has recorded such mortgage or deed of trust first. (§ 3-203).

Mortgage or deed of trust to secure purchase money is preferred to any previous judgment against purchaser, provided such mortgage or deed of trust recites that sum so secured is in whole or in part purchase money for property purchased or otherwise recites that it is purchase money mortgage or deed of trust. (§ 7-104).

Subordinate mortgagee may record in separate docket request to receive notice of proposed foreclosure sale. (§ 7-105[c][2]). Failure of subordinate mortgagee to record request for notices does not affect duty of holder of superior mortgage to provide necessary notice except that holder of superior interest does not have duty to provide notice to condominium council of unit owners or homeowners association that has not filed request for notice. (§ 7-105[c][3]).

Payment of Notes.

Title to all promissory notes and other instruments secured by mortgage is conclusively presumed to be vested in person holding record title to mortgage. As to payments made after July 1, 1974, after assignment of mortgage has been recorded, payment made by original mortgagor to assignor will be effective to reduce or discharge note or debt, unless such mortgagor has received actual notice of assignment prior to payment. (Also applies to payment by transferee of mortgaged property except where assignment of mortgage is of record at effective date of transfer of mortgaged property). (§ 7-103).

Subordination agreements honored if adequately evidenced. (243 Md. 480, 221 A.2d 361).

Assignment.

Mortgage may be assigned by lengthy assignment or by brief indorsement on instrument (to be recorded). (§§ 3-106, 4-203). Clerk records assignment with attachment containing names of parties to original mortgage and reference to where mortgage recorded. (§ 3-106). Short form is as follows:

Form

I hereby assign the within mortgage to the assignee,...... Witness my hand this...... day of...... 20..... (§ 4-203[a]).

As to mortgages or assignments executed on or after July 1, 1974, grant of security interest in mortgage as security for payment of indebtedness or performance of obligation is governed by Uniform Commercial Code, but to perfect security interest, assignment of mortgage must be recorded in county where mortgage is recorded, and no financing statement need be filed. (§ 7-101). See subhead Payment of Notes, supra.

Release.

Mortgage, deed of trust, or lien instrument may be released at option of clerk by short form of indorsement written upon record; or release may be endorsed on mortgage, deed of trust, or lien instrument which is recorded; or party may present evidence of indebtedness marked “paid” or “cancelled,” which clerk may index and record; or release may be by long form in separate instrument, setting forth names of parties and date and record reference to instrument being released, which is recorded; or party may present original mortgage marked “paid” or “cancelled” by mortgagee or agent, which clerk may index and record; or party may present canceled check evidencing final payment, which clerk may index and record, if: (1) 60 days have passed since final payment, party sent secured party copy of § 3-105 and notice that if no release is received in 30 days party will obtain release by presenting canceled check, and 30 days have passed since notice was mailed, (2) canceled check contains name of secured party, account number of debt (if any), and words indicating check represents payment in full, and (3) party presents affidavit by member of Md. Bar that mortgage, deed of trust, or lien instrument has been satisfied, that notice described above was sent, and setting forth recording reference for original mortgage, deed of trust, or lien instrument is attached to check; or party executes and acknowledges certification of satisfaction if form prescribed by statute. (§ 3-105). Short form of release is as follows:

Form

I hereby release the within (or above) mortgage (deed of trust or lien instrument). Witness my hand, etc. (§ 4-203[b]). See §§ 4-203(e) and 3-105(d)(5) for partial release.

Release of part of property allowed by execution and acknowledgment of partial release on separate instrument. (§ 3-105[f]).

Person responsible for disbursing funds at settlement must furnish buyer and seller at settlement with copy of recorded release of mortgage or deed of trust; but where such person properly disburses all funds entrusted to him within five days from delivery of deed, he need furnish such copy only upon specific request of buyer or seller. (§ 7-106[b]). Holder of lien or agent, on payment in satisfaction of lien, must furnish original copy of executed release upon written request from person responsible for disbursement of funds in connection with grant of title to property; release must be mailed or delivered within seven days of receipt of currency, certified or cashier's check or money order in payment of debt, or within seven days after clearance of other commercial paper given in payment. (§ 7-106[d]).

Satisfaction.

Payment of mortgage debt constitutes satisfaction, and mortgagor by equity proceeding can thereafter compel mortgagee to execute release. (56 Md. 421). See § 7-106(e).

Foreclosure.

Mortgages of real or personal property situated in Md. may be foreclosed under (1) power of sale, i.e., clause in mortgage authorizing mortgagee or any other person named therein to sell mortgaged property, or (2) assent to decree, i.e., provision in mortgage whereby mortgagor assents to passing of decree for sale of property. (§ 7-105[a]). In each case record holders of at least 25% of mortgage debt must consent or make application for sale, and process, answer or hearing is not required. Mortgages may also be foreclosed where there is neither power of sale nor assent to decree, in same manner as mortgage containing assent to decree, except that (1) process, answer and hearing are required, (2) 25% requirement is inapplicable, and (3) court, under certain circumstances, may order sale before final decree. Action to foreclose mortgage under power of sale may only be instituted by natural person authorized to exercise power. (R. P. 14-201—14-205).

Where foreclosure is under power of sale, person named in mortgage to make sale must do so under supervision of court of equity for county or Baltimore City where property lies. Such person must: (1) Docket suit in appropriate equity court and file verified statement of mortgage debt together with mortgage or certified copy as exhibit; (2) give bond approved by clerk or court and publish notice of time, place and terms of sale (15 days notice required for real property, once a week for three successive weeks; five days notice for personal property); and (3) not less than ten nor more than 30 days before sale, send notice by certified mail, return receipt requested, bearing U.S. Postal Service postmark to mortgagor, present record owner and holder of subordinate mortgage, deed of trust, judgment or other subordinate recorded or filed interest who has filed appropriate request to receive notice. Sale must be ratified and confirmed by court. Failure to give notice to record owner or subordinate mortgagee does not invalidate title of purchaser; failure to give notice to mortgagor does not invalidate sale if person conducting sale gives affidavit or return receipt that such notice to mortgagor has been given prior to ratification by court. (§ 7-105; 7-105.1; 7-105.2; 7-105.3; R. P. 14-203, 14-206).

Where foreclosure is under assent to decree, procedure is substantially same. Mortgagee files petition to foreclose in equity and files verified statement of mortgage debt together with mortgage or certified copy as exhibit. If default has occurred, court will enter decree ordering that property be sold forthwith and appointing trustee or trustees to make sale. Trustee must give bond and sell property pursuant to terms, including notice, fixed by court. Sale must be ratified by court. (R. P. 14-203, 14-206).

Strict foreclosure is seldom if ever used.

Deed of trust may be foreclosed in same manner as mortgage, except that foreclosure to be made by trustee appointed by deed or successor and 25% rule inapplicable. (R. P. 14-202[c],

14-210).

All purchasers at foreclosure sale have same rights and remedies against tenants of mortgagor as mortgagor had, and said tenants have same rights and remedies against purchaser as against mortgagor on date mortgage was recorded. If mortgage so authorizes and required advertisement of sale so discloses, foreclosure sale is subject to tenancies entered into after recording of mortgage. Any lease so continuing shall be unaffected by sale, except that purchaser shall become landlord, as of date of sale, on ratification of sale. (§ 7-105[f]).

Sales.

See subhead Foreclosure, supra.

Deficiency Judgment.

Decree in personam for deficiency shown by auditor's account may be obtained against mortgagor, provided motion therefor is made within three years from date of ratification of auditor's account. (R. P. 14-208).

Moratorium.

None.

Redemption.

Equitable right of redemption inherent in every mortgage transaction, regardless of form. (93 Md. 164, 48 A. 461). It must be exercised within reasonable time after forfeiture or be lost. (32 Md. 421). Right is divested by valid mortgage foreclosure sale. (153 Md. 50, 137 A. 509). Application to reopen judgment rendered in tax sale foreclosure proceeding granted only for lack of jurisdiction or fraud in conduct of proceedings to foreclosure. (tax-prop. § 14-845).

Stale Mortgages.

Presumption that mortgage or deed of trust which remains unreleased of record has been paid off if 12 years after date of last payment called for in said instrument or any amendment or modification thereto have elapsed, or 40 years after date of record of such instrument have elapsed when date of last payment called for in such instrument cannot be ascertained and if no action has been brought to enforce lien of said instrument within time periods set out above and no continuation statement has been filed within one year before expiration of applicable time period, lien created by such instrument shall terminate, shall no longer be enforceable against property, and shall be extinguished. (§ 7-106[c]).

Form for mortgage of fee simple property is as follows:

Form

This Mortgage, Made this...... day of...... in the year 20.... by and between...... of...... in the State of Maryland, of the first part, Mortgagor, and...... of the second part, Mortgagee: Whereas, Mortgagor is indebted to Mortgagee in the full and just sum of $......, etc.

Now this Mortgage Witnesseth, that in consideration of the premises and of the sum of $1, the said...... do.... grant and convey unto...... heirs and assigns in fee-simple, all...... lot.... or parcel.... of ground situate and lying in the...... aforesaid, and described as follows, to wit:—Beginning for...... block.......

To have and to Hold the aforesaid parcel.... of ground, and premises unto and to the proper use and benefit of...... heirs and assigns forever. Together with the buildings and improvements thereupon, and the rights, alleys, ways, waters, privileges, appurtenances and advantages thereto belonging or in anywise appertaining.

Provided, that if the said...... executors, administrators or assigns, shall well and truly pay, or cause to be paid, the aforesaid principal sum of...... dollars and all the installments of interest thereon, when and as each of them shall respectively be due and payable as aforesaid, and shall perform each and all of the covenants herein on...... part to be performed, then this mortgage shall be void.

And the said Mortgagor..... hereby assent...... to the passage of a decree for the sale of the property hereby mortgaged, such sale to take place only after a default in any of the covenants or conditions of this mortgage as herein provided; and the said Mortgagor...... hereby also authorize the said Mortgagee.....,...... personal representatives, or assigns, or...... duly authorized Attorney or Agent of the said Mortgagee.....,...... personal representatives, or assigns, after any default in the covenants or conditions of this mortgage, to sell the hereby mortgaged property. Any such sale, whether under the above assent to a decree or under the above power of sale, shall be under the provisions of The Real Property Article of the Public General Laws of Maryland and under Tit. 14, c. 200 of Maryland Rules of Procedure or under any other General or Local Law and of the State of Maryland relating to mortgages, or any supplement, amendment, or addition thereto. And upon any such sale of said property, the proceeds shall be applied as follows: (1) to repayment of all expenses incident to said sale, including, but not limited to, reasonable counsel fees and a commission to the party making the sale of said property equal to the commission allowed Trustees for making sale of property by virtue of a decree of a Court having equity jurisdiction in the State of Maryland; (2) to the payment of all claims of the said Mortgagee.....,...... executors, administrators or assigns hereunder whether the same shall have matured or not; (3) and the surplus (if any there be), to the said Mortgagor.....,...... heirs, personal representatives or assigns, or to whoever may be entitled to the same.

And it is agreed, that until default be made in the premises, the said part.... of the first part...... executors, administrators or assigns, shall possess the aforesaid property upon paying, in the meantime, all taxes and assessments, public dues and charges levied or assessed, or to be levied or assessed, on said hereby mortgaged property, which taxes, mortgage debt and interest, public charges and assessments,...... the said part.... of the first part covenant.... to pay when legally payable.

And the said part.... of the first part further covenant to insure, and pending the existence of this mortgage to keep insured, the improvements on the hereby mortgaged property to the amount of at least...... dollars, and to cause the policy to be effected thereon to be so framed or endorsed as in case of fire, to inure to the benefit of the said...... executors, administrators or assigns, to the extent of...... lien or claim hereunder.

Witness...... hand and seal.......

Test:

....

.... (Seal).

.... (Seal).

State of Maryland, City or County of......, ss.:

I hereby certify, that on this...... day of...... in the year 20.... before me,...... of the State of Maryland, in and for the...... aforesaid, personally appeared......, the mortgagor.... named in the foregoing mortgage and...... acknowledged the aforegoing mortgage to be...... act. At the same time also appeared......, mortgagee, and made oath in due form of law, that the consideration set forth in said mortgage is true and bona fide as therein set forth and that the loan sum secured hereby has been paid over and disbursed by the mortgagee unto the mortgagor or the person responsible for disbursing of funds in the closing transaction or their respective agent at a time no later than the final and complete execution of this mortgage.

For variation of form of affidavit of consideration, see subhead Execution, supra.

For statutory form of mortgage, see § 4-202(h).

Terms of any unexecuted declaration of provisions, covenants and conditions which has been recorded among county land records may be incorporated into mortgage or deed of trust recorded in same land records by specific reference to said declaration and by giving its record reference. Intention to incorporate must be clear, and mortgagor must be given copy of declaration when mortgage executed. (§ 7-108). Any change or modification to mortgage or deed of trust does not extinguish existing lien. (§ 7-111[a]). If change or modification increases principal secured above amount appearing on face of mortgage or deed of trust (1) existing lien priority of original document shall continue as to principal sum secured immediately before modification, and (2) lien priority for increase in principal sum shall date from date of modification. (§ 7-111[b]).

Interest chargeable in connection with loans secured by first mortgage or first deed of trust on residential real property is any amount as long as loan agreement and terms meet certain criteria. (comm. law art. § 12-103[b]). See category 3 Business Regulation and Commerce, topic 3.17 Interest, subhead Mortgage Secured Loans. As to charging of points, see category 3 Business Regulation and Commerce, topic 3.17 Interest, subhead Maximum Rate.

Secondary Mortgage Loans.

Lender, other than regulated bank or savings and loan association, or insurance company, must be licensed by Commissioner of Consumer Credit unless lender falls within one of specified exemptions. (fin. inst. art. § 11-502). See category 3 Business Regulation and Commerce, topic 3.17 Interest.

Chattel Mortgages.

See topic 20.01 Chattel Mortgages.

21 PROPERTY

21.01 ABSENTEES:

Common law presumption of death after seven years absence abolished. (courts art. § 3-102),

Care of Property.

Circuit courts have jurisdiction over protection and administration of property of absentees, as in case of disabled persons. (courts art. §§ 3-101 to 3-110; est. & tr. art. §§ 13-105[b], 13-201 to 13-222). Uniform Absence as Evidence of Death and Absentees' Property Act repealed for actions commenced Jan. 1, 1974 and thereafter.

Process Agent.

Md. corporation must have resident agent. (corps. art. § 2-108[a][2]). Otherwise, no duty to appoint agent for service of process, except in special situations such as foreign corporation doing business in state or nonresident executor, administrator or guardian acting in state. See categories 2 Business Organizations, topic Corporations; Estates and Trusts, topic Executors and

Administrators; Family, topic Guardian and Ward.

Escheat.

Uniform Disposition of Unclaimed Property Act adopted, with amendments fixing presumptions of abandonment after four years for bank deposits (other than those subject to court order), share accounts, checks, drafts, safe deposit box contents, and most other types of unclaimed funds and property and after 15 years for travelers checks. (comm. law. art. tit. 17). But see category 3 Business Regulation and Commerce, topic 3.01 Banks and Banking, subhead Unclaimed Deposits and Property.

See also categories 3 Business Regulation and Commerce, topic Banks and Banking, subhead Unclaimed Deposits and Property; Estates and Trusts, topics Descent and Distribution, subhead Escheat, Wills, subhead Unclaimed Legacies.

Absent Parents.

Child Support Enforcement Administration of Department of Human Resources maintains records on parents who have or appear to have deserted children, whether or not recipients of public assistance. (fam. law art. § 12-105).

21.02 ADVERSE POSSESSION:

Title to real estate may be acquired through possession inconsistent with title of another.

Character of Possession.

Actual enclosure no longer necessary to prove possession. Acts of exclusive use and ownership, other than enclosure, may be given in evidence to prove possession. (courts art. § 10-909[c]). Possession must be proved with clarity and precision. It must be adverse, actual, open, notorious, exclusive, hostile, under claim of title or ownership, unbroken, continuous and uninterrupted. Acts of use and ownership relied on must be consistent with claim of ownership against entire world. Possession or occupancy of part of tract of land under color of title to whole tract usually is claim to possession of whole tract. (152 Md. 174, 136 A. 537; 206 Md. 485, 112 A.2d 675).

Duration of Possession.

Full period of 20 years. (courts art. § 5-103).

Easements.

Easement may be acquired by prescription through adverse, exclusive and uninterrupted use for 20 years. (60 Md. 74).

Rents reserved out of particular property are extinguished where no demand or payment of rent has been made for more than 20 years. (real prop. art. § 8-107).

Disabilities.

Person who is minor or mental incompetent at time action accrues has lesser of three years or applicable remaining period after coming of age or sound mind to file action. Imprisonment, absence from state and marriage are no longer such disabilities as will toll running of limitations. (courts art. § 5-201). Where tenant acquires title for failure of demand or payment of specific rent reserved for period of 20 years, landlord under any legal disability at end of 20-year period has two years after removal of disability to assert rights. (real prop. art. § 8-107).

Quieting Title.

Any person in actual or constructive (if vacant) peaceable possession, regardless of whether hostile outstanding claim is being actively asserted, may bring suit in equity in county where property lies to quiet title. Proceedings may seek decree that plaintiff has absolute ownership and right of disposition of property, and defendant may be enjoined from asserting otherwise. (real prop. art. § 14-108).

21.03 [RESERVED]

21.04 CONVEYANCES:

See topic 21.06 Deeds.

21.05 CURTESY:

Estate of curtesy abolished. (est. & tr. art. § 3-202; 259 Md. 1, 267 A.2d 209).

21.06 DEEDS:

References are to Real Property Article of Code unless otherwise indicated.

See topic Real Property for types of estates.

Execution.

Every deed conveying real estate, executed prior to Jan. 1, 1973, must be signed and sealed by grantor or bargainer and should be attested by at least one witness. All deeds conveying property, executed on or after Jan. 1, 1973, which contain names of grantor and grantee, description of property sufficient to identify same with reasonable certainty, and interest or estate intended thereby to be conveyed, are sufficient if executed, acknowledged and, where required, recorded; lease sufficient without acknowledgment. (§ 4-101[a]). Where deed has been signed by grantor, absence of seal or attestation does not affect validity. Corporate seal not required for execution of deed or other instrument. (§ 4-101[b]). See category 10 Documents and Records, topic 10.01 Acknowledgments, subhead Validating Acts. See also categories 13 Estates and Trusts, topic Executors and Administrators, subhead Distribution; Family, topic Husband and Wife, subhead Conveyance or Encumbrance of Property.

Recording.

No estate of inheritance or freehold, or any declaration or limitation of use, or any estate above seven years, shall pass or take effect unless deed conveying same is executed and recorded. Rule does not apply to certain leases and when other methods of transfer permitted by law, e.g., articles of transfer by corporation. (§ 3-101). See topic 21.10 Landlord and Tenant, subhead Leases.

Instrument affecting both real and personal property recorded among land records only. (§ 3-301[a]). If interested party requests, index of financing records provided for in Uniform Commercial Code includes notation that instrument has been recorded among land records, and instrument is indexed in general alphabetical index for land records. Such notation and indexing have same effect as if instrument recorded in full among financing records. (§ 3-301[b]). Mortgage can be effective as financing statement. See comm. law art. 9-502(c), 9-515(g).

Deed must be recorded among land records of circuit court of Baltimore City or each county in which land lies. (§ 3-103). With certain exceptions, no deed recorded or transferred on assessment books until taxes due on real property and, if all realty owned in Baltimore City or county is being transferred, personal property taxes due by transferor paid. (§ 3-104[b]). Deeds, deeds of trust and mortgages to be recorded must contain certificate as to preparer. (§ 3-104[f]).

See category 10 Documents and Records, topic 10.04 Records.

Recording Fees.

For any deed or other instrument required to be recorded among land records and financing statement records, for instruments required to be recorded with Dep't of Assessments and Taxation: (i) $10 for release nine pages or less; (ii) $20 for any other instrument nine pages or less; (iii) $20 for instrument, other than as provided in (i), regardless of length involving solely principal residence; (iv) $75 for any other instrument ten pages or more. (§ 3-601).

Operation and Effect.

Recorded deed takes effect from effective date as against grantee of deed executed and delivered subsequently, unless such grantee accepted delivery: (1) In good faith and without constructive notice through possession of prior grantee; (2) for good and valuable consideration; and (3) records deed first. (§ 3-203).

Effective date of deed is date of delivery, presumed to be later of date of last acknowledgment, if any, or date stated on deed. Recorded deed takes effect from effective date as against grantor, his personal representatives, purchasers with notice, and creditors of grantor with or without notice. (§ 3-201).

No words of inheritance necessary to create fee simple estate. Every conveyance passes fee unless contrary intention is expressed or necessarily implied. (§ 4-105).

Deed not construed to create joint tenancy unless expressly so providing. (§ 2-117).

Possession under unrecorded deed constitutes constructive notice of what inquiry of possessor would disclose as to existence of unrecorded deed, provided possession inconsistent with record title. (§ 3-202).

Deeds by Attorney.

If attorney appointed by power of attorney, power must be executed and acknowledged as deed and recorded with or prior to deed. Agent or attorney must describe himself in deed and sign and acknowledge as such. Power of attorney deemed revoked when revocation recorded in office where deed should be recorded. (§ 4-107).

Conveyances by Corporation.

Sale or transfer of real property of Md. corporation as part of transaction involving sale of all or substantially all of corporate assets is accomplished by articles of transfer or articles of consolidation or merger, pursuant to general corporation law. (corps. art. tit. 3, subtit. 1). Deed by Md. corporation which contains certification by person executing deed on behalf of corporation that conveyance not part of sale, lease, exchange or other transfer of all or substantially all property and assets of corporation is valid and effective whether or not there has been compliance with corps. art. tit. 3, subtit. 1. Deed by Md. corporation executed and recorded before Jan. 1, 1979 not invalid solely because of noncompliance with corps. art. tit. 3, subtit. 1, unless proceedings to set deed aside were commenced on or before July 1, 1979. (§ 14-113).

Straw Deeds.

Abolished in most cases. Interest in property may be conveyed by one or more persons, as grantors, to themselves alone, or to himself or themselves and another person or persons, as grantees, in life tenancy, with or without powers, in joint tenancy, tenancy in common or tenancy by entireties, without use of straw man. Interest in property held by husband and wife in tenancy by entireties may be conveyed: (1) By both acting jointly, to themselves, to either of them individually, or to themselves and another person or persons, in joint tenancy or tenancy in common; (2) by both acting jointly, to either husband or wife and another person or persons in joint tenancy or tenancy in common; and (3) by either acting individually to other in tenancy in severalty, without use of straw man. (§ 4-108).

Taxes.

See category 10 Documents and Records, topic 10.04 Records, subhead Tax on Recordation.

Form.

Following form of special warranty deed may be used:

Form

This Deed, Made this...... day of...... in the year 20.... by...... of the first part and...... of the second part; witnesseth, that in consideration of (actual consideration including value of mortgage assumed, must be stated here, in acknowledgment or in separate affidavit under oath)...... the said part.... of the first part...... do.... grant and convey unto said part.... of the second part...... heirs and assigns, in fee simple, all that lot or parcel of ground...... situate, lying and being in...... and described as follows, that is to say: (Here insert description).

Together with the buildings and improvements thereupon, erected, made or being: and all and every, the rights, alleys, ways, waters, privileges, appurtenances and advantages, to the same belonging, or anywise appertaining.

To have and to hold the said lot of ground and premises, above described and mentioned, and hereby intended to be conveyed: together with the rights, privileges, appurtenances and advantages thereto belonging or appertaining unto and to the proper use and benefit of the said part.... of the second part...... heirs and assigns in fee simple. And the said part.... of the first part hereby covenant.... that.... he.... will warrant specially the property hereby granted: and conveyed: and that.... he.... will execute such further assurance of said land as may be requisite.

Witness the hand.... and seal.... of said grantor.....

Test:

Witness signs here.

(Acknowledgment).

.... (Seal).

.... (Seal).

To be recorded, deed must bear certification of attorney that deed was prepared by attorney or under attorney's supervision, or certification that deed was prepared by one of parties named in deed. (§ 3-104[f]).

Deed, or separate affidavit accompanying deed, must state actual amount of consideration paid, including value of mortgage assumed. (tax-prop. art. § 12-104).

21.07 DEEDS OF TRUST:

See category 20 Mortgages, topic 20.04 Mortgages of Real Property.

21.08 DOWER:

Estate of dower abolished. (est. & tr. art. § 3-202; 259 Md. 1, 267 A.2d 209).

21.09 ESCHEAT:

See topic 21.01 Absentees, subhead Escheat; categories 2 Business Organizations, topic Corporations, subhead Unclaimed Dividends and Stock Interests; Business Regulation and Commerce, topic Banks and Banking, subhead Unclaimed Deposits and Property; Estates and Trusts, topics Descent and Distribution, subhead Escheat, Executors and Administrators, subhead Distribution, Wills, subhead Unclaimed Legacies; Insurance, topic Insurance Companies, subhead Unclaimed Funds;.

21.10 LANDLORD AND TENANT:

References are to Real Property Article of Code unless otherwise indicated.

Kinds of Tenancy.

Lease may be for fixed term, for periodic term, at will, at sufferance or per autre vie.

Application for Residential Lease.

Fees charged certain residential tenants limited to sums actually expended for credit check and other expenses arising out of application. Application must contain statement explaining any liabilities incurred upon signing. (§ 8-213).

Leases.

Leases for terms of more than one year must be in writing and signed by party creating lease (§§ 5-101, 5-102); for more than seven years must be executed, acknowledged and recorded like deed, but, if not recorded, are still valid and binding: (1) Between original parties to lease and their personal representatives; (2) against creditors of original parties; and (3) against other person who claims by, through or under original party and who acquires interest claimed with actual notice of lease or at time when tenant (or anyone claiming by, through or under tenant) is in such actual occupancy as to give reasonable notice. (§ 3-101). For statutory form of lease, see § 4-202(i). Tenant's possession under lease for not more than seven years gives notice of his rights. (100 Md. 387, 59 A. 648). Lease carries with it implied covenant of quiet enjoyment. (§ 8-204). As to lease of single or multi-family dwelling unit, landlord must assure that tenant may peaceably and quietly enter upon leased premises at beginning of term; if landlord fails to provide possession of dwelling unit at beginning of term, rent is abated until possession is delivered, and tenant may, upon written notice to landlord, terminate lease, in which event landlord must return all deposits; whether or not lease is terminated, landlord is liable for consequential damages suffered after tenant gives notice of inability to enter premises. (§ 8-204[a]-[e]).

Residential leases, except for leases which arise after sale of owner-occupied residential property where seller and purchaser agree that seller may remain in possession of property for period of not more than 60 days after settlement (§ 8-201[b]), may not contain: (1) Confessed judgment clauses; (2) provisions whereby tenant agrees to waive right or remedy provided by law; (3) late payment penalties exceeding 5% (different provisions for weekly rental payments); (4) provisions whereby tenant waives right to jury trial; (5) provisions for notice to quit less than legal period; (6) provisions authorizing landlord to take possession of leased premises or tenant's personal property therein without benefit of formal legal process; (7) any provision indemnifying or exonerating landlord from liability arising from his fault or negligence on common areas; or (8) any provision permitting eviction or notice to quit in retaliation against organizing for collective negotiating with landlord. Provisions for automatic renewal for more than one month must be set apart distinctly and provide space for written acknowledgment by tenant; if unacknowledged, provision is unenforceable by landlord. Forbidden provisions are unenforceable and, if included in lease after July 1, 1975 or attempted to be enforced thereafter, allow tenant to recover actual damages, including reasonable attorney's fees. (§ 8-208).

After Oct. 1, 1999, any landlord who offers five or more dwelling units for rent must use written lease. Any landlord using written lease must provide, without requiring execution of lease or any prior deposit, copy of proposed form of lease to any prospective applicant who requests it in writing. Lease offered by such landlord must state agreement of parties as to condition of premises and specific obligations of parties as to heat, gas, electricity, water and repair. (§ 8-208). Receipt for security deposit must notify tenant of tenant's rights.

Name of landlord of residential property, along with address and telephone number, must be posted by landlord in conspicuous place on property, or information must be included in written lease or in rent receipt. (§ 8-210).

Recording.

Lease for longer period than seven years must be recorded as deed, but memorandum of lease may be recorded in lieu of entire lease, and lease is valid and binding as to certain parties even though not recorded. See subhead Leases, supra. (§ 3-101). Recording requirement not applicable to lease for initial term of not more than seven years, where each renewal term is for seven years or less and where renewal may be effected or prevented by party to lease or his assigns. (§ 3-101[c]). See topic 21.06 Deeds.

Rent is generally matter for agreement between parties.

After July 1, 1974, every landlord of residential property must maintain records system showing dates and amounts of rent paid and that receipt was given for each cash payment. (§ 8-208.2).

When lessee applies for renewal under covenant and cannot produce satisfactory evidence showing payment of rent, landlord may recover three years rent and no more before renewal is had. (§ 8-111).

When there has been no demand for or payment of rent growing out of any kind of lease for more than 20 consecutive years, such rent will be presumed conclusively to be extinguished and landlord may not set up claim to rent or to reversion in property. Landlord under disability has two years from removal of disability to assert rights. (§ 8-107).

Where residential dwelling unit, whether publicly or privately owned or single or multiple unit, is leased for human habitation (not farm tenancy), and where condition or defect constitutes, or if not corrected will constitute, fire hazard or serious and substantial threat to life, health or safety of occupants, rent escrow remedy is provided to tenant. Tenant must notify landlord of defect in writing by certified mail, landlord must have actual notice of defect, or landlord must be given written notice of violation, condemnation, etc., by government agency. Landlord has reasonable time (as determined by court, but period longer than 30 days presumed unreasonable) to repair or correct. Tenant may raise issue of rent escrow either affirmatively or defensively. Relief is conditioned on tenant's payment of rent into court and on tenant's not having been subject of more than specified number of complaints for rent due and unpaid in prior year. In addition to any other remedy, if landlord has not repaired defects within 90 days after court finds that defects exist, tenant can seek injunctive relief. (§ 8-211). Local subdivision ordinance comparable in subject matter supersedes state law.

Security Deposits.

Effective July 1, 1972, security deposits for residential leases may not exceed two months rent or $50, whichever is greater, and must be deposited by landlord in banking or savings institution within 30 days of receipt. Within 45 days after end of tenancy, except where tenant evicted, ejected for breach or abandons premises, landlord must return deposit to tenant together with (if deposit is $50 or more) interest (accrued at rate of 3%) less any damages rightfully withheld. Security deposit may be withheld for unpaid rent, damage due for breach of lease or damage to leased premises in excess of ordinary wear and tear (tenant having right to be present when premises are inspected to determine if such damage was done); if any portion withheld, landlord must present to tenant, within 30 days after termination of tenancy, written list of damages with statement of costs actually incurred. Where tenant evicted, ejected for breach or abandons, tenant must demand, within 45 days, return of deposit. Landlord must then send tenant list of damages and costs within 30 days of notice, and return deposit with interest but less costs within 45 days of notice, or forfeit right to withhold any part. In lieu of, or in addition to, paying security deposit, residential tenant may purchase surety bond, without landlord's consent. Surety issuing such bond must advise tenant of its rights before tenant purchases. Landlord is required to send notice to tenant before making any claim on surety bond, and tenant may dispute any such claim. Only admitted carriers licensed by Maryland Insurance Administration may issue these surety bonds. (§ 8-203). In certain instances landlord or surety may be liable for treble damages plus reasonable attorney's fees. (§ 8-203).

Smoke Detectors.

Required in sleeping areas. Landlord generally responsible for installation, repair or replacement, but refundable deposit may be required of tenant. Upon request, special detectors must be made available to hearing impaired tenants; hotels shall have at least one special detector for every 50 units. Insurers may not raise section as policy defense. (pub. saf. art. § 9-107).

Lien.

Except as indicated below, there is no lien without distraint. Where tenant makes assignment for benefit of creditors, or has his property taken by receiver under court decree in insolvency proceeding, landlord has perfected lien on all distrainable property of tenant for rent due not more than three months prior thereto, although no actual distraint levied. (comm. law art. § 15-102[c]).

Where growing crops are reserved as rent, said rent is lien on crops. (§ 8-115[a]). In St. Mary's, Prince George's, Charles, Calvert and Worcester counties, where growing crops are reserved as rent or landlord makes advances on crops to be grown, such rent and advances are lien on crops, provided contract making advances is written and executed by landlord and tenant. Lien is not divested by sale by tenant, personal representative of deceased tenant, assignment of tenant in bankruptcy or insolvency, or by process of law. (§ 8-115[b]-[c]).

Termination of Tenancy.

In counties, except Montgomery County, landlord must give tenant written notice to quit of at least one month where tenancy is by month, or one week where tenancy is by week, three months where tenancy (including tobacco farm tenancies) is from year to year, and six months in case of all other farm tenancies. (§ 8-402[b][1], [4]). These notice provisions do not apply to Baltimore City. In Montgomery County, landlord must give two months written notice where residential tenancy is at least month to month but less than from year to year, except in case of single family dwellings. (§ 8-402[b][4][iii]). No written agreement between parties may provide for longer period for notice by tenant than for notice by landlord in order to terminate tenancy. (§ 8-501).

In action of distress, after sale of all goods levied, landlord, at his election, may obtain order terminating residential lease where term is 15 years or less, provided tenant is served or twice returned non est. (§ 8-324).

Where term is seven years or less, fire or other unavoidable accident rendering improvements untenantable terminates tenancy. (§ 8-112). See subhead Destruction of Premises, infra.

Extensive requirements concerning termination of tenancy of renter for inauguration of condominium regime. (tit. 11). 180 days written notice required concurrent with first offer to purchase to tenant. (§§ 11-102.1, 11-136). Form of notice in statute. (§ 11-102.1). Tenant need not vacate until later of expiration of lease or 180 days, except for breach of lease, but exceptions provide for extension of tenancy for up to three years for certain types of tenants. (§§ 11-102.1, 11-137). See topic 21.16 Real Property, subhead Condominiums.

Retaliatory evictions or increases in rent are prohibited where residential premises are leased, but local ordinances can supersede state statute. (§ 8-208.1).

Holding Over.

Unless stated otherwise in written lease and initialed by tenant, tenant permitted to hold over takes week to week tenancy if week to week before holding over; otherwise takes tenancy from month to month. Unless lease otherwise provides, tenant unlawfully holding over is liable for actual damages, such damages to be not less than apportioned rent for holdover period at lease rate. (§ 8-402).

Dispossession.

Procedures are provided for landlord's dispossession of tenant upon failure to pay rent (§ 8-401) or for wrongful holding over (§ 8-402) or where lease gives landlord right to repossession for breach of lease (§ 8-402.1). Where dispossession is sought because of nonpayment of rent, and except where tenant has received repeated summons with complaints for unpaid rent at any time before execution of eviction order, tenant has right to redemption of leased premises upon payment of all due rent and costs. (§§ 8-401[c][5], 8-401[e]). Tenant or landlord may appeal to circuit court within ten days of judgment and if tenant, by giving bond (cases of holding over) (§ 8-402[b][2]) or two days of judgment and if tenant, by giving bond (cases of nonpayment of rent) (§ 8-401[f]).

Where jurisdiction is forbidden district court, as in actions to try title to real property (courts art. § 4-402), or in ground rent ejectment (§ 8-402.2), common law action of ejectment must be pursued in circuit court of county where disputed land lies (courts art. § 6-203).

Distress.

Landlord may distrain for unpaid rent in action at law by filing verified petition in district court. No distress available unless under written lease for more than three months or tenancy at will or periodic tenancy that has continued more than three months. (§ 8-302). Levy extends to all goods on leased premises, whether property of tenant or another (§ 8-306[a]), except: (a) Goods of subtenant or third party, where lease is more than 15 years (§ 8-306[b]); (b) certain tools, instruments, books and files of tenant used in trade or profession (§ 8-307[a]); (c) goods of tenant subject to prior recorded security interest under Uniform Commercial Code, unless landlord pays balance due holder of security interest (§ 8-307[b]). Where lease names either husband or wife as tenant, goods belonging to either or both are subject to levy as if both named tenants. (§ 8-326). If lease for more than three months is assigned, assignee liable to distress as if named tenant; goods of assignee on premises are subject to levy. (§ 8-329). Third person whose goods have been levied must petition to have goods excluded from levy within seven days thereof; otherwise goods are conclusively presumed to be goods of tenant. (§ 8-311). Within six months of distress action, landlord can obtain order to follow goods of tenant which tenant has removed. (§ 8-315). Appeal from any final order or deficiency judgment must be taken within 14 days, but such appeal does not stay subsequent distress for rent falling due after original distress petition unless tenant files appeal bond approved by court. (§ 8-332).

Action for waste is provided for by statute. (§ 14-102).

Fixtures.

Right of tenant to remove fixtures erected by him under one demise or term not lost or impaired by acceptance of new lease of same premises without intermediate surrender of possession. (§ 8-114). Lien may be given on furnishings or equipment affixed to real estate. (comm. law art. § 9-313). See category 20 Mortgages, topic 20.01 Chattel Mortgages. Uniform Commercial Code adopted.

Destruction of Premises.

Unless otherwise provided in lease, when improvements on property rented for term of not more than seven years become untenantable through fire or unavoidable accident, tenancy terminates and all rent ceases on payment of proportionate rent to date of fire or accident. (§ 8-112).

Unless otherwise provided expressly in lease, covenant by lessee to leave premises in good repair does not compel erection of similar buildings or payment therefor if destruction by fire or otherwise was without lessee's negligence or fault. (§ 8-113).

Exculpatory clause in lease, whereby tenant covenants to indemnify or hold harmless landlord, or to preclude or exonerate landlord from any or all liability to tenant or another for injury, loss, damage or liability arising from omission, fault, negligence or other misconduct of landlord on or about leased premises or common areas used in connection therewith and not within exclusive control of tenant, deemed against public policy and void. No insurer may claim right of subrogation by reason of invalidity of such provision. (§ 8-105).

Redemption.

Provision is made for redemption of lease for longer than 15 years, created on or after Apr. 8, 1884 at option of tenant, after notice to landlord, for sum equal to capitalization of rent at rate set forth below; provision does not apply to lease for business purposes for term not exceeding 99 years; lease of property improved or to be improved by apartments, condominiums or cooperatives is lease for business use. (§ 8-110).

Ground Rents.

Ground lease holder must register ground lease with State Department of Assessments and Taxation by submitting required registration form and registration fee. (§ 8-704). If ground lease holder does not properly register, reversionary interest of ground lease holder under ground lease is extinguished and ground rent is no longer payable to ground lease holder. (§ 8-708[a]). Upon application of leasehold tenant, State Department of Assessments and Taxation will issue ground lease extinguishment certificate. (§ 8-708[b]). Extinguishment of ground lease conclusively vests fee simple title in leasehold tenant. (§ 8-708[c]).

On or after Jan. 22, 2007, owner of fee simple or leasehold estate in residential property that is, was or was intended to be used for four or fewer dwelling units may not create reversionary interest in property under ground lease or ground sublease for term of years renewable forever subject to payment of periodic rent. (§ 8-111.2[b]).

Establishment of lien is remedy for nonpayment of ground rent for residential leases. (§ 8-402.3[c][1]). Ground lease holder seeking to create lien must give notice to leasehold tenant and each mortgage or trustee of property whose lien is on record. (§ 8-402.3[e]). Any party to whom notice is given will have 45 days to challenge that action in court. (§ 8-402.3[f][1]). Judge can award prevailing party reasonable expenses and attorneys fees of $500 or less. (§ 8-402.3[j][3][ii]). Ejectment as remedy still applies to commercial leases. (§ 8-402.2).

No later than 60 days before yearly or half-yearly installment payment of ground rent is due, ground rent lease holder shall mail to last known address of leasehold tenant bill for payment due. (§ 14-116.1[c]). Bill must include notice in boldface type describing rights and responsibilities of leasehold tenant associated with ground rent. (§ 14-116.1[d]). Contract for sale of real property subject to ground rent must also contain same notice. (§ 14-117[a][3]).

21.11 LEASES:

See topic 21.10 Landlord and Tenant.

21.12 [RESERVED]

21.13 PERPETUITIES:

Common law rules in force (est. & tr. art. § 11-102), except that very limited "wait and see" doctrine and saving provision reducing age contingency to 21 adopted by statute (est. & tr. art. § 11-103; 383 Md. 489, 860 A.2d 886), and except that there is no violation of Rule in case of trust created by employer as part of pension, stock bonus, disability, death benefit, profit-sharing, retirement, welfare or other plan for employees or their beneficiaries, or in case of legacy or conveyance for cemetery perpetual care of $5,000 or less, or in case of transfer of assets from one charitable corporation to another, contingent on future event, or in case of trusts for charitable purposes, or in case of trust in which governing instrument states that Rule Against Perpetuities does not apply and under which trustee has certain specified powers: in case of option of tenant to renew lease; in case of option of tenant to purchase all or part of premises leased by tenant; option of usufructuary to extend scope of easement or profit; in case of right of county, municipality, person from whom land is acquired, or successor-in-interest of person from whom land is acquired, to acquire land from State in accordance with trans. art. § 8-309; in case of right or privilege, including option, warrant, pre-emptive right, right of first refusal, right of first option, right of first negotiation, call right, exchange right, or conversion right, to acquire interest in domestic or foreign joint venture, partnership, limited liability partnership, limited partnership, limited liability limited partnership, corporation, cooperative, limited liability company, business trust, or similar enterprise, whether interest is characterized as joint venture interest, partnership interest, limited partnership interest, membership interest, security, stock, or otherwise; or in case of nondonative property interest as described in § 11-102.1 (est. & tr. art. § 11-102), or in case of uncertain donees of gift for charitable uses, provided will directs formation of corporation to take gift and corporation is formed within 12 months (est. & tr. art. § 4-409).

Accumulations of income permitted up to period of perpetuities. (See 199 Md. 264, 86 A.2d 504.)

21.14 PERSONAL PROPERTY:

Husband and wife may acquire personal property as tenants by entireties. Conveyance to husband and wife is presumed held as tenants by entirety unless contrary is designated, and property purchased with entirety money is also entirety property. (225 Md. 241, 170 A.2d 303).

Instrument shall not be construed to create joint tenancy unless instrument in writing expressly provides that property is to be held in joint tenancy. (real prop. art. § 2-117).

21.15 POWERS OF ATTORNEY:

Attorneys in Fact.

Attorney in fact may be appointed by power of attorney as at common law. Power may be general or special, authority of attorney in fact depending in each case on language of power. (53 Md. 28). Power of attorney to attorney at law with reference to recovery of tort damages, signed within five days of injury, is voidable within 60 days. (court art. § 5-305.1[A]).

Power of attorney should be executed by principal with same dignity required of any act which attorney may be called upon to perform, i.e., if attorney is to sign paper under seal, power should be under seal, and if attorney is to execute paper under oath, power should be verified.

Power of attorney to execute deed must be executed in same manner as deed and recorded with or prior to deed or it may be recorded on day after deed is recorded provided it is acknowledged and dated on or before date on which deed is executed. (real prop. art. § 4-107). Unless otherwise provided by power, attorney in fact may exercise power during any period of disability or incompetence or uncertainty as to whether principal is dead or alive. (est. & tr. art. § 13-601).

Where principal has died or become incompetent, attorney in fact may nonetheless bind representatives of principal, provided he acts in good faith under power, without actual knowledge of death or disability. (est. & tr. art. § 13-602).

For appointment of health care agent, see category 13 Estates and Trusts, topic 13.16 Wills, subhead Living Will.

21.16 REAL PROPERTY:

References are to Real Property Article of Code unless otherwise indicated.

British Statutes are no longer in force except to extent enacted by General Assembly and contained in Code. (§ 14-115).

All common law estates in real property are still recognized, except that rule in Shelley's Case has been abolished (est. & tr. art. § 11-104), contingent remainders are indestructible (est. & tr. art. § 11-101), and person seized of estate tail may grant and sell it as if seized of estate in fee simple (§ 2-102). Possibilities of reverter and rights of entry are alienable but, if created after July 1, 1969, are limited to 30 years duration. Possibilities of reverter and rights of entry existing on July 1, 1969 are invalidated unless notice of intention to preserve is recorded as prescribed; however, these limitations do not apply to state or its subdivisions. (§§ 6-101 to 6-105). No deed, devise or other writing may be construed to create estate in joint tenancy unless it is expressly provided in instrument that property is to be held in joint tenancy. (§ 2-117). Deed or devise to husband and wife creates tenancy by entireties unless otherwise provided. (193 Md. 391, 67 A.2d 258). Property interests may be granted by one or more persons to themselves alone, or to himself or themselves and any other person, as grantees, in life tenancy, with or without powers, joint tenancy, tenancy in common, or tenancy by entirety without using intermediate strawman. Husband and wife may grant property held in tenancy by entirety by acting jointly (i) to themselves, to either individually, to either and another, or to themselves and another, in joint tenancy or tenancy in common, and (ii) by either acting individually to other in tenancy in severalty, without using intermediate strawman. (§ 4-108). See topic 21.06 Deeds. Co-tenant who receives rent from third party must account to other co-tenants for rent over and above his proportionate share. (§ 14-106).

Rule in Shelley's Case.

Abolished. (est. & tr. art. § 11-104).

Statute of Uses repealed. Notwithstanding, executory interests and powers of appointment are valid, subject to rule against perpetuities. (§ 2-116).

Action for waste provided by statute where waste is committed or permitted by mortgagor, life tenant, tenant for years or at will, periodic tenant, tenant in common, joint tenant or other person in possession of land. Person committing waste may be sued even after transfer of his estate. Waste committed after injunction is subject to penalty of double damages, payable in part to injured party, applied in part as fine. Court may also imprison violator. (§ 14-102).

Foreign Conveyances or Encumbrances.

Instruments affecting real estate located in Md. must be executed in accordance with laws of Md. in order to be valid.

Land Installment Contracts.

See category 3 Business Regulation and Commerce, topic 3.22 Sales.

Condominiums.

Uniform Condominium Act not adopted. Sections of horizontal property act effective July 1, 1981, amended substantially effective July 1, 1982, phase in at different times (see § 11-142). Properties to become subject to condominium regime must be registered with Secretary of State by filing and updating promptly public offering statement, which must be refiled annually, including specified information, which must be delivered to initial purchaser, who has absolute right of rescission exercisable within specified time periods. Contract for initial sale of unit to member of public (including occupying tenant) may not be entered into until public offering statement is registered and ten days after all amendments then applicable to public offering statement are filed. (§§ 11-126, 11-127). Tenants have right of first refusal and right to receive lesser of actual moving expenses or $750. (§ 11-136). Special rights afforded to “designated household”. (§ 11-137). Local governments may, in certain instances, add additional rights or exercise right of first refusal. (§§ 11-139, 11-140). On resale, seller must furnish purchaser, not later than 15 days prior to closing, with copy of declaration, bylaws, rules, regulations, various disclosures and descriptions, and certificate containing designated information. (§§ 11-135). Declaration (§ 11-103) and bylaws (§ 11-104) must contain designated information, and, together with condominium plat, must be recorded (§ 11-105). Each unit has all incidents of real property (§ 11-106) and undivided interest in common elements (§ 11-107). Council of unit owners, which governs affairs of condominium (§ 11-109), must, with limited exceptions, maintain insurance thereon (§ 11-114), and must register with Dep't of Assessments and Taxation (§ 11-119). Unless declaration or bylaws state otherwise, rules and regulations adopted after Jan. 1, 1984 are subject to procedural requirements; unit holders are granted hearing and disapproval rights (§ 11-111). Condominium unit owners are authorized to meet in specified area, subject to reasonable rules, to consider and discuss matters relating to operation of condominium. Governing bodies and committees of condominiums are required to allow unit and lot owners to comment on specified matters during specified meetings, subject to certain rules enacted by governing bodies. (§§ 11-108 and 11-109). Disputes are governed by statutory procedures set forth in § 11-113. Assessment of each condominium unit is based on value of such unit rather than on proportionate value of whole property. (tax-prop. art. §§ 8-104, 8-207). Developer must appoint resident agent, who can be changed by unit of council owners, for service in suits against unit of council owners or arising in relation to common elements. (§ 11-119). Unless greater percentage (or lesser, if condominium is restricted to nonresidential uses) is provided in declaration, condominium may only be terminated by 80% vote. (§ 11-123). See topic 21.10 Landlord and Tenant, subhead Termination of Tenancy.

Time Sharing.

Time shares of real estate regulated by §§ 14-2401 to 14-2403 of comm. law art.

Mobile Home Parks.

Mobile homes and mobile home parks governed by tit. 8A.

Farmland.

Land actively used for farm or agricultural purposes assessed at 50% of its use value. (tax-prop. art. § 8-209). Land assessed as farmland which is converted to other use may be subject to agricultural transfer tax. Buyer of land liable or potentially liable for tax must be so notified in contract of sale or seller liable to buyer for tax amount. (tax-prop. art. §§ 8-209, 13-301 to 13-308). See also categories 10 Documents and Records, topic Records, subhead Tax on Recordation, catchline Transfer Tax; Taxation, topic Property Taxes, subhead Taxable Property, catchline Assessment.

Stale Contracts of Purchase and Options.

No recorded contract of sale for real property is enforceable or is encumbrance on title of such property, when buyer is not in possession, as against persons other than original parties thereto, unless within five years after date set out in recorded contract for delivery of deed, action or proceedings are commenced to enforce contract. (§ 10-401).

When recorded instrument creates option to purchase real property, which according to its terms has expired, and one year has elapsed since time of expiration and no conveyance or other instrument has been recorded showing that option has been exercised, then recorded instrument creating option ceases to be notice, either actual or constructive, to any person or to put any person on inquiry as to existence or exercise of option. (§ 10-402).

Cooperative Housing.

Regulated by corps. art. tit. 5, subtit. 6B.

Homeowners Associations.

Regulated by Maryland Homeowners Association Act. (tit. 11B).

New Home Builders.

Effective Jan. 1, 1991, regulated by New Home Warranty Act which requires, among other things, that new home builders disclose to purchasers and owners of new homes whether or not they participate in new home warranty security plans. (§§ 10-601–10-610). New home builders must register with Consumer Protection Division of Office of Attorney General. (10-603).

Custom Home Sales.

Regulated by Maryland Custom Home Protection Act. (tit. 10, subtit. 5).

Building Codes.

As of 10/1/09, International Building Code, including International Energy Conservation Code, (with some modifications) will serve as Maryland Building Performance Standards; local jurisdictions have authority to modify standards. (pub. saf. art. §§ 12-501 to 12-508).

See also topics 21.05 Curtesy, Deeds, Dower, Landlord and Tenant; categories 3 Business Regulation and Commerce, topic Sales; Civil Actions and Procedure, topic Partition; Family, topic Husband and Wife; Mortgages, topic Mortgages of Real Property.

21.17 TRUST DEEDS:

See category 20 Mortgages, topic 20.04 Mortgages of Real Property.

22 TAXATION

22.01 ADMINISTRATION:

Note: In 1988 session, Maryland Legislature added new article to Maryland Code to be entitled “Tax-General Article” (tax-gen. art.). This Art. is intended to revise, restate and recodify laws of State relating to certain taxes generally.

Tax-prop. art. and tax-gen. art. are general governing statutes of this topic Taxation.

Property is subject to state, county and municipal taxes.

Supervision.

Comptroller of Treasury, State Treasury Building, Annapolis 21404, has general supervision of administration of income tax, estate tax, sales and use tax, motor fuel tax, among others.

State Dep't of Assessments and Taxation, 301 W. Preston St., Baltimore 21201, has general supervision of administration of following taxes: Property taxes (review of assessments), corporation tax and franchise taxes.

Local Taxes.

Certain local taxes are imposed by individual counties. County income taxes of between 1% and 3.2% are imposed. (tax-gen. art. § 10-106). For local taxes on real property transfers, see category 10 Documents and Records, topic 10.04 Records.

Applicable State Interest Rate.

Applicable interest rate is determined annually by Comptroller in accord with statutory guidelines and may differ for refunds and amounts owed state, equal to greater of 13% or three percentage points above prime interest rate for money owed state. (tax-gen. art. § 13-604).

Refund of Taxes.

Claim for refund of property, state or local taxes erroneously or mistakenly paid must be filed within three years of payment. (tax-prop. art. § 14-915). Claim for refund of general taxes must be filed with agency to which paid within three years of payment. (tax-gen. art. §§ 13-901, 13-1104; art. 24, § 9-711). State income tax and financial institution franchise tax refund claim or claim for credit of overpayment may not be filed after periods of limitations for filing claims as provided in § 6511 of IRC. If such claim is allowed it may not exceed amount of State tax resulting from application of limits in § 6511 of IRC. (tax-gen. art. § 13-1104[c]). Taxpayer has one year from date of finality of assessment for tax year to claim refund of personal property taxes as to which taxpayer was entitled to exemption. (tax-prop. art. § 14-915). Interest at applicable state interest rate allowed if overpayment not attributable to mistake or error by taxpayer. (tax-gen. art. § 13-603). Interest on refund claims must be computed beginning 45 days after filing of claim. (tax-gen. art. § 13-603). Appeal from denial of refund claim may be taken to Md. Tax Court within 30 days from receipt of notice of disallowance (tax-gen. art. § 13-510); as to further appeal, see category 6 Courts and Legislature, topic 6.01 Courts, subhead Maryland Tax Court. Claim for refund of “special” taxes not acted upon within six months is deemed to be disallowed and may be appealed. (tax-gen. art. § 13-510). No allowed refund claim is paid until all other state taxes due by taxpayer have been paid in full. (tax-gen. art. § 13-905). For refund of sales or use tax, see topic 22.17 Sales and 22.19 Use Taxes.

Penalties.

All references are to tax-gen. art. unless otherwise indicated.

Real and personal property taxes in arrears on Oct. 1 generally bear interest of 2/3 of 1%

per month or fraction thereof until paid. However, some jurisdictions impose different rates. (tax-prop. art. §§ 14-602, 14-603). See also topic 22.17 Sales and 22.19 Use Taxes. Failure to report cost or market value of personal property results in penalty of 20% of escaped property. (tax-prop. art. § 14-705).

Failure to pay tax when due subjects taxpayer to assessment of additional penalty not exceeding 10% of unpaid tax, or 25% for nonpayment of alcoholic beverage tax, financial institution franchise tax, income tax or tobacco tax. (§ 13-701). Failure to provide income and expense information on certain income-producing real property may result in penalty of $100 per day, up to maximum of 0.1% of value of property. (tax-prop. art. § 8-105).

Tax on insurance premiums and deposits for perpetual fire insurance, due on or before Mar. 15, bears monthly interest thereafter at applicable state interest rate and delinquent payer is subject to 5% penalty. (ins. art. §§ 6-107, 6-108).

Inheritance tax bears interest at applicable state interest rate. Where there is no formal administration of estate and tax has not been paid 30 days after due date, interest begins on original due date. (§ 13-601). Interest on estate tax begins nine months after date of death.

Corporation which is subject to Md. jurisdiction, and firm or individual against whom assessment has been made for property taxes, that fails to file annual report on or before Apr. 15 is subject to initial penalty of 1/10 of 1% of assessments plus 2% of initial penalty for each 30 days or fraction thereof that default continues; initial penalty must not be less than $30 nor greater than $500. (tax-prop. art. § 14-704). Dep't of Assessments and Taxation may grant extension until June 15 of year in which report is due. (tax-prop. art. § 14-704). Request for extension must be filed electronically on or before Apr. 15 of year in which report is due or by paper document on or before Mar. 15 of year in which report is due. (tax-prop. art. § 14-704). Foreign corporation which fails to file any report required by law, after demand and notice by Dep't of Assessments and Taxation, forfeits right to do intrastate business. (corps. art. § 7-304).

Charter of corporation that fails to pay tax due by Oct. 1 is subject to annulment and forfeiture through notice and publication procedure initiated by Comptroller after Sept. 30 of following year. Forfeiture and revival procedures set forth in corps. art. §§ 3-503 to 3-520.

Recordation Tax.

Any person recording instrument without paying tax, or incurring additional debt secured by previously recorded instrument without paying additional tax, or willfully misrepresenting actual consideration by affixing evidence of greater or lesser tax paid, is subject to fine up to $500 or sentence up to six months in jail. (tax-prop. art. §§ 14-1010 to 14-1012).

Income tax and estimated tax payments paid after extension granted or additional amounts found due carry interest at applicable state interest rate. (§§ 13-601, 13-602). Taxes not paid when due bear penalty up to 25% plus interest per month at applicable state interest rate fixed by Comptroller, on unpaid taxes until paid. (§§ 13-701, 13-601, 13-604). Willful failure to file income tax return subjects taxpayer to $10,000 fine or five years imprisonment or both. (§ 13-1001). Failure of corporation or individual to file declaration of estimated tax on prescribed date, failure to pay installments when due or failure to estimate tax equal to 90% of tax due subjects taxpayer to penalty up to 25% as fixed by Comptroller plus interest at applicable state interest rate. No interest assessed on penalty tax. (§ 13-605). Willful preparation of false or fraudulent return subjects person assisting or acting in representative capacity for taxpayer to fine up to $10,000 or sentence up to five years imprisonment or both. (§ 13-1004). Willful preparation of fraudulent return subjects taxpayer or officer submitting return on behalf of corporation to prosecution for perjury and 50% penalty not to exceed 100% of underpayment of tax. (§§ 13-703, 13-1002). Failure by employer to file required withholding tax returns subjects employer to fine up to $10,000 or sentence up to five years imprisonment or both. (§ 13-1007). Failure to furnish employee with correct withholding statement subjects employer to $50 penalty for each failure in addition to criminal penalties. (§§ 13-706, 13-1007). Willful failure to provide information or providing false information on withholding certificate subjects person to fine up to $500 and/or six months imprisonment. (§ 13-1007).

Sales tax and use tax not paid when due bear penalty of 10% of unpaid tax plus interest per month at applicable state interest rate, until paid. (§§ 13-601, 13-701). Fraudulent failure to file return subjects taxpayer to 100% penalty. (§ 13-704). Failure to file return and pay tax assessment within ten days of receipt of final notice and demand subjects taxpayer to 25% penalty. (§ 13-709). Retailer who sells without sales and use tax license is subject to fine up to $100. (§ 13-1016). Any taxpayer or officer of corporate taxpayer who willfully fails to collect or pay over tax, file returns, or who files false return, is subject to fine up to $10,000 or up to five years imprisonment or both. (§§ 13-1001, 13-1003, and 13-1006). Any taxpayer or officer of corporate taxpayer who willfully fails to keep required records or uses false sales tax number is subject to fine up to $1,000 or up to one year imprisonment or both. (§ 13-1008).

Admissions and amusement tax not paid bears penalty of 10% plus interest at applicable state interest rate until paid or penalty of 100% plus interest per month at applicable state interest rate, if failure to file is with intent to defraud. (§§ 13-701, 13-704). If payment not made within 30 days after notice of delinquency, additional penalty of 25% due. (§ 13-708). Willful failure to file return or to pay taxes or keep records or willful false statement or misleading omission subjects taxpayer to fine up to $500 or up to six months imprisonment or both. (§§ 13-1001, 13-1003, 13-1005, 13-1008).

Motor fuel and motor carrier taxes not paid when due bear penalty of not greater than $25. (§ 13-701). Fraudulent failure to file return bears penalty of 100% of unpaid tax. (§ 13-703).

Tobacco tax not paid bears penalty of 25% plus interest per month at applicable state interest rate. (§ 13-701). Willful possession, sale or offer to sell more than 30 cartons of unstamped cigarettes on which tobacco tax has not been paid subjects taxpayer to fine up to $1,000 or up to one year imprisonment or both. Willful possession, sale or offer to sell 30 cartons or less of unstamped cigarettes on which tobacco tax has not been paid subjects taxpayer to fine up to $500 or three months imprisonment or both. Willful possession, sale or offer to sell other tobacco products on which tobacco tax has not been paid subjects taxpayer to fine up to $500 or up to three months imprisonment or both. (§ 13-1014).

Alcoholic beverages tax not paid bears penalty of 25% plus interest per month at applicable state interest rate and subjects manufacturer, wholesaler or retailer to fine up to $10,000 or up to five years imprisonment or both. (§§ 13-701, 13-1009).

General penalties include fine up to $500 for negligent failure to furnish required information (§ 13-1023); fine up to $5,000 and up to 18 months imprisonment, or both, for willful or intentional evasion of any tax or failure to file required reports or giving of incorrect or misleading information. (§ 13-1024).

Limitations.

Unless otherwise specifically prescribed, action for collection of all state, county or city taxes must be commenced within seven years of due date or assessment date. (tax-gen. art. § 13-1103). Action to collect sales and use taxes must be brought within four years, except that proof of fraud or gross negligence (25% or more of tax due not paid) will remove bar of statutory period. (tax-gen. art. § 13-1102).

22.02 ALCOHOL, BEVERAGES AND TOBACCO TAXES:

Alcoholic beverage tax is imposed by tax-gen. art. §§ 5-101 et seq.

Tobacco tax is imposed by tax-gen. art. §§ 12-101 et seq.

22.03 BUSINESS TAXES:

Chain store tax is imposed by bus. reg. art. tit. 17, subtit. 18.

Franchise Taxes.

Note: All references are to tax-gen. art. unless otherwise indicated.

Public Service Company Franchise Tax.

Annual state tax of 2% of gross receipts is levied on public service companies engaged in telegraph, telephone, oil pipeline, electric, or gas business in Md.; gross receipts does not include gross charges from sale by public service company of Internet access service by which connection is provided between computer and Internet. Allocation formula is provided for such companies operating in several states. Report due Mar. 15; payment due with each return. (§§ 8-401 to 8-405). Declaration of estimated tax must be filed on or before Apr. 15 of current taxable year if tax for year is estimated to exceed $1,000. Fifty percent of estimated tax is then due and payable. Underpayment (estimated payment by less than 45% of tax due for full taxable year) subject to interest calculated from due date of estimated tax payment until date of final tax payment for taxable year at applicable state interest rate. (§§ 8-401, 8-404, 8-405, 13-602).

Franchise Tax Return.

Willful failure to file Public Service Company franchise tax return subjects person required to do so to fine up to $5,000 or up to five years imprisonment or both. (§ 13-1001).

Franchise Tax on Financial Institutions.

All domestic and certain other financial institutions are subject to franchise tax at rate of 7% of net earnings allocable to Md. Tax is imposed on commercial banks, credit companies, finance companies, international banking facilities, loan companies, mortgage companies, safe deposit companies, savings banks, savings and loan associations, trust companies and any company competing with national banks in Md. (§§ 8-101, 8-203, 8-204). Each covered institution must file quarterly estimated tax return with Dep't of Assessments and Taxation. (§ 8-209). Finance companies making loans to farmers, SBIA corporations, subchapter S corporations, and REMIC's are exempt. (§ 8-101). Special deduction authorized for international financial transactions. (§ 8-205). Principal amount of tax increment financing bonds, interest payable thereon, their transfers and any income or profit derived therefrom must be included in net earnings of financial institutions to extent required by §§ 128 and 128A of IRC for purposes of measuring state franchise tax. (art. 41). Every financial institution must file declaration of estimated tax within five months of beginning of tax year if its tax is expected to exceed $1,000. Fifty percent of estimated tax is then due and payable. Tax return due by 15th day of third month after end of institution's fiscal year. (§§ 8-209, 8-210).

Franchise Tax on Savings and Loan Associations.

For all taxable years beginning after Dec. 31, 2000, franchise tax on savings and loan associations has been eliminated. (§ 8-301[b]).

22.04 [RESERVED]

22.05 EMPLOYMENT TAXES:

Unemployment compensation tax or “contribution” is imposed on each employing unit which for some portion of day has or had in employment one or more individuals. (lab. emp. art. §§ 8-101[n]. 8-607).

Tax applies only to first $8,500 of wages paid. (lab. emp. art. § 8-607[b]). Employer contributions regulated by lab. emp. art. §§ 8-606 to 8-613. Standard rate is 7.5%. (lab. emp. art. § 8-608). No tax on employees. Returns must be made and tax paid quarterly to Employment Security Administration, 1100 N. Eutaw St., Baltimore 21201. (lab. emp. art. § 8-607[e]).

22.06 [RESERVED]

22.07 ESTATE TAX:

Note: All references are to tax-gen. art. unless otherwise indicated.

Tax is imposed on "Maryland estate" of "decedent" who, at time of death, was: (a) resident of State; or (b) nonresident whose estate includes interest in real property located in State or tangible personal property that has taxable situs in State. (§ 7-352). "Decedent" is defined as resident of Md. or one who left real or tangible personal property in Md. (§ 7-302). Tax is equal to amount, if any, by which credit under federal estate tax law exceeds aggregate of state death taxes payable out of Md. estate of decedent. (§ 7-304). If federal estate tax is not in effect, Md. tax is equal to amount, if any, by which credit under federal estate tax law would have exceeded aggregate of state death taxes payable out of Md. estate of decedent had federal estate tax remained in effect. (§ 7-304). Tax is imposed on amount of credit not satisfied by payment of Maryland inheritance tax. Tax not reduced by failure of personal representative to preserve maximum state death tax credit allowable under federal law. (§ 7-304). Tax limited to amount by which its timely payment under federal law would reduce federal estate tax payable. (§ 7-304). Tax is payable nine months after date of death. (§ 7-305). Interest at applicable state interest rate, from due date to date of payment. (§ 13-601). Comptroller may grant alternative payment schedule for tax in form of payment plan on case-by-case basis. (§ 7-307). Tax is paid to Comptroller of Treasury when estate tax return is filed with register of wills. (§ 7-306).

Apportionment Against Inter Vivos Dispositions.

Uniform Estate Tax Apportionment Act adopted. (§ 7-308).

Interstate Co-operation.

Uniform Acts on Interstate Arbitration of Death Taxes (§§ 7-104 et seq.) and Interstate Compromise of Death Taxes (§§ 7-118 et seq.) adopted.

Tax on Executors' and Administrators' Commissions.

See category 13 Estates and Trusts, topic 13.08 Executors and Administrators, subhead Tax on Commissions.

22.07A GAMBLING AND ENTERTAINMENT TAXES:

Admissions and Amusement Tax.

Note: All references are to tax-gen. art.

Any county or municipal corporation may impose tax on gross receipts derived from any admissions and amusement charges in that county or municipal corporation. In addition, Maryland Stadium Authority may impose tax on gross receipts derived from any admissions or amusements for admission to facility owned or leased by Stadium Authority. (§ 4-102[c][1]).

Admissions and amusement tax is applicable to receipts derived from admission to place, use of game for entertainment, use of recreational or sports facility, use or rental of recreational or sports equipment and merchandise, refreshments, or service sold or served in connection with entertainment at nightclub or room in hotel, restaurant, hall or other place where dancing privileges, music or other entertainment are provided, but not charges for admission to political fundraising events. (§ 4-101). County may not impose tax on gross receipts from any source within municipal corporation located within that county if municipal corporation imposes admissions and amusement tax on gross receipts or specifically exempts any gross receipts from admissions and amusement tax. (§ 4-103[a][1]). Rate of tax for counties and municipal corporations shall not exceed 10% of gross receipts; Stadium Authority's rate shall not exceed 8% of gross receipts. (§ 4-105). If gross receipts are also subject to sales and use tax, counties and municipal corporations may not set rate that exceeds 10% when combined with sales and use tax. If gross receipts are also subject to admissions and amusement tax by Stadium Authority, rate cannot exceed 10% when combined with tax imposed by Stadium Authority. (§ 4-105). Following are exempt: (1) Gross receipts derived from place where dancing is prohibited and only entertainment provided is from mechanical music, radio or television; (2) gross receipts from live boxing or wrestling match; (3) concerts or theatrical events presented or offered by nonprofit groups; (4) gross receipts derived from admission charges to or for use of facility or equipment in connection with bingo game operated in accordance with art. 27, § 260; (5) bowling alley; (6) charter fishing boat; (7) gross receipts used exclusively for charitable, educational or religious purpose, or for volunteer fire company or nonprofit rescue squad, or fraternal, service, or veterans organization, or agricultural fair; (8) gross receipts used for cost of prizes or winnings distributed as part of commercial bingo game operations in Anne Arundel County. Any county may exempt community associations, nonprofit organizations and performing arts organizations; and (9) admissions and amusements charge for activities related to agricultural tourism. (§§ 4-103, 4-104).

Tax return is due on or before tenth day of month that follows month in which person received gross receipts. (§ 4-201). Person must keep complete and accurate records for four years. (§ 4-202).

Boxing and wrestling tax is imposed by tax-gen. art. §§ 6-101 et seq.

22.08 GASOLINE AND SPECIAL FUELS TAXES:

Motor fuel tax is imposed by tax-gen. art. §§ 9-301 et seq.

22.08A GENERATION SKIPPING TAX:

Generation Skipping Transfer Tax.

Note: References are to tax-gen. art.

Generation skipping transfer tax (§ 7-401 et seq.) imposes tax on certain generation skipping transfers occurring at time of and as result of death of individual. (§ 7-402). It picks up any allowable federal credit on taxable termination attributable to Maryland property passing with respect to decedents for whom federal return is required to be filed on or after 1/1/89. (§ 7-403).

22.09 GIFT TAX:

None, but inheritance tax applies to gifts in contemplation of death or intended to take effect at or after death. (tax-gen. art. § 7-201).

22.10 [RESERVED]

22.11 INCOME TAX:

Note: All references are to tax-gen. art. unless otherwise indicated.

Imposed on individuals and corporations by § 10-102. Forms and information may be procured from Comptroller of Treasury, State Treasury Building, Annapolis 21404.

Taxable net income of resident is taxpayer's federal adjusted gross income ("AGI"), modified as herein set forth, less deductions and personal exemptions hereinafter set forth. Taxpayer's federal AGI is increased by: (i) interest or dividends on obligations of any state or political subdivision (other than Md.) less related expenses; (ii) wages from and interest or dividends on obligations of any authority or instrumentality of U.S. or any foreign government which by law or treaty are exempt from federal income tax but not from state income tax; (iii) ordinary income portion of lump sum distribution allowable as deduction from federal AGI under § 402(e)(3) of IRC, and, to extent treated as ordinary income, 40% of capital gain portion of distribution as provided in § 402(a)(2) of IRC and giving effect to § 401(e)(1)(D) of IRC; (iv) oil depletion allowance as claimed and allowed under § 613 or 613A of IRC; (v) pickup contributions of retirement or pension system member; (vi) enterprise zone wage credit; (vii) reforestation and timber stand modification; (viii) amount of credit allowed under § 10-703 if credit is based upon taxes paid by S corporation to state which does not recognize federal S corporation tax treatment; (ix) certain net operating losses; (x) 50% of sum of items of federal tax preference as determined and defined in § 10-222; and (xi) expenses attributable to operating certain child care and day care facilities. Taxpayer's federal AGI is reduced by: (i) distribution to beneficiary of accumulated income on which fiduciary has paid income tax; (ii) dividends and interest from U.S. obligations, including such amounts received from mutual funds; (iii) any amount included in federal AGI under § 62 of IRC for employer-provided official vehicle used in accordance with law by member of state, county or local police or fire department; (iv) payments from pension system to surviving spouse or other beneficiary of law enforcement officer or firefighter whose death arises out of or in course of employment as law enforcement officer or firefighter; (v) income derived from Development Credit Corporation of Md.; (vi) income due to withdrawal from Keogh Plan if state taxes previously paid; (vii) payments received under fire, rescue or ambulance personnel length-of-service award programs; (viii) for any eligible low-income taxpayer, earned income as defined in § 32(C)(2) of IRC; (ix) included profit from sale or exchange of bonds issued by state or subdivisions; (x) to extent included, amounts received by individuals under Tit. II of Social Security Act or Tier I benefits under Railroad Retirement Act; (xi) relocation and assistance payments under real prop. art. § 12-201 et seq.; (xii) pickup contributions for members of retirement or pension system; (xiii) included refunds of any state or local income taxes paid; (xiv) income exempted from state income tax by federal law or treaty; (xv) any income derived from intangible personal property held in Md. in trust for benefit of nonresident or corporation not doing business in state; (xvi) overseas military pay; (xvii) certain military retirement pay; (xviii) up to $1,200 of salary of lesser-earning spouse of two-earner married couple filing jointly; (xix) income seized by Nazi Germany, if taxpayer is Holocaust victim; (xx) certain foreign earned income; and (xxi) any grant received under st. gov't art. § 9-2007. (§ 10-207). Taxpayer's federal AGI also reduced by, if over 65 or if individual or spouse is totally disabled, lesser of pension payments or annual benefit received by Md. retirees from Social Security for prior calendar year. (§ 10-209). Subject to abrogation, taxpayer's federal AGI is reduced by: (a) not more than $3,000 for all expenses actually incurred and not itemized in computing federal taxable income by adoptive parents who adopt child with special needs as defined in § 222 of IRC through public child welfare agency or licensed, not-for-profit private adoption agency; (b) not more than $2,000 for adoption of child without special need as defined in § 473(c)(1) and (2) of Social Security Act; (c) up to $1,000 in expenses incurred each taxable year by employers in providing readers for blind employees and up to $5,000 in expenses incurred each taxable year by blind individuals in obtaining reader for personal use or use in their employment; (d) expenses incurred for purchase and installation of conservation tillage equipment; (e) expenses for household and dependent care; (f) fair market value of donated art works not deductible from federal AGI with several limitations including requirement that taxpayer derive at least 50% of income from sales of art works produced by taxpayer; (g) donated farm products to gleaning cooperatives; (h) upon election of taxpayer, historic structure preservation expenses; (i) expenses for reforestation or timber stand improvement activity; (i-1) $3,500 if individual is qualifying volunteer fire, rescue, or emergency medical services member for taxable year; (j) gross income of child included in parent's gross income under § 1(a)(7) of IRC unless child is required to file income tax return or would have been required to if not for § 1(i)(7) of IRC; (k) unreimbursed automobile travel expenses incurred while serving as volunteer for organizations providing medical, health or nutritional care described in § 170 of IRC, while providing assistance (other than transportation) to handicapped individuals (as described in § 190 of IRC) attending state community college, or while serving nonprofit volunteer fire company; (l) amount by which employer business deduction for employee wages and salaries under § 280C(a) of IRC (relating to targeted jobs credit) is disallowed, (m) cost of poultry or livestock manure spreading equipment used in accordance with approved nutrient management plan; and (n) $3,500 if individual is qualifying police auxiliary or reserve volunteer. (§ 10-208[i-l]).

Deductions.

Individual who has itemized his deductions for federal income tax purposes may deduct sum of such itemized deductions reduced as required by IRC, amounts deducted under § 170 of IRC for contributions of preservation or conservation easement for which credit is claimed under tax-gen. art. § 10-722 and for state and local taxes deducted. (§ 10-218). Federal deductions which are eliminated, reduced, or changed to credit during taxable year does not affect deduction for state income tax during that year. (§ 10-108). Resident for less than full year can deduct only items expended during his residence in Md. Nonresident can claim deductions only to extent they are allocable to taxable income. Standard deduction of 15% of Md. adjusted gross income, not to be less than $1,500 ($3,000 on joint return or for head of household or surviving spouse) or not to exceed $2,000 ($4,000 on joint return or for head of household or surviving spouse), may be taken by certain individuals in lieu of itemized deductions. (§§ 10-108, 10-217, 10-220, 10-221).

Personal Exemptions.

Individual taxpayer allowed exemption of $3,200 for each personal and dependent exemption for which he is entitled to deduction for federal tax purposes in corresponding tax year. (i) additional $3,200 for each dependent who is at least 65 years old on last day of taxable year; (ii) additional $1,000 if individual, on last day of taxable year is at least 65 years old; and (iii) additional $1,000 if individual, on last day of taxable year, is blind individual. If individual has federal adjusted gross income for taxable year greater than $100,000, amount allowed for each exemption is limited to: (i) $2,400 if federal adjusted gross income for taxable year does not exceed $125,000; (ii) $1,800 if federal adjusted gross income for taxable year is greater than $125,000 but not greater than $150,000; (iii) $1,200 if federal adjusted gross income for taxable year is greater than $150,000 but no greater than $200,000; and (iv) $600 if federal adjusted gross income for taxable year is greater than $200,000. For tax returns for periods less than one year, exemptions apportioned based on number of months included in taxable period. Nonresident receiving credit for taxes paid to other state receives proportion of exemption equal to adjusted gross income in Md. divided by federal adjusted gross income. (§§ 10-206, 10-210).

Rates of tax on taxable net income of resident and on net income of nonresident taxable in Md. are 2% on first $1,000, 3% on second $1,000, 4% on third $1,000, and 4.875% for taxable year beginning after Dec. 1, 1997 but before Jan. 1, 1999; 4.85% for taxable year beginning after Dec. 31, 1998 but before Jan. 1, 2001, 4.8% for taxable year beginning after Dec. 31, 2000 but before Jan. 1, 2002; and 4.75% for taxable year beginning after Dec. 31, 2001 on excess over $3,000. (§ 10-105). For amounts in excess of $150,000 (for spouses filing jointly, surviving spouse, or head of household) or $100,000 (for other individuals) will be taxed at 6%. (§ 10-105). Counties and Baltimore City are required to impose upon their respective residents local income tax in form of surtax of not less than 20% nor more than 60% of state income tax liability. (§ 10-106). Local income tax surcharge is 50% as to Baltimore City and all counties, except as follows:

Worcester County, 20%; Baltimore, Alleghany, and Montgomery Counties, 55%; Talbot and Prince George's Counties, 60%.

Credit against income tax may be claimed: (i) By individual for income tax withheld and estimated tax payments under Subtitle 9 (§ 10-701); (ii) by individual or corporation for amount of tax paid by pass-through entity under § 10-102.1 attributable to such individual or corporation's share of pass-through entity's nonresident taxable income (§ 10-702); (iii) by resident for income tax paid in another state (§ 10-703); (iv) by individual for earned income in amount that is lesser of 50% or state income tax for taxable year equal to 50% of earned income tax credit under § 32 of IRC not to exceed income tax imposed without taking into account state personal property tax credit (§ 10-704); (v) by corporation or electricity supplier in amount of $3 for each ton of Maryland mined coal purchased in taxable year (§ 10-704.1); (vi) by individual or corporation for wages paid to qualified employment opportunity employees and for child care for children of qualified employment opportunity employee (§ 10-704.3); (vii) by individual or corporation for wages paid to qualified employees pursuant to Art. 83A § 5-1102; (viii) by individual or corporation for certified rehabilitation under State Finance and Procurement Art. § 5A-303; (ix) by individual or corporation for neighborhood and community assistance contributions under § 6-404 of Maryland community assistance contributions under § 6-404 of Maryland Housing Community Development Authority Art.; (x) for 50% of certified additional fertilizer costs to convert agricultural production to nutrient management (§ 10-704.9); (xi) for wages paid to qualified ex-felon employee; (xii) by individual for residential real estate property tax (§ 10-707); (xiii) by public utility that is telecommunications company for 60% of its total state, county and municipal property taxes on its operating real property in state (§ 10-708); (xiv) by eligible low income taxpayer in amount equal to lesser of its (a) state income tax or (b) 5% of taxpayer's earned income (§ 10-709); (xv) by employer for 5% of costs to provide long-term care insurance (§ 10-710); (xvi) by multi-jurisdictional electric company in amount equal to 25% of state income tax to employees that are employed and regularly work at such company's qualified corporate headquarters (§ 10-713); (xvii) for one Maryland project and start-up costs (§ 10-714); (xviii) for cost of providing commuter benefits under § 2-901 of Environment Art. (§ 10-715); (xix) for qualified individuals for certain child or dependent care; (xx) by classroom teacher for up to $1,500 of tuition to maintain certification (§ 10-717); (xxi) by individual for long-term care insurance (§ 10-718); (xxii) for costs of solar water heating property or photovoric property (§ 10-719); (xxiii) for producer of qualified energy resources in amount equal to 85¢ for each kilowatt hour of electricity (§ 10-720); (xxiv) for certain qualified research and development expenses (§ 10-721); (xxv) for certain costs of construction of certain green buildings (§ 10-722); (xxvi) for conveyances of preservation and conservation easements (§ 10-723); (xxvii) for purchase price of aquaculture oyster floats (§ 10-724); and (xxviii) for investments in qualified biotechnology company.

Residents are persons domiciled in state on last day of taxable year or who for more than six months of taxable year maintain place of abode in state, whether domiciled in state or not. (§ 10-101). Provision is made for allocation where person is resident for part of year. (§ 10-220[b]).

Nonresidents are taxed on federal adjusted gross income reduced by nonresident's income other than income derived from tangible property, real or personal, located in state and from business, trade, profession or occupation wholly carried on in state, and from business, occupation, profession, or trade carried on within and without Md. to extent allocable to Md. under method required by Comptroller and of certain portions of military pay received by certain military personnel for active service outside U.S. and from lottery prizes or winnings from any other wagering derived in Md. (§ 10-210). Nonresident's federal itemized deductions and state exemptions are multiplied by fraction with Md. adjusted gross income as numerator and federal adjusted gross income as denominator. Comptroller may require different method to compute Md. itemized deductions. (§ 10-219). In computing adjustment under §§ 10-206-10-210, nonresident shall allocate state income derived in connection with business, occupation, profession, or trade by separate accounting or other method that Comptroller requires. (§ 10-401). Wages earned by nonresident in Md. exempt from tax if two states agree in writing to allow reciprocal exemptions from tax and from withholding. (§§ 10-806, 10-907).

Abatement of Tax.

Income tax will be abated in case of individual who dies while in active service in military if such death occurs while in combat or from wound or disease incurred while so serving or in case of individual who dies while employed in military or as civilian employee of U.S. if death occurred outside U.S. as result of terrorism or military action. (§ 13-908).

Tax may be withheld from wages of nonresident. (§ 10-907).

Corporations are taxed 7% of portion of Maryland modified income allocable to this State, according to business carried on in state and elsewhere. Corporations may allocate income to Md. by separate accounting if practical or by three-factor apportionment fraction weighing property and payroll equally and assigning double weight to sales. (§§ 10-105, 10-402). Maryland modified income of corporation is taxable income as defined in laws of U.S., increased by: (1) Net capital loss carry-back; (2) state or local income taxes; (3) interest or dividends (less related expenses) on obligations or securities of other states or their subdivisions; (4) federal tax exempt income; (5) oil percentage depletion allowance; (5-i) deduction for qualified production activities income; (6) enterprise zone wage credit; (7) reforestation and timber stand modification; (8) net operating loss modification; (9) unlicensed child care facility expenses; (9-i) Maryland research development tax credit; (10) telecommunications companies' property tax credits; (11) electricity or steam generating sites' property tax credits; and (12) multi-jurisdictional electric companies' wage credits. (§§ 10-304 to 10-306). Income is reduced by (i) refund of state income tax; (ii) included profit from sale or exchange of bonds of State of Md. or its political subdivisions; (iii) dividends from foreign subsidiary if taxpayer owns 50% or more of stock; (iv) amounts included by operation of § 78 of IRC; (v) includible percentage of dividend income received from certain affiliated DISC's (as defined in § 992[a] of IRC) equivalent to percentage excludable if DISC were not qualified under § 992(a) (this exclusion applicable only if 50% of DISC net taxable income is subject to Md. taxation); (vi) expenses incurred for purchase and installation of conversation tillage equipment; and (vii) other miscellaneous subtractions. (§ 10-307).

Partnerships, S corporations, limited liability companies and business trusts that have one or more nonresident shareholders, partners, members or beneficiaries of business trust (“nonresidents”) and have nonresident taxable income are subject to 5% tax on each nonresident's distributive or pro rata share of nonresident taxable income of partnership, S corporation, limited liability company or business trust. Tax is treated as imposed on nonresident and paid by partnership, S corporation, limited liability company or business trust. Tax paid may not exceed nonresident's share of distributable cash flow. (§§ 10-102.1, 10-104).

Captive Real Estate Investment Trusts.

Certain deductions for dividends paid allowed under Internal Revenue Code are to be added to federal taxable income of certain real estate investment trusts to determine Maryland modified income. (§ 10-306.2).

Estates and Trusts.

Personal representatives of estate of decedent who died domiciled in Md. subject to state and county income tax and allowed $600 exemption. (§§ 10-102, 10-103, 10-212). Fiduciary of trust subject to state and county income tax, and allowed $200 exemption, if trust created by, or consists of property transferred by, will of decedent who died domiciled in Md., if creator of trust is resident of Md., or if trust principally administered in Md. (§§ 10-101[h], 10-103, 10-212).

Returns and Payment.

Returns must be filed with Comptroller on or before Apr. 15, or 15th day of fourth month following close of fiscal year, and full amount of tax must be paid at time of filing return. Husband and wife who file joint federal return must file joint return. (§§ 10-820, 10-807). Corporate income tax returns must be filed on or before Mar. 15, or 15th day of third month following close of fiscal year. (§ 10-821). Partnerships must file income tax returns on Form 501. (§ 10-814). Limited liability companies must file income tax returns as partnership if taxable under IRC § 761 or as corporation if taxable under IRC Subchapter C. (§ 10-819). Last return of decedent must be filed by Apr. 15 of year following date of death. (§ 10-808). Extensions for filing of up to six months for individual or seven months for corporation (one year for persons abroad) may be granted but taxpayer must pay interest, at applicable state interest rate, per month for period during extension when taxes remain unpaid. (§§ 10-823, 13-601). Returns are audited by Comptroller, and additional taxes may be assessed within three years after return was filed or within three years after due date of return, whichever is later; except assessment can be made at any time in case of false or fraudulent return or failure to file return or to report subsequent increases in federal taxable income. (§§ 13-1101, 13-401). Appeal may be made to Md. Tax Court within 30 days after notice of assessment is mailed. (§ 13-510).

Withholding and Payment of Estimated Tax.

Withholding of tax at source and remitting quarterly, monthly if total amount withheld in quarter is expected to be $700 or more, and within three business days of total accumulated amount withheld equaling or exceeding $700 if total withholding for prior year was $15,000 or more. (§ 10-822). Fiduciary distributing taxable income to nonresident alien must withhold. (§ 10-905). Employer is required to supply withholding statement to individuals by Jan. 31 and to Comptroller by Feb. 28. (§ 10-911). Every individual receiving taxable income not subject to withholding is required to file quarterly declarations of estimated tax beginning Apr. 15 of year for which tax is due, unless tax liability on gross income not subject to withholding does not exceed $100 for individual taxpayer as well as every individual who receives income of $500 or more in cash or property as result of wagering, contest, lottery, raffle, or use of gambling machine, unless tax to be withheld under § 10-906. (§ 10-815). Farmers and fishermen file declaration on succeeding Jan. 15, and may file return and pay tax by succeeding Mar. 1 in lieu thereof. (§ 10-820[c]). To avoid penalty, estimated tax must be at least 100% of prior year's tax or 90% of tax ultimately due. (§ 13-602). Quarterly payments of estimated tax must consist of at least 25% of estimated income tax shown on declaration for taxable year. (§ 10-902). In order to implement provisions, out-of-state employers may be required to post security. (§ 13-811).

Lien.

Unpaid tax, interest, and penalties constitute lien, in favor of state, extending to all property and rights to property. (§ 13-805). Notice of lien must be filed to prevail against subsequent mortgagee, pledgee, buyer or judgment creditor. (§ 13-809). Notice of lien on salary or wages must be given to employer. (§ 13-811).

Specially Exempt Organizations.

Following are specifically exempt from income tax: (1) Common trust funds, as defined by § 3-501 of fin. inst. art.; (2) organization that is exempt from taxation under § 408(e)(1) or § 501 of Internal Revenue Code; (3) financial institution that is subject to financial institution franchise tax; (4) person subject to taxation under Title 6 of insurance article; (5) partnership, as defined in § 761 of Internal Revenue Code; (6) S corporation; (7) investment conduit or special entity; or (8) limited liability company as defined under Title 4A of Corporations and Associations Article to extent that company is taxable as partnership, as defined in § 761 of Internal Revenue Code. (§ 10-104). Tax exempt organization must make its Federal returns available for inspection. (§ 10-818).

22.12 INHERITANCE TAX:

Note: All references are to tax-gen. art. unless otherwise indicated.

With exceptions hereinafter stated, tax is imposed on privilege of receiving property that passes from decedent and has taxable situs in Md. (§ 7-202). Property subject to inheritance tax includes: (1) Property that passes by will or under intestate laws of state, at or after death of decedent, in trust or otherwise, to or for use of another person; (2) property in which, at death, decedent had interest as joint tenant; and (3) except for bona fide sale for adequate and full consideration in money or money's worth, property that passes by inter vivos transfer by decedent, in trust or otherwise if: (a) transfer is made in contemplation of death, (b) transfer is made by decedent within two years before death, (c) transfer is intended to take effect in possession or enjoyment at or after death of decedent, or (d) under transfer, decedent retained any dominion over transferred property during life of decedent including retention of beneficial interest, power of revocation or power of appointment by will or otherwise. (§ 7-201).

Exemptions.

Property having value of $1,000 or less passing to any one person; property that passes from decedent to or for use of grandparent, parent, spouse, child or other lineal descendant, spouse of child or other lineal descendant, current or former stepparent or stepchild, brother or sister; or corporation, partnership or limited liability company if all of its stockholders, partners or members of surviving spouse, parents, stepparents, stepchildren, brothers, sisters, and lineal descendants and spouses of lineal descendants; interest in property that passes by right of survivorship; insurance payable to named beneficiary; death benefit excludable from estate under § 11-105 of est. & tr. art.; annuity or other payment under public or private employee's pension plan if payment is not taxable for Federal estate tax purposes; receipt of family allowance that surviving spouse and minor children are allowed under § 3-201 of est. & tr. art.; receipt of property for grave maintenance (up to $500); receipt of property to or for use of organization exempt from taxation under § 501(c)(3) of IRC or that is deductible under § 2055 of IRC provided corporation is incorporated under laws of this State or conducts substantial part of all its activities in Maryland or in District of Columbia or has its principal place of business in state which does not impose death taxes on property passing to charitable organization of this State; property passing from decedent's estate which qualifies under § 5-601 of est. & tr. art. as small estate; property that is income, including gains and losses, accrued on probate assets after date of death of decedent; and property passing to state, county or municipal corporation of state; assets of Holocaust victims that were seized, misappropriated or lost due to actions or policies of Nazi Germany and receipt of interest in joint primary residence held in joint tenancy by decedent and domestic partner. (§ 7-203).

Valuation.

Value of property subject to tax is appraised value stated in inventory required to be filed under § 7-225. (§ 7-207). Personal property may be reappraised prior to distribution. (est. & tr. art. §§ 7-203, 7-204). Provision is made for valuing life estates and other interests less than absolute. (§§ 7-208, 7-209).

In case of joint tenancy, where interests are not otherwise specified or fixed by law, interest passing is determined by dividing value of property by number of joint tenants. (§ 7-209).

Valuation date is date of death or date of reappraisal. (est. & tr. art. § 7-201). Valuation of contingent or remainder interest may be either as of date of death or date when preceding estate terminates. (§ 7-210).

Rates of Tax.

Tax rate for property passing from decedent is 10%. (§ 7-204).

Lien.

Tax is lien on real estate for four years from date of distribution. (§ 13-806[b]).

Payment.

Tax on distributive shares and legacies is due and must be paid to register of wills at time of filing of administration account showing distribution. (est. & tr. art. § 7-307). Comptroller may grant alternative payment schedule in form of payment deferral or installment payment plan, not to exceed five year period, for inheritance tax, if payment of tax on normal due date would require party liable for tax to sell small business, or any interest in small business owned in whole or part by decedent. (§ 7-218). For date account is due, see category 13 Estates and Trusts, topic 13.08 Executors and Administrators, subhead Intermediate Accountings.

Executors, administrators, trustees, agents, fiduciaries and other persons making distribution of any property subject to tax are charged with payment thereof. (§ 7-215).

Interest.

Unpaid taxes bear interest beginning 30 days after date tax is determined. (§ 13-601).

Nonresidents.

Property passing on death of nonresident decedent is liable for tax if property has taxable situs in Md. (§ 7-202).

No tax is imposed on personal property passing from nonresident if, at time of transfer, distribution or other disposition of such property, state, territory or country of such person's residence: (1) Did not impose transfer tax or death tax on intangible property of residents of Md. or (2) allowed reciprocal exemption. (§ 7-203).

Waivers for transfer of intangible personalty not required by Md. law.

22.12A MINES, MINERALS AND FISHERIES TAXES:

Natural Gas Tax.

See category 19 Mineral, Water and Fishing Rights, topic 19.01 Mines and Minerals.

22.13 [RESERVED]

22.14 MOTOR VEHICLE TAXES:

Motor carrier tax is imposed by tax-gen. art. §§ 9-201 et seq.

Titling Taxes.

Boat titling tax is imposed by nat. res. art. § 8-716.

Motor Vehicle Titling Tax.

See category 23 Transportation, topic 23.01 Motor Vehicles.

22.14A PRODUCE AND FOOD TAXES:

Tax on commercial apples is imposed by agric. art., § 10-406.

22.15 [RESERVED]

22.16 PROPERTY TAXES:

Note: All references are to tax-prop. art. unless otherwise indicated.

Taxable Property.

All property, other than intangible personal property, located in Maryland is subject to assessment and property tax upon owner of property. (§ 6-101[a]). Other than certain intangible personal property owned by corporation which is subject to assessment and property tax, intangible personal property is not subject to such tax. (§ 6-101[b]).

Property Owner's Bill of Rights enacted in 1990. (§§ 1-401-1-403).

Exemptions.

(1) Property owned by U.S., Md. or any political subdivision devoted to governmental use (§ 7-210); (2) property owned by religious organization used exclusively for public religious worship, as convent or for educational purposes (§ 7-204); (3) nonprofit cemeteries and mausoleums (§ 7-201); (4) property owned by nonprofit hospital (§ 7-202); (5) personal property initially leased by nonprofit hospital for more than one year (§ 7-202); (6) property (but not exceeding 100 acres of pertinent land) owned by any nonprofit organization and used exclusively for charitable or educational purpose (§ 7-202); (7) property of veterans' organizations (§ 7-234); (8) property owned by Chesapeake Bay Foundation (§ 7-203); (9) property operated as nonprofit continuing care facility for aged (§ 7-206); (10) dwellings of certain blind individuals and surviving spouses (§ 7-207); (11) dwellings of certain disabled veterans and their surviving spouses (§ 7-208); (12) property owned by nonprofit fire companies (§ 7-209); (13) property of historic societies (§ 7-214); (14) property owned by housing authority (§ 7-215); (15) property owned by Boy and Girl Scouts (§ 7-233); (16) property owned by community water systems (§ 7-205); (17) personal property that is machinery or equipment used to generate electricity or steam for sale (§ 7-237); (18) property operated as bus passenger shelter (§ 7-211); (19) property that has solar energy device installed to either heat or cool, generate electricity, or provide hot water for dwelling (§ 7-308). Interest in property in international trade center if state or agency or instrumentality of state owns property and makes negotiated payments in lieu of tax payments. (§ 7-211).

Tangible personal property of certain credit unions and certain savings and loans and of certain banks. (§ 7-221.1).

Certain manufacturing property; certain vessels, aircraft and motor vehicles, agricultural products and commodities under certain conditions; farming implements and livestock, except in certain counties; tangible personal property located at owner's residence, other than property used in connection with any business, occupation or profession; hand tools of mechanics and artisans; and business personal property in certain counties. (§§ 7-219 et seq.).

Procedures are established to apply for exemption of real property. (§ 7-103).

Assessment.

Property, real and personal, subject to ordinary taxation is valued and assessed for purposes of state and county or city taxation by supervisors of assessments appointed by Dep't of Assessments and Taxation. (§§ 2-105, 8-201, 8-202).

Property Tax Credit.

Baltimore City, certain counties and cities located within those counties are required or, in certain cases, have option to grant single mandatory credit against full amount of tax on certain types of property. (§§ 9-301 et seq.). Credit against real property taxes levied by state or local government is given to certain homeowners by reason of low income. Credit is not available to individuals whose net worth exceeds $200,000 or whose combined gross income exceeds $60,000 in that same taxable year. Taxpayer must apply to Dep't of Assessments and Taxation for credit. (§§ 9-101, 9-104). Credit against rent paid subject to similar income and net worth limits of renters 60 or older, or disabled, or meeting income guidelines and living with one or more dependent children. (§ 9-102). Homeowner's property tax credit for occupants of independent living units subject to real property taxation at continuing care facilities for aged. (§ 9-104). Credit for businesses located in enterprise zones. (§ 9-103). Counties are empowered to grant property tax credits for land dedicated to “open space”, for structures using solar energy, geothermal energy, or certain energy conservation components, for nonprofit community associations, civil leagues or organizations, or recreational or athletic organizations, and for agricultural land. (§§ 9-203, 9-206, 9-208, 9-243, 9-305). Credit for property subject to perpetual conservation easement granted prior to June 30, 1986. (§ 9-107). Baltimore City and each county authorized to grant property tax credit for improvement of real property used exclusively for specified day care services by licensed provider. (§§ 9-213, 9-214). There is property tax credit for landlords who rent to elderly or disabled at reduced rent. Property tax credit is also allowable for landowner whose property is destroyed due to natural disaster and subsequently repaired or reconstructed. (§ 9-1243). Mandatory property tax credit for conservation property (as defined in § 9-107) against all property tax that would otherwise be due. Credit allowed for 15 years. Taxpayer must apply to Dep't of Assessments and Taxation for credit. (§ 9-107). Local tax credits are also allowed in some counties and municipalities for certain unsold, unrented or unoccupied new or rehabilitated dwellings. (§ 9-207). Credit allowed all homeowners limits to 15% per year increase in tax due to increased assessment unless property increased in value due to rezoning, transfer of title, substantial change in use, extensive improvements or prior year assessment clearly erroneous. (§§ 9-104, 9-105). County or Baltimore City may grant property tax credit to surviving spouse of individual who died as result of injury or illness incurred during active law enforcement, fire, rescue or emergency medical service. (§ 9-210). County or Baltimore City may also grant tax credit for dwelling purchased to replace dwelling acquired for public use. (§ 9-246).

Governing body of municipal corporation or county may grant, by law, property tax credit for certain personal property used in research or testing facility. (§ 9-223).

Dep't of Assessments and Taxation values, assesses and taxes for purposes of state, county and city taxation: (1) Operating property of railroads or public utilities; (2) tangible personal property of corporation; (3) intangible personal property subject to taxation under § 6-101; and (4) distilled spirits. (§ 8-201).

All real and personal property is required to be assessed at full cash value on date of finality. (§§ 8-107, 8-102). Full cash value redetermined in event of transfer, zoning change, substantially completed improvement, change in use or character, subdivision or prior error. All real property reviewed, inspected and revalued triennially; resulting increases phased in over three year period. (§ 8-104). However, where residential property is rezoned, valuation and assessment may be based on residential use. (§§ 8-226, 8-228).

Special provision is made for assessment of operating property of railroads, public utilities, and other transportation property. (§§ 6-103, 7-230, 8-108). Guidelines for assessment of real property include provisions covering farm lands, marshlands, mobile homes, open space easements, woodlands, country clubs, and planned developments. Certain specified improvements may be excluded in determining value. (§§ 8-209 et seq.). In addition, Dep't of Assessments and Taxation may reduce assessments on certain damaged or threatened residential real property, and assessment of damaged property may not be increased unless property is restored, if replacement is comparable to lost property. (§§ 8-230, 8-231). With certain exemptions, where land assessed for agricultural use is transferred for nonagricultural purposes, agricultural transfer tax is imposed. See category 10 Documents and Records, topic 10.04 Records, subhead Tax on Recordation, catchline Transfer Tax. Income producing property may be valued by income capitalization method or any other appropriate method and submission of income and expense statement for property may be required. (§ 8-105). For method of assessment of value of personal property see § 8-107. For assessment and valuation of public utility property and railroad property see §§ 8-108 and 8-109. For valuation of inventory of domestic business see § 8-110.

Provision is made for reduction of taxes of real or personal property either partially or totally damaged. (§ 10-304). Notice must be given to owner or other appropriate person of real property assessment, who then has right to appeal: (1) Before existing valuation is increased or decreased; (2) before any classification is changed; (3) establishment of initial real property value; (4) decision on assessment appeal or petition to change existing real property value or classification; and (5) revaluation or reclassification, if valuation or classification has been appealed but not finally determined. (§ 8-401).

Review of Assessment.

Any taxpayer, city, county, municipal corporation or Attorney General may, with respect to any property assessed by supervisor, demand hearing before supervisor of assessments as to value or classification if written appeal made within 45 days after date of notice. Transferee of property transferred after date of finality and before beginning of next tax year has 60 days after transfer to protest assessment for ensuing year. (§ 14-502). Within 30 days of final notice of assessment, further appeal can be filed with Property Tax Assessment Appeal Board. Thirty day limitation may be waived by Appeal Board by reason of physical inability of taxpayer. (§ 14-509). Rules of Property Tax Assessment Appeal Board to be issued by its administrator, in compliance with provisions of Administrative Procedure Act. (§ 3-108). After exhausting administrative remedies, any taxpayer, city, county, municipal corporation, Attorney General, or Dep't of Assessments and Taxation may appeal value or classification determination made by Property Tax Assessment Appeal Board to Md. Tax Court. Appeals to Md. Tax Court may also be made from final actions taken by Dep't of Assessments and Taxation with respect to taxes assessable by it. All appeals to Md. Tax Court must be taken by petition filed within 30 days of final decision or mailing of notice, as case may be. (§ 14-512). As to appeal from Md. Tax Court, see § 14-513. As to appeal from Circuit Courts for county in which property located, see § 14-515.

Unless taxpayer files bond with collecting agency, appeal will not stay or affect collection or enforcement of assessment or classification. (§ 14-514). Upon final determination of appeal, excess over amount properly chargeable is refunded with interest. (§ 14-611).

Provision is made for decrease or abatement of assessment after date of finality to correct erroneous and improper assessments and prevent injustice. (§ 8-419).

Rates of Tax.

Real and personal property owners pay full state, county and/or city rate prevailing at time. (§§ 6-301, 6-302). County's tax rate in certain municipalities may be less than general county rate to adjust for municipal property taxes paid by municipal residents. (§§ 6-305, 6-306). State property tax rate for personal property provided in State Finance & Procurement Article § 8-134.

Levy, Payment, etc.

County or city authorities must annually levy county and city taxes at respective rates fixed for each taxable year (July 1-June 30). (§§ 1-101[ii], 6-204, 6-305, 6-306). Taxes on real property are imposed as of date of finality (Jan. 1) or semiannual or quarterly dates of finality (Apr. 1; July 1; Oct. 1); and taxes on personal property are imposed as of date of finality. (§ 8-416).

All state, county or city property taxes for taxable year are due on or after July 1 and are overdue and bear interest if not paid on or before Sept. 30. (§ 10-102). As general rule (although there are exceptions) interest on county or municipal corporation property tax is at rate of 2/3 of 1% per month or fractional part thereof. (§ 14-603). Certain political subdivisions allow specified discounts for payment prior to Oct. 1. (§ 10-301).

As general rule, all property tax must be collected on or before seven years from date tax is due. Any judgment entered may be enforced or renewed as any other judgment. (§ 14-1101).

Lien.

Unpaid real property taxes are first lien on property from date they become payable. (§ 14-804[a]). All unpaid taxes on personal property are liens on personal property and on real property of owner of personal property; except that lien will attach to real property only after notice has been recorded and indexed among judgment records in county where land lies, or is recorded and indexed on tax rolls. (§ 14-804[b]).

Sale of property for nonpayment of state, county or city taxes must be made under §§ 14-801 et seq. Local collector of taxes mails notice to last owner on tax roll at least 30 days prior to commencement of advertisement of sale. (§ 14-812). Type and duration of publication notice differs by county. (§ 14-813). Sale by public auction at time and place stated in ad. (§ 14-817). Payment of accrued taxes, interest, penalty and sale costs required by day after sale; other terms set by collector. (§ 14-818). Collector gives purchaser certificate of sale, which is assignable. (§§ 14-820, 14-821).

Redemption.

Party having interest in property sold by collector may redeem property during redemption period, by paying to collector amount required with interest thereon. Certain expenses of purchaser may also be payable. (§ 14-827). Generally, holder of certificate of sale may institute proceeding in circuit court after six months from date of sale to foreclose all rights of redemption, but right to redeem continues until finally barred by decree in such proceeding. (§§ 14-829, 14-833, 14-844).

Taxation of Property of Corporations.

Stock of most domestic corporations is not subject to assessment and taxation. (§ 6-101[b]). Their real property is subject to assessment in county and, if applicable, municipal corporation or special tax district where it is situated. (§ 5-102[a]). Tangible personal property is generally subject to assessment in county and, if applicable, municipal corporation in which it is permanently located. (§ 5-102[b]). However, stock in business of manufacturing or commercial business is subject to assessment in county and/or municipal corporation in which business is carried on. (§ 5-102[c]).

Where “corporation” is defined as corporation entitled to property tax exemption pursuant to contract with State, all intangible personal property owned by corporation (so defined) is subject to assessment and property tax, except as exempt by said contract. (§ 6-101[b]).

For bonus and franchise taxes on corporations, see category 2 Business Organizations, topic 2.03 Corporations. For franchise tax on savings banks and building and loan associations, see topic 22.03 Business Taxes, subhead Franchise Taxes, catchline Franchise Tax on Financial Institutions. See also category 2 Business Organizations, topic 2.04 Joint Stock Companies, subhead Real Estate Investment Trusts.

Mortgage Tax.

See category 10 Documents and Records, topic 10.04 Records.

Real Estate Conveyance Tax.

See category 10 Documents and Records, topic 10.04 Records.

22.17 SALES AND USE TAXES:

Note: All references are to tax-gen. art. unless otherwise indicated.

Sales and use tax is imposed on retail sale in state or use in state, of tangible personal property or taxable service. (§ 11-102). Retail sale is defined as sale of title or possession of tangible personal property or sale of taxable service. Taxable sales of tangible personal property also include sales for use or resale in form of real estate by builder, contractor, or landowner. (§ 11-101[e]). Tangible personal property subject to sales and use tax includes right to occupy room or lodgings as transient guest, farm equipment, wall-to-wall carpeting that is installed into real estate, and coal, electricity, oil, nuclear fuel assemblies, steam and artificial or natural gas. (§ 11-101[h]). Taxable service includes fabrication, printing or production of tangible personal property by special order, commercial cleaning or laundering of textiles, cleaning of commercial or industrial building, certain telephone services pay-per-view television, credit reporting, or security service. (§ 11-101[j]). Term “use” is defined as exercise of right or power to use, consume, possess or store that which is acquired by sale. (§ 11-101[k]).

Counties may impose sales or use tax on sale of fuels, any utilities, any space rentals or any controlled dangerous substance (unless sale is made by person who registers and complies with crim. law art., tit. 5). (§ 11-102).

Exempt sales include: (1) Certain items used for agricultural purpose; (2) certain items bought for farmers; (3) certain agricultural products; (4) cylinder demurrage charge; (5) sales to cemetery company as described in § 501(c)(13) of IRC; (6) sales to credit union; (7) sales to nonprofit charitable, educational or religious organization located in state which is not unit of U.S., except for American National Red Cross or in adjacent jurisdictions which operates within State on regular basis which contains reciprocal exemption for Maryland nonprofit organizations; (8) sales under $500 to nonprofit incorporated senior citizens' organization located in state which receives state or local funding; (9) sales to volunteer fire, ambulance or rescue squads located in state; (10) sales by church or religious organization; (11) sales by gift shops in state mental hospitals; (12) sales by hospital thrift shops staffed by volunteers which sell only donated goods; (13) sales of Md. and U.S. flags; (14) sales of food for human consumption by vendor who has no facilities for consumption on premises (but not including alcoholic beverages, soft drinks, or candy); (15) sales of food stamp items; (16) certain sales of food by vendor who has facilities for consumption on premises but also operates grocery store at that location; (17) sales of food at hospital when food charge included in regular room rate; (18) sales of food by church or religious organization; (19) meal plan food sales by school or college; (20) sales of food to support veterans' organizations; (21) food sales used to support volunteer fire or ambulance company or rescue squad; (22) sale of food or beverage in vehicle being operated in Md. in course of interstate commerce; (23) sale of seafood or crab prepared for non-immediate consumption; (23.1) sale of snack food, milk, fresh fruit, fresh vegetables or yogurt through vending machine; (24) certain fuels for residential use; (25) marine equipment and machinery used in loading, unloading and handling of cargo in interstate or foreign commerce; (26) television broadcast film or tape; (27) sales of aircraft, motor vehicle, railroad rolling stock, or vessel which is used primarily to cross state lines in interstate or foreign commerce; (28) sales of replacement part for any item listed in No. 27 above; (29) sale of motor vehicle other than house or office trailers that will be titled or registered in another state; (29.1) lease of motor vehicle that is leased for period of at least one year; (30) casual and isolated sales of less than $1,000 by person not regularly selling tangible personal property or taxable service; (31) certain capital transactions including: (a) transfers of tangible personal property to corporation upon its organization in exchange for stock, (b) transfers of tangible personal property in reorganization under §§ 368(a), 371 or 374 of IRC, (c) liquidating distribution, (d) contribution to capital of partnership or limited liability company, and (e) distribution of property by partnership to partners or by limited liability company to members; (32) sales of machinery or equipment used to produce bituminous concrete or electricity or fuel used to operate that machinery; (33) sales of certain machinery and equipment used in manufacturing or research and development; (34) sales of certain medical supplies and medicines to or by physician or hospital; (35) sales of hemodialysis drugs or devices by licensed pharmacist; (36) items for compensating for blindness; (37) decoders for captioned television programs; (38) telecommunication devices adopted specifically for hearing impaired; (39) artificial eyes, hearing devices or limbs; (40) wigs or hairpieces needed as a result of documented medical or surgical treatment; (41) colostomy or ileostomy devices; (42) corrective eyeglasses; (43) orthopedic or surgical appliances prescribed by physician; (44) batteries for artificial hearing device, larynx, transcutaneous nerve stimulator, or electrically powered wheelchair; (45) replacement cord for artificial hearing devices; (46) crutches; (47) wheelchair; (48) hospital bed; (49) oxygen tent; (50) other sickroom equipment; (51) equipment installed into motor vehicle for handicapped persons; (52) baby oil or baby powder; (53) sanitary napkins or tampons; (54) any service by sawmill of wood products for mine use in which miner retains title; (55) diesel fuel for use in reclamation of land that has been mined for coal by strip or open pit mining; (56) resales of mobile homes, and tax on first sale of mobile home is based on 60% of price (§ 11-104[d]); (57) tangible personal property or taxable service that nonresident acquires before property or service enters state and uses for 30 days or less for personal enjoyment or in presentation of exhibit, sporting event or other public performance or display; (58) precious metal bullion and coins; (59) photographic material and certain other art works for production of items used in composition or printing; (60) printing and sale of newspapers that are distributed free of charge; (61) direct mail advertising literature and mail order catalogues that will be used outside state; (62) documents of federal, state or local governments; (63) certain property for use in another state, including property merely stored in Md., certain tangible personal property to be incorporated in real property in another state, and images, videotape or other optical or digital forms or electronic signals generated from these images to cable or other nonbroadcast television network, if images are intended for viewing outside state; (64) property used for research and development; (65) items used for harvesting seafood; (66) personal, professional or insurance service that is not taxable service and involves sale of property as inconsequential element for which no separate charge is made; (67) custom computer software services; (67.1) sale of optional computer software maintenance contract if buyer does not have right, as part of contract, to receive at no additional cost software products that are separately priced and marketed by vendor; (67.2) use of taxable service obtained by using prepaid telephone calling arrangement; (68) sales to state or political subdivision of state (but not including sale of construction materials to contractors); (69) sales of admission when gross receipts are subject to admission and amusement tax; (70) sale of communication service that is not taxable service and which is subject to federal excise tax under § 4251 of IRC; (71) sale of motor fuel subject to motor fuel tax or motor carrier tax; (72) sale of motor vehicle subject to motor vehicle excise tax under § 13-809 or § 13-811 to transp. art.; (73) rental of motion picture, motion picture trailer, or advertising poster for display at theater when gross receipts from activity are subject to admissions and amusement tax; (74) sale of vessel that is subject to excise tax under § 8-716 of nat. res. art.; (75) sales in which buyer already paid sale and use tax when purchased; (76) tangible personal property or taxable service to extent buyer pays another state tax on sale or gross receipts; (77) deliverable end item testing equipment under U.S. Department of Defense contract awarded by bid after June 1, 1986; (78) transportation service; (79) water that is delivered to buyer through pipes or conduits; (80) sale to nonprofit organization made to carry on its work if organization is qualified as tax exempt under § 501(c)(4) of I.R.C., and is engaged primarily in providing program to render its best efforts to contain, clean up, and otherwise mitigate spills of oil or other substances occurring in U.S. coastal and tidal waters; (81) sale to elementary or secondary school in state or nonprofit parent-teacher organization or other nonprofit organization within elementary or secondary school in state for sale of magazine subscriptions in fund-raising campaign, if net proceeds are used solely of educational benefit of school or its students, including sale resulting from agreement or contract with organization to participate in fund-raising campaign for percentage of gross receipts under which students act as agents or salespersons for organization by selling or taking orders for sale; (82) nicotine patches, nicotine gum or other FDA approved product intended to aid in tobacco use cessation program. Property used in other states prior to use in Md. is given 10% credit against purchase price for each full year of foreign usage; (83) tangible personal property that is manufactured for purpose of initiating, supporting, or sustaining breast-feeding; (84) sales of tangible personal property through bulk vending machine for price of 75¢ or less; (85) sale by church, religious organization or other nonprofit organization for sales made at auction and proceeds are used for exempt purposes of such church or organization; and (86) sale to tax-exempt veteran's organization. No use tax is payable on item on which Md. sales tax has been paid. (§§ 11-201 to 11-224).

Rates of tax are: (1) 1¢ on sales of 20¢; (2) 2¢ on sales of 21¢ to 40¢; (3) 3¢ on sales of 41¢ to 60¢; (4) 4¢ on sales of 61¢ to 80¢; (5) 5¢ on sales of 81¢ to $1; and (6) 5¢ on each $1 plus 1¢ on each 20¢ or fraction thereof in excess of $1. (§ 11-104).

Tax of 5% is imposed on 95.25% of gross receipts from vending machine sales. (§ 11-104). Vendor may not collect tax as separately stated item. (§ 11-405).

Tax of 8% imposed on rental or lease of rental truck. (§ 11-104). Tax of 11.5% imposed on short term vehicle rentals. (§ 11-104).

Reports and Payment.

License is required of any person engaging in business of vendor in state or out of state. (§ 11-702). Application for license shall be submitted to Comptroller of Treasury. (§ 11-703). Vendor is trustee for state and is liable for collection of sales and use tax for and on account of state. (§ 11-401). For each sale sales and use tax shall be stated and charged separately from sales price and shown separately in record of sale. (§ 11-302). There is rebuttable presumption that any sale in state is subject to sales tax. (§ 11-103). Special provision is made for sales through vending machines. (§ 11-405).

Returns must be made and tax paid for each calendar month by 21st day of succeeding calendar month, to Comptroller of Treasury. (§ 11-502). Vendors receive credit for collection expense of 1.2% of first $4,200 of gross tax remitted and 0.6% thereafter. (§ 11-105). Comptroller may require vendor to post security. (§ 13-825[g]). Unpaid tax is lien on all property of person liable for payment with force of judgment lien upon recordation of lien notice in judgment docket. (§§ 13-805–13-810).

Whenever sale on which tax was paid is rescinded, vendor must refund tax to purchaser, and vendor is entitled to refund from Comptroller (if application made within four years of payment of tax). (§§ 11-403, 13-901[g], 13-1104[g]). Whenever taxpayer has erroneously or illegally paid tax, he may also apply for refund. Beginning 45 days after Comptroller receives claim for refund, claimant is paid applicable state interest rate unless refund claim is attributable to error or mistake of claimant that is not attributable to state or unit of state government (§ 13-603).

Records of taxable sales must be kept for four years. (§ 11-504). President, vice-president, treasurer, and any officer of corporation owning more than 20% of stock are personally liable for corporation's sales and use tax. (§ 11-601).

Any taxpayer may apply to Comptroller for revision of tax assessed against him within 30 days of mailing of assessment to his last known address. If tax is paid, application for refund must also be filed within same 30-day period. Comptroller must act promptly on application and notify taxpayer of action. Within 30 days of mailing of notice of such action, taxpayer may request formal hearing. Comptroller must grant hearing and notify taxpayer of decision. Taxpayer may then appeal within 30 days of mailing of notice to Md. Tax Court. (§§ 13-508 to 13-510).

Notice by certified mail, return receipt requested, bearing U.S. Postal Service postmark, must be given by purchaser from or assignee of any vendor to Comptroller at least ten days prior to taking possession of or paying thereafter for whole stock of merchandise or fixtures of business of vendor (purchased other than in ordinary course of trade and business) stating price, terms and conditions of sale, whether or not sales tax is due. (§ 11-505).

22.18 STAMP AND SEAL TAXES:

Stamp Tax.

None, except in case of instruments to be recorded. See category 10 Documents and Records, topic 10.04 Records.

22.18A TAX LIENS:

Revised Uniform Federal Tax Lien Registration Act adopted. (real prop. art. §§ 3-401 to 3-405).

22.19 USE TAXES:

See topic 22.17 Sales and 22.19 Use Taxes.

See also categories 2 Business Organizations, topic Corporations; Business Regulation and Commerce, topic Banks and Banking; Documents and Records, topic Records; Estates and Trusts, topic Executors and Administrators; Insurance, topic Insurance Companies; Transportation, topic Motor Vehicles.

23 TRANSPORTATION

23.01 MOTOR VEHICLES:

References are to Transportation Article of Code unless otherwise indicated.

Supervision.

State Motor Vehicle Administration, 6601 Ritchie Highway, N.E., Glen Burnie 21062.

Vehicle license plate or validation tab required annually. (§ 13-412). Renewal time may be staggered. (§§ 13-912 and 15-108). Registration and plates expire on midnight of date indicated on registration card. (§ 13-412). Registration number plates are obtained from Motor Vehicle Administration or, in certain circumstances, dealer licensed under transp. art., title 15 (§ 13-410), and must be displayed front and rear on motor vehicle but only rear on motorcycle or trailer (§§ 13-410, 13-411). Members of U.S. Congress, except for members elected from Maryland, and nonresident members of Armed Forces serving on active duty in state, adjoining state, or D.C. are exempt. (§§ 13-402[e]; 13-402.1[c]).

Operator's license required (§ 16-101); must be renewed every five years upon passing vision test (§ 16-115). Renewal time may be staggered. (§§ 13-912 and 15-108). For noncommercial licenses issued or renewed after Jan. 1, 1990, there are four major classes of licenses as follows: Class A, tractor trailers; Class B, trucks over 26,000 pounds, excluding tractor trailers; Class C, any vehicle 26,000 pounds or under excluding motorcycles; Class M, motorcycles. (§ 16-104.1). Operator's license obtained from Motor Vehicle Administration after written and driving tests. (§ 16-110). Conviction for controlled dangerous substance offense may affect right to obtain or retain license. (art. 41, §§ 1-501 to 1-507). Person under 18 may not be licensed, except person 16-17 may be issued noncommercial Class B, C, or M license after completing approved driver education course, and class M license must complete motorcycle safety course. (§ 16-103). Person at least 15 years, nine months may be issued learner's permit, which authorizes driving when accompanied and supervised by driver at least 21 years old and licensed three years. Person who held license and seeks different class license to drive another vehicle may take tests for license 14 days after receiving learner's permit. (§§ 16-103[c], 16-105). Applicant for learner's permit who is less than 16 years old must present Administration with certified copy of school attendance record, and permit may be denied if attendance record indicates more than ten unexcused absences in previous semester. (§ 16-105). Person at least 16 years, six months may be issued provisional license if person has learner's permit nine months, has successfully completed driver education program and minimum hours of behind-the-wheel supervised driving practice, has passed licensing tests and paid fees. (§ 16-105). Generally, provisional license holder may drive between 12:00 a.m. and 5:00 a.m. only under supervision of licensed driver at least 21 years old, and may drive unrestricted at other times. Holder of provisional license entitled to receive regular license: (1) Upon becoming 18, or (2) upon application after holding provisional license 18 months without being convicted of traffic violations enumerated in § 16-402. (§ 16-111.1). Provisional license shall expire 60 days after licensee's 21st birthday. (§ 16-115).

Application of person under age of 18 must be signed and verified by parent, or guardian, or if applicant has no parent or guardian or is married, by employer or another adult. (§ 16-107).

Any driver gives implied consent to chemical test of alcohol concentration of person's blood or breath. License suspended 120 days (1st offense) to one year (2nd or subsequent offense) upon refusal to submit to such test. Driver involved in motor vehicle accident resulting in fatality, where driver reasonably believed to be driving intoxicated or while under influence of alcohol, will be required to submit to chemical test. (§ 16-205.1). License suspended or revoked on conviction of certain offenses involving driving under influence of alcohol per se, under influence of alcohol, impaired by alcohol, or impaired by controlled dangerous substance. (§ 16-205). Motor Vehicle Administration may impose restrictions prohibiting driver from driving while any alcohol in blood. (§ 16-113[g]).

License may be refused, suspended, or revoked under point system for motor vehicle law violations. Motor Vehicle Administration may require drivers convicted of moving violation to attend driver improvement or alcohol education program. (§ 16-212). New drivers aged 18 or older must complete three-hour alcohol and drug education course. (§ 16-212.1).

Members of Armed Forces.

See subhead Operation Prohibited, infra.

Driver Education Program has been established for persons 15 to 17. Program in schools implemented by regulations of State Board of Education, endorsed by Secretary of Transportation. Program in licensed drivers' schools implemented by regulations of Motor Vehicle Administration, endorsed by State Superintendent of Schools. (§§ 16-501 to 16-507, 16-509).

Titles.

Owner must procure certificate of title from Motor Vehicle Administration (§ 13-101.1), but may obtain vehicle license without such certificate (§ 13-109). To obtain certificate of title, or vehicle license in absence thereof, owner must pay excise tax of 5% of fair market value of automobile. (§ 13-809). State, municipal and certain other vehicles are exempt from 5% tax. (§ 13-810). See subhead Motor Vehicle Taxes, infra. Certificate of title optional for farm or special mobile equipment. (§ 13-103).

Sales.

It is unlawful to sell used motor vehicle for which certificate of title not issued. (§ 13-112[e]). If transferee of vehicle is licensed dealer who holds vehicle for sale, transferee dealer must obtain new certificate of title through former owner. (§ 13-113[a]). Transferee of other new or used vehicle must obtain old certificate from transferor, surrender it, and obtain new certificate from Motor Vehicle Administration. (§ 13-112). See also category 3 Business Regulation and

Commerce, topic 3.12 Consumer Protection, subhead Miscellaneous Special Provisions.

Distributors.

Manufacturers of passenger vehicles manufactured in U.S. and distributors of foreign-made passenger vehicles engaged in business in Md. are licensed and regulated. Certain activities including coercion of dealers, false advertising and price discrimination are criminal offenses. (§§ 15-201 to 15-214).

Liens and security interests should be entered on certificate of title immediately and certificate delivered to Motor Vehicle Administration with proper filing fee. (§§ 13-107[a][3], 13-107[b], 13-203). Motor Vehicle Administration may prevent fraud on lienholder by refusing to issue new certificate of title or refusing to transfer vehicle registration and license to transferee. (§§ 13-110, 13-406). Security interest is perfected as of creation if delivery and payment of fee are completed within ten days, otherwise as of time of delivery and payment. (§§ 13-202 to 13-204). No recordation tax is payable in connection with lien or encumbrance filed with Motor Vehicle Administration. (§ 13-202). Secured party may obtain new certificate of title upon repossession. (§§ 13-114[b], 13-114[c]). See categories 3 Business Regulation and Commerce, topics Commercial Code, Sales, subhead Conditional Sales; Debtor and Creditor, topic Liens, subhead Aircraft, Boats, Mobile Homes and Motor Vehicles.

Identification Marks.

Prohibited wilfully to remove or falsify identification number of vehicle or engine or knowingly to deal with or possess item so altered. Prohibited to remove vehicle license plate or registration card from vehicle or to affix unauthorized plate, with intent to conceal or misrepresent identity of vehicle or owner. (§ 14-107). Fraudulently altering or forging certificate of title, registration card, permanent vehicle license plate, or permit, or knowingly using such altered or forged item is prohibited. (§ 14-110).

Every truck, truck tractor and bus must be distinctively identified (visible from 50 feet) with name, trade name or company logo and city and state of owner or operator. (§ 22-404.3). Dealer prohibited from placing insignia, logo or other plates advertising name of dealer on vehicle unless certain conditions met. (§ 15-313[d]). In lieu of city and state names, company unit number, ICC number, or state agency number are permitted. Excepted are gas, electric, telegraph, telephone or water company trucks; trucks of five tons capacity or less; farm trucks; farm tractors; farm area motor vehicles; school buses; and vehicles used to transport money or commercial paper. (§ 22-404.3). Propane fueled vehicles must display certain decals. (§ 22-404.4). Motor vehicles equipped with power booster system must display decal. (§ 22-404.5).

Operation Prohibited.

Person who does not have valid license not permitted to drive vehicle upon Md. highways except: (1) U.S. government officer or employee operating government vehicle on government business, or member of U.S. Congress from state other than Md. who resides in state; (2) nonresident in possession of license issued to him by his state of residence to drive type of vehicle he is driving, if he is at least same age as that required of Md. resident to drive vehicle he is driving; (3) person driving road machine, farm tractor or farm equipment temporarily operated on highway or certain dock equipment in Dundalk or Locust Point marine terminals; (4) person on active duty with Armed Forces or U.S. Public Health Service, or his dependent, if such person possesses valid license for type of vehicle driven issued by state of domicile; (5) for 30 days, person returning from active duty outside U.S. with Armed Forces, or his spouse, child, or dependent returning from residence with him, if such person possesses valid license issued by Armed Forces for type of vehicle driven; (6) new resident of state during first 60 days of residency if new resident is in possession of license issued to him by former state to drive type of vehicle he is driving, and if he is at least same age as that required by Md. to drive type of vehicle he is driving; (7) nonresident student enrolled in school in Md. or bordering state, or serving medical internship in Md., who is in possession of license issued to him by his state or residence to drive type of vehicle he is driving, provided state of his residence extends same privileges to Md. residents; (8) member of Md. National Guard driving military vehicle in line of duty if issued Md. National Guard operator's identification card for type of military vehicle driven; and (9) nonresident of U.S. if he has valid license issued to him by his country or residence to drive type of vehicle he is driving, and if he is at least same age as that required by Md. to drive type of vehicle he is driving. (§ 16-102).

Unlawful for person who is intoxicated, under influence of alcohol, under influence of alcohol per se, impaired by alcohol, or impaired by any drug to drive or attempt to drive. (§ 21-902). Unlawful for person to drive or attempt to drive while under influence of any drug or combination of drugs and alcohol. (§ 21-902).

Unlawful for person to operate or permit operation of uninsured motor vehicle without having form and minimum benefits of security required by § 17-103. (§ 17-107).

Unlawful to drive if driver and each occupant under 16 years old not restrained by seat belt. (§ 22-412.3). Unlawful to drive or ride on motorcycle unless wearing protective headgear. (§ 21-1306[b]).

Unlawful to transport children of certain ages or below certain weight in certain vehicles without child safety seat or other designated safety belt or harness. (§ 22-412.2). Violation is moving violation (primary offense).

Unlawful to drive while wearing, in one or both ears, earplugs, headset, or earphones attached to radio, tape player, or other audio device, except for certain emergency vehicles. (§ 21-1120).

Size and Weight Limits.

Regulated by §§ 24-101 to 24-114. Semitrailers up to 53 feet permitted on certain roads. (§ 24-104.2).

Equipment Required.

Regulated by §§ 22-101 to 22-418. Administrator of Motor Vehicles must approve certain equipment before it may be displayed, sold or delivered in state.

Lights Required.

Regulated by §§ 22-201 to 22-232.

Inspections.

Seller of used motor vehicle, except one selling to dealer, spouse, parent, child or co-owner must obtain certificate of inspection by authorized dealer or facility, certifying that minimum standards for equipment and mechanisms satisfied. Transferee cannot obtain permanent vehicle license or certificate of title without presenting inspection certificate to Motor Vehicle Administration. (§§ 23-101, 23-106, 23-107). Inspection facilities licensed by Automotive Safety Enforcement Division of State Police. (§ 23-103).

Preventive Maintenance Program.

Preventive maintenance required for certain trucks, tractors, buses and multi-purpose vehicles. (§§ 23-301 to 23-305).

Traffic Regulations.

Regulated by §§ 21-101 to 21-1412.

Accidents.

Driver must stop, give name, address, and registration number of vehicle he is driving and, on request, exhibit operator's license. Driver must render aid to any injured person, including seeing to transportation to doctor or hospital when necessary or requested. If driver collides with unattended vehicle, must stop and either locate operator or owner of damaged vehicle and give name and address of driver and owner of striking vehicle or leave in conspicuous place in struck vehicle written notice of name and address of driver and owner of striking vehicle. Failure to comply with above requirements is misdemeanor. Where there is injury to or death of person, driver and/or owner must within 15 days forward written report of accident and evidence of liability insurance to Motor Vehicle Administration. If operator is physically incapable of making report, or is unavailable or refuses to do so, owner of vehicle must make report. False report or failure to report is misdemeanor and, in event of injury to person, is ground for suspension or revocation of all licenses and motor vehicle registrations of person in default. (§§ 20-101 to 20-109, 27-101). Driver of each vehicle involved in accident resulting in bodily injury or death of person shall immediately return to and remain at scene of accident until he has complied with § 20-104. (§ 20-102). Driver of each vehicle involved in accident resulting in bodily injury or death shall immediately stop vehicle as close as possible to scene of accident without obstructing traffic more than necessary. (§ 20-102). Report need not be filed if police have investigated accident and filed report with State Police. (§ 20-107[f][1]). For 60 days following date accident report is filed, report is accessible only to individuals with existing relationship or interest in an (issue. bus. occup. & prof. § 10-604)..

Liability of Owner.

Owner is liable for negligence of others only when present in car operated by person under his control or car operated by his servant or agent within scope of authority and duty. Family car doctrine is not recognized. (139 Md. 557, 116 A. 68). Person who owns vehicle or who employs or otherwise directs driver may not knowingly permit operation in any manner contrary to law. (§ 26-102).

Vehicle registration may be suspended if owner permits vehicle to be driven by individual whom owner knows to have had license suspended or revoked for certain alcohol or drug-related violations. Numerous exceptions apply. (§ 13-705.1).

Guests.

No statute restricting liability for injury to gratuitous guest, and guest has been allowed to recover. (177 Md. 657, 11 A.2d 640).

Liability of Physician.

Physician who renders gratuitous emergency medical aid at scene of accident not liable in absence of gross negligence. (courts art. § 5-603). See category 5 Civil Actions and Procedure, topic 5.09 Damages, subhead Good Samaritan Law.

Proof of financial responsibility is required in following cases:

Rental and Leasing of Vehicles.

Rent v. lease distinguished. (§ 18-101). Rent is for 180 days or less. Lease is for 180 days or more. Owner of vehicle must maintain proof of financial responsibility of owner and operator in order to keep vehicle registration. (§ 18-102).

Required Security in All Other Cases.

See subhead Insurance, infra.

Insurance.

Compulsory Insurance.

Owner of Md. registered vehicle must maintain liability insurance policy providing coverage of at least $20,000 for bodily injury to or death of one person, $40,000 for any two or more persons, and $15,000 for property damage, and containing at least minimum no-fault insurance coverages required by insurance code. (§§ 17-103, 17-104). Other form of security may be accepted in lieu of policy. (§ 17-103[a][2] & [3]). Person notified of suspension of registration must voluntarily surrender all evidence of registration within 48 hours until required coverage is obtained. (§ 17-106). As to foreign vehicle, see subhead Foreign Vehicle, infra.

No-Fault Insurance.

Unless waived by affirmative written waiver of first named insured, all motor vehicle liability insurance policies must provide certain minimum benefits specified in trans. art. § 17-103 and ins. art. § 19-505 covering insured, members of insured's family residing in household, passengers injured in insured's vehicle, persons injured while using insured's vehicle with expressed or implied permission of insured, pedestrians injured by insured's vehicle and individuals injured in or on any other vehicle operated by muscular power in accident involving insured's vehicle. These provisions do not apply to taxicabs or commercial buses. (ins. art. § 19-501). Benefits are payable without regard to fault and without regard to collateral sources of benefits, and insurer has no right of subrogation. (ins. art. § 19-507). Right of any person to claim and sue for damages and losses sustained by such person as result of motor vehicle accident is not affected by no-fault insurance statute (ins. art. § 19-502), but benefits cannot be duplicated under third party's liability policy (ins. art. § 19-513). Excluded from no-fault coverage include: intentionally-caused accidents, injuries occurring while voluntarily in vehicle known to be stolen, while in commission of felony, or while fleeing pursuing police vehicle; certain economic loss benefits with respect to motorcycles; injuries to person occupying, or struck as pedestrian by, uninsured motorist vehicle owned by member of person's immediate family; and injuries to nonresident pedestrian in accident outside of state. (ins. art. § 19-505). All Maryland residents' insurance policies with collision coverage automatically extend that coverage to passenger cars rented by insureds named in policy for period of 30 days or less. (ins. art. § 19-512). Notice must be in bold type. (ins. art. §§ 19-506, 19-510). Insurers must provide certain information regarding rates and other matters to insureds. (ins. art. §§ 19-506, 19-510).

Md. Automobile Insurance Fund.

Effective Jan. 1, 1973, Fund supersedes Unsatisfied Claim and Judgment Fund. (ins. art. § 20-201).

Persons denied insurance by private carriers for reasons other than nonpayment of premiums may acquire from Md. Automobile Insurance Fund statutory minimum compulsory liability insurance coverage. (ins. art. § 20-502). Md. Automobile Insurance Fund does not cover vehicles leased to nonresidents or principally garaged out of state. (ins. art. § 20-502). Insurance by Fund may be denied or cancelled for nonpayment of premiums or suspension or revocation of insured's driver's license; but if policy covers spouse or other household member, cancellation cannot affect coverage of such innocent person. (ins. art. §§ 20-516, 20-519). Policy must be renewed if holder completes three years without chargeable traffic accident and with only one point for moving violations under point system. (ins. art. § 20-508).

Certain claims against unidentified persons and persons not covered by motor vehicle liability insurance may be made against Md. Automobile Insurance Fund (ins. art. § 20-601) to extent of statutory minimum compulsory liability insurance coverage less certain deductions. (ins.

art. §§ 20-601, 20-602).

Rate Classification and Cancellation.

Insurance companies must give 45 days notice to insured of cancellation, nonrenewal increase in premiums, or reduction in coverage, stating certain information including brief statement of basis of action. (ins. art. § 27-605). Insured has right of appeal to Insurance Commissioner and further right of judicial review. (ins. art. § 27-605). At time of issuance or renewal, insurer must provide policyholder with clear statement of rate classification. (ins. art. § 11-317). Insurer may not refuse to underwrite passenger motor vehicle solely because insured was previously insured by Maryland Automobile Insurance Fund. No insured may be retained in higher premium classification as result of claims record or points record for more than three years from date of last claim or last point; however, insurer may remove discount. (ins. art. § 11-318). Insurer may reduce rates for motor vehicle personal injury and property coverage based on actuarial justification to person age 55 or older who has completed successfully within last two years certified course in accident prevention. (ins. art. § 11-318). Insurance may not be cancelled, refused or terminated due to traffic violation or accident more than three years old on date policy or renewal is effective. (ins. art. § 11-318).

Nationwide Intercompany Arbitration Agreement.

Every automobile liability or physical damage insurer doing business in Md. must be member. Insurers must arbitrate and settle claims between themselves in accordance with terms of Agreement and rules promulgated thereunder. (ins. art. § 19-514).

Industry Automobile Insurance Association consisting of all licensed motor vehicle liability or physical damage insurers; membership required. (ins. art. § 20-402).

Foreign vehicle registered in owner's place of residence and displaying license plates issued therefor may be operated without registration in Md., provided that vehicle not used for transportation of persons for hire, not regularly operated in carrying on business within Md., not designed or used primarily for transportation of property, and not in custody of resident for more than 30 days in any registration year. (§ 13-402.1[a]). Member of Armed Forces need not register passenger vehicle in Md. if registered in state of residence (§ 13-402.1[c]). Nonresident student attending Md. school need not register, provided home state extends same privileges to residents of Md. and student meets financial responsibility requirements. (§ 13-402.1[d]). Nonresident temporarily maintaining or occupying dwelling in Md. for more than 30 days may obtain nonresident permit upon application within ten days after 30 days. (§ 13-402.1[e]). Nonresident member of U.S. Congress residing in Md. need not register or obtain vehicle license during term. (§ 13-402[e]). Nonresident working on seasonal crop operations on farm need not register or obtain license plates for motor vehicle or trailer validly registered and bearing valid license plates issued by another state, provided nonresident obtains exemption permit from Motor Vehicle Administration. (§ 13-402[d]).

Nonresident Operator.

Nonresident student enrolled in accredited school in Md. and possessing valid driver's license of state or county of domicile may operate motor vehicle in Md. if state or country of domicile extends same privilege to Md. residents. Nonresident may drive only vehicle of class which he is licensed to drive in place of domicile. (§ 16-102[a][5]).

Direct Actions.

Action by injured person against insurer not allowed. In case where insured is charitable institution, insurer may be joined, but action may be tried only after judgment is obtained against insured. (219 Md. 422, 149 A.2d 768).

Motor vehicle carriers regulated by Public Service Commission. Must operate over fixed route, have special license and secure certificate of public convenience and necessity. (§ 13-423; pub. util. comp. art. §§ 9-201-9-206). For heavy-duty vehicles that do not operate over fixed routes, special safety requirements apply. (§ 25-111). Taxicabs also regulated by Public Service Commission. (pub. util. comp. art. § 10-201).

Company van pools are regulated by § 13-934 and require no permit from Public Service Commission. (pub. util. comp. art. § 9-201).

Tax for Use and Maintenance of Roads.

There is motor carrier's road tax equivalent to rate per gallon of motor vehicle fuel tax calculated on amount of fuel consumed in state. (tax-gen. art. §§ 9-202, 9-204, 9-213).

Motor Vehicle Taxes.

Property taxes need not be paid on motor vehicles. (tax-prop. art. § 7-301).

In addition to other taxes, there is excise tax for issuance of each original certificate of title and each subsequent certificate of title and for each motor vehicle, trailer, or semitrailer in interstate operation and registered without certificate of title (excluding certain house and office trailers, vehicles transferred for no consideration to members of immediate family or to heir, legatee or distributee, or from individual to partnership or corporation in which he has interest, fire engines, ambulances, vehicles owned by federal government and vehicles owned by state or any political subdivision, or certain organizations or for certain purposes, vehicles transferred involuntarily by certain transactions, or vehicles transferred in certain corporate transactions and certain special purpose vehicles owned by coal company), at rate of 5% of fair market value of vehicle except that excise tax of $50 is imposed on trailers exempt from titling. (§§ 13-808 to 13-810).

Gasoline Tax.

See category 22 Taxation, topic 22.08 Gasoline and Special Fuels Taxes, subhead Motor Fuel Tax.

Off-Road Vehicles.

Secretary of Natural Resources promulgated rules and regulations, effective Dec. 25, 1974, concerning operation of off-road vehicles on property owned or controlled by Dep't of Natural Resources. (Comar 08.01.03.06). Every off-road vehicle to be used on such property must be registered and provided with identification by Dep't. (nat. res. art. § 5-209).

Judgments Arising from Use of Motor Vehicle.

If resident or nonresident fails within 30 days to satisfy final judgment upon cause of action arising out of ownership, maintenance or use of vehicle, person obtaining judgment or his representative may forward to Motor Vehicle Administration certified copy of judgment and certificate of facts relating thereto (on form provided by Administration), and Administration will suspend license and registration and any nonresident's operating privilege of judgment debtor. Suspension continues until judgment is stayed or satisfied in full. Exceptions are provided, including case where insurer is obligated to but does not pay judgment and case of insurer which has gone into liquidation. (§§ 17-201 to 17-209).

See also category 3 Business Regulation and Commerce, topic 3.12 Consumer Protection.

23.02 RAILROADS:

See category 3 Business Regulation and Commerce, topic 3.08 Carriers.

1
MASSACHUSETTS LAW DIGEST

—Scope —

Revised for 2010 edition by

LexisNexis(R).

(Citations, unless otherwise indicated, refer to 2002 Official Edition Massachusetts General Laws, as am'd. Session laws are cited by year and chapter number. Parallel citations to the North Eastern Reporter begin with 139 Mass. “SJC” is used as abbreviation for Supreme Judicial Court; “BMC” is used as abbreviation for Boston Municipal Court. “Mass. R. Civ. P.” refers to Massachusetts Rules of Civil Procedure; “MRAP” refers to Massachusetts Rules of Appellate Procedure; “Mass. Sup. Jud. Ct. R.” refers to Massachusetts Supreme Judicial Court Rules; “Mass. R. Dom. Rel. P.” refers to Massachusetts Rules of Domestic Relations Procedure; “Unif. Prob. Ct. Prac.” refers to Uniform Probate Court Practice; “CMR” refers to Code of Massachusetts Regulations.)

Note: This revision is current through October 2009.

Note: Readers are advised that Massachusetts Supreme Judicial Court and Appeals Court opinions since 1997 are available at Massachusetts Lawyers Weekly Internet site: http://www.masslaw.com.

1 INTRODUCTION

1.01 GOVERNMENT AND LEGAL SYSTEM:

The Commonwealth of Massachusetts is a constituent state of the United States of America. For further discussion of U.S. federal system, see Introduction to Federal Government of the United States at beginning of this volume. A great many laws are promulgated by federal government of United States and are not reflected in topics below. See Introduction to this volume for references to federal law topics covered.

Like all but one of the United States, Massachusetts has a common law legal system, with roots in English common law. For information on the courts and legislature of Massachusetts, see category 6 Courts and Legislature.

Preliminary Note.

During periods of crisis, governor may proclaim state of emergency and exercise extensive legislative powers. ALM Spec L c. S31, §5. Executive orders cited herein E.O. followed by number.

1.02 [RESERVED]

1.03 HOLIDAYS:

Legal holidays are Jan. 1, 3d Mon. in Jan., 3d Mon. in Feb., Mar. 17 (in Suffolk County only), 3d Mon. in Apr., last Mon. in May, June 17 (in Suffolk County only), July 4, first Mon. in Sept., 2d Mon. in Oct., Nov. 11, Thanksgiving Day and Christmas Day. (Mass. Gen. Laws Ann. c. 4, §7[18]).

Holiday Falling on Sunday.

When holiday falls on Sunday, following day is holiday. (c. 4, §7[18]; c. 136, §13[2]).

Legality of Transactions on Holiday.

Sun. laws apply for entire day, or on day following if day falls on Sun., on all legal holidays except Jan. 1, 3d. Mon. in Jan., 3d Mon. in Feb., Mar. 17, 3d Mon. in Apr., May 20, June 17, 2d Mon. in Oct., and Nov. 11 after 1 P.M., and transactions thereon subject to Sun. laws and are therefore void unless they constitute works of charity or necessity or works falling within exception to Sun. laws. (c. 136, §13). Retail stores may open at any time on Memorial Day, July Fourth, and Labor Day. Performance of work directly connected to retail sales on these days allowed. All types of lawful goods except alcoholic beverages may be sold. (c. 136, §16). If day set for town meeting falls on holiday, meeting postponed until following day. (c. 4, §7[18]; c. 136, §§13-15).

When last day for doing act falls on Sunday or holiday, the act may be done on next succeeding secular or business day. (c. 4, §9).

Saturdays.

State offices are closed Sat. unless kept open under special approval. When day or last day for performance of any act authorized or required to be performed at state office falls on Sat. when such office is closed, act may be performed on next succeeding business day. (c. 30, §24).

Banks may close on Sats., and any related act required to be performed on Sat. may be done on next succeeding business day. (c. 167, §21).

City or town may close any municipal office, and any act required to be performed on Sat. may be performed on next succeeding business day. (c. 41, §110A). SJC, Superior Court, Land Court, Probate Court, registries of deeds and offices of county commissioners may be closed on Sats. (c. 213, §4).

Sundays.

See c. 136. Sun. common day of rest. Work done ordinarily prohibited. (c. 136, see especially §5). Many exceptions exist to this general rule. Certain businesses may remain open on Sun. as provided by statute and various specified activities are not prohibited. (c. 136, §6). Banks may conduct banking operations on Suns. (c. 136, §6[55]). Retail stores may open any time on Suns. Performance of work directly connected to retail sales on Suns. allowed. All types of lawful goods including alcoholic beverages, may be sold. (c. 136, §§6, 16). No employee who works in shop or store dealing in retail sales of goods which employs more than seven persons, including proprietor, or who works in store which qualifies for exemption under c. 136, §§6[25, 27, 50], 16 may be required to work on such Suns. and work done must be compensated at not less than 1½ times regular rate (c. 136, §6[50]); violations are punishable by fine under c. 149, §§180A, 180. Sun. exemption for retail stores does not apply to Christmas if Christmas falls on Sun. (c. 136, §6[50]). Sabbatarian exemption allows secular place of business to remain open on Sun. if natural person in control of business conscientiously believes that Sat. should be observed as Sabbath, and causes all businesses which he may control in commonwealth to remain closed for secular business during 24 hour period he believes should be observed as Sabbath. (c. 136, §6[8]).

1.03A MASSACHUSETTS WEB SITES:

Code of Mass. Regulations (CMR).

http://www.lawlib.state.ma.us/cmr.html.

General Law of Mass.

http://www.mass.gov/legis/laws/mgl/index.htm.

Registry of Motor Vehicles.

http://www.mass.gov/rmv/.

Main Government Home Page.

http://www.mass.gov/.

Secretary of State, Corporations Division.

http://www.sec.state.ma.us/cor/coridx.htm.

State Legislature.

http://www.mass.gov/legis/.

State Agencies.

http://www.mass.gov/.

Courts:

State Courts.

http://www.mass.gov/courts/.

U.S. Bankruptcy Court for the District of Mass.

http://www.mab.uscourts.gov/.

U.S. Court of Appeals for the First Circuit.

http://www.ca1.uscourts.gov/.

U.S. District Court for the District of Mass.

http://www.mad.uscourts.gov/.

Law Schools:

Boston College Law School.

http://www.bc.edu/schools/law/.

Boston University School of Law.

http://www.bu.edu/law/.

Harvard University Law School.

http://www.law.harvard.edu/.

Massachusetts School of Law.

http://www.mslaw.edu/.

New England School of Law.

http://www.nesl.edu/.

Northeastern University Law School.

http://www.slaw.neu.edu/.

Southern New England School of Law.

http://www.snesl.edu/.

Suffolk University Law School.

http://www.law.suffolk.edu/.

Western New England College School of Law.

http://www.law.wnec.edu/.

1.04 OFFICE HOURS AND TIME ZONE:

Massachusetts in Eastern (GMT -05:00) time zone. Office hours generally 9 a.m. to 5 p.m.

2 BUSINESS ORGANIZATIONS

2.01 AGENCY:

Common law rules generally prevail.

2.02 ASSOCIATIONS:

Formation.

Associations not included in topic 2.05 Joint Stock Companies are formed by agreement among members. There are no statutes especially governing their formation or dissolution, generally. There are statutory provisions governing formation of some specific types of associations. See General Index to Mass. Gen. Laws under Associations regarding specific types. Condominium Associations are governed by c. 183A, §§1-21. Specific provisions that must appear in Condominium Associations by-laws are set out in c. 183A, §11. Fraternal benefit societies are under control of commissioner of insurance and are governed in part by statutes applying to insurance corporations. (c. 176).

Rights and Powers.

Members of association have property rights in assets of such association. (318 Mass. 649, 63 N.E.2d 571).

In becoming member of unincorporated association, order or society, one submits himself to jurisdiction of that body, and consents to be bound by its bylaws and to accept liability to expulsion in accordance with its laws, rules and usages as incidents of membership. (157 Mass. 128, 31 N.E. 776). After member has exhausted all remedies within organization, equity requires unincorporated association to obey its own rules. (311 Mass. 473, 42 N.E.2d 280).

Unincorporated associations are incapable of holding real estate, but deed to such association, all members of which can be ascertained, may be construed as grant to persons associated, as tenants in common. (140 Mass. 31, 2 N.E. 687). It is better, however, that legal title be taken and held by trustees for that purpose. Associations may not practice law. (c. 221, §46).

Liabilities.

Members are liable for acts and contracts of association which they participated in, authorized, or ratified, where association is nonprofit making. (287 Mass. 376, 191 N.E. 661). Where association is one for profit liability of members is regulated by ordinary principles of partnership.

Liability of Members of Professional Societies.

Members of professional societies or nonprofit corporations whose sole voting member is professional society composed of licensed medical practitioners, and hospital staffs are not liable for damages as result of acts or omissions performed within scope of duty as member, provided action was undertaken in good faith and with reasonable belief that action or inaction was warranted. (c. 231, §85N).

Actions.

Unincorporated association, other than labor union (386 Mass. 314, 435 N.E.2d 1027), cannot be party to litigation. All members must be joined as parties. If members too numerous to be joined, number of members properly representative of all may sue or be sued as representatives of class (358 Mass. 682, 266 N.E.2d 651; 374 Mass. 79, 371 N.E.2d 761, 1977 Mass. LEXIS 1223, 97 L.R.R.M. (BNA) 2507)

Dissolution.

Dissolution is accomplished in accordance with bylaws or rules of association. In absence of provisions relative to dissolution, property of association is divided pro rata among members. See generally c. 182 for dissolution of certain trusts. See Uniform Partnership Act at c. 108A, §§29-43 for dissolution of partnerships.

Supervision.

Commissioner of insurance has power to examine affairs of fraternal benefit societies from time to time, and in the event of mismanagement may request attorney general to commence court action to enjoin society from transacting business and for appointment of receiver and dissolution of society. (c. 176, §§33, 36-37). See topic 2.05 Joint Stock Companies, subhead Statement.

Professional Associations.

See topic 2.03 Corporations, subhead Professional Corporations.

Massachusetts Business Trust.

See topic 2.05 Joint Stock Companies.

2.03 CORPORATIONS:

Chapter 127 of Acts of 2003 replaced Massachusetts Business Corporation Law (BCL), Mass. Gen. Laws Ann. c. 156B, with Massachusetts Business Corporation Act (BCA), c. 156D. BCA, based largely on American Bar Association Revised Model Corporation Act, became effective as to Business Corporations on July 1, 2004. BCL, c. 156B remains in effect (though business corporations no longer subject to it) to preserve cross references in statutes governing banks, insurance companies and other classes of corporations. All citations in this topic are to c.

156D unless otherwise noted. Corporations may make certain required filings by accessing Secretary of State web site: http://www.sec.state.ma.us/cor/, where instructions and forms for fax filing are posted.

Special Corporations.

Other chapters of General Laws govern corporations formed to carry on following businesses and activities: Banking, including savings and cooperative banks and credit unions, cc. 167-172A; insurance, including surety companies, fraternal benefit societies and hospital and medical service corporations, cc. 174A-178 (note, c. 175, §174E is repealed); professional practice, c. 156A; limited liability companies, c. 156C; cooperative ventures, c. 157; railroads and other utilities, cc. 159-166; charitable and other nonprofit activities, c. 180. Foreign corporations previously governed by now repealed c. 181, now subject to Part 15 BCA. C. 182 governs so-called "Massachusetts business trusts" i.e., trusts with transferable shares, commonly used for business activities. See topic 2.05 Joint Stock Companies.

General supervision of corporations vested in State Secretary. Secretary of the Commonwealth, Corporations Division, One Ashburton Place, 17th floor, Boston, Massachusetts 02108. General information—tel: (617) 727-9640; fax: (617) 727-4538. Email: corpinfo@sec.state.ma.us. Division has promulgated rules and regulations covering practice with respect to business, foreign, professional and nonprofit corporations, business trusts and limited partnerships. Nonprofit medical service corporations are regulated by commissioner of insurance. (c. 176B, §1).

Purposes.

Corporation organized under c. 156D may conduct any lawful business (c. 156D, §3.01), (except businesses noted above as being governed by other chapters of General Laws) unless more limited purpose set forth in articles of organization. (c. 156D, §2.02). Supplemental information on articles but not part of articles (thus not requiring formal procedure to amend) includes brief description of type of business or SIC code and federal tax identification number. (c. 156D, §2.02[d]). Corporations may not practice law, but professional corporations, limited liability companies and partnerships are not so restricted. (c. 221, §46).

Powers.

Unless otherwise provided in articles of organization, every business corporation has same powers as individual to carry out its business. C. 156D, §3.02 contains non-exclusive list of 15 specific powers. No charter authority required for corporation to be partner in partnership. (c. 156D, §3.02[a][9]). Corporations may make contract of guarantee and suretyship unless articles of organization provide otherwise, if contracting corporation owns directly or indirectly all equity interest or all outstanding stock or has common ownership with primary obligor. (c. 156D, §3.02[b]). Validity of corporation's actions may only be challenged by shareholder, corporation directly or derivatively against former or incumbent director (c. 156D, §3.04[b]), or attorney general under c. 156D, §14.30.

Name.

Corporate name must indicate incorporation and must not be confusingly similar to name or tradename of (or reserved for) another domestic corporation or any corporation, firm, association or person which or who is, at time of either formation of corporation or change of name of existing corporation, unless, in case of similar name, written consent thereto of such other corporation, etc., is filed with State Secretary. (c. 156D, §401[c]). Availability of name may be checked by telephone but not reserved thereby. (Phone: [617] 727-9640). Corporate name may be reserved for 60 days upon written request and payment of $30 fee; upon written request and payment of additional fee, State Secretary may extend reservation for 60 days. See also category 17 Intellectual Property, topic 17.01 Trademarks and Tradenames.

Terms of corporate existence perpetual unless limited by articles of organization. (c. 156D, §3.02).

Incorporators.

One or more persons. Function is to sign and deliver articles of organization to State Secretary, exercise powers of shareholders until stock issued.

Organization.

Articles of organization must set forth corporate name, number of authorized shares, description of classes or series of shares (see c. 156D, §4.01) and name and address of incorporator(s); may set forth provisions not inconsistent with law as listed in §2.02(b), including inter alia corporate purpose, limitations on powers of corporation, directors or shareholders, par values, personal liability of shareholders for corporate debt to specified extent on stated conditions, voluntary dissolution of corporation, required or permitted bylaw provisions, and provisions relating to personal liability of directors. Form for filing articles must include street address of initial registered office, names of initial director(s), president, treasurer, and secretary, initial fiscal year, such other information as Secretary of State may require, and name of initial registered agent. (NOTE: requirement of designated registered agent did not exist under prior law. All existing corporations formed before July 1, 2004 under c. 156B must now designate registered agent who may be individual, including officer, domestic corporation or foreign corporation qualified to do business in commonwealth. (c. 156D, §5.01). Registered agent's business office is registered office of corporation.)

Filing Articles of Organization.

Articles submitted to State Secretary. May be submitted electronically or by fax. All filings must be in English on 8½ x 11 paper, may not be handwritten.

Forms have been developed by corporations' division but filings no longer need be on printed forms. Electronic filing encourage by lower fees. See Online Corporations Filings at http://www.sec.state.ma.us/cor/. Effective date of all documents is date of approval for filing by State Secretary or for articles or organization, amendment or merger such time as may be specified by Secretary's regulations or later effective date not more than 90 days after filing specified in document. See c. 156D, §1.20 for filing requirements.

Incorporation tax or fee currently $275 minimum authorizing up to 275,000 shares ($100 for each additional 100,000 shares).

Filing Fees.

None initially in addition to incorporation fee set forth above.

Paid-in Capital Requirements.

None.

Amendment of Articles.

Pursuant to c. 156D, §§10.01 and 10.03, corporation may amend articles of organization by filing articles of amendment complying with §10.06; filing fee $100 minimum; filing fee for restated articles of organization $200 minimum. Charter amendment must first be adopted by vote of directors and then two-thirds of each class of stock outstanding and entitled to vote thereon, unless articles of organization or bylaws specify greater percentage or articles lesser percentage. Only majority vote required for amendment relating solely to: (1) Increase or reduction of authorized capital stock of any class; (2) change of number of authorized shares or pro rata exchange; or (3) change of corporate name. Class or series of shares may vote separately as voting group on amendments affecting such group in manner listed in §10.04(a)(1)-(9). Directors may without shareholder approval restate articles of organization (c. 156D, §10.07) or make nonsubstantive changes as enumerated in §10.05.

Certificates (on forms currently supplied by State Secretary) of change in fiscal year, principal office of corporation in commonwealth, officers or directors, or resident agent must be filed with state secretary. Such changes not deemed amendments of articles of organization. Filing fees are posted on State Secretary's website. See subhead Reports, infra.

Bylaws.

Incorporators or board of directors must adopt bylaws not inconsistent with law or articles of organization for regulation and management of affairs of corporation. (c. 156D, §2.06). Power to make, amend or repeal bylaws is in stockholders, but articles of organization or bylaws authorized by articles of organization may permit directors to make, amend, or repeal bylaws in whole or in part, except with respect to any provision thereof which by law, articles of organization or bylaws, requires action by stockholders. (c. 156D, §10.2[a]). Bylaw amendments to change shareholder quorum or voting requirements can only be made by shareholders. (c. 156D, §10.21). Pursuant to §10.22 quorum requirement for director action may be increased or decreased. §10.22(c) allows shareholders to impose supermajority restrictions on subsequent amendment of shareholder adopted bylaws.

Stock must have one or more classes or series of shares with unlimited voting rights and right to receive net assets on dissolution. (c. 156D, §6.01[b]). Distinction between classes and series largely eliminated. Articles of organization must proscribe number of shares in each class or series with preferences and limitations of each, and may authorize classes or series that have special, conditional or limited voting rights, specify redemption or conversion rights, entitle holders to specified distribution or dividend rights and have preferences over other classes or series. (c. 156D, §6.01[c]). Charter may provide directors broad power over “blank check” shares to establish classes or series, determine number of shares included and fix terms thereof before such shares are issued (c. 156D, §6.02), or after shares are issued to reclassify unissued shares diluting interest of existing shareholders. Each series of class must have distinguishing designation.

Fractional shares or scrip in lieu thereof may be issued. (c. 156D, §6.04).

Stock certificates must be signed either manually or in facsimile by two officers designated in bylaws and state name of issuing corporation, name of shareholder and number of shares and class and designation of series. (c. 156D, §6.25). Certificate by corporation authorized to issue more than one class or series within class must summarize upon face or back variations in rights, preferences and limitations or state conspicuously that corporation will furnish copy thereof upon written request and without charge. (c. 156D, §6.25[c]). Unless prohibited by articles of organization or bylaws, board of directors may authorize any or all series and classes of shares to be without certificates, in which case corporation must send shareholder written information statement within reasonable time with information required on certificates. (c. 156D, §6.26[b]). Shares which are subject to any restriction on transfer or registration of transfer pursuant to articles of organization, bylaws or any agreement between shareholders and corporation must have restriction noted conspicuously on certificate (c. 156D, §6.27[b]), or if shares without certificate, on information statement. New certificates in place of those alleged to have been lost, mutilated or destroyed may be issued, subject to c. 106, §8-405.

Issuance of Stock.

Unless specifically limited by articles of organization, stock may be issued for any type or amount of consideration determined by directors, including future or promoters' services or any tangible or intangible property or benefit to corporation. Concept of par value or any reliance on “legal capital” eliminated. (c. 156D, §6.21). Directors determination that consideration is adequate is conclusive (c. 156D, §6.21[c]) subject to provisions on director conflict of interest in c. 156D, §8.31.

Reacquisition of Stock.

Shares previously issued which are reacquired by corporation become authorized but unissued shares unless articles of organization prohibit reissue, in which case number of authorized shares commensurately reduced. (c. 156D, §6.31). No treasury shares.

Transfer of Stock.

Covered by Uniform Commercial Code. (c. 106, §§8-101 through 8-407). If bylaws do not fix or provide method for fixing record date to determine shareholders entitled to notice and/or vote, directors may fix date not more than 70 days before meeting or shareholder action. (c. 156D, §7.07[a]). If no record date so fixed record date for such determinations is close of business on day before first notice sent or if no notice sent, day before meeting. Determination effective for any adjournment of meeting unless directors fix new date, mandatory if meeting adjourned for more than 120 days. (c. 156D, §7.07[c]).

Stock Transfer Tax.

None.

Preemptive Rights.

Stockholders have no preemptive rights regarding unissued shares unless specifically provided in articles of organization or contract to which corporation is party. (c. 156D, §6.30).

Derivative Suits.

C . 156D, §§7.40-7.47 address corporate accountability and board independence and responsibility. Standing requires being shareholder at time act or omission and fairly representing interests of corporation in enforcing its rights. (c. 156D, §7.41). To commence suit shareholder must make written demand on corporation rejected or not responded to within 90 (or in some cases 120) days. (c. 156D, §7.42[b]). §7.44 requires dismissal if independent directors or shareholders determine suit not in best interest of corporation. Court may order plaintiff to pay corporation's expenses, including counsel, on finding suit lacked reasonable cause or brought for improper purpose. Court may order corporation to pay plaintiff's reasonable expenses, including counsel fees, if proceeding results in substantial benefit to corporation. (c. 156D, §7.46). With limited exception foreign derivative suit against corporation governed by laws of jurisdiction of incorporation. (c. 156D, §7.47).

Close Corporations.

Stockholders in corporation deemed to be “close corporation” owe one another substantially same fiduciary duty in operation of enterprise that partners owe to one another. (367 Mass. 578, 328 N.E.2d 505; 370 Mass. 842, 353 N.E.2d 657). This shared obligation, however, is not intended to unduly hamper legitimate corporate activity. (449 Mass. 377, 868 N.E.2d 118 ; 402 Mass. 650, 524 N.E.2d 849). Fiduciary duty owed to minority shareholders in close corporation does not prevent controlling group of shareholders from exercising substantial discretion regarding business policy. (423 Mass. 461, 668 N.E.2d 351).

Stockholders' Liabilities.

Stockholders who receive distribution, including distribution in liquidation, knowing of violation of articles of organization or BCA personally liable to corporation and to directors who have had to pay liability to corporation for improper distribution. (c. 156D, §6.41[c]). Non-knowing shareholders liable to reimburse directors if found by court appropriate under circumstances and to repay distributions from dissolved corporation if made prior to three years after effective date of dissolution. (c. 156D, §6.41[d]).

Stockholders' meetings may be held in commonwealth or elsewhere in U.S. without special charter authority. Unless shareholders dispense with board of directors pursuant to c. 156D, §7.32 (see subhead Directors and Officers, infra), annual meeting must be held to elect directors, but no fixed time in BCA. (c. 156D, §7.01). Shareholder meetings of private corporations can be entirely in cyberspace; public corporation meetings must be in specific place but shareholders can participate by any means allowing them to read or hear and vote. (c. 156D, §7.08). Proxies valid for 11 months unless shorter or longer validity specified. (c. 156D, §7.22). Proxies, consents, votes, waivers and other actions may be given electronically or by facsimile copy. (c. 156D, §7.28). Percentage of required shareholder approval for any matter may be increased by directors or reduced by charter, but not below majority. (c. 156D, §7.28).

Written notice of date, time, place and purposes must be given to shareholders entitled to vote and others entitled to notice under articles of organization or bylaws no less than seven nor more than 60 days before meeting. (c. 156D, §7.05). Shareholder may waive notice of meeting before or after meeting by writing filed with records of meeting. Attendance waives objection regarding notice. (c. 156D, §7.06). Special meetings may be called by directors, person so authorized in articles of organization or bylaws or for nonpublic corporations holders of 10% or such lesser percent permitted in articles of organization of all votes entitled to be cast; for public corporation absent contrary provision in articles of organization or bylaws, holders of 40% of all entitled votes. (c. 156D, §7.02).

Shareholder action may be taken without meeting by signed written unanimous consent delivered to corporation of all shareholders entitled to vote on matter. However articles of organization may permit non-unanimous consent by shareholders having sufficient votes to act without meeting by written consent, including electronically transmitted consent, even though such number of shareholders is less than total entitled to vote. (c. 156D, §7.04). Notice of action must be given to non-consenting shareholders entitled to vote at least seven days prior to taking of action. (c. 156D, §7.04[a] and c. 156D, §7.04[d]).

Voting.

Unless BCA, articles of organization, bylaws or directors otherwise provide, majority in interest of all stock outstanding and entitled to vote constitutes quorum. Quorums separately determined for each voting class or series. (c . 156D, §7.25). Directors may increase quorum pursuant to c. 156D, §7.27(a). For action requiring vote of each class of stock, articles of organization, bylaws or directors pursuant to c. 156D, §7.27(a) may provide that two or more classes shall vote as single class, in which case articles or bylaws control, except that no class or series adversely affected by amendment to articles of organization shall be deprived of right to separate vote. (c. 156D, §7.26). Cumulative voting for directors may be permitted by charter (c. 156D, §7.28) or by shareholder agreement (c. 156D, §7.32). Stockholders entitled to vote have one vote for each share and proportionate vote for fraction of share. (c. 156D, §7.21[a]).

Voting trusts may be created by signed trust agreement, with shares to be registered in name of trustee. (c. 156D, §7.30). Written agreement between two or more stockholders or between one or more stockholders and one or more other persons may provide that shares held by such stockholders will be voted under procedures set forth in agreement, but unlike trusts, shares remain registered in names of beneficial owners. (c. 156D, §7.31).

Directors and Officers.

Unless shareholders agree per c. 156D, §7.32[a][1] and [b] to eliminate board of directors, every corporation must have board of directors (c. 156D, §8.01[a]), president, treasurer, secretary and may have such other officers as bylaws authorize. (c. 156D, §8.40). One individual may simultaneously hold more than one office. Number of directors may be fixed by articles of organization or bylaws. Unless otherwise provided in articles, number must not be less than three, except that whenever there are only two stockholders, number of directors must be not less than two and whenever there is only one stockholder number of directors must be not less than one unless charter specifies to contrary. (c. 156D, §8.03). Prior to issuance of any stock, number of directors shall be not less than one. Bylaw fixing number or range of number of directors can be changed only by shareholders. (c. 156D, §8.03[b]). No requirement officers be appointed by shareholders. No requirement president be director. Unless bylaws require, directors and officers need not be stockholders or Massachusetts residents. (c. 156D, §8.02). If authorized by charter or bylaws to fix or change number of directors, directors may increase number last approved by shareholders. (c. 156D, §8.03[b]). C. 156D, §8.04 deals with election of directors by classes. Vacancies filled by shareholders or directors unless articles of organization or provisions of §8.06 (staggered terms) otherwise provide. Majority of directors may fill vacancy to create quorum. (c. 156D, §8.10). Term of directors expires at next annual meeting following election unless staggered. (c. 156D, §§8.05[a], 8.06). Except as otherwise provided by articles of organization or bylaws, shareholders may remove director with or without cause (c. 156D, §8.08[a]), but directors of public corporation whose terms are staggered may be removed by shareholders only for cause (c. 156D, §8.06[d]). Director may be removed for cause by majority of incumbent directors or number of directors required by articles of organization or bylaws to take action under §8.24 of BCA. Removal requires meeting called for specific purpose of removal. (c. 156D, §8.08[a], [d] and [e]). Directors may remove any officer at any time with or without cause. (c. 156D, §8.43[b]).

Directors' meetings may be held within or without commonwealth. (c. 156D, §8.20). Unless articles of organization or bylaws provide otherwise: (1) Regular meetings may be held without notice of date, time, place or purpose (c. 156D, §8.22[a]); and (2) special meetings are held upon at least two days' notice. (c. 156D, §8.22[b]). Notice may be waived before or after meeting by signed writing or in form of electronic transmission filed with records of meeting. (c. 156D, §8.23). Unless articles of organization or bylaws provide otherwise, majority of fixed number or of directors in office constitutes quorum, and if quorum present majority of directors present may act. (c. 156D, §8.24[a] and c. 156D, §8.24[c]). Articles of organization or bylaws may authorize quorum of no less than one-third of fixed number or majority then in office. (c. 156D, §8.24[b]). Unless articles of organization or bylaws provide otherwise, “virtual” directors meetings permitted by way of any means of communication by which all directors participating may simultaneously hear each other. (c. 156D, §8.20). Any action may be taken without meeting if all directors consent thereto in writing or by electronic transmission filed with records of meetings of directors. (c. 156D, §8.21).

Powers and Duties of Directors.

Directors shall manage business and affairs and may exercise all powers of corporation, subject to any limitations imposed by articles of organization or shareholder agreement. (c. 156D, §§8.01, 7.32). Unless articles of organization or bylaws provide otherwise, directors may create committees of one or more directors. (c. 156D, §8.25). With exceptions set forth in §8.25[e] committees may exercise authority of directors.

Liability of Directors and Officers.

Standards of conduct for directors and officers set forth in c. 156D, §§8.30 and c. 156D, 8.42 respectively; liability imposed for failure to comply with such standards. Generally, directors and officers must act in good faith, with care person in like position would reasonably believe appropriate under similar circumstances and in manner directors or officers reasonably believe is in best interests of corporation. Directors who vote for or assent to distribution, including in liquidation, in violation of BCA or articles of organization personally liable to corporation for excess of distribution over amount which could have been distributed without such violation if director failed to meet standards of conduct in c. 156D, §8.30. Director who pays corporation on account of such liability entitled to contribution from every other director who could be held liable, reimbursement from each shareholder who knew distribution was improper and from unknowing shareholder to extent determined appropriate in circumstances by court. (c. 156D, §6.41).

Conflicts of interest of directors addressed in c. 156D, §8.31 which specifies process for providing safe harbor for director by subsequent approval of transaction. Loans to directors dealt with in c. 156D, §8.32, generally subject to standards set forth in c. 156D, §8.30.

Indemnification of Directors and Other Officers.

See c. 156D, §§8.50-8.59. Corporation may by articles of organization, bylaws or resolution of or agreement approved by directors obligate itself in advance to provide indemnification and advance for expenses to directors (c. 156D, §8.51) and officers (c. 156D, §8.56) or may limit such rights created by or pursuant to BCA (c. 156D, §8.58[a], [c]). Director serving as trustee or fiduciary for employee benefit plan under ERISA eligible for indemnification. (c. 156D, §8.51[b]). Permissible indemnification of directors includes good faith conduct, reasonable belief conduct in, or at least not opposed to, best interests of corporation and, in case of criminal proceeding, no reasonable belief conduct unlawful. (c. 156D, §8.51). Permissible indemnification of officers to same extent as directors or for nondirector officer, as proscribed by articles of organization, bylaws, directors' resolution or contract except for acts or omissions not in good faith or which involve intentional misconduct or knowing violation of law. (c. 156D, §8.56[a]). Mandatory indemnification of expenses for total success in defense of any proceeding against director or officer. (c. 156D, §8.52). §8.53 provides for advance expenses. Determination and authorization of indemnification made by disinterested directors, legal counsel or shareholders. (c. 156D, §8.55[b]). Corporation may maintain insurance on behalf of any person who is or was director, officer, employee or other agent of corporation or is or was serving at request of corporation as director, officer, employee, or other agent of another organization or with respect to any employee benefit plan, against liability incurred in such capacity or arising out of his status as such, whether or not corporation would have power to indemnify him against such liability. (c. 156D, §8.57).

Limited Liability.

See topic 2.06 Limited Liability Companies.

Officers.

See subhead Directors and Officers, supra.

Registered and Principal Office.

Form on which articles of organization filed must include as supplemental (thus not requiring formal amendment to modify) address of initial registered office within commonwealth. (c. 156D, §2.02[d]). Corporation may from time to time change registered office by filing statement of change with State Secretary. (c. 156D, §5.02). “Principal office” where principal executive offices of domestic or foreign corporation located need not be in commonwealth. (c. 156D, §1.40). Mandatory annual report to Secretary of State must include addresses of registered office and principal office. (c. 156D, §16.22[a][2], [3]).

Resident Agent.

Every corporation including those created prior to July 1, 2004 under earlier c. 156B must continuously maintain registered agent in Massachusetts whose business address shall be corporation's registered office. (c. 156D, §5.01). May be individual, including corporate officer, domestic profit or not-for-profit corporation or foreign profit or not-for-profit corporation qualified to do business in commonwealth. Change of registered agent requires detailed statement filed with State Secretary. (156D, §5.02[a]). Resident agent is corporation's agent for service of process, notice or demand. (c. 156D, §5.04). Generally similar provisions in §§15.07-15.10 govern registered agent of foreign corporation.

Dividends.

Directors authorized to make distributions subject to restrictions imposed in articles of organization, equitable insolvency test and positive net worth test (taking account of seniority preferences). (c. 156D, §6.40[a], [b]). See subheads Stockholders' Liability and Liability of Directors and Officers, supra, regarding consequences of improper distributions. Unless articles of organization provide otherwise, share dividends are authorized and deemed distributed without consideration, thus require no transfers from surplus and are available to insolvent corporation. (c. 156D, §6.23).

Regarding unclaimed dividends see category 21 Property, topic 21.01 Absentees, subhead Escheat.

Sale or Transfer of Corporate Assets.

Unless articles of organization requires, no shareholder approval required for: (1) Sale or other disposition of all or substantially all corporate assets in usual course of business; (2) mortgage or pledge of corporation's property; or (3) transfers to subsidiaries. (c. 156D, §12.01). Disposition or sale other than in regular course of business must be proposed by directors and submitted to vote of two-thirds, or lesser proportion (but not less than majority) if articles of organization so provide, or greater percentage if articles of organization, bylaws or directors, so provide, of each class of stock outstanding and entitled to vote thereon. (c. 156D, §12.02[a]). Notice of meeting must be given to each stockholder, whether or not entitled to vote. (c. 156D, §12.02[c]). Approval of most sales of all or substantially all assets triggers dissenters' rights under c. 156D, §13.01 et seq.

Sale or transfer other than in ordinary course of business of all or substantially all of assets of corporation situated in Massachusetts gives rise to lien on all such assets in favor of commonwealth to extent necessary to satisfy excise taxes, unless five days prior notice and tax returns are filed with commissioner of revenue and prior to or at sale or transfer excise taxes are paid; lien may be waived by commissioner before or after transfer. (c. 62C, §51). See subhead Taxation of Corporate Property, catchline Income (Excise) Tax, infra.

Any recordable instrument purporting to affect interest in real estate, executed in name of corporation by president or vice-president and treasurer or assistant treasurer (who may be same person) shall be binding on corporation in favor of purchaser or other person relying in good faith on such instrument, notwithstanding inconsistent provisions of articles of organization, bylaws, certificate of incorporation, special act of incorporation, constitution, or votes of corporation. (c. 156D, §8.46).

Books and Records.

Permanent record of minutes of shareholder and director meetings, all actions taken by shareholders or directors without meeting and of committee action must be kept in written form or other form capable of conversion into written form. (c. 156D, §16.01[a], [d]). Copies of articles of organization, amendments, bylaws, and records of all meetings or actions shareholders, written communications to shareholders within past three years, list of names and addresses of current directors and officers and most recent annual report must be kept at principal office or office of transfer agent, secretary or assistant secretary or registered agent in commonwealth. (c. 156D, §16.01[e]). Inspection rights of shareholders set forth in §§16.02-16.04, of directors in §16.05. Superior court may enforce shareholder right to inspect and copy records and order corporation to pay shareholder's cost, including counsel fees. (c. 156D, §16.04).

Reports.

Corporation must furnish to shareholders upon request annual financial statements which may be copies of federal tax returns. If prepared by public accountant his report must accompany, otherwise must be certified by president or person responsible for corporation's accounting records. (c. 156D, §16.20[a], c. 156D, §16.20[b]). Substance of bylaw amendments by directors must be reported in writing to shareholders entitled to vote on such amendments with or before notice of next shareholder meeting. (c. 156D, §16.21).

Each domestic corporation and each foreign corporation authorized to do business in commonwealth must submit annual report to State Secretary within two and one-half months after end of fiscal year its annual meeting containing current information enumerated in c. 156D, §16.22(a).

Certificate of any change of directors, required officers, registered agent or registered office must be filed with State Secretary. (c. 156D, §§5.02, 8.45). As of writing no BCA forms created, State Secretary accepting former BCL forms. Filing fee for change of registered agent or registered office $25 for paper or fax filings; no fee if filed electronically. See Secretary of State website: http://www.sec.state.ma.us/cor/coridx.htm.

Domestic or foreign corporation doing business in Massachusetts must file information returns with dept. of revenue on or before June 1 in each year with respect to Massachusetts residents or persons employed in Massachusetts to whom it has during preceding calendar year paid compensation, interest or annuities. Domestic corporation and foreign corporation doing business in Massachusetts must also file with commissioner annually on or before June 1 list of all Massachusetts residents and other persons deriving income in Massachusetts to whom it paid any income subject to taxation under c. 62 during preceding calendar year, stating amounts of such income paid by it. (c. 62C, § 8).

For returns which must be filed in connection with taxes payable by corporations, see subhead Taxation of Corporate Property, catchline Foreign Corporations, infra.

Errors in Filed Documents.

Typographical error, incorrect statement or defect of execution, attestation, seal, verification or acknowledgment in any filed documents may be corrected by filing articles of correction with State Secretary. (c. 156D, §1.24). Corrected document takes effect day of filing original document. To those persons adversely or substantially affected by correction, document is effective from date of filing correction. (c. 156D, §1.24[b]).

Corporate Bonds or Mortgages.

For authorization required for mortgage of all assets see this topic, subhead Sale or Transfer of Corporate Assets, supra.

Merger and Consolidation; Share Exchanges or Acquisitions.

One or more domestic corporations may merge with domestic or foreign corporation or other entity under plan of merger, (c. 156D, §11.02[a]), which must include name of each entity and name of survivor, terms of merger, manner of converting shares of each, articles of organization or organization documents to be created by merger and any other provision required under laws of jurisdiction under which any merger party is organized. (c. 156D, §11.02[b]). Merger of domestic corporation with foreign entity authorized only if permitted by laws of jurisdiction under which non-survivor entity organized and such entity complies with such laws and its organizational documents. Share exchange authorized under c. 156D, §11.03 under which domestic corporation may acquire all shares of one or more classes or series of shares of other domestic or foreign corporation or interest of domestic or foreign other entity.

Only restrictions on terms of merger are set forth in c. 156D, §11.02(e) on provisions in merger plan for amendment after adoption by shareholders. However c. 156D, §11.02(c) requires that terms and conditions be set forth in merger plan, including articles of organization of any or organizational documents of any entity to be created by merger or amendment to survivor corporation's articles of organization. (c. 156D, §11.02[c][4]). Capitalization of survivor may be restructured in merger and organizational documents amended by articles of merger.

Adoption and approval requirements set forth in c. 156D, §§11.04 and 11.05. Directors must adopt plan and submit to shareholders. Board may condition submission to shareholders on any basis, such as vote by specified percentage of disinterested shareholders. (c. 156D, §11.04). Share exchange plan must be approved by shareholders of class or series being acquired; merger plan by shareholders of non-survivor, unless merger is short-form merger under c. 156D, §11.05 between parent corporation and 90% or more owned subsidiary; either parent or subsidiary may be survivor. If approval of plan of merger by shareholders of domestic corporation is required under c. 156D, §11.04, shareholders must be furnished with copy or summary of survivor's organizational documents in connection with approval vote. Class or series has right to vote on merger plan as separate voting group if under plan class or series would be converted into other securities, interests, obligations, rights to acquire shares or other securities, cash or other property. (c. 156D, §11.04). If merger plan would amend articles of organization affecting voting requirement on future amendments, transaction must be approved by c. 156D, §7.27 vote. If domestic corporation party to merger or share exchange, plan must be adopted by directors and submitted for approval of two-thirds shareholders and two-thirds of each voting group entitled to vote thereon, or lesser proportion if articles of organization so provide, unless greater percentage is provided by articles of organization, bylaws or under c. 156D, §7.27, at meeting called for purpose; however articles of organization may provide that class or series has no voting right on merger or share exchange plan. (c. 156D, §11.04). Notice of meeting at which plan approval sought must be given to all shareholders, including those not entitled to vote. No shareholder vote required for corporation to acquire shares of other corporation or interest in other entity in transaction other than share exchange (c. 156D, §11.03[g]), or for other reasons enumerated in c. 156D, §11.04. In statutory merger shareholders of survivor have right to vote if increase in number of shares exceeds 20% and corporation has sufficient authorized shares to issue without amending articles of organization to increase authorized capital. (c. 156D, §11.04).

Merger takes effect on date articles of merger filed unless later date not more than 90 days after filing is specified in articles. (c. 156D, §§11.06, 11.23). Failure to make required filing does not void merger or share exchange. (c. 156D, §11.06[c]). Directors may abandon merger or share exchange before effective date even if plan previously approved by shareholders. Upon effective date of merger survivor automatically becomes vested with all assets and subject to all liabilities of entities merged into survivor. (c. 156D, §11.07[a]). Pending proceedings involving survivor or entity whose separate existence ceases in merger are continued and name of survivor may, but need not be, substituted. (c. 156D, §11.07[a][5]). Share exchange does not automatically affect separate identity of parties or transfer assets or liabilities. Foreign entity survivor deemed to appoint State Secretary as agent for service of process in action to enforce rights of shareholders of domestic corporation parties to merger to exercise appraisal rights. (c. 156D, §11.07[d]). Merger cannot make any shareholder of domestic corporation personally liable unless shareholder executes separate agreement. (c. 156D, §11.04[8]). Shareholders of domestic corporation that is party to merger may have appraisal rights under BCA Part 13, §§13.01-13.31, Dissenters' Rights.

Acquisitions of stock of banking institutions are regulated specially by statute. (c. 167A, §4a).

Fee for consolidation or merger is determined annually by secretary of administration, currently $250 minimum.

Tender Offers.

See category 3 Business Regulation and Commerce, topic 3.24 Securities, subhead Tender Offers.

Dissolution.

Voluntary dissolution may be accomplished by incorporators or initial directors filing articles of dissolution with State Secretary stating either no shares have been issued or business has not commenced, no debts remain unpaid and net assets distributed to shareholders. (c. 156D, §14.01). Once shares issued or business commenced voluntary dissolution requires submission (but not approved) by directors for shareholder approval, or if closely held corporation, any such procedure provided by articles of organization. Closely held corporation may use dissolution procedure or condition to impose machinery to resolve internal disputes. (c. 156D, §14.02[a]). Unless articles of organization provide otherwise, two-thirds shareholder vote generally required, but articles of any corporation may require greater or lesser percent, but not less than majority if publicly held. (c. 156D, §14.02[e]). When articles of dissolution filed with State Secretary (filing fee $100) corporation must cease business and begin winding-up. Articles must describe manner in which dissolution was authorized. Corporation is dissolved on date article is effective. (c. 156D, §14.03). Dissolution may be revoked within 120 days, generally by shareholder vote unless advance authority granted to directors by shareholders when dissolution authorized or if articles of organization specifically provides otherwise. (c. 156D, §14.04).

Corporation not terminated on dissolution, which simply requires corporation to terminate business activities, wind-up and liquidate. (156D, §14.04[a]). Dissolution under BCA does not abate lawsuit, transfer business property or otherwise affect rights, powers or duties of shareholders, directors or resident agent, or suits by or against corporation. (c. 156D, §14.05[a]). c. 156D, §6.40(h) conditions distributions in liquidation on adequate provision to satisfy existing or reasonably foreseeable debts and liabilities and satisfaction of superior preferential rights. C. 156D, §6.41 provides for shareholder and director liability for improper liquidation on dissolution. All known undisputed claims must be resolved. See subheads Stockholders' Liabilities and Liability of Directors and Officers, supra. c. 156D, §§14.06, 14.07 and 14.08 detail “adequate provision” and provide procedures with respect to contested, non-contingent and contingent claims which do not extinguish claims but provide safe harbors from liability for improper distributions. C. 156D, §14.06 procedure limited to good faith dispute of claim by dissolved corporation. c. 156D, §14.07 provides procedure for limiting assets subject to unknown claims, expressly excluding from such asset shelter unasserted claims arising out of corporation's product or services, treated specially in c. 156D, §14.08. Such shelter against unknown claims limits asset vulnerability to assets retained by corporation plus shareholder distributions measured by earlier of applicable statute of limitations or three year period defined in c. 156D, §14.07. By following procedure net assets of dissolved corporation may be distributed to shareholders three years after dissolution without risk of shareholder or director liability or shorter period if directors have made adequate provision, including insurance, for liabilities under c. 156D, §§6.40(h) and 6.41. (Note also limitations of transferee or successor liability.) Directors meeting conduct standard of §8.30 not liable even if reasonable provisions not ultimately adequate, but shareholders liable to disgorge distributions received during three year period. (c. 156D, §6.41[d]). C. 156D, §14.08 dealing with prospective claims arising out of goods and services requires establishing reserve fund and publication of notice after end of three year period provided in c. 156D, §14.07(b)(1). Reserve may consist of any combination of: (1) Corporate assets or set aside; (2) paid insurance; and (3) assumption of liability by responsible third party. C. 156D, §14.09 details ways to limit assets against which claims may be asserted.

Administrative dissolution authorized if corporation fails for two years to file annual reports, file tax returns or pay taxes, or if State Secretary determines corporation is inactive or dissolution would be in public interest. (c. 156D, §14.20). Secretary must provide notice and 90 day grace period. (c. 156D, §14.21). Corporation may petition Secretary for reinstatement under c. 156D, §14.22 following administrative dissolution if in compliance with all statutory requirements and all taxes paid. (c. 156D, §14.22). Secretary must give written notice stating reason for denial of reinstatement; denial may be appealed to Suffolk County Superior Court within 30 days of denial. (c. 156D, §14.23). Corporation that has commenced voluntary dissolution may petition for court supervision to permit orderly liquidation of assets and protect corporation from multitude of creditor or dissatisfied shareholder suits. (c. 156D, §14.30).

Judicial (involuntary) dissolution may be brought in superior court in county in which corporation's principal office located by attorney general of commonwealth for fraudulent articles of organization or abuse of authority, in proceeding initiated by creditor if corporation insolvent or by corporation that has commenced voluntary dissolution. One or more shareholders can petition for dissolution if deadlock of directors or shareholders has occurred or irreparable injury is threatened or suffered and at least 40% shareholders joint in petition. (c. 156D, §14.30). Policy is for involuntary dissolution to be available as mechanism for resolving internal disputes only in case of true deadlock: director deadlock if shareholders unable to break deadlock, shareholder deadlock if shareholders unable to elect directors over two-year period. c. 156D, §14.02(a) permits closely held corporation to dissolve voluntarily by method specified in articles of organization and to condition availability of such method on any basis set forth in articles.

c. 156D, §14.40 requires deposit for safekeeping (not escheat) with commonwealth treasurer after dissolution of assets due to creditor, claimant or shareholder who cannot be found.

Insolvency and Receivers.

In proceeding brought to dissolve corporation court may appoint receiver or custodian pendente lite with all powers and duties court directs to preserve corporate assets and carry on business until full hearing. (c. 156D, §14.31). C. 156D, §14.32 supplements general court powers in case of judicial dissolution to resolve internal corporate problem or effect liquidation in efficient manner. Court may appoint individual or domestic or foreign corporation as receiver or custodian and define powers of appointee and order compensation and expenses to receiver or custodian and counsel from assets of corporation or proceeds of asset sale.

Reorganization.

C. 156D, §14.34 facilitates reorganization under federal bankruptcy law by superseding BCA. Plan confirmed by decree of court needs no shareholder or director action to implement. (c. 156D, §14.34[a]). See subhead Amendment of Articles, supra.

Foreign Corporations.

Chapter 181 repealed and replaced by BCA, c. 156D, §§15.01-15.32. Foreign corporations authorized prior to July 1, 2004 subject to but not required to apply for new authority under BCA. (c. 156D, §17.02). Foreign corporation is corporation organized other than under laws of Massachusetts. (c. 156D, §1.40). Every foreign corporation which does business in Massachusetts or which has usual place of business therein, or which owns or leases real estate therein, or which is engaged therein in construction alteration or repair of any structure, railway or roads, or in any other activity requiring performance of labor, shall be deemed transacting business in Massachusetts unless its activities within Massachusetts consist of no more than one or more of following: (1) Maintaining, defending or settling proceedings; (2) holding meeting of directors or stockholders; (3) maintaining bank accounts; (4) maintaining offices or appointing trustees, depositaries, or agencies for holding, transfer, exchange or registration of its securities; (5) selling through independent contractors; (6) soliciting or obtaining orders requiring acceptance outside Massachusetts; (7) creating or acquiring indebtedness or mortgages in real or personal property; (8) securing or collecting debts; (9) “conducting isolated transaction that is not one in the course of repeated transactions of a like nature”; (10) transacting business in interstate commerce; or (11) performing activities subject to regulations under c. 167 or c. 175, if foreign corporation has complied with provisions of applicable chapter. (c. 156D, §15.01[b] and [c]).

Within ten days after commencement of doing business in Massachusetts, foreign corporation must file with State Secretary certificate accompanied by certificate of legal existence from state of domicile, setting forth: (1) Its name; (2) state or country of incorporation; (3) date of incorporation and duration; (4) address of principal office; (5) address of registered agent and office in Massachusetts, with written consent of agent; (6) fiscal year; (7) brief description of activities within Massachusetts; and (8) names and business addresses of directors and officers. (c. 156D, §15.03). Any change in name, duration, state of incorporation, principal office address, fiscal year or corporate activities must be reported to State Secretary in amended certificate. (c. 156D, §15.04). Filing fee for initial certificate currently greater of $400 ($375 if filed by fax) or cost to register Massachusetts corporation in state of organization; filing fee for amendment currently $100. Foreign corporations subject to §16.22 requirement to file annual report with State Secretary. See subheads Reports; Books and Records, supra. Filing fee currently $125 ($100 if filed electronically), $150 if not filed timely.

No foreign corporation doing business in Massachusetts can assume name or trade name of another corporation established under Massachusetts law, or of corporation wherever established, firm association or person carrying on business in Massachusetts at time of incorporation or change of name of subject corporation or within three years prior thereto, or assume name which is under reservation under laws of Massachusetts for another or proposed corporation wherever established, or assume name so similar to any of foregoing as to be likely to be mistaken for it, except with written consent of name-holder. (c. 156D, §15.06). Availability of name may be checked by telephone ([617] 727-9640), or search of Secretary of State corporation and name reservation databases, available at http://www.sec.state.ma.us/cor/corpweb/cornameres/nameresinf.htm. Name may be reserved only by written application for 60 days and by written request for additional 60 days upon payment of fee currently $30. (c. 156D, §4.02). See also category 17 Intellectual Property, topic 17.01 Trademarks and Tradenames.

Every foreign corporation which fails to file initial certificate or amended certificate as required by c. 156D, §15.03 shall be liable to commonwealth for amounts detailed therein. State Secretary has authority to assess penalties at its discretion, but may not exceed penalties established by commissioner of administration. (c. 156D, §15.02[d]). No such failure shall affect validity of any contract involving foreign corporation, but no action shall be maintained or recovery had in any of courts of commonwealth by foreign corporation as long as such failure continues. (c. 156D, §15.02[a], [e]).

Any officer of foreign corporation who signs any statement or report required by this chapter which is false in any material representation that he knows or has reason to know to be false shall be liable to creditor of foreign corporation who has relied upon such false representation to extent of actual damage sustained by reason of such reliance; provided that officer signing false report of condition shall not be liable to creditors for debts contracted or contracts entered into after filing of report of condition or corrected report of condition that is not false in any material representation. (c. 156D, §15.11[a]). No liability shall be imposed under c. 156D, §15.11 upon any director or officer who shall have discharged duties of his position in good faith and with degree of diligence, care and skill that prudent men would ordinarily exercise under similar circumstances in like position. In discharging his duties such person, when acting in good faith, shall be entitled to rely upon books of account of foreign corporation or upon written reports made to foreign corporation by any of its officers, other than such person, or by independent public accountant. (c. 156D, §15.11[b]). Any officer who pays on judgment rendered on claim asserted under c. 156D, §15.11[a] shall be entitled to contribution from other officers against whom judgment has been entered on same claim or who shall be ascertained to be liable to plaintiff upon same claim. (c. 156D, §15.11[c]). Whoever knowingly makes, executes, files or publishes any report or statement required by law to be made, executed, filed or published by foreign corporation in Massachusetts, or whoever causes same to be done, which report or statement is false in any material representation, shall be punished by fine of not more than $5,000 or by imprisonment for not more than three years, or both. (c. 156D, §15.11[d]). Whoever knowingly makes, executes, files or publishes any report or statement required by law of another state or country to be made, executed, or published by foreign corporation, or whoever causes same to be done, within Massachusetts, which report or statement is false in any material representation, shall be punished by fine of not more than $5,000 or by imprisonment for not more than three years, or both. (c. 156D, §15.11[e]).

Foreign corporations shall be liable to be sued and to have their property attached in same manner and to same extent as individuals who are residents of other states. (c. 156D, §15.10). Every foreign corporation doing business in Massachusetts which has not complied with provisions of c. 156D, §15.03 and every foreign corporation which has complied with such provisions but whose resident agent cannot, after diligent search by authorized legal agent, be found shall be deemed to have appointed State Secretary as its attorney for service of process. (c. 156D, §15.10[b]). Service of process in all judicial and administrative proceedings against foreign corporation doing business in Massachusetts may be made upon State Secretary. Service of process in all judicial and administrative proceedings against foreign corporation formerly doing business in Massachusetts including one that has withdrawn from Massachusetts, may be made upon State Secretary if proceeding involves liability alleged to have been incurred by foreign corporation while it was doing business in Massachusetts. (c. 156D, §15.10[c]).

Withdrawal of Foreign Corporation.

Foreign corporation formerly doing business in Massachusetts may withdraw upon filing with State Secretary certificate of application setting forth: (1) Its name and place of incorporation; (2) that foreign corporation is not doing and surrenders its authority to do business in commonwealth location; (3) revoking authority of registered agent and appointing State Secretary as agent for service of process; (4) mailing address to which State Secretary may mail process; (5) commitment to notify State Secretary of changes in mailing address; and (6) certificate that all taxes due to commonwealth have been paid. (c. 156D, §15.20[b]). C. 156D, §15.21 deals with automatic withdrawal, c. 156D, §15.22 with withdrawal upon conversion to nonfiling entity.

Domestication and Conversion.

C. 156D, §§9.20-9.56 establish process by which corporations may convert to other entities or other entities may convert to corporations, and corporations may change jurisdiction of organization from or to Massachusetts. “Other entities” broadly defined to include general or limited partnerships, limited liability companies and unincorporated entities. No counterpart existed in prior BCL (c. 156B). Provisions based closely on chapter 9 of A.B.A. Revised Model Business Corporation Act (2001).

Taxation of Corporate Property.

All Corporations.

Generally, every business or manufacturing corporation, domestic or foreign, is taxable locally on its real estate, poles, underground conduits, wires and pipes. (c. 59, §§2, 5[16]). Real estate tax based on value as of Jan. 1. Buildings and other things erected on or affixed to land between Jan. 2 and June 30 of fiscal year preceding that to which tax relates deemed part of such real estate as of Jan. 1. (c. 59, §2A). In addition, machinery used in conduct of business and owned by or in possession of corporation which has not been classified as manufacturing corporation is subject to local taxation. Such machinery does not include stock-in-trade or refrigeration, air conditioning or accounting or administrative equipment. (c. 59, §5[16]). Machinery regularly used locally in course of business considered situated there for local tax purposes regardless of its physical location Jan. 1. Taxes on machinery used in transporting persons or goods must be apportioned to reflect amount of time machinery physically located in city or town. (c. 59, §18). Classification of corporations is made annually by Commissioner of Revenue (“commissioner”). (c. 58, §2). Commissioner may revoke classification and assess excise due retroactively. (396 Mass. 137, 484 N.E.2d 1005). Commissioner of Revenue may prescribe regulations necessary to carry out intent and purpose of chs. 62C, 60A, 62-65C, §10 of c. 121A and §21 of c. 138 and has done so with respect to taxation of corporations. (830 CMR §63 et seq.). All corporations not exempt under c. 59, §5, 3rd and 10th are also subject to annual excise tax on motor vehicles at any time during year registered in commonwealth. (c. 60A, §1). All corporations also subject to excise (income) tax. See following paragraphs.

Income (Excise) Tax.

All domestic corporations must pay as excise tax greater of: (1) $400; or (2) $7 per $1,000 of value of tangible property as determined under c. 63, §30 and 8.33% of its net taxable income. (c. 63, §32). Current minimum excise tax is $456. (830 CMR 63B.2.2). Net income to be allocated to Massachusetts is corporation's “net income” as defined in c. 63, §§30-33, 38-38M, with modifications described in c. 63, §§38, 38A.

Net income is gross income less deductions, not credits, allowed under IRC, except for deductions allocable to one or more classes of income not included in corporations taxable net income pursuant to c. 63, §38[a]. (c. 63, §30). 5% of dividends not included in taxable net income shall be included pursuant to c. 63, §38[a]. Net operating loss (nol) is amount by which deductions allowed under §30, 4th, exceed gross income for taxable year. (c. 63, §30, 5th). Nol's sustained after Dec. 31, 1989 are allowed as deduction in determining net income with following limitations: (1) 25% of net income for period between Dec. 31, 1990 and Dec. 31, 1991; (2) 50% of net income for period between Dec. 31, 1991 and Dec. 31, 1992; (3) 75% of net income for period between Dec. 31, 1992 and Dec. 31, 1993; and (4) 100% of net income for period after Dec. 31, 1993. (c. 63, §30, 5th[b]). Nol may not be carried forward more than five years and cannot be carried back. (c. 63, §30, 5th[b]).

Gross income is federal gross income plus interest received on bonds or notes of any state, including Massachusetts, less deduction for capital losses to extent allowable by IRC. (c. 63, §30, 3rd).

Credits.

Domestic or foreign corporation allowed credit against excise tax as set forth in c. 63, §38M. C. 63, §31A sets forth requirements for investment tax credits.

Foreign Corporations.

See BCA, c. 156D, §§15.01-15.32, subhead Foreign Corporations, supra, for definition. Foreign corporation qualified to do business in Massachusetts or doing business in Massachusetts subject to Massachusetts corporate excise tax. (See c. 63, §39.) Net income is apportioned to Massachusetts as provided in c. 63, §38. Special provisions apply to foreign corporations which are subsidiaries of or otherwise closely affiliated with other corporations to ensure tax imposed on true earnings of such foreign corporations. (c. 63, §39A).

Liability for corporation excise tax extends to foreign corporations which were lessors of real estate or tangible personal property in Massachusetts at any time during taxable year. Lessee is jointly liable for tax. (c. 63, §39; c. 62C, §48).

S Corporations.

Domestic and foreign corporations qualified as S corporations under Federal Internal Revenue Code determine income and loss for Massachusetts for tax purposes as follows: Net income determined by taking into account provisions of Subchapter S or IRC. Income or loss determined as if realized or incurred directly by individual subject to taxation under c. 62. (c. 63, §32D). Income includible in net income measure under this subsection to extent income taxed to S corporation for federal income tax purposes. Also, S corporation with total receipts of between

$6,000,000 and $9,000,000 must include in net income measure of excise imposed by multiplying its net income by 2.63%; if total receipts for taxable year are $9,000,000, multiplying by 3.95%. (c. 63, §32D). Total receipts mean gross receipts or sales, less returns and allowances but not less cost of goods sold or of operations, plus dividends, interest, net capital gains, rental and all other income. (c. 63, §32D).

Consolidated Returns.

If two or more domestic business corporations or foreign corporations file consolidated return of income federally, net income measure of their excises imposed under c. 63, §32 or §39 may, at their option, be assessed upon their combined net income, in which case excise will be assessed to all said corporations and collected from any one or more of them. (c. 63, §32B). Statutes do not authorize application of "unitary business" method in determining corporation's net income taxable by Massachusetts. (c. 63, §32B; c. 63, §§33, 39A, 42; 393 Mass. 490, 472 N.E.2d 259).

Banks, including banking associations, trust companies, federal or state savings and loan associations, savings and cooperative banks, and corporations authorized to do business of banking company under c. 172A are subject to tax of 12.54% of net income or, as to foreign country banks, apportioned net income as defined. (c. 63, §§1, 2).

Security Corporations.

In lieu of regular corporation excise levied under c. 63, §32 (domestic) and §39 (foreign), every corporation engaged exclusively in buying, selling, dealing in, or holding securities (except securities of DISC) on its own behalf and not as broker is eligible for special reduced annual excise as security corporation if it obtains proper classification by application filed with commissioner prior to end of its taxable year. (c. 63, §38B[a]). If such corporation is bank holding company under Internal Revenue Code, annual excise is .33% of its gross income or $456, whichever is greater. (c. 63, §38B[b]). Any corporation taxable under §38B shall not be subject to excise tax imposed by §§2, 32 or 39. (c. 63, §38B[c]).

Filing; Penalties; Abatement.

Corporate excise (income) tax returns must be filed with commissioner by 15th day of third month following close of taxable year. (c. 62C, §11[a]). Generally, extension of six months is available; longer extension, however, may be granted. (c. 62C, §19). Changes in taxable income as determined by federal government must be reported to commissioner. (c. 62C, §30). Abatement of excess excise tax on basis of reduction in federal taxable income may be sought within one year of date of notice of final determination of reduction. (c. 62C, §§30, 37). Entire tax, less amounts previously paid with estimated returns due on date of return, interest on unpaid amounts accruing at federal short term interest rate under I.R.C. §6621(b) plus 4% compounded daily. (c. 62C, §§32, 33). Additional penalty for failure to file return equal to 1% per month of tax required to be shown on return up to 25% of tax amount, with additional penalty tax for failure to show amount of tax required to be shown on return equal to ½% per month up to 25% of tax not shown if such tax not paid within 30 days following notice of tax due. (c. 62C, §§32, 33). Applications for abatement of assessment of tax may be filed within three years from last day for filing corporate excise tax return, within two years from date tax was assessed or deemed to be assessed or within one year from any date on which tax was paid, whichever is later. (c. 62C, §37).

Disclosure of Corporate Tax Information.

Generally, all corporations which file reports with Securities and Exchange Commission and are required to file tax returns in Massachusetts must file statements with State Secretary Mar. 1 each year, disclosing certain tax information including total tax paid and credits taken on most recent return. (c. 62C, §83). Information on such statements is public, although corporate identity not revealed.

Taxation—Declaration of Estimated Tax.

Corporations which can reasonably expect to have estimated tax exceeding $1,000 for taxable year must pay estimated tax in four installments, except as otherwise provided. (c. 63B, §2). In general, interest accruing on underpayment of any installment is at federal short-term rate under I.R.C. §6621(b) plus 4%, compounded daily. (c. 63B, §3). Officers, directors or employees willfully responsible for failure of corporation to pay estimated tax installments are liable for taxes lost by commonwealth plus $500 to $5,000 penalty. (c. 63B, §9). Procedures and requirements for making payments of estimated tax, in accordance with §§2-10 of c. 63B, for taxable years ending on or after Dec. 31, 1989, are contained in 830 C.M.R. 63B.2.2.

Corporate Trusts.

Corporate trusts are generally subject to income taxation. (Mass. Gen. Laws Ann. c. 62, §8).

Professional Corporations.

Professional corporations may be formed by physicians, surgeons, psychologists, chiropractors, podiatrists, acupuncturists, registered nurses, engineers, electrologists, physical therapists, certified public accountants, public accountants, dentists, veterinarians, optometrists and attorneys. (c. 156A).

Model Non-Profit Corporation Act not adopted.

2.04 [RESERVED]

2.05 JOINT STOCK COMPANIES:

There are few statutory provisions governing joint stock companies; but voluntary associations under written instrument or declaration of trust and having transferable shares are regulated by c. 182, as amended.

Purposes.

No statutory provisions.

Formation.

On penalty of fine or imprisonment, trustees of such association must file instrument or declaration, and any amendments thereof, with State Secretary (filing fee, currently $200; $100 for amendments) and with clerk of each town or city where it has usual place of business. If association owns or controls majority of shares of public utility or common carrier, it must also file with Dept. of Public Utilities. (c. 182, §§2 and 3). Annual reports must be filed thereafter with Secretary (and Dept., if applicable). (c. 182, §§4, 12).

Rights, Powers and Liabilities.

No statutory provisions.

Actions.

Such an association may be sued in its own name in an action at law for obligations incurred by duly authorized officer or trustee or agent thereof and for damages resulting from negligence of such officer or trustee or agent acting in performance of his duty, and its property is subject to attachment and execution as if it were corporation and service of process on one trustee is sufficient. (c. 182, §6). Otherwise suit must be brought as at common law. See topic 2.02 Associations.

Dissolution.

No statutory provisions.

Massachusetts Business Trust.

These trusts are recognized as a form of voluntary association. See c. 182.

Statement.

Association with transferable shares must file annual report with State Secretary. State Secretary may seek to enjoin association which does not file from transacting business. (c. 182, §§12-14). Where association is one which controls public utility companies or common carriers, it must file annual statement showing number of shares owned or controlled, and its records, etc., may be examined by dept. of public utilities. (c. 182, §§4, 7).

Tax Reports.

Every partnership, association, trust, estate, organization, society, club, governmental agency or any other entity doing business in Massachusetts must file information returns for Massachusetts income tax purposes as in case of domestic corporation (see topic 2.03 Corporations, subhead Reports). (c. 62C, §8).

Professional Associations.

See topic 2.03 Corporations, subhead Professional Corporations.

2.06 LIMITED LIABILITY COMPANIES:

Massachusetts Limited Liability Company Act, c. 156C, became effective Jan. 1, 1996. Act is similar to §§101 to 1206 of Uniform Limited Liability Company Act. Unless otherwise noted, all references in this section are to General Laws c. 156C.

Name.

Limited liability company name must contain words “limited liability company”, “limited company”, or abbreviation “L.L.C.”, “L.C.”, “LLC”, or “LC”. (c. 156C, §3). Reservation of specified name must be made by filing with State Secretary, any application specifying name to be reserved and name and address of applicant (current name reservation filing fee, $30). (c. 156C, §4).

Purposes.

Limited liability companies may carry on any lawful business, trade, profession, purpose or activity. (c. 156C, §4).

Filing.

Organizers must file certificate of organization in office of State Secretary containing name of limited liability company, Massachusetts address of office and resident agent for service of process, date of dissolution (if fixed), managers' names and addresses, name of any other person authorized to execute any documents to be filed with State Secretary, general character of limited liability's business, and any other matters organizers determine necessary. (c. 156C, §12).

Cancellation of Certificates of Organization.

Cancelled upon dissolution and winding up of company or when there are no members, or upon filing of certificate of consolidation or merger if limited liability company does not "survive". (c. 156C, §14).

Filing Fees.

Fees for filing certification of organization and mandatory annual report is $500. (c. 156C, §12).

Liability to Third Parties.

Members or manager shall not be obligated personally for debts, obligations or liability of company solely as result of their status as member or manager. (c. 156C, §22). Regulating boards shall adopt regulations requiring designated amount of liability insurance to be maintained. (c. 156C, §65).

Liability to Company.

Member is obligated to perform any promise to contribute cash or property or to perform services, even if unable because of death or disability. May be required to contribute cash in lieu of other contribution. (c. 156C, §28).

Voting.

May be on per capita, number, financial interest, class group or any other basis. If operating agreement does not provide for voting rights of members, decision of members who own more than 50% of unreturned contributions to company shall be controlling. (c. 156C, §21).

Form of Contribution.

Contribution of member may be in cash, property, services rendered, or promissory note or other obligation to contribute cash, property, or to perform services. (c. 156C, §27).

Property.

Limited liability company interest is personal property. Member has no interest in specific limited liability property. (c. 156C, §38). Upon acceptance of c. 59, §5(16A) by any city or town, generally, all property owned by limited liability company, except real estate, poles, and underground conduits, wires and pipes, is exempt from local taxes, if limited liability company meets certain preconditions. (c. 59, §5[16A]).

Resignation of Members.

Regardless of whether operating agreement provides that member does not have right to resign, member may resign upon not less than six months' prior written notice to company and to each member and manager. If resignation violates operating agreement, limited liability company may recover from resigning member damages and offset damages against any amounts otherwise distributable to resigning members. (c. 156C, §36).

Dissolution.

Company is dissolved upon first to occur of following: time or event specified in operating agreement, written consent of all members, judicial dissolution, or death, insanity, retirement, resignation, expulsion, bankruptcy, or dissolution of member unless business of company is continued either by consent of all remaining members within 90 days following such event or pursuant to written right to continue or entry of decree of judicial dissolution. (c. 156C, §43). Procedures for winding up business of dissolved companies set forth in c. 156C, §45.

Foreign Limited Liability Companies.

Provisions relating to foreign limited liability companies contained in c. 156C, §§47 to 54.

Merger or Consolidation.

Provisions relating to merger or consolidation of two or more limited liability companies contained in c. 156C, §§59 to 63.

2.07 [RESERVED]

2.08 PARTNERSHIPS:

Uniform Partnership Act is in effect. (c. 108A).

Revised Uniform Limited Partnership Act is in effect. (c. 109). Fees for filing original certificates and amendments, withdrawals or cancellations are determined annually by secretary of administration, currently $200 and $100, respectively. Place of filing is in office of State Secretary. (c. 109, §§8, 9, 61; 950 C.M.R. 108.17).

As to necessity of appointing agent where partnership composed of nonresidents, see category 21 Property, topic 21.01 Absentees, subhead Process Agent.

As to information returns which must be filed for Massachusetts income tax purposes, see topic 2.05 Joint Stock Companies, subhead Tax Reports.

Limited Liability Partnerships.

Uniform Partnership Act, c. 108A, amended to include limited liability partnerships by c. 108A, §6. Unless otherwise indicated all references are to sections of c. 108A.

Formation.—Partnerships formed under c. 108A may register as limited liability partnership by filing registration statement with State Secretary which includes name of partnership, principal office, federal i.d. number, statement of business or profession and list of names and addresses of partners. (c. 108A, §45). Name of limited liability partnership must end with words “registered limited liability partnership”, “limited liability partnership” or abbreviation “L.L.P.” or “LLP”. (c. 108A, §46). Registration fee is $500. (c. 108A, §45).

Limited Liability.—Partner in limited liability partnership shall not be personally liable for debts and obligations of partnership, whether tort, contract or otherwise, arising while partnership is registered. (c. 108A, §15). Limitation of liability does not operate to limit personal liability of partner arising in whole or part by such partners own negligent acts. (c. 108A, §15).

Foreign Limited Liability Partnerships.—Laws of state in which foreign limited liability partnership registered entitled to full faith and credit and partnership governed by laws of state of incorporation. (c. 108A, §47). Foreign partnerships must register in same manner as domestic limited liability partnerships. (c. 108A, §47).

3 BUSINESS REGULATION AND COMMERCE

3.01 BANKS AND BANKING:

Uniform Commercial Code adopted. (c. 106). See topic 3.09 Commercial Code.

Regulated as follows: Basic statutes are chs. 167, 167C, 167D, 167E, 167F, 167G which apply to all banking institutions including, as to certain matters, national banking associations, federal savings and loan associations and federal credit unions. Bank holding companies are governed by c. 167A, mutual holding companies by c. 167H, electronic fund transfers by c. 167B, trust companies by c. 172, savings banks by c. 168, cooperative banks by c. 170, credit unions by c. 171, and deposits with others other than banks for transmission to foreign countries by c. 169. Banks and banking are under supervision of commissioner of banks. (c. 167). The Depositors Insurance Fund, c. 168 App., §1-1 has certain supervisory powers over savings banks (c. 168 App., §2-1A), as has Co-Operative Central Bank over co-operative banks (c. 170, §26A; c. 170 App., §1-1). Board of bank incorporation has supervisory powers over organization of savings banks (c. 168, §5), co-operative banks (c. 170, §4) and trust companies (c. 172, §6).

Stockholders.

Not liable to assessment.

Deposits.

Limitation of Amount.

Generally, trust companies and savings and co-operative banks may receive demand, time and other deposits, without limitation (c. 167D, §3), and may sell serial or paid-up shares in denominations of $100 to $200 without limitation (c. 167D, §4). See c. 167D, §3 for fees for accounts established for personal, family, or household purposes. Credit union members are limited to $100,000 in shares or deposits or both for individual members and $125,000 for joint accounts, exclusive of club deposits. These limits are increased in case of credit unions having assets of $4,000,000 or more to $500,000 and $600,000 and, in case of credit unions having assets of $30,000,000 or more, to $600,000 and $1,200,000. (c. 171, §30). Fraternal organizations, etc., eligible for credit union membership may have deposit accounts up to limits applicable to joint accounts for individual members, provided total deposits by organization do not exceed 25% of credit union's assets. (c. 171, §30). See c. 171, §41A for fees for accounts established for personal, family, or household purposes.

Types.

Joint accounts are permitted in all banks in names of two or more persons, payable to depositors or survivor(s) of them. (c. 167D, §5). Funds on deposit in name of minor may, unless in violation of written agreement to which bank is party, be paid to minor or to another on his written order or to his legal representative or to either parent. (c. 167D, §7). Deposits in trust may be made by one or two persons for another. Payments may be made to trustee or, if there are two trustees, to both or either or survivor of them. If no other notice of existence or terms of trust has been received in writing upon death of trustee or both trustees, account may be paid to beneficiary or his legal representative. (c. 167D, §6). Time deposits may be received by all banks, which must send notice of maturity to depositor if maturity in excess of 30 days. (c. 167D, §§2[1], 8). Bank that accepts demand deposits or NOW accounts must, upon request of depositor and without charge, return cancelled instruments of such accounts. (c. 167D, §27).

Instrument establishing deferred compensation or retirement plan, trust or custodial account and designating beneficiary will be effective according to its terms notwithstanding statutory or common law testamentary disposition. (c. 167D, §30).

Except as required by legal process, banks need not recognize adverse claims to deposits or securities held for any person unless adverse claimant gives bond of indemnity or files affidavit setting forth facts for reasonably believing that such person is his fiduciary and about to misappropriate deposit or securities. (c. 167D, §31).

Written notice by certified mail must be given upon transfer of funds of depositor to reduce or extinguish debt owed by depositor to bank. (c. 167D, §19). Debtor of bank may, with some exceptions, set off amount of deposit with bank if bank proceeds against debtor on such debt. (c. 167D, §20).

Deposits in individual name of deceased depositor of bank or federally chartered bank shall be paid to his legal representative, but if deposit does not exceed $10,000 and there has been no demand for payment from duly appointed executor or administrator, payment may be made, in discretion of treasurer or other duly authorized officer of bank, or pursuant to special vote of its board, after 30 days from death of such depositor, to surviving spouse of deceased depositor or if there be no surviving spouse, to next of kin of such deceased upon presentation of copy of decedent's death certificate and surrender of deposit book or other instrument, if any, evidencing deposit. (c. 167D,§33).

No bank may impose any fee, other than reasonable returned check fee, against savings or checking account of person 65 or older or 18 or younger. (c. 167D, §2[1]). See c. 167D, §3 for fees for accounts established for personal, family, or household purposes.

Funds Availability.

Each banking institution as defined in c. 167D, §35 must disclose to account holders its policy regarding availability for withdrawal or use of funds deposited by means of items other than cash. Obligation of foreign branch of bank to repay deposit in foreign currency governed by c. 167D, §36. Accounts include all asset accounts. Disclosures on availability requirements must be in accordance with provisions of Expedited Funds Availability Act, 12 U.S.C. 4001 et seq. and Regulation S promulgated thereunder. (c. 167D, §35).

Regulation of Consumer Transactions.

No bank shall engage in Massachusetts in unfair methods of competition or unfair or deceptive acts or practices involving consumer transactions (transactions between banks and natural persons involving primarily personal, family or household purposes). Commissioner has power to promulgate and enforce rules and regulations defining what constitutes unfair methods of competition or unfair or deceptive acts. (c. 167, §§2A-2G).

Truth-in-Savings Law.

All banking institutions must make certain disclosures to consumers opening accounts at such institutions. Commissioner authorized to issue implementing regulations. (c. 140E, §2).

Unclaimed Deposits.

Deposits where no communication from depositor has been received for three years are deemed to be abandoned and escheat to commonwealth. (c. 200A, §3). See category 21 Property, topic 21.01 Absentees, subhead Escheat.

Collections.

See Uniform Commercial Code, c. 106, Art. 4.

Trust Companies, Savings Banks, Co-operative Banks.

Trust companies and savings and co-operative banks are generally regulated and supervised by commissioner (see generally c. 167) and generally have equal banking powers. (c. 167, §1). Chapters governing location of main and branch offices (c. 167C), deposits and accounts (c. 167D), mortgages and loans (c. 167E), investments and other powers (c. 167F), and trust depts. (c. 167G), generally apply to all three types of banking institutions. Establishment and operation of trust companies is governed by c. 172, of savings banks by c. 168, and of co-operative banks by c. 170. C. 167H authorizes mutual savings banks and mutual co-operative banks to establish mutual holding companies. Deposits in all savings banks certified by commissioner to be in sound and safe condition to continue business are fully insured by

Depositors Insurance Fund (c. 168, App. §2-1) in excess of deposits insured by Federal Deposit Insurance Corp. (Id. §2-17). Shares in co-operative banks are fully insured by Co-Operative Central Bank (c. 170, App. §2-1) in excess of account balances insured by Federal Deposit Insurance Corp. (Id. §2-16). See subhead Deposits, supra. Savings banks and co-operative banks may merge with credit unions subject to approval of commissioner (see c. 168, §34F; c. 170, §26F). Articles of consolidation or merger must be filed with Secretary of State. (c. 168, §34F).

Credit Unions.

See c. 171. Loan powers and limits of credit unions are governed by c. 171, §§57-66. Preference is given to small personal loans but real estate mortgages and other types of secured loans may also be made. (c. 171, §§57, 60-62, 65, 66). See subhead Deposits, supra. Credit unions may require 90 days' notice of withdrawal of shares or 60 days' notice of withdrawal of deposits. (c. 171, §43). Deposits in trust may be made by one or two persons for another. Payments may be made to trustee or, if there are two trustees, to both or either or to survivor. If no other notice of existence or terms of trust has been received in writing upon death of trustee or both trustees, account may be paid to beneficiary or his legal representative. (c. 171, §40). Joint accounts are permitted in names of two or more persons, payable to depositors or to survivors. (c. 171, §39). Credit unions may offer special notice accounts (c. 171, §34), receive term shares or deposits (c. 171, §32), act as trustee or custodian under profit-sharing or retirement plan or IRA (c. 171, §35) and, may authorize accounts that would allow withdrawals by negotiable or transferable instruments for purpose of making transfers to third parties. Such accounts are subject to regulations of commissioner. (c. 171, §31). Deposits or shares of deceased shall be paid to legal representative unless total amount not greater than $10,000 and no demand therefor made by representative, in which case may be paid to surviving spouse or next of kin upon presentation of death certificate and passbook, if any. (c. 171, §42). Deposits and shares of minor may be paid to minor, his parents or guardian. (c. 171, §41). Insurance of deposits and shares provided by Massachusetts Credit Union Share Insurance Corp. (c. 171, §6) or by National Credit Union Administration Share Insurance Fund (c. 171, §§6, 77).

Foreign Banks.

See generally c. 167, §§38-43A. No foreign bank shall conduct banking business in commonwealth, except as provided in c. 167B, unless board of bank incorporation grants certificate to bank authorizing such activity. (c. 167, §38). Any foreign bank, which receives certificate pursuant to c. 167, §38, may, if authorized by laws of its jurisdiction of organization, merge or consolidate with Massachusetts bank or federal bank, subject to commissioner's approval. (c. 167, §39). Foreign banks, which establish branch through merger, consolidation, or purchase of assets or stock of Massachusetts bank, shall operate under supervision of commissioner and under same laws that govern operation of Massachusetts banks. (c. 167, §39).

Any out-of-state bank or out-of-state federal bank may establish and maintain branches through merger or consolidation with or purchase of assets or stock of any Massachusetts bank, subject to conditions set forth in c. 167, §39B. Out-of-state bank, which satisfies such conditions, shall operate same as Massachusetts branch under supervision of commissioner and subject to same laws governing activity of Massachusetts banks. (c. 167, §39B). Commissioner shall inspect and examine activities of foreign and out-of-state banks inside commonwealth, to determine financial status and compliance with applicable laws. For purpose of examinations, commissioner shall have access to vaults, books, and papers of out-of-state or foreign bank. (c. 167, §41). Commissioner shall maintain reports of such examinations and shall provide parent bank with copies of reports. (c. 167, §40). Additionally, each foreign bank, out-of-state bank, and out-of-state federal bank, which maintains Massachusetts branch, must register with commissioner. (c. 167, §40A).

Subject to approval of commissioner, foreign bank, out-of-state bank, or out-of-state federal bank, which does not have branch in commonwealth, may establish new bank without purchasing bank, in accordance with provisions of c. 167, §39B. However, jurisdiction in which foreign bank, out-of-state bank, or out-of-state federal bank has its principal place of business must allow Massachusetts bank to do same. (c. 167, §39C).

Banking association or corporation having principal office in another state may be authorized by board of bank incorporation to act as fiduciary in Massachusetts provided it is authorized to so act by laws of state where its principal office is located and such state has laws permitting Massachusetts banks to act in same capacity. Association or corporation holding such license and appointed fiduciary is subject to provisions of general law with respect to appointment of agents by foreign fiduciaries and to same taxes, obligations and penalties with respect to its activities as such fiduciary and property held by it in its fiduciary capacity as like corporations or associations having their principal office in Massachusetts, and such association or corporation must file agreement with board of bank incorporation to perform such obligations and pay such taxes and penalties. Any such association or corporation acting only in such fiduciary capacity as herein provided is not deemed to be transacting banking business in Massachusetts. (c. 167, §43).

Banking Emergencies.

Power of Commissioner of Banks to proclaim and regulation of banks thereupon. (c. 167, §21).

Uniform Common Trust Fund Act adopted. (c. 203A). Corporate trustees use simplified procedures in collectively invested inter vivos trusts. (c. 167G, §3).

3.02 BILLS AND NOTES:

Uniform Commercial Code applies. (c. 106, §§3-101 to 3-605). No retroactive effect for c. 106, §3-118.

Days of Grace.

Uniform Commercial Code applies. (c. 106). C. 106, §3-506 repealed.

Special Requirements.

In action on contract, other than bill of exchange, for payment of money where contract is payable beyond limits of U.S., amount to be recovered is determined by current rate of exchange on due date with interest from that date. (c. 107, §10).

Protest of bill of exchange, note or order certified under hand and seal of notary public is prima facie evidence of facts stated in protest. (c. 107, §13).

C. 106, §3-122 repealed. See c. 106, §§3-401 to 3-420 for “Liability of Parties”.

Consumer Notes.

If contract for sale of consumer goods on credit requires or involves execution of note, such note must have “consumer note” printed on face and holder of note cannot be holder in due course thereof within meaning of Art. 3 of c. 106. (c. 255, §§12C, 13I).

Judgment Notes.

Stipulation in note, contract or other instrument or in any writing relating thereto agreeing, or authorizing another person, to confess judgment in any action which may be brought thereon is void and any such judgment must be set aside on motion of defendant. (c. 231, §13A). Any judgment entered in action upon note, contract or other instrument in which defendant waived or agreed to waive issue or service of process must be set aside on motion of defendant unless service is actually made or seven days' notice of intention to enter action is given by registered mail. (c. 231, §13A).

Attorneys Fees.

See topics 3.12 Consumer Protection, 3.09 Commercial Code.

3.03 BILLS OF LADING:

See topics 3.08 Carriers, 3.09 Commercial Code.

3.04 BILLS OF SALE:

See topics 3.23 Sales, 3.09 Commercial Code.

3.05 BLUE SKY LAW:

See topics 3.24 Securities, 3.09 Commercial Code.

3.06 BROKERS:

Common law rules of Agency generally prevail unless contract provisions specify otherwise.

Uniform Commercial Code adopted. (c. 106). See topic 3.09 Commercial Code.

Insurance brokers. (See category 16 Insurance, topic 16.01 Insurance Companies.) Stock brokers. (See topic 3.24 Securities.) Brokers of transportation by motor vehicles, see category 23 Transportation, topic 23.01 Motor Vehicles, subhead Motor Vehicle Carriers. Miscellaneous. (See topic 3.18 Licenses, Business and Professional.)

Real Estate Brokers.

Unless contract specifies to contrary, broker engaged by owner ordinarily is entitled to commission when: (a) Broker produces purchaser ready, willing and able to buy on owner's terms, (b) purchaser enters binding contract with owner, and (c) purchaser completes transaction by closing title in accordance with contract terms unless failure of completion of contract results from wrongful act or interference of seller. (367 Mass. 622, 327 N.E.2d 727). Seller's scheme to obtain payment for property without paying commission constitutes bad faith dealing. (38 Mass. App. Ct. 221, 646 N.E.2d 1081, *aff'd,* 421 Mass. 537, 658 N.E.2d 687). Broker is entitled to commission only if his efforts are found to have been predominating efficient cause of sale or lease. (283 Mass. 420, 186 N.E. 547). If no closing occurs pursuant to contract, through no fault of landowner, broker not entitled to commission. (421 Mass. 537, 658 N.E.2d 687). Real estate brokers must be licensed and are subject to Board of Registration regulations. (c. 112, §§87PP-87DDD1/2). Brokers holding licenses subject to renewal on or after Jan. 1, 1999 must complete courses approved by Board of Registration. (c. 112, §87XX1/2). Brokers holding licenses renewed before Dec. 31, 2000 must attend 12 class hours and brokers holding licenses renewed on or after Jan. 1, 2001 must attend no less than six and no more than 12 class hours of approved curriculum. (c. 112, §87XX1/2, inserted by St. 1996, c. 369, §2). Continuing education requirement does not apply to foreign brokers provided that those brokers demonstrate continuing education in home state. (c. 112, §87XX1/2). Board of registration regulations do not apply to person acting for himself as owner, lessor, lessee, tenant or mortgagee. (c. 112, §87QQ).

Acceptance of “Net Listings” and other specified conduct have been prohibited. (c. 112, §87AAA).

Only licensed brokers or salesmen may engage in business of finding dwelling accommodations for prospective tenants for fee. (c. 112, §87DDD1/2).

Broker not licensed to sell real estate entitled to commission on sale of personal property. (403 Mass. 291, 528 N.E.2d 1176).

Mortgage Brokers.

Persons engaged in business of mortgage broker or mortgage lender are required to obtain license from commissioner of banks and are subject to regulation. (c. 255E, §§1-10).

C. 255E does not apply to: (1) Certain banks and federal lending institutions; (2) persons engaged as employees of mortgage brokers or lenders; (3) persons who act as mortgage brokers for, or mortgage lenders who make, fewer than five loans within any 12 consecutive months; (4) certain nonprofit, public or independent educational institutions and nonprofit agencies assisting low to moderate income households in purchase or rehabilitation of residences of four units or less; or (5) charitable organizations created by last will and testament before Jan. 1, 1950, which make no more than 12 mortgage loans during 12 month period. (c. 255E, §2).

Mortgage Loan Originators.

Persons engaged in business of mortgage loan origination are required to obtain license from commissioner of banks and are subject to regulation. (c. 255F, §§1-19). Each licensed mortgage loan originator shall register with the Nationwide Mortgage Licensing System and Registry, (c. 255F, §2), except persons exempt pursuant to subsection (b). (c. 255F, §2). The requirements for licensure are regulated by the commissioner. (c. 255F, §§4-8, 19). The unique identifier of any person originating a residential mortgage loan shall be clearly shown on all residential mortgage loan application forms, solicitations or advertisements, including business cards or websites. (c. 255F, §§1, 18). The commissioner shall require mortgage loan originators to be licensed and registered through the Nationwide Mortgage Licensing System and Registry. (c. 255F, §§2, 9, 10, 16, 17). Each mortgage loan originator shall be covered by a surety bond. (c. 255F, §12). The commissioner may enter agreements or sharing arrangements with other governmental agencies, the Conference of State Bank Supervisors, the American Association of Residential Mortgage Regulators or other associations representing governmental agencies as established by rule, regulation or order of the commissioner. (c. 255F, §13). The commissioner may impose disciplinary action or a civil assessment against a licensee for violations of provisions. (c. 255F, §§11, 15, 17).

3.07 BULK SALES:

See topic 3.09 Commercial Code; category 8 Debtor and Creditor, topic 8.08 Fraudulent Sales and Conveyances.

3.08 CARRIERS:

Common carriers are largely regulated by dept. of public utilities. (chs. 159-161).

Rates.

Generally regulated by dept. of public utilities. (c. 159, §10).

Discrimination.

Unjustly discriminatory and unduly preferential rates and charges and, in general, giving of free service are prohibited. (c. 159, §§14, 14A and 15).

Limiting Liability.

As to goods, liability for loss or damage may be limited against risks, other than negligence or misconduct of carrier, by reasonable conditions in contract for carriage. (98 Mass. 239, 93 Am. Dec. 162; see also Uniform Commercial Code, c. 106, §7-309). As to passengers, rule, in general, is that carrier may not exonerate itself by contract from liability for all negligence. (227 Mass. 493, 116 N.E. 899; see also c. 159, §3).

Bills of Lading.

Uniform Commercial Code applies. (c. 106, §§7-101 to 7-105 and 7-301 to 7-603 but optional language of 7-403[1][b] omitted).

Motor Vehicle Carriers.

See category 23 Transportation, topic 23.01 Motor Vehicles.

Liens.

Carrier has lien on goods for transportation charges and for charges for storage reasonable time after their arrival. (199 Mass. 586, 85 N.E. 846). Goods not called for within one year after receipt at place of consignment may be sold at public auction for payment of transportation and storage charges and cost of sale. (c. 135, §6).

3.09 COMMERCIAL CODE:

Uniform Commercial Code was adopted (Sept. 21, 1957, c. 106), effective Oct. 1, 1958. 1966 Official Amendments not adopted. 1972 Official Amendments adopted effective Jan. 1, 1980. 1977 Official Amendments adopted effective Mar. 1, 1984. Art. 4A (Funds Transfers) adopted Oct. 25, 1991, effective Jan. 1, 1992. Art. 6 (Bulk Transfers), repealed by St. 1996, c. 160, §3. Adopted new Art. 2A (Leases) on Aug. 29, 1996. Adopted Revised Article 9 (Secured Transactions) and amended additional provisions of Uniform Commercial Code governing secured transactions, effective July 1, 2001.

1972 Official Amendments.

Adopted.

1977 Official Amendments.

Adopted.

1987 Official Text of Article 2A (Leases) and Conforming Amendments. — Adopted.

1989 Official Text of Article 4A (Funds Transfers).

Adopted.

1990 Official Amendments.

Adopted.

1991 Official Text of Revised Article 3 and Conforming Amendments.

Not adopted.

1994 Official Text of Revised Article 8 (Investment Securities) and Conforming Amendments.

Adopted, except for 8-601-8-603.

1995 Official Text of Revised Articles 3 and 4 and Conforming Amendments.

New Arts. 3 and 4, inserted by St. 1998, c. 24, §8, conform with Uniform Commercial Code, 1995 Official Text.

1995 Official Text of Revised Article 5 and Conforming Amendments.

Conforms with Uniform Commercial Code, 1995 Official Text, with no retroactive effect.

2001 Official Text of Revised Article 9 and Conforming Amendments.

Conforms with Uniform Commercial Code, 2001 Official Text, effective July 1, 2001.

Material Variations from 1972 Official Text as amended.

1-102: Omits (5).

1-105: Adopts 1987 amendment conforming to new Art. 2A, and 1989 amendment conforming to new Art. 4A on fund transfers. Amends (16) and (17) by striking out words "Perfection provisions of the Article on Secured Transactions. Section 9-103" and by inserting in place thereof "Law governing perfection, the effect of perfection or nonperfection, and the priority of security interests. Sections 9-301 to 9-307, inclusive." Also adds subsection: "(3) In this act unless the context otherwise requires: (a) words in the singular number include the plural, and in the plural include the singular; (b) words of the masculine gender include the feminine and the neuter, and when the sense so indicates words of the neuter gender may refer to any gender."

1-109: Adds following new section "1-109 SECTION CAPTIONS. Section captions are parts of this chapter. The subsection headings in Article 9 are not parts of this chapter."

1-201: 1987 amendment to (37) adopted. Omits (46). (30) omits reference to omitted subsection 1-102(5). (33) adds "or his nominee" after "person." Does not adopt 1990 amendments to (20), (24), or (43) to conform to Revised Art. 3. Current version of (20), (24), and (43) and line 226 consistent with 1995 Official Text. Amended by striking out subsection (9) and inserting in its place following subsection: "(9) 'Buyer in ordinary course of business' means a person that buys in good faith, without knowledge that the sale violates the rights of another person in the goods, and in the ordinary course from a person, other than a pawnbroker, in the business of selling goods of that kind. A person buys goods in the ordinary course if the sale to the person comports with the usual or customary practices in the kind of business in which the seller is engaged or with the seller's own usual or customary practices. A person that sells oil, gas, or other minerals at the wellhead or minehead is a person in the business of selling goods of that kind. A buyer in ordinary course of business may buy for cash, by exchange of other property, or on secured or unsecured credit, and may acquire goods or documents of title under a pre-existing contract for sale. Only a buyer that takes possession of the goods or has a right to recover the goods from the seller under Article 2 may be a buyer in ordinary course of business. A person that acquires goods in a transfer in bulk or as security for or in total or partial satisfaction of a money debt is not a buyer in ordinary course of business." Section is further amended by inserting after word "lien" in (35) words "security interest" and in subsection (37) by striking out first paragraph and inserting in place thereof following paragraph: " 'Security interest' means an interest in personal property or fixtures which secures payment or performance of an obligation. The term also includes any interest of a consignor and a buyer of accounts, chattel paper, a payment intangible, or a promissory note in a transaction that is subject to Article 9. The special property interest of a buyer of goods on identification of those goods to a contract for sale under Section 2-401 is not a 'security interest', but a buyer may also acquire a 'security interest' by complying with Article 9. Except as otherwise provided in Section 2-505, the right of a seller or lessor of goods under Article 2 or 2A to retain or acquire possession of the goods is not a 'security interest', but a seller or lessor may also acquire a 'security interest' by complying with Article 9. The retention or reservation of title by a seller of goods notwithstanding shipment or delivery to the buyer (Section 2-401) is limited in effect to a reservation of a ‘security interest’.” 1-201 further amended by adding following subsection: “(46) ‘Written’ or ‘writing’ includes printing, typewriting or any other intentional reduction to tangible form.”

1-209: Optional Section adopted in 1979.

2-103: Amended by striking out in (39) “9-109” and inserting “9-102”.

2-207: Inserts “or different” after “additional.” Replaces “Act” with “chapter.”

2-210: Amended by striking out in (6) word “Unless” and inserting in place “Except as otherwise provided in Section 9-405, unless”. Further amended by inserting after subsection (2) following subsection: “(2½) The creation, attachment, perfection, or enforcement of a security interest in the seller's interest under a contract is not a transfer that materially changes the duty of or increases materially the burden or risk imposed on the buyer or impairs materially the buyer's chance of obtaining return performance within the purview of subsection (2) unless, and then only to the extent that, enforcement actually results in a delegation of material performance of the seller. Even in that event, the creation, attachment, perfection, and enforcement of the security interest remain effective, but (i) the seller is liable to the buyer for damages caused by the delegation to the extent that the damages could not reasonably be prevented by the buyer, and (ii) a court having jurisdiction may grant other appropriate relief, including cancellation of the contract for sale or an injunction against enforcement of the security interest or consummation of the enforcement.”

2-312: Adds subsection: “(4) Unless otherwise agreed a seller makes no warranty under subsection (3) with respect to any claim for which the exclusive remedy of the claimant is by action against the United States in the Court of Claims or in the district courts of the United States.”

2-316: Adds subsection: “(5) The implied warranties of merchantability and fitness shall not be applicable to a contract for the sale of human blood, blood plasma or other human tissue or organs from a blood bank or reservoir of such other tissues or organs. Such blood, blood plasma or tissue or organs shall not for the purposes of this Article be considered commodities subject to sale or barter, but shall be considered as medical services.”

2-316A: New section: “The provisions of section 2-316 shall not apply to extent provided in this section. Any language, oral or written, used by a seller or manufacturer of consumer goods and services, which attempts to exclude or modify any implied warranties of merchantability and fitness for a particular purpose or to exclude or modify the consumer's remedies for breach of those warranties, shall be unenforceable.

Any language, oral or written, used by a manufacturer of consumer goods, which attempts to limit or modify a consumer's remedies for breach of such manufacturer's express warranties, shall be unenforceable, unless such manufacturer maintains facilities within the commonwealth sufficient to provide reasonable and expeditious performance of the warranty obligations.

Any language, oral or written, used by a seller or manufacturer of goods, which attempts to exclude or modify any implied warranties of merchantability and fitness for a particular purpose or to exclude or modify remedies for breach of those warranties, shall be unenforceable with respect to injury to the person. This subsection does not affect the validity under other law of an agreement between a seller or manufacturer of goods and services and a buyer that is an organization, allocating, as between them, the risk of damages from or providing indemnity for breaches of those warranties with respect to injury to the person.

The provisions of this section may not be disclaimed or waived by agreement." Amended in 1990 without apparent change.

2-318: Reworded: "Lack of privity between plaintiff and defendant shall be no defense in any action brought against the manufacturer, seller, lessor or supplier of goods to recover damages for breach of warranty, express or implied, or for negligence, although the plaintiff did not purchase the goods from the defendant if the plaintiff was a person whom the manufacturer, seller, lessor or supplier might reasonably have expected to use, consume or be affected by the goods. The manufacturer, seller, lessor or supplier may not exclude or limit the operation of this section. Failure to give notice shall not bar recovery under this section unless the defendant proves that he was prejudiced thereby. All actions under this section shall be commenced within three years next after the date the injury and damage occurs."

2-326: Strikes former section and inserts in place thereof following new section: "Section 2-326. SALE ON APPROVAL AND SALE OR RETURN; RIGHTS OF CREDITORS. (1) Unless otherwise agreed, if delivered goods may be returned by the buyer even though they conform to the contract, the transaction is (a) a 'sale on approval' if the goods are delivered primarily for use, and (b) a 'sale or return' if the goods are delivered primarily for resale. (2) Goods held on approval are not subject to the claims of the buyer's creditors until acceptance; goods held on sale or return are subject to such claims while in the buyer's possession. (3) Any 'or return' term of a contract for sale is to be treated as a separate contract for sale within the statute of frauds section of this Article (Section 2-201) and as contradicting the sale aspect of the contract within the provisions of this Article on parole or extrinsic evidence (Section 2-202)."

2-502: Strikes former section and inserts in place thereof following section: "Section 2-502. BUYER'S RIGHT TO GOODS ON SELLER'S REPUDIATION, FAILURE TO DELIVER, OR INSOLVENCY. (1) Subject to subsections (2) and (3) and even though the goods have not been shipped a buyer who has paid a part or all of the price of goods in which he has a special property under the provisions of the immediately preceding section may on making and keeping good a tender of any unpaid portion of their price recover them from the seller if: (a) in the case of goods bought for personal, family, or household purposes, the seller repudiates or fails to deliver as required by the contract; or (b) in all cases, the seller becomes insolvent within 10 days after receipt of the first installment on their price. (2) The buyer's right to recover the goods under subsection (1)(a) vests upon acquisition of a special property, even if the seller had not then repudiated or failed to deliver. (3) If the identification creating his special property has been made by the buyer he acquires the right to recover the goods only if they conform to the contract for sale."

2-716: Amends (3) by adding sentence "In the case of goods bought for personal, family, or household purposes, the buyer's right of replevin vests upon acquisition of a special property, even if the seller had not then repudiated or failed to deliver."

2A-103: Amended by striking out subsection (3) and inserting in place following subsection: "(3) The following definitions in other Articles apply to this Article: 'Account'. Section 9-102(a)(2). 'Between merchants'. Section 2-104(3). 'Buyer'. Section 2-103(1)(a). 'Chattel paper'. Section 9-102(a)(11). 'Consumer goods'. Section 9-102(a)(23). 'Document'. Section 9-102(a)(30). 'Entrusting'. Section 2-403(3). 'General intangibles'. Section 9-102(a)(42). 'Good faith'. Section 2-103(1)(b). 'Instrument'. Section 9-102(a)(47). 'Merchant'. Section 2-104(1). 'Mortgage'. Section 9-102(a)(55). 'Pursuant to commitment'. Section 9-102(a)(68). 'Receipt'. Section 2-103(1)(c). 'Sale'. Section 2-106(1). 'Sale on approval'. Section 2-326. 'Sale or return'. Section 2-326. 'Seller'. Section 2-103(1)(d)."

2A-104: 1(a) inserts reference to c. 90B (motorboats and other vessels) and c. 90D (motor vehicles).

2A-108: 4(b) after word “unconscionability”, adds words “the court shall award reasonable attorney's fees to the party against whom the claim is made if the criteria of six E through six G, inclusive, of chapter two hundred and thirty-one are met.”

2A-214A: New section: (1) provides that §2A-214 (exclusion or modification of warranties) does not apply to extent provided in this section. (2) Oral or written language in consumer lease, which attempts to exclude or modify lessee's remedies for implied warranties of merchantability and fitness for particular purpose, or attempts to exclude or modify remedies for breach of such warranties, is unenforceable. (3) Oral or written language in consumer lease, which attempts to limit or modify lessee's remedies for breach of manufacturer's express warranties, is unenforceable, “unless the manufacturer maintains facilities within the commonwealth sufficient to provide reasonable and expeditious performance of the warranty obligations.” (4) Oral or written language in lease, attempting to exclude or modify implied warranties of merchantability and fitness for particular purpose, or to exclude or modify remedies for breach of said warranties, is unenforceable as to injury to person. (5) Prohibits agreements disclaiming or waiving provisions of this section.

2A-216: Text reads: Lack of privity between plaintiff and defendant shall be no defense in any action brought against the manufacturer, supplier or lessor of goods to recover damages for breach of warranty, express or implied, or for negligence, although the plaintiff did not rent or lease the goods from the defendant if the plaintiff was a person whom the manufacturer, supplier or lessor might reasonably have expected to use, consume or be affected by the goods. The manufacturer, supplier or lessor may not exclude or limit the operation of this section. Failure to give notice shall not bar recovery under this section unless the defendant proves that he was prejudiced thereby. All actions under this section shall be commenced within three years next after the date the injury and damage occurs..

2A-303: Strikes section and inserts in place following section: “Section 2A-303. ALIENABILITY OF PARTY'S INTEREST UNDER LEASE CONTRACT OR OF LESSOR'S RESIDUAL INTEREST IN GOODS; DELEGATION OF PERFORMANCE; TRANSFER OF RIGHTS. (1) As used in this section, ‘creation of a security interest’ includes the sale of a lease contract that is subject to Article 9, Secured Transactions, by reason of Section 9-109(a)(3). (2) Except as provided in subsection (3) and Section 9-406, a provision in a lease agreement which (i) prohibits the voluntary or involuntary transfer, including a transfer by sale, sublease, creation or enforcement of a security interest, or attachment, levy, or other judicial process, of an interest of a party under the lease contract or of the lessor's residual interest in the goods, or (ii) makes such a transfer an event of default, gives rise to the rights and remedies provided in subsection (4), but a transfer that is prohibited or is an event of default under the lease agreement is otherwise effective. (3) A provision in a lease agreement which (i) prohibits a transfer of a right to damages for default with respect to the whole lease contract or of a right to payment arising out of the transferor's due performance of the transferor's entire obligation, or (ii) makes such a transfer an event of default, is not enforceable, and such a transfer is not a transfer that materially impairs the prospect of obtaining return performance by, materially changes the duty of, or materially increases the burden or risk imposed on, the other party to the lease contract within the purview of subsection (4). (4) Subject to subsection (3) and Section 9-406: (a) if a transfer is made which is made an event of default under a lease agreement, the party to the lease contract not making the transfer, unless that party waives the default or otherwise agrees, has the rights and remedies described in Section 2A-501(2); (b) if paragraph (a) is not applicable and if a transfer is made that (i) is prohibited under a lease agreement or (ii) materially impairs the prospect of obtaining return performance by, materially changes the duty of, or materially increases the burden or risk imposed on, the other party to the lease contract, unless the party not making the transfer agrees at any time to the transfer in the lease contract or otherwise, then, except as limited by contract, (i) the transferor is liable to the party not making the transfer for damages caused by the transfer to the extent that the damages could not reasonably be prevented by the party not making the transfer and (ii) a court having jurisdiction may grant other appropriate relief, including cancellation of the lease contract or an injunction against the transfer. (5) A transfer of ‘the lease’ or of ‘all my rights under the lease’, or a transfer in similar general terms, is a transfer of rights and, unless the language or the circumstances, as in a transfer for security, indicate the contrary, the transfer is a delegation of duties by the transferor to the transferee. Acceptance by the transferee constitutes a promise by the transferee to perform those duties. The promise is enforceable by either the transferor or the other party to the lease contract. (6) Unless otherwise agreed by the lessor and the lessee, a delegation of performance does not relieve the transferor as against the other party of any duty to perform or of any liability for default. (7) In a consumer lease, to prohibit the transfer of an interest of a party under the lease contract or to make a transfer an event of default, the language must be specific, by a writing, and conspicuous.”

2A-307: Strikes section as appearing, and inserts in place following section: “Section 2A-307. PRIORITY OF LIENS ARISING BY ATTACHMENT OR LEVY ON, SECURITY INTERESTS IN, AND OTHER CLAIMS TO GOODS. (1) Except as otherwise provided in Section 2A-306, a creditor of a lessee takes subject to the lease contract. (2) Except as otherwise provided in subsection (3) and in Sections 2A-306 and 2A-308, a creditor of a lessor takes subject to the lease contract unless the creditor holds a lien that attached to the goods before the lease contract became enforceable. (3) Except as otherwise provided in Sections 9-317, 9-321, and 9-323, a lessee takes a leasehold interest subject to a security interest held by a creditor of the lessor.”

2A-309: Amended by striking clause (b) section (1) and inserting: “(b) a ‘fixture filing’ is the filing, in the office where a record of a mortgage on the real estate would be filed or recorded, of a financing statement covering goods that are or are to become fixtures and conforming to the requirements of Section 9-502(a) and (b).”

2A-503: (3) inserts words “Subject to sections 2A-214A and 2A-216” before “consequential”.

3-120: Did not adopt 1990 Official Amendment which replaced UCC 3-120 and 3-121 with 4-106. Repealed by St. 1998, c. 24, §8.

3-121: Retains alternative A of pre-1990 Official Text. Repealed by St. 1998, c. 24, §8.

3-501: Does not adopt 1966 Official Amendment.

3-803: Did not adopt 1990 Official Amendment which renumbered and restated UCC 3-803 with 3-119. Substitutes “receives notice that he is being sued” for “is sued,” and “notice of the obligation” for “notice of the litigation.” Repealed by St. 1998, c. 24, §8.

4-106: Adopts paragraph (b) of Alternative A and paragraph (c) of Alternative B: “(a) If an item states that it is "payable through" a bank identified in the item, (i) the item designates the bank as a collecting bank and does not by itself authorize the bank to pay the item, and (ii) the item may be presented for payment only by or through the bank. (b) If an item states that it is "payable at" a bank identified in the item, the item is equivalent to a draft drawn on the bank. (c) If a draft names a nonbank drawee and it is unclear whether a bank named in the draft is a co-drawee or a collecting bank, the bank is a collecting bank.“

4-210: Amended by striking out in line (21) words “9-203(1)(a)” and inserting “9-203(b)(3)(A)”.

4-212: Adopts optional subsection (2) from pre-1990 Official Text. Omits “If the return or notice is delayed beyond the bank's midnight deadline or a longer reasonable time after it learns of the facts, the bank may revoke the settlement, charge back the credit, or obtain a refund from its customer, but it is liable for any loss resulting from the delay.” Did not adopt 1990 Official

Amendment which renumbered UCC 4-212 as 4-214. Repealed by St. 1998, c. 24, §8.

4A-404: The second sentence of the section states "Payment is due on the payment date after the close of the funds transfer business day."

4-406: Adds new subparagraph (g) stating: "The provisions of this section are subject to section 27 of chapter 167D and section 31 of chapter 171."

5-107: (2) omits "and acquires the rights of an issuer." Current version conforms with Uniform Commercial Code, 1995 Official Text, with no retroactive effect.

5-112: (1) omits optional language: "except as otherwise provided in subsection (4) of Section 5-114 on conditional payment." Current version conforms with Uniform Commercial Code, 1995 Official Text, with no retroactive effect.

5-113: Omits (2)(b) in its entirety. Text of (a) subsumed under (2). Current version conforms with Uniform Commercial Code, 1995 Official Text, with no retroactive effect.

5-114: Omits optional (4) and (5). Adopted 1977 Official Amendment inserting "certificated" before "security" in (2) and (2)(a). Adopts 1994 conforming amendments. Current version conforms with Uniform Commercial Code, 1995 Official Text, with no retroactive effect.

5-116: Adopts 1972 conforming amendments. Current version conforms with Uniform Commercial Code, 1995 Official Text, with no retroactive effect.

5-118: Adds new section stating: "SECURITY INTEREST OF ISSUER OR NOMINATED PERSON. (a) An issuer or nominated person has a security interest in a document presented under a letter of credit to the extent that the issuer or nominated person honors or gives value for the presentation. (b) So long as and to the extent that an issuer or nominated person has not been reimbursed or has not otherwise recovered the value given with respect to a security interest in a document under subsection (a), the security interest continues and is subject to Article 9, but: (1) a security agreement is not necessary to make the security interest enforceable under Section 9-203(b)(3); (2) if the document is presented in a medium other than a written or other tangible medium, the security interest is perfected; and (3) if the document is presented in a written or other tangible medium and is not a certificated security, chattel paper, a document of title, an instrument, or a letter of credit, the security interest is perfected and has priority over a conflicting security interest in the document so long as the debtor does not have possession of the document."

6-100 et seq.: repealed by St. 1996, c. 160, §3.

7-204: Omits (4).

7-209: Does not adopt 1966 Official Amendment adding (3)(b).

7-210: (1) adds "in good faith for the purposes of avoiding or reducing loss and of effective realization" after "warehouseman" in fourth sentence.

7-308: (1) adds "in good faith for the purposes of avoiding or reducing loss and of effective realization" after "If the carrier" in fourth sentence.

7-403: (1)(b) omits optional language: ", but the burden of establishing negligence in such cases is on the person entitled under the document."

7-503: Amended by striking out in (8) figure "9-307" and inserting figure "9-320".

8-103: Amended by striking out in (23) figure “9-115” and inserting figure “9-102(a)(15)”.

8-106: Amended by striking out in (14) word “or”, by inserting in (17) after word “holder” word “or,” and by inserting after clause (2) following clause: “(3) another person has control of the security entitlement on behalf of the purchaser or, having previously acquired control of the security entitlement, acknowledges that it has control on behalf of the purchaser.” Further amended by striking out in (21) words “of clause (2)”, by striking out in (22) words “clause (2)” and by striking out in (23) and in (24) words “of said clause (2)”.

8-108: Adds “inclusive” at end of first sentence in subsection (i).

8-110: Amended by striking out subsection (e) and inserting following subsection: “(e) The following rules determine a ‘securities intermediary's jurisdiction’ for purposes of this section: (1) If an agreement between the securities intermediary and its entitlement holder governing the securities account expressly provides that a particular jurisdiction is the securities intermediary's jurisdiction for purposes of this part, this article, or this act, that jurisdiction is the securities intermediary's jurisdiction. (2) If paragraph (1) does not apply and an agreement between the securities intermediary and its entitlement holder governing the securities account expressly provides that the agreement is governed by the law of a particular jurisdiction, that jurisdiction is the securities intermediary's jurisdiction. (3) If neither paragraph (1) nor paragraph (2) applies and an agreement between the securities intermediary and its entitlement holder governing the securities account expressly provides that the securities account is maintained at an office in a particular jurisdiction, that jurisdiction is the securities intermediary's jurisdiction. (4) If none of the preceding paragraphs applies, the securities intermediary's jurisdiction is the jurisdiction in which the office identified in an account statement as the office serving the entitlement holder's account is located. (5) If none of the preceding paragraphs applies, the securities intermediary's jurisdiction is the jurisdiction in which the chief executive office of the securities intermediary is located.”

8-301: Amended by striking clause (3) of subsection (a) and inserting following clause: “(3) a securities intermediary acting on behalf of the purchaser acquires possession of the security certificate, only if the certificate is in registered form and is (i) registered in the name of the purchaser, (ii) payable to the order of the purchaser, or (iii) specially indorsed to the purchaser by an effective indorsement and has not been indorsed to the securities intermediary or in blank.”

8-302: (2) adds “unauthorized or” before “wrongful.” Amended by striking subsection (a) and inserting following subsection: “(a) Except as otherwise provided in subsections (b) and (c), a purchaser of a certificated or uncertificated security acquires all rights in the security that the transferor had or had power to transfer.”

8-308 to 8-321: Repealed by St. 1996, c. 170, §4.

8-408: Repealed by St. 1996, c. 170, §4.

8-510: Strikes section and inserts in place following section: “Section 8-510. RIGHTS OF PURCHASER OF SECURITY ENTITLEMENT FROM ENTITLEMENT HOLDER. (a) In a case not covered by the priority rules in Article 9 or the rules stated in subsection (c), an action based on an adverse claim to a financial asset or security entitlement, whether framed in conversion, replevin, constructive trust, equitable lien, or other theory, may not be asserted against a person who purchases a security entitlement, or an interest therein, from an entitlement holder if the purchaser gives value, does not have notice of the adverse claim, and obtains control. (b) If an adverse claim could not have been asserted against an entitlement holder under Section 8-502, the adverse claim cannot be asserted against a person who purchases a security entitlement, or an interest therein, from the entitlement holder. (c) In a case not covered by the priority rules in Article 9, a purchaser for value of a security entitlement, or an interest therein, who obtains control has priority over a purchaser of a security entitlement, or an interest therein, who does not obtain control. Except as otherwise provided in subsection (d), purchasers who have control rank according to priority in time of: (1) the purchaser's becoming the person for whom the securities account, in which the security entitlement is carried, is maintained, if the purchaser obtained control under Section 8-106(d)(1); (2) the securities intermediary's agreement to comply with the purchaser's entitlement orders with respect to security entitlements carried or to be carried in the securities account in which the security entitlement is carried, if the purchaser obtained control under Section 8-106(d)(2); or (3) if the purchaser obtained control through another person under Section 8-106(d)(3), the time on which priority would be based under this subsection if the other person were the secured party. (d) A securities intermediary as purchaser has priority over a conflicting purchaser who has control unless otherwise agreed by the securities intermediary."

9-101 et seq.: Strikes Article 9 as appearing and inserts new Article 9. For full text see Martindale-Hubbell Law Digest Uniform and Model Acts.

Forms.

See end of this Digest.

See also topics: Banks and Banking, Bills and Notes, Brokers, Bulk Sales, Carriers, Consumer Protection, Contracts, Factors, Frauds, Statute of, Sales, Securities, Warehousemen; categories Business Organizations, topic Corporations; Civil Actions and Procedure, topic Limitation of Actions; Debtor and Creditor, topics Assignments, Fraudulent Sales and Conveyances, Liens, Pledges; Documents and Records, topics Records, Seals; Mortgages, topic Chattel Mortgages; Transportation, topic Motor Vehicles.

3.10 CONDITIONAL SALES:

Art. 9 of Commercial Code applies, c. 106, §9-101 et seq. (superceding prior legislation dealing with conditional sales). See topic 3.09 Commercial Code.

3.11 CONSIGNMENTS:

Covered by Commercial Code, c. 106, §§1-201(37), 2-326, 2-403(2) and (3), 9-114, and 9-408. See topic 3.09 Commercial Code. As regarding fine art, any clause in consignment agreement waiving any provision of c. 104A is void. (c. 104A, §5).

3.12 CONSUMER PROTECTION:

See generally c. 6, §115A (unit pricing of packaged commodities); c. 12, §§11E, 11F (intervention by attorney general in legal proceedings on behalf of consumers in matters involving public utilities and insurance companies); c. 40, §8F (municipal consumer advisory commission); c. 90, §7N1/2 (sale, lease and repair of new motor vehicles); c. 93, §43 (unsolicited merchandise); c. 93, §48 (cancellation of consumer agreements); c. 93, §48B (travel services); c. 93, §§68A-68E (cancellation of credit service organization contracts); c. 93, §§50-68 (consumer credit reporting and identity theft); c. 93A (consumer protection act; so-called “Baby FTC Act”); c. 93, §§78-88 (health club service contracts); c. 93, §§90-93 (consumer leasing); c. 93, §107 (customized wheelchair sales and warranties); c. 94, §§184B-184E (consumer products pricing practices); c. 106, §2-316A (prohibiting limitation or modification of UCC implied warranties and certain c. 106, §2-316 express warranties); c. 106, §2-318 (privity not required for warranty action); c. 106, §2A-214A (prohibiting exclusion or modification of implied warranties in consumer lease agreements); c. 112, §84B (requiring itemized list of funeral costs); c. 140, §§86-114C (loans); c. 140D (consumer credit cost disclosure); c. 140E (consumer account disclosure); c. 151B, §§1-10 (unlawful discrimination); c. 151C, §§1-5 (fair educational practices); c. 167B (electronic fund transfers); c. 231, §85J (treble damages for fraud in sale of personal property); c. 255, §12C (consumer note); c. 255, §12F (survival of consumers' defenses in consumer loan transactions); c. 255, §13I-J (default under consumer credit transactions); c. 255, §13K (contracts between certain schools and students); c. 255B (retail installment sales of motor vehicles); c. 255C (insurance premium finance agencies); c. 255D (retail installment sales and services); c. 265, §13C (assault in order to collect loan). See also topics 3.09 Commercial Code, Interest, subhead "Truth-in-Lending" Law, Monopolies, Restraint of Trade and Competition, subhead Unfair Trade Practices, Sales, subhead Retail Installment Sales; categories 5 Civil Actions and Procedure, topics Injunctions, subhead Consumer Protection, Limitation of Actions, subhead Within Four Years; Insurance, topic Insurance Companies, subhead Unfair Methods of Competition and Deceptive Acts and Practices; Mortgages, topic Mortgages of Real Property; Transportation, topic Motor Vehicles, subhead Sales.

Unfair methods of competition and unfair or deceptive acts or practices in conduct of any trade or commerce are declared unlawful by c. 93A, §2(a). C. 93A has extensive application in consumer protection area and may be enforced by attorney general as well as by private parties. See topic 3.20 Monopolies, 3.22 Restraint of Trade and Competition, subhead Unfair Trade Practices, for detailed description.

Submission of baseless claim by attorney, on behalf of former officer, against corporation does not fall within scope of c. 93A. (425 Mass. 344, 680 N.E.2d 1163).

Consumer sales contracts are regulated by c. 255B, c. 255D, c. 93, §48; c. 140D, c. 255, §12C. Consumer retail installment sales contracts are subject to very detailed disclosure and cancellation provisions and limitations on interest rates. See topics 3.19 Interest, subhead Small Loans, 3.23 Sales, subhead Retail Installment Sales, for description.

Home Improvement Contractor Registration Program.

Program requires all who "solicit, bid on or perform residential contracting" as contractor or subcontractor to register with Board of Building Regulations and Standards (BBRS). (c. 142A, §§1-2, 9). Residential contracting includes reconstruction, alteration, renovation, repair, modernization, conversion, improvement, removal, demolition or construction of addition of owner occupied building with one–four units. (c. 142A, § 1). Under program, all contracts for work in excess of $1,000 must be in writing and contain certain provisions. (c. 142A, § 2). Registration fee for contractors: $100 for two year period. See: http://www.mass.gov/bbrs/.

Statute also establishes guaranty fund. (c. 142A, § 5). Fund used to pay owner whose contractor violates provisions of registration program. Registrants fund program with fee ranging from $100–$500, depending on number of employees. Award from fund limited to $10,000 per job and $75,000 per contractor. (c. 142A, § 7).

Owner and contractor may be eligible for arbitration through program administered by Office of Consumer Affairs and Business Regulation. (c. 142A, §§3, 4). By law, registered contractor automatically consents to arbitration through program. (c. 142A, § 4). Contractor may utilize arbitration program if owner consents and may counterclaim if owner initiates arbitration action. Contractor or owner may appeal arbitrator's decision for trial de novo in superior or district court; appeal must be filed within 21 days from arbitrator's issuance of findings. (c. 142A, § 4[e]). Owner not required to file arbitration action, and may instead bring action in state court. (c. 142A, § 3). See: http://www.mass.gov/homeimprovement/consumer/search.htm.

UCC sales, leases, secured transactions, and commercial paper articles have been modified in several ways affecting consumers. Under c. 106, §2-316A "[a]ny language, oral or written, used by a seller or manufacturer of consumer goods and services, which attempts to exclude or modify any implied warranties of merchantability and fitness for a particular purpose or to exclude or modify the consumer's remedies for breach of those warranties, shall be unenforceable." Similar provisions, respecting limitations on modification and exclusion of implied warranties, govern in consumer lease agreements. (c. 106, §2A-214A). C. 255, §12C requires that promissory note executed in connection with contract for sale of consumer goods on credit have printed on face "consumer note" and holder of note cannot be holder in due course thereof within meaning of Art. 3 of c. 106. C. 255, §§13I-J, c. 255B, §20A and c. 255D, §§21-22 specify that secured creditor may not repossess collateral from consumer/debtor until he has given consumer/debtor notice of his intention to repossess and 21 day period to cure default. If creditor repossesses said collateral after 21 day period, debtor may still redeem collateral from creditor within 20 days of creditor's taking possession. Creditor may not repossess collateral without hearing unless default "is material and consists of the debtor's failure to make one or more payments as required by the agreement, or the occurrence of an event which substantially impairs the value of the collateral," and only if possession can be obtained without use of force or entrance upon debtor's property, unless debtor gives permission for such entrance. Consumer/debtor is not liable for any deficiency after repossession or acceptance of consumer goods by creditor if unpaid balance of debt under retail installment sale contract is $1,000 or less ($2,000 or less in case of motor vehicle retail installment sale contract or secured consumer loan not under retail installment sale contract). If unpaid balance is greater than $1,000 ($2,000 in case of motor vehicle retail installment sale contract or secured consumer loan not under retail installment sale contract), deficiency must be calculated using fair market value of collateral. (c. 255, §13J; c. 255B, §20B; c. 255D, §22). See also topic 3.09 Commercial Code.

Consumer Reporting Agencies.

See generally c. 93, §§50-68. Conforms substantially to federal law. Principal differences under state law are: (1) Narrower definition of business transaction in section delineating permissible purposes (c. 93, §51); (2) consumer may elect to have name excluded from list provided by consumer reporting agency by notifying agency (c. 93, §51A); (3) consumer report may include bankruptcies that antedate report by less than 14 years (c. 93, §52); (4) consumer reporting agency must disclose contents of information in its file and upon written request provide copy thereof and must disclose names of users (c. 93, §56); (5) permits disclosures to consumers by certified mail (c. 93, §57); (6) length of consumer statement disputing completeness or accuracy of item in file not limited to specific number of words (c. 93, §58).

Fraud in Sale of Personal Property.

Seller of personal property by deceit or fraud liable in tort to purchaser for treble damages. (c. 231, §85J).

Unfair Debt Collection Practices.

No creditor may collect personal debt by harassing or embarrassing debtor, by using instruments that simulate judicial process or by communicating with certain third parties without permission of debtor. Use of language on envelope that shows debt is being collected is considered communication to third party. (c. 93, §49). Regulations governing debt collection have been promulgated by attorney general. See 940 C.M.R. §7.01 et seq. See also c. 265, §13C (assault in order to collect loan).

Cancellation of Certain Contracts.

Agreement for sale or lease of goods, or rendering of services, or both, primarily for personal, family or household purposes in excess of $25 in value and which is consummated by party thereto at place other than address of seller or lessor, may be cancelled by buyer if buyer so notifies seller within three business days. Notice requirements, penalties and remedies for failure to comply are found in c. 93, §48. Each such agreement must contain following language in bold face type of minimum size of ten points: "You may cancel this agreement if it has been signed by a party thereto at a place other than the address of the seller, which may be his main office or branch thereof, provided you notify the seller in writing at his main office or branch by ordinary mail posted, by telegram sent or by delivery, not later than midnight of the third business day following the signing of this agreement." (c. 93, §48[B]). Attached to each such agreement must be Notice of Cancellation form conforming to statutory language. (c. 93, §48[B]). Forms and notices of right to cancel prescribed by Federal Trade Commission may be substituted for those required by c. 93, §48(B). Seller's right of reclamation of goods furnished buyer under cancelled contract is limited by statute. (c. 93, §48D). Seller of services must not commence services during three day cancellation period. (c. 93, §48[J]). Retail installment sales contracts may also be cancelled within three days pursuant to c. 255D, §14. Motor vehicle retail installment sales contracts may also be cancelled by purchaser in certain situations. (c. 255B, §13). Contracts between buyers and credit service organizations are governed by c. 93, §§68A-68E. Contracts between buyer and credit service organization must be in writing, dated, signed by parties and include following language near space for buyer's signature and in minimum of ten point bold face type: "You, the buyer, have the right to cancel this contract or agreement at any time prior to midnight of the third business day following the date thereon." (c. 93, §68D[a]). Notice of Cancellation form in minimum of ten point bold face type containing specific statutory language must be attached to contract or agreement. (c. 93, §68D[b]).

Technical, vocational, trade school contracts and similar contracts may be cancelled at any time and student receives refund under conditions described in c. 255, §13K.

Unit Pricing.

Pursuant to authority given to Massachusetts consumer council by c. 6, §115A, council has promulgated Unit Pricing Regulations (202 CMR 5.00 et seq.), which apply to all retail stores except those operated by person as his sole place of business, provided that such establishment has sales volume of less than $5,000,000 per year.

Unsolicited Goods.

Any person who receives unsolicited goods offered for sale, but not ordered by same, may treat them as unconditional gift, and use or dispose of them without obligation. (c. 93, §43).

Credit Cards.

Liability for unauthorized use limited by statute. (c. 140D, §26). Credit card issuer holding funds of cardholder in deposit account may not apply them on debt arising from use of credit card without written agreement by cardholder. (c. 140D, §21). Upon receipt of proper written notification of billing error from cardholder issuer must comply with regulations promulgated under c. 140D, §29.

Credit card issuers are expressly authorized to charge annual fees, subject to disclosure, cancellation and related requirements. Applications, pre-approved written solicitations and certain printed advertisements intended to "aid, promote or assist . . . . in the issuance of a credit card" are required to contain various disclosures including, in part, finance charges expressed as annual percentage rate, whether rate can vary, and whether annual fee is imposed. All charges and fees must be disclosed. (c. 140D, §§4-5).

Flammable Sleepwear.

Massachusetts regulates hazardous and flammable substances pursuant to c. 94B, §1 et seq.

Fair Information Practices.

Governmental executive branch agencies and those contracting with them who maintain personal data systems are subject to extensive regulation designed to safeguard access to or dissemination of personal data. (c. 66A, §§1-3; 960 CMR 2.01 et seq.; 965 CMR 2.01 et seq.). Executive office of health and human services and state agencies within executive office may submit personal data to DOR to establish and maintain Mass. Longitudinal Database for Research in Child Support Enforcement and Social Services Programs. (c. 66A).

Freedom of Information.

Custodians of public records must comply, within ten days of receipt, with request for inspection or copy of public record. Attorney general or appropriate district attorney may take measures to insure compliance with this requirement. Massachusetts Superior Court and SJC given jurisdiction to order compliance. (c. 66, §10[b]).

Gift certificates valid not less than seven years after issuance. Dates of issuance and expiration must be clearly printed. (c. 200A, §5D).

Plain Language.

Insurance policies issued to more than 50 policyholders in commonwealth must meet following standards: 50 minimum Flesch scale readability; print size at least ten point type, one point leaded; style, arrangement and overall appearance do not give undue prominence to any portion of text, endorsement or rider; table of contents or alphabetical subject index included; margins and ink to paper contrast do not unreasonably interfere with readability; organization of content and summary help understanding. (c. 175, §2B). Disclosures required by Truth-in-Lending law, see topic 3.19 Interest, subhead “Truth-in-Lending” Law, must be clear and conspicuous (c. 140D, §8), and those required by chapter governing electronic fund transfers must be in readily understandable language (c. 167B, §8).

Sunshine Law.

All meetings of governmental bodies must be open to public, except for discussion of disciplinary matters, security matters and similar specified purposes, and private meeting may be held only after governmental body has voted in public to hold private meeting. (c. 39, §23B). Records must be kept of all meetings and must be made public in most circumstances. (c. 39, §23B). Supervision and maintenance of public service records is also governed by c. 66, §§1-18. On proof of failure to comply with statute, court order requiring compliance therewith shall issue. Such order may be sought by three or more registered voters, attorney general, or appropriate district attorney. Such complaint must be speedily determined and burden of proof is on respondent to establish compliance with statute. If complaint is filed within 21 days of date when action made public, such order may invalidate any action at any meeting held in violation of statute. Any order may also require records of any meeting to be made public unless determined that maintenance of secrecy is authorized. (c. 30A, §11A1/2; c. 34, §9G; c. 39, §23B, c. 66, §17C).

Telemarketing Solicitation.

Regulates when telephone solicitation can occur. No call made to consumer if name and telephone number appear on “no sales” solicitation list. (c. 159C, §§2, 5).

3.13 CONTRACTS:

Common law rules apply, modified by adoption of Uniform Commercial Code. (c. 106). See topic 3.09 Commercial Code. For other modifications, see topics 3.12 Consumer Protection, Sales; categories 10 Documents and Records, topic Seals; Family, topic Infants, subhead Disabilities.

Agreement for offer to purchase real estate is binding in certain circumstances. (44 Mass. App. Ct. 274, 690 N.E.2d 460).

Court will not apply second look doctrine at time of breach when determining enforceability of liquidated damages clause of real estate purchase and sale agreement.

Liquidated damages clause in purchase and sale agreement will be enforced where, at time agreement was made, potential damages were difficult to determine and clause was reasonable forecast of damages expected to occur in event of breach. (428 Mass. 877, 705 N.E.2d 1114). Liquidated damages may not be granted in addition to specific performance. (448 Mass. 199, 859 N.E.2d 827, 2007 Mass. LEXIS 9).

3.14 FACTORS:

Uniform Commercial Code adopted. (c. 106). See also topic 3.09 Commercial Code. U.C.C. governs, generally, rights of creditors of consignee of goods as against rights of consignor. (c. 106, §2-326), risk of loss of consigned goods (c. 106, §2-327), power of merchant to sell entrusted goods in ordinary course (c. 106, §2-403), and liens on or security interests in consigned goods (c. 106, §9-101 et seq.). C. 104, §1 also provides that consignee or factor having authority to sell consigned goods is deemed owner so as to give validity to bona fide contract of sale made by factor (but see c. 106, §2-403, dispensing with requirement of authority to sell). C. 104, §§2-6 govern liens on consigned goods. C. 106, §§9-103(d), 9-319, 9-505 govern priority disputes between consignor and secured party who is or becomes creditor of consignee. Special statute on consignment of fine art takes precedence over any inconsistent provisions of U.C.C. or c. 104. (c. 104A, §§1-6). Criminal penalty provided for fraudulent sales and conversions by factors. (c. 266, §88).

License Requirements.

None.

Liens.

Covered by Uniform Commercial Code. (c. 106, §§2-326, 2-327, 2A-306, 2A-307 and 9-101 et seq.). Also, c. 104 (not repealed by U.C.C.) allows consignee to assert lien on consigned goods in possession of shipper for money advanced to shipper without notice that shipper is not owner (c. 104, §2); permits consignee to assert lien on goods consigned by person entrusted with goods and having authority to sell or consign, if consignee had cause to believe such person was owner or had legal interest in goods to amount of lien (c. 104, §3); allows creditor of consignee or factor to assert lien on pledged goods, or document representing goods, for money advanced to consignee or factor, subject to provisions of U.C.C. (c. 104, §4); limits rights of creditor accepting pledge of consigned goods for antecedent debt of consignee or factor (c. 104, §5); and provides that c. 104, §§3-5 4 do not affect lien of consignee or factor for expenses in shipping and caring for goods, nor prevent owner from recovering goods under stated conditions (c. 104, §6). Statute on consignment of fine art provides that consigned art is held in trust for consignor and is not subject to claim by creditor of consignee, provisions of U.C.C. to contrary notwithstanding. (c. 104A, §§3-6).

Consignment Agreements.

Covered by U.C.C. (c. 106, §2-326, §9-101 et seq.). As to agreements on consignment of fine art, any clause in such agreements waiving any provision of c. 104A is void. (c. 104A, §5).

3.15 FRANCHISES:

See also U.S. Federal Law Digest, category Business Regulation and Commerce, topic Franchises.

Uniform Franchise and Business Opportunities Act has not been enacted.

Amendments to and Revocation of Franchises.

Every charter, franchise or act of incorporation shall forever remain subject to revocation and amendment. (Const. Amend. Art. LIX).

Termination.

Legislature has not adopted limitations on right to terminate franchise agreements in general (381 Mass. 284, 408 N.E.2d 1370) but in some specific areas there are limits on right of certain franchisors to terminate franchise agreements without cause: motor vehicle dealerships (c. 93B, §4[c][4]) and gasoline marketing agreements by suppliers (c. 93E, §5A). Unconscionability of provision allowing termination without cause must be determined on case by case basis, focusing in large part on whether, at time of agreement's execution, contract provision could result in unfair surprise and was oppressive to allegedly disadvantaged party. (381 Mass. 284, 408 N.E.2d 1370). Clause is not automatically oppressive because it does not require cause for termination. (381 Mass. 284, 408 N.E.2d 1370). Clauses clearly worded and not hidden in agreement may satisfy condition that it not be surprise. (381 Mass. 284, 408 N.E.2d 1370).

3.16 FRAUDS, STATUTE OF:

Unless contract or note or memorandum thereof is in writing and signed by party to be charged, or by some person duly authorized by him, no action shall be brought: (1) To charge executor, administrator, or assignee in insolvency on special promise to pay damages from his own estate; (2) to charge person on special promise to answer for debt, default, or misdoings of another; (3) on agreement upon consideration of marriage; (4) on contract for sale of real estate or interest therein; (5) on agreement not to be performed within one year from making of contract. (c. 259, §1). Consideration need not be expressed in writing but may be proved by any legal evidence. (c. 259, §2). New promise to pay debt barred by discharge in bankruptcy or insolvency must be in writing and signed by debtor or person duly authorized by him. (c. 259, §3). No action lies on representation concerning character, conduct, credit, ability, trade or dealings of another person unless made in writing and signed by party to be charged thereby or by one duly authorized by him. (c. 259, §4).

Contracts of Sale.

Uniform Commercial Code applies. See c. 106, §§1-206 (personal property) and 2-201 (goods).

Part Performance.

Uniform Commercial Code applies to sale of goods. (c. 106, §2-201). Under some circumstances, part performance will validate contract for sale of land. (289 Mass. 1, 193 N.E. 737).

Guaranty Written on Commercial Paper.

Uniform Commercial Code applies. (c. 106, §§3-416 and 3-419).

Security Interest.

Enforceability governed by c. 106, §9-203.

Wills.

Agreements relative to making or revocation of will or codicil or to giving legacy or making devise must be in writing and signed by person whose executor or administrator is sought to be charged or by person duly authorized by him in writing. (c. 259, §§5, 5A).

3.17 [RESERVED]

3.18 INFORMATION TECHNOLOGY, INTERNET AND NEW MEDIA:

Introduction.

Massachusetts has adopted revised Uniform Commercial Code Article 9 effective July 1, 2001. See category 3 Business Regulation and Commerce, topic 3.09 Commercial Code.

Uniform Electronic Transactions Act.

Act allows for electronic transactions between parties. (c. 110G, §§1-3). Transaction defined as "as action or set of actions occurring between 2 or more persons relating to the conduct of business, commercial, or governmental affairs." (c. 110G, §2). Act applies to transactions governed by Electronic Signatures in Global and National Commerce Act. (c. 110G, §3[b][3]; 15 U.S.C.S. §7001). Act only applies to parties who have agreed to conduct electronic transactions, but agreement determined by context and surrounding circumstances, including conduct of parties. (c. 110G, §5[b]). If law requires signature be notarized, verified, acknowledged, or made under oath, requirement satisfied if electronic signature of party authorized to perform act, together with all other information required by applicable law, attached to or logically associated with signature or record. (c. 110G, §11).

Automated Transactions.

Includes electronic transactions where acts or records of parties not reviewed by individual in ordinary course of forming contract. (c. 110G, §2). Contract may be formed by interaction between electronic agents, even where no individual aware of agent's actions or resulting terms of agreement. (c. 110G, §14). Individual may avoid effect of automated transaction if: (1) Agent did not provide opportunity for prevention or correction of error; (2) individual promptly notifies other party of error and of intent not to be bound by transaction; (3) takes reasonable steps to return any consideration or benefit received; and (4) has not used any consideration or benefit received. (Id.).

Retention of Electronic Records.

Statutes requiring retention of certain records satisfied under act by retaining electronic record provided record is accurate and accessible for later reference. (c. 110G, §12).

Transactions Excluded from Act.

Act does not apply to following transactions: regulations governing creation of wills and codicils; laws governing divorce and other family matters; court orders, notices, and other official court documents; regulations governing notices canceling or terminating utility services; notices canceling or terminating health insurance; default, acceleration, repossession, foreclosure, eviction or rental agreements for primary residences; recall notices that relate to matters endangering health and safety; and documents governing transportation or handling of hazardous material. (c. 110G, §3[b][2][3]).

Electronic Signature Legislation.

Federal Electronic Signatures in Global and National Commerce Act ("E-SIGN") enacted in June 2000 is presently in effect and pre-empts state laws regulating electronic signatures in transactions affecting interstate or foreign commerce unless state enacts UETA or other approved alternative law. For detailed discussion of E-SIGN see U.S. Federal Law Digest, category Business Regulation and Commerce, topic Information Technology, Internet and New Media, subhead Electronic Signature Legislation, catchline E-SIGN.

3.193.16

3.17 INTEREST:

In absence of agreement in writing or provision of law, rate of interest is 6%. (c. 107, §3).

Maximum Rate.

See subhead Usury, infra.

Judgments.

Upon finding or verdict for plaintiff for pecuniary damages for personal injuries, consequential damages or damage to property, clerk of court is required to add to damages interest thereon at 12% per year from commencement of action. (c. 231, §6B, but see 406 Mass. 62, 545 N.E.2d 1168, as to prejudgment interest in action for conscious suffering and wrongful death of stabbing victim). In contract actions, clerk is required to add to judgment for pecuniary damages interest at contract rate, if established, and otherwise at 12% per year, from date of breach or demand, if established, and otherwise from commencement of action. (c. 231, §6C). Interest at 18% may be awarded by court upon finding that defenses, setoffs or counterclaims of other party were wholly insubstantial, frivolous and not in good faith. (c. 231, §6F). Judgment bears interest from day of entry thereof until payment. (c. 235, §8). Post-judgment interest is at rate provided for prejudgment interest. (c. 235, §8).

Open Accounts.

Unless money is by express agreement, usage or understanding payable at a fixed time, interest runs only from a demand for payment, and does not run on open or unliquidated accounts. (56 Mass. 475).

Small Loans.

Any rate of interest or discount may be reserved by special agreement, which, if for more than 6%, must be in writing (c. 107, §3) except that: (1) On loans of less than $1,000 made at a rate of more than 6% per annum, other than those hereinafter referred to, discharge may be secured on payment of principal and agreed interest if less than 18% a year or on payment of 18% interest if agreed rate higher than 18% for period expiring one year after maturity, and in either case interest at 6% after one year, plus not more than $5 for actual expenses of making and securing loan may be recovered (c. 140, §90); (2) whoever engages in business of making consumer loans of $6,000 or less must be licensed, and interest rates and provisions of loan must comply with regulations of commissioner of banks (c. 140, §96); (3) maximum rate of interest chargeable by pawnbrokers must be fixed by licensing authorities (c. 140, §78); (4) maximum rate of interest on motor vehicle retail installment sales, insurance premium financing and retail installment sale of other goods and services regulated by c. 255B, §14, c. 255C, §14 and c. 255D, §11, respectively.

Discharge of security interests, pledges, assignments of wages securing repayment of small loans conforms to Commercial Code requirements. (c. 140, §107).

Open-End Credit Transaction.

No creditor may collect finance charge equivalent to annual percentage rate greater than 18%, except that when commissioner establishes index rate greater than 18%, creditor may collect finance charge at any rate established by it. Commissioner establishes index rate quarterly. (c. 140, §114B). Creditor may collect finance charge of 50¢ for billing cycle if finance charge otherwise assessable less than 50¢. (c. 140, §114B). Disclosure requirements for open-end credit transactions are found in 209 C.M.R. 32.05. For authority to charge fees and related disclosure requirements see topic 3.12 Consumer Protection, subhead Credit Cards.

Unfair Debt Collection Procedures.

See topic 3.12 Consumer Protection, subhead Unfair Debt Collection Practices.

Mortgages.

See category 20 Mortgages, topic 20.04 Mortgages of Real Property, subhead Restrictions.

Usury.

Whoever charges interest over 20% per annum shall be guilty of criminal usury, unless rate is regulated under other provision of law or regulations thereunder, or loan is by any lender subject to control, regulation or examination by any state or federal regulatory agency. “Interest” is broadly defined to include all charges, brokerage fees and the like. Usurious loan may be voided by Supreme Judicial or Superior Court upon petition by borrower. Person may avoid effects of this law by notifying attorney general of his intention to engage in such transactions and keeping records with respect thereto. (c. 271, §49).

Life Insurance Policy Loans.

The interest on policy loans made by life insurance companies is limited to 8% or adjustable rate not exceeding higher of: (a) Monthly average of Moody's published corporate bond composite yield as of two months prior to when rate is being determined or (b) current rate being used to compute cash surrender values plus 1%. (c. 175, §142).

Premium finance agencies are regulated by statute (c. 255C) and are required to comply with Truth in Lending Law (c. 255C, §23).

Motor Vehicles Sales Finance Companies.

See topic 3.18 Licenses, Business and Professional. Financing by installment contract, see category 23 Transportation, topic 23.01 Motor Vehicles, subhead Sales.

Retail Installment Sales.

See topic 3.23 Sales, subhead Retail Installment Sales for licensing requirements and form and content of agreements.

“Truth-in-Lending” Law.

See c. 140D; 209 C.M.R. 32, which contains regulations promulgated pursuant to c. 140D by commissioner of banks. Conforms substantially to federal law and regulation. Principal differences under state law are: (1) Statute of limitations is four years (c. 260, §5A); (2) written acknowledgment of receipt signed by debtor only raises rebuttable presumption of disclosure in credit transactions in which security interest on real estate is created (c. 140D, §10[c]); (3) right of rescission expires four years after transaction consummated or upon transfer or sale of consumer's interest in real property (c. 140D, §10[f]); (4) disclosures must be made to customer upon creation of credit balance (c. 140D, §22); (5) automatic debiting must be authorized in separate agreement with specified disclosure (c. 140D, §21); (6) mandatory free ride period for retail goods or services purchased with credit card (c. 140D, §20); (7) finance charge cannot be collected unless periodic statements are mailed 15 days before earlier of end of next succeeding billing cycle or payment due date (c. 140D, §19); (8) all finance charges, without exceptions for small amounts, must be expressed as annual percentage rates (c. 140D, §12[a][4]); the accrual of finance or other charges during three-day rescission period is prohibited (c. 140D, §10[a]).

Violations of this law are also violations of c. 93A. (c. 140D, §34).

Credit Bureau Reports.

See topic 3.12 Consumer Protection.

See also category 5 Civil Actions and Procedure, topic 5.14 Injunctions.

3.18 [RESERVED]

3.19 LICENSES, BUSINESS AND PROFESSIONAL:

Licensing of certain professions and occupations is governed by c. 112. Following professions and occupations, among others, require state registration and/or licensing: physicians and surgeons (c. 112, §2), physicians assistants (c. 112, §§9C-9K), podiatrists (c. 112, §§13-22), athletic trainers and occupational/physical therapists (c. 112, §§23A-23Q), respiratory therapists (c. 112, §§23R-23BB), pharmacists (c. 112, §§24-36), sellers of drugs (retail or wholesale) (c. 112, §§36A-42A), dentists (c. 112, §§43-53), veterinarians (c. 112, §§54-60), architects (c. 112, §§60A-60O), optometrists (c. 112, §§66-73B), dispensing opticians (c. 112, §§73C-73M), nurses (c. 112, §§74-81C), professional engineers and land surveyors (c. 112, §§81D-81T), embalmers and funeral directors (c. 112, §§82-87), certified public accountants (c. 112, §§87A-87E), barbers (c. 112, §§87F-87S), cosmetologists (c. 112, §§87T-87KK), sanitarians (c. 112, §§87LL-87OO), real estate brokers and salesmen (c. 112, §§87PP-87DDD 1/2), electrologists (c. 112, §§87EEE-87OOO), radio and television technicians (c. 112, §§87PPP-87VVV), certified health officers (c. 112, §§87WWW-87ZZZ), waste water treatment facility operators (c. 21, §§34A, 34B, 34C), drinking water supply facility operators (c. 112, §§87CCCC-87DDDD), chiropractors (c. 112, §§89-97), landscape architects (c. 112, §§98-107), nursing home administrators (c. 112, §§108-117), psychologists (c. 112, §§118-129B), social workers (c. 112, §§130-137), speech-language audiologists (c. 112, §§138-147), acupuncturists (c. 112, §§148-162), allied mental health and human services professionals (c. 112, §§163-172), real estate appraisers (c. 112, §§173-195). Licensed mental health counselor who also holds license as social worker must designate which license governs their practice. (c. 112, §165). Licensing of certain mortgage brokers and lenders governed by c. 255E. Licensing of inpatient hospice program governed by c. 111, §57D.

C. 221, §§37-52 governs licensing of attorneys. See category 18 Legal Profession, topic 18.01 Attorneys and Counselors, subhead Annual Registration.

Under c. 140, cities and towns may require licenses or permits for many businesses and activities, including, among others: pool tables for hire and bowling alleys (c. 140, §177), overnight camps and cabins (c. 140, §§32A-32B), innholding (c. 140, §§2-9), lodging houses (c. 140, §§22-32), dogs (c. 140, §§136A-147), firearm sales (c. 140, §§121-128), dispensing food or beverages (c. 140, §§21A-21F), public amusements (c. 140, §181), and boating (c. 140, §§194-196).

Mammography facilities are regulated and licensed under c. 111, §52.

Auctioneers are licensed under c. 100. Labeling, distribution, sale, storage, transportation, use and disposal of pesticides are regulated by c. 132B.

Physician's license may be cancelled by Massachusetts licensing authorities on ground that license was revoked by another state “for reasons substantially the same” as those for which such licenses are suspended in Massachusetts. (398 Mass. 571, 500 N.E.2d 268).

Motor Vehicles Sales Finance Companies.

(c. 255B, §§1-3). Any person, other than bank, national banking association, federal savings and loan association or federal credit union, engaged in financing motor vehicles must secure license from bank commissioner. Fees determined annually by secretary of administration. Each licensee is required to file annual report with commissioner. Copies of printed forms of retail installment contracts used must be filed with bank commissioner.

For financing by installment contract see category 23 Transportation, topic 23.01 Motor Vehicles, subhead Sales.

Commercial travelers need not be licensed.

Collection Agencies.

Person, partnership, association or corporation conducting collection agency, and not being Mass. attorney, must be licensed by commissioner of banks and must file with state treasurer $10,000 surety company bond (or deposit $10,000 cash in lieu thereof) conditioned on paying, on written demand, the proceeds of collection to the one for whom the collection was made. Upon renewal of license, bond must be $10,000 or two times average monthly net collections rounded to next highest thousand, whichever is greater, but in no event more than $25,000. (c. 93, §§24, 25). Failure to account on written demand, to pay within 30 days of written demand or to comply with terms of the statute is punishable by fine, imprisonment, or both. (c. 93, §28).

Documents resembling legal process cannot be used for collection purposes by attorneys or collection agencies. (c. 93, §49[d]).

Creditor, attorney or assignee shall not collect or attempt to collect debt incurred primarily for personal, family or household purposes in unfair, deceptive or unreasonable manner. (c. 93, §49).

Commissioner of banks may from time to time establish regulations for conduct of collection agencies. (c. 93, §24).

3.20 MONOPOLIES, RESTRAINT OF TRADE AND COMPETITION:

Illegal under c. 93, §§1-14A, known as Mass. Antitrust Act, when occurring and having competitive impact primarily and predominantly within Mass., and, where knowing violation with specific intent to injure, punishable by fine of not more than $100,000 if corporation or if any other person, by fine of not more than $25,000 or imprisonment of not more than one year, or both. (c. 93, §10). For purposes of Act, jurisdictional burden rests upon party asserting jurisdiction where 10% of person's gross revenue is derived from transactions involving interstate commerce outside of New England. As to all other persons, party asserting lack of jurisdiction has burden of establishing same. (c. 93, §3). Any person injured may recover damages sustained, together with costs of suit, including reasonable attorney's fees, and may be awarded up to three times damages sustained if court finds there was malicious intent to injure. (c. 93, §12). Civil action by attorney general on behalf of natural persons in Mass. stays any civil action under c. 93 or c. 93A based in whole or in part on same complaint. (Id.). Actions under Act must be brought within four years after cause of action accrued. (c. 93, §13).

Agreements to Discriminate on Basis of Race, Etc.

It is unlawful for any person doing business in Massachusetts to agree with any foreign government, foreign person or international organization to refuse, fail or cease to do business in Massachusetts with, or to refuse, fail or cease to do business with, any person or business in Massachusetts because of race, color, creed, religion, sex, national origin or foreign trade relationships. (c. 151E, §2). Proceedings may be brought by attorney general to restrain violations of this prohibition. Suit seeking damages or injunction may be instituted by persons injured by such violation; up to treble damages, costs and reasonable attorney's fees may be awarded if willful violation is found. Action must be brought within four years after cause of action has accrued. For purposes of act, action for continuing violation accrues at time of latest violation. (c. 151E, §3).

Unfair Trade Practices.

It is criminal offense for retailer or wholesaler, with intent to injure competitors or destroy competition, to advertise, offer to sell or sell merchandise at less than "cost" plus any sales tax. (c. 93, §14F). Exceptions are: Isolated transactions not in usual course of business; bona fide clearance sales (if advertised or offered or marked and sold as such); mark down sales after bona fide efforts to sell prior to mark down; sales of perishable merchandise to forestall loss; sales of damaged goods or goods sale of which is being discontinued (if advertised or offered or marked and sold as such); sales on final liquidation of business; sales for charitable purposes or to relief agencies; sales on contract to certain state and local agencies; sales in which price of merchandise is made in good faith to meet competition; and sales by fiduciary or other officer acting under court order. (c. 93, §14G). Special provisions apply to advertising, offering to sell or selling cigarettes at less than "cost." (c. 64C, §§12-21). Massachusetts also has undertaken to regulate private trade, business and correspondence schools. (c. 75C, §1 et seq.; c. 75D, §1 et seq.).

It is an unfair trade practice for any manufacturer, winegrower, farmer-brewer, importer or wholesaler of any alcoholic beverage to refuse to sell, except for good cause shown, any item having brand name, to any licensed wholesaler to whom such manufacturer, winegrower, farmer-brewer, importer, or wholesaler has made regular sales of such brand items during period of six months preceding any refusal to sell. (c. 138, §25E). When consumer uses credit card to purchase travel services, provider of travel services, not including air carriers, may not impose surcharge or reduce commission of travel agent. Imposing surcharge or reducing commission constitutes unfair or deceptive practice. (c. 93, §48B).

It is unfair trade practice for car dealer to force customer to purchase optional accessories installed by dealer. (c. 93B, §4[d][1]; 18 Mass. App. 733; 470 N.E.2d 142).

Regulation of Business Practice and Consumer Protection Act.

C. 93A imposes extensive requirements in connection with fair trade practices. Unfair methods of competition and unfair or deceptive acts or practices in conduct of trade or commerce are unlawful, by statute. Negligent misrepresentation of fact, truth of which is reasonably capable of ascertainment, is unfair and deceptive act. (21 Mass. App. 229, 486 N.E.2d 737; rev. den. 396 Mass. 1106, 488 N.E.2d 1179). Mass. courts guided by Federal Trade Commission and federal courts interpretations of §5(a)(1) of Federal Trade Commission Act as from time to time amended. Mass. attorney general given authority to make rules and regulations interpreting and defining unfair methods of competition and unfair or deceptive acts or practices (such rules not to be inconsistent with rules, regulations and decisions of Federal Trade Commission and federal courts interpreting 15 U.S.C. §45[a][1]; c. 93A, §2[b], [c]). Attorney general has promulgated regulations affecting business practices, landlord-tenant relations, and retail advertising.

Mass. attorney general is given power to seek court injunctions against unfair practices covered by Act and extensive investigatory powers including right to subpoena witnesses and documents. (c. 93A, §§4-7). On petition of attorney general, court may order dissolution, suspension or forfeiture of franchise of corporation which is habitual violator of such injunctions. (c. 93A, §8). Court may also order violator to pay civil penalty up to $5,000 for each violation, and reasonable costs of litigation including reasonable attorney fees. (c. 93A, §4). Willful violators of c. 93A, §2 regarding securities and futures contracts, may also be forced to pay between two and three times ascertainable loss (c. 93A, §4) but recovery for nonwillful violation is actual damages (c. 93A, §4). Statute does not apply to transactions or action otherwise permitted under laws administered by any regulatory board or officer acting under statutory authority of commonwealth or U.S. (c. 93A, §3).

Private remedies by way of complaint, counterclaim, cross-claim, or third party action are available to any person, other than person entitled to bring action under §11, who has been injured as a result of use or employment by another person of unfair or deceptive act or practice (c. 93A, §9) and to any person engaged in conduct of any trade or commerce who suffers loss of money or property as result of use or employment by another person so engaged of either unfair or deceptive act or practice or of unfair method of competition (c. 93A, §11). Unfair practice must have occurred primarily and substantially within state. (c. 93A, §11). Relief not available, however, in context of employer-employee relationship. (388 Mass. 8; 444 N.E.2d 1262). Also, statute not applicable in disputes between parties in same business venture. (421 Mass. 448, 657 N.E.2d 1267). Further, there appears to be no right of contribution among joint and several tortfeasors with regard to multiple damage assessments. (387 Mass. 841; 443 N.E.2d 1308). Injunctive relief is available only in Superior Court or, in some circumstances, Housing Court. (c. 185C, §3). See 366 Mass. 688, 322 N.E.2d 768, for pleading requisites of c. 93A action. Private enforcement by consumers (not businessmen) is subject to 30 day demand procedure in which consumer must reasonably describe offense and injury caused thereby and afford defendant opportunity to tender restitution. Demand requirements do not apply if claim asserted by way of counterclaim or cross-claim, or respondent does not maintain place of business or keep assets within commonwealth. (c. 93A, §9[3]). If court finds willful or knowing violation of c. 93A, §2 double or treble damages must be awarded. If loss of money or property not suffered, may obtain injunction if unfair practice may cause loss of money or property. (c. 93A, §§9[3] and 11). Reasonable attorneys' fees are also awarded to petitioners in all cases where violation of c. 93A, §2 is found. (c. 93A, §§9[4] and 11; see 26 Mass. App. 99, 524 N.E.2d 110).. There is no right of jury trial under c. 93A (388 Mass. 307, 446 N.E.2d 674) however Superior Court judge may in his discretion submit c. 93A claim to jury (397 Mass. 230, 490 N.E.2d 1169).

In civil action under c. 93A, doctrine of exhaustion of remedies will not be strictly applied. (c. 93A, §9[6]).

3.21 NEGOTIABLE INSTRUMENTS:

See topic 3.02 Bills and Notes.

3.21A RESTAURANT SMOKING RESTRICTIONS:

See category 15 Health, topic 15.13 Smoking Regulations.

3.22 RESTRAINT OF TRADE:

See topic 3.20 Monopolies, 3.22 Restraint of Trade and Competition.

3.23 SALES:

Uniform Commercial Code applies. (c. 106, §§2-101 through 2-725). See topic 3.09 Commercial Code.

Conditional Sales.

Uniform Commercial Code applies. (c. 106, §§9-101 through 9-507). See topic 3.09 Commercial Code.

Consumer Protection.

See topic 3.12 Consumer Protection.

Motor Vehicles.

See category 23 Transportation, topic 23.01 Motor Vehicles, subhead Sales.

Retail Installment Sales.

Any person (other than bank or savings and loan association) engaged in business of purchasing retail installment sales agreements must obtain license from commissioner of banks. (c. 255D, §2). Licensee must keep such books and records as will enable commissioner to determine whether licensee is complying with rules and regulations made by commissioner. Every licensee must preserve such books, accounts and records, for at least two years after making final entry with respect to any retail installment sale agreement, revolving credit agreement, or any sale made pursuant thereto. Any licensee neglecting to make annual report as required by regulation may be subject to fine of $50 for each day during which such neglect or failure continues. (c. 255D, §3).

Retailer cannot require buyer to use credit. (c. 255D, §10A).

Form and content of sales contracts are governed by c. 255D and “Truth-in-Lending” requirements of c. 140D. As to latter, see topic 3.19 Interest, subhead “Truth-in-Lending” Law. Buyer may cancel contract until seller has signed and delivered or mailed to buyer copy of contract or within three business days if consummated at place other than seller's address, by sending proper notice. (c. 255D, §14). Notice of debtor's right to such cancellation must be set forth in contract and detachable Notice of Cancellation form conforming to statutory language must be attached to each contract signed by buyer at place other than address of seller. Federal Trade Commission forms and notices may be submitted. (c. 255D, §9). Holder of retail installment sale agreement, or other person acting in his behalf, is subject to real and personal defenses which buyer has against seller. (c. 255D, §25A). Retail installment sales contracts may not contain certain proscribed terms. (c. 255D, §§10 and 15). No installment seller may permit any person to become obligated to said seller under more than one retail installment sales agreement executed at same time. (c. 255D, §11[D]). Holder of retail installment agreement may, by agreement with buyer, refinance unpaid balance. Also retail installment sales agreements may be altered. Refinancing of unpaid balance and alteration of contract permitted subject to conditions of c. 255D, §§16-18A.

Repossession and Deficiency Judgments.

Governed by c. 255D, §§21-22.

Discrimination in Granting Credit.

Refusal to extend credit because of individual's age, sex, sexual orientation, genetic information or marital status is unlawful except as permitted. Violations give rise to liability for actual damages, or, if none, special damages not to exceed $1,000 plus legal fees. (c. 151B, §4[14]). Retail store providing credit privileges may not refuse access solely because of person's being 62 or older. (c. 151B, §4[12]).

Massachusetts commission against discrimination issued regulations substantially similar to Federal Reserve Board's Regulation B barring discrimination on basis of race, color, religion, national origin, sex, sexual orientation, children, handicap, marital status, age (provided applicant has capacity to enter into binding contract) or fact that all or part of applicant's income derives from any assistance program in granting of credit. These guidelines implement c. 151B, §§4(3B), 4(10), 4(14), 5; c. 272, §98.

Concealment of Leased Property.

Selling, concealing or refusing to turn over personal property held under written lease or rental agreement, with intent to defraud, is criminal offense. (c. 266, §87).

“Fire, Closing Out” Sales, etc.

Persons conducting fire, closing out, removal and like sales must comply with special requirements designed to promote fair dealing with public, for violation of which fines are imposed. (c. 93, §§28A-28F). See also c. 266, §91.

Product Liability.

Lack of privity of contract is not a defense in action for breach of warranty or negligence brought against manufacturer or seller or lessor if plaintiff might reasonably have been expected to use, consume or be affected by goods. Manufacturer, seller, lessor or supplier may not exclude or limit operation of this section. Such actions must be commenced within three years after date injury or damage occurs. (c. 106, §§2-318, 2A-216).

Unit Pricing.

See topic 3.12 Consumer Protection.

Bulk Sales.

Art. 6 (Bulk Transfers), repealed by St. 1996, c. 160, §3.

Sales Below Cost.

See topic 3.20 Monopolies, 3.22 Restraint of Trade and Competition.

3.24 SECURITIES:

Uniform Securities Act, 1956 version, (see Uniform and Model Acts section) adopted. (c. 110A). Short title is Uniform Securities Act. Rules and Regulations have been issued and are found in 950 C.M.R. Following are material insertions, changes and omissions.

§102(b): Investment advisory contracts and compensation omitted.

§102(c): Custody of client's securities or funds omitted.

§§201, 202, 203 and 204: Registration provisions include investment adviser representatives.

§201(d): Registrations expire on last day of calendar year.

§202(b): Filing fees for applicant for initial or renewal registration of broker-dealer, and for agent, including agent automatically registered pursuant to §202(a), determined annually pursuant to authority deriving from §412 by commissioner of administration, currently $450 and $75. Initial or renewal fees for investment advisor or representative, including representative automatically registered pursuant to §202(a), currently $300 and $50, respectively. Fee determined annually pursuant to authority deriving from §412 by commissioner of administration, currently $50, when agent transfers from one broker-dealer or issuer to another. See website for commonwealth securities division at http://www.sec.state.ma.us/sct/sctlic/licidx.htm#fee.

§202(d): Minimum capital for broker-dealers is set forth in §202(d).

§202(e): Surety bond omitted. Broker-dealer must be registered with Securities & Exchange Commission and comply with its net capital, customer protection and custody of securities, and reporting requirements.

§204(a): Secretary may order fines or censure, as well as denial, suspension or revocation of registration.

§204(a) (2) (E)-(G): Bases upon which secretary may order fine, censure or denial, suspension or revocation of registration include order by secretary denying, suspending or revoking registration as broker-dealer, agent, investment advisor or investment adviser representative, as well as, (i) order by securities administrator or agency of another state or

Canadian province or territory, or of Securities and Exchange Commission, after notice and opportunity for hearing, denying, revoking or suspending license as broker-dealer, agent or investment advisor, (ii) order suspending or expelling applicant or registrant from membership in self-regulatory organization registered under either Securities Exchange Act of 1934 or Commodities Exchange Act; (iii) U.S. Postal Service fraud order; (iv) cease and desist order, issued after notice and opportunity for hearing by secretary, Canadian province or territory, Securities and Exchange Commission or Commodity Futures Trading Commission; (v) revocation, denial or suspension of registration by Commodity Futures Trading Commission; or (vi) finding that broker-dealer or any of its principals has engaged in any unethical or dishonest conduct in securities, commodities or insurance business.

§302: Registration by notification omitted.

§303: Registration by coordination adopted. (c. 110A, §302).

§304: Registration by qualification adopted. (c. 110A, §303).

§305: (c. 110A, §304); Uniform Act §305(b) (c. 110A, §304[b]): Filing fee for registration statement determined annually pursuant to authority deriving from §412 by commissioner of administration, currently 1/20th of 1% of Massachusetts portion of offering but not less than $300 nor more than $1,500.

§305(d): (c. 110A, §304[d]). No five year limitation.

§305(g): Escrow omitted.

§305(h): Form of subscription or sales contract omitted.

§305(k) (c. 110A, §304[i]): Filing fee for open-end investment company, determined annually, pursuant to authority deriving from §412, by commissioner of administration, currently $2,500 registration fee and $1,250 annual reporting fee. See fee schedule at commonwealth securities division website, http://www.sec.state.ma.us/sct/sctfin/finidx.htm.

§402(a)(1): Securities of Massachusetts or any subdivision thereof not exempt from §403 (filing of sales and advertising literature).

§402(a)(2): Does not include revenue obligations.

§402(a)(4): Also includes securities of corporations licensed to make small loans and subject to regulation by commissioner of banks under c. 140.

§402(a)(5): Omits annuity, investment or similar contracts dependent on investment results.

§402(a)(8): Includes securities also listed on Boston, Midwest, Pacific Coast, and Philadelphia Stock Exchanges or Chicago Board of Options.

§402(a)(12): Includes certain cooperatives organized under c. 157 or c. 157A.

§402(b)(2): Non-issuer distribution of securities registered under the Securities Exchange Act of 1934 is exempted from sections 301 and 403. (c. 110A, §402[b] [2]).

§402(b)(8): Institutional buyer includes but is not limited to (i) Small Business Investment Company under Small Business Investment Act of 1958; (ii) private business development company under §202(a)(22) of Investment Advisers Act of 1940; (iii) Business

Development Company under §2(a)(48) of Investment Company Act of 1940; (iv) Qualified Institutional Buyer per 17 C.F.R. 230.144A(a); and (v) entity with total assets over $5 million and which is either (a) company not formed for specific purpose of acquiring offered securities or (b) organization under §501(c)(3) of Internal Revenue Code.

§402(b)(9): Transaction pursuant to offer directed to not more than 25 persons other than those designated in paragraph (8) in commonwealth during any period of 12 consecutive months is exempt if seller reasonably believes that all buyers are purchasing for investment. If any commission or other remuneration is paid to any person for soliciting any prospective buyer in commonwealth other than those designated in paragraph (8) notice must be filed with secretary at least ten days before receipt of consideration from or delivery of subscription agreement by any purchaser, and secretary has five full business days to disallow exemption.

Under c. 110A, §402(b)(13), secretary is empowered by rule or order to exempt other transactions.

§403: In exercising rule-making authority under this section as to any security, including state and local issues, state secretary may require filing of sales literature used, but may not require advance approval or advance filing, or any filing by issuers outside Massachusetts, and criminal penalties of c. 110A, §409 do not apply.

§407A: When secretary determines after notice and opportunity for hearing that someone has or is about to violate c. 110A, secretary may issue cease and desist order and order fine up to $25,000 per violation, accounting, disgorgement or other relief. Secretary may issue temporary cease and desist order before hearing when delay would irreparably harm public interest.

§408: Secretary may bring court action to enforce compliance with c. 110A, and court may grant injunction or restraining order and may order accounting, disgorgement, rescission or other relief, including appointment of receiver or conservator. Secretary may be required to post bond.

§410(a)(2): Damages in civil suit defined as amount that would be recoverable upon tender less value of security when buyer disposed of it and interest at 6% a year from date of disposition.

§410(e): No person may bring action for civil liability more than four years after discovery of violation of c. 110A.

§411: Judicial review may be obtained pursuant to c. 30A, §14.

Consumer Protection.

Consumer Protection Act (c. 93A; see topic 3.20 Monopolies, 3.22 Restraint of Trade and Competition, subhead Unfair Trade Practices, catchline Regulation of Business Practice and Consumer Protection Act) includes securities and contracts of sale of commodity for future delivery and provides for double or treble damages for willful violations in addition to civil penalty not in excess of $10,000 and payment of costs including reasonable attorneys fees. (c. 93A, §§1, 4, 9[3]).

Tender Offers.

Regulated by c. 110C. Statute applies to tender offers, open market purchases, solicitation of particular shareholders, or any other acquisition which would make offeror and his associates beneficial owners of more than 10% of any class of equity securities of corporation incorporated or having its principal place of business in Massachusetts (“take-over bids”). (c.

110C, §1). Take-over bid does not include, among other things, offer made with consent of directors of target company and their recommendation of terms to all stockholders or offer for consideration consisting primarily of securities covered by current prospectus of effective registration statement under Securities Act of 1933, or offer by corporation to acquire its own securities or those of subsidiary in which it holds at least two-thirds of voting stock, or offer to acquire corporation having less than 25 stockholders. (c. 110C, §1). If offeror or target company is public utility, public utility holding company, bank or bank holding company or savings & loan holding company, and offer is subject to regulatory approval, Act does not apply. (c. 110C, §12). Term "offeror" does not include bank or broker-dealer lending funds in ordinary course of business or any person or firm providing advice or ministerial services to offeror and not otherwise participating in take-over bid. (c. 110C, §1).

Offeror shall not make take-over bid unless offeror publicly announces its terms, files with State Secretary and target company, on date of commencement of take-over bid, requisite information (set forth in §§4, 5) and pays filing fee determined annually by secretary of administration, currently $1,000. (c. 110C, §2). Target company or any offeree, within five days of such filing and upon payment of fee, currently $250, and deposit not to exceed $750 for costs, may request State Secretary to hold hearing, or, within ten days of such filing, State Secretary may order hearing if he feels it to be appropriate for protection of offerees. (c. 110C, §§2, 6). If State Secretary does not order hearing within ten days, or if hearing is ordered or requested and State Secretary finds that intended offer does not, or after appropriate amendment would not, violate statute, offer may proceed. (c. 110C, §2). Hearing must commence within 20 days of such filing and adjudication must be made within 45 days of filing. (c. 110C, §6).

If take-over bid is made for less than all outstanding equity securities of any class and if number of securities depositing in response to bid is greater than number offeror has agreed to accept, offeror must take up and pay for securities pro rata, according to number of securities deposited by each offeree. If consideration offered is increased during take-over bid, increased consideration must be paid to all offerees. (c. 110C, §7).

Prohibited offers and provisions include offers not made to all shareholders of target company who are Massachusetts residents, offers not made on same terms as offers to other shareholders who reside outside of Massachusetts, offers which do not remain open for at least 15 days with right to extend such period; purchase of shares within 15-day period; and offer to offeree of payment of fee or commission not available to all offerees. (c. 110C, §7).

In addition, offer may not be made if offeror and his associates and affiliates hold 5% or more of target company's stock any shares of which were purchased within one year before proposed offer and before making any such purchase offeror either failed to announce publicly his intention to gain control of target company or otherwise failed to make fair and full disclosure of such intention to persons from whom he acquired shares. (c. 110C, §3).

Shares tendered may be withdrawn at any time up to five days prior to date for termination of offer. (c. 110C, §7).

Solicitation materials must be filed with Secretary and delivered to target company on date of commencement of takeover bid. (c. 110C, §§2, 4).

Civil, criminal and injunctive penalties are provided. (c. 110C, §9). Offeror, target company and offerees have private rights of action for injunctive relief. (c. 110C, §9). Action must be commenced within three years after violation or within one year after discovery of facts constituting violation, whichever first expires. (c. 110C, §9[c]). Secretary has rulemaking powers. (c. 110C, §10).

Control Share Acquisitions.

Takeovers of Massachusetts corporations and foreign corporations with specified Massachusetts contacts are also regulated by Control Share Acquisitions Act, chs. 110D and 110E. Law applies to certain Massachusetts business corporations, certain gas and electric companies, and certain Massachusetts business trusts and voluntary associations with: (1) At least 200 shareholders, (2) principal office, place of business or substantial assets in Massachusetts and (3) either more than 10% of shareholders, or more than 10% of shares held by, residents of Massachusetts. (c. 110D, §1). Prior to Jan. 1, 1988, such entities may become subject to law by charter or by-law amendment or by Board vote. After that date, law will apply unless charter or by-laws provide otherwise. (c. 110D, §2). Foreign corporations meeting tests (1) and (3) above and having principal executive office and more employees or assets employed or located in Massachusetts than in any other state as of certain specified times may become subject to law by appropriate charter or by-law amendment. (c. 110E, §1).

Law applies whenever acquiror (as defined) makes or proposes to make control share acquisition (acquisition causing acquiror's ownership to exceed threshholds of 20%, 331/3% or 50% of voting power of target, subject to certain exceptions). Shares acquired in control share acquisition will have voting rights only to extent granted by majority vote of shares which are not interested shares (as defined, generally shares owned by persons not allied with acquiror or with target company management). (c. 110E, §5). Law provides mechanism for acquiror to force shareholder vote by delivery of written statement containing specified information and undertaking to pay certain target company expenses of holding special shareholder meeting. Otherwise, vote occurs at next annual or special meeting. (c. 110E, §4). Other provisions of law provide for restoration of voting rights in transfer which is not control share acquisition, authorize articles or by-laws of Massachusetts corporations to force redemption of control shares if voting rights not granted or written statement not delivered and provide appraisal rights for dissenters in Massachusetts corporations if shareholders vote to grant majority voting power to acquiror. (c. 110E, §7).

Business Combinations.

C. 110F. Corporation shall not engage in any business combination with any interested stockholder for three years unless: (1) Directors approve such action prior to stockholder becoming interested, (2) interested stockholder owned at least 90% of voting stock at time transaction commenced, or (3) directors approve and two-thirds of voting stock of non-interested stockholders affirm such business combination. (c. 110F, §1). Interested stockholder includes any person other than corporation and certain affiliates and associates of corporation that own 5% or more of corporation's voting stock. (c. 110F, §3). Restriction does not apply if, among other things: (1) Corporation's charter provides it will not be governed by such provision; (2) stockholders elect not to be governed by such provision, provided such election is not effective for 12 months and such election does not apply to any business combination between corporation and any person who became interested stockholder on or prior to date of election; (3) corporation does not have at least 200 stockholders; (4) corporation does not have principal office, place of business or substantial assets in Massachusetts and either more than 10% of its stockholders residing within Massachusetts or more than 10% of its shares held by Massachusetts residents; or (5) business combination is proposed prior to consummation or abandonment of transaction which is with or by person who was not interested stockholder during previous three years. (c. 110F, §2). Law also provides that no business combinations shall terminate or impair labor negotiated employment contracts. (c. 149, §20E).

Supervision.

Uniform Securities Act and take-over bids under c. 110C are supervised by Director, Securities Division, Office of the Secretary of the Commonwealth, John W. McCormack Building, 17th Floor, One Ashburton Place, Boston, Massachusetts 02108. Telephone: (617) 727-3548; toll free: (800) 269-5428 (Massachusetts only).

Uniform Commercial Code adopted. (c. 106). See topic 3.09 Commercial Code.

Uniform Simplification of Fiduciary Security Transfers Act not adopted.

Uniform Securities Ownership by Minors Act not adopted.

3.25 STATUTE OF FRAUDS:

See Frauds, Statute of.

3.26 TRUST RECEIPT SECURITY:

See category 8 Debtor and Creditor, topic 8.15 Pledges.

3.27 WAREHOUSEMEN:

Bonds.

Licensees must give bond to state treasurer for faithful performance of their duties in amount and with sureties approved by commissioner of public safety or designee. (c. 105, §1). Provision is made for release of sureties on such bonds on notice. (c. 105, §2A).

Licenses.

§§1-6 of c. 105 provide for issuance, on application and public notice thereof, of licenses for maintenance of public warehouses by commissioner of public safety, or designee, to suitable persons or corporations established under laws of, and having their places of business within, commonwealth. License fee is determined annually by secretary of administration, currently $250. (c. 105, §1).

Persons or Massachusetts corporations having their place of business in Massachusetts may, without license, keep public warehouse on premises of any other person or corporation for storage under contract of goods, wares or merchandise of such other person or corporation. (c. 105, §2C).

Whoever maintains public warehouse without procuring license and giving bond shall be punished by fine of not more than $1,000 and subject to injunction. (c. 105, §2).

Books and Accounts.

Warehouseperson must keep account of all transactions concerning goods in his care. Books are open to inspection by any person interested in property to which entries relate. (c. 105, §5).

Insurance and Warehouse Receipts.

Licensed warehouseperson must, upon written request by party storing property, insure such property. Any warehouse receipt delivered to depositor of family, personal or household goods shall contain following notice conspicuously printed in at least eight point type: “The property which you are putting in storage is not covered by insurance against fire or theft. You may contact the warehouseman for instructions on placing insurance coverage for fire and theft on the deposited property.” (c. 105, §4).

Penalties for false or misleading receipts or fraudulent use of receipts appear in c. 105, §§55-64.

Uniform Commercial Code applies. (c. 106, §§7-101 to 7-210; 7-401 to 7-603).

Lien.

Warehouseperson has lien against bailor on goods covered by warehouse receipt or on proceeds thereof in his possession for charges for storage or transportation (including demurrage and terminal charges), insurance, labor or charges present or future in relation to goods, and for expenses necessary for preservation of goods or reasonably incurred in their sale pursuant to law. (c. 106, §7-209[1]). Warehouseperson loses lien on any goods which are voluntarily delivered or of which delivery is unjustifiably refused. (c. 106, §7-209[4]). For provisions on enforcement of warehouseperson's lien, see c. 106, §7-210.

4 CITIZENSHIP

—Scope —

All persons who are citizens of United States and who are domiciled in Massachusetts are citizens thereof. (c. 1, §1). Only citizen residents may vote. (c. 51, §1).

4.01 ALIENS:

Aliens may sue and be sued as citizens. Employment of certain aliens: students, visitors and persons not admitted for permanent residence, is punishable by fine of up to $500 unless admitted under work permit or employment authorized by U.S. attorney general. (c. 149, §19C).

Services or benefits other than emergency services shall not be provided to undocumented aliens unless required by federal law. (c. 118E, §16D[2]). Non-resident aliens not eligible for payment of emergency medical care by Medicaid. (CMR tit. 106, §507.600; 410 Mass. 625; 574 N.E.2d 385). However, minor, elderly and disabled aliens are eligible. (c. 118E, §16D[3] and [7]).

No license to sell or permit to transport alcoholic beverages shall be issued to aliens. (c. 138, §26).

Aliens not eligible for license to sell firearms (c. 140, §122) or ammunition (c. 140, §122B), nor for firearms ID card (c. 140, §129B). Aliens may apply to obtain permit to possess firearm under certain conditions or for limited purposes. (c. 140, §§131F and 131H).

Aliens must be advised that criminal conviction might have consequences of deportation, exclusion from admission to United States, or denial of naturalization before guilty plea is accepted. (c. 278, §29D).

Property.

Resident or nonresident aliens may hold and convey real property. (c. 184, §1).

5 CIVIL ACTIONS AND PROCEDURE

5.01 ACCORD AND SATISFACTION:

In general, common law principles apply.

Compromise.

Acceptance of lesser amount for disputed or unliquidated claim is valid compromise. (60

Mass. 148).

Pleading.

An accord and satisfaction must be specially pleaded. (Mass. R. Civ. P., Rule 8[c]).

Uniform Commercial Code adopted. See category 3 Business Regulation and Commerce, topic 3.09 Commercial Code.

5.02 ACTIONS:

In 1996, District/Municipal Court Rules of Civil Procedure, which governed actions in District Court Dept. and Boston Municipal Court Dept., were merged with Massachusetts Rules of Civil Procedure (Mass. R. Civ. P.). Procedure in Massachusetts trial courts is governed by: (1) Massachusetts Rules of Civil Procedure which apply to actions before single justice of Supreme Judicial Court or Appeals Court, and in following depts. of Trial Court: Superior Court, Housing Court, Land Court, and Probate and Family Court in proceedings seeking equitable relief (In this Digest these depts. are referred to as Superior Court, Housing Court, Land Court and Probate Court, respectively, to District Court and Municipal Court Proceedings, and in all civil suits whether in law or in equity, except as provided in Rule 81 (Mass. R. Civ. P. 1); (2) Massachusetts Rules of Domestic Relations Procedure (Mass. R. Dom. Rel. P.), which apply to proceedings for divorce, separate support, custody, annulment, spousal and child support, paternity and support for child born out of wedlock, and abuse prevention. All sets of rules are based on Federal Rules of Civil Procedure, with changes appropriate to Massachusetts needs or established Massachusetts practice. Both sets of rules follow same numbering system. Significant variations between District/Municipal Court and Superior Court practice due to statutory or other limitations on jurisdiction are noted below. Mass. Uniform Small Claims Rules have been adopted. Juvenile Court Rules adopted.

Forms of Action.

One form of action known as “civil action.” (Mass. R. Civ. P. 2). Substantive equitable remedies remain unaffected, including right to reach and apply assets of debtor. (c. 214, §3). See category 6 Courts and Legislature, topic 6.01 Courts.

District Courts are virtually without equity jurisdiction, but by statute equitable defenses going to entire case may be raised in District Courts. (c. 231, §31).

Commencement.

Civil action is commenced by: (1) Mailing complaint and entry fee to clerk by certified or registered mail; or (2) filing complaint and entry fee with clerk. (Mass. R. Civ. P. 3). Actions brought for registration or confirmation (c. 185) are commenced by filing surveyor's plan and complaint on Land Court form (Mass. R. Civ. P. 3).

Parties.

Rules 17-21, equivalent to Federal Rules except Rule 17(a) does not apply to right of insurer to sue in behalf of employee in workmen's compensation case (c. 152, §15) and insurer may sue in name of assured to whose rights it is subrogated (Mass. R. Civ. P. 17); Rule 20 aggregates entry fees in certain cases.

With respect to actions against owners of residential premises for Sanitary Code violations, a tenant may join certain persons as parties pursuant to c. 111, §127N.

Class Actions.

Prerequisites for class action are equivalent to Federal Rule 23(a). Class action maintainable if prerequisites met, if common questions of law or fact predominate, and if class action is superior to other available methods. (Mass. R. Civ. P. 23[b]). There is no Mass. equivalent to Federal Rules 23(b)(1), 23(b)(2) or 23(c); notice to class members is within court's discretion. (Mass. R. Civ. P. 23[d]). Court approval required for dismissal or compromise. (Rule 23[c]). Rules 23.1 and 23.2 are equivalent to Federal Rules.

Class actions also maintainable under c. 93A, §11 on behalf of persons injured by unfair methods of competition or unfair or deceptive trade practices.

Uniform Class Actions Act not adopted.

Intervention.

Mass. R. Civ. P. 24, equivalent to Federal Rule, but requires parties challenging constitutionality of legislative act or municipal ordinance to notify attorney general.

Interpleader.

Mass. R. Civ. P. 22, equivalent to Federal Rule.

Impleader.

See infra, subhead Third Party Practice.

Third Party Practice.

Rule 14, equivalent to Federal Rule except third party complaint may be filed as of right within 20 days after service of answer. Rule excludes cases of registration and confirmation of title in Land Court.

Joinder of Claims and Parties.

Rules 18-21, equivalent to Federal Rules.

District Courts have no jurisdiction over fraudulent conveyances.

Consolidation and Separate Trial.

Rule 42, substantially equivalent to Federal Rule, except that Mass. R. Civ. P. Rule 42(c) provides procedure for consolidation of cross actions pending in more than one District Court. Whenever related actions are pending in more than one division of same department of trial court, administrative justice of such department may order consolidation of such actions for purpose of trial, upon motion of any party. (c. 223, §2A). Pursuant to Mass. R. Civ. P. 42(d), District Court may order separate trial of any claim, cross-claim, counter-claim, or third party claim.

Severance of Actions.

Rule 42(b) and Rule 19(b), substantially equivalent to Federal Rules, provide respectively for separate trial and for severance of parties as required for just adjudication.

Stay of Proceedings.

Execution upon judgment or proceedings taken for its enforcement shall be stayed until time for appeal has expired. Execution is also stayed pending appeal. (Mass. R. Civ. P. 62; MRAP 6). See Nolan, 9A Mass. Practice, §986. See also topic 5.03 Appeal and Error, subhead Stay of Proceedings; Appeal Bond. There are numerous statutes dealing with specific instances in which stay of proceedings is authorized. See Stay, General Index, Mass. Gen. Laws. See also category 21 Property, topic 21.10 Landlord and Tenant, subhead Dispossession.

Abatement and Revival.

In addition to actions which survive by common law, including most actions of contract (18 Mass. 71, 1 Pick. 71) there survive by statute actions of replevin, actions of tort for assault, battery, imprisonment or other damage to person, for medical expenses incurred by spouse, parent or guardian of injured person, for conversion, or for real or personal property damage, and actions against sheriffs for misconduct or negligence of themselves or their deputies. Actions which survive may be brought or prosecuted by or against personal representative of decedent. (c. 228, §1).

Substitution of representative of decedent is pursuant to Rule 25. Failure by surviving party to move for substitution within one year after date of approval of bond of decedent's representative will result in dismissal of action unless such failure was result of excusable neglect. Death of one of multiple parties is governed by Mass. R. Civ. P. 25(a)(2).

If one of several parties dies before final judgment, action may be prosecuted by or against surviving plaintiff or defendant as case may be. (c. 228, §7); see also Mass. R. Civ. P. 25(a)(2).

Termination of Actions.

Actions may be terminated by judgment (Rule 54); stipulation, voluntary and involuntary dismissal (with or without prejudice) (Rule 41); or by court or defendant's motion for lack of prosecution of any action which has remained upon docket for three years (Rule 41[b]).

Prohibited Actions.

No action for breach of contract to marry.

Amendments.

Rule 15, equivalent to Federal Rule, except amendment of right must be made prior to grant of order of dismissal, and provisions of Federal Rule 15(c) as to amendments changing parties are omitted.

Small Claims.

Uniform Small Claims Rules in effect. See category 6 Courts and Legislature, topic 6.01 Courts, subhead District Court and BMC, catchline Small Claims.

Amount in Controversy.

Actions may be commenced in Superior Court only if “reasonable likelihood” that recovery by plaintiff will not be less than $25,000. (c. 212, §3A; c. 218, §19). If multiple damages allowed by law, amount of single damages claim controls whether action satisfies amount in controversy requirement. Complaint must include statement signed by attorney or pro se litigant specifying facts supporting claim for damages. (Id.). Court may dismiss case without prejudice if no reasonable likelihood that estimated damaged will satisfy damages threshold, but party may recommence action in district court without payment of additional fee. Civil actions must be commenced in state district court where “reasonable likelihood” that damages will not exceed $25,000, and complaint must include signed statement detailing facts supporting claim for damages. (c. 218, §19). In district court, party may demand trial by jury of six by serving other parties with demand in writing after commencement of action. (c. 218, §19B). Failure of party to serve and file demand for jury trial constitutes waiver. (c. 218, §19B[a]). In district court, judge may dismiss case without prejudice where no reasonable likelihood that damages will fall within damages limitation. Appeal from dismissal is to single justice of Massachusetts Appeals Court. (c. 212, §3A; c. 218, §19).

Actions for Medical Malpractice.

Must be heard initially by tribunal consisting of superior court justice, physician and lawyer for determination of whether or not plaintiff's evidence raises legitimate question of liability. If tribunal finds for defendant, plaintiff is barred from usual judicial process unless he files $6,000 bond for costs within 30 days of tribunal's finding. (c. 231, §60B). Awards for pain and suffering, loss of companionship, embarrassment and other items of general damage limited to $500,000 unless fact finder finds substantial or permanent loss or impairment of bodily function, substantial disfigurement or other special circumstances. (c. 231, §60H). Such awards must be itemized. (c. 231, §60F). Limits imposed on contingency fees. (c. 231, §60I).

Actions Against Public Bodies Based on Torts.

Must be brought in Superior Court. (c. 258, §3). Prerequisites include prior written claim to appropriate “executive officer” (c. 258, §1) within two years of injury; claim must be denied in writing or compromise or settlement not reached within six months before filing action (c. 258, §4). Certain claims, such as one based on intentional tort and one based on discretionary conduct, excepted. (c. 258, §10[c][b]). Public bodies, however, are not immune under §10(c) for wanton or reckless acts. (419 Mass. 278, 643 N.E.2d 1043). Public bodies include commonwealth, counties, cities, towns, districts and departments, offices, commissions, councils, boards, divisions, bureaus, institutions or agencies thereof but not authorities and other independent bodies politic and corporate. General release of employee of municipality or public body from liability also operates to release municipality against which derivative liability would also lie. (38 Mass. App. Ct. 70, 645 N.E.2d 44, further app. rev. denied, 419 Mass. 1107, 646 N.E.2d 1071).

Actions for Contribution.

Uniform Contribution Among Joint Tortfeasors Act in effect with minor variations. (c. 231B, §§1-4).

Actions Based on Defects.

No recovery can be had for personal injury or property damage due to defect or disrepair of public or private way unless proper notice is given to county, city, town or person obligated to repair way within 30 days after injury or removal of incapacity. (c. 84, §15, c. 81, §18). Commonwealth not liable for injury from insufficient railing on state highway, injury sustained on sidewalk, or construction or repair of highway. (c. 81, §18). No recovery can be had in actions founded on defective condition of private premises and adjoining ways caused by or consisting in part of ice or snow unless proper notice to owner is given within 30 days after injury or removal of incapacity. When defect is caused by ice or snow, failure to give notice is not defense unless defendant proves that he was prejudiced by such lack of notice. (c. 84, §§18-21).

Actions to Enforce Foreign Judgments.

New action required. Uniform Enforcement of Foreign Judgments Acts not in effect.

Limitation of.

See topic 5.16 Limitation of Actions.

Right to Privacy.

See topic 5.14 Injunctions, subhead Right to Privacy.

Actions by Developers Against Public Interest Groups.

Any action against party that is brought in response to that party's exercise of its right to petition under U.S. or state constitution is subject to special motion to dismiss. (c. 231, §59H).

Special motion should be granted unless party against whom motion is brought shows: (1) moving party's exercise of its right to petition lacks factual support or arguable legal basis; and (2) moving party's actions caused injury. (c. 231, §59H). Motion may be filed within 60 days of service and costs are available to moving party if successful. (c. 231, §59H).

5.03 APPEAL AND ERROR:

Note: Massachusetts trial courts were organized and consolidated by 1978, c. 478. For description of present organization, see category 6 Courts and Legislature, topic 6.01 Courts, subhead Trial Court. Civil procedure is governed by Massachusetts Rules of Civil Procedure (Mass. R. Civ. P.), based largely on Federal Rules of Civil Procedure (see topic 5.19 Practice).

Civil Appeals.

Civil appeals from decisions of Appellate Division of District Court, and of Housing, Land, Probate and Superior Courts, are governed by Massachusetts Rules of Appellate Procedure (MRAP), modelled substantially on Federal Rules of Appellate Procedure. Appellate review may be instituted by notice of appeal filed in lower court (MRAP 3), in most cases within 30 days of entry of judgment (MRAP 4), within 60 days if Commonwealth or officer or agency thereof is party, or by report, except in child welfare cases, in which notice of appeal must be filed within 30 days from date of entry of judgment, decree, order, or adjudication (see subhead Report; Interlocutory Review, infra), to following courts:

To Supreme Judicial Court.

Supreme Judicial Court (SJC), highest court in Commonwealth, has concurrent civil jurisdiction with Appeals Court (c. 211A, §10), but no civil appeal may be taken of right to SJC except from decision of single justice of SJC (see MRAP 1[b]; but cf. c. 231, §112) and of any tribunal from which appeal must by law be brought in SJC (MRAP 1[b]). SJC regulates appeal procedure to full court of single justice's relief denial from trial court interlocutory ruling. (MRAP 1[b]; SJC Rule 2.21). Direct review, or further review following Appeals Court decision, will be permitted by SJC when majority of Appeals Court justices considering or deciding particular case determine such review to be in public interest, or when two SJC justices (for direct review) or three SJC justices (for further review) so determine. (c. 211A, §§10-11; MRAP 11 and 27.1). Party with right to remove its case to Superior Court after adverse decision by Appellate Division may not appeal to SJC prior to trial in Superior Court. (396 Mass. 303, 486 N.E.2d 26). Filing Motions Requirement; contact Susan Mellen, Clerk of Supreme Judicial Court for Commonwealth, John Adams Courthouse, Suite 1-400, One Pemberton Square, Boston, MA 02108-1724. Tel: (617) 557-1020; website: http://www.mass.gov/courts/sjc/commonwealth_clerk.html.

To Appeals Court.

Appeal may be taken to Appeals Court from decision of appellate tax board (c. 58A, §13; c. 211A, §10), Land Court, Housing Court or Superior Court (c. 211A, §10; c. 231, §113), Probate Court (c. 211A, §10), Appellate Divisions of District Court and Boston Municipal Court (c. 211A, §10; c. 231, §109) and criminal sessions of District Court and Boston Municipal Court (c. 211A, §10 as amended by 1992, c. 379, §66), except that Appeals Court may not review first degree murder convictions (c. 211A, §10). Appeals Court Clerk: Ashley Ahearn, John Adams Courthouse, One Pemberton Square, Boston, MA 02108; tel: (617) 725-8106; website: http://www.mass.gov/courts/courtsandjudges/courts/appealscourt/courtadmin.html.

To Appellate Division.

Civil appeals from decisions of District and Municipal Courts to Appellate Division of those Courts are governed by District/Municipal Courts Rules for Appellate Division Appeal (DMRA). These rules govern appeals in all civil actions commenced and any court action occurring on or after July 1, 1994. (DMRA 1A).

Notice of appeal along with filing fee must be filed with clerk of trial court and served on all parties by appellant. (DMRA 3[a]). Notice of appeal must contain items set forth in DMRA 3. Notice of appeal must be filed within ten days after date of entry of judgment in case being appealed. (DMRA 4). Ten-day extension may be granted upon showing of excusable neglect or other good reason. (DMRA 4[c]).

Appeals may be made in three different forms: Expedited Appeal—appropriate when issues limited and clearly defined. (DMRA 8A Comments). Must be filed within 20 days of filing notice of appeal and must contain items set forth in DMRA 8A(a). Filing deadlines and parties to be served expedited appeal and briefs are set forth in DMRA 8A(b), (c). Objections timely made will automatically terminate expedited appeal. (DMRA 8A[b]). Agreed Statement of Case—may be used if expedited appeal fails; allows parties to frame issues for appeal in brief form. (DMRA 8B Comment). Parties must file with trial court agreed statement of case ("Asoc") within 30 days of filing notice of appeal or termination of expedited appeal. (DMRA 8B[b]). "Asoc" must contain items set forth in DMRA 8B(b). Statement deemed approved by trial judge unless within 15 days of filing trial judge enters disapproval order, to be served on all parties by clerk. (DMRA 8B[c]). Filing deadlines and parties to be served "Asoc" and briefs are set forth in DMRA 8B(d). Appeal on Record of Proceedings—appropriate if complex issues or dispute as to nature of issues. (DMRA 8C Comments). Parties must file and serve Appeal on Record of Proceedings ("Arop") within 30 days of filing notice of appeal or termination of procedures under Expedited Appeal or Agreed Statement of Case. (DMRA 8C[b]). "Arop" must contain items set forth in DMRA 8C(b). Filing deadlines and parties to be served "Arop" and Record are set forth in DMRA 8C(c)-(g).

General provisions for filing and service (DMRA 13); computation and extension of time (DMRA 14); briefs and other papers (DMRA 16-20); oral arguments (DMRA 22). See also c. 231, §108.

Notice of Appeal.

Massachusetts courts have no jurisdiction over party not named in notice of appeal. Time for filing notice of appeal runs from date of entry on docket even if notice is never mailed to counsel. (Mass. R. Civ. P. 77). Notice of appeal filed before timely post-trial motion under Rules 50(b), 52(b) or 59 is nullity and new notice required.

Procedure for appeals from adjudications and orders of commitment in proceedings brought pursuant to c. 119, §27 governed by Interim Supplemental Rules of Appellate Procedure in Care and Protection Cases. Claim of appeal must be filed with clerk of trial court within 30 days of entry of adjudication or order of commitment. (Interim Supp. MRAP 3[c], compare c. 119, §27).

Report; Interlocutory Review.

Review of trial court verdict or finding by reporting case to Appeals Court may be granted by trial court sua sponte or upon motion. (c. 231, §111; Mass. R. Civ. P. 64). Trial court may also report case before trial or decision where parties agree in writing as to all material facts. (c. 231, §111; Mass. R. Civ. P. 64). Report of case is treated for purposes of MRAP as notice of appeal, and plaintiff in civil action, defendant in criminal action, treated as appellant. (c. 231, §112A; MRAP 5).

Interlocutory review of finding or order of trial court available if court reports that its finding or order so affects merits of controversy that interlocutory determination by appellate court is desirable. (c. 231, §111; Mass. R. Civ. P. 64). Interlocutory review of finding or order by single justice of SJC similarly available if justice reports that his findings or order so affects merits of controversy that matter ought to be determined by full SJC or Appeals Court. (c. 231, §112; Mass. R. Civ. P. 64[a], [b]). Absent interlocutory report by trial court, any party aggrieved by interlocutory order of justice of Housing Court, Land Court, Superior Court or Probate Court (but not of SJC single justice) may file petition within 30 days of order in Appeals Court seeking relief from order. (c. 231, §118).

Stay of Proceedings; Appeal Bond.

Execution generally stayed until time for appeal expires; after appeal taken execution of judgment ordinarily stayed pending decision on appeal. Unless otherwise ordered, judgment not stayed in injunction, receivership action. (Mass. R. Civ. P.62). Application for stay of judgment or order of lower court pending appeal may be made to appellate court or to single justice thereof upon showing that application to lower court for relief is impracticable or has been denied. Stay of judgment or order may be conditioned upon filing of bond or other appropriate security in trial court. (See MRAP 6.)

Extent of Review.

Except in extraordinary case, only legal issues raised by parties below are subject to review. (388 Mass. 491, 446 N.E.2d 1385). In actions tried without jury, trial court's findings of fact will not be set aside unless clearly erroneous. (Mass. R. Civ. P. 52). In actions to be tried, without jury, trial court must accept master's subsidiary findings of fact unless they are clearly erroneous, mutually inconsistent, unwarranted by evidence as matter of law, or are otherwise tainted by error of law. (Mass. R. Civ. P. 53). To extent that court adopts them, findings of master are considered findings of court. (Mass. R. Civ. P. 52).

Review of Administrative Decisions.

Judicial review of any administrative regulation, or of sufficiency of reasons for adoption as emergency regulation, is by action for declaratory relief under c. 231A, unless otherwise provided in particular instances. (c. 30A, §7). Ordinarily review of final decision of administrative agency in adjudicatory proceeding is instituted in Superior Court. (c. 30A, §14).

5.04 BONDS:

Requirements for giving of security by applicant for temporary restraining order or preliminary injunction (Mass. R. Civ. P. 65[c]), and for stay or injunction pending appeal (MRAP 6[b]) are same as in federal courts, except Mass. R. Civ. P. 65(c) also provides exemption from requirement of giving security to commonwealth, any political subdivision of commonwealth and any officer or agency of commonwealth or any political subdivision thereof. Defendant whose property has been attached in civil action may at any time dissolve attachment by giving bond with sufficient sureties. (c. 223, §120). Plaintiff, plaintiff's attorney, master in chancery, or court must approve bond. Sureties must satisfy plaintiff, or magistrate must find bond suffices to cover attachment allowing for defendant's debt. (c. 221, §§120, 125). Approval of bond requires written application to magistrate. (c. 223, §§121, 125). Bond may be required when appeal is taken from interlocutory or final judgment affecting injunction. (Mass. R. Civ. P. 62[c]). Mass. R. Civ. P. 65.1 governs procedural requirements for security).

Sureties.

Requirements vary in accordance with type of bond, court rules and local practice.

Enforcement.

Massachusetts rule governing proceedings against sureties (Mass. R. Civ. P. 65.1) is same as federal rule. Judgment may be entered against surety for full penal sum of bond, but execution will issue only for amount provided by statute. (c. 235, §§9, 10).

5.05 CERTIORARI:

Jurisdiction.

SJC or Superior Court. (c. 249, §4).

Grounds.

Petitioner for certiorari must show: (1) Errors of law were committed (353 Mass. 540, 233 N.E.2d 316); (2) in judicial or quasi-judicial proceeding (administrative actions excluded [354 Mass. 759, 236 N.E.2d 87]) which is not according to course of common law and not otherwise reviewable by motion or appeal (see also c. 249, §4); (3) such errors appear on face of record and are so substantial and material that, if allowed to stand, will result in manifest injustice or substantial injury to petitioner; (4) lack of any other available remedy (318 Mass. 681, 63 N.E.2d 561; 355 Mass. 79, 242 N.E.2d 868). (See also c. 249, §4.)

Proceedings.

Civil action in nature of certiorari may be commenced in SJC or Superior Court within 60 days after close of proceedings complained of. (c. 249, §4). Writs of certiorari have been abolished and petitioner must file motion to obtain relief pursuant to Mass. R. Civ. P. (Mass. R. Civ. P. 60[b], 81[b]). Petition is addressed to sound discretion of court (338 Mass. 450, 155 N.E.2d 791), but party aggrieved by final judgment may appeal to full court of SJC or, from judgment in Superior Court, to Appeals Court (c. 211A, §10) unless direct review by SJC is required under c. 211A, §10A or §10B. See category 6 Courts and Legislature, topic 6.01 Courts.

Review.

Appropriate standard of review determined according to nature of action sought to be reviewed. (379 Mass. 794, 401 N.E.2d 113).

5.06 CHARITABLE IMMUNITY:

See topic 5.09 Damages.

5.07 COMMISSIONS TO TAKE TESTIMONY:

See topic 5.11 Depositions and Discovery.

5.08 COSTS:

Costs are awarded to prevailing party by statute and taxed by clerk of court. (c. 261, §§1, 19). Costs do not include attorney's fees unless granted by statute (e.g. c. 93A and c. 231, §59H), but may include witness fees, entry fees, traveling expenses, premiums on bonds to dissolve attachment, expenses of taking depositions if reasonably necessary (Mass. R. Civ. P. 54[e]) and up to $500 for costs of plans, drawings, photographs and certified copies of records actually used at trial (c. 261, §25A). Exception to general rule, that legal fees are not recoverable as damages, allows insured under homeowner's policy to recover reasonable attorney's fees and expenses incurred in establishing insurer's duty to defend. (426 Mass. 93, 686 N.E.2d 989). Court may award costs only after conducting hearing and making findings of reasonable necessity. (413 Mass. 320, 597 N.E.2d 404). With certain exceptions, plaintiffs in Superior Court recovering less than $100 receive no costs. (c. 261, §4). Costs may be doubled or trebled, excluding witness fees, copying costs and deposition costs. (c. 261, §11). Costs incurred in appeal may be allowed by court before which appeal is heard. (c. 261, §22). Costs may include expenses and attorney's fees when court finds that party has brought insubstantial, frivolous or bad faith claims or defenses. (c. 231, §§6E-6G and c. 231, §59H). Award of costs bears interest from date of order. (404 Mass. 112, 533 N.E.2d 1341). Costs recoverable against commonwealth allowed only by authority of statute. (409 Mass. 89, 564 N.E.2d 998). Costs may be imposed against commonwealth in civil actions initiated by commonwealth. (c. 261, §14).

Security for Costs.

Where no plaintiff is an inhabitant of Massachusetts, an endorser for costs, who is a responsible inhabitant, must be furnished. (c. 231, §42).

Liability of Attorney.

Attorney in case is not, as such, liable for costs, but where no plaintiff is inhabitant of Massachusetts, signature of attorney on complaint constitutes endorsement for costs. (183 Mass. 102, 66 N.E. 422).

Indigent Persons.

Upon filing an affidavit of indigency, court may grant a waiver, substitution or payment by commonwealth of normal fees and costs. (c. 35, §12; c. 261, §§27A-27G). Persons claiming indigency must execute waiver authorizing probation officer to obtain person's wage and tax information for purpose of verifying indigent status. Party misrepresenting indigency subject to fine. (c. 211D, §21/2). Payment of court costs for indigent parties should be delivered to state treasurer. (c. 35, §12). Indigent party who recovers in excess of three times total amount of fees or costs waived or paid must repay total amount thereof to clerk or register of court. (c. 261, §27E).

5.09 DAMAGES:

Common law generally prevails as to compensatory damages except as noted.

Punitive damages are allowed only by statute. Instances of such statutes are: (1) At least double, and up to treble, damages plus reasonable attorney's fees for willful unfair trade practices (c. 93A, §§9 and 11); (2) certain frauds in selling goods at auction (c. 100, §12); (3) actions by third persons to recover gambling losses (c. 137, §1); (4) damages caused by dog after it is ordered to be restrained (c. 140, §159); (5) attorney who fails to pay over money collected (c. 221, §51); (6) minimum of $5,000 for willful or grossly negligent conduct resulting in death (liability of employer to employee excluded) (c. 229, §2; see category 13 Estates and Trusts, topic 13.05 Death, subhead Actions for Death); (7) willful damage to trees (c. 242, §7); (8) willful damage to farm property (c. 242, §7A); and (9) employer who retaliates against any person required to report child abuse or neglect who does so liable for treble damages, costs and attorneys' fees. (c. 119, §51A).

Comparative negligence rule has been adopted. (c. 231, §85). Contributory negligence does not bar recovery if plaintiff's negligence is not greater than total amount of negligence attributable to defendants, but any damages allowed must be diminished in proportion to amount of negligence attributable to injured party. Defense of assumption of risk abolished. (c. 231, §85).

Wrongful Death.

See category 13 Estates and Trusts, topic 13.05 Death, subhead Actions for Death.

Charitable Immunity.

If tort is committed in course of any activity carried on to accomplish directly charitable purposes of body, liability in any cause of action shall not exceed $20,000 (exclusive of interest and costs). There is no such limitation if tort is committed in course of activities "primarily commercial in character" even though carried on to obtain revenue to be used for charitable purposes. (c. 231, §85K). No director, officer or trustee of charitable educational institution who is unpaid for such services shall be liable solely by reason of such services for harm to another resulting from good faith activities performed within scope of official duty unless damage or injury caused by wilful or wanton misconduct or said person's operation of motor vehicle. (c. 231, §85K).

Sovereign Immunity.

Scope defined by c. 258. Public departments and agencies, other than certain authorities and other independent public agencies (c. 258, §1), are liable as if they were private individuals if negligent act or omission of public employee responsible was within scope of his office or employment (c. 258, §2). But remedy does not extend to punitive damages or any damages in excess of $100,000 per plaintiff or to prejudgment interest (c. 258, §2); to any claim based upon public employee's performance of, or failure to perform, discretionary act (c. 258, §10); to any claim arising out of intentional tort (c. 258, §10), to any claim arising out of collection of taxes or lawful detention of goods by law enforcement officer, or to several other claims (c. 258, §10). Remedy is exclusive (c. 258, §2) and requires that written claim be presented within two years, be denied in writing by executive office of public employer and civil action brought within three years, after cause of action arose (c. 258, §4), except for claims asserted by third-party complaint, cross-claim, counterclaim or small claims against housing authorities (c. 258, §4). Remedy precludes action against public employee or estate for injury caused by negligent or wrongful act committed within scope of office or employment, provided, however, that public employee provides reasonable cooperation to public employer in his defense. (c. 258, §2). Superior Court has jurisdiction of all civil actions brought against public employer (c. 258, §3), except that district court and housing court have jurisdiction over civil actions brought against housing authorities (c. 258, §3). Small claims against housing authorities must be brought within three years. (c. 258, §4).

No-Fault Insurance.

See category 23 Transportation, topic 23.01 Motor Vehicles, subhead No-fault Insurance.

Uniform Contribution Among Tortfeasors Act adopted with revisions. (c. 231B). Right of contribution exists in favor of joint tortfeasor who has paid more than his share of common liability. (c. 231B, §1). In determining pro rata shares, relative degrees of fault shall not be considered. (c. 231B, §2). Enactment of comparative negligence statute (c. 231, §85) did not repeal by implication this statute (395 Mass. 76, 478 N.E.2d 930). Contribution is available with respect to settlement entered into by tortfeasor to pro rata extent that amount paid was reasonable. (c. 231B, §1).

5.10 DECLARATORY JUDGMENTS:

See topic 5.15 Judgments.

5.11 DEPOSITIONS AND DISCOVERY:

Rules 26-37, Mass. R. Civ. P., Mass. and R. Dom. Rel. P. substantially similar to Federal Rules. Significant differences are noted as follows: Mass. R. Civ. P. 29, broadens procedures which may be modified by stipulation; Rule 30, leave of court must be obtained if: (i) deposition is to be taken prior to expiration of 30 days after service of summons and complaint, or (ii) there has been hearing before master; Rule 30(b) seven days written notice of deposition is required and if production of documents and tangible items are required at taking of deposition, deposing party must give at least 30 days written notice; and Rule 37, as applied by Probate and Dist./Mun. courts, in which contempt order may issue only if refusal to obey discovery order is willful and only willful failure to produce person for physical examination justifies imposition of sanctions; otherwise, Mass. R. Civ. P. 37 does not require willfulness. Rule 30A authorizes taking of audio-visual depositions and provides procedure to be followed. Depositions in actions not governed by Mass. R. Civ. P. are governed by c. 233, §§24-45.

Discovery Methods.

Discovery may be obtained by: depositions upon oral examination or written interrogatories; written interrogatories; production of documents or things; permission to enter upon land or property for inspection or other purposes; physical and mental examinations; requests for admission. (Mass. R. Civ. P. 26[a]).

Scope of Discovery.

Parties may obtain discovery of any matter which is not privileged and which is relevant to subject matter of pending action. Information inadmissable at trial may be discovered if it appears reasonably calculated to lead to discovery of admissable evidence. (Rule 26[b]).

Materials Prepared for Trial.

May be discovered if party seeking discovery shows (a) substantial need of materials in preparing party's case and (b) party unable to obtain without undue hardship their substantial equivalent by other means. If discovery ordered, court shall protect against disclosure of mental impressions, legal theories, of representatives of party to litigation. (Rule 26[b][3]).

Supplementation of Responses.

Generally, party who has responded to discovery request has no duty to supplement response to include after-acquired information, except (1) as to question directly addressed to: identity or location of person with knowledge of discoverable matters, identity of expert witness, subject matter or substance of expert testimony, (2) response given was incorrect, when given, or is no longer correct and circumstances are such that failure to supplement is in substance known concealment, or (3) court order, agreement of parties, or new request to supplement. (Rule 26[e]).

Depositions of Persons Outside of State.

Deposition to obtain testimony or documents or other things may be taken outside commonwealth on reasonable written notice. Court may commission person to administer oath or may issue letter rogatory. (c. 223A, §10). As to persons before whom depositions may be taken, see Mass. R. Civ. P. 28 (identical to Federal Rule 28).

Use of Depositions.

Rule 32 of Mass. R. Civ. P. is substantially similar to Federal Rule 32 except that under Mass. R. Civ. P. 32[a][3][B] deposition of witness found to be “out of The Commonwealth” may be used and that Mass. R. Civ. P. 32[c] has not been abrogated as in Federal Rules.

Before Whom Taken.

Depositions must be taken before an officer authorized to administer oaths under laws of commonwealth, of U.S., or before a person appointed by court in which proceeding is pending. Outside commonwealth depositions may be taken on notice before a person authorized to administer oaths in place in which examination is held by law thereof or by laws of U.S.; or before a person commissioned by court. (Mass. R. Civ. P. 28).

Recording.

In actions governed by Mass. R. Civ. P. recording by other than stenographic means permitted pursuant to Mass. R. Civ. P. 30[b][4] by order of court upon motion with notice and opportunity to be heard in opposition or by written stipulation of all parties. Where testimony is to be recorded by audio-visual methods, provisions of Rule 30A apply. In other actions electronic recording is permissible pursuant to c. 233, §30.

Production of Documents.

May be obtained upon request by party to any other party pursuant to Mass. R. Civ. P. 34 (same as Fed. R. Civ. P. 34) in actions to which they apply. If request is made in conjunction with taking of deposition, 30 days written notice for compliance must be given to party (Rule 30[b][5]), but subpoena duces tecum to nonparty witness is governed by Rule 45.

Depositions may be taken by telephone, by leave of court upon motion with notice and opportunity to be heard in opposition or by written stipulation of all parties. (Rule 30[b][7]).

Audiovisual Depositions.

Oral deposition may be recorded by audio-visual methods by leave of court upon motion with notice and opportunity to be heard in opposition or by written stipulation of all parties. Except by leave of court, notice of taking audio-visual deposition must not be served sooner than six months after commencement of action. Simultaneous stenographic record must also be prepared unless parties otherwise stipulate or upon court order. Upon motion with notice and opportunity to be heard court may in interest of justice allow introduction of audio-visual deposition as evidence. (Rule 30A).

Audiovisual Depositions of Experts.

Party may take oral deposition of own expert by audiovisual means and use as evidence at trial in place of oral testimony, unless court orders otherwise. (Rule 30A[m]). Notice pursuant to Rule 30A must also state deposition will be recorded by audiovisual means for use at trial. (Rule 30A[m][3]).

Within Commonwealth for Use Elsewhere.

On application by any interested person, or in response to letter rogatory, Mass. court may order person domiciled or found within commonwealth to testify or to produce documents for use in proceeding pending outside commonwealth. (c. 223A, §11).

Perpetuating Testimony.

Mass. R. Civ. P. 27 regulates taking of depositions for purposes other than discovery. It is identical in substance to Federal Rule 27.

Commissions.

Commissions are issued by the court. (Mass. R. Civ. P. 28).

Compelling Attendance of Witnesses.

Witness may be compelled to attend deposition by subpoena issued pursuant to Rule 45. Service may be made by anyone over 18 who is not party. Subpoena may not be served before service of deposition notice (which is complete upon mailing). Unless by court order, no Massachusetts resident may be compelled by subpoena to attend deposition more than 50 airline miles from his home or place of work, whichever is nearest to place designated for taking of deposition.

Letters Rogatory.

Deposition may be taken outside U.S. before person appointed in response to letter rogatory. Letter should be addressed “To the Appropriate Authority in [insert name of country]”. (Rule 28).

Interrogatories.

Any party may serve interrogatories on any other party; party can serve as of right no more than 30 interrogatories on any one party. (Rule 33[a]). Interrogatories may be served on plaintiff after action commenced, and on any other party with (or after) service of summons and complaint on that party. Party served must, within 45 days, answer each interrogatory, or state, in

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lieu of answer, objection and reasons for objection. Court may order further interrogatories which must be answered within 30 days of order's filing. (Rule 33[a]). If answer to interrogatory may be derived from business records, and burden of deriving answer is substantially same for both party served and party serving, it is sufficient answer to specify records concerned and afford party serving opportunity to examine them. (Rule 33[c]).

Production of Documents, Things, Entry Upon Land.

Any party may serve on any other party request to provide documents and tangible things, or to enter upon land for purpose within scope of discovery. (Rule 34[a]).

Examination of Persons.

If physical/mental condition of party, or person in party's custody, is in controversy, court may order, for good cause shown, that person submit to physical/mental examination. (Rule 35[a]). If party against whom order issued requests, party causing examination must deliver detailed written report of examination and is entitled to receive reports of any other examination of same condition. If party requests examination report, or deposes examiner, party waives any privilege regarding testimony of any person who has, or may, examine him or her in respect of same mental/physical condition; but does not otherwise waive right to object at trial to introduction of report of any part thereof. (Rule 35[b]).

Requests for Admissions.

Party may serve on any other party written request for admission of truth of any discoverable matter, including application of law to fact and genuineness of documents. (Rule 36[a]). Matter is admitted unless, within 30 days of service, party served denies matter, or serves written, signed objection. Defendant not required to serve answers or objections before expiration of 45 days after summons and complaint served unless court shortens time. (Rule 36[a]). Any matter admitted is conclusively established unless court, on motion, permits withdrawal or amendment of admission. (Rule 36[b]).

5.12 EQUITY:

See topics 5.02 Actions, 5.19 Practice.

5.13 EVIDENCE:

See topic 5.11 Depositions and Discovery.

Witnesses.

Caveat: SJC has not adopted proposed Rules of Evidence modeled after Federal Rules but has invited parties to cite such proposed Rules whenever appropriate.

Privileged Communications.

Confidential communications by client to attorney cannot be disclosed by attorney without client's consent, but client who voluntarily testifies may be asked whether he or she will waive privilege. (374 Mass. 320, 372 N.E.2d 764). All memoranda, communication and other work product made during certain mediation of disputes shall be confidential and shall not be subject to disclosure provided that they do not pertain to mediation of labor disputes in presence of mediator. (c. 233, §23C). Certain communications to priests, rabbis, ministers, and Christian Science practitioners are privileged. (c. 233, §20A).

Limited patient-psychotherapist privilege is recognized, except in proceedings for commitment of dangerous patient, in certain child custody, adoption and malpractice cases and in cases where party's mental or emotional condition is at issue. (478 N.E.2d 744, 20 Mass. App. Ct.

919 [Judge, in certain child custody cases, has discretion to force disclosure of patient-psychotherapist communications.]). (c. 233, §20B). Psychotherapist privilege has been expanded to include communications with psychiatric nurse mental health specialist. (c. 233, §20B). Limited privilege is recognized for communications between licensed social worker and patient. (c. 112, §§135-135B). Such communications must be produced if client introduces mental or emotional condition as element of claim and court concludes that importance of disclosure outweighs importance of client-social worker relationship. (c. 112, §135B[c]). Social worker privilege applies only to disclosures “from a person”, not to social worker's personal observations. (c. 112, §§135-135B, 398 Mass. 372, 496 N.E.2d 1368). Confidential communication between abused individual and domestic violence victim's counselor is privileged and in limited circumstances, is inadmissible and not subject to discovery. (c. 233, §20K).

Communications or Transactions with Persons Since Deceased or Incompetent.

In civil action, declaration of deceased person is not inadmissible as hearsay or as private conversation between husband and wife if court finds that it was made in good faith and on personal knowledge of declarant. (c. 233, §65). If party to action who has filed answers to interrogatories dies, so much of such answers as court finds have been made upon personal knowledge of deceased shall not be inadmissible as hearsay or self-serving if offered in evidence in said action by representative of deceased party. (c. 233, §65A). If suit against executor or administrator is supported by oral testimony of decedent's promise or statement, evidence of decedent's statements, memoranda, acts and habits tending to show improbability of alleged statement or promise are admissible. (c. 233, §66).

Self-Incrimination.

Privilege against self-incrimination exists. (Massachusetts Constitution, Declaration of Rights, Art. XII, G. L. c. 233, §20C; c. 3, §28).

Competency.

All persons of sufficient understanding may testify except that neither husband nor wife is allowed to testify to private conversation with other (except in desertion and nonsupport proceedings, paternity proceedings and child abuse [including incest] proceedings and as noted below) and (except as aforesaid) neither can be compelled to testify against other in criminal proceeding. Nor can unemancipated minor child living with parent testify against parent in criminal proceeding where victim not family member residing in household. (c. 233, §20). Person accused of crime is deemed competent witness at his own request only and his failure to testify creates no presumption against him. (id.). Religious belief is not necessary to render person competent as witness. (c. 233, §19). Nor does fact that person has been convicted of crime incapacitate him from acting as witness, but conviction may be shown as affecting witness' credibility, provided conviction is offered within statutory period of time. (c. 233, §21; 367 Mass. 169, 326 N.E.2d 320). Evidence of witness' record of conviction for traffic violation resulting in fine only may not be shown, unless he has been convicted of another crime within five years. (c. 233, §21). Party who calls witness is prohibited from impeaching witness' credit by evidence of bad character. (c. 233, §23; 367 Mass. 117, 324 N.E.2d 624).

Evidence may not be shown before any grand jury or court of rape victim's reputation with regard to sexual conduct. (c. 233, §21B).

Child, age three years, eight months, is competent to testify when child understands obligation to tell truth, although child is unable to explain meaning of “punishment”. (c. 233, §20, 398 Mass. 325, 496 N.E.2d 652). Child, age five years, competent to testify where child understands importance of telling truth and punishment for not doing so although no oath taken. (36 Mass. App. Ct. 583, 633 N.E.2d 1062).

Testimony of mentally retarded person may be taken by alternative procedures if court determines person will suffer trauma or loss of functioning or communicative abilities. (c. 233, §23E[b][1]). In such case, familiar person may sit near witness and testimony may be taken outside of courtroom or videotaped outside presence of jury. (c. 233, §23E).

Oath or Affirmation.

Witness may be sworn according to ceremonies of his peculiar religion. Person not believer in any religion shall be required to testify truly under penalties of perjury, and evidence of his disbelief in existence of God may not be received to affect his credibility as witness. (c. 233, §19).

Foreign Criminal Cases.

Residents of this state may be compelled to attend as witnesses at criminal trials in state of Maine or in any adjacent state under penalty of not more than $300 fine by subpoena issued by any justice of peace, upon receipt of certificate from clerk of court of record in such other state that prosecution is there pending and that such resident is supposed to be material witness therein. (c. 233, §§12, 13).

Admissibility of Certain Out-of-Court Statements.

Under certain circumstances certain out-of-court statements by sexually abused children under age of ten admissible in abuse and custody cases. (c. 233, §§81, 82, 83).

5.14 INJUNCTIONS:

Jurisdiction.

SJC, Superior Court, Probate Court and Housing Court may in their discretion issue under their general equity powers restraining orders, preliminary or permanent injunctions, except that Superior Court has exclusive original jurisdiction of all actions in which injunctive relief is sought in any matter involving or growing out of labor dispute. (See Mass. R. Civ. P. 65, based on Fed. R. Civ. P. 65; c. 214, §1; c. 215, §6; c. 220, §2; c. 185C, §3; and topic Practice).

Prerequisites.

Injunction never is issued except to prevent irreparable injury. (224 Mass. 152, 112 N.E. 853). Temporary restraining order may be granted without notice to adverse party if it clearly appears from specific facts shown by affidavit or by verified complaint that immediate and irreparable injury, loss or damage will result to applicant before adverse party can be heard. (See Mass. R. Civ. P. 65[a], based on Fed. R. Civ. P. 65) Preliminary injunction requires notice. (Mass. R. Civ. P. §65[b]). Granting of preliminary injunction requires showing of irreparable injury, likelihood of success on merits, and balancing of risks to parties. (380 Mass. 609, 405 N.E.2d 106; 417 Mass. 329, 629 N.E.2d 1321). See subhead Misappropriation of Trade Secrets, infra.

Procedure.

Governed generally by Mass. R. Civ. P. 65, based on Fed. R. Civ. P. 65. Fee of $90 plus surcharge (see category 6 Courts and Legislature, topic 6.01 Courts, subhead Superior Court, catchline Filing Fees) is imposed for issuance of injunction. (c. 262, §§4, 4C). Appeals from interlocutory orders concerning injunctive relief governed by c. 231, §118.

Temporary Injunctions.

See supra, subheads Jurisdiction; Prerequisites.

Bond.

Governed by Mass. R. Civ. P. 65(c), equivalent to Federal Rule.

Labor Disputes.

Requirements generally governed by statute. (c. 214, §6; c. 149, §20C). See category 11 Employment, topic 11.02 Labor Relations.

Misappropriation of Trade Secrets.

Injunctive relief available to prevent taking, receiving, concealing, assigning, transferring, leasing, pledging, copying, or otherwise using or disposing of trade secret regardless of value. Preliminary injunction “shall” be granted against former employee using employer's trade secret in directly competitive capacity, where competition, conversion and use of trade secret are in violation of written employment agreement. (c. 93, §42A).

Unauthorized Use of Name, Portrait or Picture.

Injunctive relief available if such is used for advertising or trade purposes; damages and treble damages may also be awarded. (c. 214, §3A).

Consumer Protection.

Injunctive relief available to any person who suffers loss as result of unfair or deceptive acts or practices. (c. 93A, §§9, 11). Injunction may be obtained by attorney general or aggrieved party against deceptive advertising. (c. 266, §91B).

Right to Privacy.

Superior Court has equitable jurisdiction to protect privacy rights against unreasonable, substantial, or serious interference therewith. (c. 214, §1B).

Unlicensed Mental Health or Health Professional, Sexual Contact.

C.12, §11L generally. Injunctive relief available to Attorney General against unlicensed mental health professional or unlicensed health professional for sexual contact with patient or client, or former patient or client. (c. 12, §11L[b]). Violation of injunction subject to criminal penalties or civil contempt. (c. 12, §11L[f] and [g]).

5.15 JUDGMENTS:

Mass. R. Civ. P. govern procedure in Superior Courts, District Courts, and Municipal Courts, and Mass. R. Dom. Rel. P. govern procedure in certain cases in Probate Court. Rules are substantially similar and, unless otherwise indicated, version appropriate for court in question should be consulted.

Judgments by Consent.

Consent judgments in certain motor vehicle cases are regulated by c. 231, §140A.

Judgments on Pleadings.

Mass. R. Civ. P. 12(c), equivalent to Federal Rule; deleted in Mass. R. Dom. Rel. P.

Summary Judgments.

Mass. R. Civ. P. 56, equivalent to Federal Rule; deleted in Mass. R. Dom. Rel. P.

Declaratory Judgments.

When an actual controversy has arisen, Supreme Judicial, Superior, Land and Probate

Courts may make binding declarations of right, duty, status and other legal relations, before or after breach or violation. (c. 231A, §1). Superior Court has jurisdiction to enjoin, and to determine legality of, administrative practices and procedures of any municipal, county or state agency or official alleged to be in violation of Constitution of U.S. or Constitution or laws of commonwealth, or which are in consistent violation of rules or regulations promulgated under authority of such laws. (c. 231A, §2). See also Mass. R. Civ. P. 57.

Default Judgments.

Mass. R. Civ. P. 55, equivalent to Federal Rule; deleted in Mass. R. Dom. Rel. P.

Offer of Judgment.

Mass. R. Civ. P. 68, substantially similar to Federal Rule; deleted in Mass. R. Dom. Rel. P.

Docketing.

See infra, subhead Entry.

Vacation or Modification.

Mass. R. Civ. P. 59-60, substantially similar to Federal Rules, except that Mass. R. Civ. P. 59 allows additur in court's discretion.

Lien.

Judgment is not lien, and no judgment or decree affecting the title to real estate has effect against third persons not having actual notice unless recorded in registry of deeds (or in case of registered land, registered [c. 185, §§86, 88]) with description of land, but such record may be made within 60 days if notice of pendency of action was so recorded and in case of unregistered land entry of ordinary attachment of real property in registry of deeds is considered notice of pendency of action (c. 184, §17; c. 185, §86). Judgment may be sued on in civil action.

Revival.

No statutory provisions.

Assignment.

A judgment may be assigned like any other chose in action.

Satisfaction.

Upon satisfaction of judgment entry thereof should be made in court. Judgment of court of record of U.S. or any state is presumed paid 20 years after rendition. (c. 260, §20).

Actions.

An action may be brought on a judgment.

Foreign Judgments.

A foreign judgment is proved by an authenticated copy of record. (c. 233, §69).

Interest.

Judgment bears interest from day entered at prejudgment rate. (c. 235, §8). Legal interest rate is 6%. (c. 107, §3). Prejudgment interest rate 12% per annum from date action commenced. (c. 231, §6B). In actions based on contractual obligations, court clerk must add interest to damages at contract rate or rate of 12% per annum from date of breach or demand or from date action commenced. (c. 231, §6C).

Judgments Nunc Pro Tunc.

Judgment of Supreme Judicial, Superior or Land Courts bears date as of date of entry, unless court orders it to be entered as of an earlier day than that of entry. (c. 235, §4).

Judgment on Frivolous Demurrer.

Mass. R. Civ. P. 12, substantially similar to Federal Rule.

Entry.

Mass. R. Civ. P. 58, substantially equivalent to Federal Rule.

Stay.

Mass. R. Civ. P. 62, substantially similar to Federal Rule except that no execution shall issue upon judgment until time for appeal from judgment has expired. Automatic stay of Mass. R. Civ. P. 62 is inapplicable to interlocutory or final judgment in action for injunction or in receivership action. For stay of such judgments, application to court must be made. (c. 231, §116). See also Mass. R. Dom. Rel. P. 62.

Uniform Enforcement of Foreign Judgments Act not adopted.

Uniform Foreign Money-Judgments Recognition Act adopted. (c. 235, §23A).

Judgment Notes and Contracts.

See category 3 Business Regulation and Commerce, topic 3.02 Bills and Notes.

5.16 LIMITATION OF ACTIONS:

Decedents' Estates.

For estates of decedents dying before Jan. 1, 1990, action against executor or administrator by creditor of deceased is barred unless creditor either: (a) Presents claim within four months of executor's or administrator's giving bond and, if disallowed, commences action within 60 days of notice of disallowance, or (b) commences action within nine months of executor's or administrator's giving bond, whichever is later; and unless, in either case, process is served by delivery in hand upon executor or administrator or service thereof accepted by him or notice stating name of estate, name and address of creditor, amount of claim, and court in which action has been brought is filed in proper registry of probate. (c. 197, §9).

Foregoing claim procedure is abolished for estates of decedents dying on or after Jan. 1, 1990. (c. 197, §9). See category 13 Estates and Trusts, topic 13.10 Executors and Administrators, subhead Presentation of Claims.

Notwithstanding foregoing, action for personal injuries or death, if commenced more than one year after date of death of deceased, may be brought against executor or administrator within three years next after cause of action accrues, provided any judgment recovered in action so brought may be satisfied only from policy of insurance or bond, if any, and not from general assets of estate (c. 197, §9A).

Uniform Commercial Code imposes four year limitation on actions for breach of contract under Code. (c. 106, §2-725). Actions for breach of warranty (at least with respect to personal injuries) may be commenced within three years after date injury and damage occurs. (c. 106, §2-318).

Uniform Fraudulent Transfers Act imposes four year statute of limitations for transfers made with actual intent to hinder, delay or defraud creditor, transfers made without receiving consideration of reasonable equivalent value under §6(a). One year limitation is imposed upon transfers arising under §6(b). (c. 254, §§5, 6, 10).

Personal Actions.

Actions are commenced by mailing complaint and fee to, or filing complaint and fee with, clerk. (Mass. R. Civ. P. 3). Civil action is timely commenced under Mass. R. Civ. P. 3 if postmark is within applicable statute of limitations. (878 F.2d 556). But see 412 Mass. 464 (civil action untimely when postmarked within statutory period prescribed by c. 30A, §14, but received and filed by clerk after expiration of statutory period). See also 71 F.3d 29 (action in Federal Court not commenced for limitations purposes either by mailing copy of complaint to district court or by facsimile transmission of incomplete copy of complaint). Actions must be begun within following times next after cause of action accrues:

Within 20 years: Actions on contracts under seal, on bills, notes, or other evidences of indebtedness issued by a bank, on promissory notes signed in the presence of an attesting witness, if brought by the original payee or his executor or administrator; actions on contracts not limited by any other statutory provision; and actions to recover for support of inmates in state institutions (c. 260, §1); also, judgments of courts of record within U.S. are presumed to be paid and satisfied at the expiration of 20 years (c. 260, §20).

Within six years: Actions on contracts, other than those to recover for personal injuries founded upon contracts or liabilities express or implied not included in §1, except judgments of courts of record of this or any other state or of U.S. (c. 260, §2).

Within four years: Actions against sheriffs for misconduct or negligence of their deputies (c. 260, §3); breach of contract of sale subject to reduction by agreement of the parties to not less than one year (c. 106, §2-725); actions arising under Mass. Antitrust Act (c. 93, §13) or any consumer statute, including c. 93A (c. 260, §5A).

See also subhead Uniform Commercial Code, supra.

Within three years: Actions against commonwealth, certain political subdivisions, certain public employees under c. 258 (see topic 5.09 Damages, subhead Sovereign Immunity); except as otherwise provided, actions for tort, actions of contract to recover for personal injuries and actions of replevin (c. 260, §2A); actions for assault and battery, false imprisonment, slander, libel, actions against sheriffs, deputy sheriffs, constables, or assignees in insolvency, for taking or conversion of personal property; actions of contract or tort for malpractice, error or mistake against hairdressers, operators and shops registered under c. 112, §§87T-87JJ; actions against cities, towns or counties for personal injuries or property damage arising out of operations of vehicle owned by, or under control of, city, town, or county; actions of tort for bodily injury or death from accidents where liability is by law required to be secured by motor vehicle liability bond or policy of insurance or by deposit with division of highways (c. 260, §4); actions of contract or tort for malpractice, error or mistake against attorneys, certified public accountants, public accountants (c. 260, §4); actions of contract or tort for malpractice, error or mistake against physicians, surgeons, dentists, optometrists, hospitals and sanitoria (in no event later than seven years after occurrence of event alleged to be cause of injury on which action based except where action based on leaving foreign object in body) (c. 260, §4); suits by judgment creditors to reach and apply obligation of insurer to judgment debtor, where judgment is in tort action for injury, death or property damage against officers or employees of, or arising out of operation of motor or other vehicles owned by, commonwealth, metropolitan district commission, or counties, cities or towns (c. 260, §4); and suits on motor vehicle liability bonds (c. 260, §4); actions of tort arising out of hit and run accidents may, notwithstanding any other provision of law, be commenced within six months after plaintiff learns of identity of defendant providing written notice of time, place and facts of accident is given to police and registrar of motor vehicles within 30 days after such accident and providing action is brought within three years after accident (c. 260, §4B); actions for negligence or breach of warranty (at least with respect to personal injuries) where Massachusetts Uniform Commercial Code applies (c. 106, §2-318); actions for personal injury or death against administrator or executor, or against decedent if no executor or administrator appointed (c. 197, §9A); actions against persons, cities, towns or counties for personal injury or property damage due to defect or disrepair of public way if notice given within 30 days (c. 84, §18); actions arising from violations of any law intended for protection of civil rights (c. 260, §5B). For actions of wrongful death generally, see category 13 Estates and Trusts, topic 13.05 Death, subhead Actions for Death. For actions under “Take-Over Bid” statute, c. 110C, see category 3 Business Regulation and Commerce, topic 3.24 Securities, subhead Tender Offers.

Within two years: Actions against guardians, trustees or conservators on any contract made or act done by them as such, except actions on probate bonds or in favor of estate or of any beneficiary or ward, or of commonwealth (c. 260, §11); or against fire insurance companies (c. 175, §99); actions to recover premiums paid to an insurance company when policy was procured through fraud, cause of action accruing at date of issue of policy (c. 175, §181); claims for personal injury, death and property damage against Massachusetts Bay Transportation Authority (c. 161A, §21); claims under minimum fair wage law (c. 151, §20A); actions to recover damages for destruction of fine art (c. 260, §2C). See category 13 Estates and Trusts, topic 13.05 Death, subhead Actions for Death.

Within one year: Actions against executors or administrators on any contract made or act done by them as such, excepting actions on probate bonds or in favor of estate or of any beneficiary or ward, or of commonwealth (c. 260, §11); certain actions to recover back wages (c. 260, §4A). Actions, except consumer protection actions referred to in c. 260, §5A, for which limit is four years, for penalties or forfeitures under penal statute if brought by person to whom penalty or forfeiture is given in whole or in part, must be brought within one year after offence is committed; if penalty of forfeiture is given in whole or in part to commonwealth, action by commonwealth may be brought within two years. (c. 260, §5). For actions under “Take-Over Bid” statute, c. 110C, see category 3 Business Regulation and Commerce, topic 3.24 Securities, subhead Tender Offers. Actions for personal injury or death caused by Dalkon Shield intrauterine device must be brought against Dalkon Shield Claimants Trust no later than one year from date of certification by U.S. Dist. Ct. for E.D. Virg. or by six months from 7/1/95, whichever is later. (c. 260, §2E; 1995, c. 5, §§200, 358).

Within six months: See subhead Uniform Commercial Code, supra.

Within sixty days: Civil actions in nature of certiorari. (c. 249, §4).

Accounts.

In action on mutual and open account current, the action is deemed to accrue from the date of the last item proved. (c. 260, §6).

Counterclaims.

Limitation period applied to permissive counterclaim as if sued on at time complaint filed; no limitation applies to mandatory counterclaim not exceeding plaintiff's claim. (c. 260, §36).

Design, Planning and Construction.

Actions of tort for damages arising out of any deficiency or neglect in design, planning, construction or general administration of improvement to real property shall be commenced only within three years next after cause of action accrues; provided, however, that in no event shall such actions be commenced more than six years after earlier of opening of improvement to use, or substantial completion and taking of possession by owner. Same provisions apply to improvements to real property of public agency, except that no such action may be commenced more than six years after earlier of: (1) Official acceptance of project, (2) opening to public use, (3) acceptance by contractor of final estimate by public agency, or (4) substantial completion and taking of possession by public agency. (c. 260, §2B). Any action brought by or on behalf of any county, city, town, regional school district, housing authority, or commonwealth to recover cost of asbestos related corrective actions shall be commenced within six years of discovery. (c. 260, §2D).

New Actions.

If an action is seasonably begun and fails for defect in process, or for certain other reasons not affecting merits, or if judgment for plaintiff is vacated or reversed, a new action, if one lies, may be brought within a year, though period of limitation has elapsed. (c. 260, §32).

Foreign Causes of Action.

The plaintiff cannot maintain his suit if it has become barred by laws of any state or country while he resided there. (c. 260, §9). This rule does not apply, however, to action brought in commonwealth against defendant who has been subject at all relevant times to service of process in commonwealth, in which case out-of-state statute of limitations is not borrowed. (399 Mass. 533, 505 N.E.2d 526). Whether to apply statute of limitations of forum state or foreign state is decided by applying significant relationship test, and is no longer procedural question resulting in automatic application of forum state's statute. (419 Mass. 658, 647 N.E.2d 42). Forum selection clauses in contracts are enforceable if enforcement is fair and reasonable. (419 Mass. 572, 646 N.E.2d 741).

Disabilities of Plaintiff.

If plaintiff was minor or incapacitated by reason of mental illness when action accrued, time runs only from removal of disability. (c. 260, §7). “Discovery” rule, whereby action does not accrue until plaintiff has knowledge or sufficient notice that he was harmed and knowledge or sufficient notice of what cause of harm was, applies to psychotherapeutic malpractice (409 Mass. 239, 565 N.E.2d 780) and child sexual abuse (c. 260, §4C; 79 F.3d 1). In medical malpractice suits only, infant must commence action within three years or before ninth birthday, whichever is later, but in no event later than seven years after occurrence of event alleged to be cause of injury on which action based except where action based on having foreign object in body. (c. 231, §60D).

Absence or Concealment of Defendant.

Absence of defendant from commonwealth while in military service does not toll limitations statute if defendant retains domicile in commonwealth. (109 Mass. 40). Fact defendant nonresident does not toll statute if service available under long-arm statute or as nonresident motorist. (c. 223A, §6; c. 90, §3A; 372 Mass. 271, 361 N.E.2d 1247). Statute tolled if defendant is or becomes nonresident during period of nonresidency but no action may be brought on cause of action barred by laws of foreign jurisdiction while defendant resided there. (c. 260, §9). If person entitled to bring action dies before same is barred, or within 30 days thereafter, action may be brought by executor or administrator at any time within period within which deceased might have brought action or within two years of his giving bond, or within three years when executor or administrator knew or should have known of factual basis for claim. (c. 260, §10). If person liable to action dies before action is barred, action may be brought against executor or administrator within one year after death of deceased if within same year process has been served by delivery in hand upon executor or administrator or service thereof accepted by him or notice filed in proper registry of probate. (c. 197, §9).

Interruption of Statutory Period.

See subhead Absence or Concealment of Defendant, supra.

Revival of Barred Claims.

An acknowledgment or new promise, to be evidence of a new or continuing contract, must be in writing, signed by the party chargeable. (c. 260, §13). A part payment of principal or interest, though not evidenced by writing, may renew the contract as to the party making it, but is not sufficiently proved by an endorsement by the party to whom it is made. (c. 260, §14). An acknowledgment, new promise or payment by one does not affect his joint contractor or the latter's executor or administrator. (c. 260, §15).

Contractual Limitations.

Time within which action against common carrier on bill of lading may be brought may be limited by contract, provided limitation is reasonable. (285 Mass. 232, 189 N.E. 98).

Pleading.

Defense of statute of limitations may be raised by motion to dismiss or judgment on pleadings but ordinarily it must be specifically pleaded. (Mass. R. Civ. P. 8[c]; 396 Mass. 278, 485 N.E.2d 947).

Concealment of Action.

If the person liable fraudulently conceals the cause of action, the period prior to discovery of his cause of action by the plaintiff is excluded. (c. 260, §12).

Conditions Precedent.

As to limitation of time for giving notice as condition precedent to certain actions, see topic 5.02 Actions.

Residence Outside State When Action Accrues.

If the defendant resides out of commonwealth when action accrues, statute runs only from his return; if after action accrues he leaves commonwealth, period of his absence, if such absence amounts to change of residence, is deducted. (c. 260, §9). Not so, however, if defendant can be served, under long arm statute or otherwise. See also subhead Absence or Concealment of Defendant, supra.

Real Actions.

Actions to recover lands or make entry thereon must be brought within 20 years after the right accrued, or within 20 years after the demandant or those under whom he claims were seized. (c. 260, §21).

Entry to constitute possession must be followed by at least one year's open and peaceable possession, or by an action begun upon such entry and seisin within one year after ouster. (c. 260, §28). 20 years bar applies to actions by the state with certain exceptions. (c. 260, §31).

No mortgage shall be foreclosed after expiration of 50 years from recording of same unless extension of same or affidavit that mortgage is not satisfied is recorded within last ten years of such period. (c. 260, §§33-35).

Workmen's Compensation.

Claim for workmen's compensation must be filed within four years of date of injury. (c. 152, §41).

Negligence.

See topic 5.09 Damages.

5.16A PARTITION:

Jurisdiction and Venue.

Any person, except a tenant by entirety, owning a present undivided legal estate in land, not subject to redemption, may file a petition for partition in the Probate Court for any county where any part of land lies. Life tenant or tenant for years of whose term at least 20 years remains unexpired may, in discretion of court, have partition of fee. (c. 241, §§1, 2).

Proceedings.

Petition for partition shall be in alternative, praying for division of land or for either public or private sale of all or any part which court finds cannot be advantageously divided. (c. 241, §6). If court determines that petitioner is entitled to partition, commissioners will be appointed to make partition. (c. 241, §12). Notice of petition must be given either by personal service or by registered mail at least 14 days before return day to all respondents whose addresses are known and to each respondent whose address is not known by mailing notice to last known address at least 14 days before return day and by publishing notice once in each of three successive weeks in such newspaper as court shall order, last publication to be at least one day before return day. (c. 241, §8). Notice of petition must be recorded in registry of deeds for every registry district in which any of land lies. (c. 241, §7).

If any persons are not served personally and do not appear, or are minors or under any disability and have no guardian or other legal representative in this state, or if anyone whose name is unknown or who is unascertained or not in being appears to have an estate as co-tenant, the court will appoint a suitable person to act for him in proceedings. (c. 241, §9).

Partition in Kind or Sale.

Partition is made in kind if possible and, if not, by sale and a division of the proceeds (c. 241, §31) or by setoff upon payment of a just amount. (c. 241, §14).

Costs determined by court and paid by commissioners from proceeds in case of sale and by petitioner in case of division with right of contribution from other parties with vested interests. (c. 241, §22). Contribution from other parties shall be in proportion to interests of parties, unless court finds different proportion more equitable. (Id.).

Probate Court in which petition is brought has equity jurisdiction over all matters relating to partition and over distribution of proceeds of sale. (c. 241, §25).

5.17 [RESERVED]

5.18 PLEADING:

Mass. R. Civ. P. and variants thereof applicable to Departments of Trial Court are substantially similar to Federal Rules. See Mass. R. Civ. P. 1 for scope of coverage. Mass. R. Civ. P. Rules govern all District and Municipal Court civil actions. (Rule 1A). Special and/or Supplemental Rules of Superior, Land, Housing, Probate & Family Departments and rules version applicable to respective courts should be consulted. Superior Court Dept. (617) 788-8130; Land Court Dept. (617) 788-7470; Administrative Office, Housing Court Dept. (617) 788-8485; Administrator Office, Probate and Family Court (617) 788-6600. Website: http://www.mass.gov/courts/contactus.html.

Pleadings Permitted.

Mass. R. Civ. P. 7-15, substantially similar to Federal Rules, except in following principal particulars: Rule 7(a) permits trustee's answer under oath as response to trustee process; Rule 8(a), no jurisdictional statement required; Rule 8(b), signature to instrument and allegation that place is public way taken as admitted unless specifically denied; Rule 10(d) requires statement of each party's residence or usual place of business or statement that they are not known; Rule 11 requires all papers be signed by member of Mass. Bar who shall include telephone number; Rule 12(b)(8) allows defense of misnomer of party; Rule 12(b)(9) allows defense of pendency of prior action; Rule 12(b)(6) requires short, concise statement of grounds on which such defense is based; Rule 12(h) provides that defenses under 12(b), (2), (3), (4), (5), (8) and (9) are waived if not raised in defendant's initial response or amendment thereof as permitted by Rule 15(a); Rule 13, see subhead Counterclaim, Set-off, and Recoupment, infra.

Complaint and Answer.

Claim for relief, whether original claim, counterclaim, cross-claim or third-party claim must contain short and plain statement of claim and demand for judgment. (Rule 8[a]). Every pleading must contain caption with name of court, county, title of action, docket number, and designation as in Rule 7(a). (Rule 10[a]). Complaint only must include names of all parties. (Rule 10[a]). Each averment of claim or defense must be made in numbered paragraphs. Each claim founded in separate transactions and each defense other than denials must be stated separately. (Rule 10[b]).

Frivolous Claims.

Reasonable counsel fees and other defense costs and expenses may be awarded after hearing in civil action if court separately and distinctly finds “that all or substantially all” of claims, defenses, setoffs or counterclaims made by party represented by counsel “were wholly insubstantial, frivolous and not advanced in good faith.” (c. 231, §6F). Frivolous claims advanced by parties not represented by counsel can give rise to award “representing . . . . reasonable costs, expenses and effort in defending against such claims.” Awards can include prejudgment interest at statutory rate set forth in c. 231, §6C. Court must specify in reasonable detail method of computing elements of any award. Assertion of novel or unusual argument or principle of law is not by itself sufficient ground for finding claim frivolous. Awards may not be entered in cases involving default judgment without appearance by defendant, nor in actions settled by parties thereto. Section does not focus on conduct of party prior to trial but on conduct of litigation. (391 Mass. 517, 462 N.E.2d 295). Good faith implies absence of malice and absence of design to defraud or seek unconscionable advantage. (403 Mass. 332, 529 N.E.2d 1334). Poor judgment does not constitute bad faith. (Id.). Party aggrieved by decision on motion made pursuant to c. 231, §6F may file appeal. (c. 231, §6G). See topic 5.03 Appeal and Error.

Time.

Governed by Mass. R. Civ. P. 6 and 12, equivalent to Federal Rules, except: Mass. R. Civ. P. 6(a) omits bad weather exception, excludes weekends and holidays from computation only when period of time prescribed or allowed less than seven days, limits holidays to those in c. 4, §7, or designated by U.S. President, U.S. Congress or commonwealth; Rule 6(b) allows court to extend time by permitting in limited cases, required action by stipulation; Rule 6(c) provides that notice of hearing must be served on opponent not later than seven days before hearing (three days in Probate & Family Court).

Counterclaim, Set-off, and Recoupment.

Governed by Rule 13, substantially similar to Federal Rule except: compulsory counterclaim is not required if pleader's claim is based upon property damage arising out of collision or personal injury, including actions for consequential damages, or death, and Rule 13(j) governs counterclaims in actions transferred, appealed and removed to Superior Court; actions in Land Court for registration and confirmation and tax title foreclosures will not allow counterclaims, except by leave of court. (Rule 13[a]).

Amendments.

See topic 5.02 Actions.

Verification.

Mass. R. Civ. P. 11(a), substantially equivalent to Federal Rule. Mass. R. Civ. P. 65 “Injunctions”, substantially similar to Federal Rule, does not require attorney certification.

Service.

All orders, pleadings and motions must be served on each party. (Mass. R. Civ. P. 5[a]). Service is generally on party's attorney, by delivery or mail. (Rule 5[b]).

Filing.

All papers must be filed with clerk of court within reasonable time after service, except for notices of deposition, deposition transcripts, requests for production under Rule 34 and responses to requests for production under Rule 34. (Rule 5[d]).

Interpleader is available under Mass. R. Civ. P. 22.

Claims for Collection.

In sending claims to Massachusetts for collection, the original instrument should be forwarded, if there be one and if the same is not in the possession of the party, a copy accompanied with reasons for the nonpossession of the original.

If it is upon an open account, the account must be fully itemized and not merely stated, as majority of complaints in such causes are upon account annexed. There should be full statement of facts. If haste is required in making attachment, send letter giving full names of all plaintiffs and defendants (in case of partnership, full names and residences of individual members of partnership, in case of corporation, exact corporate name and state of incorporation) and amount and nature of claim. Motion for ex parte attachment (or trustee process) requires affidavit of specific facts on affiant's knowledge, information and belief as to clear and immediate danger that property of defendant will be conveyed, removed, conceded or destroyed if prior notice given. (Mass. R. Civ. P. 4.1). Court may require bond. (Mass. Gen. Laws Ann. c. 246, §1). If claim is contested it must be proved either by deposition or witnesses. Where trustee fails to satisfy claim within 30 days of judgment plaintiff may commence action to have such satisfied from goods and estate of trustee. (c. 246, §45).

Small Claims.

See category 6 Courts and Legislature, topic 6.01 Courts, subhead District Court and BMC, catchline Small Claims.

5.19 PRACTICE:

Mass. R. Civ. P. govern vast majority of lower court civil cases, and are substantially similar to Federal Rules, with numerous minor variations necessitated by Massachusetts needs and by salutary or ingrained features of existing Massachusetts practice.

Probate Court Rules govern proceedings in Probate Court. Also see Mass. R. Dom. Rel. P. and Uniform Practices (Prob. Cts.). Also, Mass. R. Civ. P. govern proceedings in Probate and Family Court seeking equitable relief. (Mass. R. Civ. P. 1). See category 14 Family, topic 14.06 Divorce, subheads Process, Pleading, Practice.

In addition, practice is regulated by various statutes contained in Mass. Gen. Laws Ann. cc. 211-250, but Rules supersede great many of statutory procedural provisions set forth in those chapters.

Of these statutes, most important are c. 231 dealing with pleading and practice, c. 231A dealing with declaratory judgments, and c. 214 dealing with equity jurisdiction. Latest amendments should be consulted. See also c. 185 concerning Land Court.

Massachusetts Rules of Appellate Procedure (MRAP) govern both civil and criminal appeals. Civil appeals from District and Municipal Court decisions to those courts' Appellate Division governed by District/Municipal Courts Rules for Appellate Division Appeal (DMRA).

Supreme Judicial Court Rules (Mass. Sup. Jud. Ct. R.) conform to changes in practice and procedure introduced by Rules of Civil and Appellate Procedure. Principal effect of amendments is to tailor coverage of certain rules to criminal proceedings not covered by Rules of Civil and Appellate Procedure. In addition (Mass. Sup. Jud. Ct. R.) 3:03 allows certain qualified law school students to appear in court on behalf of indigent parties under general supervision of member of bar.

Discovery.

Governed by Mass. R. Civ. P. 26-37, substantially similar to Federal Rules. Party is limited to total of 30 interrogatories unless leave of court granted to file additional interrogatories. Parties may file more than one set of interrogatories provided aggregate does not exceed 30. Answers and objections due 45 days after service. (Rule 33). For other significant differences, see topic 5.11 Depositions and Discovery. See also infra, subhead Demand For Admission of Facts. See also Mass. Prob. & Fam. Ct., Prob. R. 27A, 27B making rules of Civil Procedure governing discovery and summary judgment applicable to probate court matters. (Probate Rules 27A, 27B).

Demand for Admission of Facts.

Under procedure equivalent to that under Federal Rules, party may request admission of matters within appropriate scope of discovery (Mass. R. Civ. P. 36[a]); matter deemed admitted unless answered or objected to within 30 days of service. If other party fails to admit truth requested but requesting party proves such truth, he may apply to court for order requiring other party to pay his reasonable expenses, including reasonable attorney's fees, in making that proof. (Rule 37[c]).

Jury Trial.

Except for Worcester central District Court and any District Court in Essex county, there is no right of trial by jury, in civil cases, except in Superior Court. (Mass. Gen. Laws Ann. c. 218, §§19A, 19B). Any party may demand jury trial of any issue triable of right by jury not later than ten days after service of last pleading directed to such issue. (Mass. R. Civ. P. 38; Mass. Gen. Laws Ann. c. 231, §102C). Mass. R. Civ. P. 38 applies to District Court proceedings only where jury trial in civil cases provided by statute. (Mass. R. Civ. P. 38[e]; Mass. Gen. Laws Ann. c. 218, §§19A, 19B).

Speedy Trials.

Superior Court may, on motion for cause shown, advance action for speedy trial. (c. 231, §59A). In any civil action in any court of Commonwealth in which one or more parties at time of commencement of proceedings is 65 years of age or older or during pendency of proceeding attains age of 65, court shall, upon motion of such person, advance proceeding for speedy trial. (c. 231, §59F). See also, malpractice cases (c. 231, §59C), election results (c. 231, §59D), housing and redevelopment authorities (c. 231, §59E).

Direct actions against insurer not permitted. (458 F.2d 1299).

Small Claims.

Governed under Uniform Small Claims Rules. See category 6 Courts and Legislature, topic 6.01 Courts, subhead District Court and BMC, catchline Small Claims.

5.20 PROCESS:

See also topics 5.02 Actions, Appeal and Error; category 8 Debtor and Creditor, topics 8.02 Attachment, 8.09 Garnishment.

Caveat.

Attachments of real and personal property available pursuant to c. 223, §42 et seq. Summary attachment declared unconstitutional (see category 8 Debtor and Creditor, topic 8.02 Attachment, catchline Caveat) and previous practice which allowed commencement of actions by serving writ of attachment or trustee process has been abolished. Mass. R. Civ. P. 4.1 provides for notice and hearing in seeking attachment of real and personal property. Rule 4.2 provides similar procedure for attachments sought to be made of goods or credits by trustee process. For summary of attachment procedure in Superior Court and District Court, see category 8 Debtor and Creditor, topic 8.02 Attachment, subheads Grounds, and Proceedings To Obtain.

Generally.

Civil actions are commenced by: (1) Mailing to clerk of proper court by certified or registered mail complaint and entry fee prescribed by law, or (2) by filing such complaint and entry fee with such clerk. (Mass. R. Civ. P. 3). After action is commenced, plaintiff or his attorney delivers copy of complaint and summons for service to sheriff, deputy sheriff, or special sheriff or any other person duly authorized by law. Summons may be obtained in blank from clerk and filled in with appropriate information by plaintiff or plaintiff's attorney. (Mass. R. Civ. P. 4[a]).

Limits of Process.

Process runs throughout state. (c. 223, §20).

Who May Serve.

See infra, subhead Methods of Service.

Defaults.

Mass. R. Civ. P. 55, substantially similar to Federal Rule except Mass. R. Civ. P. 55(b)(1) requires that party seeking default judgment file affidavit that defendant is not infant, incompetent, or in military service.

Time for Service.

Written proof of service must be made promptly and within time during which person served must respond to process, ordinarily 20 days. (Rule 4[f]; see Mass. R. Civ. P. 12). Under Rule 5(f), any paper served by a party and required to be filed with court must be so filed within five days after service.

Methods of Service.

Service of process must be made by a sheriff, deputy sheriff, special sheriff, or any other person duly authorized by law. (Mass. R. Civ. P. 4; Mass. Gen. Laws Ann. c. 220, §7; c. 221, §§70, 78). As to agreement to waive service or issue of process, see category 3 Business Regulation and Commerce, topic 3.02 Bills and Notes. *Caveat,* Rule 4 incorporates existing statutory requirements of service. In domestic relations cases, service may additionally be made by any other disinterested person, and service for contempt for failure to appear may be made by sheriff or police or other duly designated person at fee fixed by Probate Court. (Mass. R. Dom. Rel. P. 4[c]; Mass. Gen. Laws Ann.c. 215, §34A).

1. Individuals.

An individual defendant is served by delivering summons and copy of complaint in hand, or by leaving same at his last and usual place of abode, or if he has none, with his agent, within commonwealth. (Mass. R. Civ. P. 4; 393 Mass. 789, 473 N.E.2d 1097). For district court actions, if service is made at last, and usual place of abode, officer making service shall mail by first class mail copy of summons to such last and usual place of abode. (Mass. Gen. Laws Ann. c. 223, §31). In domestic relations case, service on individual within commonwealth must be by delivering summons and complaint in hand to defendant unless defendant is not amenable to personal service, when service may be by order of notice as prescribed by law. Service at last and usual place of abode and on agent are no longer authorized in domestic relations cases. (Mass. R. Dom. Rel. P. 4[d]). Personal service upon defendant while exercising his right to vote is invalid. (Mass. Gen. Laws Ann. c. 223, §31A). Citations for contempt in proceedings for support of wife or children or under Uniform Interstate Family Support Act may be served by delivering copy of summons and complaint personally, or, by leaving copy of summons and complaint at defendant's last and usual place of abode and by mailing copies to defendant. (Mass. R. Dom. Rel. P. 4[d][2]).

2. Absent Defendants.

No personal action can be maintained against a person who is not an inhabitant of the state, unless he or his agent duly appointed under Mass. Gen. Laws Ann. c. 227, §§5, 5A has been served with process within state or unless service has been made outside state (see Mass. R. Civ. P. 4[e] and Mass. Gen. Laws Ann. c. 223A, §4), or unless effectual attachment of his property (including attachment by trustee process) is made on writ of attachment; and in case of attachment without personal service judgment is valid only to secure application of property attached to satisfaction of judgment. (c. 227, §1). Where no personal service is made on absent defendant or his agent, order of notice, by publication or otherwise, must be obtained. (c. 227, §7). In actions of contract against several defendants, if due service is made on one or more, but, owing to absence from state or other sufficient cause, not on others, action may proceed to judgment against those served. (c. 227, §15). Such judgment if unsatisfied is not bar to future action on same contract against those not served. (Id.). Counterclaim may be brought by defendant against nonresident plaintiff. (c. 227, §2).

Court may also exercise personal jurisdiction over a person domiciled in, organized under laws of, or maintaining his or its principal place of business in, state as to any cause of action. (c. 223A, §2). Court may exercise personal jurisdiction over a person, who acts directly or by an agent, as to cause of action in law or equity arising from person's: (1) Transacting any business in state, including acts which relate to marriages (19 Mass. App. 228, 473 N.E.2d 209; 757 F.2d 448); (2) contracting to supply services or things in state; (3) causing tortious injury by act or omission in state; (4) causing tortious injury in state by act or omission outside state if he regularly does or solicits business, or engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered, in state; (5) having interest in, using or possessing real property in state; (6) contracting to insure any person, property or risk located within state at time of contracting; (7) having lived as party to marriage contract within state for at least one year within two years immediately preceding commencement of action, where plaintiff continues to reside in state and action concerns certain obligations relating to marriage; or (8) having been subject to exercise of personal jurisdiction of Massachusetts court which resulted in child support order where plaintiff and child continue to reside in commonwealth and where plaintiff is pursuing modifications of such order or enforcement thereof (c. 223A, §3). Advertising product in publication distributed in state does not constitute transacting business therein. (375 Mass. 149, 376 N.E.2d 548). When service is authorized outside state it may be made, when reasonably calculated to give actual notice, (1) In any appropriate manner prescribed for service within state; (2) in manner prescribed by law of place in which service is made for service in that place in action in any of its courts of general jurisdiction; (3) by any form of mail addressed to person to be served and requiring signed receipt; (4) as directed by foreign authority in response to letter rogatory; or (5) as directed by court. (Mass. R. Civ. P. 4[e]; Mass. Gen. Laws Ann. c. 223A, §6).

3. Infants and Insane Persons.

The practice is to require the same service upon infants and persons under guardianship or of unsound mind as upon other defendants and then to give notice to guardian, if any. (171 Mass. 303, 50 N.E. 612).

4. Corporations.

Service of process in action against municipal corporation may be made on treasurer or clerk. (Mass. R. Civ. P. 4[d][4]).

Services of process in an action against a domestic corporation may be made on officer, managing or general agent, or person in charge of business or other duly authorized agent, and if no such person is found, court, upon plaintiff's application, may issue order of notice in manner and form prescribed by law. (Mass. R. Civ. P. 4[d][2]). If, after diligent search, no person is found upon whom service of process may be made, service may be made upon State Secretary. (Mass. Gen. Laws Ann. c. 223, §37).

There are special provisions for service on parishes and religious societies and proprietors of wharves, general fields and certain real estate who are incorporated. (Id.)

In addition to service upon State Secretary (c. 181, §15), any foreign corporation having its principal or usual place of business in commonwealth, or which is engaged in or soliciting business in commonwealth, may be served with process in same manner as domestic corporation (Mass. R. Civ. P. 4[d][2]; Mass. Gen. Laws Ann. c. 223, §38). Constitutionality of this provision with regard to soliciting business has not been decided by SJC, but see 149 U.S. 194, and 205 U.S. 530. (See catchline Absent Defendants, supra.).

5. Voluntary Associations.

In actions against a voluntary association under a written instrument or declaration of trust with transferable shares service may be made on any trustee or like officer thereof. (Mass. Gen. Laws Ann. c. 223, §40). Any other voluntary association can be sued at law only by serving all members thereof. (327 Mass. 409, 99 N.E.2d 155). If membership is too numerous, action can be brought against class representatives as long as class adequately represents membership. (Mass. R. Civ. P. 23.2). Unincorporated association subject to suit within state under common name may be served with process in same manner as domestic corporation. (Mass. R. Civ. P. 4[d][2]). (See category 2 Business Organizations, topic 2.02 Associations.)

6. Partnerships.

Service is made on partners individually in manner described above. (275 Mass. 120, 175 N.E. 159).

7. Service on Commonwealth or agency thereof is made by delivery of summons and complaint to Boston office of attorney general, and, in case of agency, to its office, its chairman, member, its secretary or clerk. Service may be effected by certified or registered mail. (Mass. R. Civ. P. 4[d][3]).

Agents for Service of Process.

Foreign corporation doing business or having usual place of business or owning or leasing real estate or engaged in construction or building projects in commonwealth must file with State Secretary name and address of resident agent (Mass. Gen. Laws Ann. c. 181, §4); and any such corporation which does business here without in fact appointing resident agent or whose resident agent cannot be found after diligent search or who refuses to act as such, is deemed to have appointed State Secretary its attorney for service of process (c. 181, §15). Foreign insurance companies (c. 175, §151), and fraternal benefit societies (c. 176, §36), before being admitted to do business here must appoint commissioner of insurance such attorney.

Nonresidents and foreign partnerships doing business here must appoint an agent for service of process and, under certain circumstances in default of such appointment, service may be made on city or town clerk. (See category 21 Property, topic 21.01 Absentees; c. 227, §§5, 5A).

Nonresident Plaintiffs.

Complaints, summons, writs and other processes in which plaintiff is a nonresident must before entry be endorsed by some responsible person who is an inhabitant of state, such endorser is liable for all costs awarded against plaintiff. (c. 231, §§42-45, 47-48).

Nonresident Motorist.

For service of process growing out of a motor vehicle accident, see category 23 Transportation, topic 23.01 Motor Vehicles, subhead Action Against Nonresidents.

Long Arm Statute.

See subhead Methods of Service, catchline 2. Absent Defendants, supra.

5.21 REPLEVIN:

Although Massachusetts statutes providing for summary writs of replevin have not been repealed (c. 247) or amended, similar statutes in other states were held unconstitutional by U.S. Supreme Court in 407 U.S. 67. But see 416 U.S. 600; cf. 419 U.S. 601 (summary garnishment unconstitutional because bond only means of dissolution, no provision for early hearing and defendant deprived of use of property during proceeding). Furthermore, Mass. R. Civ. P. do not provide special procedure for replevin, and Reporter's Notes to Mass. R. Civ. P. 2, state that relief in nature of replevin is available under Rules, but that right to obtain immediate possession by summary process is abolished. However, c. 214, §3 does give SJC and Superior Court original and concurrent jurisdiction over actions to compel redelivery of goods and chattels taken or detained from owner. Mass. R. Civ. P. 65.2 provides that in action brought pursuant to c. 214, §3 order that party redeliver goods may be made ex parte pursuant to Mass. R. Civ. P. 65(a) and existing law governing temporary restraining orders or with notice and hearing pursuant to Rule 65(b) and existing law governing preliminary injunctions. Security required of applicant in amount determined by court to cover costs and damages to person wrongfully enjoined or restrained. (Mass. R. Civ. P. 65.2 and accompanying Reporter's Notes).

5.22 SEQUESTRATION:

Rarely used in this state. Still lies for enforcement of decrees. (c. 214, §4; 21 Mass. [4 Pick.] 507; 53 Mass. [12 Met.] 363). Preservation of property, title to which is in litigation, pending determination, may be accomplished by receivership. (215 Mass. 194, 102 N.E. 438). Chattels and choses in action may be sequestered. (147 Mass. 81, 17 N.E. 75).

See category 8 Debtor and Creditor, topic 8.02 Attachment.

5.23 SERVICE:

See topic 5.20 Process.

5.24 STAY OF EXECUTION:

See category 8 Debtor and Creditor, topic 8.05 Executions, subhead Stay.

5.25 SUBMISSION OF CONTROVERSY:

Agreement as to facts is generally called “statement of the case” or “agreed statement”. (MRAP8[d]).

5.26 VENUE:

Local Actions.

Actions concerning land are local and must be brought where the land lies, except that actions for rent, use and occupation or breach of covenant are considered transitory. (c. 223, §3). If land lies in more than one county, action in most cases may be brought in either county. (c. 223, §12).

Replevin actions are local and must be brought where goods are detained. (c. 223, §4).

Transitory actions in SJC and Superior Court, if at least one party lives in Massachusetts, must (subject to certain exceptions) be brought in county where one of parties lives or has usual place of business. (c. 223, §1). Action on assigned claim other than negotiable instrument must be brought in any county in which it could have been brought by assignor. If neither party lives in commonwealth, action may be brought in any county. (c. 223, §1). In action in which trustee process is used, action may be brought in county where any trustee lives or has usual place of business, except that if all trustees live or have usual places of business in one county action must be brought in that county. (c. 246, §2). Subject to certain exceptions, actions in Superior Court for injuries received by reason of negligence which may not be brought in District Court must be brought in county where injury was received or where plaintiff lives or has usual place of business. (c. 223, §7).

Transitory actions in District Court (other than small claims proceedings, as to which see category 6 Courts and Legislature, topic 6.01 Courts, subhead District Court and BMC, catchline Small Claims) must be brought in any county where one of parties lives or has usual place of business or in judicial district adjoining judicial district in which one of parties lives or has usual place of business or, in action commenced by trustee process, in county where trustee lives or has usual place of business, and in either case, in judicial district (or adjoining judicial district thereto) therein where party or one of trustees lives or has usual place of business; except that action may be brought in BMC if venue otherwise exists under c. 218, §54 (c. 223, §2) and except that motor vehicle tort actions may be brought either in judicial district where one party lives, in judicial district adjoining and in same county as judicial district in which defendant lives or has his usual place of business, or, if one party lives in Suffolk County, in BMC (c. 218, §21). Action against nonresident may be brought in District Court in county in which personal service on nonresident or attachment of his property is made. (c. 223, §2). Small claims proceedings may be brought in judicial district where either party lives or has his usual place of business or employment provided that action brought against landlords or lessors of land or tenements rented for residential purposes and arising out of such property or rental, may be also brought in judicial district in which property is located. (c. 218, §21).

Actions by or against an executor or administrator may be brought wherever testator or intestate might have sued or been sued at date of his decease. (c. 223, §11).

Change of Venue.

Provision is made for change of venue in case of error, possible prejudice, or improper venue for trustee process. (c. 223, §§13, 15; c. 246, §§3, 4A).

Witness.

See topic 5.13 Evidence, subhead Witnesses.

6 COURTS AND LEGISLATURE

6.01 COURTS:

United States District Court.

http://www.mad.uscourts.gov. E-mail address for clerk's office business inquiries: USDC-BostonInfo@mad.uscourts.gov. Clerk's Offices: Sarah Allison Thornton, Clerk, John Joseph Moakley U.S. Courthouse, One Courthouse Way, Suite 2300, Boston, MA 02210, tel: (617) 748-9152; Federal Building & Courthouse, 1550 Main St., Springfield, MA 01103, tel: (413) 785-0015; Harold D. Donohue Federal Building & Courthouse, 595 Main St., Worcester, MA 01608, tel: (508) 929-9900. U.S. District Court for District of Massachusetts will relocate its Western Division on August 22, 2008, from 1550 Main Street, Springfield, MA, to 300 State Street, Springfield, MA, 01105, tel: (413) 785-6800.

Massachusetts comprises one Federal District.

Sittings.

Court sits regularly at Boston, Worcester and Springfield.

Special sessions anywhere in district at discretion of any judge on request of party or otherwise. (U.S. Dist. Ct. Mass. Local R. 77.1).

Filing Fee.

On commencement of a civil action a filing fee of $350 is required. Fee of $5 for filing application for writ of habeas corpus. (28 U.S.C.S. §1914[a]).

Electronic Filing.

Pleadings and other papers must be filed, signed, and served electronically unless exemption applies or court orders otherwise; civil case opening documents must, however, be filed and served in paper format. (U.S. Dist. Ct. Mass. Local R 5.4). Pro se litigants exempt from requirement if incarcerated or not registered users. (Rule 5.4[G][2][b]).

Supreme Judicial Court.

Massachusetts Supreme Judicial Court, John Adams Courthouse, One Pemberton Square, Suite 2500, Boston, MA 02108, tel: (617) 557-1000. Clerk of Supreme Judicial Court for the Commonwealth, Susan Mellen, John Adams Courthouse, One Pemberton Square, Rm 1-400, Boston, MA 02108; tel: (617) 557-1020; fax: (617) 557-1145; e-mail: SJCCommClerk@sjc.state.ma.us.

Generally.

Supreme Judicial Court is governed by c. 211.

Jurisdiction.

See also subhead Appeals Court, infra. SJC sitting en banc has appellate jurisdiction of questions of law arising before single justice of court, or in Appeals, Superior, Probate, Land and Housing Courts, or in appellate division of any District Court or of BMC, or from trial by jury in any of several district courts which are permitted by statute to conduct such trials, and authority to review orders or rulings of certain administrative bodies. Concurrent jurisdiction with Appeals Court. Where appellate review is not within jurisdiction of Appeals Court, then appellate review shall be directly to SJC. Supreme Judicial Court holds concurrent appellate jurisdiction with Appeals Court for determinations made with certain other court departments. (c. 211A, §10). Additionally, further appellate review by Supreme Judicial Court may be decided where majority of Appeals Court justices certifies that case is of public interest or it furthers interest of justice, and three justices of Supreme Judicial Court authorize review. (c. 211A, §11). See subhead Appeals Court, catchline Appellate Review. With exceptions noted under subhead Superior Court, catchline Civil Jurisdiction, SJC has original jurisdiction of all matters cognizable under general principles of equity, and may exercise equity powers in various special cases provided for by statute. Equity cases are tried before single justice of court, but court may direct issues to be framed for trial by jury, or may transfer for partial or final disposition in superior or probate court, respectively, any cause within concurrent jurisdiction of such court. It may also direct any cause within such concurrent jurisdiction brought in Superior or Probate Court, to be transferred in whole or in part to SJC. Court has jurisdiction to issue all writs and processes to such courts and to corporations and individuals which may be necessary to furtherance of justice and to regular execution of laws. (c. 211, §3). It has original jurisdiction, concurrent with Probate, Superior and Land Courts, of declaratory judgment proceedings. (c. 231A, §1). First Mon. of every month is return day for writs and other processes. In addition to foregoing jurisdiction, court has original and exclusive jurisdiction of some special proceedings.

Court is always open in every county, and business may be transacted at any time; and in any county court may make orders, render judgments or decrees, and transact business in cases pending in any other county. Full court sits in Boston, see catchline Sittings of Full Bench, infra, and has jurisdiction of all matters that arise in, or that might be heard by it in, any county, and it may upon application and in its discretion, direct a case to be heard by full court sitting in any county and for commonwealth.

Sittings of Single Justice.

Justice of court sits in Boston to hear all matters within jurisdiction of a single justice, including cases in equity and motions arising therein in any county. Party must apply to justice to appoint time and place for hearing. (Mass. Sup. Jud. Ct. R. 2:07). Weekly list for hearing in Boston will be made up on which cases from any county may be set down, either by order of court, or by agreement of counsel; the hearing of which is subject to court's discretion..(Mass. Sup. Jud. Ct. R. 2:18). Matters will normally be heard in Boston, but single justice, in his discretion, may set any matter for hearing in any place within commonwealth. For rules governing practice before single justice see Mass. Sup. Jud. Ct. R. 2:01-2:20.

Sittings of Full Bench.

A law sitting of court for commonwealth is held in Boston on first Mon. of each month from Oct. through May. (Mass. Sup. Jud. Ct. R. 1:02).

Filing Fees.

$270 for application for further appellate review; $315 for entry of complaint, petition, or other action (single justice); $150 for entry of appeal to full bench per appellant; $90 for issuance of injunction or restraining order. Fees also apply to Appeals Court. (c. 262, §4). For surcharge see subhead Superior Court, catchline Filing Fees, infra.

Appeals Court.

Massachusetts Appeals Court, John Adams Courthouse, One Pemberton Square, Boston, MA 02108, tel: (617) 725-8106; fax: 617-523-2845. Clerk: Ashley Ahearn, tel: (617) 725-8106.

Generally.

Massachusetts Appeals Court is governed by c. 211A.

Jurisdiction.

Original jurisdiction over final orders of labor relations commission (c. 211A, §5); concurrent appellate jurisdiction with SJC with respect to determinations made in Appellate Tax Board, Superior Court, Housing Court, Land Court, Probate Court, and Family Court BMC in criminal session, BMC appellate division, Juvenile Court, District Court in criminal session and District Court appellate division, except in review of convictions for first degree murder. (c. 211A, §10).

Appellate review if matter is within jurisdiction of Appeals Court shall be in first instance by Appeals Court except (a) whenever two justices of SJC issue an order for direct review either at request of party or at court's own initiative, upon finding that questions to be decided are: (1) Questions of first impression or novel questions of law which should be submitted for final determination by SJC, (2) questions concerning constitution of commonwealth or U.S. which have been raised in court of commonwealth, and (3) questions of such public interest that justice requires final determination by SJC; and (b) whenever Appeals Court as body or majority of justices thereof considering particular case certifies that direct review by SJC is in public interest. Appellate review is direct to SJC if matter not within jurisdiction of Appeals Court. (c. 211A, §10; MRAP 11).

Appeals Court may prior to or after final determination report any case or any question of law arising therein to SJC for determination if, in opinion of Appeals Court, unusual public or legal significance of matter or efficient administration of justice so requires. SJC may remand such case or questions to Appeals Court if no determination has been made by Appeals Court. SJC may transfer to Appeals Court any case or issue pending before it which has not been determined by Appeals Court, including those within SJC's original jurisdiction and its direct appellate jurisdiction. (c. 211A, §12).

There shall be no review by SJC of any matter within jurisdiction of Appeals Court which has been decided by Appeals Court, except: (a) where majority of justices of Appeals Court deciding case or Appeals Court as a whole certifies that public interest or interests of justice make further appellate review desirable, or (b) where leave to obtain further appellate review is specifically authorized by three justices of SJC for substantial reasons affecting public interest or interests of justice. Decision of panel of Appeals Court may be reviewed and revised by majority of justices of full court. Such review shall not be condition precedent to obtaining further appellate review by SJC. (c. 211A, §11).

Party aggrieved by interlocutory order of Superior Court, Housing Court, Land Court, Family Court or Probate Court may, within 30 days of entry of order, petition single justice of Appeals Court seeking relief from such order. Relief, and whether hearing is granted, is at discretion of justice. (c. 231, §118). Party aggrieved by interlocutory order of Superior Court, Housing Court or Probate Court affecting preliminary injunction or party aggrieved by interlocutory order of single justice granting relief may, within 30 days of entry of order, appeal (as matter of right) to Appeals Court or SJC. (c. 231, §118).

Law governing presentation of cases to SJC for appellate review, except as to printing records and briefs, applies to presentation of cases to Appeals Court. (c. 211A, §13). See category 5 Civil Actions and Procedure, topic 5.03 Appeal and Error.

Sittings.

Appeals court may sit in Boston and at such other locations within commonwealth as SJC determines by rule or order. (c. 211A, §4). Court sits regularly in Boston second and third Mons., Oct. through May. (Mass. App. Ct. R. 1.26).

Documents Submitted.

Unless rules prescribe another form, application for order or other relief must be made by filing motion with proof of service on all other parties. (MRAP 15[a]). Contents of briefs prescribed. (MRAP 16). Provision regarding non-complying briefs changed to required certificate of compliance from counsel effective Oct. 1, 2005. (MRAP 16[k]). Detailed requirements for appendices. (MRAP 18). Any findings, written or oral, or memorandum of decision by trial court pertinent to appellant issue, must be included in addendum to appellant's brief. MRAP 16(a)(6). In addition, page limitation on principal briefs is 50 pages, exclusive of table of contents, tables of citations and any addendum containing statutes, rules, regulations, etc.; reply briefs, 20 pages. (MRAP 16[h]). Amicus curiae brief may be filed only by leave of appellate court or single justice granted on motion or at appellate court's request unless brief is presented by commonwealth. (MRAP 17).

Trial Court.

See c. 211B. Trial Court consists of seven departments: Superior Court Dept.; Housing Court Dept.; Land Court Dept.; Probate and Family Court Dept.; Boston Municipal Court Dept.; Juvenile Court Dept.; District Court Dept. (c. 211B, §1). (Each department is referred to by its court, e.g. Superior Court for Superior Court Dept., and Probate and Family Court is referred to as Probate Court.) Generally, departments are further subdivided into divisions. See category 5 Civil Actions and Procedure, topic 5.02 Actions, subhead Consolidation and Separate Trial.

Superior Court.

See c. 212.

Civil Jurisdiction.

In general, Superior Court has original jurisdiction of all civil actions, except those of which other courts are expressly given exclusive original jurisdiction. (c. 212, §4). It has exclusive original jurisdiction over claims against commonwealth, complaints for flowing lands, civil actions for foreclosure of mortgages and of other real and mixed actions not within jurisdiction of Land or District Courts (c. 212, §3) as well as over actions in which injunctive relief is sought in any matter involving or growing out of labor dispute (c. 214, §1). Superior Court has original and concurrent jurisdiction, with SJC, over all cases and matters of equity (c. 214, §1); Superior Court has original and concurrent jurisdiction, with SJC, Probate Court and Land Court, over actions for declaratory judgment (c. 231A, §1). Superior Court also has appellate jurisdiction of decisions of commission against discrimination (c. 151B, §6), of orders approved by associate commissioners of dept.t of labor and industries (c. 149, §9), of decisions of certain municipal planning authorities including decisions of zoning boards of appeal (c. 40A, §17), of orders making betterment assessments (c. 80, §7), and of decisions and orders of governmental bodies not specifically mentioned above. In addition, Superior Court has jurisdiction to review orders of certain other governmental bodies not hereinabove specifically mentioned. Any civil action may be transferred by motion of party or on court's motion to District Court or in the Boston Municipal Court where action was filed for trial in Superior Court and there is no reasonable likelihood damages will exceed $25,000. (c. 231, §102C). Party aggrieved by decision of BMC or District Court after such transfer from Superior Court may have case retransferred for determination by Superior Court. (c. 231, §102C). Party aggrieved by decision of BMC or District Court in case which could not have been transferred to Superior Court in first instance may have case redetermined by Superior Court. (c. 231, §97).

Criminal Jurisdiction.

Superior Court has original jurisdiction of all crimes. (c. 212, §6).

Jury Trials.

Constitutional right to trial by jury. (Const. pt. 1, Arts. XII, XV). Civil cases at law are tried before jury if either party so demands. Otherwise before justice of court alone. (Mass. R. Civ. P. 38, 39). All criminal trials are before jury with qualification that defendants in other than capital cases may waive trial by jury. (Mass. Gen. Laws Ann. c. 263, §6; Mass. R. Crim. P. 19).

Sittings (c. 212, §14).—

Barnstable County: Barnstable. (508) 375-6684.

Berkshire County: Pittsfield. (413) 499-7487.

Bristol County: Taunton, New Bedford, Fall River. (508) 823-6588.

Dukes County: Edgartown. (508) 627-4668.

Essex County: Salem (978) 744-5500; Lawrence (978) 687-7463; Newburyport (978) 462-4474.

Franklin County: Greenfield. (413) 774-5535.

Hamden County: Springfield. (413) 735-6017 for civil; (413) 735-6016 for criminal.

Hampshire County: Northampton. (413) 584-5810x287.

Middlesex County: Woburn. Lowell. (781) 939-2700.

Nantucket County: Nantucket. (508) 228-2559.

Norfolk County: Dedham. (781) 326-1600.

Plymouth County: Plymouth (508) 747-6911; Brockton (508) 583-8250.

Suffolk County: Boston. Main and Crim. clerk (617) 788-8160; Civ. clerk (617) 788-8175; App. Div. (617) 788-7795.

Worcester County: Worcester (508) 770-1899.

Business Court.

Business litigation session of Superior Court specializes in business cases originating in Suffolk County. (Super. Ct. Admin. Directive No. 03-1).

Filing Fees.

$240 for filing complaint; $90 for issuance of injunction or restraining order; $30 for filing petition to county commissioners. Clerk must collect $20 security fee for every civil case. (c. 262, §4A). There is also surcharge of $15 on any initial filing fee in any court except for entry of small claims action, for which surcharge is $10. (c. 262, §4C).

Probate Court.

See c. 215. For each county there is division of Probate and Family Court, also known as “probate court,” “court of insolvency,” or “probate and insolvency court”. (c. 215, §1).

Jurisdiction.

Probate Courts are courts of superior and general jurisdiction over matters within their jurisdiction. (c. 215, §2). Probate Court has jurisdiction of probate of wills and of granting administration of estates; of appointment of guardians and conservators; of changes of names by individuals; of petitions by married women concerning their separate estate and for matters relating to care, custody, support and maintenance of minor children; of paternity matters; of actions for divorce or for affirming or annulling marriage; of health care proxies; of petitions for adoption of children; of all matters relative to administration of moneys appropriated on account of French spoliations; and of partition of real estate held in common. (c. 215, §§3-4; c. 241, §2). Probate Court has original and concurrent jurisdiction in equity with SJC and Superior Court of all cases and matters of equity cognizable under general principles of equity jurisprudence. (c. 215, §6). Court also has concurrent jurisdiction in equity with SJC and Superior Court of all matters relating to administration of estates of deceased persons, to wills, to trusts and to guardianship and conservatorship and of any other matters of which Probate Court has jurisdiction. (c. 215, §6). Court also has concurrent jurisdiction with SJC and Superior Court and Land Court of declaratory judgment proceedings. (c. 231A, §1). See also c. 185, §1(5). Probate courts and land court have concurrent jurisdiction over petitions for partition. (c. 241, §2).

If more than one division of court has jurisdiction, court in which proceedings are first begun retains exclusive jurisdiction. (c. 215, §7). Petition for relief from interlocutory order may be made to single justice of Appeals Court. (c. 231, §118). Appeal of interlocutory order granting, continuing, modifying, refusing or dissolving preliminary injunction may as matter of right be made to Appeals Court. (c. 231, §118). Petition or appeal must be within 30 days of entry of interlocutory order. (c. 231, §118). Appeal of final decree or order must be made within 30 days of court entry and is to Appeals Court or, under certain circumstances, to full court of SJC. (c. 215, §9). See category 5 Civil Actions and Procedure, topic 5.19 Practice. Appeal of allowance or disallowance of claims by commissioners in insolvency appointed by division of court is to Superior Court. (c. 198, §§2, 11). See category 5 Civil Actions and Procedure, topic 5.19 Practice, subhead Discovery. Rules of Civil Procedure governing discovery and summary judgment applicable to probate court matters. (Mass. Prob. & Fam. Ct., Prob. R. 27A, 27B).

Sittings (c. 215, §62).—By single judge at place and time appointed by Chief Justice.

Filing Fees.

Various filing fees according to Probate and Family Court Dept. Uniform Fee Schedule, revised Nov. 2007: http://www.mass.gov/courts/courtsandjudges/courts/probateandfamilycourt/scheduleoffees_color.pdf. (c. 262, §4B). For surcharge, see subhead Superior Court, catchline Filing Fees, supra.

District Court and BMC.

See c. 218. Each county is divided into judicial districts. District Court consists of divisions, one for each judicial district. Each division of District Court may be referred to by name of principal place for holding of said court.

There are Municipal Courts established for different parts of City of Boston. Within their territorial limits these courts have same jurisdiction as District Courts, except that territorial district of BMC in civil matters is (with minor exceptions) entire County of Suffolk.

District and Municipal Courts have original jurisdiction in all civil actions seeking money damages if there is no reasonable likelihood that recovery by plaintiff will exceed $25,000 or amount ordered by SJC. Notwithstanding monetary limitation, district courts may proceed with actions for money damages in any amount in summary process actions. (c. 218, §19). Some equity jurisdiction. (c. 218, §§19, 19C). District and Municipal Courts have original jurisdiction, concurrent with Probate and Family Court Dept. over actions relative to paternity and support under c. 219C and actions under Uniform Interstate Family Support Act, c. 209D. They also have exclusive jurisdiction over proceedings transferred under c. 211, §4A. (c. 218, §19).

All of these courts have limited criminal jurisdiction. (c. 218, §26). District and Municipal Courts have original jurisdiction, concurrent with Superior Court, of following offenses: all violations of by-laws, orders, ordinances, rules and regulations, made by cities, towns and public officers, all misdemeanors (except libels), all felonies punishable by imprisonment in state prison for not more than five years, crimes referred to in c. 90B, §8(a)(1); c. 90, §§24(1)(a)(1); 24G(a), 24D(1); c. 94C, §§32(a), 32A(a); c. 94C, §32J; c. 140, §131E; c. 265, §§13K, 15A, 21A; c. 266, §§16-19, 28, 49, 127; c. 273, §§1, 15, 15A; malicious destruction of private property under c. 266, §127; crimes of escape or attempt to escape from any penal institution, indecent assault and battery on child under 14, forgery of promissory note, or of order for money or other property, and of knowingly uttering as true such forged note or order. (c. 218, §26). Their territorial jurisdiction, both civil and criminal, is restricted, but executions issued by them can be served and must be obeyed in every county to which they are directed. They as a rule sit at least once a week for civil business, and usually sit daily for criminal business. All cases are heard by single justice without jury except where jury of six members is provided by c. 218, §27A.

Party against whom action is brought in District or Municipal Court which might have been brought in Superior Court or plaintiff against whom such counterclaim or cross-claim is asserted or defendant who asserts compulsory counterclaim may, if such party desires jury trial, remove case to Superior Court if claim exceeds $25,000, by filing within 25 days of service of process claim of trial in Superior Court and affidavit, together with appropriate entry fee and $100 surety bond, except that defendant asserting compulsory counterclaim must file within five days after time to file claim expires; otherwise such party waives jury trial. No bond is necessary for removal of auto tort case if payment of any judgment for costs is secured in whole or in part by motor-vehicle liability bond or policy or by deposit as provided in c. 90, §34D. If ad damnum in writ is less than $25,000, case must be tried in District Court and party who otherwise would have been entitled to remove case to Superior Court who desires trial in Superior Court must file said entry fee and bond within 30 days after notice of decision or finding. Proceedings in all District and Municipal Courts are governed by uniform rules. See category 5 Civil Actions and Procedure, topic 5.02 Actions. In any District or Municipal Court appeal may be taken on questions of law to appellate division of such court consisting of three judges, and thence to Appeals Court. (c. 231, §§108, 109). Appellate division of such court shall also hear claims for compensation of victims of violent crimes and civil motor vehicle infractions. (c. 218, §108). In summary process actions for possession of land, judgments rendered in Superior Court, Housing Court, or District Court may be appealed within ten days after entry of judgment. (c. 239, §5, see c. 231, §97).

Every division of District Court may hold criminal sessions with juries of six people for purpose of conducting jury trials in cases commenced in several divisions of criminal or juvenile offenses over which district courts have original jurisdiction. BMC may also hold such sessions for purpose of conducting jury trials in cases commenced in BMC or in divisions of District Court in Suffolk County. (c. 218, §27A). There is concurrent jurisdiction in superior and district courts for crime of intimidating witness. (c. 218, §26).

Filing Fees.

Entry of complaint, third-party complaint, petition or other action, and for filing of motion to intervene as plaintiff, $180; entry of supplementary proceedings under c. 224, $30; entry of claim of trial by superior court under c. 231, §104, $180; approval or disapproval by court of sureties on bonds or recognizances, $60; entry of civil appeal in appellate division of district court dept., $180. No fee for entry of complaint, petition, appeal or other action by commonwealth, but fee must be taxed against other party if commonwealth prevails. (c. 262, §2). Party entering complaint, petition or other civil action in any court of commonwealth, except small claims cases, in which initial filing fee is payable, and to which separate docket number is assigned, must pay additional surcharge of $15; party entering small claims action must pay surcharge of $10. (c. 262, §4C). See http://www.mass.gov/courts/courtsandjudges/courts/districtcourt/filingfees.html.

Restraining Orders and Protective Orders.

Legislature enacted domestic violence record system to track issued protective and restraining orders. (c. 209A, et al.). C. 218, §35A governs consideration of criminal records and domestic violence records under proceedings for misdemeanors made in district court.

Small Claims (c. 218, §§21-25).—Claims of $2,000 or less, in nature of contract or tort (other than libel or slander), even if recovery may be greater than such sum because double or treble damages may be awarded, or claims for property damage caused by motor vehicle regardless of amount, may be brought before District Court of district in which either plaintiff or defendant lives or has his usual place of business or, in actions brought against landlord or lessor of land or tenements rented for residential purposes and arising out of such property or rental in judicial district in which property is located without summons and complaint or formal pleading on payment of entry fee of $20 (on claim of $500 or less) or $30 (on claims over $500), in each case plus $10 surcharge. (c. 218, §§21-22). See small claims information: http://www.mass.gov/courts/courtsandjudges/courts/districtcourt/smallclaims.html#5. Statement of claim is made to clerk and entered in concise form in docket. Service is made by first class mail. Costs may be entirely omitted in discretion of court (c. 218, §22). Intended as alternative, not exclusive remedy; case may be removed to regular civil docket at request of either party or on motion of judge to avoid loss of appellate rights or jury trial. (396 Mass. 1013, 487 N.E. 2d 853). Rules of pleading and practice may be modified. (c. 218, §§21, 22). Every cause begun under small claims procedure must be determined initially in District Court. Plaintiff beginning cause under this procedure waives trial by jury and right to appeal to jury of six in District Court. No such cause may be removed for trial in Superior Court, but defendant may, within ten days after receipt of court's finding, file in court where cause was determined claim of trial by jury of six in District Court and affidavit that there are questions of law and fact in cause requiring trial by jury, with specifications thereof, and that such trial is intended in good faith. (c. 218, §23). Claim of trial by jury must be accompanied by $25 entry fee and $100 surety bond to satisfy costs. Actions for property damage arising out of motor vehicle accidents commenced in district court shall not have res judicata or collateral estoppel effect. (c. 218, §23). Court shall waive bond requirement if satisfied that defendant has insufficient funds and appeal is not frivolous. (c. 218, §23). Plaintiff's costs in any action begun by summons and complaint which might have been begun under foregoing procedure may be eliminated in whole or in part. (c. 218, §25). Court may order payment to prevailing party of amount found due on or before day stated or by installments; may modify, extend or vacate such order; and may enforce such order by contempt proceedings. Procedure governed by Uniform Small Claims Rules.

Land Court.

See c. 185. Land Court, for registering title to real estate substantially according to so-called Torrens Systems (225 Mass. 217, 114 N.E. 365), has exclusive original jurisdiction of complaints affecting title to registered land within commonwealth, and original jurisdiction concurrent with SJC and superior court over some matters. (c. 231A, §1). All cases are tried and questions of fact finally determined by court unless interested party within time limit claims trial by jury. (c. 185, §15). In case of such claim issues of fact are framed and tried before jury in Superior

Court. Land Court may enforce its orders or decrees in same manner as decrees are enforced in equity. (c. 185, §§25, 25A). Questions of law arising in Land Court or on such trial in Superior Court may be taken on appeal to Appeals Court and in some instances to SJC. (c. 185, §15). Court sits at Boston, but may adjourn to other places. (c. 185, §1).

Filing Fees.

$240 for entry of original petition or writ; other fees listed in statute. (c. 262, §39). See Land Court fee schedule: http://www.mass.gov/courts/courtsandjudges/courts/landcourt/fees.html. For surcharge see subhead Superior Court, catchline Filing Fees, supra.

Housing Court.

See c. 185C. Housing Court consists of divisions for Hampden County, Worcester County, City of Boston, northeastern division including Essex County and certain Middlesex County municipalities and southeastern division including Bristol and Plymouth Counties. (c. 185C, §1).

Jurisdiction.

Divisions of Housing Court have common law and statutory jurisdiction concurrent with divisions of District Court and Superior Court of all crimes and civil actions, including all contract and tort actions, arising in their respective geographical boundaries, relating generally to health, safety or welfare of housing occupants or to enforce sanitary, building and fire codes and appeals from decisions of Boston Rent Board. (c. 185C, §3). Housing court also has jurisdiction over criminal prosecutions involving violations of fire code. (39 Mass. App. Ct. 285, 655 N.E.2d 386). All cases shall be tried before justice of Housing Court, except that jury is available where required by federal or state constitutions and defendant has not waived his right to trial by jury. (c. 185C, §21). Divisions of Housing Court are courts of superior and general jurisdictions, including concurrent equity jurisdiction, with reference to all cases and matters relating to housing within their jurisdiction. (c. 185C, §§2, 3). In Hampden County, division may hear appeal from zoning board of appeals or other special permit granting authority where decision concerns land in county. (c. 40A, §17).

Transfer of Cases.

Civil action within jurisdiction of Housing Court pending in another court may be transferred to Housing Court by any party.

Sittings (c. 185C, §4).—Hampden County division: at court house facilities of Superior Court within Hampden County. Boston City division: at Suffolk County court house. Worcester division in Worcester County courthouse and in certain district courthouses in county. Northeastern division: Lawrence with regular sittings in Lowell, Salem and Lynn, Peabody or Haverhill. Southeastern division: Taunton with regular sittings in Brockton, Fall River and New Bedford with at least two weekly sittings in each of Bristol and Plymouth County sites.

Filing Fees.

$120 for entry of action, filing third party complaint, other initial filings. (c. 185C, §19). See Housing Court fee schedule: http://www.mass.gov/courts/courtsandjudges/courts/housingcourt/courtfees.html. For surcharge see subhead Superior Court, catchline Filing Fees, supra.

Juvenile Court.

Juvenile Court comprised of divisions in following counties: Suffolk, Barnstable and Town of Plymouth, Plymouth, Norfolk, Middlesex, Essex, Worcester, Franklin, Hampshire, Berkshire, Hampden, and Bristol. (c. 218, §57). Within territorial limits of each division, each division exercises jurisdiction, exclusive of Municipal and District Courts located within territorial limits of division, over cases of juvenile offenders under 17, cases of neglected, wayward or delinquent children and equity jurisdiction in all cases and matters arising under c. 119 having to do with protection and care of children. (c. 218, §§59, 60). Within its jurisdiction Juvenile Court has same powers, duties and procedures as District Court and laws relating to District or Municipal Court apply to Juvenile Courts. (c. 218, §59). Procedures for prosecuting juveniles in juvenile and district courts have been amended. (See generally, c. 119, et al., and c. 120, et al.) Additionally, legislature enacted juvenile court rules regarding care and protection, guardianship and adoption of minor. (Juv. Ct. Rules 1-12).

Small Claims Courts.

See subhead District Court and BMC, catchline Small Claims.

6.02 LEGISLATURE:

Convenes annually on first business day in Jan. through end of July (Const., Amendments Arts. X, LXIV); may also reconvene or meet at such times as it judges necessary or at call of governor with advice of council if Commonwealth requires it (Const., Part II, c. II, §I, Art. V; Amendments, Arts. X, LXXV).

Bicameral legislature composed of senate and house of representatives is known as general court. (Const., Part II, c. I, §I, Art. I).

Initiative and Referendum.

There is constitutional provision for initiative and referendum. (Const., Amendments, Art. XLVIII, as am'd in part by Art. LXXIV). Attorney general may refuse to certify initiative petition which proposes to change internal procedures of general court insofar as such petition does not propose “law” within meaning of Art. XLVIII. (390 Mass. 593, 458 N.E.2d 734).

Lobbyists.

Any person deemed legislative agent must register as such with State Secretary. (c. 3, §41). Legislative agent is defined as person who for compensation or reward does any act to promote, oppose or influence legislation or governor's approval or veto thereof. Legislative agent includes person who, as part of his regular and usual business or professional activities and not simply incidental thereto, attempts to promote, oppose or influence legislation, or governor's approval or veto thereof, whether or not any compensation in addition to salary for such activities is received for such services; provided, however, that for purposes of this definition person shall be presumed to engage in activity covered by this definition in manner that is simply incidental to his regular and usual business or professional activities if he engages in any activity or activities covered by this definition for not more than 50 hours during any reporting period or receives less than $5,000 during any reporting period, for any activity or activities covered by this definition. (c. 3, §39).

Registration as Lobbyist.

Any person deemed to be legislative agent for purposes of c. 3, §39 must register as such with State Secretary. (c. 3, §§39-41). Person employing or agreeing to employ legislative agent must, within one week after such employment or agreement, register such status with Secretary of State. Agent must register within ten days. (c. 3, §40).

Further Filing.

Semi-annually, legislative agents and their respective employers and/or clients, must give itemized report on nature and extent of all expenses incurred in course of legislative agent's duration of employment, except any one day's expenditures under $35 for legislative agents need not be itemized. (c. 3, §47). Penalties for late filings. (c. 3, §§43, 47). No legislative agents may give any gift or pay for any meal, beverage or other item for public official or public official's family except if public official is member of legislative agent's family as defined by c. 3, §43. (c. 3, §43).

Organizational Activities.

Any group or organization that spends in excess of $250 during any calendar year to promote, oppose, or influence legislation, or governor's veto or approval thereof, must register itself, purposes of such organization, legislation which effects those purposes, and total amount of expenditures incurred in furtherance of such activities. This registration must be completed on or before Jan. 15 and July 15 of each year. (c. 3, §44). Appropriate forms shall be open to public inspection. (c. 3, §43). Penalties may be assessed for late filings. (c. 3, §44). See c. 3, §44 for group or organization exempt from registration.

6.03 REPORTS:

Quincy's Rep., 1 vol., 1761-1772; Tyng, 17 vols., 1804-1822; Pickering, 24 vols. 1822-1840; Metcalf, 13 vols., 1840-1847; Cushing, 12 vols., 1848-1853; Gray, 16 vols., 1854-1860; Allen, 14 vols., 1861-1867, Mass. Reps., beginning with vol. 97 published. Mass. Appeals Court Reps. beginning with Vol. 1 covering Dec., 1992 published. (Advance sheets published in Mass. Adv. Sh. and Mass. App. Ct. Adv. Sh. published currently.)

Massachusetts decisions are also reported in Northeastern Reporter.

Digests.

A digest prepared by Messrs. Bennett, Gray and Swift, with supplement, includes the Reports through 177 Mass.; a digest by M. H. Throop, with supplements, includes the Reports through 180 Mass.; an index digest by W. V. Kellen, with supplement, includes the Reports through 212 Mass., a digest by W. Ladd, published by Hildreth, includes, with supplements, Reports 212-310; a digest under the American digest system includes, with supplements, the Reports through 281 Mass.; a digest by West Publishing Co. now published includes, with supplements, current Reports.

6.04 STATUTES:

Latest official compilation of statutes is 2002 Official Edition of General Laws of the Commonwealth. Official Edition of General Laws republished each even-numbered year, annual supplement published each odd-numbered year, and monthly cumulative pamphlet published each month of every year. Massachusetts General Laws are unofficially compiled and arranged in accordance with corresponding chapters and sections of General Laws, and annotated in “Annotated Laws of Massachusetts”, now prepared and published by Michie, and in “Massachusetts General Laws Annotated”, now prepared and published by West Publishing Co.

Administrative rules and regulations are published in Code of Massachusetts Regulations, supplemented by Massachusetts Register. (c. 30A, §§6, 6A).

Code of Massachusetts Regulations and Massachusetts Register.

Prior to adoption, amendment or repeal of any agency regulation, public hearing is required if: (a) Violation of regulation is punishable by fine or imprisonment; (b) enabling legislation of agency or other law so requires; or (c) public hearing is required as matter of constitutional right. Public hearing need not be subject to provisions governing adjudicatory proceedings. Agencies are empowered to enact emergency regulations to remain in effect not more than three months which do not comply with notice and public hearing requirements. Even if public hearing is not required prior to adoption, amendment or repeal of any regulation, agencies must meet detailed notice requirements and afford interested persons opportunity to be heard. (c.

30A, §§2, 3, 3A).

State Secretary required to print executive orders of general application, regulations, notices and other items of sufficient public interest in bi-weekly serial publication entitled “Massachusetts Register”, which is available upon request of any person or group at price to be established independently of statutory charges of c. 262. Contents of Massachusetts Register shall be judicially noted and cited by volume and page number. At least one copy of Register must be maintained in prominent place at each agency office. (c. 30A, §§2-6B).

Uniform Acts.

Following Uniform Acts were adopted: *Acknowledgments (1894) (c. 183); Aircraft Financial Responsibility (1956) (c. 90); Anatomical Gift (1971) (c. 251); Arbitration (1960) (c. 251); Certification of Questions of Law (1971) (Sup. Jud. Ct. Rule 1:03); *Child Custody Jurisdiction (1983) (c. 209B); *Commercial Code (1957) (c. 106); Common Trust Fund (am'd 1969) (c. 203A); *Contribution Among Tortfeasors, Revised (1937) (c. 231B); *Controlled Substances (1971) (c. 94C); Custodial Trust (1993) (c. 203B); Declaratory Judgments (1945) (c. 231A); Durable Power of Attorney (1981) (c. 201B); Electronic Transactions (2004) (c. 110G); Foreign-Money Judgments Recognition (1966) (c. 235); Fraudulent Transfer (1996) (c. 254); Insurers Liquidation (1939) (c. 175, §§180A to 180L); Interstate and International Procedure (1968) (c. 223A); Interstate Arbitration of Death Taxes (1943) (c. 65B); Interstate Compromise of Death Taxes (1943); *Interstate Family Support (1995) (c. 209D, §§1-101 to 9-902); Limited Partnership (1976, am'd 1985) (c. 108A); Management of Institutional Funds (1976) (c. 180A); *Model Real Estate Time-Share (1988) (c. 183B); *Motor Vehicle Certificate of Title and Anti-Theft (1972) (c. 90D); Partnership (1922) (c. 108A); Photographic Copies of Business and Public Records as Evidence (1952) (c. 233); Securities (1972) (c. 110A); Simultaneous Death (1941, am'd 1961) (c. 190A); Statutory Rule Against Perpetuities (1990) (c. 184A); Statutory Will (1987) (c. 191B); Testamentary Additions to Trusts (1963) (c. 203, §3B); Transfer on Death Security Registration (1999) (c. 201E); Transfers to Minors (1986) (c. 201A).

*Adopted with significant variations or modifications.

For text of Uniform Acts falling within the scope of the Martindale-Hubbell Law Digests see Uniform and Model Acts section.

6.05 UNIFORM LAWS:

For list of Uniform Acts in force in this state see topic 6.04 Statutes. For text of Uniform Acts within the scope of the Martindale-Hubbell Law Digests see Uniform and Model Acts section.

7 CRIMINAL LAW

7.00A BAIL:

See topic 7.01 Criminal Law.

7.01 CRIMINAL LAW:

Crimes are defined by statute (see particularly cc. 264 to 274) and common law. Criminal procedure is governed by statute (see particularly cc. 263, 275-280) and Rules of Criminal Procedure effective July 1, 1979. (Mass. R. Crim. P.).

Access to Records.

Access to certain criminal records is restricted. (c. 6, §167 et seq.). Provision denying access to indices of criminal records (c. 6, §172) unconstitutional (819 F. Supp. 89). Legislature enacted sex offender registry to track recidivism rates of sex offenders. (c. 6, §178D).

Indictment or Information.

Prosecution is by grand jury indictment in Superior Court (absent waiver of indictment) and by complaint in District Court. (Mass. R. Crim. P. 3-5).

Bail.

All crimes, except capital offenses and treason, are bailable on personal recognizance unless person authorized to admit to bail determines in exercise of his discretion that release will endanger safety of other persons or community or that release on personal recognizance will not assure defendant's appearance in court. (c. 276, §58; c. 264, §1).

Child Endangerment.

Recklessly engaging in conduct that creates substantial risk of serious bodily injury or sexual abuse to child, or recklessly fails to alleviate such risk where duty to act. (c. 265, §13L).

Domestic Violence.

Person physically abused or threatened by household or family member or by person in serious dating relationship may petition court for protection from abuse. (c. 209A). Protective order under §209A may include order to refrain from abuse, vacate household, refrain from conduct. Violations of §209A orders carry criminal penalties. See category 14 Family, topic 14.06 Divorce, subhead Domestic Violence.

Drunk Driving.

Detailed provisions govern punishment for driving under influence of intoxicating liquor or controlled substance. (c. 90, §24).

Gun Control.

Carrying firearm without license or firearm identification card is punishable by imprisonment for not more than two years, and fine of not more than $500 with increased penalty for second or subsequent violation. (c. 269, §10[h]). Carrying firearms with or without license onto secondary school, college or university property without written authorization from institution administrators punishable by fine of no more than $1,000, prison term of no more than one year or both. (c. 269, §10[j]). Statutes governing licensing of firearms and firearm identification cards is controlled by c. 140, §§121-131C. Ban on sale of assault weapons that were not otherwise lawfully possessed on Sept. 13, 1994. (c. 140, §131M). Only law enforcement officials and registered weapons suppliers may possess electronic weapons designated to incapacitate, injure or kill. (c. 140, §131J). Electronic weapons must include mechanism for tracking number of times weapon has been fired.

Right to Counsel.

Right to counsel exists at every step of any criminal proceeding, including examination before grand jury. (c. 277, §14A). Right to effective assistance of counsel under Const. pt. 1, Art. XII provides greater safeguards than Bill of Rights of U.S. Constitution. (406 Mass. 135, 546 N.E.2d 159).

Sex Offender Registry.

Massachusetts maintains sex offender registry. (c. 6, §176C). All individuals who have committed “sex offense” and who live, work, or attend institution of higher learning in Commonwealth must register. (Id.). Term “sex offense” covers wide range of crimes and includes, but is not limited to: indecent assault and battery; rape; rape of child; posing or exhibiting child in state of nudity; disseminating matter harmful to children; and second offense for open and gross lewdness and lascivious behavior. (Id.).

Sex offender registry board required to place sex offenders into one of three categories. (c. 6, §178K). Designation determines whether information made available to public. When risk of reoffense low, offender receives level one designation. (c. 6, §178K[2][a]). Board transmits information regarding offender to police department where offender resides but does not make information available to public. (Id.). Where risk of reoffense moderate, offender receives level two designation. (c. 6, §178K[2][b]). For level two offenders, board transmits information regarding offender to police department where offender resides and makes information available to public. Where risk of reoffense high, offender receives level three designation. (c. 6, §178K[2][c]). For level three offenders, board transmits information to police department where offender resides and makes information available to public. (Id.). Also, police department must notify organizations in community who are likely to encounter level three sex offender. (Id.).

Sex offender who moves to Commonwealth must register with board within two days of arrival. (c. 6, §178E[g]). Registration must include home address, work address, and, when applicable, institution of higher learning offender plans to attend. (Id.). Board will transmit information to police department in municipality where offender intends to reside and to Federal Bureau of Investigation.

Stalking.

(c. 265, §43). Willfully and maliciously engaging in knowing pattern of conduct or series of acts over period of time directed at specific person which seriously harms or annoys and makes threat with intent to place person in imminent fear of death or injury is crime. (c. 265, §43[a]). Conduct includes threats made by telephone, mail, e-mail and facsimile. (c. 265, §43[a]). See category 14 Family, topic 14.06 Divorce, subhead Stalking.

Victims of Violent Crimes.

Victims of violent crimes or their dependents may be eligible for compensation by commonwealth for lost earnings, medical, funeral and other expenses up to $25,000. (c. 258C, §§2, 3[a]). Funeral expenses may not exceed $4,000. (c. 258C, §3[b][1]).

8 DEBTOR AND CREDITOR

8.01 ASSIGNMENTS:

Statutory provisions of this topic are covered by Uniform Commercial Code. (Mass. Gen. Laws Ann. c. 106, §§2-210; 9-102; 9-104[d]; 9-206[1]; 9-302[1][e]; 9-302[2]; 9-311; 9-318; 9-405). See category 3 Business Regulation and Commerce, topic 3.09 Commercial Code.

Rights, debts and choses in action are in general assignable in accordance with common law rules. Home solicitation contracts and evidences of indebtedness arising from same and retail installment sales agreements (other than for motor vehicles) signed by buyer at place other than seller's address may not be assigned by seller or lessor until midnight of fifth business day following execution of such contracts. (c. 93, §48[I]; c. 255D, §9 [D 12]).

Where a claim has been assigned by an executor or administrator that fact should be set forth in the assignee's declaration or pleading. (c. 231, §6).

Instruments Transferring Title.

No special requirements. Witnesses and acknowledgment are not necessary, except that acknowledgment is required if the instrument is to be recorded.

Recording.

No requirement except for those specified in subhead Assignment of Wages and those required for assignment of security interests or sale of accounts or chattel paper security interests by Uniform Commercial Code.

Notice.

Prior assignee, in order to prevail against actual payment to a subsequent assignee, must prove that subsequent assignee had notice of prior assignment. (344 Mass. 160, 181 N.E.2d 673).

Where notice of the assignment has been given the debtor, the assignee of a part only of a chose in action may maintain a suit in equity on the assignment, joining the assignor and the debtor as defendants. (233 Mass. 20, 123 N.E. 103).

Effect.

Common law rules apply.

Assignment of Wages.

The statutory provisions on this topic are found in c. 154. No assignment of or order for future wages to secure a loan of less than $3,000 is valid for a period exceeding one year; nor, if the assignor is a married man, unless wife's written consent is attached thereto; nor against the employer until accepted in writing by him and with such recorded with the clerk of the town where the assignor lives, if a resident, and if not a resident where he is employed, nor is it valid unless it is substantially in the standard form set forth in §5. No such assignment will be recorded unless it states on its face that the sum of $10 per week as earned of the wages assigned is exempt from such assignment. (c. 154, §2).

No assignment of or order for future wages, other than one subject to the preceding paragraph, is valid for more than two years from making thereof, nor unless made to secure debt contracted prior to or simultaneously with execution of the assignment, nor unless executed in writing in form set forth in §5 and signed by assignor in person, stating date of execution, value of consideration furnished, and rate of interest. No such assignment is valid which does not state on face that three-quarters of assignor's wages are exempt from same. No such assignment is valid unless written acceptance of employer, and if assignor is married man, of his wife, is endorsed thereon or attached thereto (c. 154, §3), and copy delivered by assignee to assignor at date of execution; nor is it binding on employer until he has received copy of assignment and written account stating balance due and sums received by assignee giving date of every payment and whether it is interest, principal, or, in case of loan, payment on charge for making and securing (c. 154, §4). No assignment of future wages is valid against trustee process, unless before service of writ, assignment has been recorded in office of clerk of town where assignor resides at time of record (c. 154, §6). Union or craft dues or obligations, or subscriptions to nonprofit hospital service corporations, or to medical service corporation, or to charitable corporation, or payments or contributions toward cost of any insurance policy or annuity contract, or purchase of government bonds, or purchase of stock pursuant to employee stock purchase plan, federal or state chartered credit unions, or payroll deductions for bank accounts may be deducted from employee's wages in accordance with written requests from individual employees regardless of foregoing requirements provided that no such written request, except in case of labor or trade union or craft dues, shall be regarded as assignment valid against trustee process. (c. 154, §8).

Fee for Recording Assignments of Future Wages or Salary.

$1, subject to change by individual community. (c. 262, §34[2]). See topic 8.09 Garnishment, subhead Earnings.

8.02 ATTACHMENT:

See also topic 8.09 Garnishment.

Caveat.

Attachment available pursuant to c. 223, §42 et seq. Prejudgment attachment of real estate, under then existing statutes and rules, held unconstitutional insofar as not providing for notice, opportunity for hearing, and court approval prior to attachment. See 365 F. Supp. 1299; 349 F. Supp. 741. Mass. Sup. Jud. Ct. R. 1:04A, Mass. R. Civ. P. 4.1, and Mass. R. Dom. Rel. P. 4.1 provide revised attachment procedure, requiring notice and hearing, except on showing of limited exigent circumstances. (See 584 F.2d 559, 561; 462 F. Supp. 172, 183 n. 12, but see, 815 F. Supp. 620, 636 [S. D. New York 1993].) Mass. Sup. Jud. Ct. R. 1:03A, Mass. R. Civ. P. 4.2, and Mass. R. Dom. Rel. P. 4.2 govern trustee process.

Actions in Which Allowed.

In all personal civil actions in which debt or damages are recoverable, property may be attached upon original writ and held as security to satisfy such judgment or decree as plaintiff may recover, but no attachment of real estate may be made on writ returnable before District Court unless damages demanded (determined by ad damnum of writ) exceed $20 (Mass. Gen. Laws Ann. c. 223, §42) and, in action or suit for amount which is liquidated or ascertainable by calculation, no attachment by trustee process or otherwise may be made for larger sum than amount of claim and amount reasonably necessary to include interest and costs (c. 223, §42A).

Courts Which May Issue Writ.

All courts may issue writ of attachment. (c. 223, §§1-15).

In Whose Favor Writ May Issue.

Attachments may be made in suits by or against nonresidents as well as in suits by or against residents. (c. 227, §1).

Against Whom Writ May Issue.

See subhead In Whose Favor Writ May Issue, supra.

Claims on Which Writ May Issue.

There is no statutory requirement that claim sued on should be payable within state. No direct attachment will lie to secure claim not yet due.

In actions or claims against the estate of a deceased person there can be no attachment other than a “chip” (nominal) attachment (282 Mass. 45, 184 N.E. 677), except by permission of the Probate Court where the executor or administrator was appointed (c. 230, §7). (This section does not apply to creditor whose claim accrues after settlement of estate. [c. 197, §29].)

Attachment may issue in action for divorce (c. 208, §33) or separate support (c. 208, §12).

Grounds.

Plaintiff must show reasonable likelihood that he will recover judgment, including interest and costs, in amount equal to or greater than amount of attachment over and above any liability insurance shown by defendant to be available to satisfy judgment. If plaintiff seeks writ of attachment, ex parte, plaintiff must show in addition to above, either: (1) That person of defendant is not subject to jurisdiction of court in action; (2) there is clear danger that defendant if notified in advance of attachment of property will convey it, remove it from state or will conceal it; or (3) there is immediate danger that defendant will damage or destroy property to be attached. (Mass. R. Civ. P. 4.1).

Proceedings To Obtain.

Action in which attachment is sought may be commenced only by filing motion for approval of attachment along with complaint and affidavit in support of motion. Copies of motion, complaint, affidavit and notice of hearing must be served on defendant in manner provided by Mass. R. Civ. P. 4, at same time summons and complaint are served. Notice of hearing must inform defendant that by appearing to be heard on motion for approval of attachment he will not thereby submit himself to jurisdiction of court nor waive service of complaint and summons upon him in manner provided by law. Court approval, after hearing, is required. (Rule 4.1[c]). For ex parte attachment, plaintiff must also file certificate as to liability insurance available to satisfy judgment. (Rule 4.1[f]).

Attachment Bond.

No bond is required to obtain attachment, but attaching officer may require sufficient security if there is reasonable doubt as to ownership of personal property either before or after attachment. (Mass. Gen. Laws Ann. c. 223, §45A).

There are certain restrictions on right to attach railroad cars and engines and steamboats in use making regular passages (c. 223, §43), ships and vessels (c. 223, §44), personal property used in printing and publishing a newspaper (c. 223, §45) and motor vehicles (c. 223, §44A).

Levy of Attachment on Real Estate.

Every original writ for attachment of real estate or any right or interest therein shall contain name and last known residence of each defendant. (c. 223, §62). Writ of attachment is not valid against subsequent good faith purchasers unless name in writ matches name under which owner of property acquired record title. (38 Mass. App. Ct. 627, 650 N.E.2d 1279 [misplaced hyphen destroyed priority]; c. 223, §66). Officer's return on writ that attachment has been made constitutes valid attachment as between parties of defendant's right, title and interest in unregistered real estate not exempt by law. No special description of land attached is required. To be effective against subsequent creditors or bona fide purchasers, attachment must be recorded at registry of deeds of district where land lies (c. 223, §63). Attachment of registered land must be filed and registered in office of assistant recorder for registry district where land lies. (c. 185, §§78, 81).

Attachment of leasehold estate is allowed. (See 57 Mass. 318.) There is no prohibition against attachment of realty held in common (369 Mass. 665, 342 N.E.2d 712) or jointly held realty (345 Mass. 423, 187 N.E.2d 859) even though attaching party has claim against only one of owners. Real estate held by husband and wife as tenants by entirety cannot be attached and sold on execution by creditor of debtor spouse so long as property is principal residence of non-debtor spouse; provided that both spouses are liable for debts incurred on account of necessities furnished to either spouse or member of family. (c. 209, §1).

Attachment expires six years from recording date unless renewed for subsequent periods of six years. (c. 223, §114A).

If an encumbrance is removed after the attachment is made, it inures to the benefit of the attaching creditor. (c. 223, §70).

Real estate fraudulently conveyed, or which is held in trust for debtor, whereby he is entitled to a present conveyance, or which was acquired by debtor by a deed describing him as trustee, regardless of validity of trust or legal effect of designation as trustee, may be attached specially as property of debtor, but must be described by locality and name of person holding legal title. (c. 223, §67).

Levy of Attachment on Personal Property.

A perfected security interest in personal property, which from its bulk or other cause cannot be immediately removed, may be obtained by filing within three days after attachment a certified copy of writ and return of attachment in office of clerk of city or town, State Secretary, or registry of deeds. (c. 223, §50; c. 106 §9-401). Wages and pensions may in certain actions be attached by trustee process (c. 246, §28), but $125 per week of wages and amounts held by trustee for defendant in pension exempt. See generally topic Garnishment.

Other personal property must be kept in possession of officer, who may put keeper over it on authorization of court therefor. To have keeper appointed, plaintiff must file affidavit with court stating facts which require such appointment and court must endorse its assent to appointment upon writ (c. 223, §48). Attached personal property may be kept on premises where found. (c. 223, §49). However, such property or keeper must be removed upon written request of defendant without unreasonable delay. (c. 223, §§48-49). If defendant in writing requests property to be left on premises, it cannot be removed until he has had reasonable opportunity to dissolve attachment by giving bond. Live animals and personal property liable to perish, or that cannot be kept without disproportionate expense, may be sold, and proceeds held subject to attachment (c. 223, §88), unless defendant deposits appraised value in money with attaching officer or gives bond with two sufficient sureties conditioned to pay appraised value of property (c. 223, §93).

Motor vehicle registered in the commonwealth may not be attached on mesne process in an action of contract except on consent in writing of a justice of the court where suit is commenced. (c. 223, §44A).

There can be no attachment of goods for which a negotiable document of title is outstanding, unless document be first surrendered to bailee or its negotiation enjoined. (c. 223, §72).

Personal property subject to mortgage, pledge, or lien or sold under conditional sale contract may be attached as if unencumbered, if creditor pays or tenders to mortgagee, pledgee, lienor, conditional vendor, or his assigns, amount for which property is so liable within ten days after demand. (c. 223, §74). If attaching creditor denies validity of any such encumbrance, encumbrancer or his assigns may be summoned as trustee and validity of encumbrance and amount due determined. If validity is upheld, attachment becomes void unless amount due is paid as ordered by court. (c. 223, §81).

Personal property owned by several jointly may, it seems, be attached on writ against one of them, but on appraisal and giving of bond by others must be surrendered to them. (c. 223, §§102-105). See 369 Mass. 665, 342 N.E.2d 712.

See also topics 8.09 Garnishment, 8.06 Exemptions.

Indemnity.

See subhead Attachment Bond, supra.

Lien.

A lien exists so long as a valid attachment remains in effect. (238 F.2d 683).

Priorities.

Successive attachments may be made in same or different suits upon same property, and take priority according to time. (Mass. R. Civ. P. 4.1[e]). In case of real property, priority is in order of recording at Registry. Person claiming interest in property attached, by reason of subsequent attachment or otherwise, may by proper proceeding be admitted to contest validity of prior attachment on ground that amount demanded in first action was not justly due or was not payable when it was commenced. (Mass. Gen. Laws Ann. c. 223, §§106-113).

Judgment creditors who have not attached have no rights in the debtor's property as against attaching creditors. (See generally Uniform Commercial Code, Mass. Gen. Laws Ann. c. 106, §9-201.)

Release of Property.

Attachment may be dissolved by depositing with attaching officer sum equal to ad damnum in complaint or writ, or by giving bond with sureties or authorized surety company approved in writing by plaintiff, or approved by magistrate upon examination, with condition to pay amount plaintiff may recover within 30 days after final judgment and/or to pay amount of any special judgment within 30 days after entry thereof. (c. 223, §§120-129). Costs of obtaining bond may be recovered by prevailing defendant. (377 Mass. 522, 386 N.E.2d 1273). Attachment may be dissolved as to particular property by giving bond as above to pay value of such property, which is fixed by appraisal. (c. 223, §125). Attachment may be dissolved by appointment of receiver on complaint filed within four months (c. 223, §130), and by final judgment in favor of defendant after time for appeal has expired. If appeal has been duly claimed any attachment or other security as by bond shall stand until appellate review has been exhausted. (c. 223, §115). Attachment is also dissolved, except as to property alienated by him before death, by death of defendant, if administration is granted on his estate upon application made within one year after death. (c. 223, §116). Also if real property is attached and no service is made upon defendant, attachment is dissolved unless record shows that notice has been given to defendant within 60 days or such further time as court may allow after entry of case. (c. 223, §115A). Property remains subject to attachment for 30 days after execution may first issue unless attachment is sooner dissolved. (For property attached or judgment rendered in Nantucket County above period extended to 60 days.) (c. 223, §59).

Any bond may be executed by another person on behalf of party to suit, if it appears to magistrate approving it that there is good cause why it is not executed by such party. (c. 223, §133). Sureties on bond to dissolve attachment are released by principal's discharge in insolvency in proceedings instituted within four months after attachment, if original claim if proved in insolvency would have been barred by discharge of defendant. (c. 223, §124).

Attachments in all cases shall be dissolved, discharged, or reduced in whole or in part without order of court by any method provided in c. 223. (c. 223, §113A).

Sale.

Animals and perishable goods which have been attached may be sold after appraisal proceedings. (c. 223, §§87-101). Proceeds of such sale are held pending final judgment and are then distributed by court. (c. 223, §87).

Third Party Claims.

Attachment may be made by party bringing counterclaim, cross claim or third party complaint in same manner as upon original claim. (Mass. R. Civ. P. 4.1[d]).

Vacation or Modification.

Ex Parte Attachments.

On two days notice to plaintiff, or on such notice as court prescribes, a defendant may move, without submitting his person to jurisdiction of court, for dissolution or modification of an ex parte attachment. At such hearing plaintiff has burden of justifying any finding in ex parte order which defendant has challenged by affidavit. (Mass. R. Civ. P. 4.1[g]).

Other Attachments.

On application to a justice of court to which process is returnable, an attachment found upon summary hearing of parties to be excessive or unreasonable may be ordered to be reduced or discharged, or part of property may be ordered to be released. (c. 223, §§113A, 114).

Liability of Attaching Officer.

The attaching officer becomes liable to the creditor for the goods attached. If attaching officer has sold on execution property attached, he shall be liable only for proceeds of sale after deducting legal fees and charges for attaching, keeping and selling such property. (c. 223, §117).

Property Liable to Attachment.

With limited exceptions (see subhead Equitable Attachment, infra and topic Exemptions), all real and personal estate liable to be taken on execution, except such personal estate as is considered from its nature or situation exempt according to principles of common law or which is by statute exempt, is liable to attachment. (c. 223, §42). C. 223, §42 specifically exempts from attachment such property as is exempt from execution under c. 235, §34.

Time of Making Attachment.

Attachment may be made within 30 days after order allowing attachment or, upon order of court, subsequent to expiration of 30-day period. (Mass. R. Civ. P. 4.1[a], [c], and [e]).

Equitable Attachment.

SJC and Superior Court, and Boston, Hampden and Worcester Housing Courts after entry of judgment, have jurisdiction to reach and apply debtor's property which cannot be attached or taken on execution or fraudulently conveyed. (c. 214, §3[6]-[9]; c. 223, §86A). Shares in domestic and foreign corporations cannot be attached in civil action in which only money damages are sought (c. 223, §71), but may be reached and applied to satisfaction of claims (c. 214, §3[7]). Choses in action and any property, right, title or interest, legal or equitable, within or without state, which cannot be taken on execution, may, without other ground of equitable jurisdiction, be reached and applied for satisfaction of debt. (c. 214, §3[6]). Civil action to reach and apply should not be confused with judgment creditors' bills to reach property that cannot be taken on execution. (215 Mass. 415, 102 N.E. 646; 388 Mass. 307, 446 N.E.2d 674).

Lis Pendens.

When litigation concerns title to or use or occupation of real property, party may create cloud on title to real property, thereby achieving some of practical effect of real estate attachment, by filing memorandum of lis pendens with local registry of deeds. (c. 184, §§15-17). No notice or hearing required. Constitutionality upheld under State Const. (383 Mass. 883, 420 N.E.2d 349); upheld under 14th Amend., Federal Const. (383 Mass. 559, 420 N.E.2d 343; see also, 670 F.2d 1316).

8.03 [RESERVED]

8.04 CREDITORS' SUITS:

By statute actions may be brought in Superior Court: (a) To reach and apply in payment of debt any attachable property fraudulently conveyed (c. 214, §3[8]); or any property or interest not reachable by attachment (whether in debtor's possession or not) if value ascertainable by means in court's ordinary procedure (c. 214, §3[6]); (b) to reach and apply, to satisfy judgment for bodily or property damage or death, insurance company's obligation to judgment debtor if judgment unsatisfied for 30 days after rendered (c. 214, §3 [9]; cf. Mass. R. Civ. P. 69); and (c) to reach and apply shares in domestic and national corporations located or having general office in Massachusetts (whether plaintiff creditor or not). (c. 214, §3[7]).

Creditors' actions in accordance with usual equity practice may also be brought.

8.05 EXECUTIONS:

All money judgments are enforceable by writ (sometimes referred to as complaint) for execution. Mass. R. Civ. P. 69, Domestic Relations R. 69, c. 235, and c. 236 prescribe law applicable to executions. See Local Dist. Ct. R. 58.2 for procedure on satisfying judgment.

Execution based on judgment of sister state will issue after judgment in Massachusetts court and if plaintiff files with Massachusetts court transcript of record of judgment in earlier case under seal of court rendering it, attested by clerk of such court. (c. 235, §14).

Judgment from foreign country is enforceable in Massachusetts in same manner as judgment from sister state (see subhead Execution Based on Judgment of Sister State, supra) pursuant to c. 235, §23A (Uniform Foreign Money-Judgments Recognition Act).

Kinds of Executions.

Execution to enforce money judgment (c. 235) or judgment for costs. Execution for possession in summary process action. (c. 239, §3). Alias and other successive executions are recognized. (c. 235, §17). For enforcement of judgment of small claims actions, see Mass. Uniform Small Claims Rules 7 and 9. See also subhead Body Execution, infra.

See category 21 Property, topic 21.10 Landlord and Tenant, subheads Holding Over, and Dispossession.

Exemptions.

See topics 8.06 Exemptions, 8.09 Garnishment.

Time for Issuance.

Execution shall not issue on judgment until all possible appellate review is exhausted. (c. 235, §16; Mass. R. Civ. P. 62).

Original execution in Superior Court and in District Courts may not issue after more than one year after party is first entitled to take it out. (c. 235, §17). No alias or other successive execution can be issued, unless within five years of return day of that which preceded it. (id).

If judgment remains unsatisfied after expiration of time for taking out execution, creditor may obtain new execution by motion to court or bring civil action thereon. (c. 235, §19).

Stay.

Mass. R. Civ. P. 62 and c. 235, §16 provide automatic stay until appellate review exhausted or time for appeal has expired.

Lien.

Prior to levy there is no lien of an execution. The only lien possible before judgment is the lien of an attachment.

Property Subject to Levy.

With limited exceptions (see topic 8.06 Exemptions) all property of the debtor may be levied upon. Gold and silver coin, currency and bank notes may be taken on execution. (c. 235, §§32, 33). Terms for 100 years or more, if 50 years or more remain unexpired, are regarded as real estate for levy of execution thereon. (c. 235, §46). Other terms for years are seized on execution in like manner as personal property, except that officer must give 14 days notice of time and place of sale by leaving written notice with debtor personally or at his last abode and by posting notice on listed premises. (id). All lands of debtor except homestead estate (c. 188, §1; but see c. 236, §18) in possession may be taken on execution against him, including remainder or reversion, all his rights of entry in lands and of redeeming mortgaged lands, and all such lands and rights fraudulently conveyed with intent to defeat, delay, or defraud his creditors, and lands directly or indirectly paid for by him, record title to which has been retained by vendor or conveyed to third person with like intent, or on trust expressed or implied whereby debtor is entitled to present conveyance. (c. 236, §1). Property qualifying under homestead exemption is beyond reach of creditors to extent of $500,000. (c. 188, §1). Real property or manufactured home of persons 62 years old or older or of disabled person protected against execution of judgment to extent of $500,000. (c. 188, §1A). Real estate of deceased person may be taken on execution against executor or administrator in suit upon debt of deceased. (c. 236, §53).

If an execution is returned satisfied in whole or in part by sale of property not liable to execution and damages are recovered on account of the sale, a new execution shall issue in the amount remaining due. (c. 235, §20).

Levy of Execution on Real Estate.

An execution may be levied on real estate either by setting off the real estate at a value fixed by appraisal (c. 236, §§6-25), or by public sale and conveyance by the officer. (c. 236, §§26-30). If real estate levied on was not attached on mesne process, the officer must file in the registry of deeds at the time of making the levy a copy of the execution with memorandum thereon that the execution is in his hands for the purpose of taking the land, and no such taking is valid against a purchaser in good faith and for value until a copy is so deposited. (c. 236, §4). If the levy is not completed by set-off or sale within six years from the date on which notice of the execution was deposited in the registry of deeds, the levy is void as to any land within the registry district unless within the six-year period it is renewed at the registry of deeds. (c. 236, §49A). If land was attached on mesne process such a copy and memorandum must be so deposited within 40 days after judgment (c. 236, §49A) and attachment becomes void 40 days after said judgment unless the copy is so deposited. Seventy days are allowed if land attached is in Nantucket County and judgment was rendered in another county, or vice versa. (c. 236, §4). To be valid against third parties acting in good faith, execution and return in case of set-off and officer's deed in case of sale must be recorded in registry of deeds within three months after levy or sale has been completed. (c. 236, §§21, 27).

Return.

An original execution is returnable 20 years after judgment except that those against executors, administrators, trustees or fiduciary officers in their respective capacities are returnable within 60 days after date of execution; alias execution five years after date thereof. (c. 235, §§17, 23; c. 260, §20). Execution for possession of rented or leased residence shall not issue later than three months following judgment and is returnable within three months after date of issuance. (c. 235, §23).

Priorities.

If property is not already subject to an attachment or other lien, priority is in the order of the time of making levy. See c. 235, §44.

Conduct of Sale.

Officer authorized to serve execution shall make sale to highest bidder at public auction and convey all debtor's title to land or rights sold. (c. 236, §27).

Satisfaction.

Defendant may pay amount of execution or property may be sold through levy on the execution. See c. 236, §§26, 32.

Sale.

Sale of property, both real (c. 236, §§26-32) and personal (c. 235, §§36-45), with certain exemptions (see topic 8.06 Exemptions) is provided for by statute. In case of personal property officer must give notice of time and place of sale by posting notices 48 hours at least before time of sale in public place in town where sale is to be made or by causing advertisement thereof to be published in newspaper published in town where debtor resides. (c. 235, §37). In case of real estate, written notice of time and place of sale must be delivered at least 30 days before sale to debtor, if he may be found in precinct, and must be posted in public place in town where land lies and in two adjoining towns; such notice must also be published in paper of town where land lies once in each of three successive weeks, first publication to be not less than 21 days before sale. (c. 236, §28).

Redemption.

Real estate set off or sold on execution may be redeemed within one year after the levy or sale. (c. 236, §33). Personal property may be redeemed prior to sale. (c. 235, §36).

Supplementary Proceedings.

(See c. 224, §§14-22.) Natural persons, corporations, trusts, societies, partnerships, associations and any other legal entities are subject to supplementary process and proceedings. Unpaid judgment creditor may file application for supplementary proceedings on which summons issues for debtor. Failure to appear in answer to summons constitutes contempt and if debtor is corporation or trust with transferable shares, court shall treat officer, trustee or agent served as contemnor. At hearing, debtor is examined as to his property and ability to pay. If court finds that debtor has property not exempt he may be ordered to produce it to satisfy judgment, interest and costs or to transfer or assign it to creditor. If court finds debtor able to pay, it may, after allowing debtor, if natural person, out of income not less than $125 per week or amount exempt under 15 U.S.C. 1671-1677 order debtor to pay judgment in full or by partial payments from time to time. Order may be made combining any of above orders. Unexcused failure to comply with order constitutes contempt, punishable by fine or imprisonment for not more than 30 days, but such punishment does not discharge debtor, and court retains jurisdiction until proceedings finally dismissed and may punish later violations. If court finds debtor is unable to pay or if creditor fails to appear, proceedings may be dismissed. If proceedings are dismissed, creditor may not within one year file new application on same judgment. Debtor may apply by petition for benefit of examination.

Creditor has burden of proof in showing existence of nonexempt property of debtor. (c. 224, §16).

Debtor may be imprisoned or fined on showing that he has conveyed or concealed property in fraud of creditors or has, since debt was incurred, gambled to extent of $100, or that he contracted debt with intent not to pay it. (c. 224, §19).

Imprisonment and supplementary proceedings are discharged by full payment of debt or by bankruptcy proceedings on proper application. (c. 224, §21).

Body Execution.

No person may be arrested on execution unless creditor makes application for certificate authorizing arrest supported by affidavit and proves to satisfaction of court that he believes and has reason to believe that judgment debtor intends to leave state. Debtor arrested on execution may give recognizance to appear within 30 days for examination relative to his property and ability to pay. He may also give notice that he desires to take oath that he does not intend to leave state, and must be examined in relation thereto. If court is satisfied that he does not intend to leave state, he will be discharged but he may be forthwith required to submit to examination. If he is not so discharged, he will be committed to jail until examination had, unless he recognizes or posts bail. (c. 224, §6). See also c. 224, §§24-25.

8.06 EXEMPTIONS:

Uniform Exemptions Act not adopted.

Personal Property Exempt from Execution.

Debtor is entitled to exemption of various items of personal property from seizure on execution, subject to specified dollar limits, including clothing, household furniture, livestock, tools, stock in trade, automobile, money for necessaries, homestead interests, cash savings deposits, and back wages for personal services or labor. (c. 235, §34).

Social Benefit Payments.

Numerous social benefits are exempt from attachment, in some instances subject to certain conditions, including funds of some relief societies and fraternal benefit societies (c. 176, §22); group life insurance proceeds, paid and unpaid (except debts arising from support obligations) (c. 175, §135); group annuity proceeds and benefits (except debts arising from support obligations under cc. 208, 209, 273), if contract so provides (c. 175, §§132C, 119A); disability insurance benefits to level of $35 per week except for necessities contracted for after insurance benefits have begun (c. 175, §110A); insurance and pension interests of insurance company employees and agents (c. 175, §§36-36B; see c. 175, §§132C and 110A); retirement funds of cooperative bank employees (except debts arising from support obligations) (c. 170, §32) and of credit union employees (except debts arising from support obligations) (c. 171, §33); workmen's compensation payments (except debts to veteran's agent or commissioner of veterans' services and/or debts arising from support obligation) (c. 152, §47); employment security benefits (except debts arising from support obligations) (c. 151A, §36); aid to families with dependent children (trustee process only) (c. 118, §10); and relocation assistance to persons displaced by eminent domain (c. 79, §6A).

Property Held by Government.

Commonwealth cannot be summoned as trustee under trustee process without statutory authorization. (362 Mass. 151, 285 N.E.2d 103. See also c. 41, §43A.) Various categories of property held by government are exempt, including wage deductions from public employees for payment to credit unions (c. 149, §178B); and property owned by governmental agencies performing proprietary duties, including housing authorities (c. 121B, §13) and Massachusetts Bay Transportation Authority (c. 161A, §2).

Earnings and Pensions.

Unpaid wages or salary for personal labor or services are exempt to extent of $125 per week except debts arising from support obligations. Wages held by trustee for defendant in pension exempt. (c. 246, §28). See topic 8.09 Garnishment.

Real Property.

Exempt to extent of $50,000 in most cases except support obligations. See topics 8.05 Executions, subhead Property Subject to Levy, 8.10 Homesteads; and c. 236, §18.

Other Exemptions.

First $500 of bank account of natural person is exempt. (c. 246, §28A). Partner's interest in partnership property may not be attached except on claim against partnership. (c. 108A, §25[2][c]). Decedent's property may not be attached without permission of probate court. (c. 230, §7). Amounts deposited with state treasurer in lieu of compulsory automobile liability coverage cannot be attached except for payment of judgment. (c. 90, §34D).

Substitution.

Debtor is not entitled to hold other things exempt in place of those named.

Debts Against Which Exemptions Not Allowed.

None.

Waiver of Exemption.

With certain exceptions, exemptions may be waived. (135 Mass. 401. But see, e.g., c. 151A, §36.)

Necessity for Claiming Exemption.

No special provisions. Exemptions should be claimed. (135 Mass. 401). Exemptions may be claimed by debtor and in certain circumstances by his wife, children, or representatives after death.

Trustee Process.

See topic 8.09 Garnishment.

8.07 FORECLOSURE:

See topics Factors, Liens, Pledges; category 20 Mortgages, topic 20.04 Mortgages of Real Property.

8.08 FRAUDULENT SALES AND CONVEYANCES:

Legislature, in 1996, repealed Uniform Fraudulent Conveyance Act and enacted Uniform Fraudulent Transfer Act. (c. 109A). New law differs in some respects from Uniform Conveyance Act. Under UFTA, person who claims that transfer was invalid must show actual fraud, which is defined as actual intent to hinder, delay, or defraud any creditor of debtor, or constructive fraud, which may be found if transfer is made without supplying consideration of reasonable equivalent value. (c. 109A, §5). UFTA now imposes special statute of limitations for fraudulent transfers. (c. 109A, §10).

8.09 GARNISHMENT:

Trustee process used in Massachusetts for objects accomplished elsewhere by garnishment. See c. 246, to which statutory citations under this topic refer; Mass. R. Civ. P., Rule 4.2; and topic Attachment.

Caveat.

Prejudgment attachment by trustee process under then existing statutes and rules held unconstitutional, insofar as not providing for notice, opportunity for hearing, and court approval prior to attachment. See 349 . Supp. 741; 365 F. Supp. 1299. Mass. R. Civ. P. Rules 4.1 and 4.2

provide revised attachment procedure applicable to goods, chattels and other property, designed to overcome constitutional deficiencies cited by federal courts. Under revised Rules providing for notice and hearing except in certain exigent circumstances, trustee process may now be used pursuant to c. 246, but only by court order upon motion in compliance with those Rules. See 584 F.2d 559, 561.

Property Which May Be Reached.

Goods, effects and credits of defendant entrusted to or deposited with a third person may be reached by trustee process except money held in any bank to meet payroll of defendant's employees (c. 246, §20) and $500 of a natural person held in a bank in commonwealth. (c. 246, §28A). Joint account shall be treated as if each depositor owned one half. (c. 246, §28A). Debts due to defendant, if due absolutely and without contingency even though not yet payable (c. 246, §24; c. 246, §32[4]), or held by any person by conveyance void as to creditors of defendant (c. 246, §25) as well as wages and pensions subject to certain exemptions (c. 246, §28), may be attached by trustee process and held to satisfy final judgment. But person may not be adjudged trustee: (1) By reason of having drawn, made, accepted, or endorsed any negotiable instrument or other security which at date of summons was negotiable to holder in due course; (2) by reason of money received as sheriff or other officer, under execution or other process in favor of defendant; (3) by reason of money in his hands as public officer; (4) by reason of money or any other thing due from him to defendant, unless it is, at time of service of summons upon him, due absolutely and without any contingency; (5) by reason of judgment debt so long as he is liable to execution; (6) by reason of money or credits due for wages of defendant's wife or minor children; (7) by reason of money or credits due as wages or lay of seaman except those accruing to fisherman (c. 246, §32); (8) by reason of money or credits due for wages of personal labor or services of defendant, except on claim reduced to judgment, and after court approval on ten days notice to defendant. (c. 246, §32[8], Mass. R. Civ. P. 4.2[a]). Various social benefit payments, and property held by government, are exempt from attachment. See topic 8.06 Exemptions.

Jurisdiction and Venue.

Action must be brought in county in which one of trustees resides or has usual place of business (Mass. Gen. Laws Ann. c. 246, §2), but in inferior courts except BMC person may not be held to answer as trustee except in county in which he lives or has usual place of business (c. 246, §4), provided, however, that if action could not be brought in that inferior court except because of residence or place of business of trustee, court may on motion of any party transfer case to any other inferior court in which action might have been commenced had there been no trustee named in writ (c. 246, §4A).

Grounds.

Court must find reasonable likelihood that plaintiff will recover judgment, including interest and costs, in amount equal to or greater than amount of trustee process over and above any liability insurance shown by defendant to be available to satisfy judgment. If plaintiff seeks ex parte order approving trustee process, court must find also that either: (i) Defendant is not subject to jurisdiction of court, or (ii) clear danger that defendant if notified in advance of trustee attachment will remove goods or credits from state or conceal them, or (iii) immediate danger that defendant will dissipate, damage or destroy goods to be attached on trustee process. (Mass. R. Civ. P. 4.2[g]).

Proceedings to Obtain.

Mass. R. Civ. P. and Rules of Domestic Relations, Rule 4.2, govern. Plaintiff must file motion for approval of attachment on trustee process, together with complaint and affidavit(s). Copies of all documents to be served on defendant. Notice of hearing must inform defendant that by appearing to be heard, he will not thereby submit himself to jurisdiction of court nor waive service of complaint and summons upon him. (Rule 4.2[c]). For ex parte attachment by trustee process, plaintiff must also file certificate as to liability insurance available to satisfy judgment. (Rule 4.2 [g]). Trustee process must be served within 30 days after order approving attachment. (Rule 4.2[c]).

Trustee process is not available in actions for specific recovery of goods and chattels, for malicious prosecution, for libel or slander, or for assault and battery. (Rule 4.2[a]). Trustee process may be used and any person may be summoned as trustee of defendant therein, except nonresident individuals having no usual place of business in this state and foreign corporations and associations having no such place of business. Except in case of summons stating that action is on judgment, or in contract for personal services, or for goods sold and delivered, or for money due under contract in writing or in tort for damages on account of operation of motor vehicle not registered in this state, no summons ad damnum of which exceeds $1,000 may be served on any alleged trustee unless plaintiff, if other than Massachusetts governmental unit, has filed in court bond with surety company authorized to do business in this state as surety, or with sureties approved by justice, associate justice or special justice of court. Bond must be of such amount not less than $250 as court shall require and must be conditioned upon payment to defendant of amount not greater than penal sum. No bond required for actions to enforce child support, maintenance or alimony if proper procedure used. Summons must bear endorsement in specified manner of fact that required bond has been so filed. Cost of bond is taxed in plaintiff's costs if he prevails in action. (c. 246, §1).

If co-partners are summoned as trustees, service on one partner is sufficient. (c. 246, §7).

Answer of Trustee (Garnishee).

Trustee must answer within 20 days under oath or statutory penalties of perjury disclosing fully what goods, effects and credits of defendant were in his hands when trustee was served (c. 246, §§10, 11), and may be interrogated from time to time in writing upon oath. (c. 246, §12).

Practice.

Trustee's answers are taken as true, but additional facts not inconsistent therewith may be proved (c. 246, §16) and trustee may be interrogated through written interrogatories. He is liable for willfully false answer for full amount of judgment recovered in suit and interest thereon. (c. 246, §19). Liquidated cross demands in favor of trustee may be set off. (c. 246, §26). Trustee who does not answer may be defaulted for full amount of unsatisfied judgment against defendant. (c. 246, §46). Trustee who answers may be allowed costs including counsel fees. (c. 246, §68).

Adverse Claims.

A person claiming by force of assignment or otherwise goods, effects or credits in hands of alleged trustee, may be admitted to suit in order to determine his title. (c. 246, §33). Person having interest by assignment or otherwise in money or credits attached may dissolve attachment by giving bond with sufficient sureties, and after filing of bond trustee is not liable to plaintiff for effects in his hands. (c. 246, §§66 and 67).

Release of Property.

Attachment may be dissolved by filing surety company bond. (c. 223, §120). Defendant may move to dissolve or modify ex parte attachment on two days notice. (Mass. R. Civ. P. 4.2[h]). See topic 8.02 Attachment.

Judgment against trustee discharges him from all demands by defendant for all goods, effects and credits paid, delivered, or accounted for by trustee by force of such judgment. (c. 246, §43).

Earnings.

Attachment of wages or salary may be made only on action brought upon judgment and court permission, after notice, required. Court may shorten or waive notice requirement if it finds that justice would be unreasonably delayed or hindered. (c. 246, §32[8]). Unpaid wages or salary for personal labor or services are exempt to extent of $125 per week, except debts arising from support obligations. Wages held by trustee for defendant in pension are exempt. (c. 246, §28). Except for writ to satisfy support order, every writ of attachment of wages for personal labor or services or of such pension must contain statement of amount exempted under statute and direction to trustee to pay over exempted amount to defendant in same manner and at same time as such amount would have been paid if no attachment had been made. (c. 246, §28; Mass. R. Civ. P. 4.2[b]).

Monies in defendant's payroll account exempt from trustee process. Fine for depositing other funds therein to avoid process. (c. 246, §20). Fine for suing resident debtor outside Massachusetts with intent of depriving him of protections afforded by commonwealth to wage earners. (c. 246, §20A). $500 in any bank account of natural persons only is exempt from attachment by trustee process. Summons served on bank must describe this exemption. (c. 246, §28A).

See topics 8.02 Attachment, 8.06 Exemptions.

8.10 HOMESTEADS:

See generally c. 188. Prior to 1977 homestead was little used because it was thought not applicable to joint property and because surviving spouse of deceased homesteader, with minor child, could not mortgage without guardianship and court approval. 1977, c. 791 made law applicable to joint property. However, in attempting to avoid need for surviving spouse to obtain court approval to mortgage, statute actually made it necessary to have court approval even while homesteader and spouse were both living (unless appropriate power was reserved in creating homestead). This was corrected by 1978, c. 539 and 1979, c. 248 but mortgages between Dec. 5, 1977 and Oct. 18, 1978 may still require court approval. Those made by surviving spouse with minor children still require court approval. In general, application and effect of statute as amended are unclear.

Estate of homestead to extent of $500,000 in land and buildings may be acquired by owner or owners of home or one or all who rightfully possesses premises by lease or otherwise, and occupies or intends to occupy said home as principal residence. Such estate shall be exempt from laws of conveyance, descent, devise, attachment, levy on execution and sale for payment of debts and legacies with specified exceptions. Owner of home for homestead purposes shall include sole owner, joint tenant, tenant by entirety or tenant in common; provided, that only one owner may acquire estate of homestead in any such home for benefit of his family; and provided further, that estate of homestead may be acquired on only one principal residence for benefit of family. Word “family” includes, for purposes of homestead statute, either parent and child or children, or husband and wife and their children, if any, or sole owner. (c. 188, §1).

Estate of homestead to extent of $500,000 per individual, whether declaration is filed individually or jointly, in real property or manufactured home may be acquired by person 62 years old or older or disabled if person occupies or intends to occupy property as principal residence. “Disabled” means having impairment meeting disability requirements for supplemental security income under 42 U.S.C.S. 1382(c)(a)(3)(A) and (C) in effect at time of filing. (c. 188, §1A). Extent of homestead limit applies to equity of homesteader and excludes amount of value mortgaged. (128 B.R. 321).

Limitation of Value.

$50,000. If premises claimed by judgment debtor as estate of homestead are in opinion of levying officer of greater value than $50,000 appraisers are appointed who must set aside so much of premises, including dwelling house, in whole or in part, as appears to be of value of $50,000 and residue of property may be levied upon. (c. 236, §18).

Limitation of Area.

None.

Debts or Liabilities Against Which Exemption Not Available.

Sale for taxes or attachment, levy or sale for debt contracted previous to acquisition or for purchase of homestead, decree for support of spouse or minor child or ground rent where buildings are on land not owned by owner of homestead. (c. 188, §1). With respect to elderly or disabled homestead: Taxes, assessments and liens; first and second mortgages; debts or contracts incurred prior to filing of declaration of homestead protection; decree for support of spouse or minor child; or ground rent where buildings are on land not owned by owner of homestead. (c. 188, §1A).

Designation of Homestead.

Homestead estate may be created by declaration in deed by which property is acquired or, after acquisition, by writing duly signed, sealed and acknowledged and recorded in registry of deeds in county where land is situated or in office of city or town clerk in city or town where manufactured home is located. (c. 188, §2). Elderly or disabled homestead estate may be created by filing elderly or disabled person declaration of homestead protection together with original or certified copy of U.S. Social Security Administration disability award letter or licensed physician's letter certifying that person meets statutory disability requirements then in effect, at registry of deeds wherein such person resides. (c. 188, §1A). Filing fee $35. See Secretary of Commonwealth, Registry of Deeds information: http://www.sec.state.ma.us/rod/rodhom/homidx.htm.

Probate court may issue judgment allowing spouse and minor children, if any, living apart from owner of homestead use and enjoyment of homestead. (c. 188, §3).

Claim of Exemption.

No special provisions. See supra, subhead Designation of Homestead.

Release.

Estate of homestead may be terminated during lifetime of homesteader by: (1) Deed signed by homesteader and spouse not specifically reserving homestead or (2) release of homestead duly signed, sealed, acknowledged by homesteader and spouse, if any, and recorded in registry for county in which property located, except that as to homesteads created between Dec. 5, 1977 and Oct. 18, 1978 guardian's license is necessary to release rights of minor children unless homesteader reserved such power in creating estate; but conveyance which does not release homestead rights shall be valid to pass any title or interest beyond or subject to estate of homestead. (c. 188, §7).

After death of homesteader, release by guardian under license of court is necessary to release interests of minor unmarried children. (c. 188, §8).

Loss of Exemption.

No special statutory provisions.

Proceeds of Sale.

Proceeds of sale of homestead are not exempt prior to investment in another homestead. Proceeds of sale licensed by court may be apportioned by court among parties entitled thereto.

Rights of Surviving Spouse and Family.

At death of person holding homestead, homestead continues for benefit of surviving spouse and minor children until youngest child reaches 18 years and surviving spouse dies or remarries. (c. 188, §4).

8.11 JUDGMENT NOTES:

See category 3 Business Regulation and Commerce, topic 3.02 Bills and Notes.

8.12 LEVY:

See topics 8.02 Attachment, 8.05 Executions.

8.13 LIENS:

The provisions of the common law as to liens are in force.

Waiver, Loss or Extinguishment.

Common law principles, and statutes as noted below, apply.

Personal Property.

Liens upon personal property are governed by c. 255.

Mechanics' and Materialmen's Liens.

Note: Legislature, in 1997, revised statutes governing mechanics liens. (c. 254).

Generally.

Law requires persons, who perform personal labor in erection, alteration, repair or removal of building, structure or improvement to real property, to file notice of written contract with registry of deeds in order to enforce lien against debtor. (c. 254, §§1, 2, 2A, 2B, 4, 5, 8). Moreover, law allows persons to enforce lien upon debtor for construction management and contractor services, as well as, rental equipment, appliances and tools. (c. 254, §2). Requirement for written contract caused confusion under prior law, and now legislature defines “written contract” as any written contract enforceable under laws of commonwealth. (c. 254, §2A).

Lien will automatically dissolve unless person entitled to enforce lien complies with statutory requirements. (c. 254, §§2, 4, 8). These requirements state that person must file just and true account of amount due creditor. (c. 254, §8). Time of filing “statement of the amount due” is at earliest date of: (a) 90 days after recording of notice of substantial completion under §2A, (b) 120 days after recording of notice of termination under §2B, or (c) 120 days after person entitled to enforce lien under §2 or anyone who performed or furnished labor, material, rental equipment, appliances or tools records in registry of deeds. (c. 254, §§2, 2A, 2B).

Any person who enters written contract to erect, alter, repair or remove building, structure or other improvement to real property or for furnishing material, rental equipment, appliances or tools must file under c. 254, §2. Once work is sufficiently complete so that it can be occupied or utilized for its intended use, creditor seeking to enforce lien must file notice of substantial completion in registry of deeds. (c. 254, §2A). If, however, contract is terminated prior to filing of notice of substantial completion under §2A, creditor seeking to enforce lien, must file notice that contract was terminated. (c. 254, §2B).

Procedure to enforce lien is governed by §5. Statute requires that creditor seeking to enforce lien must bring action in superior or district court where land lies within 30 days after filing of required statements under §8. Otherwise, lien will be dissolved. (c. 254, §§5, 8). Additionally, lien will be dissolved, unless, creditor records in registry of deeds attested copy of complaint, which contains brief description of property, and statement of amount due. These documents must be filed within 30 days after commencement of action. (c. 254, §5). Court may enter order to sell property to satisfy lien under §5A. Priority of previous and subsequent creditors is governed under §7.

Subcontractors.

Provisions governing notice and filing of liens of subcontractors is outlined in §4.

Bond.

Any person entitled under c. 254 may record surety bond in statutory form, and thereafter no lien for labor and/or materials (except for liens of principals on bond) can attach under contract as to which bond is given. (c. 254, §12).

Prior Mortgages.

Mortgage existing and recorded prior to recording of notice of lien has priority to extent of amount advanced or unconditionally committed over lien under §§2, 3 and 4 for labor and/or materials used in erection, alteration, repair or removal of building or structure, which erection, etc., was actually begun before recording of mortgage. (c. 254, §7).

Attaching Creditor.

Rights of attaching creditor cannot prevail against lien for personal labor, nor against claim of lienor when notice of contract has been filed or recorded in registry of deeds prior to recording of attachment. (c. 254, §13).

Public Buildings and Railways.

No lien shall attach to any land, building or structure thereon owned by commonwealth (c. 254, §6) or (probably) on essential property of railroad or railway (226 Mass. 148, 115 N.E. 299), but officers or agents of state or any county, city or town contracting for public buildings are required to obtain sufficient security by bond or otherwise for payment by contractors and subcontractors for labor and materials, and rental of equipment, furnished or employed. Such security must be enforced by filing petition in equity within one year after day on which claimant last performed labor or furnished materials, etc., included in claim. In addition, claimant who is subcontractor must give written notice of claim to contractor within 65 days after day on which he last performed labor, etc. (c. 149, §29).

Other Real Property Liens.

There is statutory lien on real estate for taxes (see category 22 Taxation, topic 22.16 Property Taxes); for assessments for construction of sewers and sidewalks (c. 83, §§15, 16B, 27), removal of snow (c. 85, §6), sprinkling of streets (c. 40, §§16-18) and other local improvements (c. 80, §§12, 15, 16) for two years after last installment is committed to collector; for charges due to municipal utility (c. 164, §§58B, 58C); for drainage of swamps and lowlands (c. 252, §11); for cost of removal of obstructions in gaming houses (c. 271, §25); for certain improvements made by life tenant during his tenancy (c. 237, §38); for municipal water rates (c. 40, §§42A, 42B); on mills for damages by flowage, but such lien does not extend to any amount due more than three years before commencement of action therefor (c. 253, §14); in favor of railroads on real estate adjoining lines for erection and maintenance of fences (c. 160, §94); and in favor of city or town on real estate for cost of removing dangerous or illegal structure therefrom after refusal of owner, lessee or mortgagee in possession to do so (c. 143, §9). Equitable lien may be created upon real estate in certain circumstances. (373 Mass. 445, 368 N.E.2d 276). In absence of express agreement there is no lien in favor of vendor of real estate.

Hazardous Material Removal Lien.

Commonwealth has lien to secure removal costs and other liability from release of oil and hazardous materials. Except as to residential real property, lien has priority over any prior or subsequent encumbrances or levying creditor of owner of affected site and over any subsequent purchasers. (c. 21E, §13).

Condominiums.

Condominium unit owner's share of common expenses, which shall include costs of collection, including reasonable attorneys' fees, plus interest, late fees, and fines lawfully assessed by organization of unit holders, constitutes lien upon his unit. Organization of unit holders may assess to each unit owner cost of any energy conservation device installed in unit, not already separately metered for water and utilities, and his proportionate share of costs of water and other utilities, with certain provisions. (c. 183A, §6.) Such lien shall have priority over all other liens, except municipal liens (in event of tax taking or foreclosure) or, with limited exceptions, first mortgage of record (in event of foreclosure). Organization of unit owners may assess cost of maintaining, repairing or replacing limited common area solely to owner of unit to which limited common area is designated, and assessment is enforceable as common expense. (c. 183A, §6). Condominium liens are also enforced pursuant to c. 254, §§5 and 5A.

Personal Property.

There are statutory liens on personal property as follows: Upon ships, their tackle, apparel and furniture in favor of pilots for services (c. 103, §17), and others for labor and materials furnished for construction, repairing, launching, and for provisions, stores and other articles furnished on account of vessel (c. 255, §§14-22) (if contract is maritime, enforcement only in federal courts; otherwise, enforcement by civil action in Superior Court [c. 255, §17]); in favor of persons pasturing, boarding or keeping horses and other domestic animals, placed with them by owner's consent, upon such animals (c. 255, §24); in favor of public garage owners upon automobiles placed with them by owner's consent (c. 255, §25); in favor of warehousemen (c. 106, §§7-209, 7-210), jewelers and watchmakers (c. 255, §31C); for storage of goods removed under summary process proceedings (c. 239, §4); in favor of aircraft mechanics and airport operators for landing and other charges (c. 255, §31E); upon paintings, photographs and like properties in favor of persons performing work on them (c. 255, §31F); in favor of railroads for feeding livestock (c. 272, §81); in favor of carriers for storage and transportation charges (c. 106, §§7-307, 7-308); in favor of factor or consignee for expenses of shipment and care of goods (c. 104, §§2, 3 and 6); in favor of manufactured housing communities operators for rental facilities, storage, and care of manufactured home sites (c. 255, §25A). Provisions made for enforcing these liens. (c. 255, §§26, 29, 31B).

Merchandise Liens.

Uniform Commercial Code applies. (c. 106, §§9-101 through 9-507).

Motor Vehicles.

Legislature amended rules regarding creation of security interest with motor vehicles. (c. 36, §21A).

Investment Securities.

Legislature revised laws governing investment securities and perfection of security interest. (c. 106, §§8-101, et al.). Security interest can be imposed upon investment property, which is generally defined as any security, whether certified or uncertified, security entitlement, securities account or commodities contract or account. (c. 106, §§9-115 and 9-203). To perfect security interest, perfecting party must have control over investment property. (c. 106, §§8-106 and 9-115). Control may be held where perfecting party gains possession, becomes entitlement holder, becomes registered owner, or in instances where commodity customer has granted security interest in commodity. (c. 106, §§8-106 and 9-115). See category 3 Business Regulation and Commerce, topic 3.09 Commercial Code.

Attorney's Lien.

See category 18 Legal Profession, topic 18.01 Attorneys and Counselors.

Processor's Lien on Materials.

There is a statutory lien for work, labor, and materials furnished in processing cotton, wool, silk, synthetic fibers or leather goods and hides, or of goods of which above form component part and processing of wood, metals, paper, paperboard, plastic and plastic compounds, covering addition of materials and labor furnished in printing, cutting, milling, extruding, combining and serving, as against goods in lienor's possession which extends to unpaid balance of account for work, labor and materials furnished in course of such process in respect of any other goods of same owner whereof lienor's possession has terminated. This lien has priority over any owner's title, lien, interest or encumbrance and may be surrendered or waived only by express written agreement of parties. (c. 255, §31A).

Hospital Charges.

Hospital may secure lien for its charges payable out of recoveries in tort liability cases by mailing by certified mail, return receipt requested, statutory notice of claim to injured person, his attorney, person alleged to be liable for accident, and any insurance carrier covering liability of such person. (c. 111, §§70A, 70B).

Death of Owner.

Foregoing liens are not dissolved by owner's death or conveyance of property, and subsist in favor of creditor's personal representatives.

8.14 MECHANICS' LIENS:

See topic 8.13 Liens.

8.15 PLEDGES:

Covered by Uniform Commercial Code. (c. 106, §§1-201[32]; 8-306[4], 8-401 and 9-101 through 9-507). See category 3 Business Regulation and Commerce, topic 3.09 Commercial Code.

Trust Receipts.

Covered by Uniform Commercial Code. (c. 106 §§9-101 through 9-507). See category 3 Business Regulation and Commerce, topic 3.09 Commercial Code.

Unauthorized Sale.

It is a criminal offense to sell or dispose of collateral security before maturity of the debt without the authority of the pledgee. (c. 266, §85).

Public Pensions.

A pledge of a pension, annuity or retirement allowance from the state, or county, city or town, is void and pledgee is liable to fine. (c. 32, §92).

Attachments.

The pledgor's interest in the property pledged may by proper proceedings be attached. See topic 8.02 Attachment. (c. 106, §§9-203 and 9-204).

8.16 RECEIVERS:

Jurisdiction.

Supreme Judicial and Superior Courts have general powers to appoint receivers. (c. 214, §1). (See also c. 156B, §104; c. 155, §52.)

Proceedings.

By statute receivers may be appointed inter alia: (1) For domestic corporation if execution against it is not satisfied within 30 days after demand (c. 156B, §105) or if its charter has expired or otherwise terminated, or if corporation has been dissolved under §§99, 100 or 101 (c. 156B, §104); (2) of property of absentee in certain cases (c. 200, §1 et seq.) (see category 21 Property, topic 21.01 Absentees, generally); (3) of property of out-of-state bank if insolvent, if its capital is impaired, if continuance of business would be hazardous to public or if it has exceeded its powers or failed to comply with any provision of law (c. 167, §42); and (4) for long term care facility subject to licensing under c. 11, §71 in case of emergency or when it does not have license or license application on file, or when license has been denied, revoked, or not renewed, or procedures to do so have been initiated and residents' security cannot be assured while matter is pending (c. 111, §72M-72U). (Mass. R. Civ. P. 66; Super. Ct. R. 51).

Eligibility and Competency.

No special statutory requirements.

Qualification.

A receiver may be required to give bond. (c. 214, §17).

Powers and Duties.

Receivers appointed under general equity powers have no powers except such as are conferred upon them by the orders of the court. (c. 155, §52; 107 Mass. 1). Receivers appointed under statute have powers conferred by particular statute.

Compensation.

Discretionary with court.

Discharge.

The receiver is discharged by court decree issued under general equity power, after certain conditions met. (c. 223, §131). No order discharging receiver will be entered until he has settled his final account. (Mass. R. Civ. P. 66[e], Super. Ct. R. 51).

Dissolution of Attachments.

The appointment of a receiver to take possession of property dissolves any attachment of property if complaint seeking appointment of receiver is filed within four months after attachment was made, unless court continues attachment. (c. 223, §130).

8.17 REDEMPTION:

See topics 8.05 Executions, Liens; categories 20 Mortgages, topic Mortgages of Real

Property; Taxation, topic Property Taxes.

8.18 SUPPLEMENTARY PROCEEDINGS:

See topic 8.05 Executions, subhead Supplementary Proceedings.

8.19 TRUSTEE PROCESS:

See topic 8.09 Garnishment.

8.20 USURY:

See category 3 Business Regulation and Commerce, topic 3.19 Interest.

9 DISPUTE RESOLUTION

9.01 ALTERNATIVE DISPUTE RESOLUTION:

Mandatory (Alternative) Dispute Resolution.

Chief justice for administration and management of state trial court is given authority under c. 211B, §19 to create rules for mandatory alternative dispute resolution (ADR) program for civil actions in trial court. Parties to dispute are not bound by results of any mandatory ADR. (c. 211B, §19). As part of pilot program established in Bristol, Worcester and Suffolk counties, civil action will be screened for possible referral to qualified ADR program within 12 months of filing complaint. (c. 211B, §19). Similar programs may exist in several other Massachusetts counties. Options available for those screened for ADR are self-directed settlement negotiations, case evaluation, mediation, nonbinding arbitration, expert fact-finding and binding arbitration. (c. 211B, §19). Uniform Rules on Dispute Resolution set standards for court-connected alternative dispute resolution programs and include ethical standards for all neutrals providing dispute resolution services. (Mass. Sup. Jud. Ct. R. 1:18).

Voluntary (Alternative) Dispute Resolution.

Under Superior Court Rules, when agreement has been made to refer to arbitrator and filed in clerks office, clerk should issue rule relative to agreement. (Super. Ct. R. 52). Objections to acceptance of award and motions under this rule must be made in writing setting forth specific grounds and verified by affidavit when grounded on facts. (Super. Ct. R. 52).

With respect only to Charlestown Division of District Courts, informal resolution of cases is encouraged and clerk of that court is mandated to assist parties by providing mediation services whenever possible. (Standing Order I-92[II][F][1]).

Voluntary programs may exist in other Massachusetts court by administrative order.

U.S. Dist. Ct. Mass. Local R. 16.4 contains provisions governing ADR. At each judicial conference, judge or magistrate is required to inquire about settlement and potential for ADR. (Local Rule 16.4[B]). Judge or magistrate may, in their discretion refer case to ADR program available in district court. (Local Rule 16.4[C][1]). Available ADR forums listed under rule, although not exhaustive, include mini-trials, summary jury trials, and mediation. (Local Rule 16.4[C][2]-[4]). Judge or magistrate is not limited to these options. (Local Rule 16.4[C]).

Alternative Dispute Resolution Jurisdictional Bodies/Commissions.

There are variety of court annexed dispute resolution programs available. For more information, call clerk of courts for county in which case is pending. The Uniform Rules on Dispute Resolution regulate court connected dispute resolution services, which refers to process in which neutral third party is engaged to assist in settling case without trial. Rules do not regulate dispute resolution services where there has been no prior court referral. (Mass. Sup. Jud. Ct. R. 1:18, 2-4).

There are also number of private companies in Massachusetts which offer ADR services. For more complete list of ADR providers see Directory of Massachusetts Alternative Dispute Resolution Providers, published by Boston Bar Association and Directory of Alternative Dispute Resolution Providers found in 2004 Massachusetts Lawyers Diary and Manual. See also listings in Martindale-Hubbell Dispute Resolution Directory, http://www.martindale.com/xp/legal/Professional_Resources/Dispute_Resolution_Directories/dispute_resolution_directories.xml.

Alternative Dispute Resolution Acts.

See c. 211B, §19; 457 CMR §2; Super. Ct. R. 52; U.S. Dist. Ct. Mass. Local R. 16.4.

9.02 ARBITRATION AND AWARD:

Governed by c. 251 cited below, unless otherwise indicated.

Forms and Requisites of Submission.

Submission in writing to Superior Court. (c. 251, §2). Applications to modify, correct, vacate or enforce award to be made by motion. (c. 251, §15).

Judgment on Award.

Judgment is entered upon granting of order confirming, modifying or correcting award and may be enforced as any other judgment. (c. 251, §14). Arbitration awards not subject to c. 93A multiple damages. (411 Mass. 31, 576 N.E.2d 680; 47 Mass. App. Ct. 196, 711 N.E.2d 933; 435 Mass. 664; 761 N.E.2d 482).

Enforcement.

Award binding on parties, and court may be petitioned to confirm award. (c. 251, §11). Application to arbitrator to modify, correct or clarify award must be made within 20 days after delivery of award. (c. 251, §9). Petition to court to modify or correct award must be filed within 30 days after delivery of award except in cases of award procured by corruption, fraud or other undue means, in which case petition must be filed within 30 days after such grounds are or should have been known. (c. 251, §12).

Mandatory Arbitration.

Required in following cases, subject to relevant restrictions: (1) Claims by consumers against manufacturers of defective automobiles (c. 90, §7N1/2); (2) claims for compensation by abutting communities against developers of hazardous waste facility sites (c. 21D, §§14, 15); (3) claims by health care providers excluded from participation in medical malpractice self insurance fund (c. 175F, §11).

Powers of Arbitrators.

Arbitrators have only powers specifically granted in agreement. (c. 251, §3). If there are multiple arbitrators, such powers may be exercised by majority thereof unless otherwise provided by agreement or by c. 251. (c. 251, §4). Arbitrators have powers to authorize discovery, and discovery under Rule 34, Mass. R. Civ. P. is permitted. (c. 251, §7).

Rescission.

Written contract to arbitrate subject to rescission or revocation only to extent applicable to any other contract. (c. 251, §1).

Uniform Arbitration Act Adoption/Deviation.

Uniform Arbitration Act adopted (c. 251, §§1-19) but does not apply to collective bargaining agreements to arbitrate. Judicial enforcement of arbitration provisions in labor contracts is available under similar statute. (c. 150C). Consolidation or severance of arbitration proceedings may be ordered by Superior Court under certain circumstances. (c. 251, §2A).

Jurisdictional Arbitration Acts.

See cc. 251, §§1-19; 150E, §9; 90, §7N1/2 (defective automobiles); c. 21D, §§14, 15 (hazardous waste); c. 175F, §11 (medical malpractice). See also topic 9.01 Alternative Dispute Resolution.

Credentials of/Qualifications of/Standards for Arbitrators.

If arbitration agreement provides method of appointment of arbitrators, such method must be followed. However, in absence of such appointment, or if agreed method fails and successor has not been appointed per agreement, court on application of party shall appoint arbitrator, who will have all powers of named arbitrator in agreement. (c. 251, §3).

9.02A MEDIATION:

Collective Bargaining Agreements.

When negotiations over collective bargaining agreements between public employees and their employers are at impasse before Board of Conciliation and Arbitration (board), board is required to appoint mediator within five days of determining impasse exists, or parties may agree on mediator. (c. 150E, §9). If impasse continues after 20 days of mediation, board is mandated to appoint fact finder. (c. 150E, §9). See also 457 CMR §2 et seq. for rules governing alternative dispute resolution before board.

Jurisdictional Mediation Acts.

See topic 9.02 Arbitration and Award, subhead Jurisdictional Arbitration Acts.

Credentials/Standards for Mediators.

Under Uniform Rules, court employees such as clerks and their assistants, registrars and their assistants, probation officers including family service officers and housing specialists along with retired judges who are not sitting as recall judges are considered “neutrals” when engaged as impartial third parties to provide dispute resolution services. (Mass. Sup. Jud. Ct. R. 1:18, Uniform Rules on Dispute Resolution).

10 DOCUMENTS AND RECORDS

10.01 ACKNOWLEDGMENTS:

Uniform Acknowledgments Act was, with minor differences, incorporated into c. 183, §§29-42, with results discussed in following subheadings.

Within State.

Acknowledgments within state must be before justice of the peace or notary public. (c. 183, §30). Nominal fees for services (twenty-five cents for acknowledgement of deed by one or more granters). (c. 262, §1).

Outside State but Within United States.

Out of Mass. and in U.S., acknowledgments must be before justice of peace, notary public, magistrate (which includes, probably, mayor of a city), or commissioner appointed by governor of Massachusetts for purpose (as to commissioners outside state, see c. 222, §§4-7); or before any officer authorized by law of such other state to take proofs and acknowledgments of deeds if there is annexed certificate from Secretary of State where officer resides under seal of such state, or from clerk of court of record in county where officer resides or took acknowledgment, authenticating authority of officer taking acknowledgment and genuineness of his signature. (c. 183, §§30, 33, 41). Acknowledgment taken in another state before notary public whose notarial stamp or seal is impressed to instrument is sufficient without certificate of authority. (c. 183, §30; 328 Mass. 242, 103 N.E. 2d 251).

Outside the United States.

If in a foreign country, acknowledgments must be before a justice of the peace, notary, magistrate, commissioner (as described in preceding paragraph), ambassador, minister, consul, vice-consul, chargé d'affaires, or consular officer or agent of U.S. accredited to such country. If made before U.S. official, there must be certification by him under his seal of office. (c. 183, §30).

Persons in U.S. Armed Forces.

Person serving in or with U.S. Armed Forces or dependent may acknowledge instruments before any active commissioned officer of such forces having rank of second lieutenant or ensign or any higher rank providing instrument contains statement that person executing instrument is serving in or with U.S. Armed Forces or is dependent of such person and includes serial number of person so serving. No authenticating certificate is necessary. Instruments so acknowledged outside Mass. have same effect as though taken before commissioner of Mass. appointed to take depositions in other states. (c. 222, §11).

General Requirements as to Taking.

No special statutory requirements. Arbitrator may not take acknowledgment on submission to arbitration. (37 Mass. 480). Attorney of interested party may take acknowledgment on deed. (303 Mass. 105, 20 N.E.2d 939). Grantor must actually state that instrument is executed as his free act and deed. (320 Mass. 410, 69 N.E.2d 806).

General Requirements of Certificate.

The validity of an acknowledgment for purposes of recording is not affected by absence of official seal (58 Mass. 260) or of statement indicating when commission of officer expires (c. 222, §8).

Husband and Wife.

Either spouse alone can provide acknowledgment in conveyance of property held as tenants by entirety. (8 Mass. App. 860, 398 N.E.2d 497). The acknowledgment of a married woman is taken as if she were single. (c. 183, §31).

Attorneys in Fact.

The law relative to the acknowledgment and recording of deeds applies equally to letters of attorney for the conveyance of real estate. (c. 183, §32).

Corporations.

No special requirements.

Foreign Acknowledgments.

Uniform Acknowledgments Act adopted, with exceptions noted above.

Effect of Acknowledgment.

Entitles deed to be recorded. (c. 183, §29).

Proof by Subscribing Witness.

When a grantor dies or departs from the state without acknowledging his deed, or refuses to acknowledge it, its due execution may by proper proceedings be proved by the testimony of subscribing witness, or, if they are all dead or out of state, by proof of handwriting of grantor and subscribing witness, and certificate of such proof must be endorsed upon deed, which may then be recorded. (c. 183, §§34-37, 40). Before or pending such proceedings copy compared with original by register may be filed in registry of deeds, and such filing has for 30 days, or until seven days after termination of such proceedings, same effect as recording deed. (c. 183, §38). In order to prove execution of deed as above provided, there must be at least one attesting witness. (c. 183, §39).

Authentication.

Official character of officer taking acknowledgment in this state will in all cases be certified by State Secretary (fee determined annually by secretary of administration) and also (if officer elects to file his signature with court clerk) by clerk (for civil business, in Suffolk County) of superior court (court of record) in any county where officer's signature is on file. As to acknowledgments taken outside of state, see subhead Outside State but within United States, supra. (c. 183, §33).

Forms

Begin in all cases with a caption showing the state and county where the acknowledgment is taken.

On this . . . . day of . . . . 20. . . . ., before me, the undersigned notary public, personally appeared (name of document signer), proved to me through satisfactory evidence of identification, which were . . . ., to be the person whose name is signed on the preceding or attached document and acknowledged to me that (he) (she) signed it voluntarily for its stated purpose.

(as partner for . . . ., a partnership)

(as . . . . for . . . ., a corporation)

(as attorney in fact for . . . ., the principal)

(as . . . . for . . . ., (a)
(the) . . . .). . . . . (official signature and seal of notary)

See topic 10.03 Notaries Public. E.O. 455 (03-13) §5(d-g) for other forms. Court rules, c. 183, §42, c. 192, §2, federal statutes, and federal of Massachusetts statutes not superseded by E.O. 455 (03-13), may permit use of other forms.

The certificate of acknowledgment may be on a separate paper annexed to the instrument. (c. 183, §30).

Alternative to Acknowledgment or Proof.

No statutory provision.

Curative Act.

Recorded instrument unacknowledged or defective as to acknowledgment is deemed fully effective absent suit on defect within ten years of recording. (c. 184, §24).

10.02 AFFIDAVITS:

Affidavits may be sworn:

Within State.

Before justice of peace or notary public. (c. 222, §1). If for use in proceeding in Massachusetts court, before clerk or assistant clerk of such court. (c. 221, §18).

Without State.

Before notary public duly commissioned and qualified by any other state or government, within jurisdiction for which commissioned, certified under official seal. (c. 233, §73). Also before commissioners, appointed by Massachusetts governor, in foreign countries and in states, territories, districts and dependencies of U.S., certified under official seal, when affidavit is to be used or recorded in Massachusetts. (c. 222, §§4-6). Some case authority for recognizing oaths administered by clerk of foreign court if within his statutory authority and if his office and signature are certified. (338 Mass. 263, 155 N.E.2d 165).

General Requirements as to Administration.

Affidavit must be either sworn before qualified officer or verified by written declaration that it is made under penalties of perjury. (c. 268, §1A; see also Super. Ct. R. 15 as to affidavits to be used in Superior Court). No statutory requirements as to administration of oath.

General Requirements of Jurat.

Official seal required only when affidavit sworn outside Massachusetts (c. 233, §73; c. 222, §6); preferred practice when sworn before Massachusetts officer. No requirement that date of expiration of commission be stated, but preferred practice. Jurat required by common law when affidavit is sworn, but when jurat not required by statute, notary's (unsigned) certificate qualifies statement as sworn statement. (143 Mass. 380, 9 N.E. 740; cf. 353 Mass. 551, 233 N.E.2d 723). Title of subscribing officer should be stated. (143 Mass. 380, 9 N.E. 740). Name of subscribing officer must be printed or typed below signature on sworn affidavit to be filed in Probate Court (c. 222, §8A) and preferably should be printed or typed on other affidavits.

Use of Affidavit.

Governed by rules of procedure and evidence.

Form.

No statutory form is prescribed. Customary form of sworn affidavit as follows:

Commonwealth of Massachusetts

[County], SS.

[Case caption]

I, ..., hereby state as follows:

[Statement of facts]

[Signature of Affiant]

. . . .

Subscribed and sworn to before me this day of , 20 .

[Signature of Officer]

. . . .

[Typed name of Officer]

[Title and Seal, if any]

My commission expires . . . .

Customary form of affidavit signed without oath is:

Commonwealth of Massachusetts

[County], SS.

[Case caption]

I, ..., hereby state as follows:

[Statement of facts]

Signed under the penalties of perjury this . . . . day of . . . ., 20 . . . .

[Signature of Affiant]

. . . .

Alternative to Affidavit.

Statement containing written declaration that it is made under penalty of perjury satisfies requirement of affidavit. (c. 268, §1A; 369 Mass. 175, 338 N.E.2d 834; 370 Mass. 243, 346 N.E.2d 861).

10.03 NOTARIES PUBLIC:

Rev. Exec. Order No. 455 (04–04) effective May 15, 2004. (http://www.mass.gov/Agov3/docs/EO455finalrevised.doc) establishes rules and standards of conduct for notaries public. See Governor of Massachusetts website, Information for Notaries Public: http://www.mass.gov/legal/notaries.html.

Seal.

Notary public must have current seal including exact name as commissioned, words “notary public,” “Commonwealth of Massachusetts” or “Massachusetts” and “my commission expires on [date]”; and facsimile of great seal of Massachusetts. If ink, inked seal must use black ink. (Rev. Exec. Order No. 455, §5[c].).

Official Journal.

Non-attorney notaries must keep chronological journal of notarial acts in permanent bound book with numbered pages; for attorney notaries journal recommended as “best practice”. Journal must include: (1) Date and time of notarial act; (2) type of act; (3) type, title and description of document or proceeding; (4) signature, printed name and address of each principal and witness; (5) notation of means of identification; (6) fee if any; and (7) address where notarization performed. (Rev. Exec. Order No. 455, §11).

Signature must be exactly as it appears on commission.

Powers and Duties.

Notaries public are authorized to take acknowledgments of deeds and other instruments; administer oaths or affirmations; perform jurats, signature witnessings, and copy certifications; issue summons per c. 233, §1; issue subpoenas; and witness opening of bank vaults per c. 167, §32. (c. 222, §1).

Person over 14 may nominate his guardian before a notary public. (c. 201, §2). Notary may not perform notarial act if: (1) Principal not in notary's presence; (2) principal not identified to notary through satisfactory evidence such as driver's license or passport; (3) principal has “questionable demeanor”; (4) notary personally interested in transaction; or (5) notary is spouse, domestic partner, parent, guardian, child, sibling, or in-law of principal. (Rev. Exec. Order 455, §6).

Territorial Extent of Powers.

Every notary public is authorized to act throughout the commonwealth. (c. 222, §1).

Fees.

Statute permits the charging of fees in accordance with a specified schedule. (c. 262, §§1, 41, 43).

Commissioners of Deeds.

May be appointed by governor with extraterritorial powers. (c. 222, §§4-7).

Authentication.

See topic 10.01 Acknowledgments, subhead Authentication.

10.04 RECORDS:

Recordable Instruments.

To affect persons other than parties, privies, or persons having actual notice, conveyances of estates in fee simple, fee tail or for life (see category 21 Property, topic Deeds), certain leases or proper notices thereof (see category Property, topic Landlord and Tenant), 20 mortgages, assignments of rents or profits, and assignments of mortgages of real estate (see category 20 Mortgages, topic 20.04 Mortgages of Real Property) are among those instruments which must be recorded (c. 183, §4) or, instrument, in case of registered land, registered (see subhead Registered Land, infra) in registry of deeds for county or district in which land is located.

Under c. 155, §8, and with respect to certain domestic and foreign corporations, any recordable instrument purporting to affect an interest in real estate, executed in name of corporation by president or vice-president and by treasurer or assistant treasurer, who may be one and same person, shall be binding on corporation in favor of purchaser or other person relying in good faith on such instrument, notwithstanding inconsistent provisions of articles of organization, certificate of incorporation, charter, special act of incorporation, constitution, bylaws, resolutions or votes of corporation. Comparable provision for domestic business corporations is c. 156B, §115 and for charitable corporations is c. 180, §10C. Comparable provision for trusts is c. 184, §34.

Place of Recording.

Instruments affecting real property must be recorded with registry of deeds for county where land is located, or district within county in cases of Berkshire, Bristol, Essex, Middlesex and Worcester. (c. 183, §4). *For list of Counties and County Seats see first page for this state in Volume containing Practice Profiles Section.* Financing statements are filed in accordance with the Uniform Commercial Code. (c. 106, §9-502).

Requisites for Recording.

Before a deed may be admitted to record there must be annexed to it or endorsed upon it a certificate of its acknowledgment by one or more of grantors or by attorney executing it or of proof of its due execution (c. 183, §§29, 30; see topic 10.01 Acknowledgments), which certificate is recorded therewith, except that a copy of a deed not acknowledged may be filed in registry of deeds, where it will have same effect for 30 days as if recorded if deed is within that time duly proved and recorded or if after expiration of such 30 days proceedings to compel acknowledgment are still pending. Effect of such filing continues for seven days after termination of such proceedings (see topic 10.01 Acknowledgments). (c. 183, §38).

No instrument conveying unregistered land shall be accepted for recording unless it (a) indicates that land is same as described in or conveyed by sufficiently identified prior recorded instruments or, (b) states that instrument does not create new boundaries, or (c) identifies land by reference either to a previously recorded plan recorded in same registry and sufficiently identified to locate plan, or by reference to a plan recorded with conveyance. Failure to comply does not invalidate instrument. (c. 183, §6A).

The law dealing with the acknowledgment and recording of deeds applies to letters of attorney for the conveyance of real estate. (c. 183, §32).

Every deed, mortgage or assignment of mortgage presented for record must contain or have endorsed on it the full name, residence and post office address of grantee, mortgagee, or assignee and, if deed and recital of amount of full consideration in dollars or nature of other consideration therefor. Address of land must be endorsed in margin of deed. Omission of these matters does not affect validity of deed, mortgage or assignment but may prevent recording thereof. (c. 183, §§6, 6B, 6C).

If instrument cannot be properly duplicated or a proper record thereof made, it may not be accepted for recording. (c. 36, §12A).

Recording Fees.

See c. 262, §§38, 39; c. 106, §9-525; See Secretary of the Commonwealth, Registry of Deeds, Fee Schedule: http://www.sec.state.ma.us/rod/rodnw/fee.htm.

Copies of Instruments in Registry of Deeds.

Photostat copies $1 per page. (c. 262, §38).

Excise Taxes on Deeds.

Deeds or other written instruments that purport to convey ownership interests in real property with value, exclusive of liens, in excess of $100 are subject to excise tax of $2.28 for first $500 in value or fractional part thereof and $2.28 for each additional $500 in value or fraction or part thereof. Some county-specific differences in rates provided for by statute. This tax does not apply to any instrument or writing given to secure debt or to any deed, instrument or writing to which commonwealth or U.S. or any of their agencies are party. (c. 64[D], §1). There is also additional tax equal to 14% of tax imposed under provisions of said chapter. (Acts, 1969, c. 546, §23).

Foreign Conveyances or Encumbrances.

Conveyances executed outside the commonwealth must comply with the laws of the commonwealth. (c. 155, §§1, 8).

Effect of Record.

An unrecorded instrument of defeasance has no effect, except as against the maker of the instrument, his heirs and devisees, and persons having actual notice of it. (c. 183, §53).

The record of a deed or other instrument affecting title to land, duly acknowledged or proved, is conclusive evidence of delivery of such instrument, in favor of purchasers for value without notice. (c. 183, §5).

Certain formal defects cannot be raised after a deed has been recorded for ten years. (c. 184, §24).

Taxes.

See category 22 Taxation, topic 22.18 Stamp and Seal Taxes, subhead Stamp Tax.

Agreement for purchase and sale of real estate, or any extension thereof, must be acknowledged by a seller in order to be received for record, and such recorded agreement or extension must be extended by instrument recorded, or suit for its enforcement begun and memorandum thereof (like that described in c. 184, §15, or see category 21 Property, topic 21.16 Real Property, subhead Lis Pendens) recorded, within 90 days from date provided in agreement or extension for delivery of deed in order to be effective after such 90-day period against persons other than parties. (c. 184, §17A).

Other instruments which must be recorded include: Writ of entry or other proceeding or a judgment or decree therein affecting title to real estate or the use of buildings thereon (see category 21 Property, topic 21.16 Real Property); execution on judgment for possession (c. 237, §42); execution by virtue of which land is taken (see category 8 Debtor and Creditor, topic 8.05 Executions); decrees of Land Court (c. 185, §48); certificate of entry to foreclose mortgage (c. 244, §2) (see category 20 Mortgages, topic 20.04 Mortgages of Real Property); certificate of foreclosure sale under power of sale in mortgage (c. 244, §15); certificate of entry for breach of condition (c. 184, §19); notice of partition proceedings and final decree therein (c. 241, §7) (see category 5 Civil Actions and Procedure, topic 5.16A Partition); warrant for possession of property of absentee (see category 21 Property, topic Absentees); notice of designation of property as homestead estate (c. 188, §2) (see category 8 Debtor and Creditor, topic 8.10 Homesteads); attachment on mesne process of land or leasehold in order that it be valid against subsequent attaching creditors or purchasers (c. 223, §63) (see category 8 Debtor and Creditor, topic Attachment); conditional sale of heating apparatus, elevator apparatus or machinery, plumbing and fixtures which are attached to real estate (see category 3 Business Regulation and Commerce, topic 3.23 Sales); trusts concerning land, in order to give notice of trust to all the world (c. 203, §2) (see category 13 Estates and Trusts, topic 13.15 Trusts); building contracts, in order to secure lien upon land and building (c. 254, §30) (see category 8 Debtor and Creditor, topic 8.13 Liens); decrees of court discharging such liens (c. 254, §15); notice to prevent acquisition of easement (c. 187, §3) (see category 21 Property, topic 21.02 Adverse Possession); antenuptial contracts (c. 209, §26) (see category 14 Family, topic 14.09 Husband and Wife); tax collector's deed or instrument of taking (c. 60, §54) (see category Taxation); statement of unpaid municipal water bills, in order to effect lien on real estate to which water is supplied (c. 40, §42A);

chattel mortgages (c. 106, §9-309) (see category 20 Mortgages, topic 20.01 Chattel Mortgages, subhead Filing). Notices of federal tax lien or certificate of discharge of such lien (c. 36, §24); receipts for federal succession taxes (c. 36, §16) and petition, decree of adjudication and order approving trustee's bond under federal Bankruptcy Act (c. 36, §24A) may be recorded.

Affidavits of a person's married or unmarried status, kinship, or date of birth or death, purporting to relate to title of real estate, may be recorded in registry of deeds for county where land or any part thereof lies. (c. 183, §5A). Any such affidavit, in so far as its facts bear on the title to the land, is admissible in evidence in support of such title in any court in proceedings relating to such title. (Id.).

A final decree in equity ordering conveyance or release to be made has, if recorded, same effect as though such conveyance, etc., were made and delivered. (c. 183, §§43 and 44, c. 209, §32D).

Fees.

See subhead Recording Fees, supra.

Registered Land.

Instruments affecting registered land, in lieu of recording, are presented to the recorder or assistant recorder of the Land Court. (c. 185, §§57-59). Fees for recordings relating to registered land are prescribed by c. 262, §39.

Torrens Act.

Land Court has exclusive original jurisdiction of, among other things, complaints for registration of titles to and easements in land held in fee simple and has power to hear and determine all questions arising upon complaints (c. 185, §1[a]), actions commenced pursuant to c. 208 and c. 209 excepted (c. 185, §1[a1/2]). It is court of record. Where title is contested contestants may claim jury trial at time of filing answer, and petitioner may claim jury trial within ten days after time allowed for such filing. (c. 185, §15). Issues of fact are then tried in Superior Court before jury. Questions of law arising in Superior Court or in connection with decree or otherwise in Land Court are appealable to Appeals Court or, subject to certain conditions, to SJC. (c. 185, §15).

The object of the court is to confirm and register land titles, and a decree to such effect, with few exceptions, binds the land and quiets the title thereto. (c. 185, §45).

Every applicant who receives certificate of title in pursuance of judgment of registration, and every subsequent purchaser of registered land who takes certificate of title for value and in good faith, holds same free from all encumbrances except those noted on certificate, and any of following encumbrances which may be existing:

(1) Liens, claims or rights arising or existing under laws or constitution of U.S. or of commonwealth which are not required by law to appear of record in registry in order to be valid against subsequent purchasers or encumbrances of record.

(2) Taxes, within three years after they have been committed to collector.

(3) Any highway, town way, or any private way laid out under the provisions of §21 of c. 82 if the certificate of title does not state that the boundary of such way has been determined.

(4) Any lease for a term not exceeding seven years.

(5) Any liability to assessment for betterments or other statutory liability which attaches

to land in commonwealth as lien; but if there are easements or other rights appurtenant to parcel of registered land which for any reason have failed to be registered, such easements or rights remain so appurtenant notwithstanding such failure, and are held to pass with land until cut off or extinguished by registration of servient estate, or in any other manner.

(6) Liens in favor of U.S. for unpaid taxes arising or existing under I.R.C. of 1954, as am'd from time to time, and any other federal lien which may be filed in commonwealth. (c. 185, §§45 and 46).

(7) Liens in favor of commonwealth for unpaid taxes arising or existing under laws of commonwealth (c. 185, §46) (effective as to liens recorded on and after Jan. 1, 1985).

The law provides for an insurance fund based on an assessment of one-tenth of 1% of the assessed or court-determined value of land at time of original registration to indemnify persons who have without negligence sustained loss or damage, or been deprived of their estate by operation of land registration law. (c. 185, §§99-109).

Transfers of land are made by deed and surrender of registration certificates and issue of new certificates. (c. 185, §§57 and 62).

Registration of land is optional originally, but after such registration all instruments affecting the land, except wills or leases for a term not exceeding seven years, must be registered to have effect as conveyances or otherwise to affect the land. (c. 185, §57).

Transfer of Decedent's Title.

With respect to registered land, devisees or heirs at law may, after 30 days from granting of letters testamentary or of administration or at any time after entry of final decree on appeal therefrom, file a certified copy of the final decree of the Probate Court and of will, if any, in Land Court, which, after notice to all persons in interest and hearing, may grant new certificate of title to devisees or heirs at law. (c. 185, §97). With respect to unregistered land, there is no provision for recording to show title in devisees or heirs at law, except as this is shown by records of Probate Court. In case of intestacy, sworn petition for administration is customarily relied on for identity of heirs at law. As to when title of decedent passes, see category 13 Estates and Trusts, topics 13.07 Descent and Distribution, 13.16 Wills, subhead Devises.

Vital Statistics.

City and town clerks must keep records of all births, deaths and marriages (c. 46, §1) and transmit certified copies of such records to state registrar (c. 46, §17), from whom certified copies of such copies may be obtained for fee determined annually by secretary of administration, currently $28 for mail requests. Address requests to: Registry of Vital Records and Statistics, 150 Mt. Vernon St., 1st floor, Dorchester, MA 02125, (617) 740-2600. Copies also available by Internet, http://www.mass.gov/dph/bhsre/rvr/vrcopies.htm. Reproduction of certified birth, marriage or death records of town clerk is prohibited except by certain officials in course of their official duties. (c. 46, §19A). Fee for city or town clerk's certificate of birth, marriage or death is $2, subject to change by individual community. (c. 262, §34).

Establishing Vital Records.

Town or city clerk has discretion to record birth, marriage or death not recorded when it occurred as required by law on the basis of (1) an affidavit containing the required facts made by person required by law to furnish information for an original record (in case of birth, includes parents and physician in charge) or credible person having knowledge thereof, (2) a certified copy of the record of any other town or city or (3) a written statement made at the time by any person since deceased required by law to furnish evidence thereof. (c. 46, §13). Usually clerk requires supporting written evidence made at or near the time, such as a church record.

Persons unable to furnish an affidavit for the establishment of a birth record may petition the city or town clerk for the recording of such birth. If clerk is not satisfied with evidence submitted by petitioner, petition and evidence may be submitted to a judge of probate court who may allow petition and order birth recorded. (c. 46, §13A).

Filing under Commercial Code.

When the collateral is equipment used in farming operation or farm products or accounts arising from the sale of farm products or consumer goods the financing statement is filed in the office of city or town clerk where debtor resides, or if debtor is not resident of state then in office of city or town clerk where goods are kept; if collateral is timber to be cut or minerals, including oil and gas, or likened to such, or if filing is fixture filing under c. 106, §9-334, financing statement is filed in office where real estate mortgage would be filed; and in all other cases financing statement is filed in office of Secretary of State and also if debtor has only one place of business in state in office of clerk of such city or town, or if debtor has no place of business in state but resides in state also in office of city or town where he resides. Good faith filings made improperly may, with limitations, still be effective. (c. 106, §9-501). As to fees, see category 20 Mortgages, topic 20.01 Chattel Mortgages.

Evidence.

An official record kept within commonwealth, or entry therein, when admissible for any purpose, may be evidenced by official publication thereof or by copy attested by officer having legal custody of record or by his deputy. If record is kept in any other state, district, commonwealth, territory, or insular possession of U.S. or within Panama Canal Zone, Trust territory of Pacific Islands, or Ryukyu Islands, record or entry therein, when admissible for any purpose, may be evidenced by official publication thereof or by copy attested by officer having legal custody of record, or by his deputy and accompanied by certificate that officer has custody. Certificate may be made by judge of court of record having jurisdiction in governmental unit in which record is kept, authenticated by seal of court, or by any public officer having seal of office and having official duties in governmental unit in which record is kept, authenticated by seal of his office. (Mass. R. Civ. P. 44[a][1]).

Foreign official record, or an entry therein, when admissible for any purpose, may be evidenced by official publication or copy thereof, attested by person authorized to make attestation, and accompanied by final certification as to genuineness of signature and official position (1) of attesting person, or (2) of any foreign official whose certificate of genuineness of signature and official position either (a) relates to attestation or (b) is in a chain of certificates of genuineness of signature and official position relating to attestation. Final certification may be made by secretary of embassy or legation, consul general, consul, vice consul, or consular agent of U.S. or a diplomatic or consular official of foreign country assigned or accredited to U.S. If reasonable opportunity has been given to all parties to investigate authenticity and accuracy of documents, court may, for good cause shown, admit an attested copy without final certification or permit foreign official record to be evidenced by an attested summary with or without a final certification. (Mass. R. Civ. P. 44[a][2]).

Written statement that after diligent search no record of entry of a specified tenor is found to exist in records designated by statement, authenticated as provided in this chapter in case of a domestic record, or complying with requirements of Mass. R. Civ. P. 44(a)-(b) for a summary in case of a record in a foreign country, shall be admissible as evidence that records contain no such record or entry. (Mass. R. Civ. P. 44[b]).

Public records are defined by statute (c. 4, §7, cls. 26) and must be provided by custodian thereof to any person requesting such records.

10.05 SEALS:

An impression or stamping of a seal of a court, public office, public officer or corporation upon paper is as valid as if made on wax or wafer attached to such paper. (c. 4, §9B).

Corporate Seal.

No special provisions.

Uniform Commercial Code adopted. See category 3 Business Regulation and Commerce, topic 3.09 Commercial Code.

Effect of Seal.

Some common law distinctions between sealed and unsealed instruments still exist, i.e. sealed instruments import valuable consideration. With respect to sales of goods, however, see Uniform Commercial Code. Common law rule absolving undisclosed principal of liability on unsealed instrument is abrogated. (369 Mass. 150, 338 N.E.2d 335). Effective June 4, 1977 no instrument purporting to effect interest in land shall be void for lack of seals. (c. 183, §1A). Option contract under seal requires consideration. (Prospective holding, 442 Mass. 314, 812 N.E.2d 1207).

By statute (c. 4, §9A) a recital that the instrument is sealed by or bears the seal of the person signing the same or is intended to take effect as a sealed instrument is sufficient to give the instrument the legal effect of a sealed instrument without the addition of any seal of wax, paper or other substance or any semblance of a seal by scroll, impression or otherwise, except that the foregoing does not apply where the seal of a court or public officer is expressly required by constitution or statute to be affixed to a paper, nor does it apply to corporate stock certificates.

10.06 TORRENS ACT:

See topic 10.04 Records.

10.07 VITAL STATISTICS:

See topic 10.04 Records.

11 EMPLOYMENT

11.01 EMPLOYER AND EMPLOYEE:

See topic 11.02 Labor Relations.

11.02 LABOR RELATIONS:

Principal statutes are cc. 149-152. Enforcement under direction of dept. of labor and industries (as to cc. 149, 150, 150B, and 151), labor relations commission (as to cc. 150A and 150E), dept. of employment and training (as to c. 151A), commission against discrimination (as to cc. 151B and 151C) and dept. of industrial accidents (as to c. 152).

Hours of Labor.

(See c. 136, §6[50] and c. 149, §§30-58, 39, 41, 45-51A, 52, 56-74, 60, 65-69, 73, 78, and 100-102.)

Most county and municipal employees and employees of persons engaged in public contract work restricted to eight hours work in any day, 48 hours in any week and six days in any one week, except in emergency. (c. 149, §§48-50A). State employees generally limited to eight-hour days and 40-hour weeks, with certain occupations exempted. (c. 149, §30A).

Private employers must generally allow 24 consecutive hours rest in every seven consecutive days to employees in manufacturing, mechanical or mercantile establishments, and to watchmen and guards in banks, except for persons employed in hotels, railroads, certain utility companies and certain other businesses. (c. 149, §§48-50).

Restrictions are also imposed upon requiring private employees to work on Suns. or holidays, but exceptions are made as to certain businesses and occupations. (c. 136, §6[50] and c. 149, §§45-52). Employees likewise cannot be required to work on their Sabbath or other holy days. (c. 151B, §4[1A]).

Except for certain types of facilities, or as exempted by commissioner upon application, employers must allow 30 minutes for meal for each six hours of work in calendar day. (c. 149, §§100, 101).

Wages.

Effective Jan. 1, 2008, minimum wage is $8.00. (c. 151, §1). Commissioner may not set minimum rates below $1.85 per hour except for learners, apprentices, ushers, ticket sellers and takers, whose minimum fair wage rates shall not be below $1.25. (c. 151, §7). Janitors and caretakers of property who are furnished with living quarters shall not be paid less than $36 per week. (c. 151, §7). Minimum wage for golf caddies and service people who regularly receive more than $20 per month in tips shall not be less than $1.25 (c. 151, §7); current minimum service rate for tipped employees $2.63 per hour (455 CMR 2.02). Fair wage regulations at 455 CMR 2.01 et seq. Criminal penalties for violations of between $50-$1,000, or ten-90 days imprisonment, or both (c. 151, §19), and civil remedies (c. 251, §20) provided.

Premium Rates for Overtime Work.

Private employees entitled to time-and-one-half for work in excess of 40 hours weekly, but commissions, drawing accounts and incentive pay are excluded in computing regular rate, and certain specified occupations are exempted. (c. 151, §1A). Employees (other than executive, professional and administrative employees earning more than $200 per week) of retail store employing more than seven persons (including proprietor) entitled to time-and-one half for work performed on Sun. (c. 136, §6[50]). Most state employees entitled to time-and-one-half for work in excess of eight hours per day or 40 hours per week. (c. 149, §30B).

Weekly Payment of Wages.

It is crime for employer to fail to pay employees at least biweekly or to make interval between date of payment and last date on which wages were earned greater than six days. (c. 149, §148). Bona fide executive, administrative or professional employees may be paid biweekly, or semi-monthly, or monthly if they elect. Biweekly wage payment requirement not applicable in certain instances, including agricultural, but is applicable to payment of commissions when amount thereof has been determined and become due. Wages of involuntarily discharged employee must be paid on date of discharge; or, in Boston, as soon as payroll laws are complied with; except commissions may be paid when normally calculated. Wages earned but unpaid at time of voluntary termination of employment must be paid on next regular payday or, if none, by following Sat., unless employee is absent, in which case balance payable upon demand. Violation punishable by criminal fines up to $25,000 or up to one year imprisonment, or both, for first offense; civil citations may require restitution to aggrieved party or penalty up to $25,000 for each violation. (c. 149, §§148, 27C). President, treasurer or other officer or agent involved in managing corporation is deemed to be employer, and so punishable. (c. 149, §148). Injunctive relief, treble damages, costs and attorney's fees provided for violations of §148. (c. 149, §150). Employees may not be penalized for exercise of wage and hour rights. (c. 149, §148A). Any employer who discriminates against employee because of complaint made to Attorney General's office based on violation of c. 149 shall be subject to civil citation or order. (c. 149, §148A). When paying wages, employer must furnish payslip to employee showing: employer and employee names, date, hours worked, hourly wage, and deductions or increases made in pay period. (c. 149, §148). Employer in manufacturing, mercantile and certain other businesses may not deduct wages of employee coming late to work more than proportionately to time lost. (c. 149, §152).

Priority of Wage Claims.

Massachusetts insolvency statute repealed effective July 1, 1978. Priority given to wage claims not exceeding $100 against insolvent estates of deceased persons (c. 198, §1) and in settlement of estates by receivers (c. 206, §31).

Assignment of Wages.

See category 8 Debtor and Creditor, topic 8.01 Assignments.

Presumption of Employment.

For purposes of c. 149, individual performing any service, except services authorized under c. 149, is deemed employee unless showing made that individual is free from control and direction, services are performed either outside usual course of business of enterprise or outside of all places of business of enterprise, and individual is customarily engaged in independent occupation, profession, or business of same nature as services performed. Failure to withhold state or federal taxes, unemployment compensation, or worker's compensation, cannot be used to make required showing. Violators shall be punished or shall be subject to civil citation or order. (c. 149, §148B). In case of violation by corporation, president, treasurer, and managing officer deemed employer. (c. 149, §148B). Civil remedies available. (c. 149, §150).

Child Labor.

(See c. 149, §§56-105.) Persons under 18 generally not permitted to work more than nine hours per day, more than 48 hours per week or more than six days per week; and child's hours of work each day must fall within period not exceeding ten consecutive hours in most cases (c. 149, §§56, 67); but these strictures inapplicable to persons employed in professional, executive, administrative or supervisory capacities, and to personal secretaries. (c. 149, §56). Upon written petition of not less than 60% of employees in place of employment where principal source of income is tips, Attorney General may allow periods of work to fall within period not exceeding 12 consecutive hours. (c. 149, §56). Child's hours of labor may extend to 52 hours per week in certain types of seasonal employment during June to Oct., provided total hours in any year not exceed average of 48 hours a week for whole year, excluding Sun. and holidays. (c. 149, §56). Children 14 or younger may be employed in agricultural labor for no more than four hours per day, nor more than 24 hours per week except if related by blood or marriage to owner or operator of farm on which employed. (c. 149, §56). Children under 16 are not permitted to work on certain equipment (c. 149, §61) and in certain occupations deemed overly hazardous, arduous or corruptive (c. 149, §§62-64) or which might interfere unduly with their schooling (c. 149, §§69-73). Upon finding of hardship or emergency within industry, Attorney General may suspend application of c. 149 as it pertains to regulation, limitation, or prohibition of employment of minors over age of 16. (c. 149, §67, note). Substantial criminal and civil penalties against employers, parents and children are provided for violation of child labor laws (e.g., §§57, 78-83, 86, 90-92, 95, 97-98, 104).

Female Labor.

Title VII of Civil Rights Act of 1964 preempts all state laws requiring employers to distinguish on basis of gender (except for bona fide occupational qualifications). (1971-72 Op.Atty.Gen. 134).

Discrimination.

Forbidden Practices.

C. 151B makes it unlawful to discriminate against persons on account of race, color, religious creed, national origin, sex, sexual orientation (unless such orientation involves minors as sex objects), age (over 40), ancestry or handicap, in connection with employment, tenure, terms and conditions of employment, membership rights in labor unions, or furnishing of bonds. (c. 151B, §4). Sexual harassment by employer or agent specifically defined (c. 151B, §1[18]) and prohibited (c. 151B, §4[16A]). Same-sex harassment is prohibited, regardless of sexual orientation of parties. (424 Mass. 285, 676 N.E.2d 45). Employer must make reasonable accommodation for qualified handicapped persons unless accommodation would impose undue hardship to employer's business. (c. 151B, §4[16]). Employer may not deny or terminate employment based on individual's membership in military or based on military obligation to perform duties. (c. 151B, §1D). Employment advertisements or job application inquiries which directly or indirectly express limitation based on protected class status are prohibited. (c. 151B, §4[3]).

Employer may not request information or discriminate against person refusing to provide information regarding (1) arrest not resulting in conviction, (2) first conviction for drunkenness, simple assault, speeding, minor traffic violation, affray or disturbing peace, (3) conviction of misdemeanor where conviction and incarceration, if any, ended five years or more prior, unless person has been convicted of another offense within prior five years. (c. 151B, §4[9]). Employer may not request information, nor refuse to employ, nor fire person for failing to inform regarding commitment to mental institution, provided person has been discharged and has psychiatric certification of mental competence. (c. 151B, §4[9A]). It is unlawful for any employer to refuse to hire or to terminate based on that person's genetic information. (c. 151B, §4[19A]). It is also unlawful to require genetic testing as condition of employment or to question prospective employee about his or her genetic information. (c. 151B, §4[19A]).

No person may coerce, intimidate, or discriminate in any way against any person for opposing practices forbidden by c. 151B. (c. 151B, §4[4]-[4A]).

No person may coerce, intimidate, threaten or interfere with other person for having aided or encouraged any other person in exercise of right protected by c. 151B. (c. 151B, §4[4A]).

Employers may request conviction data and custody status from Criminal History Systems Board under limited circumstances. (c. 6, §167 et seq.).

Available Relief.

Complaint must be filed with Mass. Commission Against Discrimination within 300 days of allegedly discriminatory act. (c. 151B, §5). Commission empowered to investigate and pass upon complaints of unlawful practices, to hold hearings, to issue subpoenas, and to promulgate rules and regulations. (c. 151B, §3). Voluntary mediation possible before investigation under Commission's regulations. If, after investigation, commission finds probable cause to credit allegations of complaint, and attempts at conciliation fail, single commissioner holds hearing on complaint. (c. 151B, §5). If unlawful practice found, commissioner issues cease and desist order, and such affirmative orders as may be necessary, as well as actual damages, attorney's fees and costs (but no punitive or multiple damages). (c. 151B, §5). Commissioner's decision reviewable before full commission (c. 151B, §3[6]), and then by expeditious judicial review in superior court (c. 151B, §6). Standards of review in c. 30A, §14. Respondents to c. 151B. §5 bias claim not entitled to de novo jury trial following unfavorable decision by commission. (441 Mass. 549).

Ninety days after filing complaint with commission, or sooner if commissioner assents in writing, but no later than “three years after unlawful practice occurred”, complainant may bring civil action in Superior Court, Probate Court or Housing Court, which ends review by commission. (c. 151B, §9). In civil action, court may grant injunctive relief and actual and punitive damages and must, if it finds for complainant, award attorney's fees and costs. (c. 151B, §9). In actions for age discrimination, petitioner entitled to jury trial and, if practice committed knowingly, to at least double and up to treble damages. (c. 151B, §9). Actions for employment discrimination based on sex (418 Mass. 220, 636 N.E.2d 212) or handicap (419 Mass. 792, 647 N.E.2d 716) fall within state constitutional right to jury trial although arbitration provisions in employment contract will be binding at least in context of sexual discrimination. (42 Mass. App. Ct. 347, 677 N.E.2d 242). First Circuit has held jury trial required by Seventh Amendment in other c. 151B actions. (962 F.2d 120).

In addition there are following special antidiscrimination provisions:

On Account of Age.

Dismissing from employment, refusing to employ, discriminating against in compensation or other terms of employment or giving effect to agreement entered into on or after Sept. 1, 1984 requiring any such action with regard to person over age of 40 is forbidden. (c. 149, §§24A-24J, c. 151B, §4[1B]). Exceptions provided for bona fide seniority systems or employee benefit plans and mandatory retirement at age 65 of certain executives and faculty members. (c. 151B, §4[17]). Age discrimination is punishable under c. 151B and, in private sector, by fine up to $500. (c. 149, §24A). In departure from federal law, fact that individual uses corrective device to alleviate disability not relevant in determining whether individual is disabled under statute. (434 Mass. 233).

Wage Disparities.

Payment to employee of salary or wages less than rates paid to employees of opposite gender for like or comparable work makes employer liable to underpaid employee for amount of underpaid wages, additional equal amount of liquidated damages, and reasonable attorney's fees; court action must be instituted within one year of alleged violation. (c. 149, §105A).

Maternity Leave.

Employer must give up to eight weeks of maternity leave (paid or unpaid) for purpose of giving birth or adopting child under 18 years of age, or under 23 years of age if mentally or physically disabled, to any eligible female employee on at least two weeks' notice of anticipated departure date and of intention to return. (c. 149, §105D). Commission Against Discrimination has promulgated regulations concerning pregnancy-related disabilities pursuant to c. 151B, §3. (804 CMR 8.01). Such disabilities must be treated like any other. (375 Mass. 160, 375 N.E.2d 1192).

Alternative Remedy for Race/Gender Discrimination.

Under c. 93, §102, any person denied same legal protections enjoyed by white male citizens, including right to make or enforce contracts, may sue in superior court for injunctive relief, compensatory and punitive damages, and, if successful, will be awarded attorney's fees and costs.

Alternative Remedy for Age/Handicap Discrimination.

Under c. 93, §103, any person, regardless of handicap or age, must, with reasonable accommodation, have same rights as other persons to make and enforce contracts.

Wrongful Discharge—Implied Covenant of Good Faith.

Employment relationship terminable “at-will” by employer or employee, absent express or implied term as to duration. (384 Mass. 659, 429 N.E.2d 21). Limited exception to “at-will” doctrine based on breach of implied covenant of good faith and fair dealing applies when employer discharges employee without cause with effect of depriving employee of compensation related to past services. (373 Mass. 96, 364 N.E.2d 1251). Goal of covenant is to deny employer financial windfall resulting from denial to employee of compensation for past services. (393 Mass. 231, 471 N.E.2d 47; 391 Mass. 333, 461 N.E.2d 796). Employee cannot recover unvested portions of employment compensation package based on implied covenant. (108 F.3d 5).

Violation of Public Policy.

Exception to "at-will" doctrine when employee discharged for asserting legally guaranteed right, doing what law requires, refusing to do what law forbids, or performing important public deeds, even though law does not absolutely require performance of deeds. (412 Mass. 469, 589 N.E.2d 1241; 410 Mass. 805, 575 N.E.2d 1107). Public policy must be derived from clearly articulated law (e.g. constitutions, statutes, regulations) and not from private professional codes. (412 Mass. 469, 589 N.E.2d 1241).

Where comprehensive statutory remedy for alleged wrong exists (e.g., Fair Employment Laws), employee may not assert wrongful discharge claim. (783 F. Supp. 713).

All Massachusetts employers, employment agencies, and labor organizations must have specific sexual harassment policies. (c. 151B, §3A).

Discrimination Claims.

Proof of discrimination claim is multistep process. In first stage, plaintiff must establish prima facie case of discrimination by showing: "(1) He is a member of a class protected by c. 151B; (2) he performed his job at an acceptable level; (3) he was terminated; and (4) his employer sought to fill the plaintiff's position by hiring another individual with qualifications similar to the plaintiff's." (419 Mass. 437, 646 N.E.2d 111). In second stage, defendant can rebut plaintiff's showing by articulating legitimate nondiscriminatory reason for action. (371 Mass. 130, 355 N.E.2d 309; 419 Mass. 437, 646 N.E.2d 111). In third stage, plaintiff must show that basis of employer's decision was unlawful discrimination. (432 Mass. 107, 731 N.E.2d 1075). Establishment that defendant's articulated reason for action is untrue gives rise to inference of discriminatory intent and can support jury's finding of discrimination, but does not compel finding of discrimination. (Id; 434 Mass. 493).

Labor Unions and Disputes.

Labor Relations Act.

C. 150A, modeled on National Labor Relations Act, gives employees (not including domestic workers) right to self-organization and collective bargaining. (c. 150A, §§2, 3, 3A). Domestic workers over age 17 and employed at least 16 hours per week have limited right to self-organization and collective bargaining. (c. 150A, §§3, 3A). See also category 3 Business Regulation and Commerce, topic 3.24 Securities, subhead Business Combinations.

Unfair labor practices by employers include: (1) Interference with or coercion of employees in their rights to self-organization, to bargain collectively and to engage in concerted activities for purpose of mutual aid or protection; (2) interference with or domination of either formation or administration of any labor organization; (3) discrimination in regard to hiring, tenure or any term or condition of employment on account of membership in labor organization (but union security clauses requiring union membership as condition of employment are valid and enforceable except in cases of employees unfairly denied union membership), and (4) refusal to bargain collectively with employees' chosen representatives. (c. 150A, §4).

Unfair labor practices by unions include: (1) Seizure or unlawful occupancy of private property as means of forcing settlement of labor dispute; (2) engagement in or authorization of any strike, slowdown, boycott or other concerted action for purpose of bringing about commission of unfair labor practice; (3) injuring trade or business of any person because such person has refused to commit unfair labor practice; (4) interfering with or coercing employees in selection of representatives for purpose of collective bargaining after labor relations commission has determined that employees involved do not desire to be represented by union; and (5) refusing to bargain collectively with any employer who has recognized union as exclusive bargaining agent. (c. 150A, §§4A-4B).

Commission authorized to hold hearings, conduct investigations, issue subpoenas and promulgate rules and regulations, all in aid of its primary functions to make appropriate unit determinations, certify labor unions as duly selected bargaining representatives of employees, adjudicate unfair labor practice petitions and determine any charge that employee has been unfairly denied admission to, or expelled from, membership in union. (c. 150A, §§5, 6 and 6A). Superior Court has jurisdiction to review final orders of commission. (c. 150A, §6).

Advertising and Hiring during Labor Disputes.

Advertising for or hiring of help during labor disputes is regulated, and knowing employment of professional strikebreakers during lockout or lawful strike is prohibited. (c. 149, §§22-23). Employment of civil defense personnel or armed guards during labor disputes regulated. (c. 149, §§23A-23B; c. 147, §30).

Dispute Settlement.

C. 150 provides for conciliation and arbitration of industrial disputes; c. 150B deals with peaceful settlement of industrial disputes posing threat to public health and safety, and c. 150C (based on Uniform Arbitration Act) governs enforcement of collective bargaining agreements to arbitrate.

Collective Bargaining for Public Employees.

C. 150E gives certain state, county and municipal employees, including certain personnel employed by judicial branch, right to form or join employee organizations for purposes of bargaining collectively on questions of wages, hours and other terms and conditions of employment.

“Right to Work” Law.

Massachusetts has no such law.

Injunctions.

In cases involving labor disputes, chief justice of superior court must designate three judge panel to hear any petition for injunctive relief. (c. 212, §30). C. 214, §6 forbids issuance of any restraining order or injunction, preliminary or permanent, in labor dispute, except after testimony in open court, with opportunity for cross-examination, and after findings of fact by court that: (1) Unlawful acts have been threatened and will be committed unless restrained, or have been committed and will be continued unless restrained; (2) substantial and irreparable injury to plaintiff's property will result; (3) greater injury will result to plaintiff from denial of relief than will be inflicted upon defendants by granting same; (4) plaintiff has no adequate remedy at law; and (5) public officers charged with duty to protect plaintiff's property are unable or unwilling to furnish adequate protection. Hearing must be preceded by personal notice to all known defendants and to chief of officers charged with protection of plaintiff's property, except that injunctive relief may be granted ex parte if principal representative or attorney of employees or labor organization participating in dispute was informed of time and place at which application for temporary restraining order would be presented (sufficiently in advance to appear in opposition thereto), or if plaintiff made every reasonable effort to give such notice but was unable to do so. (c. 214, §6[2]). Despite procedural compliance, injunctive relief will be denied if plaintiff fails to make all reasonable efforts to settle by alternate means, or does not abide by legal obligations. (c. 214, §6[4]). Notwithstanding foregoing, injunctive relief may be granted without reference to procedures outlined above whenever parties to jurisdictional dispute have voluntarily submitted to arbitration, and defendant has failed to abide by arbitration procedure, or to comply with terms of arbitration award, and engages in strike, picketing, boycott or other concerted interference against plaintiff. (c. 214, §6A).

Labor Unions.

May not operate unless statement filed with commissioner of labor and industries setting forth names and addresses of union's officers, its aims, scale of dues, fees, fines, assessments and officers' salaries. Labor unions having membership of more than 50 members also required to file annual statement with commissioner of receipts and expenditures of union. These reports open to public inspection. Fines provided for failing to file or making false statement, but filing with commissioner of duplicate of financial statement filed with U.S. Dept. of Labor is sufficient. (1946, c. 618, §§1-5, am'd 1949, c. 394). Labor unions may sue and be sued as legal entities. (386 Mass. 314, 435 N.E.2d 1027).

Workers' Compensation Act.

Contained in c. 152 and administered by dept. of industrial accidents. (c. 23E). Provides schedule of payments and other benefits to be made or provided by insurer of employer, including self-insurance group of which employer is member, (or by employer if self-insurer) to eligible employees in case of injuries (including certain diseases) sustained in course of employment and resulting deaths. (c. 152, §§26-51).

Employees not subject to act include officers and crew on vessels in interstate or foreign commerce, certain professional athletes, certain salespersons affiliated with real estate brokers, certain independent direct salespersons of consumer products working on commission, certain taxicab operators, persons covered by federal compensation law, and certain persons whose employment not in usual course of trade or business of employer. Provisions elective to employers of seasonal, casual or part-time domestic servants. (c. 152, §1[4]).

Employee subject to act is eligible for compensation unless employee claimed common law right of action by written notice to employer at time of hiring or, if employer was not then insured, within 30 days after notice that employer had become insured. (c. 152, §24). Employee may waive claim to common law right of action upon five days' written notice. (c. 152, §24). Agreement by employee to waive statutory right to compensation invalid (c. 152, §46), although employee can agree to binding arbitration of specific compensation claim as alternative to administrative proceeding (c. 152, §10B). No proceedings for compensation may be maintained unless injured employee or, if employee deceased, legal representative or beneficiary, serves written notice upon employer or insurer as soon as practicable, and files claim within four years after employee became aware of causal relationship between disability and employment, or after employee died. (c. 152, §41). Notice must be signed and must give time, place and cause of injury. (c. 152, §42). Inaccuracy or want of proper notice will not bar employee if insurer not prejudiced thereby. (c. 152, §44).

Compensation for incapacity not payable for injury which does not incapacitate employee five or more full days or for mental or emotional disability arising principally out of bona fide personnel action, except action for intentional infliction of emotional harm. (c. 152, §29). Suits for negligence, assault and battery, intentional infliction of emotional distress are barred by exclusivity provisions of Workers Compensation Act. (422 Mass. 563, 664 N.E.2d 815). Exclusivity of act also precludes action against employer for common law claims of intentional or negligent infliction of emotional distress arising out of workplace sexual harassment. (422 Mass. 551, 664 N.E.2d 808).

Within seven days, excluding Suns. and legal holidays, after receipt of notice or knowledge of injury resulting in five or more days loss of work, employer must notify employee, insurer and division of administration of dept. of industrial accidents, on forms prescribed by division. (c. 152, §6). Division of administration then informs employee of rights, benefits and obligations, monitors distribution of benefits, attempts to resolve disputes, and provides claim form to employee if dispute not resolved. (c. 152, §6A). Within 14 days of receipt of employer's notice, or of employee's claim form, whichever is first, insurer must either commence weekly payments or notify division, employer and employee by certified mail that it will not pay and will contest claim for payment, specifying grounds and basis for such position and stating that to secure benefits employee must file claim with department. (c. 152, §7[1]). Claim is filed with insurer, and with division of administration which attempts to resolve dispute by informal means and, if no resolution, refers claim to industrial accident board within 15 business days after receipt. (c. 152, §10).

Claim then referred to administrative judge who must require conference within 28 days after claim received by board, and within seven days thereafter enter order requiring or denying payment or modification of benefits. (c. 152, §10A). Fourteen days to appeal order for hearing before board member, to be held within 28 days of filing of appeal (c. 152, §§10A, 11); 30 days to file for appeal before reviewing board (c. 152, §11C). Appeal requires fee paid into special fund per c. 152, §65. Fee waived for indigents. (c. 152, §11C). Alternatively, at any time more than five days before conference, parties may agree to binding arbitration by independent arbitrator. (c. 152, §10B). Orders, decisions and arbitration awards enforceable by Superior Court (c. 152, §10[B][4]); appeals from reviewing board decisions go to Appeals Court. (c. 152, §12). Filing of claim, acceptance of payment or submission to proceeding under c. 152 releases all claims of employee under common law against employer. (c. 152, §23).

Employer may agree through collective bargaining to binding obligations and procedures respecting: (1) Benefits supplemental to those of c. 152, §§34-36; (2) alternative dispute resolution system; (3) use of limited list of medical treatment providers; (4) use of limited list of impartial physicians; (5) light duty, modified job, or return to work program; (6) 24 hour health care program; (7) committees and procedures for worker safety; or (8) vocational rehabilitation or retraining program. (c. 152, §10C).

Penalties for employer violation include fine and shutdown, public bidding prohibitions, exposure to lawsuits by competing bidders (c. 152, §25C), criminal penalties (including imprisonment) (c. 152, §§14[3], 25C), and recovery of amounts paid by Workers' Compensation Trust Fund to injured employees (c. 152, §65). If insurer contests claim for benefits and loses or settles, it must pay employee's reasonable attorney's fees (c. 152, §§10A-13A).

Occupational Diseases.

See subhead Workers' Compensation Act, supra.

Employers' Liability Act (c. 153) applies with certain limitations to recovery by injured employee against employer not covered by Workers' Compensation Act.

Unemployment Compensation.

Employment security benefits are governed by c. 151A and administered by Dept. of Employment and Training. Unemployed individual eligible for weekly benefits related to percentage of earnings during base period (c. 151A, §29) if (a) had wages during base period amounting to at least $3,300 (effective Jan. 1, 2008) and 30 times the weekly benefit rate, with certain provisions (see c. 151A, §24[a]); (b) capable of, available for and actively seeking employment; (c) has notified state employment office. (c. 151A, §24). Base period is last four completed calendar quarters before benefit year, but there are options to use other methods of determining base period. (See c. 151A, §1[a].) Duration of benefits generally limited to 30 weeks or 36% of individual's total wages during preceding year, whichever is less (c. 151A, §30), and benefits are paid out of fund contributed to by employers based on percentage of each employer's total payroll and on employment experience rate of each (c. 151A, §§13-18). Employer applying to state instrumentality for license to conduct profession, trade, business, or for license renewal, must certify his compliance with state contribution laws. (c. 151A, §19A). Benefits are extended if individual is attending vocational training course approved by director (c. 151A, §§24, 30) or during periods of heavy unemployment as determined by U.S. Secretary of Labor. (c. 151A, §30A). Effective July 7, 2008 — Mar. 28, 2009, extended benefits (up to 39 weeks) available pursuant to federal H.R. 2642, Supplemental Appropriations Act. See website of Mass. Executive Office of Labor and Workforce Development at http://www.mass.gov/eolwd. See category 16 Insurance, topic 16.01 Insurance Companies, subhead Universal Health Insurance.

No individual shall be disqualified from receiving unemployment benefits if reason for individual leaving employment was domestic violence. (c. 151A, §25). Individual's reasons for leaving employment may include: (1) fear of future domestic violence on route to or returning from work; (2) need to relocate to another area to avoid future domestic violence; (3) need to address physical, psychological, or legal effects of domestic violence; (4) need to relocate in order to receive services available to victims of domestic violence; or (5) any reasonable belief that termination of employment necessary for safety of individual or individual's family.

Individuals receiving day care subsidy, who subsequently become unemployed but are eligible for unemployment compensation, retain their rights to day care subsidy. (c. 151A, §30).

Penalties.

Any employer, or officer or agent thereof, who: (1) Attempts to evade contribution, or payment in lieu of contribution; or (2) knowingly misrepresents in connection with contribution; or (3) refuses to make contribution required by commissioner of dept. of employment and training; or (4) makes deduction from wages to pay required contributions; or (5) attempts by threat or coercion to induce waiver of individuals' c. 151A rights, or to prevent testimony at c. 151A hearing; or (6) willfully corrupts, or endeavors to intimidate, state officer acting pursuant to c. 151A, or willfully endeavors to impede due administration of c. 151A, is subject to substantial fines, imprisonment, or both. (c. 151A, §47). Any person who makes or assists in making false or misleading statement to obtain benefits for self or another subject to fine up to $10,000, imprisonment up to five years or both. (c. 151A, §47).

Miscellaneous.

Change of Location.

Owner of every establishment employing 12 or more persons must give notice of change of location of operations in prescribed form to commissioner of labor and industries. (c. 149, §179B).

Corporate Takeovers.

Any employee of corporation having, or within 12 months having had, class of stock registered under Securities Exchange Act of 1934 as amended who is terminated within shorter of: (1) 12 months from date of contested election of directors to facilitate voting control transfer; or (2) period from contested election to control transfer shall receive lump-sum termination payment of twice employee's weekly compensation multiplied by number of years of completed service in addition to any other payment due. (c. 149, §184).

Employment Applications.

Applications for employment must contain statutorily prescribed notice informing applicant that lie detector testing is illegal. (c. 149, §19B[2(b)]). If employer seeks information concerning prior convictions, application must contain statutorily prescribed notice informing applicant that sealed arrest and conviction records need not be revealed. (c. 276, §100A).

Health, Welfare Benefits and Retirement Funds.

Such funds are regulated by law and must register and report annually. (c. 151D). Non-state and municipal employees entitled to 90 days extended health insurance coverage when they leave group plan due to total or partial closing of facility with 50 or more employees. (c. 175, §§110D, 110G; c. 176B, §6A; c. 176G, §4A). For commercial health plans, 90–day period begins at expiration of automatic 31-day continuation period required by c. 175, §110D. Employees covered by commercial or nonprofit, Blue Cross/Blue Shield (c. 176A) plan entitled to additional 39 weeks of coverage at own expense when involuntarily laid off (c. 175, §110G; c. 176B, §6A). Employers failing to comply become responsible as insurers. Health maintenance contracts issued or renewed in Commonwealth must provide benefits for treatment of certain biologically-based mental disorders and for rape-related emotional or mental disorders. (c. 176G, §4M).

Group life insurance coverage must continue for 31 days following termination of employment. (c. 175, §134[4]). Employees must be notified of conversion rights, if any. (c. 175, §134A). Divorced spouses of participants in certain group insurance plans are entitled to continued coverage until remarriage of participant or spouse unless divorce judgment provides otherwise. Notice of cancellation of coverage of divorced or separated spouse must be given. (c. 175, §110I; c. 176A, §8F; c. 176B, §6B; c. 176G, §5A). It is unlawful for employers to fail to make contributions to health or welfare funds or pension funds or other employee benefit funds in violation of terms of collective bargaining agreement. (c. 149, §181).

In event of insolvency of health maintenance organization, enrolled individuals may enroll with any hmo available during enrollee's last enrollment period. (175, §110N). Enrollers shall be offered same coverage and rates available during last enrollment period. (175, §110N).

Industrial Homework.

C. 149, §§143-147H, prohibits manufacturing or processing of materials in home for employer unless commissioner of labor and industries has issued permit therefor to employer. Permits for certain specified homework not issued. (c. 149, §144). Restrictions on homework inapplicable to domestic service (c. 149, §143) and to organizations incorporated in Massachusetts for educational or philanthropic purposes (c. 149, §147H). Penalties are provided for violation of law or regulations issued by commissioner. (c. 149, §§147A, 147C, and 147G).

Leave from Work.

Upon request, employee of manufacturing, mechanical or mercantile establishment entitled to vote in election must be permitted to leave work for this purpose during the two hours after polls in voting precinct open. (c. 149, §178). Nontemporary employee must be granted leave of absence of up to 17 days per year without loss of position or benefits for training in ready reserves of U.S. armed forces. (c. 149, §52A). Veteran whose services not essential to public health and safety must be given leave of absence to participate in Veterans Day or Memorial Day exercises. (c. 149, §52A1/2). Employees must be given leave for jury duty (c. 234A, §60), with up to three days' pay for regularly employed person (c. 234A, §48). Eligible employee allowed 24 hours leave to participate in child's school activities, accompany child to medical or dental appointment, or accompany elderly relative to medical, dental, or professional service appointment. (c. 149, §52D; 29 U.S.C.S. §§2611-2612). Eligible employee must have worked 1,250 hours in preceding 12 months for employer, and employer must have minimum of 50 workers. (c. 149, §52D; 29 U.S.C.S. §§2611-2612).

Lie Detector Tests.

Use of lie detector tests (including polygraph and written tests) by any employer with respect to any employee or applicant for employment (even if administered outside Massachusetts) is punishable by fine of up to $1,500 or imprisonment of responsible officials for up to 90 days and is subject to civil action by aggrieved persons for injunctive relief, treble damages of at least $500 and attorneys' fees and costs. (c. 149, §19B).

Medical Examinations.

Employer may condition offer of employment on results of medical examination conducted solely for purpose of determining whether employee, with reasonable accommodation, is capable of performing essential functions of job. (c. 151B, §4[16(3)]). Employer must pay for examination (c. 149, §159B), and furnish copy of medical report to employee upon request (c. 149, §19A). If employee has reasonable expectation of doctor-patient confidentiality, disclosure of results to employer may trigger invasion of privacy action against both doctor and employer. (395 Mass. 59, 479 N.E.2d 113; 785 F.2d 352). Employer may not require HLTV-III antibody or antigen test as condition for employment—violation punishable as unfair practice under c. 93A, §2. (c. 111, §70F). For rules determining whether subjecting private employees to random drug testing violates c. 12, §11I or c. 214, §1B, see 418 Mass. 425, 637 N.E.2d 203.

See subhead Discrimination, catchline Forbidden Practices, supra, for restrictions on inquiring about criminal history, handicap, or other protected class status. Employers may be liable for negligent hiring or retaining dangerous persons. (401 Mass. 860, 520 N.E.2d 139; 26 Mass. App. Ct. 289, 526 N.E.2d 1309). Application forms seeking work history must state that applicant may include “any verified work performed on a voluntary basis”. (c. 149, §52B). Use of consumer reports and investigative consumer reports (background and credit checks) regulated. (c. 93, §50 et seq.).

Personnel Records.

Employers are required to permit present and former employees upon written request to inspect and copy their personnel records and to submit written statements of explanation for inclusion in such records. Violation punishable by $500-$2,500 fine. (c. 149, §52C).

Plant Closings.

Employers utilizing financing issued, insured or subsidized by certain quasi-public agencies must agree to make good faith effort to provide longest practicable advance notice, and maintenance of income and health insurance benefits. At least 90 days' notice or equivalent benefits expected whenever possible. (c. 149, §182). See catchline Health, Welfare Benefits and Retirement Funds, supra, for insurance continuation provisions. Reemployment assistance fund to provide benefits as determined by regulations to be promulgated. (c. 151A, §§71A-H). Employers may be billed by state for cost of benefits. (c. 149, §71H).

Toxic Substances.

Under c. 111F, employers (except certain research labs which obtain an exemption) in whose workplaces certain toxic substances are used must: (i) Label certain containers containing such substances, (ii) maintain and make available upon request to employees, unions and physicians material safety data sheets (minus trade secret information if exemption is obtained) for each substance, (iii) post notice in workplace regarding employees' rights under this law, (iv) instruct employees about proper handling of such substances, and (v) file copies of data sheets with Mass. dept. of environmental and quality engineering for possible public inspection. Violations are subject to fine of up to $250 per day. Willful violations are treated as misdemeanors subject to fine of up to $1,000 per day and/or imprisonment of up to 90 days. (c. 111F, §3).

Working Conditions.

Employer must provide proper lighting, ventilation, and sanitation in work rooms and proper heat from Oct. 15 to May 15. (c. 149, §§113, 117). Industrial and construction employers must provide drinking water. (c. 149, §106). Fire exits may not be locked or obstructed during working hours. (c. 149, §126). Employers cannot require employees to work more than six hours during calendar day without interval of at least 30 minutes for meal except in certain industries or with exemption. (c. 149, §§100, 101).

Employees Who Have Unmonitored Contact With Children.

Operators of camps for children must obtain all available criminal offender record information and juvenile data of all employees. (c. 6, §172G). Any organization providing activities or programs to children 18 years of age or less that accepts volunteers must obtain all available criminal offender record information prior to accepting volunteer. (c. 6, §172H). Information obtained under these sections not to be disseminated for purpose other than to protect children.

School committee, superintendent of schools, and principal must obtain all available criminal offender record information of any current or prospective employee or volunteer of school department who may have direct and unmonitored contact with children. (c. 71, §38R). Information must be obtained not less than every three years. (Id.). Information not to be disseminated for purpose other than protection of children. (Id.).

11.03 WORKERS' COMPENSATION LAW:

See topic 11.02 Labor Relations.

12 ENVIRONMENT

12.01 ENVIRONMENTAL REGULATION:

General Supervision.

Most Massachusetts environmental agencies are organized under executive office of environmental affairs. (c. 21A). Dept. of environmental protection includes divisions of wetlands (overseeing inland and coastal wetlands), water supply, water pollution, air quality (overseeing air and noise pollution), hazardous waste, environmental analysis, solid waste disposal and hazardous waste facility siting. Dept. of environmental management includes divisions of waterways (overseeing dredging and filling in tidal areas and certain rivers and streams), forests and parks and water resources (overseeing water planning). There are also departments of food and agriculture; fisheries, wildlife and recreational vehicles; and Metropolitan District Commission. Executive office of environmental affairs includes divisions of conservation services, environmental policy act and review (overseeing Environmental Impact Report Review) and coastal zone management. Dept.of environmental protection also plans, establishes and manages programs to assess uses of water and to plan for future water needs in commonwealth with broad permitting and regulatory powers (c. 21G) and is charged with controlling air pollution by enforcing emissions standards for stationary sources and motor vehicle sources of air contamination (c. 111, §§142A-K as am'd by 1995, c. 39 §§7-9). Commissioner of dept. of environmental protection shall adopt regulations known as state environmental code. (c. 21A, §13).

Prohibited Acts of Pollution.

Operation of sources of direct or indirect pollution of water and air is broadly prohibited, except as licensed by permit. (c. 21, §42; c. 111, §§142A-H; also see regulations promulgated pursuant to these chapters). No filling or dredging of wetlands except after compliance with extensive regulatory process; see subhead Permits, infra. (c. 131, §40). No permit or financial assistance from state to certain projects, including those likely to cause significant damage to environment, granted until 60 days after public notice of final environmental impact report. (c. 30, §§61-62H and regulations promulgated thereunder). Also, dumping of rubbish on public land, in or near coastal or inland waters or on property of another is prohibited. (c. 270, §16). Willful depositing of solid waste into commercial container of another without permission is prohibited. (c. 266, §146). Abandoned underground residential tanks utilized exclusively for heating or heating water shall be drained and cleaned properly or removed as directed by fire department. (c. 148, §38A).

Enforcement.

Division of environmental protection of dept. of attorney general is empowered at request of appropriate agency or on own initiative to commence or intervene in all departmental proceedings, as well as to bring suits and actions, civil and criminal, to enforce all antipollution laws and regulations and to secure any common law right or remedy. (c. 12, §11D, c. 21G, §14). As alternative to any other civil penalty that may be prescribed by law, dept. of environmental protection may assess civil administrative penalty of not less than $100 for failure to comply with any provision of any regulation, order, license, or approval issued or adopted by that department or of any law that department has authority or responsibility to enforce. (c. 21A, §16). Dept. of environmental protection has similar powers to adopt regulations at any time and to impose penalties as to water management. (c. 21G, §§3, 14). Moreover, any ten citizens of commonwealth may petition superior courts for injunctive or declaratory relief in cases involving imminent damage to environment. (c. 214, §7A). Commonwealth may seek injunctive relief in Superior Court for violation of air pollution regulations adopted by dept. of environmental protection. (c. 111, §142A). No person shall engage in the business of digging or drilling wells within the commonwealth unless he has filed a certification with the department. (c. 21G, §20). However, nothing shall prohibit city or town authorities from requiring any person engaged in the digging or drilling of private wells to obtain a site permit. (c. 21G, §20).

Penalties.

Discharge of pollutants into Massachusetts waters in contravention of permit requirements is punishable by fine of $2,500-$50,000 per day and/or jail sentence of up to one year; alternatively, commonwealth may bring civil action, seeking up to $50,000 per day. (c. 21, §42). Continuing violation of state environmental code is punishable by fine of up to $25,000 per day and/or imprisonment for up to one year, or civil penalty of up to $25,000 per day. (c. 21A, §13). Violation of air pollution regulations, or permit, approval or order issued thereunder from dept. of environmental protection is punishable by fine of up to $25,000 and/or imprisonment for up to one year, or civil penalty of up to $25,000 for each violation. Superior Court may also enjoin violation. (c. 111, §§142A-142B). Violations of Massachusetts Water Management Act (c. 21G) may be punished by fine of not less than $1,000 and not more than $10,000 per day and/or imprisonment up to 180 days, or civil penalty of up to $25,000 per day. (c. 21G, §14). Violations of order issued under Massachusetts Water Management Act punishable by civil penalties under c. 21A, §16. (c. 21G, §14). Filling or dredging any wetland without permit is punishable by fine of not more than $25,000 per day and/or jail sentence of not more than two years, or civil penalty of up to $25,000 for each violation. (c. 131, §40). Disposal of dredged materials within marine boundaries of commonwealth without permit is punishable by fine of up to $25,000 per day and/or imprisonment, or civil penalty, of not more than $25,000 per day. (c. 21A, §14). Violation of c. 91, §§52-54, pertaining to transportation and dumping of dredged material in tide waters, or violation of any permit or license granted under these sections, is punishable by fine of up to $25,000 per day and/or imprisonment for up to one year, or civil penalty of up to $25,000 per day. (c. 91, §55). Violation of Hazardous Waste Management Act (c. 21C) may be punished by fine of $25,000 and/or two year jail sentence or civil penalty up to $25,000 for each day of violation. Knowing violation of §5 of c. 21C, relating to collection, storage, transportation, etc. of hazardous waste, may be punished by fine of not more than $100,000 and/or state prison imprisonment for not more than 20 years or in jail for not more than 2½ years for each such violation. (c. 21C, §10). Persons who violate any provision of Oil and Hazardous Material Release Prevention and Response Act (c. 21E) or any order or regulation thereunder, subject to civil penalty of $50,000 for each violation or may be punished by fine of not more than $50,000 and/or jail for not more than two years for each violation. (c. 21E, §11). Owner or operator of site or vessel who fails to give notice of release of hazardous material therefrom, may be punished by fine of not more than $100,000 and/or imprisonment in state prison for not more than 20 years or in jail for not more than 2½ years for each day violation continues. (c. 21E, §11). Fine of not more than $5,500 for first offense and not more than $15,000 for each subsequent offense shall be imposed for dumping of rubbish on public or private land and in or near coastal or inland waters. (c. 270, §16). Failure to drain and clean or remove abandoned underground residential tanks utilized exclusively for heating or heating water as required by c. 148, §38A punishable by fine up to $25,000 and/or imprisonment up to two years, or civil penalty up to $25,000 for each violation. (c. 148, §38H).

Civil Liability, Liens.

Owner or operator of site or vessel from or at which there is or has been release or threat of release of hazardous material, person who at time of disposal owned or operated site at or from which there is release or threat of release, transporter or person who arranged for transportation of hazardous material to or in site or vessel from which there is or has been release or threat of release, any person causing or legally responsible for release or threat of release of oil or hazardous material, is liable, without regard to fault, to commonwealth for all costs of assessment, containment and removal by commonwealth and for all damages for injury to and destruction or loss of natural resources and to any person for damage to real or personal property incurred or suffered as result of such release or threat. Liability to commonwealth for costs may be trebled. Liability may be apportioned among owners or responsible persons and may be avoided by showing that release or threat of release was caused by act of God, act of war or act or omission of third party other than employee, agent or person contractually related to otherwise liable party, provided that person seeking to avoid liability exercised due care, took reasonable precautions against third party acts or omissions and foreseeable consequences and gave notice of release or threat of release. (c. 21E, §5). Certain property owners, secured lenders, and fiduciaries including trustees, that have not caused or contributed to releases or threats of releases may partially be exempt from liability under recent revisions to c. 21E, but may be liable to commonwealth up to value of property following commonwealth assessment, containment, and response actions. (c. 21E, §5[b], [d]). Liability to commonwealth for its costs constitutes debt which becomes lien on all property owned by liable party when statement of claim filed or recorded, as to real estate in manner required for recording or registering encumbrances, and as to personal property in manner required by c. 106, §9-401. Lien has priority over all encumbrances on contaminated site. (c. 21E, §13).

Permits.

Permit is required for discharge of sewage, industrial waste or any other effluent or pollutant into Massachusetts waters, including groundwater. (c. 21, §43). Air emissions permits are required for large-scale heating plants, incinerators, nuclear energy utilization facilities, and large variety of manufacturing and commercial operations, pursuant to 310 CMR 7.00 et seq. Permits are required before any inland or coastal wetland may be filled or dredged. Latter permits may be obtained only by complying with procedure, which entails public hearings and approval by local conservation commission, mayor, or board of selectmen with possible appeal to dept. of environmental protection. (c. 131, §40). Permit from dept. of environmental protection is required before removal of dredged materials from marine boundaries and may be issued only after determination that such disposal will not unreasonably degrade or endanger marine environment or public health. (c. 21A, §14). Permit (and registration statement) is also required from dept. of environmental protection for water withdrawals and uses in excess of threshold volume. (c. 21G, §§5, 7). Permit is required for individual septic system from board of health and often from dept. of environmental protection as well. (c. 21A, §13; State Environmental Code Tit. 5, 310 CMR 15.00 et seq.). Permit is required from dept. of environmental protection—division of water pollution control for new connections to public sewer system which will add more than 15,000 gallons of sewage per day, and for increases of over 2,000 gallons of sewage per day from existing connections. (c. 21, §43 and regulations promulgated pursuant thereto). Permit is required from depart. of environmental protection—division of waterways to construct structure in stream on which federal, state or municipal funds have been spent for channel improvements or flood control (c. 91, §12A) or in great ponds (c. 91, §13), tidewater, tidelands or filled tidelands (c. 91, §14). Permit is required from dept. of environmental protection for collection, storage, transportation, treatment or disposal of hazardous waste. Persons licensed to transport hazardous wastes will be required to pay fee intended to cover cost of projects undertaken to assess, contain and remove releases of oil and hazardous materials. (c. 21C, §7). No hazardous waste treatment, storage, or disposal facility may be constructed without site assignment under c. 111, §150A. (c. 21C, §7). Authority to issue permits for sewage discharge within Metropolitan Sewage System has been transferred from Metropolitan District Commission to Massachusetts Water Resources Authority. (1984, c. 372). Certification required for operation of wastewater treatment facilities. (c. 21, §34C). See also c. 164, §69K, providing for certificates of environmental impact and public need with respect to electric, oil and natural gas facilities. Environmental impact report process under Massachusetts Environmental Policy Act (c. 30, §§61-62H) is supervised by secretary of executive office of environmental affairs. Permit from fire marshall is required for removal or relocation of underground tank which has been used for keeping or storage of flammable or combustible fluids. (c. 148, §38A).

Pesticides.

Labeling, distribution, sale, storage, transportation, use, and disposal of pesticides are regulated by c. 132B. See category 3 Business Regulation and Commerce, topic 3.18 Licenses, Business and Professional.

Septic Systems.

Requirements for septic systems in general and requirements for septic system inspection for conveyancing of property effective 3/31/95 are regulated by State Environmental Code Tit. 5, 310 CMR 15.00 et seq. and 1995, c. 38, §289. (c. 21A, §13). See also 1995, c. 38, §§300, 351. Since their enactment in 1995, State Environmental Code Tit. 5 regulations have been modified in attempt to ameliorate financial burden on certain property owners. Applicable volumes of Massachusetts Register should be consulted. See website for Mass. Dept. Environmental Protection: http://www.mass.gov/dep/water/laws/regulati.htm#t5regs.

Use of Toxic Substances.

Certain users of specified toxic substances must submit reports to commonwealth disclosing levels of toxics use. (c. 21I).

Underground Storage Tanks.

Permit required for removal or relocation of underground tank used for the keeping or storage of flammable or combustible fluids (c. 21O, §1). state fire marshal or city, town or district officials may grant permit. (c. 21O, §1). If the permit is issued by an official of a town, the governing body shall establish the fee; in no event shall the fee be greater than $200.00. (c. 21O, §1). Upon abandonment of a tank, notice of such abandonment shall be reported to the board of health for the city or town in which tank is located. (c. 21O, §1). Underground storage tank defined to include any one or combination of tanks connected to underground pipes that is percent or more beneath the surface of the ground. (c. 21O, §2). Notification of the department of the existence of such tank, specifying the age, size, type, location, and uses of such tank shall be done within 30 days after the tank is first put into operation. (c. 21O, §§3, 9). The department of environmental protection is responsible for enforcement of the safety regulations of this chapter, (c. 21O, §4), including standards for tanks. (c. 21O, §4). Tank owners are subject to furnishing information and inspection requirements; right of entry upon premises is permitted. (c. 21O, §6). Violation of provisions may be enjoined or subject to a civil fine or by imprisonment for not more than two years, or both. (c. 21O, §§7, 8).

UST Fund.

Owners or operators of leaking underground storage tanks may be eligible for reimbursement of eligible cleanup costs under commonwealth's UST fund. (c. 21J).

Wetlands.

Certain uses of wetlands subject to prohibition or regulation by local conservation commissions and dept. of environmental protection. (c. 131, §40).

13 ESTATES AND TRUSTS

13.01 ADMINISTRATION:

See topic 13.10 Executors and Administrators.

13.02 ADVANCEMENTS:

See topic 13.07 Descent and Distribution.

13.03 ALLOWANCES:

See topic 13.10 Executors and Administrators.

13.04 CLAIMS:

See topic 13.10 Executors and Administrators; category 5 Civil Actions and Procedure, topic 5.18 Pleading.

13.05 DEATH:

Common law presumption of death of person absent and not heard from for seven years is recognized. (42 Mass. 204). See also category 21 Property, topic 21.01 Absentees.

Survivorship.

Uniform Simultaneous Death Act has been adopted, but does not apply to distribution of property passing under instrument, other than will, executed before Oct. 27, 1941. (c. 190A, §1).

Death Certificates.

See category 10 Documents and Records, topic 10.04 Records, subhead Vital Statistics.

Actions for Death.

(c. 229). Basis for recovery, formerly solely for tortfeasor's degree of culpability, now includes survivors' need for compensation. On all actions for wrongful death executor or administrator, on behalf of survivors and not estate, may recover fair monetary value (no floor or ceiling on amount) of decedent to persons entitled to receive damages recovered including compensation for loss of reasonably expected net income, services, protection, care, assistance, society, companionship, comfort, guidance, counsel and advice of decedent to persons entitled to damages recovered. (c. 229, §2). Grief of survivors not included. (400 Mass. 1003, 508 N.E.2d 842).

Person who: (1) By negligence causes death, or (2) by willful, wanton or reckless act causes death under circumstances that deceased could have recovered damages for personal injuries if death had not resulted, or (3) operates common carrier of passengers and by negligence causes death of passenger, or (4) operates common carrier of passengers, and by willful, wanton or reckless act causes death of passenger under such circumstances that deceased could have recovered damages for personal injuries if death had not resulted, or (5) is responsible for breach of warranty arising under Art. 2 of c. 106 which results in injury to person that causes death, shall be liable in damages in amount of: (1) fair monetary value of decedent to persons entitled to receive damages recovered (as set forth in §1) including, but not limited to, compensation for loss of reasonably expected net income, services, protection, care, assistance, society, companionship, comfort, guidance, counsel and advice, (2) reasonable funeral and burial expenses, and (3) punitive damages not less than $5,000 if death caused by willful, wanton or reckless conduct or gross negligence; except that: (1) liability of employer to person in employment not governed by this section, (2) person operating railroad shall not be liable for negligence in causing death of person while walking or being upon such railroad contrary to law or reasonable rules and regulations of carrier, and (3) person operating street railway or electric railroad shall not be liable for negligence for causing death of person while walking on railway or electric railroad not within limits of highway. Person shall be liable for negligence or willful, wanton or reckless act of agents or servants while engaged in his business to same extent and subject to same limits as he would be liable under this provision for his own act. Damages recovered by executor or administrator of deceased. For causes of action arising before Jan. 1, 1982, no recovery for death which does not occur within two years after injury which caused death. (1981, c. 493). Action to recover damages shall be commenced within three years after from date of death or date that executor or administrator knew or should have known that basis for action exists, or within such time thereafter as provided by c. 260, §§4, 4B, 9 or 10. (c. 229, §2).

If person dies through injuries suffered because of defect on way or bridge, recovery of not more than $4,000 may be had from person or governmental unit responsible for repairing same if there was reasonable notice of want of repair and if tort action is commenced within two years after injury causing death. (c. 229, §1). See category 7 Criminal Law, topic 7.01 Criminal Law, subhead Victims of Violent Crimes.

Survival of Tort Actions.

In all cases recovery may be had against executor or administrator of person causing death even if such person dies before occurrence of death giving rise to right of recovery. (c. 229, §5A). In all cases amount recovered is distributed to next of kin if no spouse survives; to surviving spouse if no issue survive; if deceased survived by spouse and by one child or by issue of one deceased child, one-half to surviving spouse and one-half to surviving child or his issue by right of representation; if deceased survived by spouse and by more than one child, surviving either in person or by issue, one-third to surviving spouse and two-thirds to children or issue by right of representation. (c. 229, §1). In certain cases recovery may also be had on separate count for conscious suffering resulting from same injury causing death, but such damages, punitive damages and funeral expenses are assets of decedent's estate. (c. 229, §6). Damages for conscious suffering received in death action more than one year from date of deceased's death are new assets of estate within meaning of c. 197, §11. (c. 229, §6B). In hit and run cases action may be brought within six months of learning identity of defendant, but in no event more than three years after accident. (c. 260, §4B).

See also categories 5 Civil Actions and Procedure, topic Damages; Employment, topic Labor Relations.

Living Wills.

See topic 13.16 Wills, subhead Living Wills.

Uniform Anatomical Gift Act.

See topic 13.16 Wills.

13.06 DECEDENTS' ESTATES:

See topics 13.07 Descent and Distribution, Executors and Administrators, Wills; category 8 Debtor and Creditor, topic 8.10 Homesteads.

13.07 DESCENT AND DISTRIBUTION:

Real estate and personal property not disposed of by will, subject to rights of spouse of deceased (see infra, subhead Surviving Spouse) and to rights of homestead (see category 8 Debtor and Creditor, topic 8.10 Homesteads), go to children and to issue of any deceased child by right of representation; if no surviving child of intestate, then to all his other lineal descendents, in equal shares if of same degree, otherwise by right of representation; if no issue, then equally to father and mother or survivor of them; if no issue, father or mother, then to brothers and sisters and to issue of any deceased brother or sister by right of representation; if no surviving brother or sister of intestate, then to all issue of his deceased brothers and sisters, in equal shares if of same degree, otherwise by right of representation; if no issue, father or mother, or issue of father or mother, then to next of kin in equal degree, through nearest ancestor. (c. 190, §§2, 3). See infra, subhead Escheat. Degrees of kindred computed according to rules of civil law; kindred of half blood inherit equally with whole blood in same degree. (c. 190, §4). Child born out of wedlock is heir of mother and of any maternal ancestor. (c. 190, §5). If parents intermarry and father acknowledges child as his, child deemed legitimate and is heir of father and any paternal ancestors. (c. 190, §7). (See infra, subhead Illegitimates.) As to inheritance by and from adopted persons, see category 14 Family, topic 14.01 Adoption. See also topic 13.10 Executors and Administrators.

In case of intestacy, title to Massachusetts real estate vests in heirs at law on death of decedent, whether resident or nonresident, subject to right of administrator to sell or mortgage for payment of debts, taxes, administration expenses, etc., if applicable personal property of estate is insufficient. (c. 202, §§1, 28).

If deceased leaves kindred and no issue, and estate does not exceed $200,000 in value, surviving spouse entitled to entire estate. (c. 190, §1). If estate valued at over $200,000, survivor entitled to $200,000 plus one half of remaining personal and one half of remaining real property. If deceased leaves issue, surviving spouse takes one half of personal and one half of real property. (Id.). If deceased leaves no issue and no kindred, surviving spouse takes whole estate.

Party charged with unlawful killing of decedent prohibited from taking from decedent's estate including property held in joint tenancy or as tenants in entirety. (c. 265, §46). For purpose of distribution, party treated as predeceasing decedent. Bar to succession applies only to murder in first degree, murder in second degree or manslaughter and does not include vehicular homicide or negligent manslaughter. (Id.). Party found not guilty may take under decedent's estate. (Id.).

Doctrine of Worthier Title.

Abolished as applies to wills (c. 184, §33A) and inter vivos trusts (c. 184, §33B).

Surviving Spouse.

Election of dower must be filed in probate registry within six months after approval of bond of executor or administrator. (c. 189, §1). If surviving spouse fails to elect, he or she takes following shares of property not disposed of by will: if deceased leaves kindred but no issue and estate does not exceed $200,000, surviving spouse takes all; otherwise survivor takes $200,000 and one-half of remaining personal and real property (if personal property is insufficient to pay $200,000, interested party may petition to have survivor paid from sale or mortgage); if deceased leaves issue, survivor receives one-half of personal and of real property; if deceased leaves neither kindred nor issue, survivor takes all. (c. 190, §1).

Half Blood.

Kindred of half blood inherit equally with whole blood in same degree. (c. 190, §4).

Posthumous Children or Other Issue.

After born child takes as if alive at date of parent's death. (c. 190, §8).

Illegitimates.

Child born out of wedlock is heir of mother and of any maternal ancestor. (c. 190, §5). *Caveat:* Similar statute held unconstitutional in 430 U.S. 762; 97 S.Ct. 1459 (1977). Statutory requirement that parents intermarry to enable child born out of wedlock to inherit from father is unconstitutional, however, separate statutory requirements of acknowledgment or adjudication of paternity are constitutional. (380 Mass. 663, 405 N.E.2d 135). When paternity conceded, right to inherit from natural father cannot be denied. (Id.). See also c. 190, §7. Child born out of wedlock declared legitimate in foreign state is legitimate child under law of commonwealth. (394 Mass. 306, 475 N.E.2d 395).

Adopted Children.

See category 14 Family, topic 14.01 Adoption.

Determination of Heirship.

Ordinarily, preferable method is petition for, and order of, distribution.

Advancements.

Real or personal property given by intestate in his lifetime to issue as advancement is considered part of intestate's estate. (c. 196, §§3, 4). Gifts and grants are held advancements if so expressed or charged in writing by intestate or acknowledged in writing by recipient. (c. 196, §5). Securities owned by deceased, value not more than $750 with any one issuer, cumulative value not more than $2,100, may after 30 days after death, if no executor or administrator has demanded payment and issuer has no notice of proceedings, be transferred to surviving spouse or adult child of deceased or to surviving mother or father. (c. 196, §9).

Election.

Surviving spouse must file election of dower in probate registry within six months after approval of administrator's bond. (c. 189, §1). If dower is claimed, intestate rights in real estate are waived. (Id.).

Election between distributive share and testamentary provision, see topic 13.16 Wills, subhead Election.

Disclaimer.

See topic 13.16 Wills, subhead Disclaimer.

Escheat.

If intestate leaves no kindred and no spouse, estate escheats to commonwealth, unless intestate veteran living in Soldiers' Home, in which case estate goes to Home. (c. 190, §3).

Dower.

See category 21 Property, topic 21.08 Dower.

Curtesy.

Merged with dower. See category 21 Property, topic 21.08 Dower.

13.08 ELECTION:

See topic 13.16 Wills.

13.08A ESTATES: (in property)

See category 21 Property, topic 21.16 Real Property.

13.09 [RESERVED]

13.10 EXECUTORS AND ADMINISTRATORS:

Uniform Probate Code not adopted.

Probate Court of each county has jurisdiction over administration of estate of person who, at his decease, was inhabitant of county and of nonresident leaving estate to be administered in county. (c. 215, §§3, 6).

Temporary Administration.

Probate Court may appoint as temporary executor or temporary administrator c.t.a. person named executor in will (c. 192, §13) or petitioner for administration c.t.a. (c. 193, §7A) for decedents dying on or after Jan. 1, 1978, if: (1) Testator requests appointment or (2) upon written assent of widow or husband and all heirs and next of kin of full age and capacity. Seven days notice of intent to seek appointment must be given to all heirs and next of kin unless appointment assented to. Counsel's certificate that notice given is prima facie evidence thereof. (c. 192, §13, c. 193, §7A). Temporary executor or administrator c.t.a. (hereinafter “temporary representative”) may be exempted from giving surety on official bond if: (1) Widow or husband and all heirs and next of kin of full age and capacity assent thereto and testator so requests, or (2) upon assent of all devisees and legatees with present vested interests; and provided that temporary representative submit affidavit that estate exceeds amount of certain preferred claims and allowances. (c. 205, §4A).

Temporary representative must collect and preserve personal property and for that purpose may commence and defend suit; unless will directs otherwise, court may without notice authorize temporary representative to take charge of real property, to sell personal property, to invest, to pay certain preferred claims and to continue decedent's business; temporary representative may not make distributions except amounts allowed to widow or minors for necessaries. (c. 192, §14).

Powers of temporary representative cease upon approval of bond of executor or administrator c.t.a. but not later than 90 days after appointment unless extended by court pursuant to c. 192, §15 and thereupon he shall deliver all property to such executor or administrator c.t.a. (c. 205, §1). If all persons appointed executors or administrators c.t.a. are same persons as temporary representatives, no new inventory need be filed and they may account for temporary administration in their account as such executors or administrators c.t.a. (c. 192, §16). Temporary representative not so appointed must render inventory and account within 30 days of discharge or cessation of powers. (Id.). Special administrators with powers similar to temporary fiduciaries may be appointed without notice if emergency requires. (c. 193, §10).

For estates of decedents dying on or after Jan. 1, 1990, action may be brought against temporary representative within one year of date of death, but will be stayed until permanent representative is appointed. (c. 193, §15).

Preferences in Right to Administer.

If competent and willing to act, and found suitable by court, executor named in will appointed by court. (c. 192, §4).

Unless court deems it proper to appoint another person, administration is granted to one or more of following persons, if competent and willing to undertake it, who are preferred in order named: widow or widower; next of kin or their guardians or conservators as court selects; principal creditors, if none of above are competent or seek appointment; if no known widow, widower, or next of kin is in commonwealth, public administrator. (c. 193, §1). Administration granted to one or more of next of kin or any suitable person if widow or widower and all next of kin resident in commonwealth of full age and capacity consent in writing. (c. 193, §2). In practice, any person named by one who is himself entitled to administration is appointed, provided proper notice is given and no objection made. Probate Court may, on request of widow, widower or heir of deceased, grant letters of administration to applicant therefor after granting such letters to public administrator; letters testamentary or of administration with will annexed must be granted when will of deceased is allowed after grant of letters of administration to public administrator. When person to whom such letters are granted gives bond as required by law, powers of public administrator over estate cease. (c. 194, §7).

Eligibility and Competency.

Any individual (either sex, whether married or not [c. 209, §5]) of proper capacity or any duly authorized national bank or Massachusetts trust company may be appointed executor or administrator. Where minor named as executor, administrator c.t.a. appointed to hold office during minority unless another executor accepts trust. (c. 193, §8; c. 192, §6). Nonresident may be appointed executor, administrator, or trustee, but may not receive letter of appointment until he has, by writing filed in registry of probate, appointed resident agent upon whom service of legal process may be made. (c. 195, §8). As to competency of foreign bank, see category 3 Business Regulation and Commerce, topic 3.01 Banks and Banking, subhead Foreign Banks.

Petition for probate of will or letters of administration must be signed by petitioners personally, sworn to by one of them and accompanied by certified copy of death certificate. (c. 192, §1). Filing fee $150 (plus $50 bond and $15 surcharge). (c. 262, §§40, 4C). See Probate and Family Court Dept. Uniform Fee Schedule, revised Nov. 2007: http://www.mass.gov/courts/courtsandjudges/courts/probateandfamilycourt/scheduleoffees_color.pdf.

If it appears in petition for probate of will or letters testamentary that no widow, widower or heir at law is known, attorney general must be made party to proceedings. (c. 192, §1A).

Proceedings for Appointment.

Notice of petition for letters testamentary or of administration must be given in manner and form prescribed by probate court and usually may be made: either by personal service of notice on all persons interested or by mailing notice to all persons interested at least 14 days before return day (court sometimes requires earlier notice where person to be notified resides at distance) and by publishing citation at least seven days before return day in newspaper. Except where executor requests exemption from sureties on his bond, no notice of petition is necessary if all parties entitled thereto assent in writing or appear voluntarily or waive notice, nor if administration is granted to one or more of next of kin or any suitable person if widow or widower and all next of kin resident in commonwealth of full age and capacity consent in writing. (c. 193, §2).

For estates of decedents dying on or after Sept. 1, 1992, petition must include sworn statement that copy of petition and death certificate have been sent by mail to dept. of public welfare.

Appeal Period.

Person aggrieved may appeal to appeals court or, in certain circumstances, to SJC within

30 days after entry of decree by Probate Court. (c. 215, §9). Acts performed by fiduciary after entry of decree of appointment or authorizing him to sell, mortgage or lease real or personal property and prior to expiration of appeal period are valid as though appeal period had expired without any appeal in all instances where no appearance entered against such appointment, sale, mortgage or lease prior to entry of decree or where such appearance entered and withdrawn prior to entry of decree, notwithstanding fact that appeal may have been taken in said period. (c. 215, §9A).

Oath.

No requirement.

Bond.

Every executor or administrator is required to give bond before entering on his duties. (c. 205, §1). Failure to give bond within 30 days of appointment may be deemed resignation or declination. (c. 205, §8). Testator may not exempt executor or administrator c.t.a. from giving bond, but he may and usually does exempt fiduciary from sureties thereon. (c. 205, §§4, 4A, 5). Bond with personal sureties is usually 50% or 100% greater than value of personal estate. Sureties must be satisfactory to court and reside within commonwealth except that surety company authorized to do business within commonwealth may be surety. (c. 205, §9). Executor and administrator c.t.a. (whether or not resident here), may be exempted from giving sureties if testator so directs, or may be exempted if all interested persons of full age, except creditors, consent, provided in either case all creditors and guardians or conservators of interested persons under disability are notified as ordered by court (usually by publication). (c. 205, §4). Court may order additional bond or new bond with new sureties or increased penal sum in proper circumstances. (c. 205, §§13, 14). Court may, in any case, order sureties. (Id.). No surety is required upon bonds filed by domestic trust companies (c. 167G, §6) or by national banks located in commonwealth and permitted to act in fiduciary capacity (c. 205, §6A) nor, in actual practice, by foreign banks appointed here. (c. 167, §43). Filing fee for each bond, $50; http://www.mass.gov/courts/courtsandjudges/courts/probateandfamilycourt/scheduleoffees_color.pdf. (c. 262, §40).

Issuance of Letters.

Letters are issued after approval of bond. (c. 192, §4).

Removal.

Executor or administrator may be removed by Probate Court if he becomes insane or otherwise incapable of acting, or is otherwise unsuitable therefor, or if he resides outside commonwealth and neglects to render accounts or settle estate after being duly cited by Probate Court. (c. 195, §11). If new bond required by court not given executor or administrator may be removed. (c. 205, §16).

Special Kinds of Administration.

If no executor is named in will or if all executors are dead, incompetent or refuse to accept trust, or if executor named in will is minor at time of probate of will (see supra, subhead Eligibility and Competency), or neglects for 30 days after probate of will to give bond according to law, administrator with will annexed may be appointed. (c. 193, §7). If sole or surviving executor or administrator dies, resigns or is removed before having fully administered estate, administrator de bonis non may be appointed. (c. 193, §9). Court is not free to substitute its own selection for that of petitioner without affirmative reasons therefor. (352 Mass. 660, 227 N.E.2d 497).

Public Administrators.

Office of public administrator created and governed by c. 194.

Inventory and appraisal must be filed by executor or administrator. (c. 205, §1). Temporary executor or administrator c.t.a. (see supra, subhead Temporary Administration) must file inventory when required by c. 192 or Probate Court. (c. 205, §1[8]). Every inventory required to be filed must include appraisal of property by executor or other fiduciary setting forth actual market values. On motion by executor or other fiduciary, before filing of inventory, or by any interested person after filing, court may appoint special appraisers if court finds it to be in best interest of estate. (c. 195, §6).

General Powers and Duties.

Executor or administrator has all powers and duties generally accompanying such office, except as restricted or otherwise provided by will or order of Probate Court, including right to sell personal property, compromise claims, make prudent investments, distribute in cash or in kind (c. 195, §5A) and, with consent of court, to sell or collect rents from realty, give or renew mortgages, etc. (c. 202, §§1-20A, 28,30) or compromise controversies with respect to will or administration of estate (c. 204, §§13, 14). He may be licensed to continue business for not more than one year from date of appointment; for cause court may extend authority beyond one year. (c. 195, §7). For deaths occurring after Jan. 1, 1997, executor may sign and file affidavit with registry of deeds stating no federal tax filing required. (c. 65C, §14).

Notice to Legatees.

Within three months after allowance of will and appointment and qualification of executor, he must by mail notify devisees and legatees named in will whose addresses are known to him and he must file affidavit in Probate Court showing names of those notified and addresses to which notices were mailed. (c. 192, §12).

Notice to Creditors.

No notice need be given to creditors except in case of estate which is declared insolvent. (c. 198, §5). For estates of decedents dying on or after Jan. 1, 1990 see subhead Proceedings for Appointment, supra.

Presentation of Claims.

For estates of decedents dying before Jan. 1, 1990, statement of claim containing prescribed information may be presented to executor or administrator within four months from date of giving bond. Claim is deemed presented upon its receipt by executor or administrator within this time period or upon its filing with register of probate. (c. 197, §9). If, at end of such four month period after giving bond, representative has no notice of demands sufficient to warrant his representing estate insolvent, he may pay debts of estate and is not personally liable for demands of creditors of which he had no notice. (c. 197, §2).

Actions against estate of decedent dying on or after Jan. 1, 1978 and before Jan. 1, 1990 are barred unless: either (1) claim is presented within four months from date of giving bond and action commenced within 60 days of its disallowance or (2) action is commenced within nine months from date of giving bond, whichever is later, and in either case before expiration of applicable period writ has been served in hand, service accepted or notice of action filed in registry of probate. Executor or administrator not held to answer action by creditor of deceased brought within any other or additional period of limitation for bringing such action hereinafter set forth unless, prior to expiration thereof, writ has been served or filed as aforesaid. (c. 197, §9).

For estates of decedents dying on or after Jan. 1, 1990, action by creditor must be commenced, and process served upon or accepted by executor or administrator, or notice of action filed in registry of probate, within one year of date of death. (c. 197, §9). If executor or administrator of such estate, at end of six month period after date of death, has no notice of demands sufficient to warrant his representing estate insolvent, he may pay debts of estate and is not personally liable for demands of creditors of which he had no notice. (c. 197, §2).

For estates of decedents dying on or after Sept. 1, 1992, if decedent received medical assistance under c. 118E while inpatient in nursing facility or other medical institution while 65 years or older, dept. of public welfare may present claims against estate within four months after approval of bond of executor or administrator by filing claim with registry of probate and delivering or mailing copy thereof to executor or administrator. (c. 197, §9).

Presentation of claim does not prevent running of short statute of limitations relating to suits against executor or administrator. Only remedy for disputed or disallowed claim is action against representative. (c. 197, §9).

Unliquidated Claims.

Creditor of deceased whose right of action does not accrue within one year after date of death may present claim to Probate Court at any time before estate is fully administered, and if Court determines claim is or may become justly due from estate, Court shall order executor or administrator to retain sufficient assets to satisfy claim. (c. 197, §13). Failure to petition for retention of assets in timely manner may constitute culpable neglect and bar late-filed claim. (c. 197, §10).

Proof of Claims.

No forms yet prescribed by courts, but claim must be in writing, including name and address of claimant, amount claimed, basis of claim, and description of security, if any. For estates of decedents dying on or after Jan. 1, 1990, notice must contain description of action filed and identify court in which filed. (c. 197, §9).

Approval or Rejection of Claims.

See supra, subhead Presentation of Claims. Interpreting pre-1990 version of statute, common law provides that failure of executor or administrator to mail notice of disallowance of claim within 60 days after expiration of four month period has effect of allowance. (18 Mass. App. 230, 464 N.E.2d 404, but see 395 Mass. 868, 482 N.E.2d 818, regarding authority of executor or administrator to change allowance of claim to disallowance). Allowed claims bear interest at legal rate from expiration of such period unless claim is based on contract specifying otherwise, in which case contract rate is applied. (c. 197, §9). Repealed for estates of decedents dying on or after Jan. 1, 1990. (1989, c. 329).

Payment of Claims.

Upon complaint filed, Probate Court may order payment of claims allowed as provided above to extent funds are available for payment. (c. 197, §9). See also infra, subhead Actions Against Representative. Repealed for estates of decedents dying on or after Jan. 1, 1990. (1989, c. 329).

Priorities and Insolvent Estates.

If Probate Court on representation of executor or administrator finds estate to be probably insolvent, it may appoint commissioners to receive and examine claims. (c. 198, §§2, 4). Notice to all known creditors is required (c. 198, §§5, 3) and, unless court extends time, all claims must be presented within six months after court's order appointing commissioners or requiring notice. (c. 198, §9).

In general, no action may be maintained against executor or administrator after estate has been represented insolvent, unless for claim entitled to preference which would not be affected by insolvency of estate or unless assets prove more than sufficient to pay all debts allowed. (c. 198, §31).

In insolvent estates, assets are applied to payment of debts in following order (no payments to be made to creditors of any class until all debts of preceding class of which executor or administrator had notice have been paid): (1) necessary expenses of last illness and funeral and expenses of administration; (2) debts entitled to preference under laws of U.S.; (3) public rates, taxes, child support arrears and excise duties; (4) debts due to division of medical assistance for estates of persons dying on or after 7/1/92, regardless of when assistance provided; (5) wages or compensation not exceeding $100 for labor done within one year before death or judgment on such wages; (6) debts not exceeding $100 for necessaries furnished decedent or family within six months of death or judgment on such debts; (7) other debts. (c. 198, §1). Excess of claim over security prorates as independent claim. (312 Mass. 200, 43 N.E.2d 795). Payment of administrative expenses entitled to priority. (357 Mass. 225, 257 N.E.2d 447).

Preferential transfer by insolvent person within four months of death may be avoided by his executor or administrator, who may recover property or its value. (c. 198, §§10A, 10B).

Sales.

(c. 202). Neither executor, unless power is given him in will, nor administrator has power to sell real estate without license from Probate Court. (c. 202, §6). Court may set terms of sale. (69 Mass. 205). For fees related to sale of real estate see Probate and Family Court Dept. Uniform Fee Schedule, revised Nov. 2007: http://www.mass.gov/courts/courtsandjudges/courts/probateandfamilycourt/scheduleoffees_color.pdf. (c. 262, §§40, 4C). If notice includes publication for three successive weeks, and no appearances entered against sale, price at which sale is licensed is conclusively presumed to be highest possible. (c. 202, §38). Both executors and administrators have full power to sell personal property without license. (295 Mass. 250, 3 N.E.2d 817). Release of Massachusetts estate tax lien on real estate required before license will be granted by Probate Court.

Actions by Representative.

Representative has right to sue on claims of decedent. In addition to actions which survive by common law, following actions survive: under c. 247; tort for assault, battery, imprisonment or other damage to person; for consequential damages arising out of injury to person and consisting of expenses incurred by husband, wife, parent or guardian for medical, nursing, hospital or surgical services in connection with such injury, for goods taken away or converted, or for property damage; and actions against sheriffs for misconduct or negligence. (c. 228, §1). Action to contest will is common law property right and survives death of contestant. (398 Mass. 817, 501 N.E.2d 504). In personal actions which survive, if sole plaintiff or defendant dies after commencement and before final judgment, action may proceed by or against executor or administrator, and appeal not entered before death may be entered thereafter. (c. 228, §4). Substitution of executor or administrator as party governed by Mass. R. Civ. P. (c. 228, §4A). Administrator de bonis non may be substituted for deceased or removed executor or administrator. (c. 230, §11).

Actions Against Representative.

See c. 197, §§1, 9. See supra, subhead Presentation of Claims; see category 5 Civil Actions and Procedure, topic 5.16 Limitation of Actions. If new assets are received after time for filing claim under §9 is barred, suit may be brought within four months after creditor has notice of receipt of such new assets and within six months after their actual receipt. (c. 197, §11). If action brought within time limit of §9 fails or is defeated for certain defects of form, plaintiff may bring new action for same cause within 60 days after determination. (c. 197, §12). Bill in equity will lie after year has expired if justice and equity require, but will not affect previous payments or distributions. (c. 197, §10). Notwithstanding §9, action for injuries or death may be commenced more than one year from date of death of deceased if commenced within three years from accrual of cause of action; any judgment recovered can be satisfied only out of proceeds of insurance policy or bond, if any, and not from general assets of estate. (c. 197, §9A). Executor or administrator not compelled to pay claim unless proved in action begun within one year after claim becomes payable. (c. 197, §14). In limited circumstances, transferee liability is available to creditors whose claims accrue after expiration of period of limitations. (c. 197, §§28-30).

Administrator de bonis non is liable to action by creditor for same period as provided in §9 for original executor or administrator (see supra, this subhead) less any time which has run against preceding officer but in any event for not less than two months from date of appointment, provided that this section is not applicable to claims already barred at date of appointment. (c. 197 §17). Repealed for estates of decedents dying on or after Jan. 1, 1990. (1989, c. 329).

In no case may action be brought against executor, administrator or administrator de bonis non before three months after giving bond, unless action is brought for recovery of demand which would not be affected by insolvency of estate or, after estate has been represented insolvent, for purpose of ascertaining contested claim, but in no case may action against administrator de bonis non be brought before six months after executor or administrator first appointed gave bond. (c. 197, §§1, 2A). Repealed for estates of decedents dying on or after Jan. 1, 1990. (1989, c. 329).

Estate of deceased person cannot be attached in suit against executor or administrator on debt due from deceased without consent of probate court. (c. 230, §7). Action against estate is valid if representative had legal existence when action commenced and had notice and filed answer for estate. (402 Mass. 92, 521 N.E.2d 721).

For actions which survive and substitution of parties, see supra, subhead Actions by Representative.

Except as hereinafter set forth, action against estate of decedent dying on or after Jan. 1, 1990 will be barred unless such action is commenced within one year after date of death and unless, before expiration of such period, process has been served upon or accepted by executor or administrator, or notice of action filed in registry of probate. Executor or administrator is not held to answer action by creditor of deceased commenced within any other or additional period of limitation for bringing such action provided by or under c. 197 unless before expiration of such period process has been served upon or accepted by executor or administrator, or notice of action filed in registry of probate. Foregoing rules also apply to trustee of trust, assets of which are subject as matter of substantive law to being reached by creditors of estate. See subheads Proceedings for Appointment and Presentation of Claims, supra for notice to be given to dept. of public welfare and presentation of claim by said department if decedent received medical assistance under c. 118E while age 65 or older. (c. 197, §9). Notwithstanding foregoing, action for injuries or death may be commenced more than one year after date of death of decedent if commenced within three years from accrual of cause of action; any judgment can be satisfied only out of proceeds of insurance policy or bond, if any, and not from general assets of estate. (c. 197, §9A).

Allowances may be made by Probate Court for immediate need of surviving spouse or minor children of deceased. (c. 196, §2). During pendency of petition relative to probate of will or appointment of administrator, court may, upon petition and after notice, make allowance for surviving spouse and children of deceased from property held by special administrator, not exceeding portion to which they would be finally entitled. (c. 193, §13).

Widow's Quarantine.

Widow or widower may remain in deceased spouse's house for six months after deceased spouse's death, rent free. (c. 196, §1).

Intermediate Accountings.

Every executor and administrator must render account at least once a year and at such other times as court requires, but may be excused in any year if court is satisfied that it is not necessary or expedient. (c. 206, §1). In practice, accounts are not filed annually.

Final Accounting and Settlement.

No fixed time within which final settlement must be made. (c. 206, §22). Before any account will be allowed, notice must be given to attorney general of Massachusetts if public charitable interests; to dept. of mental health in case of mentally ill persons or to dept. of mental retardation in case of mentally retarded persons and Veterans Administration if interested; to all legatees and devisees; to heirs; to all other persons entitled to share in estate. (c. 206, §24).

Distribution.

Unless otherwise provided in will, interest at 8% payable from one year after date of death. (c. 197, §§9, 20, Mass. Sup. Jud. Ct. R. 1:14). Executor or administrator may obtain decree for distribution to protect self. See also topic 13.16 Wills, subhead Legacies. Probate Court may, upon application of executor or administrator, authorize him to deliver to parents of minor any funds to which minor is entitled and being held by administrator or executor, when sum is less than $1,000. (c. 215, §41A).

Distribution if Abroad.

If claimant is outside of U.S. and its territories, court may require personal appearance of claimant to assist in establishing identity, right and opportunity to receive fund. (c. 206, §27A). Special provisions may be made for payment of funds to distributee where it is not possible to assure his receipt of funds.

Disclaimer.

See topic 13.16 Wills, subhead Disclaimer.

Liabilities.

Unless otherwise provided, executor or administrator is not personally liable on contract entered into in his fiduciary capacity unless he fails to disclose his representative capacity and identify estate; executor or administrator is individually liable in tort only if personally at fault. (c. 195, §17).

Compensation of Representatives.

Administrators and executors are entitled to compensation for services as court may allow. (c. 206, §16). No statutory rate, subject to changing local custom.

When Administration Unnecessary.

Insurance company which upon death of individual residing within commonwealth owes his estate aggregate sum not exceeding $10,000 under certain policies may, at any time not less than 60 days after death, pay such sum to his surviving spouse or, if none, to one or more of his heirs; provided that at time of such payment, no written claim for such sum has been received at company's home office from any executor or administrator of estate of such individual. Any payment made under such policies to person at least 18 years old constitutes full discharge of company from all liability thereunder. (c. 175, §187E).

Wages of deceased employee not in excess of $100 may be paid after 30 days to certain relatives if administration is not taken out. (c. 149, §178A).

Deposits in savings bank, co-operative bank, federally-chartered bank or credit union, or shares in credit union, with value of $10,000 or less and co-operative bank shares and savings accounts in savings banks with value of $10,000 or less may, under certain circumstances, be paid directly to surviving spouse or next of kin. (c. 167D, §33; c. 171, §42).

Informal Administration of Small Estates.

If Massachusetts resident dies leaving estate consisting entirely of personal property, which may include motor vehicle, valued at not more than $15,000, surviving spouse, child, grandchild, parent, brother, sister, niece, nephew, aunt or uncle, if of full age and legal capacity and Massachusetts resident, or, if deceased resident in dept. of mental health or dept. of mental retardation or receiving certain public assistance, designee of dept. of mental health, dept. of mental retardation or dept. of public welfare, may, 30 days after decedent's death and no formal administration commenced, file statement with Probate Court on form furnished by court and act thereunder as voluntary administrator of estate. (c. 195, §16).

If decedent with small estate qualifying for informal administration under c. 195, §16 leaves will naming person as executor that person may, upon filing information required under §16, distribute estate according to terms of will. If such executor not Massachusetts resident, he must appoint resident agent. (c. 195, §16A).

Small Estates.

See supra, subheads When Administration Unnecessary and Informal Administration of Small Estates.

Foreign Executors or Administrators.

See generally c. 199A.

Foreign representative may, after expiration of 60 days from death of nonresident decedent, collect personal property owed to or owned by such decedent upon presenting affidavit prescribed by statute (c. 199A, §2); if such decedent owned tangible personal property located in commonwealth at time of death or had at any time within 12 months prior thereto place of abode located therein, foreign representative may not accept payment or delivery earlier than one month after filing proof of his authority with Probate Court and commissioner of revenue (c. 199A, §§2, 5). Payment or delivery made in good faith to foreign representative releases resident debtor to same extent as if made to local representative (c. 199A, §3) but cannot be made once resident creditors notify resident debtor of claim (c. 199A, §4). Upon filing of proof of authority as aforesaid, foreign representative has all powers of local representative acting in same capacity (c. 199A, §6) but such power is suspended with certain exceptions upon application for local administration (c. 199A, §7). Foreign representative who files proof of authority as aforesaid, receives property from resident, etc., is subject to jurisdiction of commonwealth under specified circumstances. (c. 199A, §§8, 9, 11). Foreign representative may, after six months and such notice as court may order, be licensed to sell real estate of nonresident decedent if no local administration is pending and no creditor or other person is prejudiced thereby; after satisfaction of all claims against estate in commonwealth, proceeds may be taken by him out of commonwealth to be accounted for in court of his appointment. (c. 202, §32). Foreign representative may, after three months and such notice as court may order, be licensed to receive or sell personal property if no local representative has been appointed and foreign representative will be liable to account in jurisdiction where appointed. (c. 204, §3). Probate Court empowered to protect beneficial owners of bank and brokerage accounts held in commonwealth which allegedly have been converted by estate administrator of foreign domiciliary, even though property rights in accounts must ultimately be decided by courts in foreign country. (22 Mass. App. 689, 497 N.E.2d 26). See also topic 13.16 Wills, subhead Foreign Probated Wills.

As to sale of real estate by foreign testamentary trustee, see topic 13.15 Trusts.

Ancillary Administration.

Where administration is taken out on estate of deceased nonresident, his estate within commonwealth is, after payment of local debts, disposed of according to his last will; otherwise his real estate descends according to laws of commonwealth. (c. 199, §1). Residue of personal property distributed according to laws of state or country of which he was inhabitant by Probate Court or, in its discretion, such residue may be transmitted to executor or administrator, if any, where deceased lived. (c. 199, §2). If nonresident dies insolvent, his estate within commonwealth must be so disposed of that all his creditors, within and without commonwealth, may receive equal proportions of their respective debts. (c. 199, §3). See also topic 13.16 Wills, subheads Foreign Probated Wills, Health Care Proxy.

Uniform Fiduciaries Act not adopted.

Uniform Principal and Income Act not adopted.

Uniform Simplification of Fiduciary Security Transfers Act not adopted.

Uniform Anatomical Gift Act adopted, with minor variations. (c. 113, §§7-14).

13.11 FIDUCIARIES:

See topics 13.10 Executors and Administrators, and Trusts; also category 14 Family, topic 14.08 Guardian and Ward.

13.12 INTESTACY:

See topic 13.07 Descent and Distribution.

13.13 LIVING WILLS:

See topic 13.16 Wills.

13.14 PROOF OF CLAIMS:

See topic 13.10 Executors and Administrators; category 5 Civil Actions and Procedure, topic 5.18 Pleading.

13.15 TRUSTS:

Creation.

Trust concerning land can be created only by written instrument signed by person creating it or by his attorney (c. 203, §1) whereas trust of personal property may be oral (186 Mass 108, 71 N.E. 109). In wills and other written instruments, certain powers and discretions may be conferred on trustee by reference to statutory forms. (c. 184B).

Revocable Trusts.

Revocable inter vivos trust with income payable to settlor and with power of appointment and other interests reserved, is valid although not executed as will. (315 Mass. 457, 53 N.E.2d 113). Assets may form part of donor's estate for purposes of surviving spouse's election against will (390 Mass. 864, 460 N.E.2d 572) and subject to creditors if donor's estate insufficient to discharge debts (7 Mass. App. 633, 389 N.E.2d 768). In case of donor dying on or after Jan. 1, 1990, except as otherwise provided in c. 197, action by creditors against trustee will be barred unless commenced against trustee, executor or administrator within one year after date of death in manner provided in c. 197, §9. (c. 197, §9). See also topic 13.10 Executors and Administrators, subhead Actions Against Representative. Inter vivos pour-over trust executed contemporaneously with execution of will is valid even though not funded until settlor's death. (393 Mass. 754, 473 N.E.2d 1084). Divorced spouse does not take under revocable pour-over trust funded entirely at time of decedent's death. (Id.).

Spendthrift Trusts.

Property may be placed in trust for beneficiary (other than settlor) with provision that neither income nor principal may be alienated or subjected to claims of creditors or dependents in advance of payment. (402 Mass. 707, 529 N.E.2d 394). Prohibition against involuntary alienation does not bar voluntary alienation absent express provisions to that effect. (Id.).

Employee Trusts.

Trust created by employer as part of stock bonus, pension, disability, death benefit or profit sharing plan for benefit of some or all of his employees is exempt from rule against perpetuities or rule against suspension of alienation for such time as may be necessary to accomplish purpose. (c. 203, §3A).

Charitable Trusts.

Trusts which are “private foundations” and “split interest trusts” are prohibited from acts of “self dealing,” retaining “excess business holdings,” making investments which jeopardize trust's exempt purposes and making “taxable expenditures” as terms are defined in I.R.C. §§509, 4941, 4943, 4944, 4945, 4947. (c. 68A, §1). “Private foundations” and charitable trusts must distribute income sufficient to avoid tax liability under I.R.C, §4942(a), (c. 68A, §2), unless otherwise ordered by court (c. 68A, §7).

Condominium Trusts.

See generally c. 183A.

Pour-over Trusts.

See topic 13.16 Wills, subhead Bequests and Devises to Inter Vivos Trusts.

Trustees.

Any competent person of age may be trustee, subject to probate court's approval of suitability in case of testamentary trustee or other court appointee. Merger of otherwise qualified corporate trustee does not in all cases require new appointment. (342 Mass. 360, 173 N.E.2d 294). As to out of state corporate fiduciaries, see category 3 Business Regulation and Commerce, topic 3.01 Banks and Banking.

Dealing with Trustees.

If any money, securities or other personal property is paid, transferred or delivered to trustee, receipt of trustee is sufficient discharge and no person is bound to see to application of money, etc., by trustee. (c. 203, §20). Corporations and unincorporated associations are not bound to see to execution of any trust to which their shares are subject or to ascertain whether trust authorized transfer by holder, but they cannot knowingly participate in breach of trust. (c. 203, §21).

Compensation.

Reasonable compensation for trustee determined by court and may be apportioned between income and principal. (c. 206, §16). Customary charges by Boston banks are usually followed. Investment counsel charges are not normally allowed in addition to trustee's compensation.

Principal and Income.

Although distributions in cash or property are usually income, capital gains distributions by mutual funds are principal even if made in cash (346 Mass. 521, 194 N.E.2d 707) and distribution in stock of another corporation is income unless deemed by trustee to be essentially principal (c. 203, §21A).

Investments.

"Prudent man" rule is standard. No statutory provision regulates kinds of investments which trustees or other fiduciaries may make. Trust funds may be invested in participations in common trust fund created and administered by corporate fiduciary unless trust instrument or decree otherwise provides. (c. 203A, §§1, 2). Investments in mutual funds are not forbidden on ground of delegation. Fiduciaries may, if governing instrument permits, invest in certain investment funds holding U.S. government obligations. See c. 167G, §3(8). Any association or corporation authorized to do banking business and to exercise trust powers in commonwealth may invest funds which it holds in fiduciary capacity in any collective investment fund or common trust fund established by any affiliate of such association or corporation as defined in c. 167A, §1(e); and any such association or corporation may invest in any collective investment fund or common trust fund established by it pursuant to provisions of c. 167G or c. 203A funds held by any such affiliate in fiduciary capacity; provided that any such investment is not prohibited by any instrument, judgment, decree or order creating such fiduciary relationship. (c. 167G, §3[10A]).

Securities in Name of Nominee.

Any fiduciary, acting directly or through agent or custodian, may, under certain circumstances, register trust securities in name of partnership or corporate nominee even though trust instrument does not contain such authority. (c. 203, §14B).

Accumulations.

No statutory prohibition. Trustee may accumulate trust income for period equal to rule against perpetuities; in charitable trust, accumulation may be for any period which is not deemed unreasonable. (296 Mass. 298, 5 N.E.2d 550).

Accounting.

Testamentary trustee is obligated to render periodic accounts. Procedure for allowance governed by c. 206, §24, Mass. R. Civ. P. 72, Unif. Prob. Ct. Prac. XV and XVI. Court may waive appointment of guardian ad litem if nonaccounting co-fiduciary adequately represents interests of persons whose interests would otherwise require such appointment. (Unif. Prob. Ct. Prac. XVIA). Inter vivos trustee may be required to account by any beneficiary. (352 Mass. 194, 224 N.E.2d 417).

Disclaimer.

See topic 13.16 Wills, subhead Disclaimer.

Perpetuities.

See category 21 Property, topic 21.12 Perpetuities.

Judicial Termination.

Upon petition by trustee, any interested person or personal representative of decedent's estate, court may consolidate or terminate trust where costs of administration are such that continuation or establishment of trust would defeat or substantially impair its purposes. Distribution order shall specify shares in which both income and remainder beneficiaries may take except that marital trust shall be distributed only to surviving spouse. (c. 203, §25). Trust may be terminated if purpose fulfilled. (38 Mass. App. Ct. 308, 647 N.E.2d 722).

Uniform Common Trust Fund Act adopted. (c. 203A).

Uniform Testamentary Additions to Trusts Act adopted. (c. 203, §3B).

Uniform Principal and Income Act not adopted.

Uniform Prudent Investor Act.

Massachusetts is considering adopting some variation thereof.

Uniform Fiduciaries Act not adopted.

Uniform Simplification of Fiduciary Security Transfers Act not adopted.

13.16 WILLS:

Only person 18 years or more and of sound mind may make will. (c. 191, §1).

Testamentary disposition is not restricted as to amount which may be given to religious, charitable, etc., institutions except for spouse's right to elect statutory share (see infra, subhead Election).

Person over 18 may make gift of all or part of his body to take effect upon or prior to his death. Uniform Anatomical Gift Act (1968 Act) adopted. (c. 113, §§7-13).

Execution.

Will must be in writing, signed by testator (signature by cross alone suffices) or some person in his presence and by his express direction, and attested and subscribed in his presence by two or more competent witnesses. (c. 191, §1).

Any person of sufficient understanding is competent witness. (c. 191, §2). See infra, subhead Testamentary Gifts to Subscribing Witnesses.

Will executed in conformity with law at time of execution or (provided it is in writing and subscribed by testator) according to law of place of execution or of testator's domicile is valid. (c. 191, §§4, 5).

Attestation Clause.

(c. 192, §2). I, the undersigned testator, do hereby declare that I sign (or direct another to sign for me) and execute this instrument as my last will, that I sign it willingly (or willingly direct another to sign for me) in the presence of each of said witnesses, and that I execute it as my free and voluntary act for the purposes herein expressed.

____

Testator

We, the undersigned witnesses, each do hereby declare in the presence of the aforesaid testator that the testator signed (or directed another to sign for him and said person signed for him) and executed this instrument as his last will in the presence of each of us, that he signed it willingly (or willingly directed another to sign it for him), that each of us hereby signs this will as witness in the presence of the testator, and that to the best of our knowledge the testator is eighteen (18) years of age or over, of sound mind, and under no constraint or undue influence.

____

Witness

____

Witness

STATE OF____________________

COUNTY OF____________________

Subscribed, sworn to and acknowledged before me by the said testator and witnesses this ___ day of ______ A.D.

(Signed)____________________

(Seal)____________________

Official Capacity

See infra, subhead Probate.

Holographic wills are not recognized.

Nuncupative Wills.

Soldier in actual service or mariner at sea may make nuncupative will of personal property. (c. 191, §6).

Revocation.

Will can be revoked only by burning, tearing, canceling or obliterating with intent to revoke by testator or some person in his presence and at his direction; by some other writing executed as required for will; or by subsequent changes in testator's condition or circumstances from which revocation is implied by law. (c. 191, §8). Marriage operates as revocation unless will, itself, shows it was made in contemplation thereof, except so far as it exercises power of appointment which, in absence of such exercise, would not pass to heirs at law in case of intestacy. Unless will provides otherwise, purported disposition or appointment of property made by will of testator dying on or after Jan. 1, 1978 to former spouse is revoked by testator's divorce or annulment of marriage and property passes as if former spouse predeceased testator; provisions conferring powers of appointment or nominating spouse as fiduciary are likewise revoked. Provisions not applicable to will made under c. 191B Uniform Statutory Will Act—unless will otherwise provides. (c. 191, §9).

Revival.

Remarriage to former spouse revives provisions revoked solely by divorce or annulment. (c. 191, §9).

Testamentary Gifts to Subscribing Witnesses.

Beneficial devise or legacy in will of testator to subscribing witness or to husband or wife of such witness is void unless two other subscribing witnesses not similarly benefited thereunder. (c. 191, §2). See supra, subhead Execution.

Bequests and Devises to Inter Vivos Trusts.

Uniform Testamentary Additions to Trusts Act adopted. (c. 203, §3B). Trust may be amended after the execution of the will or the death of testator. (Id.; 341 Mass. 366, 170 N.E. 2d 350). See also topic 13.15 Trusts, subhead Revocable Trusts.

Probate.

During testator's life, will may be deposited with register of probate. (c. 191, §10). Any person, other than register, having custody of will must deliver it within 30 days after notice of testator's death to court or executors named therein who must so deliver it. One neglecting without reasonable cause to deliver will after citation to do so may be committed to jail. (c. 191, §13). Person suspected of concealing will may be examined by court upon complaint of interested party. (c. 191, §14).

Probate Court for each county has jurisdiction over estates of persons who, at time of their death, resided in that county; as to nonresidents, Probate Court of any county where assets are located has jurisdiction. (c. 215, §3). See category 5 Civil Actions and Procedure, topic 5.19 Practice.

Allowance of will secured by filing will in Probate Court, together with petition on required form, to which is annexed affidavit by at least one petitioner that statements therein made are true to best of his knowledge and belief and must be accompanied by certified copy of decedent's death certificate issued by public officer. (c. 192, §1). Notice must be given to surviving husband or wife and all heirs or next of kin (if none, to attorney general [c. 192, §1A]) and, in practice, to legatees and devisees, either by personal service or by publication and mailing. Petition for probate must state whether or not surviving husband or wife of deceased is under disability. If it appears by written consent of heirs or by satisfactory evidence that no person intends to object to probate, court may grant probate: (1) On testimony of one subscribing witness; affidavit of such witness taken before register may be received as evidence; (2) with respect to will executed or republished on or after Jan. 1, 1978, without testimony if self proved by affidavits of testator and witnesses in form prescribed by statute and made under seal and before officer authorized to administer oaths under laws of state where executed; (3) without testimony if executed, attested and made self-proved by affidavits of testator and witnesses (see subhead Attestation Clause, supra), each made under seal and before officer authorized to administer oaths under laws of state where executed; or (4) without testimony if assented to in writing by widow or husband of deceased and by all heirs at law and next of kin. (c. 192, §2). If on return day of citation issued upon petition anyone has entered appearance in opposition, question of allowance of will is set down for hearing at future date. Appeal must be claimed and filed within 30 days after entry of decree appealed from. (c. 215, §9).

Decree allowing will or compromise of will or adjudicating intestacy is, after one year from its rendition or final establishment, conclusive in favor of purchasers for value in good faith, without notice, from executors, administrators, guardians, conservators, legatees, heirs and devisees; in favor of executors, administrators, trustees, guardians and conservators who have settled their accounts in due form and in good faith disposed of assets according to law; and in favor of persons who have in good faith made payments to executors, administrators, trustees, guardians and conservators. But if subsequent decree reverses or qualifies original decree, heirs, distributees, devisees and legatees are held liable for any proceeds or assets of estate received by them. (c. 192, §3). Adjudication of fact of death is not conclusive. (c. 192, §3).

Register of probate may issue certificate of appointment to voluntary administrator or voluntary executor after payment of proper fee. (c. 195, §§16-16A). (See also topic 13.10 Executors and Administrators.)

New form for simultaneous execution and attestation of will adopted. (c. 192, §2). See supra, subhead Attestation Clause.

Self-proved Wills.

See supra, subheads Probate, Attestation Clause.

Contest ordinarily must be in probate proceedings rather than by attack on will after probate.

Legacies may be recovered by bill in equity. (c. 197, §19). Interest is payable, unless otherwise provided in will, from date of expiration of period within which creditors may bring actions against executor or administrator or six months from date upon which distribution is required by trust instrument; rate of interest shall be set by SJC rules, but in absence of such rules, rate is 4%. (c. 197, §20). Unless will or trust instrument provides otherwise, rate of interest upon pecuniary legacies or pecuniary distributions pursuant to c. 197, §20 is 8%. (Mass. Sup. Jud. Ct. R. 1:14).

Real estate of testator not liable to be sold for payment of legacy by executor either under power in will or under license or order of court in such proceeding unless proceeding is filed in Probate Court within six years from testator's death. (c. 197, §19). There is different time period for legatee to bring action to recover legacy for which testator's real estate may be used for payment if testator died prior to 1972. (1972, c. 750, §1).

Unclaimed Legacies.

See category 21 Property, topic 21.01 Absentees, subhead Escheat.

Disclaimer.

See generally c. 191A. All citations in this subhead refer to said chapter.

Interests Disclaimable.

Beneficiary may disclaim any legal or equitable interest or estate, present, future or contingent, in real or personal property, any fractional share thereof, any power to appoint, consume, apply or expend property or any right, power or privilege thereto which would otherwise pass to disclaiming party by intestate succession, devise, legacy, bequest, by exercise or non-exercise of power of appointment, as beneficiary of trust or annuity or insurance contract, as surviving joint tenant or tenant by entirety (except as to portion allocable to his contributions), under any deed, assignment, or other inter-vivos conveyance or transfer, or in any other manner. (c. 191A, §§1, 2).

Procedure.

After creation of interest disclaimed, but not more than nine months after event determining final ascertainment of beneficiary and that interest is indefeasibly vested, clear and unequivocal signed written disclaimer should be filed with probate court or courts wherein fiduciary having control of property is required to account. Copy of disclaimer shall be delivered to person or entity having possession of disclaimed property. (c. 191A, §§3-5).

Disclaimers of interests in real property must be acknowledged as provided for deeds of realty and should be filed with appropriate registry of deeds or registry district. (c. 191A, §5).

Effect.

Disclaimed interests never vest in beneficiary. Disclaimers are effective according to their terms, irrespective of spendthrift restrictions or similar restraints imposed by any instrument, statute or rule of law, and are irrevocable. (c. 191A, §§7, 9).

Bars to Right to Disclaim.

Assignment, conveyance, encumbrance, pledge or other transfer or disposition of interest by beneficiary, or any contract therefor, or judicial disposition or sale before disclaimer; insolvency of beneficiary; signed written waiver of right to disclaim; and acceptance of interest will bar right to disclaim. (c. 191A, §8).

Devises.

On probate in Massachusetts of will devising Massachusetts real estate, whether resident or nonresident testator, title vests in devisees as of date of testator's death, subject to right of executor or administrator c. t. a. to sell or mortgage for payment of debts, taxes, administration expenses, etc., if applicable personal property of estate is insufficient. (c. 202, §§1, 28).

Lapses.

If issue of child or relation dying before testator survives testator, such issue takes same devise or legacy as such child or relation unless contrary intention is shown by will. “Child” and “issue” and “relation” include adopted children. Foregoing applies to class gifts whether death occurred before or after execution of will. (c. 191, §22).

Children.

Child or issue of deceased child not provided for by will or in testator's lifetime, whether born during testator's lifetime or after his death, is entitled to same share as in case of intestacy unless omission appears to have been intentional or testator provided for child during life time. Omitted child or issue may not share in testator's real property unless claim is filed in registry of probate within one year after date of approval of executor's bond. (c. 191, §20).

Guardian ad litem must be appointed to represent certain omitted heirs under disability.

Election.

Surviving spouse (except if deceased spouse had been deserted or was living apart for justifiable cause as established by decree of court) may, within six months after probate (or if validity of will is litigated, may, with consent of court on timely petition, within six months after termination of litigation) file in registry of probate written waiver of will's provisions and then (a) if testator leaves issue, surviving spouse is entitled to one third personal and real property; (b) if testator leaves kindred but no issue, surviving spouse is entitled to $25,000 and one half of remaining personal and real property, but in either case, (a) or (b), if elective share exceeds $25,000, surviving spouse takes $25,000 and income only for life from excess over that amount, personal property to be held in trust and real property to be vested in him or her for life; or (c) if testator leaves no issue or kindred, surviving spouse is entitled to $25,000 and one half remaining personal property and one half remaining real property, absolutely. (c. 191, §15). For these purposes, property may include assets of testator's revocable inter vivos trust. (390 Mass. 864, 460 N.E.2d 572).

Dower.

Surviving spouse not entitled to dower in addition to taking under provisions of will unless will shows contrary intention. (c. 191, §17).

Foreign Executed Wills.

See supra, subhead Execution.

Foreign Probated Wills.

Will allowed elsewhere may be allowed by probate court in any county where any property on which such will may operate exists upon production of copy of will and of probate thereof duly authenticated; will which by laws of place where made is valid without probate may be allowed upon production of copy of will or official record thereof duly authenticated. Affidavit stating names and residences of known heirs and next of kin of testator living at his death and their relationship to testator must be presented. Notice of presentation for probate must be given by publication. (c. 192, §9). See also topic 13.10 Executors and Administrators, subheads Foreign Executors or Administrators and Ancillary Administration.

Effect of Will.

Every devise carries all testator's interest in land unless contrary intention appears. (c. 191, §18). Will operates on all property possessed by testator at his death unless contrary intention appears (c. 191, §19) and may pass right of entry in case of disseisin (c. 191, §24).

Powers of Appointment.

c. 204, §§27-33 provide that, unless instrument creating power provides otherwise, power may be released in manner set forth in statute. Disclaimers of powers of appointment are treated in c. 191A. See supra, subhead Disclaimer. General residuary clause will not exercise power of appointment unless reference is made to powers of appointment or there is some other indication of intention to exercise power. (c. 191, §1A). Unless instrument creating power manifests contrary intent, power may be exercised to create less than absolute legal and equitable interests, including new powers of appointment. (c. 191, §1B).

Guardian ad Litem.

Appointment by court to represent interests of unborn or unascertained persons may be avoided by testamentary provision nominating person to represent such interests or requesting that such representation be dispensed with. (c. 206, §24).

See also category 14 Family, topic 14.08 Guardian and Ward.

Doctrine of Worthier Title.

Abolished. (c. 184, §33A).

Simultaneous Death.

See topic 13.05 Death, subhead Survivorship.

Testamentary Guardian.

See category 14 Family, topic 14.08 Guardian and Ward, subhead Eligibility and Competency.

Uniform Anatomical Gift Act adopted. (c. 113, §§7-13). Lifetime gift of organs or tissue permitted if properly authorized.

Uniform Statutory Will Act adopted. (c. 191B).

Living wills not statutorily recognized in Mass. However, Mass. case law recognizes signing of living will as strong evidence of individual's intent. (398 Mass. 417, 497 N.E.2d 626). Individual's intent considered if dispute occurs. (Id.).

Health Care Proxy.

Every competent adult over age of 18 and of sound mind may appoint health care agent by executing health care proxy. Proxy must be in writing and signed by maker, or at his direction, in presence of two adult witnesses who must sign document. Appointed health care agent cannot act as witness. Health care proxy is presumed to be valid unless court determines otherwise. (c. 201D, §2). Probate Court has exclusion jurisdiction of all actions concerning health care proxies. (c. 215, §3). Valid foreign proxies are enforceable in Massachusetts. (c. 201D, §11).

Health care proxy shall identify principal and health care agent, indicate that principal intends agent to have authority to make health care decisions for principal, describe any limitations on agent's authority, and indicate that agent's authority shall become effective when it is determined that principal lacks capacity to make health care decisions. (c. 201D, §4). Determination of principal's capacity is to be made by attending physician according to accepted medical standards and must be in writing. (c. 201D, §6).

Agent has authority to make all health care decisions for principal including decisions about life-sustaining treatment, subject to any limitations in proxy. In making health care decisions, agent must consider medical alternatives and prognosis, principal's wishes if known, including his moral and religious beliefs, and if unknown, agent must act in principal's best interest. Health care providers must act according to agent's decision subject to any limitations in proxy, court order (c. 201D, §5), any objections by principal (c. 201D, §6), or physician's or health care facility's objections pursuant to c. 201D, §§14 and 15. However, health care proxy cannot permit suicide or mercy killing. (c. 201D, §12).

Health care proxy may be revoked by notifying agent or health care provider orally or in writing or by any other act evidencing specific intent to revoke. Proxy is automatically revoked upon execution of new proxy or divorce of principal if spouse is agent. Revocation must be recorded in principal's medical records. (c. 201D, §7).

Neither health care provider nor agent can be subject to criminal or civil liability if he acted in good faith while fulfilling his duty according to proxy. (c. 201D, §8).

If health care proxy has not been executed, health care provider may rely on informed consent of responsible parties acting on behalf of incompetent patient to extent permitted by law. Powers of attorney executed before this chapter was enacted Dec. 19, 1990 are valid to allow agent to make health care decisions for principal. (c. 201D, §16).

14 FAMILY

14.01 ADOPTION:

See generally c. 210; all citations, unless otherwise indicated, refer to said chapter. See also c. 119, §26(4), as amended effective Jan. 29, 1993, for authority of District and Juvenile Courts to terminate parental right to consent to adoption if in best interest of child based upon certain factors.

A person of full age (his spouse, joining) may (subject to certain exceptions) petition probate court in county where he (or if nonresident, where child) resides for leave to adopt as his child another person younger than himself (other than petitioner's spouse, brother, sister, aunt or uncle of whole or half blood). Minors may petition (or join spouse petition) for adoption of natural child of one of parties. (c. 210, §1). Spouse must join petition for adoption unless failure to join is excused by reason of prolonged absence, legal separation, incapacity, or reason constituting unreasonable withholding of consent. (c. 210, §1).

In any petition for adoption dept. of social services shall submit to court for verification that child is not registered with federal register for missing children and Massachusetts central register. (c. 210, §5A).

Adoptive parents may sue for “wrongful adoption” based on misrepresentations made by adoption agency about child's pre-adoptive history. (421 Mass. 147, 653 N.E.2d 1104).

Consent Required.

Decree for adoption requires, inter alia, written consent of child if over 12; of child's spouse, if any; of lawful parents, may be previous adoptive parents, or surviving parent; or of mother alone if child born out of wedlock and not previously adopted. Such written consent may be executed no sooner than fourth day after birth of child to be adopted. It must be attested and subscribed before notary public in presence of two competent witnesses, one of whom must be selected by consenting person. Form of consent is set forth. Any consent or surrender outside commonwealth is valid if in accord with laws of state or country where executed. (c. 210, §2).

Consent Not Required.

When petition for adoption filed by person having care and custody of child, Court may dispense with necessity of consent of persons named in c. 210, §2 (other than child) if: (i) person to be adopted is at least 18 years old; or (ii) Court finds that allowance of petition for adoption is in best interest of child. Dept. of social services or any licensed child care agency may commence proceeding to dispense with need for consent to adoption of child in care or custody of such department or agency. (c. 210, §3[a] and [b]). (On “care or custody” see c. 210, §3[b]; 25 Mass. App. Ct. 579, 521 N.E.2d 399.) Department shall file petition to dispense with consent to adoption when child abandoned, parent convicted of murder or voluntary manslaughter of one of parent's children, parent convicted of felony resulting in serious bodily injury to child of such parent, or when child is in foster care for 15 of 22 preceding months. (c. 119, §26). If Department has only temporary custody of child, foster parents have standing to file adoption petition without consent of natural parents. (416 Mass. 791, 625 N.E.2d 1362). Such petition may be heard notwithstanding pendency of petition brought under c. 119 or c. 201 regarding same child. Justice may be assigned to hear simultaneous petitions regarding same child. If petition contested, court shall appoint counsel to represent child. (391 Mass. 572, 463 N.E.2d 324; §3[a] and [b]). To dispense with parental consent, court must find clear and convincing evidence parent currently unfit to further best interests of child. (414 Mass. 705, 610 N.E.2d 898). Some hearsay admissible to establish parental fitness provided parent has opportunity for rebuttal. (416 Mass. 510, 623 N.E.2d 1118). Hearsay statements of children under ten concerning sexual abuse may be admitted with certain conditions. (c. 233, §83; 419 Mass. 67, 643 N.E.2d 26). In care and protection proceedings in District and Juvenile Courts, termination of parental right to consent to adoption may be adjudicated if in child's best interest and certain conditions met. (c. 119, §26[4]). Court consideration of termination of parental rights required under certain circumstances with 13 factors to be considered by Court. (c. 210, §3[c]). Court can consider whether parent will correct condition that currently disables parent from furthering best interests of child. (36 Mass. App. Ct. 355, 631 N.E.2d 564). Court shall enter final order of adjudication and permanent disposition no later than 15 months after date case first filed with provisions for up to three month extension. (c. 119, §26[4]). Mass. Uniform Probate Practice X requires agency to submit written report consisting of information on biological parents, summary of agency's history with child, and agency's plan for child. Section Xa provides for tracking system for all termination proceedings brought under §3, including notice requirement and discretion to appoint counsel in contested cases. Notwithstanding mother's surrender of child born out of wedlock (c. 210, §2) or termination of her right to withhold consent (c. 210, §3), one adjudicated or timely claiming to be father of child is entitled to notice and right to petition for adoption under specified circumstances (c. 210, §4A).

Conditions Precedent.

Child under 14 must (subject to waiver by court for cause) have resided with petitioner for at least six months. (c. 210, §5A). At least one of following conditions must be met in case of child under 14: (1) Child placed with petitioner for adoption by dept. of social services or by agency authorized by department for such purpose; (2) petitioner blood relative of child being adopted;

(3) petitioner stepparent of child being adopted; (4) petitioner nominated in will of deceased natural parent of child as guardian or adoptive parent; or (5) petition approved in writing by dept. of social services or authorized agency with rights of appeal to probate court in case of refusal to approve petition. (c. 210, §2A).

Jurisdiction.

Probate Court. (c. 210, §1). Residence within commonwealth by either child or petitioner. (c. 210, §1).

Venue.

County where petitioner resides or, if petitioner is nonresident, county where child resides. (c. 210, §1).

Petition.

Printed form supplied by register of probate.

Proceedings.

On petition for adoption of child under 14, unless sponsored by institution for care of children, notice must be given to dept. of social services. (c. 210, §5A). Department shall file report within 30 days of notice unless court, on showing of departmental inability to report caused by circumstances beyond its control, grants up to 30 additional days to complete report. Court may appoint certain charitable corporations to file report after unexplained failure by department to report. (c. 210, §5A). No decree may be entered until department or appointed corporation files report and until child has resided with petitioner for at least six months. Court may waive these conditions if one of petitioners is parent of child; residence requirement may be waived by court for cause. (c. 210, §5A). If written consent is not submitted, order of notice is issued to persons who should have consented. (c. 210, §4). Sworn statement must be filed by petitioners setting forth certain facts pertaining to each of them. (c. 210, §6). Hearings shall be held in chambers on request, with only necessary parties and witnesses present; if hearing is contested, consent of other parties is required. (c. 210, §6). In all proceedings affecting child's placement, presumption exists that child who has attained 12 years of age is competent to offer statements in own behalf and child must be provided with opportunity to do so. (c. 119, §1). In evaluating suitable support, court shall consider assurances by dept. of social services of adoption subsidy. (c. 210, §6). See also New Uniform Practices of Probate Courts X, Xa and Xb for requirements as to administrative agency report and plan and as to tracking of adoption petitions and proceedings thereon.

Decree.

Gives child all rights of natural child except as stated under subhead Effect of Adoption. If petitioning adopting parent dies before entry of decree, probate court may enter decree nunc pro tunc to date of filing petition within three months of date of death. Decree has effect of decree of adoption. (c. 210, §6B).

Name.

Court may decree such change of name as petitioner may request. (c. 210, §6). Adopting parent may request change in child's birth records. (c. 210, §6A). If such request has been made, town clerk receiving certificate of adoption must correct record of birth and notify adopting parent of change. Town clerk must, on judicial order or when requested by person seeking his own birth record or by person in proper official capacity, release information contained in original record; if record has been amended following adoption, information in original record may be issued only upon order of Probate Court for county where adoption granted or, if adoption granted outside commonwealth, upon order of court for county in which birth occurred. (c. 46, §13).

Records of Adoption.

All documents and record books unavailable for inspection unless court, for cause, otherwise orders. (c. 210, §5c). Under certain conditions, placement agency shall release non-identifying information about biological parents. (c. 210, §5D).

Out of State Decrees.

Resident parent of child born or adopted outside Massachusetts may present specified documentary evidence of birth or adoption to town clerk where parent was then domiciled for filing as evidence of such birth or adoption. (c. 46, §1B).

Effect of Adoption.

Adopted child inherits from his adopting parent and stands in same position with respect to kindred of such parent (including other adopted children, 291 Mass. 153, 197 N.E. 162) as natural legitimate child thereof. Adoption destroys right of inheritance from natural kindred except, after 1975, when adoption is by new spouse of surviving natural parent who remarries after death of other natural parent. All property of adoptive child passes to adoptive heirs. Court may decree that right of inheritance vests as of date petition filed. (c. 210, §7). Words “child”, “grandchild”, “issue”, “heir”, “heir-at-law” or their respective equivalents in grant, devise or bequest in instrument executed after, but not before, Aug. 26, 1958, shall include adopted person to same extent as if born to adopting parent except where contrary intention appears. (c. 210, §8). Trust's definition of grandchildren as “children of the body of” settlor's children excluded adopted grandchildren and their issue from trust. (37 Mass. App. Ct. 450, 640 N.E.2d 495).

Person adopted in another state or country in accordance with its laws is, upon proof of such fact, entitled in commonwealth to same rights of succession to property as if he had been adopted in commonwealth. (c. 210, §9).

Setting Aside Adoption.

Parent who had no personal notice before decree of adoption and who had neither waived notice (c. 210, §2) nor been subject of decree dispensing with notice (c. 210, §3) may appeal from decree within 120 days after actual notice (c. 210, §11). Adoption may be set aside for fraud or undue influence. (154 Mass. 574, 28 N.E. 1051).

Criteria.

In making orders for adoption, judge must consider need of child for loving and responsible parental care and all factors relevant to physical, mental and moral health of child. If parent of child requests religious designation for child, court may grant petition for adoption only to person of faith designated, unless not in best interest of child. (c. 210, §5B).

Bringing Children into State for Purpose of Adoption.

Permit through written application accompanied by bond must be obtained before bringing into commonwealth any child for purpose of placing or boarding such child in family or home in commonwealth with view to adoption, guardianship, custody or care by any person other than relative. (c. 119, §36).

14.02 ALIMONY:

See topic 14.06 Divorce.

14.03 COMMUNITY PROPERTY:

System does not obtain in Massachusetts.

14.04 DESERTION:

See topics 14.06 Divorce, 14.09 Husband and Wife.

14.05 DISSOLUTION OF MARRIAGE:

See topic 14.06 Divorce.

14.06 DIVORCE:

See generally c. 208. All citations, unless otherwise indicated, refer to said chapter.

Uniform Marriage and Divorce Act not adopted; but alimony and division of property are determined under §34, which is similar to Uniform Act, §307, Alternative A.

Grounds for Absolute Divorce.

Divorce may be adjudged for adultery; impotency; utter desertion continued for one year prior to filing of complaint; gross and confirmed habits of intoxication caused by voluntary, excessive use of liquor or drugs; cruel and abusive treatment; gross and cruel failure to support and maintain other spouse; irretrievable breakdown of marriage; sentence to confinement for life or for five years or more in federal penal institution or in penal or reformatory institution in any state; provided, however, that divorce shall be adjudged although both parties have cause, and defense of recrimination is abolished. (c. 208, §§1, 2). If ground for divorce is irretrievable breakdown in marriage and parties file joint petition, affidavit that is jointly or separately executed and notarized executed separation agreement, divorce nisi shall enter 30 days after court approval of agreement. (c. 208, §1A as am'd). One party may obtain divorce nisi on ground of irretrievable breakdown after hearing held no sooner than six months after filing of complaint. (c. 208, §1B as am'd). Six-month waiting period may be waived, at election of court, to permit consolidation of this type of irretrievable breakdown action with opposing party's action under §1. (). Corroborating witnesses are not required except where necessary, e.g., in adultery cases where plaintiff does not have personal knowledge; in imprisonment cases where plaintiff was not present in court when defendant was sentenced. (Uniform Practices of Probate Courts, II).

Grounds for Legal Separation.

If spouse fails without justifiable cause to provide suitable support to other spouse or deserts other spouse, or if married person has justifiable cause for living apart, Probate Court may prohibit spouse from imposing any restraint on personal liberty of other and make orders for support of spouse and care and custody of children. (c. 209, §32).

Citizenship Requirements.

None.

Residence Requirements.

See infra, subhead Jurisdiction.

Jurisdiction.

Except as hereafter stated, basis of jurisdiction is marital domicile, and divorce may not be adjudged if parties have never lived together as husband and wife in this commonwealth nor for cause which occurred in another jurisdiction unless prior thereto parties had lived together as husband and wife in commonwealth and one of them lived in commonwealth at time when cause occurred. (c. 208, §4). However, if plaintiff has lived in commonwealth for one year last preceding filing of complaint, if cause occurred without commonwealth, or if plaintiff resides in commonwealth at time of filing and cause occurred within commonwealth, divorce may be adjudged for any cause allowed by law, unless plaintiff moved into commonwealth for purpose of obtaining divorce.

Venue.

Actions for divorce must be brought in Probate Court for county in which one party lives, except that if either party still resides in county where parties last lived together, action must be brought in that county; but, in event of hardship, court may transfer action to county where affected party resides. (§6).

Process.

Governed by Mass. R. Dom. Rel. P., Rule 4. Process shall be served by sheriff, deputy sheriff or by any other disinterested person; or, if outside commonwealth, by any individual permitted to make service under Massachusetts law or under law of place where service is to be made. Summons and complaint must be served together, and defendant may accept service by written endorsement of notarized acceptance of service on summons. If service is not so accepted service shall be made upon individual by delivering copy of summons and complaint to him personally, except for paternity contempt or modification complaints where service can be made by personal delivery or by leaving copy at defendant's last and usual place of abode and by mailing copies to defendant. If personal service cannot be made, then service may be made by publication once each week for three successive weeks in newspaper designated by register of court and by mailing. Proof of service shall be made to court promptly (within time during which defendant must respond, 20 days). (Rule 4[d]).

Pleading.

Mass. R. Dom. Rel. P. 7-11 govern pleadings and appearances in actions for divorce. In addition, Probate Court Rules (Mass. Prob. & Fam. Ct., Prob. R.), Supplemental Rules (Mass. Prob. & Fam. Ct. Supp. R.) and Uniform Practices of Probate Courts (Unif. Prob. Ct. Prac.) must be consulted with regard to special areas of pleading, especially where adultery or any other allegation derogatory to character or reputation of third person is alleged in pleading. In that event rules require certain preliminary procedures before name of third party may be disclosed on public record (see Mass. Prob. & Fam. Ct. Supp. R. 404); and notice must be given to third party, who is then entitled to appear in action (Mass. Prob. & Fam. Ct. Supp. R. 405). If plaintiff is seeking conveyance of real estate as part of divorce judgment, complaint should include specific demand therefor; otherwise affidavit of notice and proof of receipt by defendant must be filed at least seven days before hearing of case. (Unif. Prob. Ct. Prac. XIV). If either party wishes to have stenographer appointed to take testimony, written request must be filed at least 48 hours before trial. (Mass. Prob. & Fam. Ct., Prob. R. 18).

Practice.

Matrimonial actions subject to Mass. R. Dom. Rel. P., Mass. Prob. & Fam. Ct. Supp. R., Unif. Prob. Ct. Prac., and Mass. Prob. & Fam. Ct., Prob. R.. Temporary orders, e.g. support, vacate marital home, are generally subject to seven days' notice requirement. (Mass. R. Dom. Rel. P. 6). Within 45 days of receipt of summons where financial relief requested, parties must file with court and deliver to each other financial statements using prescribed forms. (Mass. Prob. & Fam. Ct. Supp. R. 401). Interrogatories may be served. (Mass. R. Dom. Rel. P. 33). Spouse may be ordered to vacate marital home for up to 90 days (which may be extended) on finding that health, safety or welfare of moving party (or of any minor children) would be endangered or substantially impaired by failure to enter such order. (c. 208, §34B). During pendency of divorce, court may appoint attorney to investigate and report to court and may direct that attorney or any other attorney to defend action. (c. 208, §16).

Discovery.

Interrogatories and requests for production of documents may be served. (Mass. R. Dom. Rel. P. 33, 34). Parties have 30 days to respond, or 45 days if served with summons and complaint. Interrogatories in all sets combined may not exceed 30, including subsidiary interrogatories. (Mass. R. Dom. Rel. P. 33). Depositions may be taken upon seven days notice to parties. (Mass. R. Dom. Rel. P. 30). Attendance of witnesses may be compelled by subpoena. (Mass. R. Dom. Rel. P. 45). Financial statement may be requested upon ten days notice. (Mass. Prob. & Fam. Ct. Supp. R. 401). No further request for financial statement may be made within 90 days of previous request without court order. (Mass. Prob. & Fam. Ct. Supp. R. 401).

Judgment or Decree.

Judgment nisi is granted in first instance, to become absolute without further action by parties in 90 days, unless court otherwise orders for sufficient cause upon application of any interested party. (c. 208, §21, Mass. R. Dom. Rel. P. 58[c]). Nisi period is stayed by filing of appeal, only if claim of appeal from that portion of judgment nisi that would dissolve marriage. Filing of appeal generally does not stay other aspect of appealed judgment or other order or judgment relative to custody or visitation, alimony, support or maintenance. (Mass. R. Dom. Rel. P. 62[g]). After judgment nisi, action may not be dismissed or discontinued on motion of either party except on such terms as court orders after notice to other party and hearing, unless written agreement to dismissal or discontinuance, signed by both parties, is filed. (c. 208, §21). Under certain circumstances, judgment for separate support may require one party to make conveyance of land to other, and judgment itself may act to vest title if person fails to comply with order. (c. 209, §32D).

Temporary Alimony.

Court may order alimony pendente lite including health benefits. (c. 208, §17).

Allowance for Prosecution of Suit.

Court may require either party to pay into court amount to enable other party to maintain or defend action. (c. 208, §17; Mass. Prob. & Fam. Ct. Supp. R 406).

Contempt.

Probate and Family Courts have power to enforce orders and punish contempt under general equity jurisdiction. (c. 215, §34). Rules of Domestic Relations Procedure apply to contempt actions. (c. 215, §34A). Probate Court is empowered to enforce its orders, including jail sentence for failure to comply with support order. (c. 215, §34). Criminal contempt requires finding of ability to pay when due and intentional failure to obey. (380 Mass. 137, 402 N.E.2d 1024). Presumption of entitlement to attorney's fees to plaintiff if contempt found. (c. 215, §34A). Where finding of contempt has been made, involving support or custody order, review of order must take place before jail confinement may be ordered. (c. 215, §34B).

Alimony.

Alimony may be awarded to either party upon or after divorce (c. 208, §34), and court's order remains subject to revision (c. 208, §37). Temporary alimony may be awarded pending divorce. (c. 208, §17). In determining amount of alimony court is required to consider specified factors and may consider certain additional factors. Required factors are: length of marriage, conduct of parties during marriage, age, health, station, occupation, amount and sources of income, vocational skills, employability, estate, liabilities and needs of each of parties and opportunity of each for future acquisition of capital assets and income. Discretionary factors are: contribution of each of parties in acquisition, preservation or appreciation in value of their respective estates and contribution of each of parties as homemaker to family unit. If obligor has health insurance, in addition to any alimony, court shall order obligor either to exercise option of additional coverage in favor of spouse, obtain coverage for spouse, or reimburse former spouse for cost of health insurance. (c. 208, §34).

Alimony improper in absence of finding of financial need. (422 Mass. 477, 664 N.E.2d

10).

Orders for alimony and support may be modified in discretion of probate court when party seeking modification shows change in circumstances. (c. 208, §37; 13 Mass. App. Ct. 189, 431 N.E.2d 591). Although remarriage of spouse receiving alimony does not per se terminate alimony, it makes prima facie case requiring judge to terminate payment in absence of extraordinary circumstances. (420 Mass. 820, 652 N.E.2d 589).

Division of Property of Spouses.

May be ordered in addition to or in lieu of alimony, following application of same factors (see subhead Alimony, supra). (c. 208, §34). Court shall also consider present and future needs of dependent children. (c. 208, §34). Court may not assign dependent children interest in marital property. (425 Mass. 693, 682 N.E.2d 865). Property in which one spouse holds title subject to division irrespective of when or how acquired. (372 Mass. 398, 361 N.E.2d 1305). In determining alimony, Court may consider earning potential, but neither professional degree nor increased earning capacity marital asset subject to equitable assignment. (399 Mass. 240, 503 N.E.2d 946). In divorce proceeding court cannot assign separate property of either husband or wife to third party such as minor child. (394 Mass. 749, 477 N.E.2d 402). Court may, however, assign, as property asset, percentage of party's future pension benefits, or allocate percentage of pension benefits attributable to period of marriage if and when they are received. (399 Mass. 754, 506 N.E.2d 879). Court may not delegate to parties equitable distribution of marital estate. (420 Mass. 854, 652 N.E.2d 610).

Change of Wife's Name.

Court granting divorce may allow woman to resume her maiden name or name of former husband. (c. 208, §23).

Custody of Children.

Provision for care and custody of minor children may be made in proceedings for divorce or for legal separation (c. 208, §19; c. 209, §37) or after judgment (c. 208, §28). Same-sex partner who helps raise child may become child's de facto parent and entitled to visitation. (429 Mass. 824, 711 N.E.2d 886). Absent emergency conditions, abuse or neglect, presumption is that parents share legal custody but not physical custody of minor children. (c. 208, §31). However, statutes do not limit power of court to make any order relative to custody of child if such order is in best interest of child. No presumption in favor of or against shared legal or physical custody at time of trial. (c. 208, §31). Significant consideration must be given to domestic violence in making custody orders. (422 Mass. 590, 664 N.E.2d 434). No court may give visitation rights to parent convicted of first-degree murder of child's other parent unless child consents. (c.c. 208, §28; 209, §37). Court must consider abuse of parent or child as factor contrary to child's best interest. (c. 208, §31A). Court's finding of abuse creates rebuttable presumption that placement with abuser not in child's best interest. (c. 208, §31A). Interstate child custody proceedings governed by c. 209B. Notwithstanding any provision of c. 209B to contrary, no child may be ordered or compelled to appear or attend child custody proceeding in another state when judge, after hearing, finds probable cause to believe that such child may be in jeopardy or exposed to risk of mental or physical harm by return to other state. (c. 209B, §11). Parties filing petition or complaint involving care or custody of child must file affidavit containing list of all other known proceedings involving child including certified copies of pleadings and determination of each proceeding held outside of commonwealth. (Mass. Trial Ct. R. IV, Unif. Rule Req. Disclosure of Pending and Concluded Care or Custody Matters). If obligor has health insurance, court shall order obligor to provide any children with health insurance. (c. 208, §§20, 34). Court will not enforce agreement signed during marriage that allows spouse to implant couple's frozen embryos. (431 Mass. 150, 725 N.E.2d 1051). Enforcement of agreement would cause individual to become parent against will. (Id).

Grandparent's Right to Visitation.

Where parent or parents are deceased or where parents are divorced or separated, grandparent may petition court for visitation. (c. 119, §39D). To succeed, grandparents must establish that failure to grant visitation will cause child significant harm by adversely affecting child's health, safety, or welfare. (437 Mass. 649, 774 N.E.2d 1052).

Non-custodial Parent's Right to Student Records.

Public elementary and secondary schools must provide non-custodial parent with child's student records unless parent's access to child prohibited by restraining order, protective order or if parent has been denied visitation rights based on threat to safety of child. (c. 71, §34H). School must remove information from records pertaining to address and contact information of custodial parent. (Id.).

Allowance for Support of Children.

Allowance for support and education of minor children and for support and education of children between 18 and 21 years of age who live with parent and are principally dependent on parent for support may be made in proceedings for divorce or for legal separation (c. 208, §19; c. 209, §37) or after judgment (c. 208, §28). Court must apply child support guidelines promulgated by Chief Justice when determining child support amount, and use of guidelines creates rebuttable presumption that amount is correct. (c. 208, §28). See child support guidelines effective Feb. 15, 2006: http://www.mass.gov/courts/formsandguidelines/csg2006.html. For children between ages 21 and 23, court may order maintenance, support and education if child is domiciled in home of parent and is principally dependent upon that parent for maintenance due to child's enrollment in educational program up to and including undergraduate college degree. (c. 208, §28; c. 209C, §9; c. 209, §37). Order for child support may be modified even after death of supporting parent. (37 Mass. App. Ct. 322, 640 N.E.2d 476). C. 119A governs enforcement of child support. Division of child support enforcement in dept. of revenue has enforcement power. (c. 14, §§1, 1A). Illegitimate child is constitutionally entitled to support from biological father between 18 and 21 years of age to same extent as child of divorced parents. (23 Mass. App. Ct. 590, 504 N.E.2d 659). Court has authority to order retroactive support from birth date and provision of health insurance in cases of illegitimacy. (29 Mass. App. Ct. 967, 560 N.E.2d 1288). Child support obligation may survive death of parent and estate of decedent may be required to continue payments. (432 Mass. 438, 735 N.E.2d 359). Dept. of revenue has broad duties with respect to enforcing child support obligations including locating obligors, establishing paternity, collecting support payments, and enforcing support orders. (c. 119A, §§1-7). Dept. of revenue empowered to collect information from all commonwealth employers in enforcing child support obligations. (c. 119A, §14). In enforcing child support obligations, dept. of revenue may require withholding of pension payments (c. 32, §§11, 19C), notify Registry of Motor Vehicles to prohibit issuance or renewal of license to operate (c. 90, §22), and notify employers to withhold income from obligor paychecks (c. 119A, §12). Even where facts supported implied contract, court refused to employ equity powers to enforce domestic partner's agreement to pay child support. (442 Mass. 522, 813 N.E.2d 1244). Court reasoned that “agreements to enter into familial relationships” should not be enforced where individual reconsiders decision. Court further noted that Massachusetts does not recognize “parenthood by contract”. (442 Mass. 522, 813 N.E.2d 1244).

Remarriage.

After judgment becomes absolute, parties may remarry. (c. 208, §24). If during lifetime of spouse with whom marriage is in force person enters into subsequent marriage, and such subsequent marriage contract was entered into by one of parties in good faith believing that former spouse was dead or that former marriage had been annulled by divorce or without knowledge of such former marriage, remarried persons shall, after impediment to their marriage has been removed, if they continue to live together as husband and wife in good faith on part of one of them, be held to have legally married from and after removal of such impediment. (c. 207,

§§4, 6).

Foreign Divorces.

Divorce adjudged in another state by court having jurisdiction of cause and both parties is valid in Massachusetts, but divorce adjudged in another state is of no effect in Massachusetts if obtained by inhabitant of Massachusetts who goes into another state to obtain divorce for cause occurring in Massachusetts while parties were domiciled there or for cause which would not authorize divorce in Massachusetts. (c. 208, §39). But see, as to constitutional limits, 334 U.S. 378; 334 U.S. 343.

Enforcement of Foreign Decrees.

Foreign decrees for allowance or alimony may be enforced in Massachusetts. (c. 208, §35).

Uniform Interstate Family Support Act adopted at c. 209D, provides for registration, modification and enforcement of foreign orders for spousal and child support. Statute similar in most respects to Uniform Act with following noted modifications:

C. 209, §207(g): Any action brought under former Uniform Reciprocal Enforcement of Support Act and is pending or was decided in Municipal Court Departments may be transferred to probate and family court by following procedures in this subsection;

§§3-307(b)(4) & 3-307(b)(5): substitutes two day notice requirement with five day notice requirement;

§3-310(a): requires commonwealth to establish state information agency under Act.

Separation Agreements.

Private agreements valid as actions to dispose of property interests and as to provisions for support and maintenance if fair and entered into freely. (c. 208, §1A; 371 Mass. 433, 358 N.E.2d 432).

Separate Support.

Probate Court may after consideration of factors set forth in statute issue order for separate support although petitioner not living apart from spouse. (c. 209, §32). In case of failure to obey separate support judgment, or to participate in community service program, probate judge may order jail sentence to be served during such hours as will permit person to continue employment. (c. 215, §34). When party unable to make support payment, court may order party to seek employment or to participate in community service or job training program. (c. 215, §34).

Antenuptial Contracts.

See topic 14.09 Husband and Wife.

Domestic Violence.

Person abused by family or household member or by person in substantive dating relationship may file complaint requesting protection from abuse such as physical harm, fear of serious physical harm, forced sexual relations. (c. 209A, §1). Protection from abuse may include orders to refrain from abuse, to refrain from contacting plaintiff, to vacate household, to remain away from household and workplace, to pay temporary support, to pay monetary compensation and to attend batteror's treatment program. (c. 209A, §3). See category 7 Criminal Law, topic 7.01 Criminal Law, subhead Domestic Violence.

Temporary Orders.

If plaintiff demonstrates substantial likelihood of immediate danger of abuse, court may enter temporary relief orders as it deems necessary, without prior notice to defendant. Defendant shall have opportunity for hearing on continuation of temporary orders no later than ten court business days after temporary orders entered. (c. 209A, §4). Upon issuance of temporary order, court must order immediate suspension and surrender of defendant firearms license and surrender of all firearms and ammunition within control, ownership or possession of defendant to law enforcement officers. (c. 209A, §3B).

Powers of Police.

Whenever law officer has reason to believe that family or household member has been abused or in danger of being abused, such officer shall use all reasonable means to prevent further abuse. (c. 209A, §6). Law officer must notify abused person of rights to file complaint requesting protection from further abuse. (c. 209A, §6).

Stalking is crime. (c. 265, §43). Stalking defined as one who willfully and maliciously engages in knowing pattern of conduct or series of acts over period of time directed at specific person which seriously harms or annoys and makes threat with intent to place person in imminent fear of death or injury. (c. 265, §43[a]). Conduct includes threats made by telephone, mail, e-mail and facsimile. (c. 265, §43[a]). See category 7 Criminal Law, topic 7.01 Criminal Law, subhead Stalking.

14.07 [RESERVED]

14.08 GUARDIAN AND WARD:

Guardian may be appointed for minor, mentally ill or mentally retarded person; person unable to make or communicate informed decisions due to physical incapacity or illness or spendthrift; conservator may be appointed for person unable to care for property by reason of advanced age, mental weakness, mental retardation or physical incapacity. See generally c. 201. All citations, unless otherwise indicated, refer to said chapter.

Probate Court of county where ward resides or, if ward nonresident, has property has jurisdiction over guardianship matters. (c. 201, §1). Mentally retarded person is someone substantially limited in ability to learn or adapt, which limitations have resulted from inadequately developed or impaired intelligence. (c. 201, §1).

Selection of Guardian.

Court may nominate and appoint guardian for minor under 14; minor over 14 may nominate guardian for appointment on approval of court. (c. 201, §2). Father or mother by will may appoint guardian for minor child and such appointment shall be effective when guardian accepts appointment by filing bond in acceptable form. (c. 201, §3). Special provisions apply to appointment of charitable organizations as guardians of minors.

Eligibility and Competency.

No special requirements. Court has power to determine whether guardian fits person for guardianship. Foreign guardian authorized to manage non-resident ward's property located within Commonwealth upon presentation of proper record. (c. 201, §30). Court not free to substitute its own selection for that of petitioner without affirmative reasons, stated with particularity. (14 Mass. App. 685, 442 N.E.2d 421). Notice requirements of hearings in Mass. Prob. & Fam. Ct., Prob. R. 29b.

Appointment of Guardian.

Guardian appointed by decree of Probate Court. Temporary guardian may be appointed without notice if court satisfied of emergency. (c. 201, §14). Procedures for appointment differ depending on whether ward is minor, mentally retarded, mentally ill, physically incapacitated, or spendthrift. (c. 201, §§2, 6-6B, 8). Criminal offender record check required on persons 18 years or older residing in foster home before child may be placed in such home, except that in emergency placement check must be made within ten days of placement. (c. 28A, §10A). Physician's certificate must be filed to obtain appointment of guardian, except for minors. Examination must be within 30 days prior to entry of each decree, temporary or permanent. (Unif. Prob. Ct. Prac. XXII). Clinical team report required in guardianships and conservatorships of mentally retarded; report must be dated and examinations must be within 180 days prior to filing of each petition, temporary or permanent. Requirement may be waived. (Unif. Prob. Ct. Prac. XXII[a]).

Any judge of Probate Court may appoint guardian ad litem to institute contempt proceedings against persons who fail to obey decrees of probate court involving care, custody or maintenance of minor children, and such guardian may personally serve any citation or capias throughout commonwealth. (c. 215, §56B).

Entry fee for petition of appointment, $150 plus $15 surcharge and $50 bond (except where petitioner certifies that ward's estate does not exceed $100, in which case no entry fee). (c. 262, §40). See Probate and Family Court Dept. Uniform Fee Schedule, revised Nov. 2007: http://www.mass.gov/courts/courtsandjudges/courts/probateandfamilycourt/scheduleoffees_color.pdf.

Qualification.

Guardian must give bond in sum ordered by court; such bond must be with sureties except where testamentary guardian exempted by will. (c. 205, §§1, 5). Bond may be increased or decreased by court as value of assets increases or decreases.

No oath required.

Inventory.

Guardian must file inventory. (c. 205, §1).

Powers and Duties.

Guardian cares for and manages estate: collecting assets, paying debts, applying so much of estate as needed for maintenance and support of ward and family and representing him in actions where no guardian ad litem or next friend appointed. (c. 201, §§37-43A; see also c. 202, §§21-26). Conservator has similar powers over ward's property.

Guardians of minors have custody of person of ward and care of ward's education, except that surviving parents shall have such care and custody unless court otherwise orders. Marriage of minor ends guardian's custody of person but not property of ward. (c. 201, §5). Guardian of mentally ill, mentally retarded person or spendthrift has care and custody of person of ward. (c. 201, §12). See infra under subhead Mentally Ill. Conservators have no custody over person.

Estate Planning.

Guardian shall have custody of all wills, codicils and other testamentary instruments executed by his ward. Probate Court may, after notice, authorize conservator or guardian (other than of minor) to take action or apply funds to minimize taxes and to provide for gifts to charities, relatives and friends. Such action may include (but not limited to) release of certain interests, execution of revocable or irrevocable trusts extending beyond ward's lifetime, exercise of option to change beneficiaries of insurance policies, execution of disclaimers or renunciations, etc. Gifts may be made to prospective legatees, devisees or heirs apparent of ward or may be made to individuals or charities in which ward believed to have interest. If ward's intentions cannot be ascertained, he will be presumed to favor reduction in taxes and partial distribution of his estate as provided. Guardian not required to include as beneficiary any person whom he has reason to believe would be excluded by ward. Order effective for 12-month period. Similar applications may be made in subsequent years. (c. 201, §38).

Investments.

Court may authorize guardian to purchase life insurance or annuities for ward with funds from estate. (c. 201, §47A). See category 13 Estates and Trusts, topic 13.15 Trusts.

Real Estate.

License from Probate Court required for sale of real estate. (c. 201, §§37, 38; see also c. 202, §§21-26, 36-38). If notice includes publication at such times and in such newspapers as court orders, and no appearance entered against sale, price at which sale is licensed is conclusively presumed to be highest possible. (c. 202, §38).

Liabilities of Guardian.

Conservator or guardian subject to individual liability if fails to reveal representative capacity and identify estate, or if tort arises from administration of estate and conservator or guardian personally at fault. (c. 202, §37).

Accounts.

Annual accounts provided for unless excused by court. (c. 206, §1).

Termination of Guardianship.

Guardianship terminates on death of ward or death, resignation or removal of guardian. Guardianship of minor terminates when ward reaches 18. (c. 201, §4). Guardianship of mentally ill or mentally retarded person or spendthrift may be terminated through petition to Probate Court that guardianship no longer necessary. (c. 201, §§13, 13A).

Mentally Ill.

Parent, two relatives or friends of mentally ill or mentally retarded person, any agency within executive offices of human services or educational affairs, or certain nonprofit organizations may petition Probate Court to appoint guardian. (c. 201, §§6, 6A). Notice to allegedly mentally ill or mentally retarded person, his presumptive heirs, dept. of mental retardation, and, if interested, U.S. Veterans Bureau required. (c. 201, §7). Guardian of mentally ill person can be appointed, after hearing, on finding that he is incapable of caring for himself by reason of mental illness. (c. 201, §6; 375 Mass. 394; 378 N.E.2d 951). Guardian may be appointed for mentally retarded person who can handle some but not all of his own affairs (7 Mass. App. 56; 385 N.E.2d 1024) but who is incapable of making informed decisions concerning his personal and financial affairs (c. 201, §6A). Guardian or temporary guardian of mentally ill or mentally retarded person has no authority to commit ward to mental health or mental retardation facility unless, after hearing, court finds that same to be in best interests of ward and specifically authorizes such commitment (c. 201, §§6, 6A, 14), after finding, beyond reasonable doubt that there is likelihood of serious harm to ward (377 Mass. 272; 385 N.E.2d 995). Special provisions apply to appointment of temporary guardian of mentally ill or mentally retarded person and authority of such temporary guardian to commit ward to mental health facility. (c. 201, §14). Guardian has custody of person of ward, except married person (c. 201, §24) and management of his estate and must give bond (c. 201, §12).

Prior judicial approval required before guardian may consent to administering or withholding of proposed extraordinary medical treatment. (385 Mass. 555, 432 N.E.2d 712). Absent emergency situation, committed mental patient must have been adjudicated incompetent, guardian appointed, and substituted judgment treatment decision made by judge before patient/ward can be forcibly medicated with antipsychotic drugs. (390 Mass. 489, 458 N.E.2d 308). Order approving treatment plan (after notice and hearing) should provide for periodic review and guardian should monitor treatment for substantial changes in ward's condition and circumstances warranting modification. (Id.). Special provisions apply to authority of guardian to consent to treatment with anti-psychotic medication. (c. 201, §§6, 6A, 14).

Foreign Guardians.

Foreign-appointed guardian producing transcript showing appointment and showing giving of bond and security double value of nonresident ward's property entitled to receive from probate court of county in which ward's Massachusetts estate is situated letters of guardianship. (c. 201, §30). Foreign appointed guardian or conservator may represent interests of foreign ward in any Massachusetts proceedings to determine rights in real or personal property in Massachusetts if no local guardian or conservator has been appointed. (c. 199A, §10). Person indebted to or in possession of property belonging to foreign ward may pay debt or deliver property to foreign guardian or conservator upon receipt of proof of appointment and affidavit and payment or delivery made in good faith upon such proof of authority and appointment releases debtor or person in possession as if payment made to local guardian or conservator. (c. 199A, §§2, 3). Nonresident individual eligible for appointment as guardian, but nonresident guardian must appoint resident agent. (c. 195, §§8-10). As to foreign banks acting as guardians, see category 3 Business Regulation and Commerce, topic 3.01 Banks and Banking.

Armed Services Personnel Missing in Action or Prisoner of War.

Probate Court may, upon petition of relative or friend, appoint conservator of property of member of armed services missing in action or prisoner of war. (c. 201, §16A). Conservator must give bond. (c. 201, §19).

Persons Unable to Care for Property.

If person by reason of mental weakness or physical incapacity is unable properly to care for his property, Probate Court may, on his petition or, in first instance, that of friend, after notice to him, his heirs presumptive and, if interested, U.S. veterans' bureau and hearing, appoint conservator to have charge and management of his property subject to direction of court. (c. 201, §§16, 17). Parent, two relatives or friends of mentally retarded person, certain nonprofit organizations or any agency within office of human services may petition Probate Court to appoint conservator. (c. 201, §16B). Special provisions apply, in certain instances, to power of conservator of mentally retarded person. (c. 201, §16B). Conservator has management of estate of ward and all laws relative to jurisdiction of probate court over estate of mentally ill persons under guardianship are applicable to estate of person under conservatorship. (c. 201, §20). Temporary conservator may be appointed for person who by reason of mental weakness or physical incapacity is unable to care properly for his property if court finds that welfare of such person requires immediate appointment of temporary conservator. No separate petition necessary for appointment of temporary conservator and all procedures incident to equitable proceedings and relief prior to final decree are applicable. (c. 201, §21). Conservatorship may, upon petition, be discharged by court when no longer necessary. (c. 201, §18).

Spendthrifts.

On petition of relative or dept. of public welfare, Probate Court may, after notice to alleged spendthrift and hearing, adjudge as spendthrift person who by drinking, gaming, idleness or debauchery so spends his estate as to expose himself or family to want and may appoint guardian. (c. 201, §§8, 9).

Health Care Proxy.

See category 13 Estates and Trusts, topic 13.16 Wills.

Gifts to Minors.

See topic 14.10 Infants.

Uniform Durable Power of Attorney Act adopted 1981 as c. 201B.

Uniform Fiduciaries Act not adopted.

Uniform Simplification of Fiduciary Security Transfers Act not adopted.

14.09 HUSBAND AND WIFE:

Married person coming from another state or country into this commonwealth has all rights, powers and obligations given to married persons by laws of this commonwealth. (c. 209, §28). Such person retains all property theretofore acquired under laws of another state or country, but future rights and liabilities are governed by laws of commonwealth. (c. 209, §29).

Disabilities of Married Women.

All disabilities of married women other than those hereinafter expressly mentioned have been removed.

Separate Property.

Real and personal property of any person upon marriage remain that person's separate property, and married person may receive, receipt for, hold, manage and dispose of property, real or personal, as if such person were sole. (c. 209, §1). Transfers of real and personal property between husband and wife are valid as if they were sole. (c. 209, §3). Work and labor performed by wife for persons other than husband and children presumed to be for her separate account. (c. 209, §4).

Surname of Married Woman.

Wife may not be required to use husband's surname for purposes of voting records or any other records involving personal identification, including application for credit, provided that wife is generally known by surname other than husband's. (c. 151B, §4[15]). Either party to marriage may adopt any surname. (c. 46, §1D).

Contracts.

Wife may contract in same manner as if she were sole and may contract with husband. (c. 209, §2). Wife may act as fiduciary and bind herself and estate which she represents without any act or assent of husband. (c. 209, §5). Either spouse may become liable as endorser on bill or note made by other as surety for other. (124 Mass. 108). Bill or note made by either, valid at its inception, is not extinguished by passing into hands of other. (209 Mass. 193, 95 N.E. 297).

Actions.

Married woman may sue or be sued without joinder of husband; one spouse can sue other in connection with contracts. (c. 209, §6). Common law doctrine of spousal immunity scaled back. Interspousal cases allowed for motor vehicle accidents (370 Mass. 619, 351 N.E.2d 526) and negligence in maintenance of real estate (381 Mass. 231, 409 N.E.2d 717).

Agency.

Either spouse may act as agent or attorney for other. (315 Mass. 199; 51 N.E.2d 965).

Conveyance or Encumbrance of Property.

Either spouse may convey individually. (c. 209, §1).

Desertion and Nonsupport.

Criminal proceedings may be brought against husband or wife who without just cause deserts or unreasonably fails to support spouse or minor child (c. 273, §1 et seq. as am'd 1995, c. 5, §§97, 98) and orders for support frequently have been given in such proceedings. See also infra, subhead Legal Separation, and topic Divorce; category Property, topic Absentees.

Uniform Reciprocal Enforcement of Support Act repealed. (1995, c. 5, §105).

Uniform Interstate Family Support Act adopted. (c. 209D; 1995, c. 5, §87).

Community property system is not observed in Massachusetts.

Antenuptial contracts designating certain property to remain or become that of husband or wife are void except as between parties, heirs and personal representatives unless recorded before, or within 90 days after, marriage. (c. 209, §§25, 26).

Conveyances.

Transfers of real and personal property between husband and wife are valid as if they were sole. (c. 209, §3). Conveyances of property to wife need not state that it is to her sole and separate use.

Conveyance to husband and wife creates tenancy in common and not joint tenancy unless instrument manifests clear intent to create joint tenancy. Tenancies by entirety recognized in Massachusetts. (c. 184, §7).

Torts.

Married woman is liable for her torts as though unmarried. (110 Mass. 238). Common law doctrine of interspousal immunity and c. 209, §6 do not bar suits by spouse for tort committed by one against other. (370 Mass. 619, 351 N.E.2d 526). Post divorce tort action may not be barred unless doctrine of issue preclusion may be invoked under certain specific circumstances. (402 Mass. 21, 520 N.E.2d 151).

Legal Separation.

If judgment has been entered that spouse has been deserted or is living apart from other for justifiable cause, and if he or she dies testate, other spouse is not entitled to waive provisions of will. (c. 209, §36).

Wife or husband who has been abandoned by spouse without sufficient maintenance may be authorized, upon motion to Probate Court and with notice, to dispose of spouse's property during period of abandonment as if moving party were sole. (c. 209, §30).

Liability for Debts.

Wife and her separate property are not liable for husband's debts, but if she has property to amount of $2,000 or more, she is jointly liable with him for debts due to amount of $100 in each case for necessaries furnished with her knowledge or consent to herself or family. (c. 209, §7). If wife vests husband with title to and possession of her property and permits him to hold himself out as owner, she is estopped to deny his ownership as against creditors to extent of debts incurred relying on his ownership. (235 Mass. 330, 127 N.E. 420). Husband is not liable upon cause of action which originated against wife prior to marriage (c. 209, §8) nor upon her separate contracts thereafter made (c. 209, §9), but she has same authority as at common law to pledge his credit for her support. (242 Mass. 245, 136 N.E. 350).

Interest of debtor spouse in principal residence of nondebtor spouse, held by entireties, not subject to seizure or execution by creditor; except that both spouses are liable jointly or severally for debts incurred for necessaries furnished either spouse or member of family. (c. 209, §1).

Husband and wife holding as tenants by entirety under deed dated prior to Feb. 11, 1980 may elect provisions of c. 209, §1, by recording election at registry of deeds. (c. 209, §1A).

Wife may do business on separate account without subjecting husband to liability for debts of her business. (c. 209, §9). Requirement for filing certificate to effectuate above has been abolished. (c. 209, §§10, 11, repealed by 1974, c. 147, §4). Except in cases involving incest, failure to pay child support, or violation of restraining order, spouses disqualified from testifying against one another. (c. 233, §20 as am'd 1995, c. 5, §94).

See also category 5 Civil Actions and Procedure, topic 5.13 Evidence, subhead Witnesses.

14.10 INFANTS:

Age of majority, 18. (c. 4, §7, cl. 51; c. 231, §85P).

Adoption.

Consent required from child above age 12. See also topic 14.01 Adoption. (c. 210, §§2, 3).

Emancipation takes place when infant becomes 18 unless legally incapacitated for some reason other than age. (c. 231, §85P). See c. 208, §28 for special support entitlement for children of divorced parents between 18-23.

Disabilities.

In general, infant has no power to contract except for maintenance and education. (6 Mass. 78). Minor age 16 or over may contract for motor vehicle liability insurance. (c. 175, §113K). Minor age 15 or over may contract for life or endowment insurance. (c. 175, §128). Minor, 12 years or older, who is certified by two or more physicians to be dependent on drugs, may consent to furnishing of hospital and medical care, other than methadone maintenance therapy, without disaffirmance because of minority. (c. 112, §12E). Physician, dentist or hospital not liable for care rendered without parental consent in emergency cases when delay in treatment will endanger life, limb, or mental well-being of patient. Minor may also effectively consent without disaffirmance to certain medical or dental care (except sterilization or abortion) when either care is of emergency nature or minor: (i) Is married, widowed or divorced; (ii) is parent of child; (iii) is member of armed forces; (iv) is pregnant or believes herself pregnant; (v) is living separate and apart from parents and manages own financial affairs; or (vi) reasonably believes he suffers from or has come into contact with disease dangerous to public health. Liability will not result for good faith reliance on minor's representations of legal ability to consent. Records and information concerning such care are confidential between minor and physician or dentist. (c. 112, §12F). See c. 112, §12S for requirements applicable to unmarried minors seeking abortion. Unemancipated minor living with natural or adopted parent shall not testify in any criminal proceeding against said parent where victim is not member of said parent's family and does not reside in said parent's household. (c. 233, §20).

Persons 18 or over may vote (Art. III, Mass. Const. Art. of Amend.); may not sell alcoholic beverages except in licensed establishment or knowingly possess, transport, or carry alcohol until age 21 except in course of employment (c. 138, §§34, 34C); may not consume alcohol until age 21 (c. 138, §34A); may execute valid will (c. 191, §1); may marry without parental consent (c. 207, §7); may donate blood without parental consent (c. 111, §184C); may make anatomical gifts to take effect at death or may make gift for transplant while living (c. 113, §8[a]); and may buy lottery ticket (c. 10, §29). Police officer may immediately seize driver's license of driver under 21 with blood alcohol percentage of .02 or greater. (c. 90, §24[1][f][2] as am'd 1995, c. 38, §115).

Ratification of Contracts.

Infant may ratify all contracts after majority (no writing needed). (14 Mass. 457).

Actions.

Infant may sue by guardian, if any, or next friend (no court appointment needed). (c. 201, §36). Guardian ad litem or next friend may upon request be appointed by court to protect interest of any minor, as well as others under disability. (c. 201, §1 et seq.).

See also topic 14.08 Guardian and Ward.

Torts.

Infant is liable for torts (except for fraud in representing that he is of age [175 Mass. 513, 56 N.E. 574]) but not held to same standard of care as adult (346 Mass. 174, 190 N.E.2d 676).

Parents of infant or of adult child dependent on parents have cause of action for loss of consortium against any person legally responsible for causing infant or such child serious injury. (c. 231, §85X).

Imputed Negligence.

Negligence of parent or custodian is not imputed to infant. (c. 231, §85D).

Parental Liability.

Parents with custody of unemancipated child over age seven and under age 18 are liable up to $5,000 for damage caused by child's wilful acts resulting in property damage or injury or death. (c. 231, §85G). Parents with custody of unemancipated minor are responsible for legal fees incurred by minor in connection with criminal proceedings against him as court determines, not exceeding $300. (c. 119, §29A).

Support of Minors.

Unjustified failure or refusal to support minor child by person having legal obligation is subject to criminal sanction. (c. 273, §1). Human services dept. shall give due consideration to child's request to be placed outside home of any parent or guardian when there is history of abuse and neglect in such home by such parent or guardian. (c. 119, §39G as am'd 1995, c. 38, §138). It is felony for either parent of illegitimate minor child to neglect or refuse to contribute reasonably to such child's support and maintenance. (c. 273, §15 as am'd 1995, c. 5, §99). Court may order support for certain minors up to age 23. (c. 209C, §9; c. 208, §28). Father not entitled to relief from support obligation, despite DNA evidence indicating not father, where individual failed to challenge paternity at earliest reasonable opportunity. (434 Mass. 23, 746 N.E.2d 488). See topic Divorce for support of children of divorced parents.

Even where facts supported implied contract, court refused to employ equity powers to enforce domestic partner's agreement to pay child support. (442 Mass. 522, 813 N.E.2d 1244). Court reasoned that “agreements to enter into familial relationships” should not be enforced where individual reconsiders decision. Court further noted that Massachusetts does not recognize “parenthood by contract”. (Id.).

Uniform Child Custody Jurisdiction Act adopted as c. 209B.

Uniform Transfers to Minors Act adopted as c. 201A. Age of majority under Act is 21. (c. 201A, §1).

Uniform Reciprocal Enforcement of Support Act repealed. (1995, c. 5, §105).

Uniform Interstate Family Support Act adopted as c. 209D; 1995, c. 5, §87.

Protection.

Through various courts, orders available to protect physical or emotional welfare, or support needs, of minors in cases of: divorce (c. 208, §19); separation (c. 209, §37); family abuse (c. 209A); delinquency or other circumstances requiring special protections, such as child born to prison inmate (c. 119); desertion, nonsupport and illegitimacy (c. 273). Orders of foreign courts enforced in commonwealth. (c. 298, §5). Office for children has responsibility for those under 18, or under 22 if child has special needs. (c. 28A, §§2, 4). Social services must notify district attorney of instances of child abuse. (c. 119, §51B). Certain individuals required to report child abuse to dept. of social services. (c. 119, §51A). Abuse must be reported if individual has reasonable cause to believe child under 18 is suffering physical or emotional injury resulting from abuse and abuse causes harm or substantial risk of harm to child. (Id.). Individual must immediately report condition to dept. of social services by oral communication and by making written report within 48 hours after oral communication. (c. 119, §51A). Parties considered mandatory reporters include educators, members of medical profession, clergy, any person paid to work with or care for children, police officers, firefighters, parole officers, social workers, and probation officers. (Id.). However, clergy members not required to report information gained through confessional or similarly confidential communication. (c. 119, §51A). See category 11 Employment, topic 11.02 Labor Relations, subhead Child Labor.

Uniform Securities Ownership by Minors Act not adopted.

Inheritance.

See category 13 Estates and Trusts, topic 13.07 Descent and Distribution.

Termination of Parental Rights.

See generally c. 119 (see also c. 210, Adoption). Upon petition of person alleging abuse or neglect of minor, court, upon finding of reasonable cause, may assign custody of minor to dept. of social services, licensed child care agency, or other qualified person. (c. 119, §24). Within 12 months of transfer of custody of minor and not less than every 12 months thereafter, committing court shall conduct hearing to review permanency plan for child. Plan shall address whether child will be returned to parent, placed for adoption, referred for legal guardianship, or placed in permanent living arrangement. (c. 119, §29B). When child placed out of state, permanency plan shall address whether out of state placement continues to be in best interest of child. (c. 119, §29B). In assigning permanent custody away from natural parents, court must consider best interests of child and parental unfitness. (367 Mass. 631, 328 N.E.2d 854). Natural parents may not be deprived custody in absence of showing of “grievous shortcomings” that put child's welfare at risk. (383 Mass. 573, 421 N.E.2d 28). Efforts prior to removal to return child to parent or guardian not required if court finds child abandoned, parent convicted of murder or manslaughter of one of parent's children, parent convicted of felony which resulted in serious bodily injury to child or to another child of parent, parent murdered another parent of child in child's presence, or child or children in home subjected to sexual abuse or exploitation. (c. 119, §29C). Dept. of Social Services required to accept for placement into foster care infants seven days of age or less. (c. 119, §391/2). Such voluntary placement does not, by itself, constitute termination of parental rights.

State may file petition for care and responsibility on behalf of child accepted into foster care if determination made that placement beyond six months required for reasons unrelated to parental unfitness and parent consents to placement. (c. 119, §23). Court shall determine whether continued placement is in child's best interests. Allowance of petition does not abrogate parent's right to make decisions on behalf of the child. (Id.).

Department of Early Education and Care.

Serves as lead agency for administration of all public and private early education and care programs and services. (c. 15D, §2). Department run by board that will set all necessary policies and procedures. Nine member board includes Secretary of Health and Human Services, Commissioner of Dept. of Education, Chancellor of Higher Education, and six individuals appointed by Governor. (c. 15D, §3).

14.11 MARRIAGE:

See generally c. 207. All citations, unless otherwise indicated, refer to said chapter.

Nonage.

Common law age of consent (12 females, 14 males) in effect (67 Mass. 119), but marriage of person under age 18 may not be licensed or performed without court authority (c. 207, §§7, 24, 25).

Consent.

Probate or District Court may authorize marriage of person under age 18 upon consent of parents or guardian, or without such consent in certain circumstances. (c. 207, §25). Marriage of person of age of consent but under 18 is not subject to annulment even though licensing official and minister are subject to fine. (67 Mass. 119).

License.

Persons intending to be married must personally (substitute is permitted in case of illness), or by either party if other is in armed forces or jail, file notice of intention to marry with clerk or registrar of any city or town at least three days before marriage. (c. 207, §§19, 20). License is to be issued three or more (but not more than 60) days after filing notice of intention of marriage and must be given to minister or official before marriage may be solemnized. (c. 207, §28).

Marriage Ceremony.

Marriage may be solemnized by resident clergyman or nonresident in specified cases, or in ceremonies conducted by Quaker meetings or other assemblies specified, or according to usage of any other religious organization which may have filed certain information with Secretary of State; also by justice of peace if also town, city or court clerk or registrar (including assistant clerk or registrar), or if designated by governor as authorized to perform same. (c. 207, §§38, 39). Marriage believed to be valid by either party is not invalidated by celebrant who mistakenly or wrongfully professes his authority to perform it. (c. 207, §42).

Reports of Marriages.

Person solemnizing marriage must keep records and make certain returns to clerk or registrar of municipality issuing license. (c. 207, §§39, 40). Content of record prescribed by statute. (c. 46, §1).

Common law marriages not recognized. (127 Mass. 459; 384 Mass. 20; 423 N.E.2d 313).

Proxy Marriages.

Status of proxy marriages has not been determined by S.J.C. Not addressed by statute.

Marriages by Written Contract.

Marriage by virtue of written contract not recognized. No action for breach of contract to marry. (c. 207, §47A).

Prohibited Marriages.

No man may marry his mother, grandmother, daughter, granddaughter, sister, stepmother, grandfather's wife, grandson's wife, wife's mother, wife's grandmother, wife's daughter or wife's granddaughter, brother's or sister's daughter, father's or mother's sister. (c. 207, §1). Corresponding prohibitions as to marriage of woman except that woman may not marry daughter's husband but may marry husband's father. (c. 207, §2). Prohibitions apply even if marriage by which affinity was created was dissolved. (c. 207, §3). Marriage prohibited as polygamous or because of affinity or consanguinity is void ab initio. (c. 207, §§4, 8).

Marriage, contracted in commonwealth by party residing and intending to continue to reside in another state where such marriage would be void, is void in commonwealth. (c. 207, §11).

If person residing and intending to continue to reside in commonwealth goes into another jurisdiction and there contracts marriage prohibited and declared void by laws of commonwealth, such marriage is void for all purposes in commonwealth. (c. 207, §10).

Annulment.

Proceedings for annulling or affirming marriage may be brought by complaint in Probate Court in like manner as divorce proceedings. (c. 207, §14; c. 215, §3). Plaintiff must have domicile or five years residence in commonwealth for annulment of foreign marriage. (c. 207, §14). See category 5 Civil Actions and Procedure, topic 5.19 Practice.

Issue of Invalid Marriage.

Issue of marriage void by reason of consanguinity or affinity considered born out of wedlock. (c. 207, §15). Issue of marriage which is void for nonage or mental illness, or void by reason of prior marriage which second spouse was unaware of or in good faith considered no bar, are legitimate issue of parent capable of marrying. (c. 207, §§16, 17).

Divorce.

See topic 14.06 Divorce.

Residence.

Residence within commonwealth not required, but before issuing license (certificate) to nonresident, officer must satisfy himself by requiring affidavits or otherwise that person is not prohibited from marrying by law of jurisdiction where he or she resides. (c. 207, §12).

Same-sex Marriage.

Members of same sex entitled to marry under Massachusetts Constitution. (440 Mass. 309). State forwarded three reasons for denying right to marry to homosexual couples: (1) Procreation primary purpose of marriage; (2) heterosexual marriage ensures children raised in “optimal” setting; and (3) preservation of scarce state resources. (Id.). SJC determined that forwarded reasons did not survive “rational basis review.” (Id.). City and town clerks required to issue marriage licenses to same sex couples. Marriage is void in Massachusetts if parties reside in state where said marriage void. (c. 207, §11).

In 2007, proposed constitutional amendment to define marriage as between man and woman was defeated in legislature, thus, it will not come before voters in referendum in Nov. 2008.

14.12 MARRIED WOMEN:

See topics 14.09 Husband and Wife, Marriage; categories 8 Debtor and Creditor, topic Homesteads; Documents and Records, topic Acknowledgments; Estates and Trusts, topic Executors and Administrators; Property, topics Absentees, Dower.

15 HEALTH

15.0115.04

15.05 FOOD, DRUGS, DEVICES AND COSMETICS:

Regulated by c. 94, §1 et seq.

15.05A HEALTH INSURANCE:

See also category 16 Insurance, topic 16.01 Insurance Companies.

2006 Mass. Acts 58, “Act Providing Access to Affordable, Accountable Quality Health Care” radically changes health insurance regulation and access in state; aim to provide nearly universal health care coverage to state residents. Act restructures and partially deregulates state's small group and individual insurance markets to provide access to more affordable insurance.

Beginning July 1, 2007 all residents 18 or older must purchase and maintain minimum level of health insurance unless refusal to do so based on religious beliefs. (c. 111M, §§2, 3). Sanction for noncompliance is loss of 2007 personal exemption on state income tax, commencing 2008 penalty of up to 50% of monthly “minimum insurance premium for creditable coverage”; assessed against state tax refund. (c. 111M, §2).

“Commonwealth Health Insurance Connector”—independent quasi-government entity created to certify “good value” insurance plans and provide portable and affordable plans on pre-tax basis. (c. 176Q, §1 et seq,). See website: http://www.mahealthconnector.org/portal/site/connector/. Eligible to purchase insurance through Connector are: (1) Non-working individuals; (2) individuals working for non-offering companies; (3) individuals working for offering companies who are not eligible for benefits including part-timers, contractors, new employees; (4) small businesses with fewer than 50 employees; and (5) sole proprietors. (c. 176Q, §§ 1, 4).

Act establishes “Commonwealth Care Health Insurance Program” providing sliding scale premium subsidies for no deductible policies for individuals with incomes between 100% and 300% of Federal Poverty Level; no premium payment for those with incomes at 100% of such level. (c. 118H, §1 et seq.) Other eligibility requirements apply. (c. 118H, §§2, 3). Employers with more than ten employees required to offer “cafeteria plan” pre-tax coverage for employees under own group health plan or through Connector (c. 151F, §2); other employers must pay “Fair Share” of $295 per employee (c. 149, §188). “Free-Rider Surcharge” makes companies with 11 or more employees who use more than $50,000 in free care in one year liable for 10-100% of hospital costs, triggered when employee receives free care more than three times a year or company has five or more instances of employees receiving free care in year; companies offering health insurance to employees not subject to surcharge. (c. 118G, §18B). Employer has sole discretion regarding financial contributions to employee's health insurance cost.

Act creates “Health Care Quality and Cost Council” within Executive Office of Health and Human Services to provide consumer information and greater transparency and accountability on part of providers and insurers. (c. 6A, §16K).

“Uncompensated Care Pool” replaced by “Health Safety Net Fund”, charged with establishing certain reimbursement rates provided to uninsured and underinsured patients. (c. 118G, § 36).

Non-group Insurance.

See generally c. 176M.

Health Maintenance Organization.

See generally c. 176G.

Small Group Health Insurance.

See generally c. 176J.

15.0615.11

15.12 PUBLIC HEALTH:

See generally cc. 17, 111, 112.

Physicians must comply with all registration requirements of c. 112, §2. Profiles, including all disciplinary actions, on licensed physicians made available to public, (c. 112, §5). Registered nurses must comply with all registration requirements of c. 112, §80B.

Public assistance for pregnant women and infants with inadequate health insurance available through “Healthy Start Program”. (c. 118E, §10E).

Dept. of Public Health administers WIC program to provide supplemental foods and nutrition education to pregnant, postpartum women, infants and young children. (c. 111I, §1).

Electronic Transmittal of Prescriptions.

Unless otherwise prohibited, prescriptions may be transmitted electronically. (c. 94C, §23[g]). Prescription must be transmitted directly from prescriber to pharmacy, and no alterations of prescription information allowed. (Id.).

Emergency Contraception.

Facilities that provide care to victims of sexual assault must provide victim written information about emergency contraception. Further, facilities must offer emergency contraception at facility to female rape victim of childbearing age, and must initiate emergency contraception upon request. (c. 111, §70E).

Inpatient Hospice Programs.

Dept. of Public Health to promulgate rules for licensing of hospice programs. (c. 111, §57D). Dept. to issue licenses of term of two years, and licenses may be renewed. (Id.). Licenses subject to suspension, revocation or refusal to renew for cause. (Id.). Hospice program may not operate in Massachusetts or use word “hospice” or “Hospice Program” without hospice license issued by commissioner. (Id.). Prohibition against using word “hospice” in title or description of facility, organization, program, or services by person not licensed to provide hospice services.

15.13 SMOKING REGULATIONS:

Smoking prohibited statewide in workplaces, offices, medical facilities, restaurants, bars, schools, theaters, arenas, public transportation, state buildings, and other public places; limited exceptions include state hospital patients, private residences, private clubs, and smoking bars. (c. 270, §22). Smoking prohibited in public conveyances and transportation terminals. (c. 272, §43A). Possession and commercial use of cigarette vending machines regulated by c. 64C, §10. Municipalities may ban smoking in all public places, including restaurants, bars, workplaces and public forums under Home Rule Amendment to Massachusetts Constitution. (Mass. Const. Amend. art. 2; 383 Mass. 152, 418 N.E.2d 335). Dept. of Public Health Information Line tel.: 1-866-627-7968.

16 INSURANCE

16.01 INSURANCE COMPANIES:

Business of insurance generally governed by cc. 175, 176, as amended and is under supervision of Division of Insurance, One South Station, 5th Floor Boston, MA 02110-2208; tel. (617) 521-7794 (617), 521-7490 (TTD/TDD). Many provisions of c. 156B (Business Corporation Law) incorporated into c. 175. (c. 175, §30). Insurance company holding companies regulated by special provisions. (c. 175, §§47A, 193L-N,S). Health care insurance coverage required for state residents. (cc. 111M, 176Q, 118H).

Ten or more residents of state may form mutual or stock company. (c. 175, §§48, 48A). Capital and other financial requirements vary with type of company and types of insurance to be issued. (c. 175, §§48, 48A). License fee for organization determined annually by secretary of administration; see current fee schedule: http://www.mass.gov/Eoca/docs/doi/Companies/forms/Company_Taxes_Deposits.pdf .

Except fraternal benefit societies and savings banks (where special provisions of cc. 176 and 178 apply) only domestic companies which have obtained certificate (c. 175, §32) and foreign companies which have obtained a license (c. 175, §151, Fifth) may engage in insurance business.

All companies must file elaborate annual statements (c. 175, §§25-27) and must underwrite specified types of insurance only (c. 175, §§47, 47A, 48, 48A). Any form of insurance policy issued to more than 50 policyholders in state, other than casualty or property insurance for business, professional or governmental operations, or certain life, accident or health insurance or annuities, must be filed for approval by insurance commissioner and must meet certain specifications as to readability, organization and appearance. (c. 175, §§2B, 193F). Standard form of fire insurance policy required, but may be modified or added to by riders or by writing on margin or across face of policy. (c. 175, §99). Insertion of certain conditions or provisions in policies is prohibited. (c. 175, §§22-22C, 22E, 24A). Right of insurance companies to cancel or refuse to issue automobile insurance policies is limited. (c. 175, §§22C, 22E). See also c. 175, §113A. There is similar provision limiting cancellation of fire insurance policies. (c. 175, §§99, 193P).

Person paying consideration for life insurance contract need not have insurable interest in life of insured individual if organization qualified under §501(c)(3) of I.R.C. is named irrevocably as owner and beneficiary.

Domestic companies may under certain conditions merge or consolidate with each other or with foreign companies. (c. 175, §§19A, 19B, 193S). Minority interests in subsidiary domestic insurance company may, under certain conditions, be acquired by parent company. (c. 175, §193Q).

Interlocking directorates are regulated. (c. 175, §193C). A domestic insurance company is regulated in its right to acquire stock in another insurance company. (c. 175, 193D).

Rebates, with stated exceptions, are prohibited. (c. 175, §§182-184).

A beneficiary named in a policy of life or endowment insurance may sue thereon in his own name. (c. 175, §125).

If policyholder substantially complies with change of beneficiary policy requirements on lifetime annuity contract, exact compliance will be excused. (37 Mass. App. Ct. 357, 639 N.E.2d 1106).

An infant may not avoid or repudiate because of infancy any contract of life or endowment insurance in which he or certain near relations are beneficiaries, if he was 15 years of age when contract was made. (c. 175, §128).

Joint Underwriting Association, which provides medical malpractice insurance, has been converted to Medical Professional Mutual Insurance Company. (1994, c. 330, am'd 1995, c. 63).

When family member is injured in auto accident, spouse and children entitled to recover loss of consortium damages as separate “persons” who suffered “distinct” injuries. (392 Mass. 537, 467 N.E.2d 137). However, Commissioner of Insurance has authority to modify language of standard automobile insurance policy to remove separate per person limit for loss of consortium plaintiffs. (395 Mass. 765, 481 N.E.2d 1373). Negligent infliction of emotional distress claim of family member of passenger killed in auto accident not claim for “bodily injury” for insurance coverage and therefore subject to same per person limit as passenger's estate's wrongful death claim. (420 Mass. 587, 650 N.E.2d 793).

Commissioner of Insurance may approve standard automobile insurance policy where underinsured motorist provision not applicable to protest named insured when underlying bodily injury or death sustained by person not insured by policy. (420 Mass. 799, 652 N.E.2d 128).

Motorist who had Massachusetts auto policy with underinsured motorist coverage may not recover under higher underinsured motorist coverage in another household member's policy. (419 Mass. 144, 643 N.E.2d 435).

Blue Shield's prohibition of “balance billing” by doctors does not violate antitrust laws. (749 F.2d 922).

Homeowner's insurance policy excluding coverage of damages arising out of use of motor vehicle does not exclude claim against insured for negligent supervision of party resulting in negligent operating of motor vehicle by another insured, when considered together with clause providing that coverage applies separately to each insured. (398 Mass. 240, 496 N.E.2d 158).

Special rules apply to crime insurance. (c. 175, §102E).

Before making payments over $500, insurer must determine whether claimant subject to child support lien by examining information provided by dept. of revenue or by sending department information regarding claimant ten days before payment. (c. 175, §24D).

Universal Health Insurance.

Commonwealth adopted version of Health Insurance Portability Act (P.L. 104-191) which limits power of employer/insurer to deny coverage because of preexisting condition (c. 176M, 176N). Where c. 175 is inconsistent with c. 176M, 176M governs.

C. 118G establishes division of health care finance and policy. (c. 118G, §2). Division administers uncompensated care pool which provides health care coverage for uninsured. (c. 118G, §2[c]). Chapter also provides for small business health insurance pool to equalize employee health insurance costs for small business. (c. 118G, §21).

Both unincorporated business and corporate employers may receive tax credit for initiating employer paid health insurance programs. (c. 62, §6[f]).

Cc. 117A and 118E both contain provisions for medical care and assistance for those who qualify. (c. 117A, §§1-3, c. 118E, §§10A–10F).

Unfair Methods of Competition and Deceptive Acts and Practices.

Regulated by c. 176D. §3 of said act enumerates unfair methods of competition and unfair or deceptive practices. §3(9) proscribes certain unfair claims settlement practices. §3A prohibits specific unfair methods of competition and unfair or deceptive acts or practices by insurance companies. Single act of failing to settle case promptly may be unfair claim settlement practice under 176D, §3(9)(f). §4 contains further prohibitions pertaining to lending of money or extension of credit. C. 93A is also applicable to unfair or deceptive insurance practices. (373 Mass. 72, 365 N.E. 2d 802). See category 3 Business Regulation and Commerce, topic 3.20 Monopolies, 3.22 Restraint of Trade and Competition, subhead Unfair Trade Practices.

Accident, dental and health insurance policyholders must be provided with copies of medical information used to deny liability. (c. 175, §108). All payments or denial of liability must be furnished promptly. (c. 175, §108[4]).

Insurance company may not deny coverage due to insured's failure to give seasonable notice of claim unless company is prejudiced thereby. (c. 175, §112). Insurer doing business in Massachusetts shall reveal limits of insured's policy to injured party making claim against insured. (c. 175, §112C).

Sale of Life Insurance or Annuity Policies.

Sale of life insurance or annuity policies to replace existing policy issued by another insurer governed by regulations promulgated by insurance commissioner based on model regulation developed by National Association of Insurance Commissioners. (c. 175, §204).

Medicare and Supplemental Coverage.

Policies providing supplemental coverage to Medicare must be approved by commissioner and meet certain standards promulgated by commissioner. Exception for employers and trade unions. (c. 175, §205).

Premium Finance Agreements.

Subject to regulation and full disclosure provisions similar to those applied to retail installment sales contracts. (c. 255C; c. 140D). Persons holding or acquiring such finance agreements, except banks including federal savings banks, sales finance companies and licensed small loans companies, must obtain licenses from commissioner of banks. (c. 255C, §2). In case of conflict between statute and c. 140D, Truth-in-Lending Law, latter controls. (c. 255C, §23). Violations of c. 255C are also violations of c. 93A, consumer protection law. (c. 255C, §6).

Excise Taxes.

Every domestic insurance company, except as otherwise provided, is subject to annual excise of 2% of gross premiums for all policies written or renewed, all additional premiums charged, and all assessments made during preceding calendar year, exclusive of reinsurance. Such excise not imposed on life insurance companies with respect to amounts received as consideration for annuity contracts and business taxable under c. 63, §20, or on marine, or fire and marine, insurance companies with respect to business taxable under c. 63, §29A. Under certain circumstances, life insurance company subject to excise tax is allowed credit equal to 1.5% of such company's total contribution in excess of its full proportionate share. (c. 63, §29C). In addition, such excise does not apply to premiums for policies written or renewed for insurance of property or interests in other states or countries where tax actually paid by company or its agents. (c. 63, §22). Marine and fire and marine companies are subject to special provisions. (c. 63, §29A). Foreign companies, except life insurance companies, with respect to business taxable under c. 63, §§20, 21, marine insurance or fire and marine insurance companies with respect to business taxable under c. 63, §29A, must annually pay excise upon gross premiums for all policies written or renewed, or additional premiums charged, and all assessments made during preceding calendar year for insurance of property or interests in commonwealth or which are subjects of insurance by contracts issued herein. Excise rate is 2%, but tax to be not less in amount than would be imposed by laws of state or country under which such company is organized upon like insurance company incorporated in this commonwealth if doing business to same extent in such state or country. (c. 63, §23).

Life insurance companies authorized to transact business in Massachusetts must annually pay an excise of 2% upon premiums received during preceding calendar year. Life companies authorized to do business in commonwealth before Dec. 31, 1943 subject to special provisions under which they transfer to basis of tax on premiums, in year tax computed on net value of policies that equals or exceeds tax so computed. (c. 63, §20 and notes following). Foreign life insurance companies in addition to foregoing tax must pay sum equal to excess over such excise of amount of tax which would be imposed in same year by laws of state or country under which such company is organized upon life insurance company incorporated in Massachusetts or upon its agents if doing business to same extent in such state or country. (c. 63, §21).

Domestic non-life companies must also pay tax equal to 1% of total gross investment income earned in preceding calendar year (c. 63, §22A), while domestic life companies not subject to tax under c. 63, §22A must pay investment privilege excise equal to 14% of net investment income computed in accordance with apportionment formula (c. 63, §§22B-22D).

Domestic life insurance companies are subject to assessments to pay expenses involved in the valuation of securities by the National Association of Insurance Commissioners. (c. 175, §14A).

Agents or Brokers.

§§162H-162X govern qualifications and procedures for licensing of insurance producers. (c. 175, §162G). “Insurance producer” defined as person required to be licensed in Mass. to sell, solicit or negotiate insurance. (c. 175, §162H). Party shall not sell, solicit or negotiate insurance in Mass. for any class of insurance unless licensed in accordance with §§162H-162X. (c. 175,

§162I). In most instances, statute does not apply to special insurance brokers licensed pursuant to §168. License not required of insurer's officers, directors, employees, subsidiaries or affiliates. (c. 175, §162J). However, these employees may not receive commissions on policies written and their duties may only indirectly relate to sale of insurance. (Id.). Party applying for insurance producer license must pass written examination unless exempt pursuant to §162O. (c. 175, §162K). Savings bank employees selling life insurance must also be licensed as agents. (c. 178A, §4). . Upon proper submission of request and fees, nonresident producer license granted to nonresident person who is licensed in their home state. (c. 175, §162N). Insurance producer license remains effective unless revoked or suspended as long as fee required by c. 175, §14 is paid and education requirements for resident individual producers are met by due date. (c. 175, §162M).. For license applications and fees see http://www.mass.gov/doi.

To obtain insurance adjuster license individual must be at least 21 years old and successfully complete written examination. (c. 175, §172). Individual seeking license must also pay nonrefundable fee of $200 (c. 175, §14) and submit application and certified criminal background check to Commissioner of Insurance (c. 175, §172). See http://www.experioronline.com/mainsurance.asp; http://www.state.ma.us/doi/producer/Producer_lr_adjustor.html.

Special brokers may be licensed to negotiate insurance contracts against specified hazards on property or interests here in foreign companies not authorized to transact business here. (c. 175, §168). Otherwise, licenses apply only to insurance underwritten by companies authorized to do business here. (c. 175, §§163, 166).

Special license provisions relative to partnerships. (c. 175, §173).

Insurance agent may offset funds due an insured for return premiums against amounts due him from insured. (c. 175, §187B).

Insurance advisers subject to license and other requirements. (c. 175, §177B).

Coercion.

No person engaged in business of financing purchase of real or personal property, or of lending money on security of real or personal property shall require that insurance on such property be placed with a particular agent, broker or insurance company, provided that such person may nevertheless approve or disapprove of insurance company and terms and conditions of policy selected. (c. 175, §193E). Nor may owner of residential property be compelled to continue or renew fire insurance policy in excess of amount of outstanding mortgage (c. 175, §95A), although mortgagee may require insurance in amount not in excess of replacement cost (c. 183, §66). Charges for credit life and credit health and accident insurance are limited by statute. (c. 255B, §10; c. 255C, §14A; c. 255D, §26; c. 255, §§12F, 12G).

Discrimination.

When insurance policy, certificate or service contract provides for reimbursement or payment for any professional services performed by any person, licensed under c. 112, such reimbursements or payments shall not be denied because of race, color or creed nor shall any insurer permit any unfair discrimination to said persons. (c. 175, §193K). Life insurance companies may not discriminate in amount of premium or in any other term of policies on account of race (c. 175, §122), nor may any such company permit discrimination in favor of individuals between insurants of same class and equal expectation of life (c. 175, §120). Life insurance policies may not be refused for sole reason of mental retardation if insured is at least three years old and has no other life insurance in force, or for blindness or primarily because of exposure to DES. (c. 175, §§120A-120C). Certain medical and hospital insurance policies may not be refused by reason of blindness, deafness or exposure to DES. (c. 175, §108A; c. 176A, §8E; c. 176B,

§§4D, 4E). No discrimination on basis of blindness, physical impairment or mental retardation is permitted except where based on sound actuarial principles or related to actual experience (c. 175, §193T) and no discrimination on basis of exposure to DES (c. 175, §108C; c. 176A, §8E; c. 176B, §4E). No discrimination on basis of being victim of abuse as defined by c. 209A, §1 in policies for residential property insurance, accident or sickness insurance, and life or endowment insurance, (c. 175, §§95B, 108G, 120D), or in terms or conditions of hospital service plans (c. 176A, §3A), or medical service plans (c. 176B, §5A). No insurer may require applicant to undergo genetic testing as condition of renewal or issuance of policy. (c. 175, §108I). No medical malpractice insurer shall discriminate against any eligible health care provider based upon specialty practiced, however premium charges may be based upon reasonable classifications of risks associated with specialty. (c. 175, §193U). No health maintenance organization or insurer may cancel or refuse to issue insurance coverage based on genetic information. (cc. 176G, §24; 175, §108H). Distinction in premiums paid based on genetic information is also prohibited. (cc. 176G, §24; 175, §108H). Violation constitutes unfair method of competition or deceptive act under c. 93A and 176D. (cc. 176G, §24; 175, §108I).

Foreign Companies.

Before license issued to foreign company to engage in insurance business here it must inter alia file copy of charter and statement of condition, satisfy the commissioner that its condition is equal to required standard, appoint him attorney for service of process, and appoint a resident of state its agent. (c. 175, §151). Name of business entity formed to act as insurance producer subject to prior written approval of commissioner of insurance. (c. 155, § 9).

Commissioner may for cause revoke license. (c. 175, §5). Every foreign corporation must notify commissioner forthwith of all changes in name, location, capital, organization and certain other matters. (c. 175, §23A). Company organized under laws of foreign country must make a deposit with state treasurer or officer of another state equal to capital required for domestic companies. (c. 175, §155). Commissioner may publish fact that unlicensed foreign company is without license and is not amenable to suits in Massachusetts for collection of policies, etc. (c. 175, §160B).

Plain Language.

See category 3 Business Regulation and Commerce, topic 3.12 Consumer Protection, subhead Plain Language.

Retaliatory Laws.

If laws of any other state impose on Massachusetts insurance companies doing business there burdens and restrictions in excess of those imposed on foreign corporations by Massachusetts law, like burdens, etc., imposed on companies of said state doing business here. (c. 175, §159). Such reciprocity likewise determines imposition of retaliatory taxes. (c. 63, §24A).

Variable Annuity Insurance.

Policies may be issued by life companies, subject to commissioner's approval. (c. 175, §§132G, 132H). Insurer authorized to issue annuity contracts may issue funding agreement to fund: (1) Benefits under employee benefit plan as defined by 29 U.S.C., §1002; (2) activities of tax exempt organizations under I.R.C. §501(c); (3) any program of U.S. or state government; (4) any agreement providing for periodic payments in satisfaction of claim; or (5) any program or entity with assets in excess of 25 million dollars. (c. 175, §132I).

No-fault Insurance.

See category 23 Transportation, topic 23.01 Motor Vehicles, subheads Insurance, No-fault Insurance.

Uniform Insurers Liquidation Act, adopted. (c. 175, §§180A to 180L).

16.02 SURETY AND GUARANTY COMPANIES:

Surety companies, agents and brokers subject to all applicable provisions of c. 175 governing insurance. (c. 175, §107).

Rights and Powers.

Corporation organized in Massachusetts to guarantee fidelity of persons in positions of trust and to act as surety on official bonds may insure fidelity of persons holding public or private positions of trust and may, if approved by court, obligee or person competent to approve such bond, act as joint or sole surety upon official bond or other undertaking in civil or criminal procedure of any person or corporation to United States, commonwealth, any county, city, town, judge of probate, or public officer, or to any corporation or association; and may act as joint or sole surety upon any undertaking conditioned upon performance of any duty, or performance or nonperformance of any act specified in bond, and upon bonds to indemnify against loss any person who is responsible as surety for performance by others of any office or trust. (c. 175, §105). If by law two or more sureties are required upon any obligation upon which company is authorized to act as surety, it may act as joint or sole surety. (Id.). Provisions applicable to insurance companies in general apply to these corporations. See topic 16.01 Insurance Companies.

Foreign Companies.

Foreign corporation of this class may do business, through lawfully constituted and licensed resident agents, only after deposit of not less than $100,000 with state treasurer, or officer of another state for protection of its policyholders in U.S. (c. 175, §106), filing of power of attorney constituting commissioner of insurance its agent for service of process and compliance with other conditions set forth in c. 175, §151. (See topic 16.01 Insurance Companies.) Elaborate annual statements must be filed.

17 INTELLECTUAL PROPERTY

17.01 TRADEMARKS AND TRADENAMES:

Note:

Massachusetts adopted Model Trademark Act, effective Apr. 1, 1974. Revised Model State Trademark Bill adopted 2006, effective Oct. 29, 2006. (c.110H).

What May Be Used.

It is unlawful for any person, firm, corporation or association, except agencies or instrumentalities of the U. S. Government, in selling goods, to use words or abbreviations “Army,” “Navy,” “Marine Corps,” “Marines,” “Coast Guard,” “Government,” “Post Exchange,” “P. X.,” “G. I.” or any words or phrases which may lead public to believe business owned, operated or managed by U. S. Government, except that such words may be used in corporate name of corporation as name of charitable corporation if approved by State sSecretary. (c. 110, §4B). No person, society, association, or corporation shall knowingly assume, adopt or use name of benevolent, humane, fraternal, charitable or labor organization, or name which is colorable imitation thereof. (c. 266, §71A). No individual, association or partnership may use word “corporation” or “incorporated” or any other word or phrase which may lead public to believe that such party is corporation. (c. 110, § 4A). No person, firm, corporation or association (other than agency or instrumentality of commonwealth) shall use words “Massachusetts State Fair” or any such words or phrases without written consent of commissioner of agriculture. (c. 110, §4B). Fines of up to $200 or imprisonment for up to one year or both may be imposed for violations of aforementioned sections. (c. 110, §26; c. 266, §71A).

Corporation shall not assume name of another corporation, firm, association or person organized or doing business in commonwealth without written permission; provided, however, that in case of corporation formed to act as insurance agent, broker or fire insurance adjuster, corporate name must receive written approval of commissioner of insurance. (c. 155, §9).

Registration and Protection of Trademarks.

Person who adopts and uses trademark in Massachusetts may file application for registration of said mark with office of State Secretary. Facsimile of mark in triplicate and filing fee (currently $50) must accompany application. (c. 110H, §3). Secretary will then issue Certificate of Registration, which is admissible in evidence in any action or judicial proceeding in commonwealth. (c. 110H, §5). Registration effective for five years and can be renewed for successive periods of five years by filing renewal application within six months before date of expiration accompanied by renewal fee (currently $50). (c. 110H, §6). For more information, see: http://www.sec.state.ma.us/cor/corpweb/cortmsm/tmsminf.htm.

Assignments.

A mark and its registration assignable with good will of business in which mark is used. Assignment must be by written instrument, which may be recorded with State Secretary upon payment of recording fee. Assignment of registration void as against subsequent purchaser for value without notice unless recorded with Secretary within three months of date of said assignment or prior to subsequent purchase. (c. 110H, §7). Registration, renewal and assignment fees are determined annually by secretary of administration. (c. 7, §3B).

Protection Afforded.

Registration of mark is constructive notice of registrant's claim of ownership thereof and prima facie evidence of registrant's exclusive right to use said mark in connection with goods or services specified in application for registration. (c. 110H, §3). However, registration of mark will not adversely affect rights in common law which another party may have acquired in mark at any time by good faith use thereof. (c. 110H, §14). Common law entitles tradename or service mark owner to injunction forbidding another from using tradename or service mark so similar as to mislead public. (398 Mass. 480, 498 N.E.2d 1044).

Infringement.

Subject to exception noted in previous subhead, any person who, without consent of registrant, uses copy or colorable imitation of registered mark in conjunction with sale or other distribution of goods or services within commonwealth will be liable to registrant in civil action. (c. 110H, §12). Registrant not entitled to recover profits or damages absent proof that acts have been committed with knowledge that such mark intended to be used to cause confusion or mistake or to deceive. (c. 110H, §12). In addition to damages, registrant can seek injunctive relief in Superior Court to restrain unauthorized use of mark. (c. 110H, §13). Likelihood of injury to business reputation or dilution of distinctive quality of mark is ground for injunctive relief notwithstanding absence of competition between parties or of confusion as to source of goods or services. (c. 110H, §13).

Tradenames.

Person conducting business in commonwealth under any title other than real name of person conducting the same, or a partnership conducting business under any title not including true surname of at least one partner, or corporation conducting business under any other title than its true corporate name, must file with clerk of every city or town where office is maintained certificate under oath stating full name and residence of each person conducting such business and its address. (c. 110, §§5, 6). Such certificate must be executed under oath by each person whose name appears as conducting such business and signed by each such person in presence of city or town clerk or their designees or in presence of person authorized to take oaths. City or town clerk or person authorized to take such oaths may request person to produce evidence of his identity, and if such person does not produce evidence of his identity, notation of this fact shall be entered on face of certificate. (c 110, §5). Upon discontinuing or withdrawing from such business or change in information in file, it is necessary to file with clerk a sworn statement of withdrawal from such business or a statement otherwise correcting information on file. (c. 110, §5). If any business is conducted by trustees under written instrument, names of trustees with reference to instrument must be filed in like manner. (c. 110, §6).

17.02 TRADE SECRETS:

Crime of larceny has been extended to cover those who steal or with intent to defraud, obtain by false pretense, or who unlawfully and with intent to steal or embezzle, convert, secrete, unlawfully take, carry away, conceal or copy with intent to convert any trade secret of another, regardless of value, whether such trade secret is or is not in his possession at time of such conversion or secreting. Trade secret includes anything tangible or intangible or electrically kept or stored which constitutes, represents, evidences or records secret scientific, technical, merchandising, production or management information, design, process, procedure, formula, invention or improvement. Penalties include fine up to $25,000 and/or imprisonment. (c. 266, §30[4]).

Statute applies both to those who take and to those who knowingly receive or deal with such secrets. Broad injunctive relief available to aggrieved party where conversion is in violation of terms of written employment agreement. (c. 93, §42A). See also category 5 Civil Actions and Procedure, topic 5.14 Injunctions.

In addition to criminal sanctions, guilty party may be liable in tort for civil damages, and, in discretion of court, civil damages may be increased to twice amount of damages suffered. (c. 93, §42).

18 LEGAL PROFESSION

18.01 ATTORNEYS AND COUNSELORS:

SJC has denied petition for establishment of integrated bar. (321 Mass. 747, 74 N.E.2d 140). In 1974, however, SJC established Board of Bar Overseers, www.ma.gov/obcbbo, authorized to oversee attorney conduct and to recommend appropriate discipline. (365 Mass. 681, 313 N.E.2d 561; Mass. Sup. Jud. Ct. R. 4:01, §5[3]). See subheads Annual Registration and Disbarment or Suspension, infra.

Massachusetts Rules of Professional Conduct based on ABA Model Rules of Professional Conduct, with modifications. (Mass. Sup. Jud. Ct. R. 3:07).

Jurisdiction over Admission.

SJC and Superior Court have jurisdiction over admission of attorneys. (c. 221, §37).

Eligibility.

U.S. citizen over 18 years of age may file petition with SJC or Superior Court to be examined for admission. All petitions referred to Board of Bar Examiners for report on applicant's character, acquirements and qualifications. Admission entitles attorney to practice in all courts of commonwealth. (c. 221, §§36-37, Mass. Sup. Jud. Ct. R. 3:01, §1.3).

Aliens permitted to file petition for admission only after making primary declaration to become U.S. citizen. (c. 221, §38A).

Registration as Law Student.

No requirement. Mass. Sup. Jud. Ct. R. 3:03, §1 and U.S. Dist. Ct. Mass. Local R. 83.5.1(b)(1) provide that senior law student enrolled in evidence or trial practice course may appear in certain enumerated cases under supervision of member of Massachusetts Bar with written approval of dean of accredited law school. Mass. Sup. Jud. Ct. R. 3:03, §8 and U.S. Dist. Ct. Mass. Local R. 83.5.1(b)(5) also permit limited appearances by student who has begun next-to-last year and is currently participating in law school clinical instruction program. If appearance of senior law student is not permitted as of right under Mass. Sup. Jud. Ct. R. 3:03, §§1 and 8, justice of SJC or appeals court may permit senior law student, provided student is qualified and supervised as specified in Rule, to appear on behalf of Commonwealth. (Mass. Sup. Jud. Ct. R. 3:03, §6). Enrollment in or completion of course in appellate practice may be substitute for trial practice or evidence course. (Mass. Sup. Jud. Ct. R. 3:03, §6). Appearing law students must certify that they are familiar with local rules and will abide by standards of professional conduct set out in Mass. Sup. Jud. Ct. R. 3:07 and 3:08. (Mass. Sup. Jud. Ct. R. 3:03, U.S. Dist. Ct. Mass. Local R. 83.5.1[b][6]). Student must certify that client has been informed of student's status as law student and authorizes student to appear. (U.S. Dist. Ct. Mass. Local R. 83.5.1[b][6]).

Educational Requirements.

To take bar examination, applicant must be graduate of public day high school or its equivalent, and must have completed work acceptable for college or university bachelor's degree or equivalent education, and must have been graduated from law school approved by ABA or authorized by Mass. statute. Provision made for foreign law school applicants. (Mass. Sup. Jud. Ct. R. 3:01, §3; c. 221, §36).

Petition for Admission.

Petition must be filed with Clerk of SJC accompanied by recommendation of Massachusetts attorney and fee of $815. (c. 221, §37; Mass. Sup. Jud. Ct. R. 3:01, §1). See website for Board of Bar Examiners: http://www.mass.gov/bbe/. See subhead Admission Without Examination, infra.

Examination.

Petitioners examined by Board of Bar Examiners twice yearly. Petitioner admitted upon recommendation by Bar Examiners as to moral character, acquirements, and qualifications. (c. 221, §37; Mass. Sup. Jud. Ct. R. 3:01, §§2,5).

Bar examination includes both state law and multi-state questions. Petitioner must also pass multistate professional responsibility examination. (Mass. Sup. Jud. Ct. R. 3:01, §3). Requirements are set forth in detail in regulations issued by Board of Bar Examiners. See website for Board of Bar Examiners: http://www.mass.gov/bbe/.

Clerkship.

No requirement.

Admission Without Examination.

See Mass. Sup. Jud. Ct. R. 3:01, §6; c. 221, §§37,39. Attorney admitted in another state, district, or U.S. territory, may petition SJC for admission without regular examination, and Board of Bar Examiners may waive bar examination, if attorney complies with certain conditions, including: (1) Admitted in other jurisdiction for at least five years; (2) practiced or taught law in other jurisdiction so as to satisfy Board of Bar Examiners as to moral character and legal ability; (3) submits letters of recommendation for admission from three attorneys from Massachusetts or other jurisdiction in which applicant was admitted to bar or last resided; (4) satisfies educational requirements (see subhead Educational Requirements, supra); (5) passed multistate professional responsibility examination; (6) passed limited written examination in Massachusetts practice and procedure. To be admitted to Massachusetts bar, attorney admitted in foreign country must also comply with foregoing conditions, except that must also have principal residence in Massachusetts and must submit letters of recommendation from three members of bar of foreign jurisdiction and from two members of Massachusetts bar. Petition must be accompanied by fee of $1,015 (c. 227, §37) plus $250 for National Conference of Bar Examiners report. For admission instructions see http://www.mass.gov/bbe/onmotionappinst.pdf.

Admission Pro Hac Vice.

Member in good standing of bar of another state may appear in action, by permission of court, provided that such other state grants like privilege to Massachusetts lawyers. No requirement that foreign attorney must associate with Massachusetts attorney on matter. (c. 221, §46A). U.S. Dist. Ct. Mass. Local R. 83.5.3(b) requires certification by attorney seeking admission pro hac vice of good standing, of no pending disciplinary proceedings and of familiarity with local rules; and no appearance may be entered until application to appear has been granted, except attorney may file complaint or any paper necessary to prevent entry of default for failure to answer or otherwise plead if such complaint or other paper is accompanied by application to appear.

Licenses.

See subhead Annual Registration, infra.

Annual Registration.

Every attorney admitted to, or engaging in, practice of law in Massachusetts must register annually with Board of Bar Overseers, under penalty of suspension, supplying certain required information, and paying annual registration fee. (Mass. Sup. Jud. Ct. R. 4:02, 4:03.) For fee schedule see http://massbbo.org/feeschedule.pdf . Portion of funds so collected by Board of Bar Overseers is allocated to cost of attorney registration and disciplinary enforcement, and clients' security board, Massachusetts lawyers' assistance programs, and other purposes within Board of Bar Overseer's discretion and subject to Supreme Judicial Court approval. (Mass. Sup. Jud. Ct. R. 4:04-4:06). There are also registration requirements for individuals who engage in lobbying activities appearing before certain state agencies which affect attorneys. (c. 3, §§39-44 and 47, am'd St. 1995, c. 80).

Privileges.

No special provisions.

Disabilities.

No attorney shall become surety in any criminal or civil proceeding, except as endorser for costs, nor shall attorney for plaintiff in trustee process appear or act for party summoned as trustee. Except by leave of court, no attorney shall take part in conduct of trial in which he intends to appear as witness for his client. (Mass. Super. Ct. R. 11, 12; Mass. Dist. & Mun. Supp. R. Civ. P. 113).

Liabilities.

No attorney on behalf of creditor shall collect or attempt to collect debt in unfair, deceptive, or unreasonable manner from one who has incurred debt primarily for personal, family or household purposes. (c. 93, §49; see regulations of attorney general). No attorney member of professional society or committee thereof shall be liable for damages for acts performed within scope of his duties as member, provided he acted in good faith. (c. 231, §85N). See also category 5 Civil Actions and Procedure, topic 5.08 Costs.

Compensation.

See Mass. Sup. Jud. Ct. R. 3:07(1.5) for detailed regulations governing fees. Lawyer may not charge illegal or clearly excessive fee. (Mass. Sup. Jud. Ct. R. 3:07[1.5]; 398 Mass. 18, 494 N.E.2d 1327). Factors that determine clearly excessive fee include: time and labor required; novelty, difficulty and skill required; likelihood that acceptance of employment precludes other employment; custom; amount involved and results obtained; time limitations imposed; nature of professional relationship with client; experience, reputation and ability of lawyer; whether fee fixed or contingent. (Mass. Sup. Jud. Ct. R. 3:07[1.5(a)]).

Contingent fees allowed except in divorce, alimony, support, property settlement or criminal matters. (Mass. Sup. Jud. Ct. R. 3:07[1.5(c)]). Contingent fee must be in writing, signed in duplicate by attorney and client, attorney must retain copy for seven years, and attorney must notify client at conclusion of matter in writing showing payments and methods. (Mass. Sup. Jud. Ct. R. 3:07[1.5(c)]). Contingent fee agreement must state (i) client's and lawyer's name and address, (ii) nature of legal matter, (iii) contingency upon which fee paid and any other fee obligation outside contingency, (iv) method fee determined, and (v) method other expenses deducted. (Mass. Sup. Jud. Ct. R. 3:07[1.5(c)]).

See also c. 231, §§6E-G, governing assessment of attorney's fees where court finds all or substantially all claims, defenses, setoffs, or counterclaims wholly insubstantial, frivolous, and not advanced in good faith.

See also c. 261, §§23, 26, only nominal attorney's fees included in customary statutory “costs”. Attorney's fees, however, may be awarded under specific statutes. See e.g., c. 93A, §§9, 11 (recovery under consumer protection act).

Acting as Fiduciary.

Attorney acting as fiduciary, who charges compensation for his services, and whose gross annual income from all fiduciary services exceeds $25,000 for each of three next immediate preceding taxable years, is required to furnish to his customer certain information described in c. 203, §§4A, 4B.

Lien.

C. 221, §50 provides that attorney who is authorized by client to appear in any court action or in any state or federal department, board, or commission proceeding, shall have lien for his reasonable fees and expenses upon judgment, decree or order in his client's favor and upon proceeds derived therefrom. Statute provides for enforcement of lien. See also c. 221, §§50A, 50B. Breakdown of lawyer-client relationship serves as good cause for withdrawal, without waiver of attorney's lien. (24 Mass. App. 592, 511 N.E.2d 42).

Attorney Ethics.

Massachusetts Rules of Professional Conduct modeled after ABA Model Rules of Professional Conduct, with modifications. (Mass. Sup. Jud. Ct. R. 3:07).

Disbarment or Suspension.

SJC Rule 4:01 vests exclusive jurisdiction in SJC for discipline of any attorney admitted to, or engaging in practice of law in Massachusetts. Court-appointed 12 member Board of Bar Overseers is authorized to investigate conduct of any attorney within Court's jurisdiction, to conduct hearings, and to recommend appropriate discipline to Court pursuant to Mass. Sup. Jud. Ct. R. 4:01, 4:02, and 4:03, and Rules and Regulations of Board of Bar Overseers. Lawyers not required to report ethical violations of other lawyers. (Mass. Sup. Jud. Ct. R. 3:07 [8.3]). Collateral estoppel applies to bar discipline cases to same extent it applies in civil cases. (420 Mass. 6, 647 N.E.2d 1182). See also c. 221, §40, providing that SJC or Superior Court may assess damages and remove attorney from practice of law for deceit, malpractice or other gross misconduct. Disciplinary proceedings against attorney temporarily suspended from practice must be instituted within reasonable time after suspension, and must be given priority over other cases concerning attorneys not under suspension. (399 Mass. 431, 504 N.E.2d 652). Commonwealth recognizes reciprocal discipline rule. (407 Mass. 1010, 555 N.E.2d 233).

Unauthorized Practice.

C. 221, §41 provides for fines and imprisonment of one who practices law who has been removed from practice of law, or who has not been admitted to practice law, or who misrepresents his authority to represent persons in settling claims belonging to such persons. C. 221, §46 prohibits corporations (other than professional corporations authorized pursuant to c. 156A), and associations from practicing law or holding themselves out as being entitled to practice law.

Mandatory Continuing Legal Education.

No requirements.

Specialty Certification Requirement.

No requirements.

Professional Corporations.

Are authorized under c. 156A. Attorneys incorporating under c. 156A must also comply with provisions set forth in Mass. Sup. Jud. Ct. R. 3:06. See category 2 Business Organizations, topic 2.03 Corporations.

Limited Liability Companies.

Attorneys may form limited liability companies or partnerships under c. 156C or c. 108A. See category 2 Business Organizations, topics 2.07 Partnerships, subhead Limited Liability Partnerships; 2.06 Limited Liability Companies. Attorneys registering as limited liability companies must also comply with Mass. Sup. Jud. Ct. R. 3:06.

Advertising.

Commonwealth adopted ABA Model Rules of Professional Conduct with modifications. (Mass. Sup. Jud. Ct. R. 3:07). Lawyer may not make false or misleading communication about lawyer or services. (Mass. Sup. Jud. Ct. R. 3:07[7.1]). Communication false or misleading if it contains material misrepresentation or omission, creates unjustified expectations, compares services with other lawyer's services, unless comparison factually substantiated. (Mass. Sup. Jud. Ct. R. 3:07[7.1]).

Lawyer may advertise, with certain restrictions, in public media not involving solicitation. (Mass. Sup. Jud. Ct. R. 3:07[7.2(a)]). Lawyer may not solicit prospective clients through coercion or harassment. (Mass. Sup. Jud. Ct. R. 3:07[7.3]). Solicitation defined and explained in Rule 7.3, §§(b)-(e).

19 MINERAL, WATER AND FISHING RIGHTS

19.01 MINES AND MINERALS:

Activities such as dredging, excavating, removing, filling, altering or polluting in coastal areas, in certain agricultural land and in wetlands are subject to regulation. (c. 21A, §14; c. 132A,

§15; c. 184, §31 et seq.; c. 131, §§40, 40A; c. 252, §1 et seq.). Earth removal activities and excavation of sand, gravel and other materials may be subject to municipal regulation by ordinance or bylaws.

Coastal baseline of commonwealth is drawn in conformity with treaties to which U.S. is party. Limits of fishing areas or any fishing rights established under special acts remain unchanged. (c. 1, §3).

See also c. 131 for Inland Fisheries.

All coal mining operations regulated by c. 21B.

The owner of mines or mineral deposits, which, on account of adjacent land belonging to other persons or occupied as a highway, cannot be worked in the ordinary manner without crossing such land or highway may construct roads, tunnels and railways thereto and when such construction is required by public convenience may take land of such other persons upon filing petition and bond with county commissioners if they find such improvements necessary. (c. 252, §§15-23). The sale of stock in mining companies is regulated. (c. 93, §15).

20 MORTGAGES

20.01 CHATTEL MORTGAGES:

Covered by Uniform Commercial Code. (c. 106, §§9-101 to 9-507).

Filing.

Place of Filing.

Except with respect to fixtures, timber to be cut or minerals, including oil and gas, as to which filing is in registry of deeds where mortgage on real estate would be filed or recorded, filing required in office of State Secretary and in office of clerk of town or city where debtor resides or, if nonresident, has place of business. In case of filing with respect to consumer goods, farm equipment or farm products by farmer where debtor does not reside in commonwealth, local filing is required in office of clerk of town or city in which goods are kept. (c. 106, §9-401).

For central filing: Secretary of Commonwealth of Massachusetts, 17th Floor, 1 Ashburton Place, Boston, Massachusetts 02108, Attn: Uniform Commercial Code Filing Section. Enclose postage-prepaid, self-addressed envelope for returns.

Fees.

For list of fees: See http://www.sec.state.ma.us/cor/corfees.htm.

Forms.

Forms at end of this Digest frequently used but have no official status. Printed forms are available. Modifications may be freely made as long as basic requirements of statute are met. Forms request (617) 727-9440.

No official forms have been adopted with reference to creation of security interest. However, it is essential when creating security interest that draftsman review c. 255, §§12C, 13I, 13J (Consumer Notes), c. 255B (Retail Installment Sales of Motor Vehicle Contracts), c. 255C, §13 (Insurance Premium Finance Agreements), c. 255D, §9 (Retail Installment Sale Agreements) and c. 93, §48 (form of notice of right of cancellation). In addition many agreements creating security interest subject to commonwealth's Truth-in-Lending Law. (c. 140D).

20.02 COLLATERAL SECURITY:

See category 8 Debtor and Creditor, topic 8.15 Pledges.

20.03 MORTGAGES OF PERSONAL PROPERTY:

See topic 20.01 Chattel Mortgages.

20.04 MORTGAGES OF REAL PROPERTY:

Mortgage Brokers and Mortgage Lenders.

See category 3 Business Regulation and Commerce, topic 3.06 Brokers, subhead Mortgage Brokers.

Execution.

Usual form of mortgage is deed upon “mortgage covenants” executed under seal, acknowledged, and recorded in all respects like absolute conveyance, containing condition subsequent and power of sale upon default. (c. 183, §§18-21). Absolute conveyance with separate instrument of defeasance will also constitute mortgage but will be treated as absolute conveyance as against any person other than maker of instrument of defeasance and his heirs and devisees and persons having actual notice of it unless it is recorded in registry of deeds for county or district where land affected is situated (c. 183, §53), and in equity absolute conveyance may be shown by parol evidence to have been intended as mortgage and will be so treated.

Discrimination.

Persons engaged in business of granting mortgage loans may not discriminate against any person, either in granting of such loan or in interest, rate, terms or duration of loan, because of race, color, religion, creed, national origin, sex, sexual orientation, children, ancestry, genetic information, handicap or, subject to certain exceptions, age. (c. 151B, §4[3B]). No mortgagee doing business in Massachusetts may discriminate with respect to financing of acquisition of dwelling with indoor ambient formaldehyde level of not more than .10 ppm. (c. 167, §47). Arbitrary denial of residential mortgage loans for one to four family, owner-occupied dwellings based on location of property is forbidden. (c. 183, §64). No mortgagee may refuse to finance, or discriminate in terms of financing, based on presence of lead in paint or other materials. (c. 111, §199A[a]).

Restrictions apply as follows to loans of more than $1,500 secured by mortgage on real estate other than a first mortgage and assessed for not over $40,000 having a dwelling house for six or less separate households and used as a home by mortgagor: (1) Maximum interest 1½% per month on unpaid principal balance of loan before default and for six months after default; (2) after six months of continuing default maximum interest 1% per month; (3) except where borrower in writing agrees to different application of payments in cases where partial payments are made interest shall be calculated to time of payment, and such payment shall first be applied to interest and balance to principal; (4) interest includes all sums paid by borrower to lender for interest, brokerage, commissions, services, extension of loan, forbearance to enforce payment, but does not include sums paid to lender for recording and foreclosure costs, charges for title examination and collection (c. 140, §90A); and (5) various other detailed requirements are imposed (c. 140, §§90A-90E; c. 140D).

Conditions and restrictions may be imposed by commissioner of banks whenever any note secured by first lien on dwelling house of four or fewer separate households occupied or to be occupied in whole or in part by mortgagor provides for installment payments of principal or interest or both that will not amortize outstanding principal amount in full by maturity of such note and term of mortgage securing such note is for period not less than original or anticipated amortization period. Such conditions and restrictions shall include, but not be limited to, following: (1) Minimum term of note; (2) method by which rate of interest on renewed or extended note may be assigned; (3) maximum increase in rate of interest at renewal or extension of note; (4) provisions for decreases in rate of interest at renewal or extension of note as may be warranted by market conditions; (5) provisions for automatic renewal or extension of note at option of mortgagor; (6) requirements for advance notification and explanation of adjustment of rate of interest in connection with renewing or extending note, provided that such notification and explanation shall occur no less than 30 days prior to rate adjustment; (7) methods of disclosure to mortgagor of terms and conditions of loan as may be required under provisions of c. 140D. Notwithstanding any provision of law to contrary, commissioner may, by further conditions and restrictions, provide that rate of amortization may be varied, including utilizing period of negative amortization, in order to adjust rate of interest. These provisions summarized above do not apply to such transaction entered into by person, partnership, association, trust or corporation making five or fewer mortgage loans in calendar year; provided, however, that in computing number of mortgage loans there will be counted in loans of more than one partnership, association, trust or corporation, majority interest of which are owned or controlled directly or indirectly by same person or persons, partnerships, associations, trusts or corporations and including in loans of partnership, trust or company not incorporated loans of several members thereof; provided, further, that note exempt as described in this sentence shall contain following statement appearing conspicuously therein: THIS NOTE IS A CONTRACT FOR A SHORT-TERM LOAN. THIS LOAN IS PAYABLE IN FULL AT MATURITY. YOU MUST REPAY THE ENTIRE PRINCIPAL BALANCE OF THE LOAN AND UNPAID INTEREST WHEN DUE. THE LENDER IS UNDER NO OBLIGATION TO REFINANCE THE LOAN AT THAT TIME. YOU WILL, THEREFORE, BE REQUIRED TO MAKE PAYMENT OUT OF OTHER ASSETS YOU MAY OWN, OR WILL HAVE TO FIND A LENDER WILLING TO LEND YOU THE MONEY AT PREVAILING MARKET RATES, WHICH MAY BE CONSIDERABLY HIGHER THAN THE INTEREST RATE ON THIS LOAN. (c. 183, §60). Federal alternative mortgage regulation provided by P.L. 97-320, §804 does not apply. (1985, c. 224).

Until Dec. 31, 1997, loan fees, finder's fees, points or similar fees on mortgage loan on one-to-four-family owner-occupied dwelling shall not be charged except if fees or points previously disclosed in writing. (c. 183, §63). Effective Dec. 31, 1997, loan fees, finder's fees, points or similar fees on first mortgage loan on one- to four-family owner-occupied dwelling for originating and underwriting expenses limited by commissioner of banks. Mortgagees may be reimbursed for secondary marketing fees. (c. 183, §63). Mortgagee may revise mortgage terms per request of owner of equity of redemption on one- to four-family, owner-occupied residence, subject to certain restrictions regarding loaning or advancement of additional funds and applicable interest rate. (c. 183, §63A).

For time and form that loan proceeds must be transferred to mortgagor, see c. 183, §63B. Every application for a mortgage loan on real estate consisting of a dwelling house with accommodations for four or less separate households and occupied or to be occupied in whole or in part by obligor on mortgage debt shall be made on a printed form which shall contain following two statements in type of at least two points larger than other type used on said application: (1) The responsibility of the attorney for the mortgagee is to protect the interest of the mortgagee; (2) The mortgagor may, at his own expense, engage an attorney of his own selection to represent his own interests in the transaction. (c. 184, §17B).

Printed copy of above statements and information must be given to mortgagor at time of making application. (c. 184, §17B).

Disclosure of finance charges is required in accordance with Truth in Lending law, c. 140D. See category 3 Business Regulation and Commerce, topic 3.19 Interest, subhead “Truth in Lending” Law. Massachusetts has granted exemption for certain classes of credit transactions regulated by it pursuant to c. 140D. (c. 140D, §2). Disclosure information shall include full statement of closing costs to be incurred by customer which shall be presented before loan consummation or, if loan subject to Real Estate Settlement Procedures Act of 1974 (P.L. 93-533) and regulations issued thereunder (RESPA) before consummation or not later than three business days after receipt of customer's application, whichever is earlier. Good faith estimates of settlement costs required by RESPA may be substituted for itemization of amount financed.

Mortgagee who holds first mortgage on dwelling house of four or fewer units which is occupied in whole or in part by mortgagor and who requires advance payment of real estate taxes, must pay interest, to be determined by mortgagee, to mortgagor on amounts paid in advance. (c. 183, §61). Such mortgagee must also pay to city or town where mortgaged premises are located taxes due on or before due date to extent mortgagor has made advance payments of taxes to mortgagee. (c. 183, §62).

Title Report.

Mortgagee's attorney shall render certification of title on certain mortgages for not more than four family mortgagor-occupied dwellings. Such certification must include title examination which covers at least 50 years to warranty or quitclaim deed which on its face does not suggest defect. Certification must include statement that mortgagor holds good and sufficient record title to mortgaged premises free from all encumbrances and must enumerate exceptions thereto. Willful failure by attorney to render required certification to mortgagor constitutes unfair or deceptive act under c. 93A. (c. 93, §70). In case of registered land, title examination may start with present owner's certificate of title issued by Land Court, except bankruptcy indices and federal and state liens shall be examined. (c. 93, §70).

Recording.

Unrecorded mortgage not valid against third parties having no actual knowledge thereof. (c. 183, §4). Mortgage on registered land is registered by filing deed and entering memorandum on owner's duplicate certificate. (c. 185, §§67, 68). No mortgagee may deliver documents for recording unless at time of delivery, net proceeds of loan transferred pursuant to c. 183, §63B.

Recording Fees.

See category 10 Documents and Records, topic 10.04 Records.

Taxes.

For purposes of taxation mortgagor and mortgagee assessed for value of their respective interests in land, but tax not invalidated by failure to assess mortgagee, unless sworn statement has been filed showing his interest. (c. 59, §§12-12F). If mortgagor fails to pay taxes, mortgagee may do so and add amount thereof to mortgage debt. (c. 60, §58). If separate assessments are made, and either mortgagor or mortgagee fails to pay, other may do so, and amount is added to or deducted from mortgage debt. (See c. 60, §59. Also see c. 60, §§38-39.) If person assessed has not previously applied for abatement of tax, mortgagee who has paid not less than one-half of tax may apply for abatement between Sept. 20 and Oct. 1 of year to which tax relates. (c. 59, §59).

Trust deeds valid, but seldom used except to secure issues of bonds.

Ownership of Mortgaged Property.

Except as against mortgagee, mortgagor still deemed owner of premises. Mortgagee in general, however, entitled to damages for injuries permanently affecting value of the land. Thus where mortgaged land taken on eminent domain both mortgagor and mortgagee may join in petition for award of damages and judgment on such petition shall apportion damages according to their interests. (c. 79, §§32, 33).

Future Advances.

A mortgage may be written to cover future advances and will be binding as to third parties providing that statement to that effect is included in it, it is recorded and mortgagee is under obligation to make advances. (254 Mass. 282, 150 N.E. 293). Any sum or sums which shall be loaned by mortgagee to mortgagor at any time after recording of any mortgage of real estate, to be expended for paying for repairs, improvements, lead paint removal, or replacements to, fuel for, or for taxes or other municipal liens, charges or assessments or condominium expense assessment, including legal fees, on mortgaged premises, shall be equally secured with and have same priority as original indebtedness, to extent that aggregate amount outstanding at any time when added to balance due on original indebtedness shall not exceed amount originally secured by mortgage. (c. 183, §28A). Advances by mortgagee to consumer under open-end credit plan will be secured up to principal amount specified in mortgage as amount intended to be secured thereby. Priority shall apply to principal, interest and fees charged. (c. 183, §28B).

Late Charges.

No mortgagee secured by first or subordinate lien on house of four or fewer separate households or on residential condominium unit occupied by mortgagor shall require mortgagor to pay penalty or late charge for any payment made within 15 days from date such payment is due, or within 10 days from date bi-weekly mortgage payment is due. After period of 15 days late charge permitted only if specifically authorized by loan documents, and penalty must not exceed 3% of principal and interest overdue but not including amount of payment representing estimated tax payments required by mortgage note or deed. (c. 183, §59).

Prepayment.

If mortgage note, secured by first or subsequent lien on dwelling house of four or fewer separate households or on residential condominium unit, occupied or to be occupied in whole or in part by mortgagor, is prepaid, any prepayment penalty may not exceed balance of first year's interest or three months interest whichever is less provided, however, that with respect to any such mortgage loan insured by the Federal Housing Commissioner, mortgagor may be required to reimburse mortgagee to full amount of any charges, premiums or fees required by Federal Housing Administration to be paid by mortgagee upon payment of such note before date fixed for payment. However, if anticipatory payment is for purpose of refinancing loan in a financial institution and takes place within 36 months from date of note an additional payment not in excess of three months interest may be charged. (c. 183, §56). If prepayment is result of eminent domain taking pre-payment penalty is not enforceable but this does not apply to mortgage notes executed prior to Aug. 13, 1970. (c. 183, §57).

Property Insurance.

Mortgagees granting more than five mortgage loans per year must accept preliminary memorandum of insurance or “binder” at closing, provided insurance contract for at least one year is issued within 30 days of closing (c. 183, §65), and may not require insurance in excess of replacement cost of buildings on mortgaged premises (c. 183, §66).

Priorities are determined in accordance with priority of recording.

Subordination Agreements.

Mortgagee may agree to subordinate his mortgage in whole or in part to another lien.

Assignment.

Mortgage is assigned by instrument in writing and under seal, acknowledged and recorded. (c. 183, §§1A, 4, 6C, 28). See categories 3 Business Regulation and Commerce, topic Frauds, Statute of and Documents and Records, topic Seals.

Release.

Unrecorded assignment not good against one subsequently taking release from mortgagee without notice, but may be good on ground of laches against subsequent assignee who does not obtain possession of note or bond secured by mortgage.

Any part of the mortgaged premises may be released without impairing the mortgage as to the balance.

Recordation of executed and acknowledged or proven discharge by mortgagee, mortgage servicer or note holder constitutes discharge of mortgage and release of lien created by mortgage. (c. 183, §54C). In case of mortgage servicer, original or copy of servicing agreement or other document evidencing authority of mortgage servicer to service mortgage must be recorded with discharge.

Where supporting documents missing, discharge may be accomplished through affidavit of mortgagor confirming inability to obtain any of documents, payments made, and attaching evidence of payments in form of billing statements, written payment history, annual principal and interest payment statement or other written acknowledgment of payment from servicer or note holder. (c. 183, §54C).

Where mortgagor no longer record owner of premises and cannot be located, record owner of property may discharge mortgage through affidavit stating that owner purchased premises in good faith and for value in belief that premises were not encumbered by mortgage. Affidavit must also state that owner has not made any payments on account of mortgage and that no claims have been made against owner under mortgage subsequent to purchase. (c. 183, §54C).

Discharge.

A mortgage on registered land may be discharged by the mortgagee in person on the registration book in same manner as mortgage on unregistered land may be discharged by entry on record book at registry of deeds, and discharge shall be attested by assistant recorder. (c. 185, §69).

Satisfaction.

One of two or more joint holders of mortgages may discharge it by written acknowledgment of payment or satisfaction or by deed of release duly acknowledged and recorded. (c. 183, §54). Recordation of discharge duly executed and acknowledged constitutes discharge and release of lien created by mortgage. (c. 183, §54B).

Refusal to discharge mortgage after full performance of condition after 45 days creates liability in damages to owner. (c. 183, §55). Upon failure to provide release or written acknowledgment of payment, attorney's affidavit of payment may be recorded as discharge. (c. 183, §55).

Insurance.

See category 16 Insurance, topic 16.01 Insurance Companies, subhead Coercion.

Foreclosure.

A mortgage may be foreclosed after breach of condition by writ of entry in which the court renders a conditional judgment for possession, unless payment of the amount due or performance of the condition is made within two months. Three years peaceable possession under such judgment bars equity of redemption. (c. 244, §§1, 3-8, am'd 1991, c. 157). This method is seldom used.

Mortgagee may also make open and peaceable entry to foreclose, and foreclosure will become absolute in three years thereafter if certificate, sworn to by two witnesses, or memorandum on mortgage deed signed by mortgagor or person claiming under him, is made and recorded. (c. 244, §§1-2, am'd 1991, c. 157). In case of registered land, mortgagee must similarly file with Land Court. After foreclosure complete, mortgagee may petition for new certificate. (c. 185, §70, am'd 1991, c. 157).

In proceeding in equity for authority to foreclose mortgage, brought because of Federal Soldiers' and Sailors' Civil Relief Act of 1940, as amended, it is sufficient service if copy of notice designated in statute is recorded in each registry and clerk's office where mortgage is recorded before return day or as court directs published once not less than 21 days before return day in newspaper designated by court and mailed to each defendant by registered mail not less than 14 days before return day; and recorded copy of court's order authorizing foreclosure and of its approval thereof is conclusive evidence of compliance with such Act, so far as court may determine, as against all persons except interested parties of record prior to recording of notice unless they were named as defendants and had notice of proceeding. (1943, c. 57, §§1-3, as am'd by 1998, c. 142).

Sales.

Usual mode of foreclosure is by sale under power in mortgage. (c. 244, §§11-15). With respect to limitation of actions, see topic Limitation of Actions, subhead Real Actions. Such sale must be in conformity with the power, and notice thereof must be published once a week for three weeks in newspaper, if any, published in city or town where land is situated, or in newspaper with general circulation in town where land lies or, if none is so published, in county, first publication to be at least 21 days before sale. Notice thereof must also be sent by registered mail to owner or owners of record of equity of redemption as of 30 days prior to date of sale, said notice to be mailed 14 days prior to date of sale to said owner or owners to address set forth in registered land records, if land is then registered or, in case of unregistered land, to last address of owner or owners of equity of redemption appearing on records of holder of mortgage, if any, or if none, to address of owner or owners as given on his deed or on petition for probate by which he acquired title, if any, or if in either case no address appears, then to address to which tax collector last sent tax bill for mortgaged premises to be sold, or if no tax bill has been sent for last preceding three years, then to address of any of parcels of property in name of said owner of record which are to be sold under power of sale. (c. 244, §14). There is also provision for notice of sale to persons holding interest in property junior to mortgage being foreclosed as of 30 days prior to date of sale. Said notice to be mailed at least 14 days prior to date of sale. (c. 244, §14). Form of notice of sale provided by statute, but other forms may be used. After sale, person selling must cause copy of notice and affidavit of his acts under power to be recorded. (c. 244, §15). Deed of sale is deemed to convey premises sold subject to, and with benefit of, all restrictions, easements, improvements, liens or incumbrances, but no purchaser at sale need complete it if there are incumbrances, other than those named in mortgage and notice of sale, which are not stated at sale and included in auctioneer's bargain. (c. 244, §14). Any balance of proceeds after paying debt and costs is payable to mortgagor or those claiming under him. (c. 244, §36). Proper execution of power of sale absolutely bars equity of redemption at foreclosure auction. (c. 244, §18). No transfer by mortgagor impairs power of sale. (c. 244, §17). Mortgagee or any person acting for him may in absence of any provision to contrary purchase at foreclosure sale. (c. 183, §25). 1985 U.S. Bankruptcy Court decision held that mortgage foreclosure sale conducted in compliance with Massachusetts law, may be fraudulent conveyance under Bankruptcy Act if sale price is less than fair market value and decision suggests that appraisal of property, advertisement in real estate section of local newspaper and mailed notice to anyone who has expressed interest in property and real estate brokers within limited radius of property are required in addition to requirements under Massachusetts law for foreclosure sale. (55 B.R. 163). However, 1994 U.S. Supreme Court decision effectively overturned 1985 Bankruptcy Court decision by holding that when interpreting

11 U.S.C. §548 (Bankruptcy Code), reasonably equivalent value for foreclosed property is price received in fact from sale conducted in accordance with all of state's foreclosure laws. (511 U.S. 531). It is frequent practice as safety precaution to foreclose both through power of sale and through entry.

Deficiency Judgments.

If proceeds of sale do not pay off mortgage note, mortgagor is liable for any deficiency if prior to foreclosure a prescribed statutory notice of intention to foreclose has been mailed, postage prepaid, by registered mail, return receipt requested, not less than 21 days before date of sale and prescribed statutory affidavit has been signed within 30 days after sale. (c. 244, § 17B).Statute of limitations is two years after date of foreclosure sale or two years after maturity of note, whichever date is later. (c. 244, §17A).

Moratorium.

No provision.

Redemption.

Mortgagor or person claiming or holding under him may after breach of condition redeem land mortgaged, unless mortgagee or person claiming or holding under him has obtained possession of land for breach of condition and has continued that possession for three years, or unless land has been sold pursuant to power of sale contained in mortgage deed. (c. 244, §18). Land is sold when memorandum of sale is executed at auction. (181 Mass. 49, 62 N.E. 984). Prior to expiration of three years limited for redemption, and before or after entry for breach of condition, and before sale pursuant to power contained in mortgage, person entitled to redeem may pay or tender to mortgagee whole amount then due and payable on mortgage, performing or tendering performance of every other condition contained therein, and if there has been any action to recover land, paying or tendering costs of such action; or such person may commence suit for redemption offering to pay such amount as shall be found due from him or to perform such other conditions as case may require. (c. 244, §§19, 21-34). If person entitled to redeem makes such tender and mortgagee does not accept same mortgagor may within one year after tender commence suit for redemption, then paying to clerk of court amount tendered. (c. 244, §21).

If mortgagee has had possession, he must account for rents and profits, and must be allowed all amounts expended in reasonable repairs and improvements, all lawful taxes, and assessments paid and all other necessary expenses in care and management of land. Balance, if due from mortgagee, shall be deducted from mortgage debt. If due to mortgagee, balance shall be added to debt and paid. (c. 244, §20).

Recovery of judgment for any part of debt, after foreclosure of mortgage not containing a power of sale, on ground that value of land mortgaged at time of foreclosure was less than amount due, opens foreclosure, and person entitled may redeem land by suit for redemption brought within one year after recovery of such judgment, despite expiration of three year possession period. (c. 244, §35).

Reverse mortgage loans (loans proceeds of which are advanced in installments) authorized when dwelling designed to be occupied by not more than four families and each owner is at least 60 years of age and occupies residence in whole or in part. (c. 167E, §7). Borrower must have completed home equity conversion counseling program approved by executive office of elder affairs. (c. 167E, §7[e]). Borrower shall not be bound for seven days after loan commitment is made and shall sign statement acknowledging full disclosure by lender of all loan contingencies and terms including interest fixed at origination and ability to prepay without penalty. (c. 167E, §7[d]). Reverse mortgage loan shall constitute lien against property securing loan to extent of all advances made pursuant to reverse mortgage and all interest accrued on such advances. (c. 167E, §7[f]). Lien shall have priority over any lien filed or recorded after recordation of reverse mortgage. (c. 167E, §7[f]). Mortgagee may add additional terms pursuant to 12 U.S.C.S. §1715z to obtain federal insurance for such loans.

Forms are set forth in Appendix to c. 183. Every mortgage and assignment of mortgage shall contain address of mortgagee or assignee (c. 183, §6C), and every discharge of mortgage shall contain street address of mortgaged property, volume and page or document number of mortgage and name of mortgagor; however, failure to include any such information shall not affect validity of instrument. (c. 183, §54). Statutory short form of mortgage is as follows:

Forms

Mortgage Deed.

. . . . . of . . . ., ... County, ... for consideration paid, grant to . . . . . of . . . . with mortgage covenants, to secure the payment of . . . . . dollars in . . . . . . years with . . . . . per cent interest per annum, payable semi-annually, as provided in . . . . note of even date, the land in . . . .

(description and encumbrances, if any)

This mortgage is upon the statutory condition, for any breach of which the mortgagee shall have the statutory power of sale.

Witness . . . . . . hand and seal this . . . . . . day of . . . .

. . . .

(Here add acknowledgment.)   (Seal.)

Co-operative Bank Mortgage.

. . . . . . of . . . . . ., ... County, Massachusetts . . . . . . for consideration paid, grant to . . . . . . Co-operative Bank, situated in . . . . . . County, Massachusetts, with mortgage covenants, to secure the payment of . . . . . . dollars, and interest and fines . . . . . . as provided in . . . . . . note of even date, the land in . . . .

. . . .

(description and encumbrances, if any)

. . . . . . hereby transfer and pledge to the said mortgagee shares in the . . . . . . series of its capital stock as collateral security for the performance of the conditions of this mortgage, and . . . . . . said note upon which shares said sum of . . . . . . dollars has been advanced to . . . . . . by the mortgagee. The monthly payments under this mortgage are . . . . . . dollars. In the event of an assignment of this mortgage, interest on the unpaid balance of the principal shall be at the rate of . . . . . . per cent per annum.

This mortgage is upon the statutory co-operative bank mortgage condition, for any breach of which the mortgagee shall have the statutory co-operative bank power of sale.

Witness . . . . . . hand and seal this . . . . . . day of . . . .

. . . .

(Here add acknowledgment.) (Seal).

The construction of the words "mortgage covenants" is set forth in c. 183, §19. The "statutory condition," which may be incorporated by reference, is set forth in c. 183, §20. The "statutory power of sale," which also may be incorporated by reference, is set forth in c. 183, §21.

The statutory form of partial release of mortgage is as follows:

the holder of a mortgage by . . . . to . . . . dated . . . . recorded with . . . . Deeds, book . . . ., page . . . ., for consideration paid, release to . . . . . . all interest acquired under said mortgage in the following described portion of the mortgaged premises:

(description)

Witness . . . . hand and seal this . . . . day of . . . .

(Here add acknowledgment). (Seal).

The statutory form of assignment of mortgage is as follows:

holder of a mortgage from . . . . to . . . . dated . . . . recorded with . . . . Deeds, book . . . ., page . . . ., assign said mortgage and the note and claim secured thereby to . . . .

Witness . . . . hand and seal this . . . . day of . . . .

(Here add acknowledgment). (Seal).

The statutory form of discharge of mortgage is as follows:

holder of a mortgage from . . . . to . . . . dated . . . . recorded with . . . . Deeds, book . . . ., page . . . ., acknowledged satisfaction of the same.

Witness . . . . hand and seal this . . . . day of . . . .

(Here add acknowledgment). (Seal).

Other forms are set forth in the appendix to c. 183. In each case the instrument should give a reference to the book and page where the mortgage is recorded, should be acknowledged, and should be under seal. See category 10 Documents and Records, topic 10.05 Seals.

Chattel Mortgages.

See topic 20.01 Chattel Mortgages.

Uniform Commercial Code adopted. See category 3 Business Regulation and Commerce, topic 3.09 Commercial Code.

21 PROPERTY

21.01 ABSENTEES:

Care of Property.

If one having property in Massachusetts has disappeared or absconded from the place where he was last known to be, and has no agent in Massachusetts, and it is not known where he is, or if such person has so disappeared without providing for his spouse or minor children dependent upon him for support, and it is not known where he is, or if it is known that he is without commonwealth, anyone who would be entitled to administer upon his estate, if he were deceased, or, if there is none such, then any suitable person, including such spouse, or someone in behalf of such spouse or minor children, may file petition in Probate Court for county where any such property is, stating name, age, occupation and last known residence or address of such absentee, stating facts of disappearance, names and residences of other persons of whom inquiry may be made and schedule of property, real and personal, and its location, and asking for receiver. State treasurer must be made party to petition and given notice of subsequent proceedings. (c. 200, §1). After notice by registry or registry district recording or filing (as to real property), publication, posting and mailing (c. 200, §§2, 3, 4), receiver may be appointed (c. 200, §5). After receiver's bond has been approved, receiver shall take possession of all property of absentee within commonwealth and shall file schedule of such property (c. 200, §6) and upon court order such receiver may take possession of additional property, collect debts due absentee, sell, lease and invest property, and pay charges incurred in support of absentee's spouse and minor children and also such debts as may be proved against absentee. Court may make orders for disposition of property and proceeds in possession of receiver. (c. 200, §§7, 9-10).

Distribution.

Seven years after disappearance or, if receiver not appointed within six years, one year after appointment of receiver, absentee's interest in property ceases and it must be distributed as though absentee had then died intestate. If absentee or legal representative appears before distribution complete, court may order other distribution. (c. 200, §13).

Tax equivalent to that which would have been imposed had the absentee died intestate within the state is due and payable on such distribution. (c. 200, §13).

Escheat.

Property (including dividends, bank deposits and legacies) unclaimed for three years and dividends or distributions upon liquidation of domestic corporation or other legal entity with transferable shares, which remain unclaimed for one year after final distribution to shareholders, must be reported and turned over to commonwealth which holds same subject to right in owner to recover same. (c. 200A). Unclaimed money held by municipality may revert to its general treasury. (c. 200A, §9A).

Process Agent.

Individual not inhabitant of Massachusetts, or partnership of such individuals, who has usual place of business or engages in construction in Massachusetts must file with State Secretary written power of attorney appointing citizen-resident to be attorney for service of process and reciting that service of lawful process on such attorney is of same force and validity as service on individual or partnership. In absence of power of attorney, service may be made on State Secretary who must mail notice of action to defendant's last known address. (c. 227, §5). Other nonresident doing business in Massachusetts must file with clerk of each city or town where he does business statement setting forth full name, address, place of business, and trade name and appointing city or town clerk agent for service of process. In absence of statement, service may be made on city or town clerk with mailed copy to defendant's last known address. (c. 227, §5A).

As to appointment of agent by foreign corporation, see category 5 Civil Actions and Procedure, topic 5.20 Process, subhead Agents for Service of Process. As to appointment of agent by nonresident executor or administrator, see category 13 Estates and Trusts, topic 13.10 Executors and Administrators, subhead Eligibility and Competency.

21.02 ADVERSE POSSESSION:

Character of Possession.

Open, notorious and uninterrupted possession of premises under claim of title. (431 Mass. 143, 725 N.E.2d 1045). No right or title may be acquired in registered land by adverse possession, implied necessity or prescription. (c. 185, §53). No presumption that use permissive when family member seeks to obtain title through adverse possession from another family member. (431 Mass. 143, 725 N.E.2d 1045).

Duration of Possession.

Continuous adverse possession for more than 20 years, by operation of law invests with title to estate, subject to usual extensions in favor of reversioners, remaindermen and persons under disability. See category 5 Civil Actions and Procedure, topic 5.16 Limitation of Actions, subhead Real Actions.

Easements.

Easement of light and air cannot be acquired by use. (c. 187, §1). Easement of direct sunlight may be acquired by express grant or covenant or by solar access permit. (c. 187, §1A). Other easements cannot be acquired by adverse use or enjoyment unless such use or enjoyment is continued uninterruptedly for 20 years. (c. 187, §2).

Disabilities.

See category 5 Civil Actions and Procedure, topic 5.16 Limitation of Actions.

Notice of Intention to Prevent Easement by Adverse Use.

If person apprehends that easement in or over his land may be acquired by use or otherwise he may give public notice of his intention to prevent the acquisition of such easement by causing copy of such notice to be posted in conspicuous place upon the premises for six successive days. Such posting will prevent the acquisition of such easement by use for any length of time thereafter. Particular person may be prevented from acquiring such easement by causing such notice to be served on such person by means used for service of summons in civil action. Certificate of such posting or service by officer qualified to serve civil process, made on original notice and recorded with it within three months after posting or service is conclusive evidence thereof. (c. 187, §3).

21.03 [RESERVED]

21.04 CONVEYANCES:

See topic 21.06 Deeds; category 10 Documents and Records, topic 10.04 Records. See also category 12 Environment, topic 12.01 Environmental Regulation regarding necessity of inspection of property with septic systems before conveyance. In 1998, potential movement toward unified state-wide system.

Offer to purchase real property, in both commercial and residential real estate settings, may be binding contract despite provision requiring execution of purchase and sale agreement. (429 Mass. 84, 706 N.E.2d 629). Controlling fact is intent of parties that may be inferred from parties' agreement to all material terms in offer to purchase. (Id).

21.05 CURTESY:

See generally c. 189. Curtesy has been abolished in Massachusetts, but surviving husband given same dower rights as surviving wife. (c. 189, §1). See topic 21.08 Dower.

21.06 DEEDS:

See topic Real Property for types of estates.

Execution.

No instrument purporting to affect interest in land shall be void because it is not sealed or does not recite seal. (c. 183, §1A). (See category 10 Documents and Records, topic 10.05 Seals.) Deed executed and delivered by person, or by attorney of person having authority, shall, subject to recording requirements for notice, be sufficient without any other act or ceremony to convey land. (c. 183, §1). Acknowledgment is, in general, not necessary for validity of deed, but acknowledgment by one or more grantors or attorney executing deed, or certificate of proof of execution, is necessary for recording. (c. 183, §29). Full name, residence and post office address of grantee and street address of granted premises must be endorsed on each deed, as well as recital of amount of full consideration in dollars or nature of other consideration but failure to include address will not affect validity of document. Full consideration means total price for conveyance without deduction for liens or encumbrances. (c. 183, §§6, 6B). Decree for separate support of Probate Court may direct that one party to proceeding convey interest in real estate to second party. In such case, decree itself may take place of deed and operate to vest title in other party if party so directed fails to comply with order. (c. 209, §32D). Judgment for alimony made in proceeding for divorce directing that deed, conveyance or release of any real estate be made will also operate to vest title if judgment has not been complied with at time that divorce judgment becomes final and judgment thereafter recorded. (c. 208, §34A). See category 10 Documents and Records, topics 10.01 Acknowledgments, 10.04 Records. For conveyances of property in which homestead estate exists see category 8 Debtor and Creditor, topic 8.10 Homesteads. Dower and curtesy rights need not be specifically released in deed. See topics 21.08 Dower, 21.05 Curtesy.

Recording.

Conveyances of estates in fee simple, fee tail or for life, certain leases, or proper notices thereof (see topic 21.10 Landlord and Tenant), mortgages and assignments of mortgages of real estate are among those instruments which have no effect, except as against grantor or lessor, his privies or heirs or devisees, or persons having actual notice thereof, unless recorded (or in case of registered land, registered), in registry of deeds for county or district in which land to which it relates is situated. (c. 183, §4). Deeds presented for recording or registration must be accompanied by form containing such information as commissioner of revenue may require in order to facilitate valuation of property for tax purposes. (c. 36, §24B). See also category 10 Documents and Records, topic 10.04 Records.

Trust Concerning Land.

Recording of instrument with Registry of Deeds or registration office of Land Court creating trust in land equivalent to actual notice to every person claiming under conveyance, attachment, or execution thereafter made or levied. (c. 203, §2).

Recording Fees.

As to recording generally, fees, etc., and as to requirements for recording of real estate purchase and sale agreement, see category 10 Documents and Records, topic 10.04 Records, subheads Requisites for Recording; Recording Fees.

Operation and Effect.

No special provisions.

Taxes.

See category 22 Taxation, topic 22.16 Property Taxes, subhead Real Estate Conveyance Tax.

Forms.

Conveyancing practice in most counties in state is deed with “quitclaim” covenants; warranty deeds sometimes used in several counties only. Technical words of inheritance are not necessary to convey fee. (c. 183, §13). “Grant” is sufficient word of conveyance but implies no covenant. (c. 183, §12). No witnesses are necessary. (c. 183, §1). See c. 183, Appendix for statutory deed forms, including quitclaim and warranty deeds.

Failure to Disclose Encumbrances.

A grantor is liable by way of penalty for failure to disclose encumbrances of which he has knowledge before the consideration is paid. (c. 266, §80).

Conveyance by Attorney.

See topic 21.15 Powers of Attorney.

21.07 DEEDS OF TRUST:

See category 20 Mortgages, topic 20.04 Mortgages of Real Property.

21.08 DOWER:

See generally c. 189. All citations, unless otherwise indicated, refer to said chapter.

Certain limited dower and curtesy rights (merged and together called dower) remain but must be claimed by filing claim therefor in registry of probate within six months after approval of executor's or administrator's bond. Dower is limited to real estate owned by deceased spouse at time of death and all encumbrances take precedence over dower rights. Probate Court may assign dower, and tenant by dower is entitled to possession and profits of undivided one third of deceased spouse's real estate until assignment is made. (c. 189, §1). Wild lands not used with farm or dwelling are not subject to dower (c. 189, §3), nor equitable interests (192 Mass. 5, 78 N.E. 301), nor assets of revocable inter vivos trust. (390 Mass. 864, 460 N.E.2d 572).

Release.

Spouse may be barred of dower by jointure settled before marriage with his or her assent (c. 189, §7) or by pecuniary provision in lieu of dower made with his or her assent (c. 189, §8).

Limitations.

After ten years from recording conveyance, spouse of conveying party may not claim dower unless prior notice recorded identifying conveyance and dower claim. (c. 189, §16).

Election.

See category 13 Estates and Trusts, topics 13.07 Descent and Distribution, subhead Election, and 13.16 Wills, subhead Dower.

21.09 ESCHEAT:

See topic 21.01 Absentees, subhead Escheat; category 13 Estates and Trusts, topic 13.07 Descent and Distribution, subhead Escheat.

21.10 LANDLORD AND TENANT:

Uniform Commercial Code Art. 2A adopted. (c. 106, §2A-101 et seq.).

Kinds of Tenancy.

Tenancy for life, tenancy of years, tenancy at will and tenancy at sufferance are recognized. Tenancy from year to year is not recognized.

Leases.

An unwritten lease creates only an estate at will. (c. 183, §3). Lessor who has agreed orally to execute a lease and obtains lessee's signature, must, despite any purported waiver, deliver signed copy of lease within 30 days. Violations punishable by fine up to $300. (c. 186, §15D). Lease is properly under seal, but need not be under seal. (322 Mass. 670, 79 N.E.2d 288). There are no requirements for witnesses. Lease must be acknowledged before it may be recorded. No clause in lease of residential property may waive lessor's notice requirements for nonpayment of rent (c. 186, §15A) or allow lessor to enter premises except to inspect, make repairs or show property to prospective tenant, purchaser, mortgagee or their agents. Lessor may, however, enter such premises in accordance with court order or if premises appear to have been abandoned by lessee, or to inspect premises, within last 30 days of tenancy or after either party has given notice to other of intention to terminate tenancy, premises for purpose of determining amount of damage, if any, to premises which would be cause for deduction from any security deposit held by lessor. (c. 186, §15B).

Residential Tenant's Payments and Security Deposit.

Detailed regulations govern security deposits and advance payments of rents for residential property, including provision that lessor may not require payment in excess of following: Rent for first full month of occupancy, rent for last full month of occupancy calculated at same rate as first month, security deposit equal to first month's rent and, purchase or installation cost for key and lock. Nor may lessor demand at any time subsequent to commencement of tenancy rent in excess of current month's rent or security deposit in excess of statutory limit. Lessor must hold deposits and advance payments of rents in interest-bearing account, and pay lessee interest of 5% per year at end of each year (if held more than one year). Lessor must also provide certain detailed information regarding condition of premises and account information for deposits and advance payments. . Failure of lessor to comply may result in award of triple damages plus court costs and reasonable attorney's fees. These provisions do not apply to vacation or recreational rentals of 100 days duration or less. (c. 186, §15B; 940 CMR 3.17).

Recording.

Lease for term of more than seven years is not valid, except as against grantor, his successors, or persons with actual notice thereof, unless lease or proper notice thereof is recorded in registry of deeds (c. 183, §4), or if registered land, registered with land court (c. 185, §71). Lease for less than seven years with option to renew, which, if exercised, would cause lease to extend for more than seven years, must be recorded or notice of such lease recorded pursuant to c. 184, §4, to be effective against third parties without actual notice. (162 Mass. 473, 39 N.E. 280). Lease which provides that it shall continue on year to year basis until lessee gives prescribed notice must be recorded. (323 Mass. 310, 81 N.E.2d 821).

Rent.

A tenant at sufferance is liable to pay rent for such time as he occupies or detains the premises. (c. 186, §3). No interest can be charged under provision in lease for failure to pay rent until rent is over 30 days due. (c. 186, §15B). Massachusetts rejects common law rule that tenant's obligation to pay rent is totally independent of any of landlord's obligations. Tenant's covenant to pay rent is dependent on landlord's implied warranty of habitability; upon breach thereof by landlord, tenant may terminate lease with no further obligation to pay rent or may withhold rent pursuant to procedures in c. 239, §8A, and may raise landlord's breach as defense to action for eviction for nonpayment of rent. (363 Mass. 184, 293 N.E.2d 831). See also supra, subhead Residential Tenant's Payments and Security Deposit.

Residential Lease Tax Escalation Provisions.

Tax escalation clause in residential lease is against public policy and void unless provision sets forth: (1) That tenant shall be obligated to pay only his pro rata share of increased tax, (2) exact percentage of any increase which tenant shall pay and (3) that if landlord obtains abatement of tax, proportionate share of abatement, less reasonable attorney's fees, shall be refunded to tenant. If tenant pays more than pro rata share, excess must be refunded by landlord with interest of 5% per annum. (c. 186, §15C). See also supra, subhead Residential Tenant's Payments and Security Deposit.

Rent Control.

Massachusetts Rent Control Prohibition Act provides that no city or town may enact, maintain, or enforce rent control, except any city or town may adopt rent control where compliance by owner is voluntary and uncoerced. (c. 40P, §4[a]). Such regulations, if adopted, may not regulate occupancy, services, evictions, condo conversions, nor apply to any rental unit that is owned by person or entity owning less than ten units or that has fair market value rent exceeding $400 (c. 40P, §4[b]); and city or town must compensate owner for difference between unit's fair market value rent and unit's controlled rent (c. 40P, §4[c]).

Lien.

A landlord (other than an innkeeper) has no lien on the property of the tenant.

Termination of Tenancy.

Estates at will may be determined by either party by three months notice in writing or, if rent is payable at periods less than three months, by notice equal to interval between payments, or 30 days, whichever is longer. (c. 186, §12). No dispossession of dwelling may be made where lease terminated by operation of law or by act of landlord unless written notice received by tenant and interval between days of rent payments or 30 days, whichever is longer, has expired thereafter. But tenancy at will of property occupied for dwelling purposes shall not be terminated by operation of law by conveyance, transfer, or leasing of premises by owners or landlord. (c. 186, §13). In case of neglect or refusal by a tenant at will to pay rent due, his tenancy may be terminated by 14 days notice to quit, in writing, in form prescribed by statute, unless tenant tenders full amount of rent due within ten days of receipt thereof and has not received another similar notice within 12 months next preceding receipt of such notice. (c. 186, §12).

Provisions terminating tenancy if tenant shall have children who shall occupy premises are void. (c. 186, §16).

Written lease of premises for dwelling purposes may be terminated for nonpayment of rent upon 14 days written notice to quit unless tenant tenders rent, interest and costs on or before date answer due in landlord's action to recover possession (c. 186, §11), or, in case of written lease of premises for other than dwelling, landlord may also terminate in accordance with lease provisions (c. 186, §11A). If termination of non-dwelling lease by statutory notice, tenant may cure by tendering rent, interest and costs on or before date that answer is due in landlord's action to recover possession. (c. 186, §11A).

Reprisals Against Tenants.

Landlord of residential property who threatens or takes reprisals against tenant for seeking enforcement of tenant's rights, reporting landlord's violations of law, or organizing or joining tenants' union or similar organization shall be liable for damages not less than one month's rent or more than three month's rent, or actual damages sustained, whichever is greater, and costs of suit, including reasonable attorney's fees. Receipt of notice of termination, increase in rent, or substantial alteration in terms of tenancy within six months after tenant's action creates rebuttable presumption that such notice is reprisal against tenant. Waiver of above is void. (c. 186, §18). Attempted illegal reprisal also affords defense to action for summary process. (c. 239, §2A).

Holding Over.

Landlord may bring summary process proceedings to evict tenant if tenant holds over unlawfully. (c. 239, §1).

Dispossession.

Evictions are prohibited except through judicial process. (c. 184, §18). Summary process for possession of land is available to a lessor if lessee or person holding under him holds possession without right after determination of lease by its own limitation or by notice to quit or otherwise. (c. 239, §1). Recovery of possession before determination of lease by its own limitation is regulated by c. 239, §1A. Execution may be stayed for up to 12 months (c. 239, §9), except with respect to evictions for nonpayment of rent or because of tenant's fault. Rent arrearages may be recovered in summary process actions. If court finds dwelling premises are in violation of minimum standards for human habitation and advance notice of withholding rent has been given to landlord, and conditions may endanger or impair health or safety of tenants, residential tenants are presumed to have defense to eviction. Other claims based on condition of premises or services or equipment may also prevent recovery of possession. Court may order rent paid into court or receiver appointed to take charge of rents and remedy condition. If owner or agents knew of code violations, then no notice as aforesaid need be given provided such knowledge existed before arrearage in rent occurred. (c. 239, §8A). See subheads Nuisances; and Unsafe Conditions in Rental Property, infra. Landlords may recover possession only through civil remedies, as tenants holding over after alleged termination of term of occupancy cannot be arrested for criminal trespass. (c. 266, §120). If tenant is evicted without court order, tenant has option to recover possession or terminate lease, and landlord is liable for three times tenant's damages or for three months' rent, plus attorney's fees. (c. 186, §15F). For procedures applicable to residential care and services licensed, funded or operated by dept. of mental health, in effect from 7/1/96 to 6/30/2001, see 1995, c. 38, §308.

Discrimination.

See topic 21.16 Real Property, subhead Discrimination; category 11 Employment, topic 11.02 Labor Relations.

Nuisances.

Regulated by c. 111, §122, et seq. If board of health determines that building is unfit for human habitation, or is or may become nuisance or cause of sickness or accident, owner or occupant may be ordered to clean premises, or comply with state sanitary code or rules of local board of health. Copy of order is served on mortgagees of record. If owner or occupant refuses, board of health may cause premises to be cleaned at owner's or occupant's expense, may remove occupant forcibly and close up premises, or may issue written notice to landlord requiring conditions to be remedied. Board of health may remedy conditions by petition in equity, and expenses incurred may be charged against owner of property as debt. (c. 111, §127B).

If residential buildings fall below standards of fitness for human habitation established under state sanitary code, or by board of health, any affected tenant or board of health may file petition with district court which states that premises have been inspected and found to violate sanitary code, and that condition may endanger health and was not caused by tenant. Certified copy of report is admissible in any proceeding as prima facie evidence. Process then issues to owner and hearing is held at which public health report is evidence. (c. 111, §127C, E).

If court finds facts as alleged, it may order petitioner to pay to clerk, in lieu of rent, amount equal to fair value of use and occupation of premises less any abatement due to violation, said amount to be used to effectuate removal of violation. Petitioner may bring substantially same action in Superior Court, which may grant injunctive relief or appoint receiver. (c. 111, §§127A-J).

Affected tenant may also petition district court without stating that premises have been found by inspection agency to violate such standards by stating facts indicating likely violation, that conditions not substantially caused by tenant and that unanswered request for inspection was made to appropriate agency 24 hours before filing. (c. 111, §127C).

Cities or towns may remove or demolish burnt, dangerous or dilapidated buildings from property and cost thereof may constitute a debt due city or town. (c. 139, §3A).

Unsafe Conditions in Rental Property.

Landlord of real estate other than owner-occupied two or three family dwelling, upon notice from tenant by registered or certified mail of unsafe condition not caused by tenant, must exercise reasonable care to correct condition. Tenant or guest injured by failure to correct condition shall have right of action in tort. No notice need be given for unsafe condition in areas not under tenant's control. Notice of code violation from governmental agency satisfactory notice. This provision cannot be waived in lease. (c. 186, §19). Landlord precluded from raising as defense in action brought by tenant who has been injured by defect in common area that said defect existed at time of letting property if defect was at time of injury violation of building code. (c. 186, §15E). If tenants' health, safety and well-being are endangered by owner's violation of sanitary code or other provision, tenants, after certification of violation by board of health, other enforcement agency or court, notice to owner in writing and owner's failure to commence repairs five days after receipt of such notice and failure to substantially complete repairs within 14 days after such receipt, may repair defects constituting violation and withhold costs of such repairs from rent up to four months' rent in any twelve month period. Except in certain circumstances, this provision cannot be waived in lease. (c. 111, §127L). For court action to correct sanitary code violations, see c. 111, §§127A-J. Tenant may assert breach of warranty of habitability as partial or complete defense to landlord's claim for rent. (363 Mass. 184, 293 N.E. 2d 831).

Distress.

No distress of rent in this commonwealth.

Agreements with Respect to Furnishing Heat, Light or Water.

Lessor of any dwelling or manufactured home (other than motel) required by law or contract to furnish heat, light, water, hot water, power, gas, elevator service, telephone service, janitor service, refrigeration service, is subject to fine or imprisonment for intentional failure to furnish same, or for interference with quiet enjoyment, or for attempting to regain possession by force without benefit of judicial process. Violators liable for actual and consequential damages, or three months' rent, whichever greater, court costs, and attorneys' fees. Setoff provision may apply. (c. 186, §14). This provision may not be waived.

Lease for More Than One Hundred Years.

Lease for 100 years or more, so long as 50 years remain unexpired, considered estate in fee simple for all purposes. (c. 186, §1).

Uniform Residential Landlord and Tenant Act not adopted.

Prohibited Provisions.

Certain provisions of leases and rental agreements indemnifying lessor against liability to lessee or tenant for any omission, fault, negligence or other misconduct of the lessor are against public policy and void. (c. 186, §15). Provisions of residential leases or rental agreements whereby tenant waives right to trial by jury in litigation with landlord or agrees that no action or failure to act by landlord constitutes constructive eviction are against public policy and void. (c. 186, §15F).

Fixtures placed on the premises by a life tenant may be removed within a reasonable time after the termination of his estate. (c. 184, §12).

Identification of Landlord.

Landlord of any residential property not occupied by landlord and without resident manager or agent, shall post notice not less than 20 square inches in size in location visible to all tenants bearing landlord's name, address and telephone number. If nonresident manager or agent is employed, his name, address and telephone number must also be provided. If building is owned by corporation, name, address and telephone number of its president shall be posted and if owned by trust or partnership, name, address and telephone number of managing trustee or partner shall be posted. Fine of $50 for violation. Each day that violation continues is separate offense. (c. 143, §3S).

Manufactured Housing Communities.

Defined as any tract with three or more manufactured homes for dwelling purposes. (c. 140, §32F). Governed generally by c. 140, §§32A-R. Owner of mobile home park must be licensed. Tenants in mobile home parks have been extended some of protection afforded tenants in residential real estate. (c. 140, §§32F-R).

Unfair or Deceptive Acts or Practices.

Broadly defined by c. 93A, §2. Applies to landlords and real estate brokers. For remedies see c. 93A. Attorney General has promulgated regulations under c. 93A which, in substance, construe violations of tenant protection laws to be unfair and deceptive conduct. (940 CMR 3.00 et seq.). For specific regulations governing landlord-tenant relationships, see 940 CMR 3.17.

21.11 LEASES:

See topic 21.10 Landlord and Tenant.

21.12 [RESERVED]

21.13 PERPETUITIES:

Common law rule against perpetuities superseded by c. 184A, Uniform Statutory Rule Against Perpetuities except as to any limitations valid prior to Jan. 1, 1955. See category 6 Courts and Legislature, topic 6.04 Statutes, subhead Uniform Acts. Present 30-year limitation retained with regard to exercise of option in gross or non-vested easement in gross, contingent commencement of lease term, fee simple determinable in land, and fee simple in land subject to right of entry for condition broken. (c. 184A, §§5, 7). Certain options in gross held by government or certain other public entities must be exercised or become vested within 50 years. (c. 184A, §5[d]).

For rule as to income accumulations, see category 13 Estates and Trusts, topic 13.15 Trusts, subhead Accumulations.

21.14 PERSONAL PROPERTY:

No statute on tenancy by entireties in personal property but SJC has stated that tenancies by entirety exist with reference to personal property. (293 Mass. 67, 199 N.E. 383).

21.15 POWERS OF ATTORNEY:

Uniform Durable Power of Attorney Act adopted 1981 as c. 201B.

Attorneys in Fact.

No special form required for letters of attorney, but letters of attorney for conveyances of real estate should be acknowledged (and under seal), and may be recorded in same manner as deeds. (c. 183, §§29, 32). But see topic 21.06 Deeds, subhead Execution; category 10 Documents and Records, topic 10.05 Seals, subhead Effect of Seal.

21.16 REAL PROPERTY:

Estates of tenancy in common, joint tenancy and tenancy by the entirety are recognized. Conveyance or devise to two or more persons (except mortgage or conveyance or devise in trust) creates tenancy in common unless instrument states that they shall take jointly or as joint tenants or it appears from tenor of instrument that it was intended to create joint tenancy. (c. 184, §7). Conveyance or devise after Aug. 30, 1979 to two persons as tenants by entirety, who are not married to each other, creates joint tenancy and not tenancy in common. (c. 184, §7).

Estates or interests in land created without instruments in writing signed by grantor or his attorneys are at will. (c. 183, §3).

Term of 100 years or more, so long as 50 years thereof remain unexpired, regarded as estate in fee simple for all purposes. (c. 186, §1).

Real estate may be transferred by person to himself jointly with another person or to himself and his spouse as tenants by entirety. (c. 184, §8).

Valid instrument affecting interest in land not void for lack of seal or failure to recite seal. (c. 183, §1A).

Conveyance of estate in fee simple, fee tail or for life, lease for more than seven years from making thereof, or assignment of rents or profits not valid against anyone but grantor or lessor and persons with actual notice, unless official copy, or, where applicable, notice of lease or notice of assignment of rents or profits recorded in registry of deeds (c. 183, §4), or, if registered land, registered in land court (c. 185, §§64, 71).

Offer to purchase real estate which contemplates execution of later purchase/sale agreement may be binding. (44 Mass. App. Ct. 274, 690 N.E.2d 460).

Rule in Shelley's Case abolished. (c. 184, §5).

Conveyances between husband and wife valid to same extent as if parties were single. (c. 209, §3).

Doctrine of worthier title abolished. (c. 184, §§33A-33B).

Foreign Conveyances or Encumbrances.

See category 10 Documents and Records, topic 10.04 Records.

Condominiums recognized as real estate and governed by detailed statutory provisions. Building designed for office purposes may be established as condominium. (See generally c. 183A.) Real estate time shares are also governed by detailed statutory provisions. (c. 183B). Towns and cities are authorized to pass condominium conversion control laws. (1983, c. 527, §§1-5D, 7-8).

Lis Pendens.

Proceedings affecting title to land or use and occupation of buildings have no effect against third persons without actual notice thereof until memorandum of notice of such proceedings is recorded in registry of deeds for district (c. 184, §15) or in case of registered land, registered (c. 185, §86). If subject matter of action constitutes claim of right to title to real property or use and occupation thereof, justice of court may endorse said finding on memorandum. No register of deeds shall accept such memorandum for recording without such endorsement and affidavit of notice given. Ex parte proceeding available subject to right to dissolve. (c. 184, §15). Excepted proceedings and notice requirements are listed in statute. (c. 184, §15). After final disposition, certificate of judgment, decree, discontinuance, dismissal or other final disposition must be recorded (c. 184, §§16, 17), or registered (c. 185, §§86, 87) within 60 days to be effective against third persons having no actual notice. See category 5 Civil Actions and Procedure, topic 5.15 Judgments.

Restrictions.

No restriction enforceable unless of actual and substantial benefit to dominant estate. (c. 184, §§26-30). Obsolete restrictions or restrictions inequitable to enforce are unenforceable except by award of damages. (c. 184, §30). Restrictions otherwise unlimited as to time are limited by statute to 30 years after date of deed or other instrument, or date of probate of will, creating them, except in cases of gifts or devises for public, charitable or religious purposes and except for those contained in deed, grant or gift of commonwealth or existing on July 16, 1887 or to those having benefits of c. 184, §32. (c. 184, §23). C. 184, §§26-30 not applicable to restrictions in leases, mortgages and other security agreements, certain restrictions in orders of takings by commonwealth, and certain conservation, preservation and affordable housing restrictions. (c. 184, §26). Restrictions imposed after Dec. 31, 1961 enforceable only by party (or its successor) to instrument imposing restriction which states that restriction is for its benefit, or by owner of interest in benefited land. Such restrictions expire after 30 or 50 years, depending on date of instrument imposing restriction, unless notice filed before end of term. (c. 184, §§27, 28). Instrument must contain express identification of persons or lands benefited by restriction, supplanting common law rule that identity of those benefited by restrictions on land may be inferred from all circumstances. (447 Mass. 68, 849 N.E.2d 211; c. 184, §27[a]).

Discrimination against person seeking to buy or rent publicly assisted or multiple dwelling or contiguously located housing or other covered accommodations or commercial space forbidden if due to person's race, religious creed, color, sexual orientation, sex, age, ancestry, national origin, marital status, being veteran or member of armed services, deaf, blind, or having any other handicap. (c. 151B, §4[6,7,8,]). Term “handicap” does not include current, illegal use of controlled substances. (c. 151B, §4[1]). State must demonstrate compelling interest to enforce c. 151B, §4(6) when unmarried cohabitants refused rental based on landlord's religious beliefs. (418 Mass. 316, 636 N.E.2d 233). Unlawful to advertise housing accommodations stating preference for any of above conditions or for or against children, recipients of public assistance, or sexual orientation other than that involving minor children as sex object. (c. 151B, §4[7B]). Provision in instrument relating to real property which restricts conveyance, encumbrance, occupancy, or lease to individuals of specified race, color, religion, sex, or national origin is void. Any condition which limits use or occupancy of real property on basis of race, color, religion, sex or national origin is void except for certain real property held by religious organizations. (c. 184, §23B).

Rent control of residential properties prohibited except where voluntary by owner and city or town reimburses owner for difference between fair market value rent and controlled rent. (c. 40P, §§1-5).

Blockbusting is prohibited. See c. 151B, §§1, 3(13), 4(13) (general definitions and prohibitions); c. 112, §87AAA (sanctions against real estate brokers).

Taxes.

See category 22 Taxation, topic 22.16 Property Taxes.

See also topics 21.05 Curtesy, Deeds, Dower, Landlord and Tenant; categories 5 Civil Actions and Procedure, topic Partition; Debtor and Creditor, topic Homesteads; Documents and Records, topic Records; Family, topic Husband and Wife; Mortgages, topic Mortgages of Real Property.

Tort Liability.

Common law distinction between licensees and invitees has been abandoned in favor of duty of reasonable care owed by occupier of land to all lawful visitors (363 Mass. 693, 297 N.E.2d 43) and to child trespassers (378 Mass. 177, 390 N.E.2d 716).

Building Code.

State has building code, 780 CMR, which supersedes any less stringent requirements of local codes (c. 143, §§93-100). Copies are available, upon payment of fee, from State Bookstore, State House, Room 116, Boston, Massachusetts 02133. Tel. (617) 727-2834. bookstore@sec.state.ma.us.

Zoning.

Zoning bylaws and ordinances are enacted by cities and towns pursuant to Zoning Act, c. 40A, and St. 1956, c. 665 (Boston only).

21.17 TRUST DEEDS:

See category 20 Mortgages, topic 20.04 Mortgages of Real Property.

22 TAXATION

22.01 ADMINISTRATION:

Dept. of revenue is revenue agency of Massachusetts, located at 100 Cambridge Street, Boston, MA 02114; tel. 617-626-2201; http://www.mass.gov/dor, is composed of divisions of account management, audit, processing, operations and local services, child support enforcement, compliance, collections, problem resolution, taxpayers service, legal, forms, and information services, each headed by deputy commissioner. General administrative provisions with respect to various state taxes administered and collected by commissioner have been consolidated and appear in c. 62C. General administrative provisions relative to supervision by commissioner of local taxation appear in c. 58. Dept. of revenue regulations in 830 CMR.

Local taxation cc. 59 and 60.

Penalties.

Various penalty provisions set forth in c. 62C apply to enforcement of taxation generally. Such provisions are made expressly applicable, insofar as pertinent and consistent, to (among others) taxes imposed by cc. 62-65C (income, withholding, corporation excise [income], gasoline, cigarette, stamps, special fuels, room occupancy, sales, use, inheritance, and estate taxes). (c.

62C, §2). Such general penalty provisions include: Interest accruing after July 1, 1983 (federal rate before July 1, 1983) and before Jan. 1, 1993 at 18% per annum added to taxes not paid on or before statutory due date computed from such date until taxes are paid (c. 62C, §32); beginning Jan. 1, 1993 interest is at federal short-term rate under I.R.C. §6621(b) plus 4%, compounded daily (c. 62C, §32); for failure to file return with commissioner, penalty added to tax equal to 1% of amount of tax required to be shown on return per month or part thereof during which failure continues, up to 25% of tax amount, but commissioner, for good and sufficient cause, may waive or abate such additional penalty tax (c. 62C, §33); for wilfully attempting to evade or defeat any tax in any manner, various penalties dependent upon manner employed and type of taxpayer (c. 62C, §73); for refusing or failing to file return or to correct inaccurate or insufficient return, or for filing return with intent to evade tax, within 30 days after notification by commissioner of such failure, inaccuracy or insufficiency, commissioner may determine tax due and may assess tax at up to twice amount determined after 30 days notice to taxpayer (c. 62C, §28); for nonpayment of any check or electronic funds transfer for any tax, interest, penalty, fee or other charge, additional penalty equal to 2% of check, if $1,500 or more, and lesser of $30 or amount of payment, although commissioner has discretion to abate penalty (c. 62C, §35); revocation of license to conduct profession or business under certain circumstances (c. 62C, §§47A, 49A). Beginning Jan. 1, 1993, interest on late payment penalties accrues at federal short-term rate under I.R.C. §6621(b) plus 4%, compounded daily from 31st day following notice of tax due; interest on late filing penalties accrues at same rate from due date of return. (c. 63C, §§32, 33). Penalties or additions to tax will be abated or waived if attributed to erroneous written advice given by revenue dept. employee and reasonably relied upon by taxpayer in response to written inquiry by taxpayer. (c. 62C, §36B).

Other significant penalties which apply to only certain taxes include:

Local Taxes.

In case of failure to file annual return of personal property no abatement of tax assessed can be obtained unless applicant shows reasonable excuse for delay or unless such tax exceeds by 50% amount which would have been assessed if return had been filed when due, and in such case only excess over such 50% can be abated. (c. 59, §61).

Delinquent real estate and personal property taxes bear interest at rate of 14% per annum (c. 59, §57), except that no interest is due if tax bill is not sent until after due date, provided tax is paid within 30 days after bill is first sent.

Persons not paying property taxes when due are liable for costs of collection. See subhead Local Taxation, supra. Penalty for tendering insufficient funds check to pay property taxes is greater of $25 or 1% of amount due. (c. 60, §57A).

Income Tax.

In case of failure to file by nonresident, commissioner may assess tax based on estimate of gross income from sources within Massachusetts, without allowance for deductions or exemptions, and with penalties and interest. (c. 62C, §26[e]).

Withholding.

Employer failing to withhold and pay over income tax, including responsible officers or employees of employer corporation, is personally liable for amount which should have been withheld, with interest and penalties. (c. 62B, §§5, 6).

Employee who makes statement under c. 62B, §4 (in furnishing employer with withholding exemption certificate) which, without reasonable basis, results in decrease in amount deducted or withheld, subject to penalty of $500. (c. 62B, §11A).

Estimated Tax.

There is additional charge accruing at federal short-term rate under I.R.C. §6621(b) plus 4%, compounded daily, for period of underpayment of required installments. Required annual payment is lesser of 80% (662/3% for farmers and fishermen) of tax for year or 100% of preceding full year's tax, except no additional charge if: (1) Tax is less than $400, (2) in preceding full taxable year taxpayer was inhabitant of commonwealth and had no tax liability, (3) commissioner determines unusual circumstances, or (4) taxpayer over 61 or disabled and had cause for underpayment. (c. 62B, §14).

Estate Tax.

Interest at annual rate four percentage points higher than federal short-term rate is imposed on taxes not paid when due (c. 62C, §32), but commissioner may in his discretion extend time for payment with interest (c. 65C, §10). From July 1, 1983 through Dec. 31, 1992, interest was instead calculated at fixed rate of 18% per annum. If underpayment is due to fraud, penalty equal to 50% of underpayment is added in lieu of penalty under c. 62C, §33. (c. 65C, §13).

Stamp Tax.

Fine of not less than $500 nor more than $1,000 and/or imprisonment for not more than one year may be imposed for falsely or fraudulently affixing or removing stamps, or for altering or removing cancellation of stamps. (c. 64D, §§7, 8). Fraudulent use of stamps without effective cancellation is punishable by fine of not less than $200 nor more than $500. (c. 64D, §9).

Gasoline, etc. Taxes.

Violation of c. 64A punishable by fine of not more than $1,000 and/or by imprisonment for not more than one year. (c. 64A, §11). Certain violations of c. 64E are punishable by fine of not more than $100. Others punishable by fine of not more than $1,000 and/or by imprisonment for not more than one year. (c. 64E, §§2, 11).

Cigarette Tax.

Except as otherwise provided in §10, violation of c. 64C or filing of false return, affidavit or statement punishable by fine of not more than $1,000 and/or by imprisonment for not more than one year. (c. 64C, §10).

Controlled Substance Tax.

Violation of c. 64K punishable by penalty equal to 100% of tax and fine up to $10,000 and/or imprisonment not more than five years. (c. 64K, §9).

Employment Security Tax.

In event of failure by employer to pay amounts when due, interest will be charged from due date at 12% per annum (calendar 1983), or greater of 12% or rate established under c. 62C, §32, (federal short-term rate under I.R.C. §6621(b) plus 4%, compounded daily) (calendar 1984 and following) will be charged from due date or, in lieu of such interest, penalty of $5 per day may be imposed for not more than number of days of default. If employer fails to file any report of wages or contributions within 15 days of written demand by commissioner, commissioner may assess penalty equal to 10% of contributions due, but not less than $35 nor more than $1,000 for each such failure to file. (c. 151A, §15).

Any employer, or any officer or agent of employer, who knowingly makes false statement or representation to avoid or reduce any contribution shall be guilty of felony and punishable by fine of not less than $10,000 nor more than $50,000 and/or imprisonment for not more than five years. Any such person who knowingly fails or refuses to pay any benefit or contribution, or to furnish any report or information required by commissioner, or makes any deduction from wages to pay any contribution, or who attempts to coerce any individual to waive any rights under c. 151A, punishable by fine of not less than $2,500 nor more than $10,000 and/or by imprisonment for not more than one year. Each such failure, or refusal, to pay each such deduction from wages and each attempt to coerce, shall constitute separate and distinct offense and any other violation of c. 151A or of order, rule or regulation of commissioner for which no other punishment provided shall be punished by fine of not more than $100 for first offense, and for any subsequent offense within two years of offense, punishable by fine of not less than $200 and not more than $500 and/or by imprisonment for not more than two years. (c. 151A, §47). Any person convicted of violation of any provision of c. 151A or of any order, rule or regulation of director for which punishment is not otherwise provided is punishable by fine of not more than $100 for first offense and, for any offense within two years after conviction for like offense, by fine of not less than $100 nor more than $500, and/or by imprisonment for not more than two years. (c. 151A, §47).

Person knowingly making false statement to obtain or increase benefits is subject either to disqualification (at discretion of commissioner) or fine of between $100 and $1,000 and/or imprisonment of up to six months. (c. 151A, §§25[a], 47). If employer fails to report claimant's base period wages within seven days of date of request by commissioner, director will establish claimant's rights on basis of claimant's own statement of wages, supplemented by such other information as may be available to commissioner. (430 CMR §5.04[3]).

Sales and Use Taxes.

Representation by vendor that tax will be absorbed or refunded is punishable by fine of up to $100 for each offense. (c. 64H, §23; c. 64I, §24).

Motor Vehicle Excise Tax.

Owners neglecting to pay excise tax pay 12% per year interest on tax from time tax payable and may not renew or exchange car registration or driver's license. (c. 60A, §§2, 2A).

Poll tax repealed.

Reciprocal Enforcement of Tax Liabilities.

Tax liabilities due commonwealth or any subdivision may be enforced in courts of other states, and other states may bring similar suits in Massachusetts courts to enforce tax liabilities. (c. 58, §28C).

Failure to Pay Money Received.

Any person who, in connection with preparation or filing of tax return for another, or payment of any tax, receives money from such other person to be paid to discharge tax liability and wilfully fails to pay it over to commissioner is guilty of felony and punishable by fine of not more than $100,000, or $500,000 in case of corporation, and/or imprisonment for not more than three years, together with costs of prosecution. (c. 62C, §73).

Liens.

In addition to liens for local taxes on real estate (see subhead Local Taxation, supra), lien for unpaid personal income, corporation excise, bank excise, insurance company, utility, certain corporations selling liquor, gasoline, sales, use, cigarette, estate, realty transfer and room occupancy taxes arises at time of assessment and terminates not later than six years thereafter. (c. 62C, §50). See c. 62C, §55A for property of individual taxpayers which is exempt from levy. See also c. 36, §24; c. 185, §§46, 78, 80.

22.02 ALCOHOL, BEVERAGES AND TOBACCO TAXES:

Alcoholic Beverages Tax.

Excise tax on sale of alcoholic beverages in commonwealth, see c. 138, §21.

An income tax of one half of one per cent of gross receipts is imposed upon corporations (not subject to corporate excise), associations or organizations licensed to sell alcoholic beverages. (c. 63A).

Cigarette Tax.

See c. 64C. Excise tax imposed on sale of cigarettes in commonwealth at rate of 100½ mills, plus any amount of federal excise less than eight mills, per cigarette. Notwithstanding preceding, tax of 15% of price paid for smoking tobacco assessed. (c. 64C, §6). Portion of tax credited to Health Protection Fund, Health Care Access Fund, and Local Aid Fund. (c. 64C, §§7C, 28[a], [b]).

22.03 BUSINESS TAXES:

Franchise Taxes.

See category 2 Business Organizations, topic 2.03 Corporations.

Employment security tax is imposed on employers, as defined, at a fixed rate of payroll, particular rate depending on benefit payment experience of particular employer compared with benefit payment experience in commonwealth generally. (c. 151A, §14). Workforce training contribution of .075% of overall payroll required (repealed effective Dec. 31, 2010). (c. 151A, §14L,). Tax is payable in such manner and at such times as commissioner of dept.t of employment and training requires. (c. 151A, §13). Tax for each calendar quarter must be paid to commissioner on or before last day of month following such quarter. There is no tax on employees. Employers not subject to tax on amounts paid to independent contractors or to certain types of workers. (c. 151A, §§2, 4A, 6, 6A, 8). Nonprofit organizations and governmental employers may elect to reimburse state for benefits paid rather than pay contributions under §14. (c. 151A, §14A).

Direct Broadcast Satellite Service Excise.

An excise is hereby imposed upon the provision of direct broadcast satellite service to a subscriber or customer by any direct broadcast satellite service provider in an amount equal to 5 per cent of the direct broadcast satellite service provider's gross revenues derived from or attributable to such customer or subscriber. (c. 64M, §§1–6).

Local Option Meals Excise.

A city or town may impose a local sales tax upon the sale of restaurant meals originating within the city or town by a vendor at a rate of .75 per cent of the gross receipts of the vendor from the sale of restaurant meals. (c. 64L, §§1–6).

Room Occupancy Tax.

Tax of 5% of rent is imposed on occupancy, for 90 consecutive days or less, in hotels, motels, bed and breakfast establishments with over three rooms and lodging houses, of rooms designed and normally used for sleeping and living purposes. Exemptions include rooms at federal, state, municipal, charitable, educational or religious institutions, convalescent homes, summer camps, and occupancy where rent is less than $15 per day. Reimbursement is collected from occupant. Returns and payment are due on 20th of each month for preceding month. (c.

64G; c. 62C, §16). Rate reflects 14% surtax. (1969, c. 546, §22). Local excise tax up to 4% (4.5% in Boston) of rent is also collectible by commissioner if rent exceeds $15 per day for room in hotel, lodging house, motel or bed and breakfast establishment within city or town accepting c. 64G, §3A, effective first day of calendar quarter following 30 days after acceptance or first day of such later calendar quarter as city or town may designate. (c. 64G, §3A, 1997, c. 152, §22). Additional 2.75% excise for each occupancy in Boston, Springfield, Cambridge, and Worcester. (1997, c. 152, §9).

22.03A CONTROLLED DANGEROUS SUBSTANCES TAX:

Controlled Substance Tax.

See c. 64K. Varying rate tax imposed on marijuana and controlled substances held in violation of Massachusetts law.

22.0422.06

22.07 ESTATE TAX:

Estate tax is imposed under c. 65A and, with respect to estates of decedents dying on or after Jan. 1, 1976, also under c. 65C. For estates of resident decedents dying on or after Jan. 1, 1997, estate tax under c. 65C will be in amount equal to Federal credit for state death tax purposes, determined at date of death and adjusted for such taxes payable in other jurisdictions. For estates of nonresident decedents dying on or after said date, such tax will be in proportion which value of Massachusetts real and tangible personal property bears to total Federal gross estate. (c. 65C, §2A).

Definitions.

For purposes of c. 65C, for estate of decedents dying on or after Jan. 1, 2003, Code means Federal Internal Revenue Code in effect Dec. 31, 2000. (c. 65C, §2A[e[). Federal gross estate means gross estate as defined under Code, except three-year rule of former §2035 and former inclusion of ½ joint tenancy are retained; Massachusetts adjusted gross estate means Massachusetts gross estate less deductions allowable in computing Massachusetts taxable estate pursuant to §§2053 and 2054 of Code; Massachusetts gross estate means federal gross estate, whether or not filing of federal estate tax return is required, less value of real and tangible personal property with situs outside commonwealth and plus, for estates of those dying on or after Jan. 1, 1986, value of any property in which decedent had income interest for life and value of any property for which deduction was allowed for Massachusetts estate tax purposes with respect to transfer of property to decedent; Massachusetts net estate means Massachusetts gross estate less, to extent allowable in computing Massachusetts taxable estate, deductions for funeral expenses, claims against estate and unpaid mortgages on, or any indebtedness in respect of, property where value of decedent's interest therein, undiminished by such mortgage or indebtedness, is included in value of Massachusetts gross estate; Massachusetts taxable estate means Massachusetts gross estate less certain exemptions and deductions allowable under c. 65C, §3; and resident means person domiciled in commonwealth. (c. 65C, §1).

Tax and Rates.

Tax at following rates is imposed on transfer of Massachusetts taxable estate of deceased resident dying on or before Dec. 31, 1996: if Massachusetts taxable estate is not over $50,000, 5% thereof; if over $50,000 but not over $100,000, $2,500 plus 7% of excess over $50,000; if over $100,000 but not over $200,000, $6,000 plus 9% of excess over $100,000; if over $200,000 but not over $400,000, $15,000 plus 10% of excess over $200,000; if over $400,000 but not over $600,000, $35,000 plus 11% of excess over $400,000; if over $600,000 but not over $800,000, $57,000 plus 12% of excess over $600,000; if over $800,000 but not over $1,000,000, $81,000 plus 13% of excess over $800,000; if over $1,000,000 but not over $2,000,000, $107,000 plus 14% of excess over $1,000,000; if over $2,000,000 but not over $4,000,000, $247,000 plus 15% of excess over $2,000,000; if over $4,000,000, $547,000 plus 16% of excess over $4,000,000; provided that such tax is not to be greater than 20% of amount by which Massachusetts net estate exceeds amount of exemption noted in following paragraph. (c. 65C, §2[a]). If such tax is exceeded by maximum credit for state death taxes allowable to estate of resident or nonresident against federal estate tax, computed according to rate schedule of §2011 of Code based on Massachusetts taxable estate, such excess is added to such tax. (c. 65C, §2[b]).

Exemptions and Deductions.

For estates of decedents dying during 1993, exemption equal to Massachusetts net estate for such estates of $300,000 or less; similar exemption for estates of $400,000 or less of decedents dying during 1994; $500,000 or less of decedents dying during 1995; $600,000 or less of decedents dying during 1996. Exemption shall not exceed smallest federal taxable estate that absorbs allowable federal credit under I.R.C. §2010. (c. 65C, §3[a]). If Massachusetts net estate exceeds amount of exemption, no exemption will apply, except for purposes of exemption referenced immediately above regarding federal taxable estate. (c. 65C, §3[a]). In addition, deductions allowable in computing Massachusetts taxable estate consist of deductions or portions thereof, other than exemption of §2052 of Code, allowable in determining federal taxable estate and attributable to property in Massachusetts gross estate; provided that, with respect to estates of decedents dying on or before June 30, 1994, deduction for property passing to surviving spouse not to exceed 50% of Massachusetts adjusted gross estate. (c. 65C, §3[a]). Also see c. 65C, §3(a) for exemptions and deductions regarding estate of decedent dying on or after July 1, 1994. No deduction allowed for interest unless paid or accrued within three years of date of return. Waiver of right to claim deduction for federal estate tax purposes is considered waiver of right for Massachusetts estate tax purposes. (c. 65C, §3).

Qualified Terminable Interest Property.

No part of such property will be treated as passing to any person other than surviving spouse for purposes of §2056 of Code as long as total deduction for property passing to spouse, with respect to estates of decedents dying on or before June 30, 1994, does not exceed 50% of Massachusetts gross estate. For estates of decedents dying on or after July 1, 1994, deduction of terminable interest property will not be limited by I.R.C. 2056(c). (c. 65C, §3A).

Generation Skipping Tax.

Effective July 1, 1983, tax imposed on every generation-skipping transfer in which either original transferor is Massachusetts resident or property transferred includes real or personal property in Mass. on date of transfer. Tax equals amount allowable as credit for state death taxes under I.R.C. 2602 as in effect on Dec. 31, 1981. (c. 65C, §4A). It is unclear whether 1986 repeal of I.R.C. 2602 effectively repealed tax imposed by c. 65C, §4A.

Nonresidents.

Transfer of real and tangible personal property of deceased nonresident, if such property were includable in Massachusetts gross estate had decedent been resident, is taxed in accordance with above. Tax is amount which bears same ratio to tax which would have been due had decedent been resident as value of all such property, diminished by any mortgage or lien thereon, bears to value of decedent's Massachusetts gross estate, diminished by any mortgage or lien thereon, determined as if decedent had been resident. (c. 65C, §4). Provision is made to assure payment to decedent's domiciliary state of any inheritance, succession, transfer, estate or other death taxes due to that state (c. 65C, §21[b]), provided such state has reciprocal provision (c. 65C, §21). Foreign executor of nonresident decedent may obtain license to sell real estate under court order if c. 202, §32 provisions are satisfied.

Valuation of property in Massachusetts gross estate is as of date of death, but if alternate valuation under §2032 is used for federal return, Massachusetts estate similarly valued. If no federal estate tax payable, whether or not return is filed, §2032 date may be elected for Massachusetts return. Value of less than absolute interest in property determined in accordance with §2031. Farm real property may be valued as in §2032A. (c. 65C, §5).

Executor; Returns.

Tax to be paid by executor, which term in c. 65C means executor or administrator, or if none appointed, qualified and acting within commonwealth, any person in actual or constructive possession of decedent's property. Probate Court may authorize, in same manner as for payment of debts, executor to sell so much of property as will enable payments of tax. (c. 65C, §6[a]). For death before Jan. 1, 1997, no executor's final account is to be allowed by Probate Court unless and until executor files therein certificate of commissioner showing that tax has been paid, payment has been secured as permitted or no tax is due. (c. 65C, §6[b]). For deaths on or after Jan. 1, 1997, certificate of commissioner not required. (c. 65C, §6). If executor makes written application, accompanied by copy of final determination of federal estate tax liability, to commissioner for determination of tax and discharge from personal liability therefor, commissioner, as soon as possible, and in any event within one year after making of application or, if such is made before return filed, within one year after return is filed, is to notify executor of amount of tax, upon payment of which executor is to be discharged of personal liability for any deficiency in tax thereafter found due and is to be entitled to receipt or writing showing such. (c. 65C, §7). For decedent dying on or before Dec. 31, 1996, and Massachusetts gross estate exceeds exemption under c. 65C, §3(a), or for decedent dying after Dec. 31, 1996, if estate is liable for any tax under c. 65C, executor to make return with respect to tax imposed by c. 65C within nine months after date of death. (c. 62C, §17[a]). If executor is unable to make complete return as to part of federal gross estate, he is to include in his return description of such part and name of every person holding legal or beneficial interest therein, who, upon notice from commissioner, is in like manner to make return as to such part. (c. 62C, §17[b]). Every person liable for tax or collection thereof is to keep records, render statements, make returns and comply with rules and regulations as commissioner may from time to time prescribe. (c. 65C, §8). For good cause commissioner may grant reasonable extension of time for filing return, but only if tentative return is filed prior to date tax to be paid and amount equal to reasonably estimated tax due is paid on or before such date. Failure to pay 80% of tax due on or before such date voids extension and return subject to late return penalty. Such penalty may be abated by commissioner in whole or part for good and sufficient cause. (c. 62C, §19). Penalty determinations made under c. 62C, §33.

Due Date; Extensions; Postponement.

Tax due and payable by person liable at expiration of nine months from date of death. Return must be filed in cases where Massachusetts gross estate exceeds amount of exemption in c. 65C, §3(a). (c. 62C, §§17[a], 32). Commissioner may extend time for payment of tax for reasonable period not to exceed six months or, if he finds payment of any part thereof on due date would result in undue hardship, for reasonable period not to exceed three years from date fixed for payment. If extension is granted, commissioner may require deposit with State Treasurer of bonds or negotiable obligations of commonwealth or U.S. in amount as he may from time to time deem necessary to adequately secure payment or giving of bond to state treasurer in amount and with sureties as he deems necessary, conditional upon payment in accordance with terms of extension. (c. 65C, §10[a]). If value of reversionary or remainder interest in property included in gross estate, payment of part of tax attributable thereto may, at executor's election, be postponed until six months after termination of precedent interest, which postponed amount shall then be payable with interest thereon at 8% per annum from original due date until paid. Such postponement to be under regulations prescribed by commissioner and upon condition that person liable give bond to state treasurer in amount and with sureties as commissioner deems necessary, conditioned as prescribed. (c. 65C, §10[b]).

Assessment.

Tax deemed to be assessed at lesser of amount shown as due on return or any amendment, correction or supplement thereof or at amount properly due, and at later of time when return filed or required to be filed. (c. 62C, §26[a]). If commissioner determines that full tax has not been or not deemed to be assessed, he may within three years of later of date return was filed or was required to be filed assess same with interest as prescribed to date payment of deficiency assessment required to be paid, first giving notice of his intention to person to be assessed, which person or his representative may within 30 days after date of notification confer with commissioner or his representative. After such 30 days, commissioner to assess tax remaining due or portion thereof he believes has not been theretofore assessed. Failure of receipt of such notice does not affect validity of tax. (c. 62C, §26[b]). In case of arithmetical, clerical or other obvious error on face of return, commissioner may assess deficiency without giving prior notice. (c. 62C, §26[c]). In case of false or fraudulent return filed with intent to evade tax or failure to file return, commissioner may make assessment at any time, without notice of intention, determining tax due according to best information and belief. (c. 62C, §26[d]). If executor omits items from gross estate includible therein exceeding 25% of gross estate stated in return, tax may be assessed any time within six years after return filed, but no such item considered omitted if disclosed in return or attached statement in manner adequate to apprise commissioner of nature and amount thereof. (c. 62C, §26[f]). If any underpayment of tax required to be shown on return due to fraud, there is to be added tax of 50% of such underpayment, such underpayment meaning deficiency assessed as above described in connection with which notice of intention required, except that tax shown on return to be taken into account only if such return was filed before last day prescribed for filing with extensions. If such penalty assessed, no penalty under c. 62C, §33 to be assessed with respect to same underpayment. (c. 65C, §13).

Lien, etc.

Unless paid, tax is lien for ten years from date of death upon Massachusetts gross estate, except that such part thereof used for payment of charges against estate and expenses of administration, allowed by Probate Court having jurisdiction, to be divested of such lien. (c. 65C, §14[a]). For deaths on or after Jan. 1, 1997, affidavit of executor stating that gross estate of deceased does not require federal estate tax filing releases lien. (c. 65C, §14[a]). If tax not paid when due, spouse, transferee, trustee, surviving tenant, person in possession of real or personal property by reason of exercise, nonexercise or release of power of appointment, or beneficiary, who receives or has on date of decedent's death, real or personal property included in Massachusetts gross estate, to extent of value of such property on such date of death, to be personally liable for tax. Real property conveyed prior to decedent's death by recorded deed not disclosing intent that it take effect at or after death, and personal property transferred by, or by transferee of, such persons to bona fide purchaser, mortgagee or pledgee, for adequate and full consideration in money or money's worth divested of such lien and lien then attaches to all property of such transferor, except any part transferred to bona fide purchaser, mortgagee, or pledgee for adequate and full consideration in money or money's worth. (c. 65C, §14[b]). Such lien not to be valid with respect to any of certain securities as against any mortgagee, pledgee or purchaser thereof, for adequate and full consideration in money or money's worth, or if at time of such mortgage, pledge or purchase such mortgagee, pledgee or purchaser without notice or knowledge of existence of such lien. Such security means any bond, debenture, note or certificate or other evidence of indebtedness, issued by any corporation, including one issued by government or political subdivision thereof, with interest coupons or in registered form, share of stock, voting trust certificate, or any certificate of interest or participation in, certificate of deposit or receipt for, temporary or interim certificate for, or warrant or right to subscribe to or purchase any of foregoing; negotiable instrument; or money. (c. 65C, §14[c]).

Commissioner may release or partially discharge any such lien with respect to all or part of property subject thereto if satisfied collection of tax will not be jeopardized thereby, certificate as to which is to be held conclusive that lien on property covered by certificate extinguished. (c. 65C, §14[d]). Such lien to cease to attach to personal property after same sold or disposed of for value by person lawfully entitled to make such sale or disposition, provided that such lien thereupon to attach to proceeds or other property acquired in substitution therefor. License or decree authorizing sale of real estate of resident decedent or of any property of nonresident decedent subject to such lien must affirmatively state that lien has been released or discharged, and before license issued or decree entered authorizing sale of real estate of resident or any property of nonresident decedent subject to such lien, probate court records must show that commissioner has released or discharged such lien with respect to such property. (c. 65C, §14[e]). Election under c. 65C, §5(c) for qualified farm property will create lien in favor of commonwealth for adjusted tax difference under §2032A of Code, as in effect on Jan. 1, 1985. (c. 65C, §14[f]).

Transferee's Liability.

Amount of liability, at law or equity, of transferee of decedent's property in respect of tax is, except as follows, to be assessed, collected and paid in same manner and subject to same provisions and limitations as in case of tax with respect to which liability was incurred, whether such liability is as to tax shown on return or deficiency in tax. (c. 65C, §15[a]). Period of limitations for assessment of any such liability of subsequent transferee to be, in case of liability of initial transferee, within one year after expiration of period of limitations for assessment against transferor and, in case of liability of transferee, within one year after expiration of such period against preceding transferee, but not more than three years after expiration of such period against initial transferor; except that if, before expiration of such period, court proceeding for collection of tax or liability in respect thereof has been begun against initial transferor or last preceding transferee, respectively, then such period to expire one year after return of execution. (c. 65C, §15[b]). Absent notice of fiduciary relationship as described in c. 65C, §16, any notice of such liability to be sufficient if addressed in name of decedent or other person subject to liability and mailed to his last known address. (c. 65C, §15[c]). Transferee in this catchline includes donee, heir, legatee, devisee and his distributee, and any person described in c. 65C, §14(b), who is personally liable for any part of tax. (c. 65C, §15[d]).

Fiduciary Relationship.

Upon notice to commissioner that person acting as executor, such person to assume powers, rights, duties and privileges of executor in respect of tax until notice given such person no longer so acting. (c. 65C, §16[a]). Upon notice to commissioner that person acting in fiduciary capacity for person subject to liability described in catchline Transferee's Liability, supra, fiduciary to assume on behalf of such person powers, rights, duties and privileges of such person as so described, except that liability to be collected from estate of such person, until notice given that fiduciary capacity has terminated. (c. 65C, §16[b]).

Collection.

Commissioner to have for collection of tax all powers and remedies provided by c. 60 for collection of taxes on personal estate by collectors of taxes of towns, and may recover any tax in action of contract in name of commonwealth. (c. 62C, §§46, 47). Tax to be collected within six years of assessment or prior to expiration of period of collection agreed upon in writing by commissioner and taxpayer before expiration of six-year period, including subsequent extensions, or before any release of levy under c. 62C, §64 after six-year period. If any question relative to tax pending before any agency or court at end of above period, commissioner's right to collect to continue until one year after final determination of such question. (c. 62C, §65).

Abatement and Appeal.

Person aggrieved by tax assessment may apply in writing to, on form approved by, commissioner for abatement thereof at any time within later of three years after due date, two years from date tax was assessed or deemed assessed, or one year after payment thereof. Commissioner required to grant applicant hearing thereon if requested on application. If commissioner finds tax excessive or illegal, he must abate tax, in whole or part, and if tax has been paid, state treasurer, upon certification of commissioner, must repay amount of abatement with interest as prescribed. (c. 62C, §§37, 40). Person aggrieved by refusal of commissioner to abate tax, in whole or part, may appeal therefrom within 60 days after date of notice of commissioner's decision or within six months after time when application for abatement deemed denied as provided in c. 58A, §6 by filing petition with, if appeal from commissioner's determination of value of asset of estate, clerk of appellate tax board or, if appeal from any other matter, clerk of appellate tax board or Probate Court having jurisdiction of decedent's estate. If board or court on hearing finds person making appeal was entitled to abatement, it is to make abatement as it sees fit, and if tax has been paid, state treasurer, upon presentation to him of notice of decision of board or court, is to repay petitioner amount of abatement with interest thereon computed in accordance with c. 62C, §40. (c. 62C, §39). To facilitate collection commissioner may make installment payment agreements. (c. 62C, §37B).

Regulations issued by commissioner pursuant to c. 14, §6 for interpretation or enforcement of provisions set forth in c. 62C, §2 are to conform so far as commissioner may deem practicable to regulations relating to U.S. estate tax laws. (c. 62C, §3).

Penalties are imposed for certain wilful attempts to evade or defeat tax or payment thereof, certain wilful failures to pay tax, make return or supply information and certain wilful false, fraudulent or improper acts. (c. 65C, §§26-28).

C. 65A Estate Tax.

Tax imposed on transfer of estate of every resident in amount by which 80% of estate tax payable to U.S. under Federal Revenue Act of 1926 exceeds aggregate amount of all estate, inheritance, legacy and succession taxes actually paid to several states of U.S. in respect to any property owned by such decedent or subject to such taxes as part of or in connection with his estate. Similar tax provided to absorb any credit which may be allowed under any future federal revenue act. Tax also imposed on transfer of real property or tangible personal property in commonwealth of every resident of U.S., who was not resident of commonwealth at time of death, and upon transfer of all property, both real and personal, within commonwealth of every person who at time of death was not resident of U.S. Amount of such tax shall be equal to such proportion of amount by which credit allowable under applicable federal revenue act for estate, inheritance, legacy and succession taxes actually paid to several states exceeds amount actually so paid for such taxes, exclusive of estate taxes based upon difference between such credit and other estate taxes and inheritance, legacy and succession taxes, as value of property in commonwealth bears to value of entire estate, subject to estate tax under applicable federal revenue act. (c. 65A, §1). Tax imposed by c. 65A due and payable 12 months after death of decedent. If not paid when due, interest accrues pursuant to c. 62C, §32, however, commissioner may extend time for good cause. (c. 65A, §2).

Apportionment.

As to apportionment among recipients and beneficiaries of estate of resident decedent of estate tax under c. 65C or c. 65A or any estate tax law of U.S., see c. 65A, §5.

22.07A EXCISE TAXES:

Automobile Excise Tax.

See category 23 Transportation, topic 23.01 Motor Vehicles.

Watercraft Excise Tax.

See c. 60B. City or town where vessel habitually moored or docked or principally situated required to levy excise of $10 per $1,000 of valuation. (c. 60B, §2). Payment of tax exempts owner from any other tax thereon. (c. 60B, §2[d]).

22.08 GASOLINE AND SPECIAL FUELS TAXES:

Gasoline, Diesel and Other Combustible Motor Fuels Taxes.

For per gallon tax see c. 64A, §1 (gasoline); c. 64E, §4 (other fuels). Twenty-one cent per gallon minimum tax on gasoline and other motor fuels, no minimum tax on liquefied gas. Special restrictions and taxes are imposed upon persons bringing such gasoline and motor fuel into state. (c. 64F, §3). Diesel motor fuel tax imposed upon user and it is unlawful to operate diesel powered vehicle, except certain noncommercial vehicles, without first securing user's license from commissioner. (c. 64E, §2). Under certain circumstances nonhighway users may be entitled to refund of taxes paid on fuel consumed on farm. (c. 64A, §§7, 7A; c. 64E, §5). Distributors may sell tax free to other distributors in state or for export from commonwealth. (c. 64A, §8A).

Aviation fuel taxed at 7.5% of average price or 10¢ per gallon whichever higher (not applicable to aircraft fuel as defined in c. 64J, §1). (c. 64A, §1).

22.08A GENERATION SKIPPING TAX:

See topic 22.07 Estate Tax, subhead Generation Skipping Tax.

22.09 GIFT TAX:

None.

22.10 [RESERVED]

22.11 INCOME TAX:

Taxation of incomes dealt with in c. 62. Taxable entities include by definition certain estates, fiduciaries, partnerships, associations, trusts and corporate trusts. (c. 62, §§1, 8, 9, 10, 13, 17).

Shareholders of S corporation are subject to tax on their individual distributive share of corporation's income and may take their pro rata share of deductions and losses incurred by corporation, as provided by c. 62 and I.R.C. §1361 et seq. (c. 62, §17A).

Residents.

Starting point for computation of tax is gross income as determined under Internal Revenue Code (I.R.C.) as amended on Jan. 1, 2005, and in effect for taxable year, except that reference in c. 62 to specified sections shall refer to I.R.C. as amended. (c. 62, §1). Following are then added to gross income: Interest on governmental obligations excluded under I.R.C. 103 other than interest on certain obligations issued by commonwealth or political subdivisions thereof or certain agencies or instrumentalities of either; earned income from foreign sources excluded under I.R.C. 911; amounts excluded under I.R.C. Subchapter S for federal S corporations subject to taxation under c. 62 as corporate trusts (effective until Jan. 1, 2009); amounts considered as Massachusetts gross income under any other provision of c. 62; amounts excluded under I.R.C. 128; and certain amounts contributed for taxpayer pursuant to c. 32, §22[10] or §65D, paragraph (i) or c.15A, §40 that are not included in federal gross income. (c. 62, §2[a][1]). Items then subtracted from federal gross income are: Interest on obligations of U.S. exempt from state income taxation to extent included in federal gross income and certain exempt-interest dividends received from regulated investment company qualified under I.R.C. 851; amounts included under Subchapter S for federal S corporations subject to taxation under c. 62 as corporate trusts (effective until Jan. 1, 2009) (c. 62, §2[a][2][B]); income received from fiduciary which is taxable to fiduciary; dividends received from corporate trust to extent exempt from tax under c. 62, §8 (effective until Jan. 1, 2009; after Jan. 1, 2009, such corporate trust dividends subject to taxation under c. 62, §8, as in effect on Dec. 31, 2008, to extent derived from earnings and profits previously taxed to trust under §8 where trust properly filed returns and paid all taxes due); income from any contributory annuity, pension, endowment, or retirement fund of U.S. or commonwealth or any political subdivision thereof to which employee has contributed, or Uniformed Service retirement pay pursuant to 10 U.S.C.S. § 1072, or survivorship benefits under 10 U.S.C.S. §§ 1431–1460; income from annuity, stock bonus, pension, profit-sharing or deferred payment plans or contracts described in I.R.C. 403(b) or 404 or individual retirement accounts or annuities or retirement bonds described in I.R.C. 408 or 409 to limit of aggregate amount contributed and previously included in Massachusetts gross income; certain dividends received from regulated investment companies qualified under I.R.C. 851 that are exempt interest dividends under I.R.C. 852 directly attributable to interest from obligations issued by commonwealth and exempt from taxation under any provision of law, or that are capital gain dividends under I.R.C. 852 to the extent such dividends are attributable to gain from obligations issued by commonwealth and exempt from taxation under any provision of law; income received from royalties or from sale, lease or other transfer of patent approved by commissioner of energy resources and relating to energy conservation or alternative energy development; social security benefits included in federal gross income under I.R.C. 86. (c. 62, §2[a][2]). Additional deductions include, to extent included in federal gross income: Compensation made to victims of Nazi Germany; amounts paid by employer due to death of specified terrorist victim as defined in c. 62, §25; amount otherwise included in gross income due to discharge of indebtedness because of death of individual that resulted from Sept. 11, 2001, terrorist attacks or illness from anthrax attack occurring Sept. 11, 2001 to Jan. 1, 2002; qualified disaster relief payments; payments under §406 of Air Transportation Safety and System Stabilization Act; disability income for injuries resulting from terroristic or military action as defined in I.R.C. 692(c)(2); and certain income from employer-provided health insurance plan mandated by law. (c. 62, §2[a][2][K-Q]). Furthermore, any I.R.C. 408A(d)(3) (Roth IRA) distribution included as income for federal tax purposes is included in gross income; gain from sale of principal residence is excluded from gross income to same extent as I.R.C. 121, and (on and after Jan. 1, 2002) any contributions, allocations under or distributions from stock bonus, pension, profit-sharing, annuity or deferred payment plans or contracts or employee stock ownership plans described in I.R.C. 401(a), 402, 403, 404, 409 or 457, or simplified employee pensions under I.R.C. 408(k) are included in taxpayer's gross income to extent includible in taxpayer's gross income for federal income tax purposes. (c. 62, §2[a][3]).

Massachusetts gross income is, except as indicated below, divided into Part A gross income: (interest and dividends and capital gain net income [other than interest and dividends from deposits in banks or certain similar institutions located in commonwealth, including accounts of $100,000 or more (406 Mass. 92, 546 N.E.2d 157), and other than interest on loans made by pawnbrokers, and other than gain income from sale or exchange of capital assets held for more than one year, beginning Jan. 1, 1995, but not including gain income from sale or exchange of property defined under I.R.C. 408(m)(2)]), Part C gross income: capital gain income from sale or exchange of capital assets held for more than 1 year,. and Part B gross income: all other Massachusetts gross income. (c. 62, §2[b]). For taxable years beginning on or after Jan. 1, 1996, Massachusetts adjusted gross income is sum of Part A adjusted gross income, Part B adjusted gross income and Part C adjusted gross income. (c. 62, §2[i]).

Part A adjusted gross income determined by deducting from Part A gross income following: (1) Excess of deductions allowed under c. 62, §2(d) over Part B gross income, but not in excess of Part A gross income “effectively connected” with active conduct of taxpayer's trade or business; (2) losses from sale or exchange of capital assets held one year or less provided that excess of any Part A net capital loss over Part A net capital gain is applied against Part A interest and dividends (with not more than aggregate amount of $2,000 in Part A capital loss and Part C capital loss applied against any interest and dividends included in Part A gross income) and any remaining excess Part A net capital loss is applied against capital gains included in Part C gross income, with a one year carryover of any remaining excess Part A capital loss; (3) excess of Part C net capital losses for the year over Part C net capital gains, with any excess Part C net capital losses exceeding Part A net capital gain applied against interest and dividends included in Part A gross income, provided that the aggregate amount of applied Part A and Part C capital loss limited to $2,000, with one–year carryover of remaining excess Part C capital loss; (4) 50% of gain income from sale or exchange of property defined under section I.R.C. 408(m)(2), held for more than one year, after any reduction taken under (2–3) above. (c. 62, §2[c]).

Part A taxable income determined by deducting from Part A adjusted gross income following: That portion of Part A adjusted gross income of fiduciaries which is payable to or accumulated for nonresidents to extent such income would not be taxable if received by nonresident; that portion of Part A adjusted gross income of trustees, executors or administrators which is payable to or irrevocably set aside for charitable purposes; and excess of exemptions allowed by c. 62, §3, B over Part B adjusted gross income less deductions allowed by c. 62, §3, B, (a). (c. 62, §3[A]).

Part B adjusted gross income is Part B gross income less deductions allowed by I.R.C. 62 and 404, without regard to I.R.C. 265, However, following deductions are not allowed: (deductions allowed to life tenants and income beneficiaries insofar as such deductions are allowed to trust or estate subject to taxation under c. 62; any deduction relating to income not includable in Massachusetts gross income; any net operating loss deduction allowed by I.R.C. 172; in case of individual who is employee within meaning of I.R.C. 401(c)(1), deductions allowed by I.R.C. 404 to extent attributable to contributions made on behalf of such individual; deduction allowed by I.R.C. 1379(b)(3); deductions for individual retirement savings allowed by I.R.C. 219; deduction allowed by I.R.C. 402(e)(3) relating to ordinary income portion of lump sum distribution; deduction for forfeitures due to premature withdrawals under I.R.C. 165 to extent that income represented by forfeiture was not included in Massachusetts gross income; deduction allowed by I.R.C. 162(h) for expenses of state legislators traveling away from home; deductions from federal S corporations treated as corporate trusts under c. 62 (effective until Jan. 1, 2009); and deduction allowed by I.R.C. 164(f); for taxable years beginning on or after Jan. 1, 1996, deduction for expenses relating to influencing legislation, participation in political activities, legislative matters, or activities involving executive branch officials in attempts to influence officials; deductions allowed by I.R.C. 62(a)(3), 168(k), 199. (c. 62, §2[d][1]). Deductions also allowed equal to I.R.C. Part VI deduction for travel expenses of employee salesmen, if taxpayer itemizes deductions on federal income tax return (c. 62, §2[d][2]), and depreciation deduction for required automatic sprinkler system (c. 62, §2[d][3]).

Part B taxable income determined by deducting from Part B adjusted gross income following: (see c. 62, §3 B[a]-[c]). That portion of Part B adjusted gross income of fiduciaries which is payable to or accumulated for nonresidents to extent such income would not be taxable if received by a nonresident; that portion of Part B adjusted gross income of trustees, executors, or administrators which is payable to or irrevocably set aside for charitable purposes; taxes paid under F.I.C.A. or Federal Railroad Retirement Act; amounts deducted from wages as contributions to an annuity, pension, endowment or retirement fund of U.S. government, commonwealth or any political subdivision thereof (but in no event shall aggregate of otherwise allowable deductions for these taxes and amounts attributable to any one taxpayer exceed $2,000); income from any contributory annuity, pension, endowment or retirement fund of U.S. government, commonwealth or any political subdivision thereof, to which employee has contributed; income from contributory annuity, pension, endowment or retirement fund of any other state or political subdivision, provided such state grants reciprocal privilege; $100 of interest and dividends in case of single person or married person filing separately, or $200 in case of married persons filing joint return; amount equal to employment-related expenses allowed in determining dependent care credit under I.R.C. 21, not exceeding $4,800 if one qualifying individual with respect to taxpayer, or $9,600 if two or more qualifying individuals with respect to taxpayer; 10% of cost of renovating abandoned building in economic opportunity area; and, if no such deduction for dependent care is claimed and if taxpayer maintains household which includes one or more dependents under age of 12, who qualify for dependent exemption under I.R.C. 151, or individuals aged 65 or older, or who are disabled, who qualify as dependent under I.R.C. 152, $3,600 if one such dependent, or $7,200 if there two or more such dependents, , provided that if such taxpayer married, such deduction allowed only if taxpayer and spouse file joint return for taxable year; in case of individual or husband and wife who pay rent for principal place of residence located in Massachusetts, 50% of such rent but no more than $3,000; amount equal to amount that college tuition payments, less scholarships, grants or financial aid, exceed 25% of taxpayer's Massachusetts adjusted gross income, limited in manner provided in I.R.C. 222(d)(3); amount equal to interest payments on college education debt for undergraduate student loans, provided that deduction cannot be made for same expenses under c. 62, §2[d][1]; amount equal to charitable contribution deduction allowed under I.R.C. 170, provided, however, that rate of tax on Part B taxable income in §4 in prior taxable year was 5%, and no such deduction allowed for contributions of household goods or used clothing; amount described in I.R.C. 1341(a)(2), to extent such amount was previously included in Massachusetts taxable income and is not otherwise deductible under c. 62, §2(d)(1); amounts for tolls paid through Fast Lane account or for weekly or monthly transit commuter passes for Massachusetts Bay Transit Authority transit, provided that for single person, married person filing separate return, or head of household, this deduction applies only to amount that exceeds $150, up to $750, and for married couple filing joint return, deduction applies to portion paid for each individual that exceeds $150, up to $750 for each individual. (c. 62, §3[B][a]).

Exemptions allowable to individuals against Part B income include the following: Personal exemptions that may increase for tax years beginning on or after Jan. 1, 2004 if tax revenues increase, not to exceed $4,400 for single person or married person filing separately, $6,800 for head of household filing separately, and $8,800 for husband and wife filing jointly. (c. 62, §3[B][b]). Personal exemption amounts for taxable years beginning on or after Jan. 1, 2007 are $4,125 for single person or married person filing separately, $6,375 for head of household, and $8,250 for married couple filing joint return. (Dept. of Revenue, Technical Information Release, TIR 06–25, Dec. 22, 2006). Additional exemptions of $2,000 if taxpayer totally blind and $700 if taxpayer attained age of sixty-five; $1,000 for each dependent qualified under I.R.C. 151(c); amount equal to medical, dental and other expenses allowed under I.R.C. 213 if deductions itemized on federal income tax return; amount equal to fees paid to licensed adoption agency on account of adoption of minor child. (c. 62, §3[B][b]). For part-time residents exemptions are allocated in proportion that Massachusetts gross income bears to amount which would have been Massachusetts gross income if resident for entire year. (c. 62, §3[B][c]).

Part C adjusted gross income is Part C gross income less following deductions: (1) Losses from sale or exchange of capital assets held for more than 1 year. Amount of any class of net capital loss reduced by the amount of such loss that is deducted under c. 62, §2(c)(2)(b) is Part C capital loss in succeeding taxable year; (2) Part C net gains are reduced by any remaining excess deductions allowable under c. 62, §2(d) over Part B gross income after applying such excess Part B deductions against Part A gross income in accordance with c. 62, §2(c). and (3) where taxpayer has unused Class B, C, D, E, F, or G net loss on Apr. 30, 2002, aggregate amount of such net losses shall be taken into account after Apr, 30, 2002 as loss on sale or exchange of capital asset held for more than 1 year. (c. 62, §2[e]).

Part C taxable income is Part C adjusted gross income less deductions and exemptions allowable under Part C of c. 62, §3. (c. 62, §2[h]). In determining Part C taxable income, Part C adjusted gross income shall be reduced by following deductions and exemptions: Net amount of

Part C adjusted gross income (1) of trustees or other fiduciaries subject to tax under §§9 or 10 as payable to or accumulated for persons not in commonwealth to extent such income not subject to tax under §5A if received by nonresident; (2) of trustees, executors or administrators pursuant to terms of instrument governing estate or trust currently payable to or irrevocably set aside for public charitable purposes, or for benefit of charitable organization. (c. 62, §3[C][a]). Exemption also allowed under c. 62, §3(C) equal to amount by which total exemptions allowable under §3(B) exceed the Part B adjusted gross income less the deductions allowable under paragraph §3(B)(a) and Part A adjusted gross income less deductions allowable under §3[A][a], but such exemption not allowed to married person filing separate return.(c. 62, §3[C][b]). No tax may be imposed under c. 62 upon any stock bonus, pension or profit-sharing trust qualifying under I.R.C. 401 or any individual retirement account qualifying under I.R.C. 408. (c. 62, §5[b]).

For taxable years beginning after Jan. 1, 1998 short term capital gain, short term capital loss, long term capital gain, long term capital loss, net short term capital gain, net short term capital loss, net long term capital gain, net long term capital loss have same meaning provided in I.R.C. 1222 as amended and in effect for taxable year. (c. 62, §1). Amount of gain or loss on sale, exchange, or other disposition of property determined under c. 62, §6F.

No tax may be imposed reducing Massachusetts adjusted gross income below $8,000 for individuals and $7,600 plus deductions allowed under c. 62, §3(B)(b) for person filing as head of household or for husband and wife filing joint return. (c. 62, §5). Personal income tax return must be filed by person having Massachusetts adjusted gross income in excess of $8,000. (c. 62C, §6).

Part A taxable income consisting of capital gains taxed at rate of 12%; Part A taxable income consisting of interest and dividends taxed at same rate as provided in c. 62, §4(b) (currently 5.3%). (c. 62, §4[a]). For taxable years beginning on or after Jan. 1, 2002, Part B taxable income taxed at rate of 5.3%, with adjustment allowed in subsequent tax years, but limited to minimum of 5%. (c. 62, §4[b]). Part C taxable income taxed at same rate as provided for in c. 62, §4(b) (currently 5.3%). (c. 62, §4[c]). Current tax rates posted at Mass. Dept. of Revenue website: http://www.mass.gov/dor .

Subject to certain limitations, credits against taxes imposed are granted: (1) To residents of commonwealth for taxes due to any other state, territory, or possession of U.S., or to Canada, on account of Massachusetts gross income, subject to restrictions; effective Jan. 1, 2009, as todividends received out of tax-free earnings and profits of corporate trust previously subject to tax underc. 62, corporate trust shareholders entitled to credit for income taxes paid to other jurisdictions on those earnings and profits by corporate trust or shareholders. (c. 62, §6[a]); (2) to any owner of residential premises who pays for containment or abatement of any paint, plaster, or other accessible materials containing dangerous levels of lead, credit in amount of lesser of cost of such treatment or $1,500 per dwelling unit, and excess credit allowed to carry forward seven years (c. 62, §6[e]); (3) to owners credit for 5% of cost of property used in “certified project” in economic opportunity area (defined in c. 23A, §3A) if property would qualify for §31A credit if purchased by eligible corporation, but credit cannot exceed 50% of tax liability (c. 62, §6[g]); (4) to owners or tenants of residential property occupying same as principal residence for installation of renewable energy sources, credit in amount of lesser of 15% of cost or $1,000 and excess credit allowed to carry forward three years. (c. 62, §6[d]); (5) to taxpayer who qualified for and claimed earned income credit under I.R.C. 32, credit equal to 15% of federal credit received by taxpayer for taxable year (c. 62, §6[h]); (6) to owner of residential property occupied as his principal residence, credit equal to 40% of expenditures for repair or replacement of failed cesspool or septic system pursuant to the Title V, not to exceed $1,500, with excess credit applied over subsequent five years, up to aggregate maximum of $6,000 (c. 62, §6[i]); (7) to taxpayer or nonprofit organization which pursues environmental response action on or before Aug. 5, 2011, and who achieves and maintains permanent solution or remedy operation status in compliance with c. 21E, allowed a base credit of 25% of net response and removal costs incurred between Aug. 1, 1998, and Jan. 1, 2012, for business property it owns or leases within an economically-distressed area as defined in c. 21E, §2 (c. 62, §6[j]); (8) to owner or tenant occupying principal residence in commonwealth, who is aged 65 years or older, subject to income and other limitations, a credit equal to amount by which real estate tax payment or rent constituting real estate tax payment exceeds 10% of taxpayer's total income, but credit not to exceed $750 (c. 62, §6[k]); (9) to taxpayer making motion pictures in commonwealth, credit against taxes imposed by c. 62 for employment of persons within the commonwealth in connection with filming or production motion pictures (c. 62, §6[l]); and, (10) effective Jan. 1, 2009 - Dec. 31, 2018, to life sciences companies, credit equal to 10% of cost of qualifying property acquired or constructed in commonwealth and credit equal to 100% of user fees paid to United States Food and Drug Administration (c. 62, §6[m], [n]).

Report of change in federal taxable income required, together with payment of any additional Massachusetts tax due, within one year of receipt of notice of final determination of federal tax. (c. 62C, §30).

Innocent spouses may be relieved of liability on joint return in certain circumstances. (c. 62C, §84, effective July 1, 1993).

Any person may contribute any part of tax refund to Massachusetts AIDS Fund and Massachusetts U.S. Olympic Fund. (c. 62, §§6G, 6H).

Abatement.

Application for abatement of tax must be filed within three years from last day for filing return or within two years after tax assessed or deemed assessed or within one year after date that tax was paid, whichever occurs later. (c. 62C, §37). Taxpayer may also apply for abatement of Massachusetts tax within one year of notice of final determination of taxpayer's federal income tax. (c. 62C, §30). Abatement applications and other forms subject to due dates filed with tax commissioner presumed delivered on postmark date. (c. 62C, §33A). Applications not acted on by commissioner for six months are, in absence of applicant's written consent within such period to later action, deemed denied. (c. 58A, §6). Petitioner has 60 days from date of notice of commissioner's decision in which to claim appeal to appellate tax board. (c. 62C, §39). No abatement will be granted unless tax return has been filed. (c. 62C, §38). In general, interest accruing before Jan. 1, 1993 on refund of taxes abated at 18%; thereafter, interest accrues at federal short-term rate under I.R.C. §6621(b) plus 2 percentage points, computed as simple interest. (c. 62C, §40). Abatements for certain exempt persons and property may increase annually not exceeding Consumer Price Index cost of living increase. (c. 59, §5[cl.1, 17, 17C, 17C1/2, 17D]).

Low Income Families.

Tax relief provisions for low income families contained in c. 62, §§1-5, 5A, 6, 8, 10, 17.

Nonresidents.

Amount of Part A taxable income, Part B taxable income and Part C taxable income of any nonresident derived with respect to items of gross income from sources within commonwealth taxed according to provisions summarized above. However, only those deductions which are attributable to items included in Massachusetts gross income will be allowed. Items of gross income from sources within commonwealth are items of gross income "derived from or effectively connected" with any trade or business, including employment in commonwealth, participation in any lottery or wagering in commonwealth or ownership of any real or tangible personal property in commonwealth. (c. 62, §5A). Nonresident who is shareholder of S corporation (as defined under I.R.C. §1361, and subject to tax under c. 63 shall be subject to tax on his distributive share of income. (c. 62, §17A[b]).

Miscellaneous.

For special provisions as to corporate trusts, see c. 62, §8. For special provisions as to installment sales, see c. 62, §63. For special provisions as to income from partnerships, see c. 62, §17 and c. 62C, §7. For special provisions as to pooled income funds, charitable remainder annuity trusts, and charitable remainder unitrusts, see c. 62 §11A and §11B. For special provisions as to common trust funds, see c. 62, §17(e).

For taxation of income of corporations, see category 2 Business Organizations, topic 2.03 Corporations, subhead Taxation.

For excise tax on insurance premiums, see category 16 Insurance, topic 16.01 Insurance Companies, subhead Excise Taxes.

Trust Income.

For special provisions relating to income from trust estates, see c. 62, §§9-16.

If grantor or another person is treated as owner of any part of trust assets under I.R.C. 671-8, income, deductions and credits against tax which are attributable to such part are not taken into account in calculating taxable income of trust but are taken into account in calculating taxable income of grantor or such other person under c. 62. (c. 62, §10[e]). Trustee must file information return and disclose person(s) so treated and amounts of income, deductions and credits allocable to such person(s). (c. 62, §10[f]). Trustees having control of income payments to such person(s) not resident in state must deduct and withhold income tax at applicable rate. (c. 62, §10; c. 62C, §31A).

Withholding of Tax.

Wages Subject to Withholding.

Employers are required to deduct income tax from all wages subject to tax. (c. 62B). Wages defined as in I.R.C. 3401(a) plus periodic payments and nonperiodic distributions as defined in I.R.C. 3405(a)(b) which are subject to federal withholding. (c. 62B, §1). Definitions in Federal Internal Revenue Code are adopted for employer (I.R.C. 3401[d]), and employee (IRC, 3401[c]), except that full-time students engaged in seasonal or temporary employment, whose estimated annual income does not exceed $2,000, are not subject to tax withholding (c. 62B, §1). Wages not subject to withholding must be reported by employer annually to commissioner. (c. 62C, §8).

Employer, including any responsible officer or employee, who fails properly to withhold and pay to commissioner amounts required to be withheld and so paid is personally liable for amounts not withheld and paid. (c. 62B, §5).

Employer who fails upon notice to withhold income tax, or pay over to commissioner amounts withheld, on income of employees subjected to fine of not less than $100 nor more than $5,000 and/or imprisonment of up to one year. (c. 62B, §7). Individual who decreases withholding by making statement on withholding certificate without reasonable basis subject to penalty of $500 in addition to any criminal penalties. (c. 62B, §11A).

Withholding Tables.

Taxes are withheld in accordance with tables prepared by commissioner. (c. 62B, §2). See Mass. Dept. of Revenue Circular M, Income Tax Withholding Tables effective Jan. 1, 2008, at http://www.mass.gov/Ador/docs/dor/Forms/Wage_Rpt/PDFs/circ_m08.pdf .

Withholding Deduction and Exemption Certificates.

Every employee required to furnish employer signed withholding deduction certificate showing number of dependency deductions claimed. (c. 62B, §4).

Time for Filing Returns and Payment of Tax.

Employers are required to file returns and pay taxes withheld in manner prescribed in regulations prepared by commissioner. Such regulations must generally conform to regulations promulgated under sections of I.R.C. applicable to withholding of federal income taxes. Employer must furnish statement as to tax withheld (similar to federal W-2 form), to each employee by Jan. 31 of succeeding year, or within 30 days after final payment of wages on termination of employment before close of year. (c. 62B, §5). Individual return (Form 1, 1-NR, or ABC) due by Apr. 15 (with six-month automatic extension period), with payment of tax. (c. 62A, §6[a]; 830 CMR 62C.19.1[5]). In general, interest accruing before Jan. 1, 1993 on late payment at 18% per annum, plus penalty of ½% per month up to 25%, with additional penalty for failure to file return equal to 1% of tax per month up to 25% with additional penalty for failure to show amount of tax required to be shown on return equal to ½% per month up to 25% of tax not shown, if such tax not paid within 30 days following notice of tax due. Beginning Jan. 1, 1993, interest on late payments accrues at federal short-term rate under I.R.C. §6621(b) plus 4%, compounded daily; interest on late payment penalties accrues from 31st day following notice of tax due; interest on late filing penalties accrues on due date of return. (c. 62C, §§32, 33). Commissioner must abate or waive any portion of any penalty or addition to tax attributable to erroneous written advice furnished to taxpayer by dept. of revenue provided that it was reasonably relied on by taxpayer and penalty or addition to tax did not result from inadequate or inaccurate information provided by taxpayer. (c. 62C, §36B).

Declarations of Estimated Tax.

Requirements for Filing.

Declarations of estimated tax are required from taxpayer who expects to receive taxable income, other than wages subject to withholding, for which estimated tax over $400. (c. 62B, §13). For declarations by corporations, see category 2 Business Organizations, topic 2.03 Corporations, subhead Taxation—Declaration of Estimated Tax. In general, interest accruing before Jan. 1, 1993 on underpayment of tax at 18% per annum; thereafter, interest accrues at federal short-term rate under I.R.C. 6621(b) plus 4%, compounded daily. (c. 62C, §32). Required annual payment of estimated taxes is lesser of 80% (662/3% for farmer or fisherman) of tax for year or 100% preceding full year's tax. (c. 62B, §14).

Time for Filing of Estimates.

Estimated tax, less estimated amount of tax to be withheld, must be paid in four equal installments on Apr. 15, June 15, Sept. 15 and Jan. 15. (c. 62B, §14). Taxpayer whose estimated gross income from farming or fishing is at least two-thirds his total gross income may file return and pay tax on or before Mar. 1 of following taxable year and avoid addition to tax for underpayment. (c. 62B, §14).

22.12 INHERITANCE TAX:

Inheritance tax dealt with in c. 65.

Massachusetts has adopted Uniform Interstate Arbitration of Death Taxes Act and Uniform Interstate Compromise of Death Taxes Act. (c. 65B, §§1-7).

Caveat.

By 1975, c. 684, §97, c. 65 suspended for estates of decedents dying on or after Jan. 1, 1976, and remains in force and effect only for estates of decedents dying prior thereto except for certain future interests in property of estates of such decedents dying so prior. See topic 22.07 Estate Tax for tax on estates of decedents dying on or after Jan. 1, 1976.

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22.16 PROPERTY TAXES:

Taxes upon real estate and tangible personalty are assessed and collected by cities and towns in state independently. Assessment based on fair cash valuation (c. 59, §38) by board of assessors, elected or appointed locally (c. 41, §§1, 4A). County taxes are apportioned by county commissioners among cities and towns in several counties, respectively, and share of each city and town included by it in assessment of city or town taxes. (c. 35, §31).

Taxable Property.

All real and personal property situated in Massachusetts and all personal property of Massachusetts inhabitants wherever situated is taxable unless expressly exempt. (c. 59, §2).

Exemptions.

Property exempt from taxation includes property owned by U.S. or Massachusetts (c. 59, §5, cls. 1 & 2), unless excluded by, e.g., c. 59, §2B; personal property owned by, and real property owned and occupied by, certain charitable organizations (c. 59, §5, cl. 3); certain property of horticultural and agricultural societies, veteran, fraternal or retirement associations, annuity, pension or endowment associations and religious organizations (c. 59, §5, cls. 4-11); certain agricultural and horticultural land taxed under c. 61A (c. 59, §5, cl. 49); certain real property owned by economic development corporation organized as nonprofit corporation under c. 180 (c. 59, §5, cl. 46); certain corporate personal property (taxed under corporate excise tax) (c. 59, §5, cl. 16); certain limited liability company property (c. 59, §5, cl. 16A); certain mobile homes (c. 59, §5, cl. 36); certain personal property of mechanics, farmers and fishermen (c. 59, §5, cl. 20); motor vehicles subject to excise tax thereon (c. 59, §5, cl. 35); water and air pollution control facilities (excluding hazardous waste facilities used principally for treatment of waste produced by others) (c. 59, §5, cl. 44); solar or wind powered devices for supplying energy (exemption limited to period of 20 years from installation) (c. 59, §5, cl. 45); 10% of value of certain commercial property occupied by certain small businesses (c. 59, §5I); and certain alterations or improvements to residential real estate provided alterations are necessary to provide housing to person at least 60 years of age (c. 59, §5, cl. 50). Partial exemptions for real estate are available to certain needy surviving spouses and minor children, active military status, veterans and their surviving spouses and parents, surviving spouses and minor children of policemen and firemen killed in line of duty; real property owned and occupied by blind persons or persons over 70 with limited income or estate, and who meet residency requirements. (c. 59, §5, cls. 17-18, 22-22E, 42, 43, 37, 37A, 41, 41B, 41C). Real property tax on residence owned and occupied by certain persons over 65 may be deferred under certain conditions until death under agreement with assessors with interest charged at 8% on deferred amounts. (c. 59, §5, cl. 41A).

Assessment.

Real estate assessed to owner of record title on Jan. 1, or, if authorized by commissioner, to person in possession on Jan. 1. Commissioner may also authorize assessment of any present interest to owner of such interest on Jan. 1. Also, whenever commissioner deems it proper he may authorize in writing assessment of taxes upon real property to persons unknown. In cluster development or planned unit development, assessment on common land may be allocated to assessment on each individual lot. (c. 59, §11). Commissioner may also authorize in writing assessment, not later than June 20 of tax year, or 90 days after date on which tax bills are mailed, whichever later, of any real or personal property which has been unintentionally omitted from annual assessment. (c. 59, §75). For taxation of mortgaged real estate, see category 20

Mortgages, topic 20.04 Mortgages of Real Property. Agricultural lands may be assessed at worth for agricultural purposes only but any property so assessed shall be subject to lien for special conveyance tax imposed on certain sales and changes of use. (c. 61A). Qualifying recreational land will be assessed at no more than 25% of fair cash value upon application by owner to local board of assessors. (c. 61B, §2). Special conveyance tax assessed for sale within ten years of initial recreational classification (c. 61B, §7) or if land ceases to qualify as recreational land within ten years (c. 61B, §8). Real estate subject to permanent conservation restriction must be assessed as separate parcel. (c. 59, §11). Municipality which accepts c. 59, §57C may give notice of preliminary tax by July 1 of each year, tax to be paid in two installments on Aug. 1 and Nov. 1. (c. 59, §57C). Municipality may only give notice after July 1 upon approval by commissioner of revenue, tax to be paid in two installments; 30 days after mailing of notice and Nov. 1. (c. 59, §57C).

Owners of certain real property improved in assessed value over 50% by new construction pay pro rated tax from occupancy permit date to end of fiscal year. (c. 59, §2D).

Amendment to Constitution permits property to be classified according to use and taxed at different percentages. Home rule system authorizes each municipality to establish, within specified limits, its own classification system. (c. 40, §56). Classes are residential, commercial, industrial and open space. (c. 59, §§2A, 38). With multiple use property, percentage value must be allocated to each classification. (c. 59, §2A[b]). Residential property used by taxpayer as principal residence may be given special exemption not exceeding 20% of average of assessed values of such property. (c. 59, §5C). Classification cannot start until 100% valuation has been completed and certified by state. (c. 59, §2A[c]). Municipalities so certified must use new method. (c. 59, §2A[b]).

Real property owned by government but used for other than public purposes shall be assessed and taxed to user, lessee or occupant. (c. 59, §2B).

Grantee of land sold by federal or state government or instrumentality pays pro rata amount in lieu of real estate taxes that would have been due if real estate owned by grantee on Jan. 1 of year of sale and, if sale between Jan. 1 and June 30, Jan. 1 of preceding year. (c. 59, §2C).

Generally, tangible personal property (certain ships and vessels excepted) assessed to owner in place where it is situated on Jan. 1. Certain personal property assessed at place where owner resides on Jan. 1. (c. 59, §18). Personal property mortgaged or pledged is assessed to owner or mortgagee or pledgee in actual physical possession on Jan. 1. (c. 59, §19). Before executor or administrator appointed, personal property of deceased assessed to “estate” and after appointment executor or administrator liable therefor. (c. 59, §18).

Local Tax Levy Limitation.

Total local taxes assessed may not exceed 2½% of full and fair cash valuation of property in municipality in any fiscal year or, in municipality in which total local taxes assessed do not exceed this limit, 102½% of maximum limit in prior year plus (a) amount equal to prior year tax rate times assessed valuation of property taxed for first time plus (b) any override approved by majority vote of voters. (c. 59, §21C). Corresponding limit of 2½% in increase by commonwealth, any county, district or other governmental entity, except regional school, water and sewerage districts, legally authorized to assess costs, charges or fees upon municipalities in costs, charges or fees assessed over total assessed in prior year. (c. 59, §20A). Local authority may add water and sewage debt charges to residential property tax assessments, regardless of property tax cap provisions. (c. 59, §21C[n]).

Returns.

All persons are called upon to make return of property held by them subject to taxation on Jan. 1. Return must be filed with assessors before date fixed by them, and in case of property held for literary, temperance, benevolent, charitable, educational, or scientific purposes, before Mar. 1, unless extended. (c. 59, §29). With certain qualifications, filing of such list is made condition precedent to abatement of tax on personal property. Abatement of tax on real estate may be obtained even if list has not been filed provided sufficient description of real estate included in application for abatement. (c. 59, §§29, 61). In event of failure to file return, assessors ascertain as nearly as possible particulars of real and personal estate, and estimate value according to their best information and belief. (c. 59, §36).

Review of Assessment (Abatement).

As to filing of return being condition precedent to securing abatement, see subhead Returns, supra.

For abatement purposes, person acquiring title to realty after Jan. 1 treated as person upon whom tax has been assessed. (c. 59, §59).

Abatement of assessment of property for more than its fair cash value or for improper classification may be obtained by application to assessors on or before last day of payment of first installment of actual bill. (c. 59, §59). Applications not acted upon for three months are, in absence of applicant's written consent within such period to later action, deemed denied. (c. 59, §64). Appeal from decision of assessors to county commissioners or to Appellate Tax Board may be taken by formal or informal procedure within three months after receiving notice of decision or within three months after presumed denial as aforesaid if: (1) Tax on personal property and at least one half of tax has been paid, or (2) tax on real property, at least one-half of tax has been paid (without accrual of interest), and taxpayer petitions Board on inability to pay remaining tax. (c. 59, §§64, 65B). While appeal pending, assessors can increase or reduce assessment. (c. 58A, §7). Taxes abated are refunded with interest at 8%, computed from time of payment or due date, whichever later. (c. 59, §69). In certain circumstances Board may extend time for filing appeal. (c. 59, §65C). From any decision of Board there may be appeal on questions of law to Appeals Court, MRAP will govern such appeal. (c. 58A, §13).

Abatement of up to $200 available to qualifying senior citizens for increase in residential property tax attributable to water and sewage charges. (c. 59, §5, cl. 52).

Payment.

Tax bills are payable July 1. (c. 59, §57). Betterment assessments, water rates, annual sewer use charges, and one-half of real estate and personal property taxes bear interest at 14% computed from Oct. 1 if unpaid by Nov. 1. Remaining half of such real estate and personal property tax bears interest at 14% computed from Apr. 1 if unpaid by May 1. (c. 59, §57). City or town may assess additional 14% interest on unpaid real estate or personal property taxes not over $50. (c. 59, §§57A, 57B). City or town may allow 3% property tax discount for early tax payment. (c. 59, §58).

Collection.

Taxes may be collected, if payment not made in 14 days after demand and after issuance of warrant to collect and warrant to distrain or commit, by distress or by seizure and sale without unnecessary delay of goods, certain necessary articles, however, being exempt (c. 60, §§24-28), or by arrest and imprisonment (c. 60, §§29-34); person so imprisoned may request examination by court having authority to examine debtors under supplementary proceedings relative to his ability to pay; if found unable to pay such tax he may be discharged (c. 60, §31). Failure to receive demand does not invalidate any tax or collection proceedings therefor. (c. 60, §16). Owner located outside commonwealth must appoint agent. (c. 59, §57D). Remedies for property taking by city or town for tax payment failure set forth in c. 59, §57D. In town or city adopting c.

59, §57D provisions, owner of record must sign affidavit of address in preliminary real estate and personal property tax notice. (c. 59, §57D). Demand for payment must be made upon mortgagee if he gives written notice to collector that he holds mortgage on land. (c. 60, §38). Collector of taxes may also bring suit for collection in his own name. (c. 60, §35). In addition to tax due, collector may require payment of specified costs of collection. (c. 60, §15). Actual notice not required for tax foreclosure. (432 Mass. 571, 736 N.E.2d 837).

Lien.

Property owner may avoid lien on property for betterment assessment by paying assessment upon receipt of notice indicating assessment amount. (c. 80, §12). Taxes assessed on real estate are lien thereon from Jan. 1 in year of assessment. Lien ceases after three years and six months from end of fiscal year which taxes were assessed. (c. 60, §37). If sale or taking cannot be legally made while lien in force, it may be extended. (c. 60, §37). City or town adopting property owner information requirements in c. 59, §57D may use remedies in §57D for taking property for failure to pay taxes. (c. 59, §57D).

Tax Levy and Sale.

Taxes on real estate with all incidental costs and expenses may be levied, if not paid within 14 days after demand made either on owner or person occupying estate, by sale of smallest undivided part of real estate which will suffice to discharge taxes and charges, or of whole, if necessary (c. 60, §43), or by taking of whole real estate by city or town, in which case instrument of taking must be recorded within 60 days (c. 60, §§53-55). After city or town has taken or purchased real estate for payment of taxes, and even though it has assigned its tax title, lien of city or town, for subsequently assessed taxes continues and on redemption or foreclosure of redemption, such taxes must be paid as part of terms of redemption. (c. 60, §61). Before making such sale or taking, collector must give notice by publication and posting in two or more convenient places 14 days before sale or taking, giving substantially accurate description of property, amount of tax, and names of all owners known to collector. (c. 60, §§40-42, 53). Property taken in accordance with these provisions may be held for collection of rents and income from property, such income to be applied to delinquent tax account. (c. 60, §53). Property so taken may be sold to highest bidder at public auction, provided sum paid not less than that necessary for redemption. (c. 60, §52). Collector upon sale executes deed to purchaser, which must be recorded within 60 days, and if so recorded is prima facie evidence of all facts essential to its validity. (c. 60, §45). Sale may be adjourned. If after one or more adjournments no suitable bid made, land may be purchased by collector for city or town. (c. 60, §48). Municipality may, under certain circumstances, assign, transfer, or sell municipality's right to receive payments owed by taxpayer through public sale or public auction. (c. 60, §2C).

Redemption.

Any person having interest in land taken or sold for taxes, or his heirs or assigns, may redeem it at any time prior to filing of petition for foreclosure, if land has been taken or purchased by town and has not been assigned, by paying or tendering to treasurer amount of tax title account and interest at 16% per annum plus lawful charges; or by paying or tendering to treasurer installments not less, in each case except last, than 25% of tax with all charges and interest, to be applied toward redemption, until tax title account paid or tendered in full, but each payment or tender must include all intervening costs, charges, fees and interest. Treasurer on accepting any payment may once extend, not exceeding one year, time during which foreclosure proceedings may not be instituted. Redemption may also be effected by paying or tendering to purchaser, other than town, or to town's assignee, or to their respective representatives or assigns, at any time prior to filing of foreclosure petition, if purchaser other than town, original sum, intervening taxes, costs, interest, or, if purchaser assignee of tax title from town, amount stated in instrument of assignment with interest at 6½% from date of assignment, and in each case not more than $3 legal fees and recording fee for tax deed or evidence of taking; such payment (with $1 additional) may be made to treasurer. (c. 60, §62). Purchaser acquires no right of possession until right of redemption foreclosed. (c. 60, §45). Within specified time after sale or taking of land for taxes whoever then holds title may bring petition for foreclosure of all rights of redemption but any person claiming interest may appear in proceedings and in discretion of court be permitted to redeem by payment of amount above recited together with costs of proceeding and such counsel fee as court deems reasonable. (c. 60, §§65-70). Land Court has exclusive jurisdiction of all such petitions for foreclosure subject to review of questions of law by Supreme Judicial Court. (c. 60, §§64-73). Land Court also has jurisdiction in equity as to redemption in all cases of taking or sale of land for nonpayment of taxes, if relief sought before foreclosure proceedings have been begun. (c. 60, §§76-76A).

Right of redemption of land of low value may be foreclosed by sale without court proceeding. (c. 60, §79).

Real estate conveyance tax in amount of $2 levied on all conveyances of real estate effective June 30, 1997, when consideration of interest or property conveyed, exclusive of value of any lien or encumbrance, remaining thereon at time of sale, exceeds $100 and does not exceed $500, and $2 for each additional $500 or part thereof. Effective from July 1, 1992 through Jan. 4, 1993, rate was $1.14. Effective until June 30, 1992, rate was $2. No tax imposed on mortgages or conveyances to which U.S. or commonwealth is party. Tax imposed on seller. (c. 64D). Rates reflect 14% surtax. (1969, c. 546, §23).

22.17 SALES AND USE TAXES:

Sales Tax.

See, generally, c. 64H. Tax imposed upon retailers at rate of 6.25% of gross receipts from Massachusetts sales of tangible personal property (including meals) and telecommunications services. (c. 64H, §2). Tax on retail sale of motor vehicle paid by purchaser to registrar of motor vehicles. (c. 64H, §3, am'd 1991, c. 4). Vendors entitled to reimbursement from purchaser. (c. 64H, §3).

Exemptions (c. 64H, §6) include: (1) Sales which commonwealth prohibited from taxing under federal constitution or laws; (2) interstate sales where vendor obligated to deliver to purchaser outside commonwealth; (3) casual or isolated sales (but for casual or isolated sales of motor vehicles or trailers or any such sale of boat or airplane see subhead Use Tax, infra); (4) sales to U.S., Massachusetts, or their political subdivisions and agencies; (5) sales for use in their exempt activities to charities, etc., which are exempt under I.R.C. 501(c)(3) and which have received sales tax exemption certificate from commissioner; (6) sales of gasoline, certain special fuels and liquor (all of which are subject to other excise taxes); (7) food for human consumption (except restaurant meals), school, hospital, etc. meals; (8) utility services used for residences; (9) residential heating and aircraft fuels (but see next paragraph); railroad fuels; (10) clothing up to sale price of $175; (11) prescription medicines, prosthetic devices, insulin and insulin syringes, kidney dialysis machines, life sustaining resuscitators, incubators, heart pacemakers, hospital bed for home use; (12) newspapers, magazines; (13) books required for instructional purposes in educational institutions, books for religious worship, publications by charities; (14) motion picture films for commercial exhibition; (15) certain funeral items; (16) vessels or barges of at least 50 tons capacity manufactured in Massachusetts or vessels used in commercial fishing; (17) agricultural items; (18) containers; (19) ingredients of and machinery used to manufacture tangible personal property for sale or for use in agriculture, commercial fishing and certain other commercial activities including production of animals for health research and testing; (20) truck-mounted concrete mixers; (21) vending machine sales under $1; (22) U.S. flag; (23) fire and ambulance equipment sold to volunteer nonprofit fire and ambulance companies; (24) solar, wind-powered or heat pump equipment used in Mass. principal residence; (25) molds, etc. used exclusively in manufacture of cast metal products for sale; (26) printed material printed to special order in Massachusetts and delivered to interstate carrier, mailing house or post office for delivery or mailing to purchaser outside Massachusetts; (27) sales of specified materials by typographers, compositors and color separators for use in preparing printed matter or folding boxes to be sold; (28) rental charges for refuse containers placed on customer's premises by waste service firms; (29) sales of scientific equipment or apparatus as defined in I.R.C. 170(e)(4) by manufacturer free of charge to nonprofit educational or other specified institutions in Massachusetts; (30) sales of building materials and supplies for use in certain public works or charitable structures; (31) sales of motor vehicles to handicapped persons; (32) sales of certain medical supplies necessitated by colostomy or ileostomy; (33) sales of buses to certain common carriers; (34) meals furnished by hospitals, nursing homes, boarding homes for aged, churches or synagogues, persons transporting passengers for hire, certain organizations for elderly or handicapped, certain schools or related programs; (35) sales of tangible personal property purchased with federal food stamps, if not otherwise exempt under c. 64H; (36) certain sales of rare coins and gold or silver bullion or coins; (37) vessels used for scheduled commuter passenger service; (38) sales of gas, steam, electricity or heating fuel for use by certain small businesses; (39) sales of commercial gun safes and trigger locks; (40) sales of machinery or equipment used as part of continuous production flow; (41) sales of tangible personal property purchased by consultant contractor or subcontractor of any governmental body or agency for use in providing qualified services in public project; (42) sales of repair or replacement parts exclusively for use in aircraft; (43) sales of aircraft; (44) sales of tangible personal property to qualifying motion picture production company or accredited film school student; and (45) sales of tangible personal property purchased for certified life sciences company as authorized by life sciences tax incentive program under c. 23I, §5. (c. 64H, §6). Trade-in allowance given by dealer in case of motor vehicle, trailer, boat, snowmobile, recreation vehicle, or aircraft excluded in computing tax. (c. 64H, §§26, 27A; c. 64I, §27). Person who purchases property to use in manner which exempts it from tax under c. 64H may give exempt use certificate to vendor. Similarly, person who purchases for resale may give resale certificate to vendor. These certificates relieve vendor from liability to collect tax; otherwise all of vendor's sales are presumed to be taxable. (c. 64H, §8).

Purchasers of aircraft fuel subject to excise tax of greater of 5% of average price or 5¢ per gallon (collected by vendor who pays to commissioner) on all fuel sold or used in any city or town accepting c. 64J, effective first day of calendar quarter following 30 days after acceptance or first day of such later calendar quarter as city or town may designate. (c. 64J, §§1, 4).

Vendors required to register each place of business in Massachusetts. (c. 62C, §67; c. 64H, §7). Vendors must file returns and pay tax by 20th day of each month for preceding month. Returns may be for such other period as commissioner may determine. (c. 62C, §16[h]). Representing that tax will be absorbed by vendor prohibited. (c. 64H, §23). Any nonresident who engages in business in commonwealth as condition precedent to and by engaging in business in commonwealth, deemed to appoint State Secretary his agent for service of process under c. 64H. Such service shall be sufficient service upon person, provided that notice of service and copy of process sent by registered mail to person's last known address. (c. 64H, §32).

Promoters who rent space for four or more flea markets or other retail shows per year required to file notice at least ten days before show and file report with commissioner 20 days after end of calendar month in which show was held and to require each exhibitor to be registered under §67 as vendor. (c. 62C, §§1, 8A, 34, 67A).

For abatement, see c. 62C §§37, 40.

Sales Tax on Services.

Telecommunications services are subject to 5% tax on gross receipts if call originates from, received in or charged to address in Massachusetts. (cc. 64H, 64I). Exemption for residential main telephone service under $30 per month. (c. c. 64H, § 6([i], 830 CMR 64H.1.6[5]). Convention Center Fund requires surcharges for parking, certain sightseeing activities, and car rental in Boston. (1997, c. 152, §§8, 9). No other services are currently subject to sales tax. (c.

64H, §§1, 2, am'd 1991, c. 4).

Use Tax.

See generally c. 64I. Tax of 6.25% of sales price imposed upon storage, use or other consumption in Massachusetts of tangible personal property. (c. 64I, §2). Excluded are sales upon which sales tax imposed, sales which are exempt from sales tax (except that tax applies to motor vehicle or trailer unless purchaser is vendor's spouse, parent, brother, sister, or child), and sales on which purchaser has paid tax to another state, provided that if tax in other state at lower rate than in Massachusetts, tax must be paid to extent of difference in rates in the two states. (c. 64I, §7). Provisions for filing returns and paying tax are parallel to those under sales tax. For abatement, see c. 62C, §§37, 40.

22.18 STAMP AND SEAL TAXES:

Stamp Tax.

See topic 22.16 Property Taxes, subhead Real Estate Conveyance Tax.

23 TRANSPORTATION

23.01 MOTOR VEHICLES:

General Supervision.

Exercised by Registry of Motor Vehicles, 630 Washington Street, Boston, MA 02114. (http://www.state.ma.us/rmv/).

Vehicle License.

Vehicle registration required annually, including trailer. (c. 90, §§1, 2, 6, 7, 9, 33). Registry of motor vehicles issues vehicle registrations with staggered expiration dates but registration expires immediately upon transfer of ownership of vehicle. (c. 90, §2). Transferor of motor vehicle must remove all visible evidence of registration from motor vehicle. (c. 90, §2B). One number plate required on rear of vehicle and, if two plates are issued, one in front. (c. 90, §6). Special provisions for registration of antique motor vehicles, certain farm motor vehicles and for registration of motor vehicles owned by minors. (c. 90, §§6A, 2A, 5). Registration of heavy vehicle may be refused absent proof of payment of federal heavy vehicle tax. (c. 90, §1A).

Every applicant for registration of motor vehicle is required to appoint registrar of motor vehicles his attorney upon whom may be served any process growing out of any accident or collision in which he or his agent may be involved while operating motor vehicle within commonwealth during period of registration. (c. 90, §3D). Registration of motor vehicles and display of number plates not required for 30 days for vehicles having registrations and displaying plates issued by armed forces of U.S. in foreign countries. (c. 90, §9B). Former prisoners of war, members of Legion of Valor, or Purple Heart medal recipients may have distinctive license plates. (c. 90, §2). Special license plates honoring veterans are assessed an annual $25.00 fee, in addition to the registration fee. (c. 90, §2).

Licensing of operators of commercial motor vehicles regulated by Uniform Operation of Motor Vehicles Act adopted as c. 90F.

Registration of motor vehicles, including fleet vehicles, authorized on apportionment or allocation basis under International Registration Plan. (c. 90, §2).

Commencing with 1993 model year vehicles, motor vehicles not meeting motor emission standards may not be registered. (c. 90, §2; c. 111, §142K).

Registrar may withhold title, registration, license or plate if any fee not duly paid. (c. 90, §33).

Upon final determination of child support delinquency from dept. of revenue, registrar must suspend or prohibit issuance or renewal of license. (c. 90, §22).

Disabled Persons.

Certain special privileges are accorded to disabled and handicapped persons and to disabled veterans. (c. 90, §2).

Operator's License.

Required. Obtainable from registrar by any person 18 years of age or over who passes examination. Licenses have staggered expiration dates from one to five years. (c. 90, §§8, 10). License requirements listed at http://www.mass.gov/rmv/license/index.htm.

Licenses issued by registrar are subject to regulations establishing classifications of motor vehicles. (c. 90, §8).

Junior operator's license may be obtained by person between 16 1/2 and 18 if he has successfully completed approved driver education and training course, held valid learner's permit for no less than six months without permit suspension, maintained driving record free of surchargeable incidents, and has not been convicted of violating alcohol or drug-related laws. (c. 90, §8). Holders of junior operator's license may only operate motor vehicle under certain conditions. (c. 90, §8).

Learner's permits may be obtained by person 16 years or older. Holders of learner's permits may only operate motor vehicle under certain conditions. (c. 90, §8B).

Special license required to operate school bus. (c. 90, §§8A, 8A1/2).

Member of armed forces on active duty may operate motor vehicle if licensed in state where he is domiciled or, if returning from duty outside U.S., for maximum of 45 days after his return with license issued by armed forces in foreign country. (c. 90, §10). Persons against whom default or arrest warrant is outstanding may not obtain license. (c. 90, §22[h]).

Titles.

Massachusetts is certificate of title state. (c. 90D). Every owner of vehicle for which certificate of title has been issued must, if transferring ownership, execute assignment including actual odometer reading and warranty of title to transferee and cause certificate and warranty to be mailed or delivered to transferee or registrar. (c. 90D, §15[a]).

Sales.

Title to vehicle transferred by seller executing and delivering assignment and warranty of title to purchaser in space provided on certificate of title. Promptly thereafter, purchaser must file application for new certificate with registrar. (c. 90D, §15[b]).

Retail installment sales of motor vehicles are regulated by c. 255B. Retail installment contract must be in writing and contain certain terms and specified language. (c. 255B, §9).

Massachusetts has adopted “Lemon Law” relating to sales or lease of motor vehicles.

(c. 90, §7N1/2). Law applies to motor vehicles not used for habitation or business and sold after Jan. 1, 1984. (c. 90, §7N1/2[1]). Manufacturer, its agent or authorized dealer of motor vehicle must effect repairs which are necessary to conform motor vehicle to any applicable express or implied warranty within reasonable number of attempts. (c. 90, §7N1/2[3]). Term of protection under law runs from day of delivery for period of one year or for 15,000 miles whichever shorter and extends to any original buyer or subsequent transferee of motor vehicle who takes title during duration of any express or implied warranty. (c. 90, §7N1/2[1]). Manufacturer must accept return of motor vehicle with nonconformity and, at consumer's option, refund full contract price or replace vehicle with one acceptable to consumer if nonconformity not cured after three or more attempts or 22 business days of use have been lost due to repair. (c. 90, §7N1/2[4]).

Revocation and Suspension.

Registrar may, after notice and hearing, revoke or suspend license or registration when he has reason to believe that holder incompetent to operate motor vehicle or driving improperly. (c. 90, §22[b]). He may revoke license if person convicted of violation or there is adjudication that person is delinquent child. (c. 266, §139). He may revoke or suspend license or registration for 30 days without hearing when he has reason to believe that holder will constitute immediate threat to public safety. (c. 90, §22[a]). Registrar may suspend license: for up to seven days for permitting littering from vehicle (c. 90, §22G); for failing to appear in court in response to summons for automobile law violation after 30 days written notice by registrar of intent to revoke (c. 90C, §3[6][a]); for failing to satisfy judgment in motor vehicle case (c. 90, §22A); or of habitual traffic offender (c. 90, §22F). License may also be suspended or revoked for various criminal violations. (c. 90, §24 and c. 266, §28). Registrar may revoke operator's license, registration, title, plate, or other item issued by registrar when operator fails to duly pay fine or penalty imposed by magistrate or court. (c. 90C, §3A[6][b]). Motor vehicle violation convictions in other states or countries given same effect for purposes of suspension or revocation as if violation occurred in commonwealth. Revocation or suspension of license in another state or country bar to license or grounds for revocation of license. (c. 90, §22[c]). License may be suspended or revoked for convictions in states party to interstate compact. (c. 90, §30B). License shall be suspended for 90 days if prosecution makes prima facie showing at arraignment that operator was operating motor vehicle while percentage, by weight, of alcohol in his blood was ten one-hundredths or more. (c. 90, §24N).

Registrar shall suspend license for 120 days without hearing of operator who refuses to submit to blood test by physician or nurse when officer has reason to believe that person has been operating vehicle under influence of intoxicating liquors provided that operator afforded opportunity to have his own physician perform another test. (c. 90, §24[1][e-f]). However, refusal to take test not admissible in evidence in criminal or civil proceedings. Anyone who operates motor vehicle while under influence of intoxicating liquor, marijuana, narcotic drugs, depressants or stimulants may be fined and/or imprisoned. (c. 90, §24[a]). Anyone who, while under influence of intoxicating liquor, marijuana, narcotic drugs, depressants, or other stimulant substances, recklessly or negligently operates motor vehicle so that lives or safety of public might be endangered, and by such operation causes serious bodily injury shall be punished by imprisonment of not less than six months. (c. 90, §24L).

Liens.

Lien in favor of public garage owners upon automobiles placed with them with owner's consent. (c. 255, §25). Creation of security interest in vehicles governed by statute. (c. 90D, §§21-25). When payment in satisfaction of security interest in cash, check, inter-bank transfer of funds, or electronic transfer of funds, payment considered cleared upon receipt by lienholder. (c. 90D, §24).

Identification Marks.

Criminal penalties for altering or defacing identification marks. (c. 266, §139). Buyer may require seller to remove material advertising seller placed on vehicle without buyer's prior written consent. (c. 90, §7R1/2).

Operation prohibited by person whose license has been suspended or revoked or not licensed to operate or is intoxicated. (c. 90, §§8, 10, 24). All persons operating motor vehicle are required to have on their person or in vehicle operator's license and registration certificate for vehicle. Dealers, manufacturers, repairmen, owner-repairmen, farmers and dealers in boats and boat trailers need not carry registrations. Rental cars must provide photostats of registration certificate accompanying rental agreement. (c. 90, §11). No unregistered or improperly equipped motor vehicle may be operated. (c. 90, §9).

Size and Weight Limits.

Regulated by c. 90, §§7P, 19, 19A, 19C-19E, 19I, 19J.

Lights and Equipment Required.

Regulated by c. 90, §§7-7E, 7G-7K, 7M, 7O, 7Q, 9A, 9D. Special requirements for school buses. (c. 90 §§7B-7D1/2).

Mandatory Seat Belt Law.

Effective July 10, 2008, children under 8 years old must be secured by child passenger restraint, unless child passenger measures more than 57 inches in height. . Unless required to be secured by child passenger restraint, passenger under age 13 must wear safety belt. Exceptions to safety restraint provisions for school bus passengers, passengers in motor vehicles made before July, 1, 1966, and passengers physically unable to use conventional or specially designed child passenger restraint. (c. 90, §7D). All persons over 12 years must wear seatbelt, with some exceptions. (c. 90, §13A).

Inspection.

All motor vehicles must undergo safety and emissions test annually in accordance with rules promulgated by registrar. (c. 90, §7A). Semi-annual inspection for school buses. (c. 90, §7A). Failure to comply carries fine of $50. (c. 90, §20).

Snowmobiles and certain other recreation vehicles are regulated by statute. (c. 90B, §§20, 21-29). Certain safety features are required and noise levels are regulated. (c. 90B, §24). Such vehicles may not be operated on or immediately adjacent to public way. (c. 90B, §25). Protective headgear must be worn. (c. 90B, §26). Trespassing on private land, whether posted or not, by means of snowmobiles or other powered vehicles, punished by fine of not more than $250. (c. 266, §121A).

Motorized bicycles, mopeds, or scooters are permitted and are not defined as motor vehicles, but operator must possess valid license or learner's permit. (c. 90, §§1, 1B-1D and 8B). Motorized scooters may not be operated before sunrise or after sunset. (c. 90, §1).

Accidents.

Operator of motor vehicle involved in accident must submit written report on form approved by registrar within five days of accident, if accident caused injuries to persons or property damage in excess of $1,000. Report must be submitted to registrar with copy to police department having jurisdiction over place where accident occurred. (c. 90, §26). Operator of vehicle involved in accident resulting in any injury to any persons or property must stop and make known his name and residence and registration number of vehicle. (c. 90, §24[2][a]).

Liability of Owner.

Ownership prima facie evidence of responsibility for acts of operator. Nonresponsibility must be pleaded as affirmative defense. (c. 231, §85A).

Guests.

Liability of owner or operator for injury to guest in car not restricted by statute, and passenger in exercise of due care may recover upon proof that operator was guilty of ordinary negligence resulting in injuries or damages. (c. 231, §85L).

No-fault Insurance.

Massachusetts has adopted "No-fault" insurance as to personal injury. (c. 90, §34A). Motorists must carry these coverages as well as $20,000/$40,000 bodily injury liability coverage and $5,000 property damage liability coverage as prerequisite to registration of vehicle in Massachusetts. (c. 90, §§34A, 34M, 34O).

"No-fault" personal injury coverage applies only to accidents occurring within commonwealth, and exemption from tort liability similarly restricted. (c. 90, §34A). Coverage for property damage not geographically restricted. (See c. 90, §34O.)

Person injured by insured vehicle may recover most of his out-of-pocket losses due to bodily injury from insurer of vehicle up to a limit of at least $8,000, but not more than $2,000 if injured person covered by other insurance without necessity of establishing negligence on part of anyone, and, in most cases, despite fact that such person might have nonintentionally caused or contributed to his injury. Insurers may exclude person from personal injury protection if such person's conduct contributed to his injury in any of following ways: (1) Operating under alcohol or drugs; (2) committing felony or seeking to avoid arrest; (3) operating vehicle with intent to injure himself or others. Authorized operators and occupants, other than passenger for hire in case of taxicab, but including guests, and pedestrians are covered as well as named insured unless such person is entitled to benefits under Workers' Compensation Act, c. 152. Up to limit, insured may collect all reasonable and necessary medical expenses incurred within two years of accident, 75% of his average weekly wage or salary lost less any amount due under wage continuation program, and if such insured unemployed at time of injury, he is entitled to recovery for loss by reason of diminution of earning capacity without regard to 75% limitation. (c. 90, §34A). Policyholder may elect deduction applicable to himself alone or to himself and members of his household in amount of $100, $250, $500, $1,000, $2,000, $4,000 or $8,000. (c. 90, §34M).

Recovery for pain and suffering allowed only if reasonable and necessary medical expenses exceed $2,000, or if injury causes death, loss of body member, sight or hearing, or disfigurement, or consists of a fracture. (c. 231, §6D).

Every owner, registrant, operator or occupant of a vehicle covered by a "No-fault" policy, and any other legally responsible person, is exempt from tort liability for bodily injury or the like caused in such capacity within commonwealth, to extent that injured party is, or would be but for deduction, entitled to personal injury protection benefits under "No-fault" policy. (c. 90, §34M). No exemption from tort liability for or as against out-of-state driver not covered by "No-fault" type policy, and he may sue or be sued. Massachusetts insured injured by such out-of-state driver covered by his "No-fault" policy unless he recovers damages from out-of-state party. (c. 90, §34M). In any case, an action may be brought to recover: (1) Balance of medical expenses, 75% of lost earnings, and/or diminution in earning capacity, over the $2,000 personal injury protection limit; (2) future medical expenses to be incurred more than two years after accident; (3) for wrongful death; (4) for 25% of lost wages not covered by "No-fault" policy; and (5) for pain and suffering subject to conditions previously discussed. (c. 90, §34A).

Each Massachusetts insured required to carry property damage liability insurance for damages to property of others. "No-fault" tort liability exemption for property damage has been abolished. Insured may select for insured's own vehicle full collision coverage without regard to fault (with basic $500 deductible) or limited collision coverage, which provides benefits in four specific classes of accidents, so long as insured's comparative negligence does not exceed 50%. (c. 90, §34O). Such insurance must provide that benefits will not be payable if loss of or damage to insured vehicle occurs when operator of vehicle is household member other than insured not listed as operator on policy and if listed, would be classified as inexperienced driver or would subject policy to increased premiums under safe driver insurance plan established under c. 175, §113B. (c. 90, §34O). Strict provisions for auto repair shops must be met before insurance companies must pay them for accident repairs. (c. 90, §34O). Payment may be made directly to insured under plan approved by commissioner; if made to repair shop, must not exceed approved appraisal. (c. 90, §34O). Auto repair shops must be registered. (c. 100A, §2).

No company issuing a “No-fault” policy may require a medical examination of applicant. (c. 175, §113N).

Compulsory Uninsured Motorists Coverage.

Massachusetts insured must obtain coverage against injury or death from accident involving uninsured motorist. (c. 175, §113L). Provision which excludes coverage for automobiles owned and regularly used but not listed is invalid. (400 Mass. 259, 508 N.E.2d 845). Exclusion of coverage for accidents and losses occurring outside USA and Canada valid. (402 Mass. 810, 525 N.E.2d 651).

Transfer of Compulsory Insurance.

Under certain circumstances, insurance coverage on transferred motor vehicle continued in force and covers newly acquired motor vehicle for two registry business days. (c. 175, §113A[6]).

Safe Driver Insurance Plan.

In classifying risks for insurance premium fixing purposes, commissioner to establish safe driver insurance plan providing premium adjustments based on at-fault accidents, convictions of moving violations, filing of four or more comprehensive claims totaling $2,000 or more under certain circumstances, previous driving experience in other states, assignments to driver alcohol education program with credits for safe drivers and premium reductions for incorporation of certain safety features. (c. 175, §113B). In addition, commissioner shall determine whether insurance companies utilize adequate programs to control costs and expenses, in accordance with standards determined or approved by commissioner. (c. 175, §113B).

Death or Insolvency of Owner.

Compulsory insurance, unless cancelled, continues in effect until policy's expiration date following death or insolvency of owner and covers legal representative of estate. (c. 175, §113A[6]).

Insurance.

See generally c. 175, §§113A-P and c. 175E, and see subheads No-fault Insurance, Safe Driver Insurance Plan, Compulsory Uninsured Motorists Coverage, and Death or Insolvency of Owner, supra.

Foreign Vehicles (c. 90, §3), owner of which has fully complied with registration laws of state or country of registration, may be operated in Massachusetts for not exceeding aggregate of 30 days in one year without registration, provided state or country of registration grants similar privileges to residents of Massachusetts. It may be operated beyond 30-day aggregate limit without registration provided owner maintains liability insurance, if state or country of registration affords similar privileges to residents of Massachusetts. Failure to have, on person or in vehicle, policy or certificate thereof, creates presumption in damage cases and is prima facie evidence in other cases that no insurance was in force. Registrar may suspend or revoke rights of nonresident for cause. (c. 90, §3).

Nonresident students enrolled in Massachusetts school or college who operate vehicle in Massachusetts registered in another state for more than 30 days in aggregate between Sept. 1 of any year and Aug. 31 of following year are required to file report form with police department of city or town where school or college located and decal must be displayed on window of vehicle. (c. 90, §3).

Nonresident Operators.

Foreign owner or employee may operate his own foreign vehicle in state without operator's license if he has complied with home state licensing requirements and has evidence of such compliance on his person. Nonresident may operate any private vehicle registered in commonwealth and any commercial vehicle engaged in interstate commerce, without local operator's license, if he has complied with home state requirements and has evidence of compliance on his person, and if home state grants substantially similar privileges to residents of Massachusetts and requires substantially as high standards of fitness. (c. 90, §10).

Action Against Nonresidents.

Operation by nonresident of motor vehicle or trailer upon public way, or private way if entrance thereto was made from way, or in any place to which public has right of access in commonwealth deemed equivalent to appointment of registrar as attorney upon whom may be served process in any action growing out of any accident involving nonresident while operating motor vehicle on such way or in such place. (c. 90, §3A). Service on registrar with required fee sufficient service provided copy of process sent to defendant by registered mail or served by officer qualified to serve like process in state where defendant found. (c. 90, §3A).

Rental.

All motor vehicle rental contracts shall contain language regarding liability for parking violation payments. (c. 90, §20E). All rental offices must contain material informing renter that rental company insurance coverage may duplicate coverage already provided by renter's personal insurance policies. (c. 90, §32E1/2).

Motor Vehicle Carriers.

Regulated by Dept. of Public Utilities, One South Station, Boston, Massachusetts 02110; tel.: main, 617-305-3500; transportation, 617-305-3559; website: http://www.mass.gov/dpu.

Carriage of Passengers.

(c. 159A). Vehicles must be licensed in every city or town in which they operate (c. 159A, §1); common carriers must deposit with state treasurer bond to indemnify passengers for negligent or unlawful injury to person or property (c. 159A, §6); must have certificate from dept. of public utilities declaring after public hearing that public convenience and necessity require such operation (c. 159A, §7); must also have permit from dept. of public utilities issued only after inspection of vehicles and conformity of same to regulations as to construction, equipment, etc. (c. 159A, §8).

Carriage of Property.

(c. 159B). Common carrier, defined to include any person who directly or by his agent or under a lease or any other arrangement, or by arrangement with any other common carrier, transports property for general public for compensation on ways (c. 159B, §2), must have certificate from dept. of public utilities issued on finding, after public hearing, that applicant fit, willing and able properly to perform service proposed and to conform to all lawful requirements, and that proposed service is or will be required by present or future public convenience and necessity (c. 159B, §3). Fee for application determined annually by secretary of administration, currently $100.. (c. 159B, §3). For application and fees see ttp://www.mass.gov/Eoca/docs/dte/transportation/propasap.pdf and http://www.mass.gov/Eoca/docs/dte/transportation/ucr/ucrform.pdf. Such carrier must also file with department schedules of rates, and rates in effect from time to time must be strictly adhered to. Department may, after hearing, allow, disallow or alter any filed or existing rates and may prescribe just and reasonable rates. (c. 159B, §6).

Contract carrier, defined to include any person not within the definition of common carrier who, under special and individual contracts, directly or by agent or under a lease or any other arrangement, transports property for compensation on ways, must have permit from department issued on finding, after hearing, that applicant fit, willing and able properly to perform the service proposed, and that the proposed operation will be consistent with public interest, safety and welfare of the public on the ways, preservation and maintenance of the ways and proper regulation of common carriers using same. Fee for application determined annually by secretary of administration, currently $100. For application and fees see ttp://www.mass.gov/Eoca/docs/dte/transportation/propasap.pdf and http://www.mass.gov/Eoca/docs/dte/transportation/ucr/ucrform.pdf. Such carrier must also file with department copies of all transportation contracts and department may require it to file schedules of minimum charges and may, after hearing, prescribe such charges as may be necessary or desirable in public interest. No such carrier may make less than established minimum charge. (c. 159B, §4).

Special provisions relating to agricultural carriers and private carriers which are defined in c. 159B, §§2, 3, 6.

Diesel Powered Motor Vehicles.

For special licensing provisions see category 22 Taxation, topic 22.08 Gasoline and Special Fuels Taxes, subhead Gasoline, Diesel and Other Combustible Motor Fuels Taxes.

Motor Vehicle Taxes.

Automobiles and trailers are excepted from the general property tax and, with certain exceptions, subjected to a special excise tax based upon fixed percentage of list price, decreasing to 10% in fifth and succeeding years following designated year of manufacture. Rate of tax is uniform throughout state and $25 per $1,000 of valuation is maximum rate. Excise tax does not apply to motor vehicle owned and registered by former prisoner of war who is defined as any regularly appointed, enrolled, enlisted or inducted member of military forces of U.S. who was captured, separated and incarcerated by U.S. enemy during armed conflict. (c. 60A, §1). Registrar of Motor Vehicles may refuse to renew operator's license and registration of anyone failing to pay motor vehicle excise tax. (c. 60A, §2A). Interest on late payment at 12% annual rate must be paid. (c. 60A, §2).

Gasoline Tax.

See category 22 Taxation, topic 22.08 Gasoline and Special Fuels Taxes, subhead Gasoline, Diesel and Other Combustible Motor Fuels Taxes.

Dealers.

Business practices between dealers and public and franchises and selling agreements between motor vehicle manufacturers, distributors and dealers are regulated. (c. 93B). Persons defrauded by tampering with odometers can recover in tort three times actual damages sustained or $1,500 whichever is greater, plus costs and reasonable attorney fees. Criminal penalties are fines between $500 and $1,000 or imprisonment. (c. 266, §§141-141A). Advertised price of motor vehicles must include freight, handling, and other charges, exclusive of taxes. (c. 93B, §5A). See also subhead Sales, supra, and category Business Regulation and Commerce, topics Consumer Protection, Sales.

Rental.

Lessee must show lessor that he is duly licensed. (c. 90, §32C). Persons in business of leasing and renting motor vehicles must be licensed as sellers of second hand motor vehicles. (c. 140, §57). Right to operate subject to suspension for certain violations. (c. 90, §3).

Actions Against Parking Facilities.

Disclaimers and exclusions of liability on parking receipts do not constitute defense in tort or contract actions. (c. 231, §85M).

Bicycles.

Bicycle traffic patterns and required safety equipment are now regulated in much the same manner as those of motor vehicles. (c. 85, §11B). Accommodations for bicycle and pedestrian traffic must be considered in planning public ways. (c. 90E, §2A).

Motor boats and recreational vehicles regulated under c. 90B. Motor boats, other than those owned by governments or agencies, ship's lifeboats and marine documented vessels, required to be numbered and to display numbers (c. 90B, §§2, 3) with penalties for falsifying, removal or defacing (c. 90B, §§4A, 4B, 14). Certain lights, signaling, safety equipment required. (c. 90B, §§5, 5A). Certain dangerous operations prohibited (c. 90B, §8) with penalties of fine up to $500 ($1,000 if death ensues) or imprisonment up to six months (one year if death ensues) or both (c. 90B, §14). Operation of jet skis limited. (c. 90B, §9A). Director of division of law enforcement of dept. of fisheries, wildlife and environmental law enforcement empowered to establish speed limits, revoke numbers and otherwise enforce chapter with other state and local police and enforcement officers also empowered to enforce chapter. (c. 90B, §§11, 12). Recreational vehicles also required to be registered (c. 90B, §22), to have certain lights and equipment and to meet certain noise levels (c. 90B, §24). Dangerous operations prohibited (c. 90B, §26) with small fine ($20-$100) for violations (c. 90B, §34). Enforcement as for motorboats. (c. 90B, §32). Person refusing to produce identification or certificate of vessel upon request by officer will be fined $100. (c. 90B, §38).

Motor Vehicle Theft.

In addition to fine up to $15,000 or imprisonment up to 15 years in state prison or up to 2½ years in jail or both (c. 266, §28), thief of, committer of malicious damage to or receiver of stolen motor vehicle also subject to restitution of damages or financial loss (c. 276, §92A).

Abandoned Motor Vehicles.

Whoever abandons motor vehicle upon any way, or upon property other than his own without owner's consent, subject to fine of $250 for first abandonment and $500 for each subsequent abandonment, loss of driver's license up to three months, denial of right to register motor vehicle for one year. (c. 90, §22B). Special statute (1988, c. 212) applies to abandonments in Boston.

Towing.

Police or fire department personnel may tow illegally parked vehicles without being subject to penalties for improper removal of vehicles. (c. 89, §7A).

23.02 RAILROADS:

See category 3 Business Regulation and Commerce, topic 3.08 Carriers.

24 Forms

Commercial Code Forms

(Click here to view)

1
MICHIGAN LAW DIGEST

—Scope —

Revised for 2010 edition by

MILLER CANFIELD, PADDOCK and STONE, P.L.C. of Detroit, Ann Arbor, Grand Rapids, Kalamazoo, Lansing, Saginaw, and Troy, Michigan; New York, New York; Chicago, Illinois; Cincinnati, Ohio; Naples, Florida; Windsor and Toronto, Ontario, Canada; Shanghai, China; and Gdynia, Warsaw, and Wroclaw, Poland.

(Unless otherwise noted, section references are to Michigan Compiled Laws Annotated (abbreviated MCLA, herein); recent Public Acts are cited by year and act number. Numbering system for MCLA is same in Michigan Compiled Laws (official compilation) and Michigan Compiled Laws Service. Michigan Statutes Annotated service has been discontinued and should no longer be cited. “Rule” indicates Michigan Court Rules of 1985, effective Mar. 1, 1985 as am’d. Parallel citations to the North Western Reporter begin with 41 Mich.)

Note.—Legislature not finally adjourned at time of going to press. Public Acts of 2009 through Act No. 78, approved July 28, 2009, included. Regular sessions of legislature are convened on second Wed. in Jan. of each year at 12 noon. (Const. Art. IV, § 13).

1 INTRODUCTION

1.01 GOVERNMENT AND LEGAL SYSTEM:

The State of Michigan is a constituent state of the United States of America. For further discussion of the U.S. federal system, see Introduction to the Federal Government of the United States at the beginning of this volume. A great many laws are promulgated by the federal government of the United States and are not reflected in the topics below. See the Introduction to this volume for references to the federal law topics covered.

Like all but one of the United States, Michigan has a common law legal system, with roots in English common law. For information on the courts and legislature of Michigan, see Category 6 Courts and Legislature.

1.02 [RESERVED]

1.03 HOLIDAYS:

Holidays are: Jan. 1, 3d Mon. in Jan., Feb. 12, 3d Mon. in Feb., last Mon. of May, July 4, 1st Mon. in Sept., 2d Mon. in Oct., Nov. 11, 4th Thur. in Nov. and Dec. 25. Saturdays are half-holidays from noon to midnight. (MCLA § 435.101).

Holiday Falling on Sunday.

Next day is holiday. (MCLA § 435.102).

Holiday Falling on Saturday.

No statutory provision.

Legality of Transactions on Saturday, Sunday, or Holiday.

Provision prohibiting specified transactions on Sun. (MCLA § 435.51-.59) repealed effective Nov. 15, 1968 by 1968, No. 58. Provision that conveyance of real property or any contract, except contract of marriage, made on Sun. absolutely void (MCLA § 435.11-.13) repealed, effective June 23, 1974 by 1974, No. 171.

1.04 OFFICE HOURS AND TIME ZONE:

Michigan is in the Eastern (GMT -05:00) time zone. Office hours are generally from 9 a.m. to 5 p.m.

2 BUSINESS ORGANIZATIONS

2.01 AGENCY:

Common law rules govern. See category 21 Property, topic 21.15 Powers of Attorney.

2.02 ASSOCIATIONS:

Persons may associate together without incorporation for any purpose not prohibited by law or public policy. Unless engaged in business for profit, such associations are not partnerships. (74 Mich. 269, 41 N.W. 921). Most benevolent, religious, patriotic, agricultural, recreational, social and similar associations now incorporate under Michigan Nonprofit Corporation Act. (MCLA §§ 450.2101-.3192). Special acts cover certain kinds of associations. (MCLA §§ 450.691-.696 [libraries and lyceums]; 453.1-.9 [agricultural associations]; 454.1-.11 [mechanics' associations]; 455.1-.24 [summer resort and park associations]; 456.1-.36 [cemetery corporations and associations]; 457.1-.7 [St. George's societies]; 450.178-.186 [ecclesiastical corporations]).

No statutory provision for business trusts.

Formation.

No formalities are prescribed by statute except if association is incorporated. Articles of agreement adopted by members enforced as contract. (74 Mich. 269, 41 N.W. 921).

Rights and Powers.

Associations not incorporated or covered by statutes referred to in introductory paragraph generally do not appear to have rights or powers as entities apart from members. See, e.g., 213 Mich. 642, 182 N.W. 22; 295 Mich. 547, 295 N.W. 259.

Liabilities.

Members who act or authorize acts on behalf of association are liable individually. (111 Mich. 108, 69 N.W. 147; 125 Mich. 89, 83 N.W. 1012).

Actions.

Class action under Rule 3.501 is presumably appropriate procedure where suit by or against all members is impracticable.

Dissolution is by agreement. Upon dissolution property of association belongs to members jointly, subject to conditions of their articles of agreement. (103 Mich. 307, 61 N.W. 501).

Professional Associations.

See topic 2.03 Corporations, subhead Professional Corporations.

2.03 CORPORATIONS:

Business Corporation Act (MCLA § 450.1101 et seq.) adopted, effective Jan. 1, 1973, governing all corporations except insurance, surety, savings and loan associations, fraternal benefit societies and banking corporations. Unless otherwise provided in, or inconsistent with, Act under which such corporation is or has been formed, this Act applies to deposit and security companies, summer resort associations, brine pipeline companies, telegraph companies, telephone companies, safety and collateral deposit companies, canal, river and harbor improvement companies, cemetery, burial and cremation associations, railroad, bridge, and tunnel companies, agricultural and horticultural fair societies, and professional service corporations formed under professional service corporation act. Such entities may not, however, be incorporated under this Act. (MCLA § 450.1123).

General Supervision.

Department of Energy, Labor & Economic Growth (Department) Lansing, has general supervision of corporations. (MCLA § 450.1105[1]).

Purposes.

Corporation may be formed for any lawful purpose. (MCLA § 450.1251). Use of so-called “all purposes clause” permitted. (MCLA § 450.1202[b]).

Name.

Corporate name of domestic corporation must contain word “corporation”, “company”, “incorporated”, or “limited” or shall contain one of following abbreviations: “corp.”, “co.”, “inc.”, or “ltd.”, with or without periods. (MCLA § 450.1211). Corporate name shall not suggest purpose other than as permitted in articles of incorporation and shall be distinguished from name of any other domestic or qualified foreign corporation, nonprofit corporation, limited liability company, or limited partnership or any name reserved, registered or assumed by any of same. (MCLA § 450.1212). Compliance with this section does not create substantive rights in use of name. (MCLA § 450.1212[3]). Corporation (other than registered bank holding company) may not use name which implies that it is banking corporation, insurance or surety company or trust company and shall not use words “bank,” “industrial bank,” “deposit,” “surety,” “security,” “trust” or “trust company.” (MCLA § 450.1213). “Co-operative” or “Co-op” may only be used by cooperative corporations. (MCLA § 450.99). Corporation may file assumed name certificate and may do business under such assumed name. (MCLA § 450.1217). Corporation surviving merger may use name of any entity participating in merger by transferring assumed name in merger agreement if certificate on file before merger or providing for use of assumed name in merger agreement without transfer. (MCLA §§ 450.1217, .1707, .1712, .1724, .1736). See also category 17 Intellectual Property, topic 17.01 Trademarks and Tradenames, subhead Tradenames.

Corporate name may be reserved by filing application with administrator. Reservation expires at end of sixth full calendar month following month in which application filed. Reservation of name may be transferred by filing notice, executed by applicant and stating name and address of transferee. (MCLA § 450.1215). Fee is $10. (MCLA § 450.2060). No separate procedure for name clearance available.

Term of Corporate Existence.

Corporate term is perpetual unless limited period is fixed by articles. (MCLA §§ 450.1202[h],.1261). Corporation may extend or reduce term by amendment to articles. (MCLA § 450.1602). Corporation whose term has expired may renew corporate existence pursuant to statutory procedure. (MCLA § 450.1815).

Incorporators.

One or more persons may become incorporators of corporation by signing and filing articles of incorporation therefor. (MCLA § 450.1201). Such “person” may be individual, partnership, domestic or foreign corporation, or any other association, corporation, trust or legal entity. (MCLA § 450.1108[2]). There are no requirements as to citizenship or residence of incorporators.

Articles of Incorporation shall contain: (a) Name of corporation; (b) purposes for which corporation is formed; (c) aggregate number of shares which corporation has authority to issue; (d) if shares divided into classes or series, designation of such classes and series, number of shares in each class and series, and statement of relative rights, preferences and limitations of shares of each class and series; (e) if any class of shares is to be divided into series, statement of authority vested in board to divide such class of shares into series and to determine or change designation, number of shares, relative rights, preferences and limitations of series; (f) street address and mailing address, if different, of corporation’s initial registered office and name of corporation’s initial resident agent; (g) names and addresses of incorporators; and (h) duration of corporation if other than perpetual. (MCLA § 450.1202). Articles may contain statutory language regarding compromise, arrangement or reorganization. (MCLA § 450.1204). Articles may also contain any provision not inconsistent with Act or another state statute, including provision for management of business and conduct of affairs of corporation, or creating, defining, limiting, or regulating powers of corporation, its directors and shareholders, or class of shareholders (MCLA § 450.1209[1][a]) and provision eliminating or limiting director’s liability to corporation or its shareholders for monetary damages for any action or failure to take action, with limited exceptions. (MCLA § 450.1209[1][c]).

Filing of Articles.

Original of articles must be forwarded for filing to Michigan Department of Energy, Labor & Economic Growth, Bureau of Commercial Services—Corporation Division, either by hand at 2501 Woodlake Circle, Okemos, MI or by mail at P.O. Box 30054, Lansing, MI 48909 or by facsimile (after approval of application to use Michigan Electronic Filing System) at (517) 636-6437. (MCLA § 450.1131). Filing of articles conclusive evidence of compliance with Act. (MCLA § 450.1221). Attorney General has sole authority to challenge proper incorporation under this otherwise irrebuttable presumption. (481 Mich. 601, 751 N.W.2d 463).

Incorporation Tax or Fee.

Domestic profit corporation, cooperative association and domestic regulated investment company shall pay to Department organization and admission fee of $50 for first 60,000 authorized shares. For more than 60,000 and fewer than 1,000,001 authorized shares, fee is $100. For more than 1,000,000 and fewer than 5,000,001 authorized shares, fee is $300. For more than 5,000,000 and fewer than 10,000,001 authorized shares, fee is $500. For more than 10,000,000 authorized shares, fee is $500 plus additional $1,000 for each additional 10,000,000 authorized shares or portion thereof. Initial admission franchise fee of foreign profit corporation and foreign regulated investment company is $50 and authorized capital stock in amount of

60,000 shares shall be deemed initially attributable to state at time of admission. Number of authorized shares attributable to state is determined by multiplying total number of authorized shares by most recent apportionment percentage used in computation of tax required by single business tax act or business tax act. (MCLA §§ 208.1-145, 208.1101-1601). If business activity confined solely to state, all authorized shares are considered attributable to state. Foreign profit corporation filing amended application shall pay therewith additional fee for additional authorized shares attributable to state comparable to domestic corporations. (MCLA § 450.2062, .2021).

Nonprofit corporations pay franchise fee of $10. (MCLA § 450.3061).

Filing Fees.

Filing fees for various corporate documents established by statute. (MCLA §§ 450.1131, .2060).

License to Do Business.

Certificate of authority is issued to foreign corporation upon compliance with statute. Act does not authorize state to regulate organization or internal affairs of foreign corporation authorized to transact business in state. (MCLA §§ 450.2002, 450.2011, 450.2015-.2016, .2021).

Organization.

Before or after filing of articles, majority of incorporators, at meeting or by written instrument, shall select board and may adopt bylaws. On or after filing date of articles, any member of board may call first meeting of board upon not less than three days notice by mail to each director. Majority of directors constitutes quorum for first meeting of board. At first meeting, board may adopt bylaws, elect officers and transact such other business as may come before meeting. (MCLA § 450.1223).

Paid in Capital Requirements.

No minimum capital requirement established by statute.

Amendment of Articles.

Corporation may amend articles if amendment contains only such provisions as might lawfully be contained in original articles filed at time of amendment. Corporation may amend articles to become nonprofit corporation by adopting restated articles containing only provisions authorized by Nonprofit Corporation Act. (MCLA § 450.1601). Types of amendments, but without limitation, are listed by statute. (MCLA § 450.1602). Amendment of articles must be proposed by board and approved by majority vote of shareholders upon notice of meeting setting forth proposed amendment, except for certain specified amendments, which may be made by board action unless prohibited by articles. (MCLA §§ 450.1611[2], [3],.1301a,.1302[4]). Prior to first meeting of board, incorporators may amend articles. (MCLA §§ 450.1611[1], 450.1631[1]). Amendment becomes effective upon filing thereof with Department, together with fees and documents required by law. (MCLA § 450.1131).

Increase or Decrease of Authorized Capital Stock.

Corporation may amend articles to increase or decrease number of shares or shares of any class or series of any class in same manner as any other amendment to articles. (MCLA § 450.1602). For additional franchise fees payable on increase in authorized stock and on increase in proportion of foreign corporation’s authorized stock attributable to state, see subhead Incorporation Tax or Fee, supra.

Bylaws.

Initial bylaws of corporation shall be adopted by incorporators, shareholders or board. Shareholders or board may amend or repeal bylaws or adopt new bylaws unless power to do so is reserved exclusively to shareholders by articles or bylaws or they provide that bylaws or any particular bylaw shall not be altered or repealed by board. Bylaws may contain any provision for regulation and management of affairs of corporation not inconsistent with law or articles. (MCLA § 450.1231).

Stock.

May be divided into classes having such designations and such relative voting, dividend, liquidation and other rights, preferences and limitations as stated in articles and consistent with act. If articles so provide, class of shares may be divided into series, with such relative rights and preferences as prescribed by articles. (MCLA § 450.1301, .1302). When provided in articles, corporation may issue shares convertible, at option of holder or corporation or on happening of specified event, into shares of any class or series of any class or into bonds. (MCLA § 450.1303).

Stock Certificates.

Shareholders are entitled to certificates signed by chairperson of board, vice-chairman of board, president or vice-president which may be sealed with corporate seal or facsimile thereof, stating number, class, series, if any, name of person to whom issued, statement that corporation is formed under laws of this state. (MCLA §§ 450.1331-.1332). Signatures of officers may be facsimiles. Certificate representing shares issued by corporation authorized to issue shares of more than one class shall set forth required legend on face or back. (MCLA §§ 450.1331, .1332). Restrictions on transfer, article provision or shareholder agreement affecting management (MCLA §§ 450.1473, .1488) must be noted conspicuously on face or back of certificates, and certificates representing previously issued shares must be replaced with certificates in conformance with MCLA § 450.1488 if applicable (MCLA §§ 450.1472, .1488). Unless prohibited by articles or bylaws, board may authorize shares without certificates. If issuing uncertificated shares, corporation must send shareholders written information statement containing information that would be required to be noted on shares' face or back, if certificated, including, if applicable, information regarding authorization of shares of more than one class, transfer restrictions and shareholder agreements under MCLA § 450.1488. (MCLA § 450.1336).

Issuance of Stock.

Shares may be issued for consideration fixed by board unless articles reserve right to shareholders. (MCLA §§ 450.1314[1]-[2]). Consideration for issuance of shares may be paid in tangible or intangible property or benefit to corporation including cash, promissory notes, services performed, contracts for services to be performed, or other securities of corporation. (MCLA § 450.1314[2]). Judgment of board is conclusive insofar as nature and amount of consideration relates to whether shares are validly issued, fully paid and nonassessable. (MCLA § 450.1314[3]). Unless otherwise provided in articles or agreement between corporation and shareholders, corporation may issue unissued shares, including security convertible into or carrying right to subscribe for or acquire shares, without first offering them to existing shareholders. (MCLA § 450.1343).

Transfer of Stock.

Governed by Uniform Commercial Code. (MCLA §§ 440.8301-.8307). Articles, bylaws, or agreement between holders or holder and corporation may impose restriction on transfer of share certificate. (MCLA § 450.1472). Restriction ineffective against holder lacking actual knowledge of restriction unless restriction is noted conspicuously on share certificate or in information statement for non-certificated shares. (MCLA § 450.1472).

Record date for determining shareholders entitled to vote at meeting may be fixed in bylaws, or in absence of provision, board may fix record date, which may not be more than 60 nor less than ten days before date of meeting. (MCLA § 450.1412[1]). For purpose of determining shareholders entitled to express consent to or to dissent from proposal without meeting, bylaws may provide for fixing record date, which may not be more than 60 days before effectuation of proposed action, or in absence of provision board may fix record date, which may not be more than ten days after board resolution. (MCLA § 450.1412[2]). For purpose of determining shareholders entitled to receive payment of share dividend or distribution, or allotment of right, or for any other action, bylaws may provide for fixing, or in absence of provision, board may fix record date, which may not precede date on which resolution fixing record date adopted and may not be more than 60 days before payment, distribution, allotment, or other action. (MCLA § 450.1412[3]). No statutory provision for closing transfer books.

Uniform Simplification of Fiduciary Security Transfers Act adopted. (MCLA §§ 441.101-.112).

Uniform Commercial Code adopted. (MCLA § 440.1101-.11102). See category 3 Business Regulation and Commerce, topic 3.09 Commercial Code.

Stock Transfer Tax.

None.

Stockholders.

See subheads Stock Certificates, Issuance of Stock, supra and Stockholders' Meetings, Voting, Voting Trusts, Books and Records, Appraisal, infra, for voting rights, preemptive rights, rights to stockholders' list, rights to examine books and records, appraisal rights, and other rights of stockholders.

Stockholders Actions.

Shareholder may bring action in circuit court of county in which corporation's principal place of business or registered office is located, to establish that acts of directors or those in control of corporation are illegal, fraudulent or willfully unfair and oppressive to corporation or shareholder. If shareholder establishes grounds for relief, court may make order or grant relief it considers appropriate, including but not limited to relief specified in statute. Such action shall not be brought by shareholder whose shares are listed on national securities exchange or regularly traded in market maintained by one or more members of national or affiliated securities association. (MCLA § 450.1489). Shareholder may not commence or maintain derivative proceeding unless he was shareholder at time act or omission complained of occurred or became shareholder through transfer by operation of law from one who was shareholder at time; he fairly and adequately represents interests of corporation in enforcing right of corporation; and he continues to be shareholder until time of judgment, unless failure to continue to be shareholder is result of corporation action taken after derivative proceeding was commenced and former shareholder did not acquiesce to such action. (MCLA § 450.1492a). Shareholder may not commence derivative proceeding until written demand has been made upon corporation to take suitable action and 90 days have expired from date of demand, unless shareholder has earlier been notified that demand has been rejected or unless irreparable injury to corporation would result by waiting for 90-day period to expire. (MCLA § 450.1493a). Court shall dismiss derivative proceeding if, on motion by corporation, court finds that one of groups specified has made determination in good faith after conducting reasonable investigation that proceeding is not in best interests of corporation. Burden of proof is on corporation or plaintiff, depending on which of specified groups determined proceeding was not in best interests of corporation. (MCLA § 450.1495). See category 5 Civil Actions and Procedure, topic 5.08 Costs, for securities for expenses statute.

Stockholders' Liabilities.

Except as provided in articles, shareholder not personally liable for acts or debts of corporation except by reason of his own acts or conduct. (MCLA § 450.1317).

Stockholders' Meetings.

Meetings of shareholders may be held at place within or without state as provided in bylaws. In absence of such provision, meetings shall be held at registered office or such other place as determined by board. (MCLA § 450.1401). Unless otherwise restricted by articles or bylaws shareholder may participate by conference telephone or other means of remote communication if all participants are advised of equipment and names of all participants. Unless restricted by articles or bylaws, shareholder meetings may be conducted solely by means of remote communication. Subject to guidelines adopted by board, shareholders and proxy holders not physically present at shareholder meeting may participate by means of remote communication if corporation takes measures to verify each person meeting by remote communication is shareholder or proxy holder, to provide each shareholder and proxy holder reasonable opportunity to participate in meeting and vote, and record of votes or actions taken by remote communication is maintained by corporation. (MCLA § 450.1405). Unless greater or lesser quorum is provided in articles, bylaws adopted by shareholders or incorporators or Act, shares entitled to cast majority of votes at meeting constitute quorum at meeting. When holders of class or series are entitled to vote separately on item of business, same provision applies to determine presence of quorum of such class or series. (MCLA § 450.1415). Unless otherwise provided in Act, written notice of time, place and purpose of meeting of shareholders shall be given not less than ten nor more than 60 days before meeting, either personally, by mail, or electronic transmission to each shareholder of record entitled to vote at meeting. Unless corporation has securities registered under § 12 of Securities Exchange Act of 1934, 15 U.S.C. 78(l), notice of purpose shall include notice of shareholder proposals which are intended to be presented by shareholders who have given corporation notice of their intention to submit such proposals at meeting. Reasonable procedures for submission of proposals prior to meeting may be established in bylaws. (MCLA § 450.1404). Determination of shareholders entitled to notice of, and to vote at meeting shall be made in conformance with § 412(1). (MCLA § 450.1412[1]). Officer or agent having charge of stock transfer books shall make and certify complete list of shareholders entitled to vote at shareholders' meeting, and such list must be produced at time and place of meeting for inspection by any shareholder during meeting or posted on reasonably accessible electronic network if meeting is held solely by remote communication. (MCLA § 450.1413). Each meeting of shareholders shall be presided over by chair who will establish rules of conduct for meeting and for closing polls for shareholder voting. Rules and conduct of meeting must be fair to shareholders. (MCLA § 450.1406).

Stockholder Action Without Meeting.

Articles may provide that any action required or permitted by Act to be taken at annual or special meeting of shareholders may be taken without meeting, without prior notice and without vote, if consents in writing, setting forth actions so taken and bearing date of signature of each shareholder are signed by holders of outstanding stock having not less than minimum number of votes necessary to authorize or take such action at meeting at which all shares entitled to vote thereon were present and voted. Within 60 days after record date for determining shareholders entitled to consent or dissent to action, written consents dated not more than ten days before record date and signed by requisite number of shareholders must be delivered to corporation. Notice of taking of corporate action without meeting by less than unanimous written consent shall be given to shareholders who would have been entitled to notice if action had been taken at meeting. Any action required or permitted by Act to be taken at annual or special meeting of shareholders may be taken without meeting without prior notice and without vote, if all shareholders entitled to vote thereon consent thereto in writing including by means of electronic transmission. (MCLA § 450.1407).

Voting.

Unless articles provide otherwise, voting for directors is not cumulative. (MCLA § 450.1451). Shares held by fiduciary may be voted by him without transfer of shares into his name. (MCLA § 450.1445). Pledgee may not vote shares until they have been transferred into his name. (MCLA § 450.1444). Corporation may, in articles, confer voting rights upon bondholders. (MCLA § 450.1391). Proxy is valid for three years unless otherwise provided therein. (MCLA § 450.1421). Shareholder may grant proxy, without limitation, by executing writing or by transmitting or authorizing transmission of telegram, cablegram or other means of electronic transmission. (MCLA § 450.1421). Proxy is revocable unless entitled “irrevocable proxy”, stating it is irrevocable, and holder thereof falls within one of statutory classes. (MCLA § 450.1422, .1423).

Voting trusts for periods up to ten years are authorized. (MCLA § 450.1466).

Directors.

Business and affairs of corporation are managed by board, except as otherwise provided in Act or articles. (MCLA § 450.1501). Articles or shareholder agreements may eliminate or restrict discretion of board and otherwise govern exercise of corporate powers of management or relationship among shareholders, directors, and corporation. Such article or agreement is not grounds for imposing personal liability even if it results in failure to follow corporate formalities. Such article or agreement is only effective so long as security is not listed on national exchange or regularly traded in market maintained by one or more members of national or affiliated securities association. (MCLA § 450.1488). Director need not be shareholder unless articles or bylaws require. Articles or bylaws may prescribe qualifications for directors. (MCLA § 450.1501). Board must consist of one or more members, with number of directors to be fixed by bylaws, unless established in articles. (MCLA § 450.1505). Directors are elected annually, unless provision in articles or bylaws adopted by shareholders or incorporators permits classification of election of directors. (MCLA §§ 450.1505[2], 450.1506). Unless limited by articles, vacancy on board may be filled by shareholders or board, including board comprising less than quorum. (MCLA § 450.1515a). Unless otherwise provided by articles, vacancies in class of directors elected by particular class or series of shareholders may be filled by majority of such class of directors or holders of shares of such class. (MCLA § 450.1515a). Shareholders or board may designate one or more directors as independent director. Independent director may receive reasonable compensation in addition to compensation received by directors generally as determined by board or shareholders and reimbursements for expenses reasonably related to service as independent director. (MCLA § 450.1505). Directors may be removed, with or without cause, by vote of holders of majority of shares entitled to vote at election of directors, unless articles provide that directors may be removed only for cause or that higher vote required for removal without cause. (MCLA § 450.1511).

Directors’ meetings may be held in or outside state. Regular meeting may be held with or without notice as prescribed in bylaws. Special meeting shall be held upon notice as provided in bylaws. Attendance or participation of director at meeting constitutes waiver of notice thereof, unless upon arrival, director objects to meeting or transaction of business and does not vote in favor of any action taken at meeting. If not prohibited, may participate by conference telephone or other remote communication. (MCLA § 450.1521). Majority of members of board constitutes quorum unless articles or bylaws provide for larger or smaller number. Vote of majority of members present at meeting at which quorum is present constitutes action of board, unless vote of larger number is required by Act, articles or bylaws. (MCLA § 450.1523).

Directors’ Action Without Meeting.

Directors may act by unanimous consent in writing or by electronic transmission without meeting, unless prohibited by articles or bylaws. (MCLA § 450.1525).

Powers and Duties of Directors.

Powers of corporation are exercised by board unless otherwise provided in Act or articles. (MCLA § 450.1501). Board may designate one or more committees, which shall serve at pleasure of board, unless otherwise provided in articles or bylaws. Unless otherwise provided in resolution of board, articles, or bylaws, committees may create subcommittees. (MCLA §§ 450.1527, .1528). Unless otherwise provided in articles or bylaws, officers shall be elected or appointed by board. (MCLA § 450.1531). Officers may be removed by board with or without cause, unless officer is elected by shareholders, in which case such officer may be removed with or without cause only by vote of shareholders but board may suspend authority to act as officer for cause. (MCLA § 450.1535). Transaction in which director is determined to have interest shall not, because of interest, be enjoined, set aside, or give rise to award of damages or other sanctions, if such director establishes any of following: (a) Transaction was fair to corporation when entered into; (b) material facts of transaction and director's interest were disclosed or known to board, board committee or independent directors, and board, committee or independent directors authorized, approved or ratified transaction; (c) material facts of transaction and director's interest were disclosed or known to shareholders and they authorized, approved or ratified transaction. Transaction is authorized, approved or ratified if it received affirmative vote of majority of directors or committee members who had no interest in transaction though less than quorum or all independent directors who had no interest. Presence of, or vote cast by, director with interest does not affect validity of action taken. Transaction is authorized, approved or ratified by shareholders if it receives majority of votes cast by holders of shares who did not have interest in transaction and majority of such shares constitutes quorum for purpose of taking such action. Board may establish reasonable compensation of directors for services as directors without shareholder approval unless required by articles, bylaws or specific provisions of Act. (MCLA § 450.1545a). Corporation may lend money to, or guaranty obligation of, or otherwise assist officer or employee of corporation or its subsidiary, including officer or employee who is director, when in judgment of board, loan, guaranty or assistance may reasonably be expected to benefit corporation or is pursuant to plan authorizing loans, guarantees, or assistance, which plan will benefit corporation as reasonably determined by board. Loan, guaranty or assistance may be with or without interest, and may be unsecured, or secured in such manner as board approves. (MCLA § 450.1548). Corporation shall have power to indemnify person who is party or has threatened to be made party to any threatened, pending or completed litigation by reason of fact that he is or was director, officer, employee or agent of corporation, so long as statutory conditions are met. Provision in articles or bylaws, resolution of board or shareholders, or agreement making indemnification mandatory also makes advancement of expenses mandatory unless specifically otherwise stated. (MCLA §§ 450.1561, .1562, .1563, .1564a,.1564b,.1564c,.1565). Corporation shall have power to purchase and maintain insurance on behalf of any person who is or was director, officer, employee or agent of corporation. Such insurance may be purchased from insurer owned by corporation but only if articles contain provision eliminating or limiting liability of director and only if it insures director to extent it could indemnify director. (MCLA § 450.1567).

Liabilities of Directors.

Directors shall discharge duties of position in good faith and with care which ordinarily prudent person in like position would exercise under similar circumstances and in manner director reasonably believes to be in best interests of corporation. In discharging duties, director entitled, when acting in good faith, to rely on information, opinions, reports or statements, including financial statements and other financial data prepared or presented by: (a) Directors, officers or employees of corporation, or of business organization under joint or common control, whom director or officer reasonably believes to be reliable and competent in matters presented; (b) legal counsel, public accountants, engineers or others as to matters such director or officer reasonably believes are within such person's professional or expert competence; or (c) board committee of which such director or officer is not member if he or she reasonably believes committee merits confidence. Action against director for failure to perform duties imposed above shall be commenced within three years after cause of action accrues or within two years after time when cause of action is discovered or should reasonably have been discovered, whichever sooner occurs. (MCLA § 450.1541a). See subhead Books and Records, infra. Directors who vote for, or concur in, any of following corporate actions are jointly and severally liable to corporation for benefit of its creditors or shareholders to extent of legally recoverable injuries suffered by such persons as result of such action, but not to exceed difference between amount paid or distributed and amount that could lawfully have been paid or distributed: (a) Declaration of share dividend or other distribution to shareholders contrary to Act or contrary to articles; (b) distribution to shareholders during or after dissolution of corporation without paying or providing for debts, obligations and liabilities of corporation as required by Act; (c) making of loan to officer, director or employee of corporation or subsidiary contrary to Act. Director is not liable, however, if he has complied with § 541a of Act. (MCLA § 450.1551). Director against whom claim is successfully asserted under § 551 is entitled to contribution from other directors who voted for, or concurred in, action upon which claim is asserted. (MCLA § 450.1552). Director who is present at meeting at which corporate action referred to in § 551 is taken is presumed to have concurred in action unless his dissent is entered in minutes or unless he files written dissent with secretary of meeting before or promptly after adjournment. Director who is absent from such meeting is presumed to have concurred in action unless he files his dissent with secretary of corporation within reasonable time after he has knowledge of action. (MCLA § 450.1553). Any action against director or shareholder for recovery under § 551 shall be commenced within three years after cause of action accrues. Any action under § 552 shall be commenced within three years after payment by director to corporation. (MCLA § 450.1554). Articles may contain provision eliminating or limiting director’s liability for monetary damages for any action or failure to take action, with limited exceptions. (MCLA § 450.1209[1][c]).

Officers of Corporation.

Must consist of president, secretary, treasurer, and if desired, chairman of board, one or more vice-presidents, and such other officers as may be prescribed by bylaws or determined by board. Two or more offices may be held by same person, but officers shall not execute, acknowledge or verify instrument in more than one capacity if instrument is required by law, articles or bylaws to be executed, acknowledged or verified by two or more officers. Officer has such authority and shall perform such duties in management of corporation as may be provided in bylaws, or determined by resolution of board not inconsistent with bylaws. (MCLA § 450.1531). Officer elected or appointed by board may be removed by board with or without cause. Officer elected by shareholders may be removed, with or without cause, only by vote of shareholders but board may suspend his authority to act as officer for cause. (MCLA § 450.1535).

Liabilities of Officers.

Liabilities of officers are same as liabilities of directors, except that no limitation on availability of monetary damages against officer is authorized by statute. See subhead Liabilities of Directors, supra.

Indemnification of Directors and Officers.

See subhead Powers and Duties of Directors, supra.

Principal Office and Resident Agent.

Each domestic corporation and each foreign corporation authorized to transact business in state must have and continuously maintain in this state: (a) Registered office which may be same as place of business; and (b) resident agent, which may be individual resident in this state whose business office or residence is identical with registered office, domestic corporation or limited liability company, or foreign corporation or limited liability company authorized to transact business in state and having business office identical with such registered office. (MCLA § 450.1241).

General Powers of Corporations.

Corporation, subject to any limitation provided in Act, in any other statute of Michigan, or in its articles, shall have power in furtherance of its corporate purposes to do broad range of activities specified in Act. (MCLA § 450.1261). Act by corporation, otherwise lawful, is not invalid because corporation was without capacity or power to do act. However, lack of capacity or power may be asserted in any of following circumstances: (a) action by shareholder against corporation to enjoin action, (b) action by or in right of corporation to procure judgment in its favor against incumbent or former officer or director for loss or damage due to his unauthorized act, or (c) action or special proceeding by attorney general to dissolve corporation or enjoin it from transacting unauthorized business. (MCLA § 450.1271).

Distributions.

Unless distribution would be contrary to any restriction in articles, board may authorize corporation to make distributions to shareholders except if after giving effect to distribution, corporation would not be able to pay its debts as they become due in usual course of business, or corporation's total assets would be less than sum of its total liabilities plus, unless articles permit otherwise, amount needed, if corporation dissolved at time of distribution, to satisfy preferential rights upon dissolution. (MCLA § 450.1345). Share dividend may be issued pro rata without consideration unless articles provide otherwise, except shares of one class or series may not be issued as share dividend to holders of different class or series unless either articles so authorize, holders of class or series to be issued approve issuance by majority vote, or there are no outstanding shares of class or series to be issued. (MCLA § 450.1341a). Determination of shareholders' entitlement to dividend or distribution shall be made in accordance with MCLA § 450.1412(3).

Unclaimed Dividends.

See category 21 Property, topic 21.01 Absentees, subhead Escheat.

Sale or Transfer of Corporate Assets.

Sale, lease, exchange of all or substantially all corporate property and assets in usual and regular course of business as conducted by corporation, and mortgage or pledge of any or all corporate property and assets whether or not in usual and regular course of business, may be made upon such terms and conditions and for such consideration as authorized by board. Unless articles otherwise provide, approval of shareholders is not required. Corporation may, without further shareholder approval, sell, lease, exchange or otherwise dispose of all, or substantially all, of its property and assets following shareholder approval of dissolution if either of two conditions are satisfied. Corporation may, without shareholder approval, transfer any or all of its property and assets to any entity wholly owned by corporation, whether or not in usual and regular course of business. (MCLA § 450.1751). Subject to foregoing exceptions sale, lease, exchange of all or substantially all corporate property and assets, with or without goodwill, if not in usual and regular course of business as conducted by corporation may be made upon such terms and conditions and for such consideration in accordance with following. Board must recommend proposed transactions to shareholders unless because of specified circumstances it determines it should not and communicates basis therefore to shareholders. Proposal must be submitted for approval at meeting of shareholders. Notice of meeting must be given to all shareholders of record whether or not entitled to vote within time and in manner provided in Act for giving notice. Notice must contain summary of principal terms of proposed transaction and inform those shareholders who have right to dissent that they may do so and be paid fair value of their shares. At meeting, shareholders may authorize transaction and fix or authorize board to fix any term or condition thereof and consideration to be received by corporation. Authorization requires affirmative vote of majority of outstanding shares entitled to vote thereon, and if class or series is entitled to vote as class, affirmative vote of majority of outstanding shares of each such class or series. Notwithstanding authorization by shareholders, board may abandon transaction subject to rights of third parties under contracts, without further action or approval by shareholders. Sale, lease, exchange or other disposition of all, or substantially all, of property of entity whose majority of shares or beneficial interests are owned by second corporation shall also be treated as disposition by second corporation of its pro rata share of property and assets of entity for purposes of Act. Disposition of all or substantially all property does not occur if corporation retains significant continuing business activity which is conclusively presumed if business activity retained represented at least 25% of total assets at end of most recently completed fiscal year, and 25% of either income from continuing operations before taxes or revenues from continuing operations for that fiscal year, in each case of corporation and its subsidiaries on consolidated basis. Transaction that constitutes distribution to shareholders is governed by § 345 of Act rather than provisions governing disposition of assets. (MCLA § 450.1753).

Books and Records.

Corporation must keep books and records of account and minutes of proceedings of shareholders, board, and executive committee, if any, and such books and records may be kept outside of this state unless otherwise provided in bylaws. Corporation must keep at its registered office, or at office of its transfer agent in or outside state, records containing names and addresses of all shareholders, number, class and series of shares held by each and dates when each became holders of record. Any books, records, or minutes may be in written form or in any other form capable of being converted into written form within reasonable time. Corporation shall convert any record into written form without charge unless otherwise requested by person entitled to inspect record. (MCLA § 450.1485). Upon written request, corporation must mail to shareholder its balance sheet as at end of preceding fiscal year; its statement of income for such fiscal year; and, if prepared by corporation, its statement of source and application of funds for such fiscal year. Shareholder of record may examine, for any proper purpose, in person or by agent or attorney, during usual business hours, corporation’s stock ledger, list of shareholders and other books and records if shareholder gives corporation written demand describing with reasonable particularity purpose and records which shareholder desires to inspect and records are directly connected with purpose. If corporation does not permit inspection within five business days after receipt of demand which satisfies requirements, or imposes unreasonable conditions upon inspection, shareholder may apply to circuit court to compel inspection in accordance with provisions of Act. Director may examine corporation’s books and records for purpose reasonably related to position as director. Director may apply to circuit court to compel inspection. If court orders inspection of records demanded by either shareholder or director, court must order corporation to pay shareholder’s or director’s costs including reasonable attorney fees, incurred to obtain order unless corporation proves it failed to permit inspection in good faith based on reasonable basis. Right to inspect records includes right to copy and make extracts and if reasonable, right to require corporation to supply copies. (MCLA §§ 450.1485, .1487).

Reports.

Domestic corporations must make annual financial report and distribute such report to each shareholder within four months after end of fiscal year. Report must include information specified in section (MCLA § 450.1901) and may be distributed electronically provided report in written form is provided to shareholder on request. Each domestic and foreign corporation subject to Act must file report with chief officer of Department no later than May 15 of each year. Such report must be on approved form and must contain information specified in section. (MCLA § 450.1911). Report must be filed with $25 filing fee. Original of report shall be open to reasonable inspection by public promptly after filing. (MCLA § 450.2060). Penalties provided by statute for failure to file report or for filing report containing false statements. (MCLA §§ 450.1921, .1922, .1924, .1931, .1932). All foreign and domestic nonprofit corporations must file annual report with Department of Energy, Labor & Economic Growth on or before Oct. 1st and pay filing fee of $20. Such report must be on approved form and contain information specified in section. (MCLA §§ 450.2911, .3060).

Corporate Bonds or Mortgages.

See subhead General Powers of Corporations, supra. Articles may confer on bondholders rights to inspect corporate books and records and to vote for directors and on any other matters on which articles permit shareholders to vote. Articles may grant to board power to confer such voting or inspection rights under terms of any bonds. Signatures of officers upon a bond may be facsimiles. (MCLA § 450.1391).

Merger.

Two or more domestic corporations may merge into one corporation pursuant to approved plan. Board of each corporation shall adopt plan of merger setting forth information specified in § 701. (MCLA § 450.1701). Corporation may acquire all outstanding shares of one or more classes or series of another corporation pursuant to approved plan setting forth information specified in § 702 adopted by board of each corporation. (MCLA § 450.1702). Plan adopted by board of each constituent corporation must be submitted for approval at meeting of shareholders. Board must recommend plan unless because of specified circumstances it determines it should not and communicates basis for such determination to shareholders. Notice of meeting must be given to each shareholder of record, whether or not entitled to vote at meeting, within time and in manner specified for giving of notice of meetings of shareholders. Notice must include copy of or summary of plan and statement that copy is available upon request, statement informing those shareholders who have right to dissent of such right and that they have right to be paid fair value of their shares. At meeting, vote of shareholders must be taken on proposed plan, and plan shall be approved upon receiving affirmative vote of majority of outstanding shares entitled to vote thereon, and if class or series is entitled to vote thereon as class, affirmative vote of majority of outstanding shares of each such series or class. Class or series of shares is entitled to vote as class if plan contains provision which, if contained in proposed amendment to articles, would entitle class or series of shares to vote as class. Class or series is not entitled to vote as class if board determines on reasonable basis that class or series is to receive consideration that has fair value that is not less than fair value of class or series on date of adoption of plan. (MCLA § 450.1703a). Unless required by articles, vote of shareholders of corporation surviving merger is not necessary to authorize merger if both of following conditions are satisfied: (1) Plan does not amend articles of surviving corporation; and (2) each share of stock of surviving corporation outstanding immediately before merger becomes effective shall remain as identical share of surviving corporation and either of following are not satisfied: (1) Securities to be issued or delivered in acquisition are, or may be converted into, shares of surviving corporation or (2) common stock to be issued or delivered plus common stock initially issuable upon conversion or exchange of any other securities to be issued or delivered under plan will exceed 100% of number of common shares outstanding immediately prior to merger plus number of common shares, if any, initially issuable upon conversion or exchange of any other securities then outstanding. (MCLA §§ 450.1703a, 450.1754). Domestic corporation which has not commenced business, not issued shares, and not elected board may merge by unanimous consent of incorporators. (MCLA § 450.1706). After approval of plan, certificate of merger or share exchange must be executed and filed on behalf of each corporation. Certificate must set forth information specified in Act. Certificate shall become effective at time filed, unless subsequent effective time is set forth in document. (MCLA § 450.1707).

Domestic corporation owning at least 90% of outstanding shares of each class of another domestic corporation may merge such corporation into itself, or may merge itself, or itself and any such subsidiary into another subsidiary without approval of shareholders of any of corporations except approval by shareholders of subsidiary must be obtained if its articles require approval of merger by affirmative vote of holders of more than percentage of shares of any class or series of such corporation then owned by parent corporation; and approval of shareholders of parent must be obtained when its articles require shareholder approval of merger; or pursuant to MCLA § 450.1703a, when plan contains provision which would amend articles of parent corporation, or subsidiary is to be surviving corporation. Board of parent corporation must approve plan setting forth matters required by statute. Approval by board of subsidiary is not required. If parent owns less than 100% of outstanding shares of any constituent subsidiary, it must mail promptly after filing of certificate of merger summary of plan to each minority shareholder of any constituent subsidiary, unless waived in writing. Parent corporation must also comply with provisions of Act regarding dissenters' rights. (MCLA §§ 450.1711-.1713). Certificate of merger shall be executed and filed on behalf of parent corporation and set forth information specified in this section. Certificate shall become effective at time filed unless subsequent effective time is set forth in document. (MCLA § 450.1712).

Foreign and domestic corporations may be merged if permitted by laws of jurisdiction where each foreign corporation is organized. Domestic corporation must comply with Act with respect to merger of domestic corporations and foreign corporation must comply with laws of jurisdiction where it is organized. If surviving or new corporation is to be governed by laws of jurisdiction other than Michigan, it must comply with provisions of this Act with respect to foreign corporations if it is to transact business in state. Such corporation is liable, and subject to service of process in proceeding in Michigan for enforcement of obligation of domestic corporation which is party to merger and in proceeding for enforcement of right of dissenting shareholder of any such domestic corporation against surviving or new corporation. Foreign and domestic corporations may be merged as provided in MCLA § 450.1711, if permitted by laws of jurisdiction where foreign corporation is organized, but if parent is foreign corporation, notwithstanding laws of its jurisdiction of incorporation, it must mail summary of plan to each minority shareholder of record of each subsidiary, unless waived in writing, and also inform any shareholder who has right to dissent of such right and that he may be paid fair value of his shares. If foreign corporation is authorized to do business in state it must also file amended application to do business or information statement evidencing event. (MCLA § 450.1735). Any time before effective date of certificate of merger or share exchange, such merger or share exchange may be abandoned subject to contractual rights, if any, without shareholder action, in accordance with plan or if none, in manner determined by board or share exchange. If certificate of merger has been filed, corporation shall file certificate of abandonment within ten days after abandonment, but not later than proposed effective date. (MCLA § 450.1741). Fee to chief officer of Department of Energy, Labor & Economic Growth for examining, filing and copying any certificate of merger is $50; for filing certificate by surviving foreign corporation that merger has become effective under laws of jurisdiction of foreign corporation which was party to merger with Michigan corporation, $10; for examining, filing and copying any certificate of abandonment, $10. (MCLA § 450.2060).

One or more domestic corporations may merge with one or more business organizations (domestic or foreign limited liability company, general or limited partnership, or any other type of business enterprise) provided that board of each domestic corporation adopts plan of merger and submits plan for approval to meeting of shareholders and after approval certificate of merger is executed and filed. (MCLA § 450.1736). Such certificate shall be effective when filed, unless subsequent effective time, not later than 90 days after date of delivery is specified in document. Once effective and specified events take place, surviving entity is liable and subject to service for enforcement of obligation of domestic corporation that is party to merger and for enforcement of dissenting shareholder rights. (MCLA § 450.1736).

Conversions.

One or more domestic corporations may convert into one or more business organizations if all of following satisfied (MCLA § 450.745): (1) Conversion permitted by law that governs internal affairs of business organization or domestic corporation after conversion, and surviving organization complies with that law; (2) board of domestic corporation or business organization proposing to convert adopts plan of conversion that includes (a) name of domestic corporation or business organization, (b) name of business organization into which domestic corporation converted or reverse, (c) type of business organization into which domestic corporation converting or reverse, (d) identification of statute that will govern internal affairs for surviving business organization, (e) street address of surviving business organization or domestic corporation, (f) street address of domestic corporation or business organization if different, and (g) principal place of business of surviving business organization or domestic corporation; (3) for domestic corporation or business organization, designation and number of outstanding shares of each class and series, specifying classes and series entitled to vote, each class and series entitled to vote as class, and, if number of shares subject to change before effective date of conversion, manner in which change may occur; (4) terms and conditions of proposed conversion; (5) terms and conditions of organizational documents to govern surviving business organization; and (6) any other provision of proposed conversion that board considers necessary or desirable.

If board of domestic corporation adopts plan of conversion, plan submitted for approval in same manner required for merger (under MCLA § 7031[2]), including procedures pertaining to dissenters' rights, if any shareholder has right to dissent. If plan of conversion adopted by business organization, plan submitted for approval in manner required by law governing internal affairs of business organization.

When domestic corporation converts into business organization, all of following (among other things) apply: (1) Articles of incorporation of domestic corporation canceled; (2) surviving business organization has all liabilities of domestic corporation; (3) title to all real estate and other property and rights owned by domestic corporation remains vested in surviving business organization without reversion or impairment; (4) surviving business organization considered to be same entity that existed before conversion and considered to be organized on date that domestic corporation was originally incorporated; (5) shares of domestic corporation that were to be converted into ownership interests or obligations of surviving business organization or into cash or other property are converted; (6) unless otherwise provided in plan of conversion, domestic corporation not required to wind up affairs or pay liabilities and distribute assets on account of conversion, and conversion does not constitute dissolution of domestic corporation.

If surviving business organization is foreign business organization, it is subject to Michigan laws. Surviving business organization liable, and subject to service of process in proceeding in Michigan, for enforcement of obligation of domestic corporation, and in proceeding for enforcement of right of dissenting shareholder of domestic corporation against surviving business organization.

When business organization converts into domestic corporation, business organization files certificate of conversion with administrator. When certificate takes effect, all of following apply: (1) Surviving domestic corporation has all liabilities of business organization; (2) title to all real estate and other property and rights owned by business organization remain vested in surviving domestic corporation without reversion or impairment; (3) surviving domestic corporation may use name and assumed names of business organization if filings made and laws regarding use and form of names followed; (4) proceeding pending against business organization may be continued as if conversion had not occurred, or surviving domestic corporation may be substituted in proceedings for business organization; (5) surviving domestic corporation considered same entity that existed before conversion and considered organized on date that business organization was originally organized; (6) ownership interests of business organization that were to be converted into shares or obligations of surviving domestic corporation or into cash or other property are converted; and (7) unless otherwise provided for in conversion plan, business organization not required to wind up affairs or pay liabilities and distribute assets on account of conversion, and conversion does not constitute dissolution of business organization.

Share Exchange.

Corporation may acquire all outstanding shares of one or more classes or series of another corporation pursuant to plan of share exchange. Procedure for adoption and consummation is equivalent to that with respect to merger. (MCLA § 450.1702).

Certain business combinations and transactions involving Michigan corporation require approval by not less than 90% of votes of each class of stock entitled to be voted, and at least 2/3 of votes of each class of stock entitled to vote other than voting shares beneficially owned by interested shareholder (shareholder owning directly or indirectly 10% or more of voting power of corporation or affiliate of corporation who at any time within prior two years owned such voting power) and any affiliate of interested shareholder. (MCLA § 450.1780).

Transactions covered are any merger, consolidation, or share exchange which alters contract rights of shareholders set forth in articles, or which changes or converts outstanding shares of corporation with those of any interested shareholder or affiliate; any sale, lease, transfer or other disposition of property, not in ordinary course of business to interested shareholder or affiliate within 12 month period, book value of which is more than 10% of net worth; issuance or transfer of equity security of corporation with market value more than 5% of total market value of outstanding shares to any interested shareholder or affiliate, except pursuant to exercise of rights or warrants offered pro rata to all voting shareholders or other method affording proportionate treatment; liquidation or dissolution in which any interested shareholder or affiliate will receive other than cash; reclassification, reverse stock split or reorganization or share exchange with any subsidiary, which has effect of increasing by 5% or more proportionate amount of any class of equity securities of corporation or any subsidiary owned by any interested shareholder or affiliate. (MCLA § 450.1776).

Special voting requirements will not apply: (i) If consideration paid shareholders meets certain tests as to amount and type; and after interested shareholder became interested shareholder, there has been no reduction of regular dividends and interested shareholder has received no loans, guarantees or other financial assistance from corporation and has not acquired additional shares of corporation since becoming interested shareholder, except for shares acquired as part of same transaction by which shareholder became interested shareholder and there has been five years between date of becoming interested shareholder and date business combination is consummated; (ii) if directors have approved transaction with particular interested shareholder prior to time first became interested shareholder; and (iii) to corporation having existing interested shareholder on May 29, 1984 unless directors elect by resolution to be subject to special voting requirements; or (iv) unless articles provide otherwise, to corporation having fewer than 100 beneficial owners of stock, to registered investment company, or to corporation whose shareholders amend articles after May 29, 1984 by vote of not less than 90% of each class of stock entitled to vote and not less than 2/3 of each class held by persons other than interested shareholders. (MCLA §§ 450.1781-.1784).

Control Share Acquisitions.

Effective Apr. 1, 1988, control share acquisitions are regulated by MCLA §§ 450.1790 et seq.

Dissolution.

Dissolution without court action may be accomplished in following ways:

(1) Automatic Dissolution by Expiration of Corporate Term.

Certificate of dissolution not required. (MCLA §§ 450.1801[1][a],.1831[a]). Corporation whose term has expired may renew corporate existence, if proceeding asking for court supervision is not pending, by board resolution followed by proper notice to each shareholder entitled to vote and affirmative vote on proposed renewal by holders of majority of outstanding shares of corporation or of each class or series of such shares if such class or series is entitled to vote thereon as a class. Certificate of renewal shall be filed setting forth name of corporation, date and place of shareholders' meeting at which renewal was approved, statement that renewal was approved by requisite vote of directors and shareholders and duration of corporation if other than perpetual. Upon such filing, corporate existence becomes effective, and corporation may again transact business. Renewal does not relieve corporation of any penalty or liability accrued against it under any law of state. Administrator may require adoption of different corporate name in accordance with act. (MCLA §§ 450.1815, .1817).

(2) Dissolution by Consent of Majority of Shareholders.

Board may propose dissolution. Dissolution must be recommended unless board determines conflict of interest or other special circumstances and such is communicated to shareholder. After proper notice to shareholders, upon resolution of holders of majority of outstanding shares entitled to vote thereon (or majority of each class if entitled to vote thereon as a class), certificate of dissolution is executed and filed, stating name of corporation, date, place of shareholders' meeting at which dissolution was approved, and statement that dissolution was approved by requisite vote of shareholders and directors. (MCLA §§ 450.1801[1][c],.1804).

(3) Dissolution by shareholder agreement under § 488 is effected by executing and filing certificate of dissolution on behalf of corporation, stating corporation's name and that it is dissolved pursuant to § 488. (MCLA § 450.1805).

Dissolution proceedings commenced pursuant to (2) or (3) above may be revoked before complete distribution of assets, if proceeding requesting court supervision is not pending, by filing certificate of revocation executed, in person or by proxy, by all shareholders. (MCLA § 450.1811). Upon filing of certificate, revocation of dissolution proceedings becomes effective, and corporation may again transact business. Revocation of dissolution does not relieve corporation of any penalty or liability accrued against it under any state law. If during period of dissolution, corporate name or confusingly similar name has been assigned to another corporation, administrator may require adoption of different name upon filing of certificate of revocation of dissolution. (MCLA § 450.1817).

(4) Dissolution Before Beginning Business.

Majority of directors or incorporators file certificate stating name of corporation, that corporation has not commenced business and has issued no shares, and has no debts or other liabilities, and has received no payments on subscriptions to its shares, or, if it has received payments, has returned them to those entitled thereto, less any part thereof disbursed for expenses, and that majority of incorporators or directors have elected that corporation be dissolved. (MCLA § 450.1803).

In all of above, where filing certificate of dissolution is necessary, fee therefor is $10. (MCLA § 450.2060[1][g]). Clearance from Department of Treasury is required as to sales and use tax and income tax, if applicable. Request for clearance shall be made not more than 60 days after submitting Certificate of Dissolution. (MCLA §§ 205.65, .95, 206.451).

(5) Dissolution for Failure to File Annual Report or Pay Privilege Fee.

Neglect or refusal by domestic corporation to file any annual report or pay fees as required for two consecutive years results in automatic dissolution 60 days after expiration of two years. Such failure by foreign corporation for one year results in revocation of corporation's certificate of authority unless default is corrected within 90 days after notice of default is mailed to corporation at its registered office in Michigan and at its headquarters by administrator. Domestic corporation dissolved, or foreign corporation whose certificate of authority has been revoked, for failure to file annual reports, may renew its corporate existence or certificate of authority by filing reports and paying fees for any years not filed or paid, together with prescribed penalties. Upon compliance with foregoing, all rights of corporation are same as if dissolution or expiration of term had not occurred, and all contracts entered and rights acquired during interval are valid and enforceable. (MCLA §§ 450.1801[1][f],.1831[d],.1922, .1925, .2041, .2042).

(6) Dissolution of Nonprofit Corporation, Foundation or Trustee Corporation.

If corporate purpose is to hold property for charitable purposes other than religious purposes dissolution may be had only with 45 days prior notice to Attorney General absent court proceedings for dissolution, with his consent. (MCLA §§ 450.251-53).

Dissolution with court supervision may be accomplished in following ways:

(1) Dissolution on Insolvency or for Benefit of Stockholders.

Dissolution under court supervision may be had on petition of majority of directors setting forth that corporation is in danger of insolvency or that dissolution is deemed beneficial to stockholders. All stockholders and creditors are made defendants. (MCLA § 600.3501). Information to appear in complaint is specified. (Rule 3.611). Process may be served as in ordinary case, or court may order show cause hearing on 28 days notice mailed to all creditors and stockholders and published as provided. (Rule 3.611). Where appropriate, court dissolves corporation and appoints receiver. (MCLA § 600.3505).

(2) Dissolution by Court having Jurisdiction of Receivership or Bankruptcy Proceedings.

Corporation whose assets have been wholly disposed of under court order in receivership or bankruptcy proceedings may be summarily dissolved by order of court having jurisdiction of proceedings. Copy of order shall be filed by clerk of court with administrator. (MCLA § 450.1801[2]).

(3) Dissolution by Attorney General's Action.

Dissolution is based upon attorney general's showing that corporation has procured its organization through fraud, repeatedly and wilfully exceeded its lawful authority, or repeatedly and wilfully conducted its business in an unlawful manner. In addition, attorney general may bring suit for dissolution, revocation, or forfeiture based upon any other statutory or common law action. (MCLA § 450.1821).

(4) Dissolution by Directors' or Shareholders' Action Where Corporation Unable to Function.

One or more directors or shareholders entitled to vote may bring action for dissolution alleging that: (a) Management (directors or shareholders pursuant to § 488) is unable to agree by requisite vote on material matters respecting management of corporation's affairs, or shareholders are so divided in voting power that they have failed to elect successors to any director whose term has expired or would have expired upon election and qualification of his successor, and (b) that as result of condition stated above, corporation is unable to function effectively in best interests of its creditors and shareholders. (MCLA § 450.1823).

In (1), (3) and (4) above, action must be brought in circuit court of county in which principal place of business or registered office of corporation is located.

Provisions Applicable to Dissolution Effected in any Manner.

Except as court may otherwise direct, dissolved corporation shall continue its corporate existence solely for purpose of winding up its affairs by collecting its assets, selling assets not to be distributed in kind to its shareholders, paying its debts and other liabilities, and doing all other acts incident to liquidation of its business. (MCLA § 450.1833). Directors are not deemed to be trustees of corporation's assets during this period, and are held to same standard of conduct as before dissolution (MCLA § 450.1834; see also MCLA § 450.1541a). Title to corporation assets remains in corporation until transferred in corporate name. Dissolution does not change provisions relating to quorum or voting requirements for directors or shareholders nor provisions regarding election, appointment, resignation or removal of, or filing vacancies among, directors or officers, nor provisions regarding amendment or repeal of bylaws or adoption of new bylaws. Shares may be transferred, corporation may sue and be sued in its corporate name, process issuing by and against corporation as if dissolution had not occurred. Action brought against corporation before its dissolution does not abate because of dissolution. (MCLA § 450.1834).

Dissolved corporation may give written notice of dissolution to existing claimants who have claims or rights against corporation, whether claim is liquidated or unliquidated, but does not include contingent liability based on event occurring after dissolution. Notice must describe information to be included in claim, mailing address where claim may be sent, specify deadline for making claim which may not be less than six months from effective date of notice and state that claim will be barred if not received by deadline. Claim rejected by written notice by dissolved corporation barred if proceeding to enforce not commenced within 90 days of rejection. (MCLA § 450.1841a).

After dissolution, corporation may publish notice of dissolution and request persons with claims to present them in writing within one year after publication date. Notice shall be published once in newspaper of general circulation in county in which principal office of corporation is located, or if none, location of registered office. Claimant who does not present corporation with claim is barred unless claimant brings proceedings against corporation, with certain exceptions. (MCLA § 450.1842a).

After dissolution in any manner, corporation, a creditor, or shareholder may apply at any time to circuit court of county in which principal place of business or registered office is located for judgment that affairs of corporation and liquidation of its assets continue under supervision of court. For good cause shown, court may permit creditor who has not filed his claim or commenced action on a rejected claim within required time limits to file such claim or commence such action within such time as court directs. (MCLA § 450.1851).

Assets remaining after payment of, or provision for claims against, corporation shall be distributed in cash or kind or both to shareholders according to their respective rights and interests in accordance with Act. (MCLA § 450.1855a).

Insolvency and Receivers.

Court is authorized to appoint receiver where execution issued upon judgment is returned unsatisfied in whole or in part and upon final judgment court can direct fair distribution of property of corporation and proceeds thereof to creditors of corporation. (MCLA § 600.3610). Insolvency alone does not ordinarily justify appointment of receiver and dissolution of corporation (305 Mich. 580, 9 N.W.2d 849), but cf. 201 Mich. 1, 166 N.W. 948. Receiver may properly be appointed on undisputed averment of insolvency and showing of danger of misappropriation or waste of assets. (55 Mich. 387, 21 N.W. 375).

See subhead Dissolution, supra.

Close Corporations.

There is no separate chapter set aside for close corporations. Rather, special provisions for such corporations are included at appropriate points throughout Act. Among these provisions are sections dealing with: incorporation by one incorporator, board of directors with fewer than three members, optional high-vote or high-quorum requirements, relaxed formalities including management by shareholders, stock transfer restrictions, shareholder agreements, deadlock, dissolution, and arbitration. See appropriate subheads, supra, for detail.

Appraisal.

Shareholder is entitled to dissent from and obtain payment of fair value of shares in event, subject to certain exceptions, of: (a) Consummation of plan of merger or share exchange if shareholder approval is required, (b) consummation of sale or exchange of substantially all of property of corporation other than in usual and regular course of business, if shareholder is entitled to vote thereon, (c) certain amendments to articles of incorporation, (d) issuance of shares in transactions covered by MCLA § 450.1754, (e) action taken pursuant to shareholder vote to extent articles, bylaws or resolutions of directors provide for dissenter's rights, (f) approval of control share acquisition. Unless otherwise provided in articles, bylaws or board resolution shareholder may not dissent from: (i) Corporate action set forth in (a) to (d) above as to shares listed on national securities exchange or designated as National Market System Security on interdealer quotation system by National Association of Securities Dealers or (ii) consummation of plan of merger, share exchange or sale of substantially all of assets not in usual course of business pursuant to plan of dissolution meeting certain criteria in which shareholders receive cash or shares meeting criteria set forth above or any combination thereof.

Shareholder wishing to assert dissenter's rights must deliver to corporation before proposal is submitted to vote of shareholders written notice of intent to demand payment if proposed action is effectuated and must not vote shares in favor of or consent to proposed action. Within ten days after shareholders' authorize action corporation shall give dissenters' notice to objecting shareholders containing specified information and form of payout dividend. Shareholder receiving such dissenters' notice must demand payment, certify he acquired shares prior to specified date, and deposit share certificates in accordance with notice. Unless corporation elects to withhold payment for after-acquired shares as authorized in MCLA § 450.1771, within seven days after proposed corporate action is taken or upon receipt of payment demand (whichever is later), corporation must pay each dissenter who fulfilled statutory requirements amount equal to corporation's estimate of fair value of shares plus accrued interest. Payment must be accompanied by specified financial information.

If dissenting shareholder demands different amount and demand remains unsettled, corporation within 60 days thereafter must file action to determine fair value of shares and accrued interest. Final order in action shall determine fair value of shares of each dissenting shareholder and require corporation to pay amount by which fair value plus interest exceeds any amount paid by corporation, or amount equal to fair value plus accrued interest of after-acquired shares for which corporation elected to withhold payment to dissenting shareholders as well as such interest as court finds equitable. Costs and expenses are determined by court and generally assessed against corporation unless dissenting shareholders acted not in good faith. (MCLA §§ 450.1761-.1774).

Foreign Corporations.

Certificate of authority to do business in state is required. (MCLA § 450.2011). To procure certificate, corporation must file copy of good standing certificate from state of incorporation. (MCLA § 450.2016). Application, which must be accompanied by filing and franchise fees, is made on form provided by department stating name of corporation and jurisdiction and date of incorporation, duration of corporation, street address of main business office, address of registered office in state and name of resident agent, statement of character of business and authorization to transact same in state of incorporation, and such other facts as may be required. (MCLA § 450.2015). For calculation of franchise and filing fees, see MCLA §§ 450.2060, .2062. Authority to transact business continues until surrendered, suspended or revoked, so long as annual franchise fees paid. (MCLA §§ 450.2016, .2062). Amended application must be filed and additional franchise fees paid upon increase in number of authorized shares attributable (using most recent apportionment percentage used in computing tax required by Single Business Tax Act (MCLA §§ 208.1-.145) or Michigan Business Tax Act (MCLA §§ 208.1101-.1601) to this state. (MCLA § 450.2062).

Foreign corporation cannot use courts to enforce obligation if doing business in Michigan and has not qualified. (MCLA § 450.2051). For penalties on corporations doing business in state without authority, see MCLA § 450.2055. If permitted by its charter, foreign corporation may acquire real property in Michigan by purchase or otherwise and hold or dispose of same. (25 Mich. 214). Foreign corporation may acquire, hold and dispose of real estate without certificate, provided in so doing it is not carrying on its business. (251 Mich. 602, 232 N.W. 367).

See subheads Reports, Incorporation Tax or Fee, and Filing Fees, supra, and Franchise Tax, infra.

Surrender of Authority.

Withdrawal is effected by filing with administrator an application for withdrawal stating name of corporation and state of incorporation and statement that corporation is not transacting business in state and surrenders authority to do so. (MCLA § 450.2031). Filing fee is $10. (MCLA § 450.2060).

Taxation of Corporate Property.

Rules for taxation of corporate property are similar to rules for taxation of individual. See category 22 Taxation, topic 22.15A Real and Personal Property Taxes, subheads Assessment; Conveyance Tax. Residence of corporation for tax purposes is where office stated in articles is located except, if principal office is elsewhere, latter shall be deemed its residence. If no principal office in state, then residence is where corporation or agent transacts business. (MCLA § 211.11).

Taxation of Corporate Stock.

See category 22 Taxation, topic 22.15A Real and Personal Property Taxes.

Franchise Tax.

Effective May 14, 1977, corporate franchise tax statute (MCLA §§ 450.304-.309[a]) is repealed. Final levy of franchise tax was on May 15, 1976. (1975, No. 230).

See category 22 Taxation, topic 22.03 Business Taxes, subhead Single Business Tax.

Professional Corporations.

Persons rendering personal service to public requiring license or other legal authorization are permitted to form professional corporation under specified conditions. (MCLA §§ 450.221-.235). Recent case held that corporation must form as professional service corporation if it provides personal service to public that requires license under Professional Service Corporation Act (MCLA §§ 450.221-.235). (2007 Mich. App. LEXIS 1441). Professional Service Corporation Act requires each shareholder to be licensed in one or more professional services rendered by professional corporation. (MCLA § 450.224[2]). Shareholder of professional corporation personally liable for own negligence or wrongful acts and for those of individuals under his direct supervision and control. (MCLA § 450.226[6]). See topic 2.08 Partnerships, subhead Partnership Associations.

Limited Liability Companies.

See topic 2.06 Limited Liability Companies.

Deeds.

See category 21 Property, topic 21.06 Deeds.

Model Non-Profit Corporation Act not adopted.

For various taxes affecting corporations, see category 22 Taxation, topic 22.03 Business Taxes.

2.04 FOREIGN CORPORATIONS:

See topic 2.03 Corporations.

2.05 JOINT STOCK COMPANIES:

No statutory provisions.

Professional Corporations.

See topic 2.03 Corporations, subhead Professional Corporations.

2.06 LIMITED LIABILITY COMPANIES:

Michigan Limited Liability Company Act ("Act") permits formation of limited liability company ("LLC"). (MCLA §§ 450.4101-.5200).

Tax Treatment.

Generally, Michigan LLC with two or more members should be treated as partnership for federal tax purposes upon compliance with applicable IRS regulations and one member LLC should be treated as sole proprietorship.

General Supervision.

Department of Energy, Labor & Economic Growth (herein "Department"), Lansing, has general supervision of LLCs. (MCLA § 450.4102).

Formation.

One or more persons who need not be members may organize LLC by filing executed articles of organization ("Articles") with Department. (MCLA § 450.4202).

Articles Requirements.

Articles must be filed with Department along with appropriate fees. Articles must contain (a) name; (b) purposes; (c) street address of registered office and name of registered agent (mailing address if different); (d) statement, if applicable, that LLC will be managed by managers; and (e) other desired provisions not inconsistent with Act. Duration will be perpetual unless otherwise stated in Articles. (MCLA §§ 450.4201, .4202, .4203).

Purpose.

LLCs may be organized for any lawful business purpose including providing professional services. (MCLA §§ 450.4201, .4901).

Name.

LLC's name must include designation "limited liability company" or abbreviations "L.L.C." or "L.C." (with or without periods or other punctuation) and may not imply LLC is organized for purpose not stated in Articles. LLC's name must be distinguishable from names of other entities and trade or assumed names as filed, registered or reserved with Department. (MCLA § 450.4204). Name may be reserved by submitting application and filing fee to Department. (MCLA §§ 450.4205, .5101). If licensed as nursing home, LLC may use term "healthcenter", or similar term in its name. (MCLA § 450.4204[a]).

Maximum Duration.

Articles must state duration if other than perpetual. There is no limit on duration. (MCLA § 450.4203).

Registered Office and Resident Agent.

Each domestic LLC and foreign LLC authorized to transact business must maintain registered office and resident agent. Resident agent may be domestic corporation or LLC or foreign corporation or LLC authorized to do business in Michigan. If LLC fails to appoint or maintain agent for service of process, or agent cannot be found or served, service may be made on Department. (MCLA § 450.4207). Information kept at registered office must include (a) names and addresses of each member and manager; (b) copy of Articles and any amendments; (c) federal, state and local tax returns for last three years; (d) financial statements for last three years; (e) copies of any operating agreements; and (f) records indicating members' relative shares and voting rights. (MCLA § 450.4213).

Reports.

LLC must file annual statement containing name and address of resident agent in Michigan. Annual statement must be filed no later than Feb. 15 each year. No annual statement is required in following year if LLC is formed after Sept. 30th of previous year. (MCLA § 450.4207).

Amending or Correcting Articles.

LLC may amend its Articles if amendment contains only such provisions as might lawfully be contained in original Articles at time of amendment. (MCLA § 450.4601). Amendment becomes effective upon filing thereof with Department, together with fees and documents required by law. (MCLA § 450.4104). Amendments to Articles must be signed and state (a) name of LLC; (b) filing date of original Articles; (c) entire Articles or sections being amended; and (d) that amendment has been approved by unanimous vote of members entitled to vote unless LLC's operating agreement authorizes amendment by majority vote of members entitled to vote. (MCLA § 450.4603). Articles must be amended if change occurs in LLC's (a) name; (b) purpose; (c) method of management; (d) maximum duration; or (e) statement in Articles has become false or erroneous. (MCLA § 450.4602).

Powers.

LLC has all powers necessary or convenient, including all powers granted to general business corporations, subject to limitations of its Articles, Act and any other statute of State of Michigan. (MCLA § 450.4201).

Limited Liability.

Except as otherwise provided by law or in operating agreement, no member and/or manager of LLC is personally liable for acts, debts, or obligations of LLC. (MCLA § 450.4501).

Management.

Unless Articles provide for management by managers, LLC is to be managed by members, who then are imbued with all rights and responsibilities of managers. (MCLA § 450.4401). Articles may provide for management by one or more managers who may also be members. (MCLA § 450.4402). Unless otherwise provided in operating agreement, managers are elected or removed by majority of members. Managers may be removed with or without cause unless operating agreement provides otherwise. (MCLA § 450.4403). Unless otherwise provided in operating agreement, if LLC has more than one manager, management decisions are by majority vote of all managers with each manager having one vote. (MCLA § 450.4405). Each manager is agent with authority to bind LLC for transactions in ordinary course of business. LLC is not bound by manager's transaction with third party who has knowledge of manager's lack of authority. (MCLA § 450.4406). If Articles delegate management of LLC to managers, Articles will be deemed notice to third parties that only managers can bind LLC. (MCLA § 450.4402).

Managers have duty to act in good faith, with ordinary care and in LLC's best interests. Managers may reasonably rely on (a) one or more members, managers or employees of LLC; (b) professional advisors to LLC; and (c) committees comprised of other managers. (MCLA §

450.4404).

Operating agreement or contract may limit aspects of manager's liability and provide for indemnification of managers for judgments, settlements, penalties, fines or expenses for acts or omissions as manager. LLC may not limit liability of manager for (a) receipt of improper financial benefit; (b) knowing violation of law; or (c) approval of distributions in violation of operating agreement or Act. (MCLA § 450.4408).

Member Contribution.

Members may contribute any tangible or intangible property or benefit to LLC including cash, property, services or promissory notes. (MCLA § 450.4301). Promise to contribute is not enforceable unless it is in writing and signed by member. Member failing to make agreed contribution is obligated at option of LLC to contribute agreed amount in cash. Member's obligation to make agreed contribution may be compromised only as provided in operating agreement or by unanimous consent of members. Creditor may under certain circumstances enforce member's obligation to make capital contribution. (MCLA § 450.4302). LLC may admit member who does not make contribution. (MCLA § 450.501[2]).

Distributions of cash or other assets are allocated in equal shares to members unless operating agreement provides otherwise. (MCLA § 450.4303). Distributions are not allowed if, after distribution (a) LLC would be unable to pay its debts as they become due; or (b) if LLC's total assets would be less than sum of LLC's total liabilities plus (unless operating agreement provides otherwise) amount that would be needed, if LLC were to be dissolved at time of distribution, to satisfy any preferential rights on dissolution superior to member or members receiving distribution. (MCLA § 450.4307). Member or manager who votes for or member who receives improper distribution is personally liable for amount of improper distribution that exceeds amount that could have been properly distributed for two years after distribution. (MCLA § 450.4308).

Member's Interest and Assignment of Interest.

Member's ownership interest in LLC is personal property, and member has no interest in specific assets of LLC. Husband and wife may hold membership as joint tenants in same manner as joint ownership of real property with right of survivorship. (MCLA § 450.4504). Unless operating agreement provides otherwise, member's interest in LLC is assignable. Assignment of member's interest does not automatically entitle assignee to all rights and privileges held by assignor. Generally, assignment of member's interest only transfers assignor's right to share of LLC's distributions. Member ceases to be member upon assignment of member's entire membership interest. (MCLA § 450.4505). Grant of security interest in member's membership interest does not cause member to lose membership, unless otherwise provided in operating agreement. (MCLA § 450.4508).

Unless otherwise provided in operating agreement, assignee may become member (a) only if members unanimously consent; (b) in any manner provided in operating agreement; or (c) in accordance with terms of agreement between member and LLC in case of one-member LLC. (MCLA § 450.4506).

Inspection of Records.

Member or member's designated representative may, at member's expense and upon reasonable written request, inspect and copy any of LLC's records during normal business hours at location where records are kept. Members may also obtain upon written request (a) copies of LLC's most recent financial statements and tax returns; (b) complete information regarding current business and financial condition of LLC; and (c) any other information as is "just and reasonable" regarding affairs of LLC. Member also has right to formal accounting if provided in operating agreement or if such formal accounting is just and reasonable. (MCLA § 450.4503).

Derivative Action.

Member may sue on behalf of LLC only if all of following are met: (a) member is unable to cause LLC to sue on its own behalf; (b) member made written demand requesting that LLC sue on its own behalf; (c) member has not been notified within 90 days that demand has been rejected or LLC would suffer irreparable injury by waiting 90 days; (d) member is member at time of suit and was member at time of alleged wrong or is assignee of member who was; (e) member fairly and adequately represents interests of LLC; and (f) member continues to be member until time of judgment, unless no longer member as result of action by LLC to which former member did not acquiesce. (MCLA § 450.4510). Upon termination of derivative proceeding, court may order one of following: (a) plaintiff to pay any of defendant's reasonable expenses, including reasonable attorney fees, if proceeding was commenced or maintained in bad faith or without reasonable cause; or (b) LLC to pay plaintiff's reasonable expenses, including reasonable attorney fees, if proceeding resulted in substantial benefit to company. Court will direct plaintiff to account to LLC for any proceeds received by plaintiff in excess of expenses awarded by court (this provision does not apply to judgment rendered for benefit of injured member only and recovery was limited to loss or damage sustained by such member). (MCLA § 450.4514).

Action by Minority Member.

Member may bring action in circuit court to establish that acts of managers or members in control of LLC are illegal, fraudulent, or willfully unfair and oppressive to LLC or member. Relief may include: (a) dissolution or liquidation, (b) cancellation or alteration of provision in Articles or operating agreement, (c) direction, alteration or prohibition of act of LLC, members or managers, (d) purchase of members' interest in LLC at fair value, or (e) damages to LLC or member. Action for damages must be brought within three years of accrual or two years of discovery whichever is first. "Willfully unfair and oppressive conduct" is defined. (MCLA § 450.4515).

Expulsion.

Operating agreement can provide for expulsion of member upon occurrence of specified events. (MCLA § 450.4509).

Withdrawal.

Except as provided in operating agreement, member may not withdraw from LLC. If operating agreement allows for withdrawal, withdrawing member will receive fair market value for membership interest in LLC as of date of withdrawal, unless otherwise provided in LLC's operating agreement. (MCLA §§ 450.4305, .4509).

Voting.

Unless otherwise provided in operating agreement, each member entitled to one vote without regard to membership interest. Operating agreement must state if voting is by membership interest. Operating agreement may provide that certain members or groups have limited or no voting rights. Members have statutory right to vote on (a) dissolution of LLC; (b) merger of LLC; and (c) amendment to Articles. Transactions in which manager has interest must be approved by members unless it is preapproved by operating agreement or connected with dissolution. Articles may provide other voting rights. (MCLA § 450.4502).

Conversion of Partnership.

General partnership or limited partnership may be converted to LLC by filing Articles and Certificate of Conversion with Department. All property rights of converting partnership are thereafter vested in converted LLC.

Merger.

LLC may merge with any other business entity pursuant to plan of merger. (MCLA § 450.4701). Plan of merger must be approved by unanimous consent of members of each merging LLC, unless operating agreement provides for less than unanimous consent. If operating agreement provides for approval by less than unanimous consent, dissenting members have right to withdraw and receive fair market value interest of their membership on date of withdrawal. (MCLA § 450.4702). Upon consummation of merger, resulting entity succeeds to all rights and obligations of merged entities. (MCLA § 450.4704).

Dissolution and Winding Up.

LLC is dissolved upon: (a) time specified in Articles or operating agreement; (b) happening of event specified in Articles or operating agreement; (c) unanimous consent of members; or (d) judicial decree. (MCLA § 450.4801). Members that have not wrongfully dissolved LLC may wind up LLC's affairs. (MCLA § 450.4805). Upon winding up, LLC's assets are distributed in following order: (a) to creditors of LLC, including members who are creditors; (b) unless otherwise provided in operating agreement, to members and former members to satisfy claims for declared distributions or payments upon withdrawal; (c) unless otherwise provided in operating agreement, remaining assets to members and former members in accordance with their membership interests. Before any asset distributions are made, LLC must file tax returns and pay any tax obligation. (MCLA § 450.4808). Upon commencement of winding up, LLC must file certificate of dissolution with Department setting forth: (a) name of LLC; (b) reason for dissolution; and (c) effective date of dissolution. (MCLA § 450.4804).

Foreign LLC Qualification.

Foreign LLC must file application for certificate of authority to transact business with Department containing: (a) LLC's name and name under which it proposes to transact business; (b) jurisdiction and date of LLC's organization; (c) name and address of its resident agent; (d) consent for appointment of Department as agent to accept service of process if no registered agent is appointed, or agent's authority is revoked, agent resigns or agent cannot be found or served; (e) name and address of member or manager to whom copies of any process served may be sent; (f) address of office in foreign jurisdiction or its principal place of business; and (g) other appropriate information. (MCLA § 450.5002). Foreign LLC will not be denied registration in Michigan based on any difference between laws of LLC's state of organization and Michigan law. Foreign LLC's internal affairs are governed by laws of its state of organization. (MCLA § 450.5001). Certain listed activities do not constitute transacting business in Michigan. (MCLA § 450.5008). Foreign LLC cannot use courts of this state to enforce obligations if it is doing business in Michigan and has not qualified to transact business in Michigan. (MCLA § 450.5007).

Filing fees for various LLC documents established by statute. (MCLA § 450.5101). Expedited filing at graduated rates established by statute. (MCLA § 450.5104).

Professional Limited Liability Company.

Persons rendering personal service to public requiring license or other legal authorization are permitted to form professional LLCs under specified conditions and required to form professional LLCs if in certain categories. Department can be contacted for assistance in making this determination. Special annual report is required with significant penalties for failure to provide. (MCLA §§ 450.4901-.4910).

2.07 LIMITED PARTNERSHIP:

See topic 2.08 Partnerships.

2.08 PARTNERSHIPS:

Uniform Partnership Act adopted. (MCLA §§ 449.1-.48).

Variations from Official Text.

Partners may consist of husband and wife. (MCLA § 449.6). See also subhead Limited Liability Partnership.

Formation.

Partnership certificates for general partnerships must be filed with county clerk, setting forth name and residence of partners, place of business and name and style of firm. (MCLA § 449.101). Partnership not complying cannot sue in any court until after compliance. When place of business is changed or partnership goes out of business, certificate so stating must be filed. (MCLA § 449.102). Renewal certificate required every five years. (MCLA § 449.101[a]). Certificate of limited partnership must be filed with Department of Energy, Labor & Economic Growth. (MCLA § 449.1201). Failure to comply is misdemeanor. (MCLA § 449.106).

Name.

See category 17 Intellectual Property, topic 17.01 Trademarks and Tradenames.

Rights and Liabilities of Partners Inter Se.

Partners liable jointly and severally for partner's wrongful act or breach of trust (MCLA §§ 449.13 & .14) and jointly for all other debts and obligations of partnership. (MCLA § 449.15).

Rights and Liabilities of Partners as to Third Persons.

Partnership liable to third parties for losses and injuries caused in ordinary course of business to same degree as partner acting. (MCLA § 449.13). Person not partner but represented as such liable as partner. (MCLA § 449.16).

Dissolution.

Partnership may be dissolved by: (1) Express will of partners; (2) express will of partner if partnership not for specified period or undertaking; (3) expulsion of partner from business in accordance with partnership agreement; (4) event making business or partnership unlawful; (5) death of partner; (6) bankruptcy of partner or partnership; or (7) court order. (MCLA § 449.31).

Administration of Partnership Property.

Partnership property disbursed to satisfy liabilities in following order: (1) Creditors other than partners; (2) partners other than for capital and profits; (3) partners in respect of capital; and (4) partners in respect of profits. Property of deceased partner subject to disbursement. (MCLA § 449.40).

Limited Partnership.

Revised Uniform Limited Partnership Act (1976) (without 1985 amendments) (MCLA §§ 449.1101 et seq.) adopted with numerous variations, including: (1) "administrator" replaces "Secretary of State" throughout; "administrator" means chief officer of Michigan Department of Energy, Labor & Economic Growth or designee thereof (MCLA § 449.1101); (2) name may not contain words "corporation", "incorporated", or any abbreviation thereof or imply purpose other than that stated in certificate of limited partnership (MCLA § 449.1102); (3) adds section permitting transaction of business under assumed name if certificate filed (MCLA § 449.1104); (4) adds section permitting limited partnership to agree in writing to pay interest in excess of legal rate but not in excess of criminal usury rate (MCLA § 449.1109); (5) adds section authorizing merger with foreign or domestic limited partnership or with corporation, limited liability company, general partnership, or other business organization (MCLA § 449.1210); (6) judicial dissolution on application of partner permitted only when acts of general partners are illegal, fraudulent, or wilfully unfair and oppressive to such partner or limited partnership (MCLA § 449.1802); (7) adds section authorizing Attorney General to bring action for dissolution upon specified grounds (MCLA § 449.1803); and (8) adds section enumerating activities not constituting transaction of business in state by foreign limited partnership (MCLA § 449.1909).

Limited Liability Partnership.

Uniform Partnership Act permits partnership to register as limited liability partnership by filing prescribed form with Department of Energy, Labor & Economic Growth and paying fee; annual renewal required. (MCLA § 449.44). Last words or letters of name must be "limited liability partnership", "L.L.P.", or "LLP". (MCLA § 449.45). Except for taxes, partner of registered limited liability partnership not liable for partnership liabilities arising (through tort, contract, or otherwise) from negligence, wrongful acts, omissions, misconduct, or malpractice committed by another partner or by employee or agent of partnership, but provision does not affect liability for partner's own acts or those of person under partner's direct supervision and control. (MCLA § 449.46). Foreign limited liability partnership may not conduct business in Michigan until registered with Department of Energy, Labor & Economic Growth; annual renewal required. (MCLA § 449.47).

Out-of-State Partnerships.

See subheads Limited Partnership and Limited Liability Partnership, supra.

Partnership Associations.

Three or more persons may form partnership association by contributing capital thereto and filing articles of association with Secretary of State and County Clerk. (MCLA § 449.301). Members are not individually liable for obligations of partnership association except liabilities for labor. (MCLA § 449.302). "Limited" must be last word of name and must be affixed on outside of every place of business and used whenever name written; omission of "limited" makes members liable for indebtedness, damage, or liability arising therefrom. (MCLA §§ 449.303).

3 BUSINESS REGULATION AND COMMERCE

3.01 BANKS AND BANKING:

Uniform Commercial Code adopted. (MCLA §§ 440.1101-.11102). See topic 3.09 Commercial Code.

Regulated by Banking Code of 1999. (MCLA §§ 487.11101-.15105).

Financial Institutions Bureau under Commissioner and deputies, has jurisdiction over banks, industrial banks, trust companies and safe and collateral deposit companies. (MCLA §§ 487.12101-.12109).

Stockholders.

List of stockholders must be filed with Commission on demand. (MCLA § 487.13603). Bank has lien on its shares, with power of sale, for indebtedness of stockholders. (MCLA § 487.13803). Stockholders other than holders of preferred stock may be assessed in case of impairment of capital and their stock sold to satisfy assessment. (MCLA § 487.13807). Stockholders may vote in person or by proxy. (MCLA § 487.13601).

Fiduciary Powers.

Commissioner may grant trust or fiduciary powers. Fiduciary assets must be segregated and separate books kept. Bank with trust powers may contract with another bank to carry on trust services in its name. Current funds must be deposited in another banking institution or secured by a pledge of government securities except to extent insured by federal deposit insurance corporation. Grant of fiduciary powers is subject to Commissioner's discretion, including his judgment as to sufficiency of capital and surplus of bank. Without regard to capital or surplus, bank may be permitted to exercise limited fiduciary powers to act only as executor, administrator or guardian or as trustee of testamentary trusts. Banks receiving trust funds may invest them in same manner as prudent investor unless otherwise specified in agreement. (MCLA §§ 487.14401-.14405).

Deposits.

Deposits by or in name of minor are held for minor's exclusive right and benefit and are payable to person in whose name deposit was made. (MCLA § 487.701). Deposit made in trust for another without written notice to bank of existence and terms of trust may be paid to persons for whom deposit was made in event of trustee's death, except that if deposit exceeds $5,000 and such person is under 18, deposit may be paid only to person's legally appointed guardian, and if deposit is less than $5,000 and person is under 18, deposit must be paid to minor if minor is married, parent, or person with care and custody of minor child under court order and with whom child resides. (MCLA § 487.702).

Deposit made in names of two or more persons payable to either or survivor together with any additions thereto made by any of persons becomes property of such persons as joint tenants and, prior to bank's receipt of written notice not to pay deposit in accordance with its terms, such deposit and additions may be paid to any one of said persons or to survivor or survivors after death of one of them. Making deposit in such form, absent fraud or unique undue influence, is prima facie evidence of intention of depositors to vest title in survivor or survivors. (MCLA § 487.703). Creation of joint account creates presumption, rebuttable by competent evidence to contrary, of ownership by survivor. (320 Mich. 195, 30 N.W.2d 834). Also, statutory joint accounts may be created in names of two persons. Statute prescribes form of contract, which governs who owns and may withdraw funds during life of both or if either dies first, who owns funds if both die simultaneously and who may revoke contract. (MCLA §§ 487.711-.719).

Uniform Commercial Code governs effect of stop payment orders, forged or altered instruments and delay in presentment.

Unclaimed Deposits.

Uniform Unclaimed Property Act adopted. (MCLA §§ 567.221 et seq.). Except as provided in Act, property held, issued or owing in ordinary course of business and remaining unclaimed for five years after becoming payable or distributable is presumed abandoned. (MCLA § 567.223). Banks, trust companies and other banking organizations must report annually to state treasurer all property in possession presumed abandoned. Not less than 60 days or more than 365 days prior to filing report, notice to apparent owner of property presumed abandoned must be given if: (1) Address known; (2) claim not barred by statute of limitations; and (3) value $50 or more or, if reporting at least 25,000 properties over $50, value $100 or more. (MCLA § 567.238).

See category 21 Property, topic 21.01 Absentees, subhead Escheat.

Collections.

Uniform Commercial Code governs. (MCLA §§ 440.4101-.4504). Substantially all 1990 conforming Amendments to U.C.C. Art. 4 were adopted effective Sept. 30, 1993.

Loans.

As to interest, see topic 3.19 Interest.

Uniform Common Trust Fund Act (with additions and variations) in effect as Collective Investment Funds Act; Official Amendment not adopted. (MCLA §§ 555.101-.113).

Foreign Banks.

Non-U.S. banks authorized to obtain certificate of authority to conduct business in Michigan, but not authorized to solicit or accept deposits from citizens or residents of U.S. or exercise trust powers. (MCLA §§ 487.15101-.15105). See categories 13 Estates and Trusts, topic Executors and Administrators; Family, topic Guardian and Ward.

3.02 BILLS AND NOTES:

Uniform Commercial Code adopted. (MCLA §§ 440.1101-.11102). See topic 3.09 Commercial Code. 1990 Official Amendments to Art. III and conforming Amendments to Art. IV Adopted. (Public Acts 1993 No. 130, effective Sept. 30, 1993). Revised Art. 9 adopted. (Public Acts 2000 No. 348 effective July 1, 2001). For other options and deviations from U.C.C., see topic 3.09 Commercial Code.

Days of grace no longer recognized.

Fraudulent Issuance.

It is felony or misdemeanor depending on size of check and number of offenses to make, draw, utter or deliver, with intent to defraud, checks, drafts or orders knowing that maker or drawer has insufficient funds in or credit with bank or other depository for payment thereof, or having insufficient funds when presentation for payment is made to drawee. (MCLA § 750.131).

Usury no defense against holder in due course, unless he has actual notice. (MCLA § 438.5).

Judgment notes unknown in this state; suit necessary upon any note or other negotiable instrument before levy can be made. Judgment by confession may be had only on a warrant of authority in proper instrument distinct from bond, contract or other evidence of demand for which judgment was confessed. (MCLA § 600.2906).

Attorney Fees.

Provision for reasonable attorney fee (in relation to work performed and expenses incurred) enforceable. (241 Mich. 52; 216 N.W. 405). Stipulated attorney fee not enforceable (39 Mich. 137) even though valid in state where note executed (184 Mich. 148, 150 N.W. 847).

Special Defenses.

Holder of consumer related contracts for sale or goods or services subject to all claims and defenses of buyer arising out of consumer transaction under Retail Installment Sales Act, Home Improvement Finance Act, and Motor Vehicle Sales Finance Act. (MCLA §§ 445.865, .1207; MCLA § 492.114a).

3.03 BILLS OF LADING:

See topic 3.08 Carriers.

3.04 BILLS OF SALE:

See topic 3.23 Sales.

3.05 BLUE SKY LAW:

See topic 3.24 Securities.

3.06 BROKERS:

Uniform Commercial Code adopted. (MCLA §§ 440.1101-.11102). See topic 3.09 Commercial Code.

Michigan Department of Energy, Labor & Economic Growth, Licensing Division—Real Estate regulates real estate brokers and salesmen, former including real estate appraisers, real estate mortgage brokers, building job brokers, rental brokers, business chance brokers and others whose principal vocation is sale of real estate. (MCLA §§ 339.2501-.2518).

Licenses.

Department of Energy, Labor & Economic Growth, Licensing Division—Real Estate examines and licenses real estate brokers and salespersons. (MCLA §§ 339.2504-.2506). License fees: Broker and associate broker $36 annually; salesperson $26 annually. (MCLA § 338.2237). One broker's license may be issued to firm to be used by certain individuals designated as principals and this license shall not be transferable, but associate broker's license issued to non-principal may be transferred. Licensee may be nonresident, provided he maintains place of business in this state and files irrevocable consent to service of process on Department. Issuance and, after hearing, revocation of license is discretionary with Department. Sales of promotional nature of property outside state must be submitted to Department for investigation. (MCLA §§ 339.2501-.2518). Broker must provide client with written disclosure of party broker represents, which must substantially conform with template language required by MCLA § 339.2517. Broker providing services pursuant to buyer agency agreement or listing agreement must provide statutory minimum services unless client waives in writing. (MCLA § 339.2517).

Real Estate Brokers.

See subhead Licenses, supra.

3.07 BULK SALES:

See topic 3.09 Commercial Code; also category 8 Debtor and Creditor, topic 8.08 Fraudulent Sales and Conveyances.

3.08 CARRIERS:

Uniform Commercial Code adopted. (MCLA §§ 440.1101-.11102). See topic 3.09 Commercial Code.

Public Service Commission has general supervision of common carriers (MCLA §§ 460.1 et seq.) except that Michigan Department of Transportation has general supervision of railroad and bridge and tunnel companies regulated by Michigan Railroad Code of 1993 (MCLA §§ 462.101-.451). Railroad companies are also subject to Michigan Business Corporation Act (MCLA §§ 450.1101 et seq.) unless inconsistent with Michigan Railroad Code of 1993 or act under which formed (MCLA § 462.205). Provisions described under subheads Rates, Discrimination and Limiting Liability, catchline Freight infra do not apply to railroad, bridge or tunnel companies regulated by Michigan Railroad Code of 1993. (MCLA § 462.2a). See MCLA § 462.249 for provisions regulating railroad, bridge and tunnel company use charges.

Rates between points within state are required to be just and reasonable. (MCLA § 462.4). Schedule of all rates must be filed with commission and kept open to inspection in each depot and office, and may not be changed without notice to commission. (MCLA § 462.10). Provision is made for hearing and adjudication by commission of complaint that rates are unreasonable or discriminatory. (MCLA §§ 462.22-.27).

Discrimination is unlawful as to rates or service, and subjects carrier to criminal penalty and double damages in civil suit. (MCLA § 462.15-.19).

Limiting Liability.

Freight.

Uniform Commercial Code adopted. (MCLA §§ 440.1101-.11102, see especially §§ 7103, 7309, 1205, 1102). No limitation or change of common law liability by contract or otherwise as to negligent acts of agents and servants is permitted. (MCLA § 462.40). No contract or receipt may exempt intrastate common carrier from liability for damage caused by it or any other common carrier to whom property delivered or over whose lines property passes. (MCLA § 462.7).

Passengers.

Contract exempting common carrier in that capacity from liability to full fare passenger for negligence of self or employees void as against public policy. (151 Mich. 260, 115 N.W. 43). Carrier can limit liability by stipulations which are just and reasonable (212 Mich. 259, 180 N.W. 361) and called to attention of and assented to by passenger (205 Mich. 278, 171 N.W. 423).

Bills of Lading.

Uniform Commercial Code governs. (MCLA §§ 440.7101-.7603). Optional language in § 7-403 U.C.C. omitted. (MCLA § 440.7403). Criminal penalty provisions of Uniform Bills of Lading Act have been retained. (MCLA § 482.44-.50). For other options and deviations from U.C.C., see topic 3.09 Commercial Code.

Liens.

Uniform Commercial Code governs. (MCLA § 440.7307-.7308).

3.09 COMMERCIAL CODE:

Uniform Commercial Code adopted, effective Jan. 1, 1964. (MCLA §§ 440.1101-.11102). Michigan has adopted new Article 2A (Leases) effective Sept. 30, 1992, 1990 Revision of Article 3 (Negotiable Instruments), 1990 Amendments to Article 4 (Bank Deposits and Collections), new Article 4A (Funds Transfers) effective June 25, 1992, 1977 Revision to Article 8 (Investment Securities) and effective July 1, 2001 Revised Article 9 (Secured Transactions). Article 6 has been repealed. Section numbers of Michigan Code generally correspond with those of Official Text, printed in Uniform and Model Acts section, except that Michigan omits hyphen between first and second digits. Thus § 3-501 of Official Text corresponds with § 3501 of Michigan act. (MCLA § 440.3501).

Material variations from Official Text, and options or alternatives adopted, are as follows (citations are to U.C.C. Official Text and to sections of MCLA §§ 440.1101-.11102 et seq.).

§ 1-108 U.C.C. is omitted.

§ 1-109 U.C.C. is omitted.

§ 1-207 U.C.C. (MCLA § 440.1207) adopted. A subsection (2) which states: “Subsection (1) does not apply to an accord and satisfaction.”

§ 1-209 U.C.C. (MCLA § 440.1209)—(optional section) adopted.

§§ 1-210 and 1-211 U.C.C. (MCLA §§ 440.1210 and.1211).

§ 2-201 U.C.C. (MCLA § 440.2201) amended effective Feb. 21, 2002 to increase price of goods from $500 to $1,000.

§ 2-313b added extended period of express warranty by number of days between date goods delivered to merchant or warrantor for warranteed repairs and date purchaser notified that repairs completed, days between date repairs attempted at purchaser's premises until repairs completed, and days preceding beginning of repairs after merchant or warrantor receives notice from purchaser that goods inoperative; applies only if total number of days exceeds either ten days or 10% of warranty period. (MCLA § 440.2313b).

§ 2-316(3) U.C.C. (MCLA § 440.2316[3]) adds subsection (d) providing that there is no implied warranty that cattle, hogs, or sheep are free from disease if seller shows all state and federal animal health law has been satisfied.

§ 2-326 U.C.C. (MCLA § 440.2326) adds subsection (4) providing that work of fine art delivered to art dealer for sale, or exhibition and sale, to public on commission, is not subject to claims of art dealer's creditors.

§ 2A-104(3) U.C.C. (MCLA § 440.2804[3])—Subsection provides, "Failure to comply with any applicable statute has only the effect specified in the statute."

§ 2A-216 U.C.C. (MCLA § 440.2866)—Alternative A adopted.

§ 3-312 U.C.C. (MCLA § 440.3312) adds new definitional section regarding lost, destroyed or stolen cashier's checks, teller's checks or certified checks.

§ 4-104(1) U.C.C. (MCLA § 440.4104[1][a])—"deposit or credit" deleted and "depositor credit" inserted.

§ 4-104(9) U.C.C. (MCLA § 440.4104[1][i])—"4a" deleted and "2a" inserted.

§ 4-104(c)(3) U.C.C. (MCLA § 440.4104[3])—list includes "Draft" which is defined in § 3-104.

§ 4-106 U.C.C. (MCLA § 440.4106)—Alternative B adopted.

§ 4-301(d)(1) U.C.C. (MCLA § 440.4301[4][a])—"clearing-house" preceding "rules" deleted and "its" inserted.

§§ 4-405, 4-501, 4-502, 4-503 and 4-504 of 1990 Conforming Amendments to Art. IV not adopted.

Art. 5 U.C.C. (MCLA §§ 440.5101-.5118) 1995 amendments adopted effective Jan. 4, 1999.

Art. 6 U.C.C. repealed effective Jan. 4, 1999.

§ 7-204(4) U.C.C.—not adopted.

§ 7-403(1)(b) U.C.C.—optional language not adopted.

Art. 8 U.C.C. (MCLA §§ 440.8101-.8601) 1994 amendments adopted effective Jan. 4, 1999.

§§ 8-601, 8-602 U.C.C. not adopted.

§ 9-101 U.C.C. not adopted.

§ 9-102(a)(67) U.C.C. (MCLA § 440.9102[1])—definition of "Public-finance transaction" not adopted.

§ 9-109(d) (MCLA § 440.9109[4]) adds creation or transfer of interest in or lien on land contract mortgage governed by MCLA § 565.356 to .361 (MCLA § 440.9109[4][l], and transfer by governmental unit, subdivision or agency (MCLA § 440.9109[4][m]).

§ 9-201(b) U.C.C. (MCLA § 440.9201[2]) adds list of laws that apply to certain transactions.

9-311(a)(2) U.C.C. (MCLA § 440.9311[1][b]) provides that filing is not necessary to perfect lien under motor vehicle code (MCLA §§ 257.201-.259); parts 803 and 811 of Natural Resources and Environmental Protection Act (MCLA §§ 324.80301-.80322, .81101-.81150); and Mobile Home Commission Act (MCLA §§ 125.2330-.2330i).

§ 9-320 U.C.C. (MCLA § 440.9320) adopts noncode subsections (6) to (17) (MCLA § 440.9320[6] to [17]) which apply in case of one buying farm products from one engaged in farming operations. These provisions also address obligations of potential buyers and establish penalties for noncompliance. Subsections (15) and (16), (MCLA § 440.9320[15]-[16]) provide protection to commission merchant or selling agent who has notice of security interest unless commission merchant or selling agent withholds from seller money to pay debt owed from seller.

§ 9-334(j) U.C.C. omitted.

§ 9-406(e) U.C.C. (MCLA § 440.9406[5]) adds claim or right to receive amount excludable from gross income under 26 U.S.C. § 104(a)(1) or (2), and claims for benefits under "special needs trust" as defined in 42 U.S.C. § 1917(d)(4)(A), (B) or (C).

§ 9-408(c) U.C.C. (MCLA § 440.9408[1] and [3]) adds, as exception, subsection (4); being § 9-408(d).

§ 9-408(e) U.C.C. (MCLA § 440.9408[5]) provides that subsections (1) and (3) [§§ 9-408(a) and (c)] do not apply to claim or right to receive amount excludable from gross income under 26 U.S.C. § 104(a)(1) or (2), and claims for benefit under "special needs trust" as defined in 42 U.S.C. § 1917(d)(4)(A), (B) or (C).

§ 9-501 U.C.C. (MCLA § 440.9501) omits phrase "if the local law of this State governs perfection of a security interest or agricultural lien" in subsection (a). Filing with register of deeds need not comply with witness and acknowledgment requirement of MCLA § 565.47 (MCLA § 440.9501[3]). Secretary of State notifies individual of filing and provides copy. (MCLA § 440.9501[4] and [5]). Filing false statement is felony, and, if convicted, court may find financing statement ineffective. Debtor named in false statement may seek equitable relief. (MCLA § 440.9501[6] and [7]).

§ 9-501(a) U.C.C. (MCLA § 440.9501a) added providing process whereby named debtor can have fraudulent financing statement terminated. Not applicable to financing statement filed by regulated financial institution or its representative.

§ 9-502 U.C.C. (MCLA § 440.9502[1])—adopts optional language in (b)(3) and (c)(4).

§ 9-512(a) U.C.C. (MCLA § 440.9512[1])—adopts alternative B with optional language. Michigan adds identification by liber and page in (a)(1).

§ 9-515(b) U.C.C. (MCLA § 440.9515[2])—"public finance transaction" omitted.

§ 9-515(f) U.C.C. (MCLA § 440.9515[6])—applies only to “organization identified as transmitting utility”—not to individual.

§ 9-516(b)(3)(D) U.C.C. (MCLA § 440.9516[2][c][iv])—adopts optional language.

§ 9-516(d) U.C.C. (MCLA § 440.9516[4])—replaces “subsection (b)” with “subsection (2) or section 9520(5)”.

§ 9-518(b) U.C.C. (MCLA § 440.9518[2])—adopts alternative B with optional language.

§ 9-519 U.C.C. (MCLA § 440.9519)—adopts optional language for subsections (b), (d) and (i), and for (f), alternative B with optional language.

§ 9-520(b) U.C.C. (MCLA § 440.9520[2])—adopts optional language.

§ 9-520 U.C.C. (MCLA § 440.9520)—in subsection (1), following “section 9516(2)” inserted “or, if the filing office is the secretary of state, subsection (5)” in two instances; and adds five additional subsections as follows: (5) Permitting Secretary of State to refuse filing in specified circumstances; (6) providing procedures for determining whether contested record was wrongfully filed; (7) authorizing legal action to contest Secretary of State’s refusal to accept filing; (8) eliminating filing officer’s personal liability if specified standard met; and (9) exempting financing statement filed by regulated financial institution from subsection (5).

§ 9-521 U.C.C. (MCLA § 440.9521)—revised subsection (1), opening paragraph as entire subsection (1) from text which read: “A filing office that accepts written records for filing shall not refuse to accept a written initial financing statement in the following form, except for a reason set forth in section 9516(2):”; deleted subsection (1), UCC FINANCING STATEMENT; redesignated and revised subsection (2), opening paragraph as entire subsection (2) from text which read: “A filing office that accepts written records for filing shall not refuse to accept a written financing statement amendment in the following form, except for a reason set forth in section 9516(2):”; deleted subsection (2), UCC FINANCING STATEMENT AMENDMENT; and deleted subsection (3) which read: “A form that a filing office may not refuse to accept under subsection (1) or (2) must conform to the format prescribed for the form by the National Conference of Commissioners on Uniform State Laws”.

§ 9-522(a) U.C.C. (MCLA § 440.9522[1])—adopts alternative B with optional language, except for words “and time”.

§ 9-523 U.C.C. (MCLA § 440.9523)—adopts optional language in (c)(1)(A), (d) and (f), which sets selling price as provided in § 9-525.

§ 9-525 U.C.C. (MCLA § 440.9525)—filing fee is $15 for each name. Search fee is $6 per page, expediting search is additional $25; search with seal is additional $6, and copies of presently effective records disclosed by search are additional $2 per page.

§ 9-526 U.C.C. (MCLA § 440.9526)—designates Secretary of State in (a) and (b).

§ 9-527 U.C.C. (MCLA § 440.9527)—designates Secretary of State.

§ 9-617(a)(3) U.C.C. (MCLA § 440.9617[1][c])—optional language not adopted.

§ 9-701 U.C.C. (MCLA § 440.9701)—Michigan Act, which is effective July 1, 2001, provides “as used in this part, this amendatory act means the amendatory act that added this part.”

§ 10-101 U.C.C.—Appears as MCLA § 440.9991. Act effective on Jan. 1, 1964.

§ 10-102(1) U.C.C.—Appears as MCLA § 440.9992.

§ 10-102(2) U.C.C.—Appears as MCLA § 440.9993.

§ 10-103 U.C.C.—Michigan has not adopted this section.

§ 10-104 U.C.C. (MCLA § 440.9994)—subsection 2 omitted.

§ 11-102 U.C.C. (MCLA § 440.11102)—Official Text not enacted; section instead provides that continuation statement (signed by debtor and secured party) may be filed between Jan. 1, 1979 and July 1, 1979 electing application of Michigan version of 1972 Official Amendments—otherwise transactions entered into before Jan. 1, 1979 governed by act as in effect prior to amendment.

§§ 11-103 through 11-108 not enacted in Michigan.

Permanent Editorial Board's Recommendations for Amendment and for Optional Amendment of Uniform Commercial Code of 1966 were not enacted.

1972 Official Amendments.

Adopted effective Jan. 1, 1979.

1973 Official Amendment to § 8-102 adopted, except for minor changes in wording. (MCLA § 440.8102[3]).

1977 Official Amendments to Art. VIII adopted, effective Apr. 24, 1987.

1990 Official Amendments to Art. III and conforming Amendments to Art. IV adopted, effective Sept. 30, 1993.

Revised Art. 9 adopted effective July 1, 2001.

Filing Fees.

Governed by MCLA § 440.9525. See category 10 Documents and Records, topic 10.04 Records, subhead Filing Under Commercial Code. See also Secretary of State's web site at http://www.michigan.gov/sos/0,1607,7-127-1640_14837---,00.html.

Forms.

Uniform version. See end of this Digest.

See also topics: Banks and Banking, Bills and Notes, Brokers, Carriers, Contracts, Factors, Frauds, Statute of, Sales, Securities, Warehousemen; categories Business Organizations, topic Corporations; Civil Actions and Procedure, topic Limitation of Actions; Debtor and Creditor, topics Assignments, Fraudulent Sales and Conveyances, Liens, Pledges; Documents and Records, topics Records, Seals; Mortgages, topic Chattel Mortgages.

3.10 CONDITIONAL SALES:

See topic 3.23 Sales.

3.11 CONSIGNMENTS:

See topic 3.14 Factors.

3.12 CONSUMER PROTECTION:

Consumer Protection Act.

Effective Apr. 1, 1977, consumer protection act adopted. Prohibited practices include: using deceptive representations or causing confusion as to source, sponsorship, approval, certification, geographic origin, condition, quality, style, model, grade, supply, date of delivery or price of goods; disparaging goods, services, business or reputation of others by misleading representation; misrepresenting need for part, replacement or repair; causing probability of confusion as to authority of salesperson, terms of credit or extent of warranty; using coercion or duress in connection with sale; misrepresenting or omitting to state facts material to transaction; advertising or causing to be listed in telephone directory assumed or fictitious business name, business address, or local telephone number that intentionally misrepresents where business is located or operated; refusing to accept gift certificate; charging inactivity fees or service fees in connection with sale of gift certificate; selling gift certificate expiring in less than five years; and having independent third party make consumer’s payments on home solicitation during period consumer is entitled to cancel sale under MCLA §§ 445.111-.117. Enforcement is by action for declaratory or injunctive relief or for damages by attorney general, prosecuting attorney or private citizen. (MCLA §§ 445.901-.922).

Car Rental Contracts.

Car rental company must provide renter with estimated total price and must disclose any vehicle cost recovery or other mandatory fee. (MCLA § 445.903f).

Debt Collection Practices.

Collection agency prohibited from committing certain acts when attempting to collect debt allegedly owed or due to another. Remedies include actual and statutory damages and equitable relief. (MCLA §§ 339.901-.920). Regulated person who is not collection agency prohibited from committing certain acts when attempting to collect debt. Remedies include injunction, actual and statutory damages and cease and desist order issued by attorney general. (MCLA §§ 445.251-.258).

Deceptive advertising prohibited by statute. Prohibition includes untrue claims, misleading statements, over-statement of available supply, failure to state that products are defective or “seconds.” Exemption provided for media disseminating such advertising without knowledge of falsity. Remedies include injunction in action by Attorney General and civil penalty to State in amount not more than $1,000 for first offense, and $5,000 for subsequent offense. (MCLA §§ 445.356-.362).

Home improvement contracts must comply with statute regarding size of type and certain required provisions. Copy of contract must be delivered to buyer. Contract must grant right of cancellation to buyer by written notice given no later than 5:00 p.m. on next business day following date of execution. Contract may not contain waiver of defenses by buyer, liquidated damages to seller and certain other provisions. Finance charge in contract may not exceed $8 per $100 per annum, except that if prevailing interest rate at two successive auctions on 26-week U.S. treasury bills at time of contract exceeds 8%, finance charge on contracts entered before Dec. 31, 1987 may be equivalent to 16.5% interest per annum on unpaid balance; minimum finance charge of $12 permitted. Holder of contract is subject to all defenses of buyer. Remedies include criminal penalty, injunction in action by Attorney General or prosecuting attorney and civil penalty not exceeding $1,000 for violation of injunction. (MCLA §§ 445.1101-.1431).

Home Solicitation Sales.

On home solicitation sales involving more than $25, statute provides that buyer may cancel contract by written notice given before midnight of third business day following sale. Home solicitation sale contract must give notice of aforesaid right of cancellation. Seller cannot have third party make payment until after expiration of right to cancel. Seller seeking to collect under home solicitation sale contract must prove compliance with statute. (MCLA §§ 445.111-.117).

Lemon Law.

Manufacturer or motor vehicle dealer must repair defective new motor vehicle if consumer notified manufacturer or dealer during term of manufacturer's express warranty or within one year of date vehicle was delivered to original consumer, whichever is later. If defect continues to exist after reasonable number of repairs, within 30 days manufacturer has option to either replace vehicle with vehicle which is acceptable to consumer or accept return of vehicle in exchange for refund. (MCLA §§ 257.1401-.1410).

Mortgage lending practices regulated by statute. Credit granting institutions may not deny loan applications or vary contract terms due to racial or ethnic characteristics or trends in neighborhood or based on age of building (though condition and useful life may be considered) except on basis of written criteria uniformly applied to all neighborhoods in metropolitan statistical area or county. Minimum mortgage amount may not be more than $10,000 ($1,000 for home improvement loan). Written statement of reasons for denial of application or variance of terms is required. Credit granting institutions must make available pamphlet containing general criteria for approving loans, which must include consideration of credit eligibility of applicant, value of proposed security and factors known to institution potentially mitigating physical decline of neighborhood. Institutions must post written notice (in statutory form) disclosing rights of applicants under Act and must file reports with Commissioner of Financial Institutions Bureau of Department of Commerce. Person injured by violation has right of action for up to $2,000 or actual damages plus reasonable attorney fees (whichever is greater). (MCLA §§ 445.1601-.1614). Due-on-sale clauses and blended rate mortgages regulated by MCLA §§ 445.1621-.1624.

Plain Language.

No "Plain Language" statute.

Retail Installment Sales.

See topic 3.23 Sales, subhead Retail Credit Sales.

Uniform Deceptive Trade Practices Act not adopted. See subhead Consumer Protection Act, supra.

Unsolicited merchandise may not be sent to recipient as offer for sale. Recipient may refuse delivery thereof or may keep or dispose of such merchandise without obligation to seller. (MCLA § 445.131).

3.13 CONTRACTS:

See category 14 Family, topic 14.10 Infants; category 10 Documents and Records, topic 10.05 Seals; and topic 3.12 Consumer Protection.

Uniform Commercial Code adopted. (MCLA §§ 440.1101-.11102). See topic 3.09 Commercial Code.

3.14 FACTORS:

No factors act. Uniform Commercial Code adopted. (MCLA §§ 440.1101-.11102). See topic 3.09 Commercial Code.

License Requirements.

None. But see topic 3.27 Warehousemen.

Liens.

No statutory provision for factors' liens as such.

Consignment Agreements.

No special statutory provision for filing or recording of consignment agreements. See topic 3.09 Commercial Code.

3.15 FRANCHISES:

Uniform Franchise and Business Opportunities Act not adopted. Michigan Franchise Investment Law (MCLA §§ 445.1501-.1546) governs offer, sale and purchase of franchises, and prohibits fraudulent practices relating to franchises. Department of Attorney General has general supervision of franchises. (MCLA § 445.1502).

Franchise is contract express or implied, oral or written, between two or more persons in which franchisee is (1) granted right to engage in business of offer, sale or distribution of goods or services under marketing plan substantially prescribed by franchisor, (2) granted right to engage in business of offer, sale or distribution of goods or services substantially associated with franchisor's trademark, service mark, advertising or other commercial symbol designating franchisor and (3) required to pay franchise fee either directly or indirectly. (MCLA § 445.1502).

Registration.

Franchisee must file annual notice with department and pay $250 fee prior to offering or selling franchise in state. (MCLA §§ 445.1507a,.1540). Department will notify franchisor in writing of date by which notice must be filed and penalties for failure to file within 60 days of date franchisor required to file notice. Failure of department to notify franchisor does not relieve franchisor from requirement of complying with all provisions of Act. (MCLA § 445.1507a).

Disclosure.

Franchise must not be sold without furnishing prospective franchisee with disclosure statement naming franchisor, name under which franchisor does or intends to conduct business and other significant business and financial information and delivering to prospective franchisee copy of all proposed agreements relating to sale and notice as to prohibition of certain provisions sometimes found in franchise agreements at least ten business days prior to earlier of execution of agreement or receipt of consideration. (MCLA § 445.1508).

Exemptions.

Offer and sale of franchise exempt from registration and disclosure requirements include those: (1) by executor, administrator, sheriff, marshall, receiver, trustee in bankruptcy, guardian or conservator; (2) to bank, savings institution, trust company, insurance company, investment company or other financial institution, or to broker-dealer in which purchaser is acting for itself as fiduciary or in some fiduciary capacity; (3) in which franchise fee does not exceed $500; (4) in which franchisee not domiciliary of state and business of franchise will not be conducted in state; (5) isolated sale of franchise for franchisee's own account if franchisee provides purchaser full access to books and records related to franchise; (6) to existing franchisee who has actively operated franchise for last 18 months and purchases for investment, not for resale and (7) in which franchisee is currently in established business of franchise, person directly responsible for operation or management of franchise has been engaged in business of franchise for two or more years and franchisee and franchisor have reasonable grounds to believe that at consummation of sale, franchisee's gross sales (dollar value) will not exceed 20% of franchisee's gross sales (dollar volume) from franchisee's combined business operations. (MCLA § 445.1506).

Prohibited Practices.

Act prohibits employing any means to defraud, making any untrue statement or omission of material fact or engaging in any act which operates as fraud or deceit upon any person. Franchise may not be offered if sale of franchise business involves illegal activities, or if person convicted of certain felony offenses, subject to administrative order or has judgment entered against him involving illegal offering of franchises or securities and department finds that person creates unreasonable risk to prospective franchisees, if franchise offering is subject of permanent or temporary injunction under federal or state law, or if franchisor has failed to pay proper fee. Pyramid or chain promotions illegal and against public policy. (MCLA §§ 445.1505, .1513, .1523, .1525, .1528). Various contract provisions unlawful, including those permitting franchisor to terminate prior to expiration except for good cause, or depriving franchisee of rights and protections provided in Act. (MCLA § 445.1527).

Damages.

Where franchisor makes fraudulent representations or omissions or does not comply with disclosure requirements franchisee can rescind sale or recover from franchisor damages, with interest at 12% per year and reasonable attorney fees and court costs, subject to certain limitations. Franchisor who offers or sells franchise and does not comply with annual notice requirements is liable to franchisee for damages caused by noncompliance. (MCLA § 445.1531).

Limitation of Actions.

Action to enforce civil or criminal liability under act must be commenced within four years after act or transaction constituting violation. (MCLA § 445.1533).

Penalties.

Person who violates act can be fined not more than $10,000 or imprisoned for not more than seven years, or both. (MCLA § 445.1538).

Statutes Protecting Particular Types of Businesses.

Several statutes protect particular types of businesses. These include:

Michigan New Motor Vehicle Dealer Act (MCLA § 445.1561 et seq.).

Grants extensive rights to new motor vehicle dealers, as defined. Among other things, requires manufacturer or distributor to have "good cause," act in "good faith," and give notice and opportunity to cure before terminating or failing to renew dealer. Requires manufacturer or distributor to repurchase dealer's inventory and in certain circumstances, to compensate dealer for its lease or mortgage expenses. Allows dealer to transfer dealership under specified circumstances.

Michigan Liquor Control Code of 1998 (MCLA § 436.1101 et seq.).

Grants extensive rights to wholesale distributors of beer and wine, including right to exclusive territory, to be terminated only for cause, to transfer distributorship except for good cause, to specific successive periods of notice and opportunity to cure before termination, and to "reasonable compensation," including good will, if terminated in violation of statute. Parties may agree to arbitrate amount of compensation. (MCL 436.1305, .1307 [wine], .1401, .1403 [beer]).

Michigan Farm and Utility Equipment Franchise Act (MCLA § 445.1451 et seq.).

Prohibits manufacturer from terminating, failing to renew or substantially changing competitive circumstances of dealer in farm and certain construction equipment without good cause, notice and opportunity to cure. Requires manufacturer to repurchase inventory.

Michigan Sales Representative Commission Act (MCLA § 600.2961).

Requires principal to pay commissions to terminated sales representative within 45 days of due date. If principal intentionally fails to pay, sales representative may recover its actual damages, plus two times amount of commissions due but not paid or $100,000.00, whichever is less. Allows prevailing party to recover attorney fees and costs.

3.16 FRAUDS, STATUTE OF:

Uniform Commercial Code adopted. (MCLA §§ 440.1101-.9994). See topic 3.09 Commercial Code.

In the following cases, every agreement, contract, or promise is void unless made in writing and signed by party to be charged: Agreement not to be performed in one year; special promise to answer for debt, default, or misdoings debt of another; contract for sale of lands or leasing for longer than one year; agreement made upon consideration of marriage except mutual promises to marry; special promise by personal representative to answer damages out of his own estate; agreement to pay commission for sale of interest in real estate; assignment of things in action; agreement or promise of cure relating to medical care or treatment; and commitment of financial institution to make loan or extend credit, modify or permit delay in repayment or performance, or waive provision of loan or other financial accommodation. (MCLA §§ 566.106, .132).

Contracts of Sale.

Uniform Commercial Code requires writing signed by party to be charged, or his authorized agent or broker, to enforce contract for sale of goods for $1,000 or more, and written contract is not enforceable beyond quantity of goods shown in writing. Between merchants, written confirmation of contract is sufficient to enforce contract against recipient of confirmation, although not signed by recipient, if recipient has reason to know contents of confirmation and fails to give written objection to its contents within ten days after it is received. Requirement of writing is not necessary: (i) In certain cases where goods are specially manufactured; (ii) if contract is admitted by party against whom enforcement is sought in court proceedings; (iii) if goods were received and accepted; or (iv) if payment was made and accepted. (MCLA § 440.2201).

Part Performance.

Statute does not abridge power of chancery court to enforce specifically a contract for an interest in land which has been partly performed. (MCLA § 566.110). For sale of goods see subhead Contracts of Sale, supra.

3.17 [RESERVED]

3.18 INFORMATION TECHNOLOGY, INTERNET AND NEW MEDIA:

Advertising.

Online advertising is regulated in same manner as advertising in other media. Michigan prohibits certain unlawful trade practices (MCLA §§ 445.101-.109) and untrue, deceptive or misleading representations (MCLA § 445.356). Consumer Protection Act (MCLA §§ 445.901-.922) and laws regulating pricing and advertising of consumer items (MCLA § 445.351) also apply to online advertising. MCLA § 445.903 prohibits retailers from failing to properly disclose terms and conditions of gift certificates.

Cyber Court is created as court of record with jurisdiction of state circuit court. (MCLA §§ 600.8001-.8029).

Court Rules.

Courts required to instruct jurors not to use electronic devices, including cell phones, computers, and other mobile communication devises while attending trial or during deliberation. (Rule 2.511).

Cybercrime.

Penal Code prohibits use of Internet or computer to commit various crimes (MCLA § 750.145d), to post communication that would make victim feel terrorized, frightened, intimidated, threatened, harassed, or molested (MCLA § 750.411s), and to disrupt functions of public safety, educational, commercial, or governmental operations (MCLA § 750.543p).

Electronic Mail.

Michigan has adopted Unsolicited Commercial E-mail Protection Act regulating dissemination of e-mail messages, more commonly known as “spamming.” (MCLA § 445.2501).

Electronic Records and Signatures.

Michigan has adopted official version of Uniform Electronic Transactions Act (“UETA”), which affords recognition to electronic signatures and certain electronic records. (MCLA §§ 450.831-.849). While UETA gives legal effect to electronic records, reference must still be made to other applicable law to determine whether any particular electronic record is substantively valid. (MCLA § 450.833[4]).

Identity Theft.

Identity Theft Protection Act (MCLA §§ 445.61-.77) prohibits actions constituting identity theft, as defined, regulates certain business practices, and requires notification to those affected by security breaches.

Internet Access.

Public libraries offering Internet access to public must adopt and enforce policy restricting access to minors of obscene or sexually explicit matter. (MCLA § 397.606).

Internet Service Providers.

Michigan has eliminated authority of public service commission to control rates and terms of telecommunications services such as retail broadband services. (MCLA § 484.2322 repealed by Act 235 of 2005).

Taxation.

Michigan imposes 6% tax on privilege of using, storing or consuming tangible personal property in state. (MCLA §§ 205.91-.111). State seeks to enforce this tax on tangible personal property purchased using Internet. Liability of seller for any applicable use tax is secondary to that of consumer. (MCLA § 205.97).

UCITA.

Michigan has not adopted Uniform Computer Information Transaction Act (“UCITA”).

3.193.16 [RESERVED]

3.17 INTEREST:

Legal rate is 5%, subject to exceptions. (MCLA §§ 438.31-.154).

Maximum rate, permitted by written agreement and subject to exceptions, is 7%. (MCLA §§ 438.31-.154).

Judgments.

For complaints filed before June 1, 1980, judgments bear interest from date of filing complaint at 6% until June 1, 1980, and 12% thereafter, or, if founded on written instrument, at rate therein provided, if legal, but not exceeding, subsequent to date judgment is entered, 7% until June 1, 1980, and 13% thereafter, compounded annually. For complaints filed on or after June 1, 1980, but before July 1, 2002, judgments bear interest at rate of 12%, or if founded on written instrument having higher interest rate, at rate therein provided, but rate shall not exceed 13% after date judgment is entered, compounded annually, except as noted below. For all complaints filed on or after Jan. 1, 1987 unless otherwise specifically provided for above, and for complaints filed on or after Jan. 1, 1987, but before July 1, 2002 resulting in final, nonappealable judgment as of July 1, 2002 on written instrument not specifying interest, interest is calculated as follows: interest accrues from date of filing complaint at rate certified by state treasurer semiannually as 1% plus average rate on five-year U.S. Treasury Notes, with interest calculated on entire amount of money judgment, including attorney fees and other costs, but amount of interest is retained by plaintiff, and not paid to plaintiff's attorney. For complaint filed on or after July 1, 2002, in which rate is specified on written instrument, judgments bear interest from date of filing complaint at rate therein provided, if legal, if specified rate is variable, interest is fixed at rate in effect under instrument at time complaint is filed, but rate shall not exceed 13% per year compounded annually. For complaints filed on or after Oct. 1, 1986, interest is not allowed on "future damages", defined as personal injury damages accruing after damage findings are made. In tort cases, written settlement offer meeting certain conditions may affect foregoing. In medical malpractice cases, failure of party to allow access to medical records can affect effective time for calculation of interest charges. (MCLA §§ 600.6013, .6301). Prevailing party entitled to statutory interest on judgment even when judgment does not provide for interest. (186 Mich. App. 58, 463 N.W.2d 120).

Open accounts do not bear interest in absence of agreement. (53 Mich. 421, 19 N.W. 127; 145 Mich. 37, 108 N.W. 498).

Partial payments are applied first to interest accrued to date and balance to principal. (82 Mich. 190, 46 N.W. 227).

Provision for compound interest on delinquent interest is permitted at rate agreed to in writing not exceeding 10% per annum or 7% per annum in absence of written agreement (MCLA § 438.101), but only simple interest is allowed after maturity (41 Mich. 533, 2 N.W. 665).

Interest on Accrued Interest.

After interest has accrued, new promise to pay interest on it is permitted. (263 Mich. 609, 249 N.W. 10).

Regulated Lenders are defined as Depository Institutions (defined as banks, savings and loan associations, savings banks, or credit unions, chartered under state or federal law which maintain principal office or branch in Michigan), licensees under Motor Vehicle Sales Finance Act or sellers under Home Improvement Finance Act, licensees under Regulatory Loan Act, and licensees under Consumer Financial Services Act. (MCLA § 445.1852). They may charge, collect and receive any rate of interest or finance charge for loan or credit sale not in excess of 25% per annum and may charge, collect and receive any rate of interest or finance charge for credit card arrangement. (MCLA § 445.1854).

Small Loans.

Licensee under Regulatory Loan Act may charge on loan not exceeding regulatory loan ceilings interest not exceeding 25% per annum. Loan processing fee not in excess of 5% of principal up to $250 may be charged which limit will be adjusted every two years to reflect U.S. consumer price index change. (MCLA §§ 493.1-.26). Handling fee of up to $25 may be charged for dishonored check or similar instrument as authorized by credit reform act. (MCLA §§ 445.1851-.1864). Costs and expenses can be recovered for retaking, holding, repairing, preparing for sale, and selling any personal property (MCLA § 493.13), in accordance with uniform commercial code (MCLA §§ 440.9609, .9615). Reasonable annual fee may be charged for receiving open-end credit. Reasonable fee per payment may be charged for payment authorized either verbally or in writing for debits executed in automated procedures, which draw on borrower’s deposit account, except where borrower authorizes automated periodic installment payments at time of consummation of loan. (MCLA § 493.13).

Security Broker Loans.

Interest charged on debit balances in customer accounts payable on demand and secured by stocks or bonds not subject to usury limitations. (MCLA § 438.31c).

Credit Card Loans and Certain Installment Loans.

Depository Institutions (see subhead Regulated Lenders, supra) may charge, collect, and receive any rate of interest or finance charge for extensions of credit to cardholder of credit card or charge card issued by depository institution. Except as provided in preceding sentence, regulatory lender may charge any interest rate or finance charge not more than 25% per annum. (MCLA §§ 445.1854, 487.14201). See subhead Loans Secured by Real Estate, Infra.

Credit Union Loans.

Interest rates on loans or extensions of credit made by credit union, except to another credit union, may not exceed 25% per annum. (MCLA §§ 490.422; 445.1854). Interest on loan to member of $1,000 or less, if member has only one such loan, may not exceed 10%. (MCLA § 490.422).

Expenses.

Depository Institutions (see subhead Regulated Lenders, supra) may charge, collect and receive from borrower or buyer all fees and charges that are agreed to or accepted by borrower or buyer including those relating to making, closing, processing, disbursing, extending, committing to extend, readjusting, renewing, collecting payments upon, or otherwise servicing extension of credit or any occurrence or transaction related to extension of credit, but such fees and charges may not be excessive. Subject to exceptions in specific authorizing legislation (see e.g. subhead Small Loans, supra), regulated lenders (see subhead Regulated Lenders, supra) other than depository institutions may charge processing fee for disbursing, extending, readjusting or renewing extension of credit, which fee shall not exceed 2% of amount of credit extended, may charge late fee for installment payment that is received after expiration of agreed-upon grace period, but such late fee shall not exceed greater of $15 or 5% of installment, and may charge fee not to exceed $25 for dishonored check or other instrument. (MCLA § 445.1856). Depository institutions (see subhead Regulated Lenders, suprau) may charge agreed-upon, non-excessive fees and charges including those relating to making, closing, processing, disbursing, extending, committing to extend, readjusting, renewing, collecting payments upon, or otherwise servicing extension of credit, but for credit card arrangements such fees and charges are considered interest. (MCLA § 445.1857).

Certain Bank and Insurance Company Loan Expenses.

Reasonable, actual expenses of lending by banks, insurance companies and lenders approved as mortgagees under National Housing Act (12 USC §§ 1701-1750g) or regulated by federal agency incurred in making, closing, extending, or renewing loans may be reimbursed by borrower to lender without same standing as part of interest paid. Inspection charges imposed by local units of government may not be charged to borrower. These provisions do not apply to Federal or State Savings and Loan organizations. (MCLA §§ 438.31a,.31b).

Motor Vehicles.

Motor Vehicles Sales Finance Act (MCLA §§ 492.101-.141) provides that licensee may charge finance charge that does not exceed rate permitted by Credit Reform Act (MCLA § 492.118). Credit Reform Act provides that finance charge may not exceed 25%. (MCLA § 445.1854). Minimum finance charge of $15 may be charged on installment sales contract in which finance charge, computed at indicated rates, results in total charge of less than $15. (MCLA § 492.118[5]).

Usury.

Results in loss of all interest (MCLA § 438.32), and loss of entire loan under Regulatory Loan Act (MCLA §§ 493.13, .19). Usury cannot be pleaded against holder in due course of negotiable instrument (MCLA § 438.5) nor by corporation if corporation agreed to interest in writing (MCLA § 450.1275). Usury provisions inapplicable to loans by banks, insurance carriers and finance subsidiaries of manufacturers to “business entities,” defined by statute to include any corporation, trust, estate, partnership, cooperative or association, or natural person submitting sworn statement as to type of business in which such person is engaged in which borrowed funds are to be used; other persons extending credit to “business entities” may agree in writing to rate not exceeding 25%. (MCLA § 438.61). Debtor cannot recover usurious payments if debt is completely satisfied, but if debt is partially outstanding, all interest charged (not just usurious portion) will be applied to principal. (297 Mich. 315, 297 N.W. 505). Usury statute does not apply to obligations whose issue and interest rate have been approved by Michigan Public Service Commission or Securities Bureau of Department of Commerce (MCLA § 438.31) nor to Federal Housing Administration-insured obligations (MCLA §§ 487.751-.752) nor to interest charged by trust forming part of stock bonus, pension or profit sharing plan which satisfies requirements of Internal Revenue Code § 401(a) on loan to participating employee or beneficiary of trust (MCLA § 438.31c). Defense of usury can be waived by nonprofit corporation. (MCLA §§ 438.31d, 450.1275). Person who knowingly charges or receives interest at rate exceeding 25% simple interest per annum is guilty of criminal usury unless otherwise permitted to charge such rate and is subject to imprisonment for up to five years and/or fine of up to $10,000. (MCLA §§ 438.41-.42).

See supra this category, topic Consumer Protection.

Loans Secured by Real Estate.

Notes, bonds or other evidences of indebtedness primarily secured by first lien against real estate, or land lease if tenant owns majority interest in improvements thereon, and land contracts may bear interest at rate greater than that specified in usury statute so long as statutory provisions (which include requirement that lender be approved mortgagee under National Housing Act, 12 USC §§ 1701-1750g or regulated by state, or by federal agency which is authorized by state or federal law to make such loans) are observed (such provisions do not apply if amount is $100,000 or more and property is not single family residence). (MCLA § 438.31c). Maximum rate on such loans and land contracts made by others is 11%. (MCLA § 438.31c). Licensed secondary mortgage lender may charge up to 25% computed by actuarial method. (MCLA § 493.71). Indebtedness secured by lien on mobile home retained by seller in other than retail installment transaction may bear interest not exceeding 11%. (MCLA §

438.31c[8]).

For finance charge limits in certain cases, see topic 3.23 Sales, subhead Retail Credit Sales.

3.18 [RESERVED]

3.19 LICENSES, BUSINESS AND PROFESSIONAL:

License laws of State are voluminous and cover great variety of callings, vocations, and businesses some of which are described in Occupational Code. (MCLA §§ 339.101-.2919).

Commercial Travelers.

Cities have considerable latitude under charters and home rule acts as to licensing various occupations, such as junk dealers, peddlers, etc. (105 Mich. 670, 64 N.W. 29). Pawnbrokers must obtain license from governmental unit in which they act. (MCLA § 446.201).

Special licenses to war veterans are provided for residents of State. (MCLA § 35.441).

Collection Agencies.

Persons engaged in collecting accounts for others or soliciting accounts for collection (except attorneys, justices of the peace, fiduciaries, banks and trust companies) must obtain license and post bond with department of licensing and regulation unless activity in State is limited to interstate communication. (MCLA §§ 339.901-.920).

Health and Medical Licenses.

See category Health, topic Licensure and Certification.

3.20 MONOPOLIES, RESTRAINT OF TRADE AND COMPETITION:

Uniform State Antitrust Act adopted with modifications.

Contract, combination or conspiracy between two or more persons in restraint of, or to monopolize, trade or commerce in geographical area of actual or potential competition is unlawful. Monopoly or attempted monopoly for purpose of excluding or limiting competition or controlling, fixing or maintaining prices, is unlawful. (MCLA §§ 445.771-.788).

Unfair Trade Practices.

Certain practices including improper and misleading use of words in connection with sales of goods are unlawful and various penalties are imposed for commission of such practices. (MCLA §§ 445.101-.109). Unfair methods of competition or deception in insurance business, including workers compensation coverage provided by self insurance group, are prohibited. (MCLA §§ 500.2001-.2093). Such methods or practices include: charging different rate for same coverage based on sex, marital status, age, residence, location of risk, disability, or lawful occupation of risk unless rate differential is based on sound actuarial principles, reasonable classification system, and is related to actual or credible loss statistic. (MCLA §§ 500.2020, .2027).

Resale Price Agreements.

Agreement between manufacturer and dealer requiring dealer to sell at fixed prices unlawful under prior statute, following federal case law. (91 Mich. App. 212, 283 N.W.2d 695). Current statute expresses intent that state courts give due deference to interpretations of comparable antitrust statutes by federal courts, including doctrine of per se violations and rule of reason. (MCLA § 445.784).

3.21 NEGOTIABLE INSTRUMENTS:

See topic 3.02 Bills and Notes.

3.22 RESTRAINT OF TRADE:

See topic 3.20 Monopolies, 3.22 Restraint of Trade and Competition.

3.23 SALES:

Uniform Commercial Code adopted. (MCLA §§ 440.1101-.11102). See topic 3.09 Commercial Code.

Contracts of Sale.

Governed by Uniform Commercial Code. (MCLA §§ 440.1101-.11102). (See topic 3.16 Frauds, Statute of.) No statutory requirement as to type size in printed contracts except as indicated in category Transportation, topic Motor Vehicles, subhead Installment Sale. For requirements as to size and weight of paper in secured transactions, see category 20 Mortgages, topic 20.01 Chattel Mortgages, subhead Requisites of Instrument.

Bills of Sale.

No statutory provision.

Product Liability.

Breach of warranty, express or implied, is a ground of recovery for product-caused injury. (MCLA § 440.2714). (See this topic, subhead Conditions or Warranties, and see also topic 3.09 Commercial Code.) Privity no longer required in action on implied warranty (353 Mich. 120, 90 N.W.2d 873), and might not be required in action on express warranty (512 F.2d 1294, cf. 276 F.2d 254). These rules may conflict with Uniform Commercial Code. (MCLA §§ 440.1101-.11102, see especially MCLA § 440.2318).

Conditional Sales.

Governed by Uniform Commercial Code. (MCLA §§ 440.1101-.11102). No statutory requirement as to type size in printed contracts except as indicated in category Transportation, topic Motor Vehicles, subhead Installment Sale. For requirements as to size and weight of paper in secured transactions, see category 20 Mortgages, topic 20.01 Chattel Mortgages, subhead Requisites of Instrument.

Where sale on title retaining contract or chattel mortgage of any accessory, equipment, additional or replacement part is made to owner of motor vehicle, contract is void as against subsequent purchaser of motor vehicle or as against person who subsequently lends money on motor vehicle unless recorded on certificate of title to motor vehicle. (MCLA §§ 566.251-.253).

Retail Credit Sales.

Retail Installment Sales Act governs time sales of tangible personalty and certain services purchased for personal household or family use. Act sets type size, requires agreement to bear certain notices, sets out statement of price components, permits assertion of defenses against assignee and limits finance charge to $12 per $100 on first $500 principal balance, $10 per $100 on excess. Provisions in agreement for confession of judgment, acceleration of maturity without default, or not to assert defenses, not permitted. Holder of contract is subject to all defenses of buyer. (MCLA §§ 445.851-.872).

Home Solicitation sales are regulated by statute providing right of revocation within three days under certain circumstances. (MCLA §§ 445.111-.117).

Home Improvement Finance Act regulates contracts for sale of goods and services to improve residential dwellings. Act providing for form of contract, limitation of finance charge, assertion of defenses against assignee and prohibitions with respect to certain practices incident to sale. (MCLA §§ 445.1101-.1431).

See supra this category, topic Interest. See also supra this category, topic Consumer Protection.

Sales of Motor Vehicles.

See category 23 Transportation, topic 23.01 Motor Vehicles. See also supra this topic, subhead Conditional Sales.

Bulk Sales.

See topic 3.09, Commercial Code. See also category Debtor and Creditor, topic Fraudulent Sales and Conveyance.

3.24 SECURITIES:

Uniform Securities Act (2002) adopted eff. Oct. 1, 2009, replacing Uniform Securities Act of 1956, as am'd. (MCLA §§ 451.2101-.2703). Citations below that do not contain MCLA designations are from Uniform Act.

Uniform Commercial Code adopted. (MCLA §§ 440.1101-.11102). See topic 3.09 Commercial Code.

Supervision.

Administrator is Office of Financial and Insurance Regulation of Michigan Department of Energy, Labor & Economic Growth. (MCLA § 451.2102). Address: 6546 Mercantile Way, P.O. Box 30222, Lansing, Michigan 48909.

Regulatory Powers of Supervisory Authority.

Under MCLA § 451.2604, Administrator may issue cease and desist order, as well as seek injunction. Joint investigations and inspections with other agencies or self-regulatory bodies authorized. (MCLA § 451.2608[3]). Stop orders and penalties also authorized in some cases related to notice filings and fees under MCLA §§ 451.2302, .2303.

Prerequisites to Sales or Offerings.

Except with respect to “federally covered security” (defined as security that is “covered security” under Securities Act of 1933 or related regulations; MCLA § 451.2102[g]), unlawful without securities registration, unless security or transaction exempt under Michigan Act. (MCLA § 451.2301). However, notice filing and/or copy of documents filed with Securities and Exchange Commission must be filed with Administrator (initial filing fee between $100 and $500, plus annual renewal fees as needed between $100 and $1,400) with respect to registered investment companies and other federally covered securities. (MCLA § 451.2302). No distinction between federally covered securities and other securities in antifraud provisions of Michigan Act. (MCLA §§ 451.2501, .2502, .2509).

Prerequisites to Transacting Business.

Absent exemption, broker-dealer, agent, and investment advisor must be registered before transacting business in Michigan. (MCLA §§ 451.2401, .2402, .2403). Registration of broker-dealer, agent, or investment advisor effective on 45th day after completed application filed (unless registration denied) and expires on Dec. 31. Unless order in effect, registration automatically renewable each year by filing records and paying fees and costs. (MCLA § 451.2406[4]). "Federal covered investment advisor" (defined as person registered under § 203 of Investment Advisors Act of 1940 (MCLA § 451.2102[f]), while not required to be registered, with some exceptions must make notice filing before conducting business in Michigan. (MCLA § 451.2405). Investment advisor representative required to register absent exemption. (MCLA § 451.2404).

Securities to Which Act Applicable.

Definition of "security" conforms to Uniform Securities Act (2002). (MCLA § 451.2102c[c]). "Security" includes contract where (1) person furnishes capital (other than services) to issuer; (2) portion is subjected to risks of enterprise; (3) furnishing capital induced by representations of issuer, promoter or affiliates causing reasonable understanding that benefit will accrue to person as result of operation of enterprise; (4) person does not intend to be actively involved in management of enterprise; and (5) promoter or its affiliates anticipate gain as result of capital. (MCLA § 451.2102[c]).

Exempt Securities.

List of exempt securities conforms to Uniform Securities Act (2002). (MCLA § 451.2201).

Exempt Transactions.

List of exempt transactions in Michigan Act conforms to that in Uniform Securities Act (2002). (MCLA 451.2202).

Registration of Securities.

Application for registration may be filed by issuer, other person on whose behalf offering made, or registered broker-dealer. (MCLA § 451.2305[1]). Consent appointing administrator as agent to receive service of process required. Filing fee: 0.01% of maximum aggregate offering price of securities offered in Michigan but not less than $100 and not more than $1,250. (MCLA § 451.2305[2]). Registration statement effective for one year after effective date. (MCLA § 451.2305[8]). Periodic reports may be required so long as registration effective. (MCLA § 451.2305[9]).

Registration by coordination available for any security for which registration statement filed under Securities Act of 1933 for same offering. (MCLA § 451.2303). Registration statement for registration by coordination must contain: (1) Copy of latest form of prospectus filed under Securities Act of 1933; (2) copies of articles of incorporation and bylaws or equivalents, any agreement with or among underwriters, and any indenture or other instrument governing issuance of security to be registered and specimen, copy, or description of security required by rule or order; (3) copies of any other information filed by issuer under Securities Act of 1933 requested by administrator; and (4) undertaking to forward each amendment to federal prospectus promptly after filed with SEC. (MCLA § 451.2303[2]). Application for registration by coordination automatically effective if no stop order in effect, documents on file with administrator for 20 days, and registrant has not consented to later effective date. (MCLA § 451.2303[3]). Registrant must promptly notify administrator of date and time of effectiveness of federal registration and contents of pricing amendment. (MCLA § 451.2303[4]).

Registration by qualification available for all securities. Registration statement must contain documents enumerated by statute. (MCLA § 451.2304[1]-[2]). Registration by qualification effective on 30th day after filing registration statement if no stop order in effect and applicant has not requested delayed effectiveness. (MCLA § 451.2304[3]). Administrator may delay effectiveness once for not more than 90 days if administrator determines registration statement not complete in all materials respects. (MCLA § 451.2303[4]).

Registration of Offerors.

No requirements other than in connection with registration of securities and broker-dealers and agents.

Fraud and Liabilities.

Unlawful in connection with offer, sale, or purchase of security, directly or indirectly, to: (1) Employ device, scheme, or artifice to defraud; (2) make untrue statement of material fact or omit to state material facts necessary in order to make statement made, in light of circumstances under which made, not misleading; or (3) engage in act, practice, or course of business that operates or would operate as fraud or deceit. (MCLA § 451.2501). Unlawful to make or cause to be made, in record used in action or proceeding under Michigan Act, statement that is false or misleading in material respect, or to omit to state material facts necessary to make statement made not false or misleading. (MCLA § 451.2505). With some exceptions, person who willfully violates Michigan Act guilty of felony punishable by imprisonment for not more than ten years and/or fine of not more than $500,000 for each violation. (MCLA § 451.2508[1]). Provision for civil liability for persons who offer, purchase or sell in violation of Michigan Act and those who control sellers or purchasers and certain affiliates unless purchaser or seller did not know and through exercise of reasonable care could not have known of violation. (MCLA § 451.2509). Available remedies include action to recover security or consideration paid, interest at 6% per annum, and reasonable attorney’s fees, or actual damages. (MCLA § 451.2509[2]-[3]). Statute of limitations varies from one year after violation occurred to earlier of two years after discovery of facts constituting violation or five years after violation. (MCLA § 451.2509[10]). Applicable statute of limitations determined by violation.

Broker-Dealer Registration Requirements and Exemptions.

“Broker-dealer” means person engaged in business of effecting transactions in securities for account of others or for person’s own account. Does not include: (a) Agent; (b) issuer; (c) bank, savings institution, or trust company; (d) international banking institution; or (e) person excluded by rule or order. (MCLA § 451.2102[d]).

Registration required unless exemption available. Exemptions under Michigan Act generally conform to Uniform Securities Act (2002). (MCLA § 451.2401[2]). Exempt person includes, for offers and sales of mortgage loans, person licensed or registered as mortgage broker, lender, or servicer under Michigan Mortgage Brokers, Lenders and Servicers Licensing Act (MCLA §§ 445.1651-.1684). (MCLA § 451.2401[2][c]).

Investment Advisor Registration Requirements and Exemptions.

“Investment advisor” means person that, for compensation, engages in business of advising others, either directly or through publications or writings, as to value of securities or advisability of investing in, purchasing, or selling securities or that, for compensation, and as part of regular business, issues or promulgates, analyses or reports concerning securities. Includes financial planner or other person that, as integral component of other financially related services, provides advice to others for compensation as part of business or that holds itself out as providing investment advice to others. Does not include: (a) Investment advisor representative; (b) lawyer, accountant, engineer, or teacher whose performance of investment advice is solely incidental to practice of profession; (c) broker-dealer or agent whose performance of investment advice solely incidental to conduct of business as broker-dealer and does not receive special compensation for investment advice; (d) publisher of bona fide newspaper, news magazine, or business financial publication of general and regular circulation; (e) federal covered investment advisor; (f) bank, savings institution, trust company, or credit union; (g) any other person excluded by Investment Advisors Act of 1940 from definition of investment advisor; or (h) any other person excluded by rule or order Act. (MCLA § 451.2102[e]).

Registration required unless exemption available. Exemptions under Michigan Act conform to Uniform Securities Act (2002). (MCLA § 451.2403[2]).

Broker-Dealer and Investment Advisor Fees and Renewals.

Person registers as broker-dealer, agent, investment advisor, or investment advisor representative by filing application and consent to service of process and paying appropriate registration fee. (MCLA § 451.2406). Fees: (a) Broker-dealer: initial filing—$300, renewal—$300; (b) agent: initial filing—$65, renewal—$65; (c) investment advisor: initial filing—$200, renewal—$200; (d) investment advisor representative: initial filing—$65, renewal—$65; and (e) federal covered investment advisor: $200. (MCLA § 451.2410). Registration application must contain: (i) Information or record required for filing uniform application; and (ii) if requested by administrator, any other financial or other information or record administrator deems appropriate. (MCLA § 451.2406[1]). If information or record contained in application inaccurate or incomplete in any material respect, registrant must promptly file correcting amendment. (MCLA § 451.2406[2]). If no order in effect and no proceeding pending, registration becomes effective at noon on 45th day after completed application filed unless registration denied. (MCLA § 451.2406[3]). Registration effective until midnight on Dec. 31 of year for which application filed. (MCLA § 451.2406[4]). Unless order in effect, registration automatically renewable each year by filing records required by rule or order and paying fees and costs. (MCLA § 451.2406[4]).

Bonds.

Subject to Section 15(h) of Securities Exchange Act of 1934 or Section 222 of Investment Advisers Act of 1940, rule or order under Michigan Act may: (1) Establish minimum financial requirements for broker-dealers and investment advisors registered or required to be registered under Michigan Act; (2) require filing financial reports; and (3) require broker-dealer or investment adviser that has custody or discretionary authority over funds or securities of client to obtain insurance or post bond or other satisfactory form of security acceptable in form and amount to administrator, but no insurance, bond, or other form of security can be required of broker-dealer registered under Michigan Act whose minimum financial requirements exceed amounts required by rule or order. (MCLA § 451.2411[1], [2] and [5]).

Denial, Revocation, Suspension or Cancellation of Registration of Broker-Dealer or Investment Advisor or Other Professional.

MCLA § 451.2412 sets forth procedures and grounds for disciplinary actions. Grounds for discipline of broker-dealer, agent, investment advisor, or investment advisor representative described in MCLA § 451.2412(4). Administrator may suspend or deny application summarily, restrict, condition, limit, or suspend registration, or censure, bar, or impose civil fine on registrant pending final determination of administrative proceeding. (MCLA § 451.2412[6]). Administrator cannot institute proceeding under MCLA §§ 451.2412(1), (2), or (3) solely based on material facts known by administrator unless investigation or proceeding instituted within one year after administrator knew material facts. (MCLA § 451.2412[9]).

Advertisements.

Administrator may by rule or order require filing and acceptance prior to use of any prospectus, pamphlet, circular, form letter, advertisement, or other sales literature or advertising communication addressed or intended for distribution to prospective investors, including clients or prospective clients of person registered or required to be registered under Act as investment advisor or federal covered investment advisor unless literature relates to security or transaction exempt by MCLA §§ 451.2201, .2202, or .2203 or security is federally covered security or federal covered investment advisor. (MCLA § 451.2504).

Subdivision Offerings.

Model Land Sales Practices Act adopted, with substantial modifications. (MCLA §§ 565.801 et seq.).

Franchising, Pyramid Sales, Etc.

Regulated under Franchise Investment Law. (MCLA §§ 445.1501 et seq.). See topic 3.15 Franchises.

Uniform Simplification of Fiduciary Security Transfers Act adopted. (MCLA §§ 441.101 et seq.).

3.25 STATUTE OF FRAUDS:

See topic 3.16 Frauds, Statute of.

3.26 TRUST RECEIPT SECURITY:

See category 8 Debtor and Creditor, topic 8.15 Pledges.

3.27 WAREHOUSEMEN:

Uniform Commercial Code adopted. (MCLA §§ 440.1101-.11102). See topic 3.09 Commercial Code.

Uniform Warehouse Receipts Act makes certain dishonest acts of warehousement crimes. (MCLA §§ 443.50-.55).

Warehousemen required to keep records of all property deposited, dates of deposit and names and address of owners of property. (MCLA § 444.7). Separate provisions exist with respect to storage of farm produce, meat products and various other commodities. (MCLA §§ 285.61-.88, 444.101-.109).

Bonds.

Warehousemen of farm produce (defined at MCLA § 285.62) must give bond, running to department of agriculture, with sufficient surety and conditioned upon faithful performance of duties. Amount of bond varies with warehouse capacity. (MCLA § 285.87).

Licenses.

Grain warehousemen must secure license annually from state department of agriculture (MCLA § 285.63) and are subject to Grain Dealers Act (MCLA §§ 285.61-.88).

4 CITIZENSHIP

4.01 ALIENS:

Aliens do not have franchise. (Const. Art. II, § 1).

Property.

Aliens who are residents of this state enjoy same rights and privileges in property as citizens of this state. (Const. Art. X, § 6). Any alien may acquire and hold lands, or any right thereto or interest therein, by purchase, devise or descent, and may convey, mortgage and devise same, and if he dies intestate, lands descend to his heirs in same manner as if he were native citizen of this state, or of U.S. (MCLA §§ 554.135-.136).

5 CIVIL ACTIONS AND PROCEDURE

5.01 ACCORD AND SATISFACTION:

The principle is recognized and enforced as at common law. Accord and satisfaction is founded upon consideration, and consideration may take any form which would be held to constitute good consideration for any other agreement. Part payment of past due, liquidated and undisputed debt does not bar action for balance (330 Mich. 353, 47 N.W.2d 643), unless discharge in writing is signed by creditor. (MCLA § 566.1). An agreement to change or modify, or to discharge in whole or in part any contract where there is absence of consideration is not valid unless in writing and signed by party against whom it is sought to enforce the change, modification, or discharge. (MCLA § 566.1).

Uniform Commercial Code adopted. (MCLA §§ 440.1101-.11102). See category 3 Business Regulation and Commerce, topic 3.09 Commercial Code.

Compromise.

In general, compromise is governed by same principles as accord and satisfaction, stated supra.

Pleading.

Accord and satisfaction is an affirmative defense which must be pleaded. (Rule 2.111[F][3][a]).

5.02 ACTIONS:

Equity.

Procedural distinctions between law and equity are abolished. (Rule 2.101).

Forms of Action.

There is one form of action, known as a civil action. (Rule 2.101).

Conditions Precedent.

See topic 5.16 Limitation of Actions, subhead Claim Against State.

Commencement.

See topics 5.20 Process, 5.18 Pleading.

Parties.

Actions must be brought in name of real party in interest, but personal representative, guardian, conservator, trustee, party who has contracted for benefit of another or person authorized by statute may sue in own name without joining party for whose benefit action is brought. (Rule 2.201[B]). Assignee for collection is real party in interest (269 Mich. 608, 257 N.W. 751). Infants sue by next friend or guardian of estate. (Rule 2.201[E]). Married women sue and are sued as if sole. (MCLA § 600.2001).

Necessary parties are those whose presence is essential to permit court to render complete relief, although where jurisdiction over all such parties cannot be obtained court may proceed and grant such relief to parties as will prevent failure of justice. Reasons for omitting necessary parties must be pleaded. (Rule 2.205).

Parties may join as plaintiffs or be joined as defendants if right to relief is asserted jointly, severally as arising out of same transaction or series of transactions and there is common question of law or fact, or if convenient administration of justice will be promoted. Court may order separate trials. (Rule 2.206). Misjoinder of parties is not ground for dismissal, and parties may be added or dropped at any stage. (Rule 2.207). Class actions are permitted. (Rule 3.501). Uniform Class Actions Act not adopted. Third party defendant may be joined by timely filed third party complaint and otherwise by leave granted on motion with notice to all parties. (Rule 2.204).

Intervention.

Permitted as of right upon timely application when statute so provides, by stipulation of all parties or when applicant claims interest relating to property or transaction which is subject of action and is so situated that disposition of action may impair or impede applicant's ability to protect that interest; permitted in court's discretion when statute gives conditional right to intervene, or when applicant's claim or defense and main action have question of law or fact in common. (Rule 2.209).

Interpleader.

Persons having claims against plaintiff may be joined as defendants and required to interplead when plaintiff may be exposed to double or multiple liability. Court may order property or funds as to which plaintiff admits liability be deposited with court, or secured by bond, and may order plaintiff discharged from liability with respect thereto prior to determination of rights of claimants. Court may enjoin other actions and may award actual costs to plaintiff. (Rule 3.603).

Joinder of Causes of Action.

All claims arising out of same transaction or occurrence must be pleaded in same action, but failure to object to misjoinder or nonjoinder of claims in pleading, by motion or at pretrial waives joinder rules and judgment merges only claims actually litigated. Party may join as many claims either legal or equitable as he may have against opposing party. Counterclaim or cross-claim must be filed with answer or as amendment to answer. Counterclaim may, but need not, diminish or defeat recovery sought; and may exceed in amount or be different in kind than that sought by opposing party. Cross-claim may be asserted against co-party arising out of subject matter of original action or of counterclaim therein or relating to any property which is subject of original action. (Rule 2.203).

Consolidation of Actions.

Court may order consolidation of pending actions involving substantial and controlling common question of law or fact. (Rule 2.505[A]).

Severance of Actions.

Court may order separate trial of any claim, cross-claim, counterclaim or third party claim, or of any separate issue. (Rule 2.505[B]).

Stay of Proceedings.

No injunction may be granted in one action to stay proceedings in another action pending in any court in which the relief may be sought. (Rule 3.310[E]). Court shall adjourn proceeding when attorney acting for party dies, is removed or suspended, or ceases to act as such, and party entitled to 28 days' notice to obtain new attorney or advise court of intention to appear on own behalf. (Rule 2.503[F]).

Abatement and Revival.

All actions and claims survive death. (MCLA § 600.2921). If a party dies, court orders substitution of proper parties on motion made by his successors or representatives or by any party. Unless motion for substitution made within 91 days of filing of statement of fact of death, action must be dismissed as to deceased party unless showing of no prejudice to any other party of allowing later substitution. (Rule 2.202). See also category 13 Estates and Trusts, topic 13.09 Executors and Administrators.

Prohibited Actions.

Alienation of affections, criminal conversation, seduction of person 18 or more years old, breach of contract to marry. (MCLA § 600.2901).

Limitation of.

See topic 5.16 Limitation of Actions.

Small Claims.

See category 6 Courts and Legislature, topic 6.01 Courts.

Termination of Actions.

Question once decided by judgment on merits is final. (242 Mich. 234, 218 N.W. 783).

Administration.

See category 13 Estates and Trusts, topic 13.09 Executors and Administrators.

Direct Actions Against Insurer.

See category 23 Transportation, topic 23.01 Motor Vehicles, subhead Direct Actions.

5.03 APPEAL AND ERROR:

Appeals are governed by Rules and Revised Judicature Act. (MCLA §§ 600.101-.9948).

From Circuit Court.

Review is by appeal to Court of Appeals pursuant to Rules 7.201-.219.

How Taken.

For appeal of right (Rule 7.204) from final judgment or final order (defined in Rule 7.202[6]) appellant files claim of appeal with trial court and pays $25 appeal fee, files any appeal bond required by statute, files stay bond if stay is desired and secures trial court's approval thereof, serves on opposite party copy of claim of appeal and any bond which has been filed, and files with trial court proof of service and stenographer's or attorney's certificate that transcript has been ordered if transcript exists. Claim of appeal and proof of service thereof, with copy of judgment or order appealed from, copy of stenographer's or attorney's certificate that transcript has been ordered, copy of bond, copy of trial court docket or calendar entries, and jurisdictional checklist are filed with Court of Appeals, with $375 entry fee, immediately after filing with trial court. Within 28 days thereafter two copies of docketing statement must be filed except for appeal from order granting or denying motion for summary disposition. Form and contents of claim of appeal are specified by Rule 7.204(D). Program for expedited resolution of appeals from orders granting or denying motions for summary judgment has been suspended.

For discretionary appeals five copies of application for leave to appeal (Rule 7.205) are filed with Court of Appeals, with entry fee, copies of order or judgment appealed from, copies of transcripts designated by Rule 7.205(B)(4), proof of service on all parties and other documents specified by rule. Application for leave to appeal must set forth reasons and grounds for appeal. No oral argument on application for leave to appeal. Form and content of application for leave to appeal are specified by Rule 7.205(B). Application for leave to appeal which is more than 12 months after entry of order appealed from may not be granted. Limited exceptions are provided for criminal appeals. (Rule 7.205[F][4]). Criminal defendant may appeal judgment based on plea of guilty or nolo contendere only by application for leave to appeal. (MCLA § 600.308[2][d]). If leave to appeal is granted, appeal then proceeds as appeal as of right. (Rule 7.205[D][3]).

Time for Taking.

Not later than 21 days after entry of judgment or order appealed from, or within 21 days after entry of order denying motion for new trial or rehearing or motion for other post judgment relief if such motion is made and served within original 21 day period or within further time allowed by trial court for good cause during such original 21 day period. (Rule 7.204[A], 7.205[A]). If claim of appeal is filed late it must be filed as application for leave to appeal. (Rule 7.205[F]).

Appeal Bond.

Not required unless made condition of appeal by particular statute authorizing appeal or unless ordered by trial court or Court of Appeals. (Rule 7.204[E][3]).

Stay of Proceedings.

Appeal does not act as stay unless trial court or Court of Appeals orders otherwise. (Rule 7.209). No execution issues nor can other enforcement proceedings be taken until expiration of time for taking appeal. (Rule 2.614[A][1]). Rule 2.614 provides automatic stay, unless otherwise provided by court or rule for 21 days after entry of judgment. If motion for new trial, to alter or amend judgment, for judgment n.o.v., or to amend findings or for additional findings, is filed and served within such 21 days, no execution issues nor can other enforcement proceedings be taken until 21 days after entry of order on such motion unless court orders otherwise on motion for good cause shown. However, temporary restraining orders, preliminary injunctions, injunctive relief included in final judgment, interlocutory orders in receivership actions, and orders prior to judgment concerning custody, control and management of property, for temporary alimony, support or custody of minor children and expenses in divorce suits are not stayed unless court so orders on motion for good cause. (Rule 2.614). Further stay may be ordered by trial court with or without bond. (Rule 7.209[E][1]). If bond required, it must be conditioned on prosecution of appeal, performance of judgment or order of appellate court, performance of judgment or order appealed from if appeal is dismissed or discontinued, payment of any damages to appellee from stay in appeals from foreclosure of mortgage or land contract or in cases involving possession of land, and performance of any other act specified in statute authorizing appeal as condition of appeal bond. (Rule 7.209). If party appeals trial court's denial of claim of governmental immunity, party's appeal operates as automatic stay of all proceedings until issue finally decided. (Rule 2.614[D]).

Extent of Review.

Trial court's determination regarding motion for summary disposition reviewed *de novo*. (475 Mich. 215, 716 N.W.2d 220). Unless otherwise established by statute, court reviews questions of law and equitable actions *de novo* and findings of fact for clear error. (210 Mich. App. 636, 534 N.W.2d 217). Discretionary action taken by trial court reviewed for abuse of discretion. (245 Mich. App. 759, 630 N.W.2d 646). Only issues actually decided by trial court preserved for appeal except that Court of Appeals may overlook preservation requirement (1) to prevent manifest injustice, (2) to consider issue necessary to proper determination of case, or (3) to consider question of law for which necessary facts have been presented. (251 Mich. App. 546, 652 N.W.2d 232).

Character of Hearing.

Review based on record. (Rule 7.210). Appellant and appellee must request oral argument if oral argument is desired. (Rule 7.212[C][1]).

Judgment or Order on Appeal.

Court of Appeals may reverse, affirm, remand with instructions, order new trial, give any judgment and make any order which ought to have been given or made, and make such orders and grant such relief as case may require.

Interlocutory orders of circuit court are appealable only upon leave granted by Court of Appeals. Within time limited for appeal as of right, appellant must file with Court of Appeals and serve on opposite party application for leave to appeal, setting forth reasons and grounds, including facts showing how appellant would suffer substantial harm by awaiting final judgment before taking appeal. (Rule 7.205). For procedures for application for leave to appeal see this subhead, catchline How Taken, supra.

From Court of Appeals.

Governed by Rules 7.301-7.318.

Appeals may be taken to Supreme Court only upon application and leave granted, upon a showing of meritorious basis of appeal and any one of following grounds: (1) Issue involves substantial question as to validity of legislative act; (2) issue has significant public interest and case is by or against state, agency or subdivision thereof or officer thereof acting in official capacity; (3) issue involves legal principles of major significance to state's jurisprudence; (4) in appeal before decision by Court of Appeals, delay likely to cause substantial harm; (5) in appeal from decision of Court of Appeals, decision clearly erroneous and will cause material injustice, or conflicts with Supreme Court decision or decision of Court of Appeals; or (6) in appeal from Attorney Discipline Board, decision is erroneous and will cause material injustice. (Rule 7.302[B]).

How Taken.

Appellant files with Supreme Court application for leave to appeal containing concise statement of material proceedings and facts, accompanied by supporting brief and copy of opinion or findings of trial court and, where Court of Appeals has ruled, by copy of decision of Court of Appeals and $375 fee. Precise contents of application are specified in Rule 7.302(A). Application is noticed for hearing in Supreme Court as motion. Copies of application and brief must also be filed in Court of Appeals and served on opposing party and proof of service is filed in Supreme Court. No oral argument on application for leave to appeal unless ordered by court. If leave is granted, appeal is limited to issues raised in application for leave to appeal unless otherwise ordered by Supreme Court. (Rule 7.302[G]).

Time for Taking.

Application for leave to appeal prior to decision of Court of Appeals must be filed in Supreme Court within 42 days after filing of claim of appeal in Court of Appeals, or in case of appeals by leave, within 42 days after filing of application for leave to appeal to Court of Appeals or granting of such application, whichever is later. (Rule 7.302[C]).

Application for leave to appeal a decision of Court of Appeals must be filed within 42 days after the clerk mails notice of entered order, 42 days after filing of opinion appealed from or within 42 days after denial of application for rehearing timely filed or in criminal cases within 56 days. Late applications will not be accepted. (Rule 7.302[C]).

Appeal Bond.

No requirement beyond bond imposed in connection with appeal to Court of Appeals.

Stay of Proceedings.

Stay bond filed on appeal to Court of Appeals operates to stay proceedings pending decision of Supreme Court unless otherwise ordered by court. Appeal to Supreme Court does not operate as stay in absence of such stay bond or stay entered by trial court or Court of Appeals. (Rules 7.209 and 7.302[G]).

Extent of Review.

Trial court's determination regarding motion for summary disposition reviewed *de novo*. (475 Mich. 215, 716 N.W.2d 220). Unless otherwise established by statute, court reviews questions of law and equitable actions *de novo* and findings of fact for clear error. (210 Mich. App. 636, 534 N.W.2d 217). Discretionary action taken by trial court reviewed for abuse of discretion. (245 Mich. App. 759, 630 N.W.2d 646). Only issues actually decided by trial court preserved for appeal except that Court of Appeals may overlook preservation requirement (1) to prevent manifest injustice, (2) to consider issue necessary to proper determination of case, or (3) to consider question of law for which necessary facts have been presented. (251 Mich. App. 546, 652 N.W.2d 232).

Character of Hearing.

Review based on record. Appellant and appellee must request oral argument if oral argument desired. (Rule 7.312[B]).

Judgment or Order on Appeal.

Supreme Court may reverse, affirm, remand with instructions, order new trial, give any judgment and make any order which ought to have been given or made, and make such orders and grant such relief as case may require. (Rule 7.316[A]).

Interlocutory orders of Court of Appeals may be made subject of application for leave to appeal to Supreme Court in same manner and on same grounds as final orders.

From Probate Courts.

Final orders in adoption proceedings, condemnation proceedings under Drain Code or specified final orders affecting rights of interested person in certain estates, trusts, or conservatorships are appealable as of right to Court of Appeals. (Rule 5.801[B]; MCLA § 600.861). Other orders may be appealed to Circuit Court (Rule 5.801[C]); or, with certification of issues by probate judge, to Court of Appeals (Rule 5.801[F]). Circuit Court judgment on appeal may be appealed by application to Court of Appeals. (MCLA § 600.863). Appeal fee paid to Circuit Court is $150.

From Municipal Courts and District Courts.

Appeals in civil cases from District Courts are to Circuit Court in county where judgment is rendered. Appeals from final judgments are as of right except for judgments based on pleas of guilty or nolo contendere which are by application. All others are by application for leave. (MCLA § 600.8342; Rules 7.101, 7.102). Appeal fee is $150. (MCLA § 600.2529[1][b]).

Procedure on Appeal to Circuit Court.

How Taken.

Appellant files claim of appeal and other specified papers with circuit court, claim of appeal, appeal bond and other specified papers with lower court and pays required fees, serves copies of claim of appeal and other specified papers on appellee and files proof of service with lower court and Circuit Court. (Rule 7.101). Lower court transmits to circuit court all original papers in file, including list of docket entries. (Rule 7.101). Application to Circuit Court for order allowing appeal is necessary: (1) When no appeal of right exists, or (2) when time for taking appeal has expired. (Rule 7.103).

Time for Taking.

All steps by appellant must be taken within 21 days after entry of judgment or order of probate court, and within 21 days after entry of judgment or order denying motion for new trial or denying motion for judgment N.O.V. of lower court other than probate. When order of Circuit Court allowing appeal is required, motion for such order must be filed within same period as claim of appeal in appeals as of right, except where time for appeal has expired and showing is made by affidavit that delay was not due to lack of diligence. (Rules 7.101, 7.103). Delayed application will not be accepted more than six months after entry of order or judgment appealed from. (Rule 7.103[B][6]).

Appeal Bond.

Must be filed with claim of appeal or order allowing appeal. Bond is not less than $200 unless stay bond including security for costs has been filed or trial court sets another amount. In judgments for possession of land, amount of bond governed by Rule 4.201(N). Bond must be executed by appellant and one or more sufficient sureties. (Rule 7.101).

Stay of Proceedings.

Filing of stay bond in amount not less than one and one-quarter amount of judgment against appealing party, except in certain appeals from Probate Court, operates as stay of all further proceedings in lower court. No execution issues, and neither can other enforcement proceedings be taken until expiration of time for appeal unless court otherwise orders on motion for good cause shown. (Rule 7.101). Order of Probate Court removing fiduciary appointing temporary personal representative, temporary guardian or temporary conservator, granting new trial or rehearing, granting allowance to spouse or children of decedent, granting permission to sue on fiduciary's bond, or suspending fiduciary and appointing special fiduciary is not stayed pending appeal unless ordered by court for good cause shown. (Rule 5.802[C]).

Extent of Review.

See catchline Character of Hearing, infra.

Character of Hearing.

Except for appeals from Probate Court, proceeding in Circuit Court is trial de novo. (Rule 7.102[C]). Review on appeal from Probate Court is based on record and is not de novo. (Rule 5.802[B]).

Judgment or Order on Appeal.

Circuit Court may render any judgment or make any order which should have been rendered or made in lower court, and may grant such other relief as may be required. (Rule 7.102[C]).

From Worker's Compensation Commission.

Award of hearing referee is reviewed by Appeal Board, with presentation of additional testimony if leave is granted, by filing claim for review within 30 days. Both facts and law are reviewed by Appeal Board. Upon leave to appeal granted, on application within 30 days after award by Appeal Board, questions of law are reviewed by Court of Appeals. (MCLA §§ 418.851, .

859a,.861).

From Employment Security Board of Review.

Any judgment may be appealed to Circuit Court. Appellant files claim of appeal with Circuit Court within 30 days after mailing to him of copy of decision of Appeal Board; serves copy of claim of appeal on Appeal Board and on all interested parties and files proof of service. Board of Review has 42 days to file certified copy of record with Circuit Court and appeal is heard on this record. (Rule 7.104[B]).

From Other State Agencies.

Governed primarily by statute affecting particular agency. If statute provides for appeal of any kind to Supreme Court, appeal now goes to Court of Appeals on leave granted. (Rule 7.203[B][3]). Where statute governing agency provides for appeal to Circuit Court or makes no provision for appeal, appeal is to Circuit Court in county of appellant’s residence or of Ingham County, in same manner as other appeals to Circuit Court except appeal bond not required. (MCLA § 600.631; Rule 7.104).

5.04 BONDS:

Bonds required or permitted to be given in civil proceedings differ with respect to amount, sureties, justification of sureties, approval by court or other officer, procedure to attack sufficiency, and method of enforcement. Statutes relating to particular proceeding must be consulted. See also Rule 3.604 for provisions generally applicable to bonds given under Rules and Revised Judicature Act.

Substantial compliance with statutory form is sufficient and defective bond may be amended nunc pro tunc. (MCLA § 600.2601). Change of parties does not impair bond. (MCLA § 600.2641). All bonds are recorded by clerk of court (MCLA § 50.101), and clerk’s record or certified copy is evidence (MCLA § 50.103).

Cash deposit may be substituted for bond in any civil cause, and check certified by bank in U.S., or U.S. or satisfactory municipal bond negotiable by delivery, may be deposited in lieu of cash. (MCLA § 600.2631).

Sureties.

Surety company authorized to do business in state may be substituted for any one or more sureties required on any bond unless statute expressly provides otherwise. (MCLA § 600.2621).

Enforcement.

In every action where bond or other security for costs, supersedeas, or other purposes has been posted, judgment may be entered against surety or security on motion. (Rule 3.604[I]). Other bonds are enforced by action on bond. (MCLA § 600.2923).

5.05 CERTIORARI:

Supplanted by order of superintending control, which may be issued in appropriate circumstances by Supreme Court (Const., art VI, § 4; MCLA § 600.219; Rule 3.302[C]), Court of Appeals (Const., Art. VI, § 10; Rule 3.302[D]) and Circuit Courts (Const., art. VI, § 13; Rule 3.302[D]). For other means of review see topic 5.03 Appeal and Error.

5.06 CHARITABLE IMMUNITY:

See topic 5.09 Damages.

5.07 COMMISSIONS TO TAKE TESTIMONY:

See topic 5.11 Depositions and Discovery.

5.08 COSTS:

Policy is to limit costs to a moderate sum, and executory agreement for costs in excess of prescribed allowances is void. (39 Mich. 137).

Supreme Court.

Costs usually are awarded to prevailing party, except where public question is involved, or both parties prevail in part. Costs include appeal and entry fees, expense of transcript, of other documents reprinted as provided in Rules and of any stay bond. (Rules 7.219, 7.318; MCLA § 600.2441).

Court of Appeals.

Prevailing party may recover necessary expense of transcript and of copies thereof, together with other documents required by Rules, cost of any stay bond, and fees paid to clerk, unless otherwise ordered by court. (Rule 7.219).

Circuit Court and District Court.

Prevailing party recovers costs except when prohibited by statute or rule, or unless court otherwise directs. (Rule 2.625). Costs are fees of officers and witnesses, some disbursements incident to trial, including bond premiums, and attorney fees authorized by statute or court rule, which are generally nominal. Cost of hearing transcript taxable only if transcript desired for purpose of motion for new trial or to prepare record for appeal. (MCLA §§ 600.2405; 600.2543; 600.8375). Reasonable and actual fees paid for depositions when transcripts filed with court clerk and for certified copies of papers filed or recorded are taxable as costs when transcripts read into evidence or papers necessarily used. (MCLA § 600.2549).

Security for Costs.

Any party asserting claim in action may be required to give bond for costs on motion of defendant when such action appears reasonable and proper to court. (Rule 2.109).

Liability of Attorney.

Sanctions for frivolous claims or defenses may include payment of costs as well as attorney fees by party and/or by attorney for party. (MCLA § 600.2591; Rule 2.114[E] and [F]). Supreme Court and Court of Appeals may impose costs on attorney for violation of rules. (Rules 7.219[I] and 7.318[A]).

5.09 DAMAGES:

Common law generally governs compensatory damages. Exemplary damages in excess of pecuniary loss are allowed, as compensation to plaintiff, where plaintiff is victim of tortious conduct on part of defendant. (409 Mich. 401, 295 N.W.2d 50).

Comparative Negligence Rule.

Doctrine of comparative negligence recognized in state. (405 Mich. 638, 275 N.W.2d 511; MCLA § 600.2959).

Charitable immunity abrogated. (361 Mich. 1, 105 N.W.2d 1).

Sovereign immunity may not be abrogated except by express statutory enactment.

(303 Mich. 168, 5 N.W.2d 740). Statutory enactments have limited immunity from tort liability to exercise or discharge of governmental function. (MCLA § 691.1407). State immunity has been abrogated as to motor vehicle or aircraft negligence (MCLA § 600.6475); defective highways (MCLA § 691.1402); maintenance of public buildings (MCLA § 691.1406), and proprietary functions (MCLA § 691.1413) and modified as to ownership or operation of hospital or county medical care facility or their agents (MCLA § 691.1407).

No-Fault Insurance.

See category 23 Transportation, topic 23.01 Motor Vehicles, subhead No-Fault Insurance.

Uniform Contribution Among Tortfeasors Act not adopted. Contribution is provided for by statute in certain instances (MCLA § 600.2925[a]) as well as by common law. See category 13 Estates and Trusts, topic 13.05 Death, subhead Action for Death.

5.10 DECLARATORY JUDGMENTS:

See topic 5.15 Judgments.

5.11 DEPOSITIONS AND DISCOVERY:

After commencement of an action, any party may take testimony of any person, including party, by deposition upon oral examination. (Rule 2.306[A]).

Within State for Use Within State.

Depositions or parts thereof are admissible at trial, on hearing of motion, or in interlocutory proceeding only as provided in Rules of Evidence. (Rule 2.308[A]). Rule of Evidence 804 provides hearsay exception for deposition testimony of witness who is unavailable for trial if party against whom testimony is offered at trial, or in civil action, predecessor in interest, had opportunity and similar motive to develop deposition testimony by direct, cross, or redirect examination. Rule of Evidence 803(18) provides hearsay exception (availability of declarant immaterial) for deposition testimony of expert witness.

Within State for Use Elsewhere.

See also subhead Compelling Attendance of Witnesses, infra.

Outside of State for Use Within State.

See subhead Within State for Use Within State, supra, and subhead Compelling Attendance of Witnesses, infra.

De Bene Esse.

See subhead Within State for Use Within State, supra.

Perpetuating Testimony.

Provision is made for perpetuating testimony for use as evidence in suits not yet commenced, upon application to court of record showing necessity and persons interested, so far as known, and upon notice to expected adverse parties. (Rule 2.303[A]).

Before Whom Taken.

Within the United States.

Depositions to be taken before: (1) Any person authorized to administer oaths by laws of this state or U.S. or of place where examination is held, or (2) any person appointed by court in which action is pending, or (3) any person upon whom parties agree by stipulation in writing. (Rule 2.304[A]).

In Foreign Countries.

Depositions to be taken: (1) On notice, before person authorized to administer oaths at place of examination under law there or U.S.; (2) before person commissioned by court; or (3) pursuant to letter rogatory. (Rule 2.304[B]).

Disqualification.

No deposition can be taken before relative or employee or attorney of any party or relative or employee of such attorney or person financially interested in action unless parties so agree in writing or on record. (Rule 2.304[C]).

Notice of Taking.

Party desiring to take deposition on oral examination must give reasonable written notice to every other party stating time and place and name and address of each person to be examined. (Rule 2.306[B]).

Party desiring to take deposition on written interrogatories serves them on every other party with notice stating name and address of person who is to answer interrogatories and name or descriptive title and address of person before whom deposition is to be taken. Cross-interrogatories, redirect interrogatories and recross-interrogatories may be served by respective parties. Party taking deposition delivers copy of notice or stipulation and copies of all interrogatories to person designated to take responses, who then takes testimony of witness in response to the interrogatories. (Rule 2.307).

Commissions.

See subheads Before Whom Taken, supra, and Compelling Attendance of Witnesses, infra.

Compelling Attendance of Witnesses.

Where action is pending or anticipated in this state, clerk of court in county in which deposition is to be taken or in which action is pending issues subpoenas on request. Service of notice of taking of deposition of party, or director, trustee, officer or employee of corporate party on party or party's attorney is sufficient; subpoena need not be issued. Subpoena may command production of books, papers or tangible things which constitute or contain evidence related to matters within scope of permissible examination (see infra, subhead Examination of Witnesses), but in that event Rule 2.302 concerning protective orders is applicable and court on prompt motion may quash or modify subpoena if it is unreasonable or oppressive or require advancement of reasonable cost of producing books, papers or tangible things. (Rule 2.305[A]).

Deponent may be required to attend examination only in county where he resides or is employed or transacts his business in person, or any other convenient place fixed by order of court. Court may order nonresident plaintiff or officer or managing agent thereof to appear in this state or elsewhere upon just terms, including payment by defendant of travel expenses. On showing that deposition of nonresident defendant cannot be taken in state of his residence, court may order such defendant or officer or managing agent thereof to appear in this state or elsewhere upon just terms, including payment by plaintiff of travel expenses. (Rule 2.305[C]).

When place of examination is in another state, territory or country, party desiring to take deposition may petition any court thereof for subpoena or equivalent process. (Rule 2.305[D]).

Where action is pending in another state, territory or country, any officer or person authorized by laws of another state, territory or country to take any deposition in this state, with or without a commission, in any action pending in a court of that state, territory or country may petition court of record in county in which deponent resides or is employed or transacts his business in person or is found for subpoena to compel giving of testimony by him. Court may hear and act upon petition with or without notice, as it directs. (Rule 2.305[E]).

Examination of Witnesses.

Deponent may be examined and cross-examined regarding any matter not privileged and relevant to subject matter of action, whether it relates to claim or defense of examining party or any other party, including existence, description, nature, custody, condition and location of any books, documents or tangible things and identity and location of persons having knowledge of relevant facts. It is not ground for objection that information sought will be inadmissible at trial if information sought appears reasonably calculated to lead to discovery of admissible evidence. Parties may stipulate for examination regarding any matter. (Rule 2.302[B], [F]). On motion of party or deponent court may limit or forbid or terminate examination or otherwise protect party or witness. On motion, court may impose appropriate sanction, including reasonable expenses and attorney fees, on person who impedes, delays, or frustrates fair examination of deponent. (Rules 2.302[C], 2.306[D]).

Return.

When deposition is transcribed, person conducting examination or stenographer certifies on deposition that witness was duly sworn and that deposition is true record of testimony given by witness. When one of parties requests filing, person conducting examination seals deposition in envelope indorsed with title of action and marked “Deposition of (name of witness)”, promptly files it personally or by mail with court in which action is pending, and gives prompt notice of filing to all other parties. (Rule 2.306[F]).

Form.

See supra, subhead Return. Title of action is customarily indorsed on cover or first page of deposition together with indication of date, time and place of taking.

Discovery.

After commencement of action in state circuit court, parties may obtain discovery through depositions, interrogatories, requests for production of documents and things and entry on land for inspection and other purposes. (Rule 2.302[A][1]). No discovery is allowed in state district court prior to judgment except by leave of court or stipulation of parties. (Rule 2.302[A][2]). No discovery is permitted at any time in small claims division of state district court or in civil infraction actions. (Rule 2.302[A][3]). Parties may also obtain on good cause shown and notice to person to be examined and all other parties order for examination of party or person under legal control of party when physical or mental condition of that person is in controversy. (Rule 2.311[A]).

Demand for Admission of Facts.

Parties may serve on other parties requests for admission whose truth shall be deemed conclusively admitted unless written answer or objection to request is served within 28 days. (Rule 2.312[A], [B][1], [D]). Matter as to which request for admission pertains may be statement or opinion of fact or application of law to fact, including genuineness of documents described in request, copies of which must be served with request unless previously furnished. (Rule 2.312[A]). Answers must admit truth of matter requested, specifically deny matter, or state in detail reasons why matter cannot be truthfully admitted or denied. (Rule 2.312[B][2]). Lack of knowledge or information is not reason for failure to admit or deny unless party answering states that it has made reasonable inquiry and information known or readily obtainable is insufficient to enable party to admit or deny. (Rule 2.312[B][2]). Denial must fairly meet substance of request and, when good faith so requires, answering party must specify those parts of request that are admitted and those parts that are denied. (Rule 2.312[B][2]). Answers may be amended by leave of court for good cause shown. (Rule 2.312[D][1]). Reasons must be given for objections but it is not sufficient to object that matter as to which admission has been requested presents genuine issue for trial. (Rule 2.312[B][4]). Requesting party may recover expenses incurred in proving genuineness of document or truth of matter which has been denied unless court finds that request was previously held objectionable, admission sought was of no substantial importance, party failing to admit had reasonable grounds to believe it might prevail on requested matter, or there was other good reason for failure to admit. (Rule 2.313[C]).

Interrogatories may, without leave of court, be served on plaintiff after commencement of action and on defendant with or after service of complaint on that defendant. (Rule 2.309[A]). Within 28 days of service, each interrogatory must be answered separately and under oath unless objected to for specific stated reasons. (Rule 2.309[B]). It is not ground for objection that information sought will be inadmissible at trial if information sought appears reasonably calculated to lead to discovery of admissible evidence. (Rule 2.302[B][1]). Party answering interrogatories has option to produce business records from which answer to interrogatory may be derived providing burden of deriving answer is substantially same for party serving interrogatory as for party served and business records are specified in sufficient detail to enable interrogating party to identify records from which answer may be derived. (Rule 2.309[E]). Answer to interrogatory may be used to extent permitted by rules of evidence. (Rule 2.309[D][3]).

Requests for Production of Documents and Things and for Entry onto Land for Inspection and Other Purposes.

Parties may without leave of court serve on other parties requests to inspect and copy specifically designated documents, requests to inspect and copy, test or sample tangible things, and requests to enter designated land or other property for inspection and other purposes. (Rule 2.310[B]). Party has same obligation to preserve electronically stored information as other types; but party cannot be sanctioned for failing to provide electronically stored information if lost as result of routine, good faith operation of electronic information system. (Rule 2.302[B][5]). Party need not provide electronically stored information from sources inaccessible because of undue burden or cost. (Rule 2.302[B][6]). Burden on party from whom discovery sought to show source inaccessible because of burden or cost. (Rule 2.302[B][6]). Court may order discovery from such sources if party seeking discovery shows good cause. Court may specify conditions for such discovery. (Rule 2.302[B][6]). Inadvertently produced information subject to claim of privilege or protection may be recovered, but receiving party can challenge recovery. (Rule 2.302[B][7]). Parties may also without leave of court serve such requests on nonparties. (Rule 2.310[D]). Parties have 28 days within which to serve written response to such requests stating that requested inspection will be permitted or stating reasons for objection to requested inspection. (Rule 2.310[C][2]). If request for electronically stored information does not specify form in which to be produced, must be produced in either form in which retained or in reasonably usable form; need only be produced in one form. (Rule 2.310[C][2]). Nonparties have 14 days within which to permit inspection or entry. Unless otherwise ordered by court, producing party bears cost of assembly of items and requesting party bears any copying costs. (Rule 2.310[C][6]). If permission is not granted, party seeking inspection or entry may file motion to compel. (Rule 2.310[D][4]). Documents shall be produced as they are kept in usual course of business or labeled to correspond to categories of request. (Rule 2.310[C][5]).

5.12 EQUITY:

See topic 5.02 Actions.

5.13 EVIDENCE:

Witnesses.

No person excluded for interest, marital or other relationship to party or conviction of crime. (MCLA § 600.2158). Victims of assaults and similar crimes who are children or developmentally disabled may, upon motion of any party, be allowed to testify at criminal proceedings under special arrangements, including closing courtroom to public and shielding witness from direct view of defendant. (MCLA § 600.2163a). Parties may be witnesses. (MCLA § 600.2159).

See also topic 5.11 Depositions and Discovery.

Privileged Communications.

Privilege attaches to information given by client to certified public accountant or public accountant in connection with audit, or to information derived or resulting therefrom (MCLA § 339.732), to communications by client to attorney in professional capacity (230 Mich. 444, 202 N.W. 959), to confessions to priests or ministers of gospel (MCLA § 600.2156), to information acquired by physicians or surgeons in professional capacity if necessary to enable them to prescribe or act (MCLA § 600.2157), to information transmitted between victim and sexual assault or domestic violence counsel (MCLA § 600.2157a), to information provided to crime-stoppers organization (MCLA § 600.2157b), to communications from students or other juveniles to school executives, teachers, etc. and school records of students' behavior (MCLA § 600.2165), and to information acquired by certified psychologists from persons consulting them which was necessary for rendering of professional services (MCLA § 333.18237). Beneficiary of life insurance policy may waive physician patient privilege of deceased patient to document claim for benefits. (MCLA § 600.2157).

Husband and Wife.

Communications made by one spouse to other during marriage are privileged. (MCLA § 600.2162). Husband or wife cannot testify as to adultery by other; and cannot testify for or against other without other's consent except in suits for divorce, separate maintenance, or annulment, prosecutions for bigamy or illegal marriage or for crimes against children of either or both, cases arising from desertion, abandonment, nonsupport, or personal wrong or injury to other, or where title to separate property of either or his or her grantee denied by other. (MCLA § 600.2162). Person may seek personal protection order restraining or enjoining conduct of spouse. (MCLA § 600.2950).

Uniform Act to Secure Attendance of Witnesses From Without a State in Criminal Cases in effect. (MCLA §§ 767.91-.95).

Uniform Rendition of Prisoners as Witnesses in Criminal Proceedings Act in effect. (MCLA §§ 780.111-.120).

Communications or Transactions with Persons Since Deceased or Incompetent.

Party cannot testify as to matters equally within knowledge of a "person incapable of testifying" in an action brought by or against a person incapable of testifying, unless some material portion of his testimony is supported by corroborating evidence. "Person incapable of testifying" includes any individual who is incapable of testifying by reason of death or incompetency and his heirs, representatives or assigns, and any individual or corporation whose agent, having such knowledge, is incapable of testifying. Evidence of acts and habits of person incapable of testifying is admissible to show improbability of claims of adverse party. (MCLA § 600.2166).

Self-Incrimination.

No person can be compelled in any criminal case to be a witness against himself. (Const. Art. I, § 17). Defendant may only at his own request be deemed a competent witness, and neglect to testify creates no presumption against defendant and court must not permit reference to or comment upon such neglect. (MCLA § 600.2159). A witness is not required to give any answer which will have tendency to accuse himself of any crime or misdemeanor. (MCLA § 600.2154).

Compelling Attendance.

See topic 5.11 Depositions and Discovery.

Uniform Photographic Copies of Business and Public Records of Evidence Act adopted. (MCLA § 600.2148).

5.14 INJUNCTIONS:

Procedure is governed principally by Rule 3.310. In general, Michigan practice is similar to federal practice under Fed. R. Civ. P. 65, with some variations in details. See topic 5.18 Pleading.

Jurisdiction to issue injunctions is given to circuit courts. (MCLA § 600.601).

Prerequisites.

Granting of injunctions is within discretion of court. Standards are matter of court rule (Rule 3.310) and common law.

Procedure.

Injunctions must be prayed for specifically in complaint (Rule 2.111[B]) or by motion (Rule 2.119[A]) and may be ordered only after hearing on motion or order to show cause. (Rule 3.310[A][1]). Trial of action may be consolidated with hearing on motion. (Rule 3.310[A][2]). Order granting injunction or restraining order must state reasons for its issuance, must be specific, and must describe acts restrained. (Rule 3.310[C]). See also subhead Temporary Restraining Order, infra. Neither may be granted to stay action pending in another court if relief requested is available in other court. (Rule 3.310[E]).

Bond may be required in amount court deems proper (Rule 3.310[D]), subject to objection procedure (Rule 3.310[D][3] and 3.604). Where required it must be filed before injunction will issue. (Rule 3.310[D][4]).

Temporary Restraining Order.

Restraining orders may be granted without notice pending hearing on motion or order to show cause upon clear showing by affidavit or verified complaint that otherwise immediate and irreparable damage or physical injury will result to applicant, and subject to certain procedural requirements. (Rule 3.310[B]). Temporary restraining order granted without notice must state date and time of issuance, describe injury, why it is irreparable, and why order was issued without notice; and must set date for hearing on whether preliminary injunction should issue. (Rule 3.310[B][2]). Except in domestic relations cases, temporary restraining order expires by its terms in time court specifies, no more than 14 days, unless extended by court for good cause shown or by consent of enjoined party. Reason for extension must be stated on record or in filed document. (Rule 3.310[B][3]). After temporary restraining order entered or denied, at hearing on preliminary injunction applicant still has burden of showing preliminary injunction should issue. (Rule 3.310[A][4]). On motion to dissolve restraining order entered without notice, applicant has burden of justifying continuation. Motion to dissolve takes precedence over all matters except older motions of same character and may be heard on 24 hours' notice. (Rule 3.310[B][5]).

5.15 JUDGMENTS:

Judgments by Confession.

Judgment may be entered in circuit court on confession signed by attorney though no suit is pending, but authority to confess must be in instrument separate from obligation evidencing demand; authority must be produced to officer signing judgment, and filed with clerk of court in which judgment is entered. (MCLA § 600.2906).

Judgments by Consent.

A consent judgment is usually regarded as a judgment of parties rather than of court, and oral agreement outside court can be sufficient. (330 Mich. 295, 47 N.W.2d 616). As a general rule consent judgment will not be vacated or set aside without consent of parties in absence of claim that consent was not voluntarily given. (338 Mich. 679, 62 N.W.2d 634).

Judgments on Pleadings.

See subhead Summary Judgments, infra.

Summary Judgments.

Either party may move for summary judgment at any time on ground that court lacks subject matter jurisdiction; that other party has failed to state claim upon which relief can be granted, that other party has failed to state valid defense, or that except as to amount of damages there is no genuine issue as to any material fact. In latter case, supporting affidavits must be filed and other party may file opposing affidavits. Such affidavits, together with pleadings, depositions, admissions and documentary evidence are considered by court at hearing. Court may permit amendment of pleadings. If summary judgment is denied or if judgment rendered does not dispose of action, court may ascertain what material facts are without substantial controversy. (Rule 2.116).

Declaratory judgments are provided for in cases where actual controversies exist. (Rule 2.605).

Default Judgments.

In circuit court default may be entered for failure to plead or otherwise defend as required by Rules upon filing of affidavit showing such facts. Nonmilitary affidavit required by law must be filed in all cases where defendant failed to appear. (Rule 2.603). Rules allow clerk to enter judgment for sum certain if defaulted party has failed to appear and is not infant or incompetent; in other cases party entitled to judgment by default must apply to court, giving notice if defendant has appeared in action. (Rule 2.603). In practice application to court in all cases is often required. Court may conduct hearings, permit trial by jury or take other action including taking account, determining amount of damages or by investigating any other matter. (Rule 2.603).

Offer of Judgment.

Party may, until 28 days before trial, offer to allow judgment to be taken against him for all or part of claim, plus costs and interest then accrued. To accept adverse party must serve notice within 21 days after service of offer. Failure to respond constitutes rejection. Counteroffers may be accepted or rejected in same manner. If offer is rejected, and if offeree does not obtain judgment more favorable than rejected offer, or if offer and counteroffer were made and rejected, better than average of offers, offeree must pay actual costs incurred in prosecution or defense of action. (Rule 2.405).

Vacation or Modification.

Default regularly entered and based on personal service may be set aside as prescribed in Rule 2.612 (clerical mistakes, inadvertence, excusable neglect, etc.) or as prescribed in Rule

2.603(D) upon showing good cause supported by affidavit showing meritorious defense made within 21 days of entry of default judgment. (Rule 2.603[D]). Defendant over whom personal jurisdiction was necessary and acquired but who did not in fact have knowledge of pendency of action may enter appearance within one year after final judgment and court may relieve defendant from judgment upon showing of just cause and lack of prejudice to third parties on payment of costs or other conditions deemed just. (Rule 2.612[B]).

Lien.

Judgment as such imposes no lien except judgments on workmen's compensation awards. (MCLA § 418.821). Judgments are lien upon personal property after execution and levy (MCLA § 600.6012), but not on real estate as to subsequent bona fide conveyances until notice of levy has been recorded in office of Register of Deeds in county where premises are situated (MCLA § 600.6051) or effective Sept. 1, 2004 notice of judgment lien has been recorded and served as provided (MCLA § 600.2805). Such judgment lien has priority over subsequently recorded liens with specified exceptions (MCLA § 600.2807), is effective for five years, and may be extended for five years from date recorded (MCLA § 600.2809). Lien may not be foreclosed but collected to extent of debtor's equity upon sale or refinancing. (MCLA § 600.2819).

Revival.

Action for new judgment may be brought within ten years after rendered by Court of record of state, U.S. or of another state, and within six years after rendered by Court not of record. New judgment is enforceable for same periods. (MCLA § 600.5809).

Assignment.

No provision in statutes or Rules.

Satisfaction.

Judgment may be shown satisfied of record in whole or in part by: (1) filing satisfaction with clerk signed and acknowledged by parties or their attorneys of record in whose favor judgment was rendered, or (2) in case of money judgment only, payment to clerk of judgment, interest, and costs, or (3) filing motion with clerk for entry of order finding judgment satisfied. In latter case court hears proofs. (Rule 2.620).

Form of Satisfaction

State of Michigan, County of . . . . . ., ss.

. . . .

vs.

. . . .

In . . . . Court

. . . . acknowledge satisfaction of a judgment rendered on the . . . . . day of . . . . .., A.D. . . . . . ., in the above entitled cause in favor of . . . . the above named . . . . . . against . . . . the above named . . . . for . . . . . . Dollars, damages, and . . . . . . costs.

Dated . . . . . ., A.D. . . . .

Actions.

Actions founded upon judgments or decrees including an action for a new judgment must be brought within ten years from rendition of judgment by Court of record of this state, U.S. or another state and within six years after rendered by Court not of record. (MCLA § 600.5809).

Foreign Judgments.

Where foreign courts had jurisdiction of person and subject matter, their judgments are conclusive upon Michigan courts. (108 Mich. 170, 66 N.W. 1095). A judgment may be entered upon a properly certified transcript of justice of the peace of a foreign jurisdiction. (46 Mich. 320, 9 N.W. 432).

Final foreign judgments granting or denying recovery of money, but not including judgment for taxes, fine or penalty, or support in matrimonial or family matters, are conclusive unless: tribunal not impartial or lack of due process including lack of sufficient time to defend; no personal or subject matter jurisdiction; fraudulently obtained; against public policy; conflict with other final judgment; agreement to settle disputes in other manner; seriously inconvenient forum if personal service. (MCLA §§ 691.1131-.1142).

Foreign final decrees for alimony, where party was served with process within jurisdiction or present in court, may be sued on in action at law. (MCLA § 552.121).

Uniform Enforcement of Foreign Judgments Act adopted. (MCLA §§ 691.1171-.1179).

Uniform Foreign Money Judgments Recognition Act adopted. (MCLA §§ 691.1131-.1142).

5.16 LIMITATION OF ACTIONS:

Uniform Commercial Code adopted. (MCLA §§ 440.1101-.11102). See category 3 Business Regulation and Commerce, topic 3.09 Commercial Code.

Actions must be commenced within the following periods after they accrue:

Real Property Actions.

Action to recover land or possession of land, within five years if defendant claims under deed by fiduciary, by sheriff or other ministerial officer under order of court of this state, or by sheriff upon mortgage foreclosure sale; within ten years if defendant claims under tax deed of officer of this state or United States; within 15 years after probate of will in this state if defendant claims under devise in such will; otherwise within 15 years. (MCLA § 600.5801). Action to foreclose mortgage, within 15 years after maturity or last payment. (MCLA § 600.5803). Action to foreclose mechanic's lien, see category 8 Debtor and Creditor, topic 8.13 Liens, subhead Mechanic's and Construction Liens.

Actions to Recover Damages for Injury to Person or Property.

One Year.

Libel or slander. (MCLA § 600.5805).

Two Years.

Assault; battery; false imprisonment; malicious prosecution; malpractice; misconduct or neglect of office by sheriff or his deputies; negligence or misconduct of constable (two years after expiration of year for which constable was elected). (MCLA § 600.5805).

Three Years.

Products liability action; all actions to recover damages for death of person, or injuries to persons and property, and where no shorter limitation period is specified. (MCLA § 600.5805).

Five Years.

Claim of assault or battery by spouse, former spouse, co-parent, current or former common resident or person with whom victim has or has had dating relationship. (MCLA § 600.5805).

Six Years.

Action based on improvement to real property against licensed architect, professional engineer, land surveyor or contractor (limitation period commencing after first occupancy, use or acceptance of improvement) (alternative limitation period, one year from discovery of defect or when defect should have been discovered but not more than ten years after time of occupancy of completed improvement or use or acceptance of improvement); action charging negligence of licensed land surveyor (limitation period commencing after delivery of survey). (MCLA § 600.5839).

Actions to Recover Damages or Sums Due for Breach of Contract, or To Enforce Specific Performance of Contract.

Two Years.

Action charging any surety for costs; action on bond or recognizance given on appeal from court in this state; action on constable's bond (two years after expiration of year for which constable was elected). (MCLA § 600.5807).

Four Years.

Action charging any surety on any bond of any executor, administrator or guardian (four years after discharge of such fiduciary). (MCLA § 600.5807). Action for breach of contract for sale of goods governed by Uniform Commercial Code. (MCLA § 440.2725).

Six Years.

All other such actions except those referred to immediately below under subhead Ten Years. (MCLA § 600.5807).

Ten Years.

Action on bond of public officer; action founded on covenants in deeds and mortgages of real estate; action on bond, note, or other like instrument which is direct or indirect obligation of or issued by this state or any county, city, village, township, school district, special assessment district, or other public or quasi-public corporation in this state. (MCLA § 600.5807).

Actions to Enforce Noncontractual Money Obligations.

Two Years.

Action for recovery of any penalty or forfeiture based on any penal statute brought in name of people of this state. (MCLA § 600.5809).

Six Years.

Action founded on judgment or decree rendered in any court not of record in this state, or any other state from time of rendition of judgment. (MCLA § 600.5809).

Ten Years.

Action founded on judgment or decree rendered in any court of record of United States, this state, or any other state (ten years from time of rendition of judgment). (MCLA § 600.5809).

Common Carriers.

Actions by or against common carriers for charges or overcharges arising out of intrastate transportation must be brought within two years. (MCLA § 600.5811).

Credit Service Organization.

Actions by or against Credit Service Organization must be brought within four years after date of execution of contract for services to which action relates. (MCLA § 445.1824).

Insurance and Surety Companies.

Actions by or against insurance or surety companies including lenders for violations of State Insurance Code must be brought within five years after occurrence of violation. (MCLA § 500.1243).

Products Liability.

Period of limitations for products liability action (action based on any theory for death or injury to person or damage to property caused by faulty product) is three years, but if product has been in use for ten years or more, plaintiff is required to prove prima facie case without benefit of any presumption. (MCLA §§ 600.2945-.2949, .5805).

Personal Actions Not Specifically Provided For.

Six years, (MCLA § 600.5813).

Accrual of Claims.

Except as otherwise expressly provided, limitations run from time claim accrues. (MCLA § 600.5827). Times when various claims accrue are specified at MCLA §§ 600.5829-.5838. In cases not covered by these sections, claim accrues at time wrong was done regardless of time when damage results. (MCLA § 600.5827). In personal injury case, claim does not accrue until all elements of cause of action can be alleged in complaint. (388 Mich. 146; 200 N. W. 2d 70). Uniform Commercial Code governs accrual of actions for breach of contract for sale of goods. (MCLA § 440.2725).

Disabilities of Plaintiff.

Where person first entitled to make claim is under 18 years of age, insane or imprisoned at time claim accrues, that person or those claiming under that person has one year after disability is removed by death or otherwise to bring action although period of limitations has otherwise run. (MCLA § 600.5851). Disability must exist at time claim accrues and successive disabilities cannot be tacked. (MCLA § 600.5851). Disability due to war is recognized in some instances. (MCLA § 600.5854). Where individual dies prior to or within 30 days after period of limitations runs, claim may be brought any time within two years after letters testamentary or letters of administration are granted despite running of applicable limitations period provided personal representative commences action within three years after period of limitations has run. (MCLA § 600.5852).

Absence of Concealment of Defendant.

Where defendant fraudulently conceals existence of claim or identity of person liable for claim, action may be commenced within two years after plaintiff discovers or should have discovered existence of claim or identity of person who is liable for claim. (MCLA § 600.5855).

Foreign Causes of Action.

Where cause of action accrued outside of State in favor of resident of State statute of limitations of Michigan applies. All other claims accruing outside State must be commenced within State period of limitation or statute of limitations of other state. (MCLA § 600.5861).

Malpractice Claims.

Claim of malpractice against member of state licensed profession or one who holds self out to be member of state licensed profession, accrues at time person discontinues treating or serving plaintiff in professional or pseudo professional capacity as to matters out of which claim for malpractice arose, regardless of when plaintiff discovers or otherwise has knowledge of claim, except that medical malpractice claims against person or entity who or which holds itself out to be licensed health care professional, facility or agency, or employee or agent of such facility or agency, accrue at time of act or omission which is basis for claim. (MCLA §§ 600.5838, .5838[a]). Malpractice claim must be brought within two years after claim accrues or within six months after plaintiff discovers or should have discovered claim. (MCLA § 600.5805). Medical malpractice claim may not be brought more than six years after date of act or omission which is basis for claim, except where discovery of existence of claim was prevented by fraud or claim involves injury to reproductive system. (MCLA § 600.5838[a]). Special rules govern claims brought by minors depending on age and whether claim involves reproductive system. (MCLA § 600.5851). Medical malpractice defendant must receive 182 days' prior written notice of action, during which statute of limitations is tolled. (MCLA §§ 600.2912b,.5856).

Limitations Not Applicable.

Neither limitations nor laches apply to actions by state for recovery of land. However, person who could have asserted claim to title by adverse possession for more than 15 years is entitled to seek any other equitable relief in action to determine title to land. Limitations do not apply to actions by municipal corporations for recovery of possession of public highways or other public ground, nor to actions brought by this state or its political subdivisions for recovery of costs of care and treatment in state institutions. (MCLA § 600.5821).

Counterclaims.

Provisions of limitations chapter do not bar counterclaims to extent of plaintiff's claim unless counterclaim was barred at time plaintiff's claim accrued. (MCLA § 600.5823).

New Actions.

Statutes of limitation are tolled when complaint is filed and copy of summons and complaint are served on defendant, or when jurisdiction over defendant is otherwise acquired, or when complaint is filed and copy of summons and complaint are placed in officer's hands, in good faith, for immediate service, but in latter case statute is tolled no longer than 90 days. (MCLA § 600.5856). See subhead Malpractice Claims, supra.

Absence or Concealment of Defendant.

If defendant is outside state at time claim accrues against him, period of limitation only begins to run when he enters this state unless means of service of process sufficient to vest jurisdiction in Michigan court was available to plaintiff with same qualification, running of time after accrual of claim is interrupted by any and all absences from state in excess of two months at a time. (MCLA § 600.5853). As to concealment of defendant, see subhead Fraudulent Concealment, infra.

Death.

If a person dies before period of limitations has run or within 30 days thereafter, action which survives by law may be commenced by personal representative within two years after letters of authority are issued, except that all actions against an estate must be commenced within three years after period of limitations has run. (MCLA § 600.5852).

Fraudulent Concealment.

If a person who is or may be liable fraudulently conceals existence of claim or identity of any person who is liable, action may be commenced within two years after plaintiff discovers or should have discovered existence of claim or identity of person liable, though action would otherwise be barred by period of limitations. (MCLA § 600.5855).

Interruption of Statutory Period.

No statutory provision for any circumstances, occurring before statutory period has run, which fix a new date from which the entire period runs. See subheads New Actions, Disabilities of Plaintiff, Absence or Concealment of Defendant, Death, supra.

Revival of Barred Claims.

Express or implied contracts may be revived by acknowledgment or promise in writing signed by party to be charged. (MCLA § 600.5866). Payment on debt may remove bar if made with intention to recognize entire debt. (327 Mich. 101, 41 N.W. 2d 338). Endorsement of payment by creditor is not admissible to prove payment to bar statute. (MCLA § 600.5865).

Joint Obligors.

One or more of several joint obligors does not lose benefits of running of statute by reason of tolling of statute as against another joint obligor. (MCLA § 600.5825).

Contractual Limitations.

Parties to contract may stipulate for a reasonable period of limitation shorter than the statutory period (281 Mich. 532, 275 N.W. 238), except in life insurance policies (MCLA §§ 500.100 et seq.).

Pleading.

Bar of statute must be pleaded by answer (Rule 2.111), or raised by motion to dismiss (Rule 2.116[B], [C]).

Claim Against State.

Claim against state may not be maintained in Court of Claims unless claim or notice of intention to file claim is filed with clerk of that court within six months if claim is for property damage or personal injuries and otherwise within one year. (MCLA § 600.6431).

5.17 NEGLIGENCE:

See topic 5.09 Damages.

5.18 PLEADING:

Pleading is codified and greatly simplified by Rules 1.101-2.119. Procedural distinctions between law and equity have been abolished. See also topics 5.02 Actions, 5.20 Process.

Pleadings Permitted.

Complaint, answer, reply, counterclaim and cross-claim, answer to cross-claim, third-party complaint, third-party answer, reply to third-party answer. (Rules 2.110[A], [B]).

Complaint, Counterclaim, Cross-Claim, Third-Party Claim.

Sets forth facts upon which pleader relies with such specific averments as are necessary reasonably to inform adverse party, and demand for judgment for relief sought, and if for money, the amount thereof if sum certain. If claim is not for sum certain, specific amount of money need not be stated, but allegations must be included to show that claim is within court's jurisdiction. Relief in the alternative or of several different types may be demanded. (Rule 2.111[B]). All claims against opposing party arising out of subject matter of action must be joined. (Rule 2.203[A]).

Answer.

Pleader may assert as many defenses legal or equitable or both as he may have. Defenses not stated are waived. Averments of adverse party must be explicitly admitted or denied unless party pleads no contest or lacks knowledge as to truth or falsity of allegation, and substance of matters relied upon to support denials must be set forth. Affirmative defenses must be set forth in separate sections. (Rule 2.111[C]-[F]). Execution of written instrument is admitted if not denied under oath. (Rule 2.112[E]).

Counterclaim or Set-Off.

May or may not diminish or defeat recovery sought by adverse party; may claim relief exceeding in amount or different in kind from that sought by adverse party (Rule 2.203[C]); may set forth as many legal or equitable claims as pleader may have (Rule 2.203[A], [B], [D]).

Reply.

Reply is permitted although not required except where answer expressly demands it or where there is a denominated counter-claim. (Rule 2.110[A], [B], [C]).

Demurrer.

Demurrers are abolished, and all matters formerly raised by demurrer are now raised by motion to dismiss, to strike, or for summary judgment. (Rules 2.115, 2.116[C]-[I]).

Amended or Supplemental Pleadings.

Party may amend pleading once as matter of course within 14 days after responsive pleading is served, or if his pleading did not require responsive pleading and action has not been placed on trial calendar, he may amend it within 14 days after it is served on opposing party. Otherwise, pleading may be amended only by leave of court or by written consent of adverse party. (Rule 2.118[A]). Upon motion and just terms, court may permit supplemental pleading setting forth transactions or events since date of pleading sought to be supplemented. (Rule 2.118[E]). Amendments to conform to evidence may be made upon motion during or after trial, but when evidence is objected to at trial on ground not within issues made by pleadings, amendment is not allowed unless court is satisfied admission of evidence will not prejudice objecting party, and continuance may be granted. (Rule 2.118[C]).

Affidavits of Merit and Defense.

Either party may file affidavits in support of claim or defense in connection with motion for summary disposition, which replaces former motion to dismiss and motion for summary judgment. If it appears from affidavits and other submissions that judgment as matter of law is appropriate, court will enter judgment for moving party or may, in proper circumstances, enter judgment for opposing party. Court may order immediate trial of disputed questions of fact. (Rule 2.116[B]-[J]).

Bills of Particulars.

No requirement for bill of particulars as such. Any party may move for more definite statement before filing responsive pleading, pointing out defects complained of and details desired. (Rule 2.115[A]).

Verification.

Except when specifically provided by rule, pleadings need not be verified. (Rule 2.114[A], [B]). None of the ordinary pleadings such as complaint, answer, etc. requires verification.

Service.

Except for original service of complaint and summons, pleadings are served on party represented by attorney by service on the attorney, which may be by mail to his last known business address or by delivery to him personally or by leaving copy at his office with his clerk or some person in charge, or if no one is in charge or present, in some conspicuous place therein. If office is closed or attorney has no office, copy may be left at his usual place of abode with some person of suitable age and discretion residing therein. When party prosecutes or defends in person, service on him is by delivery of copy to him or by mailing copy to him at his address as stated in his pleadings. (Rule 2.107[B], [C]).

Filing.

Pleadings are filed with clerk of court except that judge may permit filing with him. (Rule 2.107[G]).

Time.

Answer must be served and filed within 21 days after personal service of summons and complaint in this state, within 28 days after service when summons and complaint are personally served outside this state or are required to be sent by registered mail addressed to defendant. When service is made by publication, court allows reasonable time for answer or other action, but not less than 28 days after publication is completed. Answer to cross-claim or counterclaim served on party or his attorney, and reply to a pleading requiring or permitting reply and so served, must be filed and served within 21 days after service. (Rule 2.108[A]).

Motion which raises defense or objection to a pleading must be filed within time for responsive pleading, or if no responsive pleading is required, within 21 days after service of pleading to which it is directed. (Rule 2.108[B]). Except for motions which may be heard ex parte, motion and notice of hearing together with any affidavits must be served on adverse party not later than nine, if mailed, or seven, if delivered, to party or attorney, days before time specified for hearing. Any response must be served at least five, if mailed, or three, if delivered to attorney or party, days before hearing. (Rule 2.119[C]).

In computing time periods, day of act, event or default after which designated period begins to run is excluded and last day of period is included unless it is Saturday, Sunday or legal holiday, in which event period runs until end of next day which is not Saturday, Sunday or holiday. (Rule 1.108). Court may extend time for filing if request is made before expiration of period originally prescribed. (Rule 2.108[E]).

Proof of Claims.

In action on open account or account stated, if plaintiff or someone in his behalf makes an affidavit of amount due over and above all legal counterclaims and attaches a copy of the account, and serves copy of affidavit and account on defendant with copy of complaint or with process by which action is commenced, such affidavit is prima facie evidence of the indebtedness unless defendant files affidavit denying same. Similar procedure is available to a counterclaiming defendant. Affidavit is deemed sufficient if made within ten days next preceding issuance of writ or filing of complaint or answer. (MCLA § 600.2145). No special form of affidavit is preferred by local usage.

Frivolous claims are governed by MCLA § 600.2591; Rules 2.114(E), (F), 2.625(A). If court determines civil action or defense frivolous, court will award prevailing party costs and fees incurred with such action, including court costs and reasonable attorney fees, and such costs and fees will be assessed against non-prevailing party and attorney.

Small Claims.

See category 6 Courts and Legislature, topic 6.01 Courts.

5.19 PRACTICE:

Practice is regulated by Revised Judicature Act of 1961 (MCLA §§ 600.101-.9947), effective Jan. 1, 1963 (cited herein "RJA"), and the Rules.

Discovery.

Party may obtain discovery of any matter not privileged which is relevant to subject matter involved in action, including existence, description, nature, custody and location of any books, documents, or other tangible things, or electronically stored information and identity and location of persons having knowledge of discoverable matter. (Rule 2.302). After commencement of action, any party may take testimony of any person, including party, by deposition upon oral examination or written questions for purpose of discovery or for use as evidence or for both purposes. (Rule 2.306[A]). Party may also take discovery by written interrogatories on another party (Rule 2.309) or by request for production of documents for inspection and copying or photographing to another party or third parties (Rule 2.310).

Demand for Admission of Facts.

Within time for completion of discovery any party may serve on any other party written demand for admission of genuineness of any relevant document or of truth of any relevant matters of fact or application of law to fact. If admission is refused and genuineness of document or truth of matter of fact is thereafter proved, party so refusing may be required to pay reasonable expenses and attorney fees of other party in making such proof, unless court finds there were good reasons for refusal or that admissions sought were of no substantial importance. (Rules 2.312[A]-[C], 2.313[C]).

Direct Actions Against Insurer.

See category 23 Transportation, topic 23.01 Motor Vehicles, subhead Direct Actions.

Small Claims.

See category 6 Courts and Legislature, topic 6.01 Courts.

See also topics 5.02 Actions, Appeal and Error, Depositions and Discovery, Injunctions, Judgments, Pleading, Process; category 8 Debtor and Creditor, topics 8.02 Attachment, 8.05 Executions, 8.09 Garnishment.

5.20 PROCESS:

Fee for commencement of action or filing application for extraordinary writ, except writ of habeas corpus, is $150. (MCLA § 600.2529).

All civil actions are commenced by filing complaint. (MCLA § 600.1901). Upon complaint being filed clerk issues summons. (MCLA § 600.1905).

General Requisites.

Summons must be accompanied by copy of complaint and must be under seal of court, contain name of court, names of parties, name of court clerk, be directed to defendant or defendants and state name and address of plaintiff's attorney, if any, otherwise plaintiff's address. (MCLA § 600.1905). Summons must state time within which defendant must answer or take such other action as may be permitted by law and shall notify defendant failure to do so will result in judgment against him. With personal service made within state defendant has 21 days, or if service is made outside state or when summons and complaint are required by rules to be sent to defendant by registered mail, 28 days, within which to answer complaint or take such other action as is permitted by law. (Rule 2.108). If service is made by publication court shall allow reasonable time, but not less than 28 days after publication is completed, within which to answer. (Rule 2.108). Form of summons is specified in Rule 105.

By Whom Issued.

Process is issued by clerk of court. (MCLA § 600.1905).

Who May Serve.

Process in civil actions may be served by any person of suitable age and discretion who is not party nor officer of corporate party unless process is to be personally served upon person in governmental institution, hospital or home, in which case process shall be served by person in charge of such institution or by member of his staff. (MCLA § 600.1908).

Personal Service on Individual.

Effective by leaving summons and copy of complaint with defendant personally (MCLA § 600.1912) or upon his agent authorized by written appointment (MCLA § 600.1930), or upon nonresident individual by service of summons and copy of complaint upon such agent, employee, representative, salesman or servant of defendant as is found within state, and by sending summons and copy of complaint to defendant at his last known address by registered mail (MCLA § 600.1913[1][a]; Rule 2.105[A]).

Personal Service on Infant.

Process may be served on infant as if of age, or by leaving summons and a copy of complaint with person having care and control of him with whom he resides, or with his legal guardian. (MCLA § 600.1913[1][b]; Rule 2.105[B][2]).

Personal Service on Incompetent Person.

Process may be served on incompetent person as if competent or if person has been judicially declared incompetent and a guardian has been appointed, by leaving summons and a copy of complaint with guardian. (MCLA § 600.1913[1][c]). If incompetent is inmate of governmental institution, hospital or home, process must be served by person in charge of such institution or by some member of his staff (MCLA § 600.1908[2]) and copy of complaint must be mailed to attorney general (MCLA § 600.1913[2]; Rule 2.105[B][3]).

Personal Service on Partnership.

Process is served on partnership or limited partnership by leaving summons and copy of complaint with any general partner or by leaving summons and copy of complaint with a person in charge of partnership office or place of business and sending a summons and copy of complaint by registered mail to any general partner's usual place of abode or last known address. (MCLA § 600.1917; Rule 2.105[C]).

Personal Service on Association.

Process is served on partnership association (joint stock company) or unincorporated voluntary association by leaving summons and copy of complaint with any officer, director, trustee, agent or person in charge of an office or business establishment, and sending a summons and copy of complaint by registered mail to any office of the partnership association or unincorporated voluntary association, or if none, to a member of such association other than person with whom summons and complaint was left. (MCLA § 600.1923; Rule 2.105[E]).

Personal Service on Domestic and Foreign Corporations.

Service of process upon a corporation, whether domestic or foreign, may be made by leaving summons and copy of complaint with any officer or, except with a defendant insurance company, the resident agent, or by leaving summons and copy of complaint with any director, trustee or person in charge of any office or business establishment and sending a summons and copy of complaint by registered mail to principal office of corporation. (MCLA § 600.1920[1] and [2]). If corporation has ceased to do business by inaction or by expiration of its corporate term, service may be made by leaving summons and copy of complaint with any of the persons who have been the last presiding officer, president, cashier, secretary, or treasurer of such corporation. (MCLA § 600.1920[3]). If corporation has failed to appoint and maintain a resident agent or if corporation has ceased to do business by inaction or by expiration of its corporate term, service may be made by mailing summons and copy of complaint by registered mail to the corporation or an officer and to Michigan Corporation and Securities Commission. (MCLA § 600.1920[4]). In case where a defendant is a foreign insurance company, two summonses and a copy of the complaint must be delivered or sent by registered mail to office of Commissioner of Insurance. (MCLA § 600.1920; Rule 2.105[D]).

Personal Service on Individual Doing Business Under Assumed Name.

Effective by serving such individual (MCLA § 600.1918) or by leaving summons and copy of complaint with person in charge of office or business establishment of such individual and sending a summons and copy of complaint by registered mail addressed to such individual at his usual place of abode or last known address. (Rule 2.105[B][4]).

Personal Service Outside of State.

There is no territorial limitation on range of process and persons who are subject to jurisdiction of Michigan, by reason of prescribed contacts, ties or relations, may be served anywhere. (Rule 2.105[J]). Thus any person who has consented to jurisdiction, any individual domiciled in Michigan, any corporation incorporated under Michigan law or carrying on a continuous and systematic part of its general business within Michigan, and any partnership, limited partnership, partnership association or unincorporated voluntary association formed under Michigan law or carrying on a continuous and systematic part of its general business within Michigan, has submitted to general jurisdiction of Michigan courts and personal service upon any such party outside Michigan has same force and effect as service in Michigan. (MCLA §§ 600.701, .711, .721 and.731). Any nonresident individual, corporation, partnership, limited partnership, partnership association, unincorporated voluntary association or the agent of any of the foregoing who: (1) Transacts any business in Michigan, (2) does any act, or causes any act to be done, or consequence to occur, in Michigan resulting in a tort, (3) owns, uses or possesses any real or tangible personal property situated in Michigan, (4) contracts to insure any person, property or risk located in Michigan at time of contracting, (5) enters into a contract for services to be rendered or materials to be furnished in Michigan, or (6) with respect to a nonresident individual, acts as director, manager, trustee or other officer of any domestic corporation or any foreign corporation having its principal place of business in Michigan, consents to the limited jurisdiction of Michigan courts with respect to actions arising out of any such relationships and personal service outside Michigan has same force and effect with respect to such actions as service in Michigan. (MCLA §§ 600.705, .715, .725, .735).

Service by mail, standing alone, will not give court jurisdiction over an absent defendant, but as indicated above and below there are several situations where service by registered mail is necessary, in conjunction with personal service on a specified representative of defendant or service by publication, to confer personal jurisdiction of the court over defendant. Nonresident filing assumed name certificate with county clerk must also file consent to service of process on county clerk; plaintiff serves county clerk and notifies defendant by certified mail. (MCLA § 445.3).

Substituted Service.

See various subheads supra relating to personal service.

Service by Publication.

In all civil actions in which personal jurisdiction is not required, court may order defendant to answer or take such other action permitted by law upon the filing by plaintiff, his attorney, or an agent having knowledge of the facts, of an affidavit, dated within ten days from entry of order, showing (1) Defendant resides outside state, or (2) whereabouts of defendant and his residence are unknown, or (3) summons has been returned showing service cannot be made in county where action is pending. Every affidavit must state defendant's address, or last known address, or that no address is known. Where present address or name of a defendant is not known, affidavit must set forth facts showing diligent inquiry. Order shall contain name of court, names of parties, directions as to when and where to answer or take other action permitted by law, statement of nature of proceeding and statement of effect of failure to take indicated steps. If order is not served upon defendant personally or by registered mail, return receipt, at least 20 days before time prescribed for answer, order must be published in a newspaper at least once each week for four consecutive weeks, or such further time as court shall direct, and a copy of the order must be sent by registered mail to defendant at his last known address, if known to plaintiff, on or before date of second publication. (MCLA §§ 600.1940, .1945, .1947, .1950 and.1951; Rule 2.106).

Long Arm Statute.

See subhead Personal Service Outside of State, supra.

Service on Unknown Defendants.

See subhead Service by Publication, supra.

Nonresident Motorist.

See category 23 Transportation, topic 23.01 Motor Vehicles.

Attachment.

A writ of attachment may only issue after filing of complaint. (Rule 3.103[A]). If return of writ of attachment shows that property has been attached but no defendant personally served, plaintiff must obtain order of court for defendant to appear and answer and publish order for four consecutive weeks and send copy of order to defendant, registered mail, at his last known address if known to plaintiff. Such notice does not give personal jurisdiction over defendant. (Rule 3.103[E]).

Garnishment.

After filing complaint in contract action or after any judgment, writ of garnishment may issue and may be served by any person not a party to the action or an officer of a corporate party. In case of garnishment prior to judgment, summons, copy of complaint and writ of garnishment must also be served upon principal defendant, either personally, by publication as outlined in subhead Service by Publication above, or upon his attorney. In all cases duty is imposed upon garnishee to notify principal defendant of garnishment. Garnishee has 15 days after service of writ to file disclosure touching upon his liability, if any, to principal defendant. (Rules 3.101, 3.102).

Proof of service may be made by (1) Written acknowledgment of the summons, (2) certificate of sheriff, deputy sheriff, medical examiner, bailiff, constable or deputy of such officers if such officer held office in county where issued, or (3) affidavit of person making service other than officers described above. (MCLA § 600.1910).

Inferior Courts.

Process of circuit court commissioners and of justice, municipal, district and common pleas courts is extensively regulated by statute and rules adopted by such courts.

Uniform Interstate and International Procedure Act in effect. (MCLA §§ 600.1852, 600.2114a, 600.2118a).

5.21 REPLEVIN:

Civil action may be brought to recover any goods or chattels unlawfully taken or detained and to recover damages. (MCLA § 600.2920).

Proceedings.

Plaintiff or someone on his behalf files claim and delivery complaint containing description of property claimed, its estimated value, whether it is part of divisible property, nature of claim and basis for judgment requested. Estimate of value serves to fix amount of bond and cannot be used as evidence or admission of value. (Rule 3.105[C]). Plaintiff may move for possession pending judgment. If granted, court may order sheriff to seize property. Plaintiff may be required to furnish penalty bond of not less than $100 and at least double value of property as stated in plaintiff's complaint. Upon court order, sheriff seizes property and keeps it in secure place and delivers property in accordance with court's order. (Rule 3.105[E]-[G]).

Repossession.

Court may condition defendant's continued possession on penalty bond payable to plaintiff of not less than $100 and at least double value of property as stated in plaintiff's complaint. (Rule 3.105[E]).

Claims of Third Persons.

No specific provision in pertinent statute (MCLA § 600.2920) or Rule 3.105 governing claim and delivery. See topic 5.02 Actions, subhead Intervention.

Judgment or Order.

Court orders property delivered to person entitled to possession, and also awards damages sustained by the unlawful taking or detention. (MCLA § 600.2920; Rule 3.105).

5.22 SEQUESTRATION:

When execution against domestic corporation is returned unsatisfied in whole or in part, judgment creditor or his representative may petition circuit court for appointment of a receiver and for sequestration of stock, property and things in action and effects of such corporation. (MCLA § 600.3610).

In case of judgment against absent, concealed or nonresident defendant, performance of judgment may be compelled by sequestration of real and personal estate of defendant or of specific estate or effects demanded by complaint. Upon plaintiff's giving security, in sum directed by court, court may deliver specific estate or effects to plaintiff or may satisfy judgment out of estate or effects sequestered. (MCLA § 600.6092).

Property constituting proceeds or instrumentality of crime may be seized and subjected to forfeiture. Seized property of crime victim shall be promptly returned. Information in seized computer or computer information storage device shall be copied immediately and provided to Court. (MCLA §§ 600.4702-.4703a).

See also category 8 Debtor and Creditor, topics 8.02 Attachment, 8.05 Executions, 8.09 Garnishment, 8.16 Receivers.

5.23 SERVICE:

See topic 5.20 Process.

5.24 STAY OF EXECUTION:

See topic 5.03 Appeal and Error; also category 8 Debtor and Creditor, topic 8.05 Executions.

5.25 SUBMISSION OF CONTROVERSY:

No statutory provisions.

5.26 VENUE:

Venue is not jurisdictional. (MCLA §§ 600.1601, .1651). General rule, subject to numerous exceptions, is that action may be brought in county where any defendant resides, has place of business, conducts business or in which registered office of any defendant corporation is located or, if no defendant meets any such criteria, in county where any plaintiff resides, has place of business or in which registered office of any plaintiff corporation is located. (MCLA § 600.1621). Actions, other than contract actions, real actions, actions for recovery of tangible personal property, actions against governmental units, and actions on probate bonds, may also be brought in county where cause of action or any part thereof arose. (MCLA § 600.1627).

Real Property Action.

Actions (1) To recover real property, or an estate or interest therein, or for the determination in any form of right or interest therein, (2) to partition real property, and (3) to foreclose lien or mortgage on real property may be brought in county where subject of such action, or any part thereof, is situated. (MCLA § 600.1605).

Action for Recovery of Tangible Personal Property.

County in which subject of action or any part thereof is situated is proper. (MCLA § 600.1605).

Against Transportation Line.

Action must be brought where cause of action arose or in county of plaintiff’s residence, if line or route traverses either county where cause of action arose or county of plaintiff’s residence. Otherwise action may be brought in any county in which defendant has its principal place of business or owns, operates or leases a line or route. (MCLA § 600.1635).

Against Governmental Units.

Any county where governmental unit exercises or may exercise its governmental authority is proper county to bring suit unless cause of action arose in county of its principal office, in which case suit must be brought in such county. (MCLA § 600.1615).

Tort Action.

Action must be brought in county where cause of action arose and where any defendant resides, has place of business, conducts business or where registered office of any defendant corporation is located or, if no county meets such criteria, in county where cause of action arose and where any plaintiff resides, has place of business, conducts business or where registered office of any corporate plaintiff is located or, if no county meets such criteria, in county determined to be proper according to general venue rule. For product liability actions, corporation conducts business where its products are sold at retail. (MCLA § 600.1629).

Probate of foreign will may take place in any county where testator left property affected by the will. (MCLA § 600.2936).

On Bond Filed in Probate Court.

Action may be commenced in county where bond is filed. (MCLA § 600.1611).

Attachment.

County where some of the property is situated is proper county of venue. (MCLA § 600.4021).

Garnishment.

County which would be proper county of venue as designated in MCLA §§ 600.1601 et seq. (being the chapter covered by this topic) against garnishee defendant is proper county of venue if: (1) County is designated in MCLA §§ 600.1601 et seq. as proper county of venue for principal defendant, or (2) there is no common proper county of venue against principal and garnishee defendant, or (3) personal jurisdiction cannot be obtained over principal defendant. (MCLA § 600.4025).

Changes.

If action is brought in county of improper venue, case may be tried therein, unless defendant moves for change of venue before or at time defendant files answer, when case will be transferred to county of proper venue. (Rule 2.223). Defendant may also move for change of venue after answer if court is satisfied that facts to support motion were not and could not be known to defendant until 14 days prior to motion. Each circuit court upon good cause shown may change venue in any civil cause pending therein. (Rule 2.221). Motion for change of venue based on hardship or inconvenience may be granted. (Rule 2.222; MCLA § 600.1629[2]).

Contract Provisions.

Contractual provisions seeking to establish venue for actions arising after execution of contract are unenforceable. (460 Mich. 305, 596 N.W. 2d 591).

5.27 WITNESSES:

See topic 5.13 Evidence, subhead Witnesses.

6 COURTS AND LEGISLATURE

6.01 COURTS:

United States District Courts.

Eastern District.

Clerk's office: Detroit 48226. Website: http://www.mied.uscourts.gov.

Fee for filing complaint, $350.

Northern Division is composed of following counties: Alcona, Alpena, Arenac, Bay, Cheboygan, Clare, Crawford, Gladwin, Gratiot, Huron, Iosco, Isabella, Midland, Montmorency, Ogemaw, Oscoda, Otsego, Presque Isle, Roscommon, Saginaw and Tuscola.

Court sits at Bay City.

Southern Division is composed of following counties: Genesee, Jackson, Lapeer, Lenawee, Livingston, Macomb, Monroe, Oakland, St. Clair, Sanilac, Shiawassee, Washtenaw and Wayne.

Court sits at Ann Arbor, Detroit, Flint, Port Huron.

Western District.

Clerk's office: Grand Rapids 49502. Website: http://www.miwd.uscourts.gov.

Fee for filing complaint, $350.

Northern Division is composed of following counties: Alger, Baraga, Chippewa, Delta, Dickinson, Gogebic, Houghton, Iron, Keweenaw, Luce, Mackinac, Marquette, Menominee, Ontonagon and Schoolcraft.

Court sits at Marquette.

Southern Division is composed of following counties: Allegan, Antrim, Barry, Benzie, Berrien, Branch, Calhoun, Cass, Charlevoix, Clinton, Eaton, Emmet, Grand Traverse, Hillsdale, Ingham, Ionia, Kalamazoo, Kalkaska, Kent, Lake, Leelanau, Manistee, Mason, Mecosta, Missaukee, Montcalm, Muskegon, Newaygo, Oceana, Osceola, Ottawa, St. Joseph, Van Buren and Wexford.

Court sits at Grand Rapids, Kalamazoo, Lansing.

Michigan State Supreme Court.

Court sits at Lansing. Website: http://www.courts.michigan.gov/supremecourt. Jurisdiction includes: (1) review of Judicial Tenure Commission orders (Rule 9.223-.226); (2) review by appeal of case pending in Court of Appeals or after decision by Court of Appeals (Rule 7.302); (3) review by appeal of final order of Attorney Discipline Board (Rule 9.122); (4) rendering of advisory opinion authorized by Const. art. 3, § 8; (5) response to certified question (Rule 7.305); (6) superintending control over lower court or tribunal (Rule 7.304); and (7) other jurisdiction as provided by constitution or law (Rule 7.301).

Michigan State Court of Appeals.

Court of appeals has jurisdiction over appeals from all final judgments of circuit courts, court of claims and recorder's court, orders of probate court from which appeal of right may be taken and on leave to appeal granted by court as to final judgments from all lower courts. (MCLA § 600.308).

Court sits in divisions of three judges each except as otherwise directed by Supreme Court. Divisions sit in Detroit, Lansing, Troy, and Grand Rapids. Website: http://courtofappeals.mijud.net.

Circuit Courts.

Circuit Courts for respective counties (83) have original jurisdiction in all cases of equitable nature and cases in law involving over $25,000 (MCLA §§ 600.605, .8301), appellate jurisdiction over District Courts, Probate Courts, except as to final orders dealing with trusts, estates, adoption proceedings and condemnation cases, which are appealable as of right to Court of Appeals (MCLA § 600.861), certain state agencies, and general criminal jurisdiction for matters other than misdemeanors and ordinance and charter violations (MCLA §§ 600.601-.631). Website: http://www.courts.michigan.gov/trialcourts/trial.htm.

Court of Claims.

Court of Claims has exclusive jurisdiction of all claims and demands, liquidated and unliquidated, ex contractu and ex delicto, against state and any of its departments, commissions, boards, institutions, arms or agencies, except where jurisdiction is conferred by statute on circuit court. Court will not entertain claims on which there is adequate remedy in federal court. Trial and appellate practice follows circuit court rules. Court holds not less than four sessions a year. Judges of Thirtieth Circuit sit as judges of court of claims. (MCLA §§ 600.6401-.6475). It is court of record. (MCLA § 600.1416). No claim may be maintained against state unless written notice of intent filed within six months if claim is for property damage or personal injuries, and otherwise within one year. (MCLA § 600.6431).

Probate Courts.

There are one or more judges of probate in each county or district, having exclusive jurisdiction of all matters relating to estates of deceased persons, trust administration and appointment of guardians or conservators for minors and incompetent adults. It has concurrent jurisdiction of matters ancillary to settlement of estate of decedent, ward or trust. (MCLA §§ 600.801-.880d). It is court of record. (MCLA § 600.801).

Justice Courts.

Justice Courts abolished as of Jan. 1, 1969. (MCLA §§ 600.6701-.7975).

District Courts.

In each district in state except those cities which elect to retain their present municipal courts, District Courts have exclusive jurisdiction in civil actions where amount involved is not more than $25,000 (MCLA § 600.8301) and jurisdiction of all misdemeanors punishable by fine or imprisonment not exceeding one year, or both, and ordinance and charter violations, and jurisdiction over preliminary examinations in all felony cases, including fixing of bail and accepting bond (MCLA § 600.8311). District Court has no jurisdiction in suits for injunctions, divorce, or other actions historically equitable in nature except as otherwise provided by law. (MCLA § 600.8315). Appeals shall be to circuit court for county in which judgment is rendered. Appeals from final judgments are as of right unless based on pleas of guilty or nolo contendre, and other appeals are by application. Appeals to Court of Appeals from judgments of Circuit Court on appeal from District Court are by application. (MCLA § 600.8342). Small claims division is established in each district as division of District Court. (MCLA §§ 600.8401-.8427). District court judges sit as judges of small claims division. Jurisdiction of small claims division is confined to cases for recovery of money, not exceeding $3,000. (MCLA § 600.8401). Hearings are conducted in informal manner as to do substantial justice between parties. Attorneys may not participate in filing, prosecution, or defense except in their own behalf. Nor may any collection agency or employee thereof or any other person beside plaintiff and defendant so take part in litigation. (MCLA § 600.8408[1]). Corporations may appear by full time employee. (MCLA § 600.8408[2]). Either plaintiff or defendant may demand that cause be removed to district court. (MCLA § 600.8408[4]). Acceptance of trial in small claims division is deemed waiver of right to counsel, right to trial by jury, and any right of appeal. (MCLA § 600.8412). Actions for libel, fraud, intentional torts and slander may not be instituted in small claims division nor shall state or any political subdivision of state or any governmental agency be party to any such action. (MCLA § 600.8424). Prevailing party is entitled to costs. (MCLA § 600.8421). District court magistrate may arraign and sentence upon pleas of guilty or nolo contendere and issue warrants and fix bail in certain instances. (MCLA § 600.8511).

Small Claims Courts.

See subhead District Courts, supra.

6.02 LEGISLATURE:

Regular sessions convened on second Wed. in Jan. of each year at 12 noon. (Const., Art. IV, § 13).

Extraordinary Sessions.

Governor may convene legislature on extraordinary occasions. (Const., Art. V, § 15).

Initiative and Referendum both provided for. (Const., Art. II, § 9).

Lobbyists.

MCLA §§ 4.411-.431.

6.03 REPORTS:

Official reports of Michigan Supreme Court are: Harrington's Chancery, 1 vol., Walker's Chancery, 1 vol., Douglass, 2 vols., and Michigan Reports from vol. 1 to date. Michigan decisions are also reported in Northwestern Reporter. Official report of Michigan Court of Appeals is Michigan Appeals Reports from Vol. 1 to date.

Digests are: Michigan Digest (Callaghan & Co., 1941), Michigan Civil Jurisprudence (Callaghan & Co., 1957), Michigan Criminal Law and Procedure (Callaghan & Co., 1953), Michigan Digest (West Publishing Co., 1932), Michigan Digest 2d (West Publishing Co., 1990) and Michigan Law and Practice (West Publishing Co., 1959), all kept current with pocket parts.

6.04 STATUTES:

Michigan Legislative Council prepares official compilations. (MCLA § 8.41). Latest is Michigan Compiled Laws of 1979. Public acts and joint resolutions are published and acts are assigned compilation numbers after each session of legislature. (MCLA §§ 8.21-.23). Michigan legislature website: http://www.legislature.mi.gov. West publishes Michigan Compiled Laws Annotated and LexisNexis publishes Michigan Compiled Law Service, both of which are frequently brought up to date by pocket parts; neither has official status, but both are frequently cited by courts.

Uniform Acts recommended by National Conference of Commissioners on Uniform State Laws (NCCUSL) which have been adopted are: † Anatomical Gift (2006***, adopted 2008); † Arbitration (1956, adopted 1961); Attendance of Witnesses From Without State in Criminal Proceedings, Act to Secure (1936, adopted 1970); Child Custody Jurisdiction and Enforcement (1997, adopted 2001); †‡ Commercial Code (1962, adopted 2001, am'd 2005): † Common Trust Fund (1938, adopted 1941, am'd 2005); † Controlled Substances (1970, 1990 and 1994 Acts****, adopted 1978, am'd 1993); Criminal Extradition (1936, adopted 1937); Determination of Death (1980, adopted 1992); Disposition of Community Property Rights at Death (1971, adopted 1975); Division of Income for Tax Purposes (1957, adopted 1969); † Durable Power of Attorney (1979*, adopted 1998, am'd 2008); Electronic Transactions (1999, adopted 2000); Enforcement of Foreign Judgments (1964, adopted 1966); Evidence, Rules of

(1974, adopted 1978); Federal Lien Registration (1978, adopted 1983); Foreign-Country Money Judgments Recognition (2005, adopted 2008); Fraudulent Transfer (1984, adopted 1998, am'd 2009); Guardianship and Protective Proceedings (1982*, adopted 1998, am'd 2009); † Interstate Arbitration of Death Taxes (1943, adopted 1956): † Interstate Compromise of Death Taxes (1943, adopted 1956); Interstate Family Support (1996, adopted 1998): † Limited Partnership (1976, adopted 1982, am'd 2005); Management of Institutional Funds (1972, adopted 1976); Military Justice, Code of (1980, adopted 1980, am'd 2005); Nonprobate Transfers on Death (1991*, adopted 1998, am'd 2009); † Partnership (1914, adopted 1917); Photographic Copies of Business and Public Records as Evidence (1949, adopted 1961, am'd 1992); † Principal and Income (1997, adopted 2004); † Probate Code (1969*, adopted 1998); Prudent Investor (1994*, adopted 1998, am'd 2009); Reciprocal Enforcement of Support (1952, adopted 1952, am'd 1990); Reciprocal Transfer Tax (1928, adopted 1929, am'd 1992); Recognition of Acknowledgments (1968, adopted 1969, am'd 1970); Rendition of Accused Persons (1968, adopted 1968): Rendition of Prisoners as Witnesses in Criminal Proceedings (1967, adopted 1967); Residential Landlord and Tenant (1972, adopted 1972, am'd 1995); † Securities (2002, adopted 2008); Simplification of Fiduciary Security Transfers (1958, adopted 1959); State Antitrust (1973, adopted 1984, am'd 1987); † Statutory Rule Against Perpetuities (1986, adopted 1988); Supervision of Trustees for Charitable Purposes (1954, adopted 1961, am'd 1967); Testamentary Additions to Trust (1960*, adopted 1962); TOD Security Registration (1998*, adopted 1998); Trade Secrets (1985, adopted 1998); Transboundary Pollution Reciprocal Access (1982,** adopted 1988); Transfers to Minors (1983, adopted 1998); Trustee's Powers (1964*, adopted 1992, am'd 2009); Unclaimed Property (1981, adopted 1995, am'd 2008); Vendor and Purchaser Risk (1935, adopted 1941); Veterans' Guardianship (1928, adopted 1937).

For text of NCCUSL Uniform Acts falling within the scope of the Martindale-Hubbell Law Digests see Uniform and Model Acts section.

† Adopted with significant variations or modifications. See appropriate topics as to Acts within scope of Digests volume.

‡ Adopted Art. 2A (Leases), 1990 Revision of Art. 3, 1990 Amendments to Art. 4, Art. 4A (Funds Transfers), 1995 Revision of Art. 5, 1994 Revision of Art. 8, and 2000 Revision of Art. 9; repealed Art. 6 without adopting 1989 Revision of Art. 6.

‡‡ 1937 Act repealed and replaced 1929 Act.

* Incorporated, some with modifications, in Estates and Protected Individuals Code effective Apr. 1, 2000.

**Incorporated in 1995 in Natural Resources and Environmental Protection Act at MCLA §§ 324.1801-.1808.

*** Incorporated, some with modifications, in Public Health Code effective May 1, 2008.

*** Incorporate, some with modifications, in Public Health Code, effective Sept. 30, 1978.

Other Uniform Acts not recommended by NCCUSL which have been adopted are: Uniform Act on Fresh Pursuit (1937); Uniform Budgeting and Accounting Act (1968); Uniform Condemnation Procedures Act (1980).

6.05 UNIFORM LAWS:

For list of Uniform Acts in force in this state see topic 6.04 Statutes. For text of Uniform Acts within the scope of the Martindale-Hubbell Law Digests see Uniform and Model Acts section.

7 CRIMINAL LAW

7.00A BAIL:

See topic 7.01 Criminal Law.

7.01 CRIMINAL LAW:

Criminal offenses are governed generally by MCLA §§ 750.1-752.1068. Criminal procedures are governed generally by MCLA §§ 760.1-780.974. Sentencing guidelines set forth at MCLA §§ 777.1-.69. Michigan criminal proceedings also operate under Michigan Rules of Evidence of 1978, including amendments, and Michigan Court Rules of 1985, including amendments.

Indictment or Information.—Accused usually is brought to trial on information filed by prosecuting attorney, but may be brought to trial on indictment by grand jury. (MCLA §§ 767.1-.96).

Bail.—Procedures governing pre-conviction bail. (MCLA §§ 765.1-.31). Accused generally entitled to bail. (Const. Art. 1, § 15; MCLA § 765.6). Bail must be denied to person accused of murder or treason if proof of violation evident or presumption great. (MCLA §§ 765.5). Bail may be denied if accused of violent felony where proof is evident or presumption great and felony committed while on probation or release for other violent charge, or within 15 years of at least two other violent felony convictions. Bail may be denied if accused of following offenses and proof evident or presumption great, unless clear and convincing evidence that accused not likely to flee or present personal danger: first degree criminal sexual conduct, armed robbery, or kidnapping with intent to extort money or valuable thing. (MCR 6.106). Standards for determining amount of pre-trial bail. (MCLA § 765.5; MCR 6.106). Pending appeal, bail generally discretionary for bailable offenses. Stricter procedures for assaultive crimes, and bail not available for convictions of sexual assault on minor. (MCLA § 770.8-.9b).

Interstate Compact for Probation, Parole, Prevention of Crime, and Enforcement of Penal Laws (MCLA §§ 798.101-.103).

Uniform Controlled Substances Act (MCLA §§ 333.7101-.7545).

Uniform Act to Secure Attendance of Witnesses from Without a State in Criminal Proceedings Act (MCLA §§ 767.91-.95).

Uniform Criminal Extradition Act (MCLA §§ 780.1-.31).

Uniform Rendition of Accused Persons Act (MCLA §§ 780.41-.45).

Uniform Act on Fresh Pursuit (MCLA §§ 780.101-.108).

Uniform Rendition of Prisoners as Witnesses in Criminal Proceedings Act (MCLA §§ 780.111-.120).

Revised Uniform Reciprocal Enforcement of Support Act (MCLA §§ 780.151-.183).

Interstate Agreement on Detainers (MCLA §§ 780.601-.608).

8 DEBTOR AND CREDITOR

8.01 ASSIGNMENTS:

Uniform Commercial Code adopted. (MCLA §§ 440.1101-.11102). See category 3 Business Regulation and Commerce, topic 3.09 Commercial Code.

In general causes of action including certain tort claims (36 Mich. 318) (but not claims for fraud [190 Mich. 478, 157 N.W. 282], but see 365 Mich. 552, 114 N.W. 2d 154 [1962] [concurring opinion]) are assignable. Also assignable are contingent rights under existing contract (222 Mich. 664, 193 N.W. 235), and future rents of real property owned by assignor (133 Mich. 617, 95 N.W. 710; for limitations in connection with mortgages, see category 20 Mortgages, topic 20.04 Mortgages of Real Property, subhead Rents and Profits). Claims for worker's disability compensation except for, under certain circumstances, assignments made to insurance companies, certain health maintenance organizations, or certain medical care and hospital service corporations (MCLA § 418.821), unemployment compensation (MCLA § 421.30), old age and dependent children benefits (MCLA § 400.63) and alimony (146 Mich. 298, 109 N.W. 425) are not assignable. Mere possibility of future rights, not coupled with interest or contract, is not assignable (57 Mich. 97, 23 N.W. 600), nor is expected interest in living ancestor's estate without consent of ancestor (181 Mich. 438, 148 N.W. 225). Neither income nor principal of spendthrift trust is assignable. (425 Mich. 364, 389 N.W. 2d 696).

Instrument Transferring Title.

Uniform Commercial Code adopted. (MCLA §§ 440.1101-.11102). See category 3 Business Regulation and Commerce, topic 3.09 Commercial Code. In transactions not governed by U.C.C., instrument transferring title must be in writing (MCLA §§ 566.132, .222) but need not be witnessed or acknowledged.

Filing.

Uniform Commercial Code adopted. (MCLA §§ 440.1101-.11102). See category 3 Business Regulation and Commerce, topic 3.09 Commercial Code. Assignments in transactions not governed by U.C.C., need not be filed or recorded.

Recording.

See subhead Filing, supra.

Notice.

Uniform Commercial Code adopted. (MCLA §§ 440.1101-.11102). See category 3 Business Regulation and Commerce, topic 3.09 Commercial Code. In transactions not governed by U.C.C., notice to debtor is not required to make assignment binding as between assignor and assignee. (163 Mich. 408, 128 N.W. 926). Debtor with notice of assignment is liable to assignee if he makes payment to assignor. (253 Mich. 548, 235 N.W. 249).

Effect.

Uniform Commercial Code adopted. (MCLA §§ 440.1101-.11102). See category 3 Business Regulation and Commerce, topic 3.09 Commercial Code. In transactions not governed by U.C.C., assignee of nonnegotiable chose in action takes only rights of assignor (49 Mich. 104, 13 N.W. 377), and subject to defenses existing at time of assignment, but not to latent equities (256 Mich. 441, 240 N.W. 44).

Assignment of wages is valid (36 Mich. 436) except where: (1) given as security to person licensed under Regulatory Loan Act (MCLA § 493.17); or (2) included in retail installment contract or retail charge agreement (MCLA § 445.864).

8.02 ATTACHMENT:

Actions in Which Allowed.

Attachment is available in both contract and tort actions. (MCLA § 600.4001; Rule 3.103). Small claims court is proper forum for claims up to $3,000. (MCLA § 600.8401).

Courts Which May Issue Writ.

Circuit court (MCLA § 600.4001), district and municipal courts (MCLA § 600.8306).

In Whose Favor Writ May Issue.

Any person, including nonresident or foreign corporation. (Rule 3.103).

Against Whom Writ May Issue.

Circuit courts have power to issue attachments with respect to any interest in things which are subject to judicial jurisdiction of state and belonging to person against whom claim is asserted. (MCLA § 600.4001).

Claims on Which Writ May Issue.

All claims, matured or unmatured. (MCLA § 600.4001).

Grounds.

In action to obtain original judgment, sole ground for prejudgment attachment against property located in state is that defendant is subject to judicial jurisdiction of state but cannot be served with process after diligent effort. In action brought on foreign judgment, alternative grounds for prejudgment attachment are: (i) defendant is not subject to judicial jurisdiction of state, or (ii) defendant is subject to jurisdiction of state but cannot be served with process after diligent effort. (MCLA § 600.4001; Rule 3.103). Attachment will not issue from small claims division prior to judgment. (MCLA § 600.8409).

Proceedings to Obtain.

After commencing action by filing ex parte motion requesting writ, supported by affidavit showing defendant is indebted to plaintiff in stated amount in excess of all setoffs; defendant is subject to judicial jurisdiction of State; and after diligent effort plaintiff cannot serve defendant with process. In tort action affidavit must describe injury claimed and state that affiant believes in good faith that defendant is liable to plaintiff in stated amount. In action on foreign judgment affidavit must show that defendant is indebted to plaintiff on foreign judgment in stated amount in excess of all setoffs and that defendant is not subject to judicial jurisdiction of State or that after diligent effort plaintiff cannot serve defendant with process. On issuance of writ order may specify further steps, if any, which plaintiff must take to notify defendant of action and attachment. (Rule 3.103).

Attachment Bond.

Plaintiff is not required to furnish bond. (See supra, subhead Proceedings to Obtain.)

Levy.

Sheriff attaches so much of defendant's property not exempt from execution, wherever found within county, as will satisfy plaintiff's demand and costs. Where property seized within county is not sufficient, officer seizes other property anywhere within state. Realty and interests therein are seized by officer's deposit of certified copy of writ including description of realty with register of deeds for county in which realty located. Shares of stock or interest of stockholder in domestic corporation are seized in manner provided for seizure of such property on execution. (See topic 8.05 Executions.) (Rule 3.103).

Indemnity.

No provision for levying officer to require indemnity.

Lien.

Attachment binds goods and chattels from time they were attached. Attachment of realty constitutes lien from time when certified copy of attachment including description of realty is deposited in office of register of deeds in county where realty is situated. (MCLA § 600.4035).

Priorities.

Where one or more attachments or executions are issued against same debtor or his property, attachment or execution first delivered to officer has preference, except that if there has been levy and sale of goods or chattels before a levy under first attachment or execution, levy on such goods or chattels under first attachment or execution is not permitted. (MCLA § 600.6007).

Unrecorded land mortgage has priority over subsequent attachment levy though attaching creditor had no notice of such mortgage when attachment was commenced. (130 Mich. 127, 89 N.W. 720).

Release of Property.

Attachment may be dissolved upon posting of bond. (MCLA § 600.4045). Except in action on foreign judgment, defendant may obtain dissolution of attachment by submitting to jurisdiction of court. Defendant, or person who owns, possesses, or has interest in attached property may move for dissolution of attachment by proving: (i) defendant was not subject to jurisdiction of state, or (ii) attached property was exempt from attachment. Court may dissolve attachment for any other sufficient reason. Attachment is dissolved if action is dismissed or judgment is entered for defendant. (Rule 3.103).

Sale.

Where attached property consists of animals or is perishable, court may order sale and proceeds are brought into court to abide court's order. (Rule 3.103).

Third Party Claims.

See subhead Vacation or Modification, infra.

Vacation or Modification.

Any person whose property is attached or who is in possession of or has an interest in property attached may apply to circuit judge or circuit court commissioner of county where writ issued for dissolution of the attachment. Plaintiff is notified and hearing is held. If attachment found invalid, it is dissolved and property is returned to defendant. Defendant may be required to submit himself to personal jurisdiction of court prior to granting of dissolution order. (Rule 3.103).

8.03 [RESERVED]

8.04 CREDITORS' SUITS:

Judgment creditor, on motion in original action or in a separate action, may compel discovery of assets, prevent transfer of assets, obtain satisfaction of judgment out of property not exempt from execution, and procure appointment of receiver. Return of execution unsatisfied is not necessary prerequisite. (MCLA § 600.6104). Persons having property of judgment debtor or indebted to him may also be required to appear for examination and produce books and records.

(MCLA § 600.6110). Upon request to appear for examination, third party is and judgment debtor may be restrained from transferring debtor's property. (MCLA §§ 600.6116, 6119). Court may order judgment debtor to make installment payments. (MCLA § 600.6107). Judgment creditor may also obtain any other relief formerly available by creditor's bill under MCLA §§ 606.4, 634.1-.15 et seq. now repealed. (Rule 2.621).

8.05 EXECUTIONS:

Execution may be issued on judgment of court of record against realty or personalty. (MCLA § 600.6001).

Kinds of Execution.

Except as otherwise provided by law, execution may be made against all personalty of judgment debtor liable to execution at common law (MCLA § 600.6017) and against all realty interests of judgment debtor except tenancies at will. (MCLA § 600.6018). Execution may also be made against body of judgment debtor. (See subhead Body Execution, infra.)

Exemptions.

See topic 8.06 Exemptions.

Time for Issuance.

Writs issue on judgments of courts of record upon application. (MCLA § 600.6001).

Lien.

No lien before levy. (MCLA § 600.6012).

Levy must be made before return day of the writ and may be made on the goods and chattels of the debtor or, in court of record, on his real estate if sufficient personalty is not found. (MCLA § 600.6004).

Levy on real estate must be an act capable of being proved and clearly identified when it is done. (25 Mich. 381). The property levied on is bound from the time of levy (MCLA § 600.6012), but no levy on real estate is valid against subsequent bona fide purchasers until a notice of levy is recorded in office of register of deeds for county where the premises are situated. (MCLA § 600.6051). Lien acquired by execution is, from recording of such notice, valid also against all prior grantees and mortgagees of whose claims party interested has not actual or constructive notice. (MCLA § 600.6051). Levy on real estate ceases to be a lien after five years from time of levy if property not sold thereunder within five years. (MCLA § 600.6051).

Levy on Personalty.

The statute does not prescribe mode of levy in courts of record, but it is held that a levy on personalty must be made by manual seizure or such assertion of control as can be made effectual, and must be so made as to identify or give means of identifying property levied on. (42 Mich. 75, 3 N.W. 262).

Levy on Corporate Stock.

The corporate officer who is appointed to keep record of stockholders is required, upon exhibition to him of the execution, to give the officer a certificate of the number of shares or amount of interest held by judgment debtor. (MCLA § 600.6037). The officer making the levy must leave a certified copy of the execution with the clerk, treasurer, cashier, or agent of the corporation, if there be any such officer, and if not, then with any officer or person who has at the time the custody of the books and papers of the corporation within the state, but no levy on shares of stock for which a certificate is outstanding is valid until such certificate is actually seized by the officer making the levy, or its transfer by the holder be enjoined or restrained. (MCLA § 600.6037). The court from which the execution issued has full power upon motion, without notice, to make an order restraining the transfer of any such shares of stock, and upon service of a certified copy of such order the same is fully effectual. (MCLA § 600.6037). A certified copy of the execution and return must, within 14 days after sale, be left with the corporate officer charged with keeping records of stock transfers, and the purchaser is thereupon entitled to a certificate or certificates of the shares bought by him, upon paying necessary transfer fees. (MCLA § 600.6037).

Return.

Execution from court of record is returnable in not less than 20 nor more than 90 days. (MCLA § 600.6002).

Stay.

Twenty-one days stay is given ex parte in circuit court, and in its discretion court, in addition, may stay execution pending disposition of motion for relief from judgment on certain grounds specified in Rule 2.612. Thereafter stay may be obtained upon filing bond for purposes of appeal. (Rule 2.614[A]). If more than 21 days stay is desired, bond must be given in amount designated by, and with sufficient sureties approved by, trial judge. (Rule 7.209).

Priorities.

Preference must be given to execution first delivered to officer, except that goods levied on and sold before levy under first execution may not be levied on by virtue of the first execution. (MCLA § 600.6007).

Claims of Third Persons.

No statutory provisions except as indicated in subhead Priorities, supra.

Satisfaction.

When lands sold on execution are redeemed, or when any judgment is paid where record shows a levy, officer making sale or person receiving money has duty to discharge levy or judgment from records of register of deeds. (MCLA § 600.6070).

Sales.

In case of personal property, sale is made, after setting out exemptions, on ten days notice in case of execution from court of record. (MCLA § 600.6031). In case of real estate, sale is made after advertising for six weeks. (MCLA § 600.6052).

Redemption.

There is no redemption after sale of personal property.

Where real estate is sold on execution, debtor and his underclaimants have one year (MCLA § 600.6062), and his judgment creditor, 15 months, in which to redeem, if not redeemed by the owner, his heirs, or assigns. (MCLA § 600.6063).

Supplementary Proceedings.

Proceedings may be taken permitting examination of judgment debtor and other persons and the enjoining of any conveyance of debtor's property. A receiver may be appointed with usual powers. See topic 8.03 Creditors' Suits.

Body Execution.

In court of record judgment creditor may procure debtor's arrest or imprisonment on civil process only on showing that debtor has property which he fraudulently conceals or unjustly refuses to apply to judgment, or that debtor is about to remove his property out of jurisdiction of court in which suit was brought with intent to defraud his creditor, or has disposed or is about to dispose of some or all of his property with intent to defraud his creditor, and that execution has been made and returned against all property of debtor in that county and such property is not sufficient to satisfy judgment. Warrant must issue within 30 days from return of execution. (MCLA §§ 600.6075-.6076). Judgment creditor must pay prisoner's board in advance. (MCLA § 600.6082).

8.06 EXEMPTIONS:

Following property is exempt from execution, attachment and garnishment, except in case of any lien excluded from exemption by law. (MCLA §§ 600.4031; 600.6023, .6023[a]).

(1) Family pictures, arms required to be kept by law, all wearing apparel, and provisions and fuel for householder and his family for six months; (2) all household goods, furniture, utensils, books and appliances, not exceeding $1,000 in value; (3) pew in church and lot or tomb in cemetery; (4) to each householder, ten sheep, two cows, five swine, 100 hens, five roosters and sufficient hay or grain to keep same for six months; (5) tools, materials, stock, apparatus, vehicle, horses or other things to enable person to carry on his principal profession, trade, occupation or business, not exceeding $1,000 in value; (6) certain disability insurance benefits, except where recovery is sought for necessities contracted for after accrual of such benefits; (7) shares held by a householder in certain mutual building and loan associations to $1,000 at par value, except where debtor has a homestead exempted under general laws of this state; (8) a homestead (see topic 8.10 Homesteads); (9) equity of redemption in mortgaged premises where judgment upon which execution was issued was based on the mortgage debt; (10) homestead of family after death of owner during minority of children; (11) entireties property described in MCLA § 557.151 and real property held by husband and wife by entireties exempt from execution under judgment entered against only one spouse; (12) individual retirement account including Roth IRA. IRA exemption does not apply to amounts contributed within 120 days of filing for bankruptcy or to extent such funds are subject to order of court pursuant to judgment of divorce or separate maintenance, order of court concerning child support, or contributions to IRA in excess of amount deductible under § 408 of Internal Revenue Code.

No execution may issue upon a judgment against any township, village, city or the trustees or common council or officers thereof where the action was prosecuted by or against them in their name of office, any body or board having charge or control of any state institution, any school district, or any county or its board of supervisors or any county officer in an action prosecuted by or against him in his name of office. (MCLA § 600.6021).

Substitution.

No statutory provision.

Debts Against Which Exemptions Not Allowed.

Exemption provisions do not exempt any real estate from taxation or sale for taxes. (MCLA § 600.6024). No specific piece of property, real or personal, is exempt from execution issued on judgment for purchase money for the same property, and any sale of such property after commencement of action for purchase price and filing by plaintiff of required notice with register of deeds is null and void against such an execution. (MCLA § 600.6024).

Waiver of Exemption.

Personal property exemption may be waived expressly or by conduct from which waiver may be implied. (255 Mich. 595, 238 N. W. 192).

Necessity of Claiming Exemption.

Officer levying execution makes inventory of so much of debtor's property as is sufficient to cover amount of exemptions and satisfy execution and causes appraisal to be made; debtor then selects items or amount of property exempt from execution, or on his failure to do so within ten days selection is made by officer. (MCLA §§ 600.6025; 600.6026).

Earnings.

See topic 8.09 Garnishment, subhead Earnings.

Insurance.

Life insurance contract may exempt proceeds of policy from execution or liability to any creditor of insured. (MCLA § 500.4054).

Homestead Exemption.

See topic 8.10 Homesteads.

8.07 FORECLOSURE:

See category 20 Mortgages, topic 20.04 Mortgages of Real Property.

8.08 FRAUDULENT SALES AND CONVEYANCES:

Uniform Fraudulent Transfer Act (MCLA §§ 566.31-.41 adopted, Uniform Fraudulent Conveyance Act (former MCLA §§ 566.11-.23) repealed by P.A. 1998, No. 434, effective Dec. 30, 1998. Uniform Fraudulent Transfer Act inapplicable to distributions governed by Michigan Business Corporations Act. (MCLA § 450.1122[3]).

Transfer made or obligation incurred without reasonably equivalent value by debtor who is insolvent or became insolvent as result of transfer or obligation is fraudulent as to existing creditors, without regard to intent. (MCLA § 566.35[1]).

Transfer made by debtor to insider for antecedent debt is fraudulent as to existing creditors if debtor was insolvent at time of transfer and insider had reasonable cause to believe that debtor was insolvent. (MCLA § 566.35[2]).

Transfer made or obligation incurred without reasonably equivalent value when debtor is engaged, or is about to become engaged, in business or transaction, for which property remaining in its hands is unreasonably small capital, is fraudulent as to existing and future creditors, without regard to intent. (MCLA § 566.34[1][b][i]).

Transfer made or obligation incurred without reasonably equivalent value when debtor intends or believes, or reasonably should believe, that it will incur debts beyond its ability to pay as they come due is fraudulent as to existing and future creditors. (MCLA § 566.34[1][b][ii]).

Transfer made or obligation incurred with actual intent to hinder, delay or defraud creditor is fraudulent as to existing and future creditors. (MCLA § 566.34[1][a]). Transfer or obligation cannot be avoided against person who took for good faith and for reasonably equivalent value or any subsequent transferee of obligee. (MCLA § 566.38[1]).

Transfer does not include: (i) Lapse, release, waiver, or disclaimer of power of appointment given to donee by third party, as "donee" defined in MCLA § 556.112; (ii) disposing of or parting with asset or interest in asset held in trust to person who created trust if all of following apply: (A) trust is irrevocable trust for benefit of third parties; (B) trust is grantor trust with regard to person for income tax purposes pursuant to §§ 671 to 679 of Internal Revenue Code; (C) trustee has discretionary authority to reimburse or advance trust property to person for taxes concerning income attributable to trust property; and (D) disposing of or parting with asset or interest in asset is exercise by trustee of discretionary authority described in sub-subparagraph (C). (MCLA § 566.31[l] [effective Apr. 1, 2010]).

Every conveyance or assignment, in writing or otherwise, of any valuable interest in property whatsoever, made with intent to hinder, delay or defraud creditors of maker thereof, or any other person, of their lawful suits, damages, forfeitures, debts or demands, and every bond or other evidence of debt given, suit commenced, decree or judgment suffered, with like intent, is void as to persons so hindered, delayed or defrauded. (MCLA § 566.221). Question of fraudulent intent is one of fact. (MCLA § 566.224).

Deed of gift, conveyance, transfer, or assignment, verbal or written, of property made in trust for use of person making gift, conveyance, transfer, or assignment is void as against all creditors, except does not apply to: (1) Lapse, release, waiver, or disclaimer of power of appointment given to donee by third party, as “donee” defined in MCLA § 556.112; (2) creation of trust by individual if all of following apply: (a) individual created trust for benefit of individual’s spouse; (b) trust treated as qualified terminable interest property under § 2523(f) of Internal Revenue Code; and (c) individual retains beneficial interest in trust income, trust principal, or both that follows termination of individual’s spouse’s prior beneficial interest in trust; or (3) gift, conveyance, transfer, or assignment from trust to person who created trust if all of following apply: (a) trust is irrevocable trust for benefit of third parties; (b) trust is grantor trust with regard to person for income tax purposes under §§ 671 to 679 of Internal Revenue Code; (c) trustee has discretionary authority to reimburse or advance trust property to person for taxes concerning income attributable to trust property; and (d) gift, conveyance, transfer, or assignment is exercise by trustee of discretionary authority described in subdivision (c). (MCLA § 566.131 [effective Apr. 1, 2010]).

Remedies.

Creditor may obtain avoidance of fraudulent transfer or obligation to extent necessary to satisfy its claim, attachment against asset transferred or other property of transferee, injunction against further disposition of assets by debtor or transferee, or both, appointment of receiver to take charge of asset transferred or of other property of transferee, or other equitable relief court deems appropriate. (MCLA § 566.37[1]). If creditor has already obtained judgment against debtor, creditor may execute against property fraudulently transferred. (MCLA § 566.37[2]). Transfers other than transfers with actual intent to hinder, delay or defraud creditor, are not avoidable if transfer consists of termination of lease upon default by debtor or enforcement of security interest under Art. 9 of Uniform Commercial Code. (MCLA § 566.38[5]). Statute of limitations is six years generally, but only one year for transfers from debtor to insider on account of antecedent debt. (MCLA § 566.39).

Bulk Sales.

Uniform Commercial Code, Art. 6, governing bulk sales, repealed by P.A. 1998, No. 489, § 1, effective Jan. 4, 1999.

8.09 GARNISHMENT:

After personal action arising upon contract has been commenced in court of record or after any judgment from court of record or any transcript of a judgment filed in court of record, garnishment proceedings may be instituted. (Rules 3.101; 3.102). Prejudgment garnishment is available in action to obtain original judgment only if: (i) defendant is indebted to plaintiff on contract in stated amount in excess of all setoffs; (ii) defendant is subject to jurisdiction of state and after diligent effort plaintiff cannot serve defendant with process. Prejudgment garnishment is available in action on foreign judgment, whether or not defendant is subject to jurisdiction of state, only if: (i) defendant is indebted to plaintiff on foreign judgment in stated amount in excess of all setoffs; and (ii) defendant is not subject to jurisdiction of state, or after diligent effort plaintiff cannot serve defendant with process (MCLA § 600.4011; Rule 3.102). See subhead Proceedings to Obtain, infra.

Property Which May Be Reached.

Garnishee may be held liable to plaintiff for any or all of following:

(1) All tangible or intangible property of principal defendant in his possession or control at time of service of writ on him, unless property is represented by negotiable document of title held by bona fide purchaser for value other than principal defendant; (2) all negotiable documents of title and all goods represented by negotiable documents of title belonging to defendant when documents of title are in possession of garnishee at time of service of writ on him; (3) all corporate share certificates in his possession or control at time of service of writ on him belonging to principal defendant; (4) except as to debts evidenced by negotiable instruments, all debts owing by garnishee to principal defendant at time of service of writ on garnishee, whether or not they are due; (5) all debts owing by garnishee evidenced by negotiable instruments held or owned by principal defendant at time of service of garnishment writ on principal defendant, which instruments are brought before court prior to their negotiation to bona fide purchaser for value; (6) all judgments in favor of principal defendant against garnishee in force at time of service of writ on garnishee; (7) all tangible or intangible personal property of principal defendant which at time of service of writ on garnishee the garnishee holds by conveyance, transfer or title void as to principal defendant’s creditors, whether or not principal defendant could maintain action therefor against garnishee; (8) value of all tangible or intangible property of principal defendant which prior to service of writ on garnishee the garnishee received or held by conveyance, transfer or title void as to principal defendant’s creditors, whether or not principal defendant could maintain action therefor against garnishee, and any contingent right on a claim against garnishee in favor of principal defendant at time of service of writ on garnishee; and (9) portion of defendant’s earnings that are not protected from garnishment by law under 15 USC § 1673. (Rules 3.101; 3.102). Bank or other financial institution, as garnishee, may not withhold exempt funds of debtor from account into which only exempt funds directly deposited and where funds clearly identifiable on deposit as exempt Social Security benefits, Supplemental Security Income benefits, Railroad Retirement benefits, Black Lung benefits, or Veterans Assistance benefits. (Rule 3.101[I][6]).

Garnishment before judgment of indebtedness for labor performed by principal defendant or of property held or obligation owed by state or governmental unit of state is not permitted. (MCLA § 600.4011).

Jurisdiction.

Personal property belonging to person against whom claim is asserted but in possession or control of third person is subject to garnishment if third person is subject to judicial jurisdiction of state and personal property is within state. Obligation owed to person against whom claim is asserted is subject to garnishment if obligor is subject to judicial jurisdiction of state whether or not state has jurisdiction over person against whom claim is asserted. (MCLA § 600.4011; Rule 3.101, .102).

Proceedings to Obtain.

Plaintiffs seeking writ of garnishment after judgment has been rendered must file verified statement stating: (1) judgment has been entered against defendant which remains unsatisfied; (2) amount of judgment, and amount remaining unpaid; and (3) person signing statement believes that named person has defendant’s property or is indebted to, defendant. (Rule 3.101[D]). In actions to obtain original judgment plaintiffs seeking writ of garnishment before entry of judgment must file motion supported by verified statement showing that: (1) defendant is subject to jurisdiction of state; (2) defendant is indebted to plaintiff on contract in stated amount in excess of setoffs; (3) after diligent effort plaintiff cannot serve defendant with process; and (4) person signing verified statement believes that named person has property of, or is indebted to defendant. (Rule 3.102[B]). In actions on foreign judgment, plaintiffs' prejudgment garnishment statement must state: (1) defendant is indebted to plaintiff on foreign judgment in stated amount in excess of setoffs; (2) defendant is not subject to jurisdiction of state, or after diligent effort plaintiff cannot serve defendant with process; and (3) person making request believes that named person has property of, or is indebted to, defendant. (Rule 3.102[A][3][b]).

Answer of Garnishee.

Garnishee files disclosure under oath within 14 days after service, revealing any liability to principal defendant. Except as to claims for unliquidated damages for wrongs or injuries, garnishee may claim setoff. (Rule 3.101[H]). If garnishee fails to make disclosure or do other required act within time limits specified, default may be taken against him as in other civil actions. (Rule 3.101[S]).

Practice.

If plaintiff is not satisfied with disclosure, he may within 14 days after service of disclosure serve written interrogatories or demand for oral examination on garnishee, and discovery rules apply. Claims adverse to those of plaintiff or defendant may be litigated by interpleader or third-party defendant procedures as appropriate. (Rule 3.101[L]).

If writ is served after judgment, issue of garnishee's liability is brought to trial as set forth below. If writ is served before judgment, plaintiff proceeds to perfect judgment against principal defendant. If he fails to proceed in timely manner, garnishee or other interested party may move to discontinue garnishment proceedings. Plaintiff's failure to recover judgment against principal defendant or satisfaction of judgment thus recovered constitutes dismissal of all proceedings against garnishee. Issue of garnishee's liability stands for trial after judgment has been entered against principal defendant, except that if principal defendant moves for new trial or appeals after entry of judgment against him, issue of garnishee's liability is tried after disposition of motion or appeal. (Rule 3.101[M]).

Affidavit for writ stands as complaint and disclosure and answers to any written interrogatories and transcript of any oral examination stand as garnishee's answer, and garnishee's liability to plaintiff is tried on issues thus framed. Judgment for plaintiff to extent of garnishee's admissions may be entered on motion after notice to garnishee; otherwise issues are tried as in other civil actions. Jury trial demand must be filed within seven days after filing of disclosure, answers to interrogatories, or transcript of examination. If it is determined that garnishee is indebted to principal defendant but time for payment has not arrived, no judgment is taken until after time of maturity, which is stated in verdict or finding. (Rule 3.101[M]).

Special rules and procedures apply to postjudgment garnishment of state and interception of tax refunds. (MCLA §§ 600.4061, .4061a).

Adverse Claims.

See subhead Practice, supra.

Judgment.

Judgment may be entered against garnishee for payment of money or delivery of property as facts warrant. Money judgment against garnishee may be no greater than unpaid judgment, costs and interest originally claimed against principal defendant as stated in verified statement in support of garnishment. Judgment for specific property is enforced only to extent necessary to satisfy judgment against principal defendant. Judgment acquits and discharges garnishee from all demands by principal defendant for all moneys paid or property delivered in satisfaction of judgment. If garnishee is chargeable for specific property and refuses to expose it for levy of execution, court after show cause hearing may order execution against garnishee in amount not to exceed double value of the specific chargeable property. (Rule 3.101[O]).

Installment Judgment; Stay.

Where court has entered order for payment of any judgment in installments, issuance of writ of garnishment for work and labor is stayed during period defendant complies with such order. (MCLA § 600.6215; Rule 3.101[N]).

Earnings.

Former exemption (MCLA § 600.7511) repealed (1974, No. 297; see 415 F. Supp. 170). However, plaintiff is entitled to only those earnings that are not protected by law under 15 USC § 1673.

Exemption of Money Owing for Milk or Cream.

Money owing a principal defendant on account of any milk or cream produced on his farm or farms is exempt from garnishment proceedings up to 40%. (MCLA § 600.4031).

8.10 HOMESTEADS:

Any resident is entitled to hold a homestead exempt from execution, attachment or garnishment while such homestead is owned and occupied by him. (MCLA §§ 600.4031, .6023).

Limitation of value is $3,500. (MCLA § 600.6023).

Limitation of area is one lot in a city, village or recorded town plat, or forty acres in the country. (MCLA § 600.6023). “Lot” is one or more platted lots improved as single parcel. (141 Mich. 545, 104 N.W. 980).

Debts or Liabilities against Which Exemption Not Available.

No exemption allowed as to any mortgage on homestead, lawfully obtained, except that such mortgage is not valid without signature of married judgment debtor’s wife unless mortgage is given to secure payment of purchase money or portion thereof or mortgage is recorded for 25 years without filing of notice of claim of invalidity. (MCLA § 600.6023). Under language of former statute exemption was not available against one who gave credit to provide homestead (308 Mich. 24, 13 N.W.2d 193), or owner of trust funds misappropriated to provide homestead (277 Mich. 505, 269 N.W. 577).

Designation of Homestead.

Occupancy by debtor is notice to all of homestead rights (304 Mich. 450, 8 N.W.2d 133), and no further notice or selection is necessary (271 Mich. 79, 259 N.W. 871).

Claim of Exemption.

If area occupied exceeds limitation, officer levying execution notifies debtor to select homestead, and in default of such selection, officer makes selection. (MCLA § 600.6026).

Value in Excess of Exemption.

If jury of six appraises premises at value in excess of exemption and land cannot be divided, debtor has 60 days to pay excess over exemption of amount due on execution. In default of payment premises are offered for sale. (MCLA § 600.6027).

Waiver of Exemption.

There is no specific statutory provision for waiver, although waiver is mentioned. (MCLA § 600.6033).

Loss of Exemption.

Intention of debtor determines whether homestead has been abandoned. (213 Mich. 95, 181 N.W. 177).

Alienation or Encumbrance.

Alienation by married man requires wife's signature either to bar dower (MCLA § 557.201), or to convey entireties property (MCLA § 557.203). Encumbrance by married man, except purchase money mortgage, is invalid without signature of wife unless mortgage is recorded for 25 years without filing of notice of claim of invalidity. (MCLA § 600.6023).

Proceeds of Sale.

If highest bid does not exceed exemption, no sale is made. If highest bid exceeds exemption, excess is applied on execution and amount of exemption is paid to debtor. Amount paid to debtor is exempt from execution for one year. (MCLA §§ 600.6027, .6059).

Rights of Surviving Spouse and Family.

Exemption continues after death during minority of any children. If homestead owner dies leaving surviving spouse but no children, exemption continues and surviving spouse receives rents and profits before remarriage unless surviving spouse owns homestead in own right. (MCLA §§ 600.4031, .6023). Surviving spouse is also entitled (without election against will) to homestead allowance of $15,000 subject to cost of living adjustment and exempt property of $10,000 if spouse domiciled in Michigan. If there is no surviving spouse, minor children may qualify. Homestead allowance is exempt from and has priority over claims. (MCLA §§ 700.2402, .2404).

See also categories 14 Family, topic Husband and Wife; Property, topics Curtesy, Dower, Real Property.

8.11 JUDGMENT NOTES:

See category 3 Business Regulation and Commerce, topic 3.02 Bills and Notes.

8.12 LEVY:

See topics 8.02 Attachment; Execution.

8.13 LIENS:

Uniform Commercial Code adopted. (MCLA §§ 440.1101-.11102). See category 3 Business Regulation and Commerce, topic 3.09 Commercial Code.

Lien for wages on all property of employer is given to certain miners (MCLA §§ 570.194, .201, .251) and suppliers of labor and material to oil and gas pipeline owners or lessees. Lien for wages on products of their labor is of employees of loggers or processors of forest products repealed by P.A. 2000, No. 337. Former lien for wages of employees of railroads repealed. (MCLA § 462.451).

Lien for charges is given to mechanics, artisans or tradesmen for constructing in whole or in part or altering, fitting or repairing chattels or for caring or keeping of animals. Lien may be foreclosed by public sale after nine months possession and 30 days notice of time and place of sale and amount claimed, sent by registered mail to last known address of owner or bailor. (MCLA §§ 570.185-.187). Lien for charges is also given to threshers, pressers and hullers (MCLA § 570.331), owners of stallions for services (MCLA § 287.210), garage keepers (MCLA §§ 570.302, .303), aircraft repair station operators (MCLA § 259.205), campground operators (MCLA § 554.657), innkeepers (MCLA § 427.201), marinas, boat clubs, and marine repair facilities (MCLA § 570.373), and cleaners and dyers (MCLA § 570.211). Owner of self-service storage facility also given lien for charges upon all personal property stored at facility. Enforceable by public sale after 30 days notice. (MCLA §§ 570.521 et seq.). Molder has lien on any mold or form in its possession for amount due from customer. (MCLA § 445.618). User of customer owned special tooling for metal fabrication has lien on tooling in user's possession for amounts due from customer. (MCLA § 570.553).

Municipal lien for water and sewer services is first lien on real property to which service is provided without recording notice of lien. (MCLA § 123.161).

Municipal lien for garbage disposal equipment installed in building under agreement with building owner entitles municipality to lien on building for fees and charges. (MCLA § 123.363).

Municipal costs of demolishing, repairing or maintaining dangerous building or structure becomes lien on affected real property. (MCLA § 125.541).

State Employment Security Commission granted lien on personal and real property of employer for unpaid contributions and charges, which must be recorded to take priority over other liens and encumbrances. (MCLA § 421.15[e]).

Liens on watercraft of more than five tons burthen are given for supplies, provisions, labor, wharfage, anchorage, dock hire, insurance, bottomry, salvage, towage, lighterage, violation of contracts of affreightment or carriage and personal injury or property damage caused by negligence. (MCLA §§ 570.401 et seq.).

Waiver, Loss or Extinguishment.

Lienholder's acts inconsistent with existence of lien may waive it by implication. (36 Mich. 358). Lien is waived by acquiescence in third person's taking possession on execution without notifying takers of adverse claim. (41 Mich. 505, 2 N.W. 895). Possessory lien is usually waived by voluntary parting with possession. (60 Mich. 61, 26 N.W. 832).

Enforcement.

Unless power of sale is given by statute or agreement, common law or other possessory lien gives lienor mere right to retain possession until claim is satisfied. (118 Mich. 162, 76 N.W. 371). Burden of proving lien rests on person claiming it. (319 Mich. 277, 29 N.W.2d 691).

Collateral Security.

See topic 8.15 Pledges, infra.

Common Law Liens.

Many other liens are recognized as at common law.

Mechanic's and Construction Liens.

Contractors, subcontractors, suppliers of materials or equipment and laborers who provide improvements (including surveying, engineering, and architectural planning, construction management, clearing, demolishing, excavating, filling, building, erecting, constructing, altering, repairing, ornamenting, landscaping, paving, leasing equipment, or affixing fixture or material) to real estate pursuant to contract are entitled to lien for amount due. (MCLA § 570.1107).

Property Subject to Lien.

Lien covers entire interest of owner or lessee who contracted for improvement (including any subsequently acquired interest), to interest of owner who subordinated interest to mortgage for improvement and to interest of owner who required improvement. Where person contracting for improvement had no legal title, lien attaches to improvement. (MCLA § 570.1107). Special rules apply to condominiums. (MCLA § 570.1126). If owner or lessee has paid contractor or subcontractor who failed to pay person claiming lien, lien does not attach to residential structure, and claimant may collect from Homeowner Construction Lien Recovery Fund maintained by Department of Licensing and Regulation. (MCLA §§ 570.1201-.1203).

Limitation of Amount.

Total of liens is limited to amount which owner or lessee agreed to pay person with whom owner or lessee contracted for improvement. (MCLA § 570.1107). Maximum payable from Homeowner Construction Lien Recovery Fund is $100,000 per residential structure. (MCLA § 570.1204).

Notice of Commencement.

Before beginning of physical improvement, contracting owner or lessee must record "notice of commencement" in statutory form with county register of deeds; in case of residential structure, notice of commencement need not be recorded but must be furnished to each contractor who requests same. Notice of commencement (with attached blank form of "notice of furnishing") must be furnished by owner, lessee, "designee" of owner or lessee named in notice of commencement or contractor (or by subcontractor who has received same) within ten days after mailing by certified mail of written request by subcontractor, supplier or laborer. Notice of commencement must be kept posted in conspicuous place on site during improvement. Failure to record or furnish notice of commencement extends time within which lien claimant may furnish notice of furnishing until 20 days (in case of subcontractor or supplier) or 30 days (in case of laborer) after notice of commencement is recorded or furnished. (MCLA § 570.1108). Where property is residential structure, contractor, subcontractor, supplier or laborer must request owner or lessee to provide notice of commencement, and certain additional protections are given owner or lessee. (MCLA § 570.1108a).

Notice of Furnishing.

Within 20 days after first labor or material is furnished (for subcontractor or supplier), 30 days after wages were due but not paid (for laborer), or by fifth day of second month following month in which fringe benefits or withholdings were due but not paid (for laborer), claimant other than contractor must provide "notice of furnishing" in statutory form to "designee" and general contractor named in notice of commencement by personal service or certified mail. Failure to provide notice of furnishing does not defeat lien of claimant other than laborer, but amount is reduced by payments made to contractor for work or materials furnished before service of notice of furnishing if paid pursuant to contractor's sworn statement. Failure of laborer to furnish notice of furnishing defeats lien. (MCLA § 570.1109).

Contractor's sworn statement in statutory form must be furnished by contractor to owner or lessee when payment is due or requested or when owner or lessee demands sworn statement. Subcontractor must furnish sworn statement on demand. Owner or lessee may withhold from amount due contractor or subcontractor amounts shown by sworn statement or notices of furnishing to be due subcontractors, suppliers and laborers and pay them directly. Claim of subcontractor, supplier or laborer may be avoided in reliance on sworn statement unless notice of furnishing has been served. Failure to furnish sworn statement does not invalidate lien of contractor or subcontractor, but lien may not be enforced until sworn statement is furnished. (MCLA § 570.1110).

Claim of Lien.

Right to lien terminates unless, within 90 days after claimant's last furnishing of labor or material, "claim of lien" in statutory form is recorded with county register of deeds. Claim of lien must be served on designee named in notice of commencement within 15 days after recording, and proof of service of notice of furnishing by subcontractor, supplier or laborer must be attached to claim of lien; service may be personal or by certified mail. (MCLA § 570.1111).

Duration.

Lien may not be enforced unless foreclosure proceeding is brought within one year after date of recording claim of lien. (MCLA § 570.1117).

Waiver of Lien.

Waiver of lien obtained as part of construction contract is invalid except to extent payment made. Claimant who receives full payment is required to provide full waiver of lien, and partial waiver for partial payment must be given if requested. Statutory forms of waiver are provided. (MCLA § 570.1115).

Enforcement of lien is by foreclosure proceeding in circuit court for county where property is located and filing notice of lis pendens with county register of deeds. Plaintiff must join each person with interest in property which would be impaired by foreclosure. Contract claim may be joined in same action. (MCLA § 570.1117). Court may order foreclosure sale and may appoint receiver; lien may also be ordered satisfied out of rents, profits and income from property. (MCLA §§ 570.1121, .1122).

Priorities.

All construction liens are of equal priority. Lien has priority over all other interests or encumbrances recorded after actual physical improvements. Mortgage or other encumbrance or interest recorded before actual physical improvement has priority over construction lien, but mortgage priority does not cover advances made after actual physical improvement unless made pursuant to sworn statement of contractor and waivers of lien from contractor and all subcontractors and suppliers who provided notices of furnishing. Lien of any claimant not set forth on sworn statement on which advance was made is subordinate to mortgage unless claimant, before advance, had provided notice of furnishing or filed claim of Lien. Advance made after service of notice of furnishing or filing of claim of lien is subordinate to lien unless, before advance, mortgagee receives unconditional waiver of lien from claimant for full amount due as of date of waiver and waiver is dated within 30 days before advance. (MCLA § 570.1119).

Redemption from foreclosure sale may be made by paying amount set forth in judgment of foreclosure (which may include taxes and insurance premiums due for redemption period) within period fixed by court, which may not exceed four months. (MCLA § 570.1121).

Public Works.

Contractor must give bond for payment of subcontractors, laborers and materialmen. (MCLA §§ 570.101-.105). Separate statutes govern contracts of state highway commissioner (MCLA § 250.62) and other public contracts exceeding $50,000 (MCLA §§ 129.201-.211).

Attachment Lien.

See topic 8.02 Attachment.

Attorney's Lien.

See category 18 Legal Profession, topic 18.01 Attorneys and Counselors.

Carrier's Lien.

See category 3 Business Regulation and Commerce, topic 3.08 Carriers.

Execution Lien.

See topic 8.05 Executions.

Judgment Lien.

See category 5 Civil Actions and Procedure, topic 5.15 Judgments.

Landlord's Lien.

See category 21 Property, topic 21.10 Landlord and Tenant.

Liens on Exempt Property.

See topic 8.06 Exemptions.

Liens on Homestead.

See topic 8.10 Homesteads.

Motor Vehicle Liens.

See category 23 Transportation, topic 23.01 Motor Vehicles.

Real Estate Mortgage Lien.

See category 20 Mortgages, topic 20.04 Mortgages of Real Property.

Tax Lien.

Uniform Federal Tax Lien Registration Act enacted. (MCLA §§ 211.661-.668). State tax items are also recorded with register of deeds of county in which property is situated. (MCLA §§ 211.681-.687). See category 22 Taxation, topic Administration as to state tax liens generally.

8.14 MECHANICS' LIENS:

See topic 8.13 Liens.

8.15 PLEDGES:

Uniform Commercial Code adopted. (MCLA §§ 440.1101-.11102). See category 3 Business Regulation and Commerce, topic 3.09 Commercial Code.

Remedies of Pledgee.

Governed by Uniform Commercial Code. (MCLA §§ 440.9101-.9507).

8.16 RECEIVERS:

Receivers are appointed by courts in many proceedings under various statutes, including to wind up corporations, state chartered banks, savings and loan associations, credit unions, insurance companies, and various other types of entities; under general equitable powers (MCLA § 600.2926); in garnishment proceedings (MCR 3.101[Q]); in proceedings against judgment debtors (MCLA § 600.6104[4]; MCR 2.621; see also MCR 2.622); in partition (MCLA § 600.3348); in commercial foreclosure actions in certain circumstances with unpaid taxes or insurance (MCLA § 600.2927); to collect alimony from husband's estate or enforce divorce decree; to enforce construction lien (MCLA § 570.1122); to enforce building code violations

(MCLA § 125.535); to enforce condominium association liens (MCLA § 559.208); over cemeteries (MCLA § 600.2926a); and other like cases.

Provision is made for personal receivership for persons owing obligations, the assignment of future wages to clerk of designated court and payment of obligations to creditors; garnishment of wages during receivership is prohibited. Act does not affect rights of secured creditors or debts or obligations incurred after filing of petition by employee. (MCLA §§ 600.5301-.5371).

Jurisdiction.

Circuit court in exercise of its equitable powers may appoint receivers in cases pending where appointment is allowed by law. (MCLA § 600.2926). “Allowed by law” includes cases authorized either by statute or where circumstances justify appointment of receiver to afford equitable relief. (192 Mich. App. 316, 480 N.W. 2d 337). Particular statutes set forth various jurisdictional requirements.

Proceedings.

Circuit court judges have authority to appoint receivers. (MCLA § 600.2926). Appointment of receiver, unless otherwise specifically provided by statute, must be ancillary to pending case. (264 Mich. 91, 249 N.W. 477). Typical practice is to seek appointment by motion.

Eligibility and Competency.

Receiver’s eligibility and competency, unless otherwise specifically provided, is determined by discretion of court; however, receiver interested in a suit may be appointed only by consent of all parties concerned. (43 Mich. 292, 5 N.W. 627).

Qualification.

In general, no particular residency requirements or other qualifications. Bond required. Unless otherwise specifically provided, court determines amount and conditions of receiver’s bond. (MCLA § 600.2926).

Powers and Duties.

Powers of receivers depend on statutes under which their appointment is made and orders by which they are appointed. (MCLA § 600.2926). Receivers must act in good faith but are not liable for errors in business judgment. (228 Mich App. 357; 579 N.W. 2d 99). General duty of receiver is to preserve and protect receivership property. (294 Mich. 88, 292 N.W. 569). Receivers of banks and trust companies may borrow money. (MCLA § 487.552).

Compensation.

Compensation generally provided and determined by court in its discretion. (333 Mich. 513, 53 N.W.2d 356). Court may require party who moved for appointment of receiver supplemental to judgment to pay receiver if no funds recovered. (MCR 2.622). Court may enter order for receivership expenses placing lien on real property where receiver has been appointed to remedy building code violations. (MCLA § 125.535[5]).

Discharge.

Court may terminate any receivership whenever termination appears to be in best interest of parties. (MCLA § 600.2926).

8.17 REDEMPTION:

See category 20 Mortgages, topic 20.01 Chattel Mortgages.

8.18 SUPPLEMENTARY PROCEEDINGS:

See topic 8.05 Executions.

8.19 [RESERVED]

8.20 USURY:

See category 3 Business Regulation and Commerce, topic 3.17 Interest.

9 DISPUTE RESOLUTION

9.01 ALTERNATIVE DISPUTE RESOLUTION:

Alternative Dispute Resolution in State Courts.

State court dispute resolution procedures regulated by court rules. (Rules 2.401-2.405; 2.410; 2.411; 2.501-2.503; 3.216; and 5.143). Rule 2.410 provides "all civil cases are subject to alternative dispute resolution processes unless otherwise provided by statute or court rule." Defines alternative dispute resolution (ADR) as "any process designed to resolve a legal dispute in place of court adjudication" and includes settlement conferences (Rule 2.401), case evaluation (Rule 2.403), mediation (Rule 2.411), domestic relations mediation (Rule 3.216), and other procedures provided by local rule or ordered on stipulation of parties (Rule 2.410[A][2]). Each court must adopt individual ADR plan to use ADR procedures. (Rule 2.410[B]). ADR plan must designate ADR clerk, specify how list of mediators will be maintained, include provisions for disseminating information about ADR program, and provide access to ADR processes for indigent persons. Courts may order case into ADR process. (Rule 2.410[C]). Courts may order attorneys who intend to try case and/or persons with "information and authority for responsible and effective participation" in settlement discussions to attend ADR proceeding. (Rule 2.410[O]). Failure to attend scheduled proceeding may constitute default and be grounds for dismissal under Rule 2.504(B). Motions to modify or set aside such orders must be made within 14 days. (Rule 2.410[E]).

Mediation.

Scope.

Neutral third party facilitates communication between parties, assists in identifying issues, helps explore solutions to promote settlement, but has no authoritative decision-making power unless stipulated by parties. (Rule 2.411[A][2]). Parties may stipulate as to selection of mediator, who need not meet requirements set forth in Rule 2.411(F). If parties fail to select mediator, clerk assigns one at random from approved list. (Rule 2.411[B]). Order sets time for completion of mediation. Mediation continues until: settlement reached; mediator determines that settlement not likely: end of first session: or as agreed by parties. Adjournments require stipulation or motion. (Rule 2.503). Within seven days after completion of mediation, mediator must advise court, stating only: date of completion; who participated: whether settlement reached: and whether future ADR proceedings contemplated. (Rule 2.411[C][3]). If case settled, attorneys must prepare and file appropriate documents to conclude case within 21 days. Communications between parties and mediator relating to mediation may not be disclosed without written consent of all parties, except for: (1) Mediator's report; (2) information required for administration of program; (3) information necessary to resolve disputes over fees; and (4) information regarding party's failure to attend. (Rule 2.411[C][5]). Mediator entitled to reasonable compensation, based on hourly rate commensurate with experience and usual charges for services performed. Costs of mediation divided between parties on pro-rata basis, unless otherwise agreed or ordered by court.

Qualifications.

Court roster mediators must have: (1) Completed training program providing generally accepted components of mediation skills; (2) graduate degree in conflict resolution, law degree or 40 hours of mediation experience over two years; and (3) observed two mediation proceedings and conducted third, under supervision and observation of approved mediator. (Rule 2.411[F][2]). Applicants must certify they: meet above requirements; will not discriminate against parties or attorneys; and will comply with court's ADR plan. (Rule 2.411[E]). Applicants with specialized experience or training, but not meeting above requirements, may apply to ADR clerk for special approval. (Rule 2.411[F][3]).

Domestic Relations Mediation.

Court may submit any domestic relations case to ADR. (Rule 3.216). Party may object to mediation on grounds of child abuse, domestic abuse, inability of party to negotiate without aid of attorney, health or safety, or other good cause. (Rule 3.216[D]). Mediator selected by parties or by ADR clerk conducts mediation. (Rule 3.216[E][4]). Mediator must meet qualifications set forth in Rule 3.216(G). Mediator's fees based on reasonable hourly rate, commensurate with experience and usual charges for services performed. Mediation procedure is set forth in Rule 3.216(H). Adjournment requires stipulation or motion. (Rule 2.503). Statements made during mediation may not be used in any other proceedings. (Rule 3.216[H][8]).

Parties may agree to evaluative mediation under Rule 3.216(I). If parties fail to negotiate settlement, mediator must prepare report on unresolved issues and recommendations on resolution. If both parties accept mediator's recommendations in their entirety, recommendations incorporated into judgment. Otherwise case proceeds to trial. Court may not sanction party for rejecting mediator's recommendation. Mediator may not inform court of rejecting party's identity.

Once parties stipulate to mediation, stipulation becomes enforceable. (203 Mich. App. 154, 511 N.W.2d 708).

Mediation of Custody Disputes by Friend of Court.

When custody of minor is contested, both parties may agree to mediation by office of Friend of the Court which shall provide, either directly or by contract, domestic relations mediation to assist parties in settling voluntarily dispute concerning child custody or visitation that arises from domestic relations matter. (MCLA § 552.513). Parties may not be required to meet with domestic relations mediator.

Community Dispute Resolution Act.

Act provides for community dispute resolution centers partially funded by state and administered by state court administrator. Parties to dispute may participate by mutual agreement even in absence of court case. Form or technique of mediation utilized must also be by mutual agreement of parties. Courts may refer parties to civil action to community dispute resolution center, but cannot require parties to settle. (MCLA §§ 691.1556[2]).

Mandatory Dispute Resolution.

Case Evaluation in Circuit Court.

Court may submit any civil action primarily seeking money damages or division of property to case evaluation. (Rule 2.403). Case evaluation panels composed of three practicing lawyers selected in accordance with Rule 2.404. Case evaluators placed on each county court list by written application. Standard case evaluation fee: $75 per party. (Rule 2.403[H]). Each party must file three copies of concise summary setting forth factual and legal position two weeks before hearing. (Rule 2.403[I]). Hearings usually take 30 minutes. Within 14 days after hearing, panel makes evaluation and notifies attorney for each party in writing. (Rule 2.403[K]). Each party must file written acceptance or rejection of panel's evaluation within 28 days after service of panel's evaluation. (Rule 2.403[L]). In case evaluation involving multiple parties, party accepting all awards may make acceptance conditional upon other parties' acceptance. Failure to file written acceptance or rejection within 28 days constitutes rejection. If all parties accept panel's evaluation, judgment entered in that amount, unless amount of award paid within 28 days after notification of acceptances, in which event court dismisses action with prejudice. (Rule 2.403[M]). Judgment or dismissal disposes of all claims in action and includes all fees, costs, and interest to date of entry. If party rejects award and action proceeds to verdict, must pay opposing party's actual costs incurred after rejection unless verdict is more favorable to rejecting party than award. (Rule 2.433[O]). Verdict considered more favorable to defendant if more than 10% below evaluation and more favorable to plaintiff if more than 10% above evaluation. Actual costs are those taxable in any civil action plus attorney fees based on reasonable hourly or daily rate as determined by trial judge for services necessitated by rejection of case evaluation. Costs not imposed unless award unanimous. (Rule 2.403[O][7]).

Medical Malpractice Action.

Medical malpractice cases evaluated in substantially same way as provided in Rule 2.403 (see catchline Case Evaluation in Circuit Court, supra), however, special rules apply. Panel consists of five persons: three attorneys and two healthcare professionals. Plaintiff and defendant each designate health care professional to serve on panel. (Rule 2.404). Health care professional selected for case evaluation panel may not be called as witness at trial. If panel determines action or defense frivolous as to any party and action proceeds to trial, party who has been determined to have frivolous action or defense must post cash or surety bond in amount of $5,000 for each party against whom action or defense determined frivolous. If judgment entered against party who posted bond, bond used to pay all reasonable costs incurred by other parties and any costs allowed by law or court rule, including court costs and reasonable attorney fees. (MCLA §§ 600.4901-.4923).

Personal Injury Actions.

Personal injury cases evaluated in substantially same way as provided in Rule 2.403. (See catchline Case Evaluation in Circuit Court, supra.) Case evaluation of personal injury cases mandatory unless court on motion for good cause shown finds case evaluation inappropriate. Bond requirement for actions or defenses deemed frivolous in medical malpractice actions also applies to tort actions. (MCLA §§ 600.4951-.4969).

ADR in Probate Court.

Court may submit to mediation, case evaluation, or other ADR process one or more requests for relief in any contested proceeding. Rules 2.403 and 2.404 apply to extent feasible, except sanctions must not be awarded unless subject matter of mediation involves money damages or division of property. (Rule 5.143).

Alternative Dispute Resolution in Federal Courts.

ADR in U.S. District Court for Eastern District of Michigan.

Substantially same as procedure utilized by state circuit courts under Rule 2.403. (See subhead Mandatory Dispute Resolution, catchline Case Evaluation in Circuit Court, supra.) Sixth Circuit has held attorney fees not permissible sanction under this Rule. (865 F.2d 88). However, parties may stipulate to award of attorney fees as potential sanction. (E.D. Local Rule 16.3).

ADR in U.S. Bankruptcy Court - Eastern District of Michigan.

Mediation is only form of ADR available. (LBR 7016-2). Local rule provides court or parties may initiate order for parties to "engage in mediation". (LBR 7016-2[a]). Parties are to select mediator from list. May request assistance of judge if they cannot agree. (LBR 7016-2[a][1]). Unless different time fixed in order, mediation to occur within two weeks of order for mediation. (LBR 7016-2[a][3]). Nature of "mediation" not defined in rule, but contemplates nonbinding, evaluative or facilitative mediation. Rule requires "settlement" to bind parties (LBR 7016-2[a][5]) and permits mediator to establish schedule for parties to act on "the mediator's recommendation" if one is rendered. Mediator under no duty to render recommendation. (LBR 7016-2[a][6]). If settlement is reached, parties must file motion seeking approval of agreement within ten days of execution. (LBR 7016-2[a][5]). All proceedings and written materials are privileged and confidential and may not be reported or placed in evidence. (LBR 7016-2[a][5]).

Mediators receive $200 from each party and are chosen from panel maintained by court. (LBR 7016-2[a][4] and [b]). Court clerk is responsible for maintaining list of mediators on panel and processing requests to be added to panel. (LBR 7016-2[b]). To serve as mediator, must complete court-approved training program in alternative dispute resolution and provide certificate of completion. (LBR 7016-2[b][2]).

ADR in U.S. District Court for Western District of Michigan.

Western District of Michigan favors alternative dispute resolution if it may help resolve case. (Local Rule 16.2). Court will consider alternative methods proposed by parties in addition to those specifically provided by local rules. Western District of Michigan utilizes several forms of ADR: "Case Evaluation" as provided in state circuit courts under Rule 2.403 (Local Rule 16.5), voluntary facilitative mediation (Local Rule 16.3), and early neutral evaluation (Local Rule 16.4). ADR proceedings are considered "compromise negotiations" within meaning of FRE 408. (Local Rule 16.2[d]).

"Case Evaluation substantially similar to state circuit courts (see subhead Mandatory Dispute Resolution, catchline Case Evaluation in Circuit Court, supra) with few exceptions. (Rule 16.5). Sanctions against party who rejects panel's evaluation and does not improve its position include only those costs and fees taxable in any civil action and fees paid to evaluators. Parties may stipulate in writing before award is tendered that court may also tax reasonable attorney's fees incurred from date of rejection. Medical malpractice actions and tort actions in which subject-matter jurisdiction based solely on diversity of citizenship and for which rule of decision is supplied by Michigan law ordered to mandatory case evaluation under MCLA §§ 600.4901-.4923 and 600.4951-.4969, respectively. Sanctions apply. (Local Rule 16.5). Cost of standard case evaluation is $300 per party. Awards are rendered immediately at close of hearing. (Rule 16.5[b][i]). "Blue Ribbon Case Evaluation" permits parties to select evaluators who need not be on court list. Evaluators bill at normal hourly rates. Awards must be rendered within seven days of hearing. (Local Rule 16.5[c]).

"Voluntary Facilitative Mediation" is flexible, nonbinding dispute resolution process in which impartial third party, mediator, facilitates negotiations among parties to help them reach settlement. If judge satisfied selection of facilitative mediation purely voluntary and agreed to by all parties, will incorporate in case management order and instruct parties to jointly select mediator within ten days. Parties choose one mediator from list of court certified mediators who have successfully completed training. Format for session is developed by parties and mediator and may involve more than one session. If settlement reached, mediator helps parties draft settlement agreement. Stipulation and order to dismiss filed with court. If no settlement reached, parties have seven days to inform mediator whether they desire to continue with mediation process. Information disclosed during any mediation session is not disclosed to any other party without consent. All mediation proceedings deemed compromise negotiations within meaning of Fed. R. of Evid. 408. (Local Rule 16.3).

"Early neutral evaluation" is flexible, nonbinding dispute resolution process in which experienced neutral attorney (evaluator) meets with parties early in case to evaluate its strengths and weaknesses and value, and to attempt to negotiate settlement. Parties jointly select neutral evaluator, attorney with five or more years of practice experience and general peer recognition for expertise. Judge may select evaluator, if parties are unable to agree. Evaluator is paid normal hourly rate, pro rata among parties. Evaluator and parties develop format of session(s). Each party may make oral presentation. Evaluator assesses relative strengths and weaknesses of parties' positions and explains reasoning in support of assessment. At conclusion, evaluator determines whether follow-up session would be helpful. If settlement reached, evaluator helps parties draft settlement agreement within 14 days of conclusion. If no settlement is reached, parties have seven days to inform evaluator whether they wish to continue with evaluation process. Evaluator's report to court only indicates who participated and whether any issues were narrowed or settlement reached. (Local Rule 16.4).

Summary Trials in Western District of Michigan.

Case may be selected for summary jury trial or summary bench trial by stipulation or motion of court or parties. Abbreviated proceeding in which attorneys summarize their case before six-person jury, judge, or magistrate. Verdict advisory only.

"Mini-hearing" is abbreviated proceeding in which attorneys for corporate parties present positions to parties' senior officials or to impartial experts for non-binding opinion. Parties may fashion procedure, or by motion, court may prescribe procedures and time limits. (Local Rule 16.7).

Court-Annexed Arbitration in Western District of Michigan.

Local Rule 16.6 governs referral to arbitration per 28 U.S.C. §§ 651-658. All civil actions seeking only money damages in amount of $150,000 or less, exclusive of punitive damages, interests, costs, and attorney fees, are subject to Rule and may be ordered to arbitration unless violation of Constitutional right is alleged or jurisdiction is based on 28 U.S.C. § 1343. At least seven calendar days prior to hearing, summary or brief of factual and legal positions, copies or photographs of all documents on liability and damages marked for identification and submitted to arbitrator and opposing counsel. Each party allowed maximum of 21/2 hours for presentation of case. Party may make transcript or recording at its expense. Arbitrator announces award to parties within ten calendar days of close of hearing. Unless all parties consent to arbitration, amount of award may not exceed $150,000. Party may file and serve written demand for trial de novo within 30 days of filing of award. Clerk enters judgment on award in accordance with Federal Rules of Civil Procedure immediately upon expiration of time to request trial de novo. Arbitrators' compensation limited to $250 plus expenses.

Arbitration.

See topic 9.02 Arbitration and Award.

Voluntary Dispute Resolution.

Parties to civil action in state court may avail themselves by mutual consent of any of mandatory dispute resolution techniques provided under state statutes and/or rules described above. Similarly, parties to civil action in federal court may consent to use any mandatory dispute resolution technique provided under local rules of district in which case lies. (See also subhead Mandatory Dispute Resolution, catchline Mediation in U.S. District Court for Western District of Michigan, supra.)

Dissolution of Marriage.

See category 14 Family, topic 14.04 Divorce.

9.02 ARBITRATION AND AWARD:

Forms and Requisites of Submission.

Existing dispute which might be subject of civil action may be submitted to arbitration by agreement in writing, and to be irrevocable parties must agree to entry of judgment on award in circuit court. Statute does not apply to collective contracts between employers and employees or associations of employees regarding employment, nor to claims to fee or life estate in realty (except as provided in Condominium Act, MCLA §§ 559.101, .272), but does cover controversies over claims to interest for term of years in real estate and over partition or boundaries of lands or admeasurement of dower (MCLA §§ 600.5001, .5005). Real estate disputes may be brought in common law arbitration. (283 Mich. App. 177, 769 N.W.2d 720). Employee may bring individual civil rights claim notwithstanding general arbitration clause in collective bargaining agreement. (240 Mich. App. 540, 618 N.W.2d 380). Domestic relations arbitration is governed by MCLA § 600.5070-.5082.

Enforcement, Vacation of Award.

Award may be confirmed by motion on filing with clerk of circuit court within one year. Award may be vacated where procured by corruption, fraud or undue means, where evident partiality of arbitrator appointed as neutral or misconduct is shown, when arbitrators exceeded their powers, where arbitrators refused to postpone hearing on sufficient cause shown or refused to hear material evidence or so conducted hearing as to substantially prejudice rights of party. Fact that relief exceeded that which could or would be granted by court of law or equity is not ground for vacating or refusing to confirm award. Application to vacate award must be made within 21 days after delivery of copy to applicant or if predicated on corruption, fraud or other undue means within 21 days after grounds are known or should have been known. (MCLA § 600.5025; Rule 3.602).

Judgment on Award.

Court may modify or correct award on application within 21 days after delivery of award to applicant. Court shall render judgment on award as confirmed, corrected or modified; costs are taxed as in civil actions, and execution issues as in other cases. Arbitrator’s compensation is taxable cost. (Rule 3.602).

Pre-dispute Mandatory Arbitration.

Under MCLA §§ 600.5001-.5035, provision in written contract to settle by arbitration controversy thereafter arising between parties to contract with relation thereto, in which it is agreed that circuit court may enter judgment on award, is valid and irrevocable except on grounds, at law or equity, which exist for rescission or revocation of contract, and stands as submission of any controversy under contract not expressly excluded from arbitration. (MCLA § 600.5001). In some circumstances, non-signers can be bound to arbitrate, and unsigned contract can be enforced.

Powers of Arbitrators.

Arbitrator must be sworn before hearing testimony. In manner authorized by Court Rules, witnesses and documents may be subpoenaed to appear or be produced at hearing. Arbitrators may permit depositions to be taken for use as evidence, of witness who cannot be subpoenaed or is unable to attend hearing. Majority of arbitrators may determine any questions and render final award unless concurrence of all arbitrators is expressly required in submission. Arbitrators appoint time and place for hearing and may adjourn hearing from time to time. Arbitrators have power to administer oaths to witnesses. (Rule 3.602). Powers are subject to equitable power and authority of courts over arbitrators, awards, and parties. (MCLA § 600.5035).

Agreement Irrevocable.

Neither party can revoke any agreement or submission made as provided in statute without consent of other party. If either party fails to appear before arbitrators after due notice, arbitrators may proceed on evidence of other party. (MCLA § 600.5011). Court may order parties to proceed with arbitration, or may stay arbitration commenced or threatened on showing that there is no agreement to arbitrate, but not because claim in issue lacks merit or good faith. (Rule 3.602).

Uniform Arbitration Act of 1956 Adoption/Deviation.

Uniform Act's major provisions substantially adopted. (MCLA §§ 600.5001-.5035; Rule 3.602). No specific deviations from official text of Uniform Act are noted in Uniform Laws Annotated, Master Edition, Vol. 7, Pt. 1 but it states that Michigan Act departs from official text such that various instances of substitution, omission and additional matter cannot be clearly indicated by statutory notes.

Credentials/Qualifications/Standards for Arbitrators.

Method of appointment established by arbitration agreement shall be followed. Court appoints one or more arbitrators where method not established by arbitration agreement, established method fails or for any reason cannot be followed or appointed arbitrator does not act and successor not duly appointed. Appointed arbitrator has all powers of arbitrator named in agreement. (MCLA § 600.5015).

Revocability of Agreement at Common Law.

Agreements not conforming to statute may be sustained as agreements for common-law arbitration (236 Mich. 425, 210 N.W. 488), but are revocable by either party before award unless (1) contract makes arbitration condition precedent, express or implied, to bringing action or (2) contract is for construction, paving or installation and person named or to be selected is charged with interpreting plans or specifications or estimating quantity or quality of work or materials in order to fix compensation of contractor or damages for default or defective performance (257 Mich. 670, 241 N.W. 807).

9.02A MEDIATION:

See topic 9.01 Alternative Dispute Resolution.

10 DOCUMENTS AND RECORDS

10.01 ACKNOWLEDGMENTS:

Uniform Recognition of Acknowledgments Act has been adopted. (MCLA §§ 565.261-.269).

Acknowledgments may be taken by the following officers:

Within State.

Judge, clerk of court of record or notary public. (MCLA §§ 565.8, 600.1440).

Outside State but Within U.S. and Possessions.

Notary public or any other person authorized to perform notarial acts in place in which act is performed, any judge, clerk or deputy clerk of any court of record, officer of foreign services of U.S., persons authorized by regulation of U.S. Department of State, or in certain instances persons authorized by regulation of armed forces, upon presentation of satisfactory evidence, such as picture identification (MCLA § 565.262); and in addition, as to deeds, any master in chancery, justice of peace or other person authorized by laws of such place to take acknowledgments of deeds (MCLA § 565.9).

Outside U.S.

Any officer of foreign service of U.S., consular agent or any other person authorized by regulations of U.S. Department of State to perform notarial acts in place in which act is performed, notary public or any other person authorized to perform notarial acts in place in which act is performed, or any judge, clerk, or deputy clerk of any court of record upon presentation of satisfactory evidence, such as picture identification (MCLA § 565.262); and in addition, as to deeds, any minister plenipotentiary, minister extraordinary, minister resident, chargé d'affairs, commissioner, or consul of U.S. appointed to reside there (MCLA § 565.11). See also infra, subhead Persons in or with U.S. Armed Forces.

Persons in or with U.S. Armed Forces.

Commissioned officer in active service with U.S. armed forces and any other person authorized by regulation of U.S. armed forces may perform notarial acts for merchant seaman of U.S., member of armed forces of U.S., any other person serving with or accompanying armed forces of U.S. or dependent of any of foregoing. (MCLA §§ 565.262, 600.1440).

See also supra, topic Notaries Public.

General Requirements as to Taking.

An officer who is interested cannot act. (132 Mich. 513, 93 N.W. 1067). See also infra, subhead Forms.

General Requirements of Certificate.

Notary must state when his commission expires, commissioned name and county in which authorized to officiate. (MCLA § 55.287). Person taking acknowledgment must certify that person acknowledging appeared before him and acknowledged he executed instrument and either was known to him or that he had satisfactory evidence that person acknowledging was person named in and who executed instrument (MCLA § 565.264), all of which is imported by words "acknowledged before me" (MCLA § 565.266). Satisfactory evidence requires (1) sworn word of credible witness known by notary and who personally knows signer, (2) current identification card or document bearing signer's photograph and signature, or (3) notary public's personal knowledge of signer. (MCLA § 55.285). See also infra, subhead Forms.

Married Women.

Acknowledgment taken as if sole. (MCLA §§ 565.13, .281).

Attorneys in Fact.

See infra, subhead Forms.

Corporations.

No special requirements. See infra, subhead Forms.

Foreign Acknowledgments.

Uniform Recognition of Acknowledgments Act has been adopted. (MCLA §§ 565.261-.269).

Effect of Acknowledgment.

Acknowledgment confers presumption of validity and genuineness of written instrument, and entitles it to be read in evidence, except notes, bills and wills. (MCLA § 600.2131).

Compelling Acknowledgment.

Provision is made for compelling acknowledgment by resident of instrument affecting title to real estate. (MCLA §§ 565.16-.23, .46).

Proof by Subscribing Witness.

Unacknowledged instruments affecting title to real estate may be proved by subscribing witness where party who executed instrument is dead or out of state and by proof of handwriting of grantor and any subscribing witness where subscribing witnesses are dead or out of state. (MCLA §§ 565.14-.15, .46).

Authentication.

Acknowledgment taken within state is sufficiently authenticated for local purposes by hand of officer taking it. For purposes outside state, clerk of county in which officer is appointed certifies to official capacity and genuineness of signature under seal of circuit court. Fee varies by county.

Signature, rank or title, and serial number, if any, of notary public, of judge, clerk or deputy clerk of court of record, of officer of foreign service of U.S., consular agent, or other person authorized by regulation of U.S. State Department, or of commissioned officer in active service with U.S. armed forces or other person authorized by regulation of armed forces are sufficient proof of authority of such person (other than person authorized by laws or regulations of foreign country) to act, and further proof of authority is not required. Proof of authority of person authorized to take acknowledgments by laws or regulations of foreign country is provided by any of following: (a) Certification by foreign service officer of U.S. resident in country or diplomatic or consular officer of country resident in U.S. that person is authorized to act; (b) affixing official seal of person taking acknowledgment to document; or (c) appearance of title and indication of authority of person either in digest of foreign law or in list customarily used as source of such information. As to any other person acting outside of state, sufficient proof of authority exists if clerk of court of record in place in which notarial act is performed certifies to official character of person and authority to act. (MCLA §§ 565.262-.263).

Forms.

Following statutory short forms are provided for but use of other forms is not precluded (MCLA § 565.267):

For individual acting in own right:

State of ________

County of ________

The foregoing instrument was acknowledged before me this (date) by (name of person acknowledged).

(Signature of person taking acknowledgment)

(Title or rank)

(Serial number, if any)

For corporation:

State of ________

County of ________

The foregoing instrument was acknowledged before me this (date) by (name of officer or agent, title of officer or agent) of (name of corporation acknowledging) a (state or place of incorporation) corporation on behalf of the corporation.

(Signature of person taking acknowledgment)

(Title or rank)

(Serial number, if any)

For partnership:

State of ________

County of ________

The foregoing instrument was acknowledged before me this (date) by (name of acknowledging partner or agent), partner (or agent) on behalf of (name of partnership), a partnership.

(Signature of person taking acknowledgment)

(Title or rank)

(Serial number, if any)

For individual acting as principal by attorney in fact:

State of ________

County of ________

The foregoing instrument was acknowledged before me this (date) by (name of attorney in fact) as attorney in fact on behalf of (name of principal).

(Signature of person taking acknowledgment)

(Title or rank)

(Serial number, if any)

By public officer, trustee, or personal representative:

State of ________

County of ________

The foregoing instrument was acknowledged before me this (date) by (name and title of position).

(Signature of person taking acknowledgment)

(Title or rank)

(Serial number, if any)

Alternative to Acknowledgment or Proof.

See topic 10.02 Affidavits, subhead Alternative to Affidavit.

Validating Acts.

Deeds of real estate executed within this state acknowledged before any county clerk or clerk of any circuit court, on any day prior to Sept. 18, 1903, and acknowledgment thereof, and, if recorded, record thereof are valid for all purposes so far as such acknowledgment and record are concerned. (MCLA § 565.8).

10.02 AFFIDAVITS:

Within the state an affidavit may in general be taken before any justice, judge or clerk of any court of record, circuit court commissioner or notary public. (MCLA § 600.1440).

Affidavit of a person residing in another state may be taken before any notary public, commissioner or justice of peace authorized by laws of such state to administer oaths therein. Signature of such notary public or justice of peace and fact that at time of taking of such affidavit person before whom same was taken was such notary public or justice of peace, must be certified by clerk of any court of record in county where such affidavit was taken, under seal of said court. (MCLA § 600.2102).

Affidavit of a person residing in a foreign country must be authenticated by certification of consul or consul general of United States, or his deputy, there resident, that it was taken and subscribed before him, specifying time and place, with consular seal attached, or by certification of same facts by some judge of a court with seal. The genuineness of judge's signature, the existence of the court, and that judge is a member, must be certified by its clerk under seal. (MCLA § 600.2102).

Affidavit of a person serving in or with U. S. armed forces (including civilian employee of armed forces and dependent of service man or of civilian employee), whether serving in or outside of U.S. territorial limits, may be taken before any commissioned officer in active service. Place of taking need not be shown. Officer certifies that affiant is known or satisfactorily proven to be serving in or with armed forces and that he is a commissioned officer of stated rank, and designates command to which he is attached. (MCLA § 600.1440).

General Requirements as to Administration.

An officer may be disqualified to take an affidavit by reason of interest, but small or indirect interest does not suffice. (261 Mich. 483, 246 N.W. 193).

General Requirements of Jurat.

Notaries public must legibly type, print or stamp on each affidavit given or taken by them date upon which their commissions expire and commissioned names, and must state county in which they are authorized to act. (MCLA § 55.221).

Use of Affidavits.

Affidavits are not admissible as evidence in court proceedings, except recorded affidavits as to parties to instruments affecting title to real estate, adverse possession, boundaries, etc. (MCLA §§ 565.451-.453).

Form.

No statutory form of jurat. Form in common use is:

Form

Subscribed and sworn to before me this . . . . . . day of . . . . . ., (year) . . . . . (Notary's signature) . . . . Notary public . . . . . . County, Michigan (acting in . . . . . . County, Michigan)

Alternative to Affidavit.

Petition, inventory, accounting, proof of claim, or proof of service filed with Probate Court need not be verified, acknowledged, or made on oath if person signing instrument states immediately above date and his signature: "I declare under the penalties of perjury that this—was examined by me and that the contents thereof are true to the best of my information, knowledge and belief." Provision does not apply to nominations of guardians by minors. (MCLA § 600.852). Verification of pleading does not require jurat if it contains following signed and dated statement: "I declare that the statements above are true to the best of my information and belief." (Rule 2.114[B][2][b]). There is no other provision for alternatives to acknowledgments or affidavits.

10.03 NOTARIES PUBLIC:

Governed by Michigan notary public act. (MCLA §§ 55.261-.315).

Qualification.

Must be at least 18 years of age, resident of state or nonresident who maintains principal place of business in county for which appointment is requested and is engaged in activity likely to require performance of notarial acts as defined in Uniform Recognition of Acknowledgments Act, free of specified convictions and violations, and able to read and write English. (MCLA § 55.271). Applicant must give bond in amount of $10,000 (MCLA § 55.273), not be imprisoned (MCLA § 55.269), and if not citizen provide proof that applicant is legally in United States (MCLA § 55.275).

Authentication.

See topic 10.01 Acknowledgments, subhead Authentication.

Seal.

Generally no duty to provide or use seal but notary customarily does so. May not use embosser alone or any method that cannot be reproduced. (MCLA § 55.287). See MCLA § 700.2504 as to self proof of will by acknowledgment before officer authorized to administer oaths.

Powers and Duties.

Authorized to perform notarial acts (defined at MCLA § 55.265) including taking acknowledgments, administering oaths and affirmations, and witnessing or attesting to signature. (MCLA § 55.285).

Territorial Extent of Powers.

May act as such anywhere in state (MCLA § 55.269). Must indicate as follows: "Notary Public . . . . . . County, MI" and, if acting in another county, "acting in . . . . . . County, MI." (MCLA § 55.287).

Expiration of Commission.

Must state date upon which commission expires in connection with official signature. (MCLA § 55.287).

Fees.

Not more than $10 for any individual transaction or notarial act. (MCLA § 55.285).

Commissioners of Deeds.

May take acknowledgments of deeds executed in other states. (MCLA § 565.9).

Officers of U.S. Armed Forces.

No statutory provisions conferring general notarial powers. Commissioned officer in active service and any other person authorized by Armed Forces, may perform such acts for specified persons outside State for use in State. (MCLA § 565.262). See topic 10.01 Acknowledgments.

10.04 RECORDS:

County registers of deeds have charge of records relating to property.

Uniform Commercial Code adopted. (MCLA § 440.1101-.11102). See category 3 Business Regulation and Commerce, topic 3.09 Commercial Code.

Recordable Instruments.

Every conveyance of real estate which is not recorded is void against subsequent purchasers in good faith and for a valuable consideration. (MCLA § 565.29). Conveyance includes every instrument in writing by which any estate or interest in real estate is created, aliened, mortgaged or assigned; or by which title to any real estate may be affected except wills, leases for a term not exceeding three years, and executory contracts for sale or purchase of lands. Purchaser includes encumbrancer. (MCLA §§ 565.34-.35).

Uniform Commercial Code (MCLA § 440.1101-.11102) governs recording of security interest in personal property. See categories 3 Business Regulation and Commerce, topic Commercial Code, and Mortgages, topic Chattel Mortgages, and subhead Filing under Commercial Code, infra.

Place of Recording.

Mortgages, deeds and other conveyances of real property or interest or estate therein are recorded in office of register of deeds of county where land lies. (MCLA § 565.23). *For list of Counties and County Seats see first page for this state in Volume containing Practice Profiles Section.* As to security interest in personalty, see category 20 Mortgages, topic 20.01 Chattel Mortgages, and subhead Filing under Commercial Code, infra.

Filing Under Commercial Code.

If collateral is as-extracted collateral or timber to be cut, or goods which are fixtures or intended to become fixtures and financing statement is filed as fixture filing, filing is with register of deeds in county where land lies. (MCLA § 440.9501[1][a]). If collateral is vehicle for which certificate of title is required, or accessory, and not inventory held for sale, financing statement is not required; however, title application showing security interest must be filed with secretary of state. (MCLA § 440.9311[1][b]). In all other situations filing is with secretary of state. (MCLA § 440.9501[1][b]). As to filing fees, see category 20 Mortgages, topic 20.01 Chattel Mortgages, subhead Filing.

Requisites for Recording.

In order that a deed, mortgage, power of attorney, etc., may be recorded, the following requirements must be met: (a) The instrument must be signed by the grantor or grantors (MCLA § 565.1), but if executed without state may be executed in accordance with laws of place of execution (MCLA §§ 565.9-.11). (b) Instrument must be properly acknowledged before officer authorized to take acknowledgments (see topic 10.01 Acknowledgments). (c) Names of parties executing instrument, and officer taking acknowledgment must be accurately and legibly printed, typed or stamped beneath respective signatures, post office address of each grantee must be printed, typewritten or stamped on instrument face, and instrument must contain name and business address of person who drafted it. (MCLA §§ 565.201-.203). (d) Deed or mortgage must show whether male grantors are married or single. (MCLA § 565.221). (e) Instrument, if executed within this state after Apr. 1, 1997, must not be printed or typewritten in type smaller than 10 point, and paper must not be larger than 8½ x 14 inches nor smaller than 8½ x 11 inches or of less than 20 pound weight, and must have margin of unprinted space at least 2½ inches at top of first page and at least ½ inch on all remaining sides of each page. Register of deeds shall not record instrument which purports to evidence more than one recordable event. (MCLA § 565.201 [inapplicable where other statutory provisions conflict]). (f) Instrument purporting to convey interest of survivor in land held jointly or by entireties cannot be recorded until proof of death of person indicated by such instrument to be deceased has been recorded. (MCLA § 565.48). (g) Unless law, regulation, or court order or rule requires otherwise, first five digits of any social security number must be obscured or removed. (MCLA § 565.201). These provisions do not apply to security interests in personalty, as to which see categories 3 Business Regulation and Commerce, topic Commercial Code and Mortgages, topic Chattel Mortgages. No written instrument on which stamp tax is imposed (see category 22 Taxation, topic 22.15A Real and Personal Property Taxes, subhead Real Estate Conveyance Tax, catchline Stamp Tax) may be recorded unless stamps have been affixed and, where instrument does not disclose total consideration, affidavit stating value of property transferred. If instrument is not subject to stamp tax, reason for exemption is required to be stated on its face. (MCLA §§ 207.501-.513).

Recording fee is, effective Mar. 31, 2003, $8 for first page; $3 for each additional page; additional $3 charged for each additional instrument assigned or discharged where any document assigns or discharges more than one instrument. Beginning Jan. 1, 1991, additional $2 fee for recording instruments, with certain exceptions. (MCLA § 600.2567). Fee for recording notice of tax lien on personalty is $1, as is fee for tax lien discharge or subordination. (MCLA § 211.685). For filing fees in connection with personal property under Uniform Commercial Code, see category 20 Mortgages, topic 20.01 Chattel Mortgages, subhead Filing.

Foreign Conveyances or Encumbrances.

Foreign conveyances or encumbrances are acceptable for recording, when executed and acknowledged without state, if executed and acknowledged in accordance with laws of place of execution. (MCLA §§ 565.9-.11). See category 21 Property, topic 21.16 Real Property, subhead Foreign Conveyances or Encumbrances.

Effect of Record.

Every conveyance of real estate which is not recorded is void against subsequent purchasers in good faith and for a valuable consideration. (MCLA § 565.29). Copies, records, reproductions, replacements, transcripts or certified copies of recorded instruments are treated as originals for purposes of admissibility. (MCLA §§ 600.2137-.2138).

Torrens Act not adopted.

Transfer of Decedent's Title.

In order to provide record evidence that the real estate of a resident decedent has passed to his devisees or heirs, there must be filed for record, in the office of the register of deeds of each county in which any such real estate is situated: (a) In case of testacy, a copy of the will certified by the judge who admitted it to probate; or (b) in case of intestacy, a certified copy of the order of distribution. In case of a nonresident decedent, ancillary administration must be had in this state and like papers filed for record in the register's office.

Vital Statistics.

All births, deaths, adoptions, marriages and divorces are recorded by State Department of Health, Lansing, Michigan 48913. (MCLA §§ 333.2815-.2876, 551.109). Births and deaths are recorded locally by registrar, usually health officer in larger cities and city, village or township clerk elsewhere. (MCLA § 333.2815). Marriages are recorded locally by county clerk. (MCLA § 551.103). Certificates of birth, death, marriage and divorce may be obtained at Michigan Department of Public Health, 3423 N. Logan St./Martin Luther King Jr. Blvd., Lansing 48914, c/o Vital Records. Fees are $26 for record search, including one copy or certified copy, $12 for each additional copy and $12 for each additional year searched. (MCLA §§ 333.2881-.2891).

Establishing Birth Records.

Unrecorded birth in Michigan may be recorded with State Department of Public Health subject to evidentiary requirements described by department. When department finds minimum documentation not to have been submitted or questions adequacy of documentation, applicant has right to appeal to probate court of county of residence or birth. Any birth outside continental U.S. of child born to parents, one or both of whom were residents of state at time of birth, and while one or both were in military or government service of U.S. may be registered with department if satisfactory evidence as to birth is shown by original or certified copy of birth certificate and, if in foreign language, accompanied by certified translation and affidavit from one or both parents setting forth that one or both were Michigan residents and were in military or government service of U.S. If either or both parents are dead, affidavits from credible persons with knowledge of facts may be submitted. (MCLA §§ 333.2827-.2828). Records of births so established are admissible in all courts and proceedings. (MCLA §§ 333.2827-.2831). When foreign born children are adopted by Michigan residents and facts of birth cannot be documented, probate court may determine facts and file delayed registration of birth with Department of Public Health. (MCLA § 326.38).

10.05 SEALS:

Uniform Commercial Code adopted. (MCLA §§ 440.1101-.11102). See category 3 Business Regulation and Commerce, topic 3.09 Commercial Code.

Seal is not required on any instrument affecting real estate executed by individual, partnership or corporation. (MCLA §§ 565.241-.242). No bond, deed of conveyance or other contract is invalid for want of seal or scroll. (MCLA § 600.1401).

Except as to official seals, when seal is desired on any instrument word "Seal" or letters "L. S." or scroll or other device may be used in place thereof by any person or by corporation having no corporate seal. (MCLA §§ 565.39, .231, .232).

Corporate Seals.

Corporation may have seal and may alter same at its pleasure. Corporate seal is presumptive evidence of valid corporate authority and lawful execution of instrument (MCLA § 600.2142), but is not necessary (105 Mich. 300, 63 N.W. 205).

Effect of Seal.

Seal is only presumptive evidence of consideration. (MCLA § 600.2139).

10.06 [RESERVED]

10.07 VITAL STATISTICS:

See topic 10.04 Records.

11 EMPLOYMENT

11.01 [RESERVED]

11.02 LABOR RELATIONS:

All executive and administrative (non-legislative and nonjudicial) powers, duties and functions with respect to labor matters are vested in Department of Labor. (MCLA § 16.104). Head of Department of Labor is Director of Labor. (MCLA § 16.476).

Hours of Labor.

For hours of labor of minors under 18, see subhead Child Labor, infra.

Social Security Number Privacy.

Employer prohibited from publicly displaying all or more than four sequential digits of employee’s social security number. Includes visibly printing all or more than four sequential digits of employee’s social security number on any identification badge or card. (MCLA § 445.83). Employer also prohibited from requiring employee to use or transmit all or more than four sequential digits of employee’s social security number to gain access to Internet website or computer system or network unless using secured or encrypted connection. All or more than four sequential digits of employee’s social security number also cannot be mailed or otherwise sent to individual if visible on or, without manipulation, from outside of envelope or packaging. (MCLA § 445.83). Employer must create policy, published in employee handbook, procedures manual, or similar electronically available document. (MCLA § 445.84). Policy must: (a) Ensure to extent practicable confidentiality of social security numbers; (b) prohibit unlawful disclosure of social security numbers; (c) limit who has access to information or documents that contain social security numbers; (d) describe how to properly dispose of documents that contain social security numbers; and (e) establish penalties for violation of policy. (MCLA § 445.84).

Wages.

Minimum hourly wage is $7.40 as of July 1, 2008. (MCLA § 408.384). Employer may pay new employee who is less than 20 years old training hourly wage of $4.25 for first 90 days of employment, in lieu of regular mandated minimum wage. Minimum hourly wage for employees less than 18 years of age is 85% of general mandated minimum hourly wage. (MCLA § 408.384b). Employer may not displace or reduce hours of employee merely to hire individual at lower training wage. (MCLA § 408.384b). Employer may petition state director of Department of Energy, Labor & Economic Growth to request permission to pay apprentices, learners, and persons with physical or mental disabilities who are clearly unable to meet normal production standards rate lower than regular mandated minimum wage. (MCLA § 408.387). “Tipped” employees may be paid $2.65 per hour, as long as (i) employee receives tips in course of employment, (ii) tips (on per hour basis) equal or exceed difference between $2.65 and regular mandated minimum wage, (iii) employee declares tips for FICA purposes, and (iv) employer informs employee of provisions of this statute. (MCLA § 408.387a). Time and one-half must be paid for employment in excess of 40 hours per week with certain exceptions, including executives, professionals (including teachers), elected officials or political appointees, employees of recreational establishments closed at least five months per year, certain agricultural employees, and employees not subject to minimum wage. (MCLA § 408.384a). Work periods for determining number of hours of overtime may be adjusted in certain circumstances for employees in fire protection activities, law enforcement activities, security activities, and state-run health institution activities. (MCLA § 408.384b). In lieu of monetary overtime compensation, employers may choose to provide employees who would otherwise be entitled to time-and-a-half for overtime hours with compensatory time off at rate of 1½ hours for each hour of overtime worked. If employer has adopted such plan (or agreed to same as part of collective bargaining agreement), choice of whether to receive monetary compensation or compensatory time off for overtime hours worked rests solely with employee; it is civil infraction for employer to assign overtime based on its preference for employee who accepts compensatory time in lieu of pay or to directly or indirectly influence through intimidation, coercion, or threats employee's decision. Employees may not accrue more than 240 hours of compensatory time. Employers must allow employees with compensatory time to use time in whatever manner employee sees fit, unless use of time for period requested by employee will unduly disrupt operations of employer. Employee with accrued compensatory time may request to be paid in cash for that time, in lieu of actually taking time off work. Upon receipt of request, employers must compensate employee within 30 days of request for time at rate not less than employee's regular rate at time employee performed overtime work which led to accumulation of compensatory time. If employer decides to terminate its compensatory time off plan, it must give employees at least 60 days' notice. (MCLA § 408.384a). Wages paid by contractors and subcontractors on state public works jobs must be equal to prevailing rates in job locality as determined by Director of Labor. (MCLA §§ 408.551-.558). No lien for wages, except for employees of railroads (MCLA § 462.431) which right ended on Jan. 14, 1994 by implication from statute, corporations engaged in mining minerals in Upper Peninsula (MCLA § 570.194), corporation engaged in mining coal, shale or clay (MCLA § 570.201), and processors of forest products (MCLA § 426.1). Wages for first 15 days of calendar month must be paid by first of following month, and wages for 16th and remaining days of calendar month must be paid by 15th of following month; weekly or bi-weekly pay schedules are permitted if payday occurs on or before 14th day after end of work period for which paid; monthly pay schedules are permitted if all wages for calendar month paid by first of following month. Employees engaged in hand harvesting of crops shall be paid all wages within two days following work week in which wages were earned, unless otherwise agreed in writing. (MCLA § 408.472). Employee quitting or discharged must be paid all wages earned as soon as amount can be determined with due diligence; as to employees engaged in hand harvesting of crops not later than three days after employee's voluntary termination of employment. Does not apply to contract employee who quits or is discharged and wages cannot be determined until termination of contract. In such case, employee to be paid all wages as nearly as can be estimated, with final payment to be made at termination of contract. (MCLA § 408.475). Wages must be paid in U.S. currency or by negotiable check or draft payable on presentation without discount in U.S. funds or provided employee has given free written consent by direct deposit or electronic transfer to employee's account at financial institution or issuance of payroll debit card. Consent to payroll debit card not required if at least one employee has been so paid as of Jan. 1, 2005. (MCLA § 408.476). Deductions other than those permitted or required by law or collective bargaining agreement shall not be taken without employee's full, free, and written consent, obtained without intimidation or fear of discharge for refusal to permit deduction. Overpayments of wages or fringe benefits may be deducted from employee's paycheck without written consent of employee if done so within six months of overpayment, if following conditions are met: (1) overpayment results from error or miscalculation; (2) by employer or employee or their representatives; (3) employer provides written notice and explanation of deduction at least one pay period prior to deduction; (4) deduction does not exceed 15% of employee's gross wages in pay period in which deduction is taken; (5) deduction is made after all other deductions required or permitted by law or collective bargaining agreement, and after any employee-authorized deduction; and (6) deduction does not reduce employee's wages to below greater of state or federal minimum wage law. Employee aggrieved by this section may file complaint with department of labor within 12 months of violation. (MCLA § 408.477). Partial exemption from garnishment, see category 8 Debtor and

Creditor, topic 8.09 Garnishment. Assignment of wages, see category 8 Debtor and Creditor, topic 8.01 Assignments.

Commissioned sales representatives must be paid final commissions within 45 days of termination or in accordance with contract between parties. (MCLA § 600.2961).

Child Labor.

Regulated by Youth Employment Standards Act. (MCLA §§ 409.101-.124). Minor (person under 18 years of age) may not be employed in occupation which is hazardous to health or contrary to standards established by Department of Labor. Minimum age for employment of minors is 14 (11 for golf caddies and youth athletic program referees, and 13 for persons employed in farming operations). (MCLA § 409.103). Minor may not be employed until employer obtains copy of work permit issued by school district where minor resides or where place of employment located. (MCLA § 409.104). Minor 16 years old or older may not be employed for more than six days in one week, nor longer than weekly average of eight hours per day or 48 hours per week, nor more than ten hours per day, nor between hours of 10:30 p.m. and 6 a.m., nor (if minor is in school) for more than combined school and work week of 48 hours, though during school vacation period or when minor is not enrolled in school, or on Fris. or Sats. minor may be employed until 11:30 p.m.; with written parental consent, employer engaged in cleaning, sorting, or packaging fruits or vegetables may employ minor for periods greater than set forth above if minor is employed not more than 11 hours per day, not more than 62 hours in one week (and not more than 48 hours without minor's consent), not between hours of 2 a.m. and 5:30 a.m., and, if minor is student, such period of greater employment occurs when school is not in session. Minor may not be employed more than five hours continuously without at least 30 minutes rest period; rest period of less than 30 minutes not considered to interrupt continuous work. Employer must post copy of statutory hour restrictions on premises. Employer shall keep for at least one year at place where minor is employed adequate time record of hours minor works including daily starting and ending times. (MCLA §§ 409.110-.113). Minor may not be employed in occupation involving cash transaction after 8:00 p.m. or sunset, whichever is earlier, unless adult is present. (MCLA § 409.112a). Work permit may not be issued authorizing employment of minor 16 years old or over in part of establishment where alcoholic beverages are manufactured, bottled, consumed or sold unless sale of other goods constitutes at least 50% of gross receipts; 14 and 15 year old minors may obtain work permits for employment in establishments where alcoholic beverages are sold at retail if sale of other goods constitutes at least 50% of gross receipts, but may not be employed in that part of establishment where alcoholic beverages consumed or sold for consumption on premises. (MCLA § 409.115). Act does not prohibit employment or minor in performance by performing arts organization if approval obtained from Department of Labor. (MCLA § 409.114). Act does not apply to or prohibit employment of minor: Age 16 or older who has completed high school graduation requirements; age 17 or older who has passed general educational development test; who is emancipated; student age 14 or older if written agreement between employer and board of education; in domestic work at private residence; in distributing or selling newspapers, magazines, political or advertising matter; in shoe shining; as members of youth organizations for citizenship training and character building if not to replace employees in occupations for which workers ordinarily paid; in business owned and operated by parent or guardian; in farm work if not in violation of Department of Labor standard; or by school, academy or college where student minor age 14 or older is enrolled. (MCLA §§ 409.116-.119).

Female Labor.

Discrimination between sexes in wages for similar work is misdemeanor. (MCLA § 750.556).

Labor Unions.

Right to organize and bargain collectively is recognized. (MCLA § 423.8). No "right to work” statute.

Labor Disputes.

Employer may not interfere with employees’ right to self-organization, initiate, dominate or interfere with formation or administration of labor union, discriminate against union members to discourage membership, or support company union. (MCLA § 423.16). Pursuit of work may not be hindered by mass picketing, intimidation, interference with entrance or egress from place of employment, or obstruction of public ways. Residence picketing is prohibited. (MCLA § 423.9f). Sitdown strike is prohibited. (MCLA § 423.15). Strike or lockout requires ten days notice to employment relations commission (30 days in case of public utility or hospital) and good faith participation in mediation. (MCLA § 423.9). Employment of professional strikebreakers or solicitation for employees without advising in the solicitation that they are replacements for striking or locked out employees is misdemeanor. (MCLA §§ 423.251-.254). Public employee, including public school employee, may not strike and public school employer may not institute lock-out. Public employee, upon request, is entitled to determination of whether employee actions violated non-strike provision before public employer may discharge or discipline employee for such actions. (P.A. 112 of 1994). Statutory requirement of majority vote of employees before strike (MCLA § 423.9) held to invade field preempted by Congress (339 U.S. 454).

Civil Rights Act prohibits discrimination in employment because of race, color, religion, national origin, sex, age, marital status, familial status, height or weight. Commission is empowered to issue cease and desist order, and circuit court may enforce such orders. (MCLA §§ 37.2101 et seq.). Discrimination in employment because of disability or genetic condition unrelated to ability to perform is also prohibited; same enforcement procedures apply. With some exceptions, employer must reasonably accommodate person with disability unless accommodation would impose undue hardship. Employer may not require genetic test nor have access to genetic information. (MCLA §§ 37.1101 et seq.). Pre-dispute agreement to arbitrate civil rights claim valid if does not require employee to waive any statutory rights or remedies and arbitration process is fair. (235 Mich. App. 118, 596 N.W.2d 208).

Affirmative Action.

Michigan citizens voted in 2006 to amend state constitution to ban affirmative action programs giving “preferential treatment” to groups or individuals based on race, gender, color, ethnicity or national origin for public employment, education or contracting purposes. (Mich. Const., Art. 1, § 26). Existing affirmative action programs mandated by federal government as condition of receiving federal funds excepted. Private, non-governmental entities not affected by amendment.

Occupational Safety and Health.

Federal occupational safety and health act provides for state preemption where state plan is at least as effective as Federal. Michigan Safety and Health Act (MIOSHA) took effect Jan. 1, 1975. (MCLA §§ 408.1001 et seq.). MIOSHA incorporates federal standards. Primary responsibility for administering MIOSHA is with Michigan Department of Energy, Labor & Economic Growth. (Exec. Or. No. 1996-2).

Worker’s Compensation Act abolishes defenses of contributory negligence (unless wilful), fellow servants’ negligence and assumption of risk. (MCLA § 418.141).

Compensation Bureau has jurisdiction of all controversies. (MCLA § 418.201).

Employers Subject to Worker’s Disability Compensation Act.

All employers (including limited liability companies and partnerships) are subject to Worker’s Disability Compensation Act except those who regularly employ less than three persons, no one of whom has worked regularly 35 or more hours per week for 13 weeks during preceding year. Employers of domestic servants and of farm laborers are exempt as to employees if working less than 35 hours per week for 13 weeks or longer during preceding year. Employers of real estate salespersons on commission basis who do not claim salesperson as employee for tax purposes are also exempt. All public employers are subject to Act. (MCLA §§ 418.115-.118, .121, .151).

Liability for Compensation.

If employee receives personal injury arising out of and in course of employment, not due to intentional and wilful misconduct, which incapacitates him for at least one week, employer is liable for medical care, weekly compensation during partial or total disability in amount and for length of time fixed by Act and if death results, for expenses of last illness and burial and indemnity to dependents as fixed by Act. (MCLA §§ 418.301-.305, .315, .345).

Rate of compensation for death is 80% of deceased employee's average weekly wages or 80% of after-tax average weekly wages (whichever is greater) for period of 500 weeks from date of death with maximum payments varying with number of dependents. Period may be extended for minor dependents. (MCLA § 418.321). Limitation of 52 weeks of compensation payable to vocationally handicapped person. (MCLA § 418.921). Last sickness and burial allowance up to $1,500 is allotted. (MCLA § 418.345).

Recipients of payments are those wholly dependent on employee for support, with dependency conclusively presumed with certain relations. (MCLA § 418.331).

Rate of compensation for total disability is 662/3% of employee's average weekly wages or 80% of after-tax average weekly wages (whichever is greater) for presumed period of 800 weeks up to maximum weekly amount which varies with number of dependents. (MCLA § 418.351).

Benefits under Act are reduced by amounts received under worker's compensation law of another state, 50% of old-age benefits under Social Security Act, and specified portions of disability insurance and pension benefits received by employee. (MCLA §§ 418.354, .846).

Occupational Diseases.

Personal injury includes occupational disease, defined as any disease or disability due to causes and conditions characteristic of and peculiar to employer's business which arises out of and in course of employment. (MCLA § 418.401).

Liability to Employees of Independent Contractor.

Employer subject to Act is liable for compensation to employees of independent contractor who is not subject to Act or fails to comply with provision for insuring payment of compensation, subject to indemnity by independent contractor. (MCLA § 418.171).

Insurance of Payment.

Employer subject to Act must insure payment of compensation by adopting with approval of Compensation Bureau either of following methods: (a) Self-insurance, or (b) insurance by employer's liability company authorized to take such risks in Michigan. (MCLA § 418.611).

Claim for Compensation.

Proceeding for compensation will not be maintained unless oral or written claim is made to employer, or written claim is made to Compensation Bureau within two years after injury or death or, in case of physical or mental incapacity, within two years from time employee is not incapacitated from making claim. Employee must give employer notice of injury within 90 days after injury or after employee knew or should have known of injury; failure to give this notice is excused unless employer can prove he was prejudiced. Claim is not valid unless made within two years after later of date of injury, date disability manifests itself or last day of employment with employer against whom claim is made. Payment of compensation under Act shall not be made for any period of time earlier than two years prior to date on which employee filed hearing application with worker's compensation bureau, except payment for nursing or attendant care shall not be made for any period earlier than one year prior to date of such application. (MCLA § 418.381).

Records and Reports.

Employer must record all injuries to employees which cause death or disability, and report to Bureau as required by rule. (MCLA § 418.805). Employer is also obligated to report to state Department of Energy, Labor & Economic Growth within eight hours of fatality or any hospitalization of three or more employees suffering injury from same accident or illness from exposure to same health hazard associated with their employment. (MCLA § 408.1061).

Waiver of Assignment of Compensation.

Employee may not waive right to compensation nor assign it nor is it subject to attachment or garnishment. Assignment valid if to insurance company, HMO or medical care or hospital services company. (MCLA §§ 418.815-.821).

Settlements must be approved by worker's compensation magistrate. (MCLA § 418.835).

Unemployment Compensation.

Unemployed individuals available for and seeking work are eligible for weekly benefit payments from state unemployment compensation fund. (MCLA § 421.28). Individual's weekly benefit rate is 4.1% of individual's wages paid in calendar quarter of year in which individual was paid highest total wages, plus $6 per dependent up to five dependents, where individual claims dependent(s) at time of filing for benefits but shall not exceed $362 per week. Amount of benefits individual is entitled to obtained by multiplying weekly benefit rate by ¾ of number of credit weeks earned in employment. Maximum amount of benefits payable to individual shall not exceed 26 times individual's weekly benefit rate. Number of weeks of benefits payable to individual is calculated by taking 40% of individual's base wages and dividing result by individual's weekly benefit rate (shall not exceed 26 weeks of benefits, nor be less than 14 weeks of benefits, payable in full benefit year). Employer of seasonal workforce may apply to commission for designation as seasonal employer 20 days before beginning of season. Designation is conclusive evidence that claimant is not entitled to benefits based on seasonal employment unless unemployment occurs during normal seasonal work period. Seasonal employment does not include employment in construction industry. Outstanding child support obligations shall be deducted and withheld from individual's benefits and forwarded to appropriate state of local child support enforcement agency. (MCLA § 421.27). Individual is disqualified from receiving benefits if he or she left work voluntarily without good cause attributable to employer or employing unit; was fired or suspended for certain types of on-the-job misconduct (including intoxication, drug abuse, theft, strike or other concerted action contrary to existing bargaining agreement, destruction of property and assault and battery); undertook retaliatory misconduct upon learning of discharge; failed to accept suitable work when available; was absent for reason of certain convictions and incarceration or failed to give notice to temporary help firm that job assignment was completed and later sought unemployment benefits. Work not considered suitable is position (1) opened because of labor dispute, (2) remuneration, hours and condition of which are substantially less favorable than that normally prevailing or (3) where acceptance by individual is conditioned upon joining or refraining from joining labor organization. Requalification is possible, but benefit amount is reduced. (MCLA § 421.29). Benefit received to which employee is not entitled will be deducted from employees subsequent state tax refund. (MCLA §§ 205.30a and 421.62). See also category

22 Taxation, topic 22.05 Employment Taxes, subhead Unemployment Compensation Tax.

11.03 WORKERS' COMPENSATION LAW:

See topic 11.01 Labor Relations.

12 ENVIRONMENT

12.01 ENVIRONMENTAL REGULATION:

General Supervision.

Pursuant to Executive Order, effective Oct. 1, 1995 (MCLA § 324.99903), Michigan Department of Environmental Quality (MDEQ) was created and certain duties and responsibilities formerly administered by Michigan Department of Natural Resources (MDNR) were transferred to MDEQ. MDEQ composed of following divisions: Air Quality, Environmental Science and Services, Land and Water Management, Remediation and Redevelopment, Waste and Hazardous Materials, and Water Bureau, Office of Geological Survey, Office of the Great Lakes, and Office of Civil Enforcement and Coordination. Address: Michigan Department of Environmental Quality, Constitution Hall, 525 W. Allegan St., P.O. Box 30473, Lansing, Michigan 48909-7973. Phone: (517) 373-7917.

Programs retained by MDNR include hunting and fishing, litigation response, parks and recreation, some law enforcement duties, forest, mineral, and fire management, wildlife, and waterways. While most environmental programs have been delegated to State for implementation, U.S. E.P.A. has concurrent jurisdiction or must approve issuance of some environmental permits. Generally, U.S. E.P.A. and MDEQ have agreements regarding their respective roles, many of which have been set forth in Memoranda of Understanding.

Environmental Code.

Michigan's environmental statutory law has been incorporated into single environmental code, Natural Resources and Environmental Protection Act of 1994 (Public Act 451 of 1994) MCLA §§ 324.101 et seq. ("NREPA"). Following represent most of primary parts of NREPA:

Department of Natural Resources: General Powers and Duty (MCLA §§ 324.501-.511); Michigan Environmental Protection Act (MCLA §§ 324.1701-.1706); Water Resource Protection (MCLA §§ 324.3101-.3133); Air Pollution Control (MCLA §§ 324.5501-.5542); Pesticide Control (MCLA §§ 324.8301-.8336); Hazardous Waste Management (MCLA §§ 324.11101-.11153); Solid Waste Management (MCLA §§ 324.11501-.11550); Liquid Industrial Waste (MCLA §§ 324.12101-.12118); Environmental Remediation (MCLA §§ 324.20101-.20142); Underground Storage Tank Regulations (MCLA §§ 324.21101-.21113); Leaking Underground Storage Tanks (MCLA §§ 324.21301-.21331); Refined Petroleum Fund (MCLA §§ 324.21501-.21563); Soil Conservation, Erosion, and Sedimentation Control (MCLA §§ 324.9101-.9313); Inland Lakes and Streams (MCLA §§ 324.30101-.30113); Shorelands Protection and Management (MCLA §§ 324.32301-.32315); Wetland Protection (MCLA §§ 324.30301-.30323); Sand Dune Protection and Management (MCLA §§ 324.35301-.35326); Farmland and Open Space Preservation (MCLA §§ 324.36101-.36117); Endangered Species Protection (MCLA §§ 324.36501-.36507).

Michigan Environmental Protection Act (Part 17).

(MCLA §§ 324.1701—.1706). Part 17 allows court to enjoin person from impairing, polluting, or destroying environment and grants standing to any person to bring action for protection of air, water, and other natural resources and public trusts therein from pollution, impairment or destruction. Although statute grants "any person" standing, plaintiff must meet judicial elements for standing. (479 Mich. 280, 737 N.W. 2d 447). It generally authorizes court to grant declaratory or equitable relief and to impose conditions upon defendant to protect environment. Controversy exists whether Part 17 prohibits administrative actions which authorize conduct that may pollute, impair, or destroy environment as long as feasible and prudent alternatives exist, consistent with public health, safety, and welfare.

Environmental Audit Privilege and Immunity (Part 148).

(MCLA §§ 324.14801—.14810). Part 148 became effective Mar. 18, 1996. Subject to certain requirements and exceptions, Part 148 provides that voluntary environmental compliance audits are privileged and confidential, are not subject to discovery in civil or administrative lawsuits and are not admissible in such actions. Primary requirement for privilege is that appropriate action be taken to correct any noncompliance item within reasonable amount of time after it is identified, but not longer than three years. Part 148 also provides, subject to certain requirements and exceptions, including prior notice to MDEQ of intent to conduct audit, that person is immune from specific civil and criminal penalties if person voluntarily discloses noncompliance item found in environmental audit and promptly corrects noncompliance item, provided MDEQ was notified prior to commencement of audit.

Hazardous Waste Management (Part 111).

(MCLA §§ 324.11101-.11153). Part 111 provides for “cradle to grave” regulation of hazardous waste. This Part regulates generation, transportation, treatment, storage, and disposal of hazardous waste and provides for licensing, inspection, and regulation of treatment, storage and disposal facilities (“TSDF”). It requires treatment, storage, or disposal at approved TSDFs, and establishes manifest system to track hazardous waste. Part 111 was patterned after Resources Conservation and Recovery Act (RCRA), 42 USC §§ 6901-6987.

Michigan has received from U.S. EPA authorization to implement Part 111 and its regulations in lieu of RCRA for most but not all aspects of Michigan hazardous waste management program, except 40 CFR § 264.1050(h) and 40 CFR § 265.1050(g) adopted by reference. Michigan program is administered by MDEQ Waste and Hazardous Materials Division. As with RCRA, Part 111 prescribes remedies and penalties for violation of its terms.

Hazardous waste user charges are established by Part 111.

Water Resources Protection (Part 31).

(MCLA §§ 324.3101-.3133). Part 31 is primary statute dealing with water pollution control and regulation of discharges into “waters of the state” and contents of such discharges. “Waters of the state” broadly defined to include ground waters, lakes, rivers, streams, all other water courses and waters within confines of state and Great Lakes under jurisdiction. MDEQ may conduct surveys, studies, and investigations of uses of surface and underground waters. Part 31 authorizes regulation of pollution of waters, use or alteration of water courses and flood plains, including occupation of or construction on flood plains, in stream beds and channels of streams, and establishment of standards and permit requirements. Part 31 requires persons discharging waste to have permits, which may contain conditions or annual fees; entities discharging liquid waste to surface or groundwater to have treatment facilities under control and supervision of persons certified by MDEQ; and annual reports from those discharging waste water into waters of state or sewer systems. As of Jan. 1, 2007, oceangoing vessels engaging in port operations in state must obtain permits from MDEQ and discharging ballast water is prohibited without permit. Releases that must be reported under administrative rules must be reported simultaneously to emergency dispatch of jurisdiction where release occurred via 9-1-1 call with copy of written report to local health department.

Solid Waste Management (Part 115).

(MCLA §§ 324.11501-.11550). Part 115 is intended to foster and encourage environmentally sound solid waste disposal methods that will maximize utilization of valuable resources and encourage resource conservation. It defines solid waste to include garbage, rubbish, ashes, incinerator ash, incinerator residue, street cleanings, municipal and industrial sludges, solid commercial and solid industrial waste, and animal waste other than organic waste generated in production of livestock poultry. Solid waste does not include human body waste, medical waste, organic waste generated in production of livestock and poultry, liquid wastes, certain ferrous or nonferrous scrap, certain slag, or slag products, source or site separated materials, sludges and ashes managed as recycled or non-detrimental material, fly ash produced from coal in certain circumstances, and number of other substances including waste regulated by other statutes, as well as inert material. Construction permits required for all new solid waste disposal facilities, and operating licenses required for all solid waste disposal facilities or areas. Disposal area must be included in approved county waste management plan. Exemptions from permit and licensing requirements are provided for certain transfer facilities and incinerators. Solid waste hauler must comply with requirements relating to vehicle transportation of solid waste and must deliver all waste to licensed facility. Solid waste transporting units traveling on public roads may be inspected to determine if units maintained and operated to prevent littering or determine if owners or operators of units are complying with law. Landfill owners and operators must submit annual report to state, county, and municipality in which landfill is located regarding amount of solid waste received during given year and amount of remaining disposal capacity at landfill; must provide for closure, post-closure care, and corrective action; and must provide financial assurance to cover related costs. Waste generated out of state may not be disposed of in Michigan landfill unless certain requirements are met. MDEQ may restrict or prohibit transportation or disposal of solid waste originating within or outside of state if transportation or disposal poses substantial threat to public health or safety or environment, and restriction or prohibition on transportation or disposal necessary to minimize or eliminate substantial threat to public health or safety or environment. Disposal of municipal solid waste generated outside state will be prohibited if U.S. Congress enacts authorizing legislation. Department posts list on website of materials prohibited from disposal in landfill and alternatives for disposal. Waste hauler must notify customers of materials listed on MDEQ’s web page at http://www.michigan.gov/deq. Yard clippings of more than de minimis amount to be managed by composting facilities, at point of generation, by farms, or by municipal landfill, and disposal areas must meet specific operating conditions. Yard clippings or other yard waste must be disposed in landfill if diseased or infected with invasive species. Electronics recycling provisions require state manufacturers to register and establish take-back program by Apr. 1, 2010.

Wetland Protection (Part 303).

(MCLA §§ 324.30301-.30323). Under Part 303 “wetland” means land characterized by presence of water at frequency and duration sufficient to support, and which under normal circumstances does support, wetland vegetation or aquatic life and is commonly referred to as bog, swamp or marsh and which are contiguous to Great Lake or Lake St. Clair, an inland lake or pond, or river or stream. Definition also includes noncontiguous wetlands that are more than five acres in size and noncontiguous areas five or less than five acres if MDEQ determines that protection of area is essential to preservation of state’s natural resources. Unless permit is obtained, person is prohibited from: (1) Depositing fill material in wetland; (2) dredging or removing soil or minerals from wetland; (3) constructing, operating or maintaining any use or development in wetland; or (4) draining surface water from wetland. State wetland permit applications may be obtained from local or district offices of MDEQ. Permit will not be issued unless permit is in public interest, is necessary to realize benefits of activity and activity is otherwise lawful. MDEQ must consider multiple general criteria in reviewing application. Permit may only be issued if unacceptable disruption of aquatic resources will not occur and proposed activity is primarily dependent on being located in wetland, or feasible and prudent alternative does not exist. MDEQ may hold public hearing on wetland permit application or may approve or disapprove of application without public hearing unless hearing requested or MDEQ determines permit application is of sufficient impact to warrant hearing. MDEQ administers federal wetlands program under agreements which permit EPA and U.S. Army Corps. of Engineers to intervene in state permitting decisions in certain circumstances. Department may issue order for compliance with conditions or prohibitions if violations occur. Persons have 30 days to comply. Permit fee due at time of application based on activity.

Environmental Remediation (Part 201).

(MCLA §§ 324.20101-.20142). Part 201 is state environmental cleanup statute. It establishes liability for response activity costs at sites of environmental contamination. Liability is imposed on persons who were owners and operators prior to June 5, 1995, if they are “responsible for an activity causing a release or threat of release”. Persons becoming owners or operators of contaminated property after June 5, 1995, must follow certain steps to acquire contaminated property (including property with underground storage tanks regulated under Part 213) without incurring liability for existing contamination. Part 201 establishes cleanup standards and procedures, creates reporting and disclosure requirements, establishes defenses and exemptions to liability, provides for identification, risk assessment, and priority evaluation of sites of environmental contamination and imposes fines and penalties. It establishes obligations for all owners and operators of contaminated property, regardless of liability for cleanup and provides state and private parties right of access to contaminated property. Part 201 also establishes right of state to seek recovery of state cleanup costs and natural resources damages. § 20142 provides specific liability exemption for persons complying with Part 201, but preserves liability for tort claims unrelated to response activities, for damages resulting from response activities, and from failure to fulfill requirements of § 20107a.

Underground Storage Tank Regulations (Part 211).

(MCLA §§ 324.21101-.21113). Part 211 regulates certain underground storage tank (UST) systems. Types of tanks excluded from definition of UST system include: (1) Farm or residential tanks of 1,100 gallons or less used for storing motor fuel for noncommercial purposes; (2) tanks used for storing heating oil for use on premises; (3) septic tanks; (4) any tank having capacity of 110 gallons or less; and (5) any tank that contains de minimis concentration of regulated substances. Owner of UST system must register and annually renew registration with MDEQ. UST owners or operators are required to file installation registration form with Remediation and Redevelopment Division of MDEQ at least 45 days before installing new UST system. If there is suspected or confirmed release from UST system, owner or operator of UST system must notify MDEQ within 24 hours. Person who installs or removes UST system must maintain pollution liability insurance with limits of not less than $1,000,000 per occurrence. Part 211 will be repealed 12 months after state treasurer files notice of final payment of amounts payable from fund created under part 215, infra.

Leaking Underground Storage Tank (Part 213).

(MCLA §§ 324.21301-.21331). Amended Mar. 6, 1996 to adopt same liability scheme as Part 201. (See subhead Environmental Remediation [Part 201], supra). Strict liability is imposed on owners and operators who were such prior to Mar. 6, 1996 if they are “responsible for an activity causing a release or threat of release”. Following Mar. 6, 1996, persons becoming owners or operators of contaminated property attributable to UST release must follow certain steps as provided in Part 201 to acquire property without incurring liability. Adopts risk-based corrective action approach to cleanups. All remedial work must be performed by “qualified UST consultant”, who must be on list approved by MDEQ. Also includes schedule of civil penalties for failure to submit reports on time and provides civil and criminal penalties for submitting false information or committing other fraud.

Underground Storage Tank Financial Assurance (Part 215).

(MCLA §§ 324.21501-.21563). Part 215 provides fund for reimbursing owners or operators of petroleum USTs for costs incurred to remediate contamination as result of release. Reimbursement operates on copayment scheme where owner or operator pays 10% of each remediation-related invoice up to maximum of $15,000 for first release from UST system. Owner or operator is responsible for 30% of each invoice up to $45,000 for second release from UST system. Reimbursement is not available for third release. Part 215 does not relieve owner or operator of UST from liability; state is not assuming liability, only providing assistance to owners or operators in meeting financial responsibility requirements. Persons who submit false or misleading requests for payment or indemnification under this part subject to civil and criminal penalties, including felony conviction punishable by up to five years imprisonment, $50,000 fine, or both, and must repay money taken unlawfully from fund. *Note:* Part 215 fund was declared insolvent on Mar. 31, 1995 and program is no longer available for new claims where invoices or request for indemnification were received after 5:00 p.m., June 29, 1995. Legislature extended collection of regulatory fee so that such claims submitted through June 29, 1995 would be reimbursed and repealed fee effective Dec. 31, 2010.

Air Pollution Control (Part 55).

(MCLA §§ 324.5501-.5542). Part 55, with Federal Clean Air Act (42 USC 7401, et seq.), and regulations promulgated thereunder, provides regulatory framework for air emissions in Michigan. State air emission permitting program meets federal standards. Part 55 requires that permit be obtained before any installation, construction, reconstruction, relocation or alteration to any source of emission, including any process, fuel burning, refuse burning or control equipment. Numerous exemptions from permitting requirements are included in applicable regulations. Program to control toxic air substances administered through permitting process limits emissions and prohibits ambient impacts above initial threshold screening level or risk screening level as necessary to protect public health. Regulations implementing Renewable Operating Permit Program as required by Clean Air Act amendments of 1990 have been approved by EPA.

Enforcement.

For most environmental statutes, enforcement rests with MDEQ. For air pollution control and abatement, MDEQ may conduct investigations; enter and inspect facilities, records, and equipment and take samples; seek administrative orders compelling compliance; and may initiate civil actions for fines, injunctions, and natural resource damage; initiate criminal prosecutions (MCLA §§ 324.5526; 324.20137); and also may issue emergency orders to restrain activities creating imminent and substantial endangerment (MCLA § 324.5518). MDEQ and its agents have right of entry to inspect or investigate conditions relating to pollution and obstruction of floodways. (MCLA § 324.3105). MDEQ has authority to investigate matters relating to discharge and stage characteristics of streams and to promulgate regulations to prevent harm or interference with such characteristics. (MCLA § 324.3107). For wetlands, MDEQ may hold public hearing on wetland permit application or may approve or disapprove application without public hearing. (MCLA § 324.30307). Injunctive action may be brought in civil court by any person to restrain pollution of air, water or other natural resources. (MCLA § 324.1701).

Penalties.

For violations of antipollution statutes, penalties are as follows: (1) For violation of air pollution statute, administrative penalties up to $10,000 per day per violation; civil penalties up to $10,000 per day per violation; and/or criminal penalties, including incarceration and fines up to $250,000, depending on violation (MCLA §§ 324.5529-.5532); (2) for violation of water pollution statutes, civil fine of not less than $2,500 nor more than $25,000 per day of violation; felony fine for intentional violations not less than $2,500 nor more than $25,000 per day (court may increase up to $50,000 for repeat offenders); if violation poses substantial danger to public health, safety, or welfare, additional fine of not less than $500,000 or not more than $5,000,000 (civil), or additional fine of not less than $1,000,000 and five years' imprisonment (criminal); misdemeanor fines of not more than $2,500 for each occurrence (MCLA §§ 324.3115, .3115a); (3) for violation of antilittering law, fine or imprisonment; (4) for violation of hazardous waste management, civil fine of not more than $25,000 per day for violation of permit; for misdemeanor fine of not more than $25,000 per day and/or one year imprisonment ($50,000 and two years for repeat offender);

for intentionally posing threat to human life, fine of up to $250,000 and/or five years' imprisonment (for private entity, fine up to $1,000,000) (MCLA § 324.11151); (5) for violation of solid waste management act civil penalty of up to $10,000 per day for first violation and $25,000 per day for second violation and violation of rule promulgated under act is misdemeanor subject to fine of $1,000 and up to six months in prison (MCLA §§ 324.11546, .11549); (6) for wetlands, civil fine of $10,000 per day for violation of act (MCLA § 324.30316); for violation under Part 201, fines and/or imprisonment depending on violation (MCLA § 324.20139); (7) owners/operators of USTs are subject to civil penalty for failure to submit reports on time beginning at $100 per day and increasing to $1,000 per day, and civil and criminal penalties for submitting false information or committing other fraud of up to $50,000 and five years' imprisonment (MCLA §§ 324.21313a and 324.21324).

Permits required for numerous activities which may damage environment. Exceptions and exemptions are as provided by statute. See subheads supra.

Uniform Transboundary Pollution Reciprocal Access Act adopted. Substantially incorporated in Natural Resources and Environmental Protection Act at MCLA §§ 324.1801-.1808.

12.01A WATER LAW:

See topic 12.01 Environmental Regulation, subhead Environmental Code.

Large quantity withdrawals (over 100,000 gallons per day) of groundwater or surface water regulated. Most requirements apply only to new withdrawals or increases from baseline capacity for existing withdrawals. New or increased withdrawals prohibited if harm fish populations. Annual reporting and fees apply, and permit sometimes required. (MCLA §§ 324.32701-.32730).

12.02 [RESERVED]

12.03 WILDLIFE AND ENDANGERED SPECIES:

See topic 12.01 Environmental Regulation, subhead Environmental Code.

13 ESTATES AND TRUSTS

—Scope —

Estates and Protected Individuals Code (MCLA §§ 700.1101-.8206); Disclaimer of Property Interest Law (MCLA §§ 700.2901-.2912); Testamentary Additions to Trusts (MCLA § 700.2511); Michigan Trust Code (MCLA §§ 700.7101-.7913).

13.01 ADMINISTRATION:

See topic 13.09 Executors and Administrators.

13.02 [RESERVED]

13.03 ALLOWANCES:

See topic 13.09 Executors and Administrators.

13.04 CLAIMS:

See topic 13.09 Executors and Administrators; category 5 Civil Actions and Procedure, topic 5.18 Pleading.

13.05 DEATH:

Uniform Determination of Death Act adopted. (MCLA §§ 333.1031-.1034). Adds provision that physician or registered nurse has authority to pronounce death of person. Medical facility may determine which of its personnel may pronounce death in facility.

Person absent and unheard of for five years is presumed dead. (MCLA § 700.1208). On sufficient showing person died or may be presumed to have died in disaster, court shall enter order establishing fact of death, location of disaster, date of death, and time of death. (MCLA § 700.1207[f], [g]).

Death Certificate.

See category 10 Documents and Records, topic 10.04 Records, subhead Vital Statistics.

Written finding of presumed death pursuant to federal Missing Persons Act (50 U. S. C. A. 1001 et seq.) is prima facie evidence of death (MCLA § 720.501).

Survivorship.

Uniform Simultaneous Death Act (MCLA §§ 720.101-.108) repealed effective Apr. 1, 2000. For related provisions see MCLA §§ 700.1207, .1208, .2702.

Action for death lies under Wrongful Death Act. (MCLA § 600.2922). Action is brought by personal representative. Recovery limited to certain relatives and devisees under will. Damages are reasonable medical, hospital, funeral and burial expenses for which estate is liable, reasonable compensation for pain and suffering of deceased while conscious, and loss to surviving spouse and next-of-kin. Trial court allocates amount of judgment representing loss to surviving spouse and next-of-kin and proportion to each. Probate court settles claims where no action brought in another court and distributes proceeds in both cases. (MCLA § 700.3924). Action must be brought within one to five years depending on cause of action. (MCLA § 600.5805). There is no statutory limitation of amount recoverable.

Revised Uniform Anatomical Gift Law.

See topic 13.16 Wills, subhead Revised Uniform Anatomical Gift Law.

Living Wills.

See topic 13.16 Wills, subhead Living Wills.

13.06 DECEDENTS' ESTATES:

See topics 13.09 Executors and Administrators, 13.07 Descent and Distribution, and 13.16 Wills.

13.07 DESCENT AND DISTRIBUTION:

All property of intestate decedent in excess of share of surviving spouse, or all if there is no surviving spouse, descends and is distributed as follows, each class of which member is living taking to exclusion of subsequent classes: (1) Descendants, equally if all of same degree, otherwise according to right of representation; (2) parents, or surviving parent; (3) brothers and sisters and children of deceased brothers and sisters, equally if all of same degree, otherwise by right of representation; (4) grandparents or descendants of grandparents (one-half maternal kindred, one-half paternal kindred, if no takers on one side then all to other), descendants take equally if of same degree, otherwise by right of representation; if no survivor known or determinable, to state by escheat. (MCLA §§ 700.2103, .2105).

Surviving Spouse.

Portion of surviving spouse is as follows: If decedent left no descendants nor parent, entire intestate estate; if no descendants, but at least one parent, first $201,000, plus ¾ of balance; if descendants, all of whom are also descendants of surviving spouse, first $201,000, plus ½ of any balance; if descendants, one or more of whom are not descendants of surviving spouse, first $201,000, plus ½ of any balance of intestate estate; if descendants, none of whom are descendants of surviving spouse, first $134,000, plus ½ of any balance of intestate estate. (MCLA § 700.2102).

Surviving spouses are also entitled to certain allowances. See topic 13.09 Executors and Administrators, subheads Priorities and 13.02 Allowances.

Right of spouse to intestate share, homestead allowance, dower, spousal election, exempt property or family allowance may be waived by written agreement made before or after marriage. (MCLA § 700.2205).

Surviving spouse does not include: (1) One who obtains or consents to judgment of divorce, even if not recognized as valid in this state; (2) one who following defective decree of divorce, participates in marriage ceremony with third person; (3) one who at time of decedent's death is living in bigamous relationship; (4) one who was party to valid proceeding concluded by order purporting to terminate all marital property rights, or; (5) for at least one year: (a) was willfully absent from deceased spouse; (b) deserted deceased spouse; or (c) willfully neglected or refused to provide support for deceased spouse if so required by law. Such persons shall not inherit or take estate, right or interest whatever by way of inheritance, dower, allowance or otherwise. (MCLA § 700.2801[2]).

Half blood kindred inherit as if they were of whole blood. (MCLA § 700.2107).

Posthumous Children or Other Issue.

Considered as living if lives at least 120 hours after birth. (MCLA § 700.2108).

Illegitimate child inherits from mother and mother's kindred as though legitimate. Such child inherits from father if: (1) father joins with mother and acknowledges that child is his child by completing acknowledgment as prescribed in Acknowledgment of Parentage Act (MCLA § 722.1001-.1013); (2) father joins with mother in written request for correction of certificate of birth substituting record of birth as legitimate; (3) father establishes mutually acknowledged relationship of parent and child with such child before age 18 and continued until terminated by death of either; or (4) man has been determined to be father of child and order of filiation establishing paternity has been entered pursuant to Paternity Act, MCLA §§ 722.711-.730. (MCLA § 700.2114[1][b]). Inheritance from or through child by either natural parent or his or her kindred is precluded unless that natural parent has openly treated child as his or hers, and has not refused to support child. (MCLA § 700.2114[4]).

Adopted Children.

See category 14 Family, topic 14.01 Adoption.

Determination of Heirship.

Probate Court may determine heirs and devisees in any matter before court. Any interested party may file petition for such determination and court shall schedule hearing on such petition upon notice of all interested parties. (MCLA § 700.1302[a][v]).

Advancements.

Property given by testator during lifetime to devisee shall be treated as satisfaction in whole or part of devise if will or contemporaneous writing by testator provides for deduction of lifetime gift. (MCLA § 700.2608). Property given during lifetime to heir by person dying intestate treated as advancement only if declared to be advancement in contemporaneous writing by decedent or acknowledgment to be advancement in writing by heir. (MCLA § 700.2109[1]).

Election.

Surviving spouse of Michigan decedent dying testate has right to elect (1) to abide by will; (2) to take one-half sum that would have passed to spouse had testator died intestate, reduced by one-half value of property otherwise passing to surviving spouse, or (3) if widow that she will take her dower right. Fiduciary shall serve surviving spouse notice of right to election prior to date for presentment of claims and surviving spouse shall elect within 63 days after date for presentment of claims or within 63 days after service of inventory on surviving spouse, whichever is later. If decedent died intestate leaving widow, widow may elect to take: (1) Intestate share, or (2) dower within same time periods. (MCLA § 700.2202). See topic 13.16 Wills.

Disclaimer of Legacy.

See topic 13.16 Wills.

Escheat.

If decedent left neither surviving spouse nor kindred, entire estate escheats to state. (MCLA § 700.2105).

See also topic 13.09 Executors and Administrators.

13.08 ELECTION:

See topic 13.16 Wills.

13.08A ESTATES: (in property)

See category 21 Property, topic 21.16 Real Property.

13.09 [RESERVED]

13.10 EXECUTORS AND ADMINISTRATORS:

Probate court in each county has jurisdiction of settlement of estates of all deceased persons dying residents of this state or leaving any estate in this state to be administered. (MCLA § 700.1301[a-b]). If decedent at death was resident of this state, probate court of county of residence is proper forum; if decedent at death not resident of this state, probate court of county where property located is proper forum. (MCLA § 700.3201[1]).

Preferences in Right to Administer.

For either formal or informal proceedings, priority for appointment as personal representative is: (1) Party nominated in will; (2) surviving spouse, if devisee; (3) other devisee of decedent; (4) surviving spouse; (5) other heirs; (6) suitable nominee of creditor (after 42 days after decedent's death); (6) state or county public administrator. (MCLA § 700.3203).

Eligibility and Competency.

(MCLA § 700.3204[3]).

Qualification.

Prior to receiving letters of authority, personal representative shall qualify by filing with appointing court any required bond and statement of acceptance of duties of office. (MCLA § 700.3601[1]). Deposit of collateral acceptable to court in lieu of bond is permitted. (MCLA § 700.3604).

Exemption from Bond.

Bond not required of personal representative appointed in informal proceeding, except where: (1) Special personal representative is appointed; (2) will requires bond; (3) bond ordered by Court after hearing on petition to require bond. (MCLA §§ 700.3603-.3606).

Issuance of Letters.

Personal representative must be appointed by register or court order, must qualify and must be issued letters. (MCLA § 700.3103). Upon qualifying, by filing with appointing court any required bond and statement of acceptance of duties of office, letters of authority are issued. (MCLA § 700.3601). Upon payment of fee, register shall issue certified copy of letters which indicate if probate is formal or informal, date of appointment and duration of validity; certificate may be recorded by register of deeds. (MCLA § 700.1307).

Removal.

Personal representative may be removed by: (1) Resignation; (2) court order closing estate; (3) lapse of one year after filing of closing statement; (4) upon order as court deems appropriate; (5) upon personal representative’s death. (MCLA §§ 700.3608-700.3612).

Special Kinds of Administration.

When court deems it expedient temporary personal representative may be appointed to collect and take charge of estate pending appointment of personal representative. (MCLA § 700.3614[a]). Temporary personal representative appointed by register in informal proceedings has duty to collect and manage property, preserve and account for property, and deliver property to general personal representative upon qualification. (MCLA § 700.3616).

If personal representative of estate dies or is by order of court removed or allowed to resign, or estate is closed without full administration, court shall appoint successor personal representative. (MCLA § 700.3613).

Public Administrator.

Appointment authorized by statute when no authorized person applied for appointment within 42 days after death; when no known heirs or no spouse or heir is U.S. citizen entitled to distributive share. (MCLA § 700.3203).

Inventory and Appraisal.

Personal representative must prepare inventory within 91 days of appointment. Inventory must be sent to all presumptive distributees and interested parties requesting it. (MCLA § 700.3706).

General Powers and Duties.

Fiduciary has right and duty to take possession of all assets of estate and in support thereof may initiate proceedings in probate court to recover possession of, or to determine title to, property (MCLA § 700.3709). Following collection of assets fiduciary has duty to settle estate promptly. (MCLA §§ 700.3703[1], 700.3704). During administration unless altered by governing instrument fiduciary must keep funds invested pursuant to prudent investor rule. (MCLA § 700.1505).

Business of decedent (as sole proprietor or general partner) may be continued by fiduciary for four months after appointment of personal representative or for additional period on court order. (MCLA § 700.3715[z]).

Fiduciary may mortgage estate assets. (MCLA § 700.3715[y]). Real property of estate may be leased by fiduciary including oil and gas leases. (MCLA §§ 700.3715[i], 700.3715[j]).

Notice of Appointment.

Notice of hearing must be given to interested persons. (MCLA §§ 700.1401, 700.1403). Notice may be given: (1) by registered, certified, or first class mail at least 14 days prior to time of hearing, (2) by personal service at least seven days before time of hearing, or (3) by publication at least 14 days before time of hearing if address or identity cannot be ascertained. (MCLA § 700.1401). If any heirs-at-law are residents of a foreign country, written notice must be sent by mail to consul of foreign country in City of New York or of district having jurisdiction, or consul, vice-consul or consular agent resident in this state. (MCLA § 700.1401[4]). Notice of Appointment and other documents, including copy of will and petition for independent probate, must be served upon interested parties within 28 days of appointment. (MCLA § 700.3705).

Notice to Creditors.

Upon appointment fiduciary must publish notice to creditors to present claims within four months after publication. Any known creditor i.e. one who as to which personal representative has actual notice or one whose existence was reasonably ascertainable by investigation of decedent’s available records for two years immediately preceding death and mail following death, is entitled to direct notice during four month period. If learned of within less than 28 days before expiration of such period such creditor is entitled to direct notice within 28 days of becoming known. (MCLA §§ 700.3801[1]-[2]).

Presentation of Claims.

Proceeding to enforce claim against decedent or decedent’s successors shall not commence before appointment of personal representative. (MCLA § 700.3104). Claims against estate, fiduciary and heirs are barred unless claimant complies with statutory requirements. (MCLA § 700.3803[1]). Claimant shall present claim either by (a) delivering to fiduciary written statement of claim containing specified information or (b) commencing proceeding to obtain payment in court of proper jurisdiction. (MCLA § 700.3804[1]).

Contingent and unliquidated claims are treated in same manner as other claims. (MCLA § 700.3810).

Secured claims need not be proved to protect security but must be proved to obtain deficiency. (56 Mich. 15, 22 N.W. 185). Payment shall be made on basis of amount allowed if creditor surrenders security. (MCLA § 700.3809).

Proof of Claims.

See subhead Presentation of Claims, supra.

Approval or Rejection of Claims.

Personal representative may mail notice disallowing claim in whole or in part within 63 days after time for original presentation of claims. Failure to mail notice of disallowance constitutes allowance of claim. After allowing or disallowing claim, personal representative may change allowance or disallowance. (MCLA § 700.3806[3]). Court may upon petition allow timely filed claim in whole or in part. (MCLA § 700.3806). Proceeding on claim must be commenced within 63 days of mailing notice of disallowance. (MCLA § 700.3806[1]).

Payment of Claims.

Upon expiration of four months from date of publication of notice fiduciary shall proceed to pay all claims allowed after making provision for various allowances, exemptions, costs of administration and unbarred or appealed claims. (MCLA § 700.3807[1]). If assets of estate are insufficient to satisfy all claims payment is to be made in accordance with MCLA § 700.3805(1). Claims bear interest computed pursuant to MCLA § 600.6013. See subheads Approval or Rejection of Claims and Presentation of Claims, supra.

Priorities.

Claims allowed against estate as follows: (i) costs and expenses of administration, (ii) reasonable funeral and burial expenses, (iii) homestead allowance, (iv) family allowance, (v) exempt property, (vi) debts and taxes with priority under federal law, (vii) reasonable and necessary expenses of last illness, (viii) debts and taxes with priority under law of State, (ix) all other claims. (MCLA §§ 700.3805, .3807).

Sales.

Personal representative, acting reasonably for benefit of interested persons, may properly dispose of property, including land in this or another state, for cash or credit, at public or private sale. (MCLA § 700.3715[f]).

Where real property of estate was subject of a contract to convey existing at time of death, fiduciary without court order may give deed upon full payment of contract price. (MCLA § 700.3715[c]).

Personal representative, acting reasonably for benefit of interested persons, may pending distribution or liquidation, retain property owned by decedent, in which personal representative is personally interested or that is otherwise improper for trust investment. (MCLA § 700.3715[a]).

Actions by Representative.

All actions and claims survive death. (MCLA § 600.2921). In pending actions fiduciary may be substituted. (Rule 2.202).

Actions against Representative.

See subhead Presentation of Claims, supra for procedure with respect to actions against estate arising from debts and obligations of decedent. By accepting appointment, personal representative submits personally to court's jurisdiction in proceeding relating to estate that may be instituted by interested person. (MCLA § 700.3602).

Allowances.

Surviving spouse domiciled in Michigan and minor children decedent was obliged to support are entitled to reasonable family allowance during progress of administration, of up to one year if estate is inadequate to discharge allowed claims. (MCLA § 700.2403). Surviving spouse entitled to homestead allowance. (MCLA § 700.2402).

Intermediate Accountings.

Fiduciary must account annually. (MCLA § 700.3703[4]).

Final Accounting and Settlement.

Final account must be rendered on closing date. (MCLA § 700.3954[d]). Following filing of each account, including intermediate accounts, hearing date is set unless court determines that assets and income are insufficient to justify expense, in which case hearing is deferred until final account. Notice of hearing to interested persons is required. Order allowing account is res judicata except for fraud. (MCLA § 700.3953[2]). Petition to compel settlement may be filed by any person beneficially interested or surety on bond. (MCLA § 700.3953). Summary procedures may be used in certain independent proceedings. (MCLA § 700.3982).

Consent Settlement.

No statutory provision for settlement of accounts other than by hearing and order of court. In practice, accounts are commonly presented to court with written consents to allowance of account and waiver of notice of hearing by interested persons.

Distribution.

After charges against estate are known, personal representative may deliver proposal for distribution to all distributees who have right to object. Representative's failure to receive written objections within 28 days after mailing or delivery, terminates distributee's right to object. (MCLA § 700.3908). Personal representative is not required to transfer property until amount of tax due from transferee is paid or until adequate security is furnished for payment. (MCLA § 700.3922[4]). Pecuniary bequests may be satisfied in kind with property valued as of distribution date in absence of contrary direction in will. (MCLA § 700.3907[3]).

Liabilities.

If exercise or failure to exercise power concerning estate is improper, personal representative is liable to interested parties for damage or loss. (MCLA § 700.3712). Fiduciary is liable to interested persons for loss arising out of his embezzlement, commingling of estate funds with his own, negligent handling of estate, willful and wanton mishandling, self-dealing, failure to account or terminate when estate is ready for termination and for any misfeasance or other breach of duty. (MCLA § 700.1308[1]).

Compensation of Representatives.

Personal representative is allowed reasonable compensation for services. (MCLA § 700.3719).

When Administration Unnecessary.

Special provision is made for summary administration of estates consisting of property of value not more than aggregate of all allowances and exemptions and for distribution without administration of estates consisting of property of less than $20,000 in value. (MCLA § 700.3982). Title to one or more vehicles whose value does not exceed $60,000 may be transferred by affidavit of surviving spouse or heirs where decedent left no other property requiring administration. (MCLA § 257.236).

Small Estates.

See subhead When Administration Unnecessary, supra.

Foreign Executors or Administrators.

Generally foreign representative has no rights to either real or personal property in state and ancillary administration necessary to release mortgage or to perfect title to real property in heirs or devisees. (194 Mich. 670, 161 N.W. 847; 55 Mich. 568, 22 N.W. 41). Foreign fiduciary may be qualified by filing bond and thereafter, with regard to property of nonresident decedent in

Michigan, will have same powers and duties as local personal representative. (MCLA § 700.4203[2]).

Informal Probate.

Procedures are available for informal appointment of personal representative, who may administer estate of decedent with minimal court supervision. (MCLA § 700.3301). Personal representative has extensive powers to deal with assets of estate, but may upon petition of himself or any interested party be subjected to court supervision as to part or all of estate proceedings. (MCLA § 700.3502). Probate proceedings are concluded by filing closing statement and, if no objections, issuance of certificate from probate register stating that personal representative appears to have fully administered estate. (MCLA § 700.3958).

Revised Uniform Anatomical Gift Law.

See topic 13.16 Wills.

Uniform Principal and Income Act.

(MCLA §§ 555.51-.68 repealed effective Sept. 1, 2004. Replaced by MCLA §§ 555.501 et seq.)

Uniform Simplification of Fiduciary Security Transfers Act adopted. (MCLA §§ 441.101-.112).

Registration of Securities in Beneficiary Form Act.

(MCLA §§ 451.471-.481 repealed effective Apr. 1, 2000. Replaced by MCLA §§ 700.6301 et seq.)

Funeral Arrangements.

Presumptive authority to make funeral arrangements and handling, disposition, or disinterment of decedent’s body, including decisions about cremation and right to possess cremated remains, in following order of priority: (1) Surviving spouse; (2) decedent’s heirs closest in relationship to decedent; (3) each group of heirs in increasingly remote degrees of relation to decedent; (4) decedent’s guardian, if any; (5) personal representative; and (6) county public administrator. (MCLA § 700.3206). Presumption may be challenged. (MCLA §§ 700.3207-.3208). Funeral establishment may rely on this presumptive authority and not civilly liable for such reliance. (MCLA § 700.3209).

13.11 FIDUCIARIES:

See topics 13.09 Executors and Administrators and Trusts; also category 14 Family, topic 14.07 Guardian and Ward.

13.12 INTESTACY:

See topic 13.07 Descent and Distribution.

13.13 LIVING WILLS:

Individual designated as patient advocate may make decision to withhold or withdraw treatment that would allow patient to die only if patient has expressed in clear and convincing manner that patient advocate is authorized to make such decision and that patient acknowledges that such decision could or would allow patient’s death. (MCLA § .5509[1][e]).

13.14 PROOF OF CLAIMS:

See topic 13.09 Executors and Administrators; category 5 Civil Actions and Procedure, topic 5.18 Pleading.

13.15 TRUSTS:

Note: Michigan Trust Code part of Estates and Protected Individuals Code eff. Apr. 1, 2010.

Kinds.

"Trust" includes, but is not limited to, express trust, private or charitable, with additions to trust, wherever and however created. Trust includes, but is not limited to, trust created or determined by judgment or decree under which trust to be administered in manner of express trust. (MCLA § 700.1107[n]).

Spendthrift trust for beneficiary with interest in both income and principal is valid (255 Mich. 275, 238 N.W. 284; 425 Mich. 364, 389 N.W.2d 696), except that creditors may reach excess income not required for education and support of beneficiary of a trust to receive the rents and profits of land where no valid direction for accumulation is given (MCLA § 555.13).

Charitable trust does not fail for lack of trustee or uncertainty of object or beneficiaries or because it creates a perpetuity. (MCLA § 554.351).

Creation.

Trusts may be created inter vivos or by will. Trust of land must be declared in writing (9 Mich. 358). Trust of personal property may be created by parol. (274 Mich. 484, 265 N.W. 441). Oral trusts recognized. (MCLA § 700.7407).

Trust may be created by any of: (a) Transfer of property to another person as trustee during settlor's lifetime or by will or other disposition taking effect upon settlor's death; (b) declaration by owner of property that owner holds identifiable property as trustee; (c) exercise of power of appointment in favor of trustee; (d) promise by one person to another, whose rights under promise are to be held in trust for third person. (MCLA § 700.7401[1]). Instrument establishing terms of trust not rendered invalid because property or interest in property not transferred to trustee or made subject to terms of trust concurrently with signing of instrument. Until property or interest in property transferred to trustee or made subject to terms of trust, person nominated as trustee has no fiduciary or other obligations under instrument establishing terms of trust except as specifically agreed by settlor and nominated trustee. (MCLA § 700.7401[2]).

Trusts may also be created by statute or court order.

Trust created only if: (a) Settlor has capacity to create trust, (b) settlor indicates intention to create trust, (c) trust has definite beneficiary, (d) trustee has duties to perform and (e) same person is not sole trustee and sole beneficiary. (MCLA § 700.7402).

If controversy arises respecting inter vivos irrevocable trust, circuit court can approve compromise and bind all interests. (MCLA § 700.7207).

Trust Modification or Termination.

Noncharitable irrevocable trust may be modified or terminated by court upon consent of trustee and qualified trust beneficiaries if court concludes modification or termination consistent with material purposes of trust or that continuance of trust is not necessary to achieve any material purpose of trust. (MCLA § 700.7411).

Appointment of Trustee.

Settlor of inter vivos trust names trustee. If testator names trustee, probate court must appoint person named, provided he or she qualifies. (156 Mich. 301, 120 N.W. 811). Probate court has jurisdiction to appoint Trustee. (MCLA § 700.1302[b][1]). If vacancy in trusteeship of noncharitable trust to be filled, vacancy must be filled first, in manner designated by terms of trust, and second, by person appointed by court. (MCLA § 700.7704).

Registration of Trust.

Trustee of trust having principal place of administration in this state may register trust in court at place designated in terms of trust or, if none designated, then at principal place of administration. (MCLA § 7209[1]).

Penalty Clause for Contest of Trust.

Provision in trust purporting to penalize interested person for contesting trust or instituting other proceeding relating to trust not given effect if probable cause exists for instituting proceeding. (MCLA § 700.7113).

Eligibility and Competency.

Person acting as fiduciary is at all times amenable to process issued by court. (MCLA § 700.1302). Nonresidents may be appointed. (MCLA § 700.7105).

Capacity to create, amend, revoke, or add property to revocable trust, or to direct actions of trust of revocable trust, is same as required to make will. (MCLA § 700.7601). See Topic Wills.

Qualification.

Acceptance of trusteeship requires affirmative act to assume office of trustee. Designated trustee who does not accept trusteeship within reasonable time after knowing of designation deemed to have rejected trusteeship. (MCLA § 700.7701).

Court has authority to order bond to if necessary to protect interests of beneficiaries or if required by terms of trust. (MCLA § 700.7702).

Removal of Trustee.

Equity has power to remove trustee upon proof of insolvency, incapacity, neglect, misconduct or violation of trust. (265 Mich. 358, 251 N.W. 555). If trustee resides outside state, neglects to render an account to court after due notice, absconds, becomes incapacitated, or is otherwise unsuitable or incapable to discharge trust, probate court has power of removal. (MCLA § 700.1302[b]). Settlor, cotrustee, or qualified trust beneficiary may request court to remove trustee, or trustee may be removed by court on own initiative for serious breach of trust, lack of cooperation among cotrustees, unfitness, unwillingness, or persistent failure of trustee to administer trust effectively or substantial change of circumstances. (MCLA § 700.7706).

General Powers and Duties of Trustee.

Powers and duties of trustee are determined largely by trust instrument. Inherent duty is to exercise honesty, good faith and reasonable diligence in preserving trust estate and executing trust purpose (265 Mich. 358, 251 N.W. 555), and to keep beneficiaries advised (52 Mich. 174, 17 N.W. 784). Trustee is commanded to keep trust estate invested (MCLA § 555.201), and has inherent power to do whatever is necessary to preserve trust estate (274 Mich. 225, 264 N.W. 351), such as payment of liens, taxes and insurance premiums, or employment of attorney, or settlement of claim against estate (199 Mich. 88, 165 N.W. 643). He may not continue business venture of settlor or testator without express authority or court order. (275 Mich. 237, 266 N.W.

332). Remedy of trustee or beneficiary in absence of express authority is application to court for instructions. (255 Mich. 173, 237 N.W. 535). Trustees of trusts for charitable purposes must furnish copies of trust documents, inventories, periodic written reports, and copies of accounts or petitions for distribution to state Attorney General, who has general supervision over such trusts including power to make rules and regulations. (MCLA § 14.251).

Trustees of trusts having a charitable beneficiary are subject to Charitable Trustees Powers Act which prohibits certain conduct and grants enforcement and supervisory power to attorney general. (MCLA §§ 14.271-.287).

MCLA § 700.7816 and MCLA § 700.7817 specify general and specific powers of trustee.

Upon acceptance of trusteeship, trustee must administer trust in good faith, expeditiously, in accordance with its terms and purposes, for benefit of trust beneficiaries, and in accordance with Michigan Trust Code. (MCLA § 700.7801). Trustee has duty of loyalty. (MCLA § 700.7802). Trustee must act as would prudent person in dealing with property of another, including following standards of Michigan prudent investor rule. (MCLA § 700.7803). Trust Protectors permitted. (MCLA § 700.7808).

Trustee required to maintain adequate records, keep trust property separate from trustee's property, and keep title in name of trust. (MCLA § 700.7811).

Trustee must keep qualified trust beneficiaries reasonably informed about administration of trust and of material facts necessary for them to protect their interests. Unless unreasonable under circumstances, trustee must promptly respond to trust beneficiary's request for information related to administration of trust. Trustee must, upon reasonable request of trust beneficiary, promptly furnish copy of terms of trust that describe or affect trust beneficiary's interest and relevant information about trust property. Trustee must within 63 days after accepting trusteeship notify qualified trust beneficiaries of acceptance, of court in which trust registered if registered, and of trustee's name, address, and telephone number. (MCLA § 700.7814).

Gift to Surviving Spouse.

See topic 13.16 Wills, subhead Gift to Surviving Spouse.

Sales.

Trust assets may be sold under statutory authority and standard unless instrument provides otherwise. (MCLA § 700.7401).

Investments.

Prudent Investor rule has been adopted. (MCLA §§ 700.1501 et seq.).

Securities in Name of Nominee.

A corporate sole trustee, or a corporate co-trustee with consent of co-fiduciary, may hold registrable securities in name of nominee employed by corporation without mention of the trust on the certificates evidencing securities, unless trust instrument otherwise provides, but corporate trustee must retain possession of certificates in nominee form and maintain records showing real interest in certificates. (MCLA §§ 555.441, .443).

Bequests and Devises to Inter Vivos Trusts.

See topic 13.16 Wills.

Accounting.

Testamentary trustee need not provide accounts to probate court unless ordered. (Rule 5.501). Unless otherwise stated in trust agreement, annual account must be provided to beneficiaries. (MCLA § 700.7814[3]).

Compensation.

Trustee entitled to reasonable compensation for services under circumstances (MCLA § 700.7708) and to reimbursement of expenses (MCLA § 700.7709).

Discharge.

Trustee may resign by giving 28 days' notice to beneficiaries and cotrustees or by court approval. (MCLA § 700.7705).

Uniform Common Trust Fund Act (with additions and variations) in effect; Official Amendment not adopted. (MCLA §§ 555.101-.113).

Revised Uniform Principal and Income Act.

See Topic 13.09 Executors and Administrators, subhead Uniform Principal and Income Act.

Gifts to Minors.

See category 14 Family, topic 14.10 Infants.

Uniform Fiduciaries Act not adopted.

Uniform Simplification of Fiduciary Security Transfers Act adopted. (MCLA §§ 441.101-.112).

Uniform Supervision of Trustees for Charitable Purposes Act in effect. (MCLA §§ 14.251-.266).

Accumulations.

See category 21 Property, topic 21.13 Perpetuities.

Perpetuities.

See category 21 Property, topic 21.13 Perpetuities.

Pour Over Trusts.

See topic 13.16 Wills, subhead Bequests and Devises to Inter Vivos Trusts.

Powers of Appointment.

Form, validity, rights under and manner of exercise of both general and special powers of appointment for real and personal property governed by statute. (MCLA § 556.111-.133).

Release of Powers of Appointment.

Accomplished with or without consideration by written instrument signed by donee. (MCLA § 556.118).

13.16 WILLS:

Individual, 18 years of age or older, who has sufficient mental capacity may make will. Individual has sufficient mental capacity if individual has ability to understand that he or she is providing for disposition of property after death, individual has ability to know nature and extent of property, individual knows natural objects of his or her bounty, and individual has ability to understand in reasonable manner general nature and effect of his or her act in signing will. (MCLA § 700.2501).

Testamentary Disposition.

Except as provided in subhead Election, infra, no limitation is imposed on right to dispose of property by will. (MCLA § 700.2602).

Execution.

All wills, except holographic (see subhead Holographic Wills, infra), must be in writing, signed by testator or by some person in his presence expressly directed, and execution or acknowledgment of execution witnessed by two witnesses in presence of testator. Usual but not required to show residences of witnesses. (MCLA § 700.2502).

Attestation Clause.

Two adults required to witness execution of will. Preferable to have three adult witnesses. All witnesses must observe testator sign will. (MCLA § 700.2519).

STATEMENT OF WITNESSES

We sign below as witnesses, declaring that the individual who is making this will appears to have sufficient mental capacity to make this will and appears to be making this will freely, without duress, fraud, or undue influence, and that the individual making this will acknowledges that he or she has read the will, or has had it read to him or her, and understands the contents of this will.

____

(Print Name)

____

(Signature of witness)

____

(Address)

____

(City) (State) (Zip)

Holographic wills are valid if dated and if testator's signature and material provisions are in testator's handwriting. (MCLA § 700.2502[2]).

Nuncupative wills are not recognized.

Self-proved Wills.

Form. (MCLA § 700.2504).

Revocation.

Wills may be revoked in whole or in part by subsequent will, by destruction of instrument with intention of revoking (MCLA § 700.2507) or if after execution of will testator is divorced or marriage annulled, all provisions relating to former spouse are revoked and such property shall pass as if former spouse predeceased. Remarriage to former spouse revives such provisions. Any other change in circumstances does not revoke will. (MCLA § 700.2807).

Revival.

When subsequent will revokes prior will, presumption upon revocation of subsequent will is prior remains revoked unless contrary intent of testator is evident from circumstances and/or declarations. If revocation of subsequent will is by third will, prior will is revived only by intent expressed in third will. (MCLA § 700.2509).

Testamentary Gifts to Subscribing Witnesses.

Witnessing of will by interested person does not invalidate will or any provision of it. (MCLA § 700.2505[2]).

Bequests and Devises to Inter Vivos Trusts.

Will may validly devise property to trustee of trust. (MCLA § 700.2511[1]). Uniform Testamentary Additions to Trusts Act (MCLA §§ 555.461 et seq.) repealed effective Apr. 1, 2000. Pecuniary bequests or transfers in trust of pecuniary amount may be satisfied in kind with property valued as of distribution date in absence of contrary direction in will. (MCLA § 700.3907).

Testamentary Guardians.

See category 14 Family, topic 14.07 Guardian and Ward.

Probate.

Will must be proved in probate court. (MCLA § 700.3102). Petition for probate is filed in county of testator’s domicile. (MCLA § 700.3201[1]). Notice of hearing on petition, for formal testacy and appointment proceedings unless waived in writing, must be given to heirs, devisees and legatees by publication and mail 14 days before hearing, or seven days if personal service used. (MCLA §§ 700.1401, 700.3403; Rules 5.105-.108). If person does not appear to object to admission of will, court may admit will without testimony, if will appears proper on its face. (MCLA § 700.3405[1]).

Contest.

Persons interested in decedent’s estate may apply to register for determination in informal proceedings and may petition court for orders in favor of proceeding, and if opposing probate, shall state objections. (MCLA §§ 700.3105, .3404, .3407). Appeal to Court of Appeals must be filed within 21 days of order of probate court. (Rule 7.204). Appellate review is governed by revised Judicature Act of 1961 and by supreme court rule. (MCLA § 700.1305). In absence of appeal, judgment admitting will to probate is res judicata and not subject to collateral attack. (300 Mich. 575, 2 N.W.2d 509). Settlement of will contest governed by statute and requires court approval. See subhead Adjustment of Controversies Concerning Wills, infra.

Adjustment of Controversies Concerning Wills.

Subject to rights of creditors and taxing authorities, competent interested parties may agree among themselves to alter interests to which they are entitled under will or intestacy, in writing executed by all parties affected by its provisions. Fiduciary of estate shall abide by terms of such settlement. (MCLA § 700.3914[1]). In cases where will contains charitable gift not to particular person or institution, settlement in circuit court is contemplated by statute and Attorney General is necessary party. (MCLA §§ 14.251 et seq.).

Legacies.

No specific statutory provisions as to time for payment or ademption. Payment may be compelled upon petition of that person entitled to such, while interest is awarded to pecuniary devisee after one year has elapsed since first appointment of personal representative. (MCLA § 700.3904). Ademption of general devise is matter of intention at time donor makes gift. (303 Mich. 103, 5 N.W.2d 672). Specific devises are adeemed if testator does not own property at death or same does not exist, subject to specific devisees' right to: (a) Any balance of purchase price together with security interest owing from purchaser to testator at death by reason of sale; (b) any proceeds unpaid at death on fire or casualty insurance on property, unless property is restored; (c) any amount of condemnation award unpaid at death; (d) property owned by testator at death as result of foreclosure of security for specifically devised obligation or property obtained in lieu of foreclosure. (MCLA § 700.2606).

Unclaimed Legacies.

Deposited by fiduciary with county treasurer on order of court. (MCLA § 700.3916). As to escheat see category 21 Property, topic 21.01 Absentees, subhead Escheat. See also topic 13.09 Executors and Administrators, subhead Distribution if Abroad, and category 21 Property, topic 21.01 Absentees, subhead Beneficiary of Estate.

Disclaimer of Legacy.

Governed by MCLA §§ 700.2901-.2912.

Lapse.

If devisee who predeceased testator was lineal descendant of testator's grandparents, his issue take unless will provides otherwise. (MCLA § 700.2603[1]).

Children.

Child born after execution of will and omitted from will takes intestate share if no other living children, but if other children survive, omitted child takes pro rata share of devises made to then-living children, unless will negatives intention to provide for such child. (MCLA § 700.2302).

Election.

Surviving spouse may (if widow) elect dower right or to take under will or to take as follows: One-half of sum or share that would have passed to spouse by intestacy, reduced by one-half of value of all property derived from decedent by any means other than testator intestate succession, including gifts within two years of death, property transferred subject to retained power which makes such property subject to federal taxes, and transfer via joint ownership, insurance or similar means. Surviving spouse must exercise election within 63 days after date for presentment of claims or within 63 days after proof of service of inventory on surviving spouse is filed, whichever is later. (MCLA § 700.2202). Election right and right to inherit may be waived by either spouse by written agreement before or after marriage. (MCLA § 700.2205).

Gift to Surviving Spouse.

Surviving spouse omitted from will by accident or mistake takes share to which entitled in case of intestacy, as does spouse married after execution of will unless omission was intentional or testator provided for spouse by transfers outside of will. (MCLA § 700.2301). Pecuniary bequest under will or trust agreement, unless instrument otherwise provides, may be satisfied with assets selected by fiduciary having aggregate value on date of distribution amounting to no less than and, to extent practicable, no more than amount of bequest as stated in formula in governing instrument. (MCLA § 700.3907).

Contribution.

No statutory provision for contribution. Election held to have effect only of reducing testate property and will operates to pass balance in accordance with its terms (271 Mich. 627, 261 N.W. 98), except electing spouse may not receive legacy under will (250 Mich. 117, 229 N.W. 414).

Foreign Executed Wills.

Will is valid if executed in compliance with laws of Michigan or with law of place of execution or with law of place where testator is domiciled, has abode or is national at time of execution or of death. (MCLA § 700.2506).

Foreign Probated Wills.

State's court shall accept as determinative final order of court of another state determining testacy or validity or construction of will if order includes or is based on finding that decedent was domiciled at death in state where order was made. (MCLA § 700.3408).

Simultaneous Death.

See topic 13.05 Death, subhead Survivorship.

Testamentary Trusts.

See topic 13.15 Trusts.

Revised Uniform Anatomical Gift Law.

Adopted. MCLA §§ 333.10101-.10109. Anatomical gift of donor's body or body part may be made during life of donor for purpose of transplantation, therapy, research, or education by: (a) Donor; (b) donor's agent; (c) donor's parent; or (d) donor's guardian.

Living Wills.

Person 18 years or older of sound mind at time of designation may designate person 18 years or older as patient advocate to exercise powers with respect to care, custody and medical or mental health treatment decisions. Designation must be in writing signed in presence of two witnesses (excluding specified persons) and be made part of patient's medical record before implementation. Patient advocate must accept designation in writing. (MCLA §§ 700.5506-.5520). Patient advocate designation may include statement of patient's desires on care, custody, and medical or mental health treatment. Patient advocate designation may also include patient's desires on making anatomical gift. (MCLA § 700.5507).

14 FAMILY

14.01 ADOPTION:

Consent Required.

Written consent required from: (a) Parents of adoptee unless (i) parental rights have been terminated by court order, (ii) adoptee has been released by parents for adoption to child placing agency or Department of Social Services, (iii) guardian has been appointed for adoptee, (iv) guardian has been appointed for that parent, (v) adoptee is not related to adopter within fifth degree of affinity or consanguinity, or (vi) parent having legal custody of adoptee is married to adopter; (b) Department of Social Services or child placing agency to whom adoptee permanently committed by court order or released by parents; (c) court having permanent custody of adoptee; (d) guardian of adoptee, if any; (e) guardian of parent; (f) child placing agency of another state or country which has authority to consent; and (g) adoptee if over 14 years old. Adult must consent to own adoption, and no other consent required. Guardian may not execute consent unless authority of court which appointed guardian obtained. Inability to obtain consent may be overcome by motion if arbitrary or capricious withholding is established by clear and convincing evidence. (MCLA §§ 710.43-.45).

Conditions Precedent.

Court (family division) directs full investigation unless waived as result of 12 month or longer foster care placement. (MCLA § 710.46). Not later than 14 days after receipt of report of investigation, court orders termination of parental rights. (MCLA § 710.51). Order of adoption entered six months following formal placement, but court may extend or shorten period. (MCLA § 710.56).

Jurisdiction.

Court of county in which petitioner resides or adoptee is found. (MCLA § 710.24).

Venue.

Court of county in which petitioner resides or adoptee is found or, if petitioner and adoptee reside out of state where parent's parental rights were terminated. (MCLA § 710.24).

Petition.

Person (and if married, wife or husband of such person) desiring to adopt child or adult, with or without change of name, files verified petition with probate court of county where petitioner resides or adoptee is found. Petition must state: (1) Name, date and place of birth and place of residence of petitioner, including maiden name of adopting mother, (2) name, date and place of birth and place of residence of adoptee, (3) relationship, if any, of petitioner to adoptee, (4) full name of adoptee after adoption, (5) description of property, if any, of adoptee, (6) names and addresses of parents of adoptee unless parental rights have been terminated by court of competent jurisdiction, and (7) name and address of guardian, if any, of adoptee. (MCLA § 710.24). Concurrent with or subsequent to filing of petition, petitioner, Department of Social Services employee or agent of court, or child placing agency, as appropriate, must file required documentation. (MCLA § 710.26).

Proceedings.

See subhead Conditions Precedent, supra.

Decree.

Decree entered after waiting period described under subhead Conditions Precedent, supra.

Name.

If decree provides for change of adoptee's name, such change of name effective upon entry of decree. (MCLA § 710.60).

Effect of Adoption.

Upon entry of decree adopting parents occupy in law all rights and obligations of natural parents. Upon entry of such decree, adoptee becomes heir at law of adopting parents without distinction of any kind from natural heirs at law. Adoptee is not heir at law of natural parents unless interest vests before entry of adoption decree. (MCLA § 710.60).

Setting Aside Adoption.

Adoption decree may be set aside on petition filed within 21 days after entry of decree. (MCLA § 710.64). Appeal is to court of appeals within 21 days after entry of decree appealed from or after petition for rehearing denied. (MCLA § 710.65).

14.02 ALIMONY:

See topic 14.04 Divorce.

14.03 COMMUNITY PROPERTY:

See topic 14.09 Husband and Wife.

14.04 DESERTION:

See topics 14.06 Divorce; 14.09 Husband and Wife.

14.05 DISSOLUTION OF MARRIAGE:

See topic 14.06 Divorce.

14.06 DIVORCE:

Governed by MCLA §§ 552.1-.1901 and Rules 3.201-3.221.

Sole statutory ground for absolute divorce is breakdown of marriage relationship to extent that objects of matrimony have been destroyed and there remains no reasonable likelihood that marriage can be preserved. (MCLA § 552.6).

Ground for separate maintenance is same as for divorce. (MCLA § 552.7).

Residence Requirements.

Plaintiff or defendant must have resided in this state for 180 days immediately preceding filing of complaint. One spouse must have resided in county where suit is filed for ten days immediately preceding filing except where defendant is citizen of (or born in) country other than U.S., parties have minor child(ren); and evidence exists based upon which court could conclude minor child(ren) are at risk of being removed from U.S. by defendant. (MCLA § 552.9). Defendant must be domiciled in state at time suit is filed or at time cause for divorce arose, unless brought in by publication or personally served with process in this state or personally served with copy of order for appearance and publication within this state or elsewhere. (MCLA § 552.9a, see category 5 Civil Actions and Procedure, topic 5.20 Process). When cause for divorce occurred outside Michigan, one party must have resided in state for one year immediately preceding filing. (MCLA § 552.9e). See category 5 Civil Actions and Procedure, topic 5.20 Process.

Jurisdiction.

If residence requirements are satisfied, circuit court of county where parties, or one of them, resides has jurisdiction to issue divorce decree. (MCLA §§ 552.6, .9).

Venue.

No specific venue provisions.

Process.

If there are children under 18 or party is pregnant, copies of all process, pleadings and other papers must be served on friend of court and copy of summons must be served on prosecuting attorney when required by law. (Rule 3.203[G][H]). When there are children under 17, statute requires service of copy of summons on prosecuting attorney or on friend of court in counties having population of 500,000 or more which have a friend of court. (MCLA § 552.45).

Whenever order for appearance is served outside Michigan proof of service must be made by affidavit of person serving same, made before justice of peace or notary public, and when such affidavit is made outside this state it must bear certificate of clerk of court of record certifying to official character of justice or notary and genuineness of signature. (MCLA § 552.9a).

Pleading.

Action is commenced by filing of complaint. Statute requires every complaint to state names and ages of all children. (MCLA § 552.45). Rule 3.206 specifies certain information to appear in complaint in all cases and in statement to friend of court where there are children under 18 or application for temporary or permanent support money or alimony is made. (Rule 3.206). Respondent may answer complaint without oath or affirmation. (MCLA § 552.11).

Practice.

Proofs cannot be taken until 60 days after filing of complaint (except where cause for divorce is desertion), and not until six months after filing where there are dependent children under 18 (unless upon petition compelling necessity is shown). (MCLA § 552.9f).

Final judgment is entered on determination that plaintiff is entitled to divorce.

Temporary Alimony/Spousal Support.

Pending divorce proceedings temporary spousal support may be ordered by court. (MCLA § 552.13; Rule 3.207[C]).

Allowance for Prosecution or Defense of Suit.

Upon request of either party, court may order adverse party to pay requesting party's expenses including attorneys fees in prosecuting or defending suit. (Rule 3.206[C]; MCLA § 552.13).

Spousal Support.

Upon every divorce, court may award party permanent alimony or alimony for specific duration. (MCLA § 552.23). On petition of either party, court may revise and alter decree respecting amount of spousal support or payment thereof. (MCLA § 552.28). Award of spousal support may be terminated by court as of date party receiving spousal support remarries unless contrary agreement specifically stated in divorce judgment. (MCLA § 552.13[2]).

Division of Property of Spouses.

Determined in decree. Court may restore to either party whole, or such parts it deems just and reasonable, of real and personal estate that came to either party by reason of marriage or award value thereof to be paid by either party in money. (MCLA § 552.19). If estate and effects awarded to either party are insufficient for suitable support and maintenance of either party and children of marriage committed to care and custody of either party, court may further award to either party such part of real and personal estate of either party as it deems just and reasonable considering ability, character and situation of parties and all other circumstances. (MCLA § 552.23). Husband and wife owning realty as joint tenants or as tenants by entirety become tenants in common unless otherwise determined by decree. (MCLA § 552.102).

If party contributed to acquisition or improvement of spouse's property, court may award such party all of such property or equitable portion thereof. (MCLA § 552.401).

Change of Wife's Name.

Court in divorce decree may, on wife's petition, restore her birth name or legal surname or allow her to adopt another surname if change not sought with fraudulent or evil intent. (MCLA § 552.391).

Custody of Children.

On application of either party or friend of court, court may provide for custody of minor children during pendency of suit (MCLA § 552.15) and upon divorce awards custody to one of or jointly to both parents (MCLA § 552.16) or to third party until child attains age 18 (MCLA § 552.17a). Custody determined by Best Interest of the Child factors (MCLA § 722.23) and Child Custody Act of 1970 (MCLA §§ 722.21-.31). Court may waive jurisdiction of children under 17 to probate court. (MCLA §§ 552.15, .16). Uniform Child Custody Jurisdiction Act in effect. (MCLA §§ 600.651-.673). Court may, on petition of either parent, after divorce, revise judgment concerning care, custody and maintenance of child. (MCLA § 552.17).

Allowance for Support of Children.

Pending divorce proceedings support for minor children may be ordered by court (Rule 3.207; MCLA § 552.15), and upon divorce, court may order support for children to be paid by either party (MCLA §§ 552.23, .605). Court may order support for child after child reaches age of 18 if child in high school but not beyond age 19½. (MCLA § 552.16a). Enforcement of support and visitation orders provided for in Support and Parenting Time Enforcement Act. (MCLA §§ 552.601-.650). Support may include medical, dental, health care, child care or educational expenses. (MCLA § 552.452). Upon petition of either party court may alter decree concerning maintenance of children. (MCLA §§ 552.17, .28).

Dower.

See category 21 Property, topic 21.08 Dower, subhead Divorce.

Remarriage.

No restrictions on marriage of divorced persons.

Foreign Divorces.

No statutory provisions barring recognition of foreign divorces. Foreign alimony decree will be enforced if defendant was present in court or was personally served with process within jurisdiction of foreign court. (MCLA § 552.121).

Separation Agreements.

No statutory provision.

Annulment of Marriage.

See topic 14.11 Marriage.

Antenuptial Contracts.

See topic 14.09 Husband and Wife.

14.06A DOMESTIC VIOLENCE/STALKING:

Victims of domestic violence and stalking may obtain personal protection order in Circuit Court that restrains assailant and subjects assailant to criminal penalties. (MCLA §§ 600.2950-.2950m).

14.07 DOMESTIC PARTNERS

14.08 GUARDIAN AND WARD:

Probate courts appoint and have general jurisdiction over guardians of minors (MCLA §§ 700.5201-.5219) and guardians of estate of minors and legally incapacitated persons resident or having any property within state (MCLA §§ 700.5301-.5318). Guardians of estates are termed "conservators". Without appointing conservator, court may authorize, direct or ratify any transaction except making of will. (MCLA §§ 700.5401-.5433).

Selection of Guardian.

Parent may nominate guardian or conservator by will; spouse of legally incapacitated person may so appoint guardian. (MCLA §§ 700.5202; 700.5301[2]). Minor above age 14 may nominate his own guardian or conservator. (MCLA §§ 700.5212, 700.5406).

Eligibility and Competency.

Competent person, including specified nonprofit corporation, may be appointed guardian. (MCLA § 700.5313[1]). Conservator or like fiduciary appointed in jurisdiction where protected person resides has priority for appointment as conservator. Court may appoint individual, corporation authorized to exercise fiduciary powers, or specified nonprofit corporation. (MCLA § 700.5409[1][a]).

Appointment of guardian is evidenced by issuance of letters of guardianship. (MCLA § 700.5214). Letters of conservatorship evidence transfer of all assets to conservator. (MCLA § 700.5420).

Qualification.

Guardian qualifies by filing acceptance of appointment. (MCLA § 700.5214). Court may require conservator to furnish bond. (MCLA § 700.5410).

Powers and Duties.

Guardian has care and custody of person of his ward and supervision of education if minor; if no conservator appointed, guardian may receive money or personal property for support of ward. (MCLA § 700.5215). Conservator has investment powers of trustee, discretion to retain or sell assets, and other enumerated powers to act with respect to property or affairs of protected person, including implementation of known estate plan. Conservator also has parental rights of guardian if protected person is unmarried minor without parent or guardian. (MCLA § 700.5423). Transactions of conservator affected by conflict of interest are voidable, but third party acting in good faith is protected without inquiring into propriety of conservator's exercise of power. (MCLA § 700.5421). Court may expand or limit conservator's powers. (MCLA § 700.5427).

Investments.

See subhead Powers and Duties, supra.

Securities in Name of Nominee.

Conservator may so hold securities but is liable for acts of nominee. (MCLA § 700.5423[2]).

Real Estate.

Guardian has no authority with respect to real estate. Conservator holds title to all ward's property as trustee and may deal with real estate subject to court approval. (MCLA § 700.5423).

Liabilities.

Conservator is subject to standard of care of trustee and is liable as any other fiduciary for loss of estate or other breach of duty. (MCLA § 700.5416). Guardian authorized to give medical consent and not liable for negligence or acts of third person unless such consent by parent would be illegal. (MCLA § 700.5215[c]). Conservator liable on contract only if failed to disclose capacity and identify estate, and in tort only if personally at fault. (MCLA § 700.5430).

Accounts.

Guardian must report to court condition of ward and estate subject to guardian's control, as ordered by court on petition of interested person. (MCLA § 700.5215). Conservator must file inventory under oath within 63 days of appointment, account annually to court or as court directs, account to court upon resignation or removal, and to court or ward upon termination of disability or minority. (MCLA §§ 700.5417-.5418).

Termination of Guardianship.

Guardianship of minor terminates upon minor's death, adoption, marriage or attainment of majority. (MCLA § 700.5217). Court may terminate guardianship or conservatorship when need for such protection shown to have ceased. (MCLA § 700.5431).

Gifts to Minors.

See topic 14.10 Infants.

Uniform Fiduciaries Act not adopted.

Uniform Simplification of Fiduciary Security Transfers Act adopted. (MCLA §§ 441.101-.112).

Insane Persons.

Provisions for guardianship of legally incapacitated persons apply to person unable to manage or protect his property or person because of mental incompetency or retardation, or chronic use of drugs or alcohol. (MCLA § 700.1105).

Foreign Guardians.

Conservator or like fiduciary appointed in foreign state for nonresident ward may collect property of ward by presenting proof of appointment and filing bond. (MCLA § 700.5433). See also subhead Eligibility and Competency, supra.

14.09 HUSBAND AND WIFE:

Marriage confers rights and imposes duties as at common law, except as to property. (26 Mich. 106). Loss of consortium by personal injury recoverable in action by wife (359 Mich. 33, 101 N.W.2d 227), reversing earlier rule denying recovery in action by either spouse. Loss of wife's services is element of damages in suit by husband. (295 Mich. 611, 295 N.W. 333).

Disabilities of married women have been removed with respect to their capacity to enter into contract. (MCLA § 557.23).

Separate Property.

Property owned by husband or wife before marriage or thereafter acquired, except joint property (see subhead Joint Property, infra), is his or her separate property, with right to manage and dispose of it alone (except as restricted in divorce proceeding), except that husband's real estate is subject to dower. (MCLA §§ 557.21, 202 and 203). Separate property of either spouse is not liable for debts of other. (MCLA §§ 557.21, .24). Separate property of one may be awarded to other if court finds he or she contributed to acquisition, improvement or accumulation of property (MCLA § 552.401) or if award to one spouse is insufficient for support of claimant and any children in claimant's care (MCLA § 552.23).

Joint Property.

Property held by entireties, or in such manner that neither husband or wife individually has separate property interest, constitutes separate property of husband and wife, as distinguished from community property. (MCLA § 557.203). Married woman may enter into written contract jointly or severally with another person. (MCLA § 557.27). Unless otherwise expressly provided, real property conveyed to husband and wife is deemed to be held by entireties (221 Mich. 515, 191 N.W. 213), and personal property in form of stocks, bonds, debentures, notes, mortgages and other evidences of indebtedness payable or endorsed or assigned to husband and wife, is deemed to be held jointly with right of survivorship with same incidents as real estate held by entireties (MCLA § 557.151), but presumption does not extend to bank deposits (260 Mich. 246, 244 N.W. 462), land contracts (279 Mich. 598, 273 N.W. 282), insurance or other simple contracts (54 F.2d 5).

Contracts.

Married woman may enter into contract with respect to her separate property (MCLA § 557.24) or carry on business for her own account (238 Mich. 189, 213 N.W. 163), and may contract directly with her husband (37 Mich. 563), including partnership with him (MCLA § 449.6; 304 Mich. 668; 8 N.W.2d 873). Husband is not liable for breach of contract entered into by wife relating to her separate property unless he acted as surety, cosigner or guarantor. (MCLA § 557.24). Married woman may act as surety for obligation of another, including her husband, and judgment on same may be satisfied out of her separate property whether or not contract of suretyship benefits or concerns that separate property. (MCLA § 557.25). Married woman may enter into written contract pledging or assigning her separate property as security for, or personally guaranteeing, debt of another (including her husband), and judgment on same may be satisfied out of her separate property whether or not separate property derives benefit from pledge, assignment or guarantee. (MCLA § 557.26).

Antenuptial Contracts.

Contract, assuming disclosure and absence of fraud, duress or misrepresentation at execution, relating to property made between persons in contemplation of marriage remains in force after marriage. (MCLA § 557.28).

Agency.

Either spouse may act as agent or attorney in fact for the other. There is no presumption of husband's authority to act for wife (298 Mich. 721, 299 N.W. 780), but in contracting for family necessaries wife is presumed to act for husband (26 Mich. 179).

Conveyance or Encumbrance of Property.

To convey or encumber property held by entireties husband and wife must join in same instrument. (200 Mich. 328, 166 N.W. 886). Husband need not join in deed of wife's separate property. Dower is barred by wife's joining in husband's conveyance, or may be barred by separate instrument expressing intent to bar dower. (MCLA § 558.13).

Actions.

Actions may be brought by and against married woman as if she were unmarried. (MCLA § 600.2001). Action for tort of wife cannot be brought against husband or husband and wife jointly unless circumstances were such as to render both liable. (MCLA § 600.2005). No statutory prohibition of action by one spouse against another, but common law disability may still exist. (See 117 Mich. 80, 75 N.W. 287; 288 Mich. 669, 286 N.W. 120.)

Desertion and Nonsupport.

Spouse is liable criminally for desertion and nonsupport. (MCLA § 750.161).

Revised Uniform Reciprocal Enforcement of Support Act (as am'd) has been adopted. (MCLA §§ 780.151-.183). Among material differences from uniform text are: (1) Jurisdiction is vested in circuit court of county of petitioner's residence or in which valid prior and existing support order has been issued when proceedings initiated in Michigan, or if proceedings initiated in another state and valid support order has been issued, venue rests in county in which order issued, in county where obligor resides or is found (MCLA § 780.160); (2) prosecuting attorney has duty to represent petitioner upon request of State Department of Social Services, although petitioner may have private counsel at own expense (MCLA § 780.160a); (3) significant differences from § 14 (MCLA § 780.170); (4) jurisdiction is on original petition, without need for amended petition, where respondent is located in another county of the state (MCLA § 780.163a); (5) privilege of husband-wife communications is not retained (MCLA § 780.169); (6) severability provision is omitted. Civil enforcement by circuit courts. (MCLA §§ 780.153 et seq.).

Community Property.

Statute establishing community property system (MCLA §§ 557.201-.220) has been repealed, with very limited protection of rights acquired prior to May 10, 1948, when the repealing act became effective (MCLA §§ 557.251-.254). Uniform Disposition of Community Property Rights At Death Act in effect. (MCLA §§ 557.261-.271).

14.10 INFANTS:

Age of majority, 18 for both sexes effective Jan. 1, 1972. Prior thereto, age of majority was 21. (MCLA §§ 722.51-.55). Children under 17 may be fingerprinted upon written authorization of parent. (MCLA §§ 722.771-.775).

Emancipation.

Marriage releases infant from parental control. (MCLA § 551.251).

Disabilities.

Infant lacks capacity to convey, or contract except for necessaries, but is liable for his torts. (293 Mich. 148, 291 N.W. 255). Parents of minor under 18 living with parents are liable up to $2,500 for wilful or malicious destruction of property or injury to person by minor. (MCLA § 600.2913). Infant of 16 is bound by his contract for life or disability insurance, but not for note given for premium. (MCLA § 500.2205). Infant of 18 can receive and give discharge for life insurance or endowment benefits not exceeding $2,000 in any one year if contract or agreement specifies direct payment to minor. (MCLA § 500.2206).

Support by Parents.

Parents have joint and several obligations to support minor which may be enforced by minor, relative, guardian or government. (MCLA § 722.3). Support may include medical, dental, health care, child care and educational expenses. (MCLA § 722.3).

Ratification of Contracts.

Infant's contract is voidable, unless it could not possibly be for his benefit, in which case it is void. (31 Mich. 182). Infant cannot disaffirm executed contract during minority. (268 Mich. 317, 256 N.W. 449). If he disaffirms on attaining majority, he must restore what remains in his possession of the consideration received. (183 Mich. 157, 149 N.W. 985). If he has received the benefit of the contract, he must disaffirm with reasonable promptness after attaining majority. (75 Mich. 204, 42 N.W. 805). Infant ratifies contract by continuing to perform it after majority, or by any acknowledgment or act indicating intention to be bound, but is not estopped merely by silence. (109 Mich. 640, 67 N.W. 908). Infant may not disaffirm contract for goods or loan if it appears at trial that he willfully misrepresented his age and seller had no actual knowledge of his actual age, and if such misrepresentation was made in separate instrument signed by him and dated or is admitted in open court. (MCLA § 600.1403).

Actions.

Infants begin suit by conservator, next friend or guardian ad litem and defend suits by conservator, if any, otherwise by guardians ad litem or next friend. These are appointed by court on motion. Infants over 14 years of age may make their own selection. (Rule 2.201).

Next friend or guardian ad litem unnecessary in divorce suit by or against legally married minor, unless required by circuit court judge. (MCLA § 551.251).

Adoption.

See topic 14.01 Adoption.

Uniform Child Custody Jurisdiction Act in effect. (MCLA §§ 600.651-.673).

Uniform Gifts to Minors Act in effect. (MCLA §§ 554.521-.552). Age of majority under Act is 18.

Uniform Securities Ownership by Minors Act not adopted.

Termination of Parental Rights.

If child remains in foster care in temporary custody of court following review hearing or permanency planning hearing, child may be placed in permanent custody of court if court finds by clear and convincing evidence any one of following: (1) Child has been deserted as specified; (2) child or sibling of child suffered physical injury or physical or sexual abuse as specified; (3) 182 or more days after issuance of order in proceeding brought against parent by juvenile division of probate court, court finds that conditions which led to adjudication still exist and likely to continue; (4) child has been placed in limited guardianship and parent has substantially failed to comply with limited guardian placement plan; (5) child has guardian and parent has substantially failed to comply with court-structured plan; (6) child has guardian and parent having ability to do so fails to support or assist in supporting child or having ability to do so fails to visit, contact or communicate with child for two years; (7) parent fails to provide proper care or custody for child and conditions likely to continue; (8) parent imprisoned for period that child will be deprived of normal home for more than two years and conditions likely to continue; (9) parental rights to one or more siblings of child terminated due to serious and chronic neglect or physical or sexual abuse, and prior attempts to rehabilitate parents failed; (10) there is reasonable likelihood that child will be harmed if returned to parent; (11) parent abused child or sibling as specified; (12) parent rights have been terminated, by proceeding or voluntarily, in this or another state; (13) parent has been convicted of specified criminal acts. (MCLA § 712A.19b).

14.11 MARRIAGE:

Age of consent, males and females, 18 (MCLA § 551.103); marriage of female under 16 is void (MCLA § 551.51) unless performed pursuant to MCLA § 551.201. Same sex marriages prohibited. (MCLA §§ 551.3, .4; MI Const. Art. I, § 25).

Consent Required.

Consent of one parent or legal guardian required where either party under 18 years of age, unless person does not have living parent or guardian. Consent must be written and must be acknowledged in presence of county clerk or before notary public or other officer authorized to administer oaths. (MCLA § 551.103).

Medical Examination.

Requirement for medical examination prior to marriage repealed. Applicant for marriage license must acknowledge receipt, from county clerk, of educational materials regarding transmission and prevention of venereal disease, HIV and testing for same. (MCLA § 333.5119).

License.

License is required, issued by clerk of county where either party resides, or of county where ceremony to be performed where both parties nonresidents. (MCLA § 551.101). Application may be made by either party, who is required in practice to appear before clerk in person. (MCLA § 551.103). Three days must elapse between application and issuance of license unless county clerk authorizes immediate issuance of license. (MCLA § 551.103a). Probate judge can issue secret license under certain circumstances to protect reputation. (MCLA § 551.201). License void if marriage does not occur within 33 days after application. (MCLA § 551.103[a]).

Waiting Period.

None, except for three days between application and issuance of license. (MCLA § 551.103a).

Ceremonial Marriage.

Ceremony may be performed by district court judge or magistrate (in own district), judge of probate court (in own county), municipal judge (in own city or township), mayor (in county in which city located), county clerk (in own county), county clerk (in another county with written consent of that county's clerk), judge of federal court, minister of gospel who is pastor of church or continues to preach, or nonresident minister of gospel authorized to perform ceremony in own state. (MCLA § 551.7). Clergyman or magistrate performing marriage must certify on license, time and place of marriage, name and residence of two witnesses, who must be at least 18 years old, and sign his own name in certification that marriage has been performed by him. (MCLA § 551.104).

Reports of Marriages.

Clergyman or magistrate performing marriage returns original to county clerk who issued license within ten days after ceremony (MCLA § 551.104), who must file same and report to State Health Commissioner. (MCLA § 551.103).

Record.

See category 10 Documents and Records, topic 10.04 Records, subhead Vital Statistics.

Common Law Marriages.

Cannot be effectuated after Jan. 1, 1957. (MCLA § 551.2). As to local recognition of common law marriages outside this state, see subhead Foreign Marriages, infra.

Proxy marriages are not authorized.

Marriages by written contract are not authorized.

Prohibited Marriages.

Between first cousins or persons in nearer degrees of relationship or to specified relations of spouses; persons of same sex (MCLA §§ 551.3, .4); and marriage to female under 16 (MCLA § 551.51) unless performed pursuant to MCLA § 551.201.

Foreign Marriages.

Marriage, valid where contracted, valid in Michigan although it would be invalid if contracted here, unless contrary to public policy. (239 Mich. 455, 214 N.W. 428; 31 Mich. 126). Marriage of same sex individuals not valid. (MCLA § 551.1). Marriage of man and woman resident in state of Michigan but married in another State by authorized person valid in State of Michigan. (MCLA § 551.271).

Annulment.

Court may annul invalid marriage in proceeding for that purpose. (MCLA § 552.3). If parties under age of consent at time of marriage and separated permanently before reaching that age, or consent of party obtained by force or fraud (MCLA § 552.2), marriage void without decree. Except as cohabitation after age of consent affirms marriage, there is no specific statutory limitation on time for bringing action to avoid marriage for nonage. (MCLA § 552.34).

Antenuptial Contracts.

See topic 14.09 Husband and Wife.

14.12 MARRIED WOMEN:

See topics 14.09 Husband and Wife, Marriage; categories 5 Civil Actions and Procedure, topic Evidence, subhead Witnesses; Debtor and Creditor, topic Homesteads; Documents and Records, topic Acknowledgments; Estates and Trusts, topics Executors and Administrators, Wills; Property, topic Dower.

15 HEALTH

15.01 ABORTIONS:

Informed consent for abortion required. (MCLA § 333.17015). (See also MCLA § 333.17515 with respect to physician compliance.) 24-hour waiting period between woman's receipt of required information and actual performance of abortion required. (MCLA § 333.17015[3]). Written consent of one parent required for abortions performed on unemancipated minors unless probate court grants petition for waiver of parental consent. (MCLA §§ 722.901-.903).

15.02 ADMINISTRATION:

Public Health Code enumerates powers of Michigan Department of Public Health, including authority to safeguard public health. (MCLA § 333.2226). Director appointed by Governor (with legislative approval). (MCLA § 333.2202[1]). Public Health Advisory Council advises director on public health policies and programs. (MCLA §§ 333.2201-.2210). In 1996, by executive order, most duties and powers of Public Health Department, along with those of Department of Mental Health and Medical Services Administration, transferred to and consolidated into Michigan Department of Community Health. (MCLA § 330.3101). Michigan Municipal Health Facilities Act authorizes certain local governmental units to incorporate municipal health facilities corporations and subsidiary municipal health facilities. (MCLA §§ 333.1101-.1507).

15.03 DISEASES:

Chronic Diseases.

Department of Community Health must establish chronic disease prevention and control program. (MCLA §§ 333.5401-.5411).

Communicable Diseases.

Licensed health professional or health facility must report certain communicable diseases to state. (MCLA § 333.5111 et seq.). HIV test results indicating subject is HIV infected must be reported to local health department within seven days and are subject to strict confidentiality requirements. (MCLA §§ 333.5114, .5131). Specific consent for HIV testing required. (MCLA § 333.5133). Tests for venereal disease, HIV, and hepatitis B must be taken on pregnant woman during initial exam, unless woman does not consent. (MCLA § 333.5123). If applicant for marriage license undergoes HIV test, health professional must inform both applicants if HIV infected. (MCLA § 333.5119).

Occupational Diseases.

Physician, hospital, clinic, or employer with knowledge of person with occupational disease or condition aggravated by workplace must report such to Department of Community Health within ten days of discovery. (MCLA § 333.5611). See also category 11 Employment, topic 11.01 Labor Relations, subheads Occupational Safety and Health, Worker's Compensation Act and catchline Occupational Diseases.

15.03A DURABLE POWER OF ATTORNEY AND PATIENT ADVOCATE:

See category 21 Property, topic 21.15 Powers of Attorney. Individual 18 years of age or older who is of sound mind at time designation of patient advocate is made, may designate in writing another individual to exercise powers concerning care, custody, and medical treatment decisions, including making of anatomical gift, for individual making designation. (MCLA § 700.5506). Patient designation must be written, signed, witnessed, dated, executed voluntarily, and made part of medical record. (MCLA § 700.5506). Patient advocate authority exercised when patient unable to participate in medical treatment or, as applicable, mental health treatment decisions. (MCLA § 700.5508). Michigan has enacted Do-Not-Resuscitate Procedure Act. (MCLA §§ 333.1051-.1067).

15.04 [RESERVED]

15.05 FOOD, DRUGS, DEVICES AND COSMETICS:

No single food, drug, device and cosmetic Act exists in Michigan. Sale, production and service of food governed by Food Law of 2000. (MCLA §§ 289.1101-.8111). Michigan has adopted Grade A Milk Law of 2001 (MCLA §§ 288.471-.540) and Animal Industry Act (MCLA §§ 287.701-.747). Michigan's adoption of Uniform Controlled Substances Act is in effect. (MCLA §§ 333.7101-.7545). Pharmacy Practice and Drug Control Act at MCLA §§ 333.17701-.17780. FDA approval generally shields drug manufacturer from product liability actions. (MCLA § 600.2946). Certain new technology acquisitions in connection with FDA-regulated clinical trials subject to state certificate of need laws. (MCLA §§ 333.22241-.22243).

15.06 FRAUD AND ABUSE:

Health Care False Claim Act.

Submission of false claims to health insurers and offer or receipt of kickbacks related to services paid for by health insurers prohibited. (MCLA §§ 752.1001-.1011). Michigan has enacted Whistleblowers' Protection Act (MCLA §§ 15.361-.369) and Health Care Facility Whistleblower

Protection Act (MCLA § 333.20180).

Medicaid False Claim Act.

Fraud in obtaining of Medicaid benefits or payments in connection with medical assistance program prohibited. (MCLA §§ 400.601-.613). Private right of action exists to recover losses of state for violations, including protection for whistleblowers. (MCLA §§ 400.610a-.610c).

Physicians.

Fee splitting by physicians is misdemeanor and may subject violator to licensure action. (MCLA § 750.428). Division of fees for referrals and accepting kickbacks on medical services or items by licensed health professional is prohibited. (MCLA § 333.16221). Michigan incorporates by reference federal Stark Law. (MCLA § 333.16221). Solicitation of patients through employment of any solicitor, capper or drummer is misdemeanor. (MCLA § 750.429).

15.07 HEALTH INSURANCE BENEFITS:

All insurers must obtain certificate of authority. (MCLA § 500.402). Certain transactions for insurance do not require certificate of authority. (MCLA § 500.402b). Carriers (including health maintenance organizations and nonprofit health care corporations) offering health benefit plan to small employers (at least two, not more than 50 eligible employees) governed by MCLA §§ 500.3701-.3728. Insurers providing disability insurance governed by MCLA §§ 500.3400-.3480. Insurers providing Medicare supplement insurance policy governed by §§ 500.3801-.3861. Insurers providing workman's compensation insurance governed by MCLA §§ 500.2301-.2352.

Nonprofit Health Care Corporation Reform Act.

Health care corporations created under Act not subject to general insurance or corporate laws of state except as provided in Act. Such health care corporation must offer health care benefits to all residents of state. (MCLA §§ 550.1101-.1704).

Health Maintenance Organization.

Licensing provisions, powers, and operational requirements at MCLA §§ 500.3501-.3580.

15.08 LICENSURE AND CERTIFICATION:

Health Care Facilities.

Certificate of Need.

Required for acquisition of existing health facility, operation of health facility at site not currently licensed for that type of health facility; change in bed capacity of health facility; certain changes to covered clinical services; and certain capital expenditures. (MCLA § 333.22209).

Licensing.

Department of Community Health must establish system of licensure and certification for health facilities or agencies. (MCLA § 333.20131).

Free Standing Surgical Outpatient Facilities.

Powers, duties, and licensing governed by MCLA §§ 333.20801-.20821.

Hospices.

Licensure and owner duties governed by MCLA §§ 333.21401-.21421.

Clinical Laboratories.

Licensure and duties governed b MCLA §§ 333.20511-.20554.

Hospitals.

Licensure and duties governed by MCLA §§ 333.21501-.21571.

Nursing Homes.

Licensure and operations governed by MCLA §§ 333.21701-.21799e. Licensure and operations of ambulance operations governed by MCLA §§ 333.20920-.20979. Licensure and operation of homes for aged governed by MCLA §§ 333.21301-.21335.

Emergency Medical Services.

Licensure and operations governed by MCLA §§ 333.20901-.20979.

Managed Care Organizations.

Health Maintenance Organizations.

Commissioner of Insurance establishes system of authorizing and regulating HMOs and regulates health delivery and business and financial aspects of HMOs. Licensing provisions and operational requirements at MCLA §§ 500.3501-.3580. Certificate of authority required. (MCLA § 500.3505).

Professionals.

Department of Community Health may investigate activities related to practice of health profession by licensee or registrant. (MCLA § 333.16221). Numerous health care professionals require license, including but not limited to: Audiologists (MCLA § 333.16803); Chiropractors (MCLA § 333.16411); Dentists (MCLA § 333.16611); Nurses (MCLA § 333.17211); Nursing Home Administrator (MCLA § 333.17307); Optometrists (MCLA § 333.17411); Pharmacists (MCLA § 333.17711); Physicians (Medical) and Physicians' Assistants (MCLA § 333.17011); Physicians (Osteopathic) (MCLA § 333.17511); Physical Therapists (MCLA § 333.17820); Podiatrists (MCLA § 333.18111); Respiratory Therapists (MCLA § 333.18703); Psychologists (MCLA § 333.18211). Acupuncturists and Occupational Therapists must register. (MCLA § 333.16511).

15.09 LIVING WILLS:

See category 13 Estates and Trusts, topic 13.16 Wills, subhead Living Wills. Uniform Health Care Decisions Act not adopted.

15.10 ORGAN DONATIONS:

Michigan adopted Uniform Anatomical Gift Law. (MCLA §§ 333.10101-.10123).

15.10A PATIENTS' BILL OF RIGHTS:

Uniform Health-Care Information Act not adopted. Michigan has adopted Medical Records Access Act. (MCLA §§ 333.26261-.26271).

Patient Grievance Procedures.

Health facility or agency providing services directly to patients or residents and licensed in State of Michigan must adopt patients' or residents' rights and responsibilities for admitted patients or residents. (MCLA § 333.20201). Health facilities or agencies, except emergency medical facilities, must display pamphlet developed by Department of Consumer and Industry Services outlining procedure to file complaint. (MCLA § 333.20194).

15.11 [RESERVED]

15.12 PUBLIC HEALTH:

Michigan Medical Assistance Program (Medicaid) contained within Michigan Social Welfare Act. (MCLA § 400.105). Department of Community Health creates incentives for individual medical assistance recipients who practice specified positive health behaviors. (MCLA § 400.105b). Medicaid False Claim Act prohibits fraud in obtaining of benefits or payments in connection with medical assistance program. (MCLA § 400.601). Private right of action exists to recover from Medicaid fraud, including protection for whistleblowers. (MCLA §§ 400.610a-.610c). Department of Community Health supports Medicaid funds for specialty services and Medicaid beneficiaries through Medicaid specialty prepaid health plans. (MCLA § 400.109f).

15.13 SMOKING REGULATIONS:

Michigan Clean Indoor Air Act (MCLA §§ 333.12601-.12617) prohibits smoking in certain indoor facilities such as but not limited to child care centers and health facilities, and in public places and meeting of public bodies. (MCLA §§ 333.12603-.12604a). Selling, giving or furnishing cigarette, cigar, chewing tobacco, tobacco snuff, or tobacco in any other form to person under 18 years of age prohibited by law and punishable as misdemeanor. (MCLA § 722.641).

16 INSURANCE

16.01 INSURANCE COMPANIES:

Regulated by Insurance Code of 1956. (MCLA §§ 500.100-.8254).

Supervision.

Commissioner of Insurance has general supervision over all insurance and surety companies and their agents and has power to revoke licenses for cause. (MCLA §§ 500.200, .436). Treatment of nonpublic personal financial information regulated. (MCLA §§ 500.501-.547).

Policies.

Policy provisions and features extensively regulated by statute. Insurance contracts in general (MCLA §§ 500.2204-.2264a); automobile and home insurance (MCLA §§ 500.2101-.2131); life insurance (MCLA §§ 500.4000-.4073); industrial life insurance (MCLA §§ 500.4200-.4244); group life insurance (MCLA §§ 500.4400-.4454); fire insurance (MCLA §§ 500.2804-.2866); captive insurance companies (MCLA §§ 500.4601-.4747); protected cell insurance companies (MCLA §§ 500.4801-.4813); casualty insurance (MCLA §§ 500.3004-.3037); no-fault motor vehicle personal and property protection (MCLA §§ 500.3101-.3179); disability insurance (MCLA §§ 500.3400-.3475); group, blanket, and family expense disability insurance (MCLA §§ 500.3600-.3650); creditor placed insurance (MCLA §§ 500.1601-.1631); credit life and credit health and accident insurance (MCLA §§ 550.601-.624); health maintenance organizations (MCLA §§ 500.3501-.3580); small employer group health (MCLA §§ 500.3701-.3723); basic property insurance (MCLA §§ 500.2901-.2954); long term care (MCLA §§ 500.3901-.3955). With some exceptions, no basic policy form of contract may be used until filed with and approved by Commissioner. (MCLA § 500.2236).

Rates.

Surety and fidelity, casualty, liability, automobile, worker's compensation, title, malpractice, reciprocal, and personal property floater rates regulated by MCLA §§ 500.2400-.2484. Reinsurance (other than joint reinsurance), disability, aircraft, and exempt commercial insurance rates expressly excepted from regulation under these sections. (MCLA § 500.2401).

Fire, earthquake, lightning, wind and water, bombardment, explosion, burglary, theft, navigation, transit or transportation, personal property floater, precious stones, bridge, tunnel, pier, wharf, etc., automobile (limited), and inland navigation and transportation rates regulated by MCLA §§ 500.2600-.2674. Reinsurance (other than joint reinsurance) and marine (as distinguished from inland marine) rates expressly excepted from regulation under these sections. (MCLA §§ 500.2601, .2674).

Any insurer to which both rate regulatory chapters are applicable must file with Commissioner designation as to which rate regulatory chapter shall apply to it. (MCLA § 500.2401[4]).

Annual statements must be filed with Commissioner on or before Mar. 1 of each year, unless extension not exceeding 30 days granted for good cause shown. (MCLA § 500.438). Copy must be filed by Mar. 1 of each year with National Association of Insurance Commissioners. (MCLA § 500.438a).

Discrimination.

Discrimination in rates on life policy or life annuity between individuals of same class and equal life expectancy, or in rates on accident or health policy between individuals of same class and essentially same hazard, defined as unfair competition (MCLA §§ 500.2019, .2020), which may be subject of cease and desist order issued by Commissioner, imposition of fines, and suspension or revocation of license or authority (MCLA §§ 500.2038-.2041).

Requirements and limitations with respect to genetic testing for disability insurance policies. (MCLA § 500.3407b).

Cancellation.

Grounds for cancellation of policies of automobile liability insurance regulated by statute. (MCLA § 500.3220).

Rebates on life policies, life annuities, or accident and health policies defined as unfair competition (MCLA § 500.2024), which may be subject of cease and desist order issued by Commissioner (MCLA §§ 500.2038-.2041). For exceptions see MCLA §§ 500.2024a-b, .2025. Rebates on any type of insurance not specified in insurance contract forbidden, and violation results in revocation of certificate of authority or license. (MCLA §§ 500.2066, .2068). Criminal penalties also provided. (MCLA §§ 500.2069, .2070).

Liens.

Domestic cooperative plan insurer’s assessment becomes lien. (MCLA § 500.6440). Provisions for lien on loss to real property upon final settlement (MCLA §§ 500.2227, .2845) and for liens during supervision, rehabilitation, or liquidation of foreign or alien insurer (MCLA § 500.8192).

Agents and Solicitors.

Are subject to licensing (MCLA §§ 500.1200-.1247) including examination and continuing education requirements (MCLA §§ 500.1204, .1205, .1214), for which $10 fee is charged, and annual license fees, $5 for agents and $10 for solicitors (MCLA § 500.240).

Process Agent.

Every foreign company, as condition precedent to doing business in state, must file with Commissioner irrevocable written stipulation that any legal process affecting company, served on Commissioner or his deputies, shall have same effect as if personally served upon company. Fee for service on Commissioner $10, payable at time of service. Appointment remains in force as long as any liability remains within Michigan. (MCLA § 500.456). In cases of false advertising within state by foreign insurer, transaction of any insurance business with residents of state constitutes Commissioner agent of foreign insurer for service of charges, notices and process. (MCLA § 500.2093).

Investments.

Regulated by statute. (MCLA §§ 500.901-.947).

Foreign Insurance Companies.

No foreign insurance company may do business in Michigan if its corporate purposes exceed those permitted Michigan companies. Foreign insurer licensed to transact business of life insurance in state continuously since Jan. 1, 1921 may continue to transact kinds of insurance business it was authorized to transact in state immediately before Jan. 1, 1941. For purpose of obtaining admission or renewal of authority, foreign insurer may by proper corporate action limit its powers as to Michigan business. (MCLA § 500.406). Foreign insurer must file with Commissioner of Insurance application accompanied by certified copies of charter and by-laws, together with sworn statement of business affairs up to any date required by Commissioner and any other information which Commissioner may demand. (MCLA § 500.424). If application approved, Commissioner issues certificate of authority to applicant, which remains in force until terminated by insurer or revoked by Commissioner. (MCLA § 500.435).

Capital and Assets.

Foreign companies subject to same requirements concerning financial condition as domestic companies. (MCLA § 500.404).

Supervision.

Commissioner has powers of supervision and examination over foreign insurance companies to same extent as over domestic companies. (MCLA § 500.222).

Agents and solicitors must be licensed. (MCLA § 500.1201a). Detailed licensing procedure provided by statute. (MCLA §§ 500.1204-.1247). With few statutory exceptions, only agent may solicit insurance or bind coverage. (MCLA § 500.1201a).

Deposits.

No domestic foreign or alien insurer may transact business within state until deposits specified by statute have been made with State Treasurer. (MCLA § 500.411). Any alien insurance company must have on deposit with State Treasurer, or some other state officer of U.S., or trustees for benefit of policyholders resident in U.S., cash or securities in which such company is authorized to invest in amount not less than amount of liabilities of insurer in U.S. (MCLA § 500.411).

Revocation of Authority.

Commissioner may suspend, revoke or limit certificate of authority of insurer upon finding of certain enumerated statutory conditions. (MCLA § 500.436).

Retaliatory Law.

Michigan imposes on companies of other states which treat foreign companies less liberally than does Michigan the same taxes, fees, penalties, requirements as to deposits and other burdens that such states impose on Michigan companies. (MCLA § 500.476a-.476b).

Privilege tax.—None imposed on authorized insurers. Unauthorized insurer subject to 2% premium tax plus ½% regulation fee. (MCLA § 500.451).

Premium tax.—Under Michigan Business Tax Act, insurance companies, except captive insurance companies, subject to tax equal to 1.25% of gross direct premiums. (MCLA § 208.1235). See category 22 Taxation, topic 22.03 Business Taxes, subhead Michigan Business Tax.

No-Fault Insurance.

See category 23 Transportation, topic 23.01 Motor Vehicles.

Plain Language.

See category 3 Business Regulation and Commerce, topic 3.12 Consumer Protection.

16.02 SURETY AND GUARANTY COMPANIES:

Organization.

Regulated under Insurance Code of 1956 (MCLA §§ 500.100-.8254), which requires at least 13 incorporators, a capital stock of at least $250,000, and deposit of approved securities of value of at least $300,000 with State Treasurer (MCLA §§ 500.408, .410-.411, .5006). Additional requirements imposed. (MCLA § 500.410a).

Authority.

Person required to furnish bond may use any authorized surety so long as amount is within surety’s risk limitation under MCLA § 500.640. (MCLA § 500.121).

Mutual Companies.

Reorganization of mutual companies governed by statute. (MCLA §§ 500.6001-.6031).

Foreign Companies.

May be admitted to do business in state if authorized under laws of state of incorporation and under charter to perform specified functions of surety or guarantor. Must meet same financial requirements applicable to domestic insurers (MCLA § 500.404, .424) and must appoint agent for service of process (MCLA § 500.456). Commissioner of Insurance irrevocably appointed agent to receive process in any action on surety bond in U.S. District Court. (MCLA § 500.456[3]).

17 INTELLECTUAL PROPERTY

17.01 TRADEMARKS AND TRADENAMES:

Any individual, firm, partnership, corporation, association, union or other organization may adopt and use trademarks in this state. (MCLA § 429.31).

What May Be Used.

Any word, name, symbol, device or combination thereof adopted and used to identify and distinguish goods or services constitutes trademark or service mark. (MCLA § 429.31). Marks unregistrable if: (a) Immoral, deceptive or scandalous; (b) may disparage or falsely suggest connection with persons (living or dead), institutions, beliefs or national symbols; (c) use flag, coat of arms or other insignia of U.S., any foreign nation, or any state or municipality; (d) use name, signature or portrait of any living person except with his written consent; (e) merely descriptive, deceptively misdescriptive, primarily geographically descriptive or primarily merely surname (unless mark has acquired actual distinctiveness); or (f) likely to cause confusion with trademark registered in Michigan or trademark or tradename previously used in Michigan and not abandoned. (MCLA § 429.32).

Registration.

Application filed with director of commerce with two specimens or facsimiles of trademark. Fee $50. (MCLA § 429.33). Registration according to general classes of goods and services. (MCLA § 429.40). Registration effective for ten years; renewable for successive ten-year periods by application filed within six months before expiration. Renewal fee $25. (MCLA § 429.35).

Assignment.

Trademark and registration assignable in writing with business's good will or with part of business's good will connected with trademark use. Assignment recorded with director of commerce. Fee $15. (MCLA § 429.36).

Protection Afforded.

Registrant protected against subsequent registration of same or similar trademark likely to cause confusion when applied to goods of subsequent applicant. (MCLA § 429.32[f]). See also subhead Infringement, infra.

Infringement.

Infringement is using or counterfeiting registered mark for goods or services. Mark owner may enjoin infringement and recover damages and profits from infringer. (MCLA §§ 429.42-.43). Owner may enjoin printing infringing matter; damages and profits if printer knows intended to cause confusion. (MCLA § 429.43). Additional criminal penalties for willful infringement: (1) Infringement with intent to deceive or defraud is misdemeanor; (2) distributing or advertising is misdemeanor, or felony if: (i) repeat infringer, (ii) more than 100 items, or (iii) more than $1,000; (3) manufacturing infringing goods is felony. (MCLA § 750.263). Common law rights and remedies not affected by act. (MCLA § 429.44).

Tradenames.

Any person, partnership or trust or other entity using assumed name must execute, acknowledge and file certificate identifying person using assumed name, including full name and current address (fee $6) with clerk of business's county. (MCLA §§ 445.1-.5). Failure to file certificate is misdemeanor and prevents bringing action on contracts made under assumed name until compliance with statute. (MCLA § 445.5). See category 2 Business Organizations, topic 2.08 Partnerships.

17.02 TRADE SECRETS:

Uniform Trade Secrets Act (1985, adopted 1998). (MCLA §§ 445.1901-.1910). Insignificant variations from uniform provisions.

Misappropriation of trade secrets civilly actionable for monetary and injunctive relief. Trade secret is formula, pattern, device or compilation of information used in business, kept secret by owner and affording owner business advantage over competitors. Courts determining whether trade secret exists consider: (1) extent known within relevant business; (2) extent known by employees and others outside business; (3) measures guarding secrecy; (4) value to owner and competitors; (5) effort or money expended to develop alleged secret; and (6) ease of acquisition or duplication. (421 Mich. 170; 364 N.W.2d 609).

Trade secrets voluntarily provided to public body and used to develop governmental policy may be exempt from disclosure under Michigan Freedom of Information Act if promise of confidentiality given. (MCLA § 15.243[1][f][i]-[iii]).

Trade secret confidentiality may be specially protected during investigations or proceedings connected with Occupational Safety and Health Act (MCLA § 408.1063); Dept. of Public Health's occupational disease oversight (MCLA § 333.5613); Commissioner of Insurance's administration of Nonprofit Health Care Corporation Reform Act (MCLA § 550.1604); and Dept. of Natural Resources hazardous waste regulation (MCLA § 324.11129).

18 LEGAL PROFESSION

18.01 ATTORNEYS AND COUNSELORS:

All attorneys are members of State Bar of Michigan (integrated) organized under Supreme Court rules. (MCLA § 600.901).

It is not necessary to file a warrant of attorney to authorize an attorney to appear in court for either party to an action.

Jurisdiction Over Admissions.

Applicants certified by board of law examiners are admitted on motion by Supreme Court or any circuit court. (MCLA § 600.910).

Eligibility.

To be qualified for admission, good moral character, age of 18 years, required general and legal education, fitness and ability and intention in good faith to practice or teach must be proven to law examiners. (MCLA §§ 600.934, .937).

Registration as law student not required.

Educational Requirements.

Completion of two years of study entitling applicant to admission to junior class of accredited college in state authorized to confer collegiate degrees and graduation from a reputable and qualified law school in U.S. or territories. (MCLA §§ 600.937, .940).

Petition for Admission.

Applicants are admitted upon issuance of certificate of qualification by board of law examiners and on motion made in open court. (MCLA §§ 600.910, .925; Rule 16, Supreme Court Rules Concerning the State Bar of Michigan).

Examination.

Board of law examiners conducts examination usually in Feb. and July of each year. Fee of $300 for examination, $200 for reexamination or recertification, or $600 for admission without examination. (MCLA § 600.931).

Multi-state bar examination is utilized. (MCLA § 600.934). Essay examination selected by board of law examiners may also be used. State accepts transfer of multi-state scores from other jurisdictions for test administered within three years immediately preceding multi-state bar examination in Michigan for which person would otherwise sit. Transfer of scores accepted only if person otherwise meets all requirements for admission to Michigan State Bar, person earns passing grades on examination, and state or territory from which person wishes score to be transferred accords reciprocal right to elect to use score achieved on multi-state examination administered in Michigan. (MCLA § 600.934).

Clerkship is not required.

Admission Without Examination.

An attorney admitted to practice in highest court of, and engaged in actual practice or teaching of law in, another state for three of the five years preceding application may be admitted without examination if approved as to character and education by board of law examiners. Legal practice in armed services qualifies as actual practice. (MCLA § 600.946).

Admission Pro Hac Vice.

Practicing attorney from another state may be admitted on motion to try a certain case. (MCLA § 600.916). No statutory provision for association with local attorney.

Licenses.

Any active member of State Bar of Michigan is licensed to practice. (MCLA § 600.901). Annual dues for active members are $260, except dues for member admitted between Apr. 1 and Sept. 30 are $130 for fiscal year of admission. (Rule 4, Supreme Court Rules Concerning the State Bar of Michigan).

Privileges.

Members of state bar officers of courts of Michigan, have exclusive right to designate themselves “attorneys and counselors” or “attorneys at law” or “lawyers” (MCLA § 600.901), may practice law before any Michigan court and have exclusive privilege to become judges of courts of record (Const., Art. VI, § 19).

Disabilities.

Practicing attorney cannot become surety or post bond for client in criminal or civil matter, except fiduciary’s bond of $100 or less filed in probate court. (MCLA § 600.2665).

Liabilities.

An attorney has duty to exercise reasonable skill, fidelity and care in the discharge of his professional tasks (37 Mich. 14), and is liable to his client for negligent performance of duties (132 Mich. 294, 93 N.W. 617). See category 5 Civil Actions and Procedure, topic 5.08 Costs.

Compensation.

Compensation is left to express or implied agreement of parties subject to regulation by Supreme Court. (MCLA § 600.919; MRPC 1.5). No requirement for filing contingent fee agreement.

Lien.

An attorney has general lien on all moneys and papers of his client which have come into his possession. (56 Mich. 135, 22 N.W. 222). He has also lien on judgment he recovers for his client (40 Mich. 218), although he cannot prevent his client from settling or discontinuing suit (103 Mich. 190, 61 N.W. 343). However, where other party has notice that attorney is to receive a certain per cent of recovery for his services, he should retain sufficient money to pay plaintiff’s attorney his share. (73 Mich. 256, 41 N.W. 269).

Attorney Ethics.

American Bar Association Model Rules of Professional Conduct adopted with modification. (MRPC 1.0 et seq.).

Disbarment or Suspension.

Governed by rules of Supreme Court. (MCLA § 600.904, .910). See Supreme Court Rules Concerning the State Bar of Michigan.

Unauthorized Practice.

Persons not regularly licensed and authorized are prohibited from practicing law in Michigan. (MCLA § 600.916; Rule 16, Supreme Court Rules Concerning the State Bar of Michigan).

Mandatory continuing legal education requirement for newly admitted lawyers was discontinued by order rescinding Rule 17, Supreme Court Rules Concerning the State Bar of Michigan effective Apr. 1, 1994, with direction that requirement applicable to all attorneys shall be reconsidered.

Specialty certification requirements are not required.

Professional Association (or Corporation).

See category 2 Business Organizations, topic 2.03 Corporations, subhead Professional Corporations.

19 MINERAL, WATER AND FISHING RIGHTS

19.01 MINES AND MINERALS:

Coal and metallic mining are regulated, supervised and inspected by department of environmental quality. (MCLA §§ 324.63501-.63549; 324.63101-.63306).

Operation of Mines.

See subhead Safeguarding of Employees, infra.

Safeguarding of Employees.

Inspector of copper and iron mines has authority to condemn any such mine where employees are in danger from any cause. (MCLA § 425.108).

Inspection of Mines.

See subhead Safeguarding of Employees, supra.

Oil and Gas.

Director of department of environmental quality is supervisor of oil and gas wells. (MCLA § 324.61505). Permit is required to drill or deepen wells, including key wells for secondary recovery. (MCLA § 324.61525). Supervisor may require filing of drilling log, well samples and drilling and production reports, which are confidential for 90 days. (MCLA § 324.61506).

Spacing of wells (MCLA § 324.61506) and production to prevent waste (MCLA § 324.61513) are regulated. If oil wells and test holes are not cased, plugged or repaired in accordance with statute or regulations, commissioner may do so at owner’s expense. (MCLA § 324.61519). In certain circumstances commissioner may order unit operation of unit area. (MCLA

§ 324.61704).

All unpatented overflowed lands, made lands, and Lake St. Clair lake bottom lands belonging to or held in trust for state are subject to lease for removal of oil and gas. State Department of Natural Resources is empowered to enter into such leases. (MCLA § 324.33901). Supervisor of wells has jurisdiction over administration and enforcement of all matters relating to prevention of waste and conservation of oil and gas. (MCLA § 324.61505). Covenants may be implied in oil and gas leases whether such leases contain special covenants or not. (MCLA § 565.5). Any interested lessee may file petition with supervisor of wells requesting order for unit operation of pool. (MCLA § 324.61703). However, no lessee is chargeable with more than amount of unit expense charged to his interest pursuant to plan of unitization. (MCLA § 324.61719).

Taxes.

Severance tax of 5% of gross cash market value of total production of gas and 6.6% of gross market value of oil is reported and paid monthly (MCLA §§ 205.301-.315), plus fee not to exceed 1% of gross cash market value to cover regulation costs of oil and gas wells (MCLA § 324.61524).

Low grade iron ore, low grade iron ore mining property and rights to minerals are subject to specific tax in lieu of certain other taxes. (MCLA §§ 211.621-.625). Underground beneficiated iron ore, underground agglomerated iron ore and related property are also subject to specific tax. (MCLA §§ 207.271-.279).

Mechanic's liens on oil and gas properties. See category 8 Debtor and Creditor, topic 8.13 Liens, subhead Mechanic's and Construction Liens.

20 MORTGAGES

20.01 CHATTEL MORTGAGES:

Uniform Commercial Code adopted with 1972 Official Amendments. (MCLA §§ 440.1101-.11102). See category 3 Business Regulation and Commerce, topic 3.09 Commercial Code.

Filing.

Uniform Commercial Code governs. (MCLA §§ 440.9301, .9303, .9305-.9307, .9316, .9317, .9323, .9334, .9337, .9501-.9526).

In UCC § 9-334, Michigan act omits subsection (j). (MCLA § 440.9334).

In UCC § 9-501(a)(2), and 501(b), Michigan act substitutes in first sentence "secretary of state" for bracketed materials. (MCLA §§ 440.9501[1][b],.9501[2]).

Michigan act also adds subsection (3) to UCC § 9-501 providing for recording of financing statements (and related continuation statements, terminations statements, amendments and assignment) in real estate records notwithstanding failure to comply with formal requisites for documents to be recorded under real estate law. (MCLA § 440.9501[3]).

In UCC § 9-502(b)(2), Michigan act substitutes "recorded" for "filed [for record]". (MCLA § 440.9502[2][b]).

In UCC § 9-512(a), Michigan act elects second alternative, uses phrase "filed or recorded", and deletes "[and time]" following "date". (MCLA § 440.9512[1]).

In UCC § 9-516(b)(3)(D), Michigan act uses “filed or recorded”. (MCLA § 440.9516[2][c][iv]).

In UCC § 9-518(b), Michigan act elects second alternative, uses phrase “filed or recorded”, and deletes “[and time]” following “date”. (MCLA § 440.9518[2]).

In UCC § 9-519(f), Michigan act elects second alternative, uses phrase “filed or recorded”, and deletes “[and time]” following “date”. (MCLA § 440.9519[6]).

Michigan act also adopts subsection (i) to UCC § 9-519. (MCLA § 440.9519[9]).

In UCC § 9-522(a), Michigan act elects second alternative, uses phrase “filed or recorded”, and deletes “[and time]” following “date”. (MCLA § 440.9522[1]).

In UCC § 9-523(d), Michigan act replaces second sentence with “However, if requested, the filing office shall communicate information by issuing its written certificate or another record that can be admitted into evidence in the courts of the state without extrinsic evidence of its authenticity.” (MCLA § 440.9523[4]).

Michigan act, in UCC § 9-523(f), substitutes “At least weekly, at the record rate under section 9525, the filing office”: for “At least weekly, the [insert appropriate official or governmental agency] [filing office]”. (MCLA § 440.9523[6]).

Fee for filing original financing statement, continuation statement, termination statement, amendment or assignment: $15, but no fee required for correction statement filed by individual debtor. (MCLA §§ 440.9525[1], [3], [4[).

Taxation.

No specific provision. See category 22 Taxation, topic 22.15A Real and Personal Property Taxes.

Forms.

Forms at end of this Digest have been approved by Secretary of State, printed by him on 8½” x 11” paper, and are available upon request. Two copies should be submitted to Secretary of State. Secretary of State will accept typed versions of Financing Statement and Continuation Statement without additional fee. For convenience in handling, Secretary of State would prefer to have typewritten statements on paper 11” high by 8.5” wide. If not in this form, Financing Statements are nonetheless acceptable. For filing fees for standard and nonstandard forms, see subhead Filing, supra.

20.02 COLLATERAL SECURITY:

See category 8 Debtor and Creditor, topic 8.15 Pledges.

20.03 MORTGAGES OF PERSONAL PROPERTY:

See topic 20.01 Chattel Mortgages.

20.04 MORTGAGES OF REAL PROPERTY:

Mortgage creates a lien only and confers no title until foreclosure sale (302 Mich. 666, 5 N.W.2d 524), and, except as provided by statute (see subhead Rents and Profits, infra), no right to possession or to rents and profits until expiration of period of redemption (MCLA § 600.2932[2]; 278 Mich. 457, 270 N.W. 748). Although absolute in form a deed given to secure payment of a debt may be construed as an equitable mortgage (324 Mich. 583; 37 N.W.2d 558), even though intended conditional defeasance rests only in parol (289 Mich. 577; 286 N.W. 835).

Where mortgage provides for escrow of taxes, insurance or cost of improvements, mortgagee must account annually to mortgagor on status of escrow fund. (MCLA §§ 565.161-.162).

Execution.

Requirements are same as for deed. See categories 10 Documents and Records, topic Records; Property, topic Deeds.

Recording is not necessary to validity as between parties, but unless recorded in county where land lies, mortgage is void as against subsequent purchaser or mortgagee in good faith for value whose conveyance or mortgage is first recorded. (MCLA § 565.29). Also see category 10 Documents and Records, topic 10.04 Records.

Recording Fees.

See category 10 Documents and Records, topic 10.04 Records.

Taxes.

See category 22 Taxation, topic 22.15A Real and Personal Property Taxes.

Trust deeds are not in common use.

Trust Mortgage.

Mortgage may be made to a trustee to secure payment of bonds or other obligations. Trust indenture defines rights of bondholders and duties and powers of trustee with respect to default, foreclosure, purchase at foreclosure sale, and management and disposition of foreclosed property. Court may authorize trustee to purchase at foreclosure sale, manage and sell property. (MCLA §§ 451.402 et seq.; MCLA § 600.3170). Personnel and activities of bondholders protective committees are regulated by Corporation and Securities Commission. (MCLA §§ 451.302 et seq.).

Rents and Profits.

Statutory provisions authorize assignment of rents and profits of mortgaged property, enforceable upon default and prior to expiration of redemption period in connection with mortgages of certain commercial or industrial property (MCLA §§ 554.231 et seq.; 362 Mich. 114, 106 N.W.2d 515) and certain trust mortgages (MCLA §§ 554.211 et seq.).

Future Advances.

Mortgage may cover future advances, subject to intervening rights of third persons. (253 Mich. 557, 235 N.W. 252). See subhead Priorities, infra.

Priorities of mortgages depend on order of recording, except as expressly subordinated (249 Mich. 89, 227 N.W. 674), or affected by notice (280 Mich. 335, 273 N.W. 589), estopped (262 Mich. 394, 247 N.W. 702), or equities in favor of purchase-money mortgagee (253 Mich. 51, 234 N.W. 113). Future Advance statute enacted effective Apr. 1, 1991. Future advance mortgage securing future advance has priority with respect to such future advance as if future advance made at time future advance mortgage recorded after Apr. 1, 1991 except to extent priority governed by construction lien act or tax lien act. (MCLA §§ 565.901-.906). Priority statute does not apply to residential future advance mortgages unless mortgage contains statement as to its maximum principal amount and statement that “This is a future advance mortgage”, both set forth in conspicuous manner on first page of mortgage or amendment. (MCLA § 565.903a).

Subordination Agreements.

Priority of mortgage may be waived in writing on mortgage or by separate instrument witnessed and acknowledged as deed, and when recorded is notice to all persons dealing with mortgage (MCLA § 565.391).

Assignment.

Provision is made for recording assignments of mortgages, but record is not notice to mortgagor. (MCLA § 565.33). Assignment of mortgage is nullity unless accompanied by assignment of debt secured by mortgage. (302 Mich. 666, 5 N.W.2d 524). Assignment of mortgage note carries equitable ownership of mortgage. (276 Mich. 267, 267 N.W. 829).

Duration of Lien.

Mortgage considered discharged of record unless renewed within 30 years from due date by recorded extension agreement or affidavit of owner showing amount unpaid (MCLA § 565.382); and may not be foreclosed by advertisement (284 Mich. 417, 279 N.W. 884).

Release.

Part of mortgaged property may be released from lien of mortgage. Mortgage may incorporate clause providing for such part release on agreed terms and such clause runs with land. (244 Mich. 403, 221 N.W. 322).

Satisfaction.

Mortgage discharged of record upon presentation to register of deeds of certificate of circuit judge, mortgagee or his personal representative or assignee certifying mortgage paid, satisfied and/or discharged. (MCLA § 565.42).

Foreclosure by Court Action.

Mortgage may be foreclosed by action in circuit court, in which case court may order sale after six months from filing of complaint, property being sold by circuit court commissioner or other person appointed by court at public auction to highest bidder. (MCLA §§ 600.3101-.3130). Mortgagor and those claiming under him have six months from time of sale within which to redeem. (MCLA § 600.3140). See also subhead Deficiency Judgments, infra.

Foreclosure by Advertisement.

If mortgage contains power of sale, may be foreclosed by advertisement by publishing notice for four successive weeks, at least once a week, in newspaper of county, that mortgage will be foreclosed by sale of premises. If foreclosing party not original mortgagee, record must include all assignments made. Within 15 days after first publication, copy must be posted on premises. Sale must be at public auction to highest bidder. Mortgagor or those claiming under him have one year after sale within which to redeem, except: (1) Redemption period six months in case of mortgage executed on or after Jan. 1, 1965 on commercial or industrial property or multi-family residential property exceeding four units, or in case of mortgage executed on or after Jan. 1, 1965 on residential property not exceeding four units and not more than three acres in size where amount claimed due at date of foreclosure notice is more than two-thirds of original indebtedness secured; and (2) redemption period three months in case of mortgage on residential property not exceeding four units and not more than three acres in size if amount claimed due at date of foreclosure notice more than two-thirds of original indebtedness secured and property abandoned. (MCLA §§ 600.3201-.3280).

For principal residence, where first notice of default sent after July 5, 2009 and on or before July 5, 2011, in addition to restrictions and procedures described above, foreclosing party may not commence foreclosure by advertisement until: (i) It provides detailed and extensive notice complying with statutory requirements and identifying statutory relief rights granted to borrower; (ii) time expired for borrower's right to meet with housing counselor and housing counselor or borrower have not requested meeting with mortgage holder's agent; (iii) mortgage holder meets with borrower if requested; and (iv) borrower defaults under any mortgage modification agreement agreed to by borrower and mortgage holder. (MCLA §§ 600.3204[4], .3205a, .3205b, .3205c, .3205[d]). Mortgage holder must publish notice of borrower's statutory rights before commencing foreclosure. (MCLA § 600.3205a[4]). Borrower with housing-related debt in excess of 38% of gross income entitled to modification of mortgage loan, and mortgage holder precluded from foreclosing by advertisement where borrower entitled to modification unless mortgage holder offered modification and borrower failed to accept within prescribed time. (MCLA §§ 600.3205c[7], .3204[f]).

Sales.

See subheads Foreclosure by Court Action, and Foreclosure by Advertisement, supra.

Deficiency Judgments.

Foreclosure is the only remedy of mortgagee unless mortgage or separate instrument contains a promise to pay sum secured. (MCLA § 565.6). On foreclosure by court action, judgment determines personal liability, if any, and execution issues for deficiency established on sale, but court may fix minimum price for which property may be sold. (MCLA §§ 600.3150-.3155). On foreclosure by advertisement action lies for deficiency against those personally liable, but defendant may plead that sale was for less than true value, and judgment is only for difference between mortgage debt and true value. (MCLA § 600.3280).

Moratorium.

None in effect.

Redemption.

For redemption periods see subheads Foreclosure by Court Action, and Foreclosure by Advertisement, supra. Mortgagor, any person lawfully claiming under him, or his personal representative may redeem during period by paying to purchaser at foreclosure sale, his personal representative or assignee or to register of deeds, amount bid at sale plus interest, fee of $5 and, where added by affidavits conforming to statutory requirements, certain sums advanced by mortgagee after foreclosure sale in payment of property taxes and insurance premiums. (MCLA §§ 600.3140, .3145, .3240).

Forms.

Following forms are in common use:

Forms

Mortgage:

This Mortgage, Made the . . . . . . day of . . . . . . in the year . . . . . by . . . . . . mortgagor . . . ., whose address is . . . . . ., unto . . . . . . mortgagee . . . ., whose address is . . . ., Witnesseth, That the said mortgagor . . . ., in consideration of the sum of . . . . . . dollars, the receipt of which is acknowledged, and for the purpose of securing the repayment of the said sum, with interest, as herein after provided, and the performance of the covenants hereinafter contained, hereby mortgage . . . . and warrant . . . . unto the said mortgagee, ... heirs and assigns, the lands, premises and property situated in the . . . . . . of . . . . . . County of . . . . . . and State of Michigan, described as follows, to wit: . . . . . . Together with the tenements, hereditaments and appurtenances thereof.

And the said . . . . . . mortgagor . . . . for . . . .self. . . ., ...heirs, executors and administrators, hereby covenant. . . . with the said mortgagee . . . . ., ... legal representatives and assigns, as follows:

First. Said mortgagor . . . . will pay to the said mortgagee . . . ., ... legal representatives and assigns, the said sum of . . . . . . dollars . . . . . . with interest thereon at the rate of . . . .% per annum, payable semi-annually, on the first days of . . . . . . and . . . . . . of each year, until the full payment of said principal sum, according to the terms of . . . . . . bearing even date herewith, executed by . . . . . . to the said mortgagee . . . ., and will pay interest at the rate of . . . .% per annum, semi-annually, upon all overdue interest or principal from the time of its maturity.

Second. The said mortgagor . . . ., within forty days after the same become due and payable, will pay all taxes and assessments which shall be levied upon the said lands, or upon the interest or estate in said lands created or represented by this mortgage, or by said indebtedness, whether levied against the said mortgagor . . . ., ... legal representatives or assigns, or otherwise; and, also, the said mortgagor . . . ., within forty days after the same become due and payable, will pay all taxes and assessments which shall be levied on account of this mortgage or the indebtedness secured thereby; provided, however, that the total amount so paid for taxes on said mortgage or indebtedness, together with the interest payable on said indebtedness, shall not exceed 7% per annum; and said mortgagor . . . . hereby waive . . . . any and all claim or right against said mortgagee . . . ., ... legal representatives or assigns, to any payment or rebate on, or offset against, the interest or principal of said mortgage debt by reason of the payment of any of the aforesaid taxes or assessments.

Third. The said mortgagor . . . . will also keep all buildings erected and to be erected upon said lands insured against loss and damage by fire, with insurers, and to an amount, approved by the mortgagee . . . . as a further security to said mortgage debt, and assign and deliver to the mortgagee. . . . all insurance upon said property.

Fourth. If said mortgagor . . . . make . . . . default in the payment of any of the aforesaid taxes or assessments, or in procuring and maintaining insurance, as above covenanted, said mortgagee . . . ., ... legal representatives or assigns, may pay such taxes and effect such insurance, and the sums so paid shall be a further lien on said premises under this mortgage, payable forthwith, with interest at the rate of . . . .% per annum.

Fifth. Should default be made in the payment of said principal, or interest, or taxes, or insurance premiums, or any part thereof, when the same are payable as above provided, and should the same, or any part thereof, remain unpaid for the period of thirty days, then the aforesaid principal sum, with all arrearages of interest, taxes and insurance premiums, shall, at the option of said mortgagee . . . ., ... legal representatives and assigns, become payable immediately thereafter, although the period above limited for the payment thereof shall not then have expired, anything hereinbefore contained to the contrary thereof in anywise notwithstanding.

Sixth. Said mortgagor . . . . shall pay to said mortgagee . . . ., ... legal representatives and assigns, the sum of . . . . . . dollars as a reasonable attorney's fee, in addition to all other legal costs, as often as any proceeding is taken in equity to foreclose this mortgage for default in any of its covenants, which sum shall be an additional lien on said premises.

Seventh. All the aforesaid covenants shall run with the land.

Eighth. Upon default being made in any of the aforesaid covenants, the said mortgagee

. . . ., ... legal representatives and assigns, are hereby authorized and empowered to grant, bargain and sell, release and convey the said premises, property and appurtenances, at public vendue, and to execute and deliver to the purchasers at such sale good and sufficient deeds of conveyance in law, pursuant to the statute in such case made and provided, rendering any surplus moneys, after payment of the moneys due hereon, the attorney fee provided by law, and the costs and charges of such vendue and sale, to the said mortgagor . . . ., ... heirs, legal representatives and assigns.

In Witness Whereof, The said mortgagor . . . . ha. . . . hereunto set . . . . . . hand . . . . and seal . . . . the day and year first above written.

. . . .(L. S.)

. . . .(L. S.)

Signed, sealed and de-

livered in presence of

. . . .

. . . .

(Acknowledgment).

(name and address of draftsman)

Assignment of Mortgage: Know All Men By These Presents, That . . . . . ., whose address is . . . . . ., part . . . . of the first part, for and in consideration of the sum of . . . . . . Dollars, lawful money of the United States of America, to . . . . . . in hand paid by . . . . . ., whose address is . . . . . ., part . . . . of the second part, the receipt whereof is hereby acknowledged, ha . . . . sold, assigned and transferred, and hereby do. . . . sell, assign and transfer to the said part . . . . of the second part, all the right, title, and interest of the said part . . . . of the first part in and to a certain Real Estate Mortgage dated the . . . . . . day of . . . . . . in the year nineteen hundred . . . . . . made by . . . . . . to . . . . . . and recorded in the Register's Office of the County of . . . . . ., State of Michigan, in Liber . . . . of Mortgages, on page . . . .

Signed, sealed, and delivered the . . . . day of . . . . . . A. D. . . . .

. . . .(L. S.).

. . . .(L. S.).

In presence of

. . . .

. . . .

(Acknowledgment).

(name and address of draftsman)

Release of Part of Mortgaged Premises: This Indenture, made this . . . . . . day of . . . . . . in the year one thousand nine hundred and . . . . . . Between . . . . . ., whose address is . . . . . ., part . . . . of the first part, and . . . . . ., whose address is . . . . . ., part . . . . of the second part; Witnesseth:

Whereas, ... by indenture of mortgage, bearing date the . . . . . . day of . . . . . . one thousand nine hundred and . . . . . . for the consideration therein mentioned and to secure the payment of the money therein specified, did convey certain lands and tenements of which the lands hereinafter described are part, unto . . . . . ., which said mortgage was recorded in the office of the Register of Deeds, for the County of . . . . . ., State of Michigan, in Liber . . . . of mortgages, at page . . . . . .,

And whereas, the said part . . . . of the first part, at the request of the said part . . . . of the second part, ha . . . . agreed to give up and surrender the lands hereinafter described, unto the said part. . . . of the second part, and to hold and retain the residue of the mortgaged lands as security for the money remaining due on said mortgage.

Now this indenture witnesseth that the said part . . . . of the first part, in pursuance of the said agreement, and in consideration of . . . . . . dollars, to . . . . . . duly paid at the time of the ensealing and delivery of these presents, the receipt whereof is hereby acknowledged ha . . . . granted, released, quit-claimed, and set over, and by these presents do . . . . grant, release, quit-claim and set over, unto the said part . . . . of the second part, all that part of the said mortgaged lands situated and being in the . . . . . . of . . . . . . County of . . . . . . and State of Michigan, described as follows, to wit: . . . . .

Together with the hereditaments and appurtenances thereunto belonging, and all the right, title and interest of the said part . . . . of the first part, of, in and to the same, to the intent that the lands and tenements hereby conveyed may be discharged from the said mortgage, and that the rest of the lands in the said mortgage specified may remain to the said part . . . . of the first part.

To have and to hold, the lands and premises hereby released and conveyed, to the said part. . . . of the second part, ... heirs and assigns, to . . . . . . their only proper use, benefit and behoof, forever, free, clear, and discharged of and from all lien and claim, under and by virtue of the indenture of mortgage aforesaid.

In Witness Whereof, the said part . . . . of the first part, ha . . . . hereunto set . . . . . . hand . . . . and seal . . . . the day and year first above written.

. . . .(L.S.).

. . . .(L.S.).

Signed, Sealed and Delivered

in presence of

. . . .

. . . .

(Acknowledgment).

(name and address of draftsman)

Discharge of Mortgage: Know All Men By These Presents, That . . . . . ., whose address is . . . ., in the . . . . of . . . . and State of . . . . Do hereby certify, That a certain Indenture of Mortgage bearing date the . . . . . . day of . . . . . . A. D. . . . . made and executed by . . . . of the first part to . . . . of the second part, and recorded in the Register's Office for the County of . . . . . . and State of . . . . in Liber . . . . . . of Mortgages, on Page . . . . on the . . . . day of . . . . A. D. . . . . is fully paid, satisfied and discharged.

In Witness Whereof, ... have hereunto set . . . . . . hand . . . . and . . . . . . the . . . . . . day of . . . . . . A. D. . . . .

. . . .(L. S.).

Signed, Sealed and Delivered

in presence of

. . . .

. . . .

(Acknowledgment).

(name and address of draftsman)

Chattel Mortgages.

See topic 20.01 Chattel Mortgages.

21 PROPERTY

21.01 ABSENTEES:

Care of Property.

When person has disappeared conservator may be appointed or other protective order as to estate and affairs may be made. (MCLA § 700.5401[3]).

Distribution of Property.

Person absent for continuous period of five years during which person has not been heard from, and whose absence is not satisfactorily explained after diligent search or inquiry, is presumed dead. (MCLA § 700.1208). After death has been established, property may be distributed as estate of deceased person.

Beneficiary of Estate.

In exchange for suitable receipts and following court order, if administration is supervised, fiduciary making final distribution shall deposit with county treasurer money or personal property fiduciary has that belongs to heir, devisee, trust beneficiary or claimant whose whereabouts fiduciary cannot ascertain after diligent inquiry. (MCLA § 700.3916[1][a]).

Process Agent.

Service of process may be made upon any defendant by leaving summons and copy of complaint with agent authorized by written appointment or by law to receive service of process. (MCLA § 600.1930; Rule 2.105). See also category 5 Civil Actions and Procedure, topic 5.20

Process.

Escheat.

Uniform Unclaimed Property Act adopted. (MCLA §§ 567.221-.265). In general, property presumed abandoned if remains unclaimed for more than five years (shorter time periods for utility deposits, some insurance proceeds, and in some circumstances stock or other intangible interest in business associations, etc.). Reporting duties imposed on persons holding abandoned property. (MCLA § 567.238). State receives control of abandoned property and has duties to publish and ultimately sell at public sale. With some exceptions, proceeds deposit into state's general fund. (MCLA §§ 567.240-.244).

See category 3 Business Regulation and Commerce, topic 3.01 Banks and Banking, subhead Unclaimed Deposits, and category 13 Estates and Trusts, topic Wills, subhead Unclaimed Legacies.

For other matters relating to absentees, see categories 3 Business Regulation and Commerce, topic Securities; Civil Actions and Procedure, topics Partition, Process; Estates and Trusts, topics Death, Descent and Distribution, subhead Escheat.

21.02 ADVERSE POSSESSION:

Title to land may be acquired by adverse possession and such title is marketable. (112 Mich. 452, 70 N.W. 1038). Careful purchasers stipulate for title marketable in fact and of record. Title by adverse possession is not marketable of record unless established by decree quieting title. (325 Mich. 625, 39 N.W.2d 204).

Character of Possession.

Possession must be actual, continuous, visible, notorious, distinct and hostile (not permissive) throughout the statutory period. Adverse claimant need not show color of title, but if he enters without claim of title, his possession does not become adverse until he asserts title, as by exercising acts of ownership. (311 Mich. 567, 19 N.W.2d 101). Nature of acts necessary to constitute adverse possession depends upon character of premises. (305 Mich. 137, 9 N.W.2d 35).

Duration of Possession.

Title is established by showing adverse possession for 15 years. If claimant enters under color of title by tax deed, statutory period is ten years; if under color of title by deed made upon sale by personal representative, guardian or testamentary trustee or by ministerial officer under court order or decree, five years. (MCLA § 600.5801). Claimant may tack periods of adverse possession by predecessors in privity and privity may be shown by parol transfer. (315 Mich. 598, 24 N.W.2d 414).

Easements.

Easement may be acquired by adverse use for 15 years. Requirements are the same as for acquisition of title by adverse possession, except that use need not be exclusive, provided right does not depend upon a like right in others. (240 Mich. 327, 215 N.W. 331).

Disabilities.

Period of limitation does not run against legal titleholder during his minority or insanity. (MCLA § 600.5851).

Public Grounds.

Title cannot be acquired by adverse possession to public ways or grounds of municipal corporations. (MCLA § 600.5821).

21.03 CONDOMINIUMS:

See topic 21.16 Real Property.

21.04 CONVEYANCES:

See topic 21.06 Deeds.

21.05 CURTESY:

Abolished. (MCLA § 557.21; 15 Mich. 60; 30 Mich. 422).

21.06 DEEDS:

An instrument, whatever its form or mode of execution, that passes a present interest vesting from the date of execution, is a deed. (145 Mich. 563, 108 N.W. 985).

Execution.

Signature and delivery are sufficient between parties and others with notice. (244 Mich. 403, 221 N.W. 322). Requirement of seal has been abolished. (MCLA § 565.241). Acknowledgment is necessary to entitle instrument to be recorded. (MCLA § 565.8). For circumstances in which spouse must join, see category 14 Family, topic Husband and Wife, subhead Conveyance or Encumbrance of Property; category 8 Debtor and Creditor, topic 8.10 Homesteads, subhead Alienation or Encumbrance. For other recording requirements, see category 10 Documents and Records, topic 10.04 Records. See also topic 21.16 Real Property.

Recording.

Unrecorded deed is void against subsequent purchaser in good faith (without notice) for a valuable consideration who records first. (MCLA § 565.29). Deeds are recorded in office of the register of deeds of county where the land lies. (MCLA § 565.23). Unless true consideration stated (or in case of gift, proper value) affidavit of value required in order to record. See category 10 Documents and Records, topic 10.04 Records.

Recording Fees.

See category 10 Documents and Records, topic 10.04 Records.

Operation and Effect.

No covenant implied in any conveyance of real estate, except oil and gas leases, whether containing special covenants or not (MCLA § 565.5), except that statutory form warranty deed implies covenants of seisin, right to convey, quiet possession, freedom from incumbrances and to warrant and defend title (MCLA § 565.151).

Taxes.

For tax on real estate transfers see category 22 Taxation, topic 22.15A Real and Personal Property Taxes, subhead Real Estate Conveyance Tax, catchlines Stamp Tax and Real Estate Transfer Tax.

Forms (Statutory).

Forms

Warranty Deed.

"A. B. conveys and warrants to C. D. (here describe the premises) for the sum of (here insert the consideration)," to be dated, signed, sealed and acknowledged by grantor. (MCLA § 565.151).

Quit Claim Deed.

"A. B. quit claims to C. D. (here describe the premises) for the sum of (here insert the consideration)," to be dated, signed, sealed and acknowledged by grantor. (MCLA § 565.152).

21.07 DEEDS OF TRUST:

See category 20 Mortgages, topic 20.04 Mortgages of Real Property.

21.08 DOWER:

Dower is the widow's right to the use for life of one-third of all estate of inheritance of which her husband was seized during marriage. (MCLA § 558.1).

Such estates aliened by a resident husband during marriage are subject to dower at his death as of the value at date of alienation. (MCLA § 558.7).

Dower right will not prevail against a purchase money mortgage given by the husband. (MCLA § 558.4).

Nonresident wife is not entitled to dower in lands conveyed by her husband, but only those of which he died seized. (MCLA § 558.21).

Release.

A wife may contract with her husband for release of dower. (MCLA § 558.13).

Bar.

A wife may bar her dower right by joining in husband's deed, by joining with husband in subsequent deed, or by direct conveyance to husband or grantee (MCLA § 558.13), or by an antenuptial jointure (MCLA § 558.14), or pecuniary agreement (MCLA § 558.16), assented to in lieu of dower (MCLA § 558.15). Dower of incompetent wife may be barred by proceeding in circuit court wherein cash value of dower interest is determined and paid to guardian other than husband. (MCLA § 600.2931).

Divorce.

Judgments of divorce and judgments of separate maintenance must include in decree provision in lieu of dower of wife in property of husband, which is in full satisfaction of all claims wife may have in any property husband owns or may thereafter own. (MCLA § 552.101). In case of failure of husband to pay allowance so decreed, court may award execution for collection of same or may sequester his real and personal estate or may appoint receiver thereof. (MCLA § 552.27).

Election between dower and: distributive share of husband's estate, see category 13 Estates and Trusts, topic 13.07 Descent and Distribution; testamentary provision, see category Estates and 13.15 Trusts, topic 13.16 Wills, subhead Election.

21.09 ESCHEAT:

See topic 21.01 Absentees, subhead Escheat; categories 3 Business Regulation and Commerce, topic Banks and Banking, subhead Unclaimed Deposits; Estates and Trusts, topics Descent and Distribution, subhead Escheat; Wills, subhead Unclaimed Legacies.

21.10 LANDLORD AND TENANT:

Rights and liabilities generally are contractual in nature and have sources in both statutes and common law.

Uniform Residential Landlord and Tenant Act not adopted.

Kinds of Tenancy.

Law recognizes tenancies for years, from year to year, by sufferance and at will, including periodic tenancies at will.

Leases.

Leases for longer than one year are void unless in writing signed by party by whom lease is to be made or by person authorized in writing. (MCLA § 566.108). Generally leases are viewed as contracts needing certainty. (195 Mich. 181, 161 N.W. 838). Modification does not need consideration if there is a writing signed by party against whom modification is sought. (MCLA § 566.1). Seal is not necessary for validity or recording. (MCLA § 565.241). Witnesses and acknowledgment are not necessary to validity. (337 Mich. 344, 60 N.W.2d 298). All residential leases by law include covenant of landlord of fitness of premises for use and covenant to make reasonable repairs; for leases of one year or more such covenants can be modified by agreement. (MCLA § 554.139). Provisions of rental agreements covering residential premises are subject to detailed statutory regulations under Truth in Renting Act. (MCLA §§ 554.631-.641).

Recording.

Lease for more than three years is conveyance subject to recording laws. (MCLA § 565.35). (See category 10 Documents and Records, topic 10.04 Records.)

Taxes.

Unless agreement to contrary, tenant may pay taxes and deduct amount from rent. (MCLA § 211.53).

Rent.

Unless agreement to contrary, rent not due until end of rental period (55 Mich. 468, 21 N.W. 894), and payment by notes does not satisfy obligation (265 Mich. 252, 251 N.W. 404). Amount of rent may be left to future determination by landlord (214 Mich. 607, 183 N.W. 36), by lessee (342 Mich. 92, 68 N.W.2d 771), or by arbitration (126 F.2d 936).

Lien.

Parties to lease can contract for landlord’s lien on tenant’s property, but lien attaches only to property contemplated by agreement (49 Mich. 33, 12 N.W. 899), and not until tenant is in default (27 Mich. 529). Landlord has equitable lien on amounts owing insolvent tenant from sub-tenant, superior to claims of tenant’s creditors. (270 Mich. 218, 258 N.W. 252).

Termination of Tenancy.

Seven- day notice required to terminate tenancy for nonpayment of rent. (MCLA § 600.5714). One month’s notice required to terminate tenancy by sufferance or at will. Periodic tenancy at will, where rent payable at periods of less than three months, may be terminated at any time by notice equal to interval between periods. Tenancy from year to year may be terminated at any time by one year’s notice. (MCLA § 554.134). No notice required to terminate tenancy upon expiration of specified term. (183 Mich. 62, 148 N.W. 749).

In absence of agreement to contrary, tenant may terminate lease where building has become untenantable without fault or neglect on his part. (MCLA § 554.201).

Holding Over.

Landlord may elect to treat tenant as trespasser or as tenant. (194 Mich. 276, 160 N.W. 554). Holdover tenant is not tenant at will unless he holds over by express or implied consent of landlord (40 Mich. 283), although in case of delay in eviction tenant may be by sufferance and entitled to statutory notice. (251 Mich. 512, 232 N.W. 178).

Dispossession.

Summary proceedings lie to recover possession on termination of tenancy or estate and upon certain other occurrences. (MCLA § 600.5714). Summons must issue within prescribed time limits (MCLA § 600.5735), and writ of restitution issues ten days after judgment unless judgment is appealed or unless judgment is based on nonpayment of money and defendant pays amount found due and costs. (MCLA § 600.5744). If court determines that dispossession is sought by landlord as penalty for tenant reporting health or similar violation or for asserting rights under lease or under law, landlord will be denied relief. (MCLA § 600.5720).

Discrimination on the basis of race, color, religion, sex, height, weight, age, marital status or national origin in housing is unlawful, except for certain owner occupied dwellings. (MCLA §§ 37.2101-.2804).

21.11 LEASES:

See topic 21.10 Landlord and Tenant.

21.12 PARTITION:

Persons holding lands as joint tenants or tenants in common may have partition thereof. (MCLA § 600.3304). Action may be maintained by any person who has estate in possession of lands of which partition is sought but not by anyone who has only estate in remainder or reversion. (MCLA § 600.3308).

Jurisdiction and Venue.

Circuit courts have jurisdiction. (MCLA § 600.3301). County in which land or any part thereof is situated is proper county to bring action. (MCLA § 600.1605).

Proceedings.

If court is satisfied that partition can be made without prejudice to owners it appoints disinterested person as partition commissioner to make partition. (Rules 3.401, .402).

Partition in Kind or Sale.

If partition in kind cannot be made without prejudice to owners, court may order public sale by circuit court commissioner and division of proceeds according to respective interests of parties. (MCLA § 600.3332; Rule 3.403).

Probate court has jurisdiction to partition property assigned by decree in probate proceedings to beneficiaries in common and undivided. Such partition may be ordered on petition of any person interested on proper notice and hearing before estate is closed. Court may direct sale of property if it cannot be partitioned without prejudice to owners or cannot be conveniently allotted to one party. (MCLA § 700.3913).

Court may fix minimum price at which real property which cannot be partitioned may be sold. (MCLA §§ 600.3332, 700.208).

Where trust provides for sale, without limitation on power of alienation nor restriction as to time of division, trustee may divide trust estate without court order where all consent, or with authority of court if all interested do not consent. (MCLA §§ 600.3360-.3372).

21.13 PERPETUITIES:

Uniform Statutory Rule Against Perpetuities.

Uniform Statutory Rule Against Perpetuities, effective Dec. 27, 1988. (MCLA §§ 554.71-78). Uniform act applies to nonvested property interest or power of appointment created on or after Dec 27, 1988. (MCLA § 554.76). Application of rule against perpetuities to personal property held in trust governed by Personal Property Trust Perpetuities Act. (MCLA §§ 554.91-.94). Except for second power, interest in or power of appointment over personal property held in trust is not invalidated by rule against perpetuities. (MCLA § 554.93).

Accumulations.

With respect to rents and profits of real estate under deeds or other instruments executed and delivered prior to Sept. 18, 1952, or under wills of persons dying prior to Sept. 18, 1952, accumulation may be directed only during minority of persons in being at creation of estate out of which rents and profits or income are to arise, and if to commence after creation of such estate, accumulation must commence within time permitted for vesting of estates (MCLA § 554.37); and if directed for a longer time than minority of persons intended to be benefited, or longer than 33 years after death of testator, accumulation is void as to time beyond such minority or 33 years (MCLA § 554.38). Other accumulations are permitted for lives in being plus 21 years.

Subsequent to Sept. 18, 1952 accumulations of all types are permitted for lives in being plus 21 years. (P.A. 1952, Nos. 6, 7).

Rules against perpetuities, suspension of power of alienation and accumulations do not apply to gifts or trusts for religious, educational, benevolent, charitable or public welfare purposes (MCLA §§ 554.351, .381), or to trusts created by employers for benefit of employees to pay pensions or disability or death benefits or to share profits or provide stock bonuses (MCLA § 555.301). Application of rule against perpetuities and accumulations of income as to personal property held in trust governed by Personal Property Trust Perpetuities Act. (MCLA § 554.93).

Possibilities of reverter and rights of entry on condition subsequent are unenforceable if specified condition does not occur within 30 years after terminable possessory interest was created or by Mar. 29, 1969 whichever is later, except rights of termination may be preserved by recording of written notice, within a period not less than 25 nor more than 30 years after creation of terminable interest or prior to Mar. 29, 1969, whichever is later. Restriction does not apply to leases, interests where contingency must occur within perpetuities period, terminable interests held for public or charitable, etc., purposes, or interest created in conveyance from U.S. (MCLA §§ 554.61-.65).

21.14 PERSONAL PROPERTY:

In absence of statutory prohibition, common law recognizes joint tenancy in personal property with rights of survivorship. (215 Mich. 62, 183 N.W. 942). Although occasionally referred to as tenancy by entirety (297 Mich. 513, 298 N.W. 116), it is unclear whether such tenancy possesses all attributes (e.g., immunity from partition) enjoyed by tenancies by entirety in real property. Joint tenancy with rights of survivorship has been found in bank accounts, contents of safety deposit boxes and securities. However, intent to create such tenancy must be clearly shown by agreement of tenants.

21.15 POWERS OF ATTORNEY:

Powers of attorney governed by MCLA §§ 565.36, 565.631, and 700.5501-.5520.

Attorneys in Fact.

No formalities of execution are requisite to validity between parties of power of attorney, but power to convey or encumber real estate should be executed with same formalities as deed to enable it to be recorded. (MCLA § 565.36). See category 10 Documents and Records, topic 10.04 Records. Recorded power can be revoked only by recording instrument of revocation in same office. (MCLA § 565.37). No special form is preferred by local usage.

Formalities.

See subhead Attorneys in Fact, supra.

Revocation.

See subhead Attorneys in Fact, supra.

Uniform Durable Power of Attorney Act.

Durable Power of Attorney and Designation of Patient Advocate adopted Apr. 1, 2000 by MCLA §§ 700.5501-5520. MCLA § 700.5501-5505, part of Uniform Probate Code similar to Uniform Durable Power of Attorney Act, represents deviation from common law rules. Michigan statute adds requirement that durable power of attorney authorizing agent to convey or otherwise exercise power over real estate need not contain real estate's legal description. (MCLA § 700.5502).

Members of Armed Forces.

Authority to act as agent for person in armed forces or on duty therewith or in civilian connection with operations of armed forces, outside continental U.S., is not terminated by death of principal until actual notice comes to agent. Affidavit of agent, in absence of fraud, is proof of lack of notice and is conclusive proof of non-revocation or non-termination of power at such time. Affidavit is recordable when authenticated for record if power itself is recordable. No report or listing of "missing" or "missing in action" etc. constitutes actual notice of death of principal. (MCLA § 35.501).

21.16 REAL PROPERTY:

Estates in respect to the number and connection of their owners are divided into estates in severalty, in joint tenancy, and in common. All grants and devises of lands made to two or more persons, except such as are made in trust, or to executors or to husband and wife, and mortgages, are construed to create estates in common and not in joint tenancy unless expressly declared to be in joint tenancy. A joint tenancy between husband and wife is tenancy by entirety, and a conveyance to husband and wife creates such an estate, with its common law incidents. (MCLA §§ 554.43-.45).

One spouse cannot sever tenancy by entirety (297 Mich. 559, 298 N.W. 281), except by conveyance to other spouse (MCLA § 557.101). Other joint tenancy is severed by conveyance by one tenant (290 Mich. 143, 287 N.W. 411), but right of survivorship cannot be destroyed if expressly declared in conveyance creating joint tenancy (434 Mich. 271, 454 N.W. 2d 85).

Discrimination on basis of race, color, religion, sex, height, weight, age, marital status, familial status, or national origin in housing is unlawful, except for certain owner occupied dwellings. (MCLA §§ 37.2101-.2804).

For limitation on possibilities of reverter and right of entry on condition broken, see topic 21.13 Perpetuities.

Rule in Shelley's Case.

Abolished. (MCLA § 554.28).

Foreign Conveyances or Encumbrances.

When any deed or other instrument affecting title to land is executed and acknowledged in compliance with law of state where executed and has been recorded in county where property situated, such record or certified transcript thereof is prima facie evidence of due execution. (MCLA § 565.9-.10).

Condominiums.

Extensively regulated by MCLA §§ 559.101-.276.

Land Contracts.

Land in Michigan is often sold on land contract, under which vendee acquires possession of the premises and an equitable title thereto, while legal title remains in vendor as security for vendee's performance of the contract. On death of vendee his interest passes to his heirs as real property (224 Mich. 365, 194 N.W. 996), but vendor's interest is personal property and passes to his executor or administrator on his death (129 Mich. 117, 88 N.W. 384). Specific performance is the common equitable remedy to enforce such contracts. Land contracts in general use usually contain provision that, on breach of any term thereof by vendee, vendor may declare the contract forfeited and repossess himself of the premises. After forfeiture, proceedings before district or municipal court lie to enforce delivery of possession unless vendee makes voluntary surrender. (MCLA §§ 600.5701 et seq.). Writ of restitution issues ten days after entry of judgment for possession unless judgment is based on forfeiture of executory contract for purchase of premises. (MCLA § 600.5744). Vendor may also sue at law for delinquent payments. (159 Mich. 160, 123 N.W. 539). Stamp tax imposed on land contracts; see category 22 Taxation, topic 22.15A Real and Personal Property Taxes, subhead Real Estate Conveyance Tax, catchline Stamp Tax. Uniform Statutory Rule Against Perpetuities (with 1990 amendments) in effect. (MCLA §§ 554.71-.78). Uniform Vendor and Purchaser Risk Act adopted. (MCLA §§ 565.701-.703).

See also topics 21.05 Curtesy, Deeds, Dower, Landlord and Tenant; categories 5 Civil Actions and Procedure, topic Partition; Debtor and Creditor, topic Homesteads; Documents and Records, topic Records; Family, topic Husband and Wife; Mortgages, topic Mortgages of Real Property.

21.17 TRUST DEEDS:

See category 20 Mortgages, topic 20.04 Mortgages of Real Property.

22 TAXATION

22.01 ADMINISTRATION:

In general, following taxes are imposed and/or administered by State of Michigan Department of Treasury: Sales tax (Const., art. IX, § 8; MCLA § 205.51); use tax (Const., art. IX, § 8; MCLA § 205.93); cigarette tax (MCLA § 205.507); liquor tax (MCLA § 436.16a); fuel taxes (MCLA §§ 207.101, et seq.; MCLA § 207.253; MCLA §§ 207.181, et seq.; MCLA § 281.509; MCLA § 259.303); unemployment compensation tax (MCLA §§ 421.1, et seq.); single business tax (MCLA § 208.31); income tax (MCLA § 206.51); estate tax (MCLA § 205.223); employee withholding tax (MCLA § 206.351); business tax (MCLA §§ 208.1101 et seq.).

In general, following taxes are imposed and/or administered by local governmental units: real and personal property taxes (MCLA §§ 211.1, et seq.); stamp tax (MCLA §§ 207.501, et seq.).

Collection.

For Michigan state taxes, Michigan Department of Treasury—Collections Division is responsible for collecting taxes. Actions can be instituted after State has issued intent to assess, final assessment and appeals process has expired. (MCLA §§ 205.20, .21, .22).

For local taxes, taxes apportioned to assessment district are assessed according and in proportion to valuations entered in assessment roll (MCLA § 211.39), and tax roll is delivered to collection officer on or before day taxes become lien (MCLA § 211.43). On Dec. 31 (or on date fixed by charter of cities which collect own taxes) real property tax becomes lien on property assessed, and personal property tax becomes paramount lien on all personal property of person assessed. (MCLA § 211.40). Taxes levied on certain buildings and improvements on leased land are collected in same manner as taxes on personal property. (MCLA § 211.44). Collection officer mails statements to each taxpayer at his last known address in tax roll, but failure to send statement or non-receipt by taxpayer does not prejudice right to collect tax. (MCLA § 211.44). Collecting officer may distrain on any personal property to collect real or personal property tax, and may sue to collect personal property tax (MCLA § 211.47) and may also make jeopardy assessments of personal property taxes, accelerating due date and imposition of lien (MCLA § 211.691).

Collection fee of 1% is added to taxes paid before Feb. 15 following assessment; additional 3% may be added to last day of Feb.; additional 4% county property tax administration fee and interest on tax at rate of 1% per month shall be added after last day of Feb. and before settlement with county treasurer. See MCLA § 211.44a for summer levy of county allocated property tax.

Governing body of local property tax collecting unit may waive all or part of administration fees, or late penalty charges, or both. (MCLA § 211.44). On Mar. 1, collection officer returns delinquent taxes to county treasurer and thereafter payment of taxes to county treasurer must be accompanied by collection fee of 4% plus interest at 1%. (MCLA §§ 211.59, .89).

In some cities, state and county taxes are collected as above and separate machinery is maintained by city for collection, sale and redemption of city taxes. (MCLA § 211.107; and see city charters).

Payment.

For Michigan Single Business Tax (which is repealed effective Dec. 31, 2007 and replaced by Michigan Business Tax), estimated return and quarterly payment of tax required of taxpayer who reasonably expects liability for tax to exceed $600 or adjustments under MCLA § 208.23 to exceed $100,000. For calendar year taxpayers, due dates are Apr. 30, July 31, Oct. 31 and Jan. 31. Fiscal year taxpayers use appropriately adjusted dates. (MCLA § 208.71). Final return must be filed by last day of fourth month after close of taxpayer's tax year. Commissioner may extend date for filing annual return on application by taxpayer. Tentative return must be timely filed and payment of estimated tax must be timely made. Interest on unpaid tax is 9% per annum. Interest provision applies to underpayment of estimated tax. Person whose gross receipts are less than $300,000 need not file return or pay tax. Affiliated group must combine gross receipts for purpose of calculating threshold. (MCLA § 208.73).

For Michigan Business Tax ("MBT") (effective Jan. 1, 2008), quarterly estimated returns and instructions will be mailed to businesses in early Jan. 2008. Estimated returns and quarterly payment of tax required of taxpayer who reasonably expects 2008 tax liability to exceed $800. (MCLA § 208.1501[1]). For taxpayers on calendar year basis, quarterly returns and estimated payments due by Apr. 15, July 15, Oct. 15 and Jan. 15. For taxpayers on fiscal year basis, quarterly returns and payments due 15th day of first month after each quarter. (MCLA § 208.1501[2]). Quarterly estimated payments required for estimated business income tax base and modified gross receipts tax base for quarter or 25% of estimated annual liability. (MCLA § 208.150[3]). For 2009 and each subsequent tax year, interest not assessed on quarterly estimated payments if they equal at least 85% of liability for each quarter or if preceding year's liability was less than $20,000 and four installments were submitted. For 2008 tax year, interest not assessed if sum of estimated payments equals at least 85% of liability and amount of each estimated payment reasonably approximates tax liability incurred during quarter. (MCLA § 208.1501[4]). For taxpayers with first year under MBT of less than 12 months, amounts paid with each estimate must be proportional to number of payments made in first tax year.

Annual returns due last day of fourth month after tax year end with payment of final liability. Taxpayer, other than taxpayer subject to tax imposed on insurance companies under Chapter 2A or financial institutions under Chapter 2B of MBT Act, with apportioned or allocated gross receipts less than $350,000.00 need not file return or pay tax. On application and for good cause, department may extend date for filing annual return; interest added to unpaid amount for period of extension. Payment of estimated tax liability must be remitted with application for extension. (MCLA § 208.1505[3]). If federal extension granted, automatic state extension granted to last day of eighth month with copy of federal extension, tentative return and payment of estimated tax. (MCLA § 208.1505[4]).

Taxpayer must file amended return showing any alteration or modification of federal return that affects business income tax base or modified gross receipts tax base within 120 days after final determination by IRS. (MCLA § 208.1507[2]).

Unitary business group must file combined return including each U.S. person, other than foreign operating entity, included in unitary business group. Each U.S. person included in unitary business group or combined return treated as single person, and all transactions between members of unitary group eliminated from business income tax base, modified gross receipts tax base, and apportionment formula. If U.S. insurance company or financial institution subject to tax under MBT Act Chapter 2A or 2B included in unitary business group or combined return, its business income eliminated from business income tax base, modified gross receipts eliminated from modified gross receipts tax base, and sales eliminated from apportionment formula. (MCLA § 208.1511).

MBT administered by Department of Treasury pursuant to the Revenue Act. (MCLA §§ 205.1-.31). If conflict between the MBT Act and Revenue Act, provisions of MBT Act apply. (MCLA § 208.1513).

For Michigan Income Tax, every person subject to income tax must file declaration and pay estimated tax if person's annual tax can reasonably be expected to exceed amounts withheld and allowable credits by more than $500. (MCLA § 206.301). Every person, other than corporation, which is required to file federal income tax return and whose adjusted gross income exceeds his personal exemptions must file Michigan income tax return with Michigan Department of Treasury by 15th day of fourth month following close of taxable year (Apr. 15 for calendar year taxpayers), under penalties for failure to file. (MCLA §§ 206.311, .315).

For tax years beginning in 1997, taxpayers with taxable income of less than $100 (or $200 if joint return) and who have filed withholding exemption certificate, may elect to pay income tax without filing Michigan income tax returns. Election is called "No-form Payment Option."

(MCLA § 206.51a).

For Michigan Sales/Use Tax, persons engaged in taxable business are required to obtain license (fee $1 per year) and to report and pay tax monthly. (MCLA §§ 205.53, .56). After Jan. 1, 1999, taxpayers with annual tax liability of $720,000 or more must remit monthly payments by electronic funds transfer. (MCLA § 205.56[3]). Taxpayer required to keep specified records. Taxpayer may use blanket exemption certificates on form prescribed by Department that covers all exempt transfers between taxpayer and buyer for period of up to four years, or less if agreed to by buyer and seller. Licensed liquor wholesalers exempt from exemption certificate requirement in certain instances. (MCLA § 205.67).

Penalties.

For state taxes (Single Business Tax [repealed effective Dec. 31, 2007], Michigan Business Tax [effective Jan. 1, 2008], Individual Income Tax, Sales/Use Tax, etc.), interest rate on deficiency or excessive claim for credit is current monthly interest rate of one percentage point above adjusted prime rate per annum from time tax was due until paid. If deficiency or excessive claim is due to negligence, but without intent to defraud, there is penalty of $10 or 10% of total amount of deficiency, whichever is greater, plus monthly interest of one percentage point above adjusted prime rate. Penalty becomes due and payable after notice and informal conference. If taxpayer can show that deficiency or excess claim for credit was due to reasonable cause, department will waive penalty. No penalty imposed unless and until department submits for public hearing, pursuant to administrative procedures act, rules defining what constitutes reasonable cause for waiver, with illustrative examples provided. If any part of deficiency or excessive claim is due to intentional disregard, but without intent to defraud, penalty of $25 or 25% of total amount of deficiency, whichever is greater, plus interest shall be added. If any part of deficiency or excessive claim is due to fraudulent intent to evade tax or to obtain refund, there is penalty of 100% of deficiency plus interest. (MCLA § 205.23). If taxpayer fails to file return or pay tax, penalty is 5% of tax due per month, to maximum of 25%, plus monthly interest of one percentage point above adjusted prime rate. (MCLA § 205.24).

Penalty for failure to file information return or other informational report is $10 per day for each day for each separate failure or refusal to $400 maximum. (MCLA § 205.24).

Additional penalty of 25% of tax is imposed on taxpayer who failed to file return or pay tax due before June 1, 2001 during period for which amnesty was available. (MCLA § 205.29).

For local taxes, see topic 22.15A Real and Personal Property Taxes, subhead Lien.

22.02 ALCOHOL, BEVERAGES AND TOBACCO TAXES:

Alcoholic Beverage Taxes.

Wine tax imposed by MCLA § 436.1301. Beer tax imposed by MCLA § 436.1409. Tax on spirits with alcoholic content of 21% or more imposed by MCLA §§ 436.2201-.2207. Tax on mixed spirit drinks imposed by MCLA § 436.1301.

Cigarette Tax.

See subhead Tobacco Tax.

Tobacco Tax.

Imposed by MCLA § 205.421 et seq.

22.03 BUSINESS TAXES:

Franchise Tax.

See category 2 Business Organizations, topic 2.03 Corporations.

Corporate Taxes.

See category 2 Business Organizations, topic 2.03 Corporations.

Single Business Tax.

Repealed effective Dec. 31, 2007 and replaced with Michigan Business Tax effective Jan. 1, 2008.

Rates.

Tax of 1.90% is imposed on adjusted tax base of every person with business activity that is allocated or apportioned to state. Beginning Jan. 1, 1999 and annually thereafter rate is reduced by 0.1% from 2.30% if State's Comprehensive Annual Financial Report states ending balance of more than $250,000,000 in Countercyclical Budget and Economic Stabilization Fund. (MCLA § 208.31). "Adjusted tax base" means tax base allocated or apportioned to state under rules and exemptions set forth below. "Person" means individual, firm, bank, financial institution, limited partnership, copartnership, partnership, joint venture, association, corporation, receiver, estate, trust or other group or combination acting as unit. (MCLA § 208.6). "Business activity" means transfer of legal or equitable title to or rental of property, whether real, personal or mixed, or performance of services, or combination thereof, made, engaged in or caused to be made or engaged in within state, whether intrastate, interstate or foreign commerce, with object of direct or indirect gain, benefit or advantage, to taxpayer or others; does not include services rendered by employee to taxpayer, services as director of corporation or casual transaction. (MCLA § 208.3). Business activity does not include following: (1) Proceeds from sales by principal that taxpayer collects in agency capacity; (2) amounts received by taxpayer as agent solely on behalf of principal that are expended by taxpayer for any of following: (i) performance of service by third party for benefit of principal that law requires to be performed by licensed person; (ii) performance of service by third party for benefit of principal that taxpayer has not undertaken contractual duty to perform; (iii) principal and interest under mortgage, land contract, lease or rental payments, or taxes, utilities, or insurance premiums relating to real or personal property owned or leased by principal; (iv) capital asset of type that is, or will become, eligible for depreciation, amortization, or accelerated cost recovery by principal for federal income tax purposes, or for real property owned or leased by principal; (v) property not described in (iv) purchased by taxpayer on behalf of principal that taxpayer does not take title to or use in course of performing its contractual business activities; (vi) fees, taxes, assessment, levies, fines, penalties, etc., paid to government entity that are legal obligation of principal; (3) amounts excluded from gross income of foreign corporation engaged in international operation of aircraft under § 8983(a) of IRC; (4) amounts received by advertising agency used to acquire advertising media time, space, production, or talent on behalf of another person; and (5) amounts received by taxpayer that manages real property owned by taxpayer's client that are deposited into separate account kept in taxpayer's client's name and are not reimbursements to taxpayer are not indirect payments for management services. (MCLA § 208.7).

Computation of Tax Base.

Tax base is "business income" (defined as federal taxable income for corporation and that part of federal taxable income derived from business activity for other taxpayers including, for partnerships, payments and items of income and expense attributable to business activity of partnership and separately reported to partners), before apportionment or allocation, subject to following adjustments: (1) Add gross interest income and dividends on obligations or securities of states other than Michigan in same amount as excluded from federal taxable income, less related expenses not deducted under I.R.C. §§ 265 and 291; (2) add all taxes on or measured by net income and tax imposed by this Act to extent such taxes were deducted in computing federal taxable income; (3) add, to extent deducted in computing federal taxable income, (i) net operating loss carryback or carryforward, (ii) capital loss carryback or carryforward, (iii) deduction for depreciation, amortization or immediate or accelerated write-off relating to cost of tangible assets, (iv) dividends paid or accrued except those representing reduction of insurance premiums, (v) any deduction or exclusion by taxpayer due to its classification as domestic international sales corporation or like special classification purpose of which is to reduce or postpone federal income tax liability, but not applicable to provisions of I.R.C. §§ 805, 809, and 815(c)(2)(A), (vi) all interest including amounts paid, credited or reserved by insurance companies as necessary to fulfill policy and contract liability requirements of I.R.C. §§ 805 and 809, (vii) all royalties, with certain exceptions, (viii) for tax years after Dec. 31, 1993, royalties paid by licensee of certain computer or system software, and (ix) any deduction for rent attributable to lease back under I.R.C. § 168(f)(8); (4) add compensation, defined under MCLA § 208.4 as all wages, salaries, fees, bonuses, commissions, or other payments during taxable year on behalf of or for benefit of employees, officers or directors of taxpayers and subject to or exempt from withholding under I.R.C. § 3401 excluding, for tax years after Dec. 31, 1994, workers compensation, FICA and FUTA payments and for tax years after Dec. 31, 2003 percent of payments under health and welfare and noninsured benefit plans for residents of state; (5) add capital gains related to business activity of individuals to extent excluded in computing federal taxable income; (6) deduct, to extent included in computing federal taxable income, (i) dividends received or deemed received including foreign dividend gross-up provided for in I.R.C., (ii) all interest except amounts paid, credited or reserved by insurance companies as necessary to fulfill policy and contract liability requirements of I.R.C. §§ 805 and 809, (iii) all royalties, with certain exceptions, and (iv) rent attributable to lease under I.R.C. § 168(f)(8); (7) deduct any capital loss not deducted in computing federal taxable income; (8) to extent included in federal taxable income, add loss or subtract gain from tax base attributable to another entity whose business activities are taxable under Act or would be taxable under Act if business activities were within state; and (9) for tax years after Dec. 31, 2004, deduct, to extent included in federal taxable income, income from certain small business innovation research grants, small business technology transfer programs, and grants from Michigan technology tri-corridor SBIR emerging business fund of MEDC. (MCLA § 208.9). Tax base of financial organization is sum of federal taxable income and adjustments made in MCLA § 208.9 except subsections (4)(f) and 7(b) thereof, but financial organization which is regulated investment company not subject to adjustments made in MCLA § 208.9 subsections 9(2), 4(d) and 7(a). (MCLA § 208.21). Tax base and adjusted tax base of insurance company, for tax year after 1988, is product of .25 times insurance company's adjusted receipts as apportioned. "Adjusted receipts" defined in MCLA § 208.22a(4). Insurance company's tax base and adjusted tax base is not adjusted under MCLA § 208.23 or MCLA § 208.23b. SBT for insurance company is in lieu of all other privilege or franchise fees or taxes imposed by any other law of state, except taxes on real and personal property and taxes under MCLA §§ 500.1200 et seq. (MCLA § 208.22). Tax base of nonprofit persons not required to pay federal income taxes shall be sum of net additions specified in MCLA §§ 208.9, .23, less deductions specified in those sections. (MCLA § 208.20). Tax base of foreign person, as defined, is sum of business income and adjustments related to U.S. business activity. (MCLA § 208.19).

Apportionment and Allocation of Tax Base.

For taxpayer whose business activities are confined solely to state, except taxpayers whose business activities consist of transportation services, entire tax base is allocated to state. (MCLA § 208.40). For tax years after Dec. 31, 1998 and before Jan. 1, 2006, all tax base, other than tax base derived principally from transportation, financial, or insurance carrier services or specifically allocated, is apportioned by multiplying tax base by percentage, which is sum of all of following percentages: (a) Property factor multiplied by 5%; (b) payroll factor multiplied by 5%; and (c) sales factor multiplied by 90%. For tax years beginning after Dec. 31, 2005 and before Jan. 1, 2008, all tax base, other than tax base derived principally from transportation, financial, or insurance carrier services or specifically allocated, is apportioned to state by multiplying tax base by percentage that is sum of all of following percentages: (a) Property factor multiplied by 3.75%;

(b) payroll factor multiplied by 3.75%; and (c) sales factor multiplied by 92.5%. For tax years beginning after Dec. 31, 2007, all tax base, other than tax base derived principally from transportation, financial, or insurance carrier services or specifically allocated, is apportioned to state by multiplying tax base by percentage that is sum of all of following percentages: (a) Property factor multiplied by 2.5%; (b) payroll factor multiplied by 2.5%; and (c) sales factor multiplied by 95%. For tax years after Dec. 31, 1998 and before Jan. 1, 2000, if MCLA § 208.23(e) is not in effect, all of tax base is apportioned to this state by multiplying tax base by percentage, which is sum of all of following percentages: (a) Property factor multiplied by 15%; (b) payroll factor multiplied by 15%; and (c) sales factor multiplied by 70%. (MCLA § 208.45a). For tax years beginning before Jan. 1, 1991, all tax base, other than tax base derived principally from transportation, financial, or insurance carrier services or specifically allocated, is apportioned to state by multiplying tax base by fraction, numerator of which is property factor plus payroll factor plus sales factor, and denominator of which is three. For tax years beginning after Dec. 31, 1990 and before Jan. 1, 1993, all tax base, other than tax base derived principally from transportation, financial, or insurance carrier services or specifically allocated, is apportioned to state by multiplying tax base by percentage that is sum of all of following percentages: (a) Property factor multiplied by 30%; (b) payroll factor multiplied by 30%; and (c) sales factor multiplied by 40%. Preceding sentence does not apply for tax year in which deduction not allowed under MCLA § 208.23(c). For tax years after Dec. 31, 1992 and before Jan. 1, 1997 and for years after Dec. 31, 1996 and before Jan. 1, 1998 if MCLA § 208.23(e) is not in effect, tax base is apportioned to state by multiplying tax base by percentage, which is sum of all of following percentages: (a) Property factor multiplied by 25%; (b) payroll factor multiplied by 25%; and (c) sales factor multiplied by 50%. Except as provided in subsections (4) and (7) of MCLA § 208.45 and for tax years after Dec. 31, 1996 and before Jan. 1, 1999, tax base is apportioned to this state by multiplying tax base by percentage, which is sum of all of following percentages: (a) Property factor multiplied by 10%; (b) payroll factor multiplied by 10%; (c) sales factor multiplied by 80%. For tax years after Dec. 31, 1997 and before Jan. 1, 1999 if MCLA § 208.23(e) is not in effect, tax base is apportioned to this state by multiplying tax base by percentage, which is sum of all of following percentages: (a) Property factor multiplied by 20%; (b) payroll factor multiplied by 20%; and (c) sales factor multiplied by 60%. (MCLA § 208.45). Special allocation formula provided by statute for taxpayers whose business activities consist of transportation services. (MCLA § 208.57).

Adjustments to Tax Base.

After allocation as described above, tax base is adjusted as follows: (1) (a) For tax years after Sept. 30, 1989 but before Jan. 1, 1997, for tangible assets located in and out of state, deduct cost, as defined in MCLA § 208.23; deduction shall be multiplied by apportionment factor, (b) for tax years after Dec. 31, 1996, deduct cost, as defined in MCLA § 208.23, provided assets are physically located in state for use in business activity in state and are not mobile tangible assets; deduction shall be multiplied by apportionment factor, (c) for tax years after Dec. 31, 1996, deduct cost, as defined in MCLA § 208.23, of mobile tangible assets; deduction shall be multiplied by apportionment factor, (d) for tangible assets, other than mobile tangible assets, purchased or acquired for use outside of state in tax year after Dec. 31, 1996 and physically located in state after assets are purchased or acquired for use in business activity, deduct federal basis used for determining gain or loss as of date tangible assets were physically located in state for use in business activity plus cost of fabrication and installation of tangible assets in state; deduction shall be multiplied by apportionment factor, (e) for non-mobile tangible assets physically located in this state and for years after Dec. 31, 1996, deduction under MCLA § 208.23(c) permitted if taxpayer meets certain criteria, such as taxpayer being headquartered in state, taxpayer's sales at retail of prescriptions are more than 2% and less than 10% of total sales, and for tax years before Jan. 1, 1998 taxpayer sells at retail more than 50%, and for tax years after Jan. 1, 1998 more than 20% of all of following: fresh, frozen or processed food, household products, prescriptions, health and beauty care products, cosmetics, pet products, carbonated beverages and beer, wine or liquor, (f) for tax years after Dec. 31, 1996 and for all other assets, except mobile tangible assets, deduct cost, including fabrication and installation, paid or accrued in taxable year of tangible assets eligible for depreciation, amortization, or accelerated capital cost recovery for federal income tax purposes; deduction shall be multiplied by apportionment factor (MCLA § 208.23 and.23b); (2) add gross proceeds from sale of tangible assets defined as above minus gain or plus loss from sale as reflected in federal taxable income and minus gain from sale added to tax base in MCLA § 208.9(6); this deduction shall be multiplied by apportionment factor; (3) deduct available business loss, defined as negative amount after allocation or apportionment as described above and adjustments provided in (1)-(3) above; loss can be carried forward to next ten taxable years in succession; (4) deduct unused net operating loss carryforward from state corporate income tax, but only for taxable years ending on or before Dec. 31, 1980. (MCLA § 208.23). Special adjustments and credits are provided for taxpayers whose adjusted tax bases exceed 50% of gross receipts apportioned or allocated to state. (MCLA § 208.31). For tax years beginning after Dec. 31, 1999, capital acquisition deduction described in this catchline is replaced by investment credit. (MCLA § 208.35a). Special adjustments are provided for “foreign person” that does not have permanent establishment in U.S. and whose business activity consists of transportation of persons or property for others by motor vehicle. (MCLA § 208.35b).

Exemptions.

Exempt from tax imposed by Act are following: (1) For tax years after 1992, first $45,000 of tax base of every person (special exemption provided for subchapter S corporations and professional corporations) which is increased by $12,000 for each partner or shareholder of subchapter S or professional corporation in excess of one, who is full time employee owning 10% of business and earning at least $12,000; (2) U.S., this and other states and agencies, political subdivisions and enterprises of each; (3) person who is exempt from federal income tax pursuant to provisions of I.R.C., and for tax years after Dec. 31, 1995 partnership, L.L.C., joint venture, general or limited partnership, unincorporated association, or other group or entity acting as unit if activities are exclusively related to charitable, educational or other exempt purpose, and if all partners or members of group or entity are exempt under I.R.C., except: (i) organization included under I.R.C. §§ 501(c)(12) or 501 (c)(16), (ii) organization exempt under I.R.C. § 501(c)(4), which would be exempt under I.R.C., § 501(c)(12) but for its failure to meet requirements in I.R.C. § 501(c)(12) that 85% or more of its income must consist of amounts collected from its members, (iii) adjusted tax base attributable to activities giving rise to unrelated taxable business income of exempt person; (4) portion of payroll of domestic insurers or marketing corporation that constitutes insurance sales commissions paid to employees and salaries of employees primarily concerned with adjustment of claims (except certain marketing corporations not controlled by domestic insurers); (5) beginning Aug. 3, 1987, and before being apportioned, first $130,000,000 of disability insurance premiums, other than credit insurance and disability income insurance premiums, of each insurer subject to tax under this act, which exemption shall be reduced by $2 for each $1 by which insurer’s gross premiums from insurance carrier services in this state and outside state exceed $180,000,000; (6) nonprofit cooperative housing corporation; (7) portion of tax base attributable to production of agricultural goods by person whose primary activity is production of such goods; (8) certain farmer’s cooperative corporations; (9) portion of tax base attributable to services provided by attorney-in-fact to reciprocal insurer pursuant to c. 72 of Insurance Code of 1956 (MCLA §§ 500.7200 to 500.7234); (10) portion of tax base attributable to multiple employer welfare arrangement which provides solely dental benefits; (11) foreign corporations engaged in international operation of aircraft whose income is exempt under I.R.C. § 883(a). (MCLA §§ 208.35, .19[6]).

Credits.

Partial credit allowed against tax for certain charitable contributions, public utility taxes and child care services provided employees (MCLA §§ 208.37, .38, .39, .39a), and for qualified expenditures for rehabilitation of historic resource for tax years after Dec. 31, 1998 and before Jan. 1, 2003 (MCLA § 208.39c). Certain taxpayers granted percentage credit against tax liability. Percentage credit equals 100% minus percentage computed by dividing adjusted business income by 45% of tax base, subject to certain maximum limits and reductions. (MCLA § 208.36). Unincorporated taxpayers and those electing subchapter S provisions are granted additional credit against tax calculated after credit provided in § 36 of act. Additional credit is 20% of tax liability if business income is $20,000 or less, 15% of tax liability if business income is more than $20,000 but less than $40,000, or 10% of tax liability if business is $40,000 or more. (MCLA § 208.37). Credit is granted for authorized business under Michigan Economic Growth Authority Act (MCLA §§ 207.801 et seq.), for tax years beginning after Dec. 31, 1994 and for period not to exceed 20 years (MCLA § 208.37c and MCLA § 208.37d). Credit granted for tax liability attributable to qualified business activity as defined in enterprise zone act (MCLA §§ 125.2101 et seq., 208.37a) and to high technology activity (MCLA § 208.37b). Certain employers granted credit against tax liability equal to increased federal unemployment taxes paid due to reduction of credits under I.R.C. §§ 3302(a) and (b) because of application of I.R.C. § 3302(c)(2) in state as limited by I.R.C. § 3302(f). (MCLA § 208.38a). Carriers and employers subject to workers' disability compensation statute granted credit against tax liability for certain compensation supplements paid after Mar. 31, 1984. Credit must be claimed against estimated tax payments made. (MCLA § 208.38b). For tax years 1997 to 2000, qualified taxpayer can claim credit equal to 10% of cost of eligible investment paid or accrued (as defined in MCLA § 208.38[d][8]), for maximum amount not exceeding $1,000,000. (MCLA § 208.38d). Credit for taxpayers training apprentices as defined in MCLA § 208.38e(5), equal to 50% or 100% of qualified expenses defined in MCLA § 208.38e(5)(d), for maximum amount not to exceed $2,000 (depending on company's North American industrial classification system) for each apprentice trained by taxpayer. (MCLA § 208.38e). Special credits are provided for taxpayers certified under Michigan next energy authority act (MCLA § 208.39[e]), for certain taxpayers with qualified research expenses related to pharmaceutical based business activity in state (MCLA § 208.39[f]), to eligible taxpayers undertaking certain construction or development projects in Michigan that are located in specified areas as determined by Michigan economic growth authority act (MCLA § 208.38[g]) and of $1 per long ton of qualified hematite used in production of iron or steel (MCLA § 208.39[d]). For investment credit beginning for years after Dec. 31, 1999 see catchline Adjustments to Tax Base, supra.

Michigan Business Tax.

Structure.

MBT is hybrid tax, with business income tax component and modified gross receipts tax component, levied on all forms of business enterprises (including limited liability companies [LLCs], limited partnerships [LPs], joint ventures and business trusts) with "business activity" in Michigan. Taxpayers pay both business income tax and modified gross receipts tax, as well as annual surcharge equal to percentage of taxpayer's MBT liability. "Business activity" means transfer of legal or equitable title to or rental of property, whether real, personal, or mixed, tangible or intangible, or performance of services, or combination thereof, made or engaged in with object of gain, benefit, or advantage, whether direct or indirect, to taxpayer or others, but does not include services rendered by employee to employer or services as director of corporation. Although activity may be incidental to other activities, each activity considered business engaged in for purposes of MBT. (MCLA § 208.1105[1]). "Taxpayer" means person or unitary business group liable for MBT, interest or penalty. (MCLA § 208.1117[5]). "Unitary Business group" means group of U.S. persons, other than foreign operating entity, one of which owns or controls, directly or indirectly, more than 50% of ownership interest with voting or comparable rights of other U.S. persons and has business activities or operations resulting in flow of value among persons included in unitary business group or has business activities or operations integrated with, dependent on, or contributing to each other. "Flow of value" determined by reviewing totality of facts and circumstances of business activities and operations. "United States person" means term as defined in IRC § 7701(a)(30).

Nexus.

Nexus is term for taxpayer's connection with state for purposes of determining whether taxpayer has sufficient connection with jurisdiction to subject it to tax. Under MBT Act, very broad nexus standard applied. Taxpayer has substantial nexus in this state and subject to MBT if taxpayer has physical presence in this state for more than one day during tax year or if taxpayer actively solicits sales in this state and has gross receipts of $350,000.00 or more sourced to this state. (MCLA § 208.1200[1]). "Actively solicits" to be defined by Department through written guidance and applied prospectively. (MCLA § 208.1201[2]). "Physical presence" means activity conducted by taxpayer or on its behalf by employee, agent or independent contractor acting in representative capacity; does not include activities of professionals providing services in professional capacity or other service providers if activity not significantly associated with taxpayer's ability to establish and maintain market in Michigan. (MCLA § 208.1200[3]).

Business Income Tax Rate.

Taxpayers meeting substantial nexus standard and having business activity in Michigan subject to business income tax component of MBTA, unless prohibited by 15 USC §§ 381-384 ("PL 86-272"). Tax imposed on business income tax base, after allocation or apportionment to Michigan, at rate of 4.95%. (MCLA § 208.1201[1]).

Computation of Tax Base.

Computation of tax base begins with taxpayer's business income subject to adjustments contained in MCLA § 208.1201(2), before allocation or apportionment. "Business income" means portion of federal taxable income derived from business activity. For partnerships or S corporations, "business income" includes payments and items of income and expense attributable to business activity of partnership or S corporation and separately reported to partners and shareholders. (MCLA § 208.1105[2]). For individual, estate, partnership organized exclusively for estate or gift planning purposes, or trust organized exclusively for estate or gift planning purposes, business income is that part of federal taxable income derived from transactions, activities, and sources in regular course of taxpayer's trade or business. (MCLA § 208.1105[2]).

Income tax base of unitary business group is sum of business income tax base of each person (other than foreign operating entity or person subject to insurance tax or financial institutions tax under Chapter 2A or 2B of MBT Act) included in unitary business group less items of income and related deductions arising from transactions including dividends between persons included in unitary business group. (MCLA § 208.1201[3]).

Adjustments to the Business Income Tax Base.

Business income tax base modified by following adjustments: (a) Add interest and dividend income derived from obligations or securities of states other than Michigan to extent excluded from federal taxable income, less expenses (MCLA § 208.1201[2][a]); (b) add all taxes on or measured by net income and tax imposed under MBT Act to extent taxes were deducted in computing federal taxable income (MCLA § 208.1201[2][b]); (c) add carryback or carry forward of net operating loss to extent deducted in arriving at federal taxable income (MCLA § 208.1201[2][c]); (d) deduct dividends and royalties received from persons, other than United States persons and foreign operating entities, including amounts determined under IRC § 78 and §§ 951-964 (Subpart F income) (MCLA § 208.1201[2][d]); (e) to extent included in federal taxable income, add loss or subtract income attributable to another entity with business activities subject to business income tax or that would be if conducted in Michigan (MCLA § 208.1201[2][e]); (f) to extent deducted in arriving at federal taxable income, add royalty, interest or other expense paid to person related to taxpayer by ownership or control for use of intangible asset if person not included in taxpayer's unitary business group (MCLA § 208.1201[2][f]); (g) to extent included in federal taxable income, deduction for interest income from United States obligations (MCLA § 208.1201[2][g]); (h) to extent included in federal taxable income, deduct net earnings from self-employment, as defined under IRC § 1402, of taxpayer or partner or LLC member of taxpayer except to extent those net earnings represent reasonable return on capital (MCLA § 208.1201[2]

[h]); (i) for businesses that realize increase in deferred tax, change in business's deferred tax liability through tax year 2025 (MCLA § 208.1201[2][i]); (j) deduct any gain from sale of any residential units in Michigan to qualified affordable housing project (defined at MCLA § 208.1201[9][b]) that enters agreement to operate residential rental units as rent restricted units for minimum of 15 years (MCLA § 208.1201[6]); and (k) deduct available business losses incurred after Dec. 31, 2007. "Business loss" means negative business income taxable amount after allocation or apportionment. Business loss carried forward, but not back, to year immediately succeeding loss year as offset to allocated or apportioned business income tax base, then successively to next nine taxable years following loss year or until loss is used up, whichever occurs first, but for not more than ten taxable years after loss year. (MCLA § 208.1201[4]). No legacy SBT losses can be used against business income tax base.

Taxpayer can avoid additions to tax base under clause (f) of preceding paragraph by demonstrating that transaction: (a) has "nontax business purpose" other than avoidance of business income tax; (b) is conducted with arm's length pricing and rates and terms under IRC § 482 and § 1274(d); and (c) satisfies one of following: (i) expense is passthrough of another transaction between third party and related person with comparable rates and terms; (ii) results in double taxation, meaning, transaction subject to taxation in another jurisdiction; or (iii) addback unreasonable as determined by Michigan treasurer and taxpayer agrees that addition would be unreasonable based on facts and circumstances. (MCLA § 208.1201[2][e][i]-[iii]).

Computation of Business Income of Unitary Group.

"Business income" of unitary business group is sum of each person's income, other than foreign operating entity or person subject to insurance company or financial institutions taxes under Chapters 2A and 2B, included in unitary business group, less items of income and related deductions arising from transactions, including dividends between persons included in unitary business group. (MCLA § 208.1201[3]). "Business income" means that part of federal taxable income derived from business activity. (MCLA § 208.1105[2]). "Foreign operating entity" means United States person satisfying each of following: (a) person would be part of unitary group with at least one person included in unitary group taxable in Michigan; (b) person has substantial operations outside U.S. and territorial possessions of U.S.; and (c) at least 80% of person's income is active foreign business income as defined in IRC § 861(c)(1)(B). (MCLA § 208.1109[5][a]-[c]). For partnership or S corporation, business income includes items of income and expense attributable to business activity of partnership or S corporation and separately reported to partners or shareholders. (MCLA § 208.1105[2]).

Modified Gross Receipts Tax Rate.

Modified gross receipts tax imposed on "modified gross receipts tax base" of every taxpayer having substantial nexus with state as determined under § 200 of MBT Act. (MCLA § 208.1203[1]). Tax rate imposed on modified gross receipts tax base, after allocation or apportionment to Michigan, at rate of 0.80%. (MCLA § 208.1203[1]). Tax imposed on privilege of doing business and not on income or property. (MCLA § 208.1203[2]). Prohibition of 15 USC §§ 381-384 (PL 86-272) not applicable.

Computation of Modified Gross Receipts Tax Base.

"Modified gross receipts tax base" means gross receipts less purchases from other firms before apportionment. (MCLA § 208.1203[3]). Modified gross receipts of unitary business group is sum of modified gross receipts of each person, other than foreign operating entity or person subject to tax imposed under Chapter 2A or 2B, included in unitary business group less any modified gross receipts arising from transactions between persons included in unitary business group. (MCLA § 208.1203[3]). For qualified affordable housing project (defined at MCLA § 208.1203[7][b]), certain amount may be deducted from gross receipts tax base for receipts attributable o residential rental units in Michigan. (MCLA § 1203[6]). "Gross receipts" means entire amount received from any activity carried on for direct or indirect gain, benefit, or advantage, except for following: (a) Proceeds from sale by principal that taxpayer collects as agent solely on behalf of principal and delivers to principal (MCLA § 208.1111[1][a]); (b) amounts received as agent solely on behalf of principal and expended by taxpayer for any of following: (i) performance of service by third party for benefit of principal required by law to be performed by licensed person; (ii) performance of service by third party for benefit of principal that taxpayer has no contractual duty to perform; (iii) principal and interest under mortgage loan or land contract, lease or rental payments, or taxes, utilities, or insurance premiums relating to real or personal property owned or leased by principal; (iv) capital asset of type that is, or under IRC will become, eligible for depreciation, amortization, or accelerated cost recovery under IRC or for real property owned or leased to principal; (v) property purchased by taxpayer on behalf of principal that taxpayer does not take title to or use in course of performing its contractual business activities; and (vi) fees, taxes, assessments, levies, fines, penalties, or other payments paid to governmental entity that are legal obligation of principal (MCLA § 208.1111[b][i]-[vi]); (c) amounts excluded from gross income of foreign corporation engaged in international operation of aircraft under IRC § 883(a) (MCLA § 208.1111[1][c]); (d) amounts received by advertising agency used to acquire advertising media time, space, production, or talent on behalf of another person (MCLA § 208.1111[1][d]); (e) for newspapers, amount received to acquire advertising space not owned by that newspaper in another newspaper on behalf of another person (MCLA § 208.1111[1][e]); (f) for real property managers, amounts received that are deposited into separate account kept in name of third party, if amounts received not reimbursements or indirect payment for management services (MCLA § 208.1111[1][f]); (g) proceeds from transfer of taxpayer's account receivable if sale that generated receivable was included in gross receipts for federal tax purposes, but not if taxpayer during tax year both buys and sells any receivable (MCLA § 208.1111[1][g]); (h) qualifying original issue of stock equity or debt instruments (MCLA § 208.1111[1][h]); (i) refunds from returned merchandise (MCLA § 208.1111[1][i]); (j) cash and in-kind discounts (MCLA § 208.1111[1][j]); (k) trade discounts (MCLA § 208.1111[1][k]); (l) federal, state, or local tax refunds (MCLA § 208.1111[1][l]); (m) security deposits (MCLA § 208.1111[1][m]); (n) payment of principal portion of loans (MCLA § 208.1111[1][n]); (o) value of property received in like-kind exchange (MCLA § 208.1111[1][o]); (p) proceeds from sale, transaction, exchange, involuntary conversion, or other disposition of tangible, intangible, or real property constituting capital asset under IRC § 1221(a) or land qualifying as property used in trade or business under IRC § 1231(b), less any gain from disposition to extent included in federal taxable income (MCLA § 208.1111[1][p]); (q) proceeds from insurance policy, settlement of claim or judgment in civil action, less amount included in federal taxable income (MCLA § 208.1111[1][q]); (r) for sales finance company (defined in MCLA § 492.102) directly or indirectly owned in whole or in part by motor vehicle manufacturer as of Jan. 1, 2008, and for broker or dealer (as defined in Securities Exchange Act of 1934), amounts realized from repayment, maturity, sale, or redemption of principal of loan, bond, or mutual fund, certificate of deposit, or similar marketable instrument not held as inventory (MCLA § 208.1111[r]); (s) for sales finance company (as defined in MCLA § 492.102) directly or indirectly owned in whole or in part by motor vehicle manufacturer as of Jan. 1, 2008, and for broker or dealer (as defined in Securities Exchange Act of 1934), principal amount received under repurchase agreement or other transaction properly characterized as loan (MCLA § 208.1111[1][s]); (t) for mortgage company (defined as person licensed under MCLA §§ 445.1651-445.1684 or MCLA §§ 493.51-493.81 that has more than 90% of revenues, in ordinary course of business, from origination, sale, or servicing of residential mortgage loans), proceeds representing principal balance of loans transferred or sold in tax year (MCLA § 208.1111[1][t]); (u) for professional employer organization (defined as organization that provides management and administration of human resources of another entity by contractually assuming substantial employer (as defined in IRC § 3401[d]) rights and responsibilities through professional employer agreement that establishes employer relationship with leased officers or employees (as defined in IRC § 3401[c]) assigned to other entity by doing all of following: (i) maintaining (or sharing) right of direction and control of employees' work; (ii) paying wages and employment taxes of employees from own accounts; (iii) reporting, collecting and depositing state and federal employment taxes for employees; and (iv) retaining right to hire or fire employees, any amount charged by professional employer organization that represent actual cost of wages and salaries, benefits, worker's compensation, payroll taxes, withholding, or other assessments paid to or on behalf of covered employee by professional employer organization under professional employment arrangement (MCLA § 208.1111[1][u]); (v) qualifying invoiced items used to provide favorable floor plan assistance (MCLA § 208.1111[1][v]); (w) for individual, estate, partnership organized exclusively for estate or gift planning purposes, or trust organized exclusively for estate or gift planning purposes, amounts received other than from transactions, activities, and sources in regular course of taxpayer's trade or business (MCLA § 208.1111[1][w]); (x) qualifying receipts derived from investment activity by person organized exclusively to conduct investment activity (MCLA § 208.1111[1][x]); (y) interest income and dividends derived from obligations or securities of United States government, Michigan, or any governmental unit of Michigan (MCLA § 208.1111[1][y]); (z) qualifying dividends and royalties received or deemed received from foreign operating entity or person other than United States person (MCLA § 208.1111[1][z]); (aa) certain taxes, deposits and fees collected on behalf of taxing authority, including sales and use tax (MCLA § 208.1111[1][aa]); (bb) amounts attributable to ownership interest in pass-through entity, regulated investment company, real estate investment trust, or cooperative corporation whose business activities taxable under § 203 or would be subject to tax under § 203 if business activities were in this state (MCLA § 208.1111[1][bb]); (cc) for regulated investment company as defined under IRC § 851, receipts derived from investment activity (MCLA § 208.1111[1][cc]); (dd) for fiscal years beginning after Sept. 30, 2009, unless state budget director certifies by Jan. 1 of that fiscal year that federally certified rates for actuarial soundness required under 42 CFR 438.6 specifically developed for Michigan's health maintenance organizations holding contract with state for Medicaid services provide explicit adjustment for obligations required for payment of tax under this act, amounts received by taxpayer during that fiscal year for Medicaid premium or reimbursement of costs associated with service provided to Medicaid recipient or beneficiary (MCLA § 208.1111[1][dd]).

"Purchases from other firms" means: (a) inventory acquired during tax year, including freight, shipping, delivery, or engineering charges included in original contract price (MCLA § 208.1113[6][a]); (b) assets, including costs of fabrication and installation, acquired during tax year of type that are, or under IRC will become, eligible for depreciation, amortization, or accelerated capital cost recovery (MCLA § 208.1113[6][b]); (c) to extent not included in inventory or depreciable property, materials and supplies, including repair parts and fuel (MCLA § 208.1113[6][c]); (d) for staffing companies, compensation of personnel supplied to customers of staffing companies (MCLA § 208.1113[6][d]); (e) for general building contractors, heavy construction contractors, and construction special trade contractors, qualifying payments to subcontractors and qualifying payments for materials (MCLA § 208.1113[6][e]); and (f) film rental and royalty payments paid by theater owner to film distributor, film producer, or film distributor + producer (MCLA § 208.1113[6][f]). "Inventory" means: (a) stock of goods held for resale in regular course of trade of retail or wholesale business, including electricity or natural gas purchased for resale (MCLA § 208.1111[4][a]); (b) finished goods, goods in process, and raw materials of manufacturing business purchased from another person (MCLA § 208.1111[4][b]); and (c) for new motor vehicle dealers licensed under MCLA §§ 257.1-.923, floor plan interest expenses for new motor vehicles (MCLA § 208.1111[4][c]). Personal property under lease (MCLA § 208.1111[4][d][i]) and property allowed deduction for depreciation or depletion under IRC (MCLA § 208.1111[4][d][ii]) specifically excluded from "inventory."

Annual Surcharge.

In addition to imposition of business income tax and gross receipts tax, annual surcharge imposed, calculated after allocation and apportionment but before calculation of any applicable credits. Surcharge is 21.99% of taxpayer's MBT liability. However, companies subject to franchise tax applicable to financial institutions under Chapter 2B of MBT subject to 27.7% surcharge for tax years ending after Dec. 31, 2007 but before Jan. 1, 2009 and subject to 23.4% surcharge for tax years ending after Dec. 31, 2008. Surcharge does not apply to companies subject to business tax applicable to insurance companies under Chapter 2A of MBT or to financial institution taxable under Chapter 2B that is authorized to exercise only trust powers. Surcharge cannot exceed

$6,000,000 for any taxpayer each year. (MCLA § 208.1281).

Carry Forward of SBT Losses.

For 2008 tax year, taxpayers may deduct 65% of any remaining business loss carryforward under SBT Act § 23b(h) (MCLA § 208.23b[h]) actually incurred in 2006 or 2007 tax year to extent not deducted in tax years beginning prior to Jan. 1, 2008. (MCLA § 208.1203[4]). Business loss carryforwards incurred prior to 2006 tax year not eligible for deduction. If taxpayer is unitary business group, business loss carryforward may only be deducted against modified gross receipts tax base of that included in unitary group calculated as if that entity was not included in unitary business group. (MCLA § 208.1203[4]).

Business Tax Applicable to Insurance Companies (Chapter 2A).

Insurance companies subject to tax equal to 1.25% of gross direct premiums written on property or risk located or residing in Michigan. (MCLA § 208.1235[2]). See provisions of MBT Act (Chapter 2A) for taxation of insurance companies pertaining to: (1) what constitutes premiums (MCLA § 208.1235[2][a]-[d]); (2) credits that can be claimed against premiums tax (MCLA §§ 208.1237, 208.1239, 208.1241); and (3) application of various reporting issues (MCLA § 208.1243). This tax imposed in lieu of income and modified gross receipts tax components of MBT. Captive insurance companies, as defined by Chapter 46 or 47 of Insurance Code of 1956 (MCLA §§ 500.4601-.4673, 500.4701-.4747) exempt from all taxes imposed under MBT Act. (MCLA § 208.1235[4]).

Franchise Tax Applicable to Financial Institutions (Chapter 2B).

Financial institutions with nexus in Michigan subject to franchise tax equal to 0.235% of net capital (as averaged over five years) in lieu of income and modified gross receipts taxes. (MCLA § 208.1267[1]). (See Chapter 2B of MBT Act.) Several types of banks, as well as persons owned by bank that are part of unitary business group, considered financial institutions. (MCLA § 208.1263[f]). In general, tax base of financial institution whose activities are confined solely to Michigan allocated to Michigan. Institutions with business activities subject to tax within and without Michigan apportioned by multiplying tax base by “gross receipts factor.” (MCLA § 208.1267[1]).

Entities Exempt from MBT.

Following entities exempt from MBT: (a) U.S., Michigan, other states, governmental agencies, political subdivisions and enterprises of U.S., Michigan, other states, including grantor trust established by municipality with municipality as grantor and exempt from federal tax; (b) person exempt from federal income tax under IRC, partnership, LLC, joint venture, general partnership, limited partnership, unincorporated association, or other group or combination of entities acting as unit if activities exclusively related to charitable, educational or other purpose or function constituting basis for exemption under IRC from federal income taxation of partners or members of entity are exempt from federal income tax, except: (i) organization included under IRC § 501(c)(12) or 501(c)(16); (ii) organization exempt under IRC § 501(c)(4) that would be exempt under IRC § 501(c)(12) except for failure to meet requirements in IRC § 501(c)(12) that 85% or more of income consist of amounts collected from members; (iii) tax base attributable to activities giving rise to unrelated taxable business income of exempt person; (c) nonprofit cooperative house cooperation, meaning cooperative housing corporation engaged in providing housing services to its stockholders and members and that does not pay dividends or interest on stock or membership investment but distributes all earnings to its stockholders or members (exemption not applicable to business activity of nonprofit cooperative housing corporation other than providing housing services to its stockholders and members); (d) portion of tax base attributable to production of agricultural goods by person whose primary activity is production of agricultural goods (as defined in MCLA § 208.1207[1][d]); (e) certain farmers’ cooperative corporations under specific circumstances; (f) portion of tax base attributable to direct and indirect marketing activities (as defined in MCLA § 208.1207[1][f]) of farmers' cooperative corporation organized within limitations of MCLA § 450.98 if marketing activities provided on behalf of members and related to members' direct sales of their products to third parties or, for livestock, related to members' direct or indirect sales of that product to third parties (marketing activities for product other than livestock not exempt if farmers' cooperative corporation takes physical possession of product); (g) portion of tax base attributable to services provided by attorney-in-fact to reciprocal insurer pursuant to Chapter 72 of insurance code, MCLA §§ 500.7200-.7234; (h) portion of tax base attributable to multiple employer welfare arrangement providing dental benefits only and having certificate of authority under Chapter 70 of insurance code, MCLA §§ 500.7001-.7090; and (i) foreign person domiciled in subnational jurisdiction not imposing income tax on similarly situated person domiciled in Michigan whose presence in foreign jurisdiction is same as foreigh person's presence in U.S. (MCLA § 208.1207[1][a]-[i]).

Apportionment and Allocation of Tax Base.

Taxpayer with business activities subject to tax both within and outside of Michigan may apportion tax base if: (1) taxpayer subject to business privilege tax, net income tax, franchise tax measured by net income, franchise tax for privilege of doing business, corporate stock tax, or tax of type imposed under MBT Act (MCLA § 208.1301[3][a]); or (2) another state has jurisdiction to subject taxpayer to one or more of taxes listed, regardless of whether that state in fact subjects taxpayer to that tax (MCLA § 208.1301[3][b]). In general, both income tax and modified gross receipts tax components of MBT Act use same apportionment rules. (MCLA § 208.1301[1]). Allocation to Michigan, rather than apportionment, required only where taxpayer's business activities confined solely to Michigan. (MCLA § 208.1301[2]).

Single-Factor Sales Apportionment.

Sales factor is fraction, numerator of which is total sales in Michigan during tax year and denominator of which is total sales everywhere during tax year. (MCLA § 208.1303[1]). "Sales" means amounts received as consideration from: (a) transfer of title or possession to property that is stock and trade of taxpayer; (b) performance of services that constitute business activities; (c) rental, lease, licensing or use of tangible or intangible property including interest; (d) any combination of these activities; and (e) for taxpayers not engaged in any other business activities, interest, dividends, and other income from investment assets and activities from trading assets and activities. (MCLA § 208.1115[1][a][e]).

For taxpayer that is unitary business group, sales include sales in Michigan of every person included in group without regard to whether person has nexus in Michigan. Sales between persons included in unitary business group must be eliminated in calculating sales factor. (MCLA § 208.1303[2]).

Sourcing Sales of Property.

Sales of tangible property deemed Michigan sales if property shipped or delivered, or, in case of electricity or gas, contract requires delivery to purchaser within Michigan, based on "ultimate destination" test, regardless of other terms or conditions of sale. (MCLA § 208.1305[1][a]). Receipts from sale, lease, rental or licensing of real property deemed in Michigan if property located in Michigan. (MCLA § 208.1305[1][b]). Receipts from lease or rental of tangible property deemed Michigan sales if property is used in Michigan. Extent of utilization of personal property in Michigan determined by multiplying related receipts by fraction, numerator of which is number of days property located in Michigan during lease or rental period and denominator of which is number of days in year. In cases where physical location of leased or rented property unknown or cannot be determined, location of usage of property deemed to be state in which property was located at time lessee or renter obtained possession. (MCLA § 208.1305[1][c]).

Receipts related to mobile transportation property sourced to Michigan to extent property used in Michigan. For purposes of apportioning aircraft utilization, receipts apportioned based on fraction of landings within Michigan to landings everywhere. For transportation property where location of use cannot be determined, receipts deemed in Michigan if property has principal base of operations in Michigan. (MCLA § 208.1305[1][d]). Royalties from use of tangible property, including software, attributed to state in which used. If intangible property used in more than one state, receipts apportioned to Michigan on pro rata basis in accordance to portion of usage within Michigan. If situs of usage cannot be determined, related income from intangible excluded from both numerator and denominator of sales factor. (MCLA § 208.1305[1][e]).

Sourcing Sales of Services.

MBT Act uses market-based methodology for sourcing services. All receipts from performance of services included in numerator of apportionment factor if recipient of services receives all benefit of services in Michigan. If recipient of services receives some of benefit of services in Michigan, receipts included in numerator of apportionment factor in proportion to extent recipient receives benefit of services in Michigan. (MCLA § 208.1305[2][a]). All other receipts not otherwise sourced under MBT Act sourced based on where benefit to customer is received or, if situs of where benefit to customer received cannot be determined, to customer's location. (MCLA § 208.1311). Michigan previously used cost of performance method to source services under SBT Act. (MCLA § 208.53).

Sales derived from securities brokerage services attributable to Michigan determined by multiplying amount of receipts by fraction, numerator of which is sales of securities brokerage services within Michigan and denominator of which is sales of securities brokerage services to all customers. Receipts from securities brokerage services include commissions, spread on principal transactions (where broker buys or sells from its own account), total margin interest paid on behalf of brokerage accounts owned by broker's customers, and fees and receipts of all kinds from securities underwriting. If receipts from brokerage services can be associated with particular customer but not practical to associate receipts with that customer's address, then customer's address presumed to be address of branch office that generates transaction. (MCLA § 208.1305[2][b]).

To extent transportation service provider is taxable in another state, receipts apportioned to Michigan to extent that revenue miles (as defined in MCLA § 208.113[7]) in Michigan bear to revenue miles everywhere. (MCLA § 208.1305[11][a]).

Maritime receipts sourced to Michigan as follows: (1) 50% of receipts that either originate or terminate in Michigan (MCLA § 208.1305[11][b][i]); and (2) 100% of receipts of transportation services that both originate and terminate in Michigan (MCLA § 208.1305[11][b][ii]). Special rule applies to taxpayer who transports both passengers and property. (MCLA § 208.1305[11][c]). Under this rule, passenger miles and ton miles separately computed and individually weighted by ratio of gross receipts from freight to total gross receipts and from gross receipts from passengers to total gross receipts from all transportation. If taxpayer can show that revenue mile information not available or obtainable without unreasonable expense, receipts attributable to Michigan deemed that portion of revenue derived from transportation services in Michigan to transportation services performed everywhere. Department may use other available information to apportion taxpayer's income that, in its opinion, will result in equitable allocation of taxpayer's receipts to Michigan. (MCLA § 208.1305[12]).

MBT Act also provides rules for apportionment of variety of industry-specific services, including: financial institutions (MCLA § 208.1305[3]-[9]); investment and trading activities (MCLA § 208.1305[10]); oil and gas pipelines (MCLA § 208.1305[11][d]-[e]); telecommunication services (MCLA § 208.1305[13]-[19]); and radio or television programming (MCLA § 208.1305[20]).

Alternate Apportionment Formula.

If general apportionment provisions of MBT Act do not "fairly represent" taxpayer's business activity in Michigan, taxpayer may petition for, or treasurer may require, with respect to all or portion of taxpayer's business activity, if reasonable: (1) separate accounting; (2) inclusion of one or more additional alternative factors; or (3) use of any other method to effectuate equitable apportionment of taxpayer's tax base. (MCLA § 208.1309[1]). Alternate method used only if approved by department. (MCLA § 208.1309[2]). MBT apportionment provisions rebuttably presumed to fairly represent business activity of taxpayer unless it can be demonstrated that business activity attributed to taxpayer within Michigan is out of all appropriate proportion to actual business activity transacted in Michigan and leads to grossly distorted result, or would operate unconstitutionally to tax extraterritorial activity. (MCLA § 208.1309[3]).

MBT Credits.

In general, credits under MBT can be used to offset taxpayer's total tax liability under business income tax and modified gross receipts tax components of MBT, but there are certain limitations on utilization based on taxpayer's total MBT liability. In addition, there are also certain ordering rules for utilization of credits claimed. (MCLA § 208.1403[1]).

Legacy SBT Credits.

Unless otherwise provided, any unused carryforward for any SBT credit may be applied to 2008 and 2009 tax years, and any unused carryforward after 2009 extinguished. (MCLA § 208.1401). While general rule severely limits use of SBT credits, there are credit provisions that effectively carry over previous credits available under SBT, including Michigan Economic Growth Authority (MEGA) and some renaissance zone credits. (MCLA §§ 208.1431, 208.1433). These carryover credits may apply to insurance companies taxed under Chapter 2A and financial institutions taxable under Chapter 2B. (MCLA §§ 208.1433[8],.1435[16]).

Compensation and Investment Credits.

For tax year 2008, taxpayer may claim credit against MBT liability equal to 0.296% of compensation paid in Michigan. (MCLA § 208.1403[2]). Also, taxpayer may claim investment credit equal to 2.32% of cost of net new capital assets located in Michigan. (MCLA § 208.1403[3]).

For tax years after 2008, taxpayer may claim credit against MBT liability equal to 0.370% of compensation paid in Michigan. (MCLA § 208.1403[2]). Also, taxpayer may claim investment credit equal to 2.9% of cost of net new capital assets located in Michigan. (MCLA § 208.1403[3]).

Compensation and investment credits in MCLA § 208.1403 available to companies subject to franchise tax applicable to financial institutions under Chapter 2B of MBT and companies subject to business tax applicable to insurance companies under Chapter 2A of MBT. (MCLA § 208.1403[2]).

Combined amounts of compensation and investment credits may not exceed 50% of taxpayer's liability before imposition of surcharge for tax year 2008 and for 2009 cannot exceed 52%. (MCLA § 208.1403[1]). However, for companies subject to business tax applicable to insurance companies under Chapter 2A of MBT, combined amounts of compensation and investment credits may not exceed 65%, after claiming other credits allowed by Chapter 2A. (MCLA § 208.1239[2]).

Research and Development Credits.

MBT includes two research and development credits. Taxpayer may claim credit equal to 1.52% for tax year 2008 and 1.9% for tax years after 2008 of research and development expenses in Michigan in tax year. Total of this credit and compensation and investment credits capped at 65% of tax liability, calculated before imposition of surcharge. "Research and development" defined by reference to IRC § 41(b). (MCLA § 208.1405).

For 2008 through 2010 tax years, qualified taxpayer that makes eligible contribution to eligible business may claim credit equal to 30% of contribution, not to exceed $300,000. Prior to making eligible contribution, qualified taxpayer must make application to MEGA for approval of credit. MEGA may not grant more than 20 credits for any one year. (MCLA § 208.1407). "Eligible contribution" means transfer of at least $350,000 in cash for purposes of research and development and technology innovation. "Eligible business" means taxpayer engaged in research and development that employs fewer than 50 full-time employees or has gross receipts of less than $10 million. (MCLA § 208.1407).

Entrepreneurial Credit.

For 2008 through 2010 tax years, taxpayer may claim entrepreneurial credit equal to 100% of eligible taxpayer's tax liability attributable to increased employment for three years. Taxpayer must meet all of following conditions: (a) has less than $25 million (adjusted annually for inflation) in gross receipts in immediately preceding tax year; (b) has created in Michigan or transferred into state at least 20 new jobs in immediately preceding tax year; (c) has made capital investment in Michigan of at least $1.25 million in immediately preceding tax year; and (d) is not retail establishment. (MCLA § 208.1441[2]). Entrepreneurial credit also available to taxpayer that qualifies as eligible business under statute that provides 30% credit for research and development. If taxpayer receives eligible contribution for which credit was claimed by another taxpayer, taxpayer may claim credit equal to 100% of tax liability attributable to increased employment for three years. Taxpayer must meet two requirements: (1) has less than $25 million in gross receipts in immediately preceding tax year; and (2) has increased number of new jobs in Michigan by at least 20% from immediately preceding tax year. (MCLA § 208.1441[2]).

Personal Property Tax Credits.

For property taxes levied after 2007, taxpayer may deduct 35% of amount paid for property taxes on eligible personal property in tax year. "Eligible personal property" means personal property classified as industrial personal property or situated on land classified as industrial real property. For eligible telephone company personal property, credit equals 23% of amount paid for property taxes levied in 2008 tax year and 13.5% for property taxes levied in subsequent years. Also, credit available equal to 10% of amount paid for property taxes on eligible natural gas pipeline property. (MCLA § 208.1413).

Culture Credit.

Taxpayer making charitable contributions of $50,000 or more to either of following may claim non-refundable of 50% of amount by which aggregate amount of those charitable contributions exceed $50,000: (1) municipality or nonprofit corporation affiliated with municipality and art, historical or zoological institute for purpose of benefiting art, historical or zoological institute; or (2) institution devoted to procurement, care, study and display of objects of lasting interest or value. Credit may not exceed $100,000 per tax year. (MCLA § 208.1422).

Anchor Company Credits.

Qualified high technology business may claim MBT credit for payroll attributable to employees of qualified supplier or customer, for up to five years. To qualify, business must be designated by Michigan economic growth authority (MEGA) as anchor company within last five years. To qualify as anchor company, business must be integral part of high technology activity and have ability or potential ability to influence business decisions and site location of qualified suppliers and customers. Business must also have influenced new qualified supplier or customer to open, locate, or expand in Michigan. Qualified supplier or customer is business that opens new location in Michigan, business that locates in Michigan, or existing business located in Michigan that expands business within last year as result of anchor company and that has financial transactions with anchor company; sells critical or unique component or technology necessary for anchor company to market finished product or buys critical or unique component from anchor company; has created more than ten qualified new jobs; and has had investment of at least $1 million as certified by MEGA. Credit will be awarded by MEGA to five anchor companies each year. (MCLA § 208.1431a).

Anchor company may also qualify to claim equal to sum of up to 5% of taxable value of each qualified supplier's or customer's taxable property located within ten-mile radius of qualified taxpayer and subject to collection of general ad valorem taxes under general property tax act (MCLA § 211.1-.155), for period of up to five years, as determined by Michigan economic growth authority. If qualified supplier's or customer's taxable property subject to specific tax levied under Michigan's Plant Rehabilitation and Industrial Development Districts Act (MCLA §§ 207.551-.572), qualified taxpayer may only include up to 2.5% of taxable value of that property in calculation of amount of credit allowed. (MCLA § 208.1431c).

Private Equity Fund Credit.

Qualified private equity fund may claim credit against MBT equal to taxpayer's tax liability for tax year after claiming any other applicable MBT credits. Credit calculated by multiplying taxpayer's tax liability by fraction, numerator of which is total activity of private fund equity manager in state during year and denominator is total activity conducted everywhere. (MCLA § 208.1453 added to MBT, effective Jan. 1, 2008.)

New Motor Vehicle Dealer Credit.

New motor vehicle or vehicle parts dealer may claim credit equal to 0.25% of amount paid by taxpayer to acquire new motor vehicle inventory in tax year. Credit amounts that exceed current year's liability cannot be carried over to subsequent years. (MCLA § 208.1445).

Film Industry Credits.

Qualifying production company may apply for credit for direct production expenditures or qualified personnel expenditures made after Feb. 29, 2008 equal to 42% of direct production expenditures for state certified qualified production in core community, 40% of direct production expenditures for state certified qualified production not in core community, and 30% for qualified personnel expenditures. (MCLA § 208.1455[2]). To qualify, production company must be authorized to take credit by Michigan film office and must spend at least $50,000 in Michigan for development, preproduction, production, or postproduction costs of state certified qualified production. (MCLA § 208.1455[1]).

Qualifying taxpayer may apply for credit equal to 25% of taxpayer's base investment for investment in qualified film and digital media infrastructure project. To qualify, taxpayer must be authorized to take credit by Michigan film office, on or before Sept. 30, 2015. Taxpayer must also invest and expend at least $100,000 for qualified film and digital media infrastructure project in Michigan before Jan. 1, 2009, or invest and expend at least $250,000 for qualified film and digital media infrastructure project after Dec. 31, 2008. Credit capped at $20,000,000. If all or portion of qualified film and digital media infrastructure project is facility, then credit not available until facility complete, and must be used as state of art production or postproduction facility or as support and component of facility for useful life of facility.

Qualifying production company may apply for credit equal to 50% of qualified job training expenditures. To qualify, production company must be authorized to take credit by Michigan film office, on or before Sept. 30, 2015. (MCLA § 208.1459).

Same expenditures may not be claimed for production company credits under MCLA §§ 208.1455(2),.1459(2).

To qualify for any film industry credit, taxpayer must not be delinquent in tax or other obligation owed to Michigan or be owned or under common control of entity that is delinquent. (MCLA §§ 208.1455[1][e],.1457[1][e],.1455[1][e]).

Energy Industry Credits.

Qualified taxpayer constructing and operating new facility for development and manufacturing of photovoltaic energy, photo voltaic systems, or other photovoltaic technology in Michigan may claim credit equal to 50% of capital investments made in new facility during tax year. To qualify, taxpayer must enter into agreement with Michigan economic growth authority that it will create at least 7,000 qualified new jobs and to make at least $50,000,000 in qualified capital investment of which $25,000,000 must be made before issuance of certificate. Credit available after Jan. 1, 2009 and capped at $25,000,000. (MCLA § 208.1430).

Qualified taxpayer constructing or operating new or expanded facility to manufacture polycrystalline silicon for solar cells and semiconductor microchips in Michigan may claim credit as calculated at MCLA §§ 208.1432a-.1432d. To qualify, taxpayer must enter into agreement with Michigan economic growth authority before Dec. 31, 2008. Limited to one taxpayer. (MCLA § 208.1432).

Compensation Credit For Federal Procurement Contract.

Person or group acting collectively to enter into agreement with Michigan economic development authority for tax credit based on qualified new jobs created as result of winning procurement contract offered by U.S. Department of Defense, Department of Energy, or Department of Homeland Security creating minimum of 25 qualified new jobs may qualify for credit. Credit equal to amount up to 100% of qualified taxpayer’s payroll attributable to employees who perform qualified new jobs created as result of person or group being awarded federal procurement contract by U.S. Department of Defense, Department of Energy, or Department of Homeland Security as determined by Michigan economic growth authority, multiplied by tax rate for tax year for period of up to seven years or term of contract, whichever is less, as determined by Michigan economic growth authority. (MCLA § 208.1431b).

Sports Or Entertainment Facility Credits.

For taxpayers meeting specific requirements of MCLA § 208.1410 or § 208.1410a, taxpayer may take credit related to owning, operating, managing, licensing, or leasing more than one facility or stadium in Michigan having capacity of at least 14,000 patrons per facility and primarily used for professional sporting events or other entertainment.

For taxpayers meeting specific requirements of MCLA § 208.1409, taxpayer may take credit related to owning, operating, managing, or leasing qualifying motor sports entertainment complex in Michigan.

Credit Issues Related to Small Businesses.

Credit available to taxpayer with gross receipts not exceeding $20 million and with adjusted business income minus loss adjustment not exceeding $1.3 million (adjusted annually for inflation). (MCLA § 208.1417[1]). Credit equals amount by which MBT exceeds 1.8% of adjusted business income. (MCLA § 208.1417[4]). Credit can be taken after application of compensation and investment credits and prior to application of other MBT credits. (MCLA § 208.1417[1]).

Credit not available if any of taxpayer’s officers receive more than $180,000 in compensation and phased out for officers receiving compensation between $160,000 and $180,000. (MCLA § 208.1417[1]). If gross receipts exceed $19 million, credit is reduced by fraction, numerator of which is amount of gross receipts over $19 million and denominator of which is $1 million. Credit may not exceed 100% of tax liability. (MCLA § 208.1417[5]).

Credit phases out for taxpayer with gross receipts between $350,000 and $700, 000. Taxpayer whose gross receipts allocated or apportioned to Michigan are greater than $350,000 but less than $700,000 may claim credit equal to tax liability after small business credit multiplied by fraction, numerator of which is difference between allocated or apportioned gross receipts and $700,000 and denominator of which is $350,000. (MCLA § 208.1411).

Credit for Contributions to Individual or Family Development Accounts.

Qualified financial institution or taxpayer may claim credit against MBT equal to 75% of contributions made by qualified financial institution or taxpayer in tax year to reserve fund of fiduciary organization pursuant to Individual or Family Development Account Program Act. (MCLA § 208.1426).

Credit for Photovoltaic Technology.

Taxpayer may qualify for credit by constructing and operating new facility in state for development and manufacturing of photovoltaic energy, photovoltaic systems, or other photovoltaic technology. Credit against MBT could equal up to 50% of capital investments made in new facility during tax year. Qualified taxpayer may assign credit. If credit exceeded tax liability for tax year, excess portion refundable. (MCLA § 208.1430).

Credit for Manufacturer of Polycrystalline Silicon for Solar Cells and Semiconductor Microchips.

Qualifying taxpayer must construct and operate new or expanded facility for manufacture of polycrystalline silicon for solar cells and semiconductor microchips to claim credit against MBT for 12 years for certain energy consumption costs. Credit must be taken after all other credits provided under MBT Act. (MCLA § 208.1432-1432d).

Battery Technology Credit.

Taxpayer may qualify for credit against MBT for activities stimulating domestic commercialization and affordability of high-power energy batteries, lack of which today limits hybrid, plug-in hybrid, battery-electric, and fuel cell vehicle applications. (MCLA § 208.1434).

Public Exhibition Credit.

Taxpayer may qualify for credit against MBT equal to 50% of taxpayer's MBT liability up to $200,000 if taxpayer owns, operates, or controls qualifying exhibition in Michigan open to public that promotes, advertises, or displays Michigan products. (MCLA § 208.1446).

Service Station Credit.

Qualifying taxpayer may claim nonrefundable credit against MBT equal to 30% of cost incurred in tax year to convert existing fuel delivery systems to provide E85 fuel or qualified biodiesel blends and to create new fuel delivery systems designed to provide E85 fuel or qualified biodiesel blends. (MCLA § 208.1460).

Bonus Depreciation Credit.

For tax years beginning after Dec. 31, 2008 and ending before Jan. 1, 2011, taxpayer other than regulated utility may claim credit equal to 0.42% of amount of deduction claimed for 2008 tax year for bonus depreciation under IRC § 168(k) apportioned as tax base apportioned. If amount of credit exceeds taxpayer's liability, excess not refunded but may be carried forward for ten years or until used up, whichever occurs first. (MCLA § 208.1461).

22.04 CORPORATE TAXES:

See Category 2 Business Organizations, topic 2.03 Corporations.

22.05 EMPLOYMENT TAXES:

Unemployment Compensation Tax.

Imposed on all employers employing one or more individuals during some portion of at least 20 weeks during calendar year or paying remuneration of $1,000 or more for employment during calendar year, period, all employers employing ten or more individuals for some portion of day in at least 20 weeks during calendar year in agricultural service or paying remuneration in cash of $20,000 or more to employees performing agricultural service during such period and on all employers subject to Title IX of Federal Social Security Act having employees engaged in Michigan employment.

Rate is 5.4% of payroll during first two years of liability, and thereafter may be increased or decreased depending on unemployment record of employer and condition of unemployment fund balance. In lieu of tax, governmental and nonprofit employers may elect to reimburse unemployment fund for benefits paid which are attributable to service with such employers. Special rates apply to construction employers.

There is no tax on payment to any individual in excess of maximum amount subject to Federal Unemployment Tax Act (26 USC § 3301-§ 3311) during any year. There is no tax on employees and agreement of employee to pay all or any portion of employer’s contribution is invalid.

Employers’ contributions are payable to Michigan Employment Security Commission semi-annually, or for such shorter periods (not less than 28 days) as Commission may prescribe by regulation. Reports must be filed on such forms and at such times as Commission prescribes. (MCLA §§ 421.1 et seq.).

22.06 ENVIRONMENTAL TAXES:

Hazardous Waste Tax.

See category 12 Environment, topic 12.01 Environmental Regulation, subhead Hazardous Waste Management.

Mines, Minerals and Fisheries Taxes.

Iron ore property is subject to specific tax measured by shipments where ore is agglomerated or beneficiated locally. Tax is in lieu of all ad valorem taxes. (MCLA §§ 207.271 et seq.). See category 19 Mineral, Water and Fishing Rights, topic 19.01 Mines and Minerals, subhead Taxes.

Severance tax of 5% on gas and 6.6% on oil is imposed. (MCLA §§ 205.301 et seq.).

22.07 ESTATE TAX:

Michigan has estate and generation skipping tax effective for persons who died after Sept. 30, 1993 or for generation skipping transfer that occurs after Sept. 30, 1993. (MCLA § 205.223). Former inheritance tax applies to estates of decedents dying prior to effective date of new provisions. (MCLA § 205.223). Probate court has exclusive jurisdiction of court proceedings concerning this act. (MCLA § 205.246[1]).

Tax is imposed upon transfer of estate of every person who at time of death was resident of this state. Tax is equal to maximum allowable federal credit under Internal Revenue

Code for estate, inheritance, legacy, and succession taxes paid to states. This tax is reduced by amount of all estate, inheritance, legacy, and succession taxes paid to states other than Michigan. This amount shall not exceed amount equal to proportional share of that maximum allowable federal credit that gross value of all real and tangible personal property located in states other than this state bears to gross value of all property included in decedent's gross estate wherever located. (MCLA § 205.232[1]).

Tax is imposed upon transfer of property located in this state of every person who at time of death was not resident of this state. Tax is amount equal to proportional share of maximum allowable federal credit under Internal Revenue Code for estate, inheritance, legacy, and succession taxes paid to states, that gross value of all real and tangible personal property located in this state bears to gross value of all property included in decedent's gross estate wherever located. (MCLA § 205.232[2]).

Tax shall not be imposed in respect of personal property, except tangible personal property having actual situs in this state, if one of following applies: (a) Transferor at time of transfer was resident of state or territory of U.S., or of any foreign country, that at time of transfer did not impose transfer tax or death tax of any character in respect of personal property of residents of this state, except tangible personal property having actual situs in that state or territory or foreign country. (b) If laws of state, territory, or country of residence of transferor at time of transfer contained reciprocal exemption provision under which nonresidents were exempted from transfer taxes or death taxes of every character in respect of personal property, except tangible personal property having actual situs in that state, territory, or country, provided state, territory, or country of residence of nonresidents allowed similar exemption to residents of state, territory, or country of residence of transferor. For purposes of this section, District of Columbia and possessions of U.S. are considered territories of U.S. As used in this section, "foreign country" and "country" mean both any foreign country and any political subdivision of that country, and either of them of which transferor was domiciled at time of his or her death. For purposes of this section, "tangible personal property" is construed to exclude all property common classified as intangible personal property, such as deposits in banks, mortgages, debts, receivables, shares of stock, bonds, notes, credits, evidences of interest in property, evidences of debt, and like incorporeal personal property. (MCLA § 205.253).

Generation-skipping tax is imposed upon every generation-skipping transfer in which original transferor is resident of this state at date of transfer made by original transferor. Tax is equal to maximum allowable federal credit under Internal Revenue Code for state generation-skipping transfer taxes paid to states. This tax is reduced by amount of all generation-skipping transfer taxes paid to states other than this state, which amount shall not exceed amount equal to proportional share of that maximum allowable federal credit that gross value of all transferred real and tangible personal property subject to generation-skipping transfer taxes located in states other than this state bears to gross value of all transferred property subject to generation-skipping taxes wherever located. (MCLA § 205.233[1]).

Generation-skipping tax is imposed upon every generation-skipping transfer in which original transferor is not resident of this state at date of transfer by original transferor but in which property transferred includes real and tangible personal property located in this state. Tax is amount equal to proportional share of maximum allowable federal credit under Internal Revenue Code for state generation-skipping transfer taxes paid to states that gross value of all transferred real and tangible personal property subject to generation-skipping transfer taxes located in this state bears to gross value of all transferred property subject to generation-skipping transfer taxes wherever located. (MCLA § 205.233[2]).

Personal representative of every estate required to file federal return shall file return with Department of Treasury on or before last day prescribed by law for filing federal return. Department of Treasury may waive this requirement. Department of Treasury shall extend time for filing return if time for filing federal return is extended. (MCLA §§ 205.1-.3, 205.237).

Time of Payment.

Tax is due and payable on or before last day prescribed by law for paying corresponding federal transfer taxes pursuant to federal return excluding extensions and shall be paid to Department of Treasury. Department of Treasury shall extend time for payment of tax or any part of tax if time for paying federal transfer tax is extended. Interest on underpayments is determined periodically. Interest is payable on refunds. Interest rate on refunds and underpayments floats. Penalty can also be assessed based upon negligence, intentional disregard of law, fraud and failure to file. Criminal liability can also attach. (MCLA §§ 205.1-.31, .237). Upon payment of tax, Department of Treasury shall issue to personal representative receipts in triplicate in recordable form, each of which is sufficient evidence of payment and entitles personal representative to be credited and allowed that amount by probate court having jurisdiction. If personal representative files complete return and makes written application to Department of Treasury for determination of amount of tax and discharge from personal liability for tax, Department of Treasury as soon as possible, but not later than one year after receipt of application, shall notify personal representative of amount of tax. Upon payment of tax, personal representative is discharged from personal liability for any additional tax found to be due and is entitled to receive receipt in writing showing discharge. However, discharge does not operate to release gross estate of lien of any additional tax subsequently found to be due while title to gross estate remains in personal representative or in heirs, devisees, or distributees. If after discharge is given title to any portion of gross estate has passed to bona fide purchaser for value, that portion of gross estate is not subject to lien or any claim or demand for tax. (MCLA § 205.241).

If, as result of audit, there is increase or decrease in amount of federal transfer tax, amended return shall be filed showing all changes made in original return and amount of increase or decrease in federal transfer tax within 60 days after final determination if there is increase in amount owed state, or within one year after final determination if there is refund owed by state. (MCLA § 205.238[1]).

Claim for Refund.

Must be made within one year from date of final determination of federal tax. Determination is considered to have become final on date of Internal Revenue Service closing letter or date of receipt of refund of federal tax, whichever is later. (MCLA § 205.238[2]).

Tax may not be refunded pursuant to any allegation that decedent was resident of another state unless this state is party to compromise agreement between decedent’s transferee and other state or unless this state is allowed to intervene as party in any action in other state in which residency of decedent is at issue. (MCLA § 205.238[3]).

Interest is added to refunds beginning 45 days after claim filed or after date return required, whichever is later. (MCLA § 205.30[3],.240[2]).

Apportionment against Intervivos Dispositions.

Tax due shall be apportioned as provided by Apportionment Act incorporated in Estate and Protected Individuals Code. (MCLA §§ 700.3920 et seq.).

Interstate Cooperation.

Disputes among states as to decedent’s domicile for death tax purposes may be settled by arbitration if any executor or taxing official so elects, except that any executor may reject arbitration. Michigan Commissioner of Revenue may enter into agreement with executors and taxing officials of other states for settlement of all death taxes. (MCLA §§ 205.601 et seq.).

22.07A GAMBLING AND ENTERTAINMENT TAXES:

Casinos.

Wagering tax is imposed by Michigan Gaming Control and Revenue Act. (MCLA §§ 432.201-.226).

Race Tracks.

License fees and tax imposed by Horse Racing Law of 1995. (MCLA §§ 431.301-.336).

22.08 GASOLINE AND SPECIAL FUELS TAXES:

Imposed by MCLA §§ 207.101 et seq. (gasoline); MCLA § 207.211 et seq. (motor carrier fuel); MCLA § 207.1151 (liquefied petroleum gas). See also MCLA §§ 207.181 et seq. MCLA §§ 324.71102 (marine fuel tax); MCLA § 259.203 (aircraft fuel tax); MCLA § 207.1001 et seq. (motor fuel tax).

Severance tax on oil and gas imposed by MCLA § 205.301 et seq.

22.08A GENERATION SKIPPING TAX:

See topic 22.07 Estate Tax.

22.09 GIFT TAX:

None; but see topic 22.07 Estate Tax.

22.10 HOTEL AND RESTAURANT TAXES:

Stadia or convention facility development tax imposed by MCLA §§ 207.751-.759.

State Convention Facility Development Tax, including tax on “convention hotel”, imposed by MCLA §§ 207.621-.640.

Counties meeting specified population tests may levy excise tax on hotels and motels. (MCLA §§ 141.861-.867).

22.11 INCOME TAX:

Rates.

For individuals, trusts, and estates is, before May 1, 1994, 4.6%; after Apr. 30, 1994 and before Jan. 1, 2000, 4.4%; for tax years beginning on and after Jan. 1, 2000 and before Jan. 1, 2002, 4.2%; after Jan. 1, 2002 and before Jan. 1, 2003, 4.1%; on and after Jan. 1, 2003 to July 1, 2004, 4.0%; on and after July 1, 2004 to Oct. 1, 2007, 3.9%; on and after Oct. 1, 2007 to Oct. 1, 2011, 4.35%; on Oct. 1, 2011 and each Oct. 1 thereafter, rate reduced by 0.1% each year until rate is 3.95%. (MCLA § 206.51, 51e). Income tax on corporations and financial institutions replaced by Single Business Tax. See topic 22.03 Business Taxes, subhead Single Business Tax. (MCLA §§ 208.1-108.145).

Taxable Income of Individuals.

Determined by: (1) Subtracting from federal adjusted gross income: (a) Personal exemptions of $2,500 per year for each personal or dependency exemption allowed on federal return plus for tax years before 1999 additional $900 and for tax years after 1999 additional $1,800 exemption for person who is paraplegic, quadriplegic, deaf, over 65 years old or hemiplegic (prorated for periods of less than 12 months); for each tax year after 2000 personal exemption is adjusted by multiplying exemption for tax year beginning in 2000 by fraction, numerator of which is U.S. C.P.I. for prior tax year, and denominator of which is U.S. C.P.I. for 1996-1997 state fiscal year. Resultant product (rounded to nearest $100) is personal exemption for tax year; (b) income from obligations of federal government which states are prohibited from taxing and included in federal adjusted gross income; (c) compensation including retirement benefits for service in Armed Forces; (d) all retirement or pension benefits from federal public retirement system or from public retirement system of State (or other state with income tax laws giving reciprocal deduction) or political subdivision, and social security benefits. Retirement or pension benefits from any other retirement or pension system may not exceed $7,500 ($10,000 on joint return) before Oct. 1, 1994. After Sept. 30, 1994, retirement or pension benefits not otherwise deductible from any other retirement or pension system, or benefits from retirement annuity policy in which payments made for life to senior citizen, may be deducted to maximum of $30,000 for single return and $60,000 for joint return. Maximum amounts allowed reduced by amount of deduction for retirement or pension benefits claimed under other provisions. For tax years after 1996 tax year, taxpayer who is senior citizen may deduct, to extent included in adjusted gross income, interest, dividends, and capital gains received in tax year not to exceed $3,500 for single return and $7,000 for joint return for 1997 tax year and $7,500 for single return and $15,000 for joint return for tax years after 1997 tax year. (MCLA § 206.30c). Retirement or pension benefits include, for example, qualified pension trusts and annuity plans, Keogh or HR 10 plans, individual retirement accounts, employee annuities or tax-sheltered annuities, 401k plans attributable to employee or employer contributions, plans of U.S., state governments other than state, political subdivisions, agencies or instrumentalities of State, plans maintained by church, all other unqualified pension plans that prescribe eligibility for retirement and predetermine contributions and benefits if distributions are from pension trust, and retirement or pension benefits received by surviving spouse (does not include surviving child) if benefits qualified for deduction prior to decedent’s death. Retirement or pension benefits do not include, for example, deferred compensation plans, premature distributions or payments received as incentive to retire early, unless distributions are from pension trust; (e) political contributions but not in excess of $50 ($100 on joint return); (f) wages not deductible under I.R.C. § 280C; (g) payments under advanced tuition payment contract under Michigan Education Trust Act; (h) for tax years after 1996, senior citizen may deduct interest, dividends and capital gains received not to exceed $3,500 for single return and $7,000 for joint return for 1997 tax year, and $7,500 for single return and $15,000 for joint return for tax years after 1997; for tax years after 1996, maximum amounts shall be reduced by amount of deduction claimed for retirement benefits; (i) if included in federal adjusted gross income, deduct state and city income tax refunds and state income tax credits received; (j) for 1998 and subsequent tax years, deduct amounts paid under Child Care Act of 1997, MCLA § 206.30d; (k) for tax years beginning Jan. 1, 1999 holocaust payments made under German Act Regulating Unresolved Property (MCLA § 206.30[i][v]); (l) for tax years after 1999, contributions made to education savings accounts, not to exceed $5,000 for single return or $10,000 for joint return; (m) for tax years after 1999, amount of distribution from individual retirement accounts that qualify under § 408 of I.R.C. if distribution used to pay qualified higher education expenses; (n) for tax years after 2000, amount equal to qualified charitable distribution to charitable organization; and (o) nonbusiness income of tribe member may be deducted if tribe and state have entered into specified agreement; (2) adding to federal adjusted gross income: (a) gross interest from obligations of states other than Michigan; (b) losses on sale or exchange of obligations of federal government, income of which state is prohibited from taxing to extent that loss is deducted to compute adjusted gross income; (c) income taxes to extent deducted to compute federal adjusted gross income; (d) amount of deduction under I.R.C. § 221; (e) amount paid by state to repay outstanding principal on loan taken by taxpayer for advance tuition payment under Michigan Education Trust Act, on which taxpayer defaulted; (f) for tax years after 1999, amount withdrawn from education savings accounts if not qualified withdrawal; and (3) adding to or subtracting from federal adjusted gross income: (a) shares of estate or trust income according to statutory rule; (b) adjustment to income derived from source attribution rules provided by statute; and (c) adjustment to income from recomputation of prior years’ income. (MCLA § 206.30).

Attribution of income governed by rules modeled after provisions of Uniform Division of Income for Tax Purposes Act. Net rents and royalties from real property located in this state are allocable to state; net rents and royalties from tangible personal property are allocable to state if, and to extent that, property is utilized in state. Net rents and royalties from tangible personal property are allocable to state, in their entirety and regardless of extent of utilization, in case of resident taxpayer or taxpayer having commercial domicile in state, unless taxpayer is organized under laws of, or taxable in state in which property is utilized. (MCLA § 206.111). "Commercial domicile" is defined as principal place from which trade or business of taxpayer is managed. Computation of extent of "utilization" is determined by formula. (MCLA § 206.6). Capital gains and losses from sales or exchanges of real property located in state are allocable to state. Capital gains and losses from sales or exchanges of tangible personal property are allocable to state if (a) property had situs in state at time of sale; or (b) taxpayer is resident of state or has commercial domicile in state, provided taxpayer is not taxable in state in which property had situs. Capital gains and losses on sales or exchanges of intangible personal property are allocable to state if taxpayer is resident of state or is commercially domiciled in state. (MCLA § 206.112). Interest and dividends are allocable to state if taxpayer is resident of state or has commercial domicile in state. (MCLA § 206.113). Patent and copyright royalties are allocable to state: (1) If and to extent patent or copyright is utilized in state, or (2) if and to extent that patent or copyright is utilized by taxpayer in state in which taxpayer is not taxable and taxpayer's commercial domicile is in Michigan. (MCLA § 206.114). When taxpayer has income from business activity (other than rendering purely personal services by individual) both within and without state, he may allocate income. (MCLA § 206.103). All business income, other than income from providing transportation services, is apportioned by formula. (MCLA § 206.115). In case of nonresidents other than corporations, taxable income is allocable to state to extent it is earned, received, or acquired (a) for rendition of personal services performed principally in Michigan, (b) as distributive share of net profits of unincorporated business, profession or enterprise resulting from work done, services rendered and other business activities conducted in Michigan, except as allocated to another state, for tax years after 1996, State lottery prizes, and wagering winnings paid after Oct. 1, 2003 by casinos or race meetings in Michigan. (MCLA § 206.110).

Credits.

Act allows credits against tax as follows: (1) For resident individual, trust or estate, tax imposed by another state or Canadian province on income derived from sources without state and subject to tax in another state or Canadian province (MCLA § 206.255); (2) partial credit for income tax paid to state cities according to statutory formula (MCLA §§ 206.257, .481); (3) partial credit for property taxes paid on homestead or portion of rent paid therefor (MCLA §§ 206.501 et seq.); (4) partial credit for disabled for property taxes or rent (MCLA § 206.522); and (5) for certain expenditures for rehabilitation of historic resource (MCLA § 206.266[1]-[6]). Unused credit can be carried forward to earlier of ten years or until used up. In some cases, portion of credit may be refunded. (MCLA § 206.266[8]). For tax years beginning before Jan. 1, 2009, if taxpayer sells historic credit, or it is revoked, less than five years after year in which credit claimed, designated percentage of credit amount claimed added back to tax liability in year of sale. (MCLA § 206.266[9][10]). For tax years beginning after Dec. 31, 2008, if certificate of completed rehabilitation revoked or if historic resource sold or disposed of less than five years after placed in service as defined in IRC § 47(b)(1), designated percentage of credit added back to tax liability of taxpayer. If revocation five years or more after historic resource placed in service, addback not required. (MCLA § 206.266[11]). Qualified taxpayer receiving certificate of completed rehabilitation after Dec. 31, 2008 may transfer or sell credit with property, and new owner subject to same five-year recapture. No addback to tax liability if sale of credit five years or more after year credit taken. (MCLA § 206.266[12]). Credit allowed equal to 50% of charitable contributions to qualified tax exempt recipient of automobiles (MCLA § 206.269), to state or municipalities (of certain art works), public libraries, public broadcast station (as defined in 47 U.S.C. § 397) not affiliated with institution of higher education, institutions of higher learning, Michigan Colleges

Foundation, and to approved nonprofit corporation, fund, foundation, trust, or association for benefit of institution of higher learning; limit for resident estate or trust is lesser of 10% of tax or $5,000; limit for other taxpayers is lesser of 20% of tax or $100 ($200 for husband and wife filing joint return). (MCLA § 206.260). Individual or family development account to be used for education, first-time purchase of primary residence, qualified home improvements, or business capitalization may be eligible for deductions and credits. (MCLA § 206.702-.710). Variable (depending on number of exemptions and income level) credit allowed for heating fuel costs for homestead. (MCLA §§ 206.527, .527a). Credit in amount equal to 3.3% of amount contributed to medical care savings account. (MCLA § 206.264). For tax years beginning in 1995, resident taxpayer with household income of $200,000 or less can claim credit equal to 4% of all fees and tuition paid for student to qualified institution of higher learning, not to exceed $250 for each student, for maximum of four years. (MCLA § 206.274). Earned income tax credit of 10% (for 2008 tax year) or 20% (for 2009 and later tax years) of amount of federal credit; if credit exceeds tax liability, excess refunded. (MCLA § 206.272). For tax years ending after Dec. 31, 2008 and before Jan. 1, 2012, taxpayer with adjusted gross income of $37,500 or less ($75,000 if husband and wife file joint return) can claim credit for purchase and installation of qualified home improvement for principal residence equal to 10% of amount paid, or $75 ($150 for husband and wife filing joint return), whichever is less, for each qualified home improvement purchased and installed in tax year. (MCLA § 206.253[1]). “Qualified home improvement” means following items meeting U.S. Energy Star efficiency guidelines: (i) Insulation; (ii) furnaces; (iii) water heaters; (iv) windows; and (v) refrigerators, clothes washers, and dishwashers. (MCLA § 206.253[3][c]). Taxpayer may not claim more than one credit under each item during same tax year. If credit exceeds tax liability, excess refunded. (MCLA § 206.253[1]). For tax years beginning after Dec. 31, 2008 and before Jan. 1, 2012, taxpayer with adjusted gross income of $65,000 or less ($130,000 or less if husband and wife filing joint return) may claim credit equal to following percentages of amount authorized and paid during tax year for customer’s electric utility under Section 45(2)(a) of Clean, Renewable and Energy Efficient Act: (a) for tax years beginning after Dec. 31, 2008 and before Jan. 1, 2010, 25%; (b) for tax years beginning after Dec. 31, 2009 and before Jan. 1, 2012, 20%. If credit exceeds taxpayer’s tax liability, excess refunded. (MCLA § 206.253[2]).

Exemptions.

Provided for persons exempt from federal income tax, except unrelated taxable business income of exempt person as determined under internal revenue code. (MCLA § 206.201).

Estimated Tax.

For Michigan Income Tax, every person subject to income tax must file declaration and pay estimated tax if person’s annual tax can reasonably be expected to exceed amounts withheld and allowable credits by more than $500. (MCLA § 206.301).

Returns and Payments.

Every person, other than corporation, which is required to file federal income tax return and whose adjusted gross income exceeds his personal exemptions must file Michigan income tax return with Michigan Department of Treasury by 15th day of fourth month following close of taxable year (Apr. 15 for calendar year taxpayers), under penalties for failure to file. (MCLA §§ 206.311, .315). Taxpayer may designate portion of refund as contribution to specified causes. (MCLA § 206.435).

For tax years beginning in 1997, taxpayers with taxable income of less than $100 (or $200 if joint return) and who have filed withholding exemption certificate, may elect to pay income tax without filing Michigan income tax returns. This election is called “No-Form Payment Option”. (MCLA § 206.51a).

Withholding.

Required of every employer who is required to withhold federal income taxes from employee's compensation based on State Tax Commission's Tables and for every flow through entity. (MCLA § 206.351).

22.12 INHERITANCE TAX:

None but see topic 22.07 Estate Tax.

22.13 LOCAL AND MUNICIPAL TAXES:

Uniform City Income Tax.

No village may impose any income tax. City income taxes must follow statutory uniform city income tax ordinance. Tax imposed on all income of resident. For nonresident, salaries, wages, profits and capital gains are taxed when result of activities within city. Rate is 1% on corporations and resident individuals, ½% on nonresidents, except that: (1) In cities of more than 1,000,000 population (currently only Detroit) rate may be not more than 2% on corporations, 3% on resident individuals and 1½% on nonresidents, but not to exceed ½ of tax rate imposed on resident individuals, and (2) in cities of less than 1,000,000 population levying property taxes above certain levels and meeting other requirements, rate may be not more than 2% on corporations, 2% on resident individuals and 1% on nonresidents. Members of Armed Forces are exempt from tax on wages. (MCLA §§ 141.501 et seq.).

City of Detroit Income Tax.

Applies to wages and salaries of all individual residents and all individual nonresidents for services rendered in Detroit; to net profits of all resident owners of unincorporated businesses, professions or other activities; to net profits of nonresident owners of unincorporated businesses, professions, and other activities as result of activities conducted in Detroit; and to net profits of all corporations doing business in Detroit as result of activities conducted in Detroit, whether or not corporation has office or place of business in Detroit. Rate limit is 2% on corporations, 3% on resident individuals, 1½% on nonresidents, but not to exceed ½ of tax rate imposed on resident individuals. (MCLA §§ 141.501 et seq.).

See also topic 22.15A Real and Personal Property Taxes.

22.14 MOTOR VEHICLE TAXES:

See category 23 Transportation, topic 23.01 Motor Vehicles.

Automobile Rental Surcharge.

None.

Road Tax.

None.

22.15 PREMIUM AND PRIVILEGE TAXES:

None. See category 16 Insurance, topic 16.01 Insurance Companies, subheads Premium Tax, Privilege Tax.

22.15A REAL AND PERSONAL PROPERTY TAXES:

Assessment.

All real property within state and all personal property within state or belonging to inhabitant of state, except personal property permanently invested in business in another state, is subject to taxation under the general property tax act unless expressly exempted. (MCLA §§ 211.1 et seq.). In general, all goods and chattels are assessed in tax collecting unit where goods and chattels are located. (MCLA § 211.14). For taxes levied after 2002, real property includes building and improvements located upon leased real property under specified conditions (MCLA § 211.2); buildings and improvements located upon leased real property assessed as personal property under specified conditions (MCLA § 211.8g) and leasehold improvements and structures installed and constructed on leased real property, assessed as real property to owner of leasehold improvements or structures under specified circumstances (MCLA § 211.8[h]). Personal property in possession of person using same in business for profit is deemed property of such person. (MCLA § 211.13). Certain qualifying personal property is assessed to user, not owner. (MCLA § 211.8a). Daily rental property is assessed to owner at location of rental business on tax day, under specified conditions. (MCLA § 211.8c). Intangible personal property is exempt from ad valorem taxes except computer software, which is taxable under MCLA § 211.9d. (MCLA § 211.9e).

There is specific tax on railroad, union station, telephone, telegraph, sleeping car, express, car loaning, stock car, refrigerator car and fast freight line companies. (MCLA §§ 207.4 et seq.). Tax is based upon average rate of property tax throughout state.

Annual assessment of all taxable property is made by supervisors of townships or by other assessing officer if provided for in village or city charter (MCLA § 211.10), to be completed by 1st Mon. in Mar. (MCLA § 211.24). Assessment to be made on basis of 50% of true cash value. Legislature shall provide for general ad valorem taxation of real and tangible personal property not exempt by law except for taxes levied for school operating purposes. For taxes levied in 1995 and each year thereafter, taxable value of each parcel of property is lesser of following: (a) Property's current state equalized value or (b) property's taxable value in immediately preceding year, minus any losses, multiplied by lesser of 1.05 or inflation rate, plus value of all additions. For taxes levied in 1995, property's taxable value in immediately preceding year is property's state equalized value in 1994. "Losses" and "additions" are defined in MCLA § 211.34d(b) and (h). When ownership of parcel of property is transferred, property is assessed at applicable proportion of current true cash value. (Const., art. IX, § 3; MCLA § 211.27). Upon transfer of property after 1994, property's taxable value for year following transfer is property's state equalized valuation for year following transfer. (MCLA § 211.27a[3]). Transfer of ownership means conveyance of title to or present interest in property, including beneficial use of property, value of which is substantially equal to value of fee interest. MCLA § 211.27a(6) provides list of what constitutes transfer of ownership and includes following: (a) Conveyance by deed or land contract; (b) conveyance to trust after Dec. 31, 1994, except if sole present beneficiaries are settlor or settlor's spouse, or both; (c) conveyance by distribution from trust, except if distributee is sole beneficiary or spouse of sole present beneficiary, or both; (d) change in sole present beneficiaries of trust, except change that adds or substitutes spouse of sole present beneficiary; (e) conveyance by distribution under will or by intestate succession, except if distributee is decedent's spouse; (f) conveyance by lease if total duration of lease is more than 35 years or lease grants lessee bargain purchase option (which means right to purchase property at termination of lease for not more than 80% of property's projected true cash value); (g) conveyance of ownership interest in corporation, partnership, sole proprietorship, limited liability company or partnership, or other legal entity if ownership interest conveyed is more than 50% of corporation, partnership, or other legal entity; (h) transfer of property held as tenancy in common; (i) conveyance of ownership interest in cooperative housing corporation, excepting portion not subject to ownership interest conveyed. MCLA § 211.27a(7) provides list of what does not constitute transfer of ownership including: (a) Transfer of property between spouses or from decedent to surviving spouse; (b) transfer from husband, wife, or husband and wife creating or disjoining tenancy by entireties in grantors or grantor and his or her spouse; (c) transfer subject to life estate or life lease retained by transferee, until termination of life estate or life lease; (d) transfer through foreclosure or forfeiture of recorded instrument, or through deed or conveyance in lieu of foreclosure or forfeiture, until mortgagee or land contract vendor subsequently transfers property (mortgagee must transfer property within one year of expiration of applicable redemption period); (e) transfer by redemption by person to whom taxes are assessed of property previously sold for delinquent taxes; (f) conveyance to trust if sole present beneficiary of trust is settlor or settlor's spouse, or both; (g) transfer pursuant to judgment or order of court ordering transfer, unless specific monetary consideration is specified or ordered by court for transfer; (h) transfer creating or terminating joint tenancy between two or more persons if at least one person is original owner of property when joint tenancy was initially created and, if property is held as joint tenancy at time of conveyance, at least one person was joint tenant when tenancy was initially created and that person has remained joint tenant since that date (person is original owner of property owned by that person's spouse); (i) transfer for security or assignment or discharge of security interest; (j) transfer of real property or other ownership interests among members of affiliated group, which means one or more corporations connected by stock ownership to common parent corporation. If requested by State Tax Commission, corporation must, within 45 days, furnish proof that transfer meets requirements, otherwise subject to $200 fine; (k) normal public trading of shares of stock or other ownership interest that, over any period of time, cumulatively represent more than 50% of total ownership interest in corporation or other legal entity and are traded in multiple transactions involving unrelated individuals, institutions, or other legal entities; (l) transfer of real property or other ownership interest among corporations, partnerships, limited liability companies, limited liability partnerships, or other legal entities if entities involved are commonly controlled. If requested by State Tax Commission, proof that transfer meets requirements must be provided within 45 days, otherwise subject to $200 fine; (m) direct or indirect transfer of real property or other ownership interest resulting from transaction that qualifies as tax-free reorganization under § 368 of Internal Revenue Code of 1986, 26 USC 368. If requested by State Tax Commission, proof that transfer meets requirements must be provided within 45 days, otherwise subject to $200 fines; (n) transfer of qualified agricultural property if owner files affidavit attesting property will remain qualified agricultural property; otherwise taxable value, for year following year when property ceases to be qualified agricultural property, reverts to state equalized value, and recapture tax applies.

MCLA § 211.27a(8) requires register of deeds to notify assessing officer not less than once each month of any recorded transaction involving ownership of property. Unless notification is provided under subsection (6) or (7) of MCLA § 211.27a, buyer, grantee, or other transferee of property must notify assessing officer of transfer of ownership of property within 45 days of transfer, on form prescribed by State Tax Commission which states parties to transfer, date of transfer, actual consideration for transfer, and property's parcel identification number or legal description. Failure to notify assessor of transfer will result in adjustment to taxable value, penalty of $5 per day, up to maximum of $200, any additional taxes which would be due, and interest and penalties assessed from date tax would have been originally levied. (MCLA § 211.27b). If taxable value is increased, buyer, grantee or transferee may appeal increase to tax tribunal within 35 days of receiving notice of increase. Appeal limited to issue of whether transfer of ownership occurred and correcting arithmetic errors. Dispute regarding valuation of property not permitted. (MCLA § 211.276[6]). If taxable value increased based on incorrect determination of transfer correction is made at subsequent Board of Review. (MCLA § 211.27d). Taxable status of persons and personal property is determined as of Dec. 31. (MCLA §§ 211.2, .13). County Board of Supervisors equalizes assessments as between taxing districts in county on Tues. following 2d Mon. in April. (MCLA §§ 209.1-.8). State Board of Equalization equalizes assessments between counties on 2d Mon. in May (MCLA § 209.1) and value so determined appears on rolls and tax statements (MCLA § 211.24[b]). County Tax Allocation Board determines maximum tax rate for each taxing District according to relative needs so as not to exceed constitutional tax rate limitation. (MCLA §§ 211.205-.217).

Assessing officer can require any person who is believed to have possession of personal property to make and sign written statement identifying all personal property owned by person or held for use of another. Assessing officer may require same for real property, if deemed necessary. (MCLA § 211.18). Any person, member of firm, or officer of corporation who willfully neglects/refuses to make out and deliver statement, or falsely answers or refuses to answer questions concerning property under his or her control, is guilty of misdemeanor punishable by not less than 30 days to six months imprisonment, and/or fine of $100 to $1,000, or both. (MCLA § 211.21). If assessing officer, State Tax Commission or county equalization director is satisfied that statement is incorrect, or cannot be obtained, assessing officer, State Tax Commission or county equalization director may examine, under oath, any person believed to have knowledge of amount or value of any property owned, held, or controlled by person neglecting or refusing to be examined or to furnish statement required under § 18. Assessing officer is authorized to assess to person, firm or corporation subject to assessment amount of real and personal property assessing officer considers reasonable and just. (MCLA § 211.22).

Exemptions.

Real Property.

There are numerous exemptions. For example, such property of U.S.; (MCLA § 211.7) of Michigan; of political subdivisions used for public purposes: of nonprofit theater, library, benevolent, charitable, educational and scientific institutions and organizations devoted exclusively to fostering development of literature, music, painting or sculpture; charitable homes or fraternal societies; of boy and girl scout organizations and similar associations; nonprofit clinics and hospitals (but not physicians' residences); houses of public worship, parsonages of religious societies used as such, and burial grounds; homestead property of indigent persons (not corporations); of nonprofit charitable institution that is leased, loaned or otherwise made available to another nonprofit charitable institution, nonprofit hospital, or nonprofit educational institution and, for taxes levied after 1998, real or personal property owned by nonprofit charitable institution that is leased, loaned or otherwise made available to governmental entity (MCLA § 211.7o); for taxes levied after 1996, in renaissance zone except casino in such a zone (MCLA § 211.7f f); housing owned and operated by nonprofit corporation or associations, by limited dividend housing corporation, or by State or political subdivisions, for occupancy or use solely by elderly or disabled families (MCLA § 211.7d); of qualified conservation organization held for such purpose and open to residents for educational or recreational use (MCLA § 211.7o); of certain railroad and communication companies which pay specific tax; of agricultural society used exclusively for fair purposes; landing areas of certain airports; public parks; of certain school districts, community colleges and other state supported educational institutions; of parent cooperative preschools; of municipal water authorities (MCLA §§ 211.7b-.7aa); nursery stock seasonal protection units (but not land on which they are located) (MCLA § 211.7bb); supportive housing property (defined under MCLA §§ 125.1459-.1459b) (MCLA § 211.7nn); solar, wind or water energy conversion devices; certain commercial housing facilities (but special commercial housing facilities tax equal to one-half of normal tax is imposed, which may be waived as to new facilities [MCLA § 207.606(2)]), high technology and industrial facilities for which exemption certificate granted, but not land on which situated; certain water pollution control facilities so long as certificate therefor is in effect (MCLA § 323.354); certain air pollution facilities so long as certificate of exemption in effect (MCLA § 336.4). Special treatment is accorded homesteads of certain veterans and their unremarried widows. (MCLA § 211.7b). Private forest reservations properly maintained are exempt except to value of $1 per acre. (MCLA § 320.281). Commercial forest preserve is exempt but subject to specific tax and to yield tax. (MCLA §§ 320.305 et seq.). Trees, shrubs, vines growing on agricultural land exempt. (MCLA § 211.7e). Metallic ores are exempt until mining begins, but not more than ten years. (MCLA § 211.24). Special treatment is accorded plants beneficiating low-grade ores. (MCLA § 211.622). Property which would qualify for exemption when construction is completed is also exempt while under construction. (MCLA § 211.53d).

Exempt real property is subject to tax as though owned by lessee or user when leased, loaned or otherwise made available to and used for profit by private individual, association or corporation, except: (a) Where use is by way of concession at public airport, park, market, or similar property available to general public, (b) property of any state-supported educational institution and federal property for which payments are made in lieu of taxes; (c) property used in conjunction with county fair, community fair, 4-H, or state fair, or in conjunction with special event for which lessee pays fee to county, community, 4-H or state fair; (d) property used by lessee in such manner that city or township receives revenue under § 17 of horse racing law of 1995, (MCLA §§ 431.301-336); and (e) real property located in renaissance zone excluding casino in such zone. (MCLA § 211.181).

Real and personal property of qualified start up business may obtain exemption from ad valorem taxes for limited period for taxes levied after Dec. 31, 2004. (MCLA § 211.181a).

Property used as principal residence (formerly referred to as homestead property) exempt from tax levied by local school district for school operating purposes. Owner of property must claim principal residence exemption by filing affidavit. Status of property as principal residence is determined on date affidavit is filed. Affidavit must be filed on or before May 1 with local tax collecting unit. (MCLA § 211.7cc[1]-[2]). To qualify as principal residence, property must be owned and occupied as principal residence by owner of property on date affidavit is signed. Principal residence means one place where person has fixed and permanent home to which, whenever absent, intends to return. Principal residence includes any portion of principal residence that is rented or leased so long as that portion is less than 50% of total square footage of living space. It also includes life care facility and property owned by cooperative housing corporation and occupied by tenant stockholders. “Person”, for purposes of defining owner of principal residence, means individual. “Owner” means person who owns, in whole or in part, property or who is purchasing under land contract, or who owns property as result of being beneficiary of will or trust or as result of intestate succession, or who owns or is purchasing dwelling on leased land, or person who holds life lease in property previously sold or transferred to another, or grantor who has placed property in revocable trust or qualified personal residence trust. (MCLA § 211.7dd[b]). “Qualified Agricultural Property” is also exempt from tax levied by local school district for school operating purposes. “Person,” for purposes of defining “owner” of qualified agricultural property, means individual, partnership, corporation, limited liability company, association, or other legal entity. (MCLA § 211.7ee). Upon receipt of affidavit by local assessor, property is exempt through 1998 tax year or until Dec. 31 of year property is transferred or owner rescinds exemption claim. Owner of principal residence property must file new exemption claim on same property in 1999 and every four years thereafter. Owner must file rescission of exemption claim within 90 days after property is no longer used as principal residence on form prescribed by department of treasury. Penalty for failure to file rescission form is $5 per day, up to maximum of $200. If assessor disputes owner’s principal residence exemption claim, assessor must notify owner and department in writing of reason for denial and notify owner that denial may be appealed to department of treasury within 35 days after date of notice. Department of treasury determines whether property is principal residence. Owner and/or assessor may appeal final decision of department to residential and small claims division of Michigan Tax Tribunal within 35 days of that decision. Payment of amount of tax in dispute is not required before appeal to department of treasury or Tax Tribunal. (MCLA § 211.7cc[1]-[9], [13] and MCLA § 211.7dd). Owner who owned and occupied principal residence on May 1 for which tax exemption was not on tax roll may file appeal with July or Dec. board of review in year for which exemption was claimed or immediately succeeding three years. If appeal of denial of exemption claim is received not later than five days prior to date of Dec. board of review, Dec. board of review shall be convened and appeal considered pursuant to MCLA § 211.53b. (MCLA § 211.7cc[13]). If principal residence part of unit in multiple-unit dwelling or dwelling unit in multiple-purpose structure, owner can claim exemption for only that portion of total taxable value of property used as principal residence of that owner. (MCLA § 211.7cc[10]). Person who falsely or fraudulently, or aids or abets another to falsely or fraudulently claim exemption under § 7cc, or person who fails to rescind principal residence exemption when required, is guilty of misdemeanor punishable by one year imprisonment, fine of not more than $5,000, or up to 1,500 hours of public service, or both. In addition, person who knowingly swears or verifies affidavit claiming any exemption under § 7cc that contains false or fraudulent statement, is guilty of perjury, misdemeanor. (MCLA § 211.120). Effective Apr. 1, 2008, § 7cc amended to allow homeowner to claim additional principal residence exemption in specified circumstances. In addition to current principal residence, owner can retain exemption for up to three years on property previously exempt as owner's principal residence if property not occupied and is for sale. (MCLA § 7211.7cc). In other specified circumstances, property qualified as principal residence will continue to qualify for three years after property rented or leased to another person as residence if owner is on active duty in U.S. armed forces, property would otherwise qualify as owner's principal residence, and owner files affidavit with assessor on or before May 1 attesting intention to occupy property as principal residence upon completion of active duty. In 2008 only, owner may file affidavit on or before Dec. 31. (MCLA § 211.7dd).

When property is transferred and county register of deeds records transfer of ownership, register must notify local assessor of transfer. (MCLA § 211.7cc[11]). Exemption affidavit and recision forms are made available by department of treasury; preparer of closing statements for sale of property must provide affidavit and recision forms to buyer and seller at closing, and if requested, file same with local assessor. (MCLA § 211.7cc[12]).

Personal Property.

Exemptions of personal property include such property of nonprofit theater, library, benevolent, charitable, educational and scientific institutions and organizations devoted exclusively to fostering development of literature, music, painting or sculpture regularly available to public as whole incorporated under Michigan laws; charitable homes of fraternal societies; libraries not operated for gain; patriotic or religious organizations; scout organizations, 4-H clubs and similar associations; Indians not citizens; pensions receivable from U.S.; all personal property owned and used by householder, such as customary furniture, fixtures, provisions, fuel and other similar equipment, except where held as inventory for sale; household furnishings of fraternities, sororities, and student cooperatives up to $5,000 per household; mechanic's tools up to $500 per mechanic; fire fighting equipment; property used by householder in business, in his dwelling or in one other location in his residence locality up to $500; property actually used in agricultural operations and farm implements held for sale or resale by retail servicing dealers for use in agricultural production; products (except alcoholic beverages) located in public warehouse, U.S. customs port of entry bonded warehouse, dock or port facility on Dec. 31 of each year, if in transit to destinations out of state; personal property of bank or trust company organized under Michigan law, national bank or incorporated bank holding company; processed or unprocessed farm products (except alcoholic beverages) ultimately to be used as human or animal food and regularly stored in public warehouse, dock or port facility, sugar in solid or liquid form produced from sugar beets and dried beet pulp and molasses, when owned or held by processors; personal property of parent cooperative preschool; equipment used exclusively in wood harvesting; liquified petroleum gas tanks used to store liquified petroleum gas for residential or agricultural property use located on residential or agricultural property; water conditioning systems used for residential dwellings (MCLA § 211.9), personal property that is inventory, including heavy earth moving equipment (MCLA § 211.9c), various commodities or property on which specific taxes have been paid, i.e., grain, gasoline (MCLA § 207.113), low grade iron ore under development (MCLA § 211.624), oil and gas rights (MCLA § 205.315), and motor vehicles and vessels (MCLA §§ 207.51, 207.51a); personal property of credit unions (MCLA § 490.22); certain air pollution control facilities so long as certificate of exemption is in effect (MCLA § 336.4); certain computer software (MCLA § 211.9d); bottled water coolers available for lease (MCLA § 211.9[g][1]); and from Dec. 30, 1998 until Dec. 30, 2018 personal property located in rural enterprise community which is part of natural gas distribution system. (MCLA § 211.9g). Also exempt is all "new personal property" and buildings and improvements constructed on leased real property (under certain specified circumstances); if such property meets certain conditions, such as, local assessing district approves exemption by resolution and property is located in "eligible district", which includes, by way of example, industrial development district, renaissance zone, enterprise zone, brownfield redevelopment zone, or located within "eligible distressed area" as defined in §

11 of State Housing Development Authority Act of 1966 (MCLA § 125.14). (MCLA § 211.9f).

Also, all special tools are exempt from taxation. “Special tools” means those manufacturing requisites, such as dies, jigs, fixtures, molds, patterns, special gauges, or other tools that cannot be used to manufacture another product without substantial modification of device. (MCLA § 211.9b).

Inventory property, excluding personal property under lease, is exempt from tax. (MCLA § 211.9c).

In certain circumstances local governmental unit may exempt from personal property taxes new property of eligible business located in eligible district. (MCLA § 211.9f).

See catchline Real Property, supra for exemption of personal property of start up business.

Lien.

Notwithstanding any provision in city or village charter to contrary, all taxes become debt due to township, city, village or county on tax day, Dec. 31. Amounts assessed for state, county, village or township real property taxes become lien on real property on Dec. 1, on day provided for by city or village charter, or on day provided for in MCLA § 211.40a. Notwithstanding any provision of city or village charters to contrary, all personal property taxes levied or assessed are first, prior and superior lien, on all personal property of persons assessed and lien continues until paid. Transfer of personal property does not divest or destroy lien, except where personal property is actually sold in regular course of retail trade. (MCLA § 211.40).

Treasurer may designate tax day, Dec. 31, as lien date by filing affidavit with register of deeds for county in which real or personal property is located, attesting that one or more of following events have occurred: (a) Owner or person assessed has filed for Title 11 bankruptcy (11 U.S.C. 101 to 1330); (b) secured lender has brought foreclosure action or action to enforce interest secured by real or personal property assessed; (c) for personal property only, owner or person assessed has liquidated or is attempting to liquidate personal property assessed; (d) real or personal property assessed is subject to receivership under state or federal law; (e) owner or person assessed has assigned real or personal property for benefit of creditors; (f) real or personal property has been seized or purchased by federal, state or local authorities; (g) judicial action has been commenced that may impair ability of taxing authority to collect any taxes due in absence of lien on real or personal property assessed. (MCLA § 211.40a[a]). Affidavit must include all of following: (a) Year for which taxes due were levied; (b) date on which taxes due were assessed; (c) name of owner or person assessed as identified on tax roll; (d) tax identification number of real or personal property assessed. (MCLA § 211.40a[2]).

Real Estate Conveyance Tax.

Stamp Tax.

There is imposed state documentary stamp tax of 55¢ (in counties with less than 2,000,000 population) or up to 75¢ (as determined by county board of commissioners in counties with 2,000,000 or more population) per each $500 fair market value on instruments of transfer and contracts for transfer of real property. Tax is imposed on transferor. Excepted from tax are transfers where value is less than $100, instruments evidencing contracts not to be wholly performed in state, instruments which state is prohibited from taxing under U.S. law and instruments which evidence security interests and leases, interests assessed as personalty, underground gas storage, certain instruments in which U.S., state, or any political subdivision or municipality thereof is grantee, grantor, guarantor or insurer, certain conveyances involving creation or disjoinder of tenancies by entireties, certain judgments making or ordering transfers, certain instruments used to straighten boundary lines, certain instruments (such as quitclaim deeds) used to confirm titles already vested in grantees, certain land contracts, instruments transferring mineral rights and interests and certain instruments creating joint tenancies. (MCLA §§ 207.501 et seq.).

Real Estate Transfer Tax.

After Jan. 1, 1995, in addition to all other taxes, including stamp tax, as to which see catchline Stamp Tax, supra, there is tax upon following written instruments when instrument is recorded: contracts for sale or exchange of property or any interest in property or any combination of sales or exchanges or any assignment or transfer of property or any interest in property; contracts for transfer of controlling interest in entity (means 80% of total value of all classes of stock of corporation, more than 80% of total capital and profits interest of partnership, association, limited liability company, or other unincirporated form of doing business, or more than 80% of beneficial interest in trust [MCLA § 207.522(a)]) only if real property owned by entity comprises 90% or more of fair market value of entity's assets (MCLA § 207.523[c]); and deeds or instruments of conveyance of property or any interest in property, for consideration. (MCLA § 207.522[a][b]). Unless exempt, "transfer" means conveyance of title or other interest in real property by any method, including interest acquired through acquisition of controlling interest in entity with interest in real property. (MCLA § 207.522[3]). Seller or grantor of property is liable for tax. (MCLA § 207.523). If property is located within this state, but written instrument is executed outside of this state, transfer tax is imposed. (MCLA § 207.524). Tax is levied at rate of $3.75 for each $500 or fraction of $500 of total value of property being transferred. (MCLA § 207.525). Written instrument must state on its face total value of real property being transferred unless affidavit is attached to written instrument declaring total value of property. Tax based on value of property and collected at time instrument of conveyance submitted for recording. In case of controlling interest in entity that owns real property, value apportioned based on percentage of ownership interest transferred. (MCLA 207.522[g]). Form of affidavit prescribed by Department of Treasury. If sale or transfer is of combination of real and personal property, is imposed only upon transfer of real property if values of real and personal property are stated separately on face of written instrument or if affidavit is attached to written instrument setting forth respective values of real and personal property. (MCLA § 207.525[2]). Instruments and transfers of real property which are exempt from real estate transfer tax are set forth in MCLA § 207.526, and include following: (a) Conveyance of property value of consideration of which is less than $100; (b) contract of transfer that is not to be performed wholly within state only to extent written instrument includes land lying outside of state; (c) written instrument that state is prohibited from taxing under U.S. constitution or federal statutes; (d) instrument given as security or assignment or discharge of security interest; (e) instrument evidencing lease, including oil and gas lease, or transfer of leasehold interest; (f) instrument evidencing interest that is assessable as personal property; (g) instrument evidencing transfer of right and interest for underground gas storage purposes; (h)(i) instrument in which grantor is U.S., state, or political subdivision, (ii) instrument given in foreclosure or in lieu of foreclosure of loan made, guaranteed, or insured by U.S., state, or political subdivision, (iii) instrument given to U.S., state, or one of their officers acting in official capacity as grantee, pursuant to terms or guarantee or insurance of loan guaranteed or insured by grantee; (i) conveyance from husband or wife or to husband and wife creating or disjoining tenancy by entireties in grantors or grantor and his or her spouse; (j) conveyance from individual to individual's child or stepchild or adopted child; (k) conveyance from individual to individual's grandchild or stepgrandchild or adopted grandchild; (l) judgment or order of court of record making or ordering transfer, unless specific monetary consideration is specified or ordered by court for transfer; (m) instrument used to straighten boundary lines if no monetary consideration is given; (n) instrument to confirm title already vested in grantee, including quitclaim deed to correct flaw in title; (o) land contract in which legal title does not pass to grantee until total consideration specified in contract has been paid; (p) instrument evidencing transfer of mineral rights and interests; (q) instrument creating joint tenancy between two or more persons if at least one of persons already owns property; (r) transfer made pursuant to bona fide sales agreement made before date this tax is imposed under §§ 3 and 4 (MCLA §§ 207.523-.526) if sales agreement cannot be withdrawn or altered, or contains fixed price not subject to change or modification. However, sales agreement for residential construction may be adjusted up to 15% to reflect changes in construction specifications; (s) instrument evidencing contract or transfer of property to person sufficiently related to transferor to be considered single employer with transferor under § 414(b) or (c) of Internal Revenue Code of 1986, as amended; (t) instrument conveying interest in homestead property for which homestead exemption is claimed under school code of 1976, Act No. 451 of Public Acts of 1976 (being MCLA §§ 380.1-.1852), or state education tax, Act No. 331 of Public Acts of 1993 (being MCLA §§ 211.901-.906), if state equalized value of that homestead property is equal to or lesser than state equalized value on date of purchase or on date of acquisition by seller or transferor for that same interest in property. If after homestead exemption is claimed, sale or transfer of homestead property is found by treasurer to be at value other than true cash value, then penalty equal to 20% of tax will be assessed to seller or transferor in addition to transfer tax due; (u) instrument transferring interest in property pursuant to foreclosure of mortgage, including deed in lieu of foreclosure. Exemption does not apply to subsequent transfer of foreclosed property by entity that foreclosed. (MCLA § 207.526[u]); (v) conveyance or transfer of property to receiver, administrator or trustee in bankruptcy or insolvency proceeding; (w) conveyance from exempt religious society to another such society (MCLA §§ 207.526, .527); (x) transfer to effectuate dissolution of corporation, limited liability company, partnership, or trust (MCLA § 207.526[p][i]); (y) transfer between limited liability company or partnership and members or partners if ownership interests held by same persons in same proportion before sale (MCLA § 207.526[p][ii][iii]); (z) transfer of controlling interest in entity with interest in real property if transfer would qualify for exemption if transfer was by deed (MCLA § 207.526[p][iv]); (aa) transfer in connection with reorganization of entity where beneficial ownership not changed (MCLA § 207.526[p][v]).

Tax paid to county treasurer where property located not later than 15 days after delivery of instrument of conveyance or not later than 15 days after transfer of controlling interest in entity with interest in real property. Payment of transfer tax must be evidenced by affixing of documentary stamp or stamps to each written instrument subject to tax imposed by person making, executing, issuing, or delivering written instrument. Documentary stamps may be purchased only in county in which property is located. (MCLA § 207.528[1]). Treasurer may prescribe alternate means for county treasurer to evidence payment of tax. (MCLA § 207.529). Tax is collected by county treasurer and is deposited with treasurer. (MCLA § 207.530). Written instrument that is evidence of indebtedness or of contract right is subject to transfer tax only to extent of new consideration given for property. Written instrument that is given to supplement, reform or correct prior written instrument is subject to real estate transfer tax only to extent of new consideration given for property. (MCLA § 207.532[1]). Tax is payable only once on transfer. Instrument is exempt by reason of prior payment or partial payment of tax on another written instrument executed as part of same transaction. Statement to that effect and date of payment must be set forth. (MCLA § 207.532[2]). No written instrument subject to real estate transfer tax will be recorded in office of register of deeds of any county unless documentary stamps have been purchased at time of presentation by party liable for tax (seller or grantor of property). Stamps must be affixed to face of instrument before recording unless person specifically requests that instrument be recorded before stamps are affixed. If so requested, stamps may be affixed to reverse side of written instrument. (MCLA § 207.533[1]). Any person who violates any one of prohibited acts in MCLA § 207.534(1), is guilty of misdemeanor, punishable by imprisonment for not more than one year or fined not more than $500 or both. (MCLA § 207.534[2]).

Redemption.

Property returned for delinquent taxes, upon which taxes, interest, penalties, and fees remain unpaid after property is returned as delinquent to county, is subject to forfeiture, foreclosure, and sale for enforcement and collection of delinquent taxes. On Mar. 1 of each year, taxes levied in immediately preceding year that remain unpaid shall be returned as delinquent for collection. Property delinquent for taxes levied in second year preceding forfeiture shall be forfeited to county for total of unpaid taxes, interest, penalties, and fees for those years. County property tax administration fee and interest on taxes returned as delinquent shall be added to property returned as delinquent. Persons with unrecorded interests and holders of undischarged mortgages may file request to receive notice of return of delinquent taxes on parcel(s) of property. Holder of tax lien purchased under Michigan tax lien sale and collateralized securities act, may request list identifying parcels of property for which notice is required. Governing body of local governmental unit that collects delinquent taxes may establish procedures for collection of delinquent taxes and enforcement of tax liens and schedule for forfeiture or foreclosure of delinquent tax liens. (MCLA §§ 211.78a; 7.124[1]). On June 1, and again on Sept. 1, immediately succeeding date on which unpaid taxes are returned to county for forfeiture, foreclosure, and sale or returned to county as delinquent, county treasurer shall send notice to person to whom tax bill was last sent or to person identified as owner, and to other persons entitled to notice. All rights of redemption will expire 21 days after court enters judgment of foreclosure. (MCLA § 211.78b and MCLA § 211.78c). Provisions with respect to notice, fees, vesting of title, redemption rights, withholding property from foreclosure, hearings, appeals of foreclosure rulings, minimum bid requirements, and damages are contained in MCLA § 211.78c through MCLA § 211.78p. Before Dec. 1, 1999, and again at any time during Dec. 2004, county board of commissioners, by properly adopted resolution, may elect to have State foreclose property forfeited to county treasurer. Additionally, in Dec. 2004, county board of commissioners may, by properly adopted resolution, rescind prior resolution regarding state foreclosure of property. County and local governmental unit within county may enter into agreement for collection of property taxes or enforcement and consolidation of tax liens within local governmental unit. (MCLA § 211.78).

Review of Assessment.

Board of Review meets on 1st Tues. after 1st Mon. in Mar. to review taxable status of persons and property, and on following Mon. and Tues. to hear complaints of any person whose property is assessed and review valuations. (MCLA §§ 211.29-.30). Board of Review also meets in July and Dec. at which time clerical errors or mutual mistakes of fact can be reviewed and corrected (MCLA § 211.53b), and in some cases claims for homestead exemptions and/or exemptions for qualified agricultural property (MCLA § 205.735). Prior to delivery of tax roll to proper officer for collection of taxes but not later than 1st Mon. in May, assessment rolls are subject to inspection by State Tax Commission. (MCLA § 211.152).

Tax Tribunal has exclusive and original jurisdiction over proceedings for direct review of final decision, finding, ruling, determination, or order of agency relating to assessment, valuation, rates, special assessments, allocation, or equalization, under property tax laws, and over proceedings for refund or redetermination of tax under property tax laws. (MCLA § 205.731). Proceedings before Tax Tribunal are original and independent and are considered de novo. For proceedings commenced before Dec. 31, 2006, for assessment disputes as to valuation of property or claims for exemption (excepting where July or Dec. board of review has authority to determine claims for exemption for qualified agricultural property or homestead property by Department of Treasury), assessment must be protested to local board of review before Tribunal acquires jurisdiction, except as provided in MCLA § 205.737(5) and (7). For special assessment dispute, special assessment must be protested at hearing held for confirming special assessment roll before Tribunal acquires jurisdiction. (MCLA § 205.735[1]). For proceedings commenced after Dec. 31, 2006, for assessment dispute as to valuation or exemption of property, assessment must be protested before local board of review before Tribunal acquires jurisdiction, except for property classified under MCLA § 211.34C as commercial real property, industrial real property, or development real property, assessment may be protested before board of review or appealed directly to Tribunal without protest before board of review, as provided in MCLA § 205.735a(6). (MCLA § 205.735a[4]). Jurisdiction of Tribunal in assessment dispute as to property classified as commercial real property, industrial real property, developmental real property, commercial personal property, industrial personal property, or utility personal property is invoked by party in interest, as petitioner, by filing petition on or before May 31 of tax year involved. Jurisdiction of Tribunal in assessment dispute as to property classified under MCLA § 211.34c as agricultural real property, residential real property, timber-cutover real property, or agricultural personal property invoked by party in interest, as petitioner, filing written petition on or before July 31 of tax year involved. In all other matters, jurisdiction invoked by filing petition within 35 days after final decision, ruling, determination, or order. Appeal of contested tax bill must be made within 60 days after mailing by treasurer and appeal is limited solely to correcting arithmetic errors or mistakes, not valuation or exemption disputes, or property's equalized value. (MCLA § 205.735[2]). Petition considered filed on or before expiration of time provided in MCLA § 205.735a(6) if one or more of following occur: (a) Petition postmarked by U.S. postal service on or before expiration of period; (b) petition delivered in person on or before expiration of period; (c) petition given to designated delivery service for delivery on or before expiration of period; or (d) any other requirement Tribunal prescribes. In assessment disputes, Tribunal determines property's taxable value pursuant to MCLA § 211.27a, and property's state equalized value. (MCLA § 205.737[1] and [2]). Petitioner has burden of proving true cash value of property and assessing agency has burden of proving average level of assessment. (MCLA § 205.737[3]). Before Tribunal issues its decision on original petition, taxpayer may add subsequent tax years by filing motion to amend petition to add subsequent tax years on or before time periods set for filing petitions, either May 31 or July 31 of each tax year involved. Prior protest to local board of review is not required. (MCLA § 205.737[4]). If exemption is claimed, subsequent motions to amend are not required. (MCLA § 205.737[5][a]). Residential property and small claims division of Tribunal has jurisdiction over proceedings in which residential property (meaning homestead or other residential or agricultural real property including less than four rental units) is involved, for nonresidential property if amount of that property's taxable value or state equalized value in dispute is not more than $100,000, or if more than $100,000, parties consent and leave granted by Tribunal, and in non-property matters, if amount of tax in dispute is $20,000 or less. (MCLA § 205.762). Formal record of proceeding is not required. Within 14 days after hearing referee issues decision or order, by leave of Tribunal and for good cause shown, party may request rehearing by Tribunal member. Rehearing is not limited to evidence presented before hearing referee. Hearing is held in county where property is located or in contiguous county. Appellant is not required to travel more than 100 miles from location of property to hearing site, except for rehearing which is held at site determined by Tribunal. (MCLA § 205.762[3] and [4]). Appeal to Court of Appeals from Tax Tribunal lies only for fraud, error of law or adoption of wrong principles. (Const, Art. VI, § 28). Excessive taxes paid by clerical error or mutual mistake recoverable if action commenced in Tax Tribunal within three years of payment. (MCLA § 211.53a).

Effective May 9, 2008, some proceedings in Tribunal may be submitted for mediation. (MCLA § 205.703).

Michigan Tax Lien Sales and Collateralized Securities Act.

MCLA §§ 211.921, et seq., authorizes municipalities to enter into purchase and sale agreements for sale of tax liens by municipality, to purchase tax liens through tax lien entity of municipality, or third party (MCLA § 211.924); to contract with any person, firm or corporation to service, administer, collect and foreclose on tax liens and to maintain or sell foreclosed property (MCLA § 211.922[f]); to issue tax lien collateralized securities in anticipation of collection of taxes (MCLA §§ 211.926 and 211.940). Tax lien means interest in or encumbrance on real or personal property under § 8(c) or (d) of the General Property Tax Act, MCLA § 211.8, and relates to unpaid ad valorem property taxes, unpaid special assessments, and other levies or charges that are returned as delinquent (MCLA § 211.922[d]). "Tax lien entity of the municipality" means authority, trust, or other single purpose entity created by municipality. "Tax lien collateralized securities" means bonds, notes or other obligations issued by tax lien entity of municipality, repayment of which is secured by tax liens and other funds, property, or security pledged by tax lien entity for repayment. (MCLA § 211.922[e] and MCLA § 211.926). Tax lien collateralized securities are exempt from all state taxation, except inheritance and transfer taxes (MCLA § 211.928), and all property owned by authority is exempt from taxation by state or local governments (MCLA § 211.939).

Certification of Abandoned Property for Accelerated Forfeiture.

Local unit of government may make declaration of accelerated forfeiture of abandoned property by properly adopted resolution. (MCLA § 211.963). If declaration is made before Oct. 1 of any tax year, governmental unit may identify property as abandoned if following procedures are followed: before Feb. 1, governmental unit inspects property and determines that it is abandoned; at time of inspection, notice is posted, and copy of notice is sent to owner or taxpayer of record; and taxes levied are returned to county as delinquent on Mar. 1. (MCLA § 211.964). If person with legal interest files affidavit claiming that property is not abandoned before hearing required under general property tax act, property is not forfeited on immediately preceding Mar. 1 and shall be forfeited on immediately succeeding Mar. 1 if delinquent taxes, interest, penalties, and fees have not been paid. (MCLA § 211.965). If unit of government complies with procedures and person with legal interest has not responded to notice, unit of government may certify property as certified abandoned property. (MCLA § 211.966).

Tax Reverted Property Emergency Disposal Act.

Unit of government may obtain clear title to tax reverted property, title to which vested in local unit of government prior to Jan. 1, 2000, if declaration of emergency backlog is made by properly adopted resolution, stating that existing inventory of tax reverted property is so large and of uncertain title that it is impairing governmental unit's ability to market property by conventional means, and that property is contributing to spread of neighborhood blight and deterioration. (MCLA § 211.973). After title search has been conducted to identify persons with ownership interest in tax reverted property and notice has been given, unit of government may bring quiet title action to determine title for all parcels of tax reverted property set forth in complaint. Person claiming interest in property may contest validity or correctness of unpaid delinquent taxes, interest, penalties, and fees on one or more of several grounds by filing written objection. If court determines that owner of tax reverted property is incompetent or without means of support, it may withhold that property from judgment quieting title or may enter order extending redemption period. Fee simple title to property on which delinquent taxes, interest, penalties, and fees are not paid prior to entry of judgment shall vest absolutely in unit of government upon entry of judgment. Governmental unit shall have absolute title to property, which is not subject to any lien and which shall not be stayed unless judgment is appealed. If appealed, judgment shall be stayed until court of appeals reverses, modifies, or affirms judgment. (MCLA § 211.975).

22.16 [RESERVED]

22.17 SALES AND USE TAXES:

Exemptions.

See topic 22.16 Sales and 22.19 Use Taxes, subhead Sales Tax.

Sales Tax.

Levied on all persons within state engaged in the business of making sales at retail, including conditional sales and installment lease sales, and computer software offered for general sale to public or software modified or adopted to user's needs or equipment by seller if software is available for sale either from seller or software on as is basis or as end product without modification or adaptation but excluding isolated transactions. Sale at retail means transfer for consideration of tangible personal property in ordinary course of business for any purpose other than resale in form of tangible property or demonstration and includes sales by industrial laundry under sale, rental or service agreement. (MCLA § 205.51[g]). Sale at retail does not include commercial advertising element if commercial advertising element is used to create or develop print, radio, television, or other advertisement, commercial advertising element is discarded or returned to provider after advertising message is completed, and commercial advertising element is custom developed by provider for purchaser. Commercial advertising element means negative or positive photographic image, audiotape or videotape master, layout, manuscript, writing of copy, design, artwork, illustration, retouching, and mechanical or keyline instructions. Sale at retail includes audiotape or videotape reproductions. Tangible property includes electricity, gas and steam, and beginning Sept. 20, 1999 also includes sale of transmission and distribution of electricity used by consumer or user of electricity. Tax is 6% of gross proceeds less credits for returned goods or refund less allowance for use made for motor vehicle returned under MCLA § 257.1401-.1410, as certified by manufacturer. (Const. art IX, § 8; MCLA §§ 205.51, .52, .54). Seller may add tax to price charged if he states it separately. (MCLA § 205.73). Delivery and installation charges included in sale price if incurred before completing transfer of of ownership. (MCLA § 205.51[d][iv][v]). Delivery and installation charges do not apply to exempt property. (MCLA §§ 205.51[d][iv][v], .51a[e]). Sale for residential use of electricity, natural or artificial gas, or home heating fuels is exempt from sales tax at additional rate of 2%, i.e. 4% sales tax applies. (MCLA § 205.54n).

Exempt are sales: (1) To United States or its agencies, instrumentalities or wholly owned corporations, American Red Cross, and State of Michigan or its departments, institutions or political subdivisions; (2) to parent cooperative preschools and to nonprofit educational institutions, nonprofit hospitals and nonprofit homes for children and aged persons so long as activities of such entity are carried on for benefit of public at large; (3) to churches; (4) of food to students by nonprofit educational institutions; (5) of tangible personal property affixed to and made part of real estate of nonprofit hospital or nonprofit housing; (6) of commercial vessels of 500 tons or more produced on special order and of fuel and stores for such vessels engaged in interstate commerce; (7) for agricultural production except property for human consumption or property which becomes part of real estate; (8) for industrial processing except: (a) property which becomes part of real estate, (b) services performed on property owned by others, which do not alter character of property, (c) office furniture and supplies, (d) receiving and storage of certain raw materials, (e) vehicles titled and licensed for use on public highways and (f) preparation of food and beverages by retailer for retail sale; (9) of certain computer equipment; (10) of newspapers, periodicals and copyrighted motion picture films; (11) for use or consumption in commercial radio or television transmission; (12) of hearing aids, contact lenses, eyeglasses or devices to replace part of human body or used to assist disabled person if prescribed by appropriate professional; (13) ambulance or fire department vehicles not for resale to Michigan nonprofit corporations; (14) for use or consumption in rendition of service use or consumption of which is subject to use tax, except exemption is limited to personal property located on premises of subscriber and to central office equipment or wireless equipment, directly used in transmitting, receiving, switching, or monitoring 2-way interactive communication (excluding cable or wireless facilities); (15) second class mail publications; (16) text books sold by public or nonpublic school to students in kindergarten through twelfth grade; (17) of prescription drugs for human use or food for human consumption, except prepared food intended for immediate consumption, excluding, however, milk, juices, non-carbonated beverages, fresh fruit, candy, nuts, chewing gum, bakery products, cookies, crackers, and chips sold from vending machine or vendor of mobile facility, nonalcoholic beverages and prepared food intended for immediate consumption provided to employees of food service establishments during working hours free or at a reduced rate, of deposits on returnable containers, of food or other property purchased with federal food stamps, or of certain fruit or vegetable seeds or plants; (18) of property purchased and installed as component part of water pollution control facility; (19) of subsurface irrigation pipe if used in production of agricultural products as business enterprise; (20) of qualified truck or trailer (certain proceeds only); (21) of investment coins and bullion; (22) of property used in industrial processing; (23) of property used in extractive operations; (24) of certain telephone machinery and equipment; (25) of property for use in construction, altering, repairing or improving real property or nonprofit hospital or housing; (26) of specified vehicles and watercraft for personal use of tribe members if kept within tribe agreement area; of qualified automobiles to qualified exempt organizations. (MCLA §§ 205.51, .54-.547). Sales of certain air pollution equipment are also exempt if covered by certificate of exemption. (MCLA § 336.4). Deduction allowed for “bad debts” beginning Jan. 1, 1984. (MCLA § 205.54i). Also exempt are sales for use in qualified business activities as defined in enterprise zone act (MCLA §§ 125.2101 et seq., 205.54j), and sales to business certified by Department of Treasury as engaged in high technology activity (MCLA § 205.541), sales of textiles and disposable products to industrial laundry after Dec. 31, 1997 (MCLA § 205.54a[m][i]). Limited exemption, until 2007, for corporate sponsorships of specified athletic events organized by specific exempt organizations. (MCLA § 205.55b).

Sales of tangible personal property not for resale are excluded from gross proceeds used for computation of sales tax, if made to following: (a) Health, welfare, educational, cultural arts, charitable, or nonprofit benevolent organization that has been issued exemption ruling letter signed by administrator of sales, use, and withholding tax division of department of treasury; (b) organization not operated for profit and exempt from federal income tax under § 501(c)(3) or 501(c)(4) of Internal Revenue Code. Exemptions do not apply to sales of tangible personal property and sales of vehicles licensed for use on public highways, that are not used primarily to carry out purpose of exempt organization as stated in its bylaws or articles of incorporation; (c) sales to or for lease to domestic air carrier of certain aircraft and parts and materials. (MCLA § 205.54x). At time of transfer of personal property, exempt organization shall do one of following: (a) present exemption ruling letter, (b) present signed statement, on form approved by department, stating that property is to be used or consumed in connection with operation of exempt entity and that organization qualifies as exempt organization. Transferee must provide transferor copy of federal exemption letter. Exemption ruling letter and signed statement with copy of federal exemption letter shall be accepted by all courts as prima facia evidence of exemption. Statement shall provide that if claim for exemption is disallowed, transferee shall reimburse transferor for amount of tax. (MCLA § 205.54q).

School, church, hospital, parent cooperative preschool, or nonprofit organization with tax exempt status under MCLA § 205.54q, with aggregate sales at retail in calendar year of less than $5,000 and not operating for profit, may exclude from gross proceeds sales of tangible personal property for fund-raising purposes. Club, association, auxiliary, or other organization affiliated with school, church, hospital, parent cooperative preschool, or exempt nonprofit organization is not considered separate person for purposes of this exemption for fund raising. (MCLA § 205.540). MCLA §§ 205.54n and 540 are effective for all sales at retail occurring after Dec. 31, 1994. Taxpayers providing refund or credit for returned tangible personal property must also refund or provide credit for sales tax paid. (MCLA § 205.60).

Effective Sept. 2004, Michigan has adopted Streamlined Sales Tax.

Persons engaged in taxable business are required to obtain license (fee $1 per year) and to report and pay tax monthly. (MCLA §§ 205.53, .56). After Jan. 1, 1999, taxpayers with annual liability of $720,000 or more must remit monthly payments by electronic funds transfer. (MCLA § 205.56[3]). Taxpayer required to keep specified records. Taxpayer may use blanket exemption certificates on form prescribed by Department that covers all exempt transfers between taxpayer and buyer for period of up to four years, or less if agreed to by buyer and seller. Licensed liquor wholesalers exempt from exemption certificate requirement in certain instances. (MCLA § 205.67).

Use Tax.

Use Tax (MCLA §§ 205.91 et seq.) is complimentary to sales tax. Use Tax is imposed on all persons, using, storing or consuming tangible property or using certain services within state, unless sales tax was paid on transaction. Property purchased by nonresident at time of purchase and property is brought into state more than 90 days after purchase is exempt from Use Tax. Property purchased by resident of state and brought into state more than 360 days after purchase is exempt from Use Tax. (MCLA § 205.93[1]). Use tax imposed on telecommunications services (MCLA § 205.93a) and mobile wireless services (MCLA § 205.93b). For other exemptions see generally MCLA § 205.94.

22.18 STAMP AND SEAL TAXES:

See topic 22.15A Real and Personal Property Taxes, subhead Real Estate Conveyance Tax.

22.19 USE TAXES:

See topic 22.17 Sales and Use Taxes.

22.20 UTILITIES TAX:

See topic 22.15A Real and Personal Property Taxes, subhead Assessment and topic 22.16 Sales and 22.19 Use Taxes, subhead Sales Tax.

Cities meeting certain population tests may adopt uniform city utility users tax ordinance imposing such tax. (MCLA §§ 141.1151-.1177).

23 TRANSPORTATION

23.01 MOTOR VEHICLES:

Michigan Vehicle Code (MCLA §§ 257.1-.923) is administered by Secretary of State, Lansing, Michigan 48913.

Vehicle License.

With limited exceptions, every motor vehicle, pickup camper, trailer coach, trailer, semi-trailer and pole-trailer driven or moved on highway is required to be registered with Secretary of State (MCLA §§ 257.216, .217), and to display one registration plate (MCLA §§ 257.224, .225, .255). Plates are issued by Secretary of State. (MCLA §§ 257.201, .224). Registration and plates expire on last day of Feb. (commercial vehicles other than pickup trucks and vans owned by individuals and trailers), Mar. 31 (motorcycles), date assigned by Secretary of State (vehicles owned by businesses, corporations, or owners other than individuals), and owner's birthday (other vehicles and motorcycles after Feb. 1, 2005). (MCLA § 257.226). No exemption for members of Armed Forces.

Operator's License.

Every person who drives motor vehicle on highway must be licensed by Secretary of State as operator or chauffeur. (MCLA § 257.301). Operator's license expires on operator's birthday in fourth year following date of issuance and chauffeur's first license expires on operator's birthday in fourth year following date of issuance unless license earlier suspended or revoked. Subsequent chauffeur's licenses expire on operator's birthday in fourth year following date of issuance. Two-year license may be issued to persons convicted of certain violations. First license issued to person under age 20½ expires on 21st birthday of licensee. (MCLA §§ 257.314, 257.811). Neither operator's nor chauffeur's license may be issued to one under age 18. Restricted license can be issued to anyone at least age 14 years, nine months. (MCLA §§ 257.303, .308 and 310e). Certain off-road recreational vehicles may be operated by persons between ages ten and 16 only if operator is supervised by someone 18 years of age and possesses safety certificate issued by Dept. of Natural Resources. If operator is ten or 11, operation must be only on land owned by parent or guardian. (MCLA § 324.81129). Any member of Armed Forces when furnished driver's permit and when operating official motor vehicle in that service of Armed Forces, or any military driver operating commercial motor vehicle for military purpose, is exempt from licensing requirements. (MCLA § 257.302). Operator's license is not issued to any person under 18 who has not passed approved driver education course unless licensed for one year in another jurisdiction (MCLA § 257.811), except restricted licenses (MCLA § 257.312) and temporary instruction permits (MCLA § 257.306).

Titles.

Application for certificate of title must contain name and address of owner and either mailing address (if individual) or business address (if business); description of vehicle including make, body style, and year, series or vehicle identification number, weight, odometer mileage; and statement of applicant’s title and names and addresses of holders of any security interest in vehicle and in any accessory, in order of their priority. Rebuilt, salvage, scrap or comparable certificate of title issued by another state must be reissued by Secretary of State. (MCLA § 257.217). See subhead Sales, infra.

Sales.

Seller must endorse and acknowledge assignment to purchaser, with statement of all security interests in vehicle or accessories, on certificate of title. (MCLA § 257.233). Purchaser, unless he is dealer, must present such certificate to Secretary of State with required fees and new certificate and registration will be issued. (MCLA § 257.234). Seller may retain plates for transfer to another vehicle upon application and payment of required fees. (MCLA § 257.233). Party transferring title to any motor vehicle must furnish transferee written statement setting forth: odometer reading at time of transfer, date of transfer, transferor’s name and address; transferee’s name and address; make, model, body type, year, and vehicle identification number, and, statement that to best of knowledge of transferor odometer reflects actual mileage, or if transferor knows that it reflects mileage in excess of mechanical limit, statement to that effect, or if transferor knows odometer reading is not accurate, statement that it does not reflect actual mileage and should not be relied upon including notice alerting transferor that discrepancy exists. Foregoing statement not required for vehicles: with rating over 16,000 pounds, which are not self-propelled, which are ten or more years old or which are being transferred from manufacturer to dealer. Civil and criminal sanctions provided by statute. (MCLA § 257.233a). New motor vehicle dealer must disclose in writing to purchaser any damage sustained by vehicle after manufacture if cost to repair exceeds 5% of Manufacturer’s Suggested Retail Price or $750 if repair is to surface of vehicle. Disclosure not required for damages to glass, tires, wheels, bumpers, audio equipment, in-dash components or components in living quarters of motor home, not affecting its operation as vehicle, if replaced with manufacturer’s parts and materials. (MCLA § 257.233b). Where security interest created or reserved at time of transfer, see subhead Liens, infra.

Installment Sale.

Contracts for sale of motor vehicle payable in two or more installments are extensively regulated by MCLA §§ 492.101-.141 as to form of contract, finance charge, and other matters. Sellers and persons who purchase, discount or lend on the security of motor vehicle paper are required to be licensed. Contract must state nature and amount of all items entering into time balance, payment schedule, collateral security, buyer’s rights with respect to prepayment and reinstatement after default, and seller’s rights with respect to default charges and repossession. (MCLA § 492.113). Buyer must acknowledge in writing receipt of copy of contract and receive certificate evidencing insurance placed by seller at buyer’s expense. Finance charges may not exceed amounts permitted by Credit Reform Act. (MCLA §§ 445.1851-.1864). See category 3 Business Regulation and Commerce, topic 3.19 Interest.

Liens.

Governed by Uniform Commercial Code. (MCLA §§ 440.1101-.11102). See categories 3 Business Regulation and Commerce, topic Commercial Code; Mortgages, topic Chattel Mortgages. Application for registration and certificate of title must show all liens. Secretary of State’s receipt of application for certificate of title on which security interest is to be indicated is condition for perfection of security interest in vehicle and equivalent to filing financing statement under Uniform Commercial Code. (MCLA § 257.217). Certificate of title must show all liens. (MCLA § 257.222). Title certificate is returned to owner of vehicle after notation of all security interests is made on such certificate by Secretary of State. (MCLA §§ 257.222, .234, .238). See category 3 Business Regulation and Commerce, topic 3.23 Sales, subhead Conditional Sales for liens on motor vehicle accessories and equipment sold on title retaining contract.

Identification Marks.

Any person who without intent to mislead, conceals or misrepresents identity of motor vehicle by removing or defacing manufacturer's serial number or engine or motor number, or by replacing any part of vehicle bearing serial number or motor number with new part on which proper number has not been stamped, is guilty of misdemeanor. Such acts with intent to mislead constitute felony. (MCLA § 750.415).

Odometer Alteration.

Any person who alters or allows odometer to be altered is guilty of felony. (MCLA § 257.233a).

Operation Prohibited.

Operation prohibited by person: less than 18 years old (with exceptions); whose license suspended, revoked, or denied in any state; suffering from mental or physical disability impairing control of motor vehicle; unable to understand signs in English; unable to pass knowledge, skill, or ability test administered by Secretary of State; with two or more moving violation in past three years occurring before original license issued; is non resident (including foreign exchange student); who has failed to answer citation or notice to appear in court or to comply with court order or judgment; convicted or determined responsible for any of specified crimes or civil infractions; who violated statute prohibiting minor from purchasing, possessing, or consuming alcohol or attempting to do so; whose commercial driver's license application canceled for being untrue; or not U.S. citizen unless person demonstrates legal presence in U.S. (MCLA § 257.303).

Size, Weight, and Towing Restrictions.

Regulated by MCLA §§ 257.716-.725.

Equipment Required.

Regulated by MCLA §§ 257.683-.711.

Seatbelts.

All front seat occupants must wear safety belt, excepting certain vehicle types. (MCLA § 257.710e). Child under four must be secured in rear seat, in child restraint system meeting standards in 49 CFR § 571.213. If vehicle does not have rear seat, or if all rear seating positions occupied by other children under age four, then child under four may use child restraint system in front seat. Rear-facing child restraint system may be used in front seat only if passenger air bag deactivated. (MCLA § 257.710d). Child older than four but less than eight, and less than four feet nine inches tall, must also be secured in child restraint system meeting standards in 49 CFR § 571.213, in accordance with instructions of both child restraint manufacturer and vehicle manufacturer. Child four or older but less than 16 must wear safety belt regardless of seating position. Failure to wear safety belts in compliance with statute may be considered evidence of negligence but may not reduce civil damage recovery by more than 5%. (MCLA § 257.710e). 5% limitation may not apply in some actions. (458 Mich. 582, 581 N.W.2d 272).

Lights Required.

Regulated by MCLA §§ 257.684-.704.

Inspection.

Any uniformed police officer for reasonable cause may stop vehicle and inspect equipment. (MCLA §§ 257.715-.715a).

Traffic Regulations.

Traffic signs, signals and markings regulated by MCLA §§ 257.608-.616. Speed restrictions regulated by MCLA §§ 257.627-.633. Overtaking and passing regulated by MCLA §§ 257.634-.645. Turning and starting regulated by MCLA §§ 257.647-.648. Right-of-way regulated by MCLA §§ 257.649-.655. Operation of bicycles, motorcycles and toy vehicles regulated by MCLA §§ 257.656-.662. Street cars and safety zones regulated by MCLA §§ 257.663-.666. Special stops regulated by MCLA §§ 257.667-.671. Stopping, standing and parking regulated by MCLA §§ 257.672-.675d.

Accidents.

Driver of any vehicle involved in accident must stop, give police officer, individual struck, or driver or occupants of other vehicle his name and address, registration number of vehicle he is operating, and name and address of owner, and exhibit operator’s license; and if personal injury has resulted, render reasonable assistance in securing medical aid or transportation. (MCLA §§ 257.617-.619). If other vehicle or property damaged and owner or operator cannot be located, driver must report to most convenient police officer. (MCLA §§ 257.620-.621).

Liability of Owner.

Owner is liable for any injury occasioned by negligent operation of vehicle if driven with his express or implied consent, which is presumed if driven by close relative or immediate member of family. Leasing agency not liable at common law for damages for injuries to persons or property resulting from operation of vehicle leased to person for more than 30- day period. (MCLA § 257.401).

Guests.

Michigan guest passenger statute, enacted in 1929 limited liability of owner or operator for injury to guest to cases involving gross negligence or wilful misconduct declared unconstitutional (394 Mich. 655, 232 N.W.2d 636). In unrelated case (469 Mich. 1, 664 N.W.2d 767), court held that test applicable to equal protection challenges adopted in 394 Mich. 655 was incorrect in context in which it was used and overruled its use in such context. Negligence of driver is not imputed to passenger in action against third party. (313 Mich. 218, 21 N.W.2d 105).

Proof of Financial Responsibility.

If any judgment is not satisfied within 30 days, license and registration of judgment debtor, or privileges of nonresident, are suspended until judgment is satisfied and proof of financial responsibility furnished in form of certificate of insurance, bond, or deposit of money or securities with Secretary of State. (MCLA §§ 257.511-.528).

Insurance.

See subhead No-Fault Insurance, infra.

No-Fault Insurance.

So-called “no-fault” insurance statute adopted, requiring security for payment of benefits to be provided. Complex statutory regulation governs amount and type of recovery as well as procedure. Tort liability is preserved in cases of death, serious impairment of body function or permanent serious disfigurement. (MCLA §§ 500.3101-.3179). Serious impairment of body function defined at MCLA § 257.58c.

Foreign Vehicles.

Nonresident owner of foreign vehicle may operate or permit operation of vehicle within state without registering same, if vehicle is registered in and displays registration certificate and plates issued in place of residence of owner, but only for 72 hours if vehicle operated for transportation of persons or property for compensation and owner obtains temporary permit, only for 90 days if vehicle is pleasure vehicle, and not at all without registering same if owner operates vehicle in connection with business carried on in state. (MCLA § 257.243).

Nonresident Operators.

See subhead Foreign Vehicles, supra.

Actions Against Nonresidents.

Service of summons may be made on Secretary of State as agent of nonresident in any action growing out of operation of vehicle within state by nonresident, or of vehicle owned by nonresident with his consent. (MCLA § 257.403).

Direct Actions.

Action against insurer by injured person not allowed. (MCLA § 500.3030).

Motor Vehicle Carriers.

Subject to certain exemptions (MCLA § 479.2), transportation of property by motor vehicle for hire upon and over public highways of state is subject to supervision and regulation by Michigan Public Service Commission. (MCLA § 475.2). No change may be made in any rate except on notice to commission and public, and commission may investigate and pass upon reasonableness of rates. (MCLA § 479.6a). Common motor carriers must obtain certificate of authority. (MCLA § 476.1). Contract motor carriers must obtain permit. (MCLA § 477.1). Motor carriers of passengers, not operated by municipalities, require Certificate of Authority from state transportation department under Motor Bus Transportation Act. (MCLA §§ 474.101-.141).

Motor Vehicle Taxes.

Registration fee imposed at time of registering motor vehicle. (MCLA § 257.801). Additional tax imposed upon common and contract carriers. (MCLA §§ 478.1-.8). Specific weight tax imposed upon public transportation vehicles and city and suburban buses in lieu of taxes imposed under MCLA § 257.801. (MCLA §§ 257.971-.972). See category 22 Taxation, topic 22.14 Motor Vehicle Taxes.

Gasoline Tax.

See category 22 Taxation, topic 22.08 Gasoline and Special Fuels Taxes.

Lemon Law.

See category 3 Business Regulation and Commerce, topic 3.12 Consumer Protection.

23.02 RAILROADS:

See category 3 Business Regulation and Commerce, topic 3.08 Carriers.

23.02A COMMERCIAL CODE FORMS:

Michigan accepts National Article 9 Forms. See Part III, Uniform and Model Acts section of Law Digest, Commercial Code Amendments, where National Forms are in print.

1
MINNESOTA LAW DIGEST

—Scope —

Revised for 2010 edition by **LexisNexis**(R).

(Citations, unless otherwise indicated, are to Minnesota Statutes 1996 which are numbered according to a decimal system by which figures preceding decimal point indicate chapters and those following indicate sections. Session Laws are cited by year and chapter number. Prefix “R. Civ. P.” refers to Rules of Civil Procedure for the District Courts. Prefix “R. App. P.” refers to Rules of Appellate Procedure. Prefix “R. Crim. P.” refers to Rules of Criminal Procedure. Rules for all courts appear in Appendix to Minnesota Statutes. Parallel citations to the North Western Reporter begin with 26 Minn. Official reporter discontinued following 312 Minn.)

Note: This revision incorporates legislation through Nov. 23, 2009.

1 INTRODUCTION

1.01 GOVERNMENT AND LEGAL SYSTEM:

The State of Minnesota is a constituent state of the United States of America. For further discussion of the U.S. federal system, see Introduction to the Federal Government of the United States at the beginning of this volume. A great many laws are promulgated by the federal government of the United States and are not reflected in the topics below. See the Introduction to this volume for references to the federal law topics covered.

Like all but one of the United States, Minnesota has a common law legal system, with roots in English common law. For information on the courts and legislature of Minnesota, see category 6 Courts and Legislature.

1.02 [RESERVED]

1.03 HOLIDAYS:

Legal holidays are: New Year's Day, Jan. 1; Martin Luther King Jr.'s Birthday, 3d Mon. in Jan.; Washington's and Lincoln's Birthday, 3d Mon. in Feb.; Memorial Day, last Mon. in May; Independence Day, July 4; Labor Day, 1st Mon. in Sept.; Columbus Day, 2d Mon. in Oct.; Veterans Day, Nov. 11; Thanksgiving Day, 4th Thurs. in Nov.; and Christmas Day, Dec. 25. If Jan. 1, July 4, Nov. 11 or Dec. 25 falls on Sun., following day is holiday; if on Sat., then preceding day is holiday. (Minn. Stat. §645.44).

Uniform Commercial Code adopted. See category 3 Business Regulation and Commerce, topic 3.09 Commercial Code.

Legality of Transactions on Holiday.

Acknowledgment (41 Minn. 269, 43 N. W. 7) or publication of summons (50 Minn. 457, 52 N. W. 915) on holiday is valid, but no civil process may be served thereon (Minn. Stat. §645.44).

1.04 OFFICE HOURS AND TIME ZONE:

Minnesota is in the Central Standard (GMT -06:00) time zone. Office hours are generally from 9 a.m. to 5 p.m.

2 BUSINESS ORGANIZATIONS

2.01 AGENCY:

Common law rules generally apply.

Exclusive agency does not prevent principal from acting. (41 Minn. 535, 43 N.W. 569).

Adoption of act by one not previously authorized constitutes agency for similar act; but not for dissimilar act. (38 Minn. 66, 35 N.W. 568). Knowledge acquired in employment in no way connected with agency is not notice to principal (47 Minn. 352, 50 N.W. 240) unless such knowledge actually present in agent's mind while acting for principal (46 Minn. 298, 49 N.W. 129).

Disclosure of principal pending transaction relieves agent from liability. (38 Minn. 79, 35 N.W. 575; 61 Minn. 277, 63 N.W. 734). Agent liable unless he discloses principal. (59 Minn. 476, 61 N.W. 448).

2.02 ASSOCIATIONS:

Two or more persons transacting business as associates under common name may be sued by such name, and judgment binds joint property of all associates as though all had been named defendants. (Minn. Stat. §540.15). No other general statutes except as to service of process. See category 5 Civil Actions and Procedure, topic 5.20 Process.

Religious associations are governed by Minn. Stat. c. 315.

Professional Associations.

See topic 2.03 Corporations, subhead Professional Firms.

2.03 CORPORATIONS:

General.

Legislature can create only by general laws and not by special charter. Cannot amend, renew, extend or explain charter by special law. (Minn. Const. art. 12, §1).

Most recent business corporation act effective July 1, 1981. (Minn. Stat. c. 302A). Replaces business corporation act of 1933 (Minn. Stat. c.. 301), which in turn replaced prior statutes (Minn. Stat. c. 300). Corporations formed under Chapter 300 became subject to Chapter 301 unless they elected otherwise prior to May 1, 1935. Any corporation formed for business purposes under Chapter 300 that has not subsequently become governed by Chapter 301 may elect to become governed by Chapter 302A. All business corporations in existence on or formed after Jan. 1, 1984 (except nonelecting corporations under Chapter 300) are governed by Chapter 302A. (Minn. Stat. §302A.021). Chapter 300 repealed effective Aug. 1, 2006, become governed by Chapter 302A and Chapter 47 (financial corporations), Chapter 48 (state banks), Chapter 51A (capital stock associations), Chapter 60A (insurance corporations), and Chapter 66A (mutual companies).

Finances and Funds

Prudent Management of Institutional Funds Act enacted. (Minn. Stat. §§309.73 to 309.77).

Nonprofit Corporations.

Most recent nonprofit corporation act was enacted in 1989. (Minn. Stat. c. 317A). As of Jan. 1, 1991, all nonprofit corporations even if incorporated under c. 317 or another statute, are governed by Chapter 317A. (Minn. Stat. §317A.021). Acts apply to nonprofit corporations generally except cemeteries, cooperatives, certain religious corporations and certain others. (Minn. Stat. §317A.051). Initial registration with Secretary of State is required between Jan. 1 and Dec. 31, 1990. Failure to file initial registration causes loss of good standing. (Minn. Stat. §317A.821). Annual registration is required thereafter. (Minn. Stat. §317A.823).

An act for organization and operation of development corporations adopted in 1957. (Minn. Stat. §§301.71-.84).

Minnesota Professional Firms Act adopted 1997. (Minn. Stat. c. 319B). See infra subhead Professional Firms.

Purposes.

Corporation may be formed for any business purpose or purposes, unless some other statute requires incorporation for any of those purposes under different law. Unless otherwise provided in its articles, corporation has general business purposes. (Minn. Stat. §302A.101).

Corporate name must contain word “corporation,” “incorporated,” “limited” or abbreviation of one of those words, or contain word “company” or abbreviation “Co.” if that word or abbreviation not immediately preceded by “and” or “&.” Name must be distinguishable upon records in office of Secretary of State from name of any other domestic corporation, limited partnership, limited liability partnership and limited liability company whether profit or nonprofit or foreign corporation, limited partnership, limited liability partnership or limited liability company authorized to do business in state. Secretary of State has authority to determine what is or is not “distinguishable” name. Applicant may obtain use of name that is same as or not distinguishable from another corporation, limited partnership, limited liability partnership or limited liability company by filing written consent, court decree of prior right, or certificate of inability to locate corporation, limited partnership or limited liability company formed or registered more than three years previously. Person doing business in state may contest subsequent registration of name. (Minn. Stat. §302A.115). Procedure established for reservation of corporate name for unlimited number of 12-month periods. (Minn. Stat. §302A.117).

Term of corporate existence of corporation under Chapter 302A is perpetual unless limited in articles. (Minn. Stat. §302A.161). For renewal of term of c. 302A corporations whose articles limit their duration, see Minn. Stat. §302A.801. Term can be renewed after expiration and relates back to date of expiration. (Minn. Stat. §§302A.801, .805). For extension of term of nonprofit and like corporations, see Minn. Stat. §317A.801. For renewal of Chapter 300 corporations, see Minn. Stat. §300.13.

Incorporators.

One or more natural persons of full age may form business corporation. No statutory requirements as to citizenship or residence of incorporators. (Minn. Stat. §302A.105).

Articles of incorporation must be signed by one or more incorporators; must state corporate name, address of registered office, aggregate number of shares corporation has authority to issue and name and address of each incorporator. (Minn. Stat. §302A.111). Certain statutory provisions govern corporation unless modified in articles or in a shareholder control agreement under Minn. Stat. §302A.457. (Minn. Stat. §302A.111, subdiv. 2). . Checklist of these statutory provisions that may be modified only in articles, or either in articles or bylaws, and certain other optional provisions is set forth in Minn. Stat. §302A.111, subdiv. 2. Articles may establish or authorize board of directors to issue more than one class or series of shares. (Minn. Stat. §302A.401). Liability of directors for certain breaches of fiduciary duty may be limited in articles. (Minn. Stat. §302A.251). Board of directors has statutory authority, subject to any restrictions in articles, to issue securities, rights to purchase securities, to establish relative rights and preferences of different classes and series (Minn. Stat. §302A.401) and to authorize distributions (Minn. Stat. §302A.551).

Filing of Articles.

Articles effective and corporate existence begins when articles are filed with Secretary of State, together with payment of fees. (Minn. Stat. §302A.153). Annual renewal filings to be in required format. (Minn. Stat. §5.34).

Filing Fees.

Filing fee of $35 paid to Secretary of State for filing any instrument required to be filed under Chapter 302A. (Minn. Stat. §302A.011, subdiv. 11). For merger, additional fee of $25. (Minn. Stat. §302A.153).

Total fees payable to Secretary of State for filing original articles under Chapter 302A are $135, including $100 incorporation fee and $35 filing fee. (Minn. Stat. §302A.153).

Additional $20 fee is charged for expedited over-the-counter filings with Secretary of State.

Notice of Incorporation.

Publication not required.

Paid-in Capital Requirement.

There is no paid-in capital requirement under Chapter 302A.

Amendment of articles so as to include, modify or omit any provision which could have been lawfully included in, modified or omitted from original articles, or so as to extend corporate duration, may be adopted at any meeting of shareholders or by written action of all shareholders. (Minn. Stat. §302A.131; Minn. Stat. §302A.135). Amendments proposed either by resolution approved by majority vote of directors or by shareholders owning 3% or more of shares entitled to vote must be submitted to vote at next regular or special shareholders meeting for which notice has not been but still can be timely given. Written notice to shareholders stating substance of proposed amendment required at least ten days prior to meeting or shorter time provided in articles or by-laws. Same or substantially same amendment proposed by shareholders need not be submitted to more than one shareholders' meeting during 15-month period. Proposed amendment is adopted when approved by affirmative vote of majority of shareholders required by Minn. Stat. §302A.437. However, in case of closely held corporation, if articles provide for specified proportion or number equal to or larger than majority, or if, in case of closely held corporation, proposed amendment seeks to provide for specified proportion or number equal to or larger than majority needed to transact specified type of business at meeting, proposed amendment must receive larger of vote necessary to transact that type of business prior to, or vote necessary to transact that type of business after, amendment becomes effective. For corporation other than closely held corporations, if articles provide for larger proportion or number to transact specified type of business at meeting, affirmative vote of that larger proportion or number is necessary to amend articles to decrease proportion or number. (Minn. Stat. §302A.135). Capital stock may be increased or decreased by amendment of articles. Directors of open-end management investment company may increase or decrease authorized shares without shareholder approval. Holders of shares of class or series entitled to vote as class or series if amendment would: (1) Effect exchange, reclassification or cancellation of all or part of class or series, or effect combination of outstanding shares of class or series into lesser number of shares of class or series where each other class and series is not subject to similar combination; (2) effect exchange or create right of exchange of all or any part of shares of another class or series for shares of class or series; (3) change shares of class or series into same or different number of shares of another class or series; (4) create new class or series having prior and superior preference or increase rights and preferences or number of authorized shares of class or series having prior or superior rights and preferences; (5) divide class into series and determine or authorize board to determine rights and preferences of each series; (6) limit or deny existing preemptive rights of class or series; or (7) cancel or otherwise effect distributions on shares of class or series that have accrued but not been declared. (Minn. Stat. §302A.137). Amendments which have effect of denying, limiting or modifying right to cumulative voting or, if shareholders are entitled to cumulative voting, preemptive rights are not adopted if votes of proportion of voting power sufficient to elect director at election of entire board under cumulative voting are cast against amendment. (Minn. Stat. §302A.215, Minn. Stat. §302A.413). Amendment effective upon filing with Secretary of State of articles of amendment signed by person authorized by Chapter 302A, articles, by-laws or duly adopted resolution, or upon such later date within 30 days after filing if amendment so provides. $35 filing fee. (Minn. Stat. §§302A.139, .153). Unless otherwise provided in articles, shareholder objecting to proposed amendment that materially and adversely affects rights or preferences of his shares in that it: (1) Alters or abolishes preferential right of shares; (2) creates, alters or abolishes right in respect of redemption of shares, including provision respecting sinking fund for redemption of shares; (3) alters or abolishes preemptive right to acquire shares, securities other than shares or rights to purchase shares or securities other than shares; (4) excludes or limits right of shareholder to vote on matter, or to cumulate votes, except as right may be excluded or limited through authorization or issuance of securities of existing or new class or series with similar or different voting rights or termination of applicability of control share acquisition provisions (see subhead Control Share Acquisitions, infra); or (5) eliminates right to obtain payment, has right to dissent and obtain payment of fair value of shares by filing with corporation before vote on amendment written notice of intent to demand fair value of shares. If amendment approved, corporation must supply form of demand with instructions for use by dissenting shareholder. Appraisal procedure provided if corporation and dissenting shareholder cannot agree on value of shares. Corporation must forward payment of amount it determines to be fair value of shares, plus interest, pending appraisal. (Minn. Stat. §§302A.471, .473).

Increase or Decrease of Authorized Capital Stock.

See supra, subhead Amendment of Articles.

By-laws.

Corporation may, but need not, have by-laws. Board of directors may adopt, amend or repeal by-laws unless power reserved by articles to shareholders, subject to power of shareholders to adopt, amend or repeal by-laws adopted, amended or repealed by board. However, board of directors cannot make or alter any by-law fixing shareholder quorum, prescribing procedures for removal or replacement of directors or fixing their qualifications, classifications, term of office, or number, except that board may make or alter any by-law to increase their number. (Minn. Stat. §302A.181).

Stock.

Articles may establish, or authorize board to establish, more than one class or series. Unless so established by board or specifically provided in articles, all shares are one class and one series, are common shares entitled to vote and having equal rights and preferences in all matters not otherwise provided by board and have 1¢ par value solely for tax purposes. Board of directors explicitly granted power to authorize issuance of shares and to fix rights and preferences attached to such shares, subject to any restrictions in articles. (Minn. Stat. §302A.401).

Stock Certificates.

Shares may be either certificated or uncertificated. Certificates must state on their face: (1) Name of corporation; (2) statement that corporation is incorporated under Minnesota law; (3) name of person to whom issued; (4) number, class and designation of series, if any, that certificate represents. Certificate representing shares issued by corporation authorized to issue more than one class or series must state on face or back, or must state corporation will furnish upon request and without charge, full statement of designations, preferences, limitations and relative rights, so far as they have been determined, and authority of board of directors to so determine relative rights and preferences of subsequent classes or series. Each certificate must be signed by agent or officer authorized by articles or by-laws to sign certificates, or, in absence of such authorization, by officer. (Minn. Stat. §302A.417). Such signatures may be facsimiles. (Minn. Stat. §302A.011, subdiv. 30).

Issuance of Stock.

Subject to any restrictions in articles, shares may be issued for any consideration, including money or other tangible or intangible property received or to be received by corporation under written agreement or services rendered or to be rendered to corporation under written agreement if authorized by resolution approved by affirmative vote of directors required by Minn. Stat. §302A.237 or, if provided for in articles, approved by affirmative vote of shareholders required by Minn. Stat. §302A.437. Price in money or other consideration, or minimum price or general formula or method by which price will be determined must be established. No consideration needed for exchange or conversion of corporation's shares or for share dividends, divisions, or combinations. Corporation may issue shares only upon receipt of consideration in full or with unanimous consent of shareholders. Consideration in form of promissory note, check or written agreement to transfer property or render services in future fully paid when note, check or written agreement is delivered to corporation. Consideration in form of services to be rendered fully paid when issuance of shares is authorized by directors or approved by shareholders. Directors or shareholders who are present and entitled to vote and who intentionally or without reasonable investigation fail to vote against approving issuance for consideration unfair to corporation are jointly and severally liable to shareholders who did not consent to extent of damages. Directors or shareholders present and entitled to vote who fail to vote against issuance knowing full consideration has not been paid are jointly and severally liable for difference between agreed consideration and consideration actually received by corporation if shares issued in violation of statute. Original shareholder and any transferee or successor in interest acquiring shares with knowledge of such violation also liable to same extent. Liability of pledgees limited to assets held as security. Any person found liable may sue any or all other persons found liable for contribution. Two year statute of limitations. (Minn. Stat. §302A.405).

Transfer of Stock.

Uniform Commercial Code adopted. (Minn. Stat. c. 336). See category 3 Business Regulation and Commerce, topic 3.09 Commercial Code.

Subsection (2), §10-104 in 1962 Official Text adopted.

Uniform Securities Ownership by Minors Act not adopted.

Uniform Simplification of Fiduciary Security Transfers Act adopted. (Minn. Stat. §§520.21-31).

As to fixing record date for stock ownership, see infra, subhead Shareholders' Meetings.

Stock Transfer Tax.

None.

Shareholders' Inspection Rights.

Corporation required to keep at principal executive office, or if principal executive office out of state, to make available within ten days of shareholder demand, records of all proceedings of shareholders and directors for last three years, articles as amended, by-laws as amended, reports to shareholders within last three years, names and business addresses of directors and principal officers, voting trust agreements, shareholder control agreements and certain financial statements and contracts. Corporation also required to keep shareholder register at principal executive office or another place within U.S. named by board. Shareholders of corporation not publicly held given absolute right upon written demand to inspect and copy all documents required to be kept at such location and share register without showing "proper purpose within ten days after receipt by an officer of the written demand." Any other corporate records may be examined and copied by such shareholders upon written demand only upon showing of "proper purpose." Shareholders of "publicly held corporation" have, upon written demand stating purpose with reasonable particularity, acknowledged or verified, right to examine and copy corporation's share register and other corporate records reasonably related to stated purpose upon demonstrating stated purpose to be "proper purpose". Shareholder can only use records for "proper purpose" and corporation may obtain protective order or other relief as necessary. Corporation may obtain protective order from court in state permitting corporation to withhold portions of records of board for reasonable period of time, not to exceed 12 months, to prevent premature disclosure of confidential information which would be likely to cause competitive injury to corporation. Protective order may be renewed for successive 12 month periods, in total not exceeding 36 months. (Minn. Stat. §302A.461). Corporation must prepare annual financial statements on basis of accounting methods reasonable in circumstances within 180 days after close of corporation's fiscal year and furnish such financial statements within ten days after written request by shareholder. (Minn. Stat. §302A.463).

Shareholders' Liabilities.

Double liability of shareholders abolished, except as to certain banks. For liability of shareholders of banks and trust companies, see category 3 Business Regulation and Commerce, topic 3.01 Banks and Banking.

As to liability of shareholders where stock issued for inadequate consideration or less than full consideration, see supra, subhead Issuance of Stock. As to liability of shareholders receiving unlawful dividends or distributions, see infra, subhead Distributions.

Shareholders' Meetings.

Regular meetings may be held on annual or less frequent periodic basis but need not be held unless required by articles, by-laws or by demand of shareholder. If regular meeting not held during 15-month period, shareholders holding 3% of shares entitled to vote may demand regular meeting by sending written notice of demand to chief executive or chief financial officer. Within 30 days of receipt of demand, board must cause regular meeting to be called and held on notice no later than 90 days after receipt of demand, or if board fails to do so, shareholders making demand may call meeting by giving notice required by Minn. Stat. §302A.435. Regular meetings to be held on day and at time and place fixed by, or in manner authorized by, articles or by-laws, except for meetings called by or at demand of shareholders which must be held in county where principal executive office of corporation located. (Minn. Stat. §302A.431, subdiv. 3). Special meetings may be called for any purpose at any time by chief executive officer, chief financial officer, two or more directors, any person authorized by articles or by-laws to call special meeting or, except for special meeting to facilitate business combination, shareholders holding 10% or more of shares entitled to vote. Shareholders holding 25% or more of shares entitled to vote may call special meeting to facilitate business combination. Procedure for demand of special meeting by shareholders similar to demand for regular meeting. (Minn. Stat. §302A.433). Written notice specifying date, time and place, and purpose of special meeting or if otherwise required by articles, by-laws or law, must be given in accordance with statutory provisions. Waiver of notice effective whether given before, at or after meeting, and whether given in writing, orally or by attendance. Attendance constitutes waiver, unless objection made at beginning of meeting because meeting not lawfully convened or before vote on item because item may not lawfully be considered and objecting shareholder does not participate in consideration of item at meeting. (Minn. Stat. §302A.435). Unless articles or by-laws specify larger or smaller proportion or number, holders of majority of voting power of shares entitled to vote are quorum for transaction of business. If quorum is present when meeting is convened, meeting may continue even though shareholder's withdrawal leaves less than quorum. (Minn. Stat. §302A.443). Articles or by-laws of corporation may allow shareholder attendance at regular or special meetings by any means of communication that allows all shareholders to simultaneously hear each other. Participation by remote communications also constitutes presence in person, or by proxy if proxy requirements are otherwise met, for quorum and waiver of notice purposes. (Minn. Stat. §302A.436). Board of directors may determine to hold regular or special meeting solely by remote communication if authorized by articles or by-laws. (Minn. Stat. §§302A.431, .433, .436). Except as required by law or in articles and except for election of directors, shareholders take action by affirmative vote of greater of majority of voting power of: (1) Shares present and entitled to vote on that item of business, or (2) minimum number entitled to vote that would constitute quorum. Unless otherwise provided in articles, directors are elected by plurality vote. (Minn. Stat. §302A.215). In certain situations class voting may also be required. (Minn. Stat. §302A.437). Any action required or permitted to be taken at meeting may be taken without meeting by written action signed or consented to by authenticated electronic communication by all shareholders entitled to vote on action. Articles of corporation that is not publicly held corporation may provide for less than unanimous written action if in initial articles or adopted by all shareholders entitled to vote on amendment. Such action is effective on date of last signature or consent unless different effective time is provided in written action. (Minn. Stat. §302A.441, subdivs. 1 and 2).

Voting.

Unless articles or terms of shares provide otherwise, each shareholder has one vote per share. Board may fix date not more than 60 days before date of meeting for determination of holders of shares entitled to notice of and to vote at meeting. When date is so fixed, only holders on that date are entitled to notice and permitted to vote. Unless corporation receives written notice to contrary, shares held jointly may be voted by any one of joint owners. When shareholder votes without signifying how many shares voted, all shares deemed voted. Articles may give or prescribe manner of giving creditor, security holder or other person right to vote. Board may establish procedure for treating beneficial owners as shareholders. (Minn. Stat. §302A.445). Unless articles expressly provide that there shall be no cumulative voting, shareholders may cumulate their votes for election of directors if any shareholder gives written notice of intent to cumulate votes to any officer before meeting or to presiding officer at meeting at any time before vote. (Minn. Stat. §302A.215). Specific rules regarding voting of shares by organizations and legal representatives. (Minn. Stat. §302A.447). Shareholder may cast vote in person or through written proxy filed with officer of corporation at or before meeting. Written proxy may be signed by shareholder or authorized by electronic transmission. If shareholder gives proxy authority to vote on less than all items of business to be conducted at meeting, shareholder is considered present only with respect to those items. Proxy rules permit joint owner to appoint proxy unless another joint owner notifies corporation denying authority of first joint owner to appoint proxy or appoints different proxy, and permit corporation to accept votes of proxy without determining that vote is within authority of proxy. (Minn. Stat. §302A.449). Special proxy rules with respect to control share acquisition, see infra, subhead Control Share Acquisitions.

Voting trusts may be entered into pursuant to written agreement for period not to exceed 15 years, except that if agreement is made in connection with indebtedness of corporation voting trust may extend until indebtedness is discharged. Unless otherwise specified therein, such voting trust may be terminated at any time by beneficial owners of majority of voting power of shares held by trustee. Copy of agreement must be filed with corporation. (Minn. Stat. §302A.453, subdiv. 1).

Shareholder Voting Agreements.

Written agreement among shareholders or subscribers for shares, relating to voting of shares, is valid and specifically enforceable by and against parties. Agreement may override proxy rules and is not subject to voting trust provisions. (Minn. Stat. §302A.455).

Shareholder Control Agreements.

Written agreement among shareholders and subscribers for shares relating to control of any phase of business and affairs of corporation, its liquidation and dissolution or relations among shareholders of or subscribers to shares is valid and specifically enforceable if it is signed by all persons who are then shareholders and subscribers. Copy of agreement must be filed with corporation. (Minn. Stat. §302A.457).

Directors.

Corporation's business and affairs are to be managed by or under direction of board of directors, subject to any shareholder control agreement and power of holders of shares entitled to vote for directors to take by unanimous vote any action required or permitted by board. First board may be named in articles or elected by incorporators or shareholders. (Minn. Stat. §302A.201). Board shall consist of one or more directors, number of whom shall be fixed by or in manner provided in articles or by-laws. Number of directors may be increased or decreased, subject to statutory limitations on removal of directors, by amendment to or in manner provided by articles or by-laws. (Minn. Stat. §302A.203). Directors must be natural persons. Method of election and other qualifications may be imposed by or in manner provided in articles or by-laws. (Minn. Stat. §302A.205). Directors may hold office for indefinite term, but any director serving indefinite term or whose term will expire within six months of regular shareholder meeting must stand for reelection at such meeting. (Minn. Stat. §§302A.207, .431). Fixed terms may be provided for in articles or by-laws but shall not exceed five years. (Minn. Stat. §302A.207). Unless different rules for filling vacancies are provided in articles or by-laws, vacancies resulting from death, resignation, removal or disqualification may be filled by majority vote of remaining directors, even though less than quorum; vacancies resulting from newly created directorships may be filled by majority vote of directors serving at time of increase. (Minn. Stat. §302A.225).

Directors' meetings may be held at such place within or without state as board may select or, if board fails to select place for board meeting, at principal executive office of corporation unless articles or by-laws provide otherwise. Board of directors may determine to hold meeting solely by means of remote communication. (Minn. Stat. §302A.231, subdiv. 1). Meetings may be called by any director by giving ten days written notice or such shorter or longer notice as articles or by-laws may require. Notice may be given by electronic communication to directors who have consented to form of electronic communication. (Minn. Stat. §302A.231, subdiv. 4). The board acts by affirmative vote of greater of (1) majority of directors present at time of action or (2) majority of minimum proportion or number of directors that would constitute quorum, except where articles require affirmative vote of larger proportion or number. (Minn. Stat. §302A.237). Quorum is majority unless larger or smaller proportion or number provided in articles or by-laws. (Minn. Stat. §302A.235).

Directors authorized to give advance written consent or opposition to proposal to be acted upon at board meeting at which director will be absent if articles or by-laws so provide and proposal acted upon at meeting is substantially same or has substantially same effect as proposal to which absent director consented or opposed. Such consent or opposition does not constitute presence for purpose of quorum. (Minn. Stat. §302A.233). Action required or permitted to be taken at board meeting may be taken by written action signed or consented to by authenticated electronic communication by all directors. If action need not be approved by shareholders and articles so provide, directors may act by written action taken by number of directors that would be required to take such action at meeting of board at which all directors were present. Written notice of such action must be given immediately to all directors. (Minn. Stat.

§302A.239). Presence at board meeting deemed to be assent to action taken thereat unless director registers dissent as provided in statute or is prohibited from voting because of conflict. (Minn. Stat. §302A.251).

Committees.

Resolution approved by affirmative vote of majority of directors currently holding office may committees having authority of board in management of corporation to extent provided in resolution establishing committee. Committee may include special litigation committee consisting of one or more independent directors or other independent persons to consider legal rights or remedies of corporation and whether those rights and remedies should be pursued. Committees other than special litigation committees and committees formed pursuant to Minn. Stat. §302A.673, subdiv. 1[d], are subject at all times to direction and control of board. (Minn. Stat. §302A.241, subdiv. 1).

Liabilities of Directors.

Directors must act in good faith, in manner they reasonably believe to be in best interests of corporation and with care ordinarily prudent person in like position would exercise in similar circumstances. Directors who so perform their duties are not liable by reason of being or having been director. Director is entitled to rely on information, opinions and reports or statements of certain persons, such as counsel, public accountants, committees and other persons director reasonably believes to be reliable and competent. With certain exceptions, liability of directors for certain breaches of fiduciary duty may be limited in articles. (Minn. Stat. §302A.251). As to liabilities of directors where unfair, or less than full consideration has been paid, see supra, subhead Issuance of Stock, or where directors authorize illegal dividend or distribution, see infra, subhead Distributions.

Registered Office.

Every corporation must maintain an office in the state known as its registered office, which can be changed by action of directors, without amending articles. Filing with Secretary of State required. (Minn. Stat. §§302A.121, .123).

Officers.

Corporation required to have one or more persons exercising functions of chief executive officer and chief financial officer. (Minn. Stat. §302A.301). Duties of each specified by law unless articles, by-laws or board resolution provide otherwise. (Minn. Stat. §302A.305). Board may elect or appoint other officers in manner specified by articles, by-laws or board resolution. (Minn. Stat. §302A.311). Any offices may be held or exercised by same person. (Minn. Stat. §302A.315). Officers are to discharge duties in good faith, in manner they reasonably believe to be in best interests of corporation and with care ordinarily prudent person in like position would exercise under similar circumstances. (Minn. Stat. §302A.361).

Powers.

Unless limited by any other applicable statute of state, corporation has perpetual duration and has broad powers to: Sue and be sued; own and dispose of real and personal property; trade in securities and obligations of domestic and foreign governments and instrumentalities; make contracts, incur liabilities and secure any of its obligations; make investments; hold real and personal property as security; make donations irrespective of corporate benefit for public welfare; pay pensions, retirement allowances and compensation for past services and establish employee or incentive benefit plans; participate in promotion, organization, ownership, management and operation that participating corporation would have power to conduct by itself; provide life insurance and other insurance for officers, directors, employees and agents or on life of shareholder for purpose of acquiring shares at death; conduct business under assumed names; and may have and exercise all other powers necessary or convenient to effect any or all business purposes for which corporation is incorporated. Corporation may, but need not, have corporate seal. (Minn. Stat. §302A.161).

Loans, Guarantees, Suretyship.

Corporation may lend money to, guarantee obligation of or otherwise assist any person if transaction is approved by majority of directors present and (1) is in usual and regular course of business, (2) is with or for benefit of related corporation or organization in which corporation has financial interest, business relationship or power to make donations or (3) is approved by holders of two-thirds of voting power of shares other than those held by interested person or by holders of all outstanding shares.

Corporation may lend money to, guarantee obligation of, or otherwise assist officer or other employee of corporation or subsidiary, including one who is director, whenever majority of directors present determines loan, guaranty or assistance may reasonably be expected to benefit corporation. May be with or without interest and secured or unsecured. (Minn. Stat. §302A.501). Corporation may make advances for expenses, without director vote, to directors, officers and employees. (Minn. Stat. §302A.505).

As to restrictions on ownership of real property by corporations having alien stockholders, see category 4 Citizenship, topic 4.01 Aliens.

As to conveyances by corporations, see category 21 Property, topic 21.06 Deeds.

Distributions.

Corporation may make distributions (defined as direct or indirect transfers of money or other property, other than own shares, or incurrence or issuance of indebtedness by corporation to shareholders, including cash dividends, distributions in liquidation, redemptions, purchases or other share acquisitions) provided that corporation will be able to pay debts in ordinary course of business after making such distribution. Such determination shall be made by board of directors in compliance with statutory standard of conduct (good faith, in manner director reasonably believes in best interests of corporation, and with care of ordinarily prudent person in like position under similar circumstances) on basis of financial information prepared in accordance with accounting methods or fair valuation or other method reasonable in circumstances. Effect of distribution in connection with purchase, redemption, or other acquisition of shares to be measured as of date on which money or other property transferred, or on date indebtedness payable in installments or otherwise is incurred, or on date shareholder ceases to be shareholder, whichever is earliest. Effect of other distributions measured as of date of authorization if payment within 120 days of authorization; as of date of payment if more than 120 days. (Minn. Stat. §§302A.251, .551). Shareholder liability for unlawful distribution only to extent distribution exceeded amount which properly could have been paid. (Minn. Stat. §302A.557). Directors not liable if determination made in compliance with statutory standard of conduct on basis described above and only liable to extent distribution exceeded amount which properly could have been paid. Director may seek contribution from all other liable parties. Two year statute of limitations. (Minn. Stat. §302A.559).

Share Dividends, Divisions or Combinations.

Shares may be issued pro rata to shareholders, or to shareholders of one or more classes or series, to effect share dividends, or divisions or combinations, provided no shares of any class or series which are then outstanding shall be issued to holders of another class or series (except in exchange for or in conversion of outstanding shares of other class or series) unless articles expressly provide for such issuance or issuance is approved by majority of voting power of all shares of same class or series. (Minn. Stat. §302A.405). If share division or combination adversely affects rights and preferences of outstanding shares, or if percentage of unissued shares after division or combination exceeds percentage before, articles of amendment must be adopted by board and shareholders. Otherwise, board may effect share dividend, division or combination without shareholder approval. (Minn. Stat. §302A.402).

Disposal of Assets.

Corporation may, by affirmative vote of majority of directors present, and without shareholder approval sell, lease, transfer or otherwise dispose of all or substantially all of corporate assets in usual and regular course of its business, grant security interest in part or all of its assets, whether or not in usual and regular course of its business, or transfer any or all of its property to corporation all shares of which are owned by corporation. Board of directors may sell, lease, transfer or otherwise dispose of all or substantially all of corporate assets, including good will, not in usual and regular course of its business, when and as authorized by written consent of all shareholders or by vote of holders of majority, or greater proportion as articles may require, of shares entitled to vote. Shareholder approval not required if corporation retains significant continuing business activity. Corporation that retains business activity that represented at least 25% of total assets and 25% of either income from continuing operations before taxes or revenues from continuing operations conclusively deemed to have retained significant continuing business activity. (Minn. Stat. §302A.661). Except for shares listed on New York Stock Exchange, American Stock Exchange, NASDAQ Global Market, or NASDAQ Global Select Market, shareholders dissenting from transfer of assets may demand in writing before vote payment of fair value for shares unless net proceeds are to be distributed in accordance with respective interests of shareholders within one year after date of disposition. (Minn. Stat. §302A.471, subdiv. 3). For procedure for demand, payment and appraisal rights, see supra, subhead Amendment of Articles. For provisions regarding disposition of assets with 10% or more shareholders, see subhead Business Combinations, infra.

Books and Records.

Corporation must keep share register at its principal executive office or another place within U.S. named by board. Other records to be kept at principal executive office, and if office out of state, must be made available at registered office within ten days of demand by shareholder. For corporations other than “publicly held” corporations, proper purpose no longer required to examine certain records. For provisions regarding documents to be maintained, see supra, subhead Shareholders' Inspection Rights. (Minn. Stat. §302A.461).

Merger or Exchange.

Corporation may merge with one or more domestic or foreign corporations and limited liability companies, resulting in single domestic or foreign corporation, or limited liability company with or without business purpose, pursuant to plan of merger. Shares of one or more classes or series of corporation may be exchanged for shares or other securities of same or different class of one or more other corporations or money other than property pursuant to plan of exchange. (Minn. Stat. §302A.601). Plan of merger or exchange must contain: (1) Names of constituent organizations proposing to merge or participate in exchange; (2) in case of merger, name of surviving organization; (3) in case of exchange, name of acquiring corporation; (4) terms and conditions of proposed merger or exchange; (5) in case of merger, manner and basis of converting ownership interests of constituent organizations into securities of, or other ownership interests in, surviving or any other organization or into money or other property; (6) in case of exchange, manner and basis of exchanging shares to be acquired for securities of, or other ownership interests in, acquiring organization or any other organization or converting into money or other property; (7) in case of merger, statement of any amendments to articles of surviving organization; and (8) any other provisions deemed necessary or desirable. (Minn. Stat. §302A.611). Unless otherwise provided in articles, plan of merger must be approved by majority of directors present and by majority vote of shareholders, except no shareholder approval of plan of merger by shareholders of surviving corporation required if articles of such corporation will not be amended, shareholders thereof will hold same number of shares with identical rights thereafter, and number of new shares entitled to vote or new participating shares thereafter will not exceed 20% of number of shares entitled to vote or participating shares, respectively, immediately before transaction. Unless otherwise provided in articles, plan of exchange must be approved by majority of directors present and by majority vote of shareholders of corporation whose shares will be acquired. Shareholders not entitled to vote as class solely because all classes of shares are to be canceled or exchanged if appraisal rights available. If shareholder approval required, plan or short description must be submitted to shareholders as part of notice of meeting. (Minn. Stat. §302A.613). Articles of merger or exchange filed with Secretary of State must include plan of merger or exchange and statement that plan was approved by each constituent organization pursuant to Chapter 302A and be signed on behalf of each constituent organization. (Minn. Stat. §302A.615). Merger of 90% direct or indirect subsidiaries into parent or into other 90% direct or indirect subsidiaries or of parent into 90% direct or indirect subsidiary by action of board of directors of parent without vote of shareholders of parent or any subsidiary authorized, except in certain circumstances. (Minn. Stat. §302A.621). Specific provisions for effecting holding company reorganization (Minn. Stat. §302A.626) and for abandonment of merger or exchange (Minn. Stat. §302A.631). Except for shares listed on New York Stock Exchange, American Stock Exchange, NASDAQ Global Market, or NASDAQ Global Select Market, shareholders dissenting from merger or exchange may demand in writing before vote payment of fair value for shares. (Minn. Stat. §302A.471, subdiv. 3). For procedure for demand, payment and appraisal rights, see supra, subhead Amendment of Articles. Merger or exchange effective when articles are filed with Secretary of State or on later date or at later time specified in articles of merger or exchange. (Minn. Stat. §302A.641). For provisions regarding mergers or exchanges with 10% or more shareholders, see subhead Business Combinations, infra.

Conversions.

Minnesota corporation may become Minnesota limited liability company, and Minnesota limited liability company may become Minnesota corporation, pursuant to plan of conversion. Plan of conversion must contain: (1) Name of converting organization; (2) name of converted organization; (3) whether converted organization is corporation or limited liability company; (4) terms and conditions of proposed conversion; (5) manner and basis of converting ownership interests in converting organization into ownership interests in converted organization or into money or other property; (6) proposed articles of incorporation or articles of organization of converted organization; and (7) any other provisions deemed necessary or desirable. (Minn. Stat. §302A.683). Unless otherwise provided in articles, plan of conversion must be approved by majority of directors or governors present and by majority vote of shareholders or members. (Minn. Stat. §302A.685). Articles of conversion filed with Secretary of State must be signed on behalf of converting organization and include plan of conversion, name of converting organization immediately before filing and name to which name is to be changed, type of organization that converted organization will be, statement that plan of conversion has been approved by converting organization and copy of articles of incorporation or organization of converted organization. (Minn. Stat. §302A.687). Except for shares listed on New York Stock Exchange, American Stock Exchange, NASDAQ Global Market, NASDAQ Global Select Market, shareholders dissenting from plan of conversion may demand in writing before vote payment of fair value for shares. (Minn. Stat. §302A.471, subdiv. 3). For procedure for demand, payment and appraisal rights, see supra, subhead Amendment of Articles. Conversion effective when articles filed with Secretary of State or on later date or at later time specified in articles of conversion. (Minn. Stat. §302A.691).

Control Share Acquisitions.

Unless otherwise provided in articles or by-laws approved by shareholders, information statement and shareholder approval generally required in order to vote any shares acquired of Chapter 302A corporation with at least 100 shareholders (and, in some cases, 50 shareholders) if, subject to certain specific exceptions, acquisition would result in new range of beneficial ownership of at least 20% but less than 331/3%, at least 331/3% but less than or equal to 50% or over 50%. (Minn. Stat. §§302A.011, .671). Proxies in control share acquisition must be solicited separately from offer to purchase or solicitation of offer to sell. (Minn. Stat. §302A.449).

Business Combinations.

Unless otherwise provided in articles or by-laws before corporation becomes publicly held or elects to become subject to regulation under statute, or unless board adopts by-laws prior to Sept. 1, 1987, electing out, “business combinations” with “interested shareholders” of publicly held corporation are prohibited for period of four years following interested shareholder's share acquisition date. Corporations which are not publicly held, but have 100 or more shareholders (or if election is made to be issuing public corporation prior to Jan. 1, 1998, 50 or more) may elect to become subject to regulation under statute. (Minn. Stat. §302A.673). Interested shareholder is any person (other than issuing public corporation or employee benefit, savings or stock ownership plan) which is: (1) Beneficial owner, directly or indirectly, of 10% or more of voting power of outstanding shares entitled to vote or (2) affiliate or associate of issuing public corporation that was 10% or more shareholder during preceding four years. Business combinations include: (1) Mergers, statutory exchanges of shares or other securities and certain dispositions of assets of corporation or its subsidiaries involving interested shareholder (or its affiliates or associates), (2) certain issuances of stock by corporation or its subsidiaries to interested shareholder (or its affiliates or associates), (3) liquidations, dissolutions or reincorporations of corporation proposed by or on behalf of interested shareholder (or any affiliate or associate), (4) certain reclassifications, recapitalizations and transactions between corporation and its subsidiaries that have effect of increasing proportionate share of outstanding shares entitled to vote owned by interested shareholder (or any affiliate or associate), and (5) any receipt by interested shareholder (or any affiliate or associate) of any loans, guarantees, pledges or other financial assistance or any tax credits or tax advantages from corporation or any subsidiary. (Minn. Stat. §302A.011). Not applicable to any business combination with interested shareholder who would have been interested shareholder on June 1, 1987 had section then been in effect or to transactions with persons who were interested shareholders before corporation became subject to regulation under statute and who are specified as being exempt in articles or in by-laws adopted by shareholders. (Minn. Stat. §302A.673).

Takeover Offers.

Offerer may not acquire by any means shares of publicly held corporation within two years following last purchase of shares of that class pursuant to takeover offer, unless acquisition is approved by disinterested directors before takeover offer, or shareholder is afforded reasonable opportunity to dispose of shares to offeror upon substantially equivalent terms as those provided in earlier takeover offer. (Minn. Stat. §302A.675).

Dissolution.

Corporation may be wound up and dissolved either voluntarily or involuntarily. Voluntary proceedings may be conducted either out of court or subject to supervision of court; involuntary proceedings must be subject to supervision of court. Incorporators or directors may dissolve corporation prior to issuance of shares. (Minn. Stat. §302A.711). After issuance of shares, shareholders may dissolve corporation by majority vote of holders of all shares entitled to vote. (Minn. Stat. §302A.721). Involuntary dissolution authorized under various circumstances, including by shareholder action in event directors are deadlocked in management of corporation, directors or those in control of corporation have acted fraudulently or illegally toward one or more shareholders in their capacities as shareholders or directors, or as officers or employees of closely held corporation, or in manner unfairly prejudicial toward one or more shareholders in their capacities as shareholders or directors of corporation that is not publicly held corporation, or as officers or employees of closely held corporation, shareholders are so divided they fail to elect successors to directors for two consecutive regular meetings, or assets are misapplied or wasted. (Minn. Stat. §302A.751). Resolution of dissolution no longer needs to be filed with Secretary of State; need only file notice of intent to dissolve. (Minn. Stat. §302A.723). Officers or directors wind up corporation. Trustee eliminated. (Minn. Stat. §302A.725). Alternative systems, depending on whether notice to creditors and claimants in connection with dissolution is given, established. (Minn. Stat. §302A.727). Provision for revocation of dissolution. (Minn. Stat. §302A.731). Articles of dissolution required to be filed with Secretary of State after expiration of certain time periods or occurrence of certain events. (Minn. Stat. §§302A.727, .7291). Court supervised voluntary and involuntary dissolution procedures almost identical. (Minn. Stat. §302A.741 et seq.).

Close Corporations.

Court may grant dissolution or such other equitable relief it deems just and reasonable under circumstances when it is established that directors or those in control of corporation have acted fraudulently or illegally toward one or more shareholders in their capacities as shareholders, directors or as officers or employees of closely held corporation or in manner unfairly prejudicial toward one or more shareholders in their capacities as shareholders or directors of corporation that is not publicly held corporation, or as officers or employees of corporation that is closely held corporation. (Minn. Stat. §302A.751). Closely held corporation is corporation with not more than 35 shareholders. (Minn. Stat. §302A.011). Court may also order sale by plaintiff or defendant of all shares of closely held corporation to corporation or moving shareholder. In considering whether to order equitable relief, court is to take into consideration duty all shareholders owe one another and reasonable expectations of all shareholders as they exist at inception and develop through course of relationship. Written agreements among shareholders and corporation are presumed to reflect parties' reasonable expectations concerning matters dealt with in agreements. (Minn. Stat. §302A.751).

Shareholders may assume management functions, either by unanimous vote or unanimous shareholder control agreement. (Minn. Stat. §302A.201). See supra, subhead Directors.

Appraisal.

See subheads Amendment of Articles, Disposal of Assets, Merger or Exchange and Conversions, supra. Corporation may in articles, by-laws or by board resolution also grant dissenting shareholders appraisal rights with respect to any action taken pursuant to shareholder vote. (Minn. Stat. §302A.471).

Foreign Corporations.

All foreign corporations doing business in state (except insurance companies as defined in (Minn. Stat. §60A.02) and banking or trust association acting as executor, administrator, trustee, guardian or conservator under Minn. Stat. §303.25) are required to comply with provisions of foreign corporations act. (Minn. Stat. c. 303). No foreign corporation may transact business in state that only bank, trust company or savings, building and loan association can transact in Minnesota except as provided in Minn. Stat. §303.25. (Minn. Stat. §303.04). Making of contract to be performed in Minnesota or commission of tort in Minnesota against resident of Minnesota constitutes appointment of Secretary of State as agent for service of process in action or proceeding arising therefrom. (Minn. Stat. §303.13). See also category 3 Business Regulation and Commerce, topic 3.01 Banks and Banking, subhead Foreign Corporations.

See Non-Profit Corporation Act with respect to foreign nonprofit corporations doing business in Minnesota. (Minn. Stat. §5.25; Minn. Stat. c. 317A).

Certificate of Authority.

Foreign corporation must hold certificate of authority to transact business in the state. Such certificates are issued by Secretary of State on application made on forms prescribed and furnished by Secretary of State, executed by president, vice-president, secretary or assistant secretary of corporation, and delivered to Secretary of State with certificate of existence from filing officer of state, province or country of incorporation. Following activities do not constitute transacting business in state: Maintaining, defending or settling any action; holding meetings and carrying on internal affairs of corporation; maintaining bank accounts; maintaining offices or agencies relating to its securities; holding title to or managing real or personal property as executor or administrator of estate, trustee, or guardian or conservator of any person or person's estate; participating in or creating loans, mortgages or security interests in real or personal property; collecting its debts; conducting isolated transaction completed in 30 days and not part of repeated number of like transactions. (Minn. Stat. §§303.03, .06, .08). Minn. Stat. §303.03 does not establish standards for those activities that may subject foreign corporation to taxation under Minn. Stat. §290.015 and to reporting requirements of Minn. Stat. §290.371.

Fees.

Initial license fee of $150 must be paid to State Treasurer at time of making application. (Minn. Stat. §303.7). Annual license fee of $115 to accompany annual registration form due by Dec. 31 of each year. (Minn. Stat. §303.14). Fee for other filings with Secretary of State, $50. (Minn. Stat. §303.21). Reinstatement fee after dissolution for failure to file report waived where responsible individual serving in active military service, deployed in combat operations overseas. (Minn. Stat. §5.33).

Registered Office and Agent.

Each foreign corporation authorized to transact business in the state must have registered office which may, but need not be, same as its place of business in the state, and registered agent (individual or corporate) whose business office is identical with registered office. (Minn. Stat. §303.10).

Foreign corporation is subject to service of process upon its registered agent. If such registered agent cannot be found at registered office, if no registered agent has been appointed, if corporation has withdrawn from state, or if its certificate of authority has been revoked or cancelled, service may be made on Secretary of State, except that if corporation's application for withdrawal has been approved, service may be made on Secretary of State only when based on liability of corporation incurred within state or arising out of business done in state prior to issuance of certificate of withdrawal. (Minn. Stat. §5.25; Minn. Stat. §§303.13, .16).

Notice of change of registered agent or office and notices of change of name, dissolution or merger into another corporation must be filed with Secretary of State. Registered agent may resign by filing written notice with Secretary of State, including statement that signed copy of notice has been given or mailed to foreign corporation at its principal office in jurisdiction where organized. (Minn. Stat. §§303.10, .11).

Annual Report.

By Dec. 31 of each year, every qualified corporation must file with Secretary of State annual registration form. Form is mailed to corporation at its registered office by Secretary of State. Form to set forth name of corporation, address of principal executive office, address of registered office, name of registered agent, if any, state of incorporation, and name and business address of officer exercising functions of chief executive officer. (Minn. Stat. §303.14).

Revocation of Certificate.

Certificate of authority may be revoked by Secretary of State if corporation fails to pay any fee due, to maintain registered agent, to file certificates of merger or name change or to file annual report. (Minn. Stat. §303.17). There is provision for reinstatement by application after revocation or cancellation of certificate. (Minn. Stat. §303.19).

Surrender of Authority.

Corporation desiring to withdraw from the state must file application for withdrawal setting forth: (1) Name and state of incorporation; (2) that it has no property in the state and has ceased to transact business therein; (3) that its board of directors has duly determined to surrender its authority to do business in the state; (4) that it revokes authority of its registered agent to accept service of process; (5) address to which Secretary of State may mail process against corporation served on Secretary; (6) that it will pay any additional license fees properly found to be due; (7) any additional information required or demanded by Secretary of State for determination of additional license fees. Application must be executed by same officers who would be required for application for certificate, except that application may be made by receiver or trustee if corporation is in hands of receiver or trustee. On payment of all fees, Secretary of State shall issue and record certificate of withdrawal. (Minn. Stat. §303.16).

Effect of Failure to Obtain Certificate of Authority.

No foreign corporation transacting business in the State can maintain action in any state court until it has first obtained certificate of authority. Nor can successor or assignee of such corporation, except holder in due course of negotiable instrument or assignee without actual notice of violation (who cannot recover more than purchase price), maintain any action in state court arising out of transaction of business in the state by such corporation until such corporation or its successor has obtained certificate. But failure to obtain certificate of authority does not impair validity of any contract or act of corporation and does not prevent it from defending any court action. Any foreign corporation transacting business in the state without certificate of authority becomes liable to forfeit to state penalty not exceeding $1,000 and additional penalty not exceeding $100 for each month or fraction thereof during which it continues to transact business without certificate, penalties being collected by action in name of state brought by Attorney General. (Minn. Stat. §303.20).

Professional Firms.

Minnesota Professional Firms Act adopted 1997. (Minn. Stat. c. 319B). Existing professional corporations governed by Chapter 319A will be governed by Chapter 319B beginning Jan. 1, 1999 and may elect to be governed by Chapter 319B before that date. Requires foreign and Minnesota firms that furnish professional services within Minnesota to elect to operate under Chapter 319B unless no Minnesota statute, Minnesota rule, or tenet of Minnesota common law requires firm to make election in order to furnish professional services or precludes firm from furnishing professional services in absence of election. (Minn. Stat. §319B.03, Minn. Stat. §319B.04). Professional services include services provided by physicians, physician assistants, attorneys, accountants, chiropractors, optometrists, podiatrists, psychologists, social workers, marriage and family therapists, dentists, nurses, architects, engineers, surveyors, landscape architects, geoscientists, interior designers, pharmacists, and veterinarians. (Minn. Stat. §319B.02).

Franchise Tax.

There is no annual franchise tax on corporations.

Income tax on corporations, see category 22 Taxation, topic 22.10 Income Tax.

Deeds.

See category 21 Property, topic 21.06 Deeds.

Model Non-Profit Corporation Act not adopted. See supra this topic, subhead General.

Limited Liability Companies.

See topic 2.06 Limited Liability Companies.

2.04 [RESERVED]

2.05 JOINT STOCK COMPANIES:

Few statutory provisions governing joint stock companies. Declarations of trust and business trusts are governed by Chapter 318.

All cooperative associations are governed by Chapter 308A or Chapter 308B.

Purposes.

Business trust can transact any business except insurance (except title insurance), banking, or surety business. (Minn. Stat. §318.01).

Formation.

Business trust can be organized by two or more natural persons or two or more corporations (including national banks and qualified foreign corporations). (Minn. Stat. §318.01). Instrument under which trust is organized must be filed with Secretary of State before business is transacted and must include name and address of agent for service of process (filing fee $150), and amendments must also be so filed (filing fee $50). Any such association is business trust, not partnership, joint-stock association, agency, or other relation. Business trust is also known as common-law trust and Massachusetts trust for doing business. (Minn. Stat. §318.02).

Rights, Powers and Liabilities.

Business trust has power to continue perpetually; to sue and be sued; to use seal (but failure to use shall not affect validity of any instrument); to do any acts necessary and incidental to transaction of its business or expedient for attainment of its purposes; and to acquire, sell, hold, encumber, transfer and otherwise deal in real and personal property. No personal liability for any obligation of business trust attaches to beneficial owners or trustees thereof. (Minn. Stat. §318.02).

Business trusts are subject to registration with Securities Division (Minn. Stat. §318.03) and to regulation, if engaged in insurance business, by Insurance Division (Minn. Stat. §318.04).

Dissolution.

No statutory provisions.

Professional Corporations.

See topic 2.03 Corporations, subhead Professional Firms.

2.06 LIMITED LIABILITY COMPANIES:

General.

Minnesota limited liability company act effective Jan. 1, 1993. (Minn. Stat. c. 322B). Most of Act is based on Minnesota business corporation act. (Minn. Stat. c. 302A). Significant distinctions from corporation act are summarized as follows:

Terminology.

Shareholders, directors and officers under corporation act are called members, governors and managers, respectively. (Minn. Stat. §322B.30, Minn. Stat. §322B.606, Minn. Stat. §322B.67). Ownership interests are defined as membership interests. (Minn. Stat. §322B.30).

Membership interests are divided between governance rights and financial rights. (Minn. Stat. §322B.03). Articles of incorporation are articles of organization; bylaws may be known as operating agreement. (Minn. Stat. §322B.115, Minn. Stat. §322B.603). Other terms similarly changed.

Name.

Company name must contain words “limited liability company” or abbreviation “LLC” or in case of professional limited liability company, “limited liability company” or “professional limited liability company” or abbreviations “LLC”, “PLC” or “PLLC” and must not contain words “corporation” or “incorporated” or abbreviation of those words. (Minn. Stat. §319B.05, Minn. Stat. §322B.12).

Two Member Requirement Eliminated.

Subject to provisions of Minn. Stat. §§322B.60 and 322B.80, subdiv. 1, company must have one or more members. (Minn. Stat. §322B.11).

Perpetual Existence Unless Term Limited.

Term of 30 years unless articles of organization expressly authorize shorter or longer period of duration, which may be perpetual for companies organized before Aug. 1, 1999; companies organized thereafter have perpetual organization. (Minn. Stat. §322B.115, subdiv. 1; Minn. Stat. §322B.20, subdiv. 2).

Articles of Organization.

Articles must be filed with Secretary of State, and must state company name, address of registered office, name and address of each organizer, statement of period of existence if different from period set forth in (Minn. Stat. §322B.20, subdiv. 2. (Minn. Stat. §322B.115, Minn. Stat. §322B.17). Company existence begins upon filing articles with Secretary of State together with payment of fees. (Minn. Stat. §322B.175).

Amendment of Articles.

Member objecting to proposed amendment in that it (1) changes member's right to resign or retire or (2) establishes or changes conditions for or consequences of expulsion, has right to dissent from, and obtain payment for fair value of member's membership interests. (Minn. Stat. §322B.383). Unless otherwise provided in articles, other amendments giving rise to dissenters' rights substantially similar to those giving rise to dissenters' rights under corporate act. See topic 2.03 Corporations, subhead Amendment of Articles. Dissenters' rights, with certain exceptions, may be waived in member control agreement. (Minn. Stat. §322B.37).

Filing Fees.

Filing fee of $35 paid to Secretary of State for filing any instrument required to be filed under Chapter 322B. (Minn. Stat. §322B.03). For merger, additional fee of $25. (Minn. Stat. §322B.175). Total fees payable for filing original articles under Chapter 322B are $135, including $100 organization fee and $35 filing fee. (Minn. Stat. §322B.175).

Membership Interests.

Membership interest is personal property. Member has no interest in specific company property, which is property of company itself. (Minn. Stat. §322B.30). Membership interests must (1) be one class, without series, unless articles establish or authorize board of governors to establish more than one class or series, (2) be ordinary membership interests entitled to vote in proportion to value of members' respective contributions, with equal rights and preferences in matters not otherwise provided for by board, unless articles or member control agreement fix relative rights and preferences of classes and series, and (3) share profits and losses and receive distributions in proportion to value of contributions. (Minn. Stat. §322B.40). Subject to restrictions in articles or member control agreement, board may establish classes or series by resolution setting forth designation of class or series and fixing relative rights and preferences. Rights and preferences may be made dependent upon facts ascertainable outside articles or resolution establishing class or series, and may incorporate by reference terms of agreements entered into by company in connection with establishment of class or series, if company retains copy of agreement incorporated by reference. Name of company and certified text of resolution must be filed with Secretary of State before acceptance of contributions or, if members have received notice before acceptance of contributions of creation of membership interests not set forth in articles, within one year after acceptance. Resolution is effective upon filing with Secretary of State or if not required to be filed before acceptance of contributions, on date of adoption by governors. (Minn. Stat. §322B.40). Upon member's request, company shall state in writing member's membership interest, including rights to vote, if any, to share in profits, losses and distributions, restrictions on assignments of financial and governance rights and any assignment of member's rights other than security interest then in effect. (Minn. Stat. §322B.30). Act restricts transfer of governance rights and, unless limited, permits transfer of financial rights making up membership interests. (Minn. Stat. §322B.31, Minn. Stat. §322B.313).

Contributions may be accepted only when authorized by board, subject to restrictions in articles or member control agreement. Contributions may be made by paying money or transferring property interest to company or by rendering services to or for benefit of company, or pursuant to signed written obligation to any of foregoing. Contribution not effective until board of governors accepts contribution and in acceptance describes contribution including terms of any future performance and states value accorded to contribution, and contribution and its accorded value are both reflected in company's required records. Provisions regarding valuation of contribution are similar to those governing valuation of consideration received by corporation for issuance of stock, but do not address member liability for mistaken valuation. (Minn. Stat. §322B.40). See topic 2.03 Corporations, subhead Issuance of Stock. Board must restate value of all old contributions reflected in its required records when accepting new contribution. Specified restatement method required unless articles or member control agreement otherwise provide. (Minn. Stat. §322B.41).

Distributions.

Unless otherwise provided in articles or member control agreement or by board if authorized, distributions must be allocated in proportion to value of contributions of members reflected in required records. (Minn. Stat. §322B.50). Except as provided in articles or member control agreement, member is entitled to receive distributions before company's termination only as specified in bylaws or by board action. (Minn. Stat. §322B.51). At time member becomes entitled to receive distribution, member has status and rights of creditor of company with respect to distribution. (Minn. Stat. §322B.53). Other provisions regarding distributions substantially similar to those governing corporations. See subhead Distributions, supra.

Transfer of Membership Interests.

Transfer of financial rights, governance rights or entire membership interest effective against company only when assignee's name, address, and nature and extent of assignment are reflected in company's required records. Security interest in such interest or rights effective according to Minnesota uniform commercial code. (Minn. Stat. §322B.316). Statement of membership interest available upon member demand is not certificated security or negotiable instrument under commercial code and may not serve to transfer membership interest. (Minn. Stat. §322B.30). For security interest purposes, membership interest and governance and financial rights are each to be characterized as general intangibles subject to exceptions in (Minn. Stat. §336.8-103[c]), under commercial code. (Minn. Stat. §322B.30).

Assignment of Financial Rights.

Member's financial rights arising out of membership interest transferable in whole or in part. Assignee only entitled to receive member's share of profits and losses and distributions to extent assigned. Assignment of financial rights does not dissolve company or entitle assignee to become member, to exercise governance rights, to receive any notices or to cause dissolution. (Minn. Stat. §322B.31). Additional written restriction on assignment of financial rights may be enforced against owner of restricted financial rights or successor or transferee if not manifestly unreasonable and noted conspicuously in company's required records. Restrictions may be included in articles or operating agreement, by member resolution or agreement or written action of members or among them and company. Restriction not binding with respect to financial rights reflected in required records before adoption of restriction, unless owners of such financial rights are parties to agreement or voted in favor of restriction. Restriction ineffective against person without knowledge of restriction, unless restriction noted conspicuously in required records. Assignee entitled to rely on statement of membership interest issued by company. (Minn. Stat. §322B.31).

Assignment of Governance Rights.

Member may assign governance rights to another member without any other member's consent. Unless articles or member control agreement provide for written consent by fewer than all members, any other assignment of governance rights effective only by unanimous written consent of all other members. Security interest may be granted in entire membership interest or governance rights without consent, but secured party may take or assign ownership of governance rights only upon requisite approval of other members. Upon effective assignment of governance rights (other than security interest) assignee becomes member. If assignor does not retain any governance rights, assignor ceases to be member. Assignee liable for assignor's obligations to make contributions, and for illegal distributions made to assignor, in proportion to interest assigned except to extent such liability was unknown to assignee or could not be ascertained from required records. If attempted assignment of governance rights is ineffective for failure to obtain required consent, attempted assignment is ineffective in its entirety and any accompanying assignment of financial rights is void. (Minn. Stat. §322B.313). Additional restrictions on assignment of governance rights permitted as permitted for financial rights. (Minn. Stat. §322B.313, Minn. Stat. §322B.31). Secured party may enforce security interest in member's full membership interest or governance rights without consent of member whose interest or rights are subject to security interest. (Minn. Stat. §322B.313).

Termination of Membership.

Unless otherwise provided in articles or member control agreement, member may not be expelled. Member always has power, if not right, to terminate membership at any time by resigning or retiring, but such member has no power to transfer membership interest except as provided in Act. (Minn. Stat. §322B.306). If termination does not result in dissolution, then terminated member loses governance rights and is deemed assignee of financial rights owned before termination; if termination results in dissolution, terminated member retains and may continue to exercise financial and governance rights. Member who wrongfully retires or resigns is liable to company to extent damaged. (Minn. Stat. §322B.306).

Required Records and Rights of Inspection.

Required records include current list of each member and each assignee of financial rights (other than secured party) together with description of rights assigned, copies of required financial statements and tax returns for three years and member control agreements, statements of all contributions accepted by company and all contribution and contribution allowance agreements, and explanation of any restatement of value made by company. (Minn. Stat. §322B.373). Other required records are similar to those required to be kept by corporations. See subhead Shareholders' Inspection Rights, under topic Corporations. Member has absolute right to examine and copy all required records, and right to examine and copy other company records if member demonstrates a purpose reasonably related to interest as a member. (Minn. Stat.

§322B.373). Other provisions regarding records and inspection similar to those governing corporations. See topic 2.03 Corporations, subhead Shareholders' Inspection Rights.

Members' Liabilities.

Member, governor, manager, or other agent of company not personally liable for obligations of company on account of status. Minnesota case law on piercing corporate veil expressly applicable to limited liability companies. Limited liability survives dissolution and termination of company. (Minn. Stat. §322B.303). Provisions regarding member liability for unlawful distributions substantially similar to those governing corporations. (Minn. Stat. §322B.56). See subhead Distributions, supra, also topic Corporations, subhead Distributions.

Voting.

Unless otherwise provided in articles or member control agreement, or by board, members have voting power in proportion to value of their contributions as reflected in required records. Articles or member control agreement may give or prescribe manner of nonmember voting rights. (Minn. Stat. §322B.356). Other provisions regarding voting are substantially similar to those governing corporations. See topic 2.03 Corporations, subhead Voting, supra.

Member Voting Agreement.

Provisions regarding voting agreements are substantially similar to those governing corporations. (Minn. Stat. §322B.366). See topic 2.03 Corporations, subhead Shareholder Voting Agreements.

Member Control Agreement.

Written agreement signed by all members relating to control, liquidation or dissolution and termination of company, or relations among members, or to any phase of company's affairs is valid. Agreement may contain any provision required by Act to be in articles or bylaws other than minimum information required to be in articles. Agreement may allocate to members authority ordinarily exercised by board and allocate to board authority ordinarily exercised by members, or structure governance of company in any agreed fashion. Agreement may waive member's dissenters' rights. (Minn. Stat. §322B.37, subdiv. 1). Agreement enforceable by parties and binding upon only parties and those persons having knowledge of existence of agreement. Agreement, specifically enforceable. (Minn. Stat. §322B.37, subdiv. 3).

Merger or Exchange.

Act does not provide for short form merger of substantially wholly-owned subsidiary. Act does provide for mergers with domestic cooperatives organized under Chapter 308A or Chapter 308B. Other provisions regarding merger or exchange are substantially similar to those governing corporations. (Minn. Stat. §322B.70, Minn. Stat. §322B.755). See topic 2.03 Corporations, subhead Merger or Exchange.

Conversions.

Minnesota limited liability companies that are not nonprofit limited liability companies may be converted into Minnesota corporations pursuant to (Minn. Stat. §§302A.681 to 302A.691). (Minn. Stat. §322B.78). See topic 2.03 Corporations, subhead Conversions.

Control Share Acquisitions, Business Combinations and Takeover Offers.

Act has no provisions analogous to those of corporation act dealing with control share acquisitions, business combinations or takeover offers. See topic 2.03 Corporations, subheads Control Share Acquisitions, Business Combinations and Takeover Offers.

Dissolution.

Limited liability company dissolves when period fixed in articles for duration expires and for companies formed prior to Aug. 1, 1999, dissolution occurs when any event that terminates continued membership of member, including death, retirement, resignation, redemption of membership interest, assignment of all governance rights, buy-out, expulsion, bankruptcy, dissolution of member, merger in which company is not surviving corporation. For companies formed prior to Aug. 1, 1999, business is not dissolved and may be continued (1) if there is at least one remaining member by consent of all remaining members within 90 days after termination of continued membership or (2) if membership of last or sole member terminates and legal representative of that member causes company to admit at least one member. (Minn. Stat. §322B.80). For companies formed on or after Aug. 1, 1999, termination of member does not dissolve company unless articles or member control agreement so provide or last or sole member and legal representative does not cause company to admit at least one member within 180 days after termination. Other dissolution procedures are substantially similar to those governing corporations. See topic 2.03 Corporations, subhead Dissolution.

Foreign Limited Liability Companies.

Before transacting business in Minnesota, foreign limited liability company must obtain certificate of authority. Information required in application for certificate set forth in Act. Fee of $185 for application includes $150 initial license fee and $35 filing fee. (Minn. Stat. §322B.91). Certificate of authority effective from date application is filed accompanied by requisite fees. (Minn. Stat. §322B.915). Certificate of authority does not authorize foreign limited liability company to engage in any business or exercise any power that limited liability company may not engage in or exercise in Minnesota. (Minn. Stat. §322B.90, subdiv. 2). Procedures and conditions for amendment, withdrawal and revocation of certificate set forth in Act. (Minn. Stat. §322B.92, Minn. Stat. §322B.93, Minn. Stat. §322B.935). Foreign limited liability company transacting business in state may not maintain action, suit, or proceeding in state court until it possesses certificate of authority, but failure to obtain certificate of authority does not impair validity of any contract or act of foreign company or prevent it from defending any proceeding in state court. Transacting business in state without certificate constitutes appointment of Secretary of State as agent for service of process. Fees and penalties payable for transaction of business without certificate set forth in Act. (Minn. Stat. §322B.94). Following activities do not constitute transacting business: (1) maintaining, defending, or settling any proceeding, (2) holding meetings of its members or carrying on other internal activities, (3) maintaining bank accounts, (4) maintaining offices, agencies, trustees or depositories for transfer, exchange, and registration of or with respect to company's own securities, (5) selling through independent contractors, (6) soliciting or obtaining orders requiring acceptance outside state, (7) creating or acquiring indebtedness, mortgages, and security interests, (8) securing or collecting debts or enforcing mortgages and security interests, (9) holding, protecting, renting, maintaining and operating real or personal property in state so acquired, (10) selling or transferring title to property in state, (11) conducting isolated transaction that is completed within 30 days and that is not part of course of repeated transactions. Ownership of income-producing property, other than exempt property constitutes transacting business in state. List of excluded activities not exhaustive. Provision has no effect on personal jurisdiction and does not apply in determining contracts or activities subjecting foreign company to service of process, taxation or regulation under any other state law. (Minn. Stat. §322B.945).

2.07 [RESERVED]

2.08 PARTNERSHIPS:

Uniform Partnership Act adopted. (Minn. Stat. c. 323). Uniform Partnership Act (1994) adopted in 1997, effective Jan. 1, 1999, and repealing Uniform Partnership Act effective Jan. 1, 2002. (Minn. Stat. c. 323A). 2001 Uniform Limited Partnership Act adopted in 2004, effective Jan. 1, 2005, and repealing 1976 Uniform Limited Partnership Act, effective Jan. 1, 2007. (Minn. Stat.

c. 321). No limited partnerships can be formed under Chapter 322A after Jan. 1, 2005. After Jan. 1, 2007, Chapter 321 governs all Chapter 322A limited partnerships and Chapter 322 limited partnerships which have elected to be governed by Chapter 321. (Minn. Stat. §321.1206). General partnership may become limited liability partnership for renewable one-year periods by filing statement of qualification. (Minn. Stat. §323A.1001). Limited liability partnerships must file annual registration with secretary of state. (Minn. Stat. §323.44). Limited partnership may convert to limited liability limited partnership. (Minn. Stat. §321.1102).

Filing of Certificate.

General partnership must file certificate with Secretary of State setting forth names of partners, unless agent appointed, who must maintain list of names and mailing addresses. (Minn. Stat. §323A.0303).

Limited partnership must file certificate with Secretary of State. (Minn. Stat. §321.0201). Fee $100. (Minn. Stat. §321.0206). Fee for amendments is $50. (Minn. Stat. §321.0206). Each original or annual renewal registration as limited liability partnership must be accompanied by $135 filing fee. (Minn. Stat. §321.0101).

3 BUSINESS REGULATION AND COMMERCE

3.01 BANKS AND BANKING:

Uniform Commercial Code adopted. (Minn. Stat. ch. 336). See topic 3.09 Commercial Code. Revised Art. 3 and conforming amendments to Arts. 1 and 4 adopted.

Supervision.

Department of Commerce supervises banks, savings banks, trust companies and other financial institutions under state laws. Commissioner of Commerce is in charge. (Minn. Stat. §46.04). Commissioner of Finance also has role. (Minn. Stat. §46.34).

Liability of Stockholders.

Except to pay bank or trust company full consideration for which shares are issued pursuant to (Minn. Stat. §302A.425), personal liability of stockholders of banks and trust companies abolished. (Minn. Stat. §48.03).

Powers.

Bank cannot make loan or discount on security of its shares nor be purchaser or holder thereof unless necessary to prevent loss on debt previously contracted in good faith, and within six months after acquisition bank must sell or dispose of same at public or private sale. (Minn. Stat. §48.23).

Bank may be authorized to transact trust business if it has $500,000 capital and surplus (Minn. Stat. §48.44), provided it has deposited required securities with State Treasurer and filed receipt therefore with Commissioner of Finance. Maximum deposit $1,000,000. (Minn. Stat. §46.34; Minn. Stat. §48.37).

Branch banking restricted. (Minn. Stat. §48.34). Bank, with permission of Commissioner, may establish and maintain detached facilities provided such facilities are located within municipality in which applicant bank's principal office is located; or within 5,000 feet of its principal office measured in straight line from closest points of closest structures involved; or within any municipality in which no bank is located at time of application; or in municipality of more than 10,000 persons, or if detached facility is located in municipality of 10,000 persons or less, as determined by Commissioner from latest available data from state demographer, or for municipalities located in seven county metropolitan area from Metropolitan Council, and all banks having principal office in municipality have consented in writing to establishment of facility. (Minn. Stat. §47.52[a]). Detached facility must not be closer than 50 feet to detached facility operated by any other bank and must not be closer than 100 feet to principal office of any other bank, measured in same manner previously described. This requirement inapplicable if proximity to detached facility or bank is waived in writing by other bank and filed with application to establish detached facility. (Minn. Stat. §47.52[b]). Number of facilities, distance limitations, geographic and consent restrictions inapplicable if state bank applies to Commissioner pursuant to (Minn. Stat. §47.51 to Minn. Stat. §47.56) and (Minn. Stat. §49.35 to Minn. Stat. §49.41), to acquire another state bank or national banking association and its detached facilities through merger, consolidation or purchase of assets and assumption of liabilities and to operate them as detached facilities of successor bank. (Minn. Stat. §49.34).

Interstate Banking.

An out-of-state bank holding company may acquire control of existing Minnesota bank provided that such bank has been in existence for at least five years and that out-of-state holding company files application to Commissioner of Commerce, subject to Commissioner's disapproval. (Minn. Stat. §48.93;, Minn. Stat. §48.92). Interstate branching by merger under §102 of Riegle-Neal Interstate Banking and Branching Efficiency Act of 1994 (12 U.S.C.S. §215 et seq.), permitted according to (Minn. Stat. §49.411). With approval of Commissioner of Commerce, Minnesota bank may establish, maintain and operate one or more branches outside Minnesota as result of interstate merger in which Minnesota bank is resulting bank (Minn. Stat. §49.411, subdiv. 3). Out of state banks may merge with Minnesota banks, and resulting out of state bank may maintain and operate Minnesota branches of such Minnesota banks, subject to conditions and filing requirements of Minn. Stat. §49.411. If such merger results in out of state bank's acquisition of Minnesota bank or all or substantially all of its branches, such Minnesota bank shall have been in continuous operation for at least five years. (Minn. Stat. §49.411, subdiv. 4).

See also topic 3.17 Interest.

Interstate Contracts of Deposit and Withdrawals.

Provided Commissioner has been given notice and has not objected within 30 days, state bank, savings bank, savings association, or credit union or national banking association, federal savings association or federal credit union having its main office in this state (“Customer Institution”) may contract with another such financial institution (“Service Institution”) to grant Service Institution authority to render services to Customer Institution's depositors, borrowers or other customers. “Services” means accepting and receiving deposits, honoring and paying withdrawals, issuing money orders, cashiers' checks, and travelers' checks or similar instruments, cashing checks or drafts, receiving loan payments, receiving or delivering cash and instruments and securities and disbursing loan proceeds by machine. Service Institution is not considered branch of Customer Institution. (Minn. Stat. §47.78).

Deposits.

Bank may not accept deposits in excess of 30 times amount of capital stock and actual surplus. (Minn. Stat. §48.27). Deposits by or in name of minor are held for exclusive right and benefit of minor free from lien or control of any person except creditors and can be paid to minor without liability upon bank until conservator or guardian appointed for minor has delivered certificate of appointment to bank. (Minn. Stat. §48.30). Part 2, Art. VI (Multi-Party Accounts) of Uniform Probate Code adopted with modifications. (Minn. Stat. §§524.6-201–524.6-214). Banks must offer to Minnesota resident savings account to promote thrift that has no service charge if account has average monthly balance of more than $50. (Minn. Stat. §47.76). Banks generally must give account holder 30 days notice before closing deposit account or transferring funds from one deposit account to another. (Minn. Stat. §47.77).

Unclaimed Deposits.

See subhead Uniform Disposition of Unclaimed Property Act, infra.

Uniform Disposition of Unclaimed Property Act adopted with modifications. Period after which property presumed abandoned reduced from seven to three years in many cases. (Minn. Stat. §§345.31-.60).

Savings banks may invest deposits in authorized securities. (Minn. Stat. §50.14). Savings banks may establish negotiable order of withdrawal accounts. (Minn. Stat. §50.175).

Trust Companies.

Trust companies are organized and supervised as are banks in general. May act as fiduciary. (Minn. Stat. §48A.07).

Common trust fund may be created by trust company or bank with trust powers. (Minn. Stat. §48A.07, subdiv. 6[g]).

Uniform Common Trust Fund Act not adopted.

Industrial Banks.

Industrial loan and thrift companies are organized and supervised as are banks in general. Such companies are forbidden to carry demand banking accounts, have outstanding at any one time certificates of indebtedness, savings accounts, or savings deposits 30 times sum of capital stock and surplus of company, or to act as trustee, guardian, or administrator. (Minn. Stat. §53.05).

Foreign Corporations.

No foreign corporation may transact, in the state, business which only a bank, trust company or savings association can transact in state. (Minn. Stat. §303.04). However, foreign trust association may act as trustee, executor, administrator, guardian or conservator if laws of state in which association maintains its principal office accord like privilege to Minnesota corporate fiduciaries, such association appoints Secretary of State as its attorney for service of process and bond filed or deposit of securities made, unless deed of trust dispenses with requirement of security. (Minn. Stat. §303.25).

3.02 BILLS AND NOTES:

Uniform Commercial Code adopted. (Minn. Stat. c. 336). See topic 3.09 Commercial Code.

Revised Art. 3 and conforming amendments to Arts. 1 and 4 adopted.

See topic 3.09 Commercial Code.

Special Provisions.

Note or check for gambling debt is void as between parties and as to all persons except those holding in good faith and without knowledge of illegality of consideration and except in connection with pari-mutuel betting, state lottery or Indian Gaming Regulatory Act, (25 U.S.C.§2701 et seq.) or lawful gambling activities permitted under Chapter 349. (Minn. Stat. §541.21).

Issuance of worthless check, see (Minn. Stat. §609.535).

Rate of damages collectible on duly protested commercial paper payable without U.S., 10% upon contents thereof, with interest on contents computed from date of protest; said amount of contents, damages and interest to be in full of all damages, charges and expenses. (Minn. Stat. §334.10). In case of inland paper, 5% damages, with interest provided in instrument, together with costs and charges of protest. (Minn. Stat. §334.11).

Writing Requirement.

Agreement to extend credit is not enforceable unless in writing that expresses consideration, sets forth relevant terms and conditions and is signed by creditor and debtor. (Minn. Stat. §513.33).

Judgment Notes.

No action shall be maintained upon any judgment note unless begun within one year after cause of action shall have accrued (Minn. Stat. §541.09) and because certain additional instruments required. See category 5 Civil Actions and Procedure, topic 5.15 Judgments, subhead Confession of Judgment.

Collection of attorney fee clauses are enforceable, but only to extent of reasonable value of services actually performed, which must be proved. (58 Minn. 561, 60 N.W. 668).

See also topic 3.23 Sales.

3.03 BILLS OF LADING:

See topic 3.08 Carriers.

3.04 BILLS OF SALE:

See topic 3.23 Sales.

3.05 BLUE SKY LAW:

See topic 3.24 Securities.

3.06 BROKERS:

Uniform Commercial Code adopted. (Minn. Stat. c. 336). See topic 3.09 Commercial Code.

Brokers must furnish every customer or principal with written statement of any transaction executed for him, failure to do so being prima facie evidence of irregularity. (Minn. Stat. §624.70).

Licenses.

See topic 3.24 Securities.

Real estate brokers, salespersons and closing agents licensed by Commissioner of Commerce. Licenses good for 24 months, until June 30 of expiration year. (Minn. Stat. §82.34). Fees: $150 for each individual brokers license, $100 for renewal; $70 for initial salesperson's license, $40 for renewal; $85 for each initial real estate closing agent license, $60 for renewal; $150 for initial corporation, limited liability company, or partnership license, $100 for renewal; $30 for education, research and recovery fund, $20 for renewal; $20 for each transfer; $50 for license reinstatement and $20 for reactivating corporation, limited liability company, or partnership license without land. (Minn. Stat. §82.24). Applicant for salesperson's license must complete 30-hour course, approved by Commissioner before sitting for licensing examination. (Minn. Stat.

§82.29). Applicant for salesperson's license must also complete additional 60 hours of instruction approved by Commissioner, which includes at least one hour of instruction on fair housing laws, regulations, and rules, and at least one hour of instruction on agency representation and disclosure, before applying to Commissioner for license. (Minn. Stat. §82.32). Every salesperson and real estate broker must complete additional 30 hours of continuing real estate education, either as student or lecturer, approved by Commissioner during initial license period and during each succeeding 24-month license period. Application for and obtainment of salesperson's license is required within one year of successful completion of examination or applicant will be required to repeat initial 30 hour course and examination before application for license is accepted. (Minn. Stat. §82.31). Application for broker's license must be accompanied by proof applicant has had minimum of two years actual experience, within five-year period prior to application, as licensed real estate salesperson in Minnesota or in another state having comparable requirement, or is, in Commissioner's opinion, similarly qualified by reason of education or practical experience. Applicant for broker's license must have completed educational requirements of applicant for salesperson's license. (Minn. Stat. §82.29). Applicant for limited broker's license pursuant to (Minn. Stat. §82.20[13]) is not required to have minimum of two years of actual experience as real estate salesperson in order to obtain limited broker's license to act as principal only. (Minn. Stat. §82.29, subdiv. 4). Applicant for closing agent's license must complete eight hour course approved by Commissioner. (Minn. Stat. §82.29, subdiv. 8).

3.07 BULK SALES:

See category 8 Debtor and Creditor, topic 8.08 Fraudulent Sales and Conveyances.

3.08 CARRIERS:

Uniform Commercial Code adopted. (Minn. Stat. c. 336). See topic 3.09 Commercial Code.

Express and railway companies are under general supervision of Commissioner of Transportation and Transportation Regulation Board. (Minn. Stat. cc. 174, 218).

Carrier may only charge for services at rate set forth in published schedules, and discrimination and preferences by carrier are forbidden except in case of transportation for governmental units, fairs, and in religious, educational, charitable and other specified cases. (Minn. Stat. §218.021).

The commissioner of transportation may exercise the powers granted in this chapter, as necessary, to plan, design, acquire, construct, and equip commuter rail facilities. (Minn. Stat. §174.92).

The commissioner of transportation shall establish a position of state rail safety inspector in the Office of Freight and Commercial Vehicle Operations of the Minnesota Department of Transportation. (Minn. Stat. §219.015).

Rail carriers must provide walkways adjacent to those portions of yard tracks where rail carrier employees frequently work on the ground performing switching activities. (Minn. Stat. §219.501).

Liability.

See topic 3.09 Commercial Code.

Bills of Lading.

See topic 3.09 Commercial Code.

Carrier cannot waive provisions of bill of lading. (149 Minn. 467, 184 N.W. 35).

Liens.

Carrier has lien for transportation or warehousing charges when not acting as carrier or warehouseman under Art. 7 of Uniform Commercial Code. (Minn. Stat. §§514.18, .19). If charges not paid within 90 days, goods may be sold at public sale, if notice thereof sent to owner. (Minn. Stat. §514.20). If goods to be sold are motor vehicles, 45 days written notice to all secured creditors listed on certificate of title of motor vehicles registered in Minnesota is required, or lien is ineffective against such creditors. (Minn. Stat. §§514.20-.22). See topic 3.09 Commercial Code.

Unclaimed Property.

Personal baggage in possession of carrier of passengers unclaimed within 30 days and other property in possession of any common carrier for 60 days after notice to consignee may be put in storage and, if not claimed within 12 months, may be sold on three weeks published notice, or, if perishable or subject to decay, may be sold upon ten days notice if not removed in 30 days; if in state of decay, goods may be summarily sold by order of any judge of county or municipal district court after inspection and without notice; proceeds go to county treasurer. (Minn. Stat. §§345.01-.13). Unclaimed goods in hands of consignee or bailee may be sold after one year on 60 days notice and, after deducting costs and freight or storage due, proceeds go to county treasurer. (Minn. Stat. §§345.01-.06). Owner may obtain proceeds from treasurer within five years after such sale if he furnishes satisfactory proof. (Minn. Stat. §345.07).

Motor Vehicle Carriers.

See category 23 Transportation, topic 23.01 Motor Vehicles.

3.09 COMMERCIAL CODE:

Uniform Commercial Code adopted. (Minn. Stat. c. 336). Sections of Minnesota Statutes corresponding to Official Text are preceded by 336 and decimal point. Thus Code §1-201 is Minn. Stat. (Minn. Stat. §336.1-201).

For text of 1962 Official Text, 1972 Official Amendments, 1977 Official Amendments, 1987 Official Amendments, 1990 Official Amendments, 1994 Official Amendments, 1995 Official Amendments and 2000 Official Amendments; see Uniform and Model Acts section.

1972 Official Amendments adopted.

1977 Official Amendments adopted.

1987 Official Amendments adopted.

1990 Official Amendments adopted.

1994 Official Amendments adopted as follows: (a) Amendments to Arts. 1, 4, 5, 9 and 10 conforming to 1994 Revision of Art. 8 and Revised Art. 8 (1994 Revision), adopted effective Jan. 1, 1996, except: §8-509(d) is omitted. (b) 1994 Amendments to UCC adopted to extent corrections therein were not previously adopted except: (i) changes to §9.206 were not adopted; and (ii) reference to “Leases” added to §9-203(1) and 9-302(1) were not adopted.

1995 Official Amendments adopted.

2000 Official Amendments adopted.

1986 Minn. Laws c. 444, §1, removed gender-specific references applicable to human beings throughout Minnesota statutes by adopting by reference proposed amendments prepared by Revisor of Statutes; amendments do not change substance of statutes amended.

1990 Minn. Laws c. 171, art. 2, repealed bulk sales provisions formerly found in (Minn. Stat. §§336.6-101 through Minn. Stat. §336.6-111).

1992 Minn. Laws c. 565 adopted revised Art. 3 and conforming amendments to Art. 1 and Art. 4. (1992 Minn. Laws c. 525) adopted Farm Product Statutory Liens Act. See summary following notes to Art. 9.

1997 Minn. Laws c. 11 adopted revised Art. 5 and confirming amendments to Art. 1, Art. 2 and Art. 9. (1997 Minn. Laws c. 137) amending (Minn. Stat. §336.9-403, Minn. Stat. §336.9-404 and Minn. Stat. §336A.04 subdiv. 4).

2000 Minn. Laws c. 399, adopted revised Art. 9 and conforming amendments to (Minn. Stat. §336.1-105; Minn. Stat. §336.1-201; Minn. Stat. §336.2-103; Minn. Stat. §336.2-210; Minn. Stat. §336.2-326; Minn. Stat. §336.2-502; Minn. Stat. §336.2-716; Minn. Stat. §336.2A-103; Minn. Stat. §336.2A-303; Minn. Stat. §336.2A-307; Minn. Stat. §336.2A-309; Minn. Stat. §336.4-210; Minn. Stat. §336.7-503; Minn. Stat. §336.8-103; Minn. Stat. §336.8-106; Minn. Stat. §336.8-110; Minn. Stat. §336.8-301; Minn. Stat. §336.8-302; and §Minn. Stat. 336.8-510); repealing (Minn. Stat. §§336.9-101; Minn. Stat. §336.9-102; Minn. Stat. §336.9-103; Minn. Stat. §336.9-104; Minn. Stat. §336.9-105; Minn. Stat. §336.9-106; Minn. Stat. §336.9-107; Minn. Stat. §336.9-108; Minn. Stat. §336.9-109; Minn. Stat. §336.9-110; Minn. Stat. §336.9-112; Minn. Stat. §336.9-113; Minn. Stat. §336.9-114; Minn. Stat. §336.9-115; Minn. Stat. §336.9-116; Minn. Stat. §336.9-201; Minn. Stat. §336.9-202; Minn. Stat. §336.9-204; Minn. Stat. §336.9-205; Minn. Stat. §336.9-206; Minn. Stat. §336.9-207; Minn. Stat. §336.9-208; Minn. Stat. §336.9-301; Minn. Stat. §336.9-302; Minn. Stat. §336.9-303; Minn. Stat. §336.9-304; Minn. Stat. §336.9-305; Minn. Stat. §336.9-306; Minn. Stat. §336.9-307; Minn. Stat. §336.9-308; Minn. Stat. §336.9-309; Minn. Stat. §336.9-310; Minn. Stat. §336.9-311; Minn. Stat. §336.9-312; Minn. Stat. §336.9-313; Minn. Stat. §336.9-314; Minn. Stat. §335.9-315; Minn. Stat. §336.9-316; Minn. Stat. §336.9-317; Minn. Stat. §336.9-318; Minn. Stat. §336.9-403; Minn. Stat. §336.9-404; Minn. Stat. §336.9-405; Minn. Stat. §336.9-406; Minn. Stat. §336.9-407; Minn. Stat. §336.9-408; Minn. Stat. §336.9-410; Minn. Stat. §336.9-412; Minn. Stat. §336.9-413; Minn. Stat. §336.9-501; Minn. Stat. §336.9-502; Minn. Stat. §336.9-503; Minn. Stat. §336.9-504; Minn. Stat. §336.9-505; Minn. Stat. §336.9-506; Minn. Stat. §336.9-507; and Minn. Stat. §336.9-508; Minn. Stat. §336.9-203; Minn. Stat. §336.9-401; Minn. Stat. §336.9-402; and Minn. Stat. §336.9-411.

2001 Minn. Laws c. 195, adopting revisions to revised Art. 9 and conforming amendment to Minn. Stat. §336.2-210; adopting new Minn. Stat. §336.1-110; and repealing Minn. Stat. §336.11-101; Minn. Stat. §336.11-102; Minn. Stat. §336.11-103; Minn. Stat. §336.11-104; Minn. Stat. §336.11-105; Minn. Stat. §336.11-106; Minn. Stat. §336.11-107; and Minn. Stat. §336.11-108.

2002 Minn. Laws c. 379, amending Minn. Stat. §336.a-334, subdiv. [j]).

Variations from 1962 Official Text, 1972 Official Amendments, 1977 Official Amendments and Optional Provisions, 1987 Official Amendments, 1990 Official Amendments, 1994 Official Amendments, 1995 Official Amendments, 2000 Official Amendments, revised Art. 3 and conforming amendments to Art. 1, Art. 2, Art. 2A, Art. 3, Art. 5, Art. 7 and Art. 8 adopted, are as follows:

Term “chapter” substituted for “Act” throughout.

§1-101—sentence added explaining numbering of sections.

§1-102—subsection (6) added stating that nothing in Code authorizes branch banking.

§1-105—subsection (2) Alternative A adopted.

§1-110—this new section added to authorize (a) establishment of account with State treasury for purpose of collecting fees charged by Secretary of State to offset costs of providing information under this chapter, and (b) appropriation of such funds by Secretary of State for purpose of implementing and maintaining electronic centralized filing system under this chapter.

§1-209—1966 Official Optional Amendment enacted.

§2-107—"of subsection (1)" inserted after "provisions" in subsection (3).

§2-210—"Except as otherwise provided in Minn. Stat. §336.9-406)," added to beginning of subsection (2).

§2-318—1966 Official Optional Amendment Alternative C enacted; last 15 words omitted.

§2-403—subsection (4) Alternative A adopted.

§2-702—1966 Official Amendment not enacted.

§2-725—words added to following subsection (4): "The limitations of this section do not apply to actions for the breach of any contract for sale of a grain storage structure or other goods that are incorporated into an improvement to real property, except equipment and machinery. These actions are subject only to the statute of limitations set forth in (Minn. Stat. §541.051).

This section does not apply to claims against sellers of goods for damages to property caused by the goods where the property that is damaged is not the goods and the sale is not a sale between parties who are each merchants in goods of the kind."

§2A-104—1990 Official Amendment not enacted.

§2A-517—"that is not a consumer lease" omitted after "finance lease" in subsection (2).

§2A-524—1990 Official Amendment not enacted.

§2A-529—words "In addition to any other recovery permitted by this article or other law, the lessor may recover from the lessee an amount that will fully compensate the lessor for any loss of or damage to the lessor's residual interest in the goods caused by the default of the lessee." inserted after subsection (5).

§3-206—Subsection (g) added reading "Nothing in this section prohibits or limits the effectiveness of a restrictive endorsement made under Minn. Stat. §256.9831, subdiv. 3."

§4-104(3)—definition of "Banking Day" excludes Sats., Suns., and holidays.

§4-106—Alternative B adopted.

§5-114—optional subsections (4) and (5) adopted.

Article 6—Alternative A adopted (repealing bulk sales article).

§7-204—subsection (4) omitted.

§7-209—1966 Official Amendment enacted.

§7-403—optional words in subsection (1)(b) omitted.

§8-102—1973 Official Amendment adopted.

§8-103—Subsection (c) modified and expanded to read as follows: “An interest in a partnership or limited liability company is a general intangible and is not a security or a financial asset, except as follows: (1) an interest in a partnership or limited liability company is a security and is not a general intangible if it is dealt in or traded on a securities exchange or in a securities market, its terms expressly provide that it is a security governed by this article, or it is an investment company security; (2) an interest in a partnership or limited liability company is a financial asset and is not a general intangible if it is held in a securities account.”

§8-603—Dates specified. Period of “four months after the effective date” in second sentence of Subsection (b) changed to read “the period through December 31, 1996, so long as the security interest could have remained perfected under the law in effect on December 31, 1995, if that law continued in effect after December 31, 1995,” and phrase “within that period” in said sentence changed to read “during the one-year period from January 1, 1996 to December 31, 1996.”

§9-102—definition of “manufactured home” does not include one for which certificate of title as defined in Minn. Stat. §336.9-102(83) has been issued; definition of “mortgage” includes executory contracts that entitle purchaser to possession of real property; and, definition of “transmitting utility” includes any person filing financing statement under authority of Minn. Stat. §300.111 to Minn. Stat. §300.115.

9-201—subsection (b) expanded to include, without limitation, reference to(Minn. Stat. §48.153 to Minn. Stat. §48.157; Minn. Stat. §168.66 to Minn. Stat. §168.77; Minn. Stat. §222.13 to Minn. Stat. §222.16; Minn. Stat. §334.01 to Minn. Stat. §334.06; Minn. Stat. cc. 52, 53 and 56; and Minn. Stat. §327.61 to Minn. Stat. §327.67.

§9-203—following sentence added to end of subsection (g): “The attachment of a security interest in the mortgage or lien on real property does not create an interest in real property.”

§9-334—perfected landlord's lien has priority over perfected security interest in crops growing on real property even if debtor has either interest of record or is in possession of real property.

§9-512—Alternative A selected for Minn. Stat. §336.9-512[a].

§9-518—Alternative A selected for Minn. Stat. §336.9-518[b].

§9-519—Alternative A selected for Minn. Stat. §336.9-519[f].

§9-521—modified to read: “A filing office that accepts written records may not refuse to accept a written record in the form and format adopted by the National Conference of Commissioners on Uniform State Laws, except for a reason set forth in Minn. Stat. §336.9-516[b].”

§9-522—Alternative A selected for Minn. Stat. §336.9-522[a].

§9-525—sections renumbered to reflect modification and addition of certain provisions.

Section in its entirety reads as follows:

“9-525 FEES.

(a) Initial financing statement or other record: general rule. Except as otherwise provided in subsection (d), the fee for filing and indexing a record under this part is $20.

(b) Number of names. The number of names required to be indexed does not affect the amount of the fee in subsection (a).

(c) Response to information request. The fee for responding to a request for information from the filing office, including for issuing a certificate showing whether there is on file any financing statement naming a particular debtor, is $20.

(d) Record of mortgage. This section does not require a fee with respect to a record of a mortgage which is effective as a financing statement filed as a fixture filing or as a financing statement covering as-extracted collateral or timber to be cut under Minn. Stat. §336.9-502[c]. However, the recording and satisfaction fees that otherwise would be applicable to the record of the mortgage apply.”

§9-526—modified to read “The secretary of state shall report annually on or before January 1 to the legislature on the operation of the filing office.”

§9-527—modified to read “The secretary of state may establish satellite offices by written agreements with public officials within the state for the purpose of meeting the filing officer responsibilities described in Minn. Stat. §336.9-528 to Minn. Stat. §336.9-530. The term of the agreement must be set by, and may be renewed by, mutual agreement. The agreement may be terminated upon 60 days' notice. The secretary must maintain a list of those public officials authorized to act as satellite offices. The secretary of state must make this list available in an electronic format and the list must be updated at least monthly.”

§§9-528 to 9-531—have been added and provide for administrative functions of satellite offices, maintenance and retrieval of uniform data, responsibility of secretary of state to oversee satellite offices, and liability of state officers, employees and agents.

§9-528—provides that satellite offices shall accept Uniform Commercial Code documents and respond to requests for information, filing made at satellite office is filed and effective at same time and under same rules as under any other method under Uniform Commercial Code information system, and such filing must have file number automatically assigned by Uniform Commercial Code information management system.

§9-529—provides that secretary of state shall maintain all Uniform Commercial Code documents and Uniform Commercial Code information management system used to index them regardless of where or how Uniform Commercial Code document was filed and Uniform Commercial Code documents and data shall be available from secretary of state or any satellite office.

§9-530—provides that all filing officers must perform their responsibilities in uniform manner, regardless of whether services are provided by secretary of state or at satellite office location, secretary of state is responsible for responding to reports about performance of satellite offices, and secretary of state must terminate satellite office's status and ability to perform filing responsibilities upon finding of substandard performance that has severely impaired customer service.

§9-531—new section added that reads as follows:

“9-531 ELECTRONIC ACCESS; LIABILITY; RETENTION.

(a) ELECTRONIC ACCESS. The secretary of state may allow private parties to have electronic access to the central filing system and to other computerized records maintained by the secretary of state on a fee basis, except that: (1) visual access to electronic display terminals at the public counters at the secretary of state's office must be without charge and must be available during public counter hours; and (2) access by law enforcement personnel, acting in an official capacity, must be without charge. If the central filing system allows a form of electronic access to information regarding the obligations of debtors, the access must be available 24 hours a day, every day of the year. Notwithstanding Minn. Stat. §13.355, private parties who have electronic access to computerized records may view social security number information about debtor that is of record. Notwithstanding Minn. Stat. §13.355, filing office may include social security number information in information request response under Minn. Stat. §336.9-523 or search of other liens in the central filing system. Filing office may also include social security number information on photocopy or electronic copy of record whether provided in information request response or in response to request made under Minn. Stat. §13.03.

(b) LIABILITY. The secretary of state, county recorders, and their employees and agents are not liable for loss or damages arising from errors in or omissions from information entered into the central filing system as a result of the electronic transmission of tax lien notices under Minn. Stat. §268.058, subdiv. 1[c] ; Minn. Stat. §272.483; and Minn. Stat. §272.488, subdivs. 1 and 3). The state, the secretary of state, counties, county recorders, and their employees and agents are immune from liability that occurs as a result of errors in or omissions from information provided from the central filing system.

(c) RETENTION. Once the image of a paper record has been captured by the central filing system, the secretary of state may remove or direct the removal from the files and destroy the paper record.”

§9-601—following subsections (h) and (i) are added to end of this section:

“(h) A person may not begin to enforce a security interest in collateral that is agricultural property subject to Minn. Stat. §§583.20 to.32 that has secured a debt of more than $5,000 unless: a mediation notice under subsection (i) is served on the debtor after a condition of default has occurred in the security agreement and a copy served on the director of the agricultural extension service; and the debtor and creditor have completed mediation under Minn. Stat. §583.20 to Minn. Stat. §583.32; or as otherwise allowed under Minn. Stat. §583.20 to Minn. Stat. §583.32.

(i) A mediation notice under subsection (h) must contain the following notice with the blanks properly filled in.

“TO: …(Name of Debtor)…

YOU HAVE DEFAULTED ON …(Debt in Default)… SECURED BY AGRICULTURAL PROPERTY DESCRIBED AS …(Reasonable Description of Agricultural Property Collateral)…

AS A SECURED PARTY, …(Name of Secured Party)… INTENDS TO ENFORCE THE SECURITY AGREEMENT AGAINST THE AGRICULTURAL PROPERTY DESCRIBED ABOVE BY REPOSSESSING, FORECLOSING ON, OR OBTAINING A COURT JUDGMENT AGAINST THE PROPERTY.

YOU HAVE THE RIGHT TO HAVE THE DEBT REVIEWED FOR MEDIATION. IF

YOU REQUEST MEDIATION, A DEBT THAT IS IN DEFAULT WILL BE MEDIATED ONLY ONCE. IF YOU DO NOT REQUEST MEDIATION, THIS DEBT WILL NOT BE SUBJECT TO FUTURE MEDIATION IF THE SECURED PARTY ENFORCES THE DEBT.

IF YOU PARTICIPATE IN MEDIATION, THE DIRECTOR OF THE AGRICULTURAL EXTENSION SERVICE WILL PROVIDE AN ORIENTATION MEETING AND A FINANCIAL ANALYST TO HELP YOU TO PREPARE FINANCIAL INFORMATION. IF YOU DECIDE TO PARTICIPATE IN MEDIATION, IT WILL BE TO YOUR ADVANTAGE TO ASSEMBLE YOUR FARM FINANCE AND OPERATION RECORDS AND TO CONTACT A COUNTY EXTENSION OFFICE AS SOON AS POSSIBLE. MEDIATION WILL ATTEMPT TO ARRIVE AT AN AGREEMENT FOR HANDLING FUTURE FINANCIAL RELATIONS.

TO HAVE THE DEBT REVIEWED FOR MEDIATION YOU MUST FILE A MEDIATION REQUEST WITH THE DIRECTOR WITHIN 14 DAYS AFTER YOU RECEIVE THIS NOTICE. THE MEDIATION REQUEST FORM IS AVAILABLE AT ANY COUNTY RECORDER'S OR COUNTY EXTENSION OFFICE.

FROM: …(Name and Address of Secured Party)…” ”

§9-607—sections and subsections renumbered to reflect modification and addition of certain provisions. Section in its entirety reads as follows:

“9-607 COLLECTION AND ENFORCEMENT BY SECURED PARTY.

(a) COLLECTION AND ENFORCEMENT GENERALLY.

(1) If so agreed, and in any event after default, a secured party:

(A) may notify an account debtor or other person obligated on collateral to make payment or otherwise render performance to or for the benefit of the secured party;

(B) may take any proceeds to which the secured party is entitled under Minn. Stat. §336.9-315;

(C) may enforce the obligations of an account debtor or other person obligated on collateral and exercise the rights of the debtor with respect to the obligation of the account debtor or other person obligated on collateral to make payment or otherwise render performance to the debtor, and with respect to any property that secures the obligations of the account debtor or other person obligated on the collateral;

(D) if it holds a security interest in a deposit account perfected by control under Minn. Stat. §336.9-104[a][1], may apply the balance of the deposit account to the obligation secured by the deposit account; and

(E) if it holds a security interest in a deposit account perfected by control under Minn. Stat. §336.9-104[a][2] or [3], may instruct the bank to pay the balance of the deposit account to or for the benefit of the secured party.

(2) If a secured party exercises its rights under subsection (a)(1), the following rules apply:

(A) Except as otherwise provided in subsection (B), if the obligation of the account debtor or other person obligated on collateral is secured by an interest in real property and the account debtor or other person obligated on collateral satisfies its obligation, the secured party must furnish the account debtor or the other person obligated on collateral with a release or satisfaction of the interest in real property sufficient for recording in the real property records applicable to that real property.

(B) This subsection applies in the case of an executory contract for the sale of real property or of an interest in real property that entitles the purchaser to possession of the real property. If the purchaser satisfies its obligations under that contract, the secured party shall deliver to the purchaser a deed to the real property in accordance with the terms of the contract.

(b) NONJUDICIAL ENFORCEMENT OF MORTGAGE.

(1) In case of a mortgage that is not an executory contract for the sale of real property or of an interest in real property that entitles the purchaser to possession of the real property, to exercise under subsection (a)(1)(C) the right of a debtor to enforce mortgage nonjudicially, the secured party must record in the office in which a record of the mortgage is recorded:

(A) an assignment of the mortgage to the secured party; or

(B) the secured party's sworn affidavit of assignment in recordable form stating:

(i) a default has occurred under a security agreement that creates or provides for a security interest in the obligation secured by the mortgage;

(ii) a true and correct copy of the security agreement is attached to the affidavit;

(iii) the secured party is entitled to enforce the mortgage nonjudicially;

(iv) the legal description of the real property encumbered by the mortgage;

(v) the parties to the mortgage, the date of the mortgage, the date of recording of the mortgage, the place of recording of the mortgage, and the identifying number or other indexing information that identifies the mortgage in the office of the county recorder or registrar of titles where the mortgage is recorded;

(vi) the secured party has succeeded to the interest of the debtor under the mortgage; and

(vii) the affidavit of assignment shall be an assignment to the secured party of the interest of the debtor under the mortgage.

(2) The affidavit of assignment is entitled to be recorded with the county recorder or the registrar of titles and upon recording, the affidavit of assignment shall be deemed an assignment to the secured party of the interest of the debtor under the mortgage.

(3) This subsection applies in the case of an executory contract for the sale of real property or of an interest in real property that entitles the purchaser to possession of the real property. To exercise under subsection (a)(1)(C) the right of a debtor to terminate the contract nonjudicially, the secured party shall record a transfer statement, as provided in Minn. Stat. §336.9-619, with the county recorder or the registrar of titles in the county where the real property is located. The transferee is entitled to have the statement recorded with the county recorder or the registrar of titles. When recorded, the transfer statement is a conveyance of the interest of the debtor under the contract.

(c) COMMERCIALLY REASONABLE COLLECTION AND ENFORCEMENT.

A secured party shall proceed in a commercially reasonable manner if the secured party:

(1) undertakes to collect from or enforce an obligation of an account debtor or other person obligated on collateral; and

(2) is entitled to charge back uncollected collateral or otherwise to full or limited recourse against the debtor or a secondary obligor.

(d) EXPENSES OF COLLECTION AND ENFORCEMENT. A secured party may deduct from the collections made pursuant to subsection (c) reasonable expenses of collection and enforcement, including reasonable attorneys fees and legal expenses incurred by the secured party.

(e) DUTIES TO SECURED PARTY NOT AFFECTED. This section does not determine whether an account debtor, bank, or other person obligated on collateral owes a duty to a secured party.

(f) SECURED PARTY TO OBTAIN ASSIGNMENT OF DEBTOR'S INTEREST UNDER THE MORTGAGE.

(1) This subsection applies if the obligation of an account debtor or other person obligated on collateral is secured by an interest in real property.

(2) If the interest is under an executory contract for the sale of real property or of an interest in real property that entitles the account debtor to possession of the real property, then promptly after beginning to exercise a right under this section, the secured party shall record a transfer statement as provided in Minn. Stat. §336.9-619. The statement must be recorded with the county recorder or registrar of titles in the county where the real property is located.

(3) If the interest is not under a record described in paragraph (2), then promptly after beginning to exercise a right under this section, the secured party shall:

(A) file an assignment of the mortgage to the secured party;

(B) record a transfer statement, as provided in Minn. Stat. §336.9-619, with the county recorder or registrar of titles in the county where the real property is located; or

(C) file an affidavit of assignment as provided under subsection (b).”

§9-617—subsection (a)(3) modified by deleting exception for statutory liens.

§9-619—sections and subsections renumbered to reflect modification and addition of certain provisions. Section in its entirety reads as follows:

“9-619 TRANSFER OF RECORD OR LEGAL TITLE.

(a) TRANSFER STATEMENT.

(1) In this section, “transfer statement” means a record authenticated by a secured party stating:

(A) that the debtor has defaulted in connection with an obligation secured by specified collateral;

(B) that the secured party has exercised its postdefault remedies with respect to the collateral;

(C) that, by reason of the exercise, a transferee has acquired the rights of the debtor in the collateral;

(D) the name and mailing address of the secured party, debtor, and transferee; and

(E) in addition, if the statement is to be filed in the real property records concerning a mortgage or other record evidencing an interest in real property, the statement must state the following information concerning the mortgage or other record evidencing an interest in real property:

(i) the name and title on the record;

(ii) the date on the record;

(iii) the names of the parties on the record;

(iv) the identity of the office of the county recorder or registrar of titles where the record is filed;

(v) the date the record was filed; and

(vi) the identifying number of the record in the office of the county recorder or registrar of titles; and

(vii) in the case of an executory contract for the sale of real property or of an interest in real property that entitles the purchaser to possession of the real property, the legal description of the real property subject to the contract.

(2) A transfer statement that is to be filed in the real property records must contain an acknowledgment by the secured party in a form sufficient to satisfy the requirements of chapter 358.

(3) If an executory contract for the sale of real property or of an interest in real property that entitles the purchaser to possession of the real property is terminated, the secured party may not file a transfer statement concerning that contract after the termination. If a transfer statement is filed by the secured party after the debtor has terminated that contract, the transfer statement is not effective as a conveyance.

(b) EFFECT OF TRANSFER STATEMENT. A transfer statement entitles the transferee to the transfer of record of all rights of the debtor in the collateral specified in the statement in any official filing, recording, registration, or certificate of title system covering the collateral. If a transfer statement is presented with the applicable fee and request form to the official or office responsible for maintaining the system, the official or office shall:

(1) accept the transfer statement;

(2) promptly amend its records to reflect the transfer; and

(3) if applicable,

(A) issue a new appropriate certificate of title in the name of transferee in the case of property not subject to chapter 508 or 508A; or

(B) in the case of property subject to chapter 508 or 508A, issue a new certificate of title upon satisfaction of the requirements of those chapters.

(c) TRANSFER NOT A DISPOSITION; NO RELIEF OF SECURED PARTY'S DUTIES. A transfer of the record or legal title to collateral to a secured party under subsection (b) or otherwise is not of itself a disposition of collateral under this article and does not of itself relieve the secured party of its duties under this article.

(d) TRANSFER OF CERTIFICATES OF TITLE. A secured party who complies with Minn. Stat. §86B.840, subdiv. 2[b], or Minn. Stat. §168A.12, subdiv. 2, is considered to have provided a transfer statement for purposes of this section."

§10-101—[expired].

§10-104—subsection (2) adopted.

§10-105—similar to §10-101 of Official Text.

Farm Product Statutory Liens.

Minn. Stat. §§336A.01-.16 establish computerized system for filing financing statements and lien notices against farm products. Effective financing statement must comply with other requirements of (Minn. Stat. §336.9-502) and in addition must contain following statements: "THE INFORMATION CONTAINED IN AN EFFECTIVE FINANCING STATEMENT WILL BE SENT TO FARM PRODUCT BUYERS REGISTERED IN MINNESOTA. SALE OF FARM PRODUCTS TO THOSE BUYERS MAY RESULT IN A CHECK BEING ISSUED PAYABLE JOINTLY TO BOTH THE SELLER AND THE SECURED PARTY." Effective financing statement or lien notice must substantially comply with requirements of Minn. Stat. §336A.03, including, but not limited to: (1) Must set forth any payment obligations imposed on buyer, commission merchant, or selling agent as condition for waiver or release of farm products statutory lien, (2) may not be combined with Uniform Commercial Code financing statement form or format and must be filed on form or in format designated by Secretary of State as effective financing statement/lien notice, and (3) remains effective for five years. Fee for filing and indexing standard form for lien notice, effective financing statement, or continuation statement, and stamping date and place of filing on copy of filed document furnished by filing party is $15 until June 30, 2005. Effective July 1, 2005, fee for each filing will be: (1) $15 for each electronic filing; or (2) $20 for each filing submitted in any other manner. (Minn. Stat. §336A.04, subdiv. 3). Fee to conduct search of computerized filing system for effective financing statements or lien notices and statements of continuation and to prepare report is $20 per debtor. If oral or facsimile response is requested, there is additional fee of $5 per debtor name requested. Fee of $1 per page will be charged for photocopies. (Minn. Stat. §336A.09, subdiv. 2[b]). Filing under Chapter. 336A does not affect perfection or priority of security interests filed under Uniform Commercial Code or farm products statutory lien filed in accordance with provisions of law under which it was created except as provided in Minn. Stat. §§336A.15 or .16 and U.S.C. t. 7, §163I. (Minn. Stat. §336A.05). Farm product dealers may register with Secretary of State to receive master lists of notices of security interests in farm products or farm products statutory liens. Registration must be made on annual calendar year basis. (Minn. Stat. §336A.11, subdiv. 1). Buyer in ordinary course of business who buys farm products from seller engaged in farming operations takes free of farm products statutory lien applicable to purchased farm products even though farm products statutory lien is perfected and buyer knows lien exists unless lienholder has perfected farm products statutory lien and (1) buyer has failed to register with Secretary of State as provided in Minn. Stat. §336A.11, or (2) buyer has registered with Secretary of State, buyer receives notice from Secretary of State specifying that seller and farm products being sold are subject to lien notice, and buyer fails to secure waiver or release of farm products statutory lien specified in lien notice by making payment, satisfying obligation, or otherwise. (Minn. Stat. §336A.15). Commission merchant or selling agent who sells farm products for others is not subject to farm products statutory lien even though farm products statutory lien is perfected and commission merchant or selling agent knows lien exists unless lienholder has perfected farm product statutory lien and (1) commission agent or selling agent has failed to register with Secretary of State as provided in Minn. Stat. §336A.11 or (2) commission merchant or selling agent has registered with Secretary of State as provided in Minn. Stat. §336A.11, commission merchant or selling agent receives notice from Secretary of State specifying that seller and farm products being sold are subject to lien notice, and commission merchant or selling agent fails to secure waiver or release of farm product statutory lien specified in lien notice by making payment, satisfying obligation, or otherwise. (Minn. Stat. §336A.16).

Forms.

Pursuant to Minn. Stat. §336.9-521, Secretary of State has prescribed standard forms for financing statements (UCC-1), continuation and termination statements (UCC-3), and requests for information or copies (UCC-11). Other forms complying with statutory requirements may be used. For forms, see end of this Digest.

See also topics: Banks and Banking, Bills and Notes, Brokers, Carriers, Contracts, Factors, Frauds, Statute of, Sales, Securities, Warehousemen; categories Business Organizations, topic Corporations; Civil Actions and Procedure, topic Limitation of Actions; Debtor and Creditor, topics Assignments, Fraudulent Sales and Conveyances, Liens, Pledges; Documents and Records, topics Records, Seals; Mortgages, topic Chattel Mortgages; Transportation, topic Motor Vehicles.

3.10 CONDITIONAL SALES:

See topic 3.23 Sales.

3.11 CONSIGNMENTS:

See topic 3.14 Factors.

3.12 CONSUMER PROTECTION:

See topics 3.17 Interest and 3.23 Sales.

Deceptive Practices.

Uniform Deceptive Trade Practices Act adopted. (Minn. Stat. §325D.43-48).

Insurance trade practices regulated by Minn. Stat. §§72A.17 to 72A.327.

Fraud, Misrepresentation.

Act, use or employment by any person of any fraud, false pretense, false promise, misrepresentation, misleading statement or deceptive practice, with intent that others rely thereon in connection with sale of any merchandise, whether or not any person has in fact been misled, deceived, or damaged thereby, is enjoinable. (Minn. Stat. §325F.69, subdiv. 1).

Insurance fraud governed by Minn. Stat. §§60A.951 et. seq. Fraudulent viatical settlement prevention governed by Minn. Stat. §§60A.957 to 60A.9585.

Advertising.

Untrue, deceptive or misleading advertisement is misdemeanor. (Minn. Stat. §325F.67). Advertising and marketing materials relating to legal gambling must be sufficiently clear to prevent deception and must not overstate attributes or benefits of participating in legal gambling.

(Minn. Stat. §325E.42).

Financial Transaction Cards.

No person shall be liable for use of his or her financial transaction card which did not benefit such person or member of such person's family or household unless such person signed or used card, or authorized use of card by another. (Minn. Stat. §325G.03). No person shall be liable in excess of $50 for unauthorized use of financial transaction card from which person or member of such person's household derives no benefit, so long as such person notifies financial transaction card issuer within 60 days of receipt of bill. (Minn. Stat. §325G.04). Financial transaction card issuers are required to respond to requests for explanations of questioned or disputed charges within 30 days of request. (Minn. Stat. §325G.05). It is unfair discriminatory practice to discriminate in extension of personal or commercial credit or in requirements for obtaining credit because of race, color, creed, religion, disability, national origin, sex, sexual orientation, marital status or due to receipt of federal, state or local public assistance, including rent assistance or rent supplements. (Minn. Stat. §363A.16). Female who is issued credit card may direct that card be issued in her current or former surname, and failure to issue financial transaction card constitutes unfair discriminatory practice. (Minn. Stat. §325G.041; Minn. Stat. §363A.16).

Check Cashing.

Person shall not require as condition of acceptance of check, or as means of identification, that person presenting check provide credit card number. (Minn. Stat. §325F.981).

Warranties.

All consumer sales contain implied warranties of merchantability and fitness unless disclaimed prior to sale in conspicuously prescribed language. Seller may limit damages or remedies for breach. (Minn. Stat. §325G.18). Express warranties arising out of consumer sale of new goods may not disclaim implied warranties of merchantability or fitness. (Minn. Stat. §325G.19, subdiv. 1). Statutory warranties apply to sales of new residential construction and home improvements. (Minn. Stat. §327A.02, sudivs. 1, 3). Warranty of merchantability, fitness, and conformance with applicable law implied in every sale of new manufactured home and cannot be limited, modified or disclaimed. (Minn. Stat. §327B.02). Manufacturer must replace farm tractor or refund purchase price if tractor fails to conform to express warranty within express warranty term or one year from date of physical delivery, whichever is earlier, after four attempts at repair or cumulative total of 60 business days out of service. (Minn. Stat. §§325F.6651-.6659). Statutory minimum one year warranty applies to every sale of new assistive devices intended to increase, maintain or improve functional capabilities of individuals with disabilities. Manufacturer must provide replacement device if repair lasts more than ten working days or device has been brought in for repair of same problem on two previous occasions, or it was out of service for total of 30 days because of warranty of nonconformities. (Minn. Stat. §§325G.203-.208).

Lemon Law.

Manufacturer of passenger motor vehicle under applicable express manufacturer's warranty must replace new motor vehicle or refund purchase price if: (1) Same nonconformity has been subject to repair four or more times within applicable express warranty term or during two years following date of original delivery of new motor vehicle to consumer, whichever is earlier date, but nonconformity continues to exist, or (2) vehicle is out of service because of repair for cumulative total of 30 or more business days during express warranty term or during two-year period, whichever is earlier date. (Minn. Stat. §325F.665). If manufacturer offers replacement vehicle, consumer has option of rejecting replacement vehicle and requiring manufacturer to provide refund. (Minn. Stat. §325F.665). Consumer who leases vehicle has same rights under Minn. Stat. §325F.665 as consumer purchasing new vehicle, except that if manufacturer must accept return of consumer's leased vehicle, then consumer lessee is entitled only to refund and consumer's written lease with lessor must be terminated. Refund to include full amount actually paid by consumer on written lease, including all additional charges if actually paid by consumer, less reasonable allowance for consumer's use. (Minn. Stat. §325F.665). With respect to used motor vehicles, dealer required to give express warranty as specified in statute with exception of certain enumerated vehicles. (Minn. Stat. §325F.662).

Odometers.

Tampering with odometers to lower mileage is prohibited. Operating vehicle with disconnected or malfunctioning odometer with intent to defraud is prohibited. In conjunction with sale of vehicle, seller must disclose true mileage or that true mileage is unknown if odometer not accurate. (Minn. Stat. §§325E.13-.16).

Returned Merchandise Refunds.

Retail sellers may not refuse to give cash refund to consumer for goods that are acceptable for return unless seller posts clear and conspicuous written notice, in boldface type of minimum size of 14 points, of seller's cash refund policy in store. (Minn. Stat. §325F.80).

Retail Credit Sales.

In consumer credit sale, seller or lessor may not take negotiable instrument other than check as evidence of obligation. Holder is not in good faith if negotiable instrument taken with notice of violation of foregoing. (Minn. Stat. §325G.16).

No contract or obligation relating to consumer credit sale may contain any provision by which: consumer agrees not to assert against assignee any claim or defense arising out of transaction; in absence of default, holder may accelerate maturity without reasonable cause; power of attorney to confess judgment or assignment of wages is given; authority is given to enter consumer's premises unlawfully or commit breach of peace in repossession of goods; consumer waives right of action for illegal act committed in collection of payments or repossession of goods; or consumer relieves seller from any liability for any legal remedy against seller in connection with contract or obligation. (Minn. Stat. §325G.16).

Assignee of contract or obligation relating to consumer credit sale is subject to all claims and defenses of consumer against seller arising from sale, notwithstanding any agreement to contrary. Assignee's liability, however, may not exceed amount owing assignee when claim or defense is asserted against assignee. Rights of consumer under foregoing may only be asserted as a matter of defense to or set off against claim by assignee. (Minn. Stat. §325G.16).

Consumer credit sale includes bailment, lease or terminable bailment or lease where bailee or lessee agrees to pay sum for use equivalent to or greater than aggregate value of goods and bailee or lessee has option to become owner upon compliance with agreement for no other or nominal consideration. Bailor or lessor in such transaction has security interest only. Contracts in form of terminable bailment or lease of goods relating to consumer credit sales must specify whether goods are new or used. (Minn. Stat. §325G.15-.16).

If seller or lender repossesses or voluntarily accepts surrender of personal property in which it has security interest arising out of consumer credit transaction of $5,700 or less, subject to periodic adjustment by Commissioner of Commerce, buyer is not personally liable to seller or lender for unpaid balance of debt and seller or lender is not obligated to resell obligation. Seller or lender has no repossession right or right to levy or execute on goods subject to security interest if it obtains judgment in circumstances where it has no right to deficiency judgment if it had elected to repossess. (Minn. Stat. §325G.20).

Referral Sales.

Referral and chain referral selling prohibited. Sales or lease agreements violating prohibition are unenforceable and buyer or lessee has option to rescind and obtain restitution or retain goods delivered and benefit of services performed without further obligation to pay. (Minn. Stat. §325F.69).

Home Solicitation Sales.

Buyer has right to cancel home solicitation sale in excess of $25 until midnight of third business day after sale by written notice of cancellation. Seller must give oral notice of right to cancel, furnish buyer with completed receipt or copy of contract and furnish specified forms to buyer. If seller does not follow these steps, any notice of cancellation is sufficient if buyer expresses in writing intent not to be bound by home solicitation sale. (Minn. Stat. §§325G.06-.11).

Hazardous Toys

Importation, manufacture, sale or distribution of hazardous articles prohibited. (Minn. Stat. §325F.08). Banned hazardous toys not to be introduced into commerce. (Minn. Stat. §325F.13). Recalled toys deemed unsafe not to be sold within state. (Minn. Stat §325F. 135).

Crib Safety

Unsafe cribs and children's items containing Bisphenol-A not to be introduced into commerce. (Minn. Stat. §§325F.171, 325F. 173).

Unsolicited Goods.

Receipt of unsolicited goods deemed unconditional gift from sender and recipient has right to refuse to accept delivery of goods and is not bound to return such goods to sender. (Minn. Stat. §325G.01).

Personal Solicitation Sales.

Seller of goods or services primarily for personal, family or household purposes, except nonprofit organization, who contacts buyer by telephone or in person other than at seller's place of business must first disclose seller's name, name of firm or organization represented, identity of goods or services and that seller wishes to demonstrate or sell same. When initial contact in person, seller must show identification card. (Minn. Stat. §§325G.12-.14). Use of automatic dialing-announcing telephone device prohibited unless recipient has knowingly or voluntarily requested, consented to, permitted, or authorized receipt of message or message is immediately preceded by live operator who obtains recipient's consent before message is delivered. This prohibition is not applicable to recipients with whom caller has current business or personal relationship, including school districts to students and parent. (Minn. Stat. §325E.27). Automatic dialing-announcing device must be designed so it disconnects within ten seconds after recipient ends call. (Minn. Stat. §325E.28). When message is immediately preceded by live operator, operator must first disclose name of business or organization for which message is being made, purpose of message, identity or kinds of goods or services message is promoting, and, if applicable, fact that message intends to solicit payment or commitment of funds. (Minn. Stat. §325E.29). Commercial telephone solicitation prohibited before 9 a.m. and after 9 p.m. (Minn. Stat. §325E.30). Calls not to be made to persons on no-call list; caller to identify themselves; interference with caller identification is prohibited. (Minn. Stat. §§325E.311 to 325E.3161).

Phone Services.

Phone service subscriber is not responsible for information service charges (including 1-900 calls) for calls made by minor or vulnerable adult unless call expressly authorized by subscriber or spouse. It is fraudulent misrepresentation to advise subscriber otherwise. Charges for information services must be listed separately from other phone charges. (Minn. Stat. §325F.692).

Wireless Contracts.

Provider of wireless telecommunications services must provide each customer with written or electronic copy of contract between provider and customer within 15 days of date contract entered into. Provider must give customer at least 60 days notification of any substantive change to contract, and customer must give written or oral authorization of change before it becomes effective. (Minn. Stat. §325F.695). Customer not liable for wireless charges resulting from unauthorized use of customer's cellular phone. (Minn. Stat. §325F.696).

Prize Notices.

Statute sets forth extensive disclosure requirements associated with prize notices including retail value of prize and person's odds of receiving prize and requires that prize be awarded within 30 days after sponsor has represented that person has been awarded prize. (Minn. Stat. §325F.755).

Videotape Sellers and Service Providers.

With certain exceptions, statute prohibits videotape sellers and service providers from disclosing information about their customers. (Minn. Stat. §§325I.01-.03). Videotapes and similar audiovisual material must have closed or open captioning if it is primarily produced for sale to educational institutions, training facilities, state or local government facilities or medical facilities, and is released after June 1, 1997 and more than 500 copies are produced, or if it is produced by government entity for educational purposes. (Minn. Stat. §325I.05).

Membership Cancellation.

Person who enters contract to become member of health club, social referral club or buying club can cancel contract by written notice within three days after entered. (Minn. Stat. §325G.24). Membership travel contracts may be cancelled within ten days after entered unless contract does not include prescribed notice language, and then contract can be cancelled at any time. (Minn. Stat. §§325G.50).

Plain Language.

Consumer Contracts.

All contracts with consumer entered after July 1, 1983, including contracts transferring or authorizing security interest in personal property and residential leases less than three years (excluding contracts with price above $50,000, contracts mortgaging real property or to obtain money to buy or refinance real property, contracts where sale of personal property is only incidental to sale of real property, contracts involving securities transactions with broker-dealer registered with Securities and Exchange Commission, and contracts involving commodities with commission merchant registered with Commodities Futures Trading Commission) must be written in clear and coherent manner using words with common and everyday meanings and must be appropriately divided and captioned. Court may reform contract if violation substantially confused consumer to consumer's financial detriment. Consumer may recover actual damages for violation, but violation not defense to action against consumer contract. Good faith and reasonable effort to comply is defense to action for violation. Contracts may be submitted to attorney general for certification of compliance. (Minn. Stat. §§325G.29-.37).

Insurance Policies.

Readability standards prescribed for all private passenger vehicle and homeowner's insurance policies or contracts issued, renewed or amended after July 1, 1979; all life and accident and health policies, HMO and nonprofit health service corporation contracts, and fraternal beneficiary association certificates issued, renewed or amended after July 1, 1980; and other policies after July 1, 1981. (Minn. Stat. §72C.03) Covered policies to be filed with Commissioner of Insurance prior to issuance. (Minn. Stat. §72C.06, sudiv. 1).

Deficiency Judgments.

Seller or lender who repossesses or accepts surrender of goods in which it has security interest arising out of consumer credit transaction cannot obtain deficiency judgment if amount of credit extended was $3,000 or less, subject to periodic adjustment of Commissioner of Commerce. (Minn. Stat. §§325G.21-.22).

Data Privacy

Social Security numbers of individuals, whether provided in whole or in part, collected or maintained by a government entity are private data on individuals. A government entity must not display number on mailings where it is visible, or require person to mail item to entity where number is visible. (Minn. Stat. §13.355).

Welfare data is private data on individuals and not to be disclosed. (Minn. Stat. §13.46).

3.13 CONTRACTS:

Uniform Commercial Code adopted. (Minn. Stat. c. 336). See topic 3.09 Commercial Code; categories 10 Documents and Records, topic Seals; Family, topic Infants.

3.14 FACTORS:

Uniform Commercial Code adopted. (Minn. Stat. c. 336). See topic 3.09 Commercial Code.

Grain buyers must obtain license and file bond and annual financial statements with Commissioner of Agriculture and must observe specified terms and procedures for grain purchases. Buying grain without license is misdemeanor. (Minn. Stat. §§223.15-.22).

3.15 FRANCHISES:

Franchise Law.

Minn. Stat. §80C.01 et seq.

Uniform Franchise and Business Opportunities Act not adopted.

Supervision.

Commissioner of Commerce, Minnesota Department of Commerce.

Regulatory Powers of Supervising Authority.

Broad powers of investigation and revocation of registration. (Minn. Stat. §80C.12).

Registration.

Unlawful to offer or sell franchise unless registered or exempt. (Minn. Stat. §80C.02). Application for registration made by filing with Commissioner public offering statement accompanied by fee of $400. Public offering statement must contain certain specified information. (Minn. Stat. §80C.04; Minn. Stat. §80C.05; Minn. Stat. §80C.06).

Exemptions.

Registration not required for following if method of offer or sale is not used for purpose of evading Minn. Stat. §80C.01 to Minn. Stat. §80C.22: (1) Offer or sale of franchise owned by franchisee, or of entire area franchise owned by subfranchisor if sale is not effected by or through franchisor; provided no more than one sale of franchise or area franchise during any 12 month period; (2) transaction by executor, administrator, sheriff, receiver, trustee in bankruptcy, guardian or conservator; (3) offer or sale to banking organization, financial organization or life insurance corporation as defined in Minn. Stat. §345.31; (4) securities currently registered in Minnesota pursuant to Minn. Stat. c. 80A; (5) offer or sale of franchise, not including area franchise, provided (a) no more than one sale during any 12 month period, (b) no advertising or general solicitation, (c) franchisor deposits all franchise fees in escrow account in bank located in Minnesota until all obligations of franchisor to be performed prior to opening of franchise have been performed, and (d) required notice given to Commissioner; (6) offer or sale of fractional franchise; (7) transaction which Commissioner by rule or order exempts; and (8) offer or sale to resident of foreign state, territory or country who is neither domiciled or actually present in Minnesota, if franchise business is not to be operated in Minnesota, and if sale of franchise is not in violation of law of foreign state, territory or country concerned. (Minn. Stat. §80C.03).

Annual report accompanied by $200 fee required within 120 days after fiscal year of registrant. (Minn. Stat. §80C.08).

Unfair Practices.

Statutory provisions governing termination or cancellation, failure to renew and withholding consent to transfer. Commissioner has broad power to adopt rules defining unfair or inequitable practices prohibited by statute. (Minn. Stat. §80C.14).

Special provisions applicable to motor fuel franchises (Minn. Stat. §80C.145) and burglar alarm franchises (Minn. Stat. §80C.30).

3.16 FRAUDS, STATUTE OF:

Uniform Commercial Code adopted. (Minn. Stat. c. 336). See topic 3.09 Commercial Code.

No action may be maintained upon any of following agreements unless some note or memorandum thereof, expressing consideration, is in writing subscribed by party to be charged therewith: (1) Agreements not to be performed within year from making; (2) special promise to answer for debt, default or doings of another; (3) every agreement, promise, or undertaking made upon consideration of marriage, except mutual promises to marry; (4) every agreement, promise, or undertaking to pay debt, which has been discharged by bankruptcy or insolvency proceeding; (5) every grant or assignment of any existing trust in goods or things in action (Minn. Stat. §513.01; Minn. Stat. §513.03). Consideration must be expressed with reasonable clearness. (65 Minn. 104, 67 N.W. 802). See topic 3.09 Commercial Code.

No estate or interest in lands, other than leases for term not exceeding one year, nor any trust or power over or concerning lands or relating thereto, may be created, granted, assigned, surrendered, or declared, unless by act or operation of law, or unless in writing, subscribed by parties creating, granting, assigning, surrendering, or declaring same, or by their lawful agents thereunto authorized in writing. (Minn. Stat. §513.04). Rule is not applicable to disposition of real estate by will or to creation or extinguishment of trust by implication or operation of law. (Minn. Stat. §513.04). Every contract for leasing of lands for longer period than one year, or for sale of lands or any interest therein, is void unless contract or some note or memorandum thereof, expressing consideration, is in writing subscribed by party by whom lease or sale is to be made, or by his lawful agent thereunto authorize by writing. (Minn. Stat. §513.05). Where made by an agent such contract is not entitled to record unless authority of agent is also recorded. (Minn. Stat. §513.05). This includes contract for sale of standing timber. (142 Minn. 89; 170 N.W. 920). Agreement extending time of payment for manual labor relating to cutting, hauling, banking or driving logs is void unless signed by party to be charged therewith, and promissory note for payment of agreed compensation, with interest is delivered to laborer. (Minn. Stat. §513.07).

Credit Agreement.

Debtor may not maintain action on credit agreement unless it is in writing, expresses consideration, sets forth terms and conditions and is signed by creditor and debtor. (Minn. Stat. §513.33). “Credit agreement” is agreement to lend or forbear repayment of money, goods or things in action, to otherwise extend credit, or to make any other financial accommodation. (Minn. Stat. §513.33).

Cohabitation.

Contract between man and woman living together in Minnesota out of wedlock, or contemplating doing so, is enforceable as to terms concerning property and financial relation of parties only if contract is in writing, signed by parties and enforcement is sought after termination of relationship. (Minn. Stat. §513.075; Minn. Stat. §513.076).

Part Performance.

In all cases where there has been part performance, equity may compel specific performance of agreements without regard to statute of frauds. (Minn. Stat. §513.06). Sufficient part performance, generally, where party had been induced to change party's situation to such extent that party cannot be placed in status quo, or compensated in money. (132 Minn. 86, 155 N.W. 1054). Lessee who occupies land without written lease cannot invoke statute of frauds to avoid its obligations to lessor. (446 N.W.2d 690). See topic 3.09 Commercial Code.

3.17 INTEREST:

Legal rate is 6%. (Minn. Stat. §334.01).

Judgments.

Interest rate for each year determined on or before Dec. 20 of prior year by state court administrator based on one-year constant maturity treasury yield for most recent month, rounded to nearest 1%, or 4%, whichever is greater. (Minn. Stat. §549.09, sudiv. 1).

Maximum Rate.

Written contract may provide for any rate up to and including 8%. Contract must bear same rate after maturity as before, and provision increasing rate after maturity, unless no interest stipulated for before maturity, works forfeiture of all interest. Contracts for loans of $100,000 or more and contracts entered into on or after Dec. 31, 1974 for certain loans or forbearances between current and former participants in, and beneficiaries of, ERISA plans, and such plans, are exempt from limitation. (Minn. Stat. §334.01). State banks and savings associations, national banks, and state or federally chartered savings banks, savings and loan associations and credit unions doing business in state may charge on any loan or discount made upon any note, bill or other evidence of debt except extensions of open-end credit pursuant to Minn. Stat. §48.185, interest at rate not more than 4½% above discount rate (including surcharge) on 90 day commercial paper at Ninth District Federal Reserve Bank. (Minn. Stat. §48.195). State banks, savings associations and industrial loan and thrifts and national banks and federal savings associations with their home office in Minnesota may charge finance charge on any loan at annual percentage rate of up to Minn. Stat. 21.75% (various amounts greater than Minn. Stat. 21.75% for certain small loans; 18% for open-end credit pursuant to credit card) computed on 365 day year and in accordance with Truth in Lending Act regulations plus certain specified charges. (Minn. Stat. §48.194, Minn. Stat. §47.59, Minn. Stat. §53.04). State credit union may charge up to 1% per month on unpaid balance or amount allowed by Minn. Stat. §48.195 at time loan is made, if greater. (Minn. Stat. §52.14). Banks, savings banks, trust companies, mutual savings banks and savings associations organized under Minnesota or Federal law with main office in Minnesota may also make loans secured by savings or time deposit accounts owned by borrower at 2% over rate of interest payable on said account. (Minn. Stat. §334.012).

Insurance premium finance companies may not contract for or receive finance charge in excess of 5% above discount rate on 90 day commercial paper at Ninth District Federal Reserve Bank. (Minn. Stat. §59A.09).

Brokers and dealers registered under Securities Exchange Act are exempt from state usury laws in respect of interest imposed on debit balances in their customers' demand margin accounts secured by securities or bonds. (Minn. Stat. §334.19).

Mortgage Loans.

Banks, savings associations and certain other defined lenders may make loans, mortgages, credit sales or advances, secured by first liens on residential real property (or by first liens on residential manufactured house or on stock in residential cooperative housing corporation) without any limitation on rate or amount of interest, discount points, or other charges if such loans are made after June 2, 1981. (Minn. Stat. §47.204).

Banks, savings associations and other specified financial institutions may make following mortgage loans without regard to any state restrictions on interest: (1) FHA-insured mortgage loans, (2) VA-guaranteed mortgage loans, (3) Farmers Home Administration insured or guaranteed loans, (4) such loans as would be eligible for purchase by FNMA or FHLMC, and (5) such loans as are authorized by Office of Thrift Supervision or Comptroller of Currency. (Minn. Stat. §§47.20, .21).

Contract for deed vendors may charge interest on contracts for deeds, and any lender may make conventional or cooperative apartment loans at rate not exceeding FNMA posted yield on 30-year mortgage commitments for delivery within 60 days on standard conventional fixed-rate mortgages published in Wall Street Journal for last business day of second preceding month plus four percentage points. “Conventional loan” is loan less than $100,000 secured by mortgage on real estate containing one or more residential units or upon which it is intended that one or more residential units will be constructed. “Cooperative apartment loan” is loan less than $100,000 secured by security interest on shares of stock or membership certificate issued to stockholder or member by cooperative apartment corporation. (Minn. Stat.§47.20).

Precomputed loans must provide for refund of precomputed finance charge if loan is paid in full one month or more before final installment due date.

Small Loans.

Licensee under Regulated Loan Act (Minn. Stat. §§56.001–56.26) may charge interest on loan with principal amount of up to greater of $100,000 or 15% of Minnesota corporate licensee's capital stock and surplus reserves not exceeding greater of 21¾% per year on unpaid balance of principal amount, or such greater amount provided by Minn. Stat. §47.59. (Minn. Stat. §56.002; Minn. Stat. §56.131). Licensee under Industrial Loan and Thrift Company Act (Minn. Stat. c. 53) may charge rates and impose terms and conditions permitted licensees under Regulated Loan Act on loans up to $100,000 (but in no event shall any loan cause loans to person primarily liable to exceed 20% of industrial loan and thrift capital stock and surplus), not exceeding greater of 21¾% or such greater amount provided by Minn. Stat. §47.59. (Minn. Stat. §53.04; Minn. Stat. §53.05[7]).

Bank may make certain installment loans not over $35,000 ($25,000 for savings bank, savings association or federal savings association) and charge greater of 12% on unpaid principal balance or 4½% above discount rate (including surcharge) on 90 day commercial paper at Ninth District Federal Reserve Bank. (Minn. Stat. §48.153; Minn. Stat. §48.195). Banks, state savings banks and savings associations, and any federally chartered savings and loan associations may also extend credit through open-end loan account arrangement and impose finance charge of up to equivalent of annual percentage rate of 18%, computed on 365 day year and in accordance with Truth in Lending Act (15 U.S.C. §1601 et seq. and 12 C.F.R. 226) and may impose annual bank credit card charge of $50 (Minn. Stat. §48.185, subdiv. 4).

Usury.

Contract for greater rate of interest than statute permits is void except as to holder in due course (other than contracts for deed, cooperative apartment loans, loans by certain financial institutions including banks, savings associations and credit unions, and instruments taken or received, in accordance with and in reliance on any statute). (Minn. Stat. §47.20; Minn. Stat. §48.196; Minn. Stat. §334.03). In computation of interest upon any bond, note or other instrument or agreement, interest may not be compounded, but any contract to pay interest, not usurious, upon interest overdue, shall not be construed to be usury. Agreement extending maturity date of contract, note or instrument and providing for increased rate of interest after original maturity date is not usurious if increased rate of interest does not exceed 8%. Contracts for loans of $100,000 or more exempt from limitation. (Minn. Stat. §334.01). Time price exception to usury law recognized in some circumstances. (283 Minn. 437; 168 N.W.2d 667; but see 402 N.W.2d 235 and 518 N.W.2d 544).

If instrument void, court may declare it void, enjoin all proceedings thereon and order its cancellation and surrender. (Minn. Stat. §334.05).

Payor of usurious interest, or its representative, may recover from receiver or its representative, full interest or premium paid, with costs, provided action brought within two years. (Minn. Stat. §334.02). Penalty on contract for deed or cooperative apartment loan is five times usurious portion of interest plus attorney fees. (Minn. Stat. §47.20). Usurious rate by certain financial institutions including banks, savings and loan associations and credit unions results in forfeiture of all interest, and payor may recover twice amount of interest paid provided action brought within two years. (Minn. Stat. §48.196).

Not usury: clerical error in computation; one-twelfth of 8% for every 30 days; payment of interest in advance for one year, not exceeding 8%; purchase of negotiable mercantile paper, bona fide before maturity, and no intent to evade statute, or where purchase not a part of original usurious transaction. (Minn. Stat. §334.03).

Corporations and limited partnerships are forbidden to interpose defense of usury. (Minn. Stat. §334.021). State banks, savings associations and industrial loan and thrifts and national banks and federal savings associations with home offices in Minnesota may charge "organization" including corporation and all partnerships, any agreed upon interest rate and other charges. (Minn. Stat. §47.59).

Consumer Credit.

Usury provisions notwithstanding, seller may impose finance charge on outstanding unpaid balance under open end credit plan of up to 1½% per month (11/3% per month in case of oil company with national sales above $10,000,000,000) computed on average daily balance during each monthly billing cycle, excluding sales made during billing cycle. Minimum finance charge of 50¢ per month permissible. (Minn. Stat. §334.16, subdiv. 1). Seller forfeits three times finance charge imposed for intentional violation. (Minn. Stat. §334.18).

Motor Vehicle and Mobile Home Installment Sales.

See category 23 Transportation, topic 23.01 Motor Vehicles, subhead Sales.

3.18 [RESERVED]

3.19 LICENSES, BUSINESS AND PROFESSIONAL:

Licenses are required for a large number of businesses and occupations.

Commercial travelers do not need licenses.

Collection agency and all individuals employed by collection agency performing duties of collector must obtain license from consumer services section of department of commerce. Agency must annually file bond in sum of at least $20,000. Certain out-of-state collection agencies exempt from licensure. (Minn. Stat. §§332.33-.34). "Collection agency" does not include persons whose activities are confined to and directly related to operation of business other than that of collection agency. (Minn. Stat. §332.32).

3.20 MONOPOLIES, RESTRAINT OF TRADE AND COMPETITION:

Contract, combination, or conspiracy between two or more persons in unreasonable restraint of trade or commerce is unlawful. (Minn. Stat. §325D.51). Establishment, maintenance, or use of, or any attempt to establish, maintain, or use monopoly power for purpose of affecting competition or controlling, fixing, or maintaining prices is also unlawful. (Minn. Stat. §325D.52). Certain price fixing, production control, allocation of markets, collusive bidding and concerted refusals to deal deemed unlawful. (Minn. Stat. §325D.53). Nonprofit labor, electrical, agricultural or horticultural organizations instituted for purpose of mutual help exempt. (Minn. Stat. §325D.55).

Violators subject to civil penalty of not more than $50,000; $100,000 for failure to comply with final judgment or decree. Willful violation of Minn. Stat. §325D.53 is felony. (Minn. Stat. §325D.56). Treble damages recoverable. (Minn. Stat. §325D.57). Injunctive relief available. (Minn. Stat. §325D.58). Noncompliance with final judgment or decree can result in forfeiture of charter and privilege to do business. (Minn. Stat. §325D.60).

Action for violation must be commenced within four years of date cause of action arose, except that if proceedings commenced by Attorney General, action may be commenced within one year after termination of such proceedings, if later. (Minn. Stat. §325D.64).

Also following specific prohibitions: Unlawful discrimination in sale or purchase of grain in different localities for purpose of creating monopoly (Minn. Stat. §235.10) or in sale of petroleum (Minn. Stat. §325D.67); combinations or agreements to control price or restrict competition in adoption or sale of schoolbooks (Minn. Stat. §123B.22); combinations to monopolize markets for food products (Minn. Stat. §325D.68).

Unfair trade practices and unlawful geographic discrimination in production, manufacture or distribution of commodities, goods, wares and merchandise in general use for purpose or with effect of injuring competitor or destroying competition are prohibited and provision is made for injunctive relief. Commodities, goods, wares, etc., may not be sold, offered or advertised for sale at less than cost, nor given away, offered or advertised to be given away, for purpose or with effect of injuring competitors. (Minn. Stat. §325D.01 et seq.).

Unlawful to advertise or claim that sale is at wholesale, that seller is wholesaler or that price is wholesale or reduced when not so in fact; also to misrepresent quality, ingredients or origin of merchandise or for employer to sell to employees merchandise not regularly handled by employer. (Minn. Stat. §325D.09 et seq.). Restraints on termination of sales representatives. (Minn. Stat. §325E.37).

3.21 NEGOTIABLE INSTRUMENTS:

See topic 3.02 Bills and Notes.

3.22 RESTRAINT OF TRADE:

See topics 3.20 Monopolies, 3.22 Restraint of Trade and Competition.

3.23 SALES:

Uniform Commercial Code adopted. (Minn. Stat. c. 336). See topic 3.09 Commercial Code.

Bills of Sale.

No statutory provisions.

Contracts of Sale.

No statutory limitations as to type size in printed contracts.

Conditional Sales.

See topic 3.09 Commercial Code. Special provisions relating to contracts for conditional sale of railway equipment or rolling stock. (Minn. Stat. §§222.15-.16).

See also category 23 Transportation, topic 23.01 Motor Vehicles, subhead Sales.

Bulk Sales.

See category 8 Debtor and Creditor, topic 8.08 Fraudulent Sales and Conveyances.

Sales of Motor Vehicles.

See category 23 Transportation, topic 23.01 Motor Vehicles.

Product Liability.

See topic 3.09 Commercial Code. Court adoption of rule of strict tort liability. (278 Minn. 322, 154 N.W.2d 488).

Consumer Sales.

See topics 3.12 Consumer Protection and 3.17 Interest.

3.24 SECURITIES:

Minn. Stat. §§80A.01-80A.31 (described below) were repealed as of Aug. 1, 2007. Uniform Securities Act (2002) (Minn. Stat. §80A.40 et seq.) became effective on that date.

Supervision.

Commissioner of Commerce, Minnesota Department of Commerce.

Regulatory Powers of Supervising Authority.

Broad powers of denial, suspension, investigation and revocation of registration. (Minn. Stat. §80A.54).

Registration.

Unlawful to offer or sell any security in state unless registered, exempt or federal covered security. (Minn. Stat. §80A.49).

By Notification.

Permitted in case of certain nonprofit organizations. (Minn. Stat. §80A.50).

By Coordination.

Permitted in case of any security for which registration statement has been filed under Securities Act of 1933. (Minn. Stat. §80A.51).

By Qualification.

Any security may be registered by this method. (Minn. Stat. §80A.52).

Fees.

Registration or notice filing fee is minimum of $100 plus 1/10 of 1% of maximum aggregate offering price of securities offered in state. Maximum fee, $300. Fee of $100 for every initial filing of federal covered security, plus additional annual fee of 1/20 of 1% of maximum aggregate offering price of securities offered in state during notice filing period if filing made in connection with redeemable securities issued by open end management company or unit investment trust. No maximum fee. If filing in connection with Federal covered security under §18(b)(2) of Securities Act of 1933, additional fee of 1/10 of 1% of maximum aggregate offering price up to maximum fee of $300. Fee for amendment to registration, $25, plus percent fee in certain cases. Annual report fee, $100. Fee for written opinion of Commissioner, $50. (Minn. Stat. §80A.655).

Securities exempt from registration requirements are: (1) Issued or guaranteed by U.S., any state, any political subdivision of state or any agency or corporate or other instrumentality of foregoing, but not including securities sold pursuant to §106(a)(1) or (2) of Secondary Mortgage Market Enhancement Act of 1984 or payable solely from payments to be received in respect of property or money used under a lease, sale, or loan arrangement by or for a nongovernmental industrial or commercial enterprise; (2) issued or guaranteed by Canada, any Canadian province, any political subdivision of such province, any agency or corporate or other instrumentality of foregoing, but not including revenue obligation payable solely from payments under lease, sale or loan arrangement by or for non-governmental industrial or commercial enterprise; (3) issued and representing interest in or debt of, or guaranteed by, national or state bank, savings institution or trust company; (4) issued or guaranteed by federal savings institution or by similar organization organized under laws of any state and authorized to do business in Minnesota; (5) issued or guaranteed by certain credit unions; (6) listed or approved for listing on New York Stock Exchange, American Stock Exchange, Midwest Stock Exchange, Pacific Stock Exchange or Chicago Board Options Exchange; or other security of equal or senior rank of same issuer; security called for by subscription rights or warrants so listed or approved; or warrant or right to purchase or subscribe to any of foregoing; provided that this exemption does not apply to second tier listings of any exchanges; (7) certain commercial paper maturing within nine months from date of issue and not advertised in media or by direct mailing; (8) interest in employee savings, stock purchase, pension, profit sharing or similar benefit plan, or self-employed person's retirement plan; (9) issued or guaranteed by railroad, other common carrier or public utility subject to federal regulation regarding issuance or guarantee of its securities; (10) interests in certain common trust or collective investment funds of bank or trust company or in certain separate accounts of insurance companies; (11) issued by certain entities with net income over $1,000,000 in four of last five years including most recent year, class of registered securities under 1934 Act, and no material default in last seven years on securities, debts or long-term leases, and if other than preferred stock, securities meet voting and dispersion tests; (12) certificate of indebtedness sold or issued, and any savings account or savings deposit issued, by industrial loan and thrift company, except certificate pledged as security for contemporaneous loan; (13) security designated or approved for designation upon notice of issuance on NASDAQ/National Market System; other security of same issuer of senior or substantially senior rank; security called for by subscription rights or warrants so designated or approved; warrant or right to purchase or subscribe to any of securities referred to in this section, provided that National Market System provides commissioner with notice of any material change in definition requirements. (Minn. Stat. §80A.45).

Transactions exempt from registration requirements are: (1) Sales if (a) no person makes more than ten sales in Minnesota (exclusive of sales pursuant to clause [b]) of same issuer in 12 months, provided that if seller is issuer, seller reasonably believes buyers are purchasing for investment and securities not advertised to general public by newspaper or other publications of general circulation, radio, television, electronic means or similar communications media, or through program of general solicitation by mail or telephone; or (b) no issuer makes more than 25 sales in Minnesota (exclusive of sales pursuant to clause [a]) during any 12 consecutive months, provided issuer meets conditions in clause (a), makes required filing with Commissioner and pays only reasonable and customary commissions to licensed broker-dealers; (2) nonissuer distributions of outstanding securities of issuers listed in certain manuals and meeting certain requirements; (3) execution of certain orders by broker-dealer pursuant to unsolicited offer; (4) single nonissuer sale of bonds or notes secured by mortgage if sold to single purchaser in single sale; (5) judicial sale; (6) certain sales by pledgees; (7) sale to bank, savings institution, trust company, insurance company, investment company as defined in Investment Company Act of 1940, or other financial institution or institutional buyer, or to broker-dealer; (8) sales pursuant to Rule 505 or 506 of SEC Regulation D (ULOE exemption); (9) offer, but not sale, of security for which registration statement has been filed under Minnesota Blue Sky Law; (10) certain sales by cooperatives organized under Minn. Stat. c. 308A or laws of another state; (11) certain sales in connection with corporate acquisition or reorganization if required notice has been given to Commissioner; (12) transactions between issuer and underwriter or among underwriters; (13) certain distributions by corporation to its own security holders; (14) sales of issuer's securities by affiliates of issuer if registration statement for securities of same class is in effect and sales are exempt by rule or order of Commissioner; (15) certain transactions with existing shareholders if required notice has been given to Commissioner; (16) nonissuer sales of any security, including revenue bonds, issued by State of Minnesota or any of its political or governmental subdivisions, municipalities, governmental agencies or instrumentalities; (17) any transaction exempted by rule or order of Commissioner; (18) certain sales of securities issued in connection with employee's stock purchase, savings, option, profit sharing, pension, or similar employee benefit plan, subject to specified conditions; (19) sales of certain securities of issuer that is pooled income fund, charitable remainder trust or charitable lead trust; (20) sales by qualified charities or charitable gift annuities if issuer meets net worth and other requirements; (21) certain sales by cooperatives organized under Minn. Stat. c. 308B. (Minn. Stat. §80A.46).

Licenses.

Following must register annually (Minn. Stat. §80A.61): Broker-dealers, fee $200; agents, fee $50; investment advisors, fee $100. (Minn. Stat. §80A.56; Minn. Stat. §80A.57; Minn. Stat. §80A.58; Minn. Stat. §80A.65). Notice filings required for federal covered advisers, fee $100. (Minn. Stat. §80A.60, Minn. Stat. §80A.65).

Corporate Takeovers.

Regulated by Minn. Stat. c. 80B. Any person who proposes to offer to acquire equity securities from resident of Minnesota required to register with Commissioner prior to offer if after acquisition of securities pursuant to offer such person would: Beneficially own more than 10% of equity securities of issuer of publicly-traded equity securities (a) which (1) has its principal place of business or its principal executive office located in Minnesota or (2) owns or controls assets located within Minnesota which have fair market value of at least $1,000,000 and (b) which (1) has more than 10% of its beneficial or record equity shareholders in Minnesota, (2) has more than 10% of its equity securities owned beneficially or of record by residents in Minnesota, or (3) has more than 1,000 beneficial or record equity shareholders resident in Minnesota (provided that such person beneficially owned less than 10% prior to commencement of offer). (Minn. Stat. §§80B.01, .03). Filing fee, $250. (Minn. Stat. §80B.08). See category 2 Business Organizations, topic 2.03 Corporations, subheads Control Share Acquisitions; Business Combinations.

Franchises.

See topic 3.15 Franchises. (Minn. Stat. §80C.01 et seq.).

Uniform Commercial Code adopted. (Minn. Stat. c. 336). See topic 3.09 Commercial Code.

Uniform Simplification of Fiduciary Security Transfers Act adopted. (Minn. Stat. §§520.21-.31).

Uniform Securities Ownership by Minors Act not adopted.

3.25 STATUTE OF FRAUDS:

See topic 3.16 Frauds, Statute of.

3.26 TRUST RECEIPT SECURITY:

See topic 3.09 Commercial Code; category 8 Debtor and Creditor, topic 8.15 Pledges.

3.27 WAREHOUSEMEN:

Uniform Commercial Code adopted. (Minn. Stat. c. 336). See topic 3.09 Commercial Code.

Variations from 1962 Official Text and optional provisions adopted include:

(1) §7-204—Subsection (4) omitted.

(2) §7-403—Optional words in subsection (1) (b) omitted.

(3) For additional variations see topic 3.09 Commercial Code.

Licenses.

Warehouse operators must be licensed annually by Minnesota Department of Agriculture. (Minn. Stat. §231.16; Minn. Stat. §232.22; Minn. Stat. §233.08).

Bailment v. Sale.

Delivery of grain to warehouse operator for storage, even though mixed with that of others or shipped or removed, is bailment and not sale. (Minn. Stat. §235.07).

Bond.

Warehouse operator must provide surety bond or other specified form of security in amount of $10,000 or proof of legal liability insurance coverage in amount of $50,000 or more. (Minn. Stat. §231.17). Grain warehouse operator must be bonded in such amount as Minnesota Department of Agriculture may require. (Minn. Stat. §232.22).

Lien.

Minnesota has adopted UCC provisions creating lien for warehouse operators. (Minn. Stat. §336.7-209; Minn. Stat. §336.7-210). See topic 3.09 Commercial Code. In addition, one storing property as bailee but not as warehouseman under Art. 7 of Uniform Commercial Code has possessory lien while property in bailee's possession. Nonpossessory lien can be achieved by filing notice of lien. Place of filing and enforcement of nonpossessory lien governed by Uniform Commercial Code. (Minn. Stat. §§514.18, .19).

4 CITIZENSHIP

4.01 ALIENS:

Property.

Alien, except permanent resident alien who actually resides in U.S. at least six months in every 12-month period, cannot acquire directly or indirectly agricultural real estate or any interest therein within state, except by devise, inheritance, as security for indebtedness or by enforcement of lien, or unless alien is citizen of foreign country whose rights to hold land are secured by treaty, or unless land used for transportation purposes or mining or mineral processing operations or unless tract is 40 acres or less for pipeline facilities. Land acquired by alien through collection of debt or lien must be disposed of within three years. Permanent resident alien owning such land must file report with commissioner of agriculture within 30 days of purchase and each Jan. thereafter. (Minn. Stat. §500.221).

Corporations.

Statutory limitation on agricultural real estate ownership by alien individual applies to corporations, and other business entities 20% or more owned by aliens other than permanent residents. (Minn. Stat. §500.221).

5 CIVIL ACTIONS AND PROCEDURE

5.01 ACCORD AND SATISFACTION:

Compromise with Joint Debtor.

Creditor may discharge one joint debtor without impairing liability of other joint debtors. Discharge has effect of payment by discharged party of his equal share of debt, and must be pleaded in action by creditor against other joint debtors. Discharge does not defeat other joint debtors' right of contribution. (Minn. Stat. §548.21).

Part payment of debt operates to extinguish the whole when accepted as payment in full by creditor. Immaterial whether claim out of which debt grew was disputed or not. (203 Minn. 567, 282 N.W. 459).

Pleading.

Accord and satisfaction must be pleaded as affirmative defense. (Minn. R. Civ. P. §8.03).

See also category 3 Business Regulation and Commerce, topic 3.09 Commercial Code.

5.02 ACTIONS:

Federal Rules form basis of Rules of Civil Procedure. (See topics 5.19 Practice, 5.20 Process.)

There is one form of action for enforcement or protection of private rights, styled a civil action. (Minn. R. Civ. P. 2).

Equity.

Distinctions between actions at law and suits in equity have been abolished as well as forms of all such actions.

Conditions Precedent.

In action in tort against state, notice of claim must be presented to proper official. (Minn. Stat. §3.736, subdiv. 2). See (342 N.W.2d 632; 382 N.W.2d 518) (state notice provision is not condition precedent and held nonjurisdictional but failure of notice is defense if state prejudiced). In action in tort against municipalities or other political subdivisions, notice of claim must be presented to proper governing body. (Minn. Stat. §466.05). See 277 N.W.2d 30; 356 N.W.2d 655 (statute requiring notice of claim as condition precedent to action and requiring commencement of action within one year after notice held unconstitutional).

See also topic 5.16 Limitation of Actions, subhead Action Against Governmental Units and category 21 Property, topic 21.16 Real Property, subhead Actions.

Commencement.

Action in district court is commenced by serving summons upon defendant, by receiving acknowledgment of service from defendant if service made by mail, or by delivering summons for service to sheriff in county where defendant resides if summons is served, or first publication made within 60 days thereafter. (Minn. R. Civ. P. 3.01). District court summons must be subscribed by plaintiff or his attorney, give address within state where the subscriber can be served, state time for answer, and notify defendant that failure to answer will result in judgment by default. (Minn. R. Civ. P. 4.01). Complaint must be served with summons except when service is by publication. (Minn. R. Civ. P. 3.02). Summons may be served by sheriff or any person not less than 18 years of age and not party to action. (Minn. R. Civ. P. 4.02). See topic 5.20 Process.

Parties.

Action must be prosecuted in name of real party in interest, except in cases of executor or administrator, guardian, bailee, trustee of express trust, party who has contracted for benefit of another, or person authorized by statute. (Minn. R. Civ. P. 17.01). Plaintiff's full correct name must be given, defendant's should be, but when not known and so stated, defendant may be sued by any name, and right name inserted by amendment. (Minn. R. Civ. P. 9.08).

Rules as to joinder of parties follow Fed. R. Civ. P. 19 through 21 except last sentence of Fed. R. Civ. P. 19[a] omitted. (Minn. R. Civ. P. 19-21). Rule as to class actions follows Fed. R. Civ. P. 23, Minn. Stat. §23.01 and Minn. Stat. §23.02, except in stockholder derivative actions no requirement of verification or allegation that suit is not collusive to confer jurisdiction. (Minn. R. Civ. P. §23.09).

Two or more persons associating or doing business under common name may sue or be sued under such name. If sued, summons may be served on one or more or agent. Judgment benefits or binds all persons acting jointly. (Minn. Stat. §§540.15, .151).

Third Party Practice.

See topic 5.17 Pleading.

Class Actions.

Uniform Class Actions Act not adopted.

Interpleader.

Fed. R. Civ. P. 22 followed except paragraph (2) omitted and state rule adds express authorization for discharge of defendant asserting interpleader if defendant admits being subject to liability.

Intervention.

Fed. R. Civ. P. 24 followed except provision for intervention pursuant to federal statute omitted and provision requiring notification of Attorney General of Minnesota when constitutionality of act of Minnesota legislature challenged is substituted for parallel provision in Federal Rule. Notice must state that in absence of objections within 30 days, intervention shall be deemed accomplished. (Minn. R. Civ. P. 24).

Joinder of Causes.

Fed. R. Civ. P. 18 followed. (Minn. R. Civ. P. 18.01).

Consolidation and Severance of Actions.

Court may order separate trials of claims or issues, joint hearings or trials, or consolidation of actions.

Stay of Proceedings.

Stay of execution or proceedings to enforce judgment may be ordered in discretion of court and on such conditions for security as are proper, pending certain motions. (Minn. R. Civ. P. 62.01).

Abatement of action does not result from death, incompetency, disability or transfer of interest, if cause of action continues or survives. (Minn. R. Civ. P. 25).

Cause of action for personal injury dies with death of injured person although there is cause of action for death (see category 13 Estates and Trusts, topic 13.05 Death). All other causes of action, whether or not in contract, survive death of either party. (Minn. Stat. §573.01).

Nonresident Individual or Foreign Corporation.

See topic 5.08 Costs.

Limitation of.

See topic 5.16 Limitation of Actions.

Small Claims.

See category 6 Courts and Legislature, topic 6.01 Courts.

Direct Action Against Insurer.

See category 23 Transportation, topic 23.01 Motor Vehicles, subhead Direct Actions.

5.03 APPEAL AND ERROR:

From Probate Court.

Appeal to Court of Appeals from probate court allowed from order allowing or refusing probate of wills, appointing or refusing to appoint or remove representative, authorizing or refusing to authorize sale, mortgage or lease of real estate, directing or refusing to direct conveyance or lease of real estate under contract, allowing or disallowing claims or counterclaims of over $100, setting apart property or making allowances or refusing to do so, determining or transferring venue or refusing to do so, directing or refusing to direct payment of bequest or distributive share (when over $100), allowing or disallowing accounts (when over $100), adjudging person in contempt, vacating or refusing to vacate previous appealable order, etc., because of fraud, misrepresentation, surprise or excusable inadvertence or neglect, determining or confirming distribution or any order of general protection, order under Minn. Stat. §576.142, granting or denying restoration to capacity, directing or refusing to direct payment of representative's or attorneys' fees, extending time for settlement of estate beyond five years from date of representative's appointment, from order, etc. relating to or affecting estate taxes, and from judgment or decree of partial or final distribution. (Minn. Stat. §525.71). Appeal may be taken, under Rules of Appellate Procedure, by any person aggrieved after service of notice of filing order, judgment or decree appealed from. If notice of filing not served, appeal must be taken within six months from date of filing judgment, order or decree. (Minn. Stat. §525.712). Appeal may be taken from final judgment within 60 days after its entry and within 60 days after service of written notice of filing of any appealable order. (Minn. R. Civ. App. P. 104.01).

From Municipal Court.

Appeals allowed to Court of Appeals under same procedures as from other trial courts as specified in Rules of Appellate Procedure. (2006 Minn. Laws c. 260, art. 5, §54).

From District Court.

Appeal from district court to Court of Appeals may be taken from judgment entered in district court, from order granting, refusing, dissolving or refusing to dissolve an injunction, from order vacating or sustaining an attachment, from order refusing new trial, or granting new trial if district court expressly states therein, or in attached memorandum, that order is based exclusively upon errors of law occurring at trial, and upon no other ground, from order that, in effect, determines action and prevents judgment, from final order or judgment made in proceedings supplementary to execution, from final order or judgment affecting substantial right in administrative or other special proceeding, except as otherwise provided by statute, from order that grants or denies modification of custody, visitation, maintenance, or child support provisions in existing judgment or decree, or, if trial court certifies that question presented is important and doubtful, from order denying motion to dismiss for failure to state claim upon which relief can be granted or denying motion for summary judgment, and from such other orders or decisions as may be appealable by statute or under decisions of Minnesota appellate courts. (Minn. R. Civ. App. P. 103.03). Appeal must be taken directly to Supreme Court in legislative or statewide election contests or in criminal cases where defendant has been convicted of first degree murder. (Minn. Stat. §209.09; Minn. Stat. §209.10; Minn. Stat. §590.06). Appeal from judgment must be taken within 60 days after entry thereof and from order within 60 days after service of written notice of filing thereof by adverse party unless different time is provided by law. (Minn. R. Civ. App. P. 104.01). Time for appeal from partial judgment disposing of less than all multiple claims or affecting less than all of multiple parties within 60 days of entry of judgment if trial court makes express determination that there is no just reason for delay and expressly directs entry of final judgment, otherwise time for such appeal runs from date of entry of final judgment which adjudicates all remaining claims and rights and liabilities of remaining parties. (Minn. R. Civ. P. 54).

Appeal Bond.

Appellant must file bond or undertaking for costs in amount of at least $500 or deposit that sum with clerk of court. Bond may be waived by written consent of respondent filed with clerk of trial court, or by motion to trial court. (Minn. R. Civ. App. P. 107).

Stay of Proceedings.

Where appeal is from money judgment, in order to stay execution, bond must be in amount approved by court conditioned on payment of judgment and damages if judgment affirmed or if appeal is dismissed. (Minn. R. Civ. App. P. 108.01[3]). Where appeal is from order, proceedings may be stayed by supersedeas bond conditioned on payment of costs and consequential damages of appeal, and satisfaction of any order or judgment given by appellate court. (Minn. R. Civ. App. P. 108.01[2]). Where appeal is from judgment directing assignment or delivery of documents or personal property, proceedings may be stayed by supersedeas bond conditioned on obedience to order or judgment of appellate court. (Minn. R. Civ. App. P. 108.01[4]). Where appeal is from judgment directing sale or delivery of possession of real property, proceedings may be stayed by supersedeas bond conditioned on payment of value of use and occupation of property and on undertaking not to commit or suffer commission of any waste on property during pendency of appeal. (Minn. R. Civ. App. P. 108.01[5]). In appeals brought to review decisions reviewable by certiorari or under Administrative Procedures Act, trial court may grant stay upon such terms as it considers proper. (Minn. R. Civ. App. P. 108.01[6]; Minn. R. Civ. App. P. 115). In all other cases, filing of appeal bond shall stay proceedings. (Minn. R. Civ. App. P. 108.01[6]).

Death of Party During Appeal.

Representative may be substituted. (Minn. R. Civ. App. P. 143.02).

Judgment or Order on Appeal.

On appeal from judgment or order, appellate court may reverse, affirm or modify judgment or order, or take other action as justice requires. (Minn. R. Civ. App. P. 103.04).

Review by Supreme Court.

Review of decisions of Court of Appeals is discretionary with Supreme Court. Party seeking review must petition Supreme Court within 30 days of filing of Court of Appeals' decision. (Minn. R. Civ. App. P. 117). Party also may seek accelerated review of case pending in Court of Appeals by petition to Supreme Court if case is of such imperative public importance as to justify deviation from normal appellate procedure and to require immediate determination in Supreme Court. (Minn. R. Civ. App. P. 118).

5.04 BONDS:

Bonds required or permitted to be made for security of the state, or any department thereof, or any other organization, must be signed by two or more sureties, who shall be residents and freeholders of state and, who must justify bond is at least double amount of penalty of such bond. Sureties may be accepted in discretion of approving body, for part only of penalty, and may justify in separate and different sums; but aggregate liability of sureties shall in all cases be not less than that required by law if each surety had justified in full amount. Any fiduciary required by law to give bond as such may include as part of lawful expenses actual sum paid for such suretyship; subject to limitations. (Minn. Stat. §§574.01, .17, .19).

Surety companies may be sureties on bonds, but no corporation can be accepted or approved as such unless it holds certificate of Commissioner of Commerce showing that it is authorized to contract as such. (Minn. Stat. §574.15).

Enforcement.

Before action can be brought on bond, leave must be obtained from district court where action is triable by production of copy of bond and affidavit showing delinquency. (Minn. Stat. §574.25).

Contractor's bonds for public work, see category 8 Debtor and Creditor, topic 8.13 Liens, subhead Mechanics' Liens on Real Property.

See also topic 5.08 Costs.

5.05 CERTIORARI:

Direct review of administrative determinations is available as matter of right where provided by statute. Writs of certiorari in district court and Administrative Procedure Act also provide broad scope of appellate review of administrative determinations. Review by Court of Appeals of decisions of Commissioner of Jobs and Training and other decisions reviewable by certiorari and review of decisions appealable pursuant to Administrative Procedure Act may be had by securing issuance of writ of certiorari. Appeal period and procedure are governed by applicable statute. (Minn. R. Civ. App. P. 115). Review by Supreme Court of decisions of Workers' Compensation Court of Appeals, decisions of Tax Court, and other decisions reviewable by certiorari may be had by securing issuance of writ of certiorari within 30 days after party applying for writ was served with written notice of decision sought to be reviewed unless applicable statute prescribes different time period. Petition and proposed writ are presented to clerk of appellate courts. (Minn. R. Civ. App. P. 116).

5.06 CHARITABLE IMMUNITY:

See topic 5.09 Damages.

5.07 COMMISSIONS TO TAKE TESTIMONY:

See topic 5.11 Depositions and Discovery.

5.08 COSTS:

In appellate courts, unless otherwise ordered, costs are allowed: to prevailing party in judgment on merits, $300; on dismissal, $10. (Minn. Stat. §549.02[2]; Minn. R. Civ. App. P. 139.01). Does not apply where state agency is named or intervenes as party to enforce agency's rights under Minn. Stat. §256B.056. In such cases, agency shall not be liable for costs to any prevailing party. (Minn. Stat. §549.02[3]). In addition, disbursements necessarily paid or incurred by prevailing party must be allowed unless otherwise ordered by court. (Minn. R. Civ. App. P. 139.02). In district court for action to recover money only on judgment for over $100, entitled to $200. In all other actions, except as otherwise provided, $200. Defendant entitled to $200 if judgment or dismissal. To prevailing party: $5.50 for cost of filing satisfaction of judgment. (Minn. Stat. §549.02[1]). Does not apply where state agency is named or intervenes as party to enforce agency's rights under Minn. Stat. §256B.056. In such cases, agency shall not be liable for costs to any prevailing party. (Minn. Stat. §549.02[3]). Varies in municipal courts. Plaintiff is entitled to double costs in action for wages. (Minn. Stat. §549.03). In every action in district court, prevailing party is allowed reasonable disbursements paid or incurred. Does not apply where state agency is named or intervenes as party to enforce agency's rights under Minn. Stat. §256B.056. In such cases, agency shall not be liable for costs to any prevailing party. (Minn. Stat. §549.04; Minn. Stat. §549.04[2]). Special rule applies in fourth judicial district. (Minn. Stat. §549.05).

Taxation of Costs.

In appellate courts, costs and disbursements are taxed by Clerk of Appellate Courts upon five days notice served and filed by prevailing party and inserted in judgment; failure to tax within 15 days after filing of decision or order constitutes waiver (Minn. R. Civ. App. P. 139.03); objections to be served and filed within five days after service of notice of taxation (Minn. R. Civ. App. P. 139.04). In district court, costs and disbursements may be taxed by court administrator upon two days' notice by either party and inserted in judgment; disbursements must be stated in detail, verified by affidavit and filed with court and copy must be served with notice; party may object in writing to any item and appeal will be heard by court on eight days notice. (Minn. R. Civ. P. 54.04).

Security for Costs.

Nonresident plaintiff, individual or corporation, must, before service of summons, file with court administrator bond for at least $75, conditioned for payment of all costs and expenses adjudged against plaintiff. This applies to defendant who appeals to district court, but does not apply to action for wages or personal service. (Minn. Stat. §549.18).

5.09 DAMAGES:

As general rule common law prevails as to damages, but statutory exceptions.

Charitable Immunity.

Doctrine of charitable immunity rejected. (122 Minn. 10; 141 N.W. 837).

Comparative fault rule adopted. (Minn. Stat. §604.01).

Death.

See category 13 Estates and Trusts, topic 13.05 Death, subhead Action for Death.

No-Fault Insurance.

See category 23 Transportation, topic 23.01 Motor Vehicles.

Sovereign Immunity.

Doctrine abolished prospectively by state tort claims act as to state (Minn. Stat. §3.736) and by municipal torts claims act as to municipalities and other political subdivisions (Minn. Stat. §466.01 et seq.) except for discretionary duties and particular immunities granted by statute (Minn. Stat. §3.736; Minn. Stat. §466.03); however, workers' compensation immunity held unconstitutional and repealed (376 N.W.2d 422). Abolishment of doctrine does not waive defense of judicial or legislative immunity except to extent liability insurance procured. (Minn. Stat. §3.736[1]). State liable for acts or omissions of employees while acting within scope of office or employment, or of peace officers not acting on behalf of private employer and acting in good faith, under circumstances where private person would be liable, whether rising out of governmental or proprietary function. (Minn. Stat. §3.736[1]). Municipalities or other subdivisions liable for their torts and those of their officers, employees and agents acting within scope of employment or duties whether acting out of governmental or proprietary function. (Minn. Stat. §466.02). Indemnification of state and municipal officers and employees under certain circumstances. Statutory notice of claim requirements exist in both state and municipal tort claims acts. (Minn. Stat. §3.736[5]; Minn. Stat. §466.05). State notice provision is not condition precedent and held nonjurisdictional but failure of notice is defense if state prejudiced. (342 N.W.2d 632). Municipal notice provision is condition precedent and requires commencement of action within one year after notice; condition precedent and one-year requirement both held unconstitutional, but failure of notice is defense if municipality prejudiced. (356 N.W.2d 655; 382 N.W.2d 518). Recovery limited to specific dollar amount except to extent liability exceeds limits (Minn. Stat. §3.736; Minn. Stat. §466.06), and then only to extent that valid and collectible insurance exceeds those limits and covers claim recoverable against state or municipality (Minn. Stat. §3.736; Minn. Stat. §466.06); recovery of punitive damages from employees and officers possible (297 N.W.2d 152), against which municipality must defend and indemnify officers and employees provided that officer or employee was acting in performance of duties of position and was not guilty of malfeasance in office, willful neglect of duty, or bad faith (Minn. Stat. §466.07). Municipality shall indemnify for punitive damages, provided officer or employee was (1) acting in performance of duties of position; and (2) was not guilty of malfeasance, willful neglect or bad faith. Procurement of liability insurance constitutes waiver of limits of governmental liability to extent of policy coverage. (Minn. Stat. §3.736; Minn. Stat. §466.06). Governmental units also may be liable under other statutes, including state environmental response and liability act (Minn. Stat. §115B.04), state environmental rights law (Minn. Stat. §116B.10), wrongful death statute (Minn. Stat. §573.02), civil damage act, state civil rights statute, and federal civil rights statutes.

5.10 DECLARATORY JUDGMENTS:

See topic 5.15 Judgments.

5.11 DEPOSITIONS AND DISCOVERY:

Practice with reference to depositions, interrogatories, physical and mental examinations, production of documents and requests for admission in district court follow Fed. R. Civ. P. 26-37 except as noted. (Minn. R. Civ. P. 26-37).

Unless otherwise ordered by court or agreed to by parties, officer taking deposition shall send deposition to party taking deposition, who shall be identified on record. (Minn. R. Civ. P. 30.06).

Form

State of . . . ., County of . . . ., Be it known that I took the forgoing deposition of . . . .; that I was then and there a . . . .; that, by virtue thereof I was duly authorized to administer an oath; that the witness, before testifying, was by me first duly sworn to tell the truth, the whole truth, and nothing but the truth relative to the above cause; that I am not related to any of the parties hereto nor an employee, nor interested in the outcome of the action. Witness my hand and seal this . . . . day of . . . ., 19. . . .

Depositions of employee, as well as officer, of party may be used. (Minn. R. Civ. P. 30.02[f]; Minn. Stat. §32.01[b]).

Interrogatories to parties are limited to 50 unless more permitted by court for good cause shown. (Minn. R. Civ. P. 33.01[a]). Answers due within 30 days after service; expansion of time for answer allowed by court for good cause shown except that defendant may serve answers or objections within 45 days after service of summons and complaint. (Minn. R. Civ. P. 33.01[b]). Objections shall be stated with particularity; party proposing interrogatories may at anytime move to compel answers to interrogatories or to determine objections. (Minn. R. Civ. P. 33.01[c]). Answers to interrogatories shall first set out question; interrogatories to state, corporation, partnership or association shall be answered by officer or managing agent. (Minn. R. Civ. P. 33.01[d]).

Physical, mental and blood examinations of agents of party, as well as agent of party and person under control of party, may be taken for good cause shown upon motion with notice. (Minn. R. Civ. P. 35.01). Automatic waiver of medical privilege is provided upon party's voluntarily placing in controversy mental, physical or blood condition of himself, decedent, or person under his control. (Minn. R. Civ. P. 35.03). Following waiver, medical reports concerning waiving party and conclusions therein, shall be furnished ten days after written request. (Minn. R. Civ. P. 35.04).

Compelling Attendance and Testimony of Witnesses.

Within State for Use Within State.—Witness may be subpoenaed upon proof of service of notice to take deposition. (Minn. R. Civ. P. 45.04[a]). Use of subpoena other than in connection with duly noticed deposition, hearing or trial is abuse of process. (Minn. R. Civ. P. 45.01[b]). Nonparty resident may be required to attend examination only in county where he resides or is employed or transacts business in person or at place fixed by court order; nonresident may be required to attend in any county. (Minn. R. Civ. P. 45.04[c]). Subpoena may be served by sheriff, deputy or any other person not a party. (Minn. R. Civ. P. 45.03). Subpoena of nonparty witness testifying as to profession, business or trade must advise witness of right to receive reasonable compensation for time and expenses. (Minn. R. Civ. P. 45.01[c]; Minn. R. Civ. P. 45.06). Party serving subpoena must arrange for reasonable compensation before deposition. (Minn. R. Civ. P.

45.06). Failure to obey subpoena without adequate excuse is contempt of court. (Minn. Stat. §588.01, subdiv. 3[8], Minn. R. Civ. P. 45.07).

Within State for Use Elsewhere.

Any witness may be compelled to give deposition in any case pending in court of another state or country. Resident may be required to attend examination only in county where he resides or is employed or transacts business in person or at place fixed by court order; nonresident may be required to attend in any county. Proof of service of notice to take deposition constitutes sufficient authorization for issuance of subpoenas for persons named or described therein. (Minn. R. Civ. P. 45.04). Disobedience of subpoena duly served is contempt of court. (Minn. Stat. §588.01, subdiv. 3[8], Minn. R. Civ. P. 45.07).

Outside of State for Use within State.

May be taken before officer authorized to administer oaths by laws of U.S. or of place where examination is held, or before person appointed by court in which action is pending. (Minn. R. Civ. P. 28.01).

Return should be in following form:

Form

State of . . . . . ., County of . . . . . ., Be it known that I took the foregoing deposition of . . . . . .; that I was then and there a . . . . . .; that, by virtue thereof I was duly authorized to administer an oath; that, the witness, before testifying, was by me first duly sworn to tell the truth, the whole truth, and nothing but the truth relative to the above cause; that, I am not related to any of the parties hereto nor an employee, nor interested in the outcome of the action. Witness my hand and seal this . . . . . . day of . . . . . ., 20. . . .

5.12 EQUITY:

See topics 5.02 Actions, 5.17 Pleading.

5.13 EVIDENCE:

Witnesses.

All persons may testify unless they are of unsound mind or intoxicated so as to lack capacity to remember facts or to relate them truthfully. Child under ten years of age is competent unless court finds lack of capacity to remember or relate facts truthfully. Child may describe or relate events in language appropriate to child of that age. In cases involving physical abuse or crimes of violence against testifying child or any other person, child less than 12 years of age, may testify in room other than courtroom, televised by closed-circuit equipment, or by videotape in courtroom for later showing to jury. Court may order defendant removed so not seen or heard by child. Attorneys for parties may be present with child in child protection, dissolution and custody proceedings. (Minn. Stat. §595.02, subdiv. 4).

See also topic 5.11 Depositions and Discovery.

Privileged communications are protected in cases of: attorney or his employee and client; minister and confessor or person seeking religious or spiritual advice; physician, surgeon, dentist, registered nurse, chiropractor or psychologist and patient, except in certain cases relating to abuse or neglect of minor; witness to documents or communications made during course of mediation pursuant to mediation agreement; public officers when public interest would suffer; parent and minor child in case of communications made in confidence by minor to parent except in certain intra-familial civil and criminal proceedings; sexual assault counselor and victim except where court determines good cause exists to order disclosure in proceeding for neglect or termination of parental rights; licensed chemical dependency counselors and persons consulting them, except in certain cases relating to contemplation or on-going commission of crime or in certain cases to charges against counselor. Interpreter for person handicapped in communication may not disclose otherwise privileged communication. (Minn. Stat. §595.02, subdiv. 1).

Communications between husband and wife are privileged, but privilege does not apply to action or proceeding by one against other, nor to action or proceeding for crime committed by one against other or against child under care of either spouse, nor to criminal action for homicide where date of marriage of defendant is subsequent to date of offense, nor to any action for nonsupport, neglect, dependency or termination of parental rights. (Minn. Stat. §595.02, subdiv. 1).

Communications with Persons Since Deceased or Insane.

Witness not precluded from giving evidence of or concerning conversations with or admissions of deceased or insane party merely because witness is party or has interest. (Deadman's Statute superseded.) (Minn. R. Evid. 617).

News Media.

Persons engaged in gathering, procuring, compiling, editing or publishing information for dissemination to public may not be required to disclose source or unpublished information which would tend to identify source. (Minn. Stat. §595.023). Disclosure may be required on application to district court in certain circumstances. (Minn. Stat. §595.024).

Self-incrimination.

In criminal proceeding (including grand jury proceeding), paternity proceeding, or proceeding in juvenile court, if it appears that person may be entitled to refuse to answer or produce evidence, prosecuting attorney may make written request for order that person answer or produce evidence, and judge may, after notice and hearing, so order if not contrary to public policy and not likely to expose witness to prosecution in other state or federal courts. After complying and if it would have been privileged, no testimony or information compelled under order and no information directly or indirectly derived from such testimony or information may be used against witness in any criminal case, except that witness may be prosecuted for perjury, false swearing or contempt with regard to his/her response to order. In any other proceeding where it is provided by law that witness not excused from giving incriminating testimony, witness must testify and use immunity provided, except for perjury. (Minn. Stat. §609.09).

5.14 INJUNCTIONS:

No provisions governing issuance of permanent injunction; general equitable principles apply.

Injunction will not lie to restrain nonresident from prosecuting action. (134 Minn. 455; 159 N.W. 1084). Where plaintiff is entitled to injunction at time of commencement of action, it will be granted although defendant may have discontinued acts complained of. (115 Minn. 116; 131 N.W. 1075).

Federal Rules form basis of Minnesota Rules of Civil Procedure. (See topic 5.19 Practice.) Minn. R. Civ. P. 65 establishes procedure for granting restraining orders and temporary injunctions.

Jurisdiction to issue injunctions rests with district court. (Minn. Stat. §484.03).

Temporary Injunctions.

Temporary restraining order may be granted without oral or written notice if it appears by affidavit or verified complaint that immediate and irreparable injury would result to applicant before hearing and efforts have been made to give notice to adverse party or no such notice should be required. (Minn. R. Civ. P. 65.01). Temporary injunction may be granted following hearing if it appears by affidavit, deposition testimony, or oral testimony in court that sufficient grounds exist therefore. (Minn. R. Civ. P. 65.02). In general, temporary injunction will be dissolved where sworn answer sets forth specific facts which show allegations of complaint are not true, but this is not absolute rule. (55 Minn. 482, 57 N.W. 208). Temporary writ may be granted although permanent one is not asked for. (55 Minn. 482, 57 N.W. 208).

Procedure.

Temporary injunction is only granted on motion or order to show cause, but temporary restraining order may be issued ex parte. (Minn. R. Civ. P. 65.01; Minn. R. Civ. P. 65.02). Five days notice (excluding Sats., Suns. and holidays) required on motion; three additional days required if served by mail. (Minn. R. Civ. P. 6.01; Minn. R. Civ. P. 6.04; Minn. R. Civ. P. 6.05). Injunction may be granted, suspended, modified or restored during pendency of appeal upon such terms as to bond or otherwise as established by court. (Minn. R. Civ. P. 62.02).

Bonds.

Court will ordinarily require bond or other form of security before temporary injunction will issue. (Minn. R. Civ. P. 65.03). Bond of not less than $2,000 is required before restraining order will issue, except in execution, replevin, harassment proceedings, orders for protection in domestic abuse proceedings or marriage dissolution action. (Minn. Gen. R. Prac. 135). Remedy on bond is exclusive. Counsel fees necessarily incurred in procuring dissolution may be recovered on bond. (43 Minn. 507; 45 N.W. 1134).

5.15 JUDGMENTS:

Federal Rules form basis of Rules of Civil Procedure. See topic 5.19 Practice.

Confession of judgment for money due or to become due or to secure against contingent liability of defendant may be entered upon filing with court administrator statement signed and verified by defendant authorizing entry of judgment for specified sum, stating facts out of which debt arose and showing that sum confessed is justly due or to become due. Judgment may be entered on plea of confession signed by attorney together with instrument signed by debtor authorizing such confession but such instrument must be distinct from that containing evidence of demand for which judgment is confessed. (Minn. Stat. §§548.22, .23). No provision for confession of judgment or power of attorney therefore in any retail installment contract, or separate agreement relating thereto, is valid or enforceable (Minn. Stat. §53C.08, subdiv. 1[b]), and no consumer credit sales contract shall give power of attorney to confess judgment (Minn. Stat. §325G.16).

Declaratory Judgments.

Uniform Declaratory Judgments Act adopted. (Minn. Stat. c. 555).

Default Judgments.

If defendant fails to answer or move within 20 days after service of summons and complaint, judgment may be entered by default. (Minn. R. Civ. P. 12.01; Minn. R. Civ. P. 55.01).

Overpayment of assistance under Minnesota Family Investment Plan becomes judgment by operation of law 90 days after notice of overpayment. (Minn. Stat. §256.0471).

Entry.

In case of default judgment in district court, in a money action on contract, court administrator enters judgment on request of plaintiff and affidavit; in other actions, court determines relief to be granted and orders court administrator to enter judgment accordingly. (Minn. R. Civ. P. 55.01).

Docketing.

No judgment, except for taxes, shall be docketed until judgment creditor, or his agent or attorney, has filed with court administrator affidavit stating full name, occupation, place of residence and post office address of judgment debtor. In incorporated places of over 5,000, street number of both judgment debtor's residence and place of business must be added. (Minn. Stat. §548.09).

Lien.

Except as to judgments for support and maintenance (Minn. Stat. §548.091), every judgment requiring payment of money is docketed by court administrator upon its entry (Minn. Stat. §548.09). From time of such docketing, it becomes lien on all debtor's real estate in county, then owned or thereafter acquired, for ten years after date of entry of judgment, but is not lien on registered land until recorded as set out below. (Minn. Stat. §548.09). Judgment in district court may be made similar lien on real property in any other county by filing transcript with court administrator of district court of that county, who must docket same. (Minn. Stat. §548.09). Judgment becomes lien on registered land only if person claiming lien files with registrar certified copy of judgment and statement containing description of land and proper reference to certificate of title. (Minn. Stat. §508.63; Minn. Stat. §508A.63).

Judgment in U.S. District Court for District of Minnesota may be made a lien on real estate of debtor in any county by filing transcript in office of court administrator of state district court for that county. (Minn. Stat. §548.11).

Assignment.

Every assignment of judgment must be in writing, signed and acknowledged, except written notice is sufficient for assignment of support and maintenance rights. To be valid against subsequent purchasers or creditors assignment must be filed with court administrator and docketed. (Minn. Stat. §548.13).

Satisfaction.

Judgment is deemed satisfied when there is filed with court administrator: (1) Execution satisfied; (2) certificate of satisfaction signed and acknowledged by judgment creditor or by his attorney, unless attorney's authority has been revoked and entry of revocation made on register, attorney's authority being good only for six years after entry of judgment, certificate of satisfaction to be filed within ten days after satisfaction or within 30 days of payment by noncertified funds; (3) court order made on motion directing satisfaction to be entered; or (4) where judgment has been docketed elsewhere, copy of any of foregoing documents certified to by court administrator where original entry made. Court administrator thereupon enters such satisfaction in judgment roll and on docket. (Minn. Stat. §548.15, subdiv. 1). Judgment debtor may pay court administrator if he cannot find creditor upon filing affidavit to that effect. (Minn. Stat. §548.17). Obligor under judgment for support and maintenance may pay court administrator if he cannot find obligee or obligee refuses to receive payment upon filing affidavit to that effect. (Minn. Stat. §548.17).

Foreign Judgments.

To create lien on real property or permit issuance of execution, suit must be brought and judgment obtained from court of this state. Judgment recovered in sister state is entitled to full faith and credit in this state. Such judgment is admissible in evidence when authenticated by attestation of court administrator under seal (28 U.S.C. §1738; Minn. Stat. §599.11); judgment of justice of peace in sister state must be certified by justice with certificate of magistracy thereon and signed and authenticated under seal by court administrator of a court of record in county where rendered (Minn. Stat. §599.24).

Uniform Enforcement of Foreign Judgments Act adopted. (Minn. Stat. §§548.26-.33).

Judgment Renewal.

Child support judgments may be renewed by service of notice upon debtor, and filing notice and proof of service with court administrator. (Minn. Stat. §548.091).

Judgment for Child Support.

Unpaid child support installment becomes judgment by operation of law on date it is due. To docket judgment statement identifying or copy of original judgment, affidavit of default, and affidavit of service of notice of entry of judgment must be filed with court administrator. (Minn. Stat. §548.091).

5.16 LIMITATION OF ACTIONS:

Uniform Commercial Code adopted. (Minn. Stat. c. 336). See category 3 Business Regulation and Commerce, topic 3.09 Commercial Code.

Action is barred unless commenced within following period after cause of action accrues:

Fifteen Years.

For recovery of real estate (Minn. Stat. §541.02) or foreclosure of real estate mortgage (Minn. Stat. §541.03). Time for foreclosure of mortgage not extended by nonresidence, partial payment after maturity of debt or extension of time of payment unless such extension in writing and recorded in same office as mortgage within limitation period of 15 years. (Minn. Stat. §541.03).

Ten Years.

On judgment or decree of court of record of U.S. or any state or territory. (Minn. Stat. §541.04).

Six Years.

Unless otherwise prescribed by Uniform Commercial Code: Contract or other obligation express or implied as to which no other limitation is expressly prescribed; liability created by statute except penalty or forfeiture or where shorter period is prescribed by Minn. Stat. §541.07; trespass upon real estate; taking, detaining or injuring personal property, and actions for specific recovery thereof; criminal conversation, or injury to person or rights of another not arising on contract and not hereinafter enumerated; relief on ground of fraud; to enforce trust or compel accounting, where trustee neglects to discharge trust or has repudiated it or claims to have fully performed same; against surety on bond of any public officer after expiration of term of office; for damages caused by dam used for commercial purpose; for assault, battery, false imprisonment, or other tort, resulting in personal injury, if conduct that gives rise to cause of action also constitutes domestic abuse as defined in Minn. Stat. §518B.01. (Minn. Stat. §541.05, subdiv. 1). For personal injury based on sexual abuse, cause of action accrues upon knowledge of injury caused by sexual abuse. (Minn. Stat. §541.073). See category 3 Business Regulation and Commerce, topic 3.09 Commercial Code.

Action seeking to recover for personal injuries based upon allegations of negligence is governed by six-year statute of limitations. (209 Minn. 330; 296 N.W. 176).

Five Years.

Actions for civil racketeering under Minn. Stat. §609.911. (Minn. Stat. §541.074).

Four Years.

Actions arising under Sales Article of Uniform Commercial Code. (Minn. Stat. §336.2-725[1]). See category 3 Business Regulation and Commerce, topic 3.09 Commercial Code. Action based on strict liability and arising from manufacture, sale, use or consumption of product. (Minn. Stat. §541.05). Actions against healthcare providers by patient or former patient alleging malpractice or mistake. (Counterclaim in defense of action against healthcare provider may be brought after four-year period as long as patient had counterclaim when it became barred and as long as counterclaim was not barred when claim sued on originated; however, costs are only damages available to counterclaimant.)

Three Years.

Against sheriff, coroner or constable as such official. (Minn. Stat. §541.06). Proceeding to impose penalty or forfeiture for environmental damages. (Minn. Stat. §541.075). See subhead Two Years, infra, as to certain actions for recovery of wages, overtime, damages, fees or penalties. See category 13 Estates and Trusts, topic 13.05 Death, as to statute of limitations for wrongful death action.

Two Years.

Unless otherwise prescribed by Uniform Commercial Code: For libel, slander, assault, battery, false imprisonment or other tort resulting in personal injury (but see subhead Six Years, supra as to personal injuries based on allegations of negligence); and all actions against veterinarians as defined in Minn. Stat. c. 156, for malpractice, error, mistake or failure to cure whether based on contract or tort, provided counterclaim may be pleaded as defense to any action for services brought by veterinarian after limitations herein described, notwithstanding it is barred by provisions of this chapter, if it was property of party pleading it at time it became barred and was not barred at time claim sued on originated, but no judgment thereof except for costs can be rendered in favor of party so pleading it (Minn. Stat. §541.07); for damages caused by dam used for other than commercial purposes; against master for breach of indenture of apprenticeship, limitation running from expiration of term of service; actions for recovery of wages, overtime, damages, fees or penalties accruing under any federal or state law respecting same, except that if employer fails to submit payroll records upon request of department of labor and industry or nonpayment is willful, limitation is three years; for damages caused by establishment of or change in street or highway grade; for damage to property resulting from application (but not manufacture or sale) of pesticide. (Minn. Stat. §541.07). See category 3 Business Regulation and Commerce, topic 3.09 Commercial Code.

One Year.

On instrument authorizing confession of judgment and on foreign judgment or decree or judgment or decree of federal court entered by confession under warrant of attorney or other instrument authorizing such confession. (Minn. Stat. §541.09).

Real Property Improvements.

Unless fraud or breach of certain statutory or written warranties involved, action for damages for injury to real or personal property, or for injury or death, arising from defective and unsafe condition of improvement to real property barred after two years of discovery of injury (or, in case of action for contribution or indemnity, after accrual of cause of action) against person performing or furnishing design, planning, supervision, materials, construction or observation of construction, except no action may be brought more than ten years after substantial completion of construction. Cause of action accrues upon discovery of injury or, in case of indemnity and contribution, upon payment of final judgment, arbitration award or settlement. Limitation not applicable to action for damages from negligence in maintenance, operation or inspection of real property improvement against owner or person in possession or to action by manufacturer or supplier of equipment or machinery installed upon real property. If action accrues in ninth or tenth year after substantial completion of construction, action may be brought within two years after date action accrues. (Minn. Stat. §541.051). Actions based on breach of certain statutory (Minn. Stat. §327A.02) and express written warranties to be brought within two years of discovery of breach. In case of action under Minn. Stat. §327A.05, which occurs during ninth or tenth year after warranty date, as defined in Minn. Stat. §327A.01, subdiv. 8, action may be brought within two years of discovery of breach, but in no event may action under Minn. Stat. §327A.05 be brought more than 12 years after effective warranty date. (Minn. Stat. §541.051).

Land Surveys.

Unless fraud involved, no action for damages for error in land survey (or for contribution or indemnity) may be brought against person performing survey more than two years after discovery of error, nor in any event more than ten years after survey date. If action arises during ninth or tenth year after survey date, action for damages may be brought within two years after date action arises, but in no event may action be brought more than 12 years after date of survey. (Minn. Stat. §541.052).

Time.

Action to recover balance due on mutual, open and current account, where reciprocal demands have been made between parties, accrues from date of last item proved on either side. (Minn. Stat. §541.10).

Asbestos.

Action to recover for removal of asbestos from building, location or correction of other problems related to asbestos in building, or for reimbursement for correction of removal of asbestos problem is not barred from any other limitation period if begun before July 1, 1990. (Minn. Stat. §541.22, subdiv. 2).

Disabilities.

Any of following grounds of disability existing at time when cause of action accrued or arising during period of limitation suspends running of period of limitation until disability is removed; that plaintiff is under age 18, or insane, or is alien and subject or citizen of country at war with U.S., or when beginning of action is stayed by injunction or by statutory prohibition. Time cannot be extended more than five years by any disability, except infancy, nor for more than one year after disability ceases. When two or more disabilities co-exist, suspension continues to run until all are removed. When cause of action alleges malpractice against health care provider, disability that plaintiff is under 18 suspends limitation period until disability is removed, but suspension shall not extend for more than seven years, or for more than one year after disability ceases. (Minn. Stat. §541.15).

Absence.

When defendant is absent from state and not subject to process under Minnesota law when cause of action accrues or if he departs after its accrual and resides out of state, time of his absence is not counted. (Minn. Stat. §541.13).

Foreign Causes of Action.

When action accrues in another state or in foreign country, and by laws thereof action cannot be maintained there because of lapse of time, action probably not thereby barred in Minnesota. (302 Minn. 359; 225 N.W.2d 238), but issue uncertain due to repeal of Minn. Stat. §541.14.

Revival of Barred Debt.

Debt barred by limitations may be revived and full period started running again by part payment of principal or interest or by signed written acknowledgment or new promise signed by party to be charged; but oral acknowledgment or new promise will not have this effect. (Minn. Stat. §541.17).

Contractual Limitations.

In absence of special legislation affecting limitations of particular actions, parties may, by stipulation in their contract, reduce time for bringing suit thereon below period fixed by general statute of limitation, provided time be not unreasonably short. (248 Minn. 383; 80 N.W.2d 612).

Pleading.

Statute must be pleaded or raised on motion before answer to be available as a defense. (Minn. R. Civ. P. 8.03).

Action Against Governmental Units.

Notice of tort claim against state must be presented within 180 days to attorney general and any state employee from whom claimant seeks compensation; special provisions apply for wrongful death claims and claims against University of Minnesota. Actual notice received by state or insurer complies with notice requirements. (Minn. Stat. §3.736, subdiv. 5). Tort actions brought against state also governed by applicable limitation period. (Minn. Stat. §3.736, subdiv. 11). Notice of claim against state requirement is not condition precedent to action and held nonjurisdictional but failure of notice is defense if state prejudiced. (342 N.W.2d 632). Notice of tort claim against municipalities or other political subdivisions must be presented within 180 days to governing body and special provisions apply for wrongful death claims. Actual notice received by governing body or insurer complies with notice requirements. (Minn. Stat. §466.05) Notice of claim apparently is non-jurisdictional. (356 N.W.2d 655).

See also category 11 Employment, topic 11.02 Labor Relations, subhead Workers' Compensation Act.

5.16A PARTITION:

When two or more persons are interested either as joint tenants or as tenants in common, in realty in which one or more have an estate of inheritance, or for life or for years, an action may be brought by one or more such persons, against the others for partition thereof, according to respective rights and interests of parties interested therein, or for sale of such property, or a part thereof, if it appears that a partition cannot be had without great prejudice to owners. When title is established, court must render judgment that partition be made accordingly, and appoint three referees to make partition and to set off shares of persons interested as determined by judgment. (Minn. Stat. c. 558). Orders and interlocutory judgments are appealable. (Minn. Stat. §558.215).

5.17 [RESERVED]

5.18 PLEADING:

Pleading in district court actions governed by Rules of Civil Procedure which generally follow Federal Rules of Civil Procedure. (Minn. R. Civ. P. 7-16). Pleadings for unliquidated claims for relief in excess of $50,000 may not specify amount but shall merely state that recovery of reasonable damages in amount greater than $50,000 is sought. (Minn. Stat. §544.36).

Proof of Claims.

No special requirements with respect to proof of claims sent from other jurisdictions for collection. However, nonresident plaintiff or foreign corporation must post security cost bond of $75. (Minn. Stat. §549.18).

Small Claims.

See category 6 Courts and Legislature, topic 6.01 Courts.

Frivolous claims may be penalized pursuant to both statute and court rule. (Minn. Stat. §549.211, Minn. R. Civ. P. 11). All pleadings must contain acknowledgment that party may be sanctioned for asserting frivolous claims or defenses. (Minn. Stat. §549.211).

5.19 PRACTICE:

Proceedings in civil actions in district court and in county court with concurrent jurisdiction regulated by Rules of Civil Procedure adopted by Supreme Court pursuant to enabling act. (Minn. Stat. §§480.051-.058). All other proceedings in county court and all proceedings in municipal court governed by virtually identical Rules of Civil Procedure adopted by Supreme Court. Rules are generally patterned after Federal Rules of Civil Procedure. District, county and municipal courts also may adopt practice rules not in conflict with rules promulgated by Supreme Court. (Minn. Stat. §480.055). Also excepted are certain statutory proceedings, so far as they are inconsistent, including marriage dissolution, mechanics' liens, wrongful death, partition of real estate, tax proceedings, proceedings relating to trusts, registration of title to lands, eminent domain, adoption and change of name. (Minn. R. Civ. P. 81.01).

Direct Actions Against Insurer.

See category 23 Transportation, topic 23.01 Motor Vehicles, subhead Direct Actions.

Small Claims.

See category 6 Courts and Legislature, topic 6.01 Courts.

See also topics 5.02 Actions, Appeal and Error, Depositions and Discovery, Injunctions, Judgments, Pleading, Process; category 8 Debtor and Creditor, topics 8.02 Attachment, 8.05 Executions, 8.09 Garnishment.

5.20 PROCESS:

Federal Rules form the basis of Rules of Civil Procedure. See topics 5.02 Actions, 5.19 Practice.

Who May Serve.

Summons may be served by sheriff or any person at least 18 years of age not party to action. (Minn. R. Civ. P. 4.02).

Personal service on individual is made by delivering copy to individual personally, or by leaving copy at individual's usual place of abode with resident of suitable age and discretion or according to statutory appointments or designations. If individual confined to state institution, must also serve chief executive officer thereof. If individual under 14, must also serve parent; if no parent in state, then resident guardian, if known; if none, person having control of individual or with whom individual resides or by whom individual is employed. (Minn. R. Civ. P. 4.03[a]).

Personal service on partnership or association is made by delivering copy to member or managing agent, or according to statutory appointments or designations. (Minn. R. Civ. P. 4.03[b]).

Personal service on unions, groups or associations is made by delivering copy to officer or managing agent of association, or in case of union or association having property or members outside of state and engaging in activities in state, except union subject to federal Railway Labor Act, by filing process, notice or demand with Secretary of State along with $35 fee, provided that notice of service and copy of process be sent by mail within ten days to union or association at its last known address. (Minn. Stat. §5.25[2]; Minn. Stat. §§540.152-.153).

Personal service on domestic or foreign corporation is made by delivering copy to officer or managing agent or authorized or designated statutory agent pursuant to statutory provision for manner of service. May serve express or transportation corporation by delivering copy to ticket, freight or soliciting agent in county where action brought, or, if foreign corporation and no agent in such county, to agent anywhere in state. (Minn. R. Civ. P. 4.03[c]). If private domestic corporation has no officer at registered office in state upon whom service can be made, of which return of sheriff or affidavit of private person not party is conclusive evidence, process may be served by depositing one copy and $35 fee with Secretary of State. (Minn. Stat. §5.25[1]; Minn. Stat. §543.08).

If foreign corporation authorized to transact business in state fails to appoint or maintain in state registered agent on whom service may be had, or if such registered agent cannot be found at its registered office in state, or if corporation has withdrawn from state or its certificate of authority has been revoked or cancelled, service may be made by delivering to Secretary of State one copy of process and fee of $50, provided that where corporation has withdrawn, service may be made only when based upon liability or obligation incurred in state or arising from business done in state prior to withdrawal. When summons so served on Secretary of State, corporation has 30 days from date of mailing by Secretary to corporation within which to answer. If foreign corporation makes contract with state resident to be performed in whole or part in state or commits tort in whole or part in state against state resident, service may be made by delivering to Secretary of State one copy of process and fee of $50, and corporation has 30 days from date of mailing by Secretary within which to answer. (Minn. Stat. §5.25[4]; Minn. Stat. §303.13).

Personal service on foreign insurance company may be made by copy of process with Commissioner of Commerce, but such service is not effective unless plaintiff sends Notice of Service and copy of process to defendant via certified mail at defendant's last known address and plaintiff files Affidavit of Compliance on or before return day of process, if any, or within further time as court allows. (Minn. Stat. §45.028).

Personal Service Outside the State.

Minnesota court with subject matter jurisdiction has personal jurisdiction over foreign corporation or nonresident individual who: (1) Owns, uses or possesses property in state, (2) transacts any business in state, (3) commits act in state causing injury or property damage, or (4) commits act outside state causing injury or property damage in state unless Minnesota has no substantial interest in providing forum, or jurisdiction would violate fairness and substantial justice or cause of action lies in defamation or privacy. Process may be served personally outside state on any such nonresident in actions arising out of above enumerated activities within state. (Minn. Stat. §543.19, subdiv. 1, 2).

Service by publication may be made when (1) defendant is resident individual having departed from the state with intent to defraud creditors or to avoid service or remains concealed within state with like intent, (2) plaintiff has acquired lien upon property within state by attachment or garnishment and defendant is nonresident individual, foreign corporation, partnership or association, or resident individual who has departed from the state or cannot be found therein, (3) action is for marriage dissolution or separate maintenance and court has ordered that service be made by publication, (4) subject of action is real or personal property within state in or upon which defendant has or claims lien or interest, or relief demanded consists wholly or partly in excluding him from any such interest or lien, or (5) action is to foreclose mortgage or to enforce lien on real estate within state. Service is made by three weeks published notice after filing complaint and affidavit stating one of above cases and that defendant is not resident or cannot be found and that copy of summons has been mailed to defendant's residence or that residence is unknown. Service of summons deemed complete 21 days after first publication. Personal service outside state, proved by affidavit of server, has same effect as published notice. (Minn. R. Civ. P. 4.04). If title to, interest in, or lien upon real property is involved, notice must contain description of real property and statement of object of action. (Minn. R. Civ. P. 4.041). If defendant appears within ten days after completion of service by publication, copy of complaint must be served on him or his attorney within five days of appearance and defendant has at least ten days to answer. (Minn. R. Civ. P. 4.042). If no actual notice, defendant may defend before judgment, upon application to court for sufficient cause, and, except in marriage dissolution action, on such terms as may be just at any time within one year after judgment. (Minn. R. Civ. P. 4.043).

Nonresident Motorist.

See category 23 Transportation, topic 23.01 Motor Vehicles, subhead Action Against Nonresident.

Service on Process Agent.

Nonresident person or corporation owning or claiming any interest or lien in or upon lands in state may file with Secretary of State written agreement duly executed and acknowledged as deed (see category 21 Property, topic 21.06 Deeds) appointing resident agent to accept service of summons or process in any action or proceeding concerning such interest therein or lien thereon commenced in any court of state, except actions or proceedings for collection of taxes, and consenting to service of process or summons upon agent therein designated. Service shall be made on such agent and is in respects valid and binding upon principal. No service by publication can be made upon principal while agency is unrevoked. It may be revoked at any time, but not so as to affect any service previously made. (Minn. Stat. §557.01; Minn. R. Civ. P. 4.044).

Long Arm Statute.

See subhead Personal Service Outside the State, supra.

5.21 REPLEVIN:

Claimant of personal property may obtain possession prior to final judgment after notice to respondent and hearing. Recovery prior to notice and hearing authorized in certain circumstances. (Minn. Stat. §565.21 et seq.).

Proceedings.

Claimant seeking to recover property after service of summons and complaint but before final judgment is to proceed by motion, accompanied by affidavit which states: (1) Particular property sought to be recovered, (2) facts giving rise to claimant's right to possession, (3) facts showing respondent wrongfully detaining property, (4) if property is security, date and amount of original obligation, amount paid and amount now owing, (5) if breach of contract other than debt, contractual provision and related facts, and (6) good faith estimate of current market value. Motion, affidavit and notice of hearing served on respondent in same manner as summons in civil action in district court, or if respondent has appeared in action, in same manner as pleadings subsequent to summons. (Minn. Stat. §565.23, subdiv. 1). Notice of hearing, signed by claimant or attorney, to be in following form:

NOTICE OF HEARING

TO: [the Respondent]

A hearing will be held on the . . . . day of . . . ., 20. . . ., at . . . . o'clock, . . . M., [place] to determine whether the sheriff shall remove from your possession and deliver to [claimant] (hereinafter “claimant”) the following property:

[list property]

You have a right to appear at this hearing on your own behalf or with an attorney. You will have the opportunity to present defenses to the claimant's claims and to state reasons why the property described above should not be taken.

If the court determines that the claimant has a right to have possession of the property while this lawsuit is pending, you may nevertheless keep the property until the lawsuit is decided if you file with the court a surety bond in the amount of $. . . . . [In amount computed pursuant to section Minn. Stat. §565.25]. This amount is [1¼ times the claimant's estimate of the value of the property] [1½ times the claimant's claim against you]. If you believe the [value of the property] [amount of the claim] is overstated, you may ask the court to lower it.

If you do not appear at the hearing, the court has authority to issue an order directing that the above described property be immediately taken from your possession. (Minn. Stat. §565.23).

If at hearing claimant shows probability of success and complies with bonding requirements of Minn. Stat. §565.25, court orders seizure unless respondent shows defense to merits of claimant's claim, defense is fair basis for litigation, and defense would, if established at hearing on merits, entitle respondent to retain property; that respondent's interests cannot be adequately protected by claimant's bond if property is delivered to claimant prior to final decision on merits; and respondent would suffer substantially greater harm than harm to claimant if property not seized. If seizure refused, court shall issue order protecting claimant's rights to extent possible, including part payment of debt or bond by respondent. (Minn. Stat. §565.23).

Recovery Prior to Notice and Hearing.

Court may order prehearing seizure upon claimant's motion and affidavit if it finds: (1) Good faith effort to inform respondent of motion for prehearing seizure or such information would endanger ability to recover property, (2) claimant has shown probability of success on merits, (3) respondent about to remove property from state, conceal, damage or dispose of it, or other circumstances that will cause irreparable harm to claimant, and (4) claimant cannot be protected by order other than prehearing seizure. (Minn. Stat. §565.24, subdiv. 2). If seizure refused, court may issue order protecting claimant's interest pending notice and hearing. If seizure ordered, court to set hearing at earliest practicable time. Respondent shall be served, in manner prescribed for personal service of summons or by court order calculated to provide actual notice, with copy of order for prehearing seizure, all other pleadings, and notice of post-seizure hearing, signed by claimant or attorney, in following form:

NOTICE OF HEARING

Court action has been taken which affects the following property:

[list property]

[Claimant] (hereinafter “claimant”) has claimed that claimant is entitled to this property and that claimant's interest in this property would have been harmed unless this court took immediate action.

You have a right to challenge claimant's claims at a hearing before a judge. This hearing has been scheduled for the . . . . . . day of . . . . . ., 20. . . ., at . . . . . . o'clock . . . M., at [place] . . . . After this hearing the judge will decide, what should be done with the property pending a final decision on claimant's claim.

If court later finds motion for prehearing seizure made in bad faith, respondent may be awarded actual damages incurred by seizure. (Minn. Stat. §565.24).

Repossession.

Claimant must file bond, cash, cashier's or certified check prior to seizure in amount 1½ times fair market value of property seized. Respondent may retain or regain possession by filing bond in amount of lesser of 1¼ times fair market value of property or 1½ times claimant's claim. Current fair market value of property presumed as stated in affidavit unless court determines otherwise. (Minn. Stat. §565.25, subdiv. 2). Order of seizure may be stayed up to three days for respondent to post bond. (Minn. Stat. §565.23). Costs of regaining possession borne by respondent except where property seized before hearing ordered returned to respondent. (Minn. Stat. §565.25).

Court may allow respondent to retain or regain possession of property without filing bond and may stay claimant's action for reasonable time, not more than six months, if: (1) Respondent is unable to make required payments due to unforeseen economic circumstances beyond respondent's control, (2) respondent is dependent on use of property to earn living, (3) respondent insures property for fair market value, (4) respondent makes periodic payments to claimant representing depreciation in market value of property while respondent retains possession, in amount and during times determined by court, and (5) respondent makes periodic payments to claimant representing value of use of property or costs to claimant of lost opportunity to use property, in amount and during times determined by court. (Minn. Stat. §565.251).

Claims of Third Persons.

Party claiming interest in property or transaction which is subject of action may intervene by right if action may impair or impede ability to protect interest, or may, at court's discretion, be permitted to intervene if its claim or defense shares common question of fact or law with main action, and intervention would not unduly delay or prejudice rights of original parties. Intervention accomplished by filing and serving notice of intervention, accompanied by pleading, and motion to intervene. (Minn. R. Civ. P. 24).

Judgment or order may include damages claimed in complaint or answer which prevailing party has sustained by reason of detention, or taking and withholding, of property. (Minn. Stat. §546.23).

5.22 SEQUESTRATION:

Sequestration of property of corporation may be ordered where execution is returned unsatisfied. See category 8 Debtor and Creditor, topic 8.16 Receivers.

5.23 SERVICE:

See topic 5.20 Process.

5.24 STAY OF EXECUTION:

See topic 5.03 Appeal and Error; category 8 Debtor and Creditor, topic 8.05

Executions.

5.25 SUBMISSION OF CONTROVERSY:

Parties to controversy which might be subject of civil action may, without action, agree upon case containing facts on which controversy depends, and, upon affidavit that controversy is real and proceedings in good faith, submit same to any court which would have jurisdiction if an action had been brought, and such court can determine controversy and enter judgment. (Minn. Stat. §548.24).

5.26 VENUE:

Subject to exceptions noted below, every action tried in county where begun. (Minn. Stat. §542.01). Actions relating to recovery of real estate, foreclosure of mortgage or lien thereon, partition thereof, determination of form of estate or interest therein and for injuries to land within the state, must be tried in county of situs. (Minn. Stat. §542.02). Actions on cost bonds of nonresidents—where bond filed. (Minn. Stat. §542.05). Replevin—only where personal property taken, or where situated. (Minn. Stat. §542.06). Otherwise, county in which one or more defendants reside when action began or in which cause of action or some part thereof arose. (Minn. Stat. §542.09). Actions for recovery of wages or money due for manual labor may be brought in county where labor was performed. (Minn. Stat. §542.08).

Change of Venue.

As matter of right: When county designated in complaint is not proper county. To effect change, defendant must, within 20 days after summons is served, serve demand accompanied by affidavit reciting residence at time action commenced, date of service of summons, and stating that cause of action did not arise where suit started, on plaintiff's attorney. On filing this with proof of service thereon with court administrator in county where action originally begun within 30 days, unless cause of action or some part thereof arose in county where action begun, venue automatically changed. Where several defendants reside in different counties, and where county designated in complaint is not county where cause of action or some part thereof arose, majority of defendants demanding change governs, or if numbers are equal, in nearest county. (Minn. Stat. §542.10).

By order of court: (1) Upon written consent of parties; (2) where party made defendant for purpose of preventing change of venue; (3) where impossible to get impartial trial where venue is laid; (4) for convenience of witnesses and ends of justice. (Minn. Stat. §542.11). Where judge of district court under disability or has interest or bias, another judge assigned. (Minn. R. Civ. P. 63; Minn. Stat. §542.13; Minn. Stat. §542.16).

Action for recovery of wages due, if brought in county where work performed, can only be changed by written consent of plaintiff. (Minn. Stat. §542.08). Auto vehicle cases, if brought in county where action arose or where majority of defendants reside, can only be changed by written consent of plaintiff or court order. (Minn. Stat. §542.095).

Domestic corporation other than public service corporation is considered as residing where it has an office, resident agent or place of business. (Minn. Stat. §542.09).

6 COURTS AND LEGISLATURE

6.01 COURTS:

United States District Court.

Clerk's office: St. Paul 55101; Minneapolis 55415; Duluth 55802. Judges maintain chambers in Minneapolis and Saint Paul. Cases emanating from first, second, third, fourth and sixth divisions are assigned to either third or fourth division based on location of chambers of judge to whom case is assigned. Cases emanating from fifth division are assigned to fifth division. Files are maintained in division to which case is assigned. Papers relative to any case may be filed in any office of clerk of court. (D. Minn. LR 83.11). Electronic case filing has been implemented for all civil and criminal matters in District. See "Electronic Case Filing Procedures for the District of Minnesota," on court's website, http://www.mnd.uscourts.gov. (D. Minn. LR 5.1). St. Paul courthouse will be closed for remodeling until Fall 2008. See http://www.mnd.uscourts.gov for information.

There are six divisions of United States District Court for Minnesota. (28 U.S.C. §103; D. Minn. LR 83.11[a]).

First Division is composed of following counties: Dodge, Fillmore, Houston, Mower, Olmsted, Steele, Wabasha, Winona.

Division seat is at Winona.

Second Division is composed of following counties: Blue Earth, Brown, Cottonwood, Faribault, Freeborn, Jackson, Lac qui Parle, LeSueur, Lincoln, Lyon, Martin, Murray, Nicollet, Nobles, Pipestone, Redwood, Rock, Sibley, Waseca, Watonwan, Yellow Medicine.

Division seat is at Mankato.

Third Division is composed of following counties: Chisago, Dakota, Goodhue, Ramsey, Rice, Scott, Washington.

Division seat is at Saint Paul.

Fourth Division is composed of following counties: Anoka, Carver, Chippewa, Hennepin, Isanti, Kandiyohi, McLeod, Meeker, Renville, Sherburne, Swift, Wright.

Division seat is at Minneapolis.

Fifth Division is composed of following counties: Aitkin, Benton, Carlton, Cass, Cook, Crow Wing, Itasca, Kanabec, Koochiching, Lake, Mille Lacs, Morrison, Pine, St. Louis.

Division seat is at Duluth.

Sixth Division is composed of following counties: Becker, Beltrami, Big Stone, Clay, Clearwater, Douglas, Grant, Hubbard, Kittson, Lake of the Woods, Mahnomen, Marshall, Norman, Otter Tail, Pennington, Polk, Pope, Red Lake, Roseau, Stearns, Stevens, Todd, Traverse, Wadena, Wilkin.

Division seat is at Fergus Falls.

Supreme Court of Minnesota.

Jurisdiction.

Original jurisdiction in cases prescribed by (Minn. Stat. §480.04), such as writs of error, certiorari, mandamus, prohibition, quo warranto, etc. Court is always open for issuance and return of such writs and for hearing and determination of all matters involved therein. Appellate jurisdiction in all cases and original jurisdiction in remedial cases as prescribed by law, but no trial by jury. (Minn. Const. art. 6, §2).

Court sits at St. Paul. (Minn. Stat. §480.01). Argument takes place at state capital, Minnesota Judicial Center in St. Paul, or at any other place designated by Supreme Court. (Minn. R. App. P. 134.09).

Court of Appeals.

Court of appeals, intermediate appellate court, established effective Aug. 1, 1983. Court has appellate jurisdiction over interlocutory decisions, and other matters, pursuant to provisions of appellate procedure rules and over final decisions of trial courts except decisions of conciliation courts, decisions in legislative or statewide election contests, and decisions involving first-degree murder convictions. Court also has jurisdiction over appeals from administrative agencies in contested cases pursuant to Minn. Stat. §14.63 to Minn. Stat. §14.69, review of administrative rules pursuant to Minn. Stat. §14.44 and Minn. Stat. §14.55, and appeals from decisions of Commissioner of Economic Security pursuant to Minn. Stat. 268.11. Court also has jurisdiction to issue writs of certiorari to all agencies, public corporations and public officials except Tax Court and Workers' Compensation Court of Appeals. (Minn. Stat. §480A.06).

Court of appeals consists of 16 judges. Number of judges determined by statutory formula. (Minn. Stat. §480A.01[3]). Decisions are by three-member panels with rotating memberships. (Minn. Stat. §480A.08[1], [2]). Decisions must be issued within 90 days following later of oral argument or final submission of briefs, whichever is later. Chief justice or chief judge may waive 90-day limitation if good cause is shown. Court of appeals may publish only those decisions that: (1) Establish new rule of law; (2) overrule previous court of appeals decision not reviewed by supreme court; (3) provide important procedural guidelines in interpreting statutes or administrative rules; (4) involve significant legal issue; or (5) significantly aid in administration of justice. (Minn. Stat. §480A.08[3]). Statement of decision without written opinion of Court of Appeals must not be officially published and must not be officially cited except as law of case, res judicata or collateral estoppel. (Minn. Stat. §480A.08[3]). Chambers located in St. Paul. Court may sit in each judicial district. (Minn. Stat. §480A.05; Minn. Stat. §480A.09).

District Courts of Minnesota.

Original jurisdiction in all civil and criminal actions, in all special proceedings not specially cognizable in another tribunal, in law and equity for administration of estates of deceased persons, in all guardianship and incompetency proceedings, in juvenile court matters, in proceedings for management of property of persons who have disappeared, and in all other cases in which jurisdiction specifically conferred by law. In addition, also have such appellate jurisdiction as prescribed by law. (Minn. Stat. §484.01; Minn. Const. art. 6, §3). Power to issue writs of injunction, ne exeat, certiorari, habeas corpus, mandamus, quo warranto, abatement of nuisance and all other writs, processes and orders necessary to complete exercise of jurisdiction. (Minn. Stat. §484.03).

Districts.

First Judicial District: Counties of Carver, Dakota, Goodhue, Le Sueur, McLeod, Scott, and Sibley.

Second Judicial District: County of Ramsey.

Third Judicial District: Counties of Dodge, Fillmore, Freeborn, Houston, Mower, Olmsted, Rice, Steele, Wabasha, Waseca, and Winona.

Fourth Judicial District: County of Hennepin.

Fifth Judicial District: Counties of Blue Earth, Brown, Cottonwood, Faribault, Jackson, Lincoln, Lyon, Martin, Murray, Nicollet, Nobles, Pipestone, Redwood, Rock, and Watonwan.

Sixth Judicial District: Counties of Carlton, Cook, Lake, and St. Louis.

Seventh Judicial District: Counties of Becker, Benton, Clay, Douglas, Mille Lacs, Morrison, Otter Tail, Stearns, Todd, and Wadena.

Eighth Judicial District: Counties of Big Stone, Chippewa, Grant, Kandiyohi, Lac qui Parle, Meeker, Pope, Renville, Stevens, Swift, Traverse, Wilkin, Yellow Medicine.

Ninth Judicial District: Counties of Aitkin, Beltrami, Cass, Clearwater, Crow Wing, Hubbard, Itasca, Kittson, Koochiching, Lake of the Woods, Mahnomen, Marshall, Norman, Pennington, Polk, Red Lake, and Roseau.

Tenth Judicial District: Counties of Anoka, Chisago, Isanti, Kanabec, Pine, Sherburne, Washington, and Wright.

Place of Sitting.

Aitkin County: Ninth District; court sits at Aitkin.

Anoka County: Tenth District; court sits at Anoka.

Becker County: Seventh District; court sits at Detroit Lakes.

Beltrami County: Ninth District; court sits at Bemidji.

Benton County: Seventh District; court sits at Foley.

Big Stone County: Eighth District; court sits at Ortonville.

Blue Earth County: Fifth District; court sits at Mankato.

Brown County: Fifth District; court sits at New Ulm.

Carlton County: Sixth District; court sits at Carlton.

Carver County: First District; court sits at Chaska.

Cass County: Ninth District; court sits at Walker.

Chippewa County: Eighth District; court sits at Montevideo.

Chisago County: Tenth District; court sits at Center City.

Clay County: Seventh District; court sits as Moorhead.

Clearwater County: Ninth District; court sits at Bagley.

Cook County: Sixth District; court sits at Grand Marais.

Cottonwood County: Fifth District; court sits at Windom.

Crow Wing County: Ninth District; court sits at Brainerd.

Dakota County: First District; court sits at Hastings.

Dodge County: Third District; court sits at Mantorville.

Douglas County: Seventh District; court sits at Alexandria.

Faribault County: Fifth District; court sits at Blue Earth.

Fillmore County: Third District; court sits at Preston.

Freeborn County: Third District; court sits at Albert Lea.

Goodhue County: First District; court sits at Red Wing.

Grant County: Eighth District; court sits at Elbow Lake.

Hennepin County: Fourth District; court sits at Minneapolis.

Houston County: Third District; court sits at Caledonia.

Hubbard County: Ninth District; court sits at Park Rapids.

Isanti County: Tenth District; court sits at Cambridge.

Itasca County: Ninth District; court sits at Grand Rapids.

Jackson County: Fifth District; court sits at Jackson

Kanabec County: Tenth District; court sits at Mora.

Kandiyohi County: Eighth District; court sits at Willmar.

Kittson County: Ninth District; court sits at Hallock.

Koochiching County: Ninth District; court sits at International Falls.

Lac qui Parle County: Eighth District; court sits at Madison.

Lake County: Sixth District; court sits at Two Harbors.

Lake of the Woods County: Ninth District; court sits at Baudette.

LeSueur County: First District; court sits at LeCenter.

Lincoln County: Fifth District; court sits at Ivanhoe.

Lyon County: Fifth District; court sits at Marshall.

Mahnomen County: Ninth District court sits at Mahnomen.

Marshall County: Ninth District; court sits at Warren.

Martin County: Fifth District; court sits at Fairmount.

McLeod County: First District; court sits at Glencoe.

Meeker County: Eighth District; court sits at Litchfield.

Mille Lacs County: Seventh District; court sits at Milaca.

Morrison County: Seventh District; court sits at Little Falls.

Mower County: Third District; court sits at Austin.

Murray County: Fifth District; court sits at Slayton.

Nicollet County: Fifth District; court sits at St. Peter.

Nobles County: Fifth District; court sits at Worthington.

Norman County: Ninth District; court sits at Ada.

Olmsted County: Third District; court sits at Rochester.

Otter Tail County: Seventh District; court sits at Fergus Falls.

Pennington County: Ninth District; court sits at Thief River Falls.

Pine County: Tenth District; court sits at Pine City.

Pipestone County: Fifth District; court sits at Pipestone.

Polk County: Ninth District; court sits at Crookston.

Pope County: Eighth District; court sits at Glenwood.

Ramsey County: Second District; court sits at St. Paul.

Red Lake County: Ninth District; court sits at Red Lake Falls.

Redwood County: Fifth District; court sits at Redwood Falls.

Renville County: Eighth District; court sits at Olivia.

Rice County: Third District; court sits at Faribault.

Rock County: Fifth District; court sits at Luverne.

Roseau County: Ninth District; court sits at Roseau.

St. Louis County: Sixth District; terms at Duluth, terms at Virginia, terms at Hibbing.

Scott County: First District; court sits at Shakopee.

Sherburne County: Tenth District; court sits at Elk River.

Sibley County: First District; court sits at Gaylord.

Stearns County: Seventh District; court sits at St. Cloud.

Steele County: Third District; court sits at Owatonna.

Stevens County: Eighth District; court sits at Morris.

Swift County: Eighth District; court sits at Benson.

Todd County: Seventh District; court sits at Long Prairie.

Traverse County: Eighth District; court sits at Wheaton.

Wabasha County: Third District; court sits at Wabasha.

Wadena County: Seventh District; court sits at Wadena.

Waseca County: Third District; court sits at Waseca.

Washington County: Tenth District; court sits at Stillwater.

Watonwan County: Fifth District; court sits at St. James.

Wilkin County: Eighth District; court sits at Breckenridge.

Winona County: Third District; court sits at Winona.

Wright County: Tenth District; court sits at Buffalo.

Yellow Medicine County: Eighth District; court sits at Granite Falls.

Conciliation courts may hear civil claims up to $7,500 or, if consumer credit transaction involved, $4,000. (Minn. Stat. §491A.01[3][a]). Procedure is very informal and customarily without attorneys.

Alternative Dispute Resolution.

Pilot project under way in Second and Fourth Judicial Districts (Hennepin and Ramsey Counties) to utilize various forms of nonbinding alternative dispute resolution in litigation involving amounts in excess of $7,500. (Minn. Stat. §484.74).

Small Claims Court.

See subhead Conciliation Courts, supra.

6.02 LEGISLATURE:

Meets in regular session each biennium for not more than 120 legislative days. Governor may call special sessions. (Minn. Const. art. 4, §12). No current provision for initiative or referendum. Lobbyist registration required (Minn. Stat. §10A.03) and lobbying activities regulated (Minn. Stat. §10A.01 et seq.).

6.03 REPORTS:

Minnesota Reports cover from 1850 to 1977. Decisions from 1850-1874 reported both in Minnesota Reports, volumes 1-20, and in Gilfillan Edition, volumes 1-20. Minnesota decisions are now officially reported in North Western Reporter 2nd.

Digests are Dunnell Minnesota Digest and West's Minnesota Digest.

6.04 STATUTES:

Minnesota Statutes 1994 constitutes latest official compilation of state statutes.

Uniform Acts which have been adopted are: Anatomical Gift (1969, 1985); Arbitration (1957, 1981); Attendance of Witnesses from Without a State in Criminal Proceedings (1935, 1985); Business Records as Evidence (1939); Certification of Questions of Law (1973, 1983); Child Custody Jurisdiction and Enforcement (1999); Code of Military Justice (1963, 1983); Commercial Code (1965, 1987); Condominium (1980, 1985); Conservation Easement (1985); †Controlled Substances (1971, 1987); Criminal Extradition (1939, 1985); Deceptive Trade Practices (1973, 1987); Declaratory Judgments (1933, 1943); Determination of Death (1989); Disposition of Unclaimed Property; Division of Income for Tax Purposes (1983); Duties to Disabled Persons (1973); Enforcement of Foreign Judgments (1977, 1983); Evidence, Rules of (1977, 1987); Federal Lien Registration, Revised (1979, 1985); Fiduciaries (1945, 1961); Foreign Country Money-Judgment Recognition (1985); Fraudulent Transfer (1987); Fresh Pursuit (1939); International Wills (1978); †Interstate Arbitration of Death Taxes (1951, 1978); Interstate Compromise of Death Taxes (1951, 1978); Interstate Family Support (1994); Jury Selection and Service (1977, 1987); Limited Partnership (1919, 1976); 1976 Limited Partnership (1980, 1987); Management of Institutional Funds (1973, 1987); Mandatory Disposition of Detainers (1967, 1985); Motor Vehicle Certificate of Title and Anti-Theft (1971, 1985); Notarial Acts (1985); †Parentage (1980, 1985); Partnership (1921, 1984); Photographic Copies of Business and Public Records as Evidence (1951, 1953); Post-Conviction Procedure (1967, 1983); Principal and Income, Revised (1969); Probate Code (part) (1974, 1985); Prudent Investor (1996); †Securities (1973, 1987); Simplification of Fiduciary Security Transfers (1961); Simultaneous Death (1943); Statutory Rule Against Perpetuities (1987); Subdivided Land Sales Practices (1973, 1985); Testamentary Additions to Trusts (1963, 1975); Trade Secrets (1980, 1987); Transfer of Dependents (1955); Transfers to Minors (1985, 1987).

For text of Uniform Acts falling within scope of Martindale-Hubbell Law Digests, see Uniform and Model Acts section.

† Adopted with significant variations or modifications. See appropriate topics.

6.05 UNIFORM LAWS:

For a list of Uniform Acts in force in this state see topic 6.04 Statutes. For text of Uniform Acts within the scope of the Martindale-Hubbell Law Digests see Uniform and Model Acts section.

7 CRIMINAL LAW

7.00A BAIL:

See topic 7.01 Criminal Law.

7.01 CRIMINAL LAW:

Criminal Code is contained in Minn. Stat. §609.001 et seq., and Code of Criminal Procedure is contained in Minn. Stat. §625.01 et seq.. Rules of Criminal Procedures (Minn. R. Crim. P. §1.01 to Minn. R. Crim. P. §36.08) adopted under Minn. Stat. §480.059.

Criminal Code of 1963 adopted. (Minn. Stat. c. 609).

Indictment or Information.

Offenses punishable by life imprisonment prosecuted by indictment. Other offenses may be prosecuted by indictment or complaint. Misdemeanors and designated gross misdemeanors may also be prosecuted by tab charge but complaint must follow for designated gross misdemeanors. (Minn. R. Crim. P. 17.01).

Bail.

Excessive bail may not be required. (Minn. Const. art. I, §5). All persons bailable by sufficient sureties before conviction except for capital offenses in which proof is evident or presumption great. (Minn. Const. art. I, §7). Accused must be ordered released pending trial or hearing on his personal recognizance, on order to appear, or on unsecured appearance bond in specified amount, unless it is determined that such release will be inimical of public safety or will not reasonably assure appearance of person. (Minn. R. Crim. P. 6.02). Maximum cash bail that may be required for misdemeanor or gross misdemeanor violation offense is double highest cash fine that may be imposed for that offense (Minn. Stat. §629.471[1]); however, for motor vehicle accidents (Minn. Stat. §169.09), driving while impaired (Minn. Stat. §169A.20), gross misdemeanor driving without valid license (Minn. Stat. §171.24, subdiv. 5) and bringing stolen goods into state (Minn. Stat. §609.525), maximum cash bail is quadruple highest cash fine that can be imposed (Minn. Stat. §629.471[2]). For domestic abuse (Minn. Stat. §518B.01), fifth-degree assault (Minn. Stat. §609.224), and domestic assault (Minn. Stat. §609.2242), and malicious punishment of child (Minn. Stat. §609.377), maximum cash bail is six times highest paid fine that can be imposed (Minn. Stat.§629.471[3]). Maximum cash bail provisions not applicable to persons charged with felony driving while impaired. (Minn. Stat. §629.471[4]).

Uniform Criminal Extradition Act adopted. (Minn. Stat. §§629.01-.291).

Uniform Act to Secure Attendance of Witnesses from without State in Criminal Proceedings adopted. (Minn. Stat. §§634.06-.09).

Uniform Act on Fresh Pursuit adopted. (Minn. Stat. §§626.65-70).

Interstate Compact for Adult Supervision adopted. (Minn. Stat. §243.1605).

Interstate Compact on Juveniles adopted. (Minn. Stat. §260.51).

8 DEBTOR AND CREDITOR

8.01 ASSIGNMENTS:

Uniform Commercial Code adopted. (Minn. Stat. c. 336). See also category 3 Business Regulation and Commerce, topic 3.09 Commercial Code.

All causes of action which survive to personal representative of decedent are assignable. (150 Minn. 476; 185 N.W. 656).

Claim for personal tort, before judgment, is not assignable. (53 Minn. 249; 54 N.W. 1108). Vendor's lien on real estate is generally not assignable (44 Minn. 482; 47 N.W. 53), but vendor's interest in payments on contract for deed can be assigned. If assigned for security, perfection should be made as though interest were in both real and personal property. (784 F.2d 883).

Partial assignment is valid, but all parties interested must be joined in an action by assignee, so that whole controversy may be determined in one suit. (55 Minn. 122; 56 N.W. 586).

Effect.

Assignee of a thing in action takes subject to all defenses and setoffs existing at time of notice to debtor of assignment (Minn. Stat. §540.03) unless party with setoff rights acknowledges assignment (439 N.W.2d 53). This rule is not applicable to bona fide purchaser of negotiable instrument. See category 3 Business Regulation and Commerce, topic 3.09 Commercial Code.

Assignment of Wages.

Every assignment of wages or salaries to be earned more than 60 days from date of assignment is void, except assignment of wages or salaries in excess of first $1,500 per month for less than five years and except that employee may, by written contract, authorize employer to make payroll deductions to pay union dues, insurance premiums, group annuities or contributions to credit unions, community chest fund, local arts and/or science councils, Minnesota benefit association, federally or state registered political action committee, or participation in employee stock purchase or savings plan, for periods longer than 60 days. (Minn. Stat. §181.06).

No valid action can be maintained on assignment of unearned wages unless written notice and copy of assignment is given to employer within three days after assignment and employer's consent is obtained. (Minn. Stat. §§181.04, .05). When unearned wages are assigned as security for loan of less than $200, employer must consent thereto and assignment and consent must be filed with clerk of court at assignor's residence or at place of employment of nonresident. Spouse must give written consent to any assignment of unearned wages by married person. (Minn. Stat. §181.07).

Officials and employees of state or any political subdivision of state may assign salary or wages to same extent as employees of private employers. (Minn. Stat. §181.063).

See category 5 Civil Actions and Procedure, topic 5.15 Judgments.

8.02 ATTACHMENT:

All property not exempt from execution under judgment demanded in civil action (see topic 8.06 Exemptions) may be subject to attachment. (Minn. Stat. §570.01).

Actions in Which Allowed.

Order for attachment is available as proceeding ancillary to any civil action for recovery of money. (Minn. Stat. §570.01).

Claims on Which Attachment Ordered.

Not necessary that claim sued on be payable in state.

Who May Issue Order.

Only judge of court in county in which civil action is pending may issue order. (Minn. Stat. §570.01).

Grounds.

Attachment intended to provide security for satisfaction of judgment allowed only when: (1) Respondent, with intent to delay or defraud creditors, has assigned, secreted or disposed of nonexempt property or is about to do so; (2) respondent, with intent to delay or defraud creditors, has removed nonexempt property from state or is about to do so; (3) respondent has converted or is about to convert nonexempt property into money or credit for purpose of placing such property beyond reach of creditors; (4) respondent has committed intentional fraud forming basis for civil action; (5) respondent has been convicted of felony forming basis for civil action; or (6) when respondent has violated law of this state respecting unfair discriminatory, and other unlawful practices in business, commerce, or trade, including but not limited to any of statutes specifically enumerated in Minn. Stat. §8.31, subdiv. 1. Attachment which acquires quasi-in-rem jurisdiction is allowed to extent consistent with due process of law. (Minn. Stat. §570.02, subdiv. 1).

Proceedings to Obtain.

Absent extraordinary circumstances warranting securing of property prior to hearing, claimant seeking order of attachment must proceed by motion accompanied by affidavit setting forth: (1) Basis and amount of civil action claim; and (2) facts constituting grounds for attachment. (Minn. Stat. §570.026, subdiv. 1). Respondent must also be served with notice of hearing setting forth specific information found in statute, including notice of exemption. To succeed, claimant must demonstrate probability of success on merits, and grounds for attachment. Claimant may also have to demonstrate risk of uncollectability of any subsequently awarded judgment or absence of non-frivolous defense or counterclaim which cannot be adequately protected by claimant's bond and that disproportionate amount of harm would not be suffered by respondent. (Minn. Stat. §570.026, subdiv. 1).

Preliminary Attachment Order.

Where extraordinary circumstances exist, claimant may make written application for prehearing preliminary attachment order. Application must be accompanied by affidavit setting forth: (1) Basis and amount of civil action claim; (2) facts constituting grounds for attachment; and (3) good faith estimate of harm to respondent if preliminary attachment order is issued.

Preliminary attachment order will be issued only where: (1) Claimant has made good faith effort to notify respondent of application or has demonstrated that notice would endanger collectability of any subsequently awarded judgment; (2) claimant has demonstrated probability of success on merits; (3) claimant has demonstrated grounds for attachment; and (4) extraordinary circumstances prevent claimant's interests from being protected in another way pending hearing. (Minn. Stat. §570.025, subdiv. 2).

Bond.

In any proceeding for order of attachment, claimant must either provide bond for at least $500 or deposit cash, letter of credit, cashier's check or certified check with court. (Minn. Stat. §570.041).

Levy made by officer in case of execution must be done within 90 days of date of order. In case of executing on real estate, officer shall file certified copy of order and of return of attachment with description of real estate filed with county recorder or registrar of titles if registered property, where land situated, and serve copy on respondent. This creates lien on real estate at time of filing. Perishable property must be sold. (Minn. Stat. §570.061).

Release of Property.

Any party may obtain vacation of attachment order or release of property before entry of judgment upon bond or other condition as ordered by court. Attachment expires on demand of respondent or upon discretion of sheriff where: (1) summons and complaint delivered to sheriff for service and such service not obtained within 60 days after issuance of order for attachment; (2) judgment is entered in favor of respondent; (3) claimant fails to obtain judgment within three years after issuance of order for attachment; or (4) property subject to attachment is not applied to judgment within six months after judgment becomes final and nonappealable. (Minn. Stat. §570.131, subdiv. 2).

Attachment of real estate is released by filing with county recorder or registrar of titles if registered property: certified copy of order vacating attachment or of final judgment for respondent or of satisfaction of judgment for claimant, certificate of satisfaction or discharge of attachment executed and acknowledged by claimant or his attorney, or deed of release of attached premises. (Minn. Stat. §570.11).

8.03 CONSUMER CREDIT

Consumer protection provisions generally, see topic 3.12 Consumer Protection.

Collection agency practices regulated by Minn. Stat. §§332.31 to 332.45.

Credit services organizations required to register; regulated by Minn. Stat. §§332.52 to 332.70.

Debt management services organizations required to register; regulated by Minn. Stat. §§332A.02 to 332A.19.

Debt settlement services organizations required to register; regulated by Minn. Stat. §§332B.02 to 332B.14.

8.04 CREDITORS' SUITS:

No statutory provisions.

8.05 EXECUTIONS:

District Court.

Party may proceed to enforce judgment, unless stayed or enjoined, at any time within ten years of entry thereof. (Minn. Stat. §550.01). There are two kinds of executions, one for delivery of possession of real or personal property, other against property of judgment debtor. (Minn. Stat. 550.03). Writ of execution expires 180 days after issuance. (Minn. Stat. §550.051, subdiv. 1). Alias execution may issue. (29 Minn. 87; 12 N.W. 145). All property, real and personal, equitable as well as legal estates (45 Minn. 341; 48 N.W. 187) may be levied on and sold (Minn. Stat. §550.10). If against joint debtors, judgment is joint in form and levied on all joint property and on separate property of person served with summons and complaint. (Minn. Stat. §550.04[4]). If judgment requires performance of any act other than payment of money or delivery of property, certified copy of judgment is served and compliance enforced by court. (Minn. Stat. §550.02). Thirty days after judgment is docketed, judgment creditor may request district court to order judgment debtor to mail to judgment creditor information as to judgment debtor's assets, etc. Judgment debtor's failure to comply may result in citation for contempt of court. (Minn. Stat. §550.011).

Exemptions.

See topic 8.06 Exemptions.

Stay of Execution.

District Court.

Six month stay is created by filing with clerk bond in double amount of judgment plus interest, approved by court, within ten days of entry of judgment in recovery of money only. (Minn. Stat. §550.36). For amount of interest, see category 3 Business Regulation and Commerce, topic 3.17 Interest, subhead Judgments.

Attorney's Summary Executions.

After obtaining writ of execution under Minn. Stat. §550.04, attorney for judgment creditor may execute money judgment by levying on indebtedness owed to judgment debtor by third party, including financial institutions, employers, etc. (Minn. Stat. §551.01; Minn. Stat. §551.05; Minn. Stat. §551.06). No more than $10,000 may be recovered by single notice of execution and no more than one execution per day may be served on single third party by judgment creditor. (Minn. Stat. §551.01). Procedure for summary execution is set forth in Minn. Stat. §551.04.

Levy.

No formal levy on real estate is necessary. (127 Minn. 203; 149 N.W. 199). Personal property capable of manual delivery is levied on by officer taking it into his custody. (Minn. Stat. §550.12). Levy may be made on bulky articles by filing certified copy of execution in appropriate filing office under Uniform Commercial Code. (Minn. Stat. §550.13). See category 3 Business Regulation and Commerce, topic 3.09 Commercial Code.

Other personal property not capable of manual delivery is levied on by leaving copy of execution and notice specifying property levied on with person holding same or, in case of debt, with judgment debtor, or in case of stock, or interest in stock of corporation with its president, secretary, treasurer, cashier, officer or managing agent. (Minn. Stat. §550.135[2]). In case of judgment debt from money owed judgment debtor by third party, levy may be made by sheriff through service of writ of execution on third-party by registered or certified letter or by personal service. (Minn. Stat. §550.135[3]).

Return.

In case of partial or full satisfaction, return of writ must be made to court administrator originally issuing writ with duplicate to court administrator of officer's county. (Minn. Stat. §550.051[2]).

Third Party Claims.

See category 5 Civil Actions and Procedure, topic 5.21 Replevin.

Sale.

Ten days posted notice of sale, giving time and place, is necessary prerequisite to sale of personal property; six weeks posted and published notice in case of real estate, together with description thereof. (Minn. Stat. §550.18). If sale is of personal property, at or before time of posting notice of sale, officer shall serve copy of execution and inventory, and of notice, upon judgment debtor, if debtor is a resident of the county, in manner required by law for service of summons in civil action. If sale is of real property, judgment creditor must, at least four weeks before appointed time of sale, serve copy of notice of sale in like manner as a summons in civil action in district court upon judgment debtor if judgment debtor is a resident of county and upon any person in possession of homestead other than judgment debtor. Notice of sale must also be served upon persons who have recorded a request for notice under Minn. Stat. §580.032. (Minn. Stat. §550.19, supp.; 2007 Minn. H.F. No. 3420, art. 5, §3).

Sale must take place where property situated, and, if personal property, it must be in view. Must be sold in parcels such as are likely to bring highest price, and no more may be sold than necessary. (Minn. Stat. §550.20). Where real estate is sold, officer making sale executes and gives to purchaser certificate describing execution, property, date of sale, name of purchaser, price paid, time allowed for redemption, interest rate in effect on date of sheriff's sale, and amount of debtor's homestead exemption, if any. If recorded, it operates as conveyance when time for redemption expires. (Minn. Stat. §550.22).

Redemption.

No redemption of personal property or of leasehold having less than two years' unexpired term. Real estate may be redeemed by judgment debtor, heirs, legal representatives or assigns within one year after date of sale by paying amount for which property was sold with interest at judgment rate. Creditors having lien on property may redeem in manner provided in Minn. Stat. §580.24 if there was no redemption during redemption period. (Minn. Stat. §550.24). Creditor of deceased debtor may redeem. (Minn. Stat. §§550.30-550.35). During year of redemption, holder of any sheriff's certificate of sale or holder of any certificate of redemption as junior creditor may pay costs of a hazard insurance policy for holder's interest in mortgaged premises, costs incurred when order to reduce mortgagor's redemption period under Minn. Stat. §582.032 is entered, any fees paid to county recorder, registrar of titles, or sheriff to obtain or record certificates of sale or redemption or notices of intention to redeem, any reasonable fees paid to licensed real estate brokers for broker price opinions or to licensed appraisers, any deed tax paid to file certificate of redemption, reasonable attorney fees incurred after foreclosure sale not to exceed one-half of amount authorized by Minn. Stat. §582.01, costs incurred under Minn. Stat. §582.031, and interest or installment of principal upon any prior or superior mortgage, lien, or contract for deed in default that becomes due during redemption period. (Minn. Stat. §582.03, subdiv. 1). Any such payments made and claimed due shall be proved by affidavit of holder of sheriff's certificate and filed with sheriff of county in which sale was held any time prior to expiration of mortgagor's redemption period. (Minn. Stat. §582.03, subdiv. 2; 2007 Minn. H.F. No. 3420, art. 5, §21).

Supplementary Proceedings.

When execution returned unsatisfied in whole or part, judgment creditor entitled to order from judge of district court where judgment was originally docketed or is subsequently filed ordering debtor to appear before judge or referee to be examined as to his assets. (Minn. Stat. §575.02). Judge may then order any property discovered in course of examination not exempt to be applied towards satisfying judgment. (Minn. Stat. §575.05).

8.06 EXEMPTIONS:

Reasonable amount of property shall be exempt from seizure or sale for payment of any debt or liability. Amount of exemptions shall be determined by law. Exempt property liable to seizure and sale for any debts accrued for work done or materials furnished on construction, repair or improvement of that property. (Minn. Const. art. 1, §12).

Only natural persons who are actual residents can obtain most exemptions available. (Minn. Stat. §550.37).

General exemptions are: Family Bible, library and musical instruments; seat or pew in place of worship; lot in burial ground; all wearing apparel, one watch, utensils and foodstuffs; household furniture, household appliances, phonographs, radio and television receivers of debtor and family not exceeding $4,500 in value; one motor vehicle to extent of value not exceeding $2,000, or not exceeding $20,000 if motor vehicle has been modified, at cost of not less than $1,500, to accommodate physical disability of disabled persons; farm machines and implements used by debtor engaged principally in farming, livestock, farm produce and standing crops not exceeding $13,000 in value; tools, implements, machines, instruments, office furniture, stock in trade and library reasonably necessary in debtor's trade, business or profession, not exceeding $5,000 in value; provided that total farm and business property selected for exemption by debtor cannot exceed $13,000. (Minn. Stat. §550.37).

Special Exemptions.

Other exemptions are:

Libraries, etc.

Library and philosophical and chemical or other apparatus belonging to, and used for instruction of youth in, any university, college or seminary or school indiscriminately open to public. (Minn. Stat. §550.37).

Claims, Insurance, etc.

Money from claims for destruction of or damage to exempt property; life insurance payment to spouse or child on life of deceased spouse or parent, not exceeding $20,000 plus $5,000 for each dependent of surviving spouse or child. Aggregate interest not exceeding $4,000 in accrued dividend, interest or loan value of unmatured life insurance contract owned by debtor under which insured is debtor or individual of whom debtor is dependent. Right to receive payment or payments received under stock bonus, pension, profit sharing, annuity, individual retirement account or annuity, simplified employee pension, or similar plan on account of illness, disability, death, age or length of service, to extent of aggregate interest under all plans and contracts up to present value of $30,000 and additional amounts to extent reasonably necessary for support of debtor or dependent. All money, relief or other benefits payable to or to be rendered by any police, fire, beneficiary or fraternal benefit association to any person entitled to assistance therefrom or to any certificate holder thereof or beneficiary under any such certificate. Net amount payable under accident or disability insurance policies or under accident or disability clauses attached to life insurance policies. (Minn. Stat. §§550.37, .39).

Manufactured home actually inhabited as a home by debtor. (Minn. Stat. §550.37, subdiv. 12).

Veterans compensation, including pension, bonus, adjusted compensation, allotment or other benefit paid by State of Minnesota or U.S. (Minn. Stat. §550.38).

Damages.

All claims for damages recoverable by reason of a levy on or sale under execution of exempt personal property or by reason of the wrongful taking or detention of such property and any judgment for such damages. (Minn. Stat. §550.37).

All relief based on need. (Minn. Stat. §550.37).

Rights of action for injuries to person of debtor or relative whether or not resulting in death and insurance proceeds therefore. (Minn. Stat. §550.37; Minn. Stat. §550.39).

Substitution.

No provision permitting a debtor to hold other property or money exempt in lieu of articles specifically exempted but not owned by him.

Bankruptcy.

Federal bankruptcy exemptions available. Married persons filing petitions in bankruptcy both required to elect either state exemptions or exemptions under federal Bankruptcy Code. Applies to joint petitions and any individual petition filed within three years after petition by other spouse. (Minn. Stat. §550.371).

Debts Against Which Exemptions Not Allowed.

No property is exempt in action for purchase money therefore. Certain personal property not exempt from pawnbroker's possessory lien. (Minn. Stat. §550.37).

Earnings.

Earnings of debtor within 30 days prior to court's ordering satisfaction of judgment in supplementary proceeding exempt if earnings shown to be necessary for family support (Minn. Stat. §575.05); 25% of disposable earnings of debtor or amount of wages equal to 40 times federal minimum hourly wage times number of weeks in pay period, whichever is greater, is exempt (Minn. Stat. §550.37; Minn. Stat. §550.136 Minn. Stat. §571.922). Varying limitations apply to judgments for child support. (Minn. Stat. §550.136). Wages of person returning to private employment or farming from relief or from state correctional institution exempt for six months. Earnings of minor child or any child support paid to any debtor not liable in action by reason of any debt not contracted for special benefit of child. (Minn. Stat. §550.37). See also topic 8.09 Garnishment.

Waiver of Exemption.

Exemption of wages and certain personal property may not be waived except that exemption for personal property may be waived as to purchase money security interests. Debtor with personal property above $4,500 exemption may select exemption in writing from itemized list of property at time loan made and give nonpurchase money security interest in excess. Other exemptions may be waived only by statement signed and dated by debtor at time of execution of contract surrendering exemption, adjacent to list of property in bold face type at least 12 point size, and in following form: “I understand that some or all of the above property is normally protected by law from the claims of creditors, and I voluntarily give up my right to that protection for the above listed property with respect to claims arising out of this contract.” (Minn. Stat. §550.37, subdiv. 1[a]).

Homestead Exemption.

See topic 8.10 Homesteads.

Certain Exemptions Held Unconstitutional Under Minnesota Constitution.

Exemption for benefits payable by police and fire department associations, beneficiary associations and fraternal benefit associations (402 N.W.2d 551); exemption for musical instruments (76 B.R. 683); exemptions for personal injury general damages (119 B.R. 685) and special damages (138 B.R. 943).

8.07 FORECLOSURE:

See topic 8.13 Liens; category 20 Mortgages, topic 20.04 Mortgages of Real Property.

8.08 FRAUDULENT SALES AND CONVEYANCES:

Uniform Commercial Code adopted. (Minn. Stat. c. 336). See category 3 Business Regulation and Commerce, topic 3.09 Commercial Code.

Uniform Fraudulent Transfer Act adopted. (Minn. Stat. §§513.41-.51).

Transfers in Trust.

Transfers of real or personal property by debtor to third party to be held in trust for use of debtor, void as against existing or subsequent creditors. (99 Minn. 301; 109 N.W. 242). See category 3 Business Regulation and Commerce, topic 3.09 Commercial Code.

Remedies of Creditors.

When, during pendency of action, defendant threatens to dispose of property with intent to defraud creditors, they may obtain injunction (Minn. R. Civ. P. 65) or possession of property (Minn. Stat. §565.24). Remedies under Minnesota UFTA available to creditors only; not available to debtors. (122 B.R. 89).

In all cases where rights of creditors in good faith come in question, each spouse held to have notice of contracts and debts of other as fully as if party thereto. (Minn. Stat. §519.06).

Bulk Sales.

Art. 6 of Uniform Commercial Code repealed 1991. Art. 6 of Uniform Commercial Code continues to be effective for pre-1991 transactions. See category 3 Business Regulation and Commerce, topic Commercial Code for pre-1991 variations to Art. 6.

Conveyance of Real Property.

Conveyance of estate or interest in lands, or rents or profits thereof, or any charge on same, made or created with intent to defraud purchasers for valuable consideration is void as against such purchaser. (Minn. Stat. §513.08). However, conveyance or charge is not fraudulent as against subsequent purchaser with actual or constructive notice of charge or conveyance at time of purchase, when grantee or beneficiary of charge or conveyance was privy to intended fraud. (Minn. Stat. §513.08). Conveyance or charge of estate or interest in land, containing any provision for revocation, determination or alteration of such estate or interest, or any part thereof, at will of grantor, is void, as against subsequent purchasers from such grantor for valuable consideration. (Minn. Stat. §513.09).

8.09 GARNISHMENT:

Garnishment is permitted in all actions on contract, or in tort, for recovery of money.

Property Not Attachable.

Following property is not subject to attachment by garnishment: (1) Any indebtedness, money, or other property due to debtor, unless at time of garnishment summons same is due absolutely or does not depend upon any contingency; (2) any judgment in favor of debtor against garnishee, if garnishee or garnishee's property is liable on execution levy upon judgment; (3) any debt owed by garnishee to debtor for which any negotiable instrument has been issued or endorsed by garnishee; (4) any indebtedness, money, or other property due to debtor where debtor is bank, savings bank, trust company, credit union, savings association, or industrial loan and thrift companies with deposit liabilities; (5) any indebtedness, money, or other property due to debtor with cumulative value of less than $10; and (6) any disposable earnings, indebtedness, money, or property that is exempt under Minnesota or federal law. (Minn. Stat. §571.73, subdiv. 4).

Property Which May Be Attached.

Subject to exemptions provided by Minn. Stat. §550.37 and Minn. Stat. §571.922 and any other applicable statute, service of garnishment summons attaches: (1) All unpaid nonexempt disposable earnings owed or to be owed by garnishee and earned or to be earned by debtor within pay period in which garnishment summons is served and within all subsequent pay periods whose paydays occur within 70 days after date of service of garnishment summons; (2) all other nonexempt indebtedness, money or other property due or belonging to debtor and owing by garnishee or in possession or under control of garnishee at time of service of garnishment summons, whether or not same has become payable; and, (3) all other nonexempt intangible or tangible personal property of debtor in possession or under control of garnishee at time of service of garnishment summons, including property of any kind due from or in hands of executor, administrator, personal representative, receiver, or trustee, and all written evidences of indebtedness whether or not negotiable or not yet underdue or overdue; and (4) for garnishment on judgment for child support by county, all unpaid nonexempt disposable earnings owed to or to be owed by garnishee and earned or to be earned by debtor within pay period in which summons is served and within all subsequent pay periods until judgment is satisfied. (Minn. Stat. §571.73, subdiv. 3). Multi-Party Accounts Act (Minn. Stat. §524.6-203[a]) prevents creditor from garnishing funds in joint account not contributed by debtor unless creditor proves by clear and convincing evidence that depositing party intended to confer ownership of funds on debtor.

Salary or wages of any official or employee of a county, town, city, village or school district, or any department thereof, is subject to garnishment. (Minn. Stat. §571.77).

Money due or owing to any entity or person by State on account of employment, work, contract with, or services provided to any State department or agency is subject to garnishment. (Minn. Stat. §571.771).

As to exemptions, see topic 8.06 Exemptions.

Procedure.

As ancillary proceeding to civil action for recovery of money, creditor may issue garnishment summons after entry of judgment, before entry of judgment if 40 days have elapsed since service of summons and complaint upon debtor when default judgment could be entered or before entry of judgment if it appears to court that (1) debtor has assigned, secreted, or disposed of, or is about to assign, secrete, or dispose of, any of debtor's nonexempt property, with intent to delay or defraud any of debtor's creditors; (2) debtor has removed, or is about to remove, any of debtor's nonexempt property from state, with intent to delay or defraud any of debtor's creditors; (3) debtor has converted or is about to convert any of debtor's nonexempt property into money or credits, for purpose of placing property beyond reach of any of debtor's creditors; (4) debtor has committed intentional fraud giving rise to claim upon which civil action is brought; (5) debtor has committed any act or omission, for which debtor has been convicted of felony, giving rise to claim upon which civil action is brought; or (6) purpose of garnishment is to establish quasi in rem jurisdiction and (i) debtor is resident individual having left state with intent to defraud creditors, or to avoid service, or, (ii) judgment had previously been obtained in another state consistent with due process, or (iii) claim in civil action is directly related to and arises from property sought to be attached, or (iv) no forum is available to obtain personal judgment against debtor in U.S. or elsewhere; or (7) creditor has been unable to serve upon debtor summons and complaint in civil action because debtor has been inaccessible due to residence and employment in building where access is restricted. (Minn. Stat. §571.71; Minn. Stat. §571.93, subdiv. 1). Prejudgment garnishment is available either before notice and hearing (Minn. Stat. §571.931) or after notice and hearing (Minn. Stat. §571.932).

To enforce claim asserted in civil action, garnishment summons may be issued by creditor and served upon garnishee in same manner as other summons in that court of record, except that service may not be made by publication. Service of garnishment summons on garnishee may also be made by certified mail, return receipt requested, and is effective if served at garnishee's regular place of business. Effective date of service by certified mail is time of receipt by garnishee. Garnishment summons must contain specified information and be substantially in statutory form. (Minn. Stat. §571.72; Minn. Stat. §571.74).

Creditor liable to debtor in amount of $100, plus actual damages, plus reasonable attorneys' fees and costs for serving garnishment prior to entry of judgment in main action, except where permitted. Judgment creditor may also be liable to debtor for damages, costs and attorneys' fees for actions taken in bad faith and in violation of certain statutory provisions. (Minn. Stat. §571.90). Garnishee must be paid $15 fee, and, if required to appear for oral examination, regular witness fees. (Minn. Stat. §571.76). Any party to garnishment proceeding may obtain ex parte order requiring oral disclosure upon filing affidavit showing upon information and belief that oral examination of garnishee would provide complete disclosure of relevant facts. (Minn. Stat. §571.75).

Notice to Debtor.

Copy of garnishment summons and all other papers served upon garnishee must be served by mail on judgment debtor not later than five days after service on garnishee. (Minn. Stat. §571.72; subdiv. 4).

Intervention.

Other claimants may intervene. (Minn. Stat. §571.83).

Answer of Garnishee.

Garnishee shall serve on both creditor and debtor, within 20 days after service of garnishment summons, written disclosure of garnishee's indebtedness, money, or other property owing to debtor. However, if garnishment is on earnings and debtor has garnishable earnings, garnishee shall serve disclosure and earnings disclosure worksheet within ten days after last payday to occur within 70 days after date of service of garnishment summons. Amount of garnishee's disclosure need not exceed 110% of amount of creditor's claim that remains unpaid, after subtracting total of setoffs, defenses, exemptions, ownership claims, or other interests. Answers to garnishment disclosure form may be served personally or by first class mail. (Minn. Stat. §571.75).

Default by Garnishee.

If garnishee fails to make required disclosure, upon motion supported by affidavit, court may render judgment against garnishee for amount not exceeding 110% of amount claimed in garnishment summons. For good cause shown, court may remove such default. (Minn. Stat. §571.82, subiv. 1).

No Discharge from Employment.

No employer may discharge or otherwise discipline any employee by reason of fact that employee's earnings are subjected to garnishment. (Minn. Stat. §571.927).

Discharge of Garnishment.

If garnishee's disclosure denies indebtedness to debtor or that any of judgment debtor's attachable property is in garnishee's possession, disclosure operates as full discharge at end of 20 days from date of service of disclosure in absence of further proceedings. (Minn. Stat. §571.79). Garnishee is not discharged if interested person serves motion within 20 days of service of disclosure or if creditor moves for leave to file supplemental complaint against garnishee and court vacates discharge. (Minn. Stat. §571.79). Garnishment lapses and garnishee discharged after expiration of 270 days from service of garnishment summons, if served before entry of judgment, or 180 days if served after entry of judgment. (Minn. Stat. §571.79).

8.10 HOMESTEADS:

House owned and occupied by debtor as debtor's dwelling place, together with land on which situated, is exempt from seizure or sale under legal process on account of any debt not lawfully charged thereon in writing, except such as are incurred for work and materials furnished in construction, repair, or improvement of such homestead, or for services performed by laborers and servants thereon. (Minn. Stat. §510.01; Minn. Const. art. I, §12). Homestead application is limited to ½ acre in area if in city (otherwise 160 acres) and to $200,000 in value (unless used primarily for agricultural purposes; then $500,000). (Minn. Stat. §510.02).

Person may create homestead by actual residence thereon and defeat subsequent judgment (41 Minn. 227; 43 N. W. 52); but not prior judgment which is lien thereon (23 Minn. 435). Right extends to dwelling on land owned by another (Minn. Stat. §510.04).

Limitation of Value.

None.

Limitation of Area.

½ acre within laid out or platted portion of city; 160 acres elsewhere. (Minn. Stat.

§510.02).

Exemption is not available against claim for unpaid purchase price of homestead. (Minn. Stat. §507.03). See also first paragraph of this topic.

Alienation or Encumbrance.

Sale or mortgage of homestead requires signatures of both husband and wife, except in case of purchase money mortgage, conveyance between spouses creating joint tenancy, or severance of joint tenancy. (Minn. Stat. §507.02).

Proceeds of sale or of insurance claim on homestead property are exempt for one year from judgments and debts from which homestead was exempt except that proceeds of sale are not exempt from judgment or debt for court-ordered child support or maintenance obligation in arrears. (Minn. Stat. §510.07).

Waiver or Loss.

Exemption may be lost by abandonment or by deed or mortgage signed by both husband and wife, if claimant is married. Probably cannot be waived except by instrument in writing signed by both husband and wife creating specific charge on homestead. (See Minn. Stat. §510.01; 25 Minn. 183 and 173 Minn. 576; 218 N.W. 108).

Loss of Exemption by Abandonment.

Owner deemed to have abandoned when he removes from homestead and ceases to occupy same for more than six consecutive months, unless within that time he files with county recorder of county notice, subscribed and acknowledged as required for deed, describing land and stating that he claims it as his homestead. Exemption cannot continue for longer than five years after filing such notice unless, during some portion of such time, homestead is occupied as actual dwelling place by owner or his family. (Minn. Stat. §510.07).

Rights of Surviving Spouse and Children.

In case of death of owner, right of exemption exists in favor of surviving spouse and minor children as against debts of all of them not secured thereon and also in favor of spouse and minor children when other spouse absconds from state or deserts family. (Minn. Stat. 510.06). Surviving spouse must occupy property as homestead to prevent sale for such spouse's own debts. (50 Minn. 264; 52 N.W. 862). Homestead of surviving spouse limited to lands actually occupied by deceased spouse as such. (54 Minn. 190; 55 N.W. 960). See also infra, subhead Descent.

Descent.

Where decedent leaves surviving spouse, homestead (including manufactured home which is family residence) descends free from any testamentary or other disposition thereof to which such spouse has not consented in writing or by election to take under will as follows: (1) if there is no surviving descendant of decedent, to spouse; (2) if there are surviving descendants of decedent, then to spouse for life and remainder in equal shares to decedent's descendants by representation. (Minn. Stat. §524.2-402). Where there is no surviving spouse and homestead is not disposed of by will, it descends same as other real estate. (Minn. Stat. §524.2-402). Homestead is subject to claims for state hospital care, unless claim is limited by Commissioner of Human Services. (Minn. Stat. §246.53; Minn. Stat. §510.05; Minn. Stat. §524.2-402). If there is no surviving spouse homestead is subject to medical assistance claims for total amount of assistance rendered to decedent and previously deceased spouse. Decedents homestead is subject to medical assistance claims for total amount of assistance previously rendered or being rendered to surviving spouse. (Minn. Stat. §256B.15). Heirs and devisees are entitled to apply for waiver of claim based on value or undue hardship. (Minn. Stat. §256B.15; Minn. Stat. §510.05).

Homestead passing to spouse, children or issue of deceased children is exempt from other debts of decedent which were not charges against homestead. Homestead passing otherwise is subject to expenses of administration, funeral expenses, expenses of last illness, taxes, and debts. (Minn. Stat. §524.2-402). For purposes of Minn. Stat. §524.2-402, except as to omitted spouses, surviving spouse is deemed to consent to any testamentary or other disposition of homestead to which spouse has not previously consented in writing unless spouse files petition asserting homestead rights. (Minn. Stat. §524.2-402). See categories 3 Business Regulation and Commerce, topic Commercial Code; Estates and Trusts, topic Descent and Distribution; Mortgages, topic Mortgages of Real Property.

8.11 JUDGMENT NOTES:

See categories 3 Business Regulation and Commerce, topic Bills and Notes; Civil Actions and Procedure, topic Judgments, subhead Confession of Judgment.

8.12 LEVY:

See topics 8.02 Attachment, 8.05 Executions.

8.13 LIENS:

Uniform Commercial Code adopted. (Minn. Stat. c. 336). See category 3 Business Regulation and Commerce, topic 3.09 Commercial Code.

Revised Uniform Federal Lien Registration Act adopted. Amendments adopted. (Minn. Stat. §272.479 et seq.).

General Lien Provisions.

Lien claims are assignable and assignee may file claims. (Minn. Stat. §514.73; 58 Minn. 455, 60 N.W. 23). Note given for debt does not discharge lien unless obligation by its terms so provides, or unless time of payment thereof is extended beyond time fixed by law for enforcing lien. (Minn. Stat. §514.75).

Carriers, warehousemen, etc., have lien on personal property in possession and right of detainer for transporting property, other than harvested crops or livestock, but not as carrier under Art. 7 of Uniform Commercial Code; keeping or storing property, other than harvested crops or livestock, as bailee but not as warehouse operator under Art. 7 of Uniform Commercial Code; care of domestic animals; use and storage of molds and patterns in possession of fabricator belonging to customer for balance due from customer for fabrication work; making, altering, repairing or expending any labor, skill or material on any article of personal property, other than livestock; reasonable charges for vehicle rented as replacement for vehicle serviced or repaired and retained under this section; towing and storing motor vehicles at request of law enforcement officer. (Minn. Stat. §514.18; Minn. Stat. §514.19). Services must be at request of owner or legal possessor of property. (Minn. Stat. §514.18). Liens secure all lawful charges paid by lienholders to third person, price and value of lienholder's care, storage or contribution and all reasonable disbursements from detention or sale of property. (Minn. Stat. §§514.18, 19). Lien on certificated motor vehicles may be limited to 15 days' storage unless notice is sent to secured creditors. (Minn. Stat. §514.19). Lien is enforced by public sale if sum secured by lien not paid within 90 days after it becomes due. (Minn. Stat. §§514.20-.22). See also category 3 Business Regulation and Commerce, topics 3.08 Carriers, subhead Liens (concerning 45 days written notice before sale of motor vehicle), 3.09 Commercial Code.

Self-service storage lien attaches upon default in favor of owner of self-service storage facility against personal property stored under rental agreement at facility for rent, labor and other charges specified in rental agreement. (Minn. Stat. §514.972, subdiv. 1). Lien is perfected by possession and extends to proceeds of stored personal property. (Minn. Stat.

§514.972, subdiv. 1). No lien arises if owner holds security deposit sufficient to cover rents and other charges at time of alleged default. (Minn. Stat. §514.972, subdiv. 3). Enforcement is pursuant to Uniform Commercial Code procedure for warehouse operators. (Minn. Stat. §514.973; Minn. Stat. §336.7-210). Rental agreement must include disclosure of owner's lien rights. (Minn. Stat. §514.975).

Motor Vehicle Lien.

See category 23 Transportation, topic 23.01 Motor Vehicles, subhead Liens.

Logs and timber liens for services in connection with cutting, loading, peeling, etc. (Minn. Stat. §514.40). Lien generally ceases unless statement filed within 30 days after termination of labor or service and filing shall continue lien for 90 more days unless action is commenced for its enforcement. (Minn. Stat. §514.42). Lien enforced by attachment of and levy on property. (Minn. Stat. §§514.43-45).

Wage lien on property of employer in favor of employee for wages earned within prior six months, equal to greater of $1,000 or five weeks net wages, but not more than $3,000. Has priority over any attachment or execution levied on such property; also preferred to mortgages, judgments and other liens attaching after beginning of work for which wages earned. May not be waived by agreement with employer. (Minn. Stat. §514.59). Enforced by sale of employer's property. (Minn. Stat. §§514.60-61).

Agricultural landlord's lien exists for lessors of real property leased for agricultural production. Lien is against crops produced from subject real property for unpaid rent in crop year that is subject of lease. Lien becomes effective when crops become growing crops. (Minn. Stat. §514.964, subdiv. 1). Lien is perfected by filing financing statement under Minn. Stat. §336.9-501 to Minn. Stat. §336.9-530 on or within 30 days after crops become growing crops. (Minn. Stat. §514.964, subdiv. 5). Lien is superior to all competing security interests and all agricultural liens in crops. (Minn. Stat. §514.964, subdiv. 7). Enforcement of lien is governed by Minn. Stat. §336.9-601 to Minn. Stat. §336.9-628. (Minn. Stat. §514.964, subdiv. 9).

Harvester's lien exists for persons providing combining, picking, harvesting, hauling, bailing, drying or storing services in ordinary course of business. Lien is against crops so serviced for reasonable amount of service provided. Lien becomes effective upon harvester's provision of applicable service. (Minn. Stat. §514.964, subdiv. 2). Lien is perfected by filing financing statement under Minn. Stat. §336.9-501 to Minn. Stat. §336.9-530.

on or within 15 days after last date services are provided by harvester to obligor. (Minn. Stat. §514.964, subdiv. 5). Person asserting harvester's lien may not also assert crop production lien for same goods or services provided to obligor. (Minn. Stat. §514.964, subdiv. 2). Lien is superior to all competing security interests and agricultural liens except (a) perfected landlord lien in crops, (b) crop production input lien for reasonable cost of seed in crops, and (c) if more than one harvester's lien is perfected under this section, liens rank equally in proportion of value of service provided. (Minn. Stat. §514.964, subdiv. 7). Enforcement of lien is governed by Minn. Stat. §336.9-601 to Minn. Stat. §336.9-628. (Minn. Stat. §514.964, subdiv. 9).

Crop production input lien exists for suppliers furnishing crop production inputs (agricultural chemicals, seeds, petroleum products, custom application of agricultural chemicals and seeds and labor used in preparing land for planting, cultivating, growing, producing, harvesting, drying and storing crops or crop products) for unpaid retail cost of such inputs. (Minn. Stat. §514.963; Minn. Stat. §514.964, subdiv. 3). Lien attaches to (a) existing crops to which agricultural chemical was applied or, if no crop has yet been planted, to next production crop within 16 months following last date on which such chemicals were applied, (b) crops produced from furnished seed, or (c) crops produced, harvested or processed using furnished petroleum product. (Minn. Stat. §514.964, subdiv. 3). Lien does not attach to lessor's portion of crops if grown on leased land and related lease provides for payment in crops. Lien becomes effective when inputs are furnished by supplier to obligor. (Minn. Stat. §514.964, subdiv. 3). Lien is perfected by filing financing statement under Minn. Stat. §336.9-501 to Minn. Stat. §336.9-530 on or within six months after date crop production inputs were last provided. (Minn. Stat. §514.964, subdiv. 5). Lien is superior to all competing security interests and agricultural liens except (a) perfected landlord lien in crops, (b) perfected harvester's lien in crops, (c) if more than one crop production input lien is perfected under this section, liens rank in order of effectiveness of liens, and (d) security interest in crops if crop production input lien is not effective prior to secured party's giving value to debtor. (Minn. Stat. §514.964, subdiv. 7). Enforcement of lien is governed by Minn. Stat. §336.9-601 to Minn. Stat. §336.9-628. (Minn. Stat. §514.964, subdiv. 9). In addition, crop production input supplier must notify lenders in accordance with Minn. Stat. §514.964, subdiv. 3 and may be unable to obtain lien if lender provides commitment for cost of crop production input. (Minn. Stat. §514.964, subdiv. 3).

Veterinarian's lien exists for licensed veterinarian performing emergency veterinary services that (a) are in ordinary course of business, (b) cost more than $25, and (c) are at request of owner or person in possession of animals, against animals for value of services provided. Lien does not secure services performed more than one year before date on which last item of veterinary service was performed. Lien becomes effective upon veterinarian's performance of applicable service. (Minn. Stat. §514.966, subdiv. 1). Lien is perfected by filing financing statement under Minn. Stat. §336.9-501 to Minn. Stat. §336.9-530 on or within 180 days after last veterinary service is performed. (Minn. Stat. §514.966, subdiv. 6). Lien has priority over all competing security interests and all agricultural liens on same animals except that conflicting perfected veterinarian's liens have priority in order of effectiveness of liens. (Minn. Stat. §514.966, subdiv. 8). Enforcement of lien is governed by Minn. Stat. §336.9-601 to Minn. Stat. §336.9-628. (Minn. Stat. §514.966, subdiv. 10).

Breeder's lien exists for (a) owner of livestock used for breeding services in ordinary course of business, or (b) any provider, in ordinary course of business, of semen or ova used in fertilizer, artificial insemination, or any other artificial means of impregnating livestock. Lien extends to livestock bred and any resulting offspring for value of service provided. Lien becomes effective when services are provided by breeder. (Minn. Stat. §514.966, subdiv. 2). Lien is perfected by filing financing statement under (Minn. Stat. §336.9-501 to Minn. Stat. §336.9-530 on or within six months after date that services were last provided. (Minn. Stat. §514.966, subdiv. 6). Lien has priority over all competing security interests and agricultural liens except (a) perfected veterinarian's lien and (b) perfected feeder's lien. (Minn. Stat. §514.966, subdiv. 8). Enforcement of lien is governed by Minn. Stat. §336.9-601 to Minn. Stat. §336.9-628. (Minn. Stat. §514.966, subdiv. 10).

Livestock production input lien exists for supplier furnishing livestock production inputs (feed and labor used in raising livestock) in ordinary course of business for unpaid retail cost of such inputs against livestock for which such inputs have been provided. Lien cannot exceed amount, if any, by which sales price of livestock exceeds greater of fair market value of livestock at time lien attaches or acquisition price of livestock. Lien becomes effective when inputs are provided by supplier to obligor. (Minn. Stat. §514.966, subdiv. 3). Lien is perfected by filing financing statement under Minn. Stat. §336.9-501 to Minn. Stat. §336.9-530 on or within six months after date that inputs were last provided. (Minn. Stat. §514.966, subdiv. 6). Lien is superior to all competing security interests and agricultural liens except (a) perfected veterinarian's lien, (b) perfected feeder's lien, (c) perfected breeder's lien, (d) if more than one livestock production input lien is perfected under this section, liens rank in order of effectiveness of liens, and (e) security interest in livestock if livestock production input lien is not effective prior to secured party's giving value to debtor. (Minn. Stat. §514.966, subdiv. 8). Enforcement of lien is governed by Minn. Stat. §336.9-601 to Minn. Stat. §336.9-628. (Minn. Stat. §514.966, subdiv. 10). In addition, livestock production input supplier must notify lenders in accordance with Minn. Stat. §514.966, subdiv. 3 and may be unable to obtain lien if lender provides commitment for cost of livestock production input. (Minn. Stat. §514.966, subdiv. 3).

Feeder's lien exists for person who (a) stores, cares for or contributes to keeping, feeding, pasturing or other care of livestock, including medical or surgical treatment and shoeing, and (b) does so in ordinary course of business at request of owner or legal possessor of livestock. Lien attaches to lien on livestock for price or value of services performed and for any legal charges in connection with such services paid by person providing such services to another person. Lien becomes effective when services are provided by servicer to obligor. (Minn. Stat. §514.966, subdiv. 4). Lien is perfected by filing financing statement under Minn. Stat. §336.9-501 to Minn. Stat. §336.9-530 on or within 60 days after date services were last provided. (Minn. Stat. §514.966, subdiv. 6). Lien is superior to all competing security interests and agricultural liens except (a) perfected veterinarian's lien, and (b) if more than one feeder's lien is perfected under this section, liens rank in order of effectiveness of liens. (Minn. Stat. §514.966, subdiv. 8). Enforcement of lien is governed by Minn. Stat. §336.9-601 to Minn. Stat. §336.9-628. (Minn. Stat. §514.966, subdiv. 10).

Environmental lien against real property exists for state cleanup action expenses. (Minn. Stat. §514.672). Lien attaches when state: (1) Incurs cleanup costs and (2) serves and files required notices. Environmental lien notice may not be filed by commissioner until (a) agency board for cleanup action expenses, Petroleum Tank Release Compensation Board, persons who would be included in Minn. Stat. §514.672, subdiv. 1, and each record owner and mortgagee of real property are notified in writing of intention to file lien notice and (b) within 30 days of receiving such notice, persons who would be included in Minn. Stat. §514.672, subdiv. 1, receive notice and opportunity to appear and appropriate board approves filing. (Minn. Stat. §§514.672, .673, subdiv. 3). Lien is subject to rights of any other interest holder whose interest was perfected prior to filing of environmental lien notice in appropriate real property records. (Minn. Stat. §514.672). Enforcement is by foreclosure in manner provided for judgment liens. (Minn. Stat. §514.674).

Governmental services lien exists for governmental services. No recording necessary to obtain first lien. (Minn. Stat. §514.67).

Hospital charges lien for hospital care on all causes of action accruing to person who received care, or legal representative of person, on account of injuries which necessitated care. Filing with clerk of district court within ten days after person discharged necessary to perfect lien. (Minn. Stat. §§514.68-69).

Mechanics' Liens on Real Property.

Given to all who contribute to improvement of real estate by performing engineering or land surveying services or performing labor, services and skill, or furnishing skill, material or machinery for any land or structure thereon when ordered expressly or impliedly by owner, agent or trustee, or vendee. (Minn. Stat. §514.01). Homestead included, but subject to avoidance under Bankruptcy Code. (Minn. Const. art. I, §12; 190 B.R. 106). Architects may have lien. (52 Minn. 522, 54 N.W. 746).

Mechanic's liens on real property extend to lines of railway, telephone, and similar projects, and to mines. (Minn. Stat. §514.04; Minn. Stat. §514.17).

One who bona fide furnishes material to be used on premises, though not actually delivered to or used thereon, is entitled to lien. (159 Minn. 116, 198 N.W. 406).

Notice contained in statute advising owner of certain rights must either be included in contract between owner and contractor (copy of which contract must be given to owner) or, if there is no written contract, such notice must be prepared and delivered separately by contractors and subcontractors to owner, except in case of improvement to residential property with more than four family units or improvements to nonagricultural and wholly or partially nonresidential property with more than 5,000 square feet of floor space. (Minn. Stat. §514.011).

Lien attaches when first item of material or labor is furnished for beginning of improvement, though plans may have been prepared some time earlier. (Minn. Stat. §514.05; 134 Minn. 156, 158 N.W. 918).

Trade fixtures, not attached to building so as to become an accessory thereto or so as to legally constitute part of realty, are not lienable. (159 Minn. 182, 198 N.W. 424).

Preventing Lien.

Any person with interest in real property who has not authorized improvements to property may protect that person's interest from liens by giving notice in writing by personal service or by certified mail to last known address (service is complete upon mailing) to proposed lienors within five days after first information of labor or material furnished or keeping such notice posted in a conspicuous place on land or improvement thereon that it has not authorized improvements. (Minn. Stat. §514.06).

Priorities.

As between mortgage (including mortgage to secure future advances if payment of advances obligatory) and mechanics' lien, mortgage has priority if lienholder had actual notice of mortgage if mortgage recorded before lien attaches, even though advances thereunder are made later. (134 Minn. 156, 158 N.W. 918). As to priority of mortgage and lien, and classes of same, see 54 Minn. 486, 56 N.W. 131, as modified by Minn. Stat. §514.05. Mortgage securing revolving line of credit, whether or not advances are obligations, is effective notice to all parties from time mortgage is recorded as to all advances and readvances, provided mortgage states maximum line of credit. (Minn. Stat. §507.325; Minn. Stat. §508.555).

Lien statement must be filed in writing, verified, with county recorder or, if registered land, with registrar of titles, within 120 days from doing last of work or furnishing last item, and copy served on owner, or lien ceases. (Minn. Stat. §514.08).

Foreclosure.

Lienor commencing action to foreclose must make all other lienors defendants. No other action to foreclose may be commenced for enforcement of any lien arising from same improvement, but all lienholders must answer in original action. Lienor not made party may intervene. Lien must be enforced, by action, or by answer in action started by another lienor, within one year after last item of labor or materials furnished. (Minn. Stat. §§514.11, .12). Single judgment is rendered, and property is sold, subject to rights of all persons which are paramount to such liens and to owner's one-year right of redemption.

Period allowed for redemption runs from date of confirmation of sale. (167 Minn. 208, 208 N.W. 654 and Minn. Stat. §514.15).

Public Works.

Unless amount of contract is $75,000 or less, contractor for public work must give performance bond conditioned for payment of all claims and saving obligee harmless from all costs and charges on account of work and must give payment bond for use and benefit of all persons doing work or furnishing skill, tools, machinery or materials or insurance premiums or equipment or supplies or taxes engaged under or performing contract. (Minn. Stat. §574.26, subdiv. 2). Any claim on payment bond by person furnishing labor or materials must be made by such person within 120 days after completion, delivery or provision by person of its last item of labor or materials for public work by serving written notice specifying nature and amount of claim and date of last item. (Minn. Stat. §574.31). Provision has also been made for giving of certified checks for security in lieu of payment and performance bond with approval of Commissioner of Administration where amount of contract not in excess of $5,000, or for letter of credit in lieu of bond for certain projects valued under $50,000. (Minn. Stat. §574.261). In connection with forestry development projects, Commissioner of Natural Resources may require performance or payment bonds or bid deposits. Person required to file such bond or bid deposits, if less than $100,000, may deposit securities in lieu thereof. (Minn. Stat. §§574.263-.264).

Mechanic's Lien on Watercraft.

Lien on every boat or vessel in navigating waters of Minnesota for all debts contracted by master, owner, agent, or consignee thereof on account of supplies to or work done on boat; for all sums due for anchorage or wharfage of boat within Minnesota; for all injuries done to person or property by boat; and for all damages or demands accruing from breach of any contract of affreightment, etc. (Minn. Stat. §579.01). Action against boat commenced by filing complaint in district court of county where boat is located. Upon filing of complaint, warrant shall be issued directing sheriff to seize boat. (Minn. Stat. §579.02). If lienholder obtains judgment against boat, sheriff shall sell boat. (Minn. Stat. §579.04). All actions against boat must be commenced within one year after cause of action accrues. (Minn. Stat. §579.08).

Mechanics' Lien on Aircraft.

Nonpossessory lien for work done or materials furnished given to all who make, alter, repair or otherwise enhance value of any aircraft at request of owner or legal possessor and who give up possession of aircraft. (Minn. Stat. §514.221, subdiv. 1). Lien must be filed within 90 days after performing work or furnishing materials and does not become effective until date of filing. (Minn. Stat. §514.221, subdiv. 2). Place of filing and enforcement of lien governed by Uniform Commercial Code except that foreclosure must be instituted within one year of date of filing and lien is subject to rights of purchaser who acquired aircraft prior to filing and without knowledge or notice of lien claimant's services. (Minn. Stat. §514.221, subdiv. 3).

Lien for Launderers.

Lien on any article for amount due on same for repairing, altering, dyeing, cleaning, pressing or laundering article. (Minn. Stat. §514.77).

Veterinarians.

Veterinarian has possessory lien in any unclaimed animal held by veterinarian for more than ten days for value of care and treatment given to animal, and veterinarian may summarily sell animal for its value with proceeds going first to veterinarian and any excess to owner. (Minn. Stat. §514.93). Veterinarian may also obtain nonpossessory lien for value of care and treatment given animal in manner as described for other personalty in Minn. Stat. §§514.18-514.22. (Minn. Stat. §514.94).

Agricultural Producer's Lien.

Person who produces agricultural commodity, except grain or raw milk, has lien for contract price or fair market value of agricultural commodity produced by person and delivered to buyer. (Minn. Stat. §514.945). Filing required within 20 days of delivery to buyer.

8.14 MECHANICS' LIENS:

See topic 8.13 Liens.

8.15 PLEDGES:

Uniform Commercial Code adopted. (Minn. Stat. c. 336). See category 3 Business Regulation and Commerce, topic 3.09 Commercial Code. Revised Art. 8 and conforming amendments to Art. 9 adopted. See category 3 Business Regulation and Commerce, topic 3.09 Commercial Code.

Pledgor's interest in property is subject to execution. (Minn. Stat. §550.16).

Redemption.

No provision for redemption from foreclosure sale of pledged personal property.

8.16 RECEIVERS:

When May be Appointed.

Whenever any execution on judgment against corporation is returned unsatisfied, upon complaint of creditor, court may sequester corporation's property and appoint receiver to dispose of same in following order: (1) Expenses of receivership; (2) debts due State of Minnesota and U.S.; (3) taxes and assessments; (4) claims for injuries to employees entitled to workers' compensation, where corporation carried no insurance; (5) claims for wages and fringe benefits earned within prior three months; (6) other claims duly proved and allowed. (Minn. Stat. §316.05).

In proceeding for dissolution of corporation, court may appoint receiver, before or after full hearing, to collect and preserve assets and, subject to court order, to continue business and sell, lease, transfer or dispose of assets. (Minn. Stat. §302A.753). Receiver may sue and defend in all courts. (Minn. Stat. §302A.755, subdiv. 2). Receiver shall be natural person, domestic corporation or foreign corporation authorized to transact business in state. (Minn. Stat. §302A.755, subdiv. 1).

Receivers may be appointed over affairs of insolvent banks or insurance companies or in connection with an injunction against them for violation of their charter. (Minn. Stat. §316.13). Also to enforce mechanics' liens (Minn. Stat. §514.16) or payment of maintenance or support (Minn. Stat. §518A.71); or in supplementary proceedings (Minn. Stat. §575.05). See also category 20 Mortgages, topic 20.04 Mortgages of Real Property.

In addition to above special cases, receiver may be appointed in general: (1) Before judgment, on application of any party to action who can show right to property which is subject of action and that said property or its rents and profits are in danger of loss or material impairment; (2) by or after judgment, pending appeal, or upon return of execution unsatisfied; (3) on dissolution of corporation, or where it is insolvent or has forfeited corporate rights, and in like cases of property of foreign corporations within state; (4) in such other cases as are authorized by law or existing practice (Minn. Stat. §576.01, subdiv. 1), including cases of certain absentees (Minn. Stat. §576.04). Receiver shall be appointed upon foreclosure of certain non-homestead and non-agricultural mortgages if certain mortgage covenants breached. (Minn. Stat. §576.01, subdiv. 2).

Receivers may be appointed by consent. (134 Minn. 422, 159 N.W. 948).

Eligibility.

Except by consent of parties interested, no person who has been stockholder, director, or officer of corporation during preceding year may be appointed receiver of such corporation. (Minn. Gen. R. Prac. Dist. Cts. 137.02).

Notice.

Receivers may only be appointed upon notice to interested parties except in an emergency. (Minn. Gen. R. Prac. Dist. Cts. 137.02).

Bonds.

Every receiver must give bond in such amount as court may require, with sureties approved by it. (Minn. Stat. §302A.755; Minn. Stat. §316.11). Cost thereof, subject to ceilings, is lawful expense and may be so included. (Minn. Stat. §574.19).

Actions Against Receivers.

When property is in custody of receiver, suit can be brought against him in connection with any act or transaction in carrying on business connected with such property. (Minn. Stat. §540.14). Leave of court required for other actions against receiver. (71 Minn. 190, 73 N.W. 856).

8.17 REDEMPTION:

See topics Minn. Stat. 8.05 Executions, Liens; categories 20 Mortgages, topic Mortgages of Real Property; Taxation, topic Property Taxes, subhead Redemption.

8.18 SUPPLEMENTARY PROCEEDINGS:

See topic 8.05 Executions.

8.19 TRUSTEE PROCESS:

See topic 8.09 Garnishment.

8.20 USURY:

See category 3 Business Regulation and Commerce, topic 3.17 Interest.

9 DISPUTE RESOLUTION

9.01 ALTERNATIVE DISPUTE RESOLUTION:

Mandatory Dispute Resolution.

State of Minnesota instituted pilot program for Second and Fourth Judicial Districts in which courts could order parties in all civil litigation with amount in excess of $7,500 in controversy to submit to nonbinding alternative dispute resolution. Alternatives include private trials, neutral expert fact-finding, mediation, minitrials and other forms of alternative dispute resolution. (Minn. Stat. §484.74, subdiv. 1). Where more than $50,000 in controversy, court may appoint special magistrate for binding proceedings with consent and agreement of all parties. (Minn. Stat. §484.74 subdiv. 2a).

State of Minnesota has authorized majority of judges in any judicial district to establish system of mandatory nonbinding arbitration on district-by-district basis for disposition of any civil action, with exception of matters relating to guardianship, conservatorship, civil commitment, matters within juvenile court jurisdiction involving children in need of protection or services or delinquency, matters involving termination of parental rights under Minn. Stat. §260C.301 to Minn. Stat. §260C.328 or matters arising under Minn. Stat. §518B.01 (domestic abuse), Minn. Stat. §626.557 (reporting of maltreatment of vulnerable adults) or Minn. Stat. §144.651 to Minn. Stat. §144.652 (patient bill of rights). (Minn. Stat. §484.73).

Alternative Dispute Resolution.

Effective June 1, 1991, State of Minnesota directed supreme court to establish statewide alternative dispute resolution program for resolution of all civil cases filed with courts. Except for matters involving family law, rules require use of nonbinding alternative dispute resolution processes in all civil cases, except for good cause shown to presiding judge. Methods provided in rules include arbitration, private trials, neutral expert fact-finding, mediation, minitrials, consensual special magistrates including retired judges and qualified attorneys to serve as special magistrates for binding proceedings with right of appeal. All of these methods must be nonbinding unless agreed upon by parties. Alternative dispute resolution may not be required in guardianship, conservatorship, civil commitment matters; proceedings in juvenile court, including matters involving termination of parental rights under Minn. Stat. c. 260 or matters arising under Minn. Stat. §518B.01 —(domestic abuse), Minn. Stat. §626.557 —(reporting of maltreatment of vulnerable adults) or Minn. Stat. §144.651 and Minn. Stat. §144.652 —(patient bill of rights). (Minn. Stat. §484.76). In medical malpractice cases, all parties must unanimously agree before alternative dispute resolution begins. (Minn. Stat. §604.11, subdiv. 2). Also see topic 9.02 Arbitration and Award.

Minnesota General Rules of Practice for District Courts (Minn. Stat. §§114.01-.14) are rules for mandatory alternative dispute resolution in state district courts. In addition to exceptions set forth in Minn. Stat. §484.76, these rules do not apply to following cases: (a) Conciliation court actions and conciliation court appeals where no jury trial is demanded; (b) family court matters governed by Minn. Gen. R. Prac. 301 through 379; (c) public assistance appeals under Minn.Stat. §256.045, subdiv. 7; (d) unlawful detainer actions pursuant to Minn.Stat. §504B.281, et seq.; (e) implied consent proceedings pursuant to Minn. Stat. §169A.51; (f) juvenile court proceedings; (g) civil commitment proceedings subject to Special Rules of Procedure governing proceedings under Minnesota Commitment Act of 1982; (h) probate court proceedings; (i) periodic trust accountings pursuant to Minn. Gen. R. Prac. 417; (j) proceedings under Minn.Stat. §609.748 relating to harassment restraining orders; (k) proceedings for registration of land titles pursuant to Minn. Stat. c. 508; (l) election contests pursuant to Minn. Stat. c. 209; (m) applications to compel or stay arbitration under Minn. Stat. c. 572 (Minn. Gen. R. Prac. 111.01). However, court may invoke procedures of this rule in any action where not otherwise required. (Minn. Gen. R. Prac. 111.01).

9.02 ARBITRATION AND AWARD:

Uniform Arbitration Act adopted. (Minn. Stat. §§572.08-.30).

Mandatory Arbitration.

If labor dispute cannot be settled by negotiation between charitable hospital employers and their employees, either party may petition for mediation pursuant to Minn.Stat. §§179.01-179.17, insofar as not inconsistent with Minn. Stat. §§179.35-179.39. (Minn. Stat. §179.38). If dispute is not settled within ten days after submission to mediation, unsettled issues concerning terms and conditions of employment and other issues concerning union security will, upon service of written notice by either party upon other party and director of mediation services, be submitted to determination of board of arbitrators whose determination will be final and binding. (Minn. Stat. §179.38).

10 DOCUMENTS AND RECORDS

10.01 ACKNOWLEDGMENTS:

May be taken and certified by following officers:

Within State.

Uniform Law on Notarial Acts adopted. (Minn. Stat. §358.41 et seq.). Ex officio notaries subject to following area limitations; member of legislature while resident in district in which elected; clerk or recorder of city or town; and court commissioners, county recorders, and county auditors, and their deputies, and county commissioners, all within their respective counties; peace officers licensed under Minn. Stat. §626.845 for purpose of administering oaths upon information submitted to establish probable cause to any judge or judicial officer under Rules of Criminal

Procedure. (Minn. Stat. §358.15). Fee is legal fee allowed other officers for like services for acknowledgment by notary public. (Minn. Stat. §357.17).

Outside State but Within United States.

Uniform Law on Notarial Acts adopted. (Minn. Stat. §358.41 et seq.).

Outside the United States.

Uniform Law on Notarial Acts adopted. (Minn. Stat. §358.41 et seq.).

Persons in or with U.S. Armed Forces.

Uniform Law on Notarial Acts adopted. (Minn. Stat. §358.41 et seq.). However, acknowledgment may be taken by commissioned officer on active duty in military service of U.S. (Minn. Stat. §358.45[a][2] et seq.).

General Requirements of Certificate.

Notary taking acknowledgment must print or stamp his name in addition to signing and must endorse on certificate, after his physical or electronic signature and disconnected from his seal, statement of date when his commission expires, except when expiration date is shown on seal. However, absence of typed or printed name of notary does not invalidate acknowledgment. (Minn. Stat. §359.05). Notary seal may be affixed by means of stamp which prints seal in prescribed form or may be electronic form. (Minn. Stat. §359.03, subdiv. 3).

Married Persons.

Separate acknowledgment of each spouse is not required. Where husband and wife join in acknowledgment, they must be described in certificate as husband and wife. Where their acknowledgments are taken before different officers or same officer at different times, each must be described as spouse of other. (Minn. Stat. §358.14).

Effect of Acknowledgment.

All acknowledged instruments, other than promissory notes, bills of exchange, and wills, are admissible into evidence in all courts without other proof of execution. (Minn. Stat. §600.14). Acknowledgment made in representative capacity for and on behalf of corporation, partnership, trust, or other entity and certified according to Minn. Stat. c. 358 is prima facie evidence that instrument or electronic record was executed and delivered with proper authority. (Minn. Stat. §358.50).

Authentication.

Uniform Law on Notarial Acts adopted. (Minn. Stat. §358.41 et seq.).

Record of Commission.

Commission of notary recorded in court administrator's office of district court of notary's county of residence. Commission of nonresident notary recorded in court administrator's office of district court of Minnesota county that borders county in which nonresident notary resides. (Minn. Stat. §359.061). Official character of other persons taking acknowledgments will be certified by Secretary of State; fee not statutory but usually $5.

Forms.

Uniform Law on Notarial Acts adopted. (Minn. Stat. §358.41 et seq.).

Alternative to Acknowledgment or Proof.

No statutory provision.

10.02 AFFIDAVITS:

As to what officers may administer oaths, see topic 10.01 Acknowledgments.

General Requirements of Jurat.

After physical or electronic signature of notary public, disconnected from seal, there must be indorsed unless expiration date is shown on seal, words: My commission expires . . . . . ., 20. . . . . (Minn. Stat. §359.03; Minn. Stat. §359.05).

Use of Affidavit.

Oaths and affidavits out of the state taken before any officer authorized to administer oaths, and certified by a clerk of a court of record, may be used on any motion or read in any argument in the state. (Minn. Stat. §600.09).

If taken out of state before notary public or commissioner for Minnesota, no certificate by court administrator required. (Minn. Stat. §600.09).

Form.

After title of action state:

Form

Affidavit of A.B.

State of . . . . . ., County of . . . . . . ss.

. . . . . ., being first duly sworn on oath, deposes and says: That he resides at . . . . . . in the State of . . . . . . that his business is that of . . . . . . (here insert affiant's statement).

Further affiant saith not.

. . . .

Subscribed and sworn to before me this . . . . . . day of . . . . . ., 20 . . . ., at . . . . . . State of . . . .

Notary Public (or other officer),

. . . . . . County,

State of . . . . . .

Alternative to Affidavit.

No statutory provision.

10.03 NOTARIES PUBLIC:

Appointment and commission administered by Secretary of State on behalf of Governor with advice and consent of Senate, for nonrefundable fee of $40. Registration of capability required before performing electronic notarial acts. (Minn. Stat. §359.01, subdivs. 3, 5).

Powers and Duties.

Notaries have power throughout state to administer oaths, take and certify depositions, acknowledgments of deeds, mortgages, liens, powers of attorney and other instruments, in writing, and receive, make out and record notarial protests. Acts void unless authenticated by seal; signature to be followed by printed name of notary and, if expiration date is not shown on seal, date of expiration of commission. Absence of typed or printed name of notary does not invalidate acknowledgment. Notary seal may be affixed by means of stamp which prints seal in prescribed form physical or electronic. (Minn. Stat. §359.04).

May compel attendance of and punish witnesses for refusing to testify on taking of depositions as provided by statute or court rule. (Minn. Stat. §359.11).

Certificate of Authority.

See topic 10.01 Acknowledgments, subhead Authentication.

10.04 RECORDS:

Uniform Commercial Code adopted. (Minn. Stat. c. 336). See category 3 Business Regulation and Commerce, topic 3.09 Commercial Code.

Recording Act.

Every conveyance of real estate, including mortgages (Minn. Stat. §507.01), not recorded in office of county recorder of county where land is situated, is void as against subsequent recorded conveyances of land to bona fide purchasers, including quit claim deeds, and as against subsequent judgments and attachments obtained against record owner (Minn. Stat. §507.34). *For list of counties and county seats see first page for this state in Volume containing Practice Profiles Section.* Recording constitutes notice to parties, except that recording an assignment of mortgage is not notice to mortgagor so as to invalidate payments made by him to mortgagee. (Minn. Stat. §507.32)

Notice imparted by recorded instrument not impaired by defects in attestation, acknowledgment, or certification of acknowledgment of instrument. (Minn. Stat. §507.251).

Instruments affecting standing timber, stone, ores, minerals, etc., may be recorded. (Minn. Stat. §507.36).

For requirements to entitle instrument to record, see categories 20 Mortgages, topic Mortgages of Real Property; Property, topic Deeds.

Conveyancing instruments executed after Jan. 1, 1970, affecting title to, interest in or lien on real estate must include name and address of person or corporation drafting same in order to be recorded by county recorder or registered by registrar of titles. Does not apply to decree, order, judgment or writ of any court, will or death certificate, nor any instrument executed or acknowledged outside state. (Minn. Stat. §507.091, subdiv. 1).

Form

This instrument was drafted by . . . . (name), ... (address).

Recording fees currently chargeable by county recorder: $46 except for documents containing multiple assignments, partial releases or satisfactions, which are charged $46 and $10 for each additional instrument cited over first four citations. (Minn. Stat. §357.18). Charge of $20 for UCC filing or search delivered on paper and $15 for record delivered by any electronic means. (Minn. Stat. §336.9-525). For fees payable to registrar of titles, see Minn. Stat. 508.82.

Filing under Commercial Code.

Financing statement should be filed as follows: (a) when collateral is as-extracted collateral or timber to be cut, then in office of county recorder in county where related real property is located; (b) when financing statement is filed as fixture filing and collateral is goods that are or are to become fixtures, then in office of county recorder in county where related real property is located; (c) in all other cases, in office of Secretary of State, including cases where collateral is goods that are or are to become fixtures, but financing statement is not filed as fixture filing. (Minn. Stat. §336.9-501). Mailing address of Secretary of State is Secretary of State, UCC Division, 180 State Office Building, St. Paul, MN 55155. Fee for filing and indexing any record with Secretary of State is $20. Five dollars of the fee collected for each online filing is deposited in uniform commercial code account. (Minn. Stat. §336.9-525).

Torrens Act.

Registration of title in any county in the state is optional. (Minn. Stat. c. 508). Application for registration may be made by owner of land or by one with power of disposal, guardian, corporation by officer or agent, partnership by one or more of its partners, executor or administrator, one having title by adverse possession, municipal corporation or the state. (Minn. Stat. §§508.03, .07, .08).

Application must be signed and verified (Minn. Stat. §508.05), setting forth name, and address of applicant or agent of applicant and agency relationship, marital status including full name and address of spouse, if any, whether applicant is or is not 18 years of age and any prior divorces, any legal incapacity, description of land, applicant's estate or interest therein, those claiming interests therein, occupants thereof, if any, recorded or unrecorded liens or incumbrances thereon, including addresses of those claiming interests, that requested determination terminating or modifying described interest, together with reason for relief requested, description of any other defects in applicants title and reason for curing defects. (Minn. Stat. §508.06). Nonresident applicant must file agreement executed and acknowledged, appointing resident agent. (Minn. Stat. §508.07).

Application must be addressed to district court of county where land is situated (Minn. Stat. §508.10) and filed with court administrator (Minn. Stat. §508.11). Title is referred to examiner of titles; if he finds it proper for registration, or if applicant wishes to proceed when finding is adverse to him, summons is ordered by court joining all parties as defendants who appear to have any interest in land. (Minn. Stat. §§508.12, 15). Summons served on all parties named as interested, giving them 20 days to answer; served on the state by delivering a copy to Attorney General or deputy or assistant Attorney General; on nonresidents by mailing; on parties unknown by three weeks published notice. (Minn. Stat. §508.16, subdiv. 1). Anyone claiming an interest in land may answer. (Minn. Stat. §508.17).

On hearing, court may enter default judgment, dismissal, or decree confirming title in applicant forever, quieting same. (Minn. Stat. §§508.17-.23). Decree may be reopened within 60 days (Minn. Stat. §508.26); after six months, it cannot be attacked in any way, unless fraud is shown. (Minn. Stat. §508.28; 99 Minn. 197, 108 N.W. 945). Appeals from decrees are provided for. (Minn. Stat. §508.29). Registration runs with land. (Minn. Stat. §508.24).

Certificates of title are issued by registrar of titles. (Minn. Stat. §§508.34-.39). Owner of registered land may plat and subdivide, mortgage, convey, and lease by any form of deed, mortgage, lease, etc., entry being made on certificate. (Minn. Stat. §§508.46-.48). Any interest not entered on certificate is invalid as against bona fide purchasers except: (1) Claims of U.S.; (2) liens of real property taxes or special assessments; (3) lease for less than three years if actual occupancy; (4) rights of public highways; (5) right to appeal or contest application; (6) rights of person in possession under deed or contract for deed from owner; (7) mechanic's liens rights. (Minn. Stat. §508.25).

Registered land is subject to same incidents as unregistered land, such as those growing out of marriage relation, levy, attachment on mesne process, etc., but no title adverse to registered owner can be acquired by prescription or adverse possession. (Minn. Stat. §508.02).

Certificate of Possessory Title.

County commissioners of any county may authorize registration of possessory title to real estate in county pursuant to Minn. Stat. c. 508A. Procedure is voluntary, is intended for uncontested titles, and permits registration of title without initial court adjudication. Procedure available to any person who is record owner of land, provided that person is in actual or constructive possession. (Minn. Stat. §§508A.01, 03). No title in derogation of rights of registered owner can be acquired by prescription or adverse possession after certificate of possessory title issued. (Minn. Stat. §508A.02, subdiv. 1).

Application for certificate filed with examiner of titles must set forth name and address of applicant or agent of applicant and agency relationship, marital status including full name and address of spouse, if any, whether applicant is or is not 18 years of age, and prior divorces and any legal incapacity, describe land and applicant's interest in it, disclose all persons shown of record or known to claim any right or interest in land, all occupants of land and any recorded or unrecorded liens or encumbrances, and state facts supporting applicant's claim to possessory estate. (Minn. Stat. §508A.06). Examiner prepares written report based on application, abstract of title and public records. Notices of registration are mailed by examiner to any person listed by examiner as having right, title, estate, lien or interest in land pursuant to address list and materials provided by applicant. (Minn. Stat. §508A.13, subdivs. 1, 4).

At least 20 days after mailing of notice, examiner issues written directive to registrar of titles that first certificate be issued, subject to exceptions listed in Minn. Stat. §508A.25, separate memorials showing all outstanding interests stated in examiner's report and any additional interests affecting land arising after filing application, and memorial of directive stating that land is subject to rights of persons in possession or which would be disclosed by survey, except as those rights are limited by Minn. Stat. §508A.02, subdiv. 1. (Minn. Stat. §508A.22). Actions affecting possession or title to land and founded upon any instrument, event or transaction occurring before entry of first certificate which is not set out in separate memorial on certificate or saved by Minn. Stat. §508A.25[1]-[5] and [7] is barred unless action commenced and notice of lis pendens registered within five years of first certificate. (Minn. Stat. §508A.17). Appeals are provided for. (Minn. Stat. §508A.29).

Special procedures prescribed for transactions involving land following issuance of certificate of possessory title, including reissuing certificates, conveyances, mortgages, judgments, leases, trusts, liens, attachments, death of owner, subsequent adverse claims, agencies and eminent domain. (Minn. Stat. §§508A.40, .421). Owner of land covered by certificate of possessory title may convey, mortgage, lease, charge or otherwise deal with land same as if it had not been registered. Voluntary instrument of conveyance, other than will or lease not exceeding three years, operates only as contract between parties and as authority to make registration. Act of registration is operative act to convey or affect land. (Minn. Stat. §508A.47).

After expiration of five years from date of first certificate, owner may file with registrar of titles for changeover from certificate of possessory title to certificate of title. Changeover occurs automatically upon filing of any instrument transferring title from registered owner after five-year period. Owner of certificate of possessory title may commence registration proceeding under Minn. Stat. c. 508 at any time. (Minn. Stat. §508A.85).

For registrar's fees, see Minn. Stat. §508A.82.

Transfer of Decedent's Title.

In case of land which is not registered, transfer to heir at law or devisee is shown of record by filing certified copy of will, if any, certified copy of order of distribution, if any, and personal representative's deed or certified copy of decree of distribution with county recorder of county in which land is situated. In case of registered land, new certificate of title is issued to heir at law or devisee upon filing certified copy of will, if any, certified copy of order of distribution, if any, and personal representative's deed or final decree of distribution with registrar of titles of county in which land is situated. Registrar cancels decedent's certificate of title and issues new certificate to person entitled thereto. (Minn. Stat. §§508.68, 69).

Vital Statistics.

Reports of deaths must be filed with state registrar (Minn. Stat. §§144.215, .221); marriage reports with local registrar of district court (Minn. Stat. §517.10). Birth and death records available from Minnesota Department of Health, 717 Delaware Street S. E., Minneapolis, MN 55440. Fee for certified copy of birth and death records $11 per copy.

Establishing Birth Records.

Any person born in state, if no record of his birth exists, may petition appropriate court for order directing issuance of record. (Minn. Stat. §144.217, subdiv. 2).

10.05 SEALS:

Uniform Commercial Code adopted. (Minn. Stat. c. 336). See category 3 Business Regulation and Commerce, topic 3.09 Commercial Code.

Use of private seals in written instruments is abolished. (Minn. Stat. §358.01).

Corporation has power to adopt and use corporate seal, but failure to affix seal does not affect validity of any instrument, document or act. (Minn. Stat. §301.09; Minn. Stat. §302A.163). See category 2 Business Organizations, topic 2.03 Corporations, subhead Powers.

10.06 TORRENS ACT:

See topic 10.04 Records.

10.07 VITAL STATISTICS:

See topic 10.04 Records.

11 EMPLOYMENT

11.01 EMPLOYER AND EMPLOYEE:

See topic 11.02 Labor Relations.

11.02 LABOR RELATIONS:

Department of Labor and Industry has general jurisdiction over labor matters. (Minn. Stat. §175.001). Within Department of Labor and Industry is Division of Workers' Compensation. (Minn. Stat. §171.006).

Unlawful to persuade workers to change their employment by means of representations known to be false. (Minn. Stat. §181.64). Employers recruiting employees to relocate to work in “food processing industry” must give detailed written disclosure in English and Spanish of terms and conditions of employment. (Minn. Stat. §181.635). Unlawful for employer to require employee or applicant to pay cost of medical examination or other records required as condition of employment, except in connection with administration of employee's pension and disability benefit plan, or citizenship papers, or birth records. (Minn. Stat. §181.61). Unlawful for employer or agent by direct or indirect coercion to request or require polygraph or other test of honesty of employee or prospective employee. (Minn. Stat. §181.75). Lawful for employer to test employee or job applicants for drugs and alcohol pursuant to written policy if use and conduct of test conforms to statutory requirements. (Minn. Stat. §§181.950-.957). Genetic testing of employees prohibited. (Minn. Stat. §181.974). Except as provided in Minn. Stat. §123B.03, employer may not require employee or applicant to pay for expenses incurred in criminal or background checks, credit checks or orientation, or expenses for certain required training or testing. (Minn. Stat. §181.645). Unlawful to request information from employment applicant regarding National Guard or Reserve status. (Minn. Stat. §181.535).

Status of Employment.

Minnesota generally follows employment at will rule. (197 Minn. 291, 266 N.W. 872). However, personnel handbook can give rise to contract of employment (333 N.W.2d 622), and employees may recover damages for adverse action by employer resulting from employees' whistle-blowing activities (Minn. Stat. §181.932; Minn. Stat. §181.935). Employer must give notice to employees of right to written statement of truthful reason for termination. (Minn. Stat. §181.934). Statements must be provided within ten working days of request and may not be made subject of libel, slander, or defamation claim. (Minn. Stat. §181.933). Employee has right to review, obtain copy of, and challenge accuracy of information in employer's personnel records. (Minn. Stat. §§181.960-.966). Employer may not be sued by employee or former employee for disclosure of certain employment reference information to prospective employer unless employer knew or should have known that information was false and acted with malicious intent to injure employee. (Minn. Stat. §181.967). Recipient of employee assistance services has right to review and obtain copies of employee assistance records, which must be kept separate from personnel records and may not be disclosed without written consent of recipient. (Minn. Stat. §181.980).

Wages and commissions earned and unpaid at time of discharge of employee by one employing labor in state become immediately due and payable on demand of employee, whether employed by day, hour, week, month or piece. (Minn. Stat. §181.13[a]). When employee quits, wages and commissions earned and unpaid are due and payable on first regularly scheduled payday following final day of employment, unless collective bargaining agreement has other provision. If first payday is within five days after final day of work, payment may be delayed until second regularly scheduled payday, but not more than 20 days from final day of work. However, wages of migrant workers become due and payable within five days of quit. (Minn. Stat. §181.14, subdiv. 1). Wages not paid within required time become immediately payable on demand of employee. (Minn. Stat. §181.14, subdiv. 2). Employer in default if payment not made (or post marked, if employee requests mailing) within 24 hours after demand. Employee may charge and collect wages at rate agreed upon in contract of employment for such period not exceeding 15 days after expiration of 24 hours, as long as employer is in default. (Minn. Stat. §181.13; Minn. Stat. §181.14, subdiv. 2). However, where discharged or resigning employee was entrusted with money or property, employer has ten calendar days following termination to audit and adjust accounts before wages and commissions become due. (Minn. Stat. §181.14, subdiv. 4). Payment to be made at usual place of payment unless employee requests payment by mail. (Minn. Stat. §181.14, subdiv. 5). Commissioned salesperson who is independent contractor to be paid promptly on demand commissions due for services or merchandise which has been delivered to and accepted by customer by final day of employment. Payment to be made in three working days if salesperson discharged or resigned with at least five days written notice, and in six working days after resignation without such prior notice. (Minn. Stat. §181.145, subdiv. 2). Penalty for nonprompt payment equals 1/15 of unpaid amount per day of delay up to 15 days. (Minn. Stat. §181.145, subdiv. 3). It is unlawful for any employer other than public service corporation to pay salary or wages by non-negotiable time check or order. (Minn. Stat. §181.02). Public service corporations must pay their employees at least semi-monthly. (Minn. Stat. §181.08). Wages of persons employed in transitory work requiring change of abode must be paid at least every 15 days and within 24 hours after termination of employment, whether by discharge or by quitting. (Minn. Stat. §181.10 et seq.). All employers must pay wages at least once every 31 days on regular payday designated in advance. (Minn. Stat. §181.101).

Wages may be paid by cash, check or direct deposit to employee's choice of demand deposit account unless employee makes written objection. (Minn. Stat. §177.23, subdiv. 4). Wages may also be paid with employee's written consent by electronic fund transfer to payroll card account, subject to statutory requirements. (Minn. Stat. §177.255, expires May 31, 2007).

At end of each pay period, employer must provide earnings statement including employee's name, hourly rate of pay (if applicable), total hours worked (unless exempt from minimum wage and overtime laws), total gross pay, list of deductions, net pay, last day of pay period, and legal name of employer (and operating name, if different). Statements may be provided by electronic means, accessible on employer-owned computer during regular working hours, unless employee gives notice of desire to receive written statements. (Minn. Stat. §181.032). Employer may not alter method, timing or procedures for payment of commissions after employee has resigned or been terminated. (Minn. Stat. §181.03, subdiv. 2).

If no personal representative has been appointed for deceased employee, employer must, on request, pay to surviving spouse wages due decedent, not exceeding $10,000. (Minn. Stat. §181.58).

Employer with annual gross volume of sale or business greater than $625,000 and which is covered by Minn. Fair Labor Standards Act must pay minimum wage of $6.15 per hour. Smaller employer must pay minimum wage of $5.25 per hour. However, during first 90 days of employment, employer of any size may pay employee under age 20 wage of $4.90 per hour. Gratuities may not be applied toward minimum wage. (Minn. Stat. §177.24).

Overtime pay for work in excess of 48 hours in workweek (Minn. Stat. §177.25) required by Minnesota Fair Labor Standards Act (Minn. Stat. §§177.21-.35). Exceptions are following: (1) State or political subdivision employees if compensation is time off granted at rate of 1½ hours for each hour worked in excess of 48, (2) health care, (3) motor vehicle salesperson or mechanic, and (4) constructors of on-farm silos. (Minn. Stat. §177.25). Employee must be allowed adequate time off from work every four hours to use nearest convenient restroom. (Minn. Stat. §177.253). Employee working eight or more consecutive hours must be given sufficient time to eat meal, but meal break may be unpaid time. (Minn. Stat. §177.245). Action may not be taken against nurse who refuses assignment of hours in excess of normal work period under certain circumstances. (Minn. Stat. §181.275, subdiv. 2).

Employee has right to be absent from work for purposes of voting during morning of day of election without penalty or deduction from salary or wages. (Minn. Stat. §204C.04). Individual selected to serve as election judge may, upon 20 days written notice, be absent from work without penalty other than deduction from pay for amounts paid for serving as election judge. (Minn. Stat. §204B.195).

Employer Liabilities.

Any employer found by commissioner to have violated specified statutes regarding wages, hours or other employment conditions is liable for back pay, compensatory damages, additional equal amount in liquidated damages, civil penalty of up to $1,000 for each repeated or willful violation, and reimbursement of department and attorney general for litigation or hearing costs, and may be ordered to cease and desist from violations. (Minn. Stat. §177.27, subdiv. 7). Commissioner's order becomes final if employer fails to respond within 15 calendar days. (Minn. Stat. §177.27, subdiv. 4). Employee aggrieved by violation may bring civil action to recover civil penalties or damages provided in statute violated, compensatory damages, other appropriate relief, and attorneys fees, costs and disbursements. (Minn. Stat. §177.27; Minn. Stat. §181.171).

Assignment of wages, see category 8 Debtor and Creditor, topic 8.01 Assignments.

Health coverage provided by employers is regulated by Minn. Stat. cc. 62A through 62T. State mandates waived for small employers with at least two but not more than 50 employees. (Minn. Stat. §62L.056). Patient Protection Act prohibits "gag" rules, requires disclosure to employees of certain information regarding managed care arrangements, and regulates resolution of benefits claims, access to emergency services and specialty care, and changes of providers. (Minn. Stat. §62J.695 et seq.). Health plan or third party administrator must pay or deny "clean" claims within 30 days of receipt or pay interest at rate of 1.5% per month of delay. Health care provider generally must submit charges within six months of date of service or forfeit right to collect from either patient or health plan. (Minn. Stat. §62Q.75).

Child Labor.

Employer required to have proof of age of any minor employee. (Minn. Stat. §181A.06). No minor under age of 14 may be employed, except in agricultural operations, or as actor, model, performer, newspaper carrier or youth athletic program referee, umpire or official for younger participants. (Minn. Stat. §181A.04; Minn. Stat. §181A.07). Minor under age of 16 may work only between 7:00 a.m. and 9:00 p.m., with limit of eight hours in 24 hour period and 40 hours per week. Minors under age of 18 may be restricted by rule from working in occupations which are hazardous or detrimental to their well-being. (Minn. Stat. §181A.04). Minor under age of 16 may work during school hours only pursuant to employment certificate issued by school district, which employer is required to return to issuing officer upon termination of employment. (Minn. Stat. §181A.04; Minn. Stat. §181A.05). High school students under age of 18 cannot work after 11:00 p.m. on evening before school day or before 5:00 a.m. on school day. (Minn. Stat. §181A.04[6]). Note from student's parent or guardian can extend permissible working hours by one half-hour. (Minn. Stat. §181A.04[6]). Regulations and exemptions administered by Commissioner of Department of Labor and Industry. (Minn. Stat. §181A.07; Minn. Stat. §181A.09). Fines imposed on employers for violations, violations are misdemeanors, single violation resulting in minor's death or substantial bodily harm and repeated violations are gross misdemeanors. (Minn. Stat. §181A.12).

Female Labor.

Wage discrimination based on sex prohibited under equal pay for equal work law. (Minn. Stat. §§181.66-.71). Employer must provide reasonable unpaid break time each day, and room or other location close to work area, for employee who needs to express breast milk for her infant child. (Minn. Stat. §181.939).

Discrimination in employment based on race, color, religion, national origin, sex (including sexual harassment), marital status, status with regard to public assistance, membership activity in local anti-discrimination commission, disability, sexual orientation or age (over age of majority) prohibited by Human Rights Act. (Minn. Stat. §363A.01 et seq.). Mandatory retirement based on age also regulated by Minn. Stat. §181.81 et seq. Reprisal against employee for not contributing to charity or community organization prohibited. (Minn. Stat. §181.937). Employer may not refuse to hire applicant or discipline or discharge employee for use of lawful consumable products off employer's premises during nonworking hours. (Minn. Stat. §181.938).

Employee Leaves of Absence.

Employer of more than 20 persons must grant to employee who has been employed on at least half-time basis for at least 12 consecutive months, immediately preceding request, six weeks unpaid leave in conjunction with birth or adoption of child, must allow such employee to use personal sick leave benefits (but not salary continuation or disability benefits) for absences due to illness or injury of employee's child, and must allow up to 40 hours of paid leave for bone marrow donation. All employers must grant employees employed on at least half-time basis up to 16 hours of leave during any 12-month period to attend school conferences and school related activities related to employee's child (including foster child). (Minn. Stat. §§181.940-.945). Employer must grant leave to employee to allow employee to donate blood. (Minn. Stat. §181.9458). Employer must grant up to ten days of unpaid leave to employee whose immediate family member has been injured or killed while in active military service. (Minn. Stat. §181.947). Employer must grant up to one day of unpaid leave per calendar year to employee to attend send-off or homecoming ceremony for immediate family member who has been mobilized for military service. (Minn. Stat. §181.948). Employer may not take adverse employment action against employee because of membership of spouse, parent or child in armed forces, where employee must take unpaid leave to attend certain events or programs. (Minn. Stat. §192.325). State personnel entitled to leave for blood donation. (Minn. Stat. §43A.187). Veteran with a service-related disability may apply for additional sick leave for treatment for the disability. (Minn. Stat. §43A.184).

Migrant Labor.

Employers of more than five recruited migrant laborers must provide health care insurance during period of employment or for illness or injury incurred during employment in accordance with regulations of Commissioner of Labor and Industry. (Minn. Stat. §181.73). Wages become due and payable to migrant worker within 24 hours after discharge and within five days after quitting. (Minn. Stat. §181.13; Minn. Stat. §181.14).

Labor Unions.

Employees have right to organize and bargain collectively and employers are forbidden to interfere in these activities. (Minn. Stat. §179.10). Representatives chosen by majority of employees are exclusive collective bargaining representatives. (Minn. Stat. §179.16). Commissioner of mediation services, upon request of any party, may certify bargaining unit. (Minn. Stat. §179.16).

No employer need negotiate with another union as long as valid collective bargaining agreement with union certified by director of mediation services or N.L.R.B. as accredited bargaining representative is in effect. (Minn. Stat. §179.135). Employer may recover damages against third party for strike or boycott called to prevent accredited representative from acting. (Minn. Stat. §179.28). Right to work law not adopted.

Labor Disputes.

Union seeking to negotiate or change contract and employer seeking to change contract must give notice to other party of such intention; if no settlement is reached within ten days after service of said notice, notice of strike or lockout may be served on director of mediation services and other party, and strike or lockout may not be commenced for ten days thereafter. Commissioner is directed to take steps to effect settlement. (Minn. Stat. §179.06). Where dispute affects public interest, Governor may appoint fact-finding commission and strikes and lockouts are prohibited for additional 30 days. (Minn. Stat. §179.07). Where jurisdictional strike or picketing exists, commissioner must notify Governor, who may appoint referee, and after such appointment, strike, boycott or picketing illegal. (Minn. Stat. §179.083). Injunctions and restraining orders in labor disputes limited. (Minn. Stat. §§185.01-.20).

Strikes and lockouts by charitable hospitals and their employees are unlawful. (Minn. Stat. §179.35 et seq.). Above restrictions not applicable to employer in interstate commerce, at least where activity is arguably subject to federal supervision. (236 Minn. 303, 53 N.W.2d 36; 370 U.S. 173).

Unfair labor practices are unlawful acts and may be enjoined unless employer in interstate commerce. (Minn. Stat. §179.14).

Unfair labor practices by employees or unions are: (1) strikes in violation of collective bargaining agreement or in violation of collective bargaining agreement or in violation of notice provisions, set forth above, (2) seizing or occupying property during dispute, (3) for less than a majority of pickets to be employees of picketed business, (4) for more than one person to picket an entrance where no strike in progress, (5) to interfere with motor vehicle when neither its owner nor its driver is a party to strike, (6) to intimidate a person in an effort to make him join or refrain from joining a union or strike, (7) to call a strike unless majority of employees by secret ballot approve, (8) to interfere with agricultural producer, processor or marketer so as to bring pressure on another producer (Minn. Stat. §179.11), (9) secondary boycotts (Minn. Stat. §179.41 et seq.), (10) to interfere with use of public roads or obstruct entrance to any place of business (Minn. Stat. §179.13). (Minn. Stat. §179.11).

Unfair labor practices by employers are: (1) to institute a lockout in violation of collective bargaining contract or notice provisions set forth above, (2) to encourage or discourage union membership by discrimination unless so provided by valid contract, (3) to discharge or discriminate against employee because of his activities under this Act, (4) to spy on union, (5) to blacklist, (6) to hire employee of another if such employee is paid less than wage agreed to be paid by hirer under existing union contract for same grade of work, (7) to willfully and knowingly utilize professional strike-breaker to replace employees involved in strike or lockout within state, or (8) grant or offer to grant permanent replacement status to persons performing bargaining unit work during lockout or during strike authorized by representative of employees. (Minn. Stat. §179.12).

Public Employees.

Public Employment Labor Relations Act (Minn. Stat. c. 179A) provides binding arbitration of labor disputes (Minn. Stat. §179A.16). Employees (other than persons defined as essential employees) may strike under specified circumstances. (Minn. Stat. §§179A.18, .19).

Action for Death.

Action against railroad for death of employee must be begun within two years. (Minn. Stat. §219.83).

Employers' Liability Act.

When employer is a railroad, defense of contributory negligence is a bar only proportionately to amount of such contributory negligence. Defense of contributory negligence is abolished where employer violated statute enacted for safety of employees. Defense of assumption of risk is entirely abolished. Fellow servant rule also abolished. (Minn. Stat. §§219.79-.80).

Plant Closing.

Employer giving notice of plant closing, substantial layoff, or relocation of operations under Federal WARN Act, or voluntarily under Minnesota law, must report to commissioner of employment and economic development names, addresses and occupations of affected employees. (Minn. Stat. §116L.976).

Unemployment Compensation.

Unemployment Benefits.

To be entitled to benefits, individual must register for work at employment office, submit claim, be unemployed at time claim is filed, have sufficient wage credits within base period to establish valid claim, be able and available for and actively seek suitable work, wait one week during which eligible for benefits, and participate in reemployment services if determined to be in need of such services by commissioner. Ineligible if secondary school student, incarcerated or performing court ordered community service, fails or refuses to provide information regarding issue of eligibility or disqualification, on voluntary or paid leave of absence (excluding vacation shutdowns), performing 32 or more hours per week of employment, volunteer work or self-employment, or during suspension without pay for 30 days or less for misconduct. (Minn. Stat. §§268.07, .085). Individuals who receive severance pay, bonus pay, vacation pay (except upon permanent separation from employment), sick pay, or other money wage payments equal to or in excess of weekly benefit amount upon separation from employment are not eligible for benefits for period following last day of employment equal to total of periodic payments or lump sum to be received divided by individual's regular weekly pay. (Minn. Stat. §268.086). No deduction for earnings from direct service (other than on-call or stand-by pay) as volunteer firefighter or ambulance personnel, or jury duty pay. (Minn. Stat. §268.085, subdiv. 5). Disqualification or offset also provided for earnings from employment, back pay, holiday pay, certain workers' compensation or disability insurance payments, pension or retirement payments not immediately rolled over, and certain Social Security old age or disability benefits. Special rules provided for school employees or contractors, athletes and coaches, aliens, recreational or tourist industry employees and business owners. (Minn. Stat. §268.085). Disqualifications for voluntary quit other than for good reason caused by employer (exceptions apply for former employees who resign to accept other employment, who quit unsuitable employment or who quit due to employee's serious illness or domestic abuse), discharge for misconduct or aggravated misconduct, or participation in labor dispute. (Minn. Stat. §268.095). Disqualification for eight weeks following failure to apply for or accept suitable work (including re-employment). (Minn. Stat. §268.085). Weekly benefit amount is higher of (1) 50% of individual's average weekly wage during base period up to maximum of 662/3% of state's average weekly wage, or (2) 50% of individual's average during higher quarter up to maximum of 43% of state's average weekly wage. Benefits are payable up to amount equal to lower of 331/3% of individual's total base period wage credits rounded to next lower dollar, or 26 times individual's weekly benefit amount. (Minn. Stat. §268.07, subdiv. 2). Benefits due and unpaid at claimant's death may be paid to personal representative of claimant's estate, or, if none, to surviving spouse, children or parents. (Minn. Stat. §268.087). Successful bidder on nonresidential construction or repair project who fails to provide unemployment or workers' compensation coverage required by state law is liable to any injured party for damages, attorneys fees and costs. Unsuccessful bidders presumed to be damaged in amount equal to projected profit. Violation is also misdemeanor. (Minn. Stat. §181.721). Computations of money not resulting in whole dollars are rounded down. (Minn. Stat. §268.034). Benefits may be paid for voluntary unemployment to avoid layoff of another employee. (Minn. Stat. §268.088).

Workers' Compensation Act.

Workers' compensation is under control of Commissioner of Labor and Industry who supervises Division of Workers' Compensation within Department of Labor and Industry. (Minn. Stat. c. 175). Appellate tribunal for workers' compensation is Workers' Compensation Court of Appeals. (Minn. Stat. §175A.01).

Employees of common carriers by railroad in interstate or foreign commerce, certain household workers, executive officers of certain closely held corporations and owners of family farms and family farm corporations and their spouses, parents and children, casual employees, independent contractors, persons covered under Domestic Volunteer Service Act of 1973, and managers and certain members of limited liability companies and certain of their relatives are not within Act. (Minn. Stat. §176.041). Owners and certain officers of businesses or farms and their immediate relatives, employers of farm labor and household workers, managers of small limited liability companies, and employers of independent contractors may come under Act by purchase of valid compensation insurance policy covering such persons. (Minn. Stat. §§176.042, 051).

Compensation is provided, according to schedule of rates, for personal injury or death caused by accident in course of employment, unless injury intentionally self-inflicted or caused by drunkenness or occurred while participating in voluntary recreational programs sponsored by employer. Compensation is payable at regular wage periods during temporary disability.

Permanent partial disability awards are also paid in installments unless employee elects lump sum payment of present value. (Minn. Stat. §§176.021, 101, 111). Benefits once awarded are adjusted periodically for changes in statewide average weekly wage. (Minn. Stat. §176.645).

No agreement is binding which gives employee less than law allows him (Minn. Stat. §176.021). Minors come within Act. (Minn. Stat. §§176.091, 101). Employers must insure unless they show ability to make payments. (Minn. Stat. §176.181).

Where a person other than employer is liable for injury and is insured or self-insured and where both employer and such third person were engaged in furtherance of common enterprise or in accomplishment of same or related purposes on premises, employee has option of proceeding at law against third person for damages or against employer for compensation, but not against both. (Minn. Stat. §176.061, subdiv. 1). If employee elects to take compensation, employer has right of indemnity or subrogation against third person. In other situations where third person is liable, employee, employer or attorney general may proceed at law against third person notwithstanding payment by employer or special compensation fund of compensation. (Minn. Stat. §176.061, subdiv. 3). To extent employer has fault separate from fault of injured employee, third party who is liable has right of contribution against employer proportional to employer's percent of fault. If employer waives or settles right to recover worker's compensation benefits, employee can seek full damages and any recovery that is duplicative of workers' compensation benefits is deducted from award by trial court following verdict. (Minn. Stat. §176.061, subdiv. 11). Co-employee not liable unless injury resulted from gross negligence or was intentionally inflicted by co-employee. (Minn. Stat. §176.061, subdiv. 5[c]). Settlement between third person and employee not valid unless prior notice of intent to settle given to employer. Settlement between employee or dependents and third person void as against employer's right of subrogation or indemnity for compensation paid. Copy of complaint and notice of trial or note of issue in action by employee or dependents against third party must be served on employer or insurer. Employer has lien on any judgment in such action. (Minn. Stat. §176.061, subdiv. 8[a]).

Where dispute arises between two or more employers or insurers as to liability for compensation, Commissioner, compensation judge, or court may direct either to pay up to limits of applicable coverage pending determination of liability and on determination must order party liable to reimburse any other party for payments made, with interest at 12% per annum, and award reasonable attorney's fees to claimant. Where dispute exists, payments may be made from special compensation fund, by health insurance carrier or by commissioner of public welfare, and on determination party liable must reimburse payments made, with interest at 12% per annum. Provision made for mandatory arbitration of such disputes in certain circumstances. (Minn. Stat. §176.191).

Employee must sue within three years after notice to Commissioner of accident and within six years after accident. (Minn. Stat. §176.151[1]). In case of death, dependents may bring suit within three years after notice to Commissioner and within six years after injury, unless compensation was paid for injury from which death resulted, which extends limitation to three years from notice and six years from death. (Minn. Stat. §176.151[2]). In case of persons under physical or mental disability, limitation is extended for three years from date of removal of disability. (Minn. Stat. §176.151[3]). In case of injury caused by radiation or other occupational disease, limitation is three years after employee has knowledge of cause of injury and injury has resulted in disability. (Minn. Stat. §176.151[4]).

Act applies to employee regularly performing primary employment duties in state who is injured while temporarily out of state in course of employment. Resident who is transferred outside U.S. as employee of Minnesota employer is presumed to be temporarily employed outside of state. Act does not apply to employee hired to or regularly performing primary employment duties out of state who is injured in state if employer has provided workers' compensation coverage for such injury under laws of any other state unless employee regularly resides and regularly performs part of employment duties in state. Employee hired in North Dakota by North Dakota employer excluded while temporarily working in state. (Minn. Stat. §176.041).

If employer is nonresident or foreign corporation on which service cannot be made, action may be brought in district court and garnishment or attachment is permitted. (Minn. Stat. §176.295). Petition filed with Commissioner in disputed case referred for settlement conference within 60 days or administrative conference or hearing. If no settlement, summary decision may be issued, which is final unless formal hearing is requested. (Minn. Stat. §176.106). Where issue joined in district court action, court may try without jury or refer matter for hearing before compensation judge. (Minn. Stat. §176.301). Appeals are to Workers' Compensation Court of Appeals, except for Commissioner's decisions which may be heard de novo in some other proceeding. (Minn. Stat. c. 175A, Minn. Stat. §§176.421, .442). Decisions reviewable by Supreme Court upon certiorari. (Minn. Stat. §176.471).

Claims for compensation or settlements of such claims are not assignable. (Minn. Stat. §176.175).

Building construction contractors considered independent contractors. (Minn. Stat. §181.723).

Occupational diseases are “personal injuries” within Act. (Minn. Stat. §176.66).

Occupational Safety and Health.

Regulated by Minn. Stat. c. 182. Employers are required to provide training programs for employees exposed to hazardous substances. Covered employers in industries designated by Commissioner of Labor and Industry must establish written workplace accident and injury reduction program. (Minn. Stat. 182.653). Employees may demand access to information about hazardous substances in workplace and have right to refuse in good faith to work under conditions reasonably believed to present imminent danger of death or serious physical harm. (Minn. Stat. §182.654). In case of death of employee, Department is to mail to employee's next of kin copies of citations, penalties and other agency records; and next of kin has right to consult with Department. (Minn. Stat. §182.6545). Employee, union or other person who knowingly discloses or receives information, except for medical treatment or otherwise by statute, regarding hazardous substance which has been registered as trade secret is subject to statutory penalties and civil liabilities for theft of trade secrets. (Minn. Stat. §182.668, subdiv. 5). Discharge or other discrimination against employee for exercising rights under statute is prohibited. (Minn. Stat. §182.669).

11.03 WORKERS' COMPENSATION LAW:

See topic 11.02 Labor Relations.

12 ENVIRONMENT

12.01 ENVIRONMENTAL REGULATION:

General Supervision.

Pollution Control Agency. (Minn. Stat. §116.07).

Prohibited Acts of Pollution.

Pollution Control Agency has broad powers to establish standards and regulations relating to discharge of sewage, industrial wastes and other wastes into waters, including limitations on nutrients in cleaning agents and water conditioners, air contamination and pollution, acid deposition, noise pollution, hazardous wastes, leaking underground storage tanks, industrial wastes, and waste disposal and land pollution. Violation is public nuisance. (Minn. Stat. §115.03, Minn. Stat. §116.07, Minn. Stat. §116.21, Minn. Stat. §116.44).

Enforcement.

Provisions of law and Agency regulations or standards may be enforced by injunction, also enforceable by criminal prosecution and action to recover civil or administrative penalties action to compel performance, or other appropriate action. (Minn. Stat. §115.071). Pollution Control Agency director and county board that adopts ordinances with cooperation of Pollution Control Agency may issue orders requiring hazardous waste violations be corrected and may administratively access penalty of up to $10,000 for all violations. (Minn. Stat. §116.072). Attorney General or County Attorney may bring action seeking payment of penalties or other relief. (Minn. Stat. §116.072). Agency may issue emergency order without hearing, or Attorney General may obtain temporary restraining order. (Minn. Stat. §116.11). Any person, corporation, organization or other entity may maintain civil action in district court for declaratory or equitable relief in name of state for protection of air, water, land, or other natural resources from pollution, impairment or destruction against any person violating any environmental quality regulation or standard of Pollution Control Agency, Department of Natural Resources, Department of Health or Department of Agriculture. (Minn. Stat. §116B.03, subdiv. 1). Pollution Control Agency may take steps to determine whether real property has been site of release or threatened release of hazardous substance, and may clean up such hazardous waste sites. (Minn. Stat. §115B.17). Persons responsible for hazardous waste and petroleum contamination sites are strictly liable, jointly and severally, for costs of clean up. (Minn. Stat. §115B.04, Minn. Stat. §115C.04). A state agency by order of the commissioner or a political subdivision may enter property for purposes of investigation, monitoring, testing, surveying, boring, or other similar activities necessary or appropriate to identify the existence and extent of a release or threat of release of a hazardous substance, pollutant, or contaminant. (Minn. Stat. §117.041).

Penalties.

Violation, except as follows, is misdemeanor. Civil penalties and other remedies also provided. (Minn. Stat. §115.071).

Permits.

Agency may, after public hearing, grant variances from requirements of its rules to avoid undue hardship. Local government unit authorized to exercise administrative powers may, after public hearing, grant variances from pollution control regulations adopted by it. (Minn. Stat. §116.07, subdiv. 5). Permit of Agency required for construction of all sewage and industrial waste disposal systems (Minn. R. 7080.0030) and emission and air contaminant treatment facilities and waste collection, transportation, storage, processing or disposal systems (Minn. Stat. §116.081). Except for construction of buildings worth less than $500,000, building or construction permits may not be issued for industrial or commercial buildings employing more than 12 persons unless sewage or industrial waste originating in such buildings will be discharged into disposal system for which Agency permit has been granted, unless Agency has cause not to apply requirement. (Minn. Stat. §115.03, subdiv. 4). Environmental impact statements are required by regulation for certain projects. (Minn. R. 4410.4400, subdiv. 14, am'd). Routing permit required from Environmental Quality Board, after public hearings, for constructing pipelines for transportation of hazardous liquids. (Minn. Stat. §216G.02). Commissioner of Public Safety, through Director of Pipeline Safety, must establish minimum safety standards for transportation of gas and pipeline facilities. (Minn. Stat. §299J.061 repealed, 2006 Minn. c. 212, art. 1, §26). Criminal actions, civil penalties and action to compel performance brought by Attorney General at request of Commissioner in name of state, or other appropriate actions, are remedies for failing to report emergency release from pipeline (Minn. Stat. §§299J.07,299J.16), or disposing of pipeline after emergency release (Minn. Stat. §299J.15).

Liability for Hazardous Wastes.

Persons responsible are strictly liable for death, personal injury, disease or economic loss resulting from hazardous wastes. (Minn. Stat. §115B.05). Whether responsible persons are jointly or severally liable depends upon application of applicable statutory and common law. (Minn. Stat. §115B.055).

Liability for Leaking Underground and Above-ground Storage Tanks.

Persons responsible are liable for costs of corrective action taken by MPCA. (Minn. Stat. §115C.04).

12.02 [RESERVED]

12.03 WILDLIFE AND ENDANGERED SPECIES:

General Supervision.

Commissioner of Department of Natural Resources oversees divisions of Enforcement, Fisheries, Wildlife, and Ecological Services. (Minn. Stat. §97A.015).

Game Refuges.

All state parks are designated as game refuges. May also be established by Commissioner, or by petition of area landholders or county residents. (Minn. Stat. §97A.085).

Wildlife Management Areas.

Are open to hunting and fishing unless closed by rule of commissioner or by posting of restrictions. (Minn. Stat. §97A.137).

Aquatic Species Protection

Vessel ballast water management and record-keeping requirements must be met to minimize discharge of invasive species in Lake Superior. (Minn. Stat. §§115.1701 to 115.1707).

13 ESTATES AND TRUSTS

13.01 ADMINISTRATION:

See topic 13.10 Executors and Administrators.

13.02 ADVANCEMENTS:

See topic 13.07 Descent and Distribution.

13.03 ALLOWANCES:

See topic 13.10 Executors and Administrators.

13.04 CLAIMS:

See topic 13.07 Descent and Distribution; category 5 Civil Actions and Procedure, topic 5.17 Pleading.

13.05 DEATH:

Anyone not heard from in four years, whose absence is not satisfactorily explained, is presumed dead. (Minn. Stat. §576.141).

Finding made pursuant to Federal Missing Persons Act is prima facie evidence of death. (Minn. Stat. §600.24 et seq.).

Survivorship.

Uniform Simultaneous Death Act adopted, with certain modifications. (Minn. Stat. §524.2-702). Effective for estates of intestate decedents dying after Dec. 31, 1986, person who fails to survive decedent by 120 hours is deemed to have predeceased decedent. (Minn. Stat. §524.2-104). Effective for persons who die on or after Aug. 1, 1999, beneficiary of trust in which grantor has reserved power to alter, amend, revoke or terminate provisions of trust (other than qualified or nonqualified retirement plan or individual retirement account) who fails to survive grantor by 120 hours, devisee who fails to survive testator by 120 hours, or appointee of power of appointment taking effect at death of holder of power who fails to survive holder of power by 120 hours is deemed to have predeceased grantor, testator or holder of power. (Minn. Stat. §524.2-702).

Action for death by wrongful act or omission may be brought by trustee appointed by court having jurisdiction of action on petition of surviving spouse or next of kin. Recovery is for benefit of surviving spouse and next of kin, proportionate to pecuniary loss suffered as a result of death. Maximum recovery not limited by statute. Punitive damages may be awarded. With exceptions, action must be commenced within three years after death and within six years after act or omission causing death. Where action commenced by decedent, before his death, for injury of which he died, such action may be continued by trustee, and rules governing actions begun by such trustee apply. (Minn. Stat. §573.02, subdiv. 1). Action for special damages arising from injury may be brought by trustee when injured person dies from unrelated cause. (Minn. Stat. §573.02, subdiv. 2). See also category 11 Employment, topic 11.02 Labor Relations.

Death Certificate.

Person requesting certified copy of death certificate must show tangible interest. (Minn. Stat. §144.225). See category 10 Documents and Records, topic 10.04 Records, subhead Vital Statistics.

13.06 DECEDENTS' ESTATES:

See topics 13.07 Descent and Distribution, Executors and Administrators, Wills; category 8 Debtor and Creditor, topic 8.10 Homesteads.

13.07 DESCENT AND DISTRIBUTION:

See also topic 13.10 Executors and Administrators.

For estates of decedents dying before Jan. 1, 1996, subject to allowance provided for surviving spouse or minor children and to payment of expenses of administration, expenses of last illness and funeral, taxes and debts, any part of estate of decedent not effectively disposed of by decedent's will (other than homestead and cemetery lots) passes to decedent's heirs as follows: surviving spouse takes entire estate if intestate left no issue surviving or all of decedent's surviving descendants are also descendants of surviving spouse and there is no other descendant of surviving spouse who survives decedent. (Minn. Stat. §524.2-101 and Minn. Stat. §524.2-102). If one or more surviving issue are not issue of surviving spouse, surviving spouse takes first $150,000 plus one-half of any balance of intestate estate. (Minn. Stat. §524.2-102). Excess of such real and personal estate over share of such surviving spouse, descends and is distributed as follows, each class of which a member is living taking to exclusion of subsequent classes:

(1) Children and/or issue of deceased children; (2) parents or surviving parent; (3) brothers, sisters and/or issue of deceased brothers or sisters; (4) next of kin of equal degree, except that those claiming through nearest ancestor take to exclusion of others of equal degree claiming through more remote ancestor. (Minn. Stat. §524.2-103).

Effective Jan. 1, 1996, law of descent and distribution revised as follows. Partial or full disinheritance by will allowed. Intestate share of disinherited heir passes as if heir had disclaimed. (Minn. Stat. §524.2-101). Spouse receives entire estate if (i) there are no surviving descendants of decedent or (ii) all of decedent's surviving descendants are also issue of spouse and there is no other surviving descendant of surviving spouse. (Minn. Stat. §524.2-102). If there are surviving descendants of decedent who are not descendants of spouse or there are surviving descendants of spouse who are not descendants of decedent, surviving spouse receives first $150,000 plus one-half of balance. (Minn. Stat. §524.2-102). Portion not passing to spouse passes as follows, each class of which there is living member taking to exclusion of subsequent classes: (1) surviving descendants by right of representation (per stirpes); (2) parents or surviving parent; (3) descendants of parents or either of them by right of representation; (4) grandparents or their descendants, with maternal grandparents or their descendants taking one-half and paternal grandparents or their descendants taking one-half, with descendants taking by right of representation; or if no grandparents or descendants to grandparents on either maternal or paternal side, other side takes entire estate in manner previously described; (5) next of kin in equal degree, except that those claiming through nearest ancestor take to exclusion of those claiming through more remote ancestor. (Minn. Stat. §524.2-103).

Survivorship by 120 Hours.

Effective for estates of decedents dying after Dec. 31, 1986, person who fails to survive decedent by 120 hours is deemed to have predeceased decedent for purposes of intestate distribution. (Minn. Stat. §524.2-104).

Half-blood kindred inherit equally with those of whole blood of same degree. (Minn. Stat. §524.2-107).

Posthumous child inherits as though born in parent's lifetime, provided such child lives 120 hours or more after birth. (Minn. Stat. §524.2-108).

Illegitimate child inherits from his parents, regardless of marital status of parents. (Minn. Stat. §524.2-114[2]). Parent and child relationship may be established by Parentage Act (Minn. Stat. §257.51 to Minn. Stat. §257.74).

Adopted Children.

See category 14 Family, topic 14.01 Adoption.

Advancements.

§2-110 of Uniform Probate Code adopted with modifications. (Minn. Stat. §524.2-109).

Determination of Descent.

Provision is made for proceedings to determine descent of real or personal property or any interest therein where former owner has been dead for more than three years and there has been no probate of will or grant of administration. (Minn. Stat. §525.31 et seq.). Court shall not enter decree of descent until petitioner has filed clearance for medical assistance claims and until any medical assistance claims filed have been paid, settled, or otherwise finally disposed of.

(Minn. Stat. §525.313).

Escheat.

If decedent leaves no surviving spouse nor kindred, his estate escheats to the state. (Minn. Stat. §524.2-105). In event of erroneous escheat funds will be returned by state upon application to court. (Minn. Stat. §525.84 et seq.).

References to Intestacy Laws.

Wills or other instruments executed before Jan. 1, 1996, directing distribution according to intestacy law deemed to refer to laws in effect on date of will unless will or other instrument directs otherwise. (Minn. Stat. §524.2-115).

Elective Share.

For estates of decedents dying after Dec. 31, 1986, elective share provisions of Uniform Probate Code, with certain modifications to augmented estate, will apply. (Minn. Stat. §524.2-201 et seq.). (See topic 13.16 Wills.)

Family Allowances.

Surviving spouse is entitled to either life estate in homestead (if decedent was survived by issue) or whole of homestead (if decedent was not survived by issue) free of any transfer to which spouse has not consented in writing. (Minn. Stat. §524.2-402). Notwithstanding any will, surviving spouse is allowed: (1) Wearing apparel, furniture and household goods and other personal property up to $10,000 in value, and (2) one automobile, without regard to value. (Minn. Stat. §524.2-403). If there is no surviving spouse, children receive property described in clause (1), except that where it appears from decedent's will child was omitted intentionally, child is not entitled to rights conferred by clause (1). (Minn. Stat. §524.2-403). Rights of adult children are subject to claims against decedent's estate for certain forms of financial assistance and to costs and expenses of administration, reasonable funeral expenses and debts and taxes with preference under Federal law. (Minn. Stat. §524.2-403[f]). For estate of decedents dying after July 31, 1988, if decedent is survived by child who is not child of surviving spouse (or is adult and has different parent than decedent's minor children), selection of personal property by spouse or minor children is subject to right of decedent's child not entitled to allowance to receive certain tangible personal property which court determines has sentimental value to that child, with appropriate charges to such child's share of estate. (Minn. Stat. §525.152). Spouse and children constituting family of decedent receive maintenance in monthly installments not to exceed $1,500 for 12 months if estate is insolvent or 18 months if estate is solvent. (Minn. Stat. §524.2-404). All family allowances described above are excluded in computing elective share. For decedents dying after Dec. 31, 1986, elections with respect to homestead and other family allowances are separate from elective share, so spouse may take elective share of augmented estate and take homestead under will. (Minn. Stat. §524.2-211[f]; Minn. Stat. §524.2-403[e]). Effective Aug. 1, 2000, (1) surviving spouse receiving medical assistance has until estate closing to elect share of augmented estate (including non-probate transfers) and other allowances, (2) guardian for incapacitated surviving spouse receiving medical assistance must elect share of augmented estate if election would increase share, and (3) elective share rights and other allowances of surviving spouse receiving medical assistance may only be waived in valid antenuptial agreement. (Minn. Stat. §524.2-215).

13.08 ELECTION:

See topic 13.16 Wills.

13.08A ESTATES: (in property)

See category 21 Property, topic 21.16 Real Property.

13.09 [RESERVED]

13.10 EXECUTORS AND ADMINISTRATORS:

Original jurisdiction for administration of estates of deceased person provided by law. (Minn. Const. art. 6, §11). Probate court is division of district court. (Minn. Stat. §484.011).

Uniform Probate Code adopted (Minn. Stat. §524.1-101 et seq.) with modifications. Portions of prior probate code in (Minn. Stat. c. 525) have been retained.

Summary Proceedings.

If decedent's property has been destroyed, abandoned, lost or rendered valueless, or if there be no property except such as has been recovered for death by wrongful act, or such as is exempt from all debts and charges in court, or such as may be appropriated for payment of allowances to spouse and children, expenses of administration, funeral expenses, expenses of last illness and debts having preference under laws of U.S. and taxes, representative by order of court may pay same in order named and court may summarily determine heirs, legatees and devisees in its order of distribution or final decree assigning to them their share of property. (Minn. Stat. §524.3-1203, subdiv. 1).

If court determines that there is no need for appointment of representative and that administration should be closed summarily for reason that all property in estate is exempt from debts and charges in court, final decree may be entered assigning such property to persons entitled thereto pursuant to terms of will or pursuant to law of intestate succession, as case may be. (Minn. Stat. §524.3-1203, subdiv. 2).

Summary distribution of property in kind may be made in payment of allowances to spouse and children, funeral expenses, expenses of last illness and debts having preference under laws of U.S. and taxes when property so assigned exhausts estate assets. In all summary proceedings where no representative appointed, court may require petitioner to file corporate surety bond in amount fixed by court. (Minn. Stat. §524.3-1203, subdivs. 3, 4).

If estate will not be exhausted in payment of priority items listed above, estate may be summarily closed and distributed to proper persons if gross probate estate, exclusive of exempt homestead, is not in excess of $100,000 ($30,000 prior to Aug. 1, 2000). If closing and distribution is pursuant to will, hearing on formal probate of will must be held before decree shall issue. Showing of payment of priority items and bond required of representative or petitioner. (Minn. Stat. §524.3-1203, subdiv. 5).

If value of entire probate estate, less liens or encumbrances, does not exceed $20,000 ($10,000 prior to Jan. 1, 1996), personal property may be collected by affidavit of person entitled to receive property if 30 days have elapsed since death and no administration commenced. (Minn. Stat. §524.3-1201). Person collecting is required to pay over property to others with higher priority. Person collecting by affidavit must be successor to decedent or state or county agency collecting claim for medical assistance.

Action by Foreign Representative.

Any foreign representative may prosecute an action in state in his representative capacity if he has filed authenticated copy of his appointment with probate court of county in which action is commenced. (Minn. Stat. §573.05).

Part 1, Art. VI (Multiple-Party Accounts) of Uniform Probate Code adopted. (Minn. Stat. §§524.6-201-214). Several modifications have been enacted, effective Aug. 1, 1985. (Minn.

Stat. §524.6-201 et seq.).

Uniform Anatomical Gift Act adopted. (Minn. Stat. §§525.921-95). Minor with written consent of parent or legal guardian, may make anatomical gift. (Minn. Stat. §525.9211).

Uniform Fiduciaries Act, with exception of §§3-6 thereof, adopted. (Minn. Stat. §§520.01-.13).

Uniform Principal and Income Act adopted. (Minn. Stat. §§501B.59-.76).

Uniform Simplification of Fiduciary Security Transfers Act adopted. (Minn. Stat. §§520.21-.31). (Specifically saved from repeal by U.C.C., see Minn. Stat. §336.10-104.)

Uniform Testamentary Additions to Trusts Act adopted. (Minn. Stat. §524.2-511).

Uniform Transfer on Death Security Registration Act adopted effective June 1, 1992. (Minn. Stat. §524.6-301 et seq.).

13.11 FIDUCIARIES:

See topics 13.10 Executors and Administrators, Trusts; category 14 Family, topic 14.08 Guardian and Ward.

13.12 INTESTACY:

See topic 13.07 Descent and Distribution.

13.13 LIVING WILLS:

See topic 13.16 Wills, subhead Living Wills—(Health Care Declarations).

13.14 PROOF OF CLAIMS:

See topic 13.10 Executors and Administrators; category 5 Civil Actions and Procedure, topic 5.17 Pleading.

13.15 TRUSTS:

Statutory trust law recodified as Minn. Stat. c. 501B in 1989 effective Jan. 1, 1990.

Passive express trusts of real or personal property are abolished. (Minn. Stat. §501B.02). Active trust may be created for lawful purpose. (Minn. Stat. §501B.01).

Minnesota Trustees' Powers Act permits will or instrument creating inter vivos trust to incorporate by reference all or a portion of powers of trustee enumerated therein. (Minn. Stat. §§501B.79-.82).

Payment of Consideration by Third Person.

If transfer of property is made to one person and purchase price is paid by another, resulting trust is presumed to arise in favor of person by whom purchase price is paid, except: (1) if person by whom purchase price is paid manifests contrary intention, no resulting trust is presumed to arise; (2) if transferee is spouse, child or other natural object of bounty of payor, gift in favor of transferee is presumed and no resulting trust is presumed and (3) if transfer is made to accomplish illegal purpose, no resulting trust is presumed to arise unless it is needed to prevent unjust enrichment of transferee. (Minn. Stat. §501B.07).

Qualification.

Trustees may apply to confirm appointment and obtain specifications as to manner of qualification in district court of county wherein they reside or have trust office in county in which trust is administered or county where will is being probated, which thereafter has jurisdiction of trust as proceeding in rem. (Minn. Stat. §501B.16 et seq.). In case of trust holding real property, such application may be made in district court of county in which real property is situated. (Minn. Stat. §501B.17). Confirmed trustees must file inventory upon appointment and at least annually. (Minn. Stat. §501B.23). Trustees may petition court at any time for instruction as to administration or construction of trust. (Minn. Stat. 501B.16 §et seq.).

Uniform Probate Code adopted in part (Minn. Stat. §524.2-101 et seq.) with modifications.

Trust created prior to 1990, (except trust forming part of disability, medical or other employee welfare plan or part of stock bonus, pension or profit sharing trust for exclusive benefit of employees or members of employee organization) shall not continue for a period longer than life or lives of specified persons in being at time of its creation, and for 21 years after death of survivor of them, and that free alienation of legal estate by trustee shall not be suspended for period exceeding limit prescribed by statute relating to perpetuities, see 191 Minn. 143, 253 N.W. 365; Uniform Statutory Rule Against Perpetuities adopted, effective Jan. 1, 1992; without reference to limitation on duration of trusts). Effective Jan. 1, 1990 (for trusts created before or after such date), power of alienation of property held in trust may not be suspended for more than 21 years. Future interest in real or personal property not held in trust is void if it would suspend power of alienation for period longer than lives in being plus 21 years. (Minn. Stat. §501B.09, subdiv. 2). Not applicable to trusts if beneficial interests are evidenced by or constitute securities. (Minn. Stat. §501B.09, subdiv. 2a). Effective Jan. 1, 1990, income may be accumulated in trust for period of up to lives in being plus 21 years. (Minn. Stat. §500.17, subdiv. 2). Effective Jan. 1, 1990, no statutory limitation on duration of trusts. See category 21 Property, topic 21.12 Perpetuities.

Express trust not declared in disposition of real property to trustee shall not defeat title of purchaser from trustee for value without notice of trust or rights of creditor that relied on apparent ownership of trustee. (Minn. Stat. §501B.05).

If purposes for which active express trust is created have been accomplished, or become impossible of accomplishment or illegal, trust shall terminate. (Minn. Stat. §501B.03). If trust terms provide for successor trustee and method of qualification, title to assets vests on qualification. (Minn. Stat. §501B.08). If no successor provided, district court appoints. (Minn. Stat. §501B.08).

Trustee and all beneficiaries of trust not under court supervision may enter into binding nonjudicial settlement agreement with respect to approval of trustee's accounting, resignation of trustee, determination of trustee's compensation, transfer of trust's situs, and termination of noncharitable trust and distribution of trust property if fair market value of trust is less than $50,000, and it has been determined that relative to costs of administration, continuance of trust will defeat or substantially impair accomplishment of its purposes. (Minn. Stat. §501B.154).

Unborn or unascertained person is bound by order or nonjudicial settlement to extent that person's interest is represented by another party having substantially identical interest, but only to extent there is no conflict of interest between them or among persons represented. (Minn. Stat. §501B.155, subdiv. 3[d]).

Distributions to Beneficiaries.

Effective May 15, 1993, trustee may not participate in exercise of power to distribute (1) to trustee as beneficiary unless power is limited by ascertainable standard related to trustee's health, maintenance, support or education, or (2) to any other person in discharge of trustee's support or other obligations. (Minn. Stat. §501B.14, subdiv. 1). If trustee is disqualified, other trustees may act. (Minn. Stat. §501B.14). Unless trust instrument specifically provides otherwise, by reference to section, prohibition applies to all trusts whenever created except (1) trustee who has unlimited non-fiduciary lifetime or testamentary power to appoint to trustee or trustee's estate, (2) trustee of trust created before May 15, 1993, if entire trust would be included in trustee's gross estate without regard to power, (3) trustee of trust created before May 15, 1993, if trust would not be included in trustee's gross estate even with power, and (4) trustee of trust created before May 15, 1993, if trust would be subjected to generation skipping transfer tax by virtue of trustee not having power.

Charitable Trusts.

Trust may be created for charitable, benevolent, educational, religious or other public use and shall not be void for indefiniteness or uncertainty of object or beneficiaries or because of violation of rule against perpetuities, but shall not be construed to prevent or limit free alienation of title to any part of estate by trustee in administration thereof. Court may direct administration of trust so as to carry out its general purposes if it is indefinite, impractical, inexpedient, etc. (Minn. Stat. §501B.31).

Trustees of private foundations, charitable trusts and split-interest trusts and corporations which are private foundations prohibited from activities which would result in federal excise taxes for failure to distribute investment income, self-dealing, retention of excess business holdings, investments which jeopardize exempt purposes, and making of taxable expenditure; provided, that foregoing is inapplicable if court determines that application would be contrary to terms of governing instrument and that such instrument may not be changed to comply. (Minn. Stat. §501B.32).

Most charitable trusts, including incorporated charitable foundations, are required to file registration statement and annual information with Attorney General. Failure to register and file annual information constitutes breach of trust. Attorney General has broad investigatory powers over charitable trusts and must receive notice of all court proceedings involving charitable trusts. (Minn. Stat. §501B.33 et seq.).

Investments.

Effective Jan. 1, 1997, Uniform Prudent Investor Act adopted with modifications. (Minn. Stat. §501B.151). Prudent investor rule is default rule which may be expanded, restricted, eliminated or otherwise altered by provisions of trust. (Minn. Stat. §501B.151, subdiv. 1).

Trustee shall invest and manage trust assets as prudent investor would, by considering purposes, terms, distribution requirements, and other circumstances of trust. (Minn. Stat. §501B.151, subdiv. 2). Trustee shall diversify investments of trust unless trustee reasonably determines that, because of special circumstances, purposes of trust are better served without diversifying. (Minn. Stat. §501B.151, subdiv. 3).

Securities in Name of Nominee.

Statutory authority for allowing corporate fiduciary to hold securities in name of nominee. (Minn. Stat. §48.74).

Common trust fund may be created by trust company or banks with trust powers. (Minn. Stat. §48A.07, subdiv. 6[g]).

Deeds to Trustees; Recording.

Instrument affecting title to real estate in the state granting any interest to any person, as trustee, which is recorded in office of county recorder or filed with registrar of titles but which does not set forth powers of trustee and beneficiary of such trust, does not give notice to any person of rights of any beneficiary under such trust in said real estate. (Minn. Stat. §507.35).

Certificate of Trust.

Certificate must include (1) Name of trust if one is given, (2) date of trust instrument, (3) name of each grantor, (4) name of each original trustee, (5) name and address of each trustee empowered to act at time of certificate, (6) statement that "the trustees are authorized by the instrument to sell, convey, pledge, mortgage, lease or transfer title to any interest in real or personal property, except as limited by the following: (if none, so indicate)", (7) any other trust provisions grantors or trustees include, and (8) statement as to whether trust has been terminated or revoked. (Minn. Stat. §501B.56, subdiv. 1). Certificate may be recorded in real estate records. When recorded or presented, certificate serves to document existence of trust, identity of trustees, trustees' powers, and other matters contained in certificate. Until certificate is amended or full trust instrument is recorded or presented, certificate is prima facie proof of matters contained in it and any party may rely on its continued effectiveness. (Minn. Stat. §501B.56, subdiv. 2).

Trust Provisions Tied to Public Assistance.

For trusts created after July 1, 1992, trust provision which provides for suspension, termination, limitation or diversion of trust principal or income upon beneficiary applying for or becoming eligible for public assistance is unenforceable as against public policy. (Minn. Stat. §501B.89, subdiv. 1[a]). Person other than beneficiary, beneficiary's spouse or person obligated to pay beneficiary sum under settlement or judgment may create supplemental needs trust for person with disability at time trust is created. Supplemental needs trust may limit expenditures to those for living expenses and basic needs which are not provided by public assistance. Limitation will cease to be enforceable if beneficiary becomes resident after age 64 in state institution or nursing home for six months or more and there is no reasonable expectation that beneficiary will be discharged. Supplemental needs trust created on or after Aug. 11, 1993, for person with disability is enforceable. (Minn. Stat. §501B.89, subdiv. 3).

Uniform Fiduciaries Act, with exception of §§3-6 thereof, adopted. (Minn. Stat. §§520.01-.13).

Uniform Gifts to Minors Act adopted (Minn. Stat. §§527.01-.11); replaced by Uniform Transfers to Minors Act, effective Jan. 1, 1986 (Minn. Stat. §§527.21-527.44).

Uniform Principal and Income Act (1962) adopted. (Minn. Stat. §§501.48-.63; Minn. Stat. §§501B.59-.76). Effective Aug. 1, 2001, portions of Uniform Principal and Income Act (1997) adopted, including §104 of Act with modifications. (Minn. Stat. §501B.705).

Uniform Prudent Investor Act adopted, effective Jan. 1, 1997. (Minn. Stat. §501B.151).

Uniform Simplification of Fiduciary Security Transfer Act adopted. (Minn. Stat. §520.21-.31).

Uniform Testamentary Additions to Trusts Act adopted. (Minn. Stat. §524.2-511).

Uniform Transfers to Minors Act adopted, effective Jan. 1, 1986. (Minn. Stat. §§527.21-527.44).

Uniform Statutory Rule Against Perpetuities adopted, effective Jan. 1, 1991. (Minn. Stat. §501A.01). Interest must vest or terminate no later than life in being plus 21 years, or within 90 years.

Uniform Trustees' Accounting Act not adopted.

Accumulations.

No statutory restriction on accumulations of income from personalty. Accumulations of rents and profits from real estate permitted to same extent and for same period as accumulations of income from personalty, and reasonable sums set aside for depreciation and depletion not deemed an accumulation. (Minn. Stat. §500.17). See category 21 Property, topic 21.12 Perpetuities.

Perpetuities.

See category 21 Property, topic 21.12 Perpetuities.

Pour Over Trusts.

See topic 13.16 Wills, subhead Bequests and Devises to Inter Vivos Trusts.

13.16 WILLS:

Any person 18 years of age who is of sound mind may make will. (Minn. Stat. 524.2-501). Coverture is not recognized.

Execution.

Will must be in writing, signed by testator or in testator's name by some other person in his presence and at his direction or signed by testator's conservator pursuant to court order under Minn. Stat. §524.5-411 and shall be signed by at least two persons each of whom signed within reasonable time after witnessing signing or testator's acknowledgment of signature or of will. (Minn. Stat. §524.2-502). Signature on self-proving affidavit is considered affixed to will if necessary to prove due execution. (Minn. Stat. §524.2-504[c]).

Attestation Clause.

Customary to attach to will certificate reciting that will was signed, declared and published by testator as last will and testament in presence of witnesses and witnessed by them at request of testator and that they in presence of testator and of each other attest and subscribe certificate.

Who May Witness.

Any person generally competent to be witness may act as witness to will and will is not invalid because will is signed by interested witness. (Minn. Stat. §524.2-505).

Holographic wills are not recognized.

Self-Proved Wills.

Will may be contemporaneously executed, attested, and made self-proved by acknowledgment of testator and affidavits of witnesses made before officer authorized to administer oaths under laws of state where executed, in substantially form found in Minn. Stat. §524.2-504[a]. (Minn. Stat. 524.2-504[a]). Attested will may at time of its execution or at any subsequent date be made self-proved, by acknowledgment thereof by testator and affidavits of witnesses, each made before officer authorized to administer oaths under laws of this state, or under laws of state where execution occurs, and evidenced by officer's certificate, under official seal, attached or annexed to will in form and content substantially as follows (Minn. Stat. §524.2-504[b]):

THE STATE OF . . . .

COUNTY OF . . . .

We, ..., ..., and . . . . the testator and the witnesses, respectively, whose names are signed to the attached or foregoing instrument, being first duly sworn, do hereby declare to the undersigned authority that the testator signed and executed the instrument as the testator's will, that the testator had signed willingly (or willingly directed another to sign for the testator), and that the testator executed it as the testator's free and voluntary act for the purposes therein expressed, and each of the witnesses, in the presence and hearing of the testator, signed the will as witness, and that to the best of the witness' knowledge the testator was at the time 18 years of age or older, of sound mind and under no constraint or undue influence.

. . . .

Testator

. . . .

Witness

. . . .

Witness

Subscribed, sworn to and acknowledged before me by . . . ., the testator, and subscribed and sworn to before me by . . . . and . . . ., witnesses, this . . . . . . day of . . . ., ...

(SEAL)

Signed . . . .

. . . .

(Official capacity of officer)

Living Wills—(Health Care Directives).

Effective Aug. 1, 1998, competent adult may execute Health Care Directive, whereby preferences and instructions regarding health care may be indicated and health care agent may be designated to make health care decisions on behalf of declarant. (Minn. Stat. §145C.02).

Living Wills executed under Minn. Stat. c. 145B after Aug. 1, 1989, but before Aug. 1, 1998, must conform with that chapter and form set forth at Minn. Stat. §145B.04. (Minn. Stat. §145B.04). Purported Living Wills executed after Aug. 1, 1998, and all other health care directives or health care powers of attorney, whenever executed, shall be evaluated under provisions of Minn. Stat. c. 145C. (Minn. Stat. §145B.011; Minn. Stat. §145C.03). Health care directive may, but need not, follow suggested form provided at (Minn. Stat. §145C.16). (Minn. Stat. §145C.05).

Directive must be signed by declarant and either by two witnesses (neither of whom is named as agent or alternative agent) or notary public. (Minn. Stat. §145C.03).

Declaration may be revoked by declarant at any time. (Minn. Stat. §145C.09). Declaration executed in another state may be recognized if it complies with requirements of law of jurisdiction where executed or Minnesota law. Notwithstanding, however, assisted suicide, euthanasia, etc. not allowed. (Minn. Stat. §145B.14; Minn. Stat. §145C.04[b]; Minn. Stat.

§145C.04; Minn. Stat. §145C.14).

Deposit of Wills.

Wills may be deposited with any court and are sealed. During lifetime may be delivered only to testator or person authorized in writing by testator. (Minn. Stat. §524.2-515). (Prior law required two witnesses to written order to deliver will and some courts may require witnesses.) Conservator or guardian may be allowed to examine will. Fee for depositing will is $27. (Minn. Stat. §357.021, subdiv. 2[11]).

Effect.

Every devise of land, unless contrary intent appears from will, conveys testator's whole interest therein, subject to liens and encumbrances thereon. (Minn. Stat. §525.21).

Revocation.

Will or any part thereof is revoked by subsequent will which revokes prior will or part expressly or by inconsistency or will may be revoked by being burned, torn, canceled, obliterated, or destroyed, with intent and for purpose of revoking it by testator or by another person in his conscious presence and by his direction. (Minn. Stat. §524.2-507).

Except as provided by express terms of governing instrument, other than trust instrument under Minn. Stat. §501B.90, executed prior to dissolution or annulment, court order, contract relating to division of marital property made prior to marriage, dissolution, or annulment, or plan document governing retirement plan, divorce, dissolution or annulment of marriage (but not decree of separation) revokes any revocable disposition or appointment of property to former spouse, any general or special power or appointment conferred and any nomination as personal representative, trustee or guardian of former spouse unless will expressly provides otherwise. Property passes as if former spouse failed to survive decedent. Will provisions are revived by testator's remarriage to former spouse. No other change of circumstances, other than homicide, revokes will. (Minn. Stat. §524.2-803; Minn. Stat. §524.2-804).

Bequests and Devises to Inter Vivos Trusts.

Uniform Testamentary Additions to Trusts Act adopted. (Minn. Stat. §524.2-511).

Separate Writing.

Any writing in existence when will is executed may be incorporated by reference if sufficiently identified. (Minn. Stat. §524.2-510). Will may refer to written statement or list to dispose of items of tangible personal property not otherwise specifically disposed of by will, other than money, coin collections, and property used in trade or business. Statement may be prepared or altered after execution of will. (Minn. Stat. §524.2-513).

Testamentary Guardians.

See category 14 Family, topic 14.08 Guardian and Ward.

Probate.

Uniform Probate Code adopted with modifications. (Minn. Stat. §524.1-101 et seq.).

As to jurisdiction and venue in probate proceedings, see topic 13.10 Executors and Administrators.

In proceeding for informal probate, will which appears to have required signatures and which contains attestation clause showing that requirements of execution have been met is probated without further proof. (Minn. Stat. §524.3-303[c]). When will does not contain attestation clause, court may either presume proper execution or accept sworn statement or affidavit of person with knowledge of circumstances of execution. In formal uncontested testacy proceeding, execution of will can be proved by affidavit or testimony of one attesting witness. (Minn. Stat. §524.3-405). In contested case execution of will which is not self-proved must be established by testimony of at least one attesting witnesses, if within state and competent and able to testify. Due execution of will may be proved by other evidence. (Minn. Stat. §524.3-406[a]).

Legacies.

Bear interest at legal rate one year after first appointment of personal representative, unless contrary intent is indicated by will. (Minn. Stat. §524.3-904).

Unclaimed Assets.

Any assets which have not been distributed because distributee cannot be found or refuses to accept same or cannot be distributed for any other good and sufficient reason may, upon direction of court, be deposited with county treasurer, with right to reclaim within 21 years after deposit. (Minn. Stat. §524.3-914).

Disclaimers

Uniform Disclaimer of Property Interests Act adopted. (Minn. Stat. §§524.2–1101 to 524.2–1116).

Lapse.

If devisee (legatee) is grandparent or lineal descendant of grandparent of testator and is dead at time of execution of will or fails to survive (or is deemed to have failed to survive) testator, issue of deceased devisee who survived testator by 120 hours take in place of deceased devisee. If all of same degree they take equally, but if of unequal degree those of more remote degree take by representation. Words of survivorship such as “if he or she survives me” or devise to “my surviving children” override statute. Alternate devise overrides statute only if expressly designated devisee is entitled to take. (Minn. Stat. §524.2-603).

Children.

If testator omits to provide for any children born after will is executed, omitted children take same shares of estate which they would have taken in case of intestacy, unless: (1) It appears from will that omission was intentional, (2) testator devised substantially all of estate to other parent of omitted child, and other parent survives, (3) testator provides for omitted child outside will and statements of testator on amount of such other transfers shows intent that they be in lieu of testamentary provision, or testator had children living when will was executed and omitted such children. If testator had children living when will executed and devises property to one or more of them, omitted after-born child takes share of property so devised as if included equally with devisees children under will. Issue of omitted child who predeceases testator are entitled to such deceased omitted child's share. (Minn. Stat. §524.2-302).

Spouse's Elective Share.

For decedents dying after Dec. 31, 1986 and before Jan. 1, 1996, augmented estate elective share provisions of Uniform Probate Code (pre-1990 version) adopted with modifications, including following: (1) homestead is never included in augmented estate regardless of disposition (see topic 13.07 Descent and Distribution, subhead Family Allowances); (2) for outright gifts, only gifts of more than $30,000 to one donee within one year before death are included; (3) proceeds of life insurance paid to someone other than surviving spouse are included to extent attributable to premiums paid by decedent during marriage; (4) annuities, retirement plan benefits and disability compensation (but excluding social security and tier 1 railroad retirement benefits) paid to someone other than surviving spouse are included to extent attributable to premiums or contributions by decedent during marriage; (5) life insurance annuities, and retirement benefits payable to spouse attributable to premiums or contributions by decedent. Contributions made by decedent's employer, partner or partnership are deemed made by decedent. (Minn. Stat. §§524.2-201 through .2-207).

Effective for decedents dying after Dec. 31, 1995, UPC augmented estate elective share provisions (1990) adopted with modifications. Augmented estate includes decedent's probate estate; nonprobate transfers to others (including property subject to general power of appointment, decedent's interest in property held with right of survivorship, life insurance proceeds if decedent owned policy, annuities under which decedent was primary annuitant, retirement plans); property transferred during marriage if (i) decedent retained income from property, (ii) decedent created general power of appointment exercisable by decedent alone or with another person or exercisable by non-adverse party, (iii) transfers of property during two years prior to death if transfer is of interest that would have caused inclusion of non-probate property or to extent that amount transferred exceeds $10,000 per year to any donee. Surviving spouse's property and transfers are also included in augmented estate (and are considered as having passed to surviving spouse in determining whether surviving spouse is entitled to additional amounts from decedent's probate estate or non-probate property beneficiaries). Elective share is graduated depending on length of marriage, starting at 3% for marriage of one to two years and increasing to 50% for marriage of 15 years or more. Minimum supplemental amount of $50,000 is provided regardless of percentage elective share provided. (Minn. Stat. §§524.2-201-214).

Foreign Executed Wills.

Written will is valid if executed in compliance with Minnesota law, or with law at time of execution of place where will was executed, or of place where at time of execution or at time of death testator is domiciled, has place of abode or is national. (Minn. Stat. §524.2-506). Uniform International Wills Act adopted. (Minn. Stat. §524.2-1001 et seq.).

Foreign Probated Wills.

Authenticated copy of will probated in another jurisdiction may be probated here. (Minn. Stat. §524.3-301[2]; Minn. Stat. §524.3-402[a]). Uniform International Wills Act adopted. (Minn. Stat. §524.2-1001 et seq.).

Ancillary Probate.

If no probate or application or petition therefore is pending in Minnesota, domiciliary foreign personal representative may file with court in county in which property belonging to decedent is located: (1) Certified or authenticated copy of his appointment and bond, if any, and (2) notice of his intention to exercise as to assets in Minnesota, all powers of local personal representative and to maintain actions and proceedings in Minnesota Clerk of court shall thereupon publish, at expense of estate, required notice once a week for two consecutive weeks in legal newspaper in county. (Minn. Stat. §524.4-204). Sixty days from filing domiciliary foreign personal representative may exercise all powers of personal representative over assets in Minnesota, and maintain any actions or proceedings in Minnesota If resident creditor files written objection within 60-day period personal representative cannot exercise powers. (Minn. Stat. §524.4-205). Any application or petition for local administration terminates power of foreign personal representative but he may be allowed to exercise limited powers to preserve estate. (Minn. Stat. §524.4-206).

Simultaneous Death.

See topic 13.05 Death, subhead Survivorship.

Testamentary Trust.

See topic 13.15 Trusts.

Family Allowances.

See topic 13.07 Descent and Distribution.

14 FAMILY

14.01 ADOPTION:

Any person who has resided in the state more than one year, unless length of residence waived, may adopt any child or adult. (Minn. Stat. §259.22). Any adult maybe adopted. (Minn. Stat. §259.241).

Consent required of parents unless parent of child does not appear on child's birth certificate, has not substantially supported child, was not married to natural mother within 325 days before or ten days after child's birth, is not openly living with child or mother, has not been adjudicated child's parent, and has not evidenced intent to retain parental rights or unless parent has abandoned child or has been deprived of custody of child by divorce, juvenile court, or adoption decree; guardian, if any; if none of preceding parties exist, Commissioner of Human Services, or agency having authority to place child for adoption, if any; and consent of child over 14. Birth parent who intends to grant consent to adoption must give notice to other birth parent, if such parent's consent is also required. Notice must be given prior to or within 72 hours following placement of child. Birth parent who receives such notice shall have 60 days to respond, or shall be deemed to have granted consent. If unmarried parent who consents to adoption of child is under 18, consent of parent's parents or guardian or, if none, consent of Commissioner also required. If adoptee an adult, only his written consent required. All consents must be in writing, executed before two competent witnesses and acknowledged, and contain notice of right to withdraw consent, which is statutorily prescribed. In addition, all consents except those of Commissioner, licensed child-placement agency, adult adoptee, or child's parent in stepparent adoption, must be executed before representative of Commissioner or licensed child-placing agency. (Minn. Stat. §§259.24, .49). Consent must be given no earlier than 72 hours after birth and no later than 60 days after placement. (Minn. Stat. §259.24[2a]). Consent executed and acknowledged outside of state, either in accordance with law of state or law of place where executed, is valid. (Minn. Stat. §§259.24, .26). If, after execution of consent and agreement, child is diagnosed with mental or psychological condition that may present substantial barrier to adoption, agency is to make reasonable efforts to give notice of such condition to consenting party. If child is not adopted within two years after consent and agreement are executed, agency must notify consenting parent and request parent to take custody of child or to file petition for termination of parental rights; such notice to be provided in personal and confidential manner. (Minn. Stat. §259.25[1]). Parent who has consented and agreed to adoption, upon request to agency, must be informed whether child has been adopted. (Minn. Stat. §259.25[1]). Birth parents' social and medical history, if known after reasonable inquiry, provided to adoptive parents. (Minn. Stat. §259.43).

Conditions Precedent.

Investigation and report by Commissioner of Human Services; three months residence in proposed home. Residence and investigation conditions may be waived by court. (Minn. Stat. §259.53). Prior to investigation, agency must give individuals statutorily prescribed written notice that upon adopting child, adoptive parents assume all rights and responsibilities of birth parents, including financial support and caring for health, emotional and behavioral problems and, except for subsidized adoptions under (Minn. Stat. §259.67), adoptive parents are not eligible for state or federal financial subsidies besides those birth parent would be eligible to receive. (Minn. Stat.

§259.35). Individual who takes guardianship of foreign-born child for purpose of adopting must, upon taking guardianship from child's country of origin, assume all rights and responsibilities of birth and adoptive parents. (Id.). Minnesota agency that refers individuals to foreign agency or individual country for adopting child located in that country must provide in writing, at time of making referral: (1) Name of foreign governmental authority that licenses or regulates adoption agency or individual; (2) current director's name; (3) whether foreign country requires legal adoption to take place in that country before child is removed; and (4) statutorily required notice under Minn. Stat. §259.35[1] regarding parental responsibilities. (Minn. Stat. §259.35[2]). Court shall submit adoption petition to adoption agency if child has been committed to guardianship of such agency, or if child has been placed in petitioner's home by direct placement. (Minn. Stat. §259.53). If adopting parent is related to child pursuant to Minn. Stat. §245A.02[13], court shall submit petition to county social services agency, in county where prospective adoptive parent lives. (Minn. Stat. §259.53). No petition for adoption filed unless child placed by Commissioner or licensed agency, except when child over 14 years, adoption by related party pursuant to Minn. Stat. §245A.02[13], child placed under laws of another state while child and petitioner resided there, or prohibition against private placement waived by court. (Minn. Stat. §259.22). Prospective adoptive parents may request and receive summary report on their suitability as adoptive parents at conclusion of agency's study. Summary must be used only for purposes mutually agreed upon by agency and prospective adoptive parents; summary must not identify sources of information outside agency or information about any child to be adopted. (Minn. Stat. §259.53[3a]). Contents of all reports and records of Commissioner, county welfare board, or agency on suitability of proposed adoptive home and child to each other must not be directly or indirectly disclosed to any person other than Commissioner or judge having jurisdiction in manner, except judge, upon request, must disclose to party of proceeding or party's counsel any portion of report that relates solely to suitability of proposed adoptive parents. Judge may withhold identity of individuals providing information in report or record. Agency with custody of report or record must be permitted to present reasons for or against judge disclosing identities of individuals providing information. (Minn. Stat. §259.53[3]). Except in adoption by related party pursuant to Minn. Stat. §245A.02[13]), adoption study by licensed child-placing agency must be completed before child is placed with prospective adoptive parents. (Minn. Stat. §259.41). Study, which must include at least one in-home visit, to include background check, medical and social history, assessment of potential parenting skills, financial ability to support child, and awareness of adoption issues, including where appropriate, interracial, cross-cultural and special needs adoptions. (Minn. Stat. §259.41).

Court is to award adoption if in best interests of child. (Minn. Stat. §259.57[1]). Court is to give preference first to relatives of child, next to friend with whom child has resided or had significant contact. Placement may not be denied or delayed based on race or ethnic heritage. When possible and in siblings' best interests, siblings to be placed together. Provided adoptive family meeting requirements is available, court to honor genetic parents request for same religious background. (Minn. Stat. §259.57[2]). 1997 amendment rewrote Minn. Stat. §259.57[2] to eliminate racial preference in adoption placement. Adoption and foster care provisions must be construed consistently with Indian Child Welfare Act. (25 U.S.C. §§1901-1963).

Direct adoptive placement allowed only with custody order from Court prior to placement with prospective adoptive parents. (Minn. Stat. §259.47). Order must specify that birth parents have right to custody until any consent becomes irrevocable. Adoptive parents must have health insurance and must file affidavit of intent to remain resident for at least three months. Counseling and legal counsel must be made available to birth parents at expense of prospective adoptive parents. (Minn. Stat. §259.47).

Party to Interstate Compact On The Placement of Children. (Minn. Stat. §260.851).

Jurisdiction of adoption proceedings is in juvenile court. (Minn. Stat. §259.23).

Venue of adoption proceedings is county of residence of adopting parents unless child has been committed to guardianship of commissioner of human services, and in such case shall be county with jurisdiction pursuant to Minn. Stat. §260C.317[3]. (Minn. Stat. §259.23).

Petition should set forth name, age, residence, and marital status of petitioner; when and from what person or agency physical custody of child acquired; date, county, and state of child's birth; name of child's parents and guardian; name of child; name to be given if change is desired; description and value of child's property; that petitioner desires to adopt child and that such adoption is in best interest of child. (Minn. Stat. §259.23). If adoption by stepparent, parent who is stepparent's spouse is not required to join petition. (Minn. Stat. §259.21[7]).

Proceedings.

Except for consents pursuant to Minn. Stat. §260C.201[11] parent's consent may be withdrawn by written notice provided received by agency to which child surrendered within ten working days of execution of consent. Consent irrevocable thereafter except on court order after written findings that consent obtained by fraud. (Minn. Stat. §259.24). In proceedings to determine existence of fraud, adoptive parents and child to be parties to proceedings. No presumption favoring natural parents allowed. Proceedings to be confidential. (Minn. Stat. §§259.24, .25).

Name may be changed to name of adopting parents. (Minn. Stat. §259.57).

Effect of Adoption.

Adopter and adoptee sustain legal relation of natural parent and legitimate child with all rights and duties thereof, including right of inheritance. Adoption terminates legal relationship between child and natural parents, including right of inheritance, except that adoption by stepparent does not affect relationship between child and natural parent who is spouse of stepparent. If one parent dies and child is adopted by stepparent who is spouse of surviving parent, rights of inheritance of child or issue from or through deceased parent which exist at parent's death not affected by adoption. (Minn. Stat. §259.59). An adopted person who is 19 years of age or over may request the commissioner of health to disclose the information on the adopted person's original birth record. (Minn. Stat. §259.89).

Death or Terminal Illness Notification.

Adoption agency must inform parents who adopt child on or after Aug. 1, 1987, that they must notify agency if child dies. (Minn. Stat. §259.27). Agency must inform adoptive parents that adoptive parents of adopted child under 19 or adopted person age 19 or older may maintain current address on file with agency and indicate desire to be notified if agency receives information on genetic parent's death. Agency must inform genetic parents who are entitled to notice under Minn. Stat. §259.49 that agency will notify them of child's death and cause of death, if known, provided genetic parents desire notice and maintain current addresses on file with agency. (Minn. Stat. §259.27). Genetic parents entitled to notice under Minn. Stat. §259.49 may designate individuals to notify agency if genetic parent dies, and agency receiving such information will share it with adoptive parents, if adopted person is under 19, or adopted person age 19 or older who has indicated desire of knowing of genetic parent's death and files current address with agency. (Minn. Stat. §259.27). Notices of death must be provided by agency through personal, confidential contact, not by mail. (Minn. Stat. §259.27). Adoptive parents whose child was adopted through out-of-state agency must, if child dies, notify agency of death. (Minn. Stat. §259.27). Adoption agency must inform adoptive parents and genetic parents of child adopted on or after Aug. 1, 1987, that genetic parents, adopted parents of adopted person under age 19 or adopted person age 19 or older may request to be notified if genetic parent or child is terminally ill. Agency must notify other parties if request is received and, that upon their request, agency will share information regarding terminal illness with adoptive, or genetic parents, or adopted person age 19 or older. (Minn. Stat. §259.27).

Setting Aside Adoption.

Adoptive parents may not terminate rights to adopted child for reasons that would not apply to birth parents seeking termination of parental rights. (Minn. Stat. §260C.301[5]).

14.02 ALIMONY:

See topic 14.05 Dissolution of Marriage.

14.03 COMMUNITY PROPERTY:

System does not obtain in Minnesota.

14.04 DESERTION:

See topic 14.09 Husband and Wife.

14.05 DISSOLUTION OF MARRIAGE:

Subject governed by Minn. Stat. c. 518.

Grounds for Dissolution of Marriage.

Dissolution of marriage may be granted upon showing of irretrievable breakdown of marriage relationship. Defenses abolished. (Minn. Stat. §518.06).

Separation.

Legal separation may be granted upon showing that one or both parties need legal separation. If one or both parties petition for legal separation and neither party contests separation nor petitions for dissolution, court shall grant legal separation. (Minn. Stat. §518.06).

Residence Requirements.

One party must have resided in, been domiciliary of, or been member of armed forces stationed in state 180 days immediately preceding filing of petition. (Minn. Stat. §518.07).

Jurisdiction of proceedings for dissolution and legal separation is in district and county courts. (Minn. Stat. §518.06).

Venue must be in county where either spouse resides. If neither party is resident, proceeding may be brought in county where either party domiciled. If neither party resident or domiciled in state and jurisdiction based on member of armed services being stationed in state for more than 180 days, proceeding may be brought in county where member stationed. (Minn. Stat. §518.09).

Process.

Unless proceeding brought by both parties, respondent must be served personally. When service is outside state it may be proved by affidavit of person making same. When made outside U. S., it may be proved by affidavit of person making same taken before and certified by any U. S. consular or diplomatic representative or his authorized deputies or before officer authorized to administer oath with certificate of officer of court of record of country where affidavit is taken as to identity and authority of officer taking same. If personal service cannot be made, court may order service by alternate means, determined by court on application. (Minn. Stat. §518.11; Minn. R. Civ. P. 4.04).

Pleading.

Petition for dissolution of marriage or legal separation must state name (and any prior name) and address of petitioner; social security number of petitioner if child support or spousal maintenance will be addressed; place and date of marriage; in case of petition for dissolution, that either petitioner or respondent has resided in this state or has been domiciliary of this state at least 180 days immediately preceding proceeding or has been member of armed services and has been stationed in this state at least 180 days immediately preceding proceeding, name (and any prior name) and, if known, address of respondent; social security number of respondent if child support or spousal maintenance will be addressed; name (and any prior name), social security number, age and date of birth of each living minor or dependent child born before marriage or born or adopted during marriage and reference to and expected date of birth of child of parties conceived during marriage but not born; state whether or not separate proceeding for dissolution, legal separation or custody is pending in any court; allege that one or both parties satisfy residence requirements; allege irretrievable breakdown in marriage relationship or, in proceeding for legal separation, allege need for decree of legal separation; state any temporary or permanent maintenance, child support, child custody, disposition of property, attorneys' fees, costs and disbursement applied for, without setting forth amounts and state whether order for protection under Minn. Stat. c. 518B or similar law of another state governs parties or minor child of parties, is in effect and if so, jurisdiction where entered. (Minn. Stat. §518.10). Fee for filing action for marriage dissolution is $340. (Minn. Stat. §357.021, subdiv. 2[1]).

Practice.

Respondent has 30 days to answer petition. In case of service by publication, period runs from date of last publication. No answer required to counter petition. (Minn. Stat. §518.12). If respondent fails to appear, court may hear matter as default. (Minn. Stat. §518.13). Proposed findings of fact, conclusions of law, order for judgment, and judgment and decree must be submitted to court and may be filed without hearing in following circumstances: (1) there are no minor children, parties have stipulated, or 20 days have elapsed since time for answer has elapsed and service of petition is proved; or (2) where there are minor children, parties have signed and acknowledged stipulation and both parties are represented by counsel. (Minn. Stat. §518.13). Rules of Civil Procedure applicable to dissolution proceedings to extent not inconsistent with Minn. Stat. c. 518. (Minn. R. Civ. P. 81.01).

Decree.

Decree of dissolution entered on finding that irretrievable breakdown exists. Decree is final when entered, subject to right to appeal. (Minn. Stat. §§518.13, .145). Court may relieve party from some judgments and decrees, orders or proceedings under Minn. Stat. c. 518 for specified reasons.

Maintenance.

Court may, in its discretion, direct payment of temporary maintenance and child support money (including reasonable attorney's fees and costs) pending suit. (Minn. Stat. §§518.131, .14, .62). In dissolution proceedings, court may make award of payments from future income of one spouse for support of other. (Minn. Stat. §518A.27). Order for maintenance or child support must provide for biennial cost-of-living adjustment in amount to be paid and must specify date for adjustments to become effective. (Minn. Stat. §518A.75). Court may reach, by order, property of nonresident defendant in divorce proceedings to secure maintenance. (58 Minn. 279, 59 N.W. 1017). Court may appoint trustees of maintenance or support (Minn. Stat. §518.61), or sequester obligor's property to pay it. Order for maintenance or support may be modified. Motion for modification may be decided without evidentiary hearing. (Minn. Stat. §518.145, subdiv. 2).

Division of Property of Spouses.

Marital property system of distribution generally applies. Upon dissolution, court may make such disposition of marital property as is just and equitable without regard to marital misconduct. If court finds that either spouse's resources or property, including spouse's share of marital property, are so inadequate as to work unfair hardship, court may also apportion to spouse up to one-half of nonmarital property except property excluded by valid antenuptial contract. (Minn. Stat. §518.58). All property, including vested public or private pension plan benefits or rights, acquired during marriage is presumed to be marital property unless shown to be nonmarital property. Nonmarital property is any property which is acquired as gift, bequest, devise or inheritance made by third party to one but not both spouses, is acquired before marriage, is acquired in exchange for or is increase on nonmarital property, is acquired after date of valuation, or is excluded by valid antenuptial contract. (Minn. Stat. §518.003). Court may compensate party to dissolution for disposal of assets during or in contemplation of proceedings by other party if disposal not for necessities or in usual course of business. (Minn. Stat. §518.58).

Change of Name.

In final decree of dissolution or legal separation, court will change party's name to any other name party requests, unless it finds intent to defraud or mislead; provided, that in case of convicted felon, notice must be provided to prosecuting authority for any name change. (Minn. Stat. §518.27; Minn. Stat. §259.13).

Custody and maintenance of children, both before and after decree, is in discretion of court, subject to statutory guidelines and cost-of-living adjustments for child support. (Minn. Stat. §518.551). Child support obligation not terminated by death of obligor. (Minn. Stat. §518A.439, subdiv. 4). Order may be later modified based on changed income, changed needs of child, receipt of public assistance, change in cost of living, extraordinary medical expenses of child not provided for under Minn. Stat. §518A.39, addition, elimination, substantial increase or decrease in work-related or education-related child care expenses where prior award unfair or unreasonable or upon emancipation of child. If application of child support guidelines in Minn. Stat. §518A.35 applied to current circumstances produces amount that is at least 20% and at least $75 per month higher or lower than current award, current award is rebuttably presumed unreasonable and unfair. (Minn. Stat. §518A.39). If obligor is member of licensed occupation subject to licensing board and is in arrears, court may order licensing board to suspend such license. In addition, attorney obligor in arrears may be referred to lawyers professional responsibility board. (Minn. Stat. §518A.66). Driver's license may be suspended and lien placed on motor vehicle for obligor in arrears. (Minn. Stat. §§518A.65, .67). Order for maintenance or support may be modified without evidentiary hearing. (Minn. Stat. §518A.39). Request by either or both parties establishes rebuttable presumption joint custody is in child's best interest unless domestic abuse has occurred between parents. (Minn. Stat. §518.17). For child's best interest, court to consider: (1) Parent's or parents' wishes as to custody; (2) if child of sufficient age, child's reasonable preference; (3) child's primary caretaker; (4) relationship of each parent and child; (5) interactions and interrelationships of child, parents, siblings and others who may significantly affect child's best interests; (6) child's adjustment to home, school, community; (7) length of time child has lived in stable, satisfactory environment and desirability of maintaining continuity; (8) permanence, as family unit, of existing or proposed custodial home; (9) mental and physical health of all involved; (10) capacity of parties to give child love, affection and guidance, and to continue educating and raising child in child's culture, religion or creed; (11) child's cultural background; (12) effect on child of abuser's actions if related to domestic abuse that has occurred between parents or between parent and another; (13) disposition of each parent to encourage and permit contact by other parent; and (14) evidence of false allegations of child abuse. (Minn. Stat. §518.17). Primary caretaker factor may not be used to establish presumption. (Minn. Stat. §518.17). Court may order mediation of child custody or visitation with mediator appointed by family court. (Minn. Stat. §518.619). Court must appoint guardian ad litem when it believes child is victim of domestic abuse or neglect. (Minn. Stat. §518.165). In subsequent custody proceedings, court may consider, but is not bound by, finding that domestic abuse has occurred between parties. Court must grant specified rights pertaining to records and information about minor children. (Minn. Stat. §518.17).

Uniform Child Custody Jurisdiction and Enforcement Act adopted. (Minn. Stat. c.

518D).

Uniform Interstate Family Support Act adopted. (Minn. Stat. c. 518C).

Remarriage immediately after decree of dissolution becomes final is permitted. (Minn. Stat. §517.03, Minn. Stat. §518.145).

Annulment of Marriage.

See topic 14.11 Marriage.

14.06 DIVORCE:

See topic 14.05 Dissolution of Marriage.

14.07 [RESERVED]

14.08 GUARDIAN AND WARD:

Subject is governed by Minn. Stat. §524.5, et seq. “Guardian” is person appointed by court to exercise those powers and duties which court may direct for protection of ward. “Conservator” is person appointed by court to exercise those powers and duties which court may direct for protection of estate of protected person. (Minn. Stat. §524.5-102).

Guardianships.

Court may appoint person, called guardian, to protect another person, called ward. Guardianship may be established for minor or incapacitated adult. (Minn. Stat. §524.5-102).

Minor.

“Minor” means unemancipated individual who has not attained 18 years of age. (Minn. Stat. §524.5-102). Guardian of minor appointed by parental appointment, by designation of standby guardian pursuant to Minn. Stat. c. 257B (see topic 14.10 Infants), or upon appointment by court. (Minn. Stat. §524.5-201). Until court has confirmed parental appointee, minor of 14 or more years may prevent such appointment from becoming effective by filing written objections to appointment and giving notice to all required parties. Objection does not preclude appointment by court in proper proceeding. (Minn. Stat. §524.5-203).

Incapacitated Person.

“Incapacitated person” means individual impaired to extent of lacking sufficient understanding or capacity to make or communicate responsible decisions and who has demonstrated deficits in behavior which evidence inability to meet needs for medical care, nutrition, clothing, shelter or safety. (Minn. Stat. §524.5-102). Guardian may be appointed for incapacitated person upon petition if court finds by clear and convincing evidence that: (1) Respondent is incapacitated person, and (2) respondent's identified needs cannot be met by less restrictive means, including use of appropriate technological assistance. (Minn. Stat. §524.5-310). Court must appoint attorney to represent proposed ward in initial proceedings unless counsel provided by proposed ward or others, or in meeting with court visitor, proposed ward waives counsel. (Minn. Stat. §524.5-304).

Appointment.

Any person interested in individual's welfare may petition for appointment of guardian. (Minn. Stat. §524.5-303). Priority for appointment determined by statute. (Minn. Stat. §524.5-309).

Special Guardians.

On appropriate petition and showing of necessity or expediency, court may appoint emergency guardian of person for period of not more than 60 days. Such emergency guardian has only powers necessary to provide for demonstrated needs of ward, as granted by court. (Minn. Stat. §524.5-204[c], Minn. Stat. §524.5-311). No appeal from order appointing or refusing to appoint emergency guardian. (Minn. Stat. §525.71).

Powers and Duties.

Guardian of minor has powers and responsibilities of custodial parent (except support obligation) plus powers and duties listed in Minn. Stat. §524.5-207. (Minn. Stat. §524.5-207). Guardian of incapacitated person has such of powers and duties listed in Minn. Stat. §524.5-313 as court shall determine necessary to provide for demonstrated needs of ward. (Minn. Stat. §524.5-313).

Annual Report.

Unless expressly waived or modified by court, every guardian of person must annually file report containing following information regarding ward: (1) Current mental, physical, and social condition of ward; (2) living arrangements for all addresses of ward during reporting period; (3) medical, educational, vocational, and other services provided to ward and guardian's opinion as to adequacy of ward's care; and (4) recommendation as to need for continued guardianship and/or changes to guardianship. (Minn. Stat. §524.5-316). Ward must also be given annual notice of right to request termination or modification of guardianship. (Minn. Stat. §524.5-310[e]).

Termination.

Guardian's authority and responsibility terminates on death, resignation (approved by court) or removal of guardian, or on minor's death, adoption, emancipation, attainment of majority, or as ordered by court. Liability for prior acts and obligation to account for funds and assets of ward or protected person continue until discharged by court. (Minn. Stat. §524.5-112, Minn. Stat. §524.5-210, Minn. Stat. §524.5-317).

Restoration to Capacity.

On petition of any person interested in ward's welfare, court may terminate guardianship if ward no longer needs assistance and protection of guardian. Unless otherwise determined by court for good cause, court, before terminating guardianship, follows same procedures to safeguard rights of ward as apply to petition for guardianship, including fixing time and place for hearing. (Minn. Stat. §524.5-317).

Proceedings

Uniform Adult Guardianship and Protective Proceedings Jurisdiction Act adopted. (Minn. Stat. §§524.5–601 to 524.5–903).

Conservatorships.

Court may appoint person, called conservator, to manage estate of individual, called protected person. (Minn. Stat. §524.5-102).

Appointment.

Any person interested in estate or welfare of person to be protected may petition for appointment of conservator or for protective order. (Minn. Stat. §524.5-403). Priority for appointment determined by statute. (Minn. Stat. §524.5-413).

Protective Arrangements.

Instead of appointing conservator, court may: (a) Authorize, direct or ratify any transaction necessary or desirable to achieve any arrangement for security, service or care meeting needs of protected person (including sale, mortgage, lease or other transfer of property; entry into annuity contract, contract for life care, deposit contract or contract for training and education; or addition to or establishment of suitable trust); or (b) authorize, direct or ratify contract, trust or transaction relating to protected person's financial affairs or involving his estate. (Minn. Stat. §524.5-412).

Bond.

Court may require conservator to furnish bond conditioned upon faithful discharge of all duties of conservatorship. (Minn. Stat. §524.5-415).

Effect of Appointment.

Appointment of conservator is not determination of incapacity of protected person. (Minn. Stat. §524.5-409[f]). After filing of petition for conservatorship, certificate of district court may be filed with Secretary of State, county recorder or registrar of titles of any county in which protected person owns real estate and, if protected person is resident of state, in county of residence. If conservator appointed on petition and if conservatorship order removes or restricts conservatee's right to transfer property or to contract, all transfers of real property made by protected person are void, and all contracts (except for necessaries) and transfers of personal property made by protected person are voidable. (Minn. Stat. §524.5-417[f], Minn. Stat. §524.5-418[l]).

Powers and Duties.

Conservator of estate has powers and duties listed in Minn. Stat. §524.5-417. Conservator of estate must pay for support, maintenance and education of protected person in accordance with his station in life and value of estate; pay protected person's debts and charges incurred for support, maintenance and education of protected person's spouse and children; and possess and manage estate, including collecting all debts and claims in favor of protected person, representing protected person in any court proceedings, and investing in authorized securities all funds not currently needed for debts and charges. On court order, conservator of estate may sell, exchange or purchase inherited undivided interest in real estate. (Minn. Stat. §524.5-418).

Investments.

Fiduciary standard applied. (Minn. Stat. §524.5-417[c][3]).

Accounting.

Unless expressly waived or modified by court, every conservator of estate must annually file verified account covering period from date of appointment or last account. (Minn. Stat. §524.5-420). Protected person must also be given annual notice of right to petition for termination or modification of conservatorship. (Minn. Stat. §524.5-409[e]). On termination of conservatorship, verified final account must be filed. (Minn. Stat. §524.5-420).

Termination.

Appointment of guardian or conservator terminates upon death, resignation (approved by court), or removal of guardian or conservator, or upon termination of guardianship or conservatorship. (Minn. Stat. §524.5-112). Conservatorship terminates upon death of protected person or upon order of court. Unless created for reasons other than that protected person is minor, conservatorship created for minor also terminates when protected person attains majority or is emancipated. (Minn. Stat. §524.5-431).

Facility of Payment or Delivery.

Personal representative may discharge obligation to distribute to person under legal disability by distributing to guardian or conservator. (Minn. Stat. §524.3-915). Any person (other than personal representative subject to Minn. Stat. §524.3-915[b] under duty to pay or deliver money or personal property to minor may perform duty, in amounts of $5,000 or less per annum, by paying or delivering money or property to: (1) Custodian or custodian trustee under Uniform Transfers to Minors Act or Uniform Custodial Trust Act, respectively; (2) person having care or custody of minor and with whom minor resides; (3) guardian of minor; or (4) financial institution by depositing in name of minor and giving notice of deposit to minor. Does not apply if person has actual knowledge that conservator has been appointed or proceedings for appointment of conservator of minor's estate are pending. (Minn. Stat. §524.5-104).

Delegation of Power by Parent or Guardian.

See topic 14.10 Infants.

Gifts to Minors.

See topic 14.10 Infants.

Uniform Fiduciaries Act, with exception of §§3-6 thereof, adopted. (Minn. Stat. §520.01-.13).

Uniform Simplification of Fiduciary Security Transfers Act adopted. (Minn. Stat. §520.21-.31).

14.09 HUSBAND AND WIFE:

Married woman retains same legal existence and personality after marriage as before. (Minn. Stat. §519.01).

Separate Property.

Married woman may hold any property, real or personal, as her separate property. (Minn. Stat. §519.02).

Contracts.

Married woman may make any contract which she could make if unmarried, and is bound thereby, except that every conveyance and contract for sale of her real estate or any interest therein is subject to provisions of Minn. Stat. §507.02. (Minn. Stat. §519.03; See infra, subhead Conveyances).

Wife may contract with her husband as with third person, except that no contract between them relative to real estate of either or any interest therein is valid, other than as provided in Minn. Stat. §500.19, subdivs. 4 and 5. (Minn. Stat. §519.06).

Actions.

Married woman may sue in courts of law or equity for protection of her reputation, person, property or any natural right, and it is not necessary that husband be joined as party to action by or against his wife. (Minn. Stat. §519.01). Wife may sue her husband, or vice versa, in her own name in any form of action to enforce any right affecting her property. (64 Minn. 381, 67 N.W. 206; 183 Minn. 306, 236 N.W. 455). Interspousal immunity abolished as complete defense to tort actions. (285 Minn. 366, 173 N.W.2d 416).

Agency.

Either spouse may act as attorney in fact for the other, except that no power of attorney or other authority from one to the other to convey real estate or any interest therein. Either spouse may appoint other as attorney-in-fact with respect to all property of principal, or any interest in property, whether real, personal, or mixed. (Minn. Stat. §519.06).

Conveyances.

Husband and wife by their joint deed may convey real estate of either. Either spouse may, by separate deed, convey any real estate owned by him or her, except homestead (see category 8 Debtor and Creditor, topic 8.10 Homesteads), subject to statutory right of other spouse therein (see category 13 Estates and Trusts, topic Descent and Distribution) and either may by separate conveyance relinquish rights in real estate so conveyed by the other. Subject to foregoing, either may separately appoint an attorney-in-fact to sell or convey any real estate owned by him or her, or join in any conveyance made by or for the other. (Minn. Stat. §507.02).

Minor husband or wife has legal capacity to join in conveyance of real estate owned by his or her spouse if not incapacitated for some reason other than his or her minor age. (Minn. Stat. §507.02).

Conveyance by one spouse may be binding on the other where afterwards adopted and confirmed by latter. (131 Minn. 299, 154 N.W. 1086).

Married person may dispose of real estate, except homestead, if spouse is incapacitated, with consent of guardian obtained after authorization of probate court when letters of guardianship are filed in county recorder's office where property is located, and may obtain judgment to dispose of real estate in case of desertion for more than one year. (Minn. Stat. §507.04; Minn. Stat. §519.07).

Liabilities.

Neither spouse is liable for debts of other, except for necessaries furnished to other spouse. Husband and wife living together are jointly and severally liable for all necessary medical services furnished to either spouse and all necessary household articles and supplies furnished to and used by family. (Minn. Stat. §519.05).

Antenuptial Contracts.

Man and woman of legal age may enter into antenuptial contract prior to day of solemnization of marriage provided there is full and fair disclosure of earnings and property of each party and parties have opportunity to consult legal counsel of own choice. Contract may determine rights of each party in nonmarital property upon dissolution of marriage, legal separation or death. Contract must be in writing executed by parties personally in presence of two witnesses, and acknowledged by parties before any officer authorized to administer oaths. Contract affecting rights to real property may be recorded with county recorder, and is void against subsequent purchaser in good faith if not so recorded. Contract is prima facie proof of all matters acknowledged therein. (Minn. Stat. §519.11). Postnuptial agreement allowed if in conformity with antenuptial requirements, and each spouse is represented by separate counsel. (Minn. Stat. §519.11[1a]). Postnuptial agreement presumed unenforceable in dissolution within two years of execution, unless party seeking enforcement proves contract to be fair and equitable.

Desertion and Nonsupport.

Intentional failure to provide care and support to spouse in necessitous circumstances or child is misdemeanor; such failure, or failure to provide care and support of pregnant wife, for period of in excess of 90 days, but not more than 180 days is gross misdemeanor and may be sentenced to up to one year of prison or $3,000 fine or both. Such failure for period of over 180 days is felony. (Minn. Stat. §609.375). Deserted spouse may sue and defend in absent spouse's name, and have same powers and rights in action as he might have had. (Minn. Stat. §540.09).

Uniform Interstate Family Support Act adopted. (Minn. Stat. c. 518C).

Community property system does not apply in Minnesota.

14.10 INFANTS:

Age of majority is 18 for both sexes (Minn. Stat. §645.451), but minority of married man or woman does not affect his or her capacity to join in conveyance of real estate owned by his or her spouse. (Minn. Stat. §507.02).

Validity of Contracts and Conveyances.

Infant is liable for his necessaries (56 Minn. 365, 57 N.W. 934) but all his contracts other than for necessaries are voidable and subject to disaffirmance by him (56 Minn. 365, 59 N.W. 992; 26 Minn. 389, 4 N.W. 695; 35 Minn. 488, 29 N.W. 201).

Conveyance made by infant is binding until disaffirmed by some positive act when infant reaches majority or reasonable time thereafter. (31 Minn. 468, 18 N.W. 283).

Actions.

In district court, infant may be represented by general guardian ad litem appointed by court at instance of infant if 14, otherwise by general guardian, relative or friend, or, after default, by plaintiff. Must be resident and must file consent and bond. (Minn. R. Civ. P. 17.02). Action for injury to infant may be brought by parent, general guardian, or guardian ad litem. No settlement or compromise of such action is valid unless approved by court in which action is pending. Parent must file bond before receiving money in settlement or compromise or satisfaction of judgment. In lieu of bond, court may order property so received invested in U.S. securities or invested in savings account or certificate or annuity or other form of structured settlement, with evidence of such investment filed with clerk of court. Money so invested may be released to minor or minor's guardian only by court. (Minn. Stat. §540.08).

Termination of Parental Rights.

Juvenile court may, upon petition, terminate parental rights with written consent of parent or with finding of abandonment, neglect, failure to support, palpable unfitness or other conduct inconsistent with parental obligations. If child has resided out of parent's home under court order for more than one year following determination of neglect, parent has failed to comply with orders and reasonable case plan to correct conditions, and efforts have been made by social service agency to reunite family, presumption attaches that reasonable efforts to correct neglect have failed and parental rights may be terminated. (Minn. Stat. §260C.301). Presumption of unfitness attaches if child is found to be in need of protection because of abandonment, sexual abuse, or lack of food, clothing, shelter, education or medical care, and parent has had parental rights terminated with respect to other children during preceding three years. (Minn. Stat. §260C.301). With termination of parental rights all privileges, duties, and obligations, including rights of control and visitation, are ended. (Minn. Stat. §260C.317).

Delegation of Parental Powers.

Parent or guardian may delegate powers concerning care, custody or property of minor child for period of up to one year by power of attorney. (Minn. Stat. §524.5-211). Parent with legal and physical custody of child may designate temporary or standby custodian; provided that if child has another parent whose rights have not been terminated, whose whereabouts are known, and who is willing to care for child, both parents must consent. (Minn. Stat. §257B.03). Designation must identify parent, child or children, other parent, if any, standby custodian and triggering events upon which standby custodian may act, must be signed by designator in presence of two witnesses who are at least 18 and are not standby custodian and who sign designation, and must contain consent of other parent or statement why other parent's consent is not needed. (Minn. Stat. §257B.04). Existence of designation may be noted on driver's license for fee of $4.25. (Minn. Stat. §171.07, subdiv. 11). Dept. of Public Safety maintains file of temporary and standby custodian designations and may release information to law enforcement officers. Judicial confirmation of designation may be obtained. Designator must petition for confirmation in case of temporary custodian or standby custodian where triggering event has not occurred. (Minn. Stat. §257B.05). Designated standby or temporary custodian may take legal and physical custody (either solely or with parent) upon occurrence of triggering event. (Minn. Stat. §257B.06). Death of designator confers only legal and physical custody, but standby custodian may be appointed guardian without separate petition. (Minn. Stat. §257B.06).

Uniform Transfers to Minors Act adopted, effective Jan. 1, 1986. (Minn. Stat. §§527.21-.44). Age of majority under Act is 21.

Uniform Securities Ownership by Minors Act not adopted.

Uniform Parentage Act adopted with variations. See topic 14.11 Marriage. (Minn. Stat. §§257.51-.74).

Adoption.

See topic 14.01 Adoption.

14.11 MARRIAGE:

Age of consent is 18 or 16 if accompanied by consent of parents, guardian or court and approval of judge of juvenile court of county of residence or, if judge of juvenile court is absent from county without having assigned another probate judge to act in judge's stead, by court commissioner or any district court judge in county. (Minn. Stat. §517.02).

Marriage of any infant under age of consent is voidable. (Minn. Stat. §518.02).

Marriage between persons of same sex prohibited. (Minn. Stat. §517.03).

Marriage license must be obtained from clerk of district court of any county, and marriage need not take place in county where license obtained. (Minn. Stat. §517.07). Application for license may be made by either party, who must appear in person, and must be made at least five days previous to issuance, unless in case of emergency, etc., when authorized by district. $110 fee. (Minn. Stat. §517.08, subdiv. 1b).

Waiting Period.

See supra, subhead Marriage License.

Ceremonial marriage may be solemnized by any clerk of court, any judge of court of record, retired judge of court of record, former court commissioner who is employed by court system or acting pursuant to order of chief judge of district, administrators of state schools for deaf and blind, or ordained minister of any religious denomination. (Minn. Stat. §517.04). Solemnization practices of certain religious groups and American Indians recognized. (Minn. Stat. §517.18). Minister's credentials of ordination must first be filed with clerk of district court of some county in state. (Minn. Stat. §517.05). Lack of authority of person performing ceremony does not invalidate marriage if parties in good faith believed him to have necessary authority. (Minn. Stat. §517.16).

No particular form required except that parties must contract in presence of authorized persons and at least two witnesses. (Minn. Stat. §517.09).

Solemnizing marriage illegally or willfully making false certificate is misdemeanor. (Minn. Stat. §517.14).

Illegitimate (Out of Wedlock) Children.

Parent and child relationship not dependent on marital status of parents. Parentage act establishes procedures for determining paternity, custody and visitation rights. (Minn. Stat. §§257.51-.74). Statistical presumption of paternity if likelihood of paternity, calculated with prior probability of no more than 50%, is 99% or greater and may be overcome only by clear and convincing evidence. (Minn. Stat. §257.62, subdiv. 5).

Record.

See category 10 Documents and Records, topic 10.04 Records, subhead Vital Statistics.

Reports of Marriage.

Person solemnizing marriage must file certificate of marriage with district court clerk in county in which license issued within five days after ceremony. (Minn. Stat. §517.10).

Common law marriages contracted on or before April 26, 1941, recognized (122 Minn. 407, 142 N.W. 593; 151 Minn. 72, 186 N.W. 126), but marriage contracted since that date void unless requirements hereinbefore stated complied with Minn. Stat. §517.01. Validity of marriage normally determined by law of jurisdiction where contracted and if valid there, valid in Minnesota unless it violates strong public policy. (239 Minn. 27, 57 N.W.2d 628). Strong public policy against common law marriage but court will recognize marriage if couple takes up residence and establishes elements of common law marriage in state which recognizes such marriages. (277 N.W.2d 653).

Proxy Marriages.

No statutory authorization.

Prohibited Marriages.

Persons related as ancestor and descendant, brother and sister, uncle and niece, aunt and nephew or first cousins may not intermarry; mentally retarded under guardianship or conservatorship may marry with permission of Commissioner of Human Services. (Minn. Stat. §517.03). Marriages within prohibited degrees and bigamous marriages are absolutely void. (Minn. Stat. §518.01).

See also topic 14.05 Dissolution of Marriage and infra, subhead Annulment of Marriage.

Annulment of Marriage.

Where either party incapable of assenting through want of age or lack of capacity to consent not known to other party, or because of influence of drugs or consent obtained by force or fraud and there is no subsequent voluntary cohabitation, injured party may obtain annulment dating from time of adjudication. (Minn. Stat. §518.02).

Remarriage immediately after dissolution of marriage or decree annulling marriage is permitted. (Minn. Stat. §518.145).

14.12 MARRIED WOMEN:

See topics 14.09 Husband and Wife, Infants, Marriage; categories 5 Civil Actions and

Procedure, topic Evidence, subhead Witnesses; Debtor and Creditor, topic Homesteads; Documents and Records, topic Acknowledgments; Estates and Trusts, topics Executors and Administrators, Wills; Property, topic Dower.

15 HEALTH

15.01 ABORTIONS:

Abortion legal but illegal to coerce, hold liable, or discriminate against person, hospital or institution for refusal to perform abortion. No health plan company required to provide coverage for abortion. (Minn. Stat. §145.414; Minn. Stat. §145.42). No abortion operation performed upon unemancipated minor or mentally incapacitated woman until at least 48 hours after written notice of pending operation delivered to woman's parent or guardian. (Minn. Stat. §144.343, subdiv. 2). Medical assistance covers abortion services, but only if it is medical necessity or if pregnancy is result of criminal sexual conduct or incest. (Minn. Stat. §256B.0625, subdiv. 16).

15.01A ANTITRUST LAWS:

Antitrust laws are intended to promote fair competition in marketplace and have recently been more vigorously enforced against entities in health care industry. Minnesota antitrust law prohibits contracts, combinations, or conspiracies in restraint of trade, and contracts, combinations, or conspiracies to establish, maintain, or attempt to establish or use monopoly power, whenever any of foregoing affects trade or commerce of Minnesota. (Minn. Stat. §325D.50 et seq.).

State Attorney General has authority to investigate violations of Minn. Stat. §325D.50 et seq. (Minn. Stat. §325D.59).

15.01B ADMINISTRATION

The commissioner of health shall be responsible for the adoption of rules and enforcement of applicable laws and rules relating to the operation, maintenance, design, installation, and construction of public pools and facilities related to them. (Minn. Stat. §144.1222). The commissioner of health shall award competitive grants to community health boards and tribal governments to convene, coordinate, and implement evidence-based strategies targeted at reducing the percentage of Minnesotans who are obese or overweight and to reduce the use of tobacco. (Minn. Stat. §145.986).

15.0215.05

15.06 FRAUD AND ABUSE:

Physicians may be disciplined by Medical Board for engaging in fee-splitting, such as paying or offering to pay or receiving or agreeing to receive commission, rebate or remuneration for referral of patients, dividing fees with another physician or professional corporation unless division is in proportion to services provided and responsibility assumed by each professional and physician has disclosed terms of division, referring patient to health care provider in which referring physician has financial or economic interest, and dispersing drug or device for profit unless physician has disclosed physician's own profit interest. (Minn. Stat. §147.091[1][p]).

15.06A HEALTH CARE FACILITIES:

Regulation of Hospitals.

Hospitals must be licensed and have appropriate permits in accordance with Minn. Stat.

§144.50 et seq., and must operate in compliance with (Minn. R. 4640.0100 et seq.). Construction or modification of new or existing hospitals is restricted by Minn. Stat. §144.551. Home rule charter city of third or fourth class is permitted to acquire, establish and operate hospital, provided those actions are taken pursuant to resolution or ordinance approved by two-thirds of city council. (Minn. Stat. §447.05).

Regulation of Nursing Homes.

Nursing homes must be duly licensed and are subject to regulation. See Minn. Stat. c. 144A; Minn. R. 4658.0100. Minn. Stat. §144A.071 imposes moratorium on certification of nursing home beds. Exceptions to this moratorium may be sought under Minn. Stat. §144A.071[3]).

Regulation of Hospices.

Hospice providers must be duly licensed and are subject to regulation. (Minn. Stat. §144A.753; Minn. R. 4668.0100).

15.06B HEALTH PROFESSIONALS:

Physicians and Other Providers.

All physicians must be licensed and are regulated by Minn. Stat. c. 147 and Minnesota Board of Medical Practice. Nurses must be licensed and are regulated by Minn. Stat. §148.171 et seq. and Minnesota Board of Nursing. Physicians' assistants must be licensed and are regulated by Minn. Stat. c. 147A. (Minn. Stat. §147A.02). Naturopathic physicians are licensed and regulated by Minn. Stat. c. 147E. (Minn. Stat. §§147E.01 to 147E.40). Dentistry professionals are licensed and regulated by Minn. Stat. c. 150A. (Minn. Stat. §§150A.01 to 150A.22).

15.06C INSURANCE:

Health Insurance for Poor.

Federally funded medical assistance program provides medical assistance to aged (Minn. Stat. c. 256A) and financially needy people. (Minn. Stat. c. 256B; 529 N.W.2d 438). Need-based recipients must not have income above certain amounts or assets valued in excess of certain amounts in order to be eligible. (Minn. Stat. §256B.056).

Health maintenance organizations ("HMOs") are regulated by Minn. Stat. c. 62D and Commissioner of Health. 62D requires HMOs to operate in compliance with their organizational documents, fulfill their obligations to furnish comprehensive health services, be financially solvent and responsible, and avoid advertising their services in untrue, misrepresentative, misleading, deceptive or unfair manner. (Minn. Stat. §62D.15[1]). HMOs must file report to Commissioner each year which includes financial statements, information about enrollees and contracts, and information regarding directors and officers. (Minn. Stat. §62D.03; Minn. Stat. §62D.08). Both Attorney General and Commissioner of Health have authority to investigate HMOs. (Minn. Stat. §8.31, Minn. Stat. §§62D.15-.17).

Regulation of Insurance.

Insurance is regulated by Minn. Stat. c. 60A and by Department of Commerce, including Division of Insurance Fraud Protection. Commissioner of Commerce has authority to examine and investigate insurance companies. (Minn. Stat. §60A.03).

Tax credit available in form of quality incentive payments for measurable quality health care services. (Minn. Stat. §§62U.01 et. seq.).

15.06D MINORS:

Minor may give effective consent for medical, mental and other health services to determine presence of or to treat pregnancy and related conditions, venereal disease, and alcohol and other drug abuse. (Minn. Stat. §144.343).

15.06E PATIENTS:

Patient Privacy.

Provider or person, who receives health records from provider, may not release patient's health records without signed and dated consent, subject to certain limited exceptions. (Minn. Stat. §144.335). Patient records may be released without consent if such release is specifically authorized by law, in event of medical emergency if released to related health care entities when necessary for current treatment of patient, or if record is released to law enforcement under certain emergency conditions. (Minn. Stat. §144.335). Health plan company may not use genetic testing information in determining coverage. (Minn. Stat. §72A.139). Government maintained health records are governed by Data Practices Act. (Minn. Stat. §13.01 et seq.).

Patient Rights.

Rights of patients and residents of health care facilities are protected by Minn. Stat. §144.651. Patients admitted to acute inpatient facility for more than 24 hours or resident admitted to long-term care facility must be informed of their legal rights. Patients are entitled to courteous treatment, appropriate health care, to know identity of their physicians, information about their treatment, and participate in planning of their treatment. They are also entitled to continuity of care, refuse care, privacy, confidentiality of their records, freedom from maltreatment, disclosure of services available, and responsive service. (Minn. Stat. §144.651).

Uniform Anatomical Gift Act.

Adopted (Minn. Stat. §525.921 to Minn. Stat. §525.9224).

Uniform Health-Care Information Act and Uniform Health Care Decisions Act not adopted.

15.06F TAX-EXEMPT HEALTH CARE ORGANIZATIONS:

Nonprofit corporations may be created and maintained in accordance with Minn. Stat. c. 317A. All charitable organizations that solicit funds are required to register with Attorney General's Office and provide that office with annual report every year. Filing fee is $25. (Minn. Stat. §§309.52-53). Attorney General is authorized to investigate violations of Nonprofit Corporation Act. (Minn. Stat. §8.31[1]).

16 INSURANCE

16.01 INSURANCE COMPANIES:

General supervision of insurance business is under Commissioner of Commerce.

Regulated by Minn. Stat. cc. 59A through 79A.

Standard Valuation Law (Guertin Act) adopted. (Minn. Stat. §61A.25).

Deposit Requirements.

No company except farmers' mutual, or real estate title insurance companies can do business in state unless it has on deposit with Commissioner of Commerce securities in amount of $500,000 or one-half applicable financial requirement set forth in Minn. Stat. §60A.07, whichever is less. Commissioner may require special deposit by individual foreign insurer for protection of Minnesota policyholders or claimants. (Minn. Stat. §60A.10).

Rates.

Rates and supporting information for casualty, fidelity, surety, guaranty bonds and allied lines, fire, title insurance and inland marine insurance on risk or operations in Minnesota, must be filed with Commissioner of Commerce before they become effective. (Minn. Stat. §70A.02, Minn. Stat. §70A.06). Hearing may be held whenever rate change filed that would result in 25% or more increase in 12-month period over existing rates. Rate effective unless hearing finds rate is excessive. (Minn. Stat. §70A.06, subdiv. 1a).

Policies.

Statutes regulate life insurance (Minn. Stat. cc. 61A, 61B), accident and health insurance (Minn. Stat. c. 62A), credit life and accident and health insurance (Minn. Stat. c. 62B), nonprofit health service plan corporations (Minn. Stat. c. 62C), health maintenance organizations (Minn. Stat. c. 62D), provision of health insurance to low-income persons (Minn. Stat. 62J), small employer health benefits (Minn. Stat. 62L), medical malpractice insurance (Minn. Stat. c. 62F), joint self-insurance employee health plans (Minn. Stat. c. 62H), fraternal benefit societies (Minn. Stat. c. 64B), fire and related insurance (Minn. Stat. c. 65A), homeowner's insurance (Minn. Stat. §65A.27 et seq.), automobile insurance (Minn. Stat. c. 65B), title insurance (Minn. Stat. c. 68A) workers' compensation insurance (Minn. Stat. c. 79), worker's compensation self-insurance (Minn. Stat. c. 79A) and health care utilization review services (Minn. Stat. c. 62M). Readability of policies is regulated by Minn. Stat. c. 72C. See category 3 Business Regulation and Commerce, topic 3.12 Consumer Protection, subhead Plain Language.

Discrimination.

Unfair discrimination between individuals of same class on basis of disability in life or accident and health insurance policies, or applications therefor, prohibited unless claims experience and actuarial projections establish substantial differences in class rates. “Redlining” by issuers of homeowner's insurance coverage prohibited. Discrimination on basis of sex or marital status prohibited. Automobile insurer may not use employment status, status as residential tenant, previous failure to have automobile policy in force (unless policy was required by law) or prior claims for benefits (if applicant was less than 50% negligent) as underwriting standard or guideline or reason to deny coverage or charge differential rates. (Minn. Stat. §72A.20). Discrimination prohibited in automobile insurance policies between persons of same class, on account of race, on account of physical handicap compensated for by training or equipment, or on account of marital dissolution. (Minn. Stat. §72A.20).

Rebates prohibited. (Minn. Stat. §72A.20).

Reinsurance.

Company other than life must not reinsure without filing sworn report with Commissioner. (Minn. Stat. §60A.09).

Assumption transactions by life insurance companies regulated. Assumption agreements must be filed with Commissioner and must provide that original insurer remains liable to insured if assuming insurer is unable to fulfill its obligations unless policyholder consents in writing to release original insurer and consent form has been approved by Commissioner. (Minn. Stat. §60A.09).

Mutual companies organized after April 1931 may not be licensed to write policies covering injuries in course of employment, health, fidelity, boilers, glass, burglary, water, theft, forgery, domestic animals, automobile, liability, attorneys fees, malpractice or elevators, or all risks for personal property, and valuable documents except upon compliance with special conditions. (Minn. Stat. §60A.06, Minn. Stat. §66A.08).

Insurance producer must be licensed by Commissioner of Commerce. (Minn. Stat. §60K.32).

Foreign companies are admitted upon compliance with following requirements: (1) Depositing with Commissioner of Commerce certified copy of charter, by-laws and statement of financial condition and business; (2) furnishing Commissioner proof of authority to transact proposed business and that its assets, number of risks, reserve and other securities and guaranties for protection of policyholders, creditors and the public, comply with those required of like domestic companies; (3) appointing Commissioner of Commerce its agent for service of process as long as any liability exists in the state; (4) appointing as its agents residents of the state and obtaining from Commissioner license to transact business; (5) establishing financial requirements based on lines of business it is licensed to write in state of incorporation. (Minn. Stat. §60A.19). For filing fees and annual report fees, see Minn. Stat. §60A.14.

Retaliatory law provides that whenever laws of any other state, territory, or country prohibit or do not provide for organization of or licensing in such state, territory or country of a class or kind of insurance companies or associations organized under laws of this state, then companies or associations of same kind or class of such other state, territory or country shall not be licensed to do business in this state. (Minn. Stat. §60A.07, subdiv. 9).

Premium tax in amount of 2% of annual premiums levied on all domestic and foreign insurance companies on installment basis in lieu of all other taxes except those on real property within state. Town and farmers' mutual insurance companies pay 1%. Premiums received under medical assistance, general assistance medical care, Minnesota-Care program, and Minnesota Comprehensive Health Insurance Plan are not subject to tax. Health maintenance organizations and nonprofit health service organizations are subject to tax of 1% of premiums. Insurance company may offset against its premium tax liability to state amounts paid pursuant to assessments made for insolvencies occurring after July 31, 1994 under Minn. Stat. §60C.01 to Minn. Stat. §60C.22 as prescribed by statute. (Minn. Stat. §297I.05; Minn. Stat. §297I.20).

No-Fault Insurance.

See category 23 Transportation, topic 23.01 Motor Vehicles.

Direct Actions Against Insurer.

See category 23 Transportation, topic 23.01 Motor Vehicles, subhead Direct Actions.

Uniform Insurers Liquidation Act not adopted.

16.02 SURETY AND GUARANTY COMPANIES:

Domestic or foreign corporation, holding certificate of Commissioner of Insurance of this state to effect that it appears to his satisfaction that corporation has complied with requirements of statute, may become surety on any bond, recognizance, obligation, stipulation or undertaking required by law in all actions, proceedings, municipal and other cases where same may be required with one surety or two or more sureties. (Minn. Stat. §574.15).

Bonding Charges.

Any receiver, assignee, trustee, committee, guardian, executor or administrator or other fiduciary required by law to give bond may include as his lawful expense the charges therefore of surety company so qualified, not exceeding $10 per annum when amount of bond is not over $1,000, and not more than 1% per annum on excess. In all actions or proceedings party entitled to recover costs may include therein such reasonable sum as may have been paid such company for executing or guaranteeing bond or undertaking therein. (Minn. Stat. §574.19).

17 INTELLECTUAL PROPERTY

17.01 TRADEMARKS AND TRADENAMES:

Trademarks and Service Marks.

Any person who adopts and uses trademark or service mark in state may file for registration of mark. (Minn. Stat. §333.20, subdiv. 1). Fee, $50, payable to Secretary of State. (Minn. Stat. §333.20, subdiv. 4). Each application to be on forms furnished by Secretary of State, signed and verified by applicant or by person with authority to sign on behalf of business entity and accompanied by single specimen or facsimile of such mark. (Minn. Stat. §333.20, subdiv. 1–3). Upon acceptance by Secretary of State, certificate of registration will be issued. (Minn. Stat. §333.21).

What May Not Be Registered.

Trademark or service mark will not be registered if it: (1) Comprises immoral, deceptive or scandalous matter; (2) may disparage or falsely suggests connection with person, living or dead, institution, belief or national symbol, or bring them into contempt or disrepute; (3) comprises flag or coat of arms or other insignia of U.S. or any state or municipality, or any foreign nation or any simulation of this insignia; (4) comprises name, signature or portrait of living person without their consent; (5) is merely descriptive or is deceptively misdescriptive of goods or services unless mark has become distinctive; (6) is primarily geographically descriptive or deceptively misdescriptive unless mark has become distinctive; (7) is primarily merely surname unless mark has become distinctive; or (8) so resembles mark registered in state; or corporate, limited liability entity, cooperative, or limited partnership name in use or reserved in this state, or mark or trade name previously used in state and not abandoned, as to be likely to cause confusion or mistake or to deceive. (Minn. Stat. §333.19).

Duration and Renewal.

Registration is effective for ten year period with renewals permitted for successive ten year terms upon application within six months prior to end of term on forms furnished by Secretary of State, provided mark is then used by applicant and that there are no intervening rights. Renewal fee $25. Notice of necessity for renewal given registrant by Secretary of State. (Minn. Stat. §333.22).

Assignment.

Conveyance or assignment of mark must be in writing and will be recorded by Secretary of State and new certificate issued to assignee for remainder of registration term. Recordation fee $15. Assignment will be void against subsequent purchaser for value without notice unless recorded with Secretary of State within three months of assignment or prior to subsequent purchase. (Minn. Stat. §333.23).

Cancellation of Marks.

Secretary of State shall cancel registration: (a) For failure to renew mark; (b) upon request by registrant; (c) in compliance with order of district court finding registered mark has been abandoned, registrant does not own mark, or registration was filed improperly or fraudulently obtained; (d) mark is or has become generic name for goods or services; or (e) if mark is so similar to mark registered in state or in U.S. Patent and Trademark Office before filing of application, that it is likely to cause confusion or mistake or to deceive. (Minn. Stat. §333.25).

Infringement and Remedies.

Civil action by owner of registered mark may be maintained against any person who, without consent of owner, uses any mark in connection with rendering of services or selling, offering to sell, or advertising any goods or services which mark is identical to or so similar to registered mark as to be likely to cause confusion, mistake, or to deceive purchaser as to source or origin of goods or services, or who counterfeits, reproduces, copies or imitates such mark and applies same to labels, advertisements, etc. (Minn. Stat. §333.28). District court may grant injunction to restrain infringing activity and may require defendant pay damages or profits to owner. (Minn. Stat. §333.29). Counterfeits or imitations in control of infringer may be destroyed. (Minn. Stat. §333.29). Recovery of damages or profits not allowed for acts of infringer in reproducing, counterfeiting, copying or imitating mark and applying same to labels, advertisements, etc., unless committed with knowledge that such mark was intended to be used to cause confusion or mistake or to deceive. (Minn. Stat. §333.28). Treble damages and attorney's fees may be awarded if wrongful acts committed with knowledge or in bad faith. (Minn. Stat. §333.29).

Common Law Marks.

Person's rights in mark acquired in good faith at any time at common law not affected by statutes, except that such person's rights against registrant of same or confusingly similar mark are limited to (a) areas of his use prior to registration date, and (b) areas in which mark had become known prior to registration date. (Minn. Stat. §333.30).

Tradenames.

No business can be carried on under tradename that does not reflect true name of every person interested in such business unless registered with secretary of state, giving names and addresses of all those conducting business. (Minn. Stat. §333.01). Assumed or fictitious name must not intentionally misrepresent geographic origin or location of business. (Minn. Stat. §333.01). Filing fee, $25. (Minn. Stat. §333.055). Tradenames cannot include words denoting part of U.S. government such as “Army”, “Navy”, etc. (Minn. Stat. §333.17). Tradename must not include corporation, incorporated, limited, chartered, professional association, cooperative, limited partnership, limited liability company, limited liability partnership, professional limited liability company, or professional limited liability partnership unless entity registering tradename authorized to use these terms. (Minn. Stat. §333.01). Secretary of State will not register assumed name not distinguishable from corporate, limited liability company, limited liability partnership, cooperative or limited partnership name in use or reserved in state by another, or trade or service mark registered in state, without written consent, court decree of prior right or affidavit of nonuser. Certificate effective for ten year period. Tradenames on file as of July 1, 1978 expired July 31, 1979, unless renewed. Renewal fee $25. (Minn. Stat. §333.055). If any business that has failed to file tradename commences civil action in state court, action stayed until certificate filed and defendant entitled to $250 abatement or costs. Plaintiff entitled to $250 costs where any such business defends against civil action. (Minn. Stat. §333.06). See also category 2 Business Organizations, topic 2.07 Partnerships.

Dilution.

Dilution of distinctive quality of famous mark shall be grounds for injunctive relief. Owner of famous mark may seek injunction against third party use of mark or trade name if use began after mark became famous and dilutes distinctive quality of mark. Non-commercial use, fair use of famous mark and news reporting and news commentary are not actionable under this Section. (Minn. Stat. §333.285).

17.02 TRADE SECRETS:

Uniform Trade Secrets Act adopted. (Minn. Stat. §325C.01 et seq.). Actual or threatened misappropriation may be enjoined. (Minn. Stat. §325C.02). In exceptional circumstances injunction may condition future use upon payment of reasonable royalty for no longer than period of time for which use could have been prohibited. (Minn. Stat. §325C.02). Except where monetary recovery would be inequitable, damages can be recovered for misappropriation. Damages can include both actual loss and unjust enrichment. In lieu of damages measured by other methods, reasonable royalty may be recovered. (Minn. Stat. §325C.03). Court may award damages in amount up to twice damages otherwise awardable for willful and malicious misappropriation. (Minn. Stat. §325C.03). Action for misappropriation must be brought within three years after misappropriation is discovered or by reasonable diligence should have been discovered. (Minn. Stat. §325C.06).

18 LEGAL PROFESSION

18.01 ATTORNEYS AND COUNSELORS:

The state bar is not integrated.

Jurisdiction over admission is vested in Supreme Court. (Minn. Stat. §480.05). Current rules for admission are as amended through Mar. 14, 2000.

Eligibility.

Applicant for admission to bar must be 18 years of age, of good character and fitness, reside in state or maintain office in state, or designate Clerk of Appellate Courts as agent for service of process for all purposes. (http://www.ble.state.mn.us/faq.html).

Registration as Law Student.

No registration required. (http://www.mncourts.gov/?page=1994).

Educational Requirements.

Applicant must have graduated with J.D. or L.L.B. from ABA-approved law school. Certificate of graduation, or of fulfillment of all requirements for graduation with graduation occurring within 120 days following examination, must be filed at least 30 days prior to examination.

Application for admission is to State Board of Law Examiners: http://www.ble.state.mn.us/.

Examinations are held in Feb. and July of each year. Fee is $500, plus $450 if applicant will have been admitted in another jurisdiction for more than six months by date of next exam. Application deadlines are Oct. 15 for Feb. exam and Mar. 15 for July exam. Late filing fee is $150, but no applications accepted after Dec. 15 for Feb. exam or May 15 for July exam. State exam consists of Multi-State Bar Exam plus additional questions, and applicants must also have passed Multi-State Professional Responsibility Exam. Applicant who fails exam may retake at any regular exam date in next two years upon application before 15th day of second month preceding exam and payment of fee of $400. Applicant failing three times may take further exam only after submitting study plan approved by Director of State Board of Law Examiners at least 30 days prior to application. (http://www.ble.state.mn.us/.

Admission Without Examination.

Attorneys admitted in other states may, in discretion of Supreme Court, be admitted without examination: (1) After, as principal occupation, being actively engaged in practice of law (including judicial service, legal service with government, in military, or as corporate counsel or trust officer, or teaching full-time in approved law school) for at least five of previous seven years, or (2) if applicant passed written exam in other state within prior two years which included Multi-State Bar Exam on which applicant received scaled score of 145 or above. Applicant must meet age, good moral character and education requirements, and must have passed Multi-State Professional Responsibility Exam. Admission fee $950. Any applicant who was unsuccessful on Minnesota Exam may be eligible for admission without examination if licensed elsewhere and eligible by practice or by test score subsequent to failing Minnesota Exam. (http://www.ble.state.mn.us/rules.html#rule120.

Admission Pro Hac Vice.

Foreign attorneys may, in court's discretion, try or participate in trial or proceedings. (Minn. Stat. §481.02, subdiv. 6).

Temporary License for Legal Services Programs.

Limited license to practice law available to individual admitted in another jurisdiction who is associated with legal services program in Minnesota. Admission fee $75. (http://www.ble.state.mn.us/rules.html#rule12).

Temporary House Counsel License.

Applicant who has practiced law full-time for at least five of past seven years may receive 12-month license to practice in state solely for designated employer which is single corporation (or its subsidiaries), association, business or governmental entity engaged in business other than practice of law or provision of legal services. Fee is $700. (http://www.ble.state.mn.us/rules.html#rule12).

Powers.

Attorney may bind client at any stage of action or proceeding by agreement made in open court or in presence of clerk and entered in minutes by such clerk or made in writing and signed by such attorney. (Minn. Stat. §481.08; 39 Minn. 355, 40 N.W. 262).

Attorneys may receive money claimed by client in action or special proceeding during its pendency, and within six years after judgment, upon payment thereof, may discharge claim or acknowledge satisfaction of judgment. (Minn. Stat. §481.08). May, while authority to enforce and collect judgment continues, act for client in protecting and retaining same, and notice of proceedings affecting same must be served on attorney. (23 Minn. 518). But all such authority ceases on substitution of another attorney. May be required to produce authority to appear for client. (Minn. Stat. §481.09). Attorney has no implied authority to compromise client's cause of action. (111 Minn. 183, 126 N.W. 731).

Compensation.

Upon petition of interested person, court may review reasonableness of compensation of attorney employed by personal representative in administration of estate. (Minn. Stat. §524.3-721).

Substitution of Attorney for Nonresident.

In case attorney for nonresident ceases to act as such, other party may file with court administrator notice requiring substitution; and if nonresident fails to appoint new attorney or to appear in person within 30 days, nonresident is not entitled to notice of any subsequent proceeding. (Minn. Stat. §481.12).

Lien.

Attorney has lien for compensation on cause of action from time of service of summons therein and upon judgment in action subordinate to rights of litigants; and, after filing notice of lien claim, on property wherever situated held by a third person in which client has an interest. (Minn. Stat. §481.13). Lien is assignable (31 Minn. 201, 17 N.W. 337), and superior to claim of creditor in execution levied on judgment (39 Minn. 373, 40 N.W. 254).

Disbarment, etc.

As to grounds for disbarment, removal or suspension, see Minn. Stat. §481.15. Procedures specified in Rules on Lawyers Professional Responsibility adopted by Supreme Court.

Unauthorized Practice.

No person or association, except members of the bar, and no corporation, except an attorney's professional firm organized under Minn. Stat. c. 319B, through its officers or employees may appear in any court of record to maintain or defend action except in behalf of himself or itself or in certain cases involving rental property used for residential purposes and certain matters in conciliation court. Sole shareholder of corporation may appear on behalf of corporation. (Minn. Stat. §481.02; Minn. Stat. §491A.02, subdiv. 4).

Professional Associations.

See category 2 Business Organizations, topic 2.03 Corporations, subhead Professional Firms.

Registration of Attorneys.

Annual registration fee is $217 for attorneys admitted to practice more than three years, lesser fee for certain other classifications of attorneys. Penalty for nonpayment is automatic suspension of authorization to practice law in state. (http://www.mncourts.gov/?page=302.)

Continuing Legal Education.

Every three years attorney must complete minimum of 45 hours of course work (of which three hours shall be devoted to legal ethics and two hours to eliminating bias), either as student or as lecturer, in continuing legal education in courses approved by State Board of Continuing Legal Education. (http://www.mbcle.state.mn.us/MBCLE/pages/general_info.asp.)

Attorney Ethics.

State Supreme Court has adopted American Bar Association Model Rules of Professional Conduct with modification. (Minnesota Rules of Professional Conduct).

19 MINERAL, WATER AND FISHING RIGHTS

19.01 MINES AND MINERALS:

Commissioner of Natural Resources has charge and control of waters, minerals, and wild animals of state. (Minn. Stat. §84.027).

State lands may be leased from the state for mining purposes. (Minn. Stat. §93.16).

No person shall engage in mining without a permit, for which annual fees are payable. (Minn. Stat. §§93.481, 93.482).

Inspection.

There is an inspector of mines appointed by board of commissioners in every county where there are five mines or more in operation. (Minn. Stat. §180.01). Inspector has duty of visiting each mine at least once every 90 days and may do so more often. (Minn. Stat. §180.03).

Plural Ownership of Mineral Lands.

Where lands containing ore are owned by plurality of owners, owners of interest of one half or more may bring action in district court of county where lands situated, and court may authorize them to open mines upon filing sufficient bond for proper performance. They must account to court for their operations. Non-operating owners may enter lands to verify accounts at any time and are entitled to pro-rata share of profits. No liens, save judgment liens, can attach to such properties during operation. These sections apply only to output of workings of land, not lands themselves. (Minn. Stat. §§560.01-.09).

Filing of Severed Mineral Interests.

Except for Indian tribes and state and federal government, owners of severed mineral interests where mineral interest is owned separately from fee title to surface of property upon or beneath which mineral interest exists, must file verified statement within one year after acquiring such mineral interests in office of county recorder or Registrar of Titles. (Minn. Stat. §93.52; Minn. Stat. §93.55). Failure to file results in forfeiture of mineral interests to state. (Minn. Stat. §93.55).

Iron ore taxes and production taxes on certain other minerals imposed. (Minn. Stat. c. 298).

20 MORTGAGES

20.01 CHATTEL MORTGAGES:

Uniform Commercial Code adopted. (Minn. c. 336). For variations from 1962 Official Text see category 3 Business Regulation and Commerce, topic 3.09 Commercial Code.

Forms.

Secretary of State has uniform forms (see end of this Digest) for filing under Uniform Commercial Code. (Minn. Stat. §336.9-514; Minn. Stat. §336.9-515; Minn. Stat. §336.9-516a; and Minn. Stat. §336.9-525). See category 3 Business Regulation and Commerce, topic 3.09 Commercial Code.

20.02 COLLATERAL SECURITY:

See category 8 Debtor and Creditor, topic 8.15 Pledges.

20.03 MORTGAGES OF PERSONAL PROPERTY:

See topic 20.01 Chattel Mortgages.

20.04 MORTGAGES OF REAL PROPERTY:

Mortgage operates to create lien only, and is not conveyance enabling mortgagee to recover property without foreclosure, but mortgagor may assign rents and profits from mortgaged real estate as additional security if mortgage (1) was executed, modified or amended subsequent to Aug. 1, 1977; (2) secures principal amount of $100,000 or more, or is lien upon residential real property containing more than four dwelling units; and (3) is not lien upon property that is entirely homesteaded as agricultural, or upon residential property containing four or fewer dwelling units where at least one is homestead property. Any assignment of rents or profits from residential property of four or fewer units, however, may be enforced only against non-homestead portion. (Minn. Stat. §559.17).

Deed may be proved mortgage if absolute on its face. (137 Minn. 450, 163 N.W. 746).

Execution.

Mortgage must be executed and acknowledged like deed (Minn. Stat. §§507.01, .24) and, in order to be entitled to record, name and address of draftsperson must appear on mortgage document with original signatures of notary public and executing party unless part of real estate electronic filing pilot project (Minn. Stat. §507.24, Minn. Stat. §507.091 and Minn. Stat. §507.094). Lock-in agreements for interest rate or discount points must be written, and terms and conditions must be disclosed. There are penalties for violation and unreasonable delay in processing loan application. (Minn. Stat. §47.206).

Mortgage made outside of the state must be executed and proved in same manner as deed so made or according to laws of such state. (Minn. Stat. §507.24). See category 21 Property, topic 21.06 Deeds.

Recording.

Mortgages are recorded in office of county recorder (Minn. Stat. §507.34), or registrar of titles if land is registered land (Minn. Stat. §508.55), of county where real estate is located, and if not, are void as against subsequent bona fide purchasers first recording their conveyances, or attachments levied or judgments obtained (Minn. Stat. §507.34). Certain formalities must be met for conveyance to be recordable. (Minn. Stat. §507.24).

Mortgages or deeds of trust covering easements or other less-than-fee-simple interests in real property securing debt of oil or gas pipeline company are filed with secretary of state. (Minn. Stat. §507.328).

Mortgages may be recorded electronically, in accordance with Real Property Electronic Recording Act. (Minn. Stat. §§507.0941 to 507.0949).

Recording Fees and Prerequisites.

See category 10 Documents and Records, topic 10.04 Records.

Taxes.

Mortgage registration tax is .0023 of debt or portion of debt that is secured by any recorded mortgage of real property. (Minn. Stat. §287.035). Hennepin and Ramsey Counties can impose additional mortgage registry tax equal to .0001 of principal amount. (Minn. Stat. §383A.80; Minn. Stat. §383B.80). Additional $5 fee for recording or registration of mortgages subject to mortgage registration tax and deeds subject to deed tax are collected in Anoka, Carver, Dakota (excluding City of Northfield), Hennepin (excluding cities of Hanover and Rockford), Ramsey, Scott (excluding City of New Prague), and Washington counties. (Minn. Stat. §40A.152; Minn. Stat. §473.121). If part of land is outside of Minnesota, tax is based on value of property in Minnesota described in mortgage divided by value of all mortgaged property described in mortgage. If single mortgage describes property in Minnesota and another state that secures only portion of debt amount recited, tax is based on amount of debt to be secured by real property in Minnesota. (Minn. Stat. §287.05). Lenders can limit their mortgage registry tax on multi-state mortgages intended to secure only portion of debt in mortgage by placing following statement on first page: “Notwithstanding anything to the contrary herein, enforcement of this mortgage in Minnesota is limited to a debt of $. . . . . under chapter 287 of Minnesota Statutes.” (Minn. Stat. §287.05). Tax must be paid on maximum line of credit that may be secured at any one time if mortgage secures revolving line of credit. (Minn. Stat. §287.05). Tax is payable to county treasurer of county where land is situate. (Minn. Stat. §287.08). No mortgage registration tax is due on contract for deed. (Minn. Stat. §287.04). Mortgage modifications purporting to limit enforcement to dollar amount have taxes imposed based on combined effect of any or all such statements. (Minn. Stat. §287.05).

Trust deeds are seldom used in place of mortgages.

Future Advances.

Mortgage may secure obligatory or voluntary future advances to be made by mortgagee from time to time after execution if advances are obligatory upon mortgagee under terms of contract with mortgagor. However, priority of first mortgage will not extend to voluntary advances made by first mortgagee with notice of subsequent mortgage. (134 Minn. 156, 158 N.W. 918).

Reverse mortgage loans authorized. (Minn. Stat. §47.58).

Graduated payment mortgages authorized. (Minn. Stat. §47.201).

Priorities.

Mortgage first recorded has priority unless taken with actual notice of earlier mortgage. (54 Minn. 486, 56 N.W. 131). Mortgage that encumbers seller's interest in contract for deed ceases to encumber property described in deed given under contract for deed if buyer did not join or consent to mortgage in recorded instrument and mortgage is recorded subsequent to recording of contract. (Minn. Stat. §507.402).

Assignment.

Recording of assignment of mortgage is not of itself notice to mortgagor, his heirs or personal representatives so as to invalidate payment made to mortgagee. (Minn. Stat. §507.32). But where debt is not yet due under promissory note, maker cannot pay payee and defeat recovery by bona fide indorsee of note. (29 Minn. 177, 12 N.W. 517).

Release.

Mortgagee may release either personal liability or real security; release of one does not affect the other. (13 Minn. 301, 13 Gilf. 278).

Conveyance of Mortgaged Premises by Mortgagor.

Purchaser of mortgaged premises becomes personally liable for mortgage debt by assuming and agreeing to pay it only if mortgagor was personally liable for debt. (117 Minn. 267, 135 N.W. 746).

Conveyance of premises by mortgagor to mortgagee raises no presumption that it was given as further security. (Minn. Stat. §559.18).

Rights of Junior Mortgagee.

Junior mortgagee may pay overdue taxes or insurance premiums or unpaid installments due on prior lien and make debt part of his own. (Minn. Stat. §580.29).

Satisfaction.

Mortgage may be discharged by filing for record certificate of its satisfaction executed and acknowledged as in case of conveyance by mortgagee, his representatives or assignee, or other parties authorized so to do by statute. (Minn. Stat. §§507.40-507.413). Upon written request, good and valid satisfaction of mortgage in recordable form must be delivered to any party paying full and final balance of mortgage indebtedness; such delivery must be in hand or by certified mail postmarked within 45 days of receipt of request to holder of any interest of record in said mortgage and within 45 days of payment of all sums due thereon. Noncomplying lender liable for up to $500 civil penalty plus actual damages. (Minn. Stat. §47.208).

Foreclosure.

By advertisement: Where mortgage contains power of sale it may be foreclosed by advertisement upon default. (Minn. Stat. §580.01). Prerequisites for foreclosure are: (1) Default in condition of mortgage by which power to sell becomes operative; (2) no action is pending on debt, or if action or proceeding has been instituted, that same has been discontinued, or that execution upon judgment rendered therein has been returned unsatisfied, in whole or in part; (3) mortgage and assignments thereof recorded or registered if registered land; and (4) before notice of pendency as required under (Minn. Stat. §580.032) is recorded, party has complied with (Minn. Stat. §580.021). (Minn. Stat. §580.02); (4) six weeks published notice has been given that mortgage will be foreclosed by sale of mortgaged premises (Minn. Stat. §580.03); and (5) service of such notice, in like manner as civil summons, on one in possession of premises, at least four weeks before sale, together with foreclosure advice notice as required by (Minn. Stat. §§580.041, 580.042) if property consists of one to four family dwelling units, one of which owner occupies as owner's principal residence. (Minn. Stat. §580.03). Notice must specify: (1) Names of mortgagor, mortgagee, and each assignee and original or maximum principal amount secured by mortgage; (2) date of mortgage, when and where recorded or, if registered land, when and where registered; (3) amount claimed to be due on mortgage on date of notice; (4) description of premises; (5) time and place of sale; (6) time allowed by law for redemption by mortgagor or mortgagor's personal representatives or assigns; (7) if foreclosing party wishes to preserve right to reduce redemption period after first publication of notice, notice must state in capital letters that time allowed for redemption may be reduced (see Minn. Stat. §580.04[7] for specific language); and (8) name of each mortgagor released from mortgage and statement that named mortgagor has been released from financial obligation on mortgage. (Minn. Stat. §580.04; Minn. Stat. §580.045). Where attorney forecloses, his authority must appear by power of attorney executed and acknowledged in same manner as conveyance and recorded prior to sale in county where foreclosure proceedings are had. (Minn. Stat. §580.05). If mortgage is foreclosed nonjudicially, amount received from foreclosure sale is full satisfaction of mortgage debt except as provided in (Minn. Stat. §582.30). (Minn. Stat. §580.225).

By action: Foreclosure by action is conducted like any ordinary civil suit (Minn. Stat. §581.01), judgment being entered for amount due and ordering sale of premises except as provided for in Minn. Stat. c. 581. Certified transcript of judgment is authority to sheriff to make sale. (Minn. Stat. §581.03). State may be made party if it has or claims mortgage or other lien. (Minn. Stat. §582.13).

Mortgage may be foreclosed for failure to pay any installment of principal or interest as though each installment were separate mortgage. (Minn. Stat. §580.09).

Receiver may be appointed to collect rents and apply same on taxes and repairs where mortgagor is committing waste and is insolvent, provided that security is inadequate. Second mortgagee may secure appointment of receiver when interest on first mortgage is unpaid. (151 Minn. 181, 186 N.W. 299). Statutory authorization for receiver if assignment of rents or other conditions satisfied. (Minn. Stat. §559.17, Minn. Stat. §576.01).

If owner or junior lienor pays actual amount of default with interest, disbursements, and greater of $150 or one half of authorized attorney's fees before sale, foreclosure action is abandoned. (Minn. Stat. §580.30, subdiv. 1). Upon request by sheriff, holder of mortgage shall provide, within seven days, current payoff amount, itemized schedule of amounts necessary to reinstate mortgage, identity of person or entity with authority to act on behalf of holder. If holder fails to respond within seven days, sheriff shall postpone sheriff's sale. (Minn. Stat. §580.30, subdiv. 2; 2007 Minn. H.F. No. 3420, art. 5, §19).

Strict foreclosure may be ordered when just or appropriate, but final decree cannot be made until one year after judgment determining amount due on mortgage. (Minn. Stat. §581.12).

Attorney's fees are regulated by statute, depending on amount of mortgage debt. (Minn. Stat. §582.01).

Mandatory Mediation.

Notice of Right to Mediation.

Any creditor seeking to enforce debt of more than $5,000 against agricultural property (except “agriculturally related business”), including personal and real property, whether action is mortgage foreclosure, contract for deed termination, attachment, seizure, repossession, replevin, levy or execution, must serve personal notice on debtor after default in security agreement in statutory form of right to mediate debt through local agricultural extension service office. (Minn. Stat. §336.9-601; Minn. Stat. §550.365; Minn. Stat. §559.209; Minn. Stat. §582.039; §583). These statutes do not apply to debtor who owns and leases less than 60 acres if debtor has less than $20,000 in gross sales in preceding year, or other debts specifically exempted in statute. (Minn. Stat. §583.24). Notice must also be served on director of agricultural extension service. (Minn. Stat. §582.039).

Request for Mediation.

Debtor has 14 days after receiving notice to request mediation by filing request form with agricultural extension service. (Minn. Stat. §583.26). Request form must state all known creditors. (Minn. Stat. §583.26). All time periods applicable to collection proceedings are suspended once meditation is initiated until 90 days after date debtor files mediation notice unless director otherwise allows. (Minn. Stat. §583.26). Creditor may begin proceedings sooner if mediator's affidavit is received stating debtor is not acting in good faith or five days after parties reach written agreement which has not been rescinded. (Minn. Stat. §583.26). If mediation is not requested within 14 days, no mediation is required and creditor may proceed to exercise rights. (Minn. Stat. §583.26). Once mediation request has been filed, agricultural extension service must provide orientation meeting at least five days before initial mediation meeting, and provide financial analyst at least three business days after receiving mediation request, to review and, if necessary, prepare debtor's financial records before initial mediation meeting. (Minn. Stat. §583.26).

Notice of Initial Mediation Meeting.

Within ten days after receiving mediation request, director of agricultural extension service must send mediation proceeding notice to debtor and all creditors listed by debtor in mediation request. (Minn. Stat. 583.26). Proposed mediators may be vetoed by creditors and debtor; creditors and debtor may jointly choose professional mediator. (Minn. Stat. §583.26). First mediation meeting must be held within 20 days of mediation meeting notice. (Minn. Stat. §583.26).

Mediation period may last up to 60 days from date of first meeting. (Minn. Stat. §583.26). Creditor with security interest in seasonal use farm machinery has lien for lessor of (1) total of principal and interest required to bring current until stay on enforcement is lifted, and (2) rental value of machinery used for field operation during mediation. (Minn. Stat. §514.661). Disputes as to market value are resolved by appraiser. (Minn. Stat. §583.27).

Other Creditors.

Any creditor who has been notified by director of mediation meeting and does not object to agreement is bound by it. (Minn. Stat. §583.28). After mediation agreement is reached, mediator must notify all creditors who have filed claim forms, and those creditors may file written objections within ten days after receiving notice. (Minn. Stat. §583.28). Mediator has ten days after receiving objection to meet with debtors and creditors to attempt to work out new agreement. (Minn. Stat. §583.28).

Failure to Mediate in Good Faith.

All parties (creditors and debtor) must mediate in good faith. (Minn. Stat. §583.27). If mediator files affidavit with director and parties that creditor did not mediate in good faith, and debtor requests court supervised mediation, court must require further mediation for up to 60 days. (Minn. Stat. §583.27). If court finds that creditor did not participate in mediation in good faith, court can further suspend creditor's remedies for additional period of 180 days. (Minn. Stat. §583.27). Debtor who does not participate in good faith may be ineligible for mediation; creditor may immediately proceed with creditor's remedies. (Minn. Stat. §583.27).

Crop Rights on Foreclosed Land.

Judgments for debts on agricultural property owed by farmer/debtor may not be executed upon real or personal property after three years from date judgment was entered. (Minn. Stat. §550.366). See category 8 Debtor and Creditor, topic 8.13 Liens, subheads Planting Crop Owner's Lien and Agricultural Landlord Lien.

Sales.

If mortgaged land consists of separate and distinct tracts, land must be sold in separate tracts (Minn. Stat. §580.08), unless, where foreclosure is by action, court orders sale of whole tract as most beneficial to interests of parties (Minn. Stat. §581.04). Debtor has right to separate sale of designated homestead property (unless property cannot be divided without material injury); whenever real property is sold on execution and mortgage foreclosures, statutorily prescribed notice, in ten point capitalized letters, must set forth debtor's right to designate part of real property as homestead, to have designated homestead portion sold separately, and to redeem separately each portion of property; applies to all foreclosures or executions commenced on or after July 1, 1987 in case of foreclosure of mortgage and on or after Mar. 21, 1986 in case of execution. Notice is not to be published in case of foreclosure of mortgage. (Minn. Stat. §550.175; Minn. Stat. §582.041; Minn. Stat. §582.042). Upon objection to homestead designation, executing creditor is entitled to court-approved designation of homestead and/or court determination of value. (Minn. Stat. §550.175). If court determines that value of claimed designation exceeds amount of homestead exemption, court shall order sale of entire property. (Minn. Stat. §550.175). Debtor is then paid amount of homestead exemption out of proceeds. (Minn. Stat. §550.175). Balance is applied to execution. (Minn. Stat. §550.175). Sale under foreclosure by advertisement may be postponed by executing party, from time to time, by inserting notice in newspaper in which original advertisement was published. Notice shall be published only once. (Minn. Stat. §580.07; 2007 Minn. H.F. No. 3420, art. 5, §13). Where foreclosure is by action, postponement is by court order.

Mortgagee, mortgage's assignee, or legal representative of either or both may fairly and in good faith purchase at foreclosure sale. (Minn. Stat. §580.11; Minn. Stat. §581.05). Surplus goes to mortgagor, his legal representatives or assigns. (Minn. Stat. §580.10; Minn. Stat. §581.06).

When any sale of real property is made under power of sale contained in any mortgage, officer making sale makes and delivers to purchaser certificate of sale containing description of mortgage and land, price paid, time and place of sale, name of purchaser, interest rate in effect on date of sheriff's sale, and time for redemption, provided that if certificate states five week redemption period and longer redemption period was stated in notice of sale, certified copy of court order authorizing reduction of redemption period must be attached to certificate. (Minn. Stat. §580.12; 2007 Minn. H.F. No. 3420, art. 5, §14). Certificate which states five week redemption period must be recorded within ten days after sale; any other certificate must be recorded within 20 days after sale; in either case, certificate operates as conveyance of mortgagor's right, title and interest in such land after expiration of time of redemption (Minn. Stat. §580.12). Certificates must not contain times for redemption less than those required by applicable statutes. (Minn. Stat. §580.12; Minn. Stat. §580.23; Minn. Stat. §582.032; Minn. Stat. §582.32). Within ten days after recording certificate of sale, affidavit of costs paid must be recorded with county recorder by foreclosing party. (Minn. Stat. §580.17). Action to set aside sale because of certain defects, including defective notice, must be commenced within five years (excluding disabilities) thereafter (Minn. Stat. §580.20); for defects other than those so specified, limitation period is 15 years (Minn. Stat. §580.21). There are numerous curative acts, however.

Upon coming in of report of sale, court will grant order confirming it or if it appears that justice has not been done may order new sale. (Minn. Stat. §581.08). If sale is confirmed, sheriff executes certificate of sale, to be recorded within 20 days. (Minn. Stat. §581.08). Upon confirmation of report of sale, clerk enters satisfaction of judgment to extent of sum bid for premises, less expenses and costs. (Minn. Stat. §581.09).

Deficiency.

Where amount realized is less than amount due on mortgage under Minn. Stat. c. 580 or amount of judgment under Minn. Stat. c. 581, independent action may be brought for deficiency unless in cases of foreclosure by advertisement, statutory redemption period is six months or five weeks. (Minn. Stat. §582.30). Amount realized is entered in full satisfaction of judgment unless deficiency is allowed under (Minn. Stat. §582.30), in which event balance of judgment remaining unpaid may be executed and satisfied in same manner as personal judgment against mortgagor. (Minn. Stat. §581.09). In cases of foreclosure involving mortgages on agricultural production property entered into after Mar. 22, 1986, action for deficiency judgment and determination of fair market value of property must be filed, if at all, within 90 days after foreclosure sale; for mortgages on such property entered into on or before Mar. 22, 1986, procedure is same except that deficiency judgment may not be executed until Mar. 22, 1987 (Minn. Stat. §582.30); in either case, amount of deficiency judgment is no more than difference between amount owed on mortgage under Minn. Stat. c. 580 or amount of judgment under Minn. Stat. c. 581 and fair market value as determined by jury (Minn. Stat. §582.30); limit on execution of such deficiency judgments or personal judgments is three years (Minn. Stat. §582.30). Creditor enforcing agricultural mortgage entered into on or before Mar. 22, 1986 may obtain either personal judgment or foreclosure on mortgage and deficiency judgment, if allowed. (Minn. Stat. §582.31).

Redemption.

Except as otherwise provided in Minn. Stat. §582.032, Minn. Stat. §582.32, or below, mortgagor or mortgagor's personal representatives or assigns may redeem within six months after sale if foreclosure was by advertisement, or within six months after confirmation of sale if foreclosure was by action, by paying amount bid thereof, with interest thereon from time of sale, at rate stated in certificate of sale or, if no rate is provided therein, at rate of 6% per annum, together with any further sum that may be payable pursuant to Minn. Stat. §§582.03 and 582.031. (Minn. Stat. §581.10). Mortgagor has 12 months to redeem if: (1) mortgage was executed prior to July 1, 1967; (2) amount owing on date of notice of foreclosure sale is less than 662/3% of original principal amount secured by mortgage; (3) mortgage was executed prior to July 1, 1987, and mortgaged premises exceeded ten acres on date of execution of mortgage; (4) mortgage was executed prior to Aug. 1, 1994, and mortgage premises exceeded ten acres but not 40 acres, and were in agricultural use as defined in Minn. Stat. §40A.02[3] on date of execution of mortgage; (5) mortgaged premises, as of date of execution of mortgage, exceeded 40 acres; or (6) mortgage was executed on or after Aug. 1, 1994, and mortgaged premises exceeded ten acres but not 40 acres, and was in agricultural use on date of execution of mortgage. (Minn. Stat. §580.23). Affidavit by mortgagor and certificate signed by county assessor stating mortgaged premises are not in agricultural use may be recorded against mortgaged premises as prima facie evidence of facts therein alleged. (Minn. Stat. §580.23). Redemption period is reduced to two months if mortgagor and mortgagee have agreed to voluntary foreclosure unless property is subject to federal tax lien under which U.S. government is entitled to 120-day redemption period then mortgagor's redemption period is 120 days from date of sale. (Minn. Stat. §582.32). Purchaser at sale has same rights with respect to due taxes, insurance premiums or interest or installments on prior mortgage, lien, or contract for deed as purchaser at foreclosure or execution. (Minn. Stat. §582.03. See category 8 Debtor and Creditor, topic 8.05 Executions.) Owner or junior lienor may reinstate mortgage by paying all amounts actually due to foreclosing mortgagee prior to foreclosure sale. (Minn. Stat. §580.30). Amount actually due refers only to delinquent payments plus costs set forth in Minn. Stat. §582.30, not to accelerated balance after default. (293 Minn. 44, 196 N.W.2d 473).

Creditor having lien on premises may redeem within seven days after redemption period has expired if he records notice of intention during mortgagor's redemption period with each county recorder or registrar of titles if property is registered where foreclosed mortgage is recorded, records all documents necessary to create lien and evidence creditor's ownership of lien, and delivers to sheriff conducting sale copies of documents with recording data. (Minn. Stat. §580.24; Minn. Stat. §581.10). Creditors redeem in order of priority (from senior to junior) with each creditor getting successive seven-day redemption period. (Minn. Stat. §580.24; Minn. Stat. §581.10). Creditor of estate of decedent may redeem lands of decedent. (Minn. Stat. §550.30). One desiring to redeem must offer money necessary and proof of right to redeem. (Minn. Stat. §580.25). Documents must be recorded within 24 hours and delivered to sheriff on same day. (Minn. Stat. §580.25). Redeeming party is then entitled to certificate of redemption executed in manner of conveyance, containing name of one redeeming, amount paid, description of sale from which redemption is made and of property, statement of claim upon which redemption made, and, if upon lien, amount claimed to be due thereon. (Minn. Stat. §580.26). This must be filed within four days after expiration of owner's one year redemption or creditor's redemption with county recorder or registrar of titles if property is registered. (Minn. Stat. §580.26). If time for redemption will expire during pendency of action to set aside mortgage as fraudulent or void, or paid or discharged if mortgage foreclosed by advertisement, right to redeem may be preserved (although action ultimately fails) by deposit with sheriff of amount for which premises sold with interest to date of deposit, together with bond conditioned to pay interest which may accrue, sheriff being directed to retain money and bond until final judgment (Minn. Stat. §580.28).

Until time for redemption expires, mortgagor is entitled to possession of premises and rents and profits therefrom. (135 Minn. 443, 161 N.W. 165).

Redemption of Homesteads.

Debtor has right to separate redemption of homestead property from remaining property. (Minn. Stat. §582.041). If sheriff receives homestead property designation or is ordered by court, sheriff must offer and sell designated homestead property separately from other property. (Minn. Stat. §582.041). Debtor may then redeem designated homestead or remaining property, or both. (Minn. Stat. §582.041).

Right of First Refusal for Agricultural Land.

State or federal agency (other than commissioner of agriculture pursuant to security program), limited partnership, limited liability company or corporate owner of farmland (other than family farm corporation or authorized farm corporation) may not lease or sell agricultural land or farm homestead that was acquired by enforcing debt against agricultural land or farm homestead (including by accepting deed in lieu of foreclosure or cancellation) before offering or making good faith effort to offer land for sale or lease to immediately preceding prior owner at price no higher than highest price offered by proposed buyer or lessee. (Minn. Stat. §500.245). Only family farm, family farm corporation, family farm partnership or family farm limited liability company can be immediately preceding owner. (Minn. Stat. §500.245). Selling or leasing property to third party is prima facie evidence that price is acceptable to seller or lessor. (Minn. Stat. §500.245). Form of notice of offer is statutorily prescribed. (Minn. Stat. §500.245). Notice must be personally delivered (with signed receipt) or sent by certified mail (with signed receipt) to immediately preceding owner's last known address. Notice must give informal description of property, as well as terms of proposed sale or lease to third party, and deadline for meeting proposed offer. (Minn. Stat. §500.245). Copy of proposed purchase agreement or lease with third party must be included with notice, along with affidavit by seller or lessor that purchase agreement or lease is true, accurate and made in good faith. Notice must inform immediately preceding owner that three-year statute of limitations on actions for damages (other than fraud) accrues on date conveyance is recorded. (Minn. Stat. §500.245). Identity of third party may, at lessor's discretion, be deleted from purchase agreement or lease. (Minn. Stat. §500.245). Offer to immediately preceding owner must be same cash price from third party which is acceptable to seller or lessor or, for time-price offer by third party, either same time-price terms or equivalent cash offer. (Minn. Stat. §500.245). Right of first refusal must be exercised within 15 days (for leases) or 65 days (for sales) of receipt of offer. (Minn. Stat. §500.245). Prior owner has ten days after exercising right to lease or buy to fully perform according to terms of offer, including paying amounts due. Prior owner may elect to purchase or lease entire property or contiguous and compact portion of property. (Minn. Stat. §500.245). If prior owner does not accept offer, or does not perform obligations of offer within ten days after acceptance, seller may sell and lessor may lease to third party in accordance with their lease or purchase agreement. (Minn. Stat. §500.245). Seller or lessor may record prima facie evidence of termination of right of first refusal in form of affidavit stating that identical offer was made to former owner; time period for exercising right to buy has expired, former owner did not exercise its right to buy or exercised its right to buy but did not perform within ten days; and offer to former owner has terminated. (Minn. Stat. §500.245). Former owner's rights under (Minn. Stat. §500.245) may not be extinguished or limited except by express statement in deed in lieu of foreclosure, in deed in lieu of termination of contract for deed, instrument conveying rights to state or federal agency or corporation owning agricultural land, conveying rights to person to whom agricultural land has been transferred by state or federal agency or corporation to cure title defects, or in deed to vendee of former owner. Other than as stated above, former owner's right to lease or purchase agricultural land under Minn. Stat. 500.245 may not be assigned or transferred but may be inherited. (Minn. Stat. §500.245).

Forms.

Following are forms of mortgage, and assignment, satisfaction and partial release thereof by individuals and corporations:

Forms

Short Form of Mortgage (Minn. Stat. §507.15).—

This statutory mortgage, made this . . . . . . day of . . . ., 20. . . ., between (give name and address) mortgagor, and (give name and address) mortgagee,

Witnesseth, that to secure the payment of (give description of indebtedness and instruments evidencing same), the mortgagor, hereby mortgages to the mortgagee (give description of premises “subject to” any encumbrances thereon).

And (. . . . . ., one of) the mortgagor covenants with the mortgagee the following statutory covenants: 1. To warrant the title to the premises. 2. To pay the indebtedness as herein provided. 3. To pay all taxes. 4. To keep the buildings insured against fire for $. . . . . ., and against (give other hazards insured against and amount of such other insurance) for the protection of the mortgagee. 5. That the premises shall be kept in repair and no waste shall be committed. 6. That the whole of the principal sum shall become due after, default in the payment of any installment of principal or interest, or of any tax, or in the performance of any other covenant, at the option of the mortgagee.

If default be made in any payment or covenant herein, the mortgagee shall have the statutory power of sale, and on foreclosure may retain statutory costs and attorney's fees.

In witness whereof the mortgagor has duly executed this mortgage. (Or use other testimonium clause. Add signatures, acknowledgment and draftsperson identity.)

For Uniform Conveyancing Blanks, see Minn. Stat. §507.09 and Minnesota Department of Commerce website at http://www.state.mn.us/portal/mn/jsp/home.do?agency=Commerce.

Licensing of Lenders

Residential Mortgage Originator and Servicer Licensing Act enacted. (Minn. Stat. §§58.01 et. seq.).

Chattel Mortgages.

See topic 20.01 Chattel Mortgages.

21 PROPERTY

21.01 ABSENTEES:

Care of Property.

Court may turn over care of property owned by absentee owner to receiver. Court may also make orders for care, custody, leasing and investing of all property and its proceeds in possession of receiver. If any of property consists of assets subject to likely rapid decline in value or live animals or is perishable or cannot be kept without great or disproportionate expense, court may order such property to be sold at public or private sale. Court may also make orders for management of absentee's business. (Minn. Stat. §§576.01-.16).

If beneficiary under absentee's life insurance policy is spouse, child, or other person dependent upon absentee for support, and advance payments under policy are necessary to support and maintain beneficiary, beneficiary shall be entitled to advance payments as court determines. Payment made by insurer under court order discharges it from any liability to any party for amounts paid. (Minn. Stat. §§576.121-.123).

Process Agent.

Any nonresident owning or claiming any interest in lands within state may appoint resident agent for service, except in tax matters, by filing written designation with Secretary of State. (Minn. Stat. §557.01). See also category 5 Civil Actions and Procedure, topic 5.20 Process.

Escheat.

See category 13 Estates and Trusts, topics 13.07 Descent and Distribution, subhead Escheat, 13.16 Wills, subhead Unclaimed Assets.

Uniform Disposition of Unclaimed Property Act adopted with modifications. Period after which property presumed abandoned reduced to three years in many cases. (Minn. Stat. §§345.31-.60).

21.02 ADVERSE POSSESSION:

Title to any real estate, except registered land (Minn. Stat. §508.02) or public streets, parks, etc. and public or private cemeteries (Minn. Stat. §541.01), may be acquired by adverse possession.

Duration of Possession.

Action for recovery of real estate or possession thereof cannot be maintained unless it appears that plaintiff, his ancestor, predecessor or grantor was seized or possessed of premises in question within 15 years before beginning of action. (Minn. Stat. §541.02).

Easements, by analogy, may be acquired by prescription after 20 years continuous adverse use. (36 Minn. 273, 30 N.W. 886).

Disabilities.

See category 5 Civil Actions and Procedure, topic 5.16 Limitation of Actions.

21.03 [RESERVED]

21.04 CONVEYANCES:

See topic 21.06 Deeds.

21.05 CURTESY:

Abolished. For statutory interest in lieu of curtesy see category 13 Estates and Trusts, topic 13.07 Descent and Distribution.

21.06 DEEDS:

See topic Real Property for types of estates.

Execution.

To entitle deed to record, deed must be executed and acknowledged and acknowledgment certified. (Minn. Stat. §507.24, subdiv. 1). Instrument must contain original signatures of parties and notary public (unless part of real estate electronic filing pilot project). (Minn. Stat. §507.24, subdiv. 2). See categories 8 Debtor and Creditor, topic Homesteads, subhead Alienation or Encumbrance; Documents and Records, topic Acknowledgments; Family, topic Husband and Wife, subhead Conveyances.

Recording.

Executed deed may be recorded in office of county recorder, or registrar of titles if land is registered land, of county where land is situated. (Minn. Stat. §507.24, subdiv. 1).

Unrecorded deed is void against subsequent purchaser in good faith and for valuable consideration whose deed is first duly recorded, and as against any attachment levied on property, or any judgment lawfully obtained against person in whose name title to property appears of record prior to recording of such deed. (Minn. Stat. §507.34).

No deed or contract for deed or mortgage may be recorded unless name and address of person who or corporation which drafted instrument is printed, typewritten, stamped or written in legible manner thereon. (Minn. Stat. §507.091, subdiv. 1). Following form accepted: "This instrument was drafted by . . . . (name) . . . . (address)."

No deed or contract for deed can be recorded until name and address of grantee to whom future tax statements are to be sent is indicated on instrument. (Minn. Stat. §507.092). Contract for deed must be recorded or registered by vendee within four months after execution or penalty of 2% of principal amount of contract debt is imposed, which could be enforced as lien on property. (Minn. Stat. §507.235, subdivs. 1 and 2).

Before deed or other instrument conveying land can be recorded, county auditor of county wherein land is situated must certify upon such instrument that there are no delinquent taxes on land to be conveyed or that taxes have been paid by sale where land has been sold or assigned to a purchaser for taxes. (Minn. Stat. §272.12).

Deed or other instrument must also contain statement of grantor or grantee, or successor in interest, setting forth amount of realty transfer tax due or that it is exempt from tax. (Minn. Stat. §287.241). Whenever any real estate is sold for consideration in excess of $1,000, certificate of value by grantor, grantee or legal agent must be filed in county when deed presented for recording and must state full actual consideration, financing terms and conditions of sale and tax classification of property. Items and value of personal property transferred with real property must be listed and deducted from sale price. (Minn. Stat. §272.115, Minn. Stat. §287.241).

Recording Fees and Prerequisites.

See category 10 Documents and Records, topic 10.04 Records.

Restrictions against alienation to any class or person on account of religious faith, creed, race, or color cannot be given effect. Instrument will have full force in all other respects to be construed as if no such restriction was contained therein. (Minn. Stat. §507.18).

Duty to Disclose Encumbrances.

When real property is conveyed or mortgaged, grantor must make known nature and existence of any known encumbrances, by exception in deed or otherwise. (Minn. Stat. §507.20). Any conveyance containing covenant against encumbrances when encumbrance, known or not, appears of record, imposes upon grantor contractual liability for all damages sustained in removing same. (Minn. Stat. §507.21).

Corporation may convey its real estate by attorney appointed by resolution of its directors or governing board for that purpose, copy of which, certified by clerk or secretary of such corporation, may be recorded with county recorder. (Minn. Stat. §507.05). Corporate seal need not be affixed to deed or other conveyancing instrument to permit its recording. (Minn. Stat. §302A.163).

Conveyance made outside of state may be executed in accordance with Minnesota law or laws of place of execution. (Minn. Stat. §507.24).

Contract for Deed.

When default is made in conditions of any contract for conveyance of real estate or any interest therein that gives seller right to terminate it, written notice of termination must be given, served in same manner as summons in civil action, notwithstanding any contract provisions to contrary. (Minn. Stat. §559.21). General rule is that unexercised option conveys no interest in real estate and therefore need not be cancelled pursuant to Minn. Stat. §559.21. (310 Minn. 256, 246 N.W.2d 170). Contracts executed before Aug. 2, 1976 may be terminated upon 30 days specified notice and opportunity to cure (Minn. Stat. §559.21); contracts executed after Aug. 1, 1976 and before May 1, 1980 may be terminated with 30 days specified notice and opportunity to cure if purchaser has paid less than 30% of purchase price paid, 45 days specified notice and opportunity to cure if 30% or more but less than 50% has been paid or 60 days specified notice and opportunity to cure if 50% or more paid (Minn. Stat. §559.21); contracts executed after May 1, 1980 and before Aug. 1, 1985 may be terminated with 30 days specified notice and opportunity to cure if less than 10% paid, 60 days specified notice and opportunity to cure if 10% or more and less than 25% has been paid or 90 days specified notice and opportunity to cure if 25% or more paid (Minn. Stat. §559.21); contracts executed after July 31, 1985 may be terminated with 60 days notice, except for earnest money contracts, purchase agreements and options exercised subject to Minn. Stat. §559.21, which may be terminated on 30 days notice or canceled under Minn. Stat. §559.217 unless by their terms they provide for longer termination period. (Minn. Stat. §559.21). Notice must state amount required for purchaser to cure default and that purchaser may be eligible for extension of time in underlined, capitalized letters, or other form quickly and easily distinguishable from rest of notice, and address to which payment pursuant to notice may be sent. (Minn. Stat. §559.21, subdiv. 3).

Taxes.

Realty transfer tax at rate of $1.65 for consideration of $500 or less (including no consideration and transfers pursuant to mergers, consolidations and designated transfers as defined in Minn. Stat. §287.20[3a]). When consideration, exclusive of value of any lien or encumbrance remaining at time of sale, exceeds $500, tax is .0033 of net consideration. (Minn. Stat. §287.21). If, within six months from date of designated transfer, ownership interest in grantee is transferred to any person or entity such that transfer would not have been designated transfer with new owner, standard tax of .0033 of net consideration is imposed. If subsequent transfer of ownership interests was reasonably expected at time of initial transfer, penalty is assessed. (Minn. Stat. §287.21). Consideration does not include amount paid for personal property located on real property being conveyed and transferred as part of total consideration, except if real property being conveyed is one, two, or three-unit residential structure (in which case personal property must be included). (Minn. Stat. §287.20). Tax does not apply to mortgages; leases; executory contracts for deed; plats; deeds for cemetery lots; deeds of distribution by personal representatives; wills; transfer on death deed; instruments where U.S. or agency or instrumentality thereof is grantor, assignor, transferror, conveyor, grantee or assignee; any deed to or from co-owners partitioning undivided interests in property; any deed relating to exchange of school fund lands; any referee's or sheriff's certificate of sale from foreclosure sale or certificate of redemption therefrom issued to redeeming mortgagor; any deed or instrument which grants, creates, modifies or terminates easement; any deed or instrument between parties to marital dissolution; or on consideration paid for improvement in new residential construction, if deed tax on such consideration has been paid before first residential owners take possession of improvement. (Minn. Stat. §§287.22-287.221). No mortgage registry tax imposed to record contract for deed. (Minn. Stat. §287.04[d]). Additional $5 fee, on mortgages subject to mortgage registration tax and deeds subject to deed tax, collected in Anoka, Carver, Dakota, Hennepin, Ramsey, Scott, and Washington counties. (Minn. Stat. §40A.152; Minn. Stat. §473.121). See category 20 Mortgages, topic 20.04 Mortgages of Real Property, subhead Taxes.

Forms

Warranty deed (short form): A. B., grantor, of (here insert the place of residence), for and in consideration of (here insert the consideration), conveys and warrants to C. D., grantee, of (here insert place of residence), the following described real estate in the County of . . . . . . in the State of Minnesota: (here describe the premises). Dated this . . . . . . day of . . . . . ., 20 . . . .

(Add signatures, acknowledgment and draft person identity.)

Above form covenants as to lawful seizin in fee simple and right to convey, against incumbrances, for quiet possession, and that grantor will defend title. (Minn. Stat. §507.07).

Quit-claim deed (short form): A. B., grantor, of (here insert the place of residence), for the consideration of (here insert the consideration), conveys and quitclaims to C. D., the grantee, of (here insert the place of residence), all interest in the following described real estate in the county of . . . ., in the state of Minnesota: (here describe the premises).

Dated this . . . . . . day of . . . . . ., 20. . . .

(Add signatures, acknowledgment and draft person identity.)

Above form conveys interest of grantor, but does not extend to after acquired title unless expressly provided. (Minn. Stat. §507.07).

For Uniform Conveyancing Blanks, see Minn. Stat. §507.09.

All notification or certifications may be performed by electronic means. (Minn. Stat. §272.122).

21.07 DEEDS OF TRUST:

See category 20 Mortgages, topic 20.04 Mortgages of Real Property.

21.08 DOWER:

For statutory interest in lieu of dower, see category 13 Estates and Trusts, topic 13.07 Descent and Distribution.

21.09 ESCHEAT:

See topic 21.01 Absentees; category 13 Estates and Trusts, topics 13.07 Descent and Distribution, subhead Escheat, 13.16 Wills, subhead Unclaimed Assets.

21.10 LANDLORD AND TENANT:

Leases.

Lease for one year or less need not be in writing; for more than one year, must be in writing (Minn. Stat. §513.04); for more than three years, must be executed like deed (8 Minn. 524) and recorded in order to be valid against third persons purchasing in good faith and for valuable consideration. (Minn. Stat. §507.34). However, possession under unrecorded lease puts third persons on inquiry as to tenant's rights. (4 Minn. 282; 182 Minn. 244, 234 N.W. 320). Landlord is not obligated to be reasonable in consenting to assignment or sublet of lease which contains anti-assignment clause or which provides only that tenant must secure landlord's consent. (353 N.W.2d 198; see 339 N.W.2d 901 for similar proposition).

Rent.

If premises are destroyed without any fault or neglect on tenant's part or injured by elements or any other cause so as to become untenantable or unfit for occupancy, tenant is not liable for rent thereafter, unless otherwise expressly provided in writing. (Minn. Stat. §504B.131). Tenant may continue to occupy after building is repaired. (39 Minn. 385, 40 N.W. 361). To relieve itself from paying future rent, however, tenant must surrender premises within reasonable time. (47 Minn. 462, 50 N.W. 601). Burden is on tenant to prove destruction or injury. (56 Minn. 1, 57 N.W. 157).

Liens.

No statutory provisions for landlord's liens except in connection with unlawful detainer proceedings. See infra, subhead Dispossession.

Where tenant is compelled to pay taxes which landlord should have paid, tenant may file notice with county recorder or registrar of titles where land is located, giving amount and date of payment and description of land, and get lien on land. (Minn. Stat. §272.45). See category 8 Debtor and Creditor, topic 8.13 Liens, subheads Agricultural Landlord Lien and Planting Crop Owner's Lien.

Termination of Tenancy.

Estates at will may be terminated by either party, by three months notice in writing given to other party; and when rent is payable at period of less than three months, time of such notice is sufficient if it is equal to interval between times of payment, and in all cases of neglect or refusal to pay rent due on lease at will, 14 days notice to quit, given in writing by landlord, is sufficient to terminate lease. (Minn. Stat. §504B.135).

Tenancy from year to year exists as at common law, except that notice must be given in writing at least three months prior to end of second and subsequent years. (47 Minn. 1, 49 N.W. 327). Automatic renewal provisions in residential leases with terms of two months or more are restricted in that landlord must serve notice on tenant, either in person or by certified mail at least 15 and not more than 30 days before time which tenant must give notice of termination. (Minn. Stat. §504B.145). In tenancy from month to month, lease may be terminated by month's notice by either landlord or tenant (50 Minn. 139, 52 N.W. 390), but notice served on first of rental month does not terminate tenancy with end of that month (187 Minn. 497, 245 N.W. 825). Notice must be given to tenant when property is in foreclosure. (Minn. Stat,.§580.042).

No surrender of lands leased for more than one year unless made in writing except by act or operation of law (Minn. Stat. §513.04), which occurs when acts of tenant are equivalent to abandoning premises, and of landlord resuming possession thereof (56 Minn. 93, 57 N.W. 329). Landlord of residential property must refund any damage deposit within three weeks after termination of tenancy (or five days after tenant leaves building or dwelling due to legal condemnation of same), and receipt of tenant's mailing address or delivery instructions, simple, noncompounded interest at 1% per annum, or furnish written statements indicating reasons for withholding deposit. (Minn. Stat. §504B.178). Failure of landlord to comply with Minn. Stat. §504B.178 results in liability to tenant for damages in amount equal to portion of deposit withheld by landlord and aforementioned interest thereon as penalty, in addition to portion of deposit wrongfully withheld by landlord and interest thereon, as well as punitive damages not to exceed $200 for each deposit if retention of deposit was in bad faith. (Minn. Stat. §504B.178).

Security deposits governed by Minn. Stat. §504B.178.

Holding Over.

Person holding over after end of lease after due notice to quit, or contrary to covenants or conditions of agreement, may be evicted. (Minn. Stat. §504B.285). Holding over and retaining possession of urban lands does not create tenancy longer than shortest interval between times for payment of rents under expired lease. (Minn. Stat. §504B.141).

Dispossession.

Where person holds over after sale of lands on execution of judgment, or after expiration of time for redemption on foreclosure of mortgage or after termination of contract to convey, and expiration of applicable time for redemption provided that such tenant has received at least two month's written notice of termination of tenancy, or when tenant holds over after termination of lease or after breach of its conditions, or after rent is unpaid, or if tenant at will holds over after notice to quit, landlord may recover possession by eviction action. (Minn. Stat. §504B.285, subdiv. 1; 2007 Minn. S.F. No. 2908, §3).

Eviction action is brought by filing complaint describing premises, stating facts authorizing recovery, and praying for restitution thereof and if available, full name and date of birth of person against whom complaint is made. Summons then issued, commanding defendant to appear not less than seven nor more than 14 days from day of issuing summons. Copy of complaint attached to summons, which shall state that copy is attached and that original has been filed. (Minn. Stat. §504B.321, subdiv. 1). Summons must be served in manner provided for service in civil action in district court. (Minn. Stat. §504B.331[a]). If defendant cannot be found in county and no person actually occupies premises described in complaint (if nonresidential premises), or if service has been attempted at least twice on different days, with at least one of attempts made between 6:00 and 10:00 p.m. (if residential premises), and plaintiff or attorney files affidavit stating that: (1) Defendant cannot be found or is not believed to be in state and (2) copy of summons has been mailed to defendant's last known address, if any, then service may be made by posting summons in conspicuous place on premises for at least one week. (Minn. Stat. §504B.331). Trial may be continued up to maximum of six days within discretion of court unless all parties consent to longer period. (Minn. Stat. §504B.341[a]). Either party may demand jury trial. (Minn. Stat. §504B.335). If court or jury finds for plaintiff, court shall order restitution of premises and shall tax costs against defendant. In most cases, restitution may be stayed up to seven days upon showing of substantial hardship, unless unlawful detainer action was drug-related or related to other unlawful actions or on basis that tenant was causing nuisance or endangering safety of other residents, their property, or landlord's property. (Minn. Stat. §504B.345; Minn. Stat. §504B.171; and Minn. Stat. §609.5317). Writ delayed at least 24 hours if defendant announces intent to appeal, except if case involves holdover tenant. (Minn. Stat. §504B.371). If appeal taken within ten days, further proceedings stayed upon filing of cost bond (Minn. R. Civ. App. P. 103.01; Minn. R. Civ. App. P. 108.01; Minn. Stat. §504B.371), except in action on lease against tenant holding over in which plaintiff posts bond to pay damages if judgment reversed and new trial ordered (Minn. Stat. §504B.371). If defendant fails to move out within 24 hours after service of writ on him, he may be removed by officer, and plaintiff will have lien for his costs of removing and storing defendant's property on goods of defendant on premises, enforceable after 60 days by public sale. (Minn. Stat. §504B.365).

It is a defense to action for recovery of premises following termination of tenancy by notice to quit if alleged termination was intended as penalty for tenant's attempt to enforce rights under lease or good faith reporting of violation of health, safety, housing or building laws, or in case of nonpayment of rent, that rent was increased or services decreased as penalty for such lawful acts by tenant. (Minn. Stat. §504B.285). Tenant under residential lease may also assert affirmative defense that landlord has violated statutory covenants (Minn. Stat. §504B.161) of lease (298 Minn. 54, 213 N.W.2d 339). As general rule, any effort by landlord to dispossess tenant other than by use of judicial process is unlawful. (264 N.W.2d 145). Landlord may also be liable for treble damages or $500, whichever is greater, and attorney's fees if landlord unlawfully interrupts utility services to demised premises. (Minn. Stat. §504B.221). Landlord also guilty of misdemeanor if landlord unlawfully removes tenant from possession or interrupts utility services to demised premises with intent to unlawfully remove tenant. (Minn. Stat. §504B.225).

Eviction records may be expunged by a district court. (Minn. Stat. §484.014).

Reentry.

Landlord may bring action to recover possession of property for nonpayment of rent, and such action is equivalent to demand for rent. If tenant, when sued for restitution of premises because of nonpayment of rent, tenders amount due with interest and costs and $5 attorney fee before restitution granted and performs other covenants of lease, lessee may recover possession and hold property according to original lease terms (unless another action is pending alleging lessee's material violation of lease). If tenant is unable to pay interest and costs, tenant may pay amount of rent in arrears and be restored to possession within same period of time, if any, for which court stays order to vacate under Minn. Stat. §504B.345. Landlord and tenant may agree in writing to partial payment of rent in arrears without waiving landlord's right to recover possession of premises for nonpayment of rent. Where term for more than 20 years landlord cannot evict for nonpayment of rent until after 30 days notice to tenant and all creditors and those claiming interest in property. After eviction, tenant can redeem within six months if he pays amount due with interest and costs and performs other agreements that are in default. If landlord recovers possession by action, certified copy of judgment must be filed with county recorder in county where land situated (or registrar of titles if land is registered); if possession recovered by abandonment or surrender, affidavit setting forth such facts must be similarly filed. (Minn. Stat. §504B.291).

Distress.

Common law remedy of distress for rent has been abolished. (Minn. Stat. §504B.101).

Uniform Residential Landlord and Tenant Act not adopted.

21.11 LEASES:

See topic 21.10 Landlord and Tenant.

21.12 [RESERVED]

21.13 PERPETUITIES:

Uniform Statutory Rule Against Perpetuities adopted. (Minn. Stat. c. 501A).

Where accumulation permitted by will or other instrument, income from personal property and rents and profits from real estate may be accumulated for period during which power of alienation may be suspended by future interests in real or personal property not held in trust. Where authorization in instrument permits longer period, void only as to excess period. (Minn. Stat. §500.17). See category 13 Estates and Trusts, topic 13.15 Trusts.

21.14 PERSONAL PROPERTY:

Tenancy by entirety does not exist. (43 Minn. 398, 45 N.W. 710).

21.15 POWERS OF ATTORNEY:

Attorneys in Fact.

Governed, generally by Minn. Stat. c. 523. Durable power of attorney surviving incapacity or incompetence of principal provided for. (Minn. Stat. §§523.07,.08). Powers of attorney to register real estate or to convey registered real estate must be recorded with county registrar. (Minn. Stat. §508.72; Minn. Stat. §508A.72).

Statutory Short Form Power Attorney.—Statutory form, incorporating by reference powers set out in statute, provided by statute. (Minn. Stat. §§523.23, .24). Form effective Aug. 1, 1992, which must be reproduced exactly, is as follows:

Form

STATUTORY SHORT FORM POWER OF ATTORNEY

MINNESOTA STATUTES, §523.23

IMPORTANT NOTICE: The powers granted by this document are broad and sweeping. They are defined in Minn. Stat. §523.24. If you have any questions about these powers, obtain competent advice. This power of attorney may be revoked by you if you wish to do so. This power of attorney is automatically terminated if it is to your spouse

and proceedings are commenced for dissolution, legal separation, or annulment of your marriage. This power of attorney authorizes, but does not require, the attorney-in-fact to act for you.

PRINCIPAL

(Name and Address of Person Granting the Power)

____

____

____

ATTORNEY(S)-IN-FACT (Name and Address)

____

____

____

____

____

____

____

____

SUCCESSOR ATTORNEY(S)-IN-FACT (Optional)

To act if any named attorney-in-fact dies, resigns, or is otherwise unable to serve.

(Name and address)

First Successor

____

____

____

Second Successor

____

____

____

NOTICE: If more than one attorney-in-fact is designated, make a check or "x" on the line in front of one of the following statements:

__ Each attorney-in-fact may independently exercise the powers granted.__ All attorneys-in-fact must jointly exercise the powers granted.

EXPIRATION DATE(Optional)____________________Use Specific Month Day Year Only

I, (the above-named Principal) hereby appoint the above named Attorney(s)-in-Fact to act as my attorney(s)-in-fact:

FIRST: To act for me in any way that I could act with respect to the following matters, as each of them is defined in Minn. Stat. §523.24:

(To grant to the attorney-in-fact any of the following powers, make a check or "x" on the line in front of each power being granted. You may, but need not, cross out each power not granted. Failure to make a check or "x" on the line in front of the power will have the effect of deleting the power unless the line in front of the power of (N) is checked or x-ed.)

Check or "x"

__ (A) real property transactions;

I choose to limit this power to real property in __________ County, Minnesota, described as follows: (Use legal description. Do not use street address.)

____

____

____

(If more space is needed, continue on the back or on an attachment.)

__(B) tangible personal property transactions;

__(C) bond, share, and commodity transactions;

__(D) banking transactions;

__(E) business operating transactions;

__(F) insurance transactions;

__(G) beneficiary transactions;

__(H) gift transactions;

__(I) fiduciary transactions;

__(J) claims and litigation;

__(K) family maintenance;

__(L) benefits from military service

__(M) records, reports, and statements;

__(N) all of the powers listed in (A) through (M) above and all other matters.

SECOND: (You must indicate below whether or not this power of attorney will be effective if you become incapacitated or incompetent. Make a check or “x” on the line if front of the statement that expresses your intent.)

__ This power of attorney shall continue to be effective if I become incapacitated or incompetent.

__ This power of attorney shall not be effective if I become incapacitated or incompetent.

THIRD: (You must indicate below whether or not this power of attorney authorizes the attorney-in-fact to transfer your property to the attorney-in-fact. Make a check or “x” on the line in front of the statement that expresses your intent.)

__ This power of attorney authorizes the attorney-in-fact to transfer my property to the attorney-in-fact.

__ This power of attorney does not authorize the attorney-in-fact to transfer my property to the attorney-in-fact.

FOURTH: (You may indicate below whether or not the attorney-in-fact is required to make an accounting. Make a check or “x” on the line in front of the statement that expresses your intent.)

__ My attorney-in-fact need not render an accounting unless I request it or the accounting is otherwise required by Minn. Stat. §523.21.

__ My attorney-in-fact must render __________ (Monthly, Quarterly, Annual) accountings to me or ____________________ (Name and Address) during my lifetime, and a final accounting to the personal representative of my estate, if any is appointed, after my death.

IN WITNESS WHEREOF I have hereunto signed my name this ________ day of _______________, _______.

____

Signature of Principal

(Acknowledgement of Principal)

STATE OF MINNESOTA _________________

COUNTY OF ___________________________ } ss.

The foregoing instrument was acknowledged before me this _________ day of

____________________, _______, by ____________________ (Insert Name of Principal).

____

(Signature of Notary Public or other Official)

This instrument was drafted by:

____

____

____

____

____

Specimen Signature of Attorney(s)-in-Fact

(Notarization not required)

____

____

____

____

Powers of attorney validly created pursuant to: (1) Common law, (2) law of another state or country, or (3) law of Minnesota as it existed prior to enactment of Minn. Stat. §523.01 to Minn. Stat. §523.24, if power of attorney executed before Aug. 1, 1984, are also validly executed for purposes of Minn. Stat. c. 523. (Minn. Stat. §523.02). Powers of attorney executed from Aug. 1, 1984 to July 31, 1992, using statutory form in effect during that period continue to be valid. (Minn. Stat. §523.02). Third party refusing to accept authority of attorney in fact acting pursuant to statutory short form power of attorney accompanied by required affidavits of nontermination is liable to principal, and principal's heirs, assigns, and representative of estate of principal, absent actual notice of termination. (Minn. Stat. §523.20). Alternative short forms may be prepared for military members in active service. (Minn. Stat.§523.231).

Formalities.

Power of attorney is validly executed when dated and signed by principal and, in case of signature on behalf of principal, by another, or by mark, acknowledged by notary public. (Minn. Stat. §523.01). Expiration date in power of attorney, if any, must contain specific month, day and year; otherwise it has no effect. (Minn. Stat. §523.075). Power of attorney affecting real estate may be recorded in every county where any of lands lie. (Minn. Stat. §507.24). Power of attorney affecting real estate must be acknowledged like deed to be entitled to record. (Minn. Stat. §507.24). See topic 21.06 Deeds; category 14 Family, topic 14.09 Husband and Wife, subhead Conveyances.

Revocation.

Executed power may be revoked only by written instrument signed by principal and, in case of signature on behalf of principal by another or signature by mark, acknowledged before notary public. (Minn. Stat. §523.11). Durable power terminates on earliest to occur of death of principal, expiration of date of termination specified in power of attorney, or, in case of power of attorney to spouse of principal, upon commencement of proceedings for dissolution, separation, or annulment of principal's marriage. (Minn. Stat. §523.08). Nondurable power terminates upon death of principal, incapacity or incompetence of principal, or upon expiration of time period specified in power if such period ends prior to death of principal or, in case of power of attorney to spouse of principal, upon commencement of proceedings for dissolution, separation, or annulment of principal's marriage. (Minn. Stat. §523.09).

Durable Power of Attorney for Health Care.

Any competent person may designate another to make health care decisions in event principal, in judgment of attending physician, lacks decision-making capacity. (Minn. Stat. §145C.02). Agent has duty to act in good faith. Agent has personal obligation to make decision, but does not have legal duty to do so. (Minn. Stat. §145C.07). Suggested (not required) form is set out in Minn. Stat. §145C.16. Power of Attorney must be in writing, signed by principal or at principal's direction, state principal's name, dated, and either witnessed by two witnesses or acknowledged before notary public. (Minn. Stat. §145C.03, subdiv. 1). Health care providers or their employees attending principal on date of execution of directive or on date agent must make decisions are ineligible to act as agent unless individual related to principal by blood, marriage, registered domestic partnership, or adoption, or reason for appointment clearly set forth in directive. Individual appointed by principal to make determination of principal's decision-making capacity is also ineligible to act as health care agent. (Minn. Stat. §145C.03, subdiv. 2).

Living Wills.

See category 13 Estates and Trusts, topic 13.16 Wills.

21.16 REAL PROPERTY:

Estates in land are divided into estates of inheritance, and estates for life, for years, at will, and by sufferance. (Minn. Stat. §500.01). Grant or devise to two or more persons creates tenancy in common unless expressly declared to be in joint tenancy. Requirement for unity of time, title, interest and possession to create joint tenancy abolished. Estates in severalty are also recognized. (Minn. Stat. §500.19). Estates by entirety are not recognized. (43 Minn. 398, 45 N.W. 710).

Expectant estates and contingent rights of reentry for breach of conditions subsequent and possibilities of reverter, are descendible, devisable and alienable in same manner as estates in possession. (Minn. Stat. §500.16). Except for rights to reenter or to repossess, all private covenants, conditions, or restrictions created by which title or use of real property is affected, cease to be valid and operative 30 years after date of deed or other instrument, or date of will probate, creating them. This rule does not apply to certain covenants, conditions or restrictions described in Minn. Stat. §500.20, subdiv. 2a. (Minn. Stat. §500.20).

Rule in Shelley's Case and Doctrine of Worthier Title abolished. (Minn. Stat. §500.14).

Actions.

No action affecting possession of or title to real estate, founded on an instrument or transaction more than 40 years old, can be brought unless notice of claim describing real estate and instrument or transaction on which claim is founded is filed with county recorder of county where real estate is located within 40 years after execution or occurrence. (Rule does not apply to real property while registered under Minn. Stat. cc. 508 or 508A.) (Minn. Stat. §541.023).

Foreign Conveyances or Encumbrances.

Real property may be conveyed or mortgaged by instrument executed outside of the state, provided execution according to laws of place where made be shown in prescribed manner. (Minn. Stat. §507.24).

Condominiums.

Uniform Condominium Act adopted. (Minn. Stat. c. 515A). Condominiums created prior to Aug. 1, 1980 subject to prior act (Minn. Stat. §515A.1-102) and to new act (Minn. Stat. c. 515A) in some cases (Minn. Stat. §515A.1-102). Condominiums created after Aug. 1, 1980 not subject to prior act. (Minn. Stat. c. 515). Plats required to be filed for condominiums recording declarations or amendments to same filed after July 31, 1986. (Minn. Stat. §515A.2-105; Minn. Stat. §515A.2-110; Minn. Stat. §515A.2-115). Plat must contain certification of accuracy by registered professional land surveyor or registered professional architect as to parts of plat each has prepared. (Minn. Stat. §515A.2-110). Common interest communities created after June 1, 1994 and some aspects of common interest communities created under Minn. Stat. cc. 515 or 515A are now governed separately (Minn. Stat. c. 515B).

See topics 21.05 Curtesy, Deeds, Dower, Landlord and Tenant; categories 5 Civil Actions and Procedure, topic Partition; Debtor and Creditor, topic Homesteads; Documents and Records, topic Records; Family, topic Husband and Wife; Mortgages, topic Mortgages of Real Property.

21.17 TRUST DEEDS:

See category 20 Mortgages, topic 20.04 Mortgages of Real Property.

22 TAXATION

22.01 ADMINISTRATION:

Commissioner of Revenue has general supervision over administration of tax laws. (Minn. Stat. §270C.03).

Refunds not subject to execution. (Minn. Stat. §270C.435).

Appeals.

Appeal lies with tax court from any order of commissioner of revenue. (Minn. Stat. §271.06). Time for appeal is 60 days. (Minn. Stat. §271.06[2]). Appeal lies from final order of tax court upon writ of certiorari by supreme court. (Minn. Stat. §271.10). Writ must be obtained from supreme court and served within 60 days. (Minn. Stat. §271.10[2]).

Penalties.

Criminal Penalties.

Felony penalty imposed under Minn. Stat. §289A.63 for willful attempts to evade by failure to file, collect, or pay, or by knowingly filing or aiding filing of materially false or fraudulent documents. Knowing failure to file, pay, or collect is generally gross misdemeanor. (Minn. Stat. §289A.63).

Civil Penalties.

Imposed under Minn. Stat. §289A.60 for late payment of corporate franchise, fiduciary income and estate taxes (6% of unpaid tax, plus 5% of unpaid tax not paid with any late-filed return), for individual income tax (4% of unpaid tax), and withholding or sales or use taxes (5% for each 30 day period or portion thereof to maximum of 15%). If taxpayer fails to make and file return by due date plus extension, or fails to file individual return within six months after due date plus extension, 5% penalty added. Extended delinquency penalties may apply. Penalties are imposed for filing false or fraudulent returns (50% of tax understatement plus 50% of any fraudulent refund), substantial understatements of tax (20% of understatement), negligent or intentional disregard of rules and regulations (10% of understatement), and aiding and abetting understating of tax liability. Penalty is imposed for failure to report to Commissioner change or correction to person's federal return equal to 10% of amount of any underpayment of Minnesota tax attributable to federal change.

Civil penalties for late payment and late filing are effective for tax years beginning after Dec. 31, 2000 and for estate tax returns due after Jan. 1, 2002. Prior rules as set forth in 2000 Minn. Laws c. 289A apply to earlier years.

Gasoline Tax.

If tax not paid when due, penalty of 1% per day accrued for first ten days of delinquency; thereafter tax, fees and penalty bear interest at rate to be adjusted annually based on average prime rate. (Minn. Stat. §270C.40 Minn. Stat. §296A.22). Taxpayers violating gasoline tax laws, or knowingly making false statement in any gasoline report, record or sales ticket are guilty of gross misdemeanors. Willful evasion is felony. (Minn. Stat. §296A.23).

Insurance Gross Earnings Tax.

Upon failure to timely pay tax, 5% penalty is added for each 30 day period or portion thereof up to 15%. Penalties are imposed for failure to file (5% of unpaid tax), negligent or intentional disregard of rules and regulations (10% of unpaid tax), filing of fraudulent returns and intentional evasion (50% of unpaid tax). (Minn. Stat. §297I.85). Knowing failure to file, collect or pay are gross misdemeanors. Willful failure to file, collect, or pay with intent to evade, and knowing filing or assisting with respect to materially fraudulent documents are felonies. (Minn. Stat. §297I.90).

Hospital and Health Care Provider (Minnesotacare) Tax.

Penalties imposed by Minn. Stat. §295.57 follow penalties applicable to withholding and sales taxes under Minn. Stat. §289A.60. Criminal sanctions follow general criminal tax penalties under Minn. Stat. §289A.63.

Excise Taxes on Liquor, Cigarettes, and Tobacco.

Upon failure to pay tax within time for payment, 5% penalty is added for each 30 day period or portion thereof up to 15%. Penalties are imposed for failure to file (5% of unpaid tax), neglect or intentional disregard (10% of unpaid tax), repeated failures to file (25% of unpaid tax), fraudulent returns and evasion (50% of unpaid tax). (Minn. Stat. §297F.19; Minn. Stat. §297G.18). Failure to file, intentional failure to file, and fraudulent returns have misdemeanor, gross misdemeanor, and felony consequences. (Minn. Stat. §297F.20; Minn. Stat. §297G.19).

Unemployment Compensation Tax.

Late taxes accumulate interest at rate of 1½% per month or any part thereof. Failure to timely submit quarterly wage detail report is penalized by late fee of $10 per employee, but not less than $50, and late fee doubles if delinquent wage report is not submitted within 30 days of demand of state. Penalties for failure to submit are in addition to interest and other applicable penalties. (Minn. Stat. §268.044). Any officer, director, or any employee of corporation or any manager, governor, member, or employee of limited liability company which is employer and who is responsible for paying taxes and who willfully fails to do so, and any personal representative of estate or fiduciary who voluntarily distributes assets without reserving sufficient amount, is personally liable for unpaid taxes, interest and penalties. (Minn. Stat. §268.063). Any partner of limited liability partnership shall be jointly and severally liable for contributions or reimbursement, including interest, penalties and costs, in event employer does not pay such liability. (Minn. Stat.

§268.063).

For penalty and interest provisions affecting other taxes, see subhead involving specific tax, supra.

22.02 ALCOHOL, BEVERAGES AND TOBACCO TAXES:

Liquor tax imposed by Minn. Stat. §297G.

Cigarette tax imposed by Minn. Stat. §297F.05. Excise tax imposed on sale of cigarettes at rate of 24 mills (when weighing less than three pounds per thousand) or 48 mills (when weight is greater than three pounds per thousand) due upon possession with intent to sell or sale. Distributor tax imposed at rate of 6.5% of weighted average retail price. (Minn. Stat. §297F.25).

Tobacco tax imposed by Minn. Stat. §297F.05. Excise tax imposed on sale of tobacco at rate of 35% of wholesale price due upon manufacture, import, or sale.

22.03 BUSINESS TAXES:

Insurance Gross Earnings Tax.

In general, insurance companies are subject to 2% tax on gross premiums less return premiums. (Minn. Stat. §297I.05). Similar taxes are imposed that cover life insurance, mutual town and farmers' insurance, and some mutual property and casualty companies and automobile self-insurers and various other entities. (Minn. Stat. §297I.05). Exemptions from tax include payments received from certain federal and Minnesota government programs and premiums received by certain listed insurance programs and associations. (Minn. Stat. §297I.15). Health maintenance organizations, nonprofit health service corporations and community integrated service networks are subject to tax equal to 1% of gross premiums less return premiums on all direct business. (Minn. Stat. §297I.05[5]).

Hospital and Health Care Provider (Minnesotacare) Tax.

1.5% tax is imposed (and is payable through estimated tax payments) on gross revenues of hospitals, surgical care centers, health care providers, pharmacies, and wholesale drug distributors, and on price paid by person who receives prescription drugs for resale or use in Minnesota (other than from wholesale drug distributor subject to gross revenue tax) for 1998 through 2003 calendar years. (Minn. Stat. §295.52). 2% tax is imposed on gross revenues received on or after Jan. 1, 2004. Gross revenues exclude some medicare payments, some medical assistance payments and other like payments. (Minn. Stat. §295.50).

22.04 [RESERVED]

22.05 EMPLOYMENT TAXES:

Unemployment compensation tax is imposed on employer for each calendar year that employer paid wages to employees in covered employment, except for certain governmental units and nonprofit corporations. Tax rate is sum of employer's experience rating plus minimum tax of from 1/10 of 1% to 6/10 of 1% of covered payroll, depending on state unemployment compensation fund balance. Additional solvency assessment is possible if state fund balance is too low. Special rates apply to new employers and employers in construction industry. Taxable wage base is 60% of state's average annual wage in second previous calendar year. Exemptions similar to those under Federal Act. Returns must be made and tax paid quarterly to Department of Economic Security. (Minn. Stat. §268.03 et seq.).

22.06 [RESERVED]

22.07 ESTATE TAX:

For estates of decedents dying after Dec. 31, 1985, Minnesota has adopted pure "pick-up" tax based solely on federal credit for state death taxes. Tax is proportion of maximum federal credit equal to proportion of Minnesota gross estate to federal gross estate. For residents, tax is not less than federal credit reduced by taxes paid to other states. (Minn. Stat. §291.03).

In 2001, tax was partially decoupled from federal law, and does not reflect enactment of Economic Growth and Tax Relief Reconciliation Act of 2001 (EGTRRA). Instead, tax is equal to what pick-up tax would have been under pre-EGTRRA federal law. Tax is now effectively stand-alone estate tax based on federal credit as computed according to Internal Revenue Code as amended through Dec. 31, 2000. (Minn. Stat. §291.005; Minn. Stat. §291.03).

Determination and Collection.

Personal representative must file return of estate taxes with Commissioner of Revenue within nine months after death where decedent has interest in property with situs in Minnesota and federal gross estate in excess of federal unified credit equivalent. Return to be accompanied by copy of federal estate tax return. (Minn. Stat. §289A.18; Minn. Stat. §289A.10).

Taxes take effect at death and are due and payable nine months thereafter. (Minn. Stat. §289A.20). Estate which is granted extension to pay federal tax under I.R.C. §§6161 or 6166, and owes Minnesota tax of at least $5,000, may pay Minnesota tax at same time. Installment election must be made within nine months after death. (Minn. Stat. §289A.30). Failure to pay installment when due, unless due to reasonable cause, makes entire tax and accrued interest payable in 90 days. (Minn. Stat. §289A.30). Tax paid in installments is subject to interest. (Minn. Stat. §289A.55).

Penalties.

For tax not paid when due, penalty of 6% of unpaid tax imposed. If taxpayer fails to make and file return, 5% plus another 5% if payment does not accompany return. Penalty of 50% imposed for failure to file or filing false return with intent to evade tax. (Minn. Stat. §289A.60). Persons who fail to report federal estate tax changes to Commissioner of Revenue are subject to addition to tax equal to 10% of underpayment of Minnesota tax attributable to federal change. (Minn. Stat. §289A.38; Minn. Stat. §289A.60).

For estates of decedents dying after Dec. 31, 1985, deferred payment provisions generally conform to federal rules.

Lien.

Prior lien for inheritance tax repealed. Any prior liens outstanding on Dec. 31, 1983 expire on that date.

Apportionment.

Minnesota estate tax is apportioned among beneficiaries unless will or other instrument provides otherwise. (Minn. Stat. §524.3-916).

Interstate Co-operation.

Statutory procedure for determination of death taxes where decedent's domicile is disputed, see Minn. Stat. §§291.41-.47.

22.07A GAMBLING AND ENTERTAINMENT TAXES:

Pari-mutuel licenses are taxed at rate of 1% on total bets each racing day, and they are taxed 6% on amounts withheld from pari-mutuel pools which exceed $12,000,000 annually. (Minn. Stat. §240.15).

All legal gambling (except tipboards purchased after 1988 and pull tabs purchased after 1987) is taxed at rate of 8.5% of gross receipts less prizes paid, unless entry is exempt from licensing requirements. This tax is in lieu of sales tax. (Minn. Stat. §297E.02).

22.08 GASOLINE AND SPECIAL FUELS TAXES:

Gasoline tax imposed by Minn. Stat. §296A.07. Gasoline is taxed at rate of 14.2 cents per gallon for ethanol, 11.4 cents for methanol, and 20 cents for other gasoline. (Minn. Stat. §296A.07, subdiv. 3).

22.09 GIFT TAX:

Repealed for gifts made after Dec. 31, 1979.

22.10 [RESERVED]

22.11 INCOME TAX:

Income tax is imposed by Minn. Stat. c. 290.

Tax applies to net income of every resident individual and to income assignable or apportionable to state of every nonresident individual, trust, estate, or corporation. (Minn. Stat. §§290.014, .02, .03). Exempt from this tax are corporations, individuals, estates or trusts engaged in mining or producing iron ore if subject to occupation tax. Also exempt are certain insurance companies domiciled in states or countries outside of Minnesota which impose on and does not exempt Minnesota insurance companies from retaliatory taxes or other charges for doing business in other jurisdictions, and certain town and farmers' mutual insurance companies and mutual property and casualty insurance companies. Organizations exempt from income tax under Internal Revenue Code are also exempt to same extent from state tax, but such organizations are subject to tax on unrelated business income defined under Internal Revenue Code. Commissioner may examine or investigate entity claiming exemption under this section or Internal Revenue Code, and may revoke exemption for violation of federal law regardless of whether such action has been taken under federal law. (Minn. Stat. §290.05). For most part, S corporations are not subject to tax except to extent corporation recognizes income for federal income tax purposes; S corporations are subject to minimum fee (below). (Minn. Stat. §290.014, Minn. Stat. §§290.9725-9729). Nonresident entertainers (including athletes and public speakers) are subject to withholding tax of 2% of total compensation, and such compensation is exempt from income tax. No withholding on compensation paid to public speakers if less than $2,000 or constitutes speaker's expenses. (Minn. Stat. §290.9201).

Persons other than resident individuals, conducting trade or business outside Minnesota are subject to tax if any income is assignable or apportionable to Minnesota. Activities creating jurisdiction to tax include: (1) Having business location in this state, (2) having employees, representatives, or independent contractors in this state, (3) owning or leasing real or tangible personal property in Minnesota; and (4) obtaining or regularly soliciting business from within Minnesota, including: (a) selling products or services received in Minnesota, (b) selling services performed outside Minnesota if benefits are consumed in Minnesota, (c) transacting business with Minnesota customers involving intangible property that results in receipts attributed to Minnesota, (d) leasing tangible personal property in Minnesota, and (e) selling or leasing personal property in Minnesota. (Minn. Stat. §290.015). Income derived from certain farm operations by corporation is assigned to Minnesota. Report disclosing business activities must be filed in certain cases if tax returns not filed and corporation not qualified to do business. Failure to file may preclude use of Minnesota courts. (Minn. Stat. §290.371).

Net income of nonresident individual is taxable to extent it: (1) Consists of compensation for labor or personal services performed within this state, (2) derived from tangible property having situs in this state, or (3) derived from business carried on within this state. (Minn. Stat. §§290.17, .191). Special allocation rules apply to nonresident athletes and entertainers. (Minn. Stat. §290.17[2][a][2]). Certain pension and profit-sharing income of nonresident excluded even though services were performed within state. (Minn. Stat. §290.032, Minn. Stat. §290.17[2][a][3]).

Taxable income includes income from all sources except those expressly exempted, less certain specified deductions. In general, Minnesota follows Internal Revenue Code of 1986, as subsequently amended. Net income means federal income subject to certain modifications. (Minn. Stat. §290.01[19]). Taxable net income means net income for resident individuals, apportioned net income for nonresident individuals, and part of net income allocable to Minnesota by assignment or apportioned to Minnesota for all other taxpayers. (Minn. Stat. §290.01[22]). Corporations are allowed 80% dividends received deduction if recipient owns at least 20% of payor's stock, by vote and value, and remaining 20% if dividends received are from affiliated corporation and dividend is eliminated under IRS regulations, and 70% if recipient owns less than 20% of payor's stock, by vote or value, but only if payor's stock is not in stock in trade of recipient or property held by recipient primarily for sale in true ordinary course, and only if recipient's business is not principally holding of stock and collection of income therefrom. (Minn. Stat. §290.21). 80% of royalties, fees and other like income from certain foreign sources are excludable by certain corporations. (Minn. Stat. §290.01). Corporations are required to modify federal accelerated cost recovery for property placed in service before Jan. 1, 1988. (Minn. Stat. §290.01).

Net operating losses of individuals, estates, or trusts may be carried back and carried over in same manner as for federal purposes. Corporations are only allowed net operating loss carryover for 15 years. (Minn. Stat. §290.095).

Rates applicable to individuals, estates and trusts are graduated to maximum rate of 7.85%. (Minn. Stat. §290.06). Alternative minimum tax imposed at 6.4% rate. (Minn. Stat. §290.091).

Withholding is required by every employer making payment of any wages taxable by Minnesota. Unemployment compensation benefits are to be subject to withholding unless recipient timely notifies Commissioner otherwise. 7.25% of Minnesota lottery winnings are to be withheld. (Minn. Stat. §290.92). If amount assignable to Minnesota is at least $1,000, partnerships generally must withhold from shares paid or credited to nonresident partners based on their distributive shares (lien may arise on amounts otherwise exempt from withholding) and S corporations generally must withhold from nonresident shareholders based on their share of income. (Minn. Stat. §290.92). For cumulative calendar year payments that exceed $50,000, withholding required at 8% from payments to nonresident persons or foreign corporations to perform construction work in Minnesota as surety to guarantee payment of taxes, subject to exception if contractor gives bond or has fully complied with tax laws for preceding three years. (Minn. Stat. §290.9705).

Tax credits available include dependent care credit (Minn. Stat. §290.067), marriage penalty credit (Minn. Stat. §290.0675), military service credit (Minn. Stat. §290.0677), health insurance premiums credit (Minn. Stat. §290.0678), working family credit (Minn. Stat. §290.0671), lower income motor fuels credit, and job creation (Minn. Stat. §290.06) and credit for taxes paid to another state by residents (including pro rata portion of taxes deemed paid by member of limited liability company to another state) and corporations, and refunds for contributions to candidates and political parties (Minn. Stat. §290.06). Corporations (other than S corporations) are allowed credit equal to 5% of first $2,000,000, and 2.5% of remainder of certain increases in research and experimental expenditures incurred in Minnesota, but not more than liability for tax. (Minn. Stat. §290.068). Employers are allowed credit of 30% of cost to employer of providing certain transit passes to employees for use in Minnesota. (Minn. Stat. §290.06). Nonresidents are eligible for credit for taxes paid to state of domicile on certain sales of partnership interests. (Minn. Stat. §290.06).

Inflation Adjustments.

In general, annual inflation adjustments provided for tax rate brackets and tax credits and standard deductions. (Minn. Stat. §290.06).

Rate for corporations is 9.8% plus minimum fee (below). (Minn. Stat. §290.06). In case of income derived from business carried on within and without state, statute prescribes formulae for determining portion deemed subject to tax on basis of sales (75%), property (12.5%) and payroll (12.5%). For tax years beginning after Dec. 31, 2006, these rates change annually until 2014. At that time, sales factor percentage will be 100%. (Minn. Stat. §290.191). Multistate compact enacted with modifications. (Minn. Stat. §290.171). Commissioner may require or permit combined reporting by affiliated corporations engaged in unitary business. (Minn. Stat. §290.34). Foreign corporations not includible on combined report. Special rules apply to possessions companies and to certain domestic corporations with primarily foreign operations. (Minn. Stat. §290.17). Alternative minimum tax equals excess of 5.8% of Minnesota alternative minimum taxable income (less certain credits) over regular tax imposed under (Minn. Stat. §290.06), subd. 1. (Minn. Stat. §290.0921).

Partnerships are not taxed generally, but are subject to minimum fee (below); distributive shares are taxed to individual partners. (Minn. Stat. §290.31). Limited liability company formed in Minnesota, or under similar laws of another state, that is considered partnership for federal income tax purposes, is considered partnership for Minnesota income tax purposes and its members must be considered to be partners. (Minn. Stat. §290.01). Minnesota Department of Revenue recognizes “check the box” elections made for Federal purposes except for foreign entities with single “C” corporation owners that elect to be disregarded.

Minimum fee imposed on corporations, S corporations and partnerships (other than one that derives 80% of its income from farming) to maximum of $5,000 depending on entity's total Minnesota property, payroll and sales or receipts. (Minn. Stat. §290.0922).

Accounting periods are same as under Federal Income Tax law. (Minn. Stat. §290.07). Returns are required if taxpayer is required to file federal return under I.R.C. §6012 (Minn. Stat. §289A.08), including exempt organizations subject to tax on unrelated business income. Corporations that obtained any business from within Minnesota must file notice of business activities report even if no income tax return required. (Minn. Stat. §290.371). Information returns are required of partnerships, certain regulated investment companies, and, to extent required by I.R.C. §6041, of persons, corporations or cooperatives making certain payments in any taxable year to any person or corporation on account of rents, royalties, interest, dividends or wages, etc. (Minn. Stat. §289A.12). Information returns must be furnished to recipient by Jan. 31 and duplicate filed with Commissioner by Feb. 28. (Minn. Stat. §289A.12). Returns are due Apr. 15, or 15th day of fourth month after close of fiscal year, except that returns of corporations must be filed on or before Mar. 15 or 15th day of third month after close of fiscal year. (Minn. Stat. §289A.18). Various automatic or discretionary extensions of time are available, generally not exceeding six months (seven months for corporate franchise tax), and tentative return with payment may be required on regular due date. (Minn. Stat. §289A.19).

Payment.

Tax is payable to Commissioner at time of return. (Minn. Stat. §289A.20). Estimated tax payments required if tax exceeds $500. (Minn. Stat. §289A.25 and Minn. Stat. §289A.26).

Electronic Filing.

Tax preparers who prepare 100 returns must file all Minnesota individual income tax returns electronically or pay a per-return fee. (Minn. Stat. §289A.08).

22.12 INHERITANCE TAX:

Repealed for estates of decedents dying after Dec. 31, 1979.

22.12A MINES, MINERALS AND FISHERIES TAXES:

Iron Ore Taxes.

See category 19 Mineral, Water and Fishing Rights, topic 19.01 Mines and Minerals.

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22.16 PROPERTY TAXES:

Taxable Property.

All real and personal property is subject to taxation unless exempted. (Minn. Stat. §272.01).

Exemptions listed in Minn. Stat. §272.02.

Assessment.

Real estate is listed and at least one-fourth of parcels listed shall be appraised each year with reference to their value on Jan. 2 preceding assessment, and real property becoming taxable in any intervening year is listed with reference to its value on Jan. 2 of that year. Personal property is listed and assessed annually, with reference to its value on Jan. 2.

There are municipal, county, and state boards of equalization or review. (Minn. Stat. §274.01).

Real and personal property subject to general ad valorem property taxation is classified for purposes of assessment. Tax capacity of property is based on sliding or fixed scale and depends on its market value and classification. (Minn. Stat. §273.13).

Property to be valued at market value. (Minn. Stat. §273.11).

Special rules apply to property classified as homestead. (Minn. Stat. §273.124).

Review of Assessment.

Taxpayer claiming unequal or unfair assessment of personal property real property, or that tax thereon is illegal, or that property is exempt, may contest same by filing petition in district court or tax court before Apr. 30 of year in which tax is payable. Notwithstanding general Apr. 30 date, whenever exempt status, valuation, or classification of real or personal property is changed other than by abatement or court proceeding, and owner is not given notice of change until after

Feb. 28 (or after July 1 in some cases), person has 60 days from date of mailing notice to appeal change. (Minn. Stat. §278.01 et seq.). Commissioner of revenue to review local assessment practices, upon request. (Minn. Stat. §273.0645).

Lien and Payment.

Tax on real estate is lien thereon from year in which property is assessed; as between grantor and grantee from first Mon. in Jan. following (Minn. Stat. §272.31); and can be paid on or after first business day in Mar. (Minn. Stat. §276.01). Tax on real estate and personal property tax assessed against improvements to leased property becomes delinquent if not paid prior to May 16 or 21 days after postmark date on envelope containing property tax statement, whichever is later, of year during which such tax is payable, except that tax in excess of $50 levied against any tract or lot not delinquent if at least one-half is paid prior to May 16 or 21 days after postmark date, whichever is later, and remainder prior to Oct. 16. Delinquent tax payable by May 16 or 21 days after postmark date, whichever is later, generally bears penalty of 4% (2% on homestead property) until May 31 and 8% (4% on homestead property) on June 1, which accrues on June 1 or 21 days after postmark date, whichever is later, plus 1% on first day of each month thereafter beginning July 1 up to and including Oct. 1. Delinquent tax payable by Oct. 16 bears penalty as of that date of 4% (2% on homestead property) and additional penalty of 4% on Nov. 1 and 4% (2% on homestead property) on Dec. 1. If first half becomes delinquent same may be paid with penalties without any further penalty attaching to second half if latter is paid before Oct. 16. (Minn. Stat. §279.01). Interest on delinquent property taxes, penalties, and costs unpaid on or after Jan. 1, 1991, shall be payable at per annum rate determined in (Minn. Stat. §270.75, subdiv. 5) (adjusted prime rate charged by banks, rounded to nearest full percent), but in no case less than 10% or greater than 14%. Such interest shall be doubled if taxpayer owns one or more parcels of property for which delinquent taxes thereon after Jan. 1, 1992, exceed specified amount of local school district's taxes. (Minn. Stat. §279.03, §Minn. Stat. 549.09).

Tax on personal property, except manufactured homes and sectional structures, becomes due on first Mon. in Jan. following levy, and delinquent on May 16 or 21 days after postmark date of tax statement, whichever is later, when 8% penalty is added, except that half shall not be delinquent if paid before May 16 or 21 days after postmark date whichever is later, and balance is paid before Oct. 16. Personal property taxes assessed upon improvements to certain real property become delinquent on May 16 or 21 days after postmark date of tax statement, whichever is later, but if such tax exceeds $50, one-half may be paid before May 16 and balance is paid before Oct. 16 without penalty. (Minn. Stat. §277.01). Tax (including penalties, interest, fees, and costs) assessed after Jan. 1, 1992 on personal property or manufactured homes is lien on all real and personal property in Minnesota of taxpayer which arises on Jan. 2 of year in which tax is due and continues until paid. (Minn. Stat. §277.20). Such assessed tax may be collected by county treasurer within five years after date assessed or within ten years (plus any renewal period) if notice of lien is filed. (Minn. Stat. §277.20; Minn. Stat. §277.21). Notice and demand is generally required before levy is made. (Minn. Stat. §277.21). Tax relief for destroyed property – county assessor must reassess all damaged property in a disaster or emergency area. (Minn. Stat. §§273.1231 to 273.1235).

Tax Sales.

Tax delinquent lands are bid in for state on second Mon. in May following delinquency, to be held by state until redemption or forfeiture. (Minn. Stat. §280.001 et seq.).

Redemption.

Any person claiming interest in land bid in for state may redeem same. (Minn. Stat. §281.01). Except for certain abandoned or vacant property, period of redemption for lands within incorporated area bid in for state is three years from date of sale unless lands are certain homestead lands, agricultural lands or seasonal recreational lands, for which period is five years. (Minn. Stat. §281.17). Right to redeem expires 60 days after filing proof of service of notice of expiration of period of redemption. Such notice may be issued and served not earlier than 60 days before expiration of period of redemption. (Minn. Stat. §§281.21, 23). Amount required to redeem is amount for which land was bid in plus subsequent delinquent taxes, penalties, costs and interest. (Minn. Stat. §281.02). Unless this amount is paid before expiration of time allowed within which to redeem, absolute title vests in state. (Minn. Stat. §281.18).

Deed Transfer Tax.

See category 21 Property, topic 21.06 Deeds.

Contamination Tax.

Effective for taxes assessed in 1994 and payable in 1995, contamination tax imposed on real property to extent its property tax value reduced by contamination. Tax payable at same time and in same manner as property tax. In general, tax rate is property tax rate, but rate reduced if owner and operator are not “responsible persons” with respect to contamination and if response action plan or asbestos abatement plan is being implemented. (Minn. Stat. §270.91 et. seq.)

Mortgage Registration Tax.

See category 20 Mortgages, topic 20.04 Mortgages of Real Property.

Agricultural Property Tax

Real estate consisting of ten acres or more or a nursery or greenhouse, and qualifying for classification as class 2a under section 273.13, shall be entitled to valuation and tax deferment if it is primarily devoted to agricultural use. (Minn. Stat. §273.111).

22.17 SALES AND USE TAXES:

Sales Tax.

Sales tax of Minn. Stat. 6.5% of gross receipts of sales at retail made by any person in state or to destination in state, except Minn. Stat. 9.0% rate for sales of intoxicating liquor and Minn. Stat. 3.2% or weaker malt liquor, and sales of manufactured homes used for residential purposes are taxed on 65% of dealer's cost of home, and new and used park trailers are taxed on 65% of sales price. (Minn. Stat. §297A.62). Rental motor vehicle tax of Minn. Stat. 6.2% of sales price is imposed on rentals of cars, vans, and pickup trucks (but not hearses, limousines used for funerals or van designed or adapted primarily for transporting property), provided such rentals are not longer than 28 days. Tax is to be collected like sales taxes. (Minn. Stat. §297A.64). There is also 3% fee imposed on such rentals.

Taxable Transactions.

Generally, all sales of property are taxable, most services are not taxable. Taxable transactions are listed in Minn. Stat. §297A.61.

Exemptions listed in Minn. Stat. §297A.67, Minn. Stat. §297A.68, Minn. Stat. §297A.69, Minn. Stat. §297A.70 and Minn. Stat. §297A.71.

Collection.

Seller must obtain permit from Commissioner of Revenue to collect tax from purchaser. (Minn. Stat. §297A.77 et seq.). Seller has burden of proof that any sale is not subject to tax. (Minn. Stat. §297A.72).

Penalties.

See topic 22.01 Administration.

Use Tax.

Use tax of Minn. Stat. 6.5% (subject to county option to rescind Minn. Stat. 0.5%) of sales price of sales at retail, except that rate of Minn. Stat. 4.5% of sales price applies to special tooling and rate of Minn. Stat. 2.5% of sales price applies to farm machinery. Credit given for sales tax paid on sale of such property in another state. (Minn. Stat. §297A.80).

22.18 STAMP AND SEAL TAXES:

Stamp Tax.

No documentary stamp tax.

22.18A TAX LIENS:

Revised Uniform Federal Lien Registration Act adopted. Amendments adopted. (Minn. Stat. §272.479 et seq.).

22.18B TRANSPORTATION TAXES:

Motor Vehicle Tax.

See category 23 Transportation, topic 23.01 Motor Vehicles.

Taxes on Aircraft and Scheduled Airline Flight Property.

See category 23 Transportation, topic 23.01 Motor Vehicles.

23 TRANSPORTATION

23.01 MOTOR VEHICLES:

Commissioner of transportation responsible for statewide transportation plan. (Minn. Stat. §174.03).

General supervision in Motor Driver and Vehicle Services Division of Department of Public Safety, State Highway Building, St. Paul, Mn. 55155. Website URL: http://www.dps.state.mn.us/DVS/.

Vehicle license required annually. Number plates must be displayed front and rear, unless vehicle is motorcycle, etc., trailer or semitrailer (rear only) or truck-tractor, road-tractor or farm truck (front only). Numbered plate or sticker for small trailer (under 3,000 gross vehicle weight) must be adhered to side of trailer frame tongue near hitch. (Minn. Stat. §169.79). It is unlawful to cover any numerical, letter or state of origin, including clear material that affects visibility or reflectivity. Registration and taxation provisions not applicable to motor vehicle operated by nonresident owner in military service if: (1) such motor vehicle is registered in and licensed by state of owner's residence and such vehicle is used only for personal transportation, or (2) for period of up to 30 days, such motor vehicle is owned and operated by person in military service, and vehicle is registered with and has plates of Armed Forces of U.S. in foreign country. (Minn. Stat. §168.04). Vehicle registered in other jurisdiction must be registered in state within 60 days after date owner becomes resident of state, or if 60th day occurs after 15th of month, by end of such month. (Minn. Stat. §168.012, subdiv. 8).

Operator's license required. (Minn. Stat. §171.02). Persons under 16 years of age may not be licensed, nor may persons under 18 years of age unless application is approved by parent, spouse of parent having custody or guardian having custody or if applicant has no living parent or guardian, or is married or otherwise emancipated, then minor's adult spouse, adult close family member, or adult employer; provided, that approval required by this item contains verification of age of applicant and identity of parent, guardian, adult spouse, adult close family member, or adult employer, and person has successfully completed approved course in driver education. (Minn. Stat. §171.04). Restricted farm work license and motorized bicycle license or permit may be issued to person 15 years of age upon completion of safety course and examination. (Minn. Stat. §171.041, Minn. Stat. §171.02). Limited license may be issued after appropriate waiting period by Commissioner to drivers whose licenses have been suspended or revoked if: (1) Driver's livelihood or attendance at chemical dependency treatment or counseling program depends upon use of driver's license; (2) use of driver's license by homemaker is necessary to prevent substantial disruption of education, medical, or nutritional needs of homemaker's family; or (3) attendance at post-secondary institution of education by enrolled student of that institution depends upon use of driver's license. Limited licenses may not be issued to: (1) Any drug dependent person as defined in Minn. Stat. §524A.02 subdiv. 5; (2) any person judged to be legally incompetent; (3) any person required to take road, knowledge or vision test who has not done so; (4) any person who commissioner has good cause to believe would be inimical to public safety; (5) any person who is afflicted with physical or mental disease or disorder as to prevent person from exercising reasonable and ordinary control; and (6) any person whose license has been cancelled during period of cancellation. (Minn. Stat. §171.30, subdiv. 1).

Drivers' licenses classified according to types of vehicles which may be driven by holder. Class D license valid for all single two axle vehicles under 26,000 pounds, farm trucks, and certain emergency vehicles. Holders may tow vehicles if combination of vehicles has gross vehicle weight of 26,000 pounds or less. Other vehicles require either Class A, B or C license for which special qualifications must be met. (Minn. Stat. §171.02).

Person possessing valid license issued by other state or province or by U.S. military authorities may operate motor vehicle for period of not more than 60 days after becoming resident before obtaining state license. (Minn. Stat. §171.03).

Operation Prohibited.

By person under influence of alcohol or narcotics or both whose blood alcohol content is .08% or more. (Minn. Stat. §169A.20). If two or more tests within two year period show alcohol concentration of .07% or more, driver may be required to have chemical use assessment. (Minn. Stat. §169A.54[11]). When sentenced for driving while under influence of alcohol or controlled substance, court must impose $125 chemical dependency assessment charge. (Minn. Stat. §169A.284[1][a]). If second driving while under influence of alcohol or controlled substance conviction is within ten years of prior conviction or loss of license, court must order person to submit to level of care recommended in chemical use assessment report. (Minn. Stat. §169A.275[5]). Motor vehicle used in commission of first- or second-degree driving while impaired violation or driving while impaired violation by person whose driver's license or driving privileges have been cancelled as inimical to public safety under Minn. Stat. §171.04 or person who is subject to restriction on person's driver's license, which provides that person may not use or consume any amount of alcohol or controlled substance, is subject to forfeiture. (Minn. Stat. §169A.63). Person charged with operating motor vehicle within ten years of first three or more impaired driving conditions or license revocations may be released from confinement without posting maximum bail only under special conditions. (Minn. Stat. §169A.44[2]).

Texting While Driving: No person may operate a motor vehicle while using a wireless communications device to compose, read, or send an electronic message, when the vehicle is in motion or a part of traffic. (Minn. Stat. §169.475).

Size and Weight Limits.

Regulated by Minn. Stat. §§169.80-.88.

Equipment Required.

Regulated by Minn. Stat. §169.01, Minn. Stat. §169.19, Minn. Stat. §169.223, Minn. Stat. §§169.47-.75, Minn. Stat. §169.974.

Lights Required.

Regulated by Minn. Stat. §§169.48-.66, .75.

Traffic Regulations.

See Minn. Stat. c. 169.

Intrastate motor carriers must comply with federal regulations. (Minn. Stat. §221.0314).

Accidents.

Driver must stop, give assistance if necessary, give name, address, date of birth and registration number; show license and provide name and address of insurance carrier on request; notify local police officers, state patrol or sheriff if accident involves immediately demonstrable bodily injury to or death of person; and forward written report to Commissioner of Public Safety within ten days if accident involves bodily injury to or death of person or $1,000 property damage. Violation subjects driver to criminal penalties unless left to take person with immediately demonstrable bodily injury to emergency medical care. (Minn. Stat. §169.09).

Liability of Owner.

Owner is liable for any injury or damage resulting from operation of his car with his express or implied consent, operator being deemed his agent. (Minn. Stat. §170.54).

Guests.

No restriction of liability for injury to a gratuitous guest.

Insurance.

Insurance required to cover basic economic loss, residual liability up to $30,000 per individual and $60,000 per occurrence, and $10,000 property damage. Uninsured and underinsured motorist coverage also required. (Minn. Stat. §§65B.48, .49). Personal automobile insurance policies issued or renewed in Minnesota after Aug. 1, 1987, must cover rental of private passenger vehicles, pick-up trucks and vans unless rental is principally for business use or rented on monthly or longer basis. (Minn. Stat. §65B.49[5a]). When motor vehicle is rented or leased in Minnesota, rental contract must contain statutorily prescribed notice that personal automobile insurance policy issued in Minnesota must cover rental of motor vehicle unless rental is principally for business use or rented on monthly or longer basis. No collision damage waiver or other insurance offered as part of, or in conjunction with, rental of motor vehicle may be sold unless person renting vehicle provides written acknowledgment that such protection notice has been read and understood. (Minn. Stat. §65B.49[5a(f)]).

No-Fault Insurance.

No-fault insurance adopted effective Jan. 1, 1975. (Minn. Stat. §65B.41 et seq.). Provides for basic economic loss benefits to every person suffering loss from injury arising out of maintenance or use of a motor vehicle or as result of pedestrian being struck by motorcycle for accidents in state and, if accident occurs in other state, U.S. possession or Canada, to insureds, certain drivers and occupants of secured vehicles and their dependents. Geographic coverage may be extended to other areas if expressly stated in policy. (Minn. Stat. §65B.46). Negligence action may be brought for economic loss not covered by certain benefit limitations. (Minn. Stat. §65B.51). No person may recover damages in negligence cause of action for noneconomic detriment unless medical expenses exceed $4,000 or injury results in permanent disfigurement or injury, death or disability for 60 days or more. (Minn. Stat. §65B.51[3]). Mandatory no-fault motor vehicle claims arbitration for all cases in which claim is in amount of $10,000 or less at commencement of arbitration for no-fault benefits or comprehensive collision damage coverage. (Minn. Stat. §65B.525).

Tests for Intoxication.

Operator of motor vehicle deemed to consent to test of blood, breath, or urine for purpose of determining presence of alcohol, controlled substance or its metabolite, or hazardous substance. (Minn. Stat. §169A.51[1]). Person has right to consult attorney so long as it does not unreasonably delay administration of test and to have additional tests made by person of his own choosing. (Minn. Stat. §169A.51[2]). Evidence of refusal to take test is admissible in prosecution. (Minn. Stat. §169A.45[3]). Peace officers, with probable cause to believe there is impairment by controlled substance, may require person to take blood or urine test in addition to breath test if reason to believe impairment caused by substance not subject to testing by breath test. (Minn. Stat. §169A.51[4]). Action may be taken against person refusing to take blood test or urine test only if alternative (blood test or urine test) was offered. (Minn. Stat. §169A.51[3]).

Title.

Uniform Motor Vehicle Certificate of Title and Anti-Theft Act adopted. (Minn. Stat. §§168A.01-.40). Owner must obtain certificate of title for motor vehicles and manufactured homes. (Minn. Stat. §168A.02). Application made to Registrar of Motor Vehicles on prescribed form. (Minn. Stat. §168A.04). Certain vehicles exempt. (Minn. Stat. §168A.03).

Sales.

Uniform Motor Vehicle Certificate of Title and Anti-Theft Act adopted. (Minn. Stat. §§168A.01-.40). After Oct. 1, 1972, transfer, other than by creation of security interest, is effected by execution of assignment and warranty of title to transferee in space provided on certificate at time of delivery of vehicle. Certificate and assignment must be delivered to transferee. Transferee must apply for new certificate in space provided on old certificate and mail or deliver old certificate to Registrar within ten days of transfer. If security interest is reserved or created at time of transfer, notification of security interest delivered or mailed to secured party. Except for purchases by dealers and as between parties, transfers are ineffective without compliance with transfer procedures. (Minn. Stat. §168A.10, subdiv. 1). Special procedures applicable to dealers. (Minn. Stat. §168A.11).

Motor Vehicle Retail Installment Sales Act (Minn. Stat. §§53C.01-.14) covers all motor vehicle retail installment sales contracts which are defined to include sales of motor vehicles primarily for personal, family or household use and not for resale in which title or lien is retained by seller for security purposes, including certain bailment and lease arrangements, mortgages and conditional sales contracts, and retail installment sales of mobile homes. (Minn. Stat. §§53C.01, 53C.09). Contracts must be written and signed by buyer and seller. Copy of contract must be furnished buyer at time of execution. (Minn. Stat. §53C.08, subdiv. 1[a]). Cash price may not include documentary fee or document administration fee more than $50 for services rendered on behalf of retail buyer in preparing, handling and processing documents relating to motor vehicle and retail sale closing. (Minn. Stat. §53C.01, subdiv. 2). Provisions in contracts for confession of judgment are invalid. Contracts may provide for collection charge of 5% or $5 (whichever less) for installment not less than ten days delinquent and for attorney's fees of not more than 15% of due and payable amount of contract. (Minn. Stat. §53C.08, subdiv. 1). Contracts must contain: (1) Cash sale price; (2) total amount and kind of down payment; (3) difference between cash sale price and down payment; (4) amounts of insurance and specifications thereof; (5) principal balance; (6) finance charges; and (7) total of payments payable and number, amount and dates of installments, or disclosures that satisfy Federal Truth in Lending Act in effect as of time of contract, whether or not act applies to transaction. (Minn. Stat. §53C.08, subdiv. 2).

Finance charges must be computed on principal balance and not exceed: (1) 18% per annum on current or past year's model vehicle; (2) 19.75% per annum on two or three years past model vehicles; (3) 23.25% per annum on all other vehicles. (Minn. Stat. §53C.09, subdiv. 1[a]). Contracts may be interest bearing or pre-computed and fixed rate or variable rate. (Minn. Stat. §53C.09, subdiv. 1[c]).

If insurance charge is made, policy or certificate containing pertinent information as to premium, coverage, terms etc. must be furnished buyer within 30 days after execution of contract. (Minn. Stat. §53C.08, subdiv. 1a).

Upon written request holder of contract must give buyer written statement of dates and amounts of unpaid installments. Written receipt must be given for any cash payment. (Minn. Stat. §53C.08, subdivs. 1[a], 5). Contracts may be paid in full at any time without penalty, and buyer must receive refund credit equal to actuarial method under (Minn. Stat. §168.73), less $15, after date prepayment is made, which may be deducted from refund so calculated. (Minn. Stat. §168.73).

Effective Jan. 1, 1988, if precomputed contract extended, deferred or renewed, service fee of not more than $5 may be charged plus total additional charge not exceeding simple interest annual percentage rate under original retail installment contract calculated on respective descending balances computed from date of such extension, deferment or renewal. (Minn. Stat. §168.74).

Sales finance companies engaged in purchase of contracts and retail sellers who create and hold contracts other than certain licensed financial institutions, must have license from Commissioner of Banks. Annual license fee is $250 for principal place of business and $125 for each branch. (Minn. Stat. §168.67). Buyer may recover amount of whole contract and attorneys' fees for intentional failure to comply with Act or greater of triple amount of excess time differential or $50, plus attorneys' fees for non-fraudulent failure to comply. (Minn. Stat. §168.75).

Uniform Commercial Code adopted 2004. (Minn. Stat. c. 336). See category 3 Business Regulation and Commerce, topic 3.09 Commercial Code.

Warranties.

See category 3 Business Regulation and Commerce, topic 3.12 Consumer Protection, subhead Warranties.

Liens.

Uniform Motor Vehicle Certificate of Title and Anti-Theft Act adopted. (Minn. Stat. §§168A.01-.40). Exclusive means of perfecting security interest is by delivery to department of existing certificate of title, if any, application for certificate of title containing name and address of secured party, date of security agreement, and required fee. (Minn. Stat. §168A.17[2]). Validity of security interest created in another state generally governed by law of that jurisdiction unless parties understood that vehicle would be kept in this state and vehicle was brought into this state within 30 days. (Minn. Stat. §168A.17). Security interest perfected in another jurisdiction remains perfected if secured party appears on certificate of title issued in that state; otherwise security interest must be perfected in this state within four months. (Minn. Stat. §168A.17). See category 3 Business Regulation and Commerce, topic 3.09 Commercial Code.

Identification Marks.

Alteration of registration numbers or identification marks on motor vehicles and certain farm machinery prohibited. (Minn. Stat. §168.36[3]). Alteration of odometer prohibited and mileage disclosure required. (Minn. Stat. §§325E.13-.16).

Foreign vehicles registered in home state or country and displaying license plates required by laws of home state or country may operate in this state, if laws of home state or country grant like privileges and exemptions to vehicles owned by residents of Minnesota and registered in this state and if reciprocity agreement has been made by responsible officials. Nonresidents carrying on business in this state and operating motor vehicles in intrastate commerce therein, or temporarily residing in this state while employed on same job for six months or more, are subject to same requirements as residents. (Minn. Stat. §168.181). Special registration and reciprocity provisions applicable to transport vehicles. (Minn. Stat. §168.187).

Nonresident operator who is at least 15 years old and who has in his possession valid driver's license issued by his home state or country may operate motor vehicle in this state. Nonresident who is at least 18 and whose home state or country does not require license may operate motor vehicle in this state for not more than 90 days in any calendar year, if motor vehicle so operated is currently registered in his home state or country. (Minn. Stat. §171.03).

Direct Actions.

Not authorized. (262 Minn. 509, 115 N.W.2d 266).

Motor vehicle carriers regulated by Commissioner of Transportation and Transportation Regulation Board. Must file tariffs of rates and charges, annual reports, etc. Must obtain permit or certificate of public convenience and necessity. Must file certificate of insurance evidencing bond or insurance or other form of satisfactory security. Must report accidents involving hazardous material. Applies to foreign vehicles, subject to reciprocal agreements with other jurisdictions. Interstate carriers must register with Commissioner. (Minn. Stat. §221.011 et seq.).

Motor Vehicle Tax.

In lieu of all other taxes (except such wheelage taxes as municipalities may impose and gross earnings taxes), motor vehicles using public highways are subject to annual tax as follows: Passenger vehicles, $10 plus an additional tax equal to 1.25 percent of the base value; buses and commuter vans according to weight and seating capacity; trucks, tractors, trailers (if over 3,000 pounds), and semi-trailers, classified by use and in the main taxed on basis of value or gross weight; recreational vehicles according to gross weight. Tax is reduced periodically for above types of vehicles based on age of vehicle. Annual tax of $10 on motorcycles, $6 on motorized bicycles, $20 minimum tax on recreational vehicles. (Minn. Stat. §168.013).

Vehicles exempt from motor vehicle tax: Public vehicles, farm tractors, farm trailers, highway construction equipment, motorized saws, corn shellers, etc., motorized golf carts, motor vehicles not operated on highways, mobile homes, snowmobiles regulated by Minn. Stat. §84.81 et seq., and vehicles owned and exclusively used by licensed commercial driving schools, and used by foreign power. (Minn. Stat. §168.012).

Motor Vehicle Excise Tax.

Excise tax at rate equal to 6% imposed on purchase price of any motor vehicle purchased or acquired, either inside or outside state, which is required to be registered in state, except $10 for passenger automobile ten years old or older, registered in Minnesota other than as classic car and not determined to have resale value of $3,000 or more by Registrar of Motor Vehicles. (Minn. Stat. c. 297B). Certain purchasers exempt. Purchases by nonresidents exempt if purchases occurred more than 60 days prior to date of moving residence to state and motor vehicle was registered in person's name in other state or country. (Minn. Stat. §297B.03).

Tax on Aircraft.

All private nonscheduled aircraft are subject to tax, in lieu of all other taxes, of 1% of value with minimum of greater of $50 or 25% of tax on base price. Base price value is determined by manufacturer's list price or list price of comparable aircraft. Ten per cent depreciation is allowed second year after manufacture and 15% each year thereafter. (Minn. Stat. §360.531). Tax is July 1 of each year. (Minn. Stat. §360.61, subdiv. 2). Noncommercial aircraft of nonresidents using Minnesota air space or airports are not subject to tax unless in use in Minnesota for more than 60 days in any year. Aircraft of nonresident grounded at airport for major repairs not considered as using airport. Nonresident owner of aircraft used for air show or exposition must obtain temporary permit costing $25 for valid for up to three days. Annual fee for hot air balloon is $25. (Minn. Stat. §360.55). Manufacturers of aircraft sold in Minnesota must, before Aug. 1 of each year, file with Commissioner of Transportation sworn statement showing various models manufactured and retail list price of each model. Must also file form of complete specifications of construction of each model. Statements covering new prices and models must be filed whenever changes occur. (Minn. Stat. §360.57).

Tax on scheduled airline flight property is based on formula giving equal consideration to tonnage, equated plane hours and revenue ton miles flown in Minnesota as compared to total of these factors over airline's entire system. (Minn. Stat. §§270.071-.079).

Airport property tax levy requires affirmative vote of two-thirds majority of airport authority. (Minn. Stat. §360.0427).

Gasoline Tax.

See category 22 Taxation, topic 22.08 Gasoline and Special Fuels Taxes.

23.02 RAILROADS:

See category 3 Business Regulation and Commerce, topic 3.08 Carriers.

23.02A COMMERCIAL CODE FORMS:

Please see Uniform and Model Acts section of Law Digest, Commercial Code Amendments, where National Forms are in print.

1
MISSISSIPPI LAW DIGEST

—Scope —

Revised for 2010 edition by

WATKINS & EAGER PLLC, of the Jackson Bar.

(Citations, unless otherwise indicated, refer to Mississippi Code of 1972 and latest cumulative supplement. “MRCP” refers to Mississippi Rules of Civil Procedure. “MRE” refers to Mississippi Rules of Evidence. “MRAP” refers to Mississippi Rules of Appellate Procedure. Parallel citations to Southern Reporter begin with 64 Miss. See also category 6 Courts and Legislature, topic 6.03 Reports.)

Note: This revision covers session laws adopted and approved by Governor up to C. 563. Regular session of legislature convenes annually on Tues. after first Mon. in Jan.

1 INTRODUCTION

1.01 GOVERNMENT AND LEGAL SYSTEM:

The State of Mississippi is a constituent state of the United States of America. For further discussion of the U.S. federal system, see Introduction to the Federal Government of the United States at the beginning of this volume. A great many laws are promulgated by the federal government of the United States and are not reflected in the topics below. See the Introduction to this volume for references to the federal law topics covered.

Like all but one of the United States, Mississippi has a common law legal system, with roots in English common law. For information on the courts and legislature of Mississippi, see category 6 Courts and Legislature below.

1.02 [RESERVED]

1.03 HOLIDAYS:

Mississippi State holidays are: Jan. 1, 3d Mon. in Jan., 3d Mon. in Feb., last Mon. in Apr., last Mon. in May, July 4, 1st Mon. in Sept., Nov. 11, Thanksgiving Day, Dec. 25 and Mon. following any legal holiday falling on Sun. (3-3-7). County offices may observe state legal holidays. (25-1-99). Board of supervisors can declare offices closed on those holidays created by executive order of Governor. (25-1-99).

Holiday Falling on Sunday.

When holiday falls on Sun., courthouse may close on immediately succeeding Mon. (25-1-99).

Holiday Falling on Saturday.

When holiday falls on Sat., courthouse may close on immediately preceding Fri. (25-1-99).

Legality of Transactions on Saturday, Sunday or Holiday.

Sun. closure law (97-23-63) repealed effective July 1, 1986.

1.04 OFFICE HOURS AND TIME ZONE:

Mississippi is in the Central (GMT-06:00) time zone. Office hours are generally from 9 a.m. to 5 p.m.

2 BUSINESS ORGANIZATIONS

2.01 AGENCY:

Relationship is, in general, in accordance with common law. Agent may make oath for principal in any proceeding. (11-1-3). See category 21 Property, topic 21.15 Powers of Attorney.

2.02 ASSOCIATIONS:

No general statutory provisions; however, numerous statutes control specific type of association. Religious societies (79-11-31 to 79-11-47); Agricultural Associations (79-17-1 to 79-17-41); Agricultural Cooperative Marketing Associations (79-19-1 to 79-19-63); Aquatic Products Marketing Associations (79-21-1 to 79-21-67); Mississippi Limited Liability Company Act (79-29-

101 to 79-29-1204). Provisions governing Foreign Limited Liability Companies. (79-29-1001 to 79-29-1010).

Formation.

See specific type of association.

Rights and Powers.

See specific type of association.

Liabilities.

See specific type of association.

Actions.

Unincorporated associations, while strictly not partnerships, partake of their nature and should sue and be sued in form usual in such cases. Representative suits allowed.

Dissolution.

Courts of equity have jurisdiction over bills for dissolution and appointment of receivers of such associations. Generally, members at that time are entitled to proportionate share of property.

Professional Associations.

Mississippi Limited Liability Company Act (79-29-101 to 79-29-1204), enacted in 1994, became effective July 1, 1994. Art. 9 of Act provides for formation of professional limited liability companies. (79-29-901 et seq.). One or more individuals duly and properly licensed to render professional services may form professional limited liability company. See also topic 2.03 Corporations, subhead Professional Corporation.

2.03 CORPORATIONS:

Mississippi Business Corporation Act (79-4-1.01 to 79-4-17.04), enacted 1987, is substantially same as Revised Model Business Corporation Act (1984) (including changes to Revised Model Act adopted through June 1996). (For text of Revised Model Act, see Part VI of this Digest.) Mississippi Business Corporation Act effective Jan. 1, 1988. Mississippi Professional Corporation Act (79-10-1 to 79-10-117) effective July 1, 1995.

Substantive deviations by Mississippi Business Corporation Act from Revised Model Business Corporation Act are set forth below. Section number listed is section number of Revised Model Act.

§ 1.20(g)

Add: “A document required or permitted to be filed under this chapter which contains a copy of a signature, however made, is acceptable for filing.”

§ 1.22(d)

Add: “The Secretary of State may collect a filing fee greater than the fee set out herein, not to exceed the actual costs of processing such filing, if the form for such filing prescribed by the Secretary of State has not been used.”

§ 1.22(e)

Secretary of State may promulgate rules to: (1) Reduce filing fees prescribed in this section, or provide for discounts of fees to encourage online filing of documents or for other reasons as determined by Secretary of State; and (2) provide for documents to be filed and accepted on expedited basis upon request of applicant. Secretary of State may promulgate rules to provide for additional reasonable filing fee not to exceed $25 to be paid by applicant and collected by Secretary of State for expedited filing services.

§ 1.23(c)

Add: “Notwithstanding subsections (a) and (b) of this section, any document that has a delayed effective time and date shall not become effective if, prior to the effective time and date, a statement of withdrawal is filed with the Secretary of State.”

§ 1.26(a)

Omit: “within 30 days after the return of the document.”

§ 2.02(a)(2)

Add: “and any information concerning the authorized shares as required by Section 79-4-6.01;” to end of sentence.

§ 2.02(b)(2)(v)

Omitted.

§ 2.02(d)

Add: “For the purpose of this section, a ‘director’ shall include any person vested with the discretion or powers of a director under Section 79-4-7.32.”

§ 2.02(e)

Add: “Provisions of the articles of incorporation may be made dependent upon facts objectively ascertainable outside the articles of incorporation in accordance with Section 79-4-1.20(k).”

§ 3.02(7)

Add to end of sentence: “and make contracts of guaranty and suretyship which are necessary or convenient to the conduct, promotion or attainment of the business of (a) a corporation all of the outstanding stock of which is owned, directly or indirectly, by the contracting corporation, or (b) a corporation which owns, directly or indirectly, all of the outstanding stock of the contracting corporation, or (c) a corporation all of the outstanding stock of which is owned, directly or indirectly, by a corporation which owns, directly or indirectly, all of the outstanding stock of the contracting corporation, which contracts of guaranty and suretyship shall be deemed to be necessary or convenient to the conduct, promotion or attainment of the business of the contracting corporation, and make other contracts of guaranty and suretyship which are necessary or convenient to the conduct, promotion or attainment of the business of the contracting corporation;”

§ 4.02(a)

Change “120-day period” to “180-day period”.

§ 6.01(b)(1)

Change “classes of shares” to “classes or series of shares.”

§ 6.01(b)(2)

Change “classes of shares” to “classes or series of shares.”

§ 6.02(d)

Omitted.

§ 6.22(b)

Omit: “unless otherwise provided in the articles of incorporation,”

§ 6.24(c)

Board of directors may authorize one or more officers to (1) designate recipients of rights, options, warrants or other equity compensation awards that involve issuance of shares, and (2) determine, within amount and subject to any other limitations established by board and, if applicable, stockholders, number of such rights, options, warrants or other equity compensation awards and terms thereof to be received by recipients, provided that officer may not use such authority to designate either himself or herself as any other persons as board of directors may specify as recipient of such rights, options, warrants or other equity compensation awards.

§ 6.25(c)

Omit: “Alternatively, each certificate may state conspicuously on its front or back that the corporation will furnish the shareholder this information on request in writing and without charge.”

§ 6.27(f)

Omitted.

§ 7.01(a)

Change to “Unless directors are elected by written consent in lieu of an annual meeting as permitted by Section 79-4-7.04, a corporation shall hold a meeting of shareholders annually at a time stated in or fixed in accordance with the bylaws; provided, however, that if a corporation’s articles of incorporation authorize shareholders to cumulate their votes when electing directors pursuant to Section 79-4-7.28, directors may not be elected by less than unanimous written consent.”

§ 7.02(a)(2)

First sentence of this section reads “(2) Unless the articles of incorporation provide otherwise, if shareholders having at least ten percent (10%) of all the votes entitled to be cast on an issue proposed to be considered at the proposed special meeting sign, date and deliver to the corporation one or more written demands for the meeting describing the purpose or purposes for which it is to be held.”

§ 7.04(a)

Add: “A unanimous consent signed under this subsection is the act of the shareholders when consents signed by all shareholders have been delivered to the corporation.”

§ 7.04(b)

Change to: “The articles of incorporation may provide that any action required or permitted by Section 79-4-1.01 et seq. to be taken at a shareholder’s meeting may be taken without a meeting and without prior notice, if consents in writing setting forth the action so taken are signed by the holders of outstanding shares having not less than the minimum number of votes that would be required to authorize or take the action at a meeting at which all shares are entitled to vote on the action were present and voted. The written consent shall bear the date of signature of the shareholder who signs the consent and be delivered to the corporation for inclusion in the minutes or filing with the corporate records.”

§ 7.04(c)

Change to: “If not otherwise fixed under Section 79-4-7.03 or 79-4-7.07 and if prior board action is not required respecting the action to be taken without a meeting, the record date for determining the shareholders entitled to take action without a meeting shall be the first date on which a signed written consent is delivered to the corporation. If not otherwise fixed under Section 79-4-7.03 or 79-4-7.07, and if prior board action is required respecting the action to be taken without a meeting, the record date shall be the close of business on the day the resolution of the board taking such prior action is adopted. No written consent shall be effective to take the corporate action referred to therein unless, within sixty (60) days of the earliest date on which a consent delivered to the corporation as required by this section was signed, written consents signed by the holders of shares having sufficient votes to take the action have been delivered to the corporation. A written consent may be revoked by a writing to that effect delivered to the corporation before unrevoked written consents sufficient in number to take the corporation action are delivered to the corporation.”

§ 7.04(d)

Change to: “A consent signed pursuant to the provisions of this section has the effect of a vote taken at a meeting and may be described as such in any document. Unless the articles of incorporation, bylaws, or a resolution of the board of directors provides for a reasonable delay to permit tabulation of written consents, the action taken by less than unanimous written consent shall be effective when written consents signed by the holders of shares having sufficient votes to take the action are delivered to the corporation.”

§ 7.04(e)

Add as subsection (e): “If Section 79-4-1.01 et seq. requires that notice of a proposed action be given to nonvoting shareholders and the action is to be taken by written consent of the voting shareholders, the corporation must give its nonvoting shareholders written notice of the action not more than ten (10) days after (i) written consents sufficient to take the action have been delivered to the corporation, or (ii) such later date that tabulation of consents is completed pursuant to an authorization under subsection (d). The notice must reasonably describe the action taken and contain or be accompanied by the same material that, under Section 79-4-1.01 et seq., would have been required to be sent to nonvoting shareholders in a notice of meeting at which the proposed action would have been submitted to the shareholders for action.”

§ 7.04(f)

Add as subsection (f): “If action is taken by less than unanimous written consent of the voting shareholders, the corporation must give its nonconsenting voting shareholders written notice of the action not more than ten (10) days after (i) written consents sufficient to take the action have been delivered to the corporation, or (ii) such later date that tabulation of consents is completed pursuant to an authorization under subsection (d). The notice must reasonably describe the action taken and contain or be accompanied by the same material that, under Section 79-4-1.01 et seq., would have been required to be sent to voting shareholders in a notice of a meeting at which the action would have been submitted to the shareholders for action."

§ 7.04(g)

Add as subsection (g): "The notice requirements in subsections (e) and (f) shall not delay the effectiveness of actions taken by written consent, and a failure to comply with such notice requirements shall not invalidate actions taken by written consent, provided that this subsection shall not be deemed to limit judicial power to fashion any appropriate remedy in favor of a shareholder adversely affected by a failure to give such notice within the required time period."

§ 7.04(h)

Add as subsection (h): "An electronic transmission may be used to consent to an action, if the electronic transmission contains or is accompanied by information from which the corporation can determine the date on which the electronic transmission was signed and that the electronic transmission was authorized by the shareholder, the shareholder's agent, or the shareholder's attorney-in-fact."

§ 7.04(i)

Add as subsection (i): "Delivery of a written consent to the corporation under this section is delivery to the corporation's registered agent at its registered office or to the secretary of the corporation at its principal office."

§ 7.28(b)

Add to beginning of first sentence: "For corporations incorporated before July 1, 2002, shareholders shall have a right to cumulate their votes for directors unless the articles of incorporation provide otherwise. For corporations incorporated on or after July 1, 2002, …"

§ 7.28(d)

Omitted.

§ 7.46

Omit clause (3).

§ 7.48

Add as § 7.48: "(a) The chancery court of the county where a corporation's principal office (or, if none in this state, its registered office) is located may appoint one or more persons to be custodians, or, if the corporation is insolvent, to be receivers, of and for a corporation in a proceeding by a shareholder where it is established that: (1) the directors are deadlocked in the management of the corporate affairs, the shareholders are unable to break the deadlock, and irreparable injury to the corporation is threatened or being suffered; or (2) the directors or those in control of the corporation are acting fraudulently and irreparable injury to the corporation is threatened or being suffered. (b) The court: (1) may issue injunctions, appoint a temporary custodian or temporary receiver with all the powers and duties the court directs, take other action to preserve the corporate assets wherever located, and carry on the business of the corporation until a full hearing is held; (2) shall hold a full hearing, after notifying all parties to the proceeding and any interested persons designated by the court, before appointing a custodian or receiver; and (3) has jurisdiction over the corporation and all of its property, wherever located. (c) The court may appoint an individual or domestic foreign corporation (authorized to transact business in this state) as a custodian or receiver and may require the custodian or receiver to post bond, with or without sureties, in an amount the court directs. (d) The court shall describe the powers and duties of the custodian or receiver in its appointing power, which may be amended from time to time. Among other powers, (1) a custodian may exercise all of the powers of the corporation, through or in place of its board of directors, to the extent necessary to manage the business and affairs of the corporation; and (2) a receiver (i) may dispose of all or any part of the assets of the corporation wherever located, at a public or private sale, if authorized by the court; and (ii) may sue and defend in the receiver's own name as receiver in all courts of this state. (e) The court during a custodianship may redesignate the custodian a receiver, and during a receivership may redesignate the receiver a custodian, if doing so is in the best interests of the corporation. (f) The court from time to time during the custodianship or receivership may order compensation paid and expense disbursements or reimbursements made to the custodian or receiver from the assets of the corporation or proceeds from the sale of its assets."

§ 8.01(c)

Omitted.

§ 8.04

Substitute "Each Class" for "A Class" in final sentence.

§ 8.09(a)

Change to: "The chancery court of the county where a corporation's principal office (or, if none in this state, its registered office) is located may remove a director of the corporation from office in a proceeding commenced either by the corporation or by its shareholders holding at least ten percent (10%) of the outstanding shares of any class if the court finds that (1) the director engaged in fraudulent or dishonest conduct, or gross abuse of authority or discretion, with respect to the corporation and (2) removal is in the best interest of the corporation."

§ 8.09(b)

Omitted.

§ 8.09(c)

Redesignate original as 8.09(b) and add the following as new 8.09(c): "If shareholders commence a proceeding under subsection (a), they shall make the corporation a party defendant."

§ 8.09(d)

Omitted.

§ 8.21(a)

Omit "Except to the extent that the articles of incorporation or bylaws require that action by the board of directors be taken at a meeting,".

§ 8.30

Omit 8.30(c). Redesignate 8.30(d), (e) and (f) as 8.30(c), (d) and (e). Add as 8.30(f) following: “For purposes of this section, a director, in determining what he reasonably believes to be in the best interests of the corporation, shall consider the interests of the corporation’s shareholders and, in his discretion, may consider any of the following: (1) The interests of the corporation’s employees, suppliers, creditors and customers; (2) The economy of the state and nation; (3) Community and societal considerations; (4) The long-term as well as short-term interests of the corporation and its shareholders, including the possibility that these interests may be best served by the continued independence of the corporation.”

§ 8.31(a)(2)(iv)

Substitute: “A sustained failure of the director to be informed about the business and affairs of the corporation, or other material failure of the director to discharge the oversight function; or”

§ 8.32

Omitted.

§ 8.42

Omit 8.42(b). Redesignate 8.42(c) and (d) as 8.42(b) and (c).

§ 8.50(3). “Expenses” include counsel fees.

§ 9.01-§ 9.56

Omitted.

§ 10.04(e)

Add as 10.04(e): “The provisions of subsection (a)(6) shall not apply to preferred stock issued by a public utility subject to the provisions of the Public Utility Holding Company Act,15 United States Code, Section 79, et seq., where the issuance of its securities is regulated by an agency of the United States.”

§ 11.01

Change to read as follows: “As used in this chapter: (a) “Interests” means the proprietary interests in an other entity. (b) “Merger” means a business combination pursuant to Section 79-4-11.02. (c) “Organizational documents” means the basic document or documents that create, or determine the internal governance of, another entity. (d) “Other entity” means any association or legal entity, other than a domestic or foreign corporation, organized to conduct business, including, without limitation, limited partnerships, general partnerships, limited liability partnerships, limited liability companies, joint ventures, joint stock companies, and business trusts. (e) “Party to a merger” or “party to a share exchange” means any domestic or foreign corporation or other entity that will either: (1) Merge under a plan of merger; (2) Acquire shares or interests of another corporation or an other entity in a share exchange; or (3) Have all of its shares or interests or all of one or more classes or series of its shares or interests acquired in a share exchange. (f) “Share exchange” means a business combination pursuant to Section 79-4-11.03. (g) “Survivor” in a merger means the corporation or other entity into which one or more other corporations or other entities are merged. A survivor of a merger may preexist the merger or be created by the merger.”

§ 11.02(a)

Change to: “One or more domestic corporations may merge with a domestic or foreign corporation or other entity pursuant to a plan of merger.”

§ 11.02(b.1)

Omitted.

§ 11.02(b)

Change to: “A foreign corporation, or a domestic or foreign other entity, may be a party to the merger, or may be created by the terms of the plan of merger, only if: (1) The merger is permitted by the laws under which the corporation or other entity is organized or by which it is governed; and (2) In effecting the merger, the corporation or other entity complies with such laws and with its articles of incorporation or organizational documents.”

§ 11.02(f)

Change to: “Liability from a merger shall be limited as provided in Sections 79-33-1 through 79-33-9.”

§ 11.03(b)

Change to: “A foreign corporation, or a domestic or foreign other entity, may be a party to the share exchange only if: (1) The share exchange is permitted by the laws under which the corporation or other entity is organized or by which it is governed; and (2) In effecting the share exchange, the corporation or other entity complies with such laws and with its articles of incorporation or organizational documents.”

§ 11.03(d)

Change to: “Terms of a plan of share exchange may be made dependent on facts objectively ascertainable outside the plan in accordance with Section 79-4-1.20(k).”

§ 11.04(g)(4)

Change to: “(4) The number of voting shares outstanding immediately after the merger, plus the number of voting shares issuable as a result of the merger (either by the conversion of securities issued pursuant to the merger or the exercise of rights and warrants issued pursuant to the merger), will not exceed by more than twenty percent (20%) the total number of voting shares of the surviving corporation outstanding immediately before the merger; and”.

§ 11.04(g)(5)

Add new Paragraph (5): “(5) The number of participating shares outstanding immediately after the merger, plus the number of participating shares issuable as a result of the merger (either by the conversion of securities issued pursuant to the merger or the exercise of rights and warrants issued pursuant to the merger), will not exceed by more than twenty percent (20%) the total number of participating shares outstanding immediately before the merger.”

§ 11.04(h)

Redesignate original 11.04(h) as 11.04(i) and add new 11.04(h) as follows: “As used in subsection (g): (1) “Participating shares” means shares that entitle their holders to participate without limitation in distributions. (2) “Voting shares” means shares that entitle their holders to vote unconditionally in elections of directors.”

§ 11.06(a)(1)

Add to end of sentence: “and the date on which the merger or share exchange occurred or is to be effective;”.

§ 11.06(b)

Change to: “Articles of merger or share exchange shall be delivered to the Secretary of State for filing by the survivor of the merger or the acquiring corporation in a share exchange and shall take effect on the effective date.”

§ 11.07(a)(4)

Add to end of sentence: “subject to the limitations as provided in Sections 79-33-1 through 79-33-9;”.

§ 11.07(c)

Change to: “Any shareholder of a domestic corporation that is a party to a merger or share exchange who, prior to the merger or share exchange, was liable for the liabilities or obligations of such corporation, shall not be released from such liabilities or obligations by reason of the merger or share exchange.”

§ 11.07(e)

Omitted.

§ 13.01(5)(1)

Add as subsection 5.1: “ ‘Interested transaction’ means a corporate action described in Section 79-4-13.02(a), other than a merger pursuant to Section 79-4-11.05, involving an interested person in which any of the shares or assets of the corporation are being acquired or converted. As used in this definition: (i) ‘Interested person’ means a person, or affiliate of a person, who at any time during the one-year period immediately preceding approval by the board of directors of the corporate action: (A) was the beneficial owner of twenty percent (20%) or more of the voting power of the corporation, excluding any shares acquired pursuant to an offer for all shares having voting power if the offer was made within one (1) year prior to the corporate action for consideration of the same kind and a value equal to or less than that paid in connection with the corporate action; (B) had the power, contractually or otherwise to cause the appointment or election of twenty-five percent (25%) or more of the directors to the board of directors of the corporation; or (C) was a senior executive or director of the corporation or a senior executive of any affiliate thereof, and that senior executive or director will receive, as a result of the corporate action, a financial benefit not generally available to other shareholders as such, other than: (1) employment, consulting, retirement, or similar benefits established separately and not as a part of, or in contemplation of, the corporate action; or (2) employment, consulting, retirement, or similar benefits established in contemplation of or as part of the corporate action that are more favorable than those existing before the corporate action or, if more favorable, that have been approved in behalf of the corporation in the same manner as is provided in Section 79-4-8.62; or (3) in the case of a director of the corporation who will, in the corporate action become a director of the acquiring entity in the corporate action, or one if its affiliates, rights and benefits as a director that are provided on the same basis such as those afforded by the acquiring entity generally to other directors of such entity or such affiliate. (ii) ‘Beneficial owner’ means any person who, directly or indirectly, through any contract, arrangement, or understanding, other than a revocable proxy, has or shares the power to vote, or to direct the voting of, shares; except that a member of a national securities exchange is not deemed to be a beneficial owner of securities held directly or indirectly by it on behalf of another person solely because the member is the record holder of the securities if the member is precluded by the rules of the exchange from voting without instruction on contested matters or matters that may affect substantially the rights or privileges of the holders of the securities to be voted. When two (2) or more persons agree to act together for the purpose of voting their shares of the corporation, each member of the group formed thereby is deemed to have acquired beneficial ownership, as of the date of the agreement, of all voting shares of the corporation beneficially owned by any member of the group."

§ 13.02(a)

Omit Paragraphs (6) through (8).

§ 13.02(b)(1)

Add following: "Appraisal rights shall not be available to any shareholder of the constituent corporations in a corporate reorganization transaction otherwise covered by Section 79-14-13.02(a)(1)or (2) if: (i) the shareholders of an existing corporation exchange shares of such corporation for shares of a newly formed corporation and receive, after the reorganization, the same proportionate share interest in the new corporation and the rights and interests of the shareholders in the newly formed corporation are substantially the same as those in the existing corporation prior to the transaction; (ii) the newly formed corporation has no significant assets other than the shares of the existing corporation; (iii) after the reorganization the newly formed corporation and its subsidiaries have substantially the same assets and liabilities, on a consolidated basis, as those of the existing corporation prior to the transaction; (iv) fractional shares are neither created nor eliminated as a result of the transaction; (v) the existing corporation and the newly formed corporation are the only constituent corporations to such reorganization; (vi) the existing corporation and the newly formed corporation are corporations of this state; (vii) the directors of the existing corporation become the directors of the newly formed corporation upon the effective time of the corporate reorganization; (viii) the existing corporation becomes a direct wholly-owned subsidiary of the newly formed corporation; and (ix) the shareholders of the existing corporation do not recognize gain or loss for United States federal income tax purposes as determined by the board of directors of the existing corporation."

§ 13.02(b)(1)

Redesignate as § 13.02(b)(2).

§ 13.20

Add as subsection (c): "Where any corporate action specified in Section 79-4-13.02(a) is to be approved by written consent of the shareholders pursuant to Section 79-4-7.04: (1) written notice that appraisal rights are, are not or may be available must be given to each record shareholder from whom a consent is solicited at the time consent of such shareholder is first solicited and, if the corporation has concluded that appraisal rights are or may be available, must be accompanied by a copy of this article; and (2) written notice that appraisal rights are, are not or may be available must be delivered together with the notice to nonconsenting and nonvoting shareholders required by Section 79-4-7.04(e) and (f), may include the materials described in Section 79-4-13.22 and, if the corporation has concluded that appraisal rights are or may be available, must be accompanied by a copy of this article."

§ 13.21

Add as subsection (b): “If a corporate action specified in Section 79-4-31.02(a) is to be approved by less than unanimous written consent, a shareholder who wishes to assert appraisal rights with respect to any class or series of shares must not execute a consent in favor of the proposed action with respect to that class or series of shares.”

§ 13.21

Redesignate 13.21(b) as 13.21(c).

§ 14.04(d)

Add to beginning of sentence: “Unless a delayed effective date is specified,”.

§ 14.07(c)

End of first sentence before colon reads: “within the lesser of three (3) years after the publication date of the newspaper notice, or any other applicable limitations period established by applicable law:”.

§ 14.08(a)

Add “Chancery Court” after “may file an application with the” and delete “[name or described court]”.

§ 14.21(a)

Add “except that such determination may be served by first class mail” at end of sentence.

§ 14.21(b)

Add “except that such certificate may be served by first class mail” to end of sentence.

§ 14.22(a)

Change “two years” to “five years”.

§ 14.23(b)

Add “Chancery Court of the First Judicial District of Hinds County, Mississippi” after “may appeal the denial of reinstatement to the” and delete “[name or described court]”.

§ 14.30

Add to beginning of sentence “The Chancery Court” and delete “[name or described court or courts]”.

Add as subsection (a)(5): “In a proceeding by a shareholder if the corporation has abandoned its business and has failed within a reasonable time to liquidate and distribute its assets and dissolve.” Add as subsection (b): “Section 79-4-14.30(a)(2) shall not apply in the case of a corporation that, on the date of the filing of the proceeding, has shares that are: (i) listed on the New York Stock Exchange, the American Stock Exchange, or any exchange owned or operated by the NASDAQ Stock Market, LLC, or listed or quoted on a system owned and operated by the National Association of Securities Dealers, Inc.; or (ii) not so listed or quoted, but are held by at least three hundred (300) shareholders and the shares outstanding have a market value of at least Twenty Million Dollars ($20,000,000) (exclusive of the value of such shares held by the corporation's subsidiaries, senior executives, directors and beneficial shareholders owning more than ten percent (10%) of such shares)."Add as subsection (c): "In this section 'beneficial shareholder' has the meaning specified in Section 79-4-13.01(2)."

§ 14.31(a)

Delete first sentence. Delete word "other" from second sentence of § 14.31(a).

§ 14.34(i)

Add: "Nothing contained in this section shall diminish the inherent equity powers of the court to fashion alternative remedies to judicial dissolution."

§ 15.01(d)

Add: "A foreign corporation which is a partner or member of any general partnership, limited partnership (other than a limited partner), joint venture, syndicate, pool or other association of any kind, whether or not such foreign corporation shares with or delegates to others control of such entity, which entity is transacting business in this state, is hereby declared to be transacting business in this state."

§ 15.02(d)

Add to beginning of sentence "A foreign corporation is liable for a civil penalty of Ten Dollars ($10.00) for each day, but not to exceed a total of One Thousand Dollars ($1,000.00)" and delete "A foreign corporation is liable for a civil penalty of $____ for each day, but not to exceed a total of $_____.".

§ 15.21

Omitted.

§ 15.22

Omitted.

§ 15.23

Omitted.

§ 15.31(a)

Add "except that such determination may be served by first class mail" to end of sentence.

§ 15.31(b)

Add "except that such certificate may be served by first class mail" to end of sentence.

§ 15.32

Delete 15.32 and substitute: "(a) A foreign corporation whose certificate of authority is administratively revoked under Section 79-4-15.31 may apply to the Secretary of State for

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reinstatement within five (5) years after the effective date of such revocation. The application must: (1) Recite the name of the corporation and the effective date of the administrative revocation; (2) State that the ground or grounds for revocation either did not exist or have been eliminated; (3) State that the corporation's name satisfies the requirements of Section 79-4-4.01; and (4) Contain a certificate from the Mississippi State Tax Comm. reciting that the corporation has properly filed all reports and paid all taxes and penalties required by revenue laws of this state. (a) If the Secretary of State determines that the application contains the information required by subsection (b) and that the information is correct, he shall reinstate the certificate of authority, prepare a certificate that recites his determination and the effective date of reinstatement, file the original of the certificate, and serve a copy on the corporation under Section 79-4-5.04. (c) When the reinstatement is effective, it relates back to and takes effect as of the effective date of the administrative revocation and the corporation resumes carrying on its business as if the administrative revocation had never occurred."

§ 15.33

Add as 15.33: "(a) If the Secretary of State denies a foreign corporation's application for reinstatement following administrative revocation, he shall serve the corporation under Section 79-4-5.04, Mississippi Code of 1972, with a written communication that explains the reason or reasons for denial. (b) The corporation may appeal the denial of reinstatement to the chancery court of the First Judicial District of Hinds County within thirty (30) days after service of the communication of denial is perfected. The corporation appeals by petitioning the court to set aside the revocation and attaching to the petition copies of the Secretary of State's communication of denial. (c) The court may summarily order the Secretary of State to reinstate the revoked corporation or may take other action the court considers appropriate. (d) The court's final decision may be appealed as in other civil proceedings."

§ 16.02(a)

Add to beginning of sentence, "Subject to section 79-4-16.03(c),".

§ 16.20(c)

Change: "mail" to "deliver" in first sentence. Change "mailed" to "delivered" in second sentence.

§ 16.21

Redesignate as 16.22 and add as 16.21: "(a) If a corporation indemnifies or advances expenses to a director under Section 79-4-8.51, 79-4-8.52, 79-4-8.53 or 79-4-8.54 in connection with a proceeding by or in the right of the corporation, the corporation shall report the indemnification or advance in writing to the shareholders with or before the notice of the next shareholders' meeting. (b) If a corporation issues or authorizes the issuance of shares for promissory notes or for promises to render services in the future, the corporation shall report in writing to the shareholders the number of shares authorized or issued, and the consideration received by the corporation, with or before the notice of the next shareholders' meeting."

§ 16.22(a)

Add: "within sixty (60) days of each anniversary date of its incorporation with respect to a domestic corporation or its authorization to transact business in this state with respect to a foreign corporation, or such other date as may be established by the Secretary of State [see Editor's Note below]," after "shall deliver" and before "to the Secretary of State".

§ 16.22(c)

Omitted.

§ 16.22(d)

Redesignate as 16.22(c).

§ 17.05

Omitted.

§ 17.06

Omitted.

General Supervision.

Secretary of State, Business Services Division, P.O. Box 136, Jackson, MS 39205-0136.

Purposes.

(§ 3.01).

Name.

(§ 4.01).

Term of Corporate Existence.

Perpetual, unless articles of incorporation provide otherwise. (§ 3.02).

Incorporators.

One or more. (§ 2.01).

Certificate or Articles of Incorporation.

Must set forth: (a) Corporate name pursuant to requirements of § 79-4-4.01; (b) number of shares authorized to issue and information as to shares issued; (c) street address of registered office and name of registered agent; (d) name and address of each incorporator. (§ 2.02[a]). May set forth: (a) names and addresses of initial directors; (b) purposes, management, powers of corporation, and value of shares; (c) any provision allowed or required to be set forth in bylaws; (d) provision limiting directors' liability; (e) provision requiring corporation to indemnify director. (§ 2.02[b]).

Filing of Certificate or Articles.

With Secretary of State. (§§ 2.01, 2.02).

Incorporation Tax or Fee.

See subhead Filing Fees, infra.

Filing Fees.

References are to Revised Model Business Corporation Act.

§ 1.22(a)(1), (5), (6), (10)-(12), (16), (20), (26): $50.

§ 1.22(a)(2)-(4), (13), (14), (21), (25), (27), (28): $25.

§ 1.22(a)(7), (8): $10.

§ 1.22(a)(23): $100.

§ 1.22(a)(8): $10, not to exceed $1,000.

§ 1.22(a)(19): $500.

§ 1.22(a)(9), (15), (17), (18), (22), (24): no fee

§ 1.22(b): $25.

§ 1.22(c)(1): $1 per page for copying.

§ 1.22(c)(2): $10.

License to Do Business.

(§ 2.03).

Organization.

(§ 2.05).

Paid in Capital Requirements.

None.

Amendment of Certificate or Articles.

(§§ 10.01-10.09).

Increase or Decrease of Authorized Capital Stock

(§ 6.26).

By-laws.

(§ 2.06).

Stock.

(§ 6.01–6.04; 6.20–6.28).

Stock Certificates.

(§ 6.25).

Issuance of Stock.

(§ 6.21).

Transfer of Stock.

(§ 6.27).

Uniform Simplification of Fiduciary Security Transfers Act.

(91-11-1, et seq.). Repealed to extent Act may be inconsistent with Uniform Commercial Code. (75-10-103).

Shareholders.

(§ 7.01, et seq.).

Shareholders' Actions.

(§ 7.40).

Shareholders' Liabilities.

(§ 6.22).

Shareholders' Meetings.

(§ 7.01, et seq.).

Voting Trusts.

(§ 7.30).

Directors.

(§ 8.01, et seq.).

Directors' Meetings.

(§ 8.20, et seq.).

Powers and Duties of Directors.

(§ 8.01[b]).

Liabilities of Directors.

(§ 8.30, et seq.).

Officers.

(§ 8.40, et seq.).

Liabilities of Officers.

(§ 8.42).

Indemnification of Directors and Officers.

(§§ 8.50-8.59).

Registered Office and Registered Agent.

(§ 5.01, et seq.).

General Powers of Corporations.

(§ 3.02).

Dividends.

(§§ 6.23 and 6.40).

Unclaimed Dividends.

See category 21 Property, topic 21.01 Absentees, subhead Escheat.

Sale or Transfer of Corporate Assets.

(§ 12.01, et seq.).

Books and Records.

(§ 16.01, et seq.).

Reports.

Required reports: Annual report to Secretary of State. (§ 16.22). Report to shareholders when corporation indemnifies director, and when corporation issues shares for promissory notes or future services. (§ 16.21; see § 16.20, et seq.).

Corporate Bonds or Mortgages.

Uniform Simplification of Fiduciary Security Transfers Act adopted but superseded to extent not consistent with Uniform Commercial Code. (75-10-103).

Merger and Consolidation.

(§ 11.01, et seq.).

Share Exchanges or Acquisitions.

(§ 11.03).

Dissolution.

(§ 14.01, et seq.).

Insolvency and Receivers.

(§ 14.32).

Appraisal.

(§ 13.30, et seq.).

Foreign Corporations.

(§ 15.01, et seq.). Foreign business trusts separately regulated. (79-16-1).

Taxation of Corporate Property.

Taxation rules same as for individual property. (27-35-31). Five factor test applied to intercompany sales to determine if arms-length transaction. (27-7-9).

Taxation of Corporate Stock.

Stock of corporation exempt from taxation. (27-35-31).

Franchise Tax.

Franchise tax, plus all other taxes, imposed by 27-13-1, et seq. Tax imposed upon every corporation, association, joint stock company or partnership treated as corporation for income tax purposes at rate of $2.50 for each $1,000 or fraction thereof of value of capital used, invested or employed within this state during preceding calendar or fiscal year. (27-13-5 thru 27-13-9). Tax measured by combined issued and outstanding capital stock, paid-in capital, surplus and retained earnings. (27-13-9). Minimum tax is $25. (27-13-9). Book value accepted as prima facie correct as to true capital. (27-13-11, 27-13-5). Certain corporations and organizations (e.g., nonprofit corporations, fraternal beneficiary societies) exempt from tax. (27-13-63).

Where organization does business within and without this state, value of capital determined by computing ratio between (1) real and tangible personal property owned in this state and gross receipts from business carried on in this state and (2) total real and tangible personal property owned and gross receipts wherever located and from wherever received; then applying ratio to total capital stock, surplus, undivided profits and true reserves. (27-13-13). Determined capital cannot be less than assessed value of real estate and tangible personal property in this state for year preceding year in which return is due. (27-13-13).

Return must be filed with and tax paid to Commissioner, who is Chairman of State Tax Comm., on or before 15th day of third month following close of annual accounting period. (27-13-17). Penalties prescribed for failure to pay tax. (27-13-23, 27-13-25).

Payment of tax condition precedent to continued corporate existence of a domestic corporation or continuance of right of foreign corporation to do business in this state. (27-13-27).

Where corporation fails or refuses to pay franchise tax, State Tax Commissioner may request administrative dissolution of corporation or revocation of its certificate of authority. (27-13-27[1]). Commissioner must notify Secretary of State of request for administrative dissolution or revocation of certificate of authority. (27-13-27[1]).

Corporation which has been administratively dissolved or had its certificate of authority revoked may have its rights restored, provided its principal officer(s) or attorney appears within 12 months from date of administrative dissolution or revocation of certificate, explains cause of default and pays all taxes due together with all interest, penalties and increases. (27-13-27[3], 27-13-27[4]). When full payment and complete explanation is tendered to Commissioner, then it is duty of Commissioner to notify Secretary of State immediately, so that administrative dissolution or revocation of corporation’s certificate of authority can be set aside. (27-13-27[3], 27-13-27[4]).

If administrative dissolution or revocation of certificate of authority is not set aside within 12 months from date of its original imposition, organization shall be considered nonexistent. (27-13-27[5]).

Professional Corporations.

Mississippi Professional Corporation Act effective July 1, 1995. One or more persons may incorporate professional corporation for purpose of rendering professional services through individuals licensed or otherwise authorized in Mississippi to render services. (79-10-11, 79-10-17). Professional services include, but are not limited to, personal services rendered by certified public accountants, dentists, architects, veterinarians, osteopaths, physicians, surgeons and attorneys. (79-10-5[g]). See also topic 2.02 Associations, subhead Professional Associations.

Deeds.

See category 21 Property, topic 21.06 Deeds.

Model Non-Profit Corporation Act.

Mississippi adopted 1986 Revised Model Nonprofit Corporation Act with variations. (79-11-101 et seq.).

2.04 FOREIGN CORPORATIONS:

See topic 2.03 Corporations.

2.05 JOINT STOCK COMPANIES:

Joint stock companies do not appear to be recognized in Mississippi. In instances where this term is used, it appears that corporations are meant. Mississippi Constitution includes joint stock companies in its definition of “corporations”. (Miss. Const. Art. 7, § 199).

Massachusetts Trusts.

Registration of foreign business trusts. (79-16-1, et seq.).

Professional Associations or Corporations.

See topic 2.03 Corporations, subhead Professional Corporation.

2.06 LIMITED LIABILITY COMPANIES:

Mississippi Limited Liability Company Act effective July 1, 1994. (79-29-101, et seq.). Act contains many sections similar to sections of Mississippi Business Corporation Act and, with respect to professional limited liability companies, contains many sections similar to Mississippi Professional Corporation Act.

General Supervision.

(79-29-102).

Formation.

Certificate of formation must be executed and filed with Secretary of State setting forth required information. (79-29-201). Certificate of formation may be amended by filing certificate of amendment with Secretary of State (79-29-202); restated certificate (79-29-203).

Purposes.

LLC may be formed to carry on any lawful business, purpose, or activity subject to provisions of its certificate of formation and to any other laws governing or limiting conduct of particular business or activity. (79-29-108).

Powers.

(§ 79-29-108).

Name.

LLC must contain words “limited liability company” or abbreviation “L.L.C.” or “LLC” and may contain name of member or manager. Name of LLC may not contain prohibited words or abbreviations or combinations thereof. (79-29-104).

Articles of Organization.

Members of LLC may enter into limited liability company agreement to regulate or establish affairs of limited liability company, conduct of its business, and relation of its members. (79-29-306).

Filing Articles of Organization.

No requirement to file limited liability company agreement. Only certificate of formation must be filed with Secretary of State. (79-29-207).

Registered Office and Registered Agent.

Each LLC must continuously maintain registered office, which may be same as any of its places of business, and registered agent for service of process. (79-29-106).

Management.

Vested in LLC members unless certificate of formation provides for management of LLC by manager(s). (79-29-302). Certificate of formation may limit powers of manager(s). (79-29-302). Agency power of members and managers. (79-29-303).

If certificate of formation vests management in manager(s), no member, acting solely in capacity as member, is agent of LLC and every manager is LLC agent for business purpose and affairs. (79-29-303). Managers need not be residents of Mississippi or members of LLC unless certificate of formation or LLC agreement requires. (79-29-401[2]). Certificate of formation or LLC agreement may prescribe other qualifications for managers. (79-29-401[2]). Unless otherwise provided in certificate of formation or LLC agreement, managers elected by members. (79-29-401[4]). Manager must comply with prescribed standards of conduct. (79-29-402).

Dissolution.

Affairs must be wound up at time specified in certificate of formation, or upon occurrence of events specified in certificate of formation or LLC agreement or upon written consent of all members or such lesser number as provided in certificate of formation or LLC agreement, or upon entry of decree of judicial dissolution. (79-29-801, 79-29-802). If LLC formed on or before June 30, 1998, LLC is dissolved upon event of dissociation unless continued by remaining members within 90 days following occurrence of event of dissociation. (79-29-801 [pre-1998]). If LLC formed on or after July 1, 1998, or those previously formed which file certificate of amendment, then LLC is dissolved upon event of dissociation of member, if majority of remaining members or such other number as provided in certificate of formation or LLC agreement consent to do so. (79-29-801 [post-1998]). Judicial dissolution may occur when not reasonably practical to carry on business in conformity with certificate of formation, or LLC agreement or managers or members in control guilty of or knowingly countenanced persistent and pervasive fraud or abuse of authority or persistent unfairness toward any member, or LLC property misapplied or wasted. (79-29-802).

Filing Fees.

Fees charged by Secretary of State: (1) Reservation of LLC name, $25; (2) change of address of registered agent, $25; (3) resignation of registered agent, $5; (4) certificate of formation, $50; (5) amendment to certificate of formation, $50; (6) certificate of dissolution, $25; (7) certificate of cancellation, $25; (8) restated certificate of formation or amended and restated certificate of formation, $25; (9) certificate of withdrawal, $25; (10) application for registration of foreign LLC, $250; (11) certificate correcting application for registration of foreign LLC, $50; (12) certificate of cancellation of registration of foreign LLC, $25; and (13) any other document required or permitted to be filed, $25. (79-29-1203).

2.07 LIMITED PARTNERSHIP:

See topic 2.08 Partnerships.

2.08 PARTNERSHIPS:

Uniform Partnership Act (1997) adopted effective Jan. 1, 2005. (79-13-101, et seq.). 1997 Act adopted with following material variations (section number listed is section number of Uniform Act):

§ 105(f)—Filing fees charged in Mississippi.

§ 105(g)—Added to provide general grant of power to Secretary of State to perform necessary duties.

§ 702(a)—Time period following dissociation of partner during which dissociated partner may have power to bind partnership reduced from two years to one year.

§ 703(b)—Time period following dissociation of partner during which dissociated partner may be liable for obligations entered into by partnership after partner's dissociation reduced from two years to one year.

§ 704(c)—Time period following filing of statement of dissociation after which nonpartner is deemed to have notice of partner's dissociation reduced from 90 days to 30 days.

§ 803(a)—Chancery court of county in which partnership's chief executive office is located has jurisdiction to order judicial supervision of winding up of partnership.

§ 805(c)—Change "90 days" to "30 days."

§ 903—Omitted.

§ 904(b)(1)(3)—"or limited partnership" deleted.

§ 904—Add as § 904(c): "Except for the provisions of Section 79-13-902 and this section, from and after the effective date of conversion the converted limited partnership shall be governed by the provisions of the Mississippi Limited Partnership Act."

§ 905—Substitute as § 905: "Merger. (a) Unless otherwise provided in the partnership agreement, pursuant to a plan of merger approved as provided in subsection (d), one or more domestic partnerships may be merged with a domestic or foreign entity.

(b) A domestic or foreign entity may be a party to the merger, or may be created by the terms of the plan of merger, only if: (1) The merger is permitted by the laws under which the entity is organized or by which it is governed; and (2) In effecting the merger, the entity complies with such laws and with its organizational documents.

(c) The plan of merger must set forth: (1) The name of each entity that is a party to the merger; (2) The name of the entity that will be the survivor of the merger; (3) If the surviving entity is a partnership or a limited partnership, the status of each partner; (4) The terms and conditions of the merger; (5) The manner and basis of converting the interests of each party to the merger into shares or other securities, interests, obligations, or rights to acquire shares or other securities of the surviving entity, or into money or other property, or any combination of the foregoing; (6) The organizational documents of any entity to be created by the merger, or if a new entity is not to be created by the merger, any amendments to the survivor's organizational documents; (7) The street address of the surviving entity's chief executive office; and (8) Any other provisions required by the laws under which any party to the merger is organized or by which it is governed, or by the organizational documents of any such party.

(d) The plan of merger must be approved: (1) In the case of a domestic partnership that is a party to the merger, by all of the partners, or a number or percentage specified for merger in the partnership agreement; and (2) In the case of a domestic limited liability partnership that is a party to a merger where the surviving entity is a partnership other than a limited liability partnership, by all of the partners, notwithstanding a provision to the contrary in the partnership agreement.

(f) After a plan of merger is approved and before the merger takes effect, the plan may be amended or abandoned as provided in the plan.

(g) The merger takes effect on the later of: (1) The approval of the plan of merger by all parties to the merger, as provided in subsection (d); (2) The filing of all documents required by law to be filed as a condition to the effectiveness of the merger; or (3) Any effective date specified in the plan of merger."

§ 906(a)—Substitute: "domestic partnership" for "partnership or limited partnership".

§ 906(c)-(e)—Substitute as § 906(c)-(e): "(c) A partner of a domestic partnership which is a party to a merger remains liable for all obligations incurred by such domestic partnership before the merger and for which the partner was personally liable before the merger.

(d) Without affecting any liability a partner may have in accordance with the provisions of subsection (c) of this section, a partner of a domestic partnership which is the survivor of a merger: (1) Shall not become personally liable as a result of the merger for obligations of the surviving partnership incurred before the merger by a party to the merger of which that partner was not a general partner; and (2) Except as otherwise provided in Section 79-13-306, shall become personally liable for all obligations of the surviving partnership incurred after the merger takes effect.

(e) In the case of a partner of a domestic partnership which is a party to a merger who does not become a partner, shareholder, member or other equity owner of the surviving entity: (1) The surviving entity shall cause the partner's interest in the partnership to be purchased under Section 79-13-701; and (2) If the surviving entity is a domestic partnership, the surviving partnership is bound under Section 79-13-702 by an act of the terminated partner, and the terminated partner is liable under Section 79-13-703 for transactions entered into by the surviving partnership after the merger takes effect."

§ 907(a)—Substitute: "surviving domestic or foreign entity" for "surviving partnership or limited partnership" and substitute "one or more domestic partnerships" for "one or more partnerships or limited partnerships".

§ 907(b)—Substitute as § 907(b): "A statement of merger must contain: (1) The name of each entity that is a party to the merger; (2) The name and domicile of the entity that will be the survivor of the merger; (3) The street address of the surviving entity's chief executive office and of an office in this state, if any; and (4) The type of entity of the surviving entity is (e.g., partnership, limited partnership, for profit corporation, etc.)."

§ 907(c)—Substitute: "surviving entity" for "surviving partnership or limited partnership".

§ 907(d)—Substitute: "surviving entity" for "surviving partnership or limited partnership".

§ 907(e)—Delete words: "or limited partnership" and "or limited partnerships".

§ 1003—Omitted.

Formation.

(1997 Act—§§ 101, 103 and 202).

Name.

Mississippi does not require registration of partnership name.

Rights and Liabilities of Partners Inter Se.

(1997 Act—§§ 103, 106, 401-406, 701-702).

Rights and Liabilities of Partners as to Third Parties.

(1997 Act—§§ 301-308, 703).

Dissolution.

(1997 Act—§§ 801-807).

Administration of Partnership Property.

(1997 Act—§§ 803 and 807).

Limited Partnership.

Governed by Mississippi Limited Partnership Act (79-14-101, et seq.) which is enactment of Revised Uniform Limited Partnership Act (1976) (with 1985 amendments) ("ULPA") effective Jan. 1, 1988, with following exceptions (section number listed is section number of ULPA).

§ 101—Add: "(3) 'Deliver' or 'delivery' means any method of delivery used in conventional commercial practice, including delivery by hand, mail, commercial delivery, and electronic transmission. If delivery is to the Secretary of State, delivery may be made by electronic transmission if, to the extent, and in the manner permitted by the Secretary of State; (4) 'Electronic transmission' or 'electronically transmitted' means any process of communication not directly involving the physical transfer of paper that is suitable for retention, retrieval and reproduction of information by the recipient; (5) 'Entity' means any association or legal entity organized to conduct business, including, without limitation, limited partnerships, for profit and nonprofit corporations, general partnerships, limited liability partnerships, limited liability companies, joint ventures, joint stock companies and business trusts; (11) 'Organizational documents' means the basic document or documents that create or determine the internal governance of an entity; (16) 'Sign' or 'signature' includes any manual, facsimile, conformed or electronic signature."

Substitute as § 101(15): " 'Person' means an individual, corporation, business trust, estate, trust, partnership, limited partnership, association, joint venture, government, governmental subdivision or agency, any other legal or commercial entity, nominee or any individual or entity in any representative capacity."

§ 102—Name of LP must contain words "limited partnership" or "L.P." (§ 102[a][1]). Name of limited partnership may not contain following words: bank, banker, bankers, banking, trust company, insurance, trust, corporation, incorporated, or any combination thereof, or any words of similar import. (§ 102[a][4]). Add provision (79-14-102[b]) permitting Secretary of State to authorize use of name that is not distinguishable from name(s) of other corporation(s) or limited partnership(s) licensed or registered to do business within State if other limited partnership or corporation consents to use of name in writing and undertakes to change its name in form satisfactory to Secretary of State, or applicant delivers to Secretary of State certified copy of final judgment of court which establishes applicant's right to use name applied for in this state.

§ 103—Reservation of name by Secretary of State lasts 180 days. (§ 103[b]).

§ 104—Add provisions (79-14-104[b], [c]): "(b) A registered agent may change his address to another address in the State of Mississippi by paying a fee as set forth in Section 79-14-1104 and filing with the Secretary of State a certificate, executed by such registered agent, setting forth the names of all the limited partnerships represented by such registered agent, and the address at which such registered agent has maintained his office for each of such limited partnerships, and further certifying to his new address which will be effective on a given day, and which new address such registered agent will thereafter maintain for each of the limited partnerships recited in the certificate. Upon the filing of such certificate, the Secretary of State will furnish to the registered agent a certified copy of the same under his hand and seal of office, and thereafter, or until further change of address, as authorized by law, the registered agent's office in the State of Mississippi of each of the limited partnerships recited in the certificate shall be located at the new address of the registered agent thereof as given in the certificate. Filing of such certificate shall be deemed to be an amendment of the certificate of limited partnership of each limited partnership affected thereby, and each such limited partnership shall not be required to take any further action with respect thereto to amend its certificate of limited partnership under Section 79-14-202. Any registered agent filing a certificate under this section shall promptly, upon such filing, deliver a copy of any such certificate to each limited partnership affected thereby.

(c) The registered agent of one or more limited partnerships may resign his agency appointment by paying a fee as set forth in Section 79-14-1104 and filing a certificate with the Secretary of State stating that it resigns as registered agent for such limited partnerships as are identified in the certificate, but such resignation shall not become effective until ninety (90) days after the certificate is filed. There shall be attached to such certificate an affidavit of such registered agent, if an individual, or of the president, a vice president or the secretary thereof if a corporation, that at least thirty (30) days prior and on or about the date of the filing of said certificate, notices were sent by certified or registered mail to each limited partnership for which such registered agent is resigning as registered agent, at the principal place of business thereof within or without the State of Mississippi if known to such registered agent or, if not, to the last known address of the attorney or other individual at whose request such registered agent was appointed for such limited partnership, of the resignation of such registered agent. Additionally, if the registered agent does not know of the principal place of business of the limited partnership, the registered agent shall send notice to the office of the limited partnership in the State of Mississippi as designated in subsection (a) of this section, if its address is different from that of the registered agent so resigning. After receipt of the notice of resignation of its registered agent, the limited partnership for which such registered agent was acting shall obtain and designate a new registered agent, to take the place of the registered agent so resigning. After the resignation of the registered agent shall have become effective as provided in this section and if no new registered agent shall have been obtained and designated in the time and manner aforesaid, service of legal process against the limited partnership for which the resigned registered agent had been acting shall thereafter be upon the Secretary of State in accordance with the Mississippi Rules of Civil Procedure."

§ 105(a)(3)—Change: "three (3) years" to "six (6) years."

§ 105(a)(4)—Change: "three (3) years" to "six (6) years."

§ 108—Add: "Subject to such standards and restrictions set forth in its partnership agreement, a limited partnership may, and shall have the power to, indemnify and hold harmless any partner or other person from and against any and all claims and demands whatsoever. However, the failure of a partnership agreement to provide or contain such standards and restrictions does not mean that a limited partnership may not, and does not have the power to, indemnify and hold harmless any partner or other person from and against any and all claims and demands whatsoever." (79-14-108).

§ 201—Addresses in certificate must include both street and mailing addresses of office and registered agent for service of process. (§ 201[a][2]). Add provision (79-14-201[c]): "For all purposes, a copy of the certificate of limited partnership duly certified by the Secretary of State is conclusive evidence of the formation of a limited partnership and prima facie evidence of its existence."

§ 202—Replace § 202(a)(2): "The future effective date of the amendment, which must be a date certain, unless it is effective upon the filing of the certificate of amendment;" § 202(c) designated as 79-14-202(b). § 202(b) replaced with 79-14-202(c): "(c) Notwithstanding the requirements of subsection (b) of this section, within thirty (30) days after the happening of any of the following events an amendment to a certificate of limited partnership reflecting the occurrence of the event or events shall be delivered to the office of the Secretary of State for filing: (1) The admission of a new general partner; (2) The withdrawal of a general partner; (3) The continuation of the business under Section 79-14-801 after an event of withdrawal of a general partner; (4) A change in the name of the limited partnership; (5) A change in the street or mailing address of the office of the limited partnership; or (6) A change in the name or the street or mailing address of the registered agent of the limited partnership." Replace § 202(e): "(e) Except as provided in Section 79-14-402(b), if an amendment to a certificate of limited partnership is delivered to the office of the Secretary of State in compliance with subsection (c) of this section, no person is subject to liability because the amendment was not filed earlier." § 202(f) omitted.

§ 203—Replace § 203: "A certificate of dissolution must be delivered to the office of the Secretary of State for filing upon the dissolution and the commencement of winding up of the limited partnership pursuant to Article 8 of this chapter or at any time when there are no limited partners. A certificate of cancellation must be delivered to the office of the Secretary of State for filing upon completion of the winding up of the affairs of the limited partnership or upon a merger or consolidation, as provided in Section 79-14-211, by a limited partnership that is not the surviving or resulting limited partnership. Certificates of dissolution and cancellation must be delivered to the office of the Secretary of State for filing and must set forth: (1) The name of the limited partnership; (2) The reason for delivering the certificate of dissolution or cancellation to the Secretary of State for filing; (3) The future effective date of dissolution or cancellation, which must be a date certain, unless it is effective upon the filing of the certificate by the Secretary of State; and (4) Any other information the general partners delivering the certificate for filing determine."

§ 204—Substitute as § 204(a)(3): "(3) Certificates of dissolution and cancellation must be signed by all general partners or, if there is no general partner, by the limited partners conducting the winding up of the limited partnership affairs under Section 79-14-803. A document required or permitted to be filed under this chapter which contains a copy of a signature, however made, is acceptable for filing."

§ 204(c)—Omitted.

§ 205—Substitute "a certificate" for "any certificate"; substitute "it shall order appropriate relief, including an order to the Secretary of State to record an appropriate certificate" for "it shall order the Secretary of State to record an appropriate certificate."

§ 206—Replace § 206: "(a) One (1) original of a certificate of limited partnership and of any certificates of amendment, dissolution or cancellation, or of any judicial decree of amendment, dissolution or cancellation must be delivered to the office of the Secretary of State for filing. A person who signs a certificate as an agent or fiduciary need not exhibit evidence of his authority as a prerequisite to filing by the Secretary of State. If the Secretary of State finds that the certificate meets the requirements of this article and all filing fees required by Section 79-14-1104 have been paid, he shall: (1) Endorse on the original the word 'Filed' and the day, month and year of the filing thereof; (2) File the original in his office; and (3) Return a copy to the person who delivered it for filing or his representative.

(b) Upon the filing of a certificate of amendment or judicial decree of amendment by the Secretary of State or upon the future effective date of a certificate of amendment or judicial decree thereof, as provided for therein, the certificate of limited partnership shall be amended as set forth therein. Upon the filing of a certificate of dissolution or cancellation or a judicial decree thereof by the office of the Secretary of State or upon the future effective date of a certificate of dissolution or cancellation or a judicial decree thereof, the certificate of limited partnership is dissolved or cancelled, as the case may be." (79-14-206).

§ 207—Add provision (79-14-207[b]): "(b) Except as provided in Section 79-14-402(b), no person shall have any liability for failing pursuant to subsection (a)(2) of this section to cause the amendment, dissolution or cancellation of a certificate to be filed or failing to file a petition for its amendment, dissolution or cancellation pursuant to subsection (a)(2) of this section if the certificate of amendment, certificate of dissolution, certificate of cancellation or petition is filed by the Secretary of State within thirty (30) days of when that person knew or should have known to the extent provided in subsection (a)(2) of this section that the statement in the certificate was inaccurate in any respect."

§ 209—Delete "or mail;" substitute "certificate of amendment, dissolution or cancellation" for "certificate of amendment or cancellation."

§ 210—Add: "(a) A limited partnership may, whenever desired, integrate into a single instrument all of the provisions of its certificate of limited partnership which are then in effect and operative, and it may at the same time also further amend its certificate of limited partnership by adopting a restated certificate of limited partnership. (b) If the restated certificate of limited partnership merely restates and integrates but does not further amend the certificate of limited partnership then in effect and operative, it shall be specifically designated in its heading as a 'Restated Certificate of Limited Partnership' together with such other words as the limited partnership may deem appropriate. If the restated certificate restates and integrates and also further amends in any respect the certificate of limited partnership then in effect and operative, it shall be specifically designated in its heading as an 'Amended and Restated Certificate of Limited Partnership' together with such other words as the partnership may deem appropriate. Both 'Amended and Restated' and 'Restated' certificates of limited partnership shall be signed and delivered for filing by the Secretary of State in the same manner as are certificates of amendment pursuant to Section 79-14-202. (c) Any amendment or change effected in connection with the restatement and integration of the certificate of limited partnership shall be subject to any other provision of this chapter, not inconsistent with this section, which would apply if a separate certificate of amendment were filed to effect such amendment or change."

§ 211—Merger and consolidation

(a) Unless otherwise provided in the certificate of limited partnership or partnership agreement, one or more domestic limited partnerships may merge or consolidate with a domestic or foreign entity pursuant to a plan of merger or consolidation.

(b) A domestic or foreign entity may be a party to the merger or consolidation, or may be created by the terms of the plan of merger or consolidation, only if:

(1) The merger or consolidation is permitted by the laws under which the entity is organized or by which it is governed; and

(2) In effecting the merger or consolidation, the entity complies with such laws and with its organizational documents.

(c) A domestic limited partnership that is not the surviving or resulting entity in the merger or consolidation shall file a certificate of cancellation, which shall have an effective date not later than the effective date of the merger or consolidation.

(d) If following a merger or consolidation of one or more domestic limited partnerships and one or more foreign entities, the surviving or resulting entity is a foreign entity there shall be attached to the certificate of cancellation filed pursuant to Section 79-14-203 for each such domestic limited partnership a certificate executed by the surviving or resulting foreign entity, stating that the surviving or resulting foreign entity agrees that it may be served with process in the State of Mississippi in any action suit or proceeding for the enforcement of any obligation of such domestic limited partnership, irrevocably appointing the Secretary of State as its agent to accept service of process in any such action, suit or proceeding and specifying the address to which a copy of such process shall be mailed to it by the Secretary of State. In the event of service hereunder upon the Secretary of State, the plaintiff in any such action, suit or proceeding shall furnish the Secretary of State with the address specified in the certificate provided for in this section and any other address which the plaintiff may elect to furnish, and the Secretary of State shall notify the surviving or resulting foreign entity at all such addresses furnished by the plaintiff.

(e) Upon the effective date of any merger or consolidation effected under this section, which said effective date shall not be earlier than when any certificate of cancellation required by subsection (b) of this section shall have become effective for all purposes of the laws of the State of Mississippi, all of the rights, privileges and powers of each of the foreign or domestic entities that have merged or consolidated, and all property, real, personal and mixed, and all debts due to any of said foreign or domestic entities, as well as all other things and causes of action belonging to each of such foreign or domestic entities shall be vested in the surviving or resulting foreign or domestic entity, and shall thereafter be the property of the surviving or resulting foreign or domestic entity as they were of each of the foreign or domestic entities that have merged or consolidated, and the title to any real property vested by deed or otherwise, under the laws of the State of Mississippi, in any of such foreign or domestic entities, shall not revert or be in any way impaired by reason of this chapter, but all rights of creditors and all liens upon any property of any of said foreign or domestic entities shall be preserved unimpaired, and all debts, liabilities and duties of each of the foreign or domestic entities that have merged or consolidated shall thenceforth attach to the surviving or resulting foreign or domestic entity, and may be enforced against it to the same extent as if said debts, liabilities and duties had been incurred or contracted by it.

§ 301—Replace § 301(a): “(a) A person becomes a limited partner on the later of: (1) The date the original certificate of limited partnership is filed; or (2) The date stated in the records of the limited partnership as the date that person becomes a limited partner.” (79-14-301[a]). Delete “to grant the assignee the right to become a limited partner, upon the exercise of that power and compliance with any conditions limiting the grant or exercise of the power.” (§ 301(b)[2]).

§ 302—Replace § 302: “(a) A partnership agreement may provide for classes or groups of limited partners having such relative rights, powers and duties as the partnership agreement may provide, and may make provision for the future creation in the manner provided in the partnership agreement of additional classes or groups of limited partners having such relative rights, powers and duties as may from time to time be established, including rights, powers and duties senior to existing classes and groups of limited partners.

(b) Subject to Section 79-14-303, the partnership agreement may grant to all or certain identified limited partners or a specified class or group of the limited partners the right to vote (on a per capita or any other basis) separately or with all or any class or group of the limited partners or the general partners, on any matter.

(c) A partnership agreement which grants a right to vote may set forth provisions relating to notice of the time, place or purpose of any meeting at which any matter is to be voted on by any limited partners, waiver of any such notice, action by consent without a meeting, the establishment of a record date, quorum requirements, voting in person or by proxy, or any other matter with respect to the exercise of any such right to vote.”

§ 303—Add “endorsing” after “guaranteeing” and add “or providing collateral for the limited partnership”. (§ 303[b][3]). Replace § 303(b)(4): “(4) Calling, requesting, attending or participating at a meeting of the partners or the limited partners." Replace § 303(b)(5): "(5) Taking any action required or permitted by law to bring or pursue a derivative action in the right of the limited partnership." Add "assignment" between "mortgage" and "pledge" and substitute "or granting of a security interest in any asset or assets of the limited partnership" after "transfer of". (§ 303[b][6][ii]). Add "renewal, refinancing, payment or other discharge" after "incurrence" and delete "other than…business". (§ 303[b][6][iii]). Replace § 303(b)(8): "(8) Serving on an audit committee or committee performing the functions of an audit committee." § 303(b)(8) designated 79-14-303(b)(9).

§ 305—Add: "(b) In addition to any other remedies, a court of competent jurisdiction may enforce the duty of making available the information and financial statements required by this section. (c) In any action under this section, if the court finds that the limited partnership has failed to comply with the requirements of this section, the court may award an amount sufficient to reimburse the partners bringing the action for the reasonable expenses incurred by the partners, including attorneys' fees, in connection with the action or proceeding. (d) Any waiver by a partner of the rights provided in this section shall be unenforceable."

§ 402—Add provision: "(b) Notwithstanding the provisions of subsection (a) of this section, a person who ceases to be a general partner of a limited partnership shall be deemed to be general partner with respect to third party doing business with the limited partnership who reasonably believes such person continues to be a general partner, until an amended certificate of limited partnership is filed with the Secretary of State pursuant to Section 79-14-202."

§ 405—§ 405 designated 79-14-405(b) and altered as follows: add "or a specified class or group of the general partners" behind "certain identified general partners" and "or group of the limited partners or general partners" behind "all or any class". Add provisions: "(a) The partnership agreement may provide for classes or groups of general partners having such relative rights, powers and duties as the partnership agreement may provide, and may make provisions for the future creation in the manner provided in the partnership agreement of additional classes or groups of general partners having such relative rights, powers and duties as may from time to time be established, including rights, powers and duties senior to existing classes and groups of general partners.

(c) A partnership agreement which grants a right to vote may set forth provisions relating to notice of the time, place or purpose of any meeting at which any matter is to be voted on by any general partners, waiver of any such notice, action by consent without a meeting, the establishment of a record date, quorum requirements, voting in person or by proxy, or any other matter with respect to the exercise of any such right to vote." (79-14-405[a], [c]).

§ 502(b)—Substitute "an enforceable promise" for "any enforceable promise."

§ 502(c)—Add "to the same extent as the partnership could pursuant to this section" to the end of the last sentence in § 502(c).

§ 502(d)—Add provision: "(d) A partnership agreement may provide that the interest of any partner who fails to make any contribution that he is obligated to make, shall be subject to specified penalties for, or specified consequences of, such failure. Such penalty or consequence may take the form of reducing the defaulting partner's proportionate interest in the limited partnership, subordinating his partnership interest to that of nondefaulting partners, forcing a sale of his partnership interest, forfeiting his partnership interest, the lending by other partners of the amount necessary to meet his commitment, fixing the value of his partnership interest by appraisal or by formula and redeeming or selling of his partnership interest at such value, or other penalty or consequence." (79-14-502[d]).

§ 503—Substitute "must be allocated" for "shall be allocated".

§ 602—Replace § 602: “(a) A general partner may withdraw from a limited partnership at any time by giving written notice to the other partners. If a general partner withdraws pursuant to Section 79-14-402(a)(1) or 79-14-402(a)(2) and such withdrawal violates the partnership agreement, the limited partnership may recover from the withdrawing general partner damages for breach of the partnership agreement and, in addition to any other remedies, shall have the right to offset the damages against the amount otherwise distributable to the general partner. Unless otherwise provided in writing in the partnership agreement, in the case of a limited partnership for a fixed term, a withdrawal by a general partner pursuant to Section 79-14-402(a)(1) or 79-14-402(a)(2) prior to the expiration of that term is a breach of the partnership agreement.

(b) Unless otherwise provided in the partnership agreement, and subject to the liability created under subsection (a) of this section, a general partner who ceases to be a general partner under Section 79-14-402 shall: (1) Retain the same interest in that partner’s capital account, profits, losses and distributions, but that interest shall be that of a limited partner; (2) Not be personally liable for limited partnership debts incurred after the person ceases to be a general partner, other than any debts incurred by reason of that person’s being deemed to be acting as a general partner, pursuant to Section 79-14-402; (3) Be entitled to vote as a limited partner on all matters except the admission and compensation of a general partner; and (4) Have the partner’s interest in profits, losses and distributions reduced pro rata with all other partners to provide compensation, or an interest in the limited partnership, or both, to a new general partner.”

§ 603—For domestic limited partnerships formed on or before June 30, 1998, § 603 is amended accordingly: add “partnership” in front of “agreement” in second sentence; substitute “occurrence” for “happening;” and replace “at his address on the books of the limited partnership at its office in this State” with “at his address set forth in the certificate.” For domestic limited partnerships formed on or after July 1, 1998 or those which elected to be governed by this provision by filing a certificate of amendment with the Secretary of State’s office, § 603 is replaced by the following: “A limited partner may withdraw from a limited partnership at the time or upon the occurrence of events specified in writing in the partnership agreement.”

§ 604—For domestic limited partnerships formed on or before June 30, 1998, substitute “the limited partner is entitled to receive” for “he is entitled to receive”. For domestic limited partnerships formed on or after July 1, 1998 or those which elected to be governed by this provision by filing a certificate of amendment with the Secretary of State’s office, § 604 is replaced by the following: “Subject to contrary provisions in the partnership agreement, a withdrawing partner is entitled to receive, within a reasonable time after withdrawal, the fair value as of the date of withdrawal of the interest in the limited partnership with respect to which the withdrawal has occurred.”

§ 606—Add “Subject to Sections 79-14-607 and 79-14-804,” at the beginning of § 606.

§ 607—Add “and liabilities as to which recourse of creditors is limited to specific property of the limited partnership” behind “their partnership interests”; replace “the fair value of partnership assets” with “the fair value of the limited partnership assets, provided that the fair value of any property that is subject to a liability as to which recourse of creditors is so limited shall be included in the limited partnership assets only to the extent that the fair value of the property exceeds this liability.”

§ 608—Replace “liabilities to creditors who extended credit to the limited partnership during the period the contribution was held by the partnership” with “liabilities which were in existence at the date of receipt of the return of contribution and have not been subsequently discharged.” (§ 608[a]).

§ 701—Replace § 701: “A partnership interest is personal property. A partner has no interest in specific limited partnership property.”

§ 702—Substitute “to share in such profits and losses, to receive such distribution or distributions, and to receive such allocation of income, gain, loss, deduction, credit or similar item to which the assignor would have been entitled” for “only the distribution to which the assignor would be entitled.”

§ 704—Add “and which could not be ascertained from the partnership agreement kept pursuant to Section 79-14-105” to the final sentence in subsection (b).

§ 801(3)—Add “or such lesser number as may be provided in the partnership agreement” at the end of subsection (3).

§ 802—Replace § 802: “On application by or for a partner the chancery court for the county in which the office of the limited partnership is located may decree dissolution of a limited partnership whenever any of the following occurs: (a) It is not reasonably practicable to carry on the business in conformity with the partnership agreement; or (b) The general partners have been guilty of or have knowingly countenanced persistent and pervasive fraud or abuse of authority or persistent unfairness toward any partner, or the property of the limited partnership is being misapplied or wasted by the general partners.”

§ 803—Replace § 803: “(a) Unless otherwise provided in the partnership agreement, the general partners who have not wrongfully dissolved a limited partnership or, if none, the limited partners, may wind up the limited partnership’s affairs; but the chancery court, upon cause shown, may wind up the limited partnership’s affairs upon application of any partner, his legal representative or assignee, and in connection therewith, may appoint a liquidating trustee or receiver.

(b) Upon dissolution of a limited partnership and until the filing of a certificate of cancellation as provided in Section 79-14-203, the persons winding up the limited partnership’s affairs may, in the name of, and for and on behalf of, the limited partnership prosecute and defend suits, whether civil, criminal or administrative, gradually settle and close the limited partnership’s business, dispose of and convey the limited partnership’s property, discharge the limited partnership’s liabilities, and distribute to the partners any remaining assets of the limited partnership, all without affecting the liability of the limited partners.

(c) Unless otherwise provided in the partnership agreement, the limited partners winding up the affairs of the limited partnership pursuant to this section shall be entitled to reasonable compensation.”

§ 902—Substitute “shall deliver to the office of the Secretary of State for filing one (1) original of an application for registration as a foreign limited partnership” for “shall submit to the Secretary of State, in duplicate, an application for registration as a foreign limited partnership.”

§ 902(6)—Substitute “mailing and street address” for “business address.”

§ 902(7)—Substitute “mailing and street address” for “address” (§ 902[7]); delete “capital” and “or withdrawn” (§ 902[7]).

§ 903—Substitute “meets the requirements of this article” for “conforms to law”; replace § 903(a)(3): “(3) Return a copy to the person who delivered it for filing or his representative.” (79-14-903[3]). Subsection (b) omitted.

§ 904—Add “or the abbreviation ‘L.P.’ ” behind “the words ‘limited partnership’ ”.

§ 905—Substitute "shall promptly deliver" for "shall promptly file"; replace "signed and sworn to by a general partner" with "signed by a general partner"; add "together with a fee as set forth in Section 79-14-1104" to the end of the section.

§ 906—Replace "by filing with the Secretary of State a certificate of cancellation signed and sworn to by a general partner" with "by delivering to the office of the Secretary of State for filing a certificate of cancellation signed by a general partner or such other person as may be authorized to do so under the laws of the state under which the foreign limited partnership is organized."

§ 1004—Add the following sentence to the end of § 1004: "If those proceeds are insufficient to reimburse plaintiff's reasonable expenses, the court may direct that any such award of plaintiff's expenses, or a portion thereof, be paid by the limited partnership."

§ 1102—Substitute "the Mississippi Limited Partnership Act" for "the Uniform Limited Partnership Act."

§ 1104—This section is replaced with schedule of filing fees as follows: $5 for resignation of registered agent; $25 for reservation of partnership name, change of registered agent's address, certificate of dissolution, certificate of cancellation, restated certificate of limited partnership or amended and restated certificate of limited partnership, certificate of withdrawal, and certificate of cancellation of registration of foreign limited partnership; $50 for certificate of limited partnership, amendment to certificate of limited partnership, and certificate correcting application for registration of foreign limited partnership; $250 for application for registration of foreign limited partnership.

Out-of-State Partnerships.

(79-13-1101, et seq. and 79-14-901, et seq.).

3 BUSINESS REGULATION AND COMMERCE

3.01 BANKS AND BANKING:

Uniform Commercial Code adopted, effective Mar. 31, 1968. See topic 3.09 Commercial Code.

Regulated By.

State Board of Banking Review and Dept. of Banking and Finance. Banking Act found at 81-3-1, et seq. Provisions relating to banking found in 81-5-1, et seq. Savings Association law is found at 81-12-1, et seq. Credit unions governed by 81-13-1, et seq. Savings Bank law is found at 81-14-1, et seq. Provisions relating to banks and other institutions engaging in trust business found in 81-27-1.001, et seq.

Stockholders.

Stockholder individually liable, for benefit of depositors, to extent of par value of his stock in addition to his stock, unless bank was open for business on Apr. 2, 1934, or was organized thereafter, and is a member of the FDIC or any similar agency established by U.S. laws. (81-5-27).

Holders of preferred stock not individually liable for debts, contracts, or engagements of bank or liable to assessment to restore impairment of capital. (81-5-23).

Deposits.

Joint deposits may be received and paid out to either depositor, whether or not the other is living. Intention that title vest in survivor presumed if deposit made under certain terms. (81-5-63). Deposits of minors or persons under disability may be received and paid out on their checks. (81-5-59).

Deposit not exceeding $12,500 may be paid to nearest relative of deceased depositor as defined in 91-7-322(2) without necessity of administration. (81-5-63).

Unclaimed Deposits.

Escheat in accordance with Uniform Disposition of Unclaimed Property Act, adopted with minor variations. Time period for presumption of abandonment decreased from seven years to five years. (89-12-1, et seq.). See category 21 Property, topic 21.01 Absentees, subhead Escheat.

Collections.

Uniform Commercial Code adopted, effective Mar. 31, 1968. (75-1-101, et seq.).

Bank Holding Companies and Financial Holding Companies.

Operation of multibank holding companies permitted under certain restrictions. Bank holding company prohibited from acquiring stock of bank in Mississippi if it would control banks in Mississippi having more than 25% of total deposits of all offices of commercial banks, savings banks, savings and loans, and credit unions. (81-7-19).

Geographic Expansion.

(81-5-85; 81-5-87; 81-7-1–81-7-23, 81-8-3).

Trust Companies.

Bank may: receive money or real or personal property in trust; execute trusts committed to it by any person, corporation, or court of record; act as agent for investment of money, management of property or issuance, registration, transfer, or countersigning stocks, bonds, or other evidences of indebtedness of any corporation, association, municipality, state, county, or public authority; act as executor, administrator, guardian of infant or mentally ill person, agent or attorney in fact, commissioner for sale of real or personal property, assignee, receiver, trustee in mortgage or bond issue, or in any fiduciary capacity authorized by law; accept trust funds and other property on agreed terms and pay or deliver same to owners or beneficiaries according to terms of trust agreement; execute bond for protection of any trust or trust estate being administered by it. These powers may be exercised by bank previously doing business under state laws, without amendment of charter, after obtaining written consent of Commissioner of Banking and Consumer Finance. (81-5-33).

Banks may accept accounts in name of administrator, executor, guardian, trustee, or other fiduciary. (81-5-34).

Assets held in fiduciary capacity must be segregated from general assets, and separate books and records kept. Trust funds held awaiting investment or distribution must be in separate account and not used in bank's business, unless bank has set aside in trust dept. bonds of U.S. or State of Mississippi or subdivision thereof, market value of which must always be not less than 10% in excess of trust funds exclusive of funds insured by FDIC. (81-5-33).

Bank may not invest trust funds in securities purchased from itself, except under Uniform Common Trust Fund Act, or lend trust funds to any director, officer, or employee. (81-5-33).

Trust dept. may not receive deposits subject to check or deposit of checks or other items for collection or exchange purposes. (81-5-33).

Provisions governing multistate, state and limited liability trust institutions found in 81-27-1.001, et seq.

Uniform Common Trust Fund Act.

In effect. (81-5-37).

Foreign Banks.

Foreign banking corporations or foreign mutual savings banks not organized under laws of this state may maintain bank accounts, hold mortgages on real property, collect debts, hold securities, sue or be sued within state and service of process may be performed by service upon any custodian or agent appointed within state. If no such agent has been appointed, then Secretary of State is appointed as duly authorized agent of nonresident banking corporations. Venue of any legal action must be in county of residence of plaintiff, except where land is involved, and then venue must be in county in which land is located. (81-5-41; 81-5-43). As to right of foreign bank or trust company to act as executor, administrator, guardian, or trustee, see categories 13 Estates and Trusts, topics Executors and Administrators, Trusts; Family, topic Guardian and Ward.

State banking board approval required for bank organized under laws of foreign country to transact business in state; upon approval, such foreign bank subject to state banking laws; limited to transactions clearly related to foreign business and financing international commerce; unable to exercise fiduciary power and unable to receive deposits but may maintain for account of others credit balances incidental to international transactions. Application fee minimum $500, maximum $2,500. (81-1-115).

3.02 BILLS AND NOTES:

Uniform Commercial Code adopted, effective Mar. 31, 1968. (75-1-101). See topic 3.09 Commercial Code.

Special Requirements.

Form of negotiable instruments. (75-3-104).

Judgment Notes.

Authority in notes to confess judgment prohibited. (11-7-187).

Attorney Fees.

Cost of collection and attorney fee clauses enforceable. (67 Miss. 60, 6 So. 615 [1889]).

Special Defenses.

Enforcement of instruments. (75-3-302, 75-3-305, 75-3-306, 75-3-308). See topic 3.12 Consumer Protection.

3.03 BILLS OF LADING:

See topic 3.08 Carriers.

3.04 BILLS OF SALE:

See topic 3.23 Sales.

3.05 BLUE SKY LAW:

See topic 3.24 Securities.

3.06 BROKERS:

A privilege tax license required of a broker before commencing business. No statutory lien provided for.

Uniform Commercial Code adopted, effective Mar. 31, 1968. See topic 3.09 Commercial Code.

Licenses.

Licensing requirements contained in 81-19-1, et seq. Commissioner of Banking and Consumer Finance regulates brokers. (81-19-17). License application fee is $300. (81-19-9). Surety bond in amount of $25,000 required. (81-19-9). Separate license required for each business location of broker. (81-19-13). Agreements to find and obtain consumer loan for borrower must be in writing. (81-19-21). Certain activities prohibited, violation of which constitute felony. (81-19-23).

Bond.

Surety bond in amount of $25,000 required. (81-19-9).

Real Estate Brokers.

Licensing requirements contained in 73-35-1, et seq.

Mississippi Real Estate Comm. regulates brokers. (73-35-5). Brokers must be at least 21 years old, legally domiciled in Mississippi at time of application, and satisfy education, exam, and experience requirements. (73-35-7). License application fee is $150. Separate fees apply to salespersons and other activities. (73-35-17). Nonresident broker must be licensed broker in another state, affiliated with Mississippi broker, or apply for Mississippi broker’s license and maintain office in Mississippi. (73-35-8). Limitations apply to brokerage activities by partnerships, corporations, and associations. (73-35-7).

3.07 BULK SALES:

See topic 3.09 Commercial Code; also category 8 Debtor and Creditor, topic 8.08 Fraudulent Sales and Conveyances.

3.08 CARRIERS:

Public Service Comm. supervises common carriers. (77-1-1, et seq.). Mississippi Dept. of Transportation enforces railroad laws, except rates. (65-1-2). Uniform Commercial Code adopted. (75-1-101, et seq.). See topic 3.09 Commercial Code.

Licenses.

Permits generally required for all carriers. (77-7-49 to 77-7-61).

Rebates are unlawful, as are free or reduced rate passes. (77-9-15, 77-7-311).

Each railroad operating in state pays pro rata share of $201,000 per year based on miles of track. (77-9-493).

Rates.

Common carrier must furnish list of tariffs to Public Service Comm. (77-7-211). Comm. shall revise, fix, and regulate all tariffs not subject to exclusive congressional regulation. Interstate rates advisory only. Factors to be considered when fixing rates. (77-7-221).

Discrimination.

Rate discrimination prohibited. (77-7-311).

Limiting Liability.

Carrier who issues bill of lading, whether negotiable or not, must exercise reasonable care. Damages may be limited to value stated in documents. No limitation applies to conversion for carrier's own use. (75-7-309).

Bills of Lading.

Provisions and obligations found at 75-7-101, et seq.

Liens.

Carrier has lien on goods covered by bill of lading for subsequent storage and transportation charges and for necessary expenses. Lien effective against consignor or other person entitled to goods. (75-7-307).

3.09 COMMERCIAL CODE:

Uniform Commercial Code adopted and found at 75-1-101 et seq. of Mississippi Code. 1967 Official Text adopted effective Apr. 1, 1978. (75-11-101). Section numbers same as in 1967 Official Text. Revised Article 9 section numbers same as in 1972 Official Text.

Material variations and alternatives adopted from 1972 Official Text, as amended, (found in Uniform and Model Acts section) are as follows:

§ 1-105(1)—Law of Mississippi always governs rights and duties of parties with regard to disclaimers of implied warranties of merchantability or fitness or necessity for privity of contract to maintain action for breach of warranties notwithstanding agreement of parties to contrary.

§ 2-314(1)—Phrase "Unless excluded or modified (Section 2-316)" is omitted.

§ 2-314(3)—Phrase "Unless excluded or modified (Section 2-316)" is omitted.

§ 2-314(4)—Added new subsection providing that there is no implied warranty that certain livestock are free from sickness or disease at time of sale.

§ 2-314(5)—Added computer exclusion. See § 2-314(1). Allows express disclaimer or express modification of any implied warranties of merchantability or any express limitation of remedies for breach of warranties concerning computer hardware, software, and services sold between merchants.

§ 2-315—Phrase "Unless excluded or modified under the next section" is omitted. Added new sentence providing that there is no implied warranty that certain livestock are free from sickness or disease at time of sale. Added new sentence providing that this section does not prohibit express disclaimer or express modification of implied warranties of fitness for particular purpose or express limitation of remedies for breach of warranties concerning computer hardware, software, and services sold between merchants.

§ 2-315.1—Added new section limiting exclusion or modification of warranties to consumers.

§ 2-316—Omitted. There shall be no limitation of remedies or disclaimer of liability as to any implied warranty of merchantability or fitness for particular purpose.

§ 2-318—1966 Official Optional Amendment Alternative A adopted. (See 11-7-20.)

§ 2-615(a)—Inserted between "(c)," and "is" is following language: "or failure to take delivery as provided for under the contract on the part of a buyer who complies with paragraph (d),".

§ 2-615(d)—Following is added as paragraph (d): "The buyer must notify the seller seasonably that there will be a delay or total inability to take delivery, and where practicable, state the contingency which has occurred causing such delay or inability."

§ 2-617—New section adopted as follows: "Force majeure—Deliveries may be suspended by either party in case of Act of God, war, riots, fire, explosion, flood, strike, lockout, injunction, inability to obtain fuel, power, raw materials, labor, containers, or transportation facilities, accident, breakage of machinery or apparatus, national defense requirements, or any cause beyond the control of such party, preventing the manufacture, shipment, acceptance, or consumption of a shipment of the goods or of a material upon which the manufacture of the goods is dependent. If, because of any such circumstance, seller is unable to supply the total demand for the goods, seller may allocate its available supply among itself and all of its customers, including those not under contract, in an equitable manner. Such deliveries so suspended shall be cancelled without liability, but the contract shall otherwise remain unaffected."

§ 2-719—Following has been added: "(4) Any limitation of remedies which would deprive the buyer of a remedy to which he may be entitled for breach of an implied warranty of merchantability or fitness for a particular purpose shall be prohibited. The provisions of this subsection do not apply to computer hardware, computer software, and services performed on computer hardware and computer software, which are sold between merchants."

§ 2-725(1)—Six year limitations period for breach of contract. Second sentence in subsection is deleted.

§ 2A-101—Art. 2A adopted, effective July 1, 1994, except as noted. Gender neutral language not adopted. "Articles" are referred to as "Chapters."

§ 2A-103(1)(e)—Optional language adopted; figure $25,000 inserted.

§ 2A-103(1)(g)—Definition of "finance lease" expanded.

§ 2A-104(1)(a)—Text reads "Certificate of title statute of this state, including, but not limited to, those pertaining to motor vehicles in Chapter 21, Title 63, Mississippi Code of 1972;".

§ 2A-201(1)(a)—Words "One Thousand Dollars" are inserted before figure, which is placed in parentheses, i.e., ($1,000).

§ 2A-209(4)—Lessee retains rights against supplier under agreement.

§ 2A-214—Not adopted.

§ 2A-216—Alternate A adopted.

§ 2A-303(2)—Text reads "Except as provided in Subsection (3) of Section 75-9-705." Omits "Except as provided in Subsection (3) and Section 9-407."

§ 2A-307(2)—Perfection before lease became enforceable.

§ 2A-311—Priority subject to subordination.

§ 2A-407(3)—Validity of lease terms which make lessee's promises irrevocable and independent upon acceptance not affected.

§ 2A-508(1)(d)—Exercise any other rights or pursue any other remedy in lease.

§ 2A-517(2) & (3)—Lessee may revoke acceptance of lot or commercial unit if lessor defaults under lease and default substantially impairs value of lot or unit; and lessee may revoke lot or commercial unit because of other defaults of lessor if lease so provides.

§ 2A-523(1)(f), (2), & (3)(a) & (b)—Lessor may exercise rights and remedies provided in lease; incidental damages allowed under certain conditions.

§ 2A-532—Lessor's rights to residual interest.

§ 3-101 et seq.—1990 Revision of Art. 3 adopted, effective Jan. 1, 1993.

§ 3-204(a)—Provision added at end of subsection providing for blanket endorsement of instruments representing student loans and loans insured by U.S. Secretary of Education.

§ 3-415(a)—1993 Amendment, adding subsection (e) to those subsections to which subsection (a) is subject to, not adopted.

§ 4-106(b)—Alternate B is adopted.

§ 4A-101 et seq.—Art. 4A adopted, effective July 1, 1991.

§ 6-101 et seq.—Art. 6 repealed, effective July 1, 1995.

§ 9-102(a)(44)—Goods defined so as to include farm raised fish and marine vessels.

§ 9-102(a)(55)—Mortgage defined so as to mean and include deed of trust.

§ 9-102(a)(64A)—Following language is adopted: " 'Production-money crops' means crops that secure a production-money obligation incurred with respect to the production of those crops."

§ 9-102(a)(64B)—Following language adopted: " 'Production-money obligation' means an obligation of an obligor incurred for new value given to enable the debtor to produce crops if the value is in fact used for the production of the crops."

§ 9-102(a)(64C)—Following language is adopted: " 'Production of crops' includes tilling and otherwise preparing land for growing, planting, cultivating, fertilizing, irrigating, harvesting and gathering crops, and protecting them from damage or disease."

§ 9-103A—Following language is adopted: " 'Production-money crops'; 'production-money obligation'; 'production-money security interest'; 'burden of establishing';

"(a) A security interest in crops is a production-money security interest to the extent that the crops are production-money crops.

"(b) If the extent to which a security interest is a production-money security interest depends on the application of a payment to a particular obligation, the payment must be applied:

"(1) In accordance with any reasonable method of application to which the parties agree;

"(2) In the absence of the parties' agreement to a reasonable method, in accordance with any intention of the obligor manifested at or before the time of payment; or

"(3) In the absence of an agreement to a reasonable method and a timely manifestation of the obligor's intention, in the following order:

"(A) To obligations that are not secured; and

"(B) If more than one (1) obligation is secured, to obligations secured by production-money security interests in the order in which those obligations were incurred.

"(c) A production-money security interest does not lose its status as such, even if:

"(1) The production-money crops also secure an obligation that is not a production-money obligation;

"(2) Collateral that is not production-money crops also secures the production-money obligation; or

"(3) The production-money obligation has been renewed, refinanced, or restructured.

"(d) A secured party claiming a production-money security interest has the burden of establishing the extent to which the security interest is a production-money security interest."

§ 9-109(d)(13)—Following language is adopted: "To a transfer by this state or a governmental unit of this state."

§ 9-311(a)(2)—Local statutes are referred to as follows: "Sections 63-21-1 through 63-21-77 (the Mississippi Motor Vehicle and Manufactured Housing Title Law) or a certificate of title issued pursuant to Sections 59-25-1 through 59-25-17 (Certificates of Title for Boats and Other Vessels)[.]"

§ 9-313(h)(2)—Following language is adopted as subsection (2): "A secured party does not relinquish possession, even if a delivery under subsection (h) violates the rights of a debtor. A person to which collateral is delivered under subsection (h) does not owe any duty to the secured party and is not required to confirm the delivery to another person unless the person otherwise agrees or law other than this article otherwise provides."

§ 9-313(i)—Language adopted as § 9-313(h)(2).

§ 9-320(f)—Following language is adopted: "Notwithstanding subsection (a), a secured party may not enforce a security interest in farm products against a buyer, commission merchant or selling agent who purchases or sells farm products in the ordinary course of business from or for a person engaged in farming operations unless the secured party has complied with the regulations issued by the Secretary of [S]tate under subsection (g) or unless the buyer, commission merchant or selling agent has received from the secured party or seller written notice of the security interest which complies with the requirements of Section 1324 of the Food Security Act of 1985, as now enacted or as hereafter may be amended."

§ 9-320(g)—Following language is adopted: “The Secretary of State shall issue regulations implementing a central filing system relating to farm products which conforms with the requirements of Section 1324 of the Food Security Act of 1985, as now enacted or as hereafter may be amended. The Secretary of State is authorized to set reasonable fees to defray the costs of the central filing system established pursuant to this section. At least thirty (30) days prior to the promulgation of such regulations or any amendments thereto, the Secretary of State shall give notice of such regulations and/or amendments to all licensed attorneys in the State of Mississippi.”

§ 9-324A—This section is added and is titled “Priority of production-money security interests and agricultural liens.” The text is as follows: “(a) Except as otherwise provided in subsections (c), (d), and (e), if the requirements of subsection (b) are satisfied, a perfected production-money security interest in production-money crops has priority over a conflicting security interest in the same crops and, except as otherwise provided in Section 75-9-327, also has priority in their identifiable proceeds.

“(b) A production-money security interest has priority under subsection (a) if:

“(1) The production-money security interest is perfected by filing when the production-money secured party first gives new value to enable the debtor to produce the crops;

“(2) The production-money secured party sends an authenticated notification to the holder of the conflicting security interest not less than ten (10) or more than thirty (30) days before the production-money secured party first gives new value to enable the debtor to produce the crops if the holder had filed a financing statement covering the crops before the date of the filing made by the production-money secured party; and

“(3) The notification states that the production-money secured party has or expects to acquire a production-money security interest in the debtor’s crops and provides a description of the crops.

“(c) Except as otherwise provided in subsection (d) or (e), if more than one (1) security interest qualifies for priority in the same collateral under subsection (a), the security interests rank according to priority in time of filing under Section 75-9-322(a).

“(d) To the extent that a person holding a perfected security interest in production-money crops that are the subject of a production-money security interest gives new value to enable the debtor to produce the production-money crops and the value is in fact used for the production of the production-money crops, the security interests rank according to priority in time of filing under Section 75-9-322(a).

“(e) To the extent that a person holds both an agricultural lien and a production-money security interest in the same collateral securing the same obligations, the rules of priority applicable to agricultural liens govern priority.”

§ 9-334(j)—Not adopted.

§ 9-406(j)—Rather than listing statutes, rules and regulations, this subsection provides: “This section prevails over any inconsistent provision of an existing or future statute, rule or regulation of this state unless the provision is contained in a statute of this state, refers expressly to this section, and states that the provision prevails over this section.”

§ 9-408(e)—This subsection does not list any statutes, rules or regulations, but provides: “This section prevails over any inconsistent provision of an existing or future statute, rule or regulation of this state unless the provision is contained in a statute of this state, refers expressly to this section, and states that the provision prevails over this section."

§ 9-512—Alternative B adopted.

§ 9-518—Alternative B adopted.

§ 9-519(f)—Alternative B adopted.

§ 9-522(a)—Alternative B adopted.

§ 9-523(f)—Following language is included at the end of subsection (f): "This subsection shall apply only to records filed in a filing office described in Section 75-9-501(a)(2)."

§ 9-525(a)(1)—"Ten Dollars ($10)" inserted in blank.

§ 9-525(a)(2)—"Thirteen Dollars ($13)" inserted in blank.

§ 9-525(a)(3)—"Eight Dollars ($8)" inserted in blank.

§ 9-525(b)(1)—"Thirteen Dollars ($13)" inserted in blank.

§ 9-525(b)(2)—"Ten Dollars ($10)" inserted in blank.

§ 9-525(c)—Alternative B adopted and "Four Dollars ($4)" inserted in blank.

§ 9-525(d)(1)—Following language is adopted: "Five Dollars ($5) if the request is communicated in writing on the standard form prescribed by the Secretary of State[.]"

§ 9-525(d)(2)—Following language adopted: "Ten Dollars ($10) if the request is communicated in writing and is not in the standard form prescribed by the Secretary of State[.]"

§ 9-525(d)(3)—Following language adopted: "Three Dollars ($3) if the request is communicated by another medium authorized by filing-office rule; and".

§ 9-525(d)(4)—Following language adopted: "An additional fee of Two Dollars ($2) shall be paid by the requesting party for each financing statement listed on the filing officer's certificate, the aggregate of which shall be billed to the requesting party at the time the filing officer's certificate is issued."

§ 9-623(b)(1)—Sentence expanded to read: "Fulfillment of all obligations secured by the collateral then due or past due (excluding any sums that would not be due except for an acceleration provision)[.]"

§ 9-625(e)(3)—Insert the following at end of sentence: "and fails to file a termination statement with respect to the filed record within ten (10) days after receiving an authenticated demand by the debtor, consumer obligor, or person named as a debtor in the filed record[.]"

§ 9-626—Subsection (a) not labeled as such. Language "other than a consumer transaction" omitted. Subsection (b) not adopted.

§ 9-701—Following language is adopted: "Definitions. (1) References in Part 7 to 'this act' refer to the legislative enactment by which this part is added to Article 9 of the Uniform Commercial Code."

"(2) References in this part to 'former Article 9' are to Article 9 found in Chapter 9 of

Title 75 as in effect on December 31, 2001."

§ 10-101—Effective date Mar. 31, 1968.

§ 10-102—Several statutes specifically repealed.

§ 10-104—Laws not repealed.

§§ 11-101 to 11-108—Transition provisions adopted.

1977 Official Amendments.

Adopted.

1990

Adopted 1990 Revision of Art. 3, 1990 Amendments to Art. 4, new Art. 4A (Funds Transfers).

1995

Repealed Article 6, without adopting 1989 revision of Article 6.

1996

Adopted 1995 Revision of Art. 5; 1994 Revision of Article 8.

2002

Adopted 2000 Revision of Art. 9 (effective Jan. 1, 2002).

2007

Adopted 2003 Revision of Art. 7.

Filing Fees.

See category 10 Documents and Records, topic 10.04 Records, subhead Filing Under Commercial Code.

See also topics: Banks and Banking, Bills and Notes, Brokers, Carriers, Contracts, Factors, Frauds, Statute of, Sales, Securities, Warehousemen; categories Business Organizations, topic Corporations; Civil Actions and Procedure, topic Limitation of Actions; Debtor and Creditor, topics Assignments, Fraudulent Sales and Conveyances, Liens, Pledges; Documents and Records, topics Records, Seals; Mortgages, topic Chattel Mortgages.

3.10 CONDITIONAL SALES:

See topic 3.23 Sales.

3.11 CONSIGNMENTS:

See topic 3.13 Factors.

3.12 CONSUMER PROTECTION:

Unfair Methods of Competition and Unfair or Deceptive Acts in Conduct of Trade.

Office of Consumer Protection established in office of Attorney General, who may bring action for temporary or permanent injunction in name of State for violations of Act. (75-24-1 and 75-24-9). Certain members of media exempt when unaware of false nature of advertisement and did not have financial interest in advertised product or service. (75-24-7). Private actions for recovery permitted if plaintiff has made reasonable effort to resolve claims through informal dispute resolution program approved by Attorney General. (75-24-15). Both civil and criminal penalties apply. (75-24-19 and 75-24-20). Special penalties apply for price violations in time of emergency. (75-24-25). District and county attorneys have duty to enforce act and assist Attorney General upon request. (75-24-21).

Door-to-Door Sales.

Buyer has three days to cancel home solicitation consumer credit sale. (75-66-1 et seq.). Uniform Deceptive Trade Practices Act not adopted.

Franchise and Pyramid Sales.

Franchise companies must not represent to prospective franchise participants amount of past or future earnings unless representations of amount are of a substantial number of participants in same area and accurately reflect earnings of those having circumstances similar to those of prospective participants. (75-24-55). Grantor of franchise must give 90 day notice before termination of franchise agreement. (75-24-53).

Pyramid sales schemes prohibited and sales contracts for participations in these schemes void. (75-24-51 et seq.).

Rental-Purchase Agreement Act requires numerous disclosures by lessor to consumers as well as certain provisions in rental-purchase agreements. Also requires certain disclosures in advertisements for rental-purchase agreements. (75-24-151 et seq.).

“Unsolicited goods” statute enacted. (75-65-101).

Lemon Law.

Motor Vehicle Warranty Enforcement Act adopted. (63-17-151 et seq.). Vehicle Service Contracts regulated. (83-65-101 through 83-65-123).

Plain Language.

No “plain language” statute.

3.13 [RESERVED]

3.14 FACTORS:

Person transacting business as trader, with addition of words “agent,” “factor,” “and company,” or “& Co.” or like words, must disclose identity of principal or partner or will be liable for his debts. This does not apply to vending machine or container plainly designated as property of another. (15-3-7).

Uniform Commercial Code adopted, effective Mar. 31, 1968. (75-1-101, et seq.). See topic 3.09 Commercial Code.

License Requirements.

See topic 3.09 Commercial Code.

Liens.

See topic 3.09 Commercial Code.

Consignment Agreements.

See topic 3.09 Commercial Code.

3.15 FRANCHISES:

See topic 3.12 Consumer Protection, subhead Franchise and Pyramid Sales.

Municipalities cannot grant exclusive franchises for use of public places and shall not grant any franchise without compensation or for more than 25 years. (21-27-1).

Uniform Franchise and Business Opportunities Act.

Not adopted.

3.16 FRAUDS, STATUTE OF:

Action shall not be brought to charge defendant or other party:

(A) Upon any special promise to answer for debt or default or miscarriage of another person; (B) upon any agreement made upon consideration of marriage, mutual promises to marry excepted; (C) upon any contract for sale of lands, tenements or hereditaments, or making of any lease for longer than one year; (D) upon any agreement which is not to be performed within 15 months; or (E) upon any special promise by executor or administrator to answer any debt or damage out of his own estate. (15-3-1). For writing requirements for lease contracts see UCC Art. 2A Leases. (75-2A-201, et seq.).

Uniform Commercial Code adopted, effective Mar. 31, 1968. See topic 3.09 Commercial Code.

Contracts of Sale.

Contract for sale of personal property not including goods, securities, or security agreements which exceeds $5,000 must be in writing, state price, reasonably identify subject matter, and contain signature of party against whom enforcement is sought. (75-1-206). Contracts for sale of goods for price of $500 or more must be in writing and signed by party against whom enforcement is sought. (75-2-201).

Part Performance.

Mississippi does not recognize part performance acceptance in contracts for sale of land. (187 So. 2d 316).

3.17 INTEREST:

Maximum Rate.

Legal rate 8% (75-17-1[1]); contract rate: Yield not to exceed greater of 10% or 5% per annum above discount rate on 90-day notes at Federal Reserve Bank, excluding surcharge. (75-17-1[2]). On contracts and obligations exceeding $2,500, partnerships, joint ventures, religious societies, unincorporated associations and corporations (profit or nonprofit) can pay up to greater of 15% or 5% per annum above discount rate on 90-day note at Federal Reserve Bank. (75-17-1[3]).

Residential real property loan or mortgage rate: Yield may not exceed greater of 10% per annum or 5% per annum above index of market yields of Monthly Twenty-Year Constant

Maturity Index of Long-Term U.S. Government Bond Yields. (75-17-1[4]). Notwithstanding any law to contrary, borrower and lender may contract for any finance charge agreed to in writing if principal balance to be repaid originally exceeds $2,000. (75-17-1[5]).

Retail seller, lender or issuer of credit card may charge finance charge maximum of 1¾ % per month on revolving charge agreement. (75-17-19[1]). Credit card issuer may charge annual fee of up to $12. Any issuer charging annual fee may receive no more than 1½% per month interest on account. (75-17-19[2]). No financing charges until one month after first billing statement date or purchases charged. (75-17-19[4]).

Late payment charge up to statutory limit is not interest. (75-17-27).

Judgments bear interest at rate of debt on which judgment or decree rendered. Other judgments bear interest at per annum rate set by judge from date determined by judge to be fair but not before date of complaint. (75-17-7).

Open Accounts.

Retail seller, lender or issuer of credit card may charge maximum of 1¾% per month on revolving charge agreement. (75-17-19[1]). Credit card issuer may charge annual fee of up to $12. Any issuer charging annual fee may receive no more than 1½% per month interest on account. (75-17-19[2]). No financing charges until one month after first billing statement date or purchases charged. (75-17-19[4]).

Retail seller may charge finance charges for closed end credit sales of goods, tangible property or services, made other than under revolving charge agreement: 24% on portion of balance up to $2,500; and 21% on balance over $2,500. (75-17-19[5]). Interest in excess of lawful rates may be received on any debt under which principal balance to be repaid originally exceeds: $125,000 from July 1, 1986 through June 30, 1987; $75,000 from July 1, 1987 through June 30, 1988; $25,000 from July 1, 1988 through June 30, 1994; $2,000 after June 30, 1994. As to these debts, any assertion of claim or defense of usury is invalid. (75-17-1[5]).

Small Loans.

Notwithstanding above rates, licensees under Small Loan Regulatory Law (75-67-101 et seq.) and Small Loan Privilege Tax Law (75-67-201 et seq.), may charge following maximum finance charges: 36% on amount up through $1,000; 33% on amount between $1,000 and $2,500; 24% on amount between $2,500 and $5,000; and 14% on amount greater than $5,000. However, above rates for amounts up to $1,000 may be increased by number of percentage points by which discount rate, excluding surcharge, on 90-day notes at Federal Reserve Bank, exceeds 8%; for amounts above $1,000, rates may be increased by number of percentage points by which same discount rate exceeds 10%. (75-17-21). Lender entitled to rely upon most recent discount rate announced by Commissioner of Banking and Consumer Finance. (75-17-33). As alternative, licensee may contract for and receive yield up to 18% on loans of at least $25,000. (75-17-21[2]). Closing fee for loans of $10,000 or less is limited to 4% of total payments or $25, whichever is greater; for loans greater than $10,000, closing fee cannot exceed $500. (75-17-21[3]). Late payment charges limited; not considered finance charges. (75-17-27).

Special finance charge rates for manufactured moveable homes. (75-17-23).

Finance charge defined. (75-17-25).

Maximum percentages for prepayment penalties on real estate loans. (75-17-31).

Special finance charge rates for motor vehicles. (63-19-43).

See also topic 3.01 Banks and Banking.

Usury.

Forfeits all interest and finance charges if rate exceeds maximum authorized by law by more than 100%, and any amount paid, principal or interest, may be recovered by suit. (75-67-119). Finance charges contracted for or received before July 1, 1974, shall not be unlawful if finance charge conforms to provisions of c. 564, Laws of 1974, or other law then in effect. (75-17-17). Person willfully collecting finance charges in excess of maximum permitted guilty of misdemeanor and subject to fine of not more than $1,000. (75-67-119). Each revolving charge account on which excess finance charge collected constitutes separate offense. (75-17-13).

3.18 INFORMATION TECHNOLOGY, INTERNET AND NEW MEDIA:

Computer Crimes.

Regulated by 97-45-1, et seq.

Accessing computer system or network with intent to defraud or obtain money, property or services by use of fraudulent conduct punishable by fine of not more than $1,000 and/or imprisonment of up to six months. When damage or attempted damage $500 or greater, offender punished by fine of not more than $10,000 and/or imprisonment for not more than five years. (97-45-3).

Denial of use or access to authorized computer user, or use or disclosure to another of codes, passwords, or other means of access, punishable by fine of not more than $1,000 and/or by imprisonment for not more than six months. When damage more than $100, punishment may be fine of not more than $10,000 and/or imprisonment for not more than five years. (97-45-5).

Modification or destruction of computer equipment punishable by fine of not more than $1,000 or by imprisonment for not more than six months, or both. When damage more than $100, punishment may be fine of not more than $10,000 and/or imprisonment for not more than five years. (97-45-7).

Destruction or modification, or disclosure, use, copying, taking, or accessing of intellectual property, as defined in 97-45-1, punishable by fine of not more than $1,000, or by imprisonment for not more than six months, or both. When damage more than $100, punishment may be fine of not more than $10,000 or imprisonment for not more than five years, or both. (97-45-9).

Digital Signatures.

Governed by Uniform Electronic Transactions Act. (75-12-1 through 75-12-39).

Government Agencies.

Statutes governing creation and retention of electronic records by governmental agencies. (75-12-33 through 75-12-37).

3.19 LICENSES, BUSINESS AND PROFESSIONAL:

Privilege license varying as to character of business and amount invested required in almost all instances.

Commercial Travelers.

(63-1-82, et seq.).

Collection Agencies.

No legislation. See generally 27-15-1, et seq. and 27-17-1, et seq.

Health and Medical Licenses.

See category 15 Health, topic 15.08 Licensure and Certification. Licensure of chiropractors governed by 73-6-1, et seq. Licensure of dentists governed by 73-9-1, et seq. Licensure of dieticians governed by 73-10-1, et seq. Licensure of nurses governed by 73-15-1, et seq. Licensure of optometry and optometrists governed by 73-19-1, et seq. Licensure of pharmacists governed by 73-21-69, et seq. Licensure of physical therapists governed by 73-23-31, et seq. Licensure of physicians governed by 73-25-1, et seq. Licensure of physician assistants governed by 73-26-1, et seq. Licensure of podiatrists governed by 73-27-1, et seq. Licensure of psychologists governed by 73-31-1, et seq. Licensure of respiratory care practitioners governed by 73-57-1, et seq. Licensure of speech pathologists and audiologists governed by 73-38-1, et seq. Licensure of professional massage therapists governed by 73-67-1, et seq.

3.20 MONOPOLIES, RESTRAINT OF TRADE AND COMPETITION:

A trust or combine is a combination, contract, understanding or agreement, expressed or implied, between two or more persons, corporations, firms, or associations of persons, or between one or more of either with one or more of the others: (a) to restrain trade; (b) to limit, increase or reduce price of commodity; (c) to limit, increase or reduce production or output of commodity; (d) to hinder competition in production, importation, manufacture, transportation, sale or purchase of commodity; (e) to engross or forestall commodity; (f) to issue, own or hold certificate of stock of any trust or combine; (g) to place control to any extent, of business or proceeds or earnings thereof, contrary to spirit and meaning of this chapter, in power of trustees, by whatever name called; (h) to enable or empower any other persons than themselves, their proper officers, agents and employees to dictate or control management of business; or (i) to unite or pool interests in importation, manufacture, production, transportation, or price of commodity; and is considered criminal conspiracy. (75-21-1).

Unfair Trade Practices.

Any corporation, individual, partnership, or association of persons, who shall: (a) Restrain, or attempt to restrain the freedom of trade or production; (b) monopolize or attempt to monopolize the production, control or sale of any commodity, or the prosecution, management or control of any kind, class or description of business; (c) engross or forestall, or attempt to engross or forestall any commodity; (d) destroy or attempt to destroy competition in manufacture or sale of commodity, by selling or offering same for sale at lower price at one place in this state than another, differences of freights and other necessary expenses of sale and delivery considered; or (e) destroy or attempt to destroy competition by rendering any service or manipulating, handling or storing any commodity for less price in one locality than in another, differences in necessary expenses of carrying on business considered; shall be deemed and held trust and combine, and shall be liable to penalties, fines, forfeitures, etc. (75-21-3).

Any corporation, individual, partnership, or association of persons who, intends to impede competitive sale of liquefied gases or appliances, or who accomplishes this result regardless of intent, by purchasing, or offering to purchase, such appliances of any consumer and obtaining exclusive right to serve or make sales to said consumer shall be deemed a trust or combine within meaning of section 75-21-3. (75-57-63).

3.21 NEGOTIABLE INSTRUMENTS:

See topic 3.02 Bills and Notes.

3.22 RESTRAINT OF TRADE:

See topic 3.20 Monopolies, Restraint of Trade and Competition.

3.23 SALES:

Uniform Commercial Code adopted. (75-1-101 thru 75-11-108). See topic 3.09 Commercial Code.

Contracts of Sale.

See topic 3.16 Frauds, Statute of.

Bills of Sale.

See topic 3.09 Commercial Code.

Product Liability.

No manufacturer or seller shall be liable for damages caused by product (except for commercial damages to product itself) if claimant does not prove by preponderance of evidence: (i) product was defective (manufacturing, warning, design, or express warranty, as defined); (ii) defective condition rendered product unreasonably dangerous; and (iii) defective condition proximately caused damages. Special provisions address inherent characteristics, failure to warn, assumption of risk, open and obvious, and design defect. Provides for manufacturer's indemnification of seller in certain circumstances, provided notice is given within 90 days. Common law defenses remain. Lack of privity is no defense. (11-1-63).

Retail Credit Sales.

No special restrictions. See topics 3.17 Interest and 3.12 Consumer Protection.

Consumer Protection.

See topic 3.12 Consumer Protection.

Bulk Sales.

See topic 3.09 Commercial Code.

Sales of Motor Vehicles.

See category 23 Transportation, topic 23.01 Motor Vehicles.

International Sales of Goods.

See Part V, Selected International Conventions.

3.24 SECURITIES:

Uniform Securities Act of 2002 adopted, cited as “Mississippi Securities Act of 2010.” (75-71-101, et seq.). New Act will take effect Jan. 1, 2010.

Uniform Commercial Code adopted. (75-1-101, et seq.). See topic 3.09 Commercial Code.

Supervision.

Secretary of State, Jackson, MS 39205-0136. (75-71-102[1]).

Regulatory Powers of Supervising Authority.

Secretary of State may adopt forms, orders and rules to carry out law. Secretary of State may also issue interpretive opinions. (75-71-605; 75-71-107). Secretary of State also has broad civil enforcement powers, including ability to impose administrative penalties of up to $25,000. (75-71-603; 75-71-613).

Prerequisites to Sales or Offerings.

Registration of all securities required unless exempt or federal covered security. (75-71-301).

Securities to Which Act Applicable.

Follows Uniform Securities Act of 2002. (75-71-102[28]). Includes interests in limited partnerships.

Exempt Securities.

Follows Uniform Securities Act of 2002. (75-71-201). However, oil & gas lease interests are specifically exempted. (75-71-201[10]).

Exempt Transactions.

Substantially follows Uniform Securities Act of 2002. (75-71-202). Exempts isolated nonissuer transactions. (75-71-202[1]). Exempts nonissuer transactions by investment adviser with investments under management in excess of $100,000,000. (75-71-202[8]). Secretary of State may exempt other transactions by rule or order. (75-71-203).

Registration of Offerers.

Registration statement may be filed by issuer, any other person on whose behalf offering is to be made, or registered broker-dealer. (75-71-305[a]).

Registration of Securities.

Registration required of all securities unless exempt or federally covered security. (75-71-301). Person filing must pay fee. (75-71-310).

Registration by Notification.

No provision.

Registration by Qualification.

Registration statement requirements identical to Uniform Securities Act. (75-71-304). Secretary of State may require sending of prospectus before sale. (75-71-304[e]).

Filing of Federally Covered Securities.

Secretary of State may require filing of federal registration statement for security covered under § 18(b)(2) of Securities Act of 1933 before initial offer of security. (75-71-302[a][1]). After initial offer, all amendments to federal registration statement may be filed with Secretary of State. (75-71-302[a][2]).

Registration of Dealers.

Follows Uniform Securities Act of 2002. (75-41-401).

Brokers and Agents.

Substantially follows Uniform Securities Act of 2002. However, “dual agents” (individuals registered as agents and broker-dealers) must pay separate fees for registration (ct. § 410[d] of

Uniform Act). (75-71-410).

Licenses.

See subhead Registration of Dealers, supra.

Bonds.

Secretary of State may require broker-dealers, and investment advisers to post surety bonds in amounts prescribed. (75-71-411[e]).

Advertisements.

Secretary of State may require filing of prospectus, advertisement, sales literature or other advertisement. (75-71-504).

Civil Liability.

Follows Uniform Securities Act of 2002. (75-71-501 through 75-71-510).

Criminal Liability.

Follows Uniform Securities Act of 2002. (75-71-508).

Tender Offers.

Regulated by Mississippi Business Tender Offer Law of 1980. (75-72-101, et seq.). Nonexempt tender offers require filing of disclosure statement with Secretary of State. (75-72-105). Fraudulent, deceptive or manipulative acts in connection with tender offer prohibited. (75-72-109).

Franchising, Pyramid Sales, Etc.

Pyramid sales schemes prohibited. (75-24-51, et seq.).

Uniform Act for Simplification of Fiduciary Security Transfers adopted (91-11-1, et seq.).

Uniform TOD (Transfer on Death) Security Registration Act adopted, effective Mar. 24, 1997. (91-21-1, et seq.).

3.25 STATUTE OF FRAUDS:

See topic 3.16 Frauds, Statute of.

3.26 TRUST RECEIPT SECURITY:

See category 8 Debtor and Creditor, topic 8.15 Pledges.

3.27 WAREHOUSEMEN:

Uniform Commercial Code—Documents of Title adopted. (75-7-101, et seq.). See topic 3.09 Commercial Code.

Bonds.

Where goods are stored under statute requiring bond, receipt issued has effect of warehouse receipt. (75-7-201). Farm warehouses. (75-43-29, 75-44-35).

Licenses.

Application for license must be filed with Mississippi Dept. of Agriculture and Commerce. (75-43-3).

4 CITIZENSHIP

4.01 ALIENS:

Provisions for income tax on nonresidents found at 27-7-23; aliens prohibited from labor management functions (71-1-49); employment of unauthorized aliens prohibited; felony for person to accept or perform employment for compensation knowing or in reckless disregard that person is unauthorized alien while employed (71-11-3); provisions for unemployment compensation for aliens (71-5-511); worker's compensation benefits available under certain circumstances (71-3-27).

Property.

Resident aliens may acquire, hold, dispose of and transmit by descent lands, as citizens of state may. Nonresident aliens not permitted to acquire or hold lands. They may take lien on land to secure debt, and at sale to enforce debt may purchase same, but are not then permitted to hold land longer than 20 years. Nonresident aliens may acquire up to 320 acres of land for industrial development and five acres for residential purposes. However, former citizens who became aliens by marriage may inherit and hold lands, and citizens of Syria or Lebanon may inherit from citizens of this state. (89-1-23). Land may escheat under certain circumstances. (89-1-23, 29-1-75). Provisions for quo warranto when lands are acquired or held illegally are found in 11-39-1.

5 CIVIL ACTIONS AND PROCEDURE

5.01 ACCORD AND SATISFACTION:

A creditor may settle or compromise with a joint debtor without releasing the co-debtors for the amount remaining due and unpaid, except that the full amount of the ratable share of the released debtor is credited on the debt even though he paid less than such amount. All obligations are joint and several so far as remedies are concerned. (85-5-1, 85-5-3). See topic 5.15 Judgments.

Compromise.

Governor on advice of attorney general or state tax collector may compromise any doubtful claims of state or other governmental subdivisions. (31-19-29).

Pleading.

Accord and satisfaction must be pleaded affirmatively in answer. (MRCP 8).

5.02 ACTIONS:

Mississippi Rules of Civil Procedure promulgated by Mississippi Supreme Court based on Federal Rules of Civil Procedure with certain exceptions. See topic 5.19 Practice.

Equity.

Distinction between law and equity rigidly observed. Chancery court (equity court) has exclusive jurisdiction over all matters in equity; divorce and alimony; administration of estates; matters involving minors; and cases involving persons of unsound mind. (Miss. Const. Art. 6, § 159). Actions brought in wrong court are transferred. (Miss. Const. Art. 6, §§ 157, 162).

Forms of Action.

There is but one form of action known as “civil action”. (MRCP 2).

Conditions Precedent.

No general rule. See particular topic.

Commencement.

Civil action commenced by filing complaint with court. (MRCP 3). See topics 5.18 Pleading; 5.20 Process.

Parties.

Rules 19, 20 and 21 of FRCP regarding joinder of parties, including necessary and proper parties, effective except for changes in matters not relevant to state practice. (MRCP 19, 20, 21). See Joinder of Causes of Action.

Class Actions.

Rule 23 of FRCP omitted from MRCP. For rules regarding limited availability of class actions, see 263 So. 2d 764.

Intervention.

Rule 24 of FRCP effective except for changes in matters not relevant to state practice. (MRCP 24). Plaintiff seeking to enjoin enforcement of, or declaratory judgment, regarding unconstitutional state law must give timely notice to Attorney General. (MRCP 24[d]).

Interpleader.

Rule 22 of FRCP effective except for changes in matters not relevant to state practice. (MRCP 22). Party seeking interpleader may be discharged from liability as to amounts or items at issue upon depositing same with court. (MRCP 22[b]).

Third Party Practice.

Rule 14 of MRCP provides for third party practice only by permission of court for good cause shown. Availability of third party practice broader in admiralty/maritime actions. (MRCP 14[c]).

Joinder of Causes of Action.

Rules 18 and 21 of FRCP effective. (MRCP 18, 21).

Splitting Causes of Action.

Rule 21 of FRCP effective. (MRCP 21).

Consolidation of Actions.

Rule 42(a) of FRCP effective. (MRCP 42[a]).

Severance of Actions.

Rule 42(b) of FRCP effective, except right of jury trial refers to § 31 of Miss. Const. (MRCP 42[b]).

Stay of Proceedings.

Rule 62 of FRCP effective, except for changes in matters not relevant to state practice and subsection (e) omitted. (MRCP 62).

Abatement and Revival.

Where injuries produce death and party injured could have recovered damages if death had not occurred, cause of action survives to heirs. Suit can be brought by personal representative or persons entitled under statute to recover. Only one suit can be brought. (11-7-13).

Executors and administrators may commence and prosecute any personal action at law or in equity which testator or intestate might have commenced and prosecuted. They are also liable to be sued in any court in any personal action which could have been maintained against deceased. (91-7-233).

Action for trespass against deceased person can be maintained against his executor or administrator, but vindictive damages are not allowed. Action must be brought within one year after publication of notice to creditors to probate and register claims. (91-7-235).

Cause of action survives against executor, administrator, receiver, trustee or any other selected or appointed representative in event of death or inability of nonresident to act. (13-3-57).

For definition of personal actions which survive, see 186 Miss. 850, 192 So. 45.

Rule 25 of FRCP effective, subsection (a)(1) provides for deceased party to be dismissed without prejudice. (MRCP 25). See also category 13 Estates and Trusts, topic 13.09 Executors and Administrators.

Limitation of.

See topic 5.16 Limitation of Actions.

Small Claims.

See category 6 Courts and Legislature, topic 6.01 Courts.

Termination of Actions.

Plaintiff may voluntarily dismiss action by filing notice of dismissal before service of answer or motion for summary judgment. Thereafter, voluntary dismissal only permitted by stipulation of dismissal or by court order. Court may dismiss cases on which there has been no action for one year after notice to parties from clerk. (MRCP 41).

Prohibited Actions.

See topic 5.09 Damages, catchline Sovereign Immunity.

Administration.

See category 13 Estates and Trusts, topic 13.10 Executors and Administrators.

Direct Actions Against Insurer.

Not permitted. See category 23 Transportation, topic 23.01 Motor Vehicles, subhead Direct Actions.

5.03 APPEAL AND ERROR:

Appeal lies for review of judgments of all inferior courts. Matters designated below for appeal to Supreme Court may be assigned to Court of Appeals for disposition, except for cases involving utility rates, annexations, bond issues, election contests, or statutes held unconstitutional by lower court. (9-4-3; MRAP 16).

From Court of Appeals.

Appeals from Court of Appeals to Supreme Court available only by certiorari and after appellant moves for rehearing in Court of Appeals. Petition for writ of certiorari must be filed in Supreme Court within 14 days of decision on motion for rehearing. (9-4-3; MRAP 17[b]).

From Chancery and Circuit Courts.

Appeal to Supreme Court lies from all final judgments of chancery and circuit courts in civil cases, except those entered by default. (11-51-3).

Interlocutory appeal permitted under certain limited circumstances. (MRAP 5). Petition for permission to file interlocutory appeal must be filed within 21 days after entry of order with proof of service. (MRAP 5). Appeal to Supreme Court is made by filing of notice of appeal with clerk of court where judgment, order or decree is entered. (MRAP 3, 4).

Notice of appeal to Supreme Court must be filed within 30 days of date of entry of judgment, order or decree, but when post-trial motions are filed, notice of appeal must be filed within 30 days of denial of motion. For infants or persons of unsound mind, time begins to run after removal of disability, except when guardian ad litem is appointed for infant or person of unsound mind, such appeal must be taken within two years. (MRAP 4).

Record on appeal consists of those portions of papers and exhibits filed in trial court and transcript of proceedings that respective attorneys designate in writing. (MRAP 10). Record shall include certified copy of docket entries in all cases. Docket fee for civil and criminal case is $100. (25-7-3).

From County Court.

Appeal from law side of county court to circuit court and from equity side to chancery court. (11-51-79). Appeal must be taken and bond given within 30 days from entry of final judgment, but county judge may grant extension not to exceed 60 days. (11-51-79).

From Justice Court.

Appeal from justice court to county court, if there is one in county where action pending, and if none, to circuit court. (11-51-85). Appeal must be demanded and bond posted within ten days of judgment. (11-51-85). Amount of bond shall be double amount at issue, plus costs. Provision is made for appeals without bond, including for impoverished defendants. (11-51-103, 11-51-85).

From Special Court of Eminent Domain.

Appeal from special court of eminent domain directly to Supreme Court. (11-27-29). Appeal is made by giving notice within ten days from date of judgment or final order entered to court reporter to transcribe record and by prepaying all costs adjudged against party. Notice to court reporter and payment of costs shall be as is otherwise required by law for appeals to Supreme Court. Party appealing shall deposit sum or good and sufficient surety bond, acceptable to clerk, equal to double amount of judgment, less amount of deposit, if any. (11-27-29).

From Youth Court.

Appeal from Youth Court to Supreme Court. (43-21-651). Appeal is made by filing written notice of intention to appeal with youth court clerk within ten days after rendition of judgment. Costs in youth court and filing fee in Supreme Court shall be paid as is otherwise required by law for appeal to Supreme Court. If appeal with supersedeas is desired, it is first presented to youth court, and if refused, such orders subject to review by Supreme Court. (43-21-651).

Time Allowed for Decision.—Court of Appeals must issue decision in every case heard before Court of Appeals within 270 days after final briefs have been filed with Court. (9-4-3).

Supreme Court must issue decision in every case within its original jurisdiction within 270 days after final briefs have been filed with Court. Supreme Court must issue decision in every case received on certiorari from Court of Appeals within 180 days after final briefs have been filed with court. (9-4-3).

Appeal Bond.

Not accepted except in case of supersedeas. Appellant is, however, required to prepay all costs in lower court including costs of transcript, preparation of record and $100 prescribed by 25-7-3. (11-51-29). Certain governmental entities and officials are not required to prepay costs, except for costs to prepare record, and are not required to make supersedeas bond where otherwise required. (11-51-101).

Stay of Proceedings.

Party is entitled to stay of execution of money judgment pending appeal if party gives supersedeas bond of 125% of amount of decree or judgment appealed from or value of property or matter in controversy. Amount of bond may be reduced upon good cause shown at hearing in court from which appeal taken. (MRAP 8). Bond required, in whole or in part, on account of punitive damages shall, as to punitive damages portion only, be lower of (a) 125% of total amount of punitive damages, or (b) 10% of net worth of defendant seeking appeal. Absent unusual circumstances, total amount of bond for any case as to punitive damages shall not exceed $100 million. (MRAP 8).

An appeal never vacates a judgment or decree. (11-51-3).

Extent of Review.

Review by Supreme Court may concern law and/or fact questions. (MRAP 14).

Character of Hearing.

Appeal of case from justice court is trial de novo. (11-51-91).

Appeal from county court to circuit or chancery court is considered solely on record made in county court. (11-51-79). Decision of county court to be affirmed unless prejudicial error found.

Appeal from circuit or chancery court to Supreme Court is considered on record designated by parties and briefs of parties. (MRAP 10 and 28).

Judgment or Order on Appeal.

Upon reversal, Supreme Court and Court of Appeals may remand for further proceedings or may enter such judgment as lower court should have rendered, when record enables it to do so.

5.04 BONDS:

Any bond or undertaking of any kind, in legal proceedings, or for performance of public contract or faithful discharge of any duty, shall inure to person to whom it is designed by law, as security, and be subject to judgment in his favor, no matter to whom it is made payable, nor amount, nor how it is conditioned. (11-1-25). Use of, or failure to use seal by private person will not affect bond or in any way vary rights of parties to it. All bonds in legal proceedings shall be valid without seal. (75-19-5)

Sureties.

Any company with capital of not less than $400,000, incorporated anywhere in U.S. for purpose of transacting business as surety may be accepted as surety in part, or as sole surety, upon bond of any person, officer, or corporation required by laws of state to execute bonds. (83-27-1; 83-19-31). Foreign insurance company may not be licensed to do business in Mississippi, unless it has operated in state of domicile for two years or unless it is subsidiary of company already licensed to do business in Mississippi. (83-21-3).

Enforcement.

When bond, recognizance, obligation, or undertaking of any kind shall be executed in any legal proceeding, or for performance of any public contract, or for the faithful discharge of any duty, it shall inure to person to whom it is designed by law as security and be subject to judgment in his favor, no matter to whom it is made payable, nor what amount, nor how it is conditioned; and persons executing such bond or other undertaking shall be bound thereon and thereby, and shall be liable to judgment or decree on such bond or undertaking as if it were payable and conditioned in all respects as prescribed by law, if such bond or other obligation or undertaking had effect in such proceeding or matter which bond or other undertaking payable and conditioned as prescribed by law would have had; and where any such bond or undertaking is not for any specified sum, it shall bind parties executing it for full amount for which any bond or undertaking might have been required in state in case in which it was given. (11-1-25).

5.05 CERTIORARI:

Jurisdiction.

Generally, circuit courts may issue writs of certiorari in actions from inferior courts or tribunals, including justice court and administrative agencies. (11-51-93 to 11-51-97). Also, Supreme Court may grant petitions for writs of certiorari from decisions of Court of Appeals. (MRAP 17, 9-4-3).

Grounds.

Same as grounds for appeal. See topic 5.03 Appeal and Error.

Proceedings.

Petition for writ of certiorari must be made to circuit court from inferior tribunal within six months after ruling, supported by affidavit, with bond to be approved by clerk and judge for good cause shown. (11-51-93, 11-51-95). Petition for writ of certiorari must be made to Supreme Court from Court of Appeals no more than 14 days after ruling by Court of Appeals on mandatory motion for rehearing. (MRAP 17[b]).

Review.

Review of decision of justice court judge or other inferior tribunal by circuit court is confined to examination of questions of law arising or appearing on face of record and proceeding. (11-51-93; 11-51-95). Review of decision of Court of Appeals by Supreme Court is de novo.

5.06 CHARITABLE IMMUNITY:

Doctrine of charitable immunity abolished. (126 So. 465; 55 So.2d 142). See also topic 5.09 Damages.

5.07 COMMISSIONS TO TAKE TESTIMONY:

See topic 5.11 Depositions and Discovery.

5.08 COSTS:

Except as provided by statute, costs shall be allowed as of course to prevailing party, unless court otherwise directs. (MRCP 54[d]). MRCP 54 is based on companion federal rule, but allowable costs in state court are typically very small in comparison to those permitted in federal court. Following statutes apply to costs in certain circumstances: want of prosecution (11-53-21); stale cases (11-53-25); liability of successful party for certain costs (11-53-31); certain cases (assault, assault and battery, libel and slander, recovery of less than $10) (11-53-33); class suits (11-53-37); executors and administrators (11-53-41, 11-53-43); next friend of infant (11-53-45); cases of setoff (11-53-49); appeals from justices of peace (11-53-51); certiorari appeals from inferior tribunals (11-53-53).

At conclusion of case, clerk of court shall tax costs and make out bill of taxable costs and fees, after which costs award is payable. (11-53-65 through 11-53-69).

Security for Costs.

Generally, cost deposit shall be made with filing of complaint by plaintiff in amount required by local rule; or may be required of plaintiff upon motion within 60 days of clerk or any party. (MRCP 3). In addition, security for costs may be given by recognizance entered into in open court, by written undertaking endorsed on or filed with papers in cause, or by deposit with clerk of cash or certified check. (11-53-5). Most state entities or officials not required to pay or give security for costs. (11-53-13). In addition, poor persons may sue without security for costs upon prescribed affidavit. (11-53-17, 11-53-19, 11-53-21).

Liability of Attorney.

None provided by statute.

5.09 DAMAGES:

Common law generally prevails as to compensatory damages. Punitive damages can be awarded only if claimant proves by clear and convincing evidence that defendant acted with actual malice, gross negligence which evidences willful, wanton or reckless disregard for safety of others, or committed actual fraud. (11-1-65). No award of punitive damages shall exceed following: $20,000,000 for defendant with net worth of more than $1,000,000,000; $15,000,000 for defendant with net worth of more than $750,000,000 but not more than $1,000,000,000; $5,000,000 for defendant with net worth of more than $500,000,000 but not more than $750,000,000; $3,750,000 for defendant with net worth of more than $100,000,000 but not more than $500,000,000; $2,500,000 for defendant with net worth of more than $50,000,000 but not more than $100,000,000; 2% of defendant’s net worth if it is $50,000,000 or less. (11-1-65).

Comparative Negligence Rule.

In actions involving personal injuries, death, or injury to property, contributory negligence does not bar recovery, but damages must be diminished in proportion to amount of negligence attributable to person injured, or owner of property, or person having control over property. (11-7-15). Uniform Comparative Fault Act not adopted.

Charitable Immunity.

Doctrine of charitable immunity abolished. (126 So. 465; 55 So.2d 142). However, licensed physician or certified nurse practitioner who voluntarily provides medical services without expectation of payment is immune from liability arising out of those services. (73-25-38).

Immunity not extended to acts of gross or willful negligence. Such immunity also extends to actions arising from church operated outpatient medical clinic that exists solely for purpose of providing charitable medical services provided clinic receives less than $40,000 annually in patient payments (73-25-38), as well as to physicians providing voluntary heath services to school without expectation of payment (11-1-71).

Sovereign Immunity.

Governmental immunity partially waived from and after July 1, 1993 as to state and from and after Oct. 1, 1993 as to subdivisions. (11-46-5). All claims arising after prescribed dates are limited to graduated amount not to exceed $500,000 for claims accruing after July 1, 2001. (11-46-15). No award for punitive damages, prejudgment interest or attorney's fees unless attorney's fees specifically authorized by law.

No-Fault Insurance.

See category 23 Transportation, topic 23.01 Motor Vehicles, subhead No-Fault Insurance.

Uniform Contribution Among Tortfeasors Act (Revised).

Not adopted. Under certain circumstances, contribution between fellow joint tortfeasors allowed. (85-5-7).

See category 13 Estates and Trusts, topic 13.05 Death, subhead Actions for Death.

5.10 DECLARATORY JUDGMENTS:

See topic 5.15 Judgments.

5.11 DEPOSITIONS AND DISCOVERY:

Provisions of MRCP pertaining to depositions and discovery are based on FRCP, with variations noted below. Generally under Mississippi rules, parties may obtain discovery regarding any matter, not privileged, which is relevant to issues raised by claims or defenses of any party, by one or more of following methods: depositions upon oral examination or written questions; written interrogatories; production of documents or things or permission to enter upon land or other property, for inspection and other purposes; and requests for admission. (MRCP 26). See topic 5.19 Practice.

Within State for Use within State.

Federal Rules of Civil Procedure adopted with minor variations. (MRCP 30).

Within State for Use Elsewhere.

Person desiring to take depositions may produce proof of service of notice to take deposition to clerk of court for county in which deposition is to be taken. Such proof of service constitutes sufficient authorization for clerk to issue subpoena. (MRCP 45[a][1][2] and cmts.).

Outside of State for Use within State.

Federal Rules of Civil Procedure adopted with minor variations. (MRCP 28, 30). Uniform Foreign Deposition Act not adopted.

De Bene Esse.

Federal Rules of Civil Procedure adopted with minor variations. (MRCP 27).

Perpetuating Testimony.

Federal Rules of Civil Procedure adopted with minor variations. (MRCP 27).

Before Whom Taken.

Federal Rules of Civil Procedure adopted with minor variations. (MRCP 28).

Commissions.

Depositions before commission rarely invoked, except for limited availability in probate proceedings involving nonresident witnesses. (91-7-11).

Compelling Attendance of Witnesses.

Attendance of witnesses at depositions may be compelled by subpoena in accordance with MRCP 45. (MRCP 30). Resident of state required to attend examination only in county in which he resides or is employed or transacts his business in person, or at such other convenient place as is fixed by order of court. (MRCP 45[b]). Nonresident subpoenaed within state may be required to attend only in county in which he is served, or at such other convenient place as fixed by order of court. (MRCP 45[b]). Failure by any person without adequate excuse to obey subpoena served upon him may be deemed contempt of court from which subpoena issued. (MRCP 45[g]).

Examination of Witnesses.

Federal Rules of Civil Procedure adopted with minor variations. (MRCP 30).

Return.

Stenographic reporter shall certify, under penalty of perjury, on transcript that witness was sworn in his presence and that transcript is true record of testimony given by witness. When deposition is taken by other than stenographic means, person transcribing it shall certify, under penalty of perjury, on transcript that he heard witness sworn on recording and that transcript is correct writing of recording. Deposition so certified shall be considered prima facie evidence of witness' testimony. (MRCP 30[f]). If all or part of deposition is filed with court, party filing shall give prompt notice to all parties. (MRCP 30[f]).

Form.

All depositions shall be made on 8½" by 11" paper. (MRCP 7[c]). Format for all depositions shall comply with Guidelines for Court Reporters as provided in Mississippi Supreme Court Rule 11.

Discovery.

Right to obtain discovery exists in Mississippi. Discovery is governed by MRCP, based on FRCP with minor variations. (MRCP 26-37).

Demand for Admission of Facts.

Federal Rules of Civil Procedure adopted with no material variations. (MRCP 36).

Interrogatories.

Federal Rules of Civil Procedure adopted with no material variations. Leave of court is required to serve more than 30 interrogatories. (MRCP 33).

5.12 EQUITY:

See topic 5.02 Actions.

5.13 EVIDENCE:

Witnesses.

Generally, every person is competent to be witness except (1) if spouse is party, other spouse is not competent without consent of both, (2) court appointed appraiser in eminent domain proceeding. (MRE 601).

Privileged Communications.

Governed by MRE 501-505.

Lawyer-Client.

Client may claim privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for purpose of rendering professional legal services. There is no privilege for communications made in furtherance of crime or fraud; relevant to breach of duty by lawyer to client or by client to lawyer; relevant to matter of common interest to joint clients when offered in action between or among any of clients; relevant to issue between parties who claim through same deceased client, or to communications relevant to issue concerning attested document to which lawyer is attesting witness. (MRE 502).

Physician and Psychotherapist-Patient.

Patient may claim privilege to refuse to disclose or allow disclosure of information derived by physician by virtue of his professional relationship or confidential communications made for purpose of diagnosis or treatment. There is no privilege in proceedings for hospitalization for mental illness, examinations by order of court, issues relevant to breach of duty. Filing of action against professional for services rendered is waiver of privilege. Party to action waives privilege to extent his or her pleadings puts in issue any aspect of patient’s physical, mental or emotional condition. (MRE 503).

Priest-Penitent.

Person has privilege to refuse to disclose and prevent disclosure of confidential communications (those made privately and not intended for further disclosure) by person to clergyman in his professional character as spiritual adviser. (MRE 505).

Husband and Wife.

Person has privilege to prevent spouse, or former spouse, from testifying regarding communications made privately between spouses which are not intended for disclosure to any other person. There is no privilege if one spouse is charged with crime against other, any minor child, or person residing in household of either, or against third person committed in course of committing crime against any of persons described. (MRE 504).

Husband and wife may be introduced by each other to testify in criminal and civil cases, and are competent witnesses in their own behalf, as against each other, in all controversies between them. Either spouse is competent and may be compelled to testify against other in criminal prosecution of husband or wife for criminal act against child, contribution to neglect or delinquency of child, desertion or nonsupport of child under age 16, or abandonment of child, but in all other instances where either is party litigant, other shall not be competent as witness and not required to answer interrogatories or to make discovery without consent of both. (13-1-5, MRE 601).

Communications or Transactions With Persons Since Deceased or Incompetent.

If declarant is deceased, following are not excluded by hearsay rule: (1) former testimony, (2) statements under belief of impending death, (3) statements against interest, (4) statements of personal or family history, (5) any other statement having equivalent circumstantial guarantees of trustworthiness, (6) forfeiture by wrongdoing. (MRE 804).

Self-Incrimination.

Protection against self-incrimination provided by Mississippi Constitution Art. 3, § 26 and 5th Amendment to U.S. Constitution.

Compelling Attendance.

See topic 5.11 Depositions and Discovery.

5.14 INJUNCTIONS:

Both prohibitory and mandatory injunctions available under Mississippi law. (11-13-1 et seq.).

FRCP 65 forms basis of governing procedural rule. (MRCP 65). See topic 5.19 Practice.

Jurisdiction.

Both circuit and chancery courts have jurisdiction to grant injunctive relief; county and justice courts do not have original power to issue injunctions, but county court may hear and act upon application for injunction when directed to do so by circuit or chancery court. (9-9-23, 9-11-9).

Prerequisites.

Injunction not granted unless judge or chancellor is satisfied of equity of plaintiff's position and of truth of allegations of complaint. (11-13-1).

Procedure.

FRCP 65 adopted without material variation. (MRCP 65).

Bond.

No restraining order or preliminary injunction shall issue unless applicant makes payment of costs incurred by any party found to have been wrongfully enjoined or restrained. (MRCP 65[c]). No security required of State of Mississippi or of officer or agency thereof or, in court's discretion, in domestic relations actions. (MRCP 65[c]).

Temporary Injunction.

Temporary restraining orders and preliminary injunctions available on same basis as that provided by FRCP 65. (MRCP 65[b]).

5.15 JUDGMENTS:

Judgments are final on date of entry. Motions to set aside judgments must be made within ten days of entry thereof. Court may not extend this time period. (MRCP 59). Minutes must be duly signed. Procedural rules based on FRCP. (MRCP 54 et seq.). See topic 5.19 Practice.

Circuit clerk of court must, within 20 days after adjournment of term, enroll all final judgments rendered at that term, in order in which they were entered on minutes. (11-7-189).

Abstract of judgments certified to by clerk of court where rendered can be enrolled in office of circuit clerk in other counties. (11-7-195). Chancery clerk must, within ten days after expiration of term, furnish abstract of any decrees for money entered during term to circuit clerk to be enrolled. (9-5-159).

Judgments by Confession.

Person indebted to another on promise or agreement within jurisdiction of circuit court may sign written confession of judgment in clerk's office of circuit court. To accomplish this creditor must file in clerk's office statement under oath that debtor is justly indebted to him in amount of $. . . . . . as follows (setting out copy of written contract, endorsement or open account, as case may be), and that same remains due and unpaid, and that said sum is not due or claimed under fraudulent or usurious consideration. (11-7-181).

The evidence of the debt (if in writing) or a copy of the open account must also be filed; and the debtor must sign, before the clerk, an acknowledgment written upon or annexed to such statement, to the following effect:

Form

"I do hereby acknowledge myself indebted to the said. . . . . . in the sum of. . . . . . Dollars, which includes interest up to the first day of the next term of the said circuit court, and I give my consent for judgment to be rendered against me in favor of said. . . . . ., at the next term of the said circuit court for said amount and all legal costs accruing thereon, with stay of execution (if any) until (as may be agreed upon)."

....

"Taken and acknowledged the. . . . . day of. . . . . . A. D. . . . ., before me. . . . ., clerk." (11-7-181).

Confessed judgment becomes final at end of next succeeding term if called up for order by creditor. (11-7-183).

Judgments by Consent.

Judgment entered by agreement or consent of parties given same force and effect as judgments rendered after litigation. (102 So.2d 381).

Judgments on Pleadings.

FRCP 12(c) forms basis of procedural rule; if matters outside pleadings not presented and motion sustained, party opposing motion may be allowed to file amended pleading. (MRCP 12[c], 15[a]).

Summary Judgments.

FRCP 56 forms basis of procedural rule; if motion for summary judgment denied, costs will be awarded to prevailing party, and attorneys' fees may be awarded where motion found to have been brought without reasonable cause. (MRCP 56).

Declaratory Judgments.

Actions for declaratory judgments may be brought in courts of record within their respective jurisdictions for purpose of having rights and duties under contracts or statutes construed or having declaration of status or rights regarding trust or estate made. Contract may be construed either before or after breach. Procedure governing such actions is same as that provided for other civil actions. (MRCP 57).

Default Judgments.

FRCP 55 forms basis of procedural rule; default judgment can be entered only upon application to court. (MRCP 55). Default judgment cannot be taken against state. (11-45-3).

Offer of Judgment.

FRCP 68 forms basis of rule; offer must be more than 15 days prior to trial date. (MRCP 68).

Docketing.

Judgments become final and effective upon entry by clerk in minute book. (MRCP 58, 79[a]).

Vacation or Modification.

FRCP 59 adopted without material variation. (MRCP 59). FRCP 60 forms basis of procedural rule governing relief from judgments; Rule provides for relief from judgment on ground of "accident or mistake" where federal rule speaks of "mistake, inadvertence, surprise, or excusable neglect," suggesting continuation of state's stricter rule as to setting aside of default judgments (197 Miss. 353, 20 So. 2d 697); motion based on fraud, accident or mistake, or newly discovered evidence must be made within six months of entry of judgment (MRCP 60).

Lien.

When enrolled in the office of the clerk of the circuit court, a judgment is a lien on all the judgment debtor's real and tangible personal property within county, except that where there are two judicial districts in county lien extends only to property within district in which judgment is enrolled. (11-7-191). Lien may be extended to property in any other county or district by filing certified abstract of judgment in office of clerk of circuit court of county or district in which property is located. (11-7-195). Priority of judgment liens is according to order of enrollment. (11-7-191).

Growing Crops.

Not subject to lien of judgment. (11-7-199).

Duration of Lien.

A judgment or decree, including judgment or decree in favor of state or subdivision or municipal corporation, is not lien on property of defendant for more than seven years from rendition of judgment or decree unless action is brought thereon before expiration of that time or, in case judgment in favor of state or any subdivision or municipal corporation, entity refiles notice of lien. (15-1-47; 15-1-51). Time during which execution is stayed or enjoined by supersedeas, injunction or other process, shall not be computed as any part of period. (15-1-47).

Suit on judgment preserves lien as to creditors and subsequent purchasers without notice only if notation thereof is made on judgment roll within six months after expiration of seven years from rendition of judgment. (89-5-19).

Revival.

Judgments revived only by institution of suit within seven years from date of judgment or decree. (15-1-47).

Assignment.

Assignee of any cause of action may sue for and recover in his own name, if assignment be in writing. (11-7-3).

Satisfaction.

When judgment is satisfied in whole or in part, circuit clerk must enter notice of satisfaction under proper heading and subscribe entry in “Judgment Roll.” (11-7-189).

Actions.

See category 8 Debtor and Creditor, topic 8.05 Executions.

Foreign Judgments.

A judgment or decree rendered in any court of U.S. becomes a lien in any county in this state when abstract thereof certified by clerk of court where rendered is filed with circuit clerk. After filing in any county of this state, judgment may be enrolled in other counties as may local judgment. (11-7-195). Admissibility of foreign judgments into evidence is governed by Mississippi Rules of Evidence. (MRE 803[8], 902[3]).

Revised Uniform Enforcement of Foreign Judgments Act adopted. (11-7-301 et seq.).

5.16 LIMITATION OF ACTIONS:

Actions must be brought within following periods after respective causes of action accrue or as otherwise provided in statute:

Twenty years.

For payment on public bond after maturity date of bond. (31-19-33).

Ten years.

To recover real property (15-1-7); on trust not cognizable by court of common law and not otherwise provided for (15-1-39).

Seven years.

On domestic judgment (15-1-47); on judgment of sister state or foreign court of record, unless person against whom rendered was resident of this state when action was commenced, in which case action on judgment must be commenced within three years after rendition thereof (15-1-45).

Six years.

To recover for breach of contract of sale under UCC (75-2-725); for personal injury or property damage due to construction deficiencies (wrongful death actions excepted) (15-1-41); and for tax evasion (27-3-79[3]).

Five years.

Against guardian or his sureties after ward becomes 21. (15-1-27).

Four years.

Against executor or administrator upon judgment or other cause of action against his testator or intestate. (15-1-25).

Three years.

To recover possession of personal property; on unwritten contract (except contract of employment [15-1-29]) or open account or account stated not acknowledged in writing (15-1-29); all actions for which no other period presented and if such action involves latent injury or disease, following discovery (15-1-49); applications to commissioner to recover taxes paid or suits to collect taxes, except when based on false, fraudulent, or no return (no limitations period). (27-65-42); for violation of Business Tender Offer Act of 1980 (75-72-119).

Two years.

To recover property sold by order of chancery court where sale was in good faith and purchase money was paid or property partited in kind or sold for partition where purchase money is paid (15-1-37); action against physician, osteopath, dentist, hospital, institution for aged or infirm, nurse, pharmacist, optometrist, chiropractor or podiatrist for injury or wrongful death arising out of course of medical and/or surgical treatment must be brought within two years of date act, omission or neglect shall, or with reasonable diligence might have been first known or discovered (certain disabilities excepted) but no more than seven years after alleged wrongful act (15-1-36). Action for penalty and remedies in § 95-5-10 for cutting trees without consent. (95-5-29).

One year.

For libel, slander, assault, battery, maiming, false imprisonment, malicious arrest or menace or failure to employ and claims under 42 U.S.C. § 1983 (15-1-35); for penalty or forfeiture under penal statute (15-1-33); to recover on unwritten contract of employment (15-1-29); to recover on installment note or series of three or more notes secured by mortgage, trust deed, lien or other instrument, time running from date of foreclosure or sale of pledged property (15-1-23); actions against state or political subdivisions (11-46-11). Action for trespass. (95-5-29).

No Limitation.

To enforce payment of note, bill or evidence of debt issued by bank or moneyed corporation. (15-1-79).

Uniform Commercial Code adopted, effective Mar. 31, 1968. (75-1-101, et seq.). See category 3 Business Regulation and Commerce, topic 3.09 Commercial Code.

Actions Not Specifically Provided For.

Must be commenced within three years after accrual of cause of action. (15-1-49).

New Actions.

If commenced action is abated or otherwise defeated, under certain circumstances, plaintiff may commence new action for same cause of action within one year after abatement of original suit. (15-1-69).

Foreign Causes of Action.

When cause of action has accrued outside this state, and “by the laws” of place outside this state where such cause of action accrued, action thereon cannot be maintained by reason of lapse of time, then no action thereon shall be maintained in this state; however where such cause of action has accrued in favor of resident of this state, this state’s law on limitation period shall apply. (15-1-65).

Disabilities of Plaintiff.

If any person entitled to bring personal action is, at time cause of action accrues, under disability of infancy or unsoundness of mind, he/she may bring action within limitation period prescribed for type of cause of action involved, after disability is removed, but saving may never extend longer than 21 years. (15-1-59). In medical malpractice actions only, disability of minority/infancy shall be removed at age six. (15-1-36[7]). When legal title to property or right of action is in executor, administrator or other trustee, time during which statute runs against such trustee is computed against person beneficially interested in such property or right in action, although such person may be under disability and within saving provision of statute. (15-1-53). In actions against state or political subdivisions, disability of infancy or unsoundness of mind shall apply to these claims. However, disability of unsoundness of mind shall never extend longer than 21 years. (11-46-11[4]). In actions to recover on trust not cognizable by courts of common law and not otherwise provided for, disability of infancy or unsoundness of mind shall apply to these claims, except that disability of unsoundness of mind shall never extend longer than 31 years. (15-1-39).

Absence or Concealment of Defendant.

Where person against whom cause of action accrues is absent from state at time of such accrual or thereafter departs from state, time during which he is absent is not counted. (15-1-63). However, if plaintiff can obtain process on nonresident defendant under long arm statute, plaintiff not entitled to tolling of statute during defendant's absence from state. (362 So. 2d 1253).

Interruption of Statutory Period.

When party makes partial payment of debt, acknowledges debt, or promises to pay debt before action for recovery is time-barred, limitation period shall begin again at time of such payment, acknowledgment or promise. (15-1-3). In contract actions, new promise in writing, under certain circumstances, may be construed new contract thereby starting again running of applicable limitation period. (15-1-73).

Revival of Barred Claims.

Once claim is barred by running of limitation period it generally cannot be revived. (Miss. Const. Art. 4, § 97). However, see commencement of new action (15-1-69); construction and improvements to real property (15-1-41); survival of actions against executor (91-7-235).

Contractual Limitations.

Period of limitation may not be changed by contract between parties and any attempted change by any contract or stipulation is void. (15-1-5).

Pleading.

Statute of Limitations as defense to cause of action, must be specially pleaded. (MRCP 8[c]).

5.17 NEGLIGENCE:

See topic 5.09 Damages.

5.18 PLEADING:

Mississippi Rules of Civil Procedure, based on Federal Rules of Civil Procedure, govern rules of pleading. (MRCP 1, 7-16). See topic 5.19 Practice.

Pleadings Permitted.

Pleadings permitted same as FRCP 7(a). (MRCP 7[a]). Pleadings permitted include complaint and answer; reply to counterclaim; answer to cross-claim; third-party complaint and third-party answer. (MRCP 7[a]).

Complaint.

Same as FRCP 8(a), less jurisdiction allegations. (MRCP 8[a]). Complaint for medical malpractice shall not specify amount of damages claimed but shall only state that damages claimed satisfy jurisdictional amount requirement. (11-1-59).

Answer.

Same as FRCP 8(b), (c), (d) and 12(b). (MRCP 8[b], [c], [d]; 12[b]).

Counterclaim or Set-Off.

Similar to FRCP 13 except counterclaim is not compulsory if insurer is defending opponent's claim. (MRCP 13[a]). "State of Mississippi" substituted for "United States" in FRCP 13(d). (MRCP 13[d]). Counterclaim for medical malpractice, same as for complaint.

Reply.

Allowed as in FRCP 7(a). (MRCP 7[a]).

Demurrer.

Abolished. (MRCP 7[d]).

Amended or Supplemental Pleadings.

Similar to FRCP 15. (MRCP 15).

Affidavits of Merits.

Affidavits in support of motions shall be served with motion. (MRCP 6[d]).

Affidavits of Defense.

Affidavits in support of motions shall be served with motion. (MRCP 6[d]).

Bills of Particulars.

FRCP 12(e) adopted. (MRCP 12[e]).

Verification.

Similar to FRCP 11 with additional sanctions. (MRCP 11).

Service.

Similar to FRCP 5(a) with minor variations. (MRCP 5[a]).

Filing.

Similar to FRCP 3, 5(d), (e) with minor variations. Filing shall be made with clerk of court, except judge may permit papers to be filed with him, in which event he shall note thereon filing date and transmit papers to office of clerk. (MRCP 5[e]). Court may allow electronic filing by local rule. (MRCP 5[e]).

Time.

Defendant allowed 30 days to serve answer after service and plaintiff 30 days to reply to counterclaim after service of answer. (MRCP 12[a]). Thirty days allowed to serve response to third party complaint (MRCP 14[a]) or to crossclaim (MRCP 12[a]). Ten days allowed to respond to amended or supplemental pleading. (MRCP 15[a]).

Proof of Claims.

No special provisions except to extent rule as to affidavit of merits (see subhead

Affidavits of Merit, supra) may apply.

Small Claims.

See category 6 Courts and Legislature, topic 6.01 Courts.

5.19 PRACTICE:

Mississippi Rules of Civil Procedure drafted and adopted by Supreme Court of Mississippi, not by Legislature. Federal Rules of Civil Procedure form bases for Mississippi Rules of Civil Procedure, which govern civil practice in circuit, chancery and county courts. 1993 Amendments to Federal Rules have not been incorporated.

Pretrial Conference.

Similar to FRCP 16 except mandatory upon motion of all parties. Scope broader than FRCP 16. (MRCP 16).

Discovery.

Federal Rules of Civil Procedure adopted with no substantial variations, except that 1993 amendments regarding initial disclosures and recent e-discovery provisions not adopted. (MRCP 26-37).

Small Claims.

See category 6 Courts and Legislature, topic 6.01 Courts.

5.20 PROCESS:

Process is called summons. FRCP is basis for state procedure. (MRCP 4). Procedures for service of process in justice courts and in other enumerated circumstances. (13-3-5 through 13-3-83). Procedures for service of process in certain enumerated chancery court matters. (MRCP 81[d]).

General Requisites.

Summons must be dated, signed and sealed, must have name of court, parties and plaintiff’s attorney, must be directed to defendant, must state time within which defendant shall appear and defend and notify about default for failure to appear and defend, and must be served with complaint. (MRCP 4[b]; MRCP 4[a][2]; and MRCP 4[d]).

By Whom Issued.

Summons issued by clerk. (MRCP 4[a]).

Who May Serve.

Under prescribed circumstances, service may be made by any person 18 years or older who is not party, by sheriff of county where defendant resides or is found, by mail or by publication. (MRCP 4[c]).

Personal Service on Individual.

Deliver to defendant or agent authorized by law or appointment to receive, or if cannot serve defendant or agent, leave at defendant’s usual place of abode with spouse or family member 16 years or older, who will accept, and subsequently mail copy to defendant at place where left summons. (MRCP 4[d]).

Personal Service on Infant.

Deliver to mother, father or legal guardian or person having care of unmarried infant or with whom he lives or if none available deliver to court appointed guardian ad litem if infant is under 12 years of age. If infant is 12 years or older, deliver copy to infant also. (MRCP 4[d]).

Personal Service on Incompetent Person.

If not judicially confined, deliver to incompetent and incompetent's guardian or conservator or if there is none, then to person with whom incompetent lives. If judicially confined, deliver to incompetent and to incompetent's guardian, but if none, then to court appointed guardian ad litem. (MRCP 4[d]).

Personal Service on Partnership.

Deliver to officer, managing or general agent, or to agent authorized by appointment or by law to receive. (MRCP 4[d]).

Personal Service on Domestic Corporation.

Deliver to officer, managing or general agent or to agent authorized by appointment or by law to receive. (MRCP 4[d]).

Personal Service on Association.

Deliver to officer, managing or general agent, or to agent authorized by appointment or by law to receive. (MRCP 4[d]).

Personal Service on Joint Stock Company.

Deliver to officer, managing or general agent, or to agent authorized by appointment or by law to receive. (MRCP 4[d]).

Personal Service on Foreign Corporation.

Deliver to officer, managing or general agent, or to agent authorized by appointment or by law to receive. (MRCP 4[d]).

Personal Service Outside State.

In addition to other methods authorized by MRCP 4, may serve person by certified mail, return receipt requested, and where defendant is natural person, marked restricted delivery. (MRCP 4[c]).

Service by Mail.

Upon adult, infant, incompetent, or domestic or foreign corporation, partnership, or other unincorporated association, by mailing first-class with two copies of notice and acknowledgment, and return envelope, postage prepaid addressed to sender. (MRCP 4[c]).

Substituted Service.

Substitute service is provided by statute in certain instances in addition to above provisions. Service in actions against foreign insurance companies or corporations may be made upon insurance commissioner. (83-5-11). Service on nonresident obligors in actions on contractor's bonds may be made upon insurance commissioner as in actions against foreign insurance companies. (85-7-195).

Service by Publication.

Can be used in any proceeding in chancery court or in any other court where authorized by statute when defendant is nonresident or cannot be found after diligent search and inquiry.

Upon filing of sworn complaint, petition or affidavit, clerk prepares summons and delivers to plaintiff for publication. Publish once a week for three consecutive weeks in newspaper in county where action is pending or if there is no newspaper, post notice on courthouse door and publish in newspaper of adjoining county or at seat of government of state. Must file proof of publication. Defendant has 30 days from date of first publication to appear and defend. If address known, must mail copy to address. Unknown heirs as defendants served by publication as are nonresident defendants. Unknown parties in interest may be made parties by publication. (MRCP 4[c]).

Long Arm Statute.

Service shall be made in accordance with methods authorized by Rule 4. (13-3-57). See subhead Personal Service Outside State, supra.

Proof of Service.

Server must make return promptly and within time in which defendant must respond to process.

Person, other than sheriff, making service must make return by affidavit. Return for service by mail is acknowledgment. Return for service by mail outside state is return receipt or envelope marked “refused.” (MRCP 4[f]).

Nonresident Motorist.

See category 23 Transportation, topic 23.01 Motor Vehicles.

5.21 REPLEVIN:

An owner of personalty, who is entitled to immediate possession, can replevy property wrongfully detained by another and institute an action in replevin for determination of rights to property. Property which has been seized under execution or attachment cannot be replevied.

Proceedings.

Governed by 11-37-101 et seq.

Jurisdiction and Venue.

Action of replevin may be instituted in circuit or county court of county, or justice court of county where either defendant or property may be found. Process may issue to other counties or districts. (11-37-107).

Pleadings.

Action begun by sworn complaint showing: (1) description of personal property; (2) value thereof, each article being separately valued; (3) that plaintiff is entitled to immediate possession; (4) that property is in possession of defendant; and (5) that defendant wrongfully took and detains, or wrongfully detains property. (11-37-101).

Issuance of Writ and Summons.

Upon presentation of complaint, judge may issue order directing clerk to issue writ of replevin for seizure of property and summon defendant to appear to determine rights as to seized property, or issue fiat directing clerk to issue summons to require defendant to appear to determine rights as to certain described property. (11-37-101; 11-37-109).

Return of Writ.

Writ is returnable to proper circuit or county court if value of property, as alleged, exceeds jurisdictional amount of justice court, otherwise to proper circuit, county, or justice court. Writs may be made returnable to proper court of another county where property is located. (11-37-101).

Hearing.

Defendant must have at least five days process before hearing. With such process, court having proper jurisdiction may proceed to final determination of rights of parties to possession of property. Replevin actions are preference cases and must be heard at earliest possible date. Jury may be requested by one of parties. (11-37-125; 11-37-145; and 11-37-147).

Bond of Plaintiff.

Plaintiff must post replevin bond for double value of property conditioned to pay any damages from wrongful seizure of property. (11-37-101).

Writ of Replevin.

Writ of replevin shall command proper officer to take possession of property described and after two days deliver it to plaintiff, unless bonded by defendant, and summon defendant to appear in court to answer to replevin action. (11-37-109).

Repossession.

Defendant has right within two days from seizure of property to have property restored to him pending judgment by giving bond to plaintiff in double value of property conditioned that property will be forthcoming to satisfy judgment. (11-37-115).

Claims of Third Persons.

If third person claims to be owner of property or to be entitled to its possession, he may intervene in suit. After trial of replevin action, trial shall be held between successful party and claimant to determine rights as between them. (11-37-149; 11-37-151).

Judgment or Order.

Judgment is for possession of property, or value thereof, and also for damages for taking or detention. If judgment is for defendant, judgment is for restoration of property, or for value thereof, and damages for wrongful suing out of writ. (11-37-127; 11-37-129).

5.22 SEQUESTRATION:

Generally sequestration is governed by 11-29-1 through 11-29-13. Complainant is required to make affidavit showing danger of removal of property involved in suit beyond limits of state or of its concealment in state so as to be beyond possession of court or of its transfer so as to defeat rights of complainant and that such removal, concealment or transfer is about to occur, and must give bond in double amount of indebtedness claimed. Defendant has five days from date of seizure within which to give bond and obtain possession of property. If neither party has given bond for possession of property within ten days, property must be sold, if liable to waste or decay or if subject to extraordinary expense in preserving same. (11-29-1 through 11-29-13). (Sequestration procedure found unconstitutional, 475 F. Supp. 204.)

5.23 SERVICE:

See topic 5.20 Process.

5.24 STAY OF EXECUTION:

See topic 5.03 Appeal and Error; also category 8 Debtor and Creditor, topic 8.05

Executions.

5.25 SUBMISSION OF CONTROVERSY:

No statutory provisions.

5.26 VENUE:

Under general statute, venue is in county where defendant resides, or if corporation, in county of its principal place of business, or in county where substantial alleged act or omission occurred or where substantial event that caused injury occurred. Medical claims are specially governed. In multi-plaintiff case, venue must be established independently for each plaintiff.

Actions Against Domestic Corporations.

Venue in county where domestic corporation resides or where it has principal place of business or in county where substantial alleged act or omission occurred or where substantial event that caused injury occurred. (11-11-3).

Actions Against Executors, Administrators or Guardians.

Venue for nonresidents appointed in this state in county of their appointment. Executors, etc. may be made parties by publication of summons as provided for absent and nonresident defendants. Venue for residents is in county or judicial district of their appointment. (11-11-9).

Actions Against Foreign Corporations.

Non-resident corporation qualified to do business in state in same position as a domestic corporation for venue purposes (157 Miss. 626, 128 So. 887). As result, it may be sued in county where it resides (i.e. has place of business or registered agent, 180 Miss. 552; 178 So. 83) or in county where substantial alleged act or omission occurred or in county where substantial event causing injury occurred. As to nonresident corporation not qualified to do business in state, if venue cannot be placed in county where substantial acts or omissions occurred or where substantial event causing injury occurred, venue also proper in county of plaintiff's residence. (11-11-3).

Actions Against Insurance Companies.

Venue in actions against insurance companies now governed by general statute. (11-11-3).

Actions Against Medical Providers.

Actions against certain medical providers or licensed pharmacies must be brought in county in which alleged act or omission occurred. (11-11-3).

Actions Against Public Utilities.

Venue in actions against public utilities governed by general statute. (11-11-3).

Actions Against Nonresidents.

Nonresident defendant (except corporation qualified to do business in state and having process agent) may be sued where substantial alleged act or omission occurred or in county where substantial event causing injury occurred, or if not applicable, in county where plaintiff resides or is domiciled. (11-11-3).

Actions Against Nonresident Motorists.

Where nonresident operating motor vehicle on highways of State is involved in accident or collision, upon suit where service of process is upon Secretary of State, venue is either in county where cause of action occurred or in county where plaintiff resides. (11-11-3, 13-3-63).

Actions Against State and Political Subdivision.

In action against state, venue is in county where action arose or in Hinds County. In action against subdivision, venue is in county where principal office of subdivision located. (11-45-1, 11-45-17, 11-45-25, 11-46-13).

Actions by Inmates of any Training School, Penitentiary, Prison, Jail or Hospital.

Application for writ of habeas corpus shall be made to judge or chancellor of county in which imprisoned, absent showing of good cause to contrary; however, petition by inmate of training school or hospital claiming denial of constitutional right shall be filed in county from which committed. (11-43-9).

Actions Alleging Defective Product.

May also be commenced where plaintiff obtained product. (11-11-3).

Paternity Action.

Defendant may be sued in county where mother or child resides or where father is present or has property, but defendant has 30 days to remove to county of his residence or domicile. (93-9-17).

Change of Venue.

Where objection to improper venue is made, action is transferred to proper venue. (11-11-17). (MRCP 82). Improper venue is affirmative defense and grounds for dismissal. (MRCP 8, 12; 82[d],926 So.2d 839).

Contract Provisions.

For example, 564 So.2d 36.

5.27 WITNESSES:

See topic 5.13 Evidence, subhead Witnesses.

6 COURTS AND LEGISLATURE

6.01 COURTS:

United States District Courts.

Northern District.

Clerk’s office: Oxford 38655.

Eastern Division sits at Aberdeen and is composed of following counties: Alcorn, Attala, Chickasaw, Choctaw, Clay, Itawamba, Lee, Lowndes, Monroe, Oktibbeha, Prentiss, Tishomingo and Winston.

Western Division sits at Oxford and is composed of following counties: Benton, Calhoun, Grenada, Lafayette, Marshall, Montgomery, Pontotoc, Tippah, Union, Webster and Yalobusha.

Delta Division sits at Oxford and is composed of following counties: Bolivar, Coahoma, DeSoto, Panola, Quitman, Tallahatchie, Tate, and Tunica.

Greenville Division sits at Greenville and is composed of following counties: Carroll, Humphreys, Leflore, Sunflower, and Washington.

Southern District.

Clerk's office: Jackson 39201.

Jackson Division sits at Jackson and is composed of following counties: Amite, Copiah, Franklin, Hinds, Holmes, Leake, Lincoln, Madison, Pike, Rankin, Scott, Simpson and Smith.

Eastern Division sits at Meridian and is composed of following counties: Clarke, Jasper, Kemper, Lauderdale, Neshoba, Newton, Noxubee and Wayne.

Western Division sits at Vicksburg and, if accommodations are provided at no cost to U.S., at Natchez. Jurisdiction consists of following counties: Adams, Claiborne, Issaquena, Jefferson, Sharkey, Warren, Wilkinson and Yazoo.

Southern Division sits at Biloxi and is composed of following counties: George, Hancock, Harrison, Jackson, Pearl River and Stone.

Hattiesburg Division sits at Hattiesburg and is composed of following counties: Covington, Forrest, Greene, Jefferson Davis, Jones, Lamar, Lawrence, Marion, Perry and Walthall.

Supreme Court (State).

Mississippi Supreme Court is court of last resort within state. Its jurisdiction is appellate with original jurisdiction over certain proceedings involving public utility rates. (9-3-9). Court sits at Jackson. (9-3-3). Clerk's office at Carroll Gartin Justice Bldg., 450 High Street, Jackson, MS, 39201.

Court of Appeals (State).

Mississippi Court of Appeals' jurisdiction is limited to those matters assigned to it by Supreme Court. Decisions of Court of Appeals are final and not subject to review by Mississippi Supreme Court, except by writ of certiorari. (9-4-3). Districts and terms. (9-4-5).

Court sits in Jackson. (9-4-11). Clerk's office at Carroll Gartin Justice Building, 450 High Street, Jackson, MS, 39201.

Circuit Courts.

State is divided into 22 circuit court districts. Court sits in terms at various county seats. Each county has circuit clerk. Circuit court has original jurisdiction in all actions when principal of amount in controversy exceeds $200, and of all other actions arising under constitution and laws of this state which are not exclusively cognizable in some other court. (9-7-81). It also has appellate jurisdiction as prescribed by law, and also has jurisdiction of all cases transferred to it by chancery court or remanded to it by Supreme Court. (9-7-83). Appeals are taken directly to Mississippi Supreme Court.

Place of Sitting and location of clerk's office.

Adams County: Sixth Circuit; court sits at Natchez.

Alcorn County: First Circuit; court sits at Corinth.

Amite County: Sixth Circuit; court sits at Liberty.

Attala County: Fifth Circuit; court sits at Kosciusko.

Benton County: Third Circuit; court sits at Ashland.

Bolivar County: Eleventh Circuit, First District; court sits at Rosedale.

Bolivar County: Eleventh Circuit, Second District; court sits at Cleveland.

Calhoun County: Third Circuit; court sits at Pittsboro.

Carroll County: Fifth Circuit, First District; court sits at Carrollton.

Carroll County: Fifth Circuit, Second District; court sits at Vaiden.

Chickasaw County: Third Circuit, First District; court sits at Houston.

Chickasaw County: Third Circuit, Second District; court sits at Okolona.

Choctaw County: Fifth Circuit; court sits at Ackerman.

Claiborne County: Twenty-Second Circuit; court sits at Port Gibson.

Clarke County: Tenth Circuit; court sits at Quitman.

Clay County: Sixteenth Circuit; court sits at West Point.

Coahoma County: Eleventh Circuit; court sits at Clarksdale.

Copiah County: Twenty-Second Circuit; court sits at Hazlehurst.

Covington County: Thirteenth District; court sits at Collins.

DeSoto County: Seventeenth Circuit; court sits at Hernando.

Forrest County: Twelfth Circuit; court sits at Hattiesburg.

Franklin County: Sixth Circuit; court sits at Meadville.

George County: Nineteenth Circuit; court sits at Lucedale.

Greene County: Nineteenth Circuit; court sits at Leakesville.

Grenada County: Fifth Circuit; court sits at Grenada.

Hancock County: Second Circuit; court sits at Bay St. Louis.

Harrison County: Second Circuit, First District; court sits at Gulfport.

Harrison County: Second Circuit, Second District; court sits at Biloxi.

Hinds County: Seventh Circuit, First District; court sits at Jackson.

Hinds County: Seventh Circuit, Second District; court sits at Raymond.

Holmes County: Twenty-First Circuit; court sits at Lexington.

Humphreys County: Twenty-First District; court sits at Belzoni.

Issaquena County: Ninth Circuit; court sits at Mayersville.

Itawamba County: First Circuit; court sits at Fulton.

Jackson County: Nineteenth Circuit; court sits at Pascagoula.

Jasper County: Thirteenth Circuit, First District; court sits at Paulding.

Jasper County: Thirteenth Circuit, Second District; court sits at Bay Springs.

Jefferson County: Twenty-Second Circuit; court sits at Fayette.

Jefferson Davis County: Fifteenth Circuit; court sits at Prentiss.

Jones County: Eighteenth Circuit, First District; court sits at Ellisville.

Jones County: Eighteenth Circuit, Second District; court sits at Laurel.

Kemper County: Tenth Circuit; court sits at DeKalb.

Lafayette County: Third Circuit; court sits at Oxford.

Lamar County: Fifteenth Circuit; court sits at Purvis.

Lauderdale County: Tenth Circuit; court sits at Meridian.

Lawrence County: Fifteenth Circuit; court sits at Monticello.

Leake County: Eighth Circuit; court sits at Carthage.

Lee County: First Circuit; court sits at Tupelo.

Leflore County: Fourth Circuit; court sits at Greenwood.

Lincoln County: Fourteenth Circuit; court sits at Brookhaven.

Lowndes County: Sixteenth Circuit; court sits at Columbus.

Madison County: Twentieth Circuit; court sits at Canton.

Marion County: Fifteenth Circuit; court sits at Columbia.

Marshall County: Third Circuit; court sits at Holly Springs.

Monroe County: First Circuit; court sits at Aberdeen.

Montgomery County: Fifth Circuit; court sits at Winona.

Neshoba County: Eighth Circuit; court sits at Philadelphia.

Newton County: Eighth Circuit; court sits at Decatur.

Noxubee County: Sixteenth Circuit; court sits at Macon.

Oktibbeha County: Sixteenth Circuit; court sits at Starkville.

Panola County: Seventeenth Circuit, First District; court sits at Sardis.

Panola County: Seventeenth Circuit, Second District; court sits at Batesville.

Pearl River County: Fifteenth Circuit; court sits at Poplarville.

Perry County: Twelfth Circuit; court sits at New Augusta.

Pike County: Fourteenth Circuit; court sits at Magnolia.

Pontotoc County: First Circuit; court sits at Pontotoc.

Prentiss County: First Circuit; court sits at Booneville.

Quitman County: Eleventh Circuit; court sits at Marks.

Rankin County: Twentieth Circuit; court sits at Brandon.

Scott County: Eighth Circuit; court sits at Forest.

Sharkey County: Ninth Circuit; court sits at Rolling Fork.

Simpson County: Thirteenth Circuit; court sits at Mendenhall.

Smith County: Thirteenth Circuit; court sits at Raleigh.

Stone County: Second Circuit; court sits at Wiggins.

Sunflower County: Fourth Circuit; court sits at Indianola.

Tallahatchie County: Seventeenth Circuit, First District; court sits at Charleston.

Tallahatchie County: Seventeenth Circuit, Second District; court sits at Sumner.

Tate County: Seventeenth Circuit; court sits at Senatobia.

Tippah County: Third Circuit; court sits at Ripley.

Tishomingo County: First Circuit; court sits at Iuka.

Tunica County: Eleventh Circuit; court sits at Tunica.

Union County: Third Circuit; court sits at New Albany.

Walthall County: Fourteenth Circuit; court sits at Tylertown.

Warren County: Ninth Circuit; court sits at Vicksburg.

Washington County: Fourth Circuit; court sits at Greenville.

Wayne County: Tenth Circuit; court sits at Waynesboro.

Webster County: Fifth Circuit; court sits at Walthall.

Wilkinson County: Sixth Circuit; court sits at Woodville.

Winston County: Fifth Circuit; court sits at Louisville.

Yalobusha County: Seventeenth Circuit, First District; court sits at Coffeeville.

Yalobusha County: Seventeenth Circuit, Second District; court sits at Water Valley.

Yazoo County: Twenty-First Circuit; court sits at Yazoo City.

Chancery Courts.

State is divided into 20 chancery court districts. Court sits at least twice each year at various county seats. (9-5-3). Chancery court has jurisdiction over all matters in equity; divorce and alimony; matters testamentary and of administration; minor's business; and cases of idiocy, lunacy and persons of unsound mind. (Const. Art. VI, § 159). Court also has jurisdiction over matters transferred to it by circuit court or remanded to it by Mississippi Supreme Court. (9-5-81). Appeals are taken directly from chancery court to Supreme Court.

Places of Sitting.

Adams County: Seventeenth District; court sits at Natchez.

Alcorn County: First District; court sits at Corinth.

Amite County: Fourth District; court sits at Liberty.

Attala County: Sixth District; court sits at Kosciusko.

Benton County: Eighteenth District; court sits at Ashland.

Bolivar County: Seventh District, First Division; court sits at Rosedale.

Bolivar County: Seventh District, Second Division; court sits at Cleveland.

Calhoun County: Eighteenth District; court sits at Pittsboro.

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Carroll County: Sixth District, Second Division; court sits at Vaiden.

Chickasaw County: Fourteenth District, First Division; court sits at Houston.

Chickasaw County: Fourteenth District, Second Division; court sits at Okolona.

Choctaw County: Sixth District; court sits at Ackerman.

Claiborne County: Seventeenth District; court sits at Port Gibson.

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Clay County: Fourteenth District; court sits at West Point.

Coahoma County: Seventh District; court sits at Clarksdale.

Copiah County: Fifteenth District; court sits at Hazlehurst.

Covington County: Thirteenth District; court sits at Collins.

DeSoto County: Third District; court sits at Hernando.

Forrest County: Tenth District; court sits at Hattiesburg.

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Greene County: Sixteenth District; court sits at Leakesville.

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Harrison County: Eighth District, First Division; court sits at Gulfport.

Harrison County: Eighth District, Second Division; court sits at Biloxi.

Hinds County: Fifth District, First Division; court sits at Jackson.

Hinds County: Fifth District, Second Division; court sits at Raymond.

Holmes County: Eleventh District; court sits at Lexington.

Humphreys County: Ninth District; court sits at Belzoni.

Issaquena County: Ninth District; court sits at Mayersville.

Itawamba County: First District; court sits at Fulton.

Jackson County: Sixteenth District; court sits at Pascagoula.

Jasper County: Second District, First Division; court sits at Paulding.

Jasper County: Second District, Second Division; court sits at Bay Springs.

Jefferson County: Seventeenth District; court sits at Fayette.

Jefferson Davis County: Thirteenth District; court sits at Prentiss.

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Jones County: Nineteenth District, Second Division; court sits at Laurel.

Kemper County: Sixth District; court sits at DeKalb.

Lafayette County: Eighteenth District; court sits at Oxford.

Lamar County: Tenth District; court sits at Purvis.

Lauderdale County: Twelfth District; court sits at Meridian.

Lawrence County: Thirteenth District; court sits at Monticello.

Leake County: Eleventh District; court sits at Carthage.

Lee County: First District; court sits at Tupelo.

Leflore County: Seventh District; court sits at Greenwood.

Lincoln County: Fifteenth District; court sits at Brookhaven.

Lowndes County: Fourteenth District; court sits at Columbus.

Madison County: Eleventh District; court sits at Canton.

Marion County: Tenth District; court sits at Columbia.

Marshall County: Eighteenth District; court sits at Holly Springs.

Monroe County: First District; court sits at Aberdeen.

Montgomery County: Third District; court sits at Winona.

Neshoba County: Sixth District; court sits at Philadelphia.

Newton County: Second District; court sits at Decatur.

Noxubee County: Fourteenth District; court sits at Macon.

Oktibbeha County: Fourteenth District; court sits at Starkville.

Panola County: Third District, First Division; court sits at Sardis.

Panola County: Third District, Second Division; court sits at Batesville.

Pearl River County: Tenth District; court sits at Poplarville.

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Wilkinson County: Seventeenth District; court sits at Woodville.

Winston County: Sixth District; court sits at Louisville.

Yalobusha County: Third District, First Division; court sits at Coffeeville.

Yalobusha County: Third District, Second Division; court sits at Water Valley.

Yazoo County: Eleventh District; court sits at Yazoo City.

County Courts exist in some counties (see listing below). (9-9-1). County court has jurisdiction concurrent with justice court in all matters civil and criminal in which justice court has jurisdiction; concurrent with circuit and chancery courts in all matters of law and equity, wherein amount of value of thing in controversy does not exceed $200,000; exclusive jurisdiction in eminent domain, partition of personal property, and actions of unlawful entry and detainer. (9-9-21).

Places of sitting:

Adams County: court sits at Natchez.

Bolivar County: First District; court sits at Rosedale. Second District; court sits at Cleveland.

Coahoma County: court sits at Clarksdale.

DeSoto County: court sits at Hernando.

Forrest County: courts sits at Hattiesburg.

Harrison County: First District; court sits at Gulfport. Second District; court sits at Biloxi.

Hinds County: First District; court sits at Jackson. Second District; court sits at Raymond.

Jackson County: court sits at Pascagoula.

Jones County: First District; court sits at Ellisville. Second District; court sits at Laurel.

Lamar County: court sits at Purvis.

Lauderdale County: court sits at Meridian.

Lee County: court sits at Tupelo.

Leflore County: court sits at Greenwood.

Lowndes County: court sits at Columbus.

Madison County: court sits at Canton.

Pike County: court sits at Magnolia.

Rankin County: court sits at Brandon.

Warren County: court sits at Vicksburg.

Washington County: court sits at Greenville.

Yazoo County: court sits at Yazoo City.

Small Claims Courts.

Justice Courts.

Each county has at least two justice court judges, required to sit at least once monthly in courtroom designated by county. (9-11-2, 9-11-15). Justice court judges have jurisdiction for collection of debts of every kind where principal amount sued for does not exceed $3,500. (9-11-9). Justice courts may order restitution up to $5,000 when person is convicted of criminal activities which have resulted in pecuniary damages. (99-37-3[1]). For county seat locations, see subhead Circuit Courts, supra.

6.02 LEGISLATURE:

Regular session convenes annually on Tues. after first Mon. in Jan., for period limited to 125 calendar days every fourth year and 90 calendar days every other year. Session may be extended by resolution and required vote. (Const. Art. 4, § 36).

Special or Extraordinary Sessions.

Governor has power to convene special session of legislature when, in his judgment, public interest requires it; Governor shall state by public proclamation matters to be considered in special session. (Miss. Const. Art. 5, § 121).

Initiative and Referendum.

Neither provided for.

Lobbyists.

Regulated by 5-8-1, et seq. and by 97-7-57.

6.03 REPORTS:

Official reporter for decisions of Mississippi Supreme Court through 1966 is “Mississippi Reports”, consisting of volumes 1 through 254, but early volumes are frequently cited by names of reporters, as follows: Walker, one volume; Howard, seven volumes; Smedes and Marshall, fourteen volumes. Mississippi cases since 1886 are also reported in Southern Reporter. For decisions reported after 1966, official reporter is “Southern Reporter—Mississippi Cases” (West Pub. Co.). (7-3-11, 7-3-13). Selected opinions of Court of Appeals may also be published. (Miss. R. App. P. 35-B).

Unofficial Reports.

None.

Digests.

Mississippi Digest (West Pub. Co.), supplemented by pocket parts, digests all Mississippi cases and federal cases arising in Mississippi. There are also Mississippi Digests (4 vols.) published in 1911, and Supplement (1 vol.) published in 1920, by Bobbs-Merrill Co.

6.04 STATUTES:

Latest official compilation of statutes is Mississippi Code of 1972, Annotated, effective after Nov. 1, 1973. Laws enacted subsequently are compiled according to legislative session in “General Laws of Mississippi” published by Secretary of State. Code volumes are supplemented by pocket parts and updated as needed.

Uniform Acts.

Athlete Agents (2001); Child Abduction Prevention (2009); Child Custody Jurisdiction and Enforcement (2004); Common Trust Fund (1950); Controlled Substances (1971, last am’d 1998); Determination of Death (1981, last am’d 1997); Disclaimer of Property Interests (1994); Disposition of Unclaimed Property (1982, last am’d 1997); Durable Power of Attorney (1994); Electronic Transactions (2001); Estate Tax Apportionment (1995); Health Care Decisions (1998); Interstate Enforcement of Domestic Violence Protection Orders Act (2000); Interstate Family Support (1997); Management of Institutional Funds (1998); Partnership (1977; 1997); Paternity (1962); Mississippi Post-Conviction Collateral Relief (1984); Principal and Income (1967); Mississippi Pulpwood Scaling and Practices (1982); School Law of 1986 (1987); Secure the Attendance of Witnesses from Without a State in Criminal Proceedings (1938); Securities Act (2009, eff. 2010); Simplification of Fiduciary Security Transfers (1960); Simultaneous Death (1956); Standards Code for Factory-Built Homes (1970, last am’d 1992); Trade Secrets (1990);

Nonprobate Transfer on Death (1997); Transfers to Minors (1995); Trustees' Powers (1966, last am'd 1994); Veterans' Guardianship (1930).

Uniform Commercial Code enacted, effective Mar. 31, 1968. See category 3 Business Regulation and Commerce, topic 3.09 Commercial Code.

For text of Uniform Acts falling within the scope of the Martindale-Hubbell Law Digests see Uniform and Model Acts section.

6.05 UNIFORM LAWS:

See topic 6.04 Statutes.

7 CRIMINAL LAW

7.01 CRIMINAL LAW:

Crimes are governed by Title 97, 1972 Code. Criminal procedure is governed by Title 99, 1972 Code and Uniform Rules of Circuit and County Court Practice.

Indictment or Information.

Criminal proceeding in felony initiated by returning and presentment of indictment by 12 grand jurors. (99-7-9, 99-7-11). Prosecutor with knowledge of status of criminal charge may inform victim or victim's family as to status of charge. (99-7-9).

Bail.

Where proof is evident or presumption great, preconviction bail may be denied in capital cases, and also in cases with potential sentences of at least 20 years if defendant is special danger to community or his appearance cannot be assured. (Miss. Const. Art. III, § 29). After conviction of felony, except those crimes listed in 99-35-115(1), and pending appeal, bail is matter of right unless court denies bail if special danger exists. In cases of treason, murder, rape, arson, burglary or robbery no bail of right is available unless court in exercise of greatest caution orders otherwise. (99-35-115; 63 So. 2d 52).

Where defendant in criminal matter fails to appear for proceeding as ordered by court, then court shall order bail forfeited and bench warrant issued at time of nonappearance. Upon declaration of forfeiture, court shall issue judgment nisi. Clerk shall notify surety of forfeiture by writ of scire facias, with copy of judgment nisi and bench warrant attached thereto, within ten working days of such order by personal service or certified mail. Failure of clerk to provide required notice is evidence that order should be set aside. (99-5-25). See 21-23-8 for appearance bond payable to municipality.

See 99-5-1 for form of bail, as follows:

Form

"State of Mississippi,

___________ County.

We ___________, principal, and ___________ and ___________, sureties, agree to pay the State of Mississippi _______ Dollars, unless the said ___________ shall appear at the next term of the circuit court of ___________ County, and there remain from day to day and term to term until discharged by law, to answer a charge of ___________.

Signed ____________________.

____________________.

Approved ____________________.

____________________."

See also 99-5-1 for requirements of bond form.

Uniform Act for Out-of-State Parolee Supervision.—(47-7-71).

Interstate Compact for Adult Offender Supervision.—(47-7-81).

8 DEBTOR AND CREDITOR

8.01 ASSIGNMENTS:

Uniform Commercial Code adopted. (75-1-101 thru 75-11-108). See category 3 Business Regulation and Commerce, topic 3.09 Commercial Code.

Instrument Transferring Title.

No general provision exists; however, specific requirements exist in some circumstances. Generally, choses in action are assignable. (11-7-3). For acknowledgments and witness requirements, see generally 25-33-1 to 25-33-31 and 89-3-1 to 89-3-15.

Filing.

Assignment for benefit of creditors where property assigned exceeds $1,000 must file petition relating to same under requirements of 85-1-1. Sale of chose in action made after suit filed must be evidenced by writing, signed, acknowledged and filed with papers of suit. (11-7-7). Certain liens which are assignable shall exist without writing and without recording between parties, unless otherwise expressly provided by statutes. (85-7-261). Assignments of indebtedness secured by mortgage, deed of trust, or other lien of record must be entered on margin of record or assignments must be acknowledged and filed for record. (89-5-17). Specific statutory provisions relate to various forms of assignments, need for recording same, and effect thereof.

Assignment of Wages.

Employer is not bound by assignment or pledge of wages unless copy is served on him before delivery of goods purchased or consummation of contract to purchase same and employer consents in writing to be bound. (71-1-45).

8.02 ATTACHMENT:

Mississippi's chancery attachment statutes and statutory scheme for attachment at law were held unconstitutional. (444 F. Supp. 925). Mississippi's attachment in chancery statutes were amended in 1980 to comply with procedural due process requirements. Through 2009 legislative session, Mississippi's attachment at law statutes have not been amended to comport with due process requirements. It is advised that statutory scheme providing for attachment at law not be utilized in collection efforts until such time as it is amended. See generally 11-33-1 et seq.

Actions in Which Allowed.

Attachment in chancery permitted upon demands for legal or equitable indebtedness or for damages for breach of contract or tort. (11-31-1). Attachment at law lies in all actions founded on any indebtedness, on damage claim for breach of contract or on penal statutes. (11-33-1). Exemptions exist. (71-1-43, 85-3-1 to 85-3-52).

Courts Which May Issue Writ.

Attachment writ in chancery issued by chancery court. (11-31-1). Attachment writ at law issued by supreme court judge, circuit judge, chancellor, clerk of circuit or chancery court or deputy of such clerk, or any justice court judge or mayor of any city, town or village (11-33-9, 11-33-19) and made returnable to circuit court or justice court (11-33-17).

In Whose Favor Writ May Issue.

Nonresidents, including foreign corporations, as well as citizens, can obtain writs of attachment. (19 Miss. [11 S&M] 53; 19 Miss. [11 S&M] 58; 147 Miss. 374, 112 So. 7).

Against Whom Writ May Issue.

Attachment writ in chancery against any nonresident, absent or absconding debtor who has lands and tenements in state or against any such debtor and persons in this state who have effects or are indebted to such nonresident, absent or absconding debtor. (11-31-1). Attachment writ at law generally available against resident and nonresident debtors (11-33-1, 11-33-7); joint debtors (11-33-3); partners (11-33-5); or nonresidents jointly indebted (11-33-7).

Grounds.

Attachment in chancery, if ability to recover claim is impaired or impeded if order of attachment is not issued. (11-31-2). Attachment at law, if defendant: (1) Is foreign corporation or nonresident of state; (2) has removed or is about to remove himself or property out of state; (3) so absconds or conceals himself that he cannot be served with summons; (4) contracted debt or incurred obligation in conducting business of water craft in some navigable waters of state; (5) has property or rights in action which he conceals and unjustly refuses to apply to payment of his debts; (6) has assigned or disposed of, or is about to assign or dispose of his property or rights in action, or some part thereof with intent to defraud his creditors; (7) has converted or is about to convert his property into money or evidences of debt with intent to place it beyond reach of his creditors; (8) fraudulently contracted debt or incurred obligations for which suit has been or is about to be brought; (9) is buying, selling or dealing in futures, directly or indirectly, or has done so within six months; (10) is in default as principal for public money due state, county or municipality; (11) is banker, banking company or corporation, and received deposits, knowing at time that he or it was insolvent, or has made false or fraudulent statements as to his or its financial condition; or (12) has judgment lien for nonpayment of support under Title 93 enrolled against him. (11-33-9).

Attachment will lie on ground that defendant is foreign corporation, even though it be domesticated in Mississippi. (181 Miss. 223, 177 So. 653).

Creditor may obtain attachment for debt not due by making affidavit of any of last six grounds for attachment, or that he has just cause to suspect and verily believes that his debtor will remove himself or his effects out of state before debt will become payable, with intent to hinder, delay or defraud his creditors, or has done so with such intent, leaving property in this state. (11-33-35).

Proceedings to Obtain.

Attachment in chancery; upon filing of bill of complaint, complainant may apply for order of attachment by presenting to chancellor bill and affidavit including following: (1) Statement that action is one described in 11-31-1 and is brought against defendant described in said section; (2) detailed statement of facts and grounds which entitle complainant to order of attachment, which shall include statement of specific reasons why complainant's ability to recover amount of his claim may be endangered or impeded if order of attachment is not issued; (3) statement of amount plaintiff seeks to recover; (4) statement that complainant has no information or belief that claim is discharged or stayed in proceeding under Federal Bankruptcy Act; (5) description of property to be attached under writ of attachment and statement that complainant is informed and believes that such property is not exempt from attachment or seizure under 85-3-1; and (6) listing of other persons known to complainant who may have interest in property sought to be attached, together with description of that interest. (11-31-2[1]).

Chancellor may issue order of attachment after examining affidavit and bill of complaint only if: (1) Complainant's ability to recover amount of his claim may be significantly impaired unless order is issued; (2) affidavit establishes prima facie case of complainant's right to recover against defendant; (3) complainant gives security satisfactory to court to abide further orders of court and to protect defendant from injury should action of attachment be judicially determined to have been wrongfully brought. (11-31-2[2]). Attachment at law, creditor or his agent must make affidavit to amount of his demand and to one or more of stated grounds for attachment. (11-33-9).

Attachment Bond.

Attachment in chancery, security is posted pursuant to court order. (11-31-2). Attachment at law, bond must be approved by officer issuing writ and must be double amount claimed. (11-33-11). Bond executed by agent or attorney of attaching creditor. (11-33-13). Amendment of bond. (11-33-15).

Levy.

In attachment in chancery (11-31-3, 11-31-5) and at law (11-33-23) attachment is levied on all nonexempt personal and real property.

Indemnity.

If officer who is required to levy attachment is in doubt as to ownership of property to be levied on, he may require indemnity bond in double value of such property. (13-3-157).

Lien.

Attachments constitute liens on all property as of date levied. (11-33-23).

Release of Property.

Attachment in chancery, by immediate post-seizure hearing or by giving security of 125% of value of property attached or 125% of amount of claim, whichever is less. (11-31-2). Attachment at law, personal property may be replevied by giving bond, with sufficient sureties, payable to plaintiff in double value of property. (11-33-45).

Sale.

Where perishable property attached and not replevied officer holding same may sell property in manner property sold under execution. (11-33-71). Party to suit upon ten days' notice may apply for order directing officer having custody of property to sell same, and upon sale proceeds are held by such officer pending result of suit. (11-33-73).

Third Party Claims.

All provisions of law in relation to third parties claiming property levied on shall extend and apply to claimants of property levied on by virtue of writs of attachment. (11-33-69).

Vacation or Modification.

No statutory provision.

8.03 [RESERVED]

8.04 CREDITORS' SUITS:

Suit in equity will lie on behalf of creditors of which chancery court has jurisdiction.

8.05 EXECUTIONS:

Clerks of all courts of law or equity shall issue execution after adjournment of court for term at which judgment is rendered and upon request and at cost of owner of judgment. (13-3-111). In justice courts execution may not issue until ten days after rendition of judgment, unless party recovering judgment shall make and file affidavit that he believes he will be in danger of losing his debt or demand by such delay, in which case execution shall issue immediately; but other party shall not be deprived of his right of appeal within time prescribed. (11-9-131). See category 5 Civil Actions and Procedure, topic 5.19 Practice.

Kinds of Execution.

Types of writ of execution governed by statute. (13-3-121 to 13-3-133). There are procedures to enforce chancery decrees for payment of money by any executor, administrator or guardian (11-5-81, et seq.); and other general garnishment procedures to enforce judgments (11-35-1 to 11-35-61).

Exemptions.

See topic 8.06 Exemptions.

Time for Issuance.

See introductory paragraph under this topic.

Stay.

Judgment of justice court must be stayed where debtor, within ten days after judgment, procures responsible person to appear before justice, and in writing, entered on justice's docket and signed by person so appearing, consents to become surety for payment. Period of stay is 30 days from date of judgment where judgment is not over $50 and 60 days where amount is larger. In case of nonpayment at expiration of stay execution issues against principal and sureties, or either, for principal, interest and costs. Debtor obtaining stay in this manner waives errors in judgment and abandons right of appeal and certiorari. (11-9-139; 11-9-141). See category 5 Civil Actions and Procedure, topic 5.03 Appeal and Error.

Lien.

Writ of execution, where there is no judgment lien, shall bind defendant's property only from time of levy. (13-3-139).

Levy.

Where there is no judgment lien, executions bind the property only from time of levy, and the first delivered is first levied and satisfied. Officers are required to mark day of month, year and hour of their receipt of execution. (13-3-139).

Execution cannot be levied on growing crops (13-3-137); landlord has priority lien on tenant's personal property, other than merchandise sold in normal course of business, to secure payment of rent, whether or not due (89-7-51).

Return.

Executions are returnable on first day of next term of court after rendition of judgment, provided 15 days elapse between such issuance and return, and, if not, on first day of term next thereafter. (13-3-113).

Priorities.

If there are two or more executions against the same person, that which was first delivered shall be first levied and satisfied. (13-3-139).

Claims of Third Persons.

When person not party to execution claims to be owner of or to have lien on any personal property levied upon, such person may make affidavit as to his right or title to property and enter into bond payable to plaintiff in execution, with one or more sufficient sureties, in penalty double value of property claimed, or in double amount of execution if that be less than value of property, conditioned for prosecution of claim. Upon making of affidavit and bond, officer holding execution must deliver property to claimant. Claim may be filed without giving bond, in which event property is not delivered to claimant, but is sold or held by officer. (11-23-7). Further proceedings are stayed until final decision of claim. (11-23-9).

Satisfaction.

No specific time period provided by statute upon expiration of which satisfaction is presumed.

Sale.

All sales of property under execution shall not commence sooner than 11:00 A.M., nor continue later than 4:00 P.M. All such sales must be made by auction to highest bidder for cash, and only so much of property levied on shall be sold as will satisfy execution and costs. Sales upon execution by special agent of Tax Comm. pursuant to warrant, jeopardy warrant or alias warrant issued by Comm. Chairman must take place at times specified by Chairman or his authorized agent. All such sales must be by auction to highest bidder for cash or cash equivalent acceptable to Chairman, and only so much of property levied shall be sold as will satisfy execution and costs. (13-3-169).

Redemption.

No period of redemption provided by statute.

Supplementary Proceedings.

Upon written motion and order of court judgment creditor may examine judgment debtor and compel production of books, papers and other documents to aid in satisfaction of judgment over $100. (13-1-261; 13-1-263; 13-1-265). MRCP 69 provides supplementary procedure.

Body Execution.

No statutory procedure regarding satisfaction of damages or debt. However, attachment may be issued for nonappearing subpoenaed witness. (13-3-103). See also 99-9-15 and MRCP 45 for general treatment.

8.06 EXEMPTIONS:

Every debtor is entitled to exemptions from seizure: $10,000 in tangible property selected by debtor, insurance proceeds on exempt real or personal property and proceeds of sale of such exempt property, income from certain insurance, certain stock bonus, pension, annuity, or similar plan, mobile home or similar dwelling up to value of $30,000, after deducting taxes and other liens from value of dwelling, and property subject to enforcement or collection of civil or criminal contempt orders, except orders or judgments for payment of alimony, separate maintenance and child support actions. (See 85-3-1 for full list of exemptions.) (See also 409 So. 2d 704.)

Substitution.

No statutory provision for substitution.

Debts Against Which Exemptions Not Allowed.

Property exemption is not available against claim for taxes and assessments or for purchase price thereof. (85-3-47).

Waiver of Exemption.

General waiver of exemptions in advance is not enforceable (see 42 So. 172); but exemption of specific property may be waived by contract creating lien thereon and any exemption may be waived by failure to claim it. (85-3-1[1]).

Necessity of Claiming Exemption.

See subhead Waiver of Exemption, supra.

Earnings.

Wages, salaries and compensation of resident workers are exempt for 30 days after service of attachment, execution, or garnishment writ. Thereafter, maximum subject to seizure is lesser of 25% of worker’s disposable earnings for that week or amount based upon formula incorporating federal minimum wage. (85-3-4). See also topic 8.09 Garnishment.

8.07 FORECLOSURE:

See category 20 Mortgages, topic 20.04 Mortgages of Real Property.

8.08 FRAUDULENT SALES AND CONVEYANCES:

Transfer or obligation incurred by debtor is fraudulent as to creditor, whether creditor’s claim arose before or after transfer was made or obligation was incurred, if debtor made transfer or incurred obligation with actual intent to hinder, delay or defraud creditor. (15-3-107).

Uniform Commercial Code adopted, effective Mar. 31, 1968; revised Art. 9 adopted, effective Jan. 1, 2002. See category 3 Business Regulation and Commerce, topic 3.09 Commercial Code.

Uniform Fraudulent Conveyance Act not adopted.

Uniform Fraudulent Transfer Act substantially adopted, effective July 1, 2006. (15-3-101 through—15-3-120). Reduces model act’s statute of limitations period to three years. (15-3-115). Chancery court has jurisdiction. (11-5-75). (Repealed 15-3-3, eff. July 1, 2006).

Remedies.

Creditors may obtain avoidance of transfer or obligation, attachment, injunction, appointment of receiver, or other relief. (15-3-111).

Bulk Sales.

UCC Art. 6 Bulk Transfers repealed. See category 3 Business Regulation and Commerce, topic 3.09 Commercial Code.

8.09 GARNISHMENT:

The right to subject money or property of debtor in possession of third persons to claims against the debtor by garnishment is controlled by 11-35-1 thru 11-35-61. (See 389 So. 2d 1378.)

Property Which May Be Reached.

All property in garnishee's hands belonging to defendant at time of service of writ of garnishment is bound by lien of judgment, decree or attachment. Wages, salaries and other compensation are exempt for 30 days after service of writ of garnishment. Thereafter, exemptions apply to percentages of earnings. (11-35-23; 85-3-4). Certain property is exempt from garnishment. See topic 8.06 Exemptions.

Jurisdiction.

The clerk of court where judgment or decree was obtained by the creditor may issue writ of garnishment directed to sheriff or proper officer. (11-35-1).

Proceedings to Obtain.

Writ issues on suggestion in writing by plaintiff in judgment or decree in any court upon which execution may be issued. (11-35-1, 11-35-7).

Bond is not required.

Answer of Garnishee.

Any garnishee summoned must answer on oath whether or not he is indebted to defendant, or was indebted at time of service of writ, or has since been indebted to defendant, and, if so, in what amount and whether due or not and when to become due, and how debt is evidenced and what interest it bears; also, what effects of defendant he has or had at time of service of writ on him, or has had since, in his possession or under his control; also, whether he knows or believes that any other person is indebted to defendant and, if so, who, and in what amount and where such person resides; also, whether he knows or believes that any other person has effects of defendant in his possession or under his control and, if so, who and where he resides. If garnishee is indebted to defendant for wages, salary or other compensation, he must answer on oath whether defendant is employee of garnishee, and if so, time interval between pay periods of defendant, including specific day paid. (11-35-25).

Garnishee may plead that judgment under which writ was issued is void and, if plea is sustained, no judgment can be rendered against him. (11-35-39).

Answers in circuit or chancery court are due on first day of the return term; in justice court, answer is due by noon on return day of writ. (11-35-27).

Practice.

Failure to answer on return term subjects garnishee to liability for full amount of demand against defendant and costs; garnishee, however, may suspend execution by filing sworn declaration in court showing property and effects in his possession belonging to debtor and his indebtedness to debtor, if any; and by such act and upon hearing, limit his liability to extent of such property and effects held by him. (11-35-31). No judgment can be rendered against state, county, municipality or any state institution, board, commission, or authority, for default in failing to make answer to writ. (11-35-13).

Either plaintiff or defendant may contest answer of garnishee in writing. (11-35-45, 11-35-47).

Adverse Claims.

If garnishee, by his answer or by affidavit, shows that he has been notified that another person claims title to or interest in debt or property, subject to writ, court suspends all further proceedings and summons issues for person so claiming to appear and contest with plaintiff right to such money, debt or property. (11-35-41).

Judgment.

If garnishee admits indebtedness to or possession of effects of defendant and same has not been delivered to sheriff, judgment may be rendered against him in favor of plaintiff for amount of debt admitted or for property, or value thereof, admitted to be in his possession; but judgment may not exceed plaintiff's demand. (11-35-29).

If issue is found against garnishee, judgment is rendered against him in amount of debt or money or property in his hands in favor of plaintiff as necessary to satisfy his judgment or claim against defendant, or in favor of defendant if judgment of plaintiff has been satisfied, or for so much thereof as may remain after satisfying said judgment. (11-35-51).

Garnishee can surrender to the sheriff any property, except wages, salaries or other compensation, in his hands belonging to defendant and officer is to dispose of property either as if levied on by execution or by writ of attachment. (11-35-23). If garnishee is indebted or shall become indebted to defendant for wages, salary or other compensation during first 30 days after service of writ of garnishment, garnishee shall pay over to employee all of such indebtedness. Thereafter, garnishee shall retain and writ shall bind non-exempt percentage of disposable earnings as provided by 85-3-4 for such period of time as is necessary to accumulate sum equal to amount shown on writ as due court. Unless otherwise directed by court, garnishee shall then make one payment into court of amount due, provided that at least one payment per year shall be made of all sums withheld preceding year. (11-35-23).

8.10 HOMESTEADS:

Persons entitled to homestead exemption include every citizen of state, male or female, who is householder. (85-3-21, et seq.). But husband or wife, widower or widow, over 60 years of age, who has been exemptionist, shall not be deprived because of not residing therein. (85-3-21, 23).

Limitation of Value.

Land and buildings owned and used as residence may be exempted to extent of $75,000 (85-3-21, et seq.).

Limitation of Area.

Quantity of land which may be held exempt may not exceed 160 acres. (85-3-21).

Debts or Liabilities Against Which Exemption Not Available.

Homestead exemption not available against taxes, claims for purchase price, claims for labor done on property or materials furnished therefor, or when judgment is for labor performed or upon forfeited recognizance or bail bond. (85-3-47).

Designation of Homestead.

Citizen entitled to homestead shall make declaration, including legal description of property, duly acknowledged and filed of record with office of chancery clerk (85-3-25), and in same manner as deeds are recorded (88-3-29).

Claim of Exemption.

Judgment debtor may claim exemption anytime before sale. (46 So. 414).

Loss of Exemption.

Upon debtor’s ceasing to reside on homestead, it shall be liable to his debts, unless removal be temporary or debtor be over 60 years of age. (85-3-43).

Alienation or Encumbrance.

Both husband and wife must join in same conveyance or other encumbrance of homestead, unless spouse of owner is incompetent; otherwise instrument is void. (89-1-29).

Proceeds of Sale.

If premises not capable of being divided so as to set off part for debtor, following 60 day allowance to debtor to pay valuation in excess of exempt value, officer may advertise and sell premises, and shall pay debtor exempt amount out of sale proceeds. (85-3-37).

Rights of Surviving Spouse and Family.

Where deceased person leaves widow or husband or other heirs-at-law entitled to inherit from deceased person, they shall be entitled to homestead exemption, whether or not declared by decedent during lifetime. (85-3-33).

See categories 14 Family, topic Husband and Wife, subhead Conveyance or Encumbrance of Property; Property, topic Deeds, subhead Execution.

8.11 JUDGMENT NOTES:

See category 3 Business Regulation and Commerce, topic 3.02 Bills and Notes.

State, county, city, or municipality, or officials representing same, incorporated charitable or educational institutions maintained by state, incorporated instrumentalities owned by U.S., and former employees, directors and officials of penitentiary, Penitentiary Board or psychiatric hospitals, sued individually for tortious acts committed while serving in said capacity, may appeal without bond and such appeal may operate as supersedeas. (11-51-101).

8.12 LEVY:

See topics 8.02 Attachment; 8.05 Executions.

8.13 LIENS:

Uniform Commercial Code adopted, effective Mar. 31, 1968. (75-1-101 to 75-11-108). See category 3 Business Regulation and Commerce, topic 3.09 Commercial Code.

Waiver, Loss or Extinguishment.

Expiration Within Six Months.

Unless judicial enforcement proceedings are begun, following liens expire within six months: laborer's lien on lumber and timber (85-7-3); laborer's or materialman's lien on water craft (85-7-7).

Expiration Within 12 Months.

Unless judicial enforcement proceedings are begun to enforce lien, following liens expire within 12 months: lien of owner of stallion, jackass, or bull on each foal or calf thereof (85-7-5); laborer's, materialman's, architect's, surveyor's, engineer's, water well driller's, or contractor's lien on buildings, water wells, structures, fixtures, subdivided real property, etc. (85-7-141).

Enforcement.

Any person entitled to benefit of such lien must commence his suit in circuit court of county in which property is located, if principal of demand exceeds $200, within 12 months after time when money became due and payable, and may not commence suit thereafter. (85-7-141). All parties having interest in controversy or claiming liens on same property shall be made parties; omitted parties may be added by amendment; and claims of several parties having liens on same property may be joined in same action. (85-7-143). Defendants must be summoned as in other actions by law; nonresident or absent defendants may be summoned by publication as in chancery; in default of appearance, same proceedings shall be had as if such defendant had been duly summoned and made default. (85-7-145). Defenses and counterclaims may be made by answer to petition, including any lien defendant claims upon property; trial shall be confined to issues presented in pleadings. (85-7-147).

Judgment.

May be rendered against defendant generally with costs as in other cases, and with reasonable attorney's fees, with special order for sale of property upon which lien exists for payment thereof, and execution for residue issues as in other cases. (85-7-151).

Sale of land is made under special writ of execution. (85-7-153, 85-7-155).

Liens on Crops, Advances, Lumber, Timber, Foals, Calves and Water Craft.

Person holding lien on crops, advances, lumber, timber, foals, calves or water craft, under §§ 85-7-1 through 85-7-9, may enforce it by making affidavit to any officer authorized to administer oaths in county where property is located, setting forth required information, whereupon clerk or justice shall issue writ to officer, commanding seizure of property and summons of interested persons to appear in designated court and answer complaint. (85-7-31). Nonresident and unknown parties may be made parties and proceeded against as in case of suits by attachment. (85-7-33). Form for affidavit and writ is provided in 85-7-35 through 85-7-39. Writ is returnable to justice of peace if principal of sum claimed does not exceed $200; otherwise, it is returnable to circuit court and affidavit must be filed, by officer who issued writ, in circuit court clerk's office on or before return day of writ. (85-7-41). Writs returnable to justice of peace may be made returnable at any time that provides parties in interest five days' notice before trial; writs returnable to circuit court may be executed at any time before first day of term, and cause is triable at such term. (85-7-43). Return to wrong court does not affect case, but case must be transferred to proper court. (85-7-45). Any interested person may give bond and replevy seized property; bond is handled as in like case in action of replevin; any bond given inures to benefit of person in whose favor judgment is given. (85-7-47). Any interested person may contest plaintiff's demand, on return day of writ or on any day before final judgment, by filing written statement under oath of his defense or claim; case will then be tried as other cases in court; form and content of judgment is specified. (85-7-49). Death of party does not abate suit or judgment. (85-7-51). For sale of steamboat or other water craft, officer shall levy on, advertise and sell it as personal property too cumbersome to be moved; purchaser acquires it free from all prior encumbrances saving rights of those having concurrent liens. (85-7-53).

Liens on Watches, Jewelry, Etc., Left Over 90 Days for Repairs, Etc.

Watches, jewelry, etc., left over 90 days for repair may be sold to pay reasonable or agreed charges, provided notice is given of proposed sale and amount due. (85-7-73). Notice constitutes mailing by registered or certified mail, at least 30 days before sale, of letter with return address marked, to owner at address given at time of delivery of such articles. (85-7-75). If articles are not redeemed within 30 days, they may be sold at time and place specified in letter, either at public auction or by private sale; proceeds in excess of lien must be held for six months, after which they escheat to county. (85-7-77). All persons utilizing provisions of these sections must post in prominent places in their offices two notices containing specified language. (85-7-79).

Liens for Labor and Materials on Articles Constructed, Manufactured or Repaired.

Mechanic to whom price of labor or material employed in constructing, manufacturing or repairing articles is owed has right to retain possession of such articles until price is paid; if not paid within 30 days, he may commence suit in any court of competent jurisdiction and upon proof of value of labor and material employed, he shall be entitled to judgment with costs, special order for sale of property retained, and execution for residue. (85-7-101).

Liens for Price of Feeding, Grooming, Etc., on Horses, Mules, Cows, Etc.

Owner of every livery stable, sale stable, feed stable or public pasture to whom price of feeding, grooming, etc., is owed has right to retain possession of animal until price is paid; if not paid within ten days, he may commence suit before justice of the peace where principal of amount does not exceed $200, and in circuit court if it exceeds that sum; upon proof of debt, he shall be entitled to judgment with costs, special order for sale of property retained, and execution for residue. (85-7-103). If lienholder loses possession to owner, he retains his lien and may enforce it as provided by 85-7-31 and 85-7-53. (85-7-105).

Liens for Price of Labor and Materials Used in Constructing, Manufacturing or Repairing Motor Vehicles.

Mechanic to whom price of labor or material employed in constructing, manufacturing or repairing motor vehicles is owed has right to retain possession of motor vehicle until price is paid. If not paid within 30 days, he shall notify, by certified mail, legal owner and holder of any lien of amount owed and provide opportunity for redemption. If property is not redeemed within five days after such mailing, he may commence suit in any court of competent jurisdiction. Upon proof of value of labor and materials employed, he shall be entitled to judgment with costs, special order for sale of property retained, and execution for residue. Proceeds in excess of lien must be held for six months, after which they escheat to county. (85-7-107).

Liens for Price of Towing and Storing Motor Vehicles.—Towing company that has towed motor vehicle at request of owner or at direction of law enforcement officer or real property owner has right to retain possession of motor vehicle until reasonable price of towing and storage is paid. If not paid within 30 days from initial tow, towing company shall notify, by certified mail, legal owner and lienholders of notice of sale of property. Towing company must allow owner ten days to redeem property. Following ten-day redemption period and notice of sale published for two consecutive weeks in newspaper having circulation in county where vehicle was towed, towing company may sell vehicle. Excess proceeds are paid to chancery clerk if not reclaimed within six months by owner. (85-7-251).

Liens of Owner for Rent on Personal Property in Self-Storage Facility.

For rental agreements entered into on or after July 1, 1988 (85-7-129), no enforcement action may be taken by owner of self-storage facility against occupant until occupant has been in default continuously for period of 14 days. During default period, occupant must be notified in writing by certified mail, return receipt requested, at his last known address or in person. Notice must include specified information, including demand for payment within specified time not less than 14 days after date of notice. After expiration of time specified in notice, owner must publish or post advertisement of sale, as specified. Sale to highest bidder will take place not sooner than 15 days after publication or ten days before posting of advertisement. If no one purchases property, owner may otherwise dispose of it. Any sale or disposition must be held at self-storage facility or at nearest suitable place. (85-7-125). Redemption by satisfaction allowed; sale proceeds in excess of lien must be held for one year, after which escheat to state. (85-7-127).

Liens on Clothing, etc., Placed in Storage.

Clothing or household goods placed in storage by agreement and left for 90 days without reasonable or agreed charges having been paid may be sold to pay charges, provided notice is given. (85-7-225). Notice constitutes mailing of certified, return receipt requested, letter with return address marked, to address given at time of delivery of articles, at least 30 days before sale. (85-7-227).

Mechanics' Liens.

Every house, building, water well, or structure of any kind, and any fixed machinery, railroad embankment, and subdivided property, is liable for debt contracted and owing for labor done or services of architects, engineers, surveyors, or contractors, or material furnished and such debt is lien from time of filing in most instances. (85-7-131 to 85-7-135). As to oil and gas wells, operator has lien upon interest of each nonoperator owner of interest in mineral leasehold estate for such nonoperator's proportionate part of labor, material and services rendered by operator or for operator's account in behalf of each nonoperator in drilling or other operation of such oil and gas well. (85-7-131).

Such lien exists only in favor of person employed or with whom contract to perform such labor or furnish such materials is made, and his assigns, when contract or employment is made by owner or by his agent, representative, guardian or tenant authorized either expressly or impliedly by owner. (85-7-135).

Contract may be recorded as deeds and other instruments and filed with clerk of chancery court of county where land on which building stands is situated. (85-7-139).

If building is in city, lien extends to and covers entire lot of land on which it stands. If it is not in city, lien covers one acre of land on which same stands, if there is so much, to be selected by holder of lien. (85-7-131). If structure is railroad or railroad embankment, lien extends to and covers entire roadbed and right of way, depots and other buildings used or connected therewith. (85-7-131).

Such lien takes effect as to purchasers or encumbrances for valuable consideration, without notice thereof, only from time of commencing suit to enforce lien or from time of filing contract under which lien arose in office of clerk of chancery court. (85-7-131 to 85-7-133).

Of Subcontractors and Laborers.

Where contractor or master workman entitled to lien does not pay person who has furnished materials used in erection, construction, alteration, or repair of any house, building, structure, fixture, boat, water craft, railroad, or railroad embankment or amount due by him to subcontractor, or wages of any laborer employed by him, such person, subcontractor or laborer may give notice in writing to owner of amount due and claim lien. Amount that may be due upon day of service of notice by owner to contractor is bound in hands of owner for payment in full, or if insufficient, then pro rata, of all amounts due such person, subcontractor or journeyman or laborer, who might lawfully have given notice in writing to owner. If suit be brought against owner, he may pay into court amount due on contract and all interested parties be summoned into court to protect their rights, to contest demands of any and all claimants, and court must cause issue to be made up and direct payment of amount found due. In case judgment is given against owner, such judgment is a lien from date of original notice and is enforced as other such liens. Owner not liable for greater amount than amount contracted for with contractor. (85-7-181).

When any contractor or subcontractor entering into formal contract with person, firm or corporation enters into bond guaranteeing faithful performance of contract, such bond shall be subject to additional obligation that contractor or subcontractor shall promptly make payments to persons furnishing labor or material under said contract and person furnishing labor or material shall have right to intervene and be made party in suit on bond, subject to rights of obligee. (85-7-185). If no suit is brought by obligee within six months from final settlement of contract, persons supplying labor or materials have right of action on bond. (85-7-187). Suit must be brought within one year from final settlement of contract, or abandonment thereof by contractor. (85-7-189). Only one suit can be brought on bond and any other person entitled to sue may intervene. (85-7-191).

No contractor or master workman may assign, transfer, or otherwise dispose of contract or proceeds thereof, to detriment or prejudice of subcontractor, except where bond provided in accordance with 85-7-185. (85-7-183).

Attachment Lien.

See topic 8.02 Attachment.

Attorney’s Lien.

See category 18 Legal Profession, topic 18.01 Attorneys and Counselors.

Collateral Security.

See topic 8.15 Pledges.

Execution Lien.

See topic 8.05 Executions.

Judgment Lien.

See category 5 Civil Actions and Procedure, topic 5.15 Judgments.

Landlord’s Lien.

See category 21 Property, topic 21.10 Landlord and Tenant.

Liens on Exempt Property.

See topic 8.06 Exemptions.

Liens on Homestead.

See topic 8.10 Homesteads.

Real Estate Mortgage Lien.

See category 20 Mortgages, topic 20.04 Mortgages of Real Property.

Tax Lien.

See category 22 Taxation, topic 22.15A Real and Personal Property Taxes, subhead

Lien.

8.14 MECHANICS' LIENS:

See topic 8.13 Liens.

8.15 PLEDGES:

Attachment of pledgor's interest in pledged property permitted.

Pledge may be foreclosed by sale after default. No formal proceedings for sale prescribed, and if expressly allowed, pledgee may purchase.

Uniform Commercial Code adopted, effective Mar. 31, 1968. (75-11-101 to 75-11-108). See category 3 Business Regulation and Commerce, topic 3.09 Commercial Code.

8.16 RECEIVERS:

Jurisdiction.

In chancery court. (11-5-151; MRCP 66).

Proceedings.

Appointment or removal is by court in term time or chancellor in vacation. (11-5-151). At least five days notice of application for appointment required, unless immediate appointment necessary or good cause for dispensing with notice shown (11-5-153), in which case, bond required of complainant.

Qualifications.

Receiver required to give bond (11-1-159) and must be subject to orders and instructions of court and chancellor in vacation (11-5-161).

Compensation.

Receiver allowed to have compensation as court shall allow and shall have lien upon property in hands for payment thereof and of necessary expenses. (11-5-167).

8.17 REDEMPTION:

See category 20 Mortgages, topic 20.01 Chattel Mortgages.

8.18 SUPPLEMENTARY PROCEEDINGS:

See topic 8.05 Executions.

8.19 TRUSTEE PROCESS:

See topic 8.09 Garnishment.

8.20 USURY:

See category 3 Business Regulation and Commerce, topic 3.17 Interest.

9 DISPUTE RESOLUTION

9.01 ALTERNATIVE DISPUTE RESOLUTION:

Mandatory Dispute Resolution.

No statutes or court rules required.

Voluntary Dispute Resolution.

No systematic methods established. Completely voluntary and at initiative of and only by agreement of parties. Federal courts permit alternative dispute resolution. (Local Federal Rule 16.1[E]). State authorizes court annexed mediation. (Order dated 10/2/1998, Court Annexed Mediation Rules for Civil Litigation).

Alternative Dispute Resolution Jurisdictional Bodies/Commissions.

None.

Alternative Dispute Resolution Acts.

None.

Enforcement.

Award of arbitrators is returned to court and approved and entered of record, having same effect as final judgment or decree of court, and execution may issue thereon. (11-15-35). Court may vacate award because of procurement of award by corruption, fraud or undue means; evident partiality of arbitrators; corruption of arbitrators; misconduct of arbitrators; or arbitrators exceeding powers. (11-15-23).

9.02 ARBITRATION AND AWARD:

Existing disputes may be submitted to arbitration by parties by written instrument. (11-15-1, et seq.). Existing and future disputes may be submitted to arbitration by parties to construction contract by written agreement. (11-15-101, et seq.).

(Not subject to Uniform Arbitration Act, except as noted below.)

Form and Requisites of Submission.

All competent persons may, by instruments of writing, submit any existing controversy to one or more arbitrators. (11-15-1). Arbitrators must be sworn. (11-15-9). Award may be confirmed by court having jurisdiction of subject matter. (11-15-21). Pending suits and actions may be referred to person or persons appointed by litigants. (11-15-35).

Rescission.

Revocation of submissions to arbitration of existing nonconstruction disputes is governed by common law.

Construction Contract.

Agreement to arbitrate existing or future dispute under construction contract is irrevocable unless parties waive arbitration by dispute without assertion of arbitrality as defense of suit. (11-15-103).

Powers of Arbitrators.

Construction Contract.

Arbitrators may grant any remedy which is just, equitable, and consistent with agreement of parties which is subject of arbitration. (11-15-119). Arbitrators may modify award for reasons enumerated in 11-15-135 if requested by party by registered mail within 20 days of receipt of award. (11-15-123).

Mandatory Arbitration.

Absent agreement of parties, State Highway Arbitration Board hears all disputes concerning $750,000 or less without regard to size of contract between State Highway Comm. and contractors. (65-2-1 et seq.). (Not subject to Uniform Arbitration Act.)

Uniform Arbitration Act Adoption/Deviation.

Not adopted.

Jurisdictional Arbitration Acts.

Statutes govern arbitration of controversies arising from construction contracts and related agreements. (11-15-101 et seq.). Statute requires timely arbitration before suit can be brought against sellers of plant seeds who affix prescribed label to product. (69-3-22). Binding arbitration is required between electric utility and person responsible for performing work in vicinity of high voltage overhead line regarding reasonableness or necessity of price or work to be performed. (45-15-9).

10 DOCUMENTS AND RECORDS

10.01 ACKNOWLEDGMENTS:

Uniform Acknowledgments Act and other uniform laws regarding acknowledgments not adopted.

Within State.

Acknowledgment of instrument affecting real estate or personal property may be taken by any judge of U.S. court; any judge of Supreme Court; any judge of circuit or county court or chancellor, or before any clerk of court of record or notary public who shall certify such acknowledgment or proof under seal of his office; or before any justice court judge or police justice or mayor of any city, town or village, or clerk of municipality, or member of board of supervisors. (89-3-3). Notary public, justice court judges and clerks, circuit and chancery court clerks and assistant secretaries of state can acknowledge all instruments commonly proved by notaries. (25-33-11; 25-33-17). Notaries public may charge fee not less than $2 nor more than $5. (25-7-29).

In connection with claims of veterans of all wars, their heirs or dependents, against United States government, but for no other purpose, acknowledgments may be taken by post service officer of any of nationally chartered veterans’ organizations in state under seal of office of post. (35-3-7).

Outside State but Within United States.

Acknowledgment of instrument affecting real estate or personal property may be taken by justice of U.S. Supreme Court, or U.S. circuit or district judge, or any other U.S. judge, or any judge or justice of supreme or superior court of state or territory or District of Columbia or possession of U.S., or land over which U.S. has sovereign power, or any justice of peace of such state, territory, etc., whose official character is certified under seal or court of record in jurisdiction, or commissioner residing in such jurisdiction and appointed by Governor of Mississippi to take acknowledgments and proof of conveyances, or notary public or clerk of court of record having seal of office in such jurisdiction. (89-3-9).

Outside United States.

Acknowledgment of instrument affecting real estate or personal property may be taken by any court of record or mayor or chief magistrate of any city, borough or corporation of foreign country or before any commissioner for Mississippi residing in such country, or before any ambassador, foreign minister, secretary of legation, or consul of U.S. to foreign country, or before notary public or other person authorized by foreign country to take oaths or acknowledgments, but certificate must show that party or party and witness were identified before officer, and that party acknowledged execution of instrument, or that execution was duly proved by witness. (89-3-13).

Persons in or with U. S. Armed Forces.

Persons in U.S. military service, their husbands or wives, merchant seamen outside limits of U.S., and anyone outside U.S. under authority of government dept. or official in connection with war activities may acknowledge any instrument before any commissioned officer in active service of U.S. Armed Forces. A certificate endorsed upon, or attached to, instrument, which shows date of notarial act and which states in substance that person appeared before officer, acknowledged instrument as his act or made or signed instrument under oath is sufficient. Signature, rank and branch of service of commissioned officer appearing on certificate is prima facie evidence of authority of officer and that person making oath or acknowledgment is within act. (25-33-23). Any acknowledgments made before any commissioned officer in U.S. Armed Forces prior to Mar. 30, 1946, is validated. (89-3-5). See topic 10.03 Notaries Public.

General Requirements as to Taking.

No special provisions govern.

General Requirements of Certificate.

Officer authorized to acknowledge instruments must do so under seal of his office. (89-3-3). Forms of acknowledgment to be used in case of conveyances or other written instruments affecting real estate or personal property is provided by statute. (89-3-7).

Married Women.

No special provisions govern acknowledgments of married women.

Attorneys in Fact.

No special provisions govern acknowledgments of attorneys in fact.

Corporations.

Officer of corporation signing instrument acknowledges execution of instrument or proof may be made as in other cases. (89-1-21).

Foreign Acknowledgments.

See subhead Outside the United States, supra.

Effect of Acknowledgment.

Instruments are valid between the parties without acknowledgment but acknowledgment or proof by witness is necessary to entitle them to be admitted to record. (89-3-1). Requirement of authentication or identification as condition precedent to admissibility into evidence is satisfied by evidence sufficient to support finding that matter in question is what its proponent claims. (Miss. R. Evid. 901). Authenticity is taken as sufficiently established for purposes of admissibility without extrinsic evidence in certain instances. (Miss. R. Evid. 902). Testimony of subscribing witness is not necessary to authenticate writing unless required by laws of jurisdiction governing validity of writing. (Miss. R. Evid. 903). Defect as to form for interest in land that is recorded for more than seven years is treated as properly acknowledged. Any instrument of record with no acknowledgment for ten years is treated as properly acknowledged. (89-5-13).

Proof by Subscribing Witness.

One of subscribing witnesses may appear before any officer authorized to take acknowledgments and acknowledge that he saw party whose name is subscribed thereto, sign and deliver same, or that he heard party who signed same, acknowledge that he signed and delivered same, and that he, witness, subscribed his name as witness in presence of party who signed instrument. (89-5-1).

If grantor and witness or witnesses of instrument are dead or absent, so that personal attendance of neither can be had, it may be established by oath of any person who, on examination, before officer qualified to take acknowledgments, can prove handwriting of deceased or absent witness(es), or when such proof cannot be had, then handwriting of grantor may be proved, and officer before whom such proof is made shall certify accordingly. (89-3-15).

Authentication.

No authentication of certificate of acknowledgment taken outside state is necessary except where taken by justice of peace, in which case his official character must be certified under seal of court. (89-3-9). In this state, Secretary of State can certify to official character of officer taking acknowledgment. (7-3-43).

Forms

(a) For natural persons acting in their own right:

“STATE OF ________

COUNTY OF ________

Personally appeared before me, the undersigned authority in and for the said county and state, on this __ day of _____, 20__, within my jurisdiction, the within named __________, who acknowledged that (he)(she)(they) executed the above and foregoing instrument.

_______________(NOTARY PUBLIC)

My commission expires:

___________”

(Affix official seal, if applicable)

(b) For corporations:

“STATE OF ________

COUNTY OF ________

Personally appeared before me, the undersigned authority in and for the said county and state, on this ___ day of ______, 20___, within my jurisdiction, the within named _______, who acknowledged that (he)(she) is _______ of _____, a _______ corporation, and that for and on behalf of the said corporation, and as its act and deed (he)(she) executed the above and foregoing instrument, after first having been duly authorized by said corporation so to do.

______________(NOTARY PUBLIC)

My commission expires:

________"

(Affix official seal, if applicable)

(c) In the case of a corporate general partner of a limited partnership:

"STATE OF ________

COUNTY OF ________

Personally appeared before me, the undersigned authority in and for the said county and state, on this ___ day of ______, 20___, within my jurisdiction, the within named _______, who acknowledged to me that (he) (she) is _______ of _____, a _______ corporation and general partner of _______, a _______ limited partnership, and that for and on behalf of said corporation as general partner of said limited partnership, and as the act and deed of said corporation as general partner of said limited partnership, and as the act and deed of said limited partnership, (he) (she) executed the above and foregoing instrument, after first having been duly authorized by said corporation and said limited partnership so to do.

(NOTARY PUBLIC)

My commission expires:

________"

(Affix official seal, if applicable)

(d) In the case of a corporate member of a member-managed limited liability company:

"STATE OF ________

COUNTY OF ________

Personally appeared before me, the undersigned authority in and for the said county and state, on this ___ day of ______, 20___, within my jurisdiction, the within named _______, who acknowledged to me that (he)(she) is _______ of _____, a _______ corporation and member of ___________, a member-managed limited liability company, and that for and on behalf of said corporation as member of said limited liability company, and as the act and deed of said corporation as member of said limited liability company, and as the act and deed of said limited liability company, (he) (she) executed the above and foregoing instrument, after first having been duly authorized by said corporation and said limited liability company so to do.

(NOTARY PUBLIC)

My commission expires:

________"

(Affix official seal, if applicable)

(e) In the case of a corporate manager of a manager-managed limited liability

company:

"STATE OF ________

COUNTY OF ________

Personally appeared before me, the undersigned authority in and for the said county and state, on this ___ day of ______, 20___, within my jurisdiction, the within named _______, who acknowledged to me that (he)(she) is _______ of _____, a _______ corporation and manager of _______, a _______ manager-managed limited liability company, and that for and on behalf of said corporation as manager of said limited liability company, and as the act and deed of said corporation as manager of said limited liability company, and as the act and deed of said limited liability company, (he) (she) executed the above and foregoing instrument, after first having been duly authorized by said corporation and said limited liability company so to do.

(NOTARY PUBLIC)

My commission expires:

_________"

(Affix official seal, if applicable)

(f) For persons acting in representative capacities:

"STATE OF ________

COUNTY OF ________

Personally appeared before me, the undersigned authority in and for the said county and state, on this ___ day of ______, 20___, within my jurisdiction, the within named ________, who acknowledged that (he)(she) is _______ of ______ and that in said representative capacity (he)(she) executed the above and foregoing instrument, after first having been duly authorized so to do.

_______________(Notary Public)

My commission expires:

(Affix official seal, if applicable)

(g) In the case of proof of execution of the instrument made by a subscribing witness:

"STATE OF ________

COUNTY OF ________

Personally appeared before me, the undersigned authority in and for the said county and state, on this ___ day of ______, 20___, within my jurisdiction, CD, one of the subscribing witnesses to the above and foregoing instrument, who, being first duly sworn, states that (he) (she) saw the within (or above) named AB, whose name is subscribed thereto, sign and deliver the same to EF (or that (he)(she) heard AB acknowledge that (he)(she) signed and delivered the same to EF); and that the affiant subscribed (his)(her) name as witness thereto in the presence of AB.

________________(CD)

____

(NOTARY PUBLIC)

My commission expires:

_________"

(Affix official seal, if applicable)

(89-3-7).

Validating Acts.

Instruments of conveyance, release, termination or cancellation which contain defective acknowledgment and have been of record seven years or more in land records of county in which land is located are good without regard to form of acknowledgment. Instruments of record for ten years or more and which bear no acknowledgment must be treated as if properly acknowledged. (89-5-13).

Alternative to Acknowledgment or Proof.

No statutory provision.

10.02 AFFIDAVITS:

Affidavits may be taken before any judge, court reporter, clerk, justice court judge, member of board of supervisors, notary public, master, mayor or police justice of city, town or village, clerk of municipality and any officer of any other state, or of U.S., authorized by laws to administer oaths; judge or mayor or chief magistrate of any city, borough or corporation of foreign country. (11-1-1).

General Requirements as to Administration.

None except forms required in certain circumstances.

General Requirements of Jurat.

Every notary's seal must have name of county of notary's residence with that of state and his/her own name on margin and words "notary public" across center. Official act must be attested by seal of office. (25-33-3). On any acknowledgment notary in addition to official seal and signature must include written or printed recital of date his/her commission expires. (25-33-13). For acknowledgment forms, see topic 10.01 Acknowledgments.

Use of Affidavit.

No general provision; for use in summary judgment motion see MRCP 56.

Form.

None except forms required in certain circumstances.

Alternative to Affidavit.

No statutory provision.

10.03 NOTARIES PUBLIC:

Qualification.

Bond required in amount of $5,000. Each notary required to take oath. Notary qualified by filing oath and bond with Secretary of State. (25-33-1). Notary must be at least 18 years of age, citizen or legal resident of United States, and resident of Mississippi for at least 30 days prior to date of application. Notary must meet any additional requirements established by Mississippi Secretary of State. (23-33-1).

Authentication.

See topic 10.01 Acknowledgments. (89-3-13).

Seal.

Regulation seal is prescribed. (25-33-3).

Powers and Duties.

Following powers may be exercised by every notary public: To administer oaths and affirmations in all matters incident to notarial office; to receive proof or acknowledgment of instruments of writing relating to commerce or navigation, such as bills of sale, bottomries, mortgages, and hypothecations of ships, vessels, or boats, charter parties of affreightment, letters of attorney, and such other writings as are commonly proved or acknowledged before notaries; to perform duties required of notaries by commercial usage; and to make declarations and certify the truth, under seal of office, concerning all matters done in virtue of office. (25-33-9, 25-33-11).

Territorial Extent of Powers.

A notary may act throughout state. Notaries empowered to administer oaths for taking oral testimony within state at large. (25-33-9).

Expiration of Commission.

Notary public shall hold office for term of four years. (25-33-1). This expiration date must be affixed to jurat. (25-33-13).

Fees.

Fee for notarial affidavit to account or other writing and seal; oath or affirmation and seal; copy of record and affidavit is amount not less than $2 nor more than $5 for services rendered. (25-7-29).

Officers of U.S. Armed Forces.

Instruments may be acknowledged, documents attested, oaths and affirmations administered, depositions and affidavits executed, and other notarial acts performed by second lieutenant or higher in army or marine corps, ensign or higher in navy or coast guard, or equivalent ranks of any other component part of U.S. Armed Forces. (25-33-23). Acknowledgment or affidavit or conveyance, contract, agreement or other written instrument which was acknowledged or proved before any commissioned officer in U.S. armed forces is good or binding to same extent and with like effect as if it had been acknowledged or proved in State of Mississippi. (89-3-5).

10.04 RECORDS:

Clerk of chancery court has charge of records relating to property. Uniform Commercial Code adopted. (75–1–101 thru 75-11-108). See category 3 Business Regulation and Commerce, topic 3.09 Commercial Code.

Recordable Instruments.

Conveyances, marriage instruments affecting land, deeds of trusts, mortgages must be recorded (89-5-3); title bonds or other written contracts in relation to land may be recorded (89-5-7); copies of records filed in other states or foreign countries may be recorded (89-5-9); land patents may be recorded (89-5-11); assignments of debt must be recorded (89-5-15); satisfactions of debt must be recorded (89-5-21); cancellations of oil, gas, and mineral leases must be recorded (89-5-23); substitutions of trustee must be recorded (89-5-45).

Place of Recording.

Records are kept by clerk of chancery court for county in which land is located (89-5-1); where county is divided into two districts, each district is treated as separate county for purpose of land records (89-5-41). *For list of Counties and County Seats, see first page for this state in Volume containing Practice Profiles Section.*

Requisites for Recording.

Acknowledgment or proof necessary to recording, form, and methods are statutorily provided (89-3-1, et seq.); conveyance of land is not good against purchaser, for valuable consideration without notice, or any creditor, unless it contains certificate of acknowledgment and is filed in land records where property is situated. (89-5-1).

Recording Fees.

Clerks of chancery court charge following fees: certifying copies of filed documents, $1 per document; recording and indexing deeds, wills, leases, amendments, subordinations, liens, releases, cancellations, orders, decrees, oaths, etc., $10 for first 15 pages, $1 each additional page; recording deeds of trust, $15 for first 15 pages, $1 each additional page (recording each cancellation per deed of trust, $10); recording and indexing oil and gas leases, cancellations, etc., $18 for first 15 pages, $1 each additional page (recording each oil and gas assignment per assignee, $18). (25-7-9).

Recording Taxes.

See category 22 Taxation.

Foreign Conveyances or Encumbrances.

Copy of record of any instrument affecting property in this state duly recorded in another state or foreign country may be recorded in this state in same way and with like effect as if it had been executed and acknowledged in this state. (89-5-9).

Effect of Record.

Mississippi is race-notice jurisdiction. (89-5-1, -3).

Torrens Act.

Repealed in 1930.

Transfer of Decedent’s Title.

Failure to record transfer of decedent’s title does not affect validity of transfer as between decedent and his heirs, and as to all subsequent purchasers with notice or without valuable consideration. (89-5-3).

Filing Under Commercial Code.

For as-extracted collateral or timber to be cut, in office designated for filing of mortgage on related real property. For collateral goods that are or are to become fixtures, in office designated for filing of mortgage on related real property. For all other goods, in Office of Secretary of State, P. O. Box 136, Jackson, MS 39205 (http://www.sos.state.ms.us/). (75-9-501).

Fee for filing financing statement, termination statement, statement of assignment or statement of release is $10 if on standard form, $13 if not, $8 if by another authorized medium, plus $4 for each extra listing. (75-9-525). Search fee for certificate showing presently effective financing statement is $5 if on standard form, $10 if not, $3 if by another authorized medium, plus $2 for each financing statement listed. (75-9-525).

Vital Statistics.

Bureau of Vital Statistics is a part of State Board of Health (41-57-1), and reporting and registration of vital statistics is performed by rules and regulations formulated by Board of Health (41-57-7). State is divided into registration districts and local registrars are appointed in each district. Reports of births and deaths are made by local registrar to State Board of Health, Dept. of Vital Statistics. (41-57-5, 41-57-11).

All marriages must be registered with State Registrar of Vital Statistics. Circuit clerk of each county must, each month, forward to state board of heath records of marriages reported to him during previous month. (41-57-48).

Establishing birth records is accomplished by completing forms furnished by Mississippi State Dept. of Health. Evidence required in proving date and place of birth, parentage and citizenship is affidavit of applicant corroborated by that of close relative and two or more of following documents (each of which must be over five years old and be dated): (1) U.S. census record; (2) passport; (3) immunization record (must show age and be dated); (4) school record from county superintendent of education in county in which applicant first attended school or from first school applicant attended; (5) armed forces discharge records; (6) life or burial insurance policy; (7) Social Security application (numerical identification file [Social Security Administration]); (8) employment record; (9) application for driver's license; (10) registration with Selective Service; (11) certified copies of birth certificates of any of applicant's children; (12) marriage license application. Other records may be accepted at discretion of State Registrar.

Fee for search, and certified copy of birth, death or marriage certificate is $15 and $5 for additional copies; may be obtained by mail from Mississippi Vital Records, P.O. Box 1700, Jackson, Miss. 39215-1700, by phone at 601-596-7981 or online at http://www.msdh.state.ms.us/ for additional fee. Certain records unavailable to persons without legitimate and tangible interest. (41-57-2).

10.05 SEALS:

Use of private seals is dispensed with. Failure to use seal or scroll, by private person does not affect written instrument, nor does it vary rights of parties. Bonds in legal proceedings need not be under seal.

Uniform Commercial Code adopted. (75-1-101 through 75-11-108). See category 3 Business Regulation and Commerce, topic 3.09 Commercial Code.

Corporate Seals.

Private seals abolished all distinction between sealed and unsealed instruments. (75-19-1).

Effect of Seal.

Seal has no effect. (75-19-5).

10.06 TORRENS ACT:

See topic 10.04 Records.

10.07 VITAL STATISTICS:

See topic 10.04 Records.

11 EMPLOYMENT

11.01 EMPLOYER AND EMPLOYEE:

See topic 11.02 Labor Relations.

11.02 LABOR RELATIONS:

Generally rules of common law control employment relationship.

Mississippi is at-will employment state.

Employment of children under 14 is prohibited in mills, canneries (except for fruit and vegetable canneries), workshops, factories or manufacturing establishments. (71-1-17; 71-1-31). Special duties of enforcement of child labor laws and inspection are placed on county health offices and county sheriff. (71-1-23; 71-1-25).

Provisions for trusts as part of pension, disability, death-benefit or profit-sharing plans by employer permitted. (71-1-41).

Employment of unauthorized aliens prohibited; felony to accept or perform employment knowing or in reckless disregard that person is unauthorized alien while employed; employers must enroll in federal government’s E-Verify electronic employment eligibility verification program, depending on date and number of employees. (71-11-3).

Hours of Labor.

In mill, cannery, workshop, factory or manufacturing establishment (excluding railroads and other public service corporations and except where perishable agricultural products are being handled in season with adult male labor only) hours are limited as follows: employees under 16 and over 14: maximum of eight hours per day and 44 hours per week, not between hours of 7:00 p.m. and 6:00 a.m. (71-1-21).

Wages.

No statute establishing minimum wages.

Employers engaged in manufacturing, employing 50 or more persons, and public service corporations, are required to pay employees, not those in executive, administrative, or professional capacities, at least once every two weeks or twice each month. (71-1-35).

Discounting of trade checks by employers, or purchaser thereof, is prohibited and made misdemeanor (71-1-37), and trade checks must be paid in cash at face value on regular pay days, or 25% damages allowed (71-1-39). See category 8 Debtor and Creditor, topic Assignments for treatment of assignment of wages.

Child Labor.

Children under 14 may not be employed or permitted to work in mill, cannery (except fruit or vegetable canneries), workshop, factory or manufacturing establishment (71-1-17; 71-1-31);

and no child under 16 years of age can work in such establishment except on proof that child has complied with compulsory school attendance law (71-1-19).

Establishments employing child labor subject to inspection by county health officer and children are removed from employment by sheriff upon request of county health officer. (71-1-25).

Violation of act by employer is misdemeanor. (71-1-29).

Persuading, enticing or decoying child under 18 years, being unmarried, away from parent with whom it resides, for purpose of employing child without consent of parents, is misdemeanor. (97-5-7).

Female Labor.

No statutory regulation.

Discrimination.

Prohibited against public employees on basis of race, color, religion, sex, national origin, age or handicap. (25-9-149). No statutory regulation for private employees.

Labor Unions and Labor Disputes.

Right of persons to work shall not be denied on account of membership or nonmembership in labor union. (71-1-47). Person who is alien, has been convicted of certain felonies, or has been member of communist party, may not hold office or occupy bargaining position or act as labor relations consultant until five years after conviction or release from imprisonment or termination of membership in said party. (71-1-49).

Workers' Compensation Law.

Act to establish system of workers' compensation for industrial injuries adopted. (71-3-1 through 71-3-129).

Administration.

Administered by Workers' Compensation Comm. consisting of three members appointed by Governor with consent of Senate. Comm. has powers of court of record for compelling attendance of witnesses, etc., including power to adopt rules and regulations, make or approve forms, investigate and determine claims for compensation, and make awards. (71-3-85).

Act is applicable to any employer, whether person, firm, association or corporation, including legal representatives of deceased employer or receiver or trustee of any such employer, that has in service five or more workers or operatives regularly in same business, or in or about same establishment, under any contract of hire, express or implied. (71-3-5). Independent contractors, including newspaper carrier boys, are not "employees." (71-3-3). Public service corporations are included. (71-3-5). All offices, departments, agencies, bureaus, commissions, boards, institutions, hospitals, colleges, universities, airport authorities or other instrumentalities of state are within act after July 1, 1990. Counties and municipalities are within act after Oct. 1, 1990. All political subdivisions are within act after Oct. 1, 1993. (71-3-5).

Exemptions.

Nonprofit, charitable, fraternal, cultural or religious corporations or associations; domestic servants; farmers and farm labor; purchasers of timber products who are not liable for unemployment tax or harvesters and deliverers of timber; handicapped persons employed in sheltered workshop programs; transportation and maritime employments, for which rule of liability is provided by laws of U.S. and direct buyer-seller or vendor-vendee relationship where there is no employer-employee relationship; proprietors, partners, or employees owning 15% of stock of corporation who agree in writing. (71-3-5). Owner/Operator required to provide motor carrier with proof of workers' compensation insurance policy, self-insured plan, or occupational accident policy. If proof is not provided, owner/operator and their employees will be covered under motor carrier's insurance, and motor carrier may collect premium from owner/operator. (71-3-5).

Election to Come Within the Act.

Employers exempted from act may come within it by purchasing valid insurance, and no other act is required. (71-3-5).

State, county and municipal institutions, departments, or agencies may elect to come under act. (71-3-5).

A contractor is liable to employees of a subcontractor unless the subcontractor has secured such payment. (71-3-7; 80 So. 2d 819).

Exclusive Liability.

Liability under the act of any employer who has complied therewith is in place of all other liability of such employer to the employee, his dependents and next-of-kin, or anyone otherwise entitled to recover damages at common law. (71-3-9).

Noncompliance by Employer.

If employer fails to secure by insurance payment compensation as required by act, employee, or his representative in case of death, may elect whether to claim compensation under act or to maintain action at law for damages. In such action, employer may not plead as defense negligence of fellow servant, assumption of risk or contributory negligence. (71-3-9).

Injuries Covered.

Liability of an employer under act covers disability or accidental death of an employee arising out of and in course of employment regardless of fault as to cause of injury. Compensation for aggravation of preexisting handicap may be proportionately reduced by that proportion which such preexisting disease contributed to results following injury. It includes also injury caused by willful act of a third person directed against an employee because of his employment while so employed and working on job. Injury includes disability or death due to radiation exposure and occupational disease. Act does not cover injury occasioned by intoxication of employee or by willful intention of the employee to injure or kill himself or another. (71-3-3; 71-3-7).

Insurance of Compensation.

No claim for compensation shall be maintained unless, within 30 days after occurrence of injury, actual notice of injury is provided to employer; limitation not applicable to minor or incompetent without guardian or authorized representative. (71-3-35). Limitations period begins to run when claimant is or should reasonably have been aware of incurrence of compensable injury. (586 So. 2d 823).

Rates of Compensation for Injuries.

For claims arising on or after July 1, 1988, compensation for disability or death never exceeds 66.66% of state average weekly wage (as determined annually by Employment Security Comm.) multiplied by 450 weeks. Minimum payment is $25 per week. (71-3-13). Employer is liable for all medical, surgical, nursing and hospital expenses for such period as nature of injury or process of recovery may require. (71-3-15). Compensation for total disability (permanent or temporary) is 66.66% of average weekly wages subject to maximum weekly benefit rate not to exceed 450 weeks. For permanent partial disability, 66.66% of average weekly wages for varying number of weeks never to exceed 200, depending on type of injury. (71-3-17). Temporary partial disability, 66.66% of difference between injured employee's average weekly wage before injury and his wage-earning capacity after injury, never to exceed 450 weeks. (71-3-21).

Rates of Compensation for Death.

$250 to surviving spouse; reasonable funeral expenses not to exceed $2,000; payments to surviving spouse of 35% of average wages of deceased during widowhood or dependent widowhood, or dependent widowerhood, and additional 10% of such wages for each child; if no surviving widow or dependent husband, 25% of such wages for each dependent child; if no surviving spouse or child, or if amount payable thereto is less than 66.66% of average wages of deceased, then 15% of such wage for support of any grandchild, brother, sister, parent or grandparent if dependent upon deceased at time of injury; total weekly compensation payable to all beneficiaries never to exceed weekly benefits set up in act and never to be paid for longer than 450 weeks. (71-3-25). Minimum is $25 per week except in partial dependency cases. (71-3-13 and 71-3-25).

Dependency.

All questions of dependency are determined as of time of injury. Surviving spouse, child, or children presumed to be wholly dependent. All other dependents are considered on basis of total or partial dependence as facts warrant. (71-3-25).

How Benefits Payable.

First installment of compensation due on 14th day after due notice of injury or death. Subsequent installments payable every 14 days. (71-3-37).

Lien.

Compensation is lien on the assets of employer and insurer. (71-3-45).

Priorities.

Compensation is entitled to priority in distribution of funds in case of insolvency. (71-3-45).

Exemption.

Compensation or benefits payable under the act are exempt from claims of creditors and from levy, execution and attachment. Exemption may be waived. (71-3-43).

Assignment of compensation or benefits not permitted. (71-3-43).

Waiver of Right.

No agreement by an employee to waive his right to compensation under act is valid. (71-3-41).

Hearings on Claims.

Held before Compensation Comm., which has full power and authority to determine all questions relating to payment of such claims. Details of practice and procedure in adjudication of claims are determinable by published rules of Comm. Comm. is not bound by common law or statutory rules of evidence or formal rules of procedure. Informal hearings may be had by one Commissioner, or designated representative of Comm., and his decision will be final unless within 20 days request or petition for review by full Comm. is filed. (71-3-47, 71-3-55).

Appeals.

Final award of Comm. is conclusive unless an appeal to the circuit court of the county in which the injury occurred is perfected within 30 days. Appeals are considered only upon the record. The circuit court reviews all questions of law and of fact. If affirmed, the matter is remanded to the Comm. for enforcement; if reversed, the circuit court enters such judgment or award as the Comm. should have entered. Appeals may be taken from the circuit court to the Supreme Court. (71-3-51).

Enforcement of Award.

When an employer is in default for 30 days (if payments secured) or ten days (if unsecured), any party in interest may file with circuit clerk in county in which injury occurred, or county in which employer has his principal place of business, certified copy of final decision of Comm. awarding compensation. Thereupon judgment is entered in circuit court by clerk of said court in conformity with Comm.'s decision. Such judgment is entered in same manner and has same effect as though rendered in suit duly heard and determined by circuit court, except that no appeal may be taken therefrom, and court can vacate or modify such judgment to conform to any later awards or decisions of Comm. (71-3-49).

Compromise.

The Comm. has the authority to compromise award and make lump sum settlements. (71-3-29).

Rights of employee against third parties not affected by Act except that employer or insurer is subrogated to such rights to extent of compensation paid under Act and is entitled to notice and opportunity to join in any action against third parties by employee or his dependents. (71-3-71).

Double compensation and death benefits are payable if injured employee at time of injury is a minor under 18 years of age, employed, permitted or suffered to work in violation of any provision of labor laws. Employer alone and not insurance carrier is liable for this increased compensation or death benefits. Any provision in insurance policy undertaken to relieve employer from such increased liability is void. However, penalty shall not apply to students 14 years of age and over who are employed between school terms with parental consent nor to students 14 years of age and over who are employed in on-the-job training with parental consent as a part of a regular education program. (71-3-107).

Forms can be secured at Mississippi Workers' Compensation Comm. at P. O. Box 5300, Jackson, MS 39296-5300.

Occupational Diseases.

Compensable if direct causal connection between work and disease. (71-3-7).

Employer's Liability Act.

No separate act.

Unemployment Compensation.

Available to unemployed individual who meets following requirements: (1) has registered and reports to employment office, unless registration and reporting are oppressive or inconsistent with purposes of this chapter, and participates in reemployment services (if it is determined to be likely that claimant will exhaust regular benefits), (2) has made claim for benefits, (3) is able and available for work, (4) has been unemployed for one week, (5) has been paid wages for insured work equal to not less than 36 times his weekly benefit amount for weeks beginning on or before

July 1, 1982 and not less than 40 times his weekly benefit for weeks thereafter and has been paid wages for insured work during two quarters of his base period. (71-5-511).

Weekly benefit amount shall be 1/26 of total wages for highest quarter of base period, but in no event less than $30 or more than $210 per week for any benefit beginning on or after July 1, 2002, $230 for any benefit beginning on or after July 1, 2008, or $235 for any benefit beginning on or after July 1, 2009. If weekly benefit computes to less than minimum, individual is not entitled to benefits. (71-5-503).

11.03 WORKERS' COMPENSATION LAW:

See topic 11.02 Labor Relations.

12 ENVIRONMENT

12.01 ENVIRONMENTAL REGULATION:

General Supervision.

Miss. Comm. on Environmental Quality (49-2-5), Miss. Dept. of Wildlife, Fisheries and Parks (49-1-3, 49-1-4) and Miss. Comm. On Marine Resources (49-27-5).

Gulf States Marine Fisheries Comm. conserves fishery resources, prevents depletion and physical waste of fisheries marine, shell, and anadromous of Gulf Coast. (49-15-101).

Permit Board reviews applications for issuing, modifying, revoking or denying air and water pollution control permits, solid waste and hazardous waste permits. (49-17-28, -29).

Comm. on Environmental Quality promulgates rules and regulations to prevent, control and abate pollution, which are enforced by Dept. of Environmental Quality. (49-17-17).

State Board of Health administers radiation protection program. (45-14-7).

State Board of Health administers and enforces drinking water regulations. (41-26-5).

State Oil and Gas Board, subject to Comm. on Environmental Quality's approval, regulates proper handling and disposal of oil and gas well waste. (53-1-17).

Miss. Comm. on Environmental Quality regulates surface coal mining and reclamation operations. (53-9-45).

Prohibited Acts of Pollution.

See Air and Water Pollution Control Law (49-17-1, et seq.); Solid Wastes Disposal Law (17-17-1, et seq.); Underground Storage Tank Act (49-17-401, et seq.); Radioactive Waste Transportation Act (45-14-51, et seq.); Safe Drinking Water Act (41-26-1, et seq.); Surface Coal Mining and Reclamation Law (53-9-1, et seq.); and Coastal Wetlands Protection Act. (49-27-1, et seq.).

Causing pollution of air or placing waste in locations likely to produce pollution of air; discharging waste into air such that air quality falls below standards established by Comm. on Environmental Quality; and building, erecting, altering, replacing, using or operating equipment which will cause issuance of air contaminants without permit from board. (49-17-29).

Causing pollution of any waters of state or placing waste in location where likely to cause water pollution; and discharging any wastes into any waters of state which reduce quality of waters below water quality standards established by Comm. on Environmental Equality. (49-17-29).

Enforcement.

Duties and responsibilities regarding wastewater disposal regulated by State Board of Health. (41-67-5).

Wastewater Disposal.

Individual on-site wastewater disposal systems cannot be constructed without first submitting notice of intent to State Dept. of Health and unless systems are designed and installed by certified installers and engineers and according to Board of Health and Comm. on Environmental Quality regulations. (41-67-1 through -29).

Penalties.

Person found by Comm. after hearing to have violated any provision of Solid Waste Disposal Law (17-17-1, et seq.), Miss. Air and Water Pollution Control Law (49-17-1, et seq.) or rule or written order of Comm. of Environmental Quality may be penalized not more than $25,000. Appeal may be taken from imposition of penalty to chancery court. To stay execution of penalty, bond must be given equal to double amount of penalty. Provisions of laws, rules and orders can also be enforced by Comm. instituting chancery court suit for injunction or other appropriate relief. Each day constitutes separate violation of Act. Person who causes pollution is liable for immediate remedial and cleanup expense. (17-17-29, 49-17-43). Persons causing death of fish or other wildlife are liable, in addition to above, to state for money reasonably necessary to restock waters or replenish wildlife. Comm. can recover these costs in civil action in circuit court. Unlawful to discharge pollutants in violation of 49-17-29 or of condition or limitation of permit or to introduce pollutants into publicly owned treatment works in violation of pretreatment or toxic effluent standards. Punishable by fine of not more than $25,000 per each violation. (49-17-43). Person who violates provision of Surface Coal Mining and Reclamation Law (53-9-1, et seq.) may be assessed penalty by Comm. not to exceed $25,000 per violation (53-9-55). Any person who violates any provision of Safe Drinking Water Law (41-26-1, et seq.) may be assessed penalty by director of State Board of Health not to exceed $25,000 per violation, except that each day of continuing violation amounts to separate violation. (41-26-31). Any violations of Coastal Wetlands Protection Act (49-27-1, et seq.) punishable by fine not less than $100 and not more than $1,000, or by imprisonment for 30 days or both, plus subject to civil liability. (49-27-57).

Permits.

Permit Board (49-17-28) is exclusive administrative body to make decisions on permit issuance, denial, modification or revocation of air pollution control and water pollution control permits and permits required under Solid Waste Disposal Law. (17-17-1, et seq.; 49-17-29). Permit Board must take action on application within 180 days following its receipt. Permit Board may hold public hearings on its proposed action. Party aggrieved by Permit Board's action may file written request for formal hearing within 30 days. Upon conclusion of formal hearing, Permit Board's decision becomes final unless appealed to chancery court within 20 days. Bond is required to appeal. Permit Board may authorize Executive Director of Dept. of Environmental Quality to make decisions on permits. (49-17-29).

Permit Board (49-17-28) also makes decisions on permit issuance and denial under Surface Coal Mining and Reclamation Law. (53-9-7 and 35). Permits will not be issued for term to exceed five years unless applicant demonstrates necessity. Permit is terminated unless operations are commenced within three years. (53-9-21).

Permits required for regulated activities (49-27-5) affecting Coastal Wetlands. (49-27-9).

Hazardous Materials.

See Miss. Solid Wastes Disposal Law (17-17-1, et seq.); Miss. Hazardous Waste Facility Siting Act (17-18-1, et seq.); Radioactive Waste Transportation Act (45-14-51, et seq.); and Miss. Multimedia Pollution Prevention Act (49-31-1, et seq.).

Miss. Dept. of Environmental Quality to adopt regulations for management of solid wastes, consistent with U.S. Environmental Protection Agency and U.S. Dept. of Transportation regulations. (17-17-27). Handling of exempted hazardous wastes alongside ordinary wastes prohibited by 17-17-15.

Solid Waste Disposal.—Prohibitions: burning of garbage (17-17-9); spillage while hauling (17-17-11); unauthorized dumps (17-17-17); use of salt domes or other geologic structures for disposal of radioactive waste (17-17-49); disposition of compost (17-17-215); waste tires (17-17-405, et seq.); and lead acid batteries (17-17-429, et seq.).

Numerous bodies charged with responsibility of storage and disposal of nuclear waste, including Dept. of Environmental Quality, Nuclear Waste Technical Service Committee, and Nuclear Waste Policy Advisory Counsel. (57-49-1, et seq.).

Land Use Planning.

See generally 17-1-1, et seq. (Zoning); 19-5-10 ("Master Planned Community" development agreements); and 53-9-71 (designation of lands as unsuitable under Surface Coal Mining and Reclamation Law).

Recycling.

See generally 17-17-33 (Regional Solid Waste Disposal, Recycling and Recovery Systems) and Miss. Multimedia Pollution Prevention Act (49-31-1, et seq.).

Dept. of Finance and Administration must create report of Mississippi-based companies that manufacture products using recycled materials, including: (a) Name of products using recycled materials; (b) percent of product made from recycled materials; and (c) recommended use of products by state agencies. (27-104-109).

Remediation.

See subhead Penalties, supra.

Solid Waste Management.

See Miss. Solid Wastes Disposal Law. (17-17-1, et seq.).

Underground Storage Tanks.

See Underground Storage Tank Act. (49-17-401, et seq.).

Mississippi Uniform Environmental Covenants Act adopted (with minor changes). (89-23-1).

12.02 WATER LAW:

See Miss. Safe Drinking Water Act (41-26-1, et seq.); Miss. Air and Water Pollution Control Law (49-17-1, et seq.); Navigable Waters (51-1-1, et seq.); Miss. Marine Litter Act (51-2-1, et seq.); Regulation and Control of Water Resources (51-3-1, et seq.); Miss. Scenic Streams Stewardship Act (51-4-1, et seq.); Subsurface Waters; Well Drillers (51-5-1, et seq.); Water Management Districts (57-7-1, et seq.); Joint Water Management Districts (51-8-1, et seq.);

Provisions Common to Drainage Districts and Swamp Land Districts (51-33-1, et seq.); Flood Control (51-35-1, et seq.); Watershed Districts (51-37-1, et seq.); Storm Water Management Districts (51-39-1, et seq.); and Public Water Authorities (51-41-1, et seq.).

12.03 WILDLIFE AND ENDANGERED SPECIES:

See Nongame and Endangered Species Conservation Act. (49-5-101 et seq.).

13 ESTATES AND TRUSTS

13.01 ADMINISTRATION:

See topic 13.10 Executors and Administrators.

13.02 ADVANCEMENTS:

See topic 13.07 Descent and Distribution.

13.03 ALLOWANCES:

See topic 13.10 Executors and Administrators.

13.04 CLAIMS:

See topic 13.10 Executors and Administrators.

13.05 DEATH:

Any person who is not heard from for seven consecutive years is presumed dead. (13-1-23).

Revised Uniform Anatomical Gift Act adopted, effective July 1, 2008.

Survivorship.

Uniform Simultaneous Death Law adopted. (91-3-1, et seq.).

Actions for Death.

Action for death caused by wrongful or negligent act or omission or by such unsafe machinery or appliances or impurity of foods, drugs or other articles intended for human consumption survives to widow or children, or both, or to husband or father or mother or sister or brother as would, if death had not ensued, entitle injured party to maintain action. Same privilege is afforded adopting parent. Suit may be brought by personal representative for benefit of all concerned, or by any or all persons entitled to benefit of recovery. There can be but one suit, which inures to benefit of all concerned. Except as to property damage, funeral, medical, or other related expenses, damages recovered in wrongful death action pass to beneficiaries without being subject to debts and liabilities of decedent. (11-7-13).

Action must be brought within three years after cause of such action accrued or, for latent injury, three years after discovery. (15-1-49). Cap on non-economic damages of $1,000,000. (11-1-60[2][a][b]). Cap on punitive damages depends on net worth of defendant. (11-1-65[3][a]). Death does not abate tort action. (91-7-237).

Death Certificate.

See category 10 Documents and Records, topic 10.04 Records, subhead Vital Statistics.

Uniform Anatomical Gift Act.

Uniform Act adopted as revised, 2008 (41-39-101, et seq.).

Living Wills.

See topic 13.16 Wills.

13.06 DECEDENTS' ESTATES:

See topics 13.10 Executors and Administrators, 13.07 Descent and Distribution, and 13.16 Wills.

13.07 DESCENT AND DISTRIBUTION:

Descent of realty and distribution of personalty governed by same rules.

See also topic 13.10 Executors and Administrators.

Surviving Spouse.

Spouse takes all property of deceased spouse if no children or descendants of children, otherwise spouse and children share equally. (91-1-7).

Half Blood.

No distinction in law between kindred of whole and half blood, except that kindred of whole blood preferred to kindred of half blood of equal degree. (91-1-5).

Other Heirs.

Take in following order: (1) Children and descendants of deceased children equally; (2) parents, brothers and sisters equally; (3) grandparents and uncles and aunts equally; (4) otherwise next of kin in equal degree, computed by rules of civil law. There is no representation among collaterals, except among descendants of brothers and sisters. (91-1-3).

Illegitimates.

Inherit from and through mother and her kindred, and mother and her kindred through illegitimate, according to statutes of descent and distribution. Inheritance from and through father, and that by father and his kindred from and through illegitimate, is had where: (a) Natural parents have married before birth of illegitimate, (b) paternity or legitimacy has been adjudicated prior to intestate's death or (c) paternity has been adjudicated after intestate's death by clear and convincing evidence if brought within earlier of one year after death or 90 days after first publication of notice to creditors, and one-year period shall be self-executing and not subject to tolling for any reason. However, father and his kindred shall not inherit from or through illegitimate unless father has openly treated child as his and has not refused or neglected to support it. As between mother and her kindred and father and his kindred, neither shall inherit from other through illegitimate where illegitimate has predeceased intestate unmarried and without issue; however, where illegitimate dies unmarried and without issue and leaves estate including inheritance from mother or father, such portion of illegitimate's estate shall be inherited according to statutes of descent and distribution. (91-1-15). Period will be reduced to 90 days after first notice to creditors provided actual notice given to all potential illegitimate heirs who could be located with reasonable diligence.

Adopted Children.

See category 14 Family, topic 14.01 Adoption.

Determination of Heirship.

Any interested person may seek in chancery court of residence of intestate deceased, or if nonresident in county in which he owned real estate, to decree heirs at law of deceased. (91-1-27). All heirs and next of kin must be made parties to petition and summons to unknown heirs shall be published. Court, upon due proof, must in decree designate heirs of decedent and as such place them in possession of his estate. Such decree is evidence in all courts that persons therein named are sole heirs of decedent. (91-1-29). Such decree is binding on parties after two years from date thereof, saving to minors and persons of unsound mind right to reopen said cause within one year after attaining majority or being restored to sanity. Such decree is recordable in land deed records as if it were deed of conveyance and certified copies may be recorded in any county. Such decree may not be assailed collaterally except for fraud. (91-1-31).

Advancements.

When any children of person dying intestate, or their descendants, have received from such intestate in his lifetime any real or personal estate by way of advancement, and choose to go into partition and distribution of estate with other parceners and distributees, such advancement must be brought into hotchpot, and such party so bringing into hotchpot is thereupon entitled to his or her proper portion of whole estate, real and personal. Advancement will be valued as of time of receipt by distributee. (91-1-17).

Election.

By surviving spouse between rights under intestacy law and testamentary provision, see topic 13.16 Wills.

Escheat.

Entire estate escheats to state where there are no heirs capable of inheriting even if not resident of state. (89-11-1). See topic 13.10 Executors and Administrators.

Uniform Simultaneous Death Law adopted, 1956. (91-3-1, et seq.).

13.08 ELECTION:

See topic 13.16 Wills.

13.08A ESTATES: (in property)

See category 21 Property, topic 21.16 Real Property.

13.09 [RESERVED]

13.10 EXECUTORS AND ADMINISTRATORS:

Revised Uniform Anatomical Gift Act adopted, effective July 1, 2008.

Venue of administration is in chancery court in county of decedent’s residence; if he had no fixed place of residence and will devises real estate, in county where any part of his real estate situated, or if he had no real estate, in county where he died or, where any part of personal property located. (91-7-1).

Preferences in Right to Administer.

The executor named in any last will and testament, whether made in this state or out of it, and admitted to probate here, is entitled to letters testamentary thereon, if not legally disqualified. (91-7-35). Guardian, conservator or other fiduciary of intestate deceased may be granted letters of administration unless relative or other proper person applies to court within 30 days of death of decedent. (91-7-68).

Court appointing administrators prefers first surviving husband or wife, and then such others as may be next entitled to distribution, selecting among those in equal right person or persons best calculated to manage estate, or court may, in its discretion, appoint stranger or trust company organized under laws of this state or national bank doing business in this state if kindred are incompetent. If some such person does not apply within 30 days from death of intestate, court may grant administration to creditor, or any other suitable person. (91-7-63).

Eligibility and Competency.

Any person, male or female, over age of 18 years, of sound mind, who has not been convicted of felony, may qualify as executor, executrix, administrator or administratrix. In case of person under age 21, bond executed by such person shall be as valid and binding as if of full age. (91-7-35, 91-7-37, 91-7-65). Married woman may act, as may foreign corporation.

There is no statutory provision that a nonresident may not be appointed administrator of an intestate's estate, but the court usually appoints a resident by preference. See subhead Foreign Executors or Administrators, infra.

Qualification.

See subheads Eligibility and Competency, supra and Exemption from Bond, infra.

Exemption from Bond.

Administrator must give bond in penalty equal to value of personal estate, with condition for faithful application, unless chancellor waives or reduces bond which is permissible if administrator is sole heir or if all heirs are competent and present petition to waive or reduce bond. (91-7-67). Executor must give bond equal to full value of estate unless this is dispensed with by will unless required by court. (91-7-41, 91-7-45). No state or national bank domiciled in this state shall be required to give bond. (81-5-35).

Issuance of Letters.

Executor shall be entitled to letters testamentary if not legally disqualified. (91-7-35).

Removal.

Executor or administrator may be removed on petition of any interested person upon five days notice for misconduct or disqualification. (91-7-85).

Special Kinds of Administration.

Temporary administrator may be appointed when appeal taken from grant of letters testamentary or of administration, when will contested or probate interrupted or unreasonably delayed or whenever necessary for care and preservation of estate. Powers may be special or general. (91-7-53).

Public Administrators.

When no person has applied for letters testamentary or of administration, after expiration of 60 days from death of person leaving real or personal property in state, letters of administration shall be committed to county administrator who shall administer estate. County administrator may also be appointed temporary administrator in instances where temporary administrator may be appointed. (91-7-79).

Inventory and Appraisal.

Inventory must be filed by executor or administrator within 90 days after the grant of his letters. (91-7-93).

Goods, chattels and personal estate shall be appraised by three persons unless dispensed with by court or clerk for good cause shown. (91-7-109).

General Powers and Duties.

Lands may be leased to pay debts, such lease not to exceed 15 years. (91-7-225). Court may decree power to encumber land to pay debts of decedent. (91-7-215).

Notice to Creditors.

Executor or administrator must make a reasonable attempt to locate persons with claims against estate and mail them notice of 90-day period (from date of first publication of notice) in which to have claims probated. Thereafter executor or administrator must publish notice to creditors once a week for three consecutive weeks in newspaper published in county and proof of publication shall be filed with clerk. (91-7-145).

Presentation of Claims.

Claims must be duly verified and filed with clerk of chancery court in which letters were granted within 90 days from date of first publication of notice or, where estate has been declared insolvent, at time fixed in published notice for examination of claims. Claims not filed within time allowed are barred. (91-7-151).

Proof of Claims.

If claim is on judgment or decree, certified copy thereof must be filed; if it is evidenced by writing, such writing must be filed; if there is no written evidence, itemized account of claim signed by creditor must be filed. If claim is on promissory note or instrument executed by decedent, same may be withdrawn provided clerk of court first makes certified copy thereof to be retained in file, but personal representative of estate or any party in interest may, upon good cause being shown, inspect original. (91-7-149).

Form.

Form for presenting an account is as follows:

Form

State of ___________

___________County. } ss

Personally appeared before me, the undersigned authority in and for the said county and state, ________________, who being by me first duly sworn, say that the annexed____ for ________________ Dollars against the estate of ________________, deceased, as stated, is just and correct, and owing from the deceased; that it is not usurious, and that neither ________________ the affiant nor any other person has received payment in whole or in part thereof, except such as is credited thereon, if any, and that security has not been received therefor except as stated, if any.

Probated and allowed for $___________ and registered this _____ day of _____________, A.D. 20____. (91-7-149).

____

(Official character)

Approval or Rejection of Claims.

Disputed claim may be referred to auditors, who return their findings, with evidence, to court, which may then, upon notice to claimant, allow or disallow claim. (91-7-165).

Priorities.

Expenses of decedent's last illness and funeral and administration expenses, including commissions, are first paid and other claims share ratably if assets are insufficient for full payment. (91-7-261).

Sales.

Personal Property.

Court, or chancellor in vacation, may authorize private sale of personal property. (91-7-177). Executor or administrator, without court order, may sell for cash, either at public or private sale, perishable goods or chattels of decedent whether necessary for payment of debts or not. Executor or administrator may sell any personal property necessary for payment of debts, so long as appraised value is realized. (91-7-179). Executor or administrator, upon proper notice, may petition court for order of sale of personal property, if necessary for payment of debts or if no debts and in best interest of all parties; if court is satisfied that sale is necessary or proper, it may order sale of entire or part of personal estate. Public sale of property must be advertised in at least three public places within county, ten days prior to sale. Property shall be sold to highest bidder for either cash or credit, as order may direct. Executor or administrator shall not be purchaser of any property. (91-7-183).

Confirmation.

Executor or administrator must report any sale of personal property at next term of court for confirmation, specifying time, place and amount of sale, name of purchaser and satisfy court that directions of order, if any, were followed. (91-7-185).

Creditors.

Have right to petition court for sale of real and personal property of decedent for payment of debts. (91-7-195).

Real Property.

Upon petition of executor, administrator, legatees or distributees, court may authorize sale of real property in preference to personal property, where necessary and in best interest of legatees or distributees (91-7-187), or if personal property insufficient to pay debts, court may authorize sale of all or part of real property necessary to pay debts upon petition of executor or administrator (91-7-191). Sale or lease requirements of real property set out in 91-7-197 through -211.

Actions by Representative.

Representative may commence and prosecute any personal action which deceased might have commenced and prosecuted. (91-7-233).

Actions Against Representative.

Suit or action must not be brought against executor or administrator until after expiration of 90 days from date of letters testamentary or of administration and action must be brought within four years after qualification of executor or administrator. (91-7-239, 15-1-25).

Allowances.

Appraisers of estate of decedent must set apart to widow and children, or to widow if there are no children, or to children if there is no widow, such personal property as is exempt. (91-7-117).

It is duty of appraisers to set apart, out of effects of decedent for spouse and children who were being supported by decedent, one year's provisions including such provisions as may be embraced in exempt property set apart, and if there are no provisions, appraisers must allow money for comfortable support of spouse and children for one year, and in addition sufficient sum of money to purchase necessary wearing apparel for spouse and such children and to pay tuition for children for one year. (91-7-135).

Widow's Quarantine.

None.

Intermediate Accountings.

Executor or administrator is required to file annual accounts or more often if required by court. (91-7-277).

Final Accounting and Settlement.

Final account to be filed when estate has been fully administered. (91-7-291). Final account remains on file subject to inspection of any person interested; summons issued, or publication made, to all parties interested as in other suits in chancery court to appear at term of court or before chancellor in vacation not less than 30 days after service of summons or completion of publication to show cause why final account of executor or administrator should not be allowed and approved. (91-7-295). Court will make final decree and order executor or administrator to make distribution of property if Court is satisfied that account is correct. (91-7-297).

Consent Settlement.

Claims belonging to estate which cannot be readily collected may be sold or compromised on proper petition and decree of authorization, but not until six months following grant of letters. Executor or administrator must report in writing all sales and compromises to next term of court. (91-7-229).

Distribution.

Personal property and land are to be distributed according to law regarding descent and distribution. (91-1-1, et seq.).

Distribution if Abroad.

No statutory provision.

Liabilities.

If payment of debts occurs prior to satisfaction of state tax, executor/administrator is personally liable for same. (27-9-37).

Compensation of Representatives.

Court fixes in its discretion for executor or administrator. (91-7-299).

When Administration Unnecessary.

See subhead Small Estates, infra regarding funds which may be paid to successors of deceased depositors at savings and loan associations and savings banks without necessity of administration. (81-12-143, 81-14-383).

Small Estates.

No special procedures authorized except that in estates valued at less than $500, publication of notice to creditors dispensed with, but posting notice for 30 days required at courthouse and two other public places (91-7-147); when value of entire decedent's estate does not exceed $50,000, debtor of decedent may repay debt to decedent's successor, upon affidavit of successor as to certain facts (91-7-322). See topic 13.16 Wills, subhead Probate.

Foreign Executors or Administrators.

Executors and administrators, qualified in other states or countries, may sue in courts of this state, or may receive without suit any property of, or debts due to, their testators or intestates, after filing in office of clerk of chancery court of county where there may be some person indebted to decedent, or having some of his effects in possession, certified copy of record of appointment and qualification of executor or administrator according to law of state or country where he is qualified, and certificate of officer before whom he is liable to account as such that he is there liable to account for thing sued for or received. (91-7-259). See topic 13.16 Wills.

Any foreign banking corporation, or banking association, or foreign trust corporation, authorized to act as executor or administrator of estates of decedents in the state where it has its principal office, may apply and so act in this state, if similar corporations domiciled in this state are so permitted to act in such other state. Appointment in writing of Secretary of State as agent for process is condition precedent. (81-5-43). See topic 13.15 Trusts; category 14 Family, topic 14.08 Guardian and Ward.

Uniform Fiduciaries Act not adopted.

Revised Uniform Principal and Income Law adopted, 1967. (91-17-1, et seq.).

Uniform Act for Simplification of Fiduciary Security Transfers adopted, 1960. (91-11-1, et seq.).

Revised Mississippi Uniform Anatomical Gift Act adopted, 2008. (41-39-101, et seq.). See topic 13.16 Wills.

13.11 FIDUCIARIES:

See topics 13.10 Executors and Administrators, and 13.15 Trusts; also category 14 Family, topic 14.07 Guardian and Ward.

13.12 INTESTACY:

See topic 13.07 Descent and Distribution.

13.13 LIVING WILLS:

See topic 13.16 Wills.

13.14 PROOF OF CLAIMS:

See topic 13.10 Executors and Administrators; also category 5 Civil Actions and Procedure, topic 5.18 Pleading.

13.15 TRUSTS:

Uniform Trusts Act and Uniform Probate Code not adopted.

Kinds.

Express, constructive and resulting trusts are recognized. (91-9-1).

Creation.

All trusts in land, unless constructive or implied, and all assignments or transfers thereof, must be created by instrument in writing, signed by creator and acknowledged and writing or certificate (91-9-7) filed for record in the office of the clerk of the chancery court of the county where the land lies. (91-9-1, 91-9-3).

Appointment of Trustee.

No statutory provision. Appointment for successor. (91-9-203).

Eligibility and Competency.

Any foreign trust corporation or association authorized to act as trustee under wills and voluntary trust agreements in the state where it has its principal office, may apply and so act in this state, if similar corporations domiciled in this state are so permitted to act in such other state. Appointment in writing of Secretary of State as agent for process is condition precedent. This law, however, has no application to trust agreements executed for the purpose of securing loans or guaranties thereof. (81-5-43). See topic 13.09 Executors and Administrators; category 14 Family, topic 14.07 Guardian and Ward.

Qualification.

No statutory provisions.

Removal of Trustee.

Majority of local beneficiaries of educational, charitable, or religious trusts may file bill of complaint in chancery court in county where any part of corpus of said trust is situated requesting discharge of trustee or trustees. (91-9-303). Power of court in removal proceedings. (91-9-305).

General Powers and Duties of Trustees.

Uniform Trustees' Powers Law adopted, 1966. (91-9-101, et seq.). Mississippi Uniform Prudent Investor Act adopted, 2006. (91-9-601, et seq.).

Trustee has power to perform, without court authorization, every act which prudent investor would perform for purposes of trust, including but not limited to, specified powers. (91-9-105, 91-9-107).

Trusts protected in certain instances from money judgment and creditors; spendthrift trust doctrine reaffirmed. (91-9-501, et seq.).

Sales.

Assignments. (91-9-3). Assignment by fiduciary of securities. (91-11-7). Powers of trustees generally. (91-9-107).

Investments.

Fiduciary investments. (91-13-1 through 91-13-11).

Securities in Name of Nominee.

Power of trustee to hold security in name of nominee. (91-9-107[3][p]).

Bequests and Devises to Inter Vivos Trusts.

See topic 13.16 Wills.

Accounting.

Resigning trustee must provide accounting. (91-9-203 through 91-9-205). If trustee required by law or by instrument creating trust to file accounting, trustee's account must be filed, examined, and approved in same method as accounts of executors and administrators. (91-9-5).

Compensation.

Trustee conferred power to pay compensation of trustee. (91-9-107[3][t]).

Discharge of trustee. (91-9-205).

Uniform Common Trust Fund Law adopted, 1950. (81-5-37).

Revised Uniform Principal and Income Law adopted, 1967. (91-17-1 to 91-17-31).

Gifts to Minors.

Mississippi Uniform Transfers to Minors Act adopted, 1995. (91-20-1, et seq.).

Uniform Fiduciaries Act not adopted.

Uniform Act for Simplification of Fiduciary Security Transfers adopted, 1960. (91-11-1, et seq.).

Accumulations.

See category 14 Family, topic 14.10 Infants. See category 21 Property, topic 21.13 Perpetuities.

Perpetuities.

See category 21 Property, topic 21.13 Perpetuities.

Pour Over Trusts.

See topic 13.16 Wills, subhead Bequests and Devises to Inter Vivos Trusts.

Renunciation.

No statutory provisions.

13.16 WILLS:

Uniform Probate Code has not been adopted in Mississippi.

Every person 18 years of age, being of sound and disposing mind, may execute will. (91-5-1).

Testamentary Disposition.

Person with testamentary capacity may devise all estate he has in real and personal property of any description whatsoever. (91-5-1). Mortmain statute limiting bequests to charitable, religious, and educational institutions has been repealed.

Execution.

Every person 18 years of age or older may execute a will. Every will must be signed by testator or by some person in his presence and at his express direction. (91-5-1).

Attestation Clause.

If will not wholly written by testator, it shall be attested by two or more credible witnesses in presence of testator. (91-5-1).

Holographic Wills.

Recognized. No witnesses are required. (91-5-1).

Nuncupative Wills.

Established only if made during last illness of testator at his or her habitation or where he or she resided for ten days next preceding death, except where testator was taken sick away from home and died before returning. If value of estate exceeds $100, it must be proved by two witnesses that testator called on some person present to take notice or bear testimony that such was his will. (91-5-15). Such will can be probated only after expiration of 14 days from date of death and only on summons issuing for widow, if any, and next of kin if resident in this state. (91-5-17). Must be probated within six months from time of speaking of testamentary words unless words, or substance thereof, were reduced to writing within six days after spoken. (91-5-19).

Revocation.

Will can be revoked only by testator destroying, canceling or obliterating will or causing this to be done in his presence, or by subsequent will, codicil or declaration in writing made and executed. (91-5-3).

Testamentary Gifts to Subscribing Witnesses.

Devise or bequest to subscribing witness is void if will cannot be proved without his testimony. But if such witness would have been entitled to share in estate if decedent had died intestate he may take such share up to, but not in excess of, amount of devise or bequest. (91-5-9).

Bequests and Devises to Inter Vivos Trusts.

Pour over trusts recognized. (91-5-11).

Testamentary Guardians.

See category 14 Family, topic 14.08 Guardian and Ward.

Probate.

Jurisdiction is in chancery court. (91-7-1). As to probate venue, see topic 13.10 Executors and Administrators. Execution of will proved by one subscribing witness, if alive and competent to testify, or by proof of testator’s and subscribing witnesses’ handwriting if witnesses not available. (91-7-7). If no contest, affidavit of witness sufficient to prove will. (91-7-9). For holographic will or codicil, affidavits of two disinterested persons necessary. (91-7-10).

Will executed by any member of U.S. Armed Forces during any war may be admitted to probate by chancery court of county in which testator lived when he became member of such

Armed Forces, on affidavit of any reliable person sufficient to satisfy chancellor that testator is dead, that writing propounded for probate was signed by testator as his last will, that affidavits of subscribing witnesses cannot reasonably be obtained and that there is good reason for such will to be then probated. (91-7-15).

A photostatic copy of the original will is authorized to be used by an attesting witness who is a nonresident for certification purposes. (91-7-11).

Will may be probated as muniment of title only, by sworn petition of all beneficiaries and surviving spouse, without necessity of administration, if will devises real estate in state and if value of decedent's personal estate is not more than $10,000 (exclusive of real property) and all known personal and estate debts and taxes are paid. (91-5-35).

Self-proved Wills.

No provisions.

Living Wills.

Uniform Health Care Decisions Act adopted, 1998. Persons 18 or older may authorize, in advance, withdrawal of life-sustaining mechanisms. (41-41-201 to 41-41-229).

Contest.

A will probated without notice may be contested by any person interested at any time within two years after probate, saving to infants or persons of unsound mind the period of two years to contest will after the removal of disabilities. In case of concealed fraud, limitation commences to run at time fraud might have been discovered with reasonable diligence. (91-7-23).

Legacies.

After expiration of six months from grant of letters testamentary of administrator, person entitled to legacy under will may petition Court for administrator or executor to pay legacy. Administrator or executor not compelled to pay before final settlement until bond is given. (91-7-303).

Unclaimed Legacies.

See topic 13.07 Descent and Distribution, subhead Escheat.

Lapse.

Where a legacy or devise is given to child or other descendant of testator, who dies before testator leaving issue who survive testator, such legacy or devise does not lapse, but issue of deceased legatee or devisee take as though latter has survived testator and died intestate and unmarried. (91-5-7).

Children.

If living when will is executed may be disinherited by mere failure to mention them therein. While provisions with respect to children born after execution of will vary somewhat according to whether or not testator had children living when will was executed, it may be stated generally that afterborn children, including posthumous children, not provided for by settlement and neither provided for nor disinherited by will, but merely pretermitted, take share of estate which they would have taken in case of intestacy. (91-5-3, 91-5-5).

Election.

Surviving spouse cannot be disinherited. If will does not make satisfactory provision for surviving spouse, latter may, at any time within 90 days after probate of will, file renunciation and thereupon is entitled to share that which he or she would have taken if decedent had died intestate, not to exceed one-half of estate. (91-5-25). If will makes no provision for surviving spouse, latter takes as though decedent had died intestate, not to exceed one-half of estate, and renunciation of will is not necessary. (91-5-27).

However, if surviving spouse has separate property equal in value to what would be his or her lawful portion of deceased spouse's estate, surviving spouse cannot renounce will and take his or her portion of estate. If separate estate is not of equal value, surviving spouse can have deficiency made up to him or her, notwithstanding will. If separate property of surviving spouse does not amount in value to one-fifth amount to which he or she would be entitled, surviving spouse can renounce provisions of will and elect to take his or her entire lawful proportion. (91-5-29).

Contribution.

See subhead Election, supra.

Renunciation.

Spouse may file renunciation of will within 90 days after probate of will, and elect to take in lien thereof, spouse's legal share of estate. If deceased spouse left no child, surviving spouse entitled to only one half of estate of deceased spouse. (91-5-25).

Foreign Executed Wills.

Ancillary probate proceedings are not necessary, but such may be contested as original proceedings might have been if it had been executed in this state. Will executed outside of state but not probated elsewhere can be probated originally in this state in county where there is property affected. (91-7-33).

Foreign Probated Wills.

See subhead Foreign Executed Wills, supra.

Simultaneous Death.

See topic 13.05 Death, subhead Survivorship.

Testamentary Trusts.

See topic 13.15 Trusts.

Uniform Anatomical Gift Act adopted, 1970. (41-39-31).

Revised Uniform Anatomical Gift Act adopted, effective July 1, 2008. (41-39-101 et seq.).

14 FAMILY

14.01 ADOPTION:

Adoptions are controlled by 93-17-1, et seq. Any person may be adopted. (93-17-3).

Any husband and wife jointly or any unmarried adult may adopt. Adoption by same gender couples prohibited. (93-17-3).

Consent Required.

Consent required; otherwise service by personal process or publication required. Child's consent or personal service of process upon child necessary where child over 14 years of age. (93-17-5). No infant can be adopted when either parent, after having been summoned, appears and objects before decree entered, unless court finds that objecting parent abandoned or deserted infant or is mentally, morally, or otherwise unfit. Parents are not summoned and have no right to object to adoption if parental rights have been terminated under statutory procedure. (93-17-7). Statute prescribes grounds and procedure for terminating parental rights. (93-15-101, et seq.).

Conditions Precedent.

Final decree must not be entered before expiration of six months after entry of interlocutory decree, except where child is stepchild of petitioner or related by blood within third degree according to civil law, or in any case where chancellor determines six month waiting period not necessary. Also, when child has resided in home of petitioner before entry of interlocutory decree, court may shorten waiting period for such period of time. (93-17-13).

Jurisdiction.

Chancery court has jurisdiction of adoption proceedings if: (1) Minor to be adopted (a) lived in Mississippi with parent, guardian or prospective adoptive parent, or another person acting as parent for at least six consecutive months excluding periods of temporary absence or (b), in case of minor under six months old, lived in Mississippi with any of these individuals soon after birth; (2) prospective adoptive parent lived in Mississippi for at least six consecutive months, excluding periods of temporary absence; and (3) agency that placed minor for adoption is licensed in Mississippi and is in best interest of minor for Mississippi court to assume jurisdiction because minor and minor's parent, or minor and prospective adoptive parent have significant connection with Mississippi. Jurisdiction may only be assumed on bases listed above if there is also available in Mississippi substantial evidence concerning minor's present or future care. Additionally, jurisdiction may exist if: (1) Minor and prospective adoptive parent are physically present in Mississippi and (a) minor has been abandoned or (b) it is necessary to protect minor from neglect, or action, or threatened mistreatment or abuse; or (2) no other state would have jurisdiction or another state has already declined to exercise jurisdiction on ground that Mississippi is more appropriate forum. (93-17-3). Chancery, family, or county court sitting as youth court, or such courts in vacation, has jurisdiction of termination of parental rights proceedings. (93-15-105).

Venue.

Proceedings must be brought in the chancery court of county in which adopting petitioner or petitioners reside or in which child to be adopted resides or was born, or was found when it was abandoned or deserted, or where child was surrendered. (93-17-3).

Petition.

Must be sworn to and must be accompanied by doctor's or nurse practitioner's certificate showing physical and mental condition of child to be adopted, and sworn statement of all property, if any, owned by child. Chancellor may allow adoption of child with mental or physical condition or defect if adopting parent or parents file affidavit acknowledging defect and stating that they desire to adopt child notwithstanding condition or defect. (93-17-3). Child must join in petition by its next friend. (93-17-5). No reference is required as to marital status of child's natural parents; and no recital is to be made that child was born out of wedlock in any petition filed or decree entered upon consent. (93-17-27).

Proceedings.

After filing petition and service of process, and before entry of final decree, court may require investigation, including, but not limited to, home study by qualified licensed person at petitioner's or petitioners' sole expense, at no cost to state or county, and report concerning whether child proper subject for adoption, or whether petitioners are suitable parents, or other material facts. (93-17-11). All proceedings are confidential and must be held in closed court, except upon court order. (93-17-25). All pleadings and records are confidential and docket entries must not refer to names of natural parents or to child's original name, but clerk must keep separate confidential index showing such information and name of adopting parents and new name of child. (93-17-29, 93-17-31).

Decree.

Court may enter an interlocutory decree and can require further investigation and reports after its entry. (93-17-11). Reference to child in decree must be by child's new name, if name is to be changed; and decrees spread upon court's minutes must not disclose names of natural parents nor child's original name. (93-17-29). Statute requires certified copy of final decree to be furnished to Bureau of Vital Statistics, whereupon revised birth certificate must be issued. Statute further provides for Bureau to maintain centralized adoption records which include: medical and social history of birth parents and other family members; report of birth parent(s) medical examination(s) if within one year of petition and available; report describing prenatal care and medical condition of child at birth, if available; and medical and social history of adoptee. (93-17-21; 93-17-205). Original birth certificate can be obtained thereafter only upon court order, permission of birth parent, or pursuant to Mississippi Adoption Confidentiality Act. (93-17-201, et seq.).

Name.

Chancery court or chancellor in vacation shall have jurisdiction to alter name of such person, to make legitimate any living offspring, and to decree said offspring to be heir of petitioner. (93-17-1). Chancery court has power to change child's name as part of adoption proceeding. (93-17-3).

Effect of Adoption.

Person adopted inherits from and through adopting parents and from other children of adopting parents in accordance with the statutes of descent and distribution. Adopting parents and their other children inherit from person adopted. Adopting parents, adoptive kindred and adopted person vested with all rights as if person had been born to adopting parents in lawful wedlock, including all rights under wrongful death statute. (93-17-13). See category 13 Estates and Trusts, topic 13.05 Death, subhead Actions for Death.

Natural parents and natural kindred of person adopted cannot inherit by or through him or her, except as to a natural parent who is spouse of adopting parent. (93-17-13). However, adopted person retains right to inherit from natural parents and blood relatives. (104 So.163; 230 So.2d 789; and 450 So.2d 786).

If adopted child eligible for Medicaid at time of adoption and adopting parents sign agreement with Dept. of Human Services, Medicaid coverage provided to child until age 18. (93-17-67). Adopted child receiving Medicaid for severe physical or mental handicap continues to receive Medicaid until 18, and 21 if Dept. of Human Services agrees. (93-17-67).

Setting Aside Adoption.

No adoption proceedings can be set aside except for jurisdictional defects and for failure to bring proceedings in conformity with proper statutes. (93-17-17). No action can be brought to set aside any final decree of adoption except within six months after entry of same. (93-17-15).

14.02 ALIMONY:

See topic 14.06 Divorce.

14.03 COMMUNITY PROPERTY:

See topic 14.06 Divorce.

14.04 DESERTION:

See topics 14.06 Divorce; 14.09 Husband and Wife.

14.05 DISSOLUTION OF MARRIAGE:

See topic 14.06 Divorce.

14.06 DIVORCE:

This subject is governed by 93-5-1, et seq.

Grounds for Absolute Divorce.

Natural impotency; adultery (unless there was collusion or condonation); sentence to penitentiary (unless pardoned before being sent there); desertion for one year; habitual drunkenness; habitual excessive use of drugs; habitual cruel and inhuman treatment; mental illness or retardation at time of marriage (unknown to complaining party); prior marriage undissolved; pregnancy by person other than husband at time of marriage (unknown to husband); consanguinity within prohibited degrees; incurable mental illness, if mentally ill party has been under regular treatment and confined in an institution for preceding three years. (Examination by two qualified physicians and affidavits by them that patient is mentally ill is condition precedent.) (93-5-1).

Irreconcilable differences is alternative ground for divorce, but only on joint complaint or uncontested petition after personal process. Parties must make adequate provision for custody and maintenance of children and for settlement of property rights. If unable to agree, must consent in writing to allow court to decide issues. Complaints for divorce on this ground must be filed 60 days before hearing. (93-5-2).

Grounds for Legal Separation.

No statutory or judicial provision for legal separation from bed and board. However, chancery court has inherent power to award separate maintenance. Normal prerequisites are separation without substantial fault on wife’s part and willful abandonment by husband with refusal to support. (888 So.2d 1192; 767 So.2d 272; 616 So.2d 294; 527 So.2d 617; 210 Miss. 729; 50 So.2d 603).

Citizenship Requirement.

See subhead “Residence Requirements”, infra.

Residence Requirements.

One party must be actual bona fide resident of state for six months before commencement of divorce. Court may not take jurisdiction if residence was acquired for purpose of securing divorce. (93-5-5).

Jurisdiction.

Chancery Court. (Miss. Const. Art 6, 159).

Venue.

If defendant is resident, must be filed in county in which defendant resides or may be found or county of residence of parties at time of separation, if plaintiff still resident of county; if defendant is nonresident or absent so that he cannot be served, county of plaintiff's residence. Complaint solely on ground of irreconcilable differences must be filed in county of residence of either party; where one party is nonresident, in county of resident party. Transfer of divorce complaint filed in improper county to be made in accordance with rules of civil procedure. Transfer of venue governed by MRCP 82(d). (93-5-11).

Process.

No special rules. See MRCP 4 and MRCP 81(d). No divorce judgments by default. (93-5-7).

Pleading.

Numerous special pleading provisions set out in 93-5-7, including that, in divorces other than on irreconcilable differences, plaintiff must verify that complaint not filed by collusion and state that cause(s) for divorce are true. See also 93-5-11 re: filing of complaints. Complaints for divorce must name parties, date of marriage, and number and names of living minor children born of marriage. (93-5-33).

Practice.

Married minor may bring or defend suit for divorce. (93-5-9). Guardian for spouse who becomes mentally ill may sue for divorce. (93-5-15). Proceedings to be in open court. (93-5-17).

Judgment or Decree.

Final decree entered immediately on determination of issues. Marital rights cease on decree of divorce from bonds of matrimony. (93-5-25, 93-5-27). Property jointly owned not affected, tenancy by entirety becomes joint tenancy. (434 So. 2d 1361; 336 So.2d 497).

Temporary Alimony.

May be allowed to either wife or husband. (93-5-23).

Allowance for Prosecution of Suit.

Suit money may be allowed to either wife or husband. (93-5-23).

Permanent Alimony.

May be allowed to either wife or husband and may be modified or terminated. (93-5-23).

Division of Property of Spouses.

Not community property state. No equitable distribution statute—case law permits distribution of marital assets. (639 So. 2d 921; 639 So.2d 909).

Change of Wife's Name.

May petition for under 93-17-1. See MRCP 81(d).

Custody of Children.

Court may make temporary or permanent orders as to custody based on best interest of child, and may modify such orders based on changed circumstances, but it is not presumed that best interest of child requires mother be awarded custody. (93-5-24). If parent with custodial or visitation rights deployed by military, court may enter temporary custody order effective during parent's absence and may delegate visitation rights to family member of military parent. (93-5-34). Procedures by which court may order child abduction prevention measures in child-custody proceedings governed by 2009, c. 450, known as Uniform Child Abduction Prevention Act.

Allowance for Support of Children.

Child support order must specify sum to be paid weekly or otherwise and must also provide for other expenses deemed proper by Court. (93-11-65). Chancery court has discretion in making orders touching care, custody and maintenance of children, but where both parents have estate or income, court making orders for support of children may require that each parent contribute to support in proportion to ability. (93-5-23). Uniform Interstate Family Support Act adopted. (93-25-1 et seq.). Orders for withholding child support governed by 93-11-101 et seq. Child Support Unit of Dept. of Human Services has authority to enforce child support. (43-19-31 et seq.). Withholding procedures in child support cases enforced by Dept. of Human Services. (93-11-103). Duty to support minor children terminates upon emancipation of child. (93-11-65).

Emancipation occurs when child: (1) Turns 21, (2) marries, (3) joins military, or (4) convicted of felony and sentenced to two years incarceration. (93-11-65). If incarcerated for less than two years, child support obligation suspended during incarceration. (93-11-65).

Remarriage.

No statutory prohibition against remarriage, but in cases of adultery court may prohibit remarriage of guilty party and may remove such disability after one year on petition and satisfactory evidence of reformation. (93-5-25).

Foreign Divorces.

Mississippi courts will determine jurisdiction of foreign court and consequent validity of divorce, notwithstanding recitals in decree of jurisdictional fact of residence or domicile. (173 Miss. 44, 159 So. 112; 174 Miss. 643, 165 So. 414).

Separation Agreements.

Recognized and may be incorporated into divorce decrees subject to court approval. (478 So. 2d 258).

Antenuptial or Prenuptial Contracts.

See topic 14.09 Husband and Wife.

14.07 [RESERVED]

14.08 GUARDIAN AND WARD:

Creation of guardianship within jurisdiction of chancery court. (9-5-81 and Art. 6, § 159, Miss. Constitution). Venue proper in county of residence of minor ward (93-13-13), incompetent adult (93-13-121) or missing armed services person (93-13-161) or in county where property of out of state ward is located (93-13-181).

Conservators.—If person incapable of managing own estate due to advanced age, physical or mental incapacity, or is missing or outside of United States and unable to return, chancery court can appoint conservator, upon petition of person or friend or relative, to have charge of property, and if court deems advisable, charge of person. (93-13-251). Upon filing of petition, clerk sets time and place of hearing and must provide five days notice to person for whom conservator is appointed, as well as one relative of such person. (93-13-253). Conservator has same powers and duties as guardian of minor, and laws applicable to guardian are also applicable to conservator. (93-13-259).

Selection of Guardian.

Any parent may, by instrument wholly written and signed by him or her, or attested by two or more credible witnesses not including person appointed guardian, appoint some suitable person as guardian of motherless or fatherless child to take effect at parent's death. Bond, inventory and accounting can be waived with court approval. (93-13-7).

Eligibility and Competency.

Minor cannot be appointed guardian of another minor. (185 Miss. 243, 187 So. 229). Nonresidents, if competent, eligible to serve as guardians when ward has property in state. (93-13-181).

Appointment of Guardian.

Ward is any person under legal disability such as minority, mental retardation, mental illness, unsound mind, alcoholism, addiction to drugs or felony conviction. (1-3-58). Chancery court of county of residence of ward who has estate, real or personal, or who has no estate, may appoint guardian for him, giving preference in all cases to natural guardian or next of kin, unless applicant is manifestly unsuitable for discharge of duties. Court may allow minor who is over age of 14 years and under no legal disability except minority to select his guardian. Nonresident ward owning property in this state may have guardian appointed by court of county in which such property is located. If over 14, minor ward may make selection before clerk of court of record of county of his residence. (93-13-13).

Qualification.

Every guardian, unless bond is dispensed with, by will or writing, must enter into bond payable to state in such penalty and with such sureties as court may require. No bond necessary for part of estate deposited in any one or more fully insured banks, building and loan associations or savings and loan associations, such deposit to remain until further court order. (93-13-17). No state or national bank domiciled in this state shall be required to give bond. (81-5-35).

Inventory.

Within three months after appointment, guardian must return to the court under oath true and perfect inventory of the estate, both real and personal, and must annually return inventory under oath of increase of estate, if any. (93-13-33).

Powers and Duties.

Guardian not entitled to custody of ward as against parent who is suitable. (93-13-5). Chancery court, or chancellor in vacation, may fix sum to be expended for maintenance and education. (93-13-35). Guardian may be empowered to sell or compromise claims due their ward, on same proceedings and under same circumstances prescribed by 91-7-229 for sale or compromise by executor or administrator of claims belonging to estate of deceased person. (93-13-59). Sums of $10,000 or less owed to ward may be paid directly to ward or other person, upon approval of chancery court, without necessity of guardianship under certain conditions. (93-13-211).

Investments.

Investment by guardian regulated by statute. (91-13-1). Guardian may contract for life insurance for benefit of ward on life of any person owning an estate in which minor will participate. (83-7-19). See also category 3 Business Regulation and Commerce, topic 3.01 Banks and Banking, subhead Uniform Common Trust Fund Act; also category 13 Estates and Trusts, topic Trusts.

All laws regarding disposition of property by executors and administrators are applicable to guardians. With approval of court, guardian may establish estate plan for ward's estate. (93-13-38).

Securities in Name of Nominee.

See category 13 Estates and Trusts, topic 13.15 Trusts, subhead Securities in Name of Nominee.

Real Estate.

Sale of ward's land may be had on petition of guardian, summons issued for parents or parent or two adult kin within third degree of ward (or they may join in petition), and decree of chancery court, which designates chancery clerk or guardian to make conveyance and sign deed. (93-13-51). With approval of court, guardian may execute encumbrance upon real estate of ward. (93-13-47). Undivided interest in real property of ward worth less than $10,000 may be sold without necessity of guardianship upon petition and approval of chancery court. (93-13-217).

Liabilities of Guardian.

Actions against guardian and sureties on his bond, or either of them, by ward, must be commenced within five years after ward reaches 21 years of age. (15-1-27).

Accounts.

Guardians must exhibit accounts at least once a year, and more often if required, except chancellor, for good cause shown, in his discretion, when satisfied it is to best interest and welfare of ward, may dispense with annual accounts, except final account, if ward's estate does not exceed $3,000 and no future funds will be received except interest or welfare benefits or, if ward's total assets are deposited in fully insured savings account, to remain until further court order. (93-13-67).

Termination of Guardianship.

Guardianship ceases when ward reaches age of 21, or in court's discretion, when ward reaches age of 18. When estate does not exceed $2,000, court can order guardian to turn over to ward all of ward's property provided certain statutory conditions met. (93-13-75).

Insane Persons.

Persons under disabilities of mental retardation, mental illness, or unsound mind are defined as wards. (1-3-58). Chancery court can appoint guardian for person adjudged of unsound mind on application of relative, friend, or any interested party, or upon court's own motion. (93-13-123, 93-13-125).

Where person has not been adjudged of unsound mind, guardian may be appointed if person: (1) Has been confined in public mental hospital in Mississippi for more than one year and is still so confined; (2) is of unsound mind; (3) is mentally incapable of handling estate; (4) is incapable of responding to process. Relative or friend may swear to petition. (93-13-125).

Upon death of incompetent, estate is settled in same manner as other decedent estates.

Foreign Guardians.

When ward resides out of this state, but has property here, and guardian has been appointed in state of his residence, such guardian entitled to be appointed guardian by court of county in this state in which property is situated. (93-13-181). Foreign banking or trust corporation or association authorized to act as guardian of minors or incompetent persons in state where it has its principal office, may apply and so act in this state if similar corporations domiciled in this state are so permitted to act in such other state. Appointment in writing of Secretary of State as agent for process is condition precedent. (81-5-43). See category 13 Estates and Trusts, topics 13.09 Executors and Administrators, 13.15 Trusts.

If such nonresident guardian desires to remove personal property of his ward out of state, he must present his petition for that purpose to court of this state by which he was appointed. On making settlement of his guardianship accounts, court may make order to that effect, but guardian must first give bond with surety or sureties residing in this state for full value of ward’s personal estate. (93-13-185).

A foreign guardian entitled to sue for, receive and give a valid acquittance for property of ward on same terms on which executors and administrators, who have qualified in other states or countries, are authorized to sue and receive without suit, property or debts due to their testators or intestates. (93-13-183).

Gifts to Minors.

Court shall decree that property of ward be delivered to guardian. (93-13-31). See topic 14.10 Infants.

Uniform Fiduciaries Act not adopted.

Uniform Act for Simplification of Fiduciary Security Transfers adopted. (91-11-1 et seq.).

14.09 HUSBAND AND WIFE:

Marriage confers rights and imposes duties as at common law.

Disabilities of Married Women.

Abrogated. (93-3-1).

Separate Property.

All property of a married woman, except the homestead, is her separate property. Husband’s property, except homestead, is free from any claim of wife. (93-3-1).

Contracts.

Husband and wife may contract with each other except so as to permit one to receive pay from the other for services. (93-3-7).

All transfers of real or personal property and all leases of land between husband and wife must be signed, acknowledged and recorded to be valid as against third persons. (93-3-9).

Antenuptial Contracts.

If made “upon consideration of marriage”, it is governed by Statute of Frauds and therefore required to be in writing and signed. (15-3-1).

Actions.

Husband and wife may sue each other. (93-3-3). Doctrine of interspousal tort immunity fully abrogated. (518 So. 2d 1205).

Husband who appropriates for his own use property of wife or income and profit of her property is debtor to wife and can be sued for same, but not after expiration of one year from receipt of such income or profit. If husband is permitted by wife to use income from her estate, in support and maintenance of family, he is not chargeable therewith, nor liable to account therefor. (93-3-13).

Agency.

One spouse can act as agent or attorney-in-fact for the other.

A husband who rents the wife's plantation and farming implements and stock, or who carries on business in his own name or on his own account with wife's means will be determined to be acting as her agent in such business unless contract between husband and wife which changes this relationship is evidenced by writing, subscribed by both spouses, duly acknowledged and filed for recordation with chancery clerk of county where such business is done. (93-3-7).

Conveyance or Encumbrance of Property.

There is no necessity for joinder of one spouse in deed, mortgage, etc., of other, except where homestead is involved. See category 8 Debtor and Creditor, topic 8.10 Homesteads.

Desertion and Nonsupport.

Spouses have right to maintenance and support and suits are maintainable in chancery court of county in which defendant lives. (See 152 Miss. 201, 119 So. 299.) Child Support Unit of Dept. of Human Services has authority to enforce child support. (43-19-31 et seq.).

Uniform Reciprocal Enforcement of Support Act (1952 version) repealed, for current provisions, see Uniform Interstate Family Support Act, §§ 93-25-1 et seq. Civil enforcement by chancery court.

Community Property.

System does not exist in Mississippi. (639 So.2d 921 and 639 So.2d 909).

14.10 INFANTS:

Age of majority is 21 years. (1-3-27). Drinking age is 21. (67-3-53).

Emancipation.

Chancery court may determine emancipation has occurred when child: (1) Attains age 21; (2) marries; (3) discontinues full-time enrollment in school having attained age of 18, unless child is disabled; (4) voluntarily moves from home of parent or guardian, establishes independent living arrangements, obtains full-time employment and discontinues educational endeavors prior to attaining age of 21; (5) joins military and serves on full-time basis; (6) is convicted of felony and is incarcerated for committing such felony; or (7) cohabits with another person without approval of parent obligated to pay child support. (93-11-65).

Disabilities.

As to real estate, minority may be removed, either partially or generally, under statutory procedure in chancery court of county where minor resides or owns real estate. (93-19-1). Married minors are treated as adults in suits for divorce, separate maintenance and support, child custody, and other related claims. (93-19-11, 93-5-9). Minors 18, 19 and 20 years old can contract in matters related to personal property and can settle personal injury claims without guardianship appointment. (93-19-13; 394 So. 2d 321). Disabilities of minority of married minors 18 years or over are removed for signing or executing instruments pertaining solely to homestead. (93-3-11). Minors 17 years or older can donate blood without parent's consent. (41-

41-15). Physicians can provide family planning information and contraceptive supplies to married minor, minor who is parent, minor with consent of parent or guardian, or minor referred by doctor, clergyman, family planning clinic, school or state agency. (41-42-7). Persons 18 years or older may by contract or will donate body to medical science. (41-39-9, 41-39-35). Court may consider preference of minor of 12 years or older as to custodial parent if both parents are determined fit and proper for custody. (93-11-65).

Ratification of Contracts.

To charge any person upon any promise made after full age to pay any debt contracted during infancy, or upon any ratification after full age of any promise or contract made during infancy, promise or ratification must be signed and in writing. (15-3-11).

Actions.

Court may appoint guardian ad litem to represent infant in all court proceedings where minor is not represented by legal guardian (9-5-89), except that married minor may file or defend in his own name suit involving marital rights. (93-19-11). Court may order genetic test in paternity action. (93-9-21).

Support of Minor.

It is felony for any parent to desert, willfully neglect or refuse to provide for maintenance and support of his child or children while child is under age of 18 years. (97-5-3). See also subhead Allowance for Support of Children under topic Divorce.

Parental Responsibility.

Public school district entitled to recover up to $20,000 from parents of minor child (between ages of 6-18) who maliciously and willfully damages or destroys school property. (37-11-53). Property owner entitled to recover up to $5,000 from parents of minor over age of ten and under age of 18 who maliciously and willfully damages property of such owner; this action is in addition to all other actions or rights of such owner. (93-13-2). Otherwise, no parental tort liability imposed (109 Miss. 691, 69 So. 685) unless parent authorizes or ratifies tort (134 Miss. 616, 99 So. 440) or unless parent has made it possible for child to cause injury and probable that child would do so (238 Miss. 156, 117 So. 2d 795). Procedure for termination of parental rights. (93-15-105, et seq.).

Adoption.

See topic 14.01 Adoption.

Uniform Transfers to Minors Act adopted. (91-20-1, et seq.).

14.11 MARRIAGE:

There is no statute prohibiting, under all circumstances, marriage of persons under a specified age. Marriage between persons of same gender is prohibited even where valid in jurisdiction performed. (93-1-1).

Consent Required.

Where the male is under age of 17 or female is under age of 15, consent of parents or guardian of underaged party is necessary plus written waiver of minimum age requirements by court. (93-1-5).

Medical Examination.

Medical certificate dated within 30 days prior to application must be presented to clerk showing applicants are free from syphilis as determined by blood tests performed in laboratory approved by State Board of Health. (93-1-5).

License.

Required and obtained by: (a) Sworn application of both parties to clerk of circuit court of any county in state, provided that if female applicant is Mississippi resident under age of 21, application must be made to circuit clerk of county of her residence. Application must include names, ages and addresses of applicants, names and addresses of their parents, and if no parents, names and addresses of guardian or next of kin, signatures of witnesses and any other data which may be required by law or State Board of Health. Male applicant must be at least 17 years of age and female at least 15 years of age, unless court in county where either of applicants resides waives minimum age requirements. No license can be issued when it appears to clerk that applicant is drunk, insane or imbecile. (93-1-5).

The issuance of license may be contested by any interested party by filing written protest in the circuit or chancery court of county where application is filed. Provision is made for necessary parties, issuance of process and a hearing on such protest. (93-1-7).

However, failure to comply with any of the foregoing requirements does not affect validity of any marriage duly solemnized and followed by cohabitation (93-1-9) nor validity of common law marriages entered into prior to Apr. 5, 1956; but after said date, no marriage is valid unless license is obtained and ceremony performed (93-1-15). Affidavit showing age of both applicants must be made by either father, mother, guardian or next of kin and filed with clerk, unless both applicants appear in person before clerk and subscribe oath showing their ages. Further proof of age must be given to clerk in form of birth certificate, driver’s license, school record, etc., or other official document evidencing age. (93-1-5).

Waiting Period.

Application must remain on file, open to public, in clerk’s office for three days, unless court in judicial district waives waiting period. Where either party appears to be under 21, clerk must immediately notify, by prepaid certified mail, father, mother, guardian or next of kin of both applicants at addresses shown. (93-1-5).

Ceremonial Marriage.

Any ordained minister of gospel in good standing, any Rabbi or other spiritual leader of any religious body authorized by such body to perform ceremony and in good standing, any judge of supreme court, court of appeals, circuit court, chancery court or county court, justice court judges within their respective counties, and members of board of supervisors within their respective counties may perform ceremony. (93-1-17). Any marriage performed by mayor before Mar. 14, 1994 is valid if all other requirements of law are met and marriage would have been valid if performed by official authorized to solemnize rites of marriage. (93-1-17; 93-1-18).

Record.

See category 10 Documents and Records, topic 10.04 Records, subhead Vital Statistics.

Common Law Marriages.

Valid prior to Apr. 5, 1956. (93-1-15). If common law marriage is valid in state where celebrated then it will be recognized in Mississippi. (389 So. 2d 1389).

Proxy Marriages.

Not authorized by statute.

Marriages by Written Contract.

Not authorized by statute.

Prohibited Marriages.

Void between parent and child, grandparent and grandchild, stepmother and stepson, brother and sister (whole or half blood), aunt and nephew, first cousins and between persons of same gender. (93-1-1). Children of incestuous marriages are not legitimate. (93-7-5).

Foreign Marriages.

Any attempt to evade 93-1-1 prohibiting certain marriages by marrying out of state and returning shall also be declared incestuous and void. (93-1-3). Same sex marriages from other states also not recognized. (93-1-1).

Annulment.

All bigamous or incestuous marriages are void, and either party may obtain declaration of nullity. (93-7-1). Marriage may also be annulled for any of following causes existing at time of marriage: incurable impotency; mental illness or incompetency; failure to procure valid license (provided there has been no subsequent cohabitation); marriage obtained by force or fraud, or where either party was incapable of consent because of age or understanding, or either party was physically incapable of entering into marriage state (provided there has been no ratification); or where, without husband's knowledge, wife was pregnant by one other than her husband (provided there has been no ratification). (93-7-3). Except for incestuous marriages, issue of void marriage is legitimate. (93-7-5) and custody may be determined as in divorce (93-7-7). Venue in county where defendant resides, where marriage license issued, or where plaintiff resides if defendant is nonresident. (93-7-9).

Antenuptial Contracts.

See topic 14.09 Husband and Wife.

15 HEALTH

15.01 ABORTIONS:

Abortion facilities are regulated and limited in location and scope of practice. (41-75-1).

"Abortion Complication Reporting Act" requires physician to report to State Dept. of Health if physician has reasonable basis to believe that patient under physician's care requires medical treatment or dies as result of induced abortion. (41-41-75, et seq.). Report may not include any information identifying patient but must include certain information for inclusion in annual Vital Statistics Report. Act provides criminal penalties for willfully violating reporting requirement. (41-41-77).

15.02 ADMINISTRATION:

State Board of Health and State Dept. of Health have general supervision of administration of health laws. (41-3-1.1, et seq.).

Mississippi Disability Resource Comm. established to assimilate and provide current information to people who need health, special education or disability information and services; to refer those people to appropriate agencies to receive needed information or services; to facilitate coordination of services provided by agencies for maximum benefit of people who need health, special education or disability services; to be comprehensive clearinghouse of information and single point of contact for people with disabilities related to potential service programs; and to otherwise assist people who need health, special education or disability services in obtaining information and services. (43-30-1).

15.03 DISEASES:

Physicians, health care facilities, and correctional facilities to report cases of communicable and other dangerous diseases. (41-23-1).

15.04 DURABLE POWER OF ATTORNEY:

Cross-reference: (See "Category Property, topic Powers of Attorney").

15.05 FOOD, DRUGS, DEVICES AND COSMETICS:

Controlled substances regulated by Uniform Controlled Substances Law (41-29-101, et seq.). Every person who manufactures or dispenses any controlled substance or who proposes to engage in manufacture, dispensing or distribution of any controlled substance must obtain registration by State Board of Pharmacy, State Board of Medical Licensure, State Board of Dental Examiners, or State Board of Nursing. (41-29-125).

Manufacturing, packaging, labeling, and sale of drugs as defined by statute regulated by Mississippi Pharmacy Practice Act. (73-21-71, et seq.). Mississippi State Board of Pharmacy empowered to enforce provisions of Act. Board may make, adopt, amend, and repeal rules and regulations as necessary for administration and enforcement of Act. (73-21-81). State Board of Pharmacy authorized to impose penalties against license and permit holders. (73-21-103).

Product selection does not constitute evidence of negligence by pharmacist when in accordance with reasonable and prudent pharmacy practice. (73-21-121).

Board of Pharmacy must develop and implement computerized program to report, in compliance with federal regulation, suspected abuse of controlled substances. (73-21-127). Prescriptions included are Drug Enforcement Agency Schedule II, III, IV and specified noncontrolled substances authorized by Board of Pharmacy dispensed to residents by pharmacies. (73-21-127). Access to data is confidential. (73-21-127). Pharmacists who knowingly fail to submit drug monitoring information are subject to actions against license or monetary penalties. (73-21-127).

Drug manufacturer who distributes products in state must provide for return of outdated drugs from pharmacies within six months after expiration date for full refund. (73-21-129). If manufacturer fails to comply, manufacturer's products may be ineligible for product selection in state drug assistance programs. (73-21-129)

15.06 FRAUD AND ABUSE:

[RESERVED]

15.07 HEALTH INSURANCE BENEFITS:

"Mississippi Children's Health Care Act" established program to provide assistance to uninsured, low-income children. Program is administered by Division of Medicaid. (41-86-1, et seq.).

"Health Maintenance Organization, Preferred Provider Organization and Other Prepaid Health Benefit Plans Protection Act" enumerates powers of HMO, including offering of health care services. (83-41-301, et seq.).

15.08 LICENSURE AND CERTIFICATION:

Health Care Facilities.

Adult foster care facilities required to perform criminal background checks on employees. (43-11-13).

Application for license for hospitals. (41-9-7).

Existing satellite branch office seeking hospice license exempted from moratorium on new hospice licenses. (41-85-7). Exemption for satellite branch offices repealed July 1, 2011. (41-85-7).

Hospice administration vested in Mississippi Dept. of Health. (41-85-7).

Managed Care Organizations.—Licensure, accreditation, and regulation of child-care facilities governed by Mississippi Child Care Licensing Law. (43-20-1, et seq.). Mississippi State Dept. of Health responsible for issuance (43-20-11) and renewal (43-20-13) of license. Advisory Council, appointed by state health officer, advises licensing agency on licensure and regulatory process. (43-20-7). Licensing for health maintenance organization producers. (83-41-333).

Professionals.

Licensure, competency, training and discipline of nurses are governed by Mississippi Nursing Practice Law. (73-15-1, et seq.). Mississippi Board of Nursing is empowered to prosecute persons violating Mississippi Nursing Practices Law, conduct hearings regarding discipline of licensee, and oversee examination and licensing of new applicants. (73-15-17).

Licensure, competency, training, and discipline of professional counselors, which includes psychotherapists, governed by 73-30-1, et seq. Mississippi State Board of Examiners for Licensed Professional Counselors responsible for issuance (73-30-9) and renewal (73-30-29) of licenses.

Licensure, competency, training and discipline of acupuncturists governed by 2009, c. 447. State Board of Medical Licensure responsible for issuance and renewal of licenses, regulating continuing education requirements, and instituting and conducting disciplinary proceedings for acupuncturists.

15.09 LIVING WILLS:

Form and policy statement for creating advanced care directive. (41-41-209).

"Uniform Health-Care Decisions Act" authorizes competent adult or emancipated minor to appoint agent to make health-care decisions on his or her own behalf. (41-41-201, et seq.). It further provides instruction for revoking designation of agent and/or all or part of advance health-care directive (41-41-207), and health-care provider or institution responsibilities for implementing health-care decisions or declining to comply with health-care decisions (41-41-215). Form is provided in 41-41-209 to create advance health-care directive.

15.10 ORGAN DONATIONS:

Revised Uniform Anatomical Gift Act adopted, effective July 1, 2008.

15.11 PATIENTS" BILL OF RIGHTS:

Uniform Health-Care Information Act not adopted. Mississippi Uniform Health-Care Decisions Act adopted. (41-41-201, et seq.).

15.12 PUBLIC HEALTH:

Medical Assistance for the Aged established through State Dept. of Public Welfare. (43-13-1, et seq.).

Medicaid created in and administered by office of Governor. (43-13-101).

Division of Medicaid must design and implement temporary program to provide nonemergency transportation to locations for necessary dialysis services for certain dialysis patients. (43-13-119).

15.13 SMOKING REGULATIONS:

Smoking prohibited in state office buildings, including university or college classroom building. (29-5-161).

16 INSURANCE

16.01 INSURANCE COMPANIES:

Regulated by 83-1-1 et seq.

Supervision by Insurance Dept. headed by Commissioner of Insurance, 1001 Woolfolk State Office Bldg., 501 N. West St., Jackson, MS 39201.

Rates.

Most property and casualty insurance regulated by 83-2-1 et seq.

Annual and Quarterly statements of every insurance company must be filed with Commissioner of Insurance. (83-5-55).

New domestic insurance companies required to file sworn financial statements with Dept. of Insurance each quarter after they commence to do business for two years. After two-year period, annual statement is sufficient. (83-19-29).

Policies.

Life insurance policies regulated by 83-7-1 et seq. Accident and sickness (health) insurance policies regulated by 83-9-1 et seq. Automobile insurance policies regulated by 83-11-1 et seq. Fire insurance policies regulated by 83-13-1 et seq. Credit life and credit disability insurance policies regulated by 83-53-1 et seq.

Discrimination.

Rating Bureau must not recommend any rates for insurance upon property which discriminates unfairly in same territorial classification between risks in application of like charges and credits, or which discriminates unfairly between risks of essentially same hazard and having substantially same degree of protection against fire. (83-3-23). Discrimination through fictitious grouping, except as to life, accident, health and hospitalization insurance, prohibited. (83-5-27). Making or permitting any unfair discrimination between individuals of same class and equal expectation of life in rates charged for life insurance contract or life annuity or in dividends or benefits payable thereon, or in any other terms and conditions, prohibited. Making or permitting any unfair discrimination between individuals of same class and of essentially same hazard in amount of premium, policy fees, or rates charged for any policy or contract of accident or health insurance or in benefits payable thereunder, or in any other terms and conditions of contract, or in any other manner prohibited. (83-5-35). No life insurance company doing business in Mississippi shall discriminate in favor of individuals of same class and equal expectation of life in amount of payments of premiums or rates charged, or in dividends or other benefits payable thereon, or in any terms and conditions of contract. (83-7-3).

Rebates.

Prohibited except as specified in insurance policy. (83-3-121). Rebates on life insurance policies prohibited. (83-7-3).

Liens.

Agents and Brokers.

Agent means insurance producer. Insurance producer means person required to be licensed under laws of Mississippi to sell, solicit, or negotiate insurance. For discussion of when insurance broker is considered insurer's agent, see 240 Miss. 691, 128 So. 2d 544.

Insurance agent personally liable on contracts of insurance unlawfully made by or through him for any company not authorized to do business in state. (83-17-3).

Every agent of any insurance company authorized to do business in Mississippi required to obtain from Insurance Commissioner continuous certificate under seal showing that company licensed to do business in state and that he is agent of company and authorized to do business for it. (83-17-5).

Insurance agents and solicitors writing fire, allied lines, automobile, physical damage, casualty, liability, fidelity, surety, guaranty, inland marine, life, health or accident insurance, and annuity contracts subject to examination by and must be licensed by and are under supervision of Insurance Comm. (83-17-63; 83-13-17; 83-17-251). Continuing education required for certain agents. (83-17-251, et seq.).

Commissioner may establish stamping procedure for all eligible non-admitted/surplus lines insurance policies sold on risks subject to payment of premium taxes to State of Mississippi. Commissioner of Insurance may rely on advice and assistance of duly constituted association of surplus lines agents to carry out this purpose. (83-21-21).

Insurance agent certificates valid as long as insurance company pays commissioner annual certificate fee to continue authorization. Insurance producer not acting as agent of insurer not required to become appointed. (83-17-5).

Commission payments prohibited to unauthorized insurance agents, but payments to surviving spouses of licensed insurance agent proper whether surviving spouse is licensed or not. Nominal referral fees to unlicensed employees of agents allowed if one-time payments of fixed fee for each referral, whether referral results in sale or not, and not based on percentage of premiums or commissions. (83-17-7).

Licensing of insurance producers governed by statute. (83-17-5 to 83-17-89).

Process Agent.

Foreign insurance companies must, in addition to appointing Commissioner of Insurance as agent for service of process, appoint some resident as its agent for service of process. (83-21-1).

When process served upon Commissioner of Insurance, he must immediately notify company of such service by letter prepaid and directed to its secretary and must within two days after such service forward copy of process served on him to designated official of company; but failure of Commissioner to notify company does not affect validity of service. (83-5-11).

Investments.

Capital, surplus and other funds are regulated by 83-19-51.

Foreign Insurance Companies.

Commissioner of insurance authorized to create association of surplus lines agents or contract with independent third parties for purposes of regulating foreign insurance companies. (83-21-21). Association, association's board members and employees immune from liability if acting in good faith. (83-21-21).

To be admitted, foreign insurance company must have done business for at least two years in state of domicile (unless it is subsidiary or affiliate of company already licensed in this state). (83-21-3). It must deposit with Commissioner of Insurance certified copy of charter, articles of incorporation, bylaws, or deed of settlement, and statement of financial condition, sworn to by president and secretary or other proper officer; fee for filing, $1,000. (83-21-1). It must deposit with state treasurer securities in amount not less than $50,000 unless company furnishes certificate that it is maintaining deposit with state of domicile. (83-21-3). Company must satisfy Commissioner that it is legally organized, its capital or net assets are well invested and immediately available for paying losses in this state, and that it insures no single hazard for more than one-tenth of its net assets. Company must comply with specified agent for process requirements. (83-21-1). Company must not be admitted until it has secured Commissioner's certificate that it has complied with state laws and is authorized to make contracts. (83-21-1).

Foreign insurance company which is prohibited by its charter or by law of its domicile from investing assets, other than capital stock, in bonds of this state may not be granted a license to transact business in this state. (83-21-9).

Surplus lines by non admitted companies governed by 83-21-17, et seq.

When Insurance Commissioner determines foreign insurance company in unsound condition, or is informed by State Tax Commission that it is delinquent in state tax payments, or failed to comply with law or to submit to examination, or perform any legal obligation in relation thereto, Commissioner must revoke or suspend certificate of authority and publish notification and no new business can be done while such default or disability continues nor until authority to do business is restored by Commissioner. (83-1-29).

Foreign companies not authorized to transact business in this state, except life insurance companies, can only write or issue policies after risk approved in writing and countersigned by agent; countersignature may be by facsimile in certain instances. Does not apply to individual firms and corporations indemnifying themselves through reciprocal contracts, and not employing local agents and does not apply to rolling stock of railroads or property in transit while in custody of common carrier. (83-17-21).

Commissioner issues license to nonresident agent or broker meeting requirements and assesses applicable license fees required by §§ 27-15-87 and 27-15-93. (83-17-65).

Retaliatory Laws.

When home state or country requires, of Mississippi insurers or agents thereof, taxes, licenses, and other fees, in aggregate, and any fines, penalties, deposit requirements or other material obligations in excess of those required by Mississippi of insurers and their agents of such other state or country, like requirements are imposed on such company and its agents. (27-15-123).

Premium Tax.

In addition to license tax, foreign insurance companies are assessed with annual license or privilege tax of 3% of gross amount of premium receipts received from policies written in or covering risks located in this state, except foreign insurance companies providing service under state employees life and health insurance plan are not required to pay annual license or privilege tax on premiums collected for coverage under plan; but in determining amount of premiums, there are deducted premiums received for reinsurance from companies authorized to do business in this state, cash dividends paid in this state, cancellations and premiums returned; and mutual insurance companies (including interinsurance and reciprocal exchanges, but not including mutual life, accidental, health or industrial insurance companies) may deduct any refunds to policyholders other than for losses. "Premium" includes all fees collected and no deduction is allowed for agent's commission. (27-15-103). Companies withdrawing from this state must pay tax as long as premiums are collected from policyholders in state. (27-15-105).

In addition to license tax, domestic companies pay annual tax of 3% of gross amount of premiums collected on policies written in or covering risks located in state, except for premiums received on policies issued to fund retirement, thrift or deferred compensation plan qualified under § 401, § 403 or § 457 of Federal Tax Code. (27-15-109). Insurance company must report its gross premiums and pay insurance premium tax for on quarterly basis as provided in § 27-15-107. No premium tax levied on state employee life and health plans. (27-15-109). Where domestic company pays additional premium tax under retaliatory laws of other states, total of such additional tax may be deducted from income tax due this state. (27-15-109). In addition to all other taxes authorized by law, insurance companies must pay license and privilege taxes imposed by 27-15-81 and 27-15-83, taxes imposed by 27-15-103 to 27-15-117, taxes imposed on annuities by 27-15-119, ad valorem taxes on real estate and tangible personal property, state income tax, sales tax levied on vendor with requirement of adding it to sales price and use tax levied on cost of tangible personal property purchased outside state for use in state. (27-15-115; 27-15-119). Reduction in insurance premium tax for qualifying Mississippi investments. (27-15-129). For imposition of premium retaliatory tax, see subhead Retaliatory Laws, supra.

Privilege Tax.

Insurance companies are required to pay privilege tax, ranging from $25 to $350. (27-15-83). Additional insurance privilege taxes governed by 27-15-83 through 27-15-101.

Other Insurance Taxes.

Uniform Insurers Liquidation Act.

Not adopted. Insurers Rehabilitation and Liquidation Act governs, adopted 1991. (83-24-1, et seq.).

No-Fault Insurance.

See category 23 Transportation, topic 23.01 Motor Vehicles, subhead No-Fault Insurance.

Plain Language.

See category 3 Business Regulation and Commerce, topic 3.12 Consumer Protection.

16.02 SURETY AND GUARANTY COMPANIES:

Surety company must produce evidence of compliance with requirements before being permitted to do business in this state. (83-27-3). It must meet capital and surplus requirements, and at least $100,000 of this paid-up capital must be invested in solvent securities created by laws of United States, or of this state, or under the laws of the state in which the company is incorporated, or in other safe securities, the value of which shall be at, or above par, which shall be deposited with the proper officer in the state, under which the company is incorporated. (83-27-5).

17 INTELLECTUAL PROPERTY

17.01 TRADEMARKS AND TRADENAMES:

Any individual, firm, partnership, corporation, association, union or other organization capable of suing and being sued in court of law may acquire trademark. (75-25-1 and 75-25-5).

What May Be Used.

Registered trademark may not consist of: (a) Immoral, deceptive or scandalous matter; (b) matter which may disparage or falsely suggest connection with persons, living or dead, institutions, beliefs or national symbols, or bring them into contempt or disrepute; (c) flag, coat of arms or insignia of U.S., state, municipality or foreign nation, or simulation thereof; (d) name, signature or portrait of living individual without written consent; (e) deceptively descriptive mark or surname; (f) mark resembling mark registered in state to another. (75-25-3).

Registration.

Any person who adopts or uses trademark may file application for registration on form provided in office of Secretary of State subject to limitations of Trademark Act. Information required on application: (a) Name and business address of applicant; if corporation, state of incorporation; if other entity, state where organized and names of general partners, owners, or managers; (b) goods mark is used in connection with and manner of use; (c) date trademark first used anywhere and date first used in this state; (d) statement that applicant is owner of trademark and has right to use of same and that no other person in state uses mark resembling or might be mistaken for mark. Application must be signed, verified by proper persons and accompanied by three specimens of trademark. Filing fee of $50 ($60 nonresident) must accompany application payable to Secretary of State. (75-25-5; 75-25-33).

Upon filing application, Secretary of State may examine for conformity with requirements. (75-25-7). Upon compliance with requirements of Act, Secretary of State issues certificate of registration under his signature and seal of state showing above information and registration date. Any certificate of registration or certified copy thereof is admissible in evidence as competent proof of registration in any judicial proceeding in this state. (75-25-9).

Provisions made for cancellations, classifications of types of trademarks. (75-25-17, 75-25-19).

Assignment.

Trademark and its registration assignable with related goodwill of business. Assignment instrument must be duly executed and recorded with Secretary of State upon payment of $50 filing fee. Assignee must be issued new certificate for remainder of term. (75-25-13; 75-25-33).

Protection Afforded.

Registration effective for five year-term; renewal for like terms upon payment of $50 filing fee ($60 nonresident). (75-25-11; 75-25-33). Owner of registered trademark protected from unlawful manufacture, use, display or sale of any counterfeits or imitations. (75-25-23).

Infringement consists of use without consent of reproduction, counterfeit, copy, or colorable imitation of registered mark in conjunction with sale or advertising of any goods where use likely to confuse or deceive as to origin, source of goods. (75-25-23). Upon infringement of trademarks, owner may enjoin counterfeits or imitations in court of competent jurisdiction. Court may order defendants to pay owner amount not to exceed three times all profit derived by use, pay damages for wrongful use of mark, pay reasonable attorneys' fees, and require destruction of imitation. (75-25-25, 75-25-27).

Infringement.

Tradenames.

There are no requirements for registration of business names.

17.02 TRADE SECRETS:

Mississippi Uniform Trade Secrets Act adopted, from and after July 1, 1990. (75-26-1, et seq.).

18 LEGAL PROFESSION

18.01 ATTORNEYS AND COUNSELORS:

Active attorneys must be members of Mississippi Bar. (73-3-119).

Jurisdiction over Admissions.

Supreme Court of Mississippi is exclusively vested with jurisdiction to admit attorneys to practice of law. (73-3-2).

Eligibility.

In order to be eligible for examination for admission to bar, person applying must be at least 21 years of age, of good moral character, and must have or will have within 60 days diploma or certificate from approved law school unless previously enrolled in law school in Mississippi as of Nov. 1, 1981, more than 10 years prior to date of application and applicant graduated prior to Nov. 1, 1984. Applicant must have received bachelor's degree from accredited college or credit for requirements of first three years of college work and completion of law school courses if in six-year pre-law and law program. Applicant who has begun law school or study under supervision of Mississippi lawyer prior to Nov. 1, 1979, must submit proof of completion of two years of college work. (73-3-2). Educational requirements both as to general education and legal education do not apply to any person who may have graduated from law school prior to Oct. 1, 1954. (73-3-31).

Certain law students participating in law school legal internship programs or clinical legal education courses may be authorized to engage in limited practice under certain conditions receiving no compensation but gaining academic credit towards law school requirements. (73-3-201, et seq.).

Registration as Law Student.

Must file application within six months after completion of two semesters of law school.

Educational Requirements.

See Eligibility, supra.

Petition for Admission.

See Eligibility, supra.

Examination.

Applicant is examined in writing by Board of Bar Admissions. Board will set and collect examination and admission fees. Applicant may sit for examination after graduation or within 60 days prior to graduation from approved law school. Board shall conduct not less than two bar examinations each year. (73-3-2).

Multi-State Bar Examination, Multi-State Essay Examination, and Multi-State Performance Test given; does accept transfer of multi-state bar scores from other jurisdictions taken within preceding 20-month period; additional local subjects tested: Administrative law, contracts, business organizations, including corporations, partnership and agency, criminal law and procedure, domestic relations, evidence, federal income taxation, federal jurisdiction and Rules of Civil Procedure, practice and procedure of Mississippi Courts, professional conduct and ethics, real property, torts, UCC, Constitution of U.S. and Mississippi, wills, estates, trusts and future interests (including basic federal tax consequences), conflict of laws, bankruptcy. Must achieve scaled score of 75 on Multi-State Professional Responsibility Examination 24 months before or 12 months after bar exam. Miss. R. Adms. St. B., Rule IX, § 4.

Clerkship.

None required.

Admission Without Examination.

Not available.

Admission Pro Hac Vice.

Attorneys of other states, in good professional standing and of good moral character and familiar with customs of legal profession in this state may appear and plead in any special cause before any court or administrative agency in this state provided attorney subjects himself to jurisdiction of Board or Bar Admissions and consents to application of Mississippi law. But upon petition of two members of bar of this state not of same firm, or upon its own initiative, State Board must investigate and may refuse such attorney privilege of continuing to appear or plead. (73-3-39). Local attorney must be associated.

See Mississippi Rule of Appellate Procedure 46 for application procedure and requirements.

Licenses.

Attorneys must pay enrollment fees not to exceed $400 annually to State Bar Association if admitted to practice for three years or more; $260 if admitted for more than one and less than three years; and $200 if admitted less than one year; and $50 if inactive. Lawyers over 75 years old and judges of various courts are exempt from dues. Lawyers who retired due to age, serious illness or permanent disability may be placed on inactive status and are exempt from dues. (73-3-123, 73-3-125).

Privileges.

None.

Disabilities.

None.

Liabilities.

None.

Compensation.

Board of Commissioners have no authority to regulate fees or charges of lawyers. (73-3-171).

Lien.

None.

Disbarment or Suspension.

Attorneys practicing law in Mississippi subject to disciplinary jurisdiction of Mississippi Supreme Court and certain designated agencies consisting of board of commissioners, committee on complaints and complaint tribunals. Proceedings for disciplinary action initiated by written complaint sworn to by complaining party. Procedure for hearing complaints and penalties set out in 73-3-301, et seq. If suspended or disbarred, attorney cannot practice in state unless privilege restored. Attorney may petition Court for termination of suspension or reinstatement after designated interval. Conviction or plea of nolo contendere of designated offenses results in automatic suspension and initiation of disciplinary action. Act does not restrict or modify inherent right of courts of record to supervise bar as incident to their power to admit attorneys to practice. (73-3-301, et seq.).

Unauthorized Practice.

It is a misdemeanor to practice law without first procuring license. (73-3-55).

Anyone who makes or certifies to abstract of title or real estate other than his own held to engage in practice of law; but title or abstract companies incorporated in this state may make abstracts or certify to titles where they act through some person as agent authorized under laws of Mississippi to practice law. Also, abstract company chartered under laws of Mississippi, with paid-up capital of $50,000 or more, may make or certify to abstracts of title through principal officer of such company. (73-3-55).

Mandatory Continuing Legal Education.

Attorneys practicing law in Mississippi required to complete minimum of 12 hours of continuing legal education each year. Miss. R. & R. Mand. Con’t. Legal Ed. R. 3.

Specialty Certification Requirements.

Professional Association (or Corporation).

See category 2 Business Organizations, topic 2.03 Corporations, subhead Professional Corporation.

19 MINERAL, WATER AND FISHING RIGHTS

19.01 MINES AND MINERALS:

State Oil and Gas Supervisor solely responsible for administration of offices of State Oil and Gas Board. (53-1-7).

Operation of Mines.

Drilling and production regulated (53-3-5); amount of allowable production (53-3-9); surface mining and reclamation (53-7-1, et seq.); surface coal mining and reclamation of land (53-9-1, et seq.).

Safeguarding of Employees.

See category 11 Employment, topic 11.02 Labor Relations.

Inspection of Mines.

Supervisor and employees shall have access to all oil and gas wells at all times. (53-1-33). Supervisor has authority to employ personnel necessary to carry out duties of office, including specifically geologists, petroleum engineers, and field inspectors. (53-1-9). Mississippi Comm. on Environmental Quality, acting through office of Pollution Control of Mississippi Dept. of Environmental Quality, may access private and public property to investigate, test and monitor possible pollution of air and water. (49-17-5, 49-17-21).

Oil and Gas.

Term “oil” includes any type of salvaged crude oil, which, after any treatment, becomes marketable. (53-1-71).

Taxes.

All non-producing interests in oil, gas and other minerals owned separately and apart from surface and all non-producing leasehold interests upon oil, gas and other minerals created after June 10, 1946, are exempt from ad valorem taxation (27-31-73), but are subject to mineral documentary tax paid upon filing and recording of lease (27-31-77). Amount of tax depends upon number of mineral acres or royalty acres conveyed and primary term of lease. (27-31-79). Requirements for filing application for exemption for non-producing gas, oil and mineral interests. (27-31-75).

Privilege tax on producing or severing oil or gas for sale, profit or commercial use is 6% of value at point of production. Rate is 3% on oil produced by enhanced oil recovery in which carbon dioxide is used, provided carbon dioxide is transported by pipeline to oil well site. Rate varies on occluded natural gas produced from coal seams during production life and depending on date of initial production. (27-25-503, 27-25-703).

Administrative expense tax assessed: against each barrel of oil produced and saved in state, charge not to exceed 60 mills on each barrel; against each 1,000 cubic feet of gas produced, charge not to exceed six mills per thousand cubic feet. (53-1-73). Oil and Gas Board fixes amount of such charge and subject to change within above limits. Collections are made by Oil and Gas Board. Persons owning various interests in oil or gas produced are liable for such tax in proportion to their ownership at time of production. (53-1-73, 53-1-75).

Exemptions.

Oil produced or under ground on producing properties and producing oil equipment owned by producer, all leases in production, including mineral rights in producing property, are exempt from ad valorem taxes. (27-25-523). Ad valorem taxation exemption now applies to all oil, gas and other petroleum products refined or to be refined in this state. (27-31-19). Equipment used to facilitate transportation in certain oil recovery projects is exempt from ad valorem taxes, except taxes for school district purposes, for period not to exceed ten years from date equipment is first placed in service. (27-31-102).

20 MORTGAGES

20.01 CHATTEL MORTGAGES:

Uniform Commercial Code adopted, effective Mar. 31, 1968. See category 3 Business Regulation and Commerce, topic 3.09 Commercial Code.

Filing.

See category 10 Documents and Records, topic 10.04 Records.

Taxation.

See category 22 Taxation.

Forms.

See categories 3 Business Regulation and Commerce, topic Commercial Code and Documents and Records, topic Records.

Renewal.

There is no limitation of time with respect to the lien of a chattel mortgage except the general statute of limitations applicable to written contracts. (See category 5 Civil Actions and Procedure, topic 5.16 Limitation of Actions.) To extend the lien beyond such time, renewal before period expires is necessary and may be effected by endorsement on margin of record where mortgage is recorded or by filing renewal for record.

Motor Vehicles.

Chattel mortgages securing purchase price of motor vehicles are governed by 63-19-1 et seq. Retail installment contract is one in which seller retains security interest in purchased vehicle. (63-19-3). Banks and trust and investment companies authorized to do business in Mississippi do not have to obtain license from State to engage in business of purchasing retail installment contracts from vehicle sellers. All others, however, must obtain license. (63-19-3; 63-19-7). Also, retail sellers holding retail installment contracts with aggregated, outstanding indebtedness of $500,000 or more must secure such license. (63-19-3, 63-19-7). Form of retail installment contract controlled by 63-19-31. Maximum finance charge for credit sales of motor vehicles (including commercial vehicles) is graduated from 18% per year, for new vehicles, to 28.75% for certain vehicles manufactured more than four years prior to date of sale. (63-19-43). Penalties for violations of act. (63-19-55).

20.02 COLLATERAL SECURITY:

See category 8 Debtor and Creditor, topic 8.15 Pledges.

20.03 MORTGAGES OF PERSONAL PROPERTY:

See topic Chattel Mortgages and/or category 3 Business Regulation and Commerce, topic 3.09 Commercial Code.

20.04 MORTGAGES OF REAL PROPERTY:

Both mortgages and deeds of trust are valid in this state, but the former have been practically superseded by the latter.

Grantor is deemed owner of legal title, except as against mortgagee or trustee after breach of condition of such mortgage or deed of trust. (89-1-43). Interest of mortgagor may be sold under execution of law. (89-1-43).

Execution.

No seal is necessary. No witnesses are necessary. Instrument must be properly signed by parties owning property. Instrument is valid as between parties to instrument without acknowledgment. (435 So. 2d 683). However, instrument must be properly acknowledged and filed for record to give notice to third parties. (89-5-1, 89-5-3).

Recording.

Deeds of trust and mortgages void as to all creditors and subsequent purchasers for valuable consideration without notice, unless acknowledged and recorded with clerk of chancery court of county where land located, but as between parties, heirs subsequent purchasers with notice or without valuable consideration, they are valid. (89-5-3). Mortgage and deed of trust take effect as to subsequent purchasers for valuable consideration without notice and as to all creditors only from time when it is delivered to clerk to be recorded. (89-5-5). Mortgage lien ceases after running of statute of limitations unless notice of renewal or extension is properly entered on margin of official record. (89-5-19).

Recording Fees.

See category 10 Documents and Records, topic 10.04 Records. Fee for recording deeds of trust is $15 for first 15 pages and $1 for each additional page. (25-7-9[c]). Fee for sectional index entry per section or subdivision is $1. (25-7-9[c]).

Taxes.

Ad valorem taxes on other real property become lien on Jan. 1 of each year and are entitled to preference over liens. (27-35-1). Mortgagee may redeem land subject to deed of trust by applying in writing to chancery clerk and following requirements of statute. (27-45-7). See category 22 Taxation, topic 22.15A Real and Personal Property Taxes, subhead Redemption.

Trust Deeds.

Deed of trust is commonly used to secure debts and it may be foreclosed by power of sale as well as through judicial foreclosure.

Mobile Home.

If designated as realty on or before July 1, 1999, may have security interest perfected by incorporation in deed of trust. (63-21-5).

Future Advances.

Both future advance clause and dragnet clause are valid and enforceable but breadth of coverage is dependent on language of particular deed of trust. (434 So. 2d 1351).

Priorities.

Priority of instruments. (89-5-5). Every mortgage given at time of purchase of real estate to secure payment of purchase money is entitled to preference over all judgments and other debts of mortgagor as to land purchased. (89-1-45). Any mortgage, deed of trust, judgment, materialman's lien, federal tax lien or similar lien recorded or enrolled prior to recording of deed of trust will generally have priority over such instrument.

Subordination Agreements.

No statutory restriction. Fee for recording is $10 for first 15 pages and $1 for each additional page. (25-7-9[b]).

Assignment.

If indebtedness secured by mortgage or deed of trust is assigned, assignor shall be required by assignee to enter fact of assignment on margin of record of lien in chancery clerk's office, and assignment, in writing, duly acknowledged, can be filed for record. (89-5-15). Assignment of debt secured by deed of trust or mortgage shall be entered on margin of record of lien, or assignment shall be acknowledged and filed for record. (89-5-17).

Release.

No statutory provisions.

Satisfaction.

Except for security agreements under UCC and mortgage or deed of trust securing line of credit, payment of debt extinguishes mortgage or deed of trust and revests title in mortgagor as if reconveyed. (89-1-49). When full payment made, mortgagee or assignee must enter satisfaction on margin of record which must be attested by chancery clerk. (89-5-21). In event mortgagee does not within one month after receipt of payment make such entry on record, he forfeits $200, which may be recovered by suit; and if, after request, he fails or refuses to make such acknowledgment of satisfaction, he becomes liable to party aggrieved, for any sum not exceeding mortgage money, to be recovered by action. (89-5-21). Satisfaction can be entered by agent of mortgagee if written authorization is duly acknowledged and recorded. (89-5-21). Trustee in deed of trust may acknowledge satisfaction of deed of trust just as cestui que trust may. (89-1-51).

Discharge.

No statutory provision.

Foreclosure.

Mortgages or deeds of trust can be foreclosed by proceedings in chancery court or by sale in accordance with terms of instrument and statutes. (89-1-55).

Sales.

All lands comprising a single tract and wholly described by the subdivisions of the governmental surveys, sold under mortgages and deeds of trust, must be first offered in subdivisions not exceeding 160 acres or one-fourth section and then offered as an entirety, and the price bid for the latter controls only when it exceeds the aggregate of the bids for the subdivisions. (89-1-55, Miss. Const. Art. 4, § 111).

Lands sold at public outcry under deeds of trust must be sold in the county in which the land is located or in the county of the residence of the grantor or one of the grantors, provided that where the land is situated in two or more counties, the parties may contract for a sale of the whole in any of the counties in which any part of land lies. (89-1-55).

Sale of land must be advertised for three consecutive weeks preceding sale in newspaper published in county or counties in which any part of land lies, and also by posting one notice for same time, at courthouse of county where land is situated, which notice and publication must disclose name of original mortgagor or mortgagors, whose property is advertised for sale, regardless of any contract to contrary. (89-1-55). Sale of land under deed of trust is not valid unless such sale is so advertised. (13-3-31, 89-1-55).

A sale of land by a substituted trustee under a deed of trust is absolutely void unless the substitution appears of record in the office of the chancery clerk of the county where the land is situated and has actually been spread of record before the first publication or notice of sale has been posted or published. (89-5-45).

Deficiency Judgments.

No statutory restriction. Terms of foreclosure sale subject to “commercial reasonableness” standard. (566 So. 2d 1218). Deficiency suit must be commenced within one year from date of foreclosure of property pledged as security note. (15-1-23).

Moratorium.

Procedure established for obtaining relief from inequitable mortgage foreclosure after President of U.S. has declared that emergency or major disaster exists in certain areas. (89-1-301).

Redemption.

There is no period of redemption after valid foreclosure sale under state law. (235 Miss. 162, 108 So. 2d 546).

Forms.

No prescribed forms.

21 PROPERTY

21.01 ABSENTEES:

Absentee voting is governed by 23-15-449 and 23-15-621 to 23-15-653.

Care of Property.

No statutory provision save as to nonresident or unknown owners of mineral interests. See category 19 Mineral, Water and Fishing Rights, topic 19.01 Mines and Minerals.

Process Agent.

Foreign corporation transacting business in Mississippi must appoint agent for service of process. (79-4-15.07). Registered agents are appointed by filing required documents with secretary of state's office. (79-4-15.08). Appointment of agent by foreign corporation establishes agent for service of process on that corporation. (79-4-15.10[a]).

Escheat.

Escheat of unclaimed intangible personal property in accordance with provisions of Uniform Disposition of Unclaimed Property Act, adopted with minor variations. Time period for presumption of abandonment decreased from seven years to five years. (89-12-1 et seq.). See categories 3 Business Regulation and Commerce, topic Banks and Banking, subhead Unclaimed Deposits; Estates and Trusts, topics Descent and Distribution, subhead Escheat, Wills.

21.02 ADVERSE POSSESSION:

Ten years actual, uninterrupted adverse possession of land by any person claiming to be owner vests in occupant or possessor full, complete title. (15-1-7, 15-1-13).

Character of Possession.

Occupancy is not necessary to establish actual adverse possession. (309 So. 2d 526). Possession by either claimant or tenant is sufficient. Cultivating, pasturing, cutting and selling of timber, and other acts of ownership and control can be sufficient—the extent of the necessary use varies according to character of land. Without color of title adverse possession does not extend beyond land actually and continuously used; but color of title to whole tract coupled with actual possession of part constitutes constructive possession of whole. (87 So. 2d 461).

Duration of Possession.

Period of ten years does not vary according to the character of land or according to the basis of claim of title, except in the case of claimants through tax sales. See category 22 Taxation, topic Property Taxes, subhead Suits to Recover, catchline Tax Titles.

Easements.

Can be acquired by ten years adverse possession.

Disabilities.

Saving to infants, persons of unsound mind of right to sue and set aside title allegedly acquired by adverse possession within ten years after removal of disability; but saving in favor of persons under disability of unsoundness of mind never extends beyond 31 years. (15-1-7, 15-1-13).

21.03 CONDOMINIUMS:

See topic 21.16 Real Property.

21.04 CONVEYANCES:

See topic 21.06 Deeds.

21.05 CURTESY:

Abolished. (93-3-5).

21.06 DEEDS:

Estate of inheritance or freehold, or for term of more than one year in lands shall not be conveyed from one to another unless conveyance be declared by writing, signed and delivered. (89-1-3). See topic Real Property for types of estates.

Execution.

All conveyances of land must be in writing, signed and delivered. (89-1-3). Seals and scrolls are unnecessary except official seals. Absence of corporate seal does not affect validity of conveyance where executed by officer or authorized agent or attorney in fact. (89-1-21). A spouse need not join in the execution of a deed unless the property is the homestead. (89-1-29). All bodies politic, public corporations, and private corporations may convey lands. (89-1-21).

See topic 21.16 Real Property; categories 8 Debtor and Creditor, topic Homesteads, subhead Alienation or Encumbrance; Family, topic Husband and Wife, subhead Conveyance or Encumbrance of Property.

Recording.

In order to affect creditors and subsequent purchasers for value without actual notice, deed must be acknowledged or proved and filed for record with clerk of chancery court of county where property is located. (89-5-1, 89-5-3). Priority of instruments controlled by date of filing for record in absence of actual notice. (89-5-5). See also category 10 Documents and Records, topic 10.04 Records.

Recording Fees.

Clerk’s fee for recording deeds is $10 for first 15 pages and $1 for each additional page. Fee for sectional index entries per section or subdivision is $1 (25-7-9). See category 10 Documents and Records, topic 10.04 Records.

Operation and Effect.

Word “warrant” without restrictive words in conveyance has effect of embracing all of five covenants known to common law, to wit: seisin, power to sell, freedom from encumbrance, quiet enjoyment and warranty of title. (89-1-33).

Words “warrant specially,” in conveyance constitute covenant that grantor, his heirs and personal representatives, will forever warrant and defend title of property unto grantee and his heirs, representatives, and assigns, against claims of all persons claiming by, through, or under grantor. (89-1-35).

Words “grant,” “bargain” and “sell” operate as express covenant that grantor was seized of estate, free from encumbrances made or suffered by grantor, and also for quiet enjoyment against grantor, unless limited by express words contained in conveyance. (89-1-41).

Conveyance without warranty operates to transfer title and possession of grantor as quitclaim and release. (89-1-37). Conveyance of quitclaim passes all of estate or interest of grantor in land conveyed and estops grantor and his heirs from asserting subsequently acquired adverse title to lands conveyed. (89-1-39).

Taxes.

See category 22 Taxation, topic Real and Property Taxes, subhead Real Estate Conveyance Tax.

Forms.

Conveyance of land may be in following form:

Form

“In consideration of [state it], I convey and warrant to. . .. . . the land described as, [describe it]. Witness my signature this. . . . . . day of. . . . . ., 20. . . . .”

If only a special warranty is intended add the word “specially” to the word “warrant” in the conveyance. (89-1-61).

21.07 DEEDS OF TRUST:

See category 20 Mortgages, topic 20.04 Mortgages of Real Property.

21.08 DOWER:

Abolished. (93-3-5).

21.09 ESCHEAT:

See topic 21.01 Absentees, subhead Escheat; categories 3 Business Regulation and Commerce, topic Banks and Banking, subhead Unclaimed Deposits; Estates and Trusts, topics Descent and Distribution, subhead Escheat, Wills, subhead Unclaimed Legacies.

21.10 LANDLORD AND TENANT:

Kinds of Tenancy.

Week-to-week.

If rental agreement does not define length of tenancy, it shall be week-to-week tenancy where tenant pays rent weekly and month-to-month tenancy in all other cases. (89-8-19).

Tenants in Common.

All conveyances will be construed to create tenancy in common and not joint tenancy or tenancy by entirety unless so designated by instrument. Tenancy by entirety and joint tenancy are permitted, but must be created by instrument of conveyance. (89-1-7).

Leases for more than one year must be in writing, signed and delivered, and in order to constitute notice to third persons must be recorded in office of chancery clerk of county in which property is situated. (15-3-1; 89-5-1). Possession under unrecorded lease is, however, held to constitute notice. (120 Miss. 778, 83 So. 179).

Security Deposits.

Provisions governing payment, use, retention, return and lien status of security deposit for dwelling rental agreements covered by Residential Landlord and Tenant Act. (89-8-21).

Recording.

Race-Notice State. (89-5-3; 89-5-5). Conveyances of land shall be filed with clerk of chancery court of county in which lands are situated. (89-5-1).

Rent.

Provisions governing set off of rent for dwelling rental agreements covered by Residential Landlord and Tenant Act. (89-8-21).

Lien.

Landlord has right to lien on agricultural products of leased premises to secure payment of rent, and lien is paramount to all others. (89-7-51). Landlord has right to lien on personal property in order to secure payment of rent if personal property is found on leased premises and is owned by lessee, except for merchandise sold in ordinary course of business. (89-7-51). Construction liens are allowed. (85-7-137).

Termination of Tenancy.

For dwelling rental agreement covered by Residential Landlord and Tenant Act, week to week tenancy and month to month tenancy may be terminated by written notice at least seven and 30 days, respectively, prior to termination date. (89-8-19). All other rental agreements require two months' notice for year to year tenancy, one month's notice for ½ or ¼ year tenancy and one week notice for month or week tenancy. (89-7-23). Joint tenancy or tenancy by entirety with right of survivorship can be terminated by deed of one spouse to other spouse. (89-1-7).

Holding Over.

Tenant holding over after notice to vacate is liable for double rent. (89-7-25).

Dispossession.

If one wrongfully possesses or converts rights in land to himself, complaining party may seek judgment from court. If judgment is in favor of plaintiff, warrant shall issue to sheriff which will command him to put plaintiff in possession of premises. Defendant shall pay costs of proceedings. (89-7-41). For unlawful entry and detainer see 11-25-23 and 11-25-113. Suit for ejectment may be maintained. (11-19-1). If tenant is sued for ejectment, tenant shall give notice to landlord. (11-19-9). Landlord shall have right to appear and defend action. (11-19-9).

Distress or seizure can be made for rent or supplies that are due. Attachment may be executed for rental supplied on property of rentor, but property may not be removed from county where seizure was made. (89-7-85).

Uniform Residential Landlord and Tenant Act adopted in modified form in 1991. (89-8-1 et seq.).

21.11 LEASES:

See topic 21.10 Landlord and Tenant.

21.12 PARTITION:

Partition of land held by adult joint tenants, tenants in common and coparceners may be made by agreement in writing, signed by parties. Homestead property owned by spouses is subject to partition pursuant to provisions of 11-21-1 only. (11-21-1).

Any joint tenant, tenant in common, or coparcener, whether adult or infant, having estate in possession or right of possession, and not in reversion or remainder, may procure partition of said property by instituting proceedings for partition of land, or for sale thereof. (11-21-3, 11-21-5).

Jurisdiction and Venue.

Partition suits are brought in chancery court of county in which lands, or some part thereof, are situated; or, if lands are held by devise or descent, division may be ordered by chancery court of county in which will was probated or letters of administration granted, although none of lands be in that county. (11-21-3).

Proceedings.

Partition of property is special statutory proceeding.

All persons in interest must be made parties, except life tenants, remaindermen or reversioners, if any. In partition action involving only surface of land, it is not necessary to join mineral interest owners unless they also have surface interest. Infant or non compos mentis may be defendant or can be complainant, suing by guardian, if any, or next friend. (11-21-5).

Proceedings for partition are instituted and conducted as other suits in chancery, or county or justice court within jurisdictional limits. (11-21-7; 11-21-73). Actions in county or justice court may only concern personality. (11-21-73).

All questions of title and all equities between tenants in common may be disposed of in proceeding, as well as equities and claims of encumbrances. (11-21-9).

Partition in kind may be made by court itself, or by master appointed by court. (11-21-11).

Owelty may be decreed by court, either with or without report of master, if in best of interests of parties. (11-21-13).

If partition is by master, same may be had either by assigning shares, or allotment of shares by ballot. Written report of master must be confirmed by court. (11-21-15 through 11-21-25).

Partition by Sale.

Partition is usually in kind but court may order sale of land, or any part thereof, for partition of proceeds, if it is found that this will better promote interest of all parties, or that equal division in kind cannot be made. Court may appoint master to make sale. (11-21-11, 11-21-27).

21.13 PERPETUITIES:

Estates in fee tail are prohibited. Any person may make conveyance or devise of lands to succession of donees then living and upon death of last of said successors to any person or any heir. (89-1-15).

Accumulations.

The common law rules prevail; except that an investment trust or a trust of real or personal property, or both, created by an employer as part of a pension plan, disability or death benefit plan, or profit-sharing plan, for exclusive benefit of some or all employees, is exempt against perpetuities, restraints on alienation or suspension of the power of alienation, or the accumulation of income, where contributions to such trust are made by employer or employees, or both, and where purpose of trust is to distribute earnings and principal to employees. (79-15-21, 71-1-41). See also category 13 Estates and Trusts, topic 13.15 Trusts, subhead Accumulations.

21.14 PERSONAL PROPERTY:

Tenancy by entirety recognized. (89-1-7). Note: This statute only concerns real property.

21.15 POWERS OF ATTORNEY:

Attorneys in Fact.

Such agency need not be created by writing except when within terms of Statute of Frauds. Thus powers of attorney granting authority to answer for debt or default or miscarriage of another person, or authority to make contract for sale of lands, or making of any lease thereof for longer term than one year, must be in writing. (15-3-1). Conveyances of land, or contracts relating thereto, executed by attorney in fact for his principal, and duly acknowledged and proved, have same force and effect as if executed and acknowledged by principal, and same need not be formally executed in name of principal. (87-3-3, 87-3-9).

Form.

Letter of attorney to transact any business need only express plainly the authority conferred. (87-3-7). Letters of attorney pertaining to conveyances of land may be filed in county where land is situated. (87-3-1). Before attorney-in-fact may execute land conveyance, letters of attorney should be filed of record. (476 So. 2d 599). Form to convey land suggested by 87-3-9 is as follows:

Form

Know all, that I,. . . . . ., of. . . . . . county, Mississippi, do hereby appoint. . . . . ., of. . . . . . county, my attorney in fact, with full power to sell and convey in fee simple, with general warranty (or without warranty, as the case may be) of title, that land situated in (describe it).

Witness my signature, the. . . . . . day of. . . . . ., A.D. . . . .

(Signature).

Formalities.

Before attorney-in-fact may execute land conveyance letters of attorney should be filed of record. (476 So. 2d 599). Letters of attorney may be acknowledged or proved as conveyances of land are required to be and when so acknowledged or proved may be recorded in like manner. (87-3-1, 89-5-1). See topic 21.06 Deeds.

Revocation.

Letters of attorney duly recorded continue in force until revoked in writing or by death as to all persons who deal with the attorney in good faith without notice. Subsequent disability or incompetence of principal will not revoke authority of attorney-in-fact if power of attorney executed by principal contains language showing intent that power continue despite disability or incompetence. (87-3-15, 87-3-107, 87-3-111). Any writing revoking letters of attorney may, when acknowledged as conveyances of land are acknowledged, be recorded in like manner and is effective from time of being filed for record in office in which letters revoked were recorded. (87-3-17).

Death of principal revokes the agency except as to one who, without notice of such death, in good faith and under circumstances repelling the imputation to him of fraud or negligence, deals with such agent, believing upon good reason that he is still such. (87-3-15).

Uniform Durable Power of Attorney Act.

Adopted. (87-3-101 et seq.). Uniform Probate Code not adopted.

Members of Armed Forces.

No specific provision.

21.16 REAL PROPERTY:

Any interest or claim to land may be conveyed to vest immediately or in future by writing signed and delivered. Such writing transfers, according to its terms, title of person signing and delivering as fully and perfectly as if same was transferred by feoffment with livery of seisin notwithstanding there may be adverse possession thereof. (89-1-1). Trusts may take title to real property. (91-9-2).

There is statutory procedure for confirmation of tax titles and removing clouds upon titles. (11-17-1–11-17-37). Any person or corporation claiming an interest in real property from any county or municipality or political subdivision may confirm and quiet title to such property by proceedings in chancery court. (11-17-19).

Conveyance is deemed to carry fee simple unless limited by express words, or unless it clearly appears from instrument that less estate was intended. (89-1-5).

Rule in Shelley’s Case.

Abolished. (89-1-9).

Manufactured Homes.

Certificate of title issued for manufactured home that is classified as real property may be delivered to State Tax Comm. for cancellation. (63-21-30).

Condominiums.

May convey condominium granting separate interest in residential, commercial or industrial building. Plan of building must be filed with chancery clerk. Project owner must file declaration of restriction, and may provide for management of project by governing bodies. Real property divided for condominium use includes leasehold and any other estate in land recognized by law. (89-9-5, 89-9-7, 89-9-9; 89-9-17). See also category 8 Debtor and Creditor, topic 8.10 Homesteads.

See also topics 21.06 Deeds, Dower, Landlord and Tenant; categories 3 Business

Regulation and Commerce, topic Securities; Civil Actions and Procedure, topic Partition; Debtor and Creditor, topic Homesteads; Family, topic Husband and Wife; Mortgages, topic Mortgages of Real Property.

22 TAXATION

22.01 ADMINISTRATION:

Tax statutes may be found in Mississippi Code of 1972, Annotated, Title 27.

General supervision of tax matters is vested in Dept. of Revenue, Chairman of which is known as Commissioner of Revenue. (27-3-3; 27-3-31).

Commissioner of Revenue has power and authority to adopt, amend, or appeal rules and regulations necessary and proper to administer Dept. of Revenue.

Collection.

For Mississippi state taxes, Dept. of Revenue is responsible for collecting taxes. (27-3-31 et seq.). Tax liens can be instituted after state issues intent to assess, files assessment and appeals process has expired. (27-7-1 et seq.).

Ad Valorem taxes on real property are assessed in county where property is situated, and taxes assessed as of Jan. 1 for preceding year and due Feb. 1 of year following year of assessment. (27-53-1 et seq.).

Payment.

For Mississippi State Income Tax, MS law imposes income tax on entire net income of every resident individual, corporation, other substantial corporations, association, trust, or estate in excess of credits and exemption by law. (27-7-5[1]). Every resident individual and every nonresident individual owning or selling property, earning income or doing business in Mississippi required to file federal return and whose adjust gross income exceeds personal exemption must file Mississippi state income tax return with Dept. of Revenue by 15th day of 4th month following close of taxable year. (27-7-31, 27-7-41). Partnerships and fiduciaries must file return each taxable year, which must be same taxable year as determined for Federal Income Tax purposes. (27-7-33, 27-7-35). Corporate returns shall be filed on 15th day of 3rd month following close of fiscal tax year. (27-7-41).

For sales taxes, persons engaged in taxable businesses are required to obtain permit from Dept. of Revenue, and to collect taxes by adding amount of tax due to sales price or gross income, and collecting, as far as is practicable, amount of tax due from purchaser at time of sale. (27-65-27, 27-65-31). Collection of Use taxes done in manner similar to sales tax is part practical amount of tax for purchase that income is collected. (27-67-1 et seq.).

Penalties.

In addition to other penalties, any person who is eligible for brief “tax amnesty” program in 2004 and failed to pay delinquent taxes, as well as any person who willfully attempted to avoid any taxes imposed by State Tax Comm., is guilty of felony. Maximum penalties include imprisonment up to five years and/or fines up to $100,000 for individual offenders or $500,000 for corporate offenders. (27-3-79).

Income Tax.

Any person knowingly making false return subject to ten years imprisonment. (27-7-87). If any part of additional tax due is result of fraud, penalty of 75% of underpayment attributable to fraud will apply. (27-7-105). Failure to file return or to pay due tax will result in assessment of tax plus interest at rate of 5% if failure to pay is not for more than one month, with additional 5% for each month or fraction of month during which failure continues, not to exceed 25% of aggregate. (27-7-53).

Underpayment of taxes, if not corrected, subjects taxpayer to additional assessment plus interest at rate of 1/2% per month, with additional 1/2% per month for each additional month, failure to pay continues, not to exceed 25%. (27-7-51). Taxpayer may, however, qualify for repayment under installment agreement if not able to pay additional tax liability, provided it does not exceed $3,000. (27-7-51).

Gross Income.—Includes income derived from salaries, wages, fees, or compensation for service of whatever form paid, and must be included in gross income for taxable year in which received by taxpayer. (27-7-15[1]). Gross income does not include income received by domestic corporation which is taxable in another state and derived from business activity outside of this state (27-7-15[4][g]), hazard pay to members of armed forces in designated combat zone (27-7-15[4][j]), or qualified housing expenses associated with employer-assisted housing program (27-7-15[4][ee]).

Estate Tax.

Any person making false affidavits accompanying return subject to up to ten years imprisonment. (27-9-57).

Sales Tax.

Negligent failure to file return may result in imposition of damages of 10% for first offense, 15% for second offense, 25% for third offense, and 50% for any subsequent offense, or interest at rate of 1% per month or both. If failure to file return is intentional with intent to evade law, penalty of 50% of total taxes due and interest of 1% per month is added. (27-65-39).

Lubricating Oil Tax.

Penalties set out in 27-57-21.

Private Railroads.

Penalty up to 10% of tax for failure to file required statements. (27-35-513).

22.02 ALCOHOL, BEVERAGES AND TOBACCO TAXES:

Alcoholic Beverage Taxes.

Imposed by 27-71-1 et seq.

Cigarette Tax.

See subhead Tobacco Product Tax, infra.

Tobacco Product Tax.

Imposed by 27-69-1 et seq.

22.03 BUSINESS TAXES:

Franchise Tax.

See category 2 Business Organizations, topic 2.03 Corporations.

22.04 CORPORATE TAXES:

See category 2 Business Organizations, topic 2.03 Corporations.

22.05 EMPLOYMENT TAXES:

Unemployment Compensation Tax termed "contributions," is imposed on all employers who for some portion of day in each of 20 different weeks in either current or preceding year employ or employed one or more individuals or paid $1,500 or more in wages in any calendar quarter. (71-5-11 [repealed effective July 1, 2010]). Statutory rate is 5.4% or 2.7% depending on certain conditions; but statute contemplates that rates may be based on benefit experience. (71-5-353, 71-5-355). Employer must report all wages paid, but no tax is payable on compensation in excess of $7,000 to any employee during calendar year. Contributions must not be deducted from wages of employees, and no contribution is required of any employee. Contributions are payable to Mississippi Dept. of Employment Security which is charged with administration of law. By rule of Dept., contributions are payable quarterly on or before last day of Jan., Apr., July and Oct. following close of preceding quarter. (71-5-351).

Local Employment Tax.

No statutory provisions.

Exemptions and Credits.

Special provisions apply to nonprofit organizations and state agencies. (71-5-357, 71-5-359).

22.06 ENVIRONMENTAL TAXES:

Exemptions.

None.

Hazardous Waste Tax.

Pollution prevention fee imposed upon each large quantity generator and each small quantity generator regulated under state hazardous waste regulations and each facility operator based upon quantity of hazardous waste generated annually. (49-31-25).

Solid Waste Management.

Operators of commercial nonhazardous solid waste management facilities managing municipal waste must pay fees on municipal solid waste generated both inside and outside state. (17-17-219).

Motor Fuel Environmental Protection Fee.

Any bonded distributor who sells or delivers motor fuels to retailer or user in State must pay environmental protection fee. (49-17-407).

Air Operating Permits.

As condition of any air operating permit required under Title V of federal Clean Air Act, owner or operator of any stationary source shall pay to Dept. of Environmental Quality annual permit fee. (49-17-30).

Mines, Minerals and Fisheries Taxes.

None. 27-65-15 repealed effective June 1, 2006.

Severance Taxes.

Privilege tax on persons engaged in business of growing, felling, cutting, severing and producing logs or any timber products from soil or water, for sale, profit or commercial use, or purchasing, logging, or selling logs or timber for commercial purposes. (27-25-1 et seq.).

Privilege tax on persons engaged in severance of oil in proportion of ownership at time of severance, but, except as otherwise herein provided, tax shall be paid by person in charge of production operations, who is thereby authorized, empowered and required to deduct from any amount due to producers of such production at time of severance proportionate amount of tax levied before making payments to such producer. (27-25-501 et seq.).

Privilege tax on persons engaging or continuing in business of producing, or severing natural gas, as defined herein, from below soil or water for sale, transport, storage, profit or for commercial use. (27-25-703).

Privilege tax on persons engaging or continuing in business of mining, severing or otherwise producing salt or causing it to be produced, for sale, profit or commercial use. (27-25-305).

Recycling Tax.

Any person selling new tires at retail shall collect used tire disposal fee with sale of each new tire sold for use on motor vehicle. (17-17-415).

22.07 ESTATE TAX:

Imposed by 27-9-1 et seq. Tax is imposed upon transfer of net estate of every decedent in amount equal to maximum amount of state death tax credit permissible in computing federal estate tax. (27-9-5). Uniform Estate Tax Apportionment Act adopted. (27-10-1, et seq.). Act does not apply to taxes due on account of death of decedents before Jan. 1, 1995. (27-10-25).

Gross estate is determined by including value at time of decedent’s death; or in alternative, whichever more nearly complies with method used on Federal Return as follows: (1) In case of property distributed, sold, exchanged, or otherwise disposed of, within six months after decedent’s death such property shall be valued as of date of distribution, sale, exchange, or other disposition. (2) In case of property not distributed, sold, exchanged or otherwise disposed of, within six months after decedent’s death such property shall be valued as of date six months after decedent’s death. (3) Any interest or estate which is affected by mere lapse of time shall be included at its value as of time of death (instead of later date) with adjustment for any difference in its value as of later date not due to mere lapse of time. (27-9-7).

All property, tangible or intangible, shall be included as follows: (a) To extent of interest of deceased in all property in which decedent has interest, except in case of resident, gross estate shall not include real and tangible personal property located outside state, proceeds of annuity or other payment receivable by any beneficiary under military family protection plan, survivor benefit plan or other comparable plan under federal law and allowances due MIA of armed forces subsequently declared to be dead; and in case of nonresident, gross estate shall not include tangible personal property even when located in Mississippi; (b) to extent of any interest held jointly or as tenants in entirety with any other person, or in any bank or other institution, in their joint names, and payable to either or to survivor, except such part as may be shown to have never belonged to decedent, provided, however, if decedent and spouse were only owners of property or any interests held jointly or as tenants by entirety, it is assumed that each spouse contributed equally to acquisition, unless surviving spouse proves that his or her contribution was greater than one-half of cost; (c) to extent of any property with respect to which decedent had at death general power of appointment (for which decedent’s spouse’s estate was allowed deduction due to decedent’s having such power) and to extent any property subject to such general power of appointment that decedent has at any time before death exercised or released by deed or other document executed in contemplation of, or intended to take effect in possession or enjoyment at or after death; (d) to extent of any property passing under general power or appointment exercised by decedent by will, or by deed executed in contemplation of or intended to effect possession or enjoyment at or after death, except for bona fide sale for fair consideration in money or money’s worth; (e) to extent of any qualified terminable interest property for which deduction was allowed to decedent’s spouse’s estate; such value to be reduced by percentage, depending upon whether decedent before his death disposed of any part of his qualifying interest income for life; (f) to extent of any interest in any trust created by decedent in contemplation of or intended to take effect in possession or enjoyment at or after his death, except in case of bona fide sale for fair consideration. Any transfer in nature of final disposition or distribution made within three years of death of decedent without any consideration is deemed prima facie to have been made in contemplation of death unless contrary is shown; (g) to extent of amount receivable by executor or administrator as insurance under policies taken out upon decedent’s life, and to extent of amount receivable by all other beneficiaries under insurance policies taken out by decedent upon his own life; (h) as to any annuity other than annuity described in item (a), to extent only of decedent’s contribution. (27-9-7).

Value of Farm and Closely Held Business Property.

Value of qualified real property located in state and owned by resident decedent where executor elects to comply with 27-9-8 is determined by use under which it qualifies. (27-9-8).

Valuation Date.

See subhead Gross Estate, supra.

Deductions for Residents.

For purpose of arriving at value of net estate, in case of resident, following may be deducted from gross estate:

(1) Funeral expenses, administration expenses, claims against estate, unpaid mortgages, losses during settlement of estate caused by fires, storms, shipwreck, or other casualties, or from theft, when such losses are not compensated by insurance or otherwise, and such amounts actually and reasonably required for support during settlement of those dependent upon decedent, as are allowed by laws of Mississippi, excluding, however, any income taxes upon income received after death of decedent or any estate taxes. (27-9-9).

(2) Value at time of decedent’s death of any property which can be identified as having been received by decedent as share in estate of any person who died within two years prior to death of decedent, or which can be identified as having been acquired by decedent in exchange for property so received, if estate tax under Mississippi law was collected from such estate, and if such property is included in decedent’s gross estate. (27-9-9).

(3) All bequests, legacies, devises or gifts made to State of Mississippi, or any political subdivision thereof, for exclusive public purposes, or to use of any corporation or association organized and operated exclusively for religious, charitable, scientific, literary or educational purposes, no part of net earnings of which inures to benefit of any private stockholder or individual, or to trustee or trustees exclusively for such religious, charitable, scientific, literary or educational purposes. This deduction must be made in all cases when not prohibited by Mississippi statute mortmain, but same is limited to charities located within U.S. or its possessions. (27-9-9).

(4) Value of qualified terminable interest property shall be deducted from value of gross estate to determine net estate. (27-9-10).

In determining value of net estate of resident, for estate tax purposes, further deduction of $120,666 for decedent dying in 1978; sum of $134,000 for decedent dying in 1979; sum of $147,333 for decedent dying in 1980; sum of $161,563 for decedent dying in 1981; sum of $175,625 for decedent dying in 1982 or thereafter prior to Oct. 1, 1988; sum of $400,000 for decedent dying on or after Oct. 1, 1988, but prior to Oct. 1, 1989; sum of $500,000 for decedent dying on or after Oct. 1, 1989 but prior to Oct. 1, 1990; and sum of $600,000 for decedent dying on or after Oct. 1, 1990, but prior to Jan. 1, 1998; sum of $625,000 in case of decedent dying in 1998; sum of $650,000 in case of decedent dying in 1999; sum of $675,000 in case of decedent dying in 2000 or 2001; amount of applicable exclusion established under 26 U.S.C. 2010, in case of decedent dying on or after Jan. 1, 2002. (27-9-11).

Deductions for Nonresidents.

Value of taxable net estate of nonresident is determined by deducting:

(1) From value of that part of gross estate which, at time of death, is situated in Mississippi that proportion of deductions specified in subsection (1) and (2) of § 27-9-9 that value of such part of gross estate situated in Mississippi bears to value of entire gross estate. (27-9-15).

(2) Amount equal to value of any property forming part of gross estate situated in Mississippi of any person who died within two years prior to death of decedent, which can be identified as such; but this exemption not allowed unless estate tax has been paid on behalf of estate of such prior decedent and is allowed only to amount placed by Commissioner of Revenue on such property in determining value of gross estate of such prior decedent, and only to extent that value of such property is included in that part of decedent's gross estate which is situated in this state and which is not already deducted. (27-9-15).

(3) Amount of all bequests, legacies, devises or transfers, except bona fide sales, in contemplation of or intended to take effect at or after death, to or for use of State of Mississippi, or subdivision thereof, for exclusive public purposes, or to or for use of any domestic religious, charitable or educational organization, so long as no part of net earnings inures to benefit of any private stockholder or individual, and provided that such bequests are not void under statutes of mortmain. (27-9-15).

Decedents dying on or after Oct. 1, 1988 may also deduct value of that part of gross estate, which, at time of death, is situated in Mississippi, value of property that is included in such part of gross estate and for which deduction would be allowed under § 27-9-10 in case of resident. (27-9-15).

Executor of estate of nonresident has option of paying on proportion of estate located in Mississippi, which said proportion bears to entire estate wherever located, and taking allowable deductions in same proportions; or by paying upon gross estate located in Mississippi without taking any deductions; but nonresident is not required to pay on any gross estate that is less than specific exemption provided in 27-9-11. (27-9-17).

Situs of Property.

All tangible property, real, personal or mixed, located within this state at time of decedent's death shall be deemed property within this state and shall be reported unless otherwise exempt. (27-9-19). Intangible personal property of nonresidents of this state is exempt from estate taxes where laws of state of residence of decedent have similar reciprocal provision or said laws did not impose death tax of character in respect of personal property at time of decedent's death. (27-9-13).

Returns.

Executor of estate of gross value exceeding amount of specific exemption provided in 27-9-11 must within 60 days after decedent's death, or within 60 days after qualifying as such, give written notice to Commissioner of Revenue, showing name of decedent, date of death, name of attorney, probable value of gross estate and all transfers made by decedent within two years before his death. (27-9-21).

Executor must make return in all cases where gross estate exceeds amount of specific exemption provided in 27-9-11, within nine months after death of decedent, or in case of every nonresident when any part of gross estate is situated in Mississippi. If he is unable to make complete return as to any part of gross estate of decedent, he must include in his return description of such property, name of every person holding legal or beneficial interest therein, and upon notice, Commissioner of Revenue may require such persons to make return as to such part of gross estate. (27-9-23). If no return is made after notice by Commissioner of Revenue, penalties will be imposed. (27-9-45).

In event no administration is granted, or no return is filed, or if returns are false or incorrect, on some material facts, Commissioner of Revenue, his deputy or agent, must make return and Commissioner of Revenue must assess tax thereon as provided by law. (27-9-25).

Lien.

Unless tax is paid in full, it is lien for four years from date of filing return upon decedent's gross estate, but where no return is filed it is lien for ten years from due date of return. (27-9-35). If Commissioner of Revenue is satisfied that tax liability of estate has been fully discharged, he may issue certificate or waiver releasing any or all property of estate from such lien. (27-9-35). Executor or administrator, who pays any unauthorized debts before paying this tax, may become personally liable for this tax. (27-9-35, 27-9-37).

Payment.

Tax is due and payable nine months after decedent's death, but where Commissioner of Revenue finds undue hardship, extension, not to exceed six months in any one extension, may be granted. Unpaid balances bear interest at ½ of 1% per month from due date until paid. (27-9-27). When tax is paid temporary receipt is issued, and Commissioner has four years to make any investigation desired. Should executor receive statement from Federal Government that all federal estate taxes have been paid, Commissioner may issue final receipt. (27-9-29).

Agreement as to Amount of Taxes.

For purpose of facilitating settlement and distribution, Commissioner of Revenue, upon approval by Attorney General, on behalf of state, may agree upon amount of taxes at any time due or to become due, and payment in accordance with such agreement is full satisfaction of taxes to which agreement relates. (27-9-41).

Refunds.

Where it appears that amount in excess of estate tax due has been paid, such overpayment shall be refunded to executor upon completion of investigation by Commissioner of Revenue. (27-9-49).

Enforcement of estate tax statutes is by Commissioner of Revenue, in Jackson, who may make rules and regulations from time to time as he deems necessary. Copies of any rules and regulations, forms, receipts, discharges and certificates are obtained from Commissioner. (27-9-51; 27-9-53).

Information Confidential.

It is unlawful for members of Dept. of Revenue, or any deputy, agent, clerk, officer or employee, thereof, except in accordance with proper judicial order, to divulge or make known in any manner value of any estate or any particulars set forth or disclosed in any report or return. Any person violating this secrecy is guilty of misdemeanor, and is subject to fine and/or imprisonment; and if offender be officer or employee of state, he is incapable of holding any public office in this state for period of five years. Commissioner of Revenue may, however, permit Commissioner of Internal Revenue of U.S., or of any state, by its proper officer, which is imposing similar estate tax, to inspect estate tax return of any individual, or may furnish such officer abstract of return for estate tax of any executor or administrator, or supply him with information concerning any item contained in any return disclosed by report of executor or administrator; but such information may not be given unless U.S. or other state, as case may be, grants substantially similar privileges to proper officer of this state charged with administration of estate tax law. (27-9-55).

Final account of executor may not be allowed until estate taxes have been paid. (27-9-41).

Duration of Tax.

Estate tax law is to be in effect as long as Government of U.S. retains federal estate tax in effect, and will be automatically repealed as and when Government of U.S. ceases to impose estate tax. (27-9-59).

Apportionment Against Inter Vivos Dispositions.

No statutory provisions.

Interstate Cooperation.

No procedure for compromise of death taxes where decedent’s domicile is disputed.

Apportionment.

Mississippi estate taxes are apportioned among all persons interested in estate. (27-10-1, et seq.).

Apportionment Against Inter Vivos Dispositions.

Uniform Estate Tax Apportionment Act adopted. (27-10-1, et seq.).

Interstate Corporation.

No statutory authorization.

Time of Payment.

Estate tax due and payable nine months following death of decedent. (27-9-27).

22.08 GASOLINE AND SPECIAL FUELS TAXES:

Imposed by 27-55-1 et seq.; other motor fuel tax, lubricating oil tax, 27-57-1 et seq.; liquefied compressed gas used as highway motor fuel, 27-59-1 et seq. Privilege tax imposed on motor fuels used over state highways by certain motor carriers, 27-61-3 et seq. (27-61-5, 27-61-9, 27-61-21). Dept. of Revenue responsible for administering and enforcing above taxes. (27-55-1, 27-55-53).

22.09 GIFT TAX:

None.

22.10 HOTEL AND RESTAURANT TAXES:

All hotels shall be assessed tax equal to 7% of gross income of business. (27-65-23). Hotel is defined as any entity or individual engaged in business of furnishing or providing one or more rooms intended or designed for dwelling, lodging or sleeping purposes that at any one time will accommodate transient guests and that are known to the trade as such and includes every building or other structure kept, used, maintained or advertised as, or held out to the public to be, place where sleeping accommodations are supplied for pay or other consideration to transient guests regardless of number of rooms, units, suites or cabins available, excluding nursing homes or institutions for aged or infirm as defined in § 43-11-1. (41-49-3).

22.11 INCOME TAX:

For each calendar year tax is levied upon net income (defined in 27-7-13) of every resident individual, corporation, association, trust or estate, in excess of available credits. (27-7-5). Every corporation subject to taxation shall file separate return except that affiliated corporations may elect or may be required in certain cases to file consolidated or combined return. (27-7-37).

Income Tax Credits.

Available for business enterprises located within municipal area certified by Dept. of Revenue as economically distressed community, per requirements of statute. (27-7-22.27).

Business Enterprises.

Available job tax credit for taxes imposed by § 27-7-5 equal to 10% of payroll of enterprise for net new full-time employee jobs for five years beginning with years two through six after creation of minimum number of jobs required. To be eligible for credit, enterprise must increase employment by ten or more in economically distressed community. Credit not allowed during any of five years if net employment falls below ten. Dept. of Revenue will adjust credit allowed per year for net new employment fluctuations above minimum of ten. Tax credits for five years for taxes imposed by § 27-7-5 awarded for additional new full-time jobs created by qualified business enterprises. Dept. of Revenue will adjust credit allowed for payroll fluctuations during additional five years of credit. Sale, merger, acquisition, reorganization, bankruptcy or relocation from one county to another within state of business enterprise does not create new eligibility in succeeding business entity. However, any unused job tax credit may be transferred and continued by transferee of business enterprise. Tax credits claimed but not used in any taxable year may be carried forward five years from close of tax year in which jobs were established. However, credit established taken in any one tax year is limited to amount not to exceed 50% of taxpayer’s state income tax liability attributable to income derived from operations in state for that year. Certain business enterprises pertaining to hazardous waste materials are not eligible to receive tax credits. Credits allowed may not be used by any business enterprise or corporation other than business enterprise that qualifies for credits. Business enterprises that receive tax credit under this section are not eligible for tax credits specified in § 57-73-21(2), (3) and (4). Act is effective from and after Jan. 1, 2005. (27-7-22.27).

Nonresidents.

In case of nonresident individuals, partnerships, trusts and estates, income from trade, business, or other commercial activity is taxed to extent derived from such activity within this state, but nonresident may avail itself of business deductions available under Mississippi law on account of commercial activity in State. (27-7-23). Taxable nonresident is allowed personal deductions such as contributions to charitable organizations, medical expenses, taxes, interest and optional standard deduction in ratio that net income from sources within state bears to total net income from all sources of such taxable nonresident, computed as if such taxable nonresident were resident of Mississippi. (27-7-23).

Foreign Corporations and Other Organizations.

Any corporation or organization having business income from business activity which is taxable both within and without this state shall allocate and apportion its net business income as prescribed by Commissioner. (27-7-23). If business income of corporation is derived solely from property owned or business done in this state and corporation is not taxable in another state, entire business income allocated is to this state. Corporation is taxable in another state if, in that state, corporation is subject to net income tax or franchise tax measured by net income, or if that state has jurisdiction to subject corporation to net income tax regardless of whether state does or does not subject corporation to net income tax.

Rents and royalties from real or tangible personal property, capital gains, interest, dividends, to extent they constitute non-business income, shall be allocated as follows: (1) Net rents and royalties from real property to state in which property is located; (2) net rents and royalties from tangible personal property to state in which property is used, or to state in their entirety if corporation domiciled in this state and not organized or taxable under this state in which property is utilized; (3) capital gains and losses from sale of real property to state where property is located; (4) capital gains and losses from sale of personal property to state in which property is located, or to this state, if corporation is domiciled in this state and corporation is not taxable in state in which property is located; (5) capital gains and losses from sales of intangible personal property to state of corporation's domicile; (6) interest and dividends to state where corporation is domiciled; (7) patent and copyright royalties to state in which patent or copyright is utilized by payer, or to this state, if patent or copyright is utilized by payer in state which corporation is not taxable and corporation domiciled in this state. (27-7-23).

Deductions from Gross Income.

In arriving at net income, certain specified deductions can be taken or taxpayer may take optional standard deduction: Married individuals filing joint return $4,600; married individuals filing separate return $2,300; head of family $3,400; unmarried individual $2,300. (27-7-17). Gross income is defined in 27-7-15. Compensation received by members of National Guard or Reserve Forces for active/inactive training or active duty is excludable from gross income in amount of up to $15,000 a year. (27-7-15). Limitations on capital losses from sales or exchanges of capital assets provided for in 27-7-95. Employers may deduct contributions to plans or trusts for pension disability or related purposes. (27-7-17). Employee may deduct contributions to employee's pension trust, tax-sheltered annuity plan, authorized deferred compensation plan, self-employed retirement plan, individual retirement account (Roth or traditional IRA) or retirement bond provided plan that meets IRS requirements. (27-7-16).

Exemptions.

Specified for certain payers: Single individual $6,000; married individuals $12,000 (joint exemption); head of family $9,500; $1,500 for each additional dependent; additional $1,500 for taxpayer or spouse over 65; additional $1,500 exemption for blind taxpayer or spouse. (27-7-21). Husband and wife filing combined returns may either designate one to take whole exemption or divide exemptions as they choose; husband and wife filing separate returns must equally divide exemptions. Nonresidents and part-year residents are entitled to same exemptions as residents but must prorate exemptions on basis of net income from Mississippi sources to total income. Married nonresident individual with spouse with independent income must file joint return, but where both spouses make income from Mississippi sources, they may file separate returns and divide exemptions. If one spouse is resident and one is not, they are treated as if both are nonresidents. Exemption for estates is $600. Exemption for trusts required to distribute income currently is $300; exemption for all other trusts is $100. No specific exemptions exist for corporations, foundations, joint ventures or associations. (27-7-21). Earnings and principal of irrevocable trust forming part of pension plan, stock bonus plan, disability or death benefit or profit-sharing plan of employer for employees' exclusive benefit are not taxable. Likewise exempted are trusts created under retirement plan for which exemption has been provided under federal income tax. (27-7-27). Interest income on loans by foreign lenders, other than insurance companies or foreign lenders qualified to do business in this state or which maintain office or place of business in this state, secured by real estate located within state is exempt from state income tax levy. (27-7-23). Fraternal beneficiary societies, orders or associations, nonprofit mutual savings banks, nonprofit farm loan associations, religious, charitable, educational or scientific associations or institutions, labor organizations, chambers of commerce, civic leagues, nonprofit farming cooperatives, nonprofit electric power associations, and others are exempt from state income tax. (27-7-29).

Rates.

Applicable to income in excess of credits provided are 3% on first $5,000 or part thereof; 4% on next $5,000; 5% on all taxable income in excess of $10,000. (27-7-5).

Payment.

Taxes are personal debt of taxpayer. (27-7-7). Employers are required to deduct and withhold from employee's wages as credit against employee's tax liability. (27-7-305).

Returns of individuals, estates, trusts and partnerships must be filed on or before 15th day of 4th month following close of fiscal year; or, if return made on calendar year basis, on or before Apr. 15. Returns of corporations must be filed on or before 15th day of 3rd month following close of fiscal year; or, if return filed on basis of calendar year, on or before Mar. 15. (27-7-4). Commissioner may grant reasonable extension of time where good cause shown, or commissioner may automatically recognize extension authorized by IRS. (27-7-50).

Partners.

Liable for income tax only in their individual capacity, but if individual partners do not pay taxes on partnership income, then partnership and general partners are jointly and severally liable. (27-7-25). Partnership or S corporation must file income tax return annually. (27-8-19, 27-7-33).

Fiduciary must file income tax returns for any individual, trust or estate for whom he acts. (27-7-35).

Credit is allowed individual resident taxpayers for taxes paid to another state. (27-7-77). $1,000 credit per full-time employee allowed for any qualified business located in enterprise zone. (27-7-22). Credit of 50% granted to employer sponsoring basic skills training or retraining programs through or approved by community college district in which employer is located; credit is applied to qualified training expenses as specified. (57-73-25). Up to $2,500 credit for each dependent child for qualified adoption expenses paid or incurred in legally adopting dependent during calendar year. (27-7-22.32). Up to $500 credit for 25% of premiums paid on each qualified long-term care insurance policy during tax year, effective Jan. 1, 2007. (27-7-22.33).

Limited Credit.

Allowed to certain employers with headquarters in Mississippi for portion of charges paid in import of cargo at port facilities. (27-7-22.23).

22.12 INHERITANCE TAX:

None. As to estate tax see subhead Estate Tax.

22.13 LOCAL AND MUNICIPAL TAXES:

Municipalities charged with collection of various local privilege taxes and license taxes, established by §§ 27-17-1 to 27-17-521. For privilege taxes, see topic 22.15 Premium and Privilege Taxes.

22.14 MOTOR VEHICLE TAXES:

See also category 23 Transportation, topic 23.01 Motor Vehicles.

Automobile Rental Surcharge.

None. But businesses that rent vehicles must pay additional sales tax of 6% of gross income from business. (27-65-231).

Road Tax.

None.

22.15 PREMIUM AND PRIVILEGE TAXES:

Privilege taxes, license taxes, and other taxes applicable to insurance industry established by §§ 27-15-81 to 27-15-131; motor vehicles, §§ 27-19-1 to 27-15-177; sale of alcoholic beverages, §§ 27-71-1 to 27-71-511; sale of tobacco, §§ 27-69-1 to 27-69-79; public utilities, §§ 27-15-151 to 27-15-173; multiple, assorted other local taxes collected by municipalities, §§ 27-17-1 to 27-17-521. See also category 16 Insurance, topic 16.01 Insurance Companies, subheads Premium Tax and Privilege Tax.

22.15A REAL AND PERSONAL PROPERTY TAXES:

Assessment.

Each person must render verified list of his taxable property as of Jan. 1 of each year to tax assessor, who compiles his roll of both real and personal property. (27-35-49). Land rolls and personal rolls are compiled annually. (27-35-47). Board of Supervisors can by order declare current land assessment roll to be in force for one additional year. However, such roll is subject to objections and must be approved as new roll. (27-35-133). Board's assessment of county ad valorem taxes is to be filed before Sept. 15. (27-39-317). Tax assessor is authorized to assess persons or property escaping taxes for preceding years for period of seven years from date when right to do so first accrued. (27-35-155).

Assessment ratios for taxable property for ad valorem tax purposes are as follows: Class I real property, assessed at 10% of true value; Class II and Class III property, assessed at 15% of true value; Class IV and Class V property, assessed at 30% of true value. (27-35-4).

Valuation.

Tax assessors may utilize various approaches determined by State Tax Assessor to ascertain true value of property subject to assessment, considering whenever possible income capitalization approach to value, cost approach to value and market data approach to value. Factors to be considered in assessing value are proximity to navigation, to highway, to railroad, to city, town village or road and any other circumstance that tends to affect property's value. Tax assessors are not to consider what property might bring at forced sale but what owner would be willing to accept if disposed to sell it to willing and able buyer. Statute provides other specific methods of assessing Class I and Class II property and improvements, land used for agricultural purposes, and affordable rental housing. True value of each class of property is to be determined annually. (27-35-50).

Credit.

None. For property tax exemptions, see subhead Exemptions, infra.

Exemptions.

Following property is exempt from taxation: cemeteries; property of state or any subdivision thereof; property of units of Mississippi National Guard, if not used for profit; property lawfully owned by religious society, ecclesiastical body, charitable society, historical or patriotic association, or garden or pilgrimage club, if not used for profit; property of rural waterworks or sewage disposal system; property of college or institution for education of youths, provided it has no more than 640 acres of tax exempt land and further provided it is not commercial or trade school operated for profit; property used for operation of grammar school, junior high school, high school or military school; property of fraternal or benevolent organization not used for profit; public school property; property of religious, charitable or benevolent organizations used for hospital purposes and nurses' homes; wearing apparel; jewelry to extent of $100 for each person; provisions on hand for family consumption; farm products for two years after harvesting (except tax on lint cotton by Mississippi Levee District) when owned by producer; lint cotton for five years and cottonseed, soybeans, oats, rice and wheat for one year, regardless of ownership; guns and pistols; poultry; household furniture; cattle, oxen, sheep, goats, hogs, horses, mules and asses; farming implements; property of agricultural associations and fairs; libraries; pictures and works of art; tools of mechanics; state, county, municipal and school bonds; evidence of indebtedness issued by any church in state; notes and evidences of debt which bear rate of interest not greater than maximum rate per annum applicable under law, and money loaned at rate not exceeding maximum rate per annum applicable under law; stocks and bonds of foreign corporations; property situated between Mississippi River and levee exempt from road taxes; money on deposit in banks; horse-drawn vehicles; boats and fishing equipment; materials used in construction or conversion of vessels, ships and drilling equipment while in possession of manufacturer, builder or converter for 12 months after completion of construction or conversion; 662/3% of nuclear fuel and certain nuclear fuel by-products for generating electricity; all growing nursery stock; semi-trailer used in interstate commerce; real or personal property used for housing or providing services to elderly, mentally impaired or disabled persons if owned by nonprofit organization, provided membership or governing body of organization is appointed by religious society or ecclesiastical body; all vessels while in hands of bona fide dealers as merchandise; all property, owned by nonprofit organization that is qualified as tax-exempt, assists in implementation of national or area contingency plan, and engages in programs to clean up oil spills or other substances, provided property is used for those purposes; if municipality changes its boundaries to include within its boundaries project site of any project as defined in § 57-75-5(f)(iv)1, all property located on site, owned by business operating project, for period not to exceed 30 years, provided exemption approved by Mississippi Major Economic Impact Authority; all leases of property of facility used in any aspect of production and distribution of electricity, provided title and sublease of property belongs to U.S.; all property of research and development, telecommunications, and other technology start-up companies and Mississippi nonprofit organizations supporting them. (27-31-1). Exemptions are permitted on trust funds created by employer as part of pension plan, disability or death-benefit or profit-sharing plan for benefit of employees. (71-1-43). Property of little theatres, excepting motor vehicles, if nonprofit organizations, is exempt from ad valorem taxation. (27-31-5). Property owned by not-for-profit foundation providing charitable contributions and funding for legal services to poor and for projects to improve administration of justice is exempt from ad valorem taxation. (27-31-2). Counties and municipalities have discretion to exempt from ad valorem taxation products owned by manufacturer, warehouse/distribution centers, research facilities, and other industries, as specified, located within their boundaries. (27-31-7, 27-31-101). Limited credits are permitted for any manufacturer, distributor, wholesale or retail merchant who pays to county, municipality, school district or any other taxing authority, ad valorem taxes imposed on commodities, products, goods, and wares held for resale. (27-7-22.5). Counties and municipalities have discretion to exempt from ad valorem taxation property in free port warehouses. (27-31-53 and 27-31-55). Single-family dwellings are exempt from ad valorem taxation until first leased, rented, sold or occupied. (27-31-29). Municipalities given discretion to grant exemption from ad valorem taxes for new structures or improvements to or renovations of existing structures located in municipality's central business district for not more than ten years from completion date. (27-31-31). Private railroads are exempt from local ad valorem taxes but pay sum assessed by State Tax Comm.

(27-35-515). Amount received from public employment retirement is exempt. (25-11-129).

No exemptions granted solely for members of armed forces or veterans.

Homestead.

Resident head of family is allowed exemption of homestead to extent of $7,500 from specified ad valorem taxes. If person has use and possession of home by divorce decree, that person is eligible for full exemption, regardless of whether property is jointly owned. (27-33-3, 27-33-19). Head of family who is 65 or over or veteran with 100% service-connected disability or one classified as disabled under Federal Social Security Act is exempt from all ad valorem taxes on homestead not in excess of $7,500. (27-33-3). Exemption is denied to one claiming immunity from, or not complying with, state income tax or road and privilege tax laws. (27-33-63).

New Enterprises.

Certain specified new advanced technology businesses, new factories and new enterprises of public utilities may, upon application, be exempted by county and municipal authorities from ad valorem taxation on tangible property used in or necessary to operation of service or industry, but not upon products or vehicles or trucks operating on Mississippi highways. Ad valorem taxes for school district purposes are excepted from such exemption. Both county and municipal exemption may not exceed ten years from date of completion of new enterprise. (27-31-101). Exemptions for expansions and additions to such facilities are also obtainable within discretion of county and municipal authorities. (27-31-103, 27-31-105, 27-31-107).

New Structures and Renovations.

Authorities of municipalities with populations of more than 25,000 may, upon application, grant exemption from municipal ad valorem taxes, excluding those levied for school district purposes, to privately owned new structures and new renovations or improvements to existing structures lying within designated central business districts, where such construction, renovation or improvement is made pursuant to requirements of approved urban renewal projects. Such exemption shall in no event be granted for more than seven years. Authorities of counties containing such municipalities may similarly grant exemptions from county ad valorem taxes under same circumstances and restrictions. (17-21-5, 17-21-7).

Nonprofit Industrial Corporations.

Certain unimproved real property owned by nonprofit industrial corporations, foundations or associations may be exempted by county and municipal authorities from ad valorem taxation. Such exemptions are granted on annual basis and may be terminated any year subsequent to their being granted. (17-21-1).

Timber.

All growing, standing timber is exempt from ad valorem tax, and exemption continues after severance while timber remains in unmanufactured condition and while title not in manufacturer or processor. (27-25-27).

Lien.

Taxes assessed upon land become lien as of Jan. 1; personal property except motor vehicles and heavy duty equipment as of Mar. 1; taxes assessed on stock of goods or merchandise based on value of inventory on Jan. 1 of year or average monthly inventory during preceding 12 months from Jan. 1 of each year; tax lien attaches to all heavy duty equipment when brought into or situated in state. As to lands owned by state, that are leased to private agricultural enterprises, tax lien attaches at time crop harvested. (27-35-1).

Enrolled Lien.

After accrual of tax liability, Commissioner of Revenue may file notice of tax lien with circuit clerk for entry upon judgment roll, and same becomes judgment lien from time of filing. (27-7-55, -57).

Tax lien is given preference over all judgments, executions, encumbrances, or liens. Taxes on stock of goods or merchandise are lien regardless of changes in those items. (27-35-1).

Uniform Federal Lien Registration Act adopted. (85-8-1 et seq.).

Real Estate Conveyance Tax.

None except where oil and gas interests involved. (27-25-501 et seq.).

Redemption.

Land sold for unpaid taxes may be redeemed within two years from date of sale, and person under disability has like period after removal of disability, except that this saving to minors is only as to land inherited or acquired by will. (27-45-3).

In order to redeem, owner, lien holder or person interested must pay to chancery clerk amount of taxes for which land was sold with costs incident to sale, 5% damages on amount of taxes, interest on taxes and costs at 1½% per month from date of sale, and all taxes and costs that have accrued since sale with interest from date such taxes accrued at 1½% per month. On such payment, clerk will execute release of claim or title of state or purchaser, which instrument may be recorded as deeds are recorded. (27-45-1, 27-45-3).

Review of Assessment.

Any person dissatisfied with assessment must present his objection in writing during month of July. Assessment will become final if no objection is made. (27-35-83, 27-35-87, 27-35-89, 27-35-93, 27-35-95, 27-35-135).

Appeal lies from tax assessment, if taken within ten days from adjournment of meeting at which final decision was made, if bond is given for double amount in dispute, but in no case for less than $100. (11-51-77).

Sale.

If real property taxes are not paid when due, auction sales of property are held on 1st Mon. in Apr. and last Mon. of Aug. (27-41-59) of each year. (27-41-55). Property not bid on by any individual is struck off to state. Collector may enforce payment of personal property taxes by distress and sale. (27-41-15).

Tax-Forfeited Land Sold.

Land Commissioner, with approval of Governor, may sell such land for such price as Land Commissioner and Attorney General may fix, taking into consideration value of land, but minimum price for which it may be sold is $2 per acre. (29-1-33).

Notice.

Holders of liens against land to be sold for taxes must be sent notice by certified mail. (27-43-5).

Presumption of Validity of Forfeited Tax Land Patent.

When forfeited tax land patent has been issued by state for at least ten years and patentee has paid consideration fixed by commission and all taxes accruing and payable subsequent to issuance of patent, it is presumed that patentee paid valid, legal and adequate consideration therefor, complied with all requirements of law and practiced no fraud upon state, and that such patent is valid and legal patent. State is forever precluded from questioning validity of such patent. (29-1-115).

Presumption of Lost Patent.

Where tax-forfeited land has been certified to state for more than 25 years and there is no record that patent issued, there arises presumption that said land has been duly patented out of state if taxes to state and county have been paid on said land for each year for past ten years. Land Commissioner, with consent of Attorney General, is authorized to strike such sale under such condition, upon application by one claiming title, and such striking operates as disclaimer of any right, title or interest which state has in such land. (29-1-113).

Tax Titles.

Actual occupancy of land by tax purchaser for three years, after two years from date of sale for taxes, bars any suit to recover such land or assail title thereto because of any defect in sale or in steps leading up thereto, except that minors and persons of unsound mind may sue within two years after removal of disability. (15-1-15).

Removal of Cloud.

One claiming title to land under tax sale may file suit to remove any clouds from such tax title, and may include as defendant any political subdivision of state having or asserting any evidence or claim of title adverse to such tax title. (11-17-31).

Action to cancel tax title of state or its patentees to land sold to state for taxes can be brought in chancery court, but must be brought within two years after time for redemption has expired, except where taxes were actually paid or owner is under disability. (15-1-17). This limitation has been held inapplicable where possession has not changed after tax sale. (182 Miss. 385, 182 So. 102; 188 Miss. 771, 196 So. 227).

22.16 [RESERVED]

22.17 SALES AND USE TAXES:

Exemptions.

Sales tax exemption for sales of tangible personal property to nonprofits that provide foster care, adoption services, temporary housing for unwed mothers and children, residential rehab for persons with alcohol and drug dependencies if organization exempt under § 501(c)(3) of Internal Revenue Code. (27-65-111). Prepaid student meal plans at public or private colleges and sales of prepared meals by public or private K-12 schools shall not be subject to sales tax. (27-65-9).

Sales Tax.

Levies 7% tax on gross income of numerous business activities. Tax is not applied to businesses engaged in repairing or servicing of aircraft or on sales of parts used in repair or servicing of aircraft. (27-65-23).

Levies tax of 5% on casual motor vehicle sales (sold other than at wholesale or by licensed dealer). Tax does not apply to transfers between husband and wife, parent and child, or grandparents and grandchildren if vehicle is registered or licensed in transferor's name. (27-65-201).

Contractor sales tax of 3.5% on contracting work is levied upon prime contractor when compensation exceeds $10,000, unless personal property. (27-65-21).

Exemptions.

Exemption for sales of materials, equipment used to replace or repair buildings or equipment destroyed in disasters. (27-65-101). Exemption for certain events sanctioned by Mississippi Athletic Comm. (27-65-22).

Use Tax.

Compensating (or Use) Tax is imposed at rates under 27-65-17, 27-65-19, 27-65-23, 27-65-25 for privilege of using, storing or consuming within this state, any article of tangible personal property, either purchased at retail, or acquired by gift, or extracted or produced or manufactured for use, by person doing same. It applies to property acquired at casual or isolated sale, including by-products used by manufacturer thereof, and tangible personal property withdrawn from stock for consumption by user within this state. Tax applies to persons receiving benefits for services rendered for which charge is made, including persons receiving benefits from services of cleaning, pressing, dyeing or laundering. Tax applies to any vehicle, operation of which requires payment of road and bridge privilege tax and is computed on full delivered sales price of vehicle without any deduction for amount allowed for trade-in. Tax is not applicable on use, storage, or consumption of any tangible personal property or service where sales tax has been paid, where subject is specifically exempt from sales tax, or where property is brought into state by individual nonresident for personal and temporary use; or on use, storage or consumption of literature, videotapes, and slides used by religious institution, and on use of any tangible personal property purchased and first used in another state by religious institutions; or for use of motor vehicles or personal and household effects purchased by individual while bona fide nonresident, or on use of busses or common carriers paying 3% highway privilege license tax, or on rental of motion picture film by person paying state amusement tax or one operating television broadcasting station; or on jet aircraft engines temporarily brought into State for research and testing; or on use of natural gas owned and consumed by pipeline from its own lines as fuel to operate compressor stations and other facilities necessary to marketing of gas, or on charges or amounts paid for use if motor vehicles and equipment by common carriers which have no permanent situs in this state and which are used exclusively in interstate commerce. Mississippi tag for vehicle purchased by member of armed forces in another state while stationed there is not subject to tax. Tax is payable to Commissioner of Revenue before 20th day of succeeding month. (27-67-1 et seq.).

22.18 STAMP AND SEAL TAXES:

Stamp Tax.

No requirement of documentary stamps is imposed on corporate stock or other instruments.

22.19 USE TAXES:

See topic 22.17 Sales and Use Taxes.

22.20 UTILITIES TAX:

Every person selling electricity, current, power, potable water, steam, coal, natural gas, liquefied petroleum gas or other fuel is taxed at rate of 7% of gross income. (27-65-19). Gross income from sales of electricity, current, power, potable water, natural gas, liquefied petroleum gas, or other fuel for residential heating, lighting, or other nonagricultural residential use is excluded from taxable gross income. (27-65-19).

23 TRANSPORTATION

23.01 MOTOR VEHICLES:

Supervising authority is Dept. of Revenue. (27-19-1 et seq.).

Vehicle License.

Required annually. Number plate must be displayed in rear only. Unlawful to deface, cover or obstruct license tag. (27-19-31). Fleets governed separately. (27-19-66). License tags are issued for five years. License decals are issued each intervening year. (27-19-31).

Operator's License.

Required for all drivers. (63-1-5). Issued by Dept. of Public Safety. (63-1-19). Duration is four years. (63-1-47). Temporary driving permit available to person 15 and over and who meets statutory requirements; valid one year. Intermediate license available to person 15 and over who has held temporary driving permit for six months without DUI or moving violation. Driver's license available to person 16 and over who has held intermediate license for six months without DUI or moving violation, or who has held valid license from another state for six months. Driver's license available to person 17 and over who has been issued temporary driving permit without DUI or moving violation without requirement of intermediate license. Certain educational requirements for unmarried persons under 18. No habitual drunkards, narcotic drug addicts, or persons with certain physical or mental disabilities. (63-1-9). Exemption for persons operating motor vehicle for military purposes if person is: (a) Member of U.S. Armed Forces or Reserves on active duty; (b) National Guard member on active or full-time duty; or (c) National Guard member on part-time training or National Guard technician. (63-1-7). Expired license renewable within 12 months after expiration upon application and payment of fees unless deemed not qualified. Military personnel and dependents out of state due to service when license expires may renew on-line or by mail within 90 days of discharge or return to state without any fee. Expired license of military personnel continue to be valid 90 days after discharge or return to state. Any persons going overseas for two to four years and whose license will expire during absence may renew for four years before leaving. (63-1-49).

Titles.

Certificate of title obtained from Dept. of Revenue for all motor vehicles manufactured or assembled after July 1, 1969 or subject of first sale for use after July 1, 1969; also required for motor vehicle sold by dealer after July 1, 1969; voluntary applications may be made for any model. (63-21-9).

Applicant for certificate of title to furnish applicant's driver's license number. (63-21-15).

Sales.

On sale, assignment and warranty of title must be executed on certificate and transferee apply for new certificate. (63-21-31). Seller furnishes buyer signed bill of sale showing make, model, vehicle identification number, other identifying marks, seller's address, and name and address of person from whom seller purchased. (63-17-1). Fee for recording, 50¢. Fee for purchasing certified copy, 50¢. (63-17-3).

Persons or corporations in business of purchasing retail installment contracts involving motor vehicles and retail sellers engaged in business of creating and holding retail installment contracts involving motor vehicles aggregating an amount in excess of $500,000 must secure a license from State Dept. of Banking and Consumer Finance. (63-19-1 et seq.). Maximum finance charge for credit sale of motor vehicles (including commercial motor vehicles) graduated from 18%, excluding surcharge, for new vehicle manufactured in same year, or year before year in which sale occurred, to 28.75% per year for used vehicles manufactured more than four years before year in which sale made. (63-19-43). Violations of provisions of “The Motor Vehicle Sales Finance Law” result in misdemeanor penalties. (63-19-55).

Manufacturer’s Sales.

Motor Vehicle Comm. Act creates eight member Comm. to license manufacturers, distributors, factory representatives, wholesalers, dealers, and salesmen and carry out prohibitions against impositions on dealers. Comm. has rule making power to carry out Act subject to 30 days written notice of proposed rule to affected persons within or without State. (63-17-57, et seq.).

Specifically, no manufacturer or his agent can order dealers to: (a) Accept goods not voluntarily ordered, (b) order or accept any vehicles with any special features not included in list price, (c) order any goods for any person, or (d) contribute anything to any cooperative or advertising program. (63-17-73).

Act forbids: (a) Refusal to deliver vehicles covered by franchise agreement represented to be available for delivery; (b) coercion to enter agreement by threatening cancellation of franchise, exclusive of good faith notice of violation of terms of contract agreement; (c) termination of franchise of dealer without due cause; and (d) other acts outlined in statute. (63-17-73).

Civil damages actions authorized by licensee suffering pecuniary loss because of willful failure to comply by other licensee. (63-17-101).

Liens.

See categories 3 Business Regulation and Commerce, topic Sales; Mortgages, topic Chattel Mortgages, subhead Motor Vehicles.

Odometer Alteration.

Unlawful to alter or disconnect odometer or misrepresent actual mileage. (63-7-203).

Operation Prohibited.

By intoxicated person. (63-1-9). By unlicensed person (63-1-5), except nonresident. (63-1-7). By any person under influence of narcotic drugs. (63-1-9). See subhead Nonresident Operators, infra.

Size and Weight Limits.

Regulated by 27-19-81, 63-5-33, 63-5-13 through 63-5-43, 63-5-49, 63-5-51, 27-19-89. Issuance and transfer of special permits for vehicles transporting heavy equipment with non-divisible loads regulated by Dept. of Transportation and weight limit is increased to 150,000 pounds. (63-5-52).

Equipment Required.

Regulated by 63-7-1, et seq.

Lights Required.

Regulated by 63-7-11 et seq.

Seat Belts Required.

Operator, front-seat passenger, and children under seven must wear seat belts. Violation along with conviction of other offense constitutes misdemeanor. No additional duty, standard of care or liability created between operator and passenger. Failure to provide and use seat belt not considered contributory or comparative negligence. Violation not entered on individual driving record. (63-2-1, et seq.).

Child Restraints.

Must be used for children under age of four. (63-7-301, et seq.). Fine for violation not to exceed $25 for each offense. (63-7-309).

Inspection.

Annual inspection of all motor vehicles and display of certificate required. (63-13-1, et seq.).

Traffic Regulations.

Regulated by 63-3-1, et seq.

Accidents.

Driver must stop, give assistance if necessary; give name, address, and registration number of vehicle; exhibit operator's license; and where accident results in injury, death, or property damage of $500 or more, give notice to local authorities. Accident reports are confidential, with exception of vehicle specific information, but may be released to involved person or estate representative upon written request. Any person who in good faith renders emergency care to injured person at accident is not liable for damages resulting from such acts. (63-3-401, et seq.).

Guests.

There is no statute restricting liability for injury to a guest.

Proof of Financial Responsibility.

If 20 days after receipt of report of motor vehicle accident in this State, which resulted in bodily injury, death, or damage to property of any one person in excess of $250, dept. does not have satisfactory evidence that person is financially responsible, dept. must determine amount of security which will be sufficient in its judgment to satisfy any judgment for damages resulting from such accident. (63-15-11).

If the person causing the accident is not financially responsible, dept. must within 60 days after receipt of above report, suspend licenses of each operator and all registrations of each owner. If operator is nonresident, privilege of operating motor vehicles within this state is suspended, unless operators or owners deposit security in sum determined by dept. (63-15-11). Person receiving notice has right to hearing with right of appeal from hearing. (63-15-11[3]).

Above action does not apply under following conditions: (1) If operator or owner had in effect, at time of accident, liability policy with respect to motor vehicle involved in accident; (2) if operator of motor vehicle had in effect liability policy with respect to operation of motor vehicle not owned by him; (3) if operator or owner is, in judgment of dept., covered by any other form of liability insurance policy or bond of authorized surety company; (4) to any person qualifying as self-insurer under Act; (5) to owner or operator of motor vehicle legally parked at time of accident; (6) to owner of vehicle if stolen at time of accident; or (7) to any person whom dept. has found is not reasonably probable to have judgment rendered against him in action arising out of accident. (63-15-11[4]).

Further exceptions to requirements as to security and suspension are as follows: (1) Where there was no injury or damage caused to person or property of another; or (2) if, before date of suspension, there is satisfactory evidence filed with dept. that person otherwise due to file security has been finally adjudicated not liable, or has executed acknowledged written agreement for payment of agreed amount in installments on any injury or damage claim resulting from accident. (63-15-13).

Insurance.

Not specifically required if proof of financial responsibility is filed. (63-15-37).

Coverage Requirements.

Defines statutory minimums for liability insurance coverage in any one accident as follows: bodily injury or death of one person to $25,000, bodily injury or death of two or more persons to $50,000, $25,000 for injury or destruction of property of others. (63-15-11[4]).

Cancellations.

Automobile policies may not be canceled or denied renewal except under specified conditions.

Notice of cancellation of policy effective only if based on: (a) Nonpayment of premium; (b) suspension or revocation of driver's license of named insured or operator residing in same household during policy period or 180 days immediately preceding effective date; (c) failure to pay dues to or maintain membership in designated association where original issuance was dependent on membership. (83-11-3).

Restrictions on cancellation not to apply to any policy in effect less than 60 days when notice of cancellation made. Inclusion of $100 deductible is not cancellation. (83-11-3). Notice of cancellation is not effective unless mailed to named insured 30 days before effective date of cancellation (83-11-5).

No insurer shall fail to renew a policy unless insured is given 30 days notice by mail at address shown on policy. This stipulation will not apply if: (a) Insurer has agreed to renew subject to unmet conditions; (b) insured has shown unwillingness to renew; (c) premiums are in arrears; or (d) failure to pay dues to association where original policy or renewal is dependent upon membership. (83-11-7).

Notice of cancellation other than for nonpayment of premium should apprise named insured of possible eligibility for liability insurance under assigned risk plan. (83-11-11). Notice of reason for cancellation must be forwarded within five days of request of named insured. (83-11-13). No cause of action can arise for statements made in any written notice of cancellation, etc. (83-11-15).

Persons desiring to contest reasons for cancellation or nonrenewal of policy in effect for 60 days must, within seven working days after notice of cancellation, submit written request for hearing and $15 fee with commissioner stating basis for appeal. (83-11-17). Upon seven days notice, commissioner must call hearing in which he must issue written findings. (83-11-19).

If commissioner or his designee finds for insured, he orders notice of cancellation rescinded, or if effective date has passed, orders policy reinstated. Order operates retroactively for 20 days from date cancellation would otherwise have been effective and prospectively from date of order. Reinstatement does not extend expiration or anniversary date. (83-11-19).

Within 60 days of decision either party may appeal to chancery court for trial de novo. (83-11-21).

See subhead Proof of Financial Responsibility, supra.

No-Fault Insurance.

No statutes have been adopted.

Foreign Vehicles.

Non-resident owner of vehicle licensed in another state must, subject to certain statutory requirements, within 30 days after entering state, make application for license. (27-19-63[6]).

Nonresident operators may operate in this state for not over 60 days without local license if: (a) Over 18 years of age and duly licensed by home state or country, or (b) home state or country does not require operator's license. (63-1-7).

Actions Against Nonresidents.

Acceptance by nonresident of privilege of operating motor vehicle in state is equivalent to appointment of Secretary of State as his attorney, on whom service of process or summons may be made in any action growing out of operation of vehicle in state. (13-3-63). Service is made by delivery of copy to Secretary of State or his office and a copy is sent to defendant (or to personal representative of estate in event of nonresident's death) by registered mail, which, together with affidavit and return registry receipt, is equivalent to personal service. Also applies to anyone who is nonresident when action is commenced even though said person was resident at time action accrued. (13-3-63). See category 5 Civil Actions and Procedure, topic 5.20 Process.

Direct Actions.

Not permitted.

Motor Vehicle Carriers.

Regulated by Public Service Comm. and must obtain license and certificate of public convenience and necessity. (77-7-13, 77-7-41). Vehicles transporting passengers must provide liability insurance and amount of insurance policy or bond required must in no case be less than requirements of U.S. Dept. of Transportation as set out in 49 CFR, Part 387. (77-7-83, 77-7-85 and 77-7-87). Failure to comply with insurance requirements must be cause for revocation or suspension of certificate or permit, or for imposition of fine not exceeding $1,000, or both. (77-7-93).

Motor vehicles operated for hire in any city or town must carry liability insurance with minimum limits of $10,000/$20,000/$10,000. (21-27-133).

Supervision and inspection of safe operation of motor vehicles is duty of Mississippi Transportation Comm. (77-7-16).

Motor Vehicle Taxes.

Ad valorem tax, payable with license tag fee, is imposed upon motor vehicles. (27-19-1, et seq., 27-51-1 et seq.). Exemptions set forth 27-51-41.

Privilege tax is imposed on operation of trailers and semitrailers upon state highways unless engaged in interstate commerce. (27-19-17, 27-19-18).

Prorated refund may be obtained for unexpired part of annual privilege tax or annual permit if motor vehicle damaged to extent that it is unusable or if compressed gas carburation equipment removed. (27-59-35).

Highway privilege tax is levied annually upon each carrier of property with exceptions, e.g., carrier who is licensed outside state and who transports harvesting equipment to and from particular county in this state during certain period. Rate is specified in statutory schedule. (27-19-11). Highway privilege taxes for three, six or 12 mo. periods assessed at rate set forth in 27-19-11 on basis of 35%, 60%, 100% respectively. (27-19-64). No privilege tax imposed for vehicles owned by U.S. or Mississippi governments or their agencies. (27-19-27).

Gasoline Tax.

See category 22 Taxation, topic 22.08 Gasoline and Special Fuels Taxes.

Lemon Law.

See category 3 Business Regulation and Commerce, topic 3.12 Consumer Protection.

23.02 RAILROADS:

See category 3 Business Regulation and Commerce, topic 3.08 Carriers.

1

MISSOURI LAW DIGEST

—Scope —

Revised for 2010 edition by

SWANSON MIDGLEY, LLC, of Kansas City.

(References, unless otherwise noted, are to sections of Missouri Revised Statutes 2000. “c.” denotes chapter of statutes. “C.R.” denotes section of Missouri Rules of Civil Procedure. Parallel citations to the South Western Reporter begin with 89 Mo. and 94 Mo. App., and end with 365 Mo. and 241 Mo. App., after which South Western Reporter is only reporter.)

Note: All acts appearing herein are current as of Aug. 28, 2009 through 1st regular session of 95th General Assembly, 2009 legislature. Legislature meets annually in Jan.

1 INTRODUCTION

1.01 GOVERNMENT AND LEGAL SYSTEM:

The State of Missouri is a constituent state of the United States of America. For further discussion of the U.S. federal system, see Introduction to the Federal Government of the United States at the beginning of this volume. A great many laws are promulgated by the federal government of the United States and are not reflected in the topics below. See the Introduction to this volume for references to the federal law topics covered.

Like all but one of the United States, Missouri has a common law legal system, with roots in English common law. For information on the courts and legislature of Missouri, see category 6 Courts and Legislature.

1.02 [RESERVED]

1.03 HOLIDAYS:

Public holidays are Jan. 1, 3d Mon. in Jan., Feb. 12, 3d Mon. in Feb., May 8, last Mon. in May, July 4, 1st Mon. in Sept., 2d Mon. in Oct., Nov. 11, 4th Thurs. in Nov. and Dec. 25. When any such holiday falls on Sun., the Mon. next following shall be considered holiday. (RSMo 9.010).

1.04 OFFICE HOURS AND TIME ZONE:

Missouri is in the Central (GMT -06:00) time zone. Office hours are generally from 9 a.m. to 5 p.m.

2 BUSINESS ORGANIZATIONS

2.01 AGENCY:

A principal is bound by the acts of his agent within the scope of his employment. Notice to agent is usually notice to principal. Undisclosed principal may sue or be sued, or the aggrieved party may elect to sue the agent.

2.02 ASSOCIATIONS:

No provision as to organization of unincorporated associations. See topic 2.03 Corporations.

2.02A BUSINESS ENTITIES:

Registration Process Generally.

All business entities may file registration documents electronically and documents are not required to be notarized. (RSMo 351.046).

2.03 CORPORATIONS:

Special provisions are made for the following classes of corporations: railroad companies (RSMo 351.030); motor carriers, contract haulers, and express companies (RSMo 147.010); street railroads (RSMo 351.030); telegraph and telephone companies (RSMo 351.030); manufacturing and business companies; gas, electricity, and water companies; bridge companies (RSMo 351.035); mutual savings funds; building and loan associations; co-operative companies; benevolent, religious, scientific, educational, and miscellaneous associations (c. 352 et seq.); booming and rafting companies (RSMo 351.030); loan and investment companies (RSMo 351.180); exposition companies; training schools for minors; police and firemen’s relief associations; not-for-profit corporations (355); development finance corporations; farming corporations (350, 348).

General supervision is vested in Secretary of State of Missouri, Jefferson City, Mo. 65101. (See Const. Art IV, 14.)

Purposes.

Corporations for profit, except those which are required to be organized exclusively under other provisions of law, may be organized under The General & Business Corporation law of Missouri for any lawful purposes. (RSMo 351.020).

Name must contain word “company,” “corporation,” “incorporated,” “limited,” or conclude with abbreviation of one of such words and may not include any word or phrase which indicates or implies that it is governmental agency and it must be distinguishable from name of any domestic corporation, foreign corporation, limited partnership, or limited liability company existing or authorized to transact business in Missouri or name exclusive right to which is reserved at time. If name is same, word must be added to make name distinguishable from name of such other corporation, limited liability company or limited partnership. (RSMo 351.110). Secretary of state has adopted policy refusing common name unless nature of business included.

Availability.

Secretary of state in response to written or telephone request will advise if name is available. No fee is charged for service. However, availability is not unconditional unless reserved.

Reservation.

Name reserved by filing in office of secretary of state application to reserve specified corporate name executed by applicant and payment of $25 fee ($30 for limited liability partnerships). Blank forms for reserving names are available from secretary of state. If name available for corporate use secretary of state must reserve same for exclusive use of applicant for period of 60 days, not more than 180 days. Right to exclusive use of reserved name may be transferred by filing in office of secretary of state notice of transfer executed by person for whom such name was reserved and specifying name and address of transferee. (RSMo 351.115).

Incorporators.

One or more natural persons of age of 18 years, or more, may act as an incorporator. All of stock may be owned by one owner. (RSMo 351.050).

Term of Corporate Existence.

Any number of years or perpetual. (RSMo 351.055).

Articles of incorporation must set forth: (a) name of corporation; (b) address, including street and number, if any, of initial registered office in this state, and name of initial registered agent at such address; (c) if aggregate number of shares exceeds $30K par value or 30K shares which corporation will have authority to issue, number of shares of each class, if any, that are to have par value and par value of each share of each such class, number of shares of each class, if any, that are to be without par value and statement of preferences, qualifications, limitations, restrictions and special or relative rights, including convertible rights, if any, in respect of shares of each class; (d) name, physical address and place of residence of each incorporator; (e) term of existence, which may be any number of years or perpetual; (f) purposes for which corporation is formed; (g) may set forth (i) number of directors to constitute first board of directors; (ii) extent, if any, to which preemptive right of shareholder to acquire additional shares is limited or denied and Director of Limited Liability feature provided: (1) No breach of duty of loyalty; (2) no breach of duty of good faith; (3) no self-dealing; (4) no fraudulent declaration of dividends; (5) no limit on liability prior to amendment of charter; (h) optional—limitation on director liability; (i) any other provisions, not inconsistent with law, which incorporators may choose to insert. (RSMo 351.055, 351.090).

Execution and Filing of Articles.

Articles, in duplicate, signed and verified by incorporators, are delivered to office of Secretary of State of Missouri, Jefferson City, Mo. 65101. If approved, he or she files them when organization taxes or fees are paid, retains one copy as permanent record, issues certificate of incorporation, attaches same to other copy, and delivers them to incorporators. (RSMo 351.060). Blank forms for articles of incorporation are available from secretary of state.

Form

Verification must be in form substantially as follows:

STATE OF . . . .

COUNTY OF . . . . } SS

I, ..., a notary public, do hereby certify that on the . . . . . day of . . . ., 20. . . . . ., personally appeared before me . . . . (and . . . .,) who being by me first duly sworn, (severally) declared that he is (they are) the person(s) who signed the foregoing document as incorporator(s), and that the statements therein contained are true.

. . . .

Notary Public

(NOTARIAL SEAL) (RSMo 351.051).

Commencement of Business.

Corporate existence dates from time of filing its articles of incorporation with secretary of state. (RSMo 351.075).

Certificate of Authority.

Certificate given by secretary of state shall be taken by all courts of this state as evidence of corporate existence of corporation. (RSMo 351.075).

Fees of Secretary of State are charged for most services. However, no charge is made for information relating to a corporation’s registered agent.

Amendment of Articles.

At any time or times before corporation has received any payment for any shares, board of directors may adopt amendments to articles of incorporation by executing and verifying certificate of amendment. (RSMo 351.090).

After corporation has received any payment for any shares, amendments to articles of incorporation must be made only in following manner: (a) Board of directors may adopt resolution setting forth proposed amendment and directing that it be submitted to vote at either annual or special meeting of shareholders. Proposed amendment need not be adopted by board of directors and may be directly submitted to any annual or special meeting of shareholders (RSMo 351.090); (b) written or printed notice setting forth proposed amendment or summary thereof shall be given to each shareholder entitled to vote at such meeting (RSMo 351.090) not less than ten nor more than 70 days before date of meeting, either personally, by mail or by electronic transmission (RSMo 351.230). Attendance at meeting constitutes waiver of notice except where shareholder attends for express purpose of objecting to transaction of any business because meeting not lawfully called or convened. (RSMo 351.230).

All amendments shall be adopted by a majority vote of all outstanding shares entitled to vote. However, if articles of incorporation or bylaws provide for cumulative voting in election of directors, number of directors shall not be decreased to less than three by amendment to articles of incorporation when number of shares voting against proposal for decrease would be sufficient to elect a director if such shares were voted cumulatively at election of three directors. (RSMo 351.090). Further, if articles amend control share waivers, two-third approval of outstanding voting shares are required. (RSMo 351.090, 351.407).

Holders of outstanding shares of class shall be entitled to vote as class upon proposed amendment whether or not entitled to vote thereon by articles of incorporation if amendment would change aggregate number of authorized shares of class; change par value of shares of class; create new class of shares with prior or superior rights; increase rights, preferences, or number of authorized shares of class of shares with prior or superior rights; or adversely alter or change powers, preferences, or special rights. Merger or consolidation not deemed to involve proposed amendment to articles of incorporation. (RSMo 351.093).

Any number of amendments may be submitted to the shareholders and voted on by them at one meeting. (RSMo 351.090).

Duplicate copies of certificate of amendment executed by majority of board of directors and verified by one of them with corporate seal affixed must be sent to Secretary of State. Certificate of amendment shall state name of corporation and original name if it has been changed, amendment adopted, date of adoption of amendment by shareholders, number of shares outstanding, number of shares entitled to vote on amendment or if shares of any class are entitled to vote as class number of shares of each class entitled to vote, number of shares voted for and against amendment, if amendment provides for exchange, reclassification or cancellation of issued shares or reduction of number of authorized shares of any class below issued shares, statement of manner in which it shall be effected, and if effective date of amendment is to be date other than date of filing, then effective date which may not be more than 90 days following filing date. (RSMo 351.095).

Increase or Decrease of Authorized Capital Stock.

Reduction of stated capital of corporation, whether by retirement of reacquired shares or otherwise, each allowable under Missouri law, may be made in following manner: (a) Board of directors may adopt resolution setting forth amount of proposed reduction and manner in which reduction shall be effected and directing that it be submitted to vote at either annual or special meeting of shareholders. Proposed amendment may be directly submitted to any annual or special meeting of shareholders; (b) written or printed notice stating that purpose or one of purposes of regular or special shareholders' meeting is to consider question of reducing stated capital of corporation must be given to each shareholder entitled to vote at such meeting (RSMo 351.195) not less than ten nor more than 50 days before date of meeting, either personally or by mail (RSMo 351.230); (c) at meeting vote of shareholders entitled to vote thereat must be taken on question of proposed reduction of stated capital which shall require for its adoption affirmative vote of holders of at least two-thirds of outstanding shares entitled to vote at meeting (RSMo 351.195).

No reduction of stated capital may be made which would reduce stated capital represented by shares without par value having preferential right in assets of corporation in event of involuntary liquidation to amount less than aggregate preferential amount provided from time to time to be payable upon such shares in event of such involuntary liquidation. (RSMo 351.195). Surplus, if any, created by or arising out of reduction of stated capital of corporation is paid-in surplus. (Id.). No distribution of assets to shareholders in connection with reduction of stated capital may be made out of stated capital unless assets of corporation remaining after reduction of stated capital are sufficient to pay any debts of corporation, payment of which shall not have been otherwise provided for. (Id.). Shares retired under this or any other section shall become authorized and unissued shares of class to which they belong unless reissue thereof is prohibited by articles of incorporation in which case authorized shares of such class should be reduced to extent of shares so retired. (RSMo 351.195). Preferential shares have additional requirements. (RSMo 351.200).

Bylaws.

Shareholders have power to make, amend or repeal bylaws unless articles of incorporation vest such power in directors except original bylaws may be adopted by directors or if persons to constitute first board of directors are not named in articles of incorporation incorporators may adopt original bylaws by unanimous vote. (RSMo 351.290). Bylaws may contain any provisions for regulation and management of affairs of corporation not inconsistent with law or articles of incorporation. (RSMo 351.290).

Stock.

Shares may be issued with or without par value, and may be divided into one or more classes or one or more series within any class and such classes or series may have such voting powers or no voting powers and such preferences, rights, and restrictions as stated in articles of incorporation or in resolution approved by directors pursuant to authority expressly vested in directors by articles of incorporation. If corporation is authorized to issue more than one class of stock or more than one series of any class, voting may be made dependent upon facts ascertainable outside Articles of Incorporation or any amendment thereto provided that manner in which such facts shall operate upon voting powers, preferences, rights, and restrictions of each class or series is clearly and expressly set forth in articles or in resolution providing for issue of such stock adopted by Board of Directors. Corporations may issue options entitling holders to purchase shares of stock by resolution of board. (RSMo 351.182).

Stock Certificates.

Unless otherwise provided in articles or by-laws, shares must be represented by certificates signed by president or vice-president and secretary or an assistant secretary or treasurer or an assistant treasurer and sealed with seal of corporation. Such seal may be facsimile, engraved or printed. Any or all of signatures may be facsimile, engraved, or printed. (RSMo 351.295).

Every holder of uncertificated shares is entitled to receive statement of holdings as evidence of share ownership. (RSMo 351.295). Corporations must, upon request, furnish to holders of uncertificated shares information regarding voting powers, designations, and preferences as well as relative, participating, optional, or other special rights of each class of stock. (RSMo 351.180).

Every certificate for shares without par value must have plainly stated on its face the number of shares which it represents. No such certificate may express any par value or any rate of dividend to which such shares shall be entitled in terms of percentage of any par or other value. (RSMo 351.295).

Issuance of Stock, Bonds, Etc.

Shares of stock, bonds or other obligations may be issued only for money paid, labor done, or property actually received. All fictitious issues or increases of stock or indebtedness are void, provided that no such issue or increase made for valid bona fide antecedent debts shall be deemed fictitious or void. (RSMo 351.160).

Stock Books and Stock Transfers.

Every corporation must keep correct and complete books and records of account, including amount of assets, minutes of shareholder and board of director meetings, names and addresses of officers and it must keep at its registered office or principal place of business in this state, books in which must be recorded number of shares subscribed, names of owners of shares and number owned by them respectively, amount of shares paid, and transfers of shares, with dates of transfers. Stockholders must be afforded access to stock ownership record books at all proper times under such regulations as may be prescribed in bylaws and if any officer in charge of books shall refuse to permit examination by stockholder upon demand, he shall forfeit $250 for each offense. (RSMo 351.215).

Board of directors may close transfer books for period not exceeding 70 days preceding date of any meeting of shareholders or of dividend payment or for allotment of rights or effective date of change or conversion or exchange of shares. Alternative of record date provided. (RSMo 351.250).

Uniform Commercial Code in force. See category 3 Business Regulation and Commerce, topic 3.09 Commercial Code.

Uniform Simplification of Fiduciary Security Transfers Act adopted. (RSMo 403.250-.350, specifically saved from repeal by U.C.C., see 400.10-.102).

Stockholders or subscribers to shares, assignees and transferees are under no obligation to corporation or its creditors except to pay to corporation full consideration for which such shares were, or were to be, issued. (RSMo 351.275).

Tender Offers.

Offeror making take over bid to acquire control of Missouri corporation which has principal executive offices, significant business operations and at least 10% of owners of its voting stock in Missouri must file with commissioner of securities and deliver to target corporation registration statement which includes all details of take over bid. (RSMo 409.500-.566).

Stockholders Actions.

Stockholders may seek to enjoin ultra vires acts. (RSMo 351.395). Courts will hear stockholder complaints in equity for accounting or other relief when there is no adequate remedy at law and complainant shows exhaustion of remedies within corporation. (40 S.W.2d 496).

Stockholder Liabilities.

Limited to amount originally subscribed on stock. (Const. Art. XI, § 8).

Stockholders' meetings may be held either within or without Missouri as may be provided in the bylaws. In absence of such provision all meetings must be held at the registered office in this state. If authorized by board of directors, shareholders and proxyholders not physically present at meeting of shareholders, may, by means of remote communication: participate in, be deemed present in person and vote at meeting of shareholders, whether such meeting is to be held at designated place or solely by means of remote communication. Annual meeting to elect directors on second Monday in Jan. unless bylaws fix another date. (RSMo 351.225).

Voting.

Shareholders may vote in person or by proxy executed in writing by the shareholder or by his duly authorized attorney in fact. Unless articles of incorporation or bylaws provide otherwise, cumulative voting will be utilized. Proxies invalid 11 months after date unless otherwise provided therein. (RSMo 351.245). Person who knowingly falsifies proxy in material respect is guilty of infraction. (RSMo 351.265).

Action Without Meeting.

Any action required to be taken or which may be taken at meeting of shareholders, may be taken without meeting if consents in writing setting forth action so taken, are signed by all shareholders entitled to vote. Such consents have same force as unanimous vote of shareholders at meeting duly held. (RSMo 351.273).

Notice of Stockholders' Meetings.

Written or printed notice of each meeting of shareholders stating place, day and hour of meeting and, in case of special meeting, purpose of meeting, shall be given not less than ten days nor more than 70 days prior to meeting. Printed or written notice is sufficient if sent by mail to address of stockholder appearing upon corporation's books. (RSMo 351.230). Electronic submission is sufficient if capable of retention, retrieval and reproduction of information by recipient.

If all stockholders sign waiver, the written, printed and published notice may be dispensed with. (RSMo 351.655).

Voting Trusts.

Shareholders may create voting trust. (RSMo 351.246).

Directors.

Board of directors must consist in one or more individuals, number affixed in articles of incorporation or bylaws. If first board of directors is not named in articles of incorporation incorporators may elect first board of directors by unanimous vote. (RSMo 351.080). Elected at annual meeting of shareholders for terms of one or more years, not to exceed three, but there must be annual election for such proportion as number of years composing term bears to entire number of directors. (RSMo 351.315). Unless articles of incorporation or bylaws otherwise provide, vacancies on board or new directorships may be filled by majority vote of remaining directors, provided there is quorum, until next election of directors by stockholders except if shareholders elect directors by class pursuant to 351.315, director need not be presented for election until class which director elected is presented for election to shareholders. (RSMo 351.315, .320). Voting directors may be removed by shareholders, unless articles of incorporation or bylaws provide otherwise. Meeting to remove director(s) must be held at registered or principal business office of corporation in this state or in city or county in this state in which principal business office is located. Unless articles of incorporation or bylaws provide otherwise, one or more or entire board of directors may be removed, with or without cause, by vote of holders of majority of shares then entitled to vote at election of directors. If articles of incorporation or bylaws provide for cumulative voting in election of directors, if less than entire board is to be removed, no one of directors may be removed if votes cast against his removal would be sufficient to elect him if then cumulatively voted at election of entire board of directors, or, if there be classes of directors, at election of class of directors of which he is part. Whenever holders of shares of any class are entitled to elect one or more directors by provisions of articles of incorporation, these provisions shall apply, in respect of removal of director or directors so elected, to vote of holders of outstanding shares of that class and not to vote of outstanding shares as whole. (RSMo 351.315). Impartial, provisional director may be appointed by court if even number of directors are equally divided as to management of corporation's affairs as to imperil property and business of corporation. (RSMo 351.323).

Directors' meetings may be held within or without state as may be provided in articles of incorporation or by-laws. Members of board of directors or any committee designated by board of directors may participate in meeting by means of conference telephone or similar communications equipment whereby all participants can hear each other and participation in this manner constitutes presence in person. (RSMo 351.335). Majority of full board is quorum unless greater number is required by articles of incorporation or bylaws. (RSMo 351.325).

Voting.

If all directors severally or collectively consent in writing to any action to be taken by directors, such consents have same force as unanimous vote of directors at meeting duly held. (RSMo 351.340).

Liabilities of Directors.

Directors are liable for debts during term of office to the extent of the dividends paid, for knowingly declaring and paying dividends except as permitted by statute, provided, that a director may rely in good faith upon the books of account and statements of the corporation prepared by any of its officials. (RSMo 351.345).

However, a director may be indemnified by corporation against liabilities, expenses, counsel fees and costs reasonably incurred in connection with any action or claim in which he is made a party by reason of being a director, if he acted in good faith and in manner reasonably believed to be in or not opposed to best interests of corporation or, if criminal proceeding, had no reasonable cause to believe his conduct was unlawful unless action is brought in right of corporation. If action is brought in right of corporation, director may be indemnified by corporation if he acted in good faith and in manner he reasonably believed to be in or not opposed to best interests of corporation, unless he is adjudged liable for negligence or misconduct in performance of his duty in which case he can only be indemnified if court determines that he is reasonably entitled to indemnity. Unless ordered by court, indemnity must be voted by majority of quorum of directors who are not parties to action or, if not obtainable, or if disinterested directors so direct, by independent legal counsel of shareholders. Corporation may purchase liability insurance on behalf of its directors. (RSMo 351.355).

Fiduciary Duties of Directors.

Either by articles of incorporation or by action of board of directors, corporation may waive opportunities in advance that it may be entitled to under corporate opportunity doctrine. (RSMo 351.385).

Anti-Greenmail Law.

As general rule, corporations incorporated under laws of State of Missouri may not enter into “business combinations” with “interested shareholders” (most obviously shareholders owning 20% or more of outstanding voting stock). Exceptions to general rule are: (1) Business combination or stock purchase as made by interested shareholder, as of date of combination or acquisition has been approved inadvertently by board of directors acting on written and bona fide proposal; (2) business combination is approved by affirmative vote of disinterested outstanding voting shareholders at meeting called for purpose of such vote; or (3) aggregate cash value and market value of combination proposed is at least equal to highest share price paid for stock within preceding five years less dividends paid during same period or market value of shares as of announcement date of proposed combination, whichever is higher. “Business combination” with interested shareholder is: (1) Merger, (2) sale or transfer of assets having value of at least 10% of assets of corporation, 10% of outstanding value of stock or 10% of corporation’s net income, (3) issuing stock which has market value of at least 5% of all outstanding stock, (4) adopting plan of liquidation pursuant to agreement, (5) adopting plan of reclassification of securities or recapitalization pursuant to agreement which results in interested shareholder obtaining increase in shares of voting stock, or (6) entering into loans or providing other financial assistance. Provisions do not apply to corporations which have no voting stock registered with securities and exchange commission nor to certain other corporations which have elected not to be subject to this law. (RSMo 351.459).

Executive Committee.

If bylaws so provide, board of directors, by resolution adopted by a majority of the whole board, may designate two or more directors to constitute an executive committee, which may, to extent provided in such resolution or in bylaws, exercise all authority of the board of directors. Designation of an executive committee does not relieve the directors of the responsibility imposed upon them by law. (RSMo 351.330).

Officers.

Corporation shall have president and secretary, who shall be chosen by directors, and such other officers and agents as shall be prescribed by bylaws. Unless articles of incorporation or bylaws otherwise provide, any two or more offices may be held by same person. (RSMo 351.360).

Registered Office.

Every corporation must maintain a registered office in Missouri, but this office need not be the same as its place of business. (RSMo 351.370).

General powers of corporations are: (a) to have succession by corporate name for the period limited in articles of incorporation or perpetually where there is no limitation; (b) to sue and be sued, complain and defend in any court of law or equity; (c) to have corporate seal, alterable at pleasure and valid in facsimile; (d) to purchase, take, receive, lease, or otherwise acquire, own, hold, improve, use and otherwise deal in, sell, convey, mortgage, pledge, lease, exchange, transfer and otherwise dispose of all or any part of its real or personal property, or any interest therein, or other assets, wherever situated; and to hold for any period of time, real estate acquired in payment of debt, by foreclosure or otherwise, or real estate exchanged therefor; (e) to be general or limited partner; (f) to purchase, receive, subscribe for or otherwise acquire and own, vote, mortgage, pledge or otherwise dispose of shares or other interest in or obligations of other domestic or foreign corporations, associations, partnerships or individuals, or direct or indirect obligations of U.S. or of any other government, state, territory, governmental district or municipality or of any instrumentality thereof; (g) to make contracts and guarantees and incur liabilities; to borrow money at such rates of interest as corporation may determine without regard to restrictions of any usury law of this state; to issue its notes, bonds, and other obligations; to issue notes or bonds secured or unsecured, which by their terms are convertible into shares of stock of any class, and to secure any of its obligations by mortgage, pledge, or deed of trust of all or any of its property, franchises and income; (h) to invest its surplus funds from time to time and to lend money and to take and hold real and personal property as security for payment of funds so invested or loaned; (i) to conduct its business within and without State and to exercise its powers in any other state or possession of U.S. or any foreign country; (j) to elect or appoint directors, officers and agents of corporation, define their duties and fix their compensation and to indemnify directors, officers and employees to extent and in manner permitted by law; (k) to make or alter bylaws not inconsistent with its articles of incorporation or with laws of this State; (l) to transact any lawful business in aid of U.S. in prosecution of war, to make donations to associations and organizations aiding in war activities and to lend money to state or federal government for war purposes; (m) to cease its corporate activities and surrender its corporate franchise; (n) to have and exercise all powers necessary or convenient to effect any or all of purposes for which corporation is formed; (o) to make contributions to any corporation organized for civic, charitable or benevolent or scientific or educational purposes, community chest or community fund not operated or used for profit to its members; (p) to renounce in its articles of incorporation or by action of board any interest in or expectancy interest in would-be corporate opportunities, as presented to corporation itself or its officers, directors, shareholders, etc. (RSMo 351.385).

Dividends may be declared and paid, subject to the following limitations: (a) no dividends may be declared or paid when the payment thereof would reduce the net assets below the stated capital of the corporation (RSMo 351.220); (b) dividends may be declared out of paid-in surplus if all accrued cumulative dividends on preferred classes of shares have been fully paid and the payment is identified as a liquidating dividend (RSMo 351.210); (c) if a stock dividend of par value shares is declared, an amount of surplus equal to the aggregate par value of the shares to be issued as a dividend must be transferred to stated capital; (d) if a stock dividend of shares without par value is declared and such shares have preferential rights in the event of involuntary liquidation, such shares must be issued at their liquidation value, and there must be transferred to stated capital an amount of surplus equal to the aggregate preferential amount payable upon such shares in the event of involuntary liquidation; (e) if a stock dividend of shares without par value is declared, and none of the shares has preferential rights in the event of involuntary liquidation, such shares may be issued at a value fixed by the directors, and there must be transferred to stated capital an amount of surplus equal to the aggregate value so fixed of such shares, provided that such amount is disclosed to shareholder receiving such dividends concurrently.

A split-up or division of issued shares into a greater number of shares of the same class is not a share dividend.

No dividends may be paid contrary to any restrictions of the articles of incorporation. (RSMo 351.220).

Registration.

Every corporation, foreign or domestic, except corporations exempt from taxation, shall file annual registration report by date franchise tax due or within 30 days of date of incorporation. Registration will state: (1) Corporate name; (2) registered agent and office in Missouri, giving street and number, or building and number, or both as case may require; (3) names and residence addresses of all its officers and directors; (4) mailing address of principal place of business or headquarters. Extension of time to file franchise tax does not extend due date of registration report. Corporation may change month of its corporate registration report in corporation's initial corporation registration report or subsequent report. To change its filing month, corporation shall designate desired month in its corporation report and pay additional fee. (RSMo 351.120).

Reports.

Every corporation liable for annual franchise tax under 147.010 shall make report in writing showing financial condition of corporation at beginning of business on first day of its taxable year to Director of Revenue annually on or before due date of state income tax return. Report shall be signed by officer of corporation. (RSMo 147.020).

Special reports as to financial condition may be required at any time.

Secretary of state may commence proceeding pursuant to RSMo 351.602 to revoke certificate of foreign corporation authorized to transact business in state if corporation: Does not deliver its corporate registration report to secretary of state within 30 days after it is due; fails to pay any final assessment of Missouri corporation franchise tax; is without registered agent or office in state for 30 days or more; does not inform secretary of state that its registered agent or office has changed, resigned or discontinued within 30 days of change; incorporator, director, officer or agent of corporation signed document person knew as false in any material respect with intent that document be delivered to secretary of state for filing; secretary of state receives duly authenticated certificate from official having custody of corporate records in state or country under whose law corporation is incorporated stating that it has dissolved or disappeared as result of merger; fails to pay any final assessment of employer withholding tax; or fails to pay any final assessment of sales and use taxes. (RSMo 351.598, .602).

Corporations must file annual corporation registration report. (RSMo 351.120).

See also infra, subhead Annual Franchise Tax.

Increase of bonded indebtedness requires prior approval by board of directors. Vote or consent of shareholders not necessary unless required by articles of incorporation. (RSMo 351.160).

Sale or Exchange of Corporate Assets.

Sale or exchange, other than by mortgage, deed of trust or pledge, of all or substantially all of property and assets of corporation not made in regular course of business, requires approval of board resolution at stockholders' meeting by vote of two-thirds of outstanding shares entitled to vote at such meeting. Dissenting stockholder who files written objection to sale at or prior to meeting may receive payment for fair value of his shares as of day prior to shareholders vote upon his written demand made within 20 days after vote is taken. (RSMo 351.400-.405).

Control share acquisition procedure applicable where articles of incorporation or bylaws do not exempt corporation are addressed in § 351.407.

Merger and Consolidation.

Any two or more domestic corporations, or foreign corporations, if permitted by states of organization, may merge into one of such corporations or consolidate into a new corporation. (RSMo 351.410, .415). Domestic corporation may merge or consolidate with one or more domestic or foreign limited partnerships, general partnerships, limited liability companies, trusts, business trusts, corporations, real estate investment trusts and other associations or business entities, at least one of which is not corporation. (RSMo 351.461, 355.196). Such merger or consolidation must be approved by board of directors of each corporation and submitted to vote of stockholders at annual or special meeting. Plan of merger or consolidation must receive two-thirds vote of outstanding shares entitled to vote at such meeting. (RSMo 351.420, .425). Dissenters' rights same as under subtopic Sale or Exchange of Corporate Assets, supra. (RSMo 351.455). If 90% or more of outstanding shares of corporation is owned by another corporation, parent corporation may merge subsidiary corporation into itself or merge itself into subsidiary corporation by resolution of directors with no vote of stockholders, except that where parent corporation is not surviving corporation, two-thirds of outstanding shares of parent corporation entitled to vote must approve merger at meeting duly called and held. Owners of shares of subsidiary corporation other than parent corporation have dissenters' rights as described under subhead Sale or Exchange of Corporate Assets, supra. (RSMo 351.447). Merger of domestic corporation with wholly owned subsidiary by resolution of directors with no vote of stockholders if in connection with holding company reorganization. (RSMo 351.448).

Voluntary Dissolution.

(a) Majority of incorporators or initial directors of corporation that has not issued shares or has not commenced business may dissolve corporation by delivering to secretary of state for filing articles of dissolution that set forth: (1) Name of corporation; (2) date of its incorporation; (3) either that none of corporation's shares have been issued, or that corporation has not commenced business; (4) that no debt of corporation remains unpaid; (5) that net assets of corporation remaining after winding up have been distributed to shareholders, if shares were issued; and (6) that majority of incorporators or initial directors authorized dissolution. (RSMo 351.462).

(b) Corporation's board of directors may propose dissolution for submission to shareholders. For proposal to dissolve to be adopted: (1) Board of directors must recommend dissolution to shareholders unless board of directors determines that because of conflict of interest or other special circumstances it should make no recommendation and communicates basis for its determination to shareholders; and (2) shareholders entitled to vote must approve proposal to dissolve by two-thirds of shares entitled to vote.

Board of directors may condition its submission of proposal for dissolution on any basis. (RSMo 351.464).

Corporation shall notify each shareholder, whether or not entitled to vote, of proposed shareholders' meeting in accordance with statutory shareholders notice requirements. Notice must also state that purpose, or one of purposes, of meeting is to consider dissolving corporation.

Unless articles of incorporation or board of directors require greater vote, including vote by any class of stock or any series of stock, proposal to dissolve to be adopted must be approved by at least two-thirds of votes entitled to be cast on that proposal. (RSMo 351.464).

(c) Corporation may be dissolved by written consent of holder of record of all of its outstanding shares entitled to vote on dissolution. (RSMo 351.466).

(d) In two equal shareholder deadlock situations, either shareholder may petition court for dissolution. (RSMo 351.467).

(e) At any time after dissolution is authorized, corporation may dissolve by delivering to secretary of state for filing articles of dissolution setting forth: (1) Name of corporation; (2) date dissolution was authorized; (3) if dissolution was approved by shareholders: (A) number of votes entitled to be cast on proposal to dissolve, and (B) either total number of votes cast for and against dissolution and statement that number cast for dissolution was sufficient for approval or statement that dissolution was approved by written consent of all shareholders; and (4) if voting by any class of stock or any series of any class of stock was required, information required by subdivision (3) of this subsection must be separately provided for each class of stock or series thereof entitled to vote separately on plan to dissolve. Corporation is dissolved upon effective date of its articles of dissolution. (RSMo 351.468).

Officers and directors of corporations dissolved before Aug. 28, 1990 are to act as trustees of corporation. Trustees may sue and be sued as trustees and will have joint and several liability to creditors and shareholders of corporation, to extent of corporation property. (RSMo 351.526).

Dissolved corporation continues its corporate existence but may not carry on any business except that appropriate to wind up and liquidate its business and affairs. (RSMo 351.476).

Involuntary Dissolution.

Secretary of state may commence proceeding under 351.486 to dissolve corporation administratively. (RSMo 351.484). Written notice shall be served on corporation if determination is made to dissolve corporation administratively. (RSMo 351.486).

Close Corporations.

Missouri provides for close corporations. (RSMo 351.750).

Qualification or Domestication.

Statutory close corporation is corporation whose articles of incorporation contain statement that corporation is statutory close corporation. (RSMo 351.755).

Following statement shall appear conspicuously on each share certificate issued by statutory close corporation:

"The rights of shareholders in a statutory close corporation may differ materially from the rights of shareholders in other corporations. Copies of the articles of incorporation and bylaws, shareholders' agreements, and other documents, any of which may restrict transfers and affect voting and other rights, may be obtained by a shareholder on written request to the corporation." (RSMo 351.760).

Corporation having 50 or fewer shareholders may become statutory close corporation by amending its articles of incorporation to indicate that corporation is statutory close corporation.

Amendment shall be approved by holders of at least two-thirds of votes of each class or series of shares of corporation, voting as class or series, whether or not otherwise entitled to vote on amendments. If amendment is adopted, shareholder who voted against amendment is entitled to assert dissenters' rights under §§ 351.870 to 351.930. (RSMo 351.755).

Corporate Powers.

All shareholders of statutory close corporation may agree in writing to regulate exercise of corporate powers and management of business and affairs of corporation or relationship among shareholders of corporation.

Agreement authorized by this section is effective although: (1) It eliminates board of directors; (2) it restricts discretion of powers of board of directors or authorizes director proxies or weighted voting rights; (3) its effect is to treat corporation as partnership; or (4) it creates relationship among shareholders or between shareholders and corporation that would otherwise be appropriate only among partners. (RSMo 351.800).

Statutory close corporation may operate without board of directors if its articles of incorporation contain statement to that effect. (RSMo 351.805).

Personal Liability.

Failure of statutory close corporation to observe usual corporate formalities or requirements relating to exercise of its corporate powers or management of its business and affairs is not ground for imposing personal liability on shareholders for liabilities of corporation. (RSMo 351.825).

Termination of Status.

Corporation that terminates its status as statutory close corporation is thereafter subject to all provisions of c. 351 other than provisions particular to close corporations or, if incorporated under c. 356 (professional corporation laws), to all provisions of that law.

Termination of statutory close corporation status does not affect any right of shareholder or of corporation under agreement or articles of incorporation unless particular close corporation laws, professional corporation laws, or another law of this state invalidates right. (RSMo 351.840).

Dissolution.

Articles of incorporation of statutory close corporation may authorize one or more shareholders, or holders of specified number of percentage of shares of any class or series, to dissolve corporation at will or upon occurrence of specified event or contingency. Shareholder or shareholders exercising this authority shall give written notice of intent to dissolve to all other shareholders. Thirty-one days after effective date of notice, corporation shall begin wind up and liquidate its business and affairs and file articles of dissolution under §§ 351.468 to 351.482.

Unless articles of incorporation provide otherwise, amendment to articles of incorporation to add, change, or delete authority to dissolve described above shall be approved by holders of all outstanding shares, whether or not otherwise entitled to vote on amendments, or if no shares have been issued, by all subscribers for shares, if any, or if none, by all incorporators. (RSMo 351.845).

Transfer of Shares.

(1) Person desiring to transfer shares of statutory close corporation subject to transfer prohibition of § 351.765 shall first offer them to corporation after obtaining offer to purchase shares for cash from third person who is eligible to purchase shares under subsection 2 of this

section. Offer by third person must be in writing and state offeror's name and address, number and class, or series, of shares offered, offering price per share, and other terms of offer.

(2) Third person is eligible to purchase shares if: (a) He is eligible to become qualified shareholder under any federal or state tax statute corporation has adopted and he agrees in writing not to terminate his qualification without approval of remaining shareholders; and (b) his purchase of shares will not impose personal holding company tax or similar federal or state penalty tax on corporation. (RSMo 351.770).

Appraisal.

See subheads Amendment of Articles, Sale or Exchange of Corporate Assets, Merger and Consolidation, supra.

Out-of-State Bank or Trust Company.

(Provisions of the act as to foreign corporations do not apply to corporations whose right to do business in this state is controlled by some board, bureau or administrative agency of the state other than the Secretary of State; e.g., banking or insurance corporations.)

Name of Corporation.

Corporate name, including fictitious name, of foreign corporation must be distinguishable from: (1) Corporate name of corporation incorporated or authorized to transact business in Missouri; (2) corporate name reserved or previously registered; (3) fictitious name of another foreign corporation authorized to transact business in Missouri; (4) corporate name of not for profit corporation incorporated or authorized to transact business in Missouri; (5) partnership name of limited partnership or limited liability company formed pursuant to Missouri law; and (6) partnership name of foreign limited partnership or limited liability company authorized to transact business in Missouri. (RSMo 351.584). Exceptions: If other corporation consents to use in writing and submits to distinguishing its name with records of secretary of state; if its obtains court order allowing right to use name; if merged, formed by reorganization of other company; or acquired all or substantially all of assets of other corporation. (RSMo 351.584).

Change of Name.

If corporation changes its name to one that does not satisfy Missouri law, it may not transact business under changed name until it adopts name satisfying statutory requirements and obtains amended certificate of authority. (RSMo 351.584[5]).

Executing Trusts.

Repealed 2004.

Doing Business Without Authority.

Any foreign corporation doing business in Missouri which fails to comply with Missouri laws is subject to a fine of not less than $1,000 and is prohibited from maintaining any suit or action in the state courts on any demand arising while the requirements of the Missouri corporation laws have not been complied with. (RSMo 351.574).

Registered Agents.

Each foreign corporation authorized to transact business in Missouri shall continuously maintain in this state: (1) Registered office that may be same as any of its places of businesses; and (2) registered agent, who may be: (a) individual who resides in this state and whose business office is identical with registered office, (b) domestic corporation or not for profit domestic corporation whose business office is identical with registered office, or (c) foreign corporation or foreign not-for-profit corporation authorized to transact business in Missouri whose business office is identical with registered office. (RSMo 351.586).

Surrender of Authority.

Foreign corporation authorized to transact business in Missouri may not withdraw from this state until it obtains certificate of withdrawal from secretary of state. Foreign corporation authorized to transact business in this state may apply for certificate of withdrawal by delivering application, to secretary of state, which states: (1) Name of foreign corporation and name of state or country under whose laws it is incorporated; (2) that it is not transacting business in this state, and that it surrenders its authority to transact business in this state; (3) that it revokes authority of its registered agent to accept service on its behalf and appoints secretary of state as its agent for service of process in any proceeding based on cause of action arising during time it was authorized to transact business in this state; (4) mailing address to which secretary of state may mail copy of any process served on him; and (5) commitment to notify secretary of state for five years of any change in its mailing address. (RSMo 351.596).

Annual franchise tax of 1/30 of 1% for corporation with stock value plus surplus exceeding $1 million, except corporations not organized for profit, industrial development corporations, S & L's or domestic and foreign regulated investment companies, electric and telephones (CF 351.486, 147.120), express and insurance companies paying annual tax on gross (premium) receipts in Missouri, banking institutions paying annual franchise fees imposed by 148.010 to 148.110, and electric and telephone corporations declared tax exempt organizations under § 501(c) of Internal Revenue Code. Nor to banking institutions subject to Missouri annual franchise tax. (RSMo 147.010). Annual report for purposes of this tax is required to be made annually on or before Apr. 15th to Secretary of State. (RSMo 147.020). Tax is payable on or before 15th day of Apr. (RSMo 147.030). If not paid by due date, penalty of 5% per month or fractional part thereof up to 25% maximum will be charged until tax paid. Interest at rate determined by 32.065 shall also be added. (RSMo 147.120). Failure to file report or pay tax within 60 days of due date forfeits certificate of incorporation or certificate of authority.

Stock without par value is valued at $5 per share, or at actual value if that exceeds $5 per share, for purpose of computing organization or qualification tax or fees or franchise tax. (RSMo 147.010).

Income Tax on Corporations.

See category 22 Taxation, topic 22.10 Income Tax.

Limited Liability Companies.

See topic 2.06 Limited Liability Companies.

Professional Corporations.

One or more natural persons licensed in same profession in Missouri may incorporate and own stock in professional corporation to practice that same type of professional service by filing articles of incorporation with secretary of state except that if more than one type of professional service is permitted to be practiced by professional corporation then one or more natural persons still licensed to practice any of permitted professional services may act as incorporator and professional corporation may be incorporated to practice all professional services permitted to be practiced by one professional corporation. (RSMo 356.041). Professions included: accountants; architects or engineers; attorneys; chiropodists-podiatrists; chiropractors; dentists; optometrists; osteopaths; psychologists; doctors of medicine; veterinarians; registered nurses; natural persons licensed as real estate salespersons; and physical therapists. (RSMo 356.021).

Missouri Non-Profit Corporation Act adopted. (c. 355).

See also categories 3 Business Regulation and Commerce, topic Banks and Banking; Civil Actions and Procedure, topics Process, Venue; Debtor and Creditor, topic Attachment; Insurance, topics Insurance Companies, Surety and Guaranty Companies.

2.04 [RESERVED]

2.05 JOINT STOCK COMPANIES:

The term "corporation" includes all joint stock companies or associations having any powers or privileges not possessed by individuals or partnerships. (Const. Art. XI, § 1). This does not make such companies corporations, nor require their incorporation. (288 Mo. 679, 233 S.W. 20).

Actions.

Such companies may sue and be sued. (328 Mo. 1084, 43 S.W.2d 404). Voluntary unincorporated associations not given special powers or privileges by statutes cannot sue. (Id.).

See also topic 2.03 Corporations.

2.06 LIMITED LIABILITY COMPANIES:

Missouri Limited Liability Company Act created. (RSMo 347.010).

Purposes.

Limited liability companies may be organized for any lawful purposes. (RSMo 347.035).

Name.

Must contain word "limited company", "limited liability company", or abbreviation "LC", "L.C." or "LLC", "L.L.C." and company must transact business under this name unless registered another name under which it transacts business or conspicuously discloses names as set forth in articles. Name must not contain word "association", "corporation", "incorporated", "limited partnership", "L.P.", "Ltd.", or abbreviation of such words or any word or phrase indicating it is organized for any purpose not stated in articles or that it is governmental agency. Name must be distinguishable from name of any corporation, limited liability company, limited partnership or other business entity licensed, organized, reserved or registered in Missouri, or licensed or registered in Missouri as foreign business entity unless such other entity files with secretary of state documentation changing its name to name distinguishable from name of applying limited liability company or limited liability company files with secretary certified copy of final court decree establishing prior right to use name. (RSMo 347.020).

Name reserved by filing with secretary of state application to reserve name executed by applicant. If name is available, secretary of state must reserve name for exclusive use of applicant for period of 60 days. (RSMo 347.025).

Registered Office and Agent.

Limited liability company must maintain registered office in Missouri. Registered office need not be its place of business. Limited liability company must maintain registered agent in Missouri for service of process. Agent may be either Missouri resident, whose business office is identical with registered office, or domestic or foreign corporation authorized to do business in Missouri, and whose business office is identical with registered office. (RSMo 347.030).

Organizers.

Any person, whether or not member or manager, may form limited liability company by signing and filing articles of organization with secretary of state. (RSMo 347.037).

Articles of organization must set forth: (a) name of limited liability company; (b) purposes for which company is formed; (c) address, including street number, if any, of registered office and name of registered agent at such address; (d) whether management of company is vested in one or more managers; (e) latest date on which company is to dissolve (may be perpetual); (f) name and address of each organizer; and (g) any other provision, not inconsistent with law, which are in operating agreement. (RSMo 347.039).

Execution and Filing of Articles and Other Documents.

Initial articles of organization must be executed by organizer or organizers. (RSMo 347.047). Filing fee for original articles of organization is $100. (RSMo 347.179). Amended or restated articles of organization, statement of change of registered agent or office, notice of merger or consolidation, notice of winding up, or articles of termination must be executed by authorized person, person authorized under operating agreement or person duly authorized under power of attorney. Articles, notices and documents required to be filed by limited liability company in hands of receiver, trustee or other court-appointed fiduciary must be filed by such fiduciary. (RSMo 347.047).

Commencement of Business.

Limited liability company is formed when articles of organization are filed with secretary of state or at later date set forth in articles of incorporation, not to exceed 90 days from filing date. If articles of organization are not in conformance with filing provisions, secretary must return articles with statement as to nonconformity. (RSMo 347.037).

Evidence of Organization.

Copy of articles of organization stamped “filed” and marked with filing date is conclusive evidence that limited liability company has been legally organized and formed. (RSMo 347.037).

Amendment of Articles.

Articles of organization must be amended promptly, and not later than 60 days after occurrence of following events: (1) To reflect change in management of LLC in managers or members, where such management had not previously been vested; (2) to reflect name change of LLC; or (3) to reflect change in time set forth in articles for LLC to dissolve. Unless otherwise provided in operating agreement, articles of organization may be amended at any time and in any respect so long as articles of organization contain only those provisions as are contained in operating agreement at time of amendment. Articles of organization are amended by filing with secretary of state articles of amendment, which must set forth: (1) name of limited liability company; (2) date articles of amendment are filed, and if not to become effective until specified date after filing, date they are to become effective which must not be more than 90 days after filing date; (3) if filing of articles of amendment is necessitated by event, nature and date of event; (4) amendment to articles of organization; and (5) statement that amendment is authorized under operating agreement or is required to be filed. (RSMo 347.041; 347.179).

Integration of Articles of Organization and Amendments.

Limited liability company may integrate into single instrument articles of organization and amendments thereto by filing with secretary of state “Restated Articles of Organization” stating that restated articles only reinstate and integrate and do not further amend articles previously filed, and there is no discrepancy between provisions. At same time as integrating, company may also further amend or supplement articles of organization by filing with secretary of state

“Amended and Restated Articles of Organization”. (RSMo 347.043; 347.179).

Liability of Members and Managers and Authorized Persons.

Members and managers of limited liability company are not liable, solely by reason of being member or manager, under judgment, decree, or court order, or in any other manner, for debt, obligation or liability of limited liability company, whether arising in contract, tort or otherwise, or for acts or omissions of other member, manager, agent or employee of company. (RSMo 347.057).

Liability Where Limited Liability Company Unauthorized.

Persons acting as limited liability company without authority and without good faith belief in authority are jointly and severally liable for debts and liabilities incurred. (RSMo 347.059). Authorized person not liable for action taken with respect to duties under operating agreement, or failure to take such action, if performs duties in compliance therewith. (RSMo 347.090).

Management.

Articles of organization shall provide how management of LLC will be vested and who will have right and authority to manage affairs of LLC and make all decisions with rights thereto. If articles provide management is vested in one or more managers, such manager or managers have right to manage company affairs and make decisions to extent provided in operating agreement. Unless otherwise provided in operating agreement, must obtain consent of all members to change management from members to managers, or vice versa. Managers must be designated in operating agreement, or designated, appointed or elected by members in manner prescribed in operating agreement, and may be removed or replaced as provided in operating agreement. Managers need not be members of company or individuals, unless required by operating agreement. If operating agreement does not provide manner for designating, appointing, electing, removing or replacing managers, managers are designated, appointed, elected, removed or replaced by vote of majority of members and unless earlier removed or resigned, managers hold office until successors are designated, appointed or elected and qualified. (RSMo 347.079).

Operating Agreement.

Members must adopt operating agreement. Operating agreement may contain any provision, not inconsistent with law, as deemed appropriate by member or members so adopting. (RSMo 347.081). Unless otherwise provided in operating agreement, must obtain approval or consent of all members to amend operating agreement. (RSMo 347.081). Operating agreement is enforceable at law or in equity by member, to extent provided in law. (RSMo 347.081).

Voting.

Unless otherwise provided in operating agreement, action or vote which must be taken at meeting of managers or members, may be taken without meeting, if obtain written consent of all persons entitled to act or vote on matter. (RSMo 347.083).

Distributions.

Limited liability company must make distributions of cash or other property to members before dissolution and winding up of affairs at times or upon events specified in operating agreement, or if operating agreement does not specify, at times approved by majority of authorized persons. (RSMo 347.101). No distribution may be made to extent that after distribution: (1) company would not be able to pay debts as due in usual course of business; or (2) total assets would be less than sum of total liabilities plus, unless operating agreement provides otherwise, amount needed if company were to be dissolved at time of distribution to satisfy preferential rights of members whose rights to distributions are superior to rights of members receiving distribution, except that, liabilities to members or former members are excluded from determination. (RSMo 347.109).

Assignments.

Interest of member in limited liability company is personal property, and except as provided in operating agreement, may be assigned in whole or part. Assignment of interest does not entitle assignee to participate in management or exercise member rights, unless member had power to grant assignee right to become member and assignee exercises power in compliance with conditions limiting exercise thereof. Unless otherwise provided in operating agreement, if assignee becomes member, assignor is not released from liability to company without written consent of all members. (RSMo 347.115).

Conversion of Partnership to Limited Liability Company.

General or limited partnership may convert to limited liability company by filing articles of organization including: (1) name of former general or limited partnership; and (2) for limited partnership, date and place of filing certificate of limited partnership and application for registration as limited liability partnership, and (3) for general partnership, date of filing of fictitious name registration of partnership and application for registration as limited liability partnership. Conversion does not constitute dissolution of general or limited partnership prior to conversion. Duties, debts, liens, liabilities and rights of creditors against former partnership and its partners continues without impairment and attaches to limited liability company. Existing claim, action or proceeding pending by or against partnership or its partners may be prosecuted as if conversion had not occurred, or against limited liability company to same extent as if duties, debts, liens and liabilities had been incurred or contracted by it. Judgment against partnership constitutes lien against limited liability company and may be enforced against it. (RSMo 347.125).

Merger and Consolidation.

Domestic limited liability company may merge or consolidate with one or more limited liability companies, and domestic or foreign limited liability company by agreement shall provide for surviving entity. Domestic limited liability company may merge or consolidate with one or more general partnerships or domestic or foreign limited partnerships, limited liability companies, trusts, business trusts, corporations, real estate investment trusts and other associations or business entities at least one of which is not limited liability company. (RSMo 347.127). Must obtain approval or consent of all members, unless otherwise provided in operating agreement. (RSMo 347.079). Surviving LLC, in case of merger, or new LLC, in case of consolidation, shall file notice of merger or consolidation with secretary of state. (RSMo 347.129). Filing fee for notice of merger or consolidation is $20. (RSMo 347.179). If merger or consolidation is not consummated, domestic limited liability company must promptly file with secretary of state notice of abandonment of merger or consolidation. (RSMo 347.129). Filing fee is $20. (RSMo 347.179). LLC which is not survivor of merger or consolidation shall, as soon as possible, file notice of winding up with secretary of state. (RSMo 347.137). Merger or consolidation is effective at latter of: (1) Date secretary files notice of merger or consolidation; or (2) date set forth in notice of merger or consolidation, not to exceed 90 days after notice accepted for filing. (RSMo 347.131).

In case of merger or consolidation between constituent entities where one or more is not LLC, each constituent entity must enter into written agreement of merger or consolidation. (RSMo 347.715). Agreement of merger or consolidation must be authorized, approved and certified. (RSMo 347.720). Surviving entity must file agreement of merger or consolidation with secretary of state or, alternatively, articles of merger or consolidation. Merger or consolidation effective when filed by secretary of state, unless later date specified in agreement or articles, but date may not exceed 90 days after agreement or articles delivered to secretary. (RSMo 347.725).

Dissolution.

Domestic limited liability company is dissolved upon: (1) happening of events specified in operating agreement; (2) written consent of all members; (3) except as provided in operating agreement, withdrawal of member, if majority, by number, of remaining members agree to dissolve within 90 days after withdrawal; (4) at any time there are no members, unless under certain circumstances personal representative of last remaining member agrees in writing to continue limited liability company and to admission of such personal representative to limited liability company as member, or unless under certain circumstances member is admitted to limited liability company effective as of occurrence of event that terminated continued membership of last remaining member if such admission is authorized by limited liability company agreement; (5) entry of decree of dissolution; or (6) fact that limited liability company is not surviving entity in merger or consolidation. As soon as possible after occurrence of events (1)-(4) above, company must file notice of winding up with secretary of state. (RSMo 347.137). When all remaining property and assets have been distributed, articles of organization must be canceled by filing articles of termination. (RSMo 347.045). Upon filing articles of termination, existence of limited liability company ceases, except for purposes of suits, other proceedings and appropriate action. (RSMo 347.139).

Disposal of Known Claims.

Dissolved limited liability company may dispose of known claims, other than contingent liabilities or claims based on events occurring after effective date of dissolution, by providing written notification of dissolution any time after its effective date. Notice must: (1) describe information necessary for claim; (2) provide mailing address to send claim; (3) state deadline, which may not be fewer than 90 days from effective date of notice by which company must receive claim; and (4) state that claim will be barred if not received by deadline. Notwithstanding contrary provisions of law, claim against limited liability company dissolved without fraudulent intent is barred if either: (1) claimant who was given written notice does not deliver claim by deadline; or (2) claimant whose claim was rejected does not commence proceeding to enforce claim within 120 days from effective date of rejection notice. (RSMo 347.141).

Disposal of Unknown Claims.

Dissolved limited liability company may dispose of unknown claims by filing notice of winding up which must: (1) contain request that persons with claims present them in accordance with notice; (2) describe information necessary for claim and mailing address to send claim; and (3) state that claim will be barred unless proceeding to enforce claim is commenced within three years after publication of notice. Notwithstanding other provisions of law to contrary, if limited liability company dissolved without fraudulent intent files notice of winding up, claims of following claimants are barred unless proceeding to enforce claim is commenced within three years after filing of notice of winding up. If LLC is dissolved without fraudulent intent and publishes notice thereof, then: (1) Claimant who did not receive written notice; (2) claimant whose claim was timely sent to company but not acted on; (3) claimant whose claim is contingent or based on event occurring after effective date of dissolution are barred unless claimant proceeds to enforce claim within three years after date of notice of winding up. (RSMo 347.141).

Involuntary Dissolution.

Limited liability company may be dissolved involuntarily be decree of circuit court of county of registered office, in action by attorney general if limited liability company: (1) procured articles of organization through fraud; (2) exceeded or abused authority conferred upon it; (3) carried on, conducted or transacted business in fraudulent or illegal manner; or (4) abused its powers contrary to public policy. On application by or for member, court may decree dissolution whenever not reasonably practicable to carry on business in conformity with operating agreement. (RSMo 347.143).

Winding Up.

Unless otherwise provided in operating agreement, upon dissolution, members who have not wrongfully dissolved limited liability company, or legal representative of last surviving member, not bankrupt, have, if management vested in members, right to wind up company affairs; or if management vested in one or more managers, right to authorize such manager or managers to wind up company affairs or complete unfinished transactions, except that any member, his legal representative or assignee, upon cause, may obtain winding up by court. (RSMo 347.147).

Liquidation.

Court has power to liquidate assets and business of limited liability company: (1) in creditor action, after dissolution, when claim has been reduced to judgment and execution returned unsatisfied and where limited liability company is insolvent; (2) upon application by limited liability company, or for cause shown by member, after dissolution to have liquidation continued under court supervision; (3) in action by attorney general after issuance of decree of dissolution; or (4) in action by member after issuance of decree of dissolution. (RSMo 347.149).

Foreign limited liability company must register with secretary of state before transacting business in Missouri. Must submit to secretary, in duplicate, application for registration as foreign limited liability company signed and acknowledged by member, manager or other authorized agent setting forth: (1) name of foreign limited liability company and, if different, name under which it proposes to register and transact business in Missouri; (2) jurisdiction in which it was formed and date of formation; (3) purpose of company or general character of business it proposes to transact in Missouri; (4) name and address of registered agent and registered office in Missouri; (5) statement that secretary is appointed as its agent if company fails to maintain registered agent in Missouri or if agent cannot be found or served with reasonable diligence; (6) address of office required to be maintained in its jurisdiction of organization, or if not required, of principal office of foreign limited liability company; and (7) certificate of existence or document of similar import duly authenticated by secretary of state or other official having custody of records in state or county under whose laws it is registered. Additionally, foreign LLC must provide certificate of good standing or certificate of existence from state in which it is domiciled, such document should be dated within 60 calendar days from filing. (RSMo 347.153).

If application for registration conforms to law and requisite fees paid, secretary must: (1) Endorse application word “Filed”, and full date of filing; (2) return accepted filing to person who filed or that person’s representative. (RSMo 347.155).

Foreign limited liability company transacting business in Missouri which fails to register or comply with statutory provisions is subject to fine not less than $1,000 and may not maintain action, legal or equitable, in Missouri court, whether in contract or tort, while requirements are not met. Failure to register in Missouri does not impair validity of contract or company act or prevent company from defending action in Missouri courts. Member of foreign limited liability company is not liable for debts, obligations or liabilities of company solely by reason of having transacted business in Missouri without registration. (RSMo 347.163).

Cancellation.

Secretary of state may cancel or disapprove articles of organization if limited liability company fails to file required documents, fails to maintain registered agent, fails to pay required filing fees, uses fraud or deception in any filing or violates federal or state criminal laws. Secretary must provide written notice 30 days prior to cancellation specifying reasons. Company may appeal notice of proposed cancellation to circuit court of county of its registered office by filing petition with copy of articles of organization or other relevant documents and copy of proposed written cancellation. Petition must be filed within 30 days after notice of cancellation. Company may appeal from circuit court as in other civil actions. Secretary may rescind cancellation if: (1) company provides necessary documents and affidavits indicating correction of conditions prompting cancellation; or (2) company provides documentation or statements that company is not in violation of criminal code. (RSMo 347.183).

Taxation.

Limited liability company and its authorized persons, or their equivalent, must withhold and pay taxes as imposed by law on basis consistent with company's classification as partnership or association under § 7701, IRC (1986). Solely for purposes of cc. 143, 144 and 288, RSMo., limited liability company and members shall be classified and treated on basis consistent with limited liability company's classification for federal income tax purposes. (RSMo 347.187).

Real Property Ownership.

Limited liability company which owns and rents or leases real property must disclose at least one person with management control. (RSMo 347.189).

2.07 [RESERVED]

2.08 PARTNERSHIPS:

Uniform Partnership Act adopted. (c. 358).

Liabilities of Partners.

General partners are jointly and severally liable for everything changeable to partnership. (RSMo 358.150).

Administration of Partnership Property.

In addition to standard Uniform Partnership Act provisions, surviving partner(s) file verified inventory of partnership assets and liabilities in probate court within 30 days after issuance of letters testamentary for estate of deceased partner (RSMo 473.220). Surviving partner(s) may continue in possession of partnership estate, pay its debts, and settle its business, and shall account to deceased partner's personal representative upon order of probate court. (RSMo 473.223). Probate court may order surviving partner(s) to give security (RSMo 473.227), may commit surviving partner(s) to jail for failure to perform aforementioned duties, and may appoint receiver for partnership estate (RSMo 473.230).

Partnership Name.

See category 17 Intellectual Property, topic 17.01 Trademarks and Tradenames.

Limited Partnership.

Uniform Limited Partnership Act adopted, eff. 1/1/1989 for new Missouri limited partnerships or for foreign limited partnerships doing business in Missouri on 1/1/87. (c. 359).

Limited Liability Partnership.

No partner in registered limited liability partnership shall be liable for obligations chargeable to partnership. Registered limited liability partnership may sue and be sued in its own name. (RSMo 358.150). For provisions applicable to registration of limited liability partnership see 358.440-.510.

See also topics 2.02 Associations, 2.04 Joint Stock Companies.

Mergers and Consolidations.

Domestic general partnership may merge or consolidate with one or more general partnerships, domestic or foreign limited partnerships, limited liability companies, trusts, business trusts, corporations, real estate investment trusts and other associations or business entities. (RSMo 358.520). Must be approved by all partners, unless otherwise specified in partnership agreement. (RSMo 347.720). In case of merger or consolidation of one or more domestic partnerships into surviving partnership, surviving partnership must file articles of merger or consolidation with secretary of state. (RSMo 347.725). Merger or consolidation is effective at later of (1) Date of articles of merger or consolidation; or (2) date set forth in notice of merger or consolidation, not to exceed 90 days after notice accepted for filing. (RSMo 347.725).

3 BUSINESS REGULATION AND COMMERCE

3.01 BANKS AND BANKING:

Uniform Commercial Code adopted. (c. 400). See also topic 3.09 Commercial Code.

Supervision.

Division of Finance, in Department of Consumer Affairs Regulation and Licensing at Jefferson City, has charge of execution of laws relating to banks, trust companies, savings and safe deposit companies, and all banking business in this state, including incorporation and winding up of affairs of dissolved or insolvent banks, under management of Director of Finance. (RSMo 361.020).

Director of Finance passes on all applications of banks to open branch offices. (RSMo 361.230). Director may take charge of any bank: (1) When it refuses to submit its records and affairs to inspection; (2) when it is insolvent; (3) when its continuance in business will jeopardize its depositors or other indebtedness; (4) when any bank desires to have him take charge of its affairs. Director may subsequently permit such bank to resume business, or may request Attorney General to institute proceedings to procure dissolution of such bank. (RSMo 361.370, .380). Director may, during his possession, compound doubtful claims of or against such bank, except deposit claims, and may sell or dispose of property of such bank on order of circuit court. He approves or rejects claims filed against bank, and may declare dividends on order of circuit court. (RSMo 361.450, .470).

He has authority, in connection with any examination or investigation, to compel production of documents and to compel attendance of and administer oaths to any person having knowledge of any issue involved with examination or investigation. (RSMo 361.070). For additional powers see 361.480.

Shares of stock shall be divided into shares having a par value. (RSMo 362.055).

Any banking corporation, with consent of a majority of stockholders, may issue and sell preferred stock of one or more classes, with par value of not less than $20 nor more than $100, which stock will be invalid until 100% of par value thereof in lawful money of U.S. has been paid into treasury of issuing corporation. (RSMo 362.075, 362.090).

Powers of Banks.

Banking corporations organized under laws of Missouri have general banking powers and may hold real estate conveyed to it in satisfaction of debts, and such as it may purchase at sales under judgments, decrees or liens held by it. Bank may exercise powers through subsidiary company. Real estate so acquired by any bank must be sold within ten years thereafter unless there is building thereon occupied by bank as office. Bank may purchase shares in Federal Deposit Insurance Corporation, offer financial consulting, provide securities brokerage services, purchase and sell investment securities, and establish mutual funds (RSMo 362.105-.165), may purchase shares in small business investment companies (RSMo 362.173), and may purchase and hold stock in corporations whose only purpose is to purchase or convey real property which bank or trust company itself could purchase. State banks may offer, through subsidiaries, products and services of national banks. (RSMo 362.105).

Loans.

Various restrictions on amounts of loans depending on type, character of security, etc., are set out in the statutes. (RSMo 362.170).

Fiduciary Powers.

Any bank, organized under laws of state and having paid-up capital of at least $50,000 in city of less than 10,000 population, $100,000 in city of from 10,000 to 50,000 population, or $200,000 in city of more than 50,000 population, may exercise all fiduciary powers granted to trust companies by laws of state. Director, on application and proper showing, must issue certificate showing that bank is entitled to exercise such powers, and thereupon such bank may use words “trust company” as part of corporate name. (RSMo 362.115).

Reserve Depositaries.

Missouri banks and depository trust companies shall maintain reserves against aggregate deposits as provided by Federal Reserve Act. (RSMo 362.225).

Deposits in name of depositor and another, payable to either or survivor, create joint tenancy (RSMo 362.470) except a tenancy by entirety is created when husband and wife are named (758 S.W.2d 197). Payment to either, or survivor after death of one, releases bank prior to receipt by bank of written notice by one tenant not to pay. (RSMo 362.470). Deposits in name of depositor and “pay on death to John Doe” shall, during depositor’s lifetime be depositor’s property and under his sole control. At depositor’s death account shall become property of person named as “pay on death” person. If there are more than one first named persons as depositor, they shall be joint tenants with right of survivorship. (RSMo 362.471). Deposits by or for minor are payable to minor and such payment releases bank. (RSMo 362.465).

Deposits by any person as trustee are payable upon check or order of such person bearing his signature and containing same words as deposit unless bank has further written notice of terms of trust. (RSMo 362.480). Death of person making deposit as trustee of another, without further notice to bank of terms of trust, justifies payment to stated beneficiary. (RSMo 362.475).

Unclaimed Deposits.

See category 21 Property, topic 21.01 Absentees, subhead Escheat.

Uniform Common Trust Fund Act and Official Amendment adopted. (RSMo 362.580).

Investments in Name of Nominee.

Unless expressly forbidden by instruments, etc., setting up trust, any bank or trust company qualified to act as fiduciary may, if co-fiduciaries consent, hold investments in name of nominee. Records must show true owner. (RSMo 362.207).

Liens.

Bank has a lien for rent of safe deposit boxes, and on other personal property left in its keeping as bailee. (RSMo 362.485).

Stop Payment Orders.

Governed by Commercial Code. (RSMo 400.4-403, 404).

Collections.

See topic 3.09 Commercial Code.

Savings and Loan Associations.

Regulated by statute. (c. 369).

Savings Banks.

All statutes governing repealed.

Credit Unions.

Regulated by statute. (c. 370).

Private Bankers.

New private banks may not be established. (RSMo 362.015).

Out-of-State Bank or Trust Company may be licensed by Director of Finance to do limited business in Missouri, on application showing compliance with laws of state of its incorporation and authority to carry on such business, proof of its financial condition and nature of its business, and upon designating Director as its agent for service of process. There is license fee of $250 per year. (RSMo 362.430-.445).

Director of Finance determines eligibility of all out-of-state bank or trust companies applying for license to do banking business in this state, and if satisfied issues license. (See 362.430, .435.) He may revoke such license whenever he finds that such corporation, or any private banker, is carrying on business in unauthorized or unsafe way. (RSMo 362.450).

Out-of-State bank or trust companies or other corporations organized under laws of any state other than Missouri and national banking associations having their principal place of business in such state may act in any fiduciary capacity in Missouri, if so authorized to act in such other state, without being licensed to do banking business or qualifying as foreign corporation, if such other state permits Missouri banks or other corporations or national banking associations with principal place of business in Missouri and authorized to act in fiduciary capacity in Missouri, to act in such capacity either on appointment of agent for service of process in that state, or law of which provides that engagement in any acts in fiduciary capacity in that state is deemed to constitute appointment of state official for valid service of process, or substantially similar provision, provided certificate of reciprocity reciting eligibility to act in such fiduciary capacity is obtained from Missouri Director of Finance. (RSMo 362.600).

Out-of-State bank or trust companies and savings and loan associations may acquire indebtedness in Missouri secured by mortgage or deed of trust on real estate, with or without other security, and service, collect and enforce the same, without becoming licensed herein or doing business within the meaning of any law of Missouri. (RSMo 362.423).

Regional Banking.

Bank holding companies in adjoining states may not acquire bank or trust company less than five years old. (RSMo 362.077).

See also categories 13 Estates and Trusts, topic Executors and Administrators; Family, topic Guardian and Ward.

Taxation.

A tax of 7% measured by net income, minus certain credits, is imposed on national banking associations and state bank and trust companies in lieu of tax on bank shares and tangible and intangible personal property. (RSMo 148.030). Apportionment formula is used for financial institution conducting business in other states. (RSMo 148.097).

3.02 BILLS AND NOTES:

Uniform Commercial Code as amended, in force. See topic 3.09 Commercial Code.

Judgment Notes.

Authority in a note to enter appearance and confess judgment is ineffectual, but does not invalidate note. (220 Mo. 717, 120 S.W. 36).

Attorney fee clauses are enforceable. (See 400.3-419.)

3.03 BILLS OF LADING:

See topic 3.08 Carriers.

3.04 BILLS OF SALE:

See topic 3.23 Sales.

3.05 BLUE SKY LAW:

See topic 3.24 Securities.

3.06 BROKERS:

Real estate brokers are licensed by Missouri Real Estate Commission. License fees are set by commission. Applicant for license must satisfactorily complete salesperson licensing examination prescribed by Commission. (RSMo 339.010, .020). Action brought by broker must allege broker was licensed. (RSMo 339.160). Residential mortgage brokers are licensed by Director of Division of Finance. (RSMo 443.701, et seq.).

Uniform Commercial Code in force. See topic 3.09 Commercial Code.

See also topics 3.24 Securities, Factors; category 16 Insurance, topic 16.01 Insurance Companies.

3.07 BULK SALES:

Repealed. Art. 6 of Uniform Commercial Code regarding bulk transfers has been repealed in Missouri.

3.07A BUSINESS OPPORTUNITIES:

(See 407.2000-407.2021.)

3.08 CARRIERS:

Carriers are subject to provisions of act creating Public Service Commission, which has supervision of execution of the act and determines reasonableness of rates. (cc. 386 and 387).

Carriage charges not in keeping with scheduled fares in effect are prohibited. Pooling arrangements between carriers are forbidden. (RSMo 389.320).

Midwest Interstate Passenger Rail Compact enacted. (RSMo 680.200).

Bills of Lading.

See topic 3.09 Commercial Code.

Liens.

See topic 3.09 Commercial Code.

Gross Receipts Tax on Express Companies.

Express companies must, on or before April 1 of each year, file with State Director of Revenue a report of receipts for the preceding calendar year and pay $2.50 on each $100 of gross receipts from business done within the state. Failure to file and pay tax by May 31 incurs penalty of $100 for each additional day and prevents doing business in state until filing and payment. (RSMo 153.010-.020).

Uniform Commercial Code in force. See topic 3.09 Commercial Code.

Motor Vehicle Carriers.

See category 23 Transportation, topic 23.01 Motor Vehicles.

3.09 COMMERCIAL CODE:

Uniform Commercial Code adopted. (c. 400). Section numbers of Missouri Revised Statutes generally correspond with model code's Official Text, printed in Uniform and Model Acts section except that all parts are prefixed by chapter number and decimal point.

Missouri-specific modifications to model Uniform Commercial Code, and options or alternatives adopted, are as follows:

2A-101 et seq. adopted in 1992.

3-101 Revised Art. 3 adopted in 1992.

4-101 conforming amendments to Revised Art. 3 adopted.

4A-101 et seq. adopted in 1992.

5-101 et seq. Revised Art. 5 adopted in 1997.

8-101 et seq. Revised Art. 8 adopted, but not 1994 amendment thereto.

9-101 et seq. Revised Art. 9 adopted.

11-101 et seq. omitted.

1-109 omitted.

1-201(26) revision to subsection (b) in re notice by publication.

1-209 optional language not adopted.

2-316(5) regarding implied warranties and livestock.

2-318 alternative A adopted.

2A-103(1)(e) optional language adopted but at $50,000.

2A-103(1)(g)(iii)(C) changes regarding written notice and leases.

2A-103(1)(g)(iii)(D) changes regarding written notice and leases.

2A-108 omits subsections (2) and (4).

2A-109 omits subsection (2).

2A-201(4)(a) changes language for Missouri applicability clarification.

2A-216 alternative A adopted.

2A-221(b) omits consumer lease language.

2A-303 omits subsection (7).

2A-406(1)(b) omits consumer lease language.

2A-524(1) changes regarding aggrieved lessors.

3-103(a)(4) redefines “good faith”.

3-307(b)(2) omits clause (iii).

3-415(a) omits applicability of subsection (e).

4-104(a)(3) clarifies dates.

4-106 alternative B adopted.

4-212(b) changes language for Missouri applicability clarification.

4-401(d) regarding post-dated checks.

4-401(e) regarding charges for erroneous check dishonoring.

4-406(b) change to 5 from 7 years.

4A-105(a)(6) redefines “good faith”.

4A-507(c) binds choice of law contracts between banks.

5-102(b) changes language for Missouri applicability clarification.

6-101 et seq. Art. 6 repealed in 2004.

7-204(4) recognizes invalidity of contractual limits.

7-403(1)(b) optional language omitted.

8-117 accounting for fiduciaries holding securities.

8-601 omitted (i.e. not codified and subsequent sections renumbered so as not to correspond w/ the model UCC).

8-602 omitted (i.e. not codified and subsequent sections renumbered so as not to correspond w/ the model UCC).

9-104(a)(2) non-code def. of “deposit”; “fair dealing” def. omitted; redef. “chattel paper”, “good faith”, “original debtor”, “proceeds”.

9-109(d) addition of: assignment of claim for injuries, assignment of right to receive benefits of special needs trust, transfer by government or government agency.

9-201(b) exempts from rule consumer transactions.

9-207(b)(2) risk-of-loss shifts from debtor to party with collateral.

9-210(d)(2) requires security interest and not mere interest.

9-301(1)(c) omits buyer of farm products language.

9-303(d) UCC does not govern perfection of certain liens.

9-311(d) changes language for Missouri applicability clarification.

9-315(a)(1) requires authentication for disposal by secured party to be in writing.

9-317(a) changes language for Missouri applicability clarification.

9-323(b) changes language for Missouri applicability clarification.

9-334(1) declared prevalence over any other applicable law.

9-401(3) alternative language not adopted.

9-402(3) optional language not adopted.

9-402(5) optional language not adopted.

9-402(7) concerning contents of financing statement.

9-403(2) regarding bankruptcy of debtor, when security interest is perfected by creditor.

9-403(6) redesignated 9-403(7).

9-403(7) redesignated 9-403(8).

9-406(1) declared prevalence over any other applicable law.

9-407 optional subsection adopted regarding fees.

9-407(c) clarifies effectiveness of security interest.

9-408(e) declared prevalence over any other applicable law.

9-409(a)(2) “assignment” added.

9-501 designate Secretary of State as locus for fixture filing.

9-502(b) optional language adopted.

9-509 subsequent subsections redesignated accordingly, and thus do not correspond with the model UCC.

9-513(d) concerning financing statements and transmitting utilities.

9-515(b) omits “public finance transaction” language.

9-516(b)(3)(D) optional language adopted.

9-519 subsection (i) not adopted.

9-519(b) optional language adopted.

9-519(d) optional language adopted.

9-519(f) alternative A adopted.

9-521 optional language adopted.

9-522(a) alternative A adopted.

9-523(c)(1)(A) optional language adopted.

9-523(d) second set of bracketed language adopted.

9-523(e) business days allowed increased to 3 from 2.

9-523(f) second set of bracketed language adopted.

9-527 regarding reporting requirements to Secretary of State.

9-602 regarding rights of debtor/obligor.

9-613(1)(E) change language to “disposition” from “sale”.

9-615(g) agricultural lien language omitted; notice changed from knowledge.

9-628(d) not adopted.

9-628(e) section redesignated 9-628(d).

9-710 concerning Art. 9 modification and definitions.

10-101 omitted.

10-102(2) designated Missouri’s 10-101.

10-103 omitted.

10-104 subsection (2) omitted.

Forms.

See end of this Digest.

See also topics: Banks and Banking, Bills and Notes, Brokers, Carriers, Contracts, Factors, Frauds, Statute of, Sales, Securities, Warehousemen; categories Business Organizations, topic Corporations; Civil Actions and Procedure, topic Limitation of Actions; Debtor and Creditor, topics Assignments, Fraudulent Sales and Conveyances, Liens, Pledges; Documents and Records, topics Records, Seals; Mortgages, topic Chattel Mortgages.

3.10 CONDITIONAL SALES:

See topic 3.23 Sales.

3.11 CONSIGNMENTS:

See topic 3.09 Commercial Code; see also 407.900 et seq.—Art Dealers & Consignments.

3.12 CONSUMER PROTECTION:

Unsolicited merchandise may be refused or deemed gift and be used or disposed of freely without any obligation to sender. (RSMo 407.200).

Unsolicited Commercial Email.

Merchant may not send email if subscriber has asked merchant not to, commercial email must contain “ADV” at beginning of subject line, and merchant may not use false or misleading information in subject line. (RSMo 407.1138).

Advertising.

Misdemeanor to recklessly make or cause to be made false or misleading statement in any advertisement addressed to public or to substantial number of persons. (RSMo 570.160). Misdemeanor to advertise sale of property or services with purpose not to sell or provide property or services: (1) At price offered; (2) in quantity sufficient to meet reasonably expected public demand, unless quantity specified in advertisement; or (3) at all. (RSMo 570.170).

Credit User Protection Law.

Regulates credit services. (RSMo 407.430-.436).

Credit Card Safety.

Merchant may print no more than last five digits of credit card user’s account number on sales receipt provided to cardholder. (RSMo 407.433).

Social Security Number Protection.

Person or entity may not make individual’s social security number available to others nor require transmission of individual’s social security number over Internet. (RSMo 407.1355).

Home Solicitation Sales.

Generally, buyer may cancel until midnight of third business day after day buyer signs agreement or offer to purchase. (RSMo 407.705). If cancelled, seller within ten days must tender to buyer any payments, note or other evidences of indebtedness with “cancelled” stamped conspicuously on face. (RSMo 407.715[1]). If down payment includes goods traded in, goods must be tendered in substantially as good condition as when received by seller or buyer may elect to recover amount equal to trade-in allowance stated in agreement. (RSMo 407.715[2]). Buyer may retain and has lien on goods delivered to him by seller until seller complies with this section. (RSMo 407.715[3]).

Lemon Law.

If manufacturer, through its authorized dealer or agent, cannot conform consumer's new motor vehicle to any express warranty by repairing or correcting condition which impairs use, market value or safety of vehicle after reasonable number of attempts, manufacturer must, at its option, either replace vehicle or refund full purchase price, less reasonable allowance for consumer's use of vehicle. (RSMo 407.567). It is presumed that reasonable number of repair attempts have been taken if (1) same nonconformity has been subject to repair four or more times or (2) vehicle is out of service for cumulative total of 30 or more working days. (RSMo 407.571). Consumer must give manufacturer written notice of need for repair, and manufacturer has ten calendar days to correct nonconformity. (RSMo 407.573[2]). Actions under this section must be brought within six months after expiration of warranty, or within 18 months following date of delivery of vehicle, whichever is earlier. (RSMo 407.573[3]). If manufacturer has established informal dispute settlement procedure, consumer must utilize procedure, and actions must be brought within 90 days following final action of panel. (RSMo 407.573[3]; 407.575). If consumer prevails, costs and attorney's fees are recoverable. (RSMo 407.577).

Motor Vehicle Odometers.

Misdemeanor to advertise for sale, sell, install or have installed any device which causes odometer to register mileage other than true mileage driven. (RSMo 407.516). Felony if, with intent to defraud, one disconnects, resets, or alters odometer of motor vehicle with intent to change indicated number of miles. (RSMo 407.521). Misdemeanor if, with intent to defraud, one operates motor vehicle less than ten years old knowing that odometer is disconnected or not functioning. (RSMo 407.526). If odometer incapable of registering same mileage as before repair or replacement, odometer must be adjusted to read zero with written notice attached to left door frame of vehicle by owner or agent specifying prior mileage and date odometer was repaired or replaced and no one may remove or alter notice. (RSMo 407.531). Any person transferring ownership of motor vehicle must do so by assignment of title and must place mileage at time of transfer above signature of transferor. If true mileage is different from odometer reading or if true mileage is unknown, statement from transferor relating to all facts known concerning true mileage must accompany assignment. (RSMo 407.536[2]). There are criminal penalties available to staff —for owner's or transferee's or operator's non-compliance. (RSMo 407.516-.544). Civil remedies are also available. (RSMo 507.546, .551).

Time-Share Plans.

Purchaser of time-share plan has five days to cancel. (RSMo 407.620).

Title Loans.

(RSMo 367.500-.533) includes pawnbroker loans and other small loans.

Plain Language.

No "plain language" statute.

Usury.

See topic 3.19 Interest.

Uniform Commercial Code adopted. See topic 3.09 Commercial Code.

Uniform Deceptive Trade Practices Act not adopted.

Merchandising Practices Act.

(RSMo 407.010-.436).

Health Spa Contracts Provisions.

(RSMo 407.325-.340).

Pyramid Sales Schemes.

(RSMo 407.400-.420).

New Farm Machinery Warranty.

(RSMo 407.585-.592).

Rental-Purchase Agreements.

(RSMo 407.660-.665).

Buyers’ Clubs.

(RSMo 407.671-.679).

Travel Clubs.

(RSMo 407.1240-.1252).

Motor Vehicle Rentals.

(RSMo 407.730-.748).

Wheelchair Lemon Law.

(RSMo 407.950-.97).

Telemarketing & No Call.

(RSMo 407.1070-.1132).

3.13 CONTRACTS:

See categories 10 Documents and Records, topic Seals; Family, topic Infants.

Uniform Commercial Code in force. See topic 3.09 Commercial Code.

3.14 FACTORS:

Liens.

See topic 3.09 Commercial Code.

Uniform Commercial Code in force. See topic 3.09 Commercial Code. See also topic 3.06 Brokers; category 21 Property, topic 21.15 Powers of Attorney.

3.15 [RESERVED]

3.16 FRAUDS, STATUTE OF:

No action shall be brought to charge any executor or administrator, upon any special promise to answer for any debt or damages out of his own estate, or to charge any person upon any special promise to answer for the debt, default or miscarriage of another person, or to charge any person upon any agreement made in consideration of marriage, or upon any contract made for the sale of lands, tenements, hereditaments, or an interest in or concerning them, or any lease thereof, for a longer time than one year, or upon any agreement that is not to be performed within one year from the making thereof, unless the agreement upon which the action shall be brought, or some memorandum or note thereof, shall be in writing and signed by the party to be charged therewith, or some other person by him thereto lawfully authorized, and no contract for the sale of lands made by an agent shall be binding upon the principal, unless such agent is authorized in writing to make said contract. (RSMo 432.010).

All leases, estates, interests of freehold or term of years, or any uncertain interest in realty, not in writing, have the force and effect of leases or estates at will only. (RSMo 432.050). No lease, estate, interest, either of freehold or term of years, or any uncertain interest of, in, to or out of any lands, tenements or hereditaments can be assigned or granted unless in writing signed by the party assigning or granting the same or his lawful agents authorized by writing or by operation of law. (RSMo 432.060).

Contracts of Sale.

Uniform Commercial Code in force. See topic 3.09 Commercial Code.

Part Performance.

Court of equity will enforce verbal contract if plaintiff shows: (a) Performance of acts which are cogent evidence of existence of pleaded contract; (b) terms of verbal contract shown by clear, cogent, unequivocable and convincing testimony; (c) prove acts that are evidence of existence of pleaded contract were done in reliance on contract and that as result of acts positions of parties were so changed that to permit other parties to rely on statute of frauds would result in gross injustice. (429 S.W.2d 269).

Representations.

No action may be brought to charge any person upon or by reason of any representation or assurance made concerning the character, conduct, credit, ability, trade or dealings of any other person, unless such representation or assurance be made in writing and subscribed by the party to be charged thereby, or by some person thereunto by him lawfully authorized. (RSMo 432.040).

See also categories 5 Civil Actions and Procedure, topic Limitation of Actions; Estates and Trusts, topic Trusts; Family, topic Infants.

3.17 [RESERVED]

3.18 INFORMATION TECHNOLOGY, INTERNET AND NEW MEDIA:

Missouri Digital Signatures Act.

Repealed, 2003.

Uniform Electronic Transactions Act adopted. (RSMo 432.200 to 432.295).

Uniform Computer Information Transactions Act not adopted.

3.193.16 [RESERVED]

3.17 INTEREST:

Legal Rate.

9% in absence of agreement fixing rate. (RSMo 408.020).

Maximum Rate.

No limit on interest allowable for loans to corporations, partnership or LLC; business loans of $5,000 or more, real estate loans other than residential real estate loans, loans of less than $5,000 secured by real estate used for agriculture, and loans of $5,000 or more secured solely by stock, bonds, bills of exchange, certificates of deposit, warehouse receipts, or bills of lading. (RSMo 408.035). Other loans except certain small loans (see subhead Small Loans, infra) maximum interest 10% if agreed in writing except that where "market rate" (monthly index of long term U.S. Government Bond yields for second preceding calendar month prior to beginning of calendar quarter plus 3% rounded to nearest 1/10%) is greater than 10%, parties may agree in writing to rate of interest not exceeding "market rate." (RSMo 408.030). "Market rate" determined by Director of Division of Finance on or before 20th day of last month of quarter for next quarter. (RSMo 408.030[3]).

In lieu of percentage rate of interest, parties may agree in writing to fee of $10 on any loan but no lender shall permit any borrower to be indebted to him on two or more contracts with result of contracting for or receiving fees exceeding that permitted by law. (RSMo 408.031).

Payday loans fees restricted to 75% of initial loan amount provided loan is for less than $500. (RSMo 408.500).

Judgments.

9% or higher lawful rate stipulated in contract. (RSMo 408.040).

In tort actions, if claimant has made demand for payment of claim or offer of settlement of claim, to party, parties or their representatives and amount of judgment or order exceeds demand for payment or offer of settlement, prejudgment interests, at rate of 9%, shall be calculated from date 90 days after demand or offer was made, or from date demand or offer was rejected without counteroffer whichever is earlier. Provided such demand was in writing, sent by certified mail, and accompanied by affidavit of claimant. (RSMo 408.040).

Open Accounts.

9% from time demand of payment is made. (RSMo 408.020).

Small Loans.

Lender must register with Director of Finance. Registration fee of $300 (prorated for less than a year). Additional registration required, with $300 fee, to Director of Revenue. Separate certificate required for each office or place of business. (RSMo 367.140). If lender not subject to examination or required to make reports under city ordinances, report of business conducted during preceding calendar year must be filed with Director on or before Apr. 30 and Director may examine business at any time. (RSMo 367.150, .160). Director issues regulations governing types and limits of insurance which may be sold in connection with loans, cost of which shall not exceed standard rates and insurer must be authorized to do business in Missouri. (RSMo 367.170). Registrant or employees may be licensed as insurance agent. Insurance premiums cannot be considered as interest, service charges or fees. Renewal licensing processes may be avoided by posting of $1,000 surety bond of irrevocable letter of credit. (RSMo 367.170, .190). Suspension or revocation of certificate only after ten days notice and hearing before Director and as to place of business where violation occurred. (RSMo 367.190). Violations by registered lenders or transacting such business without certificate are misdemeanors. (RSMo 367.200).

On loans to corporations and loans not secured by real estate, nonprocessed farm products, livestock, farm machinery or crops, lender may contract for and receive interest at rates agreed to by parties. (RSMo 408.100).

Interest cannot be discounted or deducted from principal or received at time loan is made, nor compounded. (RSMo 408.120). Repayment may be in consecutive monthly installments, none substantially greater than any preceding installment, but first installment may be payable any time within 45 days. (RSMo 408.120[1]). Repayment may also be as parties agree, provided agreement allows for payment of simple interest at rates not to exceed those authorized by 408.100 and 408.200. (RSMo 408.120[2]).

Statement must be delivered to borrower at time loan is made showing name and address of lender and at least one of borrowers, date of loan, schedule of installments or description thereof, type of security, principal amount, rate or amount of interest, prepayment privilege and if interest has been added to principal, that it is subject to interest calculation refund requirements if loan is prepaid in full month or more before final installment date. (RSMo 408.130).

No further or other charge or amount whatsoever may be directly or indirectly charged, contracted for or received for interest, service charges or other fees as incident to extension of credit, except insurance premiums as provided in 367.100-.200, and except on loans for 30 days or longer which are other than “open end credit”; fee not to exceed 5% of principal amount loaned not to exceed $75, but no fee for extension, refinance, restructure or renewal unless investigation made on application for extension; lawful fees actually and necessarily paid out for filing, recording or releasing instruments securing loan; if contract so provides, charge for late payment on each installment in default not less than 15 days not exceeding 5% of installments due or $50, whichever is less, charges or premiums for insurance written in connection with loan against loss of or damage to property or against liability arising out of ownership or use of property pursuant to 367.170, charges assessed for processing refused instrument plus handling fee of not more than $25; and if contract or promissory note, signed by borrower, provides for attorney fees, and if necessary to bring suit, attorney fees may not exceed 15% of amount due and payable under contract or promissory note. Fee, if agreed upon in advance, to defer three monthly loan payments (not more than once in 12 months); and, if open-ended credit contract is tied to transaction account, advance fee of $25 or 5%, whichever is less, to be added to credit amount (RSMo 408.140); and reasonable towing costs and expenses in repossession and resale in accordance with 400.9 et seq.

If excess interest on small loans is charged or received except as result of error, lender shall be barred from recovery of any interest on contract and upon demand return all interest received. (RSMo 408.150).

False advertising regarding interest, charges, terms or conditions of loans prohibited. (RSMo 408.160).

Lender must recompute amount of interest earned to date of prepayment on basis of same rate, or deduct from amount of interest contracted for proportion of such amount that sum of monthly balances prepaid bears to sum of all monthly balances of contract, but if prepaid at any time, buyer receives refund calculated by actuarial method. Lender shall not retain more interest than is actually earned if note or loan contract is prepaid. (RSMo 408.170). Different calculations for loans greater than $5,000. (RSMo 408.140).

Provisions of 408.120-408.180-.200 do not apply where rate of interest is no more than 10% simple interest or law provides no limit to interest chargeable. (RSMo 408.190).

Retail credit sales charges regulated by statute. (RSMo 408.250-.375). See topic 3.23 Sales, subhead Retail Credit Sales.

Usury invalidates any security interest in personal property or any lien thereon (RSMo 408.070) but does not avoid debt (196 S.W.2d 442), and creditor may recover 9% interest instead of contract rate (RSMo 408.060; 98 Mo. App. 382, 72 S.W. 132). See, however, as to small loans, subhead Small Loans, supra. Where usury has been collected, excess over legal rate is applied on principal or debtor may recover such excess with costs. Corporation cannot interpose defense of usury. (RSMo 408.060).

3.18 [RESERVED]

3.19 LICENSES, BUSINESS AND PROFESSIONAL:

Licenses are required for large number of businesses and occupations. Among these are acupuncturists (RSMo 324.475 et seq.), architects (c. 327), athletic trainers (RSMo 334.700-334.725), auctioneers (c. 343), audiologists (c. 345), bail bond agents (RSMo 374.695 et seq.), barbers (c. 328), bingo operations (RSMo 313.005-.080), billiard table keepers, hotels, motels and resorts (c. 315), boat dealer (RSMo 301.550-301.573), boxing and wrestling (c. 317), children’s boarding homes and child placing agencies (RSMo 210.484), child care facility (c. 210), chiropodists (c. 330), chiropractors (c. 331), clinical perfusionists (RSMo 324.125 et seq.), cosmetologists, hairdressers and manicurists (c. 329), dentists (c. 332), dieticians (RSMo 324.200), embalmers (c. 333), engineers (c. 327), geologists (RSMo 256.456), hearing aid fitters and dealers (c. 346), health care providers (c. 384), hospitals (c. 197), house movers (RSMo 324.700 et seq.), installers of manufactured homes (RSMo 700.656), insurance brokers (RSMo 375.104 et seq.), interpreter for the deaf (RSMo 209.285), landscape architects (c. 327), liquor sales (c. 311), manufacturers (RSMo 150.300-.370), marital and family therapists (RSMo 337.700 et seq.), massage therapists (RSMo 324.240 et seq.), meat plants (RSMo 265.410), merchants, itinerant vendors and peddlers (RSMo 150.100-.290), midwives, physicians and surgeons (c. 334), motor fuel terminal storage (RSMo 142.295), motor vehicle time sales financing (c. 365), motor vehicle dealer (RSMo 301.550-301.572), nurses (c. 335), nursing homes (cc. 198, 344), optometrists (c. 336), osteopaths (c. 334), pharmacists (c. 338), physical therapists (c. 334), physicians assistants, respiratory care therapists, and anesthesiologist assistants, plumbers (c. 341), podiatrist (c. 330), preneed funeral contract sellers and providers (c. 333), private fire investigators (RSMo 324.600 et seq.), private investigators (RSMo 324.1100 et seq.), public adjusters and adjuster solicitors (c. 305), psychologists and social workers (c. 337), real estate agents, brokers and appraisers (c. 339), residential mortgage brokers (RSMo 408.653), retail sales of, transportation of, or installation of equipment using liquefied petroleum gas (RSMo 323.060), sale and issue of checks, drafts and money orders by other than banks, trust companies, savings and loan associations or Federal government or its agencies (RSMo 365.030), shows, circuses and amusements (c. 316), speech language pathologists (c. 345), stationary engineers (c. 342), surveyors (c. 327), tattoo artists (RSMo 324.520 et seq.), theatrical booking agency (RSMo 289.100-.130), and veterinarians (c. 340.200 et seq.).

Commercial travelers need not be licensed unless they are itinerant vendors or peddlers. An itinerant vendor is defined as one conducting a temporary or transient business of selling goods, wares and merchandise for not more than 120 days in a room, building or other structure for the exhibition and sale of goods, etc. (RSMo 150.380). A peddler is defined as one who goes from place to place to sell patents, patent rights, patent or other medicines, lightning rods, goods, wares or merchandise, except pianos, organs, sewing machines, books, charts, maps and stationery, agricultural and horticultural products, including milk, butter, eggs and cheese. (RSMo 150.470).

Hunting and Fishing.

Licenses are required for hunting and fishing and may be procured from Missouri Conservation Commission online or from licensing vendors. Motorboat numbering required. (RSMo 306.020-.080).

Collection Agencies.

No Legislation.

See also topics 3.06 Brokers, Factors, Securities, Warehousemen; categories 2 Business Organizations, topic Corporations; Family, topic Marriage; Insurance, topic Insurance Companies; Legal Profession, topic Attorneys and Counselors; Transportation, topic Motor Vehicles.

3.20 MONOPOLIES, RESTRAINT OF TRADE AND COMPETITION:

§ 416.031, and is to be construed in harmony with ruling judicial interpretations of federal statutes also restricting contracts, etc. in restraint of free trade. (RSMo 416.141). Person violating Sherman Act type provisions is guilty of misdemeanor, punishable by maximum of one year in county jail, fine up to $50,000 or both. (RSMo 416.051[1]). Attorney general is charged with enforcement. (RSMo 416.051[2]). Persons injured by such acts may recover triple damages. (RSMo 416.121[1]). Statute of limitations for all actions is four years from date cause of action accrued. (RSMo 416.131[5]). Successful prosecution to final judgment by state in any civil or criminal action will be prima facie evidence against defendant in any action brought by another party within one year of date of judgment. (RSMo 416.061[5]).

Injunction.

Attorney general or person injured may institute action to enjoin unlawful practices. (RSMo 416.121).

Missouri Motor Fuel Marketing Act.

Business cannot sell motor fuel below cost with intent to injure competition as compared to that offered by others at same distribution level. (RSMo 416.615). Business engaged in commerce in motor fuel must publicly disclose transfer price paid for distribution of motor fuel at another marketing level. (RSMo 416.610). Violations subject to $1,000 to $5,000 civil penalty per day. (RSMo 416.625). Attorney General enforces and may seek civil penalties and injunctions against below-cost sales. (RSMo 416.630). Persons within relevant geographic area damaged by below-cost sales may sue for damages and injunctive relief. Treble damages and attorneys' fees authorized. (RSMo 416.635).

Restrictive Employment Covenants.

Reasonable covenants not to solicit, recruit, hire or otherwise interfere with employment are enforceable and not restraint of trade. (RSMo 431.202).

3.21 NEGOTIABLE INSTRUMENTS:

See topic 3.02 Bills and Notes.

3.22 RESTRAINT OF TRADE:

See topic 3.20 Monopolies, 3.22 Restraint of Trade and Competition.

3.23 SALES:

Bills of Sale.

Not required, but see (991 S.W.2d 157). See category 23 Transportation, topic 23.01 Motor Vehicles.

Product Liability.

Privity not required in action for injuries on implied warranty theory. (372 S.W.2d 41).

Products liability claim means that portion of plaintiff's damages claim is based on theory that defendant is strictly liable because: (1) Defendant, wherever situated in chain of commerce, transferred product in course of his business; and (2) product was used in manner reasonably anticipated; and (3) either or both of following: (a) product was then in defective condition unreasonably dangerous put to reasonably anticipated use, and plaintiff was damaged as direct result of such defective condition or as existed when product was sold, or (b) product was then unreasonably dangerous when put to reasonably anticipated use without knowledge of its characteristics, and plaintiff was damaged as direct result of product being sold without adequate warning. (RSMo 537.760).

Defendant whose liability is based solely on his status as seller in stream of commerce may be dismissed from products liability claim if defendant provides affidavit that he is aware of no facts or circumstances upon which verdict might be reached against him, other than his status as seller in stream of commerce and there is no credible contradicting evidence. (RSMo 537.762).

State of art shall be plead as affirmative defense and shall be complete defense for action based on strict liability for failure to warn of dangerous condition of product if found. (RSMo 537.764).

Pure comparative fault shall apply to products liability claims. (RSMo 537.765).

Conditional Sales.

See topic 3.09 Commercial Code.

Service Contracts.

Governed by 385.200 et seq.

Motor vehicle time sales subject to regulation similar to retail credit sales; persons in business of purchasing retail installment contracts involving motor vehicles regulated. (c. 365).

Uniform Commercial Code in force. See topic 3.09 Commercial Code.

Retail credit sales involving tangible chattels or services thereon are regulated by statute as to contract content and execution, including written listing of price, downpayment, insurance, fees, time charge, balance and sales price before signing by buyer. Printing must be in eight point type with ten point notice (RSMo 408.260). Limits are placed on insurance, collection charges, and time charges. Buyer must receive copy of contract and may prepay in full before maturity. (RSMo 408.250-.370). Credit may not be denied on basis of sex or marital status, age, race or religion. (RSMo 408.550).

Retail Time Contract.

On balance of principal, on contracts payable in substantially equal successive monthly payments, in lieu of interest charge, retailer may collect as agreed to by parties under retail time contract. For retail time contracts not providing for substantially equal successive monthly payments, in lieu of any other charge, retailer may collect minimum charge of $12 per contract. (RSMo 408.300).

Retail Charge Agreement.

On balance of principal, retailer may collect time charge per month also at rate agreed to by parties, except as otherwise provided by law. (RSMo 408.300).

Bulk Sales.

Repealed. Art. 6 of Uniform Commercial Code regarding bulk transfers was repealed in Missouri.

3.24 SECURITIES:

Uniform Securities Act adopted. (c. 409). Section numbers of Missouri Revised Statutes generally correspond with those of Official Text printed in Uniform and Model Acts section except that all articles are prefixed by chapter number and decimal point. Significant Missouri variations from Official Text of 2002 version are set forth in table below:

2002 Uniform Securities Act Provision Missouri Variation (102) Omits subsection (1); adds definition of “commissioner”; (412) Complete rewrite discussing considerations taken into account by commissioner attendant to issuance of order; (601) Proscribes applicability and purpose of act; determines roles of various government officers in Securities regulation; (603) Adds subsection (d) concerning consent injunctions; (603) Adds subsection (e) concerning creation of “Investor Restitution Fund”; (604) Adds subsection (h) regarding commissioner’s capacity to enter into administrative consent orders; (605) Adds subsection (g) regarding legal relation between this section and R.S.Mo. c. 536; (202[14]) Adds “a sale or an offer to sell securities of an issuer, if part of a single issue in which…”; (202[21]) Adds subsection (E) of “current employees”; (304[b][17]) Substitutes “changes in financial position” for “a statement of cash flows”; (305[b]) Provisions for determination of filing and registration fees; (401[b][1][B]) States “a broker-dealer registered under this act or not required to be registered a broker-dealer under this act”; (404[a]) Missouri deletes “representative” following “from registration as an insurance advisor”; (405[d]) Missouri adds “and shall expire on December 31 each year unless renewed” to end of provision; (503[b]) Missouri clarifies applicability of R.S.Mo. 556.051 and 056 and places burdens of proof in criminal proceedings; (508[a]) Missouri bifurcates maximum criminal sanctions based upon knowledge; sets fine and imprisonment limits; (602[a]) Adds subsection (4), provision for appointment of special investigators; (603[b][2]) Adds subsection (E) consisting in an additional remedial option and how to calculate; (604[b]) Procedure and effectiveness of commissioner’s order; (604[e]) Directs payments, at option, to investor education and protection fund; (607[b][5]) Deletes “unless used as a business telephone number” following “residential phone number”; (609[a]) Procedure for person(s) aggrieved by order of commissioner; reference R.S.Mo. c. 536; and (609[b]) Provision for judicial review of commissioner’s orders

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609(b)	Provision for judicial review of commissioner’s orders

Registration Procedure.

§ 202(a), Immediately following § 202(a)(5): Missouri does not require publication. § 202(b), No filing fee subject to refund. § 202(d), Missouri uses net capital or minimum ratio between net capital and aggregate indebtedness. § 202(e), Commissioner may require bonds of up to $25,000. No bond required where net capital exceeds $100,000. Missouri adds subsection (f) allowing commissioners to require fidelity bonds of up to $250,000 covering employees, general partners and officers.

Denial, Revocation, Suspension, Cancellation, and Withdrawal of Registration.

§ 204(a)(2)(J), Missouri adds requirement of keeping records required by this act or any commission rule or order. § 204(b)(6), Missouri adds provision that no examination is required of those registered as broker-dealers or agents or who were general partners or officers of registered broker-dealers at time of adoption of Act who have been registered continuously since. § 204(f), Missouri substitutes its own procedure.

Registration by Notification.

§ 302, Missouri deletes (a)(2) of Uniform Act. Missouri deletes (b)(6) of Uniform Act. § 302(c), Registration statement becomes effective at 2 p.m. central time of second full business day after filing. (RSMo 409.302[c]).

Registration by Coordination.

§ 303(b)(3), Missouri deletes “filed under the Securities Act of 1933.” § 303(c)(2), Registration statement must be on file 15 days. Missouri adds a subsection (d) which allows registration by coordination of securities for which a prospectus or offering circular is required by S.E.C. regulations.

Registration by Qualification.

§ 304(b)(17), Commissioner may require supporting information at applicant’s expense.

Provisions Applicable to Registration Generally.

§ 305(b), Registration fee: 1/20 of 1% of amount maximum aggregate offering price exceeds $100,000, total fee not to exceed $900. In case of withdrawal of registration statement or pre-effective stop order, commissioner retains filing fee. § 305(f), Omitted by Missouri. § 305(g), Missouri 409.305(f). Missouri adds requirement of deposit in escrow of securities to be issued to promoter, issued to a promoter within past three years, issued to promoter for consideration substantially different from public offering price within past ten years or issued to any person for consideration other than cash. § 305(h), Missouri § 409.305(g). § 305(i), Missouri § 409.305(h). Similar to Uniform Act § 305(i) except Missouri omits second and third sentences of 305(i) of

Uniform Act. § 305(k) omitted and in its place § 305(j) providing that registration statements involving securities of investment company or other similar securities involving continuous offering may request registration of indefinite amount of securities but for such securities annual report stating amount sold in fiscal year and payment of registration fee of 1/20th of 1% of amount sold in fiscal year required within 30 days after end of issuer's fiscal year but in no case shall fee exceed $3,000.

Denial, Suspension, and Revocation of Registration.

§ 306(a)(2)(E), Missouri also allows stop-order if any aspect of offering is substantially unfair, unjust, inequitable or oppressive, or if issuer's enterprise is based upon unsound business principles.

General Provisions.

§ 401(b), Agent includes a broker-dealer, a partner, officer or director of a broker-dealer, or a person occupying a similar status or performing similar functions. Partner, officer, or director of broker-dealer, however, is agent only if he otherwise comes within definition of agent under § 401(b). In § 401(b)(1) Missouri adds, as exempted transactions, §§ 402(a)(4), (6), (9), and security issuance by Missouri agricultural cooperatives. § 401(c), Missouri: a broker-dealer may also be an agent. § 401(1), Missouri adds contract or bond for sale of realty not situated in Missouri on deferred payment or installment plan.

Exemptions.

§ 402(a)(9), Commissioner must be notified in writing 30 days before security sold or offered under this subsection. § 402(a)(12), adopted in Missouri under § 409.402(a)(5). § 402(b), Missouri does not exempt transactions in oil. § 402(b)(3), Missouri omits an unsolicited order to buy. §§ 402(b)(9) and (10) Missouri omits these and the following are substituted:

§ 409.402(b)(9)—"[A]ny transaction by an issuer in a security of its own issue if immediately thereafter the total number of persons who are known to the issuer to have any direct or indirect record or beneficial interest in any of its securities (but not including persons with whom transactions have been exempted by paragraph [8] of this subsection) does not exceed twenty-five and if no commission or other remuneration is paid or given to anyone for procuring or soliciting the transaction;"

§ 409.402(b)(10)—"[A]ny transaction by an issuer in a security of its own issue if (A) during the twelve months' period ending immediately after such transaction the issuer will have made no more than fifteen transactions exempted by this paragraph (other than transactions also exempted by paragraphs [8] and [9]), and (B) the issuer reasonably believes that the buyer is purchasing for investment and the buyer so represents in writing and (C) no commission or other remuneration is paid or given to anyone for procuring or soliciting the sale; but the commissioner may by rule or order, as to any security or transaction or any type of security or transaction, withdraw or further condition this exemption, or increase or decrease the number of prior transactions permitted by clause (A) or waive the conditions in clauses (B) or (C) with or without the substitution of a limitation on remuneration;".

Uniform Simplification of Fiduciary Security Transfers Act adopted. (RSMo 403.250-.350).

Uniform Commercial Code in force. See topic 3.09 Commercial Code.

See also category 2 Business Organizations, topic 2.03 Corporations.

3.25 STATUTE OF FRAUDS:

See topic 3.15 Frauds, Statute of.

3.26 TRUST RECEIPT SECURITY:

Uniform Commercial Code in force. See topic 3.09 Commercial Code; category 8 Debtor and Creditor, topic 8.15 Pledges.

3.27 WAREHOUSEMEN:

License and Bond.

Warehouseman doing business in cities of over 25,000 inhabitants and other than grain storage must procure license from circuit court of county, or circuit court of city of St. Louis, where warehouse is situated, and must file bond or legal liability insurance policy with clerk of such court in sum of $25,000. (RSMo 415.010-.030).

Grain Warehouses.

Warehouses equipped for handling, shipping, and storing grain (unless used exclusively for storage of grain grown by owners or operators) are subject to Missouri Grain Warehouse Law. (RSMo 411.015). Must display sign at main entrance and on or about scale of warehouse notifying whether warehouse is licensed under state or federal warehouse laws. (RSMo 411.778).

Lien.

See topic 3.09 Commercial Code.

Warehouse Receipts.

See topic 3.09 Commercial Code.

Warehousemen are prohibited from issuing receipts, or other vouchers for grain without having actually received same in store or on premises of warehouse. (RSMo 411.451[1]).

Uniform Commercial Code in force. See topic 3.09 Commercial Code.

4 CITIZENSHIP

4.01 ALIENS:

Property.

Persons not citizens or residents of U.S. and corporations not created under laws of U.S. are prohibited from acquiring by grant, purchase, devise or descent tracts of agricultural land larger than five acres, and from holding leaseholds of ten or more years or beneficial interests in such tracts under contracts of sale or similar arrangements. These restrictions, however, do not apply to agricultural land located in counties which border state of Oklahoma which was owned prior to Jan. 1, 1995. No restrictions on ownership of personal property or other real estate. (RSMo 442.560, .571).

5 CIVIL ACTIONS AND PROCEDURE

5.01 ACCORD AND SATISFACTION:

Common law rules govern. Must be pleaded. (C.R. 55.08; 509.090).

Uniform Commercial Code in force. See category 3 Business Regulation and Commerce, topic 3.09 Commercial Code.

See also topic 5.15 Judgments; category 20 Mortgages, topic 20.04 Mortgages of Real Property.

5.02 ACTIONS:

Federal Rules of Civil Procedure form basis of Civil Rules. (C.R. 41-102). See topic 5.19 Practice.

There is but one form of action, known as a Civil Action. (C.R. 42.01; 506.040).

Equity.

There are no separate courts of law and equity, but the distinction between legal and equitable causes and principles is preserved. (RSMo 506.010; but see—509.170).

Conditions Precedent.

None of general application.

Commencement.

See topic 5.20 Process.

Parties.

Civil actions must be prosecuted in name of real party in interest, except in case of executors, administrators, guardians, trustees of express trusts, named party to contract for benefit of another or others expressly authorized by statute. (C.R. 52.01).

Person must be joined in action if: (1) In person's absence complete relief cannot be accorded among those already parties; or (2) person claims interest relating to subject of action and disposition of action in person's absence may (a) impair or impede person's ability to protect that interest or (b) leave any persons already parties subject to substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of person's claimed interest. If third person has not been joined, court must order that person be made party. If person should join as plaintiff but refuses to do so that person may be made defendant. (C.R. 52.04; 507.030).

If such person cannot be made a party, court must determine whether action should proceed among parties before it or should be dismissed, absent party being regarded as indispensable. Rule prescribes factors to weigh as to determine "indispensability". (C.R. 52.04; 507.030).

All persons asserting or having asserted against them any right jointly, severally or in the alternative arising from same occurrences or transactions may be joined as plaintiffs or defendants respectively, if any question of law or fact common to all will arise in the action. (C.R. 52.05).

Class Actions.

Federal rules obtain. (C.R. 52.08; 407.025; 507.070).

Intervention.

On timely application by motion accompanied by pleading stating claim or defense sought to be interposed, intervention must be allowed: (1) When a statute confers an unconditional right; (2) when applicant claims an interest relating to subject of action and disposition of action may impair or impede his ability to protect that interest, unless applicant's interest is adequately represented by existing parties. Intervention may be permitted: (1) When a statute confers a conditional right; (2) when applicant's claim or defense and main action have a common question of law or fact; or (3) when validity of constitutional provision, statute, regulation or ordinance is in question; court may notify legal officer of state or subdivision thereof. (C.R. 52.12; see generally 507.090).

Interpleader.

Persons having claims against the plaintiff may be joined as defendants and required to interplead when plaintiff may be exposed to double or multiple liability. Defendant exposed to similar liability may also obtain such interpleader. (C.R. 52.07; see generally 507.060 [as to defendants joined only]).

Third Party Practice.

Federal rules obtain. (C.R. 52.11[a]). Additionally, if counterclaim is served against plaintiff, he may cause third party to be brought in under circumstances which under this rule would entitle defendant to do so. (C.R. 52.11[b]). Where third-party defendant is liable to plaintiff or anyone holding similar position or claim on which third-party plaintiff has been sued, execution by third-party plaintiff on judgment against third-party defendant limited to amount third-party plaintiff has paid on judgment obtained against him by obligee. (C.R. 52.11[c]; see generally 507.080).

Joinder of Causes of Action.

Party asserting claim as original, counterclaim, cross claim, or third-party claim, may join either as independent or alternate claims as many claims, either legal or equitable or both, as he may have against an opposing party. (C.R. 55.06[a]; see generally 509.060).

Consolidation of Actions.

Whenever same plaintiff has several civil actions founded alone upon liquidated damages pending in same court against same defendant or several defendants court may in its discretion order such civil actions to be consolidated into one civil action. (C.R. 66.01[a]; 510.180[1]). When civil actions involving common question of law or fact are pending before court it may order joint hearing or trial of any or all matters in issue in civil actions. (C.R. 66.01[b]). If injury not resulting in death is inflicted upon person of one spouse and cause of action therefor accrued to injured spouse and also to other spouse for loss of consortium or services or medical expenses they must be enforced in one action by both spouses if they have ever been co-parties in action or if notice is given. (C.R. 66.01[d]).

Splitting Causes of Action.

Single cause of action may not be split and adjudication of suit first filed on split cause of action is bar to second suit. (256 S.W.2d 799; see 506.040).

Severance and Separate Trial.

The court in furtherance of convenience or to avoid prejudice may order separate trial of any claim, cross-claim, counterclaim or third-party claim, or of any separate issue, or of any number of claims, cross-claims, counterclaims, third-party claims or issues. (C.R. 66.02; see 510.180[2]).

Medical Malpractice.

Recovery in medical malpractice action regardless of number of defendants is limited to

$350,000 for noneconomic damages. Punitive damages can only be awarded if there was willful, wanton or malicious misconduct. Damages are divided into: (1) Past economic damages, (2) past noneconomic damages, (3) future medical damages, (4) future economic damages other than medical, and (5) future noneconomic damages. Future damages are expressed at present value. Past damages are payable in lump sum but any party may request that future damages be paid, in whole or in part, in periodic payments if total future damages exceed $100,000. Court may require judgment debtor to post security or purchase annuity adequate to assure full payment of future payments. If claimant dies before all future payments are made, obligation to make payments except for future medical payments continues. Obligation for future medical payments continues only until medical payments owing at death and due to injury for which damages were awarded are paid. (RSMo 538.210-.220).

Plaintiff in medical malpractice action must file affidavit with courts stating that he has obtained written opinion of legally qualified health care provider that defendant failed to use such care as reasonably prudent or careful health care provider would have under similar circumstances and that such failure directly caused or directly contributed to damages claimed. Affidavit must include qualifications of affiant, and there must be separate affidavit for each defendant. Affidavits must be filed no later than 90 days after petition is filed or court shall dismiss action without prejudice. (RSMo 538.225). Defendant may file motion 180 days after filing of petition asking court to examine opinion of health care provider. If opinion fails to meet requirements, court must conduct hearing within 30 days to determine whether there is probable cause to believe that one or more qualified and competent health care providers will testify that plaintiff was injured because of defendant’s medical negligence. If court so finds, plaintiff is responsible for defendant’s reasonable fees. (RSMo 538.225[7]).

Licensed physician, surgeon, registered professional nurse, licensed practical nurse or person trained in standard recognized first aid training program who renders in good faith emergency care without compensation at scene of emergency or accident not liable for civil damages other than those resulting from gross negligence or willful or wanton acts or omissions. (RSMo 537.037[1]). Licensed physician, surgeon, registered professional nurse or licensed practical nurse or person trained in standard recognized first aid training program who renders emergency care without compensation to any minor involved in accident or in competitive sports or other emergencies at scene without first obtaining consent of parent or guardian shall not be liable for any civil damages other than for gross negligence or willful or wanton acts or omissions. (RSMo 537.037[2]).

Any mental health professional, substance abuse counselor, practicing medical, osteopathic, or chiropractic physician, certified nurse practitioner or physician’s assistant may in good faith render suicide prevention interventions at scene of threatened suicide and shall not be liable for any civil damages other than for gross negligence or willful or wanton acts or omissions. Any other person who has been trained to provide suicide prevention interventions in standard recognized training program may without compensation render suicide prevention interventions to level for which such person has been trained at scene of threatened suicide and shall not be liable for civil damages for acts or omissions other than for gross negligence or willful or wanton acts or omissions. (RSMo 537.037[3]).

Abatement and Revival.

Causes of action for injury to person with some exceptions (see 537.030) or property survive death of either wrongdoer or injured party and may be brought against estate of deceased or by executor or administrator of injured party. (RSMo 537.010, 537.020). If party becomes incompetent, court may, on motion, allow action to continue by or against his representative. (C.R. 52.13[b]).

Limitation of.

See topic 5.16 Limitation of Actions.

Criminal Conversation.

Cause of action abolished. (869 S.W.2d 740).

Small Claims.

See category 6 Courts and Legislature, topic 6.01 Courts.

Direct Actions Against Insurer.

See category 23 Transportation, topic 23.01 Motor Vehicles.

See also topics 5.17 Pleading, Practice; category 14 Family, topic 14.10 Infants.

5.03 APPEAL AND ERROR:

Generally, appeal from associate circuit court lies to circuit court, and may be taken in person or by agent, by filing application for trial de novo with clerk serving associate circuit judge within ten days after judgment when claim not exceeding $3,000. (RSMo 512.180-.190).

Bond.

Applicant, or some person for him, together with one or more solvent sureties, must, in order to stay execution, within ten days after judgment file bond in a sum sufficient to secure payment of judgment and costs, to be approved by associate circuit judge. (RSMo 512.190). Supersedeas bond is limited to $50 million in all cases in which there is count alleging tort. (RSMo 512.099).

Trial in circuit court on appeal from associate circuit court is anew. (RSMo 512.270).

Judgment.

If judgment be affirmed, or be against the appellant, such judgment shall be rendered against appellant and/or his sureties. (RSMo 512.320).

Appeal from probate division of circuit court lies to circuit court, upon filing of notice of appeal within ten days after judgment, and presentment of bond. (See subhead Appeal from Circuit Court, catchline Bond, infra.) (RSMo 472.180-.210).

Appeal from circuit court lies to Supreme Court or to one of the courts of appeals, according to circuit from which appeal taken and subject matter of action or amount involved. (Const. 1945, art. V, Sec. 3; see 477.040; 512.020). Notice of appeal must be filed within ten days after judgment or order appealed from becomes final. On motion and notice, appellate court, within six months from date of final judgment, may allow appeal on special order where merit shown and delay is not due to culpable negligence. (C.R. 81.04-.07; see 512.050).

Bond.

Appeal may be taken with or without bond, but does not operate as supersedeas where no bond given unless appellant is an executor, administrator, guardian, curator or municipality. (C.R. 81.09[a][1]). Bond, when given, must be in amount fixed by court sufficient to cover whole amount of judgment unsatisfied, costs on appeal, interest and damages for delay, or if judgment is for property, the amount recovered for the use and detention, costs of action and appeal, interest, and damages for delay, conditioned to prosecute appeal, to perform judgment in case of affirmance or modification, and to pay all damages, interest and costs awarded by appellate court. (C.R. 81.09). Court may allow time not exceeding ten days to file bond. (C.R. 81.09).

Docket Fee.

Appellate court docket fee of $70 must be deposited with clerk of trial court at time of filing appeal. (C.R. 81.04).

Appeal from Administrative Agencies.

Procedure for review of actions of any administrative officer or body is provided. (C.R. 100.01-.02; 536.100-140).

See also topic 5.05 Certiorari.

5.04 BONDS:

See topics 5.03 Appeal and Error, Injunctions, Costs, Replevin; categories 2 Business Organizations, topic Corporations; Business Regulation and Commerce, topics Brokers, Securities; Debtor and Creditor, topics Attachment, Executions; Estates and Trusts, topic Executors and Administrators; Family, topic Guardian and Ward; Insurance, topic Surety and Guaranty Companies; Legal Profession, topic Attorneys and Counselors.

Sureties.

On bonds of all county officers, sureties must be residents of county. (RSMo 107.010). No sheriff, collector, constable, county treasurer, attorney, clerk, judge or justice of any court of record, may be surety on any official bond. (RSMo 107.020). Corporate surety with paid up capital of not less than $200,000 admitted to transact such business in Missouri may qualify on furnishing satisfactory evidence of solvency. (RSMo 107.080-.090).

Enforcement.

Suits on official bonds or bonds executed to the state are brought by the Attorney General at the direction of the Governor in the name of the state. (RSMo 107.150).

5.05 CERTIORARI:

Supreme Court or any of various courts of appeal (depending on jurisdictional grounds) and circuit courts may issue this writ to any inferior court and Supreme Court may also issue the writ to any court of appeals and finally determine the cause the same as on original appeal. (Const. 1945, art. V, §§ 4, 10).

See also topic 5.03 Appeal and Error.

5.06 CHARITABLE IMMUNITY:

See topic 5.09 Damages.

5.07 COMMISSIONS TO TAKE TESTIMONY:

See topic 5.11 Depositions and Discovery.

5.08 COSTS:

Prevailing party recovers costs, except where different provision is made by rule or law. (C.R. 77.01; 514.060; see 488.012 for costs).

Allowances by the court are chargeable as costs. (40 S.W. 935).

When Due.

Court may require party to furnish security for contemplated costs. (C.R. 77.02).

Liability of Attorney.

If attorney commences and fails to prosecute action, or brings wrong action and non-suit is consequence or if court believes action is erroneously brought court may, in its discretion, enter judgment against attorney for full amount of costs and damages in consequence thereof. (RSMo 484.160).

Costs Where Settlement Proposed.

If defendant offers to settle matter more than ten days before trial by allowing judgment against him with costs and plaintiff refuses to accept offer and at trial obtains judgment which is not more favorable than offer of settlement, plaintiff shall not recover costs from time of offer but shall pay costs accrued after that time. (C.R. 77.04).

5.09 DAMAGES:

Common law generally prevails as to compensatory damages. Future medical payments are to be made in amount according to schedule determined by payee's life expectancy. (See e.g. 165 S.W.3d 168.) Cap on noneconomic damages for all plaintiffs is $350,000, irrespective of number of defendants. (See 538.210-220.) Punitive damages are allowed in Missouri if, by clear and convincing proof, defendant is shown to have culpable mental state either by wanton willful or outrageous act or reckless and disregard for act's consequences from which evil motive is incurred. (176 S.W.3d 150). Exemplary or punitive damages generally are not allowed in suits on contracts. (294 S.W.2d 36).

Sovereign immunity doctrine established except for suits for compensatory damages for injuries caused by negligent acts of public employees in operation of motor vehicles within course of their employment or injuries caused by condition of public entity's property if plaintiff establishes that property was in dangerous condition at time of injury, that injury directly resulted from dangerous condition, that dangerous condition created reasonably foreseeable risk of kind of injury which was incurred, and that either negligent or wrongful act of public entity employee within course of employment created dangerous condition or public entity had actual or constructive notice of dangerous condition in sufficient time prior to injury to have taken measures to protect against dangerous condition. (RSMo 537.600). Any county, city, person, organization or agency or their employees who has charge of or benefits from free work performed as condition of probation cannot be sued for damages as result of injuries to those performing free work unless injuries are result of intentional tort or gross negligence. (RSMo 559.021[3]).

Charitable immunity doctrine abolished for tort actions arising after Nov. 10, 1969 (446 S.W. 2d 599), except that good faith donor of canned or perishable food, which is fit for human consumption and complies with all Mo. food and drug laws under c. 196, shall not be subject to criminal or civil liability arising from injury or death due to condition of food unless result of negligence, recklessness or intentional misconduct by donor. (RSMo 537.115[2]).

Any officer or member of governing body of entity which operates under standards of § 501(c) of Internal Revenue Code of 1986, who is not compensated for his services on salary or prorated equivalent basis, shall be immune from personal liability for any civil damages arising from acts performed in his official capacity. (RSMo 537.117). Immunity shall extend only to such actions for which person would not otherwise be liable, but for his affiliation with entity. (RSMo 537.117). Above does not apply to actions relating to improper health care under 538.205-538.230.

Volunteer of nonprofit organization or governmental entity is immune from personal liability for act or omission resulting in damage or injury to person intended to receive benefit from volunteer's service if volunteer acted in good faith, within scope of official functions and duties, and damage or injury was not caused by intentional or malicious conduct or by negligence of volunteer. (RSMo 537.118[2]).

Treble Damages.

May be awarded in the following instances: waste committed by a tenant for life or years during his term of anything belonging to the tenement (RSMo 537.420), and in any action for waste wantonly committed (RSMo 537.490); trespass (RSMo 537.340), unless defendant had probable cause to believe the land or the things taken, injured, or destroyed were his own (RSMo 537.360); and in some other instances.

Punitive Damages.

All actions tried before jury involving punitive damages shall be conducted in bifurcated trial before same jury if requested by any party. (RSMo 510.263[1]).

Doctrines of remittitur and additur, based on trial judge's assessment of totality of surrounding circumstances, shall apply to punitive damage awards. (RSMo 510.263[6]). Above does not apply to actions relating to improper health care under 538.205-538.230.

Discovery of defendant's assets is allowed only after trial court finds that plaintiff will likely present submissible case for punitive damages. (RSMo 510.263[8]). No award of punitive damages against any defendant shall exceed greater of $500,000 or five times net amount of judgment awarded to plaintiff against defendant. (RSMo 510.265[1]).

Double Damages.

May be awarded in the following instances: trustee selling property at auction under any writing securing payment of a debt charging a commission in excess of 2% on first $1,000 of amount of sale, 1% on sums over that and under $5,000 and ½ of 1% on all sums over $5,000 (RSMo 443.360-.370); tenant for life or years or other person in possession under or by collusion with tenant, holding over after termination of term and after demand and notice in writing requiring possession by person entitled thereto, and any tenant giving notice in writing of his intention to quit at a specified time, who fails to deliver possession at such time, for the time he retains possession (RSMo 441.080-.100); malicious or wanton damages or destruction of personal property (RSMo 537.330); and in some other very specific instances.

Collateral Source Rule.

If prior to trial defendant or his insurer or authorized representative, or any combination of them, pays all or any part of plaintiff's special damages, defendant may introduce evidence that some other person other than plaintiff has paid those amounts. Evidence shall not identify any person having made such payments. (RSMo 470.715[2]).Such introduction of evidence shall constitute waiver of any right to credit against judgment as provided by statute. (RSMo 490.715[3]). Above does not apply to actions relating to improper health care under 538.205-538.230.

Insurance.

Vexatious refusal of an insurance company to pay any loss under a policy authorizes the court or jury to allow plaintiff damages not to exceed 20% of first $1,500 of loss, and 10% of amount of loss in excess of $1,500 and reasonable attorney's fee. (RSMo 375.420).

No-Fault Insurance.

Not adopted.

Comparative Negligence Rule.

Pure comparative fault. Damages assessed by jury before allocation of fault among parties. Court-adopted system same as that of Uniform Comparative Fault Act. (661 S.W.2d 11).

See also category 13 Estates and Trusts, topic 13.05 Death, subhead Action for Death.

Joint and Several Liability.

In all tort actions for damages in which fault is not assessed to plaintiff, defendants shall be jointly and severally liable for amount of judgment rendered against such defendants. (RSMo 537.067). If defendant is found to be 51% or more at fault, defendant is jointly and severally liable for amount of judgment. If defendant is less than 51% at fault, defendant is only responsible for percentage of judgment that he or she is determined to be responsible for by trier of fact. (RSMo 537.067[1]). Above does not apply to actions relating to improper health care under 538.205-538.230.

Uniform Apportionment of Tort Responsibility Act not adopted.

Medical Malpractice.

See topic 5.02 Actions, subhead Medical Malpractice.

5.10 DECLARATORY JUDGMENTS:

See topic 5.15 Judgments.

5.11 DEPOSITIONS AND DISCOVERY:

Party to any suit pending in any court of this state may obtain deposition of anyone, including adverse party, for discovery or evidence. (C.R. 57.03).

Outside of State for Use within State.

See subhead Before Whom Taken, infra.

Perpetuating Testimony.

Depositions may also be taken to perpetuate testimony. (C.R. 57.02[1]).

Before Whom Taken.

Depositions may be taken by some one of the following officers:

Within This State.

Before officer authorized to administer oaths or person appointed by court in which action is pending. (RSMo 57.05[a]).

Without This State.

If within U.S., before person authorized to administer oaths by laws of U.S. or of place where examination is held or before person appointed by court in which action is pending. (RSMo 57.05[b]).

Special Commissioner.

Court may, in its discretion, appoint commissioner to take such depositions and fixing time and place thereof, and depositions must then be taken pursuant to said order. Such commissioner is empowered to hear and determine all objections to testimony, but on demand of party aggrieved must report his ruling excluding any evidence to court or judge forthwith or at close of depositions, for approval or reversal, continuing depositions for further proceedings if required. Commissioner shall be member of Missouri Bar. (C.R. 57.06).

Notice of time and place of taking depositions and witnesses to be examined must be delivered to adverse party or his attorney of record no less than seven days before taking of deposition. (C.R. 57.03[b][1]). Deposition of witness may be taken in this state after giving of such notice without obtaining commission (C.R. 57.06), and deposition of witness may be taken in another state after giving of such notice and without obtaining commission if adverse party by written stipulation waives issuance of dedimus.

Under certain conditions, upon application to court in which suit is pending, or judge thereof in vacation, time for which notice is given may be shortened. (C.R. 57.03[b][2]).

Examination of Witnesses.

Ordinarily depositions are taken, after due notice, by oral interrogatories, stenographically or recorded by video tape or similar methods in presence of officer before whom depositions were taken. If requested by party, testimony shall be transcribed. (C.R. 57.03[d]).

Only objections as to the form of questions or answers are waived, when not made at the time before the officer taking the deposition; all other objections may be made at trial. (C.R. 57.07[c]). Refusal of adverse party to answer proper question in deposition is ground for striking his pleadings from files or ruling adversely on any of his motions. (RSMo 491.180).

Compelling Attendance of Witnesses.

Every person, judge, or other officer of the state required to take depositions of witnesses pursuant to the foregoing sections of the statutes, or by virtue of any commission issuing out of any court of record in this or any other government, has power to issue subpoenas for witnesses to appear and testify, and to compel their attendance in the same manner and under like penalties as any court of record of this state. (C.R. 57.09). Party duly summoned, refusing to attend and testify, in addition to punishment for contempt, may have his pleadings stricken on motion or have motion ruled adversely. (RSMo 491.180).

Forms.

Officers taking depositions must observe following forms and mode of proceeding, commencing thus:

Form

Depositions of witnesses, produced, sworn and examined on the . . . . day of . . . ., in the year of our Lord 20. . . ., between the hours of 8 o'clock in the forenoon and 6 o'clock in the afternoon of that day, at . . . . in the county of . . . . and State of . . . . before me (name the officer and style of office), in a certain cause now pending in the . . . . court of the county of . . . ., in the State of Missouri between . . . ., plaintiff and . . . ., defendant, on the part of the plaintiff (or defendant).

(Here insert names of parties and attorneys appearing).

(Here insert name of witness), of lawful age, being produced, sworn and examined on the part of the . . . ., deposeth and saith (here insert the statement of the witness).

Every deposition must be recorded by reporter. (C.R. 57.03). When testimony is fully transcribed deposition must be submitted to witness for examination and read to or by him, unless such examination and reading are waived by witness and by parties. Any changes in form or substance which witness desires to make must be entered upon deposition by officer with statement of reasons given by witness for making them; original answers, changes, and reasons all being part of deposition. Deposition must then be signed by witness, unless parties by stipulation waive signing or witness is ill or cannot be found, or is dead or refuses to sign. If deposition is not signed by witness, officer must sign it and state on record reason for it not being signed by witness; and deposition may then be used as fully as though signed, unless on motion to suppress, court holds that reasons given for refusal to sign require rejection of deposition in whole or in part. (C.R. 57.03).

If any paper or exhibit is produced and proved, or referred to by the witness, it ought to be described in his deposition, or marked and referred to by the deponent, in such manner that it may be identified when the deposition is read; and all such papers and exhibits must be attached to and returned with the deposition. (C.R. 57.03).

The officer will annex at the foot of the deposition of each witness the following certificate:

Subscribed and sworn to before me, on the day, at the place, and within the hours first aforesaid. (Signature and title).

Then proceed with other depositions (if any) in the same form, annexing a like certificate to each. When all the witnesses who appear have been sworn and examined, and their depositions reduced to writing, subscribed and certified, as above, the officer will attach to the depositions all papers and exhibits proved or referred to in the examination, the commission and notice, with the following certificate indorsed thereon or attached thereto:

Form

"I (name of officer and style of office) within and for the . . . ., in the State of . . . ., do certify that in pursuance of the within (or annexed) commission and notice (or notice alone if commission has been waived), came before me at . . . ., in the county and State last aforesaid (insert names of the witnesses), who were by me severally sworn (or affirmed) to testify the whole truth of their knowledge touching the matter in controversy aforesaid; that they were examined, and their examination reduced to writing and subscribed by them, respectively, in my presence, on the day, between the hours, and at the place in that behalf first aforesaid, and their said depositions are now herewith returned." If the officer knows the residence of the witness, he will include the following in his certificate: And I further certify that said (here insert the names of the witnesses) are residents of said county of . . . ., in said State of . . . . Given at . . . ., in the county of . . . . and State of . . . ., this . . . . day of . . . ., 20. . . . . (Signature and title).

If the officer has no official seal, the return must be accompanied by a certificate of the official character of the officer taking the depositions, attested by the seal of the state of his residence or by the seal of some court of record within said state at the time when the depositions were taken, stating that such officer was duly commissioned as such.

It is advisable for the officer to note at the bottom of the depositions the amount of costs, and if paid, by which party.

Officer taking deposition shall certify on deposition that witness was duly sworn and that deposition is true record of testimony given. (C.R. 57.03[g]).

The depositions must be begun on the day mentioned in the notice. If they cannot be completed on that day, the taking of them may be adjourned to the succeeding day, at the same place and between the same hours. The person taking them should, in such case, make the following entry, closing the business for that day, viz.:

Not being able to complete the taking of said depositions, by reason that (here insert the reason), I adjourn the further taking of the same until tomorrow, then to be continued at the same place and between the same hours mentioned in the annexed notice. (Signature and title).

On the succeeding day, let the person taking the depositions commence as follows:

Pursuant to adjournment, as above stated, on the . . . . day of . . . ., 20. . . ., between the hours of . . . . in the forenoon and . . . . in the afternoon, at the . . . ., I continued the taking of said depositions as follows, viz.:

(Here insert name), in continuation of his deposition, commenced yesterday on his oath further says, etc.

Upon payment of reasonable charges officer shall deliver deposition to party who requested transcription and shall upon delivery file with court certificate showing caption of case, name of deponent, date taken, name and address of person having custody of original deposition, and whether charges have been paid. Deposition shall not be filed with court except upon court order or contemporaneously with motion placing deposition or part thereof in issue. Original deposition shall be maintained until case is finally disposed. (C.R. 57.03[g]).

See also topic 5.12 Evidence, subhead Witnesses; category 10 Documents and Records, topic 10.02 Affidavits.

5.12 [RESERVED]

5.13 EVIDENCE:

Uniform Business Records as Evidence Act adopted. (RSMo 490.660-.692). In addition, all other parties must be served with copies of records and affidavit as follows:

THE STATE OF____________________

COUNTY OF____________________

AFFIDAVIT

Before me, the undersigned authority, personally appeared _________, who, being by me duly sworn, deposed as follows:

My name is _________, I am of sound mind, capable of making this affidavit, and personally acquainted with the facts herein stated:

I am the custodian of the records of _________ Attached hereto are _____ pages of records from _________ These ____ pages of records are kept by _________ in the regular course of business, and it was the regular course of business of ________ for an employee or representative of ________ with knowledge of the act, event, condition, opinion, or diagnosis recorded to make the record or to transmit information thereof to be included in such record; and the record was made at or near the time of the act, event, condition, opinion or diagnosis. The records attached hereto are the original or exact duplicates of the original.

Affiant

In witness whereof I have hereunto subscribed by name and affixed my official seal this _____ day of _________, 20___.

____

(Signed)

(Seal)

(RSMo 490.692, 362.413[4]).

Witnesses.

All persons are competent except those who are mentally incapacitated, and children under ten years old who appear incapable of receiving correct impressions or relating them truly. (RSMo 491.060). Exception to ten year old rule is that if such child is alleged to be victim of offense under 565, 566 or 568 of R.S.Mo., then he is competent witness without qualification. (RSMo 491.060[2]). Conviction of crime does not disqualify but may be shown to affect credibility. (RSMo 491.050).

Parties are allowed to introduce evidence of value of medical treatment rendered that was reasonable, necessary, and proximate result of negligence of any party. Statements, writings, or benevolent gestures expressing sympathy made to person or family are prohibited from being admitted into evidence.

Child Victim Witness Protection Law allows limited videotape testimony for victims of abuse. (RSMo 491.675 to 491.705).

See also topic 5.11 Depositions and Discovery.

Privileged Communications.

Attorneys and physicians may not testify as to professional communications or matters unless privilege waived by client or patient. Minister, priest, or rabbi may not testify as to communication made to him or her in their professional capacity as spiritual advisors, counselors or consultants. (RSMo 491.060[4]).

Husband or wife may testify in civil actions brought by or against the other.

Where one party to contract or cause of action is dead or insane, prior relevant statements made by that party shall not be excluded as hearsay. (RSMo 491.010[2]).

Adverse parties may be compelled to testify. (RSMo 491.030).

Self-incrimination.

Witness generally cannot be compelled to give self-incriminating testimony. (RSMo 491.040). Circuit judge may issue order compelling witness to give self-incriminating testimony, but such testimony cannot be used as part of criminal prosecution against witness except for perjury, giving false or misleading statement, contempt committed in answering or failing to answer, or in producing or failing to produce evidence in accordance with order. (RSMo 491.205(1)).

See also topic 5.11 Depositions and Discovery; category 10 Documents and Records, topic 10.02 Affidavits.

Uniform Act to Secure the Attendance of Witnesses from Within or Without a State in Criminal Proceedings adopted. (RSMo 491.400-.450).

See also topic 5.11 Depositions and Discovery.

5.14 INJUNCTIONS:

Injunctions will lie whenever any irreparable injury is being done or about to be done and the injured party has no adequate remedy at law. (RSMo 526.030).

Jurisdiction.

Injunction may be granted by circuit judge, or by associate circuit judge. (RSMo 526.010).

Temporary Injunctions.

When it shall appear by the petition that the plaintiff is entitled to the relief demanded, and such relief consists in the restraining of some act of the defendant, which, during the litigation, would produce injury to the plaintiff, or if the defendant is threatening to do some act which would render a judgment ineffectual, a temporary injunction or restraining order may be granted. (RSMo 526.050).

Bond.

No injunction or restraining order may issue, unless on final hearing, except in suits instituted by the state on its behalf, until the plaintiff shall have executed a sufficient bond in such sum as the court may direct to secure the amount or other matter to be enjoined and all damages, costs or sums of money that shall be adjudged against him if the injunction be dissolved. (C.R. 92.02[c]).

5.15 JUDGMENTS:

Judgments became final 30 days after entry, or upon disposition of motion for new trial which is deemed denied if not passed on within 90 days after filing. (C.R. 78.04, 78.06).

Summary judgment proceeding commenced by motion therefor with at least 30 days notice before hearing. Statement of uncontroverted material facts shall be attached to motion. Statement shall state with particularity in separately numbered paragraphs each material fact claimed not to be of genuine issue, with specific references to pleadings, discovery, exhibits or affidavits demonstrating lack of genuine issue as to such facts. If hearing shows no genuine issue on any material fact and party is entitled to judgment as matter of law, judgment must be entered. Judgment may be on liability only with damages to be tried. (C.R. 74.04).

Default.

Interlocutory judgments authorized for failure of defendant to file or serve a pleading. (C.R. 74.05[b]). May be set aside for good cause within reasonable time. (C.R. 74.05[d]).

Judgment non pros.

Authorized for failure of plaintiff to file or serve pleading. (RSMo 511.050). May be set aside within 30 days after given for good cause. (C.R. 75.01).

Declaratory Judgments.

Uniform Act adopted. (C.R. 87.01-.11, 527.010 et seq.).

Vacation or Modification.

Trial court may vacate, reopen, correct, amend or modify its judgment for good cause within 30 days from entry thereof. After filing notice of appeal and before filing transcript on appeal, court may, after expiration of 30-day period, vacate, amend or modify judgment upon stipulation of parties accompanied by withdrawal of appeal. (C.R. 75.01).

Lien.

Judgment or decree of any court of record except associate, small claims and municipal divisions of circuit courts, shall be liens on real estate of judgment debtor situate in county for which or in which court is held. (RSMo 511.350[1]). Any such judgment or decree, on filing of and indexing of transcript thereof in circuit clerk's office of another county, becomes lien on real estate of judgment debtor situate in such other county. (RSMo 511.440[1]). Lien commences upon entry of judgment, and extends to then owned and after acquired realty. Life of liens of judgments or decrees on real estate rendered after Aug. 28, 1998 lengthened from three to ten years. (RSMo 511.360). Judgment rendered by associate circuit court is lien on real estate only after transcript of such judgment is filed in circuit clerk's office. (RSMo 511.350[2]). Owner may redeem property prior to foreclosure by paying collector. (RSMo 141.420[1]). Owner may not redeem property from judgment if property is residential property adjudged vacant for six months or more prior to judgment. (RSMo 141.520[3]).

Revival.

Judgments revived by court order within ten years of judgment or last revival. (C.R. 74.09). At any time within ten years scire facias may be sued out to revive a judgment and lien. (C.R. 74.36).

Assignment.

Judgments may be assigned in writing, executed and acknowledged by assignors and filed with clerk of court where judgment entered. (C.R. 74.12).

Execution on a judgment may be had at any time within ten years. (RSMo 516.350).

Foreign Judgments.

Uniform Enforcement of Foreign Judgments Act adopted. (C.R. 74.14). Uniform Foreign Country Money-Judgments Recognition Act adopted. (§§ 511.770 through .787; adopted under title shown.)

See also topic 5.03 Appeal and Error; categories 3 Business Regulation and Commerce, topic Interest; Debtor and Creditor, topics Executions, Liens.

5.16 LIMITATION OF ACTIONS:

Actions must be brought in the following periods:

Ten years: (1) An action which is brought on any instrument in writing, whether sealed or unsealed for the payment of money or property, except as hereinafter stated; (2) actions brought on any covenant of warranty contained in any deed of conveyance of land shall be brought within ten years next after there shall have been a final decision against the title of the covenantor in such deed, and actions on any covenant of seizin contained in any such deed shall be brought within ten years after the cause of such action shall accrue; (3) actions for relief not otherwise provided for. (RSMo 516.110). Action on judgment is barred after ten years from date of rendition or revival. (RSMo 516.350). Action for recovery of land must be commenced within ten years from time plaintiff, his ancestor, predecessor, grantor or other person under whom he claims was seized or possessed of the premises. (RSMo 516.010). Any action against person whose sole connection with improvement is performing or furnishing design, planning or construction, including architectural, engineering or construction services to recover damages for personal injury, property damage or wrongful death arising out of defective or unsafe condition of any improvement to real property, including for contribution or indemnity must be commenced within ten years of date improvement is completed. (RSMo 516.097).

Five years: (1) All actions upon contracts, obligations or liabilities, express or implied except those aforementioned and except where a different time is limited; (2) action upon a liability created by a statute other than a penalty or forfeiture; (3) action for trespass on or injury to real estate; (4) action for taking, detaining or injuring any goods or chattels, including actions for the recovery of specific personal property, or for any other injury to the person or rights of another, not arising on contract and not herein otherwise enumerated; (5) action for relief on the ground of fraud, the cause of action in such case to be deemed not to have accrued until the discovery by the aggrieved party, at any time within ten years, of the facts constituting the fraud. (RSMo 516.120).

Four years: (1) Contracts of sale under U.C.C. U.C.C. § 2-725 adopted. (RSMo 400.2-725).

Three years: (1) Action against a sheriff, coroner or other officer upon a liability incurred by the doing of an act in his official capacity and in virtue of his office, or by the omission of any official duty, including the nonpayment of money collected upon an execution or otherwise; (2) action upon a statute for a penalty or forfeiture, where the action is given to the party aggrieved, or to such party and the state (RSMo 516.130); (3) customer who fails to discover and report an unauthorized signature or any alteration on the face or back of the item or does not within three years from that time discover and report any unauthorized endorsement is precluded from asserting against the bank such unauthorized signature or endorsement or such alteration (RSMo 400.4-406[4]); (4) actions for wrongful death (RSMo 537.080).

Two years: (1) Action for libel, slander, assault, battery, false imprisonment, malicious prosecution or violation of 290.140 (service letter statute); (2) actions by employees for payment of minimum wages or overtime compensation, or for recovery of any amount under Fair Labor Standards Act (RSMo 516.140); (3) actions against physicians, hospitals, dentists, registered or licensed practical nurses, optometrists, podiatrists, pharmacists, chiropractors, professional physical therapists, any entity providing health care services for damages for malpractice, error, mistake or failure to inform patient of test results, statute running from date of occurrence of negligence, except that minor under 18 years has until his 20th birthday to sue, and where act is introducing and negligently permitting foreign object to remain within body of living person, action must be brought within two years of discovery or from date on which patient should have discovered, whichever is first, but action must be brought within two years of minor's 18th birthday (RSMo 516.105); (4) action for breach of covenant restricting land use (RSMo 516.095).

Proceedings on bond of executor or administrator barred two years after discharge. (RSMo 473.213).

See also category 13 Estates and Trusts, topic 13.05 Death, subhead Action for Death.

One Year: All actions brought by offender against department of corrections or its employees for act in official capacity or by omission of official duty. (RSMo 516.145).

See also category 13 Estates and Trusts, topic 13.16 Wills, subhead Will Contests.

When Time Begins to Run.

Except in actions for recovery of real property, limitation begins to run only upon ascertainment of the last item of damages resulting from the wrong done or breach of duty or contract. (RSMo 516.100).

As to accrual of actions under Art. III of U.C.C., see U.C.C. § 3-118. (RSMo 400.3-118).

Disabilities.

Where person in whose favor cause of action accrues is infant or insane, statutory period does not begin to run until disability is removed, but no action to recover real property or possession thereof may be commenced later than 21 years after cause or action or right of entry accrued or three years after disability is removed. (RSMo 516.030, .170). If any person entitled to sue dies before statutory period expires, if such cause of action shall survive to his representatives, his executor or administrator may, after expiration of such time and within one year after such death, commence such action, but not after that period. (RSMo 516.180).

If at any time, when any specified cause of action accrues against any person who is resident of state and is absent from state, such action may be commenced within times stated, after return of such person to state. (RSMo 516.200).

Foreign Causes of Action.

Where a cause of action has become fully barred by the laws of the state or country in which it originated, it is barred in Missouri. (RSMo 516.190).

Interruption of Statutory Period.

Part payment under circumstances not inconsistent with intent to pay balance tolls the running of the statutory period. (RSMo 516.340; 239 Mo. App. 73, 188 S.W.2d 84).

Revival.

A debt may be revived by an acknowledgment or new promise in writing signed by the party to be charged, but not otherwise. (RSMo 516.320). One joint debtor cannot revive the demand as against another joint debtor. (RSMo 516.330).

Contractual limitations are not permitted. (RSMo 431.030).

Pleading.

Limitations must be pleaded affirmatively by answer (C.R. 55.08), unless defect appears on face of petition in which case point may be raised on motion to dismiss.

Uniform Commercial Code in force. See category 3 Business Regulation and Commerce, topic 3.09 Commercial Code.

See also categories 3 Business Regulation and Commerce, topic Monopolies, Restraint of Trade and Competition; Employment, topic Labor Relations; Mortgages, topic Mortgages of Real Property; Property, topic Adverse Possession.

5.16A PARTITION:

In all cases where lands, tenements, or hereditaments are held in joint tenancy or tenancy in common, including estates in fee, for life, or for years it shall be lawful for any one or more of parties interested therein, whether adults or minors, to file petition in circuit court of proper county, asking for partition, if same can be done without great prejudice to parties in interest, and if not, then for sale of premises and division of proceeds thereof among all parties according to their respective rights and interests. In case one or more of such parties, or share or quantity of interest of any of parties is unknown to petitioner, or such interest is uncertain or contingent, or ownership of inheritance is dependent upon executory devise or remainder shall be contingent, so that such parties cannot be named, it must be so stated in petition. (C.R. 96.01, .05).

Partition in Kind or Sale.

Commissioners are appointed to make the partition and if partition cannot be made without great prejudice to the owners the land is sold under order of the court and the proceeds divided (C.R. 96.12-.18-.29).

5.17 [RESERVED]

5.18 PLEADING:

Governed by Rules of Civil Procedure.

Pleadings Permitted.

Pleadings consist of petition, answer, reply if answer contains a counterclaim, answer to crossclaim if answer contains one, third party petition if leave given to summon person not an original party, and third party answer. No other pleading required except as court may order. (C.R. 55.01).

Frivolous Claims.

Signature of attorney or party constitutes certificate that pleading has been read, is well-grounded in fact, and is warranted by existing law or good faith argument for extension or reversal thereof. Sanctions may include expenses incurred by opposing parties and attorneys' fees. (C.R. 55.03).

General Rules of Pleading.

Technical forms are not required. Each averment must be simple, concise and direct. (C.R. 55.04). Pleading setting forth claim for relief must contain short and plain statement of facts supporting claim and demand for judgment. (C.R. 55.05, 509.050). If damages requested are money damages, no dollar figure shall be included except to determine proper jurisdictional authority, but prayer shall be for such damages which are fair and reasonable. (RSMo 509.050). Relief in alternative or of several different types may be demanded. (RSMo 509.050, C.R. 55.10).

As many claims, either legal or equitable or both, as may be had against an opposing party may be joined as either independent or alternate claims. (C.R. 55.06).

Averments of adverse parties must be admitted or denied. Defenses to each claim asserted must be stated in short and plain terms. Averment of lack of knowledge sufficient to form a belief as to truth of an allegation has effect of a denial. If in good faith denying only a part of an averment, specify so much as is true and deny the remainder. Make specific denials of designated averments or deny generally except such designated averments as are expressly admitted, unless intending to controvert all averments, in which case general denial may be made. (C.R. 55.07).

Matters constituting affirmative defenses or an avoidance must be set forth affirmatively. (C.R. 55.08). Averments to which a responsive pleading is required are admitted unless denied, except as to amount of damage. If reply is filed, whether required or not, all affirmative defenses in answer not denied are deemed admitted. If responsive pleading is not required and not filed, all averments are taken as denied or avoided. (C.R. 55.09).

Averments must be made in numbered paragraphs. Each claim founded on separate transaction or occurrence and each defense, other than denial, must be stated in a separate count or defense. (C.R. 55.11).

Statements in pleadings may be adopted by reference in same or other pleadings or motions. Exhibits to a pleading are a part thereof for all purposes. (C.R. 55.12). Items of special damage must be specifically stated. Amount of exemplary or punitive damages sought must be separately stated. (C.R. 55.19). In tort action, amount sought may not be stated except to determine proper jurisdiction, and prayer must be for such damages as are fair and reasonable. (C.R. 55.19).

Written instrument may be pleaded according to legal effect. It may also be recited at length or a copy attached as an exhibit, in which case execution is deemed confessed unless party charged specifically denies execution. (C.R. 55.23).

Amended or Supplemental Pleadings.

Pleadings may be amended any time before responsive pleading is filed, or if none required, within 30 days after it is served. Otherwise, only by leave of court or consent of adverse party. On motion and notice, supplemental pleadings setting forth occurrences since date of pleading may be permitted by court. (C.R. 55.33).

Time of Answering.

Thirty days after service of summons and petition; if served by mail, 30 days after return registered mail receipt is filed; if served by publication only, 45 days after first publication and notice. Answers to crossclaims or replies to counterclaims, 30 days after filing. (C.R. 55.25). If reply is ordered by court, it shall be filed within 20 days after entry of order. (C.R. 22.25).

Small Claims.

See category 6 Courts and Legislature, topic 6.01 Courts.

5.19 PRACTICE:

Governed by Missouri Rules of Civil Procedure.

Discovery is obtained by written interrogatories (C.R. 56.01), motion to produce nonprivileged documents or objects (C.R. 58.01), motion for physical or mental examination of person (C.R. 60.01) and depositions (see topic 5.11 Depositions and Discovery). Requests for admissions of facts and genuineness of documents authorized. (C.R. 59.01). Enforcement of discovery by parties provided. (RSMo 510.060).

Direct Actions Against Insurer.

See category 23 Transportation, topic 23.01 Motor Vehicles.

Small Claims.

See category 6 Courts and Legislature, topic 6.01 Courts.

See also topics 5.02 Actions, Appeal and Error, Depositions and Discovery, Injunctions, Judgments, Pleading, Process; category 8 Debtor and Creditor, topics 8.02 Attachment, 8.05 Executions, 8.09 Garnishment.

5.20 PROCESS:

(C.R. 53.01; 54.01-.03-.06-.12).

Civil action is commenced by filing a petition with court. (C.R. 53.01). See topic 5.17 Pleading.

Form and Contents.

Summons in a civil action must contain name of court and parties, be directed to defendant and state name and address of plaintiff's attorney, if any, otherwise plaintiff's address, and time within which and place where defendant is required to appear and defend, not more than 21 days after date of summons, and it shall notify him that in case of his failure to do so, judgment by default shall be rendered against him for the relief demanded in petition. (C.R. 54.02 and 534.070).

By Whom Issued.

Clerk of court. (C.R. 54.01).

Who May Serve.

Must be by a sheriff, or his deputy, or in case sheriff in any cause is for any reason disqualified, then by coroner of county in which such process is to be served; or, for good cause shown, some person other than sheriff or coroner may be specially appointed by court in any cause, but such appointment is valid for service of process only for which such person was specially appointed. (C.R. 54.03, .05). Party may request that fees to special process server be awarded in any judgment entered in action. (RSMo 506.140).

Sheriff Fees.

Service of summons, writ or other order of court $20 for each item; service of subpoena $10. (C.R. 57.280).

Service in ordinary suits is made by delivering a copy of the petition and summons to defendant personally, or by leaving copies of same at his usual place of abode with some person of his family over 15 years of age, or by delivering copies of same to an agent authorized by law to receive service. (C.R. 54.13).

Service on a domestic or foreign corporation, partnership or unincorporated association is made by delivering a copy of summons and petition to an officer, partner or managing or general agent, or by leaving copies at any business office of defendant with person having charge thereof, or delivering same to any other agent authorized by appointment or required by law to receive service of process. (C.R. 54.13). Foreign corporation and foreign limited partnership is bound by provisions of 506.500 for personal service of process.

Service on a public, municipal, governmental or quasi-public corporation or body is made by delivering a copy of the summons and petition to the clerk of the county court in the case of a county, to the mayor or city clerk or city attorney in the case of a city, and to the chief executive officer in the case of any other public, municipal, governmental or quasi-public corporation or body. If there is, for the time being, no such officer as is specified by this subsection, court may designate appropriate officer to whom copies of summons and petition may be delivered in order to effect service. (C.R. 54.13).

Service on nonresident owner or operator of motor vehicle or watercraft in suit for damages. See category 23 Transportation, topic 23.01 Motor Vehicles.

Personal service outside state on party domiciled within state has same effect as if served within state and warrants general judgment. Party served has 30 days within which to appear. (C.R. 54.07, 55.25).

Outstate service is authorized in case of any person, whether or not a resident, firm, or corporation who in person or through an agent does any of following: (1) Transaction of any business within this state; (2) making of any contract within this state; (3) commission of a tortious act within this state; (4) ownership, use, or possession of any real estate situated in this state; (5) contracting to insure any person, property or risk located within this state at time of contracting; (6) engaging in act of sexual intercourse within this state with mother of child on or near probable period of conception of that child. (RSMo 506.500; C.R. 54.06). Service may be made by personally serving defendant outside state or, in case of corporations, by serving managing officer or registered agent in any state. Process, copy or petition, and fees must be sent to court of record or court officer at place where defendant may be served. Process may be personally served by person authorized to serve process at that place. Affidavit of person serving process, stating time, manner, and place of service, must be returned to office of clerk or judge from which it issued. (RSMo 506.510). Such service empowers court to render personal judgment. Default judgment may be entered upon expiration of at least 30 days after service and may only be set aside on showing timely and sufficient to set aside default judgment rendered on ordinary service of process within this state. (RSMo 506.520).

Service by mail or publication and personal service outside the state is allowed in cases affecting a fund, will, trust estate, specific property or any interest therein, or any res or status within the jurisdiction of the court. (C.R. 54.12, 54.13 & 54.14).

Service by Mail.

Party desiring service by mail must file with the judge or clerk an affidavit, verified by oath of the party or of someone in his behalf, for an order for such service. The petition or affidavit must show why service cannot be had in ordinary manner and state name and address of party to be served by mail. The clerk shall serve a copy of summons and of petition by registered mail, addressed to defendant at address furnished by plaintiff, requesting a return receipt signed by addressee only. (C.R. 54.16).

Service by Publication.

Party desiring service by publication shall allege in his petition or affidavit, verified by oath of the party or of someone in his behalf, for an order of publication, why service cannot be had in the ordinary manner and give the last known address of defendant or state that the same is unknown. The judge or clerk must issue an order of publication of notice to the defendant, notifying him of commencement of the action, stating briefly the object and general nature thereof, and describing the property, if any, to be thereby affected. The notice must also contain the name of the court and the names of the parties, and state the name and address of plaintiff's attorney, if any, otherwise the plaintiff's address, and the time, at least 45 days after first publication, within which defendant is required to appear and defend, and must notify him that in case of his failure to do so, judgment by default will be rendered against him. Such notice must be published at least once each week for four successive weeks in some newspaper published in county where suit is instituted, if there be a paper published there, which plaintiff or his attorney of record may designate, if not, then in some paper published in this state, which court may designate as most likely to give notice to person to be notified. Within ten days after said order, the clerk must mail a copy of the notice to each defendant whose address has been stated. When one or more of defendants are unborn or the names of one or more defendants are unknown to plaintiff, he may so state in his petition or affidavit for order of publication, and the judge or clerk may issue an order of publication of notice to the unborn or unknown defendants, who may be sufficiently described as the heirs, grantees or successors of the person to whom the property to be affected was last known to have been transferred. Attorney to represent defaulting unborn or unknown defendants may be appointed. The court may require personal service in addition to publication. (C.R. 54.17).

Personal Service Outside the State.

Plaintiff may cause a copy of the petition, with a copy of the summons, to be delivered to each defendant residing or being without this state, and at any place within the United States or their territories summoning said defendant to appear and plead within 30 days after service upon said defendant; and if the defendant shall refuse to receive such copy of the petition and summons, and the offer of the officer to deliver same to him, such refusal shall be as effectual service as though such copies were actually delivered to such defendant. Such service may be made by any officer authorized by law to serve process in civil actions within the state or territory where such service is made, or by his deputy, and shall be proved by the affidavit of such officer, or deputy, stating the time and manner of such service, made before the clerk or judge of the court of which affiant is an officer. Such clerk or judge shall certify to the official character of the affiant, and to his authority to serve process in civil actions within the state or territory where such service was made. When such certificate is made by a clerk or judge of a court of record, the same shall be attested by the seal of such court, and when the same is made by a judge of a court not of record, the official character of such judge shall also be certified by the proper officer of the state, under his official seal. Any return of service, made and certified as above provided, shall be prima facie evidence of the facts stated in such return. If the plaintiff, or his attorney of record, shall allege in his verified petition, or at the time of filing same, or at any time thereafter shall make the affidavit required for service by publication, and shall file in said cause proof of service of process on any defendant or defendants, in conformity with the provisions of this paragraph, it shall not be necessary for such plaintiff to obtain the order for service by mail or by publication or to procure the publication provided in the rule. (C.R. 54.20; 54.21).

Long Arm Statute.

(RSMo 506.500). See subhead Outstate Service, supra.

5.21 REPLEVIN:

If party claims possession of specific personal property he may at time of filing his complaint or at any time thereafter, before rendition of judgment in cause, request court order requiring defendant to deliver property specified to sheriff. (C.R. 99.01, .04).

Affidavit.

Plaintiff seeking to replevy property must file his affidavit or affidavit of some other person in his behalf showing: (1) Description of property; (2) facts showing party entitled to possession of property; (3) actual value thereof; (4) that it has not been seized under any legal process; and (5) that he will be in danger of losing property unless immediate possession is obtained or property is otherwise secured. (C.R. 99.03).

Bond.

On filing of such affidavit the writ of replevin is issued but before sheriff takes property plaintiff is required to give bond, with one or more sufficient sureties, for double value of property stated in affidavit. (C.R. 99.06).

Repossession.

Before or after delivery to plaintiff by sheriff defendant may retain or obtain redelivery of property by giving bond with one or more sufficient sureties in double value of property. (C.R. 99.07-.08).

Damages are recoverable for injuries to and detention of the property. (C.R. 99.12).

Claims of Third Persons.

No authority for intervention as of right by third persons claiming adverse interests in property. (69 Mo. App. 594).

5.22 SEQUESTRATION:

Sequestration of property may be ordered in the following cases: (1) For alimony or separate maintenance when defendant neglects to furnish security when ordered by court or defaults in payment of same (RSMo 452.130); (2) in case of judgment for performance of act other than payment of money, when court deems such procedure necessary (RSMo 511.340); (3)

when execution for judgment creditor returned unsatisfied against state or municipal employee (RSMo 525.310).

See also category 8 Debtor and Creditor, topics 8.02 Attachment, 8.05 Executions, 8.09 Garnishment, 8.16 Receivers.

5.23 SERVICE:

See topic 5.20 Process.

5.24 STAY OF EXECUTION:

See topic 5.03 Appeal and Error; category 8 Debtor and Creditor, topic 8.05 Executions.

5.25 SUBMISSION OF CONTROVERSY:

Actual controversy may be submitted on an agreed statement of facts to any court of competent jurisdiction which may render judgment thereon as in an action. It must appear by affidavit that controversy is real and proceedings in good faith. (RSMo 511.740).

See also category 9 Dispute Resolution, topic 9.02 Arbitration and Award.

5.26 VENUE:

In all actions in which there is no court alleging tort (RSMo 508.010), suits may be brought by summons either in county in which defendant resides (if he is Missouri resident) or in county wherein plaintiff resides, and defendant can be found; or, if there are several defendants (whether or not all are residents of state), in any county in which one of them resides; or when defendants are all nonresidents, in any county. In all tort actions in which plaintiff was first injured in Missouri, venue shall be county where plaintiff was first injured by wrongful acts or negligent conduct alleged. For corporate defendants in tort actions in which plaintiff was first injured outside Missouri, venue in any county where registered agent is located or, if applicable, in county of plaintiff's principal place of residence. For individual defendants in tort actions where plaintiff was first injured outside Missouri, venue in any county of defendant's principal place of residence in Missouri or, if applicable, in county of plaintiff's principal place of residence. (RSMo 508.010). If venue is in county that has two judicial circuits, venue in judicial circuit where factors exist, arose, occurred. (RSMo 478.461).

Suits against municipal corporations may be brought only in county where seat of government is situated, except cities of over 400,000 may be sued in any county in which any part of the city is situated. (RSMo 508.050).

Actions Affecting Property.

Actions for possession of real or personal property, or whereby title to real estate may be affected or for enforcement of lien of any special tax bill thereon must be brought in county where property or some part is situated. (RSMo 508.020-.030).

Actions Against Health Care Provider.

In actions against health care provider for damages for personal injury or death arising out of rendering or failure to render health care services, plaintiff will be considered injured only in county where plaintiff first received treatment by defendant for medical condition at issue in case.

Change of venue must be granted on agreement of parties (C.R. 51.02), and as matter of right in counties of 75,000 or less (C.R. 51.03), and may be granted for specified reasons (C.R. 51.04). Court must transfer venue to county unanimously chosen by parties if all parties agree in writing to change of venue. Judge will transfer case to proper forum if plaintiff or defendant is added or removed prior to trial that would alter determination of venue if originally added or removed.

5A CIVIL RIGHTS

5A.01 CROSS BURNING:

Under Missouri law, it is crime to burn cross with intent to intimidate person. (RSMo 565.095).

5A.02 RELIGION:

Religious Freedom Restoration Act adopted. (RSMo 1.302).

5A.03 RIGHT TO FIREARMS:

Concealed Firearms.

Persons that meet specific requirements may receive concealed carry endorsement to carry concealed firearm. (RSMo 571.094). St. Louis Circuit Court has issued temporary injunction against enforcement of concealed carry law while law's possible violation of Missouri Constitution is determined by court.

6 COURTS AND LEGISLATURE

6.01 COURTS:

United States District Courts.

Eastern District.

Clerk's office; St. Louis 63101.

Northern Division is composed of following counties: Adair, Chariton, Clark, Knox, Lewis, Linn, Macon, Marion, Monroe, Pike, Ralls, Randolph, Schuyler, Scotland and Shelby.

Court sits at Hannibal.

Eastern Division is composed of following: City of St. Louis; counties of Audrain, Crawford, Dent, Franklin, Gasconade, Iron, Jefferson, Lincoln, Maries, Montgomery, Phelps, St. Charles, St. Francois, Ste. Genevieve, St. Louis, Warren and Washington.

Court sits at St. Louis.

Southeastern Division is composed of following counties: Bollinger, Butler, Cape Girardeau, Carter, Dunklin, Madison, Mississippi, New Madrid, Pemiscot, Perry, Reynolds, Ripley, Scott, Shannon, Stoddard and Wayne.

Court sits at Cape Girardeau.

Western District.

Clerk's office: Kansas City 64106.

Western Division is composed of following counties: Bates, Carroll, Cass, Clay, Henry, Jackson, Johnson, Lafayette, Ray, St. Clair and Saline.

Court sits at Kansas City.

Southwestern Division is composed of following counties: Barry, Barton, Jasper, Lawrence, McDonald, Newton, Stone and Vernon.

Court sits at Joplin.

Southern Division is composed of following counties: Cedar, Christian, Dade, Dallas, Douglas, Greene, Howell, Laclede, Oregon, Ozark, Polk, Pulaski, Taney, Texas, Webster and Wright.

Court sits at Springfield.

Central Division is composed of following counties: Benton, Boone, Callaway, Camden, Cole, Cooper, Hickory, Howard, Miller, Moniteau, Morgan, Osage and Pettis.

Court sits at Jefferson City.

St. Joseph Division is composed of following counties: Andrew, Atchison, Buchanan, Caldwell, Clinton, Daviess, DeKalb, Gentry, Grundy, Harrison, Holt, Livingston, Mercer, Nodaway, Platte, Putnam, Sullivan and Worth.

Court sits at St. Joseph.

Supreme Court of Missouri.

Supreme Court is composed of seven judges, has appellate and superintending jurisdiction over circuit and other courts of record, and has power to issue writs of habeas corpus, quo warranto, mandamus, certiorari, and other remedial writs. There are two divisions of this court of equal dignity.

Jurisdiction.

Supreme Court has exclusive appellate jurisdiction of cases involving: construction of federal or state constitution, federal treaties or statutes, or state revenue laws; authority exercised under Federal laws; title to state office; and offenses punishable by death or life imprisonment. (Const. Art. 5, § 3). It has general superintending control over all inferior courts and may issue and determine original remedial writs.

Court sits at Jefferson City.

Court of Appeals.

Court of Appeals consists of three districts, Eastern, Western and Southern. (RSMo 477.040). Court has appellate jurisdiction of all cases from Circuit Courts and inferior courts of record and control over those courts, except in those cases in which appeal lies directly to Supreme Court. (See subhead Supreme Court of Missouri, supra.) Court of Appeals has power to issue prerogative and remedial writs and to hear and determine cases in which such writs may be determined.

Eastern District.

Jurisdiction comprises City of St. Louis and Counties of Audrian, Cape Girardeau, Clark, Franklin, Jefferson, Gasconade, Knox, Lewis, Lincoln, Madison, Marion, Monroe, Montgomery, Osage, Perry, Pike, Ralls, St. Charles, St. Francois, Ste. Genevieve, St. Louis, Scotland, Shelby, Warren and Washington. (RSMo 477.050).

Sessions.

In St. Louis.

Western District.

Jurisdiction comprises Counties of Adair, Andrew, Atchison, Bates, Benton, Boone, Buchanan, Caldwell, Callaway, Cass, Chariton, Clay, Clinton, Carroll, Cole, Cooper, Daviess, De Kalb, Gentry, Grundy, Henry, Holt, Howard, Harrison, Jackson, Johnson, Lafayette, Linn, Livingston, Macon, Mercer, Miller, Moniteau; Morgan, Nodaway, Platte, Putnam, Pettis, Randolph, Ray, Saline, Schuyler, Sullivan, Vernon and Worth. (RSMo 477.070).

Sessions.

In Kansas City.

Southern District.

Jurisdiction comprises Counties of Barry, Barton, Bollinger, Butler, Camden, Carter, Cedar, Christian, Crawford, Dade, Dallas, Dent, Douglas, Dunklin, Greene, Hickory, Howell, Iron, Jasper, Laclede, Lawrence, McDonald, Maries, Mississippi, New Madrid, Newton, Oregon, Ozark, Pemiscot, Phelps, Polk, Pulaski, Reynolds, Ripley, Scott, Shannon, St. Clair, Stoddard, Stone, Taney, Texas, Wayne, Webster and Wright. (RSMo 477.060).

Sessions.

In Springfield and Poplar Bluff. (RSMo 477.220).

Circuit Courts.

Jurisdiction.

Circuit Courts have original jurisdiction over all cases and matters, civil and criminal.

Juvenile Court Commissioners.

In each county of first class, having charter form of government, except counties having family court, majority of Circuit Judges, en banc, may appoint one or two persons having same qualifications as Circuit Judge, for term of four years to devote full time to such duties. In City of St. Louis one person may be so appointed. (RSMo 211.023).

Place of Sitting.

Adair County: Second Circuit; court sits at Kirksville.

Andrew County: Fifth Circuit; court sits at Savannah.

Atchison County: Fourth Circuit; court sits at Rock Port.

Audrain County: Twelfth Circuit; court sits at Mexico.

Barry County: Thirty-ninth Circuit; court sits at Cassville.

Barton County: Twenty-eighth Circuit; court sits at Lamar.

Bates County: Twenty-seventh Circuit; court sits at Butler.

Benton County: Thirtieth Circuit; court sits at Warsaw.

Bollinger County: Thirty-second Circuit; court sits at Marble Hill.

Boone County: Thirteenth Circuit; court sits at Columbia.

Buchanan County: Fifth Circuit; court sits at St. Joseph.

Butler County: Thirty-sixth Circuit; court sits at Poplar Bluff.

Caldwell County: Forty-third Circuit; court sits at Kingston.

Callaway County: Thirteenth Circuit; court sits at Fulton.

Camden County: Twenty-sixth Circuit; court sits at Camdenton.

Cape Girardeau County: Thirty-second Circuit; court sits at Cape Girardeau and Jackson.

Carroll County: Eighth Circuit; court sits at Carrollton.

Carter County: Thirty-seventh Circuit; court sits at Van Buren.

Cass County: Seventeenth Circuit; court sits at Harrisonville.

Cedar County: Twenty-eighth Circuit; court sits at Stockton.

Chariton County: Ninth Circuit; court sits at Keytesville.

Christian County: Thirty-eighth Circuit; court sits at Ozark.

Clark County: First Circuit; court sits at Kahoka.

Clay County: Seventh Circuit; court sits at Liberty.

Clinton County: Forty-third Circuit; court sits at Plattsburg.

Cole County: Nineteenth Circuit; court sits at Jefferson City.

Cooper County: Eighteenth Circuit; court sits at Boonville.

Crawford County: Forty-second Circuit; court sits at Steelville.

Dade County: Twenty-eighth Circuit; court sits at Greenfield.

Dallas County: Thirtieth Circuit; court sits at Buffalo.

Daviess County: Forty-third Circuit; court sits at Gallatin.

DeKalb County: Forty-third Circuit; court sits at Maysville.

Dent County: Forty-second Circuit; court sits at Salem.

Douglas County: Forty-fourth Circuit; court sits at Ava.

Dunklin County: Thirty-fifth Circuit; court sits at Kennett.

Franklin County: Twentieth Circuit; court sits at Union.

Gasconade County: Twentieth Circuit; court sits at Hermann.

Gentry County: Fourth Circuit; court sits at Albany.

Greene County: Thirty-first Circuit; court sits at Springfield.

Grundy County: Third Circuit; court sits at Trenton.

Harrison County: Third Circuit; court sits at Bethany.

Henry County: Twenty-seventh Circuit; court sits at Clinton.

Hickory County: Thirtieth Circuit; court sits at Hermitage.

Holt County: Fourth Circuit; court sits at Oregon.

Howard County: Fourteenth Circuit; court sits at Fayette.

Howell County: Thirty-seventh Circuit; court sits at West Plains.

Iron County: Forty-second Circuit; court sits at Ironton.

Jackson County (eastern portion): Sixteenth Circuit; court sits at Independence.

Jackson County (western portion): Sixteenth Circuit; court sits at Kansas City.

Jasper County: Twenty-ninth Circuit; court sits at Carthage and Joplin.

Jefferson County: Twenty-third Circuit; court sits at Hillsboro.

Johnson County: Seventeenth Circuit; court sits at Warrensburg.

Knox County: Second Circuit; court sits at Edina.

Laclede County: Twenty-sixth Circuit; court sits at Lebanon.

Lafayette County: Fifteenth Circuit; court sits at Lexington.

Lawrence County: Thirty-ninth Circuit; court sits at Mt. Vernon.

Lewis County: Second Circuit; court sits at Monticello.

Lincoln County: Eleventh Circuit; court sits at Troy.

Linn County: Ninth Circuit; court sits at Lineus.

Livingston County: Forty-third Circuit; court sits at Chillicothe.

Macon County: Forty-first Circuit; court sits at Macon.

Madison County: Twenty-fourth Circuit; court sits at Fredericktown.

Maries County: Twenty-fifth Circuit; court sits at Vienna.

Marion County: Tenth Circuit; court sits at Palmyra and Hannibal.

McDonald County: Fortieth Circuit; court sits at Pineville.

Mercer County: Third Circuit; court sits at Princeton.

Miller County: Twenty-sixth Circuit; court sits at Tuscumbia.

Mississippi County: Thirty-third Circuit; court sits at Charleston.

Moniteau County: Twenty-sixth Circuit; court sits at California.

Monroe County: Tenth Circuit; court sits at Paris.

Montgomery County: Twelfth Circuit; court sits at Montgomery City.

Morgan County: Twenty-sixth Circuit; court sits at Versailles.

New Madrid County: Thirty-fourth Circuit; court sits at New Madrid.

Newton County: Fortieth Circuit; court sits at Neosho.

Nodaway County: Fourth Circuit; court sits at Maryville.

Oregon County: Thirty-seventh Circuit; court sits at Alton.

Osage County: Twentieth Circuit; court sits at Linn.

Ozark County: Forty-fourth Circuit; court sits at Gainesville.

Pemiscot County: Thirty-fourth Circuit; court sits at Caruthersville.

Perry County: Twenty-fourth Circuit; court sits at Perryville.

Pettis County: Eighteenth Circuit; court sits at Sedalia.

Phelps County: Twenty-fifth Circuit; court sits at Rolla.

Pike County: Forty-fifth Circuit; court sits at Bowling Green.

Platte County: Sixth Circuit; court sits at Platte City.

Polk County: Thirtieth Circuit; court sits at Bolivar.

Pulaski County: Twenty-fifth Circuit; court sits at Waynesville.

Putnam County: Third Circuit; court sits at Unionville.

Ralls County: Tenth Circuit; Court sits at New London.

Randolph County: Fourteenth Circuit; court sits at Huntsville.

Ray County: Eighth Circuit; court sits at Richmond.

Reynolds County: Forty-second Circuit: court sits at Centerville.

Ripley County: Thirty-sixth Circuit; court sits at Doniphan.

St. Charles County: Eleventh Circuit; court sits at St. Charles.

St. Clair County: Twenty-seventh Circuit; court sits at Osceola.

St. Francois County: Twenty-fourth Circuit; court sits at Farmington.

Ste. Genevieve County: Twenty-fourth Circuit; court sits at Ste. Genevieve.

St. Louis City: (See subhead Circuit Court of the City of St. Louis, infra).

St. Louis County: Twenty-first Circuit; court sits at Clayton.

Saline County: Fifteenth Circuit; court sits at Marshall.

Schuyler County: First Circuit; court sits at Lancaster.

Scotland County: First Circuit; court sits at Memphis.

Scott County: Thirty-third Circuit; court sits at Benton.

Shannon County: Thirty-seventh Circuit; court sits at Eminence.

Shelby County: Forty-first Circuit; court sits at Shelbyville.

Stoddard County: Thirty-fifth Circuit; court sits at Bloomington.

Stone County: Thirty-ninth Circuit; court sits at Galena.

Sullivan County: Ninth Circuit; court sits at Milan.

Taney County: Thirty-eighth Circuit; court sits at Forsyth.

Texas County: Twenty-fifth Circuit; court sits at Houston.

Vernon County: Twenty-eighth Circuit; court sits at Nevada.

Warren County: Twelfth Circuit; court sits at Warrenton.

Washington County: Twenty-fourth Circuit; court sits at Potosi.

Wayne County: Forty-second Circuit; court sits at Greenville.

Webster County: Thirtieth Circuit; court sits at Marshfield.

Worth County: Fourth Circuit; court sits at Grant City.

Wright County: Forty-fourth Circuit; court sits at Hartville.

Circuit Court of the City of St. Louis.

City of St. Louis, under a provision of present Constitution of this state, is a separate municipality, having no county organization, and is entirely distinct from County of St. Louis. It constitutes Twenty-second Judicial Circuit. Circuit court sits in separate divisions, as follows: one assignment division, eleven civil divisions, three domestic relations and juvenile divisions and three criminal divisions. Judges from time to time sit in general term to establish rules of court.

Courts of Record.

Supreme Court, Courts of Appeals, Circuit Courts, and Associate Circuit Courts are courts of record.

Family court is established in Circuit Courts of Boone, Callaway, Clay, Greene, Jackson, St. Louis Counties, City of St. Louis and other which choose. Family court has exclusive original jurisdiction over actions including but not limited to dissolution of marriage, legal separation, separate maintenance, child custody, adoption, juvenile proceedings, adult abuse and change of name. Additional $30 fee for cases filed in family court. (RSMo 487.010-.190).

Probate Division.

Probate Division of Circuit Court has jurisdiction over all matters pertaining to probate business, granting letters testamentary and of administration, appointment of guardians of minors and persons of unsound minds, settling accounts of executors, administrators, and guardians, and sale or leasing of lands by administrators, executors and guardians, construction of wills as incident to administration of estates, determination of heirship, administration of testamentary and inter vivos trusts, of mental incompetency proceedings, and of such other probate business as may be prescribed by law. (RSMo 472.020).

Clerks.

Judge in most counties acts ex officio as his own clerk, but may appoint a separate clerk.

Associate Circuit Courts.

In counties of not more than 30,000 inhabitants, there is one associate circuit judge; in counties of more than 30,000 and less than 100,000 inhabitants there are two associate circuit judges. In counties of 100,000 inhabitants or more there are three associate circuit judges and one additional associate circuit judge for each additional 100,000 inhabitants or major fraction thereof. (RSMo 478.320).

Suits may be instituted either by voluntary appearance and agreement of parties or by process (summons or attachment). Plaintiff shall file written petition containing facts upon which claim is founded. Pleadings of petition shall be informal unless court in its discretion requires formal pleadings. Affirmation defenses, counterclaims and cross claims may be filed in writing not later than return date. No other responsive pleading need be filed. If no responsive pleading is filed, statements made in petition, affirmative defenses, counterclaims and cross claims are deemed denied. (RSMo 517.031). Trial procedure generally governed by circuit court usage and practice, and by c. 517. Executions returnable not less than 30 nor more than 90 days and are proceeded upon as executions from other courts of record. See c. 517 generally.

Jurisdictional limit is $25,000. (RSMo 517.011).

Associate circuit courts have jurisdiction in actions for forcible entry and detainer and unlawful detainer. (RSMo 534.060).

County Courts.

County courts have control and management of property belonging to county, power to purchase, lease and receive by donation any property for use of county, to sell and cause to be conveyed any real estate or personal property belonging to county, and to audit and settle all demands against county.

Small Claims Courts.

Each associate circuit judge must maintain separate "small claims" docket and must set aside and specify times that may be reasonable and necessary for hearing small claims. When acting as small claims court, associate circuit court has original jurisdiction of all civil cases whether tort or contract where amount in controversy does not exceed $3,000 in first-class counties exclusive of interest or costs. Parties may prosecute their claims and defenses without assistance of attorney. Corporations or unincorporated associations including labor unions may enter their appearance and be represented by officer or authorized employee. Except as otherwise provided in this act or by rule of Supreme Court, established structure, administration and procedure of associate circuit courts in their respective counties must prevail. Proceedings must be conducted in informal summary manner. Formal rules of evidence and procedure do not apply. Judge must assume affirmative duty to determine merits of claims and defenses of parties and may question parties and witnesses. No discovery permitted. Trial must be to judge sitting without jury. When associate circuit court is hearing small claims matters it is known as "small claims court".

If amount in controversy in action otherwise cognizable in associate circuit court exceeds $3,000 in first-class counties plaintiff may file and prosecute small claims action for recovery of money but he thereby waives his claim for any sum in excess of $3,000 in first-class counties in that or any subsequent proceeding involving same parties and issues. At any time up to ten days after service of process and before date of hearing defendant may file counterclaim which does not arise out of same transaction or occurrence as plaintiff's original claim. Pleading requirements for filing such counterclaim are same as those for filing original claim. At any time up to and including time of hearing defendant may raise counterclaim which grows out of same transaction or occurrence as plaintiff's original claim. If during course of hearing judge determines that defendant has counterclaim arising out of same transaction or occurrence as plaintiff's original claim, judge may question parties on counterclaim and render judgment on it as if it had been raised on initiative of defendant.

If amount of counterclaim exceeds by itself jurisdictional limit of small claims court, court shall have jurisdiction to hear both claim and counterclaim with consent of all parties to proceeding. Court must not accept consent of any party unless court has informed him he has right to consult attorney prior to giving or withholding consent. If all parties do not consent and if counterclaim grew out of same transaction or occurrence as plaintiff's original claim cause must be transferred by small claims court to associate circuit court or to another appropriate court of record. If one or more of parties does not consent and counterclaim does not grow out of same transaction or occurrence as original claim court must dismiss counterclaim without prejudice to its being heard separately in appropriate court. If one or both of parties does not consent and if counterclaim grew out of same transaction or occurrence as plaintiff's original claim and court determines amount or nature of counterclaim is not in good faith then court must dismiss counterclaim without prejudice.

No claim may be filed or prosecuted in small claims court by party who is assignee of claim or has filed more than eight other claims in Missouri small claims court during previous 12 months. At time of filing action plaintiff must sign statement so stating. However, defendant is not prohibited from filing or prosecuting counterclaim based on same transaction or occurrence.

No claim may be filed unless: (a) At least one defendant is resident of county in which court is located or at least one plaintiff is resident of county in which court is located and at least one defendant may be found in said county, or (b) facts giving rise to cause of action took place within county in which court is located.

Clerks under supervision of associate circuit judge must explain to litigants procedures and functions of small claims court and assist them in filling out all forms and necessary pleadings for presentation of their claim or counterclaim to court.

Action may be commenced by filing with clerk of court petition substantially similar to petition form provided in Act. Petition form must be provided by clerk free of charge to any person. Copy of complaint must be attached to summons. Filing fee is $10 unless claim is less than $100 then filing fee is $5. Plaintiff must pay cost of service in advance. Plaintiff must not be required to give security for costs. Court may in its discretion award fees and assess costs. Personal service of summons not required unless specifically requested by plaintiff upon showing that service by certified mail cannot be had. Service may be made by mailing copy of summons and complaint to defendant at his last known address by certified mail return receipt requested. Envelope and return receipt must be stamped with docket number of case. Receipt for certified mail must state name and address of addressee and date of mailing and must be attached to original summons. Return receipt when signed by addressee returned to court must be attached to original summons and if it shows delivery at least ten days before date of appearance constitutes proof of service. Clerk must note fact of service in permanent record.

Defendant must appear at time and place specified in summons and case must be tried on day set unless continued by court upon request of either party. No party entitled to more than one continuance except on showing of good cause and at discretion of judge. If defendant appears he need not file answer and allegations of complaint must be considered denied and defense may be provided as if specifically pleaded. If upon date for hearing defendant being duly summoned fails to appear, court may enter judgment for amount claimed. If plaintiff does not appear or if neither appears court may enter order dismissing action. Any action dismissed may not be brought in small claims court again but may be brought in appropriate associate circuit court using regular proceedings. If court finds small claims proceedings are being used by plaintiff or defendant for purpose of oppression or harassment it may issue order denying plaintiff or defendant use of small claims proceedings for up to one year.

No judgment is lien on real estate. Any person aggrieved by final judgment rendered except judgment by consent may appeal to circuit court as provided for appeals from associate circuit courts. (RSMo 482.300-.365).

See also category 5 Civil Actions and Procedure, topic 5.26 Venue.

6.01A JUSTICES OF THE PEACE:

Abolished. See topic 6.01 Courts, subhead Associate Circuit Courts.

6.02 LEGISLATURE:

Meets annually in January. (Const. Art. III, § 20).

Special Sessions.

Governor may call special sessions. (Const. Art. IV, § 9).

Initiative and referendum are provided for. (Const. Art. III, §§ 49-53).

Lobbyists.

Registration with clerk of house of representatives and secretary of senate and reports of money expended required. (RSMo 105.470).

See also topic 6.04 Statutes.

6.03 REPORTS:

Missouri Reports contain decisions of Supreme Court (1821 to 1956), Missouri Appeal Reports contain decisions of St. Louis, Kansas City and Springfield Courts of Appeals (1876 to 1956): both series numbered consecutively beginning with vol. 1. Missouri decisions are also reported in Southwestern Reporter, which is only Missouri decision reporter since end of publication of Missouri Reports (Vol. 365, 1957) and Missouri Appeal Reports (Vol. 241, 1956).

Digest.

Decisions are digested in Missouri Digest.

6.04 STATUTES:

Current official revision of statutes is Revised Statutes Missouri 2000. Missouri Revised Statutes Annotated is in general use, but not an official publication.

Uniform Acts which have been adopted are: Aeronautics (1939); Anatomical Gift (1969); Arbitration (1980); Business Records as Evidence (1949); Child Custody Jurisdiction and Enforcement Act (2009); Commercial Code (1963); Common Trust Fund (1955); Condominium (1980); Criminal Extradition (1953); Enforcement of Foreign Judgments (1951); Facsimile Signature of Public Officials (1959); Fiduciaries (1959); Foreign Money-Judgments Recognition (1984); Fraudulent Transfers (1992); Fresh Pursuit (1951); Individual Accident and Sickness Insurance (1959); Interstate Family Support (1996); Judicial Notice of Foreign Law (1949); Limited Partnership, Revised (1985); Mandatory Disposition of Detainer (1982); Parentage (1987); Partnership (1949); Principal and Income (1962); Prudent Investor Act (1994); Prudent Management of Institutional Funds Act (2009); Reciprocal Enforcement of Support (1959); Securities (1967); Simplification of Fiduciary Security Transfers (1959); Simultaneous Death (1947); To Secure Attendance of Witnesses From Without a State In Criminal Proceedings (1959); Trade Secrets Act (1985); Transfers to Minors Act (1985); Trust Code (2005); Veterans' Guardianship (1947); Vital Statistics (1947).

Significant variations or modifications, if any, to adopted Uniform Acts appear in topics in which these acts are discussed.

For text of Uniform Acts falling within the scope of the Martindale-Hubbell Law Digests see Uniform and Model Acts section.

6.05 UNIFORM LAWS:

For list of Uniform Acts in force in this state see topic 6.04 Statutes. For text of Uniform Acts within the scope of the Martindale-Hubbell Law Digests see Uniform and Model Acts section.

7 CRIMINAL LAW

7.00A BAIL:

See topic 7.01 Criminal Law.

7.01 CRIMINAL LAW:

Criminal Code is included in Revised Statutes. Criminal proceedings are instituted by indictment or information.

Persons shall be bailable by sufficient sureties, except for capital offenses when proof is evident or presumption great. (Const. Art. I, § 20). If defendant poses danger to victim, community or other person, court may increase bail, deny bail or impose special conditions.

(RSMo 544.457).

Sentencing Advisory Commission to establish system of recommended sentences. (RSMo 558.019).

It is felony for any person held in correctional facility within this state who is knowingly infected with HIV, hepatitis B, or hepatitis C to intentionally cause another person to come into contact with any of his or her bodily fluids. (RSMo 565.085[3]).

Any person convicted of federal crime is prohibited from qualifying as candidate for elective public office. (RSMo 115.348); but see Rizzo v. State, 189 S.W.3d 576.

Law enforcement agencies are allowed to hold suspect arrested without warrant for up to 24 hours before charging person with crime. (RSMo 544.170[1]).

Alcohol.

It is class B misdemeanor for owners or renters, except parent or guardian, to permit underage drinking on their property. (RSMo 311.310).

Any person who obtains, transfers, or uses any means of identification for purpose of providing false identification to minor for purchase of alcohol is guilty of class A misdemeanor. (RSMo 570.223[10])).

Probation and Parole.

Board of Probation and Parole is authorized to charge offenders placed under supervision of board monthly fee. (RSMo 217.690[3])). Any person released from prison or parole must be given written notice of procedure to register to vote. (RSMo 217.730[3]).

Court may add up to one year onto person’s probationary period when person has violated terms of his or her probation. (RSMo 559.016[3]).

Court may order restitution to be paid to victim of tampering or auto theft. (RSMo 559.105). Board of Probation and Parole is prohibited from releasing person early if person has failed to pay restitution. (RSMo 559.105[3]).

Sex Crimes.

Forcible rape and forcible sodomy added to dangerous felonies and increases minimum sentence from five to ten years. (RSMo 556.061). There is no statute of limitations for forcible rape and forcible sodomy or attempted forcible rape or forcible sodomy. (RSMo 556.036[1]).

Crimes created for sexual offenders who know they have HIV. (RSMo 191.656, 191.659, 191.677, 566.135, and 567.020).

Any person convicted of certain sex offenses when victim is younger than 14 years of age and offender is prior sentenced sex offender requires lifetime supervision by Board of Probation. (RSMo 217.735). All offenders must be electronically monitored using global positioning system. It is felony to tamper with electronic monitoring equipment (RSMo 575.205) and to violate condition of lifetime supervision by Board for any person convicted of certain sex offenses (RSMo 575.206).

Sexually oriented business may be closed as public nuisance if owner of business allows criminal activity to occur on premises. (RSMo 67.2546); but see Mo. Ass'n of Club Execs., Inc. v. State, 208 S.W.3d 885. There are restrictions on operation of adult cabarets and other sexually oriented businesses. (RSMo 67.2540, 67.2546, 67.2552); but see Mo. Ass'n of Club

Execs., Inc. v. State, 208 S.W.3d 885.

Amber Alert System adopted. (RSMo 210.1012).

Uniform Criminal Extradition Act (c. 548) and **Uniform Law to Secure Attendance of Witnesses From Within or Without State** (RSMo 491.400-.450) in effect.

National Crime Prevention and Privacy Compact adopted. (RSMo 43.542).

8 DEBTOR AND CREDITOR

8.01 ASSIGNMENTS:

Causes of action ex delicto which are not personal and causes of action ex contractu are assignable.

Assignment of wages must be in writing, with correct date and amount thereof and names of persons owing the same. Assignment of unearned wages is void. (RSMo 432.030).

Prior to release of any offender from imprisonment, assignment no greater than 10% of offender’s income from any source shall be requested. Such assignment shall be valid no longer than five years. (RSMo 217.829[5]).

Assignment of Judgment.

See category 5 Civil Actions and Procedure, topic 5.15 Judgments.

Assignments of Accounts Receivable.

See category 3 Business Regulation and Commerce, topic 3.09 Commercial Code.

Uniform Commercial Code in force. See category 3 Business Regulation and Commerce, topic 3.09 Commercial Code.

8.02 ATTACHMENT:

An attachment may be had in any civil action in circuit or associate circuit court.

In Whose Favor Writ May Issue.

Any plaintiff, including a nonresident or foreign corporation, may obtain an attachment. (56 S.W.2d 28).

Claims on Which Writ May Issue.

It is not necessary that the claim sued on be payable within the state.

As to claims not due see infra, subhead Grounds.

As to limitations on right to attach or garnish wages, see topic 8.09 Garnishment.

Grounds for attachment are that defendant: (1) Is not a resident of this state; (2) is a corporation whose chief office or place of business is out of this state; (3) conceals himself so that the ordinary process of law cannot be served upon him; (4) has absconded or absented himself from his usual place of abode in this state so that ordinary process of law cannot be served upon him; (5) is about to remove his property or effects out of state, with intent to defraud, hinder or delay creditors; (6) is about to remove out of state with intent to change his domicile; (7) has fraudulently conveyed or assigned his property or effects so as to hinder or delay his creditors; (8) has fraudulently concealed, removed or disposed of his property or effects so as to hinder or delay his creditors; (9) is about fraudulently to convey or assign his property or effects so as to hinder or delay his creditors; (10) is about fraudulently to conceal, remove or dispose of his property or effects so as to hinder or delay his creditors; or (11) that the cause of action accrued out of this state, and defendant has absconded or secretly removed his property or effects into this state; or (12) that the damages for which the action is brought arose from the commission of some felony or misdemeanor or the seduction of a female; or (13) that defendant has failed to pay the price or value of an article or thing delivered which by contract he was bound to pay upon delivery; or (14) that the debt sued for was fraudulently contracted on the part of defendant. Attachment may also be brought for rent due within one year in certain cases. Attachments may issue upon a demand not due in any of the cases above mentioned, except the first, second, third and fourth; but final judgment will not be rendered against the defendant until the demand matures. (RSMo 521.010-020).

Proceedings to Obtain.

Plaintiff, or someone in his behalf, must make affidavit that plaintiff has just demand against defendant, that amount which affiant believes plaintiff ought to recover, after allowing all just claims and setoffs, is . . . . dollars, and that affiant has good reason to believe and does believe that one or more of grounds for attachment exists, specifying grounds upon which he intends to rely in language set forth above. (RSMo 521.060). Plaintiff wishing to sue by attachment shall file with clerk of court where attachment is instituted petition of his cause and also affidavit and attachment bond (see subhead Attachment Bond, infra) if required and thereupon sue out original attachment against lands, tenements, goods, moneys effects and credits of defendant wherever they may be. (RSMo 521.050).

Attachment Bond.

Bond must be given in double amount of debt, by plaintiff or some responsible person as principal and one or more sureties, except in suits instituted by state or county in its own behalf, and except where defendant is nonresident, in which cases no bond is required, but in latter case attachment is dissolved, on motion, upon defendant entering his appearance and filing his answer to merits unless plaintiff files bond within ten days. If attachment is set aside or dismissed, attaching creditor is liable on his bond for such damages as resulted from his levy and proceedings thereunder. (RSMo 521.050-.070).

Levy.

Officer may seize, as attachable property evidences of debt of the defendant, as well as other property real, personal and mixed and also judgment debts; but no property or wages exempt from execution may be attached, except in case of nonresident or one who is about to move out of state. (RSMo 521.240). Provisions of law governing attachments apply to proceedings before circuit judges and associate circuit judges in same manner except as may be specifically provided otherwise. (RSMo 521.660).

Indemnity.

There is no statutory authority for the officer to require indemnity before levying.

Priorities.

Where same property is attached in several actions by different claimants, court shall determine priority, validity, good faith, and force and effect of different attachments, and may dissolve any attachment, wholly or partially, or make such other order as may be required. If writs have issued from different courts, all matters regarding attachments shall be determined by court out of which first writ was issued. (C.R. 85.18).

An attaching creditor is not a bona fide purchaser for value, but obtains only such rights as the debtor had in the property at the time and is postponed to other liens or claims on the property which became effective before the attachment. (112 Mo. 599, 20 S.W. 686).

Release of Property.

Owner of property may retain or regain possession of property levied on by filing sufficient bond approved by court, executed by owner of property as principal and one or more sureties, to claimant in amount equal to value of property, or amount of claim and costs, whichever is less. (C.R. 85.09).

Sale.

Court may order sale of attached personal property if property is likely to perish, is likely to depreciate in value to considerable extent, or keeping it will cause undue expense. (C.R. 85.23).

Third Party Claims.

Person claiming interest in property which has been attached may intervene in attachment proceedings. (C.R. 85.20).

Dissolution.

Attachments may be dissolved on motion made by owner of property at any time before final judgment. Claimant shall have burden of proving that attachment was properly granted. Attachment shall be dissolved at any time before final judgment when court finds: (1) Bond provided for in Rule 85.08 is inadequate and claimant fails to file sufficient bond, approved by court, within such time as court directs; (2) affidavit is insufficient and claimant fails to file sufficient affidavit, approved by court, within such time as court directs; (3) owner of property has entered his appearance in action and bond provided for in Rule 85.09 has been filed or approved; or (4) for any other reason writ of attachment should not have been issued. (C.R. 85.14).

See also topics 8.05 Executions; 8.09 Garnishment; 8.06 Exemptions.

8.03 [RESERVED]

8.04 CREDITORS’ SUITS:

All existing remedies at law, to which there is a possibility of resort must ordinarily be exhausted before a creditor’s bill can be maintained. Insolvency of the debtor is usually a condition precedent, also. The general rule is there must be a judgment, execution and a return of nulla bona before this equitable relief is granted although exceptions exist where existence and amount of debt are admitted by debtor and where debtor is absent from state and not subject to ordinary processes of law within state. (135 S.W.2d 355).

See also topics 8.08 Fraudulent Sales and Conveyances, Executions; category 13 Estates and Trusts, topic 13.09 Executors and Administrators.

8.05 EXECUTIONS:

Execution from court of record may issue to different counties at the same time. (C.R. 76.05-.06).

Exemptions.

See topic 8.06 Exemptions.

Time for Issuance.

Execution from court of record may issue at any time within ten years after rendition of judgment (RSMo 513.020), or revival, or part payment of such judgment when entered of record (RSMo 516.350).

Execution on judgment of circuit court is not issued until time for filing motion for new trial has expired and if such motion is filed not until it is overruled.

Lien.

An execution is not a lien on personal property until levied thereon. (C.R. 76.07).

Levy.

Officer making levy on real property not subject to lien of judgment (see category 5 Civil Actions and Procedure, topic 5.15 Judgments) must file with recorder of deeds of county in which such real estate is situated, notice of such levy. (C.R. 76.07).

Defendant may select what property, real or personal, may be levied upon to satisfy execution, and if he gives to officer list of property so selected, sufficient to satisfy such execution, officer must levy upon such property and no other, if in his opinion it is sufficient; if not, then upon such additional property as may be sufficient. (C.R. 76.09).

Sale of real and personal property taken in execution by an officer, must be held on the day advertised between hours of 9 A.M. and 5 P.M., and the highest bidder shall be the purchaser. (C.R. 76.18). Notice of sale of real estate must be published at least 20 days (C.R. 76.16), and of sale of personal property at least ten days, before day of sale (C.R. 76.13). Bill of sale may be secured from officer making execution sale on demand at time of sale. (C.R. 76.21).

Real Property.

When an execution is levied upon real estate, the officer levying the same must divide such property, if susceptible of division, and sell so much thereof as will be sufficient to satisfy such execution, unless the defendant in the execution desires the whole of any tract or lot of land to be sold together, in which case it must be so sold. (C.R. 76.11).

Leases for an unexpired term of three years or more are subject to execution and sale as real property. (RSMo 513.200).

Return.

Execution from a circuit court is returnable not less than 30 days nor more than 90 days after issuance. (C.R. 76.04).

Redemption.

There is no right of redemption of property sold at execution sale.

Stay.

Court out of which execution issued may, on verified petition setting forth good cause and after notice to opposite party, order execution stayed, provided sufficient bond or security to satisfy execution is furnished. (C.R. 76.25). As to stay pending review by higher court, see category 5 Civil Actions and Procedure, topic 5.03 Appeal and Error.

Claims of Third Persons.

Any person, except judgment debtor, claiming interest in property which has been levied upon may intervene by serving motion upon all parties affected thereby. Motion shall state grounds therefor, and be accompanied by pleading setting forth claim for which intervention is sought. (C.R. 76.10 and 52.12).

Supplementary Proceedings.

When execution is returned unsatisfied, judgment creditor may petition court which rendered judgment to enter order requiring debtor to appear and be examined concerning means of satisfying judgment. (C.R. 76.27).

See also topics 8.02 Attachment, Exemptions; category 5 Civil Actions and Procedure, topics 5.03 Appeal and Error, 5.22 Sequestration.

8.06 EXEMPTIONS:

Following property is exempt from attachment and execution to extent of any person's interest therein: (1) Household furnishings, goods and wearing apparel held primarily for personal, family, or household use, not exceeding $3,000 in value; (2) jewelry held primarily for personal, family or household use, not exceeding $500 in value; (3) wedding rings up to $1,500; (4) any other property not exceeding $600 in value; (5) any implements, professional books or tools of trade, not exceeding $3,000 in value; (6) any motor vehicles in aggregate not exceeding $3,000 in value; (7) any mobile home used as principal residence, not exceeding $5,000 in value; (8) any one or more unmatured life insurance contracts other than credit life insurance contract; (9) any accrued dividend or interest of any one or more unmatured life insurance contracts wherein insured is such person, not exceeding $150,000 less any amount of property transferred by insurance company to itself, not to be exempt from any claim for child support; (10) professionally prescribed health aids; (11) right to receive certain government benefits, alimony not exceeding $750 per month and payments made under certain pension and annuities plans unless subject to qualified domestic relations order under 414(p) of Internal Revenue Code, and money from certain qualified retirement plans; (12) right to receive payment for wrongful death claim. (RSMo 513.430). Spendthrift trusts created for benefit of employees are exempt from attachment and execution prior to payment or delivery of trust earnings and principal. (RSMo 456.014).

Substitution.

Head of family may select and hold exempt from execution any other property, real, personal or mixed, or debts and wages not exceeding in value amount of $1,250 plus $350 for each additional unmarried dependent child under 18, including dependents who are determined to be disabled, except 10% of any debt, income, salary or wages due such head of family. (RSMo 513.440).

Debts Against Which Exemptions Not Allowed.

Personal property is subject to execution on a judgment against the purchaser for the purchase price thereof, and cannot be made exempt from such execution and judgment except in the hands of an innocent purchaser for value without notice of existence of prior claim for purchase money. (RSMo 513.140). Nothing is exempt from attachment or execution on a judgment or decree for alimony or support and maintenance of children or from attachment or execution in proceeding by married woman for maintenance (RSMo 452.140), or from execution against property of debtor who is about to leave state or for the payment of taxes due to the state or any city, town or county (RSMo 513.465, 513.425), or against a claim for personal services of a house servant or common laborer, not exceeding $90, provided suit be instituted within six months after last service rendered (RSMo 513.060; 513.470).

Exemptions must be claimed in order to be available.

Earnings.

Maximum part of earnings of individual for workweek subject to garnishment, after deduction of amounts required by law, may not exceed: (a) 25% or (b) 30 times current federal maximum hourly wage or (c) if employee head of family and resident of state 10%, whichever is less. Restrictions do not apply to any court order for support of any person, any court order under Chapter 13 of Bankruptcy Act or state or federal tax debt. (RSMo 525.030[2]).

Homestead Exemptions.

See topic 8.10 Homesteads.

See also topic 8.09 Garnishment; categories 13 Estates and Trusts, topic Executors and Administrators, subhead Allowances; Taxation, topic Property Taxes.

8.07 FORECLOSURE:

See topic 8.13 Liens; category 20 Mortgages, topic 20.04 Mortgages of Real Property.

8.08 FRAUDULENT SALES AND CONVEYANCES:

Bulk Sales.

See category 3 Business Regulation and Commerce, topic 3.09 Commercial Code.

Uniform Commercial Code in force. See category 3 Business Regulation and Commerce, topic 3.09 Commercial Code.

Uniform Fraudulent Conveyance Act not adopted.

Uniform Fraudulent Transfer Act adopted. (RSMo 428.005-.059).

See also topic 8.02 Attachment.

8.09 GARNISHMENT:

Writs of attachment may be levied by garnishing a debtor of the defendant, as well as by levy upon property. All persons are subject to garnishment on attachment or execution who are named as garnishees in the writ, or have in their possession goods, moneys or effects of the defendant not actually seized by the officers, and all debtors of the defendant and such others as the plaintiff or his attorneys shall direct to be summoned as garnishees. (C.R. 90.02).

Property Which May Be Reached.

All goods, personal property, money, credits, bonds, bills, notes, checks, choses in action, or other effects of defendant in his possession or control between time notice is served and return date of writ of garnishment. (C.R. 90.01-.06).

Garnishee can discharge himself before final judgment by payment into court of sufficient money or property of defendant to satisfy debt and costs. (C.R. 90.10).

Garnishee must answer interrogatories filed by plaintiff. If he denies that he is indebted, issue can be made with him, which is tried in court as other causes. (C.R. 90.07).

Adverse Claims.

Adverse claimant may intervene in cause. (C.R. 90.09).

Exemptions from Garnishee Process.

No sheriff, constable, or other officer charged with the collection of money shall, prior to the return day of an execution or other process upon which the same may be made, be liable to be summoned as garnishee; nor shall any county collector, county treasurer, or municipal corporation, or any officer thereof, or any administrator or executor of an estate, prior to an order of distribution, or for payment of legacies or the allowance of a demand found to be due by his estate, be liable to be summoned as garnishee. (RSMo 525.030).

Wages in excess of amount exempt (see topic 8.06 Exemptions) are not subject to garnishment (RSMo 525.030), and no wages shall be attached or garnished before personal service is had upon defendant, unless suit be brought in county where defendant resides or where debt was contracted and cause of action arose or accrued and in cities of over 100,000 population in city where defendant resides or debt was contracted and cause of action accrued, and petition or statement in such case and writ or summons of attachment or garnishment must affirmatively show place where defendant resides and place where debt is contracted and cause of action arose.

See also topics 8.02 Attachment; 8.06 Exemptions; and 8.05 Executions.

8.10 HOMESTEADS:

Head of family is entitled to hold exempt from attachment and execution homestead consisting of dwelling house and appurtenances and land used in connection therewith, together with rents, issues and products thereof, subject to limitation as to value. (RSMo 513.475[1]).

Limitation of value of homestead which may be held exempt is $8,000. (RSMo 513.475[1]).

Limitation of Area.

None.

Debts or Liabilities Against Which Exemption Not Available.

Homestead exemption is not available as against causes of action existing prior to time when title acquired by descent or devise vested or when deed to debtor was filed for record. (RSMo 513.510).

Designation of homestead not necessary.

Loss of Exemption.

Abandonment of homestead if intent to abandon and external act by which that intention is carried into effect. (256 Mo. 501, 165 S.W. 1017).

Claim of Exemption.

Where value exceeds limitation housekeeper or head of family may choose part to which exemption shall apply. (RSMo 513.480).

Alienation or Encumbrance.

Husband and wife jointly (but not husband alone) can sell, mortgage or alienate homestead. (RSMo 513.475).

Proceeds of sale of homestead are exempt for a reasonable time pending investment in another homestead. (RSMo 513.515).

See also category 14 Family, topic 14.09 Husband and Wife.

8.11 JUDGMENT NOTES:

See category 3 Business Regulation and Commerce, topic 3.02 Bills and Notes.

8.12 LEVY:

See topics 8.02 Attachment, 8.05 Executions.

8.13 LIENS:

The following are among the liens provided for by statute: architects, professional engineers, landscape architect and land surveyors (RSMo 429.015), liens of inn and boardinghouse keepers (RSMo 419.060), liens of warehousemen (see category 3 Business Regulation and Commerce, topic 3.09 Commercial Code), mechanics' liens on realty (RSMo 429.010), factors' liens (see category 3 Business Regulation and Commerce, topic 3.09 Commercial Code), liens of contractors, laborers, and materialmen against railroads (RSMo 429.440), liens for keeping and repairing vehicles, including motor vehicles (RSMo 430.010-.082), for keeping or training animals (RSMo 430.150), liens of hospitals (RSMo 430.230), liens of common carriers (RSMo 447.070), owners of self-storage facilities (RSMo 415.415).

Mechanics' Liens on Real Property.

Every person who does work or performs labor or rents any machinery or equipment or who furnishes any material, fixtures, engine, boiler or machinery for any building, erection or improvements upon land, or who repairs or furnishes landscaping goods or services pursuant to contract, may obtain lien on such land and improvements and lot, tract or parcel of land upon which same are situated to secure payment for his labor, machinery or equipment rented or materials, except that if such land and improvements are not within limits of any city, town or village, then such lien shall be also upon land to extent necessary to provide roadway for ingress to and egress from lot, tract or parcel of land upon which such building, erection or improvements are situated, not to exceed 40' in width, to nearest public road or highway. (RSMo 429.010[1]). This includes labor or material for any sidewalk, street, curb, sewer, water or other pipeline in front of, adjacent to, along or adjoining lot in town, city or village. (RSMo 429.020). There shall be no lien involving rental of machinery or equipment unless improvements are made on commercial property, claim exceeds $5,000, and party claiming lien provides notice within five days of commencement that equipment is being used on owner's property. (RSMo 429.010[2]). Contract provision which makes payment obligation contingent upon receipt of payment from any other party is not defense to mechanic's lien. (RSMo 431.183).

Licensed or Leased Property.

Where contract is with lessee or licensee, lien attaches only to leasehold or license but not to the reversion. (RSMo 429.070).

Notice.

Original contractor must provide person with whom contract is made before receiving any payment either at time of execution of contract, when material is delivered, work commenced or delivered with first invoice, following notice in ten-point bold type: "Notice to Owner: Failure of this contractor to pay those persons supplying material or services to complete this contract can result in the filing of a mechanic's lien on the property which is the subject of this contract pursuant to Chapter 429, RSMo. To avoid this result you must ask this contractor for 'Lien Waivers' from all persons supplying material or services for the work described in this contract. Failure to secure lien waivers may result in your paying for labor and material twice." Giving this notice is condition precedent to mechanic's lien in favor of contractor, and failure to give notice with intent to defraud is misdemeanor. Notice provision does not apply to new residence if buyer has lien protection through title insurance company. Every person, other than original contractor, must give written notice to owner or agent ten days before filing lien stating that he holds claim against specified property, amount, and from whom due. Proof of service required. (RSMo 429.012, .100).

Owner.

Every person, including all cestui que trusts, for whose immediate enjoyment or benefit building, erection or improvement is made. (RSMo 429.150). Mortgagee and holder of security interest not having immediate realization of any benefit conferred by improvements, not parties to contract and having no obligation to pay subcontractor's claims, are not owners entitled to ten days notice. (513 S.W.2d 365).

Filing.

Every original contractor every journeyman and every day laborer, and every other person seeking to obtain mechanic's lien must file with clerk of circuit court of proper county just and true account of lien demand due him or them after all just credits have been given, and true description of property, or so near as to identify same, upon which lien is intended to apply with name of owner or contractor, or both, if known to person filing lien, which shall, in all cases, be verified by oath of himself or some credible person for him within six months after indebtedness accrued. With respect to rental equipment or machinery, must file within 60 days after date last piece was removed from property. (RSMo 429.080).

Owner Occupied Residential Property.

In case of improvements to owner occupied residential property of four units or less, no person other than original contractor who performs any work or furnishes any materials, fixtures, engine, boiler or machinery for any structure shall have lien unless owner of building pursuant to written contract has agreed to be liable for such costs in event costs are not paid. Consent shall be printed in ten point bold type and signed separately from contractor's notice required by 429.012 and shall state: CONSENT OF OWNER-CONSENT IS HEREBY GIVEN FOR FILING OF MECHANIC'S LIEN BY ANY PERSON WHO SUPPLIES MATERIALS OR SERVICES FOR THE WORK DESCRIBED IN THIS CONTRACT ON THE PROPERTY ON WHICH IT IS LOCATED IF THEY ARE NOT PAID. Original contractor must retain consent and furnish copy to any person performing work or supplying material upon their request. It shall be condition precedent to creation and validity of any lien by supplier or workman that copy of signed consent form be attached to claim of lien. (RSMo 429.013).

Jurisdiction.

The circuit court has jurisdiction for the enforcement of such liens. (RSMo 429.080). Associate circuit courts have jurisdiction to enforce mechanics' liens, as circuit court, when amount or balance claimed to be due does not exceed jurisdiction of magistrate courts in different counties in ordinary civil actions. (RSMo 429.350).

Time Limitation.

Actions to enforce such liens must be commenced within six months after filing the lien. (RSMo 429.170).

Parties.

All parties to the contract must and all others interested in the property may be made parties, but those not made parties will not be bound by the proceedings. (RSMo 429.190).

Action in Equity.

Any and all liens provided for by statute may be adjudicated and the rights of all parties interested in the property against which the same is claimed may be determined and enforced in one action after the statement for such lien is filed in the office of the clerk of court or such action may be brought by any owner or lessee of the property or mortgagor or holder of any encumbrance thereon. Such action must be an equitable action for the purpose of determining the various claimants, and is for the purpose of marshaling, applying and distributing the proceeds of the sale of such property that may be ordered and decreed in said action. (RSMo 429.270). All persons claiming any lien or encumbrance upon property and all persons having rights in or against it and all owners and lessees thereof to be affected thereby as disclosed by proper public records must be made parties in said action, and all parties are bound by proceedings, orders and judgments in said action. (RSMo 429.280). This does not apply to instances where there is only one lien claimant. (RSMo 429.330). Court may appoint referee to hear and report evidence and make conclusions and findings of fact and law therein and report to court. (RSMo 429.320). After such equitable action is commenced, same is exclusive of all other remedies for enforcement of mechanics' liens. (RSMo 429.290).

Public Works.

It is duty of all public entities in making contracts for public works, cost of which is estimated to exceed $25,000 to be performed for public entity, to require every contractor for such work to furnish to public entity bond with good and sufficient sureties in amount fixed by public entity and such bond, among other conditions, must be conditioned for payment of any and all materials, incorporated, consumed, or used in connection with construction of such work, and all insurance premiums, both for compensation and for all other kinds of insurance, said work, and for all labor performed in such work whether by subcontractor or otherwise. (RSMo 107.170).

Mechanics' Liens on Chattels.

Every person expending labor or material upon any chattel at the request of its owner, his authorized agent or lawful possessor thereof, in the amount of $25 or less shall have a lien upon such chattel from the date of the commencement of such expenditure for the contract price until possession of such chattel is voluntarily relinquished to such owner or authorized agent or one entitled to possession thereof. (RSMo 430.080).

Enforcement.

Unless the chattel is redeemed within three months of the completion of such expenditure, or within three months of the date agreed upon for redemption, the lien may be enforced by a sale as provided in the statute. (RSMo 430.090).

Notice of Sale.

Such sale shall be held only after not less than 20 days notice (1) by mailing a copy of the notice by registered mail if the address is known, to the owner for whom such expenditure was made, in which case a return receipt shall be evidence of due notice; (2) by not less than two publications in some newspaper of general circulation where the property was received and is to be sold, the last publication to be not less than 20 days prior to the date of sale; (3) if no newspaper be published within the county, then by posting five hand bills not less than 20 days prior to the date of sale in different places within the township, one of which shall be posted where the property was received and is to be sold. (RSMo 430.100[1]).

The form of notice by statute (RSMo 430.100) must be substantially as follows:

Form

Notice is hereby given that on (insert date), a sale will be held at (insert place), to sell the following articles to enforce a lien existing under the laws of the State of Missouri against such articles for labor, services, skill or material expended upon such articles at the request of the following designated persons, unless such articles are redeemed prior to the date of said sale.

Name of		Amount of
Owner	Article	Lien
. . . .	. . . .	. . . .
. . . .	. . . .	. . . .

. . . .

Name of Lienor

Notice of several liens may be combined in one publication. (RSMo 430.100[3]).

Sale and Proceeds Thereof.

If the chattel is not redeemed prior to the date of sale provided in the notice, the lienor may sell such articles on the date and at the place specified in the notice, and shall thereupon deposit with the county treasurer (or city treasurer in the City of St. Louis) the proceeds of the sale in excess of the charges for the expenditure of labor and material and the necessary expenses of advertising with a sworn statement containing (a) the name of the owner, (b) description of articles, (c) amount of lien, (d) sale price, (e) name of purchaser, (f) cost and manner of advertising, (g) amount paid to any prior lienholders. Proceeds shall be distributed in following order: (1) Seller’s lien and expenses of advertising, (2) prior liens on chattel created by financing statement duly perfected. The treasurer shall credit such excess to the general revenue fund of the county, or the City of St. Louis, subject to the right of the owner or his representative to reclaim the same within three years of the date of such deposit after presentation of proper evidence of ownership and obtaining an order of the county court (or the Comptroller of the City of St. Louis) directed to said treasurer for the return of said excess deposit. (RSMo 430.110).

Actions Against Lienor.

Any lienor failing or refusing to deliver to said treasurer such excess proceeds together with the sworn statement within 30 days after such sale shall be liable for double the excess proceeds of such sale, to be recovered in any court of competent jurisdiction. (RSMo 430.120). Conformity to the requirements of the Act is a perpetual bar to any action against the lienor by any person for the recovery of such chattels or the value thereof or damages growing out of the failure of such person to receive such chattels. (RSMo 430.130).

Application to Armed Services.

No provision of the Act applies to any member of the armed services of the United States until six months after his discharge from said service. (RSMo 430.140).

Redemption.

There is no right of redemption from a sale in a proceeding foreclosing any of the liens hereinbefore mentioned (RSMo 430.130); except chattels not exceeding $100 in value, which unless redeemed within one year of date agreed upon for redemption, are barred from recovery (RSMo 430.135).

Mechanics’ Lien on Motor Vehicles or Trailers.

(RSMo 430.082[1]). Every person expending labor, services, skill or material upon any motor vehicle, boat or trailer at written request of its owner, authorized agent of owner, or person in lawful possession thereof, or who provides storage for motor vehicle or trailer at written request of its owner, authorized agent of owner or person in lawful possession thereof or at written request of peace officer, shall where maximum to be charged for labor, service, skill or material has been stated as part of written request and/or daily storage charge has been stated as part of written request, have lien upon chattel from date of commencement of such expenditure for actual value of expenditure until possession of chattel is voluntarily relinquished to owner, authorized agent or one entitled to possession thereof.

Enforcement.

If chattel is not redeemed within three months lienholder may apply to director of revenue for certificate of ownership, but in case of charges for storage and/or towing, after three months lienholder must notify owner and any known lienholders and if after 45 days after notification has been mailed chattel is not redeemed, then lienholder may apply to director of revenue for certificate of ownership. Such application must be accompanied by: (a) Original, conformed or photostatic copy of written request of owner or agent with maximum amount to be charged stated therein, (b) lienholder's affidavit that owner has defaulted on payment and payment is three months past due, (c) statement of actual value of expenditure and amount unpaid, (d) fee of $10. (RSMo 430.082[3], [4]).

Notice of Lien.

If director is satisfied with genuineness of application and supporting documents, he must notify by registered mail, postage prepaid, owner and lienholders of record, other than applicant, at their last known address that application has been made for lien title on chattel. Thirty days after such notification, if no lienholder or owner has redeemed chattel and application has not been withdrawn, and if owner or lienholder has informed director that he demands hearing and enforcement of lien as provided in § 430.160, director must issue, in same manner as repossessed title is issued, certificate of ownership which must clearly be captioned "Lien Title." (RSMo 430.082[5], [6]).

Sale of Chattel.

Upon receipt of lien title, holder must within ten days begin proceedings to sell chattels as prescribed in § 430.100. Provisions of § 430.110 shall apply to disposition of proceeds and lienholder must be entitled to actual and necessary expenses incurred in obtaining lien title, but no person who is issued lien title shall be allowed any excess proceeds of sale. Charges for service and towing shall not exceed charges allowed in 304.155. (RSMo 430.082[7], [8]).

Attachment Lien.

See topic 8.02 Attachment.

Attorney's Lien.

See category 18 Legal Profession, topic 18.01 Attorneys and Counselors.

Collateral Security.

See topic 8.15 Pledges.

Execution Lien.

See topic 8.05 Executions.

Judgment Lien.

See category 5 Civil Actions and Procedure, topic 5.15 Judgments.

Landlord's Lien.

See category 21 Property, topic 21.10 Landlord and Tenant.

Real Estate Mortgage Lien.

See category 20 Mortgages, topic 20.04 Mortgages of Real Property.

Tax Lien.

See category 22 Taxation, topic 22.13 Property Taxes, subhead Lien.

Uniform Commercial Code in force. See category 3 Business Regulation and Commerce, topic 3.09 Commercial Code.

For other liens, see topics 8.02 Attachment, Pledges; categories 3 Business Regulation and Commerce, topics Banks and Banking, Commercial Code; Civil Actions and Procedure, topic Judgments; Legal Profession, topic Attorneys and Counselors; Mortgages, topic Mortgages of Real Property; Property, topic Landlord and Tenant; Taxation, topic Property Taxes, subhead Lien.

8.14 MECHANICS' LIENS:

See topic 8.13 Liens.

8.15 PLEDGES:

Whenever any personal property is pledged or mortgaged to secure an indebtedness, action to foreclose is necessary for the enforcement of the lien, unless it is agreed in writing, that the property pledged may be sold or disposed of in some other manner. (RSMo 400.9-501). In any action for enforcement of liens on personal property pledged to secure indebtedness, or to maintain or secure possession of property so pledged, proof that party holding, or claiming to hold, any such lien has received or exacted usurious interest renders pledge invalid and illegal. (RSMo 408.070).

Uniform Commercial Code in force. See category 3 Business Regulation and Commerce, topic 3.09 Commercial Code.

See also category 20 Mortgages, topic 20.01 Chattel Mortgages.

8.16 RECEIVERS:

The circuit court, or any judge thereof in vacation, has power to appoint a receiver whenever such appointment shall be deemed necessary. (C.R. 68.02[a]).

Bonds.

Receivers are required to give bonds. (C.R. 68.02[b]).

Duties of a receiver are to keep and preserve any money or other thing deposited in court, or that may be subject of a tender, and to keep and preserve all property and protect any business or business interest entrusted to him, pending any legal or equitable proceeding concerning the same, subject to the order of court. (C.R. 68.02[a]).

Compensation.

Court allows such sum for services as may be reasonable, and taxes same as costs to be paid as other costs in cause. (C.R. 68.02[c]).

See also topic 8.05 Executions.

8.17 REDEMPTION:

See topics 8.05 Executions, Liens; categories 20 Mortgages, topic Mortgages of Real Property; Taxation, topic Property Taxes, subhead Sales and Redemption.

8.18 SUPPLEMENTARY PROCEEDINGS:

See topic 8.05 Executions.

8.19 TRUSTEE PROCESS:

See topic 8.09 Garnishment.

8.20 USURY:

See category 3 Business Regulation and Commerce, topic 3.19 Interest.

9 DISPUTE RESOLUTION

9.01 ALTERNATIVE DISPUTE RESOLUTION:

Mandatory Dispute Resolution.

Uniform Arbitration Act adopted. (RSMo 435.350-435.470).

Civil Justice Expense and Delay Reduction Plan adopted by U.S. District Court, Eastern District of Missouri to reform pretrial case management and litigation practices, reduce cost and delay. (U.S. Dist. E.D. Mo. Appendix). Civil cases randomly assigned to district and magistrate judges. (E.D. Mo. App. I). If assigned to district judge, parties may consent to trial before magistrate and district judge must approve before reassignment. (E.D. Mo. App. I). If assigned to magistrate judge, parties return signed form within 20 days after entry of appearance of last served party consenting or opting for reassignment to district judge. (E.D. Mo. App. I). If party includes filing of motion requiring immediate attention of district judge, case randomly assigned to district judge. (E.D. Mo. App. I). Differentiated case management system assigns civil case to one of five tracks based on objective factors. (E.D. Mo. App. II). Track 1 expedited cases in which disposition expected in 12 months with few parties, limited discovery, low monetary claims. (E.D. Mo. App. II). Track 2 standard cases in which disposition expected in 18 months with multiple parties, substantive legal and factual disputes, moderate discovery, significant damage claims. (E.D. Mo. App. II). Track 3 complex cases in which disposition expected in 24 months with numerous parties with diverse interests, complicated factual and legal issues, extensive discovery. (E.D. Mo. App. II). Track 4 administrative cases such as administrative appeals, social security cases, non-death penalty habeas corpus, bankruptcy appeals. (E.D. Mo. App. II). Track 5 pro se prisoner civil rights cases. (E.D. Mo. App. II). Parties file Track Information Sheet with complaint or first responsive pleading. (E.D. Mo. App. II). Mandatory disclosure in F.R.C.P. 26(a)(1) not applicable to any civil case filed in Eastern District of Missouri except as otherwise agreed or ordered. (E.D. Mo. App. VI). Track assignment will determine discovery and disclosure. (E.D. Mo. App. IV). For Tracks 2 and 3, parties prepare joint proposed scheduling order within 30 days after defendants entry of appearance and after scheduling conference, Court enters case management scheduling order and may order referral to alternative dispute resolution. (E.D. Mo. App. IV). For Tracks 1 and 4, clerk issues binding scheduling order unless modified by judge. (E.D. Mo. App. IV). If mediation ordered, attendance of parties and counsel mandatory. (E.D. Mo. App. III). Moving party must notify clerk if any motion not decided within 60 days after submission. (E.D. Mo. App. IV).

U.S. District Court, Western District of Missouri implemented program known as Early Assessment Program (Program) as means to resolve disputes in faster, less costly manner. (U.S. Dist. W.D. Mo. Appendix). Cases excluded from Program are multi-district; social security appeals; bankruptcy appeals, habeas corpus; prisoner pro se; class actions; student loan. (W.D. Mo. App. IIA). One of every three cases filed assigned to participate in Program; one of every three cases assigned to group that may or may not elect to participate in Program; one of every three cases assigned to control group that is exempted from participation in Program unless specifically requested. (W.D. Mo. App. IIA). Requests to opt out made in writing to Administrator of Program within ten days of receiving notice. (W.D. Mo. App. IIC). Clerk provides copy of notice of case selection upon filing action and must be attached to summons. (W.D. Mo. App. IID). Within 20 days of filing, lawyer files certificate stating notice has been provided to each party. (W.D. Mo. App. IID). If service is waived or accepted, lawyer files within 20 days of waiver or acceptance, certificate stating lawyer mailed notice to each party that lawyer represents. (W.D. Mo. App. IID). Parties attend all Program sessions unless excused by Administrator and when party not natural person, person with settlement authority attends. (W.D. Mo. App. IV). All written and oral communications, not under oath, made in Program session are confidential and must not be disclosed. (W.D. Mo. App. VA). These communications must not be used for impeachment or in any future proceeding except by consent of parties. (W.D. Mo. App. VA). Any information made under oath may be used for impeachment purposes. (W.D. Mo. App. VC). No recording of Program session may be made. (W.D. Mo. App. VC). Program session held within 30 days after completion of responsive pleadings. (W.D. Mo. App. IIB). Administrator advises parties of various alternative dispute resolution options including mediation, nonbinding arbitration, early neutral evaluation, magistrate settlement, mini-trials, summary jury trials. (W.D. Mo. App. IIB). Administrator identifies areas of agreement and explores possibility of settling case. (W.D. Mo. App. IIB). Participants select ADR option or Administrator will select. (W.D. Mo. App. IIB). First session of ADR process held not later than 90 days after first Program session. (W.D. Mo. App. IIB). Failure to comply with attendance or settlement authority requirements subjects party to sanctions. (W.D. Mo. App. VIIA). Court may sanction failure to make good faith effort to participate in Program. (W.D. Mo. App. IX).

All civil actions in federal Western District court where money damages only are being sought that are not expected to exceed $100,000 are designated for compulsory arbitration. (U.S. Dist. Ct. R. W.D. Mo. 30). Unless otherwise agreed, arbitration hearing held before panel of three arbitrators. (W.D. Mo. 30). Arbitration award entered as judgment of Court unless party requests trial de novo within 30 days. (W.D. Mo. 30). If party receives less favorable award at trial de novo than arbitration award, party must pay arbitration fees. (W.D. Mo. 30). In practice, this arbitration requirement is effectively superseded by Early Assessment Program. (W.D. Mo. App.).

Voluntary Dispute Resolution.

Child Custody and Visitation.

Any judicial circuit may establish mediation program for child custody and visitation disputes whereby neutral mediator appointed by court assists parties to reach mutually acceptable agreement. (C.R. 88.02). Mediator of contested child custody must be attorney or one who possesses graduate degree in field of psychiatry, psychology, social work, counseling or other behavioral science substantially related to marriage and family relationships and must have at least 20 hours of child custody mediation training. (C.R. 88.05[a]). Mediator in writing must advise parties of cost, does not represent parties, and should obtain independent legal advice. (C.R.88.06[a]). Mediated agreement is not binding until in writing and signed by parties and their attorneys, if any. (C.R. 88.06[c]). Termination of mediation can occur by any party after two hours or by mediator if continuation would cause harm or prejudice or agreement is unlikely. (C.R. 88.07).

Any judicial circuit court may establish early dispute resolution program to foster voluntary settlement. (C.R. 17.01). Notice of dispute resolution services provided at time action is filed or with summons and petition. (C.R. 17.02). Individuals providing early dispute resolution services must have training or experience including 16 hours of formal training for mediators. (C.R. 17.04). Early dispute resolution results are binding on parties to extent agreed upon. (C.R. 17.05). Early dispute resolution process regarded as settlement negotiations and settlement is enforceable or admissible in evidence if parties agree. (C.R. 17.06). Admissions, representations, or confidential communications made in dispute resolution process are inadmissible as evidence and not subject to discovery. (C.R. 17.06). No person can reveal to court why, who or what caused mediation to cease or result of mediation. (C.R. 17.06). Discovery may proceed while participating in early dispute resolution program. (C.R. 17.07).

9.02 ARBITRATION AND AWARD:

Uniform Arbitration Act adopted. (c. 435).

Effect of Contract Provision.

Written agreement to submit existing controversy to arbitration or provision in written contract, except insurance contract or contract of adhesion, to submit any future controversy to arbitration is valid and enforceable. Warranties against defects in construction of new houses and reinsurance contracts are not contracts of insurance or contracts of adhesion. (RSMo 435.350).

Powers of Arbitrators.

Arbitrators have power to issue subpoenas and compel attendance of witnesses. (RSMo 435.380).

Enforcement of Award.

When judgment entered on award, obedience may be enforced in same manner as to any other judgment or decree. (RSMo 435.415).

Mandatory Arbitration.

None.

10 DOCUMENTS AND RECORDS

10.01 ACKNOWLEDGMENTS:

May be taken by following officers, etc.:

Within state: Court having a seal or judge, justice or clerk of such court; notary public. (RSMo 442.150). Maximum fee $2. (RSMo 486.350[1]).

Outside state but within United States: Notary public; state or federal court having a seal or clerk of such court; commissioner appointed by Governor of Missouri to take acknowledgments. (RSMo 442.150[2]; 486.100-.140).

Outside United States: Court of any state, kingdom or empire, having official seal; mayor or chief officer of any city or town having a seal; U.S. minister or consular officer; notary public having a seal. (RSMo 442.150[3]).

Married Women.

Husband and wife may convey real estate of husband or wife by their joint deed acknowledged and certified as herein provided. Where property conveyed is owned by husband and wife as estate by entirety, then both must be bound by covenants therein expressed or implied. (RSMo 442.030, 442.210[4]). See also categories 14 Family, topic Husband and Wife; Property, topics Deeds, Dower.

Attorneys in Fact.

Instruments containing power must be acknowledged or proved, and certified in same manner as deeds of real estate. (RSMo 442.360, 490.570).

Certificate must state act of acknowledgment and that person making same was personally known to one judge of court or officer granting certificate, which must conform to laws of this state. (RSMo 442.210). If acknowledgment is taken by notary public, certificate must clearly and legibly, by means of rubber stamp, typewriting or printing, indicate notary's name, county of commission, and words "Notary Public", "State of Missouri", My Commission Expires . . . (Expiration date)". (RSMo 486.280).

Seal of officer taking acknowledgment must be affixed.

Authentication.

Not necessary that seal or signature of notary of another state be authenticated by any other officer. Proper officer to certify to official character of notary of this state is Secretary of State, upon submission of written request, notarized document and $2 fee.

Evidence.

Written instruments conveying or affecting real estate, when acknowledged, may be read in evidence without further proof. (RSMo 490.410).

Proof by Witnesses.

If a deed is attested by subscribing witnesses and not acknowledged by the grantor, proof of its execution may be made by the testimony of a subscribing witness or where all the subscribing witnesses are dead or cannot be produced, by evidence of the handwriting of the party, and of at least one subscribing witness, given by at least two credible witnesses to each signature. (RSMo 442.260).

No proof by a subscribing witness may be taken unless such witness is personally known to one judge of the court, or the officer taking the proof, to be the person whose name is subscribed to the instrument as a witness thereto, or is proved to be such by at least two credible witnesses. (RSMo 442.270).

No proof by evidence of handwriting may be taken unless the court or officer taking same is satisfied that all the subscribing witnesses to such instrument are dead or cannot be produced. (RSMo 442.300).

Such proof may be taken by any one of the courts or officers named above as those authorized to take acknowledgments. (RSMo 442.260-.320).

Alternative to Acknowledgment or Proof.

No statutory provision.

Forms.

The following are authorized and used:

Forms

Natural person: State of . . . ., County of . . . ., ss. On this . . . . day of . . . ., 20. . . ., before me personally appeared (here insert name or names and if grantor is married add “his wife” after her name), to me known to be the person (or persons) described in, and who executed the foregoing instrument, and acknowledged that (he or they) executed the same as his (or their) free act and deed.

In testimony whereof I have hereunto set my hand and affixed my official seal at my office in said county and state the day and year last above written.

My term expires . . . .

. . . ., Notary Public.

If grantor is single, added: And the said . . . . further declared . . . .self to be single and unmarried.

Attorney in fact: State of . . . ., County of . . . ., ss. On this . . . . day of . . . ., 20. . . ., before me personally appeared (here insert name), to me known to be the person who executed the foregoing instrument in behalf of (here insert name), and acknowledged that he executed the same as the free act and deed of said (here insert name). (Certificate as above).

Corporation or joint stock associations: State of . . . ., County of . . . ., ss. On this . . . . day of . . . ., 20. . . ., before me appeared (here insert name), to me personally known, who, being by me duly sworn (or affirmed), did say that he is the president (or other officer or agent of the corporation or association) of (describing the corporation or association), and that the seal affixed to said instrument is the corporate seal of said corporation (or association), and that said instrument was signed and sealed in behalf of said corporation (or association) by authority of its board of directors (or trustees), and said (here insert name) acknowledged said instrument to be the free act and deed of said corporation (or association). (Certificate as above).

If corporation or association has no corporate seal, omit “and that the seal affixed to said instrument is the corporate seal of said corporation (or association)” and add, at end of certificate, “and that said corporation (or association) has no corporate seal.” (RSMo 442.210).

Persons in or with U. S. Armed Forces.

Acknowledgment of person without state, in military service of United States on active duty, may be taken by any commissioned, other than warrant, officer on active duty in any of the Armed Forces of the U. S., and also that of spouse, if nature of instrument requires it. (RSMo 442.160).

Form

With the Armed Forces of the United States at . . . . . . ss. On this . . . . . . day of . . . . . ., A.D. 20. . . ., before me, a commissioned officer of the Armed Forces of the United States, on active duty therewith, personally appeared . . . . . ., a member of the Armed Forces of the United States, on active duty therewith, (and . . . . . . (his wife, her husband),) to me known to be the person . . . . . . described in and who executed the foregoing instrument, and acknowledged that . . . . . . executed the same as . . . . . . free act and deed. (The said . . . . . . declared . . . . . . to be single and unmarried.)

IN TESTIMONY WHEREOF, I have hereunto set my hand and grade (serial number, branch of service, and permanent mailing address).

(Signature)

. . . .

(Serial Number)

. . . .

(Grade) (Branch of Service: Army, Navy, etc.)

. . . .

(Permanent mailing address)

. . . .

See also topics 10.02 Affidavits; categories 20 Mortgages, topic Mortgages of Real Property; Property, topic Deeds.

10.02 AFFIDAVITS:

See topic 10.01 Acknowledgments.

General Requirements as to Administration.

Affidavit may be made before notary public (RSMo 486.250), court or judge, justice of clerk thereof, certified court reporter or certified shorthand reporter (RSMo 492.010). If made before judge of another state, his official character must be certified under seal of clerk and if made before justice of peace of another state must be accompanied by certificate of official character and authority, that he had power to administer oaths when affidavit was taken, and that his signature is genuine, attested by seal of state or by certificate and seal of clerk of court of record. (RSMo 490.530-.540).

Persons in Military Service.

Any commissioned officer, other than commissioned warrant officer, of any of Armed Forces of U.S., on active duty, may take affidavit of member of Armed Forces. (RSMo 492.070).

Form

With the Armed Forces of the United States at . . . . ss. (Body of instrument). Subscribed and sworn to (affirmed) by . . . . , to me known to be a member of the Armed Forces of the United States, on active duty therewith, before me, a commissioned officer of the Armed Forces of the United States, on active duty therewith, this . . . . day of . . . . A.D. 20 . . .

(Signature)   (Serial Number)

. . . .

(Grade) (Branch of Service: Army, Navy, etc.)

. . . .

(Permanent Mailing Address)

. . . .

See also categories 5 Civil Actions and Procedure, topics Depositions and Discovery, Evidence, subhead Witnesses; Estates and Trusts, topic Executors and Administrators.

Admissibility.

Affidavits generally are not admissible in evidence, but are admitted as prima facie proof of endorsements on negotiable instruments and the existence of partnerships, names of partners and general nature of partnership business. (RSMo 490.510-.520).

Requirements of Jurat.

Expiration of notary's commission must be stated and officer's seal affixed.

Form

State of Missouri, County of . . . . . ., ss., John Doe of lawful age, being duly sworn on his oath says, etc.

. . . . Affiant.

Subscribed and sworn to before me this . . . . day of . . . ., 20. . . . .

. . . . Notary Public. (Seal).

My commission expires . . . .

Alternative to Affidavit.

Every document filed with probate court shall be signed by or on behalf of petitioner or claimant, and shall contain statement that it is made under oath or affirmation and that its representations are true and correct to best knowledge and belief of person signing, subject to penalties of making false affidavit or declaration. (RSMo 472.080[1]).

Form

State of Missouri, County of . . . ., the undersigned states that the above is made under oath or affirmation and that its representations are true and correct to the best of his knowledge and belief, subject to the penalties of making a false affidavit or declaration.

Signed . . . .

10.03 NOTARIES PUBLIC:

Qualification.

Notary must furnish $10,000 bond running to state with two sureties approved by clerk of county court or circuit court in City of St. Louis. (RSMo 486.235).

Seal.

Notary must have and use seal reciting his name and words “Notary Seal,” “Notary Public,” and “State of Missouri.” and after Aug. 28, 2004 assigned commission number, provided number has been issued to notary by Secretary of State. (RSMo 486.285[1]).

Powers.

Notaries are empowered to: (1) Take acknowledgments, (2) administer oaths and affirmations, (3) certify that copy of document is true copy of another document, and (4) perform any other act permitted by law. (RSMo 486.250).

Territorial Extent of Powers.

Notary's jurisdiction extends throughout State. (RSMo 486.210).

Certificate.

Every notary certificate must indicate in printing, rubber stamp or typewriting exact name of notary, "Notary Public," "State of Missouri," and "My commission expires . . . . . (commission expiration date)" and commission number, provided number has been issued by Secretary of State. (RSMo 486.280).

Certificate of Authority.

See topic 10.01 Acknowledgments, subhead Authentication.

Records.

Notary must keep in a special book an exact record of all his official acts. (RSMo 486.265).

Maximum fee for notarization of signature and recording thereof is $2. (RSMo 486.350[1]).Fee for certification of facsimile document and recordation thereof is $2 for each sheet retained in notary file. (RSMo 486.350[2]). Fee is $1 for all other notarial acts. (RSMo 486.350[3]). Notary may charge travel fee separate from notarial fee and fee not to exceed $25 for expedited convenience service. (RSMo 486.350[6]).

Durable Power of Attorney.

See category 21 Property, topic 21.15 Powers of Attorney, subhead Durable Power of Attorney.

10.04 RECORDS:

The recorder of deeds in each county has charge of records relating to property.

Uniform Commercial Code adopted. (c. 400). See category 3 Business Regulation and Commerce, topic 3.09 Commercial Code.

Recordable Instruments.

It is the duty of recorder to record all deeds, mortgages, conveyances, deeds of trust, assignments, bonds, covenants, defeasances, or other writings of or concerning any lands and tenements, or goods and chattels, when proved or acknowledged according to law; papers and documents concerning land and tenements, or goods and chattels received from French or Spanish authorities at change of government, marriage contracts and marriage certificates, all official commissions and official bonds required to be recorded, and records of births when furnished. (RSMo 59.330).

All deeds, mortgages, conveyances, deeds of trusts, assignments, bonds, covenants or defeasances, except supplemental indentures of utility companies and rural electric cooperatives, must contain legal description of land affected.

Restrictive covenants on property relating to race, color, religion or national origin in any instrument filed with recorder of deeds are void and unenforceable. (RSMo 442.403[1]).

It is also the duty of recorder to record any certified copy of any bankruptcy matter required to be filed by Act of Congress. (RSMo 59.335).

All instruments affecting real estate, except supplemental indentures of utility companies and rural electric cooperatives, must contain legal description of lands and all deeds, except deeds of easement of right-of-way, must contain mailing address of grantee to be recorded. (RSMo 59.330[2]).

In cities of over 350,000 population and in all counties of the first class no trustee's or mortgagee's deed under power of sale in foreclosure of any security instrument recorded prior to 1-1-86 may be recorded unless notes or other obligations for default in payment of which foreclosure was had or affidavit of owner as to loss thereof are produced to recorder. (RSMo 443.390).

Place of Recording.

The recording in the case of real estate must be in the county where the land is situated. (RSMo 442.380).

For List of Counties and County Seats see first page for this state in Volume containing Practice Profiles Section.

Indices are kept, showing names of grantor and grantee, date of instrument, date of filing for record and description of land. Separate indices are kept for instruments affecting personal property. (RSMo 59.350-.440).

Requisites for Recording.

Size of print or type on any document to be recorded shall not be smaller than eight point and if any document to be recorded contains smaller than eight point it must be accompanied by exact typewritten copy which will be recorded contemporaneously with document. Document must be sufficiently legible to produce clear and legible reproduction or exact typewritten copy must accompany document and be recorded contemporaneously. Signatures on documents must have corresponding name typed, printed or stamped underneath signature. Three inch margin required at top of first page, with following information below it: title, date, grantor's and grantee's names, statutory addresses, legal description, and reference book and pages, if applicable. Certain documents exempt from format requirements. (RSMo 59.310, 59.313).

All deeds, mortgages, deeds of trust or other instruments conveying lands or tenements or goods and chattels must be acknowledged or approved to be recorded and all deeds, except deeds of easements or right of way conveying lands or tenements must contain mailing address of one of grantees. (RSMo 59.330).

Recording Fees.

Fee for recording every deed or instrument, $5 for first page and $3 for each page thereafter; for recording plat or survey of a subdivision, $25 per page of drawings and calculations plus $5 per page of other material; for recording survey of one tract of land on one page, $5; copy of recorded instruments, $2 for first page and $1 per page thereafter; copy of plat or survey, $5 per page; certificate or seal, $1 when not recording an instrument. State user fee of $1 for all instruments conveying real estate; 25¢ fee for identifying each note to instrument when document is recorded that creates lien against real estate. Additional $25 fee after Jan. 1, 2002 for documents not conforming to format requirements. (RSMo 59.310). Additional user fees of $7 shall be charged for recording any instrument. (RSMo 59.319). Recording fees for St. Louis city differ. (RSMo 59.313).

Effect of Recording.

No instrument conveying or affecting the title to real estate is valid, except as between the parties and such as have actual notice, until deposited for record; thereafter notice is imparted to all persons. (RSMo 442.390-.400).

Torrens system not adopted.

Transfer of Decedent's Title.

Whether decedent was a resident or a nonresident, administration in Missouri is necessary to free title from his debts, unless claims of creditors are barred by lapse of time. Probate court records should be included in abstracts of title and need not be recorded with recorder of deeds. To provide record evidence in case of testacy, a certified copy of the will must be recorded, within six months after probate, in office of recorder of deeds in each county in which real estate is situated (RSMo 474.500) and it is customary to record also a certified copy of order admitting will to probate. In case of intestacy, unless the probate records include an affidavit stating date of death and names of surviving spouse, if any, and heirs, such an affidavit must be recorded with recorder of deeds.

Uniform Commercial Code in force. See category 3 Business Regulation and Commerce, topic 3.09 Commercial Code.

Filing Under Commercial Code.

Most financing statements are filed with Secretary of State. If collateral is or will become fixture on real estate, or collateral is as—extracted collateral or timber to be cut, financing statement is not filed with Secretary of State but filed with recorder of deeds for county in which fixture will be located or land upon which as—extracted collateral or timber to be cut is located. (RSMo 400.9–501). If filing office is Secretary of State's office, filing fee is $12 for first page and $1 for each subsequent page. (RSMo 400.9–525). See category 3 Business Regulation and Commerce, topic 3.09 Commercial Code.

Vital Statistics.

Reports of births and deaths must be filed with local registrar of vital statistics (RSMo 193.085[1]; 193.145[1]); reports of marriages with recorder of deeds who issued license (RSMo 451.150). Certified copy of birth or death certificate can be obtained from Registrar, Bureau of Vital Statistics, Division of Health, P.O. Box 570, Jefferson City, Missouri 65102, for fee of $13 for death certificate and $15 for birth certificate payable to Department of Revenue. (RSMo 193.265). Certified copy of marriage certificate can be obtained from Recorder of Deeds for fee of $2. (RSMo 59.310[6]).

Establishing Birth Records.

If birth certificate of person born in Missouri has not been filed within five days after birth, birth certificate may be filed after that time as provided by regulations of Division of Health. Birth certificates registered more than one year after birth are made on forms provided by state Registrar of Vital Statistics and are marked "Delayed". If delayed birth certificate is rejected by state Registrar of Vital Statistics, affected individual may petition local Circuit Court for order establishing record of date and place of his birth and his parentage on forms provided by state Registrar of Vital Statistics. If court finds that person for whom delayed certificate of birth was born in Missouri, it shall make findings as to place and date of birth and parentage and shall issue order to establish certificate of birth. This order will be forwarded to state Registrar of Vital Statistics and shall constitute birth certificate. (RSMo 193.105; 193.115).

In event of spontaneous fetal death, parents or sibling of stillborn child may file application with State Registrar for Certificate of Birth Resulting in Stillbirth. (RSMo 193.255).

10.05 SEALS:

Necessity of private seals is abolished, but seal (or scroll if corporation has no seal) is necessary to valid conveyance of real estate of corporation. (RSMo 442.060).

Uniform Commercial Code in force. See category 3 Business Regulation and Commerce, topic 3.09 Commercial Code.

See also topics 10.01 Acknowledgments, 10.02 Affidavits.

10.06 TORRENS ACT:

Not adopted. See topic 10.04 Records.

10.07 VITAL STATISTICS:

See topic 10.04 Records.

11 EMPLOYMENT

11.01 EMPLOYER AND EMPLOYEE:

See topic 11.02 Labor Relations.

11.02 LABOR RELATIONS:

The Industrial Commission of Missouri has general jurisdiction over labor matters. (RSMo 286.060).

Hours of Labor.

Period of eight hours constitutes legal days work; providing parties may agree upon longer or shorter time. (RSMo 290.010-.020). Workers in mill or plant engaged in mining, mechanical, chemical manufacturing or smelting business must work only eight of 24 hours unless otherwise consented to. Children under 16 must work no more than eight hours in a day nor three hours day when school is in session nor more than six days or 40 hours in any week nor before seven a.m. or after nine p.m. or seven p.m. when school is in session. (RSMo 294.030). These requirements may be waived by director. (RSMo 294.030[2]).

Wages.

Corporations must pay wages as often as semi-monthly within 16 days of the close of each payroll period, except that executive, administrative, professional, sales and other employees on a commission basis in whole or in part, may be paid monthly, and at least once a month furnish to employees a statement showing total deductions for the period. Violation of this section is a misdemeanor. (RSMo 290.080). Claims of employees for wages, not to exceed $100 and earned within three months next preceding demand, have priority of payment from the assets of a corporation in the hands of a receiver or assignee, except that they are not preferred over specific liens on property. (RSMo 430.360[1]).

Corporation which reduces wages without giving 30 days notice must pay to employee a penalty of $50. (RSMo 290.100).

When an employee of a corporation is discharged, with or without cause, his unpaid wages are due on the date of such discharge, and he may request, in writing, that the money due him or a valid check be sent to any station or office where a regular agent is kept, and if payment does not reach such station or office within seven days from date of such request, the employee’s wages continue until paid, but not for more than 60 days unless an action therefor be commenced within that time. (RSMo 290.110).

Minimum wage provisions provide that every employer shall pay to each employee wages at rate of $6.50 per hour, or wages at same rate(s) set under provisions of federal law as prevailing federal minimum wage applicable to those covered jobs in interstate commerce, whichever rate per hour is higher. Rate is increased or decreased each Jan. 1, by increase or decrease in cost of living based upon Consumer Price Index for Urban Wage Earners and Clerical Workers by measuring increase or decrease as of preceding July over level as of July of immediately preceding year. (RSMo 290.502).

No lien for wages.

Assignments of Wages.

See category 8 Debtor and Creditor, topic 8.01 Assignments.

Lesser wage rates due to sex are prohibited. (RSMo 290.400-.450).

Missouri Women's Council established, 11 members to be appointed by Governor, four appointed by General Assembly. Purposes of Council are to: (1) Promote and increase women's economic and employment opportunities, (2) promote occupational mobility of women workers, (3) promote access to jobs with higher skill and responsibility, (4) initiate programs to assist women in small business enterprises, (5) assure access of women to nontraditional skilled trades, (6) promote retraining programs for unemployed women, (7) apply for relevant federal and private grants, (8) conduct studies and programs in cooperation with government agencies relating to women's economic issues, (9) prepare state plan to identify and prioritize economic needs of women. (c. 186).

Child Labor.

Employment of children under age of 14 is prohibited, except in sale and distribution of newspapers, magazines and periodicals, which may be performed by children age 12 or older, and service for parent or guardian, or occasional work for others with consent of parent or guardian. (RSMo 294.011-.021). Employment of children under age of 16 is strictly regulated. (RSMo 294.024-.110). Employment of children in entertainment industry and in dangerous situations is also strictly regulated. (RSMo 294.022).

Labor Unions.

Missouri has no "right to work" laws. Employees have right to organize and bargain collectively. (Const. 1945, Art. 1, § 29).

Dismissal.

Statute declaring that employee of corporation discharged or voluntarily quitting (if employed at least 90 days) shall, upon written request, receive letter signed by superintendent or manager setting forth nature and character of service rendered and duration thereof and cause for quitting service (RSMo 290.140[1]) held not to be so vague as to be violation of due process when properly viewed as regulatory statute governing business activities (656 F.2d 323 [8th Cir. 1981]).

Discrimination.

Employers of more than six persons are prohibited from refusing to hire, discharging, or discriminating against employee because of race, creed, color, religion, national origin, sex, age (between 40 and 70), handicap, ancestry, or familial status as it relates to housing, except corporations and associations owned and operated by religious or sectarian groups. Labor organizations, lenders, sellers and renters of dwellings, owners of places of public accommodations and employment agencies similarly prohibited. Unlawful to refuse to permit handicapped person to reasonably modify dwelling. Multifamily dwellings built after 3/13/91 must be handicapped accessible. (RSMo 213.040). Missouri commission on human rights acts on complaints, with appeal available to courts. (RSMo 213.010-.126). State employees protected against discharge if called to military duty or training; law sets maximum hours of military leave and how such leave may be charged. (RSMo 105.270).

Fatal Accidents.

Division director of labor standards shall investigate all accidents which result in death, file written report, and make safety recommendations to employer. (RSMo 286.147).

Restrictive Covenants.

Reasonable covenants not to solicit, recruit, hire or otherwise interfere with employment enforceable in certain situations. (RSMo 431.202).

Workers' Compensation.

Workers' Compensation Act (c. 287), is administered by Division of Workers' Compensation of Department of Labor and Industrial Relations of State of Missouri (RSMo 287.020), which may sue and be sued in its official name (RSMo 287.590). Division may appoint administrative law judges, who must be duly licensed lawyers and may be discharged or removed only by Governor. Administrative law judges shall devote their whole time to duties of their office, and shall only have jurisdiction to hear and determine claims upon original hearings and shall have no jurisdiction upon any review hearing or by way of opening any prior award. (RSMo 287.610). Beginning Jan. 1, 2006, only administrative law judges, commission, and appellate courts of this state shall have power to review claims. (RSMo 287.801).

To Whom Applicable.

Act applies to all employers employing over five employees. (RSMo 287.030[3]). Employee does not include owner or operator of motor vehicle leased or contracted with driver as for-hire common or contract carrier operating within commercial zone, or under certificate issued by transportation division or interstate commerce commission. (RSMo 287.020[1]). Act applies to minors even if employed in violation of law. (RSMo 287.020[1]). Act applies to all state employees, and Act applies to construction industry employers if have one or more employed. (RSMo 287.020).

Act does not apply to employment of farm labor, qualified real estate agents and direct sellers; domestic servants in private home, including occasional laborers, and family chauffeurs; worker who is member of employer's family within third degree (by marriage) of affinity, employment of inmate confined in prison, penitentiary or jail or patient or resident in state mental health facility where labor is exclusively on behalf of custodial entity; volunteers of tax-exempt organizations; or persons providing services as adjudicators, sports officials or contest workers for interscholastic activities or similar amateur youth programs who are not otherwise employed by sponsoring entity, unless employer voluntarily elects to accept Act. (RSMo 287.090).

Corporation may file with division notice of election to be exempt from Act, when there are only two corporate owners who are also its sole employees. (RSMo 287.090).

Basis of Liability.

Employer is liable irrespective of negligence when injury is clearly work related. Injury must have arisen out of and in course of employment. Not compensable if work was mere triggering or precipitating factor. Employment must be substantial factor causing injury, injury followed as natural incident of work, employment fairly traceable as proximate cause, injury not due to hazard or risk unrelated to employment to which worker was exposed. Injury sustained in company-owned or subsidized automobile while traveling to or from home or work is not compensable. (RSMo 287.020). Injury sustained in workplace-related recreational activity is not compensable. Deterioration of body by aging not compensable, except where follows as incident of employment (RSMo 287.020); not liable where injury intentionally inflicted by employee. Burden of proof of intentional self-inflicted injury is on party contesting claim. Not liable for stress unless work related and extraordinary and unusual (exception does not apply to firefighters). (RSMo 287.120). Special rules as to hernia. (RSMo 287.195).

Notice is proper when sent by registered or certified mail properly stamped and addressed to person or entity to whom given, at last known address in time to reach person or entity in time to act. (RSMo 287.520).

Compensation.

For temporary total disability from injuries occurring on or after 8/28/91, 662/3% weekly earnings as of date of injury but not to exceed 105% of state average weekly wage; minimum weekly compensation $40 for injuries occurring on or after 8/28/91. Compensation for temporary total disability shall not be paid for more than 400 weeks. (RSMo 287.170). Claimant is disqualified from receiving temporary total disability benefits during time when receiving unemployment compensation. (RSMo 287.170).

For temporary partial disability from injuries occurring on or after 9/28/91, 662/3% of injured employee’s average weekly earnings, provided that compensation not exceed 105% of state average weekly wage. (RSMo 287.180[1]). Employee is ineligible to receive temporary total or partial disability benefits if terminated from post-injury employment for misconduct. (RSMo 287.170[4]).

For permanent partial disability from injuries occurring on or after 8/28/92, 662/3% of employee’s average weekly earnings as of date of injury, provided that weekly compensation does not exceed 55% of state average weekly wage. (RSMo 287.190[5]).

If disability is due to severance or complete loss of use of members included in schedule of losses, benefits increase 10%. For permanent injuries other than those listed in schedule, compensation will be paid proportionate to relation which other injury bears, not to exceed 400 weeks. If employee’s head, neck, hand or arm is permanently disfigured, additional compensation of up to 40 weeks can be awarded. Permanent partial disability is in addition to compensation for temporary total or temporary partial disability. (RSMo 287.190).

For permanent partial disability from injuries occurring on or after 9/28/83 but before 9/28/86, 662/3% of average earnings but not more than 45% of state average weekly wage as of July 1 preceding injury for period of scheduled losses (from eight to 232 weeks depending on nature of injury); for disability from injuries occurring on or after 9/28/81, weekly minimum compensation $40. If disability is due to severance or complete loss of use, benefits increase 10%. If employee’s head, neck, hand or arm is seriously and permanently disfigured, additional compensation of up to 40 weeks can be awarded. Permanent partial disability is in addition to compensation for temporary total or temporary partial disability. (RSMo 287.190).

For permanent total disability occurring on or after 8/28/91, 662/3% of average weekly earnings, not to exceed 105% of state average weekly wage. (RSMo 287.200). Claimant who accepts employer’s initial offer or prevails in action against employer is entitled to receive 100% of initial offer. (RSMo 287.390[5]).

Compensation is payable as wages were prior to injury, but at least once every two weeks. None is payable for first three regular work days of disability unless disability lasts longer than 14 days. Late payments increased by interest at 10% per annum. If employee agrees in writing, employer may pay employee directly and be indemnified by insurer. Employer or insurer is reimbursed by employee if claim found non-compensable. (RSMo 287.160).

On application of either party, award may be commuted by the Division under unusual circumstances. (RSMo 287.530).

Employer may require employee absent from work due to medical reasons to use any accumulated pay to offset absence. (RSMo 287.140).

Employees may be required from time to time during disability to submit to examination. (RSMo 287.210). Commission, division or judge may appoint qualified impartial physician to examine employee. (RSMo 287.210).

Employer is required to provide medical, surgical, chiropractic and hospital treatment, including nursing, custodial, ambulance and medicine, reasonably required to cure and relieve effects of injury. Employee may select his own physician at his own expense and employer required to advance travel expenses, but not for more than 100 miles, for necessary medical treatment under certain conditions. Health care provider has duty to communicate fully with employee regarding injuries. (RSMo 287.140[1]). Referring physicians must disclose financial interests in referee. (RSMo 287.140[11]). When employer has provided compensation, and then terminates compensation, employer must notify employee of termination and reason. If employee disputes termination of benefits, employee may request hearing before division.

No health care provider, other than one selected by employee at own expense, may attempt to collect fee for services rendered employee due to work-related injury or report to credit agency failure of employee to make payment, where injury covered under Act and such health care provider has received actual notice stating name of employer, insurer, employee, nature of injury and where claim filed. Health care provider may pursue employee for unpaid fee if injury determined non-compensable under Act. (RSMo 287.140).

Failure of employer to comply with statutes regarding safety devices increases compensation 15%. Failure of employee to use such devices, or failure of employee to obey safety rules, reduces compensation at least 25%, but not more than 50%. (RSMo 287.120).

Employee who fails to obey any rule or policy related to drug-free workplace or use of alcohol will have compensation or death benefit reduced by 50%. (RSMo 287.120). Employee’s refusal to take test for alcohol or nonprescribed controlled substance will result in forfeiture of benefits. (RSMo 287.120).

In third party action by employer under subrogation rights, recovery apportioned between employer and employee or his dependents. (RSMo 287.150).

In all cases in which employer found to knowingly employ minor contrary to law, 50% additional compensation allowed. (RSMo 287.250[7]).

Death Benefits.

If injury causes death, employer must pay direct to person furnishing same reasonable burial expenses, not to exceed $5,000. Employer must also pay to total dependents of employee death benefit if injury which caused death occurred on or after 9/28/81, weekly compensation shall in no event be less than $40 per week. If partial dependents and no total dependents, payment must be made to them proportionately. (RSMo 287.240).

Second Injuries.

In cases of permanent disability where there has been previous disability, compensation computed on basis of average earnings at time of last injury. If employee has preexisting permanent partial disability of seriousness to constitute obstacle to employment and said disability, if as to whole body, equals at least 50 weeks of compensation, or if major extremity injury only equals at least 15% permanent partial disability, and employee receives subsequent compensable injury resulting in permanent partial disability so that degree of disability, in amount equaling at least that as described above, caused by combined disabilities is substantially greater than that which would have resulted from last injury, considered alone, and if employee is entitled to compensation because of combined disabilities, employer at time of last injury is liable only for degree of disability from last injury had there been no preexisting disability. Balance paid from second injury fund. In case of total and permanent disability, above minimum degrees of disability are inapplicable; employer liable only for disability resulting from last injury considered alone. Balance paid from second injury fund. (RSMo 287.220).

Funds received by employer, or his dependents, through civil or other action, must be used to reimburse second injury fund for payments made to employee or dependents. (RSMo 287.220).

If employee has more than one employer at time of compensable injury, employer for whom employee working at time of injury is only responsible for lost wages in that employment. Employee may file claim against second injury fund for lost wages attributable to other employment where injury did not occur, up to maximum weekly benefit less benefits paid by aforementioned employer. (RSMo 287.220). In case of multiple employments, total average weekly wage equals sum of total average weekly wage for each employment employee is unable to return due to injury. (RSMo 287.250). Records pertaining to second injury fund claims open to public. (RSMo 287.220).

Limitations.

Injured party must notify employer within 30 days from injury unless good cause for failure to do so is shown (RSMo 287.420), and, except for second injury fund claims, must file within two years after date of injury or death, or last payment made on account of injury or death; provided, however, that if report of injury or death was not filed by employer as required, claim may be filed within three years after date of injury, death or last payment made on account of injury or death. If suit at law or in admiralty or action under compensation laws of another state is filed within two years after filing by employer of report of injury or death, or where payments have been made, within two years of last payment, and recovery is denied on ground that person was employee subject to provisions of Missouri Workmen's Compensation Act, two year limitation for filing claim begins to run with termination or abandonment of such suit or proceeding. Claim against second injury fund must be filed within two years after date of injury or within one year after claim is filed against employer or insurer. (RSMo 287.430-.440).

Review.

When parties are unable to agree as to compensation, hearing is held before Division through a referee, except hearing applications will not be considered until 14 days after received. (RSMo 287.450-.460). Full Commission may review award (RSMo 287.480), and appeal from decision of full Commission may be taken to appellate court. Appeal must be filed within 20 days of Commission's final decision. That court is bound by findings of fact within powers of Commission, hears no additional evidence, reviews only questions at law and may modify, remand for rehearing, set aside or reverse award only on one of following grounds: (1) That Commission acted without or in excess of its powers; (2) that award was procured by fraud; (3) that facts found by Commission do not support award; (4) that there was not sufficient competent evidence in record to warrant making of award. Appeals to circuit and appellate courts have precedence over all cases except election contests. (RSMo 287.490).

False Claims.

Unlawful to knowingly present false or fraudulent claim for payment of benefits, knowingly present multiple claims for same occurrence with intent to defraud, purposefully present or participate in preparation of writing to support false or fraudulent claim, or knowingly assist, abet, solicit or conspire with person regarding above, knowingly make false or fraudulent claim for health care benefits, knowingly submit claim for health care benefits not used by, or on behalf of, claimant; knowingly present multiple claims for health care benefits with intent to defraud, knowingly make false or fraudulent material statement or representation to obtain or deny benefit, knowingly make false or fraudulent statement regarding entitlement to benefits with intent to discourage injured worker from making claim, knowingly makes false or fraudulent statement to investigator in course of investigation. Aforementioned false claims punishable as class A misdemeanor and liable for fine up to $10,000, or double value of fraud, whichever greater. (RSMo 287.128).

Unlawful for insurance company or self-insurer to intentionally refuse to comply with legally indisputable compensation obligations, administer compensation obligations in dishonest manner or in manner to cause injury to public or person dealing with employer or insurer. Punishable as class D felony and liable for fine up to $10,000 or double value of fraud, whichever greater. (RSMo 287.128).

Any entity falsely providing proof of workers' compensation insurance is guilty of class D felony and liable for fine of up to $10,000 or double fraud, whichever greater. (RSMo 287.128[5]).

Employer failing to insure liability under Act is guilty of class A misdemeanor and is liable to State for penalty of three times annual premium had employer been insured, or $50,000, whichever greater. (RSMo 287.128[7]).

Health care provider committing fraud is guilty of class A misdemeanor and liable for fine up to $20,000. Subsequent violation is class D felony. (RSMo 287.129).

Employer's Insurance.

Insurance must be carried by employer through some company authorized to insure such liability, or may be carried by employer himself or on group insurance basis when proof of ability to do so is shown. (RSMo 287.280). Insurance carriers must provide comprehensive safety and loss control services to their insureds. Failure to provide such programs may result in combination of fines up to $10,000 or suspension or revocation of insurer's right to sell insurance. (RSMo 287.123). Employees are not permitted to pay cost of insurance. (RSMo 287.290). Employer must post special notice distributed by Division of Worker's Compensation. (RSMo 287.127).

Employees Savings and Insurance.

Benefits from other sources are no bar to recovery under the act. (RSMo 287.270).

Assignability of Compensation, etc.

Compensation is not assignable, nor subject to attachment, garnishment, execution, set-off or counterclaim. (RSMo 287.260[1]).

Settlements.

All compromises or settlements must be approved by administrative law judge or commission. (RSMo 287.390[1]). Claim for compensation may be reactivated after settlement only for payment of life threatening surgical procedures or if claimant requires use of new or modification of existing prosthetic device. (RSMo 287.430). Mediation services provided at pretrial conference if division determines claim may be settled, or upon application by either party. Upon request of either party, person providing mediation services is disqualified from conducting evidentiary hearing. (RSMo 287.460).

Occupational Diseases.

Included in workmen’s compensation provisions. (RSMo 287.110). For claims procedure and compensation see subhead Workers’ Compensation, supra.

Occupational Disease defined as disease arising out of and in course of employment including loss of hearing in one or both ears due to prolonged exposure to harmful noise in employment and disability due to radioactive properties or to Roentgen rays or exposure to ionizing radiation. Employee with repetitive trauma injury who has worked for employer less than three months must file claim against prior employer where that employment is substantial cause of injury. (RSMo 287.067).

Employers’ Liability Act.

See subhead Workers’ Compensation, supra.

Unemployment Compensation.

Insured worker, who has been paid within base period (worker who has been paid wages of at least $1,200 for claims filed after Dec. 31, 2004; after Dec. 31, 2005, $1,300 or more; after Dec. 31, 2006, $1,400 or more; after Dec. 31, 2007, $1,500 or more in at least one calendar quarter of base period) shall be eligible if: (1) He has registered for work and reports regularly to employment office unless belongs to class whose opportunities not enhanced by reporting to employment office; (2) he is able and available for (actively seeking) work; (3) he has reported to division office as directed by deputy; (4) prior to first week of benefits he has been partially or totally unemployed for one week; (5) he makes claim for benefits; and (6) he is participating in certain job search services. (RSMo 288.030-.040).

For what constitutes employer see RSMo 288.032.

For claims filed after 12/31/97, benefits are based upon formula which allows insured worker 4% of total weekly wage paid to him during that quarter of his base period in which his wages were highest, but not more than $205 for claims filed in calendar year 1998, $220 for claims filed in calendar year 1999, $235 for claims filed in calendar year 2000, $250 for claims filed in calendar years 2001-2005, $270 for claims filed in calendar year 2006, $280 for claims filed in calendar year 2007, $300 for claims filed in calendar year 2008, $310 for claims filed in calendar year 2009, and $320 for claims filed in calendar year 2010 and each year thereafter. (RSMo 288.038).

See also category 8 Debtor and Creditor, topic 8.01 Assignments.

Smokers.

Unlawful to discharge or fail to hire worker because smoker or non-smoker, as long as person complies with applicable workplace policy concerning smoking.

11.03 WORKERS’ COMPENSATION LAW:

See topic 11.02 Labor Relations.

12 ENVIRONMENT

12.01 ENVIRONMENTAL REGULATION:

General Supervision.

Control over water pollution problems is vested in Clean Water Commission of State of

Missouri, Jefferson City, Mo. 65101. (RSMo 644.021-.026). Control over air pollution is vested in Air Conservation Commission. (RSMo 643.040). Control over underground storage tanks is vested in Hazardous Waste Management Commission. (RSMo 319.109).

Prohibited Acts of Pollution.

It is unlawful to (1) cause pollution of any waters or to permit any water contaminant in location where it is reasonably certain to cause pollution of any waters; (2) discharge water contaminants which reduce quality of water below water quality standards of § 644.006 to 644.141; (3) violate toxic material control regulations or to exceed effluent regulations; or (4) discharge radiological, chemical or high level radioactive waste. (RSMo 644.051). Air pollution is presence in ambient air of one or more air contaminants in quantities, of characteristics and of a duration which directly and proximately cause or contribute to injury to human, plant, or animal life or health or to property or which unreasonably interfere with enjoyment of life or use of property. (RSMo 643.020).

Treatment of Waste.

Treatment of infectious waste is regulated by 260.203.

Enforcement.

Water pollution provisions may be enforced by Clean Water Commission. After investigation and a public hearing, Board may institute legal proceedings. Also, prosecuting attorney of any county or State Attorney General may seek injunctive relief notwithstanding fact that no administrative hearing has been held. (RSMo 644.076). Air Conservation Commission, after investigation and hearing, may institute civil action in any court of competent jurisdiction, through Attorney General of state. Air Conservation Commission may establish motor vehicle emissions inspection program for any non-attainment area. (RSMo 643.300-.355).

Specific requirements for release of petroleum, crude oil, natural gas, natural gas liquids, liquified natural gas, or synthetic gas usable for fuel by either intrastate or interstate facilities. (RSMo 260.500).

No person engaged in business of waste clean-up of environmental hazards created by others, shall be liable for any damages arising from release or discharge of pollutant, resulting from such activity, in amount greater than $1,000,000 to any one person or $3,000,000 to all persons for single occurrence. (RSMo 260.552).

No person shall be liable for removal costs or damages resulting from action or omissions consistent with National Contingency Plan or as directed by federal or state official with responsibility for oil spill response. (RSMo 260.819). This provision does not apply to personal injuries, to responsible parties or to negligent or willful misconduct.

Owner/operator of underground storage tank that is not source of release will be reimbursed for all reasonable direct costs for testing and monitoring including third-party claims not to exceed $1,000,000 per occurrence. (RSMo 319.107-.131). Petroleum Storage Tank Insurance Fund provides monies for cleanup of contamination caused by releases if owner applied or participating in fund by certain date. (RSMo 319.129-.131).

No person shall haul for commercial profit, collect, process, or dispose of waste tires except as provided for in 260.270. Third violation of this section, and each subsequent violation, may be punishable by fine not to exceed $5,000, and any other penalties authorized by law.

All rules promulgated or amended by Department of Natural Resources that prescribe standards are required to cite specific legal authority for rule. Department of Natural Resources must allow 60 days for public comments before rule is promulgated. (RSMo 640.015[4]).

Penalties.

Under Missouri Clean Water Law, Commission may seek penalty not less than $2,500 nor more than $25,000 per day of violation, or imprisonment for not more than one year, or both. Second and successive violations shall be punished by fine of not more than $50,000 per day of violation, or by imprisonment for not more than two years, or both. (RSMo 644.076). Further, state or any subdivision thereof may bring action for actual damages sustained. (RSMo 644.096). Under Air Pollution Act Commission may seek injunctive relief or fines of up to $10,000 per violation per day, or any combination thereof. No liability for violation caused by act of God, war, strike, riot or other catastrophe. (RSMo 643.151[5]).

Permits.

Permit must be obtained by any person seeking to build, erect, alter, operate, use or maintain any water contaminant or point source. No permits will be issued unless meets standards, rules or regulations promulgated pursuant to 644.006 to 644.141. (RSMo 644.051). Air Conservation Commission may grant individual variances from air pollution standards whenever it is found that compliance would result in arbitrary and unreasonable taking of property without just compensation or in practical closing and elimination of any business, occupation or activity without sufficient corresponding benefit or advantage to people. However, no variance will be granted where effect will be to permit continuation of health hazard. Any variance granted will not relieve person receiving it from any liability imposed by other law for commission or maintenance of nuisance. Director shall act on petition within 30 days and make recommendation within 120 days or hearing may be requested under 643.100. (RSMo 643.110).

Permit must be obtained from Department of Natural Resources before any person can operate solid waste management system or solid waste disposal area of solid waste management system. Before applying for permit to construct solid waste disposal area person or operator must request preliminary site investigation from Department of Natural Resources. Person or operator must further provide to Department of Natural Resources detailed surface and subsurface geologic and hydrologic investigation. (RSMo 260.205).

Nuclear Energy.

Midwest Interstate Low-Level Radioactive Waste Compact adopted.

All-terrain Vehicles.

Limitations on operation found in 300.348 and 304.013.

Missouri Blasting Safety Act.

Established in 319.300 et seq.

Missouri Propane Safety Act.

Established in 323.010 et seq.; Missouri Propane Gas Commission is established within Department of Agriculture (RSMo 323.010[2]).

13 ESTATES AND TRUSTS

13.01 ADMINISTRATION:

See topic 13.09 Executors and Administrators.

13.02 ADVANCEMENTS:

See topic 13.07 Descent and Distribution.

13.03 ALLOWANCES:

See topic 13.09 Executors and Administrators.

13.04 CLAIMS:

See topic 13.09 Executors and Administrators; category 5 Civil Actions and Procedure, topic 5.17 Pleading.

13.05 DEATH:

Any person who has resided in the state and goes therefrom and does not return thereto for five successive years, is presumed to be dead. (RSMo 473.697; 490.620).

Survivorship.

Uniform Simultaneous Death Act has been adopted. (RSMo 471.010-.080).

Action for Death.

When death results from any act, conduct, occurrence, transaction or circumstance which, if death not ensued, would have entitled decedent to recover damages, person who would have been liable had death not ensued shall be liable in action for damages brought by: (1) Spouse, children (natural or adopted, legitimate or illegitimate), father or mother of deceased (natural or adoptive); (2) brother or sister of deceased or their descendants if none of persons in (1) available; (3) plaintiff ad litem appointed by court having jurisdiction of cause of action upon application of person entitled to share in recovery if no person in (1) or (2) available. (RSMo 537.080).

Damages unlimited but recovery for grief or bereavement prohibited. (RSMo 537.090).

When recovery is by plaintiff ad litem, distribution of proceeds in accordance with laws of descent and distribution unless court otherwise directs. (RSMo 537.095[2]).

If two or more persons are entitled to maintain action any one may settle claim with approval of any Circuit Court or may maintain suit without joinder of any person provided claimant satisfies court that he had diligently attempted to notify all parties having cause of action. (RSMo 537.095[1]).

Action must be brought within three years of date of accrual. (RSMo 537.100).

Death Certificate.

See category 10 Documents and Records, topic 10.04 Records, subhead Vital Statistics.

Durable Power of Attorney.

See category 21 Property, topic 21.15 Powers of Attorney.

Missouri Uniform Trust Code enacted. (RSMo 456.1-101-.11-1106).

Uniform Anatomical Gift Act.

See topic 13.16 Wills.

Living Wills.

See topic 13.16 Wills.

13.06 DECEDENTS' ESTATES:

See topics 13.07 Descent and Distribution, Executors and Administrators, Wills; category 8 Debtor and Creditor, topic 8.10 Homesteads.

13.07 DESCENT AND DISTRIBUTION:

Subject to payment of claims and rights (see subhead Surviving Spouse, infra) of surviving spouse, all property as to which any decedent dies intestate descends and is distributed to one of the following classes, each class of which a member is living taking to exclusion of all subsequent classes: (1) Children and descendants of deceased children; (2) parents, brothers, sisters and descendants of deceased brothers and sisters; (3) grandparents, uncles, aunts and descendants of deceased uncles and aunts; (4) great grandparents and descendants and so on without end, the estate going to the nearest lineal ancestors and their children and descendants of deceased children of such ancestors, provided that collateral relatives more distant than ninth degree of kinship according to rules of civil law may not inherit. (RSMo 474.010[2]).

If there be no children or their descendants, father, mother, brother nor sister, nor their descendants, husband or wife, nor any paternal or maternal kindred capable of inheriting, the estate goes to the kindred of the intestate's predeceased spouse in like course as though such spouse had survived the intestate and then died entitled to the estate. (RSMo 474.010[3]).

Where all the descendants, ancestors or collaterals coming into partition are of equal degree of kin to the intestate they take per capita; otherwise they take per stirpes. (RSMo 474.020).

Surviving spouse takes the entire estate if intestate left neither parent nor issue. If decedent left no issue but did leave one or both parents, or if decedent left issue all of whom are also issue of surviving spouse, surviving spouse takes first $20,000 of estate plus one-half balance. (RSMo 474.010[1]). Surviving spouse takes one-half intestate estate if there are surviving issue who are not issue of surviving spouse. (RSMo 474.010[1]). Premarital contracts whereby any estate, real or personal, is received effective after death of spouse and expressed to be in full discharge of all rights of inheritance or other statutory rights in estate, are valid. (RSMo 474.120).

Gifts in fraud of marital rights shall at election of surviving spouse be treated as a testamentary disposition and recovered from donee or transferees without adequate consideration and applied to payment of spouse's share as in case of election to take against a will. (RSMo 474.150[5]).

In addition to the foregoing, either surviving spouse is entitled to certain specified articles and allowances for support. See topic 13.09 Executors and Administrators, subhead Allowances.

Collaterals of the half blood take only one-half of the share which goes to collaterals of the whole blood in same degree or to ancestors. (RSMo 474.040).

Posthumous children or descendants inherit as though born in decedent's lifetime, but no other persons inherit unless in being and capable of taking as heirs at time of intestate's death. (RSMo 474.050).

Illegitimate children inherit and transmit inheritance on the part of the mother, but not the father unless natural parents participated in marriage ceremony even if attempted marriage is void or paternity is established by adjudication before death of father or by clear and convincing proof after death of father. (RSMo 474.060-.070).

Adopted Children.

See category 14 Family, topic 14.01 Adoption.

Determination of Heirship.

Where person leaves property or any interest in property in this state and no administration has been commenced on estate of decedent in this state within one year after death of decedent, and if no written will has been presented for probate within time provided in 473.050, any person claiming interest in such property as heir or through heir may file petition in probate court to determine heirs of decedent and their respective interest as heirs. Petition must state: (a) Name, age, domicile, last residence address and fact and date of death of decedent; (b) names, relationship to decedent and residence addresses of heirs so far as known or can with reasonable diligence be ascertained; (c) names and residence addresses of heirs of decedent at decedent's death; (d) names and residence address of any persons claiming through heir of decedent when heir died after decedent; (e) particular description of property of decedent with respect to which determination is sought; and (f) net value of such property. Court must conduct hearing notice of which must be given to all persons known or believed to claim any interest in property as heir or through heir, persons who may at date of filing petition be shown by records of conveyances of county in which any real property described in petition is located to claim any interest therein through heirs of decedent and any unknown heirs. Notice must be given by publication by publishing once each week for four consecutive weeks last insertion of publication to be at least seven days before hearing. Notice must be given personally or by registered mail to every person whose address is known to petitioner. Upon hearing, court issues decree determining persons entitled to property and respective interest. Decree is conclusive evidence of facts determined against all parties. Certified copy of decree must be recorded at expense of petitioner in each county in which any real property described is situated. (RSMo 473.663).

Advancements.

When any of the children of an intestate has received, in his lifetime, any real or personal estate, by way of advancement, it must be counted toward the advancee's intestate share, but excess not required to be refunded. Inter-vivos transfers must be shown to be advancements rather than gifts. Value of advancement determined as of time advancee came into possession or enjoyment, or at death of intestate, whichever first occurs. (RSMo 474.090).

Renunciation.

No statutory provision for renunciation by beneficiary.

Escheat.

If any person dies intestate seized of any real or personal property, leaving no heirs or representatives currently capable of inheriting same, or if upon final settlement of executor or administrator there is balance on hand belonging to some legatee or distributee who is nonresident who is not in situation to receive same and give discharge thereof, or who does not appear by himself or herself or agent to claim and receive same, or under other specific situations enumerated by statute, such real and personal estate escheats and vests in state. (RSMo 470.010, 474.010[4]).

Uniform Probate Code not adopted.

See also topic 13.09 Executors and Administrators; categories 4 Citizenship, topic Aliens; Debtor and Creditor, topic Homesteads; Family, topic Adoption.

13.08 ELECTION:

See topic 13.16 Wills; category 21 Property, topic 21.08 Dower.

13.08A ESTATES: (in property)

See category 21 Property, topic 21.16 Real Property.

13.09 [RESERVED]

13.10 EXECUTORS AND ADMINISTRATORS:

Jurisdiction over administration is in probate division of circuit court. (RSMo 472.020).

Preferences in Right to Administer.

Surviving spouse has prior right to administer, and next right is in one or more distributees according to discretion of court. (RSMo 473.110[2]).

Durable Power of Attorney.

See category 21 Property, topic 21.15 Powers of Attorney.

Uniform Anatomical Gift Act adopted. (RSMo 194.210-.307).

Uniform Fiduciaries Act adopted. (RSMo 469.240-.350).

Uniform Principal and Income Act not adopted.

Uniform Prudent Investor Act adopted. (RSMo 469.900, 913).

Uniform Prudent Management of Institutional Funds Act adopted. (RSMo 402.130, 148).

Uniform Simplification of Fiduciary Security Transfers Act adopted. (RSMo 403.250-.350, specifically saved from repeal by U.C.C., see 400.10-.102).

Eligibility and Competency.

Following may not be appointed personal representatives: (1) Judge or clerk of any court or his deputy (unless decedent was spouse or relative in third degree of consanguinity or affinity); (2) person under 18 or of unsound mind; (3) person under legal disability because of commission of crime; (4) habitual drunkard; (5) foreign corporation, partnership or association except as provided in 362.600. See category 3 Business Regulation and Commerce, topic 3.01 Banks and Banking, subhead Out-of-State Bank or Trust Company; (6) personal representative of personal representative. (RSMo 473.117).

Qualification.

Personal representative must give bond in amount fixed by judge or clerk. (RSMo 473.157). Amount of bond may be reduced if fiduciary deposits certain securities with domestic trust company. Bond is not required of corporation licensed to transact trust business. (RSMo 473.160[3]).

Exemption from Bond.

Testator may exempt executor from bond unless court in its discretion requires it. (RSMo

473.160[1]).

Issuance of Letters.

Upon application verified by applicant stating: (a) Name, age, sex, domicile, residence address and date of decedent's death; (b) names, relationships and addresses of surviving spouse, heirs, devisees and legatees of decedent; (c) value of realty and personalty; (d) if decedent not domiciliary, location and value of land and personalty in state; (e) contents of will; (f) name and address of named executor; (g) if intestate, name, address and relationship of applicant to decedent; (h) name and address of applicant's attorney; (i) if letters issued he will make inventory, pay debts and legacies and perform other duties of administration; and (j) whether application is for supervised or independent administration. (RSMo 473.017[1]). Granted by probate court or clerk. (RSMo 473.023).

Removal.

Grounds for include: unsound mind, conviction of felony, nonresidence or absence for four months, drunkard, failure to discharge official duties, waste or mismanage estate, failure to answer citation and attachment to make settlement. (RSMo 473.140).

Special Kinds of Administration.

Administrator d.b.n. appointed where all executors or administrators die, resign or letters revoked and goods remain unadministered, or after final settlement and discharge unadministered asset or unpaid allowed claim remains or upon good cause shown. (RSMo 473.147). Independent administration where will so provides or all interested parties agree. (RSMo 473.780).

Public Administrator.

Where there is no surviving spouse or heir in state, or executor is absent or fails to qualify, and in certain other cases, public administrator must take charge and administer estate. (RSMo 473.743).

Inventory must be filed by representative within 30 days after letters granted. (RSMo 473.220 and .233).

Notice to Creditors.

Clerk of probate court upon issuance of letters testamentary or administration shall publish in newspaper published in county, notice of appointment of personal representative and notice to creditors to present claims within six months from date of first publication or within two months from date notice was mailed to creditor by personal representative, whichever is later. This six months does not extend limitation period that would bar claims one year after decedent's death, as provided in § 473.444, or any other applicable limitation periods. Notice published weekly for four weeks. Clerk shall send copy by ordinary mail to each heir or devisee appearing on letters for application. (RSMo 473.033).

Presentation of claims barred unless presented within six months after first publication of notice of granting of letters or within two months from date notice was actually mailed, whichever is later. (RSMo 473.360; 473.033). Claims must be in writing, and verified by claimant or someone having knowledge of facts. If founded on written instrument, original or copy with all endorsements must be attached to claim. (RSMo 473.380[2]). If claim is secured, security must be described in claim papers. Failure to file within prescribed time does not deprive creditor of security but precludes recourse against general assets. (RSMo 473.387).

Unmatured claim must be filed in prescribed time. Court may order payment at present value, or require representative to retain assets, or permit distribution if distributees give bond.

(RSMo 473.383)

Contingent claim must also be filed. Order thereon must state nature of contingency. Court may order representative to retain assets, or order bond of distributees, or permit distribution without regard to claim. In latter case distributees may be required to account to the extent of assets received by them. (RSMo 473.390).

Creditor may bring claim against beneficiary of non-probate transfer if commenced within 18 months after decedent's death and personal representative fails to do so. (RSMo 461.300).

Form.

(Proof of claim). Missouri has no statutory form for proof of claim. The following is a form in current use in one county, and generally acceptable.

Form

In the Probate Court of . . . . County, Missouri

at . . . .

State of Missouri, ...

County of . . . . } ss.

Estate Number . . . .

Claim Against Estate

In the estate of . . . .

deceased incompetent minor—

. . . ., ...

Administrat— Execut— Guardian Address

Affidavit of Claimant

. . . ., being duly sworn, states on oath that there is due h. . . . from the estate of . . . . deceased, incompetent, minor—, the sum of $. . . . . . on account of . . . .

(describe nature of claim)

An itemized statement of such claim showing dates and amounts is "is *as" follows: is attached hereto:

*(strike words not applicable)

. . . .

. . . .

**The claimant holds security for . . . . . . claim as follows: . . . .

(If none, so state; otherwise describe)

Claimant states that to the best of h. . . . knowledge and belief . . . he has given credit to such estate for all payments and offsets to which it is entitled and that the balance claimed as above stated is justly due.

. . . .

(claimant)

Subscribed and sworn to before me this . . . . day of . . . . . ., 20. . . . .

(Seal)

. . . .

Notary Public Clerk

By . . . .

Deputy Clerk

Notary commission expires

. . . . .Probate Court of

. . . . County, Missouri

Service of all notices is waived.

Consent for immediate hearing is given.

Consent is given to judgment allowing claim for $. . . . . .

(If signed, strike any part not agreed to.)

. . . .

Administrat— Execut— Guardian

**As to manner of payment of secured claims see Secs. 473.287, 473.902, 473.387 and 474.540, RSMo. Date of first publication . . . . .; Claim allowed on . . . . . in the amount of $. . . . . and placed in Class . . . . . . Abstract of Claims Book . . . . ., Page . . . . .

. . . .

Judge, Commissioner, Clerk.

Notice of Filing Claim

To the . . . .

administrator-rix executor-rix guardian

of the above named estate:

Take notice that the original claim, of which the above is a copy and on which is endorsed the date of filing, to-wit, the . . . . day of . . . . . ., 20. . . ., was filed in the Probate Court of . . . . County, Missouri, and that you have ten days from the service of this notice to file any offset or counterclaim which you may have against said claim. The time for hearing such claim is the . . . . day of . . . . . ., 20. . . ., at . . . . . o'clock . . . .M.

. . . .

Claimant

(Attach Affidavit of Service of Notice or

Sheriff's Return)

Action on Claims.

Court fixes date for hearing, not less than 20 days following notice unless shorter time is specially fixed. (RSMo 473.413). Appeals may be taken within 30 days after ruling on claim. (RSMo 472.180). Claims for expenses of administration may be approved at any settlement, whether paid or not, on application of representative or claimant, or in discretion of court. (RSMo 473.403[3]). Court may approve compromise of claim or suit against estate. Compromise without prior or subsequent approval does not bind estate. (RSMo 473.427).

Payment of Claims.

Representative may pay claims (other than his own) without filing or court's allowance if paid or filed within six months after 1st publication of notice of letters granted. (RSMo 473.403[2]). Persons interested may except to such allowances at final settlement. (RSMo 473.403[2]). Payment is on order of classification (see subhead Priorities, infra) and no claim need be paid until all previous classes are satisfied. If assets inadequate to pay any class, claims in class are prorated. No claim need be paid prior to six months after publication of notice of letters unless refunding bond is given. Thereafter claims except those of seventh class are due, and draw interest. Six months thereafter all claims are due. If estate insolvent or unable to pay claims, court may make appropriate order. (RSMo 473.430-.433). Representative is liable for failure to pay allowed claim when ordered. (RSMo 473.573). Actions on bond must be brought within one year after discharge of representative. (RSMo 473.213).

Priorities.

Order of payment of claims where estate is insufficient to pay all claims is by class as follows: (1) Costs; (2) expenses of administration; (3) exempt property, family and homestead allowances; (4) funeral expenses; (5) debts and taxes due U.S.; (6) expenses of last illness, wages of servants, cost of tombstone; (7) debts and taxes due State of Missouri or political subdivisions; (8) judgments against decedent in lifetime; and (9) all other claims. (RSMo 473.397).

Actions.

There is no suspension of the right to sue the representative on claims against the estate. Action on a claim may be brought in circuit court within six months after 1st publication of notice of letters granted in lieu of filing claim in probate court, but if judgment is obtained in circuit court transcript thereof should be filed in probate court. (RSMo 473.363-.370). Written notice to probate court of revival or institution of action within six months after first publication of letters necessary to recover against estate's assets. (RSMo 473.360-.363-.367).

Settlements.

Supervised representative must make annual settlement on anniversary of grant of letters until administration is completed. (RSMo 473.540[1]). Independent representative files petition for order of complete settlement or statement of account within one year after appointment or as continued by court. (RSMo 473.837, 473.840).

Compensation of representative is commission on personal property and proceeds of sale of realty. Minimum scale is specified in 473.153.

Allowances.

Widower or widow or unmarried minor children are entitled to keep, as his, her or their absolute property, family Bible and other books; one passenger motor vehicle; all wearing apparel of family; all household electrical appliances, musical and other amusement instruments; all household and kitchen furniture, appliances, utensils and implements, without regard to its value (RSMo 474.250); and such sums of money, to exclusion of all debts, claims, charges, legacies and bequests, as court may deem reasonable for proper support of widower or widow and minor children, if any, for one year after death of spouse, in manner suited to his, her or their condition in life, taking into account condition of decedent's estate (RSMo 474.260). In addition to above court must make homestead allowance, on application of surviving spouse or of guardian, conservator, or person having custody of persons of unmarried minor children, of amount not exceeding 50% of value of estate exclusive of exempt property and allowance for support and in no case more then $7,500, which may consist of money or property with right of selection, to be absolute property of surviving spouse, if any, otherwise of unmarried minor children in equal shares. If survived by married children or those of full age as well as unmarried minor children, but no spouse, amount as above determined is divided by number of all children, and shares of unmarried minors constitute homestead allowance. This allowance is exempt from all claims. It is charged against share to which recipient is entitled as distributee of estate but is not diminished if greater than distributive share. It is in lieu of all dower and homestead rights in land and is deemed waived if application therefor is not filed in ten days after expiration of time for filing claims, in which case there is no right to homestead or homestead allowance under any law of state. If surviving spouse selects property with value in excess of allowance, spouse may elect to pay difference or take undivided interest, or court may partition real estate. Court may order appraisal of property selected as homestead allowance; interested party may file written objections thereto within five days of appraisal; court may then order sale of such property. (RSMo 474.290).

Intermediate Accountings.

For supervised administration, one year from grant of letters; annually thereafter until administration completed. (RSMo 473.540).

Final Accounting and Settlement.

Six months and ten days after first publication of notice of letters granted or as soon thereafter as administration is completed; ten days after revocation of letters; upon application to resign. (RSMo 473.540).

Distribution.

None compelled within six months of date of letters unless legacies are perishable or subject to injury. (RSMo 473.610). After six months, if other distributees and claimants not prejudiced thereby, may distribute under order of court, which may order the return at any time before decree of final distribution and may require distributee to give security for such return. If distribution made without request for security, executor or administrator and sureties liable for loss to any party as a result. (RSMo 473.613). If personal property susceptible to division in kind, court may order it partitioned. For partition in kind, court appoints three disinterested commissioners of no kin to the parties, whose report is subject to approval by the court. (RSMo 473.640). If not to advantage of distributees to divide or to sell, on application of a majority, court shall order property delivered to such person as they designate, who shall collect all notes, accounts, and choses in action, dispose of all property to their best interest and distribute all moneys realized. Bond may be required in the discretion of the court. (RSMo 473.643[1]). If after distribution, refunding becomes necessary for the payment of debts, court will apportion the same according to the amount received, except that specific legacies shall not be required to be refunded unless residue insufficient. Court will enter judgment on application of executor or administrator in case of failure of legatee or distributee to refund amount apportioned to him. (RSMo 473.637). Distribution to distributee may be made to distributee or to person holding power of attorney executed by distributee in accordance with law of place of execution, or to distributee's personal representative, guardian or conservator. (RSMo 473.657[1]).

Administration Dispensed With.

Probate court may refuse to grant letters at any time when estate of decedent is not greater than exempt property and allowance to surviving spouse or unmarried children or when personal estate does not exceed $15,000 and there is no surviving spouse or unmarried minor child whose claim has not been barred or any creditor may apply for refusal of letters by giving bond in sum not less than value of estate. (RSMo 473.090).

When Administration Unnecessary.

See subhead Administration Dispensed With, supra.

Small Estates.

Distributees of estate consisting of personal property or real property or both have defeasible right to personal property and are entitled to real property thereof without awaiting granting of letters testamentary or administration if: (a) Value of estate, less liens and encumbrances, is less than $40,000, and (b) 30 days have elapsed since death of decedent and no application for letters or for administration or refusal of letters is pending or has been granted, and (c) file bond in amount not less than value of personal property, approved by court, conditioned upon payment of debts of decedent, including debts to State, expenses of funeral and upon compliance with further orders of probate court in relation to estate of decedent and conditioned that any property to which distributee is not entitled will be delivered to persons entitled thereto under law. Liability of sureties on bonds terminates unless proceedings against them are instituted within two years after bond is filed, except court can dispense filing of bond if it finds same unnecessary. Affidavit made by personal representative under will if presented for probate otherwise distributee entitled to receive decedent's property anytime 30 days after decedent's death and must include: (1) Decedent left no will or will was properly presented for probate, (2) unpaid debts, claims or demands against decedent or estate, all inheritance taxes due, if any, on property transfers involved have been or will be paid, (3) itemized description and valuation of property of decedent, (4) names and addresses of persons having possession of property, (5) names, addresses and relationship to decedent of persons entitled to and who will receive specific items of property, and (6) facts establishing right to specific items of property. Certificate of clerk must be annexed to or endorsed on affidavit and must show names, addresses of persons entitled to property under facts stated in affidavit, recite that will of decedent has been probated or that no will has been presented to court and that all inheritance taxes on property, if any due, have been paid. Copy of affidavit and certificate must be filed in office of probate clerk and copies furnished by clerk. (RSMo 473.097).

Distributees may establish their right to succeed to real estate of decedent by filing copy of affidavit and certificate of clerk in office of recorder of deeds of each county where property is situated. When value of property in affidavit exceeds $15,000, notice to creditors must be published once a week for two consecutive weeks. Creditors notified claims barred one year after death of decedent. Creditor may request estate be opened for administration. Upon compliance with foregoing procedure, personal property and real estate involved shall not be taken in execution for any debts or claims against decedent, but such compliance has effect in establishing right of distributees to succeed to property as if complete administration was had; nothing herein affects right of secured creditors with respect to such property. Property of decedent must be liquidated by affiant necessary to pay debts of decedent. Affiant must distribute remaining property to persons identified in affidavit. (RSMo 473.097).

Estates of Nonresidents.

Property, tangible or intangible, of a nonresident decedent which is located in Missouri is subject to original administration proceedings under the authority of this state solely, conducted as if the decedent were a resident. (RSMo 473.668). The situs of stock certificates, bonds, negotiable instruments, insurance policies payable to an estate and similar instruments is declared to be in the state where located. The situs of other debts, rights and choses in action is where the debtor is found. (RSMo 473.671). However, the following are not affected: (a) Methods of proving foreign wills or the admissibility of such wills to probate or to record; (b) the rights of a surviving spouse electing to accept or take against the will of a nonresident decedent, or the method of such election; (c) the right of a person to take as a pretermitted heir or otherwise against the will of a nonresident decedent; (d) the effect of divorce or the birth of a child as working or not working a revocation or partial revocation of the will of a nonresident; (e) the effect of the contest in another jurisdiction of the will of a nonresident decedent upon its validity in Missouri; (f) the applicability of any law in determining the validity of the execution of the will of a nonresident decedent; (g) the determination or the ultimate burden of estate or inheritance taxes imposed by reason of death of a nonresident decedent. (RSMo 473.675[1]).

Real property of an intestate nonresident decedent descends according to the laws of this state, and his personal property devolves to his heirs or next of kin determined in accordance with the laws of the state or country of his domicile. (RSMo 473.675[2]).

Support and family allowances to surviving spouses and unmarried minor children are governed by the more liberal (to them) of the laws of the decedent’s domicile and the laws of this state, but the court of this state in making such allowance and in ruling on applications for orders of refusal of letters of administration shall take into account any allowance which may be made in other jurisdictions and satisfied from property therein. (RSMo 473.675[3]).

Notwithstanding the requirements of this section that distributions during or at the conclusion of an administration shall be made as if the decedent were a resident, if the court finds that hardship to a foreign creditor would result therefrom or that the best interests of all persons having an interest in the estate would be forwarded by making a distribution to a foreign personal representative, the court may, in its discretion, order such distribution to the extent it finds necessary to avoid such hardship or to forward such interests. (RSMo 473.675[4]).

If the aggregate of liabilities of the estate in all jurisdictions exceeds its aggregate assets, the court shall order distribution, as far as practicable, so that all the creditors of decedent’s estate, here and elsewhere, may receive a share in proportion to their respective obligations, with regard being given to any preferential rights determined by the court. To this end, distribution to a foreign personal representative may be ordered if all creditors whose claims have been allowed in the administration in this state shall have received their just proportions that would be due to them if the whole of the estate of the decedent, wherever found, were divided among all creditors in proportion to their respective obligations, after applying Missouri law respecting preferences to different species of obligations, and if and to the extent that the court finds such preference to be equitable under all the circumstances of the particular case. (RSMo 473.675[5]).

If no local administration or application therefor in this state, domiciliary foreign personal representative may file authenticated copy of his appointment and any bond he has given with probate division of county in which property belonging to decedent is located. (RSMo 473.676). Domiciliary foreign personal representative may than exercise all powers of local personal representative as to assets in this state. (RSMo 473.677). Application or petition for local administration of estate terminates power of foreign personal representative but court may allow foreign personal representative to exercise limited powers to preserve estate. (RSMo 473.678).

Personal representative appointed by court of decedent's domicile has priority over all other persons for appointment as local personal representative except different person nominated in decedent's will to be personal representative in this state and in state of domicile. (RSMo 473.682). Domiciliary personal representative may nominate another, who shall have same priority as domiciliary personal representative. (RSMo 473.682).

Foreign personal representative submits himself to jurisdiction of Missouri courts by: (1) filing authenticated copies of his appointment, (2) receiving payment of money or taking delivery of personal property, or (3) doing any act as personal representative in this state which would have given state jurisdiction over him as individual. Jurisdiction under (2) is limited to money or value of personal property collected. (RSMo 473.685).

Foreign personal representative also subject to jurisdiction of Missouri courts to same extent that decedent was subject to such jurisdiction immediately prior to death. (RSMo 473.687). Service of process on foreign personal representative by registered or certified mail addressed to last reasonably ascertainable address. (RSMo 473.689[1]). Foreign personal representative shall be allowed at least 30 days within which to appear or respond. (RSMo 473.689[2]).

Any person, firm or corporation upon whom no demand has been made by a personal representative or other person authorized by this state to collect a nonresident decedent's personal property may, at any time 60 days or more after his death, transfer, pay or deliver personal property of nonresident decedent to foreign personal representative, or, if none, to such other person as may be entitled thereto under laws of said foreign state, and shall not be liable for debts of or claims against nonresident decedent or his estate by reason of having made such transfer, payment or delivery. (RSMo 473.691).

See also topics 13.16 Wills; 13.07 Descent and Distribution.

13.11 [RESERVED]

13.12 INTESTACY:

See topic 13.07 Descent and Distribution.

13.1313.14 [RESERVED]

13.15 TRUSTS:

Declarations of trust of any lands must be in writing, signed by the party declaring such trust, or by his last will in writing, except when trust arises or results by implication or construction of law, and all grants and assignments of any trust must be in writing, signed by party granting or assigning same, or by his last will in writing. (RSMo 456.4-407).

Sales.

When trust terms manifest intention that trustee, of active or passive trust, shall have full legal ownership of trust property, exercise by trustee of express or implied power of sale or other transaction incident to administration of trust, shall bind trust. (RSMo 456.003).

Trusts Void as to Creditors, etc.

With respect to irrevocable trust with spendthrift provision, spendthrift provision will prevent settlor's creditors from satisfying claims from trust assets except: (1) Where conveyance of assets to trust was fraudulent as to creditors pursuant to provisions of C. 428, RSMo or (2) to extent of settlor's beneficial interest in trust assets, if at time trust became irrevocable: (a) Settlor was sole beneficiary of either income or principal of trust or retained power to amend trust or (b) settlor was one of class of beneficiaries and retained right to receive specific portion of income or principal of trust that was determinable solely from provisions of trust instrument. (RSMo 456.5-505).

Competency as Trustee.

Any out-of-state bank or trust company may act in this state as trustee, executor, administrator, guardian, or in any other like fiduciary capacity, without necessity of complying with any law of this state relating to licensing of foreign banking corporations by Director of Finance or relating to qualifications of foreign corporations to do business in this state, and notwithstanding any prohibition, limitation, or restriction contained in any other law of this state, provided only that: (1) Out-of-state bank or trust company is authorized to act in this fiduciary capacity or capacities in state in which it is incorporated, or, if out-of-state bank or trust company be national banking association or thrift institution, it is authorized to act in this fiduciary capacity or capacities in state in which it has its principal place of business and (2) any bank or other corporation organized under laws of this state or national banking association or thrift institution having its principal place of business in this state may act in these fiduciary capacities in that state without further showing or qualification, other than that it is authorized to act in these fiduciary capacities in this state, compliance with minimum capital, bonding, or securities pledge requirements applicable to all banks and trust companies doing business in that state, and compliance with any law of that state concerning service of process. Any out-of-state bank or trust company eligible to act in any fiduciary capacity may be appointed to act in this fiduciary capacity by any court having jurisdiction in premises, all notwithstanding any provision of law to contrary. Out-of-state bank or trust company must file with Director of Finance written application for certificate of reciprocity and Director of Finance must issue certificate. Director may require bond issued by surety company authorized to do business in State of Missouri in minimum amount of $1,000,000 in form or such greater amount acceptable to Director of Division of Finance. (RSMo 362.600). See category 3 Business Regulation and Commerce, topic 3.01 Banks and Banking, subhead Out-of-State Bank or Trust Company.

Substitute Trustee.

Vacancy in trusteeship occurs if: (1) Person designated as trustee declines trusteeship; (2) person designated as trustee cannot be identified or does not exist; (3) trustee resigns; (4) trustee is disqualified or removed; (5) trustee dies; or (6) guardian or conservator is appointed for individual serving as trustee. If one or more cotrustees remain in office, vacancy in trusteeship need not be filled. Vacancy in trusteeship must be filled if trust has no remaining trustee. Vacancy in trusteeship required to be filled must be filled in following order of priority: (1) By person designated in or pursuant to terms of trust to act as successor trustee; (2) by person appointed by majority in number of qualified beneficiaries; or (3) by person appointed by court. Whether or not vacancy in trusteeship exists or is required to be filled, court may appoint additional trustee or special fiduciary whenever court considers appointment necessary for administration of trust. (RSMo 456.7-704-7.707).

Testamentary trusts are subject to control of Probate Court or Circuit Court, including requirement of bond of trustee and of accounting to court. Trustee must give bond to secure performance of trustee's duties only if court finds that bond is needed to protect interests of beneficiaries or is required by terms of trust and court has not dispensed with requirement. Court may specify amount of bond, its liabilities, and whether sureties are necessary. Court may modify or terminate bond at any time. (RSMo 456.7-702).

Transfer or devise may be made by will or other instrument including designation of beneficiary under life insurance policy and not invalid because trust is amendable or revocable. Transfer can be made to name of trust or trustee of trust. (RSMo 456.021).

Investments by fiduciaries are regulated by 362.550; 369.219-.254; and 475.190.

Investments in Name of Nominee.

Unless expressly forbidden by instruments, etc., setting up trust, any bank or trust company qualified to act as fiduciary may, if co-fiduciaries consent, hold investments in name of nominee. Records must show true owner. (RSMo 362.207).

Accounting.

Trustee must keep qualified beneficiaries of trust reasonably informed about administration of trust and of material facts necessary for them to protect their interests. Trustee must be presumed to have fulfilled this duty if trustee complies with notice and information requirements prescribed. Unless unreasonable under circumstances, trustee must promptly respond to beneficiary’s request for information. Trustee must send to permissible distributees of trust income or principal and to other beneficiaries who request it, at least annually and at termination of trust, report of trust property, liabilities, receipts, and disbursements, including source and amount of trustee’s compensation, listing of trust assets and, if feasible, their respective market values. (RSMo 456.8-813).

Delegation of Duties.

Trustee may delegate to agent duties and powers that prudent trustee of comparable skills could properly delegate under circumstances. Trustee must exercise reasonable care, skill, and caution in: (1) Selecting agent; (2) establishing scope and terms of delegation, consistent with purposes and terms of trust; and (3) periodically reviewing agent’s actions in order to monitor agent’s performance and compliance with terms of delegation. (RSMo 456.8-807).

Discretionary Distributions.

Notwithstanding use of such terms as “absolute,” “sole,” or “uncontrolled,” in exercise of discretion under ascertainable standard, trustee must exercise such discretionary power in good faith and in accordance with terms and purposes of trust and interests of beneficiaries. Unless terms of trust expressly indicate that rule in this section does not apply: (1) Person other than settlor who is beneficiary and trustee of trust that confers on trustee power to make discretionary distributions to or for trustee’s personal benefit may exercise power only in accordance with ascertainable standard; (2) trustee may not exercise power to make discretionary distributions to satisfy legal obligation of support that trustee personally owes another person; and (3) term “trustee” must include person who is deemed to have any power of trustee, whether because such person has right to remove or replace any trustee, because reciprocal trust or power doctrine applies, or for any other reason. Power whose exercise is limited or prohibited by this section may be exercised by majority of remaining trustees whose exercise of power is not so limited or prohibited. If power of all trustees is so limited or prohibited, court may appoint special fiduciary with authority to exercise power, unless: (1) Power held by settlor’s spouse who is trustee of trust for which marital deduction, as defined in § 2056(b)(5) or 2523(b)(5) of the Internal Revenue Code was previously allowed; (2) any trust during any period that trust may be revoked or amended by its settlor; or (3) trust if contributions to trust qualify for annual exclusion under § 2503(c) of the Internal Revenue Code. (RSMo 456.8-814).

Durable Power of Attorney.

See category 21 Property, topic 21.15 Powers of Attorney.

Multiple Trustees.

Any power in three or more trustees may be exercised by majority. Trustees not joining majority are not liable to beneficiaries or others for consequences of majority's action if notification given. Remaining co-trustees succeed to power, duties and authority of any co-trustees who cease to act. (RSMo 456.7-703540).

Uniform Fiduciaries Act adopted. (RSMo 469.240-.350).

Uniform Principal and Income Act adopted. (RSMo 469.401-.467).

Uniform Prudent Investor Act adopted. (RSMo 469.900-.913).

Uniform Prudent Management of Institutional Funds Act adopted. (RSMo 402.130-.148).

Uniform Simplification of Fiduciary Security Transfers Act adopted. (RSMo 403.250-.350).

Uniform Trust Code (2000) adopted. (RSMo 456-1.101-.11-1106).

Uniform Common Trust Fund Act adopted. (RSMo 362.580).

Spendthrift trusts are subject to claims of any child, spouse, or former spouse for support and maintenance. (RSMo 456.5-503).

Employee benefit trusts created as part of a stock bonus, pension, disability or death benefit, medical benefit plan, profit-sharing, or retirement plan, where contributions are made by either employers or employees or self-employed are not subject to rule against perpetuities and may exist for such time as necessary to accomplish purpose of plan. Accumulations of income in employee benefit trusts are also excepted from rule against perpetuities. (RSMo 456.011-.025). See also category 21 Property, topic 21.12 Perpetuities.

Gifts to Minors.

See category 14 Family, topic 14.10 Infants.

Accumulations.

See subhead Employee Benefit Trusts, supra.

Perpetuities.

See category 21 Property, topic 21.12 Perpetuities.

Pour Over Trusts.

See topic 13.16 Wills, subhead Bequests and Devises to Inter Vivos Trusts.

See also topic 13.09 Executors and Administrators; categories 2 Business Organizations, topic Corporations; Business Regulation and Commerce, topic Monopolies, Restraint of Trade and Competition; Family, topic Guardian and Ward; Mortgages, topic Mortgages of Real Property; Property, topic Perpetuities.

13.16 WILLS:

Testamentary Capacity.

Any person of sound mind 18 years of age or older or any emancipated minor may devise his real or personal property and may also devise whole or any part of his body to any college, university, licensed hospital or State Anatomical Board. (RSMo 474.310).

Testamentary Disposition.

No limit on extent to which testator may dispose of property.

Execution.

Every will, except nuncupative, must be in writing, signed by the testator, or by some person by his direction in his presence, and must be attested by two or more competent witnesses subscribing their names to the will in the presence of the testator. (RSMo 474.320).

Form.

Usual form of attestation clause is as follows:

Form

"Signed, sealed, published and declared by . . . ., the above named testator, as and for his last will and testament in the presence of us, who, at his request and in his presence and in the presence of each other have hereunto subscribed our names as witnesses this . . . . day of . . . . ."

Holographic Wills.

No statutory or judicial pronouncement on validity of handwritten wills.

Nuncupative will is valid only if made in imminent peril of death and death resulted therefrom, declared to be his will before two disinterested witnesses, reduced to writing by or under direction of a witness within 30 days, and submitted for probate within six months after death. It can dispose only of personal property of not more than $500, and neither revokes nor changes existing written will. (RSMo 474.340).

Revocation.

Divorce revokes all provisions in favor of divorced spouse, effect being same as if such spouse had died at time of divorce. No other change in circumstances will revoke will or any part. (RSMo 474.420).

Testamentary Gifts to Subscribing Witnesses.

No will invalid because attested by interested witness; but unless there are two other disinterested witnesses, such interested witness forfeits so much of provisions therein made for him as exceeds share of estate which would have descended or been distributed to him in case of intestacy. (RSMo 474.330[2]).

Bequests and Devises to Inter Vivos Trusts valid. (353 S.W.2d 770). No decisions on effect of amendment of trust instrument subsequent to date of will.

Probate.

Will probated in county of deceased's domicile or, if nonresident, county where deceased left major part of real estate or, if no real estate, county where deceased left any other property. (RSMo 473.010[1]).

Testimony of two subscribing witnesses proves will. If one or both witnesses unavailable, will proved by witness who is available, if any, and proof of handwriting of other witness or witnesses, or such other competent evidence as is available. (RSMo 473.053).

Commission may be issued to take attestation of witness if witness cannot attend court to prove will. (RSMo 473.057).

Will must be presented for and admitted to probate within six months after date of publication of notice granting letters or within 30 days after commencement of action to establish or contest validity of will or where no notice then within one year after death. Presented for means delivery of will or verified statement if will unavailable to probate court and affidavit or petition seeking to admit will to probate or authenticated copy of order in other state admitting will to probate. (RSMo 473.050). Action to establish interest in estate by descent must be filed prior to expiration of objection period for final settlement. (RSMo 473.070[1]).

Will ineffective to prove title to or right to possession of real or personal property until admitted to probate. (RSMo 473.087).

See also topic 13.09 Executors and Administrators.

Self-proved Wills.

Will properly executed on its face with affidavit attesting to execution may be admitted to probate without witnesses appearing before court. (RSMo 473.065[1], 474.337).

Self-proving affidavit as follows:

THE STATE OF . . . .

COUNTY OF . . . .

I, the undersigned, an officer authorized to administer oaths, certify that . . . ., the testator, and the witnesses, whose names are signed to the attached or foregoing instrument, having appeared together before me and having been first duly sworn, each then declared to me that the testator signed and executed the instrument as his last will, and that he had willingly signed or willingly directed another to sign for him, and that he executed it as his free and voluntary act for the purposes therein expressed; and that each of the witnesses, in the presence and hearing of the testator, signed the will as witness and that to the best of his knowledge the testator was at that time eighteen or more years of age, of sound mind, and under no constraint or undue influence.

IN WITNESS WHEREOF, I have hereunto subscribed my name and affixed my official seal this . . . . . day of . . . ., 20. . . . . . .

(Signed) . . . .

(Official capacity of officer)

(SEAL)

Recording.

Where a will devises land a copy thereof must be recorded, within six months after probate, in office of recorder of deeds of each county where such land is situated. (RSMo 474.500).

Will contests must be brought within six months after probate or rejection or first publication of letters, whichever is later. (RSMo 473.083[1]). Compromise of will contest is permitted with probate division approval. (RSMo 473.084, 473.085).

Legacies are not payable until after six months after date of letters (unless perishable or subject to injury if retained six months). (RSMo 473.610). Upon application of executor or administrator, or of distributee after six months, court may order delivery of any specific real or personal property if other distributees and claimants are not prejudiced thereby, subject to return, and security therefor may be required. (RSMo 473.610-.613; and see subhead Distribution under topic Executors and Administrators). Legacies other than residuary and chattels bear interest rate equal to that allowed by law on money due upon order of court after one year from testator's death, unless court finds payment of legacy would jeopardize rights of others. If jeopardizing rights of others, court shall determine what rate of interest, if any, not exceeding rate allowed by law on money due upon order of court. Yield on specifically bequeathed securities belongs to legatee. (RSMo 473.633).

Unclaimed Legacies.

See topic 13.07 Descent and Distribution, subhead Escheat; also category 21 Property, topic 21.01 Absentees, subhead Escheat.

Lapse.

Where an estate is devised to a child or grandchild or other relative of the testator and such devisee shall die before the testator leaving lineal descendants, such descendants shall take the property as such devisee would have done in case he had survived the testator. (RSMo 474.460).

Children not Provided for.

A testator is deemed to have died intestate as to children born or adopted after making last will (including posthumous) not named or provided for in his will unless it appears from will omission was intentional, or at time of will had child or children known to be living and devised substantially all of estate to child's other parent or child is provided for by transfer outside will with intent that transfer be in lieu of testamentary provision.

Election.

Surviving spouse electing to take against will receives in addition to exempt property and one year support allowance, one-half of the estate if no lineal descendants of testator, one-third otherwise both subject to payment of claims. (RSMo 474.160[1]). In determining spouse's share when there is election, all property is considered even if not subject to probate such as trust property, insurance, profit sharing plans, pension plans, and joint property. (RSMo 474.163). Election may be made within ten days after expiration of time for contesting will, or 90 days after final determination of litigation re validity or construction of will, or existence of surviving issue, or any matter affecting amount of surviving spouse's share. (RSMo 474.180).

Foreign Probated Wills.

Property of testate nonresident decedent may be devised by his last will if duly executed according to laws of this State, and his personal property may be bequeathed by his last will if duly executed according to laws of this State or State in which it was executed. (RSMo 473.675[2]). Real property of intestate nonresident decedent descends according to laws of this state, and personal property devolves to heirs or next of kin determined in accordance with laws of state or country of his domicile. (RSMo 473.675[2]).

Foreign Executed Wills.

Any person owning any real or personal estate in this state may devise or bequeath same by last will, executed and admitted to probate according to laws of this state or executed according to laws of this state and probated according to laws of this state or state or territory in which will is probated. (RSMo 474.360). Authenticated copies of wills, probated in another state, and probate thereof, shall be recorded in same manner as wills executed and proved in this state, and shall be admitted in evidence in same manner and with like effect. (RSMo 474.370). Any will admitted to probate in any state, territory or district of U.S. together with order admitting same to probate therein, authenticated according to acts of Congress, shall be admitted to probate in this state in any county where real estate is affected thereby, or filed in office of recorder of deeds in such county. (RSMo 474.380).

Testamentary Guardian.

See category 14 Family, topic 14.07 Guardian and Ward.

Proceedings to obtain ancillary probate are the same as for residents of Missouri. See also topic 13.09 Executors and Administrators, subhead Estates of Nonresidents.

Simultaneous Death.

See topic 13.05 Death, subhead Survivorship.

Testamentary Trusts.

See topic 13.13 Trusts.

Uniform Anatomical Gift Act adopted. (RSMo 194.210-.294).

"Living wills", directing withholding or removal of death-prolonging procedures, authorized. (RSMo 459.010-.055). Declarant must be 18 or over and competent. Living will must be in writing signed by declarant or another at his direction and in his presence, dated and, if not in declarant's own handwriting, must be witnessed by two persons at least 18 years of age, neither of whom signed document for declarant and at his direction. Statutory sample form: "Declaration. I have the primary right to make my own decisions concerning treatment that might unduly prolong the dying process. By this Declaration I express to my physician, family and friends my intent. If I should have a terminal condition it is my desire that my dying not be prolonged by administration of death-prolonging procedures. If my condition is terminal and I am unable to participate in decisions regarding my medical treatment, I direct my attending physician to withhold or withdraw medical procedures that merely prolong the dying process and are not necessary to my comfort or to alleviate pain. It is not my intent to authorize affirmative or deliberate acts or omissions to shorten my life rather only to permit the natural process of dying. Signed This ______ Day of ______ Signature ______ City, County, and State of Residence __________ The Declarant is known to me is 18 years of age or older, of sound mind and voluntarily signed this document in my presence. Witness _______ Address ______ Witness _______ Address ______ Revocation Provision: I hereby revoke the above Declaration. Signed ______ Date ____" (RSMo 459.015).

See also topics 13.09 Executors and Administrators, Descent and Distribution; category 22 Taxation, topics 22.06 Estate Tax, 22.12 Inheritance Tax.

14 FAMILY

14.01 ADOPTION:

Interstate Adoption Assistance Compact enacted. (RSMo 453.500). Division of Family Services may agree with another state's agency in emergencies. (RSMo 210.622).

Jurisdiction and Venue.

Adoption is by petition to and decree of juvenile division of circuit court or family court in certain circuits of county in which person seeking to adopt resides, child sought to be adopted was born, child is located at time of filing of petition, or either birth person resides. (RSMo 453.010). If child under continuing jurisdiction of court pursuant to c. 211, petition to juvenile division of circuit court having jurisdiction over child. Expedited placement to foster parent petitioning to adopt. (RSMo 453.010).

Consent Required.

Where a person sought to be adopted is over 14 years of age, his written consent is required unless court finds he has not sufficient mental capacity to give the same. When under 18 years of age, written consent of mother; man who is either presumed father, has filed notice to claim paternity or acknowledgment of paternity, or has filed action to establish paternity; or child's current adoptive parents or other legally recognized mother and father (RSMo 453.030) shall be required, except that consent of parent adjudged incompetent shall not be required nor of one who for period of six months immediately prior to filing of petition either wilfully abandoned or neglected to provide proper care and maintenance nor parent whose rights regarding child have been legally terminated nor parent who has waived necessity of consent. When identity of father is unknown, however, service shall be made by publication on "John Doe" as provided in 506.160.

Juvenile court may, upon application, if it appears wise, permit parent of child to waive necessity of his or her consent to future adoption of such child. Any consent or waiver shall be valid even though parent was under age of 18 years at time of execution and shall be irrevocable without leave of court having jurisdiction of child, given at hearing, notice of which has been given to all interested parties. Where person sought to be adopted is 18 years of age or older, his written consent alone is sufficient. (RSMo 453.030-.060).

Conditions Precedent.

Person sought to be adopted, if a minor, must have been in the lawful and actual custody of person seeking to adopt him for at least six months prior to entry of adoption decree; may be waived for foster parent. (RSMo 453.080).

Petition.

Petition must state name, sex and place of birth of person sought to be adopted; name of his parents; and if person sought to be adopted is minor, fact that petitioner has ability to care for, maintain and educate person; and if it is desired to change name of person, new name of person. (RSMo 453.020[1]).

Proceedings.

There must be full investigation of mental, physical and hereditary background of both adoptee and adopter and assessment of adoptive parents and appropriate post-placement assessments and written report thereof must be submitted to court within 90 days of request for investigation. Court may waive it where child under 18 years of age is natural child of one petitioner and where all parents required to give consent do so. Foster parent or parents over 18 years of age having cared for child continuously 12 months or more and bonding has occurred as evidenced by positive interaction, may apply to agency for placement of child for adoption and if child eligible for adoption, agency must give preference and first consideration for adoptive placement to foster parents, but court has final determination of adoption. (RSMo 453.070). Signed and verified accounting of any money or other consideration paid by or on behalf of petitioner in connection with placement or adoption. Court may decline to issue decree of adoption if it determines that payments were unreasonable or if petitioner fails to adequately report payments. (RSMo 453.075[2]).

Name.

The court may change the name of child according to the prayer of the petition. Clerk must send copy of entry of decree to State Bureau of Vital Statistics, which must change the birth records to conform. (RSMo 453.080-.100; 193.125).

Effect of Adoption.

On adoption all legal relationships and all rights and duties between child and his natural parents, other than a natural parent who joins in the petition for adoption, cease and the child thereafter is deemed for every purpose the child of his parent or parents by adoption as fully as though born to him or them in lawful wedlock, except that for purposes of intestate succession adoption of child by spouse of natural parent has no effect on relationship between child and either natural parent. Adopter and adoptee inherit from each other same as natural parent and child, and child may inherit property limited expressly to heirs of body of such parent or parents. (RSMo 453.090 and 474.060).

Special Needs Adoption.

Any person who legally adopts special needs child shall be eligible for tax credit of up to $10,000. (RSMo 135.327[3]). Any business entity providing funds to employee to enable that employee to legally adopt special needs child shall receive tax credit for up to $10,000. (RSMo 135.327[3]).

Adoption Records.

Adopted adults 21 or over may obtain physical description, nationality, religious background and medical history of their biological parent or siblings from child placement agency or juvenile court upon written request. In addition, in some circumstances adopted adult may obtain name, date of birth, place of birth and last known address of biological parent or sibling. Adopted adult requests this information in petition to court. If adoptive parents consent to request, court orders child placement agency or juvenile court having records of adoption and within three months juvenile court or child placement agency must make reasonable efforts to notify biological parents of request by adopted adult and inform biological parents of their right to file affidavit to have information disclosed to adopted adult. If biological parent cannot be located identifying information cannot be revealed. If biological parent is deceased and previously executed affirmative affidavit, information is released to adopted adult. If biological parent is deceased and has not previously executed affirmative affidavit, information can be released if court finds releasing information is necessary for health related purposes.

Adopted adults may also request identifying information concerning adult siblings following same procedure as for information concerning biological parents.

Biological parents may also follow same procedures as adopted adults to obtain identifying information. (RSMo 453.121).

Division of Family Services maintains central registry by which biological parents and adopted adults may indicate their desire to contact each other. (RSMo 453.121).

14.02 ALIMONY:

See topic 14.05 Dissolution of Marriage.

14.03 COMMUNITY PROPERTY:

System does not obtain in Missouri.

14.04 DESERTION:

See topic 14.09 Husband and Wife.

14.05 DISSOLUTION OF MARRIAGE:

Governed by c. 452.

Uniform Marriage and Divorce Act not adopted.

Grounds for Dissolution of Marriage.

Court finds no reasonable likelihood that marriage can be preserved and therefore marriage is irretrievably broken. (RSMo 452.305).

Grounds for Legal Separation.

Same as for dissolutions. (RSMo 452.305).

Residence Requirements.

Either party must be a resident or a member of armed services who has been stationed in state for 90 days next preceding commencement of proceeding. (RSMo 452.305[2]).

Jurisdiction.

Circuit Court or Family Court in certain circuits have jurisdiction in all cases of dissolution or maintenance.

Venue.

Proceedings shall be had in county where plaintiff resides, and proceedings may be directed, in first instance, in any other county in state where defendant resides. (RSMo 452.300).

Pleading must be verified and allege marriage is irretrievably broken. (RSMo 452.310). Arrangements as to custody and support of children, maintenance of spouse, date of marriage and place registered, residence, date of separation, names, ages of children and whether wife is pregnant must be included in petition. (RSMo 452.310).

Decree becomes final as any other judgment. (RSMo 452.360). See category 5 Civil Actions and Procedure, topic 5.15 Judgments.

Alimony.

Court may allow temporary maintenance to either party. (RSMo 452.315[1]). Provisions of any decree respecting maintenance or support may be modified only as to installments accruing subsequent to motion for modification and only upon showing of changed circumstances so substantial and continuing as to make terms unreasonable. Unless otherwise agreed in writing or expressly provided in decree, obligation to pay future maintenance is terminated upon death of either party or remarriage of recipient. (RSMo 452.370[3]).

Division of Property of Spouses.

See subhead Property Rights, infra.

Property Rights.

Court shall set apart to each spouse his property and shall divide marital property as Court deems just after considering relevant factors including: (1) Contribution of each spouse to acquisition of marital property, including contribution of spouse as homemaker; (2) value of nonmarital property set apart to each spouse; (3) economic circumstances of each spouse at time division of property is to become effective, including desirability of awarding family home or right to live therein for reasonable periods to spouse having custody of any children; (4) conduct of parties during marriage; and (5) custodial arrangements for minor children. (RSMo 452.330).

Custody of Children.

Court makes such orders as are reasonable with respect to care, custody and maintenance of children. (RSMo 452.375). Court must determine custody in accordance with best interests of child. Court may not give preference to either parent solely because of parent's age, sex or financial status, nor because of age or sex of child. Prior to awarding custody, Court must consider joint custody to both parents. Court shall not grant custody to parent who has been found guilty of, or plead guilty to felony violation of c. 566, when child was victim, or violation of § 568.020, when child was victim. (RSMo 452.375). Grandparents denied visitation may request and Associate Circuit Court may order mediation with party in custody. (RSMo 452.403[1]).

Support of Children.

Both parents owe duty of support to child. Court determines support considering relevant factors including: (1) financial needs and resources of child; (2) financial resources and needs of parents; (3) standard of living child would have had but for dissolution; (4) physical, emotional and educational needs of child. Rebuttable presumption that child support guideline amount is correct. Child support terminates when child dies; marries; enters active military duty; becomes self-supporting; reaches age 18 unless incapacitated or enrolled in school or non-custodial parent is primary caregiver for 28 consecutive days or longer; or reaches age 22 unless otherwise agreed to; child is emancipated under certain restrictions. (RSMo 452.340). Maintenance or support modified only upon showing of substantial and continuing changed circumstances. (RSMo 452.370[1]).

Paternity.

Uniform Parentage Act adopted. (RSMo 210.817).

Setting Aside Decree.

Court may, not later than 30 days after entry of judgment, of its own initiative, order a new trial, or reopen, correct or modify its judgment for good cause. (C.R. 75.01).

Remarriage.

No statutory restrictions on remarriage of divorced persons.

Annulment of Marriage.

See topics 14.11 Marriage, 14.09 Husband and Wife.

14.06 DIVORCE:

See topic 14.05 Dissolution of Marriage.

14.07 [RESERVED]

14.08 GUARDIAN AND WARD:

Appointment of Guardian.

Any person may petition for himself or any other qualified person to be guardian of minor or incapacitated person, or conservator of estate of minor or disabled person, or both. (RSMo 475.055-.065).

Natural Guardians.

A father and mother, with equal powers, or the survivor of them, are the natural guardians of their minor children, and have the custody and care of their persons, education, and of their estates if derived from parents. If no lawful father, then the mother. With respect to property derived from him, the parent may invest as is reasonable and prudent without court order. (RSMo 475.025).

Curators.

When a minor is entitled to, or possessed, of an estate not derived from a living parent who is acting as natural guardian, the court must appoint another person as guardian of that part of the estate. (RSMo 475.030). If the minor be over the age of 14 years, he may choose the guardian, subject to the approval of the court. (RSMo 475.045).

Eligibility and Competency.

Any person at least 18 years of age, unless parent, may be appointed guardian of person or conservator of estate, or both, and need not reside within Missouri. Corporations, charitable organizations, social service agency and national banking associations may act if empowered by charter and authorized to act in Missouri except no corporation other than social service agency can be appointed guardian of incapacitated person. (RSMo 475.055).

Qualification.

Before entering on duties of his office, conservator of estate must give bond, with sufficient surety, to be approved by court, in amount fixed by court. (RSMo 475.100).

Powers and Duties.

A guardian of the person, whether natural or legal, is entitled to the custody, and control of the person of his ward, and the care of his education, and maintenance. (RSMo 475.120[1]). Conservator of estate has care and management of estate of minor or disabled person, subject to control by court. (RSMo 475.130).

Real Estate.

Conservator may, by order of court, sell, encumber, lease or exchange any property of estate, when for care, education, treatment, habilitation, support and maintenance of protectee and his family. (RSMo 475.200; 442.035).

Investments.

See 475.190.

Investments in Name of Nominee.

See category 13 Estates and Trusts, topic 13.13 Trusts.

Inventory.

Inventory and appraisement of protectee’s estate must be made after conservator’s appointment unless estate received by conservator from personal representative, or former conservator, already has been appraised. (RSMo 475.145, 475.150).

Accounts.

Annual settlement required. (RSMo 475.270[1]). Final settlement required 60 days after all terminations of guardianship. (RSMo 475.290[1]).

Termination of Guardianship.

When minor ward becomes 18 years of age; upon marriage of ward; adjudication of competency of previously incompetent ward; revocation of letters; court's acceptance of guardian's or conservator's resignation; upon ward's or protectee's death; and upon expiration of order appointing guardian, upon court order finding parent fit, suitable and able to assume duties if in minor's best interest, or upon court order terminating guardianship. (RSMo 475.083).

Control of Court.

The probate court directs the proper education, and maintenance of protectees and their families, according to their means, and from time to time may make necessary appropriations out of estate for that purpose. (RSMo 475.125).

Incompetents.

On filing of information with probate court, and after notice and hearing, court may appoint guardian or conservator of person and estate, or separate conservator of estate. (RSMo 475.075-.085). Interstate compact on mental health in effect. (RSMo 630.810).

Settlement of Estate of Insane Persons.

No special procedure for settlement of estate of insane persons. Normal procedures are followed.

Veterans.

Uniform Veterans' Guardianship Act adopted. (RSMo 475.380-.480).

Gifts to Minors.

See topic 14.10 Infants.

Uniform Fiduciaries Act adopted. (RSMo 469.240-.350).

Uniform Simplification of Fiduciary Security Transfers Act adopted. (RSMo 403.250-.350).

Personal Custodian.

Legally competent adult may make revocable transfer of property to "personal custodian" to hold and administer for person as beneficiary of custodianship. Transferors may also transfer property to beneficiary by delivery to person designated by transferor as beneficiary's personal custodian. Creditors rights provisions do not create lien on specific property subject to non-probate transfer. (RSMo 404.570). Custodianships under transfers to minors law may be continued into adulthood. On beneficiary's death, personal custodian may make distribution pursuant to beneficiary designation or transfer on death direction. (RSMo 404.560). Custodianships may also be used by older adults as property management device. (RSMo 404.420).

See also topic 14.10 Infants.

14.09 HUSBAND AND WIFE:

Separate Property of Married Women.

A married woman may hold as her separate property any property, real or personal, owned by her at the time of marriage, thereafter acquired by gift, bequest, devise or descent or purchased with her separate money or means, anything due her as wages of her separate labor, any rights of action arising out of violation of her personal rights, and all income, increase and profits of any such property. Such property shall not be liable to be taken by any process of law for debts of her husband. (RSMo 451.250[1]).

Contracts.

A married woman may make contracts which will bind her personally and her separate property, may contract with her husband as with a third person and may sue or be sued by him. She may become bound as surety for her husband or any other person. (RSMo 451.290).

Antenuptial Contracts.

All marriage contracts shall be in writing. (RSMo 451.220).

Actions.

A married woman may sue or be sued without her husband being joined as a party. (RSMo 451.290).

Conveyances.

A spouse should either join in or give acknowledged consent in writing to a conveyance of other's separate real property (RSMo 474.150), unless marital rights have been released by prenuptial contract (RSMo 474.120), but failure to join will not prevent loss of marital rights unless fraud is present (RSMo 474.150; 327 S.W.2d 823). Also, difficulty in establishing separate character of property makes joinder advisable.

Right of Wife to Invoke Exemption and Homestead Laws.

A married woman may invoke all exemption and homestead laws for the protection of the personal and real property owned by the head of a family, except in cases where the husband has claimed such exemption and homestead rights for the protection of his own property. (RSMo 451.290).

Liability of One Spouse for Debts of the Other.

The wife's property is not liable for the debts of her husband (RSMo 451.250[1]), except that the annual products of her real estate are liable for the husband's debts incurred for necessaries of the family or for labor or materials furnished on or for cultivation of such lands (RSMo 451.260).

The husband's property, except such as may have been acquired from his wife, is not liable for debts or liabilities contracted or incurred by the wife before the marriage. (RSMo 451.270).

Liability of Husband for Torts of Wife.

A husband is not liable for civil injuries caused by his wife, but she is solely responsible therefor, unless under the law he would be jointly responsible with her if the marriage did not exist. (RSMo 537.040).

Desertion.

Where a husband, without good cause, abandons his wife and neglects to provide for her, the circuit court, on petition of the wife, may order her support and maintenance to be paid by the husband out of his property. (RSMo 452.130).

Uniform Reciprocal Enforcement of Support Act (as amended) adopted and applies to cases filed by Missouri or received by Missouri prior to Jan. 1, 1997. (RSMo 454.010-.360). In all other cases, the Uniform Interstate Family Support Act applies. (RSMo 454.850-.980).

Community property system does not obtain in Missouri.

See also topics 14.11 Marriage, Dissolution of Marriage; categories 5 Civil Actions and Procedure, topic Evidence, subhead Witnesses; Debtor and Creditor, topic Homesteads; Estates and Trusts, topic Descent and Distribution; Property, topics Curtesy, Dower, Real Property.

14.10 INFANTS:

Minor is any person under 18 years of age as to contracts (RSMo 431.055), ownership and conveyance of real estate (RSMo 442.020), and party to suit (RSMo 507.115), guardianship proceedings (RSMo 475.055, 475.285) and for all purposes in connection with law of trusts and estates (RSMo 475.010).

Disabilities.

Infants are subject to common law disabilities.

Veterans.

The disability of minority of any person not under the age of 18 otherwise eligible for guaranty of a loan pursuant to the Servicemen’s Readjustment Act of 1944, and of the spouse of such person, is removed solely for the purposes of acquiring or encumbering or selling and conveying property and the incurring of indebtedness or obligations incidental thereto, or the refinancing thereof, and litigating or settling controversies arising therefrom, if all or part of the obligations be guaranteed by the Administrator of Veteran’s Affairs pursuant to such Act, or the property covered by a loan so guaranteed, and such persons are denied the right to repudiate the written obligation so made on reaching the age of 21. (RSMo 442.100).

Actions.

Infant sues by guardian or next friend appointed by court or officer thereof, and defends by guardian. (C.R. 52.02; see also 507.110-.220).

Parental Responsibility.

Parent or guardian, excluding foster parents, of unemancipated minor under 18 in their care and custody against whom judgment has been rendered for purposely marking upon, defacing or damaging any property or for intentionally causing personal injury to any individual shall be liable for payment of judgment up to $2,000 if parent or guardian joined as defendant in original action. (RSMo 537.045[1]). Judge may order parent or minor to work for owner of property or person injured in lieu of payment if all parties are in agreement. (RSMo 537.045[3]).

Ratification of Contracts.

Infant’s contract may be ratified after attaining age 18 by acknowledgment in writing, part payment, disposal of part or all of property for which debt was contracted or refusal to deliver such property to person to whom debt is due, if still under former infant’s control on demand in writing. (RSMo 431.060). As to instruments affecting real estate, if executed while under 18, may be disaffirmed within two years after disability removed by filing deed in office of recorder of deeds where land is situate. (RSMo 442.080).

Joinder in Conveyance, etc.

Infant who is married may join with adult spouse in conveyance or encumbrance of such spouse's real estate. (RSMo 442.040).

Uniform Gifts to Minors Act repealed. (L.1985, S.B. 35). Missouri Transfers to Minors Law is c. 404. (c. 404). Age of majority under Transfers to Minors Law is 21. (RSMo 404.007).

Child Safety.

Every driver transporting child under age of 16 years must be responsible, when transporting such child in motor vehicle operated by that driver on streets or highways of this state, for providing for protection of such child as follows: (1) Children less than four years of age, regardless of weight, be secured in child passenger restraint system appropriate for that child; (2) Children weighing less than 40 lbs., regardless of age, must be secured in child passenger restraint system appropriate for that child; (3) children at least four years of age but less than eight years of age, who also weigh at least 40 lbs. but less than 80 lbs., and who are also less than four feet, nine inches tall, must be secured in child passenger restraint system or booster seat appropriate for that child; (4) children at least 80 lbs. or children more than four feet, nine inches in height must be secured by vehicle safety belt or booster seat appropriate for that child; (5) child who otherwise would be required to be secured in booster seat may be transported in back seat of motor vehicle while wearing only lap belt if back seat of motor vehicle is not equipped with combination lap and shoulder belt for booster seat installation and (6) when transporting children in immediate family when there are more children than there are seating positions in enclosed area of motor vehicle, children who are not able to be restrained by child safety restraint device appropriate for child must sit in area behind front seat of motor vehicle unless motor vehicle is designed only for front seat area. Driver transporting children referred to in this subsection is not in violation of this section. (RSMo 307.179).

Uniform Securities Ownership by Minors Act not adopted.

Uniform Child Custody Jurisdiction and Enforcement Act adopted. (RSMo 452.700-.930).

Life Insurance Benefits Payable Directly to Minor.

See category 16 Insurance, topic 16.01 Insurance Companies, subhead Life Policies.

Adoption.

See topic 14.01 Adoption.

See also topics 14.07 Guardian and Ward, Marriage, Adoption; categories 5 Civil Actions and Procedure, topics Limitation of Actions, Process, Evidence, subhead Witnesses; Employment, topic Labor Relations; Estates and Trusts, topic Wills.

14.11 MARRIAGE:

Marriage is considered a civil contract to which consent of parties capable in law of contracting is essential. (RSMo 451.010).

Minimum Age.

No license can be issued to a person under 15 years of age except on order of the circuit or associate circuit court. (RSMo 451.090[1]).

Consent Required.

No license may be issued for person under 18 years, except with written consent, duly signed and sworn to of his or her custodial parent or guardian. (RSMo 451.090[2]).

License must be obtained from recorder of deeds of any county (RSMo 451.080), who is required to record same in special book. No requirement that divorced applicant for license present copy of decree. No length of residence or waiting period is required.

Serological Tests.

None required.

Ceremonial Marriage.

Marriages may be solemnized by any clergyman, active or retired, who is a U.S. citizen in good standing with any church or synagogue in this state or by any judge of court of record, other than municipal judge. Marriages may also be solemnized by religious society, religious institution, or religious organization of this state according to customs thereof when either party to marriage is member thereof. (RSMo 451.100).

Marriage Certificate.

Person performing ceremony must issue a certificate setting forth the names and residence of the parties and the date of such marriage and the county from which the license issued and date of same. (RSMo 451.110).

Record.

See category 10 Documents and Records, topic 10.04 Records, subhead Vital Statistics.

Common law marriages contracted after Mar. 31, 1921, are null and void. (RSMo 451.040). Those contracted prior to that date are valid. (233 Mo. App. 900, 110 S.W.2d 845). Local recognition depends on law of state where marriage contracted apparently. (116 S.W. 432).

Proxy marriages are not authorized.

Marriage contracts by which any real or personal estate is secured or conveyed, or may be affected in law or equity, must be in writing, acknowledged by each of contracting parties or proved by a subscribing witness (RSMo 451.220) and, to be effective as to third persons, who have no actual notice thereof, must be recorded in the county where the estate is situated (RSMo 451.240).

Prohibited Marriages.

Between parents and children or ancestors and descendants of every degree, brothers and sisters of half as well as whole blood, uncles and nieces, aunts and nephews, first cousins, and between persons either of whom is insane, imbecile, or feebleminded; and such prohibition extends to persons born out of lawful wedlock as well as in lawful wedlock. All such marriages are absolutely void. (RSMo 451.020).

Marriage is void where either party has a former living spouse, unless former marriage dissolved. (RSMo 451.030).

Same Sex Marriages.

Marriage between persons of same sex is not recognized in Missouri even if marriage is valid where contracted. (RSMo 451.022).

Annulment.

Marriage may be annulled by suit in equity for causes existing at time of marriage, including duress, fraud and incapacity of either party. No statutory rules.

See also topics 14.09 Husband and Wife, Dissolution of Marriage; categories 13 Estates and Trusts, topic Descent and Distribution; Property, topics Curtesy, Dower.

14.12 MARRIED WOMEN:

See topics 14.09 Husband and Wife, Marriage; categories 5 Civil Actions and Procedure, topic Evidence, subhead Witnesses; Debtor and Creditor, topic Homesteads; Documents and Records, topic Acknowledgments; Estates and Trusts, topics Executors and Administrators, Wills; Property, topics Deeds, Dower.

15 HEALTH

15.0115.04 [RESERVED]

15.05 FOOD, DRUGS, DEVICES AND COSMETICS:

Governed by Missouri Food, Drug and Cosmetics Act. (RSMo 196.010-.120). Act covers acts involving drugs, cosmetics and tobacco, including adulterating and misbranding, false advertising, refusal to permit inspection and sampling, and mislabeling of foods, drugs and cosmetics.

Senior Prescription Program.

Pharmaceutical manufacturers provide Medicaid level or greater rebates for enrollees at or below 200% of federal poverty level who also meet asset test for Medicare Part D prescription benefit in order for manufacturer’s products to be available to enrollees of Missouri Rx plan. These rebates must be no less than those provided to Medicaid under § 1927 of Tit. XIX of the Social Security Act, 42 U.S.C. § 1396r-8. If revenue is generated for program. (RSMo 208.786).

15.06 [RESERVED]

15.07 HEALTH INSURANCE BENEFITS:

Health Maintenance Organizations.

Establishment and operation of HMOs regulated. (RSMo 354.400 et seq.).

Coverage for Mental Illness and Chemical Dependancy.

All health plans or policies that are individually underwritten or that provide coverage for specific individuals are required to include coverage for chemical dependency and alcoholism treatment. Exceptions do apply. (RSMo 376.779).

Missouri Health Insurance Portability and Accountability Act.

Enacted in 376.450-376.454.

15.07A NURSING:

Nursing profession regulated by The Nursing Practice Act. (RSMo 335.011 to 335.096).

15.07B OBESITY LIABILITY:

Under Commonsense Consumption Act, manufacturers, distributors, and sellers of food shall not be subject to civil liability under any state law for any claim arising out of weight gain, obesity, or health conditions associated with weight gain or obesity. (RSMo 537.900).

15.0815.11 [RESERVED]

15.12 PUBLIC HEALTH:

State Department of Health, State Board of Health provides public health and disease control services. Department monitors adverse health effects of environment and assesses environmental hazards to water, air, toxic waste, solid waste, sewage disposal and develops comprehensive disease prevention plan. (RSMo 192.100-.323).

Model School Wellness Program.

Established to create pilot programs in school districts encouraging students to avoid tobacco use, balance their diets, get regular exercise, and learn about medical conditions resulting from being overweight. (RSMo 167.229).

15.13 SMOKING REGULATIONS:

Indoor Clean Air Act regulates smoking in public places and public meetings. (RSMo 191.765-.777). Smoking permitted only in designated areas, which cannot exceed 30% of space. State employees provided with designated areas at place of employment.

16 INSURANCE

16.01 INSURANCE COMPANIES:

Regulated generally by Insurance Code. (cc. 375; 376; 379).

Supervision.

Director of Insurance, Division of Insurance, Jefferson City, Mo. 65101 has general supervision of all insurance companies and is charged with enforcement of all insurance laws. (RSMo 374.010). Trade practices regulated. (RSMo 375.930-.948).

It is illegal for any person to engage in fraudulent scheme, make false statement, or conceal material fact relating to insurance transaction. (RSMo 375.144). Any person who violates 375.144 may be fined, imprisoned, or both. Also, may be ordered to pay restitution to victim and their license shall be revoked. (RSMo 375.146).

Missouri Property and Casualty Guaranty Insurance Association created to protect insureds from insolvency of insurers. (RSMo 375.772).

Rates of insurance other than life are regulated. (RSMo 379.316-.361).

Certificate of Authority.

No company or person may transact any insurance business in this state, unless it has first procured from superintendent of insurance department certificate authorizing it to do business, stating that requirements of insurance laws of this state have been complied with, which certificate must be renewed annually as of July 1 but remains in effect until renewed or refused. (c. 375).

Investments.

For authorized investments of domestic companies, see 376.300-.307. For permissible investments by insurance companies, see 375.345, 375.330, 376.311, 376.671, and 379.080. Life insurance company investments in corporations must also meet requirements of 375.1070-375.1075 regarding outlines for investing in medium to lower quality institutions. (RSMo 375.532). Foreign companies licensed in Missouri may invest in same manner as domestic companies, or as permitted by law of their respective domiciles (RSMo 376.310), subject, however, to constitutional provisions as to holding of real estate (Const. Art. XI, § 5). For amount of minimum capital required of stock company to write lines of business it proposes to transact or is transacting, or if company is mutual company, class of permissible investments is provided in 379.080. Domestic companies' ownership of real estate is further regulated by statute. (RSMo 375.330[1]). Investment mechanisms defined by 375.345. Investment of surplus funds governed by 376.307[1], 376.311[1]. For annuities, see 376.671.

Fire insurance companies can issue policies only in standard form approved by Insurance Commissioner (RSMo 379.160), except where fire and casualty are combined in single policy (RSMo 379.017), file rating plan (RSMo 379.321), and may not give discriminating rebates or special rates (RSMo 379.356[1]). They may not deny that real property insured was worth amount of policy when issued. (RSMo 379.140). Life and health insurers must meet risk based capital standards. (RSMo 382.210).

Surplus Lines Insurance Law.

See 379.085.

Life Policies.

Any life insurance policy may restrict liability for death as result of suicide in event that insured dies within one year of date of issuance. (RSMo 376.620[1]).

Misrepresentations made in obtaining an insurance policy on the life of a citizen of this state are not deemed material and do not render the policy void, unless the matter misrepresented actually contributed to the contingency or event on which the policy becomes due and payable, and whether they so contributed is a question for the jury. (RSMo 376.580). Defenses based on misrepresentations in obtaining life policies are not valid unless, at or before trial, insurer deposits in court, for benefit of plaintiff, the premiums received on such policies. (RSMo 376.610).

Generally speaking, no life policy may be forfeited after the payment of three or more annual premiums, but extended insurance in an amount not less than the face of the policy minus indebtedness must be granted by applying three-fourths of net value of policy, less all indebtedness (or a greater value if granted in policy [333 Mo. 191, 61 S.W.2d 704]) to pay a net single premium (RSMo 376.630). But this rule does not apply to fraternal insurance (210 Mo. App. 539, 243 S.W. 257) or to policies issued by assessment companies (51 S.W.2d 142). But see 376.670, providing generally that any specified paid-up nonforfeiture benefit must be granted unless insured elects another benefit.

No additional stipulated premium plan life insurance companies are permitted. (RSMo 377.199).

Employer may insure lives of its directors, employees or retired employees with consent of insured. (RSMo 376.531). Certain charitable institutions can own insurance policy on life of individual if that individual consents. (RSMo 377.080[3]).

Life, stipulated premium, industrial and prudential insurance companies cannot make or permit any distinction or discrimination between insureds of same class and life expectation, or allow rebates or special favors as inducement to insurance, and violation renders company liable to have its charter revoked. Agents so doing are guilty of misdemeanor. (RSMo 376.500-.510).

Proceeds of assessment and stipulated premium plan policies are free from claims of creditors of insured's estate or of beneficiary. (RSMo 377.090, .330).

Life insurance benefits payable directly to minor 18 years or older due to death of his spouse may be paid by insurer without necessity of guardianship or other court proceeding, if proceeds do not exceed $10,000. (RSMo 431.066[1]).

Life Reserves and Valuation.

For required reserves and valuation of policies see 376.370-.380.

Viatical Settlements.

For viatical settlements, see 376.1100-.1130.

Group and Individual Policies Marketed with Illustrations.

Policies except: (1) variable life insurance; (2) individual and group annuity contracts; (3) credit life insurance; (4) policies written by companies with less than $25 million in annual direct life insurance premiums; (5) life insurance policies with no illustrated death benefits exceeding $10,000; (6) life insurance policies written on forms identified as marketed without illustration; shall include illustrations in conformance with 376.1500-.1527.

Long Term Care.

"Long Term Care Insurance Act" and provisions regulating same appear at 376.1100 to 376.1118 and 376.1121 to 376.1130.

Accident and Health Policies.

Forms for group accident or health policies must be approved by Director of Division of Insurance. (RSMo 376.405). Uniform Individual Accident and Sickness Insurance Law adopted. (RSMo 376.770, 376.800). All individual and group health insurance policies providing coverage on unit basis issued by nonprofit corporations and all self-insured group benefit plans must provide for hospital treatment of alcoholism; however, individual health insurance contracts insuring specific individuals and their families are exempt. Valid health care service claims must be paid within 30 days of receipt by insurer of all documents reasonably needed to determine claim. (RSMo 376.427). No individual or group insurance policy can discriminate against Medicaid eligible individuals. (RSMo 376.818). No health insurer may cancel or deny coverage to any person because person is incarcerated. (RSMo 376.821). Individual and group health insurance policies that provide maternity benefits must provide minimum inpatient care of 48 hours if natural delivery or 96 hours if cesarean delivery. (RSMo 376.995).

Reserves are required on accident and health policies upon basis stated in 376.410, but this does not affect supplementary provisions of life policies. Reserves also required for prepaid dental plans. (RSMo 354.710).

Motor vehicle insurance liability coverage must include vehicles loaned to insureds. (RSMo 379.201).

Transfer of Insurance.

Insurer must notify insured before transferring policy to another insurer. Insurer has right to refuse. (RSMo 375.1287).

Vexatious refusal to pay loss authorizes award of damages not exceeding 20% of first $1,500 of loss and 10% of loss in excess of $1,500, and reasonable attorney's fee in addition to amount of loss and interest. (RSMo 375.420).

Insurance brokers are examined, licensed and regulated by Director of Insurance. Biennial fee $100. (c. 375).

Insurance agencies must be licensed by Director of Insurance. (RSMo 375.786). Owners, officers, managers or directors of agencies acting without authority are guilty of class C felony. (RSMo 375.786). Agents must also be licensed by Director of Insurance. Biennial application fee $25. (RSMo 375.018).

Multiple Employer Self-insured Health Plan.

Must have not less than 250 covered employees and be regulated by Director of Insurance. Annual license fee is equal to 2% of paid Missouri claims. (RSMo 382.210).

Foreign Corporations.

Foreign insurance corporations must, before doing business in state, designate state director of insurance as agent for service of process, in form required by law, and his authority extends to all suits by residents and by nonresident beneficiaries or assignees on policies issued or liabilities incurred in Missouri. (RSMo 375.906).

Foreign insurance companies admitted to transact business in state upon obtaining certificate of authority issued by director of insurance. (RSMo 375.791[2]). In order to secure certificate of authority must make application to director of insurance. Applications to state: (a) Name of company and state of incorporation; (b) date of incorporation and period of duration; (c) address of principal office in state of incorporation; (d) names of states and countries, if any, where admitted or qualified to do business; (e) kinds of insurance authorized to write in state of organization; (f) kind of insurance proposed to write in this state; (g) aggregate number of outstanding shares, if any, and par value thereof and amount of surplus as regards to policyholders; and (h) additional information as may be requested by Director of Insurance. (RSMo 375.811).

Companies doing business in this state must file annual statements showing condition of affairs, maintain reserve, and make deposits similar to domestic insurance companies and transacting a similar kind of business. (RSMo 375.891[1]). In lieu of such deposit or part thereof, company may file current certificate of any other state to effect that a like deposit or part thereof of insurer is being maintained in public custody pursuant to a law of that state for protection of insurer's policyholders or policyholders and creditors. If company writes more than one kind of insurance for which a deposit is otherwise required and deposit in another state is not less than aggregate amount of all such deposits so otherwise required in this state, commissioner shall accept single certificate relative to deposit in other state without specification of kind or kinds of insurance to which same relates. Director, when satisfied by such certificate deposit or part thereof was made and is held, shall accept it in lieu of requirement of subsection (1). (RSMo 375.891[2]).

Every insurance company doing business in this state shall pay following fees to director of revenue: (1) For filing declaration required on organization of each domestic company, $250; (2) for filing statement and certified copy of charter required of foreign companies, $250; (3) for filing application to renew certificate of authority, along with all required annual reports, including annual statement, actuarial statement, risk-based capital report, report of valuation of policies or other obligations of assurance, and audited financial report annual statement of any company doing business in this state, $1, 500; (4) for filing supplementary annual statement of any company doing business in this state, $50; (5) for filing any paper, document, or report not filed under subdivision (1), (2), or (3), but required to be filed in office of director, $50 each; (6) for copy of company's certificate of authority or producer or agent license, $10 dollars; (7) for affixing seal of office of director, $10; and (8) for accepting each service of process upon company, $10. (RSMo 374.230).

All insurance companies must deposit with Director of Insurance bonds or treasury notes issued or guaranteed by U.S., or bonds of this state, any school district of this state or bonds of any political subdivision of this state in following amounts: (1) If stock company, amount of minimum capital required of company to write lines of business it proposes; (2) if mutual company or reciprocal or interinsurance exchange, amount equal to amount required to be deposited by stock company transacting same kind of business; however, for mutual companies not to exceed amount of its policyholders' surplus. (RSMo 379.098).

Foreign companies admitted to do business in the state may make contracts of insurance only by lawfully constituted and licensed agents. (RSMo 375.901).

Foreign insurance companies not authorized under Missouri law, doing specified acts in this state by mail or otherwise, are deemed to have appointed Director of Insurance as agent for service of process. (RSMo 375.256). Service of process may also be had in such cases on agents of insurer within state, but copy of petition and of summons with return thereon must be sent by registered mail, return receipt requested, within ten days to last address of insurance company. Forty-five days after service on Director of Insurance, default may be taken. (RSMo 375.266-.276). Insurance company must furnish bond or certificate of authority to do business before pleading. Damages for vexatious refusal to pay authorized. (RSMo 375.281, .296).

Retaliatory Law.

If the laws of another state or foreign country impose on foreign insurance companies any greater fees, taxes, deposits, etc., than the Missouri laws as to foreign insurance companies, then insurance companies of such state or country seeking to transact business in Missouri must pay all fees, taxes, etc., and do all of acts which, by the laws of the state or country in which said company was organized, are in excess of the fees, taxes, deposits, etc., required by the Missouri laws of foreign companies. (RSMo 375.916[1]).

Premium Tax.

All domestic companies (whether stock, mutual, associations, or reciprocal inter-insurance exchange, including life companies) and all foreign insurance companies or associations are taxed 2% per annum on direct premiums received, either in cash or notes, in this state and on account of business done in this state. (RSMo 148.320-.370). Premium tax is subject to deduction of income, franchise and personal property taxes and of valuation, registration and examination fees paid under Missouri law in addition to other credits. (RSMo 148.400). Returns must be made to Director of Insurance, financial institutions, and professional registration on or before Mar. 1 of each year for year ending on previous Dec. 31. (RSMo 148.330, 148.350).

Fire and casualty companies are credited with cancelled or returned premiums, and all companies with amounts returned to policyholders, including dividends. (RSMo 148.340-.380-.390[1]).

Excluded from premiums taxed are premiums received on policies issued in funding of pension, annuity, profit-sharing plan or individual retirement annuity, qualified or exempt under Federal Internal Revenue Code. (RSMo 148.390[1]).

Medical Malpractice Insurance.

Any physician or surgeon on staff of hospital in county of more than 75,000 must have at least $500,000 in medical malpractice insurance unless practice is exclusively in hospital and hospital's malpractice insurance covers them. (RSMo 383.500[1]).

Uniform Insurer's Liquidation Act adopted but applies only to proceedings instituted prior to 8/28/91. (RSMo 375.950).

Direct Actions Against Insurer.

See category 23 Transportation, topic 23.01 Motor Vehicles, subhead Direct Actions.

16.02 SURETY AND GUARANTY COMPANIES:

Surety companies incorporated under laws of this, or any other, state or foreign government, may be accepted on bonds on production of evidence of solvency, satisfactory to court, judge, clerk, or officer authorized to approve same. (RSMo 379.010, 107.080).

Capital Requirement.

In order to be so accepted, the company must have a paid up capital of not less than $800,000 ($200,000 if public works). (RSMo 379.010, 107.080).

Law Governing.

Foreign surety companies are subject to the laws relating to insurance companies other than life insurance companies. (RSMo 107.090).

See also topic 16.01 Insurance Companies; categories 2 Business Organizations, topic Corporations; Civil Actions and Procedure, topic Bonds.

17 INTELLECTUAL PROPERTY

17.01 TRADEMARKS AND TRADENAMES:

Any mechanic, manufacturer, association or union of workingmen or other persons may adopt a word, name, symbol or device as trademark by filing application, together with facsimile, for registration in office of Secretary of State. Fee for filing and registration, $50. No such label, trademark or form may be registered if it in any way resembles or would probably be mistaken for label or trademark already registered. Registration effective for ten years, renewal fee $10. Assignment or transfer fee, $50. (RSMo 417.005-.031).

Penalties for fraudulent use. (RSMo 417.051-.061).

Federal trademark may not be registered except by the owner.

Tradenames.

Person doing business under name other than his own true name must register same with Secretary of State within five days after beginning such business. (RSMo 417.210) Fee $2. (RSMo 417.220). Person failing to register guilty of misdemeanor. (RSMo 417.230).

Limited Partnerships.

To register as limited liability partnership pursuant to this section, written application must be filed with Office of the Secretary of State. Application must set forth: (1) Name of partnership; (2) address of registered office and name and address of registered agent for service of process required to be maintained by § 358.470; (3) number of partners in partnership at date of application; (4) brief statement of principal business in which partnership engages; (5) that partnership thereby applies for registration as registered limited liability partnership; and (6) any other information partnership determines to include in application. Application must be signed on behalf of partnership by majority of partners or by one or more partners authorized by majority in interest of partners to sign application on behalf of partnership. Application must be accompanied by fee payable to Secretary of State of $25 for each partner of partnership, but fee must not exceed $100. (RSMo 385.440).

Must register with secretary of state on forms supplied by him within five days of engaging in business in Missouri. (RSMo 417.215). Fee $2. (RSMo 417.220).

17.02 TRADE SECRETS:

Missouri Uniform Trade Secrets Act provides injunctive, monetary, and punitive relief for actual or threatened misappropriation of trade secrets. (c. 417). Five-year statute of limitations is imposed.

18 LEGAL PROFESSION

18.01 ATTORNEYS AND COUNSELORS:

The state bar is integrated. The official name of the organization is The Missouri Bar.

Power to admit to practice is vested exclusively in Supreme Court. (RSMo 484.040). Supreme Court rules on subject may be obtained from clerk.

Student Registration.

Applicant for registration must file with the Clerk of the Supreme Court a written application in prescribed form, and present proof of completion of ¾ths of work acceptable for a bachelor degree granted for a 4-year period of study in residence at a principal college or university, within 90 days after commencing study of law. For good cause in particular case, later registration may be permitted. Registration fee of $10 ($15 for late registration) must be paid to Clerk. (Rule 8.04).

Eligibility.

Applicant for admission shall have: (1) Registered as law student or, if person is admitted to practice in highest court of another state, in lieu thereof, certificate of good standing from each state in which applicant is licensed; (2) graduated with L.L.B. or J.D. degree, or equivalent first degree in law, from law school approved by Section of Legal Education and Admissions to the Bar of American Bar Association; (3) filed application to take bar examination; and (4) received approval of Board of Law Examiners. Additionally, applicant who has been admitted to practice in highest court of another state but who does not have degree in law may, in discretion of Board of Law Examiners, be permitted to take bar examination upon: (a) furnishing character report from National Conference of Bar Examiners; (b) furnishing satisfactory evidence that applicant has been for at least five years: (i) lawfully engaged in full-time practice of law in jurisdiction or jurisdictions where applicant was admitted to practice, (ii) served full-time as lawyer with U.S. Government or its armed forces, or (iii) taught as full-time instructor in law school approved by Section of Legal Education and Admissions to the Bar of American Bar Association. (C.R. 8.03, 8.06, 8.07).

Admission Without Examination.

May be admitted without examination if: (a) Has for five of preceding seven years devoted substantial portion of lawyer's time to: (1) practice of law in jurisdiction or jurisdictions where lawyer was admitted to practice, or (2) service as lawyer with U.S. Government or its armed forces, or (3) teaching as instructor in law school approved by Section of Legal Education and Admissions to the Bar of American Bar Association; (b) is graduate of law school that at time of lawyer's graduation was approved by Section of Legal Education and Admissions to the Bar of

American Bar Association; and (c) Has made application for such admission to clerk of this Court. Application consists of: (1) Application form setting out facts establishing above qualifications, including certificate establishing lawyer's satisfaction of requirement signed by judge of court of general jurisdiction in state in which applicant practiced, served or taught and affidavits of good moral character signed by two members of Bar of this state; (2) application form for character report then being used by National Conference of Bar Examiners; and (3) nonrefundable application fee of $300 plus then current fee of National Conference of Bar Examiners for preparation of character report.

Lawyer admitted pursuant to this Rule is required to meet Missouri continuing legal education requirements.

Admission without examination is not matter of right but will be granted only in those cases where public interest, considering character, education, extent and continuity of practice and ability of applicant, will be furthered by permitting such admission. (C.R. 8.10).

Application.

Applicant must file application with Clerk of Supreme Court: for July examination on or before Mar. 15; for Feb. examination on or before Oct.15, and pay prescribed clerk fee. (Rule 8.07). Application must be accompanied by affidavits from two attorneys admitted in Missouri that applicant is of good character.Forms for application to take bar examination may be obtained from Clerk of Supreme Court, Post Office Box 150, Jefferson City, Missouri 65102.

Examination.

Examination is given for two days on both last Tues. and Wed. of Feb. and July, at Jefferson City, Missouri by Board of Law Examiners of Missouri Bar. Two day examination consisting of essay questions on local law and Multi-State Bar Exam. All applicants must also pass Multi-State Professional Responsibility Exam. Multi-State Bar Exam scores may be transferred from another jurisdiction if taken within 19 months preceding examination, applicant has not previously failed Missouri examination and applicant passed entire bar exam one administration in transferring jurisdiction. (Regulations of Board of Law Examiners, promulgated under C.R. 8.08).

Admission Pro Hac Vice.

Any attorney, not a member of The Missouri Bar but member in good standing of bar of any court of record may be permitted to participate in a case in any court upon filing with his initial pleading statement identifying court of which he is member of bar and certifying that neither he nor any member of his firm is disqualified to appear in any such court, and designate member of The Missouri Bar having an office within Missouri as associate counsel. (Rule 9.01-.03).

Judge Advocates.

Member of bar of another state on active military duty in Missouri designated and assigned as a Judge Advocate by his branch of service and by legal officer of Missouri post of duty must be permitted to appear as attorney for active duty personnel or their dependents if unable to pay fee for services involved. (Rule 9.04).

License.

License issued by Supreme Court of Missouri required to practice law. (C.R. 8.08). Annual enrollment fee $225 except for persons licensed by examination less than three years before ($170) or persons licensed but not residing, practicing or employed in State. ($140). Fee paid to clerk of Supreme Court, Supreme Court Building, Jefferson City, Missouri 65101 by Jan. 31 of each year. $50 fine and $5 per month for delinquency. (C.R. 6.01).

Disabilities.

Attorney may not be surety on bond in probate proceeding or official bond. (RSMo 473.180; 107.020).

Liabilities.

See category 5 Civil Actions and Procedure, topic 5.08 Costs.

Compensation of attorney is governed by agreement, express or implied, which is not restrained by law. (RSMo 484.130).

Lien.

From commencement of action or service of answer containing counterclaim, attorney for party has lien upon his client's cause of action or counterclaim and upon written notice by attorney who has made fee agreement with client served on defendant that such agreement has been made and interest he has in cause of action agreement operates as lien upon proceeds realized from claim to extent attorney's portion thereof. (RSMo 484.130-.140).

Division of Fees.

Attorney may not divide any fee or compensation received in practice of law with any person not a licensed attorney, or any firm not wholly composed of licensed attorneys, or any association or corporation. Any person, firm or corporation who receives part of such fees is guilty of a misdemeanor and is subject to fine of from $25 to $500 and costs, and is subject to be sued for treble amount so paid. (RSMo 484.150).

Discipline.

Any attorney may be removed or suspended from practice if convicted of any criminal offense involving moral turpitude, or if he unlawfully retains his client's money or is guilty of any malpractice, fraud, deceit or misdemeanor whatsoever in his professional capacity; or if he shall have been removed, suspended or disbarred from practice in any other state or jurisdiction and shall fail to disclose such facts in his application for license. (RSMo 484.190).

Attorney Ethics.

American Bar Association Rules of Professional Conduct have been adopted with modifications. (C.R. 4).

Mandatory Continuing Legal Education.

Each lawyer must complete and report at least 15 credit hours of accredited programs and activities. Not more than six credit hours may consist of self-study, videotape, audiotape, or other similar accredited programs or activities. Lawyer is required to complete or report three professional responsibility credit hours in reporting year in which lawyer initially licensed to practice law in Missouri. Three credit hours, at least every three years, must be completed in programs devoted exclusively to professionalism, legal or judicial ethics, or malpractice. (C.R. 15.05).

Specialty Requirements.

No specialization permitted in bar.

Professional Corporations.

See category 2 Business Organizations, topic 2.03 Corporations, subhead Professional Corporations.

See also category 5 Civil Actions and Procedure, topics 5.08 Costs, 5.12 Evidence, subhead Witnesses.

19 MINERAL, WATER AND FISHING RIGHTS

19.01 MINES AND MINERALS:

The Division of Mine Inspection of the Department of Labor and Industrial Relations, with offices at Jefferson City, has general supervision of all mines and caves. (RSMo 286.100-.110; c. 293).

Inspection.

The Director of Division of Mine Inspection of the Department of Labor and Industrial Relations is charged with duty of inspection for safety and health of employees in all mines. Twice yearly mine inspection required. Director must make annual report to Governor. Judicial enforcement of detailed rules is provided. (c. 293).

Regulations.

Hoisting and lowering of men is strictly regulated, applying only to mines employing more than 16 underground. (RSMo 293.590).

Notices.

Owners of land or tenants under recorded leases, who permit other persons than employees to mine or prospect, must during the time such permission continues, keep a printed statement of the terms of such permission posted at the principal office of such owner or tenant, in the county where the lands lie or in a county contiguous thereto. (RSMo 444.010[1]).

Licensees are entitled to ore excavated, subject to payment of the royalty prescribed by the terms of the notice or where no notice is posted, the prevailing rate in the neighboring properties. (RSMo 444.030).

Employees may not be worked more than eight hour day without consent. (RSMo 293.050[1]).

Operators.

Operators must file quarterly reports and pay fees. Operators may be required to make maps of mine. (RSMo 293.030-.040).

See also category 11 Employment, topic 11.02 Labor Relations.

20 MORTGAGES

20.01 CHATTEL MORTGAGES:

Practically any kind of personal property may be subject to a chattel mortgage.

Uniform Commercial Code in force. See category 3 Business Regulation and Commerce, topic 3.09 Commercial Code.

After-acquired Property.

A chattel mortgage may cover property to be acquired by mortgagor after execution of the mortgage.

Floating Stock.

Chattel mortgage or deed of trust of stock in trade which remains in possession of mortgagor or grantor and from which sales by him are permitted, is fraudulent and void as against creditors and subsequent purchasers, unless the stock is sold in the usual course of business and the proceeds applied towards payment of the debt.

Execution.

See category 3 Business Regulation and Commerce, topic 3.09 Commercial Code.

Recording or Filing.

See category 3 Business Regulation and Commerce, topic 3.09 Commercial Code.

Duration of Lien.

See category 3 Business Regulation and Commerce, topic 3.09 Commercial Code.

Removal of Property.

There is no requirement of rerecording or refiling in case the property is moved within the state.

Liens on Motor Vehicle.

See category 23 Transportation, topic 23.01 Motor Vehicles.

Usury invalidates a chattel mortgage. See category 3 Business Regulation and Commerce, topic 3.19 Interest.

Mortgages on Unplanted Crops.

See category 3 Business Regulation and Commerce, topic 3.09 Commercial Code.

Assignments.

The transfer of a note secured by a chattel mortgage carries with it the mortgage.

Foreclosure.

See category 3 Business Regulation and Commerce, topic 3.09 Commercial Code.

Forms.

Secretary of State has prescribed standard forms of financing statement (UCC-1 and UCC-1A); change of financing statement (UCC-3); and request for information (UCC-11). Printed forms of security agreements are available from local stationers. For forms, see end of this Digest.

Redemption.

Chattel mortgages with powers of sale and all sales made by mortgagee or his personal representatives in pursuance thereof, are valid and foreclose all rights and equity of redemption of the property so sold. (RSMo 443.290).

Foreign Mortgages.

A chattel mortgage duly executed and recorded in another state is valid against the mortgaged property after it is removed into this state, although the mortgage is not recorded here, unless the mortgagee consented to or acquiesced in the removal and the rights of innocent third persons have intervened. (205 Mo. App. 357, 224 S.W. 113).

See also category 8 Debtor and Creditor, topics 8.15 Pledges, 8.08 Fraudulent Sales and Conveyances.

20.02 COLLATERAL SECURITY:

See category 8 Debtor and Creditor, topic 8.15 Pledges.

20.03 MORTGAGES OF PERSONAL PROPERTY:

See topic 20.01 Chattel Mortgages.

20.04 MORTGAGES OF REAL PROPERTY:

Mortgages are executed and acknowledged as deeds. Lien theory obtains.

Recording.

In order to be valid against any person other than the parties thereto, who is without actual notice thereof, a mortgage must be recorded in the office of the recorder of deeds of the county in which the land is situated. (RSMo 59.330, 442.380-.390).

Recording Fees.

See category 10 Documents and Records, topic 10.04 Records, subhead Recording Fees.

Trust Deeds.

The usual form of giving security on real property is by deed of trust. In deed of trust the property is conveyed to a trustee with power to sell and convey the property absolutely, if the debt which is usually evidenced by promissory notes is not paid according to the terms mentioned in the conveyance.

Future Advances.

Mortgages and deeds of trust may secure future advances made or incurred within ten years of execution of instrument, if such advances do not exceed face amount of instrument, which must be clearly stated thereon; except in case of advances made to protect security interest in real property or to complete improvement under construction loan contract. (RSMo 443.055).

Competency of Trustee.

Nonresident individual or foreign corporation may not act as trustee in any security instrument affecting any property, real or personal in state unless instrument names as co-trustee individual citizen of state or domestic corporation. (RSMo 443.350). However, corporation organized under laws of adjoining or next adjoining state or national banking association having its principal place of business in such state, laws of which permit Missouri corporation to act in fiduciary capacity there, may if qualified obtain certificate of reciprocity from Commissioner of Finance reciting its eligibility to act in such capacity without resident co-trustee. (RSMo 362.600). See category 3 Business Regulation and Commerce, topic 3.01 Banks and Banking, subhead Out-of-State Bank or Trust Company.

Insurance.

Mortgages may be insured in amount not to exceed 103% of fair market value of property. (SB 729).

Assignment of note secured by mortgage carries the security with it and no assignment of mortgage is necessary.

Satisfaction or Release.

Mortgages and deeds of trust may be satisfied upon the margin of the record in the office of the recorder of deeds, or by deeds of release, which must be acknowledged in the same form as other deeds, but in both cases the notes must be presented to the recorder for cancellation, or proper affidavits made as to their payment and loss or destruction. (RSMo 443.060). A partial release may be made by a deed of release or on the margin of the record on presentation to the recorder of deeds of the notes secured by the mortgage or deed of trust or accounting for them as in case of a full release. (RSMo 443.090). Deed of release or acknowledgment of satisfaction of mortgage or deed of trust must be executed by mortgagee, cestui que trust or assignee, and it is not necessary for trustee to join therein. (RSMo 443.060[1]). Release of any security interest may be made by release deed by president, vice-president, secretary, treasurer or cashier of corporation. (RSMo 443.150).

For deed of release on mortgage, lender is required to issue release to borrower within 45 calendar days and lender may have document recorded. If document is unable to be recorded, lender is allowed additional 60 days to have document recorded. (c. 443).

Release of record, containing defects in execution, acknowledgments, or recording, deemed valid after ten years. (RSMo 443.185).

Special provisions are made for satisfaction of mortgages or deeds of trusts of public utility companies subject to regulation of the public service commission and of whole or partial release of mortgages or deeds of trust providing for issue of notes or bonds of $100,000 or more, without producing the bonds, notes or coupons. (RSMo 443.080-.110).

Foreclosure under deeds of trust is generally without suit, by advertisement and sale in accordance with terms of the deed of trust in the county where the land is situated. Real estate conveyed in such deeds cannot be sold by the trustee without giving at least 20 days notice of sale. (RSMo 443.310). Such notice must set forth the date and book and page of the record of the mortgage or deed of trust, the grantors, time, place and terms of sale and description of the property and must be given by advertisement inserted at least 20 times, and continued to the day of sale, in some daily newspaper, in counties having cities of 50,000 inhabitants or more; and in any other county such notice must be given by advertisement in some weekly newspaper published in such county for four successive issues, the last insertion to be not more than one week prior to sale, or in some daily, tri-weekly or semi-weekly paper, published in such county at least once a week for four successive weeks, the notice to appear on the same day of each week, and last insertion to be not more than one week prior to sale. If no newspaper in county, then in nearest one thereto in this state. Where any part of the property is in a city of 50,000 or more population, notice must be published in daily paper in such city, but where property wholly or partly within a city extending into two or more counties, notice must be in newspaper published in county in which property lies in manner provided for such county, notwithstanding it lies in a city of 50,000 inhabitants. (RSMo 443.320). Trustee is granted one continuance of sale not to exceed seven days without additional notice by announcing continuance on day, time and place of sale. (RSMo 443.355).

Limitations.

Foreclosure proceedings cannot be commenced after obligation secured is barred by limitations, nor in any event can foreclosure be had after 20 years from date last maturing obligation secured by instrument to be foreclosed is due according to face of such instrument, unless within such 20 years owner of debt or some one for him files affidavit or duly acknowledged instrument showing amount due and owing. (RSMo 516.150). For deeds of trust and mortgages recorded after Jan. 1, 1979, if due date of last maturing obligation secured by instrument to be foreclosed upon does not appear on face of instrument, foreclosure proceedings cannot be commenced after 20 years from date of execution of instrument or if that date does not appear, from date of acknowledgment, and if that date does not appear, from date of secured obligation. (RSMo 516.155). In any case where foreclosed property is lawfully occupied by residential tenant who is not in violation of any lease agreement, no unlawful detainer action can be taken against tenant until at least ten business days after date of notice that foreclosure sale occurred. After foreclosure sale, tenant must receive notice by mail and by posting on door of premises where tenant resides. (RSMo 534.030).

Redemption.

All real estate sold by trustees in any deed of trust, according to the terms of said deed, without the deed of trust having been first foreclosed by judgment or decree of court, and which shall be bought in at sale by holder of debt or obligation, or by any other person for them, shall be subject to redemption by grantor in deed, or his heirs, devisees, executors, administrators, grantees or assigns, at any time within one year from date of sale upon payment of debt and interest or other obligation secured by deed of trust and to accrue thereon together with all sums paid by any holder thereof or purchaser at such sale or holder of rights of such purchaser for interest, principal or prior incumbrances and for taxes and assessments and all legal charges and costs incurred in making sale. (RSMo 443.410).

No party shall have the benefit of the above until he shall give security to the satisfaction of the circuit court for the payment of interest to accrue within such year, all interest which the purchaser or his representatives may pay on any prior encumbrance, and all interest to accrue thereon; costs of sale, taxes and assessments, with interest and costs thereon, together with interest at 6% on all such sums paid by purchaser or those claiming under him, and for all damages and waste that may be occasioned or permitted by the party giving such security or those claiming under him during such year unless said property is so redeemed. Notice in writing of intention so to redeem must be given at or within ten days before the sale to the person making or who is to make the sale, and such security furnished within 20 days after sale. If the circuit court is not in session, the clerk may take and approve the security. (RSMo 443.420-.440). The equity of redemption may be foreclosed, if the debt secured by the mortgage or deed of trust amounts to $50 or more, by filing petition in office of clerk of circuit court against mortgagor and actual tenants or occupiers of said real estate, or persons in possession of personal property, setting forth substance of mortgage deed, and praying that judgment may be rendered for debt and damages and that equity of redemption may be foreclosed, and mortgaged property be sold to satisfy amount due. (RSMo 443.190).

When the sale is fairly conducted and the property is not purchased by the cestui que trust, or his representative, no right to redeem exists. (481 S.W.2d 531).

Form.

Following form of deed of trust, with power of sale, may be used:

Form

This deed, made and entered into this . . . . day of . . . ., 20. . . ., by and between . . . ., part. . . . of the first part, and . . . ., party of the second part, and . . . ., part. . . . of the third part,

Witnesseth: that the part. . . . of the first part, in consideration of the debt and trust herein after mentioned and created, and the sum of $1 to . . . . paid by the said party of the second part, the receipt of which is hereby acknowledged, do. . . . by these presents grant, bargain and sell, convey and confirm unto the said party of the second part the following described real estate situate in the county of . . . . in the State of Missouri: (insert description); and possession of said premises now delivered unto said party of the second part;

To have and to hold the same, with the appurtenances, to the said party of the second part, and to his successor hereinafter designated, and to the assigns of him and his successor, forever.

In trust however, for the following purposes: whereas, the said . . . ., did on the . . . . day of . . . ., 20. . . ., make and deliver to (insert statement of obligation secured):

And whereas, said part. . . . of the first part agree with said part. . . . of the third part and . . . ., endorsees or assignees of said promissory note . . . ., and each of them, to pay on demand all taxes and assessments, general and special, now existing against said lands and improvements, and to pay when due or within the time required by law, all taxes and assessments, general or special, hereafter levied or charged thereon or therefor, and also to keep the improvements upon said land constantly and satisfactorily insured until said note . . . . be paid, for the sum of at least . . . . dollars, and the policy or policies thereof constantly assigned or pledged and delivered to . . . ., for further securing the payment of said note. . . ., with power to demand, receive and collect any and all moneys becoming payable thereunder and the same to apply toward the paying of said note. . . ., unless otherwise paid, and also to keep said land and improvements thereon free from all statutory lien claims of every kind; and if any or either of said agreements be not performed as aforesaid, then said part. . . . of the third part, or . . . . said endorsees or assignees or any of them, may pay such taxes and assessments or any part thereof, and may effect such insurance for said purpose, paying the cost thereof, and may also pay the final judgment for any statutory lien, including all costs; and for the repayment of all moneys paid in the premises, with interest thereon from the time of payment at the rate of . . . .% per annum, these presents shall be security in like manner and with like effect as for the payment of said note. . . . .

Now, if the said note. . . . and the interest thereon be paid when due, and said agreements be faithfully performed as aforesaid, then these presents, including the lease hereinafter set forth shall be void, and the property hereinbefore conveyed shall be released at the cost of said part. . . . of the first part; but if default be made in the payment of said note. . . . or any part thereof or any of the interest thereon when due, or in the faithful performance of any or either of said agreements as aforesaid, then the whole of said note. . . . shall become due and be paid as hereinafter provided, and this deed shall remain in force, and the said party of the second part, or in case of his death, inability, refusal to act or absence from . . . . County, Missouri, when any advertisement and sale are to be made hereunder, then, whoever shall be sheriff of . . . . County, Missouri, at the time when any such advertisement and sale are to be made (who shall thereupon for the purpose of that advertisement and sale succeed to the second party’s title to said real estate and the trust herein created respecting the same), may proceed to sell the property hereinbefore described, and any and every part thereof, at public vendue, to the highest bidder, at the . . . . front door of the . . . . County Circuit Court House, in . . . ., in the County of . . . ., aforesaid, for cash, first giving twenty days public notice of the time, terms and place of sale, and of the property to be sold, by advertisement in some newspaper printed and published in . . . ., Missouri, and upon such sale shall execute and deliver a deed of conveyance of the property sold to the purchaser or purchasers thereof, and any statement or recital of fact in such deed in relation to the nonpayment of money hereby secured to be paid, existence of the indebtedness so secured, notice by advertisement, sale, receipt of money, and the happening of any of the aforesaid events whereby the sheriff may become successor as herein provided, shall be prima facie evidence of the truth of such statement or recital; and said trustee shall receive the proceeds of said sale out of which he shall pay, first the cost and expenses of executing this trust, including compensation to the trustee, for his services, and next to said third party or . . . . endorsees or assignees, upon the usual vouchers therefor, all moneys paid for insurance or taxes and judgments upon statutory liens, claims and interest thereon as hereinbefore provided for; and next all said note. . . . then due and unpaid; and next the principal of such of said notes as are not then due when payment thereon shall be demanded, with interest up to the time of such payment, and if not enough therefor, then apply what remains; and the balance of such proceeds, if any, shall be paid to the said part. . . . of the first part or . . . . legal representatives.

And the said party of the second part covenants faithfully to perform the trust herein created.

And the said part. . . . of the second part, hereby lets said premises to said part. . . . of the first part until a sale be had under the foregoing provisions therefor, upon the following terms and conditions thereof, to wit:

The said part. . . . of the first part, and every and all persons claiming or possessing such premises, and any part thereof, by, through, or under . . . . shall or will pay rent therefor during said term at the rate of 1¢ per month, payable monthly upon demand and shall and will surrender peaceable possession of said premises, and any and every part thereof, sold under said provisions, to said party of the second part . . . . successors, assignees, or purchasers thereof under such sale, within ten days after making of such sale without notice or demand therefor.

In witness whereof, the said first part. . . . ha. . . . hereunto set . . . . hand . . . . the day and year first above written.

Executed in the presence of:

Chattel Mortgages.

See topic 20.01 Chattel Mortgages.

21 PROPERTY

21.01 ABSENTEES:

Care of Property.

No statutory provisions other than for appointment of public administrator on order of probate division of circuit court to take possession of any estate to prevent its being injured, wasted, purloined or lost. (RSMo 473.743).

Escheat.

Unclaimed dividends on assignment for benefit of creditors, unclaimed shares of proceeds of partition sale, property unclaimed on final settlement of an estate or of a receiver of company doing business in state and unclaimed refunds of premiums, rates, fares or charges deposited in any court or with custodian in connection with litigation escheat to state, subject to reclamation by persons entitled. (RSMo 470.010-.030). Unclaimed deposits, dividends and interest of liquidated banks are held by Director of Finance, then escheat to state. (RSMo 361.200).

See also category 13 Estates and Trusts, topic 13.07 Descent and Distribution.

Presumption of death of absentee, see category 13 Estates and Trusts, topic 13.05

Death.

Process Agent.

No provision for appointment by nonresident of agent for service of process, except in case of foreign corporations (see category 2 Business Organizations, topic 2.03 Corporations) and issuers of securities for sale in state (see category 3 Business Regulation and Commerce, topic Securities) and personal representatives of decedent's estates. (RSMo 473.117).

Service on Nonresidents.

See categories 5 Civil Actions and Procedure, topic Process; Transportation, topic Motor Vehicles.

See also categories 2 Business Organizations, topic Corporations; Civil Actions and Procedure, topics Costs, Limitation of Actions, Process, Venue; Debtor and Creditor, topic Attachment; Estates and Trusts, topics Executors and Administrators, Trusts; Family, topic Guardian and Ward.

21.02 ADVERSE POSSESSION:

Character of Possession.

Possession to defeat an action must be actual, open, hostile, exclusive and continuous under claim of ownership. (775 S.W.2d 568).

Duration and Disabilities.

Persons not under any disability are barred by ten years adverse possession; persons under disability (except dower claimant) have at least three years after removal of disability in which to bring action, but are barred in any event by 21 years adverse possession; dower is not barred until ten years after husband's death. (RSMo 516.010-.030).

Persons having a claim against land in the lawful possession of another on any date, must bring his action to recover within one year from such date, if the person claiming or those under whom he claims have not had possession or paid taxes thereon for 30 years. (RSMo 516.070).

Easement may be created or acquired by prescription. (753 S.W.2d 940).

21.03 [RESERVED]

21.04 CONVEYANCES:

See topic 21.06 Deeds.

21.05 CURTESY:

Estate of "curtesy" is abolished, but the widower is given the same rights of inheritance, allowances, and exemptions as a widow has. (RSMo 474.110-.250-.260-.290-.010). See topic 21.08 Dower.

See also category 13 Estates and Trusts, topic 13.07 Descent and Distribution.

21.06 DEEDS:

See topic Real Property for types of estates.

Execution and Recording.

All deeds must be acknowledged before a proper officer, or proved as provided by statute, and recorded in the county in which the property conveyed is located in order to be effective as against third persons without actual notice. (RSMo 442.130-.380-.400). No witness required if deed is acknowledged. Deed of individual does not require seal.

For circumstances in which spouse must join see category 8 Debtor and Creditor, topic 8.10 Homesteads; also category 14 Family, topic Husband and Wife.

In cities of over 350,000 population, and in all counties of first class, no trustee's or mortgagee's deed may be recorded unless notes or other obligations for default in payment of which foreclosure was had, or affidavit of owner of notes as to loss thereof, are produced to recorder. (RSMo 443.390). See also category 10 Documents and Records, topic 10.04 Records.

To qualify for recording, all deeds (except supplemental indentures of utility companies and rural electric cooperatives) must have legal description of lands and mailing address of at least one grantee. Failure to contain address does not affect deed's validity. (RSMo 59.330).

See also categories 8 Debtor and Creditor, topic Homesteads, subhead Alienation or Encumbrance; Family, topic Husband and Wife, subhead Conveyances.

Operation and Effect.

Words “Grant, bargain and sell”, unless restricted by express terms contained in such conveyances, mean grantor had indefeasible fee simple estate free of encumbrances by grantor or person under whom he claims. (RSMo 442.420). Where grantor undertakes to convey fee simple estate and has not legal title at time of conveyance, but afterwards acquires it, estate subsequently acquired passes to grantee. (RSMo 442.430).

Lands may be conveyed by attorney of owner, provided the power is acknowledged and recorded. (RSMo 442.020). Husband and wife may convey real estate of husband or wife by their joint deed acknowledged and certified as herein provided. Where property conveyed is owned by husband and wife as estate by entirety, then both must be bound by covenants therein expressed or implied. (RSMo 442.030).

See also topic 21.16 Real Property; categories 8 Debtor and Creditor, topic Homesteads; Family, topic Husband and Wife.

Corporate deed must be executed in name of corporation, under corporate seal, and signed and acknowledged by president, presiding member, or trustee. Also, holder of any office thereof, the incumbent of which is generally or specifically authorized to convey by resolution of the governing board. (RSMo 442.060).

Recording Fees.

See category 10 Documents and Records, topic 10.04 Records, subhead Recording Fees.

Forms.

Following may be used:

Forms

Warranty deed: This Indenture, Made on the . . . . day of . . . ., A. D., 20. . . ., by and between . . . . of the County of . . . ., State of . . . ., part. . . . of the first part, and . . . . of the County of . . . ., State of . . . ., part. . . . of the second part, Witnesseth. That the said part. . . . of the first part, in consideration of the sum of . . . . Dollars, to . . . . paid by said part. . . . of the second part (the receipt of which is hereby acknowledged), do. . . . by these presents, Grant, Bargain and Sell, Convey and Confirm unto the said part. . . . of the second part . . . . heirs and assigns, the following described lots, tracts or parcels of land lying, being and situate in the County of . . . . and State of Missouri, to-wit: . . . . To have and to hold the premises aforesaid with all and singular, the rights, privileges, appurtenances and immunities thereto belonging or in anywise appertaining unto the said part. . . . of the second part and unto . . . . heirs and assigns forever; the said . . . . hereby covenanting that . . . . lawfully seized of an indefeasible estate in fee of the premises herein conveyed; that . . . . has. . . . good right to convey the same; that the said premises are free and clear from any incumbrance done or suffered by . . . . or those under whom . . . . claim. . . .; and that . . . . will warrant and defend the title to the said premises unto the said part . . . . of the second part and unto . . . . heirs and assigns forever, against the lawful claims and demands of all persons whomsoever. In Witness Whereof, The said part. . . . of the first part ha. . . . hereunto set . . . . hand and seal. . . . the day and year above written . . . . (Seal).

Quit-claim deed: Same form as warranty deed except in following particulars. Omit words “grant, bargain, sell, convey and confirm” and substitute “remise, release and forever quit-claim.” Omit warranty provision “the said . . . . hereby covenanting . . . . against the lawful claims and demands of all persons whomsoever” and substitute “so that neither the said part. . . . of the first part nor . . . . heirs, nor any other person or persons, for . . . . or in . . . . name or behalf, shall or will hereafter claim or demand any right or title to the aforesaid premises or any part thereof, but they and each of them shall, by these presents, be excluded and forever barred.”

See also topic 21.15 Powers of Attorney; categories 3 Business Regulation and Commerce, topic Frauds, Statute of; Debtor and Creditor, topics Fraudulent Sales and Conveyances, Homesteads; Documents and Records, topic Acknowledgments; Family, topics Infants, Husband and Wife.

21.07 DEEDS OF TRUST:

See topic 21.06 Deeds; category 20 Mortgages, topic 20.04 Mortgages of Real Property.

21.08 DOWER:

Estate of “dower” is abolished. (RSMo 474.110). (For marital rights of widow in husband’s estate, see category 13 Estates and Trusts, topic 13.07 Descent and Distribution, subhead Surviving Spouse.)

Release.

The wife may release her marital rights in real estate by joining in a deed, acknowledged and certified, with her husband (RSMo 442.030; 474.150) or by prenuptial contract (RSMo 474.120).

Bar.

Abandonment of spouse without reasonable cause for one year next preceding death of husband, or dwelling in adultery with another bars marital rights unless reconciliation and resumption of cohabitation. (RSMo 474.140).

Election.

For election between marital rights and testamentary provision, see category 13 Estates and Trusts, topic 13.16 Wills.

Surviving husband has same rights in wife's real estate as widow has in husband's real estate, including right of election. (See topic 21.05 Curtesy.) But according to decisions, wife may defeat such rights as to her separate property by her conveyance without his joinder. See category 14 Family, topic 14.09 Husband and Wife.

See also category 13 Estates and Trusts, topic 13.07 Descent and Distribution.

21.09 ESCHEAT:

See topic 21.01 Absentees, subhead Escheat; category 13 Estates and Trusts, topic 13.07 Descent and Distribution, subhead Escheat.

21.10 LANDLORD AND TENANT:

Municipalities' code enforcement agency or occupants of one-third or more of dwelling units within building may bring civil action alleging nuisance exists with respect to dwelling unit, building or premises. (RSMo 441.510). If court finds nuisance exists, it may order rent be paid into court, allowing owner reasonable time to correct deficiencies, authorize owner to draw upon rents deposited in court to pay cost of necessary repairs upon presentation to court of original copy of invoice for work performed or materials purchased or appoint receiver to administer or collect rent and correct deficiencies. (RSMo 441.570, .590). Tenant not obligated to rebuild or repair building destroyed by fire in absence of express agreement. (RSMo 441.010). Illegal use of premises renders lease void and owner has same remedies for recovery as if tenant holding over his term. (RSMo 441.020). Tenant at will, sufferance or term less than two years may not assign his term or interest without written consent of landlord, violate conditions of written lease or commit waste. (RSMo 441.030). If owner fails to pay building's utility bills, utility or agents may have receiver appointed to collect rent and use rental revenues to continue utility service. (RSMo 441.650). Right of successor in title to recover rents pursuant to 535.070 requires adequate and timely notice to tenant. (RSMo 535.081).

Kinds of Tenancy.

At will, sufferance, month-to-month, and year-to-year.

Leases.

All leases not in writing create estate at will only (RSMo 432.050) terminable by one month's notice in writing, except leases of real estate for agricultural purposes other than garden which create tenancies from month to month (RSMo 441.060[3]) and except that a parol lease for longer than one year followed by entry into possession and payment of rent is converted by law into a tenancy from year to year (31 Mo. 13; 201 S.W.2d 509) and except that leases of land upon which person owns and occupies mobile home are terminable not sooner than 60 days from date rent payment next comes due (RSMo 441.060[4]).

Security Deposits.

(1) Landlord may not demand or receive security deposit in excess of two months' rent.

(2) Within 30 days after date of termination of tenancy, landlord shall: (a) Return full amount of security deposit; or (b) furnish to tenant written itemized list of damages for which security deposit or any portion thereof is withheld, along with balance of security deposit. Landlord shall have complied with this subsection by mailing such statement and any payment to last known address of tenant.

(3) Landlord may withhold from security deposit only such amounts as are reasonably necessary for following reasons: (a) To remedy tenant's default in payment of rent due to landlord, pursuant to rental agreement; (b) to restore dwelling unit to its condition at commencement of tenancy, ordinary wear and tear excepted; or (c) to compensate landlord for actual damages sustained as result of tenant's failure to give adequate notice to terminate tenancy pursuant to law or rental agreement; provided that landlord makes reasonable efforts to mitigate damages.

(4) Landlord shall give tenant or his representative reasonable notice in writing at his last known address or in person of date and time when landlord will inspect dwelling unit following termination of rental agreement to determine amount of security deposit to be withheld, and inspection shall be held at reasonable time. Tenant shall have right to be present at inspection of dwelling unit at time and date scheduled by landlord.

(5) If landlord wrongfully withholds all or any portion of security deposit in violation of this section, tenant shall recover as damages not more than twice amount wrongfully withheld. (RSMo 535.300).

Recording.

There is no statute requiring leases to be recorded, but they may be recorded. Actual possession puts third persons on inquiry. (99 Mo. 459; 12 S.W. 287).

Rent.

Court, after hearing on claim that nuisance exists with respect to dwelling unit, building or premises may order rents paid to clerk of court until deficiencies have been remedied. (RSMo 441.570).

Termination of Tenancy.

Tenancies at will or by sufferance or for less than one year require one month's notice in writing to person in possession requiring him to remove. (RSMo 441.060[1]). Tenancy from year-to-year requires 60 days written notice. (RSMo 441.050). No notice required where term is to end at a certain time. (RSMo 441.070).

Liens.

Landlord has superior lien (against which tenant entitled to no exemption) on crop of tenant raised on leased premises for money or supplies furnished to tenant to enable him to raise and harvest crops or subsist during tenancy, which is limited to 120 days after expiration of tenancy. In case of removal of property, lien continues for 15 days thereafter. (RSMo 441.290). Landlord has also lien on crops for eight months after annual rent is due and payable. (RSMo 441.280).

Attachment for Rent.

Landlord may attach tenant's property for rent if tenant intends or attempts to remove, or within 30 days has removed, the same from premises without paying rent, or when rent is due and unpaid after demand. (RSMo 441.240).

Holding Over.

A tenant who holds over after the termination of the time for which lands or possessions were let to him, or who wrongfully and without force obtains and continues in possession of lands, and after demand made in writing for possession by the person having the legal right thereto, is guilty of unlawful detainer. (RSMo 534.030). Suit may be brought in any associate circuit court of county (RSMo 534.060), regardless of amount of rent involved (61 Mo. 253), and associate circuit judge may render judgment for possession and for double amount of rents and profits (RSMo 441.100-.110). There are special provisions for appeals and changes of venue. (RSMo 534.380).

If premises are leased in writing and the tenant holds over, extension or renewal of lease cannot be shown by oral evidence, but contract in writing required to give right to continue in possession. (RSMo 441.120[1]).

Dispossession.

Whenever rent has become due and payable and payment has been demanded, but not made, landlord or agent may file statement, verified by affidavit, in any associate circuit court in county in which property lies, setting forth terms upon which property was rented, amount of rent actually due, that rent has been demanded, and that payment has not been made, and particular description of property leased or rented. (RSMo 535.020). Judge thereupon issues his summons which shall be executed ten days before return date thereof. If return is that defendant is not found or has absconded or absented himself from his usual place of abode, judge shall order notices set up for ten days in one public place in county. On proof of notice by affidavit, case proceeds same as if there had been personal service. (RSMo 535.030). If upon hearing it shall appear facts set forth are true, and tenant does not tender rent, with all costs, before judge, he shall render judgment that landlord recover possession of premises and amount of rent, with costs, provided amount of rent due does not exceed his jurisdiction. He shall then issue execution commanding officer to put landlord into immediate possession, and to make debt and costs out of goods and chattels of defendant, upon which execution officer shall deliver possession of property to landlord within five days from time of receiving said execution and proceed to collect debt and costs. If plaintiff so elects, plaintiff may sue for possession alone. (RSMo 535.040).

See also category 19 Mineral, Water and Fishing Rights, topic 19.01 Mines and Minerals, subhead Notices.

Landlord-Tenant Courts.

Statute provides for establishment of landlord-tenant commissioners to hear initial disputes in St. Louis City and Jackson County. (H.B. 361).

Uniform Residential Landlord and Tenant Act not adopted.

21.11 LEASES:

See topic 21.10 Landlord and Tenant.

21.12 [RESERVED]

21.13 PERPETUITIES:

Future contingent interests must vest within a life or lives in being and 21 years and ten months thereafter. (199 S.W.2d 344). The only exception to this rule is a trust of real or personal property, created as part of an employer-employee stock bonus, pension, disability or death benefit, profit-sharing, or retirement plan, where contributions are made by employers or employees or self-employed for the benefit of employees or self-employed. Such a trust may continue for such time as necessary to accomplish its purposes. (RSMo 456.011).

Accumulations.

The income arising from any property held in trust as part of such an employees' benefit plan may be permitted to accumulate until the fund is sufficient to accomplish the purposes of the plan. (RSMo 456.013). See also category 13 Estates and Trusts, topic 13.13 Trusts.

21.14 PERSONAL PROPERTY:

Tenancies by the entireties in personal property do exist. (637 S.W.2d 332).

21.15 POWERS OF ATTORNEY:

It is not necessary for agent to be authorized in writing to act for principal, except to contract for sale of lands. Contract for sale of lands made by agent is not binding upon principal unless such agent is authorized in writing to make such contract. (RSMo 432.010). Every instrument containing power to convey real estate or to execute, as agent or attorney, any instrument conveying real estate or whereby real estate may be affected must be acknowledged or proved and certified and recorded like other written instruments conveying or affecting real estate. (RSMo 442.360).

Durable Power of Attorney.

Authority granted by principal to attorney in fact in written power of attorney is not terminated in event principal becomes wholly or partially disabled or incapacitated or in event of uncertainty as to whether principal is dead or alive if power of attorney is denominated as "Durable Power of Attorney", is subscribed by principal, dated and acknowledged as prescribed by law for conveyances of real estate, and includes provision stating: "THIS IS A DURABLE POWER OF ATTORNEY AND THE AUTHORITY OF MY ATTORNEY IN FACT SHALL NOT TERMINATE IF I BECOME DISABLED OR INCAPACITATED OR IN THE EVENT OF LATER UNCERTAINTY AS TO WHETHER I AM DEAD OR ALIVE"; or "THIS IS A DURABLE POWER OF ATTORNEY AND THE AUTHORITY OF MY ATTORNEY IN FACT, WHEN EFFECTIVE, SHALL NOT TERMINATE OR BE VOID OR VOIDABLE IF I AM OR BECOME DISABLED OR INCAPACITATED OR IN THE EVENT OF LATER UNCERTAINTY AS TO WHETHER I AM DEAD OR ALIVE." (RSMo 404.705).

Durable Power of Attorney for Health Care Act.

If patient wishes to confer on attorney in fact authority to direct health care provider to withhold or withdraw artificially supplied nutrition and hydration, patient shall specifically grant such authority in power of attorney. This limitation shall not be construed to require that artificially supplied nutrition and hydration be continued when, in medical judgment of attending physician, patient cannot tolerate it.

Before attorney in fact or physician may authorize withdrawal of nutrition or hydration which patient may ingest through artificial means, physician must: (1) Attempt to explain to patient intention to withdraw nutrition and hydration and consequences for patient and to provide opportunity for patient to refuse withdrawal of nutrition and hydration; or (2) insert in patient's file certification that patient is comatose or consistently in condition which makes it impossible for patient to understand intention to withdraw nutrition and hydration and consequences to patient. (RSMo 404.805).

21.16 REAL PROPERTY:

Tenancy in severalty, tenancy in common, joint tenancy, tenancy by the entirety, homestead, and life estates are recognized.

Grant or devise to two or more persons (except executors, trustees or spouses) creates tenancy in common unless expressly declared to be in joint tenancy. (RSMo 442.450).

Real estate may be conveyed by owner or owners to himself or themselves and others, or one or more of themselves and others, or to one or more or all of themselves, and the conveyance has the same effect as to whether it creates a joint tenancy, tenancy by the entireties, tenancy in common, tenancy in partnership, or a separate ownership, as if it were granted by a stranger who owned the real estate to the persons named as grantees. (RSMo 442.025[1]).

Real property sold at tax sale subject to recorded covenants and easements. (RSMo 140.722).

All administrative actions involving real property shall be in circuit court of county where real property is located. (RSMo 536.110).

Rule in Shelley's case is abolished. (RSMo 442.490; 474.470).

Condominium property law in effect. (RSMo 448.1-101-.210). Time-sharing plans regulated. (RSMo 407.630).

See also topics 21.05 Curtesy, Deeds, Dower, Landlord and Tenant; categories 5 Civil Actions and Procedure, topic Partition; Debtor and Creditor, topic Homesteads; Family, topic Husband and Wife; Mortgages, topic Mortgages of Real Property.

21.17 TRUST DEEDS:

See category 20 Mortgages, topic 20.04 Mortgages of Real Property.

22 TAXATION

22.01 ADMINISTRATION:

Department of Revenue.

A Department of Revenue, with certain prescribed powers and duties has been created. (RSMo 32.028).

State Tax Commission likewise created. (RSMo 138.190).

The Commission must equalize the valuation of real and tangible personal property among the several counties in the State by allocating the property in certain designated classifications. (RSMo 138.390). The Commission must exercise general supervision over all the assessing officers in the State. (RSMo 138.410). Taxpayers, under rules and regulations prescribed by Commission have right to appeal to it from local boards of equalization. (RSMo 138.430).

Interstate Cooperation.

Multistate tax compact (RSMo 32.200-32.260) provides for proration and allocation of state and local tax on income of business entities doing business in party states.

Penalties.

Income Tax.

Upon conviction for false return or failure to file fine up to $10,000 or imprisonment from one to five years or both. (RSMo 143.911-.941). Interest on extension of filing date is discretionary with director of revenue. (RSMo 143.551). Failure to file without intent to evade, 5% penalty per month not to exceed 25%; 50% penalty for fraud. (RSMo 143.741-.751).

Estate Tax.

Failure to file without intent to evade, 5% penalty; 50% penalty for fraud. (RSMo 145.985).

Sales Tax.

Refusal by purchaser to pay is misdemeanor. (RSMo 144.060). Fine up to $1,000; imprisonment up to one year. (RSMo 560.016; 558.011). Seller failing to collect or remit, misdemeanor. (RSMo 144.080). Delinquency interest set each Oct. at nearest full percentage point of prime rate. (RSMo 144.170, 32.065). Failure to file return a misdemeanor. (RSMo 144.510). No return or false return with intent to defraud, fine up to $10,000 or one to five years imprisonment or both. (RSMo 144.480, .490). Fraud or evasion, penalty 25%. (RSMo 144.500).

Use Tax.

Failure to make return, 5% penalty per month not to exceed 25%. (RSMo 144.665). Fine up to $10,000 or imprisonment one to five years or both. (RSMo 144.735). Fraud, 25% penalty. (RSMo 144.675). Violations generally a misdemeanor. (RSMo 144.745).

Gasoline Tax.

Missouri pre-collects motor fuel taxes through distributors and requires exempt fuel purchasers to file for refunds of pre-paid taxes. (RSMo. 142.800, et seq.).

Cigarette Tax.

Violation shall be cause for revocation or suspension of cigarette sales license. Failure to affix tax stamps: penalty equal to 100% of tax plus tax with interest set each Oct. at nearest full percentage point of prime rate. Unstamped cigarettes are contraband, subject to confiscation. Counterfeiting, tampering with stamps, meters, false reports or entries in records a felony: imprisonment two to five years. Other violations not covered by specific criminal penalties are misdemeanor: fine up to $500; imprisonment up to one year or both. (RSMo 149.025-.081).

Merchants' Tax.

Failure to pay taxes, forfeiture of license given to secure taxes, and judgment for double amount owing and costs. (RSMo 150.230). Delinquency, penalty 1% per month plus 10% interest, not to exceed 10% per annum total. (RSMo 150.235). False statement, forfeit license and a misdemeanor: fine $100-$500; imprisonment up to six months. (RSMo 150.260).

Manufacturers' Tax.

See catchline Merchants' Tax, supra, same penalties.

Unemployment Compensation Tax.

Delinquency, interest ½% per month. (RSMo 288.150). Failure to report and pay tax, penalty equal to greater of $100 or 10% of principal and interest; for fraud 25%. (RSMo 288.160). Violations a misdemeanor: fine $50-$1,000; imprisonment up to six months; or both, for each offense; forfeit credits. (RSMo 288.380).

Credit Institutions Tax.

Interest on extension of filing date, 1% per month from due date. (RSMo 148.160). Nonpayment,determined by RSMo 32.065.(RSMo 148.180).

Building and Loan Associations and Savings and Loan Associations Tax.

Delinquency, same penalties as those imposed on tangible personalty. See catchline Tangible Personal Property Tax, infra. (RSMo 148.180).

Tangible Personal Property Tax.

Failure to provide list of property by Mar. 1, results in penalty between $10 and $100 depending on amount of property owned. No penalty assessed for certain cases of unavoidable and non-willful neglect. (RSMo 137.280[1]). Refusal to certify list misdemeanor. (RSMo 137.360[1]). False list, double assessment and possible liability for perjury (RSMo 137.285); with intent to defraud, misdemeanor (RSMo 137.420).

Tax Lien Sales.

Mineral rights and royalty interests are subjects of sale to pay off tax lien. (RSMo 140.150).

22.02 ALCOHOL, BEVERAGES AND TOBACCO TAXES:

Cigarette tax imposed by c. 149.

22.03 BUSINESS TAXES:

Manufacturers' Tax.

Manufacturers are taxed on all raw materials, finished products, and tools, machinery and appliances used by them in the same manner and to the same extent as merchants are taxed. If the value of the above listed items is less than $1,000 no manufacturers' tax is imposed. (RSMo 150.310-.370).

Merchants' Tax.

Merchants must pay ad valorem tax on amount of all merchandise in their possession whether owned by them or consigned to them for sale on Jan. 1 of each year. Merchant is defined as every person, corporation, copartnership or association of persons, who shall deal in the selling of goods, wares and merchandise at any store, stand or place occupied for that purpose. Term merchant includes all merchants, commission merchants, grocers, manufacturers and dealers in drugs and medicine, except physicians for medicine used in their practice. Tax is equal to rate levied on real estate. Motor vehicle dealers are considered merchants but are not subject to ad valorem tax. (RSMo 150.010-.290).

22.04 CORPORATE TAXES:

Franchise Taxes.

See category 2 Business Organizations, topic 2.03 Corporations.

Taxation of Banks.

See category 3 Business Regulation and Commerce, topic 3.01 Banks and Banking.

Gross receipts tax on express companies, see category 3 Business Regulation and Commerce, topic 3.08 Carriers.

Premium tax on insurance companies, see category 16 Insurance, topic 16.01 Insurance Companies.

Tax on Credit Institutions.

A tax of 7% of net income is imposed on credit institutions (exclusive of banks, trust companies, credit unions, insurance companies, mutual savings and loan associations, savings and loan associations, or real estate mortgage loan companies). Credit is given for all other taxes imposed by State of Missouri or any political subdivision thereof. Return is due on or before Apr. 15, annually except return for year in which franchise is received is due June 1 of following year. (RSMo 148.120-.230).

Building and loan associations and savings and loan associations are taxed at annual rate of 7% of net income for preceding year. Apportionment formula is used for savings and loan associations conducting business in other states. Tax is payable to Director of Revenue on or before Apr. 15. (RSMo 148.610-.710).

22.05 EMPLOYMENT TAXES:

Unemployment compensation tax (termed "contributions") is imposed on every employer having one or more persons in partial or full daily employ in each of 20 different calendar weeks, whether or not weeks are consecutive, or on any unit which in any calendar quarter in either current or preceding year paid employment wages of $1,500 or more except in: Service of spouse or parent of employer; service of child under 21 years old for parent; agricultural labor; domestic service; service of children under 18 in delivery of newspapers or shopping news, not including delivery to distribution point; service of state or political subdivision or instrumentality thereof; service with respect to which unemployment compensation is payable under system established by Congress; service in employ of foreign government, or of wholly owned instrumentality of foreign government if such foreign government grants equivalent exemption with respect to similar service performed in its country by employees of U. S. Government and its instrumentalities; service under arrangement between division and agency administering other state or federal unemployment insurance law under which services of individual are performed entirely within jurisdiction of other state or federal agency; service for school, college or university in any calender quarter by enrolled student regularly attending classes if remuneration does not exceed $50, exclusive of board, room and tuition; service as insurance agent if sole remuneration is by commissions; service of local college club or local chapter of college fraternity or sorority; service of nonprofit religious, charitable, scientific, literary or educational organization, or for prevention of cruelty to children or animals, if nonprofit. Tax applies only to wages not in excess of $8,500 per year after 1993 to any individual employee. Rates vary according to statutory classification. No tax is imposed on employees. Payment is due at such intervals, no less frequently than quarterly, and on such dates as may be fixed by regulation of Division of Employment Security of Department of Labor and Industrial Relations, which is charged with administration of Unemployment Compensation Law. (c. 288). Quarterly payments are due on or before last day of month following calendar quarter for which contributions are payable. Transient employers must post notice of registration of unemployment insurance. (RSMo 285.234).

See also categories 2 Business Organizations, topic Corporations; Business Regulation and Commerce, topic Licenses, Business and Professional; Insurance, topic Insurance Companies; Transportation, topic Motor Vehicles.

22.06 [RESERVED]

22.07 ESTATE TAX:

Equal to maximum credit for state death taxes on federal estate tax return. Extension of time to file federal estate tax results in similar extension for state tax. (c. 145).

Apportionment Against Inter Vivos Dispositions.

No statutory provision.

22.08 GASOLINE AND SPECIAL FUELS TAXES:

Gasoline tax imposed by c. 142. An additional tax may be imposed by cities upon voter approval. (Const. 1945, Art. IV, § 30[a]).

22.08A GENERATION SKIPPING TAX:

Generation-Skipping Credit Tax.

Tax imposed on generation skipping transfer equal to maximum credit for state death taxes allowed by Internal Revenue Code § 2604. (RSMo 145.995).

22.09 GIFT TAX:

None.

22.10 [RESERVED]

22.11 INCOME TAX:

Income tax is levied on all incomes with certain exceptions, exemptions and deductions. See also category 3 Business Regulation and Commerce, topic 3.01 Banks and Banking, subhead Taxation.

Tax applies to incomes of residents and nonresidents. Single residents with gross income of $1,200 or more and married couples with gross income of $2,400 or more, and single nonresidents with Missouri nonresident adjusted gross income of $600 or more must file returns. (RSMo 143.481). Residents are taxed on Missouri taxable income of every resident (RSMo 143.011); nonresidents on income from sources within state (RSMo 143.041; 143.181); residents for only part of year are taxed as nonresidents (RSMo 143.051). Tax on income of estates or any kind of property held in trust is assessed to executor, administrator, trustee or other fiduciary, if not returned by beneficiary, but where income is regularly distributed, rate of tax is based on amount of individual share distributed. (RSMo 143.501; 143.351). Tax does not apply to trust or other unincorporated organization which by reason of its purposes and activities is exempt from Federal income tax. (RSMo 143.321).

Resident Individual Income.

Missouri adjusted gross income of resident individual is federal adjusted gross income subject to following modifications:

Additions.

There shall be added to his federal adjusted gross income: (a) Amount of any federal income tax refund received for prior year which resulted in Missouri income tax benefit; (b) interest on certain governmental obligations excluded from federal gross income by § 103 of Internal Revenue Code. Previous sentence shall not apply to interest on obligations of state of Missouri or any of its political subdivisions or authorities and shall not apply to interest described in subdivision (a) of subsection 3 of this section. Amount added under this paragraph shall be reduced by amounts applicable to such interest that would have been deductible in computing taxable income of taxpayer except only for application of § 265 of Internal Revenue Code. Reduction shall only be made if it is at least $500; (c) amount of any deduction that is included in computation of federal taxable income under § 168 of Internal Revenue Code as amended by Job Creation and Worker Assistance Act of 2002 to extent amount deducted relates to property purchased on or after July 1, 2002, but before July 1, 2003, and to extent amount deducted exceeds amount that would have been deductible under § 168 of Internal Revenue Code of 1986 as in effect on Jan. 1, 2002; and (d) amount of any deduction that is included in computation of federal taxable income for net operating loss allowed by § 172 of Internal Revenue Code of 1986, as amended, other than deduction allowed by § 172(6)(1)(G) and § 172(i) of Internal Revenue Code of 1986, as amended, for net operating loss taxpayer claims in tax year in which net operating loss occurred or carries forward for period of more that 20 years and carries backward for more than two years. (RSMo 141.121). Any amount of net operating loss taken against federal taxable income but disallowed for Missouri income tax purposes pursuant to this paragraph after June 18, 2002, may be carried forward and taken against any income on Missouri income tax return for period of not more than 20 years from year of initial loss.

Subtractions.

There shall be subtracted from his federal adjusted gross income following amounts to extent included in federal adjusted gross income: (a) Interest or dividends on obligations of U.S. and its territories and possessions or of any authority, commission or instrumentality of U.S. to extent exempt from Missouri income taxes under laws of U.S. Amount subtracted under this paragraph shall be reduced by any interest on indebtedness incurred to carry described obligations or securities and by any expenses incurred in production of interest or dividend income described in this paragraph. Reduction in previous sentence shall only apply to extent that such expenses including amortizable bond premiums are deducted in determining his federal adjusted gross income or included in his Missouri itemized deduction. Reduction shall only be made if expenses total at least $500; (b) portion of any gain, from sale or other disposition of property having higher adjusted basis to taxpayer for Missouri income tax purposes than for federal income tax purposes on Dec. 31, 1972, that does not exceed such difference in basis. If gain is considered long-term capital gain for federal income tax purposes, modification shall be limited to one-half of such portion of gain; (c) amount necessary to prevent taxation under this chapter of any annuity or any annuity of other amount of income or gain which was properly included in income or gain and was taxed under laws of Missouri for taxable year prior to Jan. 1, 1973, to taxpayer, or to decedent by reason of whose death taxpayer acquired right to receive income or gain, or to trust or estate from which taxpayer received income or gain; (d) accumulation distributions received by taxpayer as beneficiary of trust to extent that same are included in federal adjusted gross income; (e) amount of any state income tax refund for prior year which was included in federal adjusted gross income; (f) portion of capital gain specified in § 135.357, RSMo, that would otherwise be included in federal adjusted gross income; (g) amount that would have been deducted in computation of federal taxable income under § 168 of Internal Revenue Code as in effect on Jan. 1, 2002, to extent that amount relates to property purchased on or after July 1, 2002, but before July 1, 2003, and to extent that amount exceeds amount actually deducted under § 168 of Internal Revenue Code as amended by Job Creation and Worker Assistance Act of 2002; (h) for all tax years beginning on or after Jan. 1, 2005, amount of any income received for military service while taxpayer serves in combat zone which is included in federal adjusted gross income and not otherwise excluded therefrom. As used in this section, “combat zone” means any area which President of United States by Executive Order designates as area in which armed forces of U.S. are or have engaged in combat. Service is performed in combat zone only if performed on or after date designated by President by Executive Order as date of commencing of combat activities in such zone, and on or before date designated by President by Executive Order as date of termination of combatant activities in such zone; and (i) for all tax years ending on or after July 1, 2002, with respect to qualified property that is sold or otherwise disposed of during taxable year by taxpayer and for which additional modification was made under Paragraph (c) of Subsection 2 of this section, amount by which additional modifications made under Paragraph (c) of Subsection 2 of this section on qualified property has not been recovered through additional subtractions provided in Paragraph (g) of this Subsection. (RSMo 141.121).

Fiduciary Adjustment.

There shall be added to or subtracted from taxpayer’s federal adjusted gross income tax payer’s share of Missouri fiduciary adjustment provided in § 143.351. (RSMo 141.121.4).

Modifications.

There shall be added to or subtracted from taxpayer's federal adjusted gross income modifications provided in § 143.411. (RSMo 141.121.5).

Involuntary Conversion of Property.

In addition to modifications to taxpayer's federal adjusted gross income in this section, to calculate Missouri adjusted gross income there shall be subtracted from taxpayer's federal adjusted gross income any gain recognized pursuant to § 1033 of Internal Revenue Code of 1986, as amended, arising from compulsory or involuntary conversion of property as result of condemnation or imminence thereof. (RSMo 141.121.6).

Nonresident Individual Income.

Includes that part of nonresident's federal adjusted gross income derived from income from sources within state as modified in same manner with respect to residents (RSMo 143.121), but does not include compensation paid by U.S. for services in armed forces of U.S. performed by nonresident (RSMo 143.181).

Personal exemptions are $1,200 for resident, $1,200 for spouse for all taxable years beginning before Jan. 1, 1999, and $2,100 for resident and $2,100 for spouse for all taxable years beginning on or after Jan. 1, 1999 (RSMo 143.151), $1,200 for each dependent (RSMo 143.161), if entitled to such deductions for Federal income tax purposes. Additional $1,000 deduction for dependent who attains 65 years of age on or before last day of taxable year. (RSMo 143.161). Additional $800 deduction for resident who qualifies as unmarried head of household or surviving spouse for Federal income tax purposes for all taxable years beginning before Jan. 1, 1999. Additional $1,400 deduction for residents who qualify as unmarried head of household or surviving spouse for federal income tax purposes for all taxable years beginning on or after Jan. 1, 1999. (RSMo 143.161).

Rates for Individuals.

Tax is always at a flat rate on entire income in excess of exemptions and credits, but such rate varies according to amount of Missouri taxable income as follows: Not over $1,000, 1½ %; over $1,000 but not over $2,000, $15, plus 2% of excess over $1,000; over $2,000, but not over $3,000, $35, plus 2½% of excess over $2,000; over $3,000 but not over $4,000, $60, plus 3% of excess over $3,000; over $4,000 but not over $5,000, $90, plus 3½% of excess over $4,000; over $5,000 but not over $6,000, $125, plus 4% of excess over $5,000; over $6,000 but not over $7,000, $165, plus 4½% of excess over $6,000; over $7,000 but not over $8,000, $210, plus 5% of excess over $7,000; over $8,000 but not over $9,000, $260, plus 5½% of excess over $8,000; over $9,000 but not over $10,000, $315, plus 6% of excess over $9,000; over $10,000 but not over $20,000, $375, plus 6.5 of excess over $10,000; over $20,000 but not over $30,000, $1,025, plus 7% of excess over $20,000; over $30,000 but not over $40,000, $1,725, plus 7.5% of excess over $30,000; over $40,000, $2,475, plus 8% of excess over $40,000. (RSMo 143.011).

Rates for Corporations, etc.

Corporations, joint stock companies and associations, organized or doing business in this state, are taxed as follows: if Missouri taxable income is: not over $100,000, 5% of the Missouri taxable income; over $100,000 but not over $300,000, $5,000 plus 6% of excess over $100,000; over $300,000 but not over $500,000, $17,000 plus 7% of excess over $300,000; over $500,000 but not over $1,000,000, $31,000 plus 8% of excess over $500,000; over $1,000,000, $71,000 plus 10% of excess over $1,000,000. (RSMo 143.071; 143.431-.471).

Provision is made for allocating income to this state on interstate business not subject to segregation, and taxpayer may show taxable Missouri income by its own method of allocation if approved by the Director of Revenue. (RSMo 143.451-.461).

Special provisions are made for apportioning income of railroad, bridge, telegraph and telephone companies, lines or property of which are partly within and partly without state. (RSMo 143.441; 143.451).

Withholding.

Employers must withhold from the wages of each employee each pay period amount determined by Director of Revenue, constituting payment on account of employee’s income tax. Withholding returns are filed by employer each quarter-month, month, quarter or year depending on amount withheld. (RSMo 143.191, 143.211)

Returns must be filed no later than 15th day of fourth month following close of taxpayer’s taxable year except exempt organizations file on date set by Internal Revenue Code. (RSMo 143.511).

Estimated tax declarations must be filed if individuals’ estimated tax will be $100 or more. Declaration due Apr. 15, with necessary amendments quarterly thereafter. Pro rata payments or estimate due on Apr. 15 and quarterly thereafter. Fiscal year adjustments provided. (RSMo 143.521-.541).

Information Returns.

Person, corporation, etc., making payment to another person of any fixed or determinable gains, profits or income of $1,200 or more to any single person or $100 or more in case of interest or dividends must make return thereof to Director of Revenue and person to whom such payment is made, on or before Feb. 28 of year following year in which such payments were made. (RSMo 143.591).

Payment.

Tax is payable on or before date on which return is due (see subhead Returns, supra) and is delinquent on following day. (RSMo 143.511).

22.12 INHERITANCE TAX:

None.

22.1322.15 [RESERVED]

22.16 PROPERTY TAXES:

Assessment.

All property is classified as real property and tangible personal property. Real property is further subclassified into residential property, assessed at 19% of true value; agricultural property, assessed at 12%; and industrial property, assessed at 32%. (RSMo 137.115). Assessment of personal property, except for grain, other crops, livestock, farm machinery, historic motor vehicles, aircraft 25 years or older and poultry, shall be at 331/3% of its true value. (RSMo 137.115).

For purposes of taxation assessor shall make list of all real and tangible personal property and may call residence or place of business of owner to obtain correct statement thereof assigned. Whenever assessor has insufficient information to assess any real property or taxable personal property list was not submitted, he or she will assess property based upon physical inspection. Assessor has right to enter any lands for purpose of assessing real or personal property, but may not enter interior of structure without permission. (RSMo 137.130). Assessors are required to use standardized schedule of depreciation in assessment of depreciable tangible personal property. (RSMo 137.122). Assessors in each county and city of St. Louis may send personal property assessment forms by mail. (RSMo 137.115). Deadline for filing personal property tax return in St. Louis, Missouri is Apr. 1, and if Apr. 1 falls on weekend, then last day for filing will be next business day. (RSMo 137.495).

Exemptions.

Property of state, county and political subdivisions; religious, educational, charitable, agricultural and horticultural societies. (Const. Art. X, § 6).

No exemption for members of armed services. Motor vehicles leased for period of one year or more to religious, educational, or charitable organization are exempt from state, county, and local tax. Property belonging to veterans' organizations is also exempt. (RSMo 137.100).

Review.

A person who thinks himself aggrieved may appeal to the county board of equalization on or before 2d Mon. in July (RSMo 137.275, 138.060), and the owner of real property or tangible personal property has the right of appeal from the local board of equalization under rules prescribed by the State Tax Commission (RSMo 138.430-.470).

Lien.

Taxes on real property are liens thereon. (RSMo 137.085).

Payment.

Taxes are delinquent Jan. 1. (RSMo 140.010). If real estate taxes not paid before Jan. 1, penalty of 18% per year is imposed. If taxes which were delinquent for preceding year are paid prior to sale, penalty added may not exceed 2% per month. (RSMo 140.100).

Collection.

County collector collects tax on tangible property and forwards to state division of taxation and collection. All other money payable to state must be sent directly to division of taxation and collection. (RSMo 136.010).

Sales and Redemption.

Any person interested in or owner of land upon which there is lien for delinquent taxes may redeem land by paying original taxes with interest at rate of 18% plus costs and attorneys fees if suit has commenced. After delinquent tax sale of land, execution and recording of deed to purchaser shall not occur for two years during which time owner or any person having interest may redeem by paying amount of judgment, interest and costs. Deed executed by sheriff is prima facie evidence of title. Action for recovery of taxes must be commenced within three years from date of delinquency. (RSMo 140.110; 140.160; 140.340; 141.010-.180).

Real Estate Conveyance Tax.

None.

22.17 SALES AND USE TAXES:

Sales and use tax (c. 144) of 4% is imposed on amount paid or charged on or for: (a)

Retail sales in state of tangible personal property (if transaction involves exchange, fair market value of property exchanged, at time and place of exchange, is included in basis of tax); (b) admission and seating accommodations, or fees paid to or in any place of amusement, entertainment, recreation, game or athletic event; (c) electricity, electric current, water and gas; (d) service to telephone subscribers and equipment or services pertaining or incidental thereto; (e) services for transmission of messages by telegraph companies; (f) rooms, meals and drinks furnished at hotel, tavern, inn, restaurant, eating house, drug store, dining car, tourist cabin, tourist camp or other place in which rooms, meals or drinks are regularly served to public; (g) intrastate tickets by operator of railroad, sleeping car, dining car, express car, boat, airplane, and such busses and trucks as are licensed by Transportation Division of Department of Economic Development, engaged in transportation of persons for hire; (h) rental or lease of tangible personal property unless lessor paid sales tax thereon or property is exempt under 144.030. (Const. Art. IV, § 43[a]; 144.020). On local option, some cities and counties impose additional sales taxes. (RSMo 144.032). There is three day sales and use tax exemption for certain retail sales in August. (RSMo 144.049).

When article on which Missouri sales or use tax has been paid is traded in and trade-in allowance is less than purchase price, sales tax computed only on difference. Where trade-in allowance exceeds purchase price, no sales or use tax is owed. Sale of motor vehicles by owner subject to same provision if replacement vehicle purchased or ordered from dealer within 180 days before or after sale. (RSMo 144.025).

Sales to duly licensed physicians, dentists, optometrists and veterinarians, of tangible personal property used in practice of their professions are deemed to be for use or consumption and not for resale. (RSMo 144.010[1][10]).

Retail sales of food shall be taxed at rate of 1%. (RSMo 144.014[1]).

Brackets used for collection of tax are established by director of revenue. (RSMo 144.285[1]).

Vendor rendering periodic statements covering taxable purchases can use brackets or apply tax rate to total on statement. (RSMo 144.285).

Sales Tax.

Exemptions.

Motor fuel subject to excise or sales tax under another law of this state; fuel to be consumed in manufacturing or creating gas, power, steam, electrical current or in furnishing water to be sold ultimately at retail; gas, propane, and electricity used by new generation processing entity; certain gases, liquids, and solids necessary in manufacturing conversion or material recovery of product; feed, medications and vaccinations administered to livestock or poultry to be sold ultimately in processed form or otherwise at retail; grain to be converted into foodstuffs to be sold ultimately in processed form at retail; all sales of pesticides and bedding used in production of livestock or poultry for food or fiber; seed, limestone or fertilizer to be used for crops, which when harvested will be sold at retail or will be fed to livestock or poultry to be sold ultimately in processed form at retail; economic poisons which are to be used for spraying growing crops, fruit trees or orchards, crop of which when harvested will be sold at retail or will be converted into foodstuffs, which are to be sold ultimately in processed form at retail; materials incorporated in new products; materials used in motor vehicles, watercraft, railroad rolling stock or aircraft used as common carriers; machinery replacing obsolete manufacturing machinery or for expansion of manufacturing plants and construction for such machinery; tangible personal property used solely for products sold to U.S.; sales of animals and poultry for breeding or feeding and sales of horses; newsprint for public newspapers; rental of films and records; common carrier pipeline pumping equipment; railroad rolling stock for use in transporting persons or property in interstate commerce; electrical energy used in actual primary manufacture, processing, compounding, mining or producing of product, or electrical energy used in actual secondary processing or fabricating of product, if total cost of electrical energy so used exceeds 10% of total cost of production, either primary or secondary, exclusive of cost of electrical energy so used; anodes which are used or consumed in manufacturing, processing, compounding, mining, producing or fabricating and which have useful life of less than one year; machinery, equipment, appliances and devices purchased or leased and used solely for purpose of preventing, abating or monitoring water and air pollution, and materials required for construction of such and so certified as such by director of department of natural resources; and tangible personal property purchased by rural water district; amounts paid to political subdivisions for admission or participation in any amusement, games or athletic events where individual making payment is actually participating in activity proceeds do not inure to private persons; sales of insulin and prosthetic or orthopedic devices including hearing aids and hearing aid supplies and prescription drugs; sales of aircraft to carriers for storage or use in interstate commerce; sales by income tax exempt summer theatre organization; ticket sales by benevolent, scientific and educational associations formed to promote progress and improvement in science and agriculture; sales to not-for-profit private secondary schools; sales of new or used farm machinery parts other than motor vehicles and fuel or electricity used to dry crops; water service, electricity, gas, wood, coal, and heating oil for domestic use; sales of handicraft items made by seller or his spouse if seller or spouse is at least 65 and total proceeds of such sales do not constitute majority of annual gross income of seller; federal excise tax on retail sales; sales of fuel delivered and consumed in operation of ships, barges or waterborne vessels used primarily in or for transportation of property, cargo or persons for hire on navigable rivers bordering or located in this state; computers and computer software purchased by certain entities headquartered in this state; sale at retail of certain types of electrical current to battery manufacturers; livestock sales when seller is grower, producer or feeder or in business of buying and selling livestock; sale of barges used primarily in transportation of property on interstate waterways. Also exempt are sales by or to: Religious and charitable organizations or institutions and elementary and secondary schools operated at public expense, in their religious, charitable or educational functions and activities; eleemosynary and penal institutions; industries of state; any institution of higher learning supported by public funds; state relief agencies in exercise of relief functions and activities; and admissions to museums, zoos and planetariums; and tickets to college campus athletic events. (RSMo 144.030-.046). Sale of light aircraft to nonresident purchaser exempt. (RSMo 144.043). Purchase of materials for construction, repairs or remodeling of exempt organization’s facilities are tax exempt. (RSMo 144.062). There is partial sales tax exemption for sale of modular units. (RSMo 144.044).

License issued at no cost by Director of Revenue required of all persons collecting sales tax, which license is prerequisite for obtaining city, county or state occupation license. License may be revoked for default in payment of sales tax, or bond required. Bond required for itinerant or temporary business. (RSMo 144.083-.087).

Returns.

Return for each quarterly period of three months must be filed with and the tax paid to the Director of Revenue on or before the last day of month following each such quarterly period. (RSMo 144.080). If deemed necessary to insure payment, or to facilitate collection of amount of taxes, or if revenue needs demand it, Director of Revenue may require returns and payment of amount of taxes for monthly or annual periods instead of calendar quarters. (RSMo 144.090).

Where for either first or second month of quarter tax is more than $250 seller shall pay such amount by 20th day of next month and credit for amount paid allowed on quarterly return. Where amount of quarterly taxes is less than $45, seller shall be permitted to file return for calendar year only. (RSMo 144.080).

Returns are not required on sales of motor vehicles where payment is made by purchaser to Director of Revenue when registering vehicle. See category 23 Transportation, topic 23.01 Motor Vehicles, subheads Sales Tax and Use Tax. (RSMo 144.070).

Use Tax.

4% tax on storing, using or consuming tangible personal property in state. Exemptions include: (a) constitutional exemptions; (b) property taxed under sales taxes of this state; (c) property which would not be subject to sales taxes if sold in this state; (d) property taxed under other states' sales or use tax, except as less than 4%, in which case shall be taxed on difference; (e) property held for resale; (f) personal and household effects and farm machinery of nonresident coming into this state. Duty of collection is on vendor, but purchaser must file return if tax is not paid to vendor. Vendor must register with Director of Revenue, may be required to give bond, and must file return quarterly. Purchaser must file return if tax is not paid to vendor unless aggregate purchases subject to use tax are less than $2,000 in calendar year. (RSMo 144.600-.745).

May impose local use tax at rate equal to local sales tax, 4% on motor vehicles. (RSMo 144.440; 144.450). See category 23 Transportation, topic 23.01 Motor Vehicles.

22.18 STAMP AND SEAL TAXES:

Stamp Tax.

No requirement of stamps on corporate stock or other instruments.

22.18A TRANSPORTATION TAXES:

Aircraft Tax.

Tax imposed by c. 155.

23 TRANSPORTATION

23.00A ANIMAL-DRIVEN VEHICLES:

Persons operating animal-driven vehicles after dark may use lamps or lanterns and reflective material that comply with rules established by Department of Public Safety. (RSMo 307.125).

23.01 MOTOR VEHICLES:

General supervision is in State Director of Revenue, Jefferson State Office Bldg., Jefferson City 65101.

Vehicle license required annually. Number plates must be displayed front and rear, or in rear if only one plate is issued and must be clearly visible at night. Plates are not transferable, but upon transfer of ownership or discontinuation of operation of original vehicle owner may register another vehicle under same number. (RSMo 301.030, .140). Citation will not be issued for missing license plate tabs if person indicates to law enforcement personnel that tabs have been stolen and check shows proper registration. (RSMo 301.302). Application must be accompanied by receipt showing applicant's previous year's personal property tax assessment has been paid, and if subject to Federal heavy vehicle use tax imposed by § 4481 IRC, proof of payment, or that such tax is not owing. (RSMo 301.025). No exemptions for members of Armed Forces. Inspection required by authorized station. (RSMo 307.350). Stations may charge up to $12 for inspection, certificate and sticker, and up to $10 for trailer or motorcycle. (RSMo 307.365).

Operator's license required. Not issued to person under 16 years of age as private operator, nor to person under 18 as chauffeur (RSMo 302.060) or person under 21 as operator of school bus or common carrier vehicle, unless licensed as a chauffeur except that drivers of trucks of less than one ton manufacturer’s rated capacity may be licensed as chauffeur if 18 years old (RSMo 302.272). Temporary permit may be obtained between ages 15 and 16. (RSMo 302.130). Active duty members of Armed Forces, no examination if renewal of license and prior license not suspended or revoked. (RSMo 302.173).

As to nonresident operators, see subhead Nonresident Operators, infra.

Interstate Driver License Compact entered. (RSMo 302.600-.605).

Municipal license taxes on motor vehicles are authorized within limits, also occupation taxes on business of transporting freight or passengers. (RSMo 301.340).

Titles and Sales.

Owner must obtain certificate of ownership from Director of Revenue. (RSMo 301.190). On transfer of ownership, seller must indorse on certificate an assignment with warranty of title and statement of all incumbrances and deliver same to buyer at time of delivery of vehicle. Buyer must present assigned certificate to Director of Revenue and thereupon new certificate is issued to him. Unlawful to buy or sell vehicle without assignment of certificate and such sale declared fraudulent and void. (RSMo 301.210). Owner may request certificate of ownership in beneficiary form. (RSMo 301.681). Certificate in name of husband and wife presumed to create estate by entirety, and on proof of death new certificate will be issued in name of survivor. (RSMo 301.675).

See also infra, subheads Sales Tax and Use Tax. See also category 3 Business Regulation and Commerce, topic 3.23 Sales, subhead Motor Vehicle Time Sales.

Liens are not valid against subsequent transferees or lienholders who took without notice unless lien is perfected as required by law. Liens are perfected by delivery to director of revenue of (1) existing certificate of ownership, (2) application for certificate of ownership containing name and address of lienholder and date of his security agreement, and (3) required fee. Releases are sent to director of revenue for removal of lienholder’s name and/or issuance of new certificate of ownership without lienholder’s name. Liens may secure future advances. (RSMo 301.600-.660).

Identification Marks.

Felony offense to remove, alter or deface manufacturer’s number, motor number or other distinguishing mark, or knowingly to possess or deal with car so altered. (RSMo 301.390-.400).

Operation Prohibited.

By persons under 16 (RSMo 577.110), intoxicated persons, persons under influence of drugs (RSMo 577.010), or persons whose licenses have been suspended or revoked in this state (RSMo 302.200) including suspension or revocation under point system (RSMo 302.302-.304).

Person older than 15 but younger than 21 when he or she violated purchase or possession of intoxicating liquid by minor law shall have driving privileges suspended or revoked. Suspension is 30 days for first offense, 90 days for second, and one year for third offense. (RSMo 577.500).

It is a misdemeanor for any person to authorize or knowingly permit a motor vehicle owned by him or under his control to be operated on any highway by a person not authorized to operate such vehicle. (RSMo 302.260).

No person 21 years of age or younger operating moving vehicle upon highways of state shall by means of hand-held electronic wireless communications device, send, read, or write text or electronic message. (RSMo 304.820.1).

Size and Weight Limits.

Regulated by 304.180-.190.

Equipment Required.

Regulated by 307.130-.196.

Seat belts are required to be worn by passengers in front seat and all drivers of cars manufactured after 1/1/68 except children under four. $10 fine. (RSMo 307.178).

Driver transporting child under age of 16 years must be responsible, when transporting such child in motor vehicle operated by that driver on streets or highways of this state, for providing for protection of such child as follows: (1) Children less than four years of age, regardless of weight, must be secured in child passenger restraint system appropriate for that child; (2) children weighing less than forty pounds, regardless of age, must be secured in child passenger restraint system appropriate for that child; (3) children at least four years of age but less than eight years of age, who also weigh at least 40 lbs. but less than 80 lbs., and who are also less than four feet, nine inches tall, must be secured in child passenger restraint system or booster seat appropriate for that child; (4) children at least 80 lbs. or children more than four feet, nine inches in height must be secured by vehicle safety belt or booster seat appropriate for that child; (5) child who otherwise would be required to be secured in booster seat may be transported in back seat of motor vehicle while wearing only lap belt if back seat of motor vehicle is not equipped with combination lap and shoulder belt for booster seat installation; and (6) when transporting children in immediate family when there are more children than there are seating positions in enclosed area of motor vehicle, children who are not able to be restrained by child safety restraint device appropriate for child must sit in area behind front seat of motor vehicle unless motor vehicle is designed only for front seat area. Driver transporting children referred to in this subsection is not in violation of this section. (RSMo 307.179).

Lights Required.

Regulated by 307.020-.125.

Inspection.

Biennial. (RSMo 307.350). For certain non-attainment areas, emissions inspection required biannually and prior to sale or transfer. (RSMo 643.300-.355). Any vehicle manufactured at least 26 years prior to current model is exempt from emission inspection. (RSMo 307.366).

Accidents.

Operator must stop and give his name, residence, including street number, motor vehicle number and chauffeur's or registered operator's number, if any, to opposite party or to police officer or to nearest policy station or judicial officer. (RSMo 577.060). If injury or death or property damage to one car over $500 accident must be reported to police immediately if within city. (RSMo 300.110).

Liability of owner for negligence of another person depends on agency. No statutory extension of liability.

Guests.

No statutory restriction of liability for injury to guest.

Mandatory Financial Responsibility.

Missouri drivers must maintain adequate financial responsibility. Motor vehicle liability insurance is principal method of meeting financial responsibility requirement, though law also permits certificates of deposit, surety bonds and self-insurance. Each owner certifies at vehicle's registration that he will maintain adequate financial responsibility. Insurance companies furnish insurance identification cards to be carried in cars. Department of Revenue is authorized to conduct verification samples. Driver's license and vehicle registrations of any person who does not maintain adequate financial responsibility can be suspended. (c. 303).

Insurance.

See subhead Mandatory Financial Responsibility, supra.

No-Fault Insurance not adopted.

Foreign vehicles, duly registered in home state or country and displaying number plate or plates issued by such state or country, may be operated in Missouri without local registration, but only to extent that home state or country grants similar exemption to Missouri vehicles. (RSMo 301.271).

Nonresident Operators.

A nonresident at least 16 years old, who has in his immediate possession a valid operator's license issued to him in his home state or country, may operate a vehicle in Missouri, but only as a private operator. Nonresident at least 18 years old, who has in his immediate possession a valid chauffeur's license issued to him in his home state or country, may operate a vehicle in Missouri, either as chauffeur or as private operator, but may not accept employment as chauffeur from a resident of Missouri without Missouri license as chauffeur. Nonresident at least 18 years old, whose home state or country does not require licensing of operators, may operate a vehicle duly registered in his home state or country for not more than 60 days in any calendar year. (RSMo 302.080).

Actions Against Nonresidents.

Nonresident owner of motor vehicle or trailer operating on Missouri highways is deemed to have appointed Secretary of State his agent on whom process may be served in any suit for damages growing out of such operation by himself or agent. Secretary of State must send notification of service by restricted registered mail to such defendant. (RSMo 506.210, .240; C.R. 54.14-.19).

Direct Actions.

No direct action against insurer by injured party is allowed.

Dealers.

Motor vehicle and boat dealers must make monthly reports to Missouri Department of Revenue as to sales on or before 15th day of month in which sales reported. (RSMo 301.280). Motor vehicles dealer, boat dealer, manufacturer and boat manufacturer must obtain license. (RSMo 301.559[1]). Dealers, except boat dealers, must have lot displaying one or more vehicles. Dealers, except wholesale dealers, must display sign carrying name and class of business. (RSMo 301.560[1]). Wholesale and public motor vehicle auctions are also subject to signage and licensure requirements. (RSMo 301.559-.561).

Motor vehicle carriers are regulated by Public Service Commission. Common carriers must obtain certificate of public convenience and necessity and contract carriers a permit from the Public Service Commission. (RSMo 390.051-.061). Must pay an annual license fee and file a liability insurance policy in such form as Commission may require to make compensation for injuries to person or property resulting from negligent operation, unless Commission satisfied of financial ability to act as self-insurer. (RSMo 390.126-.136). Commission may enter into reciprocal contracts or agreements with other states relating to motor carriers. (RSMo 386.220).

Vehicles exempted include, among others, private carriers and motor vehicles which are domiciled and licensed in another state and whose operations in this state are interstate in character and are limited exclusively to a municipality and its commercial zone. (RSMo 390.030).

Commercial vehicles must display in a conspicuous place on both sides thereof: (1) the name of the owner; (2) the address from which such motor vehicle is operated; and (3) in addition to foregoing local commercial vehicles must display in conspicuous place word “local”. (RSMo 301.330). Registration fees and penalties regulated by 301.058. Commercial vehicles with non-expiring license plates pursuant to § 301.277 may file supplemental application with Missouri Highway and Transportation Commission and transfer plate to replacement commercial vehicle. (RSMo 301.130[6]).

Salvage Motor Vehicle.

Any motor vehicle, semi-trailer, or house trailer with damage exceeding 80% of fair market value of vehicle prior to damage. Salvage titles of vehicles are negotiable with one reassignment on title by registered dealer or insurance company. (RSMo 301.010).

Bicycle Safety.

Bicycles operating at less than speed limit or slower than flow of traffic may be operated on shoulder. (RSMo 307.191). Bicyclist must signal in same manner as other vehicles. (RSMo 307.192). Motorist when passing bicyclist must leave safe distance between vehicle and bicycle. (RSMo 304.678).

Watercraft.

Service of process on nonresident owner or operator causing injury to persons or property in this state may be had in like manner to motor vehicles. See subhead Actions Against Nonresidents, supra. Person in charge of craft required to report injuries to sheriff of county within 24 hours. (RSMo 506.330-.350). Motorboat numbering required. (RSMo 306.020). *Note:* Boating safety identification cards will be required of people born on or after Jan. 1, 1984, beginning Jan. 1, 2005. (RSMo 306.127).

Outboard Motors.

The owner or the person responsible for an outboard motor kept within this State shall register it in office of director of revenue who shall issue certificate of title for same. (RSMo 306.530).

Motor Vehicle Service Contracts.

Governed by 385.200 et seq.

Sales Tax.

Subject to certain exemptions, sales tax must be paid to the Director of Revenue at the time of obtaining a certificate of ownership; also applies to trailers. (RSMo 144.070). See category 22 Taxation, topic 22.17 Sales and Use Taxes, subhead Sales Tax.

Home Trailer Parking Rental Tax.

See category 22 Taxation, topic 22.17 Sales and Use Taxes, subhead Use Tax.

Use Tax.

4% of entire purchase price on any motor vehicle or trailer required to be registered under laws of Missouri. Allowed credit for amount of sales or use tax previously paid in another state. Not applicable to vehicles on which Missouri sales tax paid, nor those registered and in good faith regularly operated in another state 90 days prior to registration in Missouri, nor those acquired by registered dealers for resale, nor those used in regular religious, charitable or eleemosynary functions, or acquired by gift, will, or inheritance if tax has been paid by donor or decedent, or those owned or used by the state or political subdivisions or public educational institutions, nor to farm tractors. (RSMo 144.440; .450).

When motor vehicle or trailer on which Missouri sales or use tax has been paid is traded in on another vehicle or trailer subject to use tax, tax imposed by §§ 144.020 and 144.040 shall be computed only on that portion of purchase price which exceeds actual allowance made for article traded in or exchanged, if there is bill of sale or other record showing actual allowance made for article traded in or exchanged. Where purchaser of motor vehicle, trailer, boat or outboard motor receives rebate, tax computed only on portion of purchase price in excess of rebate. (RSMo 144.025).

Gasoline Tax.

See category 22 Taxation, topic 22.08 Gasoline and Special Fuels Taxes.

23.02 RAILROADS:

See category 3 Business Regulation and Commerce, topic 3.08 Carriers.

23.02A COMMERCIAL CODE FORMS:

See also categories 3 Business Regulation and Commerce, topic Commercial Code; Mortgages, topic Chattel Mortgages. Uniform forms adopted.

1

MONTANA LAW DIGEST

—Scope —

Revised for 2010 edition by

CROWLEY FLECK PLLP, of Billings, Helena, Kalispell, Bozeman and Missoula, MT and Bismarck and Williston, ND.

(Unless otherwise indicated, citations refer to sections of Montana Code Annotated. See category 6 Courts and Legislature, topic Statutes herein. "M.R.Evid." indicates Montana Rules of Evidence; "A.R.M." indicates Administrative Rules of Montana; "Mont.R.Civ.P." indicates Montana Rules of Civil Procedure. Parallel citations to the Pacific Reporter begin with 4 Mont.)

Note: All legislation through end of May 2009 session of Legislature has been reviewed in preparation of this annual revision. Legislature meets each odd-numbered year for not more than 90 legislative days.

1 INTRODUCTION

1.01 GOVERNMENT AND LEGAL SYSTEM:

The State of Montana is a constituent state of the United States of America. For further discussion of the U.S. federal system, see Introduction to the Federal Government of the United States at the beginning of this volume. A great many laws are promulgated by the federal government of the United States and are not reflected in the topics below. See the Introduction to this volume for references to the federal law topics covered.

Like all but one of the United States, Montana has a common law legal system, with roots in English common law. For information on the courts and legislature of Montana, see category 6 Courts and Legislature.

1.02 [RESERVED]

1.03 HOLIDAYS:

Legal holidays are: Sundays; Jan. 1; President's Day (3d Mon. in Feb.); Martin Luther King Jr. day (3d Mon. in Jan.); Memorial Day (last Mon. in May); Independence Day (July 4); Labor Day (1st Mon. in Sept.); Columbus Day (2d Mon. in Oct.); Veterans' Day (Nov. 11); Thanksgiving Day (4th Thur. in Nov.); Christmas Day (Dec. 25); and state general election day. If any of above dates (except Sun.) fall on Sun., holiday is next Mon. All other days are business days. (MCA 1-1-216).

Act Due on Holiday.

Where day appointed by law or contract for performance of secular act falls on holiday or Sat., performance on next business day sufficient. (MCA 1-1-307).

Legality of Act Performed on Holiday.

Act performed or contract made on holiday valid.

1.04 OFFICE HOURS AND TIME ZONE:

Montana is in the Mountain (GMT -07:00) time zone. Office hours are generally from 8 a.m. to 5 p.m.

2 BUSINESS ORGANIZATIONS

2.01 AGENCY:

In general, common law rules apply. (MCA 28-10-101 to MCA 28-10-802). Agent is one who represents another, called principal, in dealings with third persons. That representation is called agency. (MCA 28-10-101).

No consideration is necessary to make authority binding upon principal (MCA 28-10-202), and oral authorization is sufficient except for authority to enter into contract required by law to be in writing can only be given by instrument in writing (MCA 28-10-203).

Authority expressed in general terms, however broad, does not authorize agent to act in his own name unless in usual course of business, to define scope of his agency, or to do any act which trustee is forbidden to do by Title 72, c. 34. (MCA 28-10-407).

Authority to Sell.

Authority to sell personal property includes authority to warrant title of principal and quantity and quality of property. (MCA 28-10-421). Authority to sell and convey real property includes authority to give usual covenants of warranty. (MCA 28-10-422). General agent to sell, with possession, has authority to receive purchase price. (MCA 28-10-423). Special agent to sell has authority to receive price on delivery but not afterwards. (MCA 28-10-423).

2.02 ASSOCIATIONS:

Allows any individual, partnership, limited partnership, limited liability partnership, corporation, limited liability corporation or other association to use assumed business name and provides for registration of name. (MCA 30-13-201 et seq.).

Any cooperative stock or nonprofit nonstock agricultural association existing on July 1, 1921 or organized after that date, may own and operate two or more cooperative enterprises in different parts of state. (MCA 35-16-212).

Actions.

When two or more persons, associated in any business, transact such business under a common name, whether it comprises the names of such persons or not, they may be sued by such common name, the summons being served upon one or more of them, and the judgment in such action binds the joint property of all the associates in the same manner as if they had all been named as defendants and sued upon their joint liability. (MCA 25-5-104).

Professional Associations.

See topic 2.03 Corporations, subhead Professional Corporations.

2.03 CORPORATIONS:

Note: Revised Model Business Corporation Act (hereinafter cited as Revised Act), prepared by Committee on Corporate Laws (Section of Corporation, Banking and Business Law) of American Bar Association, has been adopted, with variations, effective Jan. 1, 1992, and is known and cited as "Montana Business Corporation Act" (hereinafter cited as Act). (MCA 35-1-112 to MCA 35-1-1315). Except where otherwise indicated, all references are to sections of Act. For text of Revised Model Business Corporation Act as well as Official Comments and Reporter's Annotations, see Model Business Corporation Act Annotated (3d ed. 1994), supplemented as of 1997 or 1998. Law as digested below relates only to material variations of Montana Act from Revised Act.

General Supervision.

Secretary of State, P.O. Box 202801, Helena, Montana 59620-2801, (406)444-2034, http://sos.mt.gov/. § 1.30 of Revised Act adopted. (MCA 35-1-1307). Secretary of State may prescribe by rule standard form for materials required to be filed pursuant to Title 35. (MCA 35-1-1315).

Definitions.

§ 1.40 of Revised Act adopted. (MCA 35-1-113).

Purposes.

§ 3.01 of Revised Act adopted, with modification specifically excluding incorporation under Act for purpose of banking or insurance. (MCA 35-1-114).

Name.

§§ 4.01 through 4.03 of Revised Act adopted with modification including limited liability company and limited partnership in corporate name provisions. (MCA 35-1-308 to 311). Act also provides that name must be distinguishable from corporate name of domestic corporation that has dissolved within last 120 days and from any assumed business name, limited partnership name, limited liability company name registered with Secretary of State. (MCA 35-1-308). Corporation, limited liability company, or limited partnership may use name already used in state if other corporation, limited liability company or limited partnership is incorporated or authorized to do business in this state and if proposed user entity has (a) merged with other entity; (b) been formed by reorganization of other entity; (c) acquired all or substantially all assets of other entity; or (d) obtained written permission from other entity and has filed copy of grant of permission with Secretary of State. (MCA 35-1-308). Availability of name, which must be “distinguishable” from other names reserved or in use (MCA 35-1-308), obtainable from Secretary of State by either correspondence or unofficially by telephone, without charge.

Term of Corporate Existence.

§ 3.02 of Revised Act adopted. (MCA 35-1-115).

Incorporators.

§ 2.01 of Revised Act adopted. (MCA 35-1-215).

Articles of Incorporation.

§ 2.02 of Revised Act adopted. (MCA 35-1-216). Articles must set forth corporate name, number of authorized shares name of initial registered agent, and name and address of each incorporator. Articles must state name of commercial registered agent or if none, name and address of noncommercial registered agent under § 35-7-105.

In addition to required provisions, articles may also set forth names and addresses of initial directors, and include provisions (1) not inconsistent with law regarding purposes, management of affairs, powers of shareholders and directors, par value and imposition of personal liability on shareholders, (2) required or permitted to be set forth in bylaws, and (3) limiting directors’ personal liability to corporation. (MCA 35-1-216). Articles must be signed by presiding officer of board of directors or by president or another officer, and may be signed by incorporator if directors have not been selected or corporation has not been formed, and may, but need not, be acknowledged. (MCA 35-1-217).

Filing of Articles.

§ 1.20 of Revised Act adopted. (MCA 35-1-217). Articles must be filed on form prescribed by Secretary of State if Secretary has prescribed mandatory form by rule. (MCA 35-1-217).

Filing Fees.

§ 1.22 of Revised Act not adopted. Secretary of State shall establish fees for filing documents and issuing certificates; fees must reasonably reflect prevailing rates charged in public and private sectors for similar services and must be commensurate with overall costs of office of Secretary of State. (MCA 35-1-1206, 2-15-405). See Administrative Rules of Montana, § 44.5.114 for various filing fees.

License to Do Business.

§ 2.03 of Revised Act adopted. Corporate existence begins when articles of incorporation filed, unless delayed effective date is specified. (MCA 35-1-220).

Organization.

§ 2.05 of Revised Act adopted. Organizational meeting held at call of majority of incorporators or of initial directors, if named in articles. (MCA 35-1-222).

Paid in Capital Requirements.

No provisions with respect to amount to be paid in on incorporation or before commencing business.

Amendment of Articles.

§§ 10.01 to 10.09 of Revised Act adopted. (MCA 35-1-225 to 233).

Amendment of Bylaws.

§§ 10.20 to 10.22 of Revised Act adopted. (MCA 35-1-234, 238, 239).

Increase or Decrease of Authorized Capital Stock.

See supra, subhead Amendment of Articles.

Shares.

§ 6.01 of Revised Act adopted, except for addition of subsection (MCA 35-1-618[5]) as follows: "When authorized by its articles of incorporation to do so, a corporation may issue bonds, debentures or other obligations convertible into shares of any class in the amounts and on terms and conditions that may be provided by resolutions of the board of directors." §§ 6.02 and 6.03 of Revised Act adopted. (MCA 35-1-619, 620).

Preemptive Rights.

§ 6.30 of Revised Act adopted. Under § 6.30, preemptive rights not available unless expressly granted in articles. (MCA 35-1-535).

Stock Certificates.

§§ 6.04, 6.25 and 6.26 of Revised Act adopted. (MCA 35-1-621, 626, 627). Uncertificated shares permitted. Signatures may be facsimiles. (MCA 35-1-626). Scrip or certificates may be issued for fractional shares; if scrip, no voting rights or participation in assets or dividends unless provided therein. Scrip convertible to full shares. (MCA 35-1-621).

Issuance of Shares.

§§ 6.20 through 6.24 and 6.28 of Revised Act adopted. (MCA 35-1-622 to 625, 629, 534).

Shares Acquired by Corporation.

§§ 6.03 and 6.31 of Revised Act adopted. (MCA 35-1-620, 630). § 6.03 is intended when read with § 6.31 to abolish concept of "treasury shares." (MCA 35-1-620, 630).

Transfer of Shares.

Uniform Commercial Code adopted. (Tit. 30). See category 3 Business Regulation and Commerce, topic 3.09 Commercial Code. § 6.27 of Revised Act adopted. Certain stock transfer restrictions enforceable if restrictions noted conspicuously on certificate, or if holder has actual knowledge of restrictions. (MCA 35-1-628).

Uniform Securities Ownership by Minors Act.

Not adopted.

Uniform Simplification of Fiduciary Security Transfers Act.

Adopted (MCA 30-10-401 to 411) but repealed in 1991.

Share Transfer Tax.

None.

Shareholders.

Revised Act generally adopted. See specific subheads herein. If authorized by articles or bylaws, directors can adopt resolution to allow stockholder to certify that he holds shares for account of specified person. Specified person is then treated as owner of record of those shares. (MCA 35-1-526).

Shareholder Agreements.

Shareholders may agree to opt out of certain state law provisions set forth in statute. Agreement must be set forth in articles of incorporation or bylaws, or in separate written agreement (signed by all shareholders at time of agreement) subject to amendment only by all shareholders at time of amendment, and valid for ten years unless otherwise provided. (MCA 35-1-820).

Shareholders' Actions.

§§ 7.40 through 7.47 of Revised Act adopted (Derivative Proceedings). (MCA 35-1-541 to 548). §§ 13.01 to 13.03, 13.20 to 13.26, 13.30 and 13.31 of Revised Act adopted (Dissenters' Rights). (MCA 35-1-826 to 839).

Shareholders' Liabilities.

§ 6.22 of Revised Act adopted. (MCA 35-1-534).

Shareholders' Meetings.

§§ 7.01 to 7.07 of Revised Act adopted, except that subsection has been added to §§ 7.01 and 7.02 permitting corporations with 50 or fewer shareholders to allow participation in meetings by telephone or similar communication equipment if provided in bylaws. (MCA 35-1-516 to 522).

Shareholder Voting.

§§ 7.20 to 7.28 of Revised Act adopted with several modifications. (MCA 35-1-523 to 531). In § 7.20(d), all language after "corporation's expense" has been deleted and in its place, "and may provide recovery to a shareholder for costs, including reasonable attorneys fees," has been inserted. (MCA 35-1-523). § 7.21 has been modified to provide that shares acquired by corporation pursuant to § 35-1-630 are not entitled to vote as long as they are owned by corporation. (MCA 35-1-524). § 7.28 revised to provide mandatory right to vote cumulatively in all elections for directors unless denied by statement to that effect in articles. (MCA 35-1-531).

Proxies.

Expire in 11 months unless otherwise provided in proxy. Proxy may be appointed by signing appointment form or by electronic transmission. Proxy is revocable by shareholder unless appointment form states otherwise and appointment is coupled with one of following interests: pledgee, purchaser of shares, creditor who extends credit on consideration of proxy, employee of corporation whose employment contract requires proxy, or party to voting agreement. Proxy not revoked by death or incompetence unless written notice of death or adjudicated incompetence received before authority exercised. Irrevocable proxy becomes revocable when interest with which it is coupled is extinguished. Irrevocable proxy is revocable by purchaser who buys without notice of proxy, unless noted on certificates. Subsection (i) added to § 7.22 of Revised Act prohibits sale of vote or proxy, except as otherwise provided. (MCA 35-1-525).

Voting Trusts and Agreements.

§§ 7.30 and 7.31 of Revised Act adopted except added provision allowing for inspection of counterpart of voting trust agreement and copy of record. (MCA 35-1-532, 533).

Directors.

§§ 8.01 to 8.11 of Revised Act adopted, except specifically requires that each corporation have board of directors and except new § 8.08(c) (MCA 35-1-424[3]) as follows: "Any director or the entire board of directors may be removed only by a vote of the holders of two-thirds of the shares entitled to vote at an election of directors unless otherwise provided by the articles of incorporation or bylaws. If the shareholders have the right to cumulate their votes when electing directors and if less than the entire board is to be removed, a director may not be removed if the votes cast against the director's removal would be sufficient to elect director if cumulatively voted at an election of the entire board of directors or, if there are classes of directors, at an election of the class of directors of which the director is a part. If the corporation has fewer than 100 shareholders, the entire board of directors may be removed only by a vote of a majority of the shares then entitled to vote." (MCA 35-1-416, 419 to 427). § 8.30 of Revised Act adopted, which imposes on directors standard of good faith and ordinary care. Directors entitled to rely on reports and advice of officers, committees, counsel, accountants and other professionals reasonably believed to be competent. Director deemed not acting in good faith if director has knowledge that would cause such reliance to be unwarranted. No liability on director who meets standard. (MCA 35-1-418).

Directors' Meetings and Action.

§§ 8.20 to 8.25 of Revised Act adopted, except new § 8.20(c) (MCA 35-1-431[3]) as follows: "If requested by a director, minutes of any regular or special meeting must be prepared and be distributed to each director." (MCA 35-1-431 to 435, 439).

Liabilities of Directors.

§ 8.33 of Revised Act adopted except omitting § 8.33(c) statute of limitations period. Liability for unlawful distributions. (MCA 35-1-713).

Conflicts of Interest.

§§ 8.60 to 8.63 of Revised Act adopted. (MCA 35-1-461 to 464).

Indemnification.

§§ 8.50 to 8.58 of Revised Act adopted except eliminates definition of "officer" and "disinterested director" from definitions (MCA 35-1-451) and changes to § 8.51 on permissible indemnification (MCA 35-1-452).

Officers.

§§ 8.40 to 8.44 of Revised Act adopted with § 8.43 modified to allow removal of officer or assistant officer appointed by that officer. (MCA 35-1-444[2]).

Principal Office.

Adopted (MCA 35-1-313, 314) but repealed in 2007.

Resident Agent.

Adopted (MCA 35-1-313) but repealed in 2007.

Service of Process.

Service of process is made on domestic corporation by delivering copy of summons and complaint (1) to officer or director; (2) to registered agent; (3) if sheriff shall make return that no person upon whom service may be made can be found in county, then to person in charge of any office of corporation; or (4) if suit is against corporation whose charter or right to do business in Montana has expired or been forfeited, to any one of persons who have become trustees for corporation and its shareholders. (Rule 4D[2][e]). In case of voluntary dissolution, "trustees" for corporation and its shareholders are those persons so designated in filing made with Secretary of State, or if no filing, directors and officers listed in annual report most recently filed with Secretary of State.

General Powers of Corporations.

§ 3.02 of Revised Act enacted with modification of subsection (13) allowing donations for religious and war activities. (MCA 35-1-115).

Distributions.

§ 6.40 of Revised Act adopted with exception of § 6.40(g). No distributions in excess of amount that would render corporation insolvent or reduce assets below sum of liabilities and liquidation preferences. (MCA 35-1-712).

Unclaimed Dividends.

See category 21 Property, topic 21.01 Absentees, subhead Escheat.

Sale or Transfer of Corporate Assets.

§§ 12.01 and 12.02 of Revised Act adopted, except subsection (h) (MCA 35-1-823[8]) has been added to § 12.02, allowing majority shareholder approval, instead of two-thirds approval, if provided in initial articles, or articles amended by two-thirds vote. (MCA 35-1-822, 823). See also subhead Dissolution, infra.

Books and Records.

§§ 16.01 to 16.04 of Revised Act adopted (MCA 35-1-1106 to 1109), except for following modifications of § 16.01: Added "or a location from which the records may be recovered within two business days" after "principal office" in subsection (e); and subsection (e)(5) provides that corporation keep only copy of "the financial statements available to shareholders for the past three years under § 16.02." (MCA 35-1-1106).

Reports.

§§ 16.20 and 16.21 of Revised Act adopted. (MCA 35-1-1104, 1111). Corporation must provide any shareholder with financial statements upon written request. (MCA 35-1-1110).

Notice.

§ 1.41 of Revised Act adopted. (MCA 35-1-116).

Corporate Bonds or Mortgages.

§ 3.02 of Revised Act generally adopted. (MCA 35-1-115). See also subhead Stock Certificates, supra.

Share Exchange.

§§ 11.01 to 11.07 of Revised Act adopted (MCA 35-1-813 to 819), except subsection (e) has been modified to require two-thirds vote and subsection (j) (MCA 35-1-815[10]) has been added to § 11.03, allowing majority shareholder approval, instead of two-thirds approval, if provided in initial articles, or articles amended by two-thirds vote. (MCA 35-1-815).

Dissolution.

§§ 14.01 to 14.07 of Revised Act adopted (MCA 35-1-931 to 937), except subsection (f) has been added to § 14.02, allowing majority shareholder approval, instead of two-thirds approval, if provided in initial articles, or articles amended by two-thirds vote (MCA 35-1-932) and subsection added to § 14.03 requiring that if dissolution adopted by board of directors without shareholder action, statement to effect shareholder action was not required. §§ 14.30 to 14.33 of Revised Act adopted (MCA 35-1-938, 940 to 942). Section added allowing court in action for dissolution to make such order to grant such relief, other than dissolution as in its discretion it deems appropriate, including, without limitation, order: (1) Canceling or altering any provision contained in articles, or amendment of articles, or in bylaws; (2) canceling, altering, or enjoining any resolution or other act of corporation; (3) directing or prohibiting any act of corporation or of shareholders, directors, officers or other persons party to action; or (4) providing for purchase at fair value of shares of any shareholder, either by corporation or by other shareholders. (MCA 35-1-939). Such relief may be granted as alternative to decree of dissolution or may be granted whenever circumstances of case are such that relief, but not dissolution, would be appropriate. (MCA 35-1-939). § 14.40 of Revised Act adopted. (MCA 35-1-943). Added § 35-1-944, not derived from Revised Act, which prohibits filing or entry of decree of involuntary dissolution until after state tax clearance certificate issued by Department of Revenue has been filed with court or Secretary of State, as part of original instrument affecting dissolution. Involuntary dissolution is by order of Secretary of State for reasons stated in § 14.20 of Revised Act, plus failure to remit required fees. (MCA 35-6-101 to 103). Involuntary dissolution no longer results from corporation failing to notify Secretary of State of change in its registered office. (MCA 35-6-102).

Insolvency and Receivers.

See subhead Dissolution, supra.

Appraisal.

See subhead Dissolution, supra.

Assessment of Stock.

Generally assessment of stock not permitted, unless permitted by statute, except that water companies, water users associations, and irrigation, canal, ditch and reservoir companies may levy assessment if their articles so provide; Act sets forth detailed provisions as to time and amounts of levy if articles do not so prescribe.

Unauthorized Assumption of Corporation Powers.

§ 2.04 of Revised Act not adopted. In lieu thereof, Act provides that all persons who assume to act as corporation without authority to do so shall be jointly and severally liable for all debts and liabilities incurred. (MCA 35-1-119).

Foreign Corporations.

Revised Act generally adopted. See specific subheads in this topic. Current license fee is $70. (A.R.M. § 44.5.114).

Admission.

§ 15.01 of Revised Act adopted, except property described in subsection (2)(i) must be disposed of within five years after acquisition, must neither produce income nor be used in performance of corporate function (MCA 35-1-1026[2][i]) and corporation entering into contract, even with State, must obtain certificate of authority (MCA 35-1-1026[4]).

Effect of Certificate of Authority.

§ 15.05 of Revised Act adopted. (MCA 35-1-1030).

Name.

§ 15.06 of Revised Act adopted except added that name must also be distinguishable from corporate name of domestic corporation dissolved within last 120 days and any assumed business name, limited partnership name, limited liability company name, trademark, or service mark registered or reserved with Secretary of State. (MCA 35-1-1031[e],[f]).

Application for Certificate of Authority.

§ 15.03 of Revised Act adopted, with addition of subsection (1)(g), which requires statement of purposes of corporation which it proposes to pursue in transaction of business in Montana. (MCA 35-1-1028).

Amended Certificate of Authority.

§ 15.04 of Revised Act adopted. (MCA 35-1-1029).

Registered Office and Registered Agent.

§§ 15.07 to 15.09 of Revised Act adopted except adding to § 15.07 requirement that unless registered agent signed document making appointment, appointment of registered agent or successor agent on whom process may be served is not effective until agent delivers statement to Secretary of State accepting appointment. (MCA 35-1-1032, 1033, and 1036).

Service of Process on Foreign Corporations.

§ 15.10 of Revised Act not adopted. Act provides for such service in manner provided by Montana Rules of Civil Procedure. (MCA 35-1-1034). See category 5 Civil Actions and Procedure, topic 5.20 Process.

Withdrawal.

§ 15.20 of Revised Act adopted except: new subsection (2)(f) added requiring application to set forth that all state taxes are paid, to be supported by tax clearance certificate; and new subsection (2)(g) added requiring application to set forth additional information deemed necessary for determination and assessment of unpaid fees and taxes. (MCA 35-1-1037).

Revocation of Certificate of Authority.

§§ 15.30 to 15.32 of Revised Act adopted (MCA 35-1-1038 to 1040), except allowing 90 day grace period (MCA 35-1-1038).

Transacting Business Without Certificate of Authority.

§ 15.02 of Revised Act adopted (MCA 35-1-1027) except adding that contract between State, or agency thereof, and foreign corporation without certificate of authority is voidable by State.

Annual Report.

See subhead Reports, supra.

License Tax.

See subhead License Tax, infra.

License Fees.

Secretary of State shall establish fee for filing certificate of authority application. (MCA 35-1-1206).

Taxation of Corporate Property.

Generally, corporate property is subject to same property taxes as property of individual subject to specified rates and phasing-out of business equipment tax. See category 22 Taxation, topic 22.16 Property Taxes.

Corporate property is assessed in the county where located. (MCA 15-8-402). Property centrally assessed shall be assessed by Department of Revenue. (MCA 15-23-101 et seq.).

License Tax.

Every corporation, as defined in § 15-31-101, MCA, “engaged in business” or “doing business” in Montana must annually pay license fee for privilege of carrying on business in State. (MCA 15-31-101). License fee is computed on corporation’s total net income for taxable period. (MCA 15-31-112). Net income is defined in § 15-31-113. Tax rate is 6¾% unless taxpayer is filing water’s edge election and rate is 7%. (MCA 15-31-121). Minimum tax is $50. (MCA 15-31-121). Alternative tax is available in certain situations (MCA 15-31-122) as are certain credits (MCA 15-31-124 to 137, MCA 15-31-151 to 162). Corporation having business activity within and without state must allocate and apportion its net income. (MCA 15-31-301 to 313).

Exemption.

Certain organizations are exempt from license tax. (MCA 15-31-102). New research and development corporation exempted from corporate income taxes for its first five taxable years. (MCA 15-31-103).

Returns and Payment.

Calendar year corporation must file return and pay tax with Department of Revenue on or before May 15; fiscal year corporation must file return and pay tax on or before 15th day of fifth month following close of fiscal year. (MCA 15-31-111). Taxable period shall be same as for federal income tax purposes. Department of Revenue shall be promptly notified of any change in taxable year. (MCA 15-31-112).

Penalties.

Corporation which refuses or neglects to file a return, or files a false or fraudulent return, and may be denied right to continue business in state. (MCA 15-31-543). Delinquent corporate license tax assessed interest as provided in § 15-31-510. Officer or employee of any corporation who, without fraudulent intent, fails to make or sign any return or supply information is subject to late penalty of $50 or amount of tax due, whichever is less. (MCA 15-31-543).

Additional license taxes are imposed on specific industries. See category 22 Taxation, topic 22.12A License Taxes.

Alternate Tax.

See subhead Alternate Tax, infra.

Estimated Tax Payment.

Each corporation shall make estimated tax payments if annual estimated tax is $5,000 or more. (MCA 15-31-502). Payment schedule same as federal. Underpayment penalty is 1.2% per month, with maximum of 12% of tax due. (MCA 15-31-510, MCA 15-1-216).

Income Tax.

Corporate income tax is imposed (MCA 15-31-401 to 407) on all corporations not subject to license tax discussed supra, upon net income derived from sources within Montana. Income from sources within Montana includes income from tangible or intangible property located in or having a situs in Montana and income from and activities carried on in Montana, regardless whether carried on in intrastate or interstate or foreign commerce, but does not include interest earned on certain secured loans held by out-of-state financial institutions. (MCA 15-31-403). Tax rate is same as imposed under license tax. Other license tax provisions incorporated by reference. (MCA 15-31-406). There shall be offset against income tax equal in amount to any license tax imposed against corporation during same period. (MCA 15-31-404).

Alternate Tax.

½% of gross sales in lieu of other taxes for sales corporations not owning or renting realty or tangible personalty in Montana whose gross volume of sales does not exceed $100,000, pursuant to Art. IV, § 16 and § 17 of Multi-State Tax Compact. (MCA 15-31-122).

Limitation of Actions.

Action to enforce provisions of c. 31 of Tit. 15 must be brought within three years from date tax return was filed. (MCA 15-31-509).

Facsimile Filing.

Permitted with Secretary of State. Corporations failing to pay license tax assessed penalty of 12% unless failure due to reasonable cause; filing is date of receipt of facsimile copy.

Small Business Corporations.

Corporations doing business in Montana that have made valid election under Subchapter S of Internal Revenue Code of 1986, may elect to have earnings taxed solely through personal income tax of stockholders; changes regarding Subchapter S Corporations contained in 1976 federal Tax Reform Act incorporated. (MCA 15-30-3301 to 3321).

Domestic International Sales Corporations (DISC).

Corporations electing to be treated as DISC under federal Internal Revenue Code are exempt from corporate license tax; shareholders are taxed in same manner as under federal law. (MCA 15-31-102).

Close Corporations.

Model Statutory Close Corporation Supplement (hereinafter cited as “Model Supplement”), prepared by Committee on Corporate Laws (Section of Corporation, Banking and Business Law) of American Bar Association, supplemented through 1997, has been adopted, with variances, effective Oct. 1, 1987, and is known and cited as “Montana Close Corporation Act”. (MCA 35-9-101 to MCA 35-9-504). See 49 Mont. L. Rev. 66. Amendments of Model Supplement have been made where necessary for proper cross-reference of Model Supplement to Act.

Definition and Election.

§ 3 of Model Supplement generally adopted except that close corporation is limited to 25 or fewer shareholders rather than 50 as allowed under Model Supplement. (MCA 35-9-103). Articles of incorporation must contain statement that corporation is statutory close corporation. (MCA 35-9-103).

Existing Corporations.

§ 3 of Model Supplement generally adopted except that close corporation is limited to 25 or fewer shareholders. Existing corporation must amend articles of incorporation to include statement that corporation is statutory close corporation. Amendment must be approved by holders of at least two-thirds of votes of each class or series of shares, voting as separate groups, whether or not entitled to vote on amendments. Shareholders who voted against amendment are entitled to assert dissenters' rights pursuant to MCA 35-1-826 to MCA 35-1-839. (MCA 35-9-103).

Share Transfer Restrictions.

§§ 10 through 17 of Model Supplement adopted. (MCA 35-9-201 to 208). Statutory notice must appear on each share. (MCA 35-9-201). Share transfer restrictions include general prohibition on share transfers, subject to certain statutory exceptions, except to extent otherwise provided by articles of incorporation (MCA 35-9-202); corporate right of first refusal (MCA 35-9-203); and compulsory purchase of shares after death of shareholder (MCA 35-9-205).

Shareholder Agreements.

§ 20 of Model Supplement adopted. (MCA 35-9-301).

Board of Directors.

§ 21 of Model Supplement adopted. Close corporation may operate without board of directors if its articles of incorporation contain statement to that effect. (MCA 35-9-302).

Bylaws.

§ 22 of Model Supplement adopted. Close corporation need not adopt bylaws if provision required by law to be contained in bylaws are contained in either articles of incorporation or shareholder agreement. (MCA 35-9-303).

Annual Meeting.

§ 23 of Model Supplement adopted. (MCA 35-9-304).

Limited Liability.

§ 25 of Model Supplement adopted. Failure to observe usual corporate formalities or requirements relating to exercise of its corporate powers or management of its business and affairs is not ground for imposing personal liability on shareholders. (MCA 35-9-306).

Reorganization and Dissolution.

§§ 30 to 33 of Model Supplement adopted. (MCA 35-9-401 to 404).

Shareholder Protection.

§§ 40 to 43 of Model Supplement adopted. (MCA 35-9-501 to 504).

Limited Liability Companies.

See topic 2.06 Limited Liability Companies.

Religious Corporations.

Montana Religious Corporation Sole Act (Tit. 35, c. 3) provides special corporate form for religious denominations, societies, or churches to hold or manage their estate, properties, temporalities and business. (MCA 35-3-201). Where no specific provision applies, provisions of Non-Profit Corporation Act apply. (MCA 35-3-102).

Professional Corporations.

Model Professional Corporation Act, prepared by American Bar Association, has been adopted, with variances, effective Oct. 1, 1983, and is known and cited as “Montana Professional Corporation Act.” (Tit. 35, c. 4).

Nonprofit Corporations.

Revised Model Non-Profit Corporation Act (1987) has been adopted with variations, effective Jan. 1, 1992. (Tit. 35, c. 2).

2.04 [RESERVED]

2.05 JOINT STOCK COMPANIES:

Joint stock companies or Massachusetts trusts may be formed for any lawful purpose.

Taxation.

Such associations are taxed as corporations. (MCA 15-31-101).

Qualification to do business in state, in same manner as foreign corporation, required of foreign joint stock company.

Actions.

Any association may be sued in its common name, summons being served on one or more of the associates. (MCA 25-5-104).

Professional Associations (or Corporations).

See topic 2.03 Corporations, subhead Professional Corporations.

2.06 LIMITED LIABILITY COMPANIES

Purposes.

May be formed for any lawful purpose, except for purposes of banking or insurance. (MCA 35-8-106).

Powers enumerated in MCA 35-8-107 and are as follows: (i) Sue, be sued, complain, and defend in all courts; (ii) transact business, carry on operations, and have and exercise powers granted by this section; (iii) make contracts and guarantees, incur liabilities, and borrow money; (iv) sell, lease, exchange, transfer, convey, mortgage, pledge, and otherwise dispose of its assets; (v) acquire by purchase or any other manner, take, receive, own, hold, improve, or otherwise deal with any interest in real or personal property, wherever located; (vi) issue notes, bonds, and other obligations and secure them by mortgage, deed of trust, or security interest of its assets; (vii) purchase, take, receive, subscribe for, or otherwise acquire, own, hold, vote, use, employ, sell, mortgage, loan, pledge, or otherwise dispose of and use and deal with stock or other interests and obligations of corporations, associations, partnerships, limited liability companies, business trusts and individuals; (viii) invest surplus funds, lend money in any manner that may be appropriate to enable it to carry on operations or fulfill purposes set forth in its articles of organization, and take and hold real and personal property as security for payment of funds loaned or invested; (ix) elect or appoint agents and define their duties and fix their compensation; (x) sell, convey, mortgage, pledge, lease, exchange, transfer, or otherwise dispose of all or any part of its property or assets; (xi) be promoter, stockholder, partner, member, associate, or agent of any corporation, partnership, limited liability company, joint venture, trust, or other enterprise; (xii) indemnify and hold harmless any member, agent, or employee from and against any claims and demands whatsoever, except in case of action or failure to act by member, agent, or employee that constitutes willful conduct or recklessness, and subject to standards and restrictions, if any, set forth in articles of organization or operating agreement; (xiii) cease its activities and dissolve; (xiv) pay pensions and establish pension plans, pension trusts, profit sharing plans, share bonus plans, share option plans and benefit or incentive plans for any of its current or former directors, officers, employees, or agents; (xv) make donations for public welfare or for charitable, religious, scientific, or educational purposes and, in time of war, make donations aiding war activities; and (xvi) do every other act not inconsistent with law that is appropriate to promote and further business and affairs of limited liability company.

Articles of Organization.

Original filed with Secretary of State. Filing must include appropriate filing fees. (MCA 35-8-205).

Content of articles of organization prescribed by MCA 35-8-202 and includes name; duration if company is term company; address of principal place of business and registered agent; form of management and description; if management by members, names and addresses of initial members; if manager, name and address of initial manager; whether one or more members of company are to be liable for debts and obligations of company; if professional limited liability company, type of services offered; and other provisions members elect to set out. It is not necessary to set out in articles any powers enumerated in act under MCA 35-8-107. (MCA 35-8-202[2]). Articles of organization may be amended by filing articles of amendment with Secretary of State. Articles of amendment must set forth name of LLC, date articles were filed, and amendments. (MCA 35-8-203).

License Fee.

In addition to fees for filing, copying, and services as set by Secretary of State (MCA 35-8-211), fee is due at time of filing articles of organization and upon application for certificate of authority to transact business in Montana (MCA 35-8-212).

Certificate of Authority.

Foreign limited liability companies may not transact business in Montana until certificate of authority is obtained from Secretary of State. (MCA 35-8-1001[1]). Following do not constitute transacting business: (i) Maintaining, defending, or settling any proceedings; (ii) holding meetings or other internal affairs activities; (iii) maintaining bank accounts; (iv) maintaining offices or agencies for exchange or registration of company’s own securities; (v) selling through independent contractors; (vi) soliciting or obtaining orders, whether by mail or through employees or agents or otherwise, if orders require acceptance outside Montana before they become contracts; (vii) creating or acquiring indebtedness, mortgages, and security interests in real or personal property; (viii) securing or collecting debts or enforcing mortgages and security interests in property securing debts; (ix) owning real or personal property that is acquired incident to activities described in subsection viii if property is disposed of within five years after date of acquisition, does not produce income, or is not used in performance of function of limited liability company; (x) conducting isolated transaction that is completed within 30 days and is not transaction in course of repeated transactions of similar nature; or (xi) transacting business in interstate commerce. (MCA 35-8-1001[2]). Entering into contract with State of Montana or agency or political subdivision of State is considered transacting business. (MCA 35-8-1001[4]).

Annual report must be filed pursuant to MCA 35-8-208. Report must be filed between Jan. 1 and Apr. 15. (MCA 35-8-208).

Contributions to capital may be contributed by members in form of tangible or intangible property or other benefit to company, including money, promissory notes, services performed or other agreements to contribute cash or property or contracts for services to be performed. (MCA 35-8-501). Members are liable to LLC for written promises to contribute. (MCA 35-8-502).

Profits, losses and distributions are shared equally, based upon proportion of each member's interest, unless otherwise expressed in articles of organization or operating agreement. (MCA 35-8-503 and 601). Each member must also be repaid that member's capital contribution. (MCA 35-8-503).

Transfer of Interest.

Member is not co-owner of and has no transferable interests in property of limited liability company. Distributional interest in limited liability company is personal property and may, subject to MCA 35-8-707, be transferred in whole or in part. Operating agreement may provide that distributional interest may be evidenced by certificate of interest issued by limited liability company and, subject to MCA 35-8-707, may also provide for transfer of any interest represented by certificate. (MCA 35-8-703).

Transfer of distributional interest does not entitle transferee to become or to exercise any rights of member and transfer entitles transferee to receive to extent transferred only distributions to which transferor would be entitled. (MCA 35-8-707([1]).

Transferee of distributional interest may become member of limited liability company to extent transferor gives transferee right in accordance with authority described in operating agreement or all other members' consent. Transferee has same rights and powers and is subject to same restrictions and liabilities to extent transferred and remains liable for transferor member's obligations to make contributions and for obligations to return unlawful distributions but is not obligated for transferor member's liabilities unknown to transferee at time transferee becomes member. (MCA 35-8-707[2] to 707[3]). Whether or not transferee becomes member, transferor not released from liability to LLC or under statutory provisions. (MCA 35-8-707[4]).

Liability.

Unless responsible under MCA 39-51-1105 or articles of organization specify that certain members are liable for all or specified debts or obligations and that member named as liable has consented in writing to adoption of such provision in articles of organization, and as provided in MCA 39-51-1105, no person is liable solely by reason of being member or manager, or both, under judgment, decree or court order, or in any other manner, for debt, obligation, or liability of limited liability company, whether arising in contract, tort, or otherwise, or for acts or omissions of any other member, manager, agent, or employee of limited liability company. Failure of limited liability company to observe usual company formalities or requirements relating to exercise of its company powers or management of its business is not ground for imposing personal liability. (MCA 35-8-304).

Events of Disassociation.

Member is dissociated upon occurrence of one of following events: (i) Company receives notice of member's express will to withdraw; (ii) event agreed to in operating agreement as causing member's dissociation; (iii) member transfers all of member's distributional interest; (iv) member's expulsion by unanimous vote of company if (a) it is unlawful to continue business with member, (b) there has been transfer of substantially all of member's distributional interest, (c) within 90 days after company notifies corporate member that it will be expelled because it has filed certificate of dissolution, company's charter is revoked, its right to conduct business has been suspended by jurisdiction of its incorporation, member fails to obtain revocation of certificate of dissolution or reinstatement of its charter or its right to conduct business or (d) partnership or limited liability company has been dissolved and its business wound up; (v) member's expulsion by judicial determination because of member's wrongful conduct, willful or persistent material breaches of operating agreement or duties owed to company or engaging in conduct which makes it not reasonably practical to continue doing business with member; (vi) member's expulsion pursuant to operating agreement; (vii) member's becoming debtor in bankruptcy, executing assignment for benefit of creditors, seeking or consenting to appointment of trustee, receiver or liquidation of all or substantial portion of member's property or failing, after appointment, to have vacated or stayed appointment of trustee, receiver or liquidator; (viii) individual member's death, appointment of guardian or conservator for individual member or judicial determination that individual member lacks capacity to perform duties described in operating agreement; (ix) in case of member that is trust, distribution of trust's entire right to receive distributions from company; (x) in case of member that is estate, distribution of estate's entire right to receive distributions from company; or (xi) termination of existence of member if member is not individual, estate or trust other than business trust. (MCA 35-8-803).

Dissolution.

Limited liability company is dissolved upon: (i) Occurrence of events or duration of time specified in articles of organization or operating agreement; (ii) written consent of number or percentage of members specified in operating agreement; (iii) occurrence of event which makes it unlawful to continue business of company and illegality cannot be cured within 90 days of occurrence; (iv) expiration of term specified in articles of organization; or (v) decree of judicial dissolution. (MCA 35-8-901). Secretary of State may involuntarily administratively dissolve company pursuant to MCA 35-8-209.

Facsimile filing with Secretary of State is permitted. Date of filing is date of receipt of facsimile copy. (MCA 35-8-207).

2.06A LIMITED PARTNERSHIPS:

Revised Uniform Limited Partnership Act (1976) with 1985 Amendments generally adopted (MCA 35-12-501 to 1404).

Name.

Must contain words "limited partnership", abbreviation "l.p." or designation "lp;" may not contain business name identifiers (MCA 30-13-201), named of limited partner unless certain requisites met, other language that states or implies anything other than limited partnership, and must be distinguishable from other entities (MCA 35-12-505).

Certificate.

Must set forth name, address, name and address of agent for service, and name and address of each general partner. (MCA 35-12-601). Certificate of limited partnership and certificates of amendment, restatement or cancellation must be delivered to Secretary of State. (MCA 35-12-606).

Term of Certification.

Certification of limited partnership effective for five years from date of filing or renewal of certification. Certification cancelled by Secretary of State if application for renewal not filed within 90 day period prior to expiration date of certification. (MCA 35-12-610).

Renewal of Certification.

Certification may be renewed for additional five year terms. (MCA 35-12-610). Application for renewal of certification follows same requirements as original certificate set forth in MCA 35-12-601. (MCA 35-12-611).

Facsimile filing with Secretary of State is permitted. Date of filing is date of receipt of facsimile copy. (MCA 35-12-615).

Withdrawal of Limited Partner.

If partnership agreement does not specify time or events on happening of which limited partner may withdraw, limited partner may not withdraw prior to time of dissolution and winding up of limited partnership. (MCA 35-12-1003).

2.07 [RESERVED]

2.08 PARTNERSHIPS:

Revised Uniform Partnership Act adopted. (MCA 35-10-101 to 644).

Name.

Partnership may use assumed business name. (MCA 30-13-201). Must file application with Secretary of State, who registers name unless name is same as or not distinguishable to name already registered. (MCA 30-13-202 and MCA 30-13-203). If authorized agent has not commenced business, may file application with Secretary of State, who reserves name for 120 days. (MCA 30-13-211). Registration is effective for five years from date of registration; can be renewed for additional five year terms upon application. (MCA 30-13-206). Filing fees are established and collected by Secretary of State. (MCA 30-13-217).

Limited Liability Partnership.

Partnerships permitted to register with Secretary of State to become limited liability partnerships. (MCA 35-10-701 to MCA 35-10-710).

Facsimile filing with Secretary of State is permitted. Date of filing is date of receipt of facsimile copy. (MCA 35-10-112).

3 BUSINESS REGULATION AND COMMERCE

3.01 BANKS AND BANKING:

Regulated by MCA 32-1-101 to 1007. Uniform Commercial Code adopted. (Tit. 30). See topic 3.09 Commercial Code.

Supervision.

Department of Administration is statutorily required to exercise constant supervision over books and affairs of all banks doing business within state. Department of Administration is required to examine, at least once every 24 months, each bank or trust company and verify assets and liabilities as well as investigate character and value of assets to ascertain with reasonable certainty that values are correctly carried on books. Authorized examination by regulatory or insuring agency of U.S. may be accepted as examination of bank. (MCA 32-1-211).

Stockholders’ Liability.

Stockholders of bank that is member of federal deposit insurance corporation are not liable for debts of bank. (MCA 32-1-552).

Deposits.

Uniform Commercial Code adopted. (Tit. 30). See topic 3.09 Commercial Code.

Unclaimed Deposits.

Uniform Unclaimed Property Act adopted. (MCA 70-9-801). Bank accounts presumed abandoned after five years no activity. (MCA 70-9-803). See category 21 Property, topic 21.01 Absentees, subhead Escheat.

Statements to depositors are not required by statute. There is no time limitation on actions brought to recover money or other property deposited except: Any action to question or set aside any stated or settled account must be brought within five years, and any action arising out of payment of forged or altered checks or note must be brought within three years from date of notification to depositor of payment or received check or note marked “paid”. (MCA 27-2-213).

Lien of bank is a general one, dependent on possession, on all property in its hands for balance due from bank’s customer in course of business. (MCA 71-3-1502).

Collections.

Uniform Commercial Code adopted. (Tit. 30). See topic 3.09 Commercial Code.

Bad Checks.

See topic 3.02 Bills and Notes.

Loans to a person, corporation or partnership, including loans to partnership and to members of partnership, may not exceed 20% of unimpaired capital and surplus. This limitation does not apply to certain loans, obligations or extensions of credit secured by obligations of U.S. having current market value of 100% of amount loaned; or secured or covered by guaranties, or by commitments or agreements to take over or to purchase them made by federal reserve bank or by U.S., certain political subdivisions of U.S., and other enumerated entities of U.S., exclusive of certain secured or guaranteed loans. In addition, limitation is not applicable to loans between banks when term of loan does not exceed two business days, loan is secured by pledged deposits in lending bank, or when loan is covered by guarantee or by commitments or agreements to take over or purchase loan made by agency or board of state of Montana authorized by law to provide such guarantees, commitments or agreements. State-chartered banks may apply for exemption from limitations, which exemption is irrevocable for two years. (MCA 32-1-432).

Interest.

See topic 3.17 Interest.

Private banks other than student financial institutions, are subject to Bank Act. (MCA 32-1-102).

Tax.

National and state banks are subject to corporation license tax. (MCA 15-31-101). See category 2 Business Organizations, topic 2.03 Corporations, subhead License Tax.

Trust companies may be formed to receive money, perform trust duties, act as trustee and transfer property and buy and sell certain investments. (MCA 32-1-107).

Branch Banks.

Bank may establish and maintain branch bank at any place inside or outside of Montana, with prior approval of Department of Administration. Branch banks may, but are not required to, offer all services offered by bank. (MCA 32-1-372).

Merger and Consolidation.

Any two or more banks doing business within state may, with approval of Department of Administration, consolidate or merge into one bank. (MCA 32-1-371).

Uniform Common Trust Act adopted. (MCA 32-1-701 to 708). Montana Addition to § 1 of Act. Bank or trust company qualified to act as fiduciary in this state, which is not member of federal reserve system, shall, in operation of common trust fund, comply with rules adopted by department of business regulation, and department may adopt rules it considers necessary and proper in premises.

Subsidiary trust companies permitted if affiliated with commercial bank. (MCA 32-1-801 to 808).

3.02 BILLS AND NOTES:

Uniform Commercial Code adopted. (Tit. 30). See topic 3.09 Commercial Code.

Special Requirements.

There are no special requirements as to recitals in notes of particular kinds or based on particular considerations.

Judgment notes are not recognized. Provisions in contracts allowing another party to enter judgment by confession, or provisions in contracts appointing agent to confess judgment, accept service of process, or consent to entry of default are illegal and void. (MCA 28-2-709).

Attorney fee clauses are enforceable. For contracts entered into after July 1, 1971, where one party has express right to recover attorney fees in event he prevails in action on contract, all parties thereto shall be deemed to have same right, and any party prevailing can recover his attorney fees from losing party. (MCA 28-3-704).

Bad Checks-Civil Remedy.

Payee may bring civil action against issuer of check dishonored for lack of funds or because issuer has no account with drawee. Payee must, however, make written demand for payment at least ten days before suit. Damages awarded must be amount equal to service charge (not greater than $30) plus greater of $100 or three times amount of check, but in no case may damages exceed value of check by more than $500. Statute of limitations is six years from date of demand. (MCA 27-1-717).

3.03 BILLS OF LADING:

See topic 3.08 Carriers.

3.04 BILLS OF SALE:

See topic 3.23 Sales.

3.05 BLUE SKY LAW:

See topic 3.24 Securities.

3.06 BROKERS:

Uniform Commercial Code adopted. (Tit. 30). See topic 3.09 Commercial Code.

Real Estate Brokers.

Regulated by MCA 37-51-102 to 401. License required. (MCA 37-51-301). Disclosure of agency relationships required. (MCA 37-51-314).

3.07 BULK SALES:

Uniform Commercial Code adopted (sale of goods). (Tit. 30). See topic 3.09 Commercial Code.

3.08 CARRIERS:

Uniform Commercial Code adopted. (Tit. 30). See topic 3.09 Commercial Code.

Public Service Commission has power to supervise and regulate carriers in so far as they are subject to state law. (MCA 69-1-102).

Duties.

Carrier of persons for pay must use utmost care and diligence and must exercise reasonable degree of skill. Carrier of property for pay must at least use ordinary care and diligence in performance of all his duties. Carrier of messages for pay must use greater care and diligence. (MCA 69-11-107). Carrier in sense is employee of both consignor and consignee, and as such he must comply with their directions. When these directions conflict, carrier must comply with those of consignor, except as to delivery of freight, as to which he must comply with directions of consignee, unless consignor has forbidden carrier to receive any directions from consignee not in accordance with his own. (MCA 69-11-402).

Delivery of Goods.

The carrier must deliver the property to the consignee as addressed in accordance with custom of place. If there is no usage to contrary, it must be delivered, in case of railway, at station nearest place to which it is addressed. In case of water carrier it may be delivered at wharf or suitable landing within reasonable distance of place to which it is addressed. In other cases it must be delivered to consignee or agent, personally, if either, after due diligence, can be found. If carrier is unable to make personal delivery of freight, he must give due notice to consignee, and keep same in safety, upon his responsibility as warehouseman until consignee has had reasonable time to remove it. If then it is not removed, carrier may place himself from responsibility by placing property in suitable place and notifying consignee. (MCA 69-11-404 - 405).

Consignee is liable for freightage if he accepts the property with notice from consignor that consignee is to pay it. (MCA 69-11-406).

Limiting Liability.

Generally, the obligations of a carrier can be limited by special contract, but liability for gross negligence, fraud or willful wrong cannot be limited (MCA 69-11-105) nor can it limit its liability for delay resulting from negligence (28 Mont. 297, 72 P. 642).

Bills of Lading.

Uniform Commercial Code adopted. (Tit. 30). See topic 3.09 Commercial Code.

Liens.

Uniform Commercial Code adopted. (Tit. 30). See topic 3.09 Commercial Code. Liens also exist on passenger’s baggage for fare. (MCA 69-11-206).

Motor Vehicle Carriers.

See category 23 Transportation, topic 23.01 Motor Vehicles.

3.09 COMMERCIAL CODE:

Uniform Commercial Code adopted. (Tit. 30). Section numbers of Montana Code correspond with those of 1962 Official Text, except that prefix "30" is added. Thus 3-501 of 1962 official text of Art. 1 corresponds with MCA 30-3-501 of Montana Act. Revised Art. 9 (1999) adopted, effective July 1, 2001. Section numbers of Art. 9 of Montana Commercial Code correspond with those of 1999 official text, except that "A" is added after title number and outlining scheme is changed from Uniform Commercial Code scheme of §(a)(1)(A)(i) to Montana Code Annotated scheme of §(1)(a)(i)(A). For example, 9-102(a)(63)(D) of 1999 Official Text corresponds with 30-9A-102(1)(kkk)(iv).

Variations appear in the following sections (Tit. 30 omitted before section numbers):

1-101—adds subsection (2) defining "code" as "Uniform Commercial Code."

1-201(2)(jj)—adds language as to whether transaction creates security interest.

2-207(2)—adds words "or different" after word "additional."

2-316(3)(d)—livestock exempt from implied warranties. No implied warranty that agricultural seed is disease free.

2-328—omitted. Codified as 11-502.

2-403(1)(d)—substitutes "theft" for "larcenous."

2-403(3)—substitutes "has been such as to constitute theft" for "have been such as to be larcenous."

2-702—1966 Official Amendment has been enacted.

2-711(2)(b)—substitutes "recover the goods" for "replevy the goods."

2-716(3)—substitutes "a right to maintain an action for the recovery of goods" for "a right of replevin for goods."

2A-103(1)(e)—inserts "$25,000."

2A-216—adopts Alternative A.

2A-507—in subsection (1), substitutes "at the time of the default" for "at the times specified in Sections 2A-519 and 2A-528."

Art. 6—repealed 1991.

7-204—omits subsection 4.

7-209—1966 Official Amendment not enacted.

Article 11 not enacted.

In addition, the following options in the 1962 Official Text and Permanent Editorial Board's 1966 Recommendations for Optional Amendment have been exercised:

1-209—1966 Official Optional Amendment enacted.

2-318—1966 Official Optional Amendment not enacted.

4-106—optional language omitted.

4-202(1)(b)—optional clause adopted.

4-212—optional subsection (2) adopted.

5-112(1)—optional clause omitted (repealed 1997).

5-114—optional subsections (4) and (5) omitted (repealed 1997).

7-204—subsection (4) omitted.

7-403—optional clause omitted.

1972 Official Amendments.

Adopted in 1983, as follows:

1-105

1-201

2-107

5-116 (repealed 1997)

1973 Official Amendments.

Adopted 1973.

1977 Official Amendments.

Adopted 1983, as follows:

1-201

5-114 (repealed 1997)

8-102 through 8-108 (repealed 1997)

8-201 through 8-208 (repealed 1997)

8-301 through 8-321 (repealed 1997)

8-401 through 8-408 (repealed 1997)

1990 Revised Article 3.

Adopted 1991, with variations to following Sections:

3-102

3-103

3-104

3-105

3-106

3-108

3-110

3-118

3-201

3-204

3-206

3-207

3-303

3-307

3-309

3-310

3-311

3-312—omitted.

3-404

3-405

3-406

3-407

3-412

3-413

3-414

3-415

3-416

3-417

3-418

3-419

3-420

3-501

3-502

3-504

3-603

3-605

1990 Amended Article 4.

Adopted 1991, with variations to following Sections:

4-102

4-104

4-106

4-110

4-202

4-205

4-209

4-212

4-215

4-216

4-301

4-302

4-303

4-401

4-403

4-406

Article 4A.

Adopted 1991, with variations to following Sections:

4A-205

4A-403

1995 Revised Article 5.

Adopted 1991, with variations to following Sections:

5-131

5-135

5-136

1994 Revised Article 8.

Adopted 1997, with variations to following Section:

8-603—omitted.

1994 Amendments to Article 9.

Art. 9 amended to conform to Revised Art. 8.

1995 Amendments to Article 9.

Art. 9 amended to conform to Revised Art. 5.

2000 Amendments to Article 9.

Montana Legislature adopted Revised Art. 9 (1999) and amendments conforming other sections of Code to Montana Revised Art. 9 (2000) (except adopted in part conforming amendments to MCA 2-210, 2-502, 2-716, 2A-309, 8-110 and 8-510, and did not adopt 5-118, 6-102 or 6-103), *effective July 1, 2001,* with following material variations:

9-102—adopted with minor variations.

9-311—filing of financing statement not necessary or effective to perfect security interest in property subject to certificate of ownership provisions of Title 23 or 61.

9-316—security interest perfected in another jurisdiction remains effective for one year after debtor becomes bound under 9-203(d).

9-326—omits second sentence of subsection 2.

9-501—financing statements other than for as-extracted collateral, for timber to be cut, or for fixtures to be filed in office of secretary of state.

9-512—adopts Alternative B of Subsection (a). Amendment to financing statement must identify debtor and creditor, but not time that initial financing statement was filed.

9-518—adopts Alternative B of Subsection (b).

9-519—adopts Alternative B of Subsection (f).

9-521—filing office may not refuse to accept written initial financing statement or other written record in model form adopted by secretary of state except for reason set forth in 9-522 or 9-536(b).

9-522—adopts Alternative B of Subsection (a).

9-525—adopts Alternative A of Subsection (c). Fees established by rule.

9-622—subordinate interest terminated by secured party's acceptance of collateral in satisfaction of obligation, but any person to which secured party failed to send required proposal has remedy provided by 9-625(b).

9-705—omits Subsection (e). Provides that "(4) A continuation statement filed after [this act] takes effect and in accordance with the law of the jurisdiction governing perfection as provided in [sections 20 through 61] is effective to continue the effectiveness of a financing statement filed in that jurisdiction before [this act] takes effect. (5) [This act] does not render ineffective an effective financing statement that was filed before [this act] takes effect and in the office specified in [former MCA 30-9-401]. However, except as otherwise provided in subsection (6): (a) the financing statement ceases to be effective at the earlier of: (i) the time the financing statement would have ceased to be effective under [former chapter 9]; or (ii) 5 years after [this act] takes effect; and (b) a continuation statement filed after [this act] takes effect does not continue the effectiveness of the financing statement. (6) A continuation statement filed after [this act] takes effect and in the office specified in [section 71] is effective to continue the effectiveness of the financing statement."

9-706—omits Subsection (b).

9-708—for purposes of 9-322(a), priority of security interest that becomes effective under § 9-706 dates from time requirements for perfection are satisfied.

2001 Amendments to Article 1.

Montana Legislature adopted UCC Revised Art. 1 (2001) (enacted 2005) and amendments to conform to other sections of Code to Revised Art. 1 (2001), effective Oct. 1, 2005, with following material variations:

1-301—omits Subsections (a), (b), (e) and (f). Adopted Subsection (c) with variations providing: "(1) Except as otherwise provided in this section, when a transaction bears a reasonable relation to this state and also to another state or nation, the parties may agree that the law either of this state or of the other state or nation shall govern their rights and duties. (2) In the absence of an agreement effective under subsection (1) and except as provided in subsection (3), this code applies to transactions bearing an appropriate relation to this state."

2003 Amendments to Article 7.

Montana Legislature adopted UCC Revised Art. 7 (2003) (enacted 2005) and amendments to conform to other sections of Code to UCC Revised Art. 7 (2003), effective Oct. 1, 2005, with following material variations:

7-204—omits subsection (d). 7-701—omitted. 7-702—omitted. 7-703—omitted. 7-704—omitted.

2005 Amendments to Article 1.

Montana Legislature adopted UCC Revised Art. 1 (2001) (enacted 2005) with following substantive changes:

1-101—adopts subsection (4) stating that substantive rules in Art. 1 apply only to transactions within scope of other Articles (Tit. 30, cc. 2 through 5, 7, 8, and 9A).

1-201—substitutes subsection (u) definition of "good faith" with "except as otherwise provided in chapter 5, means honesty in fact and the observance of reasonable commercial standards of fair dealing, honesty in fact in the conduct or transaction concerned."

1-301—adopts subsection (2) providing: "In the absence of an agreement effective under subsection (1) and except as provided in subsection (3), this code applies to transactions bearing an appropriate relation to this state.” Adopts subsection (3) providing: “If one of the following provisions of this code specifies the applicable law, that provision governs and a contrary agreement is effective only to extent permitted by law so specified: (a) Section MCA 30-2-402; (b) Sections 30-2A-105 and 30-2A-106; (c) Section MCA 30-4-102; (d) Section 30-4A-507; (e) Section MCA 30-5-136; (f) Section MCA 30-8-120, and (g) Sections 30-9A-301 through 30-9A-307.”

2005 Amendments to Article 17.

Montana Legislature adopted Art. 17.

17-101—Montana Legislature adopted section governing “Electronic directory of Montana products.”

17-102—Montana Legislature adopted section governing conduct of public officers and employees with respect to electronic directory provided for in MCA 30-17-101.

2007 Amendments to Article 9A.

9A-420—amended to provide that in case of fraudulent lien, notice must be given to secured party and debtor and both must have opportunity to respond.

2007 Amendments to Article 14.

Montana Legislature adopted Revised Art. 14 (enacted 2007).

14-1301 through 14-1304—enacted to provide requirements for service contracts as part of certain business arrangements and requiring insurance of service contract.

14-1712 through 14-1713—enacted to make “phishing” crime of identity theft.

14-1726 through 14-1736—enacted to provide identity theft protection by allowing consumers to limit access to their own credit reports; requiring implementation procedures for consumer reporting agencies; providing for temporary lifting of security freezes; requiring notices to consumers about option for security freeze.

14-2501 through 14-2503—enacted to prohibit certain unfair practices by motorsports vehicle manufacturers, revised in 2009.

Filing and Certification.

Montana Secretary of State announces following policy on fees, requests for certificates of information and copies:

Presentation for Filing.

Instruments must be properly completed, executed, and accompanied by precise fee. Noncomplying instruments will be returned with fee and notice of defect. Multiple instruments covered by single check for all fees will be returned if any one defective. No instrument or fee will be held in suspense file. No overpayment will be returned.

Filing fees are $7 per financing statement. Continuations and amendments are $5. No fee for termination.

Certificates of Information.

Each request for certificate of information on record must concern specifically identified debtor, request summary of all effective financing and assignment statements on file as of specific date and hour, and be accompanied by precise fee. Certificate of information on record will show all instruments on file, name and address of each secured party, and filing date and hour for each instrument.

Secretary of State treats facsimile copy of document and signatures in same manner as original. If all other requirements are met, date of filing relates back to date of receipt of facsimile copy.

Financing Statement.

See category 20 Mortgages, topic 20.01 Chattel Mortgages.

Leases.

Covered by Uniform Commercial Code—Leases. Parties are limited on ability to choose applicable law in consumer lease transactions. If jurisdiction chosen is different than where lessee resides at time lease agreement becomes enforceable or within 30 days thereafter, choice is void. (30-2A-106). Lease contract is not enforceable unless total payments are less than $1,000 or lease is in writing, signed by party against whom enforcement is sought or by that party's authorized agent, sufficient to show lease has been made, term, and goods leased. (30-2A-201). Agreement modifying lease needs no consideration to be binding. (30-2A-208). Express warranties may be created by lease. Such warranties extend to any natural person who is in family or household of lessee or who is guest in lessee's home, if it is reasonable to expect that such person may use, consume, or be affected by goods and who is injured by breach of warranty. (30-2A-216). Except in case of finance lease, risk of loss is retained by lessor. (30-2A-219). Perfected interest of lessor of fixtures has priority over conflicting interest of encumbrancer or owner of real estate if lease is purchase money lease and fixture filing is made within ten days or interest of lessor is perfected before interest of encumbrancer. (30-2A-309). Action for default under lease contract must be commenced within four years after cause of action accrued. (30-2A-506).

See also topics: Banks and Banking, Bills and Notes, Brokers, Carriers, Contracts, Factors, Frauds, Statute of, Sales, Securities, Warehousemen; categories Business Organizations, topic Corporations; Civil Actions and Procedure, topic Limitation of Actions; Debtor and Creditor, topics Assignments, Fraudulent Sales and Conveyances, Liens, Pledges; Documents and Records, topics Records, Seals; Mortgages, topic Chattel Mortgages; Transportation, topic Motor Vehicles.

3.10 CONDITIONAL SALES:

See topic 3.23 Sales.

3.11 CONSIGNMENTS:

See topics 3.09 Commercial Code, 3.14 Factors.

3.12 CONSUMER PROTECTION:

See topics 3.19 Interest, 3.23 Sales.

Product Safety.

Comprehensive legislation designed to prevent sale or transfer of hazardous substances, including children's toys or articles. (MCA 50-30-101 to 307). Dept. of Public Health and Human Services charged with enforcement. Introduction or delivery for introduction of any misbranded or banned hazardous substance, or alteration or mutilation of any label on hazardous substance is prohibited. (MCA 50-30-301).

Montana Unfair Trade Practices and Consumer Protection Act of 1973 proscribes unfair methods of competition and unfair or deceptive acts or practices in conduct of any trade or commerce. (MCA 30-14-101 to 225).

Personal Solicitation Sale Transaction.

Cooling-off period of three days provided to buyer of more than $25, except sale: (1) In which buyer is personally familiar with seller, (2) in which buyer initiated contact with seller, (3) of newspaper subscription by minor, (4) sale of insurance policy, or (5) attempted sale of more than $5,000 of personal, family or household goods or services. Seller must provide return-addressed cancellation. In event seller fails to return purchase price, buyer has right of action for price plus $500 and attorney's fees. Buyer has lien on goods. Buyer must tender goods in substantially same condition. (MCA 30-14-501 - 508).

Consumer reporting agencies, defined as those who, for fee, assemble or evaluate credit information on consumers for reporting to third persons, are regulated by MCA 31-3-101 to - 153.

"Unsolicited goods" statute provides that, unless otherwise agreed, unsolicited goods delivered to person are considered gifts. (MCA 70-3-104).

Plain Language.

Minimum language simplification standards are specified for insurance policies. (MCA 33-15-325). Consumer contracts must be written in language with common everyday meanings, appropriately divided and captioned, with readable type size using ink which contrasts with paper. These requirements do not apply to consumer contracts for value exceeding $50,000, consumer contracts for securities or commodities, insurance policy contracts, contracts when government agency is acting as seller, lessor or lender, contracts for public utility service, and contracts for transfer of real estate. (MCA 30-14-1101 - 1113).

Motor Vehicle Warranty Remedy.

Consumer who notified manufacturer or its agent during warranty period that new motor vehicle does not conform to express warranties may expect warrantor to be liable for repairs or expenses of repairs regardless of expiration of warranty period after notification by consumer. (MCA 61-4-502). Arbitration procedure provided by Department of Justice for consumer and manufacturer to resolve disputes over warranties. (MCA 61-4-515).

3.13 CONTRACTS:

Uniform Commercial Code adopted. (Tit. 30). See topic 3.09 Commercial Code; categories 10 Documents and Records, topic Seals; Family, topic Infants.

Good Faith and Fair Dealing.

Conduct required by implied covenant of good faith and fair dealing is honesty in fact and observance of reasonable commercial standards of fair dealing in trade. (MCA 28-1-211; but see 242 Mont. 436, 791 P.2d 767.)

3.14 FACTORS:

Uniform Commercial Code adopted. (Tit. 30). See topic 3.09 Commercial Code and MCA 30-11-601 - 607.

License Requirements.

None.

Liens.

Factor has general lien which is dependent upon possession, for all that is due him, upon articles of commercial value that are entrusted to him by same principal. (MCA 71-3-1501).

Consignment Agreements.

Uniform Commercial Code does not apply to consignments of fine art. (MCA 22-2-505).

3.15 FRANCHISES:

Montana has not adopted Uniform Franchise and Business Opportunities Act and has no special legislation addressing franchises. Farm Implement Dealership Agreements receive special protection (MCA 30-11-801 to 811) as do Alcoholic Beverage Distributors (MCA 16-3-201 - 244) and Motor Vehicle Dealers (MCA 61-4-101 - 141 and MCA 61-4-205).

See topic 3.20 Monopolies, 3.22 Restraint of Trade and Competition.

3.16 FRAUDS, STATUTE OF:

Uniform Commercial Code adopted. (Tit. 30). See topic 3.09 Commercial Code.

Following contracts are invalid unless same, or note or memorandum thereof, are in writing subscribed by party or his agent: agreements not to be performed within a year; to answer for debt, default or miscarriage of another; in consideration of marriage, except mutual promise to marry; lease agreements for period longer than one year and agreements for sale of real property; and agreements authorizing or employing real estate agent or broker to purchase real estate for compensation or commission. (MCA 28-2-903).

Land.

Sale or lease for more than one year must be in writing and, if subscribed by agent, latter’s authority must be in writing. Also agreement authorizing agent or broker to buy or sell realty on commission. (MCA 28-2-903).

Contracts of Sale.

Uniform Commercial Code adopted. (Tit. 30).

Part Performance.

Uniform Commercial Code adopted (sale of goods). See MCA 30-2-201. Equitable doctrine of part performance to take case out of statute of frauds is recognized as to contracts for sale of real estate. (119 Mont. 45, 169 P.2d 722).

3.17 INTEREST:

Legal rate is generally 10%. (MCA 31-1-106).

Maximum rate permitted by written contract: Not to exceed greater of 15% or rate more than six percentage points per annum above prime rate of major New York banks as published in Wall Street Journal edition dated three business days prior to execution of agreement. (MCA 31-1-107).

Exemption.

Regulated lenders are exempt from all limitations on rate of interest and from operation of all usury statutes. (MCA 31-1-111 - 112). Title lenders are also exempt and are permitted specific interest rates as set out in MCA 31-11-101 et seq.

Judgments.

Interest rate 10% per annum. Interest on judgment involving contractual obligation that specifies interest rate must be paid at that rate. (MCA 25-9-205).

Open Accounts.

Unless otherwise agreed, interest runs from time of demand and, if none, from time suit begun. (29 Mont. 139, 74 P. 201).

Damages.

Interest is allowed on ascertainable damages from date right to recover such damages accrued, unless law or act of creditor prevents payment. (MCA 27-1-211).

Computation of Time.

Interest for period less than one year is based upon 365 days equaling one year. (MCA 31-1-106[2]).

Small Loans.

Persons or corporations making small loans must be licensed under Consumer Loan Act. (MCA 32-5-101 to 407). Interest charges must be added to principal and not discounted. (MCA 32-5-301). Holder of supplementary license may make open-end loans. (MCA 32-5-501). Montana Deferred Deposit Loan Act regulates short-term, high rate loans made by means of arrangement in which lender accepts check and agrees to hold check for period of time or accepts post-dated check and does not deposit or present it until date of check. (MCA 31-1-701 -725).

Usury.

Penalty for usury is forfeiture of double amount of interest received, reserved or charged. Where usurious interest paid, penalty may be recovered by payor, his heirs, executors, administrators or assigns by action brought within two years after payment. Written demand for return of interest paid condition precedent to action. (MCA 31-1-108).

See also topic 3.23 Sales.

3.18 INFORMATION TECHNOLOGY, INTERNET AND NEW MEDIA:

Uniform Electronic Transactions Act adopted in 2001 (MCA 30-18-101 - 118). UETA allows use of electronic records and signatures (MCA 30-18-104); acknowledges that electronic signatures and records are legally effective (MCA 30-18-106); insures that contracts and transactions entered into electronically are legally enforceable (MCA 30-18-106); provides for admissibility of electronic records as evidence (MCA 30-18-112); authorizes state to create, communicate, receive and store records electronically (MCA 30-18-116 - 118); provides for electronic notarization of documents (MCA 30-18-110).

Montana Electronic Transactions with State Agencies and Local Government Units Act adopted in 1999. Repealed in 2007.

Secretary of State authorized to develop statewide electronic system for filing records and documents. (MCA 2-15-401[2] - 404). Adopted revised UCC Article 9 (30-9A-101 - 628) allowing for electronic filing of financing statements. See category 3 Business Regulation and

Commerce, topic 3.09 Commercial Code.

Governmental Internet Information Privacy Act adopted in 2001, requires government entities providing Internet sites to provide notice of information practices and prohibits collection of personally identifiable information unless site operator complies with certain provisions. (MCA 2-17-550 - 553).

Email.

2001 legislature generally revised laws concerning documents to include email; provided that email used to conduct official state business is public record; included unlawful interception of email as violation of law on privacy in communication. (MCA 2-3-301; MCA 2-6-101, 102, 110, 202, 301, 401; and MCA 45-8-213).

Montana Information Technology Act adopted in 2001 (MCA 2-17-504 to 553); generally revising laws governing information technology, providing for chief information officer in department of administration (MCA 2-17-511), establishing policies for state information technology and duties re same (MCA 2-17-512). Provisions re membership and qualifications for information technology board codified (MCA 2-15-1021). Other sections to be codified at Title 2. Act intended to promote development of information technology, sharing of data among agencies, and transmission of data.

3.19 LICENSES, BUSINESS AND PROFESSIONAL:

State licenses are required of nearly every profession and many businesses carried on or practiced in the state. City councils are authorized to license all industries, pursuits, professions and occupations (MCA 7-21-4101) but this power may be exercised only in aid of police regulations and to pay the cost of special police protection or supervision, and not for purpose of raising revenue (38 Mont. 369, 99 P. 1059). Lapsed professional or occupational license that is not renewed within two years of most recent renewal date automatically terminates. (MCA 37-1-141).

Itinerant Vendors.

A $25 annual license (MCA 7-21-2303) is required of itinerant vendor retailing goods or services for future delivery to consumers either on street or in place of residence or employment, but license requirement does not apply to any vendor with commercial rating and permanent place of business in state. (MCA 7-21-2302).

License Taxes.

See category 22 Taxation, topic 22.12A License Taxes.

Collection Agencies.

No legislation.

3.20 MONOPOLIES, RESTRAINT OF TRADE AND COMPETITION:

Unfair trade practices including restraint of trade and unfair competition are unlawful. Dept. of Justice enforces Montana Unfair Trade Practices and Consumer Protection Act. (MCA 30-14-102). Certain practices in motion picture industry, such as blind bidding and payment of minimum guarantees on percentage pictures, are prohibited. (MCA 30-14-301 - 308). Uniform Trade Secrets Act enacted. (MCA 30-14-401 - 409). Montana Telemarketing Registration and Fraud Prevention Act requires registration of telemarketers and establishes standards for conducting telemarketing within state. (MCA 30-14-1401 - 1414).

Resale Price Agreements.

See category 17 Intellectual Property, topic 17.01 Trademarks and Tradenames.

3.21 NEGOTIABLE INSTRUMENTS:

See topic 3.02 Bills and Notes.

3.22 RESTRAINT OF TRADE:

See topic 3.20 Monopolies, 3.22 Restraint of Trade and Competition.

3.23 SALES:

Uniform Commercial Code adopted. (Tit. 30). See topic 3.09 Commercial Code.

Contracts of Sale.

Uniform Commercial Code adopted (sale of goods). (Tit. 30). There is statutory limitation of type size except as to retail installment contracts. (MCA 31-1-231). See infra, subhead Retail Installment Sales.

Consumer Protection.

See topic 3.12 Consumer Protection.

Products Liability.

Uniform Commercial Code adopted. (Tit. 30). See topic 3.09 Commercial Code. Restatement (2nd) Torts 402A substantially adopted by statute in 1987. (MCA 27-1-719). Strict liability adopted by case law prior to 1987. *Note:* MCA 27-1-719 was made temporary statute by legislature in 1997 and will terminate and contingent statute MCA 27-1-719 will become effective if Montana Supreme Court declares that portions of Montana’s comparative negligence statute MCA 27-1-703 are unconstitutional.

Sales of Motor Vehicles.

See category 23 Transportation, topic 23.01 Motor Vehicles.

Bulk Sales.

Uniform Commercial Code adopted (sale of goods). (Tit. 30). See topic 3.09 Commercial Code.

Retail Installment Sales.

All contracts where buyer promises to pay sale price of goods or services in one or more deferred installments must be in writing and are governed by MCA 31-1-201 - 243.

Contracts must contain specified information including notice to buyer of his rights, cash sale price, down payment, difference between sale price and down payment, amount included for insurance and official fees, principal balance, finance charge, time balance, number of installments and amount and due date of each. Printed portions of contract, except instructions for completion, must be at least 8 point type and certain portions must be at least 10 point bold type, unless transaction is subject to federal Truth-In-Lending Act and seller complies with requirements of that law. (MCA 31-1-231).

Blanks.

Contracts must not be signed which contain blank spaces to be filled in later, except for identification and due date of first installment of goods not yet delivered. (MCA 31-1-231).

Refund of insurance premium must be credited to final installment except to extent applied toward payment for similar insurance protecting interests of buyer and holder. (MCA 31-1-233).

Transfer of equity fee of not over $50 may be charged by holder if buyer transfers equity. (MCA 31-1-234).

Delinquency charge allowed plus limited attorney's fees, court costs, and actual expenses. Delinquency charge may be fee of not more than $10 or interest on installment. (MCA 31-1-235).

Finance charge shall be at rate agreed upon by retail seller and buyer. (MCA 31-1-241).

Prepayment by buyer entitles him to refund credit. (MCA 31-1-242).

Refinancing permitted. (MCA 31-1-243).

Satisfaction.

Upon payment in full and written demand by buyer, seller must acknowledge payment and release all security in goods. (MCA 31-1-236).

Licensing of Sales Finance Companies.

Persons in business of purchasing retail installment contracts must obtain license from Department of Administration. Fee is $100 per place of business per year. (MCA 31-1-221).

Conditional Sales.

Uniform Commercial Code adopted. (Tit. 30). See topic 3.09 Commercial Code.

3.24 SECURITIES:

"Securities Act of Montana" (MCA 30-10-101 - 326) is substantial adoption of major provisions of Uniform Securities Act, but numerous changes have been made.

Uniform Commercial Code adopted. (Tit. 30). See topic 3.09 Commercial Code.

Supervision.

State Auditor is Securities Commissioner, who supervises and controls administration of Act. (MCA 30-10-107). Commissioner's office is Room 270, Mitchell Building, 125 North Roberts Street, Helena, Montana 59620-0301.

Regulating Powers of Supervising Authority.

Registration is required to transact business related to sale of securities. (MCA 30-10-201).

Prerequisites to Sales or Offerings.

All securities offered for sale must be registered under the Act, except exempt securities or securities sold in exempt transactions. (MCA 30-10-202).

Securities to Which Act Applicable.

"Security" includes any note, stock, treasury stock, bond, commodity investment contract, commodity option, debenture, evidence of indebtedness, certificate of interest or participation in any profit-sharing agreement, collateral-trust certificate, preorganization certificate or subscription, transferable share, investment contract, voting-trust certificate, certificate of deposit for security, viatical settlement purchase agreement, certificate of interest or participation in oil, gas or mining title or lease or in production payments, and, in general, any interest or instrument commonly known as "security," any put, call, straddle, option, or privilege on any security, certificate of deposit, or group or index of securities, including any interest in security or based on value of security, or any certificate of interest in, temporary or interim certificate for, receipts for, guarantee of, and warrant or right to subscribe to or purchase any of foregoing. "Security" does not include any insurance or endowment policy or annuity contract under which insurance company promises to pay fixed sum of money either in lump sum or periodically for life or some other specified period. (MCA 30-10-103[22]). Definition of "security" under Montana law is identical to definition of "security" under federal law. (181 Mont. 382, 593 P.2d 1026).

Exempt Securities.

The following are exempt from operation of Act: Securities issued or guaranteed by United States, any state or political subdivision thereof, except if security is payable solely from payments received in respect of property or money used under lease, sale or loan arrangement by or for non-governmental industrial or commercial enterprise, unless enterprise or security is within exceptions in statute; securities issued or guaranteed by Canada, any Canadian province or political subdivision thereof, or by any agency or corporate or other instrumentality of one or more of foregoing, or by any other foreign government with which U.S. maintains diplomatic relations if security is recognized as valid obligation by issuer or guarantor; securities issued by and representing interest in or debt of, or guaranteed by, any bank organized under federal law, or any bank, savings institution, or trust company organized under and regulated by laws of any state; securities issued by and representing interest in, debt of, or guaranteed by federal savings and loan associations or building and loan or similar associations organized under laws of any state and authorized to do business in this state; securities issued or guaranteed by federal or other credit unions, industrial loan or similar associations organized and supervised under Montana laws; with certain limitations, securities issued or guaranteed by railroads and other common carriers, public utilities and holding companies; any security that meets all of following conditions: foreign issuer that has agent in U.S. for service of process, class of issuer's securities has been registered under § 12 of Securities Act of 1934 for at least three years prior to issue, issuer has not defaulted in certain payments for seven years, consolidated net income of at least $1,000,000 in four of last five years, security to be issued (unless preferred) has voting rights, security to be issued (unless preferred) must have been owned within six months prior to offering by at least 1,200 persons, and there must be at least 750,000 shares outstanding with aggregate market value of at least $3,750,000; securities issued by organizations operated not for private profit but exclusively for religious, educational, benevolent, charitable, fraternal, social, athletic, or reformatory purposes ($50 fee and notification required); commercial paper arising from current transactions evidencing obligation to pay cash within nine months of date of issuance, renewals thereof likewise limited, or guarantees thereof, when such paper is sold to banks or insurance companies; investment contracts issued in connection with employee's stock purchase, savings, pension, profit sharing, or similar benefit plan; securities for which Commissioner determines by order that exemption would better serve purposes of MCA 30-10-102 than would registration ($50 fee may be required); securities listed or approved for listing upon notice of issuance on New York, American, Pacific, Midwest, Philadelphia or Boston Stock Exchanges, Chicago board of options exchange, or any other stock exchange registered with Federal Securities and Exchange Commission and approved by Commissioner; national market system securities listed or approved for listing upon notice of issuance on national association of securities dealers automated quotation system or any other national quotation system approved by Commissioner; securities issued by and representing interest in or debt of or guaranteed by any insurer organized and authorized to transact business under laws of any state; and securities for which offer or sale is not directed to or received by person in Montana, and issuer does not maintain place of business in Montana. (MCA 30-10-104).

Exempt Transactions.

The following transactions are exempt from operation of Securities Act: any non-issuer isolated transaction; non-issuer distributions of outstanding securities by registered broker-dealer if certain conditions are fulfilled; non-issuer transaction through registered broker-dealer pursuant to unsolicited order or offer to buy; transaction between issuers and underwriters or between underwriters; transaction by executors, administrators, sheriffs, marshals, receivers, trustees in bankruptcy, guardians or conservators in performance of their official duties; transaction executed by bona fide pledgee without intention to evade Act; offer or sale to banks, savings institutions, trust companies, insurance companies, investment companies as defined in Investment Company Act of 1940, pension or profit-sharing trusts or other financial institution or institutional buyer or to broker-dealers; transaction pursuant to offers made in state to not more than ten persons in Montana during 12 consecutive months if seller reasonably believes buyers are purchasing for investment and no solicitation commission is paid; transaction pursuant to offer or sale to not more than 25 persons during 12 consecutive months if certain conditions are met; offer of security for which registration statement has been filed under Act and for which Commissioner does not disallow offer in writing within ten days of filing; issuance of security dividends if nothing of value is given by security holders except surrender of right to cash dividend; transaction incident to right of conversion or statutory or judicially approved reclassification, recapitalization, reorganization, quasi-reorganization, stock split, reverse stock split, merger, consolidation or sale of assets; any transaction in compliance with such rules as Commissioner in his discretion may adopt to serve purposes of MCA 30-10-102; transaction in securities of certified Montana capital company or certified Montana small business investment capital company; sale of commodity investment contract traded on commodities exchange recognized by Commissioner at time of sale; transaction within exclusive jurisdiction of commodities future trading commission as granted under Commodity Exchange Act; transaction involving purchase of precious metals which requires within seven days of payment physical delivery of precious metal to purchaser or depository as defined in statute; transaction involving commodity investment contract solely between persons engaged in producing, processing, using commercially, or handling as merchants each commodity subject to contract or any by-product of commodity; any offer or sale of security to employee of issuer, pursuant to stock ownership plan qualified under § 401 of Internal Revenue Code of 1986; and, under certain circumstances, offer or sale of securities by cooperative association. Commissioner may in his discretion require that MCA 30-10-201 through MCA 30-10-207 apply to any or all transactional exemptions adopted by rule. (MCA 30-10-105).

Registration of Securities.

All securities offered or sold must be registered either by notification, coordination or qualification, unless they are federal covered securities, exempt securities, or securities offered or sold pursuant to exempt transaction. (MCA 30-10-202). See MCA 30-10-203, 204, 205 and 206 as to conditions and requirements under each method of registration. Federal covered securities are securities that are covered under § 18(b) of federal Securities Act of 1933.

Brokers and Agents.

All broker-dealers, salespersons, investment advisers and investment adviser representatives must be registered (except for exempt transactions). Registration is accomplished by application to Commissioner on forms prescribed by Commissioner and payment of prescribed fee. Registration must be renewed each Dec. 31 and is subject to revocation if in public interest or upon grounds specified in statute. Hearing will be granted upon request after denial or revocation of registration. (MCA 30-10-201). Unlawful for broker to employ any salesman who is not registered. (MCA 30-10-201[2]). Suspension or revocation of registration of any broker-dealer, salesman or investment advisor may result in fine of not more than $5,000. Appeal may be taken from imposition of fine. (MCA 30-10-201[18]).

Liabilities.

Criminal liability is imposed for violation of Act with maximum penalties of not more than $5,000 and imprisonment for not more than ten years, with mandatory imprisonment of not less than one year for persons previously convicted of felony involving securities. (MCA 30-10-306). Civil liability is imposed, upon any person who offers or sells security in violation of Act or by means of fraud or misrepresentation, for repayment of consideration paid plus interest, costs and reasonable attorneys' fees less amount of any income received on security, or for damages if purchaser no longer owns security. (MCA 30-10-307). Act limits damages in private actions to difference between purchase or sale price received by plaintiff for security and mean trading price of security during 90-day period beginning on date on which information correcting misstatement or omission is disseminated to public. However, if plaintiff sells or repurchases security before 90-day period (referenced above), plaintiff's damages may not exceed difference between purchase or sale price paid by plaintiff for security and mean trading price during period beginning immediately after dissemination of information correcting misstatement or omission and ending on date on which plaintiff sells or repurchases security. (MCA 30-10-318). Act also provides "safe harbor" for forward looking statements under certain statutory criteria. (MCA 30-10-319).

Uniform Securities Ownership by Minors Act not adopted.

3.25 STATUTE OF FRAUDS:

See topic 3.16 Frauds, Statute of.

3.26 [RESERVED]

3.27 WAREHOUSEMEN:

Uniform Commercial Code adopted. (Tit. 30, c. 7). See topic 3.09 Commercial Code.

Agricultural Warehouse, Commodity Dealer, and Grain Standards Act enacted. (MCA 80-4-401 to 726).

Bonds.

Applicant for agricultural warehouse operator's license shall file bond. (MCA 80-4-504).

License.

Person may not act as agricultural warehouse operator without annual license. (MCA 80-4-501).

4 CITIZENSHIP

Definitions.

Citizens of state are: (1) All persons born in Montana and residing in Montana, except children of transient aliens; and (2) all U.S. citizens residing in Montana. (MCA 1-1-402).

4.01 ALIENS:

Every person within the jurisdiction of the state is entitled to its protection. (MCA 49-1-201). Rights of aliens are limited, however, in following respects:

Inheritance.

No person is disqualified to take as heir because he or person through whom he claims is or has been alien. (MCA 72-2-121). In estate where property does not vest in alien because of MCA 72-2-121, personal representative or special administrator must file report with attorney general within 30 days of filing inventory stating name, address and proportionate share of alien and value of estate. (MCA 72-2-215). (This provision is currently inconsistent with amended version of MCA 72-2-121.)

Public Office and Suffrage.

Aliens cannot hold elective or appointive offices (Const. IV, 4) or vote (Const. IV, 2).

Unemployment benefits for aliens, see category 11 Employment, topic 11.02 Labor Relations, subhead Unemployment Insurance.

5 CIVIL ACTIONS AND PROCEDURE

5.01 ACCORD AND SATISFACTION:

Accord is agreement to accept in extinction of obligation something different from or less than that to which person agreeing to accept is entitled. (MCA 28-1-1401). Though parties to accord are bound to execute it, original obligation is not extinguished until accord is fully executed. (MCA 28-1-1401).

See also category 3 Business Regulation and Commerce, topic 3.09 Commercial Code.

Satisfaction is acceptance by creditor of consideration of accord which extinguishes obligation. (MCA 28-1-1402).

Part performance of an obligation, either before or after breach, when expressly accepted by creditor in writing in satisfaction of original obligation, extinguishes original obligation. (MCA 28-1-1403).

Pleading.

Accord and satisfaction is affirmative defense that must be affirmatively pled. (Rule 8[c]).

5.02 ACTIONS:

Generally.

Governed by Montana Rules of Civil Procedure patterned after Federal Rules of Civil Procedure. See topic 5.19 Practice.

Equity.

No separate equity jurisdiction exists. (Mont. Constitution Art. VII, §§ 1-5). However, traditional equitable grounds must be shown for equitable relief.

Forms of Action.

There is only one form of action known as “Civil Action.” (Rule 2).

Commencement.

See topics 5.20 Process, 5.17 Pleading.

Conditions Precedent.

Any individual, partnership, corporation, LP, LLC, LLP or other association conducting or transacting business under assumed or fictitious name must register assumed name to maintain suit or action in courts of Montana. (MCA 30-13-215). Foreign corporation must obtain certificate of authority to do business in state before it may maintain proceeding in any Montana court. (MCA 35-1-1027[1]).

Parties.

Actions are to be prosecuted in name of real party in interest, except that personal representative, guardian, bailee, trustee of express trust, party with whom or in whose name contract has been made for benefit of another, or party authorized by statute may sue in that person's own name without joining party for whose benefit action is brought. (Rule 17[a]). Rule 17(b) differs from Federal Rule 17(b). Mont.R.Civ.P. 17(b) provides only that capacity to sue or be sued shall be determined by appropriate statute.

Class Actions.

Uniform Class Actions Act not adopted. One or more members can sue or be sued if (1) class is so numerous that joinder impractical, (2) common questions of law or fact exist, (3) claims or defenses of represented parties typical of those of class as whole, and (4) representative parties will fairly and adequately protect interests of class. (Rule 23[a]). Rule 23(f) allows judge to require security for costs and charges which may be awarded against representative party. When required, proceedings stayed until undertaking for costs and charges executed by two or more persons.

Necessary Joinder.

Person subject to service of process must be joined if (1) his presence necessary for complete relief for existing parties; or (2) he claims interest in subject of action and absence may impair his ability to protect interest or may expose existing parties to double, multiple, or inconsistent obligations. (Rule 19[a]). Rule 19(a) differs from Federal Rule 19(a) in that there is no provision precluding joinder if joinder will deprive court of jurisdiction over subject matter. Provision made for class actions. (Rule 23).

Permissive Joinder.

All persons asserting any right to relief arising out of same transaction or occurrence may join as plaintiffs, and all persons against whom any such right is asserted may be joined as defendants, if, in either case some question of law or fact common to all of them will arise in the action. (Rule 20[a]).

Intervention may be had as a matter of right upon timely application when (1) statute confers unconditional right to intervene; or (2) applicant claims interest in property or transaction which is subject of action and his interest may be impaired by action, unless applicant's interest is adequately represented by existing parties. (Rule 24[a]).

Permissive intervention may be had when a statute confers a conditional right to intervene, or when applicant's claim or defense and main action have question of law or fact in common. (Rule 24[b]).

Interpleader.

Persons having claims against plaintiff may be joined as defendants and required to interplead when plaintiff may be exposed to double or multiple liability. Defendants exposed to similar liability may obtain interpleader by cross-claim or counter-claim. (Rule 22[a]).

Joinder of Claims.

Party may join as many claims, whether legal, equitable, or both, as he may have against opposing party. (Rule 18[a]). Montana Rule 18 differs from Federal Rule in that Montana Rule 18(b) specifically provides that it may not be applied to permit joinder of liability or indemnity insurance carrier, unless carrier is by law or contract directly liable to person injured or damaged.

Consolidation of Actions.

Actions involving common question of fact or law pending before court may be heard jointly in whole or in part, or they may be consolidated. (Rule 42[a]).

Severance of Actions.

Court for convenience or to avoid prejudice may order separate trial of any claim or of any separate issue. (Rule 42[b]). Rule 42(b) differs from Federal Rule 42(b) in that Montana's rule does not refer to right to jury trial.

Abatement and Revival.

Action, cause of action or defense does not abate by death or disability of party. (MCA 27-1-501). Where party dies while action by or against him is pending, and cause of action survives, court may order substitution of proper parties upon motion by deceased's successors or representatives or any party. (Rule 25[a]). Rule 25(a) provides for reasonable time for substitution, rather than 90 days of Federal Rule 25(a).

Limitation of.

See topic 5.16 Limitation of Actions.

Small Claims.

See category 6 Courts and Legislature, topic 6.01 Courts.

Termination of Actions.

Plaintiff may dismiss action without order of court by filing notice of dismissal before adverse party serves answer or motion for summary judgment, or by filing stipulation of dismissal signed by all parties who have appeared. Such dismissal is without prejudice unless otherwise stated. (Rule 41[a]). Defendant may move for dismissal for failure to prosecute, failure to comply with the Montana Rules of Civil Procedure, or failure to comply with order of court. Such dismissal is adjudication upon merits unless otherwise specified by court. (Rule 41[b]). Upon motion of any interested party or court itself, action must be dismissed as to defendant if appearance not made within three years after commencement of action, or if summons not issued within one year, or if summons issued within one year is not served and return made and filed with clerk within three years. (Rule 4E). Under Rule 41(a), unless otherwise stated dismissal is always without prejudice, no exception as in Federal Rule 41(a).

Tort actions against state are permitted in district court on any tort claim against governmental entity arising out of governmental or proprietary function of governmental entity, or employees acting within scope of their employment, except that state is not liable for damages suffered by person confined in correctional facility for criminal offense as result of employee's negligence. (MCA 2-9-101 to MCA 2-9-318). Absolute immunity from suit if acting in official duty: for legislative acts and omissions (MCA 2-9-111); judicial acts, and omissions (MCA 2-9-112); gubernatorial actions concerning legislation (MCA 2-9-113); local governmental entity and elected executive officer immune from suit for damages for lawful discharge of duties. Montana Constitution Art. II, § 18 provides that state and all sub-entities shall have no immunity from suit for injury to person or property unless 2/3 of each house of legislature passes law specifically providing such immunity. Tort claims against state first must be presented to department of administration and denied prior to filing in district court. If department does not act within 120 days, claim is deemed denied. Statute of limitations on claim is tolled 120 days. (MCA 2-9-301).

Administration.

See category 13 Estates and Trusts, topic 13.09 Executors and Administrators.

Direct Actions Against Insurer.

See category 23 Transportation, topic 23.01 Motor Vehicles, subhead Direct Action.

See also topic 5.09 Damages.

5.03 APPEAL AND ERROR:

From Small Claims Court.

As of July 1, 1997, small claims court procedure in district court must conform to small claim's court procedure in justice court. Title 25, c. 34 governing small claims court in district court has been repealed and small claims courts in both district court and justice court are governed by Title 25, c. 35. Appeal from small claims division of district court or justice court may be taken to district court of county in which judgment was rendered. (MCA 25-35-803). Appeals from small claims division of justice court are governed by MCA 25-35-803. Trial is not de novo; appeal is limited to questions of law. (MCA 25-35-803[2]). Notice of Appeal must be filed within ten days of entry of judgment. (MCA 25-35-803).

From Justice or City Court.

Appeal from justice or city court in civil action may be taken to district court within 30 days from date of judgment by filing notice of appeal with justice or judge and serving copy on adverse party or his attorney. (MCA 25-33-102 and 103). Appeal not permitted from judgment by default except on questions of law or abuse of discretion in setting aside or refusing to set aside judgment. (MCA 25-33-303). If default judgment set aside, district court must allow pleadings to be filed and try case. (MCA 25-33-303). Action is tried de novo in district court unless justice court is established as court of record as provided in MCA 3-10-101. (MCA 25-33-301). State may only appeal in cases provided for in MCA 46-20-103. (MCA 46-17-311).

From District Court.

Appeals in civil cases to Supreme Court from district court and original proceedings in Supreme Court are governed by Montana Rules of Appellate Procedure (cited M.R.App.P.), effective Oct. 1, 2007. Appeal from district court to Supreme Court may be taken in following cases: From final judgment in action or special proceeding commenced in district court, or brought into district court; from following orders: granting or denying new trial; refusing to permit action to be maintained as class action; granting or dissolving injunction or attachment; refusing to grant or dissolve injunction; dissolving or refusing to dissolve attachment; changing or refusing to change place of trial when county designated in complaint is not proper county; appointing or refusing to appoint receiver, or giving directions with respect to receivership, or refusing to vacate order appointing or affecting receiver; directing delivery, transfer, or surrender of property; from any special order made after final judgment; and from orders in actions for partition directing or refusing to direct partition to be made; from judgment or order granting or refusing to grant, revoking or refusing to revoke, letters testamentary, or of administration, or of guardianship; or admitting or refusing to admit will to probate, or against or in favor of validity of will, or revoking or refusing to revoke probate thereof; or against or in favor of setting apart property, or making allowance for surviving spouse or child; or against or in favor of directing partition, sale, or conveyance of real property, or settling account of executor, or administrator, or guardian; or refusing, allowing, directing distribution or partition of any estate, or any part thereof, or payment of debt, claim, legacy, or distributive share; or confirming or refusing to confirm report of appraiser setting apart homestead. (M.R.App.P. 6).

Time for Filing Notice of Appeal.

From small claims division of justice court, within ten days after entry of judgment. (MCA 25-35-803[1]). From justice or city court or small claims division of district court, within 30 days after rendition of judgment. (MCA 25-33-102). From district court, within 30 days from entry of default judgment or order, and 30 days from service of notice of entry of judgment. (M.R.App.P. 4[5][a]).

Time is 60 days where State of Montana or officer, agency or political subdivision thereof is party. (M.R.App.P. 5). If notice of entry of judgment is required under Mont.R.Civ.P. 77(d), time period does not begin to run until service of notice of entry of judgment. (Id.).

An appeal is taken from district court by filing notice of appeal with clerk of Supreme Court, which notice must specify party or parties appealing, judgment or order appealed from, whether appeal is subject to mandatory mediation, whether appeal challenges constitutionality of statute, and whether transcripts have been ordered. (M.R.App.P. 4[2][a]). For appeals to district courts from lower courts, see MCA 25-33-101 to 104 and MCA 25-35-803.

District court may require appellant to file appeal bond or other security in amount it finds necessary to insure payment of costs. (M.R.App.P. 23).

Upon appeal from justice court when judgment is for payment of money, undertaking on appeal may be in form of appeal bond or deposit of money bond in amount of judgment, including costs. (M. Justice Courts R.Civ.P. 24).

Mandatory Mediation.

Appeals involving (1) Workers' compensation; (2) domestic relations; or (3) money judgments are subject to mandatory mediation. (M.R.App.P. 7). Mediation process is confidential and must be completed within 75 days after Notice of Appeal filed. (Id.).

Stay of Proceedings.

Upon entry of judgment or order, party may apply to district court for stay of execution of judgment or order, which may be granted by court in its discretion. Upon service of notice of appeal, party may secure district court's approval of supersedeas bond, which bond shall be conditioned for satisfaction of judgment or order in full, together with costs, interest and damages for delay. No stay permitted upon judgment or order which adjudges defendant guilty of usurping, intruding into, or unlawfully holding public office. (M.R.App.P. 22). Upon filing of judgment or order of Workers' Compensation Judge, party may apply to Workers' Compensation Judge, upon notice or ex parte, for stay of execution of judgment or order. Stay of execution may not extend for more than 30 days following Judge's disposition of post-trial motions.

Stay of execution on property in justice or city court may issue upon filing of undertaking or deposit. (MCA 25-33-204).

Extent of Review.

Supreme Court may, on appeal from judgment, review judgment and all previous orders objected to which led up to and resulted in judgment. (M.R.App.P. 6[1]). On questions of fact, jury's verdict or trial court's findings are conclusive if supported by substantial evidence.

Judgment or Order on Appeal.

Supreme Court may affirm, reverse, or modify any judgment or order appealed from, and may direct proper judgment or order to be entered, or direct new trial or further proceedings to be had. (MCA 3-2-204). Supreme Court's decision must be written. (Id.).

Appeal by State.

In criminal cases, state may only appeal from judgment that results in: (a) dismissing case; (b) modifying or changing verdict; (c) granting new trial; (d) quashing arrest or search warrant; (e) suppressing evidence; (f) suppressing confession or admission; (g) granting or denying change of venue; or (h) imposing sentence that is contrary to law. (MCA 46-20-103).

5.04 BONDS:

All official bonds must be signed and executed by principal and two or more sureties or by principal and one or more surety companies. (MCA 2-9-504[3]).

Enforcement.

Any official bond may be sued on by any person injured or aggrieved by any wrongful act of the principal. (MCA 2-9-527).

Sureties.

In all cases where a bond or an undertaking is required by law, the officer taking it must require the sureties to accompany it with an affidavit that they are residents and householders or freeholders within the state, and are each worth the sum specified in the undertaking, over and above all their just debts and liabilities, exclusive of property exempt from execution; but when the amount specified in the undertaking exceeds $3,000, and there are more than two sureties thereon, they may state in their affidavits that they are severally worth amounts less than that expressed in the undertaking, if the whole amount be equivalent to that of two sufficient sureties. (MCA 33-26-102).

Surety companies qualified to do business in state may furnish bonds, and need not justify. (MCA 33-26-101, 102).

5.05 CERTIORARI:

The writ of certiorari may be denominated a writ of review. (MCA 27-25-101).

Jurisdiction and Grounds.

Writ may be granted by Supreme Court and any justice of Supreme Court, in proceedings for contempt in district court. It may also be granted by Supreme Court or district court, or any judge thereof, when lower tribunal, board or officer has exceeded its jurisdiction, and there is no appeal or other adequate remedy. (MCA 27-25-102).

Proceedings.

Application must be made on affidavit. Court may grant writ with or without notice. (MCA 27-25-201).

Extent of Review.

Review upon this writ is limited to whether inferior tribunal, board or officer has regularly pursued its or his authority. (MCA 27-25-303).

5.06 CHARITABLE IMMUNITY:

See topic 5.09 Damages.

5.07 COMMISSIONS TO TAKE TESTIMONY:

See topic 5.11 Depositions and Discovery.

5.08 COSTS:

In certain actions, costs and disbursements are allowed to prevailing party as matter of course. In other actions, award of costs is discretionary, and if allowed, may be apportioned between parties in discretion of court. No costs may be allowed in action for recovery of money or damages when plaintiff fails to recover more than $50, or in action to recover possession of personal property, when value of property is not more than $50. (MCA 25-10-101 to MCA 25-10-103). Costs are allowed to plaintiff if plaintiff qualifies for award of attorney fees in actions for property damage arising out of ownership, use, or maintenance of motor vehicle, without regard to dollar limits. (MCA 25-10-101).

On appeal, costs are discretionary when new trial ordered or judgment is modified. In all other cases, successful party on appeal recovers costs. (MCA 25-10-104).

In action prosecuted or defended by executor, administrator or trustee, or any party authorized by statute, costs are chargeable only against estate, fund or party represented, though they may become personal charge as result of mismanagement or bad faith in action or defense. (MCA 25-10-108).

Court has discretion to order attorney or party who unreasonably and vexatiously multiplies proceedings to personally satisfy costs, expenses and attorneys' fees incurred because of that conduct. (MCA 37-61-421).

New Action After Voluntary Dismissal.

Where plaintiff who has voluntarily dismissed action commences another action based on or including same claim, against same defendant, court may make order for payment of costs of previous action, and may stay pending action until order for payment is satisfied. (Mont.R.Civ.P. 41[d]).

Security for Costs.

When plaintiff resides out of state, or is foreign corporation, security for costs may be required by undertaking not exceeding $300. (MCA 25-10-601). In justice court, justice of peace may require security before issuing summons. (MCA 25-31-402).

Prepayment.

Each party, except governmental entity to civil action or poor persons as defined in MCA 25-10-404, is required to pay fees fixed by law for performance of any service by officer, and no officer is bound to perform any service or duty unless fees are first paid or tendered, except when action is brought in forma pauperis. (MCA 25-10-403 to MCA 25-10-405).

5.09 DAMAGES:

Common law generally prevails. Rules are set forth in MCA 27-1-101 et seq. See also topic 5.17 Pleading, subhead Complaint; category 13 Estates and Trusts, topic 13.05 Death, subhead Action for Death.

Comparative Negligence Rule adopted. (MCA 27-1-702). Joint tortfeasors are jointly and severally liable for any amount that may be awarded to claimant but each has right to contribution from any other person whose negligence may have contributed as proximate cause to injury complained of. (MCA 27-1-703). However, any party whose negligence is determined to be 50% or less of combined negligence of all joined as parties is severally liable only and is liable only for percentage of negligence attributable to him unless party acted in concert with others. (MCA 27-1-703). In any action based on negligence, defendant may assert as defense that damages of claimant were caused in full or in part by person with whom claimant has settled or who claimant has released from liability. (MCA 27-1-703). Defendant who alleges that person released by claimant or with whom claimant has settled is at fault in matter has burden of proving: (i) negligence of such person; (ii) any standard of applicable care to such person; and (iii) that negligence of person was contributing cause under law applicable to case. (MCA 27-1-703). Defendant alleging that settled or released person is at fault in matter shall affirmatively plead settlement or release as defense in answer. (MCA 27-1-703). Defendant who gains actual knowledge of settled or released person after filing of answer may plead defense of settlement or release with reasonable promptness as long as it (1) gives defendant reasonable opportunity to discover existence of settled or released person; and (2) gives settled or released person opportunity to intervene in action and defend against claims asserted against him. (MCA 27-1-703). If defendant alleges that settled or released person is at fault in matter, defendant shall notify each such person. (MCA 27-1-703).

Doctrine of charitable immunity not abrogated by statute. However, federal district court imposed tort liability. (Howard v. Sisters of Charity, 193 F. Supp. 191).

Doctrine of interspousal tort immunity abrogated by case law.

Doctrine of sovereign immunity has been abolished by constitutional provision. State and local government entities shall have no immunity from suit for injury to person or property for causes of action arising after July 1, 1973, unless specifically provided for by law. (Const. Art. II, § 18). See topic 5.02 Actions.

Punitive damages may be awarded by trier of fact. Limited to lesser of $10 million or 3% of defendant’s net worth, except in class actions. (MCA 27-1-220[3]).

Voluntary payments to or on behalf of one sustaining injury to person or property by or on behalf of alleged tortfeasor shall not be construed as admission of fault or liability as to any claim arising out of occurrence, or as release or waiver of claim, and shall not be construed to reduce amount of damage pleaded or proved in any action arising out of occurrence. Evidence of payment is not admissible in action arising out of occurrence. Upon final settlement parties are free to treat all voluntary partial payments as they wish. In event of judgment greater than such payments, amounts shall be deductible as partial satisfaction of judgment. In event judgment is less than such payments, there shall be no right of action for recovery of excess paid. (MCA 26-1-703-706).

Jury awards may be reduced for amounts paid or payable from collateral source that does not have subrogation right. (MCA 27-1-308).

Emotional or mental distress damages prohibited in contract cases except in those cases involving actual physical injury to plaintiff. (MCA 27-1-310).

No-Fault Insurance.

See category 23 Transportation, topic 23.01 Motor Vehicles, subhead No-Fault Insurance.

Uniform Contribution Among Tortfeasors Act (Revised) not adopted.

5.10 DECLARATORY JUDGMENTS:

Uniform Act Adopted. (MCA 27-8-101 et seq.). Purpose of Uniform Declaratory Judgments Act is to settle and afford relief from uncertainty and insecurity with respect to rights, status, and other legal relations. (MCA 27-8-102). See topic 5.15 Judgments.

5.11 DEPOSITIONS AND DISCOVERY:

By 1993 amendment to Fed. R. Civ. P. 26(a), Montana Rule 26(a) is no longer similar to federal counterpart. While balance of subdivisions of Montana Rule 26 track federal rule, there are substantial differences; therefore, caution should be used in relying on federal court interpretations of Rule 26 that have been decided since 1993. (MCA 25-20-Rule 26). See topic 5.19 Practice. Parties to lawsuit are permitted to obtain discovery regarding any non-privileged matter relevant to subject matter in pending lawsuit. Opponent may not object on ground of inadmissibility if information sought appears reasonably calculated to lead to discovery of admissible evidence. (Rule 26[b]).

Uniform Foreign Depositions Act not adopted.

Within State for Use Within State.

After commencement of action, testimony of any person may be taken by deposition (Rule 30[a]) before person authorized by laws of Montana to administer oaths (Rule 28[a]), on oral examination (Rule 30[a]) or written interrogatories (Rule 31[a]), for purpose of discovery, for use as evidence in action or for both purposes (Rule 32[a]). Regarding depositions taken outside state for use within, see subheads Outside of State for Use Within State; and Before Whom Taken, infra.

Within State for Use Elsewhere.

When deposition of person is to be taken in this state for use elsewhere, district court of county where witness is to be served, upon proof that notice of deposition has been served, may issue necessary subpoenas. (Rule 28[d]).

Outside of State for Use Within State.

Whenever deposition of any person is to be taken outside Montana for use within Montana, clerk or other equivalent officer of any court having jurisdiction at place where witness is served or deposition will be taken may issue necessary subpoenas or equivalent court instruments to compel attendance of witness upon proof that notice of deposition has been served or that parties have stipulated thereto. (Rule 28[e]). See subhead Before Whom Taken, infra.

De Bene Esse.

Latin for “of well being”, Black’s Law Dictionary (8th ed. 2004). Refers to right to use deposition of witness in event witness is absent at time of trial.

Montana Rule 32(a) allows use of deposition of witness absent at time of trial under same circumstances set forth in Fed.R.Civ.P. 32(a)(4).

Perpetuating Testimony.

Deposition to perpetuate testimony before action may be taken regarding any matter cognizable in district court of State of Montana. Proceeding is commenced by filing verified petition in district court in county of residence of any expected adverse party. Petition shall show: that petitioner expects to be party to action in state but is presently unable to bring action; subject matter of expected action and petitioner’s interest therein; facts petitioner desires to establish by proposed testimony; names and addresses of anticipated adverse parties; and names and addresses of persons to be examined. Court may order testimony upon showing that it will prevent failure or delay of justice. Notice of proceeding must be given as directed by court and must be personally served on persons named in petition as expected adverse parties. If adverse parties fail to appear within 20 days after service, attorney will be appointed to represent them and cross-examine deponent. Such deposition may at any time thereafter be used in trial in which petitioner or any successor in interest is party, or between any parties in trial in which it is material to establish facts which such testimony proves or tends to prove where witness giving deposition

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is unable to be present at trial. (Rule 27[a]). Depositions may also be taken pending appeal. (Rule 27[b]).

Before Whom Taken.

If taken within territory subject to dominion of U.S., depositions may be taken before a person authorized to administer oaths by laws of Montana, U.S., place where examination is held, or before a person appointed by court in which action is pending, which persons shall have power to administer oaths. (Rule 28[a]). If taken in a foreign country, deposition may be taken before a person authorized to administer oaths in place of examination, before person commissioned by court, or pursuant to letters rogatory. (Rule 28[b]). No deposition may be taken before relative, employee, attorney or counsel of a party, or relative or employee of attorney or counsel, or one who is financially interested in action. (Rule 28[c]).

Commissions.

Depositions may be taken before person appointed by court in which action is pending or by any person authorized by laws of Montana to administer oaths. (Rule 28[a]). See category Depositions and Discovery.

Compelling Attendance of Witnesses.

Resident of state may be required to attend deposition only within 100 miles of where that person resides, is employed, transacts business in person, or any other convenient place fixed by order of court. (Rule 45[b][2][B][i]).

Examination of Witnesses.

Examination and cross-examination proceed as at trial. (Rule 30[c]). Officer before whom deposition is taken shall put witness under oath and shall record testimony of witness. Each deposition shall not last more than seven hours nor take place on more than one day without leave of court. (Rule 30[d][2]).

Return.

Montana Rule 32(d)(4) is identical to Fed.R.Civ.P. 32(d)(4). Objection to errors and irregularities in transcription waived unless motion to suppress deposition, in whole or in part, with reasonable promptness after such defect is ascertained.

Form.

While Montana Rule 30 largely derives from Federal Rule 30, there are some differences. Montana Rule 30 does not limit number of allowed depositions while Federal Rule 30(a)(2) limits depositions to ten. Montana Rule 30 does not require court reporter to perform formal opening (stating deponent’s name, time, place, etc.) while Federal Rule 30(b)(5) does.

Discovery.

Montana Rule 26 derives from Federal Rule 26. For depositions, Montana Rule 30(g) has same sanctions as Federal Rule 30(g) for failure to attend or serve subpoena compelling witness to attend deposition.

Demand for Admission of Facts.

Montana Rule 36 (requests for admission) and Rule 37(c) (expenses on failure to admit) are derived from Federal counterparts.

One difference under Montana Rule 36(a) is that defendant is not required to serve answers or objections to requests for admissions before expiration of 45 days after service of summons and complaint upon that defendant, while Federal Rule does not afford extra 15 days. Montana Rule 33 (interrogatories) and 34 (production of documents) also provides 45 days from service of summons and complaint for defendant to respond.

Interrogatories.

Montana Rule 33 closely tracks Federal Rule 33. However, there are some significant differences so use of federal decisions in interpreting Montana Rule 33 should be exercised with caution. No party may serve more than 50 interrogatories in aggregate including subparts without leave of court. (Rule 33[a]). See subhead Demand for Admission of Facts, infra.

Rule 33(c) was amended effective Feb. 28, 2007, to include electronically stored information as business records.

5.12 EQUITY:

No separate equity jurisdiction exists. (Mont. Const. Art. VII, §§ 1-5). See topic 5.02 Actions.

5.13 EVIDENCE:

See topics 5.11 Depositions and Discovery, 5.09 Damages.

Federal Rules of Evidence adopted with some changes. (MCA Title 26, c. 10).

Witnesses.

Rule 601, Montana Rules of Evidence, (cited Mont.R.Evid.), abolishes all incompetencies of witnesses except as otherwise provided in Montana Rules of Evidence. (Rule 601, Mont.R.Evid.). Witness is disqualified if she/he cannot express matter in manner understandable by judge or jury or if she/he is not capable of understanding duty to tell truth. (MCA 26-10-601).

See also topic 5.11 Depositions and Discovery.

Privileged Communications.

Attorneys at law (MCA 26-1-803), clergymen and priests (MCA 26-1-804), or licensed physicians, surgeons, or dentists in civil actions except as provided in Rule 35, Montana Rules of Civil Procedure (MCA 26-1-805), cannot testify as to matters communicated to them professionally without consent of person making such communication. Communications between psychologist and patient are placed on same basis as attorney-client communications. (MCA 26-1-807). Speech pathologists, audiologists cannot, without consent of patient, be examined in civil action. (MCA 26-1-806). Teachers of psychology may not testify, in any civil action, as to observations of children without consent of parent. (MCA 26-1-808). School counselors, psychologists, nurses, and teachers may not testify as to student's confidential communications without consent of student, or if student is minor, consent of student and student's parent. (MCA 26-1-809). Public official cannot be examined as to official confidence made to official when public interests would suffer by disclosure. (MCA 26-1-810). Victim's advocate may not divulge confidential communications with victim, without victim's consent, or as otherwise required by law. (MCA 26-1-812). Media have privilege not to disclose sources. (MCA 26-1-902).

Any physician who diagnoses physical or mental condition that, in physician's judgment, will significantly impair person's ability to safely operate motor vehicle may report person's name and other information relevant to his condition to Department of Justice. Department shall then cause examination or investigation to be undertaken. (MCA 37-2-311; MCA 61-5-207).

Physician's report may be introduced as evidence in any proceeding involving granting, suspension, or revocation of person's driver's license before division or court. In no other proceeding, criminal or civil, may report be used without patient's consent. (MCA 37-2-311).

Statements of sympathy not admissible in medical malpractice cases. (MCA 26-1-814).

Husband and Wife

Neither spouse may, without consent of other, testify during or after marriage concerning any communication made by one to other during their marriage. Privilege is restricted to communications made during existence of marriage relationship and does not extend to communications made prior to marriage or to communications made after marriage is dissolved. Privilege does not apply to civil action or proceeding by one spouse against other or to criminal action or proceeding for crime committed by one spouse against other or against child of either spouse. (MCA 26-1-802; MCA 46-16-212; MCA 41-3-437[5]).

Communications or Transactions with Persons Since Deceased or Incompetent.

Montana has abolished Dead-Man's Statute by adopting Rule 601 of Rules of Evidence. Rule 601 removes limitations which formerly attached to testimony about transactions or oral communications with persons who are dead. Under Rule 601, such testimony is admissible, subject to cross-examination to establish weight to be afforded testimony. (182 Mont. 260, 596 P.2d 474). Under Rule 601, person is disqualified as witness if court finds that person is incapable of understanding duty of witness to tell truth. (Rule 601[b]).

Self-Incrimination.

Witness need not answer question if answer will have tendency to subject witness to punishment for felony; nor if answer will have direct tendency to degrade witness' character, unless answer be to very fact in issue. (MCA 26-2-302).

Compelling Attendance.

See topic 5.11 Depositions and Discovery.

5.14 INJUNCTIONS:

Federal Rules of Civil Procedure have formed basis for procedural statutes. See topic 5.19 Practice. However, procedures for granting of restraining orders and temporary and permanent injunctions are outlined in other statutes. (Mont.R.Civ.P. 65). (MCA Title 27, c. 19).

Preliminary injunction order may be granted in following cases: (1) Applicant is entitled to relief demanded, and such relief consists in restraining act or acts complained of; (2) continuance of act complained of during litigation would produce great or irreparable injury; (3) adverse party is doing, threatening to do or permitting to be done some act in violation of applicant's rights, respecting subject of action, and which tends to render judgment ineffectual; (4) adverse party is about to remove or dispose of adverse party's property, with intent to defraud applicant; and (5) applicant, under provisions of MCA 40-4-121 or Tit. 40, c. 15, alleges physical abuse by partner or family member. (MCA 27-19-201).

Final injunction may be granted to prevent the breach of an obligation existing in favor of the applicant where: (1) pecuniary compensation would not afford adequate relief; (2) it would be extremely difficult to ascertain amount of compensation which would afford adequate relief; (3) restraint is necessary to prevent multiplicity of judicial proceedings; or (4) obligation arises from trust. (MCA 27-19-102).

Jurisdiction.

Original jurisdiction to issue is vested in district court (MCA 3-5-302), and in Supreme Court pending appeal from order of district court refusing or dissolving injunction, or in original actions where state is party, public is interested, or rights of public are involved. (MCA 3-2-205). Injunction order may be granted by court in which action is brought or by judge thereof. (MCA 27-19-101).

Prerequisites.

Preliminary injunction order may be granted after hearing, and any time before judgment, once reasonable notice given and evidence presented through verified affidavits or oral testimony. (MCA 27-19-301;-303). In action by citizens' group where injury is to property or civil right of individuals, names and addresses of persons injured and statement of injury must appear in complaint. (MCA 27-19-104). Reasonable notice to adverse party required before issuance of injunction. (MCA 27-19-301).

Procedure.

Order granting injunction or restraining order shall specify reasons for its issuance, describe in reasonable detail act or acts sought to be restrained and be binding only upon parties to action, their officers, agents, employees and attorneys; and those persons in active participation with them who have received actual notice of order by personal service or otherwise. See subsection Prerequisites above.

Bond.

Bond shall be required by court except may be waived in domestic disputes or in interest of justice. (MCA 27-19-306). Party enjoined may object to sufficiency of bond within 30 days after service of injunction. (MCA 27-19-306).

Temporary Injunction.

Temporary restraining order may be granted either before or after answer until hearing and decision on application for preliminary injunction. (MCA 27-19-314). Temporary restraining order may be granted without notice to adverse party if affidavit or verified complaint shows that delay would cause immediate and irreparable injury to applicant before adverse party could be heard and if written certification is given to court stating efforts, if any, made to give notice and reasons that notice should not be required. (MCA 27-19-315).

5.15 JUDGMENTS:

Federal Rules of Civil Procedure form the basis for procedural statutes. See topic 5.19 Practice.

Judgments are final subject only to appeal.

Judgment by Confession.

(MCA 27-9-101 to -104). Judgment may be confessed, without action, by defendant filing verified statement authorizing entry of judgment against him for specified sum, stating concisely facts out of which liability or debt arose and showing that sum for which judgment is confessed is justly due or to become due. Confession of judgment for purpose of securing plaintiff against contingent liability must state facts constituting such liability and show that sum for which judgment is confessed does not exceed such liability. (MCA 27-9-101 and 102).

Contract authorizing judgment by confession or empowering another, as agent, to confess judgment, accept service of process, or consent to entry of default is void. (MCA 28-2-709).

Judgments by Consent.

Consent judgments as distinguished from judgments by confession are not provided for. (MCA 28-2-709).

Judgments on Pleadings.

After pleadings are closed but within such time as not to delay trial, any party may move for judgment on pleadings. (12[c]). Rule 12(c) provides that if, on motion for judgment on pleadings, party relies on matters outside pleadings, court must treat motion as one for summary judgment. (1998 MT 331, 292 Mont. 277, 971 P.2d 371).

Summary Judgment.

Federal Rule 56 adopted. (Mont.R.Civ.P. 56).

Declaratory Judgments.

Uniform Declaratory Judgments Act adopted. (MCA 27-8-101 to -313).

Default Judgments.

Montana Rule 55 largely identical to Federal Rule 55, with following exceptions:

First, Federal Rule 55(c) has no provision for extension of time by court or parties.

Second, Federal Rule 55(d) prohibits default judgment against U.S. unless claim is proven before judge.

In addition, Montana Rule 55(b)(1) adds requirement of personal service and Montana Rule 55(c) provides that party making appearance before application must not be considered in default as to that appearance.

Offer of Judgment.

Federal Rule 68 adopted (Mont.R.Civ.P. 68) with minor exception. Entry of judgment provided for in Federal Rule is to be done by clerk. In Montana, it merely states, “judgment shall be entered.”

Docketing.

Clerk must docket judgment immediately after entry. (MCA 25-9-301). Prevailing party must serve notice of entry of judgment within ten days after entry of judgment. (Rule 77[d]; 223 Mont. 113, 724 P.2d 704).

Vacation or Modification.

Federal Rule 60 adopted for most part. Montana Rule 60 has different deadline for when motion must be made. While Federal Rule 60 requires motion under 60(b) to be made within reasonable time or under (1), (2) or (3) of 60(b), not more than year after entry of judgment or order or date of proceeding, Montana Rule 60 requires motion under 60(b) to be made within reasonable time, or motion for reasons (1), (2) or (3) under 60(b) must be made not more than 60 days after judgment, order or proceeding was entered. In case where notice of entry of judgment is required by Montana Rule 77(d), motion must be made not more than 60 days after service of notice of entry of judgment.

Montana Rule 60(c) provides that motion made under 60(b) will be determined within times provided by Rule 59 in case of motions for new trials and amendment of judgment. Motion is deemed denied if court fails to rule within 60 day period. (Mont.R.Civ.P. 60[c]).

Lien.

From time of filing, judgment becomes lien upon all real property of judgment debtor that is not exempt from execution in county and that is either owned or acquired after by judgment debtor that is not exempt from execution. Lien continues for ten years unless previously satisfied . When judgment for payment of child support, lien continues for ten years from later of termination of support obligation or entry of lump sum judgment. (MCA 25-9-301, MCA 25-31-914). Certified transcript filed with court clerk of another county extends lien to all real property of judgment debtor in that county. (MCA 25-9-302).

Revival.

Montana statute governing actions upon judgments does not preclude creditor from bringing action seeking renewal and extension of judgment beyond statutory ten-year limitations period. (1998 MT 214, 290 Mont. 444, 963 P.2d 1269).

Assignment.

Judgment for periodic payment of future damages in medical malpractice action may be assigned only as to amounts to secure payment of alimony, maintenance or child support; or for costs of products, services or accommodations provided by assignee for medical care. (MCA 25-9-405).

Satisfaction.

Satisfaction may be entered in clerk's docket upon acknowledgment of satisfaction made in manner of acknowledgment of conveyance of real property by judgment creditor or by his endorsement on the face or on the margin of the record of the judgment or by attorney. (MCA 25-9-311). See also topic 5.19 Practice.

Actions.

Actions on judgments, either foreign or domestic, generally barred after ten years. (MCA 27-2-201).

Foreign Judgments.

Judgment of court of record of U.S. (MCA 26-3-201) or of another state (MCA 26-3-203) is same as that of domestic court, except that: (1) it can be enforced only by action brought within this state; (2) authority of guardian, executor or administrator cannot extend beyond jurisdiction vesting guardian, executor or administrator with authority (MCA 26-3-203). Judgment of foreign court against specific thing is conclusive of title, and judgment against person is presumptive evidence of right against such person which can be repelled only by lack of jurisdiction, notice to party, collusion, fraud, or clear mistake of law or fact. (MCA 26-3-205).

Revised Uniform Enforcement of Foreign Judgments Act.

Montana adopted Uniform Enforcement of Foreign Judgments Act in 1989, with changes to section on notice of filing. (MCA 25-9-501 to -508). Montana has not adopted Revised Act.

5.16 LIMITATION OF ACTIONS:

The periods prescribed for the commencement of actions are as follows:

Lifetime of Offender.

Action under MCA 46-18-247(3) to enforce order of restitution by court may be commenced at any time during offender's lifetime during which restitution remains unpaid. (MCA 27-2-201).

Within ten years: Action upon a judgment of any court of record or judgment rendered in court not of record (MCA 27-2-201); action for mesne profits of real estate (MCA 27-2-214); action sounding in tort arising from design supervision, inspection, or construction of improvement to realty (MCA 27-2-208); action to collect past due child support (MCA 27-2-201).

Within eight years: An action upon a contract, obligation, or liability founded upon an instrument in writing, sealed or unsealed. (MCA 27-2-202).

Within six years: Certain actions relating to issuing bad check, draft, converted check, electronic funds transfer, or order stopping payment. (MCA 27-1-717).

Within five years: An action for recovery of real property, provided plaintiff seize or possess property (MCA 70-19-401); actions upon contract, account or promise, not founded upon instrument in writing (MCA 27-2-202); and actions for relief not otherwise provided for (MCA 27-2-231). In action upon open or running account, computation of time shall be from date of last item thereof. (MCA 27-2-302). Action to enforce statutory debt created by payment of public assistance, or, if fraud involved, within five years of discovery of fraud. (MCA 27-2-211). Action to question any settled or stated account against bank or financial institution within five years of statement of account. (MCA 27-2-213).

Within four years: For breach of contract for sale of goods, Uniform Commercial Code governs. (MCA 30-2-725).

Within three years: Tort action for general and personal injury. (MCA 27-2-204). Action against sheriff or other officer in his official capacity (but see subhead Within One Year), actions to recover damages for death of one caused by wrongful act or neglect of another, and action upon obligation or liability, not founded upon instrument in writing, other than contract or promise. (MCA 27-2-202 and 209). Action for medical and legal malpractice must be brought within three years after plaintiff discovers or should have discovered injury, but in no case later than five years from injury in medical case, ten years from date of act in legal malpractice case. (MCA 27-2-205 and 206). Limitation shall be tolled during any period in which doctor failed to disclose to plaintiff any act, error, or omission which is known or should have been known to such practitioner. (MCA 27-2-205). Limitations statute for medical malpractice applies to actions in tort or contract against physician, surgeon, dentist, registered nurse, nursing home or hospital administrator, dispensing optician, optometrist, licensed physical therapist, podiatrist, psychologist, osteopath, chiropractor, clinical laboratory bioanalyst, clinical laboratory technologist, pharmacist, veterinarian, licensed hospital or long-term care facility or licensed medical professional corporation. Limitations period for action for death or injury of minor under age of four on date of injury begins to run on minor’s eighth birthday or death whichever occurs first. Actions to assess deficiencies in tax reported by special fuel users and dealers must be brought within three years, except in cases of fraudulent or negligent returns. (MCA 15-70-335). Action based on forged or altered check or note within three years from day plaintiff notified of payment or paper marked “paid.” (MCA 27-2-213). Actions to recover damages for injury suffered as result of childhood sexual abuse or ritual abuse of minor must be brought within three years after abusive act or after plaintiff discovers or reasonably should have discovered that injury was caused by abuse. (MCA 27-2-216; MCA 27-2-217).

Within two years: For a statutory penalty or forfeiture (MCA 27-2-211); action for libel, slander, assault and battery, false imprisonment or seduction (MCA 27-2-204); action for injury to or trespass on real or personal property; action for taking, detaining or injuring any goods or chattels including actions for specific recovery of personal property (MCA 27-2-207); action for relief on ground of fraud or mistake, although claim does not accrue until discovery of facts constituting fraud or mistake (MCA 27-2-203); action for killing or injuring of stock by railroad company (MCA 27-2-207); action for civil liability for furnishing alcohol for injury arising from event involving person who consumed alcohol (notice of intent to file required within 180 days) (MCA 27-1-710).

Within one year: An action against a sheriff or other officer for the escape of a prisoner arrested upon civil process, an action against municipality for damages caused by mob, or action by municipality for violation of city ordinance, action against officer or de facto officer, to recover for goods, wares and merchandise, seized by such officer, or for damages done to person or property in making such seizure. (MCA 27-2-209 to 211). Claims against city or town. (MCA 7-6-4301).

Within six months: An action for claims against county which have been rejected by county commissioner. (MCA 27-2-209[3]). Action against municipality arising from decision of municipality relating to land use, construction or development project is six months from date of written decision. (MCA 27-2-209). Action challenging creation of planning and zoning district. (MCA 76-2-101[4]).

Actions not otherwise provided for must be brought within five years. (MCA 27-2-231).

Limitation of actions brought pursuant to Securities Act of Montana. (See MCA 30-10-305, 307.)

New Actions.

New action permitted within one year of reversal or termination of action, if original action brought within statutory period, even though limitation period may have expired before new action brought, except for voluntary discontinuance or judgment on merits. (MCA 27-2-407).

Liens.

As to actions to foreclose various statutory liens, see category 8 Debtor and Creditor, topic 8.13 Liens.

Disability of Plaintiff.

If person is either minor or has been committed, time of disability is not part of time limit for commencing action. However, time limit cannot extend more than five years except in case of infancy. (MCA 27-2-401).

Absence of Defendant.

If, when cause of action accrues against person, person is out of state and cannot be served with process, action may be commenced within period of limitation after return to state, and if, after cause of action accrues, person departs from state, time of absence is not part of period of limitation. (MCA 27-2-402).

Death of Either Party.

If person entitled to bring action dies before expiration of time limited for commencement thereof and cause of action survives, action may be commenced by representatives after expiration of time and within one year from death. (MCA 27-2-404).

Foreign Cause of Action.

Except in case of unfairness, if claim is substantively based upon law of one other state, limitation period of that state applies; or upon law of more than one state, limitation period of one of those states applies. Montana limitations period applies to all other claims. (MCA 27-2-503).

Acknowledgment of debt or partial payment of debt causes statute of limitations to begin running anew. Acknowledgment must be in writing and signed by debtor. (MCA 27-2-409).

Contractual Limitations.

Contractual provision limiting limitations period is void. (MCA 28-2-708; 91 Mont. 525, 9 P.2d 469).

Pleading.

Expiration of statute of limitations is affirmative defense and must be raised in first responsive pleading. (Rule 8[c]).

Paternity Actions.

May be brought at any time to declare existence or nonexistence of father and child relationship presumed under MCA 40-6-105(1)(a), (1)(b), or (1)(c). (MCA 40-6-108). Action to determine existence of father and child relationship as to child without presumed father under 40-6-105 may not be brought by child later than two years after child attains age of majority, or may be brought anytime by state agency, once social security services are requested for child and before child reaches age of majority. (MCA 40-6-108[3]). For other specifics, see MCA 40-6-108.

5.16A PARTITION:

Civil action may be brought for partition of real property held by joint tenants or tenants in common. Procedure regulated by statute. (MCA 70-29-101 to MCA 70-29-330).

Jurisdiction is in district courts. (MCA 3-5-302).

Venue is in county in which property or any part thereof is located. (MCA 25-2-123).

Proceedings.

Person entitled to partition must set forth in complaint interests of all persons in property (MCA 70-29-103), and must name specified owners as parties (MCA 70-29-104). If no prejudice would result court must order a partition. (MCA 70-29-202).

Partition in Kind or Sale.

When property cannot be divided without great prejudice to owners, court may order sale under supervision of referees. (MCA 70-29-202). Sales of real property must be at public auction with public notice. (MCA 70-29-301).

5.17 [RESERVED]

5.18 PLEADING:

Federal Rules of Civil Procedure form basis for pleading rules of Montana Rules of Civil Procedure. (Rules 7 to 16).

Pleadings permitted are same as Fed. Rule 7(a). (Rule 7[a]). All motions to be signed per Rule 11. (Rule 11).

Complaint.

Same as Fed. Rule 8(a), less jurisdiction allegations. (Rule 8[a]). In action for personal injury or wrongful death, amount of claim may not be stated. (MCA 25-4-311). Defendant may request statement of amount of claim after action filed in such actions. (MCA 25-4-312).

Answer.

Same as Fed. Rules 8(b), (c), (d), and 12(b), except for omission of improper venue as defense which may be made by motion. (Rules 8[b], [c], [d], 12[d]). Subdivisions (i) through (iii) have been added to Rule 12(b) which specify time and manner for motions for change of place of trial.

Counterclaim or Set-Off.

Similar to Fed. Rule 13 except that reference to “state of Montana or any of its governmental subdivisions, agencies or officers” is substituted for “United States” in Rule 13(d). If action pending, need not plead compulsory counterclaim. (Rule 13).

Reply.

Allowed as in Fed. Rule 7(a). (Rule 7[a]).

Demurrer.

Abolished. (Rule 7[c]).

Amended or Supplemental Pleadings.

Similar to Fed. Rule 15. (Rule 15).

Motion for More Definite Statement.

Same as Fed. Rule 12(e). (Rule 12[e]).

Verification.

Similar to Fed. Rule 11. (Rule 11).

Service.

Fed. Rule 5(a) adopted except for seizure of property paragraph. (Rule 5[a]). Can perform service by mail. (Rule 4D).

Filing.

Similar to Fed. Rules 3, 5(d), and 5(e). Original of paper filed by facsimile must be filed within five business days. (Rules 3; 5[d]; 5[e]).

Time.

Twenty days for serving answer, answer to cross-claim, reply to counterclaim, and responsive pleading after order of court on motion unless otherwise ordered by court. (Rule 12[a]). No ten day provisions as in Fed. Rule 12(a). State has 40 days to answer. (Rule 12).

Proof of Claim.

No statutory provisions other than for claim against an estate. See category 13 Estates and Trusts, topic 13.09 Executors and Administrators, subhead Uniform Probate Code, catchline Claims. (MCA 72-3-803).

Small Claims.

See category 6 Courts and Legislature, topic 6.01 Courts.

Frivolous Claims.

Attorney who, in determination of Court, multiplies proceedings in any case unreasonably and vexatiously may be required by court to satisfy personally excess costs, expenses, and attorney fees reasonably incurred because of such conduct. (MCA 37-61-421).

5.19 PRACTICE:

Federal Rules of Civil Procedure form basis for Montana Rules of Civil Procedure. Practice before administrative agencies governed by Montana Administrative Procedure Act. (MCA 2-24).

Discovery.

See topic 5.11 Depositions and Discovery. Federal Rules 35(a), 35(b)(1), 35(b)(3) adopted (Rule 35[a], 35[b][l], 35[b][3]); phrase “or may hold him in contempt of court, or both.” added to end of last sentence of Federal Rule 35(b)(1). Rule 35(b)(2) expanded to provide for waiver of physician-patient privilege upon commencement of action which places in issue mental or physical condition of party bringing action. Waiver is not applicable to mental or physical conditions not related to pending action.

Demand for Admission of Facts.

Federal Rules 36 and 37 adopted. (Rule 36 and 37).

Direct Actions Against Insurer.

See category 23 Transportation, topic 23.01 Motor Vehicles, subhead Direct Action.

Medical Malpractice.

No action may be filed prior to review by Medical Malpractice Panel. (MCA 27-6).

Small Claims.

See category 6 Courts and Legislature, topic 6.01 Courts.

See also topics 5.02 Actions, Appeal and Error, Depositions and Discovery, Injunctions, Judgments, Pleading, Process; category 8 Debtor and Creditor, topics 8.02 Attachment, 8.05 Executions, 8.09 Garnishment.

5.20 PROCESS:

Governed by Montana Rules of Civil Procedure which are patterned after Federal Rules of Civil Procedure. Substantial changes were made in jurisdiction and process portions.

See also topic 5.19 Practice.

Civil action is commenced by filing complaint. (Rule 3). Upon filing of complaint, Clerk of Court issues summons. (Rule 4C[1]).

General Requisites.

Summons must contain signature of clerk, seal of the court, name of court and parties, name and address of plaintiff’s attorney, and must state time within which defendant is required to appear. It must be directed to defendant and notify him that if he fails to appear as directed judgment by default will be rendered against him. Additional information necessary in quiet title action. (Rule 4C[2]).

By Whom Issued.

Upon filing of complaint, clerk of court issues summons. (Rule 4C[1]).

Who May Serve.

Service of process within state may be made by Sheriff or Deputy of county where party served is found, by Constable authorized by law, or by any person over 18 and not party to action. (Rule 4D[1]). Service outside state to be made in manner provided for service within state. (Rule 4D[3]).

Registered Process Server.

Person other than sheriff, constable, coroner, elisor, other government employee acting in course of employment or licensed attorney who makes more than ten services of process within state during one calendar year shall file verified certificate of registration as process server with Clerk of District Court. (MCA 25-1-1101). Registered Process Server may act as levying officer under Title 25, c. 13. (MCA 25-1-1101).

Personal service on individual is made by delivering copy of summons and complaint to him personally or to an agent authorized by appointment or law to receive service of process. (If agent designated by statute, such further notice must be given as is required by statute). (Rule 4D[2][a]).

Personal service on minor over 14 made by delivering copy of summons and complaint to him personally and by leaving copies at his dwelling house with adult residing therein, or by delivering copies to agent authorized by appointment or by law to receive service. (Rule 4D[2][b]).

Personal Service on minor under 14 made by delivering copy of summons and complaint to guardian within state, and if he has no guardian, to father, mother or other person or agency having his care or control or with whom he resides, or if service cannot be made on any of them, as ordered by court. (Rule 4D[2][c]).

Personal service on incompetent person by delivering copy of summons and complaint to court appointed guardian residing in state. If there is no such guardian, court must appoint guardian ad litem. When party is alleged to be of unsound mind, but has not been so adjudged by a court, process may be served on him personally, and court may stay pending action against him upon learning that he is of unsound mind. (Rule 4D[2][d]).

Personal service on domestic or foreign corporation, partnership, or association made by delivering copy of summons and complaint to: (1) An officer, director, superintendent or managing or general agent, or partner, or associate for such entity, or by leaving at office or place of business of such entity within state with person in charge of such office; or (2) to any agent or attorney in fact authorized by appointment or law to receive service (such further notice as may be required by statute is also necessary); or (3) if sheriff can find no such person in county, service may be made by leaving copies at any office of such entity within state with person in charge of such office; or (4) if defendant is corporation which no longer has right to do business in state, by delivering copies to one of trustees of such corporation. (Rule 4D[2][e] and MCA 35-1-316). Foreign entity must have place of business within state or be doing business herein either permanently or temporarily, or have been doing business herein either permanently or temporarily at time claim for relief accrued. (Rule 4D[2][e]).

Personal Service Outside the State.

Where service on any person cannot be made, with due diligence, personally within state, service may be made outside state in manner provided for service within state with same force and effect. Personal service outside state dispenses with necessity for following procedure for service by publication. (Rule 4D[3]).

Service by publication is permitted when subject of action is real or personal property in this state and defendant, known or unknown, has or claims lien or interest therein, or relief sought consists of excluding an interest of defendant therein; when action is to foreclose, redeem or satisfy a mortgage, claim or lien on property within state; in actions for divorce or annulment of marriage of Montana resident, or for modification of divorce decree; and when defendant has property in state which has been attached or garnished. (Rule 4D[5][a]). Status, property, or thing acted upon of defendant served by publication will be subject to decree, but such defendant will not be bound personally unless some ground for personal jurisdiction exists. (Rule 4D[5][b]). Summons must be published once a week for three successive weeks in a newspaper published in county in which action is pending (Rule 4D[5][d]). Copy of summons for publication and complaint must be mailed to defendant not later than ten days after first publication of summons unless affidavit for publication states that defendant's address is unknown. Special provisions are made for mailing to corporations. (Rule 4D[5][e]). First publication or personal service outside state must be made within 60 days after filing affidavit for publication. (Rule 4D[5][f]). Service by publication or personal service outside state is complete on date of last publication or date of personal service. (Rule 4D[5][g]).

Long Arm Statute.

See supra, subhead Personal Service Outside the State, and infra, subhead Service on Secretary of State.

Proof of Service.

If served by sheriff or other officer, his certificate; by any other person, his affidavit; by publication, affidavit of publisher of publication and mailing; or by written admission of defendant. (Rule 4D[8]). Affidavit of personal service by person other than sheriff or officer must state that person serving is of legal age, date and place of making service, and that person serving knew person served was person named in papers served and person intended to be served. (Rule 4D[9]).

Service on Secretary of State.

In actions against domestic corporations, or foreign corporations who have either qualified to do business in Montana or are otherwise subject to jurisdiction of this state, or national banking associations which through insolvency or lapse of charter have ceased to do business in Montana, where specified officers and agents cannot be found in Montana, personal service may be made upon Secretary of State; provided, that when service is made in actions and proceedings in which personal service of summons is not required to be made in order to obtain relief, service by publication must also be made. (Rule 4D[2][f]). In all other cases refer to detailed provisions in Rule 4D(6) for manner and method of serving Secretary of State.

Nonresident Motorist.

See category 23 Transportation, topic 23.01 Motor Vehicles.

5.21 REPLEVIN:

The common law action of replevin has been abolished in this state, and instead, the plaintiff in an action to recover possession of personal property may claim the same at the time of issuing summons, or before answer is made, according to the following procedure:

Proceedings.

An affidavit must be made by the plaintiff or some one on person's behalf stating: (1) That the plaintiff is the owner of the property claimed, or is lawfully entitled to the possession thereof; (2) that the property is wrongfully detained by the defendant; (3) that the property has not been taken for a tax, assessment or fine, pursuant to statute, or seized under an execution or attachment against the property of the plaintiff, or if seized, that it is exempt from execution; and (4) the actual value of the property. (MCA 27-17-201).

The plaintiff must also give to the defendant a written undertaking, executed by two or more sufficient sureties approved by the sheriff, to the effect that they are bound to the defendant, in double the value of the property, and for the return of the property to the defendant, if a return is adjudged, and for the payment of such sum as may be recovered against the plaintiff. The plaintiff may thereupon require the sheriff or constable where the property is claimed to take the same from the defendant. Judgment being given in favor of the plaintiff, and if the property has not been materially injured, and if return can be made, judgment will be for the return of the property, otherwise a money judgment will be rendered for the value of the property. (MCA 27-17-205, 303, 402, 403).

Sheriff cannot make seizure without court order which requires show cause hearing or proof that delay before hearing would impair remedy. (MCA 27-17-203).

Repossession by Defendant.

At any time before delivery of property to plaintiff, if defendant does not except to sureties of plaintiff, defendant by giving to sheriff written undertaking, may require return of property. Sureties may be required to justify, and sheriff is responsible for defendant’s sureties until they justify and he may retain property until justification is complete or expressly waived. Qualification of sureties in claim and delivery action are same as in bail on order of arrest. (MCA 27-17-304 to 307).

Third Party Claims.

If third person claiming the property serves on sheriff an affidavit of his title, sheriff need not keep property or deliver it to plaintiff unless indemnified. (MCA 27-17-309).

Judgment must be in the alternative, for the return of the property or its value (69 Mont. 46, 220 P. 101), but if property has diminished in value, action may be maintained for its undiminished value or for damages for its detention (MCA 27-17-403).

5.22 SEQUESTRATION:

No statutory provision.

5.23 SERVICE:

See topic 5.20 Process.

5.24 STAY OF EXECUTION:

See topic 5.03 Appeal and Error; category 8 Debtor and Creditor, topic 8.05 Executions.

5.25 SUBMISSION OF CONTROVERSY:

Parties to a cause in difference which might be subject of a civil suit may, without action, agree on case containing facts of controversy and submit it to any court which would have jurisdiction if action brought. It must appear by affidavit that controversy is real and proceedings in good faith to determine rights of parties. Court must hear and render judgment as if action were pending. (MCA 27-7-101, 102). Judgment must be entered in judgment book without costs for any proceeding prior to trial, may be enforced as if rendered in action and is subject to appeal. (MCA 27-7-103, 104).

5.26 VENUE:

An action affecting the title to or any interest in real property must be brought in the county where all or part of property is situated. (MCA 25-2-123). Actions to recover penalty or forfeiture imposed by statute (MCA 25-2-124) or against public official (MCA 25-2-125) must be in county where cause arose. Actions against state must be brought in county in which claim arose or in Lewis and Clark County, or if action is by Montana resident, in county of his residence. (MCA 25-2-126). Actions against political subdivision must be brought in county where claim arose or county where political subdivision is located. (MCA 25-2-126). Actions upon contract must be brought in county of defendants' residence or county in which contract was to be performed. (MCA 25-2-121). Tort actions must be brought in county of defendants' residence or where tort was committed unless defendant is corporation incorporated in state outside of Montana, then proper place of trial is county where tort was committed, where plaintiff resides or where corporation's registered agent is located. (MCA 25-2-122; 133 Mont. 320, 323 P.2d 269). If defendant is railroad and plaintiff is Montana resident, then proper place of trial subject to FELA is any county in which railroad does business. If tort is interrelated with claim for breach of contract, tort is deemed to be committed where contract is to be performed. (MCA 25-2-122). In all other cases, civil actions must be brought in county where defendants or any of them reside at commencement of action; or if none of defendants reside in Montana in contract action, in county in which contract was to be performed. (MCA 25-2-121). In tort action, if defendant is resident of state other than Montana, (1) county in which tort was committed; or (2) county in which plaintiff resides. (MCA 25-2-122, as am'd in 1997; 164 Mont. 1, 518 P.2d 791).

Change of Venue.

Change of venue is required when county designated in complaint is not proper, when there is reason to believe that impartial trial cannot be had therein; when convenience of witnesses and ends of justice would be promoted; or upon consent of all parties. (MCA 25-2-201, MCA 25-2-202).

Contract Provisions.

Provision in agreement fixing venue enforceable. (MCA 25-2-202; 132 Mont. 243, 316 P.2d 788).

6 COURTS AND LEGISLATURE

6.01 COURTS:

United States District Court.

Montana, exclusive of Yellowstone Park, constitutes one judicial district. See Rule 1.9, Local Rules of Procedure, U.S. District Court for District of Montana.

Billings Division, comprised of Counties of Big Horn, Carbon, Carter, Custer, Dawson, Fallon, Garfield, Golden Valley, McCone, Musselshell, Park, Petroleum, Powder River, Prairie, Richland, Rosebud, Stillwater, Sweetgrass, Treasure, Wheatland, Wibaux and Yellowstone Court is held at James F. Battin Courthouse, Billings, Montana. Clerk: Nancy O'Brien, Deputy in Charge, 316 N. 26th, Room 5405, Billings, MT 59101.

Butte Division, comprised of Counties of Beaverhead, Deer Lodge, Gallatin, Madison and Silver Bow Court is held at Mike Mansfield Federal Building and U.S. Courthouse, Butte, Montana. Clerk: Darlene DeMato, Deputy in Charge, 400 N. Main St., Federal Building, Room 303, Butte, MT 59701.

Great Falls Division, comprised of Counties of Blaine, Cascade, Choteau, Daniels, Fergus, Glacier, Hill, Judith Basin, Liberty, Phillips, Pondera, Roosevelt, Sheridan, Teton, Toole and Valley Court is held at Post Office Building, Great Falls, Montana. Clerk: Linda Mitchell, Deputy in Charge, 215 1st Ave. North, P.O. Box 2186, Great Falls, MT 59403.

Helena Division, comprised of Counties of Broadwater, Jefferson, Lewis and Clark, Meagher and Powell Court is held at Paul G. Hatfield Courthouse, Helena, Montana. Clerk: Darlene DeMato, Deputy in Charge, Paul G. Hatfield Courthouse, 901 Front St., Helena, MT 59626.

Missoula Division, comprised of Counties of Flathead, Granite, Lake, Lincoln, Mineral, Missoula, Ravalli and Sanders Court is held at Russell Smith Courthouse, Missoula, Montana. Clerk: Patrick Duffy; Clerk of Court, 201 E. Broadway, P. O. Box 7309, Missoula, MT 59807

Fees.

Fee for starting civil action is $350 which covers all appearances in action. Fee for habeas corpus proceeding is $5. (28 U.S.C. § 1914). (See: http://www.mtd.uscourts.gov/fees.htm.)

Electronic Filing: U.S. District Court for District of Montana has adopted Case Management Electronic Case Files ("CM/ECF") System. See http://www.mtd.uscourts.gov/cmecf.htm and Local Rule 1.6" for more information.

Supreme Court of Montana.

Supreme Court has appellate jurisdiction extending to all cases in law and equity. (MCA 3-2-203).

Supreme Court sits at Helena.

District Courts.

District courts have civil, criminal, and probate jurisdiction as well as for all cases at law and in equity. In criminal actions, they have jurisdiction in all cases amounting to a felony, and in misdemeanors not otherwise provided for. District courts have concurrent jurisdiction with justice courts in misdemeanors arising from same transaction as charged felony, resulting from reduction of felony charge, or included as lesser offense found by jury in felony case. (MCA 3-5-302). They have appellate jurisdiction from justices' courts and other courts of limited jurisdiction as may be prescribed by law. (MCA 3-5-303).

Districts.

Montana has 22 judicial districts:

First District: Counties of Broadwater and Lewis and Clark.

Second District: County of Silver Bow.

Third District: Counties of Deer Lodge, Granite and Powell.

Fourth District: Counties of Mineral and Missoula.

Fifth District: Counties of Beaverhead, Jefferson and Madison.

Sixth District: Counties of Park and Sweet Grass.

Seventh District: Counties of Dawson, McCone, Prairie, Richland and Wibaux.

Eighth District: County of Cascade.

Ninth District: Counties of Glacier, Pondera, Teton and Toole.

Tenth District: Counties of Fergus, Judith Basin and Petroleum.

Eleventh District: County of Flathead.

Twelfth District: Counties of Chouteau, Hill and Liberty.

Thirteenth District: County of Yellowstone.

Fourteenth District: Counties of Golden Valley, Meagher, Musselshell and Wheatland.

Fifteenth District: Counties of Daniels, Roosevelt and Sheridan.

Sixteenth District: Counties of Carter, Custer, Fallon, Garfield, Powder River, Rosebud and Treasure.

Seventeenth District: Counties of Blaine, Phillips and Valley.

Eighteenth District: County of Gallatin.

Nineteenth District: County of Lincoln.

Twentieth District: Counties of Lake and Sanders.

Twenty-first District: County of Ravalli.

Twenty-second District: Counties of Big Horn, Carbon and Stillwater.

Locations of courts are as follows (See: http://courts.mt.gov/locator.asp):

Beaverhead County; 5th District; Court sits at Dillon.

Big Horn County; 22nd District; Court sits at Hardin.

Blaine County; 17th District; Court sits at Chinook.

Broadwater County; 1st District; Court sits at Townsend.

Carbon County; 22nd District; Court sits at Red Lodge.

Carter County; 16th District; Court sits at Ekalaka.

Cascade County; 8th District; Court sits at Great Falls.

Chouteau County; 12th District; Court sits at Fort Benton.

Custer County; 16th District; Court sits at Miles City.

Daniels County; 15th District; Court sits at Scobey.

Dawson County; 7th District; Court sits at Glendive.

Deer Lodge County; 3rd District; Court sits at Anaconda.

Fallon County; 16th District; Court sits at Baker.

Fergus County; 10th District; Court sits at Lewistown.

Flathead County; 11th District; Court sits at Kalispell.

Gallatin County; 18th District; Court sits at Bozeman.

Garfield County; 16th District; Court sits at Jordan.

Glacier County; 9th District; Court sits at Cut Bank.

Golden Valley County; 14th District; Court sits at Ryegate.

Granite County; 3rd District; Court sits at Philipsburg.

Hill County; 12th District; Court sits at Havre.

Jefferson County; 5th District; Court sits at Boulder.

Judith Basin County; 10th District; Court sits at Stanford.

Lake County; 20th District; Court sits at Polson.

Lewis and Clark County; 1st District; Court sits at Helena.

Liberty County; 12th District; Court sits at Chester.

Lincoln County; 19th District; Court sits at Libby.

Madison County; 5th District; Court sits at Virginia City.

McCone County; 7th District; Court sits at Circle.

Meagher County; 14th District; Court sits at White Sulphur Springs.

Mineral County; 4th District; Court sits at Superior.

Missoula County; 4th District; Court sits at Missoula.

Musselshell County; 14th District; Court sits at Roundup.

Park County; 6th District; Court sits at Livingston.

Petroleum County; 10th District; Court sits at Winnett.

Phillips County; 17th District; Court sits at Malta.

Pondera County; 9th District; Court sits at Conrad.

Powder River County; 16th District; Court sits at Broadus.

Powell County; 3rd District; Court sits at Deer Lodge.

Prairie County; 7th District; Court sits at Terry.

Ravalli County; 21st District; Court sits at Hamilton.

Richland County; 7th District; Court sits at Sidney.

Roosevelt County; 15th District; Court sits at Wolf Point.

Rosebud County; 16th District; Court sits at Forsyth.

Sanders County; 20th District; Court sits at Thompson Falls.

Sheridan County; 15th District; Court sits at Plentywood.

Silver Bow County; 2nd District; Court sits at Butte.

Stillwater County; 22nd District; Court sits at Columbus.

Sweet Grass County; 6th District; Court sits at Big Timber.

Teton County; 9th District; Court sits at Choteau.

Toole County; 9th District; Court sits at Shelby.

Treasure County; 16th District; Court sits at Hysham.

Valley County; 17th District; Court sits at Glasgow.

Wheatland County; 14th District; Court sits at Harlowton.

Wibaux County; 7th District; Court sits at Wibaux.

Yellowstone County; 13th District; Court sits at Billings.

(MCA 3-5-101).

Water Courts.

Montana Water Court sits at Bozeman. Division Water Judges established in and for each of four major natural drainages within state—Yellowstone River basin, Hon. Joe Hegel, Miles City; Lower Missouri River basin, Hon. David Cybulski, Plentywood; Upper Missouri River basin, Hon. Jeffrey Sherlock, Helena; and Clark Fork River basin, Hon. Ted Mizner, Deer Lodge. (MCA 3-7-102). Montana Water Court has exclusive jurisdiction over final determination of water rights claims with priority dates before July 1, 1973 ("existing water rights"). (§ 3-7-501). Post July 1, 1973, water rights permits and charge applications are within exclusive jurisdiction of Montana Department of Natural Resource Conservation. For more info, see http://courts.mt.gov/water.

Workers' Compensation Court.

One court established in state with principal office in Helena. (MCA 39-71-2901). Exclusive jurisdiction over disputes arising under Montana Workers' Compensation Act (MCA 39-71-100 et seq.) except disputes involving statutory cause of action against uninsured employers which may be certified to Workers' Compensation Court by District Court (MCA 39-71-2905 & MCA 39-71-515). Parties must attempt mediation prior to filing petition with Workers' Compensation Court. (MCA 39-71-2401). Workers' Compensation Court must comply with Mont. A.P.A. and statutory and common law rules of evidence. (MCA 39-71-2903). Where Administrative Rules are silent as to procedural matters court will look to Montana Rules of Civil

Procedure for guidance. (Moen v. Peter Kiewit & Sons, Co. [1982], 201 Mont. 425, 655 P.2d 482). Decisions of Workers' Compensation Court appealed directly to Montana Supreme Court. (MCA 39-71-2904).

Probate Courts.

There are no separate probate courts. Probate jurisdiction is exercised by district courts. (MCA 3-5-302[b]).

Justice of the Peace Courts.

Jurisdiction.

At least one in each county, to be located at county seat; county given authority to add additional justice located anywhere in county; and city over 5,000 may request justice court. (MCA 3-10-101). Have civil jurisdiction where amount in controversy does not exceed $7,000, in following actions: (1) On contract for recovery of money only; (2) for damages for taking, detaining or injuring personal property, for injury to real property where issue of title or possession not raised; (3) for injury to person except in actions for false imprisonment, libel, slander, criminal conversation, seduction, malicious prosecution, determination of paternity, and abduction; (4) to recover possession of personal property; (5) for fine, penalty, or forfeiture given by statute or ordinance; (6) upon bonds or undertakings; (7) to take and enter judgment for recovery of money on confession (see topic Judgments) of defendant; (8) issuing temporary restraining orders or domestic relations orders of protection; (9) issues of stream restocking. (MCA 3-10-301). Concurrent jurisdiction with district courts over unlawful detainer, forcible entry, and residential landlord-tenant actions. (MCA 3-10-302). In criminal cases, jurisdiction of misdemeanors punishable by fine not more than $500, imprisonment not more than six months, or both; misdemeanor fish and game violations punishable by fine not more than $1,000 or imprisonment not more than six months, or both; concurrent with district court of misdemeanors punishable by fine exceeding $500 or imprisonment exceeding six months, or both; concurrent with district court of misdemeanor fish and game violations punishable by fine exceeding $1,000 or imprisonment exceeding six months, or both; jurisdiction of all violations of Tit. 61, c. 10; and all misdemeanor violations of Tit. 81, c. 8, part 2 (MCA 3-10-303), and misdemeanors arising from transaction where felony charged, resulting from reduction of felony charge, or included as lesser offense found by jury in felony case (MCA 3-5-302). County may establish justice court as court of record (MCA 3-10-101[5]), in which case appeal to district court is on record, not de novo (MCA 3-10-115). Civil jurisdiction is limited to county in which Justice Court sits, but summons and writs of executions may be served in any county of Montana. (§ 3-10-304).

Procedure.

Action is commenced by filing complaint. (25-23-Rule 2 Mont. Justice and City Court Rules of Civ. P.). Unlike in small claims court, corporation may not be represented by employee; it must have duly licensed attorney. (Rule 2). Defendant must file written answer and serve same on plaintiff or his attorney within 20 days after service of summons. (25-23-Rule 7). Summons may be served by sheriff, deputy, or constable of appropriate county in state, or any resident over 18 years and not party to suit. Rules for manner of service, return, and service by publication are similar to Rules of Civil Procedure for District Courts. (Rule 4D[1], Montana Justice and City Court Rules of Civ. P.).

Judgment.

Justice's court judgment creates no lien on lands of defendant unless transcript of original docket, certified by clerk of justice's court, is filed with Clerk of District Court. When so filed judgment is lien upon all real property of judgment debtor in such county (property that is owned by judgment debtor at time or that judgment debtor may afterwards and before lien expires acquire). Lien continues for ten years. (MCA 25-31-914).

City Court established in each city or town. (MCA 3-11-101). Concurrent jurisdiction with justice's court of all misdemeanors and proceedings provided for in Title 3, c. 10, Part 3. (MCA 3-11-102). Exclusive jurisdiction for: Enforcement of all civil and criminal ordinances; collection of city taxes and assessments up to $5,000; money due to city up to $5,000; bond, contract, damages, and forfeited recognizance actions up to $5,000; recovery of city property up to $5,000. (MCA 3-11-103). City Court abolished where Municipal Court established. (MCA 3-6-102).

Municipal Courts.

Cities of over 4,000 population may provide for municipal courts having concurrent jurisdiction with justices' courts, exclusive jurisdiction of same matters as city courts in other cities and towns, and concurrent jurisdiction with district courts in forcible entry and unlawful detainer. (MCA 3-6-101 and MCA 3-6-103). Municipal courts are courts of record. (MCA 3-1-102).

Small Claims Courts.

Small claims courts have jurisdiction over all actions for recovery of money or specific personal property when amount claimed does not exceed $3,000, exclusive of costs, and defendant can be served within county where action is commenced. (MCA 25-35-502). District court may remove action to small claims court if amount in controversy does not exceed $3,000. (MCA 25-35-503). Proper venue for actions commenced in small claims court is same as that provided for by law for civil actions. (MCA 25-35-504). Party may not be represented by attorney unless all parties represented by attorney. (MCA 25-35-505). Corporation may be represented by employee. (MCA 25-35-505[3]). Action commenced by executing sworn small claims complaint. (MCA 25-35-601). Except for claims under MCA 27-1-718, no party may file more than ten claims in any calendar year. (MCA 25-35-505). Pamphlets explaining procedure are given to plaintiff and copy of pamphlet must be attached to notice given defendant. (MCA 25-35-601). Defendant may remove action to justices' court within ten days of service of complaint, and failure to remove constitutes waiver of rights to trial by jury and to representation by counsel. (MCA 25-35-605). Defendant may assert counterclaim up to $2,500 arising out of same transaction or occurrence. (MCA 25-35-606). Appeal may be made to district court following small claims court decision. However, this appeal is limited to questions of law. (MCA 25-35-803). Upon removal to justice's court by defendant, or upon appeal, prevailing party may be granted attorney fees and reasonable costs. (MCA 25-35-806).

Judges Pro Tempore/Special Master.

Parties to civil action may stipulate in writing to have action tried before judge pro tempore or special master. Judge pro tempore or special master may also be appointed by district court judge to conduct preliminary, non-dispositive proceedings in criminal action. (MCA 3-5-113).

6.02 LEGISLATURE:

Const. Art. V, § 6 provides that legislature shall meet each odd-numbered year for not more than 90 legislative days, and permits any legislature to extend time limit on sessions for any subsequent legislature.

Special or Extraordinary Sessions.

Const. V, 6 provides that governor or majority of legislature may convene special session.

Initiative and Referendum.

Constitution provides for initiative and referendum except for appropriation of money.

(Const. Art. III, §§ 4 and 5).

Legislative Council.

Twelve member group of legislators serving two year terms to study and review state government, propose legislation. (MCA 5-11-101 to 107). Legislative services division established. (MCA 5-11-111). May establish functional organization within council. (MCA 5-11-112).

Lobbyists.

Lobbyists regulated by MCA 5-7-101 to 310. Licenses required. (MCA 5-7-103). Extensive reporting required by lobbyist and principal. (MCA 5-7-201, MCA 5-7-208). Failure to comply with requirements of chapter gives rise to civil and criminal penalties. (MCA 5-7-305).

Expenditure Limitation.

Except in declared emergency, or pursuant to legislative declaration, legislature cannot appropriate for expenditures in excess of previous biennium plus growth factor based on personal income of Montana residents. (MCA 17-8-106).

6.03 REPORTS:

Decisions of Supreme Court are reported in Montana Reports and Pacific Reporter.

Digests are Montana Digest and Pacific Digest.

6.04 STATUTES:

Statutes of state are recodified as “Montana Code Annotated,” formerly Revised Codes of Montana, 1947. Recodification completed Jan. 1, 1979. Montana Code Annotated (MCA) is reenactment and continuation of previous law. (MCA 1-11-103). Code Commissioner is responsible for republication, updating and supplementation. New printing of entire code after each biennial legislative session is contemplated.

MCA is arranged by Title, Chapter and Section. Citation to Title 1, Chapter 1, Section 1 would appear as MCA 1-1-101, MCA. Current version: 2009.

Uniform Acts adopted are:

† Adoption (1994 edition, adopted 1997) (Title 42)

Adult Guardianship and Protective Proceedings Jurisdiction Act (adopted 2009)

† Revised Anatomical Gift Act (2006 edition, adopted 2007) (Tit. 72, c. 17)

† Arbitration (1985 edition, adopted 1985) (Tit. 27, c. 5)

Certification of Questions of Law (1995 edition, adopted 2007) (Mont. R. App. P. 15)

† Child Custody Jurisdiction and Enforcement (1997 edition, adopted 1999) (Tit. 40, c. 7)

Commercial Code (Tit. 30, cc. 1 through 9A) (2001 Revision of Arts. 1, 2A (Leases); 1990 Revisions of Art. 3; 1990 amended to Art. 4, 4A (Funds, Transfers); 1995 Revisions of Art. 5; 2003 Revision of Art. 7; 1994 Revision of Art. 8; and 2000 Revision of Art. 9; Art. 6 repealed)

† Common Trust Fund (1938 edition, adopted 1955) (Tit. 32, c. 1, Part 7)

Conflict of Laws-Limitations (1982 edition, adopted 1991) (Tit. 27, c. 2, Part 5)

† Controlled Substances (1970 edition, adopted 1973) (Tit. 50, c. 32)

Criminal Extradition (Tit. 46, c. 30)

Declaratory Judgment (1935 edition, adopted 1947) (Tit. 27, c. 8)

Determination of Death (1980 edition, adopted 1983) (Tit. 50, c. 22, Part 1)

Disposition of Community Property Rights at Death (1971 edition, adopted 1989) (Tit. 72, c. 9)

Division of Income for Tax Purposes (1957 edition, adopted 1969) (§ 15-1-601, Art. IV)

Durable Power of Attorney (1979 edition, adopted 1985) (Tit. 72, c. 5, Part 5)

Electronic Transactions Act (1999 edition, adopted 2001) (Tit. 30, c. 18, Part 1)

Enforcement of Foreign Judgments (1964 edition, adopted 1989) (Tit. 25, c. 9, Part 5)

Evidence, Rules of (1977) (Tit. 26, c. 10)

Federal Lien Registration (1982 edition, adopted 1983) (Tit. 71, c. 3, Part 2)

Foreign-Money Claims (1989 edition, adopted 1993) (Tit. 25, c. 9, Part 7)

Foreign-Country Money Judgments Recognition (adopted 2009) (Tit. 25, c. 9, Part 6)

Fraudulent Transfer (1984 edition, adopted 1991) (Tit. 31, c. 2, Part 3)

† Guardianship and Protection Proceedings (1982 edition, adopted 1974) (Tit. 72, c. 5)

Health Care Information (1985 edition, adopted 1987) (Tit. 50, c. 16, Part 5)

International Will (1977 edition, adopted 1991) (Tit. 72, c. 2, Part 9)

Interstate Enforcement of Domestic Violence Protection Orders (2000 edition (with 2002 amendments) adopted in 2001 and 2003, respectively) (Tit. 40, c. 15, Part 4)

† Interstate Family Support (1996 edition, adopted 1993) (Tit. 40, c. 5, Part 1)

† Limited Liability Company Act (1996 edition, adopted 1999) (Tit. 35, c. 8)

Limited Partnership Act (1976 edition, adopted 1981) (Tit. 35, c. 12)

Machine Gun (1932 edition, adopted 1935) (Tit. 45, c. 8, Part 3)

† Marriage and Divorce Act (1970 edition, adopted 1975) (Tit. 40, cc. 1, 4)

Model Business Corporation (1984 edition, adopted 1991) (Tit. 35, c. 1)

Model Drug Paraphernalia (1979 edition, adopted 1981) (Tit. 45, c. 10)

Model Statutory Close Corporation Supplement (1984 edition, adopted 1987) (Tit. 35, c. 9)

Multiple-Person Accounts (1989 edition, adopted 1993) (Tit. 72, c. 6, Part 2)

Nonprobate Transfers on Death (1989 edition, adoption 1993) (§ 72-6-111)

Notorial Acts (1982 edition, adopted 1993) (Tit. 1, c. 5, Part 6)

Parentage (1973 edition, adopted 1975) (Tit. 40, c. 6, Part 1)

† Partnership (1997 edition, adopted 1993) (Tit. 35, c. 10)

Premarital Agreement Act (1983 edition, adopted 1987) (Tit. 40, c. 2, Part 6)

Principal and Income (1997 edition, adopted 2003) (Tit. 72, c. 34, Part 4)

Probate Code (1969 edition, adopted 1975; 1990 Revision of Art. II; 1989 Revision of Art. VI) (Tit. 72, cc. 1-5)

Professional Corporation Supplement to the Model Business Corporations (1976 edition, adopted 1983) (Tit. 35, c. 4)

Prudent Investor (1994 edition, adopted 2003) (Tit. 72, c. 34, Part 6)

Prudent Management of Institutional Funds (2006 edition, adopted 2007, amended 2009) (Tit. 72, c. 30)

Residential Landlord and Tenant (1972 edition, adopted 1977) (Tit. 70, c. 24)

† Revised Model State Administrative Procedure Act (1961 edition, adopted 1971) (Tit. 2, c. 4)

Rights of the Terminally Ill (1989 edition, adopted 1991) (Tit. 50, c. 9)

† Securities (1956 edition, adopted 1961) (Tit. 30, c. 10).

Simultaneous Death Act (1993 edition, adopted 1993) (§ 72-2-114; MCA 72-2-712)

Statutory Form Power of Attorney (1988 edition, adopted 1991) (Tit. 72, c. 31, Part 2)

† Statutory Rule Against Perpetuities (1986 edition, adopted 1989) (Tit. 72, c. 2, Part 10)

† Testamentary Additions to Trusts (1991 edition (§ 1 only), adopted 1991) (§ 72-2-531)

TOD Security Registration Act (1989 edition, adopted 1993) (Tit. 72, c. 6, Part 3)

Trade Secrets Act (1985 edition, adopted 1985) (Tit. 30, c. 14, Part 4)

Transboundary Pollution Reciprocal Access (1982 edition, adopted 1983) (Tit. 75, c. 16, Part 1)

Transfers to Minors (1983 edition, adopted 1985) (Tit. 72, c. 26)

Unclaimed Property Act (1995 edition, adopted 1997) (Tit. 70, c. 9, Part 8)

Uniform Commercial Code adopted. (Tit. 30). See category 3 Business Regulation and Commerce, topic 3.09 Commercial Code.

For text of Uniform Acts falling within the scope of the Martindale-Hubbell Law Digests see Uniform and Model Acts section.

† Adopted with significant variations or modifications. See appropriate topics as to Acts within scope of Digests volume.

6.05 UNIFORM LAWS:

For list of Uniform Acts in force in this state see topic 6.04 Statutes. For text of Uniform Acts within the scope of the Martindale-Hubbell Law Digests see Uniform and Model Acts section.

7 CRIMINAL LAW

7.00A BAIL:

See topic 7.01 Criminal Law.

7.01 CRIMINAL LAW:

Substantive provisions of crimes and punishments appear in Tit. 45. These chapters include: (1) General Preliminary Provisions; (2) General Principles of Liability; (3) Justifiable Use of Force; (4) Inchoate Offenses; (5) Offenses Against the Person; (6) Offenses against Property; (7) Offenses against Public Administration; (8) Offenses against Public Order; (9) Dangerous Drugs; (10) Model Drug Paraphernalia Act. Tit. 46 covers code of criminal procedure, including following chapters: (1) General Provisions; (2) Jurisdiction; (3) Venue; (4) Investigative Procedures; (5) Search and Seizure; (6) Arrest; (7) Initial Appearance of Arrested Persons; (8) Right to Counsel; (9) Bail; (10) Preliminary Examination; (11) Commencement of Prosecution; (12) Arraignment of Defendant; (13) Pretrial Motions; (14) Mental Competency of Accused; (15) Production of Evidence; (16) Trial; (17) Lower Court Proceedings; (18) Sentence and Judgment; (19) Execution of Judgment; (20) Appeals; (21) Post-Conviction Hearing; (22) Habeas Corpus; (23) Probation, Parole, and Clemency; (24) Treatment of Victims and Witnesses (cc. 25 through 29 Reserved); (30) Uniform Criminal Extradition Act; (31) Interstate Agreement on Detainers. Offenses of criminal and negligent endangerment created. (MCA 45-5-207 and MCA 45-5-208).

Indictment or Information.

All prosecutions of offenses charged in district court must be by indictment or information. (MCA 46-11-102[1]). Information is filed by county attorney. (MCA 46-11-201). Indictment may be found by eight of 11 grand jurors. (MCA 46-11-331). All prosecutions of other offenses must be by complaint. (MCA 46-11-102[2]).

Bail.

Bail is permitted as matter of right, except where offense charged is punishable by death and proof of guilt is evident or presumption of guilt is great. (MCA 46-9-102).

Interstate Compact for Adult Offender Supervision.

Interstate Compact for Adult Offender Supervision adopted during 2001 legislative session pursuant to SB 40 and effective on Oct. 1, 2001. (MCA 46-23-1115). Repeal of Uniform Act for Out-of-State Parolee Supervision.

Uniform Criminal Extradition Act.

Uniform Criminal Extradition Act adopted. (Tit. 46, c. 30). Person may be extradited without warrant provided in Uniform Act after hearing and presentation of copy of agreement to waive extradition or copy of warrant from other state. (MCA 46-30-228 and MCA 46-30-229).

8 DEBTOR AND CREDITOR

8.01 ASSIGNMENTS:

Uniform Commercial Code adopted. (Tit. 30). See category 3 Business Regulation and Commerce, topic 3.09 Commercial Code. Property of any kind may be transferred (MCA 70-1-503) except mere possibility not coupled with interest (MCA 70-1-504). Chose in action arising out of violation of property right or out of obligation may be transferred. (MCA 70-2-102).

Instrument Transferring Title.

Uniform Commercial Code adopted. (Tit. 30). See category 3 Business Regulation and Commerce, topic 3.09 Commercial Code. With respect to transfers not governed by U.C.C., transfers may be made without writing except where writing is expressly required by statute. (MCA 70-1-506). Instrument need not be witnessed or acknowledged.

Filing.

Uniform Commercial Code adopted. (Tit. 30). See category 3 Business Regulation and Commerce, topic 3.09 Commercial Code. Assignments in transactions not governed by U.C.C. need not be filed or recorded.

Notice.

Uniform Commercial Code adopted. (Tit. 30). See category 3 Business Regulation and Commerce, topic 3.09 Commercial Code. In transactions not governed by U.C.C. notice to obligor not required.

Action by the assignee, in case of assignment of thing in action, is without prejudice to any set-off or other defense existing at time of, or before, notice of assignment; but this applies only to extent not otherwise provided for by U.C.C. (MCA 27-1-503).

Assignments of Wages.

Payments made in consideration for any sale or assignments of wages are deemed loans governed by Consumer Loan Act. (MCA 32-5-101 to MCA 32-5-406,MCA 31-1-308) (See category 3 Business Regulation and Commerce, topic 3.19 Interest.) Assignments of wages to licensee under Act must not exceed 10% of wages owing at time of notice to employer and thereafter to become owing. Assignments must be written and signed by borrower and spouse, if any. Notice to employer of assignment is required only in event debtor defaults. Honoring of assignment is at option of employer. (MCA 32-5-310[2]). Assignments of wages other than those made to licensee under Act are subject to following restrictions: (1) Must be for fixed and definite part of all wages or salary theretofore earned (MCA 31-1-304); (2) wife or husband of married assignor must join in assignment, acknowledging same before notary or other authorized officer, other than assignee or person connected with him (MCA 31-1-306); (3) written notice with copy of assignment must be served on employer within one day after execution and filed in office of county clerk of county where assignor resides (MCA 31-1-307).

Wage Brokers.

Any person who accepts assignment of wages as security for loan is a wage broker (MCA 31-1-303), and must secure license from governmental authorities and obtain bond (MCA

31-1-301).

8.02 ATTACHMENT:

Actions in Which Allowed.

Property may be attached in any action upon contract, express or implied, for direct payment of money, where contract is not secured by mortgage or lien on real property, or is originally secured, where security has without act of plaintiff become valueless; where action is by local government to ensure debris removal in particular cases, and also in action based upon statutory stockholders' liability. (MCA 27-18-101). Guaranty of loan in which only condition precedent to obligation of guarantor is default is unconditional contract for direct payment of money. (MCA 27-18-101[3]).

Courts Which May Issue Writ.

Both justice (MCA 27-18-1501) and district courts (MCA 27-18-205) may issue writ.

In Whose Favor Writ May Issue.

Any plaintiff (MCA 27-18-101, 102); no provision discriminating against nonresident plaintiffs.

Claims on Which Writ May Issue.

On unmatured claims, if it appears from plaintiff's affidavit that (1) defendant is about to leave the state with his property to defraud his creditors, or (2) that defendant is disposing of, or about to dispose of, property subject to execution to defraud his creditors. (MCA 27-18-203).

Grounds.

See supra, subhead Actions in Which Allowed.

Proceedings to Obtain.

Plaintiff must file affidavit stating: That defendant is indebted in specified amount on contract such as that described above; that attachment is not sought to hinder, delay or defraud any creditor of defendant; that facts exist which create reasonable belief defendant will leave Montana taking nonexempt property with him, is disposing or about to dispose of nonexempt property, or has power to dispose of, conceal or remove property subject to execution, or may suffer liens on such property. Affidavit must contain description and actual value of property to be attached. (MCA 27-18-202).

Writ is issued by court (MCA 27-18-205) or by justice of peace (MCA 27-18-1502) after receipt of affidavit, written undertaking and prima facie showing of right to and necessity for seizure. In case of personal property, must have show cause hearing with three days notice to defendant unless plaintiff shows in open court that delay caused by notice and hearing would seriously impair remedy sought. (MCA 27-18-205).

Attachment bond in double the amount claimed if amount is $1,000 or less, or equal to amount claimed if in excess of $1,000, unless plaintiff is local government but in no case in excess of $20,000, must be filed before writ issues. (MCA 27-18-204). Within 30 days after summons served defendant may except to sufficiency of sureties. Failure so to do is waiver of defects. (MCA 27-18-715). In justice court, except where plaintiff is local government, bond must be for not less than $50, nor more than $300. (MCA 27-18-1502). Exception to sureties may be taken within two days. (MCA 27-18-1503).

Levy may be made on any property of defendant not exempt from execution (MCA 27-18-102) but chose in action for personal injuries cannot be attached (100 Mont. 496, 50 P.2d 249). In any action where amount sued for is $10 or less, wages or earnings for personal services rendered within 30 days are exempt from attachment. (MCA 27-18-102[2]).

Real property is attached by filing a copy of writ, description of property, and notice of attachment with county clerk (MCA 27-18-402); personal property capable of manual delivery is attached by taking it into custody, except where in possession of third person (MCA 27-18-404); investment securities may be attached only by seizure (MCA 27-18-409); corporate stocks or shares other than investment securities may be attached either by seizure or by leaving with president, secretary, cashier or managing agent of corporation, copy of writ and notice of attachment (MCA 27-18-409); debts or credits and personal property in possession of third person, by leaving copy of writ and notice of attachment with person owing debt or in possession or control of property (MCA 27-18-405); judgments by leaving with clerk of district court copy of writ and notice of attachment (MCA 27-18-408); interest in personal property belonging to estate of decedent, by serving personal representative with copy of writ and notice of attachment and filing copy with clerk of court in which estate is being administered (MCA 27-18-412).

Claim and Delivery Bond.

Plaintiff must submit written undertaking executed by two or more sureties for double value of property in order to attach property. (MCA 27-17-205). Claim delivery action is separate action from attachment. (See MCA 27-17-101, et seq.)

Indemnity.

Attachment bond required for application to discharge attachment levied upon interest in partnership. (MCA 35-10-506). In event of third party claim, sheriff may require bond. (MCA 27-18-602).

Lien accrues at time of attachment and in order in which writs are levied. (MCA 27-18-307).

Priorities.

Levying officer must execute writs against same defendant in order in which officer receives them. (MCA 27-18-303).

Sale of property may be had prior to judgment on order of court, proceeds to be deposited in court. (MCA 27-18-802).

Release.

After appearance defendant may obtain release of attachment upon filing undertaking in amount to be fixed by court. (MCA 27-18-721, 722). If no proceedings have been taken for five years in action in which attachment was issued, defendant or record owner may apply to clerk of court for release. (MCA 27-18-732).

Discharge.

If it appears writ was improperly or irregularly issued, it must be discharged. Court may permit amendment of affidavit or undertaking. (MCA 27-18-713).

Vacation or Modification.

Defendant has right to post-seizure hearing unless writ issued after show cause hearing. (MCA 27-18-701). If motion based on papers supporting writ, it must be made with or without notice as court sees proper; otherwise notice required. (MCA 27-18-726). Motion to vacate or modify may be made by defendant or any person acquiring interest in property after attachment. (MCA 27-18-725).

Third Party Claims.

If third party claims personal property by filing affidavit with sheriff, sheriff must deliver property to claimant unless plaintiff gives indemnity bond within ten days after notice. (MCA 27-18-602).

8.03 [RESERVED]

8.04 CREDITORS' SUITS:

No statute.

8.05 EXECUTIONS:

While rules are patterned after federal rules, executions are still governed by statute. (Rule 69). See category 5 Civil Actions and Procedure, topic 5.15 Judgments.

Judgments for money, possession of real or personal property, or arrest are enforced by writs of execution (MCA 25-13-201); judgments for sale of property, by orders of sale (MCA 25-13-202); and judgments requiring other acts, by serving certified copy of judgment on defendant or person required to obey judgment, and may be enforced by court (MCA 25-13-203).

Exemptions.

See topic 8.06 Exemptions.

Time for Issuance of Writ of Execution.

Generally, any time within ten years after entry of judgment (MCA 25-13-101; MCA 27-2-201). Judgment for payment of child support may generally be issued within ten years after termination of support obligation or within ten years from entry of lump-sum judgment or order for support arrears. (MCA 25-13-101[2]).

Stay of Execution.

See category 5 Civil Actions and Procedure, topic 5.03 Appeal and Error.

Contents of Writ.

Writ must be issued in name of state of Montana, sealed, and subscribed by clerk of court; be directed to sheriff or levying officer; and refer to judgment and require sheriff or levying officer to act. (MCA 25-13-301). In executions amount must be computed as near as may be in dollars and cents. (MCA 25-13-301). Writ served on employer of judgment debtor must be accompanied by document that describes exemptions from execution provided in MCA 25-13-614. (MCA 25-13-301[3]).

Execution Against Property of Judgment Debtor.

For writ against property of judgment debtor, sheriff or levying officer shall satisfy judgment plus interest from debtor's personal property, unless insufficient, then from debtor's real property. (MCA 25-13-304, 305).

Execution Against Personal Property Located in Judgment Debtor's Residence.

If reason to believe that personal property subject to execution is located in judgment debtor’s residence, judgment creditor may file application for warrant of execution. Application must be supported by affidavit of judgment creditor stating that writ of execution has been issued and returned unsatisfied in whole or part; that affiant has reason to believe that property subject to execution is in judgment debtor’s possession in residence; that there is no other property of judgment debtor for levy and execution; and describing property sought and place and purpose of execution. If reasonable cause exits, judge may issue warrant of execution. (MCA 25-13-213).

The writ is executed by levying on sufficient property of the judgment debtor, collecting or selling his claims or other things in action, and selling such other real or personal property as may be necessary to satisfy the judgment. (MCA 25-13-402). With respect to property held by third party, including banks, credit unions, and other financial institutions, third party shall respond to levy based on assets held at time of levy within ten days following date of levy. (MCA 25-13-402[3]). Except for perishable property, sheriff or levying officer shall hold any property or money levied upon for ten business days following notification of execution. (MCA 25-13-402). Writ must be executed no later than 120 days after receipt by sheriff or levying officer. (MCA 25-13-402[1][a]).

Levy.

Execution is levied in same manner as writ of attachment, except party requesting execution should provide bond covering costs incurred, if substantial. (MCA 25-13-403). (See topic 8.02 Attachment.)

As to levy on mortgaged personal property, see category 20 Mortgages, topic 20.01 Chattel Mortgages.

Lien.

If judgment is lien upon debtor’s real property, sheriff shall satisfy judgment from real property owned by debtor on day of judgment or after acquired by debtor, unless execution is to be issued in county other than where judgment recovered, then property owned when transcript of judgment was filed in that county. (MCA 25-13-305).

Notification of Seizure.

After property of judgment debtor executed upon, notice of seizure must be served by sheriff or levying officer upon judgment debtor within five days of seizure. Notification must inform judgment debtor that certain described property or money was seized to satisfy judgment against debtor; state case name, date of judgment, and name of judgment creditor; advise judgment debtor of statutory exemptions to execution (MCA 25-13-608) and other provisions of state and federal law; and state procedure to claim exemption and file request for exemption hearing (MCA 25-13-211).

Return by officer must be not less than ten nor more than 120 days after his receipt of the writ. (MCA 25-13-404).

Priorities are the same as in case of attachment. (See topic 8.02 Attachment.)

Claims of third persons are disposed of in same way as in case of attachment. (See topic 8.02 Attachment.)

Property Subject to Execution.

Generally, all goods, chattels, money and other real and personal property or any interest in such property of judgment debtor is liable to execution. (MCA 25-13-501). (See topic 8.02 Attachment.) Debts owed to judgment debtor may be paid to sheriff to satisfy execution. (MCA 25-13-502).

Property Exempt from Execution.

Generally following are exempt: prescribed health aids; benefits from federal social security or public assistance; veteran's benefits; disability benefits; IRA and Roth accounts, to extent of deductible contributions made before suit resulting in judgment and earnings on those contributions; health care benefits to extent used for health care; maintenance and child support; unmatured life insurance contracts; and burial plot. (MCA 25-13-608). However, veterans' and social security legislation benefits for remuneration for employment and disability benefits are not exempt if execution is for child support or maintenance to spouse or former spouse who is custodial parent of child from whom support is owed and judgment debtor is parent. See also MCA 25-13-609 allowing for exemptions for personal property from specified categories with aggregate limit of $4,500: up to $2,500 in one motor vehicle and up to $3,000 in professional books, and tools. (MCA 25-13-609).

Satisfaction.

No provision distinct from satisfaction of judgment. See category 5 Civil Actions and Procedure, topic 5.15 Judgments, subhead Satisfaction.

Sale.

Notice of sale is given by posting written notice in three public places, in the township or city where sale is to be held: (1) in case of perishable property, a reasonable time; (2) in case of other personal property, five to ten days and by publishing copy of notice at least one week before sale in newspaper of general circulation published in county, if there be one; (3) in case of real estate, 20 days, in both township or city where sale held and where property situated, and publication once a week for same period. (MCA 25-13-701; 294 Mont. 64, 979 P.2d 180). Sales are made at auction, to highest bidder between hours of 9 and 5 until sufficient property to satisfy judgment has been sold. (MCA 25-13-704).

Redemption.

Real property with estate greater than two year leasehold interest, sold on execution, may be redeemed by debtor, debtor's spouse, his successor in interest, or lien holder at any time within one year from date of sale, on paying purchaser amount of his purchase, with interest at rate established by judgment up to time of redemption, and any taxes which purchaser may have paid thereon after purchase and interest thereon, plus reasonable maintenance and repair costs. If purchaser is creditor having prior lien to that of redemptioner, other than judgment under which purchase was made, amount of lien with interest must also be paid. After first redemption, property may be successively redeemed, in 60 days after last redemption under like conditions. If judgment debtor redeems, effect of sale is terminated and he is restored to his estate. (MCA 25-13-801 to 809).

If the judgment debtor personally occupies premises as home for himself and family, he is entitled to remain in possession until the expiration of the period of redemption, but may be restrained from committing waste. (MCA 25-13-821). If tenant be in possession, purchaser is entitled to rents from time of sale. (MCA 25-13-822). For disposal of agricultural land see Title 25, c. 13, Part 9.

Supplementary Proceedings.

When an execution against property is returned unsatisfied, or before the return of execution, upon proof, by affidavit of a party, that any judgment debtor has property which he unjustly refuses to apply toward the satisfaction of the judgment, the court may, by an order, require the judgment debtor to appear at a specified time and place to answer concerning his property, and such proceeding extends to the application of such property to the satisfaction of the judgment. Instead of the order requiring the appearance of the debtor, the court may, upon affidavit that there is danger that the debtor is about to leave the state, order his arrest. No judgment debtor can be required to attend before a judge or referee out of the county in which he resides. (MCA 25-14-101, 102).

If third party possesses property of judgment debtor and claims interest in property, judgment creditor may institute action for recovery of judgment debtor's interest. (MCA 25-14-104). Witnesses may be required to appear in like manner as in trial of original issue. (MCA 25-14-105).

After issuing an order for the appearance of the judgment debtor or third person, the court may appoint receiver for property of judgment debtor. (MCA 25-14-201 to 205). At least two days' notice of application must be given personally to judgment debtor, unless judge is satisfied judgment debtor cannot be found in state. (MCA 25-14-201).

Body Execution.

Where judgment debtor unjustly refuses to apply property toward satisfaction he may be ordered to appear before judge or arrested. (MCA 25-14-102).

8.06 EXEMPTIONS:

Nonresident has no exemptions.

Resident is entitled to exemptions against execution provided by statute. (MCA 25-13-606).

Judgment debtor is entitled to exemption from execution of following: Professionally prescribed health aids, social security benefits, veteran's benefits, disability benefits, health care benefits to extent used for health care; maintenance and child support, unmatured life insurance contracts and burial plot. Veteran's benefits, social security benefits and disability benefits are not exempt if debt is for child support or maintenance to be paid to spouse or former spouse. (MCA 25-13-608). Also exempt are judgment debtors' interest in personal property not to exceed $4,500 aggregate-value of any one item not to exceed $600; value in one motor vehicle up to $2,500; $3,000 in materials necessary for trade or business. (MCA 25-13-609).

Property necessary to carry out government functions is exempt. (MCA 25-13-613).

Substitution.

There is no provision authorizing a debtor who does not own articles specifically exempted to hold other articles or money exempt in lieu thereof.

Bankruptcy.

Individual in any bankruptcy proceeding may not exempt from his estate property specified in 11 U.S.C. 522(d). Individual may exempt in bankruptcy property exempt from execution of judgment, unemployment compensation and retirement benefits. (MCA 31-2-106).

Traceable proceeds from sale of exempt property or from lost or damaged exempt property is exempt for six months. (MCA 25-13-610[1]). Earnings, exempt under MCA 25-13-614, that are traceable, remain exempt for 45 days. (MCA 25-13-610[2]).

Earnings of judgment debtor not subject to garnishment are exempt. Earnings subject to garnishment are not exempt but amount is limited as set forth in MCA 25-13-614. Separate garnishment statutory limitations apply to judgments or orders for maintenance. (MCA 25-13-614).

Workers' compensation benefits are exempt from attachment or garnishment for debts (MCA 39-71-743) unless such payments are awarded for medical and hospital services (MCA 71-3-1118). Workers' compensation benefits may also be subject to garnishment or attachment for payment of child support. (MCA 39-71-743[2]).

Silicosis benefits are exempt from execution, levy, garnishment, bankruptcy, insolvency law and other legal process. (MCA 39-73-110).

Waiver.

Personal property exemptions may be waived.

Identification of Exempt Property.

Where debtor owns more property of given class than law exempts; it is necessary to identify property to which claim attaches. (54 Mont. 524, 171 P. 1148).

Homestead Exemption.

See topic 8.10 Homesteads.

8.07 FORECLOSURE:

See topic 8.13 Liens; category 20 Mortgages, topics 20.01 Chattel Mortgages, 20.04 Mortgages of Real Property.

8.08 FRAUDULENT SALES AND CONVEYANCES:

Uniform Fraudulent Transfer Act has been adopted. (MCA 31-2-326 to 342). Uniform Commercial Code adopted. (Tit. 30). See category 3 Business Regulation and Commerce, topic 3.09 Commercial Code.

Bulk Sales.

Governed by Uniform Commercial Code.

8.09 GARNISHMENT:

In general, garnishments are in all respects subject to same statutes as executions. See topic 8.05 Executions. Montana does not have separate statute dealing with garnishments. Seizure of wages or accounts to satisfy judgment is provided for under Executions. Stock, debts, credits and property not capable of manual delivery may be attached on execution in like manner as upon writs of attachment. (MCA 25-13-501).

Property Which May be Reached.

All goods, chattels, moneys and real and personal property are subject to execution. (MCA 25-13-501).

Proceedings to Obtain.

Writ of execution is issued by clerk of court, directed to sheriff or levying officer, and requires sheriff to act in conformity therewith. (MCA 25-13-301).

Liability of Garnishee.

See Executions.

Answer of Garnishee.

See Executions.

Appearance of Garnishee.

See Executions.

Adverse Claims.

See Executions.

Duration.

Levy upon earnings of judgment debtor continues for 120 days. (MCA 25-13-402[6]).

8.10 HOMESTEADS:

Exemption.

Homestead consists of dwelling house or mobile home, and all appurtenances, and land on which same is situated. (MCA 70-32-101). Claimant must reside on premises. (MCA 70-32-106).

Limitation of value is $250,000. In any proceeding to determine value of such homestead, assessed valuation thereof is prima facie evidence of such value. (MCA 70-32-104).

Debts or Liabilities Against Which Exemptions Not Available.

The homestead is subject to execution or forced sale in following cases only: on debts secured by construction or vendor's liens; on mortgages executed by husband and wife or unmarried claimant; on mortgages executed and recorded before homestead declaration recorded. (MCA 70-32-202).

Designation of Homestead.

Person selecting homestead must execute and file declaration of homestead with county clerk and recorder where land is located. Premises described in declaration constitutes homestead from time declaration is filed for record. (MCA 70-32-105 to 107).

Waiver prior to judgment or levy is permissible if specific and executed by claimant and spouse. (MCA 70-32-301; 93 Mont. 11, 17 P.2d 62).

Abandonment, Conveyance or Encumbrance.

A homestead, once selected and recorded as such, cannot be abandoned, conveyed or encumbered except by written instrument executed and acknowledged by both husband and wife. (MCA 70-32-301, 302). See also category 20 Mortgages, topic 20.04 Mortgages of Real Property.

Proceeds of Sale.

Upon application of a judgment creditor who has levied, an order must be entered directing the sale of the homestead when the value thereof exceeds the amount of the exemption and the property cannot be divided. (MCA 70-32-210). After sale on execution against homestead, proceeds up to amount of exemption are paid to debtor and balance applied to satisfaction of judgment. (MCA 70-32-212). Money paid to debtor is entitled, for 18 months thereafter, to same protection against legal process and voluntary disposition of either spouse which law gives to homestead. (MCA 70-32-213).

Rights of Surviving Spouse and Children.

Surviving spouse is entitled to homestead allowance of $20,000. If there is no surviving spouse, allowance is divided between decedent's minor and dependent children. (MCA 72-2-412).

If estate is sufficient, specifically devised property may not be used to satisfy homestead allowance. Subject to this restriction, surviving spouse, guardians of minor children, children, or personal representative if above are unable, may select property of estate to satisfy homestead allowance. (MCA 72-2-415). Property selected need not be dwelling house and land. (32 P.3d 758).

8.11 [RESERVED]

8.12 LEVY:

See topics 8.02 Attachment, 8.05 Executions.

8.13 LIENS:

Uniform Commercial Code adopted. (Tit. 30). *Note:* Revision of Art. 9 (1998) effective July 1, 2001. See category 3 Business Regulation and Commerce, topic 3.09 Commercial Code.

Person furnishing seed has lien on crop raised therefrom. (MCA 71-3-701). Verified notice showing kind, quantity and value of seed, person to whom furnished, and description of land on which used, must be filed with secretary of state within 90 days after seed is furnished. (MCA 71-3-703). Failure to file considered waiver. (Id.).

Hotel, boarding-house and lodging-house keepers have lien upon baggage or other property brought into hotel, inn, boarding or lodging-house by guest. (MCA 71-3-1401). After six months, owner may sell property at public auction after publication of notice once a week for two successive weeks. (MCA 71-3-1402, MCA 71-3-1403).

Lien for Licenses.

All property held or used in any trade, occupation or profession is subject to lien for the amount of any state license, which may be enforced by county treasurer in manner provided for sales of personal property for taxes. (MCA 7-21-2104).

Mining partner has a lien on the partnership property for debts due creditors of the partnership and for any advances by him. (MCA 35-13-205). Lien exists notwithstanding partnership agreements to contrary.

Thresherman has lien on grain and other crops threshed. (MCA 71-3-801 to 808). Notice of intention to claim lien must be filed with secretary of state within 30 days after last service rendered. (MCA 71-3-802). Notice of lien must be sent to elevatorman or other private purchaser. (MCA 71-3-802). Action to foreclose lien must be begun within six months. (MCA 71-3-807).

Farm laborer has lien on crops raised during time services were performed. (MCA 71-3-401[1]). Lien cannot exceed $1,000, nor cover services extending over more than 60 days preceding filing. (MCA 71-3-401[2]). Verified lien must be filed with secretary of state within 30 days after services are fully performed. (MCA 71-3-402). Action to foreclose lien must be commenced within 90 days, and notice of foreclosure must be given to all lienholders. (MCA 71-3-404, 405).

Agister's Lien.

Person who keeps, feeds, or pastures stock under express or implied contract has lien on stock for amount due. (MCA 71-3-1201). Person keeping personal property or rendering services also has lien for amount due. (MCA 71-3-1201). Personal property in motor vehicle that is subject to lien is also subject to lien, except for limited statutory exceptions. Reproductive technology business also has lien for amount due for collecting and storing livestock semen and embryos. (MCA 71-3-1201). Upon nonpayment for 30 days, claimant may enforce lien by delivering to sheriff statement of amount of claim, description of property, and name of owner or of person requesting services. Upon receipt of statement, sheriff shall proceed to advertise and sell at public auction property sufficient to cover lien. Sale must be in accordance with MCA 25-13-701(1)(b). (MCA 71-3-1203). Crop or grain liens for spraying or dusting provided for in MCA 71-3-901 et seq.

Logger has lien on lumber or timber of person for whom work done. (MCA 71-3-601 to 616). Lien may only encompass period of work spanning three months, and must be filed within 30 days of finishing work. (MCA 71-3-603; MCA 71-3-605).

Vendor of realty has lien for unpaid purchase price, except as against purchaser or encumbrancer in good faith and for value. (MCA 71-3-1301 to 1303).

Vendee of realty has special lien on realty for such part of the price paid as he may be entitled to recover in event of failure of consideration. (MCA 71-3-1302).

Servants and Employees.

In case of assignment by insolvent debtor or levy of attachment or execution, servants and employees have lien on assets for wages owed and for services rendered within four months preceding. (MCA 71-3-301, MCA 31-2-205). They have similar priority in case of death of employer and in cases of execution or attachment. (MCA 71-3-302, 303). To enforce the lien, claimant must serve notice on sheriff or other officer executing writ against defendant. (MCA 71-3-303).

Physicians, nurses, physical therapists, occupational therapists, chiropractors, dentists, psychologists, licensed social workers, licensed professional counselors and hospitals, providing medical care to person injured through fault of another have lien on cause of action, any judgment obtained and money paid in satisfaction or settlement. (MCA 71-3-1114). Lien is subordinate to attorney's lien. (MCA 71-3-1114[3]). If injured person is insured or beneficiary of insurance contract, there is lien on proceeds or payment to value of services rendered. (MCA 71-3-1114[2]). Notice of lien is filed with Clerk of Court if action is commenced. (MCA 71-3-1116). Failure to recognize lien after notice results in liability for insurer. (MCA 71-3-1117). Notice is served on person and upon his insurer, if any. (MCA 71-3-1115). Provisions apply only to contracts of insurance for payment of determinable benefits upon determinable contingencies; life, group life and disability insurance, annuity contracts and benefits under qualified pension plan are excluded. Applicable to payments awarded for medical and hospital services under Worker's Compensation Act or Occupational Disease Act. (MCA 71-3-1118).

Construction Liens.

Person furnishing service or materials pursuant to real estate improvement contract may claim construction lien. (MCA 71-3-523). Lien extends to interest of contracting owner of real estate subject to provisions of MCA 71-3-525. With certain exceptions, person who may claim construction lien shall give notice of right to claim lien to constructing owner in order to claim lien. Notice must be given within 20 days after service or materials are first furnished to contracting owner. (MCA 71-3-531). Notice of right to claim construction lien to regulated lender providing funds for services or materials must be given no later than 45 days after services or materials are first furnished. (MCA 71-3-531). Notice must be by certified mail or personal delivery in form specified by statute. (MCA 71-3-531). Contents of notice are set forth in statute. (MCA 71-3-532).

Lien attaches only if filed not later than 90 days after final furnishing of services or materials or owner files notice of completion pursuant to MCA 71-3-533. (MCA 71-3-535). Contents of lien statement must conform to statutory requirements. (MCA 71-3-536). Construction lien claimants who contribute to same real estate improvement project have equal priority, regardless of date of contribution or service and regardless of date notice is filed. (MCA 71-3-541). Construction liens attaching at different times have priority in order of attachment. (MCA 71-3-541). Liens take priority over subsequent interests, liens, mortgages or encumbrances, and over certain prior interests, liens, mortgages or encumbrances with certain limitations. (MCA 71-3-542). Contracting owner may substitute bond of 1½ times amount of lien prior to commencement of action on lien. (MCA 71-3-551). Bond must be filed with Clerk of District Court. Lien must be discharged upon posting of bond. Lienholders shall then have right of action on bond in lieu of lien. (MCA 71-3-553). Action for foreclosure of lien must be begun within two years after filing of same. (MCA 71-3-562).

Public Works.

Contractor performing public work must furnish bond for faithful performance of contract and payment of all laborers, mechanics, subcontractors, materialmen, and persons supplying provisions, provender, material or supplies. Statute specifies notice to be given to public body and also provides for notice to contractors of furnishing provender, material or supplies to subcontractor. (MCA 18-2-201 to 208).

Common Expense.

When association of unit owners acting through manager provide services, labor or materials lawfully chargeable as common expenses shall have lien on individual unit and undivided interest in common elements provided statutory requirements are met. (MCA 70-23-607 to 608).

Oil Liens.

Laborers and material men have a lien for labor performed or materials, machinery or oil well supplies furnished in drilling and operating of oil or gas wells or construction of pipe lines if within six months a verified, itemized account of claim is filed with county clerk and recorder of county where wells or pipe lines are situated. (MCA 71-3-1002 to 1004). Such liens are enforced in same manner as construction liens. (MCA 71-3-1005). Priority is date of furnishing first labor or materials as against other encumbrances. All oil liens on same property are of equal standing. (MCA 71-3-1007). Property subject to lien may not be removed without consent of lienholder. (MCA 71-3-1010).

Oil and gas production damage mitigation account administered by Board of Oil and Gas Conservation has lien for costs of plugging and reclaiming oil and gas wells, plus interest accrued at rate of 10% per year, against all real and personal property in this state, owned in whole or in part, by responsible person. (MCA 82-11-164). Lien is valid until discharged. (MCA 82-11-164).

Attorney's fees are allowed to prevailing party in action to foreclose mechanic's, construction, materialman's, laborer's or oil lien, farm laborer's lien and liens for salaries and wages. Attorney fees and costs may also be allowed to defendant that makes offer of judgment, if lienholder fails to obtain judgment more favorable than offer. (MCA 71-3-124).

Redemption.

Except as otherwise provided by Uniform Commercial Code, every person having an interest in property subject to lien has a right of redemption at any time after the claim is due and before the right of redemption is foreclosed. (MCA 71-3-117). Inferior lienor may be subrogated to benefits of superior lien if necessary for protection of his interest, upon satisfying the claims secured thereby. (MCA 71-3-118). Redemption is made by performing or offering to perform the act for the performance of which the lien is a security, and paying or offering to pay damages, if any, to which holder of lien is entitled for delay. (MCA 71-3-116).

Real property, except when the estate is less than leasehold of two years' unexpired term, is subject to redemption within one year after foreclosure sale. (MCA 25-13-801, 802).

Extinguishment.

Lien extinguished by sale of property to satisfy debt secured, or in case of personal property, lien extinguished by wrongful conversion of property by lienholder (MCA 71-3-121), by expiration of statute of limitations (MCA 71-3-122) or by voluntary restoration of property to owner where lien depends on possession (MCA 71-3-123).

Attachment Lien.

See topic 8.02 Attachment.

Attorney's Lien.

See category 18 Legal Profession, topic 18.01 Attorneys and Counselors.

Carrier's Lien.

See category 3 Business Regulation and Commerce, topic 3.08 Carriers.

Collateral Security.

See topic 8.15 Pledges.

Execution Lien.

See topic 8.05 Executions.

Factor's Lien.

See category 3 Business Regulation and Commerce, topic 3.14 Factors.

Judgment Lien.

See category 5 Civil Actions and Procedure, topic 5.15 Judgments.

Landlord's Lien.

See category 21 Property, topic 21.10 Landlord and Tenant.

Liens on Exempt Property.

See topic 8.06 Exemptions.

Liens on Homestead.

See topic 8.10 Homesteads.

Real Estate Mortgage Lien.

See category 20 Mortgages, topic 20.04 Mortgages of Real Property.

Tax Lien.

See category 22 Taxation, topics 22.12 Inheritance Tax, subhead Lien, 22.13 Property

Taxes, subhead Lien.

8.14 MECHANICS' LIENS:

See topic 8.13 Liens.

8.15 PLEDGES:

Uniform Commercial Code adopted. (Tit. 30). *Note:* Revision of Art. 9 (1998) effective July 1, 2001. See category 3 Business Regulation and Commerce, topic 3.09 Commercial Code.

Lien of pledge is dependent on possession. (MCA 71-2-103).

Remedies of Pledgee.

Uniform Commercial Code adopted. (Tit. 30). See category 3 Business Regulation and Commerce, topic 3.09 Commercial Code.

Pawnbrokers' pledges are governed by special law prescribing conditions. (MCA 31-1-401, -402, -407).

Trust Receipts.

Uniform Commercial Code adopted. (Tit. 30). *Note:* Revision of Art. 9 (1998) effective July 1, 2001. See category 3 Business Regulation and Commerce, topic 3.09 Commercial Code.

8.16 RECEIVERS:

A receiver may be appointed: (1) In action by vendor to vacate fraudulent purchase of property, or by creditor to subject any property or fund to his claim, or between partners or joint owners of property, on application of interested party, where property or fund is in danger of being lost; (2) in action for foreclosure of mortgage, where security is in danger of being lost, removed or materially injured, or property is insufficient security for debt; (3) to carry judgment into effect; (4) to preserve property during appeal (MCA 27-20-102); (5) upon dissolution of corporation, on application of creditors or stockholder (MCA 27-20-103); (6) in action to enjoin violation of Consumer Loan Act (MCA 32-5-405); (7) in all other cases where receivers have heretofore been appointed by usages of courts of equity (MCA 27-20-102).

Jurisdiction to appoint is vested in district courts. (MCA 3-5-302).

Proceedings.

Generally, notice of application before judgment required. (MCA 27-20-201). Two days' notice must be given to judgment debtor before court will appoint receiver during proceedings in aid of execution. (MCA 25-14-201).

Eligibility and Competency.

Party with interest in action cannot be appointed without written consent of parties. (MCA 27-20-202).

Qualification.

Oath and bond, in amount fixed by judge, must be filed. (MCA 27-20-301).

Powers.

Under control of court, receiver has power to bring and defend actions, to take and keep possession of property, receive rents, collect or compromise debts, make transfers. (MCA 27-20-

302).

8.17 REDEMPTION:

See topics 8.05 Executions, Liens; categories 20 Mortgages, topic Mortgages of Real Property; Taxation, topic Property Taxes, subhead Redemption.

8.18 SUPPLEMENTARY PROCEEDINGS:

See topic 8.05 Executions.

8.19 [RESERVED]

8.20 USURY:

See category 3 Business Regulation and Commerce, topic 3.19 Interest.

9 DISPUTE RESOLUTION

9.01 ALTERNATIVE DISPUTE RESOLUTION:

Mandatory Dispute Resolution.

Some district courts have promulgated rules which allow court to order parties to participate in settlement conference.

Agricultural Alternative Dispute Resolution Requirements.

Buyer of seed must submit to Alternative Dispute Resolution before maintaining legal action against seller when claiming seed failed to perform (1) as represented by label or bulk certificate, (2) by warranty, or (3) by negligence. (MCA 80-5-501). Procedure by which buyer may institute Alternative Dispute Resolution is provided for in statute. (MCA 80-5-506). (See MCA 80-5-501-510 generally.)

Mandatory Appellate Alternative Dispute Resolution.

Under Montana's Rules of Appellate Procedure, certain actions are subject to mandatory mediation before proceeding on appeal. Actions affected include appeals from Worker's Compensation Court, appeals in domestic relations cases, appeals in actions seeking monetary damages/recovery, and any other action Montana Supreme Court deems appropriate for mediation. (Mont.R.App.P. 7).

Construction Contracts.

In construction contracts for projects in Montana, provisions purporting to require dispute resolution in another state are void. (MCA 28-2-2116).

Voluntary Dispute Resolution.

Some district courts have promulgated rules which allow any party to request court to convene settlement conference. See topic 9.02 Arbitration and Award.

9.02 ARBITRATION AND AWARD:

Persons capable of contracting may submit to arbitration any controversy which might be subject of civil action between them, except in cases outlined below.

Uniform Arbitration Act, as modified, adopted effective Oct. 1, 1985. (MCA 27-5-111 to 324).

Form and Requisites of Submission.

Written agreement to submit existing controversy to arbitration is valid and enforceable except upon grounds that exist for revocation of contract. (MCA 27-5-114[1]).

Contracts to Arbitrate Future Disputes.

Written agreement to submit to arbitration future disputes is valid and enforceable except upon such grounds as exist at law or in equity for revocation of contract. (MCA 27-5-114[2]).

Power of Arbitrators.

Arbitrator appointed pursuant to agreement or by court has all powers permitted under agreement. Arbitrators shall appoint time and place for hearing, cause notice to be given all parties, adjourn or postpone hearing, hear evidence and make award. Majority of arbitrators at hearing may determine any question and render final judgment unless otherwise provided by agreement. (MCA 27-5-212 to 213).

Award and Enforcement Thereof.

Award must be in writing and signed by arbitrators. (MCA 27-5-216). District court may confirm, modify, correct or vacate award as provided by law. (MCA 27-5-311, MCA 27-5-312, MCA 27-5-313).

Judgment on Award.

Upon granting of order confirming, modifying or correcting award, judgment must be entered in conformity with order and enforced as any other judgment. (MCA 27-5-314).

Award may be set aside or modified by court on grounds of fraud, corruption, partiality, arbitrator exceeded powers, miscalculation, mistake, award of matter not submitted, imperfection or refusal by arbitrator to postpone hearing for good cause, hear material evidence, or otherwise conduct hearing in way that prejudices party. (MCA 27-5-312, MCA 27-5-313).

Exclusions.

Arbitration agreements not valid and enforceable in cases involving personal injury claims, agreements between insurers and insureds relating to policies or annuity contracts, workers' compensation claims, and any contract by individual for acquisition of real or personal property, services, or money or credit where total consideration to be paid or furnished by individual is $5,000 or less. (MCA 27-5-114).

10 DOCUMENTS AND RECORDS

10.01 ACKNOWLEDGMENTS:

Uniform Law on Notarial Acts adopted. (MCA 1-5-601 to 611).

Notarial acts may be taken by following persons:

Within State.

Notary public of this state; judge, clerk, or deputy clerk of any court of this state; any other person authorized to perform specific act by law of this state. (MCA 1-5-604).

Outside State.

Notary public of that jurisdiction; judge, clerk, or deputy clerk of court of that jurisdiction; any other person authorized by law to perform specific act. (MCA 1-5-606).

Reciprocity of Notarial Acts.

Montana notarial officer may perform notarial act in bordering state if state recognizes officer's authority within state. Notarial act performed in Montana by notarial officer of bordering state is valid, provided that bordering state grants Montana's notarial officers similar authority. (MCA 1-5-605).

Notarial Acts Under Federal Authority.

Valid under Montana law as if performed by notarial officer of Montana if performed by judge, clerk, or deputy clerk of court; U.S. military commissioned officer on active duty; officer of foreign service or consular officer of U.S.; or any other person authorized by federal law to perform notarial acts. (MCA 1-5-607).

Foreign Notarial Acts.

Valid under Montana law as if performed by notarial officer if it is performed within jurisdiction of and under authority of foreign nation by any of following persons: notary public or notary; judge, clerk, or deputy clerk of court of record; or any other person authorized by law of that jurisdiction to perform notarial acts. (MCA 1-5-608).

Requirements as to Taking Acknowledgment.

Officer shall determine, either from personal knowledge or from satisfactory evidence, that acknowledgor is person whose true signature is on instrument. (MCA 1-5-603).

Fee for taking acknowledgment is $5 for first signature and $1 for each additional signature. (MCA 1-5-418). Additional fees which may be charged by notaries in statutory list. (MCA 1-5-418).

Effect of Acknowledgment.

Extrinsic evidence of authenticity as condition precedent to admissibility is not required for acknowledged documents, when accompanied by certificate of acknowledgment from notary public or authorized officer (M.R.Evid. 902[8]).

Alternatives to Acknowledgment or Proof.

Proof of execution of instrument not acknowledged may be made by one or all executing parties or subscribing witness. (MCA 1-5-301). Execution of instrument may be established by proof of handwriting of party and subscribing witness, if any, when parties and all subscribing witnesses are dead or are nonresidents, where residence or whereabouts of subscribing witness are unknown, or where subscribing witness is avoiding service or fails or refuses to testify for one hour. (MCA 1-5-302). Evidence taken under MCA 1-5-302 must prove to officer: existence of one or more conditions in MCA 1-5-302, witness' residence, that signatures are genuine, and that witness testifying knew person who signed instrument as party and knew person who signed as witness and must know both their signatures. (MCA 1-5-303).

Forms.

Following acknowledgment forms are authorized by MCA 1-5-610:

(1) *For an acknowledgment in an individual capacity:*

State of . . . .

(County) of . . . .

This instrument was acknowledged before me on (date), by (name(s) of persons(s)).

____

(Signature of notarial officer)

____

(Name-typed, stamped, or printed)

Notary Public for the State of __________

Residing at (stating the name of the town or city of the notary public's post office)

[My commission expires: . . . .]

[month, day, 4-digit year]

(Seal, if any)

(2) *For an acknowledgment in a representative capacity:*

State of . . . .

(County) of . . . .

This instrument was acknowledged before me on (date) by(name(s) of person(s)) as (type of authority, e.g., officer, trustee, etc.) of (name of party on behalf of whom instrument was executed).

____

(Signature of notarial officer)

____

(Name-typed, stamped, or printed)

Notary Public for the State of __________

Residing at (stating the name of the town or city of the notary public's post office)

[My commission expires: . . . .]

[month, day, 4-digit year]

(Seal, if any)

Validating Acts.

Notwithstanding any defect, omission, or informality in execution or acknowledgment, instruments affecting real property recorded prior to Jan. 1, 1991 shall be deemed to impart after that date notice of their contents to subsequent purchasers and encumbrancers. (MCA 70-21-

309). Similar validating acts in force for unacknowledged deeds executed prior to Jan. 1, 1983. (MCA 70-20-315).

10.02 AFFIDAVITS:

An affidavit to be used before any court, judge or officer of this state, may be taken:

Within the state, before any judge, clerk of any court, justice of peace, county clerk or notary public in this state. (MCA 26-1-1003). For fee, see topic 10.01 Acknowledgments.

Without the state but within the United States, before a commissioner appointed by the Governor of this state, a notary public or any judge or clerk of court of record having a seal. (MCA 26-1-1004).

In foreign country, before ambassador, minister, consul, vice-consul or consular agent of U. S. or before any judge of court of record having seal in such country. (MCA 26-1-1005).

General Requirements of Acknowledgment.

Notary must authenticate all acts with notary public's official seal, adding to his signature "Notary Public for the State of Montana, residing at . . . ." (stating name of town or city of notary public's post office) and expiration date of notary's commission. Notary public may not authorize notary's own signature or notarize document in which notary is individually named or has interest from which notary will directly benefit. (MCA 1-5-416). Notary must type, stamp, or legibly print notary's name, as shown on certificate of commission, after or below notary's signature.

Authentication.

If taken before judge in another state or country, genuineness of judge's signature, existence of court, and fact that such judge is member thereof, must be certified by clerk under seal. (MCA 26-1-1006).

Use.

To verify pleading or paper, to prove service of summons, notice or other paper in action or special proceeding; to obtain provisional remedy, examination of witness, or stay of proceedings; or upon motion, and in any other cause expressly permitted by provisions of Code. (MCA 26-1-1002). Affidavits may be used and considered on motion for summary judgment as provided by Rule 56, Mont.R.Civ.P.

Form.

No statutory form exists. Following is usual:

Form

State of . . . .

County of . . . . } ss.

. . . . . ., being first duly sworn, deposes and says: (Insert statements as to necessary matters).

(Signature of affiant).

Subscribed and sworn to before me this . . . . day of . . . ., 20. . . . .

(Signature and full official designation of officer, with date of expiration of commission and residence, city and state, of notary. Use official seal, if any).

Alternative to Affidavit.

Party may affirm or declare instead of taking oath, by assenting when addressed in following form: “You do solemnly affirm (or declare), etc.” (MCA 1-6-104).

10.03 NOTARIES PUBLIC:

Qualification.

Bond in amount of $10,000 for each four-year term of office must be approved by, and signed oath of office must be filed with, Secretary of State. Upon approval, Secretary of State has discretion whether to issue commission. (MCA 1-5-405). Must be resident for 30 days immediately preceding appointment, must remain resident during office, must complete training program certified by Secretary of State, and cannot be convicted felon. (MCA 1-5-402). Notary must complete certified training program to be reappointed if there has been complaint filed against notary, or Secretary of State has received evidence of improperly notarized documents by notary. (MCA 1-5-402).

Authentication.

See topic 10.02 Affidavits.

Ink stamp and seal prescribed by Secretary of State must be provided by notary and must be used to authenticate all official acts. (MCA 1-5-416).

Powers and Duties.

To take acknowledgments, take depositions and affidavits, and administer oaths and affirmations. Notary public may not notarize notary’s own signature, may not notarize document in which notary is individually named or has interest from which notary will directly benefit, and may not certify public entity’s document unless notary is employed by entity issuing or holding original document. (MCA 1-5-416). Notary public shall keep and maintain official notary journal recording details of each notarial act performed, including date, type of act, type of document, date of document, and name, address, type of identification, and signature of individual for whom notarization was performed. (MCA 1-5-416).

Territorial Extent of Powers.

The jurisdiction of a notary extends throughout the state regardless of the notary’s place of residence within state. (MCA 1-5-415).

Extraterritorial Extent of Powers.

Montana notary may perform notarial act in bordering state if state recognizes officer’s authority within state. Notarial act performed in Montana by notarial officer of bordering state has same effect under Montana law as if act were performed by Montana notarial officer, provided that bordering state grants Montana’s notarial officers similar authority within bordering state. (MCA 1-5-415 and MCA 1-5-605).

Expiration of Commission.

Notary public’s commission is four years. (MCA 1-5-403). Month, day and four-digit year must be added to signature in all cases and place of residence must be shown. (MCA 1-5-416). Upon expiration of term, resignation, removal from office, or death, notary public’s journal shall be sent to clerk and recorder of county where notary public was resident, and notary public’s official stamp and seal shall be destroyed. (MCA 1-5-419).

Fees.

For drawing affidavits, depositions, etc., $3.50 per page; acknowledgments, first signature, $5; each additional, $1; administering oath or affirmation, $5; certifying affidavit, $5; and for mileage or other charges for travel in amount provided by law for state employees. (MCA 1-5-418).

10.04 RECORDS:

Uniform Commercial Code adopted. (Tit. 30). See category 3 Business Regulation and Commerce, topic 3.09 Commercial Code.

Place of Recording.

Instruments relating to property which are entitled to recording are filed with county clerk and recorder of county where property is located. (MCA 7-4-2613). *For list of Counties and County Seats see first page for this state in Volume containing Practice Profiles Section.* See also category 21 Property, topic 21.06 Deeds, subhead Recording.

Recordable Instruments.

Any instrument or judgment affecting real property or interests appurtenant thereto. (MCA 70-21-201). Abstracts of such instruments may be recorded in lieu of original document. (MCA 7-4-2613). Recordable abstract of instrument, conveyance, or encumbrance must contain: (a) Names and addresses (street, city, state) of parties thereto; (b) description of real property affected; (c) statement that it is an abstract of another document; (d) short statement of effect of document abstracted, and (e) name and address of person who will provide a full and complete copy of document abstracted, without cost, upon request of any person. (MCA 70-21-101). Abstract shall be executed and acknowledged or proved by all parties executing abstracted document. (MCA 70-21-101). Abstract of conveyance or encumbrance acknowledged or proved, and certified and recorded, shall have same effect as if conveyance or encumbrance had been acknowledged or proved, and certified and recorded. (MCA 70-21-305).

Filing Under Commercial Code.—Place; Fees.

Financing Statements filed as follows: (a) when collateral is timber to be cut, or when financing statement is filed as fixture filing and collateral is fixtures, then in office where mortgage on real estate would be filed or recorded; (b) in all other cases, in office of Secretary of State, Helena, Montana. (30-9A-501).

Fees.

See category 3 Business Regulation and Commerce, topic 3.09 Commercial Code.

Requisites for Recording.

Judgments, decrees, letters, and patents do not require acknowledgments. All other instruments do. (MCA 70-21-203, 205, 207). If deed, mortgage or assignment of mortgage, address of grantee, mortgagee or assignee must appear. (MCA 7-4-2618). In case of transfer of realty, realty transfer certificate describing consideration paid or to be paid for property transferred must be prepared and presented to clerk and recorder before transfer instrument will be recorded. (MCA 15-7-301 to 311).

Recording Fees.

Except as provided in MCA 7-4-2631, fee for standard documents is $7 per page or fraction thereof, and fee for non-standard documents is $11 per page or fraction thereof for first five pages and $7 thereafter. (MCA 7-4-2637).

See category 20 Mortgages, topic 20.04 Mortgages of Real Property, subhead Recording Fees.

Effect of Record.

Recording is constructive notice to third persons. (MCA 70-21-302).

Torrens system or any similar system of land registration or title to land not adopted.

Transfer of Decedent's Title.

Uniform Probate Code adopted. (Tit. 72). Special procedures for property interests not requiring probate when termination results from death of person holding interest. (MCA 72-16-501 to 505).

Vital Statistics.

Birth and death certificates must be filed with County Clerk and Recorder, who files copies with Division of Vital Statistics, Department of Public Health. (MCA 7-4-2613). Clerks of court must file with Division certificates of marriage licenses issued, and of decrees of dissolution, annulment and adoption entered. (MCA 50-15-101 to 407). Department of Public Health must also be notified in certain instances of exposures to infectious disease. (MCA 50-16-701 to 705). Clerks of court must also file with Division of Vital Statistics report containing certain vital statistics relating to divorced parties. (MCA 50-15-302).

Certified copies of birth and death certificates are obtainable from local County Clerk and Recorder (fee, $5 and $3, respectively), or from Division of Vital Statistics, Department of Public Health, Helena, Montana 59601. (MCA 7-4-2631, MCA 50-15-111). Court orders are required for obtaining confidential information in vital statistics records, for example, confidential information contained in birth certificates and marriage licenses may not be disclosed, without court order, for 30 years after birth or marriage. (MCA 50-15-122).

Establishing Birth Records.

Delayed certificates are accepted for filing on submission or proof satisfactory to Division of Vital Statistics. Delayed birth certificate is one registered one year or more after birth occurred. Child one year to five years old may have his birth registered by submitting health care facility record created at birth with two additional documents, or three documents of different origin. To register birth five years or older requires proof of birth by at least three documents of different origin. All documents must be dated five years before date of application or within three years from date of birth. Documents must establish date and place of birth and names of parents. (MCA 50-15-204, 37.8.303 Administrative Rules of Montana).

10.05 SEALS:

Uniform Commercial Code adopted. (Tit. 30). See category 3 Business Regulation and Commerce, topic 3.09 Commercial Code.

No seal necessary, except in some official and corporate acts. (MCA 1-4-205). Stamp may be used as official seal. (MCA 1-4-202).

10.06 TORRENS ACT:

Not adopted.

10.07 VITAL STATISTICS:

See topic 10.04 Records.

11 EMPLOYMENT

11.01 EMPLOYER AND EMPLOYEE:

See topic 11.02 Labor Relations.

11.02 LABOR RELATIONS:

Labor law administered by Department of Labor and Industry. (MCA 39-1-102 and MCA 39-1-101[2]).

Liability from Employment Relationship.—Employer liable for all services properly rendered. Employer shall indemnify employee for what employee expends or loses in direct consequence of discharge of duties, or in obedience to directions of employer, even though unlawful, if not known by employee at time. Employer is not bound to indemnify employee against ordinary risks of business for which employee is employed. Employer shall indemnify employee for employer's want of ordinary care. (MCA 39-2-701). Employee liable to employer for damage caused by employee's negligence. (MCA 39-2-702). Liability of railway corporation of servant negligence. (MCA 39-2-703). Liability of mining corporations of servant negligence. (MCA 39-2-704).

General Obligations of employers. (MCA 39-2-201 to MCA 39-2-217). General obligations of employees. (MCA 39-2-401 to MCA 39-2-411).

General Prohibitions of employers. (MCA 39-2-301 to MCA 39-2-311).

Wages.

Payment.—Employer of labor must pay employees in lawful money of U.S. or checks on banks convertible into cash on demand for full face value. (MCA 39-3-204[1]). Payment may be made by electronic funds transfer if employee consented in writing. (MCA 39-3-204[2]). Employer who fails to pay employee or violates any other provision of this part is guilty of misdemeanor. Penalty must be assessed against and paid by employer to employee in amount not to exceed 110% of wages due and unpaid. (MCA 39-3-206). Employer must furnish employee with statement of money deducted for income taxes, social security, or other reasons. (MCA 39-3-101). Woman is entitled to equal pay with man for equivalent services. (MCA 39-3-104).

Separation of Employment.—When employee separates from employ of any employer, all unpaid wages of employee are due and payable on next regular payday for pay period during which employee was separated from employment or 15 days from date of separation from employment, whichever occurs first, either through regular pay channels or by mail if requested by employee. (MCA 39-3-205[1]). Except when employee is discharged by reason of theft, employer may withhold sufficient funds to cover theft if employee agrees in writing or employer files charges with local law enforcement within seven days of separation subject to conditions. (MCA 39-3-205[3]). Except when employee is separated for cause or laid off from employment by employer, all unpaid wages of employee are due and payable immediately upon separation unless employer has written personnel policy governing employment that extends time for payment of final wages to employee's next regular payday for pay period or to within 15 days from separation, whichever occurs first. (MCA 39-3-205[2]).

Priority of wage claims relating to liens for salaries and wages. (MCA 71-3-301 to MCA 71-3-307).

Minimum Wage.—Minimum wage equals greater of minimum hourly wage rate as provided under Federal Fair Labor Standards Act excluding value of tips received by employee and special provisions for training wage or $6.15 per hour excluding value of tips received by employee and special provisions for training wage. (MCA 39-3-409). Minimum wage subject to cost of living adjustment. (MCA 39-3-409). Minimum wage rate for business whose annual gross sales are $110,000 or less is $4 an hour. (MCA 39-3-409).

Assignment of wages; see category 8 Debtor and Creditor, topic 8.01 Assignments.

Child Labor.

Provisions vary with type of job and age of child. (See MCA 41-2-102 through MCA 41-2-118). Generally, children under age of 14 cannot be employed. (MCA 41-2-105). However, see list of exemptions. (MCA 41-2-104). Prohibition of minors at specific ages from working in certain positions. (See MCA 41-2-106 to MCA 41-2-108). Exemption from prohibited employment in agricultural occupations (MCA 41-2-109) and exemption from prohibited employment for 16 and 17 year old individuals (MCA 41-2-110).

Hours of Labor.

Limitation of eight-hour day applies to certain occupations (MCA 39-4-101 to MCA 39-4-112), including retail stores in towns having population of 2,500 or over (MCA 39-4-105) and restaurants (MCA 39-4-111).

Female Labor.

State and county governments, municipalities, and school districts and university system must have written policy supporting women who continue breastfeeding after returning from maternity leave. (MCA 39-2-215). All state and county governments, municipalities, and school districts and university system shall make reasonable efforts to provide room or other location close to work area, other than toilet stall, for employee to express breast milk. (MCA 39-2-216). All public employers encouraged to have such policies. (MCA 39-2-216). All state and county governments, municipalities, and school districts and university system shall provide reasonable unpaid break time each day to employee to express breast milk for employee’s child if breaks allowed. If no breaks, reasonable accommodations should be made. Public employer is not required to provide break time if it would unduly disrupt public employer’s operations. (MCA 39-2-217).

Discrimination.

Generally.—It is unlawful for employer to refuse employment, bar person from employment, or discriminate against person in compensation or in term, condition, or privilege of employment because of race, creed, religion, color, or national origin or because of age, physical or mental disability, marital status, or sex, when reasonable demands of position do not require age, physical or mental disability, marital status, or sex distinction. (MCA 49-2-303). See MCA 49-2-303 for further acts of discrimination.

Employer prohibited from discriminating against employees who consume lawful products during nonworking hours. (MCA 39-2-213).

Female.—It is unlawful discrimination for any public employer to refuse to hire or employ or to bar or to discharge from employment employee who expresses milk in workplace; or discriminate against employee who expresses milk in workplace in compensation or in terms, conditions, or privileges of employment unless based upon bona fide occupational qualification. (MCA 39-2-215).

Labor Unions.

Few statutory provisions with respect to collective bargaining or recognition in private sector. Montana Public Employees’ Collective Bargaining Act enacted. (MCA 39-31-101 to MCA 39-31-409). Collective bargaining for nurses regulated by statute. (MCA 39-32-101 to MCA 39-

32-114). Limited right to work law prevents union interference with sole proprietor or partnership of not more than two, and their immediate family, where engaged in retail or amusement activity. (MCA 39-33-101 to MCA 39-33-105).

Labor Disputes.

Injunction cannot be granted in labor dispute when same conditions would not warrant injunction if parties were not laborers or dispute did not involve labor. (MCA 27-19-103[8]). Unfair labor practices for Montana Public Employees. (MCA 39-31-401 to MCA 39-31-409). Unfair labor practices for nurses. (MCA 39-32-109).

Drug and Alcohol Testing.

Employer may require only employees engaged in performance, supervision, or management of work in hazardous work environment, security position, position affecting public safety, or fiduciary position to submit to drug and alcohol testing. Such testing must be conducted pursuant to written policy which meets various statutory requirements. (MCA 39-2-205 to MCA 39-2-208). Employee must be provided opportunity to rebut or explain any positive test result, and employer must obtain, at employee's request, additional test by independent laboratory selected by employee. If employee presents reasonable explanation or medical opinion indicating that original test results were not caused by illegal use of controlled substance or by alcohol consumption, no adverse action may be taken by employer. (MCA 39-2-209 to MCA 39-2-210). All information obtained pursuant to employer's drug and alcohol testing program is confidential. (MCA 39-2-211).

Wrongful Discharge.

Common law remedies eliminated. (MCA 39-2-913). Statute provides that discharge is wrongful only if it was in retaliation for employee's refusal to violate public policy or for reporting violation of public policy; if it was not for good cause after probationary period has passed; or employer violated express provisions of its own personnel policy. (MCA 39-2-904). During probationary period, employment may be terminated at will of either employer or employee on notice to other for any reason or no reason. (MCA 39-2-904). If no probationary period established, probationary period is six months from date of hire. (MCA 39-2-904).

Statute of Limitations.—Action must be filed within one year. (MCA 39-2-911). Employee must exhaust administrative process first. See MCA 39-2-911 for tolling and other limitations.

Remedies.—If employer has wrongfully discharged employee, employee may be awarded lost wages and fringe benefits not to exceed four years from date of discharge, together with interest on lost wages and fringe benefits. Interim earnings, including amounts employee could have earned with reasonable diligence, must be deducted from amount awarded for lost wages. Before interim earnings are deducted from lost wages, any reasonable amounts expended by employee in searching for, obtaining, or relocating to new employment are deducted. (MCA 39-2-905). Employee generally cannot recover damages for pain and suffering, emotional distress, compensatory damages, punitive damages, or any other form of damages. (MCA 39-2-905). Except, employee may recover punitive damages if employee establishes by clear and convincing evidence that employer engaged in actual fraud or actual malice when discharging employee. (MCA 39-2-905).

WORKERS' COMPENSATION

Generally.—Workers' Compensation Act (MCA 39-71-101) is administered by Department of Labor and Industry (MCA 39-71-203).

Occupational Disease.—Occupational Disease Act (MCA 39-72-101 to MCA 39-72-714) repealed. (§ 38, c. 416, L. 2005). Effective July 1, 2005, Occupational Disease Act merged into Workers' Compensation Act. Applies to occupational disease arising on or after July 1, 2005 (§ 43, c. 416, L. 2005). Definition of Occupational Disease at MCA 39-71-116. Occupational disease arises out of employment established by objective medical findings and events of more than single day/shift are major contributing cause in relation to other causal factors. (MCA 39-71-407[8]). Work has one year from date worker knew or should have known condition resulted from occupational disease to file claim. Claim must be in writing and signed by claimant or claimant's representative. (MCA 39-71-601). Occupational deafness statute (MCA 39-71-801 to 813) repealed; deafness claims treated as injury or disease.

Applicability.—Except as provided in 39-71-407, 39-71-601 and 39-71-603, chapter applies to injuries and occupational diseases. (MCA 39-71-124). Law in effect at time of injury is controlling. (Buckman v. Mont. Deaconess Hosp., 224 Mont. 318, 730 P.2d 380 [1986]). Given significant variation in procedural and substantive aspects of 1983, 1985, 1987, 1991, 1993, 1995, 1997, 1999 and 2001 Acts, careful attention to date of injury is required. Compensability and availability of wage and medical benefits must be determined with specific reference to version of Act in effect on date of injury.

Workers' Compensation Court.—There is workers' compensation judge. (MCA 39-71-2901, et al.). Workers' compensation judge shall withdraw if circumstances make disqualification appropriate. (MCA 39-71-2901[3]). Workers' compensation judge shall maintain list of persons interested in serving as substitute workers' compensation judge before being put on list must have been admitted to practice of law in Montana for at least five years, currently reside in Montana, and have resided in state for two years. (MCA 39-71-2901[4]). Appeals from workers' compensation court are direct appeals to Montana Supreme Court. (MCA 39-71-2904). Claimant, insurer, employer alleged to be uninsured employer, or uninsured employer's fund, has dispute under this chapter may petition workers' compensation judge for determination of dispute after satisfying dispute resolution requirements otherwise provided in this chapter. (MCA 39-71-2905). Petition for hearing before workers' compensation judge must be filed within two years after benefits are denied. (MCA 39-71-2905[2]).

Employer Defined.—(a) State and each county, city and county, city school district, and irrigation district; all other districts established by law; all public corporations and quasi-public corporations and public agencies; each person; each prime contractor; each firm, voluntary association, limited liability company, limited liability partnership, and private corporation, including any public service corporation and including independent contractor who has person in service under appointment or contract of hire, expressed or implied, oral or written; and legal representative of any deceased employer or receiver or trustee of deceased employer; (b) any association, corporation, limited liability company, limited liability partnership, or organization that seeks permission and meets requirements set by department by rule for group of individual employers to operate as self-insured under plan No. 1 of this chapter; and (c) any nonprofit association, limited liability company, limited liability partnership, or corporation or other entity funded in whole or in part by federal, state, or local government funds that places community service participants, as described in MCA 39-71-118(1)(e), with nonprofit organizations or associations or federal, state, or local government entities; and (d) religious corporation, religious organization, or religious trust receiving remuneration from nonmembers for agricultural production, manufacturing, or construction project conducted by its members on or off property of religious corporation, religious organization, or religious trust. (MCA 39-71-117). Employers are required to post signs giving notice of their coverage. (MCA 39-71-401).

Employee Defined.—(a) Each person in this state, including contractor other than independent contractor, who is in service of employer, as defined by MCA 39-71-117, under any appointment or contract of hire, expressed or implied, oral or written. Terms include aliens and minors, whether lawfully or unlawfully employed, and all of elected and appointed paid public officers and officers and members of boards of directors of quasi-public or private corporations, except those officers identified in MCA 39-71-401(2), while rendering actual service for corporations for pay. Casual employees, as defined by MCA 39-71-116, are included as employees if they are not otherwise covered by workers' compensation and if employer has elected to be bound by provisions of compensation law for these casual employments, as provided in MCA 39-71-401(2). Household or domestic employment is excluded; (b) any juvenile who is performing work under authorization of district court judge in delinquency prevention or rehabilitation program; (c) person who is receiving on-the-job vocational rehabilitation training or other on-the-job training under state or federal vocational training program, whether or not under appointment or contract of hire with employer, as defined in MCA 39-71-117, and, except as provided in subsection (9), whether or not receiving payment from third party. However, this subsection (1)(c) does not apply to students enrolled in vocational training programs, as outlined in this subsection, while they are on premises of public school or community college; (d) aircrew member or other person who is employed as volunteer under MCA 67-2-105; (e) person, other than juvenile as described in subsection (1)(b), who is performing community service for nonprofit organization or association or for federal, state, or local government entity under court order, or order from hearing officer as result of probation or parole violation, whether or not under appointment or contract of hire with employer, as defined in MCA 39-71-117, and whether or not receiving payment from third party; (f) inmate working in federally certified prison industries program authorized under MCA 53-1-301; (g) volunteer firefighter as described in MCA 7-33-4109 or person who provides ambulance services under Title 7, Chapter 34, Part 1; (h) person placed at public or private entity's worksite pursuant to MCA 53-4-704; and (i) member of religious corporation, religious organization, or religious trust while performing services for religious corporation, religious organization, or religious trust, as described in MCA 39-71-117(1)(d). (MCA 37-71-118).

Injury and Accident.—Injury and accident defined. (MCA 39-71-119).

Employments Covered and Exempted.—Workers' Compensation Act applies to all employers except household employment; casual employment; dependent family member for whom exemption may be claimed under Internal Revenue Code; sole proprietors or partner members of L.L.P.; members of L.L.C.; real estate, securities or insurance salesperson paid solely commission; direct seller defined 26 U.S.C. 3508; employment where rule of liability for injury occupational disease, death, under United States law; perform services for aid or sustenance only (except volunteer); employment with railroad engaged in interstate commerce excepting railroad construction work; employment as official at amateur athletic event; newspaper carriers and freelance correspondents; cosmetologists and barbers; person employed by enrolled tribal member; jockeys; horse trainers performing services under board of horse racing license; petroleum land professionals; certain corporate officers and managers of L.L.C.; officer of ditch company; ministers; employees covered by federal government; to provide companionship; intrastate and interstate common or contract motor carriers when hired by broker or freight forwarder; not employee or worker defined MCA 39-71-118(10); working under independent contractor exemption certificate; athletes by or on sports teams or sports club in contact sports; musician performing under written contract. (MCA 39-71-401).

Independent Contractor.—To qualify as independent contractor, worker must obtain independent contractor exemption certificate from Department of Labor and Industry. (MCA 39-71-417). Independent contractor exemption certificate creates conclusive presumption that holder is independent contractor rather than employee. (MCA 39-71-417). To obtain independent contractor exemption certification worker must swear and acknowledge that: (1) Worker is free from control or direction over performance of services; and (2) worker is engaged in independently established trade, occupation, profession or business and will provide documentation of such to Department. (MCA 39-71-417[4][a]).

Compensation Plans.—Employer may adopt one of three plans of compensation. Under plan one employer may make payments direct to employees as they become entitled to receive same under terms of act. To operate under this plan, employer must furnish satisfactory proof to department of his solvency and financial ability to pay compensation and benefits in act provided for. (MCA 29-71-2101 to MCA 29-71-2108). Under plan two employer may insure liability to pay compensation and benefits provided for through any insurance company authorized to transact business in state. (MCA 29-71-2201 to MCA 29-71-2215). Plan three is coverage by State Compensation Insurance Fund. (MCA 39-71-2311 to MCA 39-71-2370).

Benefits Generally.—Insurers must accept or deny claim within 30 days, and denials must be in writing. (MCA 39-71-606). Insurers must notify each employer, upon request, of all compensation benefits ongoing and charged to employer's account. (MCA 39-71-606). Insurer must pay reasonable costs if it denies liability or terminates benefits and claim is later adjudged compensable. Insurer must also pay attorneys' fees if its actions were unreasonable. (MCA 39-71-611). Attorneys' fees may be awarded only pursuant to statute; may not be awarded under common fund or any other doctrine. (MCA 39-71-612). Workers' Compensation Judge may also award 20% penalty when insurer unreasonably delays or refuses to pay benefits. (MCA 39-71-2907). Compensation for death payable to beneficiaries as defined in MCA 39-71-116. (MCA 39-71-721). Lump sum advance settlement may be made subject to department approval. (MCA 39-71-741). Burial compensation up to $4,000 provided. (MCA 39-71-725). Obtaining any benefits fraudulently constitutes theft. (MCA 39-71-316).

Disability Payments.—Act provides schedule of payments for all classes of disability suffered by employee, medical benefits and rehabilitation benefits. (MCA 39-71-701 to MCA 39-71-743, MCA 39-71-1004, et seq.). Disability must be supported by objective medical findings. (MCA 39-71-407). Exclusive remedy—injured employee whose employer has elected to come under terms of act can only recover compensation provided for in Act. (MCA 39-71-411). When there is dispute as to which insurer is liable, insurer for most recent claim pays until proving another insurer responsible. (MCA 39-71-407). Except for permanent partial disability, compensation may be reduced where worker also receives disability social security benefits. (MCA 39-71-701 to MCA 39-71-702). Termination of permanent partial disability benefits upon receipt of social security retirement benefits unconstitutional denial of equal protection. (Reesor v. Mont. State Fund, 2004 MT 370, 325 Mont. 1, 103 P.3d 1019). Permanently totally disabled claimants also entitled to award for physical impairment. (Rausch v. State Comp. Ins. Fund, 2002 MT 203, 311 Mont. 210, 54 P.3d 25). Biweekly compensation for temporary total disability shall be continuously paid until claimant is released by doctor, returns to work, or no longer suffers loss of earning capacity. Termination or reduction of biweekly compensation may be made only after 14 days written notice to claimant unless claimant returns to work. (MCA 39-71-609 to MCA 39-71-610).

Third Party/Intentional Acts/Subrogation.—All employments covered by Workers' Compensation Act, Act is exclusive remedy. (MCA 39-71-411). If third party, other than employer or fellow employee, negligently causes injury, employee has right to benefits under Act and separate cause of action. (MCA 39-71-412). Intentional act by employer or fellow employee gives rise to independent civil action against person who cause injury to employee. (MCA 39-71-413). Employer or insurer is subrogated to extent of all compensation and benefits paid under Act if, after request by employee bringing action, insurer agrees to pay proportionate share of costs of action and attorneys' fees. Failure to so agree, waives 50% of subrogation right. (MCA 39-71-414). Insurer entitled to subrogation only if award is in excess after claimant is "made whole" through workers' compensation benefits and third party claim recovery. (Ness v. Anaconda Minerals Co., 279 Mont. 472, 929 P.2d 205 [1996]). If employee fails to bring action within one year, insurer may do so on behalf of employee or his representative. (MCA 39-71-414).

Uninsured Employers' Fund.—Fund exists to compensate injured employee of uninsured employer. (MCA 39-71-503). Uninsured employee may elect to take under fund, bring action against employer, and/or pursue any other legal remedy. (MCA 39-71-508). Department of Labor and Industry may concurrently pursue criminal and civil actions against uninsured employer and may order employer to cease operations. (MCA 39-71-507). Employee may bring suit against employer for failure to enroll in compensation plan and recover compensation employee would have received had employer been enrolled. (MCA 39-71-515). Employee, uninsured employer, and beneficiaries may enter into liability settlement. (MCA 39-71-519). Contributory negligence (unless willful), assumption of risk and fellow servant rule are not defenses in such action. (MCA 39-71-509).

Statute of Limitations.—Notice of time and place of injury must be given within 30 days, unless employer has actual notice. (MCA 39-71-603). Workers' compensation claims are barred unless presented within 12 months in writing and signed by claimant or claimant's representative, however, insurer may waive time requirement for extra 24 months upon showing of lack of knowledge of disability, latent injury or equitable estoppel. (MCA 39-71-601). No limitation of time shall run as against any injured worker who is mentally incompetent and without guardian or injured minor under 18 years of age who may be without parent or guardian. Guardian may be appointed by any court of competent jurisdiction, in which event, period of limitations shall begin to run on date of appointment of such guardian or when such minor arrives at 18 years of age, whichever date is earlier. (MCA 39-71-602). Signed claim for compensation authorizes medical provider to release relevant records to insurer or its agent. (MCA 39-71-604).

Occupational Disease (pre-2005).

Occupational Disease Generally.—Note: Effective July 1, 2005 Occupational Disease Act merged into Workers' Compensation Act. Applies to occupational disease arising on or after July 1, 2005. Pre-2005, Occupational Disease Act applies to all diseases arising out of or contracted from and in course of employment. (MCA 39-72-305). Act applies to all employers and employees subject to Workers' Compensation Act. (MCA 39-72-301). Last injurious exposure rule applies, in liability determination between insurers with exceptions. (MCA 39-72-303). Claimant must present claim for benefits, in writing, within one year from date claimant knew or should have known of occupational disease. (MCA 39-72-403).

Denial/Reduction of Payments.—Schedule of payments for all classes of disability same as Workers' Compensation Act provisions with exception for pneumoconiosis. (MCA 39-72-701). Denying permanent partial disability payments under MCA 39-72-703 held violative of constitutional right to equal protection. (Stavenjord v. Mont. State Fund, 2003 MT 67, 315 Mont. 466, 67 P.3d 229). Denying vocational rehabilitation benefits to occupational disease claimants held violative of constitutional right to equal protection. (Henry v. State Compensation Ins. Fund, 1999 MT 126, 294 Mont. 449, 982 P.2d 456). Reducing compensation award by percentage of contribution of nonoccupational factors held violative of constitutional right to equal protection. (Schmill v. Liberty Northwest Ins. Corp., 2003 MT 80, 315 Mont. 51, 67 P.3d 290). Case law inconsistent with statutes in these areas. When insurer denies liability, department shall direct claimant to evaluator on list of physicians for examination. (MCA 39-72-602). Claimant must prove proximate causation. (MCA 39-72-408). Provisions of Workers' Compensation Act regarding costs, attorneys' fees and 20% penalty apply to occupational disease claims as well.

Unemployment Insurance.

Benefits are payable to any individual who is or becomes unemployed (MCA 39-51-2103), except athletes (MCA 39-51-2109), and illegal aliens (MCA 39-51-2110). Public school employees who provide services in instructional, research, or principal administrative capacity are ineligible for benefits between academic terms or during period of paid sabbatical leave if employee performs services in first academic term and has contract to perform services or reasonable assurance of performing services in any educational institution in second term. (MCA 39-51-2108). Weekly benefit amounts vary subject to minimum of 19% of average weekly wage and maximum of 67.5% of average weekly wage. (MCA 39-51-2201), with maximum number of weeks payable depending on amount of earning during base period. (MCA 39-51-2204). Extended benefits available. (MCA 39-51-2501 to 2511). Recipient may be disqualified for benefits by failure to comply with certain requirements or unemployment caused by certain instances enumerated at MCA 39-51-2301 to MCA 39-51-2307. Unemployment Insurance Act has been amended to conform with Federal Unemployment Tax Act.

For discussion of employer contributions, see category 22 Taxation, topic 22.04 Employment Taxes, subhead Unemployment Compensation Tax.

11.03 WORKERS' COMPENSATION LAW:

See topic 11.02 Labor Relations.

12 ENVIRONMENT

12.01 ENVIRONMENTAL REGULATION:

Const. Art. IX guarantees fundamental right to clean and healthful environment. (296 Mont. 207, 988 P.2d 1236). Legislature is directed to maintain and improve clean and healthful environment for present and future generations, to provide adequate remedies for protection of eco-systems and resources, and to provide effective reclamation standards. All water declared property of state for use of its people, subject to existing rights to use of waters for useful or beneficial purposes. Central administration of water rights required in addition to present system of local records. Legislature required to identify, acquire, and restore, enhance and preserve scenic, scientific, cultural and recreational areas and sites for use and enjoyment of people.

General Supervision.

Montana legislature enacted Environmental Policy Act (MCA 75-1-101 to -324) to encourage productive harmony between man and his environment, eliminate damage to biosphere, and enrich understanding of ecological systems and resources important to state. Act broadly directs all state agencies to administer laws in accordance with ecological principles; to utilize a systematic, interdepartmental approach in planning; and to include in every recommendation or report on proposals for major actions significantly affecting quality of human environment detailed statement on environmental impact of proposal, any adverse effects, alternatives, and any irreversible commitments of resources. Environmental impact statements must include evaluation of regulatory restrictions on private property. (MCA 75-1-201). Environmental Quality Council consisting of 17 members is directed to monitor environmental developments, prepare recommendations for legislation, conduct investigations and studies, review operating programs, prepare recommendations for remedying existing deficiencies, and perform administrative rule review, program evaluation, and monitoring functions of interim committee for Department of Environmental Quality, Department of Fish, Wildlife and Parks, and Department of Natural Resources and Conservation. (MCA 75-1-324). Council has authority to investigate and inspect all records of any state agency, board, or commission. (MCA 75-1-311). Council has subpoena power to compel attendance of witnesses at hearings and investigations. (MCA 75-1-312). Presently, supervision of individual control programs is vested in state agency having general supervisory power over particular industry or activity involved. See specific subheads, infra.

Air Pollution.

Clean Air Act of Montana (MCA 75-2-101 to -514), administered by Department of Environmental Quality, Cogswell Building, Helena, Montana 59601, with advice of Air Pollution Control Advisory Council, provides for departmental regulation of levels, concentrations, or quantities of emissions of various pollutants from any source, except certain agricultural sources not otherwise controlled by federal law (MCA 75-2-111), necessary to prevent, abate, or control air pollution. (MCA 75-2-203). Standards for fluorides established through limitations on concentrations in forage grasses, hay, silage. (MCA 75-2-202). Enforcement by notice detailing corrective action or ordering violator to pay administrative penalty, or both. Voluntary compliance encouraged. Action initiated under this section may include administrative civil penalty in lieu of criminal penalty of up to $10,000 for each day of violation, not to exceed $80,000. (MCA 75-2-401). Emergency procedure established. (MCA 75-2-402). Variances authorized. Hearing and judicial review provided for. (MCA 75-2-212, -411). Local air pollution control programs authorized (MCA 75-2-301 et seq.). Person who knowingly violates Clean Air Act or makes false report is guilty of criminal offense and faces maximum criminal penalties of $10,000 per offense and imprisonment not to exceed two years or both. (MCA 75-2-412). Each day of each violation constitutes separate violation. (MCA 75-2-412).

Public Health.

Smoking is prohibited in all enclosed public places except for bars (until Sept. 30, 2009), private residences, and private automobiles. (MCA 50-40-104). Individual violators subject to $25-$100 fine for failure to comply. (MCA 50-40-115). Proprietors of enclosed public places subject to maximum fine of $500 for failure to comply. (MCA 50-40-115).

Water Pollution.

Comprehensive statute for prevention of water pollution (MCA 75-5-101 to -641), administered by Department of Environmental Quality, Cogswell Building, Helena, Montana 59601, proscribes contamination of state waters or placement of contaminants so as to indirectly infiltrate state waters and proscribes construction, modification, or operation of disposal system or outlets for discharge into state waters without permit; also proscribes construction of sewage lagoon less than 500 feet from existing water well. (MCA 75-5-605). Permit application, modification, or suspension requires notice and opportunity for hearing. (MCA 75-5-403, -404). Department may require owner or operator of point source of pollution to monitor, record, and report discharge quantity and quality, and be subject to inspection by Department personnel. (MCA 75-5-602, -603). Hearing and judicial review provided for. (MCA 75-5-611, -641). Emergency procedure established permitting source endangering health, welfare, or livelihood to be immediately enjoined in District Court of any county in which defendant is located. (MCA 75-5-614, -622). Injunctive relief, suit for civil penalty, and criminal prosecution authorized. (MCA 75-5-614, -616, -631, -632). Any person may apply to Department protesting violation. Department shall investigate charge and, if investigation proves protest without reasonable cause, department may seek investigation costs from person making protest. (MCA 75-5-636). Violation of any rule, permit, effluent standard, or order shall be subject to civil penalty not to exceed $25,000 per day of violation. (MCA 75-5-631). Willful violation is criminal offense punishable by fine up to $25,000 per day of violation or one year imprisonment or both. Subsequent convictions up to $50,000 per day of violation or imprisonment for two years or both. (MCA 75-5-632). Responsible corporate officer included within definition of “person” for purposes of punitive provisions. (MCA 75-5-615[2]).

Mining.

Legislature declared purpose to allow exploration for and mining of minerals only while adequately providing for subsequent beneficial use of surface by reclamation. Permit required prior to prospecting, exploration, or any operation for removal of mineral. (MCA 82-4-301). Comprehensive legislative scheme requiring reclamation plan and bond before issuance of permit. Department of Environmental Quality charged with environmental supervision of mineral exploration and operations. Montana has adopted regulation according to minerals. Coal and uranium are regulated by Montana Strip and Underground Mine Reclamation Act. (MCA 82-4-201 to -254). Sand, gravel, clay, scoria, bentonite, soil materials and peat removal regulated by Opencut Mining Act. (MCA 82-4-401 to -446). Hard rock and other minerals regulated by general statute for metal mine reclamation. (MCA 82-4-301 to -390).

Strip and Underground Mine Reclamation Act, to reduce environmental impact of strip and underground mining and prospecting for strip mineable minerals, provides that all such operations be conducted under permits subject to comprehensive plan for surface reclamation and restoration and performance bond. (MCA 82-4-202). Five-year renewable permits issued by Department of Environmental Quality are required prior to any strip or underground mining. Renewal upon application so long as compliance with requirements of Act and reclamation plan continues. (MCA 82-4-221). Permit contingent upon: detailed reclamation plan treating topography, vegetation and water; operation location; owners of record and any purchasers under contract for deed of surface within one-half mile of any part of affected area; mineral owners; existing permits; prior offenses or revocations, if any; meteorological data; test bore data; water drainage data; public notice by publication in newspaper of general circulation; and any other information Department may require by regulation. (MCA 82-4-222). Application fee, $100. Surety bond to State of Montana not less than $200 per acre, but at least $10,000. (MCA 82-4-223). Prospecting permit required for prospecting on land not covered by valid strip or underground mining permit. Prospecting permit application, $100. (MCA 82-4-226). Similar reclamation plan and bond required for prospecting permit. Core drilling locations must be specified, together with method to be used for sealing aquifers. Permit may not issue if damage likely to unique or historical characteristics or improvements specified in statute. (MCA 82-4-227). Statute specifies minimum operation requirements. (MCA 82-4-232). Suspension of all permits is remedy for noncompliance with any permit conditions. (MCA 82-4-251). Private party enforcement provided. (MCA 82-4-252). Right of action for water users affected by prospecting or strip and underground mining operations. (MCA 82-4-253). Civil penalty of $100 to $5,000 per day of violation provided. Failure to correct violation shall result in penalty of not less than $750 per day, up to 30 days, upon expiration of which other sanctions may be applied. Willful violation misdemeanor with fine of $500 to $10,000 or one year imprisonment or both. Each day of violation is separate offense. (MCA 82-4-254).

Strip and Underground Mine Siting Act.

All new strip and underground mines must obtain special permits. Permit necessary for preparation to open new strip or underground mine. Application fee $50. Bond of not less than $200 or more than $10,000 per acre to be determined by Board for preparatory work. Minimum amount of bond $5,000. Purpose to assure compliance with rules. Appeal provided for. (MCA 82-4-101 to -142).

Major Facility Siting Act.

Governs construction of certain electrical transmission, pipeline and geothermal facilities within state. Requires certificate of environmental compatibility prior to construction or operation. Detailed system for application and hearings provided by statute. Extensive list of items to be considered. (MCA 75-20-101 to -1205). Pipelines greater than 25” in diameter exempt. (2003, c. 514).

Opencut Mining Act, to reduce environmental impact of open cut mining, provides that Dept. of Environmental Quality may issue permits to operators to provide for restoration and reclamation of lands disturbed. (MCA 82-4-432). Statute specifies data required in application for permit. Application fee is $50 for application to mine bentonite, clay, scoria, sand or gravel. (MCA 82-4-432). Surety bond to State of Montana required in amount of $200 to $1,000 per acre. (MCA 82-4-433). Statute specifies reclamation standards. (MCA 82-4-434). Penalty of $100 to $1,000 per day for violations of Act, following service of notice of violation. (MCA 82-4-441).

Metal Mine Reclamation Statute provides that no person must engage in exploration for or development of mineral deposits within state without first obtaining one-year permit renewable on 30 days application from Dept. of Environmental Quality. (MCA 82-4-331). New open-pit mining for gold or silver using heap leaching with cyanide prohibited. (MCA 82-4-390). Dept. granted extensive rule making powers. (MCA 82-4-321). Exploration permit must be issued to applicant who pays $100 fee, agrees to reclaim any surface area damages as required by Dept. and who is not otherwise in default of any other reclamation obligation. Exploration area must be disclosed. Disclosure of evacuation and prospecting techniques in disturbance of land is necessary, and applicant must post reclamation and revegetation bond. (MCA 82-4-332). Operating permit must be issued applicant who pays $500 fee (plus additional fee which may be required to cover department costs), and submits application containing information specified by statute including proposed reclamation plan. (MCA 82-4-335). Operators must be required to file performance bond. (MCA 82-4-338).

Reclamation plan must to extent possible be conducted simultaneously with production activities and must be completed within two years of completion or abandonment of production. Dept. may allow longer reclamation period. Other details of plan specified by statute. (MCA 82-4-336). Inspection allowed. (MCA 82-4-337). Surety bond to be in amount equal to estimated cost of reclamation (not less than $200 per acre or fraction thereof), and must be executed by duly qualified surety. Cash deposits or other forms of surety may be filed in lieu of bond. (MCA 82-4-338). Temporary bond and amended plan may be required if Dept. finds imminent danger to public health or reasonable probability of water quality violation. (MCA 82-4-338). Dept. may abate imminent danger to public health, safety or environment if permittee fails to do so, and may thereafter forfeit portion of bond to be used to abate danger. (MCA 82-4-338). Annual report of activities required of permittee. (MCA 82-4-339). Small miners exempt if various statutory requirements can be met. (MCA 82-4-305). Violation of provisions of Act may result in penalty of not less than $100 or more than $1,000 per day of violation. If violation creates imminent danger to health or safety of public or causes significant environmental harm, maximum penalty is $5,000 per day of violation. Injunctive relief authorized. (MCA 82-4-361). Certain persons and mining activity exempted. (MCA 82-4-310). Notice of noncompliance by department and suspension of permits provided for. (MCA 82-4-362).

Special tax incentives and grants for development of new energy conservation and alternative energy sources programs. (MCA 15-32-101 to -115, 401-407). Severance tax for coal used in certain new electrical generational facilities reduced. (MCA 15-35-103).

Montana Uniform Transboundary Pollution Reciprocal Access Act provides that party injured in reciprocating jurisdiction by pollution originating in Montana may bring cause of action in Montana. (MCA 75-16-101 to -109).

Hard-Rock Mining Impact Board established to mediate between local governments and large-scale mineral developers to accommodate impact on local economies, prepayment of property taxes; and written guarantees to provide funds to localities toward services and facilities. (MCA 90-6-301 to -311; MCA 15-16-201; MCA 82-4-335).

Developer and local governments must formulate impact plan to assess effect of large influx of people in area of development. (MCA 90-6-307).

Nuclear Waste.

Disposing of large quantity of radioactive material (defined: 49 CFR 173.403) in Montana is punishable by fine up to $5,000 and imprisonment of up to two years. (MCA 50-79-301 to -304). Northwest Interstate Compact on Low-Level Radioactive Waste Management adopted. (MCA 50-79-501). High-level radioactive waste may not be transported through state without permit and payment of fees. (2003, c. 560).

Littering.

Person convicted of littering forfeits hunting or fishing license or camping permit for one year. (MCA 87-2-112).

Land Use Planning.

Subdivision development regulated by statute under Montana Subdivision and Platting Act. (MCA 76-3-101 to MCA 76-4-135).

Pesticides.

Montana Pesticides Act administered by Department of Agriculture, 1300 Block Cedar, Airport Way Bldg. W., Helena, Montana 59601. (MCA 80-8-101 to -306). Every pesticide distributed, sold, or offered for sale or transported intrastate must be registered with department, and renewed annually by manufacturer or formulator of pesticide. Detailed specifications set for registration. (MCA 80-8-201). It is prohibited to sell or transport intrastate unregistered pesticides, pesticides not labeled in accordance with statute, pesticides harmful to man without additional label information, certain specified pesticides unless colored or discolored as required by regulation, or adulterated or misbranded pesticides. Altering or detaching pesticide label is also prohibited. (MCA 80-8-202). Sampling and analysis required. (MCA 80-8-302). Embargo remedy provided along with criminal and administrative sanctions for violation of embargo. (MCA 80-8-303). License required for commercial applicators (MCA 80-8-204), operators (MCA 80-8-206), and dealers after examination (MCA 80-8-207, -208). Annual license required for sale or delivery within state. (MCA 80-8-207). Report of loss or damage required. (MCA 80-8-301). Department given investigative and enforcement authority. (MCA 80-8-304). List of activities constituting violations of Act provided. (MCA 80-8-305). Penalties for violations provided. (MCA 80-8-306). Hearings and administration of Act in accordance with Administrative Procedure Act. (MCA 80-8-106). Fees collected for pesticide education programs must be expended for such purposes. (MCA 80-8-109).

Billboards.

Comprehensive regulation of outdoor advertising along primary and interstate highways. Exception for advertising cultural exhibits of nonprofit, historical, or arts organizations. (MCA 75-15-111, -113, -121). Regulation and permit system administered by Department of Transportation. (MCA 75-15-122). Standards established. (MCA 75-15-113). Violation misdemeanor. (MCA 75-15-134). Nonconforming advertising is deemed nuisance by statute. (MCA 75-15-133). State empowered to acquire nonconforming advertising for just compensation. But if certain violations (MCA 75-15-112, -132) removal without compensation authorized (MCA 75-15-123). Hearing and appeal procedures established. (MCA 75-15-131).

Antiquities.

Statute provides a method for identification, acquisition, restoration, conservation and administration of historic, scientific and cultural sites and objects in state. State Historic Preservation Office is responsible for surveying, identifying, and inventorying heritage properties in Montana. (MCA 22-3-423). State agencies must consult with Historic Preservation Office and adopt rules for preservation of antiquities. (MCA 22-3-424). No antiquities can be disturbed without antiquities permit issued by Historic Preservation Office. (MCA 22-3-432). State agencies must consult with Historic Preservation Office when environmental impact statement is prepared and must devise mitigation plan for protection of antiquities. (MCA 22-3-433). County may sell or give historic property to nonprofit organizations that agree to restore or preserve property under contract that provides property be preserved in present or restored state upon any subsequent transfer and reversion of property to county for noncompliance. (MCA 7-8-2211).

Disasters.

Governor may authorize payment of claims against state during emergency or disaster. (MCA 10-3-311). Emergency Management Assistance Compact as interstate compact adopted, authorizing requests for and responses to requests from other states for purpose of interstate sharing of equipment and personnel to respond to natural and human-caused disasters and emergencies. (MCA 10-3-1001 to -1003).

Water Resources.

Development plan for water resources, including hydroelectric power generation. State

Department of Natural Resources and Conservation can lease sites for hydroelectric power generation to any person qualified to do business in Montana, or agency can generate and sell power. (MCA 85-1-501 to -514).

Environmental Cleanup and Responsibility.

Comprehensive Environmental Cleanup and Responsibility Act (MCA 75-10-701 et seq.) generally adopts and parallels certain provisions of Federal Comprehensive Environmental Response, Compensation, and Liability Act. Act vests Dept. of Environmental Quality with broad investigative powers (MCA 75-10-707); rule making authority (MCA 75-10-702); and authority to assess penalties of not more than $10,000 per day (MCA 75-10-711). Dept. is vested with authority to take remedial and emergency actions. (MCA 75-10-711, MCA 75-10-712). Act imposes joint and several liability on certain persons for release or threatened release of hazardous or deleterious substance from facility. (MCA 75-10-715). Person who receives notice under MCA 75-10-711, who is held jointly and severally liable under MCA 75-10-715, or who initiates voluntary cleanup may bring private right of action (MCA 75-10-724).

13 ESTATES AND TRUSTS

13.01 ADMINISTRATION:

See topic 13.09 Executors and Administrators.

13.02 ADVANCEMENTS:

See topic 13.07 Descent and Distribution.

13.03 ALLOWANCES:

See topic 13.09 Executors and Administrators.

13.04 CLAIMS:

See topic 13.09 Executors and Administrators; category 5 Civil Actions and Procedure, topic 5.17 Pleading.

13.05 DEATH:

Death defined as either irreversible cessation of circulatory and respiratory functions or irreversible cessation of total brain function. (MCA 50-22-101).

Uniform Probate Code adopted. (MCA 72-1-108). See topic 13.07 Descent and Distribution.

Survivorship.

Uniform Probate Code adopted. (MCA 72-2-114).

Action for Death.

Either parent may sue for death of minor child. Guardian may sue for death of ward. (MCA 27-1-512). Personal representatives may sue for death of decedent. (MCA 27-1-513). Above actions must be commenced within three years. (MCA 27-2-204). There is no statutory limit on amount of recovery, but amount must be reasonable. (MCA 27-1-302).

Action for personal injuries survives death. (MCA 27-1-501). Statutes do not prescribe elements of damages.

See also category 5 Civil Actions and Procedure, topic 5.17 Pleading, subhead Complaint.

Death Certificates.

See category 10 Documents and Records, topic 10.04 Records, subhead Vital Statistics.

Uniform Anatomical Gift Act.

See topic 13.16 Wills.

Living Wills.

See topic 13.16 Wills, subhead Living Wills.

13.06 DECEDENTS' ESTATES:

See topics 13.07 Descent and Distribution, Executors and Administrators, Wills; category 8 Debtor and Creditor, topic 8.10 Homesteads.

13.07 DESCENT AND DISTRIBUTION:

Uniform Probate Code adopted, including 1993 Official Amendments. (Tit. 72). Following are exceptions to Uniform Probate Code:

Surviving Spouse's Intestate Share.

(1) Entire estate to surviving spouse if no surviving descendant or parent of decedent, or if all of decedent's surviving descendants are descendants of surviving spouse and no other descendant of surviving spouse survives decedent; (2) first $200,000, plus ¾ of balance of intestate estate, if no descendant of decedent survives decedent but parent of decedent survives decedent; (3) first $150,000, plus ½ of balance of intestate estate, if all of decedent's surviving descendants are also descendants of surviving spouse and surviving spouse has one or more surviving descendants who are not descendants of decedent; (4) first $100,000, plus ½ of balance of intestate estate, if one or more of decedent's surviving descendants are not descendants of surviving spouse. (MCA 72-2-112).

Heirs Other Than Surviving Spouse.

If there is no surviving descendant, grandparent, or descendant of grandparent, intestate estate not passing to surviving spouse goes to person of closest degree of kinship with decedent. If more than one person is of that closest degree, those persons share equally. However, if more than one person is of closest degree and they claim through different ancestors, those who claim through nearer ancestor shall receive to exclusion of those claiming through more remote ancestor. (MCA 72-2-113).

See also topic 13.09 Executors and Administrators.

13.08 ELECTION:

See topic 13.16 Wills.

13.08A ESTATES: (in property)

See category 21 Property, topic 21.16 Real Property.

13.09 [RESERVED]

13.10 EXECUTORS AND ADMINISTRATORS:

Uniform Probate Code adopted, including 1993 Official Amendments, but Art. VII, Trust Administration, not adopted. Following are exceptions to Uniform Probate Code:

Preferences and Right to Administer.

Custodial parent has priority over noncustodial parent for appointment of deceased child's estate. (MCA 72-3-502). Public administrator added to priority list after other heirs of decedent. (MCA 72-3-502). Objection to appointment may only be made in formal proceedings. (MCA 72-3-503). Upon such objection, priorities in MCA 72-3-502 apply, except that court may appoint any qualified person in cases where estate inadequate to discharge unsecured debts; and court may appoint person acceptable to heirs and devisees having more than half of distributable value of estate if objection to appointment is to person whose priority is not determined by will. (MCA 72-3-503).

Public Administrator.

Public administrator is a county officer, elected for two years. It is public administrator's duty to take charge of estates of persons dying within county in following cases: (1) estates where no administrator appointed and which are being wasted or lost; (2) estates of decedents without known heirs; (3) if ordered by court; and (4) estates upon which court has granted him letters of administration. (MCA 72-15-102). When public administrator takes charge of estate by order of court, must obtain letters of administration, in like manner and in like proceedings as letters of administration granted to other persons. (MCA 72-15-103). Administrator must make out and return inventory of all estates taken into his possession and administer and account for same. (MCA 72-15-201).

Inventory and Appraisement.

Within nine months after appointment, personal representative must prepare inventory of all estate property and must either file inventory with court or provide copy to all interested persons. (MCA 72-3-607).

General Powers and Duties of Personal Representative.

Personal representative may continue unincorporated business or venture in which decedent engaged at death in same form unless otherwise ordered by court. (MCA 72-3-613[24]). § 3-711 not adopted. See category 4 Citizenship, topic 4.01 Aliens, subhead Inheritance.

Notice of Hearings.

§ 1-401 adopted except MCA 72-1-301 provides if address, or identity of person is not known and cannot be ascertained with reasonable diligence, notice shall be given by publishing in weekly paper once a week for three consecutive weeks, and if in newspaper published more often than once a week, by publishing on at least three different days of publication with at least ten days from first to last day of publication, including first and last day. (MCA 72-1-301[1][c]).

Presentation of Claims.

All claims which arose before decedent's death must be presented within earlier of one year after decedent's death or four months after date of first publication of notice to creditors. (MCA 72-3-803).

Claims must either be mailed to personal representative, return receipt requested, or filed with clerk of court. (MCA 72-3-804[1]). It is suggested to do both.

Proof of Claims.

Form reprinted from June 2006 Probate Forms Manual with permission of State Bar of Montana.

Form Name, address, and phone number of Attorney for Personal Representative, Special Administrator, etc.

MONTANA . . . . JUDICIAL DISTRICT COURTCOUNTY OF . . . . IN THE MATTER OF THE ESTATE OF) PROBATE NO. . . . .,) Deceased . CLAIM AGAINST ESTATE. . . . ., creditor of the estate of . . . ., deceased, hereby states that said estate is indebted to the undersigned creditor in the amount of $. . . . . . . for . . . .

(Set forth basis of claim; date claim due if not yet due. If contingent or unliquidated, the nature of the uncertainty. If secured, describe security.) DATED. . . . .

. . . .

Claimant

. . . .

Address

Allowance of Claims.

§ 3-806 adopted. (MCA 72-3-805). Failure of personal representative to mail notice to claimant of action on claim within 60 days of time for original presentation has effect of notice of allowance.

Priorities.

If estate assets are insufficient, claims are paid in following order: (a) costs and expenses of administration; (b) reasonable funeral expenses and reasonable and necessary medical and hospital expenses of last illness of decedent, including compensation of persons attending decedent; (c) federal estate and Montana state estate taxes; (d) debt for current child support obligation and past-due support for decedent's children pursuant to support order as defined in MCA 40-5-201; (e) debts with preference under federal and Montana law; (f) other federal and Montana state taxes; (g) all other claims. (MCA 72-3-807).

Sales.

In supervised proceeding, court approval required before personal representative can purchase, directly or indirectly, property from estate. All sales are to be fairly conducted and for best price obtainable. (MCA 72-3-613[23]).

Actions Against Representative.

Personal representative may compromise claims only with consent of heirs and devisees, or court. (MCA 72-3-815). Generally, personal representative is not individually liable for contracts entered into in fiduciary capacity unless fails to identify representative capacity and estate in contract. (MCA 72-3-612). Personal representative individually liable for obligations arising from ownership and control of estate or for torts committed during administration only if personally at fault. Nonetheless, claims based on contract or tort can be asserted against estate. (MCA 72-3-612).

Actions by Representative.

Under survival statute, personal representative may maintain separate action or cause of action which arose prior to decedent's death. (MCA 27-1-501). Representative may bring action for wrongful death. (MCA 27-1-513). Either parent may bring action for child and guardian may bring action for ward. (MCA 27-1-512).

Allowances and exempt property provided for in MCA 72-2-412 through MCA 72-2-414. Homestead allowance is set forth fully in MCA 70-32-101 through MCA 70-32-303 (see category 8 Debtor and Creditor, topic 8.10 Homesteads, see also MCA 72-2-412).

Compensation.

Personal representative is entitled to reasonable compensation, not to exceed 3% of first $40,000 of value of estate and 2% of value of estate in excess of $40,000. Court may allow additional compensation for extraordinary services, not to exceed amount allowed for original compensation. (MCA 72-3-631). Attorney engaged by personal representative shall not receive more than one and one-half times compensation allowable to personal representative. For good cause, court may allow additional compensation to attorney. (MCA 72-3-633).

Small Estates.

Collection by affidavit or summary administrative procedures apply to estates which do not exceed $50,000 or those which do not exceed allowances and expenses. (MCA 72-3-1101 through MCA 72-3-1104).

Closing Estates.

In estates required to file duplicate U.S. estate tax return with Dept. of Revenue pursuant to MCA 72-16-906, for decedents who died prior to Jan. 1, 2001, certificate from Department of Revenue showing that any Montana estate tax due on assets of estate has been paid, or agreement with Department for extension of time in which to pay tax, must be filed with clerk of court before final distribution of estate property and closing of estate. (MCA 72-3-1006). Supreme Court administrator required to notify district judge if estate is not closed within two years after appointment of personal representative. If after show cause hearing, judge determines that good cause does not exist for failure to close, judge may order closed, and personal representative and his attorney may lose right to fees. (MCA 72-3-1015). Before closing, personal representative must either file accounting with court or deliver same to all interested persons. (MCA 72-3-1005).

Uniform Fiduciaries Act not adopted.

Revised Uniform Principal and Income Act 1997 version adopted. (MCA 72-34-421 to 453).

Uniform Simplification of Fiduciary Security Transfers Act repealed.

Uniform Anatomical Gift Act adopted. (MCA 72-17-101 to 312).

Uniform Disposition of Community Property Rights at Death Act adopted. (MCA 72-9-101 to MCA 72-9-120).

13.11 FIDUCIARIES:

See topics 13.09 Executors and Administrators, and Trusts; category 14 Family, topic 14.07 Guardian and Ward.

13.12 INTESTACY:

See topic 13.07 Descent and Distribution.

13.13 LIVING WILLS:

See topic 13.16 Wills.

13.14 PROOF OF CLAIMS:

See topic 13.09 Executors and Administrators; category 5 Civil Actions and Procedure, topic 5.17 Pleading.

13.15 TRUSTS:

Uniform Probate Code adopted (Tit. 72) but Article VII, Trust Administration, not adopted. Effective Oct. 1, 1989, Montana Trust Code, enacted as cc. 33 through 36 of Title 72, repealing cc. 20 through 23. Chapters 33 through 36 are applicable to all trusts regardless of when created unless court determines (1) application of trust code to trusts would substantially interfere with rights of parties and other interested persons; or (2) application of trust code to proceedings concerning trusts would substantially interfere with effective conduct of proceedings or rights of parties or other interested persons and in both cases prior law applies. (MCA 72-33-102).

Creation.

Trust may be created for any purpose that is not illegal or against public policy. (MCA 72-33-204). Trust is created only if trustor properly manifests intention to create trust. (MCA 72-33-202). Trust may be created by (1) declaration by owner of property that owner holds property as trustee; (2) transfer of property by owner during owner's lifetime to another person as trustee; (3) testamentary transfer of property by owner to another person as trustee; (4) exercise of power of appointment to another person as trustee; or (5) enforceable promise to create trust. (MCA 72-33-201). There must be trust property and beneficiary or trust instrument must grant power to trustee or some other person to select beneficiaries. (MCA 72-33-203; MCA 72-33-206). Trust for indefinite or general purpose not invalid for that reason if can be determined with reasonable certainty that particular use of trust property comes within that purpose. (MCA 72-33-205). Trust is not valid unless evidenced by one of following: (1) written instrument signed by trustee or trustee's authorized agent; (2) written instrument signed by trustor or trustor's authorized agent; or (3) operation of law. (MCA 72-33-208).

Appointment of Trustee.

District court is authorized to appoint trustee whenever trust instrument provides no method for filling vacancy. (MCA 72-33-621).

Eligibility and Competency.

Trustee must have legal capacity to take, hold and transfer trust property. Corporate trustee must be qualified to act as trustee in state. (MCA 72-33-622).

Qualification.

Trustee must accept trust or modification by signing trust instrument or written acceptance, or knowingly exercising powers or performing duties under trust instrument. (MCA 72-33-601). Trustee not required to give bond unless required by trust instrument or ordered by court. (MCA 72-33-603).

Removal of Trustee.

District court may remove trustee for breach of trust; if trustee is insolvent or unfit to administer trust; if there is hostility or lack of cooperation among co-trustees; trustee fails or declines to act; or other good cause. (MCA 72-33-618).

General Powers and Duties of Trustees.

Uniform Trustees' Powers Act repealed.

Duties.

Trustee has duty to administer trust according to trust instrument and trust code. (MCA 72-34-101). In case of revocable trusts, trustee shall follow any written direction acceptable to trustee given by person having power to revoke trust or by person to whom trustor delegates right to direct trustee. (MCA 72-34-102). Trustee must administer trust solely in interest of beneficiaries (MCA 72-34-103); and avoid conflicts of interest (MCA 72-34-105); however, certain actions and transactions performed by trustees which are regulated financial institutions or their affiliates do not violate these two duties. (MCA 72-34-117). Trustee must not knowingly become trustee of another trust adverse to interest of first trust. (MCA 72-34-106). Trustee shall take control and preserve trust property (MCA 72-34-107), make trust property productive (MCA 72-34-108) and dispose of improper investments. (MCA 72-34-109). Trustee is obligated to keep trust property separate and identified (MCA 72-34-110); enforce claims that are part of trust property (MCA 72-34-111); and defend actions that may result in loss to trust. (MCA 72-34-112). Trustee may not delegate to others entire administration of trust or acts that trustee can reasonably be required personally to perform. (MCA 72-34-113). Exercise of care, skill, prudence and diligence under circumstances then prevailing that prudent person would use is required of trustee and such standard of care is unaltered by fact that trustee is compensated. (MCA 72-34-114, MCA 72-34-118). Trustee must apply full extent of trustee's skills. (MCA 72-34-115). Discretionary powers conferred upon trustee are to be exercised reasonably. (MCA 72-34-129). Absolute discretion conferred upon trustee is to be exercised in accordance with fiduciary principles and consistent with purposes of trust. (MCA 72-34-130).

Powers.

Trustee has following powers without court authorization: (1) powers conferred by trust instrument; (2) powers conferred by statute (MCA 72-34-306 through MCA 72-34-311, MCA 72-34-316 through MCA 72-34-323, MCA 72-34-326 through MCA 72-34-332, and MCA 72-34-336 through MCA 72-34-343); and (3) power to perform any act to fulfill duty to use ordinary skill and prudence under MCA 72-34-114. (MCA 72-34-301).

Co-trustees.

Power vested in two trustees requires unanimous action to bind trust property unless trust instrument provides otherwise. (MCA 72-33-611). Power vested in three or more trustees may be exercised by majority of trustees unless trust instrument provides otherwise. (MCA 72-33-611).

Sales.

Trustee has power to sell trust property, for cash, credit or exchange at public or private sale. (MCA 72-34-316).

Investments.

Trustee has power to invest, including making those investments provided for in MCA 32-1-420, in any kind of property, whether real, personal or mixed. (MCA 72-34-309). Trustee standard of care for investment and management decisions described in Montana Uniform Prudent Investor Act. (MCA 72-34-601 to -610).

Securities in Name of Nominee.

Trustee has power to hold securities in name of nominee or another form without disclosure of trust. (MCA 72-34-330).

Bequests and Devises to Inter Vivos Trusts.

See topic 13.16 Wills, subhead Bequests and Devises to Inter Vivos Trusts.

Accounting.

Trustee must mail itemized annual statement of all current receipts and disbursements of principal and income to each income beneficiary. (MCA 72-34-126). This annual report is not required if waived in trust instrument or by beneficiary. (MCA 72-34-127).

Compensation.

When trust instrument is silent on subject of compensation, trustee is entitled to reasonable compensation. (MCA 72-33-627). In addition to other compensation to which trustee is entitled, trustee is entitled to make reasonable charge for services rendered in making temporary investments. (MCA 72-33-628). Trustee has equitable lien on trust property in amount of advances, with any interest, made for protection of trust, and for expenses, losses and liabilities sustained in administration of trust. (MCA 72-33-632).

Discharge.

Trustee who has accepted trust may resign only by one of following methods: (a) as provided by trust instrument; (b) in case of revocable trust, with consent of person holding power to revoke trust; (c) in case of irrevocable trust, with consent of all adult beneficiaries entitled to receive income or principal if trust were terminated at time consent is sought; or (d) pursuant to court order upon petition by trustee. (MCA 72-33-616). Trustee may be removed in accordance with trust instrument or by court on its own motion or on petition of co-trustee or beneficiary. Grounds for removal include: (a) breach of trust; (b) where trustee is insolvent or otherwise unfit; (c) hostility among co-trustees; (d) where trustee fails or declines to act; (e) or for other good cause. (MCA 72-33-618).

Actions.

Trustee of express trust may sue without joining beneficiaries. (Mont. R. Civ. 17[a]). Proceedings concerning trusts are governed by MCA 72-35-101 to 508.

Uniform Common Trust Fund Act adopted in Montana as “Uniform Common Trust Act”. (MCA 32-1-701 to 708). Accumulation of income permitted, but may not extend beyond time permitted for vesting of future interests. (MCA 72-2-1001, et seq.).

Revised Uniform Principal and Income Act 1997 version adopted. (MCA 72-34-421 to 453).

Uniform Prudent Investor Act adopted. (MCA 72-34-601 to 610).

Uniform Prudent Management of Institutional Funds Act adopted. (MCA 72-30-101 to 213).

Gifts to Minors.

See category 14 Family, topic 14.10 Infants.

Uniform Fiduciaries Act not adopted.

Uniform Simplification of Fiduciary Security Transfers Act repealed.

Uniform Statutory Rule Against Perpetuities adopted. (MCA 72-2-1001 to 1017).

Pour Over Trusts.

See topic 13.16 Wills, subhead Bequests and Devises to Inter Vivos Trusts.

Renunciation.

Beneficiary of trust may disclaim interest in trust property by delivering written disclaimer to trustee within nine months of latest of: effective date of trust instrument; event finally ascertaining taker of property and taker's interest is indefeasibly vested; or beneficiary's knowledge of existence of interest. (MCA 72-2-811).

Revocation.

If all beneficiaries of irrevocable trust consent, they may compel modification or termination of trust upon petition to court. However, if continuance of trust is necessary to carry out material purpose of trust, beneficiaries may not modify or terminate trust unless court in its discretion determines that reason for modification or termination under circumstances outweighs interest in accomplishing material purpose of trust. (MCA 72-33-406). If trustor and all beneficiaries consent, they may compel modification or termination of irrevocable trust. (MCA 72-33-407). Unless trust is expressly made irrevocable, trust is revocable by trustor; however, this applies only when trustor is Montana domicile on date trust is created, when trust instrument is executed in Montana, or when trust instrument provides Montana law is to govern. (MCA 72-33-401).

Restrictions on Voluntary and Involuntary Transfers.

If trust instrument provides that beneficiary's interest is not transferable, whether voluntary or involuntary, beneficiary's income or right to principal distribution under trust may not be transferred and is not subject to enforcement of money judgment until paid to beneficiary, unless trustor is beneficiary of trust. (MCA 72-33-301 to 306).

Funeral Plan Trusts.

Prior to death, person may contract for prearranged funeral plan or related service. (MCA 37-19-827). Recipient of money under contract holds money in trust (MCA 37-19-827), and must deposit money in banking institution or invest it in stock of savings or building and loan association or in shares of credit union (MCA 37-19-828).

13.16 WILLS:

Uniform Probate Code adopted (Tit. 72) including 1993 Official Amendments, but Art. VII, Trust Administration, not adopted.

Execution.

Individual 18 years of age of sound mind may make will. (MCA 72-2-521). Will must be in writing, signed by testator or in testator's name by another in testator's conscious presence and at testator's direction and signed by at least two witnesses. (MCA 72-2-522).

Attestation Clause.

Form attestation clause for self-proved will. (MCA 72-2-524).

Form

I, ..., the testator, sign my name to this instrument this . . . . . day of . . . . ., 20 . . . ., and being first duly sworn, do hereby declare to the undersigned authority that I sign and execute this instrument as my will and that I sign it willingly (or willingly direct another to sign for me), that I execute it as my free and voluntary act for the purposes expressed in it, and that I am 18 years of age or older, of sound mind, and under no constraint or undue influence.

. . . . Testator

We, ..., ... the witnesses, sign our names to this instrument, being first duly sworn, and do hereby declare to the undersigned authority that the testator signs and executes this instrument as the testator's will, that the testator signs it willingly (or willingly directs another to sign for the testator), that each of us, in the presence and hearing of the testator, hereby signs this will as witness to the testator's signing, and that to the best of our knowledge the testator is 18 years of age or older, of sound mind, and under no constraint or under influence.

. . . . Witness

. . . . Witness

THE STATE OF . . . . .COUNTY OF . . . .

Subscribed, sworn to, and acknowledged before me by . . . . . ., the testator, and subscribed and sworn to before me by . . . . and . . . ., witnesses, this . . . . . day of . . . .(SEAL)

(Signed) . . . .(Official capacity of officer)

Holographic Wills.

Holographic will valid if signature and material portions of document in testator's handwriting. (MCA 72-2-522). Even if document does not meet requirements under MCA 72-2-522, if shown by clear and convincing evidence document was intended to be will, document to be treated as such. (MCA 72-2-523).

Testamentary Gifts to Subscribing Witness.

Such gifts are valid. Interest no longer disqualifies person as witness, nor does it invalidate gift under will. (MCA 72-2-525).

Bequests and Devises to Inter Vivos Trusts.

§ 1 of Uniform Testamentary Additions to Trusts Act adopted as MCA 72-2-531.

Testamentary Guardians.

See category 14 Family, topic 14.07 Guardian and Ward.

Election.

Elective share statutes (MCA 72-2-221 to 230) provide surviving spouse increasing share of augmented estate depending on length of marriage. Maximum elective share amount is 50% of augmented estate and is applicable when decedent and surviving spouse were married to each other for 15 years or more. $50,000 supplemental elective share amount is available in cases where surviving spouse's assets and other entitlements are below that figure. (MCA 72-2-221). Surviving spouse's homestead allowance, exempt property, and family allowance, if any, are not charged against but are in addition to elective share and supplemental elective-share amounts. (MCA 72-2-226). Election to take elective share must be made within nine months of decedent's death or six months after probate of will, whichever last expires. (MCA 72-2-225).

Handwriting Analysis.

MCA 72-12-401 governs procedure for petitioning for handwriting expert. Petition may be made by any party to proceeding. Out of state or out of county expert must be specified and court determines necessity and whether expert is qualified. (MCA 72-12-401, 402).

Living Wills.

Adult may prepare declaration instructing physician or advanced practice registered nurse to withhold or withdraw life-sustaining procedures if adult has irreversible or incurable condition and is unable to participate in medical treatment decisions. Declaration may be revoked. Liability of physicians, advanced practice registered nurses, and health care providers who implement declaration is limited. Criminal penalties for failing to comply with declaration established. (MCA 50-9-101 to 206). Montana End-of-Life Registry electronically stores living wills and advance directives and allows registered health care providers and consumers access to them. Attorney General's Office oversees registry filings, security and operations. https://app.mt.gov/registry/.

Will Contest—Mandatory Attorney Fees.

Contesting party must pay defending party attorney fees and costs (as provided in MCA 25-10-201) incurred in defending validity or probate of will if court finds will valid or confirms probate. If will found to be invalid and probate revoked, costs (as provided in MCA 25-10-201), but not attorney fees, must be paid by party resisting revocation or from property of decedent, as court directs. (MCA 72-12-206).

Simultaneous Death.

See topic 13.05 Death, subhead Survivorship.

Testamentary Trusts.

See topic 13.15 Trusts.

Revised Uniform Anatomical Gift Act effective Oct. 1, 2007 and retroactive. (MCA 72-17-101 to 312).

14 FAMILY

14.01 ADOPTION:

Montana Adoption Act enacted. Child is legally free for adoption if (a) child does not have living parent; (b) parental rights have been statutorily terminated; or (c) parents, guardian, or department that has custody consents. (MCA 42-1-105). No consent required from: individual whose parental relationship to child judicially terminated for unfitness, determined not to exist, or has waived parental rights; parent who has been judicially declared incompetent; individual not married to mother of child who executes notarized statement denying paternity or acknowledging paternity but denying interest in child; or personal representative of deceased parent's estate. (MCA 42-2-302).

Putative father to receive notice of termination of parental rights if putative father complies with requirements of putative father registry. (MCA 42-2-204).

Petition.

Must be verified and must include specific information regarding petitioners and adopted child. (MCA 42-5-101).

Relinquishment.

Parent who voluntarily relinquishes custody of child for purposes of adoption may do so if custody of child relinquished to department, licensed child placing agency, or prospective adopting parent and parties have agreed to custody in writing. (MCA 42-2-402). Child may be relinquished only 72 hours after child's birth and if parent has been counseled. (MCA 42-2-408). Parent may relinquish parental rights for adoption by stepparent or member of child's extended family so long as relinquishment is executed in accordance with MCA 42-2-401 through MCA 42-2-413. (MCA 42-4-301).

Minor parent may irrevocably relinquish child for adoption if minor parent is advised by attorney. (MCA 42-2-405). Court may order state public defender's office to appoint counsel for minor parent. (MCA 42-4-405). Legal fees charged by minor's attorney are allowable expense that may be paid by prospective adoptive parents. (MCA 42-7-102).

Agencies.

Agency is child placement agency licensed by state of Montana pursuant to Title 52, c. 8, that is expressly empowered to place children preliminary to possible adoption. (MCA 42-1-103[4]).

Records.

Department of Public Health and Human Services issues substitute birth certificates showing adoptive parents as parents. (MCA 50-15-304). Records and proceedings that are confidential are subject to limited exceptions. (MCA 42-6-101 et seq.). Court may appoint confidential intermediary upon petition. (MCA 42-6-103-104).

Adoption of adult without consent of parents is permitted. (MCA 42-4-401).

Inheritance.

Adopted person is child of adopting parent or parents and not of natural parents except (1) adoption by spouse of natural parent has no effect on relationship between child and either natural parent or right of child or descendant to inherit from or through other natural parent and (2) neither natural parent (nor their kindred) can inherit from or through child unless that natural parent has openly treated child as parent's and has not refused to support child. (MCA 72-2-124.)

Fees.

Reasonable fees may be paid by adoptive parent for actual cost of services. (MCA 42-7-101). Person who knowingly offers, gives, solicits, accepts or agrees to accept from another anything of greater value than fees listed in statute commits offense of paying or charging excessive adoption process fees. May be fined up to $10,000. (MCA 42-7-105).

Waiver of Evaluations.

Court may waive pre- and post-placement evaluations when child is adopted by extended family member. (MCA 42-3-212).

14.02 ALIMONY:

See topic 14.05 Dissolution of Marriage.

14.03 COMMUNITY PROPERTY:

System not in force.

14.04 DESERTION:

See topics 14.05 Dissolution of Marriage, 14.09 Husband and Wife.

14.05 DISSOLUTION OF MARRIAGE:

Uniform Marriage and Divorce Act adopted in Montana. (MCA 40-1-101 et seq.).

Grounds for Dissolution.

District court shall enter decree of dissolution of marriage if it finds that marriage is irretrievably broken. Such findings must be supported by evidence that parties have not lived together for 180 days prior to proceeding or that serious marital discord adversely affects attitude of one of parties. (MCA 40-4-104[1]).

Grounds for Legal Separation.

Same as grounds for dissolution except one party must request legal separation and other party must not object. (MCA 40-4-104[2]).

Defenses.

Previously existing defenses (connivance, collusion, condonation or recrimination) are abolished. (MCA 40-4-105[4]).

Citizenship Requirement.

None.

Residence Requirement.

One of parties to marriage must have been domiciled in Montana or stationed in Montana while member of armed services for 90 days prior to filing of action. (MCA 40-4-104[1][a]).

Jurisdiction is vested in district courts. (MCA 3-5-302).

Venue is in county in which petitioner or respondent has resided for 90 days prior to filing of action. (MCA 25-2-118[3]).

Process.

Same as in civil actions. Service may be by publication. (Rule 4D[5][a][iii]).

Pleading.

Same as in civil actions. (Rule 7[a]). Petition for dissolution or legal separation must be verified and contain certain specific allegations enumerated in statute. (MCA 40-1-103; MCA 40-4-103; MCA 40-4-105). Each party must serve on other party preliminary disclosure statement regarding assets and liabilities within 60 days of service of petition.

Practice.

Decree may not be entered until 20 days after date of service of process as provided by Montana Rules of Civil Procedure. (MCA 40-4-105). Decree final when entered. (MCA 40-4-108).

Temporary maintenance order, injunction or restraining order may be issued by court providing for support and maintenance of party or child or to preclude civil disturbance, disposing of marital property, or removal of children from jurisdiction. Injunctive relief may also be sought without filing petition for dissolution of marriage or legal separation by filing verified petition under rules for preliminary injunctions found at MCA 27-19-301. Stalking may also be enjoined under MCA 40-4-121 and MCA 40-15-101 et seq. Stalking is defined at MCA 45-5-220. Spouses, former spouses, persons dating or in ongoing intimate relationship, and family members, may obtain restraining order for domestic abuse, assault on minor, or assault with weapon. (MCA 40-4-121; MCA 45-5-206; MCA 40-15-101 et seq.; 1999, c. 432). Party against whom temporary injunction is sought must be served with notice and copy of motion and is entitled to hearing on motion. (MCA 40-3-121[6]). At time of hearing, court must inform parties that temporary injunction may limit parties' rights relating to firearms. (MCA 40-4-121[7]).

Hearing is necessary prior to judicial decree that marriage is irretrievably broken. (MCA 40-4-107).

Judgment.

If one party disputes that marriage is irretrievably broken, court can make a finding on that issue (as in cases where there is no dispute) or continue matter up to 60 days and suggest that parties receive counseling. Finding that marriage is irretrievably broken is a determination that there is no reasonable prospect of reconciliation. (MCA 40-4-107). Decree of dissolution of marriage or legal separation is final when entered, subject to appeal. After six months, court can, upon motion, convert decree of legal separation to dissolution. (MCA 40-4-108[2]).

Registration of Decree.

Decrees of dissolution must be forwarded by clerk of court to Department of Public Health and Human Services, Helena, Montana 59601. (MCA 50-15-303).

Alimony and Allowances.

Court may grant maintenance order for either spouse without regard to marital misconduct if petitioning spouse lacks property sufficient for his needs and is unable to support himself through appropriate employment or interests of dependents preclude employment. (MCA 40-4-203). Court shall consider all relevant facts, including: (1) financial resources of party; (2) time necessary to acquire education or training; (3) standard of living during marriage; (4) duration of marriage; (5) age and physical and emotional condition of party; and (6) ability of spouse to provide maintenance. (MCA 40-4-203). Modifications may be made upon showing of written consent or changed circumstances so substantial as to make terms unconscionable. (MCA 40-4-208). When decree does not provide for maintenance or support, may be modified to so provide but only within two years of date of decree. Obligation ends upon remarriage of party receiving maintenance or death of either party. (MCA 40-4-208).

Division of Property of Spouses.

Special equity type system. Court shall equitably apportion property, and assets belonging to either or both, however, and whenever acquired and without regard to title or marital misconduct. Pre-acquired property subject to equitable distribution; non-acquiring spouse entitled only to appreciated or preserved value attributable to his/her efforts. (MCA 40-4-202). Court shall consider duration of marriage and prior marriage; age, health, station and occupation, employability, etc. of parties; custodial provisions; whether maintenance is awarded; and opportunity of each party to future acquisition of assets. (MCA 40-4-202). Court shall consider contribution of spouse as homemaker. Court may protect children by setting aside separate fund for their welfare. (MCA 40-4-202). MCA 40-4-202 is flexible and vests good deal of discretion in District Court. (Marriage of Harris, 2006 MT 63, 132 P.3d 502). Decree may be modified for failure to disclose assets and liabilities. (MCA 40-4-208).

Change of Wife's Name.

Upon request by wife whose marriage is dissolved, court must order her maiden or former name restored. (MCA 40-4-108[4]).

Custody of Children.

Uniform Child Custody Jurisdiction and Enforcement Act adopted. (MCA 40-7-101 to

MCA 40-7-125). Court shall determine parenting plan according to best interests of child. (MCA 40-4-212). Interim parenting plan may be adopted before hearing. (MCA 40-4-213). After judicial interviews and investigations, hearing must be held. (MCA 40-4-214 to MCA 40-4-216). Amendment of parenting plan is possible if it is in best interests of child or child is at least 14 years old and desires amendment. (MCA 40-4-219). Courts must address several factors when deciding parenting plan. (MCA 40-4-212).

Allowance for Support of Children.

Either or both parents may be liable for support of children without regard to marital misconduct; court must apply statutory standards and formula for calculating support obligation adopted by State Department of Health and Human Services. (MCA 40-4-204). Any support obligation established by court order or modification of court order including temporary orders and defaults is subject to mandatory income withholding under MCA 40-5-315 and MCA 40-5-411 unless court makes written exception in support order stating why it is not in best interests of child. (MCA 40-4-204; MCA 40-6-116). Child Support Income Deduction Act provides for deduction of money directly from income of liable party while income still under employer's control. (MCA 40-5-301, et seq.; see also Child Support Enforcement Act, MCA 40-5-401, et seq.). Any judgment, decree or modification establishing child support must include medical support order as provided for under Medical Support Reform Act, MCA 40-5-801 to MCA 40-5-825. Department may establish medical support order through independent proceeding without establishing child support order. (MCA 40-5-208). When one parent has been ordered to provide health insurance coverage for child and that parent fails to provide coverage, Department of Health and Human Services shall give delinquent parent 30 days to provide proof of insurance. If parent fails to comply, Department will purchase insurance for benefit of child and recover costs of premium from parent through withholding (MCA 40-5-824). Additionally, tribunal may impose fine of $25 per day for noncompliance with medical support order. (MCA 40-5-821). Failure to enroll child in insurance plan under medical support order is also punishable by contempt. (MCA 40-5-208; MCA 40-5-226). Enforcement procedures apply to support orders from other states which have been registered in Montana. (MCA 40-5-184; MCA 40-5-411). Also support orders are subject to administrative review and modification if order is not in conformance with guidelines. (MCA 40-4-204; MCA 40-5-201; MCA 40-5-226; MCA 40-6-116; MCA 40-5-272; MCA 40-5-273). If support order makes exception to mandatory withholding, department may monitor support payments, and may begin immediate withholding if payments are delinquent. (MCA 40-5-304; MCA 40-5-412; MCA 40-5-414). State Department of Revenue may also establish procedure to offset against debtor's income tax refund any debt for child support accrued through written contract, court judgment or administrative order and in form of liquidated sum due and owing for support. (MCA 17-4-105[4]). Uniform Reciprocal Enforcement of Support Act and Uniform Interstate Family Support Act adopted. (MCA 40-5-101 et seq.).

Mediation.

Court may require parties to participate in mediation to settle parenting plan, child support, visitation, maintenance, or property dispute. Mediation proceedings are confidential and may not be used as evidence in action. (MCA 40-4-301 et seq.).

Separation Agreements.

Husband and wife may agree in writing to immediate separation and provide for support of either and of children, except with respect to parenting and parental support of children. (MCA 40-2-303). Such agreements are binding on court when entering a decree of legal separation or dissolution of marriage unless it finds agreement unconscionable. (MCA 40-4-201).

Remarriage.

Either party may marry after decree of dissolution is entered and during pendency of appeal not challenging finding of court that marriage is irretrievably broken. (MCA 40-4-108).

Annulment of Marriage.

See topic 14.11 Marriage.

14.06 DIVORCE:

See topic 14.05 Dissolution of Marriage.

14.07 [RESERVED]

14.08 GUARDIAN AND WARD:

Uniform Probate Code

Adopted but Art. VII, Trust Administration, not adopted. Tit. 72 contains following exceptions to Uniform Probate Code:

Qualification.

Written notice of acceptance by guardian must be given to minor and to person having his care or a close adult relation. (MCA 72-5-211). Court must consider minor's need for continuity of care when appointing guardian of minor. (MCA 72-5-223; 72-5-225).

Appointment of Guardian.

Temporary conservator may be appointed for time period not to exceed six months if court deems appropriate. Order of appointment must state specific powers and duties. (MCA 72-5-421[1]).

Petition.

Any interested person may file request for notice of guardianship proceeding. (MCA 72-5-318). Contents required for petition are specified. (MCA 72-5-319).

Termination of Guardianship.

Termination does not affect guardian's liability for prior acts nor responsibility to account for funds. (MCA 72-5-233; 72-5-324[2]).

Incapacitated Person.

Includes person impaired by mental or physical illness, chronic drug or alcohol use, or other cause to extent he is unable to make or communicate responsible decisions concerning his person or rational decisions regarding his need for treatment. (MCA 72-5-101). Incapacitated person or any person interested in his welfare, including county attorney, may petition for finding of incapacity. (MCA 72-5-315). Guardian may petition court for 72-hour evaluation of ward who refuses treatment; ward has right to have counsel appointed by state public defender's office. (MCA 72-5-322).

Death of Guardian's Ward.

Upon order of court, and if no personal representative is authorized to do so, guardian may make arrangements for final disposition of ward's physical remains and disposition of ward's clothing, furniture and other personal effects. (MCA 72-5-231[5]; 72-5-321[6]). Guardians authority and responsibility for ward terminates thereafter. (MCA 72-5-324[6]). Guardian's authority and responsibility for minor ward terminates when guardian has completed arrangements for ward's remains and personal effects under MCA 72-5-231(5). (MCA 72-5-

233[2]).

Investments.

See category 13 Estates and Trusts, topic 13.15 Trusts.

Securities in Name of Nominee.

See category 13 Estates and Trusts, topic 13.15 Trusts, subhead Securities in Name of Nominee.

Gifts to Minors.

See topic 14.10 Infants.

Uniform Fiduciaries Act not adopted.

Uniform Adult Guardianship and Protective Proceedings Jurisdiction Act adopted. (MCA 72-5-601, et seq.).

14.09 HUSBAND AND WIFE:

Husband and wife shall support each other out of their property and labor, including nonmonetary support provided by spouse as homemaker. (MCA 40-2-102). Otherwise, neither has any interest in property of other, except that neither can be excluded from other's dwelling unless enjoined by court. (MCA 40-2-201). Spouse can be convicted of criminal offense of sexual intercourse without consent; spouse less than 16 years old will not be deemed incapable of consent for purposes of this section. (MCA 45-5-503; MCA 45-5-501[1][b][iv]).

Uniform Premarital Agreement Act adopted. (MCA 40-2-601 to MCA 40-2-610). Premarital agreement must be in writing and signed by both parties although it is enforceable without consideration. (MCA 40-2-604).

Disabilities of Married Women.

In general, disabilities have been removed. Woman may be personal representative, conservator, guardian or trustee, and may bind herself and estate she represents without consent of her husband. (MCA 40-2-108).

Separate Property.

Property of married person owned before or acquired after marriage is their separate property. (MCA 40-2-202). While neither husband nor wife as such is answerable for debts of other, necessaries for family and education of children are chargeable upon property of both. (MCA 40-2-106). Separate property of married person may be held for spouse's debts if creditors dealt in good faith without knowledge that property does not belong to spouse. (MCA 40-2-209[2]).

Contracts.

Married person may enter into any transaction, respecting property, which person might, if unmarried. Both husband and wife may contract with their spouse to same extent, subject to general rules applying to persons in confidential relations. (MCA 40-2-301).

Spouses cannot, however, alter their legal relation except as to property and to permit a separation and may make provisions for support of either spouse and any children. (MCA 40-2-303).

Actions.

Married person may sue and be sued in same manner as if he or she were single. (MCA 40-2-107). Person has cause of action against his spouse for damages caused by spouse's intentional tort against such person. (MCA 40-2-109). Common law doctrine of inter-spousal immunity abolished. (MCA 40-2-109).

Conveyance or Encumbrance of Property.

Either spouse may convey or encumber his or her separate property without consent of other spouse. (MCA 40-2-202). However, both must join in any conveyance or encumbrance of homestead. (MCA 70-32-301).

Nonsupport.

Person commits offense of nonsupport if he or she fails to provide support which he or she can provide and knows he or she is legally obligated to provide to his or her spouse, child, or other dependent. Aggravated nonsupport occurs if offender has left state to avoid duty of support or has previously been convicted of offense of nonsupport. Inability to pay may constitute defense. Nonsupport is punishable by fine up to $500 or imprisonment up to six months or both. Nonsupport under court or administrative order for six months or more or failure to pay amount equal to or greater than six months support shall be fined up to $5,000 or imprisoned up to ten years, all but two of which must be suspended with probation for remainder. Aggravated nonsupport is punishable by fine of $50,000 or imprisonment up to ten years. (MCA 45-5-621).

Parent, guardian, or other person supervising welfare of a child less than 18 years old commits offense of endangering welfare of children if he knowingly endangers child's welfare by violating duty of care, protection or support. Offense punishable by fine up to $500 or imprisonment up to six months or both. (MCA 45-5-622).

Married person is not liable for support of spouse's children by former marriage. (MCA 40-6-217).

Uniform Interstate Family Support Act adopted. (MCA 40-5-101).

Community property system does not exist. Spouses may hold real property together, jointly or in common.

Uniform Disposition of Community Property Rights at Death Act adopted. (MCA 72-9-101 to MCA 72-9-120).

Partner or Family Member Assault.

Purposely or knowingly causing bodily injury or causing reasonable apprehension of bodily injury or negligently causing bodily injury with weapon to one of following: spouse, former spouse, person with child in common, person who has been or is currently in dating or ongoing intimate relationship with offender, or family member including past or present members of household of any relationship. Person convicted shall be required to pay for and complete counseling assessment with focus on violence, dangerousness, and chemical dependency and must complete, in addition to assessment, minimum of 40 hours of counseling as well as being subject to fines and/or imprisonment and/or restitution. (MCA 45-5-206). If child is determined to be in danger because of occurrence, department may take steps to protect. (MCA 43-3-301).

14.10 INFANTS:

Age of majority for both males and females is 18. (MCA 41-1-101; Const. II, 14). Only exception is that drinking age raised to 21. (MCA 16-6-305).

Emancipation.

Parental authority ceases upon marriage of child, appointment of guardian, or attaining majority. (MCA 40-6-234). Minor may give valid consent for health services if married or previously married, has had child, graduated from high school, emancipated, separated from parents and self-supporting, pregnant, afflicted with any communicable disease (including sexually transmitted disease and drug or alcohol abuse), or in need of emergency care. (MCA 41-1-402).

Disabilities.

Minor cannot give delegation of power. (MCA 41-1-301).

Contracts and Conveyances.

Minor may convey or contract to same extent as adult, subject to his power to disaffirm (MCA 41-1-302). Minor may disaffirm upon death or return of consideration before or within reasonable time after majority. However, for purchases made with credit card minor need not return consideration. (MCA 41-1-304). Contracts for necessaries cannot be disaffirmed (MCA 41-1-305); nor can those which are either expressly authorized by statute (for instance, marriage settlement [40-2-315]) or entered into when minor has been granted limited emancipation (MCA 41-1-501; MCA 41-3-438), including specific right to enter into contracts (MCA 41-1-306). Minors have full legal capacity to contract to borrow money for education beyond high school. (MCA 41-1-303).

Torts.

Infant is civilly liable for his torts, but cannot be held for exemplary damages unless capable of knowing at the time that his act was wrongful. (MCA 41-1-201).

Parents are liable for willful or malicious damage to property caused by their children living with them under 18. (MCA 40-6-237). Recovery limited to actual damages not to exceed $2,500, costs, and attorney’s fee not to exceed $100. (MCA 40-6-238).

Actions.

A minor may sue or be sued but must be represented either by general guardian or guardian ad litem. (MCA 41-1-202; Rule 17[c], Mont.R.Civ.P.).

Support of Minor.

Parents of child entitled to custody must give child support and education suitable to child’s circumstances. (MCA 40-6-211). Support order is prima facie evidence of legal obligation to provide support. Nonsupport is crime. (MCA 45-5-621).

Uniform Transfers To Minors Act adopted. (MCA 72-26-501 to MCA 72-26-506).

Uniform Securities Ownership by Minors Act not adopted.

Adoption.

See topic 14.01 Adoption.

Uniform Parentage Act has been adopted. (MCA 40-6-101 to MCA 40-6-135). Man is rebuttably presumed to be natural father of child born during or 300 days after termination of marriage or attempted marriage between such man and natural mother, or if he has taken child into his home and holds out child as his natural child, or if he files paternity acknowledgment form with department of public health and human services, or if blood test shows 95% or higher statistical probability of paternity. (MCA 40-6-105). Action may be brought to determine father and child relationship at any time (MCA 40-6-107 to MCA 40-6-120) or mother and child relationship

(MCA 40-6-121).

Parent-Child Legal Relationship Termination Act adopted. (MCA 41-3-601 to MCA 41-3-612). Termination of relationship may only be considered after filing of abuse and neglect petition. (MCA 41-3-422; MCA 41-3-607; MCA 41-3-609). Court must appoint guardian ad litem. (MCA 40-3-607). Parental rights may be terminated if parents have relinquished child pursuant to MCA 42-2-402 and MCA 42-2-412; child has been abandoned as set forth in MCA 41-3-102; parent has subjected child to any of circumstances in MCA 41-3-423(2)(a) through (2)(e); putative father meets any of criteria in MCA 41-3-423(3)(a) through (3)(c); or child is adjudicated youth in need of care and court approved treatment plan has not been complied with or has not been successful and conduct or condition of parents rendering them unfit is unlikely to change; parent is convicted of felony involving sexual intercourse. (MCA 41-3-609). Provides extensive criteria and procedures for termination of rights by court order following petition by county attorney and judicial finding of relinquishment, abandonment, or unfitness of parents. (MCA 41-3-609). Court order terminates all rights and obligations except right of child to inherit from parent. (MCA 41-3-611).

14.11 MARRIAGE:

Uniform Marriage and Divorce Act has been adopted in Montana. (MCA 40-1-101 et seq.).

Uniform Premarital Agreement Act has been adopted in Montana. (MCA 40-2-601 et seq.). Applies to agreements executed on or after Oct. 1, 1987.

Minimum Age and Consent Required.

Persons 18 years of age may marry without consent of parents. Persons under 18 and over 16 may marry with consent of parents or guardian and authorization of District Judge. (MCA 40-1-213).

Premarital Certificate of Medical Examination.

Each female applicant for license, unless exempted for medical reasons, must present premarital certificate of physician on official form stating that she has had standard serological test. Certificates of tests from other states having comparable laws and certificates from U.S. armed forces in proper form are acceptable. (MCA 40-1-203 to MCA 40-1-208). To be acceptable, test must be performed by either (a) lab of Department of Public Health and Human Services; (b) lab approved by Department of Public Health and Human Services; (c) lab operated by another state; or (d) lab operated by U.S. Public Health Service or U.S. Armed Forces. (MCA 40-1-206).

License is required, obtained upon application by both residents to clerk of any district, or if both parties are nonresidents of state, from clerk of district court of county where marriage is to be performed. If one of parties is nonresident of county where license is to issue, his part of application may be completed and sworn to before person authorized to accept such applications in county or state where he resides. (MCA 40-1-201). Form of application for marriage license shall be prescribed by director of Department of Health and Human Sciences. (MCA 40-1-107). Upon proper application, payment of marriage license fee of $30, satisfactory proof that both parties have attained age of 18 or have necessary approval, satisfactory proof that marriage is not prohibited and certificate of results of medical examination, clerk of district court shall issue license to marry and marriage certificate form. (MCA 40-1-202).

No Waiting Period.

License to marry is effective upon issuance, and expires 180 days thereafter. (MCA 40-1-212).

Ceremony may be performed by judge of court of record, public official so authorized, by mayor or city judge or justice of peace, or by any religious denomination, Indian nation or tribe or native group in accordance with their recognized mode of solemnization. (MCA 40-1-301[1]). Solemnization of marriage is not invalidated because person solemnizing was not legally qualified to do so, if parties believed he or she had right to solemnize. (MCA 40-1-301[3]).

Reports of Marriages.

Person solemnizing marriage must complete marriage certificate and forward it to clerk of district court. (MCA 40-1-301).

Record.

See category 10 Documents and Records, topic 10.04 Records, subhead Vital Statistics.

Common law marriages are recognized. (MCA 40-1-403; MCA 26-1-602; 101 Mont. 246, 53 P.2d 451). See also subhead Foreign Marriages, infra. Common law marriage cannot be established by affidavit. Snetsinger v. Montana University Sys., 2004 MT 390, 325 Mont. 148, 104 P.3d 445. Common law marriage is equitable doctrine used to ensure people are treated fairly when relationship ends. (Id.).

Proxy Marriages.

Party unable to be present at solemnization may authorize in writing a third person to act as proxy. Parties may petition district court for an order permitting marriage to be solemnized by proxy if person solemnizing marriage is not satisfied that absent party has consented and is unable to be present. (MCA 40-1-301[2]; MCA 40-1-213[3]).

Marriages by Written Contract.

Persons may marry without solemnization by making declaration of marriage which must contain names, ages, and residences of parties, fact of marriage, names and addresses of parents, including maiden names, and that both parties are legally competent to marry. Parties must also secure required medical certificate and attach it to declaration. Declaration must be attested by two witnesses, formally acknowledged before clerk of court, filed with premarital certificate attached, and accompanied by $53 filing fee. (MCA 40-1-311).

Prohibited Marriages.

Void between ancestor and descendant; brother and sister of half as well as whole blood; niece and uncle; nephew and aunt; first cousins, and persons of same sex. (MCA 40-1-401, Art. XIII, Mont. Const.). Any marriage entered into prior to dissolution of a prior marriage of one of parties is also void. (MCA 40-1-401). No provision preventing intermarriage of races.

Marriage Settlements.

All contracts for marriage settlements must be in writing and executed and acknowledged or proved in like manner as in case of a grant of land. (MCA 40-2-312). Failure to record has same effect as failing to record in case of grant of real property. (MCA 40-2-314).

Foreign Marriages.

All marriages contracted outside state that were valid at time of contracting or were subsequently validated by either law of place of contracting or domicile of parties are valid in Montana. (MCA 40-1-104). Exception is that same-sex marriages and marriages between more than one man or more than one woman are not recognized. (Mont. Const., Article XIII, § 7).

Annulment.

Marriage may be declared invalid by decree of district court if it is entered into under following circumstances: (a) One of parties lacked capacity to consent at time of marriage due to mental incapacity, influence of alcohol, drugs or other incapacitating substance, or because of inducement to enter marriage by force, duress or fraud; (b) one party is unable to consummate marriage by sexual intercourse and other party did not know of such incapacity at time of solemnization; (c) party was under age of 16, or was 16 or 17 and did not have judicial approval or consent of parents or guardian; or (d) marriage is prohibited. (MCA 40-1-402[1]). Party who may seek a declaration of invalidity and time within which such declaration must be sought are prescribed in statute. (MCA 40-1-402[3]). Children born of a marriage declared invalid are legitimate. (MCA 40-1-402[4]). Under certain circumstances, court may make decree nonretroactive. (MCA 40-1-402[5]). Clerk of court shall give notice of declaration of invalidity. (MCA 40-1-402[6]).

Putative Spouse.

Any person cohabitating with another in good faith belief that he is lawfully married is putative spouse until he has knowledge that he is not legally married. Putative spouse acquires rights of legal spouse. (MCA 40-1-404).

14.12 MARRIED WOMEN:

See topics 14.09 Husband and Wife, Marriage; categories 5 Civil Actions and Procedure, topic Evidence, subhead Witnesses; Debtor and Creditor, topic Homesteads; Documents and Records, topic Acknowledgments; Estates and Trusts, topics Executors and Administrators, Wills; Property, topics Deeds, Dower.

14.12A PARENT AND CHILD:

See topic 14.10 Infants.

15 HEALTH

15.0115.04 [RESERVED]

15.05 FOOD, DRUGS, DEVICES AND COSMETICS:

Regulated generally by Montana Food, Drug and Cosmetic Act, MCA 50-31-101 et seq. Chapter concerns selling of food, drugs, devices, or cosmetics that includes manufacture, production, processing, packing, exposure, offer, possession, and holding of articles for sale; sale, dispensing, and giving of articles; and supplying or applying of articles in conduct of food, drug, or cosmetic establishment. (MCA 50-31-102).

15.05A HEALTH CARE INFORMATION:

Uniform Health-Care Information Act enacted to govern use and disclosure of health care information. (MCA 50-16-501 et seq.).

15.06 [RESERVED]

15.07 HEALTH INSURANCE BENEFITS:

Health Insurance regulation is combined with disability insurance regulation in MCA 33-22-101 through 2009. See topic Insurance Companies.

Children's Health Insurance Program Act provides health care to children not eligible for health care services under Montana Medicaid Program. (MCA 53-4-1001 et seq.).

Health Maintenance Organizations.

Montana Health Maintenance Organization Act governs authorization of health maintenance organizations, establishment of health maintenance organizations, regulation, and respective powers. (MCA 33-31-101 et seq.).

Small Employers.

Insurance for small employers is regulated by MCA 33-22-1801 et seq. under Small Employer Health Insurance Availability Act. (MCA 33-22-1801).

15.07A MEDICAL NEGLIGENCE:

Montana Medical Legal Panel Act.

Claimant must make application before Montana Medical Legal Panel for malpractice claim against health care provider before filing claim in any court against health care provider. (MCA 27-6-701).

Medical Malpractice.

Damages for non-economic loss limited to $250,000 in medical malpractice claim against one or more health care providers based on single incident of malpractice. (MCA 25-9-411).

15.0815.12 [RESERVED]

15.13 SMOKING REGULATIONS:

Montana Clean Indoor Air Act 1979.

Enacted to: (1) Protect public health and welfare by prohibiting smoking in public places and places of employment; (2) recognize right of nonsmokers to breathe smoke-free air; and (3) recognize right to breathe smoke free air has priority over desire to smoke. (MCA 50-40-102). Act prohibits smoking in enclosed public place and requires proprietor or manager of establishment containing enclosed public place to post sign in conspicuous place at all public entrances stating that smoking is prohibited. (MCA 50-40-104). Bars are exempt until Sept. 30, 2009, provided that smoke from bar does not infiltrate into areas where smoking is prohibited. Private residences, private motor vehicles, school property in which smoking is allowed pursuant to exception in MCA 20-1-220, hotel or motel rooms designated as smoking room and rented to guest and site that is being used in connection with practice of cultural activities by American Indians with accordance with American Indian Religious Freedom Act are also exempt. (MCA 50-40-104).

Government Offices and Work Areas.

Smoking is prohibited in all parts of buildings maintained by political subdivision. (MCA 50-40-201).

Tobacco Possession.

Possession or consumption of tobacco by persons under 18 years of age prohibited. (MCA 45-5-637).

16 INSURANCE

16.01 INSURANCE COMPANIES:

See category 3 Business Regulation and Commerce, topic 3.12 Consumer Protection, subhead Plain Language.

Surety companies are classified as “insurers” (MCA 33-1-201[6]) and are subject to Insurance Code. See also topic 16.02 Surety and Guaranty Companies.

Insurance generally is regulated by Montana Insurance Code, Tit. 33. Insurance Commissioner may impose fine not to exceed $25,000 for any violation of insurance code, except that fine imposed on insurance producers or adjusters shall not exceed $5,000. (MCA 33-1-317).

Supervision.

State auditor is ex-officio Commissioner of Insurance. (MCA 2-15-1903). He is charged with enforcement and execution of insurance code and protection of insurance consumer. (MCA 33-1-311). He has power, inter alia, to make rules and regulations; to conduct examinations, investigations and hearings; and to impose fines for violations of regulations and Insurance Code. (MCA 33-1-311 to -318). Appeals from orders of commissioner, or with respect to matters to which he has refused hearing, may be taken to district court of Lewis and Clark County or to district court of county where aggrieved resides or maintains business. (MCA 33-1-711; MCA 33-16-113).

Rates.

Provisions dealing with rates are MCA 33-16-101 to -225. Rating organization to pay annual fee of $100. (MCA 33-16-403).

Annual Statements must be filed by each authorized insurer with Commissioner on or before Mar. 1. (MCA 33-2-701).

Insurance Information and Privacy Protection Act.

Establishes standards and limitations on disclosure of information collected in connection with insurance transactions by insurers or insurance-support organizations. Provides procedure for access by private individuals to information gathered about them; penalties and equitable relief available. (MCA 33-19-101 to -409).

Policies.

Provisions relating to insurance contracts in general are found in MCA 33-15-101 to -514. Provisions regulating particular types of insurance are: life and annuities, MCA 33-20-101 to -401; group life, MCA 33-20-1001 to -1213; disability (and health), MCA 33-22-101 to -311; long-term care, MCA 33-22-1101 to -1125; credit life and disability, MCA 33-21-101 to -207; property, MCA 33-24-101 to -105; title, MCA 33-25-104 to -403; surety, MCA 33-26-101 to -107; surplus line, MCA 33-2-301 to -326; medicare supplement insurance, MCA 33-22-901 to -924. Minimal health insurance must be offered to those otherwise considered uninsurable. All insurers, insurance arrangements, societies and health service corporations must be members of Montana Comprehensive Health Association, which offers health coverage of last resort. Association is subject to insurance code regulations. Minimal coverage, details of association operations, and duties of association members are detailed in Comprehensive Health Association and Plan. (MCA 33-22-1501 to -1524).

Dependents generally must be covered to age 25 at option of covered employee.

Discrimination on basis of sex or marital status in issuance or operation of insurance policies or retirement plans is prohibited. (MCA 49-2-309).

Unlawful discrimination between individuals of same class and equal expectation of life is prohibited in rates charged or in dividends payable in any contract for life insurance, annuity, or disability policy. Insurer may not refuse to consider application for life or disability insurance on basis of genetic condition, developmental delay, or developmental disability. (MCA 33-18-206).

Special regulations pertaining to particular types of insurers are: domestic stock and mutual, MCA 33-3-101 to -704; farm mutual, MCA 33-4-101 to -511; benevolent associations, MCA 33-6-101 to -405; reciprocal, MCA 33-5-101 to -503; alien, MCA 33-2-201 to -215; fraternal benefit societies, MCA 33-7-105 to -533.

Trade practices in business of insurance are regulated by MCA 33-18-101 to -1006. Some practices prohibited are: misrepresentation of terms of policy or financial condition of insurer, deceptive advertising, incomplete comparisons for purpose of inducing action by policy holders, boycott tending to result in restraint of insurance business, unfair discrimination between individuals or property of same class, directing insureds to specific companies for glass repair work, and rebate of premiums not specified in contract. Practices excepted from prohibition of rebates and discriminations are listed in MCA 33-18-209.

No person who lends money or extends credit may require as condition precedent to loan or extension of credit or renewal thereof that person to whom loan is made or credit extended purchase insurance through particular agent or insurer, but this does not apply to credit life or credit accident and health insurance. (MCA 33-18-501). No insurance of any kind may be written by a licensee under the Consumer Loan Act (MCA 32-5-101 to -506) in connection with any loan of $300 or less (MCA 32-5-306). Agents may extend credit to policyholders in connection with insurance or servicing policies under certain requirements. (MCA 33-18-213).

Political contributions by insurers are forbidden. (MCA 33-18-305).

Liens.

No provision allowing insurance company lien on policy.

Written notice of cancellation or refusal to renew of life and disability insurance policies to be given before cancellation of policies for nonpayment of premiums. (MCA 33-22-121, 122).

Insurance producers, solicitors and adjusters are regulated by MCA 33-17-101 to -1207. Licenses for each are required. (MCA 33-17-201, -301). Applicants must be qualified as required by code. (MCA 33-17-211, -301). Continuing education for insurers is required. (MCA 33-17-1201 to -1207). Applicants for license as insurance producer or solicitor, with certain exceptions, must take written examination. (MCA 33-17-212). Commissioner may conduct examination or arrange for it to be conducted by testing service, which may recover cost of examination from applicant. (MCA 33-17-212). Commissioner may issue only nonresident license to person, partnership, or corporation otherwise qualified under insurance code but not resident of this state. (MCA 33-17-401). For license fee amounts, see MCA 33-2-708.

Process Agent.

All insurers applying for authority to transact insurance in this state must appoint the Commissioner their agent for service of process. (MCA 33-1-601, MCA 33-2-315). Service is made by serving duplicate copies of process on commissioner and paying $10. (MCA 33-1-603).

Uniform Unauthorized Insurers Process Act has been adopted. (MCA 33-1-611 to

616).

Investments of domestic and foreign insurers are regulated by Title 33, c. 12.

Foreign Insurance Companies.

Certificates of authority are required except as provided in MCA 33-2-102. (MCA 33-2-101). Applications are made to Commissioner and must show name, location of home office (or principal office in U.S. if alien insurer), kinds of insurance to be transacted, date of organization or incorporation, form of organization, and domicile. (MCA 33-2-115). Insurers must file with Commissioner following: certified copy of corporate charter or articles of incorporation, or if mutual insurer, certified copy of bylaws, or if reciprocal insurer, certified copies of power of attorney of its attorney-in-fact and its subscribers' agreements; certified copy of financial statement as of Dec. 31 next preceding; certified copy of report of last examination made of insurer; appointment of Commissioner as attorney for service of process; certificate of supervisor of insurance of domicile or state of entry into U.S. that is it authorized to transact kind of business to be transacted in Montana; any certificate of deposit required by MCA 33-2-111; specimen copies of policies to be offered with applicable rates; and, if alien insurer, copy of appointment and authority of its U.S. manager (MCA 33-2-115).

Reserves.

Compliance with reserve requirements set forth in MCA 33-2-501 to -537 is required.

Filing Fees.

Fee of $1,900 required annually from each insurer applying for or renewing certificate of authority. (MCA 33-2-708).

Unauthorized Insurers.

Representing or aiding unauthorized insurer subject to felony charge. (MCA 33-2-104). Unauthorized insurers may not sue in state to enforce rights arising out of insurance transactions in state. (MCA 33-2-105).

Real Property Investment.

Foreign insurers may invest in Montana real property or securities secured thereby without certificate of authority. (MCA 33-2-103). General restrictions on right to hold real property are found in MCA 33-12-103, -105, -207, -307.

Retaliatory Laws.

Insurer, state or country of whose domicile requires of Montana insurers any taxes, licenses, and other fees, in aggregate, and any fines, penalties, deposit requirements or other obligations, prohibitions or restrictions in excess of those imposed by Montana upon similar insurers of such other state is subject to same requirements in Montana, except that this does not apply to any fees in conjunction with licensing of insurance agents, to personal income taxes, ad valorem property taxes, or to special purpose obligations in connection with particular kinds of insurance other than property insurance. (MCA 33-2-709).

Premium Tax.

Insurers must file by Mar. 1 report showing total direct premium income and pay tax of 2¾% thereon. (MCA 33-2-705). Insurance premium finance companies are authorized and regulated. (MCA 33-14-101 to -307).

Filing and license fees are prescribed by MCA 33-2-708. (For foreign insurers, see subhead Foreign Insurance Companies, supra.) Expenses of examinations by commissioner must be paid by person examined. (MCA 33-1-413).

Direct Actions Against Insurer.

Insured has independent cause of action against insurer for actual and exemplary damages caused by insurer's violation of trade practices act. (MCA 33-18-242). Insurer may not be liable if it had reasonable basis in law or fact for contesting claim or amount of claim. (MCA 33-18-242[5]). Period prescribed for commencement of action against insurer by insured is two years from date of violation of MCA 33-18-201. For third-party claimant period is one year from date of settlement or entry of judgment on underlying claim. (MCA 33-18-242[7]).

Self-insurer may also be sued. (MCA 33-18-242[8]). See also category 23 Transportation, topic 23.01 Motor Vehicles, subhead Direct Action.

Uniform Insurers Liquidation Act.

Not adopted.

No-Fault Insurance.

Not adopted.

Variable Contracts.

Life insurers may establish separate accounts to provide for variable life insurance policies and variable annuity contracts. (MCA 33-20-606).

Viatical Settlement Act.

(MCA 33-20-1301 to 1317). Viatical Settlement Providers and Viatical Settlement Brokers must be licensed to do business in Montana. (MCA 33-20-1303). To obtain license one must be financially responsible and have good reputation as well as not being untrustworthy, incompetent, dishonest, engage in fraudulent conduct, or engage in practice of making unreasonable payments to policyholders. (MCA 33-20-1304, MCA 33-20-1307). Viatical Settlement Providers may not retain any portion of proceeds of viatical settlement. (MCA 33-20-1314). All viatical settlement contracts must be filed and approved by Commissioner of Insurance. (MCA 33-20-1308). Viatical settlement contracts must contain provision enabling policyholder to rescind contract within 30 days of contract execution or within 15 days of receiving viatical settlement proceeds, whichever is longer. (MCA 33-20-1308). If Viatical Settlement Provider enters into viatical settlement that allows viator to retain interest in policy, viatical settlement contract must include statutory provisions listed at § 33-20-1308(4). Viatical Settlement Providers must file annual reports and make extensive disclosure to policyholders entering into viatical settlement contracts. (MCA 33-20-1309). Viatical Settlement Providers must obtain extensive consents, disclosures, and witnessed documents from and about policyholder before entering into viatical settlement contract. (MCA 33-20-1312). Licensees may not pay finder's fees, commissions or other compensation for referrals. (MCA 33-20-1313). Licensees may not sell any other type of insurance to policyholder unless approved by Commissioner of Insurance. (MCA 33-20-1313).

Self-Funded Multiple Employer Welfare Arrangements are regulated by Tit. 33, c. 35.

16.02 SURETY AND GUARANTY COMPANIES:

Surety companies are classified as "insurers" (MCA 33-1-201[6]) and are subject to insurance code (Title 33 Montana Code Annotated). See topic 16.01 Insurance Companies.

Rights and Powers.

Any corporation with paid-up capital of not less than $100,000 which is incorporated in Montana for purpose of making, guaranteeing or becoming surety upon bonds or undertakings, may become and shall be accepted as security or as sole and sufficient security. (MCA 33-26-101). For requisites of undertaking or bonds of individuals see MCA 33-26-102. Surety insurer has power to become surety on bonds and undertakings subject to all rights and liabilities of private persons. (MCA 33-26-103). No foreign or other surety company is allowed to furnish bond for any state, county or city official where in addition to payment of reasonable premiums company where indemnity or other security is required. (MCA 33-26-105).

Foreign Companies.

See topic 16.01 Insurance Companies; category 2 Business Organizations, topic 2.03 Corporations.

Taxation.

See topic 16.01 Insurance Companies.

17 INTELLECTUAL PROPERTY

17.01 TRADEMARKS AND TRADE NAMES:

Definitions.

Trademark is word, name, symbol, device, or any combination thereof used to identify and distinguish goods of person, including unique product, from those manufactured or sold by others and to indicate source of goods, even if unknown. (MCA 30-13-301[12]).

Trade name means name used by person to identify business or vocation. (MCA 30-13-301[11]).

Service mark means word, name, symbol, or device or combination thereof used to identify and distinguish services of one person, including unique service, from services of others and indicate source of services, even if unknown. Titles, character names, and other distinctive features of radio or television programs may be registered as service marks notwithstanding that they or programs may advertise goods of sponsor. (MCA 30-13-301[10]). See statute for additional definitions.

Registration.

Application for registration of mark is made to Montana Secretary of State using provided form. (MCA 30-13-311). Registration is effective for five year term and may be renewed for successive five-year periods with application. (MCA 30-13-313). There are fees for registration and renewal.

Assignment.

Any mark and registration may be assigned in conjunction with good will of business in which mark is used. Assignment must be written, duly executed instruments and may be recorded with Secretary of State with fee. Upon recording assignment, Secretary of State issues new certificate in name of assignee for remainder of term of current registration. Assignment is void as against subsequent purchasers for valuable consideration without notice unless it is recorded with Secretary of State within three months after date of assignment or prior to subsequent purchase. (MCA 30-13-315).

Remedies.

Owner of registered mark may sue to enjoin manufacture, use, display, or sale of counterfeits or imitations of mark. (MCA 30-13-335). Owner may also seek injunctive relief for dilution of mark. (MCA 30-13-334).

Deceptive Business Practices.

Unlawful use of registered mark may lead to criminal liability. (MCA 45-6-318[1][e]).

Common Law.

Nothing in statutes adversely affects rights or enforcement of rights in marks acquired at common law in good faith at any time. (MCA 30-13-336).

Trade Names.

Person transacting business under assumed business name must register with Secretary of State, on Secretary of State forms or electronically, with fees. (MCA 30-13-203, 204). Registration effective for five years. (MCA 30-13-206). Business cannot maintain suit or action in state, under name without registering. (MCA 30-13-215). See category 2 Business Organizations, topic 2.08 Partnerships.

17.02 TRADE SECRETS:

Montana adopted Uniform Trade Secrets Act (1972) in 1985. (MCA 30-14-401).

Injunctive relief may be sought for actual or threatened misappropriation of trade secrets. (MCA 30-14-403). In exceptional circumstances, injunction may condition future use on payment of reasonable royalty for no longer than period of time for which use could have been prohibited. (MCA 30-14-403).

Damages.

Complainant entitled to damages for misappropriation, including actual loss and unjust enrichment caused by misappropriation, unless monetary recovery is inequitable due to material and prejudicial change of position prior to acquiring knowledge or reason to know of misappropriation. (MCA 30-14-404). Exemplary damages may also be awarded for willful and malicious misappropriation. (MCA 30-14-404).

Statute of Limitations.

Action for misappropriation must be brought within three years after misappropriation is discovered or should have been discovered. (MCA 30-14-407).

18 LEGAL PROFESSION

18.01 ATTORNEYS AND COUNSELORS:

Montana bar is integrated. (Montana Supreme Court Order No. 12616[1974]).

Jurisdiction.

Montana Supreme Court may make rules governing admission to bar. (Art. VII, § 2 of Montana Constitution). See Rules for Admission to Montana Bar. See also http://www.montanabar.org.

Eligibility.

Any person who has Juris Doctor or equivalent degree from law school accredited by American Bar Association at time of graduation. Applicant must possess necessary qualifications of good moral character and fitness to practice law. Applicant must successfully complete necessary examinations. (Rules for Admission to Montana Bar §§I-III).

Registration as Law Student.

See Rules for Admission to Montana Bar, §§I, II, III, VI and VII found in Annotations to Mont. Const. Art. VII, § 2.

Examination.

Unless waived by Montana Supreme Court, all applicants must take and pass Multistate Essay Examination, Multistate Performance Test, Multistate Bar Examination and Montana Essay Examination. All applicants must obtain and complete State Bar of Montana application for admission and supporting documents and pay fee. (Rules for Admission to Montana Bar §§I and III).

Three day examinations are conducted by State Board of Bar Examiners twice a year, in July and Feb. For July examination, application deadline is Mar. 1. For Feb. examination, deadline is Oct. 1. Applicants also must pass Multistate Professional Responsibility Examination administered three times each year nationwide. (Rules for Admission to Montana Bar §III).

Fingerprints.

Department of Justice and other criminal justice agencies may accept fingerprints of applicants for admission to state bar, and shall exchange available state, multistate, local, federal, and other criminal history record information with Montana Supreme Court and its commission on character and fitness. (MCA 44-5-302[2]).

Admission Pro Hac Vice.

Upon written application and payment of fee, attorney not admitted to practice law in Montana state courts and admitted and authorized to practice law in highest court of another state may appear pro hac vice in any action or proceeding, if attorney admitted to practice in courts of Montana is associated as attorney of record. Attorney may not appear pro hac vice if resident of Montana, regularly employed in Montana, or regularly engaged in practice of law or substantial business or professional activities in Montana, unless application to State Bar of Montana is pending. No attorney or firm may appear pro hac vice in more than two actions except on showing of good cause. Montana attorneys of record must sign all pleadings, motions and briefs and participate actively in all phases of case. Applications for pro hac vice must be obtained from Montana Bar. Applications can be found at www.montanabar.org. (Rules for Admission to Montana Bar §IV).

Licenses.

Annual license fee is $25. (MCA 37-61-211). No attorney shall practice in Montana until such attorney pays license tax for current fiscal year and obtains certificate. Attorney violating section is guilty of misdemeanor. (MCA 37-61-214).

Change of Attorneys.

Attorney in action or special proceeding may be changed at any time before or after judgment or final determination: (1) upon consent of client and attorney filed with clerk; or (2) upon order of court on application of client or attorney, after notice. When attorney dies, is removed, or ceases to act, person whom such attorney represented must, by written notice, appoint another attorney or appear in person. (MCA 37-61-403 to 405).

Liabilities.

Attorney who is guilty of deceit, or collusion, or consents to same, with intent to deceive court or party, is guilty of misdemeanor, and is liable for treble damages to injured party. (MCA 37-61-406). Attorney must not directly or indirectly buy or be interested in listed items with intent to bring claim. Attorney who violates is guilty of misdemeanor and must be removed from office. (MCA 37-61-408, 409). Any attorney who willfully delays client's cause, with view to his own gain, or willfully receives money or allowance for or on account of money which he has not laid out or become responsible for, is liable to party injured for treble damages. (MCA 37-61-407).

Compensation.

May be fixed by court in probate matters. (MCA 25-10-301). Fees are regulated by Dept. of Labor and Industry in workers' compensation cases. (MCA 39-71-613). Compensation is governed by agreement, express or implied, which is not restrained by law. (MCA 37-61-420).

Right to Attorney's Fees.

Where one party has express right to recover attorney fees in event he prevails in action on contract, all parties thereto shall be deemed to have same right, and any party prevailing can recover his attorney fees from loser. (MCA 28-3-704). In actions solely for property damages arising out of ownership, maintenance or use of motor vehicles, attorney fees awarded to plaintiff if plaintiff receives judgment equal to or greater than amount of damages claim in his last written offer prior to filing cause of action. (MCA 25-10-303).

Disabilities.

Attorney cannot become surety on any bond or recognizance of any sheriff, constable or coroner, or on any bond for payment of money into court without consent of judge of district court. (MCA 37-61-419). Attorney cannot act as receiver in action in which he is interested, without filed consent of parties. (MCA 27-20-202).

Justice of the peace who is licensed attorney may practice law in Montana except that he or any partner, member, or associate may not represent party involved in case filed or tried in, or appealed from his court or any other justice court in his county. (MCA 3-1-602).

Lien.

Attorney has lien for compensation upon client's cause of action and proceeds thereof. (MCA 37-61-420).

Disbarment or Suspension.

Supreme Court has exclusive jurisdiction to disbar or suspend attorney. (MCA 37-61-301).

Unauthorized Practice.

Practicing law without license prohibited. (MCA 37-61-210).

Mandatory Continuing Legal Education.

CLE is required for engaging in practice of law under rules and regulations for CLE. Each active member of Montana Bar shall complete minimum of 15 hours of approved CLE activity during each year. (Rule 4[A] Rules & Regulations for CLE). Of those 15 hours, ten hours must be earned by attending interactive seminars where instructor and at least four participants are able to interact and approved by Board. Five credit hours may be earned by "other methods" such as, audio/video presentation, writing and publishing law review article, teaching and preparing written materials for approved activity, and attending in-house courses offered by law firms, corporate legal departments, or similar entities. (Rules & Regulations for CLE 4[A], 6[B], 7[B]). Montana attorneys are required to complete at least five credits of ethics every three years. On or before Apr. 1 of each year, each attorney who is not exempt under Rule 4(B) shall file affidavit with Board reporting CLE activity in previous year. (Rule 5 Rules & Regulations for CLE). Exemptions to CLE requirements for inactive members, lawmakers, and special circumstances constituting undue hardship are available. (Rule 4[B][1][4]). Accreditation of CLE activities, compliance, noncompliance and related matters are monitored by Board of Continuing Legal Education. (Rules 3, 6 and 7; see generally rules and regulations for CLE found at Annotations of Mont. Const. Art. VII, § 2), (see also www.montanabar.org).

Specialty Certification Requirements.

None.

Professional Corporations.

See category 2 Business Organizations, topic 2.03 Corporations, subhead Professional Corporations.

Attorney Ethics.

Montana has adopted American Bar Association Model Rules of Professional Conduct with modification. (See Montana Rules of Professional Conduct at www.montanabar.org.)

19 MINERAL, WATER AND FISHING RIGHTS

19.01 MINES AND MINERALS:

Permit.

Legislature declared purpose to allow exploration for and mining of minerals while adequately providing for subsequent beneficial use of surface by reclamation. Comprehensive legislative scheme has been enacted requiring a permit prior to prospecting, exploration, or operation of a mineral removal facility. For details concerning permit for each category of mineral regulation, see category 12 Environment, topic 12.01 Environmental Regulation, subhead Mining.

Notice to Surface Owner.

All prospectors, miners, or others contemplating disturbance of land other than by hand tools are required to ascertain ownership and possessory right of surface before beginning such disturbance. (MCA 82-2-302). Written approval must be acquired from persons controlling surface and with possessory right of land. Notice must be provided to such persons and must include map of proposed operations and plan for restoration in sufficient detail to permit surface owner to evaluate extent of disturbance contemplated. (MCA 82-2-303). Act exempts discovery pits on federal land excavated with hand tools. (MCA 82-2-304). Act exempts operations performed pursuant to prospecting permit, lease of mineral interest, or other agreements authorizing such operations. (MCA 82-2-305). Violation is a misdemeanor. (MCA 82-2-306). Oil and gas developers required to give surface owners written notice of intent to begin drilling operations no more than 180 days and no fewer than 20 days prior to commencing any activity that disturbs land surface, and required to compensate surface owners for damages caused by drilling and production operations. (MCA 82-10-503 and 504).

Location of Mining Claims.

Locators of mining claims on public domain of U.S. located within Montana must: (1) post notice at point of discovery; (2) within 30 days mark location on ground so that its boundaries can be readily traced; and (3) within 60 days after posting notice, comply with Federal mining laws. (MCA 82-2-101 and -102). Locators must record all locations in office of clerk and recorder within

60 days after posting notice of location, otherwise there is prima facie presumption of intent to abandon. (MCA 82-2-102). Claims may be relocated or amended in certain circumstances. (MCA 82-2-105 to -114). Filing false or invalid claim with county clerk and recorder punishable by fine of $5,000, five years imprisonment, or both. (MCA 82-2-115).

Operation of Mines.

Montana law conforms and is equal to Federal Mine Safety and Health Act of 1977. As long as that Act is administered and enforced, Montana Department of Labor and Industry is not authorized to conduct inspections of those mines. (MCA 50-72-201 to 210). However, this does not apply to coal mines. (MCA 50-72-201).

Safeguarding Employees.

There is a comprehensive code of safety regulations for coal mines. (Tit. 50, c. 73). Division of Workmen's Compensation, Department of Labor and Industry appoints coal mine inspectors (MCA 50-73-401) and supervises enforcement of safety regulations (MCA 50-73-402, et seq.). Department of Labor and Industry is authorized to make and enforce regulations with respect to unsanitary conditions and reporting of occupational diseases. (MCA 50-70-101 to -118).

Inspection of Mines.

Coal mines must be inspected at least quarterly. (MCA 50-73-406).

Oil, Gas and Coal—Defined.

Coal defined as combustible carbonaceous rock formed from compaction and induration of various plant remains. Coal does not include methane gas or any other natural gas that may be found in any coal formation, oil shale, or gilsonite. Gas defined as all natural gases and all other fluid hydrocarbons, including methane gas or any other natural gas found in any coal formation, as produced at wellhead and not defined as oil. Oil is defined as crude petroleum oil and other hydrocarbons, regardless of gravity, that are produced at wellhead in liquid form by ordinary production methods and that are not result of condensation of gas before or after it leaves reservoir. (MCA 82-1-111).

Oil and Gas Administering Agency.

Board of Oil and Gas Conservation has duty of enforcing statutory regulations on oil and gas industry which include conservation laws defining and prohibiting waste of oil and gas and provisions for well spacing and drilling units, including compulsory pooling. (Tit. 82, c. 11). Violation of any Board rule or order is misdemeanor and also subjects violator to civil penalty of at least $75 and not more than $10,000 per day. (MCA 82-11-149).

Pooling and Spacing of Oil and Gas Wells.

Temporary and permanent spacing units may be established in interests of protecting correlative rights, preventing waste of oil and gas, and avoiding drilling of unnecessary wells. (MCA 82-11-201). Pools may be divided into different zones. (MCA 82-11-201[3]). Interests within spacing unit may be force-pooled by Board. (MCA 82-11-202). Penalties for nonjoinder by working interest owner and for nonjoinder by owner of oil and gas interest in spacing unit not subject to lease or other contract for development. (MCA 82-11-202[2]).

Mineral leases, including oil and gas leases, which are forfeited, canceled or expire, must be released of record by lessee within 60 days. (MCA 82-1-201). Lessee has 30 days to file release upon receiving written notice from lessor. (MCA 82-1-201). If not, lessor may bring action 20 days after demand for release, and recover damages, plus attorney's fees. (MCA 82-1-202, -203). Lessee who fails to remove expired lease from record is guilty of misdemeanor. (MCA 82-

1-201).

Taxes.

Net proceeds tax is assessed by Department of Revenue against metal mines and royalty interests therein. (MCA 15-23-501 to -507). Metals mined are taxed on ad valorem basis. (MCA 15-23-802). There is also metalliferous mines license tax (MCA 15-37-101 to -117); and micaceous mineral mine license tax of 5¢ per ton mined (MCA 15-37-201 to -221).

Persons engaged in mining gold, silver, copper, lead or other metal or precious or semiprecious stones must pay annual license tax computed on gross value of products in preceding calendar year as follows: For concentrate shipped to smelter, mill, or reduction work first $250,000, 0%; more than $250,000, 1.81% of increment. For gold, silver, or any platinum group that is dore, bullion, or matte and that is shipped to refinery, first $250,000, 0%; more than $250,000, 1.6% of increment. (MCA 15-37-103).

The surface ground of mines is taxed at its full value as are all improvements and machinery thereon, and the annual net proceeds of all mines are taxed like other personal property. (MCA 15-23-501). Production of oil and natural gas is taxed on gross taxable value of production based on type of well and type of production according to schedules for working interest and nonworking interest owners. (MCA 15-36-304). Severance tax is imposed on all coal production. (MCA 15-35-103). Tax imposed varies depending on heating quality of coal. (Id.)

Privilege and license tax is imposed for purpose of defraying expense of enforcing laws concerning oil and gas conservation. Operator or producer of oil and gas shall pay assessment not to exceed 3/10 of 1% of market value of petroleum produced, saved, marketed, or stored within state, or exported from state. Same rate on market value of each 10,000 cubic feet of natural gas. (MCA 82-11-131). Coal severance tax. (MCA 15-35-101 to -122).

Certain royalties received by Montana Indian tribes are exempt. (MCA 15-36-309 and MCA 15-38-121).

Resource Indemnity Trust Act provides for establishment of an investment fund in principal sum of $100,000,000, earnings from which shall be used to improve total environment and rectify damage to environment. (MCA 15-38-101 to 203). Trust is funded by severance tax to be paid by persons engaged in mining, extracting, or producing mineral resource. (MCA 15-38-104). Report of gross yield must be made annually, together with other information required. (MCA 15-38-105). In event of failure to make report, Department of Revenue must estimate and assess tax from available information. (MCA 15-38-107).

Report to Department of Labor and Industry.

Employer in oil or mining industry, who owns less than one-half unencumbered fee being worked, must file with Department of Labor and Industry and county clerk verified list of names and addresses of persons interested in such operations and name of agent for service of process. Failure to file statement is misdemeanor. (MCA 39-3-501, -502).

Bond for Payment of Wages.

Employer in oil or mining industry who fails to pay wages of employees may be required to give bond for payment of future wages. (MCA 39-3-510, 511).

Reclamation.

See subhead Permit, supra.

20 MORTGAGES

20.01 CHATTEL MORTGAGES:

1998 Uniform Commercial Code adopted with effective date of July 1, 2001. Uniform Commercial Code adopted. (Tit. 30). See category 3 Business Regulation and Commerce, topic 3.09 Commercial Code.

What May be Mortgaged.

Uniform Commercial Code adopted. (Tit. 30). See category 3 Business Regulation and Commerce, topic 3.09 Commercial Code.

After-acquired Property.

Uniform Commercial Code adopted. (Tit. 30). See category 3 Business Regulation and Commerce, topic 3.09 Commercial Code.

Floating Stock.

Uniform Commercial Code adopted. (Tit. 30). See category 3 Business Regulation and Commerce, topic 3.09 Commercial Code.

Future Advances.

Uniform Commercial Code adopted. (Tit. 30). See category 3 Business Regulation and Commerce, topic 3.09 Commercial Code.

Requisites and Execution of Instrument.

Uniform Commercial Code adopted. (Tit. 30). See category 3 Business Regulation and Commerce, topic 3.09 Commercial Code.

Filing and Refiling.

Uniform Commercial Code adopted. (Tit. 30). See category 3 Business Regulation and Commerce, topic 3.09 Commercial Code, subhead Filing and Certification.

Removal or Sale of Property by Mortgagor.

Uniform Commercial Code adopted. (Tit. 30). See category 3 Business Regulation and Commerce, topic 3.09 Commercial Code.

Release.

Uniform Commercial Code adopted. (Tit. 30). See category 3 Business Regulation and Commerce, topic 3.09 Commercial Code.

Satisfaction or Discharge.

Uniform Commercial Code adopted. (Tit. 30). See category 3 Business Regulation and Commerce, topic 3.09 Commercial Code.

Foreclosure by Court Proceedings.

Uniform Commercial Code adopted. (Tit. 30). See category 3 Business Regulation and Commerce, topic 3.09 Commercial Code.

Foreign Mortgages.

Uniform Commercial Code adopted. (Tit. 30). See category 3 Business Regulation and Commerce, topic 3.09 Commercial Code.

Taxation.

Chattel mortgages are exempt from taxation. (MCA 15-6-201).

Forms.

Financing Statement.

Montana filing offices accept National UCC Financing Statement (Form UCC1) and National UCC Financing Statement Amendment (Form UCC3) and related Addenda.

Security Agreement.

Forms of security agreements employed in other states will be adequate for use in Montana provided minimum standards of Code are met.

Caveat: Montana has adopted a Retail Installment Sales Act (MCA 31-1-201 to MCA 31-1-243) which may be applicable to financing arrangement contemplated. See category 3 Business Regulation and Commerce, topic 3.23 Sales, subhead Retail Installment Sales. See also category 3 Business Regulation and Commerce, topic 3.19 Interest, subhead Small Loans.

20.02 COLLATERAL SECURITY:

See category 8 Debtor and Creditor, topic 8.15 Pledges.

20.03 MORTGAGES OF PERSONAL PROPERTY:

See topic 20.01 Chattel Mortgages.

20.04 MORTGAGES OF REAL PROPERTY:

Any interest in real property capable of being transferred may be mortgaged. (MCA 71-1-201). Mortgage is not deemed conveyance so as to enable owner of mortgage to recover possession of property without foreclosure and sale. (MCA 71-1-202). Lien of mortgage is eight years from maturity of debt with renewal possibility for eight additional years. (MCA 71-1-210).

Execution.

A mortgage must be executed with the same formalities as a deed. (MCA 71-1-203). Post office address of mortgagee must appear in the instrument to entitle it to be recorded. (MCA 7-4-2618).

Mortgage of Mortgagor’s Home.

Mortgage of land personally occupied by mortgagor as his home cannot contain waiver of right to possession prior to foreclosure and during the year allowed for redemption. (MCA 71-1-229).

Recording.

In order to be effective against subsequent purchasers or encumbrancers in good faith without actual notice, a mortgage must be recorded in the office of the county clerk and recorder of the county where the land lies. (MCA 70-21-208; MCA 70-21-304). Abstract of instrument may be recorded. (MCA 70-21-101; MCA 70-21-305). See category 10 Documents and Records, topic 10.04 Records, subhead Recordable Instruments.

Recording Fees.

Recording fee is $7 per page or fraction thereof. (MCA 7-4-2631; MCA 7-4-2632; MCA 7-

4-2637). All documents recorded with office of county clerk and recorder must meet certain formatting requirements. (MCA 7-4-2636). Recording fee for non-standard documents will be $11 per page or fraction thereof for first five pages and $7 per page or fraction of page thereafter. (MCA 7-4-2637).

Taxes.

Mortgages are exempt from taxation. (MCA 15-6-201[1][h]).

Priorities.

Purchase-money mortgage takes priority over all other liens created against purchaser, subject to recording laws. (MCA 71-3-114). Liens otherwise equal have priority according to their time of creation. (MCA 71-3-113).

Future Advances.

Mortgage may cover future advances, which has priority just as if advanced at mortgage execution, if total amount of all contemplated future advances or total indebtedness that may be outstanding at any given time is stated in mortgage, notwithstanding fact that from time to time during term of mortgage no indebtedness is due from mortgagor to mortgagee. Total amount of indebtedness that may be secured by mortgage may decrease or increase from time to time, but total principal amount of obligations secured at any one time may not exceed face amount stated in mortgage together with interest as provided in instrument secured by mortgage. (MCA 71-1-206).

Subordination agreement or waiver in favor of subsequent purchaser or encumbrancer may be executed by record holder of mortgage and recorded like mortgage. (MCA 71-1-208).

Assignment.

The assignment of the debt secured by mortgage carries with it security. (MCA 71-1-110). Assignment may be recorded in like manner as mortgage and record operates as legal notice to mortgagor and other persons, including subsequent purchasers and encumbrancers. Assignment must contain assignee's post office address in order to be recorded. (MCA 71-1-207).

Discharge by County Clerk when presented with certificate issued by mortgagee, mortgagee's personal representative, or assignee in proper form for recording specifying mortgage satisfied. (MCA 71-1-211). If discharge is made by someone other than mortgagee, person discharging debt must file certified copy of his authority unless authority is already recorded. (MCA 71-1-213).

Satisfaction.

Failure of mortgagee to deliver certificate of discharge or release of mortgage within 90 days after request for one is liable to mortgagor or mortgagor's heirs or assigns in sum of $500 and actual damages. (MCA 71-1-212).

Trust Deeds.

Small Tract Financing Act of Montana provides for use of trust indentures for estates in real property not exceeding 40 acres to secure obligation with power of sale in trustee upon breach. (MCA 71-1-304). Foreclosure may be by advertisement and sale or by judicial procedure as mortgage. (MCA 71-1-304). Trustee must be member of bar, bank, trust company, savings and loan association or title insurer or title insurance producer or agency authorized to do business in state under laws of Montana or U.S. (MCA 71-1-306). Trustee may foreclose by advertisement and sale upon default of grantor if trust deed is recorded with county clerk of county in which property is located, and if trustee or beneficiary has filed for record with said clerk notice of sale containing required information concerning nature of default and proposed sale. (MCA 71-1-313). Trustee must give notice of sale by mailing by certified mail copy of recorded notice of sale at least 120 days prior to date of sale to grantor and other persons specified in statute, by posting copy of said notice in newspaper of general circulation in conspicuous place on property at least 20 days before sale, and by publishing said notice in county where property is situated once a week for three successive weeks, last publication to be at least 20 days prior to sale. (MCA 71-1-315). Affidavit of compliance is to be recorded prior to sale. Property must be sold at public auction to highest bidder. Any person including beneficiary but excluding trustee may bid at sale. Sale must be for cash. Upon receipt of payment, trustee must execute deed to purchaser. (MCA 71-1-315). Purchaser is entitled to possession on tenth day after sale. (MCA 71-1-319).

Grantor or junior encumbrancer at any time prior to sale may pay amount due plus costs and trustee's and attorney's fees, and interest due on obligation at time of default, whereupon all proceedings must be discontinued and deed of trust reinstated. (MCA 71-1-312; MCA 71-1-320).

Proceeds of sale must be applied to expenses of sale including reasonable trustee's and attorney's fees, obligations, and then surplus to the persons entitled thereto. Trustee may deposit surplus with county clerk. (MCA 71-1-316).

Debtor's obligation is extinguished by foreclosure by advertisement and sale and no deficiency judgment may be obtained. (MCA 71-1-317). Deficiency judgment may be obtained if trust deed is judicially foreclosed as mortgage. (MCA 71-1-305).

Small Tract Financing Act does not invalidate or preclude use of deeds of trust, trust deeds, or trust indentures, which are not executed in conformity with Act and such instruments are considered mortgages, subject to all laws relating to mortgages, and are considered constructive notice of contents to subsequent purchasers and encumbrancers from time filed of record. (MCA 71-1-321).

Foreclosure.

Real estate may be foreclosed by usual action in equity (MCA 71-1-222), or mortgage may give power of sale to mortgagee (MCA 71-1-111; MCA 71-1-223). With some exceptions, there is only one action for recovery of debt or enforcement of any right secured by mortgage upon real estate. (MCA 71-1-222). If mortgagee wishes to foreclose by way of power of sale for any mortgage not subject to Small Tract Financing Act of Montana (MCA 71-1-301, et. seq.), notice must be given within 30 days prior to sale. Notice must be advertised in newspaper in county in which property is located. (MCA 71-1-224).

Deficiency Judgment.

If sale is made under judgment of court, and proceeds are insufficient to pay amount due, judgment for deficiency may be docketed, except in case of mortgage executed, to vendor for balance of purchase price. (MCA 71-1-222; MCA 71-1-232).

Attorney Fees.

Attorney's fees are allowed as part of the costs, where the mortgage or promissory note secured so provides. (MCA 71-1-233).

Redemption.

There is a right of redemption within one year after sale under a mortgage deed of trust, whether foreclosure is by suit or by exercise of a power of sale in the instrument, except trust deeds foreclosed by advertisement and sale pursuant to MCA 71-1-301, et seq. (MCA 25-13-301 to 825; MCA 71-1-228). If debtor is using property as personal residence, he is entitled to possession of property during redemption period. (MCA 71-1-229). Redemption is effected by same persons, on same terms and in same manner as in case of execution sale. (MCA 71-1-228). See category 8 Debtor and Creditor, topic 8.05 Executions.

Forms

Mortgage of real property may be made in the following form (MCA 71-1-204):

This mortgage, made the . . . . day of . . . ., in the year . . . ., by A. B., of . . . ., mortgagor, to C. D., of . . . ., mortgagee: That the mortgagor mortgages to the mortgagee (here describe the property), as security for the payment to mortgagor of . . . . dollars, on (or before) the . . . . day of . . . . in the year . . . ., with interest on that amount (or as security for the payment of an obligation. describing it, etc.). (Signature and Acknowledgment)

Renewal.

Mortgages apply from date recorded until eight years after maturity of entire debt. Mortgages may be renewed for additional eight years by mortgagee by filing affidavit setting forth: date of mortgage, when and where recorded, amount of debt secured by mortgage, amount remaining unpaid, and statement that mortgage is not being renewed for purpose of hindering, delaying, or defrauding creditors of mortgagor. (MCA 71-1-210).

Assignment.

Assignments of mortgages may be recorded in same manner as mortgage. Recorded assignment operates as legal notice to mortgagor and all subsequent purchasers. To be effective, assignment must contain assignee's post-office address. (MCA 71-1-207[2]).

Satisfaction.

Upon full satisfaction of mortgage, mortgagee or mortgagee's personal representative must execute certificate specifying that mortgage has been paid or otherwise satisfied or discharged. (MCA 71-1-211).

Chattel Mortgages.

See topic 20.01 Chattel Mortgages.

Mortgage Lending.

With some exceptions, person or entity may not act as residential mortgage broker or loan originator unless licensed. (MCA 32-9-102), exceptions (MCA 32-9-104).

21 PROPERTY

21.01 ABSENTEES:

There is no general statute affecting the rights and liabilities of nonresidents or absentees. Particular provisions other than those herein mentioned are digested under the following categories: Civil Actions and Procedure, topics Costs, Limitation of Actions; Process; Debtor and Creditor, topic Attachment; Estates and Trusts, topics Death, Executors and Administrators; Family, topics Guardian and Ward, Husband and Wife; Transportation, topic Motor Vehicles.

Care of Property.

Uniform Probate Code adopted (MCA 72-1-101 et seq.), except that, absence period upon which presumption of death is based is reduced to five years (MCA 72-1-108[5]).

Escheat.

Uniform Unclaimed Property Act adopted. (Tit. 70, c. 9, Pt.8).

When title to any property, either real or personal or mixed, fails for any reason including absence of heirs, title vests in state immediately upon death of owner. (MCA 72-14-102). Property administered by Department of Revenue. (MCA 70-9-809). Presumption of abandonment if property unclaimed for statutory period. (MCA 70-9-803). See also categories 3 Business Regulation and Commerce, topic Banks and Banking, subhead Unclaimed Deposits; Estates and Trusts, topics Descent and Distribution, Wills.

21.02 ADVERSE POSSESSION:

Person may acquire title to real estate by adverse possession. (MCA 70-19-401 et seq.).

Character of Possession.

Where possession is assumed under claim of title founded on written instrument claimed to be a conveyance or a decree of a competent court, such possession is adverse. (MCA 70-19-408). In such case, possession is evidenced by: (a) Cultivation or improvement; (b) enclosure; (c) use for supply of fuel or fencing timber for husbandry, pasturage or other ordinary uses. (MCA 70-19-408). Where possession is actual and continued, but not based on written instrument, possession is adverse (MCA 70-19-409), but such possession may be evidenced only by: (1) Enclosure or (2) cultivation or improvement (MCA 70-19-410).

Duration of possession is five continuous years. (MCA 70-19-411).

Taxes must have been paid during five year period by adverse possessor and his predecessors. (MCA 70-19-411).

Easements may be acquired by prescription in same manner as title to land is acquired by adverse possession. (MCA 70-19-405; 92 Mont. 227, 12 P.2d 273). However, no taxes need be paid to acquire easement by prescription. (221 Mont. 166, 717 P.2d 558).

Disabilities.

Statutory period is suspended if person entitled to commence action for recovery of real property is under age of majority, committed under MCA 53-21-127, or imprisoned for less than life. Five-year period begins upon termination of disability or death. (MCA 70-19-413).

21.03 [RESERVED]

21.04 CONVEYANCES:

See topic 21.06 Deeds.

21.05 CURTESY:

Abolished. (MCA 72-2-122).

21.06 DEEDS:

An estate in real property, except an estate at will, or for a term not exceeding one year, can be transferred only by operation of law, or by an instrument in writing. (MCA 70-20-101). See topic Real Property for types of estates.

Execution.

A deed must be signed, but no witnesses are necessary. Corporate deed should bear seal, although this is probably not essential. Deed must be proved by either subscribing witness or acknowledgment pursuant to Title 1, c. 5 (MCA 70-21-203) and show address of grantee to entitle it to record (MCA 7-4-2618), although these requirements do not affect its validity between parties. For circumstances in which spouse must join, see categories 8 Debtor and Creditor, topic Homesteads, subhead Abandonment, Conveyance or Encumbrance; Family, topic Husband and Wife, subhead Conveyance or Encumbrance of Property.

Delivery.

A grant duly executed is presumed to have been delivered at its date, and it takes effect only upon delivery. It cannot be delivered conditionally, without discharging the conditions and thus rendering it absolute, except it be deposited by the grantor with a third person, to be delivered to the grantee on performance of the conditions, and on delivery by the depository it will take effect. A grant is constructively delivered in the following cases: (1) When the instrument is, by agreement of the parties, understood to be delivered, and under circumstances entitling the grantee to immediate delivery; (2) when it is delivered to stranger for grantee, and grantee's assent is shown, or may be presumed from circumstances. (MCA 70-1-508 to MCA 70-1-512).

Recording.

In order to affect subsequent purchasers and mortgagees with constructive notice, deed must be properly acknowledged or proved and certified and recorded in office of county clerk and recorder of county where land is situated. (MCA 70-21-302; MCA 70-21-304). Abstracts of conveyance may be recorded. (MCA 70-21-101). See category 10 Documents and Records, topic 10.04 Records, subhead Recordable Instruments.

Recording fees are established by state law. (MCA 7-4-2631 et seq.). See also category 10 Documents and Records, topic 10.04 Records.

Interpretation.

A grant is to be interpreted in favor of the grantee, but a reservation in a grant and a grant by a public officer to a private person are to be interpreted in favor of the grantor. (MCA 70-1-516). Fee simple is presumed to pass by grant, unless it appears that lesser estate was intended. (MCA 70-20-301).

Operation and Effect of Deed.

Where a person purports by proper instrument to grant real property in fee simple, and subsequently acquires any title or claim of title thereto, the real property passes by operation of law to grantee or grantee's successors, except in case of a quitclaim deed. (MCA 70-20-302). Every grant of estate in realty is conclusive against grantor and against everyone afterwards claiming under grantor, except purchaser or encumbrancer in good faith, and for valuable consideration who acquires title or lien by instrument that is first duly recorded (MCA 70-20-303), but attachment will not prevail over prior unrecorded deed (84 Mont. 276, 275 P. 278).

When grant is made upon condition subsequent, which fails to occur, grantee must reconvey property back to grantor. (MCA 70-20-311).

Effect of grant by owner of estate for years or life purporting to convey greater estate is to pass to grantee all estate which grantor could lawfully transfer. (MCA 70-20-313).

Easements.

Transfer of property passes all easements attached to it. (MCA 70-20-308).

Taxes.

See category 22 Taxation.

Covenants Implied.

Word “grant” in any conveyance which passes estate of inheritance, following covenants and none other, are implied: (1) That prior to time of such conveyance, grantor has not conveyed same estate, or any right, title or interest therein to any person other than grantee; (2) that such estate at time of execution of conveyance is free from encumbrances made or suffered by grantor. (MCA 70-20-304). However, agreement on part of seller of real property to give usual covenants binds him to insert in deed covenants of “seisin,” “quiet enjoyment,” “further assurance,” “general warranty,” and “against encumbrances.” (MCA 30-11-109). Statute recites substance of covenants, and language may be incorporated by reference to MCA 30-11-110 or set out in full.

Joint Tenancy.

Joint Tenancy is created by designating in conveyance names of all joint tenants. (MCA 70-20-105). To create joint tenancy with rights of survivorship, such language must be included in conveyance. (MCA 70-20-310).

Form.

Use of following form is authorized (MCA 70-20-103):

Form

I, A.B., in consideration of . . . . dollars paid, grant to C.D. all the real property situated in (insert name of county) County, State of Montana, described as follows: (here insert description, or if the land sought to be conveyed has a descriptive name, it may be described by the name as, for instance, “the Norris ranch”).

Witness my hand this . . . . day of . . . ., 20. . . (Signature and acknowledgment).

Attorney must subscribe his own name as attorney-in-fact and his principal’s when executing instrument transferring estate. (MCA 70-20-108).

See also categories 8 Debtor and Creditor, topic Homesteads, subhead Abandonment, Conveyance or Encumbrance; Family, topic Husband and Wife, subhead Conveyance or Encumbrance of Property.

21.07 DEEDS OF TRUST:

See category 20 Mortgages, topic 20.04 Mortgages of Real Property.

21.08 DOWER:

Abolished. (MCA 72-2-122).

21.08A EMINENT DOMAIN:

Public uses for which eminent domain may be exercised. (MCA 70-30-102). Property that may be taken. (MCA 70-30-103). Taking of easement presumed sufficient for public use project. (MCA 70-30-104[2]).

Whenever interest in real property acquired by right of eminent domain or for public purpose—other than fee simple—is abandoned or purpose for which it was acquired terminates, property reverts to original owner or successor in interest. (MCA 70-30-321, 322). Fee simple interest in real property acquired for public use may be sold at public auction if use is abandoned and original owner or successor in interest has option to purchase property for amount equal to amount bid at sale or, if no bid, appraised value of property. (MCA 70-30-321, 322).

21.09 ESCHEAT:

Escheated Estates Act.

(MCA 72-14-101 et seq.). Whenever title to any real, personal or mixed property fails, title vests in state of Montana immediately upon death of owner and there is no presumption that owner died leaving heirs or next of kin. (MCA 72-14-102). Attorney general is advisor for all escheated property. (MCA 72-14-103). For procedure for state acquisition of escheated property see MCA 72-14-201 to 210. Persons claiming property in hands of state treasurer must bring action in Lewis and Clark County, serving state treasurer, attorney general and director of revenue. (MCA 72-14-301). Action must be brought within five years from date money or property is received by state treasurer with several exceptions. (MCA 72-14-302).

See topic 21.01 Absentees, subhead Escheat; categories 3 Business Regulation and Commerce, topic Banks and Banking, subhead Unclaimed Deposits; Estates and Trusts, topics Descent and Distribution, Wills.

21.10 LANDLORD AND TENANT:

Tenant who receives notice of proceedings to recover real property occupied by tenant, or possession of the same, must immediately inform landlord of notice; and if notice is in writing, shall deliver writing to landlord, and is responsible to landlord for all damage resulting from any omission to inform of notice or deliver notice, if in writing. (MCA 70-26-104).

Montana Residential Mobile Home Lot Rental Act governs renting of lots for mobile and manufactured homes, effective Oct. 1, 2007. (MCA 70-33-101 to 434).

Uniform Residential Landlord and Tenant Act adopted as modified in Montana Residential Landlord and Tenant Act, effective July 1, 1977. (MCA 70-24-101 to 442). Sections omitted: 1.203; 2.101; 4.104(b). Significant variations from Uniform Act: excluded are rental agreements for non-city occupancies including hunting, fishing, or agricultural privileges (MCA 70-24-104); reasonable attorneys fees allowed in action on rental agreement notwithstanding any agreement to contrary (MCA 70-24-442); landlord's maintenance must comply with housing codes in effect at time of original construction on units built after July 1, 1977 (MCA 70-24-303); tenants in one-, two- or three-family residence may agree to perform some types of landlord's maintenance (MCA 70-24-303[3]); landlord may not allow tenant to engage in activity that may damage premises or injure neighbors, including manufacture of drugs, operation of lab, or gang-related activities (MCA 70-24-303); landlord's rules substantially modifying tenant's bargain valid after seven days written notice in week-to-week tenancy, 30 days written notice in month-to-month tenancy (MCA 70-24-311); tenant may not engage in activity that may damage premises or injure neighbors, including manufacture of drugs, operation of lab, or gang-related activities (MCA 70-24-321); tenant may make repairs and deduct up to one month's rent if landlord fails to maintain premises (MCA 70-24-406); tenant may recover damages under MCA 70-24-406(2) up to one month's rent for landlord's noncompliance with rental agreement or with MCA 70-24-303 (MCA 70-24-407). Other variations contained in subheads Rent, and Termination of Tenancy, infra.

Kinds of Tenancy.

For life, years, from year to year, quarter to quarter, month to month, etc., for other indefinite and unascertained durations except tenancies at will. (MCA 70-15-202).

Leases for more than one year must be in writing (MCA 28-2-903) and must be acknowledged to be recorded (MCA 70-21-203). Validity of lease between parties not affected by absence of acknowledgment. For formal requirements, see topic 21.06 Deeds.

Security Deposits.

Governed by MCA 70-25-101 to 206. Security deposit can be used to cover damages to property, unpaid rent, cleaning expenses, utilities, penalties due under lease, and other money owed to landlord as defined by statute. (MCA 70-25-201). Before landlord can withhold security deposit he must provide tenant with list of damages and cleaning costs. (MCA 70-25-202). Tenant can recover security deposit if wrongfully withheld. (MCA 70-25-204, 205). Mailing deposit to tenant's last known address when new address not provided is not wrongful withholding, but tenant may still recover deposit. (MCA 70-25-202, -205). Landlord must provide written statement of condition of premises and any damages given to previous tenant to charge security deposit to new tenant. (MCA 70-25-206). Waivers of statutory provisions are invalid. (MCA 70-25-103).

Recording.

Written leases for more than one-year terms are void, unless recorded, against subsequent purchasers or encumbrancers whose deeds or incumbrances are first recorded. (MCA 70-21-304). However, unrecorded lease is valid as to persons having notice thereof (MCA 70-21-102) and open and notorious possession of lessee is constructive notice of facts relating to his interest which reasonable inquiry would reveal (see 63 Mont. 38, 206 P. 407).

Rent.

Unless rental agreement provides otherwise, periodic rent is payable at landlord's address without demand at beginning of term and is apportionable day-to-day. (MCA 70-24-201). After written notice and reasonable time, tenant may make repairs to premises that cost less than one month's rent and deduct same from rent. (MCA 70-24-406). Tenant may terminate rental agreement after three days in case of emergency that landlord fails to remedy. (MCA 70-24-406). After notice to landlord and reasonable time tenant may deduct cost of essential services from rent if to be provided by landlord in rental agreement. (MCA 70-24-408).

Lien.

Landlord does not have lien on tenant's property, but may sell abandoned property after reasonable attempt to contact tenant or destroy it if value would be exceeded by storage cost. (MCA 70-24-430).

Termination of Tenancy.

Written notice to tenant stating noncompliance with rental agreement terminates tenancy in not less than 14 days unless breach remedied, or in not less than three days if noncompliance involves unauthorized pet or person. (MCA 70-24-422). Notice of substantially same act during next six months terminates tenancy upon at least five days' written notice. (MCA 70-24-422). Tenancy terminates three days following failure to pay rent after written warning and demand therefor. Landlord may terminate rental agreement on three-days' notice for violation of MCA 70-24-321(3). (MCA 70-24-422). Termination also effected by mutual consent; on seven day notice in week-to-week tenancy and 30 day notice in month-to-month tenancy; by destruction of property; by tenant acquiring title superior to landlord; or automatically following landlord's failure to comply with tenant's written demand for repairs. (MCA 70-24-406). Where hiring of commercial real property is for unspecified term, notice of intention to terminate tenancy must be given at least one rent period, not exceeding 30 days, before termination. (MCA 70-26-205). Tenancy at will terminated by not less than 30-day notice. (MCA 70-27-104). Treble damages may not be recovered for tenant's early termination of tenancy. (MCA 70-24-422).

Holding Over.

Renews commercial lease for like term, not exceeding one month of rent payable monthly or in any case one year, if landlord accepts rent. (MCA 70-26-204).

Damages for Holding Over.

If tenant holds over after expiration of the term of his tenancy without landlord's consent and in bad faith, he is liable to landlord for three months rent or treble damages, whichever is greater. (MCA 70-24-429).

Unlawful Detainer.

Where tenancy has been terminated by notice or otherwise, or where tenant is in default in rent or other respects, landlord may recover possession after first serving three day notice. (MCA 70-27-108, 110). Action may be brought in either justice or district court. (MCA 70-27-101). Complaint must allege giving of required notice. (88 Mont. 162, 293 P. 315). Unlawful detainer statutes do not apply to residential arrangements governed by MCA 70-24-101 et seq. (MCA 70-27-101).

Distress.

No right of distraint.

21.11 LEASES:

See topic 21.10 Landlord and Tenant.

21.12 [RESERVED]

21.13 PERPETUITIES:

Uniform Statutory Rule Against Perpetuities (MCA 72-2-1001 to MCA 72-2-1007) provides nonvested property interest is invalid unless, when interest is created, it is certain to vest or terminate no later than 21 years after death of individual then alive, or, interest either vests or terminates within 90 years after its creation.

21.14 PERSONAL PROPERTY:

Estate by entireties is not permissible mode of ownership. (143 Mont. 183, 387 P.2d 907).

21.15 POWERS OF ATTORNEY:

Real Property.

Power of attorney to execute mortgage must be in writing. (MCA 71-1-102). When attorney-in-fact executes instrument transferring estate in real property, attorney-in-fact must subscribe name of principal and attorney-in-fact's own name as attorney-in-fact. (MCA 70-20-108). Where attorney-in-fact releases mortgage, release must be accompanied by power of attorney if latter not already of record. (MCA 71-1-213).

Delegation of Powers.

Agent, unless forbidden, can delegate powers only: (1) when act to be done is purely mechanical; (2) when act is such agent himself cannot and subagent can lawfully perform it; (3) if it is the usage of the place to delegate such powers; (4) when such delegation is specially authorized by principal. (MCA 28-10-501).

Agency is terminated as to every person having notice of: (1) expiration of its term; (2) extinction of its subject; (3) death of agent; (4) renunciation of agency; (5) incapacity of agent to act. (MCA 28-10-801). Unless power of agent is coupled with interest in subject of agency, it is terminated by revocation by principal, principal's death, or principal's incapacity to contract. (MCA 28-10-802).

Attorneys in Fact.

Power to convey real estate must be acknowledged like deeds (MCA 70-21-203) and may be recorded (MCA 70-21-201).

Recorded power of attorney can be revoked only by acknowledging and recording revocation in same office with original. (MCA 70-21-308).

Uniform Durable Power of Attorney Act adopted. (MCA 72-5-501 and MCA 72-5-502).

Uniform Statutory Form Power of Attorney Act adopted. (MCA 72-31-201 to MCA 72-31-238).

21.16 REAL PROPERTY:

Estates in real property, in respect to duration, are either: (1) of inheritance or perpetual estates; (2) for life; (3) for years; (4) from year to year, quarter to quarter, month to month, week to week, day to day, and other indefinite and unascertained durations of enjoyment whatsoever, except estates or tenancies at will; or (5) at will. (MCA 70-15-202). Ownership of property by several persons is of either: (1) joint interests; (2) partnership interests; or (3) interests in common (MCA 70-1-306). Every interest created in favor of several persons in their own right, including husband and wife, is an interest in common, unless acquired by them in partnership for partnership purposes or declared in its creation to be a joint interest. (MCA 70-1-314). Seller of real property has obligation to obtain and communicate information relating to latent defects. (See 232 Mont. 332, 757 P.2d 779; 304 Mont. 176, 18 P.3d 1024.)

Rule in Shelley's Case has been abolished. (MCA 70-15-215).

Condominiums.

Unit Ownership Act adopted. (MCA 70-23-101 to MCA 70-23-902). Condominium is deemed subdivision for purposes of regulation, approval and environmental impact. (MCA 76-4-102).

Montana Timeshare Act.

Adopted. (MCA 37-53-101 to MCA 37-53-506). Provides for registration of timeshare offerings (MCA 37-53-201, et seq.); licensure of timeshare salespersons (MCA 37-53-301, et seq.); public offering statements and disclosures to purchasers (MCA 37-53-303, -304); and provides for both criminal and civil penalties for violations (MCA 37-53-307, MCA 37-53-308, and MCA 37-53-506).

Subdivided Land.

Montana Subdivision and Platting Act (MCA 76-3-101 to MCA 76-3-625), requires land divided into two or more parcels, whether contiguous or not, any of which is less than 160 acres which cannot be described as one-quarter aliquot part of U.S. Government section when parcels have been segregated from original tract (with certain condominiums exempted by MCA 76-3-203) and cannot be described except by metes and bounds, must be surveyed and platted. This requirement does not apply to: (a) airport lands if lease or rental is for onsite weather, navigational facilities, manufacture, maintenance, or storage of aircrafts, or other air carrier-related activities or, (b) lands owned by state unless another parcel is created for residential purposes. (MCA 76-3-205). Act is inapplicable to divisions created by: court order; security for lien, mortgage, trust indenture; life estate reserved; lease for agricultural purposes; or if it creates cemetery lots, or an interest in gas, oil, minerals, or water severed from surface, or is in location over which state lacks jurisdiction. (MCA 76-3-201). Certain divisions or aggregations of land are exempt from regulation under this part, but remain subject to survey requirements and zoning regulations. (MCA 76-3-207). Before court orders division of land it must notify and request written comment from local governing body. (MCA 76-3-201). Engineering plans, specifications, reports, and soil and ground water investigations required must be prepared and filed by registered engineer, subject to regulations, with board of county commissioners or other planning board designated by commissioners. Transport, utilities, open space, ditch and recreation easements are to be considered. (MCA 76-3-402). Variances from strict compliance permitted to prevent hardship. (MCA 76-3-506). Public hearing required prior to preliminary approval; 15 days public notice required; joint hearings on preliminary plat and annexation required when proposed subdivision is to be annexed to municipality. (MCA 76-3-605). Subdivision regulations must comply with city/county growth policies, where policies adopted. (MCA 76-3-504, MCA 76-1-606). Final plat to be submitted with certificate of abstractor showing interests of record and title insurance guaranteeing public's interest in dedicated land. (MCA 76-3-612). Subdivision application must be accompanied by environmental impact assessment describing topography, surface water, ground water, vegetation, geology, soil suitability, and community impact, including education and bussing, road and maintenance, water, sewage, solid waste, police and fire protection. (MCA 76-3-603). Final plat cannot be approved without certification by county treasurer that there are no delinquent taxes on property. (MCA 76-3-611). Person who violates provision of Act or local regulations adopted pursuant thereto shall be guilty of misdemeanor punishable by fine of $100 to $500 or imprisonment up to three months or both. (MCA 76-3-105).

Under state regulation of subdivisions (MCA 76-4-101 to MCA 76-4-135) county clerk and recorder cannot accept for record plat, nor may owner dispose of any lot within subdivision, erect building providing or requiring water or sewage disposal facilities, or occupy any permanent building within subdivision until environmental impact statement has been prepared by developer, approval has been obtained from local planning board and health officer, and, when municipal water and sewage facilities will not be used, Department of Health and Environmental Sciences has approved plat and proposed plans and removed any existing sanitary restriction. (MCA 76-4-121 to -126). Condominiums filed under Unit Ownership Act and camper and mobile home parks are deemed subdivision for purposes of Act (MCA 76-4-102), but condominiums constructed on land divided in compliance with subdivision and Platting Act are exempt (MCA 76-4-111). Subdivision under State Regulation of Subdivisions statutes means division of land or land so divided that creates one or more parcels containing less than 20 acres. (MCA 76-4-101).

See also topics: Deeds, Eminent Domain, Landlord and Tenant; categories Civil Actions and Procedure, topic Partition; Debtor and Creditor, topic Homesteads; Documents and Records, topic Records; Family, topic Husband and Wife; Mortgages, topic Mortgages of Real Property.

22 TAXATION

22.01 ADMINISTRATION:

Department of Revenue has general supervision of assessment and tax laws.

Dispute Resolution.

Tax disputes resolved through uniform dispute review procedure; disputes resolved by final department decision within 180 days of referral to dispute resolution office. (MCA 15-1-211).

Payment.

Individual income taxes due on or before 15th day of 4th month following close of fiscal year, or on April 15th for calendar year. (MCA 15-30-2604). Property taxes due one-half on Nov. 30 and one-half on May 31. (MCA 15-16-102). Corporation license or income tax due on or before 15th day of 5th month following close of fiscal year, or on May 15th for calendar year. (MCA 15-31-111).

Penalties.

Failure to file penalty of $50 or amount of tax, whichever is less. (MCA 15-1-216). Failure to pay penalty of 1.2% to 12% per month from original return due date, regardless of extensions. (MCA 15-1-216). Failure to pay tax penalty on withholding, estimated, telecommunications, lodging, and sales and use taxes of 1.5% to 15% per month. (MCA 15-1-216). Additional penalty of $1,000 to $10,000 if person purposely or knowingly fails to file return when due or within 60 days after written notice from department. (MCA 15-1-216). Interest on individual income taxes is greater of 8% or underpayment rate for individuals established by IRS for preceding year fourth quarter. (MCA 15-1-216). Interest on all other taxes is 12%. (MCA 15-1-216). Any individual, corporation, or partnership or officer, member or employee thereof, who purposely, with intent to evade any tax or requirement, fails to pay tax, fails to file or sign return, withholds information, or supplies fraudulent information is guilty of misdemeanor, subject to $1,000 fine and/or one year imprisonment. (MCA 15-30-2641).

Unemployment Compensation.

Penalty of $25 is due for failure to file reports or make payments in timely manner. Additional penalty of $50 is due if department issues subpoena or makes summary or jeopardy assessments as result of employer’s refusal or failure to provide requested information. Penalty of $100 is assessed for failure to comply with subpoena. Unemployment contributions and penalties accrue interest at rate of 1.5% month. (MCA 39-51-1301).

Special corporation license taxes, discussed under topic License Taxes, contain special penalty provisions.

See also category 2 Business Organizations, topic 2.03 Corporations, subheads Taxation of Corporate Property and License Tax.

Tax Moratorium.

Collection of income taxes due from persons serving in U.S. armed forces is deferred for period of service or qualified hospitalization plus 180 days, if service materially impairs ability to pay. Any other tax obligation of person in such service may be suspended for like period by order of court on showing that military service impairs ability to pay. (MCA 15-30-2632, 2633).

22.02 ALCOHOL, BEVERAGES AND TOBACCO TAXES:

Alcoholic Beverage Taxes.

For companies that manufacture, distill, rectify, bottle, or process liquor and sell over 200,000 proof gallons nationwide, following excise taxes apply: Less than 20,000 proof gallons, 3%; 20,000 to 50,000 proof gallons, 8%; 50,001 to 200,000 proof gallons, 13.8%; and over 200,000 proof gallons, 16%. (MCA 16-1-401, 404). License tax is reduced to 2% if company sells not more than 50,000 proof gallons nationwide. (MCA 16-1-404). Beer wholesalers are taxed based on brewer production at $1.30 for up to 5,000 barrels, $2.30 for 5,001 to 10,000 barrels,

$3.30 for 10,001 to 20,000 barrels, and $4.30 for over 20,000 barrels. (MCA 16-1-406). Table wine is taxed at $0.27 per liter (MCA 16-1-411). Hard cider is taxed at 3.7 cents per liter. (MCA 16-1-411).

Cigarette Tax.

Each package of 20 cigarettes is taxed $1.70 (MCA 16-11-111). Cigarettes are tax exempt within Montana Indian reservations, up to certain quotas. (MCA 16-11-111).

Tobacco Product Tax.

Each package of moist snuff is taxed $0.85 per ounce. (MCA 16-11-111). All tobacco products other than cigarettes and moist snuff are taxed at 50% of wholesale price. (MCA 16-11-111).

22.03 BUSINESS TAXES:

Premium Tax.

See category 16 Insurance, topic 16.01 Insurance Companies.

Retail Telecommunications Excise Tax Act.

Excise tax on telecommunications services at 3.75% of sale price of retail telecommunications services, including, local exchange, long distance, paging, and wireless service. (MCA 15-53-130).

22.04 CORPORATE TAXES:

See category 2 Business Organizations, topic 2.03 Corporations, subheads Taxation of Corporate Property and License Tax.

22.05 EMPLOYMENT TAXES:

Unemployment Compensation Tax.

Imposed in form of “contributions” by MCA 39-51-101 to 3207.

Contributions are required from every employer whose total annual payroll in current or preceding calendar year exceeds $1,000 or who has acquired business of another employer subject to Act. (MCA 39-51-202). Act does not, however, apply to domestic services; certain services provided by sole proprietor’s family; freelance correspondents and photographers; newspaper carriers; qualified real estate agents and insurance sales people who are paid solely commission; cosmetologists; certain “casual labor”; services performed by sole proprietors and partners; services performed by floor covering installers; services performed by “petroleum land professionals”; services of ordained members of clergy; services performed by those receiving qualified rehabilitation; services performed for work-relief or work-training programs; court-ordered community service; services performed by elected public officials; certain agricultural labor; services performed by government employees; services performed by students in employ of school; services performed as crew member on vessel; services performed by certain aliens in education, specialty occupations, agriculture, or exchange programs; Indian tribal fishing rights activities; companionship or respite care services for elderly or infirm person; officials’ services at amateur athletic event; and election judges receiving less than $1,000 in year. (MCA 39-51-204).

22.06 ENVIRONMENTAL TAXES:

Hazardous Waste Tax.

Fees of $8.00 per ton of hazardous waste received at landfill units, surface impoundments, land treatment units, incinerators, boilers, or industrial furnaces. Fees of $4.00 per ton of waste received at all other facilities.

Mines, Minerals and Fisheries Tax.

See category 19 Mineral, Water and Fishing Rights, topic 19.01 Mines and Minerals, subhead Taxes.

22.07 ESTATE TAX:

Estate tax is imposed on all estates of decedents who died prior to Jan. 1, 2005 that are subject to tax under Internal Revenue Code and which have taxable situs in Montana. Statute designed to be “pick-up” tax and capture full benefit of maximum state death tax credit allowable against federal estate tax. Where more than one tax situs is involved, statute provides for allocation of entire credit proportioned by fraction of estate with Montana situs. (MCA 72-16-901 to 912).

Apportionment Against Inter Vivos Dispositions.

Uniform Probate Code adopted. (Tit. 72, cc. 1-5, c. 16 part 6).

Interstate Co-operation.

No procedure is available for compromise of death taxes where decedent’s domicile is disputed. Apportioned estate tax to person domiciled in other state may bring court action to recover proportionate amount of taxes paid in other state. (MCA 72-16-612).

22.08 GASOLINE AND SPECIAL FUELS TAXES:

Montana imposes tax on gasoline in form of license tax on distributors for privilege of engaging in business in state at rate of 4¢ per gallon of aviation fuel, and 27¢ per gallon of all other gasoline. (MCA 15-70-204). “Special fuel” (diesel) distributors must be licensed and post security in order to do business in state. (MCA 15-70-341). Tax of $.2775 per gallon is imposed on each gallon of special fuel. (MCA 15-70-321). Biodiesel distributors entitled to 2¢ per gallon refund of special fuel tax for each gallon of biodiesel produced from Montana products. (MCA 15-70-369).

Special biodiesel fuel producers are exempt from special fuel tax imposed by MCA 15-70-321. (MCA 15-70-301). Ethanol Tax Incentive and Administration Act of 1983 provides tax incentive of up to 20¢ per gallon for ethanol-based gas produced from Montana products for first six years of production. (MCA 15-70-501 to 527).

Montana participates in International Fuel Tax Agreement (IFTA) which allows fuel users operating in more than one state to complete single fuel tax filing in home state. (MCA 15-70-121).

22.09 GIFT TAX:

None.

22.10 HOTEL AND RESTAURANT TAXES:

Facility tax of 4% and sales tax or use tax of 3% of accommodation charge is imposed on users of hotels, motels, campgrounds, resorts, dormitories, condominium inns, dude ranches, guest ranches, hostels, public lodging houses, and bed and breakfasts. (MCA 15-65-111 and 15-68-102).

See category 22 Taxation, topic 22.17 Sales and Use Taxes.

Retail Food establishments with not more than two employees pay annual license fee of $85, all others pay annual license fee of $115. (MCA 50-50-205).

22.11 INCOME TAX:

Income tax is imposed on taxable income of individuals. Taxable income is defined as adjusted gross income less deductions and exemptions. (MCA 15-30-2101[32]). For 2008 tax year, tax rates are as follows: 1% on first $2,600 or part thereof; 2% on next $2,000; 3% on next $2,400; 4% on next $2,500; 5% on next $2,700; 6% on next $3,400; 6.9% on income over $15,600. These brackets to be adjusted annually for inflation. (MCA 15-30-2103). Specified deductions and exemptions allowed, including exemptions for single person, spouse and dependents, additional exemptions, for taxpayer or spouse if blind or aged 65 or more, and disabled dependent child. (MCA 15-30-2114, 2116). Standard deduction of 20% of adjusted gross income with minimum of $1,780 and $4,010 maximum for single or married filing separately, and twice that amount for married filing jointly or head of household. (MCA 15-30-2132). Deduction of federal income tax paid up to $5,000 for single, head of household and married filing separately and $10,000 for married filing jointly. (MCA 15-30-2131). Net operating loss deduction established. (MCA 15-30-2119). Dividend and capital gain income from investment in small business investment companies is exempt. (MCA 15-33-106). Exemption for contributions to medical care savings account and withdrawals for qualified medical expenses. (MCA 15-61-202).

Adjusted gross income equals taxpayer's federal income tax adjusted gross income, with adjustments for, inter alia, dividends, tax refunds, interest on government obligations, and pension and annuity income. (MCA 15-30-2110). Health care professionals may exclude any payments made under qualified loan repayment incentive program up to $5,000. (MCA 15-30-2110). Married taxpayers filing separately may allocate capital losses, passive activity losses, individual retirement contributions, qualified education loan interest, and qualified tuition deductions to attributable spouse rather than split equally. (MCA 15-30-2110). Adjusted gross income does not include 40% of capital gains on sale or exchange of capital assets before Dec. 31, 1986. (MCA 15-30-2110).

Nonresidents are taxed on Montana source income. After calculating tax imposed on nonresident's entire net income, tax due and payable is determined based on ratio of Montana source income to total income from all sources. (MCA 15-30-2104). Alternate tax provided for certain corporations and individuals with gross sales of less than $100,000 in Montana. See category 2 Business Organizations, topic 2.03 Corporations, subhead Alternate Tax. (MCA 15-30-2104).

Fiduciaries are subject to all income tax provisions that apply to any other taxpayer. (MCA 15-30-2603).

Credit for Capital Gains.

Individual credit of 2% of net capital gains for tax year. (MCA 15-30-2301).

Members of Military.

Salaries, veteran's bonuses, reimbursements for group life insurance premiums, and active duty death benefits are exempt from state income tax. (MCA 15-30-2117).

Credit for Dependent Care Assistance.

Employer credit is lesser of $2,500 per child, 15% of construction costs, or $50,000. (MCA 15-31-133). Employer credit for 25% of amounts paid by employer for Dependent Care

Assistance. Credit may not exceed $1,575 of day care assistance paid to or on behalf of employee. (MCA 15-31-131).

Credit for Using Post-Consumer Glass.

Credit of $8 per ton for using post-consumer glass—recycled material. (MCA 75-2-225).

Credit for Energy Conserving Expenditures.

Credit against income tax liability for resident individuals not primarily engaged in provision of gas or electricity derived from fossil fuel extraction or conventional hydroelectric development equal to 25% of expenditure not to exceed lessor of $500 or taxpayer’s income tax liability. (MCA 15-32-109; MCA 15-32-104). For corporate taxpayers, maximum credit for installations or investments in residential buildings is $1,800; $3,600 for installations or investments in buildings not used as residence. (MCA 15-32-103). Credit not to exceed $1,500 for installation of “geothermal system” in taxpayer’s principal dwelling or in residence taxpayer constructed. (MCA 15-32-114). Additional credit not to exceed $500 for installation of energy system using recognized nonfossil form of energy generation or low emission wood or biomass combustion devices (MCA 15-32-201); credit available to resident individual taxpayers only.

Credit for Investment in Wind Energy.

Certain businesses can obtain 35% credit for qualifying investment in wind generation. (MCA 15-32-402). Ability to claim multiple state energy of investment tax credits and property tax reductions limited. (MCA 15-32-405).

Credit for Elderly Care Expenses.

Credit not to exceed $5,000 per “qualifying family member” ($10,000 for two or more qualifying family members) for “qualified elderly care expenses”. (MCA 15-30-2366). Amount of credit decreases as taxpayer’s adjusted gross income exceeds $25,000. Credit completely phased out if AGI is $55,000 or more ($60,000 if two or more qualifying family members). (MCA 15-30-2366).

Small Employer Insurance Credit.

Eligible small employers with more than two and less than nine eligible employees may apply for tax credits of lesser of 50% of actual premium or $125 per month for each employee, $100 for each employee’s spouse and up to $40 per month for up to two dependents for which employer offers health insurance. (MCA 15-31-130; Tit. 33 c. 22 part 20).

Residential Property Tax Credit for Elderly.

Credit against income tax liability for persons age 62 or over for property taxes (or 15% of rent) paid on residence. (MCA 15-30-2337 through 2341). Elderly homeowners may request refund up to five years after due date of return. (MCA 15-30-2339).

Credit for Taxes to Other Jurisdictions.

Where same income is taxable in Montana and also in another state or foreign country, limited credit on Montana tax may be allowed on tax paid to such other jurisdiction. Foreign tax credit is not allowed if taxpayer claims foreign tax credit on federal income tax return. (MCA 15-30-2302).

Who Must File.

Every single individual and every married individual not filing jointly with income of $3,560 and married individuals filing jointly with income in excess of $7,120 must file return with Department. Amounts referred to are increased by $1,900 as adjusted for inflation for each additional personal exemption allowed. (MCA 15-30-2602).

Returns must be filed with Department of Revenue, Helena, Montana, on or before Apr. 15 or 15th day of fourth month following close of fiscal year, except automatic six month extension is allowed provided proper extension application filed with Internal Revenue Service and applicant has paid 90% of current year's tax liability during course of tax year or 100% of previous year's tax liability. Additional extension allowed if good cause exists. (MCA 15-30-2604). Taxpayer must furnish copy of Federal Income Tax Return on request of Department. (MCA 15-30-2619).

Declaration and Payment of Estimated Tax.

Generally, taxpayers must, through combination of employer withholding and estimated tax payments, pay either: (i) 90% of current year tax, or (ii) 100% of prior year's tax (as long as taxpayer prior year tax period was 12 months). (MCA 15-30-2512).

Employer Withholding.

Employers making wage payments for employment must withhold tax on such wages according to tables prepared and issued by Department of Revenue. (MCA 15-30-2502). Employer whose liability for withholding during preceding 12 month period ending preceding June 30 ("lookback period") was $12,000 or greater, shall make return and payment on due date of federal income tax weekly withholding payment, shall file quarterly return on or before last day of Apr., July, Oct. and Jan., and shall file annual summary statement on each employee by Feb. 28. (MCA 15-30-2504). If liability during preceding lookback period was less than $12,000 but greater than $1,199, payments due monthly and shall file annual summary return. (MCA 15-30-2504). If employer's liability for lookback period was less than $1,200, employer must file return and make payment on annual basis by Feb. 28. (MCA 15-30-2504). Each employer shall provide to each employee summary form by Jan. 31. (MCA 15-30-206). Excess tax withheld will be refunded to employee on timely filing of state income tax return. (MCA 15-30-2602). Potential liability to corporate officer, partners, and members of LLC for failure to withhold. (MCA 15-30-2503). Mineral Royalty Backup Withholding Act requires 6% withholding on net royalty payment amounts to certain non-exempt royalty owners. (MCA 15-30-2536 to 2547).

Pass-Through Entities.

Partnerships, S-corps and "disregarded entities" are exempt from income tax. (MCA 15-30-3302). S-corp must file informational return on or before 15th day of 3d month following close of annual accounting period; partnerships must file on or before 15th day of 4th month following close of annual accounting period. (MCA 15-30-3302). Pass-through may file and pay composite tax for all nonresident or foreign C-corps owners. (MCA 15-30-3312). Otherwise must file written consent to tax by nonresident or foreign C-corp owner, or remit income tax (at highest marginal code) for each owner with pass-through's information return. (MCA 15-30-3313).

As to corporate license tax based on income see category 2 Business Organizations, topic 2.03 Corporations, subheads Taxation of Corporate Property and License Tax.

22.12 INHERITANCE TAX:

Inheritance tax was repealed by voter approved Legislative Referendum.

22.12A LICENSE TAXES:

General Corporation License Tax.

See category 2 Business Organizations, topic 2.03 Corporations.

License taxes are imposed on metal and micaceous mines (MCA 15-37-101; MCA 15-37-201); cement or gypsum producers or importers (MCA 15-59-102); electrical energy manufacturers, generators and producers (MCA 15-51-101); gasoline and ethanol-blended gasoline distributors (MCA 15-70-204); oil and gas producers (MCA 82-11-131); tobacco product vendors, wholesalers, retailers and subjobbers (MCA 16-11-122); retail communications services (MCA 15-53-130—imposed on purchaser and collected by telecommunication service providers); sale of liquor, wine and beer (MCA 16-1-401 to 411); public contractors (MCA 15-50-205). Public utility or financial institution may apply for credit against certain license taxes if it makes energy conservation loans. (MCA 15-32-107).

22.12B MINES, MINERALS AND FISHERIES TAXES:

Mining Taxes.

See category 19 Mineral, Water and Fishing Rights, topic 19.01 Mines and Minerals.

22.13 22.15 [RESERVED]

22.16 PROPERTY TAXES:

Property Subject to Taxation.

All property located in Montana is subject to taxation unless specifically exempted. (MCA 15-6-101).

Exemptions.

Following categories are generally exempt from taxation: (a) Property of U.S.A., State of Montana, counties, cities, towns and school districts, nonprofit irrigation districts organized in Montana, municipal corporations, public libraries, rural fire districts, and special districts; (b) property used for religious purposes; (c) property owned and used exclusively for nonprofit agricultural and horticultural societies; (d) property, not to exceed 80 acres, used exclusively; (i) for educational purposes, and (ii) by nonprofit educational institutions that both have attendance policy and definable curriculum with systematic instruction; (e) property used exclusively for licensed nonprofit health care facilities; (f) property owned by nonprofit cemeteries and used in connection with cemetery; (g) property owned by public charities or leased from federal, state or local government entity if used for purely charitable purposes; (h) evidence of debt secured by mortgage upon real or personal property in Montana; (i) nonprofit public museums, art galleries, zoos, and observatories; (j) motor vehicles, land, fixtures, buildings, and improvements owned by cooperative association or nonprofit corporation organized to furnish water to its members for other than irrigation of agricultural land; (k) rights of entry relating to oil, gas, coal and minerals reserved or received by conveyance (exclusive of leasehold interests); (l) property owned and used by nonprofit corporation for care of developmentally disabled, mentally ill or vocationally handicapped or for care of retired, aged or chronically ill; (m) (property owned by nonprofit corporation organized to provide facilities for athletic training and practice or for competition in international sports and athletic events. (MCA 15-6-201). Freeport merchandise and business inventories. (MCA 15-6-202). Veterans' clubhouse and incompetent veterans' trust. (MCA 15-6-203). Moneys and credits. (MCA 15-6-204). State water conservation projects. (MCA 15-6-205). Certain irrigation and drainage facilities. (MCA 15-6-206). Certain agricultural products and low value farm buildings, implements and machinery. (MCA 15-6-207). Certain mineral production. (MCA 15-6-208). Building and appurtenant land, not exceeding three acres owned by nonprofit community services organization. (MCA 15-6-209). Certain disabled or deceased veterans' residences and appurtenant lands, not to exceed five acres. (MCA 15-6-211). Down-hole equipment in oil and gas wells. (MCA 15-6-213). All property used exclusively for filming motion pictures and television commercials brought into state for 180 consecutive days or less. (MCA 15-6-215). Improvements to commercial buildings made to assist disabled individuals. (MCA 15-6-216). Licensed vehicle of out of state healthcare professional serving underserved area of Montana. (MCA 15-6-217). Intangible personal property. (MCA 15-6-218). Following are exempt: (a) Harness, saddlery, and other tack equipment; (b) up to $15,000 of hand-held tools used to (i) construct, repair, and maintain real property or (ii) repair and maintain machinery, equipment, appliances and other personal property; (c) all household goods and furniture; (d) bicycle used for personal transportation; (e) personal property for rent or lease in ordinary course of business if (i) less than $15,000, (ii) owned by business with primary income from rental and lease of personal property and no one customer generates greater than 10% of annual income, and (iii) lease term of generally hourly, daily or weekly; (f) certain space vehicles and related machinery, fixtures, equipment and tools; (g) title plant owned by title insurer or title insurance producer. (MCA 15-6-219). Machinery and equipment used in either canola seed oil processing facility or malting barley facility, personal property used by industrial dairy, industrial milk processor and dairy livestock used by industrial dairy, and all manufacturing machinery, fixtures, equipment and tools used to produce ethanol from grain for period beginning during construction of ethanol facility, and for ten years thereafter. (MCA 15-6-220). Residential rental property owned by nonprofit entity to provide low income housing. (MCA 15-6-221). Certain percentage of market value of residential and commercial property. (MCA 15-6-222). Timber. (MCA 15-6-223). Certain nonfossil energy generation investments. (MCA 15-6-224). Machinery and equipment used in qualifying generation facilities. (MCA 15-6-225). Certain railroad buildings and appurtenant land leased to nonprofit for less than $100 per year. (MCA 15-6-227). Property subject to registration fee. (MCA 15-6-228). Certain land adjacent to transmission line right-of-way easement. (MCA 15-6-229). Any Class 8 property of person or business with market value of $20,000 or less. (MCA 15-6-138). Portions of unused commercial real property improvements can be exempted by local governments.

Classification of Property and Basis of Assessment.

Nature of property included in each class and taxable percentages are as follows: Class 1, 100% of annual net proceeds of mines and mining claims, except bentonite, coal and metal mines. (MCA 15-6-131). Class 2, 3% of annual gross proceeds of metal mines. (MCA 15-6-132). Class 3, agricultural land defined within MCA 15-7-202 and certain nonproductive patented mining claims taxed at same rate as Class 4 property; nonqualified agricultural land is valued by multiplying value of such land by seven times taxable percentage for agricultural land. (MCA 15-6-133). Class 4, 3.22%—2005, 3.14%—2006, 3.07%—2007, 3.01%—2008 and thereafter of all land and improvements except those specifically included in another class, graduated schedule of taxation on first $100,000 of market value of any improvement on real property and appurtenant land not exceeding five acres owned or under contract for deed and actually occupied at least seven months of year as primary residential dwelling of any person whose total income from all sources including otherwise tax-exempt income of all types, but excluding social security income paid directly to nursing home, is not more than $15,000 for single person or $20,000 for married couple. Golf courses, including land and improvements, taxed at ½ taxable percentage rate of other Class 4 property. (MCA 15-6-134). Class 5, 3% of market value of all property used and owned by rural cooperative, electrical and telephone associations, air and water pollution control equipment, new industrial property, property used primarily for production of ethanol-blended gasoline (during construction and first three years of operation), property owned by research and development firm and used for that purpose, machinery and equipment used in electrolytic reduction facilities and all property used and owned by those engaged in providing telecommunication services exclusively to rural areas. (MCA 15-6-135). Class 7, 8% of market value of property owned by cooperative rural electrical and cooperative rural telephone associations serving less than 95% of electrical consumers or telephone users within incorporated limits of cities or towns; electric transformers, meters, electric light and power substation machinery, natural gas measuring and regulating station equipment owned by centrally assessed public utilities; machinery used to repair and maintain property excluding wind generation facilities. (MCA 15-6-137). Class 8, 3% of market value, but if taxpayer owns aggregate of $20,000 or less of Class 8 property, then such property is exempt from taxation.

(MCA 15-6-138). Class 9, 12% of market value of centrally assessed allocations of electric power company or centrally assessed allocations of electric power company that owns or operates transmission or distribution facilities, including centrally assessed natural gas companies and other centrally assessed companies, with exception of select electrical generation facilities, wind generation facilities, carbon dioxide pipelines and property, carbon dioxide sequestration equipment, equipment used in closed-loop enhanced oil recovery operations, high-voltage direct-current converter stations, biodiesel production facilities, biomass gasification facilities, coal gasification facilities, geothermal facilities, ethanol production facilities, integrated gasification combined cycle facilities, renewable energy manufacturing facilities, natural gas combined facilities, electric transmission lines, and associated equipment. (MCA 15-6-141). Class 10, forest lands, are taxed at rate of .79% of forest productivity value. Rate to be reduced .11% each year until property is taxed at .35% of forest productivity value. (MCA 15-6-143). Class 12, certain railroad and airline property, is taxed at rate of 12% or percentage determined by formula, whichever is less. (MCA 15-6-145). Class 13, 6% of market value of certain electrical generation facilities and centrally assessed telecommunications services companies. (MCA 15-6-156). Class 14, 3% of market value of wind generation facilities. (MCA 15-6-157). Class 15, 3% of market value of certain carbon dioxide pipelines, liquid pipelines, carbon sequestration equipment, closed-loop enhanced oil recovery equipment and property of pipeline. (MCA 15-6-158). Class 16, 2.25% of market value of certain high-voltage direct current converter stations. (MCA 15-6-159).

Assessment.

Department of Revenue has full charge of assessing all property subject to tax. (MCA 15-8-101). Department must revalue Class 3, 4 and 10 property by Jan. 1, 2009, effective for Jan. 1, 2009, and each succeeding six years. Valuation changes phased in for each year until next reappraisal. If percentage change not established, then percentage phase in is 16.66%. All other property revalued annually. (MCA 15-7-111). With certain exceptions, Department assesses property between Jan. 1 and first Mon. in Aug. (MCA 15-8-201).

Review.

Assessments may be reviewed by county tax appeal board, consisting of three members appointed by county commissioners, which has power to reassess. (MCA 15-15-101 to 104). Appeal lies to State Tax Appeal Board consisting of three members appointed by governor. (MCA 15-2-101 to 306). Judicial review provided. (MCA 15-2-303).

Lien.

Taxes on real property or on improvements to real property made by someone other than owner are considered liens upon real property or improvements. These liens attach on Jan. 1 of each year. Taxes are lien on real estate as of Jan. 1 each year. (MCA 15-16-403). Personal property tax is lien on property taxed and also first lien on real estate for taxable value up to $10,000. Where taxes of personal property based on taxable value exceeds $10,000, personal property tax is first lien on real estate, unless owner of mortgage or other lien files notice with county assessor and county treasurer before tax lien attaches. Where owner has failed to pay taxes on real estate and personal property for one or more years, owner of mortgage on real estate may have property separately assessed and personal property tax does not become lien on real property. (MCA 15-16-402). Personal property taxes which are not lien on real property and other contractual obligations cancelled after five years payment delinquency. Real property taxes for property sold at tax lien sale cancelled after ten years payment delinquency. (MCA 15-16-701 to 704).

Collection.

Personal property taxes may be collected by suit (MCA 15-16-503) or by sale (MCA 15-16-119). County Treasurer in charge of collection. (MCA 15-16-119).

Payment.

One-half of tax and special improvement assessments are payable on or before Nov. 30th, and other half on or before May 31st, except that low-income property tax assistance recipients may pay 20 days later without penalty. (MCA 15-16-102-103). County Treasurer may accept partial payment of centrally assessed property taxes. (MCA 15-16-102).

Sale.

On or before last Mon. of each June, and for three consecutive weeks, County Treasurer must publish notice of time, date and place of sale of all property for which there is tax lien sale, together with statement of amount due. (MCA 15-17-122). If no person pays delinquent taxes, including penalties, interest, and costs, on first day of tax sale, county is considered to be purchaser. (MCA 15-17-214).

Warrant of Distraint.

Department of Revenue may issue warrant for distraint ordering sheriff to levy on and sell real and personal property of delinquent taxpayers, for tax administered and collected by Department that is unpaid 30 days after due; 30 days notice required before issuance of warrant, unless emergency exists which would allow Department to proceed without waiting period. Procedures for review of tax liability (except inheritance, estate, or property tax liability) prior to execution of warrant filed with District Court (MCA 15-1-701 to MCA 15-1-705); Department must provide notice of such right to taxpayer; and review process and any appeals must be completed prior to execution (MCA 15-1-704). Review process can be eschewed in emergency, but post-execution hearing must then be provided. Execution on warrant same as execution on any judgment. Warrant for distraint not exclusive remedy. (MCA 15-1-701 to 709).

Redemption.

Redemption of property tax lien acquired at tax lien sale or otherwise may be made by owner, or any person having interest in or lien on property, within 36 months from date of purchase or within 60 days following giving of required notice, whichever is later. (MCA 15-18-111 and MCA 15-18-212). Time for redeeming property subdivided as residential or commercial lot upon which special improvement district or rural special improvement district assessments are delinquent is 24 months or within 60 days following giving of required notice. (MCA 15-18-111).

Real Estate Conveyance Tax.

None.

22.17 SALES AND USE TAXES:

Sales Tax.

No general sales tax. Tax of $1.70 per package of 20 cigarettes, or fraction thereof, sold or possessed in Montana (MCA 16-11-111) and 4% statewide bed tax on users of hotel, motel, and campground facilities (MCA 15-65-111). Defined resort area may also establish resort tax on defined luxury items, hotel services, restaurants, food store, bar, and lounge goods and services. (MCA 7-6-1501 to 1509).

Use Tax.

None.

22.18 STAMP AND SEAL TAXES:

Stamp Tax.

No requirement of documentary stamps on corporate stock or other instruments.

22.18A TAX LIENS:

Uniform Federal Lien Registration Act enacted. (MCA 71-3-201 to 207).

22.18B TRANSPORTATION TAXES:

Passenger Tramway Tax.

Repealed in 1997. (MCA 23-2-715).

23 TRANSPORTATION

23.01 MOTOR VEHICLES:

Following uniform acts adopted: Uniform Accident Reporting Act (MCA 61-7-101 to 118); Motor Vehicle Insurance Responsibility and Verification Act (MCA 61-1-101 to 151). General supervision exercised by Registrar of Motor Vehicles, Deer Lodge, Montana 59722.

Vehicle registration required annually unless vehicle is subject to permanent registration. (MCA 61-3-321 and MCA 61-3-562). Motor vehicle is propelled by its own power and designed or used to transport persons or property upon highways of state. (MCA 61-1-101[40]).

Operator's License.

Drivers licenses are required. (MCA 61-5-102). Separate motorcycle endorsement is required to operate motorcycle. (MCA 61-5-102). Separate commercial vehicle endorsement is required to operate commercial vehicle. (MCA 61-5-102). Licenses expire on anniversary of date of birth of licensee eight years or less after date of issue until age 75, after that, every four years. (MCA 61-5-111(4). License issued to person who is under 21 years of age expires on licensee's 21st birthday. (MCA 61-5-111). Nonresident must be licensed within 60 days of residence in state. (MCA 61-5-103). License may not be issued to any person under 16 unless (1) at least 15, has passed approved driver education course; or (2) at least 13 and can demonstrate individual hardship entitling individual to restricted license. (MCA 61-5-105). Member of Armed Forces exempt while driving U.S. government vehicle on official business. (MCA 61-5-104)

Operation or actual physical control prohibited by persons under influence of alcohol or other drugs. (MCA 61-8-401). "Under the influence" means that as result of taking into body alcohol, drugs, or any combination of alcohol or drugs, person's ability to safely operate motor vehicle has been diminished. (MCA 61-8-401). Every operator deemed to have given consent to chemical test for purpose of determining alcoholic content of blood or presence of drugs. (MCA 61-8-402). Inference of sobriety if 0.04 or less alcohol concentration. No inference if over 0.04 but less than 0.08 alcohol concentration. Rebuttable inference of intoxication if 0.08 alcohol concentration. (MCA 61-8-401). It is unlawful for commercial vehicle to be operated by person with alcohol concentration of .04 or more. (MCA 61-8-406). Absolute liability as provided in MCA 45-2-104 will be imposed for violation of this section. (MCA 61-8-406).

Titles.

Motor vehicle owner must file application for registration with county treasurer in county of residence. (MCA 61-3-303). Division of Motor Vehicles, Department of Law Enforcement and Public Safety will then issue certificate of registration and certificate of ownership to owner. (MCA 61-3-322 and MCA 61-3-202).

Sales.

Dealer transfers title to used vehicle by forwarding certificates of title and application for certificate of title, and copy of temporary registration permit to county treasurer and new vehicle by forwarding copy of temporary registration permit, application for certificate of title, and manufacturer’s certificate. (MCA 61-4-112; MCA 61-4-111).

Motor vehicle manufacturer must make repairs necessary to bring motor vehicle into compliance with express warranties. If repairs unsuccessful, manufacturer must provide for replacement or refund. (MCA 61-4-503).

Identification Marks.

It is crime to sell or offer for sale, vehicle with original vehicle identification number altered or removed. This is punishable by fine of $200 to $500 and jail term of 30 to 180 days. (MCA 61-3-604).

Odometer.

Seller of vehicle must certify that odometer reading reflects actual miles driven or that odometer reading is not correct (MCA 61-3-206), unless exempt from such by MCA 61-3-203(3).

Size and Weight Limits, Enforcement and Penalties.

Regulated by MCA 61-10-101 to 148.

Equipment Required.

Regulated by MCA 61-9-101 to MCA 61-9-520.

Lights Required.

Regulated by MCA 61-9-201 to MCA 61-9-229.

Inspection.

Various officials may require submission to inspection, where reasonable cause to believe that vehicle is unsafe exists. (MCA 61-9-501 and MCA 61-9-503).

Seat Belts Required.

No driver may operate motor vehicle upon highway of state of Montana unless each occupant of designated seating position is wearing properly adjusted and fastened seatbelt, subject to exceptions. (MCA 61-13-103). Violation does not affect driving record but subjects driver to $20 fine. (MCA 61-13-104). Evidence of compliance or failure to comply is not admissible in civil actions. Failure to comply does not constitute negligence. (MCA 61-13-106).

Accidents.

Driver must stop, render assistance, and give name, address and license number to person injured or other occupant or owner of property damaged. (MCA 61-7-105). Accident involving death, personal injury or property damage to any one person to apparent extent of $500 or more must be reported immediately to police chief, sheriff or highway patrol. (MCA 61-7-108). Unless accident was investigated and reported by law enforcement officer, written report of accident must be made within ten days if accident involved personal injury or death or where damage to property of any one person exceeds $1,000. (MCA 61-7-109). All accident reports are confidential, however, parties to accident or their representatives may examine reports. (MCA 61-

7-114).

Owner Liable.

Owner of vehicle is liable for damages to persons or property done by any person in his employment as driver. (MCA 61-6-201).

Liability for Operation by Minor.

Parent, custodian, guardian, or other person signing application of minor for driver's license liable for any negligence or wilful misconduct of minor, unless motor vehicle liability policy, as prescribed in Tit. 61, c. 6, is in effect. (MCA 61-5-108).

Offenses Committed by Persons Under 18.

Person under 18 convicted of offense under Title 61 shall not be punished by incarceration. Can be fined in same amount as if offense was committed by adult; revocation or suspension of license; and/or vehicle impoundment. (MCA 61-8-723).

Proof of financial responsibility required under Motor-Vehicle Insurance Responsibility and Verification Act. (MCA 61-1-101 to MCA 61-1-151).

Department, on receipt from clerk of court of certified copy of judgment, must suspend license, and nonresidence operating privilege of person against whom judgment rendered, unless judgment creditor consents in writing that judgment debtor be allowed license, or nonresidence operating privilege, in which event Department may allow same until consent is revoked. (MCA 61-6-122). Suspension continues until judgment is stayed, satisfied in full or in part as provided or for six years after entry of judgment. (MCA 61-6-123).

If Division revokes operator's license such license shall remain revoked until proof of financial responsibility is given. Such proof is also required for renewal of nonresidence operating privilege. (MCA 61-6-131).

A nonresident operator of motor vehicle not registered in Montana, may give proof of financial responsibility by filing with Division of Motor Vehicles a written certificate of an insurance carrier authorized to transact business in state in which motor vehicle is registered, provided insurance carrier executes a power of attorney authorizing Division to accept service of process in any action arising out of motor vehicle accident in this state and agrees in writing that policy shall be deemed to conform with laws of this state relating to terms of motor vehicle liability policies issued herein. (MCA 61-6-134).

Insurance.

Motor vehicle liability insurance is compulsory unless exemption applies or certificate of self-insurance is issued. (MCA 61-6-301). Proof of compliance with this requirement must be carried in motor vehicles. (MCA 61-6-302). Exemptions to MCA 61-6-301 include government vehicles, vehicles for which adequate bond is posted, equipment driven only incidentally on highways, motorcycles, human or animal-powered vehicles and vehicle owned by nonresident if it is currently registered in owner's resident jurisdiction and nonresident is in compliance with motor vehicle liability insurance requirements, if any, of that jurisdiction. (MCA 61-6-303). Penalties and suspension of vehicle registration and license plates are provided for failing to comply with insurance requirements. (MCA 61-6-304).

Out-of-State Vehicle.

Vehicle operated for profit or used by owner while engaged in gainful occupation, except vehicles part of interstate fleet otherwise registered and licensed in state, must secure special registration certificate and pay regular license fee. (MCA 61-3-701).

Nonresident licensed operator is not required to obtain local operator's license. (MCA 61-5-104[2]).

Action against nonresident, arising out of highway accident, may be commenced by service on Secretary of State, who must mail copy of process to defendant and must notify defendant by registered or certified mail marked "Deliver to Addressee Only" and "Return Receipt Requested." The return receipt must be received by the Secretary of State. Defendant may also be served personally outside of state. (MCA 25-3-601, 602; Rule 4D[6]).

Direct action against insurer by injured person not allowed. (98 Mont. 31, 37 P.2d 565), except as provided by MCA 33-18-242.

Motor Vehicle Carriers.

Regulated by Public Service Commission. Must have certificate of public convenience and necessity. Act does not apply, among other things, to vehicles used to transport employees engaged exclusively in construction or maintenance of highways or in logging or mining operations; or to operation of municipal or district transportation system. (MCA 69-12-102). Motor Carriers Act applies to interstate and international carriers as far as permitted by Federal Constitution, treaties and statutes, provided no showing of public convenience and necessity is required except as to intrastate transportation. (MCA 69-12-101 to 423). Authorizes reasonable inspections. (MCA 69-12-203). Special fuel users must display original or reproduced copy of their permit in vehicle except in certain circumstances. (MCA 15-70-302).

Motor Vehicle Taxes.

Registration fees imposed on all motor vehicles, trailers, semi-trailers, pole trailers, snowmobiles and water crafts. (MCA 61-3-321). Additional fees imposed upon trucks, truck-tractors, trailers and semi-trailers, based upon maximum gross loaded weight, (MCA 61-10-201) with specified exemptions (MCA 61-10-214) upon motor trucks and trailers from other states operated in Montana upon itinerant basis (MCA 61-10-211); and upon new passenger motor vehicles, not otherwise assessed (MCA 61-4-102).

Multistate Highway Transportation Agreement adopted. (MCA 61-10-1101).

Gasoline Tax.

See category 22 Taxation, topic 22.08 Gasoline and Special Fuels Taxes. Lemon Law. (Title 61, c. 4, Part 5).

23.02 RAILROADS:

See category 3 Business Regulation and Commerce, topic 3.08 Carriers.

1
NEBRASKA LAW DIGEST

—Scope —

Revised for 2010 edition by

FRASER STRYKER PC LLO of Omaha.

(References are to sections of Revised Statutes of Nebraska, 1943, as reissued, 2001, 2003, 2004, 2007 and 2008 Supplements, Uniform Commercial Code volume and Laws of Nebraska, 100th Legislature Second Session. Parallel citations to the North Western Reporter begin with 9 Neb. and 1 Neb. Unof. Abbreviation used are: Fed. R. Civ. P.—Federal Rules of Civil Procedure.)

Note: This revision incorporates 2009 Acts passed by 101st Legislature 1st Session and approved by Governor through May 29, 2009. Regular sessions of Legislature are held each year commencing on 1st Wed. after 1st Mon. in Jan.

1 INTRODUCTION

1.01 GOVERNMENT AND LEGAL SYSTEM:

The State of Nebraska is a constituent state of the United States of America. For further discussion of the U.S. federal system, see Introduction to the Federal Government of the United States at the beginning of this volume. A great many laws are promulgated by the federal government of the United States and are not reflected in the topics below. See the Introduction to this volume for references to the federal law topics covered.

Like all but one of the United States, Nebraska has a common law legal system, with roots in English common law. For information on the courts and legislature of Nebraska, see category Courts and Legislature.

1.02 [RESERVED]

1.03 HOLIDAYS:

Legal holidays are: Jan. 1; 3d Mon. in Jan.; 3d Mon. in Feb.; last Fri. in Apr.; last Mon. in May; July 4; 1st Mon. in Sept.; 2d Mon. in Oct.; Nov. 11 and federally recognized holiday therefor, or either of them; 4th Thurs. and Fri. in Nov.; Dec. 25. (Neb. Rev. Stat. 62-301[1]). Bank may close on Sat. and Sat. is then treated as holiday for bank transactions. (Neb. Rev. Stat. 62-301.01).

Holiday Falling on Sun.

Next succeeding business day is holiday. (Neb. Rev. Stat. 62-301[1]).

Holiday Falling on Sat.

All courts and their offices observe preceding Fri. as holiday. (Neb. Rev. Stat. 25-2221).

Federal Holiday.

If date different (except Vet. Day), Federal holiday observed. (Neb. Rev. Stat. 62-301[1]).

Legality of Transactions on Holiday.

Transactions valid. (See Neb. Rev. Stat. 62-301.01.)

1.04 OFFICE HOURS AND TIME ZONE:

Nebraska is in the Central (GMT -06:00) time zone. Office hours are generally from 9 a.m. to 5 p.m.

2 BUSINESS ORGANIZATIONS

2.01 AGENCY:

Rules of common law apply in absence of statutory provisions.

2.02 ASSOCIATIONS:

No statutory provision for formation of unincorporated associations. Provisions govern and exist for creation of special types of associations such as: Nebraska Limited Cooperative Associations (Neb. Rev. Stat. 21-290 to -29,134); Condominium Associations governed by Condominium Property Act (Neb. Rev. Stat. 79-801 to -823); Nonstock Cooperative Association governed by Nonstock Cooperative Marketing Act (Neb. Rev. Stat. 21-1401 to -1414); Nebraska Association of Resources District governed by Interlocal Cooperation Act (Neb. Rev. Stat. 13-801 to -827); Nebraska Life and Health Insurance Guaranty Association governed by Nebraska Life and Health Insurance Guaranty Association Act (Neb. Rev. Stat. 44-2701 to -2719.02); Nebraska Property and Liability Insurance Guaranty Association governed by Nebraska Property and Liability Insurance Guaranty Association Act (Neb. Rev. Stat. 44-2401 to -2418); Capital Stock Savings and Loan Association governed by Department of Banking and Finance (Neb. Rev. Stat. 8-356 to -384); Fraternal Benefit Society governed by Department of Insurance (Neb. Rev. Stat. 44-1072 to -10,109).

Rights and Powers.

Rights incident to membership in voluntary, unincorporated association do not flow from common law, but from organization's agreement. Power over membership is absolute, except when civil or property rights invaded. (9 Neb. App. 782, 619 N.W. 2d 604).

Actions.

Unincorporated associations may sue and be sued by such usual name as such association may have assumed or be known by. (Neb. Rev. Stat. 25-313). Courts do not generally intervene in affairs of voluntary association, but action may be brought for breach of contract. (218 Neb. 241, 353 N.W. 2d 11).

Professional Associations.

See topic Corporations, subhead Professional Corporations.

2.03 CORPORATIONS:

Note: Model Business Corporation Act, prepared by Committee on Corporate Laws (Section of Corporation, Banking and Business Law of American Bar Association), has been adopted, with variances, effective 1963, and is known as ``Business Corporation Act.'' For text of Model Act, see Uniform and Model Acts section. Law as digested below relates only to variances of Business Corporation Act from Model Act as revised through 1993, and contained in Uniform and Model Acts section. In addition none of subsequent amendments to Model Act have been adopted except where indicated. Most provisions of Revised 1993 Act adopted, operative on Jan. 1, 1996.

Sections Not Adopted.—§ 2(o); § 54(j); § 69; § 80(c); § 82(a)(6); §§ 94(a), (d) and (e); § 108(a); §§ 110(f thru k); § 116; §§ 119(f thru h); § 121(a); § 130; § 131; § 136; § 137; § 138; § 140; § 146.

General Supervision.

Secretary of State, State Capitol Building, Lincoln. All questions and filings should be addressed to: John A. Gale, Secretary of State, Corporations Division, 1301 State Capitol Building, P.O. Box 94608, Lincoln, NE 68509, (402) 471-4079.

Purposes.

With some exceptions, corporations may be organized under this act for any lawful purpose. (Neb. Rev. Stat. 21-2018). Different manner of organization prescribed for corporations for particular purposes. (c. 21, arts. 6, 13, 14, 17, 19, 22).

Name.

Must not be same as or deceptively similar to other corporation or trade name of any domestic corporation or foreign corporation authorized to do business. Shall contain word corporation, company, incorporation, or limited, or abbreviation of such words except corporation organized to conduct banking business. (Neb. Rev. Stat. 21-2028). Affected corporation may acquiesce in use of name similar to its own by another corporation through written consent. (Neb. Rev. Stat. 21-2028). Reserve available name by letter and $25 fee. (Neb. Rev. Stat. 21-2005). Suggest call to Secretary of State.

Term of Corporate Existence.

Unless its articles of incorporation provide otherwise, every corporation shall have perpetual duration and succession in its corporate name. (Neb. Rev. Stat. 21-2025).

Incorporators.

One or more natural persons of age of majority may act as incorporators, who have direction of company until directors are elected. (Neb. Rev. Stat. 21-2017).

Certificate or Articles of Incorporation.

Articles must set forth name of corporation, and shall contain word ``corporation'', ``incorporated'', ``company'', or ``limited'', or abbreviation ``corp.'', ``inc.'', ``co.'', or ``ltd.'', or words or abbreviations of like import in another language, unless corporation is bank; number of shares corporation is authorized to issue and, if such shares are to consist of one class only, par value of each of such shares or, if such shares are to be divided into classes, number of shares of each class and statement of par value of shares of each such class; street address of corporation's initial registered office and name of its initial registered agent at that office. Post office box number may be provided in addition to street address; name and street address of each incorporator; and any provision limiting or eliminating requirement to hold annual meeting of shareholders if corporation is registered or intends to register as investment company under Federal Investment Company Act of 1940. Provision shall not be effective if such corporation does not become or ceases to be so registered. (Neb. Rev. Stat. 21-2018).

Filing and Recording of Articles.

Original and duplicate copy of articles, signed by all incorporators to be filed with Secretary of State. A duplicate copy, with Secretary of State stamp, is returned to incorporators and is to be recorded with clerk of county where registered office of corporation is located. Corporate existence begins upon filing and recording with Secretary of State. (Neb. Rev. Stat. 21-2019). Articles need not be notarized or acknowledged.

Incorporation Tax or Fee.

Fees for incorporation are: (i) If capital stock is $10,000 or less, fee shall be $60; (ii) if capital stock is more than $10,000 but does not exceed $25,000, fee shall be $100; (iii) if capital stock is more than $25,000 but does not exceed $50,000, fee shall be $150; (iv) if capital stock is more than $50,000 but does not exceed $75,000, fee shall be $225; (v) if capital stock is more than $75,000 but does not exceed $100,000, fee shall be $300; and (vi) if capital stock is more than $100,000, fee shall be $300, plus $3 additional for each $1,000 in excess of $100,000. (Neb. Rev. Stat. 21-2005).

License To Do Business.

Anyone may apply to Secretary of State to furnish certificate of existence for domestic corporation or certificate of authorization for foreign corporation. Certificate will show: (i) Domestic corporation is duly incorporated under law of this state, date of its incorporation, and period of its duration if less than perpetual or (ii) foreign corporation is authorized to transact business in this state. (Neb. Rev. Stat. 21-2011).

Organization.

After incorporation, initial directors must hold organizational meeting at call of majority of directors to complete organization of corporation by appointing officers, adopting bylaws, and carrying on any other business brought before meeting. (Neb. Rev. Stat. 21-2021).

Paid in Capital Requirements.

No required minimum. (Neb. Rev. Stat. 21-2018).

Amendment of Articles of Incorporation.

Purposes, procedure and class voting generally same as Model Act, except unanimous consent of directors and shareholders obviates need for meeting or vote. (Neb. Rev. Stat. 21-20,118). Amendment must be approved by holders of two-thirds outstanding stock of each class thereof. (Neb. Rev. Stat. 21-20,118). If amendment adversely affects shareholder's rights he can dissent. (Neb. Rev. Stat. 21-20,138). When amendment would change existing priority rights or provisions of outstanding class of shares, adversely affected shareholder may enjoin adoption on ground of fraud or unfairness unless proponents show amendment equitable. Incorporators may file amendments before acceptance of any subscription to stock. (Neb. Rev. Stat. 21-20,120).

Filing of Amendment.—Amended articles effective upon filing and recording original with Secretary of State. (Neb. Rev. Stat. 21-20,121).

Restatement of Articles.—Upon directors' resolution, filing with Secretary of State and payment of required fees, restated articles become effective. Secretary of State required to find restated articles conform to law. Duplicate copy of restated articles filed in county clerk's office of county where registered office is located. (Neb. Rev. Stat. 21-20,122).

Reorganization.

Generally same as Model Act. In addition: If plan or reorganization has been approved by court decree articles of amendment shall be executed and acknowledged by person appointed by court, and include name of corporation, amendments approved by court, date of decree, title of court proceedings, and statement that such decree was entered by court having jurisdiction over reorganization pursuant to federal law. (Neb. Rev. Stat. 21-20,123).

Increase or Decrease of Authorized Capital Stock.

Corporation's acquisition of own shares. (1) Corporation may acquire its own shares and shares so acquired shall constitute authorized but unissued shares. (2) If articles of incorporation prohibit reissue of acquired shares, number of authorized shares shall be reduced by number of shares acquired, effective upon amendment of articles of incorporation. (3) Board of directors may adopt articles of amendment under this section without shareholder action and deliver them to Secretary of State for filing. Articles shall set forth: (a) Name of corporation; (b) reduction in number of authorized shares, itemized by class and series; and (c) total number of authorized shares, itemized by class and series, remaining after reduction of shares. (Neb. Rev. Stat. 21-2049).

Bylaws.

Initial bylaws to be adopted by incorporators or board of directors. (Neb. Rev. Stat. 21-

2022). Corporation's board of directors may amend or repeal corporation's bylaws unless articles of incorporation Business Corporation Act reserves this power exclusively to shareholders; or shareholders in amending or repealing particular bylaw provide expressly that board of directors may not amend or repeal that bylaw. (Neb. Rev. Stat. 21-2025). Corporation's shareholders may amend or repeal bylaws even though bylaws may also be amended or repealed by board of directors. (Neb. Rev. Stat. 21-2025).

Stock.

Generally, same as Model Act. Sept. 1977 amendment to § 23 of Model Act adopted. (Neb. Rev. Stat. 21-2022). All stock except preferred, to be of equal par value. (Neb. Rev. Stat. 21-2035). Articles may limit voting rights for any class of stock. Voting stock shareholders have right to vote for directors. (Neb. Rev. Stat. 21-2059). One vote is allowed for each share of stock. Stockholder may vote in person or by proxy and at election for directors may cumulate his vote. (Neb. Rev. Stat. 21-2066). Cooperative and mutual companies may limit voting. (Const. Art. XII, § 1). Shares not preferred as to dividends or liquidation distributions not to be designated preferred. Shares having such preference not to be designated as common. (Neb. Rev. Stat. 21-2066).

Stock Certificates.

Shares may but shall not be required to be represented by certificates. Unless Business Corporation Act or another law expressly provides otherwise, rights and obligations of shareholders shall be identical whether or not their shares are represented by certificates. At minimum, each share certificate shall state on its face: (a) Name of issuing corporation and that it is organized under laws of this state; (b) name of person to whom issued; and (c) number and class of shares and designation of series, if any, certificate represents. (1) If issuing corporation is authorized to issue different classes of shares or different series within class, designations, relative rights, preferences, and limitations applicable to each class, variations in rights, preferences, and limitations determined for each series, and authority of board of directors to determine variations for future series, shall be summarized on front or back of each certificate. Alternatively, each certificate may state conspicuously on its front or back that corporation will furnish shareholder this information on request in writing and without charge. (2) Each share certificate (a) shall be signed, either manually or in facsimile, by two officers designated in bylaws or by board of directors and (b) may bear corporate seal or its facsimile. (3) If person who signed share certificate no longer holds office when certificate is issued, certificate is nevertheless valid. (Neb. Rev. Stat. 21-2044).

Issuance of Stock.

Board of directors may authorize shares to be issued for consideration consisting of any tangible or intangible property or benefit to corporation, including cash, promissory notes, services performed, contracts for services to be performed, or other securities of corporation. Before corporation issues shares, board of directors shall determine that consideration received or to be received for shares to be issued is adequate. Such determination by board of directors shall be conclusive insofar as adequacy of consideration for issuance of shares relates to whether shares are validly issued, fully paid, and nonassessable. (Neb. Rev. Stat. 21-2040). Labor or property used to pay for stock may not be taken at greater value than actual value at time said labor was done or property delivered. (Neb. Rev. Stat. 21-2040). All fictitious increases in stock shall be void. (Neb. Rev. Stat. 21-2040).

Transfer of Stock.

Articles of incorporation, bylaws, agreement among shareholders, or agreement between shareholders and corporation may impose restrictions on transfer or registration of transfer of shares of corporation. Restriction shall not affect shares issued before restriction was adopted unless holders of shares are parties to restriction agreement or voted in favor of restriction. (Neb. Rev. Stat. 21-2046).

Uniform Simplification of Fiduciary Security Transfers Act.

Not adopted.

Stock Transfer Tax.

None.

Amount of Stated Capital.

Directors may increase stated capital by directing transfer of surplus. Directors may direct that transferred surplus is stated capital in respect of any designated class of shares.

Stockholders.

Shareholder obligation to corporation with respect to shares limited to payment of full consideration for shares. (Neb. Rev. Stat. 21-2041).

Preemptive Rights.

None, unless in articles of incorporation. (Neb. Rev. Stat. 21-2048).

Stockholders' Liabilities.

Purchaser from corporation of its own shares must not be liable to corporation or its creditors with respect to shares except to pay consideration for which shares were authorized to be issued or specified in subscription agreement. Shareholder not personally liable for acts or debts of corporation may become personally liable by reason of own acts or conduct. (Neb. Rev. Stat. 21-2041).

Stockholders' Meetings.

Generally same as Model Act. (Neb. Rev. Stat. 21-2051).

Action Without Meeting.

Unanimous, signed consent of shareholders has same effect as unanimous vote. (Neb. Rev. Stat. 21-2054).

Voting Trusts.

One or more shareholders may create voting trust conferring on trustee right to vote or otherwise act for them by signing agreement setting out provisions of trust, which may include anything consistent with its purpose, and transferring their shares to trustee. When voting trust agreement is signed, trustee shall prepare list of names and addresses of all owners of beneficial interests in trust, together with number and class of shares each transferred to trust, and deliver copies of list and agreement to corporation's principal office. Voting trust is not valid more than ten years after its effective date unless extended properly. (Neb. Rev. Stat. 21-2067).

Voting List.

Generally same as Model Act (Neb. Rev. Stat. 21-2058).

Directors.

Generally same as Model Act. Number of directors shall be fixed by by-laws. Articles of incorporation may provide for staggering terms of directors by dividing total number of directors into two or three groups. (Neb. Rev. Stat. 21-2080, 21-2083).

Removal.

At meeting of shareholders called for such purpose, majority of shareholders may remove any director with or without cause unless articles of incorporation provide otherwise. (Neb. Rev. Stat. 21-2085).

Vacancies.

Unless articles of incorporation provide otherwise, vacancy may be filled by: (a) shareholders; (b) board of directors; (c) directors remaining in office if there is less than quorum. (Neb. Rev. Stat. 21-2087).

Directors' Meetings.

Generally same as Model Act. (Neb. Rev. Stat. 21-2089).

Action without meeting permitted upon unanimous, written consent of directors. (Neb. Rev. Stat. 21-2090).

Board or committee meetings may be by means of conference telephone or similar communications equipment where all directors may participate and hear each other simultaneously during meeting. (Neb. Rev. Stat. 21-2089).

Powers and Duties of Directors.

All corporate powers shall be exercised by, or under authority of, and business and affairs of corporation managed under direction of, its board of directors, subject to any limitation set forth in articles of incorporation or in agreement authorized under § 21-2069, such as shareholder agreement that eliminates board of directors or restricts discretion or powers of board of directors. (Neb. Rev. Stat. 21-2078).

Director's Dissent.

Generally same as Model Act. (Neb. Rev. Stat. 21-2093).

Directors' Liabilities.

Generally same as Model Act. Director must exercise such care as ordinary prudent person in like position under similar circumstances. Directors voting for or assenting to loans to officer or director or loans secured by shares of corporation (except to prevent loss upon debt previously contracted) are jointly and severally liable for amount loaned until repayment. Officers are elected and removed as in Model Act. Directors present at meeting where action taken presumed to have assented to same unless written dissent filed or entered in minutes. Articles of incorporation may limit liability of outside director for breach of duty for certain acts. (Neb. Rev. Stat. 21-2018 and -2095).

Director's Liability, Nonprofit Corporations.

Noncompensated directors immune from civil liability for acts within scope of official capacity if acts in good faith, as prudent person, and in reasonable belief of best interest of corporation. (Neb. Rev. Stat. 21-1986).

Registered Office and Registered Agent.

Agent may be either resident individual or domestic or foreign corporation. (Neb. Rev. Stat. 21-2031). Street address of its initial registered office and name and street address of its initial registered agent must be identical. (Neb. Rev. Stat. 21-2031). Must use Secretary of State form for statement of change of agent of office. (Neb. Rev. Stat. 21-2032). Duplicate of statement bearing Secretary of State filing date must be filed with clerk of county where corporation's registered office located. (Neb. Rev. Stat. 21-2031). If statement changes location of registered office to another county, statement should be filed in both counties. (Neb. Rev. Stat. 21-2034). *Caveat:* Failure to comply with Neb. Rev. Stat. 21-2034 can result in dissolution of corporation. Registered agent may transfer office from address in city to another in same city by filing acknowledged statement with Secretary of State. (Neb. Rev. Stat. 21-2032).

Officers.

Any two or more offices may be held by same person. (Neb. Rev. Stat. 21-2097).

Officers' Personal Liability.

Corporate officers personally liable for unpaid corporate taxes if nonpayment was result of officer's willful failure to have corporation perform such act. (Neb. Rev. Stat. 77-1783.01).

Indemnification of Directors and Officers.

Corporation has power to indemnify directors. (Neb. Rev. Stat. 21-20,110).

Corporation may indemnify director against liability incurred in proceeding if: (1) He or she conducted himself or herself in good faith; he or she reasonably believed: (a) in case of conduct in his or her official capacity, that his or her conduct was in best interests of corporation; and (b) in all other cases that his or her conduct was at least not opposed to best interests of corporation; and (c) in case of any criminal proceeding, he or she had no reasonable cause to believe his or her conduct was unlawful; or (2) he or she engaged in conduct for which broader indemnification has been made permissible or obligatory under provision of articles of incorporation as authorized by subdivision (2)(e) of § 21-2018. Termination of proceeding by judgment, order, settlement, or conviction or upon plea of nolo contendere or its equivalent shall not be, of itself, determinative that director did not meet relevant standard of conduct described in this section. Unless ordered by court under subdivision (1)(c) of § 21-20,106, corporation may not indemnify director under this section: (a) In connection with proceeding by or in right of corporation, except for reasonable expenses incurred in connection with proceeding if it is determined that director has met relevant standard of conduct under subsection (1) of this section; or (b) in connection with any proceeding with respect to conduct for which he or she was adjudged liable on basis that he or she received financial benefit to which he or she was not entitled, whether or not involving action in his or her official capacity. (Neb. Rev. Stat. 21-2103).

Principal Office.

Articles of Incorporation must set out street address of corporation's initial registered office. Post office box number may be provided in addition to street address. (Neb. Rev. Stat. 21-2018).

Resident Agent.

Articles of Incorporation also must set out name of its initial registered agent at that office. (Neb. Rev. Stat. 21-2018).

General Powers of Corporation.

In addition to those enumerated in Model Act, corporation expressly empowered to enter into partnerships, joint ventures, syndicates, pools, associations and other arrangements for carrying out its purposes and to purchase liability insurance for directors, officers and employees and indemnify directors, officers and employees for expenses, fees and judgment under certain circumstances. (Neb. Rev. Stat. 21-2025). Corporation may not make loans secured by its shares, but corporation may loan to officers or directors. (Neb. Rev. Stat. 21-2025). Corporations may guarantee obligations of others for corporate purposes.

Acquisition of own shares permitted to extent of unreserved and unrestricted surplus as defined in the act. (Neb. Rev. Stat. 21-2025).

Dividends.

Generally same as Model Act.

Unclaimed Dividends.

See category Property, topic Absentees, subhead Escheat.

Sale or Transfer of Corporate Assets.

Directors may authorize sale of all or substantially all assets in regular course of business or mortgage of any or all assets whether or not in usual course of business. (Neb. Rev. Stat. 21-20,136). Such a sale not in regular course of business must be authorized by holders of at least two-thirds of outstanding shares or each class thereof, but such mortgage does not need such authorization. (Neb. Rev. Stat. 21-20,136). Each share entitled to vote whether or not articles of incorporation so provide. (Neb. Rev. Stat. 21-2025).

Books and Records.

Corporation shall keep as permanent records, minutes of all meetings of its shareholders and board of directors, record of all actions taken by shareholders or board of directors without meeting, and record of all actions taken by committee of board of directors in place of board of directors on behalf of corporation. Corporation shall keep copy of following records at its principal office: (a) Articles or restated articles of incorporation and all amendments thereto currently in effect; (b) bylaws or restated bylaws and all amendments thereto currently in effect; (c) resolutions adopted by its board of directors creating one or more classes or series of shares and fixing their relative rights, preferences, and limitations if shares issued pursuant to those resolutions are outstanding; (d) minutes of all shareholders' meetings and records of all action taken by shareholders without meeting for past three years; (e) written communications to shareholders generally within past three years, including financial statements furnished for past three years under § 21-20,186; (f) list of names and business addresses of its current directors and officers; and (g) most recent biennial report delivered to Secretary of State under § 21-301. (Neb. Rev. Stat. 20-182).

Rights to Inspect.—Shareholder of corporation shall be entitled to inspect and copy during regular business hours at corporation's principal office any of records of corporation described in subsection (5) of § 21-20,182 if he or she gives corporation written notice of his or her demand at least five business days before date on which he or she wishes to inspect and copy. (Neb. Rev. Stat. 20-183).

Reports.

Corporation shall furnish its shareholders annual financial statements which may be consolidated or combined statements of corporation and one or more of its subsidiaries, as appropriate, that include balance sheet as of end of fiscal year, income statement for that year, and statement of changes in shareholders' equity for that year unless such information appears elsewhere in financial statements. If financial statements are prepared for corporation on basis of generally accepted accounting principles, annual financial statements shall also be prepared on that basis. (Neb. Rev. Stat. 21-20,186).

Corporate Bonds or Mortgages.

All bonds issued by corporation shall be payable solely out of revenue and receipts derived from leasing or sale by corporation of its projects or of any thereof as may be designated in proceedings of board of directors under which bonds shall be authorized to be issued. (Neb. Rev. Stat. 21-2309).

Merger, Consolidation and Exchange.

Notice to be given to all shareholders must be written or printed. Plan to be approved in case of merger, consolidation or by acquired corporation or in case of exchange by at least two-thirds of outstanding shares of each class. (Neb. Rev. Stat. 21-20,130). Each share entitled to vote whether or not it has such rights under articles of incorporation. (Neb. Rev. Stat. 21-20,130). Copy of articles with Secretary of State's stamp to be filed with clerk of county where registered office of surviving, new or acquiring corporation located. (Neb. Rev. Stat. 21-20,132).

Subsidiary may be merged without vote of shareholders if 90% owned by parent. (Neb. Rev. Stat. 21-20,131).

Merger, consolidation or exchange effective upon effective date of merger or exchange. (Neb. Rev. Stat. 21-20,133).

Surviving corporation's articles of incorporation deemed amended to extent changes stated in merger plan. (Neb. Rev. Stat. 21-20,133).

Exchange of Stock.—Model Act provision adopted. (Neb. Rev. Stat. 21-20,134).

Shareholders may dissent in writing to plan of merger, consolidation or sale of substantially all assets not in regular course of business, any plan of exchange in which corporation's shares are to be acquired, any amendment to articles of incorporation which materially and adversely affects rights of dissenting shareholders if it: (i) Alters or abolishes preferential right, (ii) creates, alters or abolishes redemption right, (iii) alters or abolishes preemptive right, or (iv) excludes right of shareholder to vote on any matter. (Neb. Rev. Stat. 21-20,139). Shareholders required to dissent before vote at shareholders meeting. (Neb. Rev. Stat. 21-20,140). If shareholder dissents he cannot attack validity of underlying transaction, unless action is unlawful or fraudulent. (Neb. Rev. Stat. 21-20,138).

Payment for Shares.

Upon effectuation of plan corporation must pay shareholder fair value as determined by corporation. (Neb. Rev. Stat. 21-20,138). If shareholder disagrees he must demand within 30 days additional payment of what he considers deficiency. (Neb. Rev. Stat. 21-20,148). If corporation disagrees with shareholder demand, corporation requests court to determine fair value of shares. (Neb. Rev. Stat. 21-20,149). If corporation fails to file suit within 60 days, shareholder shall be paid his demanded amount. (Neb. Rev. Stat. 21-20,148).

Disposition of Shares.

Shareholders' Protection Act adopted. (Neb. Rev. Stat. 21-2431). Act requires shareholder approval before shares of certain ``issuing public corporations'' possess voting rights on matters other than elections of directors. Issuing public corporation is Nebraska corporation with 100 shareholders or more, at least $10,000,000 of assets in Nebraska, or 10% or more of its shareholders reside in Nebraska or 10% or more of its shares owned by Nebraska residents; or foreign corporation with 100 or more shareholders, its principal executive offices in Nebraska, 10% or more of its shareholders reside in Nebraska or 10% or more of its shares owned by Nebraska residents, and at least 500 employees in Nebraska. Act also prohibits ``business combinations'' (i.e. mergers, consolidations, sales, leases, etc. of 10% or more of corporate assets or corporate shares, etc.) between issuing public corporations and shareholders owning 10% or more of issuing public corporation, for five year period. (Neb. Rev. Stat. 21-2431 to -2453).

Tender Offers.

No specific statutory provision, but see subhead Mergers, Consolidation, and

Exchange.

Dissolution.

Generally same as Model Act.

Incorporators may file original and duplicate copy of articles of dissolution with Secretary of State if corporation has not commenced business or issued any shares. Duplicate copy, with Secretary of State stamp, and certificate of dissolution returned to incorporators to be recorded in county clerk's office in county where registered office of corporation is located. (Neb. Rev. Stat. 21-20,153).

Corporation or shareholders may dissolve corporation. Holders of at least two-thirds of outstanding stock, or each class thereof, must approve dissolution. Each outstanding share entitled to vote whether or not articles of incorporation so provide. (Neb. Rev. Stat. 21-20,152). Statement of intent to dissolve filed with Secretary of State and clerk of county where corporation's registered office located. (Neb. Rev. Stat. 21-20,154). Dissolution not allowed until all occupation taxes due or assessable have been paid and report filed. (Neb. Rev. Stat. 21-20,153). Articles of dissolution, stamped by Secretary of State must also be so filed. (Neb. Rev. Stat. 21-20,153). Corporate existence ceases upon filing articles of dissolution with Secretary of State. (Neb. Rev. Stat. 21-20,153). Statement of revocation of dissolution proceedings by corporation or shareholders with Secretary of State's stamp to be filed with clerk of county where corporation's registered office located. (Neb. Rev. Stat. 21-20,154).

Involuntary dissolution effected by decree of District Court in an action filed by Attorney General when it is established that: (1) Corporation procured its articles of incorporation through fraud; or (2) corporation has continued to exceed or abuse the authority conferred upon it by law. (Neb. Rev. Stat. 21-20,162). Other Model Act grounds not adopted.

Dissolution for Nonfiling of Report and Nonpayment of Tax.—Date of involuntary dissolution is Apr. 16 of years when report and tax due. (Neb. Rev. Stat. 21-323).

District Court also has power to liquidate assets and business of a corporation upon action brought by shareholder or creditor on grounds enumerated in the act. (Neb. Rev. Stat. 21-20,163). Court may appoint receiver. (Neb. Rev. Stat. 21-20,164). Decree of dissolution to be filed with Secretary of State and clerk of county in which registered office located. (Neb. Rev. Stat. 21-20,153[1]).

Publication of Notice.

Required for three successive weeks in legal newspaper of general circulation near registered office of corporation for incorporation, amendment, merger, consolidation, statement of intent to dissolve with consent, or statement of intent to dissolve by act of domestic corporation. (Neb. Rev. Stat. 21-20,189).

Incorporation notice must show: (1) Corporate name for corporation; (2) number of shares corporation is authorized to issue; (3) street address of corporation's initial registered office and name of initial registered agent at that office; and (4) name and street address of each incorporator. (Neb. Rev. Stat. 21-20,189[1]).

Amendment, merger or consolidation notice to include brief resume of plan.

Dissolution notice to include terms and conditions of dissolution, names and titles of persons who are to manage corporate affairs and distribute assets, and statement of assets and liabilities. (Neb. Rev. Stat. 21-20,189[2]).

Proof of publication to be filed with Secretary of State and clerk of county where registered office is located. (Neb. Rev. Stat. 21-20,189[3]).

Insolvency and Receivers.

Creditor of corporation cannot intervene in action by duly-appointed receiver of corporation to enforce individual liability of stockholders, especially where it is not shown that receiver is not acting in good faith for best interests of creditors, or has disregarded or violated duties of his trust in that regard. (Brown v. Brink, 57 Neb. 606).

Reports.

Must be in writing as of Jan. 1 of each even-numbered year and forwarded to Secretary of State on or before Apr. 15. Biennial fee is delinquent if not paid by Apr. 15. (Neb. Rev. Stat. 21-301, -304, and -20,188).

Foreign corporation may not take or hold real estate or any leasehold for more than five years (Neb. Rev. Stat. 76-402) except real estate necessary for construction and operation of railroads, public utilities, common carriers, manufacturing or industrial establishments and incidental facilities or filling or bulk stations for petroleum products or real estate within corporate limits of city or village or within three miles thereof (Neb. Rev. Stat. 76-412 to -414). For violation of law, corporation is barred from doing business in state and land forfeited to state. (Neb. Rev. Stat. 76-407). If state declares forfeiture it must pay full value of land to owner. (Neb. Rev. Stat. 76-408). Foreign corporation may, however, acquire lien on real estate and foreclose said lien, and hold any land acquired thereunder for ten years. (Neb. Rev. Stat. 76-411). May also own and operate oil and gas leases for not exceeding ten years and as long thereafter as oil, gas or other hydrocarbon substances can be produced in commercial quantities. (Neb. Rev. Stat. 76-404). State alone can question title and good title may be conveyed by corporation before forfeiture has been declared by state. (115 Neb. 33, 211 N.W. 210).

Corporate Bonds or Mortgages.

Corporation has power to issue bonds. (Neb. Rev. Stat. 21-2025).

Forfeiture or Revocation of Charter.

Corporation is automatically dissolved for failure to pay occupation taxes on Apr. 16 of current year when tax becomes delinquent. (Neb. Rev. Stat. 21-323).

Close Corporations.

No special statutory provisions.

Appraisal.

If shareholder and corporation disagree on fair value of stock of stockholders who dissented from merger, consolidation, exchange or sale of substantially all of property and assets of corporation, court will determine fair market value and may use appraisers. (Neb. Rev. Stat. 21-20,149).

Foreign Corporations.

Generally same as Model Act. Foreign corporations not to do business in state without certificate of authority from Secretary of State. (Neb. Rev. Stat. 21-20,170).

Doing Business.

Activities not constituting doing business for purposes of being required to secure certificate are those listed in Model Act plus, acting as foreign corporate trustee to extent authorized by Neb. Rev. Stat. 30-3820. (Neb. Rev. Stat. 21-20,168).

Enumerated activities are not standards for amenability to service of process or liability for ad valorem taxes assessed against any real property or interest therein. (Neb. Rev. Stat. 21-20,168). Requirements of Business Corporation Act do not apply to foreign or alien insurers. Instead, see c. 44 of Neb. Rev. Stats. (Neb. Rev. Stat. 21-20,168).

Revocation of Certificate.

Secretary of State may revoke certificate on at least 60 days notice when corporation has failed to appoint and maintain registered agent for at least 60 days, failed to file statement required when registered office changed within 60 days or made a misrepresentation in any document filed pursuant to act. (Neb. Rev. Stat. 21-20,179 and -20,180). Corporation shall be barred from doing business if annual report and occupation tax delinquent after Apr. 15 of current year when report and tax become delinquent. (Neb. Rev. Stat. 21-325).

Registered office location may be changed from one address to another in same city, or village upon agent's filing statement with Secretary of State. (Neb. Rev. Stat. 21-20,174 and -20,175).

Service of process on corporation's registered agent. (Neb. Rev. Stat. 21-20,174).

Transacting Business Without Certificate of Authority.

Corporation and its corporate successors and assignees can institute but cannot maintain court action until certificate of authority obtained. (Neb. Rev. Stat. 21-20,169; 202 Neb. 658, 276 N.W.2d 659). Maintenance of lawsuit does not alone constitute ``transacting business.'' (Neb. Rev. Stat. 21-20,169; 205 Neb. 768, 290 N.W.2d 199).

Uniform Trade Secrets Act (1985, adopted 1988). (Neb. Rev. Stat. 87-501 to -507).

Taxation of Corporate Property.

For most corporations, same as individuals. See category Taxation, topic Corporate Taxes.

Franchise Tax.

See topic Occupation Tax.

Income Tax.

See category Taxation, topic Income Tax.

Occupation Tax.

Every domestic corporation organized for profit must file with Secretary of State, by Apr. 15 of each even-numbered year, report signed by its president, vice-president, secretary or treasurer (Neb. Rev. Stat. 21-301) (obtain forms from Secretary of State if registered agent fails to receive same in advance mailing) stating: (1) Name of corporation; (2) location of its registered office; (3) street address of corporation's principal office; (4) names of president, secretary, treasurer and directors with street address of each; (5) amount of paid up capital stock; (6) nature and kind of business in which corporation is engaged; (7) change or changes, if any, in above particulars made since last biennial report (Neb. Rev. Stat. 21-302). Biennial occupation tax is due on Jan. 1, and delinquent, Apr. 15 by every corporation for profit registered on Jan. 1, and payment must accompany report. (Neb. Rev. Stat. 21-303). Minimum fee $26. (Neb. Rev. Stat. 21-303). Upon failure to pay tax and file report, Secretary of State shall upon Apr. 16 of same year dissolve corporation for nonpayment of taxes. (Neb. Rev. Stat. 21-313). Tax is computed on paid-up capital and rates can be obtained from Secretary of State at (402) 471-2554.

Foreign corporation must, by Apr. 15 of each even-numbered year, file with Secretary of State, report signed by its president, vice-president, secretary, or treasurer (Neb. Rev. Stat. 21-304), stating: (1) Name of corporation; (2) under laws of which state or country organized; (3) location of registered office in Nebraska; (4) mailing address of corporation's principal office; (5) names of president, secretary, treasurer and directors with street address of each; (6) nature and kind of business in which company is engaged; (7) value of property owned and used by company in Nebraska and where such property is situated; (8) change or changes, if any, in above matters made since last biennial report. (Neb. Rev. Stat. 21-305). If foreign corporation has domesticated, tax is same as on domestic corporation. (Neb. Rev. Stat. 21-303). If foreign corporation is merely operating under license to do business in this state, tax is measured by all property employed in conduct of its business in Nebraska and for purpose of computing tax, property consists of all real estate and personal property employed in Nebraska by such foreign corporation in transaction of business. Tax is computed at double fees prescribed by Neb. Rev. Stat. 21-303 maximum of $15,000, same rate as for domestic corporations set out above and is payable to Secretary of State when filing report. (Neb. Rev. Stat. 21-306).

Professional Corporations.

Persons rendering personal service which requires as a condition precedent the obtaining of a license such as certified public accountant, physician, real estate broker, and attorneys, may form professional corporation. (Neb. Rev. Stat. 21-2201 to -2222). All shareholders, officers and directors must be licensed professional employees, with exception of secretary and assistant secretary who may be nonprofessional. (Neb. Rev. Stat. 21-2216).

Deeds.

See category Property, topic Deeds.

Nebraska Non-Profit Corporation Act.

Act modeled after Revised Model Nonprofit Corporation Act with revisions. (Neb. Rev. Stat. 21-1901 to -19,177).

Limited Liability Companies.

See topic Limited Liability Companies.

2.04 FOREIGN CORPORATIONS:

See topic Corporations.

2.05 JOINT STOCK COMPANIES:

No special legislation.

2.06 LIMITED LIABILITY COMPANIES:

General Supervision.

Secretary of State, State Capitol Building, Lincoln. All questions and filings should be addressed to: John A. Gale, Secretary of State, Corporations Division, 1301 State Capitol Building, P.O. Box 94608, Lincoln, NE 68509, (402) 471-4079.

Limited Liability Company Act (Neb. Rev. Stat. 21-2601 to -2653) sets forth guidelines for establishment of limited liability companies.

Formation.

Limited liability company may be organized pursuant to Limited Liability Company Act for any lawful purpose other than for purpose of being insurer. (Neb. Rev. Stat. 21-2602).

Powers.

Limited liability company organized pursuant to and existing under Limited Liability Company Act may: (1) Sue, be sued, complain, and defend in its name; (2) purchase, take, receive, lease, and otherwise acquire, own, hold, improve, use, and otherwise deal in and with real or personal property or interest in real or personal property wherever situated; (3) sell, convey, mortgage, pledge, lease, exchange, transfer, and otherwise dispose of all or any part of its property and assets; (4) lend money to and otherwise assist its members; (5) purchase, take, receive, subscribe for, and otherwise acquire, own, hold, vote, use, employ, sell, mortgage, lend, pledge, and otherwise dispose of, use, and deal in and with shares or other interests in or obligations of other limited liability companies, domestic or foreign corporations, associations, general or limited partnerships, or individuals or direct or indirect obligations of United States or of any government, state, territory, governmental district, or municipality or of any instrumentality thereof; (6) make contracts and guarantees and incur liabilities, borrow money at such rates of interest as limited liability company may determine, issue its notes, bonds, and other obligations, and secure any of its obligations by mortgage or pledge of all or any part of its property, franchises, and income; (7) lend money for its proper purposes, invest and reinvest its funds, and take and hold real property and personal property for payment of funds loaned or invested; (8) conduct its business, carry on its operations, and have and exercise powers granted by act in any state, territory, district, or possession of United States or in any foreign country; (9) elect or appoint one or more managers and agents of limited liability company and define their duties and fix their compensation; (10) make and alter operating agreements, not inconsistent with its articles of organization or with laws of this state, for administration and regulation of affairs of limited liability company; (11)(a) indemnify member, manager, or former member or manager of limited liability company against expenses actually and reasonably incurred in connection with defense of civil or criminal action, suit, or proceeding in which such person is made party by reason of being or having been member or manager except in matters as to which such person is adjudged in action, suit, or proceeding to be liable for negligence or misconduct in performance of duty and (b) make any other indemnification that is authorized by articles of organization or by article of operating agreement or resolution adopted by members after notice; (12) cease its activities and surrender its certificate of organization; (13) have and exercise all powers necessary or convenient to effect any or all of purposes for which limited liability company is organized; (14) become member of general partnership, limited partnership, joint venture or similar association, or other limited liability company; and (15) render professional service within or without this state. (Neb. Rev. Stat. 21-2603).

Name.

Words ``limited liability company'', ``ltd. liability company'', or ``ltd. liability co.'', or abbreviation ``L.L.C.'' or ``LLC'', shall be last words of name of every limited liability company. (Neb. Rev. Stat. 21-2604).

Articles of Organization.

Articles of organization of limited liability company shall set forth: (a) Name of limited liability company; (b) purpose for which limited liability company is organized but, if limited liability company provides professional service, articles of organization shall contain statement of profession to be practiced by limited liability company; (c) address of its principal place of business in this state and name and address of its current registered agent in this state. Post office box number may be provided in addition to street address; (d) total amount of cash contributed to stated capital and description and agreed value of property other than cash contributed; (e) total additional contributions agreed to be made by all members and times at which or events upon happening of which contributions will be made; (f) right, if given, of members to admit additional members and terms and conditions of admission; and (g) if limited liability company is to be managed by one or more managers, names and addresses of persons who will serve as managers until successor is elected, or if management of limited liability company is reserved to one or more classes of members, names and addresses of such members. (Neb. Rev. Stat. 21-2606).

Filing of Articles of Organization.

One or more persons may form limited liability company by executing and delivering articles of organization in duplicate to Secretary of State. (Neb. Rev. Stat. 21-2605).

Registered Office and Registered Agent.

Limited liability company shall have and continuously maintain in this state: (1) Registered office which may but need not be same as its place of business; and (2) registered agent having business office identical with registered office, which agent may be individual resident in this state, domestic corporation, or foreign corporation authorized to transact business in this state. (Neb. Rev. Stat. 21-2609).

Management.

Unless articles of organization provide to contrary, management of limited liability company shall be vested in each member in proportion to such person's contribution to capital of limited liability company as adjusted from time to time to properly reflect any additional contribution or withdrawal by another member. If articles of organization provide for management of limited liability company by one or more managers, managers shall be elected by one or more classes of members in manner provided in operating agreement. Managers shall also hold offices and have responsibilities accorded to them by such members and as set out in operating agreement. (Neb. Rev. Stat. 21-2615).

Dissolution.

Limited liability company shall be dissolved only upon occurrence of following: (a) Expiration of period fixed, if any, for duration of limited liability company; (b) unanimous written agreement of all members; (c) any other event described in articles of organization; or (d) judicial dissolution of limited liability company. On application by or for any member, district court may decree dissolution of limited liability company whenever it is not reasonably practicable to carry on business of such limited liability company in conformity with its articles of organization or its operating agreement. (Neb. Rev. Stat. 21-2622).

Filing Fee.

Filing fee for all filings pursuant to Limited Liability Company Act, including amendments, shall be $10 plus recording fees of $5 per page, except that filing fee for filing certificate of organization and for filing application for certificate of authority as foreign limited liability company shall be $100 plus such recording fees and $10 for certificate. There shall be no recording fee collected for filing of biennial report or any corrections or amendments thereto. Fee of $1 per page plus $10 per certificate shall be paid for certified copy of any document on file pursuant to Act. Fees for filings pursuant to Act shall be paid to Secretary of State and remitted by him or her to State Treasurer. (Neb. Rev. Stat. 21-2634).

Taxation.

Limited liability company shall be classified for state income tax purposes in same manner as it is classified for federal income tax purposes.

2.07 LIMITED PARTNERSHIP:

See topic Partnerships.

2.08 PARTNERSHIPS:

Uniform Partnership Act (1997, adopted 1997). (Neb. Rev. Stat. 67-401 to -467).

Formation.

Except for association formed under statute other than Uniform Partnership Act of 1998, predecessor statute, or comparable statute of another jurisdiction, partnership is association of two or more persons to carry on as co-owners business for profit forms partnership, whether or not persons intend to form partnership. (Neb. Rev. Stat. 67-410).

Name.

Partnership may file statement of authority with Secretary of State, which must be executed by at least two partners and include name of partnership, street address of chief executive office and one office in state, if there is one, names and mailing addresses of all partners or agents, and names of partners authorized to execute transfers of real property held in name of partnership. (Neb. Rev. Stat. 67-406, and -415). Statement of authority may be amended; amendment must be filed with Secretary of State, must name partnership, identify statement, and state substance of amendment. (Neb. Rev. Stat. 67-406). Statement of dissolution stating that partnership has dissolved and is winding up business may be filed by any partner who has not wrongfully dissociated. (Neb. Rev. Stat. 67-443).

Rights and Liabilities of Partners.

Partners liable jointly and severally for all obligations of partnership unless otherwise agreed by claimant or provided by law. (Neb. Rev. Stat. 67-418).

Dissolution.

Partnership deemed automatically dissolved upon any of stated events in Neb. Rev. Stat. 67-439. Partnership continues after dissolution only for purpose of winding up its business. Partnership is terminated when winding up of its business is completed. At any time after dissolution of partnership and before winding up of its business is completed, all partners, including any dissociating partner other than wrongfully dissociating partner, may waive right to have partnership's business wound up and partnership terminated. (Neb. Rev. Stat. 67-440).

Actions.

Partnership may sue or be sued in its usual name. (Neb. Rev. Stat. 25-313).

Administration of Partnership Property.

Partner is considered to have dissociated from partnership upon death, appointment of guardian or general conservator for partner, or judicial determination that partner has otherwise become incapable of performing partner's duties under partnership agreement. If partner is dissociated from partnership without resulting in dissolution and winding up of partnership business, partnership shall cause dissociated partner's interest in partnership to be purchased for buyout price. Buyout price of dissociated partner's interest is amount that would have been distributable to dissociating partner if, on date of dissociation, assets of partnership were sold at price equal to greater of liquidation value or value based on sale of entire business as going concern without dissociated partner and partnership were wound up as of that date. Interest must be paid from date of dissociation to date of payment. (Neb. Rev. Stat. 67-431 to -437).

Limited Partnership.

Revised Uniform Limited Partnership Act (1976, adopted 1981). (Neb. Rev. Stat. 67-233 to -297).

Out-of-State Partnerships.

Before transacting business in this state, foreign limited partnership shall register with Secretary of State. In order to register, foreign limited partnership shall submit to Secretary of State, in duplicate, application for registration as foreign limited partnership, signed and sworn to by general partner and setting forth: (1) Name of foreign limited partnership and, if different, name under which it proposes to register and transact business in this state; (2) state or country and date of its formation; (3) statement that Secretary of State is appointed agent of foreign limited partnership for service of process if no agent has been appointed under subdivision (4) of this subsection, if agent has been appointed but agent's authority has been revoked, or if agent has been appointed but cannot be found or served with exercise of reasonable diligence; (4) name and street address and post office box number, if any, of any agent for service of process on foreign limited partnership whom foreign limited partnership elects to appoint. Agent must be individual resident of this state, domestic corporation, foreign corporation having place of business in and authorized to do business in this state, domestic limited liability company, or foreign limited liability company having place of business in and authorized to do business in this state; (5) address of office required to be maintained in state or country of its organization by laws of that state or country or, if not so required, of principal office of foreign limited partnership; and (6) name and business, residence, or mailing address of each of general partners.

3 BUSINESS REGULATION AND COMMERCE

3.01 BANKS AND BANKING:

Department of Banking and Finance, whose administrative officer is Director of Banking and Finance, has general supervision and control of banks and banking. (Neb. Rev. Stat. 8-101.01 to -1,140). Uniform Commercial Code in effect. See topic Commercial Code.

Regulated By.

Department of Banking and Finance shall, under laws of this state specifically made applicable to each, have general supervision and control over banks, trust companies, credit unions, and building and loan associations; all of which are hereby declared to be quasi-public in nature and subject to regulation and control by state. (Neb. Rev. Stat. 8-101 to -1,140).

Stockholders.

Among its other powers, Federal Deposit Insurance Corporation in performance of its powers and duties as such receiver or liquidator, shall have right and power upon order of court of record of competent jurisdiction to enforce individual liability of stockholders and directors of any such banking institution. (Neb. Rev. Stat. 8-709).

Deposits.

Banks may, by agreement, provide that deposits received under agreement shall be repaid only on presentation of pass books and may require notice to be given before such deposits are repaid. (Neb. Rev. Stat. 8-134). All persons, regardless of age, may become depositors in any bank and shall be subject to same duties and liabilities respecting their deposits. Whenever deposit is accepted by any bank in name of any person, regardless of age, deposit may be withdrawn by depositor by variety of means. (Neb. Rev. Stat. 8-135). No bank shall accept or receive on deposit for any purpose any money, bank bills, United States treasury notes or currency, or other notes, bills, checks, drafts, credits, or currency, when such bank is insolvent; and if any bank shall receive or accept on deposit any such deposits when such bank is insolvent, officer, agent, or employee knowingly receiving or accepting or being accessory to, or permitting or conniving at receiving or accepting on deposit therein or thereby, any such deposit shall be guilty of Class III felony. (Neb. Rev. Stat. 8-138).

Unclaimed deposits.

Collections.

See Nebraska Uniform Commercial Code. (Neb. UCC 4-101 to -504).

Bank Holding Companies and Financial Holding Companies.

Upon compliance with all other provisions of Nebraska Bank Holding Company Act of 1995 and any other applicable law, out-of-state bank holding company may acquire bank or banks under Act only if bank or banks to be acquired have been chartered for five years or more. Out-of-state bank holding company shall not, directly or indirectly, form, charter, or establish bank in Nebraska or cause bank in Nebraska to be formed, chartered, or established unless (a) bank is formed, chartered, or established solely for purpose of acquiring all or substantially all of assets of bank which has been chartered for five years or more and (b) bank does not open for business prior to such acquisition. (Neb. Rev. Stat. 8-911).

Uniform Common Trust Fund Act.

In effect. (1952, adopted 1953). (Neb. Rev. Stat. 30-3202 to -3207).

Foreign Banks.

No out-of-state bank shall be permitted to establish or acquire branch located in this state without engaging in interstate merger transaction or as provided in subsection (3) of § 8-2104. (Neb. Rev. Stat. 8-2105). Neb. Rev. Stat. 8-2104 states that Nebraska bank which has been in existence for five years or more may be acquired by and engage in interstate merger transaction with any out-of-state bank. Bank which is acquired and converted to branch of out-of-state bank pursuant to interstate merger transaction shall have all powers and be subject to same limitations as any other branch located in this state. Out-of-state bank that has acquired Nebraska bank under Interstate Branching By Merger Act of 1997 may maintain and operate branches of Nebraska bank with which out-of-state bank engaged in interstate merger transaction, and may establish or acquire additional branches in this state, to same extent that any Nebraska bank may establish or acquire branch in Nebraska. All branches of out-of-state bank shall comply with all applicable Nebraska laws and regulations in conduct of their business in this state to maximum extent authorized by federal law. (Neb. Rev. Stat. 8-2104). Director may prescribe requirements for periodic reports regarding any out-of-state bank that operates branch in Nebraska pursuant to Interstate Branching By Merger Act of 1997. Any reporting requirements prescribed by director under this subsection shall be consistent with reporting requirements applicable to Nebraska state banks. (Neb. Rev. Stat. 8-2107).

General Powers, Duties and Liabilities.

Bank may hold real estate conveyed to it for debts and may purchase real estate at sale on judgments, decrees, deeds of trust or mortgages held by bank or upon its securities at amount not in excess of judgment and costs, but must sell same within five years, unless Department authorizes longer holding. (Neb. Rev. Stat. 8-150).

Interest paid on deposits controlled by regulation of director of banking. Bank may secure deposits of trustee by pledge of assets or surety bond. (Neb. Rev. Stat. 8-133).

Delayed Deposit Services Licensing Act. (Neb. Rev. Stat. 45-901 to -929).

Loan Limits.

Except within specific exceptions, no bank shall loan more than 25% of paid-up capital, surplus, and capital notes and debentures or 10% of such impaired capital and unimpaired surplus, whichever is greater, of any such bank to any single entity. (Neb. Rev. Stat. 8-141).

Destruction of Records.

Most records other than ledger sheets showing unpaid balances in favor of depositors and corporation records relating to bank may be destroyed after six years. Photostatic or photographic copies may be used in evidence. (Neb. Rev. Stat. 8-170).

Currency Transaction Reports.

No separate state requirements.

Unclaimed Deposits.

See category Property, topic Absentees, subhead Escheat.

Accrual and Limitation of Actions.

Actions based on claims inconsistent with entry on books of bank accrue one year after date of entry and must be brought within five years from date of accrual. (Neb. Rev. Stat. 8-173).

Stockholders' Liability.

Stockholders' double liability has been abolished.

Trust Companies.

Department of Banking has power to issue permits to and to supervise and regulate all trust companies. National banks authorized to act in fiduciary capacity may make deposits similar to those required of domestic companies, which are held and used the same as deposits made by domestic companies. (Neb. Rev. Stat. 8-201).

Trust company has power to: Receive trust funds for investment for specific purposes as agreed; execute such trusts as may be committed to it; take, accept and hold by order of any court or by gift any real or personal property, care for or manage same and execute and perform any such trust; act as agent or attorney in fact; act either by itself or jointly with any natural person or persons as executor, administrator, guardian, conservator or trustee; loan money upon real estate and upon collateral security when collateral would be legal investment for said corporation; borrow money; execute and issue its notes payable at future date and to pledge its real estate, mortgages or other securities therefor (no loan may be made to any officer or director of corporation); issue and sell capital notes or debentures, with approval; buy, hold, own and sell securities issued or guaranteed by U.S. government or any agency or wholly owned corporation thereof, or with authority to borrow directly from U.S. Treasury, or any security secured by obligations of any state or political subdivision thereof which possesses general powers of taxation, stocks, warrants, bills of exchange, notes, mortgages, banker's acceptances, certificates of deposit in institutions insured by FDIC, securities issued pursuant to Nebraska Business Development Corporation Act, and other investment securities, except stock or other securities of any corporation organized under article relating to trust companies; purchase, own and improve such real estate as it may be required to bid in under foreclosure or in payment of other debts; perform all acts and exercise all powers incident to or necessary for full exercise of rights granted. Trust company may not conduct banking business. (Neb. Rev. Stat. 8-206). Commercial banks may be authorized to conduct trust business. (Neb. Rev. Stat. 8-160). All trust business may be transferred from affiliated bank to trust company pursuant to order of County Court. (Neb. Rev. Stat. 8-231). State trust company, with approval of two-thirds of its capital stock, may merge with state bank. (Neb. Rev. Stat. 8-229). Each trust fund doing business under 8-201 to 8-226 must obtain fidelity bond naming trust company as obligee. (Neb. Rev. Stat. 8-205.01).

Interstate Trust Company Office Act. (Neb. Rev. Stat. 8-2301 to -2313). Nebraska state-chartered trust companies may maintain out-of-state branches with prior approval of Director of Banking and Finance. Provides requirements for establishment of Nebraska branch of out-of-state trust company. (Neb. Rev. Stat. 8-2305 to -2307).

Joint Deposits.

Deposits in the name of two or more persons, payable to either or their survivor(s), may be paid to any such persons or their survivor(s) in due course of business. (Neb. Rev. Stat. 30-2728 and -2729).

Multibank holding companies authorized in Nebraska in certain circumstances. (Neb. Rev. Stat. 8-910). Auxiliary offices, automatic teller machines and point-of-sale terminals are also authorized. (Neb. Rev. Stat. 8-157.01). See also Interstate Branching by Merger Act of 1997. (Neb. Rev. Stat. 8-2101 to -2108).

Savings Associations.

Bank may acquire eligible savings association and convert it into auxiliary office of bank. (Neb. Rev. Stat. 8-157 and -1516). Savings and loan associations incorporated under laws of Nebraska have all rights, benefits, powers, and privileges as do federal savings and loan associations doing business in Nebraska as of operative date of section. (Neb. Rev. Stat. 8-355). Any state or federal savings association may apply for conversion to state bank. (Neb. Rev. Stat. 8-183.01 to -183.03).

Nebraska Bank Holding Company Act of 1995. (Neb. Rev. Stat. 8-908 to -917). Out-of-state bank holding companies may not form or establish banks in Nebraska unless bank is formed to acquire all or most assets of bank chartered for five years. (Neb. Rev. Stat. 8-911[2]). Out-of-state banks may not acquire state banks chartered for less than five years. (Neb. Rev. Stat. 8-911[1]).

Private banking is prohibited. (Neb. Rev. Stat. 8-114; 182 Neb. 164, 153 N.W.2d 743).

3.02 BILLS AND NOTES:

Uniform Commercial Code in effect. See topic Commercial Code.

Special Requirements.

Tuition Notes.—It shall be unlawful for any proprietor, officer, agent or representative of any business college, or business or commercial department of any school doing business within State of Nebraska, or without state when operating or soliciting within state, to contract for or receive for tuition or scholarship negotiable note or negotiable contract, unless such negotiable note or notes or negotiable contract shall have printed in red ink prominently and legibly and in 24 point bold type diagonally across face thereof, and above signatures thereto, words ``negotiable note given for tuition'', if note, or words ``negotiable contract note given for tuition and scholarship'', if contract, and unless copy of said instrument shall be delivered to makers thereof at time of signing same. It shall be unlawful for any such proprietor, agent or representative of any such school or department to sell or dispose of any such negotiable note or negotiable contract note, received in payment for tuition or scholarship, prior to three days from entrance and personal registration of student, for whom same was purchased, in matriculation register at place of location of school or department. (Neb. Rev. Stat. 62-303).

Judgment Notes.

No confession of judgment, power to confess judgment or to appear for maker may be given in note to industrial loan companies (Neb. Rev. Stat. 8-447) or to bank on personal installment loan (Neb. Rev. Stat. 8-823), nor power of any kind to installment loan licensee (Neb. Rev. Stat. 45-1029).

Attorney Fees.

Attorney fee clauses not enforceable. (90 Neb. 223, 133 N.W. 199).

Days of Grace.

No provision.

Patent Rights.

Negotiable instruments, consideration for which in whole or in part is right to make, use or vend patented invention or one claimed to be patented, must have written or printed prominently and legibly across face thereof and above signature words ``Given for a patent right''. Such instrument in hands of any purchaser or holder is subject to same defenses as in hands of original owner or holder, and any person who purchases or becomes holder of negotiable instrument, knowing it to have been given for such consideration holds it subject to such defenses although required words are not on its face. (Neb. Rev. Stat. 62-302; 84 Neb. 808, 122 N.W. 61).

3.03 BILLS OF LADING:

See topic Carriers.

3.04 [RESERVED]

3.05 BILLS OF SALE:

See topic Sales.

3.06 BLUE SKY LAW:

See topic Securities.

BROKERS:

Uniform Commercial Code in effect. See topic Commercial Code.

Real Estate Brokers and Salespersons.

Must obtain licenses from State Real Estate Commission. (Neb. Rev. Stat. 81-885.07). Fee payable by broker is set by Commission, but maximum fee is $250 for each examination and application, $250 for license. Fee payable by salesperson is set by Commission: maximum fee is $250 for examination and application, $200 for license. (Neb. Rev. Stat. 81-885.14). Reexamination fees are set by Commission, with maximum fee of $250. Each applicant for sales license must complete two courses in real estate subjects, approved by Commission, composed of not less than 60 class hours of study, or correspondence courses approved by Commission. Each two year period, every licensee shall complete 12 hours of continuing education. Broker or salesman must be 19 years old and must either be high school graduate or holder of certificate of equivalency. Special requirements have been established for nonresident brokers and salespersons. Obtaining nonresident broker's license shall constitute sufficient contact with this state for exercise of personal jurisdiction over licensee in any action arising out of licensee's activity in this state. (Neb. Rev. Stat. 81-885.01 to -885.54).

Contract for broker's compensation for sale of real estate must be in writing, subscribed by owner, and must describe land and broker's compensation. (Neb. Rev. Stat. 36-

107). Promissory note made by vendor to real estate broker and accepted by broker in payment for commission is enforceable even if no written sales contract. (206 Neb. 753, 295 N.W.2d 106).

Bond.

None required.

Loan Brokers.

Regulated by Dept. of Banking and Finance. (Neb. Rev. Stat. 45-189 to -191.11).

3.07 BULK SALES:

Bulk sales portion of Uniform Commercial Code has been repealed. See topic Commercial Code.

See also category Debtor and Creditor, topic Fraudulent Sales and Conveyances.

3.08 CARRIERS:

Uniform Commercial Code in effect. See topic Commercial Code.

Supervision of common carriers is lodged with Public Service Commission, which has power to regulate rates and services and exercise general control. (Neb. Rev. Stat. 75-109).

Licenses.

Public Service Commission regulates and licenses all common and contract carriers engaged in transportation of freight or passengers for hire, including motor carriers, pipeline carriers, railroad carriers, transmission lines and rights-of-way, water service, and jurisdictional utilities, as well as all carriers engaged in furnishing telecommunications services for hire in intrastate commerce. (Neb. Rev. Stat. 75-109, 75-109.1, 75-302, 75-501, 75-401, 74-918, 74-919, 75-702).

Rates.

Legislature can fix maximum rates. (Const. Art. X, § 4). Public Service Commission fixes both passenger and freight rates. (Neb. Rev. Stat. 75-118). Printed schedule showing all rates must be kept by carrier for public inspection. (Neb. Rev. Stat. 75-124).

Discrimination.

Prohibited. (Neb. Rev. Stat. 75-126).

Limited Liability.

Carrier that issues bill of lading, whether negotiable or nonnegotiable, shall exercise degree of care in relation to goods which reasonably careful person would exercise under similar circumstances. This subsection does not affect any statute, regulation, or rule of law that imposes liability upon common carrier for damages not caused by its negligence. Damages may be limited by term in bill of lading or in transportation agreement that carrier's liability may not exceed value stated in bill or transportation agreement if carrier's rates are dependent upon value and consignor is afforded opportunity to declare higher value and consignor is advised of opportunity. However, such limitation is not effective with respect to carrier's liability for conversion to its own use. (Neb. UCC 7-309).

Limitation of liability by railroads is forbidden (Const. Art. X, § 4), but liability on interstate shipment may be limited to agreed value on which rate is adjusted (226 U. S. 513).

Bill of Lading.

Penalty for issuing false bill of lading with intention to defraud is fine or imprisonment up to 20 years. (Neb. Rev. Stat. 28-603). Reasonable provisions as to time and manner of presenting claims and commencing actions based on shipment may be included in bill of lading or transportation agreement. (Neb. UCC 7-309).

Liens.

Carrier's lien on goods may be enforced by public or private sale of goods, in bulk or in packages, at any time or place and on any terms that are commercially reasonable, after notifying all persons known to claim interest in goods. Notification must include statement of amount due, nature of proposed sale, and time and place of any public sale. Fact that better price could have been obtained by sale at different time or in method different from that selected by carrier is not of itself sufficient to establish that sale was not made in commercially reasonable manner. Carrier sells goods in commercially reasonable manner if carrier sells goods in usual manner in any recognized market therefor, sells at price current in that market at time of sale, or otherwise sells in conformity with commercially reasonable practices among dealers in type of goods sold. Sale of more goods than apparently necessary to be offered to ensure satisfaction of obligation is not commercially reasonable, except in cases covered by preceding sentence. (Neb. UCC 7-308).

3.09 COMMERCIAL CODE:

Uniform Commercial Code (1962 text) has been adopted. Rights previously created are not affected. 1972 and 1977 Official Amendments adopted, with variations discussed below. 1986 Official Amendments not adopted. 1990 Revisions adopted. 1999 revisions as they apply to Article 9.

Code appears in a separate volume of the official statutes and is cited herein as Neb. UCC, sections numbered substantially same as UCC Nebraska annotated act reissued in 2001.

Material Variations From 1962 Text and 1972, 1977 and 1999 Official Amendments are effective throughout year.

Following sections of UCC are omitted:

§ 3-122

§§ 6-101 to Neb. UCC 6-111

Following sections of UCC are modified as indicated:

§ 1-201 UCC (Neb. UCC 1-201)—subsections (26)(a) and (b) enacted as subsections (26)(c) and (a), respectively; subsection (26)(b) relating to notice by publication added; subsection (35) redefines term ``security interest;'' including provision that security interest does not include consumer rental purchase agreement.

§ 2-201 UCC (Neb. UCC 2-201)—subsection (2)(b) provides that contracts between merchant, and buyer or seller of grain not merchant, are enforceable unless written notice of objection is given within ten days and all other requirements of section are met.

§ 3-113 UCC (Neb. UCC 3-113)—subsection (9) now subject to exception as provided in § 4-401(c).

§ 4-106 UCC (Neb. UCC 4-106)—Alternative A enacted.

§ 7-204 UCC (Neb. UCC 7-204)—subsection (4) not enacted.

§ 7-210 UCC (Neb. UCC 7-210)—subsection (2)(b) provides for personal or ``registered'' mail delivery of notice.

§ 7-403 UCC (Neb. UCC 7-403)—bracketed language in subsection (1)(b) not enacted.

§ 9-102 UCC (Neb. UCC 9-102)—provides that definition of instrument for Subsection 47 contains nonuniform phrase ``including but not limited to, a writing that would otherwise qualify as a certificate of deposit (defined in Subsection (j) of Section Neb. UCC 3-104) but for the fact that the writing contains a limitation on transfer.''

§ 9-103 UCC (Neb. UCC 9-103)—phrase ``in a transaction other than a consumer-goods transaction'' is deleted from beginnings of Subsections (e) and (f) in order to provide that these provisions apply to transactions involving consumer goods.

§ 9-201 UCC (Neb. UCC 9-201)—Subsection (b) provides that transaction subject to revised Art. 9 is subject to, among other things, ``any other statute or regulation governing usury, small loans, retail installment sales, or the like.''

§ 9-311 UCC (Neb. UCC 9-311)—Subsection (a)(2) provides that filing of financing statement is not necessary or effective to perfect security interest in property subject to state statutes identified in this subdivision.

§ 9-315 UCC (Neb. UCC 9-315)—Subsection (a)(2) contains nonuniform language intended to eliminate potential for implied waiver, modification, release, or termination of security interest in farm products in any case when lender has either complied with provisions of Nebraska's Central Filing System or when buyer of farm products has been properly prenotified pursuant to provisions of federal law.

§ 9-320 UCC (Neb. UCC 9-320)—Subsection (a) adds sentence ``A buyer of farm products may be subject to a security interest under Sections Neb. Rev. Stat. 52-1301 to Neb. Rev. Stat. 52-1322.'' And Subsection (f) ``no buyer shall be allowed to take advantage of and apply the right to offset to defeat a priority established by any lien or security interest.''

§ 9-513 UCC (Neb. UCC 9-513)—Subsection (c) reads ``There is no fee for the filing of a termination statement.''

§ 9-519 UCC (Neb. UCC 9-519—Subsection (a) provides filing office duties for filed records ``including each record filed in a filing office pursuant to The Uniform Federal Lien Registration Act.''

§ 9-523 UCC (Neb. UCC 9-523)—Subsection (f)(2) provides for filed records to be made available electronically through gateway or electronic network.

§ 9-525 UCC (Neb. UCC 9-525)—provides for fee schedule and is substantially rewritten to meet Nebraska needs and established practice.

§ 9-527 UCC (Neb. UCC 9-527)—requirement for Secretary of State to prepare and file annual report that includes statement of how his or her filing office rules are not in harmony with similar rules in other jurisdictions.

§ 9-528 UCC (Neb. UCC 9-528)—nonuniform section which provides duties for Secretary of State regarding inquiries.

§ 9-529 UCC (Neb. UCC 9-529)—provides for implementation of centralized computer system.

§ 9-530 UCC (Neb. UCC 9-530)—provides filing duties for Secretary of State regarding security interest and statutory liens.

§ 9-531 UCC (Neb. UCC 9-531)—provides for Uniform Commercial Code cash fund and for inquiry and search duties for Secretary of State.

§ 9-611 UCC (Neb. UCC 9-611)—provides for notification before disposition of collateral after default. Subdivision (c)(2) adds exception that ``unless no security for the obligation or indebtedness was taken or contemplated at the time the secondary obligor became accountable in whole or in part for payment or other performance of the obligation.''

§ 9-613 and § 9-614 UCC (Neb. UCC 9-613 and Neb. UCC 9-614)—contain Subdivision (5) and Subdivision (3) respectively each of which provides that ``in no event shall it be necessary for notification of disposition to refer to any guarantee agreement, to identify or designate the capacity in which a debtor or secondary obligor is being sent such notification, or to identify or designate the capacity in which the debtor or secondary obligor may be liable for any deficiency existing after sale or disposition of collateral.''

§ 9-625 UCC (Neb. UCC 9-625)—Subsections (e) and (f) provide certain cases of secured party's failure to comply with revised Art. 9 for recovery of ``reasonable attorney's fees and court costs.''

Permanent Editorial Board's Recommendations for Amendments.

§ 2-702–1966 Official Amendment not enacted.

§ 3-501–1966 Official Amendment not enacted.

§ 7-209–1966 Official Amendment not enacted.

Optional Provisions.

§ 1-209–1966 Official Optional Amendment not enacted.

§ 2-318–1966 Official Optional Amendment Alternative A enacted.

§ 3-121 UCC (Neb. UCC 3-121)—Alternative B enacted.

§ 9-105–1966 Official Optional Amendment not enacted. (repealed July 1, 2001 by Laws 1999, LB 550 & 217).

§ 9-106–1966 Official Optional Amendment not enacted. (repealed July 1, 2001 by Laws 1999, LB 550 & 217).

1972 Official Amendments.

§§ 1-105, UCC 1-201, UCC 2-107, UCC 5-116, UCC 9-102 to -106, UCC 9-114, UCC 9-203 to -205, UCC 9-301 to -302, UCC 9-304 to -308, UCC 9-312 to -313, UCC 9-318, UCC 9-401 to -403, UCC 9-405 to -408, UCC 9-501 to -502, UCC 9-504 to -505—Adopted.

Filing Fees.

$10 if document is one page, regardless of number of debtor indexes/addresses. 50¢ per page for attachments (if documents are two-sided, 50¢ for each side). Filing made in Secretary of State's office, Lincoln, Neb., UCC Division, after 1981, for previous filings check with clerk of county where property located. No fee for filing termination statements. Written or online information requests: $4.50 per debtor or trade name searched, additional $10 for certificate. Phone inquiries: $1 per debtor's name. Personal inspection: no charge for up to ten names per day; $1 per each additional name. EFS inquiry $4.50 per debtor; Electronic Filing Fees: no charge for terminations; $8 for financing statement, continuations, statutory liens.

See category Documents and Records, topic Records, subhead Filing Under Commercial Code.

Forms.

See Part III, Uniform and Model Acts, Commercial Code Amendments for National Article 9 Forms.

Nebraska Secretary of State UCC Division accepts National Financing Statement for no additional filing fees. Computer generated form is acceptable and original plus one copy is required. Nebraska UCC Division accepts National UCC Financing Statement Amendment form.

See also topics: Banks and Banking, Bills and Notes, Brokers, Carriers, Contracts, Factors, Frauds, Statute of, Sales, Securities, Warehousemen; categories Business Organizations, topic Corporations; Civil Actions and Procedure, topic Limitation of Actions; Debtor and Creditor, topics Assignments, Fraudulent Sales and Conveyances, Liens, Pledges; Documents and Records, topics Records, Seals; Mortgages, topic Chattel Mortgages; Transportation, topic Motor Vehicles.

3.10 CONDITIONAL SALES:

See topic Sales.

3.11 CONSIGNMENTS:

See topic Factors.

3.12 CONSUMER PROTECTION:

Uniform Deceptive Trade Practices Act adopted with modifications, §§ 2(a)(12) and 7 not adopted (1966, adopted 1969). (Neb. Rev. Stat. 87-301 to -306). Criminal penalties added for violation of Act. (Neb. Rev. Stat. 87-303.08 to -303.09). Certain chains and pyramid sales are unlawful. (Neb. Rev. Stat. 87-301 to -302). Loan broker activities regulated; advance fees prohibited. (Neb. Rev. Stat. 45-189 to -193).

Consumer Rental Purchase Agreement Act adopted regulating terms of agreements. (Neb. Rev. Stat. 69-2101 to -2119). Membership Campground Act adopted, prohibiting deceptive practices, requiring disclosure statements and registration of membership contracts. (Neb. Rev. Stat. 76-2101 to -2121).

Lemon Law. (Neb. Rev. Stat. 60-2701 to -2709).

Home solicitation sales regulated. (Neb. Rev. Stat. 69-1601 to -1607). Buyer's right of cancellation provided. (Neb. Rev. Stat. 69-1603).

Unconscionable act by supplier in consumer transaction is unlawful. (Neb. Rev. Stat. 87-303.01).

Plain Language.

Nebraska UCC contains special requirements for contents of notification of disposition and safe-harbor, ``plain English'' form of notification, for consumer-goods transactions. (Neb.

UCC 9-614).

Consumer Default Procedures.

Creditor required to give ten days notice of default and debtor is given 20 days to cure. (Neb. Rev. Stat. 45-1,106 to -1,107).

Unsolicited goods statute. (Neb. Rev. Stat. 69-2201).

Nebraska Drug Product Selection Act providing for sale of drugs by generic name. (Neb. Rev. Stat. 71-5401.01 to -5409).

Motor Vehicle Service Contract Reimbursement Insurance Act.

See category Insurance, topic Insurance Companies.

See category Insurance, topic Insurance Companies.

See also category Debtor and Creditor, topic Creditors' Suits.

Hospitals.

Medicaid residents: Require long-term care hospitals to meet conditions relating to retention of residents. (Neb. Rev. Stat. 71-6023.01).

3.13 CONTRACTS:

Common law rules followed.

Uniform Commercial Code in effect. See topic Commercial Code. See also topic Consumer Protection; categories Dispute Resolution, topic Arbitration and Award; Documents and Records, topic Seals; Family, topic Infants.

3.14 FACTORS:

See topic Commercial Code.

3.15 FRANCHISES:

Uniform Franchise and Business Opportunities Act (1987) not adopted.

Franchise Practices Act adopted to define relationships and responsibilities of franchisors and franchisees in connection with franchise agreements. (Neb. Rev. Stat. 87-401 to -410).

Separate statutes control fuel franchises. (Neb. Rev. Stat. 87-411 to Neb. Rev. Stat. 87-414).

Beer Distribution.

Distribution agreements between beer suppliers and beer wholesalers defined and regulated. (Neb. Rev. Stat. 53-201 to -223).

3.16 FRAUDS, STATUTE OF:

See Neb. UCC 1-206, 2-201, 3-416, 8-319 and 9-203. See topic Commercial Code.

Real Property.

No estate or interest in land other than lease for one year or less may be created, granted, assigned, surrendered or declared unless by operation of law or by deed of conveyance subscribed by parties creating same. (Neb. Rev. Stat. 36-103). Contract for leasing for longer than one year, or for sale of land, is void unless contract or some note or memorandum thereof be in writing, signed by party by whom lease or sale to be made. (Neb. Rev. Stat. 36-105). Auction of real estate without reserve is within statute. (208 Neb. 330, 303 N.W.2d 496).

Personal Property.

See topic Sales; category Mortgages, topic Chattel Mortgages. See Neb. UCC as above.

Contracts.

Following agreements are void unless some note or memorandum thereof in writing be subscribed by party to be charged: Agreement by its terms not to be performed within one year; special promise to answer for debt, default or misdoings of another person; agreement in consideration of marriage, except mutual promises to marry; special promise of executor or administrator to answer damages out of his own estate; agreement for repurchase of corporate stocks, bonds or other securities. (Neb. Rev. Stat. 36-202).

Contract of Sale.

In cases in which contracts for sale or lease of lands owned by state have been duly signed, executed and delivered to purchaser or purchasers or lessees named in such contracts, by proper state officers, omission on part of proper officers to have first offered such lands at public sale shall not invalidate private sales or leasing of such lands; but purchaser or purchasers or lessees in such contracts mentioned, or their assignees, upon performance by them of covenants and conditions on their part, by terms of such contracts to be done, kept and performed, shall be entitled to deed or contract of sale from state for such lands; and proper officers of state in such cases are authorized and directed to make, execute and deliver to such purchaser or purchasers or lessees, or their assignees, deeds or contracts of sale from state, which deeds, when properly executed and delivered, shall convey all right, title and interest of state in and to lands described therein. (Neb. Rev. Stat. 72-101). Action for breach of any contract for sale must be commenced within four years after cause of action has accrued. By original agreement, parties may reduce period of limitation to not less than one year but may not extend it. (Neb. Rev. Stat. 2-725).

Part Performance.

Common law applies.

3.17 INTEREST:

Maximum rate of 16% is valid on any loan or forbearance, if expressly agreed. (Neb. Rev. Stat. 45-101.03). This limit does not apply to loans made by Department of Banking licensees or permittees; loans made to any corporation, partnership or trust, or to guarantor or surety thereof; when principal amount is $25,000 or more; loans guaranteed, sponsored, etc. by federal or state government; loans on securities as defined in Neb. Rev. Stat. 8-1101(15); interest charges made on open credit accounts; minimum charge of $10 per loan not to exceed 19% per annum; loans made by state or federal savings and loan defined in Neb. Rev. Stat. 8-319(4); certain loans made primarily for business or agricultural purposes; loans under installment contracts for goods and services. (Neb. Rev. Stat. 45-101.04). Variable rate loans permitted, on consumer goods loan ten days notice before increase required. (Neb. Rev. Stat. 45-101.03). Amounts charged for actual filing and recording fees, or for premiums on credit life, sickness and accident insuring policies in regard to loan transactions, and fees agreed to by parties for loan service costs for exceeding authorized limits are not considered as interest. (Neb. Rev. Stat. 8-821).

Legal rate is 12% through Aug. 31, 1983, then 6% commencing on Sept. 1, 1983, unless greater rate, not exceeding 16%, is contracted for. (Neb. Rev. Stat. 45-102).

Judgments.

Bear interest at 1% above bond equivalent yield, as published by U.S. Secretary of the Treasury of average accepted auction price for last auction of Treasury bills in effect on date of entry of judgment, provided judgment interest rate is not provided by law or judgment interest rate agreed by contract. (Neb. Rev. Stat. 45-103). Prejudgment interest allowed only in limited circumstances. (Neb. Rev. Stat. 45-103.02).

Open Accounts.

Accounts that are unsettled bear 12% interest from date of billing unless paid within 30 days from date of billing. Settled accounts bear same rate but from day balance is agreed upon. (Neb. Rev. Stat. 45-104).

Small Loans.

No loan, made outside this state, in amount or of value of $3,000 or less, for which greater rate of interest, consideration, or charges than is permitted by Act shall be enforced. Loan limit rates: Unpaid balance charges not to exceed 24% on unpaid principal on first $1,000 and 21% of remainder. (Neb. Rev. Stat. 45-1024).

Usury.

Contract for more than 16% is not void because of usury; however in any action principal, only, is recoverable. (Neb. Rev. Stat. 45-105). Contract for payment of money in satisfaction of debt which prevents full discharge by paying same number of dollars in lawful money of U.S. as debtor originally contracted to pay, plus interest not in excess of maximum legal rate, is usurious. (Neb. Rev. Stat. 45-109). In any action on such contract plaintiff's recovery is limited to same number of dollars contracted for at time original contract was made, plus interest not exceeding maximum legal rate and costs. (Neb. Rev. Stat. 45-110).

Delinquent taxes draw interest at 14% from date due. (Neb. Rev. Stat. 77-207).

Installment Loan Act inhibitory provisions apply to both licensed and nonlicensed lenders. (162 Neb. 11, 75 N.W.2d 122). Loan limit rates: Unpaid balance charges not to exceed 24% on unpaid principal on first $1,000 and 21% of remainder. (Neb. Rev. Stat. 45-1024).

Installment Sales Act of 1965; except for certain vehicles, fixed or variable annual percentage rate that is agreed to by parties, not to exceed 18%, except that minimum time-price differential of $10 may be charged on installment contract and $10 origination fee. (Neb. Rev. Stat. 45-338). Installment sale defined. (Neb. Rev. Stat. 45-335).

Consumer Rental Purchase Agreement Act adopted. (Neb. Rev. Stat. 69-2101 to -2115).

Registered banks and trust companies may, on loans initiated by credit cards contract for any amount agreed upon by parties. (Neb. Rev. Stat. 8-820). On all other personal loans 19%. (Neb. Rev. Stat. 8-820). Permitted to charge commercially reasonable fees for credit cards. (Neb. Rev. Stat. 8-820).

Credit unions may lend at rates of interest not exceeding 18% on unpaid balance. (Neb. Rev. Stat. 21-1788).

Building and loan associations may, on property improvement loans made under

Title I of National Housing Act, as am'd, and unsecured loans authorized in § 5C of Home Owners Act, as am'd, charge interest not exceeding lawful rate. (Neb. Rev. Stat. 8-330).

Revolving Charge Accounts.

1¾% per month on amounts less than $500; 1½% per month on $500 or more. (Neb. Rev. Stat. 45-207). No time price differential shall be assessed on account if payment of outstanding balance is received prior to beginning of next billing cycle under agreement.

3.18 INFORMATION TECHNOLOGY, INTERNET, AND NEW MEDIA

Advertising.

Electronic advertising is treated same as print advertising for purposes of Nebraska law.

Computer Crime.

Nebraska has adopted Uniform Computer Crimes Act. (Neb. Rev. Stat. 28-1341 to -1348). Person commits offense of unauthorized computer access if person intentionally and without authority penetrates computer security system. (Neb. Rev. Stat. 28-1343.01). Any person who intentionally accesses or causes to be accessed, directly or indirectly, any computer, computer system, computer software, or computer network without authorization or who, having accessed any computer, computer system, computer software, or computer network with authorization, knowingly and intentionally exceeds limits of such authorization shall be guilty of crime. (Neb. Rev. Stat. 28-1344). Any person who accesses or causes to be accessed any computer, computer system, computer software, or computer network without authorization or who, having accessed any computer, computer system, computer software, or computer network with authorization, knowingly and intentionally exceeds limits of such authorization shall be guilty of crime. (Neb. Rev. Stat. 28-1345). Any person who intentionally accesses or causes to be accessed any computer, computer system, computer software, or computer network without authorization, or who, having accessed computer, computer system, computer software, or computer network with authorization, knowingly and intentionally exceeds limits of such authorization, and thereby obtains information filed by public with state or any political subdivision which is by statute required to be kept confidential shall be guilty of crime. (Neb. Rev. Stat. 28-1346). Any person who intentionally accesses any computer, computer system, computer software, computer network, computer program, or data without authorization and with knowledge that such access was not authorized or who, having accessed any computer, computer system, computer software, computer network, computer program, or data with authorization, knowingly and intentionally exceeds limits of such authorization shall be guilty of crime. (Neb. Rev. Stat. 28-1347). All punishments for aforementioned crimes are subject to penalties found within their respective sections.

Digital Signatures.

Uniform Electronic Transactions Act does not require record or signature to be created, generated, sent, communicated, received, stored, or otherwise processed or used by electronic means or in electronic form. (Neb. Rev. Stat. 86-632). Electronic signature means electronic sound, symbol, or process attached to or logically associated with record and executed or adopted by person with intent to sign record. (Neb. Rev. Stat. 86-621). If law requires record to be in writing, electronic record satisfies law. If law requires signature, electronic signature satisfies law. (Neb. Rev. Stat. 86-634).

Government Agencies.

Governmental agency means executive, legislative, or judicial agency, department, board, commission, authority, institution, or instrumentality of federal government or of state or county, municipality, or other political subdivision of state. (Neb. Rev. Stat. 86-622).

3.19 LICENSES, BUSINESS AND PROFESSIONAL:

Statutes require licenses for numerous occupations.

Cities, towns and villages generally provide by ordinance for license fees by transients engaged in business within corporate limits and by permanent residents pursuing occupations regarded as affected with public interest.

Commercial Travelers.

No statute, but license required in some cities under city ordinance.

Collection Agencies.

Collection Agency Act adopted. (Neb. Rev. Stat. 45-601 to -622). Collection agency required to secure license from Collection Agency Licensing Board. (Neb. Rev. Stat. 45-601). May be retained by state agency, county, city or other political subdivision for debt collection. (Neb. Rev. Stat. 45-623).

Health and Medical Licenses.

See category Health, topic Licensure and Certification.

3.20 MONOPOLIES, RESTRAINT OF TRADE AND COMPETITION:

Unfair Trade Practices.

Every contract or combination in form of trust or conspiracy in restraint of trade or commerce is illegal. Violation is class IV felony. (Neb. Rev. Stat. 59-801). Following are specifically prohibited: Discrimination in rates between different sections for purpose of destroying business of competitor (Neb. Rev. Stat. 59-501); attempt to monopolize any part of trade or commerce in state (Neb. Rev. Stat. 59-802); combinations to drive other persons out of business (Neb. Rev. Stat. 59-805).

Violations of foregoing requirements generally subject offenders to fine or imprisonment or both (Neb. Rev. Stat. 59-505, -802, -805, and -830) and liability to party injured for damages with attorney's fee (Neb. Rev. Stat. 59-821). Corporate violator also forfeits right to do business. (Neb. Rev. Stat. 59-508).

Musical Compositions.

Price charged different licensees must not be discriminatory. (Neb. Rev. Stat. 59-1405).

School Books.

Contract with publisher who becomes party to combination in restraint of trade for purpose of raising price of school books becomes null and void at option of school board. (Neb. Rev. Stat. 79-736).

Fair Trade Act.

Unconstitutional. (159 Neb. 703, 68 N.W.2d 608; modified, 160 Neb. 319, 68 N.W.2d 608; 202 Neb. 524, 276 N.W.2d 191).

3.21 NEGOTIABLE INSTRUMENTS:

See topic Bills and Notes.

RESTRAINT OF TRADE:

See topic Monopolies, Restraint of Trade and Competition.

3.22 [RESERVED]

3.23 SALES:

Uniform Commercial Code in effect. See topic Commercial Code.

Recording of bill of sale is not required by statute, but it may be recorded in office of county clerk; fee, $5 per page. (Neb. Rev. Stat. 33-109).

Contracts of Sale.

No statutory limitation as to type size in printed contracts. No special requirement.

Product Liability and Retail Credit Sales.

Manufacturer strictly liable in tort when it knowingly markets article without inspection and defect injures rightful user. (187 Neb. 428, 191 N.W.2d 601 [1971]). Strict liability in tort applicable to physical harm to property alone, without physical injury. (213 Neb. 782, 332 N.W.2d 39).

Retail Credit Sales.

Generally, each retail installment contract shall be in writing, shall be signed by both buyer and seller, and shall contain following items and copy thereof shall be delivered to buyer at time instrument is signed: (a) Cash sale price; (b) amount of buyer's downpayment, and whether made in money or goods, or partly in money and partly in goods, including brief description of any goods traded in; (c) difference between subdivisions (a) and (b) of this subsection; (d) amount included for insurance if separate charge is made therefor, specifying types of coverages; (e) amount included for debt cancellation contract or debt suspension contract. (Neb. Rev. Stat. 45-336).

Consumer Protection.

See topic Consumer Protection. Uniform Deceptive Trade Practices Act (1966, adopted 1969). (Neb. Rev. Stat. 87-301 to -306).

Bulk Sales.

See topic Commercial Code; category Debtor and Creditor, topic Fraudulent Sales and Conveyances.

Sales of Motor Vehicles.

See category Transportation, topic Motor Vehicles.

International Sales of Goods.

U.S. is contracting state to UN Convention on International Sale of Goods; CISG applies as law of contract for sale of goods between parties whose places of business are in different contracting states. See Selected International Conventions in Law Digest.

3.24 SECURITIES:

Uniform Securities Act (1956, adopted 1965). (Neb. Rev. Stat. 8-1101 to -1123).

Uniform Commercial Code in effect. See topic Commercial Code.

Supervision.

Sales of Securities are regulated by Securities Act of Nebraska (Neb. Rev. Stat. 8-1101 to -1123), enforcement of which is by Director of Banking and Finance, except regulations of securities issued by or representing interest of insurance companies enforced by Director of Insurance (Neb. Rev. Stat. 8-1120).

Regulatory Powers of Supervising Authority.

Except as otherwise provided in § 8-1718 or § 8-1719, no person shall sell or purchase or offer to sell or purchase any commodity under any commodity contract or under any commodity option or offer to enter into or enter into as seller or purchaser any commodity contract or any commodity option. (Neb. Rev. Stat. 8-1717). To encourage uniform application and interpretation of Commodity Code and securities regulation and enforcement in general, Director of Banking and Finance and employees of Director may cooperate, including bearing expense of cooperation, with securities' agencies or director of another jurisdiction, Canadian province, or territory or such other agencies administering its Commodity Code, Commodity Futures Trading Commission, Securities and Exchange Commission, any self-regulatory organization established under Commodity Exchange Act or Securities Exchange Act of 1934, any national or international organization of commodities or securities officials or agencies, and any governmental law enforcement agency.

Prerequisites to Sales or Offerings.

Unless securities are exempt (under Neb. Rev. Stat. 8-1110) or sold in exempt transactions (under Neb. Rev. Stat. 8-1111), or security is federal covered security, sale of any security is unlawful unless registered by: (a) Notification (under Neb. Rev. Stat. 8-1105), (b) coordination (under Neb. Rev. Stat. 8-1106), or (c) qualification (under Neb. Rev. Stat. 8-1107). (Neb. Rev. Stat. 8-1104). (See subhead Registration of Securities, infra.)

Securities to Which Act Applicable.

Security is defined as any note, stock, treasury stock, bond, debenture, units of beneficial interest in real estate trust, evidence of indebtedness, certificate of interest or participation in any profit sharing agreement, collateral-trust certificate, preorganization certificate or subscription, transferable share, investment contract, voting trust certificate, certificate of deposit for security, certificate of interest or participation in oil, gas or mining title or lease or in payments out of production under such title or lease, or in general, any interest or instrument commonly known as security, or any certificate of interest or participation in, temporary or interim certificate for, guarantee of, or warrant or right to subscribe to or purchase, any of foregoing. (Neb. Rev. Stat. 8-1101[15]).

Security does not include endowment or annuity contract of insurance company. (Neb. Rev. Stat. 8-1101[15]).

Exempt Securities and Transactions.

Following securities are exempt from operation of Securities Act (Neb. Rev. Stat. 8-1110): (1) Security, including revenue obligation issued or guaranteed by State of Nebraska, any political subdivision, or any agency or corporate or other instrumentality thereof or any certificate of deposit for any of foregoing; (2) security issued or guaranteed by government with which U.S. maintains diplomatic relations; (3) any security issued or guaranteed by any federal credit union, or any credit union, or similar association organized under Nebraska law; (4) any security issued or guaranteed by any railroad, other common carrier, public utility, or holding company which is: (a) registered holding company under Public Utility Holding Company Act of 1935 or subsidiary of such company within meaning of that act, (b) regulated by U.S., state, or municipal authority with regards to its rates and charges, or (c) regulated in respect of issuance or guarantee of security by governmental authority of U.S., any state, Canada, or any Canadian province; (5)(a) any security listed on Chicago Stock Exchange, Chicago Board Options Exchange, Tier I of the Pacific Stock Exchange, Tier I of the Philadelphia Stock Exchange, or any other stock exchange or market system approved by director, if, in each case, quotations have been available and public trading has taken place for such class of security prior to offer or sale of that security in reliance on exemption, any other security of same issuer which is of senior or substantially equal rank; any security called for by subscription rights or warrants so listed or approved, or any warrant or right to purchase or subscribe to any of foregoing or to any security listed on New York Stock Exchange, American Stock Exchange, or NASDAQ Global Market (5)(b) issuer of any security which has been approved for listing or designation on notice of issuance on such exchanges or market systems, and for which no quotations have been available and no public trading has taken place for any of such issuer's securities, may rely upon exemption stated in subdivision (5)(a) of this section, if notice is filed with director, together with filing fee of $200, prior to first use of disclosure document covering such securities in this state; failure to file such notice in timely manner may be cured by director in his or her discretion, (5)(c) director may adopt rules and regulations which, after notice to such exchange or market system and opportunity to be heard, remove any such exchange or market system and opportunity to be heard, remove any such exchange or market system from exemption stated in subdivision (5)(a) of this section if director finds that listing requirements or market surveillance of such exchange or market system is such that continued availability of such exemption for such exchange or market system is not in public interest and that removal is necessary for protection of investors (Neb. Rev. Stat. 8-1110); (6) any security meeting all of following conditions: (a) if issuer is organized under laws of U.S. or state, it has authorized agent in U.S. for service, (b) class of issuer's securities is required to be and is registered under § 12 of S.E.C. Act of 1934, and was registered for three years preceding offering date, (c) neither issuer or significant subsidiary has had material default during last seven years, or during issuer's existence if in existence less than seven years, in payment of principal, interest, dividends, or sinking fund installments on preferred stock or indebtedness for borrowed money or rentals under leases with terms of three or more years, (d) issuer has had consolidated net income, not taking into account extraordinary items and cumulative effect of accounting changes of at least $1,000,000 in four of its last five fiscal years, and if its offering is of interest-bearing securities issuer has had for its last fiscal year net income before taxes and depreciation, of at least one and one half times issuer's annual interest expense, (e) if offering is of other than preferred stock or shares, such securities have voting rights (at least as many votes as shares, and right to vote on as many general corporate decisions as holders of issuer's other outstanding stock or shares) except as otherwise required by law, (f) if offering is of stock or shares other than preferred stock or shares, such securities are owned beneficially or of record, on any date within six months prior to commencement of offering, by at least 1,200 persons, and on such date there are at least 750,000 such shares outstanding with aggregate market value of $3,750,000, based on average bid price for that day; (7) any security issued or guaranteed as to both principal and interest by international bank of which U.S. is member; (8) any security issued by any person organized and operated not for private profit but exclusively for religious, educational, benevolent, charitable, fraternal, social, athletic, or reformatory purposes, or as chamber of commerce or trade or professional association. Certain transactions are exempted, most patterned after federal law with others peculiar to Nebraska. See Neb. Rev. Stat. 8-1111. Of interest is exemption of any transaction pursuant to sale to not more than 15 persons in this state during any period of 12 consecutive months, if: (a) Seller reasonably believes that all buyers are purchasing for investment, (b) no commission or other remuneration is paid or given directly or indirectly for soliciting any prospective buyer, except to broker-dealer registered under The Securities Act of Nebraska, (c) notice generally describing terms of transaction and containing representation that conditions of this exemption are met is filed by seller with director within 30 days after first sale for which exemption is claimed, and (d) no solicitations are made by newspaper, radio, or television. Also transactional exemption is provided for any offer or sale of preorganization certificate or subscription if: (a) No commission or other remuneration is made or given directly or indirectly for soliciting any prospective subscriber, (b) number of subscribers does not exceed ten, and (c) no payment is made by any subscriber. Issuance of any investment contract in connection with employees stock purchase, savings, pension, profit sharing, or similar benefit plan is exempt under certain conditions. (Neb. Rev. Stat. 8-1111). Federal limits on securities registration provided in Philanthropy Protection Act of 1995 do not apply in Nebraska. Nebraska retains authority to require or not require federal registration under Securities Act of Nebraska, or to have such registration requirements apply in all administrative and judicial actions. (Neb. Rev. Stat. 8-1122.01).

In any proceeding under this Act, burden of proving an exemption is upon person claiming it. (Neb. Rev. Stat. 8-1111).

Registration of Offerers.

Registration statement may be filed by issuer, by any other person on whose behalf offering is to be made, or by registered broker-dealer. Director may require as condition of registration by qualification (a) that proceeds from sale of registered security be impounded until issuer receives specified amount, (b) that applicant comply with Federal Securities Act of 1933 if it appears to Director to be in public interest or that registered security is or will be offered in such manner as to be subject to such Act, (c) such reasonable conditions, restrictions, or limitations upon offering as may be in public interest, or (d) that any security issued within past three years, or to be issued, to promoter for consideration substantially different from public offering price or to any person for consideration other than cash, be delivered in escrow to him or her or to some other depository satisfactory to him or her under escrow agreement that owners of such securities shall not be entitled to sell or transfer such securities or to withdraw such securities from escrow until all other stockholders who have paid for their stock in cash shall have been paid dividend or dividends aggregating not less than six percent of initial offering price shown to satisfaction of Director to have been actually earned on investment in any common stock so held. (Neb. Rev. Stat. 8-1108). Whenever it appears to Director that sale of any security is subject to registration under Securities Act of Nebraska and is being offered or has been offered for sale without such registration, he or she may order issuer or offerer of such security to cease and desist from further offer or sale of such security unless and until it has been registered under Act. (Neb. Rev. Stat. 8-1108.01).

Registration of Securities.

Securities may be registered by: (1) Notification if (a) issuer or predecessor has been in continuous operation for five years and there has been no default during preceding three years in payment of principal, interest or dividends on any security with fixed maturity, interest or dividend provision and issuer and predecessor during past three fiscal years have had average net earnings equal to at least 5% of amount of securities without fixed maturity, interest or dividend provision outstanding on date of registration; (b) any security other than interest in oil, gas or mining has been registered under this Act or a predecessor Act, or security was originally issued pursuant to an exemption under provisions of this Act or a predecessor Act. (Neb. Rev. Stat. 8-1105[1]); (2) Any security for which a registration statement was filed under Federal Securities Act of 1933 may be registered by coordination. (Neb. Rev. Stat. 8-1106[1]); (3) Any security may be registered by qualification. (Neb. Rev. Stat. 8-1107[1]).

In each mode of registration issuer must file a statement with Director setting forth information required by same. (Neb. Rev. Stat. 8-1105, -1106 and -1107). Filing fee equal to 1/10 of 1% of aggregate offering price of securities offered, minimum $100. (Neb. Rev. Stat. 8-1108[3]). Registration effective for one year or until sooner revoked. (Neb. Rev. Stat. 8-1108[4]).

Regulatory Powers of Supervising Authority.

Director may make full investigation of registrations, possible violations or to aid in enforcement at applicant's expense. Director may take testimony, subpoena witnesses, and issue subpoena duces tecum. (Neb. Rev. Stat. 8-1115).

Registering as broker-dealer, issuer-dealer, or investment adviser, or directly or indirectly offering security constitutes sufficient contact with state for exercise of personal jurisdiction. (Neb. Rev. Stat. 8-1112).

Misrepresentation.

False or misleading statements, omissions, misrepresentation to buyer make person who makes same and those who directly or indirectly control or are employed by said person liable for damages of buyer. Person so charged sustains burden of proof that he did not know, and exercising reasonable care could not know of existence of facts on which liability is based. (Neb. Rev. Stat. 8-1118).

Licenses.

Broker-dealer, issuer-dealer, agent, investment adviser, or investment adviser representative may apply for registration by filing with Director application and payment of fee (initial or renewal registration shall be $250 for broker-dealer, $200 for investment adviser, $100 for issuer-dealer, $40 for agent, and $40 for investment adviser representative). If applicant is individual, application shall include applicant's social security number. Registration of broker-dealer or issuer-dealer shall automatically constitute registration of all partners, limited liability company members, officers, or directors of such broker-dealer or issuer-dealer as agents, except any partner, limited liability company member, officer, or director whose registration as agent is denied, suspended, or revoked, without filing of applications for registration as agents or payment of fees for registration as agents. (Neb. Rev. Stat. 8-1103).

Bonds.

Surety bond issued by bonding company or insurance company authorized to do business in this state, in principal sum of $100,000 and in additional principal sum of $5,000 for each location, in excess of one, at which applicant proposes to sell checks in this state, but in no event shall bond be required to be in excess of $250,000. Bond shall be in form satisfactory to Director and shall run to state for benefit of any claimants against applicant or its agents to secure faithful performance of obligations of applicant and its agents with respect to receipt, handling, transmission, and payment of money in connection with sale of checks. Aggregate liability of surety in no event shall exceed principal sum of bond. Bond shall remain in force and effect until surety is released from liability by Director or until bond is canceled by surety, which cancellation may be had only upon 30 days' written notice to Director. Such cancellation shall not affect any liability incurred or accrued prior to termination of 30-day period. (Neb. Rev. Stat. 8-1006).

Advertisements.

Director may issue order denying effectiveness to, or suspend or revoke effectiveness of, registration statement to register securities by qualification if he or she finds issuer's or registrant's literature, circulars, or advertising is misleading, incorrect, incomplete, or calculated to deceive purchaser or investor. (Neb. Rev. Stat. 8-1109.01).

Criminal Liability.

Willful violation of any provision of this Act is a criminal offense punishable by fine not more than $10,000 or imprisonment of not more than five years, or both. Action must be brought within five years. (Neb. Rev. Stat. 8-1117).

Whenever it appears to Director that a violation of Act has occurred or is about to, he may seek injunction of such acts in any court of competent jurisdiction. (Neb. Rev. Stat. 8-1116).

Tender Offers.

See category Business Organizations, topic Corporations.

Subdivision Offerings.

Subdivision property is not considered security; however sale of such property may only be made by broker upon application to Real Estate Commission and approval of Attorney General. Application fee is $100 plus $25 for each 100 lots or fraction thereof. (Neb. Rev. Stat. 81-885.33 to -885.55).

Uniform Simplification of Fiduciary Security Transfers Act repealed. Fiduciary security transfers governed by § 8 Uniform Commercial Code.

Uniform Securities Ownership by Minors Act not adopted.

Shareholders Protection Act. (Neb. Rev. Stat. 21-2431 to -2453). See category Business Organizations, topic Corporations.

3.25 STATUTE OF FRAUDS:

See topic Frauds, Statute of.

3.26 TRUST RECEIPT SECURITY:

Uniform Commercial Code in effect. See category Business Regulation and Commerce, topic Commercial Code.

3.27 WAREHOUSEMEN:

Public Service Commission has general supervision of public warehouses.

Uniform Commercial Code in effect. Vol. 6, Neb. Rev. Stats. See topic Commercial Code.

Lien.

Uniform Commercial Code in effect. See topic Commercial Code.

Public Grain Warehouses.

Any grain elevator, mill, grist mill, building, or receptacle in which grain is held in storage for more than ten consecutive days, except those licensed under U.S. Warehouse Act, shall be licensed and regulated by Public Service Commission. License required for person to operate warehouse or act as warehouseman. (Neb. Rev. Stat. 88-527). Such warehouses shall be inspected by Commission at least once every 12 months. (Neb. Rev. Stat. 88-527). Each applicant for license and each warehouse licensee shall annually file application with Commission in form prescribed by Commission to do business under Grain Warehouse Act and shall include audited or reviewed fiscal year-end financial statement prepared in accordance with generally accepted accounting principles by person or firm which holds permit granted by Nebraska State Board of Public Accountancy and shall set forth location of warehouse, relation to railroad trackage, capacity, general plan and equipment, and ownership. (Neb. Rev. Stat. 88-528). Annual license fee shall be charged by Commission, except as provided in Neb. Rev. Stat. 88-531, based on warehouse capacity. (Neb. Rev. Stat. 88-529). Each license applicant must show sufficient net worth or equity to conform with financial requirements promulgated by Commission and file with Commission bond, irrevocable letter of credit, or certificate of deposit for benefit of all persons storing grain in warehouse. Bond is conditioned upon warehouse's carrying of insurance, delivery of grain upon surrender of warehouse receipt, and faithful performance of applicable law. (Neb. Rev. Stat. 88-530). License shall expire 12 calendar months after issuance, but may be kept in continuous force by filing application for renewal which Commission can approve prior to termination date. (Neb. Rev. Stat. 88-532). Notice of security filed with Commission and all warehouse storage, receiving, and load-out fees shall be posted in conspicuous place. (Neb.

Rev. Stat. 88-532).

No warehouse licensee shall increase storage capacity without approval of Commission and applicable revision in security and fees. (Neb. Rev. Stat. 88-533).

Warehouse licensee shall, at time of delivery to or shipment from warehouse, issue lawful scale ticket to owner of grain containing all information prescribed by Commission. Scale ticket issued by warehouse licensee is prima facie evidence of holder's claim of title to goods described thereon. (Neb. Rev. Stat. 88-535).

Public Service Commission may prescribe forms of warehouse receipts and fix storage rates. (Neb. Rev. Stat. 88-536 and -541).

Property, books, records, accounts, papers, and proceedings of every warehouse shall be subject to inspection by Commission at all times during business hours. (Neb. Rev. Stat. 88-542).

Penalty for issuing receipt when grain not actually received subjects person to fine of not more than $10,000 or imprisonment for not more than five years, or both. (Neb. Rev. Stat. 88-543).

At election of warehouseman, storage contracts may be terminated on application to Commission and upon good cause shown according to rules and regulations of Commission. Owner may terminate contract at any time by payment or tender of all legal charges and surrender of warehouse receipt, together with demand for delivery of such grain or notice to sell same. (Neb. Rev. Stat. 88-544).

Penalty for violation of Grain Warehouse Act subjects persons to fine of not more than $10,000, or imprisonment for not more than five years, or both, in addition to any damages arising from such violation. (Neb. Rev. Stat. 88-545).

Each warehouseman, at least once each calendar year and not later than one year from date of receipt of previous written notice, shall send written notice to each person storing grain, specifying type and amount of grain in storage, location of grain being stored, and current rate of storage. Any violation of this section is punishable by fine of not more than $100. (Neb. Rev. Stat. 88-549).

Farm Warehouses.

Provisions regulating farm warehouses repealed.

Bonded and Licensed Storage Areas.

Freeport statute repealed 1982.

4 CITIZENSHIP

4.01 ALIENS:

Real Estate.

May acquire property in any city or village or within three miles thereof. (Neb. Rev. Stat. 76-414). In addition thereto may acquire and hold property anywhere in state necessary for construction and operation of railroads, public utilities and common carriers, manufacturing or industrial establishments and facilities incidental thereto or for filling or bulk stations for handling petroleum products. (Neb. Rev. Stat. 76-412 and -413). Cannot acquire other property or leasehold interest therein for more than five years except in satisfaction of lien thereon. (Neb. Rev. Stat. 76-402). Property so acquired must be sold within ten years after title is obtained or it will escheat to state. (Neb. Rev. Stat. 76-411). Resident alien may acquire title by devise or descent and hold for not more than five years (Neb. Rev. Stat. 76-405), and widow or heirs of alien who acquired title before Mar. 16, 1889, may hold for ten years. (Neb. Rev. Stat. 76-403). Before expiration of such periods land must be sold to bona fide purchaser or it escheats to state. (Neb. Rev. Stat. 76-403 and -405).

Alien owning land on Mar. 16, 1889, may dispose of same during his life time. (Neb. Rev. Stat. 76-410).

Corporation organized to hold or holding real estate (except real estate which aliens or foreign corporations may hold under sections Neb. Rev. Stat. 76-412 to -414 and oil leases and oil production facilities which foreign corporations may acquire under section Neb. Rev. Stat. 76-404) may not elect aliens as directors or trustees in number sufficient to constitute majority of board or as executive officers or managers, or have majority of capital stock owned by aliens (Neb. Rev. Stat. 76-406), under penalty of provisions applicable to alien persons. Domestic corporations violating this provision are held to be alien and shall forfeit charter and be dissolved and foreign corporations forfeit right to do business in state. (Neb. Rev. Stat. 76-407). State alone may question title; corporation may pass good title though real estate might have been subject to escheat. (115 Neb. 33, 211 N.W. 210).

Rights to take property by devise or succession controlled by Neb. Rev. Stat. 4-107 and Neb. Rev. Stat. 76-403, -405, and -411.

5 CIVIL ACTIONS AND PROCEDURE

5.01 ACCORD AND SATISFACTION:

Uniform Commercial Code Adopted.

See category Business Regulation and Commerce, topic Commercial Code.

Compromise.

Parties able to contract may agree to payment of certain sum in satisfaction of disputed claim and where such compromise is pleaded and proved, it binds in absence of fraud, mistake or duress. (161 Neb. 252, 73 N.W.2d 165).

Pleading.

Must be specifically pleaded and proved. (222 Neb. 69, 382 N.W.2d 313).

5.02 ACTIONS:

Equity.

Distinction between actions at law and suits in equity abolished. (Neb. Rev. Stat. 25-101).

Forms of Action.

Only one form of action recognized called civil action. (Neb. Rev. Stat. 25-101). Feigned issues abolished. (Neb. Rev. Stat. 25-103).

Conditions Precedent.

None except for special actions. Forcible entry and detainer, three days notice to quit (Neb. Rev. Stat. 25-21,221), cancellation of oil or gas leases, 20 days demand that lease be discharged of record (Neb. Rev. Stat. 57-209).

Commencement.

See topic Process.

Parties.

Real party in interest must prosecute. (Neb. Rev. Stat. 25-301; 203 Neb. 727, 280 N.W.2d 53). Executor, administrator, guardian, trustee of express trust, person with whom contract made for another's benefit or person authorized by statute, may bring action without joining beneficiary; officer may sue and be sued in name authorized by law and official bonds may be sued on same way; assignee of choses in action assigned for collection may sue on any claim assigned in writing. (Neb. Rev. Stat. 25-304). Unincorporated associations which engage in business, hold property or represent employees in collective bargaining in this state may sue or be sued under their usual names. (Neb. Rev. Stat. 25-313). In actions for recovery of real or personal property, any person having interest in property may be made party on application to court. (Neb. Rev. Stat. 25-324). All persons may join in one action as plaintiffs if they assert any right to relief jointly, severally, or alternatively arising out of same transaction or occurrence, or series thereof and if common question of law or fact will arise in action. (Neb. Rev. Stat. 25-311). Unknown claimants to real estate may be designated as ``all persons having or claiming any interest in'' real estate accurately described, followed by words ``real names unknown''. (Neb. Rev. Stat. 25-321).

Class Actions.

Permitted (Neb. Rev. Stat. 25-319); unless members of class would have inconsistent interests (195 Neb. 170, 237 N.W.2d 86).

Intervention.

Permitted by any person claiming an interest in the matter in litigation. (Neb. Rev. Stat. 25-328).

Interpleader.

Permitted by order of court upon affidavit of defendant. (Neb. Rev. Stat. 25-325, and -326).

Third Party Practice.

After commencement of action defending party as third party plaintiff may bring in person not party to action who is or may be liable third party plaintiff for all or part of plaintiff's claim against third party plaintiff. Third party plaintiff need not obtain leave to make service if third party plaintiff files third party complaint not later than ten days after filing original answer. Otherwise, third party plaintiff must obtain leave of court by motion upon notice to all parties. Third party defendant shall have all rights of defendant and may assert against plaintiff any defenses which third party plaintiff has to plaintiff's claim. Third party defendant may assert any claim against third party plaintiff arising out of transaction or occurrence that is subject matter of plaintiff's claim against third party plaintiff. Plaintiff may assert any claim against third party defendant arising out of transaction or occurrence that is subject matter of plaintiff's claim against third party plaintiff. Third party defendant or subsequent defendants may proceed under this section. Court on its own motion or motion of any party may move to strike third party claim or for its severance or separate trial if third party claim should delay trial, confuse jury, or jeopardize rights of plaintiff. (Neb. Rev. Stat. 25-331).

Joinder of Causes of Action.

Party asserting claim for relief as original claim, counterclaim, cross claim, or third party claim may join as many claims as party has against opposing party. (Neb. Rev. Stat. 25-701). Need not obtain judgment against uninsured motorist as condition precedent to bringing suit against uninsured motorist coverage carrier. (209 Neb. 396, 308 N.W.2d 503).

Splitting Causes of Action.

Common law rule prevails.

Consolidation of Actions.

Where causes of action might have been joined, actions in same court may be consolidated on motion of defendant, by order of court or judge in vacation. (Neb. Rev. Stat. 25-703, and -704). No requirement of joinder. (207 Neb. 24, 295 N.W.2d 302).

Severance of Actions.

Parties may be dropped or added by court order on motion of any party or by court's own initiative at any stage of action and on terms that are just. Any claim may be severed and proceeded with separately. (Neb. Rev. Stat. 25-705).

Small Claims.

See category Courts and Legislature, topic Courts.

Abatement and Revival.

In addition to causes which survive at common law, causes of action for mesne profits, for injury to real or personal estate, or for deceit or fraud survive and action may be brought notwithstanding death of person entitled or liable to same. (Neb. Rev. Stat. 25-1401). No action pending in any court abates by death of either or both parties thereto, except libel, slander, malicious prosecution, assault, assault and battery or nuisance, all of which abate by death of defendant. (Neb. Rev. Stat. 25-1402).

After death of one of parties, if right of action survives against remaining parties, action may proceed against surviving parties (Neb. Rev. Stat. 25-1403) or may be revived in name of proper representative of deceased (Neb. Rev. Stat. 25-1405).

Termination of Actions.

Action may be dismissed without prejudice: By plaintiff before final submission; by court, if plaintiff fails to appear, or for want of necessary parties or on application of some defendants where there are others whom plaintiff fails to diligently prosecute or for plaintiff's disobedience of order concerning proceedings in action. (Neb. Rev. Stat. 25-601). If no counterclaim or setoff has been filed by opposite party, plaintiff in vacation may dismiss without prejudice, upon payment of costs. (Neb. Rev. Stat. 25-602). Despite plaintiff's dismissal or failure to appear, defendant may proceed to trial on his counterclaim or setoff. (Neb. Rev. Stat. 25-603).

Limitation of.

See topic Limitation of Actions.

Prohibited Actions.

No actions for (1) alienation of affections or (2) criminal conversation shall commence after Jan. 9, 1986. (Neb. Rev. Stat. 25-21,188).

Administration.

See category Estates and Trusts, topic Executors and Administrators.

Direct Actions Against Insurer.

See category Transportation, topic Motor Vehicles, subhead Direct Actions.

5.03 APPEAL AND ERROR:

Writs of error abolished in civil cases. (Neb. Rev. Stat. 25-1930). Judgments of district courts in civil cases now come to Court of Appeals and/or Supreme Court by appeal. (Neb. Rev. Stat. 25-1912).

Appeals Lie: To Court of Appeals and/or Supreme Court from district court (Neb. Rev. Stat. 24-1105 and -1106); Worker's Compensation Court (Neb. Rev. Stat. 48-185); Juvenile Court (Neb. Rev. Stat. 43-2,106.01), and in all actions by or against state (Neb. Rev. Stat. 25-21,213); to district court from county courts except in matters arising under Nebraska Probate Code or involving adoption, inheritance tax, or domestic relations or appeals from juvenile court or appeals within jurisdiction of Tax Equalization and Review Commission (Neb. Rev. Stat. 25-1901 and -2807), small claims court (Neb. Rev. Stat. 25-2807), and other tribunals, boards and officers exercising judicial functions and inferior to district court in jurisdiction, other than Juvenile Court (Neb. Rev. Stat. 25-1901 and -2807). Order of remittitur entered by district court in law action is deemed final order for purposes of appeal to Court of Appeals. (Neb. Rev. Stat. 25-1936).

Method and Time.

To Court of Appeals.—By filing in office of clerk of district court in which judgment was rendered within 30 days from rendition of judgment or overruling of motion for new trial, notice of appeal signed by appellant and depositing with said clerk $100 docketing fee. (Neb. Rev. Stat. 25-1912, 25-1913, and 33-103). Motion for new trial not necessary for consideration of sufficiency of evidence but is necessary for review of damages asserted as excessive or inadequate. (Neb. Rev. Stat. 25-1912.01). Appellant must designate each specific document to be included in transcript prepared by clerk of court. (Rules of Supreme Court, R.4.A). Certified transcript containing judgment must be filed with clerk of Supreme Court within 30 days from filing notice of appeal. (Neb. Rev. Stat. 25-1912). Case will be heard by Court of Appeals, unless case involves life imprisonment, death penalty or constitutionality of statute. Supreme Court hears all cases involving constitutionality of statute and life imprisonment or death penalty cases. (Neb. Rev. Stat. 24-1106). Juvenile court's final order or judgment may be appealed to Court of Appeals. (Neb. Rev. Stat. 43-2,106.01).

To Supreme Court—From Court of Appeals.

Party may file petition with Supreme Court to bypass review by Court of Appeals immediately upon filing of appeal. Party aggrieved by Court of Appeals decision may petition Supreme Court for review within 30 days of issuance of decision. Supreme Court may, on its own motion, remove case from consideration of Court of Appeals for decision by Supreme Court. (24-1106 and -1107).

To District Court—From County Court; Small Claims Court.

By filing with clerk of lower court, within 30 days after rendition of judgment, or making of final order complained of, notice of appeal and $42 docketing fee. (Neb. Rev. Stat. 33-106 and 25-2729). Notice of appeal must be served upon all parties who have appeared in action or upon their attorney of record and proof of service must be filed with notice of appeal. (Neb. Rev. Stat. 25-2729).

Proceedings under 25-1901 to reverse, vacate or modify judgment or final order must be commenced within 30 days after rendition of judgment or making of order, except that infant, mentally incompetent or person imprisoned has one year, exclusive of time of disability, within which to commence proceedings. (Neb. Rev. Stat. 25-1931).

Appeal Bond.

On appeal from district court, appellant must file cost bond for $75 or deposit $75 in cash with clerk of district court within 30 days from rendition of judgment or making of order or overruling of motion for new trial, unless supersedeas bond has been given. (Neb. Rev. Stat. 25-1914). No appeal bond required from state or any officer litigating in official capacity. (Neb. Rev. Stat. 25-21,216).

In appeals from district court on money judgment, bond is for lesser of: (a) Taxable court costs in district court, estimated amount of costs of appeal, and estimated interest pending appeal as fixed by trial court; (b) 50% of appellant's net worth; or (c) 50 million dollars. (Neb. Rev. Stat. 25-1916). Bond is conditioned on prosecution of appeal without delay and payment of final judgment and costs. (Neb. Rev. Stat. 25-1916). Special requirements are imposed in particular cases. (Neb. Rev. Stat. 25-1907, -1908, -1916 and -1918).

Bond and sureties must be approved by court in which judgment was rendered or clerk thereof. (Neb. Rev. Stat. 25-1908 and -1918). Cash may be deposited in lieu of bond. (Neb. Rev. Stat. 25-1916).

In appeals from lower courts to district court involving money judgment, bond is for amount of judgment, costs, and estimated interest pending appeal. In cases involving judgment for possession of specified personal property, bond is at least double amount of property. (Neb. Rev. Stat. 25-2730).

On appeal from small claims court to district court appellant must file cost bond or undertaking with at least one surety approved by court, in amount of $50.

See Uniform Probate Code adopted as Nebraska Probate Code for appeal bond provision in probate matters.

Stay of Proceedings.

Appeal to appellate court does not stay proceedings unless supersedeas bond is filed within 30 days after rendition of judgment or making of order or overruling motion for new trial (Neb. Rev. Stat. 25-1916), except that if judgment is for conveyance or other instrument, appellant may execute same, deposit it with clerk of court which renders judgment and no bond is then necessary (Neb. Rev. Stat. 25-1917).

Perfecting appeal from lower court to district court does not operate as supersedeas, unless appellant within 30 days after rendition of judgment deposits with clerk of lower court cash bond or undertaking with at least one surety approved by court. No bond required for appeals under Nebraska Probate Code, Uniform Residential Landlord and Tenant Act. (Neb. Rev. Stat. 25-2730).

Extent of Review.

Appeals to appellate court are tried on record from lower court; only errors appearing in record are considered. On questions of law, appellate court obligated to reach independent conclusion from that of trial court. In law actions, standard of review is that district court judgment will not be set aside on appeal unless it is clearly wrong and not supported by evidence. In equity actions, case is tried de novo on record, errors in law and fact are considered. (Neb. Rev. Stat. 25-1925).

Appeals to district court from county court are reviewed for error appearing on record. (Neb. Rev. Stat. 25-2733).

Judgment of Order on Appeal.

If judgment or final order shall be reversed either in whole or in part, in Court of Appeals or Supreme Court, courts shall proceed to render such judgment as court below should have rendered or remand cause to court below for such judgment. (Neb. Rev. Stat. 25-1926 and -1315.03).

On appeals to district court from county court, district court shall render judgment, which may affirm, affirm but modify, or reverse judgment or final order of county court. If district court reverses, it may enter judgment in accordance with its findings, or remand case to county court for further proceedings consistent with judgment of district court. Within two days after decision of district court becomes final, clerk of district court shall issue mandate in appeals to clerk of county court. (Neb. Rev. Stat. 25-2733).

Appeal Under Newly Enacted Laws.

When law does not prescribe appeal procedure, appeal to district court is same as appeal from county court in civil actions. Appeal from district court is same as appeal to supreme court in civil actions. (Neb. Rev. Stat. 25-1937; 180 Neb. 121, 141 N.W.2d 768).

5.04 BONDS:

Surety on every undertaking, bond and recognizance provided for by code must be resident of Nebraska and have property liable to execution situated in county in which bond, etc., is to be given and filed worth at least double the sum to be secured beyond all liens and encumbrances thereon and his exemption. This provision does not apply to incorporated surety companies authorized to transact business in this state. Except in case of incorporated surety companies, where there are two or more sureties for same bond, etc., they must in aggregate have qualifications prescribed above. (Neb. Rev. Stat. 25-2223).

All officers required to take security, undertakings, bonds and recognizances must require surety to make affidavit as to his qualifications. (Neb. Rev. Stat. 25-2222).

Sureties.

Whenever bond required with one surety or with two or more sureties, it is sufficient if executed alone by surety company, organized under laws of Nebraska, or of any state of United States, having paid up capital of not less than $100,000 and power under its charter to become surety in same manner and with same rights and liabilities as natural persons, but bond must be approved in each instance by proper officer. (Neb. Rev. Stat. 11-123).

Disability as Surety.

No state or county officer or deputy may be security on bonds of any administrator, executor or other officer from whom by law bond is required. (Neb. Rev. Stat. 11-114). See also category Legal Profession, topic Attorneys and Counselors.

Enforcement.

Action on bond may be brought in county where any defendant resides, in county where cause of action arose, in county where transaction or some part of transaction occurred, or if all defendants are nonresidents of state, in any county. (Neb. Rev. Stat. 25-403.01).

5.05 CERTIORARI:

Writ abolished in civil cases. (Neb. Rev. Stat. 25-1930).

5.06 CHARITABLE IMMUNITY:

See topic Damages.

5.07 COMMISSIONS TO TAKE TESTIMONY:

See topic Depositions and Discovery.

5.08 COSTS:

Awarded to prevailing party in actions for money judgments, or for recovery of specific real or personal property except as waived or released in writing and upon voluntary payment after action is filed but before judgment, but may be awarded, taxed and apportioned by court in its discretion in other actions; parties may agree to costs as part of settlement. (Neb. Rev. Stat. 25-1708 to -1711). District court may tax actual fees and expenses of jury trial demanded for frivolous or capricious reason. (Neb. Rev. Stat. 25-1711).

Security for Costs.

Partnership must give security for costs. (Neb. Rev. Stat. 25-315). In all cases proper officer may require costs paid in advance or security given therefor. (Neb. Rev. Stat. 33-120).

Liability of Attorney.

None.

5.09 DAMAGES:

Common law generally prevails as to compensatory damages. Punitive damages not generally allowed. Liquidated damages, if not in fact a penalty, may be allowed in proper cases. Only actual damages are imposed for unlawful restraint of trade. In illegal overcharge or undercharge case when both direct and indirect damages are involved, defendant may prove, as partial or complete defence to claim for damages under Nev. Rev. Stat. 59-801 to -831 and this section, that illegal overcharge or undercharge was passed onto others who are themselves entitled to recover so as to avoid duplication of recovery. (Neb. Rev. Stat. 59-821).

Comparative Negligence Rule.

For causes of action accruing after Feb. 8, 1992, fault of plaintiff diminishes proportionately amount of award; if plaintiff's fault is equal to or greater than fault of all defendants, plaintiff cannot recover. (Neb. Rev. Stat. 25-21,185).

Charitable Immunity.

Abrogated. (180 Neb. 183, 141 N.W.2d 852).

Sovereign Immunity.

Cities and all other governmental subdivisions and local bodies of state are not immune from tort liability arising out of ownership, use and operation of motor vehicles. (183 Neb. 430, 160 N.W.2d 805). See State Tort Claims Act (Neb. Rev. Stat. 81-8, 209 to -8, 235) and Political Subdivision Tort Claims Act (Neb. Rev. Stat. 13-901 to -926). Limit of liability for political subdivisions $1,000,000 per person for claims arising from single occurrence and $5,000,000 for all claims arising from single occurrence. (Neb. Rev. Stat. 13-926).

Hospital-Medical Liability Act.

University of Nebraska: to authorize establishment of risk-loss trusts; to provide for use of such trusts; to provide for applicability of certain laws; to provide requirements for certain risk-loss trusts; to provide duties for Director of Insurance; to harmonize provisions; and to repeal original sections. (Neb. Rev. Stat. 44-2824 to -2847; 44-2854 to -2855; and 85-1126 and -1127).

No Fault Insurance.

See category Transportation, topic Motor Vehicles, subhead No-Fault Insurance.

Uniform Contribution Among Tortfeasors Act (Revised).

Not adopted.

5.10 DECLARATORY JUDGMENTS:

See topic Judgments.

5.11 DEPOSITIONS AND DISCOVERY:

Depositions may be taken by either party, upon oral examination, by videotape under certain circumstances, or written interrogatories, for discovery or as evidence, after action started and service had on defendant. Leave of court unnecessary unless notice of taking is served by plaintiff within 30 days after service of summons. (Neb. Rev. Stat. 25-1242 and Neb. Disc. Rule 30[a]).

Statutory discovery rules repealed. Rules now promulgated by Nebraska Supreme Court. (Neb. Rev. Stat. 25-1273.01). Copy of Nebraska Supreme Court Rules of Practice and Procedure may be obtained for $10 by writing Clerk of Supreme Court, 2413 State Capitol Building, Lincoln, NE 68509. Rules are similar to Federal Rules of Civil Procedure (pre-1993 Amendments) except as noted. See topic Practice.

Uniform Foreign Depositions Act not adopted.

Within State for Use Within State.

At trial, or hearing of motion, or interlocutory proceedings, deposition may be used against party present or represented at taking of deposition, or who had notice thereof, in accordance with any one of following: (1) Contradicting or impeaching testimony of deponent as witness; (2) deposition of officer, director, or managing agent of corporation, partnership or association, which is party, may be used by adverse party for any purpose; (3) deposition of witness, whether party or not, may be used for any purpose if court finds (a) witness dead, (b) witness is at greater distance than 100 miles from place of trial or hearing, or out of state, or beyond subpoena power of court, unless absence procured by party offering deposition, (c) witness aged, sick, infirm or imprisoned, (d) party offering deposition unable to procure attendance of witness by subpoena, (e) exceptional circumstances exist, (f) upon application and notice in interest of justice. (Neb. Disc. Rule 32).

Within State for Use Elsewhere.

Deposition may be taken within state for use elsewhere in same manner and by same process and proceedings as may be employed for purpose of taking testimony in proceedings pending in this state. District Court for county where deponent is found may make such orders as could be made in laws and rules of such foreign jurisdiction. (Neb. Disc. Rule 28[e]). Parties can stipulate to modify procedure for other methods of discovery. (Neb. Disc. Rule 29).

Outside of State For Use Within State.

See subheads Before Whom Taken; and Notice, infra.

De Bene Esse.

See subhead Perpetuating Testimony.

Perpetuating Testimony.

Person desiring perpetuation of own or others' testimony may file verified petition in district court covering residence of expected adverse party showing: (1) That action expected but presently unable to be brought, (2) subject matter of and petitioner's interest in expected action, (3) facts desired to be established and reason for perpetuating them, (4) names and addresses of expected adverse parties, (5) names and addresses of persons to be examined and substance of expected testimony, and (6) prayer for authorization to take testimony. (Neb. Disc. Rule 27[a][1]). Notice, stating time and place petitioner will apply to court, together with copy of petition, must be served upon expected adverse party at least 20 days before date of hearing. Provision made for perpetuation of testimony after district court decision where appeal to be taken and testimony to be used in event of further proceedings in district court. (Neb. Disc. Rule 27[a][2]).

Before Whom Taken.

Within Nebraska depositions may be taken before judge or clerk of Supreme Court or district court, county judge, clerk magistrate, notary public, or any person appointed by court in which action is pending. Person so appointed has power to administer oaths and take testimony. (Neb. Disc. Rule 28[a]).

Elsewhere in U.S. depositions may be taken before officer authorized to administer oaths by laws of U.S. or of place where examination is held, or before person appointed by court in which action is pending. (Neb. Disc. Rule 28[b]).

Notice.

Prior to taking deposition by oral examination reasonable notice in writing must be given to every other party to action. Notice must state time and place for taking deposition and name and address of each person to be examined. If subpoena duces tecum is to be served, notice must also contain list of materials to be produced. (Neb. Disc. Rule 30[b][1][A]). Notice must state manner in which testimony will be recorded and preserved. Deposition by videotape permitted. (Neb. Disc. Rule 30[b][8][A]).

When party against whom deposition is to be used is unknown, party may be notified of deposition by publication. Publication must be made in some newspaper printed in county where action is pending, if none, in state newspaper of general circulation in that county. Publication must contain same as written notice. Proof of publication set forth in Neb. Rev. Stat. 25-520. (Neb. Disc. Rule 30[b][1][B]).

By Stipulation.

If parties stipulate in writing deposition may be taken before any person, at any time or place, upon any notice, and in any manner; and when so taken may be used like other depositions. (Neb. Disc. Rule 29).

By Written Interrogatories.

Notice of examination by written interrogatory must be served upon every other party to action. Notice must state name and address of person who is to answer written questions and name and address of officer before whom deposition is to be taken. Within 30 days after notice and written interrogatories are served, any party may serve cross-questions upon all other parties. Ten days after cross-questions served redirect questions may be served. Ten days after redirect questions served party may serve recross-questions. (Neb. Disc. Rule 31[a]).

Compelling Attendance of Witnesses.

A subpoena may be issued by any officer authorized to take depositions. (Neb. Rev. Stat. 25-1225).

Examination of Witnesses.

After being placed under oath, witness may be examined on any nonprivileged, relevant matter, including matter reasonably calculated to lead to discovery of admissible evidence, and may be cross examined same as at trial except that court in which action pending upon motion and notice and good cause may limit scope, subject matter and persons present. Party taking deposition shall determine in what manner testimony is to be taken. Evidence objected to shall be taken subject to objections. (Neb. Disc. Rule 30).

Objections.

Objections for incompetency, irrelevancy or immateriality not waived by failure to make at time of deposition unless ground of objection is one which might have been obviated if presented at that time. Objections may be made at trial to receive deposition or part thereof for any reason requiring exclusion if witness present and testifying, except that errors in manner of taking depositions, qualifications of person recording deposition, in form of questions or answers, in oath, in conduct of party, or errors which might be obviated if promptly presented, are waived. Objections may be heard on motion of either party before trial. (Neb. Disc. Rules 32[a] & [b]).

Return.

After certifying on deposition that witness truly sworn and that deposition is true record, unless otherwise directed by court, officer delivers original to party taking deposition, and files with clerk of court certificate setting forth to whom original was delivered, date it was delivered, and charges for deposition. (Neb. Disc. Rule 30[f]).

Form

The form ordinarily used is as follows:

Depositions of sundry witnesses taken before me (here insert the name of the magistrate and his official character as a justice of the peace, or notary public, etc.), within and for the county of ...., in the State of ...., on the .... day of .... in the year ....., between the hours of .... A. M. and .... P. M., at .... in said county, pursuant to the annexed notice (or agreement as the case may be), to be read in evidence in behalf of the (plaintiff or defendant as the case may be) in an action pending in .... (naming the court), in which .... is plaintiff and .... is defendant.

A. B., of lawful age, being by me first duly examined, cautioned and solemnly sworn, as hereinafter certified (or affirmed), deposes and says as follows, viz: (Here write the deposition), and so on with all witnesses.

Depositions are closed with a certificate in this form:

I, A. B. (naming the official character of the magistrate according to the fact) do hereby certify that (naming all witnesses who have testified) were by me first severally duly sworn (or affirmed) to testify the truth, the whole truth and nothing but the truth and that the depositions by them respectively subscribed as above set forth, were reduced to writing by myself (or if by any other person, name him, and say by ...., who is not interested in the suit, in my presence, and) in the presence of the witnesses respectively, and were respectively subscribed by the said witnesses in my presence and were taken at the time and place in the annexed notice (or agreement) specified; that I am not counsel, attorney or related to either party or otherwise interested in the event of this suit. (If there be adjournments, add) and said depositions were commenced at the time in said notice specified and continued by adjournments from day to day as above stated.

In Testimony Whereof, I have hereunto set my hand and affixed my official seal, at .... in said county, the day and year last above written.

(Signature).

(Title of officer).

Form of endorsement for outside of envelope in which depositions are transmitted to clerk of the court:

In the .... Court of .... County, Nebraska.

....

Plaintiff,

vs.

....

Defendant. { Deposition of (insert name of witness).

Demand for Admission of Facts.

This follows Federal Rule by providing procedure for determining sufficiency of answers or objections, and controlling effect and withdrawal of admissions. (Neb. Disc. Rule 36).

Written Interrogatories.

Nebraska Discovery Rule 33(a) differs from Federal Rules by imposing limit of 50 interrogatories upon any party, unless court permits more for good cause shown. Rules 33(b) and 33(c) follow Federal Rules (pre-1993 Amendments). (Neb. Disc. Rule 33).

5.12 EQUITY:

See topic Actions.

5.13 EVIDENCE:

Proposed Federal Rules of Evidence materially adopted as Nebraska Evidence Rules, Aug., 1975. (Neb. Rev. Stat. 27-101 to -1103).

Witnesses.

Every person of sound mind is competent to be witness. (Neb. Rev. Stat. 27-601). See also topic Depositions and Discovery. Expert witnesses are entitled to reasonable fees.

Privileged Communications.

Communications between attorney, physician, surgeon, minister or priest, professional counselor, and client, etc., are privileged if occurring while rendering professional service (Neb. Rev. Stat. 27-503 to -506).

Husband and wife may not testify concerning any communication made by one to the other during the time of marriage, whether called while that relation exists or afterwards. (Neb. Rev. Stat. 27-505). During marriage privilege can be waived if both parties consent. (Neb. Rev.

Stat. 27-505).

Either spouse may be witness against other in action brought by husband or wife against third person relating to marriage relationship or interruption of same. Also, in any criminal case where crime charged is crime of violence, bigamy, incest or any crime committed by one against person or property of another or of child of either or in any criminal prosecution against husband for wife or child abandonment. (Neb. Rev. Stat. 27-505). Either spouse is competent in any divorce proceedings brought against other. Except as stated, neither husband nor wife can be witness against other, except in certain criminal proceedings; but either may be witness for other in any criminal proceeding. (Neb. Rev. Stat. 27-505).

``*Dead-Man" Statute* repealed.

Self-incrimination.

Witness is not excused from answering question on ground that he would subject himself to civil liability (Neb. Rev. Stat. 25-1209), but cannot be compelled to answer when matter sought to be elicited would tend to render him criminally liable or to expose him to public ignominy, except that witness may be interrogated as to his previous conviction for felony but no other proof of such conviction is competent except record thereof (Const. Art. 1, § 12; Neb. Rev. Stat. 25-1210).

5.14 INJUNCTIONS:

Injunction may be final judgment in an action, or allowed as a provisional remedy and when so allowed shall be by order; writ of injunction abolished. (Neb. Rev. Stat. 25-1062).

Jurisdiction.

Injunction may be granted at time of commencing action or any time afterward before judgment by Court of Appeals or Supreme Court or any judge thereof. (Neb. Rev. Stat. 25-1064).

Prerequisites.

When it appears by complaint that plaintiff is entitled to relief sought, including restraining commission or continuance of some act which would cause great or irreparable injury to plaintiff or when it appears during litigation that defendant is doing, threatens, is about to do, or is procuring or suffering to be done, some act in violation of plaintiff's rights in subject of action and tending to render judgment without effect, temporary injunction may be granted to restrain act. May also be granted in any case specially authorized by statute. (Neb. Rev. Stat. 25-1063).

Procedure.

Order granting injunction or retraining order must (1) set forth reasons for issuance; (2) be specific in terms; (3) describe with reasonable detail and not by reference to pleading or other document, act or acts sought to be restrained; and (4) be binding only upon parties, officers, agents, servants, employees, and attorneys, and those in active concert or participation with them who receive actual notice of order by personal service or otherwise. (Neb. Rev. Stat. 25-1064.01). Order of injunction must be addressed to party enjoined, state injunction and be issued by clerk. (Neb. Rev. Stat. 25-1068). Where injunction is allowed during litigation and without notice of application, order shall issue and sheriff shall serve upon each party enjoined, in manner for serving summons, and make return thereof without delay. (Neb. Rev. Stat. 25-1069).

Bonds.

Party obtaining injunction must give bond with one or more sufficient sureties approved by clerk of court granting injunction in amount to be fixed by court or judge allowing same, to secure party enjoined as to damage which he may sustain if final decision is that injunction should not have been granted, and no injunction, unless provided by special statute, is operative until bond is given. (Neb. Rev. Stat. 25-1067). Additional security may be required by court on application of party enjoined. (Neb. Rev. Stat. 25-1073).

If party enjoined disobeys injunction he may be punished by contempt and required to give security. (Neb. Rev. Stat. 25-1072).

Temporary Injunctions.

Plaintiff or his agent must make affidavit showing right to a temporary restraining order which may be issued immediately with direction that reasonable notice be given to party restrained to appear and show cause why temporary injunction should not be issued. (Neb. Rev. Stat. 25-1064). On hearing of application for injunction each party may read affidavits. (Neb. Rev. Stat. 25-1074). If injunction granted without notice defendant may apply for vacation or modification thereof at any time before trial. (Neb. Rev. Stat. 25-1075).

5.15 JUDGMENTS:

Judgments by Confession.

Any person indebted or against whom cause of action exists may personally appear in court of competent jurisdiction and with assent of creditor or person having such cause of action, confess judgment therefor, which must be entered accordingly. (Neb. Rev. Stat. 25-1309). Creditor's assent presumed where judgment confessed for amount claimed in petition. (22 Neb. 235, 34 N.W. 367). Debt or cause of action must be briefly stated in judgment or in writing to be filed as pleadings in other actions. (Neb. Rev. Stat. 25-1310). Confession operates as release of errors and judgment is enforceable as any other. (Neb. Rev. Stat. 25-1311). Attorney must produce warrant of authority to confess judgment; original or copy must be filed with clerk of court. (Neb. Rev. Stat. 25-1312).

Judgments by Consent.

Authorized and may be modified only on certain terms. (140 Neb. 408, 299 N.W. 519).

Judgments on Pleadings.

After pleadings are closed but within such time as will not delay trial, any party may move for judgment on pleadings. If, on such motion, matters outside pleadings are presented to and not excluded by court, motion is treated as one for summary judgment, and all parties shall have reasonable opportunity to present all material made pertinent to such motions by statute. (Neb. Ct. R. of Pldg. in Civ. Actions § 6-1112[c]).

Summary Judgments.

Permitted by any party, with or without supporting affidavits. (Neb. Rev. Stat. 25-1330 and -1331). Motion must be served at least ten days prior to hearing. (Neb. Rev. Stat. 25-1332). Usual standards apply for granting motion; may be rendered on issue of liability alone. (Neb. Rev. Stat. 25-1332).

Declaratory Judgments.

Uniform Declaratory Judgments Act (1922, adopted 1929). (Neb. Rev. Stat. 25-21,149 to -21,164).

Judgment Notes.

See category Business Regulation and Commerce, topic Bills and Notes.

Default Judgments.

If defendant fails to file appropriate written response to petition within 30 days after service, district court may enter judgment for relief demanded in petition. In county court, default judgment may be entered 30 days after commencement of action. If there is judgment upon failure to answer, court may take account, hear proof, or assess damages; or may refer same to referee, master, or commissioner, or may direct same to be assessed by jury. (Neb. Rev. Stat. 25-1308). For all civil actions filed on or after Jan. 1, 2003, rules of pleading promulgated by Supreme Court shall apply.

Offer of Judgment.

Defendant may offer in court to confess judgment for part of amount claimed or part of causes involved in action, and if plaintiff does not accept such offer and fails to recover more than was offered he must pay all costs incurred by defendant after offer. (Neb. Rev. Stat. 25-906). Similar offer may be made in court before action is brought and if claimant, after notice of offer, does not accept same and afterwards commences action and does not recover more than amount offered he must pay all costs of action. (Neb. Rev. Stat. 25-907).

Docketing.

All judgments and orders must be entered on journal of court. Complete record, unless such record or part thereof duly waived, must be made up by clerk, and signed by presiding judge. Evidence introduced at any proceeding is not part of complete record of cause. (Neb. Rev. Stat. 25-1318 to -1321).

Vacation or Modification.

District court has equitable power to set aside judgment or order during term, or after term upon motion filed within six months after entry of judgment or order. Clerical mistakes and errors due to oversight or omission may be corrected by court by order nunc pro tunc any time on court's initiative or on motion of any party and after any notice court orders. During pendency of appeal, mistakes may be corrected before case is submitted in appellate court, and thereafter with leave of appellate court. (Neb. Rev. Stat. 25-2001). District court may vacate or modify its own judgments or orders after term (a) for mistake, neglect, omission of clerk or irregularity in obtaining; (b) for fraud by successful party in obtaining; (c) for newly discovered material evidence, which could not have been discovered with reasonable diligence either before trial or in time to move for new trial; (d) for erroneous proceedings against infant or person of unsound mind, if condition of such defendant does not appear in record of proceedings; (e) for death of party before judgment; (f) for unavoidable casualty or misfortune which prevents party from prosecuting or defending; and (g) for taking judgment upon warrants of attorney for more than was due plaintiff when defendant was not summoned or otherwise given legal notice of time and place of taking such judgment. (Neb. Rev. Stat. 25-2001). In proceeding to modify or vacate judgment, complaint shall set forth judgment or order, grounds for vacation or modification, and defense to action, if party applying was defendant. On such complaint, summons shall issue and be served as in commencement of action, except where there is upon minutes of court, or in files of case, waiver of error by party or party's attorney, unless court or judge thereof endorses on complaint permission to issue summons in such case. (Neb. Rev. Stat. 25-2002).

Lien.

Lands and tenements of debtor within county where judgment is entered are bound for satisfaction thereof from day on which judgment is rendered, if judgment was entered by district court. All other lands, as well as goods and chattels of debtor, are bound from time they are seized on execution. (Neb. Rev. Stat. 25-1504).

Transcript of judgment of any district court in state may be filed in office of clerk of district court in any county and when entered on judgment record, is a lien on property of debtor in county where filed in same manner and under same conditions as in county where judgment rendered, and execution may be issued as on original judgment. (Neb. Rev. Stat. 25-1303). Filing fee is $26; $5 per page, plus 50¢ per lot.

Transcript of any judgment or decree rendered in United States district court within state, may be filed in office of clerk of district court in any county, and, when entered on judgment record is a lien on property of debtor in county where filed in same manner and under same conditions as if such judgment or decree had been rendered by district court of such county. Lands and tenements of debtor within county where judgment entered are bound for satisfaction thereof from day on which judgment is rendered without filing of transcript. (Neb. Rev. Stat. 25-1305).

Order reviving dormant judgment becomes lien on lands and tenements of judgment debtor only where entered on judgment record in same manner as original judgment. (Neb. Rev. Stat. 25-1305).

Judgment for unpaid court costs ceases to be lien on realty unless action has been brought thereon within five years after last payment thereon, or five years after case becomes inactive or is closed by final judgment. (Neb. Rev. Stat. 25-1716).

Judgment for fines and costs in criminal cases is a lien on all property of defendant within county from time of docketing case, and judgments upon forfeited recognizance are a like lien from time of forfeiture. (Neb. Rev. Stat. 29-2407).

Revival.

If either or both of the parties die after judgment, and before satisfaction thereof, their representatives may be made parties in manner prescribed for reviving actions before judgment. (Neb. Rev. Stat. 25-1419). If execution is not sued out within five years after date of entry of judgment or if five years have intervened between successive executions thereon, judgment and all taxable costs of action in which it was obtained become dormant and cease to operate as lien. (Neb. Rev. Stat. 25-1515). If judgment becomes dormant it may be revived, within ten years after dormancy, by motion and order of court on notice to adverse party. (Neb. Rev. Stat. 25-1420).

Assignment.

Assignee of a judgment takes it subject to the then existing equities. (89 Neb. 445, 131 N.W. 960).

Satisfaction.

On payment, but not otherwise, attorney may discharge judgment claim and acknowledge satisfaction of judgment. (Neb. Rev. Stat. 7-107). Judgment may be satisfied by proper notation on docket, signed by attorney or by separate instrument, for which no form is prescribed. (Neb. Rev. Stat. 7-107 and 25-2210).

Actions.

Independent action may be maintained on domestic judgments. (35 Neb. 884, 53 N.W. 1008).

Foreign Judgments.

Actions on foreign judgments allowed if brought within five years. (Neb. Rev. Stat. 25-205).

Uniform Enforcement of Foreign Judgments Act (1964, adopted 1993). (Neb. Rev. Stat.

25-1587.01 to -1587.09).

5.16 LIMITATION OF ACTIONS:

See Neb. UCC including Neb. Rev. Stat. 2-725, Neb. Rev. Stat. 4-406. See category Business Regulation and Commerce, topic Commercial Code.

Actions must be commenced within the following periods after respective causes of action accrue:

Ten years.—To recover real estate or foreclose mortgage thereon (Neb. Rev. Stat. 25-202, and see subhead When Cause of Action Accrues, infra as to accrual of cause of action to foreclose); statute of repose for product liability actions, from date when injury causing product was sold for products manufactured in Nebraska; within time allowed by applicable statute of repose, if any, of state or country where product was manufactured for products manufactured outside Nebraska, but in no event less than ten years (Neb. Rev. Stat. 25-224[2]); on official bond of executor, administrator, guardian, sheriff or other officer or on attachment or injunction bond or other bond required by statute (Neb. Rev. Stat. 25-209).

Five years.—On specialty or any agreement, contract or promise in writing, express or implied, or foreign judgment. Action on contract made pursuant to statute later held unconstitutional must be brought within one year from effective date of decision. Otherwise, action on invalid sales agreement must be commenced within one year after last payment. (Neb. Rev. Stat. 25-204 and -205).

Four years.—On contract not in writing, express or implied, on statutory liability other than forfeiture or penalty, for trespass on real property, for taking, detaining or injuring personal property or to recover possession thereof, for relief on ground of fraud (time running from discovery), for injury to right not arising under contract for which no other limitation fixed (Neb. Rev. Stat. 25-206, -207, and -212); against surety on guardian's bond (time running from discharge of guardian and person out of state or under disability having five years from return or removal of disability) (Neb. Rev. Stat. 25-210); for damages arising out of want or failure of consideration for contract or to recover money paid on contract consideration for which has failed in whole or in part (Neb. Rev. Stat. 25-211); action for which no other period prescribed (Neb. Rev. Stat. 25-212); action for breach of any contract for sale of goods (Neb. UCC 2-725); products liability actions (Neb. Rev. Stat. 25-224); for unfair trade practice (Neb. Rev. Stat. 59-1612); for disclosure of trade secrets (Neb. Rev. Stat. 87-506).

Three years.—On liability, other than forfeiture or penalty, created by federal statute providing no period of limitation. Certain claims under probate code. (Neb. Rev. Stat. 30-2408).

Two years.—For malpractice (Neb. Rev. Stat. 25-208); for wrongful death (Neb. Rev. Stat. 30-810); action against the state (Neb. Rev. Stat. 25-218).

Eighteen months.—Action to recover collateral transferred to third party which was used as security for payment pursuant to written agreement covering farm products. (Neb. Rev. Stat. 25-205[2]).

One year.—For forcible entry and detainer or detainer only of real estate (Neb. Rev. Stat. 25-203); for libel or slander (Neb. Rev. Stat. 25-208); for fine for violation of laws applicable to cities of second class and villages (Neb. Rev. Stat. 17-565).

Tort claim against state.—must be filed within two years with State Claims Board; suit must be filed within six months of final disposition by Board. (Neb. Rev. Stat. 81-8,227[1]). *Caveat:* Action against State must be commenced within two years from time claim arises. (Neb. Rev. Stat. 25-218).

Tort claim against political subdivision.—must be filed within one year with governing body; suit must be filed within two years or six months of final disposition by governing body, whichever is later. (Neb. Rev. Stat. 13-919).

When cause of action accrues.—as regards subsequent purchaser and encumbrancers for value, cause of action for foreclosure of mortgage deemed to have accrued at last date of maturity of debt as stated in or ascertainable from record of such mortgage or in extension thereof duly executed and recorded and if no date of maturity be stated thereon or be ascertainable therefrom, not later than 30 years from date of mortgage. But if mortgage creditor, before mortgage is barred under this section, files in recorder's office mortgage or sworn copy or affidavit that mortgage is unpaid and still valid and subsisting lien, cause of action is not barred until expiration of ten years from such filing. Period of ten years not extended by nonresidence, legal disability, partial payment, acknowledgment of debt, or promise to pay. (Neb. Rev. Stat. 25-202).

Action is deemed commenced.—on date complaint is filed with court. If service is not obtained within six months, action dismissed without prejudice. (Neb. Rev. Stat. 25-217).

New Actions.

If applicable limitations period would prevent plaintiff from commencing new action, new action may be commenced by plaintiff, or by plaintiff's representatives if plaintiff has died and action survived, if action was commenced within limitations period but failed for reason other than (a) merits; (b) voluntary dismissal by plaintiff for some reasons other than loss of diversity jurisdiction in federal court; (c) plaintiff's failure to serve defendant within time specified by statute; or (d) some other inaction by plaintiff where burden of initiating action was on plaintiff. Such new action may be commenced within period equal to lesser of (a) six months after failure of action or (b) period after failure equal to applicable limitations period for original action. (Neb. Rev. Stat. 25-201.01).

Foreign Causes of Action.

Uniform Conflict of Laws Limitations Act adopted. (1982, adopted 2006). (Neb. Rev. Stat. 25-3201 to -3207).

Disabilities of Plaintiff.

If person entitled to bring action, except for penalty or forfeiture or for recovery of title or possession of lands or foreclosure of mortgage thereon, be, at time action accrues within age of 20, with mental disorder or imprisoned, he may bring action within respective times limited, after removal of disability. For recovery of title or possession of land or foreclosure of mortgage thereon such person is entitled to bring action within 20 years from accrual, but in no case longer than ten years after termination of disability. Absence from state, death or disability does not extend period within which such actions in rem are to be commenced by and against nonresident or his representative. (Neb. Rev. Stat. 25-213).

Absence or Concealment of Defendant.

If when cause of action accrues against a person he is out of the state or has absconded or concealed himself time does not commence to run until he comes into state or while he is absconded or concealed. If after cause of action accrues, he departs from state or absconds or conceals himself, time of his absence or concealment is excluded in computing time within which action must be brought. (Neb. Rev. Stat. 25-214).

Interruption of Statutory Period.

On part payment or written acknowledgment of debt, statute starts to run anew from date of payment or acknowledgment. (Neb. Rev. Stat. 25-216).

Revival of Barred Claims.

In any case founded on contract, when any part of principal or interest has been voluntarily paid, or an acknowledgment of an existing liability, debt or claim or any promise to pay has been made in writing, an action may be brought in such case within the period prescribed for same, after such payment, acknowledgment or promise. (Neb. Rev. Stat. 25-216).

Contractual Limitations.

Generally not permitted (171 Neb. 820, 108 N.W.2d 84), but see Neb. UCC 2-725(1); parties may reduce period of limitation to not less than one year for breach of contract for sale.

Pleading.

Defense must be pleaded by demurrer or answer or will be considered waived. (171 Neb. 820, 108 N.W.2d 84).

See also categories Business Regulation and Commerce, topic Commercial Code; Courts and Legislature, topic Courts; Estates and Trusts, topic Executors and Administrators.

5.17 NEGLIGENCE:

See topic Damages.

5.18 PLEADING:

For all civil actions filed on or after Jan. 1, 2003, rules of pleading promulgated by Supreme Court shall apply. Special rules apply to actions against political subdivisions. (Neb. Rev. Stat. 13-902 to -926).

Pleadings Permitted.

Pleadings permitted for third party actions are complaint, answer of third party defendant, and cross claim. (Neb. Rev. Stat. 25-331). For all civil actions filed on or after Jan. 1, 2003, rules of pleading promulgated by Supreme Court shall apply. Cross-petition, cross-bill, and cross-suit are abolished. Demurrers to pleading and special appearances shall not be used. Plea in bar, plea in abatement, and other dilatory pleas shall not be used in civil actions. (Neb. Rev. Stat. 25-801.01).

General Requirements.

All pleadings shall be construed as to do substantial justice. (Neb. Rev. Stat. 25-801.01).

Petition/Complaint.

Plaintiff's initial pleading shall be petition when that designation is provided elsewhere by statutes. In all other civil actions plaintiff's initial pleading shall be complaint. (Neb. Rev. Stat. 25-801.01).

Answer.

Fed. R. Civ. P. 7 followed.

Counterclaim and Set-Off.

No mandatory counterclaims. Otherwise, Fed. R. Civ. P. 13 followed.

Third-Party Practice.

Defendant, as third-party plaintiff, may file third-party complaint against person who is or may be liable to him for all or part of plaintiff's claim against him. Third-party defendant may assert claim against plaintiff arising out of transaction or occurrence which is subject matter of plaintiff's claim. (Neb. Rev. Stat. 25-331).

Reply.

Fed. R. Civ. P. 7 followed.

Demurrer.

Demurrers must not be used. (Neb. Rev. Stat. 25-801.01).

Amended or Supplemental Pleadings.

Fed. R. Civ. P. 15 generally followed.

Affidavits of Merits and Defense.

Motions for summary judgment may be made with or without supporting affidavits. (Neb. Rev. Stat. 25-1330). Such affidavits shall be made on personal knowledge, shall set forth facts as would be admissible, and shall affirmatively show that affiant is competent to testify to matters stated therein. (Neb. Rev. Stat. 25-1334). Affidavit is required for temporary restraining order granted without notice. (Neb. Rev. Stat. 25-1064). Also required in certain other instances, such as for order of attachment. (Neb. Rev. Stat. 25-1002).

Verification.

Pleadings of fact need not be verified.

Service and Filing.

Except for service by publication, copy of complaint is served with summons. Plaintiff shall give clerk sufficient copies at time of filing. (Neb. Rev. Stat. 25-504.01). All subsequent filings must be served upon adverse party if pro se, or his attorney if represented, and original must be so certified.

Time for Serving or Filing.

See category Civil Actions and Procedure, topic Limitations of Actions.

Preparation of Claim.

If claim is based on judgment rendered in foreign state, copy of judgment should be obtained and registered in any state court having jurisdiction. (Neb. Rev. Stat. 25-1587.03).

Proof of Claims.

Sister states.—Uniform Enforcement of Foreign Judgments Act. (Neb. Rev. Stat. 25-1587.01-1587.09).

Small Claims.

See category Courts and Legislature, topic Courts.

5.19 PRACTICE:

Governed by Code of Civil Procedure and Rules promulgated by Nebraska Supreme Court.

Discovery rules are promulgated by Nebraska Supreme Court. (Neb. Rev. Stat. 25-1273.01). These rules follow structure of pre-1993 Amendment discovery portion of Federal Rules, but content of Nebraska Rules is not always same. Federal rule numbers were retained for convenience. See topic Depositions and Discovery.

Physical or Mental Condition of Party.

Nebraska Rule follows Federal Rule, and establishes useful procedure for exchange of medical reports. Subdivision (b)(2) of Federal Rule is not used because Neb. Rev. Stat. 27-504 contains direct waiver of privilege. (Neb. Disc. Rule 35).

Demand for Admission of Facts.

This rule follows Federal Rule by providing procedure for determining sufficiency of answers or objections, and controlling effect and withdrawal of admissions. (Neb. Disc. Rule 36). See also topic Depositions and Discovery.

Written Interrogatories.

Nebraska Discovery Rule 33(a) differs from Federal Rules by imposing limit of 50 interrogatories upon any party, unless court permits more for good cause shown. Rules 33(b) and 33(c) follow Federal Rules. (Neb. Disc. Rule 33).

Direct Actions Against Insurer.

See category Transportation, topic Motor Vehicles, subhead Direct Actions.

Small Claims.

See category Courts and Legislature, topic Courts.

See also topics Actions, Appeal and Error, Depositions and Discovery, Injunctions, Judgments, Pleading, Process; category Debtor and Creditor, topics Attachment, Executions, Garnishment.

5.20 PROCESS:

Civil action must be commenced by filing complaint in office of clerk of proper court. (Neb. Rev. Stat. 25-501). Action deemed commenced on date complaint is filed if proper service obtained within six months of filing. Action shall stand dismissed without prejudice as to any defendant not served within six months from date of filing complaint. (Neb. Rev. Stat. 25-217). Plaintiff must file with clerk praecipe for summons stating name and address of each party to be served and manner of service for each party. (Neb. Rev. Stat. 25-502.01).

General Requisites.

Summons shall be directed to defendant or defendants, and contain names of parties, and name and address of plaintiff's attorney or plaintiff. It shall notify defendant that written response shall be filed with court within 30 days, or upon failure court may enter relief demanded. (Neb. Rev. Stat. 25-503.01). Copy of complaint shall be served with summons, except when by publication. Plaintiff shall deliver to clerk sufficient copies at time of filing. (Neb. Rev. Stat. 25-504.01).

By Whom Issued.

Summons is issued by clerk of proper court. (Neb. Rev. Stat. 25-2204). Must be signed by clerk, with seal of court, and dated day issued. (Neb. Rev. Stat. 25-2201).

Who May Serve.

Except when plaintiff elects service by certified mail, summons served by sheriff of county where service is made, person authorized by law, or person not party to action specially appointed by court. Service by certified mail made by plaintiff or attorney. When county does not have designated person to serve process, any person 21 years of age or older or corporation, partnership or limited liability company may serve process as long as such person or entity is not party to action, is not related to party to action, does not have interest in action, is not public official employed by county where service is made whose duty includes service of process, and furnishes good and sufficient corporate surety bond in sum of $15,000, such bond being conditioned on such person or entity faithfully performing duties of process server. (Neb. Rev. Stat. 25-506.01, -507). Some Nebraska sheriffs do not serve civil process from other states.

Personal Service on Individual.

Plaintiff may elect following methods: (1) Personal service by leaving summons with person to be served; (2) residence service by leaving summons at usual place of residence, with some person of suitable age and discretion residing therein; (3) certified mail service by (a) sending summons within ten days of issuance to defendant by certified mail and (b) filing proof of service with signed receipt attached; (4) by depositing with delivery service authorized by 26 U.S.C. 7502(f)(2) copy of summons and complaint addressed to party to be served, delivering to addressee, and obtaining receipt. (Neb. Rev. Stat. 25-505.01).

Personal Service on Infant.

When defendant is minor under 14, he may be served by personal, residence, or certified mail service upon adult with whom minor resides and is minor's parent, guardian or person having care for minor. If none can be found, minor may be served by personal service. (Neb. Rev. Stat. 25-508.01).

Personal Service on Incompetent Person.

Individual, other than person under age of 14, may be served by personal, residence, or certified mail service. If person to be served is incapacitated person for whom conservator or guardian has been appointed or is confined in institution, notice of service shall be given to conservator, guardian or superintendent or similar official of institution. Failure to give such notice does not affect validity of service on incapacitated person. (Neb. Rev. Stat. 25-508.01).

Personal Service on Partnerships.

May be made by personal, residence, or certified mail service upon any partner except limited partner, or by certified mail to usual place of business, or left with employee at usual place of business. (Neb. Rev. Stat. 25-512.01). When such organization does not have usual place of business in state, it is required to appoint agent upon which process may be served. (Neb. Rev. Stat. 25-530.08). Unincorporated association is served in same manner as partnership. (Neb. Rev. Stat. 25-513.01).

Personal Service of Domestic Corporation.

May be served by personal, residence or certified mail service upon any officer, director, managing agent, or registered agent, or by leaving process at corporation's registered office, or by certified mail to registered office. (Neb. Rev. Stat. 25-509.01).

Dissolved corporation may be served by personal, residence, or certified mail service upon appointed receiver, and if none, then upon any person who at time of dissolution was officer, director or managing agent or registered agent at time of last annual report. (Neb. Rev. Stat. 25-511.02).

Personal Service on Association.

Unincorporated association may be served by personal, residence, or certified mail service upon officer or managing agent, or by certified mail service to association at usual place of business, or by leaving process at its usual place of business with employee of unincorporated association. (Neb. Rev. Stat. 25-513.01).

Personal Service on Foreign Corporation.

Where defendant is foreign corporation, service may be on registered or managing agent. (Neb. Rev. Stat. 25-509.01).

Personal Service Outside State.

Court may exercise personal jurisdiction over person: (1) Who acts directly or by agent as to cause of action arising from person (a) transacting business in state, (b) contracting to supply services or things in state, (c) causing tortious injury by act or omission in state, (d) causing tortious injury by act or omission outside state if person regularly does or solicits business, engages in any persistent course of conduct, or derives substantial revenue from goods used or consumed, or services rendered in state, (e) having interest in, using, or possessing real property in this state, or (f) contracting to insure any person, property, or risk located within state at time of contracting; or (2) who has any other contact with or maintains any other relation to state to afford basis for exercise of personal jurisdiction consistent with constitution of U.S. (Neb. Rev. Stat. 25-536).

Mailing of Publication Notice.

Party serving notice by publication must within five days after first publication mail copy thereof to every party having direct legal interest therein whose name and post office address is known to him. Registered or certified mail not required. Proof of mailing such notice must be made by affidavit within ten days after mailing. Affidavit must state that party and his attorney after diligent search and investigation were unable to ascertain post office address of any parties other than those to whom notice mailed. Mailing of notice or notices may be waived in writing or by entering voluntary appearance or by personal service. (Neb. Rev. Stat. 25-520.01).

Substituted Service.

Any party may be served by personal, residence or certified mail service upon agent authorized by appointment or by law to receive service. (Neb. Rev. Stat. 25-514.01). Upon motion and showing by affidavit that service cannot be made with reasonable diligence by any other method provided by statute, court may permit service to be made by (1) leaving process at defendant's usual place of residence and mailing copy by first class mail to defendant's last known address; (2) by publication, or (3) by any manner reasonably calculated under circumstances to provide party with actual notice of proceedings and opportunity to be heard. (Neb. Rev. Stat. 25-517.02).

Service Without State.

Service without state may be made: (a) In manner prescribed for service within state; (b) in manner prescribed by law in state where service is to be made; (c) as directed by foreign authority in response to letters rogatory; or (d) as directed by court. Proof of service may be made by affidavit of individual who made service, or in manner prescribed by law, order pursuant to which service was made, or law of place in which service was made. (Neb. Rev. Stat. 25-540).

Personal Service on Political Subdivision.

Summons against county, city, or village may be served by personal, residence or certified mail service upon chief executive or clerk. (Neb. Rev. Stat. 25-510.02).

Any political subdivision defined in Neb. Rev. Stat. 13-903, other than county, city, or village, may be served by personal, residence, or certified mail service upon chief executive, clerk, secretary, or other official whose duty it is to maintain official records, or any other member of governing board or body, or by certified mail to principal office of subdivision. (Neb. Rev. Stat. 25-510.02).

Nonresident Motorist.

See category Transportation, topic Motor Vehicles.

Voluntary appearance is equivalent to service except defense of lack of jurisdiction over person, insufficiency of process, or insufficiency of service of process may be asserted only under procedure provided in pleading rules adopted by Supreme Court. (Neb. Rev. Stat. 25-516.01).

Agent for Service.

Any person, association or corporation owning or claiming any interest in or lien upon real estate lying within state may file in office of register of deeds of county in which such real estate is located an appointment in writing of some resident of county upon whom process may be served in any action concerning such real estate to which such owner or claimant shall be made a party. (Neb. Rev. Stat. 25-528). See also categories 2 Business Organizations, topic Corporations; Business Regulation and Commerce, topic Securities; Insurance, topic Insurance Companies; Transportation, topic Motor Vehicles.

Service by Publication.

May be made: (1) When such service is elsewhere provided for by statute or (2) when ordered by court. (Neb. Rev. Stat. 25-518.01). Motion and affidavit must be filed that service cannot be made with reasonable diligence by any other method provided by statute. (Neb. Rev. Stat. 25-517.02).

Publication must be made once each week for three consecutive weeks in some newspaper printed in county where complaint filed or if none, in newspaper printed in state of general circulation in that county. Shall contain summary statement of claim of relief of complaint, mention court wherein it is filed and notify person or persons thus to be served when they are required to answer. (Neb. Rev. Stat. 25-519). Service by publication is complete when made in manner and for time above set forth, and is proved by affidavit of printer or his foreman or principal clerk or other person knowing same. (Neb. Rev. Stat. 25-520). Party or his attorney may designate newspaper. (Neb. Rev. Stat. 25-522).

Legal newspaper must be printed in English language, with bona fide circulation of at least 300 copies weekly, published within county 52 successive weeks prior to publication of notice and printed in whole or in part in office maintained at place of publication. (Neb. Rev. Stat. 25-523).

Service on Less Than All Defendants.

If action is against two or more defendants and one or more, but not all, are served, plaintiff may proceed as follows: If action be against defendants jointly indebted on a contract, he may proceed against defendant served unless court otherwise directs; if action be against defendants severally liable, he may without prejudice to his rights against those not served proceed against defendants served as though they were the only defendants. (Neb. Rev. Stat. 25-527).

Long Arm Statute.

See subhead Personal Service Outside State, supra.

Proof of Service.

Within 20 days after date of issue, person serving summons, other than by certified mail service, shall make proof of service to court stating time, place, including address if applicable, name of person with whom left, and method of service, or return unserved summons to court with statement of reason for failure to serve. Where service is by certified mail service, plaintiff or his attorney shall file proof of service within ten days after return of signed receipt. Failure to make proof of service or delay in doing so does not affect validity of service. (Neb. Rev. Stat. 25-507.01). Service by publication is proved by affidavit of printer or foreman or principal clerk or other person knowing same. (Neb. Rev. Stat. 25-520).

Uniform Interstate and International Procedure Act.

Nebraska has not adopted this uniform act, although its long arm statute (see subhead Personal Service Outside State, supra) is patterned after it. (Neb. Rev. Stat. 25-536).

5.21 REPLEVIN:

Plaintiff in action to recover possession of personal property may at commencement of suit or at any time before answer, request delivery of such property by replevin. (Neb. Rev. Stat. 25-1093). Grounds for replevin are plaintiff's right to immediate possession by virtue of ownership or some interest in specific personal property. (Neb. Rev. Stat. 25-1094).

Proceedings.

Action may be brought in district, county, or municipal court with due regard to jurisdictional amount. See category Courts and Legislature, topic Courts.

Affidavit must be filed with clerk of court before issuance of order of replevin. It must show: (1) Description of property claimed; (2) that plaintiff is owner of property or has special ownership or interest therein (stating facts in relation thereto), and that he is entitled to immediate possession of same; (3) that property is wrongfully detained by defendant; (4) that it was not taken in execution on any order or judgment against said plaintiff, or for payment of any fine, tax or amercement assessed against him, or by virtue of an order of delivery or any other mesne or final process issued against him, or that property was taken on execution of judgment or order other than an order of delivery in replevin and that same is exempt from such execution or attachment under laws of state. Attached to affidavit shall be specific request for delivery of property and issuance of order by court to that effect. (Neb. Rev. Stat. 25-1093.01). On filing of affidavit, defendant with full knowledge of allegations and effect of plaintiff's request may agree that such delivery be had and execute voluntary waiver under oath of his rights to notice and hearing, in which event court shall order all further proceedings be suspended and property be delivered to plaintiff forthwith. If defendant does not so waive this right, court shall issue temporary order requiring defendant to hold property described, in condition it was at time of order until further order of court. Order shall give notice of hearing at which will be determined rights of possession pending final hearing and at which defendant must show cause why plaintiff should not get possession. Hearing shall be no sooner than seven days and no later than 14 days after service of notice. (Neb. Rev. Stat. 25-1093.02). If filed at commencement of suit, notice shall accompany summons. (Neb. Rev. Stat. 25-1093.03).

Bond must be given in order to secure delivery of property to plaintiff. Amount shall be twice appraised value of property, conditioned that plaintiff shall duly prosecute action, pay all costs and damages which may be awarded against him and return property to defendant in case judgment for return of such property is rendered against him. (Neb. Rev. Stat. 25-1098). Bond must be given within 24 hours from taking of property by officer; otherwise property is returned to defendant. (Neb. Rev. Stat. 25-10,100). Defendant may except within 24 hours to sufficiency of sureties in which case they must justify. (Neb. Rev. Stat. 25-10,101).

Order.

If court finds at hearing plaintiff is entitled to possession, order shall issue and be delivered to sheriff for service and return. Order for delivery will be executed by clerk of court after receipt of order of court that there is sufficient probability that plaintiff has receipt for such service. (Neb. Rev. Stat. 25-1093.04 to -1094).

Execution of Order.

Order is executed by sheriff by taking property and serving copy of order on person detaining property, or leaving copy of order at his usual place of residence. (Neb. Rev. Stat. 25-1097). Officer has property appraised (Neb. Rev. Stat. 25-1099), and if plaintiff gives proper bond (see subhead Bond, infra) delivers property to plaintiff (Neb. Rev. Stat. 25-1098).

Repossession.

If, before delivery to plaintiff, defendant executes within 24 hours from levy bond in double property's value, officer must return property. (Neb. Rev. Stat. 25-1098).

Claims of Third Persons.

No special provision. All persons having any apparent interest may be made parties. (Neb. Rev. Stat. 25-328).

Disposition of Cause.

If property has been delivered to plaintiff and plaintiff fails to prosecute his action, defendant may have jury impaneled to ascertain his right in property and possession thereof and if jury finds that said property was property of defendant at commencement of action, or that defendant was entitled to possession only at commencement of action, jury must assess damages for defendant, on which finding, together with costs, court renders judgment. (Neb. Rev. Stat. 25-10,102). On issue joined and tried, jury must make findings as to ownership of property or right to possession thereof, and if judgment is rendered in favor of defendant, it must be in alternative for return of property or value thereof, in case return cannot be had, or value of possession of same and damages for withholding said property if defendant was entitled to possession only, together with costs of suit. (Neb. Rev. Stat. 25-10,103 and -10,104). If verdict is for plaintiff, jury must assess damages for illegal detention of property and judgment for same together with costs of suit, must be rendered for plaintiff. (Neb. Rev. Stat. 25-10,105). When property has not been taken or has been returned to defendant for want of bond, action may proceed as one for damages only. (Neb. Rev. Stat. 25-10,106).

5.22 [RESERVED]

5.23 SERVICE:

See topic Process.

5.24 STAY OF EXECUTION:

See topic Appeal and Error; also category Debtor and Creditor, topic Executions.

5.25 SUBMISSION OF CONTROVERSY:

Parties to a question which might be subject of civil action, may without action agree upon case containing facts in controversy and present submission of same to any court which would have jurisdiction if action had been brought. They must file affidavit that controversy is real and proceedings are in good faith to determine rights of parties. Court shall thereupon hear and determine same and render judgment as if action were pending. (Neb. Rev. Stat. 25-903). Case, submission and judgment constitute complete record. (Neb. Rev. Stat. 25-904). Judgment is with costs, may be enforced and is subject to reversal in same manner as if rendered in action, unless otherwise provided in submission. (Neb. Rev. Stat. 25-905).

5.26 VENUE:

Real Property Actions.

All actions to recover damages for trespass upon or injury to real property must be brought only in county where such real estate or some part thereof is situated, except that such an action against a railroad company may be brought in any county where service of summons can be had. Action for recovery of real property or estate or interest therein, partition of real property, or sale of real property under mortgage or other encumbrance or charge, must be brought where subject of action is situated. (Neb. Rev. Stat. 25-401). If property be entire tract or separate tracts situated in two or more counties action may be brought where any part thereof is situated, unless action is for recovery of possession, in which case if the property be an entire tract situated in two or more counties, action may be brought in either of such counties but if it consists of separate tracts in different counties, possession must be recovered by separate actions, each brought in county where real property is situated. (Neb. Rev. Stat. 25-402). Action for specific performance of contract for sale of real property may be brought in any county where any of defendants reside or, if all defendants are nonresidents, in county where real property or some part thereof is situated. (Neb. Rev. Stat. 25-403).

Other Actions.

(1) County where defendant resides, (2) county where cause of action arose, (3) in county where transaction or some part of transaction occurred out of which cause of action arose, or (4) if all defendants are nonresidents of this state, in any county. (Neb. Rev. Stat. 25-403.01). If venue improper, court may order attorney's fees paid upon transfer. (Neb. Rev. Stat. 25-411).

Venue Definitions.

(1) Any private corporation organized under laws of this state and any foreign corporation authorized to transact business in this state is resident of any county in which it has its registered office or other office or is doing business. Foreign corporation not authorized to transact business in this state is not resident of this state. (2) Partnership sued in its firm name is resident of any county in which any partner resides or in which partnership has office or is doing business. If all partners are nonresidents of this state and partnership does not have office or do business in this state, partnership is not resident of this state. (3) Voluntary unincorporated association sued in its own name is resident of any county in which association has office or in which any officer of association resides. If it has no office in this state, voluntary unincorporated association is not resident of this state. (4) Limited Liability Company is resident of county where it has registered office, other office, or is doing business. Foreign LLC is not resident if not authorized to do business in state. (Neb. Rev. Stat. 25-403.02).

Change of Venue.

Change of venue, on the usual grounds, is provided for. (Neb. Rev. Stat. 25-410 to -412).

Contract Provisions.

If parties have agreed in writing that action on controversy may be brought in this state and agreement is only basis for jurisdiction, court will entertain action if (a) court has power under law of state to do so; (b) state is reasonably convenient place for trial of action; (c) agreement was not obtained by misrepresentation, duress, abuse of economic power, or other unconscionable means; and (d) defendant, if in state, was served as required by law in case of persons within state or, if without state, was served personally or by certified mail directed to last known address. Section does not apply to cognovit clauses, arbitration clauses, or appointment of agent for service of process pursuant to statute or court order. (Neb. Rev. Stat. 25-414).

5.27 WITNESSES:

See topic Evidence, subhead Witnesses.

6 COURTS AND LEGISLATURE

6.01 COURTS:

United States District Court.

Clerk's office: 111 S. 18th Plaza, Suite 1152, Omaha, NE 68102.

Nebraska comprises one Federal District coterminous with State of Nebraska and is not subdivided into divisions for any purpose. Official name is U.S. District Court for District of Nebraska. Official station of clerk of court is Omaha. Deputy clerks are stationed at Omaha and Lincoln.

Civil cases may be filed in clerk's office either at Omaha or Lincoln.

Court sits at Omaha, at Lincoln, and at North Platte.

Place of trial of civil cases as between Omaha, Lincoln or North Platte, by requests, if all request identical place. Plaintiff, or removing party, files request with complaint or petition for removal. Defendant files request with first pleading. Plaintiff in removed action files request within ten days after notice of removal. Copies of requests must be served on all parties affected. If places requested are not identical, on notice and hearing, a judge will determine place where case shall be calendared for trial, with due consideration for convenience of litigants, witnesses and counsel. Changes in designation of place of trial may be sought by motion with reasons stated made before case is calendared for trial. In criminal cases government attorney endorses request on information or indictment, defendant requests in writing within ten days after giving bond or arrest, where no bond is given, and case is calendared in one of said three cities designated by defendant, unless government attorney files objection within ten days after defendant's request. (Neb. Civ. Rule 40.1[b]).

On institution of any civil suit, $350 must be paid to clerk; on filing notice of appeal to Circuit Court of Appeals or U.S. Supreme Court, $455 notice of appeal and docket fees.

Bankruptcy Court.

Clerk's office, 111 S. 18th Plaza, Suite 1125, Omaha, NE 68102, 463 Federal Building, 100 Centennial Mall North, Lincoln 68508. C. 7 $299; c. 13 $274; c. 11 $1,039; c. 12 $239; c. 9 $1,039. Judge may also require deposit to cover expenses before proceeding with case on matters raised by motion of opposing counsel, trustee or creditors' committee.

Supreme Court of Nebraska.

There are seven judges in Supreme Court, one of whom is Chief Justice. (Const. Art. V, § 2). All sessions of court are held in Capitol Building at Lincoln. Judges may reside in Lincoln but must reside in state, and they must not be deemed to have lost their residence at place from which they were selected. (Const. Art. V, § 4).

Jurisdiction is original in cases relating to revenue, civil cases in which state is a party, mandamus actions, quo warranto, habeas corpus, and election contests involving state officers other than members of legislature (Const. Art. V, § 2; Neb. Rev. Stat. 24-204), and appellate in all civil and criminal actions appealed from district or appellate court (Neb. Rev. Stat. 24-204).

Majority of judges is necessary to constitute quorum and opinions and judgments can be given by majority except in cases involving constitutionality of statute, in which concurrence of five judges is necessary to declare act unconstitutional. (Const. Art. V, § 2). Court has power to appoint judges of district court or appellate court to act as associate judges of Supreme Court and to divide court into two divisions of five judges each when associate judges are sitting with Supreme Court. When court is sitting in two divisions, four of judges are necessary to constitute a quorum or to render an opinion or decision. In all cases involving constitutionality of a statute and all appeals from conviction for homicide, Supreme Court sits without division. (Const. Art. V, § 2).

Court sits at seat of government. (Const. Art. V, § 3).

Docket entry, $100 (Neb. Rev. Stat. 33-103); security for costs, $75 or bond (Neb. Rev. Stat. 25-1914).

Court of Appeals.

Consists of six judges sitting in panels of three. (Neb. Rev. Stat. 24-1101).

Jurisdiction includes all cases appealed from District Court except death penalty or life imprisonment cases and cases raising constitutionality of statute. (Neb. Rev. Stat. 24-1106).

District Court.

District court has original jurisdiction in both chancery and common law, and has general jurisdiction over all matters except probate matters. (Neb. Rev. Stat. 24-302, -517). District court also has appellate jurisdiction on appeals from county courts. (Neb. Rev. Stat. 25-2728). On appeal, action is reviewed for error on record. (Neb. Rev. Stat. 25-2733).

District court is divided into 12 districts, comprising counties as set out below. Court is held in each county at county seat thereof. (See list of counties and county seats at head of Nebraska Geographical Section, in volume containing list of Nebraska lawyers.)

First District. Counties of Saline, Jefferson, Gage, Thayer, Johnson, Pawnee, Nemaha, Fillmore, and Richardson.

Second District. Counties of Sarpy, Cass, and Otoe.

Third District. County of Lancaster.

Fourth District. County of Douglas.

Fifth District. Counties of Merrick, Platte, Colfax, Boone, Nance, Hamilton, Polk, York, Butler, Seward, and Saunders.

Sixth District. Counties of Dixon, Dakota, Cedar, Burt, Thurston, Dodge, and Washington.

Seventh District. Counties of Knox, Cuming, Antelope, Pierce, Wayne, Madison, and Stanton.

Eighth District. Counties of Cherry, Keya Paha, Brown, Rock, Blaine, Loup, Custer, Boyd, Holt, Garfield, Wheeler, Valley, Greeley, Sherman, and Howard.

Ninth District. Counties of Buffalo and Hall.

Tenth District. Counties of Adams, Clay, Phelps, Kearney, Harlan, Franklin, Webster, and Nuckolls.

Eleventh District. Counties of Hooker, Thomas, Arthur, McPherson, Logan, Keith, Perkins, Lincoln, Dawson, Chase, Hayes, Frontier, Gosper, Dundy, Hitchcock, Red Willow, and Furnas.

Twelfth District. Counties of Sioux, Dawes, Box Butte, Sheridan, Scotts Bluff, Morrill, Garden, Banner, Kimball, Cheyenne, Grant, and Deuel.

A clerk of district court for each county is located at county seat.

Fees: Civil cases including appeals and domestic relations, $79, except dissolution of marriage, $154; transcribing record of judgment, $47.

County Courts.

County courts are courts of record and have exclusive original jurisdiction in all matters of probate and administration of estates of deceased persons and in proceedings to determine heirship, appointment of conservators and settlement of their accounts, and juvenile matters in counties where there is no juvenile court. They have exclusive original jurisdiction in all matters relating to guardianship of person and in matters of adoption, except if separate juvenile court already has jurisdiction over child in need of guardian or child to be adopted; in that case, they have concurrent original jurisdiction with separate juvenile court. County courts have concurrent jurisdiction with district court to involuntarily partition ward's interest in real estate, in paternity determinations, and in matters arising under Uniform Trust Code. (Neb. Rev. Stat. 24-517).

They also have jurisdiction, concurrently with district court in civil actions up to $51,000. County courts have concurrent original jurisdiction with district courts in any criminal matter classified as misdemeanor or any misdemeanor that arises from same incident as charged felony, and exclusive jurisdiction over city ordinance violations except in counties having municipal court. (Neb. Rev. Stat. 24-517). County court certifies proceedings to district court of county in which action is pending: (1) Upon request of any party when pleadings or discovery proceedings indicate there is amount in controversy in excess of $51,000, or (2) when relief requested is exclusively within jurisdiction of district court. (Neb. Rev. Stat. 24-517).

Probate Courts.

There are no separate probate courts. Probate jurisdiction is exercised by county courts. (Neb. Rev. Stat. 24-517).

Fees: Generally set in accordance with respective value of estate involved.

Small Claims Court.

County and municipal courts have small claims department having jurisdiction in civil actions of any type when amount in controversy is less than $2,400, exclusive of interest and costs. (Neb. Rev. Stat. 25-2802). Parties cannot be represented by attorneys, and must represent themselves except as provided in § 25-2805. Corporation or association represented by officer or employee. Partnerships represented by partner or employee. LLC represented by member, manager, or employee. No assigned claims can be filed. (Neb. Rev. Stat. 25-2803). Setoff or counterclaim may be filed, if less than $2,700, exclusive of interest and costs. If setoff or counterclaim exceeds such amount, entire case is transferred to regular county court. No prejudgment actions of attachment, garnishment, replevin, or other provisional remedy may be filed. (Neb. Rev. Stat. 25-2804). All actions tried to court without jury. (Neb. Rev. Stat. 25-2805).

No formal pleadings, or rules of evidence, except for privileged communications. (Neb. Rev. Stat. 25-2806). Default judgments may not be set aside but may only be appealed. Appeal may be made to district court. (Neb. Rev. Stat. 25-2807).

Fees: $23, plus service costs. (Neb. Rev. Stat. 24,703, 25-2804[2], 33-154 to -156, 33-10,703 and 47-633).

Juvenile Courts.

Separate juvenile court may be established in any county having population of 75,000 or more. (Neb. Rev. Stat. 43-2,111). Douglas, Lancaster and Sarpy Counties have established separate juvenile courts. These courts have exclusive original jurisdiction over: (1) Child under 18 years of age who is homeless, destitute, or without proper support through no fault of his parent, guardian, or custodian; (2) child under 18 who is: (i) abandoned, (ii) lacks proper care by reason of fault or habits of parent or guardian, (iii) whose parent, guardian or custodian neglects or refuses to provide proper or necessary subsistence, education or other care necessary for his health, morals or welfare, (iv) whose parent, guardian or custodian neglects or refuses to provide special care made necessary by child's mental condition or (v) who is in situation or engages in occupation which is dangerous to life, limb or injurious to his health and morals; (3) any child under 16 at time he violated any law of state or any city or village ordinance amounting to offense other than felony or traffic offense or parking violation; (4) any child under 18: (i) who by reason of being wayward or habitually disobedient, uncontrolled by his parent or guardian, (ii) who is habitually truant from school or home or (iii) who deports himself so as to injure or endanger seriously morals or health of himself or others; (5) parent, guardian or custodian who has custody of any child described above; (6) proceedings for termination of parental rights. (Neb. Rev. Stat. 43-247).

These courts have concurrent jurisdiction with district court as to (1) any child under 18 who has committed felony; (2) any child 16 or 17 who violated law amounting to offense other than traffic offense; (3) any child under 18 who has committed act which would constitute traffic offense as defined in § 43-245; and (4) any proceedings for termination of parental rights, or for paternity determination for child over which juvenile court already has jurisdiction. Juvenile court has concurrent jurisdiction with county court as to any juvenile who was ward of juvenile court at inception of his or her guardianship and whose guardianship has been disrupted or terminated and over adoption or guardianship proceedings for child over whom juvenile court already has jurisdiction. Where no separate juvenile court established, county court has exclusive jurisdiction. Separate juvenile courts are prohibited from appointing juvenile probation officers after Dec. 31, 1984. District court has exclusive jurisdiction over proceeding brought pursuant to Neb. Rev. Stat. 71-510. (Neb. Rev. Stat. 43-247).

Juveniles; Jurisdiction of county court expanded to include jurisdiction over parents of detained juveniles to cause parents to pay support money to agency where juvenile is detained. (Neb. Rev. Stat. 43-254 and -290).

Nebraska Worker's Compensation Court.

This court consists of seven judges appointed by Governor and has original jurisdiction to determine all controversies arising under Nebraska Worker's Compensation Law. (Neb. Rev. Stat. 48-152). Hearings are held within county where accident occurred unless some other place is fixed by agreement of parties. (Neb. Rev. Stat. 48-177). Claims for compensation will be barred unless filed within two years after accident or within two years of last compensation paid arising out of accident (Neb. Rev. Stat. 48-137), or within two years after learning that compensable disability resulting from original accident (211 Neb. 704, 320 N.W.2d 111).

6.02 LEGISLATURE:

Legislature is unicameral body. (Const. Art. III, § 1). Regular sessions are held each year commencing on 1st Wed. after 1st Mon. in Jan. Sessions must not exceed 90 legislative days in odd numbered years and 60 legislative days in even numbered years unless extended by vote of not less than 4/5 of all legislators. (Const. Art. III, § 10).

Special or Extraordinary Sessions.

Governor may call extra sessions. (Const. Art. IV, § 8).

Initiative and Referendum.

People have initiative and referendum. (Const. Art. III, §§ 2, 3).

Lobbyists.

See Neb. Rev. Stat. 49-1480 to -1492. For specifically prohibited practices, see Neb. Rev. Stat. 49-1490 to -1492.

6.03 REPORTS:

Decisions of Supreme Court are officially reported in Nebraska Reports, and unofficially reported in Northwestern Reporter and Nebraska Supreme Court Journal. (Neb. Rev. Stat. 24-212). Decisions of Court of Appeals which are approved for publication by Supreme Court will appear in Nebraska Appellate Reports and Northwestern Reporter.

Digests are: Nebraska Digest (West Publishing Company) consisting of 12 volumes and pocket supplement. Covers all Nebraska Reports, Nebraska cases in Northwestern Reporter and Nebraska cases reported in Federal Courts and the United States Supreme Court.

6.04 STATUTES:

Revised Statutes of Nebraska compiled in 1943. Supplements issued annually, Cumulative Supplements periodically. Session Laws published at close of each session of legislature. Statutes printed in volumes, updated from time to time in ``Reissue'' reprints. Current Reissues: Vols. 1 and 1A, 2007; Vols. 2, 2A, and 3, 2008; Vols. 3A and 3B, 2004; Vols. 4 and 4A, 2003; Vols. 5 and 5A, 2008; Uniform Commercial Code Vol. 6, 2001; Cumulative Supplement, 2008.

Uniform or Model Acts are: Anatomical Gift (1968, adopted 1971) (Neb. Rev. Stat. 71-4801 to -4812); Arbitration (1956, adopted 1987) (Neb. Rev. Stat. 25-2601 to -2622); Business Corporation Act (1993, adopted 1995) (Neb. Rev. Stat. 21-2001 to -20,193); Child Abduction Protection (2006, adopted 2007) (Neb. Rev. Stat. 43-3901 to -3912); Child Custody Jurisdiction and Enforcement (1997, adopted 2003) (43-1226 to -1266); Choice of Forum (1968, adopted 1969) (Neb. Rev. Stat. 25-413 to -417); Code of Military Justice (1950, adopted 1969) (Neb. Rev. Stat. 55-401 to -480); Commercial Code (version and adoption dates vary based on UCC article) (Neb. UCC 1-101 to 10-103); Common Trust Fund Act (1952, adopted 1953) (Neb. Rev. Stat. 30-3202 to -3207); Composite Reports as Evidence (1936, adopted 1951) (Neb. Rev. Stat. 25-12,115 to -12,119); Condominium (1980, adopted 1983) (Neb. Rev. Stat. 76-825 to -894); Conflicts of Laws Limitations (1982, adopted 2006) (Neb. Rev. Stat. 25-3201 to -3207); Construction Lien (Construction Lien Article from the Uniform Simplification of Land Transfers Act of 1977, adopted 1981) (Neb. Rev. Stat. 52-125 to -159); Controlled Substances (1973, adopted 1977) (Neb. Rev. Stat. 28-401 to -456.01); Criminal Extradition (1936, adopted 1963) (Neb. Rev. Stat. 29-729 to-758); Custodial Trust (1987, adopted 1997) (Neb. Rev. Stat. 30-3501 to -3522); Deceptive Trade Practices (1966, adopted 1969) (Neb. Rev. Stat. 87-301 to -306); Declaratory Judgments (1922, adopted 1929) (Neb. Rev. Stat. 25-21,149 to -21,164); Determination of Death (1980, adopted 1992) (Neb. Rev. Stat. 71-7201 to -7203); Disposition of Unclaimed Property (1966, adopted 1969) (Neb. Rev. Stat. 69-1301 to -1329); Divorce Recognition (1947, adopted 1949) (Neb. Rev. Stat. 42-341 to -344); Durable Power of Attorney (1979, adopted 1985) (Neb. Rev. Stat. 30-2664 to -2672); Enforcement of Foreign Judgments (1964, adopted 1993) (Neb.

Rev. Stat. 25-1587.01 to -1587.09); Electronic Transactions (1999, adopted 2000) (Neb. Rev. Stat. 86-612 to -643); Environmental Covenants Act (2003, adopted 2005) (Neb. Rev. Stat. 76-2601 to -2613); Evidence Rules (1974, adopted 1975) (Neb. Rev. Stat. 27-101 to -1103); Federal Lien Registration (1978, adopted 1988) (Neb. Rev. Stat. 52-1001 to -1008); Fraudulent Transfer (1984, adopted 1989) (Neb. Rev. Stat. 36-701 to -712); Fresh Pursuit (1937, adopted 1937) (Neb. Rev. Stat. 29-416 to -421); Health Maintenance Organization (1978, adopted 1990) (Neb. Rev. Stat. 44-3292 to -32,180); Interstate Arbitration and Compromise of Death Taxes (1943, adopted 1976) (Neb. Rev. Stat. 77-3301 to -3316); Interstate Enforcement of Domestic Violence Protection Orders (2002, adopted 2003) (Neb. Rev. Stat. 42-932 to -940); Interstate Family Support (2001, adopted 2003) (Neb. Rev. Stat. 42-701 to -751); Judicial Notice of Foreign Law (1936, adopted 1947) (Neb. Rev. Stat. 25-12,101 to -12,107); Limited Partnership (1976, adopted 1981) (Neb. Rev. Stat. 67-233 to -296); Mediation (2001, adopted 2003) (Neb. Rev. Stat. 25-2930 to -2942); Motor Vehicle Records Disclosure (1997, adopted 1997) (Neb. Rev. Stat. 60-2901 to -2912); Partnership, (1997, adopted 1997) (Neb. Rev. Stat. 67-401 to -467); Photographic Copies of Business and Public Records as Evidence (1949, adopted 1951) (Neb. Rev. Stat. 25-12,112 to -12,114); Premarital Agreement (1983, adopted 1994) (Neb. Rev. Stat. 42-1001 to -1011); Principal and Income (1997, adopted 2001) (Neb. Rev. Stat. 30-3116 to -3149); Probate Code (1969, adopted 1974)(Neb. Rev. Stat. 30-2201 to -2902); Property (1938, adopted 1941) (Neb. Rev. Stat. 76-101 to -123); Prudent Investor (1994, adopted 1997) (Neb. Rev. Stat. 30-3883 to -3889); Prudent Management of Institutional Funds (2006, adopted 2007) (Neb. Rev. Stat. 58-610 to -619); Reciprocal Transfer Tax (1928, adopted 1951) (Neb. Rev. Stat. 77-2007.01 to -2007.02); Recognition of Acknowledgments (1968, adopted 1969) (Neb. Rev. Stat. 64-201 to -210); Rendition of Accused Persons (1967, adopted 1969) (Neb. Rev. Stat. 29-3101 to -3106); Rendition of Prisoners as Witnesses in Criminal Proceedings (1957, adopted 1969) (Neb. Rev. Stat. 29-3201 to -3210); Residential Landlord and Tenant (1972, adopted 1974) (Neb. Rev. Stat. 76-1401 to -1449); Secure the Attendance of Witnesses from Without the State in Criminal Proceedings (1936, adopted 1937) (Neb. Rev. Stat. 29-1906 to -1911); Securities (1956, adopted 1965) (Neb. Rev. Stat. 8-1101 to -1123); Simultaneous Death (1940, adopted 1947) (Neb. Rev. Stat. 30-121 to -128); State Administrative Procedure (1981, adopted 1987) (Neb. Rev. Stat. 84-901 to -920); Statutory Rule Against Perpetuities (1986, adopted 1989) (Neb. Rev. Stat. 76-2001 to -2008); Testamentary Additions to Trusts (1991, adopted 1999) (Neb. Rev. Stat. 30-3601 to -3604); Trade Secrets (1985, adopted 1988) (Neb. Rev. Stat. 87-501 to -507); Transfer to Minors (1986, adopted 1992) (Neb. Rev. Stat. 43-2701 to -2724); Trust Code (2003, adopted 2004) (Neb. Rev. Stat. 30-3801 to -38,110); and Unauthorized Insurers (1938, adopted 1969) (Neb. Rev. Stat. 44-2001 to -2008).

Uniform Commercial Code in effect. See category Business Regulation and Commerce, topic Commercial Code.

For text of Uniform Acts falling within the scope of the Martindale-Hubbell Law Digests see Uniform and Model Acts section.

7 CRIMINAL LAW

7.01 CRIMINAL LAW:

Nebraska Criminal Code covers all crimes and criminal procedure. (Neb. Rev. Stat. cc. 28 and 29). Persons accused of crime are brought to trial by indictment of grand jury (Neb. Rev. Stat. 29-1416), or on information filed by prosecuting attorney (Neb. Rev. Stat. 29-1601 and -1602). Defendant has burden of proving insanity defense by preponderance of evidence. (Neb. Rev. Stat. 29-2203).

Bail.

All persons are bailable by sufficient sureties, except on charge of treason, sexual offenses involving penetration by force or against will of victim, and murder where proof is evident or presumption great. (Const. Art. I, § 9).

Victims Reparation.

Criminal victims may seek reparations through Crime Victim's Reparations Act. (Neb. Rev. Stat. 81-1801 to -1842).

DNA Identification Information Act. State DNA database and sample bank established as repository for DNA samples from individuals convicted of felony sex and other specified offenses and from individuals to assist in identifying missing persons and human remains. (Neb. Rev. Stat. 29-4101 to -4115).

Sexual Predator Residency Restriction Act. (Neb. Rev. Stat. 29-4015 to -4017).

Sex Offender Commitment Act adopted to provide court-ordered treatment of sex offenders who have completed their sentences but continue to pose threat of harm to others. (Neb. Rev. Stat. 71-1201 to -1226).

Sex Offender Registration Act. (Neb. Rev. Stat. 29-4001 to -4014). Sex offenders of minors must register with officials.

Concealed Handgun Permit Act. (Neb. Rev. Stat. 69-2427 to -2447).

Uniform Rendition of Accused Persons Act (1967, adopted 1969). (Neb. Rev. Stat. 29-3101 to -3106).

Uniform Rendition of Prisoners as Witnesses in Criminal Proceedings Act (1957, adopted 1969). (Neb. Rev. Stat. 29-3201 to -3210).

Uniform Deceptive Trade Practices Act (1966, adopted 1969). (Neb. Rev. Stat. 87-301 to -306).

Uniform Controlled Substances Act in compliance with federal classification (1973, adopted 1977). (Neb. Rev. Stat. 28-401 to -456.01).

8 DEBTOR AND CREDITOR

8.01 ASSIGNMENTS:

In general all choses in action except those of personal nature are assignable.

Accounts Receivable.

See category Business Regulation and Commerce, topic Commercial Code.

Instruments Transferring Title.

Assignment of mortgage, effect of (Neb. Rev. Stat. 76-256); assignment of mineral rights (Neb. Rev. Stat. 72-311). Requisites of instrument transferring title for goods (Neb. UCC 9-406); for lien rights (Neb. Rev. Stat. 52-149).

Filing.

Filing of assignment not required except when recording required. See topic Recording.

Required recording as to security interests (Neb. UCC 9-501 to -527); mineral rights (Neb. Rev. Stat. 72-311); school land lease (Neb. Rev. Stat. 72-241).

Notice.

Debtor may continue to pay original claimant until received notice of assignment and direction that no payments may be made without assignee's consent. (Neb. Rev. Stat. 52-149; Neb. UCC 5-406). Recording mortgage not notice of assignment to invalidate payment made to mortgagee. (Neb. Rev. Stat. 76-256).

Effect.

Assignee of thing in action may maintain action in his own behalf (Neb. Rev. Stat. 25-302), subject to setoff or defenses between original parties, except bona fide purchasers of negotiable paper (Neb. Rev. Stat. 25-303).

For Assignment of Wages.

Head of family must be in writing and signed and acknowledged by both husband and wife. Spouse need not join in authorization for payroll deductions for purchase of Government bonds, contributions to charities, payment of dues, insurance, etc. (Neb. Rev. Stat. 36-213). Person withholding wages under void assignment is liable to injured party for expense of recovering same, including attorney's fees, and also guilty of misdemeanor. (Neb. Rev. Stat. 36-213.01).

Licensee under Installment and Chattel Loan Act may not take assignment of wages for more than amount of loan. All blanks in assignment must be filled in (Neb. Rev. Stat. 45-1028) and assignment must be signed personally by borrower (Neb. Rev. Stat. 45-1029); if borrower is married written consent of husband or wife must be obtained (Neb. Rev. Stat. 45-1030).

Liens.

Generally assignable, see specific topic headings; see also topic Liens.

Enforcement.

Assigned claim cannot be filed in small claims court. (Neb. Rev. Stat. 25-2803).

Form.

No special form prescribed by law.

See also category Business Regulation and Commerce, topic Commercial Code.

8.02 ATTACHMENT:

Actions in Which Allowed.

Attachment may be allowed in any civil action for the recovery of money only. (Neb. Rev. Stat. 25-1001).

Courts Which May Issue Writ.

All courts having jurisdiction of civil cases. (Neb. Rev. Stat. 25-1002).

Time for Issuance.

Attachment may issue at or after the commencement of an action. (Neb. Rev. Stat. 25-1001).

In Whose Favor Writ May Issue.

Any plaintiff, in civil action, including nonresident or foreign corporation, may obtain attachment. (Neb. Rev. Stat. 25-1001).

Against Whom Writ May Issue.

Writ may issue against defendants or debtors upon proper grounds. (Neb. Rev. Stat. 25-1001 and -1049).

Claims on Which Writ May Issue.

Attachment may issue on either matured or unmatured claim. (Neb. Rev. Stat. 25-1001 and -1049).

Grounds.

Defendant, or one of several defendants: (1) Has absconded with intent to defraud creditors; (2) has left county of his residence to avoid service of summons; (3) so conceals himself that summons cannot be served upon him; (4) is about to remove his property or part thereof out of county in which property is located with intent to defraud creditors; (5) is about to convert his property or part thereof into money for purpose of placing it beyond reach of creditors; (6) has property or rights in action which he conceals; (7) has assigned, removed or disposed of or is about to dispose of property with intent to defraud creditors; (8) fraudulently contracted debt or incurred obligation for which suit is about to be or has been brought. (Neb. Rev. Stat. 25-1001).

On claims not due grounds of attachment are that debtor: (1) Has sold or conveyed or otherwise disposed of property with fraudulent intent to cheat or defraud, hinder or delay creditors; (2) is about to make such sale, disposition or conveyance of his property with such fraudulent intent; (3) is about to remove property with intent or effect of cheating, defrauding, hindering or delaying creditors. (Neb. Rev. Stat. 25-1049).

Proceedings to Obtain.

In order to obtain an attachment plaintiff must file an affidavit showing: (1) That facts set forth in plaintiff's complaint state valid cause of action and amount plaintiff is entitled to recover are true; (2) describing existence and approximate value of defendant's property known to plaintiff to be subject to jurisdiction of court; and (3) stating specific facts demonstrating reasonable cause that one or more of grounds for attachment exist. (Neb. Rev. Stat. 25-1002).

If claim sued on is not due an order is required from court in which action is brought or from judge thereof or county judge, and before attachment is allowed affidavit shall be presented demonstrating: (1) That plaintiff will possess valid cause against defendant when claim becomes due; (2) date when claim shall be due; (3) amount of claim; (4) description of existence and approximate value of defendant's property known to be within jurisdiction of court and not exempt from attachment; and (5) existence of at least one of grounds for attachment. (Neb. Rev. Stat. 25-1050).

Attachment Bond.

Judge to whom affidavit is presented shall determine amount of bond, taking into account amount of probable damage suffered by defendant if property is wrongfully attached. (Neb. Rev. Stat. 25-1003).

Issuance of Writ.

The writ is issued from the office of the clerk of the court in which the action was brought and directed to the sheriff. (Neb. Rev. Stat. 25-1003 and -1004).

Levy.

Sheriff must make levy in presence of two residents of county and, with such residents, make and return an inventory and appraisement of property attached. Where real property is attached, sheriff must leave with occupant thereof, or if there is no occupant, in a conspicuous place thereon, a copy of the order. Accessible personal property is taken into sheriff's custody and held subject to order of court. (Neb. Rev. Stat. 25-1008).

Indemnity.

No statute provides right of levying officer to require.

Lien.

Order of attachment binds property attached from time of service. (Neb. Rev. Stat. 25-1017).

Priorities.

If same officer has several attachments against same defendants he must serve them in order received. (Neb. Rev. Stat. 25-1007).

Release of Property.

Defendant may obtain release of property attached by giving surety bond in appraised value thereof conditioned that such value and money shall be forthcoming to answer judgment (Neb. Rev. Stat. 25-1009); or may obtain discharge of attachment by giving bond in amount of plaintiff's claim conditioned for performance of judgment rendered in action (Neb. Rev. Stat. 25-1024).

Sale.

By order of court as on execution. (Neb. Rev. Stat. 25-1033).

Third Party Claims.

If personal property be claimed by any person other than defendant, officer must have validity of claim tried. (Neb. Rev. Stat. 25-1036).

Vacation or Modification.

Defendant may at any time before judgment upon reasonable notice to plaintiff move to discharge an attachment as to whole or part of property. (Neb. Rev. Stat. 25-1040). If attachment discharged by order, any party affected and excepting may appeal within time fixed by court or judge, on giving surety bond, conditioned for payment of all damage in consequence of appeal if attachment finally discharged. (Neb. Rev. Stat. 25-1047).

In inferior courts rules for attachments are same as in district courts. (Neb. Rev. Stat. 25-1042).

8.03 CONSUMER CREDIT:

Uniform Consumer Credit Code not adopted.

8.04 CREDITORS' SUITS:

If consumer is in default for at least ten days, creditor may give notice to consumer. (Neb. Rev. Stat. 45-1,106). Consumer then has 20 days to cure. If no cure, creditor may accelerate or take possession of collateral. (Neb. Rev. Stat. 45-1,107).

If judgment debtor has no personal or real property subject to levy on execution sufficient to satisfy judgment, any interest he may have in any banking, turnpike, bridge, or other joint stock company or in any money, contract, claims or choses in action due or to become due, any judgment or decree or any money, goods or effects which he may have in possession of any person, body politic or corporate, may be subjected to payment of such judgment by proceedings in equity. (Neb. Rev. Stat. 25-1564). At any time after entry of judgment, unsatisfied debtor may be examined before District Judge. (Neb. Rev. Stat. 25-1565).

8.05 EXECUTIONS:

Money judgments are enforceable by execution. (Neb. Rev. Stat. 25-1503).

Kinds of Execution.

Execution may issue against property of judgment debtor and for delivery of possession of real property with damages for withholding same and costs. (Neb. Rev. Stat. 25-1502).

Exemptions.

See topic Exemptions.

Time for Issuance.

Execution may issue immediately after judgment, or on expiration of stay if any granted. (Neb. Rev. Stat. 25-1504 and -1513). Judgment becomes dormant after five years unless execution issued. (Neb. Rev. Stat. 25-1515 and -1542; 213 Neb. 243, 328 N.W.2d 759). Judgments may be kept alive indefinitely by issuance of executions at intervals of not more than five years. (213 Neb. 243, 328 N.W.2d 759).

Stay.

On all court judgments for recovery of money only (except judgment rendered on appeal or writ of error or for money received in fiduciary capacity or for breach of official duty) there may be stay if within 20 days after entry of judgment defendant gives two or more sufficient freehold sureties to enter surety bond for payment of judgment, interest, and costs. Period of stay is three months if judgment does not exceed $50; six months if it exceeds $50 but does not exceed $100; nine months if it exceeds $100. (Neb. Rev. Stat. 25-1507). No stay for more than nine months after entry of judgment. (Neb. Rev. Stat. 25-1505 and -1507). No appeal allowed after stay taken and no stay granted on judgment against surety for stay of execution. (Neb. Rev. Stat. 25-1509).

Lien.

No statute addresses liens of execution before levy.

Levy.

Officer having execution must immediately levy on goods and chattels; if none found, he must endorse ``No goods'' on writ and forthwith levy on lands and tenements of debtor. (Neb. Rev. Stat. 25-1518). If execution is for delivery of possession of real property, writ must require officer to deliver property, particularly describing it, to party entitled thereto and may require officer to satisfy any costs and damages recovered in same judgment out of goods and chattels, or if none, out of lands and tenements, of judgment debtor. (Neb. Rev. Stat. 25-1581).

Return.

Execution from court of record is returnable as soon as practicable after writ has been served. (Neb. Rev. Stat. 25-1543).

Priorities.

When two or more writs of execution against same debtor are delivered to officer on same day, no preference shall be given to either; if sufficient sum of money is not made to satisfy all executions, amount made distributed in proportion to amount of respective demands. In all other cases, writ first delivered shall be first satisfied; duty of officer to endorse on every writ of execution time when he received writ. (Neb. Rev. Stat. 25-1517).

Claims of Third Persons.

Officer levying on goods claimed by third person must give written notice to court, stating names of plaintiff, defendant and claimant, and schedule of property claimed. Court shall immediately enter notice upon docket and determine right of claimant to property in controversy. (Neb. Rev. Stat. 25-1521).

Satisfaction.

When any writ shall issue, directing sale of property previously taken in execution, officer issuing said writ shall, at request of person entitled to benefit thereof, his agent or attorney, add thereto command to officer, that if property remaining not sold shall, in his opinion, be insufficient to satisfy judgment, he shall levy same upon lands and tenements, goods and chattels, or either, as law shall permit, being property of judgment debtor, sufficient to satisfy debt. (Neb. Rev. Stat. 25-1526). If judgment debtor has insufficient personal or real property to satisfy judgment, any interest in any banking, turnpike, bridge, or other joint stock company, or any interest he may have in any money, contracts, claims or choses in action, due or to become due to him, or in any judgment or decree, or any money, goods or effects which he may have in possession of any person, body politic or corporate, shall be subject to payment of such judgment. (Neb. Rev. Stat. 25-1564).

Sale.

On sale of personal property, four successive weeks notice must be given by advertisement once per week in newspaper printed in county or if none, by putting up advertisements in five public places in county, two in precinct where sale to be held. (Neb. Rev. Stat. 25-1525). On execution sale of personal property officer delivers same to purchaser without court action.

On sale of land at least four successive weeks' notice must be given by advertisement printed once per week in newspaper printed in county, or if none, in newspaper of general circulation therein and by putting up advertisement on court house door and in five other public places in county, two in precinct where land lies. (Neb. Rev. Stat. 25-1529). Prior to execution sale, party seeking confirmation of sale must inform debtor of homestead exemption procedure. Notice shall be made by certified mail at least ten days prior to hearing on confirmation. (Neb. Rev. Stat. 25-1531). Posting notice unnecessary if notice was published. (7 Neb. 456). Sale is held at county court house or at door of house in which district court last held. (Neb. Rev. Stat. 25-1536). Sale is subject to confirmation, which may be made conditional on such terms as may be just and equitable. (Neb. Rev. Stat. 25-1531). If not confirmed new sale is held. If sale is postponed it must be readvertised. (64 Neb. 472, 90 N.W. 245). After confirmation selling officer makes deed to purchaser, conveying all interest of judgment debtor. (Neb. Rev. Stat. 25-1532).

Redemption.

Owner of land sold on execution may redeem at any time before sale confirmed by paying into court amount of decree with interest and costs; if land sold to any person not party to suit, owner redeeming must pay to purchaser 12% interest on purchase price from date of sale to date of redemption, or deposit same with clerk of court where decree or judgment rendered. (Neb. Rev. Stat. 25-1530).

Supplementary Proceedings.

At any time after entry of judgment, judgment debtor may be required to appear and answer concerning his property. (Neb. Rev. Stat. 25-1565).

Person indebted to debtor may be similarly examined. (Neb. Rev. Stat. 25-1569).

Judge may appoint receiver of property of judgment debtor and may also forbid transfer or disposition of property of judgment debtor not exempt, and any interference therewith. (Neb. Rev. Stat. 25-1573).

Notice must be given to all parties affected of time and place of application for receiver (Neb. Rev. Stat. 25-1082 and -1089), but if delay is hazardous to rights of any party, court or judge may direct sheriff to take temporary possession of property and appoint early day for hearing of application (Neb. Rev. Stat. 25-1083).

Judge may order any property of judgment debtor, not exempt by law, to be applied toward satisfaction of judgment; however, greater of 85% of wages of heads of families and 75% of other wage earners or 30 times minimum hourly wage, on weekly basis is exempt from attachment, execution and garnishment. (Neb. Rev. Stat. 25-1558).

Body Execution.

If judge is satisfied, by affidavit of party or otherwise, that there is danger of debtor leaving state or concealing himself to avoid examination, he may issue warrant for debtor's arrest. Warrant issuable only by county judge or judge of district court of county in which debtor resides or may be arrested. If on examination it appears there is danger of debtor leaving state and that he has property which he unjustly refuses to apply to judgment, he may be ordered to give bond in sum prescribed by judge with one or more sureties that from time to time he will attend for examination before judge or referee as directed; on default of bond, may be committed to county jail by warrant of judge as for contempt. (Neb. Rev. Stat. 25-1566).

8.06 EXEMPTIONS:

Federal exemptions provided by 11 U.S.C. § 522(d) rejected. (Neb. Rev. Stat. 25-15,105).

Any resident is entitled to exemption of immediate personal possessions, necessary wearing apparel, interest not exceeding $1,500 in household goods, interest not exceeding $2,400 in tools or supplies for use in family's principal trade or business (Neb. Rev. Stat. 25-1556), $2,500 personal property wild card (Neb. Rev. Stat. 25-1552).

Following property also exempt: Burial lots used exclusively for burial purposes, not for profit (Neb. Rev. Stat. 12-517); burial grounds so recorded in county clerk's office (Neb. Rev. Stat. 12-520); crypts, lots, tombs, niches, vaults, sold or contracted to be sold by mausoleum associations, if for sole purpose of interment, used or held for burial purposes only, not for profit (Neb. Rev. Stat. 12-605); fire fighting equipment, except as against voluntary liens by bill of sale, or security agreement as defined in Art. 9 UCC (Neb. Rev. Stat. 35-105); property of public library (Neb. Rev. Stat. 51-218); public benefits (Neb. Rev. Stat. 68-1013); worker's compensation (Neb. Rev. Stat. 48-149); unemployment (Neb. Rev. Stat. 48-647).

Substitution.

No statute allows debtor who does not possess articles specifically exempted to hold money or other property exempt in lieu thereof.

Debts Against Which Exemptions Not Allowed.

Claim for wages of clerks, laborers or mechanics or money due from attorney to person for whom he received same. (Neb. Rev. Stat. 25-1557 and -1560). Personal and property taxes. (Neb. Rev. Stat. 25-1555).

Waiver of Exemption.

No statute.

Necessity of Claiming Exemption.

Debtor claiming exemptions in lieu of homestead exemptions must file request for hearing in county issuing writ of execution. (Neb. Rev. Stat. 25-1516 and -1552). Debtor must also file list of all property owned indicating all exempt property and its value. (Neb. Rev. Stat. 25-1552).

Annuities or Insurance.

Proceeds in loan value, cash surrender value and all and every benefit accruing under any annuity contract, or under any policy or certificate of life insurance payable to beneficiary other than estate of insured and under any accident or health insurance policy is exempt from all claims of creditors of insured and of beneficiary if related to insured by blood or marriage unless written assignment to contrary has been obtained by claimant, unless individual's aggregate interests exceed $100,000, or if benefits were established or increased within three years prior to bankruptcy or entry against individual of money judgment. (Neb. Rev. Stat. 44-371).

Pensions.

Every resident who was soldier, sailor or marine disabled in U.S. service has exemption of all pension money and of all property purchased and improved exclusively therewith, not exceeding $2,000. (Neb. Rev. Stat. 25-1559). In bankruptcy and collection of money judgment, interest under stock bonus, pension, profit-sharing or similar plan or similar contract payable on account of illness, disability, death, age, or length of service is exempt to extent reasonably necessary for support of debtor and dependents unless certain conditions exist. (Neb. Rev. Stat. 25-1563.01). For county employees, see Neb. Rev. Stat. 23-2322; for school employees, see Neb. Rev. Stat. 79-1060 and -1552; for state employees, see Neb. Rev. Stat. 84-1324.

Earnings.

Maximum part of aggregate disposable earnings of individual for any work week subject to garnishment not to exceed lesser of: (1) 25% of his disposable earnings that week; (2) amount by which his disposable earnings for that week exceed 30 times federal minimum hourly wage; or, (3) 15% of his disposable earnings that week if he is head of family. (Neb. Rev. Stat. 25-1558). Foregoing exemptions do not apply to any court order for support of any persons, any court order of bankruptcy under Ch. 13 of The Bankruptcy Act, or any state or federal tax debt. (Neb. Rev. Stat. 25-1558).

Suit or action on claim or debt against laborer, servant, clerk or employee of individual, firm or corporation engaged in interstate business may not be commenced or prosecuted for purpose of seizing, attaching or garnishing wages of such person earned within 60 days prior to commencement of proceeding. (Neb. Rev. Stat. 25-1560). Nonresident cannot claim benefits of this section. (77 Neb. 857, 110 N.W. 547). Plaintiff bringing such action becomes liable for amount of debt with all costs, expenses and reasonable attorney's fee, and also for fine and costs. (Neb. Rev. Stat. 25-1563).

See also topic Garnishment.

8.07 FORECLOSURE:

See category Mortgages, topic Mortgages of Real Property.

8.08 FRAUDULENT SALES AND CONVEYANCES:

Uniform Commercial Code in effect. See category Business Regulation and Commerce, topic Commercial Code.

Dual contracts between identical parties one of which is inflated to obtain loan on real property constitutes misdemeanor; punishable by fine of $100-$500 or jail of five to 30 days. (Neb. Rev. Stat. 76-2,107 and -2,108).

Uniform Fraudulent Conveyance Act repealed.

Uniform Fraudulent Transfer Act (1984, adopted 1989). (Neb. Rev. Stat. 36-701 to -712).

Remedies.

Creditor may obtain avoidance of transfer or obligation to extent necessary to satisfy claim or attachment or other provisional remedy against asset transferred or other property of transferee. Subject to equitable principles and procedural rules, injunction against further disposition of assets transferred, appointment of receiver to take charge of asset transferred, or any other relief circumstances require. (Neb. Rev. Stat. 36-708).

Bulk Sales.

Bulk sales provisions of UCC repealed. See category Business Regulation and Commerce, topic Commercial Code.

8.09 GARNISHMENT:

Garnishment is allowed and procedure to obtain writ is similar to attachment, except garnishment of wages only after judgment. (Neb. Rev. Stat. 25-1010). See topic Attachment.

Property Which May Be Reached.

Debts and property that cannot be reached directly by attachment may be reached by garnishment. (Neb. Rev. Stat. 25-1010).

Property exempt from garnishment includes: proceeds or interest from payments or settlements under Workers' Compensation Act (Neb. Rev. Stat. 48-149), except for attorney's fee approved in writing by district court (Neb. Rev. Stat. 48-108); fraternal insurance benefits (Neb. Rev. Stat. 44-1089); certain wages; proceeds, cash values and benefits accruing under any annuity contract, policy or certificate of life insurance payable upon death of insured to beneficiary other than estate of insured, or under any accident or health insurance policy (Neb. Rev. Stat. 44-371) (see topic Exemptions).

Grounds.

For grounds for issuing writ, see topic Attachment.

Jurisdiction.

Any court in which a civil action is pending has jurisdiction.

Proceedings to Obtain.

To garnish before judgment, plaintiff must file affidavit containing necessary allegations of affidavit of attachment (see topic Attachment) and in addition: (1) That plaintiff has good reason to and does believe that any person, partnership, or corporation to be named, (2) within county where action is brought, (3) has property of defendant, describing same (4) in his possession, and (5) that cannot be levied upon by attachment. (Neb. Rev. Stat. 25-1010).

Answer of Garnishee.

Rather than provide answer, judgment debtor entitled to hearing within ten days of request to determine issues of exemption or amount owed on judgment; judgment debtor shall make request via hearing form filed within three business days of receipt of notice; court shall grant hearing within ten days of request. (Neb. Rev. Stat. 25-1011).

Garnishment in Aid of Execution.

After judgment, creditor may file affidavit setting forth amount due on judgment, interest, and costs, and that he has good reason to believe a person has property of, or is indebted to, judgment debtor and have garnishment issued. Except when wages are involved, garnishee must hold all property and credits of defendant, to extent of amount set forth in summons, in possession at time of service of summons and interrogatories until further court order. When wages involved, garnishee must pay employee earnings exempted from garnishment, and hold earnings remaining after such payment until further order of court. Thereafter, service of order of garnishment and further proceedings will be had same as in garnishment before judgment. Garnishment may become continuing lien on nonexempt earnings of judgment debtor. (Neb. Rev. Stat. 25-1056).

Practice.

Interrogatories are filed with affidavit. Summons, order of garnishment, interrogatories (in duplicate), notice to judgment debtor form, and request for hearing to be served upon garnishee. (Neb. Rev. Stat. 25-1010 and -1011). Garnishee is required to answer under oath within ten days. (Neb. Rev. Stat. 25-1010). Supreme Court shall promulgate uniform garnishment forms for future use. (Neb. Rev. Stat. 25-1011). If garnishee answers that he has money or property, he may pay same into court and will be discharged. (Neb. Rev. Stat. 25-1027). If garnishee fails to answer he is presumed to be indebted to defendant to full amount of plaintiff's claim and upon notice as directed by court judgment may be entered against him. (Neb. Rev. Stat. 25-1028). Garnishee may be permitted to retain property upon giving bond. (Neb. Rev. Stat. 25-1029). If garnishee's answer is unsatisfactory or he fails to comply with order of court by delivering property, plaintiff may file application within 20 days for determination of liability of garnishee. Trial is had upon application of determination of liability and garnishee's answer and judgment rendered as facts justify. If plaintiff fails to file application within 20 days garnishee is released and discharged. (Neb. Rev. Stat. 25-1030). Fee for issuance of writ of execution, restitution, garnishment, attachment, and examination in aid of execution is $5 each. (Neb. Rev. Stat. 25-1031.02).

Adverse Claims.

Any person claiming the money or property in the hands of garnishee may intervene and set up his claim thereto. Defendant in original action may also set out facts showing property not liable for plaintiff's claim. (Neb. Rev. Stat. 25-1030.03).

Judgment.

Final judgment deferred until determination of action against defendant. (Neb. Rev. Stat. 25-1031).

Earnings.

Excess of amount exempt subject to garnishment. See topic Exemptions.

8.10 HOMESTEADS:

Every head of a family is entitled to hold, exempt from execution or forced sale, a homestead consisting of the dwelling house in which he resides and its appurtenances and land on which it is situated. (Neb. Rev. Stat. 40-101).

Limitation of Value.

Value of property which may be held exempt is $60,000. (Neb. Rev. Stat. 40-101).

Limitation of Area.

Area which may be held exempt is 160 acres in country or two lots in incorporated city or village. (Neb. Rev. Stat. 40-101).

Debts or Liabilities Against Which Exemption Not Available.

Debts secured by mechanics', laborers' or vendors' liens on the premises or by mortgage on the premises executed and acknowledged by debtor and his or her spouse, if any. (Neb. Rev. Stat. 40-103).

Designation of Homestead.

Homestead of married debtor may be selected from separate property of husband or, with consent of wife, from her separate property; homestead of unmarried head of family may be selected from any of his or her property. (Neb. Rev. Stat. 40-102).

Filing of application required. (Neb. Rev. Stat. 40-107).

Alternative Homestead.

If debtor's residence and ground on which it is situated, with five acres surrounding same, amount to more than homestead exemption, other land on which no buildings or residence stand may be selected as homestead. (Neb. Rev. Stat. 40-110).

Claim of Exemption.

When execution for enforcement of judgment not within Neb. Rev. Stat. 40-103 is levied upon lands or tenements, head of family may apply to court for order determining whether exemption exists. (Neb. Rev. Stat. 40-105). Application must contain: (1) Fact that execution has been levied upon property claimed as homestead, (2) name of judgment creditor, (3) facts giving rise to exemption, and (4) value of exemption. (Neb. Rev. Stat. 40-106). Service of notice must be ten days before hearing. (Neb. Rev. Stat. 40-107).

Waiver of Exemption.

No statute.

Loss of Exemption.

If homestead abandoned or if owner fails to claim exemption.

Alienation or Encumbrance.

Both husband and wife must execute and acknowledge conveyance or mortgage of homestead of married person. Interest of spouse can be conveyed or encumbered by conservator or attorney-in-fact. (Neb. Rev. Stat. 40-104).

Proceeds of Sale.

If land claimed as homestead exceeds in value the amount of homestead exemption and cannot be divided, court orders sale at which no bid will be received unless it exceeds $6,500 and proceeds of sale up to $6,500 are paid to claimant and excess applied to satisfaction of execution. (Neb. Rev. Stat. 40-111 to -112). Money so paid to debtor is within homestead exemption for six months thereafter. (Neb. Rev. Stat. 40-113).

Homestead may be sold and another homestead selected or purchased. In case of sale proceeds up to $6,500 (or in case sale is under lien as against which exemption is not available, excess proceeds over amount of lien, up to $6,500) are exempt for six months. (Neb. Rev. Stat. 40-116).

Rights of Surviving Spouse and Family.

Subject to Uniform Probate Code elections.

See categories Property, topics Curtesy, Deeds, Dower, Real Property; Family, topic Husband and Wife.

8.11 Judgment Notes.

See category Business Regulation, topic Bills and Notes.

8.12 Levy.

See topics Attachment; Executions.

8.13 LIENS:

See Neb. UCC including Neb. UCC 4-504, 7-209, 7-307, 8-103. See category Business Regulation and Commerce, topic Commercial Code.

Waiver, Loss, or Extinguishment.

Failure to execute judgment lien within five years of date of entry or passage of five years from last execution extinguishes lien. (Neb. Rev. Stat. 25-1515 and -1542). Commingling property subject to lien with other like property does not extinguish lien so long as there is enough sufficient property in like quality and value to satisfy lien. (209 Neb. 422, 308 N.W.2d 331). Taking security interest for amount of debt for which statutory lien is claimed does not ordinarily destroy lien. (190 Neb. 77, 206 N.W.2d 579).

Enforcement.

See various subcategories for enforcement mode of particular type of lien.

Mechanics' Liens.

See subhead Construction Lien infra.

Attachment Lien.

See topic Attachment.

Attorney's Lien.

See category Legal Profession, topic Attorneys and Counselors.

Collateral Security.

See topic Pledges.

Execution Lien.

See topic Executions.

Judgment Lien.

See category Civil Actions and Procedure, topic Judgments.

Landlord's Lien.

See category, topic Landlord and Tenant.

Liens on Exempt Property.

See topic Exemptions.

Liens on Homestead.

See topic Homesteads.

Real Estate Mortgage Lien.

See category Mortgages, topic Mortgages of Real Property.

Tax Lien.

See category Taxation, topic Taxes.

Construction Lien.

Nebraska Construction Lien Act adopted. (Neb. Rev. Stat. 52-125 to -159). Lien covers both structure and land. No non-consensual improvements lien permitted. (Neb. Rev. Stat. 52-126). Act limits liability of owner-occupied residential real property to payments made to general contractors after notice by claimant. (Neb. Rev. Stat. 52-136).

Rela Estate Vendor.

Common law lien of vendor of real estate for balance of purchase price is recognized. (29 Neb. 672, 44 N.W. 857; 49 Neb. 369, 68 N.W. 531).

Artisans.

Person who makes, alters, repairs or in any way enhances value of any vehicle, automobile, machinery, farm implement or tool, or shoes horse or mule at request or with consent of owner has lien on property, while in his possession, for reasonable or agreed charge for work done or material furnished and may retain property until charges are paid. (Neb. Rev. Stat. 52-201).

Jewelers, silversmiths and watch and clock repairers have a lien on articles left with or given to them for repairs, parts or work thereon for cost of repairs, parts or work thereon and materials. (Neb. Rev. Stat. 52-301).

Cleaners, Repairers, etc.

Persons altering, cleaning, repairing or pressing garments or household goods, or storing garments after 90 days, have lien for their reasonable or agreed charges, enforceable by sale after prescribed notice to owner. (Neb. Rev. Stat. 52-801 to -806).

Physicians, nurses, chiropractors, and hospitals have lien for services and professional treatment on sum awarded (except in workers' compensation cases) on judgment or settlement as damages for personal injuries. (Neb. Rev. Stat. 52-401).

Owner or operator of threshing machine or corn sheller has lien on grain, seed or corn which he threshes, hulls or shells with such machine, for agreed price or reasonable charge.

Lien must be evidenced by notice filed with county clerk where work done within 30 days thereafter. On sale, lien shifts to proceeds. If sale made with consent of lienor, lien is lost unless lienor notifies purchaser in writing, if sale made within 30 days after work done. Lien is foreclosed like secured transaction under UCC. (Neb. Rev. Stat. 52-501).

Owner of land has agister's lien on stock running at large for damage done by them, enforceable by sale after statutory notice. (Neb. Rev. Stat. 54-402 and -407).

Person caring for livestock under contract has lien thereon for contract price of feed and care, which may be foreclosed like secured transactions under UCC Art. 9. Prior to removal of livestock, person entitled to lien must file affidavit with Secretary of State. (Neb. Rev. Stat. 54-201).

Services of Stallion, etc.

Owner, lessee, agent or manager of stallion, jack or bull has lien on mare or cow served and on colt or calf gotten for reasonable value or agreed price of service. Lien foreclosed by delivery to sheriff or constable of true copy of lien certified by county clerk, with affidavit of lienor or agent or attorney having knowledge of facts stating amount due. (Neb. Rev. Stat. 54-1501).

Notices and Recordings.

(1) Notice of commencement defines priority of liens and serves to limit liability. (Neb. Rev. Stat. 52-138). Form—``Notice of Commencement''—Be advised (owner's name) of (owner's address) has contracted to benefit (legal description), (contractor's name) shall provide (general description of project) to (erect or repair) premises. This notice shall last for duration of (date). (Must be signed by owner).

(2) Notice of lien liability required to past owner of residential owner-occupied property on notice. May be sent any time after contracting. (Neb. Rev. Stat. 52-135). Form—``Notice of Lien Liability'' (claimant's name and address) hereby gives notice of a right to assert a lien against (address/legal of property) for services or materials (specify) furnished in connection with improvements of said property under a contract with (name and address of contracting party) for the amount of ($ amount—actual or estimate).

``WARNING .... If you did not contract with the person giving this notice, any future payments you make in connection with this project may subject you to double liability.''

You are also instructed to provide notice to claimant upon the filing of any Notice of Termination of the Notice of Commencement.

(3) Notice of termination of notice of commencement must be filed at least 30 days before termination date and serves to limit period of exposure. Copies must be sent to all parties having requested notice, and published for three consecutive weeks once per week in paper of general circulation. (Neb. Rev. Stat. 52-146).

(4) Lien.

Recorded in county of property location and set forth subjected real estate description, description or services or materials, name and address of: Claimant, person against whom lien is claimed and claimant's contractor, amount claimed and date of last furnishing by claimant. (Neb. Rev. Stat. 52-147). Claimant shall send copy of recorded lien to contracting owner within ten days after recording. (Neb. Rev. Stat. 52-135).

Time for Filing.

Lien must be filed within 120 days of last furnishing materials or services and attaches as of date of recording of notice of commencement, or if no recording of notice then earliest of filing lien, or visible commencement of improvements. (Neb. Rev. Stat. 52-137).

Duration of Lien.

From commencement of labor or furnishing of material until two years after filing lien. (Neb. Rev. Stat. 52-140).

Transfer of Lien.

May be assigned with proper notice or bond substituted by owner. (Neb. Rev. Stat. 52-149). In case of subdivisions liens can be apportioned to owners of record affected. (Neb. Rev. Stat. 52-133).

Foreclosure of Lien.

By civil action or suit in equity in district court brought any time after lien is filed and before the expiration of lien. (Neb. Rev. Stat. 52-155). Procedure is similar to foreclosure of real estate mortgage.

Release of Lien.

On payment of debt lienholder is required to release lien either on margin of record or filing release in the same manner as releasing a real estate mortgage. (Neb. Rev. Stat. 52-142).

Railroads and Utilities.

Covered by special statute. (Neb. Rev. Stat. 52-115 to -117).

On public works, mechanics' liens are not recognized; officials must take from contractor bond in sum not less than contract price with one surety company, conditioned for payment of all laborers and mechanics, and suppliers of material and equipment. Bond must run to board awarding contract, and no contract may be made until bond is first taken. (Neb. Rev. Stat. 52-118). Action on bond must be brought within one year from settlement of principal contract. (Neb. Rev. Stat. 52-118.02).

Transportation of Oil Field Equipment.

Owner must file verified claim within four months after delivery of equipment with county clerk of county in which equipment was delivered and serve copy upon owner or agent. Claim must set out amount claimed, items thereof, name of owner, name of contractor, name of claimant and description of property. (Neb. Rev. Stat. 57-303). If equipment is removed from point of original delivery to another county, within 30 days after receipt of notice of such removal claimant may file copy of lien with county clerk of county to which property was removed. Action to foreclose lien must be instituted within two years. (Neb. Rev. Stat. 57-304).

Electrical Power or Seed.

Lien on crops produced therefrom. (Neb. Rev. Stat. 52-1201).

As to other liens mentioned in various topics of this digest, see topics Attachment, Pledges; categories Business Regulation and Commerce, topics Carriers, Factors, Warehousemen; Civil Actions and Procedure, topic Judgments; Mortgages, topics Chattel Mortgages, Mortgages of Real Property; Property, topic Landlord and Tenant; Taxation, topics Administration, subhead Uniform Federal Lien Registration Act; Inheritance Tax; Property Tax; Transportation, topic Motor Vehicles.

Redemption.

There is no right of redemption as to personal property after foreclosure sale and as to real property after the sale is confirmed by the court. Property may be redeemed any time prior thereto by paying or tendering the amount of the lien, including interest and accrued costs. (Neb. Rev. Stat. 25-1530).

See also category Business Regulation and Commerce, topic Commercial Code.

Uniform Federal Lien Registration Act (1978, adopted 1988). (Neb. Rev. Stat. 52-1001 to -1008).

8.14 MECHANICS LIENS:

See topic Liens, subhead Contractors Liens.

8.15 PLEDGES:

Uniform Commercial Code in effect. See category Business Regulation and Commerce, topic Commercial Code.

Pledgor may assign interest in item pledged and assignee succeeds to all rights of pledgor in property or against pledge, at least where pledge has notice of assignment. (63 Neb. 181, 88 N.W. 175).

Remedies of Pledgee.

No statute expressly governs remedies of pledgee by sale of pledged property or otherwise.

8.16 RECEIVERS:

May be appointed by: (1) In action by vendor to vacate fraudulent purchase of property or by creditor to subject property or funds to his claim or between partners, limited liability company members or others jointly owning or interested in any property or fund on application of any party to suit, when property or fund is in danger of being lost, removed or materially injured; (2) in mortgage foreclosure or trust deed foreclosure when there is danger of loss, removal or material injury or probable insufficiency to discharge debts secured by mortgage or trust deed; (3) in connection with exercise of power of sale under trust deed and following filing of notice of default under Nebraska Trust & Debt Act when property is in danger of being lost, removed, or materially injured on probable insufficiency to discharge debt secured by trust deed; (4) in action pursuant to Neb. Rev. Stat. 52-1705 to enforce written assignment of rents provision in agreement which provides for appointment of receiver; (5) in any other case in which mortgage or trustor agrees in writing to appointment of receiver; (6) after judgment or decree, to carry same into execution or to dispose of property according to decree or judgment or to preserve during pendency of appeal; (7) in all cases provided for by special statutes; (8) in all other cases where receivers have heretofore been appointed by usages of courts of equity. (Neb. Rev. Stat. 25-1081).

Jurisdiction.

District court has jurisdiction to appoint receivers. (Neb. Rev. Stat. 25-1081).

Proceedings.

Receiver may not be appointed except in a suit actually commenced and pending and after notice to all parties to be affected thereby of time and place of application, names of proposed receiver, proposed sureties of receiver and of applicants. Service may be made on the party or his attorney and must be at least five days before proposed hearing. (Neb. Rev. Stat. 25-1082).

Applicant must give bond to cover damages if receiver is wrongfully appointed. (Neb. Rev. Stat. 25-1084).

Eligibility and Competency.

Cannot be attorney for either party or interested in the action. (Neb. Rev. Stat. 25-1086). A trust company organized under the laws of this state may act as receiver. (Neb. Rev. Stat. 8-207).

Qualifications.

Receiver must give bond for the faithful performance of his duties. (Neb. Rev. Stat. 25-1084).

Powers and Duties.

Fixed by the order of appointment or subsequent orders issued by the court. (Neb. Rev. Stat. 25-1087).

Compensation.

If appointed to preserve property or continue a business, receiver may be compensated by a fixed salary or a lump sum allowance. If appointed to liquidate a business compensation is based on a percentage of the cash accounted for. (Neb. Rev. Stat. 25-1092).

Discharge.

By order of court appointing receiver.

9 DISPUTE RESOLUTION

9.01 REDEMPTION:

See category Mortgages, topic Chattel Mortgages.

9.02 SUPPLEMENTARY PROCEEDINGS:

See topic Executions.

9.03 TRUSTEE PROCESS:

See topic Garnishment.

9.04 USURY:

See category Business Regulation and Commerce, topic Interest.

9.05 ALTERNATIVE DISPUTE RESOLUTION:

Alternative Dispute Resolution Jurisdictional Bodies/Commissions.

There exists Office of Dispute Resolution, Director of Office of Dispute Resolution and Advisory Council on Dispute Resolution. (Neb. Rev. Stat. 25-2904 and -2905).

Alternative Dispute Resolution Acts.

Dispute Resolution Act (Neb. Rev. Stat. 25-2901 to -2921). Approved center may hear civil claims and disputes between: neighbors, business associates, landlords and tenants, and disputes within communities, concerning domestic relations and involving juveniles (Neb. Rev. Stat. 25-2911). Centers must provide procedures to be followed by parties. (Neb. Rev. Stat. 25-2912). Statute of limitations tolls during dispute resolution process for period not to exceed 60 days without consent of parties. (Neb. Rev. Stat. 25-2917). See topic Mediation for further discussion. See also Uniform Arbitration Act (Neb. Rev. Stat. 25-2601 to -2622); Nebraska Fair Employment Practice Act (Neb. Rev. Stat. 48-1101 to -1125); Uniform Act on Interstate Arbitration and Compromise of Death Taxes (Neb. Rev. Stat. 77-3301 to -3316).

9.06 ARBITRATION AND AWARD:

Forms and Requisites of Submission.

Contracts must contain following underlined language: ``THIS CONTRACT CONTAINS AN ARBITRATION PROVISION WHICH MAY BE ENFORCED BY THE PARTIES." (Neb. Rev. Stat. 25-2602.02).

Contracts to Arbitrate Future Disputes.

Provision in written contract to submit to arbitration any controversy thereafter arising between parties is valid, enforceable, and irrevocable, except upon such grounds as exist at law or in equity for revocation of any contract, if provision is entered into voluntarily and willingly. (Neb. Rev. Stat. 25-2602.01).

Rescission.

Court may vacate award under certain circumstances (Neb. Rev. Stat. 25-2613), or may modify or correct award under certain circumstances (Neb. Rev. Stat. 25-2614). On application of party or by order of court under certain circumstances, arbitrators may modify or correct award. (Neb. Rev. Stat. 25-2610).

Powers of Arbitrators.

Appoint time and place for hearing and notify parties, adjourn hearing from time to time as necessary and postpone hearing. Arbitrators may hear and determine controversy upon evidence produced. Majority may determine any question and render final award. (Neb. Rev. Stat. 25-2606).

Award and Enforcement Thereof.

On application showing that agreement described in Neb. Rev. Stat. 25-2602.01 exists and that opposing party refuses to arbitrate, court shall order arbitration. (Neb. Rev. Stat. 25-2603).

Judgment on Award.

Judgment shall be entered and enforced as any other judgment. (Neb. Rev. Stat. 25-2615). Costs may be awarded by court. (Neb. Rev. Stat. 25-2615). On entry of judgment, clerk shall prepare judgment roll consisting of agreement, award, copy of order confirming, modifying or correcting award and copy of judgment. Judgment docketed as if rendered in action. (Neb. Rev. Stat. 25-2616).

Mandatory Arbitration.

Provisions in contracts to submit future controversies to arbitration are valid, enforceable and irrevocable, except upon such grounds as exist at law or in equity for revocation of any contract, if provision is entered into voluntarily and willingly. (Neb. Rev. Stat. 25-2602.01).

Uniform Arbitration Act Adoption/Deviation.

Uniform Arbitration Act adopted with changes (1956, adopted 1987). (Neb. Rev. Stat. 25-2601 to -2622). Claim for worker's compensation not subject to Arbitration Act. (Neb. Rev. Stat. 25-2602.01). Contract provisions invalid in various circumstances, including personal injury claims, claims under Nebraska Fair Employment Practice Act, agreements covered by Neb. Rev. Stat. 60-1401 to -1440, and agreements concerning insurance policy (see statute for other circumstances). (Neb. Rev. Stat. 25-2602.01). Method of appointment of arbitrators set forth in agreement shall be followed or, if no method set forth, court, on application of party, shall appoint odd number of arbitrators. (Neb. Rev. Stat. 25-2604). Court must confirm award within 60 days of party's application. (Neb. Rev. Stat. 25-2612). Term ``court'' means any district court of this state. Nothing in Act empowers Commission of Industrial Relations to order that any party under its jurisdiction submit to, or contract to submit to, arbitration. (Neb. Rev. Stat. 25-2618). Upon appointment, arbitrator must disclose rate for arbitration services. (Neb. Rev. Stat. 25-2604). Proceedings must take place in designated county unless otherwise agreed. (Neb. Rev. Stat. 25-2606). Court shall vacate award if arbitrator was subject to disqualification. (Neb. Rev. Stat. 25-2613). When amount of controversy subject to terms of otherwise valid arbitration agreement is within jurisdiction of Small Claims Court, party may submit controversy to Small Claims Court for ultimate resolution. (Neb. Rev. Stat. 25-2618.01).

Jurisdictional Arbitration Acts.

Uniform Arbitration Act (1956, adopted 1987) (Neb. Rev. Stat. 25-2601 to -2622); Nebraska Fair Employment Practice Act (Neb. Rev. Stat. 48-1101 to -1125); Uniform Act on Interstate Arbitration and Compromise of Death Taxes (1943, adopted 1976) (Neb. Rev. Stat. 77-3300 to -3316).

Credentials of/Qualifications of/Standards for Arbitrators.

No credentials, qualifications or standards set forth under statute. However, arbitrators must disqualify themselves upon demand of any party if arbitrator has interest in or is related to interested party or his or her attorney or attorney's copartner. (Neb. Rev. Stat. 25-2604.01). Arbitrator must also disqualify self if he or she is ex-copartner of attorney retained or interested in arbitration. (Neb. Rev. Stat. 24-739).

9.07 MEDIATION:

Jurisdictional Mediation Acts.

Dispute Resolution Act (Neb. Rev. Stat. 25-2901 to Neb. Rev. Stat. 25-2921); see topic Alternative Dispute Resolution. See also Farm Mediation Act (Neb. Rev. Stat. 2-4801 to Neb. Rev. Stat. 2-4815); Parenting Act (Neb. Rev. Stat. 43-2920 to -2943).

Credentials of/Qualifications of/Standard for Mediators.

Mediators of approved centers must have completed at least 30 hours of training in conflict resolution techniques, neutrality, agreement writing, and ethics. For disputes involving marital dissolution, mediators must have additional 30 hours in family mediation. Apprenticeship with experienced mediator required for mediators without prior mediation experience. Must be impartial, neutral, and unbiased and may not make decisions for parties or sanction or penalize parties. (Neb. Rev. Stat. 25-2913).

10 DOCUMENTS AND RECORDS

10.01 ACKNOWLEDGMENTS:

Uniform Recognition of Acknowledgments Act (1968, adopted 1969). (Neb. Rev. Stat. 64-201 to -210).

Within State.

Judge or clerk of any court, U.S. Magistrate or notary public (Neb. Rev. Stat. 76-217); deputy clerk of district or county court in name of his principal (Neb. Rev. Stat. 24-403); Secretary of State, or his deputy on Secretary's appointment in Secretary's absence or disability (Neb. Rev. Stat. 84-507, and -508); register of deeds or deputy appointed by him under authority of county board and who has given bond (Neb. Rev. Stat. 23-1505); county clerk or his deputy, under seal of county (Neb. Rev. Stat. 23-1307). Officer can take acknowledgment only within his territorial jurisdiction. (Neb. Rev. Stat. 76-217). See topic Notaries Public.

Outside State But Within U.S.

Court of record or clerk or other officer holding seal thereof; commissioner appointed by Governor of Nebraska; notary public. (Neb. Rev. Stat. 76-219).

Outside U.S.

U.S. minister plenipotentiary, extraordinary or resident chargé d'affaires, commissioner, commercial agent or consul appointed to reside in country where taken; notary public under his seal. (Neb. Rev. Stat. 76-226).

Persons In or With U.S. Armed Forces.

See topic Notaries Public.

General Requirements as to Taking.

Officer must know, or have satisfactory evidence of, identity of person acknowledging. (Neb. Rev. Stat. 76-234).

General Requirements or Certificate.

He must endorse on instrument his certificate, signed by himself, setting forth matter required to be done, known or proved, and names of witnesses examined before him, with their places of residence and evidence given. (Neb. Rev. Stat. 76-233).

Married Women.

Conveyances required to be executed by married women pass no title, unless acknowledged as prescribed by law. (5 Neb. 174). Acknowledgment by married woman of execution of instrument affecting her title to real estate is not essential to validity, except in cases which involve release of dower or homestead. (104 F. 584). If notary fails to ask married woman formal question as to whether she acknowledges deed to be her free and voluntary act is at most irregularity only. (93 Neb. 482, 140 N.W. 768).

Attorneys in Fact.

Attorney or employer or associate of attorney, or any stockholder, officer, or employee of professional corporation authorized to practice law and who is notary public may take acknowledgment of written instrument given in connection with professional activities of such attorney or corporation and to administer oath to any person executing such instrument. (Neb. Rev. Stat. 64-211). Attorney may not take acknowledgment when he is interested party. (207 Neb. 44, 295 N.W.2d 711).

Corporations.

Following may take acknowledgment if notary public: Professional corporation authorized to practice law (Neb. Rev. Stat. 64-211); member, shareholder, officer, agent, director, or employee of insurance company or credit union (Neb. Rev. Stat. 64-212 and -213); stockholder, director, officer, employee, or agent of bank (Neb. Rev. Stat. 64-214); shareholder, director, employee, agent, or officer of savings and loan association (Neb. Rev. Stat. 64-215).

Foreign Acknowledgments.

Officer of foreign service of United States, consular agent, or any other person authorized by regulation of United States Department of State to perform notarial acts in place in which act is performed may take acknowledgment. Any other person authorized to perform notarial acts in place in which act is performed may take acknowledgment. (Neb. Rev. Stat. 64-201).

Effect of Acknowledgment.

Properly acknowledged deed entitled to be recorded and to be read in evidence without further proof. Acknowledgment may be rebutted. (Neb. Rev. Stat. 76-235).

Proof by Subscribing Witness.

If grantor dies before acknowledgment, or his attendance cannot be procured, or he refuses to acknowledge, proof of execution and delivery of deed may be made by any competent subscribing witness before any officer authorized to take acknowledgment. Witness must state on oath his residence, and that he set his name to deed as witness, knew grantor, and saw him sign or heard him acknowledge he had signed. Officer must be personally acquainted with subscribing witness or have satisfactory evidence of his identity. (Neb. Rev. Stat. 76-228). If all subscribing witnesses are dead or out of state, execution of deed may be proved by proof of handwriting of grantor and of any subscribing witness. (Neb. Rev. Stat. 76-231).

Authentication.

Authentication of acknowledgment taken outside of state not required if taken before notary public or other officer using official seal. In other cases there must be attached certificate of clerk of court of record or proper certifying officer of county, district or state within which acknowledgment was taken under seal of his office, showing official character of person taking acknowledgment and that certifying officer is acquainted with handwriting of such person and believes signature to be genuine and that instrument is executed according to laws of place where taken. (Neb. Rev. Stat. 76-242).

Certificate of authority for local notaries costs $10 and may be obtained from Secretary of State, Notary Office, State Capitol, Lincoln, NE 68509.

Forms.

No particular form is mandatory by statute. Statute does authorize following (Neb. Rev. Stat. 64-206):

Form

Individual acting in his own right:

State of ....

County of ....

The foregoing instrument was acknowledged before me this (date) by (name of person acknowledged).

(Signature of Person Taking

Acknowledgment)

(Title or Rank)

(Serial Number, if any)

Corporation:

State of ....

County of ....

The foregoing instrument was acknowledged before me this (date) by (name of officer or agent, title of officer or agent) of (name of corporation acknowledging) a (state or place of incorporation) corporation, on behalf of the corporation.

(Signature of Person Taking

Acknowledgment)

(Title or Rank)

(Serial Number, if any)

Partnership:

State of ....

County of ....

The foregoing instrument was acknowledged before me this (date) by (name of acknowledging partner or agent), partner (or agent) on behalf of (name of partnership), a partnership.

(Signature of Person Taking

Acknowledgment)

(Title or Rank)

(Serial Number, if any)

Limited Liability Company:

State of ....

County of ....

The foregoing instrument was acknowledged before me this (date) by (name of acknowledging member or agent), member (or agent) on behalf of (name of limited liability company), a limited liability company.

(Signature of Person Taking

Acknowledgment)

(Title or Rank)

(Serial Number, if any)

Attorney in Fact:

State of ....

County of ....

The foregoing instrument was acknowledged before me this (date) by (name of attorney in fact) as attorney in fact on behalf of (name of principal).

(Signature of Person Taking

Acknowledgment)

(Title or Rank)

(Serial Number, if any)

Public Officer, trustee, or personal representative:

State of ....

County of ....

The foregoing instrument was acknowledged before me this (date) by (name and title of position).

(Signature of Person Taking

Acknowledgment)

(Title or Rank)

(Serial Number, if any)

Note.

For seal, see general requirements. (Neb. Rev. Stat. 64-210).

Validating Acts.

Defective acknowledgments taken by army officers (Neb. Rev. Stat. 76-227), and those in which seals are defective (Neb. Rev. Stat. 76-217.01), or by insurance company or credit union, or shareholders and officers of certain corporations (Neb. Rev. Stat. 64-213), have been validated.

Alternative to Acknowledgment or Proof.

No statutory provision.

See category Property, topic Deeds.

10.02 AFFIDAVITS:

General Requirements as to Administration.

May be made either in or out of state before any person authorized to take depositions, including attorney for client making affidavit. (Neb. Rev. Stat. 25-1245).

General Requirements of Jurat.

No statute.

Use of Affidavit.

Affidavits may be used to verify pleadings, prove service of summons, notice or other process, in action, to obtain provisional remedy, examination of a witness, stay of proceedings, upon motion and in any other case permitted by law. (Neb. Rev. Stat. 25-1244).

Affidavit explaining or correcting apparent defect in chain of title to real estate may be recorded as instrument affecting real estate, and record is prima facie evidence of facts recited therein. (Neb. Rev. Stat. 76-271, and -272).

Referee in partition proceedings may receive affidavits of parties interested. (Neb. Rev. Stat. 25-2189).

Form

State of Nebraska

County of .... } ss.

.................., being first duly sworn, deposes and says ....

And further affiant saith not.

(Signature of affiant.)

Subscribed and sworn to before me this .... day of ...., 20.....

Notary Public.

(Notarial seal.)

Alternative to Affidavit.

No statutory provision.

10.03 NOTARIES PUBLIC:

Qualifications.

Must be resident of Nebraska and 19 years of age. (Neb. Rev. Stat. 64-101). Must pass written exam and not be convicted of felony or other crime involving fraud or dishonesty. (Neb. Rev. Stat. 64-101). Must give bond in sum of $15,000. (Neb. Rev. Stat. 64-102).

Authentication.

See topic Acknowledgments, subhead Authentication.

Seal.

Notary must have seal bearing words ``State of Nebraska, General Notary'' or ``State of Nebraska General Notarial'' and his name (Neb. Rev. Stat. 64-210) and may show also date of expiration of his commission. All official acts must be authenticated by seal. (Neb. Rev. Stat. 64-210).

Powers and Duties.

To administer oaths in all cases, take depositions, acknowledgments and proof of execution of deeds, mortgages, powers of attorney and other instruments in writing to be used or recorded in this or another state; to demand acceptance or payment of any foreign, inland or domestic bill of exchange, promissory note or other obligation in writing, and to protest same for nonacceptance or nonpayment, and give notice to endorsers, makers, drawers or acceptors of such demand or nonacceptance or nonpayment; to exercise and perform such other powers and duties as by law of nations, and according to commercial usage, or by laws of U.S., or of any other state or territory of U.S., or of any foreign government or country, may be exercised and performed by notaries public and over his signature and official seal to certify performance of such duties so exercised and performed. His certificate is presumptive evidence in all courts of this state as to facts therein certified. (Neb. Rev. Stat. 64-107). When notice or commission to take depositions has been deposited with notary, he may issue summons for witnesses. (Neb. Rev. Stat. 64-108).

Territorial Extent of Powers.

Notary may act throughout state. (Neb. Rev. Stat. 64-102).

Expiration of Commission.

Must be stated in connection with notary's signature unless this date appears on his seal. (Neb. Rev. Stat. 64-210).

Fees.

For each protest, $1; for recording protest, $2; for each notice of protest, $2; for taking affidavit, $2; for administering oath, $2; for certificate and seal, $5; for taking acknowledgment, $5. (Neb. Rev. Stat. 33-133). Mileage at rate provided in Neb. Rev. Stat. 81-1176 for state employees.

Commissioners of Deeds.

No statute.

Certificate of Authority.

See topic Acknowledgments, subhead Authentication.

Officers of U.S. Armed Forces.

Authorized to perform all notarial acts. If instrument shows signature, rank and branch of service of officer, no further proof of authority required. (Neb. Rev. Stat. 76-227).

10.04 RECORDS:

Uniform Commercial Code in effect. See category Business Regulation and Commerce, topic Commercial Code.

In counties having population of more than 20,000, and not more than 400,000 county clerk is ex officio register of deeds. If population of county which has separate office of register of deeds falls below 20,000 after establishing register of deeds or has separate office prior to July 10, 1990, and has population below 20,000, office of register of deeds shall continue. (Neb. Rev. Stat. 32-518).

Recordable Instruments.

Deeds, mortgages, and all instruments affecting title to real property (Neb. Rev. Stat. 76-238); copy of will with certificate of probate (Neb. Rev. Stat. 76-248).

Place of Recording.

Deeds, instruments affecting real property, and certified copy of will covering real property, in office of register of deeds of each county where said real estate or any portion thereof is located. (Neb. Rev. Stat. 76-245). Certificate of incorporation must be filed with Secretary of State, (Neb. Rev. Stat. 21-2019). Designation of registered office and agent of foreign corporation must be filed with Secretary of State and with register of deeds of county where registered office is located. (Neb. Rev. Stat. 21-21,205). Notice of assignment of accounts receivable is filed with county clerk and controlled by Uniform Commercial Code.

For list of Counties and County Seats, see first page for this state in Volume containing Practice Profiles Section.

Requisites for Recording.

Deeds, mortgages, or instruments affecting real estate must be acknowledged or proved to be entitled to record. (Neb. Rev. Stat. 76-241). Witness not required. Only originals will be recorded.

Recording Fees.

For recording deed, mortgage, release, recording and indexing will or decree in testate estate, proof of publication, or any other instrument, $5 per page. For certified copy, $1.50 for certification per page. (Neb. Rev. Stat. 33-109). For filing financing statement, continuation, amendment, separate assignment, or full or partial release, $10 plus 50¢ per lot, or $8 if record is communicated by another medium authorized by filing-officer rule. No fee for termination statement. (Neb. Rev. Stat. 52-204; Neb. UCC 9-525).

Recording Taxes.

See category Taxation.

Foreign Conveyances or Incumbrances.

If executed in accordance with laws of place where executed, or the laws of this state, instrument may be recorded in this state. (Neb. Rev. Stat. 76-219).

Effect of Recording.

Charges all persons with notice from time instrument is deposited with officer for recording. (Neb. Rev. Stat. 76-238). Certified copy may be received in evidence. (Neb. Rev. Stat. 76-235).

Torrens Act.

Torrens System is not in force.

Transfer of Decedent's Title.

If distribution of real property is made, deed of distribution must be recorded in each county where real property is situated, and must include court in which probate proceedings took place. (Neb. Rev. Stat. 30-24,105).

Filing Under Commercial Code.

See category Business Regulation and Commerce, topic Commercial Code, subhead Material Variations from 1962 Text and 1972 and 1977 Official Amendments, § 9-501 Art. 9 effective July 1, 2001; also subhead Filing Fees. Nebraska Secretary of State UCC Division accepts National Financing Statement for no additional filing fees. Computer generated form is acceptable and original plus one copy is required. Nebraska Secretary of State UCC Division does not accept National Amendment Form.

Vital Statistics.

Department of Health and Human Services Finance and Support has supervision of registration of vital events. (Neb. Rev. Stat. 71-603). Fee for certified copy of record $11. (Neb. Rev. Stat. 71-612). Records may be obtained from Bureau of Vital Statistics, P.O. Box 95065, Lincoln, Nebraska 68509.

Lis Pendens.

In actions brought to affect title to real property, plaintiff may either at time of filing complaint or afterwards, file, or in case any defendant sets up affirmative cause of action and demands relief which shall affect title to real estate, he or she may, at time of filing such answer or at any time afterwards, file with clerk or register of deeds of each county in which real estate thus to be affected, or any part thereof, is situated, notice of pendency of such action. Notice shall contain names of parties, object of action, and description of property in such county sought to be affected thereby. If action is for foreclosure of mortgage, such notice shall contain date of mortgage, parties thereto, and time and place of recording same. Clerk or register of deeds of such county shall record notice thus filed and enter same upon numerical index of all lands, any part of which is included in description in notice, for which he or she shall be entitled to receive filing fees to be paid by person filing such notice, and which shall be taxed as part of costs in action. From time of filing such notice, pendency of such action shall be constructive notice to any purchaser or encumbrancer to be affected thereby. (Neb. Rev. Stat. 25-531).

Establishing Birth Record.

Any person born in Nebraska whose birth is not registered within one year of date of birth may file application for delayed registration of birth with Bureau of Vital Statistics. If birth occurred after 1905, applicant must pay $11, search fee. Applicant must be 18 years of age; however, application of minor may be made by father, mother, guardian or attendant at birth. Application must be accompanied by three independent supporting records which are specified in statute. Registrations not supported by minimum supporting evidence will be denied birth certificates. Denial may be appealed by petition to county court of Lancaster county, county of petitioner's residence or county in which birth is claimed to have occurred. If court finds from evidence that person was born in this state, it shall order delayed birth certificate issued. Department of Health shall charge $11 fee, plus $1 when delayed birth certificate is issued for each application submitted. (Neb. Rev. Stat. 71-617.01 to Neb. Rev. Stat. 71-617.15). As to procedure in case of adopted child, see Neb. Rev. Stat. 71-626, 627.

Death Certificate.

Funeral director and embalmer in charge of any person dying in Nebraska and physician last in attendance must execute certificate on form prepared by Department of Health and Human Services Finance and Support showing cause of death, etc., and file same with Registrar where death occurred prior to burial or removal of the body from the county. (Neb. Rev. Stat. 71-605). Where death occurred while in military service United States certificate may be recorded with Department of Health. (Neb. Rev. Stat. 71-605.01). See also category Estates and Trusts, topic Death.

10.05 SEALS:

Uniform Commercial Code in effect. See category Business Regulation and Commerce, topic Commercial Code.

Private seals have been abolished and are not required on any instrument. (Neb. Rev. Stat. 76-212).

Corporate Seals.

Corporation may adopt seal. (Neb. Rev. Stat. 21-2025).

Effect of Seal.

None. (Neb. Rev. Stat. 76-212 and -213).

10.06 TORRENS ACT:

See topic Records.

10.07 VITAL STATISTICS:

See topic Records.

11 EMPLOYMENT

11.01 EMPLOYER AND EMPLOYEE:

See topic Labor Relations.

11.02 LABOR RELATIONS:

Hours of Labor.

Any person, firm or corporation running assembly plant, workshop or mechanical establishment must provide 30 min. lunch break. (Neb. Rev. Stat. 48-212).

Child between 14 and 16 may not work, without permit, after 10 P.M. Child under 14 may not work after 8 P.M. without permit. (Neb. Rev. Stat. 48-310).

Wages.

Employer required to pay wages on regular days designated or agreed upon. Before paydays can be altered, 30 days written notice must be given to employee. On termination of employment, wages due next regular payday or within two weeks, whichever is sooner. If wages not paid within 30 days of regular payday, employee may institute court proceeding. (Neb. Rev. Stat. 48-1230).

Employer may deduct, withhold or direct portion of employee's wages only when required by law, court order or written agreement with employee. (Neb. Rev. Stat. 48-1230).

Any registered voter allowed two consecutive hours while polls are open to vote. Registered voter shall not be liable for any penalty and no deduction shall be made from his or her salary or wages on account of such absence. Employer may specify voting hours. (Neb. Rev. Stat. 32-922).

No employer shall subject employee to discharge, loss of pay, loss of sick leave, loss of vacation time or any other form of penalty on account of his or her absence from employment by reason of jury duty except that employer may reduce pay equal to amount of compensation or expenses paid by court. (Neb. Rev. Stat. 25-1640).

For assignment of wages, see category Debtor and Creditor, topic Assignments.

Child Labor.

Child under 16 may not be employed in (1) service for wages or (2) be under contract for hire or (3) in any business service during hours when public schools are in session or (4) more than 48 hours in any one week, more than eight hours per day, nor before 6 a.m. or after 8 p.m. (Neb. Rev. Stat. 48-302 and -310). Child under 16 may be employed on certificate approved by superintendent of schools or if child is from adjoining state, by Department of Labor. (Neb. Rev. Stat. 48-302 and -303). No child under age of 16 may be employed in any work dangerous to life, limb, health or morals. (Neb. Rev. Stat. 48-313). Employers who are parents or persons standing in loco parentis to child employee are exempted from certain child labor law requirements. (Neb. Rev. Stat. 48-302.02).

Female Labor.

Unlawful to discriminate wage rate on basis of sex for comparable work. (Neb. Rev. Stat. 48-1219 to -1227).

Discrimination.

Unlawful employment practice to: (1) Fail or refuse to hire or to discharge or harass any individual or to otherwise discriminate against any individual, because of race, color, religion, sex, age, disability, marital status, or national origin; (2) to limit, advertise, solicit, segregate, or classify employees in any way that would deprive or tend to deprive any individual of employment opportunities because of race, color, religion, sex, age, disability, marital status, or national origin. (Neb. Rev. Stat. 48-1001 to -1125). Employer includes State of Nebraska, governmental agencies and political subdivisions. (Neb. Rev. Stat. 48-1002). Jurisdiction lodged with Equal Opportunity Commission. (Neb. Rev. Stat. 48-1007). Unlawful employment action to retaliate against employee for filing charge, testifying, assisting or participating in any manner in proceeding, investigation or hearing under Act. (Neb. Rev. Stat. 48-1114). Jurisdiction is proper in State District Court without exhausting administrative remedies. (250 Neb. 306, 549 N.W.2d 153).

Labor Unions.

Closed shop prohibited. (Const. Art. XV, §§ 13 to 15; Neb. Rev. Stat. 48-217 to -219).

Unlawful for alien to be elected to or hold office in a labor or educational organization. (Neb. Rev. Stat. 4-106).

Labor Disputes.

Legal picket must display sign with name of protesting organization. Interfering with legal picketing subjects person to fine of not more than $500 or imprisonment of not more than three months, or both. No statutory prohibition against issuing injunctions in labor disputes in proper cases. Unlawful picketing includes: (1) Use of threatening language toward worker or immediate family to (or attempt to) induce or influence employee to quit or refrain from seeking employment; (2) following or interrupting employee against will; (3) menacing, threatening, coercing, intimidating, or frightening in any manner; (4) committing assault on employee; (5) picketing or patrolling place of work or residence of employee or street, alley, road, highway, or any other place where employee may be and against his will. (Neb. Rev. Stat. 28-1317, and -1318). Mass picketing prohibited. Mass picketing includes: pickets which constitute obstacle to free ingress and egress. (Neb. Rev. Stat. 28-1317 to -1320). Provisions (1) and (2) were held unconstitutional by United Food v. IBP, Inc., 857 F.2d 422 (8th Cir. 1988).

Commission of Industrial Relations has jurisdiction of labor disputes involving governmental services or public utilities. (Neb. Rev. Stat. 48-810). Act prohibits unfair labor procedures and provides for appeal procedures and was amended to reflect adoption of Collective Bargaining Act. (Neb. Rev. Stat. 48-801 to -838). State or governmental subdivision cannot be compelled to enter employment contract with labor organization. (Neb. Rev. Stat. 48-810.01). State Employees Collective Bargaining Act: (1) Recognizes right of state employees to organize for purpose of collective bargaining; (2) requires state employee be represented by exclusive bargaining agent to negotiate and enter agreements with chief negotiator of Division of Employee Relations. (Neb. Rev. Stat. 81-1370). Act provides that state employees be divided into 12 units by occupation. (Neb. Rev. Stat. 81-1373). Act provides for appointment of mediator mutually selected by parties if impasse is reached or appointed by Federal Mediation and Conciliation Service. (Neb. Rev. Stat. 81-1381).

Workers' Compensation Law.

Workers' Compensation Act (Neb. Rev. Stat. 48-101 to -1,117) applies to State of Nebraska and every governmental agency created by it and to every employer having one or more employees in the regular trade, business, profession or vocation of such employer, except railroad companies engaged in interstate commerce, employers of household domestic servants, employers of farm laborers unless such employers employ ten or more unrelated full-time employees for 13 weeks, and those engaged in agricultural operations or their related employees when they work occasionally for such persons who will provide reciprocal or similar services. (Neb. Rev. Stat. 48-106). Excluded employers may elect to bring employees under act.

It provides for compensation by: (1) Action at law; or (2) elective compensation. Employers and employees are presumed to accept terms of compensation schedule as outlined in statute, for injuries arising out of and in course of employment. It is not defense in Workers' Compensation proceeding: (a) That employee was negligent, unless negligence was willful or that employee was intoxicated; (b) that injury was caused by negligence of a fellow employee; or (c) that employee assumed risks inherent in, or incidental to, or arising from failure of employer to provide and maintain safe premises and suitable appliances. (Neb. Rev. Stat. 48-102). If employer does not carry policy of workers' compensation insurance or qualify as self-insurer, employer loses right to assert three defenses mentioned above in any negligence action later brought by employee. (Neb. Rev. Stat. 48-103).

A special court, known as ``Nebraska Workers' Compensation Court,'' has original jurisdiction to determine all controversies arising under Nebraska Workers' Compensation Laws. Court consists of seven judges. First hearing on any dispute is held before one member of court, who makes his findings and award. If either party is dissatisfied, trial de novo is held by court en banc. Appeal may be taken to Supreme Court. Appeals are given preference as to time of hearing. (Neb. Rev. Stat. 48-152 to -191). See also category Courts and Legislature, topic Courts.

All claims against state must be filed with Risk Manager of State Claims Board. There is Workers' Compensation Claim Fund established in state treasury to be administered by Risk Manager. (Neb. Rev. Stat. 81-8,211 and -8,212).

Benefits are as follows:

Total Disability.

During total disability 662/3% of wages received but not more than 100% of state average weekly wage as determined by Worker's Compensation Court; minimum benefit of $49 per week. (Neb. Rev. Stat. 48-121 to -121.01).

Partial Disability.

662/3% of the difference between wage received at time of injury and earning power thereafter but not more than 100% of state average weekly wage as determined by Worker's Compensation Court, and not less than $49 and compensation shall not continue for more than 300 weeks after date of accident. If total disability precedes or follows partial disability number of weeks paid for total disability shall be deducted from 300 weeks maximum allowed for partial disability. (Neb. Rev. Stat. 48-121 and 121.01).

Loss of Limb, etc.

In accordance with schedule. (Neb. Rev. Stat. 48-121).

Death leaving one or more persons dependent 662/3% of wage but not more than 100% of state average weekly wage as determined by Worker's Compensation Court (Neb. Rev. Stat. 48-122) nor less than $49 per week, provided if wage is less than $49 per week, then full amount of wage. Payments to spouse, children and/or dependent blood relatives according to schedule. Payments not more than 100% of state average weekly wage as determined by Worker's Compensation Court (Neb. Rev. Stat. 48-122) or less than $49 per week. Schedule complicated and interrelated. (Neb. Rev. Stat. 48-122). Expenses of burial, not exceeding $6,000 are also paid to dependent or personal representative. (Neb. Rev. Stat. 48-122). Nonresident alien dependents receive same as resident dependents except employer may at any time within one year commute future installments by paying lump sum. (Neb. Rev. Stat. 48-122). Consul or his representatives must be sole representative for adjusting and collecting compensation due alien dependent. (Neb. Rev. Stat. 48-122).

Occupational Diseases.

Within the Act. (Neb. Rev. Stat. 48-101). Last injurious exposure rule followed. (Neb. Rev. Stat. 48-128).

Attorney Fees.

Added to award which is affirmed on rehearing or appeal if employer took appeal. (Neb. Rev. Stat. 48-125).

Employers' Liability Act.

Included in Workers' Compensation Act.

As to employees of railroads and street railways, assumption of risk doctrine abolished where employer guilty of negligence (Neb. Rev. Stat. 25-21,184), and contributory negligence does not bar recovery for injury, comparative negligence rule being adopted (Neb. Rev. Stat. 25-21,185).

Unemployment Compensation.

Employment Security Law governs unemployment compensation. (Neb. Rev. Stat. 48-601 to -671). Unemployment Compensation Fund administered by Commissioner of Labor. (Neb. Rev. Stat. 48-617). Amount of weekly benefit payable to individual determined through Dec. 31, 2005, as one-half weekly wage rounded down to nearest even whole dollar amount; after Jan. 1, 2006, one-half weekly wage rounded down to nearest even whole dollar amount not to exceed $288; after Jan. 1, 2008, one-half weekly wage rounded down to nearest even whole dollar not to exceed lesser of one-half of state average weekly wage or previous year's maximum benefit plus $10; after Jan. 1, 2011, one-half weekly wage rounded down to nearest even whole dollar amount not to exceed one-half state average weekly wage. (Neb. Rev. Stat. 48-624). Unemployed individual eligible to receive benefits if individual: (1) has registered for work and continued to report for work at unemployment office; (2) has made claim for benefits; (3) is able to work, and is available to work; (4) has been unemployed for waiting period of one week; and, (5) has for any benefit year, beginning on or before Dec. 31, 2005, within base period, been paid total sum of wages for employment equal to not less than $1,600 of which at least $800 has been paid in each of two quarters in base period and for any benefit year, beginning on or after Jan. 1, 2006, within base period, been paid total sum of wages for employment equal to not less than $2,500, of which sum at least $800 has been paid in each of two quarters in base period, and subsequent to filing he has insured work of at least six times weekly benefit amount for previous year beginning Jan 1, 2007 and each Jan. 1 thereafter, amount which individual is required to earn within base period adjusted annually; (6) is participating in reemployment services unless individual has completed such services or shows just cause for failure to complete. (Neb. Rev. Stat. 48-627). Conditions disqualifying applicants found at (Neb. Rev. Stat. 48-628). Child support may be withheld from unemployment compensation. (Neb. Rev. Stat. 48-647).

11.03 WORKERS' COMPENSATION LAW:

See topic Labor Relations.

12 ENVIRONMENT

12.01 ENVIRONMENTAL REGULATION:

General Supervision.

Environmental Control Council and Department of Environmental Quality. (Neb. Rev. Stat. 81-1501 to -1532, controlling environment of water, air and land).

Prohibited Acts of Pollution.

Discharging into air, land or water any pollutants or wastes which are below standards set by Council. Any of following acts done without first obtaining a permit: (a) Discharge of any pollutant into waters of state; (b) construction, installation, modification or operation of any disposal system or part thereof; (c) increase in volume or strength of any waste in excess of permissive discharge as specified, under any existing permit; (d) construction, installation or operation of any industrial, commercial, or other establishments or any extension or modification thereof or addition thereto, operation of which would cause an increase in discharge of waste into air, waters or land of State or would otherwise alter physical, chemical or biological properties of air, water or land of State in any manner not already lawfully authorized; (e) construction or use of any new outlet for discharge of any waste into air, waters or land of State; (f) construct and operate livestock waste control facility without first obtaining permit. (Neb. Rev. Stat. 54-2419 and 81-1506).

No person shall dispose of any refuse, garbage or rubbish at any place, except disposal area licensed as provided by Act. (Neb. Rev. Stat. 81-1516).

It shall be unlawful for any property owner or person in lawful possession of property to allow accumulation of junk on property that is not purely agricultural in character to extent that such accumulation is a potential hazard to health. (Neb. Rev. Stat. 81-1523).

Section Neb. Rev. Stat. 46-701 to -754 regulates use of ground water under Ground Water Management and Protection Act.

Low-Level Radioactive Waste Disposal Act governs disposal of low-level radioactive waste. (Neb. Rev. Stat. 81-1578 to -15,116).

Wastewater Treatment Facilities Construction Assistance Act governs construction of sewage and wastewater treatment plants. (Neb. Rev. Stat. 81-15,147 to -15,158).

Buffer Strip Act governs use of and government compensation for strips of vegetation used to intercept or trap field sediment, organics, pesticides, and other potential pollutants before they reach surface water. (Neb. Rev. Stat. 2-5101 to -5111).

Wellhead Protection Area Act governs protection of underground water supplies from contaminants. (Neb. Rev. Stat. 46-1501 to -1509).

Livestock Waste Management Act governs prevention and reduction of livestock pollutant discharge to state waters. (Neb. Rev. Stat. 54-2416 to -2438).

Enforcement.

(Neb. Rev. Stat. 81-1504). Department of Environmental Quality shall be enforcing agency.

In all cases, Department shall make every effort to obtain voluntary compliance through warning, conference, or any other appropriate means prior to initiating enforcement proceedings. (Neb. Rev. Stat. 81-1510).

Where a violation of Act is suspected, a notice may be served upon violator specifying provision violated, and including an order for corrective action or criminal or civil action. Such order shall become final unless, no later than 30 days after date notice and order are served, person named therein requests in writing a hearing before Director. Upon such request, Director shall hold a hearing. In lieu of an order, Director may require that alleged violator appear before Director for a hearing at a time and place as specified in notice to answer charges complained of. (Neb. Rev. Stat. 81-1507).

Any duly authorized officer or representative of Department may at any reasonable time and with proper warrants or consent enter and inspect any property for purpose of ascertaining state of compliance with this Act and rules and regulations in force pursuant thereto. Nothing in this section shall be construed to prevent prompt inspection without consent or appropriate warrant in acute and compelling emergency situations when there is neither sufficient time nor opportunity to obtain a search warrant. If requested, owner or operator of premises shall receive a report setting forth all facts found which relate to compliance status. (Neb. Rev. Stat. 81-1511).

Department has exclusive general supervision over administration and enforcement of Act, and all rules, regulations and orders thereunder. (Neb. Rev. Stat. 81-1504).

Penalties.

Any person who violates any provision of Environmental Protection Act, Integrated Solid Waste Management Act or Livestock Waste Management Act (Acts), by knowingly and willfully committing any of following offenses is guilty of Class IV felony: (a) violating any rule or regulation, permit, license or permit or license condition or regulation of: water pollution control law pursuant to National Pollutant Discharge Elimination System; air pollution control law; hazardous waste control law; mineral production, mineral exploration or injection control law; (b) making any false statement, representation or certification in any application, label, manifest, record, plan, or other document required to be filed or maintained by Acts, rules or regulations; (c) falsifying, tampering with or rendering inaccurate any monitoring device or method used or required for compliance with any permit or license or Acts or rules or regulations; or (d) transporting hazardous waste to unpermitted facility. (Neb. Rev. Stat. 81-1508 to -1508.01).

Any person who knowingly and willfully violates any solid waste control law or livestock control law or rule, regulation, permit, license, or permit or license condition or limitation shall be guilty of Class I misdemeanor. Any person who knowingly and willfully violates any other provision of Acts or rule or regulation adopted and promulgated pursuant to Acts shall be guilty of Class III misdemeanor. Each violation under this section shall be actionable. In case of continuing violation, each day shall constitute separate offense. Any person who knowingly and willfully violates this section shall be subject to personal liability. In assessing amount of any fine, court shall consider degree and extent of violation, size of operation, any economic benefit derived from noncompliance. Each day upon which such violation occurs shall constitute separate violation. Any person guilty of violation of Act which causes death to fish or wildlife, shall in addition to other penalties be liable to pay to state any sum reasonably necessary to restock fish, or replenish wildlife. In addition, injunction may be obtained pursuant to this Act on showing that some person or persons are violating or about to violate provisions of Act, and such injunction shall be granted without necessity of showing lack of adequate remedy at law. (Neb. Rev. Stat. 81-1508.01).

Laws make it unlawful for any person: (a) To refuse right of entry and inspection to any authorized representative of department who is acting under provisions of permit issued by department; (b) to violate any air, water, or land quality standards, any emission or effluent standards or limitation, any permit or license condition or limitation, any order of director, or any monitoring, reporting, or record-keeping requirements pursuant to Acts, rules or regulations adopted and promulgated pursuant to Acts; (c) to make any false statement, representation, or certification in any application or other document required to be maintained by such acts, rules or regulations; (d) to falsify, tamper with, or render inaccurate any monitoring device or method used or required for compliance with permit or license or such acts, rules or regulations; or (e) violate any other provision or fail to perform any other duty imposed by such acts, rules or regulations. (Neb. Rev. Stat. 81-1508.01). Each violation of Neb. Rev. Stat. 81-1508.01 or Neb. Rev. Stat. 81-1506 shall subject person to civil penalty of no more than $10,000 per day. In case of continuing violation each day shall constitute separate offense. Amount of penalty shall be based on degree and extent of violation, size of operation, and any economic benefit derived from noncompliance. (Neb. Rev. Stat. 81-1508.02).

Permits.

All persons engaged or desiring to engage in operations which result or which may result in air, water or land pollution must secure permit from Dept. of Environmental Quality. (Neb. Rev. Stat. 81-1505.04). Variance may be obtained. (Neb. Rev. Stat. 81-1513).

Hazardous Materials.

Liability for hazardous materials limited for volunteers, but not limited for those receiving compensation. (Neb. Rev. Stat. 81-1567 to -1570).

Land Use Planning.

No statutes specifically address land use planning.

Recycling.

Litter Reduction and Recycling Act (Neb. Rev. Stat. 81-1534 to -1566.01) and Waste Reduction and Recycling Incentive Act (Neb. Rev. Stat. 81-15,158.01 to -15,165) enacted.

Remediation.

Remedial Action Plan Monitoring Act enacted. (Neb. Rev. Stat. 81-15,181 to -15,188). Superfund Cost Share Cash Fund created to provide cost share for remediation of Superfund sites. (Neb. Rev. Stat. 81-15,180).

Solid Waste Management.

Done in conjunction with cities, counties, and political subdivisions. (Neb. Rev. Stat. 13-1701 to -1714). Integrated Solid Waste Management Act adopted. (Neb. Rev. Stat. 13-2001 to -2043).

Underground Storage Tanks.

Petroleum Release Remedial Action Act (Neb. Rev. Stat. 66-1501 to -1532) and Petroleum Products and Hazardous Substances Storage and Handling Act (Neb. Rev. Stat. 81-15,117 to -15,127) enacted. Aboveground tanks also authorized. (Neb. Rev. Stat. 81-1575 to -1577.01).

13 ESTATES AND TRUSTS

13.01 ADMINISTRATION:

See topic Executors and Administrators.

13.02 ADVANCEMENTS:

See topic Executors and Administrators.

ALLOWANCES:

See topic Executors and Administrators.

CLAIMS:

See topic Executors and Administrators.

13.03–13.04

13.05 DEATH:

Death is presumed in case of continued and unexplained absence from home for five years where person not heard of or from (Neb. Rev. Stat. 30-2207), and may be presumed after shorter period where circumstances show exposure to danger probably resulting in death (96

Neb. 130, 147 N.W. 112; 18 Neb. 664, 26 N.W. 460). Estate of person domiciled in state so presumed dead may be administered by county court of domicile. (Neb. Rev. Stat. 30-2210 and -2211).

Survivorship.

Uniform Simultaneous Death Act (1940, adopted 1947). (Neb. Rev. Stat. 30-121 to -128). See topic Executors and Administrators. Heirs must survive decedent for 120 hours. (Neb. Rev. Stat. 30-2304).

Action for Death.

Action lies for wrongful death, if commenced within two years thereafter. Must be brought by personal representative of decedent for exclusive benefit of widow, widower and next of kin. Recovery of settlement must be paid into court for payment and distribution to widow or widower and next of kin in proportion pecuniary loss suffered by each bears to total pecuniary loss suffered by all such persons. Claim may not be compromised without approval of court. (Neb. Rev. Stat. 30-809 and -810). No statutory limitation of amount which may be recovered.

Death Certificate.

May be obtained from Bureau of Vital Statistics, Dept. of Health, Lincoln Executive Building, 1003 ``O'' St., Lincoln, Neb. 68508. Fee, $11, unless requested by U.S. Veterans' Admin., in which case such certificate is provided free of charge. (Neb. Rev. Stat. 71-612). Local deputies are appointed in some counties and copies may be obtained at same fee if death occurred in that county. See also category Documents and Records, topic Records, subhead Vital Statistics.

Uniform Anatomical Gift Act.

See topic Wills.

13.06 DECEDENTS' ESTATES:

See topics Executors and Administrators, Descent and Distribution, and Wills.

13.07 DESCENT AND DISTRIBUTION:

Intestate succession governed by statute. (Neb. Rev. Stat. 30-2301). Part of intestate estate not passing to surviving spouse or entire intestate estate if there is no surviving spouse passes pursuant to Neb. Rev. Stat. 30-2303. Per capita and per stirpes governed by Neb. Rev. Stat. 30-2303. Per stirpes distribution is ordinarily applicable in intestate succession. (225 Neb. 19, 402 N.W.2d 288).

Uniform Probate Code adopted, with modifications (1969, adopted 1975). (Neb. Rev. Stat. 30-2201 to -2902).

Surviving Spouse.

Interest of surviving spouse determined prior to payment of federal and state estate taxes. (Neb. Rev. Stat. 30-103.01). Dower and curtsey abolished. (Neb. Rev. Stat. 30-104). Surviving spouse receives entire intestate estate if there is no surviving issue or parent of decedent. If there is no surviving issue but decedent is survived by parent intestate share of surviving spouse is first $100,000, plus one half of balance of intestate estate. If there are surviving issue all of whom are issue of surviving spouse also, intestate share of surviving spouse is first $100,000, plus one half of balance of intestate estate. If there are surviving issue one or more of whom are not issue of surviving spouse, intestate share of surviving spouse is one half of intestate estate. (Neb. Rev. Stat. 30-2302). Right to elective share and procedure for elective share provided in Neb. Rev. Stat. 30-2313 to -2319. Situation in which spouse unprovided for in will governed by Neb. Rev. Stat. 30-2320.

Half Blood.

Degrees of kindred shall be computed according to rule of civil law. Relatives of half blood inherit same share they would inherit if they were of whole blood. (Neb. Rev. Stat. 30-2307).

Posthumous Children or Other Issue.

Relatives of decedent conceived before his death but born thereafter inherit as if they had been born in lifetime of decedent. (Neb. Rev. Stat. 30-2308).

Illegitimates.

Person born out of wedlock is child of mother. (Neb. Rev. Stat. 30-2309). Person born out of wedlock is also child of father, if: (i) Natural parents participated in marriage ceremony before or after birth of child, even though attempted marriage is void; or (ii) paternity is established by adjudication before death of father or is established thereafter by strict, clear and convincing proof. Paternity established under this subparagraph (ii) is ineffective to qualify father or his kindred to inherit from or through child unless father has openly treated child as his, and has not refused to support child. (Neb. Rev. Stat. 30-2309).

Adopted Children.

Adopted person is child of adopting parent and not of natural parents except that adoption of child by spouse of natural parent has no effect on relationship between child and that natural parent. (Neb. Rev. Stat. 30-2309).

See category Family, topic Adoption.

Advancements.

If person dies intestate as to all his estate, property which he gave in his lifetime to heir is treated as advancement against latter's share of estate only if declared in contemporaneous writing by decedent or acknowledged in writing by heir to be advancement. (Neb. Rev. Stat. 30-2310). Property valued pursuant to Neb. Rev. Stat. 30-2310.

Renunciation.

Person may renounce in whole or in part by filing written instrument of renunciation. (Neb. Rev. Stat. 30-2352). Instrument shall describe property or part thereof or interest therein renounced, be signed and acknowledged by person renouncing in manner provided for in execution of deeds of real estate, declare renunciation and extent thereof, and declare that renunciation is irrevocable and unqualified refusal to accept renounced interest. (Neb. Rev. Stat. 30-2352). Renunciation must comply with time limits. (Neb. Rev. Stat. 30-2352).

Escheat.

If decedent leaves no surviving spouse or kindred his real and personal property escheats to state. (Neb. Rev. Stat. 30-2305).

Uniform Disposition of Unclaimed Property Act (1966, adopted 1969). (Neb. Rev. Stat. 69-1301 to -1329).

Personalty.

Can be passed by separate written list (Neb. Rev. Stat. 30-2338), or collected and distributed by affidavit when value of net estate does not exceed $25,000. (Neb. Rev. Stat. 30-24,125).

Real Property.

Deed of distribution of real property must be recorded with register of deeds in each county in which such real property is situated and shall indicate court in which probate proceedings were conducted. (Neb. Rev. Stat. 30-24,105).

See topic Executors and Administrators.

ELECTION:

See topic Wills.

13.07A ESTATES: (in property)

See category Property, topic Real Property.

13.0813.09

13.10 EXECUTORS AND ADMINISTRATORS:

Uniform Probate Code adopted, with modifications (1969, adopted 1974). (Neb. Rev. Stat. 30-2201 to -2902).

Material Variances From Uniform Probate Code.

§ 1-201. Definitional differences.

§ 1-401. Notice of any hearing, unless other specific notice requirements are provided, must be given by publication for three consecutive weeks with last publication at least three days before hearing and by mailing copy of notice to each interested person at least 14 days before hearing. (Neb. Rev. Stat. 30-2220).

§ 2-301. Nebraska eliminates provisions relating to intentional omissions and transfers outside will, unless waived. (Neb. Rev. Stat. 30-2320).

§ 2-404. Court may require notice before distribution of assets and satisfaction of family allowances. (Neb. Rev. Stat. 30-2325).

§ 2-503. Holographic will, to be valid, must have indication of date; either written, or from extrinsic evidence; or be only writing. (Neb. Rev. Stat. 30-2328).

§ 2-513. Requirement of indication of date; or from extrinsic evidence; or be only writing, or contain no inconsistency with any other like writing added to language list provisions. (Neb. Rev. Stat. 30-2338).

§ 3-108. Will may be formally admitted to probate after three years from informal probate for purpose of proving it as document of title. (Neb. Rev. Stat. 30-2408).

§ 3-301. Notice of informal probate must be given by newspaper publication once a week for three weeks within 30 days thereof. (Neb. Rev. Stat. 30-2415).

§ 3-307. Notice of appointment must be given by newspaper publication once a week for three weeks within 30 days thereof. (Neb. Rev. Stat. 30-2420).

§ 3-803. Time for filing claims under Nebraska Code is two months, rather than the four months of Uniform Probate Code; provision for late claims also included. (Neb. Rev. Stat. 30-2485).

§ 3-906. If distribution is of real property, deed shall be recorded with register of deeds. (Neb. Rev. Stat. 30-24,105).

§ 7-101. Registration of living trust is discretionary rather than mandatory. (Neb. Rev. Stat. 30-2816).

Preferences in Right to Administer.

Whether proceedings are formal or informal, persons who are not disqualified have priority for appointment in following order: Person with priority as determined by probated will including person nominated by power conferred in will; surviving spouse of decedent who is devisee of decedent; other devisees of decedent; surviving spouse of decedent; other heirs of decedent; 45 days after death of decedent, any creditor. Objection to appointment can be made only in formal proceedings. (Neb. Rev. Stat. 30-2412).

Eligibility and Competency.

Qualifications of personal representative. (Neb. Rev. Stat. 30-2444).

Qualification.

Qualifications of personal representative, acceptance of personal representative appointment, and bond requirements. (Neb. Rev. Stat. 30-2444 to -2461).

Exemption From Bond.

Bond is required of personal representative unless: Will expressly waives bond, expressly requests that there be no bond, or waives requirement of surety thereon other than personal representative; all of heirs file with court written waiver of bond requirement; personal representative is national banking association, holder of banking permit under laws of this state, or trust company holding certificate to engage in trust business from Department of Banking and Finance; or petition for formal or informal appointment alleges that probable value of entire estate will permit summary procedures under Nebraska law. (Neb. Rev. Stat. 30-2446).

Removal.

Person interested in estate may petition for removal of personal representative for cause at any time. Cause for removal exists when removal would be in best interests of estate, or if it is shown that personal representative or person seeking his appointment intentionally misrepresented material facts in proceedings leading to his appointment, or that personal representative has disregarded order of court, has become incapable of discharging duties of his office, or has mismanaged estate or failed to perform any duty pertaining to office. (Neb. Rev. Stat. 30-2454).

Special Kinds of Administration.

Supervised administration. (Neb. Rev. Stat. 30-2439 to -2443).

Inventory and Appraisal.

Within three months after appointment, personal representative must prepare and file inventory of property owned by decedent at time of death. Inventory made at fair market value as of date of decedent's death and type and amount of any encumbrance. Personal representative must send copy of inventory to interested persons who request it and must file original inventory with court. (Neb. Rev. Stat. 30-2467). Personal representative may employ qualified and disinterested appraiser. (Neb. Rev. Stat. 30-2468).

General Powers and Duties.

Personal representative is fiduciary who must comply with prudent investor rule. Personal representative is under duty to settle and distribute estate of decedent in accordance with terms of any probated and effective will and Nebraska Probate Code as expeditiously and efficiently as is consistent with best interests of estate. (Neb. Rev. Stat. 30-2464).

Notice of Appointment.

For notice requirements, consult Neb. Rev. Stat. 30-2438.

Notice to Creditors.

Unless notice has already been given and except when appointment of personal representative is made pursuant to Nebraska Probate Code, clerk of court upon appointment of personal representative shall publish notice once a week for three successive weeks in newspaper of general circulation in county announcing appointment and address of personal representative, and notifying creditors of estate to present their claims within two months after date of first publication of notice or be forever barred. (Neb. Rev. Stat. 30-2483). First publication shall be made within 30 days after appointment. (Neb. Rev. Stat. 30-2483). Under certain circumstances, notice must also be mailed to Department of Health and Human Services with decedent's social security number and, if available upon reasonable investigation, name and social security number of decedent's spouse if such spouse is deceased. (Neb. Rev. Stat. 30-2483). Statute of limitations for creditors' claims is in Neb. Rev. Stat. 30-2484 and -2485.

Presentation of Claims.

Claimant may file written statement of claim, in form prescribed by rule, with clerk of court. (Neb. Rev. Stat. 30-2486). If claim is not yet due, date when it will become due shall be stated. If claim is contingent or unliquidated, nature of uncertainty shall be stated. If claim is secured, security shall be described. Failure to describe correctly security, nature of any uncertainty, and due date of claim not yet due does not invalidate presentation made. (Neb. Rev. Stat. 30-2486). Statute of limitations for creditors' claims is in Neb. Rev. Stat. 30-2484 and -2485.

Proof of Claims.

Procedure for presenting claim specified in Neb. Rev. Stat. 30-2486. If claim is not yet due, date when it will become due shall be stated. If claim is contingent or unliquidated, nature of uncertainty shall be stated. If claim is secured, security shall be described. (Neb. Rev. Stat. 30-2486).

Form.

Form specified by rule of court. (Neb. Rev. Stat. 30-2486).

Approval or Rejection of Claims.

Personal representative may mail notice to any claimant stating that claim has been disallowed. (Neb. Rev. Stat. 30-2488). Every claim which is disallowed in whole or in part by personal representative is barred so far as not allowed unless claimant files petition for allowance in court or commences proceeding against personal representative not later than 60 days after mailing of notice of disallowance or partial allowance if notice warns claimant of impending bar. (Neb. Rev. Stat. 30-2488). At any time within 14 days of filing of petition for allowance of claim, personal representative may transfer claim to regular docket of county court by filing with court notice of transfer. (Neb. Rev. Stat. 30-2488). Upon petition of personal representative or of claimant in proceeding for purpose, court may allow in whole or in part any claim or claims filed with clerk of court in due time and not otherwise barred. (Neb. Rev. Stat. 30-2488).

Payment of Claims.

If applicable assets of estate are insufficient to pay all claims in full, personal representative shall make payment in order prescribed by statute. (Neb. Rev. Stat. 30-2487). Upon expiration of two months from date of first publication of notice to creditors, personal representative shall proceed to pay claims allowed against estate in order of priority prescribed, after making allowance for costs and expenses of administration and after making provision for homestead, family and support allowances, for claims already presented which have not yet been allowed or whose allowance has been appealed, and for unbarred claims which may yet be presented. (Neb. Rev. Stat. 30-2489).

Priorities.

If applicable assets of estate are insufficient to pay all claims in full, personal representative shall make payment in order prescribed by statute. (Neb. Rev. Stat. 30-2487).

Sales.

Personal representative has same power over estate property that owner has, in trust for creditors and other interested parties. (Neb. Rev. Stat. 30-2472). Personal representative may acquire or dispose of asset, including land in Nebraska or another state, for cash or on credit, at public or private sale. (Neb. Rev. Stat. 30-2476).

Actions by Representative.

Except as to proceedings which do not survive death of decedent, personal representative of decedent domiciled in this state at his or her death has same standing to sue and be sued in courts of this state and courts of any other jurisdiction as his or her decedent had immediately prior to death. (Neb. Rev. Stat. 30-2464). No statute of limitations running on cause of action belonging to decedent which had not been barred as of date of his death shall apply to bar cause of action surviving decedent's death sooner than four months after death. Cause of action which, but for this section, would have been barred less than four months after death is barred after four months unless tolled. (Neb. Rev. Stat. 30-2409).

Actions against Representative.

If exercise of power concerning estate is improper, personal representative is liable to interested persons for damage or loss resulting from breach of fiduciary duty same extent as trustee of express trust. (Neb. Rev. Stat. 30-2473). Claimant may commence proceeding against personal representative in any court which has subject matter jurisdiction and personal representative may be subjected to jurisdiction, to obtain payment of his or her claim against estate, but commencement of proceeding must occur within time limited for presenting claim. No presentation of claim is required in regard to matters claimed in proceedings against decedent which were pending at time of his or her death. (Neb. Rev. Stat. 30-2486). In case of claim which is not presently due or which is contingent or unliquidated, personal representative may consent to extension of 60-day period prescribed by statute, or to avoid injustice court, on petition, may order extension of 60-day period, but in no event shall extension run beyond applicable statute of limitations. (Neb. Rev. Stat. 30-2486).

Allowances.

In addition to right to homestead allowance and exempt property, if decedent was domiciled in Nebraska, surviving spouse and minor children whom decedent was obligated to support and children who were in fact being supported by him are entitled to reasonable allowance in money out of estate for their maintenance during period of administration. (Neb. Rev. Stat. 30-2324). Allowance may not continue for longer than one year if estate is inadequate to discharge allowed claims. (Neb. Rev. Stat. 30-2324). Allowance may be paid as lump sum or in periodic installments. (Neb. Rev. Stat. 30-2324). Allowance is payable to surviving spouse, if living, for use of surviving spouse and minor and dependent children; otherwise to children, or persons having their care and custody; but in case any minor child or dependent child is not living with surviving spouse, allowance may be made partially to child or his guardian or other person having his care and custody, and partially to spouse, as their needs may appear. (Neb. Rev. Stat. 30-2324). Family allowance is exempt from and has priority over all claims except for costs and expenses of administration and homestead allowance. (Neb. Rev. Stat. 30-2324).

Widow's Quarantine.

None.

Intermediate Accountings.

Interim orders approving or directing partial distributions or granting other relief may be issued by court at any time during pendency of supervised administration on application of personal representative or any interested person. (Neb. Rev. Stat. 30-2443).

Final Accounting and Settlement.

Procedures governing closing of estate are provided by statute. (Neb. Rev. Stat. 30-24,115 to -24,122).

Consent Settlement.

When claim against estate has been presented, personal representative may, if it appears for best interest of estate, compromise claim, whether due or not due, absolute or contingent, liquidated or unliquidated. (Neb. Rev. Stat. 30-2495).

Distribution.

Distribution governed by Neb. Rev. Stat. 30-2499 to -24,114.

Liabilities.

Personal representative is fiduciary. (Neb. Rev. Stat. 30-2464). Personal representative shall not be surcharged for acts of administration or distribution if conduct in question was authorized at time. (Neb. Rev. Stat. 30-2464). If exercise of power concerning estate is improper, personal representative is liable to interested persons for damage or loss resulting from breach of fiduciary duty to same extent as trustee of express trust. (Neb. Rev. Stat. 30-2473).

Compensation of Representatives.

Personal representative entitled to reasonable compensation for services. (Neb. Rev. Stat. 30-2480).

When Administration Unnecessary.

See subhead Small Estates, infra.

Small Estates.

Collection of personal property by affidavit and summary administrative procedures permitted for small estates. (Neb. Rev. Stat. 30-24,125 to -24,128). Succession to real property by affidavit permitted for small estates. (Neb. Rev. Stat. 30-24,129 to -24,130).

Foreign Executors or Administrators.

All assets of estates being administered in Nebraska are subject to all claims, allowances and charges existing or established against personal representative wherever appointed. (Neb. Rev. Stat. 30-2497). If estate, either in Nebraska or as whole, is insufficient to cover all family exemptions and allowances determined by law of decedent's domicile, prior charges and claims, after satisfaction of exemptions, allowances and charges, each claimant whose claim has been allowed either in Nebraska or elsewhere in administrations of which personal representative is aware is entitled to receive payment of equal proportion of his claim. (Neb. Rev. Stat. 30-2497). By accepting appointment, personal representative submits personally to jurisdiction of Nebraska court in any proceeding relating to estate that may be instituted by any interested person. (Neb. Rev. Stat. 30-2445).

Uniform Anatomical Gift Act (1968, adopted 1971). (Neb. Rev. Stat. 71-4801 to -4812).

Uniform Fiduciaries Act not adopted.

Uniform Principal and Income Act (1979, adopted 2001). (Neb. Rev. Stat. 30-3116 to -3149).

Uniform Simplification of Fiduciary Security Transfers Act repealed.

Uniform Simultaneous Death Act (1940, adopted 1947). (Neb. Rev. Stat. 30-121 to -128).

13.11–13.13

13.14 FIDUCIARIES:

See topics Executors and Administrators, and Trusts; also category Family, topic Guardian and Ward.

INTESTACY:

See topic Descent and Distribution.

PROOF OF CLAIMS:

See topic Executors and Administrators; also category Civil Actions and Procedure, topic Pleading.

13.15 TRUSTS:

Uniform Probate Code adopted as Nebraska Probate Code at Neb. Rev. Stat. 30-2201 to -2902. See topic Executors and Administrators.

Uniform Trust Code (2003, adopted 2004). (Neb. Rev. Stat. 30-3801 to -38,110). Operative Jan. 1, 2005.

Kinds.

Trust may be created only to extent its purposes are lawful, not contrary to public policy, and possible to achieve. Trust and its terms must be for benefit of its beneficiaries. (Neb. Rev. Stat. 30-3830). Spendthrift provision valid only if it restrains both voluntary and involuntary transfer of beneficiary's interest. (Neb. Rev. Sta. 30-3847). Revocable trusts authorized. (Neb. Rev. Stat. 30-3853 to -3856).

Creation.

Trust may be created by: Transfer of property to another person as trustee during settlor's lifetime or by will or other disposition taking effect upon settlor's death; except as otherwise provided by law, declaration by owner of property that owner holds identifiable property as trustee; or exercise of power of appointment in favor of trustee. (Neb. Rev. Stat. 30-3827). Settlor must have capacity to create trust. (Neb. Rev. Stat. 30-3828). Settlor must indicate intent to create trust. (Neb. Rev. Stat. 30-3828). Trust must have definite beneficiary or be charitable trust, trust for care of animal, or trust for noncharitable purpose. (Neb. Rev. Stat. 30-3828). Trustee must have duties to perform. (Neb. Rev. Stat. 30-3828). Same person is not sole trustee and sole beneficiary. (Neb. Rev. Stat. 30-3828).

Appointment of Trustee.

Creation of trust and establishment of trustee generally provided by Neb. Rev. Stat. 30-3827. Person may accept or decline office of trustee. (Neb. Rev. Stat. 30-3857).

Eligibility and Competency.

Statutes provide priority of appointing trustee. (Neb. Rev. Stat. 30-3860). Foreign corporate trustee is required to qualify as foreign corporation doing business in Nebraska if it maintains principal place of administration of any trust within Nebraska. (Neb. Rev. Stat. 30-3820).

Qualification.

Trustee must accept appointment. (Neb. Rev. Stat. 30-3857). Trustee shall give bond to secure performance of trustee's duties only if court finds bond is needed to protect interests of beneficiaries or is required by terms of trust and court has not dispensed with requirement. (Neb. Rev. Stat. 30-3858).

Removal of Trustee.

Settlor, cotrustee, or beneficiary may request court to remove trustee, or trustee may be removed by court on its own initiative. (Neb. Rev. Stat. 30-3862). Court may remove trustee under specified circumstances. (Neb. Rev. Stat. 30-3862).

General Powers and Duties of Trustees.

Uniform Trustees' Powers Act adopted. (Neb. Rev. Stat. 30-2819 to -2826).

Duty to administer trust. (Neb. Rev. Stat. 30-3866). Duty of loyalty. (Neb. Rev. Stat. 30-3867). Duty of impartiality. (Neb. Rev. Stat. 30-3868). Duty of prudent administration. (Neb. Rev. Stat. 30-3869). Power to direct. (Neb. Rev. Stat. 30-3873). Control and protect trust property. (Neb. Rev. Stat. 30-3874). Keep records and identify trust property. (Neb. Rev. Stat. 30-3875). Enforce and defend claims. (Neb. Rev. Stat. 30-3876). Collect trust property. (Neb. Rev. Stat. 30-3877). Inform and report. (Neb. Rev. Stat. 30-3878). Exercise powers conferred by trust. (Neb. Rev. Stat. 30-3880). Other specific powers enumerated. (Neb. Rev. Stat. 30-3881).

Sales.

Trustee has authority to acquire or sell property, for cash or on credit, at public or private sale. (Neb. Rev. Stat. 30-3881).

Investments.

Neb. Rev. Stat. 30-3883 to -3889.

Securities in Name of Nominee.

Fiduciary may register securities in name of nominee. (Neb. Rev. Stat. 30-3211).

Bequests and Devises to Inter Vivos Trusts.

See Wills.

Accounting.

Trustee shall keep qualified beneficiaries of trust reasonably informed about administration of trust and of material facts necessary for them to protect their interests. (Neb. Rev. Stat. 30-3878). Trustee shall send to distributees or permissible distributees of trust income or principal, and to other qualified or nonqualified beneficiaries who request it, at least annually and at termination of trust, report of trust property, liabilities, receipts, and disbursements, listing of trust assets and, if feasible, their respective market values. (Neb. Rev. Stat. 30-3878).

Compensation.

If terms trust do not specify trustee's compensation, trustee is entitled to reasonable compensation. (Neb. Rev. Stat. 30-3864). If terms of trust specify trustee's compensation, trustee is entitled to be compensated as specified, but court may allow more or less compensation under certain circumstances. (Neb. Rev. Stat. 30-3864).

Discharge.

None.

Uniform Common Trust Fund Act.

(1952, adopted 1953). (Neb. Rev. Stat. 30-3202 to-3207).

Uniform Principal and Income Act (1997, adopted 2001). (Neb. Rev. Stat. 30-3116 to -3149).

Gifts or Transfers to Minors.

See category Family, topic Infants.

Uniform Fiduciaries Act not adopted.

Uniform Simplification of Fiduciary Security Transfers Act repealed.

Accumulations.

See category Property, topic Perpetuities, subhead Accumulations.

Perpetuities.

See category Property, topic Perpetuities.

Pour Over Trusts.

See topic Wills, subhead Bequests and Devises to Inter Vivos Trusts.

Renunciation.

See Neb. Rev. Stat. 30-2352.

Registration of Trusts.

Trustee may register trust in county court located at principal place of administration. (Neb. Rev. Stat. 30-3816). By registering trust, trustee and beneficiaries are subject to jurisdiction of court in any proceeding regarding administration of trust. (Neb. Rev. Stat. 30-3813).

Registration procedures, see 30-3817.

Uneconomic Trusts.

Total value less than $100,000. (Neb. Rev. Stat. 30-3840).

Reference to Written Statement or List.

Trust may refer to written statement or list to dispose of tangible personal property, other than money, evidences of indebtedness, documents of title, and securities, and property used in trade or business. Must have indication of date or contain no inconsistency with any like writing, must be in handwriting of settlor or be signed by him or her, and must describe items and beneficiaries with reasonable certainty. (Neb. Rev. Stat. 30-3844).

Revocation or Amendment of Revocable Trust.

Where no method of revocation set forth in trust document, settlor may revoke or amend revocable trust by instrument evidencing intent to amend or revoke trust signed by settlor, or by other individual in presence of and by direction of settlor. Must have indication of date or contain no inconsistency with any like writing. (Neb. Rev. Stat. 30-3854).

Limitation on Action Constituting Validity of Revocable Trust.

Earlier of one year after settlor's death or 120 days after notice by trustee. (Neb. Rev. Stat. 30-3856).

Certification of Trust.

See Neb. Rev. Stat. 30-38,102 to -38,106.

Uniform Prudent Investor Act (1994, adopted 1997). (Neb. Rev. Stat. 30-3883 to -3889).

Fiduciary Investments.

Unless otherwise authorized by the instrument creating the trust, trustees, executors, guardians and administrators, whether appointed by Nebraska court, or acting under other authority, having funds for investment, must invest same in investments nature of which prudent men would retain for their own account. (Neb. Rev. Stat. 30-3201).

Trust funds received by administrators, executors, trustees or guardians may be kept invested in the securities received by them unless otherwise ordered by court of appointment or unless instrument under which such trust was created directs change of investment, and they are not liable for any loss due to depreciation of such securities. (Neb. Rev. Stat. 30-3204 and -3210).

Common trust funds permitted to be established by bank or trust company for investment of fiduciary funds. (Neb. Rev. Stat. 30-3208).

Securities in Name of Nominee.

Trust securities may be registered either in name of trustee or nominee without words indicating the fiduciary capacity if certain requirements are met. (Neb. Rev. Stat. 30-3211 and -3212).

Employees' Trust Plans.

Trustee must be licensed to do business in Nebraska. (Neb. Rev. Stat. 48-2002).

13.16 WILLS:

Any individual who is 18 or more years of age or is not minor and who is of sound mind may make will. (Neb. Rev. Stat. 30-2326).

Uniform Probate Code adopted as Nebraska Probate Code at Neb. Rev. Stat. 30-2201 to -2902. See topic Executors and Administrators.

Testamentary Disposition.

Personal and real property may be disposed of by will to extent not otherwise controlled or limited by this Nebraska Probate Code. (Neb. Rev. Stat. 30-2326).

Execution.

Every will is required to be in writing signed by testator or in testator's name by some other individual in testator's presence and by his direction, and is required to be signed by at least two individuals each of whom witnessed either signing or testator's acknowledgment of signature or of will. (Neb. Rev. Stat. 30-2327).

Attestation Clause.

See Neb. Rev. Stat. 30-2329.

Holographic Wills.

Signature, material provisions, and indication of date of signing must be in handwriting of testator. (Neb. Rev. Stat. 30-2328). No witnesses are required. (Neb. Rev. Stat. 30-2328). In absence of indication of date, holographic will valid if instrument is only such instrument or contains no inconsistency with any like instrument or if such date is determinable from contents of such instrument, from extrinsic circumstances, or from any other evidence. (Neb. Rev. Stat. 30-2328).

Nuncupative Wills.

Cannot transfer real property by oral will. (89 Neb. 673, 132 N.W. 197). Every will is required to be in writing. (Neb. Rev. Stat. 30-2327).

Revocation.

Will or any part thereof is revoked by subsequent will which, as is evident either from its terms or from competent evidence of its terms, revokes prior will or part expressly or by inconsistency; or by being burned, torn, canceled, obliterated, or destroyed, with intent and for purpose of revoking it by testator or by another person in presence of and by direction of testator. (Neb. Rev. Stat. 30-2332). Divorce, dissolution, or annulment revokes any disposition or appointment of property made by will to former spouse, any provision conferring general or special power of appointment on former spouse, and any nomination former spouse as executor, trustee, conservator, or guardian, unless will expressly provides otherwise. (Neb. Rev. Stat. 30-2333).

Revival.

If second will which, had it remained effective at death, would have revoked first will in whole or in part, is thereafter revoked, first will is revoked in whole or in part unless it is evident from circumstances of revocation of second will or from testator's contemporary or subsequent declarations that he intended first will to take effect as executed. (Neb. Rev. Stat. 30-2334). If second will which, had it remained effective at death, would have revoked first will in whole or in part, is thereafter revoked by third will, first will is revoked in whole or in part, except to extent it appears from terms of third will that testator intended first will to take effect. (Neb. Rev. Stat. 30-2334).

Testamentary Gifts to Subscribing Witnesses.

Will or any provision thereof is not invalid because will is signed by interested witness. Unless there is at least one disinterested witness to will, interested witness to will is entitled to receive any property thereunder only to amount or extent not exceeding that which is or would be intestate share of such interested witness if testator died intestate at date of death. (Neb. Rev. Stat. 30-2330).

Bequests and Devises to Inter Vivos Trusts.

Uniform Testamentary Additions to Trusts Act adopted. (1991, Neb. Rev. Stat. 30-3601 to -3604).

Testamentary Guardians.

See category Family, topic Guardian and Ward.

Probate.

County court has exclusive original jurisdiction in probate of wills. (Const. Art. V, § 16).

In all matters arising under Nebraska Probate Code or Nebraska Uniform Trust Code, appeals must be allowed in same manner as appeals from district court to Court of Appeals. (Neb. Rev. Stat. 30-1601).

Self-proved Wills.

Provided for by Neb. Rev. Stat. 30-2329.

Living Wills.

Rights of Terminally Ill Act. (Neb. Rev. Stat. 20-401 to -416).

Contest.

There is no provision for contesting a will after it has been probated. If probate was obtained by fraud, the judgment could be attacked the same as any other judgment.

Legacies.

Payable at time fixed by court for distribution (see topic Executors and Administrators) and do not bear interest.

Unclaimed Legacies.

Payable to county judge (Neb. Rev. Stat. 25-2714) who holds them for three years on behalf of legatee or creditor. If no claim is made within that time, he notifies State Treasurer and pays such fund into permanent school fund on direction by state treasurer. (Neb. Rev. Stat. 25-2715 to -2717).

Lapse.

If devisee related to testator in any degree of kinship is dead at time of execution of will, fails to survive testator, or is treated as if he predeceased testator, issue of deceased devisee who survive testator by 120 hours take in place of deceased devisee and if they are all of same degree of kinship to devisee they take equally, but if of unequal degree then those of more remote degree take by representation. One who would have been devisee under class gift if he had survived testator is treated as devisee for these purposes whether his death occurred before or after execution of will. (Neb. Rev. Stat. 30-2343).

Children.

If testator fails to provide in his will for any of his children born or adopted after execution of his will, omitted child receives share in estate equal in value to that which he would have received if testator had died intestate. (Neb. Rev. Stat. 30-2321). If at time of execution of will testator fails to provide in his will for living child solely because he believes child to be dead, child receives share in estate equal in value to that which he would have received if testator had died intestate. (Neb. Rev. Stat. 30-2321).

Election.

Surviving spouse has right of election to take elective share in any fraction not in excess of one half of augmented estate. (Neb. Rev. Stat. 30-2313). Surviving spouse may elect to take his or her elective share in augmented estate by filing in court and mailing or delivering to personal representative, if any, petition for elective share in any designated fraction not in excess of one half or, in absence of any such designation, of one half of augmented estate within nine months after date of death or within six months after probate of decedent's will, whichever time limitation last expires.

Contribution.

After notice and hearing, court determines amount of spouse's elective share and orders its payment from assets of augmented estate or by contribution. (Neb. Rev. Stat. 30-2317). Only original transferees from, or appointees of, decedent and their donees, to extent donees have property or its proceeds, are subject to contribution to make up elective share of surviving spouse. Person liable to contribution may choose to give up property transferred to him or to pay its value as of time it is considered in computing augmented estate. (Neb. Rev. Stat. 30-2319).

Renunciation.

Procedure for renunciation provided in Neb. Rev. Stat. 30-2352.

Foreign Executed Wills.

Written will valid if its execution complies with law at time of execution of place where will is executed or of place where at time of execution or at time of death testator is domiciled, has place of abode, or is national. (Neb. Rev. Stat. 30-2331).

Foreign Probated Wills.

Not provided for.

Simultaneous Death.

See topic Death, subhead Survivorship.

Testamentary Trusts.

See topic Trusts.

Evidence.

Uncontested will may be admitted into evidence in any court proceeding upon certification by registrar, judge, or person to whom magistrate duties have been assigned. (Neb. Rev. Stat. 30-2402).

Recording.

Probated will affecting real estate may be recorded with register of deeds. (Neb. Rev. Stat. 76-248).

Uniform Disposition of Unclaimed Property Act (1966, adopted 1969). (Neb. Rev. Stat. 69-1301 to -1329).

Uniform Anatomical Gift Act (1968, adopted 1971). (Neb. Rev. Stat. 77-4801 to -4812).

14 FAMILY

14.01 ADOPTION:

Minor child may be adopted by any adult person and any adult child may be adopted by spouse of such child's parent. (Neb. Rev. Stat. 43-101). If adopter is married, husband and wife must join in petition and jointly adopt said child, unless he or she is parent of child. (Neb. Rev. Stat. 43-101). Adoption of American Indian children governed by Nebraska Indian Child Welfare Act. (Neb. Rev. Stat. 43-1501 to -1516).

Consent Required.

Of: (a) Minor if over 14 years of age or adult child (Neb. Rev. Stat. 43-104); (b) any district or separate juvenile court having jurisdiction of custody of minor by virtue of proceedings; and (c) both parents, if living, of child born in lawful wedlock; or surviving parent of child born in lawful wedlock; or mother of child born out of wedlock unless alleged father files notice of intent to claim paternity with Department of Social Services within five days after birth of child, in which case natural father must consent. Consent of parent is not required if parent: (1) Has relinquished child for adoption by written instrument; (2) has abandoned child for six months next preceding filing of petition; (3) has been deprived of his parental right by any court of competent jurisdiction; or (4) is incapable of consenting. Written consent or relinquishment for adoption is not valid unless signed at least 48 hours after birth of child. (Neb. Rev. Stat. 43-104, -104.02). Where consent of both parents of child born in lawful wedlock is not required, consent may be given by: (1) Department of Social Services if minor has been committed to state home (Nebraska Center for Children and Youth) for dependent children (Neb. Rev. Stat. 43-906); (2) licensed agency for placement of children to which child has been relinquished for adoption; or (3) guardian or guardian ad litem of minor, with approval of court having jurisdiction of guardianship. Substitute consent does not apply to biological father whose consent is not required. (Neb. Rev. Stat. 43-105). Consent must be in writing, signed in presence of at least one witness and acknowledged before officer who may not also be witness. (Neb. Rev. Stat. 43-106).

Specific consent requirements for adoption of foreign born children. (Neb. Rev. Stat. 43-104.07).

Conditions Precedent.

(1) Adopted child must reside with adoptive parent for at least six months next preceding entry of decree of adoption, and where petition of adoption filed after Sept. 1, 1988; (2) copy of child's and biological parent's (if available) medical history filed with court; and (3) relinquishing parent signs affidavit acknowledging receipt and explanation of non-consent form. (Neb. Rev. Stat. 43-109).

Jurisdiction.

County court of county in which person or persons desiring to adopt child reside has jurisdiction of adoption proceedings, except that if separate juvenile court already has jurisdiction over child to be adopted under Nebraska Juvenile Code, such separate juvenile court has concurrent jurisdiction. (Neb. Rev. Stat. 43-102).

Petition.

Requirements for petition provided in Neb. Rev. Stat. 43-102.

Notification of Father.

When child claimed born out of wedlock and biological mother contacts adoption agency or attorney to relinquish rights to child, or biological mother joins in petition for adoption filed by her husband, agency or attorney contacted must attempt to establish identity of biological father and inform biological father of right to execute relinquishment and consent to adoption or denial of rights. (Neb. Rev. Stat. 43-104.08).

Proceedings.

Adopter must file signed and verified petition accompanied by required consent of adoption forms, affidavits regarding vital statistics of child, and completed replacement adoptive home study. Adoption decree not issued until six months after adoptive home study completed. (Neb. Rev. Stat. 43-102). Home study is discretionary in stepparent adoptions. Members of armed forces in state for one year deemed resident of state and county where stationed. (Neb. Rev. Stat. 43-102.01). Court thereupon fixes time for hearing and directs what notice, if any, shall be given. (Neb. Rev. Stat. 43-103). County judge shall request Department of Social Services or placement agency to examine allegations and propriety of such adoption and report its findings; discretionary in adoption by stepparent. (Neb. Rev. Stat. 43-107).

At hearing child, unless over age of 14, and adopting parents must appear in person before judge; court may accept affidavit of absent spouse who is in armed forces and it appears to court absent spouse will not be able to be present for one year because of his military assignment. (Neb. Rev. Stat. 43-108).

Department or agency may charge reasonable fee to recover expenses in amount established by department or agency in rules and regulations. Department may waive fee if requesting party shows that fee would work undue financial hardship on party.

Fee for filing petition for adoption in county court is $26.50. Birth certificate $8 from State Department of Health.

Decree.

May not disclose that child was born out of wedlock. (Neb. Rev. Stat. 43-109).

Name.

May be changed by decree. (Neb. Rev. Stat. 43-109).

Effect of Adoption.

Adopted child and adopting parents bear all the legal relations and consequences of the natural relation of child and parent. (Neb. Rev. Stat. 43-110). The natural parents of the adopted child are relieved from any further parental duties or responsibilities for such child and have no rights over such child or over his or her property by descent and distribution. (Neb. Rev. Stat. 43-111).

Setting Aside Adoption.

Adoption conclusively presumed valid in all respects unless action challenging validity brought within two years. (Neb. Rev. Stat. 43-116).

Special Needs Child.

Department of Social Services may make payments on behalf of child with special needs after legal completion of child's adoption. Child so adopted shall have been child for whom adoption would not have been possible without financial aid. (Neb. Rev. Stat. 43-117 and -118).

Access to Records.

Adopted child 25 years of age has access to names of relatives or to original birth certificate if consent form has been filed by relatives. (Neb. Rev. Stat. 43-130 and -131).

14.02–14.03

14.04

ALIMONY:

See topic Dissolution of Marriage.

COMMUNITY PROPERTY:

See topic Dissolution of Marriage.

DESERTION:

See topic Husband and Wife, subhead Desertion and Nonsupport.

14.05 DISSOLUTION OF MARRIAGE:

Divorce is called dissolution of marriage. Subject governed by Neb. Rev. Stat. 42-341 to -823.

Grounds for Absolute Dissolution of Marriage.

Finding by court that marriage is irretrievably broken. (Neb. Rev. Stat. 42-361).

Grounds for Legal Separation.

No statutory grounds are stated for decree of legal separation. Apparently within court's discretion. (Neb. Rev. Stat. 42-347, -350, and -368).

Citizenship Requirements.

None.

Residence Requirements.

No action for dissolution can be brought unless at least one party has actually resided in state for one year prior to filing of petition, with bona fide intent of making state his permanent home, or unless marriage was solemnized in state and at least one party has resided in state from time of marriage. Persons serving in armed forces who have been continuously stationed at any military base or installation in Nebraska are deemed residents of Nebraska. (Neb. Rev. Stat. 42-349).

Jurisdiction.

In District Court or County Court of county in which one of parties resides. (Neb. Rev. Stat. 42-348).

Venue.

In county where one of the parties resides. (Neb. Rev. Stat. 42-348).

Process.

Respondent must be properly served with summons and copy of petition or enter appearance in case. (Neb. Rev. Stat. 42-355).

Pleading.

Petition must contain (1) Name and address of petitioner and his attorney; (2) name and address of respondent, if known; (3) date and place of marriage; (4) name and date of birth of each child whose custody and welfare might be affected; (5) statement of whether petitioner is a party to any other action for divorce, separation or dissolution, and if so, where such action is pending; (6) reference to existing restraining orders, protection orders, or criminal no contact orders regarding any party to proceedings; (7) statement of relief sought; and, (8) allegation that marriage is irretrievably broken. (Neb. Rev. Stat. 42-353). No marriage dissolved or legal separation unless defendant properly served or enters appearance. (Neb. Rev. Stat. 42-355). No final hearing or trial may be had until 60 days after service or entry of appearance. (Neb. Rev. Stat. 42-363).

Judgment or Decree.

No suit for divorce may be heard until 60 days after service of process at which time suit may be heard or tried and decree may be entered. (Neb. Rev. Stat. 42-363).

For purposes of appeal, decree is treated as final upon entry. (Neb. Rev. Stat. 42-372).

For purposes of remarriage and continuation of health insurance coverage, decree becomes final six months after decree is entered; for all other purposes decree becomes final after 30 days or on date of death of one of parties, whichever occurs first. (Neb. Rev. Stat. 42-372.01).

Curative Act. Divorce decrees entered prior to Aug. 27, 1951, conclusively presumed valid regardless of record or failure of record unless action is brought prior to Aug. 27, 1953, attacking validity. (Neb. Rev. Stat. 42-345). Decrees entered after Aug. 27, 1951, conclusively presumed valid regardless of record or lack of record unless action brought within two years from entry of decree attacking validity. (Neb. Rev. Stat. 42-346).

Temporary Alimony.

Discretionary with court. (Neb. Rev. Stat. 42-357).

Allowance for Prosecution of Suit.

Discretionary with court. (Neb. Rev. Stat. 42-367).

Permanent Alimony.

Court may order payment of such alimony by one party to the other as is reasonable, having regard for circumstances of parties, etc.; reasonable security for payment may be required by court; except for amounts accrued prior to service of a petition to modify, orders of alimony can be modified or revoked on a showing of good cause, but where no alimony was provided for in original decree, such decree cannot be modified to award alimony. Except as otherwise agreed by parties or by court order, alimony terminates upon death of either party or remarriage of recipient. (Neb. Rev. Stat. 42-365).

Division of Property of Spouses.

Generally, Nebraska falls into marital property category of property division. Court may include inherited property and retirement plans in marital estate. While criteria for reaching reasonable division award of alimony may overlap, the two serve different purposes and are to be considered separately. (Neb. Rev. Stat. 42-365). Where dissolution or separation is decreed, parties can enter into written property settlement regarding support, maintenance and property as to themselves and any minor children. Agreement, except for terms relating to support and custody of minor children, is binding upon court unless it finds agreement is unconscionable. Unless agreement provides to contrary, it becomes part of decree. Terms of agreement can be enforced by all available remedies. Alimony may be ordered in addition to property settlement. Except for terms concerning custody and support of minor children, decree may preclude or limit modification of its terms. (Neb. Rev. Stat. 42-366).

Change of Spouse's Name.

When pleading is filed pursuant to Neb. Rev. Stat. 42-353, -354 or -373, either petitioner or respondent may include request to restore his or her name. (Neb. Rev. Stat. 42-380).

Custody and Support of Children.

Court may make suitable orders concerning custody and support of children and occupancy of either party's premises during pendency of suit and after final decree. (Neb. Rev. Stat. 42-357). Custody shall be determined on basis of children's ``best interests''. Grandparent visitation rights provided for in certain instances. Court may order employer of parent-employee to withhold for support of minor child; Department of Social Services may apply to set off against debtor's income tax refund any debt owing for support of minor child. (Neb. Rev. Stat. 42-364.01 to -364.12). Support can be modified upon showing change of circumstance. (202 Neb. 345, 275 N.W.2d 287). Court may order, on its own motion or at request of party, genetic testing to determine paternity. (Neb. Rev. Stat. 43-1414).

Lien of Judgment for Alimony and Child Support.

Same as other judgments except judgment for alimony ceases to be a lien upon property ten years from date of either entry of judgment, most recent payment or most recent execution, whichever date is latest; judgment for alimony or child support not lien after ten years after youngest child becomes of age or dies, or most recent execution, whichever is later, and such lien shall not be reinstated. (Neb. Rev. Stat. 42-371; 157 Neb. 57, 58 N.W.2d 600). Delinquent child support payments draw interest at legal rate and such interest shall be computed as simple interest. (Neb. Rev. Stat. 42-358.02). With approval of court rendering decree person to whom child was committed may execute partial or total release of child support judgment. (Neb. Rev. Stat. 42-371). On application of person desiring release and upon notice to person having custody of child, court may release lien. (Neb. Rev. Stat. 42-371). Upon application and notice, court may release either general or specific property from alimony lien. (Neb. Rev. Stat. 42-371). Judgment for child support does not abate upon death of judgment debtor.

Remarriage.

No restrictions after decree has become final.

Foreign Divorces.

Uniform Divorce Recognition Act (1947, adopted 1949). (Neb. Rev. Stat. 42-341 to -344). Invalid if both parties were domiciled in Nebraska at divorce. (Neb. Rev. Stat. 42-341).

Separation Agreements.

See subhead Division of Property of Spouses, supra.

Antenuptial or Prenuptial Contracts.

See topic Husband and Wife.

14.06 DIVORCE:

See topic Dissolution of Marriage.

14.07 DOMESTIC PARTNERS:

Only marriage between man and woman shall be valid or recognized in Nebraska. Uniting of two persons of same sex in civil union, domestic partnership, or similar same sex relationship shall not be valid or recognized in Nebraska. (Const. Art. I, § 29).

14.08 GUARDIAN AND WARD:

Uniform Probate Code adopted with modifications (1969, adopted 1974). (Neb. Rev. Stat. 30-2201 to -2902). Uniform Durable Power of Attorney Act (1975, adopted 1985). (Neb. Rev. Stat. 30-2664 to -2672).

County courts have exclusive original jurisdiction to appoint guardians and settle their accounts. (Const. Art. V, § 16; Neb. Rev. Stat. 24-517). Venue is in court of county in which minor resides or, in case of nonresident minor, of county where property is situated. (Neb. Rev. Stat. 30-2609). Conflicts of venue and change of venue. (Neb. Rev. Stat. 30-2212).

Selection and Appointment of Guardian.

Surviving parent may appoint guardian by will. (Neb. Rev. Stat. 30-2606). Where no such appointment guardian is selected by court, unless minor is over 14, in which case minor may select guardian subject to approval of court. (Neb. Rev. Stat. 30-2610).

Temporary guardian may be appointed pending hearing on appointment of regular guardian. (Neb. Rev. Stat. 30-2626).

Eligibility and Competency.

Parents or surviving parent are natural guardians. (Neb. Rev. Stat. 30-2608). Court may appoint as guardian any person whose appointment would be in best interests of minor. Court shall appoint person nominated by minor 14 or older, unless contrary to minor's best interests. (Neb. Rev. Stat. 30-2610).

Guardian or conservator may be required to give bond for faithful performance of duty. (Neb. Rev. Stat. 30-2640).

Qualification.

State Court Administrator shall approve training curricula for persons appointed as guardians and conservators. Statutes list content of curricula. (Neb. Rev. Stat. 30-2601.01). Court may appoint as guardian any person whose appointment would be in best interests of minor. Court shall appoint person nominated by minor, if minor is 14 years of age or older, unless court finds appointment contrary to best interests of minor. (Neb. Rev. Stat. 30-2610).

Inventory.

Consult general powers and duties of guardian. (Neb. Rev. Stat. 30-2613).

Powers and Duties.

Guardian of minor has powers and responsibilities of parent who has not been deprived of custody of his minor and unemancipated child. General powers and duties specified in Neb. Rev. Stat. 30-2613.

Listing for Taxation.

Guardian must list ward's personal property for taxation. (Neb. Rev. Stat. 77-1201 and -1229).

Investments.

Prudent investor rules apply. (Neb. Rev. Stat. 30-3201). See category Estates and Trusts, topic Trusts.

Securities in Name of Nominee.

See category Estates and Trusts, topic Trusts, subhead Securities in Name of Nominee.

Real Estate.

Generally under Uniform Probate Code property of ward, including real estate is subject to control of conservator rather than guardian. Guardian has limited power with court approval. (Neb. Rev. Stat. 30-2613).

Accounts.

Guardian must, upon expiration of guardianship, settle account with court or ward and deliver and pay over effects then in his hands. (Neb. Rev. Stat. 30-2613).

Insane Person.

Guardian appointed by county court on application of relative or friend of incompetent or any interested person after notice to incompetent. (Neb. Rev. Stat. 30-2619). County court of county where nonresident incompetent owns property may also appoint guardian for nonresident. (Neb. Rev. Stat. 30-2618). See Uniform Durable Power of Attorney Act. (Neb. Rev. Stat. 30-2664 to -2672).

Foreign Guardians.

No provision. However foreign conservator may act with all powers of local conservator after filing with court. (Neb. Rev. Stat. 30-2661). See Uniform Durable Power of Attorney Act. (Neb. Rev. Stat. 30-2664 to -2672).

Use of Principal.

Under certain circumstances guardian of minor may, with approval of court, use principal for support and education of minor. (Neb. Rev. Stat. 30-2613).

Gifts to Minors.

See topic Infants. Uniform Gifts to Minors Act adopted as Nebraska Uniform Transfers to Minors Act. (Neb. Rev. Stat. 43-2701 to -2724).

Termination of Guardianship.

On minor's becoming of age, being adopted or married or dying; or death, resignation or removal of guardian (Neb. Rev. Stat. 30-2614), or incompetent being adjudicated competent (Neb. Rev. Stat. 30-2623), or death of guardian or ward (Neb. Rev. Stat. 30-2622).

Fees Payable to County Court.

Appointment of guardian or conservator, $22; consolidated appointment of both guardian and conservator, $22; successor guardian or conservator, $22; temporary guardian or temporary or special conservator, $22; protective order in absence of guardianship or conservatorship, $22.

Only one fee assessed if more than one ward listed in petition for guardian or conservator. For each report filed, $5 while guardianship or conservatorship pending; appointment of custodian, $22. (Neb. Rev. Stat. 33-126.02).

Uniform Child Custody Jurisdiction and Enforcement Act (1997, adopted 2003). (Neb. Rev. Stat. 43-1226 to -1266).

Uniform Fiduciaries Act not adopted.

Uniform Veterans' Guardianship Act not adopted.

Uniform Simplification of Fiduciary Security Transfers Act repealed.

See also category Estates and Trusts, topic Executors and Administrators.

14.09 HUSBAND AND WIFE:

Separate Property.

Property which woman owns at time of marriage and issue thereof and property which comes to her by descent, devise or gift of any person except her husband or which she acquires by purchase or otherwise, is her sole and separate property, and is not subject to disposal of her husband or liable for his debts; but all property of married woman, not exempt by law from sale on execution or attachment, is liable for debts contracted for necessaries furnished her family after execution against husband has been returned unsatisfied. (Neb. Rev. Stat. 42-201).

Any woman married out of state, if her husband afterwards becomes resident of the state, enjoys all rights as to property acquired by laws of any other state, territory or country or by virtue of any marriage contract or settlement made out of this state. (Neb. Rev. Stat. 42-204). Nothing in statute invalidates any marriage settlement or contract. (Neb. Rev. Stat. 42-205).

Contracts.

Married woman may bargain, sell and convey her real and personal property and enter into any contract concerning same, as freely as married man (Neb. Rev. Stat. 42-202), but in order for her contract to bind her it must be made in reference to, or with intent to bind, her separate property, trade or business (121 Neb. 847, 238 N.W. 750). She may contract with her husband as with third person and may become bound as surety for her husband or any other person. She may carry on any trade or business and perform any labor or service on her own account and her earnings are her sole and separate property, to be used and invested by her in her own name. (Neb. Rev. Stat. 42-203).

Antenuptial Contracts.

Uniform Premarital Agreement Act (1983, adopted 1994). (Neb. Rev. Stat. 42-1001 to -1011).

Property of husband is not liable for debts of wife contracted before marriage. (Neb. Rev. Stat. 42-206).

Actions.

Married women may sue and be sued as if unmarried (Neb. Rev. Stat. 25-305), and defend in own name; if sued with husband may also defend his right if he neglects to do so (Neb. Rev. Stat. 25-306). One spouse can sue the other to enforce contract and property rights (9 Neb. 16, 2 N.W. 221; 72 Neb. 845, 101 N.W. 989); interspousal tort immunity abrogated (203 Neb. 537, 279 N.W.2d 382).

Agency.

Agency may be created by slight circumstances. (212 Neb. 826, 326 N.W.2d 179).

Conveyances or Encumbrance of Property.

If both husband and wife are residents of this state, each must join in a conveyance of the real estate of the other in order to cut off his or her statutory rights therein. (200 Neb. 672, 264 N.W.2d 865; see Neb. Rev. Stat. 40-103). Married woman who joins in conveyance of her husband's property for sole purpose of relinquishing her statutory rights therein is not bound by convenants in deed. (Neb. Rev. Stat. 42-207; 109 Neb. 716, 192 N.W. 195).

Conveyance by way of mortgage or otherwise, or sale or transfer of household goods or any interest therein owned by husband and wife and used by them for their dwelling house, or purchased or held by them or either of them for use of family, is void unless executed and acknowledged by both spouses like real estate conveyance. Special provision is made, however, for conveyance or mortgage where one spouse is insane or incapable of executing instrument. (Neb. Rev. Stat. 42-501).

Desertion and Nonsupport.

Any person who fails to provide support legally obligated to provide, on conviction is guilty of class II misdemeanor; if in violation of court order class IV felony. (Neb. Rev. Stat. 28-706).

Enforcement of Support.

Child Support.—Court may at any time appoint an attorney to initiate contempt proceedings for failure of any party to pay permanent child support upon motion of any aggrieved party in cases where payments are more than 30 days in arrears. (Neb. Rev. Stat. 42-358).

Uniform Interstate Family Support Act (2001, adopted 2003). (Neb. Rev. Stat. 42-701 to -751).

Revised Uniform Reciprocal Enforcement & Support Act. Not adopted.

Community Property Law repealed.

See also topic Guardian and Ward; category Estates and Trusts, topic Executors and Administrators.

14.10 INFANTS:

Age of majority, 19 for both sexes. (Neb. Rev. Stat. 43-2101).

Emancipation.

Marriage of male or female terminates minority. (Neb. Rev. Stat. 43-2101).

Contracts.

Infant's indorsement of negotiable instrument passes property therein although infant incurs no liability thereon. Building and loan association stock may be subscribed for, held, transferred, surrendered, withdrawn or forfeited and payment thereon received and receipted for by any minor with same effect as adult, except that neither the infant nor his estate is bound on subscription to stock except to extent of payment actually made thereon. (Neb. Rev. Stat. 8-318).

Infants may become depositors in any bank and may withdraw funds therefrom. (Neb.

Rev. Stat. 8-135).

Ratification of Contracts.

Common law applies.

Actions.

Infant sues by guardian or next friend and defends by guardian ad litem. Dismissal of action by guardian or next friend must be by approval of court. (Neb. Rev. Stat. 25-307, -310).

Infant heir may maintain action for injury to real estate in time of his ancestor as well as in his own time, unless barred by statute of limitations. (Neb. Rev. Stat. 25-2133).

Child Safety Seats.

Children under age of four or weighing less than 40 pounds must be restrained with appropriate child passenger restraint system while riding in vehicle driven by Nebraska resident. Also, safety belt restriction on children between four and five or over 40 pounds and under age five. (Neb. Rev. Stat. 60-6,267).

Support of Minor.

Parent generally obligated to support minor. (Neb. Rev. Stat. 43-1402).

Parental Responsibility.

Parents jointly and severally liable for willful and intentional infliction of personal injury or destruction of property by minor or unemancipated children limited to actual expenses, not to exceed $1,000 for each occurrence. (Neb. Rev. Stat. 43-801).

Termination of Parental Rights.

Parental rights may be terminated when in best interest of juvenile and juvenile has been abandoned, neglected, parents unfit or upon conditions leading to juvenile court jurisdiction. (Neb. Rev. Stat. 43-292). After termination, care of child may be awarded to State Department of Social Services; Department may consent to adoption. (Neb. Rev. Stat. 43-293). See also topic Adoption, subhead Notification of Father.

Adoption.

See topic Adoption.

Earnings are property of wage earner, parent is only custodian.

Uniform Child Custody Jurisdiction and Enforcement Act. (1997, adopted 2003). (Neb. Rev. Stat. 43-1226 to -1266).

Uniform Transfers to Minors Act adopted. Age of majority under Act is 19. (1986, adopted 1992). (Neb. Rev. Stat. 43-2701 to -2724).

Uniform Securities Ownership by Minors Act not adopted.

14.11 MARRIAGE:

Age of consent: Males and females 17. (Neb. Rev. Stat. 42-102).

Consent Required.

Where party is a minor, written consent under oath required from (1) either parent or parents, if living together, (2) parent having legal custody of minor if parents are separated, (3) surviving parent if one is dead, (4) guardian if both parents dead or guardian has actual custody of minor. Affidavit of person giving consent is sufficient proof of his authority to consent. (Neb. Rev. Stat. 42-105).

Medical Examination.

None.

License.

Must be obtained from Nebraska county clerk. License must be used within one year of issuance. (Neb. Rev. Stat. 42-104).

Waiting Period.

None.

Ceremonial Marriage.

Marriage must be solemnized by authorized person, otherwise invalid. (Neb. Rev. Stat. 42-104). Ceremony may be performed by any judge or minister of the Gospel authorized by usages of church to which he belongs. (Neb. Rev. Stat. 42-108). Marriage according to rites and customs of religious society to which parties belong is valid. (Neb. Rev. Stat. 42-115). No particular form of ceremony is required, but parties must declare that they take each other as husband and wife, and there must be two witnesses besides person performing ceremony. (Neb. Rev. Stat. 42-109). Marriage not invalidated by lack of authority of person performing ceremony if consummated with full belief of either party that marriage was lawful. (Neb. Rev. Stat. 42-114).

Reports of Marriage.

Must be made to county clerk within 15 days after marriage. (Neb. Rev. Stat. 42-108).

Record.

See category Documents and Records, topic Records, subhead Vital Statistics.

Common Law Marriages.

Cannot be contracted in Nebraska since 1923. However, common law marriage validly contracted in another state is recognized. (161 Neb. 782, 74 N.W.2d 919).

Proxy Marriages.

If both parties to the marriage are members of a religious sect which recognizes proxy marriages and the ceremony is conducted in accordance with the rights and customs of the said sect, the marriage is presumably valid; but there is no authoritative decision on this point in Nebraska.

Marriages by Written Contract.

No statute.

Prohibited Marriages.

Marriage is void where: Either party has husband or wife living or has mental disorder at time of marriage; parties (born in or out of wedlock) related as parent and child, grandparent and grandchild, brother and sister (whole or half blood), first cousins of whole blood, uncle and niece or aunt and nephew. (Neb. Rev. Stat. 42-103 and 28-702). Person with venereal disease may not marry. (Neb. Rev. Stat. 42-102). If such person does marry, marriage is voidable, not void. (144 Neb. 763, 14 N.W.2d 613).

Foreign Marriage.

Valid where contracted, is valid in Nebraska. (Neb. Rev. Stat. 42-117).

Annulment.

If marriage is solemnized when either party is under age of legal consent and they separate during such non-age and do not cohabit together afterwards or if consent of one of parties was obtained by force or fraud, and thereafter there is no voluntary cohabitation, marriage is voidable. (Neb. Rev. Stat. 42-118). Actions for annulment brought in same manner as actions for dissolution, except only residency requirement is that petitioner be actual resident of county in which petition is filed. (Neb. Rev. Stat. 42-373). Grounds for annulment: (1) Marriage prohibited by law; (2) impotency; (3) bigamy; (4) mental illness or retardation; (5) force or fraud. (Neb. Rev. Stat. 42-374). Petition may be filed by parent or next friend. Annulment cannot be had if parties freely cohabited after ground for annulment has terminated or become known to innocent party. (Neb. Rev. Stat. 42-375). Children born to annulled marriage are legitimate unless otherwise decreed by court. (Neb. Rev. Stat. 42-377). If court finds a party entered into marriage in good faith supposing other party to be capable of marrying, and marriage is declared a nullity, such fact is grounds for compensatory damages and award of costs and attorney fees. (Neb. Rev. Stat. 42-378).

Time Within Which Annulment Action Must Be Commenced.

No special statute.

Antenuptial Contracts.

See topic Husband and Wife.

MARRIED WOMEN:

Disabilities, see topic Husband and Wife.

15 HEALTH

15.01 ABORTION:

Except as otherwise set forth, notice to parent of unemancipated woman under 18 years or to guardian of incapacitated, disabled, or incompetent woman required to perform abortion. (Neb. Rev. Stat. 71-6901 and -6902).

15.02 ADMINISTRATION:

Uniform Credentialing Act adopted, including professional practice acts (effective Dec. 1, 2008) to regulate persons and business providing health and health-related services and environmental services. (Neb. Rev. Stat. 38-101 to -1,140).

15.03 DISEASES:

Reporting Contagious Diseases.

Physicians shall promptly report discovery of existence of any contagious or infectious diseases Department of Health and Human Services Regulation and Licensure may from time to time specify. Failure to make such report shall be deemed Class V misdemeanor. (Neb. Rev. Stat. 71-503).

Confidentiality and Immunity.

Whenever any statute, ordinance or regulation requires medical practitioners or other persons to report cases of communicable diseases, such reports or notifications and resulting investigations shall be confidential except as provided in this section, shall not be subject to subpoena, and shall be privileged and inadmissible in evidence in any legal proceeding. (Neb. Rev. Stat. 71-503.01). Any person making such reports or notifications shall be immune from suit for slander or libel or breach of privileged communication based on any statements contained in such reports and notifications. (Neb. Rev. Stat. 71-503.01).

Human Immunodeficiency Virus Infection.

Specifies when informed consent is required for human immunodeficiency virus (HIV) testing. (Neb. Rev. Stat. 71-531).

Mental Health Practitioners Duty to Warn.

Mental health practitioner shall have no liability for failing to warn of and protect from patient's threatened violent behavior except when patient has communicated to mental health practitioner serious threat against herself or reasonably identifiable victim or victims. (Neb. Rev. Stat. 38-2137).

Occupational Diseases.

See category Employment, topics Occupational Diseases, Workers' Compensation Law.

15.04 DURABLE POWER OF ATTORNEY:

See category Property, topic Powers of Attorney.

15.05 FOOD, DRUGS, DEVICES AND COSMETICS:

Drugs.

Regulated generally by c. 71, art. 24. Adulteration or misbranding of any drug prohibited. (Neb. Rev. Stat. 71-2401 to -2405). Mail Service Pharmacy Licensure Act (Neb. Rev. Stat. 71-2406 to -2409) requires registration of out-of-state pharmaceutical suppliers providing drugs to individuals within state, except pharmaceutical companies that ship to laboratory for research purposes. Emergency Box Drug Act adopted. (Neb. Rev. Stat. 71-2410 to -2417). Nebraska Drug Product Selection Act adopted. (Neb. Rev. Stat. 71-5401.01 to -2512). Wholesale Drug Distributor Licensing Act (Neb. Rev. Stat. 71-7427 to -7463) implements federal Prescription Drug Marketing Act of 1987. Sale of poisons is regulated. (Neb. Rev. Stat. 71-2501 to -2510).

15.05A HEALTH INSURANCE BENEFITS:

Health Insurance.

Nebraska Life and Health Insurance Guaranty Association Act conforms to National Association of Insurance Commissioners Life and Health Guaranty Fund Model Act. (Neb. Rev. Stat. 44-2701 to -2720). Medicare Supplement Insurance Minimum Standards Act sets forth minimum standards for insurance policies supplementing Medicare coverage. (Neb. Rev. Stat. 44-3601 to -3610). Long-Term Care Insurance Act establishes standards for long-term care insurance. (Neb. Rev. Stat. 44-4501 to -4521). Health Insurance Access Act provides mechanism to allow insurers to provide basic levels of health insurance to those people who are underinsured, are below certain income levels, and are not qualified for income-based assistance programs. (Neb. Rev. Stat. 44-5301 to -5311).

Nebraska Hospital-Medical Liability Act.

(Neb. Rev. Stat. 44-2801 to -2855). Sets forth civil penalties for breach of express or implied contract assuring results (Neb. Rev. Stat. 44-2818), bodily injury or wrongful death (Neb. Rev. Stat. 44-2819), failure to obtain informed consent (Neb. Rev. Stat. 44-2820); and limits amount of recoverable damages (Neb. Rev. Stat. 44-2825).

Nebraska Hospital and Physicians Mutual Insurance Association Act.

(Neb. Rev. Stat. 44-2901 to -2918). Any three or more hospitals located and licensed in this state may incorporate mutual insurance association. (Neb. Rev. Stat. 44-2901). Any ten or more physicians licensed in this state may incorporate mutual insurance association. (Neb. Rev. Stat. 44-2902).

Nebraska Professional Association Mutual Insurance Company Act.

(Neb. Rev. Stat. 44-3101 to -3112). Establishes procedures for organizing and regulating operations of professional association mutual insurance companies within state of Nebraska. (Neb. Rev. Stat. 44-3102).

Prepaid Limited Health Service Organization Act.

(Neb. Rev. Stat. 44-4701 to -4727).

Small Employer Health Insurance Availability Act.

(Neb. Rev. Stat. 44-5223 to -5267).

Group Health Plans.

Regulated generally by c. 44, art. 69.

Health Carrier Grievance Procedure Act.

(Neb. Rev. Stat. 44-7301 to -7315). Provides standards for establishment and maintenance of procedures by health carriers to assure that covered persons have opportunity for appropriate resolution of their grievances as defined in act. (Neb. Rev. Stat. 44-7302).

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15.08 LICENSURE AND CERTIFICATION:

Health Care Facilities.

Health Care Facility Licensure Act. (Neb. Rev. Stat. 71-401 to -464). Division of Public Health of Department of Health and Human Services supervises licensure and promulgates rules and regulations. (Neb. Rev. Stat. 71-410, -413, -432, -457). Operation and maintenance of any health care facility or service requires licensure. (Neb. Rev. Stat. 71-432). Facility or service includes any ambulatory surgical center, assisted living facility, center or home for developmentally disabled, critical access hospital, general acute hospital, health clinic, hospital, intermediate care facility, care facility for mentally retarded, long-term care hospital, mental health center, nursing facility, pharmacy, psychiatric or mental hospital, public health clinic, rehabilitation hospital, skilled nursing facility, substance abuse treatment center, adult day service, home health agency, hospice, or respite care, but does not include in-home personal services agency. (Neb. Rev. Stat. 71-413 and -415).

Managed Care.

Managed Care Emergency Services Act establishes standards for health carriers that offer managed care plans to provide access by covered person to and delivery of emergency services. (Neb. Rev. Stat. 44-6825 to -6833). Health Maintenance Organization Act regulates operation of HMOs. (Neb. Rev. Stat. 44-3292 to -32,180). Managed Care Plan Network Adequacy Act establishes standards for creation and maintenance of networks by health carriers and sets forth requirements for agreements between health carriers offering managed care plans and participating providers. (Neb. Rev. Stat. 44-7101 to -7112).

Professionals.

Licensing requirements specified for advanced practice registered nurses (Neb. Rev. Stat. 38-201 to -212), alcohol and drug counselors (Neb. Rev. Stat. 38-301 to -321), athletic trainers (Neb. Rev. Stat. 38-401 to -414), audiologists and speech-language pathologists (Neb. Rev. Stat. 38-501 to -527), certified nurse midwives (Neb. Rev. Stat. 38-601 to -618), registered nurse anesthetists (Neb. Rev. Stat. 38-701 to -711), chiropractors (Neb. Rev. Stat. 38-801 to -811), clinical nurse specialists (Neb. Rev. Stat. 38-901 to -910), cosmetology, electrology, nail technology, and body art practitioners (Neb. Rev. Stat. 38-1001 to -10,171), dentists (Neb. Rev. Stat. 38-1101 to -1151), out-of-hospital emergency medical providers (Neb. Rev. Stat. 38-1201 to -1237), environmental health specialists (Neb. Rev. Stat. 38-1301 to -1315), funeral directors and embalmers (Neb. Rev. Stat. 38-1401 to -1428), hearing aid instrument dispensers and fitters (Neb. Rev. Stat. 38-1501 to -1518), licensed practical nurses (Neb. Rev. Stat. 38-1601 to -1625), massage therapists (Neb. Rev. Stat. 38-1701 to -1715), medical nutritionists (Neb. Rev. Stat. 38-1801 to -1816), medical radiographers (Neb. Rev. Stat. 38-1901 to -1920), physicians and surgeons (including osteopathic physicians) (Neb. Rev. Stat. 38-2001 to -2061), mental health practitioners (Neb. Rev. Stat. 38-2101 to -2139), registered nurses (Neb. Rev. Stat. 38-2201 to -2236), nurse practitioners (Neb. Rev. Stat. 38-2301 to -2323), nursing home administrators (Neb. Rev. Stat. 38-2401 to -2425), occupational therapists (Neb. Rev. Stat. 38-2501 to -2531), optometrists (Neb. Rev. Stat. 38-2601 to -2623), perfusionists (Neb. Rev. Stat. 38-2701 to -2712), pharmacists (Neb. Rev. Stat. 38-2801 to -28,103), physical therapists (Neb. Rev. Stat. 38-2901 to -2929), podiatrists (Neb. Rev. Stat. 38-3001 to -3012), psychologists (Neb. Rev. Stat. 38-3101 to -3132), respiratory care practitioners (Neb. Rev. Stat. 38-3201 to -3216), and veterinarians (Neb. Rev. Stat. 38-3301 to -3330).

Uniform Credentialing Act adopted, including professional practice acts (effective Dec. 1, 2008) to regulate persons and business providing health and health-related services and environmental services. (Neb. Rev. Stat. 38-101 to -1,140).

Nebraska Health Care Certificate of Need Act.

Neb. Rev. Stat. 71-5801 to -5870.

Nebraska Regulation of Health Professions Act.

Neb. Rev. Stat. 71-6201 to -6229.

Nursing Homes.

Regulated generally by Neb. Rev. Stat. 71-6008 to -6037.

See also Neb. Rev. Stat. 71-401 to -464, -516 to -516.04, -2084 to -2096, -6043 to -6052, and -8401 to -8407.

15.08A LIVING WILLS:

See category Estates and Trusts, topic Wills, subhead Living Wills.

Uniform Health Care Decisions Act not adopted.

ORGAN DONATION:

Uniform Anatomical Gift Act adopted. (1968, adopted 1971). (Neb. Rev. Stat. 71-4801 to -4812).

PATIENT'S BILL OF RIGHTS:

Uniform Health Care Information Act not adopted.

Access to Medical Records.

Access to patient's medical records by such patient must be provided upon request pursuant to Neb. Rev. Stat. 71-8401 to -8407, except that mental health medical records may be withheld if any treating physician, psychologist, or mental health practitioner determines in her professional opinion that release of records would not be in best interest of patient, unless release is required by court order. (Neb. Rev. Stat. 71-8403).

Child/Vulnerable Adult Abuse Reporting Requirement.

When healthcare professional has reasonable cause to believe that vulnerable adult or child has been subjected to abuse he or she must report abuse incident to law enforcement. (Neb. Rev. Stat. 28-372 and 28-711).

PUBLIC HEALTH:

Nebraska Medical Assistance Program (NMAP or Medicaid) provided for by Neb. Rev. Stat. 68-901 to -967. Administered by state Department of Health and Human Services. Available to low income persons who are aged, blind, disabled, children and meet eligibility requirements.

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15.13 SMOKING REGULATIONS:

Clean Indoor Air Act.

Nebraska Clean Air Indoor Air Act adopted. (Neb. Rev. Stat. 71-5716 to -5934). Except as otherwise provided, no person may smoke in place of employment or public place. (Neb. Rev. Stat. 71-5729). Proprietor must take necessary steps to ensure compliance. (Neb. Rev. Stat. 71-5731). First offense failure to comply constitutes Class V misdemeanor; second and subsequent offenses constitute Class IV misdemeanors. (Neb. Rev. Stat. 71-5733).

16 INSURANCE

16.01 INSURANCE COMPANIES:

Companies may be organized for variety of kinds of insurance. (Neb. Rev. Stat. 44-201). They may be formed on stock or mutual or fraternal plans, or, subject to certain requirements, on assessment plan. (Neb. Rev. Stat. 44-202). Domestic company may perform activities reasonably complementary or supplementary to its insurance business and may in certain circumstances act as trustee or fiduciary in administration of pension, profit-sharing and other benefit plans. (Neb. Rev. Stat. 44-202). Mutual insurance company must maintain minimum surplus of at least $1,000,000 if transacting in life or variable life insurance and $2,000,000 if transacting in multiple lines. (Neb. Rev. Stat. 44-219). All lines insurers must maintain minimum surplus of at least $2,000,000. (Neb. Rev. Stat. 44-243).

Insurance Companies.

Regulated by Neb. Rev. Stat. 44-101.01.

Supervision by Nebraska Department of Insurance, Ann M. Frohman, Director, Terminal Building, 941 O Street, Suite 400, Lincoln, NE 68508-3639.

Rates.

Neb. Rev. Stat. 44-361; 44-5001 to -5039; 44-360.

Annual statements must be filed with Director. (Neb. Rev. Stat. 44-244, -322).

Policies.

Life, sickness, and accident insurance. (Neb. Rev. Stat. 44-701 to -7,103). Fire insurance. (Neb. Rev. Stat. 44-601 to -606). Fire, auto, life, sickness, accident, and casualty insurance form requirements. (Neb. Rev. Stat. 44-501 to -531). Group insurance. (Neb. Rev. Stat. 44-1601 to -1645). Title insurance. (Neb. Rev. Stat. 44-1978 to -19,123).

Discrimination.

Department of Insurance must issue regulations for all plans providing retirement, disability, sickness, accident, or death benefits which are established, participated in, or administered by domestic insurance companies. Standards prescribed shall prohibit discrimination in favor of officers and supervisory or highly compensated personnel. (Neb. Rev. Stat. 44-213.02). Insurer may not discriminate against Department of Health and Human Services. (Neb. Rev. Stat. 44-3,148). No sickness and accident insurer shall make or permit any unfair discrimination between individuals of substantially same hazard in amount of premium rates charged for any policy or contract of such insurance or in benefits payable thereunder. (Neb. Rev. Stat. 44-749). Discrimination may constitute unfair trade practice. (Neb. Rev. Stat. 44-1525). Insurers prohibited on discriminating on basis of abuse. (Neb. Rev. Stat. 44-7401 to -7410).

Rebates.

Prohibited. (Neb. Rev. Stat. 44-361). Those in violation may be subject to penalties. (Neb. Rev. Stat. 44-367).

Unfair practices defined and prohibited. (Neb. Rev. Stat. 44-1524, -1525, -1540, and -2143).

Reports.

On or before Mar. 1 of each year every company authorized to do business in state must file annual report on forms furnished by Department. (Neb. Rev. Stat. 44-322). Fraternal beneficiary society must file report at same time (Neb. Rev. Stat. 44-1097), also must provide valuation of certificates in force Dec. 31 previous.

No insurance company can transact business without certificate of authority from Department of Insurance. Certificate expires Apr. 30 and must be renewed annually. (Neb. Rev. Stat. 44-303).

Agents and Brokers.

Insurance Producers Licensing Act (Neb. Rev. Stat. 44-4047 to -4067). Agent or broker must be licensed unless: (1) not receiving commission; (2) strictly salaried clerical or administrative services; (3) person who secures and furnishes information for group life, enrolling individuals under such insurance plans or issuing certificates thereunder; or administering plans, if no commission paid; (4) person administering employee benefit plan if person/employee is not compensated by insurance company; (5) employees or insurers or organizations employed by insurers who are engaging in inspection, rating, or classification of risks or in supervision of insurance producers not engaged in sale, solicitation, or negotiation of insurance; (6) person whose activities in state are limited to advertising without intent to solicit insurance in state; (7) person not resident of state who sells, solicits, or negotiates contract of insurance for commercial property and casualty risks to insured with risks located in more than one state insured under contract if that person is otherwise licensed to sell insurance in state where insured maintains its principal place of business; (8) salaried full-time employee who advises employer relative to insurance interests of employer if employee does not sell insurance or receive commission. (Neb. Rev. Stat. 44-4051).

Agent who is nonresident shall receive nonresident license if currently licensed as resident and in good standing in home state. (Neb. Rev. Stat. 44-4055). Reciprocity.

Application for license made to Director of Insurance and accompanied by fee established by Director subject to statutory limitations. (Neb. Rev. Stat. 44-4052 to -4053). Written exam required. (Neb. Rev. Stat. 44-4052 to -4053). Exam fee not to exceed $100. (Neb. Rev. Stat. 44-4052 to -4064). Temporary license can be issued: (1) To surviving spouse, personal representative, legal guardian, employer of personal representative, or employee of deceased or incapacitated agent; (2) to designee of licensed agent entering active service in armed forces; (3) in discretion of Director to agency required to be licensed; (4) in other circumstances which Director deems to be in public interest. (Neb. Rev. Stat. 44-4058).

Other Fees.

Filing of documents, papers, statements, etc., required by law upon entry of foreign or alien insurers, statistical agents, or advisory organizations, $300. Amendment to articles of incorporation, $20. Restated articles of incorporation, $20. Renewing certificate of authority or statistical agents, $100, unless domestic assessment association, doing business in less than 31 counties, then $20. Certified copy of articles of merger, $50. Annual statement, $200. Certificate of valuation, deposit, compliance, or other certificate, $5. Filing reports required from unincorporated mutual associations, $5. Copying, 50¢ per page. Review of documents for admission of foreign or domestic insurer, nonrefundable, $1,000. (Neb. Rev. Stat. 44-114).

Investments.

Insurers Investment Act. (Neb. Rev. Stat. 44-5101 to -5154).

Foreign Insurance Companies.

Foreign company must file in office of Dept. of Insurance authenticated copies of articles of incorporation or charter and by-laws, including all amendments, with certificate of officer having custody of articles or charter, under seal of his office, that company is authorized under laws of state or country where incorporated to do business therein; certificate showing amount of capital stock and assets; and duly certified copy of last annual statement made in state or country where organized, and must furnish such other information as Department requires. (Neb. Rev. Stat. 44-304). Such company must have unimpaired capital stock, if stock company or unimpaired net assets, if mutual company, equal to minimum paid up capital or assets required for domestic company. Alien company must deposit with insurance department of some state of U.S. not less than $200,000 in approved securities for benefit of policyholders in U. S. (Neb. Rev. Stat. 44-305).

Retaliation Laws.

Authorizes Department of Insurance, in case any state imposes on Nebraska companies requirements as to deposits, taxes, fines, penalties, license fees, loan, surrender or nonforfeiture values to policy holders, certificates of solvency and good management, etc., in excess of gross requirements imposed by Nebraska on foreign companies generally, to impose same requirements on companies of such state. (Neb. Rev. Stat. 44-150 to -152).

Motor Club Services Act adopted to provide services to motorists, including insurance for injury or death. (Neb. Rev. Stat. 44-3701 to -3721).

Nebraska Hospital-Medical Liability Act adopted to provide alternative method for determining malpractice claims. (Neb. Rev. Stat. 44-2801 to -2855).

Nebraska Hospital and Physicians Mutual Insurance Association Act adopted. (Neb. Rev. Stat. 44-2901 to -2918).

Premium Tax.

See subhead Taxation.

Privilege Tax.

See subhead Taxation.

Process.

Procuring certificate of authority to do business in this state constitutes sufficient contact with state for exercise of personal jurisdiction over company. (Neb. Rev. Stat. 44-135 and -1204).

Taxation.

Every insurance company, except fraternal benefit societies, transacting business in Nebraska shall on or before Mar. 1 of each year pay to Director 1% of gross amount of direct writing premiums received by it during preceding calendar year; except that: (1) For group sickness/accident rate is.5 of 1%, (2) for property/casualty, excluding individual sickness/accident, rate shall be 1%. Taxable premiums shall include premiums paid on lives of persons residing in this state and risks located in this state whether or not insurance was written in Nebraska. (Neb. Rev. Stat. 77-908).

If tax not paid, Director may revoke license. (Neb. Rev. Stat. 77-911).

Other Insurance Taxes.

See category Business Organizations, topic Corporations.

Uniform Insurers Liquidation Act. Not adopted.

No-Fault Insurance. See category Transportation, topic Motor Vehicles, subhead No-Fault Insurance.

Plain Language.

Nebraska Life, Sickness and Accident Insurance Policy Readability Act. (Neb. Rev. Stat. 44-3401 to -3408). See category Business Regulation and Commerce, topic Consumer Protection.

Prepaid Limited Health Service Organization Act. (Neb. Rev. Stat. 44-4701 to -4727).

Property and Casualty Insurance Rate and Form Act. (Neb. Rev. Stat. 44-7501 to -7535).

16.02 SURETY AND GUARANTY COMPANIES:

Classified as surety, mortgage guaranty or financial guaranty insurance companies, and are subject to same general provisions as regards incorporation, operation and supervision as other insurance companies. Department of Insurance has general supervision. (Neb. Rev. Stat. 44-101.01).

17 INTELLECTUAL PROPERTY

17.01 TRADEMARKS AND TRADENAMES:

What May Be Used.

Neb. Rev. Stat. 87-129, -132, and -209.

Registration.

Any person who adopts or uses a trademark in this state may file in office of Secretary of State, an application for registration of that trademark setting forth: (a) Name and street address of person applying for such registration; and, if corporation, state of incorporation and if partnership, state where organized and names of general partners; (b) goods or services in connection with which mark is used and mode or manner in which mark is used in connection with such goods and class in which such goods fall; (c) date when trademark was first used anywhere and date when it was first used in this state by applicant or his predecessor in business; and (d) statement that applicant is owner of trademark, that mark is in use, and that no other person has right to use such trademark in this state either in identical form thereof or in such near resemblance thereto as might be calculated to deceive or to be mistaken therefor. Application for trademark shall be signed and verified by oath, affirmation or declaration by applicant, member of firm, or officer of corporation or association. Application must be submitted in duplicate and accompanied by three specimens showing mark as actually used. Application fee is $100. (Neb. Rev. Stat. 87-130).

Trademark, by which goods or services of any applicant for registration may be distinguished from goods and services of others shall not be registered if it consists of immoral, deceptive, scandalous, misleading matter, or so resembles a trademark already registered or used in this state so as to cause confusion or deception. (Neb. Rev. Stat. 87-129).

Registration shall be effective for a term of ten years, and within six months prior to expiration of term registration may be renewed for successive ten year periods. Renewal fee is $100. Secretary of State shall notify registrants of necessity of renewal within year next preceding expiration of ten years from date of registration or of last renewal, by writing to registrant's last known address. (Neb. Rev. Stat. 87-133).

Any trademark and its registration hereunder shall be assignable with goodwill of business in which trademark is used, or with that part of goodwill of business connected with use of and symbolized by trademark. (Neb. Rev. Stat. 87-134).

Violations in use of trademark subject such violator to civil liability to owner of registered trademark. (Neb. Rev. Stat. 87-139).

Assignment.

Trademark (Neb. Rev. Stat. 87-134) or tradename (Neb. Rev. Stat. 87-212) is assignable with goodwill of business in which it is used.

Protection Afforded.

Any person who (1) uses, without consent of registrant, any reproduction, counterfeit, copy, or colorable imitation of mark registered under Trademark Registration Act in connection with sale, distribution, offering for sale, or advertising of any goods or services on or in connection with which such use is likely to cause confusion or mistake or to deceive as to source of origin of such goods or services or (2) reproduces, counterfeits, copies, or colorably imitates any such mark and applies such reproduction, counterfeit, copy, or colorable imitation to labels, signs, prints, packages, wrappers, receptacles, or advertisements intended to be used upon or in connection with sale or other distribution in this state of such goods or services, is liable in civil action. (Neb. Rev. Stat. 87-139). Injunction, damages, and attorney's fees prescribed by (Neb. Rev. Stat. 87-141). Misuse of trade name enforced by civil action. (Neb. Rev. Stat. 87-216). Injunctions, damages, and attorney's fees available for misuse of trade name. (Neb. Rev. Stat. 87-217).

Infringement.

Any person who (1) uses, without consent of registrant, any reproduction, counterfeit, copy, or colorable imitation of mark registered under Trademark Registration Act in connection with sale, distribution, offering for sale, or advertising of any goods or services on or in connection with which such use is likely to cause confusion or mistake or to deceive as to source of origin of such goods or services or (2) reproduces, counterfeits, copies, or colorably imitates any such mark and applies such reproduction, counterfeit, copy, or colorable imitation to labels, signs, prints, packages, wrappers, receptacles, or advertisements intended to be used upon or in connection with sale or other distribution in this state of such goods or services, is liable in civil action. (Neb. Rev. Stat. 87-139). Injunction, damages, and attorney's fees prescribed by Neb. Rev. Stat. 87-141.

Trade Names.

Any person who adopts trade name for use in this state may file in office of Secretary of State on form furnished by Secretary of State application for registration of trade name setting forth: (a) Name and street address of applicant for registration; and, if corporation, state of incorporation; (b) trade name sought to be registered; (c) general nature of business in fact conducted by applicant; (d) length of time during which trade name has been used in this state; (e) signature of applicant; and (f) filing fee of $100. (Neb. Rev. Stat. 87-210).

Trade name consisting of immoral, deceptive, or scandalous matter, misleading or so resembling trade name already registered in this state or name of corporation doing business within state, so as to be confusing or deceptive shall not be registered. (Neb. Rev. Stat. 87-209).

Registration of trade name shall be effective for term of ten years, and within six months prior to expiration date of term registration may be renewed for successive ten year periods. Renewal fee is $100. Secretary of State shall notify registrants of necessity of renewal within year next preceding expiration of ten years from date of registration or of last renewal, by writing to registrant's last known address. (Neb. Rev. Stat. 87-211).

Any trade name so registered shall be assignable with goodwill of business. Assignment fee is $5. (Neb. Rev. Stat. 87-212).

Violation in use of trade name subjects such violator to civil liability to registrant of trade name. (Neb. Rev. Stat. 87-216).

Any person, not excepted by 87-210, who shall engage in or transact any business in state under trade name without registering such trade name shall be guilty of Class V misdemeanor. (Neb. Rev. Stat. 87-220).

Owner of farm, ranch or home may upon payment of $1 have name thereof recorded with county clerk of county where located, and thereupon no other farm, ranch or home in same county may use such name unless plain designating words are prefixed or affixed or both. Transfer of registration may also be recorded. (Neb. Rev. Stat. 23-1313).

Fair Trade Act unconstitutional. (159 Neb. 703, 68 N.W.2d 608).

Uniform Deceptive Trade Practices Act (1966, adopted 1969) (Neb. Rev. Stat. 87-301 to -306). See category Business Regulation and Commerce, topic Consumer Protection.

17.02 TRADE SECRETS:

Nebraska has adopted Uniform Trade Secrets Act which makes illegal misappropriation or disclosure of trade secret (1985, adopted 1988). (Neb. Rev. Stat. 87-501 to -507). Statute of limitations is four years. (Neb. Rev. Stat. 87-506).

18 LEGAL PROFESSION

18.01 ATTORNEYS AND COUNSELORS:

Integrated Bar.

Nebraska bar has been integrated under rules promulgated by Supreme Court. All practicing attorneys must be members of Nebraska State Bar Association, annual dues $220 for first five years of practice and $320 per year thereafter, judicial active $320, inactive fee is $85, senior active (75 years old) is $145.

Jurisdiction over Admissions.

Supreme Court has control over admission to practice (Neb. Rev. Stat. 7-102) and has promulgated rules for admission.

Eligibility.

Each applicant must file with secretary of bar commission written request for admission and personal affidavit as to applicant's age, residence, and time and place of study and degree, or admission and period of practice in courts of record in another state, District of Columbia, or territory, together with certificates or affidavits of at least two citizens of good standing in community where applicant resides, or formerly resided, and such other information as bar commission may require.

Record manifesting significant deficiency by applicant in one or more of following essential eligibility requirements for practice of law may constitute basis for denial of admission. In addition to admission requirements otherwise established by these rules, essential eligibility requirements for admission to practice of law in Nebraska are: (A) Ability to conduct oneself with high degree of honesty, integrity, and trustworthiness in all professional relationships and with respect to all legal obligations; (B) ability to conduct oneself diligently and reliably in fulfilling all obligations to clients, attorneys, courts, and others; (C) ability to conduct oneself with respect for and in accordance with law and Nebraska Rules of Professional Conduct; (D) ability to communicate clearly with clients, attorneys, courts, and others; (E) ability to reason, analyze, and recall complex factual information and to integrate such information with complex legal theories; (F) ability to exercise good judgment in conducting one's professional business; (G) ability to avoid acts that exhibit disregard for health, safety, and welfare of others; (H) ability to use honesty and good judgment in financial dealings on behalf of oneself, clients, and others; (I) ability to comply with deadlines and time constraints; (J) ability to conduct oneself professionally and in manner that engenders respect for law and profession.

Registration as Law Student.

Not required.

Educational Requirements.

All applicants must have received at time of examination their first professional degree from law school approved by American Bar Association. Applicant without first degree from approved law school shall be permitted to take examination if such applicant will receive first degree from approved law school within 60 days after date of examination taken.

Petition for Admission.

Contents prescribed by Neb. Rev. Stat. 7-102.

Clerkship.

No requirement.

Admission on Examination.

Examination is given twice annually by Commission appointed by Supreme Court. Application for admission must be made at least four weeks prior to examination. Applicant must be citizen of U.S., 21 years old, resident of Nebraska, of good moral character and hold LL.B. or J.D. degree from accredited law school. Examinations are held on day set for National Multi-state Bar Examination and day following each year. List of subjects to be covered by examination is published by Commission and includes use of Multi-State Exam and Nebraska law on Agency, Commercial Paper, Conflicts, Corporations, Equity, Family, Jurisdiction, Partnerships, Probate, Property, Practice, Professional Responsibility, Reg. Industry, Tax, Trusts & Wills. Multi-State scores of other states not accepted. Fee of $515 must accompany application. Applicants must also pass Multi-State Professional Responsibility Exam.

Admission Without Examination.

Supreme Court may admit on motion, without examination, any practicing attorney upon proof of his having, at time of his admission in another state, qualifications equal to those presently required in this state or upon proof that he has practiced law at least five full years in another state and proving good moral character. Fee, $700, if practicing less than one year; $950 if practicing more than one year. (Neb. Rev. Stat. 7-109).

Admission Pro Hac Vice.

Practicing attorneys admitted in other states may be admitted on motion and taking oath for appearance in a particular case if associate is a Nebraska practicing lawyer; not required to comply with this provision if from state whose laws permit practicing attorneys of other states to practice in their courts without association with local attorney. (Neb. Rev. Stat. 7-103).

Licenses.

Membership dues in following amounts are due on or before Jan. 1 for year of membership. Regular Active, $355; Judicial Active, $355; Junior Active, $240; Senior Active, $150; Military Active, $0; Inactive, $105; Emeritus Inactive, $0.

Powers.

May execute in name of client bond for an appeal, or any other paper necessary and proper for prosecution of suit already commenced; may bind client by agreement in respect to any proceeding within scope of proper duties and powers; may receive money claimed by client in action or proceedings, during pendency thereof or afterward, unless previously discharged by client, and upon payment thereof, may discharge claim or acknowledge satisfaction of judgment. (Neb. Rev. Stat. 7-107).

Disabilities.

Practicing attorney may not be taken as surety on any official bond or bond in any legal proceeding in district in which he resides. (Neb. Rev. Stat. 11-114).

Liabilities.

See category Civil Actions and Procedure, topic Costs.

Compensation.

Lawyer shall not make agreement for, charge, or collect unreasonable fee or unreasonable amount for expenses. Scope of representation and basis or rate of fee and expenses for which client will be responsible shall be communicated to client, preferably in writing, before or within reasonable time after commencing representation, except when lawyer will charge regularly represented client on same basis or rate. Any changes in basis or rate of fee or expenses shall also be communicated to client. Fee may be contingent on outcome of matter for which service is rendered, except in matter in which contingent fee is prohibited by paragraph (d) or other law. Contingent fee agreement shall be in writing signed by client and shall state method by which fee is to be determined, including percentage or percentages that shall accrue to lawyer in event of settlement, trial or appeal; litigation and other expenses to be deducted from recovery; and whether such expenses are to be deducted before or after contingent fee is calculated. Agreement must clearly notify client of any expenses for which client will be liable whether or not client is prevailing party. Upon conclusion of contingent fee matter, lawyer shall provide client with written statement stating outcome of matter and, if there is recovery, showing remittance to client and method of its determination. Lawyer shall not enter into arrangement for, charge, or collect: any fee in domestic relations matter, payment or amount of which is contingent upon securing of divorce or upon amount of alimony or support, or property settlement in lieu thereof; or contingent fee for representing defendant in criminal case.

Lien.

Attorney has lien for general balance of compensation upon any papers of his client which have come into his possession in course of his professional employment; and upon money in his hands belonging to his client, and in hands of adverse party in action or proceeding in which attorney was employed from time of giving notice of lien to that party. (Neb. Rev. Stat. 7-108).

Disbarment or Suspension.

Violation of professional rules of conduct or other violations of law may result in disbarment or suspension.

Unauthorized Practice.

No person may practice as attorney or counselor at law, or commence, conduct or defend any action or proceeding to which he is not party, either by using or subscribing his own name, or name of any other person, or by drawing pleadings or other papers to be signed and filed by party, in any court of record, unless he has been previously admitted to bar by order of Supreme Court. No such paper may be received or filed in any action or proceeding unless same bears endorsement of some admitted attorney, or is drawn, signed, and presented by party to action or proceeding. Violation is Class III misdemeanor. (Neb. Rev. Stat. 7-101).

Special committees are established for hearing complaints against attorneys. Disbarment proceedings are before Supreme Court under special rules of procedure. (Revised Rules of Supreme Court, Disciplinary Proceedings).

Mandatory Continuing Legal Education.

Beginning Jan. 1, 2010, all active Nebraska attorneys must obtain ten hours of continuing legal education each year, two credits of which need to meet definition of professional responsibility. (Neb. Ct. R. 3-401.1 to -402.3).

Ethics.

American Bar Association's Code of Professional Responsibility as in effect Mar., 1984, together with amendments and additions approved by Nebraska Supreme Court through July, 1990, adopted as standard for Nebraska Association.

Specialty Certification Requirements.

None.

Professional Association.

See category Business Organizations, topic Corporations, subhead Professional Corporations.

19 MINERAL, WATER AND FISHING RIGHTS

19.01 MINES AND MINERALS:

State aid for coal and iron development (Neb. Rev. Stat. 57-101) industries. All pipe lines are under jurisdiction of Public Service Commission. (Neb. Rev. Stat. 75-501). Statute makes provision as to forfeiture of oil, gas and mineral leases. (Neb. Rev. Stat. 57-201). Executors, guardians, etc., may grant easements for pipe lines by obtaining proper license from court. (Neb. Rev. Stat. 57-401 and -402). Neb. Rev. Stat. 77-802 provides for taxation of public services on basis of original cost of all property in tax subdivision to original cost of all property located in state.

Department of Environmental Quality regulates uranium mining. (Neb. Rev. Stat. 81-1531.02). Department of Environmental Quality generally responsible for regulating air and water quality. (Neb. Rev. Stat. 81-1504).

Operation of Mines.

Uranium mining by any method other than mineral production and injection wells shall be prohibited until legislation is passed authorizing Department to regulate such mining activities. (Neb. Rev. Stat. 81-1531.02). Department of Environmental Quality shall establish regulations for uranium mining. (Neb. Rev. Stat. 81-1531.02).

Safeguarding of Employees.

No statutory provisions.

Inspection of Mines.

No statutory provisions.

Oil and Gas.

Oil and gas leases. (Neb. Rev. Stat. 57-201 to -224). Oil field equipment lien. (Neb. Rev. Stat. 57-301 to -304). Easements for oil and gas pipelines. (Neb. Rev. Stat. 57-401 to -402). Liquidified petroleum gas. (Neb. Rev. Stat. 57-501 to -517). Underground storage of natural gas. (Neb. Rev. Stat. 57-601 to -609). Oil and gas liens. (Neb. Rev. Stat. 57-801 to -820). Eminent domain for pipelines. (Neb. Rev. Stat. 57-1101 to -1106).

Taxes.

Oil and gas severance tax. (Neb. Rev. Stat. 57-701 to -719). Uranium severance tax. (Neb. Rev. Stat. 57-1201 to -1214).

20 MORTGAGES

20.01 CHATTEL MORTGAGES:

Uniform Commercial Code in effect. See category Business Regulation and Commerce, topic Commercial Code.

Filing.

$10 for first page plus $.50 per each additional page. (Neb. UCC 9-525).

What May be Mortgaged.

Uniform Commercial Code governs. (Neb. UCC 9-109). For exclusions, see Neb. UCC 9-109.

After-acquired Property.

Uniform Commercial Code governs. (Neb. UCC 9-204).

Future Advances.

Uniform Commercial Code governs. (Neb. UCC 9-204).

Mortgage of Motor Vehicle.

See category Transportation, topic Motor Vehicles, subhead Liens.

Requisites of Instrument.

Uniform Commercial Code governs. (Neb. UCC 9-502).

Execution of Instrument.

May be executed by mortgagor's agent if authorized in writing. (Neb. UCC 1-201[35] and 1-201[39]).

Necessity.

Uniform Commercial Code governs. (Neb. UCC 9-310). See category Business Regulation and Commerce, topic Commercial Code.

Filing.

Uniform Commercial Code governs. See category Business Regulation and Commerce, topic Commercial Code, subhead Material Variations From 1962 Text and 1972 and 1977 Official Amendments.

Fees.

Uniform Commercial Code governs. (Neb. UCC 9-525). See category Business Regulation and Commerce, topic Commercial Code, subhead Filing Fees.

Disposal or Removal of Property.

Uniform Commercial Code governs. (Neb. UCC 9-610).

Satisfaction.

Uniform Commercial Code governs. (Neb. UCC 9-622).

Foreclosure by Court Proceeding.

By common law equity action in district court. (Neb. UCC 9-609).

Foreclosure and Sale without Court Action.

Uniform Commercial Code governs. (Neb. UCC 9-609).

Redemption.

Uniform Commercial Code governs. (Neb. UCC 9-623).

Foreign Mortgages.

Uniform Commercial Code governs. (Neb. UCC 9-103 [repealed effective July 1, 2001]; Neb. UCC 9-307 [effective from and after July 1, 2001]). See category Business Regulation and Commerce, topic Commercial Code, subhead Material Variations From 1962 Text and 1972 and 1977 Official Amendments.

Taxation.

No special statute.

Forms.

For forms of Financing Statement, Termination Statement, and Statement of Continuation, Partial Release, Assignment, etc., Uniform & Model Act section of Law Digest.

Security Agreement.

Uniform Commercial Code governs.

SECURITY AGREEMENT

....

DATE

.................., a resident of

....

NO. AND STREET CITY

....

COUNTY STATE

(hereinafter called ``DEBTOR''), for consideration grants to

Name:

Office Address:

(hereinafter called ``SECURED PARTY'') a security interest in the following property and any and all additions, accessions and substitutions thereto or therefore (hereinafter called the ``COLLATERAL"):

Mark if applicable ☐ (a) All of Debtor's inventory including all goods, merchandise, raw materials, goods in process, finished goods and all other tangible personal property now owned or hereafter acquired and held for sale or lease or furnished or to be furnished under contracts of service or used or consumed in Debtor's business (all hereinafter called the ``Inventory"), and in contract rights with respect thereto and proceeds of both. Without limitation the term ``Inventory" includes

Mark if applicable ☐ (b) All accounts, notes, drafts, chattel paper, acceptances and other forms of obligations and receivables now or hereafter received by or belonging to Debtor for goods sold by it or for services rendered by it, all guaranties and securities therefor, all right, title and interest of Debtor in the merchandise which gave rise thereto, including the right of stoppage in transit, and all rights of Debtor earned or yet to be earned under contracts to sell goods or render services and in the proceeds thereof.

The security interest granted hereby is to secure payment of the indebtedness evidenced by a certain promissory note of even date herewith payable to the Secured Party, or order, as follows: together with such additional sums as may hereafter be advanced to the Debtor or expended by the Secured Party or its assigns on behalf of the Debtor or his assigns for any purpose whatsoever and evidenced by notes, drafts, open account, or otherwise, with interest thereon at rates to be fixed at the time of advancing or expending such additional sums, provided, however, that the making of any such advances or expenditures shall be optional with Secured Party, or its assigns; and this security agreement shall secure the payment of any and all extensions or renewals and successive extensions or renewals of said note or notes, and of any indebtedness at any time owing to Secured Party, or its assigns, and shall further secure the payment of any and all indebtedness owing by Debtor to Secured Party, and for all of which this security agreement shall stand as a continuing security until paid (all of such indebtedness being referred to as the ``Obligations"); and the Debtor agrees that the Secured Party, its successors or assigns, may apply any payments made on the Obligations secured hereby, at its option, on any of the notes or other indebtedness secured hereby.

DEBTOR EXPRESSLY WARRANTS AND COVENANTS:

1. That except for the security interest granted hereby Debtor is, or to the extent that this agreement states that the Collateral is to be acquired after the date hereof, will be, the owner of the Collateral free from any adverse lien, security interest or encumbrance; and that Debtor will defend the Collateral against all claims and demands of all persons at any time claiming the same or any interest therein.

Mark if applicable ☐ 2. Debtor is a duly organized and existing corporation under the laws of the State of .... and is duly qualified and in good standing in every other state in which it is doing business.

Mark if applicable ☐ 3. The execution, delivery and performance hereof are within Debtor's corporate powers, have been duly authorized, are not in contravention of law or the terms of Debtor's charter, by-laws, or other incorporation papers or of any indenture, agreement or undertaking to which Debtor is a party, or by which it is bound.

Mark if applicable ☐ 4. As to all accounts receivable, Debtor will from time to time, as requested by Secured Party give Secured Party a list of the accounts receivable existing at the time of the request and all accounts reported to the Secured Party will be good and valid accounts representing an undisputed bona fide indebtedness of the account debtor to Debtor for merchandise theretofore shipped or delivered pursuant to or in connection with a contract of sale or for services theretofore rendered by Debtor to or for said account debtor; there are and will be no set-offs or counter claims of any nature whatsoever against any such account; no agreement under which any deduction or discount may be claimed has been or will be made with the account debtor on any of such accounts except as reflected in the report furnished by Debtor; the Debtor will be lawful owner of all such accounts and will have good right to pledge, sell, assign and transfer the same and grant a security interest therein. None of such accounts has been or will be pledged, sold, assigned or transferred to any other person than Secured Party or in any way encumbered except to Secured Party and Debtor will warrant and defend all accounts against the lawful claims and demands of all persons.

5. Debtor will keep its records concerning accounts, contract rights and inventory at .... Debtor will at all reasonable times and from time to time allow Secured Party by or through any of its officers, agents, employees, attorneys, or accountants to examine and inspect the inventory and to examine, inspect and make extracts from Debtor's books and other records, and to arrange for verification of accounts receivable, under reasonable procedures directly with account debtor or by other methods. Debtor will furnish to Secured Party upon request all notes or other papers evidencing any accounts receivable and any guarantees, securities or other documents and information relating thereto.

Mark if applicable ☐ 6. So long as Secured Party does not request that the account debtors on the Collateral be notified of the assignment thereof to Secured Party, Debtor shall make collections of such accounts and turn over such proceeds to Secured Party weekly or at such longer intervals as the Secured Party may allow, together with a collection report in form satisfactory to Secured Party. Secured Party may at any time notify account debtors that the accounts have been assigned to Secured Party and shall be paid to Secured Party. Upon request of Secured Party at any time, Debtor will so notify such account debtors and will indicate on all billings to such account debtors that the accounts are payable to Secured Party. Any proceeds of accounts thereafter received by Debtor shall be turned over to the Secured Party daily in the exact form in which they are received.

7. To evidence Secured Party's rights hereunder Debtor will assign or endorse the Collateral or proceeds thereof to Secured Party as Secured Party may request. Secured Party shall have full power to collect, compromise, endorse, sell or otherwise deal with the Collateral or proceeds thereof in its own name or that of Debtor. Debtor shall pay to Secured Party on demand any and all expenses incurred or expended by Secured Party in the collection or attempted collection of Collateral and in protecting and enforcing the obligations and other rights of Secured Party hereunder.

Mark if applicable ☐ 8. With regard to inventory Debtor shall immediately notify Secured Party of any event causing loss or depreciation in the value of the inventory and the amount of such loss or depreciation. Debtor will deliver to Secured Party prior to the tenth day of each month a report in form satisfactory to Secured Party with respect to the next preceding month, showing opening inventory, inventory acquired, inventory sold and delivered, inventory sold and held for future delivery, inventory returned or repossessed, inventory used or consumed in Debtor's business and closing inventory.

Mark if applicable ☐ 9. Until default, Debtor may use the inventory in any lawful manner not inconsistent with this agreement or with the terms or conditions of any policy of insurance thereon and may also sell the inventory in the ordinary course of business. A sale in the ordinary course of business does not include a transfer in partial or total satisfaction of a debt. Debtor will report to Secured Party weekly, or at such longer intervals as Secured Party may allow, the sales of inventory for such week or longer period. All proceeds of inventory received by Debtor shall be turned over to Secured Party, together with the periodic report required above, unless Secured Party agrees that the proceeds for any period need not be turned over to it.

10. That no financing statement covering the Collateral or any proceeds thereof is on file in any public office and that at the request of Secured Party, Debtor will join with Secured Party in executing one or more financing statements pursuant to the Nebraska Uniform Commercial Code in form satisfactory to Secured Party and will pay the cost of filing such financing statement, this security agreement and any continuation or termination statement, in all public offices wherever filing is deemed by Secured Party to be necessary or desirable.

11. To pay all taxes and assessments of every nature which may be levied or assessed against the Collateral.

12. Not to permit or allow any adverse lien, security interest or encumbrance whatsoever upon the Collateral and not to permit the same to be attached or replevined.

13. At its option, Secured Party may discharge taxes, liens or security interests or other encumbrances at any time levied or placed on the Collateral and may pay for the repair of any damage or injury and may pay for the maintenance and preservation of the Collateral. Debtor agrees to reimburse Secured Party on demand for any payment made or expense incurred by Secured Party pursuant to the foregoing authorization. Until such reimbursement, the amount of any such payment, with interest at the rate of 9% per annum from date of payment until reimbursement, shall be added to the indebtedness owed by Debtor and shall be secured by this security agreement.

14. That Debtor will at Debtor's own expense forthwith insure the tangible Collateral in a reliable insurance company against loss or damage by fire, extended coverage and theft for an amount equal to the value of said Collateral, and keep the same so insured continuously until the full amount of said indebtedness is paid, with loss payable to Secured Party as its interest may appear, and that Debtor will on demand deliver said policies of insurance or furnish proof of such insurance to the Secured Party, and in case of loss, the Secured Party shall retain from the insurance money an amount equal to the total balance of said indebtedness remaining unpaid, whether according to the tenor and effect of any promissory note or notes evidencing such indebtedness the same is due or not. Should the Debtor fail or refuse to forthwith effect such insurance and deliver the policies or furnish proof of such insurance as aforesaid, or fail to keep the Collateral so insured continuously until the full amount of said indebtedness is paid, the Secured Party may at its option effect such insurance and the amount so paid for such insurance with interest at the rate of 9% per annum from date of payment until repaid shall be added to said indebtedness, and the same shall be secured by this security agreement.

15. Debtor will pay the reasonable attorney's fees of Secured Party and said Debtor will pay said Secured Party any and all costs and expenses incurred in recovering possession of the Collateral and incurred in enforcing this security agreement, and the same shall be secured by this security agreement.

16. That Debtor will not use the Collateral in violation of any applicable statutes, regulations or ordinances.

UNTIL DEFAULT Debtor may have possession of the Collateral and use it in any lawful manner not inconsistent with this agreement and not inconsistent with any policy of insurance thereon, and upon default Secured Party shall have the immediate right to the possession of the Collateral.

DEBTOR SHALL BE IN DEFAULT under this agreement upon the happening of any of the following events or conditions:

(a) default in the payment or performance of any obligation, covenant or liability contained or referred to herein or in any note evidencing the same;

(b) any warranty, representation or statement made or furnished to Secured Party by or on behalf of Debtor proves to have been false in any material respect when made or furnished;

(c) any event which results in the acceleration of the maturity of the indebtedness of Debtor to others under any indenture, agreement or undertaking;

(d) loss, theft, damage, destruction, sale (except as authorized in paragraph 9 hereof) or encumbrance to or of any of the Collateral, or the making of any levy, seizure or attachment thereof or thereon;

(e) death, dissolution, termination of existence, insolvency, business failure, appointment of a receiver of any part of the property of, assignment for the benefit of creditors by, or the commencement of any proceeding under any bankruptcy or insolvency laws by or against Debtor or any guarantor or surety for Debtor.

UPON SUCH DEFAULT and at any time thereafter, or if it deems itself insecure, Secured Party may declare all Obligations secured hereby immediately due and payable and shall have the remedies of a secured party under the Nebraska Uniform Commercial Code. Secured Party may require Debtor to assemble the Collateral and deliver or make it available to Secured Party at a place to be designated by Secured Party which is reasonably convenient to both parties. Unless the Collateral is perishable or threatens to decline speedily in value or is of a type customarily sold on a recognized market, Secured Party will give Debtor reasonable notice of the time and place of any public sale thereof or of the time after which any private sale or any other intended disposition thereof is to be made. The requirements of reasonable notice shall be met if such notice is mailed, postage prepaid, to the address of Debtor shown at the beginning of this agreement at least five days before the time of the sale or disposition.

No waiver by Secured Party of any default shall operate as a waiver of any other default or of the same default on a future occasion. The taking of this security agreement shall not waive or impair any other security said Secured Party may have or hereafter acquire for the payment of the above indebtedness, nor shall the taking of any such additional security waive or impair this security agreement; but said Secured Party may resort to any security it may have in the order it may deem proper, and notwithstanding any collateral security, Secured Party shall retain its right of setoff against Debtor.

All rights of Secured Party hereunder shall inure to the benefit of its successors and assigns; and all promises and duties of Debtor shall bind his heirs, executors or administrators or his or its successors or assigns. If there be more than one Debtor, their liabilities hereunder shall be joint and several.

This agreement shall become effective when it is signed by Debtor.

Debtor:

By ....

....

NAME TITLE

See also category Business Regulation and Commerce, topic Commercial Code.

20.02 COLLATERAL SECURITY:

See category Debtor and Creditor, topic Pledges.

20.03 MORTGAGES OF PERSONAL PROPERTY:

See topic Chattel Mortgages; also category Business Regulation and Commerce, topic Commercial Code.

20.04 MORTGAGES OF REAL PROPERTY:

In absence of stipulation to contrary mortgagor of real estate retains legal title and right of possession. (Neb. Rev. Stat. 76-276). Every deed which, by any other instrument in writing, appears to have been intended only as security by way of mortgage must be so considered. (Neb. Rev. Stat. 76-251).

Execution.

Mortgage must be signed and acknowledged by grantor (Neb. Rev. Stat. 76-211, 242); but mortgage not acknowledged, except as to a homestead, is good between the parties (50 Neb. 656, 70 N.W. 241). All consensual interests in real property which secure payment or performance of obligation should be denominated ``Security Interest''. (Neb. Rev. Stat. 52-127[15]).

Recording.

Mortgage must be recorded in county in which real estate or part thereof is situated and as to creditors and subsequent purchasers in good faith without notice takes effect only on delivery to register of deeds for record; but is valid between parties to instrument. (Neb. Rev. Stat. 76-238, and -245).

Recording Fees.

$5 per page. (Neb. Rev. Stat. 33-109). Indexing, 50¢ for each entry. (Neb. Rev. Stat. 33-112).

Taxes.

None required on recording.

Trust Deeds.

Authorized as substitute for mortgage by Nebraska Trust Deed Act. (Neb. Rev. Stat. 76-1001 to -1018).

Trustee must be member of State Bar, licensed real estate broker of Nebraska, corporation authorized to conduct trust business in Nebraska, bank, building and loan association, savings and loan association, credit union, title insurer authorized to do business in Nebraska, or agency of U.S. Department of Agriculture involved in lending. (Neb. Rev. Stat. 76-1003). If expressly provided, trustee may have power of sale, or trust deed may be foreclosed as provided for mortgages, after execution of acknowledgment to beneficiary, that document executed is trust deed and not mortgage. (Neb. Rev. Stat. 76-1005). Written notice by publication of sale must be given. (Neb. Rev. Stat. 76-1007). Such sale of property must be made within period prescribed in Neb. Rev. Stat. 25-205 for commencement of action on obligation secured by trust deed. (Neb. Rev. Stat. 76-1015). Transfer of any debt secured by trust deed operates as transfer of security therefor. (Neb. Rev. Stat. 76-1016). Trust deed may be recorded. (Neb. Rev. Stat. 76-1017).

Future Advances.

Any interest in real property capable of being transferred may be mortgaged to secure future advances necessary to protect security, and any future advances made at option of parties; provided, that at no time shall secured principal future advances, not including sums advanced to protect security, exceed total amount, or percentage of total amount stated in mortgage.

However, if any optional future advance is made under mortgage, after written notice of an intervening mortgage, lien or claim against property, or written notice of labor or material furnished on said property, or contracted to be so furnished, then amount so advanced shall be junior to any such mortgage, lien or claim. (Neb. Rev. Stat. 76-238.01).

Subsequent advances under security agreement recorded before construction lien have priority if it is made under construction agreement and in payment of agreed improvements or to protect security interest, or if applied to any lien or encumbrance prior to construction lien. (Neb. Rev. Stat. 52-139).

Priorities.

As to creditors and subsequent purchasers in good faith and without notice mortgage becomes effective on delivery to register of deeds for recording (Neb. Rev. Stat. 76-238); as to other persons from execution and delivery of mortgage.

Subordination Agreements.

No statute.

Assignment.

Recording of assignment of mortgage is not sufficient notice to mortgagor, his heirs or representatives, so as to invalidate subsequent payments to mortgagee. (Neb. Rev. Stat. 76-256). ``Due on sale'' clauses are not restraints on alienations, nor are they against public policy. (206 Neb. 469, 293 N.W.2d 843).

Satisfaction.

Recorded mortgage discharged by register of deeds upon receipt of certificate executed by mortgagee, personal representative or assignee acknowledged, proved, or certified (see Neb. Rev. Stat.64-204, 76-216 and -236) specifying mortgage paid, satisfied, or discharged (Neb. Rev. Stat. 76-253).

Release of part of property by senior mortgagee will, if made with notice of a junior mortgage, operate in favor of junior mortgagee as a satisfaction of senior mortgage to extent of value of property released. (58 Neb. 670, 79 N.W. 613).

Discharge.

Any mortgage shall be discharged upon record thereof by register of deeds in whose custody it shall be, whenever there shall be presented to him certificate executed by mortgagee, his legal personal representative or assignee, acknowledged specifying that such mortgage has been paid, or otherwise satisfied and discharged. (Neb. Rev. Stat. 76-253).

Every such certificate and proof or acknowledgment shall be indexed in order of mortgages and recorded at full length. In record of discharge, register of deeds shall make reference to book and page or computer system reference where mortgage is recorded. (Neb. Rev. Stat. 76-254).

Foreclosure.

Suit must be brought in district court of county where land or some part thereof is located. (Neb. Rev. Stat. 25-401, and -2137). Court has power to decree sale of mortgaged premises or sufficient thereof to pay debts and costs of suit. (Neb. Rev. Stat. 25-2138). Complaint must state whether any proceedings have been had at law for recovery of debt and whether any part of debt has been paid. (Neb. Rev. Stat. 25-2142). If judgment obtained in suit at law for any part of mortgage debt no proceeding for foreclosure unless return of execution shows that it is unsatisfied in whole or in part and that defendant has no property to satisfy execution, except mortgaged premises. (Neb. Rev. Stat. 25-2143).

If complaint is based on nonpayment of interest or installment of principal and other portions become due subsequently, complaint must be dismissed upon defendant bringing into court at any time before decree of sale principal and interest due, with costs. (Neb. Rev. Stat. 25-2148). If, after decree for sale, defendant brings into court principal and interest due, with costs, proceedings must be stayed but court must enter decree of foreclosure and sale to be enforced by further order of court upon subsequent default in payment of any installment of principal or interest. (Neb. Rev. Stat. 25-2149). If defendant does not bring into court amount due with costs or if for any other cause decree passes for complainant, court may direct reference to sheriff to ascertain and report situation of mortgaged premises or may determine same on oral or other testimony and if it appears same can be sold in parcels without injury to parties, decree must direct so much of mortgaged premises to be sold as will be sufficient to pay amount then due on mortgage, with costs, and such decree remains as security for any subsequent default (Neb. Rev. Stat. 25-2150), on happening of which court may on complaint direct sale of so much of mortgaged premises as will satisfy amount due, with costs, which proceedings may be had as often as default happens (Neb. Rev. Stat. 25-2151). If court concludes sale of whole property will be most beneficial to parties, decree must be entered accordingly in first instance. (Neb. Rev. Stat. 25-2152).

Clerk of district court, on satisfaction or payment of amount of decree, must forward to register of deeds certificate of satisfaction, on payment of $3, taxable as costs. (Neb. Rev. Stat. 25-2154).

Order of sale stayed up to nine months after rendition of judgment, if mortgagor within 20 days after such rendition files with clerk of court written request for stay, otherwise order of sale may be issued immediately after expiration of 20 days. If maturity of mortgage on lot or residential property less than three acres is more than 20 years from filing of complaint, then stay is three months and if such original maturity is more than ten years but not more than 20 years from date of filing then stay period is six months. (Neb. Rev. Stat. 25-1506; 128 Neb. 415, 258 N.W. 873). Court of equity has power to relieve mortgagor from effect of operative acceleration clause when default results from unconscionable conduct by mortgagee. (203 Neb. 727, 280 N.W.2d 53).

Sales.

Sales are made by sheriff or some other person authorized by court in county where premises or some part thereof located. (Neb. Rev. Stat. 25-2144). Sheriff's deed vests in purchaser same estate that would have vested in mortgagee if equity had been foreclosed; deed is as valid as though executed by mortgagor and mortgagee. (Neb. Rev. Stat. 25-2145). Proceeds applied to discharge of debt and costs and surplus, if any, brought into court for use of defendant or other person entitled thereto, subject to order of court. (Neb. Rev. Stat. 25-2146).

Officer must give public notice of time and place of sale before sale, by publication once each week for four successive weeks in some newspaper printed in county or, if none, in newspaper of general circulation therein and by posting notice on court house door and in five other public places in county, two of which must be in precinct where lands lie. Sale made without such notice must be set aside on motion. (Neb. Rev. Stat. 25-1529).

Officer making sale files a return with clerk of court, and if sale is approved court enters order confirming sale and directing officer to deed property to purchaser. Such deed conveys as good title as debtor could have made at time property became liable to judgment or at any time thereafter and is sufficient evidence of legality of sale. (Neb. Rev. Stat. 25-1531, and -1533).

Except in circumstances described in Neb. Rev. Stat. 40-103, party seeking confirmation of sale must provide debtor notice of homestead exemption procedure. Failure to provide such notice may result in setting aside of sale. (Neb. Rev. Stat. 25-1531).

Deficiency Judgment.

Not granted in foreclosure action. (Neb. Rev. Stat. 25-2139).

After foreclosure complaint has been filed and decree rendered thereon, no proceedings may be had at law for recovery of mortgage debt unless authorized by court. (Neb. Rev. Stat. 25-2140). After exhausting remedy in equity, action at law may be brought for deficiency. (138 Neb. 518, 293 N.W. 424).

Moratorium.

None.

Redemption.

Owner may redeem at any time before sale is confirmed by paying into court the amount of the judgment with interest and costs to date or, if the property has been sold to some person other than plaintiff, by paying to the purchaser or into court for use of the purchaser, the purchase price with 12% interest thereon from date of sale to date of redemption. No redemption after sale confirmed. (Neb. Rev. Stat. 25-1530).

Ordinary form is as follows:

Form

This indenture, made and executed this ....day of ...., A.D ...., by and between .... party of the first part, and ....party of the second part, Witnesseth, that the said party of the first part, for and in consideration of ....Dollars, paid by said party of the second part, the receipt whereof is hereby acknowledged, has granted, bargained, sold and conveyed, and by these presents, does grant, bargain, sell and convey, unto said party of the second part, the following described real property, situate in the County of ....and State of Nebraska, to-wit: ....together with the tenements, hereditament and appurtenances to the same belonging, and all the estate, title, dower, right of homestead, claims and demands whatsoever of the said party of the first part of, in or to said premises or any part thereof; and said party of the first part does hereby covenant that said party of the first part is lawfully seized of said premises; that said premises are free from incumbrance .... and that said party of the first part will warrant and defend the title to said premises against the lawful claims and demands of all persons whomsoever ....

Provided always, and these presents are upon these conditions: Whereas, said party of the first part has executed and delivered to the said party of the second part ....promissory note ....and whereas, the party of the first part has agreed to keep the buildings, if any, upon said premises, insured in some company or companies approved by said party of the second part, for the sum of not less than .... dollars, and deliver to said party of the second part the policy or policies containing a clause with the loss payable to said party of the second part, or assigns, and has agreed to pay all taxes and assessments against said premises before the same, by law, become delinquent, and has agreed that if said party of the first part does not provide such insurance, or fails to pay all taxes as aforesaid, then said party of the second part, or holder thereof, may pay such insurance and taxes, or either of them, and all amounts so paid by said party of the second part shall bear interest at the rate of 9% per annum from date of payment, and this mortgage shall stand as security therefor, and said sum may be added to the amount of the mortgage debt, and the same recovered as a part thereof. Now, if the said party of the first part shall well and truly pay or cause to be paid the said sum of money in said note.................. mentioned, with interest thereon according to the tenor and effect of said note.................. and shall keep said buildings insured as aforesaid, and shall keep all taxes and assessments paid, and shall duly keep, and perform all the other covenants and agreements herein contained, then these presents to be null and void. But if said sum of money or any part thereof, or any interest thereon, is not paid when the same is due, or if said buildings shall not be kept insured as aforesaid, or if the taxes and assessments against said premises are not paid at or before the time the same become by law delinquent, or if said party of the first part shall fail to keep and perform any covenants herein contained, the holder hereof shall have the option to declare the whole of said indebtedness due and payable at any time after such failure or default, and may maintain an action at law or equity to recover the same, and the commencement of such action shall be the only notice of the exercise of said option required.

And it is further provided and agreed that the said mortgagor shall and will pay all taxes levied upon this mortgage or the debt secured thereby, together with any other taxes or assessments which may be levied under the laws of Nebraska, against the said mortgagee or the legal holder of the said principal note.................. on account of this indebtedness.

In Testimony Whereof, ... hereunto set .... hand.................. the date above written.

....

....

(Acknowledgment).

Form of Assignment.

Know All Men by These Presents: That ....of the first part, in consideration of the sum of ....Dollars to .... in hand paid by .... of the second part, receipt whereof is hereby acknowledged, have sold and by these presents do sell, assign and transfer unto the said part.................. of the second part a certain indenture of mortgage bearing date the .... day of .... in the year 20.................., made by .... in favor of .... and conveying .... in .... county, in the state of .... and which mortgage was recorded in the records of said county on the .... day of .... in the year 20.................. in book .... of mortgages on page ...., together with the notes or obligations therein described, without recourse or in any event or for any cause.

To Have and to Hold the same unto the said part.................. of the second part, ... executors, administrators or assigns, subject only to the provisions in the said indenture of mortgage contained.

In Witness Whereof, ... have set .... hand.................. and .... seal.................. this .... day of .... in the year 20..................

....

....

(Acknowledgment).

Form of Release.

In Consideration of the payment of the debt named therein. I hereby release the mortgage made by .... to .... on the following described property situate in the

County of .... and State of Nebraska, to-wit: .... which was recorded on the .... day of ...., 20.................., in Book .... of Mortgages, at page .... of the mortgage records of .... County, Nebraska.

Witness my hand this .... day of ...., 20..................

....

....

(Acknowledgment).

21 PROPERTY

21.01 ABSENTEES:

Uniform Probate Code (1969, adopted 1974). (Neb. Rev. Stat. 30-2201 to -2902).

On partition, share of absent owner is retained or proceeds invested for his benefit. (Neb. Rev. Stat. 25-21,111). Clerk receives same in official capacity. (134 Neb. 824, 279 N.W. 778).

Care of Property.

No statutory provision, however absentees still required to pay taxes on property. (208 Neb. 429, 303 N.W.2d 765).

Process Agent.

No statutory provision.

Escheat.

Uniform Disposition of Unclaimed Property Act adopted. (Neb. Rev. Stat. 69-1301 to 1329).

Unclaimed Dividends.—Every person holding funds or other property, tangible or intangible, including any stock, shareholding, or other intangible ownership interest in business association, presumed abandoned under Uniform Disposition of Unclaimed Property Act shall report and pay or deliver to State Treasurer all abandoned property. (Neb. Rev. Stat. 69-1305, 69-1312).

Unclaimed Deposits.—Any demand, savings, or matured time deposit that is not automatically renewable made in this state with banking organization, together with any interest or dividends thereon is presumed abandoned and escheats to state if there is no action on account within five years. (Neb. Rev. Stat. 69-1302). Bank shall report to State Treasurer and pay or deliver all abandoned property. (Neb. Rev. Stat. 69-1312).

Foreign Property.—Individual alien and foreign corporations' real property escheats to state in some instances. (Neb. Rev. Stat. 4-107, 76-402 and -415).

See category Estates and Trusts, topics Descent and Distribution, subhead Escheat, Wills, subhead Unclaimed Legacies or Sums Due Creditors.

21.02 ADVERSE POSSESSION:

Character and Duration of Possession.

Persons in actual, continued, notorious and adverse possession under claim of ownership to land for ten years are vested with valid title (154 Neb. 221, 47 N.W.2d 504), except as against county, city, town, village, other municipal corporation, public power district, public irrigation district or natural resources district which may begin action any time for recovery of title or possession of any public road, street, alley or other public grounds or city or town lots (Neb. Rev. Stat. 25-202).

Easements.

Hereditaments can be obtained by adverse possession. (Neb. Rev. Stat. 25-202).

Disabilities.

Persons under disability may bring action within 20 years from date of accrual but in no event more than ten years after termination of disability. (Neb. Rev. Stat. 25-213).

21.03 CONDOMINIUMS:

See topic Real Property.

21.04 CONVEYANCE:

See topic Deeds.

21.05 CURTESY:

Abolished. (Neb. Rev. Stat. 30-104).

21.06 DEEDS:

See topic Real Property, for types of estates; also categories Debtor and Creditor, topic Homesteads, subhead Alienation or Encumbrance; Family, topic Husband and Wife, subhead Conveyances of Real Estate.

Execution.

Deed of real estate or any interest therein, except lease for one year or less, must be signed by grantor of lawful age, and must be acknowledged or proved and recorded. (Neb. Rev. Stat. 76-211, -216, -228, and -237). However, deed without acknowledgment, except as to homestead, is valid between parties. (76 Neb. 335, 107 N.W. 580; 12 Neb. 152, 10 N.W. 545). Neither seal nor witness is necessary. Statement as prescribed by Tax Commissioner required and may require recitation of any information, and other factors which may influence transaction. (Neb. Rev. Stat. 76-214).

Corporate deed acknowledged or proved, and certified by president or any officers named in Neb. Rev. Stat. 76-217, -219, -220, -226, or -227 is prima facie evidence of proper conveyance of corporation. Corporate seal is unnecessary. (Neb. Rev. Stat. 76-235).

Recording.

Deed must be recorded in county where real estate or any part thereof is located in order to be effective as against creditors or of subsequent purchasers (Neb. Rev. Stat. 76-245), and as to such persons takes effect from delivery to register of deeds for record (Neb. Rev. Stat. 76-238). Deeds must be acknowledged or proved to be entitled to record. (Neb. Rev. Stat. 76-241). Witness not required. See also category Documents and Records, topic Records.

Recording Fee.

$5 per page (Neb. Rev. Stat. 33-109); each entry of index, 50¢ (Neb. Rev. Stat. 33-112); certified copy of any recorded instrument, $1.50 per page (Neb. Rev. Stat. 33-109).

Operation and Effect.

Covenant in conveyance that grantor is ``seized'' or ``lawfully seized'', or words to that effect, will be interpreted that grantor has good title to property. (Neb. Rev. Stat. 76-206). Where grantor undertakes to convey greater interest than they have, but later acquires it, estate subsequently acquired passes to grantee. (Neb. Rev. Stat. 76-209). Use of private seals is abolished. (Neb. Rev. Stat. 76-212). Land may be conveyed by attorney of owner, provided power is properly recorded. (Neb. Rev. Stat. 76-247).

Deed by Agent.

Deed may be subscribed by agent authorized in writing. (Neb. Rev. Stat. 36-409). Power of attorney must be proved or acknowledged to be entitled to record (Neb. Rev. Stat. 76-204), but unacknowledged power is valid except as to conveyance of homestead (61 Neb. 537, 85 N.W. 565).

Foreign Deed.

Deed executed in any other state, territory or district of United States must be executed and acknowledged or proved, according to laws of such place or of this state (Neb. Rev. Stat. 76-219). Deed of land situated in this state, executed in another state and acknowledged there before notary public presumed to have been executed according to laws of that state though not witnessed, and is entitled to be received in evidence in this state without other proof that grantors actually executed and delivered deed. (134 Neb. 33, 277 N.W. 785). Deed executed in foreign country may be executed according to its laws. (Neb. Rev. Stat. 76-226).

After acquired interest passes under deed purporting to convey greater interest than grantor had, but not under quitclaim or special warranty deed. (Neb. Rev. Stat. 76-209).

Uniform Property Act (1938, adopted 1941). (Neb. Rev. Stat. 76-101 to-123).

Taxes.

State documentary tax stamps on deeds at rate of $2.25 per $1,000 of actual consideration. Grantor pays tax. (Neb. Rev. Stat. 76-901). Tax shall not apply to certain deeds. (Neb. Rev. Stat. 76-902).

Grantee must file completed Property Tax Administrator's statement with deed. (Neb. Rev. Stat. 76-214). Failure to complete and file is misdemeanor punishable by fine of $10 to $500. (Neb. Rev. Stat. 76-215).

Forms.

No statutory forms. Bar Association promulgated forms are optional. Real estate transfer tax forms available from county recorder and are required at time of filing.

Forms

Warranty Deed.

Ordinary form is as follows:

Know All Men by These Presents, That ....and.................., husband and wife, in consideration of $.................. in hand paid, do hereby grant, bargain, sell, convey and confirm unto .... the following described real estate situate in the county of .... and

State of Nebraska, to-wit: ...., together with all the tenements, hereditaments and appurtenances to the same belonging and all the estate, title, dower, right of homestead, claim or demand whatsoever of the .... of, in, or to the same or any part thereof.

To Have and to Hold the above described premises, with the appurtenances, unto the said .... and to his heirs and assigns forever, and we, the said ...., for ourselves and our heirs, executors and administrators, do covenant with the said .... and with his heirs and assigns, that we are lawfully seized of said premises; that they are free from encumbrance except ....; that we have good right and lawful authority to sell the same and that we will and our heirs, executors and administrators shall warrant and defend the same unto the said .... and his heirs and assigns forever against the lawful claims of all persons whomsoever.

In Witness Whereof we have hereunto set our hands this .... day of ...., 20.....

....

....

(Acknowledgment).

Warranty Deed to Joint Tenants.

The following form may be used:

Know All Men by These Presents, That .... in consideration of .... Dollars, in hand paid, do hereby grant, bargain, sell, convey, and confirm unto .... as joint tenants, and not as tenants in common, the following described real estate, situated in the County of .... and State of Nebraska, to-wit: together with all the tenements, hereditaments, and appurtenances to the same belonging, and all the estate, title, dower, right of homestead, claim, or demand whatsoever of the said grantor ...., of, in, or to the same, or any part thereof.

It being the intention of all parties hereto, that in the event of the death of either of said grantees, the entire fee simple title to the real estate described herein shall vest in the surviving grantee.

To Have and to Hold the above described premises, with the appurtenances, unto the said grantees as Joint Tenants, and not as tenants in common, and to their assigns, or to the heirs and assigns of the survivor of them, forever, and .... the grantor .... named herein for .... and .... heirs, executors, and administrators, does covenant with the grantees named herein and with the assigns and with the heirs and assigns of the survivor of them, that .... lawfully seized of said premises; that they are free from incumbrance except as stated herein, and that .... the said grantor .... has good right and lawful authority to sell the same, and that .... will and .... heirs, executors, and administrators shall warrant and defend the same unto the grantees named herein and unto their assigns and unto their heirs and assigns of the survivor of them, forever, against the lawful claims of all persons whomsoever, excluding the exceptions named herein.

In Witness Whereof .... have hereunto set .... hand .... this .... day of ...., A.D..................

....

....

(Acknowledgment).

Quitclaim Deed.

The following form may be used:

This Indenture, made this .... day of ...., in the year one thousand .... between .... of the first part, and .... of the second part, Witnesseth, that the said part .... of the first part, in consideration of the sum of .... Dollars, to .... duly paid, the receipt whereof is hereby acknowledged, ... granted, conveyed, remised, released and quitclaimed, and by these presents does grant, convey, remise, release, and forever quitclaim unto the said part .... of the second part, and to .... heirs and assigns forever, all .... right, title, interest, estate, claim, and demand, both at law and in equity, of, in and to the following described real estate, situate in .... County and State of Nebraska, to-wit; .... together with all and singular the hereditaments and appurtenances thereunto belonging; To Have and to Hold the above described premises unto the said ...., heirs and assigns.

In Witness Whereof, the said part .... of the first part ha.................. hereunto set .... hand the day and year first above written.

....

(Acknowledgment).

21.07 DEEDS OF TRUST:

See category Mortgages, topic Mortgages of Real Estate.

21.08 DOWER:

Abolished. (Neb. Rev. Stat. 30-104).

21.09 ESCHEAT:

See topic Absentees, subhead Escheat; categories Business Regulation and Commerce, topic Banks and Banking; Estates and Trusts, topics Descent and Distribution, subhead Escheat, Wills, subhead Unclaimed Legacies or Sums Due Creditors.

21.10 LANDLORD AND TENANT:

Uniform Residential Landlord and Tenant Act became effective July 1, 1975. (Neb. Rev. Stat. 76-1401 to -1449).

Uniform Commercial Code Art. 2A adopted. (Neb. UCC 2A-101 to -532).

Kinds of Tenancy.

Unless rental agreement fixes a definite term, tenancy shall be week-to-week in case of roomer who pays weekly rent, and in all other cases month-to-month. (Neb. Rev. Stat. 76-1414).

Leases.

Landlord and tenant may include in rental agreement terms and conditions not prohibited by Uniform Residential Landlord Tenant Act or other rule of law including rent, term, and rights and obligations of parties. (Neb. Rev. Stat. 76-1414). Lease is not enforceable by party unless there is signed writing sufficient to indicate that lease relationship exists between parties. Signed writing must describe leased premises and contain lease term to be enforced. (Neb. UCC 2A-201). Affixing of seal does not render lease sealed instrument and is not required for lease to be enforced. (Neb. UCC 2A-203).

Security Deposits.

Not to exceed one month's rent (except pet deposit), and may be applied to payment of rent and damages at termination of lease. Balance shall be returned to tenant within 14 days of demand. (Neb. Rev. Stat. 76-1416).

Recording.

Leases executed the same as a deed may be recorded, but recording not required. (Neb. Rev. Stat. 76-901).

Rent.

In absence of agreement, tenant shall pay for rental value. Unless agreed otherwise, rent is payable at beginning of term if term is one month or less and otherwise in equal monthly installments at beginning of month. (Neb. Rev. Stat. 76-1414). If landlord fails to deliver possession or properly habitable premises during lease term, tenant may give 30 days' notice of breach of lease. If problem is not remedied in this time, tenant may terminate lease and recover damages, including rent paid. (Neb. Rev. Stat. 76-1425). No statutory right to withhold rent.

Lien.

For hotel, apartment house, tourist camp, or rooming house, see category Debtor and Creditor, topic Liens.

Termination of Tenancy.

If personal property is left after termination of lease, landlord must give written notice to tenant. (Neb. Rev. Stat. 69-2303). If personal property has value greater than $250, landlord may notify tenant and charge storage fee or hold public sale. If personal property is less than $250, notice must inform tenant of landlord's right to keep, sell or dispose of property without further notice. (Neb. Rev. Stat. 69-2301 to -2314).

Holding Over.

Landlord may bring action for possession and damages if willful and in bad faith. (Neb. Rev. Stat. 76-1437).

Dispossession.

Action for possession may be filed in district or county court, and must contain: Facts entitling landlord to possession; reasonably accurate description of premises; compliance with notice provisions (Neb. Rev. Stat. 76-1441). Summons must contain enumerated items, and may be served by anyone. (Neb. Rev. Stat. 76-1442). Trial must not be less than ten nor more than 14 days after service. (Neb. Rev. Stat. 76-1446).

Distress.

Upon failure to pay rent, landlord gives tenant 30 days' notice of breach. If breach is not remedied, tenant may terminate lease and recover damages. (Neb. Rev. Stat. 76-1431).

Right of action for forcible entry and detainer remains, but is not applicable to premises covered by URLTA. (201 Neb. 91, 266 N.W.2d 222).

Forms.

Statutory form for writ of execution (Neb. Rev. Stat. 25-21,230) is as follows:

Form

The State of Nebraska

.... County } ss.

To any Constable or Sheriff of .... County:

Whereas in a certain action for the forcible entry and detention, (or the forcible detention, as the case may be) of the following described premises, to wit:.................. lately tried before the court, wherein .... was plaintiff, and .... was defendant, judgment was entered on the .... day of .... A.D.................., you therefore are hereby commanded to cause the defendant to be forthwith removed from the premises, and the plaintiff to have restitution of the same; also that you levy of the goods and chattels of the said defendant, and make the costs aforesaid, and all accruing costs; and of this writ make legal service and due return.

Witness my hand this .... day of ...., A.D.

....

Clerk of County or District Court

21.11 LEASES:

See topic Landlord and Tenant.

21.12 PARTITION:

Partition.

Any joint owner in real estate or owner of interest in any rights in real estate may compel partition action. (Neb. Rev. Stat. 25-2170-1).

Jurisdiction is concurrent between district court and county court when amount in controversy is $51,000 or less, but solely in district court when such amount exceeds $51,000. Supreme Court shall adjust jurisdictional amount for county court every fifth year commencing July 1, 2005. If county court's ward, jurisdiction is concurrent for any amount. (Neb. Rev. Stat. 25-2706 and 24-517).

Proceedings.

Complaint must describe property and several estates of joint owners if known. (Neb. Rev. Stat. 25-2170). If number of shares or interests is known, but owners are unknown or if there are or are supposed to be any interests which are unknown, contingent or doubtful, these facts shall be set forth in complaint with reasonable certainty. (Neb. Rev. Stat. 25-2171). Encumbrancers may appear in action on owner's default. (Neb. Rev. Stat. 25-21,109). Persons having contingent interests may be made parties. (Neb. Rev. Stat. 25-21,110). Creditors having general or specific lien upon all or any portion of property may or may not be made parties at option of plaintiff. (Neb. Rev. Stat. 25-2172). Each party appearing must exhibit his documentary proof of title, if he have any and must file same or copies thereof with clerk. (Neb. Rev. Stat. 25-2177). Statements in complaint that are not denied in answer or contradicted by documentary proof exhibited shall be taken as true. (Neb. Rev. Stat. 25-2178). After all shares or interests have been settled, confirming judgment must be rendered directing partition to be made accordingly

(Neb. Rev. Stat. 25-2179), with appointment of referees not exceeding three in number, to make partition (Neb. Rev. Stat. 25-2180). If referees conclude partition cannot be made without prejudice to owners, they must so report. (Neb. Rev. Stat. 25-2181). Special allotment may be made under order of court. (Neb. Rev. Stat. 25-2182).

Partition in Kind or Sale.

Partition may be made in kind or by sale or part in kind, part by sale. (Neb. Rev. Stat. 25-2180 to -21,103). Presumption in favor of partition in kind unless character and location of property is such that partition in kind cannot be made. (215 Neb. 367, 338 N.W. 2d 754). If by sale, conducted in same manner as execution sale. (Neb. Rev. Stat. 25-2186). If land is located in two or more counties, sale may be held in county where any part is located. Place and terms of sale is fixed in court order.

If sale confirmed court orders referee or majority of referees to execute conveyance when purchase money is paid or secured. (Neb. Rev. Stat. 25-2196). Such conveyance, recorded in county where premises are situated, is valid against all parties and subsequent purchasers. (Neb. Rev. Stat. 25-2197).

Lien on one or more undivided interests remains charge on proceeds of sale or property awarded debtor, but due proportion of costs is chargeable on such interest or interests and is paramount to all other liens. (Neb. Rev. Stat. 25-2173).

21.13 PERPETUITIES:

Statutory rule against perpetuities. (Neb. Rev. Stat. 76-2002).

21.14 PERSONAL PROPERTY:

Tenancy by the entirety does not exist. (60 Neb. 663, 84 N.W. 92).

Some business and private personal property subject to state taxation. See category Taxation, topic Property Taxes.

21.15 POWERS OF ATTORNEY:

Attorneys in Fact.

Real estate may be conveyed under power of attorney. See topic Deeds.

See also category Estates and Trusts, topic Executors and Administrators.

Uniform Durable Power of Attorney Act.

Adopted. (Neb. Rev. Stat. 30-2664 to -2672).

Nebraska Short Form Act. (Neb. Rev. Stat. 49-1501 to -1561). Provides standard forms for power of attorney and other instruments.

Formalities.

Must be acknowledged to be valid. (Neb. Rev. Stat. 49-1552). Not required to have seal. (Neb. Rev. Stat. 49-1552).

Revocation.

Revocation can be obtained through signing and acknowledgment by principal of revocation of Power of Attorney document or else through any other document effective to terminate agency relationship between principal and agent. (Neb. Rev. Stat. 49-1520).

21.16 REAL PROPERTY:

Tenancy in common and joint tenancy recognized. (Neb. Rev. Stat. 76-118; 175 Neb. 883, 125 N.W.2d 68). Conclusive presumption of co-tenancy when present interest in real estate is conveyed to more than one person and grantees are named in disjunctive. (Neb. Rev. Stat. 76-275.07). Estate in realty may be created to take effect at future date. (Neb. Rev. Stat. 76-210). Estates fee tail (Neb. Rev. Stat. 76-110; 104 Neb. 678, 178 N.W. 262), and estates by entirety (60 Neb. 663, 84 N.W. 92) not recognized.

Uniform Property Act adopted. (Neb. Rev. Stat. 76-101 to -123).

Rule in Shelley's Case.

Abolished. (Neb. Rev. Stat. 76-112).

Foreign Conveyances or Encumbrances.

Conveyances executed in another state may be executed and acknowledged or proved according to the laws of place where executed or of this state. (Neb. Rev. Stat. 76-219). Conveyances executed in foreign countries may be executed according to the laws of said country. (Neb. Rev. Stat. 76-226). See category Documents and Records, topic Acknowledgments.

Condominiums.

Nebraska Condominium Act adopted. (Neb. Rev. Stat. 76-825 to -894).

Future Interests.

Rights of reentry and possibilities of reverter limited to 30 years. (Neb. Rev. Stat. 76-107). Exceptions noted in Neb. Rev. Stat. 76-2,104(5) and 248 Neb. 353, 535 N.W.2d 400.

Uniform Simplification of Land Transfers Act.

Certain sections adopted in Nebraska Construction Lien Act. (Neb. Rev. Stat. 52-125 to -159).

Curative Acts.

Many conveyances that might otherwise be defective validated by curative acts. (Neb. Rev. Stat. 76-258 to -275.07).

Restrictive Covenants.

Covenants restricting use of property are not favored in law and will be construed in manner permitting maximum unrestricted use of property. (206 Neb. 42, 291 N.W.2d 228).

Historical Properties.

Properties of historical interest or natural beauty may be protected by filing easement which runs with land. (Neb. Rev. Stat. 76-2,111, -2,112, and -2,115).

Virgin prairie land belonging to state or any political subdivision can be protected by declaring boundaries in recorded covenants binding upon subsequent purchasers. (Neb. Rev. Stat. 76-2,111, -2,112, and -2,115).

Marketable Title Act.

Adopted 1947. Persons having unbroken chain of title through themselves, immediate or remote grantors recorded for more than 22 years deemed to have marketable title with certain exceptions. (Neb. Rev. Stat. 76-288 to -298).

See also topics Curtesy, Deeds, Dower, Landlord and Tenant; categories Civil Actions and Procedure, topic Partition; Debtor and Creditor, topic Homesteads; Documents and Records, topic Records; Family, topic Husband and Wife; Mortgages, topic Mortgages of Real Property.

TRUST DEEDS:

See category Mortgages, topic Mortgages of Real Property.

22 TAXATION

22.01 ADMINISTRATION:

Taxable Property.

Current state of taxation is unclear. At center of controversy is language of Art. VIII of State Constitution that taxes shall be levied by valuation uniformly and proportionately upon all tangible property and franchises. Various legislation has been challenged on this basis in Nebraska courts. See 241 Neb. 106, 486 N.W.2d 858; 238 Neb. 565, 471 N.W.2d 734; 237 Neb. 357, 466 N.W.2d 461; 229 Neb. 822, 428 N.W.2d 919; 229 Neb. 60, 425 N.W.2d 320; 226 Neb. 236, 411 N.W.2d 35; 885 F.2d 415; 238 Neb. 696, 472 N.W.2d 363; 237 Neb. 591, 467 N.W.2d 55. Taxes shall be levied by valuation uniformly and proportionately upon real property and franchises; tangible personal property shall be taxed at depreciated cost using same depreciation method with reasonable class lives, as determined by legislature, or shall be taxed by valuation uniformly and proportionately (allows Legislature to classify, exempt or tax personal property). Subsequent court decision has challenged legality of system of taxation passed by 1992 Legislature. (See 241 Neb. 106, 147, 486 N.W.2d 858, 883 [1992].)

Exemptions From Taxation.

Following property exempt: Property of state and its governmental subdivisions to extent used or developed by state for public purpose; unleased property of state and its governmental subdivisions which are not being used or developed for public purpose but upon which payment in lieu of taxes is paid for public safety, rescue, and emergency services and road or street construction or maintenance services to all governmental units providing such services to property; property owned and used exclusively for agricultural and horticultural societies; properties owned by educational, religious, charitable or cemetery purposes, or any organization for exclusive benefit of any such educational, charitable or cemetery organization when not owned or used for financial gain or profit to either owner or user; household goods and personal effects when such property is not owned or used for financial gain or profit to either owner or user; increased value of land by reason of shade or ornamental trees planted along highway; tangible personal property which is not depreciable; motor vehicles required to be registered on state highways; business and agricultural inventory; any personal property exempt pursuant to 77-4105 or 77-5209.02; livestock; any personal property exempt pursuant to Nebraska Advantage Act. (Neb. Rev. Stat. 77-202). Any organization or society seeking tax exempt status on tangible personal property must apply to county assessor on or before Dec. 31 of year preceding year for which exemption is sought. Any organization or society which fails to file exemption application on or before Dec. 31 may apply on or before June 30 to County Assessor. Organization or society shall also file in writing request with County Board of Equalization for waiver. (Neb. Rev. Stat. 77-202.01). Value of mobile home occupied and owned by disabled or blind veteran who was discharged or otherwise separated under honorable conditions also exempt. (Neb. Rev. Stat. 77-202.24). Exemption under 77-202.24 must be applied for on or before Apr. 1 of each year. (Neb. Rev. Stat. 77-202.25).

Payment.

Time for payment depends on tax being paid.

Collection.

Collection of most taxes is vested in County Treasurer. (Neb. Rev. Stat. 77-1701 to -1767).

Penalties.

If County Assessor finds that taxpayer has failed to file a personal property tax return or has omitted property on a return filed, for current year or for three previous taxing periods, he must assess tax of 10% if assessed between May 1 and on or before July 31. Any valuation added on or after Aug. 1 of year property is required to be reported is subject to 25% penalty. Any valuation to property added after May 1 must have interest assessed at rate specified by 45-104.01.

Any person making false or fraudulent list of taxable property, or willfully failing or refusing to deliver to assessor a list of taxable property or who shall temporarily convert such property into property not taxable, to evade payment of taxes, shall be guilty of Class IV misdemeanor for any such offense committed before tax year 1993, and Class II misdemeanor for any such offense regarding tax year 1993 or thereafter. (Neb. Rev. Stat. 77-1232).

See topics and subheads detailing particular taxes.

Reciprocity With Other States.

Any state of U.S. or any political subdivision thereof has right to sue in courts of State of Nebraska to recover any lawfully unpaid taxes which may be owing it, whether or not taxes have been reduced to judgment, when like right is accorded to State of Nebraska and its political subdivisions either by statute or granted as matter of comity. (Neb. Rev. Stat. 77-1774).

Interstate Co-operation.

Nebraska repealed Multistate Tax Compact in 1985.

Uniform Federal Lien Registration Act. (1978, adopted 1988). (Neb. Rev. Stat. 52-1001 to -1008).

22.02 ALCOHOL, BEVERAGES AND TOBACCO TAXES:

Alcoholic Beverages Tax.

Imposed, see (Neb. Rev. Stat. 53-160).

Cigarette Tax.

Imposed, see Neb. Rev. Stat. 77-2601 to -2622.

Tobacco Product Tax.

Imposed, see Neb. Rev. Stat. 77-4001 to -4025.

22.03 BUSINESS TAXES:

Franchise Tax.

See category Business Organizations, topic Corporations, subhead Occupation Tax.

22.03A CONTROLLED DANGEROUS SUBSTANCES TAX:

Marijuana and Controlled Substances Tax.

Taxes on marijuana and other controlled substances held or acquired by dealer in violation of Nebraska law imposed. (Neb. Rev. Stat. 77-4301 to -4316).

22.04 CORPORATE TAXES:

Taxation of Corporations.

Corporate income tax is based on Nebraska tax rate. Nebraska taxable income: at rate equal to 150.8% of primary rate imposed on individuals for first $100,000 of taxable income and rate of 211% on all taxable income in excess of $100,000. (Neb. Rev. Stat. 77-2734.02). When corporation operates in more than one state, Nebraska taxable income will be computed by using sales-only formula. Percentage of sales occurring in Nebraska will be deemed to be percentage of total corporate income taxable in Nebraska. (Neb. Rev. Stat. 77-2734.05 to -2734.16). Tax credits to businesses are available under Employment and Investment Growth Act. (Neb. Rev. Stat. 77-4101 to -4112).

Credits applicable to larger corporations can be gained through agreement with Tax Commissioner. Proposal must include plan for either: (a) Investment in qualified property of at least $3,000,000 and addition of at least 30 new employees, or (b) minimum investment in qualified property, resulting in net gain in total value of tangible property in state of type subject to depreciation, amortization, or other recovery under Internal Revenue Code of 1986, of $20,000,000. Depending on proposal, credits and incentives may include: (1) Election to use sales-only formula for income computation; (2) exemption on various personal property; (3) refund of all sales and use taxes paid on qualifying investments; and (4) credit equal to 5% of compensation paid to either Nebraska employees or base-year employees plus credit for 10% of investment in qualified properties. (Neb. Rev. Stat. 77-4104 and -4105). Certain transactions or activities are ineligible for credits. (Neb. Rev. Stat. 77-4104.01).

Smaller qualifying businesses may receive tax credits by adding five new employees and investing $250,000 in real or depreciable tangible personal property within Nebraska, or by adding two new employees and investing $125,000 if business is in lesser-populated county. Credit will be $3,000 for each new employee and $2,750 for each $50,000 of increased investment. This credit shall not exceed amounts set out in application and approved by Tax Commissioner. (Neb. Rev. Stat. 77-27,188).

22.05 EMPLOYMENT TAXES:

Unemployment Compensation Tax.

``Contributions'' are imposed by Neb. Rev. Stat. 48-601 to -671.

Rate is such percentage of payroll as may be determined by Commissioner of Labor to be necessary to maintain required reserve. Reserve and rate of contribution are based on employer's entire payroll, without limitation as to amount paid to any individual. (Neb. Rev. Stat. 48-649).

No contributions are required from employees and employer may not deduct his contributions from wages of employees.

Commissioner of State Department of Labor is charged with administration of the act and given authority to prescribe time and manner of payment of contributions. (Neb. Rev. Stat. 48-606 and -648).

Local Employment Tax.

Counties and municipalities have power to levy. (Neb. Rev. Stat. 14-109).

22.06 ENVIRONMENTAL TAXES:

Any city or village may create special tax on all taxable property for purpose of creating fund out of which anti-pollution-of-water measures may be taken. (Neb. Rev. Stat. 18-512).

22.07 ESTATE TAX:

In addition to inheritance tax, an estate or excise tax is levied on the estate of every resident decedent dying before Jan. 1, 2007 based, in part, upon the state tax credit allowed by the Federal Estate Tax. In case of resident decedents dying on or after Jan. 1, 2003 and before Jan. 1, 2007, estate tax is amount calculated according to 77.2101.03, reduced by percentage which gross value of transferred property not situated in Nebraska bears to gross value of transferred property minus amount of state inheritance taxes paid, and for estate of every nonresident decedent, tax amount is amount calculated in 77-2101.03 multiplied by percentage which gross value of transferred property situated in Nebraska bears to gross value of transferred property minus amount of state inheritance taxes paid.

Time of Payment.

Estate tax is due and payable to State Treasurer within 12 months from date of death of decedent, and limitation of time in which tax return shall be open to inspection and examination is three years from date of filing same. Executors, administrators, trustees, grantees, donees, beneficiaries and surviving joint owners are liable for tax until it is paid and tax is lien on property subject thereto until paid except that no interest in any property passing from decedent to decedent's surviving spouse shall be subject to this lien. If tax is not paid when due, it draws interest at legal rate from due date. Interest on deficiency accrues beginning on date tax becomes payable. (Neb. Rev. Stat. 77-2101.01 to -2102).

Apportionment.

Governed by Neb. Rev. Stat. 77-2108.

Apportionment Against Inter Vivos Disposition.

See Neb. Rev. Stat. 77-2108.

Interstate Cooperation.

No procedure available for compromise of death taxes where decedent's domicile is disputed. Neither Uniform Act on Interstate Arbitration of Death Taxes or Uniform Act on Interstate Compromise of Death Taxes are in force.

Valuation Date.

Value of assets is determined as of date of death; no optional date.

22.07A GAMBLING AND ENTERTAINMENT TAXES:

Mechanical Amusement Device Tax.

See Neb. Rev. Stat. 77-3001 to -3011.

Pari-Mutuel Tax.

See Neb. Rev. Stat. 2-1208.01.

22.08 GASOLINE AND SPECIAL FUELS TAXES:

Gasoline Tax.

Adopted International Fuel Tax Agreement Act. (Neb. Rev. Stat. 66-1401 to -1419).

Special Fuels Tax.

All motor fuel suppliers, distributors, wholesalers, importers, and retailers licensed under Nebraska law shall furnish cash bond to state. (Neb. Rev. Stat. 66-733 to -736).

22.08A GENERATION SKIPPING TAX:

Imposed by Neb. Rev. Stat. 77-2101.02.

Taxable generation-skipping transfers shall be taxed at rate of 16% of Nebraska taxable transfer. (Neb. Rev. Stat. 77-2101.03[3]).

22.09 GIFT TAX:

None; but inheritance tax applies to gifts made within three years of death. (Neb. Rev. Stat. 77-2002).

22.10 HOTEL AND RESTAURANT TAXES:

One percent sales tax imposed on all hotel rooms in state. (Neb. Rev. Stat. 81-1253).

Governing body of any county may also enact additional two percent sales tax on use of all hotel rooms in county. (Neb. Rev. Stat. 81-1254).

No statutory provision for dining tax.

22.11 INCOME TAX:

Income tax imposed on every resident individual and on income of every nonresident individual and partial-year resident which is derived from sources within this state, except that any individual who has additions to adjusted gross income of less than $5,000 shall not have individual income tax liability after nonrefundable credits under Nebraska Revenue Act of 1967 that exceeds his or her individual income tax liability before credits under Internal Revenue Code of 1980. (Neb. Rev. Stat. 77-2715).

Personal exemption from individual income tax liability governed by Neb. Rev. Stat. 77-2716.01.

Corporate income tax of 150 and 8/10% of primary rate imposed on individuals on first $100,000 of taxable income and at rate of 211% of such rate on all taxable income in excess of $100,000. For corporate taxpayer that is subject to tax in another state, its taxable income shall be portion of taxpayer's federal taxable income, as adjusted, that is determined to be connected with taxpayer's operations in Nebraska. (Neb. Rev. Stat. 77-2734.02).

Returns are to be filed at or before time for filing federal return and payment made of any tax due. Declaration and payment of estimated tax are to be made at time for filing federal tax estimates, unless otherwise provided by regulation issued by Tax Commissioner. Authority to make regulations on other matters is also given. Extensive provisions deal with collection of tax deficiencies, making of refunds and imposition of penalties. Taxes unpaid after demand, together with interest and penalties, become a lien upon taxpayer's real estate or any interest therein, which lien is valid against a mortgagee, purchaser or judgment creditor, only after notice thereof has been filed with Register of Deeds of county where property of taxpayer is located. (Neb. Rev. Stat. 77-2714 to -27,124). Nebraska is not member of Multistate Tax Compact (repealed, 1985).

Rates.

Beginning with tax years on or after Jan. 1, 1987, tax on income earned by residents and Nebraska-source income earned by nonresidents is based on Nebraska taxable income, calculated by making certain Nebraska adjustments to federal taxable income. Legislature sets rate of income tax which shall become effective Jan. 1 of succeeding year and remain in effect until changed. (Neb. Rev. Stat. 77-2715.01). For rate schedules, see 77-2715.02.

Special Provisions.

There are special provisions relating to trusts and estates and their beneficiaries, resident and nonresident, partnerships, determination of Nebraska income of nonresident individuals and of corporations subject to tax. (Neb. Rev. Stat. 77-2717 to -27,148). Withholding from wages taxable under law is provided for. (Neb. Rev. Stat. 77-2753).

22.12 INHERITANCE TAX:

All property, including life insurance payable to executor or administrator, passing by will or intestate laws of state or by transfer made in contemplation of death or intended to take effect in possession or enjoyment after death of grantor is subject to an inheritance tax, based on clear market value. Interests passing to surviving spouse by will shall not be subject to tax. If joint property was acquired by gift from third person, only fractional part owned by deceased is included in his estate. (Neb. Rev. Stat. 77-2001 to -2004).

Valuation Date.

Value of assets is determined as of date of death; no optional date. (117 Neb. 854, 223 N.W. 633).

Rates and Exemptions.

For:

(1) Transfer to father, mother, grandfather, grandmother, child or any lineal descendant, brother, sister, or any lineal descendant legally adopted, or to any person to whom deceased for not less than ten years stood in relation of parent, or to spouse of any such persons. Exempt up to $40,000; 1% on excess. Also exempt is value of homestead allowance, exempt property, and family maintenance allowance. Interest passing to surviving spouse, by will or otherwise, must not be subject to tax. (Neb. Rev. Stat. 77-2004).

(2) Transfer to uncle, aunt, nephew, niece or lineal descendant of any of these: exempt up to $15,000; 13% on excess over $15,000. (Neb. Rev. Stat. 77-2005).

(3) All other transfers: exempt up to $10,000; 18% on excess. Rates applied to clear market value of beneficial interests received. (Neb. Rev. Stat. 77-2006).

Gifts to United States or any agency or instrumentality thereof, to the State of Nebraska or any sub-division, municipality or agency or instrumentality of the state or sub-division (Neb. Rev. Stat. 77-2007.03) or to any religious, charitable or educational corporation or trustee of such corporation provided any one of the following conditions exist: (a) corporation is organized under the laws of the State of Nebraska or United States; (b) property to be used solely within the state; (c) corporation is organized under the laws of another state that has no similar tax or has a reciprocal provision for tax exemptions, are exempt (Neb. Rev. Stat. 77-2007.04).

Transfer of Property of Nonresident Decedent.

No statutory procedure for obtaining waiver of inheritance tax on transfer of securities owned by nonresident decedent.

Uniform Reciprocal Transfer Tax Act (see Part III of this volume for text) has been adopted pertaining to personal property (except tangible personal property having an actual situs in this state) of nonresident decedent. (1928, adopted 1951). (Neb. Rev. Stat. 77-2007.01 to -2007.02).

Assessment.

County court of county in which decedent resided or in which real property of nonresident decedent is located, has jurisdiction to determine all questions of assessment of said tax. (Neb. Rev. Stat. 77-2027). Court may appraise the estate or appoint an appraiser, who sets time and place for hearing and gives interested parties notice thereof and at said time and place appraises all property of estate and reports to court. Clerk magistrate also has authority to appoint appraiser. Upon determination that inheritance tax due, all costs incurred in determination and assessment of tax, including appraiser's fees, are charged to decedent's estate. (Neb. Rev. Stat. 77-2019 to -2024). Any person dissatisfied with appraisement may appeal to Court of Appeals in same manner as appeal from district court to Court of Appeals. (Neb. Rev. Stat. 77-2023). County court computes tax from appraisement. (Neb. Rev. Stat. 77-2022). In absence of probate of estate, proceedings for determination of tax may be instituted, by petition of county attorney or other person having legal interest in property (Neb. Rev. Stat. 77-2018.02).

Lien.

Except as to bona fide purchasers for value without notice, tax is a lien for ten years from date of death if, within five years after amount of inheritance tax is finally ascertained and assessed by court having jurisdiction, action is brought for collection of tax. (Neb. Rev. Stat. 77-2037).

Payment and Collection.

All taxes are due and payable 12 months from decedent's date of death and draw interest at legal rate from said date. (Neb. Rev. Stat. 77-2010).

Executor or administrator may pay tax and deduct same from property of legatee or person entitled thereto and may sell property to raise funds for this purpose. If tax not paid, collection may be enforced by county treasurer in same manner as collection of other tax, or person from whom tax is due may be cited by county court to appear before court and show cause why tax is not paid. (Neb. Rev. Stat. 77-2028 to -2030).

Estates in Possession and Remainder.

If bequest, devise or transfer is in trust or otherwise for life or term with vested or contingent remainder over, the entire property is assessed and the tax allocated between beneficiaries in accordance with regulations of State Tax Commissioner. Where any interest is contingent a tax is computed on the highest possible rate and on happening of the contingency tax can be recomputed and surplus, if any, refunded. Tax is paid out of corpus and refund becomes a part of corpus. (Neb. Rev. Stat. 77-2008 to -2008.02).

Application for forms, etc., should be made to State Tax Commissioner, Lincoln.

Application for information should be made to county judge in charge of particular estate.

Uniform Act on Interstate Arbitration and Compromise of Death Taxes. (1943, adopted 1976). (Neb. Rev. Stat. 77-3301 to -3316).

22.13 LOCAL AND MUNICIPAL TAXES:

Counties and municipalities given authority to tax in various areas.

22.14 MOTOR VEHICLE TAXES:

Motor vehicles are assessed separately. (See category Transportation, topic Motor Vehicles.)

Automobile Rental Surcharge.

None.

Road Tax.

None.

22.14A PRODUCE AND FOOD TAXES:

Grain and Seed Tax.

Grain and seed, if business or agricultural inventory, are exempt from personal property tax. (Neb. Rev. Stat. 77-202).

22.15 PREMIUM AND PRIVILEGE TAX:

See category Insurance, topic Insurance Companies, subheads Premium and Privilege Tax.

22.16 REAL AND PERSONAL PROPERTY TAXES:

Assessment.

General supervision of assessment of property taxes rests in County Assessor (elected by county [32-519]). County Assessor must obey instructions of Tax Commissioner and Tax Equalization and Review Commission. (Neb. Rev. Stat. 77-1311). Immediate assessment is made by County Assessor. (Neb. Rev. Stat. 77-1311).

Real property is assessed annually on Jan. 1 at 12:01 A.M. (Neb. Rev. Stat. 77-1301) on basis of actual value (Neb. Rev. Stat. 77-201). Actual value is market value in ordinary course of trade, determined by (1) comparison with sales of property of known or recognized value, taking into account location, zoning, and current functional use; (2) earning capacity of property; and (3) reproduction cost less depreciation, among other things. (Neb. Rev. Stat. 77-112). Agricultural land and horticultural land shall constitute separate and distinct class of property for purposes of property taxation, valued at 75% of its actual value for agricultural or horticultural use pursuant to 77-1343, and at its actual value when land is disqualified for special valuation under 77-1347. (Neb. Rev. Stat. 77-201; Neb. Rev. Stat. 77-1343 to -1348. After Mar. 19 and on or before July 25, County Assessor shall report to County Board of Equalization any overvaluation or undervaluation of any real property. County Board of Equalization shall consider report in accordance with 77-1504. (Neb. Rev. Stat. 77-1315.01). *Tangible personal property* is assessed annually on Jan. 1 at 12:01 A.M., which assessment shall be used as basis of taxation until next regular assessment. (Neb. Rev. Stat. 77-1201). Tangible personal property, not including motor vehicles registered for highway operation, shall constitute separate and distinct class for purposes of property taxation, valued at net book value. (Neb. Rev. Stat. 77-201). Every person of legal age and sound mind shall list and verify by statement of all personal property which he is required to list, either as owner, lessee or occupant in control thereof or as parent, guardian, trustee, personal representative, administrator, receiver, accounting officer, partner, limited liability company member, or agent, upon blanks furnished by county assessor and prescribed by Tax Administrator. (Neb. Rev. Stat. 77-1201; Neb. Rev. Stat. 77-1229). Schedule must also be filed by corporation, partnership, manufacturer's agent, personal representative, administrator, receiver and holder of leased property. (Neb. Rev. Stat. 77-1201). Taxable tangible personal property shall be listed and assessed when it has acquired tax situs. (Neb. Rev. Stat. 77-1202). Taxable tangible personal property brought into state or into one county from another county after 12:01 A.M. Jan. 1 and before July 1 taxable unless tax has been paid thereon in some other state. (Neb. Rev. Stat. 77-1211).

Credit.

State Treasurer disburses dollars to each county to credit property tax account of individual taxpayers. (Neb. Rev. Stat. 77-4212).

Exemptions.

Homestead exemption governed by Neb. Rev. Stat. 77-3501 to -3529. No real property will be assessed for any prior year when such real property has changed ownership otherwise than by will, inheritance, or gift. (Neb. Rev. Stat. 77-1317).

Lien.

Uniform Federal Lien Registration Act not adopted.

Real property taxes are payable to county treasurer on Dec. 31 next following levy. One half of tax becomes delinquent on May 1 (Apr. 1 in all counties having population of more than 100,000 inhabitants) following and other half becomes delinquent on Sept. 1 (Aug. 1 in all counties having population of more than 100,000 inhabitants). (Neb. Rev. Stat. 77-203 and -204). Delinquent real property taxes draw interest at legal rate from date of delinquency. (Neb. Rev. Stat. 77-207 and 45-104.01). Taxes on real property are first lien thereon from Dec. 31 next following levy until paid or extinguished. (Neb. Rev. Stat. 77-203).

Personal property taxes become due and payable on Dec. 31 next following date of levy. (Neb. Rev. Stat. 77-203). Due date is accelerated in event of attempted sale, levy of attachment, or attempted removal from jurisdiction. (Neb. Rev. Stat. 77-1214). Delinquent personal property taxes draw interest at legal rate from date of delinquency. (Neb. Rev. Stat. 77-207; Neb. Rev. Stat. 45-104.01). Personal property taxes are first lien on all personal property of person to whom assessed, after Dec. 31 next following date of levy until paid. (Neb. Rev. Stat. 77-203).

Redemption.

Tax certificates may be redeemed at any time before delivery of deed by county treasurer by payment to treasurer of sum mentioned in certificate with interest at 14% per annum (Neb. Rev. Stat. 45-104.01) from date of purchase to redemption, together with all subsequent taxes paid by holder of certificate with interest thereon at same rate from date of payment to date of redemption, and treasurer must issue redemption certificate to person so redeeming (Neb. Rev. Stat. 77-1824). There is absolute right of redemption for period of not less than two years from such sale and occupant must in all cases be served with personal notice before time of redemption expires. (Const. Art. VIII, § 3).

Review of Assessment.

County board of equalization may meet between June 1 and July 25 to consider and correct current year's assessment of any real property which has been undervalued, or overvalued. Action of board may be protested within 30 days after mailing of notice. (Neb. Rev. Stat. 77-1504). Appeals may be taken from County Board of Equalization to Tax Equalization and Review Commission in accordance with Tax Equalization and Review Commission Act. (Neb. Rev. Stat. 77-5001 to -5031). Commission equalizes valuations between counties. (Neb. Rev. Stat. 77-5022). Appeal may be taken from Commission to Court of Appeals. (Neb. Rev. Stat. 77-5019).

Sales.

Real Property.—All real property, on which there are delinquent taxes, is offered for sale on first Mon. of Mar. of each year by county treasurer. (Neb. Rev. Stat. 77-1802). Treasurer must give notice by publication in some newspaper in counties having more than 250,000 inhabitants, once each week for three consecutive weeks, commencing first week in Feb., and by posting copy of said notice in his office. Notice must describe property and give amount of delinquent taxes due thereon. (Neb. Rev. Stat. 77-1804).

Sales continue from day to day until all parcels have been offered for sale or sold. (Neb. Rev. Stat. 77-1806). After such sale has closed, treasurer may sell land at private sale to any person who will pay amount of taxes, penalty and costs. (Neb. Rev. Stat. 77-1814). A certificate known as ``County Treasurer's Certificate of Tax Sale'' is issued to purchaser, stating sum paid, description of property and when purchaser will be entitled to deed, if not redeemed. (Neb. Rev. Stat. 77-1818 and -1819). Certificates are assignable; any assignment shall be recorded by county treasurer. (Neb. Rev. Stat. 77-1822).

Treasurer's deed cannot be issued until holder of certificate, at least three months before applying for deed, service of notice made by certified mail, return receipt requested, upon person whose name title to real property appears of record, to address where property tax statement was mailed, and also all record owners and encumbrancers, if found in the county, with notice stating when such purchaser purchased land, description thereof, in whose name assessed, for what year taxed or specially assessed, and that after expiration of three months from date of service, deed will be applied for. (Neb. Rev. Stat. 77-1831 and -1832). If address of owner or encumbrancer appears of record, notice may be sent by certified mail, otherwise if cannot be found in county, notice may be published for three consecutive weeks in newspaper published or in general circulation therein, first time not more than five months and last time not more than three months before time for redemption expires. (Neb. Rev. Stat. 77-1832 to -1835). Deed must be applied for within six months after expiration of three years from date of sale. (Neb. Rev. Stat. 77-1837). No action can be brought for recovery of real property sold for nonpayment of taxes after five years from execution and recording of treasurer's deed, unless owner is minor, mentally incompetent person or convict in penitentiary, in which case it must be brought within five years from removal of disability. (Neb. Rev. Stat. 77-1855).

If owner of tax sale certificate fails to demand deed or commence action for foreclosure within six months after expiration of three years from date of sale, certificate is cancelled by county treasurer. (Neb. Rev. Stat. 77-1856).

Tangible Personal Property.—Delinquent personal taxes may be collected by distress warrant after Sept. 1 of year following levy, executed in same manner as execution on personal property. (Neb. Rev. Stat. 77-1717).

Foreclosure of Tax Lien.

Instead of applying for treasurer's deed, or if deed has been issued by surrendering same in court, holder of a tax certificate may foreclose tax lien by suit in district court brought within six months from expiration of three years from date of sale. (Neb. Rev. Stat. 77-1902).

If any parcel of real estate is not sold at treasurer's sale for want of bidder, county board may order county attorney to foreclose tax lien by equity suit. If suit is based on tax certificate, confirmation may be had immediately after sheriff's sale; otherwise final confirmation may not be had for two years from sheriff's sale. All tax certificates owned by the plaintiff, even if they cover separate tracts owned by different people, may be included in one suit. All persons claiming any interest in the real estate may be joined; if owners are unknown or can not be found, action may proceed against the land itself, and service may be had in manner provided for service on unknown defendants. Attorney's fee of 10% of tax, interest, and costs may be taxed as a part of the costs and apportioned with other costs. Decree may order surplus from sale of one parcel to be applied on lien on another tract owned by same defendant if rights of third persons are not affected thereby. Court may order that only so much of the land owned by any defendant shall be sold as may be necessary to satisfy the lien on all the land owned by said defendant. Order of sale may issue twenty days after entry of decree. The property is sold as upon execution. If the purchaser is a private person, all subsequent taxes must be paid before confirmation, except that if a taxing unit has issued to it a tax sale certificate covering the subsequent taxes, upon production of such certificate in court the sale may be confirmed, even though the subsequent taxes have not been paid. (Neb. Rev. Stat. 77-1901 to -1913).

Real Estate Conveyance Tax.

$2.25 per $1,000 value on real estate transfers, but see topic Administration, subhead Exemptions. (Neb. Rev. Stat. 76-901 to -908).

Condominium Tax.

Condominium taxes and assessments, assessed to and collected on each individual condominium apartment, each of which should be carried on tax book as separate taxable entity. No sale of condominium building, as whole, for delinquent taxes, will divest or affect title on individual units. Value of common areas determined by assessor and taxes apportioned against individual units. (Neb. Rev. Stat. 76-823).

22.17 SALES AND USE TAXES:

Streamlined Sales and Use Tax Agreement adopted (Neb. Rev. Stat. 77-2712.03 to -2712.05).

Exemptions.

Aircraft fuel; minerals, oil, or gas; motor vehicle fuels, diesel and compressed; performance of written contracts entered into prior to June 1, 1967; newspapers; leased property; insulin, prescription drugs, and medical equipment; meals and food products sold in schools or by churches; products shipped outside state; coin-operated laundry; purchases by state, schools, or governmental units; purchased by Nebraska State Fair Board; purchases by Nebraska Investment Finance Authority; purchases by State Racing Commission; purchase of motor vehicle for disabled person; semen and insemination services; aircraft delivered to resident of another state; railroad rolling stock; leases between related companies; agricultural machinery and equipment; state lottery tickets; molds, dies, and patterns; copies of public records; industrial machinery and equipment; prepaid telephone calling arrangement; videotape and film rentals; satellite programming and service; purchase of fine art by museum. (Neb. Rev. Stat. 77-2704.02 to -2704.60).

Sales Tax.

Tax upon sales at retail, is applicable to sales of tangible personal property, utility services, temporary lodgings and admissions, with certain exceptions and exemptions. Rate set annually by Legislature as assisted by Nebraska Economic Forecasting Advisory Board. (Neb. Rev. Stat. 77-2703 to -2713). Current tax rate is 5.5%. (Neb. Rev. Stat. 77-2701.02). Any purchaser of depreciable agricultural machinery or equipment purchased for use in commercial agriculture may apply for refund of all Nebraska sales or use taxes and all local option sales or use taxes paid on repairs or parts. (Neb. Rev. Stat. 77-2708.01). Incorporated municipality may, by ordinance of its governing body, impose sales and use tax of ½ to 1½% if majority of electors have approved. (Neb. Rev. Stat. 77-27,142 to -27,148). Sales tax is assessed upon certain services including, but not limited to cleaning, security, certain construction, etc. (Neb. Rev. Stat. 77-2701.16).

Use Tax.

Same rates applies with similar exemptions. Reporting and payment of tax is provided for monthly with 2½% deduction on first $3,000 remitted each month and 2/3% on all amounts in excess thereof, as reimbursement for cost of collecting tax. (Neb. Rev. Stat. 77-2703[2][d]).

22.18 STAMP AND SEAL TAXES:

Stamp Tax.

See topic Real and Personal Property Taxes, subhead Real Estate Conveyance Tax.

22.18A TRANSPORTATION TAXES:

Railroad Tax.

Railroad property is taxed as provided by Neb. Rev. Stat. 77-601 to -623.

22.19 USE TAXES:

See topic Sales and Use Tax.

22.20 UTILITIES TAX:

Cities and villages have power to tax for use and benefit of water used or supplied to them by waterworks companies. (Neb. Rev. Stat. 17-538). Any producer of electricity generated by zero-emission facility shall earn renewable energy tax credit. (Neb. Rev. Stat. 77-27,235).

23 TRANSPORTATION

23.01 MOTOR VEHICLES:

Department of Motor Vehicles, P.O. Box 94965, 301 Centennial Mall South, Lincoln, Nebraska 68509, has general supervision of motor vehicles.

Uniform Motor Vehicle Records Disclosure Act adopted. (Neb. Rev. Stat. 60-2901 to -2913).

Vehicle License.

Required, must show proof of financial responsibility or evidence of insurance to register vehicle (Neb. Rev. Stat. 60-387), renewable annually, fee is $15 (Neb. Rev. Stat. 60-3,143). Special licenses for dealers. (Neb. Rev. Stat. 60-3,114). On number plates issued to tax exempt vehicles, word tax exempt will appear on plate. (Neb. Rev. Stat. 60-3,107). Salvage certificate of title not valid for registration purposes. (Neb. Rev. Stat. 60-385). Number plates must be displayed front and rear. (Neb. Rev. Stat. 60-3,100). New plates are issued every six years, beginning in 2005. Validation decals are issued in years when plates are not issued. (Neb. Rev. Stat. 60-3,101). Members of armed forces may renew license without examination. (Neb. Rev. Stat. 60-4,121). Message license plates permitted; fee is $40 annually. (Neb. Rev. Stat. 60-3,119).

Operator's License.

Issued by county treasurer or Department of Motor Vehicles (Neb. Rev. Stat. 60-4,119) on application and examination by Director of Motor Vehicles (Neb. Rev. Stat. 60-4,113), except as provided in Neb. Rev. Stat. 60-4,122(8). Members of armed forces and full-time students exempt from licensing requirement of this state if licensed under laws of residence. (Neb. Rev. Stat. 60-488). Application for replacement license because of change of name or address must be made within 60 days of change. (Neb. Rev. Stat. 60-4,120). Minimum age for operator's license 17, however, person may obtain provisional operator's permit allowing holder to drive unsupervised from six o'clock a.m. to midnight, and at other times when accompanied by licensed person of at least 21 years. (Neb. Rev. Stat. 60-4,118.05 and -4120.01). To obtain license, any person under age of 18 must produce certified birth registration or notarized birth registration, must have possessed valid provisional operator's permit for 12 months prior to application and must not have accumulated three or more points in the 12 months prior to application. (Neb. Rev. Stat. 60-484 and -4,118.05). Person 15 years or more may obtain learner's permit, may operate vehicle if accompanied by licensed operator who is at least 21 years of age. (Neb. Rev. Stat. 60-4,123). To obtain permit, applicant must successfully complete department-approved driver safety course. (Neb. Rev. Stat. 60-4,120.01). Nonresident individuals who serve in state on active duty as members of armed forces or who are considered full-time students are exempt from licensing requirements of Nebraska if duly licensed in state of residence. Any person who lives on farm and is 13-15 years of age may obtain farm permit. (Neb. Rev. Stat. 60-4,126). Nonresident individuals engaged in temporary agricultural employment in Nebraska, not to exceed 60 days, may be granted additional 30 day immunity if similar immunity is granted by state of his permanent residence. (Neb. Rev. Stat. 60-488). All licenses expire on licensee's birthday in fifth year of issuance except that any operator's license issued to person less than 21 years of age expires on that person's 21st birthday. (Neb. Rev. Stat. 60-490). Licenses issued to persons wearing glasses expire on licensee's birthday if issued before Jan. 1, 2007, and on licensee's birthday in 2d year after issuance if issued after Jan. 1, 2007. (Neb. Rev. Stat. 60-490). Licensee may waive written portion of exam if license is renewed before or within one year after expiration and license not suspended, revoked or cancelled. (Neb. Rev. Stat. 60-4,122).

Titles.

Certificate of title is required, which is issued by county clerk where vehicle is kept for majority of year. (Neb. Rev. Stat. 60-139, -140 and -144). Application for certificate of title must include statement that identification inspection has been conducted. (Neb. Rev. Stat. 60-148).

Sales.

Manufacturer or importer selling new car to dealer for resale must furnish dealer with a manufacturer's or importer's certificate. Any other seller must deliver to purchaser a certificate with proper assignment thereon, failing in which purchaser acquires no title. Within 30 days after delivery of motor vehicle, purchaser must apply for certificate of title, which is issued by county clerk on presentation of certificate duly assigned or bill of sale or other satisfactory proof of ownership. Such certificate may be cancelled by Department of Motor Vehicles if issued to wrong person, and vehicle may not be operated after cancellation. The act also covers commercial trailers, semi-trailers and cabin trailers. Fee for issuing title certificate is $10. (Neb. Rev. Stat. 60-139, -144 and -154).

Liens.

Security agreement, conditional sale contract or other instrument intended to operate as lien on a motor vehicle must be accompanied by certificate of title or manufacturer's or importer's certificate, which must be retained by lienholder unless, in case of certificate of title, county clerk has made notation of lien on face thereof. When lien is discharged, holder must endorse cancellation on certificate over his signature and certificate may then be presented to county clerk who will note cancellation in his records. These provisions supersede other statutory provisions as to filing of security agreements, conditional sale contracts, etc., so far as motor vehicles are concerned. (Neb. Rev. Stat. 60-164). No limitation on length of time lien continues.

Fee for noting lien on certificate is $7. (Neb. Rev. Stat. 60-155). No fee for notation of release of lien. (Neb. Rev. Stat. 60-164).

Uniform Commercial Code in effect. See category Business Regulation and Commerce, topic Commercial Code.

Identification Marks.

Person selling motor vehicle whose motor number or manufacturer's serial number has been altered or defaced is subject to fine up to $10,000 or imprisonment up to five years, or both. (Neb. Rev. Stat. 28-105 and 60-179).

Odometer Alteration.

Unlawful (Neb. Rev. Stat. 60-179 and -190); subject to fine up to $10,000 or imprisonment up to five years, or both. (Neb. Rev. Stat. 28-105).

Operation Prohibited.

By person under 17 or intoxicated person or person under age of 21 who has alcohol concentration level of.02 grams per 100 ML of blood 210L of breath. (Neb. Rev. Stat. 60-6,211.01 to -6,211.04). However, outside of metropolitan cities and cities of primary and of first class, person older than 14 years and two months and younger than 16 and three months may obtain limited permits to drive to and from school by nearest way or may drive under personal supervision of parent or guardian. (Neb. Rev. Stat. 60-4,123.01, -4,124). Also, person 15 years or more may obtain learner's permit, may operate vehicle if accompanied by licensed operator who is at least 21. (Neb. Rev. Stat. 60-4,123). Person at least 16 years but less than 18 may obtain provisional operator's license, see subhead Operator's License, supra. (Neb. Rev. Stat. 60-4,120.01). Operating motor vehicle to avoid arrest can lead to order forbidding operator from driving motor vehicle for two years and revocation of license for same period. (Neb. Rev. Stat. 28-905). See also subhead Traffic Regulations, infra.

Size and Weight Limits.

Regulated by Neb. Rev. Stat. 60-6,288 to -6,294.

Tolerance.

Gross weight on which registration has been paid plus 1,000 lbs. (Neb. Rev. Stat. 60-6,300). Fines of $25 for each 1,000 pounds or fraction thereof for overloading. (Neb. Rev. Stat. 60-6,300).

Equipment Required.

Regulated by Neb. Rev. Stat. 60-6,220 to -6,305. Studded snow tires permitted between Nov. 1 and Apr. 1. (Neb. Rev. Stat. 60-6,250). See also subhead Seat Belts, infra; category Family, topic Infants.

Lights Required.

Regulated by Neb. Rev. Stat. 60-6,219 to -6,225, and general provisions of Uniform Act.

Inspection.

Held unconstitutional and program abandoned July 1, 1982.

Traffic Regulations.

Substantially all of provisions of Uniform Act Regulating Traffic on Highways has been adopted. Driving while intoxicated law stiffened, and applied to liquor or drugs. First offense, mandatory minimum seven days imprisonment and $400 fine. Second offense 30 days and $500, subsequent offenses 90 days minimum, one year maximum sentence, $600 fine (Neb. Rev. Stat. 28-106). In addition, for first offense, court shall order person not to drive for six months and license revoked for same period; second offense within 12 years, one year loss of driving privilege with revocation of license for same; for three or more offenses prior to current conviction within past 12 years, 15 year loss of privilege and license revoked for same. (Neb. Rev. Stat. 60-498 to -498.04 and 60-6,196 to -6,204). Nebraska considers convictions in Nebraska as well as those in other states if at time of such conviction, offense for which person was convicted would be violation in Nebraska. (Neb. Rev. Stat. 60-6,197.02).

Accidents.

Operator is required to stop and render reasonable assistance to injured parties. Must give name, address, telephone number and show operator's number. Maximum penalty is fine not more than one year or $1,000 or both and revocation of driver's license. (Neb. Rev. Stat. 60-696 to -698).

Liability of Owner.

Negligence of others is governed by common law generally. Owner is liable for injuries caused by automobile driven by servant between garage and place of employment, despite slight deviation from direct route. (143 Neb. 344, 9 N.W.2d 488). Owner and head of family who furnishes automobile for pleasure and convenience of family is liable for injury inflicted by car when driven by member of family with his express or implied consent (Family Purpose Doctrine). (238 Neb. 1, 468 N.W.2d 604). Family car doctrine recognized. (195 Neb. 518, 239 N.W. 2d 487).

Guests.

No liability for injury to guest including guest related to operator of car by marriage, or parent, grandparent, child, grandchild or sibling of operator, unless operator of car was intoxicated or guilty of gross negligence. (Neb. Rev. Stat. 25-21,237). Statute is constitutional. (210 Neb. 272, 313 N.W.2d 688).

Proof of Financial Responsibility.

Motor Vehicle Safety Responsibility Act has been adopted. Owner or operator of any motor vehicle involved in accident causing property damage to apparent extent in excess of $1,000 to that of each person or personal injury or death of any person must, within ten days, make written report of accident to Department of Roads. (Neb. Rev. Stat. 60-699). License and registration of residents and all operating privileges of nonresidents are suspended unless owner or operator: (1) Has insurance or bond in effect to cover $25,000 property damage, $25,000 for personal injury to or death of one person and $50,000 for two or more persons; (2) qualifies as self-insurer; (3) within 60 days deposits securities in such amount as Department may determine to satisfy any judgment growing out of accident; (4) within 60 days is released from liability by judgment of court or any judgment rendered is satisfied. Insurance must be written in company authorized to do business in Nebraska or if written outside state by company not authorized to do business in Nebraska company must execute acknowledgment that it shall be amenable to process issued by Nebraska court in any action upon policy. (Neb. Rev. Stat. 60-507 to -509). Provision is made for reinstatement of license and registration on certain conditions. Penalties for various violations run up to $1,000 or one year imprisonment or both. (Neb. Rev. Stat. 60-501 to -569).

Uninsured and Under Insured Motorist Coverage Act: Owner or operator of any motor vehicle must carry insurance to cover underinsured motorist liability in amount of: (1) $25,000 for one person for bodily injury, or death; (2) $50,000 for two or more persons. Insured may request additional coverage but not to exceed $100,000 per person or $300,000 per accident. Maximum liability of insurer is lesser of difference between limit of underinsured's coverage and amount paid to insured; or amount of damages sustained but unrecovered. Act does not apply if: (1) Insured in writing refuses coverage; (2) insured enters into settlement which adversely affects rights of insured; (3) injury caused by insured or family member; (4) statute of limitations has expired. (Neb. Rev. Stat. 44-6401 to -6414).

See also subhead Vehicle License, supra; category Insurance, topic Insurance Companies, subhead Policies.

No-Fault Insurance.

Not adopted.

Foreign Vehicle.

Registered in home state and displaying license plates required by laws thereof may operate without license provided trucks, truck-tractors, semitrailers or buses must comply with regulations imposed on Nebraska trucks, truck-tractors, semitrailers or buses and pay same fees as are charged residents of Nebraska. (Neb. Rev. Stat. 60-366 and -3,178).

Nonresident Operator.

Who has complied with license and registration requirements of home state may operate car in state without Nebraska operator's license for period not exceeding 30 days. Privilege forfeited on conviction of violation of any motor vehicle law. (Neb. Rev. Stat. 60-488). Nonresident Violator Compact of 1977 adopted. (Neb. Rev. Stat. 60-4,100).

Nonresident Owner.

Gainfully employed or present in Nebraska shall register his car after 30 days employment or presence, unless home state grants immunity. (Neb. Rev. Stat. 60-366).

Action Against Nonresident.

Arising out of operation of vehicle in state may be commenced under general provisions on service of process as they apply to all civil proceedings.

Direct Actions.

Against insurer by injured person not authorized by statute.

Motor Vehicle Carriers.

Public Service Commission shall regulate and exercise general control over all carriers engaged in intrastate commerce. (Neb. Rev. Stat. 75-109). Carrier must comply with all orders of Commission or be guilty of misdemeanor. (Neb. Rev. Stat. 75-117).

License fees to foreign motor carriers are generally amount charged Nebraska residents. (Neb. Rev. Stat. 60-3,198).

There are special provisions with respect to shipment of livestock (Neb. Rev. Stat. 60-3,147 and -6,305), and transportation of motor vehicle fuels (Neb. Rev. Stat. 66-501 to -512; Neb. Rev. Stat. 68-525 to -531).

Helmet Requirement.

Person shall not operate or be passenger on motorcycle on any highway unless wearing approved protective helmet. Violators shall be fined $50. (Neb. Rev. Stat. 60-6,278 to -6,282).

Towing Motor Vehicles.

Any transporter doing business in state may, in lieu of registering each vehicle transported, secure transporter's certificate and one transporter number plate from Department of Motor Vehicles. Fee, $10. Transporter plate may be displayed upon motor vehicle or trailer being transported. Applicant shall keep record of each vehicle transported for six years. (Neb. Rev. Stat. 60-378).

Insurance.

See subhead Proof of Financial Responsibility, supra.

Liability of Lessor.

Owner of leased truck, truck-tractor, or trailer is liable for injury or death resulting from operation thereof. (Neb. Rev. Stat. 25-21,239).

Motor Vehicle Taxes.

Before license issued applicant must show payment of current tax on said vehicle or camper unit. (Neb. Rev. Stat. 60-3,188 and -1803). Valuation fixed by Department of Motor Vehicles. (Neb. Rev. Stat. 60-3,188). If nonresident desires to register vehicle, it must be registered in county where vehicle is domiciled, or where bona fide business conducted. Every owner of vehicle required to be registered shall make application for registration to county treasurer of county in which vehicle is kept for majority of year. (Neb. Rev. Stat. 60-366).

Armed Forces members need not pay tax provided they are not domiciled in Nebraska. (Neb. Rev. Stat. 60-3,185).

Gasoline Tax.

See category Taxation, topic Gasoline and Special Fuels Taxes, subhead Gasoline Tax.

Lemon Law.

See category Business Regulation and Commerce, topic Consumer Protection.

Motor Vehicle Dealers License Board.

Persons or firms engaged in sale of or lease, for more than 60 days, motor vehicles in Nebraska, new or used, must be licensed by Board. Application for license, in form prescribed by Board, must be submitted in writing, accompanied by proof of insurance. (Neb. Rev. Stat. 60-1407 and -1407.01). Board has power to deny, revoke or suspend license after hearing. (Neb. Rev. Stat. 60-1413). Annual fees not to exceed: Dealers, $400; salesmen, $20; manufacturer, $600; distributors, $600; factory representatives, $20; finance companies, $400; wrecker or salvage dealer, $200; supplemental dealer's license, $20; dealer's agent license, $100; distributor representative, $20; factory branch license, $200; motor vehicle auction license, $400. (Neb. Rev. Stat. 60-1411.01).

Service on Unauthorized Foreign Manufacturers or Distributors of Motor Vehicles.

See category Civil Actions and Procedure, topic Process.

Seat Belts.

Required equipment in motor vehicles manufactured after 1973. Statute requires seat belt usage on all roadways. Violators are fined $25. (Neb. Rev. Stat. 60-6,265 to -6,273).

COMMERCIAL CODE FORMS:

See Part III, Uniform and Model Acts, Commercial Code Amendments for National Article 9 Forms.

1

NEVADA LAW DIGEST

—Scope —

Revised for 2010 edition by

WOODBURN and WEDGE, of Reno.

(Citations, unless otherwise indicated, NRS refers to Nevada Revised Statutes. J.C.R.C.P. refers to Justices' Courts' Rules of Civil Procedure. N.R.C.P. refers to The Nevada Rules of Civil Procedure. N.R.A.P. refers to The Nevada Rules of Appellate Procedure. N.A.R. refers to Nevada Arbitration Rules. Parallel citations to Pacific Reporter begin with 17 Nev.)

Note: This revision covers all Acts approved by Governor through Oct. 1, 2009. See category 6 Courts and Legislature. Legislature meets biennially in Jan. of odd numbered years.

1 INTRODUCTION

1.01 GOVERNMENT AND LEGAL SYSTEM:

The State of Nevada is a constituent state of the United States of America. For further discussion of the U.S. federal system, see Introduction to the Federal Government of the United States at the beginning of this volume. A great many laws are promulgated by the federal government of the United States and are not reflected in the topics below. See the Introduction to this volume for references to the federal law topics covered.

Like all but one of the United States, Nevada has a common law legal system, with roots in English common law. For information on the courts and legislature of Nevada, see category 6 Courts and Legislature.

1.02 [RESERVED]

1.03 HOLIDAYS:

Following days are legal holidays for state and county government offices: Jan. 1, 3d Mon. in Jan., 3d Mon. in Feb., last Mon. in May, July 4, 1st Mon. in Sept., last Fri. in Oct., Nov. 11, 4th Thurs. and Fri. in Nov., Dec. 25 and any day that may be appointed by President except appointment of fourth Mon. in Oct. as Veterans' Day. (NRS 236.015).

Holiday Falling on Sun. If Jan. 1, July 4, Nov. 11, and Dec. 25 fall upon Sun., Mon. following shall be observed as legal holiday. (NRS 236.015).

Holiday Falling on Sat. If Jan. 1, July 4, Nov. 11, and Dec. 25 fall upon Sat., Fri.

preceding shall be observed as legal holiday. (NRS 236.015).

Legality of Transactions on Sat., Sun. or Holidays. Sundays and all of preceding holidays are nonjudicial days and on such days, with certain exceptions, no judicial business may be done. (NRS 1.130).

When performance of any act fixed by law or contract falls upon holiday or nonjudicial day it may be performed on the next business day. (NRS 10.165).

1.04 OFFICE HOURS AND TIME ZONE:

Nevada is in the Pacific (GMT-08:00) time zone. Office hours are generally from 9 a.m. to 5 p.m.

2 BUSINESS ORGANIZATIONS

2.01 AGENCY:

Rights and liabilities of principal and agent with respect to each other are largely determined under common law rules. The Uniform Fiduciaries Act (1922), covering particular phases of the relationship, has been adopted here. (NRS 162.010-162.140).

2.02 ASSOCIATIONS:

Five or more persons may form a cooperative association for purpose of transacting any lawful business. (NRS 81.180). Cooperative nonprofit associations may be formed by three or more persons, and have powers similar to those of private corporations. (NRS 81.010-81.160).

Formation.

Cooperative association must prepare articles of association, setting forth name, purpose, name of commercial registered agent, or name and address of noncommercial registered agent, term to exist, which may be perpetual, number, names and residences of directors, amount which each member is to pay as fee for membership and name and address of each person signing articles, which must be filed with Secretary of State. (NRS 81.200). Association must adopt code of bylaws within 40 days of formation. (NRS 81.230).

Rights and Powers.

Has succession by associate name, in such name may sue and be sued, have seal, hold and convey real and personal property, as purposes of association may require, execute contracts necessary to purpose for which formed, borrow money and issue evidences of indebtedness. (NRS 81.220).

Liabilities.

Property of association is subject to judgment and execution. (NRS 81.260). Bylaws must state amount of indebtedness which may be incurred (NRS 81.230), and no member is responsible for any of debts in excess of his proportion of such indebtedness (NRS 81.190).

Actions.

May sue and be sued in association name. (NRS 81.220).

Dissolution.

May be obtained by non-profit cooperative corporations in accordance with general corporate law contained in c. 78.

Professional Associations.

May be formed by two or more persons licensed or legally authorized to render professional service when created by written articles of association. (NRS 89.020[4]).

See also topic 2.03 Corporations, subhead Professional Corporations.

2.02A BUSINESS TRUST:

Business trust may be formed to carry on any lawful business or activity. (NRS 88A.200). Has such powers as are necessary or convenient to effect any of purposes for which business trust formed. (NRS 88A.300). Created by one or more persons adopting governing instrument and signing and filing certificate of trust with Secretary of State. (NRS 88A.210). Certificate of trust must set forth name of business trust, name and address of at least one trustee, name of commercial registered agent, or name and address of noncommercial registered agent, name and address of each person signing certificate and any other information trustees determine to include. (NRS 88A.210). Foreign business trust must register with Secretary of State prior to transacting business in state of Nevada. (NRS 88A.710). All business trusts must file initial and annual lists. (NRS 88A.600). Certificate of trust must be canceled by filing certificate of cancellation with Secretary of State upon completion or winding up of business trust and its termination. (NRS 88A.420). Business trust may request reinstatement after forfeiting its right to transact business. (NRS 88A.650). If certificate of business trust has remained revoked for period of five consecutive years, certificate must not be reinstated. (NRS 88A.650).

2.03 CORPORATIONS:

Uniform Commercial Code has been adopted (2005). (NRS cc. 104, 104A). See category 3 Business Regulation and Commerce, topic 3.09 Commercial Code.

The present corporation law, digested here, is 78.010-92A.500. Model Business Corporation Act has not been adopted.

Purposes.

Corporation may be formed for any lawful business or any legitimate object or purpose (NRS 78.030), except to carry on business of a trust company, savings and loan association, thrift company or banking corporation (NRS 78.020). Insurance and mutual fire insurance companies, surety companies, express companies and railroad companies, not infringing laws of another jurisdiction wherein the carrying on of business is contemplated, may be incorporated under the statute, and such corporations may conduct business within state upon complying with other regulatory statutes. (NRS 78.020).

Nonprofit corporations are governed by special act. (NRS 82.006-82.546).

Nonstock nonprofit corporations are provided for with specified rights and duties. (NRS 81.410-81.660).

Professional corporations and associations are governed by special act. (NRS 89.010-89.270).

Close corporations (no more than 30 shareholders) may be governed by special act. (NRS 78A.010-78A.200).

Corporate name must be distinguishable from names of all artificial persons registered under cc. 78, 78A, 80-82, 84, 86-89 whose name is on file or reserved; if name not so distinguishable, articles of incorporation shall be returned to incorporator, unless written consent of holder of reserved or registered name is obtained. (NRS 78.039). Any form of name is permitted except that name appearing to be that of natural person and containing given name or initials must not be used as corporate name except with additional word or words such as “Incorporated,” “Limited,” “Inc.,” “Ltd.,” “Company,” “Co.,” “Corporation,” “Corp.,” or other word which identifies it as not being natural person. (NRS 78.035).

The words “trust” or “bank” cannot be used in corporate name unless corporation proposes to carry on banking or trust company business either exclusively or in connection with bank, savings and loan or thrift company without prior approval of Commissioner of Financial Institutions. (NRS 78.045[1]).

Words “engineer”, “engineered”, “engineering”, “professional engineer”, “registered engineer”, or “licensed engineer” cannot be used in corporate name unless State Board of Engineers and Land Surveyors certifies that principals of corporation are licensed, or that corporation is exempt from NRS 625.520, or corporation has publicly traded securities and is regulated by Securities Exchange Act of 1934 and does not engage in practice of professional engineering. (NRS 78.045[3]).

Words “architect”, “architecture”, “registered architect”, “licensed architect”, “registered interior designer”, “residential designer” or “residential design” cannot be used, unless Nevada State Board of Architecture, Interior Designs, and Residential Designs certifies that principals of corporation are holders of certificate of registration to practice, or corporation is qualified to do business in Nevada pursuant to NRS 623.49, or corporation has publicly traded securities and is regulated by Securities Exchange Act of 1934 and does not engage in practice of architecture or residential design or interior design. (NRS 78.045[4]).

Secretary of State may not file certificate of articles of incorporation of any corporation which provides that name of corporation contains word “accountant”, “accounting”, “accountancy”, “auditor” or “auditing” unless Nevada State Board of Accountancy certifies that corporation is registered pursuant to provisions of NRS c. 628, or corporation has filed with Nevada State Board of Accountancy sworn statement that corporation is not engaged in practice of accounting and is not offering to practice accounting in Nevada. (NRS 78.045[5]).

Secretary of State may not file articles of incorporation or any certificate of amendment thereto of any corporation formed or existing pursuant to laws of Nevada which provides that name of corporation contains words “common-interest community”, “community association”, “master association”, “unit-owners’ association” or “homeowners’ association” or if it appears in articles of incorporation or certificate of amendment that purpose of corporation is to operate as unit-owners’ association pursuant to NRS cc. 116 or 116B, unless Administrator of Real Estate Division of Department of Business and Industry certifies that corporation has registered with Ombudsman for Owners in Common-Interest Communities and Condominium Hotels pursuant to NRS 116.31158 or 116B.620 and paid to Administrator of Real Estate Division fees required in NRS 116.31155 or 116B.620. (NRS 78.045[6]).

Name is reserved upon application, for 90 days during which use by another requires written, acknowledged consent of reserving party. (NRS 78.040). Fee is $25. (NRS 78.785[4]).

Secretary of State will not accept articles of incorporation if it appears from articles of incorporation that business to be carried on is subject to supervision by Commissioner of Insurance or Commissioner of Financial Institutions without prior approval of appropriate Commissioner. (NRS 78.045[2]).

See topic 16.01 Insurance Companies.

Term of Corporate Existence.

Unless otherwise specified in articles, has perpetual existence. (NRS 78.060).

Incorporators.

One or more persons may establish corporation. (NRS 78.030). No statutory requirements that they be residents of state or subscribers of stock.

Articles of Incorporation.

Articles of incorporation must contain:

1. Name of corporation. For requirements as to name, see subhead Corporate Name, supra.

2. Name of commercial registered agent, or name and address of noncommercial registered agent.

3. Number of shares authorized to issue and if more than one class or series is authorized, classes, series, and number of shares of each authorized, unless articles authorize Board to determine by resolution classes, series, and numbers of each class or series.

4. Names and mailing or street addresses, either residence or business, of first board. Also any desired provision as to changing number of directors.

5. Name and mailing or street address, either residence or business, of each incorporator signing articles. (NRS 78.035).

6. Articles of incorporation may also contain any provision, not contrary to Nevada laws: (1) For management of business and for conduct of affairs of corporation; (2) creating, defining, limiting or regulating powers of corporation or rights, powers or duties of directors, officers or stockholders, or any class of stockholders, or holders of bonds or other obligations of corporation; or (3) governing distribution or division of profits of corporation. (NRS 78.037).

Execution and Filing of Articles.

Articles must be signed and filed in office of Secretary of State. (NRS 78.030). By last day of first month after filing articles of incorporation, corporation must file list containing: (1) Name of corporation; (2) file number if known; (3) names, titles and addresses of officers and directors; (4) name of commercial registered agent, or name and address of noncommercial registered agent; and (5) signature of officer certifying that list is true, complete and accurate. (NRS 78.150).

Each document filed with Secretary of State must be on or accompanied on form prescribed by Secretary of State and Secretary of State may refuse to file document if it does not contain all information required by statute. (NRS 78.026). Secretary of State may provide for electronic filing of documents. (NRS 78.026).

Some entities must include fee of $100,000 with their annual list as well as descriptive statement and attestation that annual list contains no material misrepresentations of fact. (NRS 78.153). This requirement pertains only to such entities that hold, solely or in conjunction with its parent and all subsidiaries, 25% or more of share of market within Nevada for any product sold or distributed by entity within Nevada and which, entity itself or its parent or subsidiaries, has been investigated at least five times within previous five years in any jurisdiction within U.S. including state and federal investigations involving allegations of restraint of trade and which resulted in entity being fined, penalized, required to divest holdings, or being unable to acquire holdings. (NRS 78.153).

Incorporation Tax.

None.

Filing Fees.

For articles of incorporation, if amount represented by total number of shares provided for in articles is:

$75,000 or less	$75
Over $75,000 and not over $200,000	$175
Over $200,000 and not over $500,000	$275
Over $500,000 and not over $1,000,000	$375
Over $1,000,000 for the first $1,000,000	$375

and for each additional $500,000 or fraction thereof $275.

Maximum fee that may be charged for original filing of articles of incorporation is $35,000. (NRS 78.760).

Value of shares for fee purposes is: (1) if only shares of a par value are provided for, the aggregate par value of all shares; (2) if only shares without par value are provided for, the product obtained by multiplying the number of shares by $1; (3) if shares with and without par value are provided for, aggregate par value of shares with par value plus product of number of shares without par value multiplied by $1. Consideration or value prescribed for shares without par value can not be used to determine filing fees. Corporate shares worth par value less than 1/10 of 1¢ are treated as having par value of 1/10 of 1¢ for calculating fees. (NRS 78.760).

Existence of the corporation commences upon filing of articles and payment of filing fees and issuing of certificate by Secretary of State; filing of articles does not, by itself, constitute commencement of business of corporation. (NRS 78.050).

A copy of certificate or articles of incorporation, certified by Secretary of State under official seal, or with respect to corporation organized before Oct. 1, 1991, of copy thereof filed with any county clerk, or microfilmed by clerk, under county seal, certified by clerk, must be received as prima facie evidence of facts therein stated and of existence and due incorporation of such corporation. (NRS 78.055).

Organization.

Articles may contain any provision, not contrary to Nevada law, for management of business and for conduct of affairs and powers of corporation or its directors, officers, or shareholders. (NRS 78.037).

Paid In Capital Requirements.

There is no provision requiring any capital to be paid in before commencing business.

Amendment of Articles of Incorporation.

Any changes in articles of incorporation may be made by amendment, except that provision which would have been unlawful or improper to insert in original articles cannot be inserted therein by amendment. (NRS 78.385). Except as otherwise provided in NRS 78.340, amendment is effected by resolution passed by board of directors declaring such amendment advisable and either calling meeting of stockholders entitled to vote on amendment or directing that proposed amendment be considered at next annual meeting of stockholders entitled to vote on amendment. (NRS 78.390). If at such meeting majority in interest of stockholders having voting power vote in favor of such amendment and no greater number is required by articles, officer of corporation must sign certificate accordingly, setting forth such amendment or articles as amended, vote by which such amendment was adopted and must file certificate with Secretary of State. (NRS 78.390[1]). Resolution of stockholders approving proposed amendment may provide that at any time before effective date of amendment, notwithstanding approval of proposed amendment by stockholders, board of directors may, by resolution, abandon proposed amendment without further action by stockholders. (NRS 78.390[5]). Amendment becomes effective upon filing with secretary of state or upon later date specified in certificate, which must not be more than 90 days after certificate is filed. (NRS 78.390[6]). If filed certificate specifies effective date and if resolution of stockholders approving proposed amendment provides that board may abandon proposed amendment, board may terminate effectiveness of certificate by resolution and by filing certificate of termination with Secretary of State that: (1) Is filed before effective date specified in certificate filed; (2) identifies certificate being terminated; (3) states that, pursuant to resolution of stockholders, board is authorized to terminate effectiveness of certificate; (4) states that effectiveness of certificate has been terminated; (5) is signed by officer of corporation; and (6) is accompanied by filing fee of $175. (NRS 78.390[7]). If amendment would adversely alter or change any preference or right of one or more classes or series of stock, holders of each class or series adversely affected are, unless articles specifically provide otherwise, entitled to vote as class on such amendment, even though not given voting power by articles, and majority vote of such class is necessary to pass amendment. (NRS 78.390[2]).

Before any stock in corporation has been issued two thirds of incorporators or two thirds of board of directors may amend original articles. (NRS 78.380).

Increase or decrease of authorized stock may be effected by amendment of articles of incorporation, provided such amendment conforms to 78.035 and 78.037. (NRS 78.385).

Unless articles otherwise provide, corporation may change number of shares of class or series of its authorized stock by increasing or decreasing number of authorized shares of class or series and correspondingly increasing or decreasing number of issued and outstanding shares of each stockholder by resolution adopted by board of directors without stockholder approval, except where proposal to increase or decrease number of authorized shares provides that only money will be paid or scrip issued to stockholders who before increase or decrease held 10% or more of outstanding shares of affected class or series and would otherwise be entitled to receive fractions of shares in exchange for cancellation of their outstanding shares must be approved by majority, or greater number if required by articles, of affected class or series. (NRS 78.207). Articles of incorporation may specifically deny right to vote on such increase or decrease. (NRS 78.207[3]). Any such proposal which includes provisions that only money will be paid or scrip issued to stockholder who before increase or decrease held 1% or more of outstanding shares of affected class or series and would otherwise be entitled to receive fraction of share in exchange for cancellation of all of their outstanding shares allows affected stockholder to dissent pursuant to 92A.300 to 92A.500. (NRS 78.207[4]).

Unless increase or decrease of number of authorized shares is accomplished by action that otherwise requires amendment to articles of incorporation, such amendment is not necessary; change is effective after filing statutory certificate with Secretary of State; however, if proposal would adversely alter or change any preference or other right given to any class or series of shares, proposal must be approved by majority vote of adversely affected class or series regardless of restrictions on their voting power unless articles specifically deny right to vote on such increase or decrease. (NRS 78.207[3]).

Bylaws.

Corporation may make bylaws not inconsistent with Constitution or laws of U.S. or

Nevada. (NRS 78.060[2][e]). Subject to bylaws adopted by stockholders, directors may adopt, amend or repeal any bylaw, including any bylaw adopted by stockholders. (NRS 78.120[2]). Articles of incorporation may grant authority to adopt, amend or repeal bylaws exclusively to directors. (NRS 78.120[3]).

Seal.

Use of seal or stamp on any corporate record is not necessary. (NRS 78.065).

Stock.

Corporation must prescribe class, series and number of shares of each which corporation is authorized to issue in articles; if more than one class or series authorized, articles must prescribe, or vest authority in board to prescribe, class, series and number of each and voting powers, designations, preferences, limitations, restrictions and relative rights of each, and distinguishing designation for each class or series. (NRS 78.195[1]). Unless articles provide otherwise, no stock issued as fully paid up may ever be assessed, and articles cannot be amended in this matter. (NRS 78.195[3]).

Stock Certificates.

Stockholder is entitled to certificate signed by designated officers or agents unless corporation provides for issuance of uncertified shares, in which case corporation must send shareholder statement containing information required on certificate and must thereafter confirm annually. (NRS 78.235). Stock issued by transfer agent may bear facsimile of signature of officers or agents lithographed or printed thereon. (NRS 78.235[2]).

Issuance of Stock.

Board may authorize shares to be issued for any consideration consisting of tangible or intangible property or benefit to corporation including services performed or contracts for services to be performed. (NRS 78.211[1]). Judgment of Board as to consideration received for shares issued is conclusive in absence of actual fraud in transaction. (NRS 78.211[1]). When corporation receives authorized consideration, shares issued are fully paid. (NRS 78.211[2]).

For purpose of this section, “benefit to the corporation” includes issuance of shares to up to 100 persons without consideration for sole purpose of qualifying corporation as real estate investment trust pursuant to 26 U.S.C. §§ 856, et seq., or any successor provision.

For corporations organized on or after Oct. 1, 1991, shareholders do not have preemptive right to acquire stock except to extent articles so provide. (NRS 78.267). For corporations organized before Oct. 1, 1991, shareholders do have preemptive rights unless limited or denied in articles of incorporation. (NRS 78.265[2]). For these corporations, unless specifically granted in articles of incorporation, there are no preemptive rights to acquire: (1) Shares issued to directors, officers, or employees pursuant to approval of majority vote, (2) shares sold for consideration other than cash, (3) shares issued at same time, or as part of same offering in which, shareholder claiming preemptive right acquired his, or (4) shares, treasury shares or securities convertible into shares, if shares or those into which convertible securities may be converted are upon issuance registered pursuant to 15 USC § 781. (NRS 78.265[3][a]). Also for these corporations, holders of preferred or limited shares not entitled to preemptive rights, and holders of common stock without voting rights not entitled to preemptive rights of shares of common stock with voting rights. (NRS 78.265[3]). Holders of common stock have preemptive right to shares of preferred or limited class unless convertible into shares of common stock. (NRS 78.265[3]).

Unless articles of incorporation provide otherwise, corporation may decrease number of issued and outstanding shares of class or series held by each stockholder of record without correspondingly decreasing number of authorized shares of same class or series pursuant to board resolution and approval by vote of stockholders. (NRS 78.2055[1]).

Transfer of Stock.

Restriction on transfer or registration of transfer of stock may be imposed either by articles of incorporation, bylaws, or agreement among shareholders, or between shareholders and corporation. (NRS 78.242). Restriction must be noted on stock certificate or contained in statement of information required by 78.235. (NRS 78.242). Uniform Commercial Code adopted. See category 3 Business Regulation and Commerce, topic 3.09 Commercial Code.

Uniform Simplification of Fiduciary Security Transfers Act adopted (1959). (NRS 162.150). See category 3 Business Regulation and Commerce, topic 3.04 Commercial Code.

Uniform Commercial Code—Investment Securities adopted (1997). (NRS 104.8101-104.8511).

Uniform Commercial Code adopted (2005). (NRS cc. 104, 104A). See category 3 Business Regulation and Commerce, topic 3.09 Commercial Code.

Stock Transfer Tax.

None.

Stockholders.

All shares of series must have voting powers, designations, preferences, limitations, restrictions and relative rights identical with those of other shares of same series and, except to extent otherwise provided in description of series, with those of other series of same class. (NRS 78.195[2]). Stockholder of at least 15 percent of shares is entitled to inspect books of account and all financial records of corporation. (NRS 78.257[1]). See Supra, subhead Financial Records.

Stockholder Actions.

Stockholder denied right of inspection may bring cause of action to enforce right and recover costs and attorney's fees. (NRS 78.257). As to security for costs, see category C Civil Actions and Procedure, topic 5.08 Costs.

Stockholders' Liabilities.

Unless articles provide otherwise, no stockholder is liable for debts or liabilities of corporation. (NRS 78.225). Purchaser of shares only liable to pay consideration for which share authorized to be issued or specified in written subscription agreement. (NRS 78.225). Stockholder may be individually liable for debts or liabilities of corporation where stockholder acts as alter ego of corporation. (NRS 78.747[1]). Whether stockholder acts as alter ego of corporation is determined by court as matter of law. (NRS 78.747[3]).

Stockholders' meetings may be held either within or without state as directed in articles of incorporation or by-laws. (NRS 78.310[1]). Unless articles or bylaws provide otherwise, entire board, any two directors or president may call annual and special meetings of stockholders and directors. (NRS 78.310[1]). There must be written notice signed by president or vice-president or secretary or assistant-secretary, given personally or by mail to each stockholder not less than ten nor more than 60 days before meeting. (NRS 78.370). Articles of incorporation or by-laws may require publication of notice also. (NRS 78.370). Unless articles or bylaws provide otherwise, whenever any shareholder to whom notice of two consecutive annual meetings and all notices of meetings between those two consecutive meetings, or all or at least two payments sent by first class mail of dividends or interest on securities have been addressed to him at his address shown on corporate records but have been returned undeliverable, giving of further notice is not required. (NRS 78.370). Notice may be given electronically. (NRS 78.370). Unless period of more than 60 days or period of less than ten days is provided in articles, closing date for record ownership may be fixed by directors not more than 60 or less than ten days prior to meeting. (NRS 78.350[2]). If record date is not fixed, record date is at close of business on day before day on which first notice is given or, if notice is waived, at close of business on day before meeting is held. Determination of stockholders of record entitled to notice of or to vote at meeting of stockholders applies to adjournment of meeting unless board of directors fixes new record date for adjourned meeting. Board of directors must fix new record date if meeting is adjourned to date more than 60 days later than date set for original meeting. (NRS 78.350). Board may adopt resolution prescribing date upon which stockholders of record entitled to give written consent pursuant to NRS 78.320 must be determined. Such date may not precede or be more than ten days after date resolution is adopted by board. (NRS 78.350).

Unless c. 78, articles or by-laws otherwise provide: (a) majority of voting power in person or proxy constitutes quorum, regardless of whether proxy has authority to vote on all matters, and stockholder action is approved, other than election of directors, if number of votes in favor of action exceeds opposition; (b) any action that could be taken at meeting may be taken without meeting if, before or after action, written consent signed by stockholders holding at least majority, or larger proportion if required, of voting power; and (c) stockholders may participate at meeting by telephone conference or similar methods of communication by which all participants can hear each other, such participation constitutes presence in person at meeting (NRS 78.320).

Voting for directors is by plurality and may be cumulative only when articles of incorporation or amendment so provide, and then only if written notice is given president or secretary at least 48 hours before meeting date if at least ten day notice had been provided, otherwise not less than 24 hours before meeting. (NRS 78.360). Voting may be by proxy, including one limited to designated matters, appointed by written instrument. (NRS 78.355).

Person holding stock in fiduciary capacity is entitled to vote shares held. Person whose stock is pledged is entitled to vote, unless in pledge, pledgor has expressly empowered pledgee to vote stock. Where stock is owned jointly, if only one owner votes, that person's act binds all, if more than one votes, act chosen by majority of votes binds all, or if more than one votes, but vote is evenly split on any matter, each faction may vote shares in question proportionately. (NRS 78.352).

Proxy shall be deemed irrevocable if written authorization states that proxy is irrevocable and, only for as long as it is coupled with interest sufficient in law to support irrevocable power. (NRS 78.355[5]).

Voting trusts may be created for period not exceeding 15 years but may be extended by written agreement. Agreement must be in writing and duplicate copy thereof must be filed in registered office of corporation. Stock placed in such trust must be cancelled and new certificates issued to voting trustees and it must appear that stock is issued pursuant to agreement. Shareholders, by written agreement for period not exceeding 15 years, may agree that their stock must be voted pursuant to provisions of agreement, as they may subsequently agree, or in accordance with agreed upon procedure. (NRS 78.365).

Directors.

Business must be managed under direction of board of directors or trustees, all of whom must be natural persons who are at least 18. Corporation must have at least one director but may provide for other number, variable number, and for manner of increasing or decreasing directors. Directors need not be stockholders, unless articles provide otherwise. (NRS 78.115). At least one-fourth of them must be elected annually. (NRS 78.330[2]). Unless articles or bylaws provide otherwise, each director holds office after expiration of his term until his successor is elected and qualified or until he resigns or is removed. (NRS 78.330). If amendment reclassifying directors would otherwise increase term of director, unless amendment is to articles of incorporation and otherwise provides, term of each incumbent director on effective date of amendment terminates on date it would have terminated had there been no reclassification. (NRS 78.330). Articles may provide that voting power of individual directors or classes may be greater or less than that of other individual directors or classes. (NRS 78.330[3]). Vacancy in board may be filled by majority of remaining directors, unless otherwise required by articles. (NRS 78.335)

Director or directors may resign effective at close of meeting and such directors may participate in election of successors. (NRS 78.335).

Classes. Articles of incorporation or bylaws may provide for classification of directors as to their election by one or more authorized classes or series of shares. (NRS 78.330[2]).

Directors' meetings may be held within or without the state. (NRS 78.310). A majority then in office is necessary for quorum unless articles or bylaws otherwise provide. (NRS 78.315).

Unless restricted by articles of incorporation or bylaws, any action required or permitted to be taken at any meeting of board of directors or committee thereof may be taken without meeting if all members give written consent, except that written consent is not required to be signed by common or interested directors who abstain in writing. If director abstains, fact of common directorship, office, or financial interest must be known to board before written consent, and board must approve action in good faith by unanimous consent without counting abstaining director. (NRS 78.315). Unless otherwise restricted by articles of incorporation, members of board of directors can participate in meeting of such board by telephone conference or similar communication methods by which all persons participating in meeting can hear each other. Such participation constitutes presence. (NRS 78.315).

Powers and Duties of Directors.

Directors have full control of corporation and may make bylaws. (NRS 78.120). Directors must exercise powers in good faith with view to best interest of corporation. May rely on information, opinions and reports prepared or presented by other directors, officers or employees reasonably believed to be reliable and competent and counsel, accountants, financial advisers, valuation advisers, investment bankers or others reasonably believed to be within his or her competence, or committee of directors on matters which it is reasonably believed to merit confidence (NRS 78.138). Directors and officers in deciding upon matters of business are presumed to act in good faith, on informed basis and with view to interests of corporation. (NRS 78.138).

Liabilities of Directors.

Director is individually liable for any damages as result of any act or failure to act in his capacity as director only if director breached his fiduciary duties as director and such breach involved intentional misconduct, fraud, or knowing violation of law. (NRS 78.138).

Director is liable for wrongful declaration of distributions. This liability will not apply to director who caused his dissent to be entered upon minutes of meeting of directors at time action was taken or who was not present at meeting and caused his dissent to be entered on learning of action. (NRS 78.300).

Director may be individually liable for debts or liabilities of corporation where director acts as alter ego of corporation. Whether director acts as alter ego of corporation is determined by court as matter of law. (NRS 78.747).

Officers.

Every corporation must have a president, a secretary, and a treasurer. May also have vice-presidents, assistant secretaries, assistant treasurers, etc. Officers hold their office for such terms and have such powers and duties as prescribed in bylaws or determined by board of directors. Any person may hold two or more offices. All officers must be natural persons. (NRS 78.130).

Liabilities of Officers.

Officer is individually liable for any damages as result of any act or failure to act in his capacity as officer only if officer breached his fiduciary duties as officer and such breach involved intentional misconduct, fraud, or knowing violation of law. (NRS 78.138).

Officer may be individually liable for debts or liabilities of corporation where officer acts as alter ego of corporation. Whether officer acts as alter ego of corporation is determined by court as matter of law. (NRS 78.747).

Indemnification of Directors and Officers.

Corporation may purchase and maintain insurance, or other arrangements, for director, officer, employee or agent for liability asserted and expenses incurred in that capacity whether or not corporation has authority to indemnify such person. No financial arrangement to protect person liable for intentional misconduct, fraud or knowing violation of law. (NRS 78.752). In absence of fraud, decision of board as to such insurance is conclusive; insurance is not void or voidable and any director approving it, even if beneficiary, is not subject to personal liability for such approval. (NRS 78.752).

Registered Office.

Every corporation, domestic or foreign, to do business in state, must have registered agent who resides or is located in state. (NRS 78.090[1]). Street address of registered agent is registered office of corporation. (NRS 78.090[1]).

Registered Agent.

Designation of registered agent must be filed with Secretary of State at time of filing articles of incorporation. (NRS 78.035). If registered agent resigns pursuant to NRS 78.370, or if commercial registered agent terminates its listing, corporation, before effective date of resignation or termination, must file statement of change of registered agent. (NRS 78.097). Registered agent must be in Nevada. (NRS 78.090[1]).

General Powers of Corporation.

Corporation has power to: (1) Have succession by its corporate name until dissolved; (2) sue and be sued; (3) make contracts and adopt and use a common seal or stamp; (4) appoint officers and agents as corporation requires; (5) make bylaws for management of its affairs, transfer of its stock, transaction of business and calling and holding of meetings; (6) wind up and dissolve itself; and (7) unless articles otherwise provide, engage in any lawful activity. (NRS 78.060[2]). Unless articles provide otherwise, corporation has perpetual existence. (NRS 78.060[1]).

Subject to any limitations contained in the articles, it has also power to: (1) Borrow money and contract debts; (2) issue bonds, promissory notes, bills of exchange, debentures and obligations, secured or unsecured; (3) guarantee, purchase, hold, take, obtain, receive, subscribe for, own, use, dispose of, sell, exchange, lease, lend, assign, mortgage, pledge or otherwise deal in bonds, obligations or securities issued by any person, government, governmental agency or political subdivision and to exercise all rights of ownership including right to vote; (4) purchase, hold, sell and transfer shares of its own stock; (5) conduct business and to have offices, hold, purchase, lease, mortgage, convey and take by devise or bequest property in any of states and in foreign countries; (6) make donations for public welfare, enter into any relationship with another person; (7) renounce in its articles or action by board, any interest or expectancy in specified business opportunities that are presented to it; and (8) do all things incidental to those enumerated in its articles. (NRS 78.070).

Distributions and Dividends.

Except as otherwise provided in articles, board may authorize and corporation may make distributions to shareholders, including distributions on shares that are partially paid, provided that no distribution can be made if, after giving it effect, corporation would not be able to pay its debts as they become due in usual course of business, or corporations total assets would be less than sum of its liabilities plus amount needed if corporation was dissolved to satisfy preferential rights on dissolution of those shareholders whose preferential rights are superior to those receiving distribution. (NRS 78.288).

Unless otherwise provided in its articles of incorporation, corporation may issue share dividends pro rata and without consideration to its stockholders. (NRS 78.215[3]).

Unclaimed Dividends.

See category 21 Property, topic 21.01 Absentees, subhead Escheat.

Sale or Transfer of Corporate Assets.

Unless its articles of incorporation provide otherwise, every corporation may, by action taken at any meeting of its board of directors, sell, lease or exchange all of its property and assets. Although most such transfers require approval of majority of voting stockholders, transfer of assets by way of mortgage, or in trust or in pledge to secure indebtedness of corporation, or to abandon sale, lease or exchange of assets, does not. (NRS 78.565).

Books and Records.

Every corporation shall keep at its registered office certified copy of its articles of incorporation, its by-laws, and stock ledger or duplicate stock ledger revised annually, of all stockholders alphabetically arranged, showing their places of residence and number of shares held by each. Stock ledger must be open daily during business hours for inspection by designated stockholders, and they may make extracts therefrom. In lieu of such stock ledger, corporation may keep at its registered office statement designating name of custodian of stock ledger, with complete post office address. Corporation incurs penalty of $25 per day for noncompliance. Stock ledger or duplicate stock ledger must be maintained by registered agent for three years following resignation or termination of registered agent or termination of corporation by Secretary of State. (NRS 78.105). Any records maintained by corporation in its regular course of business may be stored in electronic form if they are convertible into legible paper form within reasonable time after request. (NRS 78.0297).

Financial Records.

Any stockholder owning 15% of issued and outstanding shares of corporation, upon five days written notice, is entitled to inspect books of account and financial records of corporation, to make copies of records, and conduct audit of such records upon furnishing affidavit that such inspection is desired solely in relation to his interest as stockholder. This law does not apply to any corporation that has filed during preceding 12 months all reports required to be filed pursuant to § 13 or § 15(d) of Securities Exchange Act of 1934, or any corporation that furnishes its stockholders detailed, annual financial statement. (NRS 78.257).

Reports.

Domestic corporations, foreign corporations, and all nonprofit corporations doing business in state must file with Secretary of State, on or before last day of first month after filing articles of incorporation, or copy thereof in case of foreign corporation, list on form furnished by Secretary of State containing name of corporation, file number of corporation, names and titles of required officers, all directors and name of commercial registered agent, or name and address of noncommercial registered agent with their addresses certified by officer of corporation accompanied by declaration under penalty of perjury that corporation has complied with provisions of § 108 of this act, and acknowledges that it is Category C felony to knowingly offer any false or forged instrument with office of Secretary of State. (NRS 78.150). On or before last day of month in which anniversary date of incorporation occurs domestic corporation must file on form furnished by Secretary of State similar list, or certification that no changes have occurred; foreign corporation must file such list and designation plus any amendments to its articles which change its name or increase its capitalization. Filing fees vary and must accompany annual reports. (NRS 78.150). Canceled check or other proof of payment for filing fee received by corporation constitutes certificate authorizing it to transact business within this state for one year. (NRS 78.150-78.165; 80.110-80.140).

Foreign corporation. In addition to above-described reports, must publish each year not later than month of Mar. statement, with specific information as required by statute, of its last calendar year's business in two numbers or issues of newspaper published in this state that has total weekly circulation of at least 1,000. (NRS 80.190). If fiscal year is other than calendar year, statement must be published not later than end of third month following close of fiscal year. Any foreign corporation that fails to publish statement liable for penalty of $100 for each month statement not published. (NRS 80.190).

Failure to make required filings and pay fee within time fixed results in penalty of $75 for domestic or foreign corporations, $50 for nonprofit corporations. (NRS 78.170; 80.150; 82.193). Foreign corporation forfeits right to transact any business in state if filing fee and penalty not paid on or before last day of month in which anniversary date of incorporation occurs in which filing fee was required. (NRS 80.150). Secretary of State shall notify, by written notice to registered agent, each corporation in default. On first day of first anniversary of month following month filing was required, corporation's charter is revoked and right to transact business in State is forfeited; Secretary of State shall compile list of such corporations and shall notify each corporation (NRS 78.175, 80.160).

Reinstatement.

Secretary of State may reinstate any corporation on payment of filing fee, reinstatement fee, and penalties, except if charter has remained revoked for five consecutive years it cannot be reinstated. (NRS 78.180, 80.150, 80.170).

Corporate Bonds or Mortgages.

No statutory provisions.

Merger and exchange.—One or more domestic entities may acquire all outstanding shares or owner's interests of one or more classes or series of another foreign or domestic corporation, limited liability company, limited partnership or business trust permitted. (NRS 92A.110). Plan of merger or exchange must set forth in writing name, address, jurisdiction of organization, and governing law of each entity; terms and conditions of exchanging shares or owner's interests; and may set forth other provisions. (NRS 92A.110). After adopting plan, Board of each corporation to merger and Board whose shares will be acquired in exchange, must submit plan for approval by its shareholders who are entitled to vote on plan. (NRS 92A.130). Plan must be approved by majority of voting power, with class approval if classes entitled to vote on plan as class. Separate vote by class required for merger if plan would adversely affect class and for exchange by each class to be exchanged (NRS 92A.130; 92A.120), but action by shareholder of survivor not required for merger if articles of survivor are not different, shareholders would hold same number with identical rights, designations, preferences and limitations after merger, number of voting or participating shares after merger plus voting or participating shares after merger plus voting on participating shares issued as result of merger not exceed 20% of total number of voting or participating shares of survivor outstanding immediately before merger (NRS 92A.130). Simplified procedure for parent corporation owning at least 90% of outstanding shares of each class of subsidiary entitled to vote on merger, unless articles or operating agreement provide otherwise. Parent may merge subsidiary into itself or merge with and into subsidiary. (NRS 92A.180). After plan effective, surviving or acquiring entity must file articles of merger or exchange with Secretary of State. (NRS 92A.200).

Foreign entity may merge or enter into exchange agreement with domestic entity; provided in case of merger, it is permitted by law of foreign entity, if in case of exchange where acquired interests are of domestic entity, regardless of law of foreign acquiring entity provided both entities comply with act. Surviving foreign entity to merger and acquiring foreign entity in exchange must appoint Secretary of State as agent for service of process to enforce dissenters' rights. (NRS 92A.190).

Shareholders may dissent and obtain fair value of shares in event of merger or exchange (NRS 92A.380); but if stock listed on national securities exchange or held by at least 2,000 shareholders, no such right exists (NRS 92A.390).

Conversion.

Except as limited by NRS 78.411 to 78.444, one domestic general partnership or one domestic entity, except domestic nonprofit corporation, may convert into domestic entity of different type or foreign entity if plan of conversion is approved pursuant to NRS c. 92A. Plan of conversion must set forth in writing name of constituent entity and proposed name for resulting entity, governing law of each entity, terms and conditions of conversion, manner and basis of converting owner's interest or interest of partner in general partnership of constituent entity into owner's interests, rights of purchase and other securities in resulting entity or canceling such owner's interest in whole or in part, and full text of charter documents of resulting entity; and may set forth other provisions. (NRS 92A.105). After adopting plan, Board of each domestic corporation that is constituent entity in conversion, must submit plan for approval by its shareholders who are entitled to vote on plan. (NRS 92A.120). Unless otherwise provided in partnership agreement, all partners must approve plan of conversion involving domestic general partnership. (NRS 92A.140). Once conversion takes effect, resulting foreign entity shall be deemed to have appointed secretary of state as its agent for service of process in proceeding to enforce any obligation. After plan of conversion approved, constituent entity must file appropriate articles of conversion with secretary of state. (NRS 92A.195).

One foreign entity or foreign general partnership may convert into one domestic entity provided it is permitted by law of foreign entity or foreign general partnership and compliance with that law in effecting conversion. (NRS 92A.195).

Domestication.

Any foreign organization may become domesticated in this state as domestic entity. Articles of domestication must set forth date when and jurisdiction where foreign organization was first formed, incorporated, organized or otherwise created, name of foreign organization immediately before filing articles of domestication, name and type of domestic entity and jurisdiction that constituted principal place of business or central administration of foreign organization. Upon filing articles of domestication and charter document with Secretary of State, and payment of requisite fee for filing charter document of domestic entity, foreign organization is domesticated in this state as domestic entity described in charter document. When foreign organization is domesticated, domestic entity resulting from domestication is for all purposes deemed to be same entity as foreign organization. (NRS 92A.270).

Tender Offers.

Person is not considered beneficial owner of shares tendered under offer for tender or exchange until tendered shares are accepted for purchase or exchange. (NRS 78.414[2]).

Dissolution.

Board of directors may adopt resolution approving dissolution if corporation has not issued stock; if corporation has issued stock must recommend dissolution and submit to stockholder vote for approval; if dissolution approved certificate signed by officer of corporation setting forth that fact and list of names and addresses of corporation's, officers and directors must be filed with Secretary of State. (NRS 78.580).

The effect of a dissolution or forfeiture of charter is to permit corporation to function with limited rights and for limited purposes; does not impair any claims available to or against it, its directors, officers or stockholders, arising before dissolution and commenced within two years. (NRS 78.585).

Insolvency and Receivers.

Where corporation is insolvent or certain other circumstances exist, court may appoint receiver to manage affairs of corporation and, if necessary, to wind up its business. (NRS 78.630; 78.635; 78.650).

Close Corporations.

May be formed provided all issued stock held by not more than 30 shareholders, stock subject to restrictions on transfer, and corporation makes no public offering of stock. (NRS 78A.020). Stock certificates of close corporation must contain statutory statement concerning shareholders rights. (NRS 78A.040). Shares in close corporation may not be transferred except as permitted by certificate of incorporation, bylaws, shareholders agreement, or voting trust agreement. (NRS 78A.050). Close corporation may operate without board of directors if certificate of incorporation so provides. (NRS 78A.090). Any written agreement of shareholders, or provision in certificate of incorporation or bylaws relating to any phase of affairs of corporation is not invalid on ground that it is attempt to treat corporation as partnership. (NRS 78A.080). Certificate of incorporation may include provision granting any shareholder or percentage of shareholders option to dissolve corporation at will or upon occurrence of specified event or contingency. (NRS 78A.160).

Appraisal.

If merger or exchange requires stockholders' vote notice of meeting must advise of dissenters' rights, if no stockholders' vote required, corporation must provide written notice of dissenters' rights in accordance with 92A.410 and 92A.430. If meeting required dissenting stockholder must deliver written notice of intent to demand payment before vote taken and not vote shares in favor of action (NRS 92A.420); if proposed action creating dissenters' rights is taken by written consent of stockholders, dissenter must not consent to or approve proposed action (NRS 92A.420); if no meeting required shareholder receiving statutory notice of dissenters' rights must demand payment and deposit certificates in accordance with notice (NRS 92A.440). Corporation must then pay what it determines to be fair value of shares, plus interest (NRS 92A.460); dissenter may notify corporation, in writing, of shareholder's own estimate of fair value, plus interest, and demand payment (NRS 92A.480); corporation must commence action within 60 days after receiving demand if matter remains unsettled and court may appoint appraisers to recommend decision of fair value (NRS 92A.490 and 92A.500).

Foreign Corporations.

Every foreign corporation before doing business in this state must file with Secretary of State: (1) Certificate of corporate existence issued not more than 90 days before date of filing by authorized officer of jurisdiction of its incorporation setting forth filing of records related to articles of incorporation, or governmental acts or other authority by which corporation created; (2) name of commercial registered agent, or name and address of noncommercial registered agent; (3) acknowledged statement by officer of corporation setting forth: (a) authorized stock, number of par value shares and their par value, number of no par value shares, as of date not earlier than six months prior to filing, and (b) general description of corporate purposes. Secretary of State will not file records if name is same or deceptively similar to name of corporation or limited partnership formed in this state, foreign corporation or limited partnership authorized to do business in this state or name reserved for corporation or limited partnership. (NRS 80.010).

Foreign corporation not qualified cannot commence, maintain or defend lawsuit in state however can commence proceeding seeking extraordinary remedy pursuant to NRS c. 31 provided corporation qualifies within 45 days thereafter (NRS 80.210).

Filing fees for foreign corporations are same as incorporation fees of domestic corporations, but in no case will the amount exceed $35,000 for initial filing or $35,000 for filing certificate increasing authorized capital stock. (NRS 80.050). See subhead Filing Fees, supra.

Real Property.

Nonresident corporation has power to take, hold and enjoy real property on same terms and conditions as residents. (NRS 111.055). Foreign corporations owning property must appoint and keep registered agent in state. (NRS 80.060).

Doing Business.

Following does not constitute doing business in this state: maintaining or defending any proceeding, holding board or shareholder meetings, maintaining accounts in banks or credit unions, maintaining offices for transfer, exchange and registration of corporation’s own securities, making sales through independent contractors, soliciting orders outside state and accepting them outside state and shipping goods into state, creating or acquiring indebtedness, mortgages and security interstate in real or personal property, securing or collecting debts or enforcing mortgages and security interests in property securing debts, owning real or personal property, isolated transactions not completed within 30 days, production of motion pictures, transacting business as out of state depository institution pursuant to NRS Title 56 and transacting business in interstate commerce. Foreign corporation not doing business within meaning of this statute does not have to qualify with cc. 80, 645A, 645B, or 645E of NRS, or Titles 55 and 56 of NRS unless maintains office in state for transaction of business, solicits or accepts deposits as defined in c. 657 of NRS in this state, solicits business for activities of mortgage broker as defined by NRS 645B.0127, or arranges mortgage loan secured by real property which is not commercial paper as defined by NRS 645E.040. (NRS 80.015).

Withdrawal.

Any foreign corporation may surrender its right to do business in this state by filing with Secretary of State notice of its purpose to do so duly authorized by resolution of its board of directors and executed under corporate seal, and paying required fee of $75 (NRS 80.050) provided corporation’s right to do business had not previously been forfeited (NRS 80.200, 80.050).

For other matters relating to foreign corporations, see supra, subheads Registered Office; Resident Agent; Books and Records; Reports; Merger and Exchange.

Fictitious Name.

No action may be commenced or maintained by corporation conducting, carrying on, or transacting business under assumed or fictitious name or designation that is in any way different from legal name of corporation upon or on account of any contract made or transaction had under such fictitious name, nor upon or on account of any cause of action arising or growing out of business so carried on, unless a certificate signed by an officer of corporation, and acknowledged before some officer authorized to take acknowledgments of conveyances of real property, is filed with county clerk of each county in which business is being carried on. (NRS 602.010–602.090).

Taxation of Corporate Property.

Property of every incorporated company is taxed in county in which it is located. (NRS 361.235[2]).

Taxation of Corporate Stock.

Owner or holder of stock in incorporated company, entire capital of which is invested in property which is assessed, or capital of which is assessed, is not assessed individually for his stock in such company. (NRS 365.235[1]).

Franchise Tax.

No annual franchise tax. Corporations are taxed on their property in county where located, the same as individuals. Foreign corporations regularly doing business here are similarly taxed.

Excise Payroll Tax.

Excise payroll tax imposed on each employer at rate of 0.63% of wages, as defined in NRS 612.190, paid by employer during calendar quarter with respect to employment. (NRS 363B.110).

Income Tax.

There is no corporation income tax.

Professional corporations may be formed to provide any type of personal service which may legally be performed only pursuant to a license, certificate of registration or other legal authorization. (NRS 89.010–89.100).

See also topic 2.02 Associations, subhead Professional Associations.

Deeds.

See category 21 Property, topic 21.06 Deeds.

Model Non-Profit Corporation Act not adopted. See supra, subhead Purposes.

Limited Liability Company.

See topic 2.06 Limited Liability Companies.

2.04 FOREIGN CORPORATIONS:

See supra, topic Corporations, subhead Foreign Corporations.

2.05 JOINT STOCK COMPANIES:

There are no statutes concerning the organization of companies. The common law concerning joint stock companies prevails. See also topic 2.02 Associations.

Professional Associations.

See topic 2.02 Associations, subhead Professional Associations; topic 2.03 Corporations, subhead Professional Corporations.

2.06 LIMITED LIABILITY COMPANIES:

Formation.—One or more persons may form limited liability company by signing and filing with Secretary of State articles of organization for company. (NRS 78.151[1]).

Purposes.—Limited liability company may be formed for any lawful purpose other than insurance unless approved by Commissioner of Insurance. (NRS 86.141).

Powers.—Limited liability company may: (1) Sue and be sued, complain and defend, in its name; (2) purchase, take, receive, lease or otherwise acquire, own, hold, improve, use and otherwise deal in and with real or personal property; (3) sell, convey, mortgage, pledge, lease, exchange transfer and otherwise dispose of all or any part of its property and assets; (4) lend money to and otherwise assist its members; (5) purchase, take receive, subscribe for or otherwise acquire, own, hold, vote, use, employ, sell, mortgage, lend, pledge or otherwise dispose of, and otherwise use and deal in and with shares, member's interests or other interests in or obligations of domestic or foreign limited liability companies, domestic or foreign corporations, joint ventures or similar associations, general or limited partnerships or natural persons, or direct or indirect obligations of United States or of any government, state, territory, governmental district or municipality or of any instrumentality of it; (6) make contracts and guarantees and incur liabilities, borrow money at such rates of interest as company may determine, issue its notes, bonds and other obligations and secure any of its obligations by mortgage or pledge of all or any part of its property, franchises and income; (7) lend, invest and reinvest its money and take and hold real property and personal property for payment of money so loaned or invested; (8) conduct its business, carry on its operations and have and exercise powers granted by this chapter in any state, territory, district or possession of United States, or in any foreign country; (9) appoint managers and agents, define their duties and fix their compensation; (10) lease its activities and surrender its articles of organization; (11) exercise all powers necessary or convenient to effect any of purposes for which company is organized; and (12) hold license issued pursuant to provisions of NRS c. 463. (NRS 86.281).

Name.—Name of limited liability company formed must contain words "Limited Liability Company", "Limited Liability Company", "Limited Company", or "Limited" or abbreviations "Ltd.", "L.L.C.", "L.C.", "LLC" or "LC". Word "Company" may be abbreviated as "Co.". (NRS 86.171[1]). Proposed name must be distinguishable from other names on record with Secretary of State. (NRS 86.171[2]). Secretary of State will not accept any articles of organization for any limited liability company if name of limited liability company contains word "accountant", "accounting", "accountancy", "auditor" or "auditing" unless Nevada State Board of Accountancy certifies that limited liability company is registered with Board or has filed with Board statement that limited liability company is not engaged in practice of accounting. (NRS 86.171[5]). Secretary of State will not accept any articles of organization or certificate of amendment of articles of organization of any limited liability company which provides that name of limited liability company contains word "bank" or "trust" unless it appears from articles of organization or certificate of amendment that limited liability company proposes to carry on business as banking or trust company and articles of organization or certificate of amendment is first approved by Commissioner of Financial Institutions. (NRS 86.171[6]). Secretary of State will not accept for filing any articles of organization or certificate of amendment of articles of organization of any limited liability company which provides that name of limited liability company contains words "engineer", "engineered", "engineering", "professional engineer", "registered engineer" or "licensed engineer" unless State Board of Professional Engineers and Land Surveyors certifies that principals of limited liability company are licensed to practice engineering pursuant to laws of this State or that limited liability company is exempt from prohibitions of NRS 625.520. (NRS 86.171[8]). Secretary of State will not accept for filing any articles of organization or certificate of amendment of articles of organization of any limited liability company which provides that name of limited liability company contains words "architect", "architecture", "registered architect", "licensed architect", "registered interior designer”, “registered interior design”, “residential designer”, “registered residential designer”, “licensed residential designer” or “residential design” unless State Board of Architecture, Interior Design and Residential Design certifies that principals of limited liability company are holders of certificate of registration to practice architecture or residential design or to practice as registered interior designer or that limited liability company is qualified to do business in Nevada pursuant to NRS 623.349. (NRS 86.171[9]). Secretary of State will not accept for filing any articles of organization or certificate of amendment of articles of organization of any limited liability company which provides that name of limited liability company contains words “common-interest community”, “community association”, “master association”, “unit-owners’ association” or “homeowners’ association” or if it appears in articles of organization or certificate of amendment of articles of organization that purpose of limited liability company is to operate as unit-owners’ association pursuant to NRS cc. 116 or 116B unless Administrator of Real Estate Division of Department of Business and Industry certifies that limited liability company has registered with Ombudsman for Owners in Common-Interest Communities and Condominium Hotels pursuant to NRS 116.31158 or 116B.625 and paid to Administrator of Real Estate Division applicable fees. (NRS 86.171[10]).

When requested to do so, Secretary of State will reserve, for period of 90 days, right to use any name available for use of any proposed limited liability company. (NRS 86.176).

Articles of Organization must set forth: (1) Name of limited liability company; (2) name of commercial registered agent, or name and address of noncommercial registered agent, or title of office or position to whom service of process is to be sent; (3) name and address of each of organizers signing articles; (4) name and address of each original manager or member; and (5) if company is to have one or more series of members and debts or liabilities of any series are to be enforceable against assets of that series only and not against assets of another series or company generally, statement to that effect and statement setting forth relative rights, powers and duties of series, or indicating that relative rights, powers and duties of series will be set forth in operating agreement or established as provided in operating agreement. (NRS 86.161[1]).

Articles may set forth any other provision, not inconsistent with law, which members elect to set out in articles of organization for regulation of internal affairs of company. (NRS 86.161[2]). It is not necessary to set out in articles of organization rights of members to contract debts on behalf of limited liability company if limited liability company is managed by its members, rights of manager or managers to contract debts on behalf of limited liability company if limited liability company is managed by manager or managers, or any of powers enumerated in NRS c. 86. (NRS 86.161[3]).

Filing Articles of Organization.—Upon filing of articles of organization with Secretary of State and payment of required filing fees, Secretary of State will issue to company certificate that articles, containing required statement of facts, have been filed. Signer of articles of organization or manager designated in articles does not thereby become member of company. At all times after commencement of business by company, company must have one or more members. Filing of articles does not, by itself, constitute commencement of business by company. (NRS 86.151).

Registered Office and Registered Agent.—Limited liability company must have registered agent who must have street address for service of process. Street address of registered agent is registered office of limited liability company in Nevada. (NRS 86.231).

Management of limited liability company is vested in its members in proportion to their contribution to its capital, as adjusted from time to time to reflect properly any additional contributions or withdrawals by members. Unless otherwise provided in articles of organization or operating agreement, management of series is vested in members associated with series in proportion to their contribution to capital of series, as adjusted from time to time to reflect properly any additional contributions or withdrawals from assets or income of series by members associated with series. If provision is made in articles of organization, management of company may be vested in manager or managers, who may but need not be members, in manner prescribed by operating agreement of company. Manager or managers also hold offices and have responsibilities accorded to them by members and set out in operating agreement. (NRS 86.291).

Dissolution.—Company must be dissolved and its affairs wound up at time specified in articles, on occurrence of event specified in operating agreement, unless otherwise provided by articles of operating agreement, upon affirmative vote or written agreement of all members or upon entry of decree of judicial dissolution. (NRS 86.491).

Except as otherwise provided in articles of operating agreement, death, retirement, resignation, expulsion, bankruptcy, dissolution or dissociation of member or any other event affecting member, including, sole member, does not terminate status of person as member or cause limited liability company to be dissolved or its affairs to be wound up. (NRS 86.491).

Filing Fees.—Secretary of State shall charge and collect for: (1) Filing original articles of organization, or for registration of foreign company, $75; (2) amending or restating articles of organization, amending registration of foreign company or filing certificate of correction, $175; (3) filing articles of dissolution of domestic or foreign company, $75; (4) certifying copy of articles of organization or amendment to articles, $30; (5) certifying authorized printed copy of NRS c. 86, $30; (6) reserving name for limited liability company, $25; (7) filing certificate of cancellation, $75; (8) signing, filing or certifying any other record, $50; and (9) copies provided by Office of Secretary of State, $2 per page. Secretary of State will charge and collect, at time of any service of process on him as agent for service of process of limited liability company, $100 which may be recovered as taxable costs by party to action causing service to be made if party prevails in action. Fees set forth in NRS c. 78 apply to limited liability companies. (NRS 86.561).

2.07 LIMITED PARTNERSHIP.

See topic 2.08 Partnerships.

2.08 PARTNERSHIPS:

Uniform Partnership Act (1914) adopted with modifications. (NRS 87.010-87.430). However, Revised Uniform Partnership Act (RUPA) (1997) also adopted. (2005, NRS 87.4301-87.4357). Provisions of NRS 87.010 to 87.430 apply to partnership: (1) Which was formed before July 1, 2006, and which does not voluntarily elect to be governed by provisions of NRS 87.4301 to 87.4357; or (2) which is formed on or after July 1, 2006, and which voluntarily elects to be governed by provisions of NRS 87.010 to 87.430. (NRS 87.025). Thus, partnerships can elect to be governed by either 1914 or 1997 version of Uniform Partnership Act.

Formation.—

No specific statutory provisions must be followed for formation of partnership. Partnership exists where two or more persons associate as co-owners to carry on business for profit. (NRS 87.060; 87.4322).

Partnerships governed by Uniform Partnership Act (1914) will be viewed as aggregate of partners and not entity having completely separate legal personality. (100 Nev. 586, 691 P.2d 417 (1984)). Partnerships governed by Uniform Partnership Act (1997) will be viewed as entity distinct from its partners. (NRS 87.4321).

Rights and Liabilities of Partners Inter Se.—

Under Uniform Partnership Act (1914), each partner must be repaid his contributions, whether by way of capital or advances to partnership property, and share equally in profits and surplus remaining after all liabilities, including those to partners, are satisfied. Each partner must contribute towards losses, whether of capital or otherwise, sustained by partnership according to his share in profits. Partnership must indemnify every partner in respect of payments made and personal liabilities reasonably incurred by him in ordinary and proper conduct of its business, or for preservation of its business or property. Partner, who in aid of partnership makes any payment or advance beyond amount of capital which he agreed to contribute, must be paid interest from date of payment or advance. Partner may receive interest on capital contributed by him only from date when repayment should be made. All partners have equal rights in management and conduct of partnership business. No partner is entitled to remuneration for acting in partnership business, except that surviving partner is entitled to reasonable compensation for his services in winding up partnership affairs. No person may become member of partnership without consent of all partners. Any difference arising as to ordinary matters connected with partnership business may be decided by majority of partners. No act in contravention of any agreement between partners may be done rightfully without consent of all partners. (NRS 87.180).

All partners are liable jointly and severally for everything chargeable to partnership by partner's wrongful act or breach of trust, and jointly liable for all other debts and obligations of partnership; but any other partner may enter into separate obligation to perform partnership contract. (NRS 87.150).

Uniform Partnership Act (1997) grants similar rights and duties as its predecessor but also states that each partner is deemed to have account that is: (1) Credited with amount equal to money plus value of any other property, net of amount of any liabilities, partner contributes to partnership and partner's share of partnership profits, and (2) charged with amount equal to money plus value of any other property, net of amount of any liabilities, distributed by partnership to partner and partner's share of partnership losses. Other addition is that partner may use or possess partnership property only on behalf of partnership. (NRS 47.4333).

Under Uniform Partnership Act (1997), all partners are jointly and severally liable for all obligations of partnership, except that person admitted to existing partnership is not personally liable for any obligation incurred before person's admission, and any obligation incurred while partnership is registered as limited liability company is solely obligation of partnership.

Rights and Liabilities of Partners as to Third Persons.—

Uniform Partnership Act (1914) partnership is bound to make good loss: (1) Where one partner acting within scope of his apparent authority receives money or property of third person and misapplies it; and (2) where partnership in course of its business receives money or property of third person and money or property so received is misapplied by any partner while it is in custody of partnership. (NRS 87.140).

Dissolution.—

Under Uniform Partnership Act (1914), dissolution of partnership is change in relation of partners caused by any partner ceasing to be associated. (NRS 87.290). On dissolution partnership is not terminated, but continues until winding up of partnership affairs is completed. (NRS 87.300).

Under Uniform Partnership Act (1997), partnership is dissolved, and its business must be wound up, only upon occurrence of any of following events: (1) In partnership at will, partnership's having notice from partner of that partner's express will to withdraw as partner, or on later date specified by partner; (2) In partnership for definite term or particular undertaking, within 90 days after partner's dissociation by death or otherwise with express will of at least half of remaining partners to wind up partnership business, express will of all of partners to wind up partnership business, or expiration of term or completion of undertaking; (3) event agreed to in partnership agreement resulting in winding up of partnership business; (4) event that makes it unlawful for all or substantially all of business of partnership to be continued, but cure of illegality within 90 days after notice to partnership of event is effective retroactively to date of event for purposes of this section; (5) on application by partner, judicial determination that economic purpose of partnership is likely to be unreasonably frustrated, another partner has engaged in conduct relating to partnership business which makes it not reasonably practicable to carry on business in partnership with that partner, or it is not otherwise reasonably practicable to carry on partnership business in conformity with partnership agreement; or (6) on application by transferee of partner’s transferable interest, judicial determination that it is equitable to wind up partnership business after expiration of term or completion of undertaking, if partnership was for definite term or particular undertaking at time of transfer or entry of charging order that gave rise to transfer, or at any time, if partnership was partnership at will at time of transfer or entry of charging order that gave rise to transfer.

Administration of Partnership Property.—

Under Uniform Partnership Act (1914), unless dissolution is caused in contravention of partnership agreement, each partner as against his copartners, may have partnership property applied to discharge his liabilities, and surplus applied to pay in cash net amount owing to respective partners. But if dissolution is caused by expulsion of partner who is discharged from all partnership liabilities, either by payment or agreement, he shall receive in cash only net amount due him from partnership. (NRS 87.380[1]). When dissolution is caused in contravention of partnership agreement rights of partners shall be as follows: (1) Each partner who has not caused dissolution wrongfully shall have right to have partnership property applied to discharge his liabilities with surplus applied to pay in cash net amount owing to respective partners, and right against each partner who has caused dissolution wrongfully, to damages for breach of agreement; (2) Partners who have not caused dissolution wrongfully, if they all desire to continue business in same name, either by themselves or jointly with others, may do so, during agreed term for partnership, and for that purpose may possess partnership property, provided they secure payment by bond approved by court, or pay to any partner who has caused dissolution wrongfully, value of his interest in partnership at dissolution, less any damages recoverable for breach of agreement, and in like manner indemnify him against all present or future partnership liabilities; (3) partner who has caused dissolution wrongfully shall have all rights of partner to receive in cash only net amount due him from partnership subject to copartners’ right to damages for breach if business is not continued; or, if business is continued, right as against his copartners to have value of his interest in partnership, less any damages caused to his copartners by dissolution, ascertained and paid to him in cash, or payment secured by bond approved by court, and to be released from all existing liabilities of partnership. (NRS 87.380[2]).

Under Uniform Partnership Act (1997), person winding up partnership’s business may preserve partnership business or property as going concern for reasonable time, prosecute and defend actions and proceedings, whether civil, criminal or administrative, settle and close partnership’s business, dispose of and transfer partnership’s property, discharge partnership’s liabilities, distribute assets of partnership settle disputes by mediation or arbitration, and perform other necessary acts. (NRS 87.4353).

Name.

Names and places of residence of all partners must be filed in proper county or counties (see category 17 Intellectual Property, topic 17.01 Trademarks and Tradenames), and upon every change in membership, within month thereafter, new certificate must be filed containing required information. (NRS 602.040).

Limited Partnership.

Uniform Limited Partnership Act with 1985 Amendments has been adopted. (NRS 88.010). However, Uniform Limited Partnership Act (2001) also adopted. (2007, NRS 87A.005). Limited Partnership must maintain office at which records required by NRS 88.335/87A.195 are kept and registered agent. If office containing records changes, general partner must notify

Secretary of State. (NRS 88.330; 87A.215). If agent dies, resigns or moves from state, Secretary of State must be advised and successor agent appointed. (NRS 88.332). Also, limited partnership must file with Secretary of State annual lists certified by general partners as to partnership name, file number of limited partnership, names and addresses of general partners, and name of commercial registered agent, or name and address of noncommercial registered agent with accompanying fees. (NRS 88.395, 87A.290).

Fees.

Secretary of State will charge for filing certificate of limited partnership or registering foreign limited partnership, $75 (NRS 88.415), for filing certificate of limited liability limited partnership or foreign registered limited liability limited partnership, $100 (NRS 89.415), amendment or restated certificate, $175. Fee for reservation of name, $25. (NRS 88.415). Fee for filing initial list and subsequent annual lists, $125. (NRS 87A.290).

Mining Partnership.

See category 19 Mineral, Water and Fishing Rights, topic 19.01 Mines and Minerals.

3 BUSINESS REGULATION AND COMMERCE

3.01 BANKS AND BANKING:

Uniform Commercial Code adopted. (NRS cc. 104, 104A). See topic 3.09 Commercial Code.

Regulated by NRS 657.005-668.115; even though banks incorporated under earlier statutes.

General Supervision.

Commissioner of financial institutions as chief of division of financial institutions of Dept. of Commerce supervises banking activities.

Branch banks are permitted. Principal office and parent bank must be within this State. (NRS 660.015).

Loans and Discounts.

Bank may lend money on personal security or real or personal property (NRS 662.015), but may not make loan or discount on security of shares of its own stock or member’s interest, or be purchaser or holder of such shares or interests unless such security or purchase is necessary to prevent loss on debt previously contracted in good faith, or has been approved by commissioner and such stock or interest must be sold or disposed of within two years after its acquisition unless commissioner authorized otherwise. (NRS 662.125).

Liabilities of Directors, Officers, etc.

Any director, manager, officer, or other person who knowingly and intentionally participates in violations of state laws relating to banks is liable for damages which bank or its stockholders, members, depositors or creditors suffer in consequence thereof. (NRS 661.195). They may not receive deposits after bank is known to be insolvent or in failing circumstances or give creditor any unfair preference. (NRS 668.045). Violation makes such person guilty of felony and subject to prison time and fine. (NRS 668.045).

Stock and Stockholders.

Shares of stock are deemed personal property. (NRS 78.240). Full and correct list of names and places of residence of stockholders must be kept. (NRS 78.150). Stockholders are not liable to assessment on stock except for purpose of repairing impaired capital. (NRS 673.275).

Where equity of bank is impaired, commissioner of financial institutions must notify bank to make impairment good within three months from date after notice. Thereupon directors may declare assessment on stock or managers shall make assessment on members. If impairment is not made good within three months, commissioner may take possession of business until its affairs are finally liquidated. (NRS 661.085). Bank has bond from officers, managers, or employees in amount required by directors or operating agreement. Bank may sue for breach of bond. (NRS 661.185).

Deposits and Withdrawals.

Banking division of financial institutions may authorize any bank for good cause shown to restrict for limited period percentage of withdrawals from all accounts. (NRS 664.015).

Joint bank accounts are recognized by Nevada law (NRS 100.085), but clear proof of creation of such account is required by courts, tendency being to limit rather than extend application of theory of joint tenancy (62 Nev. 41, 140 P.2d 566).

Deposits in trust are permitted. On death of trustee this deposit may be paid to person for whom deposit was made. (NRS 663.025).

Unclaimed Deposits.

Uniform Disposition of Unclaimed Property Act has been adopted. (NRS 120A.010 et. seq.). Repealed, effective Oct. 1, 2007. (2007, c. 228). Uniform Unclaimed Property Act has been adopted, effective Oct. 1, 2007. (As of time of publication, bill has not been codified, but see § 8 of c. 228, Statutes of Nevada 2007, at page 757.)

Collections.

Uniform Commercial Code adopted. See topic 3.09 Commercial Code.

Bank Holding Companies and Financial Holding Companies.

Nevada adopts definition in § 4(1)(2) of Bank Holding Company Act of 1956, 12 U.S.C. § 1841 (1)(2). (NRS 683A.231).

Trust Companies.

Bank may, by so stating in articles of incorporation, conduct trust company business in connection with banking business, or it may be organized for trust company business only. Such bank may act as trustee under any mortgage or bond, accept and execute municipal or corporate or individual trust not inconsistent with law, act under appointment of court as guardian, administrator, receiver or trustee, act as executor or trustee under any will, as registered agent for foreign (except insurance) corporations, or as fiscal agent for any state, municipality, or corporation. (NRS 662.235).

See also category 13 Estates and Trusts, topic 13.15 Trusts, subhead Trust Companies.

Uniform Common Trust Fund Act adopted. (NRS 164.070-164.100).

Uniform Prudent Investor Act and Uniform Principal and Income Act have been adopted. (NRS 164.700-164.775).

Savings Banks.

Bank may carry on savings bank business under certain restrictions. (NRS 662.215).

Building, savings and loan associations are formed under special statute which regulates branch offices, activities of officers, directors, employees and capital stockholders, investments and borrowing, shares, surpluses and dividends, appraisals, loans and withdrawals, etc. (NRS 673.001-673.850). Commissioner of financial institutions shall supervise domestic and foreign associations doing business within state. (NRS 673.040).

Federal associations may be converted into domestic. (NRS 673.650-673.740).

Foreign Banks.—

Foreign bank operating at state branch or agency has same rights, privileges and powers as Nevada bank at same location, including eligibility to exercise fiduciary powers, and is subject to same duties, restrictions, penalties, liabilities, conditions and limitations that would apply under Nevada law to Nevada bank doing business at same location, with some limitations. (NRS 666A.150). No foreign bank which is licensed to establish and maintain state branch or agency may engage in fiduciary activities at that office unless foreign bank first obtains certificate of authority from Commissioner to engage in fiduciary activities there. (NRS 666A.160).

3.02 BILLS AND NOTES:

Uniform Commercial Code adopted. (NRS cc. 104, 104A). See topic 3.09 Commercial Code.

Judgment Notes.

Status of judgment notes in Nevada is questionable, there having been no Supreme Court decision as to effect of usual judgment note.

Collection of attorney fee clauses are enforceable though no statutory authority exists.

3.03 BILLS OF LADING:

See topic 3.08 Carriers.

3.04 BILLS OF SALE:

No statute.

3.05 BLUE SKY LAW:

See topic 3.24 Securities.

3.06 BROKERS:

Uniform Commercial Code adopted. (NRS c. 104, 104A). See topic 3.09 Commercial Code.

Licenses.—

It is unlawful for any person to engage in business of real estate broker without first obtaining license. (NRS 645.230). Person who wishes to be licensed as mortgage broker must file written application for license with Office of Commissioner and pay applicable fees. (NRS 645B.020).

Real Estate Brokers and Salesmen.

Must be licensed and are regulated by real estate division of department of commerce. (NRS 645.001-645.995). Statutory definitions of “broker,” “broker-salesman,” and “salesman” are broad. (NRS 645.030-645.040). Generally, applicant to be licensed as broker must be actively engaged as full-time licensed broker-salesman or salesman in Nevada, or as full-time licensed broker, broker-salesman, or salesman in another state or District of Columbia, for at least two of four years immediately prior to issuance of Nevada broker’s license and must submit statement required by division. (NRS 645.330). Applicants must submit verified application on forms furnished by real estate division of department of commerce. (NRS 645.350). All applicants must pass written examination. (NRS 645.450-645.475). Broker or salesman cannot recover commission without alleging and proving possession of license. (NRS 645.270). Cities, towns, and counties may require a license for revenue purposes only. (NRS 645.550).

Designated property manager must be natural person holding real estate broker’s license, permit to engage in property management and two years active experience conducting property management. (NRS 645.6052-645.6058).

3.07 BULK SALES:

See topic 3.09 Commercial Code; also category 8 Debtor and Creditor, topic 8.08 Fraudulent Sales and Conveyances.

3.08 CARRIERS:

Note: In 2001, Nevada Legislature made major changes to laws regulating electric utilities and sale of energy. NRS c. 704 should be thoroughly consulted in any matters pertaining thereto.

Jurisdiction over carriers and their rates is in Public Service Commission, subject to judicial review. (NRS 704.010; 704.020).

Uniform Commercial Code adopted. (NRS c. 104, 104A). See topic 3.09 Commercial Code.

Licenses.

Any common carrier, before commencing any intrastate business, must procure certificate of public convenience from Public Service Commission. (NRS 704.330).

Schedules of rates must be filed and adhered to and rates are subject to regulation by Commission. (NRS 704.040-704.110, 704.210).

Discrimination.—

If, upon any hearing and after due investigation, rates, tolls, charges, schedules or joint rates shall be found to be unjust, unreasonable or unjustly discriminatory, or to be preferential, Public Service Commission shall have power to fix and order substituted rate or rates, tolls, charges or schedules as shall be just and reasonable. If any regulation, measurement, practice, act or service complained of is unjust, unreasonable, insufficient, preferential, unjustly discriminatory or otherwise in violation of provisions of this chapter, or if it be found that service is inadequate, or that any reasonable service cannot be obtained, Commission shall have power to substitute other regulations, measurements, practices, service or acts and make such order relating thereto as may be just and reasonable. (NRS 704.120).

Limiting Liability.—

No statutory provision.

Bills of Lading.

Uniform Commercial Code adopted. See topic 3.09 Commercial Code.

Liens.

No relevant statutory provisions.

Railroad Corporations.

Railroad corporations may be formed under general corporation law. (NRS 78.020).

Corporate powers of railroads extend to operation of motor-vehicle transportation. (NRS 78.075).

Railroad may sell or lease property or franchises. (NRS 705.080).

3.09 COMMERCIAL CODE:

Uniform Commercial Code adopted. (NRS cc.104, 104A).

Contained in Nevada Revised Statutes 104.1101-104.9709; 104A.2101-104A.4507. Section numbers follow Uniform Commercial Code Official Text section numbers, but prefixed by "104" or "104A". Dashes in U.C.C. Official Text are omitted and in some cases (e.g., 104.4105) numbers have been substituted for letters in subsections. Thus, U.C.C. § 1-101 becomes NRS 104.1101. For 1962 Official Text of Uniform Commercial Code and Amendments see Uniform and Model Acts section.

1966 Official Amendments to §§ 2-702, 3-501, 7-209 not adopted.

1966 Optional Amendments to §§ 1-209, 9-105, 9-106 not adopted. Optional Amendment to § 2-318 adopted in form of Alternative A.

1972 Official Amendments adopted, effective July 1, 1975.

1973 Official Amendment adopted.

1977 Official Amendments adopted.

1989 Optional Amendments adopted repealing Art. 6-Bulk Transfers; adopting revised Article 6-Bulk Sales in form of Alternative A, and Art. 4A-Funds Transfers. Art. 4A located at NRS 104A.4101-104A.4507.

1990 Amendments adopted providing for new Art. 2A-Leases, revision of Art. 3-Negotiable Instruments and amendments to Art. 4-Bank Deposits and Collections. Art. 2A located at NRS 104A.201-104A.2532.

1994 Revised Art. 8-Investment Securities adopted.

1995 Revised Art. 5-Letters of Credit adopted.

1998 Revised Art. 9-Senate Bill No. 62 of 1999 Legislature adopted revisions consistent with revisions of National Conference of Commissioners on Uniform State Laws to Article 9, to become effective July 1, 2001.

104.1109: Omitted.

104.2318: Alternative A-1966 Optional Official Amendment enacted.

104.2502: Adds subsection 2: “The right of the buyer to recover the goods under subsection 1 vests upon acquisition of a special property even if the seller has not then repudiated or failed to deliver.” (NRS 104.2502[2]).

104.4106: Alternative A- 1990 enacted. Subsection (c) omitted.

104.7106: (Added Section): “This article does not repeal or modify any laws prescribing the form or contents of documents of title or the services or facilities to be afforded by bailees, or otherwise regulating bailees’ businesses in respects not specifically dealt with in this article; but the fact that such laws are violated does not affect the status of a document of title which otherwise complies with the definition of a document of title (NRS 104.1201).”

104.9102: Amends subsection (k): “Chattel paper means a record or records that evidence both a monetary obligation and a security interest in or a lease of specific goods or of specific goods and software used in the goods, or a security interest in or a lease of specific goods and a license of software used in the goods. The term does not include charters or other contracts involving the use or hire of a vessel, or records that evidence a right to payment arising out of the use of a credit or charge card or information contained on or for use with the card. If a transaction is evidenced by records that include an instrument or series of instruments, the group of records taken together constitutes chattel paper. As used in the paragraph, ‘monetary obligation’ means a monetary obligation secured by the goods or owed under a lease of the goods and includes a monetary obligation with respect to software used in the goods.” (2001, c. 140).

104.9311: Amends subsection 4: “During any period in which collateral subject to a statute specified in paragraph (b) of subsection 1 is inventory held for sale or lease by a person or leased by that person as lessor and that person is in the business of selling goods of that kind, this section does not apply to a security interest in that collateral created by that person.”

104.9317: Amends subsection 1: “A security interest or agricultural lien is subordinate to the rights of: (a) A person entitled to priority under NRS 104.9322; and (b) A person that becomes a lien creditor before the earlier of the time: (1) The security interest or agricultural lien is perfected; or (2) One of the conditions specified in paragraph (c) of subsection 2 of NRS 104.9203 is met and a financing statement covering the collateral is filed.”

104.9406: “Secretary of State” added. Adds following words, “Provides that the” in subsections 4(b) and 6(b): “*** assignment or transfer, ***.” Amends 104.9406(9): “This section does not apply to an assignment of a health-care insurance receivable or to a transfer of a right to receive payments pursuant to section 2 of this act.”

104.9407: Optional section adopted. Amends subsection 1(a): “Prohibits, restricts, or requires the consent of a party to the lease to the assignment or transfer, or the creation, attachment, perfection, or enforcement of a security interest in an interest of a party under the lease contract or in the lessor’s residual interest in the goods; or ***.”

104.9408: Adds following words, “Provides that the” in subsections 1(b) and 3(b): “*** assignment or transfer, ***.”

104.9409: Adds following words, “Provides that the” in subsection 1(b): “*** assignment ***.”

104.9513: Adds subsection 4(b): “For the purposes of subsection 7 of NRS 104.9519, subsection 1 of NRS 104.9522 and subsection 3 of NRS 104.9523, a financing statement that indicates that the debtor is a transmitting utility causes the effectiveness of the financing statement to lapse."

104.9516: Adds filing does not occur with respect to record that filing office refuses to accept because: "The record lists a public official of government unit as a debtor and the public official has not authorized the filing of the information in an authenticated record as required pursuant to NRS 104.9509."

104.9519: Amends subsection 9: "Subsections 2 and 8 do not apply to a filing office described in paragraph (a) of subsection 1 of NRS 104.9501."

Financing statement filed before July 1, 2001 may be amended if financing statement and amendment are filed in office specified in NRS 104.9501; amendment is filed in office specified in NRS 104.9501 concurrently with, or after filing in that office of, initial financing statement that satisfies requirements of NRS 104.9706(3); or initial financing statement that provides information as amended and satisfies requirements of NRS 104.9706(3) and is filed in office specified in NRS 104.9501. If law of this state governs perfection of security interest, effectiveness of financing statement filed before July 1, 2001 may be continued only under NRS 104.9705(4), (6) or 104.9706. Effectiveness of financing statement filed before July 1, 2001, may be terminated by filing termination statement in office in which financing statement was filed, unless initial financing statement that satisfies requirements of NRS 104.9706(3) has been filed in office specified by law of jurisdiction governing perfection.

104.9521: Initial financing statement and written record must be submitted on form prescribed and made available by Secretary of State except for reason as set forth in 104.9516(2).

Article 10 omitted. See 104.1110, 104.7106 and 104.8108.

2005 Revised Arts. 1 and 7—Senate Bill No. 201 of 2005 Legislature adopted revisions of Arts. 1 and 7 of Uniform Commercial Code.

2005 revision repeals and replaces provisions of Art. 1 by enacting new general provisions relating to construction, application and subject matter of Uniform Commercial Code. Many of 2005 changes to Art. 1 are nonsubstantive technical changes such as reordering and renumbering sections and adding gender neutral terminology. However, other changes are substantive clarifications and revisions.

2005 revision deletes provisions in Art. 1 relating to statute of frauds and specifically states that substantive rules of Art. 1 only apply to transactions that are within scope of Articles of the Uniform Commercial Code. Bill also clarifies that, unless specific provision of Uniform Commercial Code provides otherwise, Code preempts principles of common law and equity that are inconsistent with provisions of Code or its purposes and policies.

2005 revision expands that definition of "good faith" to include element of commercial reasonableness, which is use in other Articles.

2005 revision also authorizes use of course of performance in interpreting agreements, in absence of express terms in agreement to contrary.

2005 revision repeals and replaces provisions of Art. 7 and enacts new provisions to provide rules for electronic documents of title. Rules address recognition of electronic documents of title, extension of statute of fraud requirements to electronic records and signatures, establishment of authenticity of electronic documents of title and interchangeability between electronic and tangible documents of title. Revision provides that, to extent possible, rules relating to electronic documents of title are identical to or similar to rules for tangible documents of title. Revision also modernizes other provisions of Art. 7 and makes various other technical changes to other Articles of the Uniform Commercial Code that are necessary as result of revisions to Arts. 1 and 7 of Code.

Filing Fees.

See category 10 Documents and Records, topic 10.04 Records, subhead Filing Under Commercial Code. List of fees may be found at http://sos.state.nv.us/business/ucc/forms.asp.

Forms.

See also topics: Banks and Banking, Bills and Notes, Brokers, Carriers, Contracts, Factors, Frauds, Statute of, Sales, Securities, Warehousemen; categories Business Organizations, topic Corporations; Civil Actions and Procedure, topic Limitation of Actions; Debtor and Creditor, topics Assignments, Fraudulent Sales and Conveyances, Liens, Pledges; Documents and Records, topics Records, Seals; Mortgages, topic Chattel Mortgages.

3.10 CONDITIONAL SALES:

See topic 3.23 Sales.

3.11 CONSIGNMENTS:

See topic 3.14 Factors.

3.12 CONSUMER PROTECTION:

Revised Uniform Deceptive Trade Practices Act has been adopted with significant variations. (NRS 598.005-598.990).

Consumer affairs division of department of business and industry investigates deceptive trade practices (NRS 598.096) which are enumerated by statute (NRS 598.0915) and may apply to courts for temporary restraining orders or injunctions, for return of money or property to deceived person, and for commencement of criminal proceedings (NRS 598.0979). Penalties up to $10,000 for each violation are possible, and willful violation is misdemeanor, second violation gross misdemeanor, third and subsequent violation felony. (NRS 598.0999). Suspension of right to conduct business or dissolution of corporation possible. (NRS 598.0999).

Attorney General may institute criminal proceedings or commence action for temporary restraining order or preliminary or permanent injunction if he has reason to believe deceptive trade practice is occurring. (NRS 598.0963).

Consumer’s advocate for customers of public utilities may represent public interest and any class of customers in any proceedings, except as otherwise provided by NRS c. 704. (NRS 228.390).

Consumer Fraud.

Civil action for consumer fraud may be brought by any person who is victim of deceptive trade practice enumerated by statute, or of misleading or inaccurate advertising or breach of statutory warranty by vehicle dealer or rebuilder, or of unlawful misrepresentation, deceit, or fraud in sale of land. Applies to consumers and consumer goods as well as business entities and commercial transactions. If claimant is prevailing party, court shall award him any damages sustained, his costs in action and reasonable attorney’s fees. (NRS 41.600). This action is not action upon any underlying contract. (NRS 41.600).

Retention of Unsolicited Merchandise.

Person who receives merchandise offered for sale but not ordered by him, orally or in writing, may consider such to be an unconditional gift, except when merchandise is sent by mistake or as substitute in response to order for other goods, or is sent by mistake to member of subscription-type plan, or is delivered by mistake to person other than person who ordered goods, or has been ordered by another to be delivered directly to recipient. (NRS 597.950).

Credit and Credit Reporting.

Discrimination by creditor against credit applicant with respect to any aspect of credit transaction because of applicant's sex or marital status is unlawful. (NRS 598B.100). Creditor must consider combined income of husband and wife for purpose of extending credit to married couple. (NRS 598B.110). If husband and wife separately apply for and obtain credit, their credit accounts cannot be combined for purposes of determining finance charges or loan ceilings. (NRS 598B.120). For violations, court may grant injunctive relief, damages, or both. (NRS 598B.170).

Credit reporting agency must identify separately in its reports, credit histories of any person, person's spouse, and joint accounts of person and spouse, to extent information is available. (NRS 598B.130).

Advertising.

Any use or publication of a statement known or which should be known to be false, deceptive or misleading to induce purchase, lease, or sale of any property or services is unlawful (NRS 207.171) with civil and criminal penalties (NRS 207.174, 207.175).

Door-To-Door Sales.

Seller commits deceptive sales practice unless he identifies himself and purpose of call within 30 seconds, or if he offers investment and makes misrepresentations or charges fee for advice concerning investment and fails to disclose he is selling product or is licensed relating to service he is providing. (NRS 598.092). Buyer entering door-to-door contract for goods or services exceeding $25 in price may rescind in writing within three business days. (NRS 598.230). Seller must furnish written copy of contract which informs buyer of his right to cancel (NRS 598.240) and includes detachable "Notice of Cancellation" for buyer's use (NRS 598.250). Seller may assess penalty for cancellation of 5% of price, $15, or any down payment, whichever is lesser amount. (NRS 598.260).

Deceptive trade practice occurs when one in course of business knowingly passes off goods or services as those of another, makes false representations as to source of goods, or affiliation or association with another, uses deceptive representations of geographic origin of goods, makes false representations as to ingredients, uses or benefits of goods or services, represents goods as new when in fact they are not, represents goods or services of particular quality knowing they are not, disparages goods of another by false or misleading statements, advertises goods or services with intent not to sell as advertised or to supply reasonable expected demand unless limited supply is disclosed, advertises under guise to obtain sales personnel when purpose is to sell product to applicant, makes false or misleading statements as to price (NRS 598.0915); when one in course and scope of business employs "bait and switch" advertising consisting of offer to sell goods or services which seller may not intend to sell accompanied by refusal to show goods advertised, disparagement of advertised goods or services, requiring other sales or undisclosed conditions to be met before advertised sale, refusing to take orders within reasonable time period, showing defective goods impractical for advertised purposes, or accepting deposit and switching purchase order to higher priced goods or services (NRS 598.0917); or when one in course of business knowingly fails to identify water damaged goods, solicits by telephone or door-to-door unless seller identifies himself and who he represents within first one-half minute, knowingly misstate that services or repairs are needed, fails to make delivery within reasonable period of time, advertises opportunity for investment unless strict compliance with statute, notifies person as part of advertising plan he has won prize but to receive it he must purchase or rent goods or services, or fails to inform customers that refunds or exchanges are not allowed (NRS 598.092); when one in course of business during solicitation by telephone or sales presentation uses threatening, intimidating, profane or obscene language, repeatedly or continuously conducts solicitation or presentation in manner that is considered by reasonable person to be annoying, abusive, or harassing, solicits person by telephone at his residence between 9 p.m. and 8 a.m. or blocks or otherwise intentionally circumvents any service used to identify caller when placing unsolicited telephone call (NRS 598.018); or when tour broker or tour operator as defined in NRS 598.455 and 598.465, respectively, fails to disclose in clear and conspicuous manner total price customer is required to pay to take sightseeing tour as defined by this chapter (NRS 598.475).

Seller of travel, as defined in this section, must, before advertising its services or conducting business in this state, register with consumer affairs division of department of business and industry by submitting to division application for registration on form prescribed by division, paying fee of $25 to division, depositing with division proper security as required by NRS 598.375, and paying to division fee of $100 pursuant to NRS 598.37. (NRS 598.365). Violation of deceptive trade practice may result in penalty not more than $10,000 for each violation and criminal penalties for violator or its officers or managing agents. (NRS 598.0999). This is not exclusive list of deceptive trade practice and Nevada continues to expand this chapter.

Pyramid promotional sales and endless chain distributions constitute deceptive trade practice. (NRS 598.110).

Motor vehicle repairs are regulated. Person authorizing repairs to motor vehicle must be given upon request, written estimate of total charge including costs of labor and any necessary parts or accessories. (NRS 597.510). No charge may be made exceeding estimate by 20% or $100, whichever is less, without consent of person authorizing repairs. (NRS 597.520).

Miscellaneous.

Also regulated are charitable solicitations (NRS 598.1305); credit service organizations (NRS 598.741-598.787); discount clubs (NRS 598.840-598.930; dance studios and health clubs (NRS 598.940-598.966).

Mobile home manufacture and sale are regulated. (NRS 489.021-489-491).

Plain Language.

No “plain language” statute enacted.

See also topic 3.19 Interest; category 16 Insurance, topic 16.01 Insurance Companies.

3.13 CONTRACTS:

Uniform Commercial Code has been adopted. (NRS cc. 104, 104A). See topic 3.09 Commercial Code.

There are no statutory provisions modifying common law of contracts. See category 10 Documents and Records, topic 10.05 Seals; category 14 Family, topic 14.10 Infants.

3.14 FACTORS:

Uniform Commercial Code adopted. (NRS cc. 104, 104A). See topic 3.09 Commercial Code.

No other statutory provision. Common law governs.

3.15 FRANCHISES:

Manufacturer, distributor or factory may not require dealer to agree to jurisdiction or venue or tribunal in which controversy arising under franchise agreement may or may not be submitted for resolution, may not prohibit dealer from bringing action in any forum allowed by Nevada, may not require dealer to waive right to jury trial and may not terminate or refuse transfer of franchise, or controlling interest in dealership because dealer prior to Oct. 1, 1997 established additional franchise to sell other new vehicles, or after that date unreasonably prevent dealer from establishing additional franchise to sell or service other makes of new vehicles in same facility. (NRS 482.3638).

Uniform Franchise and Business Opportunities Act has not been adopted.

3.16 FRAUDS, STATUTE OF:

Every conveyance of any interest in land (except a lease for one year or less) and every trust or power over or concerning lands must be in writing expressing the consideration and signed by the grantor or his lawful agent. (NRS 111.205-111.210).

Every agreement which, by its terms, is not to be performed within one year from the making thereof, every special promise to answer for the debt, default or miscarriage of another, every promise or undertaking made on consideration of marriage, except mutual promises to marry, every promise or commitment to loan money or extend credit of at least $100,000 made by one in business of lending money or extending credit, and every promise or commitment to pay fee of $1,000 or more for obtaining loan or extension of credit are void unless in writing, expressing consideration and subscribed by party to be charged therewith. (NRS 111.220).

Uniform Commercial Code adopted. (NRS cc. 104, 104A). See topic 3.09 Commercial Code.

Contracts of Sale.

See topic 3.09 Commercial Code.

Grants and assignments of existing trusts in realty and personalty are void unless in writing subscribed by the maker or his lawfully authorized agent. (NRS 111.235).

Part Performance.

Nothing in the statute abridges the power of the courts to compel specific performance of agreements in cases of part performance of such agreements. (NRS 111.015).

3.17 INTEREST:

In absence of agreement fixing rate of interest, interest is allowed at rate equal to prime rate at largest bank in Nevada, as ascertained by Commissioner of Financial Institutions, on Jan. 1 or July 1, as may immediately precede date of transaction, plus two percent, upon all money from time it becomes due, in following cases: (1) Upon contracts other than book accounts; (2) upon settlement of book or store accounts from day on which balance is ascertained; (3) upon money received to use and benefit of another and detained without his consent; and (4) upon wages or salary, if it is unpaid when due, after demand for payment has been made. Rate must be adjusted accordingly on each Jan. 1 and July 1 thereafter until judgment is satisfied. However, this rate of interest does not apply to amounts owed prime contractor under NRS c. 624 which is governed by provisions of NRS 624.630. (NRS 99.040).

Maximum Rate.—

Except as otherwise provided in § 670 of John Warner National Defense Authorization

Act for Fiscal Year 2007, Public Law 109-364, or any regulation adopted pursuant thereto, parties may agree for payment of any rate of interest on money due or to become due on any contract, for compounding of interest if they choose, and for any other charges or fees. Parties must specify in writing rate upon which they agree, that interest is to be compounded if so agreed, and any other charges or fees to which they have agreed. (NRS 99.050).

Judgments.—

When no rate of interest is otherwise specified, judgment draws interest from time of service of summons and complaint until satisfied, except for any amount representing future damages, which draws interest only from time of entry of judgment until satisfied, at rate specified in NRS 99.040. (NRS 17.130).

Open Accounts.—

No statutory provision.

Small Loans.—

NRS c. 604A places limitations on amount company engaged in business of lending short-term and high-interest loans.

Usury.—

Nevada does not have usury law.

Thrift companies are licensed and regulated by Department of Commerce which must require licensee insured by FDIC to comply with any reserves and limits imposed by that insurer. (NRS 677.230; 677.620). Statutory limitations exist on amount of secured loans licensee can make. (NRS 677.770). Loans may be secured by real or personal property regardless of location or nature of property. (NRS 677.780). Licensee may lend at any rate of interest and subject to any charge as parties agree. (NRS 677.730).

3.18 INFORMATION TECHNOLOGY, INTERNET AND NEW MEDIA:

Advertising.—

No statutory provision.

Computer Crime.

Nevada law identifies unlawful acts regarding computers, computer systems, networks, Internet or network sites, information services, electronic mail, encryption and data in NRS 205.473-513. Employee is presumed to have authority to access and use employer's computer, system or network and any supporting documents to data contained in computer, system or network. (NRS 205.509).

Advisory board for Nevada task force for technological crime facilitates cooperation between state, local and federal officers in detecting, investigating and prosecuting technological crimes. (NRS 205A.060).

Victim of technological crimes may bring civil action, whether or not person who committed crime is or has been charged with, convicted, or acquitted of crime, to recover actual and punitive damages, costs and reasonable attorney's fees. (NRS 205.511).

Internet providers must keep confidential all information concerning subscriber other than electronic mail address of subscriber, unless subscriber gives written permission to disclose.

Subscriber is entitled to keep his electronic mail address confidential upon requesting provider. Internet provider must give notice of these requirements to all subscribers. Violation results in misdemeanor. (NRS 205.498).

Digital Signatures.

Nevada has adopted Uniform Electronic Transactions Act. (NRS 719.010). Use of digital signature allowed provided both parties to transaction agree. Documents not applicable to this law are records required to be signed in presence of third party or records with additional qualifying requirement. (NRS 720.160).

Government Agencies.

No relevant statutory provision.

Licensing.

No relevant statutory provision.

3.18 [RESERVED]

3.19 LICENSES, BUSINESS AND PROFESSIONAL:

Many businesses, occupations and activities are deemed to be affected with public interest sufficient to require or justify licensing them. For example, recent legislation deals with some phase of licensing the following: accountants (NRS 628.380); architects (NRS 623.010-623.370); chiropodists (NRS 635.010-635.180); chiropractors (NRS 634.010-634.230); contractors (NRS 624.010-624.965); child care facilities (NRS 432A.010-432A.280); debt adjusters (NRS 676.110-676.210); dentists (NRS 631.015-631.400); employment agencies (NRS 611.020-611.320); escrow agents (NRS 645A.020-645A.040); farmers' markets (NRS 244.336-244.338; 268.091-268.093); hearing aid specialists (NRS 637A.010-637A.360); institutional pharmacies (NRS 639.2324); livestock auctioneers (NRS 573.020); manufacturers or wholesalers of drugs and medicines (NRS 639.100); mobile home dealers, manufacturers and rebuilders (NRS 489.301-489.491); mortgage companies (NRS 645B.020-645B.051); nurses (NRS 632.300-632.345); optometrists (NRS 636.010-636.420); pharmacists (NRS 639.100-639.2122); practice of traditional Oriental medicine (NRS 634A.010-634A.250); private detectives (NRS 648.060-648.149); taxidermists (NRS 502.370); and wholesale liquor dealers (NRS 369.180-369.320).

Commercial Travelers.—

No statutory provision.

Collection Agencies.—

Unless he has certificate of registration as foreign collection agency issued by Commissioner of Financial Institutions pursuant to NRS 649.171, person must have license issued by Commissioner of Financial Institutions to conduct collection agency in Nevada or engage in business of collecting claims for others. Fee for license application is not more than $500 and fee of not less than $200 or more than $600 is charged for each original license issued.

Health and Medical Licenses.—

See category 15 Health, topic 15.08 Licensure and Certification.

Retail merchants must procure license, upon showing (1) whether applicant is engaged in business under fictitious name, and if so whether he has complied with fictitious name statute (see category 17 Intellectual Property, topic Trademarks and Tradenames); and (2) whether there was any change in business during preceding calendar year, and if so whether there was compliance with bulk sales law (see category 8 Debtor and Creditor, topic 8.08 Fraudulent Sales and Conveyances). (NRS 364.110).

Games.

Operation of gambling games and devices is licensed by state and county, license fees in general varying according to number of games and devices operated. (NRS 463.010-463.480). Nevada Gaming Commission may, with advice and assistance of Nevada Gaming Control Board, adopt regulations governing licensing and operation of interactive gaming. (NRS 463.750).

Collection agents (except attorneys and individuals employed by them at regular wages as collectors, banks, nonprofit cooperative corporations, abstract companies doing an escrow business) and licensed foreign collection agencies holding Nevada certificate of registration, duly licensed real estate agents and out of state collection agencies must be licensed by commissioner of financial institutions and must give bond for $35,000, running to State of Nevada, conditioned to account for all collections in accordance with agreement with customer and to comply with all requirements of present or future statutes on subject. Within three months after issuance of license, and semiannually thereafter, commissioner shall determine appropriate amount of bond and may increase amount required in accordance with NRS 649.105. Managers must obtain certificate from, and employees handling money or making contact with public must register with, Superintendent. (NRS 649.075-649.165). Commissioner of financial institutions shall conduct investigations, may issue orders to cease and desist, impose administrative fines and bring suit against unlicensed persons who engage in activities relating to collection of debts for which license is required. (NRS 649.390).

License expires June 30 following issuance and must be renewed annually. It is not transferable and must be framed and hung in place of business. (NRS 649.235; 649.315). Change in business location must receive prior written approval from commissioner. (NRS 649.325). License is revocable by commissioner after complaint under oath and hearing. (NRS 649.385; 649.395). Collecting without license is gross misdemeanor. (NRS 649.435).

Bond must be in form approved by Division of Financial Institutions. It covers all matters placed with licensee during term of license or renewal. Action on bond must be brought within two years after revocation of license. (NRS 649.115).

3.20 MONOPOLIES, RESTRAINT OF TRADE AND COMPETITION:

Unfair Trade Practices.

Nevada Unfair Trade Practice Act prohibits bid rigging and other price fixing, tying arrangements, monopolization of trade or commerce, attempting or conspiring to monopolize trade or commerce and agreements between competitors to divide markets or to allocate customers. (NRS 598A.060). Act does not apply to labor, agricultural and horticultural organizations organized for self-help and not for profit; or to religious or charitable activities of nonprofit organizations established exclusively for such purposes; or to conduct expressly authorized or approved by federal or state statute or local ordinance, excepting ordinances relating to video service providers, or otherwise regulated by federal, state, or local agency; or to restrictive covenants which are part of contract of sale of business and carry reasonable time limitation, or which are part of commercial shopping center lease. (NRS 598A.040).

Attorney general and district attorneys, as he permits or directs, enforce Act, investigate suspected violations, and bring suit for injunctive relief against threatened damage and for civil and criminal penalties for determined violations. (NRS 598A.070). Individual violator is liable for damages, fine and/or imprisonment. (NRS 598A.280). Corporation, partnership, or other legal entity is liable for acts of officers, directors, or representatives. (NRS 598A.230). Dissolution of domestic corporation or other entity may be ordered. Privilege to conduct business of domestic or foreign corporation or association may be suspended. (NRS 598A.180; 598A.190).

Under Act: (1) Civil action for any violation to recover actual damages and secure other relief, may be brought by attorney general as parens patriae of Nevada residents, or as representative of class or classes of persons within state; or as parens patriae with respect to damages sustained by general economy of state or political subdivision (NRS 598A.160); (2) attorney general may sue person engaging in activities prohibited and recover amount not exceeding 5% of gross income from sale of commodities or services by such person in each year in which prohibited activities occurred (NRS 598A.170); (3) person injured or threatened with violation has civil action for treble damages or injunctive relief (NRS 598A.210); (4) state or political subdivision injured in business or property by any violation has action for treble damages (NRS 598A.200).

Costs and attorney fees are recoverable to prevailing plaintiff. (NRS 598A.200; 598A.210).

Limitation of actions: Four years after cause of action accrues under Act, or if action based on conspiracy, within four years after plaintiff discovered, or should have, facts relief upon to prove conspiracy. Private damages action or action by state as parens patriae, or as class representative, must be brought within one year after conclusion of any damages action brought by state or political subdivision for injury to its property or for violations, if second action is based in whole or in part on same matter as first. (NRS 598A.220).

3.21 NEGOTIABLE INSTRUMENTS:

See topic 3.02 Bills and Notes.

3.22 RESTRAINT OF TRADE:

See topic 3.20 Monopolies, 3.22 Restraint of Trade and Competition.

3.23 SALES:

Uniform Commercial Code adopted. (NRS c. 104, 104A). See topic 3.09 Commercial Code.

Contracts of Sale.

Except as to retail installment sales there is no statutory provision as to size of type in printed contracts. Retail installment sale contracts must be in size equal to 8-point type. (NRS 97.165).

Bills of Sale.

There is no statutory provision for bills of sale and recording them has no effect.

Product Liability.

Uniform Commercial Code adopted, 1966 Optional Amendment 2-318 on third party beneficiaries of warranties adopted in form Alternative A. For text, see Part VI of this Volume.

Privity required before liability can be based on implied warranties of fitness or merchantable quality under previous statute, U.S.A. Privity held not to exist between seller and buyer’s employee. (79 Nev. 241, 382 P.2d 399).

Court adoption of rule of strict tort liability. (86 Nev. 408, 470 P.2d 135).

Retail Credit Sales.

Upon purchase of goods at retail by conditional sales contract amount of finance charge and any other fee, expense, or charge may be amount agreed upon by parties. (NRS 97.195). See topic 3.19 Interest, subhead Time Price Differential.

Consumer Protection.

See topic 3.12 Consumer Protection.

Bulk Sales.

See topic 3.09 Commercial Code.

Lease Option Agreements.

Lease of personal property primarily for personal, family or household purposes with option to purchase must contain statutory disclosures (NRS 597.030, 597.040) and cannot contain confession of judgment, negotiable instrument, security interest, assignment of wages, waiver of defenses, or provision authorizing lessor to commit breech of peace to repossess (NRS 597.060). If lessee has paid less than 2/3 of total price and voluntarily surrenders property to lessor, lessor may reinstate agreement within 21 days after property is returned, if paid more than 2/3 may reinstate within 45 days. (NRS 597.070). Not apply to lease option agreements for business, commercial or agricultural purposes, agreement made with any governmental agency, lease incidental to lease of real property, lease of motor vehicle and lease of safe deposit box. (NRS 597.020).

Sales of Motor Vehicles.—

See category 23 Transportation, topic 23.01 Motor Vehicles.

International Sales of Goods.—

United States is contracting state to United Nations Convention on International Sale of Goods. Therefore, CISG applies as law of contract in contracts for sale of goods between parties whose places of business are in different contracting states.

3.24 SECURITIES:

Uniform Securities Act (1985) has been adopted. (NRS 90.211-90.860). Act administered by Secretary of State and administrator of securities division of office of Secretary of State. (NRS 90.710).

Fees.

Applicant for license must pay following annual license fees: Broker-dealer $300, sales representative $110, investment advisor $300, and representative of investment advisor $110. Administrator shall by regulation require licensing of branch offices. (NRS 90.360). Filing fee for registration statement is 0.2% of maximum aggregate offering price but not less than $700 or more than $5,000; if registration statement is thereafter amended, filing fee for amendment is three times fee otherwise payable. (NRS 90.500). Open end management company, face amount certificate company or unit investment trust may register indefinite amount of securities by paying filing fee of $1,000 and within 60 days after its fiscal year during which statement is effective fee of $4,000 or file report specifying sales and pay fee of 0.2% of total sales price of securities sold in this state which shall not be less than $700 or more than $5,000. (NRS 90.500).

Supervision of securities law is vested with administrator of Securities Division of Office of Secretary of State.

Regulatory Powers of Supervising Authority.—

No person may engage in business as broker-dealer, sales representative or transfer agent unless licensed or exempt from licensing. No person licensed or exempt from licensing may employ or contract with broker-dealer, sales representative or transfer agent unless broker-dealer, sales representative or transfer agent is licensed or exempt from licensing. (NRS 90.310).

Prerequisites to Sales or Offerings.—

Security must be registered or exempt (NRS 90.460), and administrator may require filing of any prospectus, pamphlet, circular, form letter, advertisement or other sales literature or advertising communication addressed or intended for distribution to prospective investors, including clients or prospective clients of investment adviser unless security, transaction or investment adviser is exempt (NRS 90.560).

Securities to Which Act Applicable.—

Note, stock, bond, debenture, evidence of indebtedness, certificate of interest or participation in profit-sharing agreement, limited partnership interest, interest in limited liability company, collateral-trust certificate, preorganization certificate or subscription, transferable share, investment contract, voting-trust certificate, certificate of deposit for security, fractional undivided interest in oil, gas or other mineral lease or in payments out of production of such lease, right or royalty, put, call, straddle or option on security, certificate of deposit or group or index of securities including any interest therein or based on value of any of foregoing, or, in general, any interest or instrument commonly known as security or any certificate of interest or participation in, temporary or interim certificate for, receipt for, whole or partial guarantee of or warrant or right to subscribe to or purchase any of foregoing. However, security does not include: (1) Insurance or endowment policy or annuity contract under which insurance company promises to pay fixed sum of money either in lump sum or periodically for life or some other specified period; or (2) interest in contributory or noncontributory pension or welfare plan subject to Employee Retirement Income Security Act of 1974. (NRS 90.295).

Exempt Securities include: (1) Security issued, insured or guaranteed by United States, agency or corporate or other instrumentality of United States, international agency or corporate or other instrumentality of which United States and one or more foreign governments are members, state, political subdivision of state, or agency or corporate or other instrumentality of one or more states or their political subdivisions, or certificate of deposit for any of foregoing; (2) security issued, insured or guaranteed by Canada or any other foreign government or entity with which United States maintains diplomatic relations; (3) security issued by and representing interest in or direct obligation of depository institution if deposit or share accounts of depository institution are insured by Federal Deposit Insurance Corporation, National Credit Union Share Insurance Fund or successor to applicable agency authorized by federal law; (4) security issued by and representing interest in or direct obligation of, or insured or guaranteed by, insurance company organized under laws of any state and authorized to do business in Nevada; (5) security issued or guaranteed by railroad, other common carrier, public utility or holding company with certain limitations; (6) equipment trust certificates in respect to equipment leased or conditionally sold to person, if securities issued by person would be exempt pursuant to this section; (7) security listed or approved for listing upon notice of issuance on New York Stock Exchange, American Stock Exchange, Chicago Stock Exchange, Pacific Stock Exchange or other exchange designated by administrator, any other security of same issuer which is of senior or substantially equal rank, security called for by subscription right or warrant so listed or approved, or warrant or right to purchase or subscribe to any of foregoing; (8) security designated or approved for designation upon issuance or notice of issuance for inclusion in national market system by National Association of Securities Dealers, Inc., any other security of same issuer which is of senior or substantially equal rank, security called for by subscription right or warrant so designated, or warrant or right to purchase or subscribe to any of foregoing; (9) option issued by clearing agency registered under Securities Exchange Act of 1934, other than off-exchange futures contract or substantially similar arrangement with certain limitations; (10) security issued by person organized and operated not for private profit but exclusively for religious, educational, benevolent, charitable, fraternal, social, athletic or reformatory purpose, or as chamber of commerce, or trade or professional association if at least ten days before sale of security issuer has filed with administrator notice setting forth material terms of proposed sale and copies of any sales and advertising literature to be used and administrator by order does not disallow exemption within next five full business days; (11) promissory note, draft, bill of exchange or banker's acceptance that evidences obligation to pay cash within nine months after date of issuance, exclusive of days of grace, is issued in denominations of at least $50,000 and receives rating in one of three highest rating categories from nationally recognized statistical rating organization, or renewal of such obligation that is likewise limited, or guarantee of such obligation or of renewal; (12) security issued in connection with employees' stock purchase, savings, option, profit-sharing, pension or similar employees' benefit plan; (13) membership or equity interest in, or retention certificate or like security given in lieu of cash patronage dividend issued by, cooperative organized and operated as nonprofit membership cooperative under cooperative laws of any state if not traded to general public; (14) security issued by issuer registered as open-end management investment company or unit investment trust under § 8 of Investment Company Act of 1940 with certain limitations. (NRS 90.520).

Exempt Transactions.—

Following transactions are exempt from registration and notice requirements: (1) Isolated nonissuer transaction; (2) nonissuer transaction in outstanding security if issuer of security has class of securities subject to registration under § 12 of Securities Exchange Act of 1934, 15 U.S.C. § 78l, and has been subject to reporting requirements of § 13 or 15(d) of Securities Exchange Act of 1934, 15 U.S.C. §§ 78m and 78o(d), for not less than 90 days next preceding transaction, or has filed and maintained with administrator for not less than 90 days preceding transaction information, in such form as administrator, by regulation, specifies, substantially comparable to information issuer would be required to file under § 12(b) or 12(g) of Securities Exchange Act of 1934, 15 U.S.C. §§ 78l(b) and 78l(g), were issuer to have class of its securities registered under § 12 of Securities Exchange Act of 1934, 15 U.S.C. § 78l, and paid fee of $300 with filing; (3) nonissuer transaction by sales representative licensed in Nevada, in outstanding security, with certain limitations; (4) nonissuer transaction in security that has fixed maturity or fixed interest or dividend provision if there has been no default during current fiscal year or within three preceding years, or during existence of issuer, and any predecessors if less than three years, in payment of principal, interest or dividends on security; (5) nonissuer transaction effected by or through registered broker-dealer pursuant to unsolicited order or offer to purchase; (6) transaction between issuer or other person on whose behalf offering of security is made and underwriter, or transaction among underwriters; (7) transaction in bond or other evidence of indebtedness secured by real estate mortgage, deed of trust, personal property security agreement, or by agreement for sale of real estate or personal property, if entire mortgage, deed of trust or agreement, together with all bonds or other evidences of indebtedness secured thereby, is offered and sold as unit; (8) transaction by executor, administrator, sheriff, marshal, receiver, trustee in bankruptcy, guardian or conservator; (9) transaction executed by bona fide secured party without purpose of evading this chapter; (10) offer to sell or sale of security to financial or institutional investor or to broker-dealer; (11) except as otherwise provided, transaction pursuant to offer to sell securities of issuer, with certain limitations; (12) offer to sell or sale of preorganization certificate or subscription with certain limitations; (13) offer to sell or sale of preorganization certificate or subscription issued in connection with organization of depository institution if that organization is under supervision of official or agency of state or of United States which has and exercises authority to regulate and supervise organization of depository institution; (14) transaction pursuant to offer to sell to existing security holders of issuer, including persons who at time of transaction are holders of transferable warrants exercisable within not more than 90 days after their issuance, convertible securities or nontransferable warrants, with certain limitations; (15) transaction involving offer to sell, but not sale, of security not exempt from registration under Securities Act of 1933, 15 U.S.C. §§ 77a et seq., with certain limitations; (16)

transaction involving offer to sell, but not sale, of security exempt from registration under Securities Act of 1933, 15 U.S.C. §§ 77a et seq., with certain limitations; (17) transaction involving distribution of securities of issuer to security holders of another person in connection with merger, consolidation, exchange of securities, sale of assets or other reorganization to which issuer, or its parent or subsidiary, and other person, or its parent or subsidiary, are parties, with certain limitations; (18) transaction involving offer to sell or sale of one or more promissory notes each of which is directly secured by first lien on single parcel of real estate, or transaction involving offer to sell or sale of participation interests in notes if notes and participation interests are originated by depository institution and are offered and sold subject to certain conditions; (19) transaction involving offer to sell or sale of one or more promissory notes directly secured by first lien on single parcel of real estate or participating interests in notes, if notes and interests are originated by mortgagee approved by Secretary of Housing and Urban Development under §§ 203 and 211 of National Housing Act, 12 U.S.C. §§ 1709 and 1715b, and are offered or sold, subject to conditions specified in subsection 18, to depository institution or insurance company, Federal Home Loan Mortgage Corporation, Federal National Mortgage Association or Government National Mortgage Association; (20) transaction between any of persons described in subsection 19 involving nonassignable contract to buy or sell securities described in subsection 18 if contract is to be completed within two years and subject to other limitations; (21) transaction involving one or more promissory notes secured by lien on real estate, or participating interests in those notes, by mortgage banker licensed pursuant to NRS c. 645E to engage in those transactions or mortgage broker licensed pursuant NRS c. 645B to engage in those transactions. (NRS 90.530).

Registration of Offerors.—

No statutory provision.

Registration of Securities.—

It is unlawful for person to offer to sell or sell any security in Nevada unless security is registered or security or transaction is exempt. (NRS 90.460).

Registration of Dealers.—

It is unlawful for person to offer to sell or sell any security in Nevada unless security is registered or security or transaction is exempt. (NRS 90.460).

Brokers and Agents must be licensed or exempt from licensing. (NRS 90.310).

Licenses are given by administrator upon application and payment of fees. (NRS 90.350).

Bonds may be required in regulations adopted by administrator. (NRS 90.453).

Advertisements.—

Administrator may require that advertisements be filed. (NRS 90.560).

Liabilities.—

Person who offers or sells security in violation of subsection one of NRS 90.310; NRS 90.460; subsection ten of NRS 90.500; subsection two of NRS 90.570; subsection two of NRS 90.610; or condition imposed in subsection eight or nine of NRS 90.500, is liable to person purchasing security. Upon tender of security, purchaser may recover consideration paid for security and interest at legal rate of Nevada from date of payment, costs and reasonable attorney’s fees, less amount of income received on security. Purchaser who no longer owns security may recover damages. Damages are amount that would be recoverable upon tender less value of security when purchaser disposed of it, plus interest at legal rate of Nevada from date of disposition of security, costs and reasonable attorney's fees determined by court.

Tender Offers.—

No statutory provision.

Subdivision Offerings.—

No statutory provision. Model Land Sales Practices Act has not been adopted.

Franchising, Pyramid Sales, Etc.—

No statutory provision.

Uniform Simplification of Fiduciary Security Transfers Act adopted. (NRS 162.150). Corporation registering security in name of one described as fiduciary not bound to inquire into existence or extent of fiduciary relationship, and may assume that relationship continues until written notice to contrary (NRS 162.170); and may transfer security pursuant to assignment without inquiry. (NRS 162.180).

Uniform Commercial Code adopted. (NRS cc. 104, 104A). See topic 3.09 Commercial Code.

Uniform Securities Ownership by Minors Act not adopted.

See also topic 3.12 Consumer Protection.

3.25 STATUTE OF FRAUDS:

See topic 3.16 Frauds, Statute of.

3.26 TRUST RECEIPT SECURITY:

See topic 3.09 Commercial Code.

3.27 WAREHOUSEMEN:

Uniform Commercial Code adopted. (NRS cc. 104, 104A). See topic 3.09 Commercial Code.

Bonds—No requirement.

Permits required for storage of household goods and effects. (NRS 712.040).

4 CITIZENSHIP

4.01 ALIENS:

Except where taking by descent or inheritance, any nonresident alien person, including corporation, may take, hold, and enjoy real property or interest therein to same extent as resident citizen or domestic corporation. (NRS 111.055).

Property.

Right of nonresident alien to take by descent or inheritance real or personal property depends upon existence of reciprocal right accorded to U. S. citizens by country which he inhabits or of which he is citizen. (NRS 134.230).

5 CIVIL ACTIONS AND PROCEDURE

5.01 ACCORD AND SATISFACTION:

Common law rules apply. (48 Nev. 430, 233 Pac. 530).

Uniform Commercial Code adopted. (NRS cc. 104 and 104A). See category 3 Business Regulation and Commerce, topic 3.09 Commercial Code.

Compromise.

No specific statutory provision.

Pleading.

An accord and satisfaction must be specially pleaded. (48 Nev. 430, 233 Pac. 530; N.R.C.P. 8[c]).

5.02 ACTIONS:

Federal Rules of Civil Procedure form basis for procedural statute. (N.R.C.P. 1-86). See topic 5.19 Practice. Uniform Contribution Among Tortfeasors Act adopted. (NRS 17.225-17.305).

Equity.—

Nevada Rules of Civil Procedure govern procedure in district courts in all suits of civil nature whether cognizable as cases at law or in equity. (N.R.C.P. 1).

Forms of Action.—

There is but one form of action, known as "civil action".

Commencement.

Civil action is commenced by filing complaint with court. (N.R.C.P. 3).

Parties.

Every action must be prosecuted in name of real party in interest, except that executor or administrator, guardian, bailee, trustee of express trust (including person with whom or in whose name contract is made for benefit of another) or person expressly authorized by statute may sue without joining person for whose benefit action is prosecuted. (N.R.C.P. 17[a]).

Permissive Joinder. All persons may join as plaintiffs if they assert right to relief, or as defendants if there is asserted against them right to relief, jointly, severally or in alternative in respect of or arising out of same transaction, occurrence, or series of transactions or occurrences and if any question of law or fact common to all will arise in action. (N.R.C.P. 20[a]).

Necessary Joinder. Persons having joint interest must be made parties and joined on same side as plaintiffs or defendants if person is subject to service of process and joinder will not deprive court of subject matter jurisdiction. One who should but refuses to be plaintiff may be made defendant or involuntary plaintiff. (N.R.C.P. 19[a]).

Tort action against present or former officer or employee of state or any political subdivision, immune contractor, or state legislator arising out of act or omission within scope of his public employment must name state or appropriate political subdivision as party defendant. (NRS 41.0337).

Class Actions.

One or more members of class may sue or be sued on behalf of all if class so numerous that joinder of all members impracticable; there are questions of law or fact common to all; claims or defenses of representative parties are typical of claims or defenses of all; and representative parties will fairly and adequately protect interests of all. (N.R.C.P. 23[a]).

Intervention.

As of right intervention may be had upon application (1) when statute confers unconditional right to intervene; (2) when applicant claims interest relating to property or transaction which is subject of action and applicant is so situated that disposition of action may impair applicant's ability to protect that interest, unless that interest is adequately represented by existing parties. (N.R.C.P. 24[a]). Permissive intervention may be had upon application: (1) When statute confers conditional right to intervene; (2) when applicant's claim or defense and main action have question of law or fact in common. (N.R.C.P. 24[b]).

Interpleader.

Persons having claims against plaintiff may be joined as defendants and required to interplead when plaintiff may be exposed to double or multiple liability. Defendant exposed to similar liability may obtain interpleader by cross-claim or counterclaim. (N.R.C.P. 22).

Third Party Practice.

Defendants, and plaintiffs facing counterclaims, may cause to be made parties, persons liable to them for any part of claim against them. If third-party complaint not filed within ten days of serving original answer, third-party plaintiff must obtain leave to make service. Third-party defendants may raise defenses and counterclaims against plaintiff and third-party plaintiff in same manner as original defendant and is subject to claim of plaintiff arising out of transaction or occurrence that is subject matter or plaintiff's claim. (N.R.C.P. 14).

Joinder of Courses of Action.

Party asserting claim to relief as original claim, counterclaim, crossclaim, or third-party claim, may join, either as independent or alternative claims, as many claims, legal or equitable, as party has against opposing party. (N.R.C.P. 18[a]). Whenever claim is one heretofore cognizable only after another claim has been prosecuted to conclusion, two claims may be joined in one action. (N.R.C.P. 18[b]).

Consolidation of Actions.

When actions involving common question of law or fact are pending court may order: (1) Joint hearing or trial on any or all matters in issue; or (2) consolidation of all actions; or (3) may make such order as may tend to avoid unnecessary costs or delays. (N.R.C.P. 42[a]).

Splitting Courses of Action.

Court may, in furtherance of convenience or to avoid prejudice, or when separate trials will be conducive to expedition and economy, order separate trial of any claim, cross-claim, counterclaim, or third party claim, or of any separate issue or of any number of claims, cross-claims, counterclaims, third party claims, or issues, always preserving inviolate right of trial by jury. (N.R.C.P. 42[b]).

Severance of Actions.

Any party may move to strike third-party claim, or for its severance or separate trial. (N.R.C.P. 14).

Stay of Proceedings.

On demand or motion of either party, trial or proceeding may be stayed pending appeal of order granting or refusing to grant motion to change place of trial of action or proceeding. (N.R.A.P. 3A[b][4]).

Abatement and Revival.

No cause of action lost by reason of death of any person, but may be maintained by or against executor or administrator. (NRS 41.100[1]).

Action for wrong does not abate by death of any party after verdict has been rendered, but proceeds in same manner as cases where cause of action survives by law. (NRS 12.100). See topic 5.16 Limitation of Actions, subhead Death of Party.

Termination of Actions.

Voluntary dismissal may be had by plaintiff without order of court: (1) By notice filed before answer or motion for summary judgment filed; or (2) by stipulation signed by all appearing parties. (N.R.C.P. 41[a]). Involuntary dismissal may be had on motion of defendant for failure to prosecute. (N.R.C.P. 41[b]).

Dismissal for want of prosecution is mandatory after five years, discretionary after two years from date of commencement of suit. (N.R.C.P. 41[e]).

Dismissal of medical or dental malpractice action filed on or after Oct. 1, 2002 but before Oct. 1, 2005 is mandatory after three years. Dismissal of medical or dental malpractice action filed after Oct. 1, 2005 is mandatory after two years. (NRS 41A.061). Medical or dental malpractice actions filed in district court must be dismissed if filed without affidavit by medical expert. (NRS 41A.071).

Prohibited Actions.

No action may be brought for alienation of affections or breach of promise to marry, or for criminal conversation that accrued after July 1, 1979. (NRS 41.380).

Limitation of.

See topic 5.16 Limitation of Actions.

Small Claims.

See category 6 Courts and Legislature, topic 6.01 Courts.

Administration.

See category 13 Estates and Trusts, topic 13.10 Executors and Administrators.

Direct Actions Against Insurer.

See category 23 Transportation, topic 23.01 Motor Vehicles, subhead Direct Actions.

Conditions Precedent.

No tort action can be brought against state or its agencies unless claim filed with attorney general within two years from accrual of cause of action. (NRS 41.036). Claim based on conduct of immune contractor, employee or officer of political subdivision first must be filed against political subdivision before complaint filed against contractor, employee or officer. (NRS 41.039).

Arbitration.

If claim for relief filed in District Court arises in Nevada, and amount in issue does not exceed $50,000 per plaintiff, exclusive of attorney's fees and costs, all civil actions filed for damages must be submitted to nonbinding arbitration or alternative method of resolving disputes established by Supreme Court or agreed upon by parties. (NRS 38.250[1]). Following actions are excluded from this requirement: class, equity, title to real property, probate, appeals from courts of limited jurisdiction, declaratory relief, divorce or domestic relations, relief based on extraordinary writs, judicial review of administrative decisions, those where parties have by agreement or by Supreme Court rules submitted controversy to arbitration or other alternative dispute resolution, actions presenting unusual circumstances constituting good cause for removal from program, actions involving incarcerated party, and actions submitted to mediation pursuant to Supreme Court rules. (NRS 38.255[3]).

5.03 APPEAL AND ERROR:

Controlled by Nevada Rules of Appellate Procedure (N.R.A.P. 1-48).

Appeal to Supreme Court may be taken from final judgment of district court from order granting or refusing new trial and from certain orders before and after judgment. Appeal may be taken without first moving for new trial. (N.R.A.P. 3A[a]).

How Taken. Appeal is taken by filing with district court notice of appeal within 30 days from service of written notice of entry of judgment appealed from. (N.R.A.P. 4[a]). Cost bond of $250 must be filed with notice of appeal. (N.R.A.P. 7). Docketing statement must be filed with Supreme Court within 15 days after docketing of appeal. (N.R.A.P. 14[b]).

Extent of Review. Supreme Court reviews errors of law and sufficiency of evidence. (N.R.A.P. 3A[a]). May require attendance of counsel and parties at settlement conference in civil appeals. (N.R.A.P. 16[e]).

Appeal to district court may be taken from justice's court on any appealable judgment or order in civil action. (J.C.R.C.P. 72A[a]). (Appeals from justice's courts are governed by J.C.R.C.P. 72-76B).

How Taken. By filing notice of appeal with justice's court. (J.C.R.C.P. 72[a]). Notice must specify parties taking appeal; judgment or order of part thereof appealed from; court appealed to. Notice shall be mailed to all parties or their counsel except appellant. (J.C.R.C.P. 72[c-d]).

Time for Taking. Appeal must be taken within 20 days of date of service of written notice of entry of judgment. (J.C.R.C.P. 72B[a]).

Appeal Bond. Undertaking of $250 for costs must be given. (J.C.R.C.P. 73).

Stay of Proceeding. If stay is desired, bond conditioned for satisfaction of judgment in full, together with costs and interest, and to satisfy in full any modification of judgment appellate court may adjudge. (J.C.R.C.P. 73A[a][1]).

Extent of Review. May be on questions of law or sufficiency of evidence. (J.C.R.C.P. 72A[a]).

Record on Appeal. Certified transcript of proceeding must be transmitted to district court. (J.C.R.C.P. 74[a]). If no findings in fact and conclusions of law, parties may submit agreed statement of case (J.C.R.C.P. 74[e]) or appellant must serve statement of evidence or proceedings. (J.C.R.C.P. 74[c]).

Character of Hearing. Case appealed must not be tried anew. (J.C.R.C.P. 76A).

5.04 BONDS:

Bonds in civil actions or for fiduciaries require two sureties worth sum equal in amount to penalty. When bonds are for $3,000 or over there may be more than two sureties, each qualifying for less than penalty, but all aggregating at least two sufficient sureties. (NRS 20.010). Bond is presented to clerk of court in which action is pending for approval before filing. (NRS 20.050). Approval may be refused if power of attorney in fact covering agent signing bond is not on file with clerk. (NRS 20.050).

Bondsmen on official bonds must be residents of state and freeholders or householders therein. (NRS 282.140).

Surety companies after qualifying to do business in Nevada may become sole sureties, but all surety company bonds, where statute so requires or where given in civil actions, must be approved by court, judge, clerk or deputy. (NRS 20.030).

Sureties may be required to justify before proper officer and if examination does not show them to be worth amount specified over debts and liabilities and property exempt from execution new bond is required. (NRS 20.010, 20.020).

In condemnation proceeding by state to occupy property in advance of compensation payment, no bond is required but only pledged public faith and credit of state, or state may deposit with clerk amount equal to value of premises plus damages as appraised by state (NRS 37.100[9]); no bond, undertaking or security is required of state, or any county, city, town or officer thereof in his official capacity which is party to action (NRS 20.040[1]).

Form.

N.R.S. 20.015 provides that undertaking may be in substantially following form:

UNDERTAKING

State of Nevada)

) ss.

County of . . . .)

In the . . . . court . . . . (state title of the action). Whereas the above named . . . . desires to give an undertaking for . . . . (state purpose) as provided by NRS . . . . Now, therefore, we the undersigned sureties, do hereby obligate ourselves, jointly and severally to . . . . (name the obligee) under the provisions of NRS . . . . in the sum of $. . . . .

Dated this . . . . day of the month of . . . . , of the year . . . . .

. . . .

(Signature of Principal)

. . . .

. . . .

(Signature of Sureties)

5.05 CERTIORARI:

Writ of certiorari may be granted by Supreme or district court when inferior tribunal, board or officer exercising judicial functions has exceeded its or his jurisdiction and there is no appeal or other plain, speedy and adequate remedy. (NRS 34.020).

Jurisdiction.

Both Supreme Court and district court have jurisdiction to issue writ to inferior tribunal or board or officer exercising judicial function. (NRS 34.020[1]).

Grounds.

Granted in all cases when inferior tribunal, board, or officer, exercising judicial functions, has exceeded its or his jurisdiction and there is no appeal or other plain, speedy and adequate remedy. (NRS 34.020[2]).

Proceedings.

Application made on affidavit and court may require notice to adverse party, or grant order to show cause why it should not be allowed, or grant writ without further notice. (NRS 34.030, 34.040-34.140).

Review.

Review may not extend, further than to determine whether tribunal, board or officer has regularly pursued its or his authority. (NRS 34.090).

Where, on appeal from justice’s or municipal court, district court has passed on constitutionality of statute or ordinance, writ may be granted for review by Supreme Court of question of constitutionality. (NRS 34.020[3]).

5.06 CHARITABLE IMMUNITY:

See topic 5.09 Damages.

5.07 COMMISSIONS TO TAKE TESTIMONY:

See topic 5.11 Depositions and Discovery.

5.08 COSTS:

Costs must be allowed to prevailing party in actions to recover real property, or possessory right thereto, to recover personal property in excess of $2,500, in actions for damages exceeding $2,500, in special proceedings, except those conducted pursuant to 306.040, and in actions involving title or boundaries to real estate, or legality of any tax, assessment, or municipal fine. (NRS 18.020). Attorney’s fees and costs in justice court (NRS 69.020, 69.030) and in district court when authorized by statute or to prevailing party who has not recovered more than $20,000, or without regard to recovery sought when court finds claim or defense was brought or maintained without reasonable ground or to harass prevailing party; however, limitations in district court do not apply to actions arising out of written instrument or agreement which entitles prevailing party to award of reasonable attorney’s fees (NRS 18.010).

See also category 3 Business Regulation and Commerce, topic 3.20 Monopolies, 3.22 Restraint of Trade and Competition.

Security for Costs.

Nonresident plaintiff may be compelled to give security for costs in sum of $500 with two sufficient sureties (NRS 18.130) or by bond of qualified surety company (NRS 691B.020), provided demand therefor is made within time limited for answering complaint (NRS 18.130). In justice court, security required is $100, but increase may be ordered. (NRS 69.010). Plaintiff in shareholders' derivative action may be required by court to give security for costs upon finding that there is no reasonable possibility that suit will benefit corporation or that moving party, if other than corporation, did not participate in transaction complained of in any capacity. (NRS 41.520).

Liability of Attorney.

No relevant statutory provision.

5.09 DAMAGES:

Common law generally prevails as to compensatory damages. In actions for breach of obligation not arising from contract, where proven by clear and convincing evidence that if defendant is guilty of oppression, fraud or malice, express or implied, plaintiff, in addition to actual damages, may recover punitive damages not to exceed three times compensatory damages, if such damages equal or exceed $100,000, or not to exceed $300,000 if such damages are less than $100,000. (NRS 42.005[1]). This cap on punitive damages does not apply to actions for defective product, bad faith actions against insurer, actions for violation of law prohibiting discriminatory housing practices, actions for injury caused by emissions, disposal or spilling of toxic or hazardous waste or material, or actions for defamation. (NRS 42.005[2]). If punitive damages are claimed pursuant to this section, and trier of fact concludes they should be assessed, subsequent proceeding before same trier of fact must be conducted. (NRS 42.005[3]). In action for breach of obligation where defendant caused injury by operation of vehicle in violation of 484.379 or 484.3795 or § 484.37955 related to driving under influence after willfully using alcohol or another substance knowing that he would thereafter operate vehicle, plaintiff in addition to compensatory damages, may recover punitive damages without any limitation as to amount and without any subsequent proceeding. (NRS 42.010). Person suffering injury as proximate result of perjury or subornation of perjury committed by another, convicted for same, may recover actual damages and any punitive damages which facts warrant. (NRS 41.365). Owner may bring civil action for treble damages against knowing receiver of stolen property. (NRS 41.580).

See also category 13 Estates and Trusts, topics 13.05 Death, subhead Action for Death; Monopolies, Restraint of Trade and Competition.

Comparative Negligence Rule.

Negligence of plaintiff does not bar recovery for damages for death, injury to person or property if his negligence was not greater than negligence of defendant. Damages allowed are diminished in proportion to amount of plaintiff's negligence. If defendant settles with plaintiff before judgment, neither comparative negligence of that defendant nor amount of settlement is admissible, but judge deducts amount of settlement from verdict. (NRS 41.141).

Charitable Immunity.

Any person rendering emergency care or assistance gratuitously and in good faith, except for person who is performing community service, cannot be held civilly liable for any act or omission not amounting to gross negligence. (NRS 41.500[1]). Person licensed under NRS c. 630, 632 or 633 who renders care to patient for governmental entity or nonprofit organization is not liable for any civil damages as result of act or omission by him if care is rendered gratuitously, in good faith and does not amount to gross negligence, or reckless, willful, wanton conduct. (NRS 41.505[3]). Physician or nurse is not excused from liability for damages resulting from acts or omissions that occur in licensed medical facility where there exists preexisting relationship with patient. (NRS 41.505[1]). No licensed health care facility, employee of facility, or person licensed under NRS c. 630, 632 or 633, who in good faith, renders emergency care to person who entered trauma or emergency unit of facility, either gratuitously or for fee, may be held liable for more than $50,000 unless care rendered amounts to gross negligence or reckless, willful or wanton conduct. (NRS 41.503[1]). There is rebuttable presumption that limitation on liability applies to follow-up care directly related to original traumatic injury for which care was rendered. (NRS 41.503[3]). This limitation does not apply to care rendered to nonemergency patient. Person who successfully completed course in cardiopulmonary resuscitation, course in basic emergency care of persons in cardiac arrest or directed by instructions of agency that provides emergency medical service who in good faith renders cardiopulmonary resuscitation not liable for civil damages if care does not amount to gross negligence. (NRS 41.500[6]). Person who gratuitously and in good faith renders emergency care involving use of external defibrillator, not liable for civil damages if care does not amount to gross negligence. (NRS 41.500[8]). Business organization placing automated external defibrillator on its premises for use in accordance with statutory conditions is not liable for civil damages if care does not amount to gross negligence. (NRS 41.500[9]). Doctrine of charitable immunity prevails, based not upon trust theory but rather beneficiary theory. (51 Nev. 372, 277 Pac. 798).

Medical Malpractice.

In action for damages for medical or dental malpractice, noneconomic damage for each plaintiff from each defendant must not exceed $350,000, absent gross malpractice or exceptional circumstances. (NRS 41A.035). Judge may recommend action be settled for limit of professional liability insurance policy. (NRS 41A.085). Defendant may introduce evidence of any social security, disability, worker’s compensation, health or accident insurance benefits and any agreement of organization to pay medical expenses, received by plaintiff. (NRS 42.021).

Sovereign Immunity.

State, its agencies and political subdivisions waive immunity from liability and action unless otherwise provided by statute. (NRS 41.031). No waiver of action brought based on act or omission of officer, employee, or immune contractor, exercising due care in execution of statute or regulation or performance or failure to perform discretionary duty (NRS 41.032), except owner of property may commence action to recover actual damages caused by arbitrary or unlawful action which imposes limitations or conditions on use of property in excess of that authorized by ordinance or regulation (NRS 278.0233). No waiver of action brought based on failure to inspect or failure to discover hazard regardless of whether inspection made (NRS 41.033), or act or omission of member or employee of Nevada National Guard while engaging in training or duty (NRS 41.0333). No action can be brought against police chief, sheriff or chief of fire department based solely on act or omission of officer, deputy or firefighter. (NRS 41.0335). Fire department or law enforcement agency not liable for negligence of its employees or volunteers unless person made specific representation to another who relied on it to his detriment, or conduct of person affirmatively caused harm. (NRS 41.0336). Award of damages in tort action limited to $75,000 and may not include punitive damages. (NRS 41.035).

No-Fault Insurance.

See category 23 Transportation, topic 23.01 Motor Vehicles, subhead No-Fault Insurance.

Uniform Contribution Among Tortfeasors Act.

Not adopted. See category 13 Estates and Trusts, topic 13.05 Death, subhead Actions for Death.

5.10 DECLARATORY JUDGMENTS:

See topic 5.15 Judgments.

5.11 DEPOSITIONS AND DISCOVERY:

Federal Rules of Civil Procedure, as am'd in 1970, form basis for procedural statute. (N.R.C.P. 26-37). See topic 5.19 Practice.

Any party may take deposition of any person, including a party, upon oral examination or written questions for purpose of discovery or use as evidence. (N.R.C.P. 30, 31).

Early Case Conference Report.

Within 30 days after filing of answer, and not more than 180 days thereafter, attorneys must meet to confer regarding nature and basis of claims and defenses and possibility of prompt resolution of case, to make initial disclosures and to develop discovery plan. (N.R.C.P. 16.1[b][1]). Thirty days thereafter joint case conference report must be filed. (N.R.C.P. 16.1[c]). Discovery disputes are to be resolved by discovery commissioner where available, who will file recommendations which court may affirm, reverse or modify. (N.R.C.P. 16.1[d]). In complex litigation, court may on motion and for good cause shown waive these requirements. (N.R.C.P. 16.1[f]).

Uniform Foreign Depositions Act adopted. (NRS 53.050-53.070).

Leave of Court.

After filing joint case conference report or ten days after filing separate case conference report leave not necessary (N.R.C.P. 26[a]); but must be obtained if deponent is in prison, or if parties have not stipulated in writing and deponent has already been deposed in case or deposition is sought before time specified in Rule 26(a), unless deponent is expected to leave state. (N.R.C.P. 30[a]).

Action Pending Elsewhere.

Any party may take deposition of any person within this state as if such action were pending within this state. (NRS 53.060).

Within State for Use within State.

Unless otherwise indicated, rules under this topic apply.

Within State for Use Elsewhere.

See subheads Action Pending Elsewhere, supra, and Foreign Depositions, infra.

Outside of State for Use within State.

Upon proof of notice to take deposition outside state, clerk shall issue commission or letter of request in form prescribed by jurisdiction in which deposition is to be taken, to be presented by party seeking deposition. (N.R.C.P. 28[a]).

Before Action.

One who desires to perpetuate testimony may file verified petition in district court of county where expected adverse party may reside. Petition must show: (1) Petitioner expects to be party but is presently unable to bring action; (2) subject of expected action and petitioner's interest therein; (3) facts petitioner desires to establish and reasons for desiring to perpetuate testimony; (4) names or description, and addresses of persons petitioner expects will be adverse parties; (5) names and addresses of persons to be examined and substance of testimony expected; (6) request for order authorizing taking of deposition for purpose of perpetuating testimony. (N.R.C.P. 27[a][1]). Notice, and copy of petition, must be served at least 20 days before hearing on expected adverse parties, which notice must state that petitioner will apply at stated time and place for order sought. (N.R.C.P. 27[a][2]).

Pending Appeal.

If appeal has been taken, or if time has not expired, district court may allow perpetuation of testimony for use in event of further proceedings. Application and notice as if action were pending in district court, except that notice must show (1) names and addresses of persons to be examined and the substance of testimony; (2) reasons for perpetuating testimony. (N.R.C.P. 27[b]).

Before Whom Taken.

Within United States, before officer authorized to administer oaths by laws of United States or of place of examination, or before person appointed by court in which action is pending. (N.R.C.P. 28[a]).

In Foreign Countries.

May be taken: (1) Pursuant to treaty or convention; (2) pursuant to letter of request; (3) on notice before person authorized to administer oaths in place of examination; or (4) before person commissioned by court. (N.R.C.P. 28[b]).

Stipulation.

Unless otherwise directed by court, parties may by written stipulation agree to take deposition before any person, at any time or place, upon any notice and in any manner; and parties may also modify discovery procedures except stipulations extending discovery responses required by Rules 33, 34 and 36 may be made only with court approval if they would interfere with time set for completion of discovery, hearing of motion, or trial. (N.R.C.P. 29).

On Oral Examination.

Party desiring to take deposition shall give reasonable notice, not less than 15 days, to every other party, stating time and place and names and addresses of persons to be examined. If subpoena duces tecum is to be served on person to be examined, designation of materials to be produced must be attached to or included in notice. (N.R.C.P. 30[b][1]). Party taking deposition shall state method of recording testimony. (N.R.C.P. 30[b][2]). With five days' notice, any party may designate additional method of recording deposition, to be made at that party's expense. (N.R.C.P. 30[b][3]). On showing that examination is being conducted in bad faith or to unreasonably annoy, embarrass or oppress, court may order termination of examination or limit scope and manner as provided by Rule 26(c). (N.R.C.P. 30[d]). Party's notice may name corporation, partnership, association or governmental agency and describe matters on which examination is requested; organization must then designate person or persons who consent to testify on its behalf and will testify as to matters known or reasonably available to organization. (N.R.C.P. 30[b][6]). Notice may be accompanied by Rule 34 Request For Production but Rule 34 procedure must apply. (N.R.C.P. 30[b][5]). Telephonic and other remote electronic depositions allowed. (N.R.C.P. 30[b][7]).

On Written Questions.

Party desiring to take deposition on written questions must serve them on every party with notice of name and address of person to answer and name if known or description sufficient to identify person, and name or title and address of officer before whom deposition is to be taken. (N.R.C.P. 31[a][3]). Within 14 days party served may serve cross-questions; within seven days thereafter redirect questions may be served; within seven days thereafter recross questions may be served. (N.R.C.P. 31[a][4]). Copy of notice and all questions must be delivered by party taking deposition to officer who must promptly proceed as in case of oral examination, to take deposition, prepare, certify, file or mail deposition to clerk for filing. (N.R.C.P. 31[b]).

Record of Examination.

Officer must put witness on oath or affirmation, testimony must be taken stenographically or by other permitted means. All objections made at time of examination to qualifications of officer, manner of taking, evidence presented, conduct of any party, and any other objection to proceeding must be noted by officer upon record of deposition; but examination shall proceed with testimony taken subject to objections. Instead of participating in oral examination, parties may serve written questions in sealed envelope on party taking deposition who shall transmit them to officer who shall propound them to witness and record answers. (N.R.C.P. 30[c]).

Termination and Limiting Examination.

Objections shall be concise, non-argumentative and non-suggestive. Party may instruct deponent not to answer only if necessary to preserve privilege, enforce limitation directed by court or present motion under N.R.C.P. 30(d)(3). (N.R.C.P. 30[d][1]). If court or discovery commissioner finds conduct has frustrated fair examination, sanction may be imposed, including attorney's fees and costs. (N.R.C.P. 30[d][2]). At any time during taking, on motion of any party or deponent and upon showing that examination is being conducted in bad faith or unreasonably annoys, embarrasses or oppresses deponent or a party, court where action is pending or where deposition is taken may order officer to cease forthwith or may limit scope and manner as stated above in case of oral examination. If so terminated, examination must be resumed only on order of court in which action is pending. (N.R.C.P. 30[d][3]).

Signing and Certification.

If requested by deponent or party before deposition is completed, deponent has 30 days after notification by officer that transcript or recording is available to review and sign statement making any changes to form or substance and giving reasons therefor. Officer shall indicate whether review was requested and shall append any changes made. (N.R.C.P. 30[e]). Officer must certify on deposition that witness was duly sworn and that deposition is true record of testimony. He must securely seal deposition, endorse with title of action, and mark "Deposition of . . . . . ." and send it to party who arranged for transcript or recording who must store it to protect from loss, destruction, tampering or deterioration. (N.R.C.P. 30[f][1]).

Scope of Examination.

Unless otherwise ordered by court, deponent may be examined regarding any matter, not privileged, which is relevant. (N.R.C.P. 26[b][1]-[2]).

Compelling Attendance of Witnesses.

Subpoena may be issued by clerk of court or attorney authorized to practice therein, and shall command person to attend and give testimony or produce and permit inspection of books, documents, tangible things or premises. (N.R.C.P. 45[a]). Served by disinterested person over 18 years of age. (N.R.C.P. 45[b]). Failure to obey deemed contempt. (N.R.C.P. 45[e]). Person responding to subpoena for documents shall produce them as kept in usual course of business or organize and label them to correspond with categories in demand. (N.R.C.P. 45[d][1]). If information withheld on claim of privilege or trial preparation, claim shall be express and supported by description sufficient to enable demanding party to contest. (N.R.C.P. 45[d][2]).

Use of Deposition.

So far as admissible, deposition may be used against any party who was present or had notice to contradict or impeach; deposition of party may be used by adverse party for any purpose; deposition of any witness may be used by any party if court finds that witness is dead or out of State or at greater distance than 100 miles from place of trial or hearing, unable to testify because of age, sickness, infirmity or imprisonment, or party is unable to procure attendance by subpoena; or in exceptional circumstances in interest of justice. (N.R.C.P. 32[a][1]-[3]). If only part of deposition offered in evidence by party, other party can compel introduction of other parts. (N.R.C.P. 32[a][4]).

Interrogatories to parties may be served by any party without leave or stipulation, not to exceed 40 in number, including all subparts, any time after joint case conference report is filed or ten days after separate case conference report is filed. (N.R.C.P. 33[a]). Party upon whom served must serve copy of answers or objections within 30 days, unless shorter or longer time is directed by court or agreed to by parties. (N.R.C.P. 33[b]). Party to whom interrogatory directed has option to produce business records under certain circumstances. (N.R.C.P. 33[d]).

Discovery.

Party may, without leave of court, provided joint case conference report has been filed or not less than ten days have passed since individual case conference report is filed, request any other party to produce and permit inspection or copying of designated documents or, tangible things which constitute or contain evidence or may request permission to enter upon land for inspection, etc. (N.R.C.P. 34[a]). Party upon whom request is made must serve response, permitting discovery or objecting, within 30 days of request unless shorter or longer time is directed by court or agreed to by parties. (N.R.C.P. 34[b]).

Physical and Mental Examination.

If physical or mental condition (including blood group) of party or person in custody or under control of party is in controversy, court may order party to submit to examination by licensed or certified examiner. (N.R.C.P. 35[a]).

Admission of Facts.

Provided joint case conference report has been filed or not less than ten days have passed since individual case conference report is filed, party may serve on another party written request for admission of truth of any matters within scope of Rule 26(b) that relate to statements or opinions of fact or application of law to fact, including genuineness of any document described in request. Party served must answer or object within period designated (30 days or other period allowed by court or stipulated to in writing), or matter will be admitted. (N.R.C.P. 36[a]). No more than 40 requests for admissions can be served without prior written stipulation or order. (N.R.C.P. 36[c]).

Foreign Depositions.

Uniform Act adopted. (NRS 53.050-53.070).

Perpetuating Testimony.

See subhead Use of Deposition, supra.

Commissions.

See subheads Before Whom Taken, Foreign Depositions, and Outside of State for Use within State, supra.

Forms.

Following may be used:

Forms

In the . . . . . . Judicial District Court of the State of Nevada in and for the County of . . . . . .

JOHN DOE,

Plaintiff,

vs.

RICHARD ROE,

Defendant. { Deposition of . . . .

Be it Remembered, that pursuant to (oral, or written, stipulation of counsel) (the annexed notice) in the above-entitled action, and under the provisions of the Nevada Rules of Civil Procedure, the deposition of . . . . . ., a witness in said action, was taken before me, ..., a Notary Public in and for the County of . . . . . ., State of . . . . . ., at the offices of . . . . . ., in the City of . . . . . ., County of . . . . . ., State of . . . . . ., on the . . . . . . day of . . . . . ., 20 . . . ., commencing at the hour of . . . . M. of said day.

That the said witness was first duly sworn by me to tell the truth, the whole truth, and nothing but the truth, in the testimony he was about to give in the above-entitled matter and, thereupon, while said witness was under oath I (counsel) propounded to him the (oral) (written) interrogatories (attached to said notice) and he gave the following answers to them, respectively:

(If deposition is an oral interrogatories, insert transcript of proceedings. If on written interrogatories, insert questions and answers, numbering each question and answer correspondingly.)

(After the deposition is taken, the interrogatories and answers should be signed by the witness unless signature is waived.)

The Notary Public should then certify as to the time, place and manner of taking the deposition, as follows:

STATE OF NEVADA

COUNTY OF . . . . } ss.

I, ..., a Notary Public in and for the County of . . . . . ., State of . . . . . ., duly commissioned, qualified and acting, hereby certify that the deposition of . . . . . ., a witness in the above-entitled action, was taken before me at the offices of . . . . . ., in the City of . . . . . ., County of . . . . . ., State of . . . . . ., on the . . . . . . day of . . . . . ., 20 . . . ., commencing at the hour of . . . . . .M. of said day;

That before the taking of said deposition, said witness was first duly sworn by me to testify to the truth, the whole truth and nothing but the truth; that thereupon, and while said witness was under oath, said witness was examined upon (oral) (written) interrogatories (attached to said notice) propounded to him by me (counsel), and said witness made answers thereto; that said interrogatories and said answers thereto, and the proceedings had at the taking of said deposition, were caused by me to be reduced to writing; that the foregoing record of said deposition is a full, true and correct transcription of all of said interrogatories so propounded and of all of said answers made by the said witness thereto, and of all of said proceedings had on said day, in the order in which said interrogatories, answers and proceedings were made;

That, when completed, said deposition was read by (to) said witness and corrected by him in every particular he desired, and was thereupon subscribed by him in my presence (that by stipulation the reading, correcting and signing of said deposition by said witness were expressly waived);

That I am not an attorney or counsel for, or related to or employed by, any of the parties to the said action in which this deposition was taken, and that I am not a relative or employee of any attorney or counsel employed by the parties hereto, and am not financially interested in said action.

In Witness Whereof, I have hereunto set my hand and affixed my notarial seal at the City of . . . . . ., County of . . . . . ., State of . . . . . ., this . . . . . . day of . . . . . ., 20 . . . . .

(Seal)

. . . .

Notary Public in and for the County of. . . . . ., State of . . . . . .

5.12 EQUITY:

See topic 5.02 Actions.

5.13 EVIDENCE:

Witnesses.

Every person is competent to be witness except person may not testify to matter unless he has personal knowledge of it or states opinion as expert. (NRS 50.015; 50.025). Interpreter must be appointed in all judicial proceedings in which person with disability appears as witness. In civil proceeding, compensation of interpreter may be taxed as costs. (NRS 50.050). Judge and jurors of trial may not testify at that trial. (NRS 50.055; 50.065).

See also topic 5.11 Depositions and Discovery.

Privileged Communications. Client of attorney or accountant has privilege to refuse to disclose, and to prevent any other person from disclosing, confidential communications (1) between himself or his representative and his attorney or accountant, (2) between his attorney or accountant and representative of attorney or accountant, and (3) made for purpose of facilitating rendition of professional services to client by him or his attorney or accountant to attorney or accountant representing another in matter of common interest. (NRS 49.095; 49.185). Patient of doctor, dentist, osteopath, or psychiatric social worker has privilege to refuse to disclose and to prevent others from disclosing confidential communications among himself, his doctor or persons participating in diagnosis or treatment, including members of patient's family. (NRS 49.225). No such privilege exists for communications relevant to proceedings to hospitalize for mental illness, or made in course of court ordered examination, or written medical or hospital records relevant to condition of patient in any proceeding in which condition is element of claim or defense, or if services of physician are sought or obtained to aid or enable person to commit fraud or any unlawful act in violation of NRS c. 616A-616D, or 617 which person knows or should know is fraudulent or unlawful, or in certain statutory proceedings concerning controlling communicable diseases. (NRS 49.245). Member of organized hospital committee and committee of organizations providing emergency medical services having duties to evaluate and improve care, review committees of medical and dental societies, and medical review committees of county or district board of health when functioning as peer review committees cannot be compelled to testify concerning meetings, and proceedings of such meetings not subject to discovery, however no privilege exists as to statement by one in attendance who is party, person requesting staff privileges, or proceedings concerning action against insurance carrier alleging bad faith failure to settle. (NRS 49.265). Clergyman may not be examined as witness to any confession made to him in professional capacity unless confessor consents. (NRS 49.255). Public officer may not be examined as to communications made to him in official confidence if public interest would suffer. (NRS 49.285). No reporter, former reporter or editorial employee of press or employee of radio or television station may be required to disclose, in any legal proceedings or investigation, published or unpublished information obtained or prepared by such person in his professional communications capacity or source of any information. (NRS 49.275). Certified school counselor cannot be examined as witness concerning pupil's communications in counseling in any civil or criminal action to which pupil is party, unless crime punishable by death or life imprisonment is involved. (NRS 49.290). Pupil's communications to licensed teacher during counseling concerning possession or use of drugs or alcohol are privileged. (NRS 49.291). No privilege exists in child abuse or neglect cases except attorney who acquires knowledge of conduct from client and clergyman who acquires knowledge from offender during confession. (NRS 432B.220).

Husband and Wife. Husband or wife cannot be examined as witness, one against the other, without that other's consent, nor may husband or wife be examined during or after marriage as to any communication made during marriage (NRS 49.295[1]); except in civil action by one against other; or proceeding to commit or place spouse or property under control of third party; or proceeding to establish competence; or proceeding in juvenile or family court; or criminal action involving charges against spouse for bigamy or incest, or crime relating to abandonment of child or nonsupport; or criminal proceedings that took place before marriage; or crime against other's person or property; or crime involving neglect of wife or child (NRS 49.295[2]); but when one spouse has been adjudged insane other may testify, while such insanity adjudication continues, to any fact which transpired before or during insanity (NRS 49.305).

Communications or Transactions with Persons Since Deceased. Personal representative of deceased client of attorney or accountant may claim privilege and prevent disclosure (NRS 49.105; 49.195), except as to communication relevant to issue between parties who claim through same deceased client (NRS 49.115; 49.205). Personal representative of deceased patient may prevent doctor's disclosure. (NRS 49.235-49.245).

Self-Incrimination. Prohibited by Nev. Const. Art. I, § 8.

Compelling Attendance. Witnesses served with subpoenas are compelled to appear and remain until testimony is closed. Person present may be compelled to testify as if subpoenaed to appear. (NRS 50.165).

Expert medical testimony in medical malpractice case may only be given by provider of medical care who has practiced in area similar to practice engaged in at time of alleged negligence. (NRS 41A.100[2]).

See topic 5.11 Depositions and Discovery.

5.14 INJUNCTIONS:

Federal Rules of Civil Procedure form basis for procedural statute. (N.R.C.P. 1-86). See topic 5.19 Practice.

Injunction may be granted; when it appears that plaintiff is entitled to relief demanded, and such relief consists wholly or in part in restraining commission or continuance of act complained of either for limited time or perpetually; when it appears that commission or continuance of some act during litigation would produce great or irreparable injury to plaintiff; or when during litigation it appears that defendant is doing or threatens or is about to do or procure or permit doing of some act in violation of plaintiff's rights respecting subject of action and tending to render judgment ineffectual. (NRS 33.010).

Preliminary Notice.

No preliminary injunction issued without notice to adverse party. (N.R.C.P. 65[a][1]).

Bond.

No bond requirement.

Temporary Restraining Order.

Will not be granted without notice to adverse party, unless it appears that irreparable injury will result to applicant before notice and hearing can be had and applicant's attorney certifies to court efforts made, if any, to give notice. Period covered by said order may not exceed 15 days, but court may extend for like period for good cause shown or if adverse party consents. Such orders are filed with county clerk and hearing must be set at earliest possible time, and adverse party may demand such hearing on two days notice. (N.R.C.P. 65[b]). No notice is necessary in divorce, alimony, separate maintenance or child custody suits. (N.R.C.P. 65[f]).

Security.

No restraining order or preliminary injunction may issue without giving by applicant of security in such form as court deems proper for payment of damages to any party who is found to be wrongfully restrained. No such security is required of state or its officer or agency, nor in any divorce, alimony, separate maintenance or child custody suit. Surety on such bond submits surety to jurisdiction of court and irrevocably appoints clerk as agent upon whom any papers affecting surety's liability on bond may be served. (N.R.C.P. 65.1).

5.15 JUDGMENTS:

Federal Rules of Civil Procedure form basis of procedural statute. (N.R.C.P. 1-86). See topic 5.19 Practice.

Judgment includes decree and any appealable order.

Judgment on Pleadings.

After pleadings are closed any party may move for judgment. If matters outside pleadings are presented and not excluded, motion must be as one for summary judgment. (N.R.C.P. 12[c]).

Summary Judgment.

Party seeking relief may at any time after 20 days from commencement of action or after service of motion for summary judgment by adverse party, move with or without supporting affidavits for summary judgment. (N.R.C.P. 56[a]). Party against whom relief is claimed may so move at any time. (N.R.C.P. 56[b]). Motion must be served at least ten days before hearing. (N.R.C.P. 56[c]).

Judgment as Matter of Law.

If during jury trial party has been fully heard on issue, and on facts and law party has failed to prove sufficient issue for jury, court may determine issue against party and grant judgment as matter of law against party with respect to claim or defense. Motion may be made at close of evidence offered by non-moving party or at close of case. (N.R.C.P. 50[a]).

Judgment on Partial Findings.

If during bench trial party has been fully heard on issue and court finds against party, court may enter judgment as matter of law against party with respect to claim or defense or may decline to render judgment until close of evidence. (N.R.C.P. 52[c]).

Default Judgment.

When plaintiff's claim is for sum certain or for sum which can by computation be made certain and defendant has been personally served in this state, clerk upon request must enter judgment for amount due and costs if defendant has been defaulted for failure to appear and is not infant or incompetent. In all other cases party entitled must apply to court. (N.R.C.P. 55[b]).

Declaratory Judgments.

Uniform Act adopted but modified. (NRS 30.010-30.160).

Vacation or Modification.

On motion and upon such terms as are just, made within reasonable time, usually six months, court may relieve party from judgment. (N.R.C.P. 60[b]).

Offer of Judgment.

At any time more than ten days before trial, one defending claim may serve upon adverse party offer to allow judgment as specified in offer with costs then accrued. (N.R.C.P. 68[a]). If offer accepted within ten days judgment will be entered by clerk upon receiving notice of acceptance. (N.R.C.P. 68[d]). If not accepted and judgment is obtained by offeree which is not more favorable than offer, offeree may not recover costs nor attorney's fees. (N.R.C.P. 68[f]). When liability of one party determined by verdict or judgment, but amount of liability remains to be determined, party adjudged liable may make offer of judgment if served within ten days prior to commencement of hearing to determine amount of liability. (N.R.C.P. 68[h]).

Any party may serve written offer of judgment at any time more than ten days before trial. (NRS 17.115[1]). Offeree must accept offer of judgment ten days after it is made; otherwise deemed rejected and withdrawn. (NRS 17.115[3]). If offer accepted in writing judgment is to be entered unless party requests dismissal of claim and pays amount of offer within reasonable time. (NRS 17.115[2]). If party to whom offer made fails to obtain more favorable judgment, he cannot recover costs, attorney's fees or interest on judgment for period between service of process and entry of judgment and must pay offeror's taxable costs incurred from date action commenced and may have to pay costs of services of expert witnesses, interest on judgment and attorney's fees from time of offer. (NRS 17.115[4]).

Judgment by confession may be entered without action, either for money due or to become due or to secure any person against contingent liability on behalf of defendant, or both. (NRS 17.090).

Authorization for such judgment must be by statement in writing, signed and verified by defendant, and must authorize entry of judgment for specified sum. If confession of judgment is for money due or to become due, facts out of which liability arose must be stated concisely, and it must appear that sum confessed is justly due or to become due. If purpose of confessing judgment is to secure plaintiff against contingent liability, facts constituting liability must be stated concisely, and it must appear that sum confessed does not exceed liability. (NRS 17.100).

Entry of Judgment.

Statement is filed with clerk of court in which judgment is to be entered, clerk indorses upon it, and enters in judgment book judgment for amount confessed with $28 costs. Judgment and affidavit, with judgment indorsed, constitute judgment roll. (NRS 17.110).

In any judgment, interest on verdict or decision must be entered, and clerk must insert computation of costs in copies and docket of judgment. (NRS 17.130; 17.190).

Lien.

District court judgment or judgment of court of U.S. in and for District of Nevada may be made lien on all real property of defendant not exempt from execution by filing transcript of original docket or abstract or copy of any judgment or decree, certified by clerk of court, with county recorder of county in which such real property is located. Lien continues for six years from date of original docketing, excluding any time during which execution of judgment is suspended by appeal or action of court or defendant and is continued each time judgment is renewed unless judgment is for arrearages of child support payments in which lien continues until judgment is satisfied. (NRS 17.150).

Justice's Judgments.

Judgment rendered in justice court does not create lien upon lands unless abstract thereof is recorded in office of recorder of county in which lands are situated. When so recorded it becomes lien for six years. (NRS 68.040).

Assignment.

Common law rule as to assignment of judgment prevails.

Satisfaction.

Satisfaction of judgment may be entered in clerk's docket if execution returned satisfied and if acknowledgment of satisfaction filed with clerk, acknowledged as conveyance of real property by judgment creditor, or by attorney, unless revocation of his authority is previously filed. Whenever judgment is satisfied it is duty of party or attorney to give such acknowledgment and party who has satisfied judgment may move court to compel it or to order clerk to enter satisfaction in docket of judgment. (NRS 17.200).

Form of Satisfaction.

No statutory form. Following is suggested:

Form

(Title of court and cause).

For and in consideration of the sum of . . . . dollars ($ . .), current lawful money of the United States, to me paid by . . . ., the defendant in the above-entitled action, full satisfaction is hereby acknowledged of a certain judgment rendered and entered in said . . . . Court in the said action, on the . . . . day of . . . ., 20 . ., in favor of . . . ., the plaintiff in said action, and against the said defendant, for the sum of . . . . dollars ($ . .), current lawful money of the United States, with interest thereon from the . . . . day of . . . ., 20 . ., at the rate of . . . . per cent per annum until paid, together with said plaintiff's costs and disbursements, amounting to the sum of . . . . dollars ($ . .), and recorded in book of judgments, at page . . . . . And I hereby authorize and direct the clerk of said Court to enter satisfaction of record of said judgment in said action.

(Acknowledgment).

. . . .

Foreign Judgments.

Authentication or identification is a condition precedent to admissibility and is satisfied by evidence that matter in question is what its proponent claims. (NRS 52.015). Evidence that writing authorized by law to be recorded or filed and in fact recorded and filed in public office is from public office where items of this nature are kept is sufficient to authenticate document. (NRS 52.085).

Document purporting to be executed or attested in his official capacity by person authorized by laws of foreign country to make such execution is presumed authentic if accompanied by final certification as to genuineness of signature and official position of executing person or any foreign official whose certificate of genuineness and official position is involved. Final certification may be made by secretary of embassy or legation, consul general, consul, vice-consul or consular agent of U.S., or diplomatic or consular official of foreign country assigned to U.S. If reasonable opportunity is given to all parties to investigate authenticity of official document, court may treat it as presumptively authentic without final certification. (NRS 52.115).

Copy of official record is presumed authentic if it is certified as correct by custodian or other person authorized to make certification. (NRS 52.125).

Revised Uniform Enforcement of Foreign Judgments Act has been adopted (1979) with amendments (2001). (NRS 17.330-17.400).

5.16 LIMITATION OF ACTIONS:

Uniform Commercial Code adopted. (NRS cc. 104 and 104A). See category 3 Business Regulation and Commerce, topic 3.09 Commercial Code.

Legal proceedings must be brought in following times:

Within six years: Action on judgment or decree of court within U.S. or renewal thereof, or on contract, obligation or liability evidenced by writing, sealed or unsealed, not limited by specific statute. (NRS 11.190[1]). See also subhead Within Four Years, infra. No action may be commenced against designer or builder of improvements on real property for faulty design or construction or for personal injury or wrongful death caused by deficiency apparent by reasonable inspection more than eight years after substantial completion of such improvements. (NRS 11.205).

Within five years: Actions to recover real property or the possession or rents or profits thereof, except as hereinafter stated. (NRS 11.070-11.160). Victim, person against whom crime has been committed or killed or injured as direct result of crime or surviving spouse, parent or child of such person, may commence action that arises from commission of felony against felon within five years after felon becomes entitled to receive compensation for any book, articles, movies, interviews substantially related to felony perpetrated against victim; however if limitation period has otherwise expired liability of felon limited to compensation received. (NRS 217.007).

Within four years: (1) Actions upon open accounts; (2) actions upon articles charged on store account; (3) actions upon contracts, obligations or liabilities not founded upon instruments in writing; (4) actions for deceptive trade practice violating 598.0903 to 598.0999 inclusive but action accrues when aggrieved discovers or should have discovered facts constituting deceptive trade practice. (NRS 11.190[2]). Statute commences to run from date of last transaction or last item charged, or last credit given; and whenever any payment on principal or interest has been or shall be made upon existing contract, whether it be bill of exchange, promissory note or other evidence of indebtedness, if such payment be made after same shall have become due, limitation shall commence from time last payment was made. (NRS 11.200). Where there are reciprocal charges, statute runs from last item proved in account on either side. (NRS 11.210); (5) actions for breach of contracts of sale under Uniform Commercial Code unless parties originally agreed to shorter period. (NRS 104.2725); (6) malpractice action occurring before Oct. 1, 2002, after date of injury, or two years after plaintiff discovers, or should have, injury, whichever occurs first, in action against professional health care provider for negligence, rendering professional services without consent, or for error or omission in such provider’s practice; however, statute is tolled during period health care provider concealed any act, error or omission upon which action is based and which is known or should be to provider. (NRS 41A.097); (7) malpractice actions against attorneys and veterinarians measured from time plaintiff sustained damage or within two years after plaintiff discovered or should have discovered facts constituting cause of action, whichever occurs earlier (NRS 11.207); (8) action under Nevada Unfair Trade Practice Act, after cause of action accrues, or if action based on conspiracy, within four years after plaintiff discovered, or should have, facts relied upon to prove conspiracy (NRS 598A.220); (9) malpractice action against accountant measured from completion of performance of service or date of initial issuance of report, or within two years after plaintiff discovered or should have discovered facts constituting cause of action, whichever occurs earlier (NRS 11.2075).

See further category Business Regulation and Commerce, topic Monopolies, Restraint of Trade and Competition.

Actions not specifically provided for. Four year limitation applies also to actions for any relief not otherwise specified. (NRS 11.220).

Within three years: (1) Upon liability created by statute other than penalty or forfeiture; (2) for waste or trespass on real property; (3) for taking, detaining or injuring personal property; (4) action for relief upon ground of fraud, or mistake, time running from discovery; (5) action by financial institution or other lender against borrower who makes false statement or conceals material fact for purpose of obtaining loan (NRS 11.190[3]); (6) action to recover real estate sold by guardian, time running from termination of guardianship (NRS 11.260); (7) action to recover real estate sold by executor or administrator in probate proceedings, time running from sale (NRS 11.270); (8) action against corporate directors on statutory liability, time running from discovery (NRS 11.380); (9) malpractice action occurring after Oct. 1, 2002, after date of injury, or two years after plaintiff discovers, or should have, injury, whichever occurs first, in action against professional health care provider for negligence, rendering professional services without consent, or for error or omission in such provider’s practice (NRS 41A.097).

Within two years: (1) Against sheriff, coroner or constable for official misconduct; (2) upon statute for penalty or forfeiture; (3) for libel, slander, assault, battery, false imprisonment or seduction; (4) action against sheriff, or other officer, for escape of prisoner arrested or imprisoned on civil process; (5) action to recover damages for injury to person or for death of person by wrongful act or neglect of another (NRS 11.190[4]); (6) action to recover damages for intentional, willful, reckless, or negligent injury or killing of pet; (7) after plaintiff discovers, or should have, injury due to negligence, rendering services without consent, or error or omission by professional health care provider (NRS 41A.097); (8) upon action to recover mining claim or possession thereof (NRS 11.060).

Within one year: (1) Action against officer or de facto officer to recover personal property seized in official capacity, or its value; (2) action for damages to person or property in such seizure, or for money paid him under protest or seized by him; (NRS 11.190[5]); (3) actions under Nevada Equal Credit Opportunity Law (NRS 598B.180).

Three months from date of payment of last installment when property owner taxpayer sues tax department and commission for excessive assessment. (NRS 361.420[3]).

One Hundred Eighty Days.

Action for restoration of rights by person injured by unfair employment practice. Tolled during pendency of complaint before commission. (NRS 613.430).

Ninety Days.

Actions to recover fees paid by motor convoy carriers. (NRS 706.581).

Thirty Days.

Actions seeking judicial review of orders of governing bodies concerning planning or zoning. (NRS 278.02788[4]).

Within fourteen days if no recount is demanded or within five days after recount completed, proceedings must be begun to contest any election. (NRS 293.413).

New Actions. If action must be commenced within time prescribed and judgment therein for plaintiff is reversed on appeal, plaintiff may commence new action within one year, after said renewal. (NRS 11.340).

Stay of Action.

Time during which commencement of action is stayed by injunction or statutory prohibition is no part of limitation period. (NRS 11.350).

Disabilities of Plaintiff.

If person entitled to sue for recovery or possession of real property is, when title first descends or accrues, minor, insane or imprisoned for criminal offense for term less than life, action may be commenced within two years after removal of disability or within two years after death of such person while still under disability. (NRS 11.180). If action be to recover real estate sold by guardian or by executor or administrator in probate proceedings, it must be commenced within three years after termination of guardianship, or in case of executor or administrator within three years after sale. (NRS 11.260, 11.270).

If person entitled to bring action other than for recovery of real property is, when cause of action accrues, infant, insane or in custody of state, if placed in such care while less than 18 years of age, except when person imprisoned, paroled or on probation, time of such disability is no part of time limited for commencing action. (NRS 11.250).

Parent, guardian, or legal custodian of any minor child is responsible for prosecuting medical malpractice action on behalf of child. If parent, guardian, or legal custodian fails to commence action on behalf of minor child within time of limitation, child is not permitted to bring action on same alleged injury upon removal of his legal disability, except that in case of brain damage or birth defect, period of limitation is extended until child attains ten years of age, and in case of sterility, period of limitation is extended until two years after child discovers injury. (NRS 41A.097[4]).

Action to recover damages for injury arising from sexual abuse of plaintiff which occurred when plaintiff was less than 18 years of age must be commenced within ten years after plaintiff reaches 18 years of age, or discovers or reasonably should have discovered that injury was caused by sexual abuse, whichever occurred later. (NRS 11.215).

Prospective Plaintiff.

If person entitled to bring action dies before expiration of time limited for commencement thereof, and cause of action survives, action may be commenced by his personal representatives within one year after his death. (NRS 11.310[1]).

Prospective Defendant.

If person against whom action might be brought dies before expiration of time limited for commencement thereof and cause of action survives, action may be brought against his executor or administrator within one year after issuance of letters testamentary or of administration, provided claim has been properly presented and final account of representative has not been filed. (NRS 11.310[2]). If such person dies outside of state, action may be brought within one year after issuance of letters within state. (NRS 11.320).

Absence or concealment of defendant from state suspends running of statute. (NRS 11.300).

Foreign cause of action is barred if barred in state or country where it arose, unless it is in favor of citizen of Nevada who has held it since its accrual. (NRS 11.020).

Revival of Barred Claims.

Only written promise signed by party is sufficient evidence of new or continuing contract to take case out of operation of statute (NRS 11.390), except whenever part payment made time runs from date of last payment. (NRS 11.200).

Contractual Limitations.

No statutory prohibition.

Pleading.

Facts showing bar must be pleaded, as affirmative defense. (N.R.C.P. 8[c]).

Acknowledgment of debt or cause of action is not evidence of new or continuing contract, sufficient to take case out of operation of statute unless it is in writing, signed by party to be charged thereby. (NRS 11.390).

5.17 NEGLIGENCE:

See topic 5.09 Damages.

5.18 PLEADING:

Governed by N.R.C.P. 7 et seq.; patterned largely on Federal Rules.

Pleadings Permitted.

There must be complaint and answer; reply to counterclaim; answer to cross-claim; third party complaint if person who was not original party is summoned; third party answer. (N.R.C.P. 7[a]).

Complaint or any pleading which sets forth claim for relief must contain short and plain statement of claim and demand for judgment for appropriate relief. (N.R.C.P. 8[a]).

Answer.

Defendant must serve his answer within 20 days after service of summons is complete. Answer to cross-claim must be served within 20 days after service; reply to counterclaim in answer must be served within 20 days after service of answer. (N.R.C.P. 12[a][2]).

Every defense to claim for relief must be asserted in responsive pleading, if one is required, except that following may, at pleader's option, be made by motion: (1) lack of jurisdiction over subject-matter; (2) lack of jurisdiction over person; (3) insufficiency of process; (4) insufficiency of service of process; (5) failure to state claim on which relief can be granted; and (6) failure to join indispensable party. (N.R.C.P. 12[b]).

Counterclaim.

Pleading must state as counterclaim any claim pleader has against opposing party if it arises out of transaction or occurrence that is subject-matter of opposing party's claim if it does not require presence of third party of whom court cannot acquire jurisdiction. (N.R.C.P. 13[a]).

Pleading may state as counterclaim any claim against opposing party not arising out of same transaction or occurrence that is subject-matter of opposing party's claim. (N.R.C.P. 13[b]).

Cross-Claim.

Pleading may state as cross-claim any claim by one party against co-party arising out of transaction or occurrence that is subject of original action or of counterclaim, or relating to any property that is subject-matter of original action. (N.R.C.P. 13[g]).

Reply to counterclaim is required and court may order reply to answer or third-party answer. (N.R.C.P. 7). Court may permit reply affidavits. (N.R.C.P. 59).

Demurrer is abolished. (N.R.C.P. 7[c]).

Amended or Supplemental Pleadings.

Any pleading may be amended once as of course before time for responsive pleading has expired. Further amendment allowed in discretion of court. (N.R.C.P. 15[a]).

Affidavits of Merits.—No statutory provision.

Affidavits of Defense.—No statutory provision.

Bills of Particulars.—No statutory provision.

Verification is not required unless specifically provided by rule or statute. Pleading of party who is represented must be signed by one attorney in attorney's individual name, and if not so represented, by party, and shall state signer's address and phone number, if any. (N.R.C.P. 11[a]).

Service and Filing.

All pleadings are served on adverse party or attorney and filed with clerk of court. (N.R.C.P. 5[a]).

Form.

Appendix to Rules sets forth forms intended for illustration only and to indicate simplicity and brevity of statement which rules contemplate.

Time to answer in justice's court is 20 days after service of summons or complaint. (J.C.R.C.P. 12[a]).

Proof of Claims.

Claims sent for collection should be accompanied by fully itemized bill and following information should be given: Is creditor corporation? If so, in what state incorporated? If partnership, what are full names of partners? If doing business under fictitious name, who compose association and has it complied with laws of its own state as to fictitious names? In order to avoid demand for bond as nonresident plaintiff it is better to send blank assignment of claim. If creditor is corporation, title of executing officer should appear and seal be affixed. Instructions for immediate attachment are futile unless affidavit is sent, fully complying with attachment statute. (See category 8 Debtor and Creditor, topic 8.02 Attachment.)

Affidavits cannot be made upon information and belief. Attachment bond should also be arranged.

Small Claims.

See category 6 Courts and Legislature, topic 6.01 Courts.

5.19 PRACTICE:

Federal Rules of Civil Procedure form basis for procedural statute. (N.R.C.P. 1-86).

Direct Action Against Insurer.

See category 23 Transportation, topic 23.01 Motor Vehicles, subhead Direct Actions.

Small Claims.

See category 6 Courts and Legislature, topic 6.01 Courts.

See topics 5.02 Actions, Appeal and Error, Depositions and Discovery, Injunctions, Judgments, Pleading, Process; category 8 Debtor and Creditor, topics 8.02 Attachment, 8.05 Executions, 8.09 Garnishment.

5.20 PROCESS:

Federal Rules of Civil Procedure form basis for procedural statute. (N.R.C.P. 1-86). See topics 5.18 Pleading, 5.19 Practice.

By Whom Issued.

Summons is issued and signed by clerk under seal of court and delivered to plaintiff or counsel who is responsible for service. (N.R.C.P. 4[a]).

Who May Serve.

Summons may be served by sheriff of county where defendant is found, or by deputy, or by any person not party and who is over 18 years of age. (N.R.C.P. 4[c]).

Service outside of United States may be made (after order of publication) by any person not party and who is over 18 years of age. (N.R.C.P. 4[c]).

Time Limitation on Service.—If summons and complaint not served on defendant within 120 days after filing of complaint, action shall be dismissed as to that defendant without prejudice unless party required to serve files motion to enlarge time for service and shows good cause why service not made. (N.R.C.P. 4[i]).

Personal service on individual is made by delivering copy of summons, attached to copy of complaint, to defendant personally or by leaving copies with person of suitable age and discretion residing at defendant’s abode or by delivering copies to agent authorized by appointment or law to receive service. (N.R.C.P. 4[d][6]).

Personal service on infant under 14 years of age, residing in state, is made by delivering above described copies to infant personally, and to minor’s father, mother, or guardian within state, if any, otherwise to person having care or custody of minor, or with whom minor resides or by whom minor is employed. (N.R.C.P. 4[d][3]).

Personal service on incompetent person residing in state, and judicially declared to be such, is made by delivering copies to incompetent and also to his or her guardian. (N.R.C.P. 4[d][4]).

Personal service on foreign corporation or nonresident partnership, joint stock company or association doing business and having managing or business agent, cashier, or secretary within state can be made on such agent, cashier, or secretary, or on agent designated for service of process, as required by law. In event no such agent is designated, service is made on Secretary of State or Deputy Secretary of State, as provided by law. (N.R.C.P. 4[d][2]).

Service on Domestic Corporation.

If defendant be Nevada corporation, service must be made on president or other head of corporation, secretary, cashier, managing agent or resident agent. (N.R.C.P. 4[d][1]). Service can be made upon registered agent by leaving copy with person of suitable age and discretion at most recent street address of registered office shown on information filed with Secretary of State. (NRS 78.090; 14.020[2]). If such service cannot be made, plaintiff shall file affidavit setting forth facts showing personal service cannot be had, and service may then be made by delivering copy of summons attached to certified copy of complaint, to Secretary of State or deputy and posting copy in office of clerk of court in which action is brought. Thereafter, if it appears from affidavit that there is last known address of known officer outside state, plaintiff must send, by registered mail, to such officer at such address copy of summons and certified copy of complaint. Defendant has 20 days after service on Secretary of State and posting (or after mailing as above stated) in which to answer. (N.R.C.P. 4[d][1]).

Service on Foreign Corporation, Limited Liability Company, Limited Liability Partnership, Limited Partnership, Limited Liability Limited Partnership, Business Trust or Municipal Corporation.

If defendant be foreign artificial person described in 14.020, doing business or owning property within state, process may be served on its registered managing or business agent, cashier or secretary (N.R.C.P. 4[d][2]), or on its duly appointed registered agent (NRS 14.020), or if none of above, on Secretary of State or Deputy Secretary of State (NRS 14.030). Service can be made upon registered agent by leaving copy with person of suitable age and discretion at most recent street address shown on information filed with Secretary of State. (NRS 14.020). Service on Secretary of State must include citation to statute and $10 fee (NRS 14.030[1]), and affidavit of diligence showing that service cannot otherwise be made (NRS 14.030[3]), and if such affidavit shows last known address of corporation or any officer thereof copy of summons and certified copy of complaint must be sent by registered mail to corporation or such officer (NRS 14.030[4]).

Any nonresident company, firm, partnership, corporation or association producing or otherwise supplying directly or indirectly products to be sold, distributed or used within state may be served with process in any action for damages for injury to person or property resulting from such distribution, sale or use within state by delivering copy of process to Secretary of State and mailing by registered mail with return receipt to last known address of company copy of summons and certified copy of complaint. (NRS 14.080[1]). Defendant is allowed 40 days after date of service to answer or plead. (NRS 14.080[2]). This is additional means of service and does not invalidate any other service. (NRS 14.080[3]).

Service on city, town or county is made by delivering process to mayor, president of council or trustees or other head of legislative department or chairperson of board of commissioners. (N.R.C.P. 4[d][5]).

Service on nonresident in action arising out of automobile accident, see category 23 Transportation, topic 23.01 Motor Vehicles.

Service by Publication.

Service on nonresident or absent defendant or person concealing self to avoid service may be made by publication in newspaper, on affidavit and order of court or judge. (N.R.C.P. 4[e][1][i]). If residence of nonresident defendant is known, certified copy of complaint and copy of summons must be mailed to person's place of residence in addition to publication. (N.R.C.P. 4[e][1][iii]). Personal service out of state must be shown by affidavit of person making it or written admission of defendant. (N.R.C.P. 4[g]).

See also supra, subhead Who May Serve.

In action relating to property in this state (real or personal), in which defendant (individual or corporate) claims lien or interest (actual or contingent), or in which part of the relief demanded consists in excluding defendant from any interest therein, service by publication may be had as above stated, in case of non-residence, absence, or concealment of defendant. (N.R.C.P. 4[e][1][ii]).

Long Arm Statute.

Court in this state may exercise jurisdiction over party in civil action on any basis not inconsistent with Nevada or U.S. Constitution. (NRS 14.065[1]). Personal service of summons on party outside state is sufficient to confer jurisdiction over party served if service is made by delivering copy of summons and complaint to party served in manner provided by statute or rule for service on person within this state. (NRS 14.065[2]).

Proof of Service.—

Person serving process must make proof of service thereof to court promptly and within time during which person served must respond to process. Proof of service must be as follows: (1) If served by sheriff or deputy, affidavit or certificate of such sheriff or deputy; or (2) if by any other person, affidavit thereof; or (3) in case of publication, affidavit of publisher, foreman or principal clerk, or other employee having knowledge thereof, showing same, and affidavit of deposit of copy of summons in post office, if same must have been deposited; or (4) written admission of defendant. In case of service otherwise than by publication, certificate or affidavit must state date, place and manner of service. Failure to make proof of service does not affect validity of service. (N.R.C.P. 4[g]).

5.21 REPLEVIN:

Replevin is also known in Nevada as “Claim and Delivery.”

Plaintiff in action to recover personal property, except property subject to proceeding for forfeiture, may at time of issuing summons, or at any time before answer, claim delivery of such property to him. (NRS 31.840).

Proceedings by Plaintiff.

Where delivery is claimed, affidavit shall be made by plaintiff, or by some one in his behalf and filed with court, showing: (1) that plaintiff is owner of property claimed (particularly describing it), or is lawfully entitled to possession thereof; (2) that property is wrongfully detained by defendant; (3) alleged cause of detention thereof according to his best knowledge, information, and belief; (4) that same has not been taken for tax, assessment, or fine, pursuant to statute, or seized under execution or attachment against property of plaintiff, or, if so seized that it is exempt by statute; and, (5) actual value of property. (NRS 31.850).

If affidavit meets requirements, court will issue order to defendant to show cause why property should not be taken from him and delivered to plaintiff. (NRS 31.853). Hearing is held to determine who, with reasonable probability, is entitled to possession pending final adjudication. (NRS 31.863[1]). Following finding for plaintiff, writ of possession may be issued if plaintiff files written undertaking executed by two or more sufficient sureties, approved by court, to effect they are bound to defendant in double value of property for return of property to defendant if return thereof is ordered. If plaintiff is reasonably believed to be secured party, no undertaking will be required. (NRS 31.863[2]).

Writ of possession may issue prior to hearing if plaintiff establishes probability that: (1) Defendant gained possession by criminal act; (2) property consists of negotiable instruments or credit cards; or (3) property is perishable or in immediate danger of destruction, concealment, removal from state, or sale. (NRS 31.856[1]). Written undertaking is also required. (NRS 31.856[2]).

Writ of possession describes property and its location, directs sheriff to seize and retain it, and advises defendant of his right to except to sureties or file written undertaking for redelivery of property. Written undertaking filed by plaintiff must be attached to writ. (NRS 31.866). Sheriff must forthwith take property described in writ, if it be in possession of defendant or his agent, and retain it in his custody. He must also without delay serve on defendant copy of writ and undertaking. (NRS 31.870).

Proceedings by Defendant.

Defendant may within two days after service of such copy give notice to sheriff that he excepts to sufficiency of sureties. If he fails to do so, he is deemed to have waived all objection to them. If defendant excepts to sureties they must justify before court. Sheriff is responsible for sufficiency of sureties until objection to them is waived or until they are justified. If defendant excepts to sureties, he cannot reclaim property. (NRS 31.880).

If defendant does not except to sureties, he may at any time, before delivery of property to plaintiff, require return thereof, upon filing with court and serving plaintiff with written undertaking, approved by court and executed by two or more sufficient sureties, to effect they are bound in double value of property, for delivery thereof to plaintiff, if such delivery be adjudged and for payment to him of such sum as may for any cause be recovered against defendant. (NRS 31.890).

Claims of Third Persons.

If such return of property is not so required within five days after serving writ of possession and undertaking upon defendant, it must be delivered to plaintiff (NRS 31.890), unless property is claimed by some other person than defendant or his agent, and such person makes affidavit of his title thereto, or right to possession thereof, stating grounds of such title or right, and files affidavit with court and serves copy upon sheriff, in which instance sheriff is not bound to keep property or deliver it to plaintiff, unless plaintiff on demand of sheriff or his agent, indemnifies sheriff against such claim by undertaking, by two sufficient sureties or surety company, accompanied by their affidavits that they are worth double value of property, as specified in affidavit, over and above their debts and liabilities, exclusive of property exempt from execution, and are freeholders, or householders in county (NRS 31.940). No claim to such property by any other person than defendant or his agent shall be valid against sheriff unless so made. (NRS 31.940).

Sheriff’s Return.

Sheriff must file writ of possession and undertaking with his proceedings thereon with clerk of court in which action is pending, within 20 days after taking property mentioned therein. (NRS 31.950).

Judgment may be for property or, if return cannot be held, then for its value, together with damages. (NRS 17.120).

5.22 SEQUESTRATION:

Available only in matrimonial (see category 14 Family, topic 14.05 Divorce) and equitable actions.

5.23 SERVICE:

See topic 5.20 Process.

5.24 STAY OF EXECUTION:

See topic 5.03 Appeal and Error; category 8 Debtor and Creditor, topic 8.05 Executions.

5.25 SUBMISSION OF CONTROVERSY:

Nevada laws do not provide for submitting controversy to court on agreed statement, except through medium of arbitration on question of law. See category 9 Dispute Resolution, topic 9.02 Arbitration and Award.

5.26 VENUE:

Except as otherwise specially provided, residence of defendants or anyone of them determines county in which action must be tried. If no defendant resides in state or no residence therein is known to plaintiff, action may be tried in any county which plaintiff may designate. If defendant is about to leave state, action may be tried in any county where either of parties resides or can be served, subject to power of court to change place of trial under prescribed rules. (NRS 13.040).

Location of Real Property.

Actions to recover real property or for injuries thereto, to recover interest therein, for partition, or for foreclosure of mortgage, must be tried in county where property, or part thereof, is situated. Action to foreclose lien or mortgage on property situated partly in one county and partly in another may be tried in either county, except that if plaintiff applies for injunction pending action, it must be tried in county in which defendant, or majority of defendants, reside at commencement of action. (NRS 13.010[2]).

Place Where Cause Arose.

Action to recover penalty or forfeiture imposed by statute must be tried in county where cause arose, except that when it arose on lake, river or other stream situated in two or more counties, action may be brought in any county bordering thereon and opposite place where offense was committed. (NRS 13.020[1]). Action against public officer or person especially appointed to execute his duties, for act done in virtue of his office, or against person who by his command or in his aid does anything touching duties of such officer, must be tried in county where cause arose. (NRS 13.020[2]). Any tort action against State or its agencies may also be brought in Carson City. (NRS 13.020[3]).

Actions against county may be commenced in judicial district court embracing said county, provided, that actions between counties must be commenced in court of competent jurisdiction in any county not party. (NRS 13.030[1]).

Place Where Obligation Is to Be Performed.

Where one has contracted to perform obligation at particular place outside county in which he resides, action on such contract must be commenced in county in which he resides or in county in which obligation is to be performed. County in which obligation is incurred is deemed to be county in which it is to be performed unless there is special contract to contrary. (NRS 13.010[1]).

Venue in Divorce Actions.

See category 14 Family, topic 14.05 Divorce.

Justice Court Actions.

If there is no court for township or city in which defendant resides, in any township or city of county in which defendant resides; if two or more persons are jointly bound in any debt or contract or otherwise are jointly liable in same action, and reside in different townships whether in same or different counties, in township where any of them reside; in cases of injury to person or property in township or city where injury was committed or defendant resides; for actions to recover personal property or value thereof or damages for taking or detaining same, in township or city in which property may be found or was taken, or in which defendant resides; when defendant is nonresident of county, in any township where he may be found; when defendant is nonresident of state, in any township in state; when contract is to be performed at particular place, and contracting party resides in another township, in township where it is to be performed or in which he resides, and township or city in which it was incurred is deemed place of performance, unless there is special contract to contrary; when parties voluntarily appear and plead without summons, in any township or city in state; in all other cases, in township in which defendant resides. (NRS 66.010).

Change of Venue.

Defendant is entitled to change place of trial upon written demand made before time for answering expires, when county designated in complaint is not proper county, or there is reason to believe that impartial trial cannot be had therein, or convenience of witnesses and ends of justice will be promoted by change. (NRS 13.050). This rule applies to divorce actions. (53 Nev. 228, 297 Pac. 504).

Contract Provisions.

See subhead Place Where Obligation Is to Be Performed, supra.

6 COURTS AND LEGISLATURE

6.01 COURTS:

United States District Court.

Clerk’s office: 400 South Virginia Street, Reno 89501, 333 Las Vegas Blvd. South, No. 1334, Las Vegas 89101.

Fee for filing complaint, $350.

Court sits at Reno or Las Vegas according to the convenience of parties, witnesses and counsel.

Supreme Court of Nevada.

Supreme Court consists of Chief Justice and six associate justices (NRS 2.010) and senior justice in commission is chief justice (Const. Art. 6 § 3). Three justices constitute quorum to transact business and concurrence of three justices who heard argument is necessary to pronounce judgment. (NRS 2.140).

Clerk’s office: 201 South Carson Street, Carson City 89701.

Jurisdiction.

Court has appellate jurisdiction in all civil cases arising in district courts and on questions of law alone in all criminal cases where offense charged is within original jurisdiction of district courts; court has power to issue; writs of mandamus, certiorari, prohibition, quo warranto, and habeas corpus, and writs necessary to complete exercise of its appellate jurisdiction; writs of habeas corpus may be issued by any one of justices, returnable before justice issuing or before court or before any district court or judge. (Const. Art. 6, § 4; see also 2.090).

District Courts of Nevada.

Jurisdiction.

These are courts of general jurisdiction, and have original jurisdiction in all cases in equity and in all cases at law, except those in which exclusive jurisdiction is conferred upon justices' or other inferior courts. District court has appellate jurisdiction in cases arising in justices', municipal or other inferior courts. (Const. Art. 6, § 6). Counties whose population exceeds 100,000 have family court as division of district court (NRS 3.0105), which has exclusive jurisdiction of proceedings brought pursuant to cc. 31A, 123, 125, 125A, 125B, 125C, 126, 127, 128, 129, 130, 159, 425, or 432B of NRS, specified actions concerning minors and approving withdrawal of life sustaining procedures except if child is subject to jurisdiction of Indian tribe (Const. Art. 6, § 6).

Districts.

First District.—Carson City and Storey County.

Second District.—Washoe County.

Third District.—Churchill and Lyon Counties.

Fourth District.—Elko County.

Fifth District.—Mineral, Esmeralda and Nye Counties.

Sixth District.—Lander, Pershing and Humboldt Counties.

Seventh District.—Eureka, White Pine and Lincoln Counties.

Eighth District.—Clark County.

Ninth District.—Douglas County.

(NRS 3.010).

Locations.

District courts sit at respective county seats of counties within districts. Clerks' offices are likewise so located.

Probate Courts.

Probate jurisdiction is exercised by district courts sitting in probate. (Const. Art. 6, § 6; 136.010).

Juvenile Courts.

Juvenile Courts are special courts within each county district court and only hear matters involving children. (NRS 62B.020, 62B.300). "Child" means: (1) Person less than 18 years of age; (2) person less than age 21 and subject to jurisdiction of juvenile court for unlawful acts committed while less than age 18; and (3) juvenile sex offenders, pursuant to 62F.200, 62F.220, and 62F.260. (NRS 62A.030[1]).

Court has jurisdiction over proceedings where: (1) Children need supervision; (2) children commit delinquent acts; and (3) children are under parole or probation supervision. (NRS 62B.320, 62B.330[1], 62B.340). Court has no jurisdiction over children subject to exclusive jurisdiction of Indian tribe. (NRS 62B.360). Delinquent act defined as: (1) Violation of county or municipal ordinance; (2) violation of rule or regulation; or (3) violation of Nevada criminal laws. (NRS 62B.330[2]).

Court has no jurisdiction over children who commit: (1) murder or attempted murder; (2) sexual assault or attempted sexual assault, if juvenile was over age 16 at time of crime or juvenile was previously adjudicated delinquent for felony; (3) any offense or attempted offense involving firearm, if juvenile was over age 16 at time of crime or juvenile was previously adjudicated delinquent for felony; (4) any felony resulting in death or substantial bodily harm, if felony committed at school, at activity sponsored by school or on school bus and juvenile intended to create risk of death or substantial bodily harm to many people by using weapon, device or hazardous action; and (5) any other offense, if juvenile was previously criminally convicted. (NRS 62B.330[3]).

Court may terminate jurisdiction at any time of its own volition or for good cause shown (NRS 62B.410) and can transfer jurisdiction to another court or certify child as adult for criminal proceedings. (NRS 62B.310).

Justice Courts.

Justice courts have jurisdiction, within their respective townships, of actions at law and suits on mechanics' liens, when amount of demand, or value of property, does not exceed $10,000, in criminal misdemeanor cases, and orders for temporary or extended protection against domestic violence except: (1) In county with population more than 100,000 and less than 400,000; (2) in town with population of 100,000 or more located within county of more than 400,000; or (3) if district court issues written order to justice court requiring further proceedings relating to action be conducted before district court. (NRS 4.370).

Procedure.

Justice Courts' Rules of Civil Procedure.

Municipal courts may be established by legislature in incorporated towns or cities. Jurisdiction is over violations of city ordinances, vagrancy, minor public offenses, and civil actions involving city where amount in controversy does not exceed $2,500. (NRS 5.050).

Small Claims Court.

Justice courts have jurisdiction in cases for recovery of money only where sum does not exceed $5,000 and defendant is resident of, is employed in, or does business in, township, in which action is maintained. (NRS 73.010). No attachment or garnishment shall issue before judgment including garnishment in aid of execution. (NRS 73.020). No attorney fees allowable in small claim actions except in civil shoplifting actions. (NRS 73.040).

6.02 LEGISLATURE:

Meets biennially in January, of odd numbered years.

Special Sessions may be called by Governor.

Initiative and referendum are provided for. (Const. Art. 19; 295.015-295.220).

Lobbyists are regulated in NRS c.218.

6.03 REPORTS:

Nevada Reports, beginning with volume one, contain Supreme Court decisions. Nevada decisions are also reported in Pacific Reporter, beginning 1883 with volume 17 of Nevada Reports.

Digests.

Nevada Digest, published by Bancroft Whitney Company, 1912, in one volume, digests cases in Nevada Reports, volumes 1 to 32 inclusive and contains annotations of cases in volumes 1 to 30 inclusive.

Revised Laws 1919 (being Revised Laws, Volume 3) contain, in addition to statutes, digest of Nevada Reports, volumes 33 to 40 inclusive. Compiled Laws 1929 contains digest of volumes 33 to 51.

Nevada Digest, published by Legislative Counsel Bureau, Carson City, Nevada, in 1965, in loose-leaf form; no longer updated.

All Nevada Supreme Court decisions are digested in Pacific Digest.

6.04 STATUTES:

Latest compilation is Nevada Revised Statutes of 1957, loose-leaf type code which is supplemented after each legislative session by reprinting or adding.

Uniform Acts which have been adopted are: Act on Rights of Terminally Ill (1991); Adult Guardianship and Protective Proceedings Jurisdiction Act of 2007 (2009); Revised Anatomical Gift (2007); Arbitration (2000); Assignment of Rents (2007); Attendance of Witnesses from Without State in Criminal Proceedings, Act to Secure (1967); Child Abduction Prevention (2007); Child Custody Jurisdiction (1979); ‡*Commercial Code (1965; 1973); Common Interest Ownership (1991); Common Trust Fund (1955); ‡*Contribution Among Tortfeasors (1973); Revised Controlled Substances (1991); *Criminal Extradition (1967); Custodial Trust (2007); †Debt-Management Services Act of 2008 (2009); *Declaratory Judgments (1929); Determination of Death (1985); Disclaimer of Property Interests Act of 1999 (2007); Electronic Transactions (2001); Enforcement of Foreign Judgments (1979); Facsimile Signatures of Public Officials (1963); ‡*Federal Lien Registration (1967); *Fiduciaries (1923); Foreign-Country Money Judgments Recognition (2007); Foreign Depositions (1921); Foreign Executed Wills (1915); Fraudulent Transfer (1987); Illegitimacy (1923); Insurers Liquidation (1971); International Wills Act of 1973 (2009); Interparty Agreements (1927); Interstate Family Support (1997, Revised 2007, 2009); Interstate Fresh Pursuit (1967); Interstate Arbitration of Death Taxes (1987); Interstate Compromise of Death Taxes (1987); Joint Obligations (1927); Revised Limited Partnership (1976 Act with 1985 Amendments) (1985); Limited Partnerships Act of 2001 (2007); Military Justice Code (1967); Motor Vehicle Drivers' License (1969); Notarial Acts (1993); ‡*Partnership (1931); Post-Conviction Procedure (1967); Power of Attorney Act of 2006 (2009); Premarital Agreement (1989); Principal and Income Act (Adopted 1997, Revised 2003, 2007); Principal and Income (Adopted 1997, Revised 2003, 2009); Prudent Investor (2003); Prudent Management of Institutional Funds (2007); Real Property Electronic Recording Act (2007); Reciprocal Enforcement of Support Act, Revised (1969); Securities (1985); Simplification of Fiduciary Security Transfers (1959); Simultaneous Death (1949); Statutory Rule Against Perpetuities (1987); Testamentary Additions to Trust (1967); Trade Secrets (1987); ‡*Transfers to Minors (1985, 1991); Trustees' Accounting (1941 and 1955); ‡*Trusts (1941); Unclaimed Property (2007); Unincorporated Nonprofit Association Act of 2008 (2009); Vendor and Purchaser Risk (1987); Veterans' Guardianship (1929).

Uniform Commercial Code adopted. (NRS cc. 104 and 104A). See category 3 Business Regulation and Commerce, topic 3.09 Commercial Code.

For text of Uniform Acts falling within scope of the Martindale-Hubbell Law Digests see Uniform and Model Acts section.

‡ Adopted with significant variations or modifications, or subsequently amended. (See appropriate topics.)

† Debt-Management Services Act, delayed effective date of July 1, 2010.

6.05 UNIFORM LAWS:

For list of Uniform Acts in force in this state see topic 6.04 Statutes.

7 CRIMINAL LAW

7.01 CRIMINAL LAW:

Chapters 193 to 208 of Nevada Revised Statutes contain most of law relating to crimes. Criminal procedure is largely found in Chapters 169 to 179A.

Indictment, Information or Complaint.

Prosecutions are by indictment of grand jury filed in district court except for offenses tried in justices' courts, arising in militia, or in connection with removal of civil officer (see 172.015; 172.035), and by information filed by district attorney after preliminary examination before justice of peace or other examining officer (see 173.035). In cases of criminal proceedings in justices' courts, procedure is governed by c. 189 and Tit. 14 of NRS. (NRS 189.005).

Bail.

Before conviction, all offenses are bailable except in capital cases in which proof is evident or presumption great, or felony committed while released on bail or on probation or parole for different offense without court order. Persons arrested for domestic violence or for violating protective order may not be admitted to bail sooner than 12 hours after arrest. (NRS 178.484). In some instances persons charged may be released without bail by sheriff or chief of police. (NRS 178.4851). Bail is allowable pending review unless it appears that appeal is frivolous or taken for delay. (NRS 178.488).

Interstate Compact for Supervision of Parolees and Probationers adopted. (NRS 213.185). Repealed.

Interstate Compact for Adult Offender Supervision adopted. (NRS 213.215).

Uniform Criminal Extradition Act adopted. (NRS 179.177-179.235).

Uniform Desertion and Nonsupport Act adopted. (NRS 201.020-201.080).

Uniform Act on Interstate Fresh Pursuit adopted. (NRS 171.154-171.164).

Uniform Act on Intrastate Fresh Pursuit adopted. (NRS 171.166-171.176).

Uniform Controlled Substances Act (1990) adopted. (NRS 453.011-453.348).

Medical marijuana exceptions. See category 15 Health.

Uniform Act for Out-of-State Parolee Supervision adopted. (NRS 213.180-213.210). Repealed (2001).

Uniform Act To Secure the Attendance of Witnesses From Without a State in Criminal Proceedings adopted. (NRS 174.395-174.445).

Interstate Compact on Juveniles adopted. (NRS 214.010-214.060). Repealed, (2003, c. 206).

Interstate Corrections Compact adopted. (NRS 215A.010-215A.060).

8 DEBTOR AND CREDITOR

8.01 ASSIGNMENTS:

Uniform Commercial Code adopted (NRS cc. 104 and 10A), effective Mar. 1, 1967. See category 3 Business Regulation and Commerce, topic 3.09 Commercial Code.

Assignments which would be good at common law, are good in Nevada.

Except as provided in U.C.C., where assignment is of thing in action, action by assignee is without prejudice to any set-off or other defense, existing at time of, or before notice of, assignment; but this does not apply to negotiable promissory note, or bill of exchange, transferred in good faith, and for value before maturity. (NRS 12.010).

Any creditor may, without consent of debtor, transfer all or any part of his rights against debtor to any third party. Assignee is entitled by virtue of assignment or transfer to sue in his own name as real party in interest. (NRS 100.075).

Assignment of wages, salary or earnings by person against whom unsatisfied judgment for debt exists in this state is prima facie evidence of fraud, and is void as against judgment creditor. (NRS 608.170).

See also category 13 Estates and Trusts, topic 13.05 Death, subhead Action for Death.

8.02 ATTACHMENT:

Actions in Which Allowed and Grounds.

With Notice and Hearing: (1) Action upon a judgment or contract, for direct payment of money which is not secured by mortgage, lien or pledge upon real or personal property situated in this state, or if so secured, when such security has been rendered valueless or insufficient without act of plaintiff or person to whom security was given. If security has depreciated without such act, attachment lies for excess of debt over value of security; (2) action in which one or more of grounds with or without notice exists; (3) action where court finds that extraordinary circumstances exist making it improbable for plaintiff to reach property of defendant by execution after judgment. (NRS 31.013).

Without notice to defendant, in following actions only: (1) Against a defendant not residing in this state. Domestic and foreign corporations qualified to do business in this state are deemed residents; (2) upon a foreign judgment for direct payment of money; (3) for recovery of value of personal property which has been taken or converted by defendant without consent of owner; (4) where defendant is about to remove his money or property from this state and defendant's remaining property will be insufficient to satisfy plaintiff's claim; (5) where defendant is about to give, assign, hypothecate, pledge, dispose of or conceal his money or property, or any part, if that remaining is insufficient to satisfy plaintiff's claim; (6) for recovery of money or property obtained through embezzlement, forgery, larceny or extortion; (7) one brought under

Uniform Fraudulent Conveyances Act; (8) one by state, or a political subdivision, brought under Uniform Reciprocal Enforcement of Support Act; (9) one where jurisdiction can be obtained only by attachment of defendant's property. (NRS 31.017).

Courts Which May Issue Writ.

District court and justice court. (NRS 31.010, 71.090).

Time for Issuance of Writ.

Plaintiff at time of issuing summons, or at any time afterwards, may have property of defendant attached as security for satisfaction of any judgment that may be recovered, unless defendant gives security to pay such judgment. (NRS 31.010).

In Whose Favor Writ May Issue.

There is no provision excluding nonresidents or foreign corporations from the right to obtain attachment.

Against Whom Writ May Issue.

No relevant statutory provision.

Claims on Which Writ May Issue.

There is no provision requiring that the contract or obligation sued on should be made or payable within this state. Neither is there any provision which authorizes issuance of the writ on any unmatured claim. A writ may issue for a foreign judgment for direct payment of money. (NRS 31.017).

Proceedings to Obtain.

Application for writ of attachment must be accompanied by affidavit by or on behalf of plaintiff showing nature of claim and that same is valid; stating amount which affiant believes plaintiff is entitled to recover; describing in reasonable and clear detail all facts which show existence of grounds for attachment without notice or with notice and hearing; describing in reasonable detail money or property sought to be attached, its location, value, and any exemption from execution; naming all third persons upon whom writ of garnishment will be served; and including copy of any foreign judgment. (NRS 31.020).

Court will order clerk to issue writ of attachment without notice to defendant if plaintiff's affidavit and any additional evidence meet these elements and it determines that ground for attachment without notice exists. (NRS 31.022).

If application seeks a writ of attachment after notice and hearing and affidavit sets forth items required, court will issue an order to defendant to show cause why order for attachment should not be issued. Upon hearing held by court without jury, writ of attachment will be issued if court determines from all evidence that plaintiff's claim is probably valid or defendant fails to appear. (NRS 31.024).

Attachment Bond.

Plaintiff must give a written undertaking with two or more sureties in a sum not less than amount claimed by plaintiff or value of property to be attached, whichever is less, for payment of costs and damages, including attorney's fees, should defendant recover judgment or attachment be discharged. Defendant may except to sufficiency of sureties, and if they fail to justify, writ must be vacated. (NRS 31.030).

The sureties to the undertaking must be residents and householders or freeholders within this state, and worth double the amount specified in the undertaking, over and above all debts and liabilities, exclusive of property exempt from execution. (NRS 31.030). The undertaking may also be made by a surety company authorized to do business in this state. Surety company bonds must be approved by the judge, clerk, or deputy clerk. The plaintiff may also deposit cash in lieu of a bond. (NRS 20.030).

Examination as to Property or Debts.

The defendant, or any person owing him, may be cited to appear before the court, judge, or justice cited to appear before the court, judge, or justice of the peace and be examined on oath as to property of defendant or debts owing to him. (NRS 31.100).

Levy.

Stocks, debts and any property not exempt from execution may be attached provided judgment creditor or sheriff also serves statutory notice of execution and procedure for claiming exempt property (NRS 31.050): (1) Real property by recording copy of writ with county recorder, with description of property attached, and by leaving copy of writ with occupant, or if not occupied by posting copy conspicuously on premises; (2) personal property by taking it into custody and if directed by plaintiff using authorized carrier to tow it to authorized facility, or by placing keeper in charge of going business where such property is located, during which period defendant may continue to operate business if all sales are for cash and proceeds given to keeper; (3) debts, credits and other personal property in possession or under control of persons other than defendant by service of writ of garnishment. (NRS 31.050-31.060).

Indemnity.

Sheriff or constable may demand indemnity if third party claim is made. (NRS 31.070). Plaintiff must deposit with sheriff amount sufficient to pay expenses of taking, transporting and keeping personal property for 30 days. (NRS 31.065).

Lien of attachment on real property is conclusively presumed discharged after ten years. (NRS 108.250).

Release of Property.

Where amount sought to be released is less than demand of writ, court or judge, upon application of defendant and notice to plaintiff, may discharge attachment in whole or in part, upon defendant giving bond in amount sought to be released. Where amount sought equals or exceeds demand of writ, defendant may discharge attachment by giving bond in amount of judgment which may be recovered in favor of plaintiff, or demand of writ, whichever is less. On like application writ may be discharged if improperly or improvidently issued, if properly levied on is exempt from execution or necessary and required by defendant for support and maintenance of himself and family, or if levy excessive. Property may also be released upon written stipulation by plaintiff and defendant. (NRS 31.180-31.220).

Sale.

Perishable property may be sold by officer on reasonable posted notice and attached debts and credits collected if possible without suit. (NRS 31.120). Court or judge may order attached property sold as under execution if beneficial to parties. (NRS 31.130). If plaintiff recovers judgment attached property is sold under execution. (NRS 31.140).

Third Party Claims.

If verified third party claim is filed with attaching officer, he must release property unless, within seven days after written demand, plaintiff gives undertaking in double value of property.

Plaintiff or third party claimant is entitled to trial of title before court within ten days after filing of claim, on seven days notice to claimant. (NRS 31.070).

Vacation or Modification.

At any time after issuing attachment, but not later than five days after actual notice of levy thereof, defendant may except to sufficiency of sureties. If he fails to do so, he is deemed to have waived all objections to them. When excepted to, plaintiff's sureties, within five days from service of written notice of exception, upon notice to defendant of not less than two nor more than five days, must justify before judge, justice, or clerk of court in which action is pending; and upon failure to justify, or if others in their place fail to justify, at time and place appointed, writ of attachment must be vacated. (NRS 31.030[3]).

8.03 [RESERVED]

8.04 CREDITORS' SUITS:

No statutory provision.

8.05 EXECUTIONS:

Money judgments and those requiring delivery of real or personal property are enforced by execution; where any other act is required certified copy of judgment is delivered to party affected or to officer required to execute. (NRS 21.050).

Federal Rules of Civil Procedure form basis for procedural statute. (N.R.C.P. 1-86). See category 5 Civil Actions and Procedure, topic 5.19 Practice.

Exemptions.

See topic 8.06 Exemptions.

Time for Issuance.

Execution may issue at any time before judgment expires except enforcement of judgment for child support which may be commenced at any time (NRS 21.010), unless stayed by supersedeas bond (NRS 17.150).

Death of Party.

Execution may issue after plaintiff's death upon application of personal representative or successor in interest. It may issue after defendant's death only upon judgment for recovery of real or personal property. (NRS 21.060).

To Whom Issued.

Execution may issue from district court to sheriff of any specified county in state. (NRS 21.070).

Writ is issued by clerk under seal of court and directed to sheriff, or by justice of the peace and directed to constable or sheriff; if it is against property, must require satisfaction from personal property or if insufficient, real property. If it is against debtor's property in hands of third persons, must require satisfaction from that property. If it is issued on judgment payable in specified kind of money or currency, must require satisfaction in that kind of money or currency. If it is for delivery of real or personal property, it must direct him to deliver it to party entitled, and to satisfy costs, etc., out of defendant's personal property. If it is against person of debtor, it must direct him to arrest debtor and detain him in jail until judgment is satisfied or legally discharged.

(NRS 21.020). If personal property levied on under writ of execution belongs to going business and judgment debtor consents, sheriff must place keeper in charge of such property for at least two days. During such period judgment debtor may continue to operate business if all sales are for cash and proceeds are given to keeper for purpose of execution. (NRS 21.118).

Effect of Issuance.

Mere issuance of an execution does not affect any property of the defendant; a levy is necessary for this purpose. (NRS 21.080).

Levy.

See supra, subhead Writ.

Return.

An execution must be returnable not less than ten nor more than 60 days after its receipt by sheriff. (NRS 21.040).

Stay may be granted by district court in its discretion after entry of judgment or on motion for new trial with conditions of security or on an appeal by filing supersedeas bond. (N.R.C.P. 62).

In justice court, justice may stay execution for ten days. (NRS 70.010). No express requirement of bond.

Notice of sale under execution after sheriff has served statutory Notice of Writ of Execution and copy of Writ is given in case of perishable property by posting notice in three public places in township or city where sale is to take place, for such time as may be reasonable, considering character and condition of property. (NRS 21.130).

In case of other personal property, by posting a notice of the time and place of sale in three public places not less than five nor more than ten days, and in case of a sale on an execution out of a district court, by publication of the notice in a newspaper, if there by one in the county, at least twice, the first publication being not less than ten days before date of sale. (NRS 21.130).

In case of sale of real property, by personal service upon each judgment debtor, or by registered mail to last known address of each, and by posting a notice for 20 days successively in three public places in township or city where property is situated, and also where property is to be sold; also by publishing copy three times, once a week for three successive weeks, in newspaper if there by one in county, provided that where judgment is for less than $500, notice may be given by posting only in three public places in county. (NRS 21.130).

Mode and Conditions of Sale.

All execution sales must be made at auction to the highest bidder. Only so much of the property of the judgment debtor as is necessary to satisfy the judgment, costs and expenses of the sale may be sold. The judgment debtor may direct the order in which the property shall be sold. (NRS 21.150, 21.110).

Redemption.

Real property sold under execution may be redeemed by judgment debtor, his successor or a creditor having a judgment or mortgage lien subsequent to that under which property was sold, such creditors being called redemptioners. (NRS 21.200).

Time, Mode and Effect.

Redemption may be made, within one year after sale, by paying price of sale with interest at 1% per month from time of sale until redemption and also any taxes, assessments or payments toward liens created prior to purchase, paid by purchaser, with interest. If purchaser be a creditor holding a lien prior to that of redemptioner (other than judgment under which purchase was made) amount of such lien and interest must also be paid. If property is redeemed by redemptioner, judgment debtor or another redemptioner may redeem within 60 days thereafter by paying amount paid on previous redemption plus 2% and also any taxes or assessments, with interest, paid by prior redemptioner and also amount, with interest, of any lien prior to his own held by such prior redemptioner, buy judgment under which property was sold need not be paid as prior lien. Such redemptions may be continued, each within 60 days after preceding redemption. When debtor redeems, his estate is restored. Where redemptioners redeem, last redemptioner is entitled to deed after 60 days but not before one year from sale, judgment debtor having full year to redeem. Where there is no redemption, purchaser is entitled to deed after one year from sale. (NRS 21.210-21.220).

Any person redeeming may deduct from amount to be paid the amount of rents and profits received or claimed by purchaser or prior redemptioner. (NRS 21.250).

Third Party Claims.

Procedure in case of attachment (see topic 8.02 Attachment) is applicable. (NRS 21.120).

Supplementary Proceedings.

Upon return of execution unsatisfied, the creditor may have an order requiring judgment debtor to appear and answer concerning his property; but he may not be required to appear outside county of residence. (NRS 21.270). Judgment debtor may also be required to so appear and answer, before return of execution, upon proof that he has property that he unjustly refuses to apply in satisfaction of judgment. Execution proceedings may thereupon be had against property. Upon affidavit that there is danger of debtor absconding he may be arrested and required to give security to attend from time to time before judge, and that he will not in meantime dispose of his property. In default of such security he may be committed to prison. (NRS 21.280). Persons indebted to judgment debtor may be also required to appear and answer concerning such indebtedness, and witnesses may be required to appear and testify in such proceedings. (NRS 21.300-21.310).

Order.

The judge may order property of or debts due to the judgment debtor to be applied on the execution, if not exempt. (NRS 21.320. See topic 8.06 Exemptions.) In case of an adverse claim to such property or debts by the third party, the judge may authorize a suit to be brought to test his right, and may enjoin any transfer of the property. (NRS 21.330).

Body Execution.

See supra, subhead Writ.

8.06 EXEMPTIONS:

There are numerous exemptions from execution of personal property, usually limited as to value. (NRS 21.090).

Other exemptions include corpus and income of spendthrift trust or any trust created by, or corpus of which proceeded from, any person other than judgment debtor or beneficiary (NRS 21.080); all monies, benefits, privileges and immunities growing out of life insurance, to extent that annual premium does not exceed $15,000, qualified I.R.A.'s and pension or profit sharing plan not to exceed $500,000; all moneys paid for support and maintenance of child or former spouse; social security benefits. (NRS 21.090).

Substitution.

There is no provision for holding money or other property in lieu of articles of personalty specifically exempted but not owned by the debtor.

Debts Against Which Exemptions Not Allowed.

Exemption is not available against taxes, claims for purchase money or valid liens. (NRS 21.090).

Waiver of Exemption. Homestead exemption may be waived pursuant to NRS 115.010. (NRS 21.090[l]).

Necessity of Claiming Exemption. In order to claim exemption of any property levied on, judgment debtor must, within eight days after notice prescribed in NRS 21.075 is mailed, serve on sheriff and judgment creditor and file with clerk of court issuing writ of execution affidavit setting out his claim of exemption. Clerk of court must provide form for affidavit. (NRS 21.112).

Earnings of debtor are exempt to extent of greater of 75% of disposable earnings for any work week, or amount by which his disposable earnings for each week exceed 50 times minimum hourly wage prescribed by § 6(a)(1) of Federal Labor Standards Act of 1938, 29 U.S.C. § 206(9)(1). This exemption does not apply to court orders for support of any person, any order of court of bankruptcy, or of any debt due for any state or federal tax. “Disposable earnings” means that part of earnings remaining after deductions withheld as required by law. “Earnings” means compensation paid or payable for personal services performed in regular course of business including income, wages, tips, salary, commission, or bonus. Term includes compensation in possession, held in account, or due. (NRS 21.090).

8.07 FORECLOSURE:

See topic 8.13 Liens; category 20 Mortgages, topic 20.04 Mortgages of Real Property.

8.08 FRAUDULENT SALES AND CONVEYANCES:

Uniform Commercial Code adopted. (NRS cc. 104 and 104A). See category 3 Business Regulation and Commerce, topic 3.09 Commercial Code.

Uniform Fraudulent Transfer Act adopted. (NRS 112.010-112.130).

Criminal Liability.

Every person who is party to any fraudulent conveyance of lands or chattels or any right issuing out of same or any fraudulent concealment, removal or destruction thereof is guilty of gross misdemeanor. (NRS 205.330).

Remedies. Except for certain limitations imposed in transfers to good faith transferees, in action for relief against fraudulent transfer or obligation, creditor may obtain: (1) Avoidance of transfer or obligation to extent necessary to satisfy creditor’s claim; (2) attachment or garnishment against asset transferred or other property of transferee pursuant to NRS 31.010 to 31.460; and (3) subject to applicable principles of equity and in accordance with applicable rules of civil procedure: injunction against further disposition by debtor or transferee, or both, of asset transferred or of other property; appointment of receiver to take charge of asset transferred or of other property of transferee; or any other relief circumstances may require. (NRS 112.210[1]).

If creditor has obtained judgment on claim against debtor, creditor, if court so orders, may levy execution on asset transferred or its proceeds. (NRS 112.210[2]).

Bulk Sales.

Uniform Commercial Code adopted. See category 3 Business Regulation and Commerce, topic 3.09 Commercial Code.

8.09 GARNISHMENT:

At time of order directing writ of attachment to issue, or at any time thereafter, court may order that writ of garnishment issue as security for any judgment plaintiff may recover. (NRS 31.240). No writ of garnishment in aid of attachment may issue except on order of court. Plaintiff's application must be made by affidavit in which affiant expresses a belief garnishee is defendant's employer or is indebted to or has property belonging to defendant which is not exempt from execution. If garnishee is state, writ must be served on state controller. Grounds and procedure are identical to those for writ of attachment. (NRS 31.249).

Property Which May Be Reached.

Under writ plaintiff may attach money, credits, effects, debts, choses in action and other personal property of defendant in possession or under control of any third person as garnishee. (NRS 31.240). Debts and credits, due or to become due, and items in process of collection unless item is returned unpaid from bank or savings and loan association, moneys collected by peace officers and clerks of court, and moneys held by executors or administrators may be reached. (NRS 31.291-31.292). If garnishee answers that he is defendant's employer writ continues for 120 days or until amount demanded is satisfied, whichever first occurs. (NRS 31.296).

Jurisdiction.—Sherriff's return of writ of garnishment showing due service of writ upon one or more garnishee defendants with payment or tender of garnishee's fees gives court jurisdiction to proceed against each such garnishee. (NRS 31.280).

Proceedings to Obtain.—Writ of garnishment may issue in order directing clerk to issue writ of attachment, or if writ of attachment has previously issued without notice to defendant and defendant has not appeared in action, by separate order without notice to defendant. (NRS 31.249[1]). Plaintiff's application to court for order directing issuance of writ of garnishment must be by affidavit made by or on behalf of plaintiff to effect that affiant is informed and believes that named garnishee is: employer of defendant, or is indebted to or has property in his possession or under his control belonging to defendant, and that to best of knowledge and belief of affiant, defendant's future wages, garnishee's indebtedness or property possessed is not by law exempt from execution. (NRS 31.249[2]). Defendant is entitled to notice of execution of writ of garnishment, delivered by sheriff. (NRS 31.260). No bond or hearing required for garnishment.

Answer of Garnishee.

The garnishee, upon payment to him of $5, is required to answer under oath what property effects, etc., he has in his possession belonging to the defendants, and whether he is in any manner indebted to the defendants. (NRS 31.270; 31.290).

Failure of Garnishee to Answer.

If garnishee fails to answer, court may enter judgment for defendant for use of plaintiff against garnishee for value of amount specified in writ. Notice must be given to each defendant before such judgment is given. (NRS 31.320).

Interpleader.

When the answer of the garnishee discloses that any person other than the defendant claims the indebtedness or property in his hands, the court may order such claimant to be interpleaded, giving notice to all parties. (NRS 31.350).

Practice.—Writ served by sheriff (NRS 31.270) and garnishee is required to submit answer to interrogatories served by sheriff with writ of garnishment within 20 days (NRS 31.260).

Adverse Claims.—Money, property, demands, debts, claims, choses in action and any other property which is subject to garnishment may be reached and subjected even though another action is pending thereon. (NRS 31.294).

Judgment.

If the garnishee has property in his possession, the court may enter judgment that the garnishee deliver it to the sheriff, and if the plaintiff recover judgment, that the property so delivered be sold as upon execution. If the garnishee answers that he is indebted to the defendant, and if the plaintiff recovers judgment, the court must enter judgment in favor of the defendant for the use of the plaintiff against the garnishee, for the amount of the indebtedness, not greater than is necessary to satisfy judgment of plaintiff. (NRS 31.300).

Judgment against a garnishee acquits him from all demands by the defendant for all goods, effects and credits paid, delivered or accounted for by the garnishee by force of such judgment. (NRS 31.370).

Earnings.—With certain exceptions, maximum amount of aggregate disposable earnings of person which are subject to garnishment may not exceed whichever is less of: (1) 25 percent of his disposable earnings for relevant workweek; or (2) amount by which his disposable earnings for that week exceed 50 times federal minimum hourly wage prescribed by § 6(a)(1) of federal Fair Labor Standards Act of 1938, 29 U.S.C. § 206(a)(1), in effect at time earnings are payable.

8.10 HOMESTEADS:

See also categories 14 Family, topic Husband and Wife; Property, topics Curtesy, Dower; Real Property.

Made by either husband and wife, or both of them, or single person claiming homestead, are entitled to homestead exempted from execution by declaring intention in writing to claim property as homestead. Trustee may claim homestead for settlor or beneficiaries if person for whom claim made resides on property. (NRS 115.010; 115.020).

Property Which May Be Claimed.

Homestead may be set aside from either community property or separate property. Homestead not extinguished where underlying property placed in trust for individuals who declared it. (NRS 115.020).

Dwelling house, including mobile home, may be exempt, though situated on land not owned by occupant $350,000 of equity limit. (NRS 21.090).

Limitation of value which may be held exempt is $550,000 of equity in property unless allodial title has been established and not relinquished in which case exemption extends to all equity in dwelling, appurtenances, and land on which it is located. Allodial title is issued by State Treasurer on application of owner of single-family dwelling free and clear of all encumbrances and prepayment of all future property tax liability for that dwelling in accordance with formula set forth in 361.900. (NRS 115.010; 361.900).

Limitation of Area.

None.

Exemption is not available against claims for purchase price, mechanics' or laborers' liens or mortgages or deeds of trust executed thereon, liens to which prior consent was given through acceptance of property subject to recorded declaration of restriction, deed restriction, restrictive covenant or equitable servitude, including assessment lien of unit owners association, or claims by Department of Human Resources resulting from payment of Medicaid. (NRS 115.010; 115.040; 115.090). Mortgage or deed of trust must be executed, and consent to lien given, by both husband and wife when that relationship exists. (NRS 115.040).

Designation of Homestead.

Declaration of homestead must be recorded in county recorder's office in county where homestead is situated. If homestead is declared from separate property of either spouse, when marriage relationship exists, both must join in declaration. (NRS 115.020-115.030).

Waiver of Exemption.

Homestead may be waived by written abandonment, signed, acknowledged and recorded or by conveyance or mortgage executed by husband and wife, head of family, or single person claiming homestead. (NRS 115.040).

Alienation or Encumbrance.

No mortgage or conveyance of homestead valid if made to secure loan or indebtedness on property unless executed by husband and wife, when that relationship exists, and acknowledged separately by wife apart from husband. (NRS 115.040). Any mortgage or conveyance of homestead whether declared or not must be by joint consent of husband and wife. (NRS 123.230).

Proceeds of Sale.

If homestead is sold under execution, proceeds up to $550,000 of equity in property are exempt. Statute does not provide for any exemption of proceeds of voluntary sale. (NRS 115.050).

Rights of Surviving Spouse and Family.

Exemption from execution upon homestead declared as community property by husband and wife continues until death of surviving spouse. If homestead is separate property, exemption continues until death of spouse deemed to own separate property as to debts existing at time of death but ceases as to any subsequent debt of survivor. Exemption of homestead declared property of single person continues against certain qualified individuals who continue to reside on homestead. If two unrelated persons have claimed homestead of single parcel exemption continues as to debt of decedent and other declarant until death of last declarant if declarant continues to reside on property unless otherwise provided in premarital agreement. (NRS 115.060). If no homestead had been selected, probate court, on own motion or on application shall set apart homestead. (NRS 146.020).

8.11 JUDGMENT NOTES:

See category 3 Business Regulation and Commerce, topic 3.02 Bills and Notes.

8.12 LEVY:

See topics 8.02 Attachment, 8.05 Executions.

8.13 LIENS:

Uniform Commercial Code adopted. (NRS cc. 104 and 104A). See category 3 Business Regulation and Commerce, topic 3.09 Commercial Code.

All common law liens exist, with common law remedies thereon.

Agistor's Lien.

Person who boards animals has lien which can be foreclosed by public sale of animals after compliance with certain notice provisions. (NRS 108.540-108.570).

Persons working for wages have certain liens. See category 11 Employment, topic 11.02 Labor Relations.

Jewelers.

Liens are given for labor and materials in repairing watches, clocks and jewelry. (NRS 108.370).

Innkeepers' liens have been extended to owners of furnished or unfurnished apartment houses and bungalow courts. See category 21 Property, topic 21.10 Landlord and Tenant, subhead Lien.

Hospital Liens.

Reasonable value of hospitalization allowed as lien against amounts recovered as damages for personal injuries. (NRS 108.590-108.660).

Enforcement.

Justices of the peace have concurrent jurisdiction with district courts to enforce liens above mentioned when amount claimed does not exceed $10,000. (NRS 4.370).

Motor Vehicle Liens.

Vehicle dealers, garages, repair men, mobile or manufactured home dealers, and landlords have special lien, not dependent on possession, inferior to any existing conditional sale contract. Lien can be enforced by auction sale of vehicle or home after written notice of lien has been served, written notice of sale sent registered mail to owner and interested persons at least ten and not more than 30 days before sale and publication of notice of sale for three consecutive weeks setting forth time which cannot be less than 22 days after first publication, and place of sale. Misrepresentation or fraud in creating lien is misdemeanor. (NRS 108.270-108.360).

Mechanics' Liens.

Every person who performs labor or furnishes material of value of $500 or more in or for construction, alteration, or repair of any structure or mine has lien thereon for unpaid balance agreed upon if parties entered into written contract, or in absence of written contract amount equal to fair market value of labor or materials, including reasonable overhead and profit. If license required for work, only licensed contractor, or employee, or one who furnishes materials to project may have lien. (NRS 108.222; 2003, c. 427).

Foundrymen, boiler makers and persons performing labor or furnishing material for construction, maintenance or operation of mill, factory or hoist are entitled to similar lien. (NRS 108.249).

Extent and Priority of Lien.

Land on which any structure stands and convenient space around it is subject to lien in like manner as structure. Such liens are preferred to any mortgage, encumbrance placed on property after structure was commenced or work thereon begun; or to any mortgage or encumbrance unrecorded at time when structure was commenced or work thereon begun. (NRS

108.225).

Nonresponsibility Notice.

Any improvement made with knowledge of owner or other interested person is deemed made at his request unless, within three days after knowledge of construction or intended construction, he records notice of nonresponsibility with county recorder of county where land or building is situated. (NRS 108.234).

Lien Claim.

Every person other than one who performs only labor who claims benefit of mechanics lien statutes must within 31 days after first delivery of material, or performance of work or services under his contract, deliver in person or by certified mail notice to owner or reputed owner of property that such person has supplied materials or performed work or services. Said notice must give general description of material, work or services and anticipated total value. If said notice is not given, no lien for materials furnished or for work or services performed except labor may be perfected. (NRS 108.245). Person who constructs, alters or repairs residential real property must serve 15-day notice of intent to lien before recording notice of lien. (NRS 108.226). Service of 15-day notice of intent extends time for recording notice of lien by 15 days. (NRS 108.226). Every person claiming lien must record his notice of lien within 90 days after completion of his contract, delivery of material by him or performance of his labor. In event owner records notice of completion, then notice of lien must be recorded within 40 days thereafter. Lien claim must be verified by oath of claimant or some person on his behalf and be filed in county recorder's office of county where property is situated and in addition within 30 days after recording must be served on owner in person, or prescribed substituted service effected. Person who knowingly makes false statement in recording notice of lien guilty of gross misdemeanor. (NRS 108.226-108.227).

Duration of Lien.

No lien binds property for more than six months unless suit be commenced to enforce lien within that time after lien is filed, unless time is extended by written instrument prior to expiration of six months period. Such written extension binds only persons signing it and second extension may not be given. In no case shall extension be given one year beyond recording of lien. (NRS 108.233).

Enforcement of Lien.

Any number of persons claiming liens against same property may join in same action or after lien claims are filed they may be assigned to one for purpose of collection or separate actions by lien claimants may be consolidated. Court must allow as part of costs, reasonable attorney's fees for foreclosing and interest and money paid for recording lien. (NRS 108.237; 108.239).

Mechanics' liens may be enforced in any court of competent jurisdiction that is located within county where property upon which work of improvement is located. Those not exceeding $10,000 may be foreclosed in justice's court. (NRS 4.370). All others must be foreclosed in district court. (NRS 108.239).

Sale and Redemption.

Sale is made by sheriff as upon executions. Redemption statute applies. See topic 8.05 Executions. If claim is not satisfied by sale, claimant has personal judgment for residue against party liable therefor. (NRS 108.239).

The lienee may apply to have lien discharged, on reasonable notice and posting undertaking equal to one and a half times amount of lien. (NRS 108.2413-108.2425).

Public improvements are not subject to mechanics' liens, but where contract price of public building or other public improvement exceeds $100,000, contractor must give performance bond and payment bond, each not less than 50% of contract amount. No action may be brought unless party who has furnished labor or materials gives written notice describing nature of his claim to principal, obligee and surety within 90 days after he finished performing, and commences action within one year after work ceased. Where claims exceed amount of bond, claims are prorated and to that end all actions are consolidated. (NRS 339.015-339.065).

Producer's Lien.

Person who grows or produces agricultural, horticultural, viticultural or vegetable products in Nevada has lien for certain labor, care or expense in growing and harvesting farm product if those farm products are sold to person who buys them for purpose of processing, manufacturing, selling, reselling or redelivering them. (NRS 108.887).

Attachment Lien.

See topic 8.02 Attachment.

Attorney's Lien.

See category 18 Legal Profession, topic 18.01 Attorneys and Counselors.

Collateral Security.

See topic 8.15 Pledges.

Execution Lien.

See topic 8.05 Executions.

Landlord's Lien.

See category 21 Property, topic 21.10 Landlord and Tenant.

Liens on Exempt Property.

See topic 8.06 Exemptions.

Liens on Homestead.

See topic 8.10 Homesteads.

Real Estate Mortgage Lien.

See category 20 Mortgages, topic 20.04 Mortgages of Real Property.

Tax Lien.

See category 22 Taxation, topic 22.13 Property Taxes.

8.14 MECHANICS' LIENS:

See topic 8.13 Liens.

8.15 PLEDGES:

Remedies of Pledgee.

Nevada's "one action" statute NRS 40.430, dealing specifically with mortgage or lien, does not apply to pledges, and pledgee may proceed personally against pledgor for whole debt without selling pledge. (58 Nev. 261, 75 P.2d 992).

The business of a pawnbroker is regulated by statute, with special reference to keeping records of transactions. (NRS 646.010-646.060).

Uniform Commercial Code adopted. (NRS cc. 104 and 104A). See category 3 Business Regulation and Commerce, topic 3.09 Commercial Code.

8.16 RECEIVERS:

Receivers may be appointed by district court in which action pending or judge thereof:

1. In action by vendor to vacate fraudulent purchase of property, or by creditor to subject any property or fund to his claim, or between partners or others, jointly owning or interested in any property or fund, on application of plaintiff, or of any party whose right to or interest in property or fund, or proceeds thereof, is probable, and where it is shown that property or fund is in danger of being lost, removed, or materially injured;

2. In action by mortgagee for foreclosure of his mortgage and sale of mortgaged property, where it appears that mortgaged property is in danger of being lost, removed, or materially injured, or that condition of mortgage has not been performed, and that property is probably insufficient to discharge the mortgage debt;

3. After judgment, to carry judgment into effect;

4. After judgment, to dispose of property according to judgment, or to preserve it during pendency of appeal or in proceedings in aid of execution, where execution has been returned unsatisfied, or when judgment debtor refuses to apply his property in satisfaction of judgment;

5. In cases when corporation has been dissolved, or is insolvent; or in imminent danger of insolvency, or has forfeited its corporate rights;

6. In all other cases where receivers have heretofore been appointed by usages of courts of equity. (NRS 32.010).

In connection with injunction proceedings a receiver may be appointed for insolvent or failing corporation. (NRS 78.635). See 49 Nev. 145, 241 Pac. 317.

Powers and duties of receiver of insolvent corporation are outlined in law regarding private corporations. (NRS 78.720).

Compensation.

Receivers are paid a reasonable compensation for their services. (NRS 78.705).

See also category 21 Property, topic 21.01 Absentees, subhead Escheat.

8.17 REDEMPTION:

See topics 8.05 Executions, Liens; categories 20 Mortgages, topic Mortgages of Real Property; Taxation, topic Property Taxes, subhead Redemption.

8.18 SUPPLEMENTARY PROCEEDINGS:

See topic 8.05 Executions.

8.19 TRUSTEE PROCESS:

See topic 8.09 Garnishment.

8.20 USURY:

See category 3 Business Regulation and Commerce, topic 3.19 Interest.

9 DISPUTE RESOLUTION

9.01 ALTERNATIVE DISPUTE RESOLUTION:

Mandatory (Alternative) Dispute Resolution.

If claim for relief filed in District Court and amount does not exceed $50,000 per plaintiff, exclusive of attorney's fees, interest and court costs, all civil actions must be submitted to nonbinding arbitration. (NRS 38.250). Following actions are exempt from this provision: class actions, appeals from courts of limited jurisdiction, probate, divorce and domestic actions, judicial review of administrative action, title to real estate, actions for declaratory relief, actions governed by NRS 41A.003 - NRS 41A.069, actions presenting issues of public policy, and actions seeking equitable or extraordinary relief, actions that present unusual circumstances that constitute good cause for removal from program, actions in which any of parties are incarcerated, and actions submitted to mediation. (NRS 38.255).

Voluntary Dispute Resolution.

If parties agree, claims filed in Justice Court may be submitted to arbitration. Parties may agree to alternative methods in lieu of mandatory arbitration procedure including settlement conference, mediation, or binding short trial. Any agreement to pursue alternative method must be in writing, entered into at time of dispute, and entered knowingly and voluntarily. Parties may also voluntarily agree to participate in arbitration when amount in controversy exceeds $50,000 per plaintiff, exclusive of attorney's fees, interest and court costs, and may agree that any arbitration be binding. (NRS 38.250).

9.02 ARBITRATION AND AWARD:

Uniform Arbitration Act of 2000 adopted (2001). (NRS 38.206-38.248).

Form and Requisites of Submissions.

Arbitrator has complete discretion in conduct of arbitration hearing. (NAR 14). Arbitration decision must be in writing and signed by arbitrator. Decision shall determine all issues. Maximum award that arbitrator may make is $50,000. Arbitrator has discretion to file findings of fact and conclusions of law or written opinion stating reasons for decision. Arbitrator may award attorneys' fees not to exceed $3,000. (NAR 16).

Contracts to Arbitrate Future disputes. Agreement contained in record to submit to arbitration any existing or subsequent controversy arising between parties to agreement is valid, enforceable and irrevocable except upon ground that exists at law or in equity for revocation of contract. (NRS 38.219).

Judgment on Award.

Arbitrator must file decision with discovery commissioner within seven days of hearing or 30 days after filing of any final authorized memoranda. (NAR 17). Party has 30 days to file request for trial de novo. (NAR 18). If no request for de novo is filed, judgment becomes final. Prevailing party may then submit final judgment form to district court for approval. (NAR 19).

If case proceeds to trial de novo, arbitration award must be admitted as evidence and discovery obtained during arbitration must be admissible. Costs and attorney's fees incurred in trial de novo will be awarded to prevailing party pursuant to statute or N.R.C.P. 68. (NAR 20).

Enforcement.

Final arbitration decision has same effect as decision in district court trial except that judgment cannot be appealed. (NAR 19).

Powers of Arbitrators.

Arbitrators are authorized to hear cases and render decisions. Arbitrators may administer oaths and relax evidentiary and procedural rules to effectuate speedy resolution of case. (NAR 8).

Credentials of/Qualifications of/Standards for Arbitrators.

Supreme Court in association with State Bar of Nevada shall provide training to arbitrators. (NRS 38.253). Non-attorney arbitrators must be approved by American Arbitration Association or similar reputable service or have Juris Doctorate degree and eight years experience in area of expertise. Attorney arbitrators must be licensed to practice law in Nevada and have practiced minimum of eight years in any jurisdiction. (NAR 7).

Judgment on Award and Enforcement Thereof.

Upon granting order confirming, vacating without directing rehearing, modifying or correcting award, court must enter judgment in conformity therewith. Judgment may be recorded, docketed and enforced as any other judgment in civil action. (NRS 38.243).

9.02A MEDIATION:

Jurisdictional Mediation Act.

Mediation and Arbitration of Claims Relations to Residential Property within Common Interest Community. (NRS 38.300-38.360). All disputes related to interpretation, application, and enforcement of any covenants, conditions, or restrictions applicable to residential property or any bylaws, rules, or regulations or increasing, decreasing, or imposing additional assessments must be submitted to mediation or arbitration. (NRS 38.310). Written claim must be filed with real estate division of department of business and industry and include name, nature of claim, whether person is requesting arbitration or mediation and any other information along with fee as determined by division. Claim must be served in accordance with N.R.C.P. 4. Opposing party then has 30 days to respond. (NRS 38.320).

10 DOCUMENTS AND RECORDS

10.01 ACKNOWLEDGMENTS:

Uniform Law on Notarial Acts adopted. (NRS 240.161-240.169).

Acknowledgments may be taken by following officers:

Within State.

Judge or clerk of court; justice of peace; notary public of Nevada; or other person authorized to perform specific act by law of Nevada or federal authority. (NRS 240.1635; 247.060, 111.265).

Outside State but Within United States.

Notary public of that jurisdiction, judge or clerk of court of that jurisdiction, or any other person authorized by law of that jurisdiction to perform notarial acts or under federal authority. (NRS 240.164).

Outside United States.

If performed within jurisdiction of and under authority of foreign nation, its constituent units or multinational or international organization by: notary public or notary, judge or clerk of court of record, or any other person authorized by law of that jurisdiction to perform notarial acts. (NRS 240.165).

Federal Authority and Person with U.S. Armed Forces.

If performed anywhere by following under Federal authority: judge or clerk of court, commissioned officer on active duty in U.S. Military service, foreign service officer or consular officer of U.S., or any other person authorized by federal law to perform notarial acts. (NRS 240.1645). See topic 10.03 Notaries Public.

General Requirements as to Taking.

Notarial act must be evidenced by certificate signed and dated by notarial officer. Certificate must include identification of jurisdiction in which act is performed, title of office of notarial officer, and may include official stamp or seal. If officer is notary public must include date of expiration, if any, of office; if officer is commissioned officer on active duty in U.S. military, must include officer's rank. (NRS 240.1655).

In taking acknowledgment notary public must determine from personal knowledge or satisfactory evidence that person making acknowledgment is person whose signature is on document. (NRS 240.1655).

Married Women.

No special requirements. As to necessity of acknowledgment by married woman of instrument affecting real property, see category 14 Family, topic 14.09 Husband and Wife.

Attorneys in Fact may act for principal in representative capacity. (NRS 240.003).

Corporations.—Person may act in representative capacity on behalf of corporation, partnership, trust or other entity, as authorized officer, agent, partner, trustee or other representative. (NRS 240.003).

Foreign Acknowledgments.—Notarial act has same effect under Nevada law as if performed by notarial officer of Nevada if performed within jurisdiction of and under authority of foreign nation or its constituent units or multinational or international organization by notary public, judge, clerk or deputy clerk of court of record, or person authorized by law of that jurisdiction to perform notarial acts.

Effect of Acknowledgment.

Acknowledgment entitles instrument affecting real estate to be recorded provided instrument includes grantee's mailing address and assessor's parcel number, if any, and if recorded document includes legal description of real property in metes and bounds, name and mailing address of person who prepared legal description, or, if document including same legal description has previously been recorded, all information relevant to locate previous recording, and if instrument conveys real property, name and address of person to whom statement of taxes assessed is to be mailed (NRS 111.312, 111.310) and imparts notice of its contents (NRS 111.320). Certificate of acknowledgment may be rebutted. (NRS 111.340).

Proof by a subscribing witness has same effect as acknowledgment. (NRS 111.115).

Authentication.

No authentication as to official character or genuineness of signature of officer taking acknowledgment to be used within state is required, except as to justices of the peace, as above stated. It is imperative that notary attach his stamp. There is no statute providing for authentication of acknowledgments taken within state for use elsewhere; in practice such authentications are made by county clerks, usual fee $1. (NRS 111.265).

Forms of acknowledgment and proof are found in 240.166-240.169.

Proof by subscribing witness (NRS 111.115-111.130):

State of . . . ., county of . . . .—ss. On this . . . . day of . . . ., A.D. . . . ., before me, ..., a notary public, (or judge or other officer as the case may be) in and for said county of . . . ., personally appeared A.B., known to me to be the same person who is described in and who executed the within instrument as subscribing witness thereto, and who being by me first duly sworn, deposes and says: That on the . . . . . day of . . . ., A. D. . . . ., he was personally acquainted with C. D., the person described in and who executed the within instrument; that on said last-named day he saw the said C. D. execute the said instrument, that the said C. D., whose name is subscribed to said instrument as a party thereto, is the person who executed the same; that he executed the same freely and voluntarily and for the uses and purposes therein mentioned; that affiant thereupon signed the same as subscribing witness thereto. Witness my official stamp at . . . . . in said county, the day and year in this certificate first above written.

. . . .

(signature) (stamp).

Validating Acts.

No statutory provision.

Alternative to Acknowledgment or Proof.

No statutory provision.

Fees.

Notary maximum, $5 first signature of each signer; $2.50 each additional and agreed upon traveling fees. (NRS 240.100). Notary may charge additional fees subject to statute. (NRS 240.100).

10.02 AFFIDAVITS:

Within State.

Affidavit to be used before any court, judge or officer of this state may be taken before judge or clerk of any court, or any justice of peace or notary public in state. (NRS 53.010).

Outside State but in United States.

Affidavit taken in another state or territory of United States must be taken before commissioner appointed by Governor of this state to take affidavits and depositions in such other state or territory, or before any notary public or judge of court of record having seal. (NRS

53.020).

Foreign Country.

Affidavit in foreign country must be taken before ambassador, minister, consul, vice-consul or consular agent of United States, judge of court of record with seal attached, notary public or other person authorized by laws of such country to administer oaths. If taken before court that has no seal such fact must be certified by judge or clerk. (NRS 53.040).

General Requirements as to Administration.

No statute.

General Requirements of Jurat.

When taken before judge of court outside of this state, but within U. S., genuineness of signature of the judge, existence of court, and that such judge is a member thereof, must be certified by clerk of court under the seal thereof. (NRS 53.030).

Where affidavit is taken before a notary public, his stamp must be affixed. (NRS 240.040).

Use of Affidavit.

Affidavits may be used in court in ex parte proceedings, in support of motions, to prove service of process, and for purpose of setting aside process on motion. Affidavit or declaration of qualified person or expert as to presence or identity of alcohol or controlled substance is admissible in criminal trial in certain cases. Defendant who demands expert is responsible for witness' expenses if convicted. (NRS 50.325). Grand jury investigating charge for purpose of presentment or indictment may receive similar affidavit or declaration from expert in lieu of personal testimony or deposition as to presence or identity of alcohol or controlled substance and may receive affidavit of owner, possessor or occupant of property. (NRS 172.135).

Form.

The usual form of heading and jurat or certificate is as follows:

Form

State of . . . ., county of . . . . ss. . . . ., being first duly sworn deposes and says: (then follows statement of facts, followed by signature of affiant). Subscribed and sworn to before me this . . . . day of . . . ., (giving correct date) adding officer's signature, office, and seal or stamp.

If affidavits are taken out of the United States, then they are headed in the country and correct subdivision thereof.

Alternative to Affidavit.

No statutory provision.

10.03 NOTARIES PUBLIC:

Qualification.

Appointed by Secretary of State; may appoint resident of adjoining state under certain statutory restrictions. (NRS 240.010). Notary must pay secretary $35, take official oath, submit proof of completion of course of study pursuant to NRS 240.018, and execute bond for $10,000, to be filed with county clerk. Bond and oath are filed and recorded in county clerk's office, thereafter Secretary of State issues certificate of appointment. Court reporter who has registration certificate pursuant to NRS 656.180 may apply for appointment as notary public with limited powers to administer oath or affirmation without bond. (NRS 240.030).

Authentication.

See topic 10.01 Acknowledgments, subhead Authentication.

Seal.

No seal required. Stamp required gives name, number of certificate of appointment, phrase "Notary Public, State of Nevada" and date appointment expires. If notary public is resident of adjoining state appointed by Secretary of State, stamp must include word "nonresident". (NRS 240.040).

Powers and Duties.

Notary may, during normal business hours, perform notarial acts in lawful transactions for person who requests act and tenders fee. (NRS 240.060). However, notary cannot perform any notarial act if he executed or is named in instrument, or will receive any consideration from transaction relating to instrument or pleading in excess of his authorized fees, or is related to person whose signature he is notarizing. (NRS 240.065). Notary must not influence person concerning transaction involving notarial act, certify instrument containing known false statements, perform any act as notary with intent to deceive, promote any product or service if his appointment as notary is used in promotional statement, certify copies of birth, death or marriage certificate or divorce decree, or allow another to use notary's stamp or sign notary's name in notarial capacity. (NRS 240.075).

Liabilities.

Notary is liable on bond for damages caused by misconduct or negligence; employer of notary public liable for damages caused by misconduct of notary acting within scope of employment at that time and employer consented to misconduct. Revocation or suspension of appointment and statutory fines for willful neglect or violation of duty. (NRS 240.150).

Territorial Extent of Powers.

Functions may be performed anywhere in state. (NRS 240.020).

Expiration of Appointment.

Notary's stamp gives date of expiration. (NRS 240.040).

Fees.

Maximum fee for taking acknowledgment first signature of each signer $5, additional signatures of each signer $2.50, for administering oath or affirmation $2.50, for certified copy $2.50, for each signature on jurat $5, plus any agreed upon travel fees. (NRS 240.100). Notary may charge additional fees subject to statute. (NRS 240.100).

Commissioners of Deeds.

No statutory provision.

Officers of U.S. Armed Forces.

Notarial act performed by commissioned officer on active duty has same effect under Nevada law as if performed by notarial officer of Nevada. (NRS 240.1645).

10.04 RECORDS:

Recordable Instruments. Uniform Commercial Code adopted. (NRS cc. 104, 104A). See category 3 Business Regulation and Commerce, topic 3.09 Commercial Code.

Any instrument concerning real property must, in order to constitute notice to third persons, be acknowledged and recorded with recorder of county in which property is situated, or, for instrument filed by public utility in office of Secretary of State to extent permitted by 105.010-105.080, and conveyance or incumbrance of real estate is void as against subsequent bona fide purchaser or incumbrancer for value whose deed or other instrument is first recorded. (NRS 111.315-111.325). Unrecorded instruments are, however, good as between parties thereto. (NRS 111.315). All instruments filed for recordation must have names of signers typed or printed thereon. (NRS 247.190).

Place of Recording. Proper documents may be recorded in office of recorder of any county in state. (NRS 111.310). For list of counties and county seats, see first page for this state in Volume containing Practice Profiles Section.

Requisites for Recording. All instruments conveying real property, or agreeing to do so must contain grantee's mailing address or if no grantee, mailing address of person recording document and assessors parcel number of property, and if recorded document includes legal description of real property in metes and bounds, name and mailing address of person who prepared legal description, or, if document including same legal description has previously been recorded, all information relevant to locate previous recording, and name and address of person to whom statement of taxes assessed is to be mailed. (NRS 111.312).

Recording fees are charged and collected by county recorders according to following uniform fee schedule: Recording any document, first page, $10, each additional page, $1; recording each portion of document which must be separately indexed, after first indexing, $3; copying any record, for each page, $1; certifying, including certificate and seal, $4; certified copy or abstract of marriage certificate, $10. (NRS 247.305).

Foreign Conveyances or Encumbrances.

See category 21 Property, topic 21.16 Real Property.

Recording taxes. See category 22 Taxation.

Stamp Tax. See category 22 Taxation, topic 22.13 Property Taxes, subhead Real Estate Conveyance Tax.

Effect of Record. Every conveyance or instrument of writing, acknowledged or proved and certified, and recorded in manner prescribed, must from time of filing same with Secretary of State or recorder for record, impart notice to all persons of contents thereof; and subsequent purchasers and mortgagees are deemed to purchase and take with notice. (NRS 111.320).

Torrens Act has not been adopted.

Filing Under Commercial Code.

If collateral is as extracted collateral, timber to be cut or if financing statement is fixture filing and collateral is or will be fixture: office designated for filing or recording mortgage. In all other cases, Office of Secretary of State, U.C.C. Division, Capitol Complex, Carson City, Nevada 89710. (NRS 104.9501).

Fees.

Provided for in 104.9525.

Transfer of Decedent's Title to Real Estate.

Whether decedent be resident or nonresident, his estate must be administered in Nevada and certified copy of decree of final distribution recorded in office of recorder of county where property situated. Where property is held in joint tenancy, or as community property with right of survivorship, survivor takes without administration by recording in county where property is situated affidavit meeting requirements of NRS 111.365, accompanied by certified copy of death certificate of deceased. (NRS 40.525). If question of identify of decedent arises simple proceeding for termination of life estate is used. (NRS 40.515).

Vital Statistics.

Birth and death certificates must be filed with local health officer, who must make and keep a copy and register same and transmit original to State Board of Health, Carson City, which keeps and registers same. Certified copies are prima facie evidence. (NRS 440.010-440.780). Certified copies of certificates of birth or death may be obtained from Office of Vital Records, Bureau of Health Planning and Statistics, Nevada State Health Division, 4150 Technology Way, Suite 104, Carson City, Nevada 89706, at fees set by statute. (NRS 440.700).

Procurement or possession of birth certificate of another for purpose of establishing false identity is prohibited. (NRS 440.765).

Marriage certificates are recorded in office of recorder of county from which license was issued. (NRS 122.130). Copies may be obtained from county recorder for $1 for each page. Certified copies or abstracts of marriage certificates cost $10. (NRS 247.305).

Record of each marriage is also filed with state registrar. (NRS 440.595). District courts file report with state registrar for each divorce and annulment granted. (NRS 440.605).

Establishing Birth Record.

Any person who desires to establish date and place of his birth and his parentage may file, in district court of county in which he has been resident for at least six months, verified petition reciting facts and accompanied by his finger print chart and small recent photograph of himself. Action must be entitled "In the Matter of the Parental Relation of . . . . and . . . .". Notice of action must be served in accordance with N.R.C.P. upon person whose parentage it is sought to establish and each known or alleged parent. Court can compel State Registrar of Vital Statistics to examine any relevant data. After hearing, and if proof be satisfactory, court issues decree establishing facts, which is prima facie evidence thereof, and copies of which must be filed with State Health Officer and in office of county clerk in county in which decree was rendered. No fee may be charged by county clerk (who is ex-officio clerk of district court). (NRS 41.210-41.260).

Proof of Public Writings.

Judicial or official record and all records of State of Nevada and political subdivisions may be proved by microfilm or photostatic copy, duly certified. (NRS 52.125, 52.265).

Lis pendens.—In action for foreclosure of mortgage upon real property, or affecting title or possession of real property, plaintiff, at time of filing complaint, and defendant, at time of filing his answer, if affirmative relief is claimed in answer, must record with recorder of county in which property, or some part thereof, is situated, notice of pendency of action, containing names of parties, object of action and description of property in that county affected thereby, and defendant must also state in notice nature and extent of relief claimed in answer. Notice of action affecting real property, which is pending in any United States District Court for District of Nevada may be recorded and indexed in same manner and in same place as provided with respect to actions pending in Nevada state courts. From time of recording only, except as otherwise provided in NRS 14.017, pendency of action is constructive notice to purchaser or encumbrancer of property affected thereby. In case of foreclosure of mortgage, all purchasers or encumbrancers, by unrecorded deed or other instrument in writing made before recording of notice, and after date of mortgage, are deemed purchasers or encumbrancers after recording of notice, and subject thereto, unless NRS 17.017 is applicable or they can show that, at time of recording notice, plaintiff had actual notice of purchase or encumbrance. (NRS 14.010).

10.05 SEALS:

Private seals are not necessary to validity of any instrument. (NRS 52.315).

Effect of Seal.

No effect.

Uniform Commercial Code adopted. (NRS cc. 104, 104A). See category 3 Business Regulation and Commerce, topic 3.09 Commercial Code.

10.06 TORRENS ACT:

None.

10.07 VITAL STATISTICS:

See topic 10.04 Records.

11 EMPLOYMENT

11.01 EMPLOYER AND EMPLOYEE:

See topic 11.02 Labor Relations.

11.02 LABOR RELATIONS:

Labor Commissioner must enforce all labor laws whose enforcement is not otherwise provided for, whether or not employee is lawfully employed, and may adopt regulations to carry out such enforcement. (NRS 607.160). Labor Commissioner or other designated agent of employees may take assignments of wage or commission claims and bring single action against any one employer on any number of such assigned claims. (NRS 607.175).

Every employer must furnish safe and healthful employment and guard life, health, and safety of his employees in accordance with standards of Division of Industrial Relations. (NRS 618.375).

Hours of Labor.

Except for situations of one employee, and for employees under collective bargaining agreement, all employees must be granted meal period of at least half hour and two ten-minute rest periods over continuous eight-hour working period. Rest periods are counted as hours worked. (NRS 608.019).

No child under 16 years of age may be employed more than 48 hours in one week or more than eight hours in any one day, except in domestic or farm work or employment as performer in motion picture. (NRS 609.240).

See also category 19 Mineral, Water and Fishing Rights, topic 19.01 Mines and

Minerals.

Wages.

All wages of employees in private employment are due and payable semimonthly, unless by agreement paid more frequently. (NRS 608.060). Discharged employee is entitled to wages immediately (NRS 608.020), and employee who resigns or quits is entitled to wages no later than day he would have been regularly paid or seven days after resignation, whichever is earlier (NRS 608.030). If employer fails to pay within three days after wages of discharged employee become due or on day wages due for employee who resigns or quits, wage continues at same rate until paid or 30 days, whichever is less. (NRS 608.040). Every employer must establish and maintain regular pay days and post and maintain notices thereof in at least two conspicuous places. (NRS 608.080[1]). After employer establishes regular paydays and places of payment employer shall not change same without seven days' written notice calculated to give actual notice. (NRS 608.080[2]). If employee is absent at time or place of payment, he must be paid within five days after making written demand, unless employee secretes or absents himself to avoid payment. (NRS 608.080[3]).

Any check or writing issued as evidence of indebtedness for wages due must be negotiable. In event of nonpayment, holder in due course stands in same position as payee had with respect to unpaid wage claim. Employer who knowingly issues negotiable instrument for wages for which there are insufficient funds to pay must reimburse employee for any penalty or charge incurred. (NRS 608.130).

Minimum wages for employees in private employment: shall be set by Labor Commissioner in accordance with federal law. (NRS 608.250[1]). Provisions do not apply to casual babysitters, live-in domestic service employees, salespersons who work on commission basis, some agricultural employees, taxicab and limousine drivers, and specified severely handicapped persons. (NRS 608.250[2]).

Employee suing for wages and recovering is entitled to attorney's fees in addition to wages, penalties and costs, if at least five days before bringing suit he made written demand for sum not exceeding amount found due him. (NRS 608.140).

Public building contracts of state or any political subdivision thereof including projects financed from public money must provide that workers be paid prevailing wage in their locality. (NRS 338.020[1]). "Wages" includes fringe benefits. (NRS 338.010[21]).

Deductions from Wages. Employer may retain dues, rates or assessments for hospital association, or for other institutions maintained for benefit of employees, or other deductions which may be authorized by written order of employee. (NRS 608.110[1]). But employer is prohibited from collecting any hospital fees unless there is hospital actually furnished. (NRS 613.180[2]).

For assignment of wages, see category 8 Debtor and Creditor, topic 8.01 Assignments.

Liens and Priorities. In case employer assigns property to pay debts, employees have preferred claim for wages up to $600 for services within 90 days before assignment. In case of attachment, execution and similar writs against employer's property such claims are preferred to other debts. (NRS 100.020). When corporation becomes insolvent employees have lien for three months' wages not exceeding $1,000. (NRS 78.720). On death of employer, employee has preferred claim for services rendered within three months before death up to $600, ranking next after administration, funeral expenses, expenses of last illness, family allowance, debts having preference under U.S. laws, and moneys owed to Department of Human Resources resulting from payment of benefits for Medicaid. (2003, c. 409, § 14).

Every employee also has same rights as are accorded under mechanics' lien act or NRS 108.221 to 108.246, inclusive. (NRS 608.050[2]).

Discharge.

Employee may not be discharged or disciplined on information of special agent in matter which involves question of integrity or honesty of employee or violation of rules without hearing and opportunity to face his accuser. (NRS 613.160[1]).

Discrimination with respect to hiring, discharging, compensation, or conditions of employment because of race, color, religion, sex, sexual orientation, age, disability or national origin is unlawful employment practice. (NRS 613.330).

It is unlawful to discriminate on basis of sex in paying unequal wages to employees performing equal work. (NRS 608.017[1]).

Discrimination is prohibited employment practice under Local Government Employee-Management Relations Act. (NRS 288.270).

Discrimination against employee of medical facility who in good faith reports improper or negligent conduct of physician is prohibited. (NRS 449.205).

Collective bargaining by employees is authorized (NRS 614.090), and violation of Act results in misdemeanor (NRS 614.110).

Labor organization representing gaming casino employees must file with gaming control board list of officers and others in policymaking and other functional roles as designated. (NRS 463A.030[1]). Persons listed must supply board with specified information including organizational and occupational history fingerprints and criminal record, if any. (NRS 463A.030[2]). Pursuant to statutory procedure, board may disqualify for cause person from function as listed. (NRS 463A.040).

Local Government Employee-Management Relations Act recognizes right of local government employees to organize and bargain collectively (NRS 288.010-288.280), enumerates mandatory bargaining subjects and subjects excluded from bargaining (NRS 288.150).

See also subhead Union Membership, infra.

Labor Disputes.

Governor may, at request of either party to controversy, use his best efforts to settle same, either personally or by commission appointed for purpose. Such disputes may, on agreement of parties, be settled by arbitration. (NRS 614.010).

Union Membership.

It is unlawful for state or any subdivision thereof, corporation, individual or association to enter into contract by terms of which employee of such person, or entity, as condition for obtaining or continuing employment, shall be required to become or continue to be member of any labor organization. (NRS 613.250).

Employment Frauds.

It is unlawful for any person to influence or engage workmen to change from one place to another in this state, or bring workmen to this state through means of deceptive representations, false advertising or false pretenses concerning kind and character of work to be done, compensation paid, sanitary conditions, existence or non-existence of strike or trouble pending between employer and employee (NRS 613.010[1]), and violations result in gross misdemeanors (NRS 613.010[2]).

Child Labor.

Person employing, or parent allowing employment of, child under 14 years of age in store, factory, mine or other inside labor not associated with farm or housework must have written permission from district court. (NRS 609.245). No child under 16 years of age may be employed more than 48 hours in one week or more than eight hours in any one day, except in domestic or farm work or employment as performer in motion picture. (NRS 609.240).

Minors under 16 years of age are forbidden employment in designated industries (NRS 609.190), and labor commissioner determines other employment injurious to health or morals or minors (NRS 609.200).

Female Labor. If employer grants leave with or without pay, or leave without loss of seniority to his employees for sickness or disability because of medical condition, it is unlawful employment practice to fail or refuse to extend same benefits to any female employee who is pregnant. Female employee who is pregnant must be allowed to use leave before and after childbirth, miscarriage or other natural resolution of her pregnancy, if leave is granted, accrued or allowed to accumulate as part of her employment benefits. (NRS 613.335).

Railroads are liable to employees or personal representatives for benefit of surviving widow, husband, children, parents or dependents of employee for injury or death resulting in whole or in part from negligence of any officer, agent, or employee of railroad or by reason of any defect or insufficiency due to employer's negligence. (NRS 705.270). Contributory negligence is not bar to action, but comparative negligence doctrine applies to diminish damages, but contributory negligence is no defense where violation by employer of any state or federal statute enacted for safety of employees contributed to accident. (NRS 705.280). Assumption of risk is not defense. (NRS 705.290). Occurrence of accident is presumptive evidence of negligence. (NRS 705.310). Contract to exempt from liability under this statute is void. (NRS 705.320). Receivers or other persons or corporations charged with duty of management and operation of business are included in act. (NRS 705.260). Action must be brought within two years from accrual of cause of action. (NRS 705.340).

Workmen's Compensation Act.

State Industrial Insurance Act is applicable to practically every master and servant relation. It is compulsory upon state, county and municipal corporations, school districts, contractors, sub-contractors and employees of same. (NRS 616A.105-616A.220; 616B.618-616B.627). It extends to employer with single employee. (NRS 616B.633).

Employers wishing to accept Act may pay monthly premiums or obtain certificate as self-insured. Requirements for self-insured status are in NRS 616B.300.

If employer fails to accept provisions of Act he is deemed to reject it and where injury is to employee, employer is deprived of common law defenses. If employer fails to provide or maintain compensation, Administrator may order immediate cessation of all business operations until employer provides compensation. (NRS 616D.110). Where employer fails to provide coverage, injured employee may file claim with SIIS. (NRS 617.401[2][c]; 617.401[5]). Employee must provide written notice to SIIS and make irrevocable assignment to SIIS of right to be subrogated to rights of injured employee pursuant to 616C.215. (NRS 616C.220).

Employee is presumed to have accepted benefits of Act unless he gives written notice of rejection to his employer, administrator and insurer. Where employee rejects, employer, if under act, may plead practically all common law defenses. Employee who rejects coverage may rescind at any time upon written notice to employer, administrator and insurer. (NRS 616B.656[3]).

The Act makes employers responsible for such medical, surgical, hospital and certain other treatment as may be reasonably required at time of injury to employee and within six months. (NRS 616C.245).

The Act provides stated compensation for death and for various injuries. (NRS 616C.400-616C.510[1]). As to employment outside state such compensation is exclusive and calls for complete release of liability. (NRS 616C.190). If employment is exclusively in another state that requires coverage, laws of that state control. (NRS 616C.190[1]).

Pamphlet copy of Act can be secured from Nevada Division of Industrial Relations, 400 West King Street, Carson City, Nevada 89703.

Nevada Occupational Diseases Act provides complete program for compensating employee who is disabled because of occupational disease arising out of and in course of employment, or his dependents in case of death. Administration of Act is committed to Department of Industrial Relations, in conjunction with, but not as part of State Industrial Insurance System. (NRS 617.080-617.485). If employer fails to provide mandatory occupational disease coverage, employee who contracts occupational disease may elect coverage by filing claim for compensation from system, written notice to division and irrevocable assignment to system of his right of action against uninsured employer, division of right to be subrogated to employee’s rights pursuant to 616C.215. (NRS 617.401).

Unemployment Compensation.

Unemployed person eligible if administrator finds that he has registered for work at, and reports to, office of division, has made claim for benefits pursuant to statutes, is able to work and is available for work, and has, during base period, been paid wages equal to or exceeding one and one-half times his total wages for highest quarter of base period, or in each of at least three of four quarters of base period. Also unemployed person determined to likely exhaust regular benefits and need services to assist in reemployment may be eligible for benefits for any week if he participates in those services. (NRS 612.375). Claimant not eligible if he voluntarily leaves last work without good cause unless he left unsuitable employment to enter training approved by 19 USC § 2296 (NRS 612.380); discharged from his last work for misconduct connected with his work (NRS 612.385); has failed without good cause to apply for available suitable work or to accept suitable work when offered (NRS 612.390); when his unemployment is due to dispute at establishment where he was last employed (NRS 612.395); has received benefits under any other unemployment compensation law (NRS 612.400); received wages or severance pay for that week (NRS 612.420); is on paid vacation (NRS 612.425); or has made false statement or failed to disclose material fact for purpose of causing benefit to be paid or increased (NRS 612.445).

Rates Generally.

Weekly benefit equal to 1/25th of total wages during quarter when total wages were highest, but in no case less than $16 nor more than maximum weekly benefit amount as determined by statutory formula. (NRS 612.340). Standard rate of employer contribution is 2.95%. (NRS 612.540).

Extended unemployment benefits are provided. (NRS 612.377; 612.3786).

11.03 WORKERS’ COMPENSATION LAW:

See topic 11.02 Labor Relations.

12 ENVIRONMENT

12.01 ENVIRONMENTAL REGULATION:

General Supervision.

State Environmental Commission adopts rules and regulations in accordance with Nevada Water Pollution Control Law. (NRS 445A.425). State Department of Conservation and Natural Resources is State Water Pollution Control Agency for all purposes of federal water pollution control legislation except that Commission has exclusive power to promulgate rules and regulations as provided in NRS 445A.425. (NRS 445A.440). Department has final authority in administration of water pollution prevention, abatement and control. (NRS 445A.720). State Department of Conservation and Natural Resources is air pollution control agency for purposes of federal acts. (NRS 445B.205). Department issues orders to implement state air pollution laws. (NRS 445B.230). State Environmental Commission establishes air quality standards and emission control requirements and requires access to records relating to emissions which cause or contribute to air pollution. (NRS 445B.210[2], [3], [8], and [9]). If federal regulations of indirect sources of air contaminants become effective after Jan. 17, 1977, authority of state agency to review new indirect sources may be exercised only to enforce those federal regulations or to extent federal act requires enforcement by state. (NRS 445B.310).

Public Utilities Commission of Nevada, subject to review of Division of Environmental Protection of State Department of Conservation and Natural Resources, has general supervision of environmental aspects of location and construction of all utility lines and associated facilities. (NRS 704.820-704.900). If public utility subject to provisions of NRS 704.736 to 704.751, inclusive, and § 4.3 of Utility Environmental Protection Act, applies to Public Utilities Commission of Nevada for permit for construction of utility facility Commission has exclusive jurisdiction with regard to determination of whether need exists for utility facility and no other permitting entity may consider, in its review of any application for permit, license or other approval for construction of utility facility, whether need exists for utility facility. (NRS 704.873).

State environmental commission develops statewide solid waste management system plan and approves local plans required of every municipal governing body.

State Department of Conservation and Natural Resources is state agency for purposes of Federal Resource Conservation and Recovery Act of 1976. (NRS 444.590).

Except as otherwise provided in subsection 3 of NRS 40.1140 and subsection 6 of NRS 202.450, respective boards of county commissioners may regulate, control or prohibit excessive noise. (NRS 244.363; 268.412).

Department of Transportation regulates noise emission from vehicles. (NRS 484.6101[1][a]). State Environmental Commission regulates standards for exhaust emissions, fuel evaporative emissions and visible smoke emissions from mobile internal combustion engines, but standards pertaining to motor vehicles must have prior approval of Dept. of Motor Vehicles. (NRS 445B.760[1], [4]). State Environmental Commission, in cooperation with Dept. of Motor Vehicles and any local air pollution agency, establishes rules regarding approval, installation and maintenance of pollution control devices. (NRS 445B.770[2], [3]).

Certain populated counties control emissions from motor vehicles by compulsory inspection programs for diesel fueled vehicles being reregistered or registered and used motor vehicles being registered to new owner. (NRS 445B.795).

Jurisdiction in all matters pertaining to distribution, sale, and transportation of pesticides and devices pursuant to 586.010 to 586.450 vests exclusively in Director of State Department of Agriculture. (NRS 586.230). Person retailing restricted use pesticide must be registered (NRS 586.406), and person using must be licensed (NRS 555.280-555.300).

State Conservation Commission directs conservation, protection and controlled development of renewable natural resources. (NRS 548.010-548.550).

Forest practices and logging are regulated by Division of Forestry of State Department of Conservation and Natural Resources. (NRS 528.010-528.120).

Hazardous waste storage, transportation and disposal are regulated by State Department of Conservation and Natural Resources. (NRS 459.400-459.600). State Board of Health regulates possession, transfer and disposal of radioactive material. (NRS 459.201-459.370).

Prohibited Acts of Pollution.

Water.

Persons may not discharge any pollutant into any waters of state or any treatment works, inject fluids through well into any waters of state, discharge from any point source pollutant or inject fluids through well that could be carried into waters of state by any means, or allow such to remain in place where pollutant or fluids could be carried into waters of state by any means except as authorized by permit. (NRS 445A.465[1]). Persons may not violate standards established by State Environmental Commission or State Department of Conservation and Natural Resources. (NRS 444.570).

Air.

No person shall discharge into atmosphere any substance, except water vapor and water droplets, which violates air quality standards established by State Environmental Commission. (NRS 445B.110, 445B.210). All governmental sources of air contaminants must comply with local and state pollution laws, regulations and ordinances with limited statutory exceptions. (NRS 445B.595[1]). Motor vehicles must comply with state or federal law concerning motor vehicle pollution control devices. (NRS 484.644).

Regulations may also be promulgated by supervisory departments or boards.

Enforcement.

Water.

State Environmental Commission and State Department of Conservation and Natural Resources may require person injecting wells discharging pollutants to install monitoring equipment, sample discharges, maintain records and make reports on such discharges. (NRS 445A.660). Upon presenting proper credentials, Director of State Department of Conservation and Natural Resources or authorized representative of Department may enter any premises violating regulations, inspect records and monitoring equipment, and sample discharges. (NRS 445A.655). Department is authorized upon discovery of violation or imminent violation to prescribe corrective action, commence civil action for fine or injunction, or seek criminal indictment or information through attorney general. (NRS 445A.670-445A.705).

Commission hears appeals on department action on permits.

Any person planning construction of any treatment works must obtain permit from department. (NRS 445A.585).

Air.

Authorized representative of State Department of Conservation and Natural Resources may enter and inspect any property at which air contaminant source is located or being constructed at any reasonable time. (NRS 445B.240[1]). State Environmental Commission may require person responsible for source of air contaminant to apply for and obtain operating permit for source. (NRS 445B.300[1][a]).

Department Director has power to serve notice on persons responsible for violating air and water pollution laws. Notice may include order to take corrective action.

Commission regulates warnings and emergency standards when imminent and substantial danger to health exists due to air pollution. (NRS 445B.560[1]).

Any peace officer may enforce State Environmental Commission's regulations on engine pollution standards. (NRS 445B.845).

Solid Waste.

State Department of Conservation and Natural Resources or solid waste management authority may bring action in court to enjoin violation of solid waste laws or its regulations. (NRS 444.600).

Actions for declaratory and equitable relief may be commenced by resident of state where any pollution violation is alleged to have occurred, if such resident has first given 30 days written notice of his intention to file suit. (NRS 41.540-41.570).

Penalties.

Water.

Violation of terms of permit is gross misdemeanor or treated as violation of hazardous waste permit, whichever is greater. Permit is also subject to revocation or suspension. (NRS 445A.600). One who intentionally or with criminal negligence violates regulations is guilty of gross misdemeanor punishable by fine up to $25,000 for each day of violation or by imprisonment up to one year, or both; second violation is Category D Felony punishable by imprisonment of one to four years and fine up to $5,000. (NRS 445A.705). Knowing false representation on any required document or tampering with monitoring devices is gross misdemeanor punishable by fine up to $10,000 or imprisonment up to one year, or both. (NRS 445A.710). Violation or aiding and abetting violation of Nevada Water Pollution Control Law, or any regulation or permit issued under it, is subject to civil penalty of up to $25,000 per day plus, with limited exception, actual damages and expenses for correction. (NRS 445A.700).

Air.

Violators of air pollution control law may be subject to administrative fine of up to $10,000 for each day of violation. Lesser violations subject to administrative fine not exceeding $2,000. (NRS 445B.640[1], [2]). Violation of motor vehicle pollution control regulations is misdemeanor. (NRS 445B.845[1]).

Solid Waste.

Person violating state board of health regulation or local ordinance guilty of misdemeanor and is liable for civil penalty which is at least $500 but not more than $5,000. (NRS 444.610; 193.150).

Permits.

Water.

Department of Conservation and Natural Resources may grant renewable permits for fixed terms up to five years which must specify appropriate quantitative limitations of authorized discharges or injection of fluid through well. (NRS 445A.495). No permit may be granted to discharge or inject fluid through well of any radiological, chemical or biological warfare agent or high-level radioactive waste, to discharge material which would substantially impair anchorage and navigation, to discharge material inconsistently with area waste treatment plan or with commission regulations. (NRS 445A.490). Permits to discharge radioactive, or hazardous waste can be obtained (NRS 445A.625), but applicant must deposit security to assure compliance with terms and conditions (NRS 445A.635). Department may grant, deny or waive certification of applicant if federal license or permit is required. (NRS 445A.620).

Air.

State Environmental Commission may require operating permits for any source of air contaminant. (NRS 445B.300[1]). Owner or operator of source of air contaminant or person desiring to establish such source may apply to Commission for variance from regulations. (NRS 445B.400).

Utilities.

Person, other than local government, must obtain permit from Public Utilities Commission of Nevada before commencing to construct utility facility in state. (NRS 704.865[1]).

13 ESTATES AND TRUSTS

13.01 ADMINISTRATION:

See topic 13.08 Executors and Administrators.

13.02 ADVANCEMENTS:

See topic 13.07 Descent and Distribution.

13.03 ALLOWANCES:

See topic 13.08 Executors and Administrators.

13.04 CLAIMS:

See topic 13.08 Executors and Administrators; category 5 Civil Actions and Procedure, topic 5.17 Pleading.

13.05 DEATH:

There is disputable presumption that person not heard from for three years is dead. (NRS 47.250[14]).

Death Certificate.

See category 10 Documents and Records, topic 10.04 Records, subhead Vital Statistics.

Uniform Anatomical Gift Act adopted with amendments. (NRS 451.500-451.590). Repealed, effective Oct. 1, 2007. (2007, c. 232). Revised Uniform Anatomical Gift Act (NRS 451.500-451.598) adopted, effective Oct. 1, 2007.

Survivorship.

Uniform Simultaneous Death Act adopted. (NRS 135.010-135.090).

As to survival of action or cause of action notwithstanding death of party, see category 5 Civil Actions and Procedure, topic 5.02 Actions.

Action for death may be brought by heirs or personal representatives of decedent (NRS 41.085[2]) provided same is commenced within two years after death (NRS 11.190[4][e]). In action by heirs, heirs may recover damages for grief, loss of probable support, companionship, society, comfort and consortium and decedent's pain, suffering or disfigurement, and proceeds of judgment for such damages are not liable for decedent's debts. (NRS 41.085[4]). Personal representative may recover any special damages, such as decedent's medical or funeral expenses, and any penalties, including punitive damages, decedent would have recovered if he lived, which damages are liable for decedent's debts unless otherwise exempt. (NRS 41.085[5]). Personal representative of person insured under life insurance policy may recover all damages resulting from act that constitutes unfair practice pursuant to 686A.310. In action against executor or administrator, plaintiff, may recover any damages that would have been awarded if decedent lived, except exemplary or punitive damages or other damages imposed primarily for sake of example or to punish defendant. (NRS 41.100[2]).

Right to Die.

See topic 13.16 Wills, subhead Living Wills.

See also topic 13.08 Executors and Administrators, subhead Special Administrator; categories 5 Civil Actions and Procedure, topic Actions, subhead Abatement; Employment, topic Labor Relations, subhead Workmen's Compensation Act.

13.06 DECEDENTS' ESTATES:

See topics 13.07 Descent and Distribution, Executors and Administrators, Wills; category 8 Debtor and Creditor, topic 8.10 Homesteads.

13.07 DESCENT AND DISTRIBUTION:

See also topic 13.08 Executors and Administrators.

In absence of limitation by marriage contract, separate real and personal estate of intestate decedent, or if there is surviving spouse excess over share of such spouse, descends and is distributed as follows, each class of which member is living taking to exclusion of subsequent classes: (1) Child or children and descendants of deceased children, equally if all of same degree and otherwise according to right of representation (NRS 134.040); (2) parents equally or all to surviving parent (NRS 134.050); (3) brothers and sisters of decedent and to lawful issues of any deceased brother or sister by right of representation (NRS 134.060); (4) next of kin of equal degree except that those claiming through nearest ancestor take to exclusion of those of equal degree claiming through more remote ancestor (NRS 134.070).

If decedent left more than one child or one child and issue of one or more deceased children, and child dies unmarried, without issue and before attaining majority, share of such child descends to other children and issue of deceased children, equally if all of same degree and otherwise according to right of representation. (NRS 134.085).

Surviving spouse takes following share of separate estate, real and personal, of deceased spouse: (1) One-third if decedent left more than one child, or one child and descendants of one or more deceased children; (2) one-half if decedent left one child, descendants of one child, parent or parents, brother or sister; (3) all if decedent left none of aforementioned relatives. (NRS 134.040-134-050). As to disposition of community property see category 14 Family, topic 14.09 Husband and Wife.

Illegitimate Child.

Obligation of parent is enforceable against his estate in such amount as court may determine. (NRS 125B.130; 126.031).

Adopted Children.

See category 14 Family, topic 14.01 Adoption.

Advancements are regarded as part of estate for purposes of distribution, and must be taken by donee receiving same toward his share of estate of decedent. But no gift is deemed advancement unless so expressed in gift or grant, or charged in writing by decedent as advancement, or acknowledged in writing by donee to be such. (NRS 151.120-151.130).

Community Property.

As to disposition thereof in case of death of either spouse, see category 14 Family, topic 14.09 Husband and Wife.

Petition for Distribution.

Personal representative, heirs, assignees, etc., may petition for their share of estate after three months from issuance of letters, on giving bond with approved security, for payment of person's proportion of debts of estate, to secure creditors unless court dispenses with same (NRS 151.010), or when final account is settled (NRS 151.080). Customary procedure is for personal representative to petition for distribution in connection with final account.

Escheat.

In absence of surviving spouse or kindred, property escheats to state (NRS 134.120), but after-discovered heir may sue for property or proceeds within six years (NRS 154.120[1]). In case of minor or incapacitated person, suit may be brought within five years after removal of disability. (NRS 154.120[7]).

13.07A ESTATES: (in property)

See category 21 Property, topic 21.16 Real Property.

13.0813.09 [RESERVED]

13.10 EXECUTORS AND ADMINISTRATORS:

District courts have exclusive jurisdiction of administration. Wills may be proved and letters granted in county where decedent resided at time of death, and district court of such county has exclusive jurisdiction. (NRS 136.010[1]). Estate of nonresident decedent may be administered in any county where part of estate is located, and court to which application first made has exclusive jurisdiction. (NRS 136.010[2]).

Preferences in Right to Administer.

Right to administration of intestate estate is in following order: (1) Surviving spouse; (2) children; (3) father or mother; (4) brother or sister; (5) grandchildren; (6) any other kindred entitled to share in estate; (7) public administrator; (8) creditors; (9) other kindred within fourth degree; (10) any other person legally qualified. (NRS 139.040[1]). Person in foregoing classes is entitled to appointment, if person is resident of Nevada, or banking corporation authorized to do business in Nevada, or associates as co-administrator resident of Nevada, or banking corporation authorized to do business in Nevada, or is named as personal representative in will if will is subject of pending petition for probate and court believes it would be appropriate to make such appointment. (NRS 139.040[2]). Nominee has same priority as nominator. (NRS 139.040[2]). As among persons having equal right to administer relatives, of whole blood are preferred to those of half blood (NRS 139.060), or court may, in its discretion, grant letters to one or more of such persons (NRS 139.070). Persons in each class have right to nominate others to be appointed in their stead. (NRS 139.050). Partner of decedent must not be appointed if anyone objects. (NRS 139.030).

When letters of administration have been granted to any person other than surviving spouse or spouse's nominee, child, father, mother, brother or sister of decedent, any one of them, if otherwise qualified, may obtain revocation of letters by petition requesting revocation and that letters of administration be issued to petitioner. (NRS 139.140).

Competency.

Executor or administrator cannot be minor, nor convicted of felony unless court determines that such conviction should not disqualify person from serving in position of administrator nor adjudged by court disqualified because of conflict of interest, drunkenness, improvidence or lack of integrity or understanding, nor non-resident of Nevada, unless person associates as co-administrator resident of Nevada or banking corporation authorized to do business in Nevada, or is named as personal representative in will if will is subject of pending petition for probate and court believes it appropriate to make such appointment; or is banking corporation not authorized to do business in Nevada, unless banking corporation associates as co-administrator resident of Nevada or banking corporation authorized to do business in Nevada or is named as personal representative in will if will is subject of pending petition for probate and court believes it appropriate to make such appointment. (NRS 139.010). If any heir who is otherwise entitled to appointment is minor or incompetent person for whom guardian has been appointed, court may appoint guardian of minor or incompetent person as administrator. Any person interested may contest petition for letters on ground petitioner is not qualified, by filing written opposition, or may assert his own right and request letters. (NRS 138.060, 139.110).

Organization that does not maintain office in this state to conduct business of trust company may be appointed as fiduciary if organization associates as cofiduciary bank or trust company authorized to do business in this state or is trust company organized under laws of and has principal place of business in another state which allows trust corporations or trust companies licensed pursuant to c. 669 of NRS to act as fiduciary in that state, is authorized by its charter to act as fiduciary, and, prior to appointment as fiduciary, files with Secretary of State notarized document: (1) Appointing Secretary of State as its agent for service of process; (2) containing its agreement that appointment continues in force as long as any liability remains outstanding against it in Nevada; (3) containing address to which Secretary of State may mail process when received; (4) accompanied by fee of not more than $20. (NRS 662.245[1]).

Foreign bank cannot act as executor unless it associates as co-executor authorized to do business in Nevada bank, but may appoint substitute executor, without association but any natural person so appointed must be resident of Nevada. (NRS 138.020).

If disqualified person is named as sole executor in will, or if all persons so named are disqualified or renounce right to act, or fail to appear and qualify, letters of administration with will annexed must issue. (NRS 138.020[2]). Executor of deceased executor may not administer estate of first testator but letters of administration with will annexed of estate of first testator left unadministered must be issued. (NRS 138.070). Administrators with will annexed have same authority as qualifying executor named in will would have had, but no discretionary powers. (NRS 138.090).

Special administrator may be appointed to collect, take charge of and preserve estate where there is delay in granting letters, where letters have been granted irregularly, where no sufficient bond is filed, where no petition for letters is filed, where executor or administrator dies or is suspended or removed. If there may be no assets subject to administration but good cause exists, or in any other proper case. (NRS 140.010). He must give such bond as court may direct. (NRS 140.030). Appointment of special administrator to prosecute right of action for wrongful death of decedent is valid in Nevada, even though right of action is not an asset of estate. Bringing of action is not part of administration of estate and proceeds realized are held for benefit of persons entitled thereto. (83 Nev. 208, P.2d 383;[Nev. 1967] 83 Nev. 208, 427 P.2d 383).

Public administrator may apply for letters on estate subject to administration in his county where heirs, next of kin, or creditors named in statute do not petition therefor. (NRS 139.040; 139.080).

Issuance of Letters.

Letters of administration are issued to applicant on petition, after notice and hearing (NRS 139.090-139.100), upon proof of death, and intestacy and proper notice (NRS 139.120). Letters testamentary are issued upon probate of will. (NRS 138.010). Before letters issue, personal representative must file with county clerk written statement containing name and permanent address at which process may be served. (NRS 143.190).

Removal.

Executor or administrator may be removed for: failure to furnish sufficient bond (NRS 142.100); failure to file inventory (NRS 144.080); absconding (NRS 150.140); or waste, conversion, fraud, neglect, conflict of interest, unreasonable delay, or disqualification to act (NRS 141.090).

Oath and Bond.

Before letters may be issued, personal representative must take oath or affirmation to perform duties of office according to law. (NRS 142.010). Requirement of bond for personal representative is discretionary with court. (NRS 142.020[1]). No bond required of banking corporation or trust company doing business in state unless court requires. (NRS 142.020[6]). Any person with interest in estate exceeding $10,000 may demand bond. (NRS 142.020[4]). Amount of bond is to be value of personal property plus one year income from all property, unless will provides otherwise, or court so orders. (NRS 142.020[5]).

Exemption from Bond.

Bond may be required despite provisions of will. (NRS 142.070).

Inventory.

Within 60 days after his appointment, executor or administrator must file inventory and appraisement. (NRS 144.010). Executor or administrator may engage qualified and disinterested appraisers. (NRS 144.020[1]). Where no reasonable doubt as to value of assets such as money, bank deposits, securities, bonds, or life insurance policies, executor or administrator must file verified record of value in lieu of appraisement. (NRS 144.020[3]). Inventory must include all of estate of decedent wherever situated; statement of all debts, receivables, partnerships and other interests; also what portion of estate is community property and separate property. (NRS 144.040).

Powers, Duties and Liabilities.

Except as otherwise provided, personal representative has right of possession of assets, is entitled to rents and profits of real estate until estate settled or real estate given to heirs by court order and must make necessary repairs (NRS 143.020); must collect debts due decedent (NRS 143.030); with court's approval, personal representative may invest estate property, make loans and accept security therefor and exercise options to purchase or exchange securities or other property (NRS 143.175[1]); without court's approval, personal representative may invest estate property in FDIC insured savings, interest-bearing obligations of or fully guaranteed by U.S., interest-bearing obligations of United States Postal Service, Federal National Mortgage Association, Nevada State, county, city, or school district, or money-market mutual funds invested in obligations permitted without court approval, or investments authorized by decedent's will (NRS 143.175[2]); with court's approval, may compromise with debtor unable to pay in full, in cases where estate is benefited, and may extend, renew or modify terms of any obligation owing to decedent (NRS 143.140); may hold stock in name of nominee without mention thereof in stock certificate or registration book if his records show such holding and nominee has signed statement showing true interest of personal representative, but he is personally liable for any loss resulting from act of nominee with regard to stock (NRS 143.187); with court's approval may borrow money and mortgage real property (NRS 149.010-149.050), sell property in general (NRS 148.050-148.160), personal property (NRS 148.170-148.210), real property (NRS 148.220-148.320), and mining property (NRS 148.360-148.400); and lease property (NRS 149.060-149.100); is not liable for debts uncollected without his fault and cannot profit by increase of estate and is not chargeable with loss without his fault (NRS 150.070); and cannot directly or indirectly purchase property of estate without approval of court after notice and hearing (NRS 143.170). Business of decedent may be continued by personal representative on court order. (NRS 143.050).

Executor or administrator must close estate within 18 months after appointment. (NRS 143.037[1]). If claim against estate in litigation, or amount of federal estate tax has not been determined, court on petition shall order certain amount of assets be returned and remainder of estate be distributed. (NRS 143.037[2]). If contest of will or proceeding to determine heirship pending, court may order partial distribution or for good cause order that entire estate be retained. (NRS 143.037[3]). Personal representative of estate not closed must file explanation with court within six months of appointment if no federal estate tax return required, within 15 months if federal return required (NRS 143.035[2]), and court must set hearing to determine if reasonable diligence has been used in administration of estate (NRS 143.035[3]). Statute of limitations running on decedent's cause of action that was not barred as of date of death does not bar cause of action sooner than one year after death. (NRS 143.065).

Notice to Creditors.

Personal representative must publish and mail notice to creditors. (NRS 147.010). Notice by publication must be in newspaper published in county where probate pending or, if none, in paper of general circulation (NRS 155.020[2]); publication must occur on three dates and, if paper published more than once a week, must be more than ten days between first and last dates of publication (NRS 155.020[1][b]). In addition, as soon as practical after appointment, copy of notice must be mailed to creditors whose names and addresses are readily ascertainable as of date of first publication of notice and to Director of Department of Health and Human Services. (NRS 155.020[1][a], [4]). Notice must advise creditors to file claims within 60 or 90 days after mailing or first publication. (NRS 155.020[4]). Personal representative shall mail notice to additional creditors found before last day for filing claim who were not readily ascertainable at first publication. (NRS 155.020[5]).

Where summary administration has been ordered, personal representative must publish and mail notice to creditors in accordance with 155.020, above; however, claims must be filed within 60 days after mailing or first publication of notice. (NRS 145.060).

Presentation of Claims.

Unless claim is filed as required in notice to creditors it is absolutely barred, unless it is made satisfactorily to appear, by affidavit, that claimant had no notice, in which case it may be filed any time before filing of final account. Creditor must file claim with clerk within 60 days after mailing of notice or 60 days after first publication. (NRS 145.060[2]).

Secured claim need not be filed to protect security, but must be filed in order to protect excess over security, which excess, if any, ranks with general claims against estate. (*Kirman v. Powning*, 25 Nev. 378, 60 P.834 [1900]).

Claim on which action was pending when decedent died may not be continued against decedent's personal representative unless claim first filed under c. 147, claim rejected, and within 60 days of notice of rejection plaintiff applies to court for order substituting personal representative. (NRS 147.100[1]).

Proof of Claims.

Claim filed of $250 or more must be supported by affidavit of claimant that amount is justly due, (or if claim is not yet due, that amount is just demand and will be due on . . . . day of . . . . .), that no payments have been made thereon which are not credited, and that there are no offsets to same to knowledge of claimant or other affiant. (NRS 147.070[1]). Every claim filed with clerk must contain mailing address of claimant; any written notice mailed by personal representative to claimant is proper notice. (NRS 147.070[2]). When affidavit is made by any other person than claimant, reasons why it is not made by claimant must be set forth in affidavit. (NRS 147.070[3]). Oath may be taken before any person authorized to administer oaths. (NRS 147.070[4]). Amount of interest must be computed and included in statement of claim and rate determined. Except as provided in NRS 147.070(7), court may, for good cause shown, allow defective affidavit to be corrected or amended on application any time before final account but amendment may not increase amount of claim after time for filing has expired. (NRS 147.070[6]).

When claim is founded on written instrument, original need not be filed, but copy with all indorsements must be attached to claim filed. (NRS 147.080[1]).

If claim secured by mortgage or lien, certified copy of mortgage or lien must be attached to claim and filed with clerk. (NRS 147.080[2]).

Approval or Rejection of Claims.

Within 15 days after time for filing claims has expired, personal representative must either endorse them with allowance or rejection, or file notice of allowance or rejection. (NRS 147.110[1]). Refusal or neglect of executor or administrator to endorse allowance or rejection on claim or failure to file notice is deemed rejection, but claim may nevertheless be allowed by executor or administrator at any time before final accounting. (NRS 147.110[2]).

Payment of Claims.

Claims which are approved by personal representative or court must rank as acknowledged debts of estate and are paid in due course of administration. (NRS 147.120). Payment may be enforced by petition to court.

Personal representative must pay expenses of funeral and last illness, family allowance, money owed to Dept. of Health and Human Service as result of payments for Medicaid, and wage claims as soon as funds are available, but may retain sufficient for expenses of administration (NRS 150.230[1]); personal representative may, without court approval, pay debts of $500 or less if proper claim filed, debt is legally due and estate is solvent (NRS 150.230[3]); personal representative need not pay other debts until ordered by court (NRS 150.230[2]).

Claims bear interest from date of filing at rate equal to prime rate at largest bank in Nevada plus 2% as ascertained by Commissioner of Financial Institutions unless different rate is applicable. (NRS 147.220).

Amount of unmatured claim is paid into court to await maturity. (NRS 150.250[1]).

Priorities.

Debts and charges of estates must be paid in following order: (1) Expenses of administration; (2) funeral expenses; (3) expense of last illness; (4) family allowance; (5) debts having preference by laws of U.S.; (6) money owed to Department of Health and Human Services resulting from payment of benefits for Medicaid; (7) wages up to $600 of each employee of decedent for services rendered within three months of decedent's death; (8) judgments against decedent during lifetime and mortgages in order of their date, mortgage preference extending only to proceeds of mortgaged property; (9) all other demands. (NRS 147.195). If secured claim exceeds security, creditor prorates with other creditors as to excess. If estate is insolvent, creditors of each class must be paid in full before creditors of any subsequent class receive anything, and creditors of same class are paid pro rata if assets are insufficient to pay all in full. (NRS 150.240).

Compromise of Claims.

After time for filing claims, personal representative may with court approval, compromise any claim. (NRS 147.180[1]).

Sales.

Perishable property, property liable to depreciate and personal property necessary for family allowances may be sold by representative without notice. (NRS 148.170). Securities authorized by will or consent of devisees or heirs to whom they are to be distributed may be sold without notice. (NRS 148.180[1]). Sale as directed by will may be made with or without notice as personal representative determines. (NRS 148.080). All sales of real property, if summary administration ordered, must be made upon notice given and in manner required by NRS c. 148. (NRS 145.070).

Sales may be made when necessary to pay debts, devises, family allowances or expenses or when for best interest of estate, and there is no preference between real and personal property. Sale may be either public or private. (NRS 148.050). Sale of personal property must be after two weeks, published notice. (NRS 148.190). Notice of time and place of sale of real property must be published in newspaper published in county in which property or some portion of property is located (or if there be none so published in such paper as court or judge may direct) for two weeks (three publications, one week apart) before day of sale, or, in case of private sale, before day on or after which sale is to be made. For good cause, court may decrease number of publications to one and shorten time for publication to no less than eight days. (NRS 148.220[1]). If personal representative is sole devisee or heir of estate, or if all devisees or heirs of estate consent in writing, court may waive requirements of publication. (NRS 148.220[2]). Where inventoried value of property does not exceed $5,000, publication may be waived by posting notice of time and place of sale for two weeks in three most public places in county in which property or some portion of property is located. (NRS 148.220[3]).

If real estate is sold on credit, the representative must take note or notes for unpaid purchase money secured by mortgage or deed of trust on property (NRS 148.290[1]); if purchaser defaults court may vacate confirmation of sale and order resale (NRS 148.300).

Allowances.

Except as otherwise provided in NRS c. 146, widow and/or minor children may remain in homestead and possess wearing apparel, provisions and household furniture, and are entitled to reasonable provision for support. (NRS 146.010). After inventory return, court may set apart homestead and exempt personal property for widow and/or minors, and it is not subject to administration. (NRS 146.020). If property set apart is insufficient for support, further allowance may be made, but if estate is insolvent this may not continue more than one year after granting of letters of administration. (NRS 146.030[1]).

Actions.

Right to sue on any claim against estate is suspended until such claim has been filed and rejected or deemed rejected because of failure to act thereon, except that action may be brought by holder of mortgage to enforce mortgage against property of estate subject thereto without filing claim provided complaint waives all recourse against other property of estate. (NRS 147.150).

If claim is rejected, personal representative must immediately notify claimant, who must bring suit within 60 days thereafter, whether or not claim is due or claim is forever barrred, or, if claim filed by Dept. of Health and Human Services, Department may file petition for summary proceeding within 20 days thereafter. (NRS 147.130). If claim on which action was pending when decedent died is rejected, personal representative may be substituted as defendant if claimant applies to court for order of substitution within 60 days of notice of rejection. (NRS 147.100[1]). Actions against estates of decedents are within exclusive original jurisdiction of district courts, regardless of amount involved. (Const. Art. 6, § 6; NRS 4.370).

Personal representative may sue or be sued to recover property, to quiet title and on decedent’s contracts. (NRS 143.060). He may sue for waste, destruction. taking or conversion of goods of decedent (NRS 143.070[1]), for trespass (NRS 143.070[2]), and may be sued for similar acts of decedent (NRS 143.080).

Fraudulent Conveyances.

In case of deficiency of assets, personal representative, on petition of any creditor, shall sue to recover property (real or personal) fraudulently conveyed by decedent. (NRS 143.150). All real property so recovered must be sold for payment of debts and proceeds of all goods, chattels, rights or credits so received must be applied in payment of debts.

Accounting and Settlement.

Personal representative must file first account within six months after his appointment (NRS 150.080); annual account thereafter (NRS 150.105); and final account when estate is ready to be closed (NRS 150.110[1]). All interested persons must be given notice of hearing of petition for final distribution, individually by mail to persons entitled, including Director of Dept. of Health and Human Services, and to public by publication. (NRS 151.090, 155.020).

Distribution.

It is customary to file petition for distribution with final account, but after three months from issuance of letters personal representative or any heir, devisee or assignee, grantee or successor in interest of any heir or devisee may petition for share of estate. (NRS 151.010). If, on hearing after notice, it appears that estate has little debt and that petition may be granted without injury to creditors, court shall grant petitioner’s request; however, court may require petitioner to give security or bond for his proportionate share of debts. (NRS 151.010, 151.040, 155.010).

Distribution if Abroad.

No statutory provision as to distribution of funds payable to distributee to whom payment is not feasible except that estate escheats to state where no distributee capable of inheriting. (NRS 154.010).

Community property may, or may not, be subject to administration in ordinary manner according to the circumstances. (See category 14 Family, topic 14.09 Husband and Wife.)

When Administration Unnecessary.

See subhead Small Estates, infra.

Small Estates.

Provision is made for summary administration of estates not exceeding $200,000 (NRS 145.010-145.110) and for dispensing with administration where estate does not exceed $100,000 (NRS 146.070). Order for summary administration dispenses with regular proceedings and notices except for notice of petition for probate and issuance of letters (NRS 145.030), notice to creditors which must be both mailed and published (NRS 145.060), inventory and appraisal or record of value (NRS 144.010), notice for sale of real property (NRS 145.070) and notice upon final accounting and distribution (NRS 145.075). (NRS 145.010). Creditors must file claims with clerk within 60 days after mailing or first publication, and personal representative must act on claims within 15 days thereafter. (NRS 145.060[2]). If at any time after entry of order for summary administration, it appears that estate exceeds $200,000 after deducting encumbrances, personal representative shall petition court for order revoking summary adjudication. (NRS 145.110).

Proceedings taken pursuant to NRS c. 145 are originated by petition containing jurisdictional information, describing decedent's property, estimating value, identifying heirs, and devisees and statement indicating whether person to be appointed as personal representative has been convicted of felony. (NRS 145.020). Notice of petition for probate of will and issuance of letters pursuant to NRS c. 145 must be given as provided in NRS 155.010. (NRS 145.030).

Compensation of personal representative, unless specific compensation is provided by the will, is at following rates on estate accounted for: 4% on first $15,000, 3% on next $85,000 and 2% on excess over $100,000. (NRS 150.020[1]). Additional fees may be allowed by court, if such fees are just and reasonable and fees authorized by NRS 150.020(1) are insufficient to reasonably compensate personal representative. (NRS 150.020[4]). If there are two or more personal representatives, compensation is apportioned. (NRS 150.020[3]). Further allowances for extraordinary services such as management, sales, or mortgages of property, litigation, carrying on decedent's business and other services may be made by court. (NRS 150.030). Contracts for compensation higher than that allowed by statute are void. (NRS 150.040).

Claim against personal representative is not affected by his being named as such in will, but receivable or demand must be included in inventory and personal representative is liable for it when due, unless otherwise provided. (NRS 144.050).

Attorney's Fees.

Attorney for personal representative in charge of decedent's estate is entitled to reasonable compensation paid out of estate (NRS 150.060[1]). Attorney for personal representative may be compensated based on: (a) Attorney's applicable hourly rate; (b) value of estate accounted for by personal representative; (c) under certain circumstances, agreement between attorney and personal representative, subject to court approval; or (d) any other method preapproved by court pursuant to request in initial petition for appointment of personal representative. (NRS 150.060[2]).

Foreign executors or administrators have no power over the decedent's estate in Nevada. See also topic 13.16 Wills, subhead Foreign Probated Wills.

Uniform Fiduciaries Act adopted. (NRS 162.010-162.140).

Uniform Prudent Investor Act (2003) (NRS 164.700-164.775) and Uniform Principal and Income Act (1997) adopted. (NRS 164.700, subsection 2 of NRS 164.720, and NRS 164.780-164.925 inclusive). (NRS 164.700-164.775).

Act for Simplification of Fiduciary Security Transfers adopted (NRS 162.150-162.250) and not repealed by Uniform Commercial Code (NRS 104.8108).

Uniform Anatomical Gift Act adopted with amendments. (NRS 451.590). Repealed, effective Oct. 1, 2007. Revised Uniform Anatomical Gift Act adopted, effective Oct. 1, 2007. (NRS 451.500-451.598).

13.11 [RESERVED]

13.12 INTESTACY:

See topic 13.07 Descent and Distribution.

13.13 [RESERVED]

13.14 PROOF OF CLAIMS:

See topic 13.08 Executors and Administrators; category 5 Civil Actions and Procedure, topic 5.17 Pleading.

13.15 TRUSTS:

May be created by declaration of property owner, inter vivos transfer, will, exercise of power of appointment or enforceable promise to create trust. (NRS 163.002). Except as otherwise expressly provided by testator in will or by settler in trust instrument, all powers enumerated in NRS 163.265 to 163.410 must be incorporated in such will or trust instrument as to fiduciaries appointed under will or trust. (NRS 163.260). District court has jurisdiction over confirmation of trustee on petition and thereafter over administration. (NRS 164.010-164.040). Upon petition by any trustee or beneficiary, district court having jurisdiction may transfer supervision of trust to another district court in state, or to any court outside state which accepts jurisdiction over trust, when it appears desirable to parties concerned. (NRS 164.130).

Testamentary Trusts.

The district court retains jurisdiction over trusts created by will, including life estates and estates for years to continue after distribution, until distribution of residue. (NRS 153.020).

Spendthrift trusts are authorized and regulated. (NRS 166.010-166.170).

Trusts for care of animal are recognized. (NRS 163.0075).

Trust Companies.

Domestic corporation formed under banking act with trust company powers may act as trustee. (NRS 662.235). Nonresident bank may act as trustee if it associates as cofiduciary with bank authorized to do business in Nevada. (NRS 662.245).

Trust companies not engaged in banking business regulated in detail. (NRS 669.010 et seq.).

Uniform Prudent Investor Act (2003) and Uniform Principal and Income Act (1997) adopted. (NRS 164.700-164.925).

Uniform Fiduciaries Act adopted excluding § 3. (NRS 162.010-162.140).

Act for Simplification of Fiduciary Security Transfers adopted. (NRS 162.150-162.250). See category 3 Business Regulation and Commerce, topic 3.24 Securities.

Uniform Trusts Act adopted (NRS 163.010-163.200), with variations.

Securities in Name of Nominee.

Fiduciary may hold stock in name of nominee if all records, accounts and reports of trustee clearly show ownership and facts of its holding and nominee has deposited with trustee signed statement showing trust ownership. Trustee is personally liable for loss resulting from acts of nominee. (NRS 163.090).

Accounting.

Uniform Trustees' Accounting Act adopted (NRS 165.010-165.240), with provision that trustee of nontestamentary trust must annually furnish each beneficiary entitled to receive income under trust, each residuary beneficiary, each specific beneficiary who has not received complete distribution, and any surety on trustee's bond with account of trust (NRS 165.135).

Actions.

Trustee of express trust may sue without joining beneficiary. (N.R.C.P. 17[a]). Court may allow costs out of trust fund or against trustee personally for mismanagement or bad faith in action or defense. (NRS 18.090). Trustee or beneficiary may petition court regarding any aspect of affairs of trust. (NRS 153.031[1]). Petition must state grounds of petition and name and address of each interested person. (NRS 153.031[2]).

Compensation of trustees is fixed by the court. (NRS 153.070).

Accumulations.

There are no statutory limitations on accumulations of income.

Perpetuities.

See topic 13.16 Wills; category 21 Property, topic 21.12 Perpetuities.

Pour Over Trusts.

See topic 13.16 Wills, subhead Bequests and Devises to Inter Vivos Trusts.

Gifts to Minors.

See category 14 Family, topic 14.10 Infants.

13.16 WILLS:

Every person over 18 years of age, of sound mind may dispose of his or her estate by will. (NRS 133.020). Except as otherwise expressly provided by testator in will or by settler in trust instrument, all powers enumerated in NRS 163.265 to 163.410 must be incorporated in such will or trust instrument as to fiduciaries appointed under will or trust. (NRS 163.260).

Testamentary Disposition.

There are no limitations on power to dispose of property except such as result from rights of surviving spouse, minor child or minor children of decedent with respect to homestead (see category 8 Debtor and Creditor, topic 8.10 Homesteads) and personal property exempt from execution. (NRS 146.020).

Execution.

No will except holographic will or electronic will is valid unless it is in writing, signed by testator or by attending person at testator's express direction, and attested by two competent witnesses who subscribed their names to will in presence of testator. There is no required statutory form of attestation clause. (NRS 133.040).

Self-proving affidavit may be signed by any or all attesting witnesses, executed within or without state, before any person qualified to administer oaths, written on will or attached thereto in following form:

Form

STATE OF NEVADA

} ss.

COUNTY OF . . . .

(Date) . . . .

Then and there personally appeared . . . . and . . . ., who, being duly sworn, depose and say: That they witnessed the execution of the foregoing will of the testator, ...; that the testator subscribed said will and declared it to be his last will and testament in their presence; that they thereafter subscribed the will as witnesses in the presence of the testator and in the presence of each other and at the request of the testator; and that the testator at the time of the execution of the will appeared to them to be of full age and of sound mind and memory.

Affiant . . . .

Affiant . . . .

Subscribed and sworn to before me this . . . . day of . . . ., ...

. . . .(Stamp)

Notary Public

(NRS 133.050).

Nuncupative Wills.

A nuncupative or oral will is not valid. (NRS 133.100).

Holographic Wills.

Property may be disposed of and taken under holographic wills, in which signature, date and material provisions are written by testator's hand; such wills are subject to no other form and may be made in or out of this state. (NRS 133.090[1]). Such wills are valid and have full effect as if formally executed. (NRS 133.090[3]). It may be proved by authentication satisfactory to court. (NRS 136.190).

Electronic Wills.

Electronic will is valid and has same force and effect as if formally executed. (NRS 133.085[3]). Electronic will is will of testator that: is written, created and stored in electronic form; contains date and electronic signature of testator; and is created in such manner that only one authoritative copy exists and authoritative copy is controlled and maintained by testator or custodian designated by testator in electronic will, any attempted alteration of authoritative copy is readily identifiable, and each copy of authoritative copy is readily identifiable as copy that is not authoritative copy. (NRS 133.085[1]).

Revocation.

Written will may only be revoked by burning, tearing, cancellation, or obliteration with intention of effecting revocation, or by due execution of another will or codicil, or by implication of law from changes in testator's condition or circumstances. (NRS 133.120).

If person marries after making will and spouse survives maker, will is revoked as to spouse, unless: (a) Provision has been made for spouse by marriage contract; (b) spouse is provided for in will, or in such way mentioned therein as to show intention not to make such provision; or (c) spouse is provided for by transfer of property outside will and it appears that maker intended transfer to be in lieu of testamentary provision. (NRS 133.110).

Revival.

If after making will testator executes second will, destruction, canceling, or revocation of second will does not revive first, unless contrary intention appears from terms of revocation, or unless after such revocation, first will is duly reexecuted. (NRS 133.130).

Gifts to subscribing witness are void unless there are two other competent witnesses to will (NRS 133.060), but mere charge on estate for payment of debts does not prevent creditor from being competent witness (NRS 133.070).

Probate and Contest.

Will may be proved in district court of county in which testator resided at time of his death. (NRS 136.010). May be contested prior to and subsequent to probate. (NRS 137.010-137.140).

Self-proved Wills.

See subhead Execution, supra.

Foreign Probated Wills.

Except as otherwise provided, if in writing and subscribed by testator, last will and testament executed outside Nevada in manner prescribed by law, either of state where executed or of testator's domicile, shall be deemed legally executed, and is of same force and effect as if executed in manner prescribed by Nevada law. (NRS 133.080). Presentation for probate may be made by nominee of executor. (NRS 136.260). Ancillary probate is recognized method of establishing title under foreign probated will. (NRS 136.260).

Bequests and Devises to Inter Vivos Trusts.

Uniform Testamentary Additions to Trusts Act adopted. (NRS 163.220). Any devise or bequest validity of which is determinable by Nevada law may be made by will to existing trust established by testator or other person, if trust is identified in will and its terms are set forth in written instrument executed before or concurrently with execution of will. (NRS 163.230[1]). No gift is invalid because trust is amendable or revocable (NRS 163.230[2]), but termination of trust before death of testator causes devise gift to lapse (NRS 163.230[4]).

Legacies.

Court directs payment of devises when all liabilities of estate have been paid. (NRS

150.280[1]). Devisees may petition for their share of estate after three months from issuance of letters, on giving bond to secure creditors (NRS 151.010), or when final account is settled (NRS 151.080). There is no provision for interest on legacies.

Unclaimed Legacies.

Estates escheat to state when any person dies within state and leaves no heirs, representatives, or devisees capable of inheriting or holding estate. (NRS 154.010).

Lapse.

Devise to child or other relation of testator, when devisee dies before testator, leaving lineal descendants, does not lapse, but descendants take estate in same manner as devisee would have taken had he survived, in absence of contrary provision in will. (NRS 133.200).

Children.

Where will omits to provide for any child of testator or for issue of any deceased child, it shall be presumed that omission was intentional. Should court find that omission was unintentional, such child or issue of any deceased child shall have same share in estate of testator as if he or she had died intestate. (NRS 133.170). Children born after making of will shall receive intestate share unless: (a) It is apparent from will that it was intention of testator that no provision should be made for that child; or (b) testator provided for omitted child by transfer of property outside will and it appears testator intended transfer to be in lieu of testamentary provision. (NRS 133.160).

Election.

Surviving spouse has no right of election to take under intestacy law and against will.

Divorced Spouse.

Divorce or annulment of marriage of testator revokes every devise, beneficial interest or designation to serve as personal representative given to testator’s former spouse by will executed before decree unless separate property agreement or former will is approved by court in divorce proceedings. (NRS 133.115).

Simultaneous Death.

See topic 13.05 Death, subhead Survivorship.

Testamentary Trusts.

See topic 13.15 Trusts.

Revised Uniform Anatomical Gift Act adopted with changes. (NRS 451.500-451.590).

Living Wills.

Adult person may voluntarily execute declaration governing withholding or withdrawal of life-sustaining treatment through declaration signed by declarant, who must be person of sound mind and 18 or more years of age, or signed by another at declarant’s direction, and attested by two witnesses. (NRS 449.600).

14 FAMILY

14.01 ADOPTION:

Any adult person who is ten years older than person adopted (NRS 127.020) and who has resided within this state during six months prior to granting adoption (NRS 127.060) may adopt a minor. Petition for adoption of child who currently resides in home of petitioners may be filed after child has lived in home for 30 days (NRS 127.110), however, no order or decree of adoption may be made until after child has lived for six months in petitioner's home (NRS 127.150). If petitioner is married other spouse must join in petition. (NRS 127.030). Adoption of younger adults by adults permitted by agreement approved by decree of adoption of district court of county where either person resides. (NRS 127.190).

Consent Required.

Consent of minor child is required if over 14 years of age. (NRS 127.020). Except as provided in NRS 127.090, written consent of minor's parents or living parent or guardian is necessary. (NRS 127.040). Consent must be in writing and acknowledged by person consenting. (NRS 127.040). Parental consent is unnecessary if parent has been incurably insane for two years (NRS 127.040) or when parental rights have been terminated by order of court (NRS 127.090).

Adoption of adults by adults requires only consent of spouses, if capable, of adopting and to be adopted adults. (NRS 127.200).

No consent is valid unless it is in writing, signed by persons consenting, acknowledged in form required for conveyances, contains names of persons to whom consent is given, attested by two competent disinterested witnesses who may sign affidavits showing due execution in form prescribed by statute, one of which must be social worker as defined if neither petitioner nor spouse related to child within third degree of consanguinity, and true copy of such consent is delivered to agency which provides child welfare services. (NRS 127.053-127.057).

Relinquishments.

Specified agencies may accept relinquishments for adoption from parent or guardian and give the consent thereto. (NRS 127.050). Relinquishment must be in writing and acknowledged by person relinquishing and such writing is generally irrevocable. (NRS 127.040; 127.080). Relinquishment by minor parent is irrevocable upon coming of age. (NRS 127.080).

Petition.

Two or more brothers and sisters may be adopted in one petition. (NRS 127.060). The district court of any county is a proper court in which to make application. The petition is filed in duplicate with the county clerk, who transmits copy of petition to agency which provides child welfare services for investigation unless petitioner, or spouse of petitioner, and child are related within third degree of consanguinity where court may waive such investigation which order waiving investigation must be sent to agency which provides child welfare services by petitioners within seven days after entry. (NRS 127.120). Agency which provides child welfare services must submit report within 30 days after receipt of copy of petition or before child lived in home of petitioners for six months, whichever is later, but if court is dissatisfied with it independent investigation may be ordered. (NRS 127.120). Any placement for adoption may be terminated by mutual consent of petitioners and adoption agency, or order of district court on application of agency when agency feels placement is detrimental to interests of child. (NRS 127.051).

Petition for adoption of child who currently resides in home may be filed at any time after child has lived in petitioner's home for 30 days. (NRS 127.110).

Contents of petition must include: Full names, age, and length of residency within state of petitioners, age of child and length of time child has lived in petitioner's home, desire or not to have name of child changed, desire to establish parent and child relationship, and sworn representation that proposed adoptive parents are fit and proper persons for such relationship, have complied with requirements of law, have financial ability to care for and support child, and whether child is Indian child. (NRS 127.110).

Petition for adoption of adults by adults filed in district court of county where either resides. Court may require investigation by division. Petition prays for approval of adoption agreement. (NRS 127.210).

Hearings.

Except as otherwise provided in NRS 239.0115, hearings and agencies' reports are confidential. (NRS 127.140).

Appeal.

An appeal lies to the Supreme Court. (NRS 127.180).

Decree or Order.

The effect of the decree or order of adoption is to vest in the parties the same legal rights as though the child were the natural child of the adoptive parents. There is a complete severance of legal ties between the natural parent or parents and their next of kin. (NRS 127.160).

Effect of Adoption.

Upon adoption child becomes legal child of adopting parents and they become legal parents with rights and duties of natural parents of legitimate child.

Adopted child inherits from adoptive parents or relative the same as though he were legitimate. If child dies intestate, adoptive parents and relatives inherit his estate. After adoption, natural parents of adopted child are relieved of parental responsibility and have no rights over adopted child or property. Adopted child will not inherit from natural parents or kindred nor does he owe them any legal duty. (NRS 127.160).

14.02 ALIMONY:

See topic 14.05 Divorce.

14.03 COMMUNITY PROPERTY:

See topic 14.09 Husband and Wife.

14.04 DESERTION:

See topics 14.05 Divorce, 14.09 Husband and Wife.

14.05 [RESERVED]

14.06 DIVORCE:

Grounds for Absolute Divorce.

(1) Insanity existing for two years prior to commencement of action; (2) spouses living separate, apart and without cohabitation for one year; (3) incompatibility. (NRS 125.010).

Legal Separation.

There is no provision for divorce a mensa et thoro. As to separate maintenance see topic

14.09 Husband and Wife.

Residence Requirements.

Unless the cause of action accrued within the county where the action is brought while both plaintiff and defendant were actually domiciled therein, no court has jurisdiction to grant a divorce unless either plaintiff or defendant has been a resident of the state for not less than six weeks preceding the commencement of the action. (NRS 125.020).

Mere intention to make residence in Nevada is insufficient. There must also be actual, physical presence within the state for the required time (NRS 10.155), corroborated by credible evidence (NRS 54.010).

Jurisdiction of matrimonial actions is in the district courts. (NRS 125.020).

Venue is county in which cause for divorce accrued, or in which defendant resides or is found, or in which plaintiff resides, or in which parties last cohabited, or in any county if plaintiff has resided within state for six weeks. (NRS 125.020. See *Prouse v. Prouse*, 56 Nev. 467, 56 P.2d 147 [1936]).

Change of Venue.

See category 5 Civil Actions and Procedure, topic 5.26 Venue.

Process.

Personal service of summons and a copy of complaint is made upon defendant in person within state when he can be there found; or, when defendant cannot be served personally, then by publication of summons for period of four weeks in newspaper to be designated by court in its order and also by mailing to defendant at his place of residence, a copy of summons and complaint. Personal service of summons upon party outside this state may be made by delivering copy of summons, together with copy of complaint, to party served in manner provided by statute or rule of court for service upon party of like kind within this state. (N.R.C.P. 4).

Voluntary appearance of the defendant is the equivalent of personal service of the process upon defendant in Nevada. (N.R.C.P. 4[f]).

Where a default judgment or decree has been entered, the defendant may thereafter, on written consent of plaintiff, enter a general appearance in the action with the same effect as if entered at proper time prior to rendition of judgment or decree. Thereupon court may make modified judgment or decree showing such general appearance and enter same nunc pro tunc as of date of original decree. Parties may stipulate for further modification of judgment or decree. (N.R.C.P. 60).

Pleading.

The complaint of the plaintiff must be verified and plaintiff's complaint, or cross-claim or counterclaim of defendant may state cause or causes for divorce upon which party or parties rely, in words of statute. (NRS 125.020-125.030).

Defendant shall serve answer within 20 days after being served with summons and complaint, unless otherwise provided by statute when service of process made pursuant to Rule 4(e)(3). (N.R.C.P. 12).

Bills of Particulars.

Where the grounds for divorce are pleaded in the words of the statute, either party, after appearance of the defendant and upon five days, written demand therefor, is entitled to a bill of particulars stating in detail the facts, dates, times and occasions upon which the plaintiff or the defendant relies for cause of action, and either party may, upon motion, be required to furnish in writing a further bill of particulars upon good cause shown. Such bill or bills of particulars need not be filed, and if filed may be withdrawn upon the written consent of the parties. (NRS 125.030).

Offer of Judgment.

Party to divorce may, at any time more than ten days before trial, make offer of judgment concerning property rights of parties. Offer of judgment shall not address issues related to child custody, child support, or spousal support. If party rejects offer of judgment and fails to obtain more favorable judgment at trial, court may, among other things, order that party to pay reasonable attorney's fees incurred by opposing party after date of offer of judgment that relate to adjudication of those property rights. (NRS 125.141).

Trial.

The judge of the court determines all questions of law and fact. (NRS 125.070).

Court must, upon demand of either party, direct that trial and issue or issues of fact joined therein be private, and upon such direction all persons, except officers of court, parties, and their witnesses and counsel, parents or guardians, and siblings, must be excluded from court or chambers wherein action is tried. (NRS 125.080).

Where divorce is sought on the ground of insanity, the court must require corroborative evidence of the insanity of the defendant at the time of the trial. (NRS 125.010).

There is no provision for delay between the commencement of a divorce action and disposition thereof once the matter reaches issue.

Application for decree by default may be by affidavit, unless court requires testimony of witnesses. If marital settlement agreement, it must be identified in, and attached to, affidavit. Affidavit must be on personal knowledge, contain admissible evidence, give factual support to each allegation, and establish competency of affiant to testify. (NRS 125.123).

Judgment or decree of divorce is final. (NRS 125.130). There is no interlocutory decree. No divorce binding on parties may be attacked by third parties. (NRS 125.185).

Where it appears to court that grounds for divorce exist, court in its discretion may grant divorce to either party. (NRS 125.120).

Judgment Roll and Other Papers.

The papers and pleadings which constitute or will make up the judgment roll in an action for divorce are open to public inspection in the clerk's office. But all other papers, records, proceedings and evidence, including exhibits and transcript of the testimony must, upon the written request of either party to the action, filed with the clerk, be sealed and may not be open to inspection except to the parties or their attorneys, or when required as evidence in another action or proceeding. (NRS 125.110).

Support of Insane Spouse.

A decree of divorce granted on ground of insanity does not relieve plaintiff from contributing to support and maintenance of defendant and plaintiff may be required to give bond therefor in amount fixed by court. (NRS 125.010).

Temporary Alimony and Suit Money.

Court may require either spouse to pay other such sum necessary to provide temporary maintenance for other party or temporary support for children of parties, or to enable other party to carry on or defend divorce suit. Court may make necessary order affecting property of either spouse or both. (NRS 125.040).

Allowance for Provision of Suit.

Reasonable attorneys' fees may be awarded to either party if such fees are issue under pleadings, whether or not application for suit money has been made. (NRS 125.150).

Permanent alimony may be granted to wife, or to husband unless premarital agreement provides otherwise. Unless otherwise decreed, alimony ceases on death of either party or remarriage of spouse to whom alimony was to be paid. (NRS 125.150).

Court may modify alimony decree or agreement upon showing of changed circumstances whether or not modification jurisdiction was expressly retained on all decrees after July 1, 1975. Court cannot modify decree or agreement with respect to payments already accrued at time of motion for modification. (NRS 125.150). Change of 20% or more in gross monthly income of spouse ordered to pay alimony constitutes change of circumstances. (NRS 125.150).

Arrearage default may warrant order for arrears, with costs and reasonable attorney's fees. (NRS 125.180).

Division of Property of Spouses.

Nevada is community property jurisdiction. Property rights are determined by court, which may make such disposition of community property or joint tenancy property as appears equitable (NRS 125.150) and may also set apart such portion of husband's property for wife's support, or wife's property for husband's support, or property of either spouse for support of their children as shall be deemed just and equitable (NRS 125.150). Division of interest in, or entitlement to pension or retirement benefit provided by Public Employees Retirement System is determined pursuant to 125.155.

Agreements settling property rights are favorably considered and usually approved. Property settlement agreement, made when divorce suit is pending or immediately contemplated, is not invalidated by provision therein that it shall become effective only in event of divorce. If such contract is introduced as exhibit in divorce action and is adopted, approved or ratified by court, it has same force as if copied into decree or attached thereto by reference. (NRS 123.080). To avoid merger in decree, decree should specifically provide that agreement is not merged but shall survive. (80 Nev. 386, 395 P.2d 321).

Effect on Will.

See category 13 Estates and Trusts, topic 13.16 Wills, subhead Divorced Spouse.

Change of wife's name to any former name she has legally borne may be ordered. (NRS 125.130).

Custody of Children.

Court determines matters relating to custody and support of children and at any time during minority of children may order changes of custody or support where it appears to their best interests even if divorce obtained by default. Sole consideration for court is best interests of child and there is presumption that joint custody is in best interest of child. (NRS 125.510; 125.480; 125.490).

Agreements with respect to custody and support of children are favorably considered and usually approved.

Remarriage.

No restrictions.

Annulment of Marriage.

See topic 14.11 Marriage.

Uniform Premarital Agreement Act adopted. (NRS 123A.010—123A.100). See topic 14.09 Husband and Wife.

14.07 [RESERVED]

14.08 GUARDIAN AND WARD:

When necessary or convenient guardians of person and estate, or either, of minors may be appointed. (NRS 159.0487).

Selection of Guardian.

Court shall appoint qualified person who is most suitable and is willing to serve giving consideration to: request of parent contained in will or other written instrument; request by minor 14 years of age or older; relationship by blood or marriage of proposed guardian. (NRS 159.061).

Rights to Appointment.

Parents, if qualified and suitable, shall be preferred over all others. (NRS 159.061). Appointment of parent as guardian may not conflict with valid custody order in place. (NRS 156.061). Court may consider other relatives of whole or half blood equally for appointment. Proposed guardian may be related to ward by blood, adoption, or marriage. (NRS 159.061).

Who May Apply for Appointment.

Proposed ward, governmental agency, nonprofit corporation or any interested person may petition for appointment of guardian. (NRS 159.044).

Jurisdiction for appointment of guardian is in any court of competent jurisdiction. (NRS 159.0487).

Venue for appointment of guardian when ward’s home state is this state must be county where ward resides. (NRS 159.037).

Notice of hearing must be given by serving citation upon ward who is 14 years of age or older, spouse of ward, all other known relatives that are within second degree of consanguinity and parent or legal guardian of minor ward. If ward has no spouse or relatives, then office or county public guardian must be served. (NRS 159.047). Guardian may be appointed without court issuing citation if: Petitioner is parent seeking appointment of guardian for minor child who has sole legal and physical custody of minor and has court order or birth certificate; if minor is 14 years of age or older petition must be accompanied by written consent of minor, or minor consents in open court. (NRS 159.049).

Qualification.

Person is not qualified to serve as guardian who is: incompetent, is minor, is person who has been convicted of felony unless court decides it is in best interests of ward to appoint convicted felon (NRS 159.059), has been person suspended for misconduct or disbarred from practice of law, accounting, or any other profession that requires license and involves management or sale of money, investments, securities or real property (NRS 159.059) during period of suspension or disbarment, is nonresident of this state who has not associated as co-guardian resident or banking corporation whose principal place of business is in this state, and is not petitioner (NRS 159.059) in guardianship proceeding or has been judicially determined by clear and convincing evidence, to have committed abuse, neglect or exploitation of child, spouse, parent or other adult. Before entering upon his duties as guardian, every guardian must execute and file bond with sufficient surety in amount to be determined by court. If banking corporation is appointed guardian of estate of ward, no bond is required unless specifically required by court. No bond is required if there are no assets of ward. If person is appointed in will to be guardian and will provides that no bond is to be required, court may direct letters of guardianship to issue to guardian after taking and subscribing oath of office and filing his name and address in proceeding. Every guardian shall take and subscribe official oath and file in guardianship proceeding his name, residence, and post office address. (NRS 159.059; 159.065; 159.073).

Inventory.

Guardian must file verified inventory of all property which comes to his possession or knowledge no later than 60 days after date of appointment and if any further property comes into his possession must file verified supplemental inventory within 30 days or include property in his next accounting. (NRS 159.085).

Powers and Duties.

Guardian of person has care, custody, and control of person and shall perform duties necessary for proper care, maintenance, education and support of ward. Guardian of estate shall protect, preserve, manage, and dispose of estate of ward according to law and for best interest of ward. Estate of ward shall be applied for proper care, maintenance, education, and support of ward and any person to whom ward owes legal duty of support. Guardian of person and estate has authority and shall perform duties set forth above. (NRS 159.079; 159.083).

Investments.

Investments may be made upon petition to court for order authorizing investment. (NRS 159.113, 159.117).

Securities in Name of Nominee.

Guardian may hold stock in name of nominee if all records, accounts, and reports of guardian clearly show ownership and facts of its holding and nominee has deposited with guardian signed statement showing estate ownership. Guardian is personally liable for loss resulting from acts of nominee. (NRS 159.101). See category 13 Estates and Trusts, topic 13.15 Trusts, subhead Securities in Name of Nominee.

Sale of Realty.

Real or personal property of estate may be sold by guardian. (NRS 159.127; 159.132). All sales of real property must be reported to court and petition for confirmation must be filed. Interested person may file written objections to any sale and hearing may be conducted. (NRS 159.134).

Sale of Personalty.

See subhead Sale of Realty, supra.

Liability of Guardian for Acts of Ward.

Guardian and minor ward are jointly and severally liable for injury or death to person, or injury to private or public property resulting from ward's act of willful misconduct unless licensed to conduct foster home. Liability of guardian cannot exceed $10,000. (NRS 41.470). See also topic 14.10 Infants; category 23 Transportation, topic 23.01 Motor Vehicles.

Accounts.

Guardian must account annually not later than 60 days of anniversary of appointment or at such other times as court may order. (NRS 159.177).

Termination of Guardianship.

Guardianship terminates on death of ward; upon ward's change of domicile to place outside state and transfer of jurisdiction to court having jurisdiction in new domicile; upon order of court, if guardianship is no longer necessary; or upon ward turning 18 or graduates from high school, whichever occurs last. (NRS 159.191). Age of majority is 18 years; court may declare minor who is at least 16 years of age emancipated under certain conditions. (NRS 129.010).

Compensation.

Subject to approval of court, guardian must be allowed reasonable compensation necessary and reasonable expenses. (NRS 159.183).

Incompetent Persons.

Guardian for insane or mentally incompetent person may be appointed in similar manner and with like authority as guardian for minor. (NRS 159.0487).

Foreign Guardians.

Where nonresident has foreign guardian and no guardian has been appointed in this state, and person in this state is indebted to such nonresident, or he has property within this state capable of removal and not subject to mortgage, pledge, lien, or other encumbrance restricting removal of property from this state, person in possession of property may deliver it, or person indebted may pay such debt, to foreign guardian. Delivery of payment constitutes release and discharge with respect to such property of debt. Foreign guardian may be required by court to post bond in same manner as required of resident guardian and may enter orders necessary to protect secured creditors of ward and unsecured creditors of ward who are residents of this state. (NRS 159.203).

Temporary Appointment of Guardians for Minors.

Temporary guardian may be appointed for minor by written instrument executed by parent or parents having legal custody. Minor 14 years of age or older must provide written consent to short-term guardianship. Both parents must consent to short-term guardianship. Short-term guardianship expires in time period specified in written consent or six months, whichever is shorter. (NRS 159.205).

Uniform Veterans' Guardianship Act adopted. (NRS 160.010-160.190).

Guardian ad Litem.

See topic 14.10 Infants.

Gifts to Minors.

See topic 14.10 Infants.

Uniform Fiduciaries Act adopted. (NRS 162.010-162.140).

Uniform Simplification of Fiduciary Security Transfers Act adopted. (NRS 162.150-

162.250).

14.09 HUSBAND AND WIFE:

The unity of husband and wife, and rule that residence of husband is that of wife unless, having ground for divorce she establishes separate residence, are recognized by our courts. No action may be brought for alienation of affections or for criminal conversation that accrued after July 1, 1979. (NRS 41.380). Husband and wife cannot by agreement alter their legal relations, except as to property, and except that they may agree to immediate separation; and such agreement is not invalid because made conditional on procuring of contemplated divorce. (NRS 123.080).

Marriage Contracts.

All marriage contracts or settlements must be in writing and acknowledged or proved in same manner as deeds. (NRS 123.270). If contract affects real property, it must be recorded in office of county recorder where property located (NRS 123.280) which provides notice to all persons of contents of contract (NRS 123.290). No such contract valid as to any real property, except as between parties, until it is recorded. (NRS 123.300).

Uniform Premarital Agreement Act adopted. (NRS 123A.010-123A.100).

Tenancy of Property.

Real or personal property may be held by husband and wife in joint tenancy, tenancy in common, or as community property. (NRS 123.030).

Separate Property.

All property of each spouse owned before marriage, and all acquired afterward by gift, bequest, devise or descent, or by award for personal injury damages, with rents, issues and profits thereof, is separate property of that spouse. (NRS 123.130). If husband and wife are living separate, earnings of minor children unless relinquished, are separate property of spouse with custody, or with whom children are living. (NRS 123.180). Written authority by one spouse to other to appropriate spouse’s earnings to his own use is deemed gift and separate property. (NRS 123.190).

If married person is resident of Nevada, inventory of separate property, exclusive of money, duly acknowledged or proved, may be recorded in county of residence. If real property situated in another county is included in a recorded inventory, inventory must also be recorded in such other county. (NRS 123.140). Failure to file inventory for record, or omission from inventory, is prima facie evidence, as between such married person and good faith purchaser from other spouse, that property omitted or not filed is not separate property of such person. (NRS 123.160).

Contracts.

Husband and wife may contract with each other, and either or both may contract with third person, to same extent as if they were unmarried, subject to general rules governing persons in confidential relationship. (NRS 123.070).

Debts and Obligations to Support.

Neither separate property of spouse nor his share of community property is liable for debts of other spouse contracted before marriage. (NRS 123.050).

Where husband does not furnish necessaries to wife, any other person may do so and recover from husband. Separate property of husband is liable for cost of necessaries if community property is insufficient. (NRS 123.090).

Husband or wife abandoned by spouse is not liable for support of abandoning spouse until such spouse offers to return, unless abandonment was justified by misconduct of abandoned spouse. (NRS 123.100). Where there is no community property or separate property of husband, wife must support infirm husband from her separate property. (NRS 123.110).

Revised Uniform Interstate Family Support Act (1997) adopted. (NRS 130.0902-130.802).

Conveyance or Encumbrance of Property.

Either spouse may, without consent of other spouse, convey, charge, encumber or otherwise in any manner dispose of his separate property. (NRS 123.170).

Actions.

Husband and wife may sue jointly on all causes belonging to either or both of them, except when action is for personal injuries, injured spouse is a necessary party; and when action is for compensation for services rendered, spouse having rendered services is necessary party. (NRS 12.020).

If husband and wife are sued together, either or both may defend, and if either neglects to defend, other may defend for both. (NRS 12.030).

When suit is joint, damages must be segregated. If action is for personal injuries, damages for injuries, pain and suffering belong to injured spouse as separate property; damages for loss of comfort and society belong to spouse who suffers such loss; damages for loss of services and for medical and hospital expenses belong to spouses as community property. If action is for injury to property, damages to separate property belong to spouse owning injured property; damages to community property belong to spouses as community property. (NRS 123.121).

Desertion.

Uniform Desertion and Non-Support Act adopted. (NRS 201.015-201.080).

Separate Maintenance.

When either has been deserted for 90 days or has any cause for divorce against other, he may maintain separate maintenance action for his support and that of children. Each has much the same summary remedies as in divorce cases. (NRS 125.190-125.280).

Community Property.

All property acquired after marriage, by either husband or wife, except that acquired by gift, devise, bequest or descent, or award for personal injury damages, with rents, issues and profits thereof is community property, unless otherwise provided by written agreement between spouses, or by decree of separate maintenance or by other decree or written agreement, or, in case of spouse’s own earnings, by written authorization from other spouse for earnings spouse to appropriate same to his own use. (NRS 123.130, 123.220, 123.190).

Either spouse, acting alone, may control community property, with like power of disposition as acting spouse has over his separate property, except that neither spouse may devise or bequeath by will more than one-half community property; neither spouse may give community property without other’s consent, express or implied; community real property can be conveyed or encumbered only by instrument executed and acknowledged by both spouses; transaction of purchase or execution of contract to purchase community real property must be joined in by both spouses; both spouses must join in contract of sale of, or in execution of agreement creating, security interest, other than purchase money security interest in community household goods, furnishings, or appliances; and neither spouse may acquire, purchase, sell, convey or encumber assets, including real property and goodwill, of business where both spouses participate in its management without consent of other. (NRS 123.230). Husband or wife may give written power of attorney to other to sell, convey or encumber any property held as community property; except neither may devise more than one-half of community property, make gift of community property without consent of other, or sell, convey or encumber community real property unless both execute and acknowledge instrument. (NRS 123.230).

On death of either husband or wife, undivided one-half interest in community property is property of surviving spouse and such person's sole separate property, except that no person convicted of murder of decedent may succeed to any portion of estate. Remaining interest is subject to testamentary disposition of decedent and in absence thereof, goes to surviving spouse, and is only portion subject to administration under probate laws. (NRS 123.250).

14.10 INFANTS:

Males and females under age of 18 are infants unless 16 or older and are emancipated by court. (NRS 129.010).

Emancipation of infants, at least 16 years of age, who are married or living apart from legal guardian may be ordered by District Court in county of minor's residence. (NRS 129.080). If court enters decree of emancipation, it removes all disabilities of minor that may affect incurring indebtedness or contractual obligations, litigation and settlement, acquiring, encumbering or conveying property, consenting to medical, dental or psychiatric care, enrolling in school, and establishing own residence. Unless otherwise provided by decree, emancipation terminates obligation of support owed by parent or guardian. (NRS 129.130).

Disabilities.

In cases specified by statute, certain infants may enter into contract for insurance. (NRS 687B.070).

Minors are prohibited from purchasing or consuming alcoholic beverages or possessing same in public (NRS 202.020) or loitering in saloons (NRS 202.030) if under age of 21 years, and, if under age of 18 years, from purchasing cigarettes (NRS 202.2493). Person who contributes to delinquency or improper dependency of child may be punishable by fine or imprisonment or both or directed to perform fixed periods of community service. (NRS 193.150; 201.080-201.110).

Ratification or repudiation of contracts after attaining majority is governed by common law rules, there being no statute on subject.

Actions.

Where infant is party to action he must appear by general guardian or by guardian ad litem appointed by court in which action is prosecuted or by judge thereof. (NRS 12.050; N.R.C.P. 17).

Rights and liabilities of Parents.

Governed by common law.

Willful misconduct of minor child resulting in injury or death to another person or in property damage is imputed to parents or guardian. Joint and several liability of parents or guardian with minor cannot exceed $10,000. (NRS 41.470). Also, see category 23 Transportation, topic 23.01 Motor Vehicles.

Uniform Gifts to Minors Act repealed; Uniform Transfers to Minors Act adopted. (NRS 167.010-167.100). Age of majority under Act is 18. (NRS 167.020).

Uniform Securities Ownership by Minors Act not adopted.

Adoption.

See topic 14.01 Adoption.

14.11 MARRIAGE:

Marriage is civil contract to which consent of parties, capable in law of contracting, is essential. (NRS 122.010).

Who May Marry.

Male and female person, both at least 18 years old, may marry (NRS 122.020), provided marriage does not violate any of statutory prohibitions (see infra, subhead Prohibited Marriages). Person, at least 16 but less than 18 years old, may marry only with consent of either parent, or legal guardian. (NRS 122.020). Persons under 16 years need authorization by district court in addition to consent from either parent or guardian. (NRS 122.025).

Consent Required.

Persons under 18 must have consent of either parent or guardian. Such consent must be given personally to clerk when license is applied for or certified by parent or guardian attested by two witnesses, one of whom must appear and swear that he saw parent or guardian subscribe same or heard him acknowledge same, or in writing subscribed to and acknowledged before person authorized to administer oaths. (NRS 122.040). Persons under 16 also need authorization by District Court. (NRS 122.025).

Marriage license must be obtained from county clerk of any county by either of prospective parties, who must appear and apply in person; license expires one year after date of issuance. (NRS 122.040).

Time and Place of Marriage.

Marriage may take place immediately after issuance of license and may be solemnized in any county. (NRS 122.040; 122.080).

Who May Solemnize Marriage.

Ministers of the gospel, duly licensed, and holding valid certificate of permission from county clerk of county in which they reside. (NRS 122.062-122.073). Supreme and district court judges and justices of the peace and municipal judges subject to statutory restrictions may solemnize marriages. (NRS 122.080). Temporary replacements for licensed ministers, duly certified, may solemnize marriages for period up to 90 days. (NRS 122.062). Military chaplain assigned in this state may solemnize marriage upon obtaining certificate of permission from county clerk. (NRS 122.062).

Person who undertakes to join others in marriage, knowing that he is not lawfully authorized to do so or that there is legal impediment to marriage, is guilty of misdemeanor. (NRS 122.260).

However, marriage solemnized by person professing to be entitled to perform ceremony is valid if consummated with full belief on part of persons married that they are lawfully married. (NRS 122.090).

Marriage Ceremony.

There is no particular form of solemnization, except that parties must declare, in presence of person performing ceremony, that they take each other as husband and wife. One witness is necessary. (NRS 122.110).

Other Marriages.

Marriage solemnized among people called Friends or Quakers, or members of Indian tribes, according to their own form and practices, are valid in Nevada. (NRS 122.150, 122.160, 122.170).

Marriage Certificate and Record.

After marriage solemnized, person doing so must give couple being married marriage certificate that substantially meets statutory form. Person who solemnizes marriage must make record thereof within ten days and deliver same to recorder of deeds of county where such license was issued. Certificate must be filed and recorded by county recorder. Person solemnizing marriage, who fails to deliver such certificate within time, or recorder who fails to record copy of certificate, is guilty of misdemeanor and punishable by fine and imprisonment. (NRS 122.120; 122.130; 122.230; 122.240).

The making of false certificate of marriage or pretended marriage is gross misdemeanor. (NRS 122.250).

Record.

See category 10 Documents and Records, topic 10.04 Records, subhead Vital Statistics.

Certificate as Evidence.

Original certificate of marriage or certified copy of record or abstract thereof is presumptive evidence of marriage. (NRS 122.030).

Common law marriages are prohibited. (NRS 122.010).

Local Recognition of Out of State.

No statutory provision.

Proxy Marriages.

No statute authorizing.

Marriages by Written Contract.

No statute authorizing.

Prohibited Marriages.

Persons who are nearer of kin than second cousins, or cousins of the halfblood, may not intermarry. (NRS 122.020).

Marriages prohibited by law on account of consanguinity between the parties, or on account of either of them having a wife or husband then living, are void without decree of divorce, annulment or other legal proceedings. Such void marriages do not bar prosecution for bigamy. (NRS 125.290).

Legitimacy of Children.

Marriage of parents of illegitimate children legitimizes children. (NRS 122.140). Issue of a marriage deemed null in law are legitimate. (NRS 125.410).

Foreign Marriages.

No statute, except as to Quaker marriages (see subhead Other Marriages, supra) and presumption in annulment suits (see infra, subhead Annulment of Marriage).

Annulment of Marriage.

Venue.

Annulment may be obtained by complaint under oath to any district court within state if marriage contracted within state. If marriage contracted without state, annulment may be obtained by complaint to any district court within state if plaintiff shall have resided within state for six weeks before suit is brought. If plaintiff shall have not resided in state for six weeks, then by complaint to court of county in which defendant shall reside or county in which plaintiff shall reside if it is county in which parties last cohabited. (NRS 125.370).

Residence Requirement in Case of Foreign Marriage.

No court in Nevada has authority to annul any marriage performed, contracted or entered into out of Nevada unless one of parties has resided in state for six weeks before filing the complaint. (NRS 125.370).

Grounds.

Annulment may be granted where marriage was induced by fraud or either party was incapable of assenting for want of age or understanding and consent required of parents, guardian, or court was not obtained and there has been no subsequent cohabitation, or where there is ground for annulling or declaring void a contract in a court of equity. (NRS 125.300-125.350).

Limitation.

Suit to annul marriage on ground of underage and lack of consent must be brought within one year after attainment of age of consent. (NRS 125.320). See supra, subhead Who May Marry.

Process.

In a suit for annulment of marriage, process is served in the same manner as in actions at law, and the courts have the same power upon a substituted or constructive service of process to annul such marriage and regulate and determine status of parties as they would have had if process had been personally served. (NRS 125.400).

Presumption as to Foreign Law.

In any suit for annulment of marriage in any wise affected by law of another state, it must be presumed that law of such other state is same as law of Nevada, unless and until law of such other state is alleged and proved. (NRS 125.420).

Regulating Status of Parties.

As action for annulment of marriage is in rem, court may, in addition to annulling marriage or declaring it void, regulate and determine status of parties. (NRS 125.390).

Cohabitation as Precluding Annulment.

Marriage may not be annulled if cohabitation is continued after attainment of legal age, restoration to sanity, or acquisition of knowledge of fraud. (NRS 125.310-125.340).

Legitimacy of marriage is not affected by annulment on grounds of nonage of either or both of parties to marriage. (NRS 125.410).

Effect on Will.

See category 13 Estates and Trusts, topic 13.16 Wills, subhead Divorced Spouse.

14.12 MARRIED WOMEN:

See topics 14.09 Husband and Wife, Marriage; categories 5 Civil Actions and Procedure, topic Evidence, subhead Witnesses; Debtor and Creditor, topic Homesteads; Documents and Records, topic Acknowledgments; Estates and Trusts, topics Executors and Administrators, Wills; Property, topic Dower.

15 HEALTH

15.0115.04 [RESERVED]

15.05 FOOD, DRUGS, DEVICES AND COSMETICS:

Manufacturing, packaging, processing, labeling and sale of drugs, devices and cosmetics as defined by statute are regulated. (NRS 585.010 et seq.). Administrator of Health Division of Department of Human Resources is charged with appointing Commissioner for enforcement of such requirements. (NRS 585.200). Commissioner is empowered to grant licenses, investigate, inspect, issue regulations and conduct hearings with regard thereto. (NRS 585.200-585.290).

15.05A MEDICAL USE OF MARIJUANA:

Subject to strict guidelines, acquisition, possession, and use of marijuana for medical purposes is permitted. (NRS 453A.200-453A.310).

15.05B NURSING:

Licensure, competency, training and discipline of registered nurses are governed by State Board of Nursing. (NRS 632.140-632.240). Licensure, competency, training and discipline of practical nursing is also governed by State Board of Nursing. (NRS 632.270-632.280).

15.0615.11 [RESERVED]

15.12 PUBLIC HEALTH:

Health care corporations, health care plans, and health maintenance organizations are subject to documentary, filing, and financial requirements. (NRS 695C.010-695C.060).

Durable Power of Attorney for Health Care.

Nevada has adopted Uniform Power of Attorney Act as part of Title 13 of NRS.

Any adult may appoint agent to make health care decision on his or her behalf in “Durable Power of Attorney for Health Care”. Uniform Act not yet assigned statutory provision. Form “Durable Power of Attorney for Health Care” is provided.

Orders not to resuscitate are governed by 450B.400-450B.590.

15.13 SMOKING REGULATIONS:

Smoking in Public Places.

Regulated by 202.2483 et seq. Smoking is prohibited in certain enumerated private and publicly owned facilities and areas. (NRS 202.2483, 202.2491, 202.2492). Smoking prohibited within school buildings or on school property. (NRS 202.2483). Posting of signs prohibiting smoking required. (NRS 202.2483). Sale of cigarettes through vending machine is unlawful in area if minors are permitted access to that area. (NRS 202.2494). Person who violates smoking regulations is guilty of misdemeanor and is liable for civil penalty of $100 for each violation. (NRS 202.2492, 202.24925).

16 INSURANCE

16.01 INSURANCE COMPANIES:

Regulated by Nevada Insurance Code. Insurance commissioner and advocate for insurance customers of department of insurance enforce insurance laws. (NRS 232.805-232.840). Insurers issuing health or life policies or annuity contracts must be members of Nevada Life and Health Insurance Guaranty Association which acts to protect persons specified in statute against insolvent insurers. (NRS 686C.020; 686C.130).

Rates and rate service organizations are regulated by statute. (NRS 686B.010-686B.370).

Annual statements must be filed with Insurance Commissioner on or before Mar. 1. (NRS 680A.270).

Policies.

Statutes regulating particular policies are: life insurance and annuity contracts (NRS 688A.010-688A.430), group life insurance (NRS 688B.010-688B.190), health insurance (NRS 689A.010-689A.755), health insurance for small employers (NRS 689C.010-689C.980), group and blanket health insurance (NRS 689B.010-689B.115), credit life and health insurance (NRS 690A.010-690A.280), casualty insurance (NRS 690B.010-690B.180), property insurance (NRS 691A.010), surety insurance (NRS 691B.010-691B.030), title insurance (NRS 692A.011-692A.270), fraternal benefit societies (NRS 695A.001-695A.580), nonprofit hospital, medical and dental service corporations (NRS 695B.010-695B.320), motor clubs (NRS 696A.010-696A.360).

Insurer cannot cancel, refuse to renew or increase premium on policy of motor vehicle insurance covering private cars or commercial vehicles as result of claims made to which insured not at fault. (NRS 687B.385).

Discrimination.

Unfair discrimination between individuals of same class and equal life expectancy prohibited in life insurance and life annuity contracts; between individuals of same class and essentially same hazard prohibited in health insurance contracts; between persons legally qualified to provide particular services prohibited in health insurance contracts (NRS 686A.100); between insureds or property having like characteristics in premiums or rates, benefits, or other terms, in property, casualty, surety or title insurance (NRS 686A.130).

Rebates are prohibited with certain exceptions. (NRS 686A.110-686A.130).

Misrepresentation or false advertising of policies, or engaging in unfair claims settlement practice, enumerated in statute, is punishable by administrative fine and/or suspension or revocation of license. (NRS 686A.020-686A.310).

Agents, Solicitors and Brokers.

No person may sell, solicit, or negotiate insurance in Nevada for any class of insurance unless he is licensed for that class of insurance. (NRS 683A.201). In order to obtain license, person must: have attained age of 18 years; complete application for license; pass certain background checks; pay certain fees; and unless exempt, have completed course of study for lines of authority for which application is made. (NRS 683A.241-683A.251).

Agent or broker must keep records of all insurance business transacted for three years after expiration of policy. (NRS 683A.351).

Captive Agents.

Pure captive insurers, association captive insurers, agency captive insurers, and rental captive insurers have limitations as to what risk they may insure. There is nonrefundable $500 application fee for captive insurer license and annual fee of $300. License may be renewed annually upon satisfaction of all requirements imposed by Commissioner and payment of renewal fee. (NRS 694C.300, 694C.220, 694C.230).

Process Agent.

Every insurer must appoint Commissioner as attorney for service of process. (NRS 680A.250). Every nonresident agent or broker shall appoint Commissioner as attorney upon whom process may be served, and must file with Commissioner agreement to appear pursuant to notice of hearing, show cause order or subpoena issued by Commissioner. (NRS 683A.281).

Investments.

Insurance companies may invest in certain securities enumerated by statute. (NRS 682A.010-682A.290). Domestic insurers may organize or acquire subsidiaries, or invest in subsidiaries. (NRS 692C.130).

Foreign Insurance Companies.

Foreign insurer to be authorized to transact insurance in state must maintain required reserves, be authorized to transact such business in its domiciliary state or country, and not be in arrears to this state for any sums due it. If insurance protects from liability from ownership use or maintenance of vehicle, insurer must comply with 485.314 and demonstrate compliance to Department of Vehicles and Public Safety. (NRS 680A.080). Foreign insurer must hold substituting certificate of authority from Commissioner authorizing it to transact insurance business in this state. (NRS 680A.060). No foreign insurer owned or controlled in whole or substantial party by any government or government agency can transact insurance business in Nevada. (NRS 680A.090). General corporation laws do not apply to certified foreign insurers holding certificates of authority, except provision for publication of annual statement and registering with Secretary of State and paying fee dependent on number of shares. (NRS 680A.230, 80.190, 80.110). Service of process against foreign insurer is made only upon Commissioner. (NRS 680A.250).

Investment Requirements.

Investment portfolio of a foreign insurer may be as permitted by laws of its domicile if of a quality substantially equal to that required under Nevada Insurance Code for similar funds of like domestic insurers. (NRS 682A.290).

Insurance holding company law authorizes domestic insurers to organize or acquire subsidiaries, or to invest in subsidiaries. (NRS 692C.130).

Premium Tax.

Each insurer and property bondsman must, on or before Mar. 15 of each year, file with Department of Taxation report showing total income derived from premiums written and other income (NRS 680B.030), and pay tax of 3.5% upon net direct premiums and net direct consideration received. (NRS 680B.027).

Fee Schedule.

Commissioner must collect in advance miscellaneous charges. Some of charges are as follows: For filing power of attorney, $5; for issuance and annual continuation of any one kind of insurance, $283; for two kinds of insurance, $578; filing charter documents, $10; filing annual statement, $25; for issuing following licenses, fees are: application and license, $125; resident agent’s appointment, $15; temporary license, $10; surplus lines broker, $125; managing general agents, $125; adjusters, $125; associate adjusters, $125; motor vehicle physical damage appraisers, $125; each insurance vending machine, $125; licenses and renewals for title agents and escrow officers, $125; purchasing groups, $100. (NRS 680B.010). Cities, towns and counties may require additional license fees. (NRS 680B.020).

Direct Actions Against Insurer.

See category 23 Transportation, topic 23.01 Motor Vehicles, subhead Direct Actions.

No-Fault Insurance.

See category 23 Transportation, topic 23.01 Motor Vehicles, subhead No-Fault Insurance.

16.02 SURETY AND GUARANTY COMPANIES:

Surety Companies may be formed under laws regarding private corporations. (NRS 78.020).

Surety Bonds.

See category 5 Civil Actions and Procedure, topic 5.04 Bonds.

17 INTELLECTUAL PROPERTY

17.01 TRADEMARKS AND TRADENAMES:

Any person who adopts or uses mark in this state may file in Secretary of State’s office, on designated form, application for registration of that mark, along with registration fee in amount set by regulation. Registration of mark is effective for five years and may be renewed within six months prior to expiration, along with renewal fee in amount set by regulation. (NRS 600.340-600.360). It is unlawful to imitate or use such label, trademark, form of advertising, name or seal without authorization and any manufacturing, use, display or sale of counterfeits or imitations of mark may be enjoined with judgment for damages, treble damages, costs, attorney fees, and accounting for profits. Violation is also misdemeanor. (NRS 600.420-600.430). Court may also order destruction of counterfeits or imitations. Owner of mark also may bring action to enjoin commercial use of mark by person if such use begins after mark has become famous and likely to cause dilution of mark. (NRS 600.435).

Assignment.

No statutory provision, common law applicable.

Fixing Resale Price.

Fair Trade Act (NRS 599.010-599.070) repealed. Common law governs.

Tradenames.

Every person doing business in this state under assumed or fictitious name which is in any way different from legal name of each person owning interest therein must file with county clerk of each county where business is conducted certificate showing such real name or names and places of residence. (NRS 602.010, 602.020). No person may adopt any fictitious name which includes “Corporation”, “Limited Liability Company”, “Business Trust”, “Professional Corporation”, “Professional Association”, “Limited”, or any like designations and abbreviations unless that person is lawfully organized and registered to do business as such entity in state. (NRS 602.017). Such certificate must be filed also where there is change in membership of co-partnership. (See category 2 Business Organizations, topic 2.07 Partnerships.)

Fee for filing with county clerk certificate of doing business under fictitious name $20.

Assignment.

No statutory provision, common law applicable.

Persons violating this requirement, or their assignees, cannot commence or maintain action on any transaction or cause arising out of business illegally conducted until they file requisite certificate before commencement of action. (NRS 602.070). Such violation also constitutes misdemeanor. (NRS 602.090).

For limitation on use of surnames by limited partnership, see 88.320.

18 LEGAL PROFESSION

18.01 ATTORNEYS AND COUNSELORS:

“The State Bar of Nevada” is incorporated and is under exclusive jurisdiction and control of Supreme Court. It is governed by rules adopted by Supreme Court. (NRS 7.275). It is integrated bar. (Sup. Ct. Rule 77).

Jurisdiction over Admission.

Admission is by Supreme Court upon recommendation of Board of Examiners of State Bar of Nevada. (Sup. Ct. Rule 49).

Educational Requirements.

Applicant for admission must have received a degree of Bachelor of Laws, or its equivalent, from an American Bar Association approved law school. (Sup. Ct. Rule 51).

Registration as Law Student.

(Sup. Ct. Rule 49.5).

Fees.

Before application is further considered, applicant must pay to treasurer of State Bar of Nevada $450, or $650 if previously admitted to practice in another jurisdiction. (Sup. Ct. Rule 54). Applicant admitted must pay additional $25 before receiving license. (NRS 7.030). Annual membership fee for active members in practice more than five years $450; for active members in practice less than five years $250; inactive members $125. (Sup. Ct. Rule 98).

Petition for Admission.

Applicants must, no later than Mar. 1 if application is for following July examination and not later than Oct. 1 if application is for following Feb. examination, file with admissions director of State Bar, on forms furnished by admissions director, verified application in duplicate stating: (a) When and where applicant was born, various places of his residence, and giving at least two references in each place in which applicant has resided since attaining age of 21 years and for the five years immediately preceding filing of application; (b) whether or not applicant has been engaged in business at any time; and, if so, when, where and kind of business; (c) names and post office addresses of all persons by whom applicant has been employed, for period of ten years immediately preceding application; (d) applicant's general and legal education, what schools he has attended, length of time in attendance at each, whether or not he is graduate of any school or schools and whether applicant has ever been subject to discipline for violation of any school policy; (e) whether or not applicant has ever applied to any entity for admission to practice law; if so, when and where, and results thereof; (f) if naturalized citizen, when and where naturalized; (g) whether or not applicant has ever been arrested; if so, when and where, nature of crime and disposition of charge, complaint, indictment of information; (h) marital status of applicant; if married, name of spouse, date and place of marriage, and number and names of children, if any; if divorced, name of former spouse, date and court granting decree; (i) whether applicant has ever applied to practice law in any jurisdiction, and, if admitted, specific information regarding standing, including (1) certificate of clerk of court in state in which he last practiced, certifying that he is member in good standing of bar of that state or district, and that no disbarment or other proceedings affecting his standing as attorney are pending and undisposed of before court; (2) letter of recommendation from judge of court of record before which he last practiced; (3) such other evidence of good moral character and fitness as may be required by court; and (4) such other evidence as may be required by board of bar examiners; (j) whether applicant has ever defaulted on any financial obligations; and (k) whether or not applicant is, or ever has been, member of any organization devoted to or advocating support of, violent overthrow of U.S. or of any state, giving full particulars. Applicants must arrange to be fingerprinted by police or sheriff's office on form provided by state bar and attach it to application. (Sup. Ct. Rules 52-53).

Examination.

Applicants for license to practice as attorneys and counselors will be examined by Board of Bar Examiners, at places fixed by order of Board, every Feb. and every July.

Examination will consist of Multistate Bar Examination and separate written bar examination held for three days during Feb. and July to coincide with dates set by National Conference of Bar Examiners for Multistate Bar Examination. Exam may also include one or more Performance Test questions. (Sup. Ct. Rules 65-66). Transfer of Multistate Bar Examination scores from another jurisdiction not accepted. Applicants must also have passed Multistate Professional Responsibility Exam not earlier than three years preceding year applicant passes examination or no later than three years after applicant passes examnination.

Clerkship.

No requirement.

Admission Without Examination.

All applicants must take examination.

Admission Pro Hac Vice.

Nonresident attorney, even though admitted to practice in Nevada, may practice in Nevada only when associated with Nevada attorney who resides in Nevada and is personally present at all proceedings. Nonresident attorney must also file application on form approved by State Bar, file and serve all counsel and State Bar, pay $500 filing fee to State Bar and set application for hearing; nonresident attorney may not practice until application approved by court. (Sup. Ct. Rule 42).

License.

See subhead Fees, supra.

Liabilities.

No statute.

Compensation.

Compensation of attorney and counselor for his services is governed by agreement, express or implied, which is not restrained by law. (NRS 18.010).

See also category 13 Estates and Trusts, topic 13.08 Executors and Administrators, subhead Attorney's Fees.

Lien.

Attorney has lien on any claim or demand placed in his hands by client for suit or collection, or upon which suit or other action instituted, for amount of agreed upon fee or if no agreement, for reasonable fee for services rendered. Lien attaches to verdict, judgment or decree entered and to money or property recovered from time of service of statutory notices. (NRS 18.015).

Attorney Ethics.

American Bar Association Model Rules of Professional Conduct adopted. (Nevada Rules of Professional Conduct Rule 1 et seq.).

Disbarment or Suspension.

Board of Governors of State Bar has power, after hearing, to discipline members, or to recommend to Supreme Court disbarment, suspension, or fine. Decisions of Board are reviewable by Supreme Court of state. (Sup. Ct. Rules 105, 111-112).

Unauthorized Practice.

It is unlawful to practice unless one is active member of State Bar. (Sup. Ct. Rule 77).

Professional Association.

See category 2 Business Organizations, topic 2.02 Associations, subhead Professional Associations.

19 MINERAL, WATER AND FISHING RIGHTS

19.01 MINES AND MINERALS:

Bureau of mines and geology has been established and placed under direction of regents of University of Nevada and community college system and director appointed by them. (NRS 514.010-514.080).

Persons employed or working in underground mines or underground workings must not be employed more than eight hours in any 24-hour period except in emergencies or in event no qualified employee is available for relief. (NRS 608.200).

Portal to Portal Time.

Time occupied in getting to place of work and back again or for meals is not included in eight hours. (NRS 608.200).

Maliciously removing or altering boundary mark is public offense proportionate to value of loss resulting therefrom, but not less than misdemeanor. (NRS 206.220).

Mortgagee of mining claim may preserve it by doing acts his mortgagor could do to prevent forfeiture. (NRS 111.050).

Lode Locations.

Any U.S. citizen or anyone who has made declaration of intention to become citizen, who discovers vein or lode, may locate lode claim by erecting monument at place of discovery and posting thereon notice of location. Boundaries must be marked within 60 days after posting location notice and two maps of claim must be filed with county recorder within 90 days. Within 90 days after posting location notice, claim must be recorded with county recorder by filing duplicate location certificates. (NRS 517.010-517.080).

Placer Claims.

Location of placers must be made by posting notice of location, marking boundaries, recording notice of location and two maps of claim with county recorder. (NRS 517.090-517.110).

Mill Site.

Proprietor of mine or mining claim or owner of mill or reduction works may locate five acres of non-mineral land as mill site by posting notice of location, marking boundaries, and recording notice of location and two maps of claim with county recorder. (NRS 517.120-517.140).

Tunnel rights may be located by posting notice of location, marking boundaries and recording notice and maps as in other cases. (NRS 517.150-517.180).

All Locations.

Locater of lode or placer claim or claim for mill site or tunnel right must post separate notice of location and record separate certificate of location for each location; if either includes more than one location, void as to all others. (NRS 517.195). Fee, in amount to be determined by regulation but not to exceed $6 per claim, must accompany each filing. (NRS 517.185). Division of minerals must prescribe forms for documents to be recorded and adopt regulations concerning maps. (NRS 513.075).

Oil and Gas.

Production of oil and gas is regulated by statute with view to conservation, under supervision of division of mineral resources of Department of Conservation and Natural Resources. (NRS 522.010-522.150).

Pipe lines transporting crude oil or petroleum are declared to be common carriers and placed under jurisdiction of Public Utilities Commission. (NRS 708.010-708.140).

Sale and distribution of petroleum and its products are regulated by statute, and standard specifications prescribed for products sold as “motor vehicle fuel” and other types of fuels. (NRS 590.010-590.330).

Mining Partnerships.

Express agreement not necessary. Profits and losses shared pro rata. Each member has lien. Gravel worked by is property of partnership. Not dissolved by sale of interest. Purchaser takes subject to liens. Part of partners cannot bind by writing. Majority govern. (NRS 520.160-520.260).

Taxation.

Mines and mining claims, when not patented, are not taxed, the proceeds and royalties only being taxable. (NRS 362.010-362.240). If proceeds of unpatented mine are uncollectible in executive director's opinion, upon approval of county commissioners, district attorney and Nevada Tax Commission, department may remove name and amount from its tax records. (NRS 362.175). If at least $100 in development work has been actually performed upon patented mine in year, there will be no assessment against that particular patented mine or mining claim. (NRS 362.040). Department of Taxation determines and assesses net proceeds of operating mines; appraises and assesses smelters, mills, and other facilities, and all machinery, equipment, and improvements used in connection with mining or related operations. Every operator and recipient of royalties must file verified report of claimed net proceeds with department on or before Feb. 16 of each year. (NRS 362.100-362.110). For deductible items and determining gross yield, see 362.120. Royalty payments do not include fixed and periodic rental or other compensation not related to extent of use, or fixed and periodic minimum royalty covering period when mine not in production. (NRS 362.105).

Exploration of Patented Claims Forfeited for Nonpayment of Taxes.

When a patented mine or claim has become property of county for nonpayment of amount of one year's taxes, plus penalties and costs, county commissioners may, without charge, and provided mine or claim has been property of county for less than one year, grant permit to explore it for period of six months, with privilege of purchase at expiration thereof. When mine or claim is property of county for more than one year, any U.S. citizen may file with board of county commissioners of such county to have such mine or claim advertised for sale to highest bidder. (NRS 517.390-517.460).

Printed pamphlets of mining laws may be secured without charge from Inspector of Mines, 400 W. King St., Suite 210, Carson City, Nevada 89703.

20 MORTGAGES

20.01 CHATTEL MORTGAGES:

Uniform Commercial Code adopted. (NRS 104.1101-104.9507). See category 3 Business Regulation and Commerce, topic 3.09 Commercial Code.

See also category 23 Transportation, topic 23.01 Motor Vehicles, subhead Titles, Sales and Liens.

What May Be Mortgaged.

See category 3 Business Regulation and Commerce, topic 3.09 Commercial Code.

Requisites of Instrument.

See category 3 Business Regulation and Commerce, topic 3.09 Commercial Code.

Execution of Instrument.

See category 3 Business Regulation and Commerce, topic 3.09 Commercial Code.

Filing.

See category 10 Documents and Records, topic 10.04 Records, subhead Filing Under Commercial Code.

Real estate mortgage and chattel mortgage may be included in one document and recorded in special book provided document complies with statutory requirements (see category 10 Documents and Records, topic 10.01 Acknowledgments). (NRS 247.180).

Refiling or Extension.

See category 3 Business Regulation and Commerce, topic 3.09 Commercial Code.

Duration of Lien.

See category 3 Business Regulation and Commerce, topic 3.09 Commercial Code.

Removal of Property by Mortgagor.

See category 3 Business Regulation and Commerce, topic 3.09 Commercial Code.

Fraudulent Intent.

Debtor who removes property subject to security interest from county in which property located with intent to hinder, delay or defraud secured party is guilty of gross misdemeanor. (NRS 205.335).

Assignment or Discharge.

See category 3 Business Regulation and Commerce, topic 3.09 Commercial Code.

Foreclosure.

See category 3 Business Regulation and Commerce, topic 3.09 Commercial Code.

Redemption.

See category 3 Business Regulation and Commerce, topic 3.09 Commercial Code.

Forms.

See end of this Digest.

20.02 COLLATERAL SECURITY:

See category 8 Debtor and Creditor, topic 8.15 Pledges.

20.03 MORTGAGES OF PERSONAL PROPERTY:

See topic 20.01 Chattel Mortgages.

20.04 MORTGAGES OF REAL PROPERTY:

Property of all kinds may be mortgaged, including mining claims and possessory claims to public lands as well as estates for years. (NRS 111.010; 106.195; 106.200). Mortgage is not alienation, but mere security for debt, and though absolute in form does not give mortgagee right of possession. (NRS 40.050; 23 Nev. 134, 43 Pac. 916; ; 54 Nev. 388, 19 P.2d 769).

Execution.

Mortgage is within provisions of statute dealing with conveyances, and must be executed in manner of conveyance. (NRS 111.010; 55 Nev. 350, 34 P.2d 1076). See category 21 Property, topic 21.06 Deeds. No seal is required. (NRS 52.315).

Recording.

Mortgages must be recorded in county where property is situated or, for instrument filed by public utility, in office of Secretary of State to extent permitted by 105.010-105.080, and such record imports notice to all persons. If not so recorded, mortgage is void as against subsequent purchaser or mortgagee in good faith and for valuable consideration whose deed or mortgage is first recorded. (NRS 111.320; 111.325). As to recording fees, see category 10 Documents and Records, topic 10.04 Records.

Future Advances.

Mortgage may cover future advances. (NRS 106.360).

Assignment or Subordination.

Assignment of mortgage of real property or of beneficial interest under deed of trust, or copy thereof certified by notary public or other officer authorized to take acknowledgment, may be recorded, and record operates as constructive notice of contents of instrument from date of recordation. Same rule applies to any instrument by which mortgage, deed of trust, lien on or interest in real or personal property is subordinated or waived as to priority. (NRS 106.210-106.220).

Mortgage may be assigned by entry on margin of record, signed by mortgagee, his personal representative, or assignee. (NRS 106.260).

Discharge and Satisfaction.

Upon full performance of conditions of mortgage, whether or not there has been breach, mortgagor is entitled to certificate of discharge, duly acknowledged and recorded. Properly executed entry of satisfaction on margin of record likewise discharges mortgage. (NRS 106.260-106.290).

Partial release may be executed and acknowledged by mortgagee and recorded. It should describe mortgage, its place of record and land released from lien. (NRS 106.260-106.270).

Foreclosure.

Except as provided in U.C.C. (c. 104) or when real collateral is environmentally impaired if estimated clean up and remedial costs exceeds 10% of indebtedness secured by collateral there is but one action for foreclosure of mortgage, which must be by suit in district court. Judgment and decree must direct sale of property by sheriff to pay mortgage debt and costs and expenses. Sale must be made by sheriff in same manner as sales upon execution. (NRS 40.430-40.450; 40.512). Notice of lis pendens must be recorded in recorder’s office of county where property is situated. (NRS 14.010). Priority of distribution of proceeds of foreclosure sale are: (a) Payment of expenses of taking possession and protecting property, costs and fees of sale including trustees fees, taxes, costs of title insurance, and if provided in lien, any advances, and attorney fees and expenses; (b) satisfaction of obligation being enforced by sale; (c) satisfaction of obligations secured by junior liens in order or priority, and (d) balance, if any, to debtor. Junior lien holders must submit proof of obligation within 15 days or demand by person conducting sale, or will waive any right to proceeds. (NRS 40.462). If there be surplus from proceeds of sale, it may be paid to person entitled to it. (NRS 40.440). If there be deficiency, judgment creditor or beneficiary of deed of trust, within three months from date of foreclosure sale or trustee’s sale held pursuant to NRS 107.080, and after hearing to determine fair market value of property sold as of date of foreclosure sale or trustee's sale, shall be awarded deficiency judgment. Deficiency judgment must not exceed lesser of difference between fair market value of property at time of sale with interest from date of sale and amount of secured indebtedness, or difference between sale price and amount of indebtedness. (NRS 40.451-40.459).

No moratorium on mortgage foreclosures.

Obligation of guarantor on note secured by deed of trust not within scope of one action rule. (91 Nev. 396, 536 P.2d 487). Upon full satisfaction by guarantor or other surety on note secured by deed of trust, payor is entitled to assignment of security and can enforce all remedies against mortgagor or grantor of deed of trust (NRS 40.475); upon partial satisfaction, payor has lien in proceeds of indebtedness to extent of payment (NRS 40.485).

Redemption.

Property sold under foreclosure of mortgage may be redeemed from purchaser any time within one year after sale by paying purchaser amount of purchase price plus 1% per month to time of redemption and any taxes or payments toward liens created prior to purchase and paid by purchaser plus interest. Property redeemed by redemptioner may be redeemed by successive redemptioners within 60 days of last redemption. (NRS 21.210-21.220). See category 8 Debtor and Creditor, topic 8.05 Executions.

Deeds of Trust.

Any estate in real property, including an estate for years, may be transferred in trust to secure performance of obligation for payment of any debt. (NRS 107.020). Power of sale is conferred upon trustee. After breach beneficiary must record notice of such breach and of his election to cause sale to be made and mail copy of notice to grantor and to person who holds record title as of date notice is recorded at their respective addresses; and not less than three months must thereafter elapse before noticing of such sale. Notice must be locally posted and published. (NRS 107.080). Grantor or successor in interest or anyone else who has subordinate lien of record on property has period of 35 days following filing of notice of breach in which to make good his deficiency in performance or payment. If acceleration is permitted by note secured by deed of trust, such acceleration shall not occur if deficiency in performance or payment is made good and cost of recording such notice is paid within 35 days following recording of such notice. Notice of time and place of sale must be given after expiration of three month period and in manner and for time not less than required by law for sale of real property upon execution. Notices must be given to grantor and person who holds record title as of date of notice of default; however any person who is or may be liable for any debt secured by lien on property who recorded request for notice must also be given notice. Statute particularly describes various covenants of grantor commonly used in deeds of trust and provides that they may be incorporated in deed of trust merely by reference to them by covenant numbers as contained in act; any assumption fee must be set forth in deed of trust at time of execution. (NRS 107.030-107.100).

There is no equity or right of redemption after a sale made under the power of sale contained in such trust deeds. (NRS 107.080).

Persons with an interest evidenced by recorded instrument in real property subject to trust deed or any other person who is or may be liable for any debt secured by lien on property may record request for notice of default or sale under deed of trust on real property at county recorder's office of county where property is located. Request should identify deed of trust by stating names of parties, date recorded, and volume and page number and state name and address of those requesting it. Person authorized to record notice of default must send copy to whoever requested it within ten days of recordation. Person authorized to make sale must send notice of sale to those who requested it 20 days before sale. (NRS 107.090).

Deficiency Judgments.

See subhead Foreclosure, supra.

Form.

The following is the briefest form of mortgage:

Form

This indenture, made this . . day of . . by and between . . mortgagor, and . . mortgagee, witnesseth: That the mortgagor for and in consideration of the sum of $. . in hand paid by the mortgagee, receipt of which is hereby acknowledged, does by these presents grant, bargain, sell, convey and confirm unto the mortgagee; his heirs (or if it is a corporation, its successors) and assigns forever, all that certain real property situate, lying and being in (put in name of city, county, etc.), State of Nevada, described as follows, to-wit (insert description). Together with all and singular the tenements, hereditaments and appurtenances thereunto belonging or in any wise appertaining, and the reversion and reversions, remainder and remainders, rents, issues and profits thereof.

Nevertheless this conveyance is intended as a mortgage to secure the payment of all sums which are or may hereafter in any manner become due or owing from the mortgagor to the mortgagee, and particularly the payment of a certain promissory note, which note is in the words and figures following to-wit: (Insert copy of note). In witness whereof, mortgagor has hereunto set his hand and seal the day and year first above written.

. . . .(Seal).

Add acknowledgment.

In addition, it is customary to insert in mortgage provisions that it is to secure any additional sums loaned by mortgagee to mortgagor, provisions concerning insurance on premises, for payment of taxes by mortgagor, right of mortgagee to compromise adverse claims, fixing rate of interest on sums advanced over and above original indebtedness, provisions for right of mortgagor to take possession or have receiver appointed therefor in event of default and starting suit to foreclose, statement that all covenants bind, heirs, representatives and assigns of mortgagor and mortgagee, warranties of title, covenants against waste, and similar provisions for protection of parties in accordance with idea of person drawing mortgage.

Most such covenants are contained in statute and can be incorporated in mortgage or deed of trust by reference to statute and number of covenant. (NRS 106.020-106.050; 107.030-107.050).

Master form mortgages or deeds of trust can also be incorporated by reference to county where it is recorded, date it was recorded, book or volume and first page of record in recorder’s office where located, and by paragraph numbers that definitely identify provisions incorporated. (NRS 111.353).

There are no statutory forms for assignment, satisfaction or partial release of mortgage. Any form which particularly describes object is sufficient.

Chattel Mortgages.

See category 3 Business Regulation and Commerce, topic 3.09 Commercial Code.

21 PROPERTY

21.01 ABSENTEES:

Unknown Heirs.

In actions involving title to real property where names and residences of decedent's heir are unknown to plaintiff, such heirs may be described as unknown heirs of such decedent with name, last place of residence, and any further available identification of decedent. Upon trial, proof must be given of diligent search to ascertain names and residences of heirs, and that same remain unknown to plaintiff. (NRS 12.120).

See also category 13 Estates and Trusts, topic 13.05 Death.

In probate proceedings, court may appoint attorney to represent absent heirs, devisees or legatees unless absent party retains own counsel. (NRS 136.200; 150.180, 152.040).

Care of Property.

When property is assigned or distributed to person who cannot be found, or to minor or incompetent person who has no legal guardian, money may be deposited in name of such person with county treasurer, who is liable on his official bond therefor. (NRS 151.170). If such nonresident is minor, or insane or incompetent, distribution may be made to legally appointed foreign guardian of such person. (NRS 151.180). If estate remains unclaimed for one year, it may be sold by order of court and proceeds paid to county treasurer. (NRS 151.190).

Process Agent.

There is statutory provision for appointment of agent for service of process upon resident agent for foreign corporation, upon Secretary of State in absence of such resident agent and upon Director of Department of Motor Vehicles under Nonresident Motor Vehicle Statute.

See category 5 Civil Actions and Procedure, topic 5.20 Process; also category 23 Transportation, topic Motor Vehicles. (NRS 14.020, 14.030, 14.070).

Escheat.

In any receivership dividend unclaimed for three years reverts to general fund of estate and is applied, in order, to pay: (1) Costs of administration, and (2) creditors not previously paid in full. After claims are paid in full, balance is deemed abandoned under Uniform Unclaimed Property Act. (NRS 32.020).

See also categories 3 Business Regulation and Commerce, topic Banks and Banking, subhead Unclaimed Deposits; Estates and Trusts, topics Descent and Distribution, subhead Escheat, Wills, subhead Unclaimed Legacies.

21.02 ADVERSE POSSESSION:

Possession is presumed to be in holder of legal title, and possession of another is presumed to be subordinate to legal title until adverse elements are made to appear. (NRS 11.100). Possession of tenant is presumed to be possession of landlord. (NRS 11.160).

Character of Possession.

Where occupant's possession is under written instrument, or judgment, or decree, it is sufficient that land has been usually cultivated or improved, or protected by substantial enclosure, or where not enclosed has been used for supply of fuel or fencing timber, husbandry, pasturage or ordinary uses of occupants. Where a known farm or single lot is partly improved, the portion not cleared or enclosed, according to the usual course and custom of the adjoining country, is deemed occupied for the same time as the part improved and cultivated. (NRS 11.120). Where premises consist of a tract divided into lots, possession of one lot is not deemed possession of any other lot of the same tract. (NRS 11.110).

Where the occupant's claim is not founded upon a written instrument, only the premises actually occupied are deemed held adversely (NRS 11.130), and the property must have been protected by a substantial enclosure or cultivated or improved (NRS 11.140).

Payment of Taxes.

In all cases, whether occupant's possession is or is not under a written instrument, occupant or his predecessors must have paid or tendered all state, county and municipal taxes on property for five years immediately preceding action. (NRS 11.150).

Duration of Possession.

Five years adverse possession is sufficient to defeat recovery by another (NRS 11.070-11.080); two years for mining property (NRS 11.060). Fifteen years of adverse possession is necessary for possessor to bring action to remove cloud upon title to real property unless cloud was created by possessor in which case possession must be for ten years. (NRS 40.090).

Easements.

Five years adverse user is sufficient. (NRS 11.070-11.180; 19 Nev. 69, 6 Pac. 437).

Disabilities.

Where the owner is under age of majority, insane, or imprisoned, there is no adverse possession for the period of disability if it existed at the time title first accrued to him, and he may bring action to recover property within two years after removal of the disability (NRS 11.180), but where the property has been sold by a guardian, executor or administrator, he has only one year (NRS 11.280).

21.03 [RESERVED]

21.04 CONVEYANCES:

See topic 21.06 Deeds.

21.05 CURTESY:

Abolished by 123.020.

21.06 DEEDS:

See also topic 21.16 Real Property; categories 8 Debtor and Creditor, topic Homesteads; Family, topic Husband and Wife.

Execution.

Conveyances of land or of any estate or interest therein may be made by deed, signed by the grantor, if of lawful age, or by his lawful agent or attorney, and acknowledged or proved. (NRS 111.105, 111.240). For circumstances in which spouse might join see category 14 Family, topic 14.09 Husband and Wife.

Deed does not need to be witnessed. Seal is not necessary; however, it is better practice to place seal on corporate deed. (NRS 52.085, 52.315).

Delivery.

Deed does not take effect until delivered. To be effective, delivery must place deed beyond control of grantor. (51 Nev. 437, 279 Pac. 32).

Recording.

When properly acknowledged, deed is entitled to be recorded in office of any county recorder in this state (NRS 111.310) provided it contains grantee's mailing address or mailing address of person requesting recording and assessor's parcel number at top left corner of first page, if any (NRS 111.312). Deed which seeks to transfer ownership upon grantee's death must be recorded before death of owner or death of last surviving owner. (NRS 111.109). Any conveyance of real property or instrument in writing setting forth agreement to convey real property will not be recorded unless document being recorded contains name and address of person to whom statement of taxes assessed on real property is to be mailed. (NRS 111.312). If document that is being recorded includes legal description of real property that is provided in metes and bounds, document must include name and mailing address of person who prepared legal description. (NRS 111.312). For recording fees, see category 10 Documents and Records, topic 10.04 Records.

Conveyance of or agreement to convey real estate is valid and binding between parties without any recording, but in order to operate as notice to third persons it must be recorded in office of recorder of county in which real estate is situated or, for instrument filed by public utility, in office of Secretary of State. (NRS 111.315). If not so recorded it is void as against subsequent purchaser in good faith and for valuable consideration whose conveyance is first recorded. (NRS 111.315-111.325). See also category 10 Documents and Records, topics 10.03 Notaries Public, 10.04 Records.

Power of attorney to convey real estate must be executed, acknowledged and recorded like deed in order to be effective. (2009, c. 64 § 42).

Effect.

Words "grant, bargain and sell" warrant that grantor has not suffered any encumbrance or transfer of title prior to execution of conveyance. (NRS 111.170). Special warranties may be inserted.

Deeds (except quitclaim) convey after acquired title as well as present title. (NRS 111.160). Deeds to two or more grantees convey tenancy in common unless they expressly state that title is to be held by joint tenancy. (NRS 111.060).

Taxes.

See category 22 Taxation, topic 22.13 Property Taxes, subhead Real Estate Conveyance Tax.

Form.

The following may be used:

Form

This indenture, made this . . . . day of . . . ., 20. . . ., between . . . . of the county of . . . ., party of the first part, and . . . . of the county of . . . ., party of the second part. Witnesseth: That said party of the first part, for and in consideration of the sum of . . . . dollars to him in hand paid by said party of the second part, the receipt whereof is hereby acknowledged, does by these presents grant, bargain and sell unto said party of the second part, his heirs and assigns forever, all that certain lot, piece or parcel of land situate, lying and being in the county of . . . ., state of . . . ., and more particularly described as follows, to wit: . . . . . Together with all and singular the tenements, hereditaments and appurtenances thereunto belonging or in anywise appertaining, and the reversion and reversions, remainder and remainders, rents, issues and profits thereof. To have and to hold, all and singular the said premises together with the appurtenances unto said party of the second part, and to his heirs and assigns forever. In witness whereof, the party of the first part has hereunto set his hand and seal the day and year first above written.

In quitclaim deed, conveying words are "remise, release and forever quitclaim."

In joint tenancy deed, conveyance should run to "the said parties of the second part and the survivor of them," and same words should be used in habendum clause.

21.07 DEEDS OF TRUST:

See category 20 Mortgages, topic 20.04 Mortgages of Real Property.

21.08 DOWER:

Abolished by 123.020.

21.09 ESCHEAT:

See topic 21.01 Absentees, subhead Escheat; categories 2 Business Organizations, topic Corporations, subhead Unclaimed Dividends; Business Regulation and Commerce, topic Banks and Banking, subhead Unclaimed Deposits; Estates and Trusts, topics Descent and Distribution, subhead Escheat, Wills, subhead Unclaimed Legacies.

21.10 LANDLORD AND TENANT:

Statutory provisions govern rights, liabilities, obligations and remedies under rental agreement for dwelling unit (118A et seq.) and mobile homes (118B et seq.). Landlord must deliver premises to tenant at commencement of rental term in habitable condition. (NRS 118A.280). In absence of good faith agreement to contrary, landlord must maintain dwelling unit in habitable condition. (NRS 118A.290).

Uniform Commercial Code Art. 2A adopted. (NRS 104A.010-104A.2532).

Rent.

Rent may be increased only upon 45 days' written notice, or in case of tenancy of less than one month, 15 days in advance of first rental payment to be increased. (NRS 118A.300). Landlord may not demand or receive security (including last month's rent, cleaning or repair deposit) which total amount exceeds three months' periodic rent. (NRS 118A.240-118A.242).

Leases.

Written rental agreements must be signed by landlord and tenant, or their agents, and must contain certain specified provisions as to duration, rent, manner and time of payment, occupancy by children or pets, services included with unit, extra fees, deposits, late charges, charges for returned checks, inspection rights of landlord, listing of persons or number of persons to occupy unit, responsibility for utility charges, inventory of premises, summary of provisions of NRS 202.470, information regarding procedure pursuant to which tenant may report to appropriate authorities: nuisance or violation of building, safety or health code or regulation and information regarding tenant's right to display American flag. (NRS 118A.200, 118A.210). Landlord may not refuse to rent dwelling solely because service animal will be residing with prospective tenant. (NRS 118.105). Leases for more than one year must be in writing. (NRS

111.210). Lease may not exceed following terms: Agricultural or grazing land, 25 years; other real property, 99 years. Lease for longer period is void as to excess. (NRS 111.200).

Notices.

At or before commencement of tenancy, landlord, or agent, must disclose to tenant names and addresses of manager, owner, or person within Nevada authorized to accept service of notices, demands and process regarding premises and telephone number at which responsible person who resides in county or within 60 miles where premises are located who may be called in case of emergency. Alternatively, notice may be made by placing printed or typewritten notice in every elevator and one other conspicuous place or if no elevators, in at least two conspicuous places. Service upon manager or agent is deemed service upon landlord. (NRS 118A.260; 118A.270).

Termination.

If landlord fails to comply with rental agreement, tenant shall deliver written notice to landlord specifying acts and omissions constituting breach. If landlord fails to remedy breach, or make reasonable effort to do so, within 14 days tenant may terminate rental agreement and recover actual damages unless condition complained of was caused by his act. If landlord breaches rental agreement or fails to maintain premises in habitable condition, and reasonable cost of compliance is less than greater of $100 or one month's rent, tenant may notify landlord of his intention to correct condition at landlord's expense. If landlord fails to correct condition within 14 days after notice, tenant may correct condition and deduct cost of work from his rent, upon submission of itemized statement to landlord. (NRS 118A.350, 118A.360). Tenant may also terminate agreement under certain circumstances if landlord fails to deliver possession (NRS 118A.370), unlawfully removes or blocks tenant from premises (NRS 118A.390) or if premises are damaged or destroyed by fire or casualty (NRS 118A.400). Landlord may terminate for any breach of rental obligation or statutory obligation, but tenant must be given notice and five days to remedy breach. If tenant's breach can be remedied by repair, replacement of damaged item or cleaning, and tenant fails so to do within 14 days after written notice, landlord may enter unit, complete work and bill tenant for work so done on next periodic rent. (NRS 118A.430, 118A.440).

Landlord may not terminate in retaliation for any exercise by tenant of rights granted in rental agreement or by statute. (NRS 118A.510).

Failure to Provide Essential Services.

If landlord fails to provide essential services, including heat, air conditioning, water, electricity, etc., tenant may (1) procure services; (2) recover damages; (3) withhold rent; and/or (4) procure other housing. (NRS 118A.350-118A.360, 118.380).

Abandonment of Dwelling Unit.

If tenant abandons, landlord must store tenant's property for 30 days, after which tenant's property may be sold. Landlord must notify or attempt to notify tenant of his intent to dispose of property 14 days before intended sale. (NRS 118A.450, 118A.460).

Other Abandonment.

If tenant abandons property before expiration of term, rental agreement terminates when tenant provides notice of intent to abandon and landlord accepts surrender of property, landlord re-rents property, property is deemed to be abandoned, agreement terminated by court order, or agreement expires per its terms. (NRS 118.185). Property is deemed to be abandoned if landlord, believing tenant has abandoned property and tenant is in default of payment of rent, serves tenant with notice and within five days thereafter tenant fails to pay rent due and to provide landlord with written notice setting forth intent not to abandon and address where tenant may be served with process. (NRS 118.195).

Lien.

Landlord’s lien or security interest in tenant’s household goods must be created by attachment or garnishment. (NRS 118A.520).

Distress.

Distraint for rent is abolished. (NRS 118A.520).

Summary Proceedings.

Summary dispossession of tenant is by unlawful detainer proceedings. Tenant of real property or mobile home for term less than life is guilty of unlawful detainer when having leased: (1) Real property or mobile home for indefinite time with periodic rent, if he continues in possession after five days’ notice for tenancy at will, seven days’ notice for weekly tenancy and 30 days’ notice for all other periodic tenancies, (2) dwelling unit defined in 118A if he continues in possession after expiration of its term and expiration of notice of seven days for weekly tenancies and 30 days for all others or five days’ notice of breach by tenant of obligations under 118A, (3) mobile home lot defined in 118B if he continues in possession after advance notice of five days if termination due to tenant’s conduct constituting nuisance, ten days if termination due to failure to pay rent or service fees, 180 days if termination due to change of land use by landlord, 45 days if termination for any other reason. (NRS 40.250-40.255, 118B.180; 118B.190).

Tenant of real property or mobile home for term less than life also guilty of unlawful detainer if: (1) Continues in possession after default in payment of rent and written notice requiring rent or surrender of premises not complied with for five days, or in case of mobile home lot ten days (NRS 40.2512), (2) assigns or sublets contrary to lease terms, commits waste, conducts unlawful business, or maintains any nuisance on leased premises, and continues in possession after service of three days’ notice to quit (NRS 40.2514), or (3) continues in possession after failure to perform any term of lease or agreement (other than specified above) after service of five days’ written notice requiring performance of term or surrender of property (NRS 40.2516).

When tenant is guilty of unlawful detainer, landlord is entitled to summary eviction procedures, except that written notice to surrender premises must be given to tenant, which notice advises tenant of his right to contest action by filing affidavit with court having jurisdiction over matter that he is not guilty of unlawful detainer. (NRS 40.250, 40.253). If tenant timely files affidavit that he has tendered payment or paid rent, landlord, after receipt of conformed copy of filed affidavit cannot provide for nonadmittance of tenant to premises by locking or otherwise. If tenant disputes costs claimed by landlord, may file motion with court which conducts hearing within ten days to determine costs, if any, and order release of tenant’s property. (NRS 40.253). Landlord utilizing summary eviction procedures must submit affidavit to court with jurisdiction containing: (1) Date tenancy commenced, its term, and copy of rental agreement; (2) amount of any periodic rent reserved, or any rent or deposits paid in advance; (3) date rental payments became delinquent, amount of time tenant has remained in possession without payment, and amount delinquent; and (4) statement that written notice was served on tenant, together with copy of written notice. (NRS 40.253). Summary eviction procedures are also available when tenant of any dwelling, apartment, mobile home or commercial premises with periodic rent reserved by month or any shorter period is in default in payment of such rent. Landlord must follow substantially same procedure as outlined for summary eviction in unlawful detainer cases. (NRS 40.253).

If tenant is 60 years of age or older or has physical or mental disability, tenant may request to continue possession for additional 30 days by submitting written request. If landlord rejects request, tenant may petition court for extension. (NRS 40.251).

Court may issue temporary writ of restitution, pendente lite, on application after defendant has been given opportunity to be heard, and upon filing of sufficient bond. (NRS 40.300).

If verdict, or court finding, is in favor of plaintiff judgment is entered for restitution of premises, and if case be for unlawful detainer, after failure to perform any condition of lease or agreement or after default in rent, judgment forfeits lease or agreement. Judgment must also cover damages occasioned by forcible entry or forcible or unlawful detainer, waste and unpaid rent. Judgment in forcible entry or forcible or unlawful detainer must include rent due and treble damages. Where case is for unlawful detainer after default in rent and lease has not by its terms expired execution is stayed for five days after entry of judgment, during which tenant, subtenant, or other party interested may pay judgment and estate be restored. If no such payment made judgment and possession of premises. In all other cases judgment may be enforced immediately. (NRS 40.360).

Public Housing Authorities and Landlords.

Summary statutory procedure for eviction if tenant or person residing with tenant is convicted of certain offenses regarding controlled substances. (NRS 315.031, 315.041, 315.051).

Remedies of tenant against subtenant to obtain possession of premises are much same as remedies of original lessor to obtain possession from his lessee. (NRS 40.270).

21.11 LEASES:

See topic 21.10 Landlord and Tenant.

21.12 PARTITION:

Any one of several persons holding possession of real estate as joint tenants or in common, in which they have estate of inheritance, or for life or lives, or for years, may bring suit for partition and sale of property, or part of it, if partition cannot be had without great prejudice to owners or if owners consent to sale. When impracticable or inconvenient to make complete partition among all parties, court may determine shares held by original co-tenants and cause partition to be made as if such original co-tenants were sole parties in interest, and partition separately each share or portion so ascertained and allotted between those claiming under original tenant, or may allow them to remain tenants in common thereof if they desire. (NRS 39.010).

Proceedings.

Complaint must set forth interests of all persons in property. (NRS 39.020).

Lienholders of record must be brought in as parties, or master will be appointed to ascertain and report extent of their interests. (NRS 39.100).

Lienholders not of record need not be made parties. (NRS 39.030).

Notice of lis pendens must be recorded by plaintiff immediately after recording complaint. (NRS 39.040).

Summons must be directed to all interested parties. (NRS 39.050).

Unknown parties may be served by publication and court may appoint attorney to represent. (NRS 39.060).

Answer must specify defendants' interests, and nature and amount of any liens they claim. (NRS 39.070).

Partition in Kind or Sale.

If partition in kind cannot be made without great prejudice to owners, or if owners consent, sale may be ordered. Otherwise partition must be ordered and master may be appointed to make partition. (NRS 39.120).

Partition among heirs and devisees of decedent's real or personal estate may be had on petition filed at any time before decree of distribution. (NRS 152.010-152.170). When real property cannot be divided without prejudice or inconvenience to owners, it may be assigned to one of them who will accept and pay others just price or furnish adequate security. (NRS 152.150).

Sale may be ordered on recommendation of commissioners, where property cannot be divided fairly. Such sale must be conducted, reported on and confirmed, in same manner as sales by personal representative pursuant to court order. (NRS 152.110). See category 13 Estates and Trusts, topic 13.08 Executors and Administrators.

21.13 PERPETUITIES:

No perpetuities are allowed except for charitable purposes. (Const., Art. XV, § 4).

21.14 PERSONAL PROPERTY:

There are no tenancies by entireties. See 123.010 and 123.220, which apply community property law to all property except enumerated cases.

21.15 POWERS OF ATTORNEY:

Every power of attorney designed to affect interest in real estate must be acknowledged, or proved and certified, and recorded, in same manner as conveyances generally. (2009, c. 64 § 42).

The revocation of recorded power of attorney can be effected only by depositing revocation in office in which instrument containing power is recorded. (2009, c. 64 § 42).

Revocation.

Written power of attorney that contains words that it is not affected by disability of principal, or becomes effective upon such disability, or similar words, may be exercised as provided in power notwithstanding principal's later disability or incapacity. (2009, c. 64 §§ 24, 56, 68). All acts done by attorney bind principal and principal's successors in interest as if principal had performed act. (2009, c. 64 § 40). If court appoints guardian of principal's estate after principal executes power of attorney, power of attorney is terminated. (2009, c. 64 § 23).

Incapacity of principal who executed nondurable power of attorney does not terminate agency as to attorney in fact or other person who, without actual knowledge of incapacity acts in good faith under power of attorney. (2009, c. 64 § 25).

21.16 REAL PROPERTY:

In Nevada, real estate may be held in joint tenancy (NRS 111.065), tenancy in common (NRS 111.060-111.064), as community property of husband and wife (NRS 123.030), and/or in condominium (NRS 117.010). Tenancy by entirety is not mentioned in statute but seems to be abolished by implication.

Tenancy in common is created by grant or devise to two or more persons, other than executors and trustee, unless instrument expressly declares estate granted or devised to be joint tenancy. (NRS 111.060).

Joint tenancy may be created without intervention of third person or “straw man.” (NRS 111.065).

Foreign Conveyances or Encumbrances.

See category 10 Documents and Records, topic 10.01 Acknowledgments.

Soliciting Land Sales.

Board of county commissioners and governing body of incorporated city may license and regulate solicitation of customers for land sales. (NRS 599A.050). Regulations for solicitation and advertisement of subdivision sales are provided by statute. (NRS 119.010-119.340). Any concealment or misrepresentation of material fact, or false or deceptive statement, or failure to disclose obligations connected with any free benefit offered to customers, or contacting any person to attend sales presentation without first disclosing purpose is misdemeanor. (NRS 599A.060).

Condominiums are allowed if plan is recorded in county where located which describes surface of land, diagrams floor plans of buildings in order to identify each unit, and contains consent of record owners and holders of security interests to recordation of such plan. (NRS 117.020). Rule against perpetuities and rule against unreasonable restraints on alienation do not defeat provisions of NRS 117 relating to condominiums. (NRS 117.103). Time share estates are regulated. (NRS 119A.010-119A.710).

Planned unit developments are regulated. (NRS 278A.010-278A.590).

Uniform Common Ownership Act adopted. (NRS 116.001-116.795).

Rule in Shelley’s Case is abolished this state. (NRS 111.101).

Rule Against Perpetuities.

Nonvested property interest is invalid unless when interest is created it is certain to vest or terminate no later than 21 years after death of natural person then alive or interest either vests or terminates within 365 years after its creation. (NRS 111.1031).

See also topics 21.05 Curtesy, Deeds, Dower, Landlord and Tenant; categories 5 Civil Actions and Procedure, topic Partition; Debtor and Creditor, topic Homesteads; Family, topic Husband and Wife; Mortgages, topic Mortgages of Real Property.

21.17 TRUST DEEDS:

See category 20 Mortgages, topic 20.04 Mortgages of Real Property.

22 TAXATION

22.01 ADMINISTRATION:

Department of Taxation headed by tax commission with eight members has general supervision and control over entire state revenue system. (NRS 360.010, 360.200). Department has original power of appraisal and assessment of property. (NRS 360.210). Chief administrative officer of department is director appointed by governor. (NRS 360.120).

Poll Tax.

None.

Penalties.

All Taxes.

Department, if not satisfied with amount of tax to be paid state or if person fails to file return, may determine amount due; if any part of deficiency is due to negligence or intentional disregard of statute or rules, 10% penalty is added; if due to fraud or intent to evade payment for tax or fee assessed by Department of Taxation, 25% penalty is added or, if tax imposed pursuant to NRS c. 372 or 374 for storage, sale, use or consumption of vehicle, vessel or aircraft, three times amount of determination is added. Taxpayer may petition for redetermination 45 days after service of determination. Determination becomes final 45 days after served with notice of determination, or if petition for redetermination filed after 30 days notice of redetermination unless appeal filed with Tax Commission, than 30 days after Commission's order. All determinations due and payable when they become final; penalty of 10% of amount of determination, exclusive of interest, and penalties. (NRS 360.300-360.415). If department believes collection of tax would be jeopardized by delay, it determines amount to be collected, serves notice; amount specified in notice must be paid within ten days unless petition for redetermination is filed, otherwise penalties and interest added to amount of determination. (NRS 360.412-360.416). Unless different penalty or rate specifically provided, failure to pay tax imposed by NRS cc. 362, 363A, 363B, 369, 370, 372, 374, 377, 377A, 444A or 585, or fee in 482.313 or 360.787, results in penalty of not more than 10% of amount of tax owed in addition to tax, plus interest at 1% per month. (NRS 360.417).

Property Taxes.

4% of installment on first installment delinquency, 5% of two installments on second installment delinquency, 6% of three installments on third installment delinquency, 7% of total tax on full amount due. (NRS 361.483). See also topic 22.13 Property Taxes, subhead Collection and Sale.

Sales and Use Taxes.

Retailer who fails to furnish any required return or who renders false or fraudulent return is guilty of misdemeanor subject to fine not exceeding $500 for each offense. (NRS 372.755, 372.765). Any person required to make, sign or verify any report who makes any false or fraudulent return with intent to defeat or evade determination of amount due required by law to be made, shall for each offense be fined not less than $300 nor more than $5,000, or may be imprisoned for not exceeding one year or be subject to both. (NRS 372.760). Any violation of Sales and Use Tax statutes except as otherwise provided is misdemeanor. (NRS 372.765).

Cigarette Tax.

It is unlawful for any person with intent to defraud state to alter or counterfeit any license permit stamp for cigarettes or to have any such forged stamp in his possession or to affix to any package of cigarettes stamp or cigarette tax meter impression which has been removed from any other package of cigarettes or possession of cigarettes for sale which do not bear indicia of state tax. Violation is Category C Felony punishable by one to five years imprisonment and fine up to $10,000. (NRS 370.380). All other violations of Cigarette Tax Act constitute gross misdemeanors. (NRS 370.390).

Gasoline Tax.

Unlawful for anyone to violate any gasoline tax statutes. (NRS 365.570, 365.580). Taxes to be paid before last day of each month. (NRS 365.330).

Unemployment Compensation.

Violation of any provision of statutes relating to unemployment compensation is misdemeanor. Any person failing to make reports as required by law must pay forfeit of $5 for each report. In addition if such report is more than ten days delinquent such person must pay interest upon wages subject to contributions involved in such report of one-tenth of 1% for each month thereafter until such report has been filed. (NRS 612.735, 612.740).

Tax forms may be obtained from Department of Taxation, 1550 College Parkway, Carson City 89706.

22.02 ALCOHOL, BEVERAGES AND TOBACCO TAXES:

Intoxicating liquor tax imposed by 369.330-369.370 et seq.

Cigarette Tax.

Imposed by 370.080-370.430.

22.03 BUSINESS TAXES:

Business Tax.

Tax imposed on privilege of conducting business which must be paid quarterly based on wages paid to employees. (NRS 363B.110). No business may be conducted without obtaining business license issued by Department of Taxation; application for license must be made on form prescribed by department, set forth name and location of business, and be accompanied by $200 fee. (2009, c. 381 § 11).

Taxation of Insurance Companies.

See category 16 Insurance, topic 16.01 Insurance Companies.

Taxation of Mines and Mining Claims.

See category 19 Mineral, Water and Fishing Rights, topic 19.01 Mines and Minerals.

Taxation of Bank Stock.

See category 3 Business Regulation and Commerce, topic 3.01 Banks and Banking.

22.04 [RESERVED]

22.05 EMPLOYMENT TAXES:

Unemployment Compensation Tax.

Employers within Act must pay, without deduction from wages, 2.95% of wages or such rate or proportion thereof as administrator of Employment Security Division may fix under prescribed rules of classification and .05% of wages paid into Unemployment Compensation Administration Fund for employment and training of employed and unemployed. (NRS 612.606; 612.535; 612.540).

Act applies to all employers of one or more individuals who have payroll of $225 or more for any calendar year, including with some exceptions, agricultural labor, domestic services in private home, and employment by state or political subdivision, but not including service in crew of foreign vessel on navigable waters of U.S.; service in employ of son, daughter or spouse; service of child under 18 years old in employ of father or mother; service in employ of Federal Government or any state or of any instrumentality or political subdivision of either, with certain limitations and exceptions; service for various religious, charitable, scientific and similar organizations; service with respect to which unemployment compensation is payable under act of Congress; service of person under 18 years old in delivery or distribution of newspapers; service by licensed real estate salesman or broker employed by another broker if paid solely by commission; service by lessee engaged in mining. (NRS 612.055-612.142).

22.06 [RESERVED]

22.07 ESTATE TAX:

Tax imposed on transfer of taxable estate of resident decedent in amount of maximum credit allowable against federal estate tax for payment of state death taxes. (NRS 375A.100). Legislature cannot increase this tax due to Nevada Constitution Art. 10, § 4.

Apportionment Against Inter Vivos Dispositions.

Provided for by 150.290 through 380.

22.07A GAMBLING AND ENTERTAINMENT TAXES:

Live Entertainment Tax.

Imposed by NRS 368A.200.

22.08 GASOLINE AND SPECIAL FUELS TAXES:

Gasoline tax imposed by 365.170-365.210.

Special fuel tax on fuels other than gasoline imposed by 366.190-366.210.

22.09 GIFT TAX:

None.

22.10 [RESERVED]

22.11 INCOME TAX:

None.

22.12 INHERITANCE TAX:

None.

22.1322.15 [RESERVED]

22.16 PROPERTY TAXES:

Taxable Property.

All property of every kind and nature within this state is subject to taxation, except that which is specifically exempted by Constitution or statute. (NRS 361.045). Where certain exempt real or personal property is leased to person in connection with business conducted for profit, or such property is leased or loaned to person as residence, taxes will be assessed to lessee in same manner as taxes assessed to owners of real property, except property located within or on limits of public airport, park, market or fairground or any property owned by public airport, unless property not located on public airport and is leased or made available for any purposes other than public airport, payments are made on federal property in lieu of taxes, property belongs to state-supported school, except any property located in tax increment area, property is leased under Taylor Grazing Act, U.S. Forest Service, or Bureau of Reclamation property of any Indian or Indian tribe held in trust or subject to restriction against alienation by United States, vending stand locations and facilities operated blind persons under Bureau of Services to Persons Who Are Blind or Visually Impaired of Rehabilitation Division of Department of Employment, leases held for development of geothermal resources not in commercial production, property is made available to public employee or officer incident to employment, personage, or property owned by charitable or religious corporation used as residence by person in connection with carrying out activities of organization, low cost housing owned by government, occasional rental of meeting rooms, and exempt property providing day care by nonprofit organization. (NRS 361.157; 361.159).

Various political subdivisions submit budgets to tax commission for approval and upon adjustment it certifies the combined tax rate for state and local areas. (NRS 361.455; 361.4547). Rate statutorily limited to $3.64 on each $100 of assessed valuation (NRS 361.453) in all counties unless Nevada Tax Commission determines that local government's financial condition is in state of "severe financial emergency" at which time additional taxes may be imposed per 354.685 and 354.695 and rate constitutionally limited to 5¢ on each $1 of assessed valuation (Const. Art. 10).

Exemptions.

Following property is exempt from taxation: All property owned by United States; all property owned by State of Nevada except certain property assigned to Department of Wildlife; property owned by Nevada Rural Housing Authority, any county, domestic municipal corporation, irrigation drainage or reclamation district, or town; certain property acquired by conservation district; public and privately owned parks open for public use free of charge; public and private airports used by public without charge; trust property benefitting any public function; property dedicated to public school uses; vehicles; personal property held for sale by merchant or manufacturer, raw materials consumed during manufacturing, tangible personal property consumed during business operation, livestock, colonies of bees, agricultural equipment used to convey irrigation water, boats, camper shells, fine art for public display, property owned by nonresident located in state for display, exhibition, convention, carnival, fair, or circus; household goods and furniture; drainage ditches and canals including rights of way; permanent irrigation systems and concrete linings used for irrigation and agriculture; real and personal property of water users' nonprofit association; certain residential properties containing radioactive fallout protection shelter; property of surviving spouse, not to exceed $1,000; certain real and tangible personal property used for housing and related facilities for persons with low income; certain property containing hospital or charitable asylum for care of orphans, sick, infirm, or indigent; property of blind, not over $3,000; certain property used for housing elderly or disabled persons; residential improvements aiding safety, movement, and comfort of disabled; Nathan Adelson Hospice property; property of certain veterans, not over $2,000; severely disabled veterans up to $20,000; funds, furniture, paraphernalia, regalia and property owned by national ex-serviceman organization, not to exceed $10,000; property leased or rented to charter school; property owned by charitable foundation established by University of Nevada board of regents; property leased or rented to Nevada System of Higher Education at less than 10% fair market lease value; real property owned by fraternity or sorority; nonprofit private schools; certain property of apprenticeship program; property of Pershing County Kids, Horses, Rodeo, Inc.; buildings, furniture, and land used by Nevada Museum of Art, Inc., Boulder City Museum and Historical Association, Young Men's Christian Association, Young Women's Christian Association, American National Red Cross, Salvation Army Corps, Girl Scouts of America, Camp Fire Girls, Inc., Boy Scouts of America, and Sierra Arts Foundation; real property and improvements acquired by Archaeological Conservancy, Nature Conservancy, American Land Conservancy, or Nevada Land Conservancy; property of Nevada Children's Foundation, Inc., Nevada Heritage Association, Inc., and Habitat for Humanity International; buildings, lots, furniture, and equipment of churches and chapels, other than marriage chapels; cemeteries and graveyards open to public for burial at no cost; cemetery lands and property of certain nonprofit corporations; funds, furniture, paraphernalia, regalia, real estate and fixtures owned by Benevolent Protective Order of Elks, Fraternal Order of Eagles, Free and Accepted Masons, Independent Order of Odd Fellows, Knights of Pythias or Knights of Columbus, or similar charitable organization, Lahontan Audubon Society, National Audubon Society, Inc. of New York, Defenders of Wildlife of the District of Columbia, or similar charity; buildings owned by and land occupied by corporation with religious, educational or charitable purposes whose funds are derived from grants or donations; buildings, furniture, and equipment of noncommercial, nonprofit theaters used for conducting classes and production of nonprofessional plays; and property of organized and incorporated volunteer fire departments. All claims for tax exemption on real property must be filed by June 15; once initial claim filed by exempt organization not required to file annual claims if property remains exempt. (NRS 361.155).

Personal property in transit through state and that stored in warehouse within state for final distribution or resale outside Nevada is expressly excluded from taxation. (NRS 361.160-361.185).

Persons intending to locate or expand business in Nevada may apply for partial abatement of certain taxes pursuant to statutory provisions. (NRS 360.750).

The annual levy for state and county taxes is made by county commissioners immediately after commission certifies combined tax rate and lien attaches on July 1 of year for which taxes are levied. (NRS 361.445-361.470). Personal property taxes are lien on all property in county and on real property in other counties from time certified copy of unpaid tax is filed for record with county recorder. (NRS 361.450).

Assessment.

All taxes are assessed by county assessors each year. (NRS 361.260). Assessment is based upon 35% of taxable value of property. (NRS 361.225). County assessor with county and state boards of equalization determine taxable value using factors enumerated by statute. (NRS 361.227).

Agricultural real property and open space real property is assessed upon application at 35% of taxable value for agricultural use and open space use respectively, with notification to owner of agricultural use or open space use assessment with notation that deferred taxes will become due when parcel converted to higher use. (NRS 361A.130, 361A.220). Fiscal year when property converted to higher use becomes base year and deferred taxes for previous years of deferred taxes and penalties calculated pursuant to statutory formula become lien on property. (NRS 361A.280).

State tax commission establishes valuations of property of interstate or intercounty nature (NRS 361.320) and of all land and mobile homes (NRS 361.325). County assessor must appraise property applying factors adopted and approved by tax commission, and reappraise all real property at least once every five years thereafter using same standards. (NRS 361.260). Whenever property is appraised or reappraised, assessor must deliver or mail written notice, on or before Jan. 1 of fiscal year in which appraisal or reappraisal is made, to owner of property stating its assessed valuation as determined. (NRS 361.300).

Property tax appraiser employed by state or political subdivision must be certified by department. (NRS 361.221).

Payment.

Taxes on net proceeds of minerals extracted are due on or before May 10 of year certificate indicating amount due is received. (NRS 362.130-362.150). Annual taxes on migratory property are payable to assessor immediately upon being assessed if owner owns no realty in county. (NRS 361.505). Real property taxes are payable in four equal installments on or before third Mon. in Aug., and first Mon. in Oct., Jan., Mar. (NRS 361.483).

Prepayment of All Property Taxes.

Owner of single-family dwelling, free and clear of all encumbrances except unpaid assessments for public improvement may apply to county assessor to establish allodial title; upon application, state treasurer determines amount of money required to be paid that would be adequate to pay all future tax liability of property for life expectancy of youngest titleholder, and upon payment of that amount, state treasurer issues certificate of allodial title to property. (NRS 361.900). Certificate transmitted to assessor, who shall collect no further taxes from allodial titleholder, and state treasurer shall pay all amounts due for taxes even if there is deficiency based on treasurer's determination of amount due. (NRS 361.905). Allodial title valid as long as homeowner continues to own residence unless he chooses to relinquish allodial title and receive refund of moneys paid to establish title pursuant to 361.915. (NRS 361.910).

Collection and Sale.

In all cases where taxes are delinquent county tax receiver, after giving prescribed notice, must issue to county treasurer certificate authorizing him to hold property as trustee until it is redeemed or time for redemption has expired, property being assessable to treasurer during such period. (NRS 361.565-361.570). At expiration thereof treasurer, upon order of county commissioners and after giving prescribed notice, must sell property for taxes, costs, penalties, and interest (which is added for such period at rate of 10% per annum). Before deed is delivered it must be recorded at purchaser's expense, and with it must be furnished affidavits showing that all required proceedings have been taken. Such deed is primary evidence of regularity of proceedings. (NRS 361.585-361.595).

Where net amount of delinquent tax exceeds $3,000, suit must be brought by district attorney of county in which it was assessed and tax collected by prescribed proceedings, unless sooner paid by delinquent. (NRS 361.625-361.730).

Redemption.

Real estate held by county treasurer for delinquent taxes may be redeemed by owner at any time within two years, by paying taxes, penalties and costs, with 10% per annum interest, assembled monthly (NRS 361.570), and right of redemption continues after expiration of two year period until such time as county treasurer gives public notice of sale (NRS 361.585).

Tax Liens.

Property taxes constitute perpetual lien against property assessed until such taxes, penalty charges, and interest are paid. Lien for taxes on personal property attaches to real property assessed against property assessment is filed with county recorder in county in which real property is situated. (NRS 361.450).

Uniform Federal Lien Registration Act adopted in Nevada. (NRS 108.825-108.837). Federal tax liens on real property recorded in county where property located, and liens on personal property recorded in county where taxpayer resides or with Secretary of State if taxpayer is corporation or partnership having principal executive officer in state. (NRS 108.825-108.837). County shall charge its standard fee for recording and Secretary of State shall charge fee dependent on length of document. (NRS 108.833).

Corporations are taxed on their property in county where property is located. There is no franchise tax or income tax on corporations.

Real Estate Conveyance Tax.

County recorder computes and collects tax of 65¢ for each $500 of value of any lands in county with population of less than 400,000 and $1.25 for each $500 of value in county with population of 400,000 or more, except unpatented mines or mining claims, transferred to another person if consideration paid exceeds $100. Each deed evidencing transfer of title subject to tax must pay that tax, as computed by county recorder before deed will be accepted for recordation. Statutory exemptions contained in 375.090. Certain counties may by ordinance impose tax on transfer of real property. (NRS 375.010-375.110).

22.17 SALES AND USE TAXES:

Sales tax at rate of 2% of sale price and city-county relief tax at rate of 2.25% is imposed on retail sales of tangible personal property. (NRS 372.105; 377.040). Separate tax of 2.25% imposed on gross receipts of retail sales of all tangible personal property within county. Known as Local School Support Tax Law. (NRS 374.010, et seq.). Constitutionality of School Support Tax upheld in 83 Nev. 266, 428 P.2d 371.

Use tax at rate of 2% of sales price is imposed on storage, use or other consumption in state of tangible personal property purchased from retailer on or after July 1, 1955. (NRS 372.185). Separate tax of 2.5% is imposed on storage, use or other consumption of tangible personal property purchased on or after July 1, 1967, as part of Local School Support Tax, supra. (NRS 374.190). Among exemptions applicable to both taxes are: Property subject to proceeds of mine tax, motor vehicle fuels, animal food products, animal feeds, seeds and plants, fertilizers, farm machinery and equipment, prosthetic devises, medicines, food for human consumption, textbooks sold within University of Nevada System, containers, gas, electricity, water, and heating fuels, newspapers, 40% of gross receipts from new manufactured and mobile homes, aircraft, major aircraft components, occasional sales of tangible property, sales or loans to U.S., Nevada, or local governments or their agencies, sale of personal property by or to religious, charitable, or educational nonprofit organizations, sales of property to common carrier, property shipped outside Nevada, and property on which sales tax is paid.

(NRS 372.260-372.350).

Monthly returns must be filed with Nevada Tax Commission. (NRS 372.355-372.395).

22.18 STAMP AND SEAL TAXES:

Stamp Tax.

See topics 22.02 Alcohol, Beverages and Tobacco Taxes, subhead Cigarette Tax, 22.13 Property Taxes, subhead Real Estate Conveyance Tax.

22.18A TAX LIENS:

Uniform Federal Lien Registration Act.

See topic 22.13 Property Taxes, subhead Tax Liens, catchline Uniform Federal Lien Registration Act.

23 TRANSPORTATION

23.01 MOTOR VEHICLES:

Motor vehicle law is administered by Department of Motor Vehicles and Nevada Highway Patrol, 555 Wright Way, Carson City 89711. (NRS 481.015-481.087).

Vehicle license is required annually. Registration card must be carried and license plates displayed in front and rear unless vehicle was not manufactured to include device for securing front license plate. (NRS 482.255, 482.275).

No exemption for members of armed forces.

Operator's License.

Uniform Motor Vehicle Drivers' License Act adopted. (NRS 483.010-483.630).

Under certain circumstances, Department may refuse to issue license or revoke existing license. (NRS 483.250; 483.460).

Department may enter into agreement with another state to facilitate exchange of information concerning issuance, renewal, suspension or revocation of drivers' licenses. (NRS 483.635).

Members of armed forces when operating vehicle in service of armed forces are exempt from license. (NRS 483.240).

Identification Marks.

Removal or alteration of motor number, identification number, or other identification mark of part of motor vehicle placed on it by manufacturer is category D felony. (NRS 482.553). Knowingly to operate vehicle or vehicle containing part which has identification number or mark falsely attached, removed, defaced, altered, or obliterated is misdemeanor. (NRS 482.545; NRS 482.555).

Titles, Sales and Liens.

Department of Motor Vehicles and Public Safety with whom every vehicle is registered, issues certificate of ownership which must disclose both name and address of owner and legal owner and odometer reading by seller. (NRS 482.245). If security interest is taken or retained by seller of vehicle, such information must appear on certificate of ownership. (See 482.428.) Registration fee is $33 for auto, $33 for truck under certain weight, and additional fee of $6 for transfer of registration; fee of $250 if owner failed to have insurance, or fee of $50 if owner allowed insurance coverage to expire without first canceling registration for vehicle. (NRS 482.480). Notice of sale of repossessed vehicles, see 482.516. Repossessed vehicle must be sold in commercially reasonable manner. (NRS 482.5163). See also category 8 Debtor and Creditor, topic 8.13 Liens.

Operation Prohibited.

Driving while intoxicated or under influence of liquor or stimulating or stupefying drugs. (NRS 484.379). Drinking liquor in moving vehicle. (NRS 484.448). Any person who drives or is in actual physical control of vehicle upon highways, or on premises to which public has access, is deemed to have given consent to evidentiary test for alcoholic or drug content of his blood, urine, breath, or other bodily substance. (NRS 484.383).

Size and Weight Limits.

Regulated by 484.737-484.775. Multistate Highway Transportation Agreement enacted. (NRS 481A.010-481A.020).

Equipment Required.

Regulated by 484.541-484.646. Unlawful to drive passenger car unless it is equipped with seat belts; driver and front seat passenger of car weighing less than 10,000 pounds must wear belt or be subject to fine. Failure to do so however is not moving traffic violation, may not be considered as negligence in civil or criminal action, and may not be considered misuse or abuse of product in any action for damages for injury resulting from manufacture, sale or use of product. (NRS 484.641). Motorcycle operator and passenger must wear protective headgear and if motorcycle not equipped with windscreen, glasses or face shields. (NRS 486.231).

Lights Required.

Regulated by 484.545-484.591.

Inspection.

Peace officers and Department vehicle safety inspectors, with reasonable grounds, may require driver to submit vehicle to inspection and appropriate tests. Department may establish vehicle inspection centers to inspect tires and brakes on certain vehicles intended to be registered. (NRS 484.695).

Traffic Regulations.

Rules of road, 484.253-484.527.

Accidents.

Driver must stop, give assistance if necessary, give name and address of owner, passengers and driver and license numbers if demanded, and report accident to nearest police station if in city, otherwise to sheriff. (NRS 484.219; 484.223). When unoccupied vehicle or property is stuck, driver must immediately locate and notify owner of unattended vehicle or property of driver’s name and address or securely attach that information in conspicuous place, and immediately notify nearest office of police authority or Nevada Highway Patrol. (NRS 484.225; NRS 484.227). Driver of vehicle involved in accident on highway or premises to which public has access, causing death or bodily injury or apparent property damage of $750 or more, must file written report of accident with Department within ten days. No report required if accident investigated by law enforcement officer whose report contains name and address of insurance company with coverage, number of each policy and dates when coverage begins and ends. (NRS 484.229). If any person is injured in accident, driver of colliding vehicle is subject to fine and imprisonment if he fails to stop and remain at accident scene. (NRS 484.219). Causing death or substantial bodily injury to another while under influence of alcohol or drugs is felony; if defendant transporting child under 15 years of age, at time, court must consider such aggravating factor in determining sentence. (NRS 484.3795).

Liability of Owner.

Negligence or willful misconduct of operator of motor vehicle driven with express or implied permission of owner is imputed to owner for all purposes of civil damages where operator is wife, husband, son, daughter, father, mother, brother, sister, or other immediate member of owner’s family. (NRS 41.440-41.460).

Abandonment of Vehicle.

Registered owner of any abandoned vehicle responsible for cost of removal and disposition under most circumstances. (NRS 487.220).

Liability for Acts of Minors.

Negligence or willful misconduct of minor under 18 years operating motor vehicle resulting in injury or death to another person or property damage is imputed to person who signed minor's application for license. (NRS 483.300; 486.101). Such person or parent or guardian is relieved of liability where he files verified written request to Driver's License Division of Department that minor's license be cancelled. (NRS 483.310; 486.111).

Guests.

There is no limitation on liability for injury to guest. (91 Nev. 506, 538 P.2d 574; 41.130).

Insurance.

See subhead Security Following Accident, infra.

No-Fault Insurance.

Nevada's No-Fault Act (NRS 698.010 et seq.) was repealed effective Jan. 1, 1980. (96 Nev. 872, 620 P.2d 373).

Security Following Accident.

Accident report must be filed within ten days if injury or property damage exceeding $750 unless accident investigated by law enforcement officer whose report contains name and address of insurance company with coverage, number of each policy and dates when coverage begins and ends. (NRS 484.229). Department is required to suspend his license and registration privileges of owner, and to see that adequate security is furnished, unless full protection is assured injured or damaged third person under liability policy or bond, or arrangement has been made for satisfying claims. (NRS 485.190-485.300). Owner or operator has right to hearing before any suspension. (NRS 485.191).

Foreign vehicle, duly licensed in home state, may be operated by nonresident without local license until current nonresident registration expires, provided plates issued by home state are displayed. (NRS 482.385). If foreign vehicle is furnished to resident of Nevada for his continued use, it must be registered in Nevada within 60 days. (NRS 482.385). If owner becomes resident he must register vehicle in this state within 60 days or at time he obtains driver's license, whichever is earlier. (NRS 482.385). Nonresident carrier for hire must comply with law governing motor vehicle carriers, unless laws of his state grant reciprocal rights to Nevada carriers, in which case only nonresident permit is required. (NRS 482.390).

Nonresident Operators.

No restrictions.

Actions Against Nonresidents.

Use of highway by any person, either as principal, master, agent or servant, is equivalent to appointment of Director of Department of Motor Vehicles and Public Safety as his attorney on whom process may be served in action growing out of such use or resulting in damage or loss to person or property while using public highway. Process so served is equivalent to personal service on motorist, provided notice of such service and copy of process are forthwith sent, by registered mail to defendant at address supplied in his accident report, if any, and if not at best address available to plaintiff, and return receipt signed by defendant or by United States Postal Service stating that defendant refused to accept delivery, or could not be located or that address was insufficient and plaintiff's affidavit of compliance with requirements are appended to original process and filed in action. Personal service of such notice and copy of process on defendant outside state is equivalent of mailing and may be proved by affidavit appended to original process and filed. Court may order such continuances as may be necessary to give defendant reasonable opportunity to defend. (NRS 14.070).

Direct Actions.

Direct action by injured person against insurer not allowed.

Motor vehicle carriers are licensed by Department. (NRS 706.186). Transportation services authority regulates licensing (NRS 706.481-706.631) and rates (NRS 706.311-706.371). All carriers licensed (NRS 706.491) and “fully regulated common motor carriers” must have certificate of public convenience and necessity (NRS 706.386). Every fully regulated carrier and operator of tow car must file, as authority requires, liability insurance policy or certificate or bond of surety. (NRS 706.291). Each regulated public utility keep detailed accounts of business transacted and render them to commission upon request and file annual report to commission by May 15 in form and detail prescribed by regulation. (NRS 703.191, 703.193).

Taxicabs are regulated in detail by 706.881-706.885.

Intrastate carriers must furnish such information as authority may request. (NRS 706.266).

Motor Vehicle Taxes.

Annual governmental services tax imposed on privilege of operating vehicle on public highways is 4¢ on each $1 valuation. (NRS 371.030, 371.040). Valuation based upon 35% of manufacturer’s suggested retail price or of retail price to original purchaser where determinable except for buses and certain trucks and trailers. (NRS 371.050). Depreciation allowances set forth in 371.060. Tax collected by Department. (NRS 371.120).

Gasoline Tax.

See category 22 Taxation, topic 22.08 Gasoline and Special Fuels Taxes.

23.02 RAILROADS:

See category 3 Business Regulation and Commerce, topic 3.08 Carriers.

24 Forms

Commercial Code Forms

1

NEW HAMPSHIRE LAW DIGEST

—Scope —

Revised for 2010 edition by

Hinckley, Allen, & Snyder LLP of Concord.

(Citations, unless otherwise indicated, refer to New Hampshire Revised Statutes Annotated, 1955, which are kept up to date by cumulative pocket supplements. Session laws are cited by year and chapter number. Parallel citations to the Atlantic Reporter begin with 64 N.H.)

All session laws passed by 2009. Legislature have been included or considered through Sept. 14, 2009. Legislature meets annually in Jan.

1 INTRODUCTION

1.01 GOVERNMENT AND LEGAL SYSTEM:

The State of New Hampshire is a constituent state of the United States of America. For further discussion of the U.S. federal system, see Introduction to the Federal Government of the United States at the beginning of this volume. A great many laws are promulgated by the federal government of the United States and are not reflected in the topics below. See the Introduction to this volume for references to the federal law topics covered.

Like all but one of the United States, New Hampshire has a common law legal system, with roots in English common law. For information on the courts and legislature of New Hampshire, see category 6 Courts and Legislature.

1.02 [RESERVED]

1.03 HOLIDAYS:

Legal holidays are: Jan. 1; 3d Mon. in Jan. (known as Martin Luther King, Jr. Civil Rights Day); 3d Mon. in Feb. (known as Washington’s Birthday); last Mon. in May (known as Memorial Day, or on date to coincide with federal observance of it if it is held on different day); July 4 (known as Independence Day); 1st Mon. in Sept. (known as Labor Day); 2d Mon. in Oct. (known as Columbus Day); election day; Nov. 11 (known as Veteran’s Day); Thanksgiving Day; Dec. 25 (Christmas Day). (RSA 288:1).

Holiday Falling on Sunday.

Following day is observed as holiday.

Holiday Falling on Saturday.

No effect.

Legality of Transactions on Saturday, Sunday or Holiday is not governed by statute, but statute prohibits any person from doing secular work, business or labor, to disturbance of others, on Sunday, except works of necessity or mercy. (RSA 332-D:1).

1.04 OFFICE HOURS AND TIME ZONE:

New Hampshire is in the Eastern Standard (GMT -05:00) time zone. Office hours are generally from 9 a.m. to 5 p.m.

2 BUSINESS ORGANIZATIONS

2.01 AGENCY:

Common law rules govern except that any bank specified in RSA 384:29 doing business in this state may continue to recognize power of an attorney-in-fact authorized in writing to make withdrawals either in whole or in part from account of a depositor, whether minor or adult, until it receives written notice or is on actual notice of revocation of his authority or has received notice of death, adjudication of incompetency or appointment of guardian (RSA 384:39). Relationship between real estate licensees and their clients and consumers governed by c.331-A.

As to conveyance by attorney, see category 21 Property, topic 21.06 Deeds.

2.02 ASSOCIATIONS:

No statutory provisions except as to religious societies (c. 306), proprietors of meeting houses (c. 307), proprietors of common lands (c. 303), cooperative marketing and rural electrification associations (c. 301) and consumers' cooperative associations (c. 301-A). Common law rules as to unincorporated associations apply. Association may register name, insignia, etc. with office of secretary of state. (RSA 302:2). Associations doing business in New Hampshire shall register trade name of business with secretary of state. (RSA 349:1).

Professional Associations.

See topic 2.03 Corporations, subhead Professional Corporations.

2.03 CORPORATIONS:

Note: Model Business Corporation Act, prepared by Committee on Corporate Laws (Section of Corporation, Banking and Business Law of American Bar Association), has been adopted, with variances as set forth below, and is known as "New Hampshire Business Corporation Act". (RSA 293-A:1.01). See Uniform and Model Acts section for Model Business Corporation Act. New Hampshire has not adopted amendments of Sept. 24, 1977, Sept. 23, 1978, and June 20, 1980. It has, however, adopted amendments of Jan. 14, 1978. New Hampshire has not adopted 1984 Revised Model Act.

General Supervision.

Secretary of State, Corporations Division, 107 North Main Street, Concord, New Hampshire 03301.

Purposes.

Corporations may be organized for purpose of carrying on any lawful business except banking, construction and maintenance of railroads, business of making contracts for payment of money at fixed date or upon happening of some contingency, or business of trust, surety, indemnity, or safe deposit company. (RSA 293-A:3.01). (See also RSA 293-A:4.01.)

Name.

Corporate name shall contain word "corporation," "incorporated" or "limited," or abbreviation "corp.," "inc.," or "ltd.," or words or abbreviations of like import in another language. Corporate name shall not be same as name of any domestic corporation, foreign corporation authorized to transact business in state, reserved name or agency or instrumentality of U.S. or New Hampshire or subdivision thereof, name of any political party recognized by (RSA 652:11) unless written consent is given by political party, or name of proprietorship, partnership, cooperative or association registered as tradename in New Hampshire. (RSA 293-A:4.01). Name may be reserved for period of 120 days for fee of $15. Informal name clearance may be obtained through Secretary of State's Office. (RSA 293-A:1.22, 4.02).

Term of Corporate Existence.

Unless articles of incorporation provide otherwise, every corporation has perpetual duration.

Incorporators.

One or more persons may act as incorporator or incorporators and incorporate corporation by delivering articles of incorporation and certification required by RSA 421-B:13, Ia(b) to Secretary of State for filing.

Articles of Incorporation.

In addition to requirements of Model Business Corporation Act, principal purpose of corporation may also be set forth in its articles of incorporation. (RSA 293-A:2.02).

Filing of Articles of Incorporation.

Articles of incorporation should be filed with Secretary of State's Office. Incorporators must also file statement that stock issued by corporation has either been registered or is exempt from registration, and whether stock will be offered for sale, within terms of c. 421-B (see category 3 Business Regulation and Commerce, topic 3.24 Securities). (RSA 421-B:13).

Filing Fees.

Fee for filing articles of incorporation is $50, and $35 for addendum pursuant to c. 421-B. Late filing fees are $50. (RSA 293-A:1.22).

Stock certificates must be signed by either chairman or vice-chairman or president or vice-president of corporation and secretary or assistant secretary of corporation, or treasurer or assistant treasurer of corporation.

Uniform Simplification of Fiduciary Security Transfers Act.

Not adopted. Uniform Commercial Code adopted. See category 3 Business Regulation and Commerce, topic 3.09 Commercial Code.

Tender Offers.

See category 3 Business Regulation and Commerce, topic 3.24 Securities.

Directors.

Board of directors must consist of one or more individuals, with number specified in or fixed in accordance with articles of incorporation or bylaws. If board of directors has power to fix or change number of directors, board may increase or decrease by 30% or less number of directors last approved by shareholders, but only shareholders may increase or decrease by more than 30% number of directors last approved by shareholders. Articles of incorporation or bylaws may establish variable range for size of board of directors by fixing minimum and maximum number of directors. If variable range is established, number of directors may be fixed or changed from time to time, within minimum and maximum, by shareholders or board of directors. After shares are issued, only shareholders may change range for size of board or change from fixed to variable-range size board or vice versa. (RSA 293-A:8.03). Cumulative voting for directors not required.

Officers.

New Hampshire does not require corporate vice-president. New Hampshire corporation has officers described in its by-laws. Same individual may simultaneously hold more than one office. (RSA 293-A:8.40).

Resident Agent.

Corporation must continuously maintain in this state registered agent whose business office is identical with registered office.

Foreign Corporations.

Law governing foreign corporations also applies to Massachusetts trusts and Business trusts. (RSA 293-A:15.01). Foreign corporations are subject to trustee process in New Hampshire. (RSA 293-A:15.10). Application for certificate of authority to do business in State must set forth name of corporation, its place of incorporation, its date of incorporation, period of its duration, address of its principal office, address of its registered office in state, name of its registered agent in state, names and addresses of directors and officers of corporation. (RSA 293-A:15.03). Completed application must also be delivered with certificate of existence. Foreign corporations must also file statement required of domestic corporations by c. 421-B along with fee schedule provided in c. 421-B:31 (see subhead Filing of Articles of Incorporation, supra).

Taxation of Corporate Property.

Taxable property of corporations and property taxable to corporations shall be taxed to corporation by its corporate name, in town in which it is located, except where otherwise provided. (RSA 73:3). See generally category Taxation, topic Property Taxes, subhead General Property Tax.

Professional Corporations.

New Hampshire has adopted Professional Corporations Supplement to Model Business Corporation Act. (c. 294-A). Professional corporations may be incorporated for purpose of rendering professional services. “Professional services” are services that may lawfully be rendered only by certified public accountants, public accountants, architects, attorneys, podiatrists, chiropractors, dentists, pharmacists, professional engineers, land surveyors, registered professional nurses, optometrists, physicians and surgeons, physician assistants, psychologists, veterinarians, and all other professionals licensed, registered, certified, or otherwise authorized and permitted to practice independently under specified statutory provision and which may not lawfully be rendered by corporation organized under laws governing business corporations. New Hampshire has adopted Alternate 1 to § 11(d), imposing no greater personal liability on shareholder of professional corporation than that imposed on shareholder of corporation under Business Corporation Act (RSA 294-A:17, IV). New Hampshire did not adopt §§ 23, 24, 25 and 26 of Professional Corporations Supplement.

Deeds.

See category 21 Property, topic 21.06 Deeds.

Model Non-Profit Corporations Act.

Not adopted (Non-profit corporations goverened under RSA 292).

Limited Liability Companies.

See topic 2.06 Limited Liability Companies.

2.04 [RESERVED]

2.05 JOINT STOCK COMPANIES:

No statutory provisions.

Professional Corporations.

See topic 2.03 Corporations.

2.06 LIMITED LIABILITY COMPANIES:

May be formed by delivery of certificate of formation to secretary of state. (RSA 304-C:12,I). Certificate must state name (including “limited liability company” or “L.L.C.”) (RSA 304-C:3,I); nature of primary business; name and address of registered agent; date of dissolution; identification of management; any other matters members decide to include (RSA 304-C:12,II). No member or manager of L.L.C. is personally liable for L.L.C.’s obligations merely by being member or manager. (RSA 304-C:25).

2.07 [RESERVED]

2.08 PARTNERSHIPS:

Uniform Partnership Act adopted with modifications. (c. 304-A).

Limited Partnership.

Uniform Limited Partnership Act has been adopted. (c. 304-B). This subdivision was enacted by NH general court and is not part of national Uniform Limited Partnership Act. Foreign partnerships must be registered with Secretary of State. (RSA 305-A:1). Partnership includes registered limited liability partnership. (RSA 304-A:6, I). Registration requirements set forth at RSA 304-A:44-55.

3 BUSINESS REGULATION AND COMMERCE

3.01 BANKS AND BANKING:

Uniform Commercial Code has been adopted. See topic 3.09 Commercial Code.

Regulated by N. H. RSA Chapters 383 through 397.

Deposits.

Deposits in trust for another are, upon death of trustee payable to person for whom deposit was made, including a minor, where no notice of existence and terms of a legal and valid trust have been given in writing to bank. (RSA 384-D:1). Joint accounts, upon death of either, are payable to survivor. (RSA 384:28).

Unclaimed Deposits.

Accounts in savings banks which have been inactive for five years is presumed to be abandoned property. (RSA 471-C:6). Within 36 months after close of calendar year in which any property presumed abandoned is paid or delivered to State Treasurer, if no claim for property is made and established by any person, not including another state, entitled to property, State Treasurer shall pay or deliver all such property to appropriate county treasurer subject to 15% deduction for costs and services State provides in escheat proceedings. (RSA 471-C:30).

See also category 21 Property, topic 21.01 Absentees, subhead Escheat.

Loans.

First mortgage loans by savings banks on real estate in New Hampshire or within any state contiguous to New Hampshire may not exceed 75% of value of mortgaged real estate except that a loan may be made which exceeds 75% but not 90% if real estate contains a dwelling unit of not more than four families and if note secured by mortgage is payable within period of 40 years. In determining whether any loan exceeds authorized percentage of value of real estate no consideration shall be given to (1) that portion of obligation which is guaranteed by Administrator of Veterans’ Affairs under Title III of Servicemen’s Readjustment Act of 1944, as amended from time to time or (2) obligation wholly guaranteed under such Title, nor shall any bank be restricted to above authorized percentages on loan secured by property which borrower is purchasing from bank. (RSA 387:4).

First mortgage loans by savings banks on real estate outside New Hampshire and states contiguous thereto may not exceed 75% of value of mortgaged real estate, unless loan is further secured by guarantee satisfactory to commissioner, in which case it shall not exceed 90% of value of said real estate. In determining whether or not any loan exceeds above specified percentages, no consideration is given to that portion of obligation which is guaranteed by Administrator of Veterans' Affairs under Title III of Servicemen's Readjustment Act of 1944, as amended, and to any obligation wholly guaranteed under such Title. (RSA 387:4).

Collections.

Upon repayment, lenders shall mark loan documents "paid in full" or "cancelled" and return or provide to borrower within reasonable time. (cc. 399-A, § 12, VI; 384, § 16-g). Uniform Commercial Code applies. (c. 382-A).

Common Trust Funds.

Uniform Common Trust Fund Act adopted. (c. 391:1-a).

Investments.

Investments of savings banks are governed by c. 387 as amended.

Fiduciary Powers.

Any trust company or similar corporation incorporated under laws of New Hampshire or any national bank duly authorized and located within New Hampshire may be appointed trustee or executor, subject to same conditions and requirements as individuals. Foreign banks and trust companies may be similarly appointed trustee or executor provided laws of state in which such trust company is incorporated or in which such national bank has its principal place of business allow banks and trust companies incorporated or located in New Hampshire to be appointed trustees or executors in that state. (RSA 390:13).

Savings banks, incorporation is governed by c. 386-A. Minimum capital requirement is $250,000. (RSA 386-A:21).

Trust companies, formation is governed by c. 392. Minimum capital requirement is $500,000. (RSA 392:25).

Verification of Deposits.

Savings banks, trust companies, cooperative banks and building and loan associations shall conduct verification of deposits and due books as required by commissioner. (RSA 386:21).

Mutual savings banks, limitations on conversions. (cc. 386, §§ 59-63, 386-B).

Mutual holding company, governed by RSA 386-B:8.

Building and loan associations are under the supervision of the Bank Commissioner. (c. 393). No foreign building and loan association may do business in this state. (RSA 393:44).

Credit unions are under the supervision of the Bank Commissioner. (c. 394-B).

Private banking is prohibited. (RSA 384:24).

Taxation.

See category 22 Taxation, topic 22.03 Business Taxes.

Mortgage Bankers and Brokers.

Licenses required. (c. 397-A).

Deceptive or misleading advertisement is prohibited. (RSA 397-A:14-a).

Mortgage servicing companies, regulated by Bank Commissioner under c. 397-B. Registration must be filed annually before Dec. 1. (RSA 397-B:4). Requirements for escrow accounts. (RSA 397-B:5).

Fees and interest rates must be disclosed. (RSA 397-A:16, RSA 397-A: 16-a).

Interstate Acquisitions.

Authorizes establishment of new New Hampshire banks and acquisition of New Hampshire banks or bank holding companies by out-of-state bank or bank holding company. (RSA 384:58-60).

Revolving credit plans authorizes bank to extend revolving credit plans to customers if complies with various regulations under this Chapter. (c. 384-G:1).

3.02 BILLS AND NOTES:

Uniform Commercial Code applies. (c. 382-A). See topic 3.09 Commercial Code.

Judgment Notes.

Judgment notes are authorized and process for judgment does not destroy negotiability. (RSA 382-A:3-104 [a][3][ii]).

Attorney Fees.

Attorney fees not recoverable in action on retail installment contract or extension of credit where goods purchased or loan proceeds are used primarily for personal, household or family purposes unless contract or evidence of indebtedness also provides: (1) That retail buyer, borrower or debtor shall be awarded attorney's fees if (a) he prevails in suit brought by retail seller or lender or (b) he prevails in action brought against seller or lender; and (2) that if buyer, borrower or debtor successfully asserts partial defense or set-off, recoupment or counterclaim, court may withhold from seller or lender entire amount or such portion of attorney fees as court considers equitable. (RSA 361-C:1, 2).

Special Defenses.

See subhead Uniform Commercial Code, supra.

3.03 BILLS OF LADING:

See topic 3.08 Carriers.

3.04 BILLS OF SALE:

See topic 3.23 Sales.

3.05 BLUE SKY LAW:

See topic 3.24 Securities.

3.06 BROKERS:

Uniform Commercial Code has been adopted. See topic 3.09 Commercial Code.

Real Estate Brokers.

No person can act as a real estate broker or real estate salesman without license and otherwise complying with provisions of New Hampshire Real Estate Practice Act. (RSA 331-A:3). If nonresident of New Hampshire wishes to become real estate broker or salesman in New Hampshire, he or she only needs to pass New Hampshire State portion of licensing organization if he or she is already active real estate broker or salesman in good standing in another state. (RSA 331-A:22). Nonresidents may be licensed provided they file irrevocable consent that legal actions may be filed against them in this state. (RSA 331-A:22). Nonresident whose license is under revocation or suspension in another state shall not be granted license in this state. (RSA 331-A:23). Commission shall establish fees that are sufficient to produce estimated revenues of 125% of direct operating expenses of commission for previous fiscal year, and sufficient to provide for periodic payments to reimburse for other money appropriated under New Hampshire Real Estate Practice Act. (RSA 331-A:24).

Mortgage Brokers.

Any person who engages in business of brokering first mortgage loans secured by state-located real property must obtain license from banking department. (RSA 397-A:3). Brokers with principal place of business outside of state must designate in-state agent for service of process. (RSA 397-A:6). Each licensee must file annual report with banking department concerning operations for preceding year. (RSA 397-A:13).

As to security brokers, see topic 3.24 Securities.

3.07 BULK SALES:

See topic 3.09 Commercial Code and category 8 Debtor and Creditor, topic 8.08 Fraudulent Sales and Conveyances.

3.08 CARRIERS:

Uniform Commercial Code has been adopted. See topic 3.09 Commercial Code.

Common carriers are supervised by the Public Service Commission and Commissioner of Transportation. (RSA 365:1, 22).

Rates for freight and passengers are subject to regulation by the Public Service Commission. (RSA 378:7). Rate schedules must be published. (RSA 378:1).

Limiting Liability.

Liability of railroad for personal baggage lost or damaged in transit is limited to $100 unless notice given of value in excess of that amount and extra charge paid. (RSA 377:14).

Bills of Lading.

Uniform Commercial Code applies. (c. 382-A).

Note: The criminal provisions of the Uniform Bills of Lading and Warehouse Receipts Acts remain in force, despite repeal of the balance of those acts. (RSA 335:50-55).

Motor Vehicle Carriers.

See category 23 Transportation, topic 23.01 Motor Vehicles.

3.09 COMMERCIAL CODE:

Uniform Commercial Code has been adopted, and became effective July 1, 1961. (c. 382-A).

Material Variations from 1962 Text.

See topics 3.02 Bills and Notes, 3.23 Sales, 3.24 Securities.

New Provision: § 2-329—Covers express warranties given by manufacturers. Concerns time within which manufacturers must provide replacement warranted parts, how long manufacturer must keep warranted parts available, requirements for warranty service, and penalties for failure to comply with law. See topic 3.23 Sales.

Optional Provisions:

Art. 2A on leases adopted (eff. 1/1/94).

Revised Art. 3 adopted (eff. 1/1/94).

Revised Art. 4 adopted (eff. 1/1/94). Expanded definition of negotiable instrument to include demand drafts. (RSA 382-A:3-104[f]). Enforcement requirements for lost negotiable instruments. (RSA 382-A:3-309).

Art. 4A on funds transfers adopted (eff. 1/1/94).

§ 5-112, U.C.C.—(eff. 1/1/99).

§ 5-114, U.C.C.—(eff. 1/1/99).

Art. 6 of U.C.C. on bulk sales repealed (eff. 1/1/94).

§ 7-204, U.C.C.—optional subsection 4 omitted.

§ 7-403 (1) (b), U.C.C.—optional language omitted.

Revised Art. 8 adopted (eff. 7/24/87). Replace by 1994 Revisions in their entirety (eff. 1/1/99).

§ 9-203, U.C.C.—defer to cc. 398, 398-A, 399-A, 399-B, 399-C and 399-D.

Permanent Editorial Board’s Recommendations for Amendments.

§ 2-702, 1966 Official Amendment not enacted.

§ 3-501, 1966 Official Amendment not enacted.

§ 7-209, 1966 Official Amendment not enacted.

Permanent Editorial Board’s Recommendations for Optional Amendments.

§ 1-209, 1966 Official Optional Amendment not enacted.

§ 2-318, 1966 Official Optional Amendment not enacted.

1972 Official Amendments.

Adopted.

Filing.

§§ 9-501 through 518 (eff. 7/1/01).

Forms.

See end of this Digest.

See also topics: Banks and Banking, Bills and Notes, Brokers, Carriers, Contracts, Factors, Frauds, Statute of, Sales, Securities, Warehousemen; categories Business Organizations, topic Corporations; Civil Actions and Procedure, topic Limitation of Actions; Debtor and Creditor, topics Assignments, Fraudulent Sales and Conveyances, Liens, Pledges; Documents and Records, topics Records, Seals; Mortgages, topic Chattel Mortgages.

3.10 CONDITIONAL SALES:

See topic 3.23 Sales.

3.11 CONSIGNMENTS:

See topic 3.14 Factors.

3.12 CONSUMER PROTECTION:

Consumer Fraud.

It is unlawful to use any unfair method of competition or any unfair or deceptive act or practice in conduct of any trade or commerce, including: passing off goods or services as those of another, causing likelihood of confusion or of misunderstanding as to source, sponsorship, approval or certification of goods or services, causing likelihood of confusion or of misunderstanding as to affiliation, connection or association with, or certification by, another, using deceptive representations or designations of geographic origin in connection with goods or services, representing that goods or services have sponsorship, approval, characteristics, ingredients, uses, benefits, or quantities that they do not have or that a person has a sponsorship, approval, status, affiliation, or connection that he does not have, representing that goods are original or new if they are deteriorated, altered, reconditioned, reclaimed, used or secondhand, representing that goods or services are of a particular standard, quality, or grade, or that goods are of a particular style or model, if they are of another, disparaging goods, services, or business of another by false or misleading representation of fact, advertising goods or services with intent not to sell them as advertised, advertising goods or services with intent not to supply reasonably expectable public demand, unless advertisement discloses a limitation of quantity, failing to disclose legal name or street address of business under c. 361-B:2-a, making false or misleading statements of fact concerning reasons for, existence of, or amounts of price reductions, and conducting going out of business sales other than name implies, or which last more than 60 days, or which are held more than once every two years by same owner of business. (RSA 358-A:2). Consumer Protection and Antitrust Bureau of Department of Justice investigates and prosecutes complaints. (RSA 358-A:4). Private and class actions are also allowed. (RSA 358-A:10, 10a). Interstate commerce exemption repealed. (RSA 358-A:3, II).

Antimonopoly provisions prohibit pricing of goods and services in manner that tends to create or maintain monopoly or harm competition. (c. 356:3).

Retail installment sale agreements arising from door-to-door solicitation may be cancelled by buyer before midnight of third day after buyer has signed agreement. All contracts must contain language to this effect. If seller has made no effort to recover his property after 90 days following sale, goods become property of buyer without further obligation. (c. 361-B).

Consumer credit reporting regulated by c. 359-B. Obsolete information may not be reported. Consumer has right to receive copy of report, sources of information, list of persons receiving report and nature and substance of all information in full (except medical). Consumer may file statement as to any disputed item which must be provided with reports.

Land Sales Full Disclosure Act requires registration with Attorney General's Office (Department of Justice) of all residential subdivisions of more than 15 lots and all time sharing subdivisions prior to all offerings. (c. 356-A).

Condominium Act requires registration with Attorney General's Office (Department of Justice) of all residential condominiums of more than ten units and all time sharing condominiums prior to all offerings. (c. 356-B).

Protection of Tenants in Conversion of Rental Units.

(c. 356-C).

"Unsolicited merchandise" statute adopted. (RSA 339:2-a).

Chain distributor schemes whereby person is sold license or right to solicit or recruit one or more additional persons who are also sold such license or right are prohibited. (c. 358-B).

Collection Practices.

Unfair, deceptive and unreasonable debt collection practices against consumers are prohibited. (c. 358-C).

Health Clubs, Rental Referral Agencies and Buying Clubs regulated. (c. 358-H, I, J). Health Club initiation fees not to exceed 100% of annualized monthly fee.

Anti "Cramming" provisions prohibit utility companies from submitting unauthorized, misleading, or deceptive charges on customer's utility bill. (c. 378:46).

Plain Language.

No "Plain Language Statute".

Exclusion or Modification of Warranties.

Sellers are restricted in their ability to exclude or modify warranties in sale of consumer goods. (c. 382–A, § 2–316[4]).

Urea-formaldehyde Foam Insulation.

Manufacture and sale in new homes prohibited. (RSA 339-A:9). Warnings of use in existing homes required. (RSA 339-A:11).

See category 23 Transportation, topic 23.01 Motor Vehicles, subhead Sales; also topic Sales, this category.

3.13 CONTRACTS:

Common Law rules apply. Uniform Commercial Code adopted. See topic 3.09 Commercial Code. (c. 382-A).

See also categories 10 Documents and Records, topic Seals; Family, topic Infants.

3.14 FACTORS:

Uniform Commercial Code adopted. (c. 382-A). See topic 3.09 Commercial Code.

License Requirements.

None.

3.15 FRANCHISES:

Franchising is governed by Distributorship Disclosure Act unless by order Attorney General exempts distributorship from provisions of Distributorship Disclosure Act. (c. 358-E). No person may offer or sell distributorship without first registering with Attorney General. (RSA 358-E:2, 3). Each prospective distributor must be provided with disclosure statement seven days prior to execution of agreement. (RSA 358-E:4).

3.16 FRAUDS, STATUTE OF:

Uniform Commercial Code has been adopted. (c. 382-A). See topic 3.09 Commercial Code.

No action can be maintained on a contract for the sale of land or on a promise by an administrator or executor to pay out of his own estate, nor to hold one for the debt, default or miscarriage of another, nor on an agreement in consideration of marriage, nor on any contract not to be performed within one year, unless there is a note or memoranda of the same in writing signed by the party to be charged or by his agent duly authorized. (RSA 506:1-2). Power of attorney to convey real estate must be in writing, signed and acknowledged. (RSA 477:9).

Part Performance.

The doctrine that part performance takes a case out of the Statute of Frauds is an equitable doctrine. (120 N.H. 593, 599, 419 A.2d 1097, 1101). Note that payment of purchase money is not such part performance as will have this effect. (67 N.H. 389, 390, 32 A.154). If purchaser under verbal contract has entered into possession, with assent of other party, and made improvements, specific performance may be decreed. (117 N.H. 676, 677, 377 A.2d 890, 891-92).

Contracts of sale of goods for a price of $500 or more must be in writing set forth in Uniform Commercial Code. (c. 382-A).

Guarantee Written On Commercial Paper.

Uniform Commercial Code applies. (RSA 382-A:3-416).

3.17 [RESERVED]

3.18 INFORMATION TECHNOLOGY, INTERNET AND NEW MEDIA:

Uniform Electronic Transactions Act enacted. (c. 294-E).

3.193.16 [RESERVED]

3.17 INTEREST:

Interest may be at any rate, but is computed at 10% unless a different rate is expressly stipulated in writing. Annual rate of interest on judgments, determined by state treasurer, is prevailing discount rate of interest on 26-week U.S. Treasury bills at last auction preceding last day of Sept. of prior year, plus two percentage points, rounded to nearest tenth of a percentage point. (RSA 336:1).

Judgments.

In any action on a debt or account stated or where liquidated damages are sought, interest runs from time of institution of suit. (RSA 524:1-a). In all other civil proceedings at law or in equity in which a verdict is rendered or a finding is made for pecuniary damages, whether for personal injuries, wrongful death, for consequential damages, for damages to property, business or reputation or for any other type of loss for which damages are recognized there is added forthwith by clerk of court to damages interest from date of writ or filing of petition. (RSA 524:1-b).

Small Loans.

No person, partnership or corporation shall engage in business of making loans up to amount of $10,000 without securing license from bank commissioner. Interest on open and closed end loans $10,000 and under governed by RSA 399-A:3.

Home Mortgage Loans.

Allowable rate of interest computed on unpaid balance for second mortgage loan on property which is occupied in whole or in part as home by any obligor shall be rate agreed upon in note between borrower and lender; however, following sixth month of any period in which loan has been in continuous default, not more than 1.5% per month on any unpaid balances. (RSA 397-A:16-a).

Usury.

There is no general usury law, but see subheads, supra.

3.18 [RESERVED]

3.19 LICENSES, BUSINESS AND PROFESSIONAL:

Licenses are required before persons can engage in practically any businesses for which licenses are usually required, and are granted by state and local authorities. See Title XXX Occupations and Professions cc. 309-B-332-J.

The provisions of the act requiring licenses of hawkers and peddlers do not apply to any person selling the products of his own labor or the labor of his family and the product of his own farm or the one which he tills. (RSA 320:3).

Itinerant vendors must obtain both state and local licenses and are subject to stringent regulations. (RSA 321:1, 4, 11). The provisions requiring licenses of itinerant vendors do not apply to sales made to dealers by commercial travelers or selling agents. (RSA 321:3).

Marriage Licenses.

See category 14 Family, topic 14.11 Marriage, subhead New Requirements.

3.20 MONOPOLIES, RESTRAINT OF TRADE AND COMPETITION:

Every contract, combination or conspiracy in restraint of trade is unlawful. (RSA 356:2, I). Establishment, maintenance or use of monopoly power or any attempt to establish, maintain or use monopoly power over trade or commerce for purpose of affecting competition or controlling, fixing or maintaining prices is unlawful. (RSA 356:3).

Restraints Prohibited.

Contracts, combinations or conspiracies are unlawful which have purpose or effect of: Fixing, controlling or maintaining prices, rates, quotations or fees in any part of trade or commerce; fixing, maintaining, controlling, limiting, or discontinuing production, manufacture, mining, sale or distribution of any commodity or service; allocating or dividing customers or markets in any part of trade or commerce; refusing to deal, or coercing, persuading or inducing any person to refuse to deal with another person; or fixing or controlling price quotation of any bid for public or private contract, submitting sham or complementary bids or controlling submission of bids including refusals to bid. (RSA 356:2, II).

3.21 NEGOTIABLE INSTRUMENTS:

See topic 3.02 Bills and Notes.

3.22 RESTRAINT OF TRADE:

See topic 3.20 Monopolies, 3.22 Restraint of Trade and Competition.

3.23 SALES:

Uniform Commercial Code has been adopted. See topic 3.09 Commercial Code.

Bills of Sale.

No statutory form is prescribed.

Bulk Sales.

See topic 3.09 Commercial Code; and category 8 Debtor and Creditor, topic 8.08 Fraudulent Sales and Conveyances.

Conditional Sales.

Uniform Commercial Code applies. See topic 3.09 Commercial Code. No statutory limitation exists as to type size in printed contracts.

Consumer Protections.

See topic 3.12 Consumer Protection; and category 8 Debtor and Creditor, topic 8.08 Fraudulent Sales and Conveyances.

Contracts of Sale.

No statutory limitation exists as to type size in printed contracts.

Product Liability.

Governed by general principles of common law tort liability and U.C.C., where applicable (RSA 382-A:2-313 to 2-315). Restatement of Torts 2d, § 402A adopted. (110 N.H. 36, 260 A.2d 111).

Breach of warranty actions under UCC 2-313, 2-314, 2-315, are limited to four years from when breach of warranty occurs. (RSA 382-A:2-725).

Requirement of privity has been substantially abolished by revision of UCC 2-318 which requires only that plaintiff be a person whom manufacturer, seller or supplier might reasonably have expected to use, consume or be affected by goods. (RSA 382-A:2-318). Labeling of hazardous substances is required. (c. 339-A). Donors of food for charitable purposes are, under certain circumstances exempt from liability for all but gross negligence, recklessness or intentional conduct when harm results from ingestion. (RSA 508:15).

Retail Credit Sales.

Any person in the business of extending credit must provide a written statement to borrower or purchaser clearly setting forth finance charges (RSA 399-B:2); finance charge statement conforming to 12 C.F.R. 226 or Regulation M (12 C.F.R. 213) is deemed to fulfill this requirement. See topic 3.19 Interest. Repossession of goods by seller requires retroactive allocation of payments received under contract to purchases in same proportion as original cash prices bear to one another. Down-payment must be allocated in its entirety to related purchase. Allocation report must be given to buyer and buyer has 15 day right to cure. (RSA 399-B:6).

3.24 SECURITIES:

Uniform Securities Act adopted. (c. 421-B).

Uniform Commercial Code in effect. See topic 3.09 Commercial Code.

Supervision.

Sales of Securities are regulated by Uniform Securities Act, c. 421-B, which is enforced by Secretary of State, State of New Hampshire, Concord, New Hampshire.

Exempt Securities.

Following securities are exempted from registration requirements of Act (RSA 421-B:17): (A) Securities issued or guaranteed by U.S., any state, any political subdivision of state or any agency or corporate or other instrumentality of one of foregoing, but industrial development bonds and industrial revenue bonds are not exempt; (B) securities issued by any foreign government with which U.S. currently maintains diplomatic relations, if security is recognized as valid obligation by issuer or guarantor; (C) any security issued by or representing interest in or debt of, or guaranteed by, any bank organized under laws of U.S., or any bank, savings institution, or trust company organized under laws of any state; (D) any security issued by and representing interest in or debt of, or guaranteed by, any federal savings and loan association, or any building and loan or similar association organized under laws of any state and authorized to do business in New Hampshire; (E) any security issued or guaranteed by any federal credit union or any credit union or similar association organized under laws of New Hampshire; (F) any security listed or approved for listing upon notice of issuance on New York Stock Exchange, American Stock Exchange, Boston Stock Exchange, Chicago Board Options Exchange, NASDAQ/NMS or securities designated by Federal Reserve System as “O.T.C. Margin Stocks”; (G) any commercial paper arising from current transaction or proceeds of which have been or are to be used for current transactions, and that evidences obligation to pay cash within nine months of date of issuance, or any guarantee of such paper or of any renewal not advertised for sale to general public; (H) any interest in any employees savings, stock purchase, pension, profit sharing or similar benefit plan, or self-employed persons retirement plan; (I) any security issued or guaranteed by any railroad, other common carrier or public utility subject to regulation by governmental authority of U.S. with respect to issuance or guarantee of securities; (J) any interest in common trust fund or similar fund maintained by state bank or trust company organized and operating under laws of New Hampshire, or of national bank, for collective investment and reinvestment and reinvestment of funds contributed to such common trust fund or similar fund by bank or trust company in its capacity as trustee, executor, administrator, or guardian; (K) any security meeting all of following conditions: if issuer is not organized under laws of U.S. or this state, it has appointed duly authorized agent in U.S. for service of process and prospectus sets forth that agent’s name and address; class of issuer’s securities is registered under § 12 of Securities and Exchange Act of 1934 and has been so registered for three years immediately preceding offering date; neither issuer nor significant subsidiary has had material default during last seven years of principal, interest, dividend or sinking fund installment on preferred stock or indebtedness for borrowed money, or rentals under leases with terms of three years or more; issuer has had consolidated net income of at least $1,000,000 in four of last five fiscal years including last fiscal year and, if offering is of interest bearing securities, has had net income in its last fiscal year of at least one and one half times issuer's annual interest expense; if offering is of stock or shares other than preferred stock or shares, securities have voting rights including right to have at least as many votes per share and right to vote on at least as many general corporate decisions as each of issuer's outstanding classes; and, if offering is of stock or shares, other than preferred, securities are owned beneficially or of record, on any date within six months prior to offering, by at least 1,200 people, and on that date there are at least 750,000 such shares outstanding with aggregate market value of at least $3,750,000; (L) any certificate of indebtedness sold or issued for investment other than certificate of indebtedness pledged as security for loan made contemporaneously by industrial loan and thrift company; (M) any security issued by any person organized and operated not for private profit but exclusively for charitable purposes, or as chamber of commerce or trade or professional association; (N) any security designated by rule or order by secretary of state after finding that designation is consistent with purposes fairly intended by policy and provisions of this title.

Exempt Transactions.

Following transactions are exempt from registration requirements of Act (RSA 421-B:17): (1) Any non-issuer transactions, whether or not effected by or through broker-dealer resulting in completion of five or fewer sales of securities of single issuer by same non-issuer within any period of 12 consecutive months. Secretary of State, on case-by-case basis, may by rule or order, retroactively or prospectively, increase number of persons to whom sales may be made under this exemption. (2) Any sales of securities by issuer, if: (A) Number of purchasers of securities of issuer, in all jurisdictions combined, does not in consequence of sale, exceed ten in number during any 12 consecutive months and 25 in number during issuer's existence; (B) securities sold in reliance on this subparagraph have not been offered to public by any form of general solicitation or general advertisement; (C) commission or remuneration is not paid or given, directly or indirectly, to person other than broker-dealer registered under this chapter or agent registered under this chapter for soliciting prospective purchaser; and (D) except for sales of securities registered under Securities Act of 1933 or exempted by § 3(b) of that act, seller reasonably believes that all buyers are purchasing for investment.

Registration of Securities.

Securities may be registered by notification, coordination or qualification. Industrial development bonds, industrial revenue bonds and any securities issued by person or organization exclusively for social, religious, educational, benevolent, fraternal, charitable, reformatory, athletic, chamber of commerce, trade, industrial development or professional association purposes and not for pecuniary gain, may be registered by notification. Securities for which registration has been filed under Securities Act of 1933 may be registered by coordination. Registration statement filed by coordination must be accompanied by two copies of latest form of prospectus and any other documents required by Secretary of State. Registration statement becomes automatically effective at moment federal registration statement becomes effective so long as no stop order is in effect and no proceeding pending, registration statement has been on file with Secretary of State for at least 20 days, and statement of maximum and minimum proposed offering prices and maximum underwriting discounts and commissions has been on file for two full business days. (RSA 421-B:11-14).

Any security may be registered by qualification. Security registered by qualification must contain information required by § 305 of Uniform Securities Act and any other information required by Secretary of State. (RSA 421-B:14).

Licenses.

All licenses for agents, broker-dealers, investment advisers and issuer dealers expire every year on Dec. 31. (RSA 421-B:6).

Postlicensing Provisions.

Each broker-dealer doing business in New Hampshire must within 60 days of close of fiscal year, file with Secretary of State document showing its financial statement, changes in management, changes in ownership and any significant changes in method of doing business in preceding fiscal year. Secretary of State may require at any reasonable time any other statements, reports or information from persons subject to this Act. (RSA 421-B:8).

Records of broker-dealer, investment adviser, and of insurer-dealer are subject to such reasonable periodic, special, or other audits or inspections by representative of Secretary of State, within or without this state, as Secretary of State considers necessary or appropriate in public interest and for protection of investors. Audit or inspection may be made at any time and without prior notice. Secretary of State may copy, and remove for audit or inspection, copies of all records Secretary of State reasonably considers necessary or appropriate to conduct audit or inspection. (RSA 421-B:9).

Tender Offers.

C. 421-A requires filing of registration statements prior to any takeover bid with respect to equity securities of any New Hampshire corporation or corporation having its principal place of business or principal executive office within State.

Uniform Simplification of Fiduciary Security Transfers Act not adopted. Uniform Commercial Code adopted.

3.25 STATUTE OF FRAUDS:

See topic 3.16 Frauds, Statute of.

3.26 TRUST RECEIPT SECURITY:

See category 8 Debtor and Creditor, topic 8.15 Pledges.

3.27 WAREHOUSEMEN:

Any person, firm or corporation having a place of business in the state, who keeps or maintains for hire a warehouse for the storage of goods, wares and merchandise, is defined to be a public warehouseman. A public warehouseman must obtain an annual license from the Secretary of State upon payment of a license fee of $50. (RSA 348:1). Licensee must give bond to state for faithful performance of duties. Suit on bond may be brought in name of state. (RSA 348:2, 3).

Warehousemen must give bailor negotiable receipt for property so stored unless such person requests that receipt be stamped “Not Negotiable”. (RSA 348:5).

Uniform Commercial Code has been adopted. See topic 3.09 Commercial Code.

Note: Criminal provisions of Uniform Warehouse Receipts Act remain in force, despite repeal of balance of those acts. (RSA 335:50-55).

Warehouse Receipts.

Warehouse receipts and other documents of title and the rights, duties and liabilities of warehousemen are covered by the Uniform Commercial Code. (c. 382-A).

Cold storage warehouses are specially licensed by the State Department of Health and Human Services, Division of Public Health Services, and specially regulated. (RSA 145:1, 2).

4 CITIZENSHIP

4.01 ALIENS:

Aliens in general have same rights as citizens.

Property.

Resident alien may take, purchase, hold, convey or devise real estate, and it may descend in the same manner as in the case of a citizen. (RSA 477:20). If woman, wife of alien or man residing in another state, has resided in this state six months successively, separate from her husband, she may convey all real and personal property, held by her in New Hampshire, same as if she were sole and unmarried. (RSA 460:12).

5 CIVIL ACTIONS AND PROCEDURE

5.01 ACCORD AND SATISFACTION:

No statutory provisions. The payment and acceptance as in full of something less than or different from what might legally be claimed under a liquidated or unliquidated obligation is a defense to an action for the balance. (74 N.H. 358, 68 A. 325, reaffirmed at 107 N.H. 321, 221 A.2d 236).

See category 3 Business Regulation and Commerce, topic 3.09 Commercial Code.

5.02 ACTIONS:

The common law actions are in use, modified by statutes.

Special writs in common use are: Replevin (c. 536-A); scire facias (RSA 543:1); habeas corpus (RSA 534:1, 8); mandamus and quo warranto (RSA 491:7).

Equity.

Distinction between law and equity is still maintained, but both are administered by the same court. (RSA 491:7; RSA 498:1).

Class Actions.

Superior court determines whether class action is to be maintained. (Super. Ct. R. 27-A).

Conditions Precedent.

Notice of claim against governmental unit must be sent by registered mail to clerk of unit within 60 days after injury specifying date, time and location, provided that in any case where lack of written notice, actual knowledge or reasonable opportunity to obtain knowledge of any injury within said 60 day period is alleged by governmental unit, burden of proof shall be on governmental unit to show that it was substantially prejudiced thereby. (RSA 507-B:7).

Commencement.

See topic 5.20 Process.

Summary Judgment.

See topic 5.15 Judgments.

Parties.

Writs against unknown defendants may be issued in fictitious name and later amended. (RSA 509:7). No abatement may be had for non-joinder (RSA 514:10) or misjoinder (RSA 514:13) of parties and such errors may be cured by amendment (RSA 514:9).

Interpleader.

Depositaries of personal property may interplead. (RSA 543:1). The State of New Hampshire is authorized to enter into interpleader compacts with other states which provide that personal jurisdiction may be obtained over foreign parties in interpleader actions. (c. 5A).

Abatement.

Proceedings will not be abated because of a mistake, where the person or case may be rightly understood by the court, nor through any defect in form only. (RSA 514:8). No action abates by death of a party if the cause survives. In case of death, court may, at any time before end of 12 months after death of plaintiff or grant of administration on estate of defendant allow action to continue by or against personal representatives. (115 N.H. 15, 332 A.2d 168; RSA 556:10). When one of two or more plaintiffs or defendants dies, and right of action survives, action may be prosecuted by or against surviving parties, such death being suggested on record. (RSA 514:12).

Survival.

Actions for tort for physical injuries to the person and all other actions and causes of action existing in favor of or against a deceased person, except those for recovery of penalties and forfeitures of money under penal statutes, survive, and may be prosecuted or defended by decedent’s executor or administrator. (RSA 556:9, 15). There is six years statute of limitations on new actions for personal injury. (RSA 556:11).

Tender.

At any time before the return day of the writ, the defendant may tender to the attorney who brought the action the amount of the debt with interest and costs, and such tender bars any further proceedings in the case. (RSA 515:1).

Small Claims.

See topic 5.19 Practice; category 6 Courts and Legislature, topic 6.01 Courts.

Prohibited Action.

For breach of promise to marry. (RSA 508:11). Liability of governmental unit for personal injury or property damage arising out of ownership, occupation, maintenance, or operation of public sidewalks, streets and highways is limited as provided in RSA 231:90-93, and liability of any governmental unit with respect to publicly owned airport runways and taxiways is limited as provided in c. 422. (RSA 507-B:2). Liability of municipality or school district operating facility for purpose of skateboarding, rollerblading, stunt biking, or rollerskiing is limited. (c 507-B:11). Liability of municipality for hazards caused by snow, ice or other inclement weather is limited. (RSA 507-B:2).

Limitation of.

See topic 5.16 Limitation of Actions.

Administration.

See category 13 Estates and Trusts, topic 13.08 Executors and Administrators.

Direct Actions Against Insurer.

See category 23 Transportation, topic 23.01 Motor Vehicles, subhead Direct Actions.

5.03 APPEAL AND ERROR:

From Probate Courts.

Appeals of questions of law may be taken to Supreme Court from all decisions of probate court in accordance with rules of Supreme Court. (RSA 567-A:1). Appeals from decisions of commissioners of insolvent estates are governed by c. 558. Filing of appeal shall stay all proceedings pending determination by Supreme Court. (RSA 567-A:7). Supreme Court may reverse, affirm or remand case for further proceedings. (RSA 567-A:8).

From District or Municipal Court.

In civil cases, questions of law may be transferred to Supreme Court in same manner as from Superior Court. (RSA 502-A:17-a; RSA 502:24). In criminal cases, appeal may be taken to Superior Court except in cases in district courts served by regional jury trial courts. (RSA 502-A:12-a; RSA 599:1). Recognizance with sufficient sureties, up to $2,000, may be required. (RSA 599:2).

From Superior Court.

Appeal from Superior Court decision on merits may be made to Supreme Court which may decline to accept discretionary appeals. (Sup. Ct. R. 7[1][B]). Supreme Court must hear mandatory appeals. (Sup. Ct. R. 7[1][A]). Interlocutory appeals prior to decision on merits may be made from lower court ruling (Sup. Ct. R. 8) or prior to lower court ruling (Sup. Ct. R. 9). Supreme Court may, in its discretion, decline to accept any interlocutory appeal. (Sup. Ct. R. 8, 9).

From Administrative Agencies and Commissions.

Appeals from orders of any administrative agency or commission may be taken to Supreme Court. (RSA 541:6; Sup. Ct. R. 10). Appealing party must file Motion for Rehearing with agency or commission from whose decision appeal is sought. (RSA 541:3). No new or additional evidence may be presented in Supreme Court, but upon good cause, Supreme Court may remand case for further proceedings. (RSA 541:14).

Writs of Error.

The Supreme Court has authority to issue writs of error. (RSA 490:4). Writs of error may be sued out within three years after judgment, and not afterward unless allowed by the court for sufficient cause, upon petition and notice. (RSA 508:7).

Stay of Execution.

Since questions of law are generally transferred to the Supreme Court prior to the entry of judgment, without bond, the necessity of staying execution rarely arises. Injunctions may, however, issue for cause shown against levying an execution which has issued. (RSA 527:17). There is no provision requiring the giving of a supersedeas bond in such a case.

5.04 BONDS:

Common law rules apply.

5.05 CERTIORARI:

Supreme Court has jurisdiction to issue writs of certiorari. (RSA 490:4).

5.06 CHARITABLE IMMUNITY:

See topic 5.09 Damages.

5.07 COMMISSIONS TO TAKE TESTIMONY:

See topic 5.11 Depositions and Discovery.

5.08 COSTS:

Party claiming costs shall file with clerk itemized, verified bill of costs. Following costs are allowed for prevailing party: witness fees of clerk, expense of view, fees for service of process, costs of transcripts, and such other costs provided by law. (Super. Ct. R. 87).

Security for Costs.

Writs must be indorsed by the plaintiff or his agent or attorney if he is a resident of the state. If a nonresident, writ must be indorsed by some responsible resident (usually the attorney who brings suit) and indorser becomes liable for costs. (RSA 509:8, 9)

5.09 DAMAGES:

Common law generally prevails as to compensatory damages, although it has been stated that liberal damages may be awarded in cases where malice, wantonness, or willful indignity in causing the injury are present. (112 N.H. 71, 73, 289 A.2d 66, 68). In any action for personal injury, damages awarded may include compensation for noneconomic loss, but such damages shall in no case exceed $875,000. (RSA 508:4-d, I). This limitation has, however, been held unconstitutional. (134 N.H. 50, 52, 587 A.2d 1232, 1233).

The following schedule of punitive damages is provided for willful trespass and conversion: fences, three times value thereof (RSA 539:3); stone, ore, gravel, clay, sand, turf or mold, three times value thereof and not more than $15 (RSA 539:4); property of electric utility, actual damage and costs incurred by utility plus attorney’s fees. (RSA 539:7).

Doctrine of charitable immunity abrogated. (105 N.H. 53, 56, 193 A.2d 788, 791).

Exemplary damages may be recovered against a defendant who files a plea of title in a landlord and tenant action if judgment is subsequently recovered against him. (RSA 540:23).

Comparative Negligence.

Contributory negligence is not bar to recovery if plaintiff’s negligence not greater than defendant’s. (RSA 507:7-d). Damages reduced in proportion to negligence of plaintiff. (Id.). If more than one defendant, damages proportioned in accordance with their negligence. In all actions, damages are apportioned among parties. (RSA 507:7-e). Rule of contribution among tortfeasors adopted as of July 1, 1986. (RSA 507:7-f; see also RSA 507:7-g, h, i).

See also category 13 Estates and Trusts, topic 13.05 Death, subhead Actions for Death.

5.10 DECLARATORY JUDGMENTS:

See topic 5.15 Judgments.

5.11 DEPOSITIONS AND DISCOVERY:

See also topic 5.19 Practice.

Depositions de bene esse may be and are freely taken.

Uniform Foreign Depositions Act adopted. Effective Jan. 1, 1998. (RSA 517-A:1).

Within State for Use Within State.

Depositions in all cases generally are taken by agreement but may be taken by notice and subpoena. (RSA 517:4; RSA 516:4). Statute relative to taking and use of depositions (RSA 517:1) has been repealed in favor of N.H. Rule of Evidence. (c. 804[b][1]). Respondent in criminal case may take deposition of any person in his defense and may use same at trial of case whenever in discretion of court, such use is deemed necessary for promotion of justice. However, no party in criminal case shall take discovery deposition of victim or witness who has not achieved age of 16 years at time of deposition (RSA 517:13-a), unless court, upon motion of party or victim, authorizes taking of videotape deposition on grounds that child will suffer emotional or mental strain from testifying in court or that further delay will impair child's ability to recall and relate facts. Videotape deposition of witness under 13 in criminal case will generally be taken. (RSA 517:13-a).

No person shall write testimony of witness, record testimony of witness, or act as magistrate in taking same, if such person is party to action, or is relative, employee, or attorney of party to action, or if such person has financial interest in action or its outcome; or such person has entered into arrangement with person or entity which has financial interest in action or its outcome where arrangement purports to create relationship in which person transcribing deposition or recording deposition will be providing exclusive deposition transcribing or deposition recording services for interested person or entity, or such person is employed by or is independent contractor working for person or entity which has financial interest in action or its outcome, where arrangement purports to create relationship in which person's employer will be providing exclusive deposition transcribing or deposition recording services for interested person or entity. (RSA 517:3).

Within the State for Use Elsewhere.

Commissioners or other persons appointed by courts of record of other states may take depositions here. (RSA 517:18).

Outside of State for Use Within State.

Any commissioner appointed under the laws of the state to take depositions in other states, any judge or justice of the peace or notary public in any other state or country, may take the deposition. (RSA 517:2). A justice of the superior court, either in term time or vacation, may appoint any suitable person to take depositions outside the state. (RSA 517:15).

Deposition in perpetual remembrance of any fact may be taken before a court of record, or before two justices of the peace, one of whom shall be of the quorum. (RSA 518:1). A person desiring to take such deposition must present his petition to the court or justices in writing, under oath, briefly setting forth his interest in the subject, and the facts to which the desired testimony relates, the names and residences of all persons supposed to be interested therein, or, if the fact be so, that the names or residences of such persons are unknown, and the names of the witnesses proposed to be examined. (RSA 518:2). Notice must be given by the court or justices to such interested parties in the manner provided for the taking of ordinary depositions, which notice must contain or be annexed to a copy of the petition for the taking of the depositions. (RSA 518:3). If the name or residence of a party interested is unknown the notice must be published three weeks successively, beginning at least eight weeks before the time of taking, in some newspaper printed in Concord, and in some newspaper printed in the county, and, if the deposition relates to land, a like notice must be posted in some public place in the shire town of the county in which the land lies. (RSA 518:5). Caption and manner of taking are the same as in ordinary depositions (RSA 518:6). If the depositions relate to real estate, or to any transaction connected therewith, the petition, depositions, certificate, notice and evidence of service must within 90 days from the taking thereof, be recorded in the registry of deeds of the county where the estate lies; and the depositions taken in any other case may be so recorded. (RSA 518:8).

Depositions in perpetual remembrance may be used in the trial of any cause wherein the matters concerning which they were taken are drawn in question; and in case they shall be lost or out of the possession and control of the party desiring to use them a copy of the record thereof may be used. (RSA 518:9).

Compelling Attendance of Witnesses.

Any New Hampshire justice or notary can summon witnesses to appear before himself or any other justice or notary to give depositions in any matter or cause in which the same may be lawfully taken. (RSA 516:4). If a person so summoned neglects to attend or to give his attendance so long as may be necessary for the purpose for which he was summoned, or refuses to testify or to give his deposition if required, having no reasonable excuses therefor, he shall be liable to the party aggrieved for all damages sustained thereby. (RSA 516:6). In addition justice or notary before whom he has been summoned shall find him guilty of violation (carrying penalty up to $4,000, RSA 651:2, IVa) and he may be ordered to pay costs. (RSA 516:7).

Commissioners or other persons appointed by foreign courts have the same powers of procuring the attendance of witnesses, and of requiring the production of papers as have local justices of the peace within this state. (RSA 517:18).

Commissioners appointed by New Hampshire courts to take depositions elsewhere for use here have all the powers conferred by the laws of other states, territories and foreign countries upon commissioners or other persons authorized to take depositions in such other states, territories and foreign countries for use in causes pending in this state. (RSA 517:17).

Notice Required.

The party proposing to take a deposition must cause a notice in writing, signed by a justice or notary, stating the day, hour and place of taking the same, to be delivered to the adverse party, or one of them, or to be left at his abode, if either of such parties resides in this state, and within 20 miles of the place of taking, or of the party taking the same, a reasonable time before the taking thereof. (RSA 517:4). No notice to the adverse party of the taking of depositions is deemed reasonable unless served three days, exclusive of the day of service and the day of caption, before the day on which they are to be taken: and when the adverse party lives more than ten miles from the place of caption, one day more must be allowed for every additional 20 miles. However, 20 days notice is deemed reasonable in all cases, unless otherwise ordered by the court. (Super. Ct. R. 38). No deposition shall be taken within 20 days after service of action, except by agreement or by leave of court for good cause shown. (Super. Ct. R. 38).

Where the statute requires notice of the taking of depositions to be given to the adverse party, it may be served on such party, or on attorney of record of such party. In cases where action is in name of nominal party, and writ or docket discloses real party in interest, service must be made on party in interest, or on attorney of record of such party. Service may be given by mail or in hand. (Super. Ct. R. 40).

If the adverse party resides out of the state, or more than 20 miles from the place of caption, or from the party proposing to take the deposition, a like notice, given to the agent or attorney of such adverse party or left at his abode, is sufficient. No person may be deemed an agent or attorney for this purpose unless he has indorsed the writ in the cause, or has appeared for his principal before the court, justice, referees or arbitrators, where the action is pending, or has given notice in writing that he is such attorney or agent. (RSA 517:5-6).

Time Limit.

No deposition taken after the Monday next preceding first day of term shall be used in any trial, unless deponent is witness, except for good cause shown and upon such terms as court may order. (Super. Ct. R. 37).

Manner of Taking.

Interrogatories shall be put by attorneys and interrogatories and answers shall be taken in shorthand or other form of verbatim reporting approved by court and transcribed by a competent stenographer agreed upon by parties or their attorneys present at deposition. In absence of such agreement, stenographer shall be designated by court. Failure to object in writing to stenographer in advance of taking of deposition shall be deemed agreement to stenographer recording testimony. (Super. Ct. R. 41).

No deposition, as transcribed, shall be changed or altered, but any alleged errors may be set forth in separate document attached to original and copies. (Super. Ct. R. 41).

Magistrate shall cause to be noted any objection to any interrogatory or answer without deciding its competency. If complaint is made of interference with any witness, magistrate shall cause such complaint to be noted and shall certify correctness or incorrectness thereof in caption. (Super. Ct. R. 41).

Parties can and usually do agree that deposition may be taken by stenographer in shorthand and later transcribed. Court may allow as costs whole or any part of expense thereof, as justice may require. (RSA 517:20). Deponent must sign his deposition and make oath to its truth. (RSA 517:7).

Caption.

The magistrate taking the deposition must certify the oath of the deponent, with the time and place of taking the deposition, the case and court in which it is to be used, that the adverse party was or was not present, was or was not notified, and that he did or did not object. (RSA 517:8).

Return.

The deposition must be sealed up by the magistrate, directed to the court or justice before whom it is to be used, with a brief description of the case, and so delivered into court, (RSA 517:10). If the adverse party did not attend, there must be annexed to the deposition a copy of the notice left with the adverse party, his agent or attorney, with a return of service written thereon, stating the time when the notice was left. (RSA 517:9). It is customary for parties to agree at the time of the deposition that all formalities of filing shall be waived. Upon motion, court may order filing of depositions, and, upon failure to comply with such order, court may take such action as justice may require. (Super. Ct. R. 41).

Forms

The usual form of notice to take depositions is as follows:

State of New Hampshire, ... ss.

To . . . . . .

You are hereby notified that one or more depositions will be taken before a justice of the peace, at the office of . . . . . . in . . . . . . in said County of . . . . .on the . . . . . . day of . . . . . ., 20. . . ., at . . . . . . of the clock in the . . . .noon to be used in an action to be heard and tried at the Superior Court to be holden at . . . . . . in said County of . . . . . . on the . . . . . . Tuesday of . . . . . ., 20. . . ., in which plea . . . . . . and . . . . . .

of . . . . in . . . . County of . . . . is . . . . Dated at . . . . the . . . . day of . . . ., 20. . . . . .

Justice of the Peace.

The usual form of deposition is:

I, ... of . . . . in the County of . . . . and State of . . . . on oath depose and say in answer to the following interrogatories: (insert questions and answers. (Add signature of deponent).

The caption is usually in the following form and should be annexed to the deposition:

State of . . . .

County of . . . . } ss

Personally appeared before me, the subscriber, a (state magistrate's title), the within named A. B., at the office of . . . . in . . . . in said County, on the . . . . day of . . . ., 20. . . . ., and made solemn oath that the within deposition by him subscribed contains the truth, the whole truth and nothing but the truth relative to the cause for which it was taken. The said deposition is taken at the request of C. D., of . . . ., to be used at the . . . . Court of the State of New Hampshire to be held at . . . . in and for the County of . . . . on the . . . . day of . . . . next, in a plea wherein . . . . of . . . . is plaintiff and the said C. D. is defendant; and the taking of the same was begun at . . . . o'clock in the forenoon, on the first mentioned day, and continued until the whole was completed.

The said . . . . being duly notified was (or was not) present, and did not object.

(Signature and title).

Any waiver by the parties of formalities as to the manner of taking the deposition, or of formalities with respect to notice, caption, or filing, should be stated in the caption.

When the deposition is filed it should be accompanied by a statement as follows:

To the . . . . Court of the State of New Hampshire:

Enclosed is a deposition to be used in an action in which . . . . is plaintiff, and . . . . is defendant, taken and sealed by

(Signature and official title).

5.12 EQUITY:

See topic 5.02 Actions.

5.13 EVIDENCE:

See topic 5.11 Depositions and Discovery.

Witnesses.

No person interested as party or otherwise in the result of an action is excluded or excused from testifying on that account (RSA 516:22) except as hereinafter stated.

Privileged Communications.

There is no statutory privilege as to communications to attorneys; however, confidential physician-patient communications are placed by statute “on the same basis as those provided by law between attorney and client” and privilege applies to communications between persons working under physician, to extent necessary for treatment and diagnosis (RSA 329:26) as are communications between certified psychologists and their clients (RSA 330-A:32). Priest-penitent privilege is also recognized. (RSA 516:35). Confidential communications between victims of sexual assault or domestic abuse and their counselors and third persons present to assist communication with victim are privileged. (RSA 173-C:2).

Death or Incompetency of Party to Transaction.

In action by indorsee or assignee of bill of exchange, promissory note or mortgage, against original party thereto, defendant may not testify in his own behalf if either of original parties to such bill, note or mortgage, is dead or insane, unless plaintiff testifies or offers testimony of original party thereto. (RSA 516:26).

See also topic 5.11 Depositions and Discovery.

5.14 INJUNCTIONS:

The superior court has jurisdiction to issue injunctions whenever the same are necessary to prevent fraud or injustice. (RSA 498:2).

Temporary Restraining Order; Notice; Hearing; Duration.

Temporary restraining order may be granted only by justice of superior court without written or oral notice to adverse party or his attorney only if it clearly appears from specific facts, shown by affidavit or by verified petition, that, immediate and irreparable injury, loss or damage will result to applicant before adverse party or his attorney can be heard in opposition. Every temporary restraining order, which is granted without notice, shall be endorsed with date and hour of issuance, shall define injury and state why it is irreparable and why order was granted without notice, and shall expire by its terms within such time after issuance, not to exceed ten days, as court fixes, unless, within time so fixed, order, for good cause shown, is extended for like period, or unless party, against whom order is directed, consents that it may be extended for longer period. In case temporary restraining order is granted without notice, application for preliminary injunction shall be set down for hearing at earliest possible time, and in any event within ten days, and, when matter comes on for hearing, party, who obtained temporary restraining order, shall proceed with application for preliminary injunction, and if he does not do so, court shall dissolve temporary restraining order. On two day’s notice to party who obtained temporary restraining order without notice, or on such shorter notice to that party as court may prescribe, adverse party may appear and move its dissolution or modification, and, in that event, court shall proceed to hear and determine such motion as expeditiously as ends of justice require. (Super. Ct. R. 161[a]).

Preliminary Injunction.

No preliminary injunction shall be issued without notice to adverse party and they shall only be issued by Justice of Superior Court. (Super. Ct. R. 161[b]).

Bond.

Whenever an injunction is issued without notice to, or appearance by, the adverse party (except in marital cases), the party at whose request it is issued, ordinarily shall, and in any case may, be required to give bond with sufficient sureties, conditioned to pay and satisfy all such damages as may be occasioned to the adverse party by reason of the injunction, in case it shall appear that the injunction was improper. (Super. Ct. R. 163).

See also topic 5.19 Practice.

5.15 JUDGMENTS:

Interest.

See category 3 Business Regulation and Commerce, topic 3.19 Interest.

Summary Judgment.

In any action a party may move for summary judgment as to all or part of any claim, counter-claim or cross-claim. Motion shall be supported by affidavit and unless counter-affidavits are filed within 30 days and show a genuine issue, judgment shall be entered. (RSA 491:8-a).

Judgment by Default.

If a defendant neglects to enter his appearance within the first seven days after the return day, he is defaulted, and judgment is entered accordingly; and no such default can be stricken off, except by agreement or order of court upon motion and affidavit of defense. (Super. Ct. R. 14[a]).

Declaratory Judgments.

Any person claiming a present legal or equitable right or title may maintain a petition against any person claiming adversely to such right or title, to determine the question between the parties, and the judgment or decree of the court thereon is conclusive. (RSA 491:22[I]). District court has concurrent authority with superior court, but defendant has right to remove action to superior court if claim exceeds $1,500. (RSA 491:22[II]). Probate court has exclusive jurisdiction over claim arising under its subject matter jurisdiction authority in c. 547 and RSA 552:7. (RSA 491:22[II]). Authority to determine insurance coverage is given to U.S. District Court in appropriate cases. (RSA 491:22-c).

Lien.

Real or personal property shall be attached and held until expiration of six years from time of rendering judgment. (c. 511: 55, I). All real estate liens recorded prior to Jan. 1, 1976 expired on Jan. 1, 1988 unless attachment was renewed prior to that date. (RSA 511:55, III).

Revised Uniform Enforcement of Foreign Judgments Act adopted. Effective June 6, 1994. (c. 524-A).

See also topic 5.19 Practice.

5.16 LIMITATION OF ACTIONS:

Uniform Commercial Code enacted. (c. 382-A).See category 3 Business Regulation and Commerce, topic 3.09 Commercial Code.

Actions must be brought within the following periods after the respective causes of action accrue:

Twenty Years.

Actions for the recovery of real estate (RSA 508:2); actions of debt upon judgments, recognizances and contracts under seal (RSA 508:5); actions on notes secured by mortgage of real estate (RSA 508:6).

Eight Years.

Actions for injuries resulting from creation of improvement to real property must be commenced within eight years after substantial completion of improvement. (RSA 508:4-b, I).

Six Years.

Whenever execution is returned, satisfied in whole or in part by extent or levy upon estate or property not liable to be taken upon execution, action of debt may be brought upon judgment, within six years after extent or levy, for amount equitably due and costs of levying. (RSA 507:4). If action of tort is not commenced prior to death of party, one may be brought within six years after said death, subject to c. 508. (RSA 556:11).

Four Years.

Actions for breach of any contract for sale must be commenced within four years after the cause of action has accrued. (RSA 382-A:2-725).

Three Years.

All personal actions except where otherwise specified. (RSA 508:4).

Two Years.

Writs of scire facias on bonds given in discharge of attachments (RSA 511:42); all suits or prosecutions founded upon any penal statute for penalties or forfeitures, time running from commission of offense (RSA 616:9); certain personal injury actions against ski area operators (RSA 225-A:25, IV).

Whenever one has a claim against the estate of a deceased person which has not been prosecuted within the time limited by law, such person may apply to superior court having subject matter jurisdiction over nature of claim, by petition setting forth all facts; and if court shall be of opinion that justice and equity require it, and that claimant is not chargeable with culpable neglect in not bringing or prosecuting his suit within time limited by law, it may extend time for filing and prosecuting claim; however no such extension or judgment entered upon claim shall affect any payments or compromises made before beginning of proceedings. (RSA 556:28).

If no administration shall have been granted upon the estate of a deceased person within two years from the date of death, no creditor of the deceased shall thereafter be entitled to maintain any action or proceeding in any court to appropriate the real estate or interests therein of which the deceased died seized, to the payment or satisfaction in whole or in part of his claim against the estate. (RSA 556:29).

One Year.

Writs of scire facias for costs against a person who has endorsed a writ (RSA 509:9-10); unless company shall notify insured that any action will be forever barred by law if writ is not served on company within 12 months after such notification, he may bring his action at any time (c. 407:15); actions by and against estates of decedents not already barred by statute of limitations, time running from death of decedent (RSA 556:7); action in contribution, after judgment or payment or agreement to pay disproportionate share (RSA 507:7-g[III]).

New Actions.

If plaintiff fails in an action brought within the time limited therefor but the right of action is not barred by the judgment in such action, a new action may be brought within one year after such judgment. (RSA 508:10).

Disabilities.

A person who was an infant or mentally incompetent when the cause of action accrued may bring action to recover real estate within five years (RSA 508:3), or personal action within two years (RSA 508:8), after disability ceases.

Absence.

The time for bringing a personal action does not run while defendant is absent and residing out of the state. (RSA 508:9).

Revival of Barred Debts.

No statutory provisions.

Contractual limitations are permitted. See supra, subhead Six Months.

See also category 3 Business Regulation and Commerce, topic 3.23 Sales.

5.16A PARTITION:

Jurisdiction and Venue.

Probate Court has exclusive jurisdiction of partition. (RSA 498:1; RSA 547-C:2). Nothing in 547-C is intended to abrogate common law or statutory authority of superior and district courts to adjudicate issues of personal property between parties engaged in litigation before those courts. Petition may be filed in county in which property or any part thereof lies. (RSA 547-C:2).

If there is no dispute, petition for partition shall be filed with judge of probate for county where property or greater part thereof lies or is then located, who shall appoint time and place of hearing on petition. (RSA 547-C:19).

Proceedings.

Any person owning present undivided legal or equitable interest or estate in real or personal property, not subject to redemption, or holder of equity of redemption shall be entitled to institute partition proceedings. (RSA 547-C:1). If such interest or estate is in fee, person shall be entitled to partition or division in fee; if life estate or term for years person shall be entitled to partition or division thereof to continue so long as person’s estate or interest endures. (RSA 547-C:1). Life tenant, remainderman, or tenant for years of whose term at least 20 years remains unexpired may in exercise of court’s equitable powers, have partition of fee. (RSA 547-C:1). Existence of lease of whole or part of property to be divided shall not prevent partition or division, but such partition or division shall not disturb possession of lessee under lease covering interests of all co-tenants. (RSA 547-C:1). Petition must particularly describe property, names of all owners or persons interested, if known, and share or interest of petitioner in property and pray for partition or division of property. (RSA 547-C:2). If persons interested in property with petitioner are unknown, property shall be described in same manner as is required in case of taxing unimproved lands of nonresidents, specifying share held by each petitioner, and stating that it is held with persons unknown. (RSA 547-C:4). Provision is made for notice to all parties and appointment of guardians or agents for all incapacitated parties. (RSA 547-C:5-8).

Partition in Kind.

If issue is determined in favor of petitioner, or if after notice petitionee does not appear, or if no sufficient objection is made, court shall render judgment that partition be made, and shall by decree set off and assign to petitioner or petitionee their shares according to their respective rights, titles, or interests, and award costs, as court deems equitable and just. (RSA 547-C:11). In doing so, with appropriate pleading, court may also quiet title in discharge or extinguishment of any right, title, or interest that may otherwise unlawfully or inequitably encumber or burden real estate as fully and completely as court of general equity may do. (RSA 547-C:11). Court shall make such partition as it decrees by metes and bounds or other distinct description and partition shall be recorded at registry of deeds for county where real estate lies. (RSA 547-C:11).

Sale.

Whenever property is so situated or is of such nature that it cannot be divided so as to give each owner his/her share or interest without greater prejudice or inconvenience, whole or part of property may be assigned to one of them, assignee paying to others who have less than their share such sums as court shall award or order. (RSA 547-C:22). When proceedings are pending if it is alleged in petition that property is so situated or is of such nature that it cannot be divided so as to give each owner his/her share or interest without great prejudice or inconvenience and court so finds, court may order it to be sold and proceeds from sale to be divided among owners according to their respective rights, titles, or interest, and may make all other orders that may be necessary to cause such sale and distribution of proceeds, as court of equity may do in like cases. (RSA 547-C:25).

5.17 [RESERVED]

5.18 PLEADING:

No writ, declaration, etc., will be abated or quashed, for any error or mistake when the person or case may be rightly understood by the court, nor through any defect or want of form or addition only; and courts and justices may, on motion, order amendment in such case. (RSA 514:8). Amendments in matters of substance may be permitted in any action, in any stage of the proceedings, upon such terms as the court shall deem just and reasonable, but the rights of third persons may not be affected thereby. (RSA 514:9).

No special plea is required in a civil action, except a plea of title to real estate in actions in municipal court; but any defense may be proved under general issue, upon a brief statement thereof being filed in such time as court may order. (RSA 515:3).

If the defendant pleads specially, the plaintiff may file such reply as the case requires. (c 515, § 4).

Mutual demands and debts may be set off one against the other. (RSA 515:7). The defendant may plead such set off, or give notice thereof with the general issue, describing the debt or demand with the same certainty as is required in a declaration. (RSA 515:11).

Frivolous Claims.

In any contract or tort action, any party which brings claim or raises defense which is frivolous or intended to harass prevailing party is subject to penalty of costs and reasonable attorneys' fees incurred by prevailing party. (Superior Court Rule 59). Such conduct shall also be reported to Supreme Court Committee on Professional Conduct. (RSA 507:15).

Preparation of Foreign Claims.

No statutory provisions. Those preparing foreign claims for suit in this state bear in mind that common law rules of procedure are here in force, but that great leniency is allowed in matters of form.

Rules of superior court relating to procedure are not in statutes. Citations following are to such rules.

All writs at time of service upon defendant must have attached thereto a specification setting forth particulars of claim or a special declaration, but court, for good cause shown, may waive this requirement on motion of plaintiff, which must be filed at time of entry of writ and accompanied by such specification or special declaration and a statement that copies of same have been mailed or delivered to defendant or his attorney, but court for good cause shown upon motion also filed with writ may extend time for filing specification or special declaration. (Rule 23).

No plaintiff may have leave to amend, unless in matters of form, after a default, until a notice upon the defendant, to show cause why the amendment should not be allowed has been served. (Rule 24).

Amendments in matters of substance may be made on such terms as justice may require. (Rule 26).

All special pleas and brief statements must be filed within 30 days following return day of writ; otherwise cause must be tried upon general issue. (Rule 28). Appearances must be filed within seven days of return date. (Rule 14).

Either party may, by motion, obtain an order on the other to plead.

Pleas in abatement must be filed and a copy delivered to counsel for the adverse party, within 30 days after return day of writ. (Rule 30).

No set off, counterclaim or recoupment may be filed after 30 days from entry of action, except by leave of court and upon payment of costs; and when set off, counterclaim, or recoupment is filed, copy must be given to plaintiff or his attorney. (Rule 33).

Small Claims.

See topic 5.19 Practice and category 6 Courts and Legislature, topic 6.01 Courts.

5.19 PRACTICE:

The practice is according to the common law, liberalized by statutes and rules of court.

Discovery rules are analogous to Federal Rules of Civil Procedure (Super. Ct. R. 35), use of interrogatories (Super. Ct. R. 36) and depositions, including video tape depositions (Super. Ct. R. 45, 45-A).

Small Claims.

Special procedure is provided for actions, not involving title to real estate, in which debt or damage, exclusive of interest and costs, does not exceed $7,500. (RSA 503:1). Plaintiff or his attorney files claim with clerk of municipal court in town in which defendant or plaintiff reside, or if no municipal court, then District Court, who records nature of claim and sets date for hearing. (RSA 503:3-a). If attorney appears on behalf of party, must file appearance and provide copies to all opposing parties at least seven days prior to hearing. (RSA 503:2-a). Representation of business organization by non-attorney must be by duly authorized official. (RSA 503:11, I-V). Action against nonresident defendant may be filed in municipal or District Court where defendant or his agent transacts any business, makes contract with resident of town or district, commits tort, or owns, uses, or possesses any real or personal property. (RSA 503:3-b). Notice to defendant is sent by registered mail, directing him to appear at time and place of hearing, which must be not less than 14 days from date of mailing notice. (RSA 503:6). See also category 6 Courts and Legislature, topic 6.01 Courts.

Direct Actions Against Insurer.

See category 23 Transportation, topic 23.01 Motor Vehicles, subhead Direct Actions.

See also topics 5.02 Actions, Appeal and Error, Depositions and Discovery, Injunctions, Judgments, Pleading, Process; category 8 Debtor and Creditor, topics 8.02 Attachment, 8.05 Executions, 8.09 Garnishment.

5.20 PROCESS:

Original process in superior court consists of summons and attachment. (RSA 509:4).

Original writs, before service thereof, must be indorsed by the plaintiff or by his agent or attorney, if the plaintiff is an inhabitant of the state, otherwise by some responsible person who is such inhabitant. (RSA 509:8).

Who May Serve.

Writs of summons returnable to superior or supreme court must be directed to sheriff of any county or his deputy. (RSA 509:3). Writs of attachment returnable to superior court shall be directed to sheriff, plaintiff, or any other person. (id.) Writs issued by justices of municipal and district courts must be directed to sheriff of county or his deputy, or to any constable of any town in county, or to either of said officers; provided, however, that writs of attachment may also be directed to plaintiff, his attorney, or any other person. (RSA 509:11). Where defendant in action before municipal court has personal property liable to attachment in county of which he is not inhabitant, original writ and execution may be directed to sheriff of any county, his deputy or to any constable of any town in which defendant resides or has such property. (RSA 509:13). Constables serve and return writs and other civil precepts to them directed wherein amount demanded in damages does not exceed $75, and no others, and have similar powers and are subject to similar liabilities in relation thereto as sheriffs. (RSA 104:9).

Personal Service.

All writs and other processes are served by giving to defendant or leaving at his abode an attested copy thereof, except in cases otherwise provided for. (RSA 510:2).

Service of writs against corporations may be made upon registered agent (RSA 293-A:5.04), or upon clerk, treasurer, cashier, or one of directors, trustees or managers, if any in state; otherwise upon any principal member or stockholder, or upon any agent, overseer or other person having care of any of property or charge of any of business of corporation (RSA 510:14).

Service of writs or other process against unincorporated associations, joint stock companies, limited liability companies, syndicates, orders or any mutual association of persons, other than a partnership having not more than four members (where personal service on all required), within this state, may, except when otherwise provided, be made upon any officer thereof; or, if it have no officer, then upon any two members thereof. (RSA 510:13). Service of process upon foreign partnership made by service on registered agent or Secretary of State if not registered. (RSA 305-A:6).

Service of writs against a railroad corporation may be made upon any person doing business of the corporation as ticket master for the sale of passenger tickets, at any station upon its railroad. (RSA 510:15).

Service of a writ against a manufacturing corporation may be made by leaving an attested copy of the writ at the office or counting room of the corporation. (RSA 510:16).

Service of writs against counties may be made upon one of the county commissioners and treasurer for county; against cities, upon mayor or one of aldermen and city clerk; against towns, upon one of selectmen and town clerk; against school districts, upon one school board member and clerk of district; and against village districts, upon one of commissioners and clerk of district. (RSA 510:10).

Substituted Service.

Service may be made by registered mail in suits against foreign corporations except insurance companies. (RSA 293-A:15.10).

Writs against nonresident administrators of domiciled decedents are served upon resident agents appointed for the purpose. (RSA 553:29).

A writ of scire facias may be served, in case the defendant is not an inhabitant of the state, on the attorney who appeared for him in the original action, or by giving him or leaving at his abode outside the state an attested copy of the writ. (RSA 510:4, 6).

Service on nonresident individuals may be made by service on Secretary of State and by certified mail upon defendant, where any nonresident in person or through agent commits tortious act within state, transacts any business within state or has ownership, use or possession of any real or personal property situated in state. (RSA 510:4).

Service may be made upon foreign corporation as “doing business” in State of New Hampshire. (RSA 293-A:15.10). N. H. has adopted so called “long arm” statute whereby foreign corporation making contract to be performed in whole or in part by either party in New Hampshire or committing tort in whole or in part in New Hampshire is deemed to appoint Secretary of State as its agent for service of process in any actions or proceedings arising out of such contract or tort. (RSA 293-A:15.10).

Publication.

Where notice by publication in a newspaper is ordered by any court upon any petition, writ or other similar process, the original of which is upon file in such court, it is sufficient to publish a citation containing the title of the case, the name of the court in which it is pending, the time and place of the return and hearing, the fact that such original is on file and may be examined by interested parties and such other facts as the court may order. (RSA 510:9).

Order of Notice.

When the defendant is not an inhabitant of the state, and no mode of serving the writ is prescribed, or service thereof cannot be made in the mode prescribed, the action may be entered in court and such notice ordered as the case requires; and notice of the pendency of the suit, given according to the order, is sufficient service. (RSA 510:8).

Time of Service.

Service must be made at least 14 days before the sitting of the court to which they are returnable. (RSA 510:1).

Continuance for Notice.

If no personal service has been made on a defendant in an action which may be entered without such service the court, on suggestion thereof, may order the action to be continued and notice of the pendency thereof to be given by publication, by mail in a registered letter, by personal service or otherwise, as it thinks proper; and, upon satisfactory evidence that the order has been complied with, the notice is sufficient. (RSA 514:3). Specific provisions are made for procedure in this respect in municipal courts. (RSA 514:4, 5).

Nonresident Motorist.

See category 23 Transportation, topic 23.01 Motor Vehicles.

Long Arm Statute.

See subhead Substituted Service, supra.

See also topic 5.19 Practice.

5.21 REPLEVIN:

When goods or chattels are unlawfully taken or detained from the owner or person entitled to the possession thereof, or when goods or chattels attached are claimed by a person other than the defendant in the suit in which they are attached, such owner or other person may maintain replevin therefor. (RSA 536-A:1). This action may be maintained by owner of goods or chattels exempt by law from attachment when attached upon mesne process, or by person from whose possession they were taken at any time before they were taken on execution. (RSA 536-A:2).

Proceedings.

The action is commenced by writ in statutory form, directing sheriff, constable or police officer within whose jurisdiction property is located to replevy goods in question and deliver them to plaintiff. (RSA 536-A:8).

Writ of replevin must describe specific property to be seized, and must specify location or locations where there is probable cause to believe property is located. (RSA 536-A:8).

Hearing is required under replevin statute. (RSA 536-A:3). At hearing defendant must show cause why property should not be taken from him. (Ibid.). Upon notice of hearing defendant cannot remove property from state or from its location, or transfer, sell, pledge, assign, or otherwise alter, damage, dispose of, or permit it to become subject to security interest or lien, until further order from court. (RSA 536-A:4). Ex parte issuance of writ of replevin is possible upon application to judge if defendant gained possession of property by theft, property consists of negotiable instruments or credit cards, or property is in immediate danger of removal or serious harm. (RSA 536-A:12).

Security.

Plaintiff, in seeking replevin, before service of writ, must give security to sheriff with sufficient security in sum double value of property replevied and he must pay all damages and charges as may be awarded against him if he does not prevail. (RSA 536-A:7).

Custody of Property.

Levying officer may take property into his custody or, upon good cause shown, install keeper. (RSA 536-A:9). Levying officer may deliver property to party preliminarily determined to be entitled thereto, after expiration of time for filing bond. (RSA 536-A:16). If defendant shall give security, in sum not less than double value of goods, with condition that he will pay all costs and charges of keeping and insuring them and all depreciation thereof, if plaintiff in suit shall prevail against him, officer shall return goods within five days after service of notice of filing such undertaking. (RSA 536-A:14).

Repossession.

No provision for repossession by defendant while proceedings are pending, except through filing of security in double value of property. (RSA 536-A:14).

Claims of Third Persons.

Common law rules govern.

Judgment or Order.

If the defendant shall prevail in the suit he shall have judgment for the return of the goods, with such further damages as may be awarded to him. (RSA 536-A:18). If goods have been delivered to plaintiff, defendant, if he prevails, may have judgment of return of such of goods and chattels replevied as may at time of trial or judgment remain in possession of plaintiff, or of any part of same, if he shall so elect. (RSA 536-A:18). Whenever defendant shall have so elected, value of goods to be returned is found by jury or ascertained by court, and upon such return their value is deducted from damages assessed in suit in favor of defendant. (RSA 536-A:18).

5.22 SEQUESTRATION:

Voting securities in insurance holding company may be sequestered when they have been acquired in violation of insurance holding company legislation. (RSA 401-B:9, III).

5.23 SERVICE:

See topics 5.20 Process, Replevin; category 8 Debtor and Creditor, topics 8.02 Attachment, 8.05 Executions, 8.09 Garnishment, 8.16 Receivers.

5.24 STAY OF EXECUTION:

See topic 5.03 Appeal and Error; category 8 Debtor and Creditor, topic 8.05 Executions.

5.25 SUBMISSION OF CONTROVERSY:

Declaratory judgment process is designed to make controversy of legal or equitable right justiciable at earlier stage than it would be if matter were pursued at law or equity. (RSA 491:22). See topic 5.15 Judgments.

5.26 VENUE:

Transitory action should be brought in the county or judicial district thereof in which one of parties resides. If neither resides in state action may be brought in any county or judicial district thereof, provided proper service is made. (RSA 507:9).

Specific provisions for venue in particular actions are: Action for forfeiture of state grant where land is in more than one county, either county (RSA 535:6); action against executors or administrator, county or one of counties in which it might have been brought by or against testator or intestate at time of his decease, but an executor or administrator may sue in county wherein he was appointed (RSA 507:10); trustee process, county or judicial district in which suit would have been brought if no trustee were summoned (RSA 512:2); action for injuries caused by defects in highway, county where injuries were received (RSA 231:110); appeal by creditor from disallowance of claim against insolvent estate, county where either party resides (RSA 558:5); abatement of criminal nuisances, county or judicial district where property is located (RSA 544:4); partition in probate court, county in which property or any part of property lies or is then located (RSA 547-C:2); suit on recognizance, county or judicial district where taken unless court orders change of venue (RSA 597:34); trial of computer crime, venue proper in town where act took place or where computer equipment is located (RSA 638:19); action for bridge defects, county where injuries received (RSA 231:110). All petitions initiated under RSA 168-A, RSA 458, and RSA 458-C shall be brought in county in which either party lives and before Superior Court (RSA 458:9); disposition of unclaimed or abandoned property, Merrimack County Superior Court (RSA 471-C:28, 30).

Change of Venue.

The superior court may change the venue in any civil proceeding when justice or convenience requires it. (RSA 507:11). No lien obtained by attachment or otherwise is abated or in any way affected thereby. (RSA 507:12). If criminal offense(s) take place in more than one county, offense may be tried in either county or judicial district thereof. (RSA 602:1).

6 COURTS AND LEGISLATURE

6.01 COURTS:

United States District Court.

Clerk's office: Warren B. Rudman U.S. Courthouse, 55 Pleasant St., Room 110, Concord, NH 03301.

Court sits at Concord.

Deposit of $350 must be made with clerk of court at commencement of all actions at law and proceedings in equity.

U.S. Bankruptcy Court.

Deposit of $299 must accompany Chapter 7 and $274 for Chapter 13 filing. Deposit of $1,039 must accompany Chapter 11 and $239 for Chapter 12 filing.

New Hampshire Supreme Court.

Jurisdiction.

Supreme Court has final jurisdiction of questions of law, and exercises general superintendence over inferior courts including approval of rules of court and administration of canons of ethics. It has exclusive authority to issue writs of error and may issue writs of certiorari, prohibition, habeas corpus, and all other writs and processes to other courts, to corporations and to individuals. (RSA 490:4). It has final authority in making of rules regulating practice in probate courts in insolvency proceedings. (RSA 568:5). It hears appeals from Public Utilities Commission (RSA 541:6) and can remand case to Commission to hear new evidence if justice requires (RSA 541:14), and decides questions arising from transfers of questions of law from Public Utilities Commission (RSA 365:20) and likewise transfers of questions of law from district courts. It may appoint and remove reporter of its decisions (RSA 505:1).

Court sits at Concord.

Superior Court.

Jurisdiction.

Original jurisdiction of superior court embraces all classes of civil and criminal cases that call for a trial by court or jury, as to either questions of law or fact, including factual issues certified by probate court and certain appeals from district courts, divorce, and proceedings in equity. (RSA 491:7; RSA 498:1).

Place of Sitting.

County and court records are kept at county seats which are designated by a *.

Belknap County: Court sits at Laconia *.

Carroll County: Court sits at Ossipee *.

Cheshire County: Court sits at Keene *.

Coos County: Court sits at Lancaster * and at Berlin. Adjournments from Lancaster or Berlin may be made to Colebrook whenever the presiding justice deems it advisable.

Grafton County: Court sits at North Haverhill.

Hillsborough County: Northern District of Court sits at Manchester. Southern District of Court sits at Nashua.

Merrimack County: Court sits at Concord *.

Rockingham County: Court sits at Brentwood *.

Strafford County: Court sits at Dover *.

Sullivan County: Court sits at Newport *.

Probate Court.

Court has jurisdiction of probate of wills and of all matters and things of probate jurisdiction relating to composition, administration, sale, settlement, and final distribution of deceased persons, including establishment of death or person presumed dead and assignment of homestead and claims against executor or administrator for those services related to prior care and maintenance of decedent and administration of insolvent estates and appeals therefrom; interpretation and construction of wills and interpretation, construction, modification, and termination of trusts as defined in RSA 564-A:1,I; appointment, removal, surcharge, and administration of trustees of trust as defined in RSA 564-A:1,I; appointment, removal of conservators, and of guardians of minors, mentally incompetent persons and spendthrifts, and in relation to duties imposed by law on such conservators and guardians, management, and disposition of estates or their wards; adoption of children; change of names of persons who reside in county and who apply therefore; termination of parental rights; durable powers of attorney for health care under RSA 137-J; interpretation and effect of living wills under RSA 137-H; petitions for partitions of real estate pursuant to RSA 547:11-c; declaratory judgment actions pursuant to RSA 547:11-b; waiver for marriage of minors (concurrent with Superior Court), petitions for partition of real estate (RSA 547:3, 10), cases of insolvency (RSA 568:1), and has power to issue attachments and levies of execution (c. 547:3-j).

Probate Court sits as follows:

Belknap County: at Laconia.

Carroll County: at Ossipee.

Cheshire County: at Keene.

Coos County: at Colebrook, at Lancaster, at Gorham and at Berlin.

Grafton County: at North Haverhill.

Hillsborough County: at Manchester and at Nashua.

Merrimack County: at Concord.

Rockingham County: at Brentwood.

Strafford County: at Dover.

Sullivan County: at Claremont and at Newport.

Municipal Courts.

RSA 502 relative to municipal courts repealed.

District Court.

A district court system has been established which became effective July 1, 1964. Each county in state is divided into districts, each having a separate district court.

In criminal cases, district courts have original jurisdiction, subject to appeal, of all crimes and offenses committed within confines of district in which such court is located, which are punishable by fine not exceeding $2,000 or imprisonment not exceeding one year or both (RSA 502-A:11), and concurrent jurisdiction, subject to appeal, of prosecution of any violation of local ordinance, code, or regulation punishable by civil penalty, in which case penalty imposed may not exceed court's civil jurisdiction (RSA 502-A:11-a).

In civil matters, district courts have concurrent jurisdiction with superior court in actions in which damages claimed do not exceed $25,000 (in some selected district courts, $50,000) and defendant or plaintiff resides within district where such court is located. (RSA 502-A:14, II). District Courts have original and exclusive jurisdiction where damages claimed do not exceed $1,500, title to real estate is not involved and defendant or plaintiff resides within district. (RSA 502-A:14, I). Defendant may remove civil action filed in district court to superior court upon motion setting forth that there is pending in superior court cause arising out of same transaction, or that defendant has claim arising out of same transaction in which his claim for damages exceeds $1,500. (RSA 502-A:14, III). In cases where damages claimed exceed $1,500 or title to real estate is involved, defendant may request, within seven days of entry of action, trial by jury and have case transferred to superior court. (RSA 502-A:15). Questions of law may be transferred directly to Supreme Court. (RSA 502-A:17-a).

Small Claims Courts.

Simplified, informal procedure is provided for in small claims not involving title to real estate, in which debt or damages, exclusive of interest and costs, does not exceed $5,000. (RSA 503:1). Action commenced by filing statement of claim in district court by plaintiff setting forth nature and amount of claim and residence of each party. Written statement notifying defendant of claim and date of hearing mailed by justice to defendant by registered mail. Plaintiff generally must pay court fee of $35, plus $20 surcharge and $5 mediation fee, for total of $60. Technical rules of evidence do not apply. Judgment may be entered payable in installments. Prevailing claimant is entitled to interest and costs on judgment. (RSA 503:7).

See also category 5 Civil Actions and Procedure, topic 5.19 Practice.

6.02 LEGISLATURE:

Regular sessions held annually in Jan. (Const., Part 2, art. 3). Governor may call extra sessions. (Const., Part 2, art. 50).

Lobbyists regulated by c. 15.

6.03 REPORTS:

Decisions of Supreme Court are reported in New Hampshire Reports (RSA 505:1, 7-13) and in Atlantic Reporter. Decisions available on Lexis and Westlaw.

Digests.

The latest state digest now in use is West's New Hampshire Digest which includes cases determined in Supreme Court of New Hampshire from year 1760 to date.

Supreme Court decisions beginning with 64 N. H. are digested in Atlantic Digest.

6.04 STATUTES:

Latest compilation is Revised Statutes of New Hampshire, Annotated, 1955.

Uniform Acts adopted are: Aircraft Financial Responsibility (1955); Anatomical Gift (1969); Attendance of Witnesses from Without a State in Criminal Proceedings (1937); Business Corporations (1981); Business Records as Evidence (1953) (repealed effective Jan. 1, 1995); Child Custody Jurisdiction (1979); Choice of Forum, Model (1969); Civil Liability for Support (1955); Commercial Code (1959); Common Trust Fund (1953); Criminal Extradition (1937); Determination of Death (1987); Divorce Recognition (1949); Electronic Transactions (2001); Enforcement of Foreign Judgments (1994); Estate Tax Apportionment (1959); Facsimile Signatures of Public Officials (1959); Federal Tax Lien Registration, Revised (1967); Foreign Depositions (1998); Fraudulent Transfer (1987); Fresh Pursuit (1937); International Wills (1998); Interstate Family Support (1997); Limited Partnership (1937); Management of Institutional Funds (1973); Marriage Recognition (1979); Military Justice (1957); Motor Vehicle Certificate of Title and Anti-Theft (1967); Notarial (2005); Partnership (1973); Paternity (1971); Photographic Copies as Evidence (1951) (repealed effective Jan. 1, 1995); Principal and Income (1990); Professional Corporations (1981); Prudent Management of Institutional Funds Act (2008); Reciprocal Enforcement of Support (Replaced 1/1/98 by Interstate Family Support Act except for pending actions) (1968); Rendition of Prisoners as Witnesses (1957); Securities (1981); Simultaneous Death (1941); Status of Convicted Persons (1967); Testamentary Additions to Trusts (1961); Trade Secrets (1989); Transfer on Death (TOD) Security Registration (1997); Transfers to Minors (1985); Trustees Powers (1969); Veterans' Guardianship, 1928 (1929).

Uniform Commercial Code in effect. See category 3 Business Regulation and Commerce, topic 3.09 Commercial Code.

For text of Uniform Acts falling within the scope of the Martindale-Hubbell Law Digests see Uniform and Model Acts section.

6.05 UNIFORM LAWS:

For list of Uniform Acts in force in the state see topic 6.04 Statutes. For text of Uniform Acts within the scope of the Martindale-Hubbell Law Digests see Uniform and Model Acts section.

7 CRIMINAL LAW

7.00A BAIL:

See topic 7.01 Criminal Law.

7.01 CRIMINAL LAW:

Criminal code has been established effective Nov. 1, 1973. (1971, c. 625). Criminal procedure is contained in cc. 592-A to 614.

Indictment or Information.

Criminal proceedings are based on indictment by a grand jury (RSA 601:1) or on complaint in case of lesser offenses. Informations are prescribed (RSA 601:4), but statute does not state clearly when they are to be used or by whom signed.

Bail.

All offenses are bailable, except capital offenses where proof is evident or the presumption great. Cash, bail or a bond with sufficient sureties is acceptable. Bail may be taken on Sunday. (RSA 597:1-2). *Unappealed felony convictions are, before sentencing, bailable only if court finds by clear and convincing evidence that defendant is unlikely to flee or pose danger to anyone. Appealed conviction for capital offenses and for those punishable by life imprisonment without parole are not bailable. Appealed felony convictions are bailable only if defendant establishes clearly and convincingly that he is unlikely to flee or pose danger to anyone and by preponderance of evidence that appeal is neither frivolous nor taken to delay. (RSA 597:1-a).

*Bail hearings are required for probation violations. (RSA 597:2).

8 DEBTOR AND CREDITOR

8.01 ASSIGNMENTS:

Common law requirements govern assignment of rights, debts or choses in action except where changed by statute.

Statutory provisions relating to assignments are covered by the Uniform Commercial Code. See category 3 Business Regulation and Commerce, topic 3.09 Commercial Code.

Assignment of Wages.

No assignment of or order for wages to be earned in the future is valid against a creditor of the person making it until it has been accepted in writing and a copy of it and of the acceptance has been filed with the clerk of the town or city where the party making it resides. (RSA 506:3). Clerks of towns and cities must keep for public inspection alphabetical list of all such orders and assignments filed with them. (RSA 506:4).

8.02 ATTACHMENT:

Prejudgment attachments may be had in all actions at law, upon notice to defendant, and if defendant objects, a showing by plaintiff that there is a reasonable likelihood that he will recover judgment including interest and costs of an amount equal to or greater than amount of attachment and unless defendant can establish that his assets will be sufficient to satisfy such judgment with interest and costs if plaintiff recovers same. (RSA 511-A:3). Court may order prejudgment attachment without prior hearing if plaintiff shows probable cause of his right to recover and amount thereof, and: (1) There is substantial danger property will be damaged, destroyed, concealed, or removed from state; or (2) attachment is necessary to vest quasi-in-rem jurisdiction; or (3) in cases for specific performance where there is imminent danger of transfer to bona fide third party; or (4) notice period under bulk sale is about to expire and absolute vesting of title is imminent; or (5) attachment is necessary to secure important governmental or general public interest. (RSA 511-A:8). Probate court may not grant attachment. (129 N.H. 4, 11, 523 A.2d 28, 33).

In Whose Favor Writ May Issue.

There is no discrimination against nonresidents or foreign corporations, except that all writs brought by nonresidents, corporate or otherwise, must be indorsed by some responsible resident, who thereby becomes liable for costs. (RSA 509:8, 9).

Claims on Which Writ May Issue.

There is no requirement that the claim sued on be payable in the state and no provision as to issuance of attachment on unmatured claims.

Grounds.

No special grounds are necessary; mere bringing of the action (with appropriate showing indicated above) is sufficient.

Bonds.

Plaintiff is not required to furnish any bond in order to obtain attachment.

Excessive Attachments.

If an excessive or unreasonable attachment of any kind has been made, defendant may apply to superior court to have amount of attachment reduced or to have it discharged. Upon such application party making attachment shall have burden of proof to show that attachment is not excessive or unreasonable. If, upon hearing, court finds that attachment is excessive or unreasonable under all circumstances, it shall order reduction or discharge of attachment as justice may require. (RSA 511:53).

Levy.

Real estate may be attached by any person—generally an officer—leaving attested copy of writ and of his return of attachment thereon at office or dwelling house of register of deeds of county in which real estate is situate. (RSA 511:3). Personal property is taken into possession by officer making attachment. After taking possession of live stock or articles which are incapable of being conveniently taken into actual possession, including motor vehicles, trucks, trailers and tractors, attaching officer, may, within 48 hours thereafter, leave attested copy of writ, and of his return of such taking possession or such attachment thereof, at office of Secretary of State or in registry of deeds, and such levy is effective although actual possession is not taken. (RSA 511:23). Officer, upon completion of such bulky article attachment, is under no duty to care for or preserve attached property unless requested by attaching creditor, who is responsible for all reasonable costs and expenses incurred by officer, including his reasonable fees, in complying with such request. (RSA 511:23).

Indemnity.

Although there is no statutory authority therefor, attaching officer who fears liability for wrongful levy requires indemnity bond for value of property to be attached plus anticipated costs.

Encumbered Property.

A creditor or officer attaching encumbered personal property must pay or tender to the owner of the encumbrance the amount of his lien. (RSA 511:26). Encumbrance on real estate may be discharged by payment or tender of amount of encumbrance to owner thereof. (RSA 511:10, 11).

Priority.

Attaching creditors acquire liens in the order in which their attachments are made, and do not share pro rata. (RSA 511:55, 56).

Release of Property.

A defendant whose real estate has been attached may obtain its release upon application to superior court by giving bond to plaintiff with sufficient sureties, conditioned to pay judgment which plaintiff may recover, with costs, within 60 days after judgment. (RSA 511:48).

Duration of Lien.

Attachment lien continues for six years after judgment on real estate or personal property. Attachment of real estate or of right or interest therein where no judgment is involved expires ten years from filing thereof in Registry of Deeds. (RSA 511:55).

Release on Bond of Defendant.

The debtor can, by giving suitable bond, secure the restoration of the property attached whether it be real (RSA 511:48) or personal (RSA 511:35-37).

Sale of Attached Property.

Personal property attached must be sold by the officer before judgment, if the parties consent thereto in writing. (RSA 511:30). Appraisers will be appointed and attached property will be sold when it consists of living animals, or goods liable to perish or waste, or to be greatly reduced in value by keeping, or which cannot be kept without great expense. (RSA 511:31-34).

Retirement Accounts.

Individual retirement accounts and simplified employee pensions are subject to seizure, set off or attachment by means of legal process. (c. 515:13-a).

8.03 [RESERVED]

8.04 CREDITORS' SUITS:

When property of a debtor against whom execution has been issued and returned unsatisfied is asserted to be so held that it cannot be reached, or to have been conveyed by the debtor in fraud of his creditors, or held by others for the debtor's use, proceedings in equity may be had for a discovery and full relief, and court shall make proper decrees and orders, and issue process to compel a discovery, to prevent a transfer of the property and to make application as justice requires. (RSA 498:8). Such relief does not apply to property exempt from attachment and certain trusts. (RSA 498:9). Usual practice in equity prevails. (RSA 498:2).

8.05 EXECUTIONS:

Executions issue against the property, real and personal, of the defendant, and also against his body. (RSA 527:12). Writs of possession (RSA 527:13) and scire facias writs (RSA 510:6) are also used.

Exemptions.

See topic 8.06 Exemptions.

Time of Issuance.

No execution shall issue until time for appeal has expired. (RSA 527:1). Writs of possession do not issue until two months after the date of judgment, where the same are issued in proceedings to foreclose mortgages upon real estate. (RSA 524:8). Executions may be issued at any time within two years after judgment rendered. However, when real or personal property is attached, execution against real and personal property may be issued within six years after judgment. (RSA 527:6). Thereafter execution may issue on scire facias. (RSA 527:7).

Return.

Execution from superior court may be made returnable at any return day within six months from date of issuance and, upon notice to the debtor, may be extended to any subsequent return day as justice may require. (RSA 527:2, 4). Execution from district court is returnable within 90 days from its date. (RSA 527:5).

Stay.

When a bill of exceptions is allowed the court may stay execution upon such terms and conditions as it deems just. (RSA 491:18).

Superior court, on application and notice to debtor may order return day of execution issued by court to be changed to any subsequent return day as justice may require; which order is recorded upon clerk's record of judgment and execution. (RSA 527:4).

Injunctions will issue to stay executions when equity requires the same to be done. (RSA 498:1; RSA 527:17). In such case, however, the existing lien (as in case of attachment) is continued for 30 days after dissolution of the injunction. (RSA 527:17).

Levy and Sale.

Goods and chattels taken on execution must be safely kept by officer, at expense of debtor, four days at least; advertised for sale, by posting notice of time and place of sale at two of most public places in town where sale is to be, 48 hours before expiration of said four days; and sold at auction to highest bidder. (RSA 528:2). When execution is levied upon debtor's shares in corporation, notice in writing of time and place of sale of such shares or interest must be given by officer to debtor, or left at his abode, and must be posted at one or more public places in town where sale is to be, and in two adjoining towns, 30 days before sale. (RSA 528:16). If debtor does not reside in county, posting of such notice and publishing of such notice in some newspaper, if any, in county, otherwise in adjoining county, three weeks previous to sale, are sufficient, without further notice to debtor. (RSA 528:17). Special notices are prescribed where execution is levied on pews or seats in meeting houses and on franchise or corporation to take tolls. (RSA 528:11, 12).

In levying against real estate, an amount sufficient to satisfy the judgment may be set off to the creditor (RSA 529:1), or any interest of the debtor in land may be sold for the creditor's benefit (RSA 529:19).

In case of setting off real property officer levying execution must cause three appraisers to be appointed, one by creditor, one by debtor and one by himself, who must be discreet and disinterested men, resident in county, and must be sworn by justice impartially to appraise such real estate as shall be shown them as estate of debtor. (RSA 529:2). If debtor, on due notice, neglects to appoint appraiser, or does not reside in county or within 20 miles of property to be appraised, officer must appoint appraiser for him. (RSA 529:3). Notice given to clerk, treasurer, agent or one of directors of corporation to choose appraiser for corporation, ten days before levy, is legal notice to corporation. (RSA 529:4). Appraisers must set off to creditor, by metes and bounds or other distinct description, real estate appraised by them, or so much as may be necessary in payment of execution and costs of levying. (RSA 529:7). Officer must deliver seizin and possession of property so set off to creditor or his attorney, make full return of his proceedings, and cause execution and return to be recorded at length in registry of deeds of county, and to be returned to office of clerk of court to which it is returnable. (RSA 529:12).

When the debtor's interest in real estate is sold at auction (RSA 529:19), notice of the time and place of sale must be given to the debtor, or left at his abode if he resides in the state and within 20 miles of the property, and a like notice must be posted at two of the most public places in the town in which the property is situate, 30 days before the sale. If the debtor does not reside in the state a like notice must also be published. If the debtor resides within the state, but not in the county or within 20 miles of the property, the notice may be given in hand to the debtor or left at his abode, or may be published. (RSA 529:20-21). The sale may be adjourned from time to time, but not exceeding ten days at a time nor 60 days in the whole, notice of the adjournment being posted in the same manner as notices of the sale. (RSA 529:22).

Redemption.

The owner may redeem any goods and chattels before the sale, by satisfying the execution and the officer's fees and charges. (RSA 528:3). Debtor may redeem real estate within one year after sale (RSA 529:26), or within one year after return day of execution where execution has been by set-off (RSA 529:14).

Supplementary Proceedings.

Actions on the original judgment may be brought in which new property may be attached (RSA 509:4; RSA 511:1) or additional funds trusteed (RSA 557:1). Equitable proceedings are provided for to discover assets of the debtor and to reach and apply the same to satisfy the judgment where the original execution has been returned unsatisfied. (RSA 498:8).

See also category 5 Civil Actions and Procedure, topic 5.19 Practice.

8.06 EXEMPTIONS:

Goods and property exempt from attachment and execution are as follows: Necessary wearing apparel, beds, bedding, and bedsteads for the debtor and his family; household furniture to the extent of $3,500; cooking stove and one refrigerator and its necessary utensils; one sewing machine; provisions and fuel to value of $400; uniform, arms and equipment of every officer and private in militia; Bibles, school books and libraries to value of $800; tools of his occupation to value of $5,000; one hog, and one pig; and pork of same when slaughtered; six sheep and fleeces of same; one cow, yoke of oxen or horse when required for farming or teaming purposes or other actual use, and hay not exceeding four tons; domestic fowls not exceeding $300 in value; debtor's interest in one pew in any meeting house where he or his family usually worship; debtor's interest in one lot or right of burial in cemetery; one automobile to value of $4,000; jewelry to value of $500; interest in any property not to exceed $1,000 in value, plus up to $7,000 of any unused amount of other specified exemptions; any interest in qualified retirement plan subject to provisions. (RSA 511:2).

Money, rights and credits of defendant are exempt from trustee process in following instances, and trustee is not chargeable therefor: (1) Wages for labor performed by defendant after service of writ upon trustee; (2) wages of defendant earned before service of writ upon trustee, except in actions founded upon debt on judgment issued by N.H. court, in which case wages earned before service shall be exempt to amount of 50 times minimum hourly wage for each week, and except in actions founded upon loan contract, where wages earned before service are exempt to $50 per week; (3) wages for personal services and earnings of wife and minor children of defendant; (4) any pension or bounty money of defendant, allowed by any law of U.S., before it has come into his actual possession; (5) funds held by trustee in capacity of clerk, cashier or other employee of defendant, which were received in ordinary course of such employment; (6) fees due to defendant for attendance at court as juror or witness; (7) damages recovered for conversion of property exempt from attachment; (8) moneys, rights and credits of defendant in hands of any insurance company or its agents, whenever same are due on account of loss of, or damage by fire to, any property which by laws of this state was exempt from attachment, or levy on execution; provided, that whenever building or structure so damaged or destroyed was part of homestead, only so much of amount due therefor is exempt as, together with value of part of homestead remaining, if any, equals sum of $5,000 (RSA 512:21); (9) wages of defendant earned before service of writ upon trustee if defendant is married woman and action is founded upon any loan contract subject to provisions of c. 399-A on which her husband is obligor, jointly or severally, contingently or otherwise.

Waiver of Exemption.

Exemption may be waived in advance of levy on property, either by agreement or by conduct. (71 N. H. 251, 252, 51 A. 908, 909).

Necessity of Claiming Exemption.

In event exempt property is levied on, exemption must be claimed or it will be lost and consent implied from nonaction. (See 71 N. H. 251, 252, 51 A. 908, 909.)

Homestead Exemptions.

See topic 8.10 Homesteads.

See also topic 8.09 Garnishment.

8.07 FORECLOSURE:

See topic 8.13 Liens; category 20 Mortgages, topic 20.04 Mortgages of Real Property.

8.08 FRAUDULENT SALES AND CONVEYANCES:

Uniform Commercial Code has been adopted (c. 382-A) (see category 3 Business Regulation and Commerce, topic 3.09 Commercial Code); also Uniform Fraudulent Transfer Act (c. 545-A).

No conveyance, lease or mortgage of household goods, in use by husband and wife, is valid, unless in writing and executed by the owner and the husband or wife of the owner, but this does not apply in case of conditional sale. (RSA 460:11).

Bulk Sales.

Uniform Commercial Code applies. (c. 382-A).

Bulky Articles.

Constructive notice may be given of the sale of bulky articles by written memorandum signed by the vendor and the vendee describing the property, its location and the consideration of the sale, and containing a statutory affidavit and causing the same to be filed where filing is required to perfect a security interest under the Uniform Commercial Code. (RSA 340:3-4; 382-A:9-401).

8.09 GARNISHMENT:

Personal actions, except actions of replevin, may be begun by a trustee process. (RSA 512:1). If upon the disclosure of the trustee it appears that the trustee had in his possession at the time of the service of the writ upon him, or to the date of the taking of his disclosure, any money, goods, chattels, rights or credits of the defendants, he may be charged therefor, unless such money, etc., is exempt. (RSA 512:21). Bank, trust company, building and loan association, or similar corporation served as trustee is chargeable only for any goods, chattels, rights, or credit of defendant in hands of trustee at time of service. (RSA 512:9-b). See topic 8.06 Exemptions.

Property Which May Be Reached.

All money, goods, chattels, rights or credits of the defendant, not exempted from trustee process (RSA 512:20), including encumbered property (RSA 512:29) as to which the court may appoint a receiver if more can be obtained for it than the claims upon it.

Earnings in excess of $50 per week earned before service of the writ upon the trustee, are subject to trustee process. (RSA 512:21). Wages for labor performed by the defendant after service of the writ upon the trustees are not subject to trustee process and the trustee will not be chargeable therefor. (RSA 512:21).

Salary or wages of state official or employee may be trusteed by service of writ on State Treasurer who is chargeable for amount due official or employee at time of service of writ. (RSA 512:9-a).

If an excessive or unreasonable attachment has been made by trustee process on mesne process, the defendant may apply to the superior court to have the amount of the attachment reduced or to have it discharged. If, upon hearing, the court shall find that the attachment is excessive or unreasonable under all the circumstances, it shall order the reduction or discharge of the attachment as justice may require. (RSA 511:53).

Jurisdiction to Issue Writ.

Any personal action may be begun by trustee process except actions of replevin (RSA 512:1) and this applies in municipal court, district court, and in Superior Court (RSA 512:48).

Answer of Garnishee.

Within 30 days of filing trustee disclosure, either party may take trustee's deposition pursuant to court rules.

Practice.

The trustee writ constitutes an attachment and summons and must be served upon the defendant and trustee like a writ of summons; and the goods and estate of the defendant may be attached thereon. (RSA 512:3). Trustee disclosure must be served concurrently and first page of attachment must instruct trustee to complete and file disclosure upon plaintiff, defendant, and court within 30 days. Return of disclosure operates as trustee's answer and appearance. (RSA 512:3). Nonresident trustees may be served and charged by service upon and disclosure of agent within the state. (RSA 512:5). The names of any persons may be inserted in the writ as trustees after service thereof upon any other trustee, but not after service upon the defendant. (RSA 512:6). A partnership may not be charged as trustee unless the persons summoned are described as partners and the partners cannot be charged severally unless severally summoned. (RSA 512:7). No trustee may be charged on default until that person shall have neglected to file properly served trustee disclosure form in timely manner, after such notice as court may order. (RSA 512:10). If trustee fails to file trustee disclosure form with court within 30 days of service of trustee, trustee may be adjudged chargeable for sum up to amount of judgment which may be recovered by plaintiff against defendant. (RSA 512:11).

Adverse Claims.

If it appears from the depositions taken that the property for which the trustee is sought to be charged is claimed by a third person, such third person must be, on motion and terms as the court may order, admitted to defend his right and he may offer evidence in support thereof. (RSA 512:26). If such a claimant does not appear in court the court may order notice to be given to him personally or by publication to appear or be forever barred. (RSA 512:27). Upon appearance such claimant must be admitted as a party to maintain his claim and may have trial by jury of an issue or issues between plaintiff and claimant as may be framed therefor under the direction of the court. (RSA 512:28).

Judgment.

Upon filing of trustee disclosure not objected to within 60 days, or upon court's decision after evidentiary hearing, court shall charge trustee pursuant to applicable rules.

8.10 HOMESTEADS:

Any person is entitled to a homestead in that person's real estate or interest therein. Homestead does exist in manufactured housing which is owned and occupied as dwelling by same person, but shall not exist in land upon which manufactured housing is situated if that land is not also owned by owner of manufactured housing. (RSA 480:1).

Limitation of Value.

$100,000 (effective Jan. 1, 2004). (RSA 480:1).

Limitation of Area.

None.

Debts or Liabilities Against Which Exemption Not Available.

The homestead right is not available in the following cases: (1) in the collection of taxes; (2) in the enforcement of liens of mechanics and others for debts created in the construction, repair or improvement of the homestead; (3) in the enforcement of mortgages which are made charge thereon according to law; (4) in levy of executions. (RSA 480:4).

Designation of Homestead.

The superior court, upon petition of the owner of a homestead, or the wife or husband of such owner, or upon petition of a judgment creditor and such notice as it may order, may appoint appraisers and cause the homestead right to be set off, and, a record of the proceedings being made in the registry of deeds, the right is established as against all persons. (RSA 480:8-a).

Levy on Homestead.

The officer required to levy an execution on the debtor's property in which a homestead right may exist may levy the execution or sell said property subject to the homestead right. (RSA 480:7).

Waiver of exemption may be executed by owner and wife or husband, if any, with the formalities required for the execution of a conveyance of land. (RSA 480:5-a).

Alienation or Encumbrance.

Where the homestead owner is married, his or her spouse must join in any conveyance or encumbrance thereof except a purchase money mortgage. (RSA 480:5-a).

Rights of Surviving Spouse.

Owner and spouse are entitled to occupy the homestead during owner's lifetime and after decease of owner, spouse is entitled to occupy it during the lifetime of the survivor. (RSA 480:3-a). Minor children have no rights. (RSA 480:3-a).

The right of a surviving spouse in the homestead of a deceased spouse may be lost by abandonment of spouse, nonsupport of wife by husband, conduct constituting cause for divorce in consequence of which deceased spouse was justifiably living apart at time of death, waiver or release filed in probate court within one year after death of spouse, or marriage settlement stipulated to be in lieu of homestead right. (RSA 560:14-16, 18, 19).

8.11 JUDGMENT NOTES:

See category 3 Business Regulation and Commerce, topic 3.02 Bills and Notes.

8.12 LEVY:

See topics 8.02 Attachment, 8.05 Executions.

8.13 LIENS:

Uniform Commercial Code has been adopted. See category 3 Business Regulation and Commerce, topic 3.09 Commercial Code.

Statutory liens are given to following persons: Boarding house keepers (RSA 448:1); boarders or pasturers of animals (RSA 448:2); owners of stallions, upon colts for service fees, which lien continues until colt is eight months old and may be enforced by an attachment of such colt at any time after it is four months old (RSA 448:3); any person who maintains a public garage, public or private airport or hangar or trailer court for storage and care of motor vehicles or aircraft or house trailers brought to his premises or placed in his care by or with consent of legal or equitable owner (RSA 450:1); any person who by himself or others performs labor, furnishes materials, or expends money in repairing, refitting or equipping motor vehicle or aircraft (RSA 450:2); any person who by himself or others performs labor, furnishes materials, or expends money in erecting or repairing building, dam, canal, sluiceway, well or bridge (RSA 447:2); every person who maintains establishment for cleaning, pressing, glazing, laundering or dyeing, who places in storage, who does work on personal property at request of owner or legal possessor of same (RSA 449:1); any person who sells or furnishes monumental work to be placed in cemetery or at grave (RSA 452:1); jewelers, watchmakers and silversmiths (RSA 451:1); towns, upon stock and goods of itinerant vendors, for local license fees (RSA 321:14); hospitals and home health care providers, on sum collected or to be collected, whether by judgment or settlement, of claim of patient against third party arising out of accident not covered by Workmen’s Compensation Act (c. 448-A:1); cities, towns and counties for support of paupers on property passing by will or intestate succession, property settlement or civil judgment for personal injuries (RSA 165:28-a); state on any items used for drug related offenses and subject to forfeiture (RSA 318-B:17-b); state, for hazardous waste cleanup costs (RSA 147-B:10-b); state, for nonpayment of fees and charges under fuel tax agreement or international registration plan (RSA 260:63); financier of lumbermen (RSA 453:1); radio and television repair shop owner (RSA 451-A:1); storer of boats and boat motors (RSA 450-A:1); self-storage facility owners for unpaid rent, charges, fees, or expenses (RSA 451-C:2).

Foreclosure.

If debt arises from alteration, manufacture, repair, or any other work performed by jeweler, watchmaker, or silversmith and such debt remains unpaid for 90 days, article subject to jeweler’s lien may be sold at public or private sale, and proceeds, after paying expense of sale, applied in payment of debt, balance, if any, to be paid over to county treasurer of county where sale is held, in trust for debtor. (RSA 451:2). Before any such sale is held notice in writing of amount due and time and place of sale must be given debtor. If debtor’s residence is known such notice must be mailed to him 14 days before sale; if his address is unknown notice must be posted in county courthouse or city, village or town hall, where lienholder resides, 30 days before sale. (RSA 451:3).

If such lien remains undischarged for period of 60 days after work has been completed, or after expiration of agreed terms of storage if any, or in absence of such agreement after expiration of 90 days from date of storage, lienholder may give such article or articles to a duly organized charitable corporation or sell such article at public or private sale. (RSA 449:2).

Thirty days notice in writing of the intention to enforce the lien of a vendor of monumental work must be given the purchaser, or his legal representative, or be left at his usual place of abode. If the purchaser resides out of the state, or his residence is unknown, notice may be given by publication. Upon the expiration of 30 days from such notice, and within two years, the vendor may pay or tender to the purchaser, or his legal representative, or, if neither resides within the state or their residence is unknown, into the town treasury of the town where the monumental work is located, subject to the purchasers' order, all sums which the purchaser has paid in excess of one-third of the contract price. Thereupon, and within the said two years, he may enter upon the premises where the work has been placed, and remove the same, and it is then his property, free from all claim of the purchaser. The vendor must put the lot or grounds from which such removal is made in as good condition as before the monumental work was erected, and may retain the money paid him, not in excess of said one-third, to pay the expense of removal and repairs. Such retaking constitutes payment in full for all claims against the purchaser under the contract. (RSA 452:2-7).

Liens for license fees on goods of itinerant vendors may be enforced by suit and judgment within ten days from the time goods were first publicly offered or exposed for sale in the town asserting the lien. (RSA 321:14).

Other liens other than security interests covered by Ch. 382-A, Art. 9, are foreclosed by sale at auction as follows, unless otherwise provided by contract. (RSA 444:1-2; RSA 450:3). Notice of sale must be given by posting in two or more public places in town where property is situate, at least 14 days before sale, and if value of property exceeds $100, by publishing notice. Notice of sale must be served upon general owner, if resident in county, same number of days before sale, stating in writing time and place of sale, property to be sold and amount of lien thereon. Balance of proceeds of sale, if any, after payment of amount of lien and reasonable expenses incident to sale, must be paid to general owner or person entitled thereto, on demand. Holder of lien must cause a copy of notices and an affidavit of service, with an account of sale and of fees and charges thereon, to be recorded in books of town where sale took place. (RSA 444:3-6). Lienholder must inquire of Division of Motor Vehicles, Secretary of State or town clerk, as appropriate, to determine whether filings of other liens exist. Any such written inquiry that requests information on financing statements filed under c. 382-A shall be in form, and subject to fees, and required under c. 444. If there is no response 14 days after such inquiry, sale may proceed as hereinbefore described. If determination is made that other liens exist, notice must be sent to such lienholders of record at least 14 days prior to sale. Any such lienholder has right to redeem. (RSA 444:4-a).

Mechanics' Liens.

A person, who by himself or others, performs labor, or furnishes material toward building, repairing, fitting or furnishing a vessel within this state, payment for which is due, has a lien for four days after it is completed. (RSA 447:1). A person who, by himself or others, performs labor, or furnishes materials to the amount of $15 for the erection, alterating or repairing of a building, or for building any dam, canal, sluiceway, well or bridge, or for consumption or use in the prosecution of such work, other than for a municipality, under a contract with the owner thereof, has a lien on the buildings and on the lot of land on which they stand, for the period of 120 days after labor is performed or materials are furnished. (RSA 447:2, 9).

A person who performs labor or furnishes materials to the amount of $15 or more for making brick under a contract with the owner thereof has a lien upon the kiln containing such brick for 120 days after burning. (RSA 447:3, 9).

A person, who by himself or others, or by teams or machinery, performs labor or furnishes supplies to the amount of $15 toward rafting, driving, cutting, hauling, sawing or drawing wood, bark, lumber or logs, or toward cooking or hauling supplies in aid of such labor under a contract with the owner of the wood, bark, lumber or logs, has a lien thereon for 120 days. (RSA 447:4, 9).

A person who by himself or others makes an advance or series of advances of money to the owner of, or person entitled to the possession of, any logs, lumber, or pulp wood for the purpose of financing the cutting, hauling, yarding, piling, trucking, rafting, booming, driving or towing the same, can obtain a lien thereon for two years by placing his registered mark thereon.

(RSA 453:1).

A subcontractor can entitle himself to any of the three preceding liens by giving a notice in writing to the owner or to the person having charge of the property, that he shall claim such lien before performing the labor or furnishing the materials for which it is claimed, and by furnishing every 30 days to such owner an account in writing of the labor performed or materials furnished during the 30 days, and if he gives such notice after the labor has been performed or materials have been furnished, his lien will then be valid to the extent of the amount then due or that may be due from the owner. (RSA 447:5, 6, 8).

A person who performs labor or furnishes materials to the amount of $15 in the grading, masonry, bridging or track-laying of a railroad under a contract with an agent, contractor or subcontractor, of the proprietors, has a lien upon the railroad and the land upon which it is constructed if he give a notice in writing like that before mentioned to such proprietor, or to the person having charge of the railroad, and if he furnish an account once in 30 days, as required of subcontractors in the three preceding liens. (RSA 447:7).

The foregoing liens take precedence of all prior claims except liens on account of taxes.

Any lien may be secured by attachment of the property upon which it exists at any time while the lien continues, the writ and return thereon distinctly expressing that purpose. (RSA 447:10).

Such attachment has precedence over all lien claims for labor, materials and other things done or furnished after attachment was made, except where same were done or furnished in performance of a contract existing when attachment was made or were necessary for preservation of property attached. (RSA 447:11). Such attachments have precedence and priority over any construction mortgage unless mortgagee can show that proceeds of mortgage alone were disbursed either toward payment of invoices from or claims due subcontractors and suppliers of materials or labor for work on mortgaged premises, or upon receipt by mortgagee from mortgagor or his agent of an affidavit that work on mortgaged premises for which such disbursement is to be made has been completed and that subcontractors and suppliers of materials or labor have been paid for their share of such work. This precedence shall not apply to wage claims of mortgagees working for wages under a mortgagor-mortgagee relationship as defined in R.S.A. 275:42. (RSA 447:12-a). Except as stated above, all such attaching lien creditors share pro rata in accordance with amounts of their respective lien judgments in property attached or in its proceeds. (RSA 447:12).

No lien is defeated by taking a note, unless it was taken in discharge of the amount due and of the lien. (RSA 447:14).

Public Works.

Subcontractors’ liens for labor performed and materials furnished attach to any money due or to become due from the state or any subdivision thereof by virtue of any contract for any public work or construction, alteration or repair. (RSA 447:15).

Bond to Discharge Liens.

A bond or other security is compulsory in the case of any public works contract involving an expenditure of $25,000, and optional if it involves less than that, in an amount equal to at least 100% of the contract price, or of the estimated cost of the work if no aggregate price is agreed upon, conditioned upon the payment by the contractors and subcontractors for all labor performed or furnished, and for all equipment hired, including trucks, for all material used and for fuels, lubricants, power, tools, hardware and supplies purchased by the principal and used in carrying out the contract, and for labor and parts furnished upon the order of the contractor for the repair of the equipment used in carrying out the contract. (RSA 447:16). To obtain the benefit of the bond, any person, firm or corporation having a claim must, within 90 days after completion and acceptance of project by contracting party, file in office of Secretary of State, if state is a contracting party, or with Department of Public Works and Highways, if state is a party to said contract by or through said Department, or in office of clerk of superior court for county in which contract is to be principally performed, if any political subdivision of state is a contracting party, a statement of claim, a copy of which must be forthwith sent by mail by office where it is filed to principal and surety. (RSA 447:17). Within one year after filing claim, claimant must institute proceedings in superior court for county within which contract has been principally performed. (RSA 447:18).

Merchandise Liens.

Uniform Commercial Code applies. (c. 382-A).

Revised Uniform Federal Tax Lien Registration Act adopted. (c. 454-B).

8.14 MECHANICS' LIENS:

See topic 8.13 Liens.

8.15 PLEDGES:

Uniform Commercial Code has been adopted. See category 3 Business Regulation and Commerce, topic 3.09 Commercial Code.

Trust Receipts.

Covered by Uniform Commercial Code. See category 3 Business Regulation and Commerce, topic 3.09 Commercial Code.

Other Liens.

Any person having a lien on personal property, other than a security interest covered by the Uniform Commercial Code, where no time is limited for the payment of the debt or redemption of the property, may sell the same or so much thereof as is needful at auction, by posting notices of the sale in town where property is situated 14 days at least before sale, and by serving notice of sale upon general owner, if resident in county, same number of days before sale, stating in writing time and place of sale, property to be sold and amount of lien thereon. (RSA 444: 1, 3, and 4). If time is limited for payment of debt or redemption of property, property may be sold at any time after expiration of limited time, upon like notice. (RSA 444:2).

The balance of the proceeds of sale, if any, after payment of the amount of the lien and the reasonable expenses incident to the sale, shall be paid to general owner or person entitled thereto, on demand. (RSA 444:5).

Record of Sale.

The holder of the lien shall cause a copy of such notices and an affidavit of service, with an account of the sale and of the fees and charges thereon, to be recorded in the books of the town where the sale takes place. (RSA 444:6).

8.16 RECEIVERS:

Receivers are appointed by the superior court, either in term time or in vacation, in accordance with the general principles of equity. (RSA 498:1, 12).

Receivers must file bond with sufficient sureties, for the faithful discharge of their duties, payable to the clerk and his successor for the benefit of all persons interested. They must file inventories within 30 days after their appointment, and file accounts under oath of all their transactions, receipts and expenditures, on the first days of January and July, and at such other times as the court may order. (Super. Ct. R. 165).

8.17 REDEMPTION:

See topic 8.05 Executions; categories 20 Mortgages, topic Mortgages of Real Property; Taxation, topic Administration, subhead Redemption.

8.18 SUPPLEMENTARY PROCEEDINGS:

See topic 8.05 Executions.

8.19 TRUSTEE PROCESS:

See topic 8.09 Garnishment.

8.20 USURY:

No usury law, but see category 3 Business Regulation and Commerce, topic 3.19 Interest.

9 DISPUTE RESOLUTION

9.01 ALTERNATIVE DISPUTE RESOLUTION:

Mandatory (Alternative) Dispute Resolution.

All writs of summons from superior court and transfers of actions from district courts shall be assigned to ADR. Counsel may agree to (1) neutral evaluation, (2) mediation, (3) nonbinding arbitration, or (4) binding arbitration. If counsel cannot agree, ADR procedure chosen by counsel with lowest number above shall be utilized. Any ADR other than binding arbitration shall not impair right to trial. ADR proceedings shall be confidential and statements made and documents prepared and produced in ADR shall not be admissible unless otherwise admissible notwithstanding its use at ADR. (Super. Ct. R. 170).

Voluntary (Alternative) Dispute Resolution.

Mandatory ADR in superior court can be avoided by parties voluntarily submitting to private ADR. (Super. Ct. R. 170).

Alternative Dispute Resolution Jurisdictional Bodies/Commissions.

None official.

Alternative Dispute Resolution Acts.

c. 542.

9.02 ARBITRATION AND AWARD:

Arbitration agreements are considered valid and enforceable in New Hampshire. (RSA 542:1). However, provisions of statute shall not apply to arbitration agreements between employers and employees unless such agreement specifically references statute. (RSA 542:1). Disputes between employers and employees concerning conditions of employment or wages may be submitted to State Board of Conciliation and Arbitration. (RSA 273:12-27).

Forms and Requisites of Submission.

If pursuant to superior court mandatory ADR rules, parties must submit and exchange summaries of significant aspects of their case not later than ten days before hearing. Summary shall be not more than four pages and shall set forth uncontested facts, contested facts, applicable law, disputed issues of law, specific claims of liability, specific defenses, itemized statement of special damages, specific claims of injury, deposition transcripts of all experts, and most recent demand and offer if parties agree. (Super. Ct. R. 170).

Judgment on Award.

Upon granting of order confirming, modifying or correcting award, judgment may be entered in conformity therewith in court wherein order was granted. (RSA 542:9).

Enforcement.

Superior court will, upon petition, order defaulting party to proceed with arbitration proceedings in accordance with terms of arbitration agreement. (RSA 542:3). Upon petition for cause shown, superior court will confirm, modify or vacate award. Where award is vacated and time within which agreement required award to be made has not expired, court may in its discretion direct rehearing by arbitrators or by new arbitrators appointed by court. (RSA 542:8).

Mandatory Arbitration.

None.

Powers of Arbitrators.

Arbitrators are empowered to summon witnesses under penalty of punishment for contempt. (RSA 542:5).

Rescission.

Provision in any written contract to settle by arbitration controversy thereafter arising out of such contract, or agreement in writing to submit to arbitration any controversy existing at time of agreement, is valid and irrevocable, except upon such grounds as exist at law or equity for revocation of any contract. (RSA 542:1).

Uniform Arbitration Act Adoption/Deviation.

Not adopted.

Jurisdictional Arbitration Acts.

c. 542, Super. Ct. R. 170.

Credentials of/Qualifications of/Standards for Arbitrators.

If pursuant to superior court mandatory ADR rules, attorneys approved by court. If pursuant to agreement and parties cannot agree on arbitrators or for any lapse in appointing, any party may petition superior court to appoint arbitrators.

9.02A MEDIATION:

Jurisdictional Mediation Acts.

Super. Ct. R. 170, c. 273-A (Public Employee Labor Relations).

Credentials of/Qualifications of/Standards for Mediators.

If pursuant to superior court mandatory ADR rules, attorneys approved by court. If public employee labor dispute, neutral party chosen by parties; if no agreement, then by Public Employee Labor Relations Board.

10 DOCUMENTS AND RECORDS

10.01 ACKNOWLEDGMENTS:

Uniform Law of Notarial Acts has been adopted. (c.456-B).

Under other statutes acknowledgment may be taken by the following officers:

Within state: Notary public, judge, clerk, deputy clerk, marital master, registrar of probate, or deputy registrar of probate. (RSA 455:3; RSA 456-B:3, RSA 477:3).

Without state but within United States: Notary public, judge, clerk, deputy clerk, or any other person authorized by law of that jurisdiction to perform notarial acts. (RSA 456-B:4).

Without United States: See § 6 of Uniform Law of Notarial Acts. Notarial act has same affect under laws of New Hampshire as if performed by notarial officer of New Hampshire if performed within jurisdiction of and under authority of foreign nation by any one of following people: (a) Notary public or notary; (b) judge, clerk, or deputy clerk of court of record; or (c) any other person authorized by law of that jurisdiction to perform notarial acts. (RSA 456-B: 6[I]).

Proof of Witnesses.

If grantor dies, becomes insane, or goes out of State before acknowledgment, due execution of conveyance may be made by oath of two witnesses acquainted with handwriting of grantor. (RSA 477:12). If grantor refuses to acknowledge, proof of execution may be made before any court of record pursuant to RSA 477:12. (RSA 477:13).

Forms set forth in § 8 of Uniform Law on Notarial Acts may be used.

Alternative to Acknowledgment or Proof.

No statutory provision.

10.02 AFFIDAVITS:

Within the state, affidavits may be taken before a justice of the peace (cc. 455-A,); notary public (RSA 455:3); commissioner or other person specially authorized to administer oaths (RSA 455:15).

Without the state, affidavits may be taken before a commissioner, appointed by the Governor of New Hampshire with the advice and consent of executive council, to administer oaths in any foreign state, district or territory of U.S., or in any foreign country to which U.S. sends representative. (RSA 455:12, 14). Although there is no statute touching upon oaths administered by other officers in foreign states, it is custom to accept oath administered by anyone entitled to receive oaths within jurisdiction where oath is made. When oath is administered by foreign official in foreign state, it is customary to require that official state when his commission expires. See topic 10.01 Acknowledgments.

Evidence.

Affidavits are not admissible in evidence.

Form.

Uniform Law of Notarial Acts § 8 contains several short forms for certificates of notarial acts. (RSA 456-B:8[I]). A form in common use is:

I, ..., of . . . . . ., County of . . . . . ., State of New Hampshire, on oath depose and say that, etc. State of New Hampshire, ... County.—ss.

Personally appeared the above-named . . . . . . and subscribed and made oath to the foregoing affidavit.

Before me, ..., Justice of the Peace.

Alternative to Affidavit.

No statutory provision.

10.03 NOTARIES PUBLIC:

Qualification.

Must be resident of state and state under oath whether ever arrested or convicted of crime that has not been annulled. Two notaries and registered voter of this state must endorse applicant. (RSA 455:2).

Authentication.

See topic 10.01 Acknowledgments, subhead Authentication.

Seal.

Notarial seal or legal imprint of stamp bearing words “Notary Public, New Hampshire”, name of notary and date commission expires must be affixed to acknowledgments and jurats. (RSA 455:3).

Powers and Duties.

Usual powers of office and same powers as justice of peace in relation to depositions, acknowledgment of deeds and other instruments and administering of oaths. (RSA 455:3).

Territorial Extent of Power.

Jurisdiction is statewide. (RSA 455:3).

Expiration of Commission.

Five years. (RSA 455:1).

Fees.

Up to $10 for each oath, witness, service or certification. (RSA 455:11). Between $5 and $50 for services related to taking of depositions. (RSA 455:11; RSA 517:19).

10.04 RECORDS:

Uniform Commercial Code has been adopted. See category 3 Business Regulation and Commerce, topic 3.09 Commercial Code.

Place of Recording.

Uniform Commercial Code contains provisions as to the place of recording of all instruments required by the Code to be recorded. See category 3 Business Regulation and Commerce, topic 3.09 Commercial Code.

Instruments eligible to record with register of deeds for each county are: Deeds and other conveyances of real estate situated in said county, including leases and mortgages thereof (RSA 477:3-a, 7); powers of attorney to convey real estate (RSA 477:9); discharges of mortgages and decrees thereof (RSA 479:7, 16), and returns of foreclosure sales of real estate (RSA 479:26); attachments of real estate and dissolutions thereof (RSA 511:3, 8); returns of execution levies against and execution sales of real estate and returns of intermediate steps taken to effect same (RSA 529:29, 30, 31); notices prior to and returns of sales of real estate for nonpayment of taxes, and redemption therefrom (RSA 80:22, 27); returns of service of writs of possession (RSA 527:19); any instrument required by law to be recorded in office of town clerk where place of recording is unincorporated or unorganized place having no clerk (RSA 53:7).

For list of Counties and County Seats see first page for this state in Volume containing Practice Profiles Section.

Where executions have been returned unsatisfied, bills for discovery against the defendant may be filed with the clerk of the town where the defendant resides, thereby effecting a lien upon the personal property to which the bill relates. (RSA 498:14). Attachments of live stock and bulky articles may be completed without taking them into actual possession by filing a copy of the writ, with a return thereon, of a taking of possession, at the home or office of the clerk of the town where the property is situated. (RSA 511:23).

Assignments of wages should be recorded by the clerk of the town where the assigning party resides. (RSA 506:3).

The following instruments may be recorded with Secretary of State: Any ancient record, plan document or public paper prior to the year 1825. (RSA 41:64, 65). Address of Secretary of State is: State House, Concord, NH 03301.

Fees of registers of deeds and other recording and certifying officers are as specified in RSA 478:17-g. See category 21 Property, topic 21.06 Deeds.

Fees for Town Clerks.

Minimum fee of $2 for recording bill of conditional sale, personal property mortgage or for copy of any public records in his or her custody except copies of vital statistics, for recording writs of attachment, discharging mortgage on margin of record or for recording assignment thereof, provided, however, that each town, at annual town meeting, may determine rate and amount of compensation, in lieu of statutory fees, in combination with portion of statutory fees or just statutory fees, to be allowed to town clerk for his or her services. (RSA 41:25).

Consequences of Failure to Record.

For security interests see Uniform Commercial Code. (RSA 382-A:9-701, 9-302, 9-312). Returns of execution levies upon real estate are invalid against subsequent purchasers without notice and attaching creditors unless properly recorded. (RSA 529:29). Unrecorded conveyances of real estate (RSA 477:7) are invalid against all except grantor or his heirs. Unrecorded assignment of wages is invalid against creditor of assigning party. (RSA 506:3).

Torrens System of registering titles to real estate has not been adopted.

Filing under Commercial Code.

Proper place to file for perfection of security interest is as follows: Office designated for filing or recording of mortgage if collateral is as-extracted collateral or timber to be cut or financing statement is filed as fixture filing and collateral are or are to become fixtures. In all other cases, in office of Secretary of State including cases where collateral is goods that are or are to become fixtures and financing statement is not filed as fixture filing. (RSA 382-A:9-601).

Fees for recording deed, mortgage, attachment of real estate, lease, agreement, or assignment, fee is $10 for first recorded page, plus $4 for every subsequent page. (RSA 478:17-g).

Vital Statistics.

Governed by c. 5-C. Records of vital events are kept by division of vital records administration within department of state. (RSA 5-C:2). Copies of vital records may be procured by persons with direct and tangible interest in such records. (RSA 5-C:9). Department of Health and Human Services shall have direct and tangible interest in vital records information. (cc. 126).

10.05 SEALS:

Uniform Commercial Code has been adopted. See category 3 Business Regulation and Commerce, topic 3.09 Commercial Code.

10.06 TORRENS ACT:

Not adopted.

10.07 VITAL STATISTICS:

See topic 10.04 Records.

11 EMPLOYMENT

11.01 EMPLOYER AND EMPLOYEE:

See topic 11.02 Labor Relations.

11.02 LABOR RELATIONS:

The state official in charge of labor affairs is the Labor Commissioner (RSA 273:1), and there is also a Board of Conciliation and Arbitration, consisting of three members (RSA 273:12), whose jurisdiction extends to businesses employing not less than ten employees (RSA 273:15, 19, 26). Certain matters may be referred to hearings officer. (RSA 273-A:6).

The Commissioner must visit manufacturing, mechanical and mercantile establishments to ascertain whether laws are being complied with and reasonable sanitary and hygienic conditions maintained, may, when deemed necessary, prosecute offenses against labor laws and must make reports to Governor and Council and to Legislature. (RSA 273:9-11).

In case of a labor dispute the Commissioner must, on application of the employer or a majority of the employees, visit the locality, make inquiry, advise what should be done to adjust the controversy or difference and make a written decision. (RSA 273:15). If employer and employees fail to agree to settlement through Commissioner, he must endeavor to have them consent to submit matter to Board of Arbitration (RSA 273:19), and if he cannot secure such reference he must request from each side statement of facts and of reason for not submitting to arbitration, which statement must be given publicity through such newspapers as care to use it (RSA 273:25).

In case of a strike or lockout or threat thereof, the Commissioner must endeavor to effect an amicable settlement or a submission of the matter to the Board. If the parties do not agree to such submission, he may investigate controversy and may make and publish report fixing responsibility. (RSA 273:26-27).

When a matter is submitted to the Board of Conciliation and Arbitration it may summon witnesses and conduct hearings, and must render its decision within seven days after completion of the hearing. Such decision is final and is binding on the parties for six months or until 60 days after either party has given the other written notice of intention not to be bound. (RSA 273:20, 22-23).

Apprenticeship.

A state apprenticeship council of eight has been created to establish standards for apprenticeship agreements and promote the development of apprenticeship programs. (RSA 278:1-2).

Labor Contracts.

No person shall coerce or compel, or attempt to coerce or compel, any person into an agreement, either written or oral, in order to join or become a member of any labor organization, as a condition of securing or continuing in any such employment. (RSA 275:1).

In all contracts relating to labor, eight hours actual labor constitutes day's work unless otherwise agreed by parties. This does not apply to classes of labor for which law provides day limits. (RSA 275:30).

No employee may be required to work in any mill or factory on any legal holiday, except to perform such work as is both absolutely necessary and can lawfully be performed on the Lord's Day. (RSA 275:28).

No employee may be required or requested to work more hours in any one day than is limited by law, in order to make up time lost by reason of a legal holiday. (RSA 275:31).

No employee may be required to pay the cost of a medical examination or the cost of furnishing any records required by the employer as a condition of employment. (RSA 275:3).

Employee may not be required to do usual work of his occupation on Sunday, unless he is allowed during the six days next ensuing 24 consecutive hours without labor. (RSA 275:32).

Every employee in any manufacturing or mercantile establishment (with certain exceptions) must be allowed at least 24 consecutive hours of rest in every seven consecutive days. No employer may operate any such manufacturing or mercantile establishment on Sunday unless he has posted in conspicuous places on the premises a schedule containing list of employees required or allowed to work on Sunday, and designating day of rest for each, and filed a copy of such schedule and every change therein with Commissioner of Labor. No employee may be required or allowed to work on day of rest designated for him. (RSA 275:33).

Wages.

Every person, firm or corporation engaged in operation of a manufacturing, mechanical or mercantile establishment, hotels and restaurants, or in mining, quarrying, stone cutting or granite cutting, or in cutting, harvesting and driving pulpwood and timber, or in a railroad, telegraph, telephone, express or aqueduct business, or in erection, alteration, repair or removal of any building or structure, or in construction or repair of any railroad, road, bridge, sewer, gas, water or electric light works, pipes or lines, and every municipal corporation, must inform new employees, before they begin work, of wages they are to receive, and must inform employees of any proposed change in wages before change is made. If wages are on a piece work basis, employees must be informed of rate paid, and in case of wage incentive plans employees must be informed of approximate minimum rates and methods on which supplementary wages are fixed. (RSA 275:42, 49). If employee reports to work at employer's request, he shall be paid not less than two hour's pay at his regular rate of pay. (RSA 275:43-a). Employers who are responsible for making contributions into health and welfare or pension fund, and fail to do so, may be pursued by Labor Commissioner. Prime contractor may be pursued only after reasonable efforts are made to secure payments from subcontractor. (RSA 275:43, I-a). Every employer in said industries must pay wages earned by employees who work by day or week within eight days, including Sunday, after expiration of each week and must keep posted, in conspicuous place in his or its office, notice, on form prescribed by Commissioner of Labor, that wages will be so paid. (RSA 275:42; RSA 279:27). Such weekly payment of wages must be made in cash, by electronic transfer, direct deposit, or by check, and no employee may be compelled by his employer to accept any goods or merchandise in payment of wages. Nothing above mentioned prevents payment of wages by check wherever such form of payment is acceptable to employee to whom payment is made. (RSA 275:43).

On discharge of employee, his earned wages are due immediately and must be paid within 72 hours, except that if employee worked at place other than employer's principal place of business his wages are due on next regular pay day. (RSA 275:44). If employee quits, his wages are due on next regular pay day. If work is suspended because of labor dispute, or if employee is laid off, wages earned and unpaid at time of suspension are payable on next regular pay day, together with any deposit or other guarantee held by employer for faithful performance of duties of employment. (RSA 275:44). If employer terminates salaried employee for cause, employer may prorate employee's salary to daily basis. (RSA 275:43-b, II). Employers are prohibited from withholding or diverting any portion of employees' wages unless: (a) Employer is required or empowered to do so by state or federal law; (b) employer has written authorization by employee for deductions for lawful purpose accruing to benefit of employee or upon employees' written request to deduct: (1) Voluntary contributions into cafeteria plans or flexible benefit plans, or both; (2) voluntary payments by employee for following: (A) child care fees by licensed child care provider; (B) parking fees; (C) pharmaceutical items, gift shop, and cafeteria items purchased on site of hospital by hospital employees; (c) deductions are pursuant to any rules or regulations for medical, surgical, or hospital care or service, without financial benefit to employer and openly, clearly, and in due course recorded in employer's books. (RSA 275:48).

See also infra, subhead Children.

Minimum Wages.

No person, firm or corporation shall employ any employees at a rate of less than that required by federal minimum wage law, as amended, or as statutorily proscribed, whichever is higher. (RSA 279:21). Minimum wage requirements do not apply to employees engaged in household labor, domestic labor, farm labor, outside salesmen, summer camps for minors, employees engaged as newsboys or golf caddies and hotel, motel, cabin, tourist home and restaurant industry. (RSA 279:21). Employer may take tips received by employee into account in complying with minimum wage requirements. (RSA 279:21). In addition, certain employers may deduct certain prescribed allowances for meals and lodging furnished employee. (RSA 279:21-a). Person with less than six months experience in any occupation or person 16 years of age or under need receive only 75% of applicable minimum wage rate. (RSA 279:21). Lesser rates of pay are permissible to employers who employ high school or post secondary school students working for practical experience in jobs approved by Commissioner. (RSA 279:22-aa).

Labor Commissioner has power to investigate and ascertain wages of employees employed in any occupation in state. (RSA 279:3). Appeal lies from written decision of Commissioner to Superior Court. (RSA 279:16-a). Underpaid employee may recover in civil action difference between wage paid and statutory minimum wage plus costs and attorney's fees. (RSA 279:29).

Assignment of Wages.

See category 8 Debtor and Creditor, topic 8.01 Assignments.

Children.

No minor under 18 years of age may be employed in any hazardous occupation except in apprenticeship, vocational rehabilitation, or training program approved by Commissioner. No such minor under 16 years of age is allowed to work without certificate except at work defined as casual or farm labor, or for his parents, grandparents or guardian. Minor under 16 years of age may not be employed in manufacturing, construction, mining and quarrying occupations or in woods and logging. Minor under 16 years of age may not be employed earlier than 7 A.M. or later than 9 P.M., more then three hours per day on school days and 23 hours per week during school weeks, except that on nonschool days he may be employed eight hours per day and during vacations 48 hours per week. Commissioner upon application may suspend this restriction for minor under 16 years of age in agricultural work. Minor under 12 years of age may not be employed except for his parents, grandparents or guardian, or at casual work or in delivery of newspapers. (RSA 276-A:4). Certificates must be obtained by employer within three business days of first day of employment. Certificates are issued by principals of schools only after determination of satisfactory level of academic performance by student and must include proof of age and adequate health. (RSA 276-A:5). Minor 16 or 17 years of age may not work more than six consecutive days or more than 30 hours during school calendar week or more than 48 hours during school vacations. (RSA 276-A:4).

Safety Appliances.

All places of employment employing one or more employees must provide specified safety appliances. (RSA 277:1). These include medical chests and reasonable and proper toilet facilities and reasonable sanitary and hygienic conditions for employees. (RSA 277:6, 10). Whenever nature or condition of any such place of employment, or machinery or other appliances therein, are such as to render work therein or in proximity thereto dangerous to safety or health of employees, employer must provide and maintain such safeguards, safety devices, appliances and lighting facilities, and do such other things as may be reasonably necessary and practicable to lessen dangers of such employment. (RSA 277:11). Commissioner is authorized to promulgate rules to implement c. 277. (RSA 277:16, I).

The Labor Commissioner must cause inspections to be made to see that the foregoing provisions are enforced, and may make specific orders relating thereto. (RSA 277:13-21). Employee may petition Commissioner to have his place of employment inspected for violations of this chapter. (RSA 277:13-a). Provision is made for review of Commissioner’s orders on rehearing (RSA 277:25-28), and for appeal therefrom to Superior Court (RSA 277:29-32).

Occupational Health Unit.

Commissioner, division of public health services, department of health and human services shall develop and conduct comprehensive policies and programs for evaluation of hazards associated with use of chemical or physical agents and for their amelioration; develop and conduct programs with due regard for compatibility with federal programs for consultation regarding chemical or physical agents; advise, consult, and cooperate with other agencies of state, federal government, other states, and interstate agencies, political subdivisions, industries, and with groups concerned with control of chemical or physical agents; have authority to accept, spend for purpose of this subdivision, and administer loans, grants, other funds or gifts, conditional or otherwise, in furtherance of its function, from federal government and from other sources, public or private; encourage, participate in, or conduct studies in training, research, and demonstrations relating to control of chemical or physical agents, measure of these agents, effects on health of exposure to these agents, and related problems as it may deem necessary or advisable to discharge of its duties hereunder; collect and disseminate health education information relating to protection from chemical or physical agents; require reports from physicians regarding ailments or diseases which may be contracted from occupational exposures to chemical or physical agents; and develop schedule of fees by rule, pursuant to RSA 541-A, and assess and collect such fees for services provided under this subdivision. Commissioner is authorized to establish revolving fund into which it shall deposit fees collected under this program. Commissioner, with approval of governor and counsel, shall be authorized to utilize moneys from revolving fund so created for purposes outlined in this subdivision. (RSA 140:4). Subject to direction and control of governor, Commissioner shall have responsibility and authority to carry out all public health activities within state in cooperation and collaboration with division of emergency services, communications, and management. (RSA 21-P:49).

Labor Unions.

See subhead Labor Contracts, supra.

Unemployment Compensation.

An unemployed individual who is able to work and available for suitable work is eligible to receive weekly benefits. (RSA 282-A:31).

Workmen's Compensation Law.

(RSA 281-A:1-70).

Employer, with respect to private employment, means person, partnership, association, corporation, or legal representative of one of foregoing, who employs one or more persons. (RSA 281-A:2 [VIII][a]). Executive officers are not considered to be employees unless they exceed three in number. (RSA 281-A:2 [VIII][a]). Term employer includes employer's insurance carrier. (RSA 281-A:2 [VIII][c]). Any other employer may accept provisions of Act by purchasing valid workmen's compensation insurance. (RSA 281-A:2 [VIII][b], § 3). With respect to public employment, employer means state agencies at state, counties, cities, towns, schools, and other districts, public or quasi-public corporations and any political subdivision of preceding. (RSA 281-A:2 [IX]). Public employees may purchase self-insurance and legislative body of employer shall appropriate sufficient funds to pay for self-insurance. (RSA 281-A:11). Employer not subject to Act which has accepted Act may revoke his or its acceptance by filing termination notice with Commissioner of Labor which shall be effective 30 days after such filing and by posting notice of such revocation in conspicuous place on his or its premises. (RSA 281-A:10). Self-insured worker's compensation programs administered by private employers are covered under statute. (RSA 281-A:5-a, b, c, d).

Employee, with respect to private employment, means any person in service of employer subject to provisions of this chapter under any contract of hire, express or implied, oral or written, except railroad employees engaged in interstate commerce whose rights are governed by Federal Employers' Liability Act, but including, if they elect to be personally covered by this chapter, persons who regularly operate businesses or practice their trades, professions, or occupations, whether individually, or in partnership or association with other persons, whether or not they hire employees. Any person, with few exceptions, who performs services for pay for employer, is presumed to be employee, subject to rebuttal criteria. (RSA 281-A:2 [VI]). Employee of employer subject to act is conclusively presumed to have accepted provisions thereof and to have waived his rights of action at common law, New Hampshire statute or laws of any other state, to recover for personal injuries against his employer or, except for intentional torts, against any officer, director, agent, servant or employee acting on behalf of employer or employer's insurance carrier. (RSA 281-A:8 [I]). No other person (including spouse) who might otherwise be entitled to recover damages on account of covered employee's injury or death can maintain direct action against employer, employer's insurance carrier or, except for intentional torts, any officer, director, agent, servant or employee acting on behalf of employer or his carrier. (RSA 281-A:8 [II]).

Average Weekly Wages.

Computed by using whatever statutory method yields result most favorable to injured employee. (RSA 281-A:15).

Personal injury, or injury as used in and covered by this chapter means accidental injury or death arising out of and in course of employment or all occupational diseases arising out of and in course of employment, or death resulting therefrom, including disability due to radioactive properties or substances or exposure to ionizing radiation. Injury or personal injury does not include, mental injury resulting from job actions taken in good faith by employer, nor does it mean accidental injury, disease, or death resulting from participation in athletic/recreational activities, on or off premises, unless employee reasonably expected, based on employer’s instruction or policy, that such participation was condition of employment or was required for promotion, increased compensation, or continued employment. (RSA 281-A:2[XI]). For purposes of this chapter, occupational disease is defined as injury arising out of and in course of employee’s employment and due to causes and conditions characteristic of, and peculiar to, particular trade, occupation or employment. (RSA 281-A:2[XIII]). For purpose of determining date of injury for occupational disease, date of injury shall be taken to be last date of injurious exposure to hazards of such disease or date on which employee first knew or reasonably should have known of condition and its relationship to his employment, whichever is later. (RSA 281-A:16). It shall not include other diseases or death therefrom unless they are direct result of accidental injury arising out of or in course of employment, nor shall it include disease which existed at commencement of employment, nor disease last injurious exposure to hazards which occurred prior to Aug. 31, 1947. (RSA 281-A:2 [XIII]). Total amount of benefit in case of death shall not exceed balance remaining between amounts paid for disability and total compensation payable under this chapter. (RSA 281-A:27). There is presumption that certain cancer, heart, and lung disease in fire fighter is occupationally related. (RSA 281-A:17).

Posting of Notice.

Every employer subject to the act, or who elects to accept its provisions, must keep posted in a conspicuous place upon his premises a notice that he is working under the provisions of the act. (RSA 281-A:4).

Notice of Claim.

Claims for benefits shall be barred unless notice of injury is given to employer within two years of injury unless nature of injury and its possible relationship to employment is not known. In that case, time for filing notice shall not begin to run until earlier of following: (1) Date employee knew or should have known nature of injury and its possible relationship to employment; or (2) in event of death, date dependent knew or should have known of nature of injury and possible relationship to employment. (RSA 281-A:19). Notice of injury in writing on blanks to be approved by Commissioner of Labor must apprise employer of injury and must state name and address of workman injured, and date of place of accident. Notice must be executed in duplicate, both copies to be signed by employee. Employer must acknowledge receipt of notice by signing on both original and duplicate and employee must retain duplicate. (RSA 281-A:20). It may be served personally, or by sending it by certified mail addressed to employer at his last known residence or place of business. (RSA 281-A:21).

Hearings and Awards.

If there is a dispute as to employer’s responsibility for compensation, medical and hospital benefits, or other remedial care, or as to any other provision of this chapter, any party to such dispute may petition for hearing and award in premises to Commissioner of Labor. Commissioner must set a time and place for hearing and give at least 14 days notice to parties. Within 30 days after hearing Commissioner must make his award, and must forthwith notify each of parties thereof. (RSA 281-A:43[I]). Payment of compensation in accordance with

Commissioner's decision must be made within five workdays and cannot be terminated except by terms of decision or by final court determination. (RSA 281-A:43 [II]). Appeals shall be taken to compensation appeals board no later than 30 days from decision. 14 days notice of scheduled hearing shall be given. Board shall make its decision within 30 days of hearing, setting forth its findings of fact and rulings of law. Appeals of board's decision may be taken to Supreme Court pursuant to c. 541. (RSA 281-A:43[I][b]). In any case appealed employee is entitled to reasonable counsel fees and costs and interest in that portion of award contested, if he prevails. (RSA 281-A:44). Claimant shall be entitled to reasonable fees and costs pending appeal. (RSA 281-A:44[VI]). Any person who was prevented from appealing within specified time through mistake, accident, or misfortune and not his own neglect, may petition appeals board at any time within one year thereafter, to be allowed appeal, setting forth his interest, his reason for appealing and causes of his delay. (RSA 281-A:50). Notices of hearings shall be given in hand, or by sending it by regular or certified mail, return receipt requested, addressed to employee, employer and employer's insurance company and, in superior court hearings, by certified mail to Commissioner of Labor. (RSA 281-A:45).

Commissioner may conduct investigations and hold hearings to resolve disputes between employer and employer's workers' compensation carrier regarding whether person engaged by employee are employees or independent contractors for purposes of determining whether additional premium charge is to be paid by employer for workers' compensation insurance. Any party aggrieved may appeal to Superior Court.

Modification.

Upon application of any party in interest upon ground of change in conditions, mistake as to nature or extent of injury or disability, fraud, undue influence or coercion, Commissioner of Labor may, not later than four years after date of last payment of compensation, or date of last payment for hospital treatment, charges for which are payable under act, make an order ending, diminishing or increasing compensation previously awarded, subject to maximum or minimum provided in act. He must state his reasons therefor. Such a review shall not affect awards as regards to any money previously paid. (RSA 281-A:48).

Enforcement of Awards.

Commissioner may assess penalty of $100 per day for noncompliance with his order and for continued noncompliance may petition superior court for injunction. (RSA 281-A:43[II]). All rights of compensation have same preference or priority against assets of employer as is allowed by law for claim by employee against his employer for unpaid wages. (RSA 281-A:51).

Security for Compensation.

Employers subject to the act must secure compensation to their employees in one of the following ways; (1) by insuring and keeping insured the payment of such compensation with a company licensed to write workmen's compensation insurance in this state, and filing with the Commissioner of Labor, in a form prescribed by him, such evidence of such coverage as he may determine; (2) by insuring and keeping insured payment of compensation to domestic employees with company which provides insurance in accordance with RSA 281-A:6 by furnishing to Commissioner of Labor satisfactory proof of financial ability to pay direct compensation in amounts and manner and when due as provided by act. (RSA 281-A:5). Employers who fail so to secure compensation to their employees may be assessed civil penalty of up to $2,500 and, in addition, may be assessed penalty of up to $100 per day per employee for each day of noncompliance. Penalties shall be assessed from first day of infraction not to exceed one year and persons with control or responsibility over decisions to disburse funds or salaries who knowingly fail to secure payment of workers' compensation shall be held personally liable for payments of penalties. In addition, other penalties include possible injunction from doing business in New Hampshire, and in addition their property is subject to lien of eight years duration for such amount as Labor Commissioner, upon application of employee or his dependents, shall find to be due. (RSA 281-A:7).

Subrogation.

The employer is subrogated to the rights of an injured employee against a third person injuring the employee, to the extent of compensation, medical, hospital or other remedial care already paid or agreed or awarded to be paid under the provisions of the act. Subrogation is specifically applicable to an action for wrongful death, and employer's lien applies to the remainder after deduction of expenses for which employer is not liable under the compensation statute and after deduction of the distributive share of any person to whom nothing is payable under the act. In any case in which the employee neglects to exercise his right of action by failing to proceed at law against such third person for a period of nine months after the injury the employer may so proceed and shall be subrogated to the rights of the injured employee to recover against such third person, provided, if the employer recovers from such other person damages in excess of the compensation, medical, hospital or other remedial care already paid, or agreed or awarded to be paid to the employee, then any such excess shall be paid to the injured employee, less the employer's expenses and costs of action. Settlements of claims against third parties are not binding until approved by the Commissioner of Labor if no suit has been brought or by the Superior Court if suit is brought and settlement made during actual trial or if the action goes to judgment. When recovery is had against a third person, the Labor Commissioner, or the superior court, as the case may be, must order such division of expenses and costs of action, including attorney's fees, between employer and employee as justice may require. (RSA 281-A:13). Any provision in any agreement which requires employers or employer's insurance carrier to waive any rights of subrogation granted pursuant to this chapter is hereby prohibited.

Compensation for Total Disability.

Compensation is payable during period of total disability. If employee's average weekly wage is 30% or less of state's average weekly wage, compensation shall be full amount of average weekly but not to exceed 90% of employee's after tax earnings determined by RSA 281-A:15. (RSA 281-A:28-a[I]). If employee's average weekly wage is more than 30% of state's average weekly wage, compensation shall be 60% of employee's average weekly wage or 30% of state's average weekly wage, whichever is greater, but shall not exceed 100% of state's average weekly wage or 100% of employee's after tax earnings determined by RSA 281-A:15. (RSA 281-A:28-a[II]).

Compensation for Temporary Partial Disability.

60% of difference between employee's average weekly wage before injury and average weekly wage which he is able to earn thereafter. Payments are not to continue after disability ends, nor longer than 262 weeks, and in case partial disability begins after period of total disability, period of total disability shall be deducted from such total period of 262 weeks. (RSA 281-A:31, 31-a).

Compensation for Death.

If death results from injury, compensation shall be paid to dependents of deceased employee in amount according to schedule of weekly payments for total disability. (RSA 281-A:26). Compensation payable to any dependent other than widow, widower, or children shall cease when such dependent is married, legally adopted, or determined by Commissioner to be self supporting. (RSA 281-A:26[VII]). In all cases where compensation is payable to widow or widower for benefit of herself or himself and dependent child or children, Commissioner of Labor shall have power to determine in his discretion what portion of compensation shall be applied for benefit of such child or children, and may order same paid to guardian. (RSA 281-A:26 [I]). In case of remarriage of widow without dependent children, compensation payments cease. (RSA 281-A:26[II]). In case of remarriage of widow who has dependent children, unpaid balance of compensation which would otherwise become her due shall be payable to mother, guardian, or such other person as Commissioner of Labor may order, for use and benefit of such children during dependency. (RSA 281-A:26 [III]). Employer shall pay expenses of burial not exceeding $5,000. (RSA 281-A:26 [IV]).

Any dependent except a widow, widower, child, or children who at time of injury of injured is in part only dependent upon his earnings, is entitled to receive such portion of benefits provided for those wholly dependent as amount of wage contributed by deceased to such partial dependents at time of injury bore to total support of dependents. (RSA 281-A:26 [V]). Compensation for a dependent child ceases when child becomes 18 years of age or 25 years of age if enrolled as a full time student in an accredited educational institution, unless child is physically or mentally incompetent, or earlier if child is determined by Labor Commissioner to be self-supporting, or upon marriage or legal adoption of such child. (RSA 281-A:26 [VI]). Dependents are defined to mean employee’s widow, widower, children, parents, persons in direct line of ascent or descent, or next of kin, who were wholly or partially dependent in fact upon earnings of employee for support at time of injury. Dependents include common law wife or husband of deceased and posthumous child or children. (RSA 281-A:2 [V]).

Medical and Hospital Care, etc.

Employer must furnish reasonable medical, surgical, hospital services, etc., for such period as nature of injury may require. (RSA 281-A:23 [I]). Injured employee, if he so chooses, shall have right of selection of duly qualified physician or other remedial care upon due notice to employer. Employer must pay cost of artificial limbs, eyes, teeth, orthopedic appliances and physical and surgical aids made necessary by injury and shall pay cost of replacement or repair made necessary by wear and tear or by physical change in person and shall pay compensation for resulting disability based on employee’s average wages at time of original injury. (RSA 281-A:23 [II]). If in accident employee has suffered loss of glasses, false teeth, artificial member, or hearing aid, employer shall pay costs of repair or replacement. (RSA 281-A:23 [III]). Employer may satisfy requirements of RSA 281-A:23 by providing managed care program approved by Commissioner in accordance with RSA 281-A:23-a.

Special Compensation.

Employer subject to this chapter, or employer’s insurance carrier, shall pay workers’ compensation to employee sustaining personal injury which is totally disabling, but temporary in nature, and employee is unable to return to work, but has not achieved maximum medical improvement, but not for first three days of disability unless disability continues for 14 days or longer, as follows: (1) If employee’s average weekly wage is 30% or less of state’s average weekly wage, weekly compensation shall be full amount of that employee’s average weekly wage, but shall not exceed 90% of employee’s after tax earnings determined by RSA 281-A:15; (2) if employee’s average weekly wage is over 30% of state’s average weekly wage, weekly compensation shall be 60% of that employee’s average weekly wage or 30% of state’s average weekly wage, whichever is greater, but in no event shall weekly compensation exceed 150% of state’s average weekly wage rounded off to nearest dollar as Commissioner determines for year in which injury occurred. In no event shall maximum weekly compensation rate exceed 100% of employee’s after tax weekly earnings as determined under RSA 281-A:15; (3) with certain exceptions, compensation of private employees shall be computed on basis of 80% of their average weekly salary, but no more than 150% of state’s average weekly wage. (RSA 281-A:28).

Compensation for Minors.

Compensation and death benefits are doubled in the case of minors under 18 years of age employed in violation of statutes dealing with child labor and apprenticeship, one-half to be paid by the insurance carrier and one-half by the employer. (RSA 281-A:33).

Lump sum settlements except for medical provisions under this chapter may be permitted when best interests of all concerned will be served thereby. Any such settlement must be approved by labor commissioner after hearing. (RSA 281-A:37).

Agreements as to Compensation.

If an employer or his insurer and an injured employee enter into an agreement in regard to compensation payable under the provisions of the act, a memorandum thereof must be filed with the Commissioner of Labor. (RSA 281-A:40).

Penalties.

Civil penalties up to $2,500 may be imposed if payments are not made when ordered under this chapter. (RSA 281-A:7; 42; 53).

11.03 WORKERS' COMPENSATION LAW:

See topic 11.02 Labor Relations.

12 ENVIRONMENT

12.01 ENVIRONMENTAL REGULATION:

General Supervision.

Numerous statutes and regulations exist. Environmental division of Attorney General's Office enforces statutes and common law. (RSA 21-M:10). Various other state agencies have been created to promulgate regulations and to provide oversight relative to specific statutes.

Air Pollution Control Agency has authority to promulgate rules and regulations and issue cease and abate orders pertaining to all aspects of air pollution. (RSA 125-C:4, 6).

Permits, approvals or certificates required for construction and operation of new stationary sources of air pollution or of modifications to existing sources (RSA 125-C:11), any burner, furnace, machine, equipment or article which, in opinion of air pollution control agency, contributes or may contribute to pollution of air (RSA 125-C:11; RSA 125-I:5), to dredge, excavate, place fill, mine, transport forest products or undertake construction in or on border of any surface waters or to significantly alter characteristics of terrain, in such manner as to impede natural runoff or create unnatural runoff (RSA 485-A:17), to construct sewerage or waste disposal system not connected to public sewer system (RSA 485-A:4), and to subdivide land, except if purpose of subdivision is to correct or conform boundary lines, to exchange land between abutters and no building is contemplated, or for bona fide gift (RSA 485-A:29). Registrations are also required before transport of hazardous waste (RSA 147-A:6) and for operation of hazardous waste facilities (RSA 147-A:4).

Cleanup Costs.

Municipalities may authorize issuance of bonds in order to pay costs associated with superfund sites. (RSA 33:3-e).

Enforcement.

Various commissions, boards, and agencies, acting through Environmental Protection Division of Attorney General's Office, may sue for injunctive relief and bring criminal action against violators. (RSA 21-M:10, RSA 485-A:13).

Penalties.

Any operator, generator, or transporter who causes or suffers treatment, storage, transportation or disposal of hazardous waste in violation of RSA 147-A shall be held strictly liable for costs relating to containment of waste, cleanup and removal. (RSA 147-A:9). Hazardous Waste Management Act also imposes criminal penalties as well as civil forfeiture of up to $50,000 for each day of continuing violation. (RSA 147-A:16, 17). Hazardous waste cleanup fund statute also creates strict liability (RSA 147-B:10), creates lien for all costs expended by State pursuant to cleanup fund (RSA 147-B:10-b) and imposes criminal penalty for violations of Act (RSA 147-B:11).

13 ESTATES AND TRUSTS

13.01 ADMINISTRATION:

See topic 13.08 Executors and Administrators.

13.02 ADVANCEMENTS:

See topic 13.07 Descent and Distribution.

13.03 ALLOWANCES:

See topic 13.08 Executors and Administrators.

13.04 CLAIMS:

See topic 13.08 Executors and Administrators; category 5 Civil Actions and Procedure, topic 5.17 Pleading.

13.05 DEATH:

Administrator may be appointed by court following hearing, on estate of person, with such limitations and powers as judge deems appropriate, where person is presumed dead or person has left his home and has not been heard of or from, directly or indirectly, for six months and whom court believes to be dead, upon proof that notice has been published and given. (RSA 553:18).

In absence of death certificate, fact of death may be established after evidentiary hearing if court finds by clear and convincing evidence that person has been killed as result of some catastrophic event but his/her body could not be recovered, or person has been absent for continuous period of four years, during which time he/she has not been heard of or from, and whose absence cannot satisfactorily be explained after diligent search and inquiry. (RSA 553:19).

A written finding of presumed death or that a person is missing, missing in action, interned in a neutral county, or beleaguered, besieged or captured by an enemy, or is dead, or is alive, as the case may be, made by an officer or employee of the United States pursuant to the Federal Missing Persons Act, is accepted by New Hampshire courts as prima facie evidence of the truth thereof, and all signatures on and certifications of such findings, reports and records are deemed prima facie valid. (RSA 523:1-3).

Survivorship.

The Uniform Simultaneous Death Act has been adopted. (RSA 563:1-11).

Actions for Death.

Executor or administrator may sue for personal injuries to decedent which caused his death, where no action for such injuries was commenced by decedent in his lifetime. Such action must be commenced within three years after death. (cc. 556, § 11 and 508, § 4). Damages are limited to $50,000 unless decedent left widow, widower, child or children, father or mother, or relative dependent on decedent, in which case there is no limitation. (RSA 556:13). Estate of spouse whose death was occasioned by other spouse's negligence may recover against latter though tortfeasor may be sole surviving distributee. Such recovery is limited to costs to estate. (RSA 556:14). Health/accident insurer must pay on these facts. (114 N.H. 110, 316 A.2d 177).

Elements of damage: mental and physical pain suffered by decedent in consequence of the injury, reasonable expenses occasioned to his estate by the injury, probable duration of his life but for the injury and his capacity to earn money during his probable working life. (RSA 556:12). If action was pending prior to death of plaintiff, action shall abate unless administrator appears and assumes prosecution within 12 months after death. If decedent was defendant, plaintiff must procure scire facias to be issued to administrator of decedent within 12 months after administrator appointed by Probate Court. (RSA 556:10; 115 N.H. 15, 332 A.2d 168).

Damages, less expenses of recovery, administration, taxes or other debts as approved by probate court become a part of decedent's estate and is distributed in accordance with applicable provisions of law. (RSA 556:14).

If death results from work-related injury, recovery is had under Workmen's Compensation. (RSA 281-A:26).

Uniform Anatomical Gift Act adopted. (c. 291-A).

Certificates of Death.

See category 10 Documents and Records, topic 10.04 Records, subhead Vital Statistics.

13.06 DECEDENTS' ESTATES:

See topics 13.07 Descent and Distribution, Executors and Administrators, Wills; category 8 Debtor and Creditor, topic 8.10 Homesteads.

13.07 DESCENT AND DISTRIBUTION:

Real Estate and Personalty.

Real estate and personal estate of every person deceased, not devised or bequeathed, subject to any homestead right, and liable to be sold by license from court of probate in cases provided by law, and personally remaining in hands of administrator on settlement of his account, shall descend or be distributed by decree of probate court: (1) If deceased is survived by spouse, spouse shall receive: (a) If there is no surviving issue or parent of decedent, entire intestate estate; (b) if there are surviving issue of decedent all of whom are issue of surviving spouse also, and there are no other issue of surviving spouse who survive decedent, first $250,000, plus ½ of balance; (c) if there are no surviving issue of decedent but decedent is survived by parent or parents, first $250,000, plus ¾ of balance of intestate estate; (d) if there are surviving issue of decedent all of whom are issue of surviving spouse also, and surviving spouse has one or more surviving issue who are not issue of decedent, first $150,000, plus ½ of balance of intestate estate; (e) if there are surviving issue of decedent one or more of whom are not issue of surviving spouse, first $100,000, plus ½ of intestate estate; (2) part of intestate estate not passing to surviving spouse or entire intestate estate if there is no surviving spouse, passes as follows: (a) To issue of decedent, if they are all of same degree of kinship to decedent they take equally, but if of unequal degree, then those of more remote degree take by representation; (b) if there is no surviving issue, to his parent or parents equally; (c) if there is no surviving issue or parent, to brothers and sisters and issue of each deceased brother or sister by representation; if there is no surviving brother or sister, issue of brothers and sisters take equally if they are all of same degree of kinship to decedent, but if of unequal degree then those of more remote degree take by representation; (d) if there are no surviving issue, parent or issue of parent but decedent is survived by one or more grandparents, one half of estate passes to paternal grandparents if both survive or to surviving paternal grandparent if one paternal grandparent is deceased and other half passes to maternal grandparents in same manner; or if only one grandparent survives, such grandparent shall receive entire estate; (e) if there are no surviving issue, parent, issue of parent, or grandparent but there are issue of decedent's grandparent who survive, one half of estate passes to issue of paternal grandparent who are not beyond fourth degree of kinship to decedent and said issue shall take equally if they are all of same degree of kinship to decedent, but if of unequal degree those of more remote degree take by representation, and other half passes to issue of maternal grandparent who are not beyond fourth degree of kinship and said issue shall take equally if they are all of same degree of kinship to decedent, but if of unequal degree those of more remote degree take by representation; provided, however, that if there are no issue of decedent's grandparent within fourth degree of kinship to decedent on either paternal or maternal side, entire estate passes to issue on other side who are not beyond fourth degree of kinship to decedent and said issue shall take equally if they are all of same degree of kinship to decedent, but if of unequal degree those of more remote degree take by representation; (f) no portion of decedent's intestate estate shall pass to any person who is of fifth or greater degree of kinship to decedent; (g) if there is no taker under provisions of this section, intestate estate passes to state of New Hampshire. (RSA 561:1). If any person die under age and unmarried his estate, derived by descent or devise from his father or mother, descends to his brothers and sisters, or their legal representatives, if any, to exclusion of other parent. (RSA 561:2).

Rights of Surviving Spouse.

Upon death of either husband or wife, testate, if surviving spouse has elected to waive homestead right, if any, and provisions of will in his or her favor, if any, such surviving spouse shall be vested with following portion of estate remaining after payment of debts and expenses of administration: (1) If there are children of deceased surviving (whether by surviving spouse or by previous marriage) or issue of any deceased children, one third part of personalty and one third part of real estate; (2) if decedent leaves no children or issue of any deceased children, but does leave mother or father or sister or brother surviving, $10,000 in value thereof a personalty and $10,000 in value of real estate, and also one half of remainder above $10,000 in each, real estate to be assigned to surviving spouse in same manner as dower heretofore has been assigned. Where inventory value of the real estate does not exceed $10,000 surviving spouse is entitled to whole of said remainder and no assignment of same is required unless some party in interest petitions to probate court therefor; (3) if decedent leaves no children or issue of any deceased children, nor mother or father, nor sister or brother surviving, $10,000 of value thereof, plus $2,000 for each full year from date of marriage to decease of spouse, and also one half in value of remainder above said sum computed as above, in personalty, and same in real estate, real estate to be assigned in same manner as dower has heretofore been assigned. Where inventory value of real estate does not exceed $10,000, surviving spouse is entitled to whole of said remainder and no assignment of same is required unless some party in interest petitions probate court therefor. That part of estate not passing to surviving spouse per paragraphs 1 through 3 shall pass via terms of will, provided that surviving spouse shall take nothing under will. (RSA 560:10). Deceased spouse's inter vivos transfer of property to trust defeats rights of surviving spouse even if decedent exercised complete control over property during lifetime, unless transfer was for purpose of depriving survivor of those rights. (123 N.H. 175, 459 A.2d 246).

Bar of Right to Inherit.

Surviving spouse is entitled to nothing, except such as may be given to him or her by the will: (1) Where surviving husband willfully abandoned decedent, or willfully neglected to support her, or has not been heard from, in consequence of his own neglect, for three years next preceding her death or (2) where, at time of decedent's death, decedent was justifiably living apart from surviving spouse because the latter was, or had been, guilty of conduct constituting cause for divorce. (RSA 560:18, 19).

As to election between testamentary provision and statutory rights in estates, see topic 13.16 Wills.

Illegitimate Children.

Child born of unwed parents shall inherit from or through his mother as if born in lawful wedlock. Estate of person born of unwed parents dying intestate and leaving no issue, nor husband, nor wife shall descend to mother, and, if mother is dead, through line of mother as if person so dying were born in lawful wedlock. However, such child shall inherit from or through his father as if born in lawful wedlock if: (a) Parents intermarry after birth; (b) father acknowledges paternity or legitimation; (c) court decree adjudges decedent to be father before his death; (d) paternity is established after father's death by clear and convincing evidence; or (e) decedent had adopted child. (RSA 561:4).

Adopted Children.

See category 14 Family, topic 14.01 Adoption.

Posthumous children and pretermitted heirs not otherwise made devisees or legatees are entitled to same portion of estate as they would be if decedent died intestate. (RSA 551:10).

Advancements.

If individual dies intestate as to all or portion of individual's estate, property decedent gave during lifetime to individual who, at decedent's death, is heir is treated as advancement against heir's intestate share only if: (a) Decedent declared in contemporaneous writing that gift was advancement; (b) heir acknowledged in writing prior to decedent's date of death that gift was advancement; (c) decedent's contemporaneous writing otherwise indicates that gift is to be taken into account in computing division and distribution of decedent's intestate estate; or (d) heir's written acknowledgment prior to decedent's death indicates that gift is to be taken into account in computing division and distribution of decedent's intestate estate. Property is valued as of time heir came into possession or enjoyment of property or as of time of decedent's death, whichever occurs first. If recipient of property fails to survive decedent, property is not taken into account in computing division and distribution of decedent's intestate estate unless decedent's contemporaneous writing provides otherwise. If value of property received by heir during decedent's lifetime exceeds value of heir's share of decedent's intestate estate, heir shall have no obligation to pay such excess amount to decedent's estate unless decedent's contemporaneous writing provides otherwise. (RSA 561:13).

Escheat.

No statutory provision.

Unclaimed Shares.

If on settlement of fiduciary's account there remains in his hands any sum of money in excess of $5,000 belonging to person whose place of residence is unknown and cannot be found, or who refuses to accept or receipt for such sum, probate court may decree that same be paid over to State Treasurer and at expiration of three years after such payment may decree distribution as though such person had no interest in estate unless he appears and establishes his rights. State Treasurer shall hold any such sums received in accordance with c. 471-C. (RSA 561:10).

See also topic 13.08 Executors and Administrators.

13.07A ESTATES: (in property)

See category 21 Property, topic 21.16 Real Property.

13.0813.09 [RESERVED]

13.10 EXECUTORS AND ADMINISTRATORS:

Jurisdiction.

Judges of probate of several counties have exclusive jurisdiction of probate of wills; of granting of administration and of all matters and things of probate jurisdiction relating to sale, settlement and final distribution of estates of deceased persons; interpretation and construction of wills and interpretation, construction, modification, and termination of trusts of appointment, removal, surcharge, and administration of trustees of trusts. (RSA 547:3). Special administrators may also be appointed by superior court. (RSA 553:21).

Venue.

Probate of will and granting administration on estate of person deceased belongs to judge of probate for county in which such person was last inhabitant; but, if such person was not inhabitant of this state, for any county in which such person had estate, or in which personal representative or kin of such person has cause of action. (RSA 547:8).

Right to administer the estate of a deceased person is in the following order: (1) The executor named in his will; (2) the widow, husband or any of the next of kin, or to such suitable person as they or any of them may nominate; (3) one of the devisees or creditors; (4) such other person as the judge may think proper. (RSA 553:2).

Competency.

Minors and persons deemed by probate judge to be unsuitable cannot administer estates. (RSA 553:4). Married women are eligible to act as executors and administrators (RSA 553:9), as are nonresidents, if judge deems their appointment proper under circumstances (RSA 553:5). Trust companies, banks or savings associations organized under N. H. laws and national banks or federally chartered savings associations located within state may be appointed executors or trustees, but not administrators. New Hampshire religious, charitable and eleemosynary corporations can act in all fiduciary capacities. No foreign corporation except national bank duly authorized and located within state can be appointed executor or trustee. (RSA 390:13).

Bond.

Every executor or administrator must furnish bond to judge of probate with sufficient sureties or, in lieu of bond, other forms of security acceptable to court, conditioned: (1) To return to judge true and perfect inventory or estate of deceased, upon oath, within 90 days from date of appointment; (2) to administer estate according to law; (3) to render to judge account of administration, upon oath, within one year, and annually thereafter; (4) to pay all taxes for which he may be or become liable; (5) to pay and deliver rest and residue of estate which shall be found remaining upon account of administrator to such person or persons respectively as judge, by his decree, according to law, shall limit and appoint; (6) to deliver letters of administration into court of probate, in case will of deceased shall thereafter be approved and allowed. In discretion of judge of probate requirements for giving of bond and sureties may be waived. When estate has gross inventory value of $25,000 or less, only personal bond without sureties will be required. (RSA 553:13).

Removal.

Failure to comply with the statutory requirements is ground for removal of administrators.

(RSA 553:28).

Special Kinds of Administration.

If the administration on an estate becomes vacant by death, or extinguishment or revocation of letters, probate court may grant administration on estate not before administered to such person as court may think proper, having due regard to order of right to administer. (RSA 553:7).

A special administrator will be appointed, if the interests of the estate require it, whenever, by reason of an appeal from the probate of a will or the appointment of an administrator, or from any other cause, there is delay in determining the final grant of administration. (RSA 553:20, 21). He must give bond with sufficient sureties for the faithful discharge of his duties or other forms of security acceptable to court (RSA 553:13), and his duties are, in general, to return inventory of estate of deceased, to take care of and preserve his property, and to do all other acts which he may be directed to perform by probate judge or by superior court. (RSA 553:22).

Ancillary administrators will be appointed in proper cases. (RSA 547:8).

Resident Agent.

A nonresident who is appointed executor or administrator in this state, or a resident who is so appointed and subsequently removes from the state or departs therefrom intending to be absent more than one year, must appoint some person resident in this state as agent to receive notice of claims against their respective estates and service of process against such nonresidents. The appointment must be in writing, must state the full name and postoffice address of the agent, and must be filed in the office of the register of probate. When nonresident is appointed, he must insert in the notice of his appointment the name and postoffice address of his agent. (RSA 553:25, 26).

Inventory and Appraisal.

Every executor or administrator, within three months after his appointment, must return to the probate office, under oath, a full, true and itemized account of all the estate of the deceased which has come to his knowledge.

Inventory must contain a description of the real estate; a correct schedule of all goods, chattels, stocks, bonds and other effects of the deceased, all notes, with their dates and terms of payment, and the date and amount of each endorsement thereon, all deposits in savings banks, with name and location of each bank, number of each book, date of last dividend, and whole amount then due thereon less any withdrawals since that date; and list and description of decedent’s other written evidences of debt. Appraisers must class property under appropriate heads, and must foot each class. Judge may appoint one or more appraisers, if in his opinion nature of property or size of estate makes it advisable so to do. (RSA 554:1, 3). Wearing apparel, etc., of widow and minor children and personal possessions and trinkets of deceased of sentimental rather than intrinsic value must not be inventoried or accounted for. (RSA 554:4-5).

General Powers and Duties.

As the personal representative of the decedent the executor or administrator is charged with the duty of collecting all debts due to the estate and accounting therefor in money. (RSA 554:11). Debts due from insolvent person may be compromised and discharged by administrator in his discretion, and he will be chargeable only for amount received. (RSA 554:12). In event estate is insolvent administrator must receive rents and profits of real estate and keep same in repair, accounting for net proceeds thereof in his administration account. (RSA 554:15). If there are sufficient assets, administrator must redeem all property of deceased under mortgage, pledge or levy of execution for less than its value, or which if unredeemed would diminish value of estate, unless he by license sells it subject to encumbrance. Neglect so to redeem constitutes maladministration and waste. When real estate under mortgage is specifically devised, devisee takes such real estate subject to mortgage, unless testator in his will or by insurance has provided expressly or by necessary implication that such mortgage be otherwise paid; and if note or obligation of testator secured by such mortgage is paid out of other property in his estate after his decease, executor of his will, at request of any person interested, and by leave of probate court must sell such specifically devised real estate for purpose of satisfying estate of testator for amount so paid, together with costs and expenses thereof. (RSA 554:16). Real estate purchased by or set off to administrator to secure or satisfy debt due estate vests in heirs in same manner as if decedent had died seized thereof, and may be sold for payment of debts, or divided as part of estate. (RSA 554:18). Prior to rendering final account, notification must be given to city or town of persons coming into ownership of real estate by inheritance or devise. (RSA 554:18-a).

Authorization to Continue Decedent’s Business.

The probate court may authorize the executor or administrator to continue any business of the decedent, for the benefit of the estate, for not more than one year from the date of his appointment; and such authority may be extended from time to time, but no single extension may be for more than one year. The decree may provide the extent of the liability of the estate, or of the executor or administrator, for obligations incurred in the continuation of the business and such other conditions, restrictions, regulations and requirements as may be deemed for the benefit of the estate and of creditors thereof. (RSA 553:30).

Sale of Personal Property.

All goods and chattels shall be accounted for at appraised value, unless sold at auction or private sale, and all stocks and bonds at prices which they shall bring at public or private sale; and administrator conducting sale with fidelity and impartiality shall be credited with loss, or charged with gain, upon sale. (RSA 554:7, 8).

Sale of Real Estate.

The executor or administrator must apply for and procure license for the sale of so much of the real estate as may be necessary to pay debts and legacies, if the personal estate is insufficient; and neglect or refusal to obtain such license, to make such sale, to account for the proceeds thereof, or fraudulent conduct therein, is deemed maladministration and a breach of his bond. (RSA 554:17; c. 559).

Unless will provides otherwise, executor or administrator, with written consent of widow or widower and heirs at law or devisees, or guardians or conservators of such of them as are under disability may sell whole or any part of decedent’s real estate conducting sale with fidelity and impartiality. Such sale conveys title, free from claims of decedent’s creditors and of persons claiming under decedent or under his will, but claims of such persons are a charge on proceeds of sale. Such proceeds must be accounted for to probate court and, except for such deductions as court may make for payment of debts, legacies, inheritance taxes and expenses of administration, must be paid over, on distribution of estate, to persons who would have been entitled to such estate in proportions to which they would have been entitled had it not been sold. (RSA 559:18-19).

Mortgage of Real Estate.

An executor or administrator, with assent of the heirs or devisees, may obtain a license to mortgage the real estate of the deceased when the personal property is insufficient to pay the just demands by law chargeable to the estate, or to make necessary or desirable repairs to preserve such real estate, or where it is otherwise necessary to raise money to facilitate settlement of the estate. A foreign executor or administrator may obtain such license with respect to land located in this state. No such license may issue later than two years after date of appointment of the administrator or executor, and no license shall be available to sustain a mortgage made under said license unless made within 90 days from the granting thereof. (RSA 554:30-35).

Redemption of Property.

If there be sufficient assets, the executor or administrator must redeem all property of the deceased under mortgage, pledge or levy of execution for less than its value, or which, if unredeemed, would diminish the value of the estate, unless, by license, he sells it subject to the encumbrance; and neglect so to redeem is deemed maladministration and waste. When real estate under mortgage is specifically devised, the devisee takes subject to the mortgage unless the testator in his will or by insurance has provided expressly or by necessary implication that the mortgage be otherwise paid. (RSA 554:16).

Notice of Appointment.

Every executor must, within 60 days after date of appointment, notify each legatee specifically named in the will that he appears to be interested therein, and must also notify the surviving spouse and heirs at law, if known, that the will has been proved. (RSA 552:15).

Notice to Creditors.

Every executor or administrator must, within 15 days after his appointment, cause notice thereof to be published for two weeks successively in newspaper circulated in vicinity. (RSA 21:32; RSA 553:16; RSA 550:10).

Presentation of Claims.

Claims against the estate of a decedent must be exhibited to the executor or administrator and payment demanded within the time limited therefor, or else they are forever barred. Time allowed for such exhibition and demand is six months from original grant of letters (excluding any time during which administration may have been suspended). (RSA 556:1, 3). No exhibition is required if estate has been represented insolvent within said six months. (RSA 556:4). Notice sent to representative or his agent by registered mail, setting forth nature and amount of claim and demanding payment, is sufficient. (RSA 556:2). If representative is nonresident, claim must be exhibited to and demand made on resident agent appointed for that purpose. (RSA 553:25).

There are no distinctions operating either in favor of or to the prejudice of nonresident creditors as distinguished from resident creditors. There are no specific provisions as to presentation of secured claims.

Unmatured and contingent demands may be filed in court of probate, and the judge may require the executor or administrator to retain in his hands such sum as may be necessary to pay them; unless widow, heirs or legatees give bond for payment thereof when they become due or absolute. (RSA 556:6).

Proof of Claims.

If executor or administrator so requires, all claims against an estate must be exhibited under oath as follows:

Form

I do solemnly swear that, according to the best of my knowledge and belief, the above is a true statement of my claim against the estate of . . . . . ., late of . . . . . ., and that I have not on my books or elsewhere any credit, nor have I any knowledge of any credit or offset that should be allowed against my claim, except what is stated in the foregoing account. So help me

God. (RSA 554:24).

Payment of Claims.

Allowed claims should be paid within six months from original grant of letters (RSA 556:1); if such a claim is not paid claimant may bring an action at law thereon against representative within one year after original grant of administration, exclusive of time such administration may have been suspended. (RSA 556:5).

The judge may require the executor or administrator to retain in his hands such sum as may be necessary to pay unmatured and contingent claims, unless the widow, heirs or legatees give bond for the payment thereof when they become due or absolute. (RSA 556:6).

Priorities.

The executor or administrator must pay all debts, legacies and taxes due from the estate. (RSA 554:19). Order of payment is: (1) administration expenses; (2) funeral expenses; (3) allowance to widow; (4) debts; (5) support of infant children until they reach age of 18 years, if estate is solvent; (6) total amount paid for old age assistance and/or disability; (7) legacies. (RSA 554:19). Executors or administrators of solvent estates may erect suitable monuments at the graves of testators or intestates, and reasonable expense thereof is allowed them on settlement of their accounts. (RSA 554:21). Executors, administrators and trustees may pay, upon order of judge, to cemetery corporation or to city or town in which decedent has burial place, reasonable sum of money for perpetual care of lot in which decedent is buried and monuments thereon. (RSA 554:22).

Actions by Representative.

At any time within one year after the original grant of letters the executor or administrator may bring suit or defend in any suit brought on a right of action existing and surviving in favor of or against the deceased at the time of his death. (RSA 556:7). He may appear and prosecute any action pending at time of death of deceased before end of second term after said time of death. (RSA 556:10).

Actions Against Representative.

No action may be brought against the executor or administrator on a claim against the estate unless such claim has been exhibited to him and payment demanded within six months after original grant of administration. (RSA 556:1, 3). Right to sue is suspended for six months from original grant of letters (RSA 556:1) unless estate has been represented insolvent (RSA 556:4), and action must be brought within one year from original grant of letters or claim is barred, unless claim is unmatured, in which case action thereon must be brought at maturity (RSA 556:5-6). Superior court may, however, grant leave to sue after the one year period if justice and equity so require and claimant is not chargeable with culpable neglect. (RSA 556:28).

If an action is pending at the time of the decease of the defendant, the action abates and is forever barred unless the plaintiff procures a scire facias to be issued to the administrator of the deceased party before the end of the second term after the original grant of administration upon his estate, provided that the administrator forthwith notifies in writing the adverse party or his attorney of record of such death and grant of administration, and such action is not barred until the end of the second term after the giving of such notice. Such notice must be by registered mail, return receipt requested, and such administrator must file an affidavit in the probate court, showing compliance with the provisions thereof, provided further, however, that any justice of the superior court must, for good cause shown, grant relief from any of the foregoing requirements as justice may require. (RSA 556:10).

Widow’s Quarantine and Support.

The widow may remain in the house of her husband 40 days next after his death without being chargeable with rent therefor, and in the meantime is entitled to her reasonable sustenance out of the estate; and the same is taken into consideration by the judge in the allowance he may make to her. (RSA 560:2). In addition, the judge may make to the widow of a deceased person, a reasonable allowance out of the personal estate, for her present support; and, in the decree of distribution of the personal estate, the whole, or such part thereof as the judge may deem reasonable, must be accounted as part of her distributive share. (RSA 560:1).

Accounts.

The account of the executor or administrator, or the schedules filed therewith, must contain an itemized account of every sum of money received and paid out by him, with the date thereof and a statement of the source from which it was received or of the consideration for which it was paid. (RSA 554:25). Every executor or administrator must file in the probate office an annual account of administration, unless upon petition he is excused by the judge of probate; but in no event may he be excused for a period longer than three years. Before giving notice to settle his final account, he must file it in the probate office of the county where it is to be settled, and cause the fact of such filing to appear in the notice, and at the same time file a statement of the names and residences of the heirs, legatees and beneficiaries, if known to him. (RSA 554:26). When an executor or administrator files his account in the probate court, he must contemporaneously forward to all persons beneficially named copy of account and notice that account may be approved unless written objection is filed within 30 days. (RSA 550:11, 12). See topic 13.15 Trusts, subhead Accounts. Notice required in any proceeding in probate court may be dispensed with if all parties entitled thereto assent in writing to such proceeding or in writing waive notice. (RSA 550:13). Accounts are not usually filed during first six months after original grant of administration because claims of creditors can be presented at any time before end of that period. (RSA 556:3). Probate court requires that notice of filing of final account be published for two weeks.

Distribution of Estate.

No time limit is set within which the estate is to be distributed. Distribution is customarily made as soon as possible after the end of the first year after the original grant of administration. Distribution may be made after the first six months by consent of probate court.

Personal property specifically bequeathed must not be sold, if not needed for the payment of debts; and any property may be reserved at the sale, unless so needed, for the benefit or upon the request of the heirs or legatees, and the executor or administrator is discharged by delivery thereof to the persons entitled thereto. The judge may order the executor or administrator to transfer stocks, bonds and other evidences of debt to the heirs or their guardians, in just proportion, whenever he deems it for the interest of the heirs that the same should not be sold; and such guardians are authorized to receive the same. (RSA 554:9, 10).

Where minor, whose estate is not under legal guardianship, is entitled to receive share or legacy, executor or administrator shall make such distribution to person designated as such minor’s custodian under either Uniform Transfers to Minors Act, c. 463-A, or another state’s Uniform Transfers to Minors Act or similar statute. (RSA 561:20).

Distribution if Abroad.

When it appears that a legatee, distributee, cestui or beneficiary not residing within the territorial limits of the United States or any territorial possession thereof would not have the benefit or use or control of property due him and that special circumstances make it desirable that delivery to him be deferred, the probate court may order that such property be converted into available funds and paid to the State Treasurer to be handled subject to further order of the court, provided a reasonable fee, as allowed by the court of the attorney for such legatee, etc., shall be considered a lien on such funds and shall be paid by the fiduciary to such attorney prior to the payment to the State Treasurer. (RSA 561:12-a).

Compensation of Representatives.

No statutory provisions. As a matter of practice, the executor or administrator presents a claim for compensation when he renders his account to the probate court, and the same, if deemed reasonable, is allowed to be paid out of the estate. Reasonable compensation paid to executor or administrator may be deducted in calculation of estate taxes.

Insolvent Estates.

The estate of a deceased person may, on application of the executor or administrator, be decreed to be administered as insolvent, and one or more persons, not exceeding three, must be appointed commissioners to examine and allow the claims of creditors against the estate. If the application is made more than six months after original grant of administration, it may be granted only upon notice of petition by publication, and at discretion of judge. (RSA 557:1-2). At a time not less than three nor more than six months from date of commission, commissioner, after giving notice to creditors, claimants and others, must hear and allow claims against estate. (RSA 557:6-8, 12). This time limit may be extended up to one year by probate court for cause shown. (RSA 557:8). Mutual claims of deceased and creditor may be set off against each other. (RSA 557:14).

If a secured claim exceeds the estimated value of the security, the creditor is allowed the excess only. (RSA 557:15). If dissatisfied, he may surrender the security, which is sold and the proceeds paid to him, and his claim allowed for the full excess over the amount realized on the security. (RSA 557:16).

The expenses of administration, the necessary charges for the burial of the deceased, the allowance made by the judge to the widow out of the personal estate and taxes must be allowed by the judge and first paid, giving preference to them in the order in which they are here placed. Claims for the last sickness of the deceased must be designated as such in the commissioner’s report, and must be paid in full, if the balance in the hands of the executor or administrator, after the payments before directed are made, is sufficient; otherwise the balance must be distributed pro rata to such claimants in proportion to their respective claims. If, after payment in full of the claims before mentioned, any balance remains in the hands of the administrator, it must be decreed to be distributed among the other creditors in proportion to their respective claims as allowed, or in full payment thereof, with interest. If anything remains after payment of the preferred claims, the debts due from the estate and for the support of the children, if any under seven years of age, such residue must be distributed among the legatees or heirs according to law. (RSA 557:22-24, 27). If the laws of any foreign state are reciprocal, the New Hampshire property of an insolvent deceased, domiciled in such foreign state, will be so administered that all creditors, here and elsewhere, shall receive an equal share in proportion to their respective debts. (RSA 557:28-30).

An appeal may be taken from the finding of the commissioner by either the administrator or creditor. (RSA 557:21).

When Administration Unnecessary.

Administration is not required to collect wages, salaries or commissions of deceased person not exceeding $500 where decedent leaves surviving spouse. (RSA 560:20).

Summary administration is available to expedite closing of estate when further court supervision is no longer necessary. (RSA 553:32, 33).

Small Estates.

See subhead When Administration Unnecessary, supra.

Foreign Executors and Administrators.

Whenever an executor, administrator, trustee or guardian, duly appointed and acting as such in another state or country, represents a person who owned or is entitled to personal property in this state, he may make petition to the probate court in the county where the property is situated, or, if it is stock in a corporation, to the court in the county where the corporation has its principal place of business, for license to sell, transfer or receive and dispose of the same, and the judge, after such notice as he may order, if no sufficient objection appears, must license him to sell, transfer and convey, or to receive and dispose of, such property and shares in the same manner as he might do if appointed under the laws of this state. Such license may not be granted until the expiration of six months after the death of the testator or interstate, nor unless it appears: (1) That there is no executor, administrator, trustee or guardian appointed under the laws of this state, entitled to the property; (2) that such foreign executor, administrator, trustee or guardian will be liable for the avails of the property and shares in the state or country where he is appointed; (3) that no creditor or person interested, who is a resident of this state, objects to such license or will be liable to be prejudiced thereby; (4) that all taxes due to the state have been paid or secured; (5) that the foreign fiduciary has filed in the probate court authenticated copies of his petition, bond and appointment in such other state or country. (RSA 554:28-29).

License to sell New Hampshire realty will be granted a executor or administrator under the same conditions enumerated in the above paragraph relative to the sale of personal property. (RSA 559:18, RSA 553:5). He must give bond and with sufficient sureties resident in the state, make oath, and is in all respects entitled to the same rights and subject to the same liabilities as if appointed in this state. (RSA 559:13).

Uniform Fiduciaries Act not adopted.

Uniform Principal and Income Act not adopted.

Uniform Simplification of Fiduciary Security Transfers Act not adopted.

Uniform Anatomical Gift Act adopted. (c. 291-A).

See also topic 13.16 Wills, subhead Foreign Probated Wills.

13.11 [RESERVED]

13.12 INTESTACY:

See topic 13.07 Descent and Distribution.

13.13 [RESERVED]

13.14 PROOF OF CLAIMS:

See topic 13.08 Executors and Administrators; category 5 Civil Actions and Procedure, topic 5.17 Pleading.

13.15 TRUSTS:

Uniform Trust Act adopted. (RSA 564-B:1-101 —8-814). Common law rules supplement Uniform Trust Act, except as modified by any statutory law. (RSA 564-B:1-106).

All trusts concerning lands, except implied and resulting trusts, must be created or declared by an instrument signed by the party creating the same or by his attorney. (RSA 477:17). Scope of common law doctrine of cy pres enlarged by statute. (RSA 498:4a-4e).

Trustees of testamentary trusts are under jurisdiction of probate court and, except towns and cities, must give bond when appointed trustee. (RSA 564:1, 2). Bond without sureties may be accepted in estates of $5,000 or less where judge finds such to be in interest of estate. (RSA 564:1).

Trustee may resign (RSA 564:8) or, for cause, be removed by judge of probate following hearing noticed to trustee, all known beneficiaries, and such other persons determined by judge to have interest in trust. (RSA 564:9). If trustee appointed in will, no provision being made therein for perpetuating trust, declines to accept it, dies, resigns or is removed, trustee may be appointed by judge in his stead, after notice to persons interested in trust estate. (RSA 564:10). Executor or administrator of deceased trustee will be licensed by judge of probate to convey any real estate held in trust to cestui qui trust or to such other person as may be designated by judge. (RSA 564:20).

General Powers and Duties of Trustees.

Uniform Trustees' Powers Act has been adopted. (c. 564-A).

Eligibility and Competency.

In addition to individuals the following may be appointed trustee: Any New Hampshire trust company or national bank duly authorized and located within this state and any religious, charitable or eleemosynary corporation incorporated under laws of this state. (RSA 390:13; RSA 564:4). Foreign corporations are not eligible.

Agent for Nonresident Trustees.

Every resident trustee who removes from the state or who goes out of the state with the intention of being absent more than a year, and every resident of another state who is appointed trustee within this state, must forthwith appoint some person residing in this state as his agent, to receive notice of claims against the estate and service of process against him as trustee. The appointment must be in writing and state the full name and post-office address of the agent, and it must be filed in the office of the register of probate. (RSA 564:12).

Fiduciaries in Military Service.

While a fiduciary is in military service, a co-fiduciary may be authorized to exercise, or a substituted fiduciary pro tem may be appointed to exercise, all powers which can be transferred to him. (RSA 113:2, 4, 8).

Supervision.

The judge of probate, on application of a trustee or of any person interested, may, after notice to all persons interested, authorize and require the trustee to sell any property holden in trust, and to invest the proceeds of the sale in such manner as will be most for the interest of all persons concerned therein; and the judge may, from time to time, make such orders and decrees as he may think just and reasonable, in relation to the sale, management, investment and disposition of the trust property and the settlement of the accounts of the trustee. When the purposes for which any trust was created have been performed the judge may, by license and decree, authorize the trustee to transfer, by suitable deed or conveyance, any property remaining in his hands to such person as may be entitled thereto. Authority to mortgage trust property may be granted. When a trust estate is seized of an undivided fractional part of real estate the judge, upon petition of the trustee, notice and hearing, may authorize the trustee to purchase any other undivided fractional part of such real estate when it will be conducive to the interests of the trust estate to do so; and when the trustee is so authorized he may use the funds of the trust to pay the purchase money. (RSA 564:14-17).

Reports of Trustees of Public Trusts.

First report of a public trust is to be made to Attorney General not later than four months 15 days following close of first calendar or fiscal year in which any part of income or principal is authorized or required to be applied to a charitable purpose and reports are required annually thereafter. (RSA 7:28[V]).

Copies of accounts filed by trustee in court having jurisdiction of trust may be filed with Attorney General as a report if it substantially complies with Attorney General's rules and regulations. (RSA 7:28).

Trustee must file with Attorney General within six months after any authorization or requirement of expenditure of any part of income or principal a copy of instrument providing for title, duty and powers of trustee. (RSA 7:28[I]).

Investments.

Trustee may invest and reinvest trust assets in accordance with provisions of trust, to sell or exercise stock subscription or conversion rights and to deposit trust funds in bank, including bank operated by trustee. (RSA 564-B).

Securities in Name of Nominee.

Corporate trustees when acting in a fiduciary capacity, either alone or jointly with individual or individuals, may, with consent of individual fiduciary or fiduciaries, cause stock or other securities to be registered and held in name of nominee without mention of fiduciary relationship. (RSA 390:18).

Common Trust Funds.

Uniform Common Trust Fund Act adopted. (c. 391).

Gifts to Minors.

See category 14 Family, topic 14.10 Infants.

Uniform Simplification of Fiduciary Security Transfers Act not adopted.

Uniform Fiduciaries Act not adopted.

Accounts.

Every trustee must file in the probate office an annual account of administration, unless upon petition he is excused by the judge of probate, but in no event can he be excused for a period longer than three years, except that in cases where such filing may be impractical and may work financial hardship to the trust estate, the judge of probate, upon written approval of the attorney-general, may extend such period not exceeding, in the aggregate, five years. Such annual account of administration provided for herein may be allowed by the judge of probate without publication unless he shall otherwise order. Before giving notice to settle his final account, he must file it in the probate office, and cause the fact of such filing to appear in the notice, and must at the same time file a statement of the names and residences of the beneficiaries in the trust estate. (RSA 564:19). Whenever a trustee files an account in the probate court, fiduciary must contemporaneously forward all persons beneficially interested and all parties appearing of record (1) copy of account; and (2) notice that account may be approved unless written objection is filed within 30 days after date account is filed in probate court. (RSA 550:11). Notice required in any proceeding in probate court may be dispensed with if all parties entitled thereto assent in writing to such proceeding or in writing waive notice. (RSA 550:13).

Uniform Principal and Income Act not adopted.

Compensation.

A trustee is allowed his reasonable expenses incurred in the execution of his trust; and unless otherwise expressly provided in the trust instrument, he shall have such reasonable compensation for services as the judge of probate may allow. Unless otherwise expressly provided in the trust instrument, such compensation and expenses for trustee of non-charitable trust may be apportioned between principal and income as judge may determine equitable. (RSA 564:21). Unless otherwise provided in trust, compensation and expenses shall be apportioned between income and principal.

Accumulations.

Income accumulated in trust for benefit of unborn or unascertained persons shall be taxed as if accumulated for benefit of inhabitants of state. (RSA 77:11).

Perpetuities.

See category 21 Property, topic 21.12 Perpetuities.

Pour Over Trusts.

See topic 13.16 Wills, subhead Bequests and Devises to Inter Vivos Trusts.

13.16 WILLS:

Every person, including married women, of sane mind, of the age of 18 years or married although under that age, may dispose of all his or her property by will. (RSA 551:1).

Formalities.

A will must be in writing, signed by the testator or by some person in his presence and by his express direction, and attested and subscribed in his presence by two or more credible witnesses. Seal is not necessary. (RSA 551:2). Wills may be self-proving, i.e. acknowledged by testator and sworn to by witnesses before notary public or Justice of Peace. (RSA 551:2-a).

Form

The usual form is: I, ..., of . . . . . . County of . . . . . . State of . . . . . . do make this my last will and testament, hereby revoking all former wills by me made, and do hereby dispose of my estate in manner following: . . . . . .

In witness whereof I have hereunto set my hand and seal this . . . . . . day of . . . . . ., 20. . . . .

Signed, sealed, published and declared by . . . . . ., the above named testator, as and for his last will and testament, in the presence of us and each of us, who, at his request and in his presence and in the presence of each other, have hereunto subscribed our names as attesting witnesses this . . . . . . day of . . . . . ., 20. . . . .

The foregoing instrument was acknowledged before me this . . . . . (day) by . . . . ., the testator; . . . . . . and . . . . . ., the witnesses, who under oath do swear as follows:

1. The testator signed the instrument as the testator’s will or expressly directed another to sign for the testator.

2. This was the testator's free and voluntary act for the purposes expressed in the will.

3. Each witness signed at the request of the testator, in the testator's presence, and in the presence of the other witness.

4. To the best of my knowledge, at the time of the signing the testator was at least 18 years of age, or if under 18 years was a married person, and was of sane mind and under no constraint or undue influence.

Signature

Official Capacity

Witnesses.

Any beneficial devise or legacy made or given in a will to a subscribing witness thereto or to the wife or husband of such a witness is void unless there be two other subscribing witnesses. (RSA 551:3).

Holographic wills are not recognized.

Nuncupative will is not valid where the property exceeds in value $100, unless declared in the presence of three witnesses who are requested by the testator to bear witness thereto, in his last sickness and in his usual dwelling; except where he was taken sick from home and died before his return, nor unless a memorandum thereof was reduced to writing within six days, and presented to the probate court within six months after the making. (RSA 551:15, 16).

Revocation.

No will or clause thereof may be revoked unless by some other valid will or codicil, or by some writing executed in the same manner, or by canceling, tearing, obliterating, or otherwise destroying the same by the testator, or by some person by his consent and in his presence. This provision does not, however, control or affect any revocation implied by law from any change in the circumstances of the testator, or his family, devisees, legatees or estate, occurring between the time of making the will and the death of the testator. Divorce or annulment of marriage revoke any disposition or appointment made by trust to former spouse. (RSA 551:13-14). Marriage and birth of a child would seem such a change of circumstances as to revoke a will executed before the marriage. (See 63 N. H. 507, 3 A. 636.) Divorce or annulment after execution of will revokes any disposition or appointment of property to former spouse. (RSA 551:13).

Probate and Contest.

Wills must be proved and allowed by the court of probate and recorded in the office of the register of probate, in order to be effectual. (RSA 552:1).

If probate of a will is not contested the judge of probate may allow and approve it in common form, upon the testimony of one of the subscribing witnesses. (RSA 552:6). No notice need be given to anyone at the time of this probate. (RSA 550:4). If the attesting witnesses, after the execution of a will, become incompetent from any cause, or if court determines that testimony of such witnesses is unavailable under circumstances, will may be proved and allowed upon other satisfactory evidence. (RSA 552:12).

Any party interested may have probate of a will which has been proved without notice re-examined, and will proved in solemn form before court of probate at any time within six months of such probate. Any issue related to execution of will, testamentary capacity, or fraud, duress, or undue influence shall be tried to court of probate, and any party interested may request same within six months of such probate. Petition for that purpose may be presented to judge, and notice thereof given to executor, personally if practicable, and published. If, upon hearing and re-examination, probate be not confirmed, will and probate are void. (RSA 552:7, 8). Minor, insane person or person out of U.S., or their legal representative, who is interested may have probate in common form re-examined at any time within one year after removal of disability. (RSA 552:9). No decree approving and allowing or disallowing a will may be made in solemn form until guardians have been appointed for all minors and others interested therein who are incapacitated to take care of their estates, and until agents have been appointed by judge for all persons interested who reside out of state or are unknown. (RSA 552:11).

The usual procedure for contest is to have the will proved in solemn form. If will is allowed, only avenue of appeal is to supreme court. (RSA 567-A:1). Such appeal must be taken within 30 days after probate court has allowed will. (Rules of Sup. Ct., R7).

Self-proved Wills.

Wills following form required by statute may be proved without testimony of any subscribing witness. (RSA 551:2-a). To qualify as self-proved, signatures of testator and witnesses shall be followed by sworn acknowledgment made before notary public or justice of peace or other official authorized to administer oaths in place of execution. Testator and witnesses acknowledge signing of will, voluntariness of act, role of witnesses, capacity of testator and his or her freedom from constraint or undue influence. (RSA 551:2-a).

Legacies.

General legacies are payable at the end of one year after testator’s death (102 N. H. 293, 155 A.2d 805) and bear interest thereafter. If not paid, legatees may sue on probate bond.

Unclaimed Legacies.

Probate court, when satisfied that due diligence has been used to find a legatee whose residence is unknown and cannot be found, shall decree that legacies in excess of $5,000 be paid over to state treasurer and such payment shall be discharge of executor. Any person entitled to receive such sum may petition probate court at any time before final disposition thereof, and payment to him shall be decreed, upon notice and hearing. (RSA 561:10).

Bequests and Devises to Inter Vivos Trusts.

New Hampshire court has declared pour over trusts to be valid. (95 N. H. 435, 65 A.2d 282). Trust instrument may be amended subsequently to date of testator’s will. (c. 563-A). Uniform Testamentary Additions to Trusts Act adopted. (RSA 563-A:1).

Lapse.

If a devisee or legatee dies before the testator, leaving issue who survive, such issue take as their ancestor would have taken if living. (RSA 551:12).

Child Not Named.

Every child born after the decease of the testator, and every child or issue of a child of the deceased not named or referred to in his will, is entitled to the same portion of the estate, real and personal, as if the deceased were intestate, to be made up, if necessary, in just proportion from the property devised or bequeathed to others. (RSA 551:10, 11).

Election.

Any devise or bequest to a surviving spouse is held to be in lieu of all his or her rights in estate of deceased spouse unless it appears by will that such was not intention. (RSA 560:17).

Surviving spouse may, however, receive distributive share of estate, on filing waiver of testamentary provision in lieu thereof. This waiver must be in writing and must be filed at probate office within six months after appointment of an executor or administrator, and not afterwards unless by permission of probate judge for good cause shown. Where real estate is involved, waiver and release shall be recorded in Registry of Deeds of county where real estate is situated. (RSA 560:10, 14).

Living Wills.

Authorized by RSA 137-J.

Foreign Executed Wills.

A will made out the state, if valid according to the laws of the country or state where executed, may be proved and allowed. Self proved foreign will is self proved under New Hampshire law. (RSA 551:5).

Foreign Probated Wills.

Where the will of a nonresident has been proved and allowed by a court of probate jurisdiction in another state or in a foreign country, duly authenticated copies of such will and the probate thereof may, on written application of a party in interest and such citation and notice as the court may order, by decree of the court of probate, be filed and recorded in the probate office, and thereupon such will has the same force and effect as if executed according to the law of this state and duly proved and allowed in this state. (RSA 552:13).

Simultaneous Death.

See topic 13.05 Death, subhead Survivorship.

Testamentary Trust.

See topic 13.15 Trusts.

Uniform Anatomical Gift Act adopted. (c. 291-A).

14 FAMILY

14.01 ADOPTION:

Following adults may petition to adopt any individual: husband and wife together; unmarried adult; unmarried parent of person to be adopted; married person without that person’s spouse if person to be adopted is not married person’s spouse and if: (1) Spouse is parent of person to be adopted and that parent consents; (2) petitioner is legally separated from his or her spouse; (3) spouse’s failure to join in adoption is excused by court because of prolonged or unexplained absence, unavailability or unreasonable withholding of assent; or (4) spouse assents and person to be adopted is over 18. (RSA 170-B:4).

Consent must be obtained by: (1) Person to be adopted if 14 years of age or older; (2) guardian ad litem if person to be adopted is alleged to be incapacitated; and (3) spouse of person to be adopted, whether person to be adopted is minor or adult. Consent of spouse may be waived by court. (RSA 170-B:3).

Surrender of parental rights must be surrendered by: (1) Birth mother if over 18, and possibly her parents or legal guardian if under 18; (2) legal father if he is over 18, and possibly his parents or legal guardian if under 18; (3) birth father if over 18 and entitled to notice and right to surrender under 170-B:6, and possibly his parents or legal guardian if under 18; (4) legal guardian of person to be adopted; or (5) department or agency that has care, custody, and control of person to be adopted and right to surrender. If surrendering parent is incapacitated, guardian ad litem may be appointed to protect that parent's interest.

Jurisdiction of adoption proceedings is in probate courts of several counties if individual to be adopted is present in this state or is in legal custody or guardianship of authorized agency located in state. (RSA 170-B:15).

Venue.

Proceedings shall be brought in county in which either surrender, termination of parental rights under RSA 170-C or guardianship under RSA 463 has occurred related to same adoptee or elsewhere by leave of court. (RSA 170-B:15).

Petition must be filed within 30 days after child has been placed in adoptive home, except petition to adopt adult or related child may be filed at any time. (RSA 170-B:16). Chapter 170-B, § 16, III states information required in petition.

Proceedings.

Proceeding to adopt unrelated minor child shall be commenced by filing petition within 30 days of minor being placed in adoptive home, unless later time is permitted by court. Petition to adopt adult or related child may be filed at any time. (RSA 170-B:16). Prior to hearing in adoption of unrelated child or adoption through agency, department or licensed child-placing agency shall conduct investigation into suitability of adoptive home and whether placement is in best interests of child. Report must be filed within 60 days of petition being filed in probate court. (RSA 170-B:18). Prior to adoption of unrelated minor child not through agency, petitioner must request investigation at least 30 days before minor child is placed in parents' home. (RSA 170-B:18).

Decree.

Interlocutory decree does not become final until child has lived in adoptive home for at least six months after placement by agency or division of welfare or six months after division of welfare has been notified of custody of minor by petitioner. Final decree may be made immediately if petitioner or petitioner's spouse is natural parent of child. (RSA 170-B:19).

Name.

Change of name may be decreed if requested. (RSA 170-B:26).

Effect of Adoption.

Upon final decree of adoption, adopted child bears same relation to adopting parents and their kindred in all respects, including right of inheritance, as he would if he were natural child of such parents. Until final decree, adoptee shall be considered child of birth parent(s) only with respect to inheritance rights and privileges. All rights and obligations as between adopted child and natural parents are extinguished by final decree of adoption. If only one spouse petitions to adopt, child's relationship to birth parent of opposite sex is not to be altered if child and birth parent so agree. (RSA 170-B:25).

Setting Aside Adoption.

Subject to appeal from probate court decree, upon expiration of one year from final decree, decree cannot be questioned by any person for any reason whatsoever. (RSA 170-B:21).

14.02 ALIMONY:

See topic 14.06 Divorce.

14.02A CIVIL UNIONS:

Civil union between one man and another man, or one woman and another woman is recognized and parties entering into civil union are entitled to same rights and subject to same obligations and responsibilities as married persons. (c. 457-A). RSA 457:1-a, effective Jan. 1, 2010, provides for same sex marriages.

14.03 COMMUNITY PROPERTY:

System does not obtain.

14.04 DESERTION:

See topics 14.06 Divorce, 14.09 Husband and Wife.

14.05 DISSOLUTION OF MARRIAGE:

See topic 14.06 Divorce.

14.06 DIVORCE:

This subject is governed by c. 458 et seq.

Grounds for divorce are: Impotency; extreme cruelty; conviction, in any state or federal district, of a crime punishable by imprisonment for more than one year, and actual imprisonment under such conviction; adultery; treatment such as to seriously injure health or seriously endanger reason; absence unheard of for two years; habitual drunkenness for two years; joining any religious sect or society which professes to believe relation of husband and wife unlawful, and refusal to cohabit for six months; abandonment and refusal for two years together to cohabit; irreconcilable differences which have caused irremediable breakdown of marriage. (RSA 458:7, 7-a).

Grounds for legal separation are identical to those enumerated above for absolute divorce. (RSA 458:26).

Jurisdiction of the courts is limited to those causes for divorce which exist or wholly accrue while the plaintiff is domiciled in this state. (RSA 458:6).

Residence Requirements.

Jurisdiction over the parties exists only in the following cases: (1) Where both parties were domiciled in the state when the action was commenced; (2) where the plaintiff was so domiciled and the defendant was personally served with process within the state; (3) where the plaintiff was domiciled in the state for one year next preceding the time when the action was commenced. Where the domiciled plaintiff has filed a libel, and nondomiciled defendant may have affirmative relief upon filing a cross libel. (RSA 458:5).

Venue.

All libels for divorce must be brought in the county in which the parties, or one of them, live. (RSA 458:9).

Proceedings.

If parties file joint petition for divorce, petition shall be filed at appropriate court without further service or notice required.

Individual petition for divorce shall be filed together with filing fee with appropriate court. Service of individual petition may be accepted by respondent, respondent's attorney or made by sheriff. Respondent or respondent's attorney may accept service at court within ten days. Upon receipt of individual petition for divorce, court shall attach to petition notice of respondent and appearance form. Petitioner shall serve petition on respondent by sheriff or certified mail, if respondent lives within state, or by authorized officer or certified mail if respondent lives outside New Hampshire. (RSA 458:9, II). In-state service shall be made in hand or by leaving attested copy of petition, notice to respondent, and appearance at respondent's abode, within 25 days of receipt of orders of notice, and return of service shall state street and number, or some other description, of abode.

When residence of respondent is unknown, petition shall state and verify by petitioner's affidavit respondent's last known address, and name and address of some near relative of respondent or, if relative is unknown, name and address of friend of respondent. Petitioner or their attorney shall file petition with court together with name and address of newspaper published in city or town nearest to respondent's last known address. Service shall then be ordered by publication in such newspaper, to be completed not less than 15 days before return date, and by certified mail addressed to respondent, care of relative or friend of respondent, or otherwise as court may order. Publication may be waived for good cause upon motion to court.

All petitions and cross petitions which allege adultery, or answers which allege adultery as affirmative defense shall contain name(s) and address(es) of person(s) with whom party is accused of adultery, if known; and, if not, statement to that effect. (RSA 458:11).

Respondent's appearance must be filed on or before return date, or facts in petition will be deemed admitted. Answer or cross petition shall be filed in cases in which responding party wishes to bring cross petition, assert affirmative defense or seek alimony. In all cases, answer may be filed. Responsive pleadings shall be filed within 30 days of return date. Answer to cross petition shall be filed within ten days after cross petition is filed. Responsive pleadings need not be formally served on opposing party by law enforcement officer, but must contain certificate that copy of pleading has been provided to other party, or counsel, in hand or by U.S. Mail.

Domestic relations forms may be obtained at Judicial Branch web site, located at http://www.state.nh.us. Use of forms is not mandatory so long as pleadings conform to temporary rules. For domestic relations cases in Rockingham, Belknap, Carroll, Coos, Sullivan, or Grafton Counties, see Family Division Pilot Program Rules.

Marriage Counseling Referral Service.

Whenever petition for divorce or petition for legal separation has been filed, matter may be referred for marriage counseling, either on compulsory or voluntary basis, to approved family service agency within jurisdiction of Court. (c. 167-B).

Temporary alimony and restraining orders may only be granted ex parte if court finds that immediate and irreparable injury, loss or damage will result to applicant, children or property before adverse party can be heard. No ex parte order will be granted without documentation of notice or attempted notice to other party, or determination by court that such notice or attempt at notice afforded other party opportunity to appear. If temporary orders are ex parte, adverse party may request hearing to be held no later than five days after receipt of written request. (RSA 458:16).

Decree of divorce becomes final as matter of course on last day of term in which case is heard, except in Hillsborough County where judgment dates are set for cases heard in the preceding month. In any county, if due cause is shown, final decree will be entered immediately on determination that ground for divorce exists.

Alimony.

Upon decree of nullity or divorce, or within five years thereafter, court may order alimony to be paid for such length of time as parties may agree or court orders. In determining amount of alimony, court shall consider length of marriage, age, health, station, occupation, amount and source of income, vocational skills, employability, estate, liabilities, and needs of each of parties and opportunity of each for future acquisition of capital assets and income. Court may also consider contribution of each of parties in acquisition, preservation, or appreciation in value of their respective estates and noneconomic contribution of each of parties to family unit. Court shall not consider minor child's social security benefit payments or second or subsequent spouse's income, but may consider veteran's disability benefits by either or both parties to extent permitted by federal law. (RSA 458:19, IV[c]). Court may award lump sum or periodic payments or both. Unanticipated consequences of changes in federal tax legislation or regulations may be grounds to modify any alimony order or agreement. (RSA 458:19, V).

Foreign Divorces.

A superior court has jurisdiction to make such orders or temporary orders of alimony to divorced wife or husband or of support to children of divorced parents if justice requires in cases where decree of divorce was not granted in this jurisdiction, even though said divorce decree makes provision for alimony and support (RSA 458:19-a), subject to provisions of Uniform Interstate Family Support Act (c. 546-B).

Orders for permanent alimony for definite period of time may be renewed by either party's petition if petitioned within five years of original order's termination date.

Uniform Divorce Recognition Act has been adopted. (c. 459).

Division of Property of Spouses.

Property includes both tangible and intangible, real and personal assets, however held. Court may order "equitable" division of property between parties which can be equal or unequal depending upon how court analyzes variety of factors. (RSA 458:16-a). Court has power to issue restraining orders to safeguard property pending final orders. (RSA 458:16-b).

Support and Custody of Children.

During pendency of petition, superior court or any justice thereof may, on petition of either party, make such order respecting custody and maintenance of minor children of parties as shall be deemed expedient for benefit of children. (RSA 461-A:8).

Upon decree of divorce the court must make such further decree in relation to the support, education and custody of the children as is most conducive to their benefit. (RSA 461-A:14). Court cannot order divorced parent to pay for adult child's college expenses. (RSA 461-A:14, V). Court can preserve education savings account or divide account as marital asset. (RSA 458:16-a, III). There is presumption in favor of joint legal custody except where abuse as defined (RSA 173-B:1) has occurred, in which case court will make custody and visitation orders that best protect children, abused spouse, or both (RSA 461-A:5). If divorced parents agree that joint custody is not working, court may change custody based on child's best interests. (RSA 461-A:11). Where custodial parent of stepchild becomes incapacitated, spouse may make emergency treatment decisions. (RSA 461-A:19). Premiums for ex-spouse in group health insurance plan of which other spouse is member shall be paid by member spouse, ex-spouse, by both as they may agree or as ordered by court. (RSA 458:18-a). Court may provide for trusteeship for benefit of minor children. (RSA 461-A:14, XVI). See also topic 14.09 Husband and Wife, subhead Resident Wife of a Nonresident. If court finds it is in interest of child, it may award visitation rights to grandparents or stepparents. (RSA 461-A:13, 6). If custody order or agreement between parties does not expressly govern relocation of child's principal residence, RSA 461-A:12 applies.

Uniform Child Custody Jurisdiction Act adopted. (c. 458-A).

Financial Affidavits filed under c. 458 are confidential and available only to parties, their counsel, guardian ad litem, department of health and human services employees responsible for administering child support, persons specified in RSA 161-B:7, III, and state and federal officials for their official functions. Court may grant access to others upon showing by clear and convincing evidence that public interest outweighs private interest in maintaining confidentiality. (RSA 458:15-b).

Modification of Child Support.

Motion for modification of child support is effective from date of service or notice to respondent. (RSA 458-C:7).

Trusteeship and Security.

Court may set aside portion of property in separate trust fund for benefit of minor or incompetent child of parties (RSA 461-A:14, XVI) or for either party (RSA 458:20). In all cases where alimony or allowance is decreed for wife or children court may require security to be given for payment thereof. (RSA 458:21).

Change of Name.

In any domestic relations proceeding except action for separation, court may restore former name of spouse, regardless of whether request therefor had been included in initial pleading. (RSA 458:24).

Remarriage after divorce is subject to no statutory restrictions.

Separation Agreements.

Private agreements between parties for separation without legal proceedings are invalid in this state. (74 N. H. 288, 67 A. 406). It would seem that this invalidity extends to agreements in praesenti as well as those to operate in futuro.

Annulment of Marriage.

See topic 14.11 Marriage.

14.07 [RESERVED]

14.08 GUARDIAN AND WARD:

Probate court of county where minor resides or in which underlying cause of action arose has exclusive jurisdiction to appoint guardian of his person or his estate or both subject to provisions of c. 458-A. (RSA 463:4).

Selection of Guardian.

Guardians of minors may be nominated by will, by petition or by written consent to petition by another (RSA 463:5) and such person will be appointed guardian except for cause shown (RSA 463:5). Court will ascertain preference of minor and, although not required to appoint such person so preferred as guardian, will give weight to such preference. (RSA 463:8). Minor over age of 14 may petition for appointment of suitable person for guardian. This provision does not apply in context of divorce custody proceedings. (129 N.H. 252, 525 A.2d 704).

Eligibility and Competency.

Nonresident may be appointed as guardian provided nonresident appoints some person in State as agent to receive service of process. (RSA 464-A:24). Any competent person, who agrees to so serve, may be appointed guardian of person and estate, or person or estate. Bank having trust powers or trust company may be appointed guardian of estate. No institution or agency providing care and custody of incapacitated person may be appointed as guardian. (RSA 464-A:10). Father or mother of minor child may be appointed his guardian. (RSA 463:3).

Appointment of Guardian.

Petitions for appointment of guardian of minor may be made by parent, adult sibling, grandparent, aunt, uncle, person who has filed for adoption of minor or any person who has had physical custody of minor not less than 30 consecutive days with consent of parent. (135 N.H. 688). Such petition must set forth specific facts concerning actions, omissions, or occurrences that demonstrate that appointment of guardian is in best interests of such minor. (RSA 463:5, V).

Qualification.

Guardian of person or estate must give bond to probate court, with sureties, in such sum as judge shall approve. In discretion of judge, bond without sureties may be given if gross value of ward’s estate does not exceed $10,000 or guardianship is only of person of incapacitated person or minor. (RSA 464-A:21).

Inventory.

Guardian of minor must take reasonable care of minor’s personal effects and other property and report condition of minor’s estate subject to guardian’s possession. (RSA 463:12). Guardian of estate must file inventory in same manner as inventories of estates of persons deceased are made. (RSA 463:19, III).

Powers and Duties.

Guardian of person of minor shall have powers and responsibilities of parent regarding minor’s support, care and education of minor. Guardian of property of minor shall have care and management of estate of minor. (RSA 463:12). Guardian of incapacitated person may, subject to certain exceptions, establish place of abode of his ward and may give consent for medical care or treatment of his ward. Court, in its discretion, may limit powers of guardian of incapacitated person. (RSA 464-A:25). Guardian of incapacitated person is under duty to provide for care, comfort and maintenance of his ward and, whenever appropriate, to arrange for ward’s training, education or rehabilitation. (RSA 464-A:25). Guardian of estate shall have possession and control over his ward’s real and personal property and shall, in general, have power to perform every act which persons of prudence, discretion and intelligence and exercising care as in management of their own affairs would perform for purposes of guardianship. Guardian or estate must file annual account with probate court unless court finds that it is not appropriate. (RSA 464-A:25). Such powers include, but are not limited to, powers specified in Uniform Trustee’s Powers Act. (c. 564-B; RSA 464-A:26). Guardian must file annual report with probate court. (RSA 464-A:25, I[c]).

Settlements on Behalf of Minor.

See topic 14.10 Infants.

Investments.

Governed by RSA 463:26 in case of minors.

Securities in Name of Nominee.

See category 13 Estates and Trusts, topic 13.15 Trusts, subhead Securities in Name of Nominee.

Real Estate.

Upon petition, judge may authorize guardian of minor to purchase with his ward's funds real estate situate in state as home for him. (RSA 463:24). Upon petition, court may authorize guardian of estate to sell property, including real estate, of his ward for purpose of providing for care or for paying debts of said ward. (RSA 463:20, 27). Before such sale, guardian of estate must give oath that he will act in best interests of ward in form specified by statute. (RSA 463:21).

Accounts.

Guardian of person of incapacitated person must file report of his ward's condition biennially within 90 days after anniversary of his appointment. (RSA 464-A:35). Subject to provisions of RSA 464-A:26, guardian of estate of incapacitated person shall file account annually within 90 days after anniversary of his appointment. (RSA 464-A:36). At time of filing, guardian must forward to ward and all parties of record copy of account and notice indicating that interested party has 30 days in which to object. (RSA 464-A:36). Upon termination of guardianship, or upon resignation, removal or death of guardian, such guardian or his personal representative must render final account. (RSA 464-A:40).

Termination of Guardianship.

Guardian of minor shall continue to hold such office until minor reaches age 18, until discharged or until court's jurisdiction over minor has ended. (RSA 463:15, I). Upon petition of ward or other interested person, court may remove guardian. (RSA 463:15, IV). Upon petition, if court finds that ward is no longer incapacitated, it may terminate guardianship. (RSA 464-A:40).

Periodic Court Review.

Status of all minors under guardianship shall be reviewed by court at 6, 12, and 24 months, then annually, except court may waive requirement for guardian parents. (RSA 463:17).

Incapacitated Persons.

Any relative, public official or interested person, or individual himself, may petition for finding of incapacity and appointment of guardian. (RSA 464-A:4). Court will appoint attorney to represent rights of person claimed to be incapacitated. (RSA 464-A:6). Hearing must be held at which ward must be present unless physically unable to attend, but court may waive personal attendance of ward if petitioner or counsel for ward files written statement with court at least 24 hours prior to hearing indicating that proposed ward does not express desire to attend hearing. However, if ward first expressed desire not to attend hearing at such time as to make it unreasonable to require filing of written statement at least 24 hours prior to hearing, then court may waive personal attendance of ward at hearing upon filing of required written statement at any time up to time of hearing. Statement must include physician's affidavit indicating that overall physical, emotional, or psychological condition of ward is such that he is likely to suffer harm or that ward has no ability to understand nature and consequence of proceedings. (RSA 464-A:8).

Temporary guardian may be appointed for period not to exceed 60 days. (RSA 464-A:12). Guardian may seek extension of guardianship. (RSA 464-A:11-a).

Foreign Guardians.

Nonresident guardian must appoint agent within state. (RSA 464-A:24). Guardian duly appointed by another state will be appointed in N. H. without further notice or hearing. (RSA 464-A:44).

Nomination of Guardian for Children of Activated Members of Armed Services.

Any member of United States Armed Forces ordered to active duty outside of New

Hampshire who has sole primary physical custody of minor residing in New Hampshire, or is guardian of such minor, may nominate guardian of minor in accordance with RSA 463:12. (RSA 463:18-a). Such nomination will be valid for seven days, during which time nominee may petition for appointment of guardian with formalities prescribed in RSA 463:18-a. Guardianship under RSA 463:18-a shall terminate upon receipt of petition from original service member. (RSA 463:18-a). Same shall apply for guardians of incapacitated persons. (RSA 464-A:4-a).

Temporary Recognition of Foreign Guardianships.

Any person who has been appointed guardian of person of minor by foreign court of competent jurisdiction, for minor who is temporarily in this state, shall be accorded powers of guardianship as reflected in order appointing guardian for period not exceeding 120 days. (RSA 463:32-a). Same shall apply for guardians of incapacitated persons. (RSA 464-A:44).

Transfer of Guardianship from Foreign Jurisdictions.

Any person who has been appointed guardian by foreign court of competent jurisdiction, for minor who has become resident of this state, or who intends to move to this state, shall be accorded powers of guardianship as set out in guardianship order for period not exceeding 120 days. If petition for transfer of guardianship is filed within 120 day period, New Hampshire state court will not make determination of appropriateness of guardian's appointment unless specifically requested to. (RSA 463:32-b). Same shall apply for guardians of incapacitated persons. (RSA 464-A:45, 46).

Transfer of Guardianships to Foreign Jurisdictions.

If minor has moved permanently to foreign jurisdiction, guardian shall file motion to transfer guardianship to foreign court of competent jurisdiction. Motion shall include documentation from foreign court accepting guardianship or certified copy of appointment of guardianship issued by foreign court. Upon receipt and acceptance of motion, guardian shall file final account and be discharged with his or her bond released. (RSA 463:32-c). Same shall apply for guardians of incapacitated persons. (RSA 464-A:46).

Gifts to Minors.

See topic 14.10 Infants.

Uniform Fiduciaries Act not adopted.

Uniform Simplification of Fiduciary Security Transfers Act not adopted.

Uniform Child Custody Jurisdiction Act adopted. (c. 458-A).

14.09 HUSBAND AND WIFE:

Separate Property.

A married woman holds to her own use, free from the interference or control of her husband, all property at any time earned, acquired or inherited by, or bequeathed, given or conveyed to her, either before or after marriage, if such earning, acquisition, conveyance, gift or bequest were not occasioned by payment or pledge of the property of the husband. (RSA 460:1).

Contracts.

Every married woman has the same rights and remedies, and is subject to the same liabilities in relation to property held by her in her own right, as if she were unmarried, and may convey, make contracts, and sue and be sued, in all matters in law and equity, and upon any contract by her made, or for any wrong by her done, as if she were unmarried. (RSA 460:2).

Premarital Debts of Wife.

Husband is not liable for debts contracted by the wife prior to marriage. (RSA 460:3).

Actions.

A married woman may sue or be sued for her torts and upon her contracts as though she were unmarried. Either spouse may sue the other. (RSA 460:2, 2-a; 55 N. H. 279; 78 N. H. 4, 95 A. 657).

Conveyance or Encumbrance of Property.

Real estate may be conveyed directly by husband to wife, or wife to husband, in all cases where same thing might lawfully be done through intervention of a third person. (RSA 460:5). With exception of liens reserved on household goods sold conditionally, no lease or mortgage of household goods in use by husband and wife in their household is valid unless made in writing and executed by owner and husband or wife of owner. (RSA 460:11). A married woman of full age may convey her real estate. A married spouse, though not of full age, may join with her (his) husband or wife in release of homestead. (RSA 460:4).

A married man or woman, who is justifiably living apart from his or her spouse because such spouse has been guilty of conduct which constitutes cause for divorce, may apply by petition to the judge of probate for the county in which real estate owned by him or her lies for a license to convey the same in such manner as to bar all rights of homestead therein to which such guilty party may then or thereafter be entitled. (RSA 460:8).

Resident Wife of a Nonresident.

If a woman, the wife of an alien or of a man residing in another state, has resided in this state six months successively, separate from her husband, she may convey all real and personal estate, held by her in this state, the same as if she were sole and unmarried. (RSA 460:12).

If the husband of such woman becomes a citizen of this state, and they cohabit together, the fact of his becoming such citizen, and such cohabitation, has the same effect upon any contract or business of the wife as if the marriage between them had then first been solemnized. (RSA 460:13).

If the husband of such woman obtains a divorce from his wife in a court of tribunal of any other state or country, or if a divorce be decreed upon application of the wife during such separate residence, she retains the exclusive custody and guardianship and receives the earnings of her minor children living with her. (RSA 460:14). No person may take from the custody of such wife any minor child of the marriage residing with her, or remove the child from this state against the consent of the mother. (RSA 460:15). Upon her application, a guardian may be appointed for the child, and the superior court, or a justice thereof, may issue an injunction restraining the father and all other persons from removing the child from this state against the consent of the mother, and may make such further orders and degrees as shall secure to her or to the guardian the custody of the child. (RSA 460:16).

Resident Husband of a Nonresident.

The rights of a resident husband of a nonresident wife are identical to those of the resident wife of a nonresident husband, as is above set forth. (RSA 460:17).

Uniform Interstate Family Support Act adopted. Jurisdiction vested in Superior Court or Department of Health and Human Services. Support enforcement agency must provide services to extent permitted by Title IV-D of Social Security Act. (RSA 546-B:18, I).

Antenuptial Agreements.

Man and woman in contemplation of marriage may enter into written, interspousal contract and courts of this state shall give same effect to such contracts entered in other jurisdictions as would courts of such other jurisdictions. However, no contract otherwise enforceable under this section may contain any terms which attempt to abrogate statutory or common law rights of minor children of contemplated marriage. (RSA 460:2-a).

Separate Maintenance.

If either spouse is living apart from other without justifiable cause or willingly absents himself or herself from other, superior court may, upon petition, restrain either party from interfering with personal liberty of other and from entering tenement wherein other resides, may grant temporarily or permanently, custody, care, education and maintenance of their minor children, if any, and may make reasonable allowance for support, all subjects to such limitations as court shall deem just. (RSA 458:31). Domicile requirements of RSA 458:4, 5, and 6 do not apply to this section and court may grant relief to nonresident plaintiff if defendant is resident. (RSA 458:31).

Community property system does not apply.

14.10 INFANTS:

Age of majority is 18, effective June 3, 1973. However, legal drinking age is 21. (c. 179:5 and 6).

Minors and their sureties are bound by their recognizances. (RSA 597:14). They may hold shares in a building and loan association or a credit union and be held to stockholder’s liability thereon. (RSA 393:10; RSA 394-B:25). Savings banks and other institutions for savings may pay minors the deposits to their credit as if they were of age, and their receipts are sufficient discharges for the same. (RSA 386:18).

Minors can join with their spouses in valid release of their respective homestead interests in real estate. (RSA 460:4).

Actions.

Next friend actions are commonly used. No net settlement exceeding $10,000 in any such action is valid unless approved by court in which action is pending or to which writ is returnable. In any suit involving minor which exceeds $10,000, any person or entity who receives money on behalf of minor must be appointed guardian of estate of such minor by probate court. Court may make all necessary orders to protect interests of infant. (RSA 464-A:42).

Parental Responsibility.

Parent not vicariously liable for torts of child, but parent is responsible if parent can be shown to be independently negligent. (100 N.H. 98, 120 A.2d 335). Under certain circumstances when parents or guardian of child committing act of vandalism are found to have failed to exercise reasonable supervision and control, such parents or guardians can be ordered to make restitution to victim. (RSA 169-B:45; RSA 507:8-e).

Involuntary Termination of Parental Rights.

Probate court has exclusive original jurisdiction over petitions to terminate when child is present in state or in legal custody of authorized agency in state. Petition shall be filed in probate court of county in which child or parents reside at time of filing, or in probate court of county where authorized agency has provided services to child. (RSA 170-C:3). Petition may be filed by either parent, guardian, foster parents, or authorized agency. (RSA 170-C:4). Petition may be granted where court finds that one or more of following conditions exist: Parent has abandoned or neglected child; parent due to mental deficiency or illness is incapable of giving child proper care and protection; parent has knowingly or willfully severely abused or permitted another to severely abuse child. (RSA 170-C:5). Court shall appoint guardian to represent interests of child in all termination hearings. (RSA 170-C:8).

War Veterans.

The disability or minority of any person otherwise eligible for a loan, or guaranty or insurance of a loan, pursuant to the act of Congress entitled the Servicemen's Readjustment Act of 1944 (58 Stat. 284) as heretofore or hereafter amended (38 U. S. C. 693 et seq.), and of the minor spouse of any eligible veteran, in connection with any transaction entered into pursuant to said Act of Congress, as heretofore or hereafter amended, shall not affect the binding effect of any obligation incurred by such eligible person or spouse as an incident to any such transaction, including incurring of indebtedness and acquiring, encumbering, selling, releasing, or conveying property, or any interest therein, if all or part of any such obligation be guaranteed or insured by the government or the Administrator of Veterans' Affairs pursuant to said act and amendments thereto; or if the Administrator be the creditor, by reason of a loan or a sale pursuant to said act and amendments. The Act does not create, or render enforceable, any other or greater rights or liabilities than would exist if neither such person nor such spouse were a minor. (RSA 117:1).

Uniform Transfers to Minors Act adopted. (c. 463-A). Age of majority under Act, 21.

Uniform Securities Ownership by Minors Act not adopted.

Adoption.

See topic 14.01 Adoption.

Uniform Child Custody Jurisdiction Act adopted. (c. 458-A).

14.11 MARRIAGE:

The "age of consent" is fixed by statute at 18 for both sexes, but if special cause exists rendering marriage of a person under the age of consent (and not below the age of 14 in case of a male or 13 in case of a female) desirable, a judge of the superior court or the probate judge of the county where such party resides may, on due application, grant permission for such marriage. (RSA 457:4-7).

License.

Persons proposing to marry within the state must complete marriage license application, with all facts required by RSA 5-C:7, to be entered in any town clerk's office. Clerk shall record application in book to be kept for that purpose. (RSA 457:22). (See RSA 457:23 —AIDS education and affidavit required for license.) Town clerk shall deliver to parties marriage license embodying facts required in application and specifying time and date when application was entered, which license shall be delivered to minister or magistrate who is to officiate, before marriage is solemnized. License shall be valid for not more than 90 days from date of filing. (RSA 457:26). On application to superior court justice or probate judge within county where proposed marriage is to be solemnized, period of three days may be shortened but not if both parties and their parents are nonresidents. (RSA 457:27).

Solemnization.

Marriage may be solemnized by a justice of the peace commissioned in the state; by Art. III federal judges or U.S. magistrate judges appointed pursuant to federal law; by Art. I bankruptcy judges appointed pursuant to federal law; by any minister of gospel in state who has been ordained according to usage of his denomination, resides in state and is in regular standing with his denomination; and, within his parish, by minister residing out of state, but having pastoral charge wholly or partly in this state. (RSA 457:31). Secretary of State may issue special license to nonresident individual, who is citizen of U.S., authorizing him in special case to marry couple within state. (RSA 457:32, 37).

The validity of a marriage solemnized before a person professing to be a justice of the peace or minister of the gospel is not affected by want of jurisdiction or authority in such supposed justice or minister, or on account of any omission or informality in the certificate of intention of marriage. If the marriage is in other respects lawful and has been consummated with the belief on the part of either of parties thereto that they were lawfully married. (RSA 457:36).

Friends or Quakers and Jewish rabbis who are citizens of the United States, residing in this state, are allowed to solemnize marriages according to their usual practices. (RSA 457:37).

Reports of Marriages.

See category 10 Documents and Records, topic 10.04 Records.

Record.

c. 457, § 38. See category 10 Documents and Records, topic 10.04 Records, subhead Vital Statistics.

Common law marriages are not recognized except to limited extent of RSA 457:39. (134 N.H. 675, 597 A.2d 74).

Proxy marriages are not authorized by any statute.

Presumption of Legal Marriage.

Persons cohabiting and acknowledging each other as husband and wife, and generally reputed to be such for three years, and until the decease of one of them, are thereafter deemed to have been legally married. (RSA 457:39).

Prohibited Marriages.

A man may not marry his mother, his daughter, his granddaughter, stepdaughter, sister, aunt, niece, first cousin, mother-in-law or widow of his father, son or grandson or any other man, and there are corresponding prohibitions against marriage of woman. (RSA 457:1-3). Male below the age of 14 or female below age of 13 may not marry. (RSA 457:4). Permission may be obtained from superior court or probate court if special cause exists where man or woman is below age 18, so long as man is at least 14 and woman is at least 13, but no waiver of age of consent is granted where both parties are nonresidents. (RSA 457:6). One who has former wife or husband known to be alive and undivorced may not marry another person. All such marriages are void. (RSA 458:1).

Foreign Marriages.

Any marriage by nondomiciliaries which is legally contracted in another state and would not be prohibited by RSA 457:1-2, will be recognized as valid if parties become permanent residents. (RSA 457:3). Uniform Marriage Recognition Act adopted. (RSA 457:43-44).

Annulment.

Marriages between parties below the age of consent may be annulled at the suit of the party who was married below the age or at the suit of his or her parent or guardian unless the party after arriving at such age has confirmed the marriage. (RSA 457:5). No other statutory grounds of annulment. There is no specific statutory provision limiting the time within which an action for annulment on the ground of non-age must be brought. Superior court has jurisdiction of annulment cases, except those counties under Family Division Pilot program. (RSA 491:7).

In any proceedings for annulment for any cause, whether under the statute or under common law, a New Hampshire court will assume jurisdiction as to a marriage entered into in this state even though neither party has been at any time a resident herein. (RSA 458:3).

14.12 MARRIED WOMEN:

See topics 14.09 Husband and Wife, Marriage; categories 5 Civil Actions and Procedure, topic Evidence, subhead Witnesses; Debtor and Creditor, topic Homesteads; Documents and Records, topic Acknowledgments; Estates and Trusts, topics Executors and Administrators, Wills; Property, topic Dower.

15 HEALTH

15.0115.04 [RESERVED]

15.05 FOOD, DRUGS, DEVICES AND COSMETICS:

Regulated by RSA 146:1, et seq.

15.05A HEALTH INSURANCE:

See category 16 Insurance, topic 16.01 Insurance Companies.

Accident and health insurance, health maintenance organizations, and the like are covered under Title XXXVII (Insurance), cc. 417-D through 420-K.

15.0615.11 [RESERVED]

15.12 PUBLIC HEALTH:

Covered by Title X, cc. 125 through 149-O.

Health care providers are regulated under Title XXX (Occupations and Professions) as follows: podiatrists (c. 315); chiropractors (c. 316-A); dentists (c. 317-A); pharmacists (c. 318); nurses (c. 326-B); occupational therapists (c. 326-C); midwives (c. 326-D); respiratory care practitioners (c. 326-E); dieticians (c. 326-H); optometrists (c. 327); physicians and surgeons (c. 329).

15.13 SMOKING REGULATIONS:

Governed by c. 155.

Smoking is generally prohibited in public places such as restaurants, cocktail lounges, schools, child care agencies, hospitals, public conveyances, and social, fraternal and religious organizations when open to public. Smoking may be permitted in other public places or publicly owned buildings when smoking permitted area can be effectively segregated.

16 INSURANCE

16.01 INSURANCE COMPANIES:

Business of insurance is under supervision of Insurance Commissioner. (c. 400-A; c. 402-C). Qualifications and procedures for licensing have been brought into compliance with Gramm-Leach-Bliley federal legislation. (402-J).

Corporations may be formed for practically all kinds of insurance business. (RSA 401:1, 5).

Insurance holding companies, mergers involving insurance company, and acquisitions of insurance companies are regulated. (c. 401-B).

Special statutes govern employers' mutual associations, and fraternal benefit societies. (c. 418).

Mutual Companies; Members' Liability.

Members of a mutual insurance company are not individually liable for debts of the company, beyond their liability to assessments for losses occurring therein, nor to such assessments beyond the amount of their deposit notes. (RSA 402:1). Any mutual fire or casualty insurance company organized under the laws of this state, which charges a full cash premium, may limit the liability of policyholders to assessment by a stipulation in the policy, which has the same effect as a deposit note signed by the insured; but such contingent liability of a member may not be less than an amount equal to and in addition to the cash premium written in this policy. (RSA 402:2). No person insured in such company, or in any class thereof, in which the amount insured is less than $50,000, may be assessed any greater sum than he would be if that amount were insured; but the officers of the company are individually liable for the indebtedness of the company not provided for by such assessments. (RSA 402:3).

Deposit Requirements.

An insurance company of another state must make such deposit with the Insurance Commissioner as the laws of its home state require of foreign companies doing business therein. (RSA 402:73).

Reports.

Every insurance company doing business in this state must, on or before Mar. 1 of each year, make and transmit to the Commissioner a statement, under oath of its president and secretary, in accordance with The National Association of Insurance Commissioners Annual Statement Blank following The National Association of Insurance Commissioners Annual Statement Instructions and those accounting procedures and practices prescribed by National Association of Insurance Commissioners Accounting Practices and Procedures Manual, showing amount of its capital stock, assets, liabilities, outstanding risks, premium notes, receipts, expenditures, losses, assessments, salaries and emoluments, and any other information calculated fully to disclose condition and method of management of company for year ending preceding Dec. 31, which statement must include whole amount of premiums written during preceding year for insurance on property or risks located or persons resident in this state. Commissioner may require like statement or further information at any other time. (RSA 400-A:36). Commissioner may extend time for filing such statement for not more than 60 days. Life insurance companies are not required to file that part of their annual statement known as gain and loss exhibit until succeeding May 1. (RSA 400-A:36).

Federal Liability Risk Retention Act of 1986.

Formation and regulation of risk retention groups pursuant to "RRA 1986" are governed by state statute. (c. 405-A).

Discrimination is prohibited in cancellation, renewal or issuance of automobile and personal liability and property insurance. (RSA 417-A:3; RSA 417-B:2). Specific grounds for cancellation are laid out. (RSA 417-B:3).

Rates.

With certain exceptions, all insurers must file with Commissioner of Insurance, every manual, minimum premium, class rate, rating schedule or rating plan and every other rating rule and every modification of foregoing which it proposes to use. (RSA 412:16). Premium rates are subject to approval of Commissioner in following classes of insurance: fire and casualty insurance (RSA 412:2, 16); employers' liability under workmen's compensation law (RSA 412:28); automobile liability (RSA 412:16-18); joint underwriting, reinsurance pools, assigned risk and residual market mechanisms (RSA 412:26).

Policies.

Forms of policies are subject to the approval of the Commissioner in the following classes of insurance: fire (RSA 407:1), motor vehicle (RSA 264:14; RSA 412:5), accident and health (RSA 415:1), group life (RSA 408:15, 16).

Standard nonforfeiture and valuation laws have been adopted. (c. 409; c. 409-A; c. 410).

Investigation of Claims.

The assured must give immediate written notice of loss under fire insurance policy after loss occurs (RSA 407:22), and company must begin adjustment of loss within 15 days after receipt of such notice (RSA 407:12).

Reinsurance.

No domestic life insurance company may transfer its risks or any part thereof to, or reinsure its risks, or any part thereof except reinsurance effected in the ordinary course of business in, any insurance corporation, association or society which is not at the time of such transfer or reinsurance authorized to do business in this state. (RSA 411:30).

Miscellaneous Prohibitions.

Giving and receiving rebates are criminal with exemption for credit card charges. (RSA 402:39-42). Also criminal are misrepresentations of terms of insurance policy either in one's own company or in another. (RSA 402:46-49). There is special statute covering embezzlement by insurance agents and illegal fees. (RSA 402:50-53). Insurance company cannot contribute to any political campaign. (RSA 402:43).

Special statute specifically prohibits unfair practices in business of insurance under following classifications: (1) Misrepresentations; (2) misrepresentations in insurance applications or transactions; (3) false information and advertising generally; (4) defamation; (5) boycott, coercion and intimidation; (6) false financial statements; (7) stock operations and advisory board contracts; (8) unfair discrimination; (9) rebates; (10) title insurance commissions, rebates and discounts; (11) political contributions; (12) collecting improper premiums; (13) separate charge for insurance; (14) coverage reduction; (15) unfair claim settlement practices by insurers; (16) coercion in requiring insurance: requiring as condition precedent to loaning money upon security of any real or personal property that owner of property to whom money is to be loaned negotiate any policy of insurance covering such property through particular insurance agent or broker; whenever instrument requires that purchase, mortgagor, or borrower furnish insurance of any kind on real or personal property which is being conveyed or which is collateral security to loan, mortgagee or lender shall refrain from disclosing or using any and all such insurance information to its own advantage and to detriment of either borrower, purchaser, mortgagor, insurer, or company or agency complying with requirements relating to insurance; notwithstanding any other law to contrary, creditor or lender of loan secured by interest in real property shall not require borrower to keep mortgaged property insured under property insurance policy in sum in excess of value of buildings on real property; (17) requiring as condition precedent to loaning money upon security of any real or personal property that owner of property to whom money is to be loaned negotiate any policy of insurance covering such property through particular insurance agent or broker; (18) complaint handling procedures applicable to insurance companies; (19) conflict of interest; (20) requirements for conducting tests to determine presence of antibody or antigen to human immunodeficiency virus; (21) coercion in requiring certain automobile or glass repair; (22) most favored nation or equally favored nations provisions. (RSA 417:4). Insurance Commissioner is empowered, upon hearing, to issue cease and desist orders, to suspend, revoke, or refuse to renew license of person and to impose penalty of up to $2,500, subject to appeal to Supreme Court. (RSA 417:5, 10, 11, 12, 13; c. 541). Borrower may not be required to insure mortgaged property for sum greater than value of buildings thereon. (RSA 417:4 XVI[d]). No person who is director of another insurance company, either foreign or domestic, may be director of domestic insurance company if effect thereof is to substantially lessen competition generally in insurance business or tends to create monopoly therein. (RSA 417:17). No liability insurer shall require that bodily injury claim be settled or adjudicated as condition precedent to settlement of property damage claim arising out of same motor vehicle accident. (RSA 264:18,VII).

Life insurance made payable to a married woman inures to her benefit, or, in case of her death, to her children’s benefit, against the claims of creditors or representatives of the person effecting the same. (RSA 408:1). The party to whom a life insurance policy is made payable is entitled to the sum so insured against the claims of the creditors or representatives of the party effecting the same. (RSA 408:2).

Foreign Companies.

No foreign company can do business within the state without first obtaining a license from the Insurance Commissioner. (RSA 405:1; RSA 416:7). The license is revocable if the company violates the law or if the Commissioner deems it no longer safe, reliable, or entitled to confidence. (RSA 405:12-13).

Commissioner may issue producer license to resident of state permitting producer named to procure insurance policies and contracts of insurance or suretyship to be effective in this state in foreign insurance companies not authorized to transact business in this state, but which are duly authorized to do business in some state having insurance commissioner. (RSA 405:24).

Requirements as to Capital and Assets.

No stock insurance company may be licensed to do business in the state unless it possesses a paid-up capital of $800,000, invested in securities readily convertible into cash, one-half at least of which are not loans secured by real estate; nor unless it possesses, in addition to such capital, assets equal in amount to all its outstanding liabilities, estimating as liabilities 50% of premiums received on unexpired fire risks running one year or less from date of policy, and a pro rata amount of all premiums received on unexpired risks running more than one year from date of policy, and on marine risks 50% of the amount of premiums written on policies on yearly risks, and on risks covering more than one passage not terminated, and the full amount of premiums written on policies of all other marine risks not terminated. (RSA 405:2).

No mutual insurance company may be licensed to do business in the state unless it has $800,000 of cash assets invested as above stated, nor unless its assets equal its outstanding liabilities, including reinsurance. (RSA 405:4).

Qualification.

The company must also file with the Commissioner a certified copy of its charter and bylaws and a full statement, under oath, of its president and secretary, showing the financial standing and condition of the company, in accordance with blanks furnished by the Commissioner, except in cases where the company has already filed such papers, and must otherwise comply with all laws relating to such companies. (RSA 405:11).

Process Agent.

No joint stock or mutual insurance company, nor its agents, may do business in this state until it has filed with the Commissioner a written stipulation, agreeing that legal process affecting the company, served on the Commissioner for the time being, shall have the same effect as if served personally on the company within the state. Service of such process is made by leaving copy of process in hands of Commissioner or in his office and paying fee prescribed by RSA 400-A:29. (RSA 405:10).

Unauthorized Insurers.

Certain acts by an unauthorized foreign or alien insurer such as issuance of contracts of insurance to residents, solicitation of such insurance, collection of premiums and any other transaction of business constitute an appointment by such insurer of insurance commissioner as its true and lawful attorney upon whom may be served all lawful process in any action or proceedings arising out of contracts of insurance. (c. 406-B).

Filing of Pleadings.

Before any unauthorized foreign or alien insurer shall file or cause to be filed any pleading in any action or proceeding instituted against it, it must procure a certificate of authority to transact business in this state or deposit cash or securities or file a bond with the clerk in an amount to be fixed by the court sufficient to secure the payment of any final judgment unless the court, in its discretion, dispenses with such deposit or bond in certain cases. (c. 406-B:6).

Attorney's fees may be included in judgment against unauthorized foreign or alien insurer if person or insurer has failed for 30 days after demand prior to commencement of action to make payment in accordance with terms of contract, and it appears to court that such refusal was vexatious and without reasonable cause. (RSA 406-B:7).

Reinsurance.

See RSA 405:45-52.

Risk Retention Act.

Formation and operation of risk retention groups and purchasing groups are regulated pursuant to Federal Liability Risk Retention Act of 1986, 15 U.S.C. § 3901, et seq. (RSA 405-A:1 et seq.).

Returns.

Each such company must, on or before Mar. 1 of each year, make a return, under oath, to the Commissioner, showing the gross premiums in force on risks in this state on Dec. 31 previous and the unabsorbed portion of such premiums computed at the rate of return actually made on annual policies expiring during the year by said companies. (RSA 405:9).

Resident Producers.

Foreign insurance or surety companies shall only write insurance through agents who are regularly commissioned and licensed to transact business in this state. (RSA 405:17-b). Agent licenses are issued to eligible persons or businesses in accordance with c. 402-J. (RSA 405:15). Commissioner, pursuant to 402-J, may issue producer license to resident of state permitting producer named therein to procure insurance policies and contracts of insurance or suretyship to be effective in this state in foreign insurance companies not authorized to transact business in this state, but which are duly authorized to do business in some state having insurance commissioner. (RSA 405:24). Such insurance or suretyship placed with unadmitted company shall be for such amount as agent cannot place with admitted company, and shall not be placed until agent has first satisfied Insurance Commissioner that he cannot procure such insurance in admitted company. (RSA 405:24). Every licensee before delivering to insured must stamp on base of binder or policy following: "the company issuing this policy has not been licensed by the State of New Hampshire and the rates charged have not been approved by the Commissioner of Insurance. If the company issuing this policy becomes insolvent, the New Hampshire Insurance Guarantee Fund shall not be liable for any claims made against this policy." (RSA 405:24).

Unauthorized Insurers False Advertising Process Act.

Special act confers jurisdiction on insurance commissioner and the courts to prevent insurers not authorized to transact business in this state from placing in or sending into this state any false advertising designed to induce residents to purchase insurance from them. (c. 406-A). So-called "insurance consultants" are licensed and regulated and must pay civil penalty for noncompliance. (RSA 405:44-a—44-g).

Investments.

See c. 411-A.

Retaliatory Law.

The Commissioner may revoke licenses of companies of any state where New Hampshire companies are unfairly treated or unjustly taxed, fined, etc. (RSA 405:53-59).

Separate statutes prescribe the law pertaining to fraternal benefit societies, and foreign casualty companies operating upon the assessment plan.

Privilege Tax.

See schedule in RSA 400-A:29.

Premium Tax.

Every insurer (excluding ocean marine) shall pay to insurance commissioner tax of 2% of net premiums. On quarterly basis insurers are required to pay amount equal to ¼ of previous year's tax as partial payment for that year. Minimum annual tax is $200. Penalty for failure to comply is 10% on amount of tax due. Commissioner may suspend or revoke license of insurer for noncompliance. (RSA 400-A:32).

Administrative Fee.

Administrative fee is imposed annually based on premiums charged. Minimum fee payable by each insurer is $100. (RSA 400-A:39).

Interstate Insurance Product Compact.

Adopted. (c. 408-C).

Direct Actions Against Insurer.

See category 23 Transportation, topic 23.01 Motor Vehicles, subhead Direct Actions.

No-Fault Insurance.

See category 23 Transportation, topic 23.01 Motor Vehicles, subhead No-Fault Insurance.

16.02 SURETY AND GUARANTY COMPANIES:

Foreign companies may transact business in this state upon complying with the provisions of all laws relating to foreign insurance companies and their agents, and not otherwise. (RSA 416:7). See topic 16.01 Insurance Companies.

Rights.

The judge, head of department, or other officer authorized to approve the bond of any person required by law to give a bond, may accept as a surety upon the bond any such company which has been licensed to do business in this state, and, if satisfied with the financial ability of the company, he need not require other sureties. A reasonable sum for the expense of procuring such surety may be allowed in the settlement of the account of a person required by law to give a bond. (RSA 416:2, 3).

Reinsurance.

No surety company, domestic or foreign, may assume any liability as surety on any bond exceeding 10% of its net assets, without reinsuring in some surety company authorized to do business in this state the amount by which such liability may exceed 10%. (RSA 416:5).

17 INTELLECTUAL PROPERTY

17.01 TRADEMARKS AND TRADENAMES:

Model State Trademark Act was adopted in 1969. (c. 350-A).

17.02 TRADE SECRETS:

Uniform Trade Secrets Act adopted. (c. 350-B).

18 LEGAL PROFESSION

18.01 ATTORNEYS AND COUNSELORS:

The state bar is integrated.

Jurisdiction over Admission.

The Supreme Court has jurisdiction over the admission of persons to practice as attorneys in all courts of the state (RSA 311:2), and has enacted rules governing the admission of candidates.

Eligibility.

Any citizen of the age of 18 or over, of good moral character and suitable qualifications, may be admitted to practice as an attorney. (RSA 311:2).

Registration as law student not required.

Educational Requirements.

(a) Every applicant must furnish satisfactory proof that before beginning study of law he successfully completed at least three years of work required for a bachelor's degree in accredited college. (b) Every applicant must have graduated from law school approved by American Bar

Association having three-year course and requiring students to devote substantially all their working time to study, called full time law school, or from law school approved by American Bar Association having course of not less than four school years equivalent in number of working hours to three year course in full time law school and in which students devote only part of their working time to their studies, called part time law school. Combination of study in full time and part time law schools will be accepted only if such law schools meet above requirements, and applicant shall have graduated from one or other. Study in any law school which conducts its courses by correspondence or does not require attendance of its students at its lectures or classes does not constitute compliance with rule. (Sup. Ct. R., § 42[4][b]).

Petition for Admission.

Person wishing to be examined must file with Committee on character and fitness and with clerk of New Hampshire Supreme Court, Concord, on or before May 1 for July examination or Dec. 1 for Feb. examination, petition and sworn questionnaire upon form to be furnished by clerk; signed by two persons certifying applicant's good moral character. (Sup. Ct. R., § 42[5][c]). If papers so filed show that he is entitled to be examined he will be allowed to take next scheduled examination. Prior to his original and any subsequent examination, he must pay to clerk examination fee and character and fitness investigation fee, both of which are nonrefundable. (Sup. Ct. R., § 42[5][l]). Applicant must also furnish evidence of satisfactory completion of Multistate Professional Responsibility Examination. (Sup. Ct. R., § 42[7][f]).

Clerkship.

No requirement that clerkship be served.

Examination.

A committee consisting of members of bar of state will be appointed to examine candidates. Two examinations, consisting of two days each are given annually in Concord in July and Feb. Multi-State Bar Examination given first day. Second day consists of essay questions on broad range of subjects. Multi-State Bar Examination results from other states may not be transferred.

Admission Without Examination.

Applicant may, upon motion, be admitted to bar without taking examination if applicant: (1) Has been admitted by bar examination to practice law in another state, territory, or District of Columbia; (2) has satisfied education requirements under Sup. Ct. R., § 42(4)(b); (3) has been primarily engaged in active practice of law in one or more states, territories or District of Columbia for five of seven years immediately preceding date of motion; (4) has either taken and passed another bar examination in accordance with these rules, or has been primarily engaged in active practice of law in another state or territory in accordance with these rules; (5) produces evidence of satisfactory completion of MPRE; (6) establishes that applicant is member in good standing in all jurisdictions where admitted; (7) is not currently subject to lawyer discipline; and (8) that applicant possesses character and fitness to practice law in New Hampshire. (Sup. Ct. R., § 42[10]). Admission to New Hampshire Bar without examination for Vermont and Maine attorneys requires procedures under Sup. Ct. R., §§ 42(11)-(12). Admission to New Hampshire Bar without examination under Daniel Webster Scholars program requires procedures under Sup. Ct. R., § 42(13).

Limitation.

No person may act as attorney in any cause in which person has acted as judge. (RSA 311:5).

Liens.

Attorney has lien for reasonable fee and expenses on client's cause of action, upon judgment decree or other order of court. (RSA 311:13).

Attorney Ethics.

American Bar Association Model Rules of Professional Conduct adopted with modification as New Hampshire Rules of Professional Conduct.

Disbarment.

Supreme Court may suspend or disbar attorney for fraud, malpractice or contempt of court. (RSA 311:8).

Unauthorized practice of law may be restrained by Supreme or Superior Court through action of Attorney General or New Hampshire Bar Association. (RSA 311:7-a).

Professional Corporation.

See category 2 Business Organizations, topic 2.03 Corporations, subhead Professional Corporations.

19 MINERAL, WATER AND FISHING RIGHTS

19.01 MINES AND MINERALS:

C. 277 refers to safety and health of employees and applies to mines.

C. 12-E governs mining and reclamation of mined lands. Commissioner of department of resources and economic development has supervision and control under provisions of this chapter. Prospecting and mining permits are required. (RSA 12-E:3, 4).

20 MORTGAGES

20.01 CHATTEL MORTGAGES:

Uniform Commercial Code has been adopted. See category 3 Business Regulation and Commerce, topic 3.09 Commercial Code. However, secured party has 20 days (rather than ten) to perfect interest. (c. 382-A, 9-312).

Recording Fee.

See category 3 Business Regulation and Commerce, topic 3.09 Commercial Code.

Improper removal or concealment of mortgaged property with the intent of placing it beyond the control of the mortgagee, by mortgagor or another, is a criminal offense. (RSA 360:24).

Forms.

No official approval of a form of security agreement has been made. Illustrative form for motor vehicle follows (modifications of form would have to be made for other types of financing arrangements) (For UCC-1 and UCC-3 forms, see end of this Digest):

Purchase Money Security Agreement

. . . .

Name No. and street city or town

. . . .

County State and zone

(hereinafter called the “Seller”) hereby agrees to sell, and

. . . .

Name No. and street city or town

. . . .

County State and zone

(hereinafter called the “Buyer”) hereby agrees to buy the goods described below (hereinafter called the “Goods”) upon the terms hereinafter stated. The Buyer acknowledges receipt of the Goods in satisfactory condition and accepts the same and also acknowledges that they conform to the description and to any sample or model previously examined by the Buyer.

. . . .

```
NewUsed       Description(including make and year)       Model No.     Serial No.    Motor No.
```

. . . .

. . . .

together with all equipment used therewith and accessories therefor, all of which is hereinafter included in the term “Goods.” It is agreed by the Buyer that there are no warranties, express or implied, of merchantability or otherwise, which extend the above description of the goods. The Buyer agrees to pay to the Seller the Time Balance, computed as follows:

A.

CASH PRICE $

B.

EQUIPMENT AND ACCESSORIES $

C.

SERVICE $

D.

SALES TAX $. . . .

E.

CASH SALE PRICE $

F.

DOWN PAYMENT:

1. TRADE-IN ALLOWANCE . . . . $
year make model

LESS 2. ENCUMBRANCE TO $. . . .

3. NET TRADE-IN ALLOWANCE $

4. OTHER CREDIT ALLOWANCES, IF ANY $

5. CASH DOWN PAYMENT $. . . .

G.

TOTAL DOWN PAYMENT AND ALLOWANCES $. . .

H.

BALANCE (ITEM E. LESS ITEM G.) $

I.

INSURANCE: TYPE OF COVERAGE COVERAGE PERIOD PREMIUMS
1. COMPREHENSIVE FIRE & THEFT $ 2. COLLISION ($ deductible) $ 3. BODILY INJURY $ 4. PROPERTY DAMAGE $
5. $ 6. $ 7. LIABILITY INSURANCE COVERAGE FOR BODILY INJURY AND PROPERTY DAMAGE CAUSED TO OTHERS IS NOT INCLUDED (UNLESS PREMIUMS ARE STATED).

J.

TOTAL INSURANCE PREMIUMS $. . . .

K.

PRINCIPAL BALANCE $

L.

FINANCE CHARGE $. . . .

M.

TIME BALANCE $

Payable in . . . . monthly installments of $. . . each on the . . day of each month beginning . . . ., 20. ., and a final installment of $. . . on . . . ., 20. .

N.

RECORDING CHARGES $

O.

TOTAL TIME PRICE $

(Sum of Items E, J, L, and N)

The Buyer agrees to pay, in the event that any installment shall be in default for ten (10) days or more, a delinquency and collection charge on demand which shall be with respect to each such installment the lesser of five per cent (5%) of such installment or the sum of Five Dollars ($5.00). The Buyer agrees to pay interest on unpaid installments from maturity or as soon after maturity as is permitted by State law at the rate of six per cent (6%) per annum.

The Buyer hereby warrants and covenants for the purpose of inducing the Seller to sell to the Buyer the property hereby sold that:

1. The property is bought or to be used primarily for

personal, family or household purposes

farming operations use

business use.

2. The goods shall be kept at:

. . . .

No. and street city or town County State

until such time as written consent to a change of location is obtained from the Seller or its assignee.

3. If the Goods are bought primarily for personal, family or household purposes or for farming operations use, or if the Buyer has no place of business in said State, the Buyer's residence in said State is that shown at the beginning of this agreement.

4. If the Goods are bought primarily for business use, the Buyer's place of business in said State, if any, is that shown at the beginning of this agreement; and all other places of business of the Buyer in said State outside of the city or town mentioned in the previous clause are located as follows: . . . .

. . . .

5. If the Goods are to be attached to real estate, a description of the real estate is as follows: . . . .

. . . .

. . . .

and the name of the record owner is . . . ., and if the Goods are attached to real estate prior to the perfection of the security interest granted hereby, the Buyer, on demand of the Seller, shall furnish the latter with a disclaimer or disclaimers, signed by all persons having an interest in the real estate, of any interest in the Goods which is prior to the Seller's interest. The Buyer agrees to notify the Seller in writing of any intended sale, mortgage or conveyance of the realty and to give written notice of the terms and conditions of this contract to any prospective purchaser, mortgagee or grantee of said realty and a copy of such notice to the Seller.

6. If the Goods are of a type normally used in more than one State and the Buyer has a place of business in more than one State, the Buyer's chief place of business is

. . . .

No. and Street City or Town State

or, if left blank, is that shown at the beginning of this agreement, and the Buyer shall immediately notify the Seller in writing of any change in the Buyer's chief place of business. If Certificates of Title are issued or outstanding in respect to any of the Goods, the Buyer shall cause the interest of the Seller to be properly noted thereon.

All rights of the Seller in, to and under this agreement and in and to the Goods shall pass to and may be exercised by any assignee thereof. The Buyer agrees that if the Seller gives notice to the Buyer (a) of an intended assignment of said rights and thereafter such an assignment is made or (b) of such an assignment having been made then, in either event, the liability of the Buyer to the assignee shall be immediate and absolute and the Buyer will not set up any claim against the Seller as a defense, counterclaim or set-off to any action brought by any such assignee for the unpaid balance owed hereunder or for possession of the Goods. The Buyer hereby acknowledges receipt of notice that the Seller intends to assign all said rights to . . . . Bank.

THIS AGREEMENT IS SUBJECT TO THE ADDITIONAL PROVISIONS SET FORTH ON THE REVERSE SIDE HEREOF, THE SAME BEING INCORPORATED HEREIN BY REFERENCE.

IN WITNESS WHEREOF the parties hereto have executed this agreement as a sealed instrument this . . . . day of . . . . . ., 20. . . . .

. . . .

By . . . . }

. . . .

By . . . . } Signature of

Further Warranties and Covenants of The Buyer. The Buyer hereby warrants and covenants that:

1. The Buyer shall not sell or offer to sell or otherwise transfer or encumber the Goods or any interest therein without the prior written consent of the Seller.

2. No financing statement covering any of the Goods or any proceeds thereof is on file in any public office. The Buyer shall immediately notify the Seller in writing of any change in address from that or those shown in this agreement and shall also upon demand furnish to the Seller such further information and shall execute and deliver to the Seller such financing statements and other papers and shall do all such acts and things as the Seller may at any time

or from time to time reasonably request or as may be necessary or appropriate to establish and maintain a perfected security interest in the Goods, as security for the Obligations, subject to no prior liens or encumbrances.

3. The Buyer shall keep the Goods at all times insured against risks of loss or damage by fire (including so-called extended coverage), theft and such other casualties as the Seller may reasonably require, including collision in the case of any motor vehicle, all in such amounts, under such forms of policies, upon such terms, for such periods and written by such companies or underwriters as the Seller may approve, losses in all cases to be payable to the Seller and the Buyer as their interests may appear. All policies of insurance shall provide for at least ten days' prior written notice of cancellation to the Seller; and the Buyer shall furnish the Seller with certificates of such insurance or other evidence satisfactory to the Seller as to compliance with the provisions of this paragraph. The Seller may act as attorney for the Buyer in making, adjusting and settling claims under and cancelling such insurance and endorsing the Buyer's name on any drafts drawn by insurers of the Goods.

4. The Buyer shall keep the Goods free from any adverse lien, security interest or encumbrance and in good order and repair, shall not waste or destroy the Goods or any part thereof and shall not use the Goods in violation of any applicable statute, ordinance or policy of insurance thereon. The Seller may examine and inspect the Goods at any reasonable time or times wherever located.

5. The Buyer shall pay promptly when due all taxes and assessments upon the Goods or for their use or operation or upon this agreement. Additional Rights of Parties: The Buyer authorizes the Seller, in its discretion, to discharge taxes, liens or security interest or other encumbrances at any time levied or placed on the Goods, to place and pay for insurance thereon, to order and pay for the repair, maintenance and preservation thereof and to pay any necessary filing or recording fees. The Buyer agrees to reimburse the Seller on demand for any payment made or any expense incurred by the Seller pursuant to the foregoing authorization. Until default it shall be lawful for the collateral to remain in the possession of the Buyer, liable however, to be taken and removed by the Seller, as well before as after such default; and for that purpose the Seller may, without judicial process, enter the place where the Goods are at the time located and remove the same at pleasure.

Events of Default—Remedies: Upon the occurrence of any of the following events or conditions, namely: (i) default in the payment or performance of any of the Obligations or of any covenant or liability contained or referred to herein; (ii) any warranty, representation or statement made or furnished to the Seller by or on behalf of the Buyer in connection with this agreement proving to have been false in any material respect when made or furnished; (iii) loss, theft, substantial damage, destruction, sale or encumbrance to or of any of the Goods, or the making of any levy, seizure or attachment thereof or thereon; (iv) death, dissolution, termination of existence, insolvency, business failure, appointment of a receiver of any part of the property of, assignment for the benefit of creditors by, or the commencement of any proceeding under any bankruptcy or insolvency laws by or against the Buyer or any guarantor or surety for the Buyer;—thereupon, or at any time thereafter (such default not having previously been cured) the Seller at its option may declare all of the Obligations to be immediately due and payable and shall then have the remedies of a secured party under the Uniform Commercial Code of New Hampshire (regardless of whether the Code has been enacted in the jurisdiction where rights or remedies are asserted), including without limitation thereto, the right to take possession of the Goods, and for that purpose the Seller may, so far as the Buyer can give authority therefor, enter upon any premises on which the Goods or any part thereof may be situated and remove the same therefrom. The Seller may require the Buyer to make the Goods available to the Seller at a place to be designated by the Seller which is reasonably convenient to both parties. Unless the Goods are perishable or threaten to decline speedily in value or are of a type customarily sold on a recognized market, the Seller shall give the Buyer at least five (5) days' prior written notice of the time and place of any public sale thereof or of the time after which any private sale or any other intended disposition thereof is to be made. The Buyer agrees that the standard of commercial reasonableness in the disposition of the Goods will be met by either a public sale or a private sale. The requirements of reasonable notice shall be met if such notice is mailed, postage prepaid to the address of the Buyer shown at the beginning of this agreement at least five (5) days before the time of the sale or disposition, and in the case of a public sale shall post such notice in two (2) public places in the City or Town in which said public sale is to be held at least five (5) days before said public sale. Expenses of retaking, holding, preparing for sale, selling or the like shall include the Seller's reasonable attorneys' fee and legal expenses.

General: This agreement and the security interest in the Goods created hereby shall terminate when the Obligations have been paid in full. No waiver by the Seller of any default shall be effective unless in writing nor operate as a waiver of any other default or of the same default on a future occasion. All rights of the Seller hereunder shall inure to the benefit of its successors and assigns; and all obligations of the Buyer shall bind the heirs, legal representatives, successors and assigns of the Buyer. If there be more than one Buyer, their obligations hereunder shall be joint and several.

If and to the extent that applicable law confers any rights or imposes any duties inconsistent with or in addition to any of the provisions of this agreement, the affected provisions shall be considered amended to conform thereto, but all other provisions hereof shall remain in full force and effect.

20.02 COLLATERAL SECURITY:

See category 8 Debtor and Creditor, topic 8.15 Pledges.

20.03 MORTGAGES OF PERSONAL PROPERTY:

See topic 20.01 Chattel Mortgages.

20.04 MORTGAGES OF REAL PROPERTY:

Subject to priority provisions of RSA 447:12-a, recorded mortgage takes priority as of date of its recording as to advances or obligations thereafter made or incurred that do not exceed maximum amount stated in mortgage. (RSA 479:3). Mortgage or deed of trust which purports to be given in whole or in part as security for notes or bonds thereafter to be issued or other expectant future obligations, and which states nature of obligations designed to be secured by it, amount thereof presently to be issued, if any, and limitations, if any, contained in mortgage or deed of trust or in contract referred to in mortgage or deed of trust with respect to total or maximum amount thereof ultimately to be issued, shall become lawful security for same as, when and to extent that they shall actually be issued or come into existence as valid obligations of mortgagor. (RSA 479:5).

Suit upon a mortgage note may be maintained separately without loss of the mortgage security, and a suit upon the note and a suit to foreclose the mortgage may be maintained at the same time. (RSA 524:10).

Title theory of mortgage applies. (1 N.H. 169).

Formal Requisites.

No conveyance in writing of lands may be defeated, nor any estate encumbered, by an agreement, unless it is inserted in the condition of the conveyance and made part thereof, stating the sum of money to be secured, or other thing to be performed. (RSA 479:2).

A deed in substance following the form prescribed by statute, when duly executed and delivered, has the force and effect of a mortgage deed to the use of the mortgagee and his heirs, successors and assigns with the mortgage covenants and upon the statutory conditions and with the statutory power of sale as defined in the following:

(a) In a conveyance of real estate the words “mortgage covenants” shall include in their meaning the same meaning as given to “warranty covenants” in § 27 of c. 477. (RSA 477:29, I).

(b) Words “statutory conditions,” except as otherwise specifically stated in mortgage shall mean: “Provided, nevertheless, that if the mortgagor, his heirs, executors and administrators, successors and assigns shall pay unto the mortgagee or his executors, administrators, successors or assigns the principal and interest secured by the mortgage, shall perform any and each obligation provided in the note or other instrument secured by the mortgage, until such payment and performance shall pay when due and payable all taxes, charges and assessments for which the property mortgaged may become liable, shall keep the buildings on said premises insured against perils insured in the New Hampshire in a sum not less than the amount secured by the mortgage standard fire policy, or as otherwise provided therein, for the benefit of the mortgagee and his executors, administrators, successors and assigns in such form as he or they shall approve, deliver the policies therefor to him or them, and shall not commit or suffer any strip or waste of the mortgaged premises, or any breach of any covenant allocable to said buildings in said mortgage, then this mortgage deed shall be void.” (RSA 477:29, II).

(c) The words “statutory power of sale” shall be understood as giving the mortgagee and his executors, administrators, successors and assigns the right, upon any default of the performance of the statutory condition as above defined, or any other condition contained in the mortgage, to foreclose by sale under RSA 479:25-27a. (RSA 477:29, III).

Execution and Recording.

A mortgage must show mailing address of grantee and be signed by party granting same, acknowledged by grantor before justice, notary public or commissioner, and recorded at length in registry of deeds in county in which land lies. (RSA 477:3, 4).

Building situated on land not belonging to owners of building is deemed real estate for purposes of transfer, whether voluntary or involuntary, and is conveyed, mortgaged or leased, and is subject to attachment, other liens, foreclosure, and execution, in same manner and with same formality as real estate. (RSA 477:44, I).

Recording Fees.

$10 for first recorded page, $4 for each additional recorded page. Charge for assignments of mortgages shall be $10 for first recorded page, including first mortgage assigned, plus $5 for each additional mortgage assigned plus $4 for each additional recorded page. Charge for recording discharge of mortgage, release of lien, or filings pursuant to RSA 21-J, RSA 260, RSA 282-A, RSA 382-A, RSA 439, RSA 450, RSA 454-B, RSA 498, RSA 511, or RSA 511-A shall be $15 for first recorded page plus $4 for each additional recorded page. (RSA 478:17g).

Timber.

Whenever standing trees have been mortgaged as real estate, or are covered by a mortgage of land on which they stand, mortgagee may indorse upon said mortgage over his signature a consent that trees may be cut, which consent must be recorded on margin of record of said mortgage in registry of deeds. Statute provides that both parties to mortgage may then execute and attach thereto affidavit required by law to be attached to mortgages of personal property; however affidavits are no longer required under Uniform Commercial Code. Mortgage, consent and affidavit may then be recorded with proper town clerk, as mortgages of personal property are required to be recorded; and thereupon lien of mortgage is extended to cover trees after they are cut, and lumber therefrom, as fully as though same had been mortgaged as personal property after cutting. (RSA 477:37-38).

Redemption.

Mortgaged lands may be redeemed by the mortgagor, after condition broken, by payment of all demands and performance of all things secured by the mortgage, and the payment of all damages and costs sustained and incurred by reason of the nonperformance of its condition, or by a legal tender thereof, before foreclosure. (RSA 479:18).

Discharge.

Upon performance of the condition of the mortgage and the payment of all damages and costs arising from the nonperformance thereof, or upon the legal tender of such performance and payment, the mortgage is void. (RSA 479:6). Within 60 days of satisfaction of mortgage and tendering of reasonable charges to mortgagee, mortgagee must issue and record discharge and provide written confirmation of discharge to payor of final payment. Recording fees may be charged to mortgagor if so provided in prior written disclosure. (RSA 479:7). Upon refusal of mortgagee to execute discharge, mortgagor may, by petition, have superior court decree mortgage discharged. (RSA 479:10-12).

The mortgagor upon written request is entitled to receive from the mortgagee a just and true account of all of the latter’s demands secured by the mortgage, and of all damages and costs incurred by reason of the nonperformance of the condition thereof, and of all rents and profits received by him. (RSA 479:13). Upon the mortgagee’s refusal, the mortgagor may within one year thereafter obtain a decree from the superior court of the amount due, and secure a discharge of the mortgage by paying that amount into court. (RSA 479:14-17).

Licensed mortgage banker or broker must, within five days of receipt of written request, provide net payoff amount as of specific date with daily interest rate charge. (RSA 397-A:15, V).

Validation.

Every duly recorded satisfaction piece or instrument executed prior to Jan. 1, 1980, with intent to cancel and discharge or assign mortgage of real estate, fully identifying mortgage so intended to be canceled and discharged or assigned, but not drawn in formal accordance with statutory requirements shall be held valid discharge or assignment of such mortgage and release or assignment of mortgage interest in such real estate, except as to such satisfaction pieces or instruments, validity of which had been brought in question in any suit pending in any of courts of this state on Jan. 1, 1987. (RSA 479:9).

Ancient Undischarged Mortgages.

All mortgages which have been on record for a period of more than 50 years on or before Jan. 1, 1960, become void on Jan. 1, 1960, unless prior to that date the mortgagee or assignee thereof has recorded an affidavit signed by the mortgagor and the mortgagee or assignee stating that the mortgage is not discharged and is still in full force and effect, and upon the recording of such affidavit such mortgage retains its full legal effect and priority for an additional period of 50 years from the date of such recording. This provision does not apply to mortgages held by banks, trust companies, building and loan associations and federal savings and loan associations, whether as named mortgagee or assignee of record. (RSA 479:28-9).

Foreclosure.

(a) Mortgages without power of sale may be foreclosed in the following modes: (1) Entry under process; i.e., entry into the mortgaged premises under process of law, and continued actual possession thereof for one year. (2) Entry and publication; i.e., peaceable entry into the mortgaged premises, and continued, actual, peaceable possession thereof for the space of one year, and by publishing in some newspaper printed in the same county, if any there be, otherwise in some newspaper printed in an adjoining county, three weeks successively, a notice stating the time at which the possession for condition broken commenced, the object of such possession, the name of the mortgagor and mortgagee, the date of the mortgage and a description of the premises, the first publication to be at least six months before the right to redeem would be foreclosed. (3) Possession and publication; i.e., by mortgagee in possession of mortgaged premises publishing in some newspaper printed in same county, if any there be, otherwise in some newspaper printed in an adjoining county, three weeks successively, a notice stating that from and after a certain day, specified in notice, not more than four weeks after last day of publication of notice, such possession will be held for condition broken and for purpose of foreclosing right of mortgagor, and of all persons claiming under him, to redeem same, and stating names of mortgagor and of mortgagee, date of mortgage and a description of premises; and by retaining actual, peaceable possession of premises for one year after day specified in notice. (RSA 479:19). Affidavit of party making an entry into real estate, under second method of foreclosure, and of witnesses thereto, as to time, manner and purposes of entry, and a copy of published notice required under second and third methods of foreclosure respectively, verified by affidavit as to time, place and mode of publication, recorded in registry of deeds for county in which lands lie, are evidence of entry, possession and publication. (RSA 479:21).

(b) If suit is brought on a mortgage containing a power of sale and a conditional judgment rendered, the demandant may, instead of a writ of possession, have a decree entered that the property be sold pursuant to such power, and thereupon the demandant must give such notices and do all such acts as are authorized and required by the power or by the court in its decree. (RSA 479:22). The party selling must, within ten days after the sale, make to the court under oath a report of the sale and of his doings, and file the same in the clerk’s office, and the same may be confirmed and allowed, or set aside and a new sale ordered. Any person interested may intervene or be summoned and heard on such proceedings, and the order of the court confirming the sale is conclusive evidence as against all persons that the power was duly executed. (RSA 479:23-24).

Instead of such suit and decree of sale, mortgagee or assignee may, upon breach of condition, give such notices and do all such acts as are authorized or required by power including giving of foreclosure deed upon completion of said foreclosure; but no sale under and by virtue of such power is valid and effectual to foreclose mortgage, unless following conditions are complied with: (1) Notice of sale must be published once a week for three successive weeks in some newspaper of state-wide circulation or of general circulation within town or county in which property is situated. In event that mortgaged premises are situated in more than one county, publication in newspaper of statewide circulation shall be sufficient. First publication must be not less than 20 days before day of sale calculated by excluding date of publication of first notice and date of sale. (2) Copy of notice shall be served on mortgagor or sent by registered or certified mail to his last known address or to such person as may be agreed upon in mortgage at least 25 days before sale. Term “mortgagor” shall include mortgagor or then record owner of premises. Like notice to be sent to any person having lien on premises of record, provided such lien is recorded in registry of deeds for county in which property is situated at least 30 days before date of sale. Notice shall be sent not less than 21 days before sale. Such notice of sale shall be sufficient if it fully sets forth date, time and place of sale; town, county, street or highway and street number, if any, of mortgaged premises, date of mortgage, volume and page of recording of mortgage, location where original mortgage instrument may be examined and terms of sale. Waiver of notice obtained by mortgagee is effective and shall be recorded in appropriate registry of deeds. Notice of sale as served on, or mailed to mortgagor shall include following language: “You are hereby notified that you have a right to petition the superior court for the county in which the mortgaged premises are situated, with service upon the mortgagee, and upon such bond as the court may require, to enjoin the scheduled foreclosure sale.” Failure to institute such petition and complete service upon foreclosing party, or his agent, conducting sale prior to sale shall thereafter bar any action or right of action of mortgagor based on validity of foreclosure. (3) Sale must be held on premises unless different place of sale is agreed upon in mortgage. (RSA 479:25). Person selling under power must, within 60 days after sale, cause foreclosure deed, copy of notice of sale, and his affidavit setting forth fully and particularly his acts in premises, to be recorded in registry of deeds in county where property is situated; and such affidavit, or duly certified copy of record thereof, is evidence on question whether power of sale was duly executed. (RSA 479:26). Mortgagee selling under power contained in mortgage may be purchaser at sale, unless mortgage contains provision to contrary. (RSA 479:27).

Where a mortgage is foreclosed under a statutory power of sale the mortgagee may give a deed to the purchaser in the short form prescribed by statute. See Forms, infra. A deed in substance in that form, when duly executed and delivered, has the force and effect of a deed in fee simple to the grantee, his heirs, successors and assigns, to his and their own use, with covenants on the part of the grantor, for himself, that at the time of the delivery of such deed, he was duly authorized to make sale of the premises; that in all of his proceedings in the sale thereof he has complied with the requirements of the statute in such case provided; and that he will warrant and defend the same to the grantee, his heirs, successors and assigns against the lawful claims of all persons claiming by, for or under him. (RSA 477:31).

In actions on mortgages the judgment must be conditional, that if the mortgagor or person having his right pays to the mortgagee or person having his right the sum the court adjudges due, within two months after judgment rendered, with interest, such judgment shall be void; otherwise that a writ of possession shall issue (RSA 524:8), or, in the case of a power of sale mortgage, that a sale be held (RSA 479:22).

Forms

The statutory short form of power of sale mortgage (RSA 477:29) is:

. . . . . ., of . . . . . ., ... County, State of . . . . . ., for consideration paid, grant to . . . . . ., of . . . . street, town (city) of . . . . . ., ... County, State of . . . . . ., with mortgage covenants, to secure the payments of . . . . . . dollars, with . . . . . . per cent interest payable semiannually and also perform all the agreements and conditions as provided in note . . . . . . of even date, the (description of land or interest therein being conveyed; incumbrances, reservations, exceptions, if any). This mortgage is upon the statutory conditions, for any breach of which the mortgagee shall have the statutory power of sale.

. . . . . ., wife (husband) of the said mortgagor, release all rights of homestead and other interests in the mortgaged premises.

(Here add acknowledgment)

The statutory form for foreclosure deed under power of sale (RSA 477:31) is:

. . . . . ., of . . . . . ., ... County, State of . . . . . ., holder of a mortgage from . . . . . . to . . . . . ., dated . . . . . ., recorded in . . . . . . Registry of Deeds, Vol. . . . . . ., Page . . . . . ., by the power conferred by said mortgage and every other power, for . . . . . . dollars paid, grant to . . . . . ., of . . . . street, town, (city) of . . . . . ., ... County, State of . . . . . ., the premises conveyed by said mortgage.

(Here add acknowledgment)

Assignment: For value received, I sell, assign, transfer and set over unto A. B. of . . . . . . all my right, title and interest to the within mortgage and to the debt secured thereby, with full power to collect and discharge the same, or to dispose of the same in my name.

Discharge: For value received, ..., holder of a mortgage from . . . . to . . . ., dated . . . ., and recorded in . . . . County Registry of Deeds at Book . . . ., Page . . . ., hereby discharges said mortgage.

Chattel Mortgages.

See topic 20.01 Chattel Mortgages.

21 PROPERTY

21.01 ABSENTEES:

Administration will be granted on estate of person who has left home, has not been heard from directly or indirectly for one year, and is believed to be dead. No distribution for three years. (RSA 553:18). See category 13 Estates and Trusts, topic 13.05 Death.

If an absentee from the state neglects to make provision for his or her minor child, and if guardian has been appointed, said guardian may be authorized to sell such portion of said absentee's property as is necessary for comfortable support, education and maintenance of child. (RSA 463:28).

Absentee Serving in Armed Forces or as Merchant Seaman.

A conservator of the property of an absentee serving in the U. S. Armed Forces or as a merchant seaman, who has been reported missing, or missing in action, or interned in a neutral country, or beleaguered, besieged or captured by an enemy, may be appointed upon the probate court's own motion or upon that of any person who would have an interest in the property of the absentee if the latter were deceased, upon giving of suitable bond; said conservatorship to terminate at any time upon petition signed by the absentee or by an attorney in fact acting under an adequate power of attorney granted by absentee. In absence of appointment of guardian, spouse or if absentee has no spouse, next of kin, may apply to probate court for authority to act with respect to particular item or portion of property or matter requiring consent of absentee. (RSA 464-A:1 et seq.).

Escheat.

Unclaimed property generally presumed abandoned if unclaimed after five years, at which time report of abandonment and delivery of property is made to State Treasurer. If claim has not been made within 36 months after close of calendar year in which property is presumed abandoned, such property automatically escheats to state's general fund or appropriate county treasurer. (c. 471-C).

N. H. has adopted Unclaimed and Abandoned Property Act which is similar to Uniform Disposition of Unclaimed Property Act. (c. 471-C).

See categories 3 Business Regulation and Commerce, topic Banks and Banking, subhead Unclaimed Deposits; Estates and Trusts, topics Descent and Distribution, subhead Escheat, and Wills, subhead Unclaimed Legacies.

21.02 ADVERSE POSSESSION:

No statutory provisions with respect to character of possession necessary to acquire title adversely.

No person may acquire, by adverse possession: Any right to any land, as against the state or its grantees (RSA 539:6); any right to impede or in any way injure navigation, passage of fish or any other public easement in any waters of state (RSA 477:33); any part of town-house, school-house, church lot or any public ground (RSA 477:34).

No title to real estate or any interest therein shall be acquired by or against railroad by adverse possession, however exclusive or long continued. (RSA 367:45).

Duration of Possession.

Twenty years possession is necessary. (RSA 508:2).

Disabilities.

If the person first entitled to bring an action against an adverse possessor is an infant, or an insane person, at the time the right accrues, the action may be brought within five years after such disability is removed. (RSA 508:3).

Improvements.

Where the defendant in an action for the recovery of real property, and those under whom he claims, have been in actual peaceable possession, under a supposed legal title, for more than six years before commencement of the action, and have made improvements increasing the value of the property, he is entitled to have a judgment for plaintiff conditioned upon payment of such increased value within one year. (RSA 524:2-4).

21.03 [RESERVED]

21.04 CONVEYANCES:

See topic 21.06 Deeds.

21.05 CURTESY:

Right of curtesy has been abolished. (RSA 560:3).

21.06 DEEDS:

Execution.

Deeds must be signed by grantor, and acknowledged and show mailing address of grantee. (RSA 477:3). See also category 10 Documents and Records, topics 10.01 Acknowledgments, 10.05 Seals. Deed which is not acknowledged or not recorded is valid only as against grantor and his/her heirs. (RSA 477:7). Deed must show names of all municipalities in which property is located in first line of description and must have names of all persons signing, printed or typed beneath their signatures. (RSA 478:4-a).

If homestead is to be released, husband or wife should join in conveyance. (RSA 480:3-a, 5-a; RSA 460:4; RSA 464-A:30). Acknowledgment is required if homestead right is to be barred. (RSA 480:3-a, 5-a). See also topic 21.16 Real Property; categories 8 Debtor and Creditor, topic Homesteads, subhead Alienation or Encumbrance; Family, topic Husband and Wife, subhead Conveyance or Encumbrance of Property.

Notification.

Prior to executing contract for conveyance of building, seller shall disclose possibility of radon gas; lead paint; private water supply condition; sewage disposal condition; and, in case of

1-4 family dwelling, description of insulation. (RSA 477:4-a). Additional notifications must be made prior to conveyance of condominium. (RSA 356-B:58).

Conveyance by Attorney.

A conveyance of land can be made by an attorney in fact (RSA 477:1), if the power of attorney is signed and acknowledged (RSA 477:9).

Recording.

All deeds must be and powers of attorney may be (RSA 477:1, 9) recorded in the registry of deeds in the county in which the land lies (RSA 477:1, 3, 7). See also category 10 Documents and Records, topic 10.04 Records.

Operation and Effect.

Statutory forms of deeds are authorized, but other forms appropriate for the conveyance of real estate may be used. (RSA 477:23). The word "grant" in a conveyance of real estate is, without more, a sufficient word of conveyance in either a warranty or a quitclaim deed. In a conveyance or reservation of real estate the term "heirs," "assigns" or other technical words of inheritance or succession are not necessary to convey or reserve an estate in fee. A deed or reservation of real estate will be construed to convey or reserve an interest in fee simple unless a different intention clearly appears in the instrument. (RSA 477:24). Statute of uses not to affect trusts: conveyance or devise of real estate vests legal title in grantee or devisee, as trustee. (RSA 477:25). In a conveyance of real estate or any interest therein, all rights, easements, privileges and appurtenances belonging to the granted estate or interest shall be deemed to be included in the conveyance, unless the contrary is stated in the deed, and it is unnecessary in order for their inclusion to enumerate or mention them either generally or specifically. (RSA 477:26).

Deed in substance in short form of warranty deed prescribed by statute has force and effect of deed in fee simple to grantee, heirs, successors and assigns, to their own use, with covenant on part of grantor, for himself, or herself, heirs, executors and administrators, that, at time of delivery of such deed, grantor was lawfully seized in fee simple of granted premises, that said premises were free from all incumbrances, except as stated, that grantor had good right to sell and convey same to grantee, heirs, successors and assigns, and that grantee will, and heirs, executors and administrators shall, warrant and defend same to grantee and heirs, successors and assigns, against lawful claims and demands of all persons. (RSA 477:27).

Deed in substance in short form of quitclaim deed prescribed by statute has force and effect of deed in fee simple to grantee, heirs, successors and assigns, to their own use, with covenants on part of grantor, for himself, or herself, heirs, executors and administrators, with grantee, heirs, successors and assigns, that at time of delivery of such deed premises were free from all incumbrances made by grantor, except as stated, and that grantor will, and heirs, executors and administrators shall, warrant and defend same to grantee and heirs, successors and assigns forever against lawful claims and demands of all persons claiming by, through or under grantor, but against none other. (RSA 477:28).

Deed in substance in short form of fiduciary deed prescribed by statute, "when duly executed and delivered," has force and effect of deed in fee simple to grantee, heirs, successors and assigns, to their own use, with covenants on part of grantor, for himself, or herself, that, at time of delivery of such deed, grantor was duly authorized to make sale of premises; that in all of proceedings in sale thereof, grantor has complied with requirements of statute in such case provided; and that grantor will warrant and defend same to grantee, heirs, successors and assigns, against lawful claims of all persons claiming by, from or under grantor in capacity aforesaid. (RSA 477:30).

Notice of lease consisting of an instrument in writing executed, and acknowledged by all persons who are parties to lease may be recorded in lieu of lease provided that notice contains following information: (1) Names and addresses of each party to lease; (2) date of execution of lease; (3) description of demised premises as it appears in lease; (4) term of such lease; (5) date of commencement of such term and all rights of extension or renewal. (RSA 477:3, 7-a).

Validation of Ancient Documents.

When any instrument in writing has been recorded in office of register of deeds for a period of ten years, and there is a defect in such instrument because it omitted to state any consideration therefor, or because it was not sealed by grantors or any of them, or because it was not witnessed or because it was not validly acknowledged; it then becomes valid, and imparts to subsequent purchasers, incumbrancers and all other persons whomsoever, notice of such instrument so far as and to same extent that same then is recorded, copied or noted in such books of record notwithstanding such defect. Rights acquired by grantees, assignees or incumbrancers subsequent to filing of such instrument for record and prior to expiration of ten years from filing of such instrument for record are not affected by foregoing provision. (RSA 477:16).

Recording Fees.

Recording each deed, mortgage, attachment of real estate, lease, agreement, assignment, release, partial discharge, or any like document, $10 for first recorded page plus $4 for each additional recorded page; assignments of mortgages, $10 for first assignment per recorded document plus $5 for each subsequent mortgage being assigned, plus $4 for each additional recorded page; for recording plans, $9 for first 200 square inches and $2.50 for each additional square inch or part thereof. (RSA 478:17g).

Taxes.

Tax is imposed on each of purchaser and seller upon sale or transfer of real estate other than by devise at rate of 75¢ per $100 or fractional part thereof except where consideration is less than $4,000. Minimum tax is $20. Tax does not apply to transfer by governmental authority, mortgage, discharge of mortgage, corrective deed or tax collector’s deed. (RSA 78-B:1, 2).

Forms

The statutory short form of warranty deed (RSA 477:27) is:

. . . . . . of . . . . County, State of . . . . . ., for consideration paid, grant to . . . . . ., of (complete mailing address) . . . . Street, Town (City) of . . . . County, State of . . . . . ., with warranty covenants, the (description of land or interest being conveyed; incumbrances, exceptions, reservations, if any),

(wife)(husband) of said grantor, release to said grantee all rights of homestead and other interests therein.

(Here add acknowledgment)

The statutory short form of quitclaim deed (RSA 477:28) is:

. . . . . . of . . . . County, State of . . . . . ., for consideration paid, grant to . . . . . ., of (complete mailing address) . . . . Street, Town (City) of . . . . County, State of . . . . . ., with quitclaim covenants, the(description of land or interest therein being conveyed; incumbrances, exceptions, reservations, if any),

(wife)(husband) of said grantor, release to said grantee all rights of homestead and other interests therein.

(Here add acknowledgment)

The statutory short form of fiduciary deed (RSA 477:30) is:

. . . . . ., of . . . . County, State of . . . . . ., executor under the will (administrator of the ". . . . ." estate) (trustee under the will) (guardian) (conservator) (receiver of the estate) (commissioner) of . . . . . ., of . . . . . ., by the power conferred by . . . . . . and every other power, for . . . . . . dollars paid, grant to . . . . of (complete mailing address) . . . . Street, Town (City) of . . . . . ., ... County, State of . . . . . ., the (insert description of land or interest therein being conveyed; incumbrances, reservations, exceptions).

(Here add acknowledgment)

Statutory short form of Manufactured Housing Warranty Deed (RSA 477:44) is:

. . . .,
of . . . . , ... County, State
of . . . . , for consideration paid, grant
to . . . . of (complete mailing address) . . . . .Street,
Town (City) of . . . ., ...County, State
of . . . ., with warranty covenants,
the . . . . (Description of manufactured housing being conveyed: name of manufacturer, model and serial number and incumbrances, exceptions, reservations, if any) which manufactured housing is situated, or is to be situated, at . . . . (state name or park, if any, and street address), Town (City)
of . . . ., ...County, State of New Hampshire. The tract or parcel of land upon which the manufactured housing is situated, or is to be situated, is owned by . . . . by deed
dated . . . . and recorded at
Book . . . ., Page . . . . , in
the . . . . County Registry of Deeds.

. . . . (wife) (husband) of said grantor, release to said grantee all rights and other interests therein.

Signed this _______ day of _____________, _____.

(Here add acknowledgment)

. . . ., owner of the tract or parcel of land upon which the aforesaid manufactured housing is situated, or is to be situated, hereby consents to the conveyance of the manufactured housing.

(Here add acknowledgment)

21.07 DEEDS OF TRUST:

See category 20 Mortgages, topic 20.04 Mortgages of Real Property.

21.08 DOWER:

Right of dower has been abolished. (RSA 560:3).

21.09 ESCHEAT:

See topic 21.01 Absentees, subhead Escheat; categories 3 Business Regulation and Commerce, topic Banks and Banking, subhead Unclaimed Deposits; Estates and Trusts, topics Descent and Distribution, subhead Escheat, and Wills, subhead Unclaimed Legacies.

21.10 LANDLORD AND TENANT:

General rights and liabilities of parties are governed by common law. c. 540-A sets forth illegal and unfair practices by landlords and tenants. Actions against tenants are governed by c. 540. For purpose of interpreting or enforcing any lease or rental agreement for residential tenants in effect on July 1, 2006, notice to quit should be deemed eviction notice under this section.

Kinds of Tenancy.

Every tenancy or occupancy is deemed to be at will, and the rent payable upon demand, unless a different contract is shown. (RSA 540:1).

Leases.

No lease for more than seven years is valid against any person except the grantor and his heirs, unless executed, attested, acknowledged and recorded like a deed. (RSA 477:7). See topic 21.06 Deeds. Lessor must deliver copy of lease to lessee within 30 days after execution by all parties. (RSA 477:7-b).

Security Deposits.

Regulated by RSA 540-A:5-8.

Agreements Affecting Interest of Landlord.

No specific statutory provision but see RSA 382-A:9-316, § 9-401 for filing requirements in general.

Levy on Landlord’s Interest.

If a judgment debtor is seized of a rent or of the income of real estate, a levy may be made thereon, and the appraisers may set off the same for such term as they judge sufficient to pay the judgment, interest and costs; and the sheriff must cause the tenant to attorn and become tenant to the creditor, and, upon his refusal, turn him out of possession, and deliver seizin to the creditor to hold for the term of the setoff. (RSA 529:11).

Improper Use of Premises.

If a tenant uses the premises or any part thereof for lewdness, assignation, or prostitution or for the illegal manufacture, sale or keeping for sale of intoxicating liquor, such use annuls and makes void the lease or other title under which he holds and, without any act of the owner, causes the right of possession to revert to him, and he may, without process of law, make immediate entry upon the premises. (RSA 544:1, 41).

Landlord’s Remedies to Recover Possession.

Any tenancy may be terminated by lessor or owner by giving to tenant or occupant eviction notice. (RSA 540:2). Notice period varies with type of tenancy. If nonresidential tenant neglects or refuses to pay rent due and in arrears, upon demand, seven days notice is sufficient; if rent payable more frequently than once in three months, whether rent due or not, notice equal to rent period is sufficient, and three months notice is sufficient in all cases. Residential tenancy may not be terminated except upon giving notice in writing to tenant of eviction notice within period of not less than 30 days; provided that if reasons for termination are nonpayment of rent, substantial damage to premises or behavior adversely affecting health or safety of other tenants, landlord or his representatives, such tenancy may be terminated upon seven days notice (RSA

540:3). Demand is sufficient if made on tenant or occupant at any time after rent becomes due and prior to or simultaneous with service of notice of eviction. (RSA 540:4). If eviction notice is based on nonpayment of rent, notice shall inform tenant of his right, if any, to avoid eviction by payment of arrearages and $15 in liquidated damages. (RSA 540:3).

Where to constitute forfeiture for violation of written lease, demand for rent is required such demand may be made when rent is due or in arrears, but lessor must not demand greater sum than whole rent in arrears when demand is made. (RSA 540:7, 8). No tenancy shall be terminated for nonpayment of rent, utility charges or any other lawful charge if tenant, prior to expiration of notice period, tenders all arrearages plus $15 as liquidated damages; provided that tenant may not defeat eviction for nonpayment by use of this section more than three times within 12-month period. (RSA 540:9).

No tenancy in mobile home park may be terminated without giving notice as follows: 30 days for nonpayment; 60 days for violation of applicable law, damage, repeated conduct disturbing peace or violation of park ordinance; 18 months for condemnation or change of use of park. (RSA 205-A:3, 4). No manufactured housing park owner shall make final unconditional acceptance of any offer for sale of such park without first giving 60 days' notice to each tenant of intent to sell and of terms of acceptable offer. Owner shall consider any offer received from tenants or their association within notice period and shall negotiate with them in good faith. (RSA 205-A:21).

In all instances, demand for rent and eviction notice may be served by any person by true and attested copy thereof, return of such service to be shown by true and attested copy of notice accompanied by affidavit of service, sworn or unsworn. Notice of demand for rent is sufficient if served any time after rent becomes due and before or simultaneous with service of eviction notice. (RSA 540:5, 7).

After proper eviction notice has been served, owner or lessor may serve on tenant writ of summons, returnable before municipal court, setting forth in substance that plaintiff is entitled to possession of demanded premises, and that defendant is in possession thereof without right, after notice in writing to evict same, which writ must be served seven days before return day thereof. (RSA 540:12-13).

Landlord may make claim for unpaid rent in writ of summons. If this claim is made, tenant may put forth any defense, claim, or counterclaim which offsets or reduces amount owed to landlord. If court finds landlord is entitled to possession on grounds of nonpayment of rent, landlord will be awarded money judgment for rent. If amount owed by landlord to tenant exceeds or equals amount of rent owed to landlord, judgment for possession shall be granted to tenant, plus any additional amount owed to tenant. Money judgement is limited to $1,500, and shall not preclude either party from making subsequent claims in appropriate court to recover amount in excess of $1,500 judgment. (RSA 540:13).

During pendency of possessory action based on nonpayment of rent, landlord may accept payment of rental arrearage without creating new tenancy, provided landlord informs tenant in writing of landlord's intention to proceed with eviction in spite of acceptance of payment. (RSA 540:13, VII).

Writ shall be accompanied by notice from district court, including all elements set forth in RSA 540:13, II. If defendant makes default, or if on trial it is considered by court that plaintiff has sustained his complaint, judgment must be rendered that plaintiff recover possession of demanded premises and costs, and a writ of possession shall issue. (RSA 540:14). Judgment may be enforced, at sole discretion of plaintiff, either by directing sheriff to serve writ of possession or by seeking judicial relief against defendant for civil contempt. (RSA 540:14). Writ of possession shall authorize sheriff to remove defendant from premises. (RSA 540:14). If tenant proves retaliation, however, damages of up to three months' rent may be awarded to tenant. (RSA 540:14). Records of complaints made by other tenants may be used by landlord in possessory action based on allegations of behavior so long as records are authenticated as genuine and prepared at or near time of complaint and court deems them admissible. (RSA 540:16-a). If defendant pleads plea which may bring in question title to demanded premises he or she must forthwith recognize plaintiff, with sufficient sureties, in such sum as court shall order, to enter and prosecute action at next return day of superior court for county, and to pay all rent then due or which shall become due pending action, and damages and costs which may be awarded against him/her. After filing of such plea and entry of such recognizance no further proceedings may be had before municipal court, but action may be entered and prosecuted in superior court in same manner as if it were originally begun there. (RSA 540:17-18). Party aggrieved by judgment of municipal court upon issue joined in such case may, within seven days after rendition of judgment, appeal therefrom to Supreme Court. (RSA 540:20).

If tenant appeals in case of nonpayment of rent, tenant must pay weekly rent into district court. (RSA 540:25).

Nothing in the foregoing may be construed to prevent a landlord from pursuing his legal remedy at common law. (RSA 540:26).

Whenever the estate occupied by a tenant at will or sufferance is conveyed by a landlord his grantee has the rights and remedies which the grantor would have had if the estate had not been conveyed. (RSA 540:27). Tenant cannot in lease waive any rights granted by c. 540. Any attempted waiver of such rights shall be null and void. (RSA 540:28). Any federal law relative to federally subsidized rental units shall supersede contrary or inconsistent provisions of N.H. law. (RSA 540:29).

Guest of public lodging facility may be ejected if guest: remains in rental unit beyond registered departure date; disturbs, threatens, or endangers other guests; is less than 21 years of age and possesses alcohol; possesses illegal drugs; violates any rule of public lodging facility; or violates any local or state law. Facility owner may use law enforcement personnel to effect removal. (RSA 353:3-c).

Termination by Lessee.

A lessee may terminate his lease by notice in writing, in the same manner as the lessor, and the notice has the same effect for all purposes as a notice by the lessor to the lessee. (RSA 540:11).

Conversion of Rental Units.

Governed by c. 356-C.

21.11 LEASES:

See topic 21.10 Landlord and Tenant.

21.12 [RESERVED]

21.13 PERPETUITIES:

Trust created by employer as part of a stock bonus, pension, disability, death benefit or profit-sharing plan not invalid as violating rule against perpetuities. (RSA 275:48-a).

21.14 PERSONAL PROPERTY:

Tenancy by entirety in personal property not recognized.

21.15 POWERS OF ATTORNEY:

Revocation.

Durable power of attorney authorized. (RSA 506:6).

21.16 REAL PROPERTY:

All common law estates are recognized except those in coparcenary (20 N. H. 150) and those by entirety (56 N. H. 105). Deed which names grantees to be tenants by entirety creates joint tenancy. (RSA 477:18). Statutory provision is made for homestead right of $100,000. (RSA 480:1).

Conveyances and devises of real estate to two or more persons are construed to create an estate in common and not in joint tenancy unless the contrary is expressly provided. A conveyance to a husband and wife as tenants by the entirety creates a joint tenancy. (RSA 477:18). Joint heirs are deemed tenants in common. (RSA 477:19).

Rule in Shelley's Case.

Abolished. (RSA 551:8).

Foreign Conveyances or Encumbrances.

Must conform to New Hampshire law. (RSA 477:1, 7).

Condominiums are permitted. (c. 356-B).

See also topics 21.05 Curtesy, Deeds, Dower, Landlord and Tenant; categories 3 Business Regulation and Commerce, topic Consumer Protection; Civil Actions and Procedure, topic Partition; Debtor and Creditor, topic Homesteads; Documents and Records, topic Records; Family, topic Husband and Wife; Mortgages, topic Mortgages of Real Property.

21.17 TRUST DEEDS:

See category 20 Mortgages, topic 20.04 Mortgages of Real Property.

22 TAXATION

22.01 ADMINISTRATION:

Actions Against Nonresidents.

The officers responsible for the collection of any tax in any state or commonwealth of the United States or political subdivision thereof, have the right to bring an action or suit in the courts of this state to recover any unpaid tax against a person within this jurisdiction, when the same or a similar right is accorded to the proper officer of this state or any of its political subdivisions by such state or commonwealth either by law or comity. (RSA 80:51).

Discount.

Any town may direct a discount to be made to persons paying taxes (except resident taxes) within such periods as town may limit. (RSA 80:52). If authorized by appropriate legislative body, taxes and fees may be paid by credit card provided service charge for acceptance of card is added to amount due. (RSA 80:52-c).

Abatement.

Selectmen may for good cause shown abate any tax, including any portion of interest accrued on such tax, assessed by them or by their predecessors. Application for abatement must be in writing on proper form by Mar. 1st, following notice of tax. Upon receipt of application, selectmen must review application and grant or deny it by July 1st and failure to do so shall constitute denial. (RSA 76:16). If selectmen neglect or refuse to abate, any person aggrieved, having complied with statutory requirements as to filing of inventories upon payment of application fee of $65 may, within eight months, after notice of such tax, and not afterwards, apply in writing to board of tax and land appeals, for abatement. (RSA 76:16-a). Any person so aggrieved, having complied with statutory requirements as to filing of inventories, may, within eight months after notice of tax, or, having first applied to board, within three months after notice in writing of decision of board of tax and land appeals, apply by petition to superior court in county, which must make such order thereon as justice requires. (RSA 76:17). Whenever board of tax and land appeals or superior court grants abatement, selectmen or assessors shall thereafter use correct assessment value. (RSA 76:17-c).

Contractors’ Taxes.

Whenever a contractor enters into a contract or agreement with the state or any political subdivision thereof and such contractor brings into this state any property which is or may be subject to being taxed in this state, it shall be a term or condition of such contract that the state or political subdivision shall withhold or retain from the contract price provided for in said contract such sum of sums as will secure the payment of the taxes levied and assessed upon such property until such taxes are paid by such contractor, or are authorized paid by him from the sums so withheld, provided the collector of taxes or other person responsible for the collection of the taxes notifies the treasurer of the state or political subdivision that such taxes have been assessed but are unpaid. If the taxes so assessed are not paid by Dec. 1 of the year of assessment the treasurer, upon notice from the collector of taxes, shall pay over the same to the collector and take his receipt therefor. (RSA 80:7).

Subcontractors’ Taxes.

Whenever a person, firm or corporation enters into a contract or agreement with state or any political subdivision thereof and such contractor employs a subcontractor to perform any of work contemplated by such contract or agreement, it must be a stated term or condition of such contract, that said contractor will be liable for payment of any taxes assessed in name of and upon property of subcontractor, used by said subcontractor in performance of said subcontract if assessed while said contract is being performed, to extent of any sum or sums that may be due from contractor to subcontractor at time of or after contractor has been notified by collector of taxes in writing that payment of said taxes has been demanded of said subcontractor but said subcontractor has failed, neglected or refused to pay same. Said contractor may retain from contract price, amount for which he is liable hereunder. Amount of taxes for which said contractor may be liable hereunder may be withheld or retained from contract price under provisions for Contractors’ Taxes above. (RSA 80:7-a).

User’s Taxes.

Whenever a person, firm or corporation enters into a contract or agreement with state or any political subdivision thereof and such contractor has in his possession and uses any taxable property owned by another upon job to be performed under contract or agreement, it must be a stated term or condition of such contract that contractor having such property in his possession will be liable for amount of taxes assessed against such property in name of owner of such property while same is in possession of such contract to extent of amount of any sum or sums of money that may be due from said contractor to owner of such property for rental or hire thereof at time of or after collector of taxes has notified said contractor in writing that he has made demand upon owner of such property for payment of taxes assessed upon said property but that owner of such property has failed, neglected or refused to pay said taxes. Said contractor may retain from sums to be paid for use of such property amount for which he is liable hereunder. Amount of taxes for which said contractor may be liable hereunder may be withheld or retained from contract price under provisions for Contractors' Taxes above. (RSA 80:7-b).

Exemption from Attachment.

Sums so withheld by treasurer of state or any political subdivision thereof upon notice from collector of taxes under provisions for Contractors', Subcontractors' and Users' Taxes shall be exempt from attachment, garnishment and trustee process by any person except in an action or suit brought by collector of taxes to collect such taxes. (RSA 80:7-c).

Tax liens continue until one year from Oct. 1 following assessment. All such liens shall have priority over all other liens. (RSA 80:19). Liens by Dept. of Revenue are valid for six years and if not paid by end of six years, Dept. can renew lien for another six years. (RSA 21-J:28-c).

Tax Sales—Personal Property.

Collector may distrain the goods, chattels, personal estate, property interest, right or credit of any person or corporation neglecting to pay taxes. (RSA 80:8). Collector must keep personal property distrained for four days at cost of owner. If tax, costs and charges are not then paid, he must post, in two or more public places in town where sale is to be, 24 hours before time of sale, notice of place, day and hour of sale, with particular description of property to be sold; and at time and place appointed, which must be in town where distress is made, between 10 A. M. and 6 P. M. and within 48 hours after expiration of said four days, he must sell same at auction. (RSA 80:10). Owner is entitled to account in writing. (RSA 80:11).

Tax Sales—Real Property.

That portion of common and undivided interest in real estate of any delinquent taxpayer necessary to pay delinquent taxes plus interest and costs may be sold by collector if taxes are not paid on or before Dec. 1 next after their assessment. (RSA 80:20). Collector must give notice of every sale by posting advertisements thereof in two or more public places in town at least 25 days before sale, exclusive of day of posting and day of sale, in which shall be stated name of owner or of person to whom same was taxed, description of property as recorded by selectmen, amount of tax, interest due thereon, and costs and fees incident to advertising and posting, and place, day and hour of sale. He must also, before posting, but not more than 30 days before posting, send like notice by registered mail to last known post-office address of owner or person against whom tax was assessed (RSA 80:21) and within 15 days thereafter deliver or forward by registered mail to register of deeds for county in which real estate is situated, copy of notice, with affidavit that it was so posted and mailed (RSA 80:22). Sale must be at auction, in some public place in town or place where land is situated, between 10 A. M. and 6 P. M., and must be of so much of property as will pay taxes and incidental charges. Sale may be adjourned from day to day, not exceeding three days, by proclamation made at place of sale within hours aforesaid. (RSA 80:24). When such sale is of less than whole estate, collector shall sell only undivided interest in property and no portion thereof shall be sold in severalty by metes and bounds. (RSA 80:24). Any town or county or state may purchase at such sale. (RSA 80:26). Within 30 days after sale, tax collector must deliver or forward by registered mail to register of deeds for county in which real estate is situated detailed statement of particulars of sale. (RSA 80:27).

Notice of Sale to Mortgagees.

Within 45 days from date of sale, purchaser must notify all persons holding mortgages upon such property as recorded in office of registry of deeds. Such notice must give date of tax sale, name of delinquent taxpayer, total amount for which real estate was sold, and amount of costs for notifying mortgagee. Tax collector shall send similar notice to any mortgagee within 30 days of time of payment of any subsequent tax thereon by purchaser. Copy of notice must be given to each mortgagee in hand, left at his usual place of abode or sent by registered mail to his last known address. Failure to give this notice voids sale of encumbered real estate as against mortgagee not receiving notice. (RSA 80:28, 29).

Notice to Commissioner of Health and Human Services is required of all tax sales of real estate upon which there is lien for old age assistance recorded in registry of deeds. (RSA 80:31).

Release of Share of Part Owner.

If the share of a part owner of taxable real estate has been definitely determined and recorded in the annual inventory and in warrant book as committed to collector, part owner may pay taxes on his share or interest in property and only residue may be sold. (RSA 80:35).

Tax Deed.

If land is not redeemed (see subhead Redemption, infra) within two years after sale, tax collector must execute a deed to the purchaser except where purchaser is municipality which has notified tax collector it will not accept deed due to potential environmental liability to owner of property. (RSA 80:38). At least 30 days prior to executing deed, tax collector must notify current owner of impending deeding. (RSA 80:38-a). During two-year period, municipality cannot convey to any person tax lien upon real estate acquired by it at tax collector’s sale. (RSA 80:42). Authority to transfer or to sell shall continue for one year from date of town meeting or action by city council or, if warrant article or vote specifically provides, may continue indefinitely. (RSA 80:42). Tax collector’s deed is incontestable after ten years from date of record. (RSA 80:39).

Redemption.

Any person with legal interest in land sold may redeem same by paying or tendering to collector, or in his absence at his usual place of abode, at any time before deed is given by collector (see subhead Tax Sales—Real Property, catchline Tax Deed, supra), amount for which land was sold and cost of notifying mortgagees, if any, with 18% interest on whole amount from time of sale, together with redemption costs. (RSA 80:32). Partial payments in sum of $5 or multiples thereof may be made. (RSA 80:33-a).

A part owner of an interest in land separately assessed to him may redeem his interest in the land by paying his assessed portion of the taxes, accrued interests and costs incident to advertisement and sale of the real estate. (RSA 80:35).

Optional Tax Lien Procedure.

Municipality may adopt optional tax lien procedure. (RSA 80:59-87). Such tax lien shall have priority over all other liens. (RSA 80:59).

Collection.

Commissioner of Revenue Administration has general supervision over all tax collectors in performance of their duties. (RSA 41:39). Any town which has a town manager may vote to transfer the office of collector of taxes to that of town manager. (RSA 37:16).

Penalties.

General Property Taxes.

Interest at 12% per annum is charged upon all taxes except resident taxes not paid on or before Dec. 1 after their assessment or 30 days from mailing of tax bill, whichever is later. (RSA 76:13).

Resident Tax.

Penalty of $1 if tax not paid by Dec. 1 following assessment. (RSA 76:13-a).

Upon neglect or refusal to pay taxes assessed, tax collector may distrain goods or chattels, personal estate, property interest, right, or credit of taxpayer. (RSA 80:8).

Legacy and Succession Tax (Inheritance Tax).

RSA 86, chapter on Taxation of Legacies and Successions repealed.

Bank Tax.

Repealed, effective July 1, 1993.

Business Profits Tax.

Repealed.

Gasoline Tax.

See RSA 260:32 et seq.

Refined Petroleum Products Tax.

Late payment charge of 10% of defaulted payment plus 1% per month or fraction thereof until paid. (RSA 78-C:4).

Timber Tax.

Unpaid tax bears interest at 18% from due date. (RSA 79:4-a).

22.02 ALCOHOL, BEVERAGES AND TOBACCO TAXES:

Tobacco Tax.

See c. 78.

22.03 BUSINESS TAXES:

Business Profits Tax.

Tax at rate of 8.5% is imposed upon taxable business profits of every business organization. (RSA 77-A:2).

Business organizations include any enterprise which is organized for gain or profit and which carries on business activities within state, except such enterprises as are expressly made exempt from income taxation under U.S. Internal Revenue Code (1954) and except such enterprises state taxation of which is limited by U.S. Code RSA 12:548, as am'd.

Taxable business profits mean gross business profits adjusted by additions and deductions provided under law (RSA 77-A:4) and then adjusted by appropriate method of apportionment (RSA 77-A:3).

Gross business profits are defined in relation to type of business enterprise. (RSA 77-A:1, III).

Taxable period is same as that used by taxpayer for U.S. income tax purposes. (RSA

77-A:1, V).

Allocations.

Certain business organizations which derive gross business profits from business activity both within and without state are permitted to apportion their gross business profits, according to formula set forth in detail in statute. (RSA 77-A:3).

Returns must be filed by every business organization having gross business income in excess of $50,000 on or before 15th day of third month following expiration of taxpayer's taxable period in case of corporations and fourth month of noncorporate taxpayers. At same time, declaration of estimated taxable business profits and tax for its subsequent taxable period must be filed. (RSA 77-A:6).

Payments.

25% of estimated business profits tax is due and payable on 15th day of fourth month of subsequent taxable year; 25% is due on 15th day of sixth month; 25% is due on 15th day of ninth month; 25% is due on 15th day of 12th month. (RSA 77-A:7).

If taxpayer is exempted from filing declaration, tax, if any, is due and payable at time return is filed.

Business Enterprise Tax.

Tax rate of ¾ of 1% is imposed upon taxable enterprise value tax base of every business enterprise. (RSA 77-E:2).

Business enterprise means any profit or nonprofit enterprise or organization engaged in or carrying on any business activity within state, except such enterprises as are exempt from income taxation under § 501(c)(3) of the U.S. Internal Revenue Code, to extent such enterprise does not engage in any business activity constituting unrelated business activity as defined in § 513 of U.S. Internal Revenue Code. (RSA 77-E:1, III).

Gross business receipts means all income for federal income tax purposes from whatever source derived in conduct of business activity. (RSA 77-E:1, IX).

Taxable enterprise value tax base means sum of all compensation paid or accrued, interest paid or accrued, and dividends paid by business enterprise adjusted by appropriate method of apportionment. (RSA 77-E:4, I and 4, XV).

Taxable period means calendar or fiscal year, or fractional part of year, which business enterprise uses for federal income tax purposes, or if not required to file federal income tax return, calendar or fiscal year adopted for financial purposes. (RSA 77-E:1, XVI).

Apportionment.

Certain business enterprises which engage in or carry on business activities which are taxable both within and without this state are permitted to apportion their enterprise value tax according to formula set forth in detail in statute. (RSA 77-E:4).

Returns.

Every business enterprise having gross business receipts in excess of $100,000 during taxable period or enterprise tax value base of which is greater than $50,000 shall, on or before 15th day of third month in case of corporations and on or before 15th day of fourth month in case of all other business enterprises following expiration of taxable period, file return with commissioner together with declaration of estimated business enterprise tax for subsequent taxable period unless less than $200. (RSA 77-E:5).

Payment is due with return. (RSA 77-E:6).

Credit Against Business Profits Tax.

Business enterprise liable for taxes under both this statute and Business Profits Tax statute is entitled to credit against business profits tax as set forth in statute. (cc. 77-E:13; 77-A:5, X).

Insurance Company Taxes.

See category 16 Insurance, topic 16.01 Insurance Companies.

Medicaid Enhancement Tax.

See c. 84-A. Rate set by Legislature each biennium.

22.04 [RESERVED]

22.05 EMPLOYMENT TAXES:

Unemployment compensation tax, in the guise of "contributions," is imposed by c. 282-A.

Contributions are exacted from: (1) Every employing unit which, in each of 20 weeks (whether or not consecutive) during the current or preceding calendar year, has or had in employment one or more individuals, irrespective of whether same individuals are or were employed in each day; (2) every other employing unit subject to tax levied by Federal Unemployment Tax Act as amended. (c. 282-A:8).

Rate is not less than 2.7% except for certain merit rates. (RSA 282-A:69). Tax is imposed on wages paid for employment during calendar year, not to exceed $8,000 paid to individual in calendar year. (RSA 282-A:69, I).

Contributions are payable to a special fund in the state treasury known as the unemployment compensation and employment service administration fund, in accordance with such regulations as may be prescribed by Commissioner of department of employment security. (RSA 282-A:138).

22.06 [RESERVED]

22.07 ESTATE TAX:

Estate tax is imposed upon transfer of all estates which are subject to estate tax under provisions of United States Internal Revenue Code and amendments thereto where decedent at time of his death was domiciled in this state. Amount of New Hampshire estate tax shall be equal to extent, if any, of excess of credit allowable under said United States internal revenue code over aggregate amount of all estate, inheritance, transfer, legacy and succession taxes paid to any state or territory or District of Columbia in respect to any property in estate of said decedent, provided that such estate tax hereby imposed shall in no case exceed extent to which its payment will effect saving or diminution in amount of United States estate tax payable by or out of estate of decedent had this chapter not been enacted. Furthermore, estate tax is imposed upon transfer of real property and tangible personal property in this state of every person who at time of his death was resident of U.S. but not domiciled in this state, and upon transfer of all property, real and personal, within this state, of every person who at time of his death was not resident of U.S., amount of which shall be sum equal to such proportion of amount by which credit allowable under applicable U.S. revenue act for estate, transfer, legacy, succession and inheritance taxes actually paid to several states exceeds amount actually paid for such taxes exclusive of estate taxes based on difference between such credit and other estate, transfer, legacy, succession and inheritance taxes, as value of property in this state bears to value of entire estate, subject to estate tax under provisions of U.S. Internal Revenue Code. Amount of this tax will automatically be changed with any change in federal estate tax law with respect to credit allowed for inheritance, etc., taxes paid to states and territories. (RSA 87:1).

Apportionment.

Uniform Estate Tax Apportionment Act is in effect. (c. 88-A).

Valuation Date.

Date of death or alternate federal date, whichever is used by estate.

Interstate Co-operation.

Provision for settling taxes in case of disputes as to domicile (see topic 22.12 Inheritance Tax, subhead Disputes as to Domicile) applies to estate taxes.

Disputes as to Domicile.

In case of dispute as to domicile of decedent, Department of Revenue Administration may enter into written agreement with taxing authorities of other state or states claiming that decedent was domiciled therein and with executor or administrator, fixing amount which shall be paid to each state in full of inheritance, legacy and succession taxes thereof. This applies only if all states involved have substantially similar laws. (RSA 86:71; RSA 90:3).

22.08 GASOLINE AND SPECIAL FUELS TAXES:

Gasoline Tax.

Imposed by RSA 260:32.

Refined Petroleum Products Tax.

1/10 of 1% of fair market value per barrel at refinery site. (c. 78-C).

22.09 GIFT TAX:

None.

22.10 [RESERVED]

22.11 INCOME TAX:

None. Commuters Income Tax (c. 77-B) declared unconstitutional (95 S.Ct. 1191).

22.12 INHERITANCE TAX:

Repeal effective Jan. 1, 2003.

22.13 LOCAL AND MUNICIPAL TAXES:

Resident tax of $10 on every resident over 18 and under 65 except paupers, insane persons, and surviving spouses of certain veterans. (RSA 72:1).

Time of Assessment.

Every person is taxed in town where he resides on Apr. 1, for his resident tax and estate. (RSA 73:1).

22.13A MINES, MINERALS AND FISHERIES TAXES:

Yield tax on timber at rate of 10% of stumpage value at time of cutting is assessed against owner of growing wood and timber within 30 days of filing by owner of report of cutting with assessing officials. Tax is payable within 30 days of time bill is mailed. (RSA 79:3). Owner intending to cut any wood or timber shall give written notice of his intention prior to such cutting to assessing officials. (RSA 79:10). Assessing officials or Commissioner of Revenue Administration may require an owner to insure payment of tax. (RSA 79:3-a, 10-a).

22.1422.15 [RESERVED]

22.16 PROPERTY TAXES:

General Property Tax.

All nonexempt real estate except growing wood and timber is liable to taxation. (RSA 72:6; RSA 79:2). Manufactured housing (horse trailers, travel trailers and mobile homes) is taxable as real estate. (RSA 72:7-a). Radio antennas, towers, and related structures used exclusively in operation of amateur communications station under F.C.C. amateur radio service rules and regulations are not taxable as real estate. (RSA 72:7-c). Following personal estate is taxable: Certain boats. (c. 72-A).

Taxes in Unincorporated Places.

Commissioners of every county must annually assess real estate in each unincorporated or unorganized place to owner or claimant thereof. (RSA 81:1).

Exemptions which are applicable to real estate include value of improvements made to residential real estate for purpose of assisting physically handicapped person who resides on property (RSA 72:37-a), public cemeteries and all property held in trust for benefit of public burial places (RSA 72:22). Following real estate and personal property is exempt from taxation: Lands and buildings thereon and personal property owned by state, cities, towns, school districts and village districts unless used or occupied by other than state or city, town, school district or village district under lease or agreement; lands, buildings and personal properties owned and used by any county for governmental purposes, including hospitals, court houses, registry buildings, and county correctional facilities; however, county farms and their lands, buildings and taxable personal property shall be taxed; houses of public worship, parish houses, church parsonages occupied by their pastors, convents, monasteries, buildings and lands appertaining to them owned, used, and occupied directly for religious training or for other religious purposes by any regularly recognized and constituted denomination, creed or sect, organized or incorporated in this state and personal property used by them for which they are established; buildings and structures of schools, seminaries of learning, colleges, academies and universities organized or incorporated legally doing business in this state and owned, used and occupied directly by them for purposes for which they are established, provided none of income or profits are divided among members or stockholders or used or appropriated for any other purpose than purpose for which they are organized or established; provided further that if value of dormitories, dining rooms and kitchens shall exceed $150,000, value thereof in excess of said sum is taxable. Town at annual town meeting or governing body of city may vote to increase amount of exemption upon dormitories, dining rooms and kitchens. Also exempt are buildings, land and personal property owned by charitable organizations and societies organized, incorporated or legally doing business in this state owned, used, and occupied by them directly for purposes for which they are established. (RSA 72:23). Every charitable organization or society, except those religious and educational organizations and societies whose real estate is exempt shall annually before June 1 file with municipality in which property is located financial statement. (RSA 72:23). Real estate and personal property owned, occupied and used directly by New Hampshire Veterans Association, United Spanish War Veterans, Veterans of Foreign Wars, American Legion, Disabled American Veterans, Sons of Union Veterans of the Civil War, Veterans of World War I Incorporated and any other veterans organization incorporated by Act of Congress or of its departments or local chapters or posts is exempt from taxation. (RSA 72:23-a). Also exempt is real estate and personal property belonging to American National Red Cross (RSA 72:23-b); real estate and personal property owned by New Hampshire Congregational-Christian Conference, or a subsidiary corporation thereof, occupied and used by conference or subsidiary corporation to provide community housing for elderly persons, if none of income of profits of community housing is used for any purpose other than purpose for which housing is established. Elderly person is one who is 62 or more years of age. Age of head of family determines eligibility of family unit in community housing. On or before Dec. 1 of each year, owner of community housing pays to town or city in which property is situated, in lieu of taxes, sum representing 10% of shelter rent received by owner during preceding calendar year. Board of tax and land appeals may abate all or portion of payment in lieu of taxes for cause shown. Owner on or before June 1 of each year files with municipality in which property is located statement of financial condition for preceding year. (RSA 72:23-d). Real estate and personal property of charitable, nonprofit community housing and community health care facilities for elderly and disabled persons, if none of income or profits is used for any purpose other than community health care, is exempt from taxation. Elderly person is one who is 62 or more years of age. Age of head of family determines eligibility of family unit in project. (RSA 72:23-K).

Standard veteran’s tax credit shall be $50. (RSA 72:28, I). Optional veteran’s tax credit, upon adoption by city or town pursuant to RSA RSA 72:27-a, shall be amount from $51 up to $500. (RSA 72:28, II). Optional veteran’s tax credit shall replace standard veteran’s tax credit in its entirety and not be in addition thereto. (RSA 72:28, II). Either standard veteran’s tax credit or optional veteran’s tax credit shall be subtracted each year from property tax on veteran’s residential property. (RSA 72:28, III). However, surviving spouse of resident who suffered service connected death may have amount subtracted from property tax on any real property in same municipality where surviving spouse is resident. (RSA 72:28, III). Every New Hampshire resident who served not less than 90 days in armed forces of U.S. in Spanish War, Philippine Insurrection, Boxer Rebellion, World War I, World War II, Korean Conflict, Vietnam Conflict, or any other war or armed conflict since May 8, 1975 and in which resident earned armed forces expeditionary medal or theater of operations service medal qualifies for either standard or optional veteran’s tax credit. (RSA 72:28, IV and V). Every New Hampshire resident who was terminated from armed forces because of service connected disability, or surviving spouse of such resident, or surviving spouse of any resident who suffered service connected death also qualifies for standard or optional veteran’s tax credit. (RSA 72:28, IV). If any person or persons entitled to credit shall own fractional interest in residential real estate, each such person shall be granted tax credit in proportion to his interest therein with other persons so entitled, but in no case shall total tax credit exceed tax credit allowed under RSA 72:28, I or II except as provided for by exemption for husband and wife below. (RSA 72:30). If any person entitled to service credit as specified above shall be totally and permanently disabled from service connection and satisfactory proof of such service connection is furnished to assessors, or if such person be double amputee or paraplegic as result of service connection, he or his wife or surviving spouse shall receive standard credit from taxation on real or personal property to amount of $700 of property taxes on residential property. (RSA 72:35). Optional tax credit for service connected total disability, upon adoption by city or town, shall be amount from $701 to $2,000. Optional tax credit for service connected total disability replaces standard tax credit. (RSA 72:35, I-a).

Person who is discharged from military service of U.S. under conditions other than dishonorable or officer honorably separated from military service and who is totally and permanently disabled from service connection and satisfactory proof of such service connection is furnished to assessors and who is a double amputee or paraplegic as result of service connection and who owns a specially adapted homestead which has been acquired with assistance of Veterans Administration or which has been acquired using proceeds from sale of any previous homestead which was acquired with assistance of Veterans Administration, person or person's surviving spouse is exempt from all taxation on said homestead. (RSA 72:36-a). Husband and wife, each qualified for exemption, shall each be granted tax credit upon their residential real estate as provided under RSA 72:28, I or II.

Every inhabitant who is legally blind, deaf, or severely hearing impaired, is exempt each year on assessed value of his or her residential real estate to value of $15,000 and city or town may exempt any amount it may determine is appropriate to address significant increases in property values. (RSA 72:37, 38-b).

Town, by vote of a majority of those present and voting at any regular town meeting, acting under an article duly incorporated in warrant for said meeting, and a city, by vote of governing body thereof, may exempt owner of privately owned air navigation facility available for public use without charge, who holds as of Apr. 1 of any year a certificate for such facility from department of transportation, division of aeronautics, that facility is necessary for maintenance of effective airway system, from taxation of such facility for each such year and owners of certain private airports may seek state reimbursement grant for certain property taxes paid. (RSA 72:38).

Residential real estate, as defined by RSA 72:29, II, to assessed value of $5,000 is exempt for property tax purposes if it is: (1) Owned by resident 68 years of age or over; or (2) owned by resident jointly or in common with his spouse, either of whom is 68 years of age or over; or (3) owned by resident 68 years of age or over jointly or in common with person not his spouse; (4) owned by resident whose spouse is 68 years of age or over and who has been living with his spouse as man and wife for at least five years in house for which exemption is requested; or (5) owned by resident whose spouse is 68 years of age or over and who has been living with his spouse as man and wife for at least ten years in this state. (RSA 72:39).

If any entitled person or persons shall own a fractional interest in residential real estate, each such entitled person shall be granted exemption in proportion to his interest therein with other persons so entitled, but in no case shall total exemption to all persons so entitled exceed amount provided in RSA 72:39-b. (RSA 72:41).

In addition to other conditions hereunder no exemption shall be allowed under RSA RSA 72:39-b where resident applying therefor has received transfer of real estate from person under age of 65 related to him by blood or marriage, within preceding five years. (RSA 72:40-a). Applications for exemption or tax credits claimed under c. 72 shall be filed by Mar. 1 following date of notice of tax under RSA 72:1-d. (RSA 72:33).

City or town by majority vote can provide for exemption for solar energy systems, for purpose of heating, cooling or providing electricity, wind-powered energy systems or centralized wood heating systems (RSA 72:61-72), for totally and permanently disabled persons as defined under federal Social Security Act (RSA 72:37-b), or for elderly (RSA 72:43-e and 43-f).

No exemptions for members of Armed Forces except as above stated.

Certain ski area equipment is exempt from taxation as real property. (RSA 72:12-c).

Time of Assessment.

Every person is taxed in the town where he resides on Apr. 1, for his resident tax and estate. (RSA 73:1).

Mode of Assessment.

Selectmen of each town shall annually make list of all polls and take inventory of all taxable estate in such town on Apr. 1. (RSA 74:1). Every person or corporation must fill out inventory of all of his or its taxable property, make oath to same, and mail it to selectmen or assessors on or before Apr. 15 (RSA 74:4-7) or before June 1 if delay is due to accident, mistake or misfortune (RSA 74:8). Failure to file inventory results in additional tax of 1% of property tax, but not less than $10 nor more than $50. (RSA 74:7-a). On return of inventory, selectmen appraise property at its full and true value in money (RSA 75:1) and assess tax according to such appraisal (RSA 74:11; c. 76). Any person who refuses to consent to selectmen or appraising officials to enter property for purpose of completing inventory or appraising property shall lose right to appeal any matter pertaining to property tax or any exemptions to which person may be entitled. (RSA 74:17). Owner of residence located in industrial or commercial zone may apply for special assessment based upon value at its current use as residence. (RSA 75:11). Open space land, at request of owner, may be taxed according to its current use, provided that if use changes there shall be land use charge tax of 10% of full and true value of land. (c. 78-A). Distinct interests in same real estate may, on request, be appraised and assessed to owners thereof separately (RSA 75:2), except that when one person erects building on land of another, land and building may be taxed together as real estate to owner of land if one of selectmen gives proper statutory notice to said owner (RSA 75:3). List of all property taxes assessed is made by selectmen under their own hands, with warrant under their hands and seal, directed to collector of such town, requiring him to collect same. (RSA 76:10). List of taxes assessed on real estate must contain: Value of property (RSA 75:4); name of owner, if known; number of lot and range, if lotted, otherwise such description as land may be readily known by; number of acres, if known; amount of taxes assessed thereon. (RSA 76:7).

Jeopardy Assessment.

Whenever it appears to the selectmen or assessors that the assessment of taxes against any property be made as soon as possible in order to insure payment of the taxes and to protect the public interest, they may, on or after Apr. 1, make a reasonable jeopardy assessment of the taxes against the owner or person to whom such property is assessed and commit a warrant to the collector for the same, and the collector, after making written demand for such taxes, may immediately use any of the remedies provided by law to collect the taxes assessed to him in such warrant. Provision is made for refunding an overpayment and collecting any under-assessment. (RSA 76:10-a).

Personal Property on Land of Another.

Whenever any person leaves upon the real estate of another person, with such person’s consent, any taxable personal property, the tax upon the same may be assessed to the owner of the land if not paid when due by owner of personal property, provided selectman or assessor, before or at time of taking inventory, gives notice in writing to such landowner that such personal property is to be taxed to him. These provisions do not apply to manufactured housing. Owner of land has lien upon such personal property for payment of tax. (RSA 73:16-a).

Payment and Collection.

See topic 22.01 Administration, subhead Penalties, catchline General Property Taxes. In addition, real estate is liable for all taxes against owner thereof. (RSA 80:19). Homeowner who is 65 years of age or older or who is eligible for benefits for totally or permanently disabled under federal social security act and who has owned his homestead for at least five years may give tax lien in lieu of real estate taxes to city or town for up to 85% of equity value of his real estate; upon death of owner, lien plus interest at 5% shall become due. (RSA 72:38-a).

Environmental Investigation.

Prior to or in connection with tax lien procedure or tax sale, town, county, or state may enter upon property to conduct environmental site assessment or audit, provided 30 days notice is given to owner or consent is obtained. (RSA 80:19-a).

Redemption.

See topic 22.01 Administration, subhead Redemption.

Exemption from Attachment.

See topic 22.01 Administration, subhead Exemption from Attachment.

Tax Liens.

See topic 22.01 Administration, subhead Tax Liens.

Nuclear Station Property Tax.

See c. 83-D.

Real Estate Conveyance Tax.

See category 21 Property, topic 21.06 Deeds, subhead Taxes.

Tax on Intangibles.

Tax is imposed on income received from intangibles, including dividends (except stock dividends and dividends declared to be return of capital and other exclusions under RSA 77:4-a, 4-b, 4-c, 4-d), and interest from bonds, notes, money at interest and debts due taxpayer (except interest on deposits in savings banks and similar institutions and on notes or bonds of any political subdivision of this state, interest on notes or bonds of this state, and interest on College Tuition Savings Plans qualifying under c. 195-G). Income up to $1,200 is exempt. Rate: 5%. Not applicable to corporations. (RSA 77:1-4).

The estates of deceased persons who last dwelt in this state are subject to this tax upon all taxable income received by such persons during their lifetime which has not already been taxed. The income received by such estates during administration is taxable to the estate, except such proportion thereof as equals the proportion of the estate to be distributed to nontaxable persons or organizations. (RSA 77:9).

Annual returns must be made to Commissioner of Revenue Administration on forms prescribed by it. Declaration of estimated taxes must be given if taxes exceed $200. (RSA 77:18, 18a). Tax is payable to Commissioner of Revenue Administration. (RSA 77:23).

22.17 SALES AND USE TAXES:

Sales Tax.

Tax at rate of 8% on meals, rooms and rental of motor vehicles. (c. 78-A).

Use Tax.

None.

22.18 STAMP AND SEAL TAXES:

Stamp Tax.

None, except on tobacco.

22.18A TAX LIENS:

Revised Uniform Federal Tax Lien Registration Act adopted. (c. 454-B).

22.19 [RESERVED]

22.20 UTILITIES TAX:

Electricity Consumption Tax.

Every consumer is liable for a per kilowatt hour tax on consumption of electricity. Providers shall collect such taxes unless consumer seeks state permission to pay tax directly to state.

Gas and Electric Utilities Tax.

(RSA 83-C:2, 4). Repealed, 1997.

Communications Services Tax.

See c. 82-A.

23 TRANSPORTATION

23.01 MOTOR VEHICLES:

Department of Safety, Director of Motor Vehicles, Hazen Drive, Concord, N.H. 03301 has general supervision. (c. 260).

Vehicle License.

Generally required. (RSA 261:40). Reregistration required annually (RSA 261:62) or upon transfer of ownership (RSA 261:66).

Driver's License.

Generally required. (RSA 263:1). Expires in five years. (RSA 263:10). Age required for driver's license 18 unless applicant 16 or older has successfully completed driver education course. (RSA 263:19). School bus driver must be 18 or older. (RSA 263:24). Applicant for commercial license must be 18 or older. (RSA 263:27).

Titles.

Certificate of title required. Issued by Division of Motor Vehicles when change in registration required by sale. (RSA 261:1).

Sales.

Transfer of title accomplished by execution and warranty of title to transferee on certificate. Certificate must then be mailed or delivered to transferee or Division of Motor Vehicles. (RSA 261:14). Transferee must make application for new certificate. (RSA 261:1). Regulations generally covering consumer motor vehicle warranties are set forth in RSA 357-D:1. Defects and any corrected damage exceeding 6% of manufacturer's suggested price on any new motor vehicle must be disclosed by manufacturer to dealer and by dealer to purchaser prior to delivery. (RSA 357-C:5, III [d]).

Liens.

Security interest perfected at time of creation if certificate of title so indicating is delivered to Division of Motor Vehicles within 20 days thereafter. (RSA 261:24). Garageman's lien available to one who repairs or stores motor vehicle. (c. 450).

Identification Marks.

Willful alteration of any factory, serial, or other vehicle identification number or mark on or from any motor vehicle is misdemeanor. (RSA 262:9).

Operation Prohibited.

Persons without valid driver's license may not operate motor vehicle. (RSA 263:1). No physical defect of applicant for driver's license shall debar him from receiving license unless it can be shown by common experience that such defect incapacitates him from safely driving motor vehicle. (RSA 263:6).

Size and Weight Limits.

Regulated by RSA 266:9-26.

Emissions Certificate Required.

(RSA 261:72-a). Repealed.

Equipment Required.

Regulated by RSA 266:27-84.

Lights Required.

Regulated by RSA 266:31-46.

Prohibition of Text-Messaging While Operating Vehicle.

Person operating moving motor vehicle who writes text message or uses two hands to type on or operate electronic or telecommunications device, is guilty of violation. Person does not write text message when he or she reads, selects, or enters phone number or name in wireless communications device for purpose of making phone call. (RSA 265:105-a).

Seatbelts and Child Restraints.

No person shall carry any person under 18 years of age in motor vehicle without seatbelts or child restraints. If child is less than six years of age and is less than 55 inches in height, child restraint must comply with 49 CFR 571.213. Nonuse shall not be evidence of contributory negligence. (RSA 265:107-a I and II).

Inspection.

Required once a year for all motor vehicles excepting OHRV, snow traveling vehicles and mopeds. Antique motor vehicles are inspected in Apr. (RSA 266:1). Motorcycles and recreational vehicles shall be inspected annually by July 1.

Traffic Regulations.

Regulated by c. 265.

Accidents.

Driver of vehicle involved in accident involving death, bodily injury or property damage must stop and give driver of any other vehicle involved, person injured or owner of property damaged, his name, address, number of driver's license, registration number of vehicle and name and address of each occupant of his vehicle. If injury, death or property damage in excess of $1,000 results, driver must report facts to Division of Motor Vehicles within 15 days thereafter. (RSA 264:25).

Liability of Owner.

Common law rules of agency not extended by statute. Family car doctrine not recognized.

Guests.

No guest statute.

Proof of Financial Responsibility.

Required upon conviction of driving under influence of intoxicating liquor or drugs, failing to stop and report accident, homicide or assault arising from operation of motor vehicle, second speeding offense and second offense reckless operation. (RSA 264:2). Required within 60 days after receipt of report of accident if driver deemed responsible by Division of Motor Vehicles does not have liability insurance policy with limits of $25,000 or more for bodily injury to one person, $50,000 or more for bodily injury to two or more persons or $25,000 for property damage. If no insurance amount of proof up to such amounts is required. (RSA 264:8, 20). Uninsured driver must maintain proof of financial responsibility in future. Proof of financial responsibility must be furnished to Division of Motor Vehicles by filing certificate of insurance company or surety company, depositing money or securities or, in case of corporation, by satisfying Director of Motor Vehicles of financial ability. (RSA 264:21).

Insurance.

No requirement for compulsory insurance. But see subhead Proof of Financial Responsibility, supra.

No-Fault Insurance.

Not adopted.

Foreign Vehicles.

May be operated by nonresident to extent that state of registration would allow N. H. resident. (RSA 261:44). If state of registration would impose restrictions, taxes, penalties, etc. on N. H. resident, in excess of those imposed by N. H., such shall be imposed on nonresident. (RSA 261:43). Bus registration tax proration and reciprocity agreement is in effect. (RSA 261:49-51). Nonresident who has his regular place of abode or business in this state for more than six months in any year is deemed resident. (RSA 259:67). Nonresident who becomes resident has 60 days thereafter in which to register motor vehicle (RSA 261:45) and to obtain driver's license (RSA 263:35).

Nonresident Operators.

See subhead Foreign Vehicles, supra.

Action Against Nonresident.

Service of process made on Director of Motor Vehicles (RSA 264:13) or Secretary of

State (RSA 510:4).

Direct Actions.

Not allowed against liability insurer by injured person.

Motor Vehicle Carriers.

Common and contract carriers of passengers are governed by the New Hampshire Motor Carrier Act. (c. 376).

All common and contract carriers of passengers, except those expressly exempted (see infra), are subject to jurisdiction of Public Service Commission and must hold certificates issued by the Commission. (RSA 376:4, 7). The Commission has jurisdiction over rates or fares charged by common carriers (RSA 376:14), minimum charges and contracts of contract carriers (RSA 376:18) and practices which may result in discriminatory or preferential charges or unfair competition.

The Commission has authority to establish requirements and regulations with respect to reasonable and adequate service, transportation of baggage and express, uniform system of accounts, records and reports, preservation of records and safety of operation and equipment. (RSA 376:21).

All carriers holding certificates must annually register each vehicle operated under the provisions of the certificates. (RSA 376:24, 25). Carriers must file with the Commission annual reports furnishing such information as Commission deems necessary. (RSA 376:20).

Carrier must keep in force an insurance policy or indemnity bond in such amount as Commission requires, providing for payment of any judgments recovered against the carrier for death of or bodily injury to passengers. (RSA 376:13).

The following are exempt from the provisions of the Motor Carrier Act: (1) Motor vehicles while employed solely in transporting school children and teachers to and from school; (2) taxicabs having a manufacturer’s rated capacity of not more than seven passengers, unless, after investigation, the commission shall be of the opinion that the service provided is in competition with the schedules of a common carrier by highway or railroad; (3) motor vehicles owned and operated by hotels and used exclusively for transportation of hotel patrons between hotels and local railroad or carrier stations; (4) motor vehicles engaged exclusively in work for any branch of United States government, for any department of the state or for any county, city, town or village; (5) motor vehicles engaged exclusively in delivery of U. S. mail or (6) vans engaged in car-pooling not less than eight people and no more than 15 people to/from work on nonprofit basis. (RSA 376:3).

Intrastate common carriers of property for hire on public highways must obtain certificate of public convenience from Public Utilities Commission; must file schedule of rates and charges with Commission, obtain special number plates and are subject to regulation by Commission generally. (c. 375-B).

Contract carrier operating in competition with common carrier must file with Commission rates, rules or regulations applying to such service, unless property is to be transported for common carrier whose rates are filed. (RSA 375-B:4).

With certain exceptions, carriage of passengers for a consideration in motor vehicle designed or constructed exclusively for transportation of goods, materials or commodities is prohibited. (RSA 265:106, 107).

School buses are regulated by RSA 266:7; RSA 263:24, 29, 29-a.

Taxicabs.

Towns may provide for registration of taxicabs and require insurance or bond for protection of passengers therein. (RSA 31:40).

Motor Vehicle Taxes.

Tax imposed on use of fuel other than gasoline. (RSA 260:52).

Gasoline Tax.

See category 22 Taxation, topic 22.08 Gasoline and Special Fuels Taxes.

23.02 RAILROADS:

See category 3 Business Regulation and Commerce, topic 3.08 Carriers.

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NEW JERSEY LAW DIGEST

—Scope —

Revised for 2010 edition by

SILLS CUMMIS & GROSS P.C., of Newark, Princeton and New York.

(References, unless otherwise indicated, are to the Constitution of 1947; to the New Jersey Statutes, as amended, supplemented and revised, by title, chapter and section number; session laws are cited by year and chapter number; and to Rules Governing the Courts of the State of New Jersey, as amended, as promulgated by the Supreme Court. All references to the county courts shall be deemed to designate the Superior Court. Parallel citations to the Atlantic Reporter begin with 47 N. J. L., 41 N. J. Eq., 10 N. J. Misc.)

Note: This revision includes legislation of 2009 adopted and approved by Governor through C. 86 (July 4, 2009). Legislature meets annually in Jan.

1 INTRODUCTION

1.01 GOVERNMENT AND LEGAL SYSTEM:

The State of New Jersey is a constituent state of the United States of America. For further discussion of the U.S. federal system, see Introduction to the Federal Government of the United States at the beginning of this volume. A great many laws are promulgated by the federal government of the United States and are not reflected in the topics below. See the Introduction to this volume for references to the federal law topics covered.

Like all but one of the United States, New Jersey has a common law legal system, with roots in English common law. For information on the courts and legislature of New Jersey, see category 6 Courts and Legislature.

1.02 [RESERVED]

1.03 HOLIDAYS:

Holidays, in addition to Suns., are Jan. 1; 3d Mon. in Jan.; Feb. 12; 3d Mon. in Feb.; Good Friday; last Mon. in May; 3d Sat. in June; July 4; 1st Mon. in Sept.; 2d Mon. in Oct.; Nov. 11; general election day; 4th Thurs. in Nov.; Dec. 25; any day designated by President or Governor for fast, or prayer or as bank holiday; Sat. after 12 noon. (NJSA 36:1-1).

Sats. are whole holidays for purpose of presentation and protest of negotiable instruments. (NJSA 36:1-1).

Sats. are holidays in state, county and municipal offices. (NJSA 36:1-1.1).

If holiday falls on Sat., preceding Fri. is holiday. (NJSA 36:1-1.2).

If holiday falls on Sun., following Mon. is holiday. (NJSA 36:1-1).

Legality of Transactions.

Business, including banking business, may be transacted on holidays and Suns. (NJSA 36:1-2; NJSA 2C:98-2, repealing NJSA 2A:171-1; NJSA 45:4-26; NJSA 5:12-97). Sun. service or execution of process, writ, warrant, order or judgment valid. (NJSA 2A:15-21.1). Horse racing and parimutuel wagering may be held on Suns. under certain circumstances. (NJSA 5:5-84).

1.04 OFFICE HOURS AND TIME ZONE:

New Jersey is in the Eastern (GMT -05:00) time zone. Office hours are generally from 9 a.m. to 5 p.m.

2 BUSINESS ORGANIZATIONS

2.01 AGENCY:

Common law rules govern.

2.02 ASSOCIATIONS:

Formation.

No legislative provisions exist for formation of unincorporated associations. Such associations derive existence from consensual agreement of members who act by virtue of agency. (12 N. J. 310, 96 A.2d 660). See Tit. 15 as to incorporation, powers, dissolution, etc. of associations not for pecuniary profit.

Rights and Powers.

Unincorporated association not competent to take title to land by deed. (27 N. J. Eq. 157). However, if association in possession under deed recorded prior to Jan. 2, 1964 incorporates under name set forth in deed, conveyance is valid. (NJSA 46:7-7). Association consisting of seven or more persons and having recognized name may sue or be sued in civil action affecting its common property, rights and liabilities (NJSA 2A:64-1) except actions of equitable nature against fraternal, charitable or other organizations not organized for pecuniary profit; execution or other process may issue on judgment, as upon judgment against corporation, upon common property of association (NJSA 2A:64-6); action may also be brought against members individually liable (NJSA 2A:64-5).

Liabilities.

Where judgment entered against association, execution may issue against common property in same manner as on judgment against corporation. (NJSA 2A:64-3). Unsatisfied judgment against association no bar to action against individual members. (NJSA 2A:64-4).

Dissolution.

No legislative provision.

Taxation.

See category 22 Taxation.

Professional Association.

See topic 2.03 Corporations, subhead Professional Corporations.

2.03 CORPORATIONS:

Under constitution (Art. 4, § 7, par. 9) corporations may be created only under general laws. On Jan. 1, 1969, a new Corporation Act became effective in New Jersey to be incorporated in Statutes of New Jersey under Title 14A, and most of provisions of prior Corporation Act were repealed. Title 14A applies to every corporation created under it, reincorporated under it or organized under Title 14, under Corporation Acts of 1896 and 1875 and under any law with respect to which legislature reserved power to amend or repeal and which provided for organization of corporation or corporations for purpose or purposes for which corporation may be organized under Title 14A and other corporations to extent provided in Title 14A or to extent provided in law under which they were created. (NJSA 14A:1-3). Title may be amended or repealed, and corporations to which it applies must be bound thereby. (NJSA 14A:1-5). Title amended in many respects effective Dec. 1, 1988 by L. 1988, c. 94.

General Supervision.

None. (NJSA 14A:7-8.1). Secretary of State supervises certificates and other documents required to be filed in Secretary of State's office. Address: 125 W. State St., P.O. Box 300, Trenton, New Jersey 08625.

Purposes.

Corporations for profit may be organized under Title 14A for any lawful business purpose or purposes except to do in New Jersey any business for which organization is permitted under any other New Jersey statute, unless statute permits organization under Title 14A. (NJSA 14A:2-1). This excludes banks, safe deposit, building and loan, savings and loan, insurance and corporations not for pecuniary profit.

Name.

Corporate name of every domestic corporation and foreign corporation authorized to transact business in New Jersey must contain as part of corporate name "corporation," "company," "incorporated" or abbreviations thereof, or "ltd." or words or abbreviations of like import in other languages, except that foreign corporation not so named must add one of such words or abbreviations at end of name for use in New Jersey. (NJSA 14A:2-2[1][d]). Corporate name must not contain anything indicating or implying that corporation is organized for purpose other than those permitted by certificate of incorporation and must distinguish it on records in office of Secretary of State from: (1) Name of any other for profit or nonprofit domestic corporation or foreign corporation authorized to do business in New Jersey; (2) name of any domestic or foreign limited partnership; or (3) name subject to current name reservation or registration, and must not contain anything, use of which is prohibited or restricted by any other statute of New Jersey unless restrictions are complied with. (NJSA 14A:2-2[1][a]-[c]). No domestic corporation or foreign corporation authorized to do business in New Jersey may use words “blind” or “handicapped” or term, imprint, stamp, label or symbol suggesting such impairments as part of name without approval of Attorney General or designee. (NJSA 14A:2-2.2). Corporate name of any dissolved domestic corporation or nonprofit corporation may not be used until one year after dissolution unless written consent obtained. (NJSA 14A:2-2[4]). Reservation of right to use corporate name made by filing application with Secretary of State to reserve specified corporate name or first name available for corporate use among not more than three names, executed by or on behalf of applicant and containing name and address of applicant. If Secretary of State finds name complies with NJSA 14A:2-2, name is reserved for exclusive use of applicant for 120 days from date of filing of application and certificate of reservation issued. Reservation certificate fee $50 whether single name or up to three names submitted. (NJSA 14A:15-3[1]). Unlimited number of reservations of corporate name for successive 120-day periods permitted. (NJSA 14A:2-3[4]). Reservations may be transferred by filing with Secretary of State notice of transfer executed by or on behalf of applicant and specifying name and address of transferee. (NJSA 14A:2-3[3]). Fee of $25 for transfer of reservation. (NJSA 14A:15-3[2]). Certificate of availability of corporate name issued by Secretary of State. Letter requesting availability of up to three corporate names and $25 fee should be sent to Office of Secretary of State, 820 Bear Tavern Road, West Trenton, New Jersey 08625. No other procedure for requesting availability of corporate name.

Alternate Names.

No domestic or foreign corporation may use name other than actual name in transacting business in New Jersey unless: (1) It also uses its actual name in such way as to avoid deception; (2) it is authorized to transact business in New Jersey using assumed name under NJSA 14A:2-2; or (3) it registers alternate name with Secretary of State. Registration certificate fee $50; renewal fee $25; termination of alternate name fee $75. (NJSA 14A:15-3). No action arising out of act or contract in which fictitious name is used can be maintained until above requirements met. (NJSA 14A:2-2.1[6]).

Term of Corporate Existence.

The period of existence may be either limited or perpetual. (NJSA 14A:3-1[a]). Duration may be changed or, if expired, renewed. (NJSA 14A:9-1).

Incorporators.

One or more individuals or corporations, regardless of citizenship or residence, may incorporate. (NJSA 14A:2-6[1]).

Certificate of Incorporation.

Certificate of incorporation must state: (1) Name; (2) purpose for which organized, it being sufficient to state corporation may engage in any activity within purposes for which corporations may be organized under title; (3) aggregate number of authorized shares; (4) if shares divided into classes or series, designation of each class or series, number of shares, and relative rights, preferences and limitations of shares of each class or series to extent same have been determined; (5) any authority of Board to divide shares into classes or series and to determine or change designation, number of shares, relative rights, preferences, and limitations thereof; (6) any provision consistent with Title 14A or other law for management of corporation or creating or limiting powers of corporation, its directors and shareholders; (7) address of registered office and name of registered agent at such address; (8) number, names and addresses of first board of directors; (9) names and addresses of incorporators; (10) duration if other than perpetual; (11) effective date of certificate if other than upon filing, but not more than 90 days after filing date. (NJSA 14A:2-7).

Filing of Certificate.

Certificate must be filed in office of Secretary of State. (NJSA 14A:2-7[2]).

Incorporation, License and Filing Fees.

Following fees payable to Secretary of State: (1) Filing fees for (a) certificate of incorporation and amendments thereto: original certificate of incorporation $125, certificate of amendment, including any number of amendments $75, certificate of abandonment of one or more amendments $75, certificate of merger or consolidation $75, and certificate of abandonment of merger or consolidation $75, (b) restated certificate of incorporation $75, (c) dissolution of corporation: certificate of dissolution $75, certificate of revocation of dissolution proceedings $75, (d) admission and withdrawal of foreign corporation: application for certificate of authority to transact business in State and certificate of authority $125, application for amended certificate of authority and amended certificate $75; application for withdrawal from New Jersey $75, certificate of change of post office address to which process may be mailed by Secretary of State $25; certificate, order or decree with respect to dissolution of foreign corporation, termination of its existence, or cancellation of its authority $75, (e) registered office and registered agent: certificate of change of address of registered office or change of registered agent, or both $25, certificate of change of address of registered agent, where such certificate effects change in address of registered office of one to 499 corporations or of 500 or more corporations in cases where filing information is not transmitted to Secretary of State in machine readable format agreeable to Division of Commercial Recording, for each corporation named in certificate $25, for filing certificate of change of address of registered agent where such certificate effects change in address of registered office of 500 or more corporations in cases where filing information is transmitted to Secretary of State in machine readable format agreeable to Division of Commercial Recording $5,000 (in addition to imposition of $5,000 fee, Secretary of State may assess additional fee not to exceed administrative costs associated with technical transmission of filing information), and affidavit of resignation of registered agent $25, (f) annual report $50, (g) tax clearance certificate from Director of Division of Taxation $20 (NJSA 14A:15-2); (2) additional filing fees: application to reserve corporate name $50; if application to reserve first name available for corporate use among not more than three specified names $50, notice of transfer of reserved corporate name $25, application by foreign corporation to register its corporate name $50, application by foreign corporation to renew registration of corporate name $50, statement of cancellation of shares $75, statement of reduction of stated capital $75, certificate as to acquisition of shares or class of shares of domestic corporation $75, certificate of standing including registered agent and registered office $25, certificate of standing including incorporators, officers and directors and authorized shares $25, certificate of standing listing charter documents $25, certificate of availability of corporate name (one to three names) $25, certification of registration of alternate name $50, certificate of renewal of registration of alternate name $25, certificate of correction in addition to applicable license fee $10, reinstatement of charter $75, corporate status reports $5 per name, accepting service of process against corporation under NJSA 2A:15-26 et seq. $25, termination of alternate name $75. (NJSA 14A:15-3).

Following fees payable to State Treasurer: Filing original business certificate where no fee fixed by statute or regulation $125, filing change or amendment to previously filed document where no fee fixed by statute or regulation $75, issuing certificate or filing other document where no fee fixed by statute or regulation $25 (with exceptions), certification or exemplification of document on file $25, certification or exemplification of name or signature on file including issuance of apostille $25, filing certified copy of order of change of name $50, paper copy of document on file $1 per page, roll of microfilm images $1 per image, microfiche copy of microfiche $3, filing proof of publication $10. (NJSA 22A:4-1a). Fee schedule available at: http://www.state.nj.us/treasury/revenue/dcr/geninfo/fees_pd.html.

License to Do Business.

No license to do business issued to domestic corporations. Body corporate is created upon filing of certificate of incorporation with Secretary of State or effective date set forth in certificate (not more than 90 days after filing). (NJSA 14A:2-7[2]).

Organization.

Majority of board of directors calls first meeting of directors named in certificate upon five days' notice. Directors organize corporation. (NJSA 14A:2-8).

Paid-in Capital Requirements.

None. Subscribers entitled to rights and privileges of shareholders when full consideration paid. (NJSA 14A:7-5[2]).

Amendments of Certificate.

Corporation may change name; enlarge, limit or change purposes or powers; change duration; increase or decrease authorized shares; increase or decrease par value of shares; exchange, classify, reclassify or cancel shares; change designation, preferences, limitations and relative rights of shares; change shares having par value into shares without par value or shares without par value into shares having par value; change shares of any class or series into different number of shares of same class or series or into same or different number of shares of other classes or series; create new classes or series of shares with rights and preferences superior or inferior to or equal with shares of any class or series; cancel or otherwise affect accrued, undeclared dividends; divide classes into series and fix designation, preferences, limitations and relative rights of series; authorize board to divide authorized, unissued shares into series and fix designations, number, preferences, limitations and relative rights of series; authorize board to fix or change designation, number, preferences, limitations or relative rights of any series of unissued shares; revoke, diminish or enlarge authority of board with respect to foregoing; limit, deny or grant preemptive rights to shareholders; strike out, change or add provision for management of corporation or create, define, limit and regulate powers of corporation, its directors and shareholders. (NJSA 14A:9-1). Certificate of incorporation may be restated by action of board of directors if no substantive amendment involved and by action of stockholders if substantive amendments included. (NJSA 14A:9-5).

Before organization meeting, incorporators may amend. Board of directors, without stockholder action, may make amendments to eliminate invalid provision; where authorized by certificate of incorporation, to create class or series of shares and set forth rights, preferences and limitations thereof; to cancel reacquired shares; to effect share divisions and combinations in certain cases; and in certain other cases. (NJSA 14A:9-2[1]-[3]).

Other amendments require approval by board of directors and affirmative vote of majority of votes cast by holders of shares entitled to vote thereon and, if any class or series is entitled to vote thereon as a class, requisite votes of such class, except if Title 14A requires a greater vote for a specific amendment, vote so required, or if certificate of incorporation requires a greater vote, vote so required, or if corporation organized prior to Jan. 1, 1969 and has not adopted majority voting provisions of Title 14A, affirmative vote of two-thirds of votes cast. (NJSA 14A:9-2[4]).

Amendment not effective until certificate of amendment executed on behalf of corporation by chairman of board, president or vice-president setting forth certain information is filed in office of Secretary of State. (NJSA 14A:9-4[5]). Seal of proof of acknowledgment permitted but not required. (NJSA 14A:1-6[2]). Certificate must set forth name of corporation; amendment; date of adoption by shareholders; number of shares entitled to vote; number of shares voted for or against; if exchange, reclassification or cancellation of issued shares involved, manner of effecting same; and if amendment effective after filing, date effective. Amendment effective upon filing or as stated in certificate (no more than 90 days from date of filing). (NJSA 14A:9-4[3], [5]).

Increase or Decrease of Authorized Capital Stock.

Authorized capital stock may be increased by amendment of certificate of incorporation. (NJSA 14A:9-1).

Shares reacquired by purchase or redemption or upon conversion into other shares deemed cancelled unless board determines shares to be treasury shares or by-laws so provide. Board may cancel treasury shares at any time; no filing required. Upon cancellation reacquired shares become authorized but unissued shares unless certificate of incorporation provides that such shares shall not be reissued, in which case certificate of amendment to certificate of incorporation must be filed, pursuant to board resolution, reducing authorized shares by number of shares cancelled. (NJSA 14A:7-18[1]).

By-laws.

Initial by-laws adopted by board at organization meeting. Thereafter, board has power to make, alter and repeal by-laws unless such power reserved to shareholders in certificate. By-laws made by board may be altered or repealed, and new by-laws made by shareholders. Shareholders may prescribe in by-laws adopted by them that by-laws must not be altered or repealed by board. Initial by-laws of corporation adopted by board at organization meeting deemed to have been adopted by shareholders. (NJSA 14A:2-9).

Stock, common or preferred, may be with or without par value and may be issued in classes or in series within classes. Each class or series may have such designation and such relative voting, dividend, liquidation and other rights, preferences and limitations as stated in certificate of incorporation or amendment thereto whether adopted by shareholders or by board, pursuant to authority expressly granted in certificate. All shares of same class must be without par value or have same par value, and each class must have a distinctive designation. (NJSA 14A:7-1 – 14A:7-2). Unless otherwise provided in certificate of incorporation, shares may be issued for consideration fixed by board or determined by general formula or at not less than minimum consideration authorized by board. (NJSA 14A:7-4). Subscriber cannot become holder of any shares for which full consideration to be received by corporation has not been paid, unless otherwise provided by subscription agreement. (NJSA 14A:7-3[3]).

Redemption.

Certificate of incorporation may provide for redemption of shares at option of corporation. Certificate may provide for redemption at option of shareholders (such provision amendable only with unanimous approval of holders of outstanding shares of such redeemable stock). Redemption may be in cash, corporation’s bonds or other property, at prices fixed or established by formula, within periods and under conditions stated in certificate of incorporation. Sinking fund may be created for redemption of any class or series of redeemable shares. (NJSA 14A:7-6). No acquisition may be made contrary to any restriction in certificate of incorporation, unless after such acquisition there remain voting shares outstanding or in case of redeemable shares, at price greater than applicable redemption price plus, in case of shares entitled to cumulative dividends, dividends that would have accrued to next dividend date following date of redemption. (NJSA 14A:7–16).

Purchase of Shares by Corporation.

Corporation may acquire its own shares. No requirement for maintenance of stated capital. (NJSA 14A:7-16[7]). Agreement to reacquire shares may include grants of security interests in acquired shares to secure payment but shares so acquired by corporation not deemed reacquired and cancelled on books of corporation until obligation of corporation is fully paid or discharged. Corporation may acquire or agree to acquire its shares even if such acquisition would render corporation insolvent in equity or balance sheet sense, if all or part of purchase price deferred until time when payment would not result in insolvency. (NJSA 14A:7-16[8], 14A:7-16[9]).

Conversion.

When certificate so provides, corporation may issue shares of any class or series convertible at option of holder or of corporation or both into shares of any other class or classes or series thereof. Unless otherwise provided in certificate of incorporation, corporation may issue bonds convertible at option of holder or of corporation or both into shares of any class or classes or series thereof, provided, however, bond must set forth or incorporate by reference terms and conditions of conversion privilege. No convertible bonds or shares may be issued unless a sufficient number of shares into which they are convertible expressly reserved by board for that purpose. (NJSA 14A:7-9).

Rights and Options.

Corporation may create and issue, whether or not in connection with issuance and sale of any of its shares or bonds, rights or options entitling holders thereof to purchase from corporation shares of any class or series for consideration and upon terms and conditions fixed by board. (NJSA 14A:7-7[1]). Unless otherwise provided in certificate of incorporation, rights or options may include conditions preventing holder of specified percentage of shares of corporation from exercising same or conditions that invalidate such rights or options beneficially owned by any such holder. (NJSA 14A:7-7[3]).

Pre-emptive Rights.

None for corporations formed under this title unless otherwise provided in certificate of incorporation. Unless otherwise provided in certificate of incorporation, consequences of granting pre-emptive rights set out in statute. Shareholders in corporations organized prior to Jan. 1, 1969 have preemptive rights unless certificate of incorporation or by-law adopted prior to that date provides otherwise. (NJSA 14A:5-29).

Issuance of Stock.

Unless otherwise provided in certificate of incorporation, shares have no par value and no stated capital required to be maintained. (NJSA 14A:7-8.1[1]). Subject to charter restrictions, all shares may be issued for consideration fixed by board of directors or determined pursuant to general formula or at not less than board-authorized minimum consideration. Certificate of incorporation may reserve to shareholders right to fix consideration for shares. (NJSA 14A:7-4). Consideration for shares may be money, real property, tangible or intangible personal property (including stock of another corporation, obligations of subscriber or any other person, secured or unsecured), or labor or services actually performed for corporation or in its formation or to be performed in future for corporation. Termination of employment with previous employer or acceptance of employment with corporation adequate consideration for issuance of shares to new employee. (NJSA 14A:7-5). Consideration for shares must be paid before share certificates issued. (NJSA 14A:7-11[4]).

Stock Certificates.

Board may provide for uncertified shares but must give written notice to registered owners thereof within reasonable time after issuance or transfer of information required to be set forth in share certificates. For rights, duties and obligations of issuers of uncertified share, see category Uniform Commercial Code Forms, topic Uniform Commercial Code Forms.

Stock certificates must be signed by chairman or vice-chairman of board or president or vice-president and may be countersigned by treasurer or assistant treasurer or secretary or assistant secretary. Any or all signatures may be facsimiles. Certificate must state on face thereof that corporation organized under laws of New Jersey, name of person to whom issued, number of shares, class of shares and designation of series, if any. If more than one class authorized, certificate must set forth designation, relative rights, preferences and limitations thereof to extent determined and any authority of board of directors with respect thereto or set forth that corporation will furnish to any shareholder upon request and without charge a statement thereof. Certificate may be card that is punched, magnetically coded or otherwise treated if it otherwise complies with requirements above. (NJSA 14A:7-11).

Transfer of Stock.

No provision in law for closing stock transfer books. Uniform Commercial Code regulates transfers. (NJSA 12A:8-204, 301-307, 401-407). By-laws may provide for fixing or in absence of such provision, board may fix record date not more than 60 days nor less than ten days before meeting of shareholders nor more than 60 days prior to any other action. (NJSA 14A:5-7[1]). If no record date fixed, date for determination of shareholders entitled to notice of or to vote at meeting of shareholders close of business on day next preceding notice day, or if no notice given, day next preceding meeting day; except that record date for determining shareholders for any other purpose must be close of business on day on which resolution of board relating thereto is adopted, and record date for determining shareholders entitled to consent to corporate action in writing without meeting must be first date on which signed written consent delivered to corporation. Determination must apply to adjournment unless board fixes new record date. (NJSA 14A:5-7[2], [3]).

Except as otherwise provided by law, only banking institutions and qualified corporations may act as transfer agents or registrars, or both, for any domestic or foreign corporation or body politic. Qualified corporation is domestic corporation or foreign corporation authorized to transact business in New Jersey and registered with Department of Banking and Insurance which: (1) Has sufficient capital, surplus and undivided profits as fixed by Commissioner of Banking and Insurance; (2) has adequate vault and safekeeping facilities to safeguard stocks and other securities; and (3) is adequately insured, as may be provided by regulation. Such qualified corporations are subject to regulations of Commissioner of Banking and Insurance and examination by Department of Banking and Insurance. (NJSA 17:9A-213).

Uniform Simplification of Fiduciary Security Transfers Act (1958; adopted 1959), (NJSA 14:18-1 – 14:18-12) repealed, effective Sept. 12, 1997 (L. 1997, c. 252).

Stock Transfer Tax.

None.

Stockholders’ Actions.

Holders of shares or voting trust certificates representing less than 5% of outstanding shares of any class or series of stock, unless shares or voting trust certificates have market value in excess of $25,000, may be required by corporation to give security for reasonable expenses of suit, including counsel fees, instituted in name of corporation. Complainant in such action must have been holder of such shares or voting trust certificates at time of transaction complained of or show that they devolved by operation of law from person who was holder at such time. If court upon final judgment finds that action was brought without reasonable cause, it may require complainant to pay defendants their reasonable expenses incurred in defense of such action including attorney’s fees. (NJSA 14A:3-6).

Stockholders' Liabilities.

Stockholders or subscribers are under no obligation to corporation or its creditors to pay for shares other than for unpaid portion of consideration for which such shares were issued or to be issued, not to be less than amount for which such shares could be lawfully issued. Unless otherwise provided in articles of incorporation, shareholders not personally liable for acts of corporation, except that shareholders may become personally liable by reason of their own acts or conduct. Person holding stock in fiduciary or representative capacity not personally liable as holder or subscriber but estate and funds in his hands is liable. Any person becoming assignee or transferee of shares or of subscription for shares in good faith and without knowledge or notice that full consideration not paid not liable to corporation or its creditors for unpaid portion but original holder or subscriber is liable. (NJSA 14A:5-30). No certificate to be issued for any share until such share has been fully paid for. (NJSA 14A:7-11).

Stockholders' meetings may be held in or out of state as provided in by-laws or fixed by board by authority granted in by-laws. In absence of provision, meetings must be held at registered office of corporation. (NJSA 14A:5-1). Holders of shares entitled to cast majority of votes at meeting constitute quorum unless greater or lesser number required by certificate of incorporation. (NJSA 14A:5-9). Any action required or permitted to be taken at meeting of shareholders may be taken without meeting if all shareholders entitled to vote thereon consent thereto in writing. Act also provides for action by written consent of less than all stockholders in lieu of meeting in certain cases where provisions of act followed, except in case of annual election of directors. (NJSA 14A:5-6).

Voting.

Unless otherwise provided in certificate of incorporation, each share entitles holder to one vote, but certificate may provide for cumulative voting. (NJSA 14A:5-10, 14A:5-24). Person holding stock in fiduciary capacity may vote same without transfer of shares in his name. Stock held by number of fiduciaries and where instrument or order of appointment does not otherwise provide, may be voted as majority may determine and in case of deadlock, any court having jurisdiction, in summary proceeding or otherwise, may appoint additional person to act with fiduciaries in matter. (NJSA 14A:5-15). Pledgor may vote stock until transferred to pledgee on books of corporation. (NJSA 14A:5-17). Shares owned by corporation or by another corporation controlled by it are neither voted nor counted in computing number of outstanding shares. (NJSA 14A:5-13).

Proxies.

Every shareholder entitled to vote at shareholder meetings may express consent by proxy. Proxy must be executed in writing by shareholder or shareholder's agent but may be given by telegram, cable, telephonic transmission or any other means of electronic communication that results in writing, provided it includes information setting forth that manner of proxy is authorized by shareholder or agent. No proxy is valid for more than 11 months unless longer time provided therein. Proxies are not revoked by presence of stockholders at meeting unless shareholder notifies secretary of meeting in writing prior to voting of proxy. Unless coupled with interest, proxy is revocable at will; interest may be in stock or in corporation. Otherwise irrevocable proxy may be revoked by holder of shares without actual knowledge of restriction if not noted conspicuously on share certificate. Proxy is not revoked by death or incapacity of shareholder. (NJSA 14A:5-19).

Voting Trust.

Written voting trusts valid, but term must not exceed 21 years, and copy of trust agreement must be at registered office of corporation and shares deposited with or transferred to trustee or trustees. Filed agreement subject to inspection by stockholders. Voting trust certificates must be issued to evidence beneficial interest in trust. (NJSA 14A:5-20). For special rule as to bank stock, see category 3 Business Regulation and Commerce, topic 3.01 Banks and Banking.

Directors.

Except as otherwise provided in certificate of incorporation, business and affairs of corporation managed by or under direction of board of directors, each of whom must be at least 18 years of age. (NJSA 14A:6-1[1]). Board of directors must consist of one or more members. Subject to certificate of incorporation, by-laws must specify number of directors or minimum number, maximum number and method to derive actual number. (NJSA 14A:6-2). Directors must be elected at annual meeting of shareholders to hold office until next annual meeting except where certificate of incorporation provides for classification of directors to hold office for term not shorter than one year or longer than five years. (NJSA 14A:6-3, 14A:6-4). Certificate of incorporation may grant shareholders of class or series of shares right to elect one or more directors upon occurrence of stated events for specific term or term ending upon occurrence of stated events. (NJSA 14A:6-4[2]). Except as otherwise may be provided in certificate of incorporation or by-laws, any directorship not filled at annual meeting and any vacancy, however caused, occurring in board and newly created directorships resulting from increase in authorized number of directors may be filled by remaining directors even though less than quorum. (NJSA 14A:6-5). Directors may be removed by shareholders for cause and, unless otherwise provided by certificate (and except in case of classified board), without cause. Where there is cumulative voting, if less than entire board is being removed, no director may be removed if votes against removal would be sufficient to elect director if voted cumulatively. Director elected by class vote can be removed only by vote of class that elected director. (NJSA 14A:6-6).

If provided in certificate of incorporation or by unanimous amendment of all outstanding shareholders all or any part of authority of board may be transferred to persons named in certificate. If all management powers otherwise within authority of board so transferred, certificate of incorporation may provide that corporation not have board of directors. (NJSA 14A:5-21[2]).

Directors’ Meetings.

Unless otherwise provided in certificate of incorporation or by-laws, directors’ meetings may be held anywhere. Regular meetings may be held with or without notice as provided in by-laws, special meetings on notice prescribed in by-laws. (NJSA 14A:6-10). Majority of entire board required for quorum unless certificate of incorporation or by-laws provide otherwise. Quorum may not be less than one-third of entire board, except that when board consists of one director, then one director shall constitute quorum. Vote of majority present at meeting at which quorum present constitutes act of board unless greater voting requirement required by Tit. 14A, certificate or by-laws. Board may act by unanimous consent in lieu of meeting unless otherwise provided in certificate or by-laws. (NJSA 14A:6-7.1). Unless otherwise provided in by-laws, purpose of meeting need not be included in notice. Notice may be waived either before or after meeting. Where appropriate communication facilities are reasonably available, any director may participate in meeting of board or committee by any means of communication by which all persons participating in meeting are able to hear each other unless certificate of incorporation or by-law provides otherwise. (NJSA 14A:6-10).

Duties and Liabilities of Directors.

Directors and members of any committee of directors must discharge their duties in good faith and with that degree of diligence, care and skill that ordinary prudent people would exercise under similar circumstances in like positions. In discharging duties, directors or any member of committee of directors not liable if, acting in good faith, they rely upon opinion of counsel for corporation or upon written reports setting forth financial data concerning corporation prepared by independent or certified public accountants or upon financial statements, books of account, or reports of corporation represented to be correct by president, officer of corporation having charge thereof, or person presiding at meeting of board or written reports of board committees. (NJSA 14A:6-14). In taking action on behalf of corporation, directors are authorized to consider effects of action not only on shareholders but also on employees, suppliers, creditors and customers of corporation and on community in which corporation operates, and to consider long-term and short-term interests of corporation and its shareholders, including possibility that such interests are best served by continued independence of corporation. (NJSA 14A:6-1[2] — 14A:6-1[3]). Except in cases of breach of duty of loyalty, bad faith, knowing violation of law, or receipt of improper personal benefit, director not personally liable to corporation or shareholders for damages for breach of duty if and to extent liability is eliminated or limited in certificate of incorporation. Act or omission in breach of duty of loyalty defined as act or omission that director knows or believes to be contrary to best interests of corporation or its shareholders in connection with matter in which director has material conflict of interest. (NJSA 14A:2-7[3]). Directors who vote for or concur in: (a) Declaration of dividends or distribution of assets to shareholders or purchase of shares of corporation contrary to provisions of Title 14A or to any restrictions contained in certificate of incorporation; (b) distribution of assets to shareholders during or after dissolution without paying or adequately providing for all known debts, obligations and liabilities of corporation (except only to extent of value of assets so distributed and to extent such debts, obligations and liabilities not thereafter paid, discharged or barred); (c) complete liquidation of corporation and distribution of all assets without dissolving or providing for dissolution and payment of all fees, taxes, and other expenses incidental thereto to extent of value of assets so distributed and to extent that such fees, taxes or expenses are not thereafter paid; and (d) making of loans to officer, director or employee of corporation or any subsidiary thereof contrary to provisions of Title 14A are made jointly and severally liable to corporation for benefit of its creditors or shareholders to extent of any injury suffered by such persons as result of action. Directors entitled to contribution from other directors who voted for or concurred in action complained of and have rights of subrogation. (NJSA 14A:6-12). Director present at meeting at which action complained of taken who does not vote therefor presumed to concur in action unless dissent noted in minutes or written dissent filed with secretary of meeting before or promptly after its adjournment. Absent director is presumed to concur where director fails to file dissent with secretary of meeting within reasonable time after learning of such action. (NJSA 14A:6-13). Distribution of assets in dissolution or liquidation prior to payment of certain state taxes results in imposition of personal liability therefor. (NJSA 14A:6-12).

Indemnification of Directors, Officers and Employees.

Title 14A provides for indemnity and authorizes other action to protect any person serving as director, officer, employee or corporate agent or serving, at request of corporation, as director, officer, trustee, employee or agent of any domestic or foreign corporation or any partnership, joint venture, sole proprietorship, trust or other enterprise, whether or not for profit, or any director, officer, employee or agent of any constituent corporation absorbed by indemnifying corporation in consolidation or merger ("corporate agent"). Term "other enterprises" includes employee benefit plans. Any corporation given power to indemnify corporate agent party to or threatened to be made party to, or legal representative of corporate agent party to or threatened to be made party to, any proceeding by reason of fact that corporate agent served corporation at request of corporation as corporate agent, against expenses and liabilities in connection with proceeding if proceeding not brought by or on behalf of corporation and if: corporate agent acted in good faith and in manner reasonably believed to be in or not opposed to best interests of corporation; and with respect to any criminal proceeding, such corporate agent had no reasonable cause to believe conduct unlawful and against expenses if proceeding brought by or in right of corporation and if corporate agent acted in good faith and in manner reasonably believed to be in or not opposed to best interests of corporation; provided, however, no indemnification provided in respect of any claim, issue or matter as to which corporate agent has been adjudged to be liable to corporation, unless and only to extent that court in which such proceeding was brought determines, upon application, that despite adjudication of liability, but in view of all circumstances of case, corporate agent is fairly and reasonably entitled to indemnity for expenses court deems proper. Term "proceeding" means any pending, threatened or contemplated civil, criminal, administrative or arbitrative action, suit or proceeding, or any appeal therein or any inquiry or investigation that could lead to such action, suit or proceeding. Term "expenses" means reasonable costs, disbursements and counsel fees. Term "liabilities" means amounts paid or incurred in satisfaction of settlements, judgments, fines (including excise taxes assessed with respect to employee benefit plans) and penalties. Phrase “not opposed to best interests of corporation” includes acting in good faith and in manner reasonably believed to be in interests of participants and beneficiaries of employee benefit plan. Corporate agent or representative of deceased corporate agent indemnified against expenses in connection with proceeding to extent that corporate agent or representative of deceased corporate agent has been successful on merits or otherwise in proceeding or in defense of any claim, issue or matter therein. Unless otherwise ordered by court, indemnification may be made in specific case only upon determination that corporate agent met applicable standard or standards of conduct. Unless otherwise provided in certificate of incorporation or by-laws, determination made by board of directors or committee thereof, acting by majority vote of quorum consisting of directors who were not parties to or otherwise involved in proceeding or by independent legal counsel, in written opinion, if designated by majority vote of quorum of disinterested directors or by shareholders if authorized by certificate of incorporation, by-laws, resolution of board of directors or resolution of shareholders. Expenses incurred by corporate agent in connection with proceeding may be paid by corporation in advance of final disposition of proceeding as authorized by board of directors upon receipt of undertaking of corporate agent to repay such amount if determined that agent not entitled to be indemnified as provided in this section. If corporation, upon application of corporate agent, has failed or refused to provide indemnification as required or permitted or to make payments in advance, corporate agent may apply to court for award of indemnification and court is authorized to award same notwithstanding any earlier determination. Corporation authorized to purchase and maintain insurance on behalf of any corporate agents, and insurance may include insurance against expenses incurred by and/or liabilities of corporate agent by reason of being or having been corporate agent and may cover expenses and liabilities against which corporation would not have power to indemnify corporate agents. Insurance may be purchased from or reinsured with affiliated insurers. Except in case of mandatory indemnification, corporation may prohibit, limit or condition indemnification by provision of certificate of incorporation, by-law, resolution of board of directors or shareholders, agreement or other proper corporate action effective at time of accrual of alleged cause of action. Statutory indemnification not exclusive of any other rights to which corporate agents entitled under certificate of incorporation, by-law or agreement, including right to be indemnified against liabilities and expenses incurred in proceedings by or in right of corporation (derivative actions); but no indemnification permitted if adverse final judgment or other adjudication against corporate agent establishes that acts or omissions of agent were in breach of duty of loyalty, or in bad faith or involved knowing violation of law, or resulted in receipt of improper personal benefit. (NJSA 14A:3-5).

Officers.

Corporation must have a president, secretary and treasurer and may have such other officers as may be provided in by-laws. Unless otherwise provided in by-laws, officers are elected by board. Officers have such duties as may be provided in by-laws or resolution of board. (NJSA 14A:6-15). Corporation may lend money to or guarantee obligations of or otherwise assist directors, officers or employees of corporation or any subsidiary thereof when in judgment of board such action may reasonably be expected to benefit corporation. (NJSA 14A:6-11).

Liability of Officers.

Certificate of incorporation may include provision eliminating or limiting liability of officers or directors for damages to corporation or shareholders, absent breach of duty of loyalty, bad faith, knowing violation of law, or receipt of improper personal benefit. For definition of breach of loyalty, see subhead Duties and Liabilities of Directors. (NJSA 14A:2-7[3]).

Registered Agent and Registered Office.

Every New Jersey corporation and every foreign corporation authorized to transact business in New Jersey must continuously maintain a registered office in New Jersey and a registered agent having a business office identical with such registered office. Registered agent must be a person over age of 18 years or a domestic or foreign corporation authorized to transact business in New Jersey. (NJSA 14A:4-1). Corporation must file certificate with Secretary of State as to changes of registered agent or office. (NJSA 14A:4-3[2]). Record containing names and addresses of all shareholders, number, class and series of shares held by each, and dates when they respectively became owners of record thereof must be kept at principal office of corporation, at office of registered agent or at office of transfer agent. (NJSA 14A:5-28[1]). Registered agent may resign by mailing certified mail, return receipt requested, notice of resignation to president, vice president, secretary or treasurer of corporation and filing such notice together with affidavit of service thereof in office of Secretary of State. Such resignation becomes effective upon expiration of 30 days after such filing or appointment of new registered agent by corporation, whichever is earlier. If no new registered agent is designated within 30-day period, corporation deemed to have no registered agent or office in New Jersey. (NJSA 14A:4-4).

General powers of corporations include power to: Have perpetual duration unless limited period is stated in certificate of incorporation; sue and be sued, complain, defend and participate in any judicial, administrative, arbitrative, or other proceeding; have corporate seal; purchase, lease or otherwise acquire, own, hold, improve, use and otherwise deal in and with real and personal property or any interest therein wherever situated; sell, convey, mortgage, create a security interest in, lease, exchange, transfer and otherwise dispose of all or any part of its property and assets; purchase, subscribe for or otherwise acquire, own, hold, vote, use, employ, sell, exchange, mortgage, lend, create a security interest in or otherwise dispose of and otherwise use and deal in and with shares or other interests in or obligations of other domestic or foreign corporations, associations, partnerships, or individuals or direct or indirect obligations of any domestic or foreign government or instrumentality thereof; make contracts and guarantees and incur liabilities, borrow money, issue bonds and secure any of its obligations by mortgage of or creation of a security interest in its property, franchises and income; lend money, invest its funds and take and hold real and personal property as security for payment for funds so loaned or invested; conduct its business, carry on its operations, have offices and exercise powers granted by this title anywhere in universe; elect or appoint officers, employees and agents and define their duties and fix their compensation; make and alter by-laws for administration and regulation of affairs of corporation; pay pensions and establish pension, profit-sharing, stock option, stock purchase, incentive and deferred compensation plans and plans of similar nature for, and to furnish medical services, life, sickness, accident, disability or unemployment insurance and benefits, education, housing, social and recreational services and other similar aids and services to, any or all of its directors, officers, employees and agents, their families, dependents, or beneficiaries; participate with others in any corporation, partnership, limited partnership, joint venture or other association of any kind or in any transaction, undertaking, or arrangement which participating corporation would have power to conduct by itself whether or not such participation involves sharing or delegation of control with or to others; transact any lawful business in time of war or other national emergency notwithstanding purpose or purposes set forth in its certificate of incorporation providing it is requested to do so by U.S. Government or any of its agencies; provide insurance with respect to services of directors, officers, employees and agents or on life of any shareholder for purpose of acquiring at his death shares of its stock owned by such shareholder; have and exercise all other powers necessary or convenient to effect any or all purposes for which corporation is organized. (NJSA 14A:3-1). Corporation may give guarantee not in furtherance of its direct or indirect business interests only when authorized at meeting of shareholders by vote of all of votes cast of each class and series entitled to vote thereon. (NJSA 14A:3-3). Unless otherwise provided in certificate of incorporation or by-laws, corporation has power to make charitable contributions irrespective of corporate benefit. (NJSA 14A:3-4).

Dividends.

Directors may declare and pay dividends or make other distributions on outstanding shares in cash or its bonds or other property including shares of other corporations except where corporation rendered insolvent in equity or balance sheet senses. (NJSA 14A:7-14.1 – 14A:7-14.15). Corporation may declare dividends in its own shares. (NJSA 14A:7-15).

Share dividends, divisions and combinations may be effected by board action alone, except that any division that adversely affects shares of another class must be made by amendment. Board authorized to amend certificate of incorporation to increase or decrease par value of shares and number of authorized shares and to make any other changes necessary to assure rights or preferences of holders of outstanding shares not adversely affected; but shareholder approval required for charter amendment if as result of amendment: (1) Rights or preferences of holders of outstanding shares of any class or series will be adversely affected or (2) percentage of authorized shares that remain unissued after share dividend, division or combination will exceed percentage of authorized shares that were unissued before dividend, division, or combination. (NJSA 14A:7-15.1[2]).

Unclaimed Dividends.

See category 21 Property, topic 21.01 Absentees, subhead Escheat.

Sale of Assets.

Sale, lease, exchange, or other disposition of all or substantially all assets of corporation in usual and regular course of its business as conducted by such corporation may be authorized by board without shareholder approval unless otherwise provided in certificate of incorporation. (NJSA 14A:10-10). If not in regular course of its business, sale or other disposition must also be approved by affirmative vote of shareholders by majority of votes cast by shareholders entitled to vote thereon except in case of corporation formed prior to Jan. 1, 1969, in which case affirmative vote of two-thirds of votes cast required. Such corporation may adopt majority vote by amendment to certificate of incorporation adopted by two-thirds of shareholders' votes cast at meeting. Sale, lease or exchange, or other disposition of all, or substantially all, assets of one or more subsidiaries, not in regular course of business, is treated as disposition of all or substantially all of corporation's assets if subsidiary or subsidiaries constitute all or substantially all assets of corporation. All shareholders, whether or not entitled to vote, must receive notice of meeting at which action or sale is proposed to be taken. However, unless parent corporation's certificate of incorporation otherwise provides, no shareholder approval is required for parent corporation to transfer any or all of its assets to any wholly-owned subsidiary. (NJSA 14A:10-11).

Books and Records.

Unless otherwise provided in by-laws, books, records and minutes may be kept outside state. Record of names and addresses of all shareholders, number, class and series of shares held by each and dates when they became owners of record thereof must be kept at principal office, registered office or office of transfer agent. See subhead Registered Agent and Registered Office, supra. Books, records and minutes of corporation must be in written form or in any other form capable of being converted into readable form within reasonable time. Person who has been shareholder of record for at least six months immediately preceding his demand or person holding or authorized by holders of at least 5% of outstanding shares of any class or series upon five days' written demand has right for any proper purpose to examine corporation's minutes of proceedings of shareholders and records of shareholders and to make extracts at place where same are kept. Upon written request of shareholder, corporation must mail to shareholder its balance sheet as at end of preceding fiscal year and its profit and loss and surplus statement for fiscal year. (NJSA 14A:5-28).

Reports.

Every domestic or foreign corporation authorized to do business in State must file with Dept. of Treasury annual report stating: Name of corporation and, if foreign, jurisdiction of incorporation; address of registered office and name of registered agent; names and addresses of directors and officers; address of main business or headquarters office; and address of principal business office in New Jersey, if any. Report may be executed on behalf of corporation or by registered agent. Annual report forms furnished by Secretary of State. Report must be filed

30 days prior to or 30 days subsequent to date designated by Secretary of State for such corporation. Procedure prescribed for revocation within 30 days after giving of notice by proclamation issued by State Treasurer of certificate of incorporation of domestic corporation and certificate of authority of foreign corporation to transact business in New Jersey in event of failure to file reports for two consecutive years. (NJSA 14A:4-5).

Bonds.

See subhead Stock, catchline Conversion, supra. Certificate of incorporation or amendment thereof may empower holders of bonds to vote, in which case they have same rights accorded to shareholders. (NJSA 14A:5-23).

Employees’ Participation.

Corporation may adopt employee benefit plan that may provide for: (a) Sale or distribution of its shares of any class or series held by it or issued or purchased by it for purpose including stock options, stock purchase, stock bonus, profit sharing, savings, pension, retirement, deferred compensation and other plans of similar nature whether or not such plans also provide for distribution of cash or property other than shares; (b) payments solely in cash or property other than shares of corporation including profit sharing, bonus, savings, pension, retirement, deferred compensation and other plans of similar nature; or (c) furnishing medical services, life, sickness, accident, disability or unemployment insurance or benefits, education, housing, social and recreational services, and other similar aids and services. Beneficiaries may be employees, officers, directors, and agents of corporation or any subsidiary or others active in business, including any who have retired, become disabled or died prior to establishment of any plan. Plan may be adopted, amended or terminated by board, board committee, or officers to whom responsibility delegated, but plans providing for issuance of shares must be adopted initially by board or board committee. (NJSA 14A:8-1). In carrying out plan, corporation may establish one or more trust funds to which rule against perpetuities does not apply. (NJSA 14A:8-2.1, 14A:8-3.1).

Merger and Consolidation.

Two or more New Jersey corporations, or one or more New Jersey corporations and one or more other business entities, one or more New Jersey corporations and one or more corporations of another state may merge or consolidate into single corporation or other business entity, which may be one of such merging corporations or new corporation or new business entity provided that such merger or consolidation of corporation of another state is authorized by laws of such other state. (NJSA 14A:10-1, 14A:10-7). In case of merger or consolidation of domestic corporations, board of directors of each corporation is required to approve plan of merger or consolidation. Plan must set forth names of corporations or other business entities, terms and conditions, and in case of merger, statements of amendments to certificate of incorporation to be effected by merger, and manner and basis of converting shares of each corporation into shares, obligations or other securities of surviving corporation or new business entity or of any other corporation or business entity or, in whole or part, into cash or other property. Amendments to certificate of incorporation effected by merger may be set forth in and effected by restated certificate of incorporation filed as additional document together with certificate of merger. Plan generally must be submitted to vote at meeting of shareholders on notice of not less than 20 nor more than 60 days before meeting. Notice must be accompanied by copy or summary of plan and statement of right to dissent. Adoption requires affirmative vote of majority of votes cast; in case of corporation organized prior to Jan. 1, 1969, which has not adopted majority voting provisions of Title 14A, vote must be two-thirds of votes cast. Merger or consolidation does not become effective until certificate and copy filed in office of Secretary of State setting forth plan of merger and information showing adoption, or on such later date, not to exceed 90 days from date of filing, as set forth in certificate. (NJSA 14A:10-1 — 14A:10-3, 14A:10-4.1).

Approval of shareholders of surviving corporation is not required to authorize merger, unless certificate of incorporation otherwise provides, if: (a) Plan does not amend certificate of incorporation of surviving corporation required to be approved by such shareholders; (b) each shareholder of surviving corporation whose shares were outstanding immediately before effective date of merger will hold same number of shares, with identical designations, preferences, limitations and rights, immediately after merger; (c) number of voting shares outstanding immediately after merger, plus number of voting shares issuable on conversion of other securities or exercise of rights and warrants issued pursuant to merger, will not exceed by more than 40% total number of voting shares of surviving corporation outstanding immediately before merger; and (d) number of shares entitling holders to participate without limitation in distributions (participating shares) outstanding immediately after merger, plus number of participating shares issuable on conversion of other securities or on exercise of rights or warrants issued pursuant to merger, will not exceed by more than 40% total number of participating shares of surviving corporation outstanding immediately before merger. (NJSA 14A:10-3[4]).

Where corporation proposes to acquire, directly or through subsidiary, some or all of outstanding shares of another corporation in exchange for its shares, obligations or other securities, its shareholders have same rights as if they were shareholders of surviving corporation in merger as to notice, voting and dissent if: (i) Number of voting shares outstanding immediately after transaction, plus number of voting shares issuable on conversion of other securities or exercise of rights and warrants issued pursuant to transaction, will exceed by more than 40% total number of voting shares of corporation outstanding immediately before transaction; or (ii) number of participating shares outstanding immediately after transaction, plus number of participating shares issuable on conversion of other securities or exercise of rights and warrants issued pursuant to transaction, will exceed by more than 40% total number of participating shares of corporation immediately before transaction. (NJSA 14A:10-12).

Shareholder approval is not required to authorize merger of corporation with or into single indirect wholly-owned subsidiary of corporation if: (a) Corporation, holding company and indirect wholly-owned subsidiary are only parties to merger; (b) each shareholder of corporation will hold same number of shares of holding company with identical designations, preferences, limitations and rights immediately after effective date of merger; (c) corporation, indirect wholly-owned subsidiary and holding company are domestic corporations; (d) certificate of incorporation and by-laws of holding company immediately after effective date of merger contain provisions identical to certificate of incorporation and by-laws of corporation before effective date of merger, other than provisions regarding incorporators, corporate name, registered office and agent, initial board of directors, initial subscribers for shares and provisions necessary to effect change, exchange, reclassification or cancellation of shares, if such change, exchange, reclassification or cancellation has become effective prior to effective date of merger; (e) surviving corporation, as result of merger, remains or becomes direct or indirect wholly-owned subsidiary of holding company; (f) directors of corporation remain or become directors of holding company upon effective date of merger; (g) certificate of incorporation of surviving corporation immediately after effective date of merger is identical to certificate of incorporation of corporation immediately before effective date of merger, other than provisions regarding incorporators, corporate name, registered office and agent, initial board of directors, initial subscribers for shares and provisions necessary to effect change, exchange, reclassification or cancellation of shares, if such change, exchange, reclassification or cancellation has become effective prior to effective date of merger, provided that: (i) certificate of incorporation of surviving corporation contains provision requiring its adoption under NJSA 14A:1-1 et seq., or by certificate of incorporation of surviving corporation, until thereafter otherwise amended by approval of shareholders of surviving corporation and holding company, and (ii) certificate of incorporation of surviving corporation may be amended to reduce number of classes and shares of capital stock that surviving corporation is authorized to issue; and (h) shareholders of corporation do not recognize gain or loss for U.S. federal income tax purposes as determined by board of directors of corporation. (NJSA 14A:10-3[6]).

On and after effective date of merger authorized by action of board of directors of corporation and without vote of shareholders pursuant to NJSA 14A:10-3(6), to extent that restrictions of "New Jersey Shareholders' Protection Act" (NJSA 14A:10A-1 et seq.) applied to corporation and its shareholders at effective date of merger, restrictions apply to holding company and its shareholders immediately after effective date of merger in same manner as if it were corporation, and all shares of holding company acquired in merger deemed for purposes of New Jersey Shareholders' Protection Act to have been acquired at time that shares of corporation converted in merger acquired. (NJSA 14A:10-3[7]).

Term "holding company" is corporation that from its incorporation until consummation of merger governed by NJSA 14A:10-6 was at all times direct wholly-owned subsidiary of corporation and shares of which are issued in merger. Term "indirect wholly-owned subsidiary" is corporation all shares of which are owned directly or indirectly by holding company. (NJSA 14A:10-3[8]).

Domestic corporation owning at least 90% of each class and series of another domestic corporation may merge with such corporation upon following procedure prescribed in NJSA 14A:10-5.1. Shareholder approval not required unless certificate of subsidiary requires greater vote than shares held by parent or unless certificate of incorporation of parent requires shareholder approval or where certificate of incorporation of parent is to be changed (unless change can be made by board without shareholder approval) or subsidiary is to be surviving corporation. (NJSA 14A:10-5.1).

In merger or consolidation of domestic and foreign corporations, domestic corporations required to follow procedure of Tit. 14A with respect to merger or consolidation of domestic corporations, and each foreign corporation required to comply with applicable provisions of laws under which organized. If surviving corporation is foreign corporation, it must make appropriate arrangements for service of process on it in New Jersey, appoint Secretary of State its agent to accept service and agree to pay dissenting shareholders promptly. (NJSA 14A:10-7).

Upon merger or consolidation becoming effective, separate existence of parties to plan of merger or consolidation, except surviving or new corporation, ceases, and all rights, property, franchises, etc. vest in surviving corporation. Surviving corporation is liable for all debts and obligations of merged or consolidated corporations. (NJSA 14A:10-6). Prior to time merger or consolidation becomes effective, it may be abandoned pursuant to provisions thereof, if any.

Any domestic or foreign corporation may acquire all outstanding shares, or all outstanding shares of one or more classes or series, of domestic corporation if board of each corporation adopts and shareholders of acquired corporation approve plan of exchange providing for, among other matters, exchange of shares of acquired corporation for shares, obligations or other securities of acquiring corporation or any other corporation, or for cash or other property, or any combination thereof. (NJSA 14A:10-13). Prescribed procedures parallel those provided for mergers. Shareholders of acquired corporation have same rights of dissent as in merger.

Shareholders of corporation that is party to merger or consolidation have right to dissent and have shares purchased by surviving corporation except with respect to shares: (1) Of class or series listed on national securities exchange or held by not less than 1,000 holders on record date fixed to determine shareholders entitled to vote upon plan of merger or consolidation; or (2) for which they will receive (i) Cash, (ii) shares, obligations or other securities that, upon consummation, will either be listed on national securities exchange or held of record by not less than 1,000 holders, or (iii) cash and such securities; however, certificate of incorporation may provide for right to dissent in such cases. (NJSA 14A:11-1). Dissenter must file with corporation before vote of stockholders is taken, or if no meeting of shareholders is to be held, within time specified in NJSA 14A:5-6(2)(b) or 14A:5-6(2)(c), written notice of dissent stating that dissenter intends to demand payment for shares if action taken. (NJSA 14A:11-2). Shareholder may not dissent as to less than all shares owned beneficially. (NJSA 14A:11-1[3]). Shareholder may not dissent from plan if merger did not require, for its approval, vote of shareholders as provided in NJSA 14A:10-5.1. To perfect rights, dissenter must follow procedure prescribed in NJSA 14A:11-1 et seq.

Takeover Bid Disclosure.

No offeror may make takeover bid to purchase number of equity securities of target company that together with presently owned shares exceeds 10% of outstanding shares of any class of equity securities unless at least 20 days prior to making bid, offeror files statement on form prescribed by Bureau of Securities, along with consent of offeror to service of process, with chief of Bureau of Securities with copy to principal office of target company (target company includes corporation organized under laws of New Jersey, or with principal place of business in New Jersey, or with substantial portion of assets in New Jersey). (NJSA 49:5-2, NJSA 49:5-3). Material terms of proposed offer must be publicly disclosed by offeror to leading wire services for financial press. (NJSA 49:5-3[a]). No offeror shall make takeover bid without permission of Bureau chief, which may be after public hearing conducted by Bureau. (NJSA 49:5-3). Copies of all advertisements, circulars, letters or materials published by offeror or target company soliciting acceptance or rejection of takeover offer, except initial press release, must be filed with Bureau chief and must not be false or misleading. (NJSA 49:5-6). Civil and criminal penalties prescribed. (NJSA 49:5-13, 49:5-15).

New Jersey Shareholder Protection Act prohibits resident domestic corporation (defined as issuer of voting stock, organized under laws of New Jersey, and as of stock acquisition date in question, having principal executive offices or significant business operations in New Jersey) from engaging in business combinations with any interested stockholder (as defined) for period of five years following stock acquisition date (as defined) by interested shareholder, unless: (1) Approved by board of directors before such stock acquisition date and (2) certain other conditions are met, including approval by vote of two-thirds of voting stock not beneficially owned by interested shareholder and fair price requirements. Certain exemptions and other conditions apply. (NJSA 14A:10A-4, 14A:10A-5).

Dissolution of a corporation may be effected (1) By filing of certificate of dissolution upon expiration of period of duration; (2) by action of incorporators or directors prior to commencing business; (3) by unanimous consent of shareholders entitled to vote thereon; (4) by recommendation of directors approved at meeting by majority of votes cast by shareholders entitled to vote thereon and in addition by majority of votes cast by any class or series entitled to vote thereon as a class; (5) by shareholder or group of shareholders at will or upon occurrence of specified event, if certificate of incorporation so provides; (6) by judgment of Superior Court in action brought by Attorney General upon specified grounds or by director or shareholder of deadlocked corporation; (7) by proclamation of Secretary of State repealing or revoking a certificate of incorporation for nonpayment of taxes or failure to file annual reports; or (8) by action of corporation without assets pursuant to NJSA 14A:12-4.1. Majority voting requirement in (4) may be increased by certificate of incorporation and not applicable to corporations organized prior to Jan. 1, 1969, unless adopted by amendment of certificate of incorporation approved by two-thirds of votes cast by shareholders entitled to vote thereon. (NJSA 14A:12-1 – 14A:12-7). Voluntary dissolution effective upon filing certificate of dissolution with Secretary of State, or within 90 days thereafter if so specified in certificate of dissolution. (NJSA 14A:12-8). Certificate of Director of Division of Taxation (fee $25) that all taxes are paid must be filed with certificate of dissolution, except in case of merger or consolidation when resulting business entity will be either domestic business entity or foreign business entity qualified to transact business in New Jersey. (NJSA 54:50-13, 54:50-15). Dissolved corporation continues in existence, may sue and be sued, but may not carry on business except to wind up its affairs. Directors not deemed trustees of assets. (NJSA 14A:12-9). Dissolved corporations may be reinstated, provided no corporate assets have been distributed and reinstatement occurs within 60 days of dissolution. (NJSA 14A:12-10). Dissolved corporation may bar creditors by mailing and publishing notice that creditors must present claims on or before specified date, not less than six months after date of first publication; creditors who do not so present claims are barred, except creditor who shows good cause for not having previously filed claim and who files claim within five years of dissolution of corporation. (NJSA 14A:12-12, 14A:12-13, 14A:12-13.1). Creditor whose claim is rejected is barred unless suit brought within 60 days of mailing of notice of rejection. (NJSA 14A:12-14).

Insolvency and Receivers.

In case of insolvency, suspension of business for want of funds or conduct of business at a loss prejudicial to creditors or stockholders, corporation, creditor, or stockholder owning at least 10% of capital stock may apply to Superior Court for appointment of receiver, in which case claims by and against corporation, sale of its property, distribution of its assets, etc., are within jurisdiction of Superior Court. (NJSA 14A:14-2).

Reorganization or arrangement pursuant to act of Congress may be effected without further action by directors or stockholders. (NJSA 14A:14-24).

Close Corporations.

See this topic generally.

Appraisal.

See subheads Sale of Assets; Employees' Participation; Merger and Consolidation; supra.

Foreign corporations doing business in New Jersey are subject to Title 14A, to extent provided therein so far as applicable. (NJSA 14A:1-3[5]).

Qualification.

Foreign corporation cannot qualify under name not distinguishable on records of Secretary of State from other names. See subhead Name, supra. For case of conflict, it may adopt assumed name for use in New Jersey. (NJSA 14A:2-2[1]). Secretary of State will issue certificate of authority to foreign corporation upon filing with Secretary of State of application containing name of corporation, state and date of incorporation, period of duration, main address and name and address of registered agent in New Jersey, and stating nature of business to be transacted in New Jersey and that it is authorized to transact such business in its state of incorporation. Certificate of good standing in state of incorporation, dated not earlier than 30 days prior to filing of application, must be attached to application. (NJSA 14A:13-3 – 14A:13-5).

Foreign corporation authorized to transact business in New Jersey is required to obtain amended certificate of authority if it changes its corporate name, enlarges, limits or otherwise changes character of business it proposes to transact in New Jersey. (NJSA 14A:13-6). If change of name is to name for which certificate of authority would not be granted on application therefor, certificate of authority is suspended and corporation prohibited from thereafter transacting any business in New Jersey until it has changed its name or otherwise complied with act. (NJSA 14A:13-7).

Real Estate.

Foreign corporation has same powers with respect to real estate as domestic corporation. (NJSA 14A:13-1).

Failure to Qualify.

Foreign corporation transacting business in New Jersey without authorization forfeits to state penalty of not less than $200 nor more than $1,000 for each calendar year, not more than five years prior thereto, in which it transacted business without authority. Until certificate is obtained, foreign corporation may not maintain any action or proceeding in any New Jersey court. (NJSA 14A:13-11).

Reciprocal Provisions.

Foreign corporations having proper authorization enjoy same but no greater rights and privileges than domestic corporations organized for similar purposes and are subject to same duties, restrictions, penalties and liabilities imposed upon domestic corporations of like character. (NJSA 14A:13-2).

Change of Office or Agent.

On change of registered office, or of registered agent, corporation must file with Secretary of State statement of change or of appointment of new agent. On failure to do so, authority to transact business in this state may be revoked. (NJSA 14A:13-10).

Reports from foreign corporations are same as required from domestic corporations. See subhead Reports, supra.

Surrender of Authority.

Foreign corporation authorized to do business may obtain certificate of withdrawal from Secretary of State upon filing application containing name of corporation, state of incorporation and address to which Secretary of State may mail any process and stating that corporation is not transacting business in New Jersey and surrenders its authority to transact business in New Jersey. (NJSA 14A:13-8).

Taxes.

See subheads Taxation of Corporate Property; Franchise Tax; Corporate Income Tax Act, infra.

Activities Reporting Act.

Where foreign corporation has not received certificate of authority or filed return under Corporation Business Tax Act or Corporate Income Tax Act, it must file a notice of business activities report with Director of Division of Taxation of State Department of Treasury. (NJSA 14A:13-15, 14A:13-16). Failure of foreign corporation to file timely report precludes use of New Jersey courts until delinquent reports filed and all taxes, interest and civil penalties for all periods have been paid or provided for by adequate security. (NJSA 14A:13-20; 108 N.J. 277, 528 A.2d 1288).

Corporate Tax.

See category 22 Taxation, topic 22.04 Corporate Taxes.

Professional Corporations.

An individual or group of individuals (e.g. certified public accountants, architects, optometrists, professional engineers, land surveyors, land planners, chiropractors, dentists, osteopaths, physicians and surgeons, doctors of medicine, doctors of dentistry, podiatrists, chiropodists, veterinarians, and subject to Rules of Supreme Court, attorneys at law) rendering professional service for which such individuals required by law to be licensed or to obtain other legal authorization, may incorporate. (NJSA 14A:17-1 et seq.).

Model Non-Profit Corporation Act not adopted. L. 1983, c. 127 (effective Oct. 1, 1983) revised statutes governing operation of nonprofit corporations in New Jersey by enacting new Tit. 15A, Non-profit Corporation Act, and repealing most provisions of former Tit. 15 governing corporations and associations not-for-profit. Tit. 15A provides general corporate form for conduct of nonprofit activities and makes law governing nonprofit corporations as nearly compatible with Corporation Act (Tit. 14A) as practicable.

General Provisions.

Tit. 15A applicable to all corporations that organize under Act after effective date, to corporations that reincorporate under Act, to foreign corporations to extent provided under Act, and to every other nonprofit corporation that was previously organized under any law with respect to which legislature reserved power to amend or repeal and that provided for organization of corporation or corporations for purpose or purposes for which corporation may be organized under Tit. 15A. (NJSA 15A:1-3). Provisions concerning dissolution and insolvency, among other events, applicable to corporations organized under Tit. 16 (religious corporations) if such corporations so elect by amending certificates of incorporation or by-laws except as may otherwise be provided by law. (NJSA 15A:1-3). Foreign nonprofit corporations conducting activities in New Jersey required to file application to operate in New Jersey by Dec. 30, 1983. (NJSA 15A:13-3). Nonprofit corporations using alternate name different from true name (such as acronym or abbreviation) required to register alternate name. (NJSA 15A:2-3). Certificate of incorporation or authority revocable for failure to file annual report for two consecutive years on receipt of written demand for said reports by Secretary of State. (NJSA 15A:4-5[c]).

Formation.

Names of nonprofit corporations must not be same as or confusingly similar to: (1) Corporate name of any domestic corporation; (2) corporate name of any foreign corporation authorized to conduct business in New Jersey; (3) any corporate name reserved or registered under Tit. 15A; or (4) any corporate name in use, reserved or registered under Tit. 14A. (NJSA 15A:2-2). Names of nonprofit corporations (except religious corporations) required to include word or phrase indicating that entity is corporation. (NJSA 15A:2-2). Original and copy of certificate of incorporation must be filed with Secretary of State. (Advance filing with various county clerks eliminated.) (NJSA 15A:2-8). Copy of certificate of incorporation will be submitted to State Attorney General by Secretary of State. Corporation may be organized under Tit. 15A for any lawful purpose other than for pecuniary profit, including those purposes set forth in Act. (NJSA 15A:2-1).

Powers.

General powers of nonprofit corporations set forth in NJSA 15A:3-1; power to provide reasonable indemnification to officers, employees, agents and trustees expressly provided for. (NJSA 15A:3-4).

Registered Office and Registered Agent.

Every nonprofit corporation must maintain registered office and registered agent in New Jersey. (NJSA 15A:4-1). Every nonprofit corporation subject to Tit. 15A must file annual report including home addresses or another address where trustee regularly receives mail. (NJSA 15A:4-5).

Meeting of Members, Election of Trustees, and Rights and Liabilities of Members in Certain Cases.

Nonprofit corporations whose members elect trustees must conduct meeting of members at least once every two years. (NJSA 15A:5-2). Special meetings of members may be called by president or board or other officers, trustees or members as provided in by-laws, and upon application to Superior Court by not less than 10% of all members entitled to vote at meeting. (NJSA 15A:5-3). Unless otherwise provided in certificate of incorporation or by-laws, action may be taken by members by written consent. (NJSA 15A:5-6). Unless otherwise provided in certificate of incorporation or by-laws, voting by proxy is authorized. (NJSA 15A:5-18). Members not personally liable for debts, liabilities and obligations of corporation, except to extent of any unpaid portion of membership dues or assessments or other indebtedness of member to corporation, and then only after creditor has pursued corporation's assets. (NJSA 15A:5-25).

Trustees and Officers.

Nonprofit corporations must have at least three trustees. (NJSA 15A:6-2). Trustees must be elected at least biennially. (NJSA 15A:6-3). Classification of trustees permitted if certificate of incorporation or by-laws so provide, but no class of trustees may hold office for less than one year nor more than six years, and term of office of at least one class shall expire every two years. (NJSA 15A:6-4). Loan may be authorized to officers or employees (but not to trustees). Loans to officer or employee who is also trustee may be authorized by two-thirds vote of entire board (excluding vote of interested trustee), if permitted by certificate of incorporation or by-laws. (NJSA 15A:6-11).

Memberships.

Use of certificates or other written evidence of membership is permitted, but if used, certain minimum requirements for their contents required. (NJSA 15A:7-1). Memberships, unless otherwise provided for in certificate of incorporation or by-laws, not transferable and terminate on death of member. (NJSA 15A:7-2).

Employee Benefit Plans.

Statutory framework set up to provide guidance as to limits of benefit plans provided to employees and methods by which such plans are adopted. (NJSA 15A:8-1).

Amendments, Changes or Alterations.

Unless certificate of incorporation provides for lesser (or greater) voting requirement, major act such as amendment of certificate of incorporation may be accomplished only by two-thirds of votes cast by members (in corporation with members). (NJSA 15A:9-2).

Merger, Consolidation and Sale of Assets.

Mergers between domestic nonprofit corporations and domestic and foreign nonprofit corporations authorized. (NJSA 15A:10-1). Merger of nonprofit corporations, either domestic or foreign, with business corporations, domestic or foreign, is not authorized.

Rights of Dissenting Members.

Dissenters' rights not provided to members of nonprofit corporations. Member dissatisfied with vote on merger or similar corporate action may, if transaction is fraudulent or fundamentally unfair, seek relief in courts to enjoin transaction. (NJSA 15A:11-1).

Dissolution.

Specific provisions made for disposition of assets impressed with charitable trusts to ensure that upon dissolution, such assets are properly devoted to purposes for which they were intended. (NJSA 15A:12-8). Attorney General can bring action for dissolution of corporation organized fraudulently, having certificate of incorporation revoked, conducting activities improperly or prejudicially to interest of creditors or member or to public, misusing powers, being insolvent, having suspended activities for lack of funds, or violating certificate of incorporation. (NJSA 15A:12-11).

Foreign Corporations.

Nonprofit corporations organized in other states must qualify to transact activities in New

Jersey. (NJSA 15A:13-3). Filings with Secretary of State also provided to Attorney General so that Bureau of Charitable Registration aware that foreign nonprofit corporation is conducting activities in New Jersey. (NJSA 15A:13-4).

Fees of State Treasurer.

For filing original certificate of incorporation, $75 fee payable to State Treasurer. (NJSA 15A:15-1).

Limited Liability Companies.

See topic 2.06 Limited Liability Companies.

Deeds.

See category 21 Property, topic 21.06 Deeds.

2.04 [RESERVED]

2.05 JOINT STOCK COMPANIES:

No statutory provision for organization.

2.06 LIMITED LIABILITY COMPANIES:

See generally NJSA 42:2B-1 – 42:2B-70.

General Supervision.

In Secretary of State.

Purposes.

May be formed for any lawful business, purpose or activity. (NJSA 42:2B-8[a]).

Name of each limited liability company must contain words “limited liability company” or abbreviation “L.L.C.” (NJSA 42:2B-3[a]). Name of limited liability company must distinguish it from any corporation, limited partnership, business trust or limited liability company reserved, registered, formed or organized under New Jersey laws, or qualified to do business or registered as foreign corporation, foreign limited partnership or foreign limited liability company in New Jersey. (NJSA 42:2B-3[c]). Limited liability company may adopt and use alternate name, including any name unavailable as name of domestic or foreign limited liability company because already in use, but it must include words “limited liability company” or abbreviation “L.L.C.” Must file original and copy of certificate of registration of alternate name with Secretary of State. Certificate must include name, jurisdiction and date of establishment of limited liability company, alternate name, brief statement of nature of particular activities to be conducted using alternate name, and must state that limited liability company has not previously used alternate name in New Jersey. (NJSA 42:2B-4[b]). Registration effective for five years from date of filing and can be renewed successively for additional five-year periods. (NJSA 42:2B-4[c]).

Term of Company Existence.

May not exceed 30 years from date of filing certificate of formation with Secretary of State unless certificate of formation provides that limited liability company is perpetual, or operating agreement provides otherwise. (NJSA 42:2B-48[a]).

Formation of Limited Liability Company.

Must be made by at least one person who executes certificate of formation. Certificate must be filed with Secretary of State and set forth: name and address of limited liability company, address of registered office, registered agent for service of process, whether limited liability company has perpetual existence, and latest date on which limited liability company to dissolve if it has specific date of dissolution. (NJSA 42:2B-11[a]). If any information is incorrect, certificate of correction may be filed specifying inaccuracy or defect to be corrected and setting forth correction. (NJSA 42:2B-12). Certificate of formation will be canceled upon dissolution and completion of winding up of company, or upon filing of certificate of merger or consolidation. (NJSA 42:2B-14[a]). Once certificate of formation has been received by Secretary of State together with filing fees required, Secretary of State will certify certificate has been filed with office and return copy of original signed instrument, endorsed and certified to person who filed it. (NJSA 42:2B-17[a]).

Operating agreement is written agreement among members or, for limited liability company with one member, between member and limited liability company as to affairs of limited liability company and conduct of its business. (NJSA 42:2B-2). Operating agreement provides how person shall be admitted as member of company or in what manner person must become assignee of company interest or other rights or powers of member. (NJSA 42:2B-21[d]). Operating agreement provides for rights, powers and duties of members as well as classes and groups of members. (NJSA 42:2B-22[a]). Operating agreement may provide for taking of action, including amendment of operating agreement without vote or approval of any member or class or group of members, including action to create under provisions of operating agreement class or group of limited liability company interests that was not previously outstanding. (NJSA 42:2B-22[a]). Operating agreement may grant rights to certain members or specified classes or groups of members. (NJSA 42:2B-22[a]). Operating agreement may also provide for members to comply with terms and conditions of operating agreement and for them to be subject to specific penalties or consequences upon failure to comply or upon happening of events specified in operating agreement. (NJSA 42:2B-26). Operating agreement may also eliminate or limit personal liability of members for such failure to comply with its terms and conditions or for any other reason. (NJSA 42:2B-26).

Management.

Limited liability company management is vested in members in proportion to their interests in profits, with decision of members owning more than 50% of such interests controlling. (NJSA 42:2B-27[a][1]). If provided in operating agreement, management is vested in one or more managers chosen by members in manner provided in operating agreement. (NJSA 42:2B-27[a][2]). Managers hold offices and have responsibilities given to them by members as set forth in operating agreement. (NJSA 42:2B-27[a][2]). Managers can contribute to limited liability company, share in its profits and be members. (NJSA 42:2B-28). Persons who are both managers and members have rights and powers of both. (NJSA 42:2B-28). If members manage limited liability company, unless otherwise provided in operating agreement, each member can bind limited liability company. (NJSA 42:2B-27[b][1]). Each member also has authority to file for insolvency or reorganization under State or federal law if member has prior approval of members with more than 50% interest in profits of limited liability company. (NJSA 42:2B-27[b][1]). Operating agreement may provide for different classes or groups of managers with different rights, powers and duties. (NJSA 42:2B-29[a]). Managers may be subject to specific consequences or penalties for failing to perform in accordance with terms and/or conditions of operating agreement. (NJSA 42:2B-30). Unless otherwise provided in operating agreement, manager is not personally liable for failure to comply with operating agreement or for any other reason unless he or she commits gross negligence or willful misconduct. (NJSA 42:2B-30). Operating agreement may eliminate all such liability of manager. (NJSA 42:2B-30). Members and managers are fully protected when reasonably relying in good faith upon records of company and such information, opinions, reports or statements as presented to company by any of its other managers, members, officers, employees or committees or by any other person. (NJSA 42:2B-31).

Distributions.

Cash or other assets of limited liability company distributed among members as provided in operating agreement. (NJSA 42:2B-35). If not provided in operating agreement, distributions are made on basis of agreed value of contributions made by each member. (NJSA 42:2B-35). Profits and losses of limited liability company allocated among members in same fashion. (NJSA 42:2B-34). Limited liability company will not distribute to member if liabilities exceed fair value of assets of company. (NJSA 42:2B-42[a]). Upon resignation, member receives any distribution to which entitled, under operating agreement, and if operating agreement makes no such provision, after resignation, member receives fair value of interest as of date of resignation based upon net present value of member's share from distributions, less all valuation discounts, unless operating agreement provides otherwise. (NJSA 42:2B-39[a]). If resigning member is in violation of operating agreement, limited liability company may recover damages for breach of operating agreement and offset damages against amount otherwise distributable to resigning member. (NJSA 42:2B-39[a]). After three years from date of distribution, member who receives distribution not liable for amount of distribution unless action to recover distribution from members is commenced prior to expiration of three year period. (NJSA 42:2B-42[c]).

Filing Fees.

Filing certificate of registration of alternate name or certificate of renewal, $50. (NJSA 42:2B-65[a][1]). Filing certificate of formation, $125; filing certificate of correction, amendment, cancellation, merger or consolidation or restated certificate of formation, $100. (NJSA 42:2B-65[a][5]). Filing of annual report, $50. (NJSA 42:2B-65[a][6]). Reinstatement of certificate of limited liability company, $75 plus late fee of $200. (NJSA 42:2B-65[a][7]). Certified copies of any paper on file with Secretary of State, $25 per copy certified. (NJSA 42:2B-65[a][8]). Filing of application for registration as foreign limited liability company, $125. (NJSA 42:2B-65[a][10]). Certificate from Secretary of State including certificate of good standing, $50; certificate reciting all filings with Secretary of State, $100. (NJSA 42:2B-65[a][13]). Fee schedule available at: http://www.state.nj.us/treasury/revenue/dcr/geninfo/fees_pd.html.

Taxation.

Limited liability company classified as partnership for federal income tax purposes is classified as partnership for purposes of New Jersey taxation. (NJSA 42:2B-69[a]). Member or assignee of member in limited liability company so classified is treated as partner in partnership. (NJSA 42:2B-69[a]). For purposes of taxation, one-member limited liability company disregarded as entity separate from its owner, unless limited liability company is classified for federal tax purposes as partnership. (NJSA 42:2B-69[b]).

Transferability of Interests.

Person acquiring limited liability company interest is admitted as member of limited liability company upon later to occur of: formation of limited liability company, or time provided in and upon compliance with operating agreement, or if operating agreement does not so provide, when person's admission is reflected in records of limited liability company. (NJSA 42:2B-21[a]). Person may be admitted to limited liability company as member of company without making contribution or being obligated to make contribution. (NJSA 42:2B-21[c]). Limited liability company interest is considered personal property and is assignable in whole or in part. (NJSA 42:2B-43, 42:2B-44[a]). Assignee of limited liability company interest may become member and obtain right to participate in management of business only as provided in operating agreement and upon approval of all members or pursuant to any procedure established in operating agreement. (NJSA 42:2B-44[a]). Assignment of interest allows assignee to receive distributions and allocation of income, gain, loss, deduction, credit or any other similar item to which assignor entitled. (NJSA 42:2B-44[b]). Limited liability company interest can be pledged, and security interest or lien can be given against it. (NJSA 42:2B-44[b][3]). Regardless of whether assignee of limited liability interest becomes member, assignor is not released from his or her liability to limited liability company. (NJSA 42:2B-46[c]). Assignee has no authority to seek or obtain court order dissolving or liquidating limited liability company. (NJSA 42:2B-44[e]).

Registered Office and Registered Agent.

Must be maintained in state and may be changed. (NJSA 42:2B-6). If limited liability company fails to designate registered agent or fails to designate new registered agent for 30 days or more, company deemed to have no registered agent or office until certificate of change of registered agent or office filed. (NJSA 42:2B-7[c][2]).

Powers.

Members or managers of limited liability company, except as otherwise provided in operating agreement, may lend money to, borrow money from, act as surety, guarantor, or endorser for, guarantee or assume obligations of, provide collateral for, and transact other business with limited liability company. (NJSA 42:2B-9). Debts, obligations and liabilities of limited liability company are those of company; no member, manager, employee or agent of company is obligated personally for any such debts. (NJSA 42:2B-23).

Dissolution.

Limited liability company dissolved at first to occur of: time specified in operating agreement or 30 years from date of formation, unless limited liability company perpetual, happening of certain events specified in operating agreement, written consent of all members, judicial dissolution or additional member is not admitted within 90 days of limited liability company having no members. (NJSA 42:2B-48). Member or manager can apply to Superior Court for decree of dissolution of company when not reasonably practical for business to carry on in conformity with operating agreement. (NJSA 42:2B-49). Any time after limited liability company dissolved, limited liability company, liquidating trustee or appointed receiver may give notice requiring all creditors to present claims in writing within time limit specified. (NJSA 42:2B-49.1). Any creditor not filing claim as provided within time limit specified forever barred from suing on or enforcing claim. (NJSA 42:2B-49.2). Either manager or member or person approved by members may wind-up limited liability company’s affairs. (NJSA 42:2B-50[a]). Upon winding-up of limited liability company, assets distributed first to creditors then to members, first for return of contribution and second respecting their limited liability company interest in proportions in which members share in distributions. (NJSA 42:2B-51[a]).

Foreign Limited Liability Company.

Must be registered with Secretary of State. (NJSA 42:2B-53[a]). Company doing business in state may not maintain any action, suit or proceeding in state until it has registered and paid all fees and penalties. (NJSA 42:2B-57[a]). Penalty for doing business in state without registration $200 per year. (NJSA 42:2B-57[d]).

2.07 [RESERVED]

2.08 PARTNERSHIPS:

Uniform Partnership Act (1919) with certain modification and Revised Uniform Limited Partnership Act (1976) with 1985 Amendments have been adopted. (NJSA 42:1A, 42:2A).

Dissolution.

Partnership may be dissolved by application to Superior Court. Temporary receiver may be appointed. (NJSA 42:4-1, 42:4-7).

Partnership doing business under name containing designation “and Company” or “& Co.” must file statement in office of county clerk of county where such business is conducted. See category 17 Intellectual Property, topic 17.01 Trademarks and Tradenames.

Limited Liability Partnership.

Limited liability partnerships created upon partnership approval and by filing with Division of Commercial Recording in Treasury Department statement of qualification stating name of partnership, street address of partnership CEO and any New Jersey office if different address, statement of election to limited liability partnership and deferred effective date, if any. Agent for service of process of limited liability partnership must be New Jersey resident or person authorized to do business in New Jersey. Status of limited liability partnership effective on later of filing of statement of qualification or date specified in statement of qualification. Status of limited liability partnership not affected by errors or later changes in information required in statement of qualification. Name of limited liability partnership must end with “Registered Limited Liability Partnership,” “Limited Liability Partnership,” “R.L.L.P.,” “L.L.P.,” “RLLP,” or “LLP.” Foreign limited liability partnership must file statement of foreign qualification with Division of Commercial Recording in Treasury Department before transacting business in New Jersey. Requirements similar to those of domestic limited liability partnership. Partnership must file with Division of Commercial Recording in Department of Treasury annual report consisting of: name of limited liability partnership and jurisdiction under whose laws foreign limited liability partnership formed, street address of partnership CEO and any New Jersey office if different address, and name and street address of partnership’s agent for service of process if partnership has no office in New Jersey. If annual report not filed or fee not paid, State Treasurer provides written notice of intent to revoke statement of qualification. State Treasurer may revoke statement of qualification if no compliance by partnership within 60 days of notice of intent. Revocation only affects partnership’s status as limited liability partnership and does not dissolve partnership. Division of Commercial Recording of the Treasury Department may reinstate partnership’s statement of qualification within two years of effective date of revocation if partnership applies and successfully contests or corrects ground for revocation. (NJSA 42:1A-47 – 42:1A-54).

3 BUSINESS REGULATION AND COMMERCE

3.01 BANKS AND BANKING:

Banking Act is NJSA 17:9A-1 – 17:9A-467, general and comprehensive re-codification and revision of banking laws, effective Sept. 16, 1948, known as “The Banking Act of 1948.” Act is cited herein by section number only; e.g., § 1 refers to NJSA 17:9A-1. Uniform Commercial Code, effective Jan. 1, 1963 repeals §§ 220, 225, 226, 228, 229, 230-246 of Banking Act. (NJSA 12A:10-105). NJSA 17:9A-18 amended June 21, 2004. (Provides that nonbank may use term “bank” in its name under certain circumstances.)

Supervision.

Banks and savings banks are under supervision of Department of Banking and Insurance, chief officer of which is Commissioner of Banking and Insurance. (NJSA 17:1-1 – 17:1-24; NJSA 17:1C-6.1 – 17:1C-32). Commissioner of Banking and Insurance may impose wide variety of sanctions and penalties upon banks, savings banks, State associations, or other officers, directors, employees or major shareholders thereof deemed to have: (i) Failed to comply with order by commissioner or other regulatory agency; (ii) violated State or Federal law; (iii) taken any action resulting in material interest of institution being adversely affected; (iv) been convicted of crime that would permit adverse action by governmental agency pursuant to NJSA 2A:168A-1; or (v) provided incorrect, misleading, incomplete or untrue information to Commissioner or any Federal regulatory agency. (NJSA 17:1-25 – 17:1-28). Banking Advisory Board is appointed by Governor to assist Commissioner and Governor in promoting sound banking methods. (§§ 305-314). NJSA 17:9A-24 b.1 provides expedited approval process for certain applications by financial institutions and updates parity provisions for financial institutions.

Organization of banks is governed by Arts. 2 and 4; of savings and capital stock savings banks by Arts. 3, 3A and 4; and of mutual savings banks and bank holding companies by Art. 49.

Director, Officer, Board of Managers.

No director, officer or manager of financial institutions having principal office in municipality may hold same position in another financial institution having principal or branch office in same or adjacent municipality, or same market area, as determined by Commissioner. Excepted are: Directors or officers of bank holding companies acting as directors or officers of subsidiary banks of such holding companies; directors or officers of subsidiary banks acting as such in other subsidiary banks. When more than 50% of stock of two or more financial institutions is owned directly by same persons, person acting as director or officer of one such institution may hold such position in any other such institution. (NJSA 17:16E-1 – 17:16E-6). Bank or savings bank in compliance with federal "Depository Institution Management Interlocks Act," 12 U.S.C. § 3201 et seq., and federal regulations effecting that act, 12 C.F.R. § 348, are deemed in compliance with NJSA 17:16E-1 – 17:16E-6.

Directors' and Officers' Liabilities.

Except in case of breach of duty of loyalty, bad faith, knowing violation of law, or receipt of improper personal benefit, directors and officers of bank, savings bank or capital stock savings bank will not be personally liable for damages to bank or stockholders for breach of duty if and to extent liability eliminated or limited in certificate of incorporation. (§§ 3, 8.2, 197.1). For definition of breach of duty of loyalty, see category 2 Business Organizations, topic 2.03 Corporations, subhead Duties and Liabilities of Directors.

Stockholders.

Subject to certificate of incorporation, stockholders have pre-emptive rights to purchase new stock; rights of holders of preferred stock apply only to issue of preferred stock of same class or class having prior preference. (§ 99).

Directors may fix date not more than 60 days prior to any stockholders' meeting, any dividend payment date, date for allotment of rights, or date for change, conversion or exchange of stock, as record date for determination of stockholders entitled to receive notice and to vote or to be recognized for such purposes; if no record date is fixed, 65th day prior to date in question is treated as record date. (§ 96).

Fiduciaries holding stock of banking institution may exchange it for stock of bank holding company having 80% or more of outstanding stock of such banking institution. (NJSA 3B:20-21 – 3B:20-22).

Stockholders' Liabilities.

Except as expressly provided by law or certificate of incorporation, stockholders are not liable by reason of stock ownership for bank's debts or for assessment. (§ 100).

Stockholders' Meetings.

Annual meeting held on such day in Jan., Feb., Mar. or Apr. as bylaws provide or on fourth Tues. in Mar., or in case of savings bank operating on fiscal year basis, no later than 120 days after closing of fiscal year. Notice of meeting must be published and mailed to stockholders. (§§ 79, 81). Stockholder action may also be taken by unanimous written consent. (§ 79.1). Special meetings may be called by president, board of directors, holders of not less than one-tenth of voting shares outstanding, or by such other officers or persons authorized in certificate of incorporation or by-laws. Upon request of person or persons entitled to call meeting, secretary or cashier must give notice thereof by mail; if notice not given, Commissioner may order that meeting be called. (§§ 80-82). Meetings may be held at bank's principal office, branch office, or anywhere in municipality where bank maintains principal or branch office. (§ 83). Majority of outstanding shares entitled to vote, represented in person or by proxy, constitutes quorum for transaction of business. (§ 91).

Proxies must be filed with secretary or cashier; are invalid after eleven months from date thereof unless a longer time is expressly provided therein (but may in no event be valid after three years). They are revocable at will, but revocation is effective only after written notice thereof is filed with secretary or cashier, and presence of stockholder at meeting does not revoke proxy unless stockholder files written notice of revocation with secretary of meeting (unless by-laws provide otherwise). Death or incapacity of stockholder does not revoke proxy until written notice thereof is filed with secretary or cashier. Statute does not limit duration or permit revocation contrary to its terms, of proxy coupled with an interest. (§ 90).

Cumulative voting not permitted. (§ 94).

Voting trust agreements are invalid, unless in effect on Sept. 16, 1948. (§ 90.1).

Agency and Fiduciary Powers.

Bank, and national banking association having its principal office in New Jersey, hereafter authorized to act as fiduciary, or authorized prior to Sept. 16, 1948, to exercise any of the following powers may exercise all of them (whether or not specifically set forth in certificate of incorporation), and savings bank authorized either heretofore (by special charter) or by incorporation or amendment under the Act, to exercise any of such powers, may exercise them: (1) Act as custodian or escrow agent of personal property; (2) as agent, receive, hold, manage and dispose of by sale or otherwise personal and real property, and act as agent for any other purpose not prohibited by law; (3) act as transfer agent or registrar; (4) act as trustee of or with respect to any security or instruments of indebtedness or of security, and as trustee under any other corporate or public trust; (5) act under judicial appointment as guardian, custodian, trustee or administrator, of person or estate or both, of any person; (6) act as executor, trustee, testamentary guardian, administrator c. t. a., administrator, substituted trustee or administrator; (7) act as assignee of trustee for benefit of creditors; (8) act under judicial appointment as receiver or trustee; (9) receive from any person and hold in trust and dispose of, personal and real property; (10) act, under contract with State Treasurer, as fiscal agent or custodian for state or pension agency of state (NJSA 52:18A-8.1); (11) employ registered broker-dealer as custodian of securities held in fiduciary capacity and register securities in name of broker-dealer; (12) retain, purchase or otherwise acquire for trust accounts administered in fiduciary capacity, N.J. state and local obligations or obligations guaranteed by state or local body, held by bank or acquired by bank as underwriter or as member of underwriting syndicate (but not more than 50% of any obligations issued by bank); (13) accept, administer and execute all other trusts and act in all other fiduciary capacities; (14) exercise all fiduciary powers permitted to State savings and loan associations under NJSA 17:12B-48. Banks, national banking associations and savings banks having such powers are called qualified banks. (§§ 1, 28, 28.1, 28.2). Qualified bank that is wholly-owned subsidiary of bank holding company organized under laws of N. J. may apply ex parte to Superior Court to be substituted in place of one or more qualified banks that are wholly-owned subsidiaries of such bank holding company. On application, court makes order appointing applicant qualified bank as successor fiduciary with same powers and duties as possessed by qualified bank for which successor fiduciary substituted. (§ 29). Qualified bank named as fiduciary in will or other instrument need not give security unless such instrument requires it. (§ 30). Qualified bank that creates fund to be held as security for performance of its fiduciary obligations need not give any other security upon appointment as fiduciary unless instrument appointing it specifies otherwise. Such fund, consisting of investments lawful for fiduciaries, must be deposited by bank on order of Superior Court with federal reserve bank of district in which it is located, or with another qualified bank approved by Commissioner for such purpose, and held subject to order of Court. Withdrawals of or substitutions for investments may be made on order of Superior Court except that U.S. Treasury bonds may be substituted for like bonds of same amount without such order. (§ 31).

Insured depositories in state are authorized to accept deposits and conduct other banking business as agents for any affiliates and are not required to obtain branch office license in connection therewith. (§ 19.2).

Savings and loan associations may apply to Commissioner for permission to act as trustee, executor, administrator, guardian or in any other fiduciary capacity in which federal savings and loan associations doing business in New Jersey are permitted to act. Whenever under New Jersey law corporations acting in fiduciary capacities are required to deposit securities with state authorities for protection of private or court trusts, associations so acting must make similar deposits. In such cases, associations are not required to execute bond usually required of individuals if New Jersey corporations under similar circumstances are exempt from this requirement. Commissioner may make regulations with respect to exercise by savings and loan associations of their fiduciary powers; regulations to be in substantial conformity with similar rules and regulations of Federal Home Loan Bank Board. (NJSA 17:12B-48 [19(a), (c)]).

Trust funds held by qualified banks must be kept separate from other moneys, securities and property, and are not liable for bank's debts or obligations. Moneys held by qualified bank in one or more fiduciary capacities, awaiting investment or disbursement, may be deposited in single account or separate accounts with itself or any other banking institution in New Jersey or any other state. In case of insolvency of bank that has deposited funds held in fiduciary capacities with itself, such bank in its fiduciary capacities may assert preferred claims against its assets, which are prior to claims not otherwise entitled to preference but subordinate to all other preferred claims. In case of insolvency of other banking institution in which such funds have been deposited, qualified bank that has made such deposits is liable for amount thereof as if they had been deposited with itself and is subrogated to its claims as fiduciary against insolvent banking institution. Qualified banks acting in fiduciary capacity shall invest or deposit all moneys in excess of $100, whether income or principal, in trust accounts, on interim basis pending distribution or more permanent investment. "Prudent investment" standard applies, and qualified banks are authorized to charge reasonable fee for this service. (§ 35).

Trust funds held by savings and loan associations acting in fiduciary capacities must be segregated from general assets of association, and separate set of books and records must be maintained, documenting transactions with respect thereto. Associations may not receive in their trust departments deposits of current funds subject to check or deposits of checks, drafts, bills of exchange or other items for collection or exchange purposes. Funds deposited or held in trust by association awaiting investment must be carried in separate account and may not be used by association in conduct of its business unless it first sets aside in its trust department U.S. bonds or similar securities approved by Commissioner, nor may such funds be loaned to any officer, director or employee of association. In event of failure of any such association, owners of funds held in trust for investment shall have lien on securities so set apart in addition to claims against estate of association. (NJSA 17:12B-48 [19(a)]).

Common trust funds provided for. (§§ 36-46). Where there is cofiduciary, bank shall acquire no participation in common trust fund without prior written consent of cofiduciary. Participation shall be withdrawn within three months after written request by cofiduciary. (§ 37[B]). Bank may combine or merge two or more of affiliate banks' common trust funds provided: (1) Merger does not contravene written plan for each fund to be merged; (2) written plan governing merger has been approved by board or authorized committee of bank or banks and designates which common trust fund is surviving trust fund, specifies amendments or changes in plan of operation of surviving fund, and provides for conversion of units of participation of merging funds into units of surviving fund; and (3) each participant in merging funds receives units in surviving fund based on pro rata interest in value of assets of merging funds. (§ 37.1).

Bank (including savings bank, national banking association and foreign bank authorized to act as fiduciary in this state) acting as fiduciary may register and hold securities in name of nominee unless will or trust directs otherwise. Bank acting as fiduciary will be liable for any loss caused by acts of nominee with respect to securities registered. (NJSA 3B:20-3 – 3B:20-5).

Powers: Federal Parity.

By regulation of Commissioner, savings banks are authorized to exercise any power authorized for federal savings banks pursuant to federal law or rules or regulations of Federal Home Loan Bank Board. Such powers are automatically exercisable upon expiration of 30 days from date of adoption by federal regulatory agency, except if Commissioner within said 30-day period provides notice that power should not be granted to New Jersey savings banks. (N. J. Admin. Code, NJSA 3:6-1.1). Similar authority, unless otherwise contrary to state law, is extended by regulation to banks in respect of powers, rights, benefits or privileges authorized for national banks pursuant to federal law or rules or regulations of Comptroller of Currency, Federal Reserve Board and Federal Deposit Insurance Corporation.

Deposits and Withdrawals.

Absent contrary intent manifested in contract or by clear and convincing evidence at time account is created: (1) Joint account belongs, during lifetime of all parties, to parties in proportion to their contributions; (2) P.O.D. account belongs to original payee(s) during lifetime; (3) trust account belongs beneficially to trustee(s) during his or her lifetime(s). If there is irrevocable trust, account belongs beneficially to beneficiary. (NJSA 17:16I-4). At death of party to joint account, absent evidence of different intent when account was created, sums in account belong to surviving party. If P.O.D. account: (1) On death of one of two or more original payees, remaining sums belong to surviving payees, absent evidence of different intent when account was created; (2) on death of sole original payee or survivor of two or more original payees, sums belong to P.O.D. payee(s), if surviving, or to survivor of them if one or more die before original payee; if two or more P.O.D. payees survive, no right of survivorship in event of death of payee thereafter, unless expressly provided for in terms of account or deposit agreement. If trust account: (1) On death of one of two or more trustees, remaining sums belong to surviving trustees, absent evidence of different intent when account was created; (2) on death of sole trustee or survivor of two or more trustees, remaining sums belong to beneficiary or beneficiaries or their survivors, absent evidence of contrary intent. If two or more beneficiaries survive, no right of survivorship on death of any beneficiary thereafter, unless expressly provided for in account agreement. In other cases, death of any party to multiple-party account has no effect on beneficial ownership of account, other than to transfer rights of decedent as part of his or her estate. Right of survivorship arising from express terms of account or under NJSA 17:16I-5, beneficiary designation in trust account, or P.O.D. payee designation, cannot be changed by will. (NJSA 17:16I-5). Above provisions are determined by form of account at death of party. Form may be altered by written notice. (NJSA 17:16I-6). When P.O.D. account payee or trust account beneficiary is under age 18 when entitled to payment, financial institution shall make payment if: (1) Certificate appointing guardian is filed with institution, to guardian of estate or to guardian of beneficiary or payee; or (2) if certificate is not filed, payment prioritized as follows: (a) to beneficiary or payee if married, (b) to parent(s) or any person having custody of and residing with beneficiary or payee, or (c) to beneficiary or payee upon attaining age 18. (NJSA 17:16I-12[b]). Absent written notice, payments made pursuant to Tit. 17, c. 16I or Tit. 17, c. 12B, discharges institution from all claims whether or not payment is consistent with beneficial ownership of account. (NJSA 17:16I-12[a]).

Savings and loan association deposits generally subject to same conditions, except beneficiaries paid at age 16. (NJSA 17:12B-89 – 17:12B-91; NJSA 17:16I-2 - 17:16I-15).

Where account is in name of cofiduciaries, withdrawals may be made by any one or more of them who are so authorized in writing by all of them, unless instrument, order or decree under which they act provides otherwise. (§ 219).

Consumer Checking Accounts.

(NJSA 17:16N-1-7). Depository institutions that offer regular checking accounts must offer New Jersey Consumer Check Account at low cost to all low-income consumers. New Jersey consumer checking account must be used primarily for personal, family, or household purposes. Depository institution may close New Jersey consumer checking account under same standards for fraudulent activity and overdrafts as it applies to holders of regular checking accounts at depository institution.

Death or Incompetency of Depositor.

§ 220 repealed by Uniform Commercial Code (NJSA 12A:10-105), effective Jan. 1, 1963.

Death or incompetency of depositor who has in writing appointed agent to indorse and deposit instruments for payment of money does not terminate agent's authority until banking institution receives actual notice of death or incompetency. (§ 221).

Adverse claim to deposit need not be recognized unless accompanied by court order or indemnity bond, except where deposit is in name of a fiduciary for adverse claimant, who makes affidavit showing fiduciary relationship and reasonable cause for belief that fiduciary is about to misappropriate deposit. (§ 223).

Stop payment order § 225 repealed by Uniform Commercial Code, (NJSA 12A:10-105), effective Jan. 1, 1963.

Payment of Forged or Altered Instrument.

§ 226 repealed by Uniform Commercial Code, (NJSA 12A:10-105), effective Jan. 1, 1963.

Final Payment of Item by Payor Bank.

Item is finally paid by payor bank when bank has first done any of following: paid item in cash; settled for item without right to revoke settlement under statute, clearing-house rule, or agreement; or made provisional settlement for item and failed to revoke settlement in time and manner permitted by statute, clearing-house rule, or agreement. If collecting bank receives settlement for item that is or becomes final, bank is accountable to customer for amount of item and any provisional credit given for item becomes final. Subject to applicable law stating time for availability of funds and any right of bank to apply deposit to obligation of depositor, deposit of money becomes available for withdrawal as of right at opening of bank's next banking day after receipt of deposit. (NJSA 12A:4-215).

Nonpayment Through Mistake.

§ 228 repealed by Uniform Commercial Code, (NJSA 12A:10-105), effective Jan. 1, 1963; optional language omitted from NJSA 12A:4-202(1)(b).

Delay in Presenting Instrument for Payment.

§ 229 repealed by Uniform Commercial Code. (NJSA 12A:10-105), effective Jan. 1, 1963.

Policy Disclosure.

Every banking institution shall provide written disclosure to every deposit account holder and to every applicant for deposit account describing institution's policy with respect to when account holder may draw against deposits, and shall notify in writing all deposit account holders of any change in policy. (NJSA 17:16L-2).

Unclaimed Deposits.

Escheat for presumed unclaimed deposits, as provided in NJSA 17:9-18 – 17:9-26, was repealed by L. 1989, c. 58, § 1, and is now covered by Uniform Unclaimed Property Act (1981), NJSA 46:30B-1 – 46:30B-109 (revising escheat law so that title remains in owner, although state has full use of property until successful claim is made). See also category 21 Property, topic 21.01 Absentees, subhead Escheat.

Collections.

Uniform Bank Collection Code (Art. 36, §§ 230-246) repealed by Uniform Commercial Code, (NJSA 12A:10-105), effective Jan. 1, 1963.

Loans and Investments by Banks.

Subject to provisions of Act, banks have power to make loans, secured or unsecured, including loans to stockholders. (§ 25[7]). Banking institution may make loan to depositor secured by pledge of deposit, but not to exceed amount of deposit. Rate of interest on such loan shall not exceed maximum permitted by NJSA 31:1-1 or 2% in excess of interest rate paid on pledged deposit, whichever is greater. (§ 59.40). Unlawful for bank to discriminate against person or group because of race, creed, color, national origin, ancestry, age, marital status, affectional or sexual orientation, genetic information, sex or typical hereditary cellular or blood trait of any individual, or because of liability for service in Armed Forces of U.S. or Nationality of any individual, or because of refusal to submit to genetic test or make available results of genetic test to employer in fixing rates, conditions or provisions of loan. (NJSA 10:5-12). Unlawful for bank to discriminate in granting mortgage loans because property is located in specific geographical area. (NJSA 17:16F-3). Banks may make extra charge for insurance on borrower's life, and if consented to in writing by borrower, said charge may be deducted from proceeds of loan. (§ 70.2). Banks may also make or invest in secondary mortgage loans subject to specified conditions. (§ 24[14]). With certain restrictions, graduated payment mortgages, reverse annuity mortgages and reverse direct payment mortgages are permitted. (NJSA 46:10B-12 – 46:10B-21). Bank may make demand loan in amount of $5,000 or more secured by interest in warehouse receipts, bills of lading, or other documents of title that are subject to Uniform Commercial Code or by interest in negotiable instruments or commercial paper subject to Uniform Commercial Code or by interest in stocks, bonds, certificates of deposit or other securities subject to Uniform Commercial Code or by interest in any combination of foregoing. No maximum rate of interest is applicable to such loan except criminal usury limits of 30% on loans to individuals and 50% on loans to corporations. (§ 24.9[8]; NJSA 2C:21-19).

In addition to investments otherwise authorized by law, with exception of bank service corporations, bank may invest in any kind or kinds of assets, wherever located, of any person, partnership, corporation, other business entity, association or body politic, in amounts not exceeding in aggregate more than 3% of bank's total assets, or 50% of its capital, surplus, reserves, undivided profits and capital notes, whichever is less. Bank may invest in bank service corporations in aggregate amount not to exceed 10% of bank's unimpaired capital stock surplus. (§ 24.12). Aggregate amount invested in asset or assets of any one person, partnership, corporation, other business entity, association or body politic, shall not exceed 1% of bank's total assets. (§ 24.12).

Banks may purchase, hold and invest in mortgages, obligations or other securities that are or have been sold by FHLMC pursuant to §§ 305 or 306 of FHLMC Act to same extent bank may purchase, hold or invest in obligations issued by or guaranteed by U.S. (§ 24[15]). Banks may acquire and sell warrants, options or other similar rights to any class of equity securities issued by corporation if, when acquired, issuer or issuer's parent company, affiliate or subsidiary, is borrower of funds loaned by bank, and if acquisition and sale neither adds to bank's credit risk nor increases its financial liabilities. (§ 24.9[10]).

With certain exceptions, total loans and extensions of credit by bank to any one borrower to bank may not exceed 15% of aggregate of bank's capital funds if not fully secured by collateral having market value at least equal to amount of loans and extensions of credit (10% if loans and extensions of credit are fully secured). (§§ 60-63; Admin. Code, NJSA 3:11-7.8). See also §§ 71-75.

Small Business Loans.

Bank may make small business loans not exceeding $50,000 upon terms and conditions prescribed in Act. (§§ 59.25-59.39).

Small Loans by Banks.

See topic 3.19 Interest.

Banks may also make "advance loans" pursuant to written contract (including credit card agreements) by paying borrower's checks or credit card charges notwithstanding borrower has no funds on deposit. (§§ 59.1-59.15). Limit is $25,000 exclusive of interest, insurance premiums and other charges per borrower. (§ 59.11). Interest may be at such rate as is agreed to by banks and borrower, subject to criminal usury limits. Subject to specified conditions, provisions for increases and decreases in rate of interest applicable to such loans are permitted. (§ 59.6). Penalties provided for violations. (§§ 59.12, 59.13).

Banks may extend credit through use of credit cards issued through arrangements with participating vendors. (§ 24.9[4]).

Market Rate Consumer Loan Act generally authorizes banks, savings banks and savings and loan associations to extend to consumers open and closed-end credit at those rates of interest and for those amounts and terms as may be agreed to by lender and borrower. Acceleration clauses, waiver of borrower's right to sue clauses and clauses granting power of attorney to confess judgment in revolving credit plans and close-end credit agreements prohibited. (NJSA 17:3B-4 – 17:3B-28).

Banks may make any investment authorized for State savings and loan associations under NJSA 17:9A-24.9. See subhead Loans and Investments by Savings and Loan Associations, infra.

Loans and Investments by Savings Banks.

Legal investments include: (1) certain federal, state, county and municipal securities (§ 175) and revenue bonds of certain units, agencies or commissions thereof (§§ 175.2-175.5); (2) loans made pursuant to Federal Servicemen's Readjustment Act (NJSA 17:2-9.2); (3) certain railroad bonds and equipment obligations (§§ 177, 179); (4) certain public utility bonds (§ 178); (5) certain industrial obligations (§ 180); (6) certain interest-bearing corporate securities (§ 180.1); (7) certain Canadian dominion, province and city securities (§ 175.1); and (8) subject to certain restrictions, (a) common and preferred stocks of certain corporations, (b) shares in investment companies whose shareholders are limited to savings banks of New Jersey, (c) common stock of national banks that are members of Federal Reserve, (d) common stock of insurance companies authorized to do business in New Jersey, (e) debentures or participation certificates of New York trust companies, all of whose stock is owned by not less than 20 New York savings banks (§§ 180.5-180.11), (f) certain development bonds issued by foreign governments and obligations of international development banks (NJSA 17:2-10), and (g) certificates of stock or other evidence of ownership interest in and proprietary lease from corporation or partnership formed for purpose of cooperative ownership of real estate in New Jersey for purpose of financing or refinancing existing ownership interest in such corporation or partnership (NJSA 17:2-6). In addition to investments otherwise authorized by law, savings bank may invest in any kind or kinds of assets, wherever located, of any person, partnership, corporation, other business entity, association or body politic, in amounts not exceeding in aggregate more than 3% of savings bank's total assets, or 50% of its capital, surplus, reserves, undivided profits and capital notes, whichever is less. Aggregate amount invested in asset or assets of any one person, partnership, corporation, other business entity, association or body politic, shall not exceed 1% of savings bank's total assets. (§ 24.12). Savings banks may also make any investment authorized for State savings and loan associations under NJSA 17:12B-155. (§ 24.9). See subhead Loans and Investments by Savings and Loan Associations, infra. Commissioner may by regulation authorize other loans or investments that federal savings and loan associations are authorized to make. (§ 182.1). Commissioner can by regulation authorize investment in marketable corporate obligations not otherwise authorized by Banking Act. (§ 182.3). Savings banks may make "check loans" and commercial loans subject to same terms and conditions as pertain to such loans when made by banks (§ 26[7], §§ 59.1-59.15), and may extend credit through use of credit cards issued through arrangements with participating vendors (§ 24.9). Commissioner may by regulation authorize savings banks to exercise such powers as are authorized for Federal mutual savings banks. (§ 24b. 1; N.J.A.C. 3, c. 6, § 1.1). Savings banks may purchase, hold and invest in mortgages, obligations or other securities which are or have been sold by FHLMC pursuant to §§ 305 or 306 of FHLMC Act to same extent bank may purchase, hold or invest in obligations issued by or guaranteed by U.S. (§ 24[15]). Savings banks may acquire and sell warrants, options or other similar rights to any class of equity securities issued by corporation if, when acquired, issuer or issuer's parent company, affiliate or subsidiary is borrower of funds loaned by savings bank, and if acquisition and sale neither adds to savings bank's credit risk nor increases its financial liabilities. (§ 24.9[10]).

Mortgage Loans.

Savings bank may make first mortgage loans on real property. Unlawful for savings bank to discriminate in granting mortgage loans because property is located in specific geographical area. (NJSA 17:16F-3). Savings banks may also make or invest in secondary mortgage loans subject to specified conditions. (§ 24). With certain restrictions, graduated payment mortgages, reverse annuity mortgages and reverse direct payment mortgages are permitted. (NJSA 46:10B-12 – 46:10B-21). If servicing of mortgage loan for which escrow account has been established is sold, assigned, or transferred, seller shall notify mortgagor of sale not more than 45 days after, nor less than ten days prior, to date next payment of property taxes are due. (NJSA 17:16F-17).

Loans on collateral securities are permitted: (1) to a depositor on pledge of deposit; (2) up to $10,000 on pledge of certain life insurance policies, but not in excess of 90% of cash surrender value; (3) up to $10,000 on pledge of securities, valued at twice amount of loan, which (a) are legal investments for savings banks or (b) have a readily ascertainable value or are listed on a securities exchange, or up to $20,000 in certain obligations of U. S. having a value not less than 110% of such loan. (§ 182).

Market Rate Consumer Loan Act generally authorizes banks, savings banks and savings and loan associations to extend to consumers open and closed-end credit at those rates of interest and for those amounts and terms as may be agreed to by lender and borrower. Acceleration clauses, waiver of borrower's right to sue clauses and clauses granting power of attorney to confess judgment in revolving credit plans and closed-end credit agreements prohibited. (NJSA 17:3B-4 – 17:3B-28).

New Jersey Residential Mortgage Lending Act (NJRML) governs residential mortgage activity formerly governed by New Jersey Licensed Lenders Act. Act was enacted in response to new standards set forth under Federal Secure and Fair Enforcement for Mortgage Licensing Act to provide additional protection for consumers seeking mortgage loans and to ensure fair practices by mortgage lending industries. (P.L. 2009, C. 53). New Jersey Licensed Lenders Act, which formerly handled all lending activities, was split into two separate acts. NJRML concerns mortgage activities, while New Jersey Consumer Finance Licensing Act governs non-mortgage lending activities. NJRML covers activities in primary and secondary mortgage loan markets. (P.L. 2009, C. 53).

Loans and Investments by Savings and Loan Associations.

Legal investments include: (1) Obligations of U.S.; (2) Federal Home Loan Bank Stock; (3) participations in mortgage loans; (4) accounts of other State or Federal Associations whose principal office is located in New Jersey; (5) authorized investments of savings banks of New Jersey; (6) loans upon obligations secured by pledge of any security designated in (1) and (5); (7) securities of certain New Jersey corporations; (8) securities of Federal corporations; (9) general obligations of State of New Jersey or any political subdivision thereof; (10) loans to certain financial institutions and to registered brokers and dealers; (11) certificates in certain registered open-end management investment companies; (12) commercial paper and corporate debt securities approved pursuant to rules and regulations promulgated by Commissioner. (NJSA 17:12B-165). Savings and loan associations may also invest in certain development bonds issued by foreign governments and obligations of international development banks (NJSA 17:2-10) and certificates of stock or other evidence of ownership interest in and proprietary lease from corporation or partnership formed for purpose of cooperative ownership of real estate in New Jersey for purpose of financing or refinancing existing ownership interest in such corporation or partnership, with certain restrictions (NJSA 17:2-6).

Savings and loan associations may also issue credit cards, extend credit in connection therewith, and otherwise engage in or participate in credit card operations, subject to such regulations as Commissioner may make. (NJSA 17:12B-48).

In accordance with rules and regulations promulgated by Federal Savings and Loan Insurance Corporation, savings and loan association may make or purchase any loan that it is otherwise authorized by law to make or purchase to or from any officer, director, attorney, employee or any affiliated person of such association. (NJSA 17:12B-69).

Foreign Banks.

Banks organized under laws of another state, territory or possession of U. S. and banks organized under laws of U. S. that do not have principal office in New Jersey may transact business in New Jersey only as executor or as testamentory trustee or guardian and then only when named in decedent’s will or codicil. Successor by merger or consolidation to foreign bank lawfully transacting business in New Jersey upon qualification generally may continue to transact business as fiduciary if not contrary to controlling fiduciary instrument. Bank organized under laws of foreign government may not transact any business in New Jersey. No foreign bank may maintain office in New Jersey except that service facilities may be maintained in this State provided that only back office operations are performed. (§§ 316-317). Foreign bank desiring authority to transact business in New Jersey as aforesaid must apply to Commissioner and file: (1) Copy of its certificate of incorporation; (2) proof of adequate insurance coverage in connection with volume of transactions and nature of business; (3) certificate that it will comply with laws of New Jersey; and (4) power of attorney authorizing Commissioner to accept service of process on its behalf. (§ 318). Certificate of authority is good unless revoked by Commissioner or surrendered by bank. Commissioner may adopt regulations establishing requirements for periodic renewal of certificate and for notification to Commissioner if foreign bank desires to surrender certificate or merges with or is acquired by another financial institution. Failure to provide notification required by regulations is grounds for revocation of certificate. (§ 322). Commissioner must revoke certificate of authority if bank ceases to be authorized by laws of its own jurisdiction to act in capacities permitted to it by New Jersey law, or for other causes stated in statute. (§

326).

Foreign bank may not sue on any cause of action arising out of transaction of business in violation of statute, and violation of provisions of act is crime of fourth degree. (§ 330, NJSA 2C:43-1[b]). Statute does not prohibit foreign bank from: (1) Contracting in New Jersey with banking institution to acquire partial or entire interest in loan which banking institution proposes to make, with like interest in any security and security instruments to be given to banking institution to secure or evidence loan; (2) contracting in New Jersey with banking institution to acquire, and acquiring in New Jersey from such banking institution partial or entire interest in any loan made by such banking institution, with like interest in any security and security instrument given to secure or evidence such loan; (3) enforcing in New Jersey obligations acquired by it in transaction of business outside of New Jersey or in transaction of any business authorized by (1) and (2); or (4) acquiring, holding, leasing, mortgaging, contracting with respect to, or otherwise protecting or conveying property in New Jersey assigned, transferred, mortgaged or conveyed to it as security for, or in whole or part satisfaction of, loan or loans made by it or obligations acquired by it in transaction of business outside of New Jersey or in transaction of any business authorized by (1) and (2). (§ 331).

Taxation of Bank Stock.

(NJSA 54:11A-5, 54:11A-7) repealed, effective July 7, 1993.

Excise Tax on Savings Institutions.

(NJSA 54:10D-1 et seq.) repealed, effective July 2, 2002.

Annual Assessment for Regulatory Expenses.

Depository and financial entities chartered, licensed, or registered by Division of Banking will be charged annual assessment to recoup state's actual expenses in supervising and monitoring such entities. (NJSA 17:1C-33 – 17:1C-48). Total assessment charged to each entity consists of base assessment and, if necessary, volume assessment. (N.J.A.C. 3:5-4.2). Base assessments are determined by Commissioner of Department of Banking and Insurance, and shall take into account such factors as average size of entities within each regulated industry, extent of regulatory activities required with respect to each industry, potential impact of assessment on business entities of various sizes, and certain maximum base assessment amounts for each regulated entity. (N.J.A.C. 3:5-4.3). Base assessments are totaled and deducted from Department's total incurred expenses; remaining expenses shall be satisfied by volume assessments. (N.J.A.C. 3:5-4.4). Volume assessments are calculated for each regulated entity by multiplying remaining expenses by percentage of: (i) Total assets under supervision if entity is depository institution or if entity is credit union with more than $40 million in assets; or (ii) loan volume for licensee entities, including mortgage bankers, correspondent mortgage bankers, secondary lenders, consumers, lenders, pawnbrokers, sales finance companies, insurance premium finance companies, home repair contractors, and motor vehicle installment sellers. (N.J.A.C. 3:5-4.4).

Limitations on Ownership of Bank Stocks.

Upon violation, commissioner may order to cease and desist. Civil penalties provided. Prior approval from Commissioner of Banking is required before person obtains or exercises control of capital stock savings bank, or acquires or offers to acquire beneficial ownership of more than 25% of voting stock of capital stock savings bank. Same rules apply to acquisition of voting shares in bank or holding company that controls bank. (NJSA 17:9A-382 – 17:9A-387).

Regional and National Banking.

New Jersey has enacted legislation permitting interstate operations of state or federally chartered savings and loan associations or federally chartered savings banks and savings and loan holding companies on regional or national reciprocal basis under certain circumstances. Act establishes Central-Atlantic region consisting of New Jersey, Delaware, Illinois, Indiana, Kentucky, Maryland, Michigan, Missouri, Ohio, Pennsylvania, Tennessee, Virginia, West Virginia, Wisconsin, and District of Columbia. When any two states, excluding New Jersey, with $20,000,000,000 in insured deposits adopt legislation permitting New Jersey based savings banks, savings and loan associations or savings and loan holding companies, or both, to acquire this type of insured institution or savings and loan holding company, or both, in their state, region would be established. Once established, if any state in region enacts legislation permitting New Jersey insured institutions or savings and loan holding companies to acquire same type of institution or holding company in its state, then institutions or companies in that state could acquire institutions or companies in New Jersey. Act allows nationwide acquisition of insured institutions and savings and loan holding companies on reciprocal basis, when at least 13 states, excluding New Jersey and including four of largest ten states, determined by deposits, permit New Jersey insured institutions and savings and loan holding companies to acquire like institutions and companies located in those states. (NJSA 17:12B-278 – 17:12B-280).

Bank holding companies and savings and loan holding companies are subject to periodic filing requirements and to examination by Commissioner of Banking. (NJSA 17:12B-282, 17:12B-283).

Permissible Release of Customer Account Information by Financial Institutions.

Financial institutions are immune from liability for releasing certain information to law enforcement agency or county protective service provider if financial institution has knowledge of or suspects fraudulent or illegal activity against vulnerable senior customer. (NJSA 17:16T-1).

3.02 BILLS AND NOTES:

Uniform Commercial Code adopted (Tit. 12A as am'd), effective Jan. 1, 1963; c. 3 repealed and replaced by L. 1995, c. 28, § 1, effective June 1, 1995, and codified at Tit. 12A, c. 3; c. 4 repealed and replaced by L. 1995, c. 28, § 2, effective June 1, 1995, and codified at Tit. 12A, c. 4; c. 9 repealed and replaced by L. 2001, c. 117, § 1, effective July 1, 2001, and codified at Tit. 12A, c. 9. See topic 3.09 Commercial Code.

Uniform Negotiable Instruments Act (Tit. 7, cc. 1-4) repealed by Uniform Commercial Code, (NJSA 12A:10-105), effective Jan. 1, 1963.

Days of Grace.

Uniform Commercial Code, effective Jan. 1, 1963, (NJSA 12A:10-105), repeals statute, (NJSA 7:5-2), abolishing days of grace. NJSA 12A:10-103 provides that repeal of any statute shall not of itself revive any right or remedy abolished by the statute so repealed.

Special Requirements.

There are no special requirements as to recitals in notes of particular kinds.

Sat. until 12 o'clock noon shall be deemed business day.

Sun. is bank holiday; bills, checks and notes payable or presentable on Sun. deemed payable or presentable on next business day. (NJSA 36:1-1).

Checks.

Check Cashers Regulatory Act of 1993. (NJSA 17:15A-30 et seq.). See topic 3.01 Banks and Banking.

Judgment Notes.

No judgment by confession shall be entered upon warrant of attorney included in body of bond, note or any instrument for payment of money. (NJSA 2A:16-9). Judgment by confession may not be used in connection with retail installment sales contracts and home repair contracts (NJSA 17:16C-37, 17:16C-64), revolving credit plans and closed-end credit agreements (NJSA 17:3B-13[c], 17:3B-23[c]). See also category 5 Civil Actions and Procedure, topic 5.15 Judgments, subhead By Confession. Practice on warrants for confession governed by Rule 4:45.

Attorney fee clauses do not destroy negotiability and are enforceable if reasonable (79 N.J. Super. 65, 190 A.2d 400) (decided under old c. 3, since repealed and replaced by Tit. 12A, c. 3).

3.03 BILLS OF LADING:

See topic 3.08 Carriers.

3.04 BILLS OF SALE:

See topic 3.25 Sales; category 23 Transportation, topic 23.01 Motor Vehicles.

3.05 BLUE SKY LAW:

See topic 3.26 Securities.

3.06 BROKERS:

Real Estate Brokers.

Business of real estate broker, broker-salesperson or salesperson is under regulation of New Jersey Real Estate Commission, Department of Insurance, which issues licenses after examination. Fines and penalties pursuant to these provisions are paid to Director of Division of Budget and Accounting. Expenses incurred by commission are paid from collected fees. (NJSA 45:15-1-29.5). Sales and other dispositions in state of subdivision or subdivided lands located outside state are subject to registration and related requirements under Real Estate Sales Full Disclosure Act. (NJSA 45:15-16.27). Act became effective Jan. 2, 1990, replacing “Land Sales Full Disclosure Act” (NJSA 45:15-16.3 – 45:15-16.26 repealed by NJSA 45:15-16.27 et seq.). Applicant for license as broker must be at least 18 years old, person of good moral character, not convicted of certain crimes within five years, possess equivalent of high school education and have served apprenticeship as licensed real estate salesperson in New Jersey for three years immediately preceding date of application (subject to waiver except where applicant was licensed broker in another state for three years immediately prior to application date). In case of corporate broker, all directors must be at least 18 years old, and citizens, and at least one officer must hold broker’s license. (NJSA 45:15-9, 45:15-12.1). Special provision for temporary license in case of death or mental or physical incapacity of licensed broker where no other member or officer of licensed entity holds broker-salesperson license or no employee of deceased or mentally or physically incapacitated broker holds such license. (NJSA 45:15-11.3).

License may be issued and renewed biennially upon payment of fee fixed by NJSA 45:15-15. (NJSA 45:15-10). Biennial renewal fees: Real estate broker’s license, $200; real estate salesperson’s license, $100; real estate broker-salesperson’s license, $200; branch office license, $100; late renewal fee for salesperson or broker-salesperson, $20; late renewal fee for broker, $40. See New Jersey Department of Banking and Insurance website at http://www.state.nj.us/dobi/division_rec/licensing/recfees.htm. Initial license fees at same site.

Disabled war veteran may be licensed without fees under special provisions. (NJSA 45:15-11).

Nonresident may be licensed as broker or salesperson and licensed broker or salesperson of another state may obtain New Jersey broker’s or salesperson’s license under reciprocity provisions. (NJSA 45:15-20, 45:15-21). Issuance of broker’s or salesperson’s license to nonresident deemed consent to service of process by service upon Secretary of Real Estate Commission and jurisdiction of commission regarding business records, premises and conduct of licensee. (NJSA 45:15-9, 45:15-21).

Bond not required.

Contract Requirements.

No broker or real estate agent acting on behalf of principal to transfer interest in real property, including lease interest for less than three years, is entitled to commission unless authority is in writing and signed by principal or authorized agent, or unless memorandum thereof, similarly signed, is made before or after sale or exchange has been effected. Rate or amount of commission must be stated therein. Oral agreement with principal is effective, if broker or agent, within five days from making thereof and before sale or exchange, serves notice on principal embodying terms thereof, and principal does not repudiate agreement by written notice before sale or exchange or if broker, prior to principal serving rejection or oral agreement, effects, transfer or enters good faith negotiations with subsequent party effecting transfer. Notice may be served personally or by registered or certified mail. (NJSA 25:1-16). Defense of statute available only to principal. (22 N. J. 576, 127 A.2d 13).

Real Estate Guaranty Fund.

Administered by New Jersey Real Estate Commission. Persons aggrieved by embezzlement, conversion or unlawful obtaining of money or property in real estate brokerage transaction by licensee or unlicensed employee of real estate broker may recover not more than $10,000 in connection with any one transaction for causes of action arising before May 20, 1993; $20,000 thereafter. (NJSA 45:15-34).

Mortgage Brokers.

See topic 3.21 Licenses, Business and Professional, subtopic Mortgage Lenders and Brokers.

Authorized Fees.

Residential Mortgage Lenders and Brokers. Except as otherwise provided by law, residential mortgage lender may, incident to origination, processing and closing of first mortgage loan transaction, charge only following fees: Credit report fee; appraisal fee; application fee; commitment fee; warehouse fee; fees necessary to reimburse mortgage banker or broker for charges imposed by third parties; and discount points. (NJSA 17:11C-74[a]). Residential mortgage broker, incident to brokering of first mortgage loan, may charge only application fee and discount points. (NJSA 17:11C-74[b]). Additional limits on fees chargeable by residential mortgage lender in connection with secondary mortgage loan. (NJSA 17:11C-80).

Securities broker-dealer, agent or investment advisor is generally required to be registered with Bureau of Securities, Department of Law and Public Safety on yearly basis, but exemptions from registration exist where transactions effected are few in number or have minimal nexus to New Jersey (NJSA 49:3-56); registration fees set by rule of bureau chief; certain conditions as to minimum capital, bond, character, training, experience, passage of oral or written examination, etc. may be imposed for registration (NJSA 49:3-57). Fraudulent practices and representations prohibited. (NJSA 49:3-47 – 49:3-76). See topic 3.26 Securities.

Uniform Commercial Code adopted (Tit. 12A), effective Jan. 1, 1963.

Ticket broker is any person situated in and operating in New Jersey who is involved in business of reselling tickets of admission to places of entertainment and who charges premium in excess of price, plus taxes, printed on tickets. (NJSA 56:8-26). No ticket broker shall engage in or continue in business of reselling tickets for admission to place of entertainment without owning, operating or maintaining permanent office, branch office, bureau, agency or other place of business, not including post office box, for purpose of reselling tickets; obtaining certificate of registration to resell or engage in business of reselling from director; listing ticket broker's registration number in any form of advertisement or solicitation in which tickets are being sold for purpose of purchase by general public for events in New Jersey; maintaining records of ticket sales, deposits and refunds for period of not less than two years from time of any of these transactions; disclosing to purchaser cancellation policy of that broker; disclosing that service charge is added by ticket broker to stated price on tickets; disclosing to purchaser, whenever applicable, that ticket broker has guarantee policy (if ticket broker guarantees delivery of tickets to purchaser and fails to deliver tickets, ticket broker shall provide full refund for cost of tickets); disclosing to purchaser of tickets when broker is using tentative order policy; when guaranteeing tickets in conjunction with providing tour package, ticket broker who fails to provide purchaser with those tickets shall refund fully price of tour package and tickets; and providing to purchaser of tickets who cancels order full refund for cost of tickets less shipping charge, if those tickets are returned to broker within three days after receipt (when tickets are purchased within seven days of event, refund shall be given only if tickets are returned within one day of receipt, and no refund shall be given on any tickets purchased within six days of event unless ticket broker is able to resell tickets). (NJSA 56:8-27). Every applicant for certificate of registration to engage in business of reselling tickets as ticket broker shall file written application with division, which shall be accompanied by fee, determined by director, not to exceed $500, and description of location where applicant proposes to conduct business. (NJSA 56:8-28). Within 120 days after receipt of completed application, fee and bond, if any, when director is satisfied that applicant has met all requirements, director shall grant and issue certificate of registration to applicant. (NJSA 56:8-29).

3.07 BULK SALES:

See category 8 Debtor and Creditor, topic 8.08 Fraudulent Sales and Conveyances.

3.08 CARRIERS:

Uniform Commercial Code adopted (Tit. 12A), effective Jan. 1, 1963. See topic 3.09 Commercial Code.

State Department of Transportation has authority to supervise, regulate and control common carriers within state except taxicabs and certain busses (NJSA 48:2-13, 48:2-21 [as am'd by L. 1995, c. 172, §§ 1-2 and L. 1995, c. 180, §§ 1-7]; Tit. 48, c. 16), including construction, equipment, insurance and operation of auto busses, whether engaged in intrastate or interstate operation (NJSA 48:4-2.1[a] [subject to NJSA 39:8-59, et al.]). Department of Transportation also supervises and controls accounts (NJSA 48:2-16; c. 3, §§ 5, 7.3, 7.5, 7.8), and must verify their accuracy (5 N. J. 196, 74 A.2d 580).

Discrimination in service, rates, classifications or regulations is forbidden. (NJSA 48:3-1 – 48:3-4).

Liability.

Railroads may limit liability to $100 per hundred pounds (or $1 per pound, 79 N. J. L. 87, 74 A. 297) by giving notice to shipper unless shipper pays a premium. (NJSA 48:12-125).

Bills of Lading.

Uniform Act. (Tit. 48, c. 20) repealed by Uniform Commercial Code. (NJSA 12A:10-105).

Carrier's lien for transportation and storage may be enforced by public sales after six months, public notice being given in one or more newspapers of county at least six days before sale and by posting at least five days before sale in five public places in neighborhood where property was directed to be left and where sale is to take place and written notice being given to consignee, if residence is known. (NJSA 2A:44-13, 2A:44-16). Perishable goods may be sold after two days, notice being published once and posted for one full day. In emergency, sales without notice may be made immediately. (NJSA 2A:44-16). Or, lien on perishable goods may be enforced by Superior Court order. (NJSA 2A:44-13, 2A:44-17).

Motor Vehicle Carriers.

See category 23 Transportation, topic 23.01 Motor Vehicles.

Abandonment of Right of Way.

For government to acquire right of way, railroad must notify state, county and municipality of abandonment and refrain from selling for 90 days after ICC approval. (NJSA 48:12-125.1).

Taxation of Railroads.

Class II property (i.e., that which is used for railroad purposes, other than main stem, tangible personal property, and facilities used in passenger service) (NJSA 54:29A-7, 54:29A-17; 44 N.J. 491, 210 A.2d 214), is taxed on basis of true value at rate of $4.75 per $100. Since Jan. 1, 1967, Classes I and III (main stem, tangible personal property, and facilities used in passenger service) are no longer taxed. (NJSA 54:29A-7). Subject to maximum and minimum provisions, franchise tax rate is 10% based on net railway operating income allocable to New Jersey, such allocation being fixed by proportion of New Jersey trackage to railroad’s total trackage. (NJSA 54:29A-13, 54:29A-14). Director of Division of Taxation assesses franchise and property taxes. (NJSA 54:29A-2, 54:29A-15, 54:29A-18.1). Franchise tax is due June 15 and property tax Dec. 1; both taxes are payable to State Treasurer. (NJSA 54:29A-46). These taxes are in lieu of all other state and local taxation. (NJSA 54:29A-74.1). Railroad property not used for railroad purposes is assessed locally and taxed at local rates. (NJSA 54:29A-4). Procedure for appeal and review, returns and collection of tax, allotment and distribution is provided. (NJSA 54:29A-24.1, 54:31-72).

Taxation of Other Carriers.

See categories 22 Taxation; Transportation, topic Motor Vehicles.

3.09 COMMERCIAL CODE:

Note: On Feb. 15, 1995, L. 1995, c. 28 adopted 1990 amendments to Uniform Commercial Code for Arts. 3 and 4 and §§ 1-201 and 1-207. On Oct. 12, 1994, L. 1994, c. 114, adopted Arts. 2A and 4A and repealed Art. 6. On June 26, 2001, L. 2001, c. 117, § 1 repealed Art. 9 and adopted revised Art. 9.

Uniform Commercial Code (1961; adopted 1963). (Tit. 12A). (Complete 1962 Official Text set forth in Uniform and Model Acts section.)

Substantive variations in New Jersey Code from 1962 Official Text (as to Art. 9, 1998 Official Text with 2001 Amendments) and subsequent amendments (excluding those involving only formal changes in language) are following:

(1) § 1-201 (37) adds: “whether lease is intended as security is to be determined by facts of each case; however, (a) inclusion of option to purchase does not of itself make lease one intended for security, and (b) agreement that upon compliance with terms of lease, lessee shall become or has option to become owner of property for no additional consideration or for nominal consideration does make lease one intended for security.”

(2) § 1-201 (43): adds words “or indorsement.”

(3) § 2-107 (1) adds words “including oil and gas.”

(4) § 2-107 (2) adds words “or of timber to be cut.”

(5) § 2-313.1 is added: “Warranty of any consumer goods product sold for less than $1,000 which is for 90 days or less shall start running on date consumer goods product is received or installed, and calculation of termination date of such warranty shall exclude any period of time entire product or part thereof covered by warranty is in possession or control of Seller, or an agent of Seller for repairs or otherwise. Nothing herein shall be construed as limiting in any way warranty or any consumer good product.”

(6) § 2-702 (3) omits words “or lien creditor.” (NJSA 12A:2-702[3]).

(7) § 6-101 to § 6-111, repealed by L. 1994, c. 114, § 11, effective Jan. 10, 1995. See category 8 Debtor and Creditor, topic 8.08 Fraudulent Sales and Conveyances, subhead Bulk Sales.

(8) § 8-101 et seq., see topic 3.26 Securities.

(9) § 9-102(a)(2) adds words “and bondable transition property.”

(10) § 9-102(a) adds subsection (8.1): “ ‘Bondable transition property’ shall have the meaning set forth in section 3 of P.L. 1999, c. 23 (C.48:3-51).”

(11) § 9-108(a) adds words “and (f).”

(12) § 9-108 adds subsection (f): “A description of bondable transition property is sufficient if it refers to the bondable stranded costs rate order, as defined in section 3 of P.L. 1999, c. 23 (C.48:3-51), establishing the bondable transition property.”

(13) § 9-109(c) omits subsections (2) and (3).

(14) § 9-109(d) adds subsection (14): “a transfer by a government or governmental unit.”

(15) § 9-203 adds subsection (j): “Bondable transition property is presently existing property for all purposes, including for purposes of paragraph (2) of subsection b. of this section, whether or not the revenues and proceeds arising under the property have accrued and notwithstanding that the value of the property may depend upon customer use of electricity or performance of service by electric public utilities, or both.”

(16) § 9-406(f) adds words “and (j)” after “subject to subsections.”

(17) § 9-527 is omitted entirely.

(18) § 9-625(e) adds new subsection (1): “fails to comply with 12A:9-207;”

(19) § 9-626 omits subsection (b) entirely.

(20) § 10-101, repealed by L. 2001, c. 117, § 32, eff. June 26, 2001.

(21) § 10-102 reads: “This act shall be so interpreted and construed, if possible, as to effectuate its general purpose to make uniform the laws of those states which enact it.”

(22) § 10-103, reads: "The repeal of any statute or part of a statute hereby affected shall not of itself revive any right or remedy abolished or superseded by the statute or part of a statute so repealed."

Section numbers of the New Jersey Code correspond to those of the 1962 Official Text and amendments except as previously indicated and except for the omission of § 1-109, and addition of §§ 9-408, 10-105, and 10-106.

Permanent Editorial Board's Recommendations for Amendments.

§ 2-702 1966 Official Amendment enacted.

§ 3-501 1966 Official Amendment not enacted.

§ 7-209 1966 Official Amendment not enacted.

Permanent Editorial Board's Recommendations for Optional Amendments.

§ 1-209 1966 Official Optional Amendment not enacted.

§ 2-318 1966 Official Optional Amendment not enacted.

§ 9-105 1966 Official Optional Amendment not enacted.

§ 9-106 1966 Official Optional Amendment not enacted.

1972 Official Amendments.

Adopted.

1973 Official Amendment.

Not adopted.

1977 Official Amendments.

Adopted.

Forms.

See Part III, Uniform and Model Acts, Commercial Code Amendments, National Forms.

See also topics: Banks and Banking, Bills and Notes, Brokers, Carriers, Factors, Frauds, Statute of, Sales, Securities, and Warehousemen; categories Business Organizations, topic Corporations; Civil Actions and Procedure, topic Limitation of Actions; Debtor and Creditor, topics Assignments, Fraudulent, Sales and Conveyances, Liens, Pledges; Documents and Records, topics Records, Seals; Mortgages, topic Chattel Mortgages.

3.10 CONDITIONAL SALES:

See topic 3.25 Sales.

3.11 CONSIGNMENTS:

See topic 3.13 Factors.

3.12 CONSUMER PROTECTION:

Consumer protection legislation administered by Office of Consumer Protection in Division of Law of Department of Law and Public Safety. (NJSA 52:17B-5.6).

Unlawful practice for any person to solicit funds or contribution of any kind, or sell or offer for sale any goods, wares, merchandise or services, by telephone or otherwise where such person falsely represents or consumer falsely led to believe such person soliciting by or on behalf of charitable or nonprofit organization or that contribution to or purchase from such person benefits handicapped persons. (NJSA 56:8-2.7). Unlawful practice for person to advertise merchandise for sale accompanied by picture or illustration of merchandise in assembled condition when intended to be sold unassembled, unless advertisement states merchandise to be sold unassembled. (NJSA 56:8-2.4). Unlawful practice to advertise merchandise for sale as “going out of business sale” for more than 90 days or to advertise more than one such sale in 360 days. (NJSA 56:8-2.8). Advertisement of merchandise as part of plan or scheme not to sell item or service advertised or not sell same at advertised price is unlawful. (NJSA 56:8-2.2). Act, use or employment by any person of unconscionable commercial practice, deception, fraud, false pretense, false promise, misrepresentation or knowing concealment, suppression, or omission of material fact with intent that others rely upon such concealment, suppression or omission in connection with sale or advertisement of any merchandise or real estate or with subsequent performance of such person as aforesaid, whether or not any person has in fact been misled, deceived or damaged thereby, is declared unlawful practice. Nothing herein applies to owner or publisher of newspaper, magazines, publications or printed matter wherein such advertisement appears, or owner or operator of radio or television station disseminating such advertisement when owner, publisher or operator has no knowledge of intent, design or purpose of advertiser. (NJSA 56:8-2). Notification to person by any means, as part of advertising plan or scheme, that person has won prize and requiring person to do any act, purchase any other item or submit to sales promotion effort is unlawful practice. (NJSA 56:8-2.3). Unlawful practice for retail mercantile establishment to fail to post refund policy as to all merchandise in at least one visible location. Policy does not apply to sales of motor vehicles, perishable goods, or custom ordered goods. (NJSA 56:8-2.14 – 56:8-2.21). Unlawful practice to require consumer to sign document as evidence of contract for sale of merchandise, or of terms thereof, without providing consumer with copy of document; not applicable to mail order sales. (NJSA 56:8-2.22).

Generally, receipt of unsolicited goods deemed unconditional gift to recipient. (NJSA 46:30A-1). Unlawful to sell any merchandise at retail unless total selling price is plainly marked by a stamp, tag, label or sign either affixed to merchandise or at point where merchandise is offered for sale. (NJSA 56:8-2.5). Unit Price Disclosure Act requires display of price per unit of standard measure on all consumer commodities in certain retail establishments. (NJSA 56:8-21, 56:8-25). Home solicitation of senior citizen prohibited for home improvement loan encumbering primary residence. (NJSA 56:8-104, 56:8-105). Sale of tents and sleeping bags that are not flame-resistant prohibited. (NJSA 2A:123-17). Obstruction of item costs indicators on cash registers in certain business establishments prohibited. (NJSA 46:30A-6). Advertisement of prescription drugs by pharmacists permitted with certain restrictions. Substitution of prescription drugs by pharmacists permitted with certain restrictions. (NJSA 24:6E-1 et seq.).

Warranty of 90 days or less on goods costing less than $1,000 runs from date consumer product received or installed. (NJSA 12A:2-313.1).

Retail Credit Sales.

Extensive statutory provisions obtain, including: prohibition against provision in retail installment contract relieving holder or other assignee from liability for any civil remedy sounding in contract that retail buyer may have against retail seller under retail installment contract or any separate instrument executed in connection therewith; requirement that any note executed in conjunction with retail installment contract shall contain words “Consumer Note” on face thereof in ten-point or larger bold type; real property mortgage as additional security prohibited. License fees for persons engaged in business of dealing in retail installment contracts; limitations on adjustments to rate of interest and time price differential; and other requirements as to nature and contents of written documents. Any subsequent holder of consumer note shall be subject to all claims and defenses of retail buyer against retail seller arising out of transaction, but not in excess of time sales price (or time balance in case of new motor vehicle) under retail installment contract. (NJSA 17:16C-1 – 17:16C-61). Any retail installment sale or contract for sale (other than for motor vehicle, boat or motor vehicle or boat accessories) for purchase price in excess of $25 entered into at place other than place of business of retail seller must include two copies of receipt to buyer stating seller's name, place of business, description of goods and amount of money paid. (NJSA 17:16C-61.6). Whenever seller regularly uses language other than English in advertisements, solicitations or negotiations, must provide one copy of receipt in English and other copy in such other language. (NJSA 17:16C-61.6[d]). Sale may be rescinded by retail buyer if buyer so notifies seller by certified mail, return receipt requested, postmarked not later than 5:00 P.M. of third business day following day on which retail installment sale or retail installment contract is executed. Buyer must give up goods delivered prior to receipt of such notice by seller. (NJSA 17:16C-61.5).

If consumer notifies creditor of billing error within 60 days of mailing of statement, creditor must: (1) Mail written acknowledgment to consumer within 30 days, (2) make corrections on statement or send reasons to consumer why creditor believes original statement was correct within 90 days after receipt of notice, and (3) forbear reporting unfavorable credit information to anyone regarding consumer's failure to pay, pending resolution of dispute. (NJSA 56:11-3).

“Lemon” Law.

Protects purchasers, lessees and, during warranty period, transferees of new automobiles and motorcycles. If consumer reports defect or condition of vehicle that substantially impairs use, value or safety of vehicle to manufacturer or dealer during first 18,000 miles of operation or within two years following original delivery, whichever is earlier, manufacturer shall make or arrange with dealer to make all necessary repairs within reasonable period of time. Repairs made after earlier of first 12,000 miles or one year from date of original delivery are payable by consumer, unless otherwise covered by warranty. If defect or condition not repaired or corrected within reasonable time, manufacturer required to accept return of vehicle and to refund full purchase price and other charges, fees and expenses incurred by consumer, less reasonable allowance for use. Manufacturer may offer replacement vehicle in lieu of refund, but consumer not obligated to accept. Failure to repair or correct defect or condition within reasonable time presumed where three or more attempts to correct same defect or condition or vehicle out of service for cumulative total of 20 or more calendar days, and manufacturer given notice of potential claim and afforded at least one opportunity to repair or correct same within ten calendar days. Written disclosures of statutory rights to purchasers and lessees of vehicles at time of purchase and lease prescribed. Vehicles returned to manufacturers under Act cannot be resold or re-leased in State unless written notice given to consumer reciting circumstances of prior return and defect, and dealer or lessor obtains from consumer signed receipt certifying such notice given. (NJSA 56:12-29 – 56:12-49). Makes numerous practices unlawful, including for dealer to misrepresent mechanical condition of used car or to fail to disclose defect known to dealer, misrepresent terms or existence of warranty, or fail to disclose meaning of “as is” sale. Mandates warranty for used cars that requires dealer, upon failure of covered item during term of warranty, to correct malfunction or defect, if delivered to dealer at regular place of business, less $50 deductible, excluding items covered by manufacturer's warranty or recall, damage caused by abuse or accident, or consumer's failure to properly maintain vehicle. Minimum term of warranty is (1) 90 days or 3,000 miles for vehicle with 24,000 miles or less, (2) 60 days or 2,000 miles for vehicle with more than 24,000 but less than 60,000 miles, and (3) 30 days or 1,000 miles for vehicle with more than 60,000 miles. If dealer fails to correct material defects within warranty period, dealer must repurchase car from consumer at full price less governmental charges and allowance for excessive wear and tear and personal use. Warranty provisions do not apply when vehicle costs under $3,000, is more than seven years old, more than 100,000 miles or been declared total loss by insurance company after accident. (NJSA 56:8-67).

Motor Vehicle Leasing.

Mandates that every automobile lease must be in writing and include: identity of parties, date when lease executed, no blank spaces, intervals when payments due, whether purchase option price exists and, if so, price or method for calculating price. Lease must also list odometer reading, year, make and model of vehicle, whether vehicle has air conditioning, automatic or manual transmission, power assisted or manual braking and steering, and vehicle identification number. If odometer is over 1,000 miles at lease inception, dealer must provide explanation of prior usage. Compliance with or violation of Federal Consumer Leasing Act, 15 U.S.C. § 1601 shall be considered compliance with or violation of this law. Lessee who defaults on payments may have lease reinstated if all past due payments, late fees, and other costs under lease are made. Lessor must reinstate only one time during lease. Right to reinstate lease exists only for failure to make timely payments required by lease. When lessee is liable for excessive wear and damage or repair, parties can opt for independent third party appraisal of cost for repair or reduction in value, which shall be final and binding on parties. (Tit. 39, cc. 19-20).

Abusive Mortgage Lending.

New Jersey Home Ownership Security Act prohibits abusive lending practices that have exacerbated loss of equity in homes and caused increases in number of foreclosures. (NJSA 46:10B-22, 23). Among other things, Act prohibits creditors from financing credit life, credit disability, credit unemployment or credit property insurance, or any other life or health insurance, for debt cancellation or suspension agreement or contract. (NJSA 46:10B-23), amended June 14, 2004. Creditors also prohibited from encouraging default on existing loans or debts or charging late fees except according to specified rules. (NJSA 46:10B-25). Department of Banking and Insurance enforces provisions of Act with respect to persons licensed or subject to provisions of New Jersey Licensed Lenders Act. (Tit. 17, c. 11C-1 et seq.; NJSA 46:10B-28[7][a]). Any violation of Act constitutes unlawful practice under Tit. 56, c. 8-1 et seq. (NJSA 46:10B-29[8][a]).

Home Repair Contracts.

Extensive statutory provisions regulate installment sales of goods and services used or furnished in modernization, rehabilitation, repair, alteration or improvement of real property and provide for licensing of home repair contractors and home repair financing agencies. Home repair contractor must own, rent or lease place of business in New Jersey. Any home repair contract for a purchase price in excess of $25 entered into at place other than place of business of home repair contractor must include two copies of receipt stating contractor’s name and place of business, description of services and goods and amount of money paid or cash value of goods delivered. Receipt must include statement in at least ten-point bold type that contract may be rescinded by owner if owner so notifies home repair contractor by certified mail, return receipt requested, postmarked not later than 5:00 P.M. of third business day following day on which home repair contract is executed. Owner must give up goods delivered prior to receipt of such notice by home repair contractor. Whenever contractor regularly uses language other than English in advertisements, solicitations or negotiations, contractor must provide two copies of receipt with notice of right to rescind, one copy in English and other copy in such other language. No home repair contractor shall request or accept certificate of completion signed by owner prior to completion of work. Completion certificate must contain, in ten-point bold type or larger, notice to owner not to sign certificate before project complete. (NJSA 17:16C-62 – 17:16C-103).

Electrical Contractors.

Person commits fourth degree crime if that person knowingly engages in business of electrical contractor without having business permit issued by Board of Examiners of Electrical Contractors. (NJSA 2C:21-33).

New Home Warranty & Builder Registration Act provides for new home warranty and registration of home builder with Dept. of Community Affairs. Builder liable on warranties with certain limitations up to purchase price or fair market value of home on its completion date. Act establishes notice and claims procedure and creates fund for payment of claims unsatisfied by builder. Penalty up to $2,000 for builder's failure to register. (NJSA 46:3B-1 – 46:3B-12). Board of Trustees established to provide increased security, equity and accountability in administration of new home warranty security fund. (NJSA 46:3B-7.1 et seq.).

Credit Cards.

Credit cardholder is not required to provide any personal identification information that is not required by issuer to complete consumer transaction. If credit card transaction is one for which credit card issuer does not require authorization, credit cardholder can be required to provide telephone number. "New Jersey Fair Credit Reporting Act" provides consumer protection with respect to credit reports and credit agencies consistent with "Federal Fair Credit Reporting Act." Division of Consumer Affairs is charged with enforcing both New Jersey and federal act. (NJSA 56:11-1).

Products Liability.

Privity of contract between consumer and manufacturer not required. (44 N. J. 52, 207 A.2d 305; 44 N. J. 70, 207 A.2d 314).

Manufacturing, warning, and design defects among theories under which manufacturer or seller may be held liable for harm caused by product. Manufacturer or seller shall not be held liable for design defect if practical and feasible alternative design did not exist when product left manufacturer's control; if unsafe aspect of product is inherent and would be recognized by ordinary person; or if harm was caused by unavoidably unsafe aspect of product and adequate warning accompanied product. Above provisions not applicable if court determines product is egregiously unsafe or ultra-hazardous; if ordinary person cannot reasonably be expected to know of products' risks; or product poses risk of serious injury to persons other than user; or if product has little or no usefulness. Compensatory damages determined by trier of fact. Punitive damages determined in separate proceeding; awarded only if claimant proves harm resulted from manufacturer's or seller's acts or omissions actuated by malice or wanton and willful disregard of user's safety. (NJSA 2A:58C-1 et seq.).

Punitive damages will not be awarded if drug or device or food or food additive that caused harm was approved or licensed by FDA or is generally recognized as safe and effective pursuant to regulations established by FDA, including packaging and labeling regulations. If, however, product manufacturer knowingly withheld or misrepresented required information, punitive damages may be awarded. (NJSA 2A:58C-4, 2A:58C-5).

Hazardous Toys.

Any manufacturer, distributor or dealer who, pursuant to any law or any regulation of U.S. Consumer Product Safety Commission, is required to give public notice with regard to defect or hazard in any toy or other article intended for use by children in New Jersey shall notify New Jersey's Director of Division of Consumer Affairs. (NJSA 56:8-50). Dealer who is notified by manufacturer, distributor or U.S. Consumer Product Safety Commission of defective or hazardous toy or other article intended for use by children shall prominently display that notification for at least 120 days after its receipt in each premises where toy or article would normally be sold. Notification shall be displayed accessible to public and its content shall be easily readable by person of normal vision. (NJSA 56:8-51).

Bicycle Helmets.

No person shall sell or offer to sell at retail any bicycle unless there is affixed to that bicycle statement promoting use of helmets by bicycle rider. If bicycle is sold unassembled, statement shall be displayed in prominent manner on carton or package containing unassembled bicycle. (NJSA 39:4-14.4a).

Plain Language Requirements.

Certain consumer contracts, defined in statute, must be written in simple, clear, understandable and easily readable language. Specific guidelines are set forth in statute. Provision is made for issuance of opinions respecting compliance. Penalties for violation provided. (NJSA 56:12-1, 56:12-18; NJSA 39:6A-23).

Motorized Wheelchairs.

Statutory provisions protecting purchasers and lessees of motorized wheelchairs. Manufacturer must provide warranty for at least one year that wheelchair will be free from any condition or defect that substantially impairs value of wheelchair to consumer. During warranty period, manufacturer will attempt to repair nonconformity at no cost to consumer, and, if it is not successfully repaired after reasonable attempts, manufacturer must accept return of wheelchair and replace it with comparable new motorized wheelchair and refund any collateral costs. For consumer who leased wheelchair that is not properly repaired during warranty period, manufacturer must accept return of wheelchair, refund lessor and any holder of security interest, current value of lease and amount paid under lease, plus any collateral costs, less reasonable allowance for use. (NJSA 56:12-75).

Industrial Hygienist Truth in Advertising Act.

It is unlawful practice for any person to advertise or hold himself/herself out as certified industrial hygienist in training or “CIHIT,” or certified industrial hygienist or “CIH,” unless that person is certified by industrial hygiene certification organization. It is unlawful practice for any person who does not have industrial hygienist education to advertise or hold himself/herself out as industrial hygienist.

Uniform Deceptive Trade Practices Act.

New Jersey has not adopted Uniform Deceptive Trade Practices Act.

3.13 [RESERVED]

3.14 FACTORS:

Uniform Commercial Code.

(1961; adopted 1963).

There is no general factor’s act in New Jersey. Common law rules prevail.

Lien.

Factors Lien Law (NJSA 2A:44-178 – 2A:44-186) repealed by Uniform Commercial Code (NJSA 12A:10-105), effective Jan. 1, 1963.

License Requirements.

Commission merchants dealing in poultry, perishable agricultural commodities and cattle are licensed and regulated by Secretary of Agriculture. (NJSA 4:11).

3.15 FRANCHISES:

Franchise Practices Act adopted, effective Dec. 21, 1971. (NJSA 56:10-1). Extensive statutory provisions regulating relationship between franchisors and franchisees. Applicable only to franchises contemplating or requiring franchisee to establish or maintain place of business in New Jersey, where gross sales of products or services between franchisor and franchisee exceed $35,000 for 12 months immediately preceding institution of suit pursuant to this Act, and where more than 20% of franchisee gross sales are intended to be or are derived from franchise, or to franchise for sale of new motor vehicles (as defined in NJSA 39:10-2), performance of which contemplates or requires franchisee to establish or maintain place of business in New Jersey. (NJSA 56:10-4). Prohibited acts include: Terminating, cancelling or failing to renew franchise without, except in limited circumstances, 60 days advance written notice to franchisee of reason for action and then only for good cause (limited to failure to substantially comply with franchise requirements) (NJSA 56:10-5); requiring waivers, releases and estoppel relieving any person from liability under Act; requiring or prohibiting changes in management of franchisee, except for good cause set forth in writing (NJSA 56:10-7); and prohibiting franchisee engaged in retail sale of motor gasoline from purchasing suitable alternate motor fuel from authorized and available sources (NJSA 56:10-7.1).

Motor Vehicle Franchises.

Specific statutory provisions governing relationship between motor vehicle franchisors and franchisees. Motor vehicle franchisees entitled to indemnification from franchisors for claims by and damages due third parties for defects in merchandise or service systems, procedures or methods of motor vehicle franchisors sold or performed by franchisees, and to reimbursement for services rendered and parts supplied by franchisee in satisfaction of franchisor warranties. (NJSA 56:10-14 – 56:10-15). Terms and conditions of motor vehicle franchise agreements subject to specific prohibitions, including waivers of jury trial provisions, limitations of jurisdiction, venue or tribunals for dispute resolutions and, absent consent of both parties, provisions requiring arbitration or other binding alternative dispute resolution procedures. (NJSA 56:10-7.3). Franchisees protected by statute from improper termination and improper exercise of franchisor’s right of first refusal. (NJSA 56:10-13.3 – 56:10-13.7). Granting, relocating, reopening, reactivating or establishing motor vehicle franchises and businesses on retail level by motor vehicle franchisors prohibited if determined injurious to existing franchisees and to public interest. 90-day advance written notice to existing franchisees within relevant market area (generally eight mile radius of proposed franchise) required. (NJSA 56:10-18 – 56:10-19). Manufacturers, distributors and importers of new motor vehicles prohibited from selling new motor vehicles to consumers other than employees of manufacturer, distributor or importer, except through motor vehicle franchisee; also prohibited from owning or operating place of business as motor vehicle franchisee, subject to limited exemptions. (NJSA 56:10-27 – 56:10-28).

3.16 FRAUDS, STATUTE OF:

Interests in Land.

Transaction intended to transfer interest in real estate shall not be effective to transfer ownership unless (1) description of real estate, nature of interest, fact of transfer, and identity of transferor and transferee are established in writing signed by or on behalf of transferor; or (2) transferor has placed transferee in possession of real estate and transferee has paid all or part of consideration or has reasonably relied on effectiveness of transfer to transferee’s detriment. (NJSA 25:1-11). Transaction intended to create lease of real estate for more than three years shall not be enforceable unless (a) leased premises, term of lease and identity of lessor and lessee are established in writing signed by or on behalf of party against whom enforcement is sought; or (b) real estate, term of lease and identity of lessor and lessee are proved by clear and convincing evidence. (NJSA 25:1-12). Agreement to transfer interest in real estate or to hold interest in real estate for benefit of another shall not be enforceable unless (a) description of real estate sufficient to identify it, nature of interest to be transferred, existence of agreement, and identity of transferor and transferee are established in writing signed by or on behalf of party against whom enforcement is sought; or (b) description of real estate sufficient to identify it, nature of interest to be transferred, existence of agreement and identity of transferor and transferee are proved by clear and convincing evidence. (NJSA 25:1-13). Transactions involving interest in real estate, and agreements to transfer interest in real estate or to hold interest in real estate for benefit of another, which are not established in writing, are not effective against bona fide purchasers for valuable consideration without notice or against lienors without notice. (NJSA 25:1-14).

Sales of Lands.

See subhead Promises and Agreements, infra.

Part Performance.

Equitable doctrine of part performance to take case out of statute of frauds is recognized (66 N. J. Eq. 328, 58 A. 337) but applies only to contracts for sale of real estate (77 A. 518, 77 N.J. Eq. 529).

Sales of Personal Property.

Except for contracts for sale of goods (NJSA 12A:2-201), sale of securities (NJSA 12A:8-113) and security agreements (NJSA 12A:9-203), contract for sale of personal property is not enforceable beyond $500 unless writing indicates contract has been made between parties at defined or stated price, reasonably identifies subject matter, and is signed by party against whom enforcement is sought or by authorized agent. (NJSA 12A:1-201).

Sales of Goods.

See Uniform Commercial Code—Sales, as to contracts for sale of goods that must be in writing. (NJSA 12A:2-201).

Sales of Investment Securities.

See Uniform Commercial Code—Investment Securities, as to when writings are necessary to evidence enforceable contracts for sale of investment securities. (NJSA 12A:8-319). Repealed by L. 1997, c.252, § 1, eff. Sept. 13, 1997.

Promises and Agreements.

No action shall be brought upon any of following agreements, unless agreement or promise, upon which such action shall be brought or some memorandum or note thereof, shall be in writing, and signed by party to be charged therewith, or by some other person lawfully authorized by party: (1) Agreement upon consideration of marriage entered into prior to effective date of “Uniform Premarital and Pre-Civil Union Agreement Act”, P.L. 1988, c. 99 (NJSA 37:2-31 et seq.); (2) contract, promise, undertaking or commitment to loan money or to grant, extend or renew credit, in amount greater than $100,000, not primarily for personal, family or household purposes, made by person engaged in business of lending or arranging for lending of money or extending credit. For purposes of this subsection, contract or promise to loan money includes agreements to lease personal property if lease is primarily method of financing obtaining of property; or (3) agreement by creditor to forbear from exercising remedies pursuant to contract, promise, undertaking or commitment subject to provisions above (NJSA 25:1-5).

Liability for Obligation of Another.

Promise to be liable for obligation of another person, in order to be enforceable, shall be in writing signed by person assuming liability or by that person’s agent. Consideration for promise need not be stated in writing. (NJSA 25:1-15).

Security Interests.

See topic 3.09 Commercial Code. Depending upon type of transaction, security interest is perfected by filing (NJSA 12A:9-304) or by taking possession (NJSA 12A:9-305).

3.17 [RESERVED]

3.18 INFORMATION TECHNOLOGY, INTERNET AND NEW MEDIA:

Internet Transactions.

Uniform Electronic Transactions Act (NJSA 12A:12-1 et seq.) governs transactions over Internet. Electronic records equivalent to paper records, with few exceptions. Electronic signatures are legitimate authorization.

Civil Actions for Computer-Related Injuries.

Governed by NJSA 2A:38A-3. Plaintiff has cause of action for compensatory and punitive damages, attorney fees and costs for damage to software, hardware, networks, databases or computer systems.

Computer Related Crimes.

Governed by NJSA 2C:20-23. High Technology Crimes and Interactive Computer Services Protection Act, L. 1998, c. 134, establishes Internet crime information to be available from Department of Law and Public Safety.

3.19 INTEREST:

Legal rate of interest is 6% per annum or, where there is written contract specifying rate of interest, 16%. This rate is subject to increase by regulation of Commissioner of Banking in case of loans secured by first liens on real estate on which is or is to be erected structure containing one to six dwelling units, portion of which structure may be used for nonresidential purposes; provided that rate fixed by Commissioner shall not exceed Monthly Index of Long Term U.S. Government Bond Yields for second preceding calendar month plus additional 8% per annum rounded off to nearest quarter of 1% per annum. Commissioner may establish different rates for residential mortgages, depending upon ratio of loan to appraised value of real property. In computing interest for less than year, day is deemed 1/360th of year and month 1/12th of year. No maximum civil legal rate of interest applicable to loans over $50,000 which are not secured by first lien on real property on which there is erected or to be erected structure containing one to six dwelling units, portion of which may be used for nonresidential purposes. No maximum legal rate applicable to veterans’ loans and FHA loans. (NJSA 31:1-1). But see subhead Usury, infra.

In case of loan secured by first lien on real property, beginning in calendar year following date of mortgage loan, and annually thereafter, mortgagee shall notify mortgagor of interest rate ceilings established by Commissioner as of 15th day of month preceding. Such notification shall be given at same time as mortgagee gives notice to mortgagor for federal income tax purposes of interest paid on loan in preceding calendar year. (NJSA 31:1-1).

Commissioner may establish rate to be charged by any person equal to rate allowed by federal law to be charged by national bank wherever federal law allows such rate in excess of 8%, except as to loan secured by first lien on real estate on which there is erected one to six dwelling units, portion of which structure may be used for nonresidential purposes. (NJSA 31:1-1.1).

Notwithstanding any provision of NJSA 31:1 or any other New Jersey statute to contrary, banks, savings banks, savings and loan associations and credit unions may charge any periodic percentage rate on outstanding balance and include any other charges or fees on any class or type of loan, other than residential mortgage loans and any loan that such lender is not otherwise authorized by law to make, as permitted to any other lender by laws of New Jersey on that class or type of loan. (NJSA 17:13B-2).

Market Rate Consumer Loan Act generally authorizes banks, savings banks and savings and loan associations to extend to consumers open and closed-end credit at those rates of interest and for those amounts and terms as may be agreed to by lender and borrower. (NJSA 17:3B-4 – 17:3B-28). Acceleration clauses, waiver of borrower's right to sue clauses and clauses granting power of attorney to confess judgment in revolving credit plans and closed-end credit agreements prohibited. (NJSA 17:3B-13).

Judgments.

Practice is to allow collection of interest on judgments at legal rate. (123 N. J. L. 232, 8 A.2d 256). See R. 4:42-11.

Open Accounts.

Interest is allowable after reasonable period of credit. (3 N. J. L. 136).

Bank Loans.

Bank may receive interest on installment loans according to actuarial method at rate agreed to by bank and borrower. (NJSA 17:9A-53). Subject to specified conditions, provisions for increases and decreases in rate of interest applicable to installment loans are permitted. (NJSA 17:9A-54). If balance is paid on precomputed loan before maturity or maturities of unpaid installments are accelerated, bank must allow credit on account of precomputed interest. (NJSA 17:9A-56). Maximum period for such loans is 12 years and three months. Aggregate unpaid balances on installment loans to any one borrower may not exceed $20,000 exclusive of interest and other charges in case of installment loans secured by interests in real property, and $25,000 exclusive of interest and other charges in case of other installment loans, secured or unsecured. (NJSA 17:9A-54). Bank may require co-makers, endorsers or guarantors of loans. Prior to default, bank may take security interests in tangible personal or real property. Bank may require security to be insured; require taxes, assessments, water rents and other governmental charges to be paid when due; charge recording or filing fees and collection fee on suit for collection of loan in default. (NJSA 17:9A-55). Instrument evidencing loan or securing loan may provide that upon default of any installment entire unpaid balance may be accelerated; upon acceleration, bank may charge interest upon unpaid balance from acceleration date at rate not exceeding rate charged on loan; late charges not exceeding lesser of 5% or $5 may be charged with respect to unpaid installments; no party to note evidencing loan or security instrument is released by bank extending time for payment or waiving any term or condition thereof; all parties to instrument evidencing loan must waive presentation and demand for payment, protest and notice of protest, nonpayment, dishonor, bank's election to accelerate maturities of unpaid installments. (NJSA 17:9A-55). Every note evidencing installment loan shall contain statement to that effect. (NJSA 17:9A-57). Violation of §§ 53-59 results in bank's forfeiture of interest and liability for twice interest received on such loan; suit to be commenced within two years of violation. (NJSA 17:9A-59). Amount of interest charged with respect to mortgage loan shall be fixed for entire term of loan. New Jersey Housing and Mortgage Finance Agency shall initially establish that rate semiannually by adding 1% to index, which is weekly average yield at time rate is reset on ten-year U.S. Treasury securities. If issuance of ten-year U.S. Treasury securities is discontinued, subsequent index shall be determined by State Treasurer with advice of New Jersey Housing and Mortgage Finance Authority. Term of any mortgage loan so made shall not exceed 30 years. (NJSA 43:16A-16.11). See topic Banks and Banking for check loans.

Credit unions may charge late fees, filing and recording fees, collection fees up to 20%, and interest on loans at such rate as is agreed to by credit unions and members. (NJSA

17:13-104).

Pawnbrokers may charge up to 3.7% monthly rate of interest on loan. (NJSA 45:22-22).

Usury.

On contract usurious under law of place where contract was made or is to be performed, only amount actually lent, without interest or costs, may be recovered. (NJSA 31:1-3). Borrower may by action in Superior Court, against lender, or in any discovery proceeding, compel lender to discover amount actually lent and all transactions relative to loan; and if more than lawful interest was reserved, lender must accept principal without interest or other consideration, and must pay costs. (NJSA 31:1-4). Usurious loan or agreement to loan constitutes disorderly persons offense and may be crime, depending on amount and interest rate involved. (NJSA 2C:21-19). Loans or agreements to loan with interest rates in excess of 30% per year, or, in case of loans to corporations, 50% per year, are not authorized or permitted by law; guilty party is chargeable with crime of second degree or third degree. (NJSA 2C:21-19). Corporation may not plead usury as to obligation executed by it. (NJSA 31:1-6). But see subhead Small Loans, supra. Federal Truth In Lending Act supersedes inconsistent provisions of state law. (NJSA 17:3B-1).

3.20 [RESERVED]

3.21 LICENSES, BUSINESS AND PROFESSIONAL:

Licenses must be obtained from various state agencies to engage in many businesses and enterprises. Driver’s, professional or occupational licenses may be denied, suspended or revoked for failure to pay child support. (NJSA 2A:17-56.8). See also category 23 Transportation, topic 23.01 Motor Vehicles, subheads Registration, Motor Vehicle Carriers.

Medical Malpractice Liability Insurance.

Physicians and podiatrists are required to have medical malpractice liability insurance coverage or letter of credit. Violators are subject to disciplinary action and civil penalties. (NJSA 45:9-19.17).

Insurance License.

Person, firm, association or corporation acting as managing agent with respect to risks in or outside of New Jersey for insurer licensed or domiciled in New Jersey is required to be licensed as insurance producer in New Jersey. (NJSA 17:22C-2 – 17:22C-3).

Consumer Lenders.

New Jersey Consumer Finance Licensing Act requires licensing and governs practices of consumer lenders and sales finance companies. (NJSA 17:11C-1 et seq.). Licenses are renewable and biennial. (NJSA 17:11C-8[d], 17:11C-11). Qualifications for licensure include financial responsibility, experience, character and general fitness such that business will be operated honestly, fairly and efficiently. (NJSA 17:11C-7[c]). Sale or transfer of controlling interest must be pre-approved by commissioner. (NJSA 17:11C-12). Annual report required. (NJSA 17:11C-43). Licensees must establish and maintain net worth of $100,000 and liquid assets of $100,000. (NJSA 17:11C-16). Licenses may be denied, suspended or revoked for, among other things, violations of Act, omissions and misstatements on application, conviction of offense involving breach of trust, fraud, or other moral turpitude, civil judgment for fraud or deceit, insolvency or failure to maintain net worth. (NJSA 17:11C-18). Certain written notices required on face of loan documents. (NJSA 17:11C-21[e], 17:11C-24[b], 17:11C-26, 17:11C-32[b], 17:11C-32[c][4]). Act governs consumer loans of $50,000 or less. (NJSA 17:11C-2).

Mortgage Lenders and Brokers.

Licensing and regulation of residential mortgage lenders, brokers, and originators are transitioning from New Jersey Licensed Lenders Act (renamed as New Jersey Consumer Finance Licensing Act [NJSA 17:11C-1 et seq.]), to New Jersey Residential Mortgage Lending Act (NJRML) (NJSA 17:11C-51 et seq.), signed into law on May 4, 2009. On or before July 31, 2010 (or later date approved by Secretary of United States Department of Housing and Urban Development), Commissioner of Banking and Insurance shall begin issuing licenses under NJRML. Initial licenses expire Dec. 31, 2010, thereafter annually on Dec. 31. (NJSA 17:11C-68).

Licensing will require, among other things, criminal background check; fingerprinting; proof of financial responsibility experience, character, and general fitness sufficient to ensure honest, fair and efficient operation; surety bond coverage; compliance with tangible net worth requirements; payment of fees, and 75% correct answers required on qualified written test. (NJSA 17:11C-56 - 17:11C-57; NJSA 17:11C-60). No person may hold license as residential mortgage lender or mortgage broker unless one officer, director, partner, owner or principal is qualified individual licensee of same type. If qualified individual allows license to lapse or depart, business licensee shall notify commissioner within ten days and shall appoint another qualified individual licensee within 90 days or such longer period as permitted by commissioner. (NJSA 17:11C-54[a][2]). Individuals previously registered as mortgage solicitors must be licensed under NJRML. (NJSA 17:11C-54[c][3]). Business licensee must obtain blanket bond before doing business as residential mortgage lender or broker in amount prescribed by regulation but not less than $25,000. (NJSA 17:11C-63).

Minimum 20 hours of pre-licensing educational credits required for licensure, including instruction on federal statues and regulations, ethics, and lending standards for nontraditional mortgage products. (NJSA 17:11C-59). Similar continuing education required. (NJSA 17:11C-61). Applicant for business license as residential mortgage lender must show, and licensee must maintain, tangible net worth of at least $250,000, except that tangible net worth of correspondent mortgage lender (e.g., lender that does not hold mortgage loans in portfolio, or service loans, for more than 90 days) must be at least $150,000. Applicant for business license as residential mortgage broker must show, and licensee must maintain, tangible net worth of at least $50,000. (NJSA 17:11C-64). Branch office permitted. (NJSA 17:11C-65). New Jersey office not required, but licensee must be qualified to do business in State and must have registered agent for service of process. (NJSA 17:11C-66). Sale or transfer of controlling interest in lender or broker must be pre-approved by commissioner. (NJSA 17:11C-69). Commissioner may refuse to issue, revoke, suspend or refuse to renew license for violation of Act, failure to meet licensure requirements, conviction of offense involving breach of trust, moral turpitude or fraud or dishonesty, failure to comply with reporting requirements, insolvency, and demonstrated unworthiness, incompetence, bad faith or dishonesty in business. Commissioner may also impose penalties, require restitution, issue cease and desist orders, and bring injunctive actions. (NJSA 17:11C-70). Commissioner has subpoena power. (NJSA 17:11C-84).

Requirements of Act do not apply to, among others, licensed attorneys negotiating terms of residential mortgage loan for client as ancillary matter, unless attorney is compensated by residential mortgage lender, broker, or loan originator; real estate broker not otherwise engaged in residential mortgage lending; employers who makes residential mortgage loans to employees as benefit of employment at interest rate below usury level; immediate family members; and persons making residential mortgage loans secured by dwelling that served as person’s residence. (NJSA 17:11C-55).

Act limits fees that can be charged. (NJSA 17:11C-74). Borrower shall not be required to purchase credit life or accident and health insurance, but licensee may require borrower to show that property securing mortgage loan is insured against damage or loss for term not to exceed term of loan and amount not to exceed amount of loan, together with amount needed to satisfy all prior liens on property. (NJSA 17:11C-73). Prohibited practices include: Deceptive advertising;

advertising interest rates that are not available; advertising “immediate approval” of loans; attempting to influence appraiser’s judgment; and charging fee based on “best efforts” to obtain mortgage loan. (NJSA 17:11C-75). Any agreement to waive any provision of Act is unenforceable and void. (NJSA 17:11C-86).

Secondary mortgage loans are permitted. Permissible terms and charges are discussed at NJSA 17:11C-76 — 17:11C-83.

Municipal Licenses.

Municipalities have broad powers by ordinance to license and regulate wide range of vehicles, tradesmen, pursuits and places that do not hold license or certificate issued by state agency, except for real estate auctioneers or brokers. (NJSA 40:52-1). Transient merchants and itinerant vendors must obtain license from municipality and file bond and power of attorney for service of process; foregoing article is not applicable to sale of fruits, vegetables or farm products, or to bona fide charitable, religious, art, antique or historical societies, or to certain agricultural shows, fairs or garden societies selling out their exhibits. (NJSA 45:24-1 – 45:24-9). Special license can be obtained by resident honorably discharged service personnel and resident exempt firemen. (NJSA 45:24-9). Provides for cancellation of license for transfer thereof and for other violations. Application for new license may be made one year after cancellation. (NJSA 45:24-13). Dog licenses must be acquired annually or every third year. (NJSA 4:19-15.1 et seq.).

Counselors.

Professional counselors, associate counselors and rehabilitation counselors seeking licensure are subject to State standards of qualification, education, training, and experience. (NJSA 45:8B-34 et seq.). Alcohol and drug counselors must be licensed or certified by State under State standards of education, experience, ethics and competency. (NJSA 45:2D-1 et seq.).

Hunting, Trapping and Fishing.

Licenses generally required; obtainable from any county or municipal clerk or any salaried warden or agent designated by Division of Fish and Game in Department of Environmental Protection and Energy. All-around sportsman license also available. Pennsylvania fishing license valid for fishing in portion of Delaware River within New Jersey’s jurisdiction. (NJSA 23:3-1 et seq.).

Commercial Travelers.

No provision as to licenses for such persons except in case of transient merchants. (NJSA 45:24-1-8).

Boats.

Numbering of certain vessels in N. J. waters is mandatory. (NJSA 12:7-34.38). Fees based on length. (NJSA 12:7-34.47). Department of Environmental Protection and Energy administers provisions of law. (NJSA 12:7-34.37 et seq.). Operators of personal watercraft must be at least 16 years of age and complete boat safety course. (NJSA 12:7-86).

Child Care Centers or Life Safety Approved Child Care Centers.

License approval or renewal is subject to DYFS review of department’s child abuse records. DYFS shall deny, revoke or refuse license upon department’s determination that employee, owner or sponsor of child care center has record of substantiated child abuse or neglect. (NJSA 30:5B-6.2). Within two weeks after employment of new employee, owner or sponsor must notify DYFS so it can conduct review of its child abuse records. Until center owner or sponsor receives department’s results, new employee shall not be left alone caring for children. New employee shall be immediately terminated upon determination of substantiated child abuse or neglect record. (NJSA 30:5B-6.4).

Hospice care programs must be licensed by Department of Health and Senior Services. (NJSA 26:2H-80[a]). Hospice care programs defined. (NJSA 26:2H-79). Certain nursing homes exempted. (NJSA 26:2H-80[d]). Certificate of need not required for facilities licensed under Act. (NJSA 26:2H-80[e]).

Home inspector license permitted for licensed engineers and architects. (NJSA 45:8-71[b]).

Money transmitters are licensed and regulated by Department of Banking and Insurance. (NJSA 17:15C-1 et seq.). New Jersey Money Transmitters Act establishes minimum capital requirements, which vary depending on nature of services provided. (NJSA 17:15C-5). Money transmitters must post bond in amount between $100,000 and $1,000,000 as determined by Commissioner of Banking and Insurance. (NJSA 17:15C-8).

Mortuary science licensure for out-of-state practitioner requires certain education and experience. (NJSA 45:7-49.1).

Casino Gaming.

Casino gaming permitted by Casino Control Act (NJSA 5:12-1 et seq.) in casino rooms or simulcast facilities in limited number of major hotel convention complexes in Atlantic City (NJSA 5:12-1[b][4]). Act administered by Casino Control Commission (NJSA 5:12-63) and Division of Gaming Enforcement (NJSA 5:12-76). In event state of emergency declared due to failure to enact appropriation law, casinos may remain open under certain conditions. (P.L. 2008 c.23).

Shipment of Gaming Devices.

Shipment into New Jersey of gaming devices, including slot machines, is legal if device is registered, recorded and labeled in accordance with Federal law. (NJSA 5:12-132).

Casino Licenses.

Casino license required of, and available only to, owner, builder, contract purchaser, lessor, lessee or person in control of “approved casino hotel”, or person having written agreement for complete management of casino and, if applicable, of any authorized games in casino simulcasting facility. (NJSA 5:12-82; see § 83 for description of “approved hotel” and “casino hotel”). Casino licenses issued for initial period of one year (NJSA 5:12-87e), renewed for up to five years for licenses renewed after Apr. 30, 2004. (NJSA 5:12-88a). No limit on number of casino licenses, but no person or control group may hold casino license if holding results in “undue economic concentration” in Atlantic City casino operations. (NJSA 5:12-82e). Licensing criteria include financial stability, integrity and responsibility, good character, honesty and integrity, sufficient business ability and casino experience, adequacy of financial resources, integrity of all financial backers and suitability of casino and related facilities. (NJSA 5:12-84). Control persons must qualify. (NJSA 5:12-85). Control presumed from 5% equity interest. (NJSA 5:12-105d). Banks and other licensed lending institutions that make loans or hold mortgages or other liens acquired in ordinary course of business need not qualify. (NJSA 5:12-84b, 5:12-85 c). Generally, institutional investors holding less than 10% of equity securities of casino holding companies or less than 20% of debt securities of casino holding companies or casino financing affiliates, or less than 50% of any issue of debt securities thereof, need not qualify. (NJSA 5:12-85f).

Employee Licenses.

License or registration required of casino personnel. (NJSA 5:12-7, 5:12-9, 5:12-11, 5:12-

11.1, 5:12-89 – 5:12-91). Licensing standards include financial stability, integrity and responsibility, good character, honesty and integrity, and age. (NJSA 5:12-89 – 5:12-91; N.J.A.C. 19:41-4.3a).

Service Industry Enterprise Licenses.

License required of all persons providing any gaming-related goods or services to casinos and, generally, all persons supplying $150,000 nongaming goods or services to one casino or $500,000 nongaming goods or services to several casinos in 12-month period. (NJSA 5:12-92, 5:12-102; N.J.A.C. 19:51-1.2, 19:51-1.2A). Exceptions for license requirement exist for person regulated by public agency, person providing insignificant amount of goods or services, or person for whom licensure unnecessary to protect public interest. (NJSA 5:12-92). No casino service industry enterprise license shall be issued unless person provides proof of valid business registration with Division of Revenue in Department of Treasury. (NJSA 5:12-92e).

License Fees.

For issuance of casino license: $100,000 nonrefundable deposit applied to issuance fee of not less than $200,000; for one-year renewal: not less than $100,000; for up to five-year renewal: not less than $200,000. (NJSA 5:12-88a, 5:12-139). For gaming-related casino service industry enterprise license (e.g., sale of gaming equipment): minimum charge of $5,000, plus up to $10,000 more if investigation consumes up to 1,000 hours, plus hourly rate above 1,000 hours, plus unusual out-of-pocket expenses, for application and four-year renewal after initial two-year license term. (N.J.A.C. 19:41-9.8; N.J.A.C. 19:51-1.8[a]). For nongaming casino service industry enterprise license: $2,000 upon application for initial three-year period; $2,500 for four-year renewal. (N.J.A.C. 19:41-9.9; N.J.A.C. 19:51-1.8[a]). For junket enterprises: $3,000 for application for initial three-year period; $3,750 for four-year renewal. (N.J.A.C. 19:41-9.9 A; N.J.A.C. 19:51-1.8[a]).

Gaming Schools.

Schools offering courses concerning gaming or dealing techniques must be licensed and meet Department of Education requirements concerning conducting business as vocational school. (NJSA 5:12-92a[1]; N.J.A.C. 19:51-2.1).

Credit.

Gaming on credit permitted. (NJSA 5:12-101). Casino gaming debts enforceable at law in courts of New Jersey. (NJSA 5:12-101f).

Charter Provisions.

Publicly traded holding companies of casino licensees must provide in corporate charters that securities of corporation are held subject to condition that if holder is disqualified by Commission, holder must dispose of securities. Nonpublicly traded holding companies of casino licensees must provide in corporate charters that Commission has right of prior approval with regard to transfers of securities. (NJSA 5:12-82d[7]; see §§ 44, 47.2 for definitions of “security” and “transfer”).

Tax on Gross Revenues.

See category 22 Taxation, topic 22.07A Gambling and Entertainment Taxes, subhead Casino Control Act.

Collection agencies must file bond with Secretary of State before commencing business. (NJSA 45:18-1-6). Notice of discontinuance must be filed with secretary of state. (NJSA 45:18-6.1).

3.22 MONOPOLIES, RESTRAINT OF TRADE AND COMPETITION:

New Jersey Antitrust Act.

Makes unlawful: contracts, combinations or conspiracies in restraint of trade or commerce in state or for any person to monopolize or attempt to monopolize commerce in any relevant market within state; prohibits corporation engaged in commerce from acquiring whole or part of stock of another corporation or corporations engaged in commerce where effect may be to substantially lessen competition within state between corporation whose stock is acquired and corporation making acquisition, or to restrain commerce in any section or community or tend to create monopoly within state (acquisition of stock solely for investment without bringing about or attempting to bring about substantial lessening of competition, or formation and operation of subsidiaries to carry on their immediate lawful business or natural and legitimate branches or extensions thereof, without substantial lessening of competition, not prohibited). (NJSA 56:9-3 – 56:9-4). Act to be construed in harmony with comparable federal antitrust statutes and uniform state antitrust acts. (NJSA 56:9-18). Dissolution of corporation or suspension of privilege of conducting business in state also provided for. (NJSA 56:9-7). Attorney General or private party may seek injunctive relief against violation of Act. (NJSA 56:9-10). Civil action for treble damages (and attorney's fees and costs) available to any person (including state, political subdivisions or public agencies) injured in business or property by reason of violation of Act. (NJSA 56:9-12). Action barred unless commenced within four years after cause of action arose or, if cause of action based upon conspiracy, within four years after plaintiff discovered or should have discovered facts. (NJSA 56:9-14).

Exceptions.

Act does not prohibit: (a) Existence of trade and professional organizations created for purpose of mutual help and not having capital stock, nor otherwise legitimate activities thereof; (b)[1] activities of labor organizations or individual members thereof directed solely to otherwise legitimate labor objectives; (b)[2] activities of agricultural or horticultural cooperative organizations or individual members thereof directed solely to otherwise legitimate objectives of such cooperative organizations; (b)[3] activities of public utility to extent subject to jurisdiction of state or specified federal agencies; (b)[4] activities of insurance company agent, broker, adjuster or rating organization to extent activities subject to regulation by Commissioner of Insurance or permitted or authorized by Department of Banking and Insurance Act (NJSA 17:1-1.1 et seq.; NJSA 17:1C-1 et seq.), although exception does not apply to private passenger automobile insurance business, except as provided in NJSA 17:33B-31; (b)[5] bona fide religious and charitable activities of non-profit corporation, trust or organization; (b)[6][i] activities of securities dealers, issuers or agents licensed by state or members of National Association of Securities Dealers or of any National Securities Exchange registered with S.E.C., engaged in course of offering, selling, buying and selling, or otherwise trading in or underwriting securities as agent, broker or principal; (b)[6][ii] activities of any National Securities Exchange registered with S.E.C., including establishment of commission rates and schedules of charges; (b)[7] activities of state or national bank to extent regulated or supervised by state or federal government; (b)[8] activities of state or federal savings and loan association to extent regulated by state or federal government; (b)[9] activities of bona fide nonprofit professional association, society or board licensed and regulated by courts or any agency of state, in recommending schedules of suggested fees, rates or commissions for use solely as guidelines in determining charges for professional and technical services; (b)[10] activities permitted under laws dealing with unfair competition. (NJSA 56:9-5).

Penalties for Violation of Act.

Any person violating provisions of Act liable to penalty of not more than greater of $100,000 or $500 per day for each and every day of violation. (NJSA 56:9-10[c]). Person knowingly violating or aiding or advising in violations of any provisions of Act guilty of crime. Person convicted of violation involving trade value less than $1,000,000 guilty of crime of third degree; subject to fine of not less than $25,000 nor more than $150,000, or imprisonment, or both. Business entity convicted of crime of third degree subject to fine of not less than $100,000 not more than $300,000. Person convicted of violation involving trade of value equal to or greater than $1,000,000 guilty of crime of second degree; subject to fine of not less than $50,000 nor more than $300,000, or imprisonment, or both. Business entity convicted of crime of second degree subject to fine of not less than $250,000 nor more than $1,000,000. Person convicted of violation involving bid rigging on public contracts, regardless of value, guilty crime of second degree; penalty same as second degree penalty above. (NJSA 56:9-11).

Fair Sales Act prohibiting sale or offer for sale of merchandise at less than cost (NJSA 56:4-7 – NJSA 56:4-15) has been repealed (L. 1975, c. 107).

"Unfair Cigarette Sales Act" prohibiting the sale of cigarettes by retailers or wholesalers at less than cost with intent to injure competitors or to destroy or substantially lessen competition has been enacted. (NJSA 56:7-18 et seq.).

"Act Regulating Retail Sale of Motor Fuels" prohibiting certain sales practices in connection with retail advertising and sale of motor fuels, and certain wholesale practices when accompanied by intent to injure competitors or destroy or substantially lessen competition. (NJSA 56:6-19 et seq.). See NJAC 18:19-1.1 et seq.

Resale Price Agreements.

See category 17 Intellectual Property, topic 17.01 Trademarks and Tradenames.

3.23 NEGOTIABLE INSTRUMENTS:

See topic 3.02 Bills and Notes.

3.24 RESTRAINT OF TRADE:

See topic 3.22 Monopolies, Restraint of Trade and Competition.

3.25 SALES:

Note: Uniform Commercial Code (Tit. 12A) (1961; adopted 1963), repeals Uniform Sales Act (NJSA 46:30-1 – NJSA 46:30-76) and Uniform Conditional Sales Act (NJSA 46:32-1 – NJSA 46:32-33). See topic 3.09 Commercial Code.

Bills of sale are not necessary to pass title to personalty, except automobiles. (NJSA 39:10-9). See category 23 Transportation, topic 23.01 Motor Vehicles.

Fraudulent Advertising.

Certain kinds of fraudulent sales and advertising declared unlawful by Tit. 56, c. 8 et seq.

Bulk Sales.

See category 8 Debtor and Creditor, topic 8.08 Fraudulent Sales and Conveyances.

Sales of Motor Vehicles.

See category 23 Transportation, topic 23.01 Motor Vehicles.

Sales Under Cost.

See topic 3.22 Monopolies, Restraint of Trade and Competition.

Resale Price Agreements.

See category 17 Intellectual Property, topic 17.01 Trademarks and Tradenames.

Consumer Protection.

See topic 3.12 Consumer Protection.

Poppy Sales.

It is unlawful for any entity to sell poppies or its replica to raise funds for veterans' projects between May 1 and Memorial day of each year unless said entity is chartered by Act of Congress. (NJSA 38:25A-1 et seq.).

Products Liability.

See topic 3.12 Consumer Protection.

3.26 SECURITIES:

Registration of broker-dealers, agents and investment advisors required. (NJSA 49:3-56). Every issuer proposing to effect securities transactions in New Jersey must file with Bureau of Securities issuer qualification application. (NJSA 49:3-61). Registration by coordination with federal registrations and by notification provided. (NJSA 49:3-61.1, 49:3-61.2). Every broker-dealer, agent or investment advisor, and issuer required to file with bureau to claim exemption from registration or to register security in this State must file with Bureau irrevocable consent appointing Bureau Chief as attorney to receive service of process. (NJSA 49:3-73[a]).

Uniform Commercial Code—Investment Securities NJSA 49:3-73(a) has been adopted in substance. (NJSA 12A:8-101 et seq.). NJSA 12A:8-208 reduces warranty as to form. See also topic Commercial Code.

Uniform Securities Act.

Note: Uniform Securities Act, as amended, has been superseded by Uniform Securities Act (1985) with 1988 Amendments, approved by National Conference of Commissioners on Uniform State Laws in Aug., 1985 and amended in 1988. Following notations reference provisions of 1985 Act, as amended. This act amends and supplements Uniform Securities Law (1967) and must now be cited as Uniform Securities Law (1997). (NJSA 49:3-47 et seq.). This act differs from Uniform Securities Act (1967) in following material respects:

§ 101: Definition of fraud expanded to include any unreasonable promises or misrepresentations and schemes calculated to deceive or gain exorbitant profits. Definition of broker-dealer narrowed to exclude persons effecting transactions through or with issuers, other broker-dealers, and financial institutions. Definition of investment advisor narrowed to exclude persons whose only clients in this State are other investment advisors, broker-dealers, banks, bank holding companies, savings institutions, trust companies, insurance companies, investment companies, or other financial institutions. Definition of issuer excludes interests in oil, gas or mining titles or leases. Definition of sale or sell narrowed to exclude mergers, consolidations or sale of corporate assets in consideration for securities of another corporation. Definition of security narrowed to exclude variable insurance annuities but includes viatical investments. Definitions of "agent," "capital," "guaranteed," "savings institution," "accredited investor," "direct participation security," "blind pool" and "viatical investments" added. (NJSA 49:3-49 [b]-[h], [j], [k], [m], [p], [q], [r], [w]). § 101(3)-(5), (7)(i), (7)(iv), (7)(v), 8(ii), (12), (14), (17) omitted in New Jersey. New Jersey omits following with respect to security definition: inclusion of limited partnership interests, puts/calls on foreign currency exchange, other puts/calls; exclusion of interests in ERISA-type pension plans. (NJSA 49:3-49[m]). Expanded to include failure to deliver prospectus under Securities Act of 1933 to each purchaser of security registered under that Act in accordance with delivery requirements of that Act. (NJSA 49:3-52[d]).

§ 102(b): Extended to any person acting as investment advisor. (NJSA 49:3-53[b]).

§ 201: Registration requirement extended to investment advisor and investment advisor representatives. (NJSA 49:3-56[a]). Permits Chief of Bureau to bar, pending final determination of any proceeding under this subsection, persons convicted of crimes from being partner, officer or director of issuer, or broker-dealer or investment advisor. (NJSA 49:3-56[k]). Every registration will expire one year from its effective date unless renewed. (NJSA 49:3-56[m]).

§ 202 & § 204 omitted in New Jersey.

§ 205: Applicant for initial, renewal, or supplemental registration must pay filing fee as set by Bureau Chief. (NJSA 49:3-57[b]). Bureau Chief may require minimum capital for registered broker-dealers. (NJSA 49:3-57[d]). Amount of bond that may be required to be posted by registered broker-dealers and investment advisors will be set by Bureau Chief. (NJSA 49:3-57[e]). Registration of broker-dealers dealing with direct participation securities permitted. (NJSA 49:3-57[g]).

§ 207: Oral or written examination requires fee set forth by Bureau Chief. (NJSA 49:3-57[f]).

§ 212: Registration may be denied, suspended or revoked if broker-dealer or investment advisor or anyone directly or indirectly controlling them has been convicted of crime involving any aspect of security business or any crime of moral turpitude. (NJSA 49:3-58[a][2][iii]). Registration may be denied, revoked or suspended for failure to pass examination required by Bureau Chief. (NJSA 49:3-58[a][x]).

§ 302: Omitted in New Jersey.

§ 303: Three copies of latest prospectus filed under Securities Act of 1933 required. (NJSA 49:3-61.1b[1]).

§ 304: Bureau Chief may require as condition of registration by qualification that securities issued in past three years to promoter at substantial difference from public offering price or for noncash consideration be deposited in escrow and that proceeds from sale of securities registered in New Jersey be deposited in escrow until issuer receives specified amount from sale of securities. (NJSA 49:3-61[e]). Bureau Chief may require that prospectus be sent to offerees. Bureau Chief may require use of specified form of subscription contract as condition of registration by qualification. (NJSA 49:3-61[f]).

§ 305: Nonrefundable filing fee for registration statement as set by Bureau Chief. (NJSA 49:3-62[b]). Documents may be incorporated by reference if filed within three years preceding filing of registration statement. (NJSA 49:3-62[d]). § 305(c), (h), (i), (j), (k), (l), (o) omitted in New Jersey.

§ 306: Reasons for revocation expanded to include: issuer or affiliated parties convicted of fraud or theft with respect to securities, enjoined from securities work, registration suspended, registration revoked by SEC, has been dishonest/unethical in securities work or is insolvent, offering is blind pool. (NJSA 49:3-64[a][2][viii], [ix]). § 306(a), (5)-(8) omitted in New Jersey.

§ 401: Definition of fraud expanded to include any unreasonable promises or misrepresentations and schemes calculated to deceive or gain exorbitant profits. Definitions of “capital,” “savings institutions,” “accredited investor,” “direct participation security” and “blind pool” added. (NJSA 49:3-49[d], [e], [f], [k], [p], [q]).

§ 402: Exemptions expanded to include NASDAQ securities designated as National

Market securities and commercial paper arising out of current transactions that evidence obligation to pay within 12 months of date of issuance. (NJSA 49:3-50[a][8], [10]). Bureau Chief may also adopt securities exemption. (NJSA 49:3-50[a][12]). Exempt transactions expanded to include transactions by or on behalf of issuer or other person if seller has reasonable grounds to believe maximum of 35 purchasers in New Jersey were provided with written offering statement. (NJSA 49:3-50[b][12]).

§ 401 & § 403: Exemptions expanded to include commercial paper arising out of current transactions that evidence obligation to pay within 12 months of date of issuance. (NJSA 49:3-50[a][10]). Profit and loss statement for nonissuer listed in recognized securities manual required for period not less than two years next prior to date of balance sheet or of issuer's existence. (NJSA 49:3-50[b][2]). Limited offerings allowed to no more than ten offerees purchasing for investment but advertising and solicitation not specifically excluded. (NJSA 49:3-50[b][9]).

Exempt transactions expanded to include transactions by or on behalf of issuer if, among other things, maximum of 35 purchasers in New Jersey are provided with written offering statement. (NJSA 49:3-50[b][12]). § 401(a)(5) (iv), (a)(13) omitted in New Jersey. § 402(13)—(18) omitted in New Jersey. Securities issued by persons organized for social and educational purposes or as chamber of commerce or trade association are not exempt. (NJSA 49:3-50[a][9]).

§ 502: Omitted in New Jersey.

§ 503: Compensation agreement for investment advisors must be in writing and not based on capital gains, except as authorized by Bureau Chief. (NJSA 49:3-53[c]).

§ 603: Bureau Chief may take action against securities law violators by either issuing cease and desist order, with no less than three days notice to lift summary order, or having action brought by Attorney General on Bureau Chief's behalf. (NJSA 49:3-69[a]).

§ 604: Criminal penalties for violations: less than $75,000 for third degree and $75,000 or more for second degree. No person may be imprisoned for violation if no knowledge of rule. (NJSA 49:3-70[d]).

§ 605: Statute of limitations extended to no more than two years after time aggrieved knew or should have known of existence of cause of action. (NJSA 49:3-71[g]).

Real Estate Syndication Offering Law (NJSA 49:3-27-44) repealed, effective Apr. 10, 1986 (L. 1985, c. 405).

Supervision.

Bureau of Securities, Division of Consumer Affairs, Department of Law and Public Safety, 153 Halsey Street, 6th Floor, Newark, N.J. 07102.

Regulatory Powers of Supervising Authority.

Chief of Bureau of Securities charged with administration of Act (NJSA 49:3-66[a]) and may promulgate rules, forms and orders, investigate violations, conduct hearings, seek injunction or appointment of receiver (NJSA 49:3-67 – 49:3-69). Bureau Chief may issue stop orders denying effectiveness of any registration statement in violation of law or if in public interest and issuer, partner, officer or director of issuer, person controlling or controlled by issuer, or broker-dealer or other person involved in offering has been convicted of certain crimes, or offering is blind pool. (NJSA 49:3-64[a]). Bureau Chief authorized to permit by regulation performance-based compensation in investment advisory contracts. (NJSA 49:3-64[c]). For regulation of trading in equity securities of certain New Jersey stock insurance companies see category 16

Insurance, topic 16.01 Insurance Companies, subhead Directors, Officers.

Takeover Bid Disclosure.

See category 2 Business Organizations, topic 2.03 Corporations.

Uniform Simplification of Fiduciary Security Transfers Act (1958; adopted 1959). (NJSA 14:18-1 – 14:18-12) and was saved from repeal by Uniform Commercial Code (NJSA 12A:10-104).

New Jersey Uniform Gifts to Minors Act (1956; adopted 1963). (NJSA 46:38-13 – 46:38-41), repealed effective July 1, 2007; replaced by NJSA 46:38A-1 — 46:38A-57. See category 14 Family, topic 14.10 Infants.

New Jersey Uniform Transfers to Minors Act (1983; adopted 1987). (NJSA 46:38A-1 – 46:38A-57).

Uniform Securities Ownership by Minors Act not adopted.

3.27 STATUTE OF FRAUDS:

See topic 3.16 Frauds, Statute of.

3.28 TRUST RECEIPT SECURITY:

See topic 3.25 Sales; category 8 Debtor and Creditor, topic 8.15 Pledges.

3.29 WAREHOUSEMEN:

Storage rates are not regulated by state law. All municipalities have power to regulate by ordinance storage of inflammable or combustible materials, to provide for inspection of warehouses and goods and materials contained therein and to require address registration of certain property owners. (NJSA 40:48-1, 40:48-2.53). Warehousing charges for storage of all personal property not held for sale in regular course of business are subject to sales and use tax. (NJSA 54:32B-2, 54:32B-3).

Public Movers and Warehousemen Licensing Act, see (NJSA 45:14D-1 et seq.).

Every person engaged in business of storing or moving household goods, office goods, or special commodities for transportation in intrastate commerce shall issue receipt or bill of lading therefor and shall be liable to lawful holder thereof. Receipt issued shall not be denied legal effect solely because it is in electronic form, provided that both parties have affirmatively agreed to electronic form of receipt, issuer affirmatively provides to holder receipt in accessible form that is capable of being received, retained and accurately reproduced by holder, and receipt contains all legally required information. (NJSA 45:14D-10).

Uniform Commercial Code.

Documents of Title (Tit. 12A, c. 7) repealed and superseded Uniform Warehouse Receipts Act. See topic 3.09 Commercial Code.

Bonds.

Bonds are not generally required, but see subhead Alcoholic Beverage Public Warehouses, infra.

Licenses.

It is unlawful for any person to engage in business of public moving or storage unless having obtained license to engage in business and having permanent place of business in this state. (NJSA 45:14D-9.)

Lien.

See Uniform Commercial Code. (NJSA 12A:7-209).

Commercial Code.

See topic 3.09 Commercial Code.

Alcoholic beverage public warehouses each require license from the Director of the Division of Alcoholic Beverage Control in Department of Law and Public Safety (NJSA 33:1-14, 33:1-15, 33:1-18; NJSA 52:17B-15, 52:17B-18) and special bonded warehouse bottling license is provided for (NJSA 33:1-10). Alcoholic beverage warehouse receipts license is required of anyone selling such receipts. Fee for such license is $375. (NJSA 33:1-72). Certain tax reports and records are required of all alcoholic beverage warehousemen. (NJSA 54:45-1).

Cold storage warehouses are licensed and regulated by state Department of Health. (NJSA 24:9-21 – 24:9-37).

4 CITIZENSHIP

4.01 ALIENS:

“Alien friends” in general have equal privileges with citizens, except voting and holding office. “Alien friend” defined, NJSA 46:3-18.

Property.

“Alien friends” in general share same burdens and same rights, powers and duties as native-born citizens with respect to real estate. “Alien friend” defined, NJSA 46:3-18.

Alien may take, hold, convey and dispose of real property (NJSA 46:3-18) and may inherit (NJSA 3B:5-12). Real property of alien enemies in time of war is subject to sequestration, seizure or disposal by either state or national government; exception for bona fide conveyance by alien enemy to U.S. citizen or to alien friend. (NJSA 46:3-18[b]).

Electoral Restrictions.

To vote for public officers, must be U.S. citizen, age 18, resident of state and resident of county 30 days prior to election. (NJ Const. Art. 2, par. 3[a]). Alien cannot be voted into Electoral College unless he or she has been citizen of U.S. for seven years preceding election, legal state voter and minimum of 25 years old. (NJSA 19:3-5; NJSA 46:3-18[a]).

Occupational Restrictions.

Alien may not be licensed as private detective. (NJSA 45:19-11). Alien may apply for license to practice following professions, provided alien declares intention of becoming citizen: optometry (NJSA 45:12-5); orthoptics (NJSA 45:12A-3); and professional planning (NJSA 45:14A-9).

Alien may not teach in public schools (except as foreign language instructor if resident in U.S. for less than ten years) unless alien declares intention of becoming citizen and holds valid teacher’s certificate, or if enrolled in teacher placement or exchange program with approved agency. (NJSA 18A:26-1). NJSA 34:9-1, prohibiting employment of alien contractors on public works, implicitly repealed by NJSA 10:2-1. (45 N.J. 372, 212 A.2d 545).

State Income Tax.

New Jersey gross income tax rates set for "nonresident taxpayers". (NJSA 54A:1-2[n], NJSA 54A:2-1.1; NJSA 54A:5–7, 54A:5–8).

Driver's License.

Valid proof required that alien's presence in U.S. is authorized under federal law. (NJSA 39:3-10, 39:3-13, 39:3-13.1, 39:3-17.1, 39:3-29.3).

Monitoring.

Council on undocumented aliens within Department of Labor monitors population of undocumented aliens in state and advises department and legislature on remedial action and legislation with respect to such aliens on employment opportunities for legal residents. (NJSA 34:1A-81 – 34:1A-84).

5 CIVIL ACTIONS AND PROCEDURE

5.01 ACCORD AND SATISFACTION:

Agreements, executed or executory, for discharge of liabilities or contracts by payment or performance of something less than, or different from, what might legally be claimed.

Common law rules apply generally. Note, Uniform Commercial Code adopted (Tit. 12A), (adopted 1961, effective Jan. 1, 1963). (175 N.J. Super. 345, 418 A.2d 1326). See category 3 Business Regulation and Commerce, topic 3.09 Commercial Code.

Compromise.

Where debt or demand is liquidated or certain and is due, additional consideration or release of debt by creditor is required for valid accord and satisfaction on payment of lesser sum. (88 N. J. L. 630, 96 A. 915). Where debt or demand is unliquidated or in bona fide dispute, payment and acceptance of lesser sum than claimed may constitute consideration and may be valid accord and satisfaction. (83 N. J. L. 707, 85 A. 354). In either case, to constitute defense, payment and acceptance must be executed and must be made with intent to satisfy. (34 N. J. Super. 203, 111 A.2d 796, aff'd, 20 N. J. 537, 120 A.2d 442). Accord must partake of elements of enforceable contract (129 N. J. L. 490, 30 A.2d 56), but it is not of consequence that satisfaction consists in part of giving of new promise by third person. (64 N. J. Super. 465, 166 A.2d 585, vacated on other grounds, 35 N. J. 558, 173 A.2d 905).

Minor not less than 15 years of age may enter into compromise with respect to certain insurance contracts. (NJSA 17B:24-2).

Pleading.

Defense must be pleaded affirmatively. (Rule 4:5-4).

5.02 ACTIONS:

Only form of civil proceeding is known as "civil action." Formal distinctions between actions at law and suits in equity have been abolished. (Rules 4:2-1, 4:3-1).

Equity.

Equitable titles, rights and remedies continue. If primary right asserted or principal relief sought is equitable or probate in nature, action is brought in Chancery Division of Superior Court even though legal relief may also be demanded. (Rule 4:3-1).

Commencement.

Civil actions, including proceedings in lieu of prerogative writs and attachments, are commenced by filing complaint with court, accompanied where required by certification that all necessary transcripts of local agency proceedings in cause have been ordered. (Rules 4:2-2, 4:60-2, 4:69-1, 4:69-4, 6:3-1). Case Information Statement and certification regarding related actions and parties may be required. (Rule 4:5-1[b]). Designation of trial counsel permitted. (Rule 4:5-1[c]). See also topics 5.20 Process; 5.16 Pleading.

Parties.

Action may be brought in name of real party in interest; but executor, administrator, guardian, trustee or one who has contracted for benefit of third person may sue in fiduciary's own name without joining person for whose benefit suit is brought. (Rule 4:26-1). Beneficiary of contract may sue or defend in own name. (NJSA 2A:15-2). Person subject to process must be joined if in person's absence complete relief cannot be accorded among those already parties, or if person's claims an interest in subject matter of action and is so situated that disposition of action in person's absence may as practical matter impair or impede ability to protect that interest or leave any of persons already parties subject to substantial risk of incurring double, multiple, or other inconsistent obligations by reason of person's claimed interest. If person has not been joined, court shall order person be made party, and if person should join as plaintiff but refuses to do so person may be made defendant. If person should be joined but cannot be served with process, court shall determine whether it is appropriate for action to proceed among parties before it, or should be dismissed, absent person being thus regarded as indispensable. (Rule 4:28-1). Action is not defeated by misjoinder; parties may be dropped or added by order of court on motion by any party, or on court's own motion. (Rule 4:30). Nonjoinder of claims required to be joined by entire controversy doctrine shall result in preclusion of omitted claims to extent required by entire controversy doctrine. (Rule 4:7-1; Rule 4:28-1; Rule 4:29-1; Rule 4:30; Rule 4:30A; 116 N.J. 7).

Class actions are permitted. (Rule 4:32). Requirements for maintaining class action and relevant procedures are based substantially on Federal Rule of Civil Procedure 23.

Uniform Case Management.

Every civil action except civil commitment actions, actions in probate, foreclosures, and all other general equity actions shall be assigned to one of four tracks. Track assignment is made by court at time complaint and Case Information Statement filed. Summary actions by order to show cause assigned to Track I. (Rule 4:5A-1). Court notifies plaintiff of track assignment in ten days, and plaintiff attaches copy of track assignment notice to process served. (Rule 4:5A-2[a]). Within 30 days of receipt of track assignment notice, plaintiff may apply to court for change of track assignment by filing certification of good cause. (Rule 4:5A-2[b]). Once case assigned, designated judge presides over all pretrial motions and management conferences. (Rule 4:5B-1). For general track designations, see sample Civil Case Information Statement, Appendix XII-B of Court Rules. For discovery time limits by track, see topic 5.11 Depositions and Discovery.

Intervention.

Upon timely application, anyone permitted to intervene in action if applicant claims interest relating to property or transaction that is subject of action and applicant is so situated that disposition of action may as practical matter impair or impede ability to protect that interest, unless applicant's interest is adequately represented by existing parties. (Rule 4:33-1). Intervention is permissive if claim or defense and main action have question of law or fact in common. When party to action relies in support of claim or defense upon statute or executive order administered by state or federal government agency or officer or upon any regulation, order, requirement or agreement issued or made pursuant to statute or executive order, agency or officer upon timely application may be permitted to intervene. In exercising discretion, court shall consider whether intervention will unduly delay or prejudice adjudication of rights of original parties. (Rule 4:33-1, Rule 4:33–2). Application to intervene is by motion setting forth grounds therefor, together with pleading setting forth claim or defense for which intervention is sought and Case Information Statement. (Rule 4:33).

Interpleader.

Persons having claims against plaintiff that may expose plaintiff to double or multiple liability may be joined as defendants and required to interplead; defendant exposed to similar liability may obtain interpleader by crossclaim or counterclaim. (Rule 4:31).

Third Party Practice.

See topic 5.17 Pleading.

Joinder of claims, legal or equitable or both, is permissible (Rule 4:27), except that, without leave of court, claim by or against fiduciary as such may not be joined with claim by or against fiduciary personally unless claim arose out of fiduciaryship (Rule 4:28-2). Claims by or against husband and wife may be joined with claims by or against either separately. (Rule 4:28-3). Nonjoinder of claims required to be joined by entire controversy doctrine results in preclusion of omitted claims to extent required by entire controversy doctrine. (Rule 4:30A; 116 N.J. 7). Entire controversy doctrine extended to include all affirmative claims party might have against another party including counterclaims and cross-claims. Successive action against party with material interest in controversy not barred unless failure to join in original action inexcusable and ability of party to defend successive action substantially prejudiced. (Rule 4:51). Entire controversy doctrine relaxed to exempt non-germane claims from inclusion in foreclosure actions brought pursuant to Rule 4:64-5. See also Rules 4:7-1, 4:30A.

Consolidation of Actions.

Superior court actions involving common question of law or fact arising out of same transaction or series of transactions in Superior Court may be ordered consolidated by court on own initiative or on motion. Actions not triable in same county or vicinage may be so consolidated on order of assignment judge of county wherein first action was instituted by party’s motion, Judge’s initiative, or on certification to assignment judge by judge of Law or Chancery Division. Motion to consolidate action pending in Special Civil Part with action pending in Chancery Division or Law Division, Civil Part will be heard, regardless of which action filed first, in Chancery or Law Division, Civil Part county of venue. If motion granted, Special Civil Part action consolidated with Chancery or Law Division, Civil Part action. When action is pending in Superior Court, and another action involving common question of law or fact arising out of same transaction or series of transactions is pending in any other court, Superior Court on motion of party or on its own motion may remove action to and consolidate actions in Superior Court. (Rule 4:38-1; 191 N.J. Super. 114).

Transfer.

Court may transfer pending action to Tax Court provided principal issues raised are cognizable in that court. Action may be transferred from municipal court to Superior Court, Chancery Division, Family Part, provided that gravamen of offense or violation arises out of family or family-type relationship between defendant and victim. (Rules 4:3-4, Rules 5:1 – 5:2). Action pending in Special Civil Part of Superior Court involving common questions of law or fact arising out of same transaction(s) as action pending in Superior Court may be removed and consolidated in latter court. (Rules 6:4-1, 4:38-1). Counterclaims in Special Civil Part action that exceed jurisdictional limit of that court may be filed and upon application action may be removed to Law

Division. (Rule 6:4-1).

Severance of Actions.

Any claim against a party may be reserved or severed and proceeded with separately by order of court. (Rule 4:30). For convenience or to avoid delay, expense or prejudice, court may order separate trial of any claim or claims or of any issue or issues. (Rules 4:38-2, 4:29-2).

Stay of Proceedings.

Restraint will not be granted in Superior Court action to stay another action pending in same court; relief must be sought on counterclaim or otherwise in pending action. (Rule 4:52-6).

Abatement.

In event of death of one or more plaintiffs or defendants in action in which right sought to be enforced survives only to surviving plaintiff or against surviving defendant, action does not abate, but death is noted on record, and action proceeds in favor of or against surviving parties. (Rule 4:34-1; 194 N.J. Super. 307). If party becomes mentally incapacitated, court may, upon motion, allow action to be continued by or against guardian or guardian ad litem. (Rule 4:34-2). Court on motion will order substitution of proper parties. (Rule 4:34-1). Marriage does not abate action. (NJSA 37:2-7). See NJSA 2A:26-16 for effect of death of defendant on attachment action, and NJSA 2A:64-1 for effect of death or resignation of officer of unincorporated association on action against association.

Survival.

In addition to actions that survive at common law, every action based on tort to person or property, except action based on injury to feelings without property damage, survives for and against decedent’s personal representative. (NJSA 2A:15-3, 2A:15-4; 88 N. J. L. 64, 95 A. 618). Same rule applies to statutory rights of action, such as claims for wrongful death under Death Act (NJSA 2A:31-1) and statutory actions of waste (89 N. J. L. 120, 97 A. 782).

Actions Abolished.

The right to recover money damages for alienation of affections, criminal conversation, seduction or breach of promise to marry has been abolished. (NJSA 2A:23-1).

Small Claims.

See category 6 Courts and Legislature, topic 6.01 Courts.

Limitation of.

See topic 5.16 Limitation of Actions.

Direct Actions Against Insurer.

See category 23 Transportation, topic 23.01 Motor Vehicles, subhead Direct Actions.

Conditions Precedent-New Jersey Tort Claims Act.

Notice of claim must be filed within 90 days of accrual of claim, which period may be extended to one year from accrual of claim at discretion of court in absence of prejudice to public entity or public employee. Suit may be filed after expiration of six months following receipt of notice of claim. Suit must be filed within two years of accrual of claim. (NJSA 59:8-8, 9).

5.03 APPEAL AND ERROR:

Appellate jurisdiction in civil cases is vested in Supreme Court and in Appellate Division of Superior Court. (NJ Const., Art. 6, § 2, par. 2; Art. 6, § 5, pars. 1, 2). Rules governing appellate practice set forth in Rules 2:1 et seq.

To Supreme Court.

Appeals may be taken to Supreme Court from final judgments as of right where there is dissent in Appellate Division; in cases involving substantial question arising under Constitution of United States or New Jersey; directly from trial court in capital causes; and in such other cases as may be provided by law (NJ Const., Art. 6, § 5, par. 1; Rule 2:2-1), by leave of Supreme Court from interlocutory orders of trial courts when death penalty imposed; from interlocutory judgments or orders of Appellate Division when necessary to prevent irreparable injury; and on certification by Supreme Court to Appellate Division (Rule 2:2-2).

To Appellate Division.

Appeals may be taken as of right to Appellate Division from final judgments in trial divisions of Superior Court, or judges thereof sitting as statutory agents; from Tax Court; in summary contempt proceedings in all trial courts except municipal courts; from final decisions or actions, or to review rules of, any state administrative agency or officer; and in such other cases as provided by law. Appeals also may be taken to Appellate Division by leave granted, in extraordinary cases and in interests of justice, from final judgments of courts of limited jurisdiction, or from decisions or actions of administrative agency or officer if matter appealable or reviewable as of right in trial division of Superior Court. (Rule 2:2-3). Appeal may be permitted from interlocutory judgments or orders in interest of justice if final judgment is appealable as of right. (Rule 2:2-4).

Time for Appeal.

Appeal from judgments of courts and final judgments or orders of judges sitting as statutory agents and final judgments of Division of Workers' Compensation shall be taken within 45 days of entry. Appeals from final decisions or actions of state administrative agencies or officers other than workers' compensation appeals and wage collection section appeals shall be taken within same period of time from date of service of decision or notice of action taken. (Rule 2:4-1). Appeals from interlocutory orders shall be by serving and filing with lower court or agency and with appellate court, notice of motion for leave to appeal with appellate court within 20 days after date of service of such order, administrative decision or notice of such administrative action. (Rule 2:5-6). Time for appeal is tolled by death of aggrieved party, by death, disbarment, resignation or suspension of attorney of record for such party (but time runs anew from date of death, etc.), by timely filing and service of application for rehearing made to Appellate Division or, upon appeal to Appellate Division, from state administrative agency or officer of agency pursuant to its rules of practice, or in criminal actions, by timely filing and service of motion to trial court to enter judgment of acquittal or for new trial or in arrest of judgment, or for rehearing or to amend or make additional findings of fact pursuant to Rule 1:7 – Rule 4 and by insanity of defendant, but time shall run anew from date of removal of such disability. (Rule 2:4-3). Cross-appeals must be taken within 15 days after service of notice of appeal or entry of order granting leave to appeal. (Rule 2:4-2). Notice of petition for certification must be served and filed within 20 days to review judgment of Appellate Division. (Rule 2:12-3).

How Taken.

Appeal taken by serving copy of notice of appeal and request for transcript on all other parties appearing in action and, in adult criminal matters, on Appellate Section of New Jersey Division of Criminal Justice, and by filing originals with appellate court and copy of notice of appeal and transcript request with court from which appeal taken. In civil actions, notice must specify: (1) Name and address of appellant or its attorney and names of all other parties to action and appeal, (2) judgment or part thereof appealed from, (3) name of lower court judge, and (4) court from which appeal taken and court to which appeal taken. In criminal actions, notice must set forth: (1) Name and address of appellant or its attorney, (2) concise statement of offense and judgment, specifying date of judgment and sentence imposed or other disposition, (3) place of confinement, (4) name of judge who sat below, and (5) court from which appeal taken and court to which appeal taken. In addition to filing of Notice of Appeal, appellant shall mail copy thereof, with copy of Case Information Statement annexed, by ordinary mail to trial judge. (Rule 2:5-1). For preparation of record on appeal and required fees, see Rules 2:5-3, 2:5-4. Joint appeals are permitted. (Rule 2:3-3). For procedure on petition for certification, see Rule 2:12.

Stay of proceedings below is not automatic, but rests in discretion of court below or appellate court. Judgment in civil action adjudicating liability for sum of money or rights or liabilities of parties in respect of property, may be stayed only if supersedeas bond has been given or cash deposit made unless court otherwise orders on good cause shown. (Rule 2:9-5). Application for stay made prior to date of oral argument in appellate court must be to court below, and thereafter to appellate court. (Rule 2:9-5[b]). Supersedeas bond must be approved by court below, or appellate court, as to amount and sureties. Bond must be conditioned for satisfaction of judgment in full, with interest, trial cost and damages. In case of property, amount of bond secures damages recovered for use and detention of property, trial and appellate costs, and interest. Agencies or political subdivisions of state, or officers thereof, are not required to give bond or other security. (Rule 2:9-6).

Deposit for Costs.

No bond other than supersedeas is required, but appellant must deposit $300 with clerk of appellate court to cover costs of appeal unless supersedeas is filed or deposit in lieu thereof is made. (Rule 2:5-2). Petitioner for certification must make deposit of $300. (Rule 2:12-5).

Extent of Review.

In both civil and criminal actions issue of whether a jury verdict was against weight of evidence shall not be cognizable on appeal unless motion for new trial on that ground was made in trial court, and trial court’s ruling on such motion shall not be reversed unless it clearly appears that there was miscarriage of justice. (Rule 2:10-1). Any error or omission shall be disregarded unless it is of such nature as to have been clearly capable of producing unjust result, but court in interests of justice may notice plain error not brought to attention of trial or appellate court. (Rule 2:10-2). Appellate court may exercise such original jurisdiction as is necessary for complete determination of cause. (NJ Const., Art. 6, § 5, par. 3; Rule 2:10-5).

Judgment on Appeal.

Opinion of appellate court shall include its judgment, and no other form of judgment is required. Date of filing of opinion shall be deemed to be date of entry of judgment. (Rule 2:11-3[b]). See Rule 2:11-6 for procedure for motion for reconsideration.

5.04 BONDS:

Bonds, if required, are specified by rules governing New Jersey courts dealing with particular forms of actions or proceedings. Generally, bonds must be approved by court as to form and sufficiency prior to filing. (Rule 1:13-3[a]). For particular bonds, refer to topic covering form of action.

Sureties.

Company authorized under New Jersey law to do surety business constitutes sufficient surety on any bond required or permitted by law. (NJSA 17:31-1). See category 16 Insurance, topic 16.02 Surety and Guaranty Companies. No practicing attorney may be surety on bond. (NJSA 2A:13-3).

Enforcement.

Every bond to be filed with court must provide that surety submits itself to jurisdiction of court, and that liability of surety may be enforced by motion without independent action. (Rule 1:13-3[b]). When claim is made on bond containing penalty to secure payment of money only, true sum and not penalty shall be deemed to be amount due. (NJSA 2A:55-3). If bond provides for performance of more than one act, prosecution of claim for breach does not bar later actions for breaches occurring thereafter. (NJSA 2A:55-9). Bond given by fiduciary to court, may, on forfeiture, be prosecuted by and at expense of aggrieved party in name of state at relation of such party. (NJSA 3B:15-24).

5.05 CERTIORARI:

Writ of certiorari is superseded and relief in lieu thereof is afforded as of right in Superior Court, as provided by Rules (see Rule 4:69).

5.06 CHARITABLE IMMUNITY:

See topic 5.09 Damages.

5.07 COMMISSIONS TO TAKE TESTIMONY:

See topic 5.11 Depositions and Discovery.

5.08 COSTS:

Allowance of costs is within discretion of court. (NJSA 2A:15-59). Counsel fees are not normally included (Rule 4:42-9), except that successful party in civil action may recover reasonable costs and counsel fees if judge finds complaint, counterclaim, cross-claim or defense of nonprevailing party frivolous. Court must find either that pleadings were in bad faith solely for purposes of harassment, delay or malicious injury, or that nonprevailing party knew or should have known that pleadings were without reasonable basis in law or equity and could not be supported by good faith argument for extension, modification or reversal of existing law. (NJSA 2A:15-59.1). Attorneys' fees also available when party prejudiced by bad-faith failure to disclose pending litigation on same issue pursuant to Rule 4:5-(b)(2). (196 N.J. 316, 953 A.2d 478). Public entity required or authorized by law to provide defense for current or former employee may also be awarded reasonable counsel fees and reasonable litigation costs if individual for whom defense provided is prevailing party in civil action, and if judicial determination at any time during proceedings or upon judgment that complaint, counter-claim, cross-claim or defense of non-prevailing party was frivolous. (NJSA 2A:15-59.1).

Costs in Trial Court.

Except when express provision therefor is made by statute or court rules, costs are allowed as matter of course to prevailing party, unless court otherwise directs. (Rule 4:42-8). For costs after offer of judgment, which in certain circumstances may include attorney's fee, see Rule 4:58.

Costs on appeal, including cost of transcript and reasonable printing expenses, are taxed in manner ordered by appellate court or, in absence of order, in favor of prevailing party. (Rule 2:11-5).

Taxation of costs is by the clerk, on application of party entitled thereto, or by the court. (NJSA 2A:15-64). Costs must be taxed within six months after entry or final disposition of judgment or order but court may order taxation thereafter for good cause shown. (NJSA 2A:15-65). Action of clerk in taxing costs may be reviewed on motion. (Rule 4:42-8). Taxed costs now include fees paid to private person serving process pursuant to Rule 4:4-3, but not in amount exceeding allowable sheriff's fees. (Rule 4:42-8[c]).

Counsel Fees.

Fee allowances possible in some instances (such as certain family, probate and foreclosure actions) as well as in all cases where counsel fees permitted by statute, except in tax or mortgage foreclosure actions. All applications for allowance fees shall be supported by Affidavit of Service. (Rule 4:42-9). Applications for allowance pursuant to offer of judgment rule (Rule 4:58-1) shall be made in accordance with provisions of Rule 4:42-9(b) within 20 days after entry of final judgment. Party awarded counsel fees pursuant to fee-shifting statute, rule or provision not allowed to recover duplicative costs. (Rules 4:42-9, 4:58-5).

Collection.

Process to collect costs allowed by judgment or order is by writ of execution, unless court otherwise orders or law otherwise provides. (Rule 4:59-1).

Security for Costs.

Nonresident claimant in any action in Superior Court may, on demand of opposing party, be required to file bond or deposit cash with clerk in amount of $200 as security for costs. (NJSA 2A:15-67, 2A:15-68). Plaintiff in attachment may in court's discretion be required to give bond for costs. (NJSA 2A:26-7). On appeal or on petition for certification, in civil action, $300 deposit must be made unless supersedeas is filed or appeal as indigent is allowed. (Rules 2:5-2, 2:12-5).

Poverty of party justifies any court in its discretion to waive or dispense with fees. (NJSA 22A:1-7). Collection of fees may be waived in particular circumstances by rule or order of Supreme Court or by order of any court made pursuant to authority granted by rule of Supreme Court. (NJSA 22A:2-23). Indigent inmates who bring civil actions may have part or all of filing fees waived. Types of actions for which fee waiver available include administrative decision appeals, including but not limited to parole and disciplinary matter. (NJSA 30:4-16.3).

5.09 DAMAGES:

In general, common law rules prevail. Wife, however, can recover for loss of consortium resulting from negligent injury to husband. (46 N. J. 82; 215 A.2d 1). See topic 5.02 Actions, subhead Joinder of Claims and category 23 Transportation, topic 23.01 Motor Vehicles, subhead No-Fault Insurance.

Libel and Slander.

In action for libel in newspaper, periodical, etc., plaintiff may recover only actual damage proved and specially alleged in complaint, unless he proves either malice in fact or that defendant, after having been requested by plaintiff in writing to retract libelous charge, failed to do so within reasonable time. (NJSA 2A:43-2). Broadcasting stations are not liable for statements made by legally qualified candidates for public office under certain circumstances. (NJSA 2A:43-3).

Pleading.

See that topic, infra.

Actions for Wrongful Death.

See category 13 Estates and Trusts, topic 13.05 Death, subhead Action for Wrongful Death.

Charitable Immunity.

Nonprofit corporation, society, or association organized exclusively for religious, charitable, or educational purposes is not liable for damages negligently inflicted upon beneficiary of their services; but immunity from liability does not extend to damages inflicted upon non-beneficiary. Immunity extends to trustees, directors, officers, employees, agents, or volunteers, except where damage caused by willful, wanton, or grossly negligent act, including crimes of sexual nature. (NJSA 2A:53A-7[a], [c]). Immunity does not extend to health care provider who is compensated employee, agent, or servant of any such entity. Nonprofit corporation, society, or association organized exclusively for hospital purposes shall not be liable for injury to beneficiary from negligence of its employees, agents, or servants; immunity not granted if person injured not beneficiary of hospital organization. No immunity for individual liability. (NJSA 2A:53A-7[b]). Notwithstanding foregoing, liability of nonprofit hospitals to beneficiary limited to $250,000 per accident, but no limit placed on liability to non-beneficiary. (NJSA 2A:53A-8). Notwithstanding any other provision of law, unpaid trustees, directors, officers and members of any nonprofit corporation, society or association not liable for any damages resulting from exercise of discretion in connection with duties of office, absent reckless disregard for duties. Immunity extends to trustees, directors, officers, employees, agents, servants or volunteers, absent willful, wanton or grossly negligent acts, or negligent operation of motor vehicle or independent contractor of religious, charitable and educational organization. (NJSA 2A:53A-7.1).

Collateral Source Rule.

In any civil action brought for personal injury or death, except actions brought pursuant to provisions of NJSA 39:6A-1 — 39:6A-35, if plaintiff receives or entitled to receive benefits for injuries allegedly incurred from any source other than joint tortfeasor, benefits, other than worker's compensation benefits or proceeds from life insurance policy, shall be disclosed to court and amount thereof that duplicates any benefit contained in award shall be deducted from any award recovered by plaintiff, less any premium paid to insurer directly by plaintiff or by any member of plaintiff's family on behalf of plaintiff for policy period during which benefits are payable. Any party to action is permitted to introduce evidence regarding any of matters described in this act. (NJSA 2A:15-97).

Comparative Negligence Rule.

Adopted. (NJSA 2A:15-5.1 et seq.). Contributory negligence not bar unless plaintiff's negligence is greater than defendant's or combined negligence of multiple defendants. If not greater, judgment reduced by plaintiff's percentage of negligence. Trier of fact determines percentage of negligence by parties and total amount of damages. Judge then molds judgment from such findings.

Drug Dealers and Users Rule.

Adopted. (NJSA 2C:35-1 et seq.). Civil actions for economic and non-economic damages available against defendants who used or participated in marketing controlled dangerous substances.

Social Host Liability.

Social host who is not holder of or required to hold liquor license is not liable for injury to person or property resulting from negligent provision of alcoholic beverages to guest who has attained requisite age to purchase or consume alcoholic beverages unless: (1) Guest visibly intoxicated in presence of social host or under circumstances manifesting reckless disregard, (2) provision of alcoholic beverages created unreasonable risk of foreseeable harm and social host failed to exercise reasonable care to avoid foreseeable risk, and (3) injury arose from negligent operation of motor vehicle by guest. Irrebuttable and rebuttable presumptions of visible intoxication provided by statute based on blood alcohol level of guest. No liability for injury to guest and intoxicated guest is assessed percentage of negligence by trier of fact for which neither social host nor any other person can be held responsible. (NJSA 2A:15-5.5 et seq.).

Sovereign Immunity.

Under New Jersey Tort Claims Act, NJSA 59:1-1 et seq., public entity is generally subject to tort liability for acts or omissions of public entity or public employees within scope of employees' employment. Public entity is not liable for injury resulting from exercise of judgment or discretion, legislative or judicial action or inaction, administrative action or inaction of judicial nature, or exercise of high level official judgment or discretion. Public entity remains liable for employee acts or omissions of ministerial nature, although public entity is not liable for failure to inspect or to adequately inspect property, but is liable for negligence in maintaining or failure to protect against dangerous conditions of its property. Public entity may also be liable for failure to provide emergency signals or signs, but is not liable for failure to provide ordinary traffic signals or signs. Further, public entity is not liable for injuries caused by plan or design of public property. Public employee not liable for injury where public entity is immune from liability for injury. (NJSA 59:3-1 et seq.). See topics 5.02 Actions and 5.16 Limitation of Actions.

Product Liability.

See category 3 Business Regulation and Commerce, topic 3.12 Consumer Protection, subhead Products Liability.

Uniform Contribution Among Tortfeasors Act (Revised).

Not adopted.

5.10 DECLARATORY JUDGMENTS:

See topic 5.15 Judgments.

5.11 DEPOSITIONS AND DISCOVERY:

Depositions are taken pursuant to Rules of Civil Practice in Superior Court. (Rules 4:10 through 4:16).

Municipal court may order depositions to be taken in criminal actions if witness likely to be unavailable at trial due to impending death or physical or mental incapacity and deposition necessary to prevent manifest injustice. (Rule 7:7-6). Interrogatories may be served in Superior Court, Special Civil Part as in other courts in all actions except forcible entry and detainer actions, landlord and tenant summary actions for recovery of premises, and actions commenced or pending in small claims section. (Rule 6:4-3[a]). Limitations on service of interrogatories in Superior Court, Special Civil Part are governed by Rule 6:4-3(b).

Material which follows applies only to civil cases; for criminal cases, see Rule 3:13.

Perpetuating Testimony.

Person may perpetuate his or her own testimony or that of any other person or preserve evidence or inspect documents or property or copy documents by petition stating that due to extraordinary circumstances explained in detailed affidavit, depositions are needed to comply with Affidavit of Merit Statute; or by filing verified petition seeking appropriate order, entitled in petitioner's name showing: (1) That petitioner expects to be party to action cognizable in New Jersey court but is presently unable to bring it or cause it to be brought; (2) subject matter of expected action and petitioner's interest therein; (3) facts petitioner desires to establish by proposed testimony and why he or she desires to perpetuate or inspect it; (4) names, or description, and addresses of those petitioner expects will be adverse parties; (5) names and addresses of persons to be examined and substance of testimony expected to be elicited from each; and (6) names and addresses of persons having control or custody of documents or property to be inspected and description thereof. Petition shall ask for order preserving evidence or authorizing petitioner to take depositions of persons to be examined named therein for purpose of perpetuating their testimony. (Rule 4:11-1[a]). At least 20 days notice of hearing on petition must be served, with copy of petition attached, on each person named in petition as expected adverse party; if after diligent inquiry personal service cannot be made, court may order service by publication or otherwise and appoint attorney to represent such party. (Rule 4:11-1[b]). If court finds that perpetuation or inspection may prevent failure or delay of justice, it must make order designating or describing evidence to be preserved or documents or property to be inspected or persons to testify, specifying subject matter of examination and whether depositions shall be taken orally or by written interrogatories. (Rule 4:11-1[c]). Deposition taken to perpetuate testimony under these rules, or, although not so taken, one that would be admissible in courts of U.S. or of state where taken, may, subject to rules, be used in any action between same parties or their privies involving same subject matter that is subsequently brought in any court of New Jersey. (Rule 4:11-1[d]).

Provision is made for taking of depositions pending appeal from trial division of Superior Court for use in event of further proceedings there. (Rule 4:11-2).

After commencement of action testimony of any person, including party, may be taken by deposition upon oral examination or written interrogatories for purpose of discovery or use as evidence or both. Leave of court in civil suits need not be obtained unless notice of taking is served by plaintiff within 35 days after service of summons and complaint on defendant. (Rules 4:10-1, 4:14-1). Documentary evidence exhibited before officer, or exhibits proved or identified by witness may be annexed to and returned with deposition, or, if requested by party producing same, officer taking deposition must mark documentary evidence or exhibit as exhibit in case and return it to such party, and it may be received in evidence as if annexed to and returned with deposition. (Rule 4:14-6[b]). Deposition of any person may be taken by judgment creditor, or person's successor in interest appearing of record, in aid of judgment or execution. (Rule 4:59-1[e]).

Before Whom Taken.

No deposition may be taken before or recorded by person who is relative, employee or attorney of any party, or relative or employee of such attorney, or who is financially interested in action. (Rule 4:12-4).

By Stipulation.

Unless Court orders otherwise, parties may by written stipulation provide that depositions may be taken before any person, at any time or place, upon any notice and in any manner and, when so taken, may be used like other depositions. (Rule 4:13).

Within State for Use Within State.

Within this State, depositions must be taken before person authorized by laws of New Jersey to administer oaths. (Rule 4:12-1). If taken on written interrogatories, before officer designated in notice. (Rule 4:15-1; Rule 4:15-2).

Within State for Use Outside State.

Superior Court may, on motion, award subpoena in aid of taking deposition in New Jersey pursuant to laws of another jurisdiction for use in proceedings there. (Rule 4:11-4).

Outside of State for Use Within State.

Within U. S. and its territories and possessions, may be taken before person authorized to administer oaths by laws of New Jersey, U. S. or place where taken. (Rule 4:12-2). Unless international treaty or convention otherwise requires, in foreign countries may be taken (1) on notice before secretary of embassy or legation, consul general, consul, vice consul, or consular agent of U. S., or (2) before person or officer appointed by commission or under letters rogatory. (Rule 4:12-3).

Commissions and letters rogatory are issued to take depositions in foreign country, on application and notice. (Rule 4:12-3).

Notice.

Unless upon application and for good cause court prescribes shorter notice, party wishing to take deposition on oral examination must give every other party to action not less than ten days notice in writing, stating time and place for taking, and name, or description, and address of deponent. On motion court may, for cause, enlarge or shorten time of party served with notice. (Rule 4:14-2).

If deposition is to be taken on written interrogatories party proposing to take it must serve other parties with notice, accompanied by interrogatories, stating name and address of deponent and name or title and address of officer to take them. Within 30 days thereafter party so served may serve cross-interrogatories. Redirect interrogatories may be served within ten days thereafter, and recross interrogatories within ten days of service of redirect interrogatories. (Rule 4:15-1).

In actions for divorce, depositions may be taken as to all matters except those relating to elements constituting grounds for divorce. (Rule 5:5-1[c]).

Objections to Taking or Use.

Objections as to notice are waived unless served in writing at least three days prior to taking, or within such time as court may direct. (Rule 4:16-4[a]). Objections based on disqualification of officer are waived unless made before taking or as soon thereafter as known, or discoverable by reasonable diligence. (Rule 4:16-4[b]). Objections as to competency of witness or testimony taken are not waived if not made before or during taking unless ground for objection could have been removed if presented then. (Rule 4:16-4[c]). Except as otherwise provided by Rule 4:14-3(c), errors and irregularities occurring at taking upon oral examination that might be removed if promptly presented are waived unless seasonable objection is made on taking. (Rule 4:16-4[c]). Objections to form of written interrogatories are waived unless served in writing within time allowed for serving succeeding cross or other interrogatories, or, if to recross interrogatories, within five days of service. (Rule 4:16-4[c]). Errors as to completion and return of deposition waived unless motion to suppress deposition or part thereof is made with reasonable promptness after defect is with due diligence ascertained. (Rule 4:16-4[d]).

Compelling Attendance of Witnesses.

Subpoena will issue to command witness to attend (Rules 4:14-7[a] and 1:9-1) and may also command witness to produce books, papers, documents or tangible things that constitute or contain evidence. (Rules 4:14-7[a] and 1:9-2). New Jersey resident may be required to attend only in county where he or she resides or is employed or transacts business in person, at location in New Jersey within 20 miles from witness's residence or place of business, or at such other convenient place as is fixed by order. Nonresident subpoenaed within New Jersey for taking of deposition may be required to attend only in county where served, or at place in New Jersey within 40 miles from place of service, or at other convenient place fixed by order. (Rule 4:14-7[b]). Subpoena commanding production of evidence for discovery only issuable to person whose attendance at deposition is compelled. Subpoena must state that subpoenaed evidence may not be produced until date specified for deposition and if deponent is notified that motion to quash subpoena has been filed, deponent may not produce subpoenaed evidence until ordered by court or release is consented by all parties to action. (Rule 4:14-7[c]). Copy of subpoena must be served on all parties not less than ten days before scheduled date. Evidence so procured is available to all parties for inspection and copying. (Rule 4:14-7[c]).

Completion of Discovery.

From time first answer filed or 90 days after first defendant served, whichever occurs first, discovery must be complete in: Track I, 150 days; Track II, 300 days; Tracks III and IV, 450 days. (Rule 4:24-1). Discovery time limits apply to actions commenced on or after Sept. 5, 2000. For actions commenced before, discovery must be completed 150 days from date of service of complaint on each defendant, or as otherwise prescribed by rule effective when complaint was filed or by court order. Parties may consent to or court may direct extension or limitation of time. (Rule 4:24-1).

Penalties.

If party or officer, director, etc., of party fails to attend deposition within New Jersey, after being served with proper notice, court may, on motion and notice, strike that party's pleadings, or dismiss action, or enter judgment by default, or take such other action as it deems advisable. (Rule 4:23-4). If party giving notice fails to attend and proceed, or to serve subpoena on witness and witness, who, because of such failure, fails to attend, but another party attends, court may order party giving notice to pay reasonable expenses of attending party, including reasonable attorney's fees. (Rule 4:14-8). In granting or refusing motion to terminate or limit examination, court may impose on either party or witness requirement to pay such costs and expenses as it deems reasonable. (Rules 4:14-4, 4:23-1). Person subpoenaed to depose and paid statutory fees who fails to attend without lawful or reasonable excuse shall forfeit not more than $50 to party aggrieved by his failure to attend and shall be liable to suit by such party for damages sustained by want of his evidence. Such person shall also be punishable for contempt of court out of which process issued. (NJSA 2A:81-15).

Refusal to Answer.

Answers to questions may be compelled by order of court on notice. (Rule 4:23-1). Refusal to answer after such order is punishable as contempt. (Rule 4:23-2[a]). If party or director, officer or agent of party fails to obey order to provide or permit discovery, court may also by order establish designated facts for purpose of action, forbid support of or opposition to designated claims or defenses, strike out all or part of pleadings, stay proceedings until answer given, dismiss action, render judgment by default, or treat as contempt of court failure to obey any orders except order to submit to physical or mental examination, and court, in lieu of or in addition to foregoing, may order payment of reasonable expenses, including fees, caused by failure, unless justified. (Rule 4:23-2[b]).

Examination of Witnesses.

Deponent may be examined on any matter, not privileged, relevant to subject matter of pending action, including liability insurance policy limits. It is not ground for objection that testimony will be inadmissible at trial if reasonably calculated to lead to discovery of admissible evidence, nor that examining party has knowledge of the matters as to which testimony is sought, but deponent need not produce any writing prepared by party, attorney or agent, etc., in anticipation of litigation and preparation for trial unless court otherwise orders; and in no event need writing be produced that reflects attorney's mental impressions or conclusions, but party may require other party to disclose identity of proposed expert witnesses and unless court otherwise orders, such experts may be deposed as to their opinions, and party taking deposition shall pay expert reasonable fee for appearance. (Rule 4:10-2). Examination and cross-examination proceed as at trial, but cross-examination need not be limited to subject of examination-in-chief. (Rule 4:14-3). Court may make order for protection of party or witness for good cause shown or by stipulation of parties. (Rule 4:10-3).

If taken upon oral examination, officer puts witness on oath and has testimony taken stenographically and transcribed on typewriter unless parties agree otherwise. (Rule 4:14-3). Evidence objected to is taken subject to objection. (Rule 4:14-3). No objections shall be made during taking of deposition except: (1) Those addressed to form of question, or (2) to assert privilege, or (3) to assert right to confidentiality, or (4) to assert limitation pursuant to previously entered court order. (Rule 4:14-3). Depositions must be taken continuously and without adjournment unless otherwise ordered by court or stipulated by parties and deponent. (Rule 4:14-3). No communication is permitted between deponent and counsel during course of deposition while testimony is being taken except as to previously entered court order, assertion of claim of privilege, or right to confidentiality. (Rule 4:14-3). Attorneys may telephone judge during taking of deposition to obtain cease and desist order if adversary is acting in bad faith or is unreasonably annoying, embarrassing or oppressing deponent or party. (Rule 4:14-4). In lieu of participating in oral examination, parties may serve written questions and have officer propound and record answers verbatim. (Rule 4:14-3).

Objections to proceedings made at time of taking deposition must be noted thereon. (Rule 4:14-3).

Return.

If officer is certified shorthand reporter, witness shall not sign deposition. Otherwise, unless waived by stipulation of parties, officer must request deponent to read and sign deposition. On deponent's failure to do so, officer must sign deposition and state on record fact of waiver or of failure or refusal of witness to sign together with reason, if any. (Rule 4:14-5).

Officer must certify deposition, and file statement with deputy clerk of Superior Court in county of venue identifying deposition. Reporter must furnish party taking deposition with original and copy. Original must be made available to judge at hearing. (Rule 4:14-6[a]). Officer may annex and return any exhibit proved or identified by witness, or, if requested by party producing it, mark it as exhibit in case and return it to party. (Rule 4:14-6[b]).

Party taking deposition bears cost thereof. (Rule 4:14-6[c]).

Use.

At trial or hearing, part or all of deposition may be used, so far as admissible under rules of evidence, in accordance with any of following provisions: (1) by any party, to contradict or impeach testimony of deponent as witness; (2) deposition of party or of one who at time of taking was officer, director, etc., of entity which is a party may be used by adverse party against deponent or entity for any purpose; (3) deposition of witness, whether or not party, may be used by any party for any purpose against any other party present or represented at taking, or who had notice thereof, only if court finds that (a) witness is dead, or (b) is out of New Jersey, unless absence was procured by party offering deposition, or (c) is unable to attend or testify because of age, sickness, infirmity or imprisonment, or (d) party offering deposition was unable to procure attendance of witness by subpoena. Upon application and notice, deposition of absent but not unavailable witness may be used where exceptional circumstances exist making it desirable to allow deposition to be used. If only part of deposition is offered in evidence by party, adverse party may require offering party to introduce all of it which is relevant to part offered, and any party may offer any other parts. (Rule 4:16-1).

Videotaped Depositions.

Permitted in accordance with Rule 4:14-9. Videotaped depositions may be used at trial in accordance with Rule 4:16-1 and, in case of deposition of treating physician or expert witness, may be used for discovery purposes at trial in lieu of testimony whether or not witness available to testify, provided witness is produced by party taking deposition for further videotaped deposition necessitated by discovery completed after original deposition or for other good cause. (Rule 4:14-9[e]).

Form

CAPTION

DEPOSITION (UPON ORAL EXAMINATION)

(UPON WRITTEN INTERROGATORIES)

Transcript of the deposition of . . . . . ., called (for oral examination) (to answer written interrogatories pursuant to notice, copies of which are attached hereto) by . . . . . . in the above entitled action, said deposition being taken pursuant to Rules Governing Civil Practice in the Superior Court of the State of New Jersey, by and before . . . . . ., a . . . . . . of the State of . . . . . . at . . . . . . on . . . . . . at . . . . . . o'clock.

Appearances: . . . . . .

. . . . . ., being duly sworn according to law by the Officer, testified as follows:

(If on oral examination, give questions and answers; if on written interrogatories, state answers consecutively.)

(Signature of witness, unless waived or unnecessary)

CAPTION

CERTIFICATE OF OFFICER

I, ..., a . . . . . . of the State of . . . . . ., do hereby certify that prior to the commencement of the examination the witness, ..., was duly sworn by me to testify the truth, the whole truth and nothing but the truth.

I DO FURTHER CERTIFY that the foregoing is a true and accurate transcript of the testimony as taken stenographically, by and before me at the time, place and on the date hereinbefore set forth, to the best of my ability.

I DO FURTHER CERTIFY that I am neither a relative nor employee of, nor attorney or counsel for, any of the parties to this action, and that I am neither a relative nor employee of such attorney or counsel, and that I am not financially interested in the action.

(Signature and title of examining officer)

5.12 EQUITY:

See topic 5.02 Actions.

5.13 EVIDENCE:

Witnesses.

General law is Tit. 2A, c. 81, 84A except where superseded by New Jersey Rules of Evidence. (NJSA 2A:84A-40).

Conviction of crime or interest in outcome of suit does not exclude or disqualify witness, but may be shown to affect credibility. (NJSA 2A:81-12, repealed by P.L. 1999, c. 319). Party to civil action may be called as witness by adverse party, except in divorce suit or action to recover penalty or enforce forfeiture, and may be examined and cross-examined like other witnesses. (NJSA 2A:81-6, 2A:81-11).

See also topic 5.11 Depositions and Discovery, subhead Compelling Attendance of Witnesses.

Privileged Communications.

Confessions made to clergymen in confidence are privileged (NJSA 2A:84A-23) as are confidential communications between attorney and client and, with limitations, doctor and patient (NJSA 2A:84A-20, 2A:84A-22.2). Person engaged by, connected with or employed by news media cannot be compelled to disclose source of information obtained by him during professional activities. (NJSA 2A:84A-21).

Husband and Wife.

Married person is competent and compellable to testify for or against spouse interested in civil suit as party or otherwise. Generally, absent mutual consent, spouses are incompetent to testify against each other in criminal actions except to prove marriage, unless accused is charged with offense against spouse, child of accused or spouse, or such spouse is complainant. (NJSA 2A:84A-17). With exceptions confidential communications between spouses during marriage are privileged. (NJSA 2A:84A-22).

Testimony at Former Trial.

Subject to judge's discretion, in civil action and when offered by defense in criminal action, testimony in prior proceedings is not excluded by hearsay rule if declarant is unavailable as witness and if testimony in prior proceeding was developed, through examination or cross-examination, by party who had interest and motive to develop testimony similar to that of person against whom testimony sought to be introduced. (N.J.R.E. 804[b][1]).

Communications or Transactions with Persons Since Deceased or Incompetent.

When party to civil action is lunatic suing or defending by guardian, or when party sues or is sued in representative capacity, any other party who asserts claim or affirmative defense against such lunatic or representative, supported by oral testimony of promise, statement or act of lunatic while of sound mind or of decedent, shall be required to establish same by clear and convincing evidence. (NJSA 2A:81-2).

Self-incrimination.

Generally every natural person has a right to refuse to disclose in any action, or to a police officer or other official, any matter that will incriminate him or expose him to a penalty or a forfeiture. (NJSA 2A:84A-19). Witness before court or grand jury in criminal action may be compelled to give incriminating evidence but such evidence cannot be used in future prosecution against him for offense concerning which he gave evidence. (NJSA 2A:81-17.3). But if public officer or employee fails or refuses to appear and testify on matters relating to his or her office before any court, grand jury or State Commission of Investigation, after having been informed of duty to so appear and testify by prosecuting attorney or member of or attorney for State Commission of Investigation, public officer or employee is subject to removal from office, position or employment. (NJSA 2A:81-17.2a1).

See topic 5.11 Depositions and Discovery; category 6 Courts and Legislature, topic 6.04 Statutes.

5.14 INJUNCTIONS:

In addition to particular statutory powers to enjoin specified acts, courts have general equitable powers to grant injunctive relief to forbid and prevent irreparable injury. (135 N.J. 126, 638 A.2d 1260; 22 N.J. 184, 123 A.2d 498). Temporary restraints, interlocutory injunctions, or permanent injunctions can be sought. (Rule 4:52).

Jurisdiction to issue injunctions is vested in Superior Court. (NJ Const., Art. VI, § 3, pars. 2, 4).

Procedure and Prerequisites.

Action is commenced by filing of complaint, followed by service of complaint and summons, or order to show cause in lieu of summons (see topic 5.02 Actions), except as noted infra. Complaint need not be verified or accompanied by affidavit except when ex parte relief is sought. (Rules 1:4-7, 4:52-1). Temporary restraining order will not issue without notice to or consent of adverse party unless facts presented by affidavit or verified complaint show that immediate and irreparable damage will probably result before notice can be served and hearing had. (Rule 4:52-1). Order granted without notice may be dissolved or modified on motion with not more than two days notice and may provide for continuation of restraint until return date which shall not be later than 35 days after date of its issuance, unless extended for cause for a like period or by consent. (Rule 4:52-1). During pendency of action interlocutory injunction or temporary restraint may be applied for on motion or order to show cause. (Rule 4:52-2). Restraining orders and orders granting injunctions must (a) set forth reasons for issuance, (b) be specific in terms and (c) describe in reasonable detail acts sought to be restrained. Order binds parties, their officers, agents, etc., who receive actual notice of same. (Rule 4:52-4). Injunction will not be granted in one action to stay proceedings pending in another action in Superior Court, but such relief may be sought on counterclaim or otherwise in pending action. (Rule 4:52-6). In some summary statutory actions, court, on verified complaint and order to show cause in lieu of summons, may grant interim restraints to prevent immediate and irreparable damage. (Rule 4:67-2[a]). For preliminary restraint in matrimonial matters, see Rules 5:7-2(b), 5:7A. Restraints may be used in Superior Court and in Special Civil Part in aid of execution. (NJSA 2A:17-65).

Bond or security may be required in certain cases. Court may require security on granting temporary restraining order or interlocutory injunction. (Rule 4:52-3).

Labor Disputes.

See category 11 Employment, topic 11.02 Labor Relations.

Temporary Injunctions.

See subhead Procedure and Prerequisites, supra.

5.14A JOINT TORTFEASORS:

See topic 5.15 Judgments, subhead Contribution.

5.15 JUDGMENTS:

Nature.

Judgments are either final or interlocutory. Ordinarily final judgment finally disposes of, adjudicates or determines rights or some of rights of parties, either on entire controversy or on separate and definite aspect thereof. Interlocutory judgment is one given in middle of cause on some plea, proceeding or default, which does not finally determine or complete suit. (5 N. J. 507, 76 A.2d 249; 53 N. J. Super. 424, 147 A.2d 568; cert. denied, 30 N.J. 151, 152 A.2d 170).

Leave of court necessary for appeal of interlocutory judgment to Supreme Court or Superior Court, Appellate Division. (Rules 2:2-2 and 2:2-4). See category 14 Family, topic Divorce for appeals in matrimonial actions.

By Confession.

Judgment by confession will not be entered upon warrant of attorney included in body of instrument for payment of money. (Rule 4:45-1). No judgment will be entered on warrant except on motion after notice to party liable. If instrument is for payment of money, obligee can obtain judgment on return date of motion by producing: (a) Warrant of attorney for confessing judgment, (b) the instrument, (c) plaintiff's affidavit stating true consideration, amount then justly due to plaintiff and that judgment is not confessed with fraudulent intent. In addition to affidavit, court may require proof that (a) Warrant was duly executed; (b) person liable is alive and is on notice of application; (c) debt is unsatisfied. (Rule 4:45-2).

Warrant is irrevocable. (NJSA 2A:16-9). Judgment by confession on bond secured by mortgage on land cannot be entered unless, prior to entry of judgment, notice of such proposed judgment is filed with clerk or register of county where land located. (NJSA 2A:50-6). Clauses granting power of attorney to confess judgment in revolving credit plans and closed-end credit agreements prohibited. (NJSA 17:3B-13, 17:3B-23). See category 3 Business Regulation and Commerce, topics 3.02 Bills and Notes, subhead Judgment Notes; 3.01 Banks and Banking, subhead Loans and Investments by Banks, catchline Market Rate Consumer Loan Act.

Summary judgment may be entered whenever pleadings, depositions, answers to interrogatories, admissions and affidavits show that there is no genuine issue as to any material fact and moving party is entitled to judgment as matter of law. (Rule 4:46-1 et seq.). Complaint, defense or counterclaim, or any part thereof, insufficient in law or sham, may be struck out or dismissed. (Rules 4:6-4, 4:6-5). Motion for summary judgment may be made by claimant after 35 days from service of complaint, counterclaim or cross-claim and may be made by defendant at any time. Motion must be served and filed at least 28 days before return date; opposing papers at least ten days before return date; and answer to opposing papers at least four days before return date. (Rule 4:46-1). Motion must be served with briefs, statement of material facts, and with or without affidavits. (Rule 4:46-2[a]). Statement of material facts shall set forth in separately numbered paragraphs concise statement of each material fact as to which movant contends there is no genuine issue, with citation establishing fact. Party opposing motion must file responding statement of material facts admitting or disputing each of facts in movant's statement. All material facts which are sufficiently supported will be deemed admitted for purposes of motion only unless specifically disputed by citation demonstrating genuine issue of material facts. Opposing party may include additional facts that party believes are material and as to which there exists genuine issue. (Rule 4:46-2[b]). Issue of fact is genuine only if evidence together with all legitimate inferences would require submission of issue to trier of fact. (Rule 4:46-2[c]). If summary judgment is not rendered upon whole case, court may ascertain which material facts are controverted and which uncontroverted and direct such further proceedings as are appropriate. (Rule 4:46-3).

Declaratory Judgment.

Uniform Declaratory Judgments Act adopted 1924 with minor differences. (NJSA 2A:16-50 – 2A:16-62). Judgment for declaratory relief is not precluded by existence of another remedy. (Rule 4:42-3).

Default Judgment.

Default is entered on docket upon written request by moving party, supported by affidavit of default, filed within six months of actual default. (Rule 4:43-1). Default in Special Civil Part is entered by clerk, without request, upon occurrence of actual default. (Rule 6:6-2). After entry of default, attorney required to send copy to defaulting party by ordinary mail. (Rule 4:43-1). Entry of final judgment of default may be vacated for good cause and in accordance with Rule 4:50-1. (Rule 4:43-3). In action where damages can be readily ascertained, plaintiff has damages assessed, on filing affidavit, by court or clerk and final judgment entered; otherwise plaintiff, on notice to defendant, if latter has appeared, proves damages by hearing before court with or without jury and obtains final judgment on verdict. (Rule 4:43-2). Attorney seeking default judgment must provide defaulting party with notice of proof hearing by ordinary mail. (Rule 4:43-2). If party entitled to final judgment by default has failed to apply therefor within four months, court shall give party entitled to apply for default written notice that action will be dismissed without prejudice when six months after entry of default elapses absent application for entry of default or special circumstances. Final judgment by default may not be entered without leave of court more than four months after entry of default on docket. (Rule 4:43-2).

Offer of Judgment.

Except in matrimonial actions, at any time more than 20 days before actual trial date, any party may serve on any adverse party offer to take monetary judgment in offeror's favor (or to allow judgment to be taken against offeror) for sum stated therein. If offer is accepted in writing on or prior to tenth day before actual trial date, offeree files notice of acceptance with court. Offer deemed withdrawn if not accepted within ten days before trial date or within 90 days of service, whichever is earliest. (Rule 4:58-1). If offeree-claimant rejects or fails to respond to offer and determination at least as favorable to offeror or, if monetary judgment, amount excluding allowable prejudgment interest and counsel fees, is 80% of offer or less, claimant must pay to adverse party certain costs incurred after offer, litigation expenses and attorney's fee as prescribed by Rule 4:58-2. No allowance permitted if claim dismissed, no-cause verdict returned, or only nominal damage. (Rule 4:58-3). If offeror-claimant obtains determination at least as favorable as rejected offer or, if money judgment, in amount 120% of offer or more, excluding allowable prejudgment interest and counsel fees, claimant prejudgment entitled to recover all reasonable litigation expenses incurred following nonacceptance, 8% interest on any money recovery from date of offer, to extent such interest exceeds that allowed by Rule 4:42-11(b) and reasonable attorney's fee. (Rule 4:58-2).

Docketing.

Judgments recovered in Superior Court are docketed in office of clerk of that court at Trenton. Clerk will enter abstract of judgments submitted for entry for payment of money. (NJSA 2A:16-11). Final judgment of Superior Court, Special Civil Part, if not less than $10 including costs remains due thereon, may be docketed in Superior Court. (NJSA 2A:18-32). Upon final judgment in construction lien case, claimant must file statement with county clerk with oath of claimant stating amount due. (NJSA 2A:44A-24).

Vacation or Modification.

On motion with briefs court may relieve party or representative from final judgment, order or proceeding on following grounds: (a) Mistake, inadvertence, surprise or excusable neglect; (b) newly discovered evidence that would probably alter judgment, order or proceeding, and which could not by due diligence have been discovered in time to move for new trial; (c) fraud, misrepresentation or other misconduct of adverse party; (d) judgment is void; (e) judgment has been satisfied, released, or discharged or because prior judgment upon which it was based has been reversed or vacated; (f) any other reason justifying relief. (Rule 4:50-1).

Clerical mistakes in judgment may be corrected by court on its own motion or upon motion of party. (Rule 1:13-1).

Recording.

Judgment of Superior Court, Chancery Division, affecting realty may be recorded as a deed. (NJSA 46:16-1.1).

Lien.

On personalty, see category 8 Debtor and Creditor, topic 8.05 Executions. Superior Court judgment is lien on land for 20 years, commencing from entry of judgment on court minutes. (NJSA 2A:16-1; NJSA 2A:17-3). Entry of judgment creates lien on land as against subsequent deeds and mortgages (13 N.J. Eq. 434), and attachments (12 N.J.L. 29), but subsequent judgment on which execution has issued and levy has been made acquires priority over prior judgment under which no levy has been made (NJSA 2A:17-39). See also category 8 Debtor and

Creditor, topic 8.05 Executions. Judgments recovered or docketed in Superior Court are liens on debtor's lands throughout state. All postponements of lien of judgments of records in court clerk's office must contain full description of property and book and page of judgment to be postponed. (NJSA 2A:16-44).

Revival.

Judgment may be revived by proper proceedings or action at law brought thereon within 20 years after date of judgment excluding period of obligor's nonresidence, if long-arm service cannot be effectuated, and six-month period succeeding death. (NJSA 2A:14-5, 2A:22-23).

Assignment of judgment recovered or docketed in Superior Court on being acknowledged and recorded with clerk of court where recovered or docketed, is notice to all persons, except officer executing the judgment without actual notice. (NJSA 2A:16-15, 2A:16-42).

Contribution.

Where one or more joint tortfeasors have paid on judgment in excess of their pro rata share, contribution may be recovered in amount of excess, except that no person is entitled to contribution from one entitled to indemnification by him in respect to liability for which contribution is sought. (NJSA 2A:53A-3). Settling parties not entitled to benefit of contribution. (108 N.J. 493; 531 A.2d 717).

Satisfaction.

Upon return of execution satisfied, clerk of court cancels judgment of record. (Rule 4:48-2[a]; NJSA 2A:16-48). In proper case, court may order satisfaction to be entered. (Rule 4:48-2[b], NJSA 2A:16-45). On receiving satisfaction of judgment, person legally entitled thereto or person's attorney shall either enter acknowledgment of satisfaction on record of judgment or deliver to party making satisfaction, party's representative, guardian or attorney or to clerk of court wherein judgment is entered or docketed, warrant directing the clerk to satisfy judgment of record. (NJSA 2A:16-46; Rule 4:48-1).

Form

Attorney address . . . .

Attorney for . . . .

Plaintiff (Court Name)

v. Docket No. . . . .

Defendant Civil Action

WARRANT TO SATISFY

JUDGMENT

TO CLERK OF ABOVE-NAMED COURT:

WHEREAS, Judgment was entered in the above-titled action in favor of . . . . against . . . . for . . . . as appears by the record thereof in Judgment Book . . . ., on page . . . . . ., or Docket No. . . . . . .;

NOW, THEREFORE, this is your warrant and authority to enter on the aforesaid record this satisfaction of judgment . . . .

Dated: . . . .

. . . .

(LL.B or J.D.)

I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

Dated: . . . .

. . . .

Actions.

See topics 5.16 Limitation of Actions and 5.17 Pleading.

Foreign Judgments.

Judgment of court of another state (if exemplified in accordance with acts of Congress), or duly certified judgment of federal court if offense constitutes indictable offense if committed in New Jersey, is admissible in evidence in New Jersey courts. (NJRE 803[c][22], [23]).

In action on foreign judgment, defendant can prove he was not summoned or did not appear even in face of recital to contrary in judgment record. (NJSA 2A:82-4.1).

Uniform Enforcement of Foreign Judgments Act adopted. (NJSA 2A:49A-25 et seq.). (1964; adopted 1997).

Uniform Interstate Family Support Act adopted for family matters. (NJSA 2A:4-30.65 et seq.). (1996; adopted 1998).

5.16 LIMITATION OF ACTIONS:

Actions must be commenced within following periods:

Twenty Years.

After cause of action accrues for recovery of real estate or rents, including actions by State. (NJSA 2A:14-7-8). Right or title of entry into real estate is barred unless entry made within 20 years after accrual of right or title. (NJSA 2A:14-6). If mortgagee is in possession of realty for 20 years after default of payment by mortgagor, equity of redemption is barred. (NJSA 2A:50-21). After date of bond, against sureties on certain fiduciaries' bonds. (NJSA 2A:14-16). After date of judgment, to revive judgments of any court of this state. (NJSA 2A:14-5). Action on judgment of any other state or country is barred unless commenced within 20 years after date thereof or within period in which like action might be brought thereon in that state or country, whichever period is shorter. (NJSA 2A:14-5). Execution must issue on unrevived judgment within 20 years of its entry. (NJSA 2A:17-3).

Sixteen Years.

After cause of action accrues, on sealed obligation or recognizance for payment of money only (as to contracts for sale of goods, seal ineffective to modify four year period of limitations in NJSA 12A:2-725); for rent on lease under seal; on sealed award of arbitrators for payment of money only; except that period is six years where action is founded upon instrument under seal brought by merchant or banks, finance company, or other financial institution (NJSA

2A:14-4). After date of bond, on prison limits bond. (NJSA 2A:14-20).

Ten Years.

After date of bond, on bonds of municipal magistrates or clerks of municipal courts (NJSA 2A:14-19); after design, planning or construction of improvement to real property, for damages for injury to real or personal property or to person or for wrongful death, arising out of defective and unsafe condition of improvement to real property (not applicable to person in actual possession and control at time defective and unsafe condition causes such injury or to certain actions by governmental units) (NJSA 2A:14-1.1).

Nine Years.

After date of bond, on bonds of sheriffs, county treasurers, and municipal collectors and treasurers. (NJSA 2A:14-17).

Seven Years.

After judgment of probate, on action concerning title to real estate adjudicated thereby. (NJSA 3B:3-31).

Six Years.

After cause of action accrues, for trespass to real property; tortious injury to real or personal property; taking, detaining or converting personal property; replevin; tortious injury to rights of another other than personal injury, libel or slander; recovery upon contractual claim or liability, express or implied, not under seal (except for action for breach of contract for sale of goods under Uniform Commercial Code [NJSA 12A:2-725]); recovery upon account other than concerning trade or merchandise between merchants, their factors, agents and servants (NJSA 2A:14-1); on debt or demand for liquidated damages alleged by defendant by way of set-off (NJSA 2A:14-27). After filing and recording of civil recognizance action must be prosecuted to final judgment thereon within six years in order to preserve the lien thereof against real estate. (NJSA 2A:14-29). After action accrues, for recovery of money or property of municipality or school district. (NJSA 2A:49-2). After cause of action accrues for injury to personal property by fire caused by railroad engine where such injury occurs after March 12, 1963. (NJSA 48:12-151). Artist has cause of action against person publicly displaying artist's work in altered, mutilated or modified form. Limitations period is later of six years from violation or two years after constructive discovery. (NJSA 2A:24A-4, 2A:24A-8).

Four Years.

After date of bond, on bonds of constables (NJSA 2A:14-18); and actions for breach of contract for sale of goods under Uniform Commercial Code (NJSA 12A:2-725).

Two Years.

After cause of action accrues, for injuries to the person. (NJSA 2A:14-2). After accident occurs or payment due under an agreement is defaulted or last partial payment is made under an award followed by default, for injuries compensable under Workmen's Compensation Act. (NJSA 34:15-41, 34:15-51). After offense committed, for forfeiture on a penal statute where forfeiture is limited in favor of State only. After offense committed or cause of action accrues, for forfeiture on a penal statute which is limited in favor of party aggrieved only. (NJSA 2A:14-10). After death occurs, in action under Wrongful Death Act, provided normal limitation for personal injury has not already run before death. Exception to two-year limit exists by which action can be brought at any time, if death caused by murder, aggravated manslaughter, or manslaughter for which defendant convicted, found not guilty because of insanity or adjudicated delinquent. (NJSA 2A:31-3; 44 N. J. Super. 93, 129 A.2d 727; aff'd 26 N. J. 33, 138 A.2d 529). After date of ordinance, by any person other than fee owner or holder of mortgage, judgment or lien, to establish easement or right in lands dedicated as park lands but not accepted as such by municipality and vacated as such by municipal ordinance. (NJSA 2A:14-12, 2A:14-13). After occurrence of offense, or where appropriate after earlier death or deliverance out of prison of person aggrieved, upon actions for offense against statute governing illegal imprisonment and habeas corpus. (NJSA 2A:67-11). After constructive discovery by artist of person's publicly displaying artist's work in altered, mutilated or modified form. (NJSA 2A:24A-4, 2A:24A-8). After cause of action accrues for injuries compensable under Law Against Discrimination. (NJSA 10:5-1; 133 N.J. 282, 627 A.2d 654). After date of postconviction relief in form of court's setting aside guilty plea of person whose attorney did not inform person of consequences of such plea, in legal malpractice suit. (197 N.J. 180, 962 A.2d 482).

One Year.

After publication, for libel or slander. (NJSA 2A:14-3). After offense committed, by individuals for forfeiture on a penal statute where action is permitted by any person or by the State; or for forfeiture where forfeiture is limited to any county, township or town corporate, or officer thereof or person or persons for the use thereof, subject, however, to any shorter period which statute may prescribe. (NJSA 2A:14-10). After passage of ordinance to reassert private rights in roads, streets, public grounds, etc., the public rights in which have been released, vacated or extinguished by municipal ordinance, except persons owning interest in land abutting such ways or whose right to ingress and egress to public street is solely over such ways. (NJSA 2A:14-11).

Nine Months.

After death of decedent or of donee of power, for disclaimer of present interest by any devisee or beneficiary under will, appointee under power of appointment exercised by will, or heir; after happening of event which determines right to possession, use or enjoyment of property or interest therein, for disclaimer of future interest by any devisee or beneficiary under will, appointee under power of appointment exercised by will, or heir. (NJSA 3B:9-5). See NJSA 46:2E-6 for similar limitations respecting disclaimers of transfers under non-testamentary instruments.

Six Months.

After accrual, for distraint of chattels for rent in arrears. (NJSA 2A:33-7). After Superior Court orders executor or administrator of decedent's estate to give public notice, creditors must present claims. (NJSA 3B:22-4). After appointment of personal representative of decedent's estate, for claim by surviving spouse to "elective share." (NJSA 3B:8-12).

Three Months.

After notice of refusal of claim against decedent's estate, to enforce same against executor or administrator with respect to distributed assets. (NJSA 3B:22-8). After presentation of claim by creditor of decedent's estate, executor or administrator must allow or dispute it in whole or in part. (NJSA 3B:22-7).

Two Months.

After notice of claim to property in actions against sheriffs by claimants of personal property attached or levied on under execution. (NJSA 2A:14-9).

Actions in lieu of prerogative writ are governed by Rule 4:69.

Miscellaneous actions for various specialized purposes are limited by statutes creating such actions. See categories 8 Debtor and Creditor, topic Liens; Mortgages, topic Mortgages of Real Property; Property, topics Absentees, Adverse Possession.

Actions Not Specifically Provided For.

No general limitation, but see NJSA 2A:14-1, which covers broad variety of situations.

New Actions.

Plaintiff and plaintiff's heirs, executors and administrators, have one year after reversal of judgment theretofore entered in plaintiff's favor, in which to commence new action. (NJSA 2A:14-28). This section does not apply to any action for breach of contract of sale covered by NJSA 12A:2-725 of Uniform Commercial Code.

Foreign Causes of Action.

Generally, local law of forum governs. (83 N. J. 478, 416 A.2d 862). For exceptions, see 63 N.J. 130, 305 A.2d 412.

Disabilities.

In general, statute of limitations does not run during period of plaintiff's minority or insanity provided he was under such disability when cause of action accrued. (NJSA 2A:14-21). Statute does not run against parents' claim for damages because of injury to minor child until statute begins to run against child's claim. However parents' claim must be prosecuted in same action as child's or is barred. (NJSA 2A:14-2.1).

Absence of defendant from New Jersey, or, in case of foreign corporation, failure to be represented in New Jersey by person or officer upon whom process can be served, tolls statute of limitations as to most actions if it appears from affidavit of diligent inquiry that long-arm service cannot be effectuated whether absence or failure to be represented exists at time of or occurs after accrual of action during time limited (NJSA 2A:14-22); but this does not apply to causes arising out of state involving nonresidents (293 F.2d 199).

Period of military service in time of war and six months thereafter, of either plaintiff or defendant, is not included in computing any limiting period running on Apr. 16, 1945, or commencing to run thereafter. (NJSA 2A:14-26). Cessation of hostilities is not termination of war for purposes of this statute. (68 N. J. Super. 1, 171 A.2d 331).

Death of person liable for most causes of action tolls statute of limitations for six months thereafter. (NJSA 2A:14-23).

Action belonging to decedent, which action was not barred on date of death, shall not be barred by any statute of limitations sooner than six months after death. (NJSA 2A:14-23.1).

New Promise or Part Payment.

In actions on simple contracts, no acknowledgment of promise is sufficient evidence of new or continuing contract for purpose of starting statute running anew or reviving claims already barred, unless in writing signed by party chargeable thereby; but payment on account, if payor knows of larger claim and admits it to be correct, will start statute running anew and revive claims already barred. (NJSA 2A:14-24; 96 N. J. L. 450, 115 A. 443). Actions on sealed instruments may also be brought within 16 years after any payment thereon, whether made within or after preceding 16-year period. (NJSA 2A:14-4). Part payment does not extend time within which judgment may be revived. (19 N. J. Misc. 387, 20 A.2d 609).

Contractual limitations are permitted. (27 N. J. Super. 417, 99 A.2d 552).

Pleading.

Bar of statute must be pleaded (Rule 4:5-4), except that where bar of statute appears on face of complaint it may be raised by motion (Rule 4:6-2; 90 N. J. Super. 578, 218 A.2d 873).

New Jersey Tort Claims Act.

Notice of claim must be filed within 90 days of accrual of claim. 90-day period may, in discretion of court, for good cause and in absence of prejudice to public entity, be extended to one year from accrual of claim. Suit may be filed after expiration of six months from date of receipt of notice of claim. Suit must be filed within two years from accrual of claim. (NJSA 59:8-1 et seq.).

5.16A PARTITION:

Action for partition may be maintained in Superior Court by tenant in common or joint tenant, but not by tenant by entirety. When terms of testator’s will authorize executor of estate to sell any realty interest held by testator at time of testator’s death, then executor has power to bring action to partition realty provided that testator had such power while he lived. (NJSA 2A:56-1 et seq.; Rule 4:63-1).

Proceedings.

Court may appoint commissioners to allot shares. (Rule 4:63-1).

Partition in Kind or Sale.

Where it appears that land cannot be partitioned without great prejudice to owners, court may order sale. (NJSA 2A:56-2, 3; Rule 4:63-1).

5.17 [RESERVED]

5.18 PLEADING:

Form of pleadings governed by Court Rules, extensive revision of which became effective Sept. 8, 1969. Formal distinction between actions at law and suits in equity has been abolished although actions where primary right asserted or principal relief sought is equitable must be brought in Chancery Division of Superior Court rather than Law Division. (See topic 5.02 Actions.) Federal Rules of Civil Procedure form basis of many rules.

Pleadings Permitted.

Only pleadings allowed are: complaint, answer, answer to counterclaim, answer to cross-claim, third-party complaint, third-party answer and reply. (Rule 4:5-1[a]). Application to court for order must be by motion or in special cases, by order to show cause. (Rule 1:6-2). Except in civil commitment actions (Rule 4:74-7) and in actions in probate, foreclosure and all other general equity actions, first pleading of each party must include (i) certification whether matter in controversy is subject of any claim pending or contemplated in any court or arbitration proceeding, (ii) mandatory Case Information Statement form, and (iii) certification of compliance with confidentiality requirements of Rule 1:38-7(b). (Rule 1:5-6; Rule 1:38-7[c]; Rule 4:5-1[b]). For form, see Appendix XII to Rules.

General Requirements.

Every pleading must be captioned with name and division of court, county in which Superior Court action is laid, title and docket number of action and designation of pleading. (Rule 1:4-1). Allegations are made in numbered paragraphs (Rule 1:4-2) and must be simple, concise and direct (Rule 4:5-7). Claims or defenses may be set forth alternatively or separately in one or separate counts; party may state as many claims or defenses as party has, regardless of consistency or whether on legal or equitable grounds. (Rule 4:5-6). Pleading according to legal effect is permitted as long as adversary is apprised. (Rule 4:5-8[c]). In pleading judgment or decision of domestic or foreign court, tribunal, agency or officer, matter showing jurisdiction need not be shown. (Rule 4:5-8[d]). First pleading of any party must state party's residence or, if not natural person, party's principal place of business. (Rule 1:4-1[a][1]). Pleadings must be signed by attorney of record or associate or pro se party; signatures of a firm may be typed followed by signature of partner or associate. (Rule 1:4-5). Pleading need not be verified except for ex parte relief or where rule or statute provides otherwise. (Rule 1:4-7). Signature of attorney or pro se party on pleading certifies that signatory has read pleading, it is well grounded, it does not contain scandalous or indecent matter, and it is not interposed for delay. (Rule 1:4-8). Pleadings shall be on letter-size paper and must be double-spaced with type size no smaller than ten-pitch or 12-point type. Both sides of paper and recycled paper may be used, provided legibility can be maintained. (Rule 1:4-9). For rules applicable to Special Civil Part of Superior Court (formerly county district court), see Rule 6:3 and in municipal court, see Rules 7:2-1 and 7:7-1.

Complaint must contain (1) Statement of facts on which claim is based, showing pleader is entitled to relief, and (2) demand for judgment; relief in alternative or of different types may be demanded. Where unliquidated damages claimed in any court, other than Special Civil Part, pleadings need not specify amount of damages. (Rule 4:5-2). Complaint must state names of all parties. (Rule 1:4-1[a][1]). Item of special damage must be specially stated, except general demand for unliquidated damages. (Rule 4:5-8[f]).

Answer must state all defenses, legal or equitable, except those permitted by motion, which must be made before further pleadings, i.e., (a) Lack of subject-matter jurisdiction; (b) lack of personal jurisdiction; (c) insufficiency of process; (d) improper service; (e) failure to state claim; (f) failure to join indispensable party. Special appearance is abolished. (Rule 4:6-2). Defenses (b), (c) and (d) above are waived if not raised by motion within 90 days of answer; defenses (5) and (6) may be raised at any time. (Rule 4:6-3). Answer must state defenses to each claim and admit or deny allegations of complaint. Partial denials must be specified. Statement of insufficient knowledge has effect of denial. (Rule 4:5-3). Allegations not denied, except for amount of damages, deemed admitted. (Rule 4:5-5). Pleader must state affirmatively including statement of facts, avoidance or affirmative defense such as accord and satisfaction, arbitration and award, contributory negligence, discharge in bankruptcy, duress, estoppel, failure of consideration, fraud, illegality, injury by fellow servant, laches, license, payment, release, res judicata, statute of frauds, statute of limitations, or waiver. (Rule 4:5-4).

Motions made other than during trial or hearing must be in writing, after proper notice, unless court otherwise permits. (Rule 1:6-2). Except as otherwise provided by Rule 4:46-1 (summary judgment) and Rule 5:5-4(c) (post-judgment motions), notice of motion shall be served and filed not later than 16 days before specified return date unless otherwise provided by court order, which may be applied for ex parte. (Rule 1:6-3). Supporting affidavits or certifications and briefs, if required or desired, are submitted with motion. (Rules 1:6-3, 1:6-5). Every motion must state time and place when being presented to court, grounds on which made and nature of relief sought, and must be accompanied by proposed form of order. Motions in Law Division—Civil Part must state discovery end date or that no such date assigned. (Rule 1:6-2[a]). Respondent must serve and submit answering brief at least eight days before return date, and reply brief, if any, must be served and submitted at least four days before return date. (Rule 1:6-5). Motions for summary judgment require briefs, and statement of material facts that must set forth in separately numbered paragraphs concise statement of each material fact as to which movant contends there is no genuine issue, together with citation to portion of motion record establishing fact. (Rule 4:46-2[a]). Affidavits, if any, must be made only on personal knowledge, only as to admissible facts as to which affiant is competent to testify (see category 10 Documents and Records, topic 10.02 Affidavits); court may allow cross-examination of affiant. (Rule 1:6-6). Except in family actions (see Rule 5:5-4), no motion shall be listed for oral argument unless requested by party in papers or ordered by court. Request may be conditioned upon motion being contested. Except for discovery or calendar motions, request granted as of right. (Rule 1:6-2[d]). Certain defenses may be raised by motion (see subhead Answer, supra, Rule 4:6-2). Any party may move for summary judgment or partial summary judgment, after 35 days after service of pleading (Rule 4:46-1), on any issue in action on showing of no dispute as to material fact on that issue (Rule 4:46-2[c]). Motion for summary judgment must be served and filed not later than 28 days before time specified for return date (opposing papers ten days; reply papers four days). (Rule 4:46-1). Denial of motion for judgment at trial does not preclude moving party from offering evidence. (Rule 4:40-1). Where motion raising defenses does not include all defenses and objections that could have been raised, subsequent motions may be forfeited. (Rule 4:6-6, see also subhead Answer, supra).

Counterclaim, Set-Off and Crossclaim.

Defendant may set off or counterclaim any cause of action, except in summary or foreclosure actions. (Rule 4:7-1). Liquidated claims may be set off; defendant failing to set off such claim or claim that can be ascertained by calculation or failing to include all aspects of controversy in litigation is precluded from bringing subsequent action therefor. (Rules 4:7-1, 4:27-1, 4:30A). Counterclaim need not arise out of transaction that is subject matter of suit (Rule 4:7-1), nor need it diminish plaintiff's claim or recovery. (Rule 4:7-2). Relief sought may exceed or be different from or not germane to that sought by plaintiff. (Rule 4:7-2). Counterclaim maturing or acquired after pleading or inadvertently omitted by excusable neglect may be asserted by leave of court. (Rules 4:7-3, 4:7-4). Except in summary actions, claim of party against co-party may be pleaded as cross-claim and may include claim that co-party is or may become liable to cross-claimant for claim asserted against cross-claimant. (Rule 4:7-5[a]). Claim for contribution or indemnity against co-party shall be made under heading "Claim for Contribution" or "Claim for Indemnity" by general demand without pleading facts. (Rule 4:7-5[b]). Cross-claims allowed of right within 90 days of service on cross-claimant or party claimed against, thereafter by leave of court. (Rule 4:7-5[c]). Non-settling defendant's failure to assert cross-claim for contribution against settling defendant does not preclude allocation of percentage of negligence against settling defendant or credit in favor of non-settling defendant provided plaintiff had notice settling defendant's liability was issue and plaintiff had opportunity to meet issue at trial. (Rule 4:7-5[c]).

Reply is necessary to allege matters in avoidance of affirmative defense in answer (Rule 4:5-1); if not avoided in reply, affirmative defense is deemed denied (Rule 4:5-5). Allegations in reply taken as denied or avoided and factual or legal defenses may be asserted at trial. (Rule 4:5-5).

Amended and Supplemental Pleadings.

Pleadings may be amended as matter of course at any time before responsive pleading is required and if action is not on trial calendar, within 20 days after pleading is served. Otherwise, amendments are by court order or written consent of adversary. (Rule 4:9-1). Court may permit statement of new or different claim or defense. (Rule 4:9-3). Amendments to conform to evidence may be made by motion at any time, even after judgment. (Rule 4:9-2). Amendments normally relate back to date of original pleading. Amendment changing party relates back if assertion arose out of transaction set forth in original pleading and, within pertinent limitations period for action against new party, such party: (1) Had received notice of action and will not be prejudiced, and (2) knew, or should have known that, but for mistake concerning identity of proper party, action would have been brought against new party. (Rule 4:9-3).

Court, on notice and terms, may permit supplemental pleadings setting forth matters occurring after date of original pleading. (Rule 4:9-4).

Third party action may be initiated by defendant within 90 days of service of answer as matter of right, thereafter by leave of court and on notice to plaintiff, annexing copy of proposed third-party complaint to notice of motion. (Rule 4:8-1[a]). Third-party defendant may counterclaim and cross-claim against other parties and proceed similarly against other nonparties. Plaintiff may assert direct claims out of same transaction against third-party defendant, and third-party defendant may assert defenses available to third-party plaintiff. (Rule 4:8-1[b]). Plaintiff may bring in third party upon defendant's counterclaim. (Rule 4:8-2).

Bills of particulars have been superseded, but motion for more definite statement may be made where pleading is so vague or ambiguous that responsive pleading cannot be framed. Statement becomes part of pleading. (Rule 4:6-4[a]). For methods of discovery, see topic 5.19 Practice.

Verification.

Pleading need not be verified or accompanied by affidavit, except when ex parte relief is sought or when expressly required by rule or statute (Rule 1:4-7), as in divorce actions (Rule 5:4-2[c]), actions on order to show cause in lieu of summons (Rule 4:67-2) and actions relating to trusts, guardianships, adoption of adults and decedent's estates (Rules 5:11, 4:83-5).

Frivolous Claims.

When attorney or pro se party signs paper for filing with court, he/she certifies that: (1) Paper is not being presented for improper purpose, such as to delay or harass; (2) claims, defense and other legal contentions are warranted by existing law or represent non-frivolous arguments to extend or reverse existing law or establish new law; (3) factual allegations can be supported by evidence; (4) denials of allegations are warranted by evidence or reasonably based on lack of information or belief. If attorney believes adversary has violated rule, aggrieved lawyer must notify adversary that motion for sanctions will be made unless offending paper is withdrawn within 28 days. If paper is timely withdrawn, no sanctions motion may be filed. If motion is filed, and judge decides that paper was filed frivolously, judge can order violating lawyer to pay "a sum sufficient to deter repetition of such conduct." Sum can include penalty paid into court or reasonable attorneys' fees and costs paid to moving party. (Rule 1:4-8). Rule does not apply to discovery motions governed by Rule 4:23. (Rule 1:4-8[e]).

By statute, prevailing party may be awarded reasonable litigation costs and reasonable attorneys fees if court finds complaint, counterclaim, cross-claim or defense of non-prevailing party was frivolous, i.e., either that it was made in bad faith or that non-prevailing party knew or should have known complaint, counterclaim, cross-claim or defense was without any reasonable basis in law or equity and could not be supported by good faith argument for extension, modification or reversal of existing law. (NJSA 2A:15-59.1[a][1]). Public entity that is required or authorized by law to provide for defense of present or former employee may be awarded all reasonable litigation costs and reasonable attorney's fees if individual for whom defense was provided is prevailing party in civil action, and if there is judicial determination at any time during proceedings or upon judgment that complaint, counterclaim, cross-claims, or defense of non-prevailing party was frivolous. (NJSA 2A:15-59.1[a][2]). Standards for determination that claim is frivolous set forth at NJSA 2A:15-59.1(b).

Service.

As to complaint, see topic 5.20 Process. Unless court otherwise directs, all pleadings subsequent to complaint and all written orders, judgments, notices, appearances, demands, briefs, memoranda of law, motions other than ex parte, bills of costs and offers of judgment must be served upon all attorneys of record and unrepresented parties, except those in default for failure to appear unless new or additional claims made against such party. (Rule 1:5-1[a]). Service on attorney is by ordinary mail, by handing it to attorney, by leaving it at attorney's office with person in attorney's employ, or, if office is closed or attorney has no office, in same manner as service is made upon party. (Rule 1:5-2). Service upon attorney by mail is complete upon mailing, except for service of motion papers, which is only effective upon receipt, but is presumed to occur on third business day after mailing. (Rules 1:5-4[b], 1:6-3[c]). Service on party accomplished as in topic Process or by registered or certified mail, to party's last known address, or if party refuses to claim or to accept delivery, and simultaneously by ordinary mail to last known address, or by ordinary mail to clerk of court if last address unknown. (Rule 1:5-2). Mailing to post office box permissible only if sender cannot, after diligent effort, determine addressee's street address, or if post office does not make street address delivery to addressee. (Rule 1:5-2). Proof or acknowledgment of service must be filed promptly (Rule 1:5-3) and if service by publication, mailing or posting, within 20 days thereof (Rule 1:5-6[a]).

Filing.

Complaint and all subsequent pleadings and papers for which service is required must be filed with court either before service or promptly thereafter unless rule requiring service or filing provides otherwise. (Rule 1:5-6[a]). Whenever provision is made for publication, mailing or posting of notice, proof thereof must be filed with court within 20 days after publication, mailing or posting. (Id.). Except as otherwise provided for motion papers (Rule 1:6-4), briefs (Rule 1:6-5), orders and judgments (Rule 4:42-1[e]), and motions in family actions (Rule 5:5-4), paper is filed with trial court if original is filed: (1) In civil actions in Law Division of Superior Court and in Chancery Division, General Equity, except mortgage and tax foreclosure actions, with deputy clerk of Superior Court in county of venue; (2) criminal actions in Superior Court, Law Division, with Criminal Division Manager in county of venue, as designee of deputy clerk of Superior Court; (3) in mortgage and tax foreclosure actions, with Clerk of Superior Court, unless and until action is deemed contested and papers have been sent by Clerk to county of venue, in which event subsequent papers must be filed with deputy clerk of Superior Court in county of venue; (4) in actions in Chancery Division, Family Part, with deputy clerk of Superior Court in county of venue if action is for dissolution of marriage, with Surrogate of county of venue if action is for adoption, and in all other actions, with Family Division Manager in county of venue, as designee of deputy clerk of Superior Court; (5) in probate matters in Surrogate's court, with Surrogate, and in actions in Chancery Division, Probate Part, with Surrogate of county of venue as designee of deputy clerk of Superior Court; (6) in actions in Special Civil Part as provided by Part VI of Rules of Court; and (7) in actions in Tax Court as provided by Part VIII of Rules of Court. (Rule 1:5-6[b]). For treatment of nonconforming papers, see Rule 1:5-6(c).

Time.

Answer must be served within 35 days after service of complaint (Rule 4:6-1) or not later than three days before return date of order to show cause or such additional time as ordered by court. (Rule 4:67-4). Answer to counterclaim or cross-claim must be served within 35 days. Reply to answer must be served within 20 days. (Rule 4:6-1[a]). One extension of up to 60 days for service of responsive pleading days may be filed by written consent of parties. Thereafter, leave of court is necessary. (Rule 4:6-1[c]). Filing of certain motions extends time to answer to ten days after notice of court's decision on motion. (Rule 4:6-1[b]). Party served with amended pleading must respond within original time for response or 20 days of service, whichever is longer. (Rule 4:9-1). Except for summary judgment, ex parte, and post judgment motions, 16 days notice of motion is required. Opposing affidavits and cross-motions require eight days notice; answers to response must be served four days before return date. (Rule 1:6-3). Party served with any paper by mail has three additional days for response. (Rule 1:3-3). For summary judgment motions, see topic 5.15 Judgments.

Small Claims.

See category 6 Courts and Legislature, topic 6.01 Courts.

5.19 PRACTICE:

Practice in all courts is governed by Court Rules. (NJ Const., Art. 6, § 2, par. 3). See also the following: As to Superior Court, Tit. 2B, c. 1-9. As to Surrogate's Courts, NJSA 2B:14-1 – 2B:14-13. Rules of Court supersede inconsistent procedural statutes. (5 N. J. 240, 74 A.2d 406).

Discovery Methods.

Except in family actions (see Rule 5:5-1), discovery of parties may be obtained by deposition upon oral examination or written questions, interrogatories, production of documents or things, order for inspection of property, physical and mental examinations, and requests for admissions. Unless ordered by court, no limits on use of discovery methods. (Rule 4:10-1). Discovery is permitted as to all relevant matters not privileged. (Rule 4:10-2[a]). Writings obtained or prepared in anticipation of litigation or in preparation for trial are discoverable only upon showing of substantial need and undue hardship to obtain materials requested. (Rule 4:10-2[c]). Party may require disclosure of experts and deposition as to their opinions (Rule 4:10-2[d]) and production of expert's reports (Rule 4:17-4[e]). Depositions may be taken before action is commenced on showing that due to extraordinary circumstances explained in detailed affidavit, depositions are needed to comply with Affidavit of Merit Statute, or on verified petition showing: (1) That petitioner expects to be party but presently is unable to bring action; (2) subject matter and petitioner's interest therein; (3) facts to be perpetuated and reasons therefor; (4) expected opposing parties; (5) persons to be examined and expected testimony; and (6) persons having control of documents to be inspected and description thereof. (Rule 4:11-1[a]). Party may request inspection and copying of designated documents, including writings, drawings, graphs, charts, photographs, sound recordings, images, electronically stored information, and any other data or data compilations stored in any medium from which information can be obtained and translated, if necessary, and may request entry on land or other property for inspection, measuring, survey or photography of land or objects. (Rule 4:18-1[a]).

Request for production of documents may specify form or forms in which electronically stored information is to be produced. If request does not specify form or forms for producing electronically stored information, responding party shall produce information in form or forms in which it is ordinarily maintained or in form or forms that are reasonably useable. (Rule 4:18-1[b]).

Absent exceptional circumstances, court may not impose sanctions on party for failing to provide electronically stored information lost as result of routine, good faith operation of electronic information system. (Rule 4:23-6).

Medical examination by medical or other expert may be ordered, on motion of party or court at pretrial conference or before trial, when physical or mental condition of party is in dispute. (Rule 4:19).

Court may control and limit discovery proceedings to protect parties and deponents (Rules 4:14-4, 4:10-3), and may compel discovery and impose consequences for refusal to answer, produce matter, allow inspection or submit to examination (Rule 4:23). If cause shown, court may extend or shorten time for taking deposition. (Rule 4:14-2[b]). Motions to compel discovery and to impose or enforce sanctions for failure to provide discovery must be made returnable prior to discovery end date. (Rule 4:24-2). For Special Civil Part see Rule 6:4, for juvenile and domestic relations courts see Rule 5:5, for municipal courts see Rule 7:7.

Demand for Statement of Damages.

Upon service of written request, party filing pleading must furnish requesting party written statement of amount of damages claimed, within five days after service of request. (Rule 4:5-2).

Demand for Documents Referred to in Pleading.

When document or paper is referred to in pleading but neither annexed thereto nor recited verbatim therein, copy of such must be served on adverse party within five days after service of demand therefor. (Rule 4:18-2).

Request for Admission of Facts.

At any time before trial, party may serve on adversary demand for admission of relevant facts or genuineness of documents. Matter is admitted unless denied within 30 days of request. (Rule 4:22). Party denying matters subsequently proved may be charged with expenses of proof, unless failure to admit is reasonable or unimportant in court's view. (Rule 4:23-3).

Time Limit.

From time first answer filed or 90 days after first defendant served, whichever occurs first, discovery must be complete in: Track I, 150 days; Track II, 300 days; Tracks III and IV, 450 days. (Rule 4:24-1[a]). For general track designations, see sample Civil Information Statement, Appendix XII-B of Court Rules. Court may, for good cause shown, enter order extending discovery for specified period. (Rule 4:24-1[c]).

Professional Liability Claims.

Medical malpractice claims as of Sept. 2008 no longer need to be identified in caption of such actions. Case information statements require designation of nature of case for tracking purposes. (Comment to Rule 1:4-1).

Pretrial Conference.

Pretrial conference is discretionary in all contested actions except in Chancery, General Equity, and in actions in lieu of prerogative writ. (Rule 4:25-1).

Direct Actions Against Insurer.

See category 23 Transportation, topic 23.01 Motor Vehicles, subhead Direct Actions.

Small Claims.

See category 6 Courts and Legislature, topic 6.01 Courts.

See also topics 5.02 Actions, Appeal and Error, Depositions and Discovery, Injunctions, Judgments, Pleading and Process; category 8 Debtor and Creditor, topics 8.02 Attachment, 8.05 Executions, 8.09 Garnishment.

5.20 PROCESS:

Process in civil actions is summons (Rule 4:4-1) or certified order to show cause in summary actions, unless otherwise ordered by court (Rule 4:67-3). Capias ad respondendum and ne exeat may be used as original process in certain actions, but shall issue only by court order after application supported by affidavit. (Rule 4:51-1).

General Requisites.

Courts are deemed always open for issue and return of process. (Rule 1:30-1). Face of Summons shall be in form prescribed by Appendix XII-A of Court Rules except in summary proceedings in family actions. Summons must be in name of state, signed in name of clerk of court and directed to defendant, and must contain name of court and plaintiff and name and address of plaintiff's attorney, if any, otherwise plaintiff's address; it must state time within which defendant is required to answer (or in matrimonial actions file appearance or acknowledgment of service) and that failure to answer may result in default judgment for relief demanded; it must inform defendant of need to file answer (or in matrimonial actions, appearance or acknowledgment of service) and proof of service with clerk of court in accordance with rules. If defendant is individual in this state, summons shall advise that if unable to obtain attorney, defendant may communicate with Lawyer Referral Service of county of defendant's residence or county in which action is pending or if none in either county, Lawyer Referral Service of adjacent county. Summons must also advise that if unable to afford attorney defendant may contact Legal

Services in county of residence or venue. If defendant is individual not resident in this state, summons shall similarly advise defendant directing defendant to appropriate agency in county in which action is pending. Summons shall state explicitly telephone number of each agency or service. (Rule 4:4-2). Complaint is separate from summons, but both are served together. (Rule 4:4-4). See also category 14 Family, topic 14.05 Divorce, subhead Practice.

By Whom Issued.

Summons is issued by plaintiff, plaintiff's attorney or clerk of court. (Rule 4:4-1). In Special Civil Part, summons is issued by clerk. (Rule 6:2-2).

Who May Serve.

Process may be served by sheriff or other officer (or sergeant-at-arms in Special Civil Part and municipal court), or by plaintiff's attorney, attorney's agent, or other competent adult not having direct interest in litigation. Service may also be made by person specially appointed by court or by person otherwise authorized by Rules of Court. (Rules 4:4-3[a], 6:2-3[a]).

Personal service on individual 14 years or older who is not incompetent may be made by personally serving summons and complaint or by leaving a copy at individual's dwelling house or usual place of abode with competent member of household 14 years or older residing therein, or by delivering copy to agent duly authorized to receive process. (Rule 4:4-4[a][1]). Where personal service is required, alternate service may be made by mailing registered, certified or ordinary mail but is only effective if party answers or otherwise appears. If defendant does not answer or appear within 60 days following mailed service, service shall be made as is otherwise prescribed by this rule, and time prescribed by Rule 4:4-1 (issuance of summons) will begin to run anew. (Rule 4:4-4[c]). In addition individual engaged in business or owning real property may be served in actions with respect thereto by serving managing or general agent, or in some cases, by servant acting in discharge of duties in connection with such business. (Rule 4:4-4[a][4]). Service out of state by registered or certified mail addressed to dwelling house or usual place of abode, permitted upon affidavit specifying inquiry as to why individual cannot be served in New Jersey under Rule 4:4-4(a). (Rule 4:4-4[b][1]). Substituted service within state by mail in counties with service by mail programs may be made in Special Civil Part. (Rule 6:2-3[b], [d]). If service not effected, then by personal service upon any person upon whom service authorized by law in state or outside state or in manner provided by court order. (Rules 4:4-4[b][2], 4:4-4[b][3]). (See subhead Personal Service Outside State, infra.)

Personal service on infant under 14 is made by personally serving parent, guardian or competent adult member of household with whom he resides, or as court may order. (Rule 4:4-4[a][2]).

Personal service on mentally incapacitated person is made by personally serving guardian or competent adult member of household with whom he resides or, if he lives in institution, director or chief executive officer of institution, or as court may order. (Rule 4:4-4[a][3]).

Personal service on partnership or association is made by serving partner, managing or general agent or officer in manner prescribed above for personal service on individual 14 years or older. (Rule 4:4-4[a][5]).

Personal service on domestic or foreign corporation is made (1) by serving officer, director, trustee or managing or general agent or any person authorized to receive service on corporation's behalf; or (2) in manner prescribed above for personal service on individual 14 years or older by leaving copy at registered office of corporation with person in charge; or (3) if service cannot be made on any of these persons, then upon person in charge of principal place of business in New Jersey; or (4) if service cannot be made on any of foregoing and if there is no office or place of business within state, by serving any servant discharging duties within state.

(Rule 4:4-4[a][6]).

Personal service on county, municipality or public body is made by serving copy of summons and complaint, in manner prescribed above for personal service on individual 14 years or older on presiding officer, clerk or secretary thereof. (Rule 4:4-4[a][8]).

Personal service on State of New Jersey is made by registered, certified or ordinary mail or personal delivery of copy of summons and complaint to Attorney General or Attorney General's designee named in writing filed with Superior Court clerk. (Rule 4:4-4[a][7]).

Personal Service Outside State.

If service upon partnership, association, foreign or domestic corporation or individual cannot be effected in any of the above ways in state, then upon affidavit specifying inquiry made and why defendant cannot be served within N.J., process can be served within U.S. or District of Columbia personally in same manner as if service were made in N.J., or by official having authority to serve process in that state or attorney at law of that state, or N.J. Outside U.S. in accordance with international treaty or convention or, if none, in manner as if service in U.S. but by person specially appointed by court. (Rules 4:4-5[a], 4:4-4[b][1][A][B]). Service outside of N.J. limited by U.S. Constitution. (89 N. J. Super. 366, 215 A.2d 56).

Substituted Service by Mail or Publication.

If personal service cannot be made, then upon affidavit of diligent effort and inquiry, service may be effected by mailing summons and complaint by registered or certified mail and simultaneously by ordinary mail to: (1) Competent individual 14 years or older at dwelling house or usual place of abode; (2) minor or incompetent person addressed to person upon whom personal service authorized for such persons; or (3) corporation, partnership or association addressed to registered agent for service, principal place of business or registered office. (Rule 4:4-4[b][1][c]). In action in rem or quasi in rem, and upon affidavit of diligent inquiry, process can be served or by publishing notice of process once in newspaper in county of venue and by mailing copy of notice and complaint to defendant's last known residence or mailing address, or as court may otherwise order. (Rule 4:4-5[b], [c], [d]).

Long Arm Statute.

See subhead Personal Service Outside the State.

Proof of Service.

Persons serving process must make proof of service on original (and copy, if issued out of Superior Court) and file same with court promptly, or at least within time for defendant's response. (Rule 4:4-7). If service is made by person other than sheriff or court appointee, proof must be by affidavit, including facts of affiant's diligent inquiry into defendant's place of abode, business, or employment. (Rule 4:4-7). If made by mail, explanation by affidavit of failure to effect personal service and of diligent efforts to determine above facts required. (Rule 4:4-7).

Nonresident Motorist.

See category 23 Transportation, topic 23.01 Motor Vehicles.

5.21 REPLEVIN:

Action for replevin may be brought in Superior Court for recovery of goods wrongly held by another. (NJSA 2B:50-1). If action is for wrongful detainer only, demand and refusal of possession before beginning action must be alleged in complaint. (Rule 4:61-2).

Proceedings.

Writ of replevin shall issue duly upon court order on motion of party claiming right to possession of chattels, signed in name of clerk issuing writ and served in manner prescribed for service of summons, unless court otherwise orders. (Rule 4:61-1). Temporary relief is available on notice (NJSA 2B:50-2; Rule 4:61-1[a]), and without notice in extraordinary cases (NJSA 2B:50-3; Rule 4:61-1[b]). As part of any court order that determines who shall hold goods pending judgment, court may order holder to give security. (NJSA 2B:50-4).

Upon receipt of writ and bond or cash deposit required by law (NJSA 2B:50-4), sheriff or other officer takes property and delivers it to plaintiff. (Rule 4:61-1[c]).

Judgment.

Where property has been delivered at commencement of suit to plaintiff who later prevails, recovery is limited to damages for unlawful taking. (41 N. J. L. 255). In such case if defendant does not appear and defend, plaintiff may not have judgment for damages or costs, except where defendant has refused to deliver pursuant to written demand made before commencement of action. (Rule 4:61-4[d]). In case where plaintiff did not obtain immediate delivery, upon judgment awarding possession to plaintiff, court may in judgment order officer to take possession and deliver property without requiring bond. (Rule 4:61-4[c]). In case where replevined property is redelivered to defendant making claim thereto and plaintiff recovers, he is entitled to judgment in damages for taking and detaining as well as for value of property. Plaintiff, upon such judgment, in addition to remedy on redelivery bond, may have execution against defendant. (Rule 4:61-4[a]). If defendant prevails, court must, except where taking was distress for rent, award return of property to defendant, if not already redelivered to defendant and defendant is entitled to costs and remedy on replevin bond; at defendant's election, which must be alleged in counterclaim, defendant may recover value of property and damages instead. (Rule 4:61-5[a]).

Distress for Rent.

Where plaintiff has recovered possession of goods or chattels taken as distress for rent, and judgment is rendered for defendant, defendant may elect return of goods or chattels, judgment for sum in arrears, or value of goods or chattels if value is less than arrearages. (Rule 4:61-5[c]).

5.22 SEQUESTRATION:

Writs of sequestration or proceedings in nature thereof are superseded except to enforce a judgment or court order, whether final or interlocutory. (Rule 4:60-19; 3 N. J. 561, 71 A.2d 196). See category 8 Debtor and Creditor, topic 8.02 Attachment.

Divorce Proceedings.

Superior Court may sequester property of defendant to provide for payment of alimony, and care, custody, education and maintenance of children. (NJSA 2A:34-23).

5.23 SERVICE:

See topic 5.20 Process.

5.23A SETTLEMENT:

Structured Settlement Act.

Promotes arrangement for periodic payment of damages for personal injuries or sickness established by settlement or judgment in resolution of tort claim or for periodic payments in settlement of workers' compensation claim. (NJSA 2A:16-64). Not less than three days prior to date on which transfer agreement is signed, transferee shall provide payee separate disclosure statement, in bold type no smaller than 14 points, setting forth amounts and due dates of structured settlement payments to be transferred; aggregate amount of payments; discounted present value of payments to be transferred; gross advance amount; itemized listing of all applicable transfer expenses, other than attorneys' fees; net advance amount; amount of any penalties or liquidated damages; and statement that payee has right to cancel transfer agreement. (NJSA 2A:16-65).

5.24 STAY OF EXECUTION:

See topic 5.03 Appeal and Error; category 8 Debtor and Creditor, topic 8.05 Executions.

5.25 SUBMISSION OF CONTROVERSY:

No statutory provision.

5.26 VENUE:

In actions affecting real property and in attachment actions, venue is in county where property is situate. In other actions involving state, municipal corporations, counties, or public agencies or officials thereof, venue is in county where cause of action arose. Venue in all other actions (except certain structured settlement, attachment, probate, receivership, family and Special Civil Part actions) is in county: (1) Where cause of action arose or (2) where any party resided at commencement of suit or (3) where any defendant, if nonresident, was served. Corporation is deemed resident in county where it has registered office or is actually doing business. (Rule 4:3-2[a], [b]).

Special Provisions.

Venue in guardianship actions is in county of ward's domicile, or if not domiciled in N.J., where ward's property is situated. (Rule 4:83-4). Venue in actions in Special Civil Part in county where at least one defendant in action resides. (Rule 6:1-3[a]). Actions for recovery of security deposit may be brought in county where property is situated. In receivership actions, venue is in county where principal place of business of corporation or partnership is located. (Rule 4:53-2). For venue in matrimonial actions, see category 14 Family, topic 14.05 Divorce. For venue in adoption actions, see category 14 Family, topic 14.01 Adoption. Venue in actions primarily involving support or parentage of child (except those joined with divorce or nullity claims) is county in which child is domiciled. (Rule 5:2-1a). Where juvenile is charged with delinquent act or adult codefendant has been charged with indictable offense, venue is county in which circumstances occasioning complaint were alleged to have occurred, but only upon good cause shown if juvenile is domiciled elsewhwere. (Rules 5:2-1[f], 5:19-1[a]). Venue in action to terminate parental rights is county in which plaintiff agency has principal N.J. office, except if parent granted divorce or there was another prior superior court proceeding affected custody, in which event venue is county in which divorce action venue lay. (Rules 5:2-1[e], 5:9-1). Uniform Child Custody Jurisdiction and Enforcement Act applies to venue for child custody and welfare actions unconnected to divorce actions. (NJSA 2A:34-54 — 2A:34-68; Rule 5:2-1[b][1]).

Change of Venue.

Motion for change of venue is not permitted after ten days from date of last permissible responsive pleading or, if summary action, on or before return date, except where fair trial cannot be had in county where action is to be tried (Rule 4:3-3[a][2]), in which case motion must be made before trial. (Rule 4:3-3[b]). In some special proceedings, motion may be made at any time and granted for good cause shown. (Rule 5:19-1[b]).

6 COURTS AND LEGISLATURE

6.01 COURTS:

United States District Court.

Clerk's office: Newark: M. L. King, Jr. Federal Bldg. & U.S. Courthouse, 50 Walnut St., Newark 07101; Trenton: Clarkson S. Fisher Federal Bldg. & U.S. Courthouse, 402 E. State St., Trenton 08608; Camden: Mitchell H. Cohen Federal Bldg. & U.S. Courthouse, 1 John F. Gerry Plaza, Camden 08101.

Schedule of Fees.

(All checks, except those drawn by members of Bar of Court having offices in New Jersey, must be certified and may be made payable to Treasurer of U.S. or Clerk of District Court by name or title). See http://pacer.njd.uscourts.gov/fees.htm.

To Clerk: filing application for writ of habeas corpus, $5; commencing any other civil proceeding, $350; filing notice of appeal, $455 (including docket fee of U.S. Court of Appeals).

Bankruptcy: For filing fees see 28 U.S.C. § 1930.

Admission of attorney to practice (including certificate), $200.

Searches: $26 for each name or item.

Copies: Made by clerk (excluding certification), 50¢ per page for photostatic copies; comparing copies furnished by applicant (excluding certification), $2 per page.

Filing paper not in case or proceeding, $39.

For U.S. Marshals' fees see 28 U.S.C. § 1921.

Court sits at Camden, Newark and Trenton.

Supreme Court.

Clerk's Office: Hughes Justice Complex, 25 W. Market St., CN-970, Trenton 08625. Supersedes former Court of Errors and Appeals.

This Court, consisting of Chief Justice and six Associate Justices, five members constituting quorum (NJ Const., Art. 6, § 2 par. 1), exercises appellate jurisdiction in last resort in all causes (NJ Const., Art. 6, § 2, par. 2). Appeals may be taken to it: (a) In causes determined by Appellate Division of Superior Court involving question arising under U.S. or State Constitution; (b) in causes where there is dissent in Appellate Division of Superior Court; (c) directly from trial courts in capital causes; (d) on certification to Superior Court where provided by Rules (specifically Rule 2:12) and to inferior courts; and (e) in such cases as may be provided by law. (NJ Const., Art. 6, § 5, par. 1; Rule 2:2-1). Makes rules governing administration of, and, subject to law, governing practice and procedure in, all courts in State, and has jurisdiction over admission to practice of law and discipline of those admitted. (NJ Const., Art. 6, § 2, par. 3). Chief Justice is administrative head of all courts of State and appoints an Administrative Director who, subject to directions of Chief Justice, performs various administrative functions. (NJ Const., Art. 6, § 7, par. 1; NJSA 2A:12-1 – 2A:12-6).

Schedule of Fees.

To Clerk: filing notice of appeal or cross-appeal, notice of petition or cross-petition for certification or notice of petition for review: $200; first paper filed by any other person: $30. See http://www.judiciary.state.nj.us/prose/filingfees.htm.

Court sits at Trenton.

Applicable Rules are 2:1 to 2:14.

Superior Court.

Supersedes former Supreme Court, Court of Chancery, Pre-rogative Court and Circuit Courts. *Note:* References elsewhere in this digest to following courts are superseded by indicated divisions of Superior Court, pursuant to State Constitutional amendments: County Courts: superseded by Law Division; County District Courts: superseded by Law Division, Special Civil Part; Juvenile and Domestic Relations Courts: superseded by Chancery Division, Family Part; Chancery Division, Matrimonial Part: superseded by Chancery Division, Family Part.

This court consists of number of Judges authorized by law (NJ Const., Art. 6, § 3, par. 1), and has original general jurisdiction throughout State in all causes (NJ Const., Art. 6, § 3, par. 2; for certain special proceedings see 7 N. J. 393, 81 A.2d 766). It is divided into Appellate, Law and Chancery Divisions, each division having such parts and such number of Judges and hearing such causes as may be provided by Supreme Court rules. (NJ Const., Art. 6, § 3, par. 3). Law and Chancery Divisions exercise each other’s functions as necessary to completely determine causes, subject to Supreme Court rules. (NJ Const., Art. 6, § 3, par. 4). All actions maintainable on Sept. 14, 1948, in Chancery or before Chancellor or in Prerogative Court or before Ordinary are brought in Chancery Division, all other actions in Law Division; habeas corpus is brought in Law Division, except for custody of children; if primary right of plaintiff or principal relief sought is equitable, action is brought in Chancery Division even though additional or alternative legal relief is sought. (Rule 4:3-1[a]). Chancery Division has jurisdiction over escheat cases. (NJSA 46:30B-97). Chancery Division Judges are assigned by Supreme Court. (NJSA 2B:2-2). Transfers of actions between Law and Chancery Divisions are allowed, but cases once transferred cannot be retransferred. (Rule 4:3-1[b]).

Chancery Division.

Applicable rules are 4.1 through 4.101.

Chancery Division, Family Part.

Supersedes former Chancery Division, Matrimonial Part and Juvenile and Domestic Relations Courts.

Each county has Family Part. Jurisdiction includes but not limited to all cases formerly heard by Juvenile and Domestic Relations Courts. (Rule 4:3-1[a][3]). Family Part shall hear family actions, including matrimonial, child support and custody actions, juvenile delinquency actions, and certain criminal and quasi-criminal actions. (Rule 5:1-1). Each county must establish court intake service with trained counselors to screen family and juvenile actions. (NJSA 2A:4A-70).

Applicable rules are 5:1 through 5:25.

Law Division.

One assignment judge in each county supervises selection of jury panels, charges grand jury and is responsible for assignment of cases in Superior Court; generally has charge of administration of civil and criminal justice in county. (Rule 1:33-4).

Applicable Rules are 3:1 through 3:29 and 4:1 through 4:101.

Law Division, Special Civil Part.

Supersedes former County District Courts.

Each county has Special Civil Part. (Order of Supreme Court of New Jersey dated Dec. 13, 1983). Special Civil Part has jurisdiction over civil actions where amount in controversy does not exceed $15,000, small claims actions in counties previously having small claims divisions, summary landlord/tenant actions, and summary proceedings for collection of statutory penalties and municipal court actions, pursuant to Rule 7:1, in Bergen, Hudson and Warren counties. (Rule 6:1-2). All Special Civil Part cases where amount in controversy exceeds $2,000 are mandated to be submitted to arbitration. (Order of Supreme Court of New Jersey dated May 6, 1991).

Applicable rules are 6:1 through 6:12.

Chancery Division, General Equity Part and Law Division, Civil and Criminal Parts, have following vicinages:

Sitting At *County*	*Chancery Division*	*Law Division*
Atlantic	Atlantic City	Atlantic City and Mays Landing
Bergen	Hackensack	Hackensack
Burlington	Mt. Holly	Mt. Holly
Camden	Camden	Camden
Cape May	Atlantic City	Atlantic City, Cape May Court House and Mays Landing
Cumberland	Woodbury	Woodbury and Bridgeton
Essex	Newark	Newark
Gloucester	Woodbury	Woodbury and Bridgeton
Hudson	Jersey City	Jersey City
Hunterdon	Somerville	Somerville and Flemington
Mercer	Trenton	Trenton
Middlesex	New Brunswick	New Brunswick
Monmouth	Freehold	Freehold
Morris	Morristown	Morristown
Ocean	Toms River	Toms River
Passaic	Paterson	Paterson
Salem	Woodbury	Salem
Somerset	Somerville	Somerville
Sussex	Morristown	Morristown and Newton
Union	Elizabeth	Elizabeth
Warren	Somerville	Somerville and Belvidere

Appellate Division.

Appellate Division consists of such Parts as may be designated by Supreme Court, each Part consisting of three or more judges, and hears appeals from final judgments of Law and Chancery Divisions, other inferior courts and administrative agencies, and any such cases as may be provided by law except appeals in capital causes, which are certified directly to Supreme Court. (Rules 2:2-1, 2:2-3). Interlocutory appeals are discretionary. (Rule 2:2-4).

Court sits at Trenton, Newark, Morristown, Springfield, Hackensack, Atlantic City and Elizabeth. Springfield and Hackensack offices will move to Hall of Records in Newark in Jan. 2010.

Applicable Rules are 2:1 through 2:15.

Tax Court.

On July 1, 1979, superseded Division of Tax Appeals, Treasury Department.

This Court, consisting of six to 12 judges, has initial review jurisdiction of County Board of Taxation, Director of Division of Taxation, other state agencies or officers with respect to tax matters, and county recording officer with respect to realty transfer fee. (NJSA 2B:13-1 et seq.). Presiding Judge, appointed by Chief Justice, performs administrative functions. (NJSA 2B:13-10; Rule 1:33-1). Appeals are taken to Appellate Division of Superior Court. (NJSA 2B:13-4; Rule 2:2-3).

Court sits in Newark, Hackensack, Morristown, and Trenton.

Applicable Rules are 8:1 to 8:12.

Small claims division has jurisdiction in proceedings to set aside taxes or refunds less than $2,000 excluding interest and penalties. (NJSA 2B:13-14; Rule 8:11).

County Court.

Abolished as of Dec. 7, 1978. Pending cases transferred to Superior Court. (Rule 1:1 A-1 et seq.).

Surrogate's Court.

Surrogate of each County is judge of Surrogate's Court for that county. (NJSA 2B:14-1). Surrogate has jurisdiction as expressed in specific topics.

Juvenile and Domestic Relations Courts.

Abolished as of Dec. 31, 1983. Pending cases transferred to Chancery Division, Family Part. (NJSA 2B:9-1).

County District Courts.

Abolished as of Dec. 31, 1983. Pending cases transferred to Law Division, Special Civil Part. (NJSA 2B:9-1).

Applicable Rules are 6:2 through 6:12.

Municipal Courts.

Any municipality, or two or more municipalities by agreement, may establish a municipal court with territorial jurisdiction coextensive with municipality or municipalities. (NJSA 2B:12-1). Central municipal court may also be established in certain counties. (NJSA 2B:12-1).

Municipal courts have concurrent civil jurisdiction with Superior Court, Special Civil Part, if defendant resides within territorial jurisdiction of court, matter is contract action involving not more than $100 exclusive of costs, and court has been approved for exercise of civil jurisdiction pursuant to Rules of Supreme Court (NJSA 2B:12-20); also have jurisdiction over violations of motor vehicle, traffic, fish and game laws, municipal ordinances of municipality or municipalities to which court's jurisdiction extends and certain other specified statutory violations (NJSA 2B:12-16 – 2B:12-17).

Police, magistrates and recorders' courts in existence on January 1, 1952, are constituted municipal courts. (NJSA 2B:12-1).

Applicable Rules are 7:1 through 7:14.

Small Claims Courts.

Superior Court, Special Civil Part has Small Claims Section for claims of $3,000 or less, including penalties but exclusive of costs ($5,000 in action for return of security deposit. Actions not cognizable in Small Claims Section include professional malpractice, probate, family, tax, prerogative writ, and actions in which primary relief is equitable). (Rule 6:1-2).

Arbitration.

NJSA 39:6A-25 mandates arbitration of automobile negligence cases in which claims for noneconomic loss or uncompensated economic loss, other than for damages to property, are valued at $15,000 or less.

Schedule of Fees.

Upon filing or entering of first paper in any action or proceeding in Law Division, Chancery Division, Tax Court, $200; upon filing answer, asserting counterclaim or third party claim, $200; upon filing of first paper by any other person $135. Upon filing of motion in Law Division, Chancery Division, $30. Other fees and costs, see NJSA 22A:2-1 et seq. and NJSA 22A:5-1. See http://www.judiciary.state.nj.us/prose/filingfees.htm.

Courts and Administrative Records.

Newly implemented rules governing access and exchange of court records was effective on Sept. 1, 2009. Court records and administrative records as defined by Rule 1:38-2 and Rule 1:38-4, and within custody and control of judiciary are open for public inspection and copying, except as otherwise provided in this rule. Exceptions enumerated in this rule shall be narrowly construed to implement policy of open access to records of judiciary.

Court Record includes: (1) Any information maintained by court in any form in connection with case or judicial proceeding, including but not limited to pleadings, motions, briefs and their respective attachments, evidentiary exhibits, indices, calendars and dockets; (2) any order, judgment, opinion, or decree related to judicial proceeding; (3) any official transcript or recording of public judicial proceeding, in any form; (4) any information in computerized case management system created or prepared by court in connection with case or judicial proceeding; (5) any record made or maintained by surrogate as judicial officer. **Court Record does not include**: (1) Information gathered, maintained or stored by governmental agency or other entity to which court has access but which is not part of court record as defined by this rule; (2) unfiled discovery materials in any action. (Rule 1:38-2).

Court Records excluded from public access include: (a) Records required to be kept confidential by statute, rule or prior case law consistent with this rule, unless otherwise ordered by court. These records remain confidential even when attached to non-confidential document; (b) internal records such as: (1) working papers maintained in any form by or for use of judge or judiciary staff member, except notes required by rule or law; (2) records of consultative, advisory, or deliberative discussions pertaining to rendering of decisions or management of cases; (c) records of criminal and municipal proceedings; (d) records of family part proceedings; (e) records of surrogate proceedings; (f) records of other proceedings, including records pertaining to mediation sessions and complementary dispute resolution proceedings, but not fact that mediation has occurred; records of transcripts of civil commitment proceedings; police investigative reports, unless admitted into evidence or submitted to court in support of motion, brief or other pleading; impounded and sealed records pursuant to Rule 1:38-11, or records subject to protective order pursuant to Rule 4:10-3. (Rule 1:38-3).

“Administrative record” is any information maintained in any form by judiciary that is not associated with any particular case or judicial proceeding. **(Rule 1:38-4). Administrative records excluded from public access** (not exhaustive list) include: (a) Records required to be kept confidential by statute, rule, or prior case law, unless otherwise ordered by court; (b) notes, memoranda, or other working papers maintained in any form by or for use of justice, judge or judiciary staff member in course of official duties, including administrative duties; (c) minutes, reports, memoranda, notes and correspondence pertaining to development and implementation of judiciary rules and policies, including draft versions of rules, policies and procedures, selfcritical analysis reports, and peer review reports; (d) reports, memoranda, and other records pertaining to policies and procedures for court security and data security; (e) personnel records, except for employee's name, title, position, salary, compensation, dates of service, and date and type of separation; (f) completed jury questionnaires and preliminary lists of jurors, which shall be confidential unless otherwise ordered by assignment judge; (g) records relating to attorney discipline to extent provided under Rule 1:20-9; (h) records of District Fee Arbitration Committees to extent provided under Rule 1:20A-5. (Rule 1:38-5).

Regarding Intergovernmental Exchanges, Supreme Court may authorize exchange of information, otherwise excluded from public access, with other branches of state government, other state governments, and federal government when public benefit of such disclosure outweighs need for confidentiality. Child support information may be exchanged only to extent allowed by federal law and regulations. (Rule 1:38-6).

Confidential personal identifiers include: Social security number, driver's license number, vehicle plate number, insurance policy number, active financial account number, or active credit card number. Prohibition on submission of personal identifiers to court sets forth that party shall not put forward confidential personal identifiers as defined in Rule 1:38-7(a) in any document or pleading submitted to court unless otherwise required by statute, rule, administrative directive, or court order; provided, however, that active financial account number may be identified by last four digits when financial account is subject of litigation and cannot otherwise be identified. (Rule 1:38-7).

Information in court record may be sealed by court order for good cause. Moving party shall bear burden of proving by preponderance of evidence that good cause exists. Good cause exists when: (1) Disclosure will likely cause clearly defined and serious injury to any person or entity; (2) interest in privacy substantially outweighs presumption that all court and administrative records are open for public inspection pursuant to Rule.1:38. (Rule 1:38-11).

6.02 LEGISLATURE:

Meets annually on second Tuesday in January. (NJ Const., Art. 4, § 1, par. 3).

Special Sessions.

Governor must convene legislature upon petition of majority of all members of each house (NJ Const., Art. 4, § 1, par. 4); he may convene legislature, or Senate alone, whenever he thinks public interest requires it (NJ Const., Art. 4, § 1, par. 4; Art. 5, § 1, par. 12).

Initiative and Referendum.

No referendum or initiative as such, but legislature cannot incur debts (with certain exceptions) unless sanctioned by majority vote at general election. (NJ Const., Art. 8, § 2, par. 3).

6.03 REPORTS:

Under the former court system, the officially reported decisions are printed in two series: One containing decisions of former Supreme Court and of former Court of Errors and Appeals on appeals from law courts (1-137 N. J. L.); the other, decisions of former Chancery Court and Prerogative Court and of former Court of Errors and Appeals on appeals from those courts (1-142 N. J. Eq.).

Law reports are: Coxe, 1 N. J. L.; Pennington, 2-3 N. J. L.; Southard, 4-5 N. J. L.; Halsted, 6-12 N. J. L.; Green, 13-15 N. J. L.; Harrison, 16-19 N. J. L.; Spencer, 20 N. J. L.; Zabriskie, 21-24 N. J. L.; Dutcher, 25-29 N. J. L.; Vroom, 30-85 N. J. L.; Gummere, 86-125 N. J. L.; Abbots, 126-137 N. J. L.

Equity reports are: Saxton, 1 N. J. Eq.; Green, 2-4 N. J. Eq.; Halsted, 5-8 N. J. Eq.; Stockton, 9-11 N. J. Eq.; Beasley, 12-13 N. J. Eq.; McCarter, 14-15 N. J. Eq.; C. E. Green, 16-27 N. J. Eq.; Stewart, 28-45 N. J. Eq.; Dickinson, 46-66 N. J. Eq.; Robbins, 67-70 N. J. Eq.; Buchanan, 71-85 N. J. Eq.; B. Stockton, 86-101 N. J. Eq.; Backes, 102-142 N. J. Eq.

Under present court system, officially reported decisions are printed in three series: Decisions of Supreme Court, 1 N. J. et seq.; such decisions of Appellate Division, and trial divisions of Superior Court and of other courts as are approved for publication, 1 N. J. Super. et seq.; and such decisions of Tax Court as are approved for publication, 1 N. J. Tax et seq.

Unofficial Reports.

Miscellaneous Reports contain decisions from various former courts not published elsewhere. Atlantic Reporter contains law, equity and miscellaneous decisions and decisions of present courts.

Digests are: Halsted's 1843; Stewart's covering all reports to 1876; Stewart's Supplement covering from 1876-1887; Wall's Supplement to Stewart covering from 1887-1897; Hartshorne's Index Digest covering to 1885; Elmer's 1838; Nixon's 1855, 1861, 1868; Hood's 1877; New Jersey Digest covering to 1908 with three supplements covering 1908-1913, 1914-1921 and 1922-1924; Honeyman's Index Analysis of New Jersey Statutes, 1909; Soney & Sage-West Pub. Co. New Jersey Digest Annotated, 1790-present.

All decisions are digested in Atlantic Digest.

6.04 STATUTES:

By virtue of Laws of 1937, c. 188 (approved Dec. 20, 1937), revision, consolidation and compilation prepared under direction of Legislature by Revision Commission was adopted as the public statute law of New Jersey, to be known as "Revised Statutes." Subsequent acts of Legislature, supplementing Revised Statutes, are published in Pamphlet Laws and officially allocated.

In this digest, the Revised Statutes and supplements thereto are cited by title, chapter and section numbers.

The Revised Statutes and supplements thereto are unofficially compiled and annotated in New Jersey Statutes Annotated.

Uniform Acts adopted are: Aeronautics (1929); Alcoholism Treatment and Rehabilitation (1975); Anatomical Gift (1969); Business Records as Evidence (1949) (but see Rules of Evidence, below); Child Custody Jurisdiction (1979); Commercial Code (1963); Controlled Dangerous Substances (1970); Criminal Extradition (1936); Declaratory Judgments (1924); Desertion and Nonsupport (1917); Developmentally Disabled Uniform Application (2000); Disclaimer of Transfers by Will, Intestacy or Appointment (1980); Disclaimer of Transfers under Non-Testamentary Instruments (1980); Enforcement of Foreign Judgments (1997); Fiduciaries (1927) (§§ 3, 4 and 5 of Tit. 3A, c. 41, since repealed); Foreign Money-Judgments Recognition (1997); Fraudulent Transfer (1988); Gifts to Minors (1963); Governing Secured Creditors' Dividends in Liquidation Proceedings (1941); Insurers Liquidation (1975); Interstate Compromise of Death Taxes (1944); Interstate Family Support (1981); Judicial Notice of Foreign Law (1941) (but see Rules of Evidence, below); Limited Partnership (1976 Act) (1984), with certain modifications; Mediation (2004); Parentage (1983); Partnership (1919); Photographic Copies of Business and Public Records of Evidence (1951); Premarital Agreement (1988); Principal and Income, Revised (1991); Revised Uniform Limited Partnership (1983); †Rules of Evidence (1966); ††Securities (1997); Simplification of Fiduciary Security Transfers (1959); Simultaneous

Death (1947); Statutory Rule Against Perpetuities (1991); Testamentary Additions to Trusts (1962); To Secure Attendance of Witnesses from Without a State in Criminal Proceedings (1941); Transfers to Minors (1987); †††Unclaimed Property (1989); Veterans' Guardianship (1929).

Uniform Commercial Code adopted (Tit. 12A as am'd), effective Jan. 1, 1963. All statutes and parts of statutes inconsistent with Tit. 12A are repealed, including following Uniform Acts: Bank Collection Code; Bills of Lading; Conditional Sales; Fiduciaries (§§ 4 and 5 of Tit. 3A, c. 41, only); Negotiable Instruments; Sales; Stock Transfer; Trust Receipts; and warehouse Receipts.

Uniform Probate Code adopted in part (Tit. 3B, c. 1) with certain modifications. Provisions so adopted pertain, in part, to guardians of minors and mental incompetents (NJSA 3B:12-12 et seq.); disclaimers of testamentary (NJSA 3B:9-1 et seq.) and non-testamentary (NJSA 46:2E-1 et seq.) interests; and general provisions respecting making and execution of wills and administration of testamentary and intestate estates. Other provisions pertain to right of surviving spouse to claim "elective share" of decedent's "augmented estate." (NJSA 3B:8-1 et seq.).

For text of Uniform Acts falling within the scope of the Martindale-Hubbell Law Digests see Uniform and Model Acts section.

† Adopted with significant variations or modifications by Order of Supreme Court of New Jersey, pursuant to Tit. 2A, c. 84A (Appendix A New Jersey Rules of Evidence). N.J.R.E. 803 supersedes Uniform Business Records as Evidence Act (1949); Evid. Rules 9-12 supersede Uniform Judicial Notice of Foreign Law Act (1941).

†† Adopted with significant variations or modifications. See category 3 Business Regulation and Commerce, topic 3.26 Securities.

††† Adopted with significant additions. See category 21 Property, topic 21.01 Absentees.

6.05 UNIFORM LAWS:

For list of Uniform Acts in force in this state see category 6 Courts and Legislature, topic 6.04 Statutes. For text of Uniform Acts within the scope of the Martindale-Hubbell Law Digests see Uniform and Model Acts section.

7 CRIMINAL LAW

7.00A BAIL:

See topic 7.01 Criminal Law.

7.01 CRIMINAL LAW:

Crimes are governed by NJSA 2C:1 et seq.

Indictment.

No person shall be held to answer for criminal offense unless on presentment or indictment of grand jury, except in cases of impeachment or cases of type that could, on Jan. 1, 1948, be prosecuted without indictment, or arising in army, navy or militia, or when in actual service, in time of war, or public danger. (NJ Const., Art. 1, par. 8).

Bail, before conviction, is allowed in all except (1) capital cases where proof exists that there is likelihood of conviction and reasonable ground to believe death penalty will be imposed or (2) extradition proceedings for person charged with capital crime. (NJ Const., Art. 1, par 11; Rule 3:26-1). See also Rule 2:9-5(a) and NJSA 2A:162-12. Except as provided by Rule 2:9-5(a) (stay of judgment in civil actions) and by Rule 1:10 (contempt), criminal defendant is entitled to bail pending appeal only if appeal involves substantial question that should be determined by appellate court and safety of public is not threatened and there is no significant risk of defendant's flight. (Rule 2:9-4). Defendants sentenced to death are not entitled to bail pending appeal. (Rule 2:9-4). In domestic violence cases, information regarding location of victim shall be kept confidential and not appear in any documents or records to which defendant has access. (NJSA 2C:25-26[c]).

Procedure.

Criminal practice in Superior Court is governed by Rules 3:1 to 3:29, inclusive; and in municipal courts by Rules 7:1 to 7:14, inclusive. Post-conviction relief is governed by Rule 3:22.

8 DEBTOR AND CREDITOR

8.01 ASSIGNMENTS:

Contracts for sale of lands, judgments and decrees of any court within U.S. and choses in action arising on contract are assignable; assignment of sealed instrument by writing not under seal is as valid as if under seal. (NJSA 2A:25-1). Although statute applies to "any" chose in action, it has been held that chose in action arising from tortious injury to person or property is not assignable. (289 N.J. Super.181, 673 A.2d 300 [tort claim cannot be assigned prior to judgment]; 120 N. J. L. 410, 199 A. 778, aff'd, 124 N. J. L. 127, 10 A.2d 732). Expectancies and powers of termination for breach of condition subsequent are assignable. (78 N. J. Super. 257, 188 A.2d 310; 26 N. J. 246, 139 A.2d 291).

Actions and Defenses.

Assignee may sue on assigned cause of action in own name; in such action, set-offs, discounts and defenses are allowed not only against assignee but also against assignor before notice of assignment is given to defendant. Assignee for valuable consideration of chose in action may sue for same in own name, although assignor be dead; defendant in such action may set up any defense against assignor or assignor's representative arising before receiving notice of assignment. (NJSA 2A:25-1). Security interests in commercial tort claims may be created, attached, perfected and enforced in accordance with NJSA 12A:9-101 et seq.

Instrument Transferring Title.

No specific form is required by statute or otherwise.

Recording.

Assignment of interest in realty or of judgment may be acknowledged or proved and then recorded. (NJSA 46:16-1, 46:16-2; NJSA 2A:16-41). Recording fees: assignment of judgment, Superior Court, $15 (NJSA 22A:2-29); assignment of mortgages, other than building and loan and savings and loan mortgages, $10 for entering marginal notation; recording any instrument, $30 for first page and $10 for each additional page (NJSA 22A:4-4.1).

Notice.

Party liable on assigned chose in action is not affected thereby until party has notice. (123 N. J. Eq. 428, 198 A. 220, aff'd, 125 N. J. Eq. 347, 5 A.2d 699). Payment, after notice, to other than assignee, does not relieve debtor of liability to assignee. (107 N. J. Eq. 32, 151 A. 839). Between successive assignees of same chose in action, priority of notice by later assignee without more does not defeat prior assignee. (109 N. J. Eq. 409, 157 A. 663).

Assignment of Wages.

It shall be unlawful for any person to purchase or have assigned to such person, other than by order of court, any salary, wages, commissions, pay or other compensation for services, or any part thereof, due or to become due to any employee, and any such purchase or assignment, whenever executed, shall be void. It shall also be unlawful for any person to withhold or pay to any other person, on basis of any such assignment or purchase, any salary, wages, commissions or any other compensation of any employee. Any person violating this act, or attempting to do so, shall be liable to employee for amount withheld or wrongfully paid. (NJSA 34:11-4.14).

Claims under Workers' Compensation Act are not assignable. (NJSA 34:15-29).

Uniform Commercial Code adopted (Tit. 12A as am'd), effective Jan. 1, 1963. C. 3 repealed and replaced by L. 1995, c. 28, § 1, and c. 4 repealed and replaced by L. 1995, c. 28, § 2, both effective June 1, 1995, and codified at NJSA 12A:3 and NJSA 12A: 4, respectively. C. 9 repealed and replaced by L. 2001, c. 117 and amended by and supplemented by L. 2001, c. 386 effective June 26, 2001 and Jan. 8, 2002, respectively, codified at NJSA 12A:9-101 et seq., and operative starting July 1, 2001. See category 3 Business Regulation and Commerce, topic 3.09 Commercial Code.

8.02 ATTACHMENT:

Courts That May Issue Writ.

Attachment may issue out of Superior Court. (NJSA 2A:26). For property exempt from attachment, see topic 8.06 Exemptions.

In Whose Favor Writ May Issue.

Writ may issue on application of any plaintiff, whether resident or nonresident. (NJSA 2A:26-2; Rule 4:60-1).

Against Whom Writ May Issue.

Attachment may issue against real and personal property of any defendant, including corporations and heirs, devisees, executors, administrators or trustees of decedents, where grounds for attachment exist. (NJSA 2A:26-2). A legacy or distributive share of an estate in hands of executor, administrator or trustee may be attached in action against legatee or next of kin. (NJSA 2A:26-6).

Grounds.

(1) Same as would entitle plaintiff to order of arrest before judgment in a civil action. In such cases attachment may issue against property of corporation in same manner as though defendant were liable to arrest in civil action, except that in action founded on tort, attachment cannot issue against corporation on which summons can be served in New Jersey. (2) Defendant absconds or is nonresident and summons cannot be served on defendant in New Jersey; but attachment cannot issue on this ground against rolling stock of common carrier of another state or goods of nonresident in transit in custody of common carrier of New Jersey or another state. (3) Cause of action that existed against decedent survives against heirs, devisees or personal representatives, who (or some of whom) are unknown or nonresident and cannot be served with summons in New Jersey, and property in New Jersey by law is subject to plaintiff's claim. (4) Plaintiff has claim of equitable nature as to which money judgment is demanded, and defendant absconds or is nonresident and summons cannot be served on defendant in New Jersey. (5) Defendant is corporation created by laws of another state but authorized to do business in New Jersey, and such other state authorizes attachments against New Jersey corporations authorized

to do business in that state. (NJSA 2A:26-2).

Proceedings to Obtain.

Action in attachment commenced by filing complaint. Venue governed by same rules applicable to issuance of summons (except if no rule applicable, venue is laid in any county in which any property to be attached is situated). Writ may be sole or additional process in action. Court order must fix amount or value of property to be attached. Notification of defendant or defendant's attorney of application for writ is discretionary with court. On filing with court, complaint, affidavits, order and bond (if required), clerk issues writ in duplicate addressed to sheriffs in counties in which property to be attached is situated. (Rule 4:60-2, 4:60-5, 4:60-6). Further writs may be issued prior to judgment, on further affidavit and order. (Rule 4:60-6).

Attachment Bond.

Court, in its discretion, may direct plaintiff to give bond, with sufficient sureties, to indemnify defendant for all damages resulting from attachment and taxed costs of action if it is dismissed or judgment given for defendant. (NJSA 2A:26-7; Rule 4:60-5[d]). See category 5 Civil Actions and Procedure, topic 5.04 Bonds.

Levy must be made within 30 days from date of writ as follows: (1) on real property by endorsing upon writ a description of property and serving a certified copy of writ upon any person in possession of same, (2) on tangible personal property in possession of a bailee for which a negotiable document of title is outstanding, by complying with the provisions of NJSA 12A:7-602 and serving a certified copy of writ upon bailee, (3) on all other tangible personal property by taking same into custody or by serving certified copy of writ upon person holding same, (4) on choses in action evidenced by negotiable commercial paper, by taking said paper into custody or by serving certified copy of writ upon person owing same and serving upon person in possession of said paper order of court enjoining its negotiation, (5) on negotiable investment securities, by complying with provisions of NJSA 12A:8-317, (6) on all other choses in action by serving certified copy of writ upon person owing same, (7) on legacies or distributive shares in decedent's estate or beneficial interest in trust, by serving certified copy of writ upon fiduciary. (Rule 4:60-7).

Consolidation of Actions.

Whenever two or more plaintiffs in separate actions obtain attachment writs against same defendant and levy on same property, actions may be consolidated to determine disposition of attached property. Plaintiff whose attachment writ became first lien on property is plaintiff in consolidated action; other plaintiffs become applying claimants. (Rule 4:60-16).

Lien.

Attachment binds attached goods and chattels, rights and credits, moneys and effects of defendant from time of its execution, and attached property, unless released, remains during pendency of action as security for any judgment which may be entered therein. (NJSA 2A:26-8). Attachment from time of its issue is lien on real estate of defendant throughout state even though officer fails to especially attach same or any part thereof. Attachment is also lien on all real estate acquired by defendant in state after its issue and before final judgment. Lien continues until plaintiff's claim is satisfied, attachment is discharged, or judgment is given against plaintiff (NJSA 2A:26-9), and any conveyance of attached real estate prior to release of attachment is void as against plaintiff (NJSA 2A:26-10). Judgment in the action is lien on defendant's real estate acquired either before or after entry thereof. (NJSA 2A:26-11).

Attack on writ or levy must be made by motion. Such motion does not constitute general appearance. Upon such motion, proof may be presented by affidavits or depositions or orally before the court. Burden of proof on plaintiff. Court may vacate writ or discharge or correct levy. (Rule 4:60-11).

Release of attached property from lien of attachment, and return thereof, may be obtained by defendant, or any person who had possession or control thereof at time of levy, at any time during course of action, by filing with clerk of court bond in amount and form and with sureties approved by court, after notice to plaintiff and any applying claimants. Filing of bond does not constitute general appearance. (Rule 4:60-13).

Third Party Claims.

Any person claiming property attached may proceed in the action on order to show cause. (Rule 4:60-14).

Procedure after Levy and Return.

Plaintiff must serve on defendant notice of attachment and copy of complaint (if not previously served) and copy of order and accompanying affidavits within one week after filing of return, or within such time as court fixes. (Rule 4:60-9). Service of notice is to be in accordance with Rule 1:5-2 if defendant has previously appeared in action, or in accordance with Rule 4:4-4 or 4:4-5 if defendant has not previously appeared, or as court may order. See topic Process. Where notice is served by publication, plaintiff must furnish defendant with copy within five days after written request therefor. (Rule 4:60-9). Where defendant has not been served with summons, he must file answer or move against complaint within 35 days after service of notice of attachment, if service made in N. J., or within 35 days if service made outside N. J., by registered or certified mail, or within 35 days after last publication if service made by publication alone, or within such time as court may fix. Where defendant has been served with summons but has not appeared, defendant has 35 days to move against attachment and levy after notice of same has been served on defendant or after publication, if service is by publication alone. (Rule 4:60-10).

Applying Claimants.

At any time before defendant enters appearance, any person having a liquidated or unliquidated claim against defendant, due or not, may apply to court to be admitted as applying claimant. Application must be by verified complaint, upon notice to plaintiff and claimants previously admitted, and will be admitted upon prima facie proof of cause of action alleged by claimant. Within ten days after order of admission or such time as court designates, claimant must serve notice on defendant of admission order and, if possible, copy of verified complaint, in same manner as plaintiff must serve notice of attachment on defendant. Defendant has same time after service to move or answer as is allowed for answering plaintiff’s complaint. Any applying claimant may defend against the claim of plaintiff and any other applying claimant by serving and filing notice of contest of such claim at least ten days prior to time fixed for trial or proof thereof. Proceedings on claimant of applying claimants do not suspend or affect course of plaintiff’s action against defendant. (Rule 4:60-15).

Appearance.

Defendant may enter appearance at any time before final judgment. Thereafter no applying claimants may intervene, lien of attachment continues in favor of plaintiff and applying claimants, proceedings with respect to attached property may be had as if no appearance had been entered, and any judgment in favor of plaintiff and applying claimants is general. If defendant has not legally been served with summons or does not appear, judgment is special against attached property only. (Rule 4:60-12).

Auxiliary Proceedings.

Court may order attaching officer to prosecute actions to obtain attached property in hands of third persons, including collection of choses in action, trust income or corpus and legacies or distributive shares of decedent’s estate, and may make any orders necessary to preserve attached property, including orders to attaching officer to deliver property to court appointed receiver, who may be empowered to collect attached assets and apply as court directs. (Rule 4:60-17; NJSA 2A:26-13).

Sale of Attached Property.

Execution sale of attached property by sheriff or other officer and conveyance pursuant thereto convey all title held by defendant at time attachment became lien or acquired by him thereafter. (NJSA 2A:26-15). Court may order sale of personal property before judgment. (Rule 4:60-17). Sale of attached personal property pursuant to statute or court order has same effect as if made by defendant when attachment became lien. (NJSA 2A:26-14). For effect of landlord's lien for rent on sale of attached personalty taken on leased premises, see NJSA 2A:42-2.

Distribution of Proceeds.

Proceeds of attached property, after payment of any costs and charges directed by court to be paid therefrom, are applied, first, to payment of plaintiff's judgment and costs and, second, among the applying claimants in proportion to, but not in excess of, their judgments and costs. (Rules 4:60-17, 4:60-15[e]).

8.03 [RESERVED]

8.04 CREDITORS' SUITS:

There are no statutory provisions.

See topic 8.08 Fraudulent Sales and Conveyances.

8.05 EXECUTIONS:

Judgments for payment of money, other than alimony and maintenance in matrimonial actions, and for costs are enforceable by execution. (Rules 4:59-1, 4:59-5, 4:59-7-5[b]).

On all judgments recovered or docketed, in the Superior Court, an execution may issue into several counties at once, but more than one sale cannot be had except to satisfy deficiency on first sale. (NJSA 2A:17-4, 2A:17-5). Satisfaction must be obtained first out of goods and chattels, and if these are insufficient, then out of real estate. (NJSA 2A:17-1).

Exemptions.

See topic 8.06 Exemptions.

Kinds of Execution.

Party recovering judgment may have execution against goods and chattels, or goods, chattels and real estate of defendant or in some instances against body. (NJSA 2A:17-1, 2A:17-17, 2A:17-78, 2A:17-79).

Time for Issuance.

Execution may issue without a revival of judgment at any time within 20 years after its entry. (NJSA 2A:17-3).

On Docketed Judgments.

After docketing of county district court judgment in Superior Court, no execution may issue thereon out of district court, nor may execution issue out of Superior Court on such docketed judgment pending determination of motion before district court for new trial, etc. (NJSA

2A:18-32, 2A:18-41 – 2A:18-43). Certificate of debt issued by Department of Treasury under NJSA 2A:17-50 has same force and effect as civil judgment docketed in Superior Court. (NJSA 2A:17-50).

Stay.

Court may, for good cause, stay proceedings on one or more executions issued into several counties upon same judgment, or direct under which judgment sale shall first be made. (NJSA 2A:17-5).

As to stay pending appeal, see category 5 Civil Actions and Procedure, topic 5.03 Appeal and Error.

Real Property.

Real estate, except decedent's lands on judgment against decedent's personal representatives, is liable to be levied upon and sold upon execution issued on judgment obtained in any court of record except county district courts. (NJSA 2A:17-17).

Personal Property.

Writ of execution binds personal property from time delivered to sheriff or other officer to be executed (NJSA 2A:17-10), provided levy is made while writ is alive and before return day (79 N. J. L. 480, 76 A. 1031).

Money may be levied on and returned as so much money collected. Shares of stock in any corporation, incorporated under authority of this state, another state, United States or another country, belonging to execution defendant may be taken and sold by virtue of execution in same manner as goods and chattels, subject to provisions of Uniform Commercial Code, NJSA 12A:8-317. (NJSA 2A:17-15, 2A:17-16).

Rights and credits may be levied upon. (NJSA 2A:17-59). They may be sold only by leave of court or may be liquidated by levying officer by collection or by receiver appointed by court. (NJSA 2A:17-60 – 2A:17-62, 2A:17-66, 2A:17-67). Garnishee may be required to pay debt, if admitted, to such officer or receiver. (NJSA 2A:17-63). Judgment debtor may be required to make payments in stated installments if it appears debtor is entitled to or in receipt of income or any property or money or things in action, or rights and credits, but not income or property as is recovered or exempt by law. (NJSA 2A:17-64).

Wages.

Execution can issue against wages, debts, earnings, salary, income from trust funds, (including income from "spendthrift" trusts). Such execution may not exceed 10% thereof unless income of judgment debtor exceeds 250% of poverty level for individual, taking into account size of individual's family, in which case state may seek wage execution of up to 25% of debtor's gross earnings. (NJSA 2A:17-56). Execution is presented to person from whom wages, etc., are due or are to become due, and becomes continuing levy. Garnishee entitled to retain 5% of each payment made, as compensation for expenses and services in payment of execution. Only one such execution may be satisfied at a time, and if more than one be issued, they are to be satisfied in order of presentation to garnishee, except that execution arising from support order is prior to other execution presented to garnishee on same day, and execution arising out of debt to state department or agency has priority over any other wage execution, except those arising from support order. (NJSA 2A:17-50 – 2A:17-53, 2A:17-56; 111 N. J. L. 129. 166 A. 717; Cowan v. Storms, 121 N.J.L. 336, 2 A.2d 183, 1938 N.J. Sup. Ct. LEXIS 108). Every order for alimony, maintenance or child support must include written notice to obligor that order is enforced by withholding income due from employers of obligor and upon unemployment compensation benefits due obligor and against debts, income, trust funds, profits or income from any other source due obligor. Administrative law judge has power to hear state's application for wage execution pursuant to NJSA 2A:17-50. Procedures for and effect of income withholding are prescribed. (NJSA 2A:17-56.8 – 2A:17-56.26). Statute permits execution against wages, etc., of municipal, county and state, but not federal, employees. (NJSA 2A:17-53; 124 N. J. L. 159, 11 A.2d 315).

Levy is made on tangible personalty by officer's taking actual possession or by making inventory and constituting owner as bailee of property. (45 N. J. Eq. 594, 17 A. 943). When realty is levied upon, levying officer must make description of land and return it with writ of execution. (69 N. J. L. 553, 55 A. 101). Levy on corporate stock is made in accordance with Uniform Commercial Code, NJSA 12A:8-112.

Return.

Officer to whom writ of execution is delivered must endorse date of receipt thereon (NJSA 2A:17-11), and must return to clerk of court together with verified statement of amount of money collected, time of collection, balance due and items of bill of costs (NJSA 2A:17-9).

Priorities.

As between several executions against real or personal property of same person, writ delivered to officer first must be executed and satisfied first, except that execution arising from support order is prior to other execution delivered to officer on same day. (NJSA 2A:17-12, 2A:17-13). This is so even though levy be made first on later execution, since levy relates back to time of delivery of writ. (128 N. J. L. 119, 24 A.2d 219). See also category 5 Civil Actions and Procedure, topic 5.15 Judgments.

Claim of third person to property levied on is made by written notice to levying officer. Sale of goods or chattels levied on by virtue of execution issued out of any court is delayed ten days to enable claimant to institute action to establish claim in court from which execution issued or county court of county wherein goods and chattels were seized. Action shall proceed in summary manner and be tried by jury. Execution creditor may indemnify sheriff and proceed with sale. (NJSA 2A:17-29-32).

Sales.

Sale of goods and chattels under execution must be advertised by posting advertisements in sheriff's office at least five days before sale. (NJSA 2A:17-33). Sale of real estate must be advertised by posting notice of sale containing designated information in sheriff's office and at premises at least three weeks before sale, and by publishing same four times in two newspapers, at least once a week, during four consecutive calendar weeks, first publication to be at least 21 days and last publication to be not more than eight days prior to sale. (NJSA 2A:61-1). Party procuring execution must notify other parties appearing in action and owner of real property at least ten days prior to sale. (Rule 4:65-2). Notice of sale must mention possibility of surplus money and procedures for claiming it. (Rule 4:65-2, am'd. 2008).

Redemption.

There is no statutory right of redemption after sale. There may be ten day right of redemption after court-authorized sale of real estate. (Rule 4:65-5; 56 N. J. 508, 267 A.2d 495). For redemption after real estate mortgage foreclosure sale, see category 20 Mortgages, topic 20.04 Mortgages of Real Property.

Provisions in Aid of Execution.

Superior Court out of which execution issued, upon proof by oath of party or agent or attorney or of any other person, showing facts that judgment debtor has property or any person owes debtor, or holds money or property in possession or action in trust for debtor or for debtor's use over and above such property as is exempt or reserved by law, may forbid the payment or transfer of such property or money until further order of court. (NJSA 2A:17-65). Any person, including judgment debtor, may be examined as provided by rules for taking of depositions. (Rules 4:59-1[e]; Rule 6:7-2).

Body Execution.

Execution against body will not issue on any judgment founded upon contract except where order to hold defendant to bail has been issued and remains in force, or upon proof establishing facts on which plaintiff would be entitled to hold defendant to bail or that defendant has rights or credits, moneys or effects, either in defendant's possession or in possession of any one to defendant's use, of value of $50 or over which he unlawfully refuses to apply in payment of judgment. (NJSA 2A:17-78). The writ will not issue on judgment recovered in action of tort commenced by summons unless court finds that injuries or damages were caused willfully or maliciously and orders issuance of writ. (NJSA 2A:17-79). If capias be once executed, no other execution can issue for same debt, so long as defendant remains in custody. (40 N. J. L. 372).

No female may be arrested or imprisoned by virtue of any mesne process or process of execution in civil action. No execution may be issued against body of judgment debtor, under 16 years, and where debtor is over 16 and under 21 years it is within judge's discretion whether such execution shall issue. (NJSA 2A:17-77).

Satisfaction.

See category 5 Civil Actions and Procedure, topic 5.15 Judgments.

8.06 EXEMPTIONS:

Personal property of every kind (including money) to value of $1,000 as well as all wearing apparel of debtor are exempt from execution or other civil process. (NJSA 2A:17-19; 121 N. J. L. 285, 2 A.2d 367). See also NJSA 3B:16-5, NJSA 2A:19-12 and NJSA 2A:33-3 for similar exemptions of property of (1) decedent leaving family in New Jersey, (2) assignor for benefit of creditors who has family residing in New Jersey, and (3) in distress actions. In attachments, household goods and furniture to value of $1,000 of debtor whose family resides in New Jersey are exempt except as to debt incurred in purchase thereof. (NJSA 2A:26-4). Personal property within New Jersey of a nonresident debtor cannot be attached by nonresident creditor if law of state where they are resident exempts such property. (NJSA 2A:26-5).

Substitution.

No statutory provisions.

Debts Against Which Exemptions Not Allowed.

Personal property is not exempt from execution on judgment for purchase price thereof or from process for collection of taxes or assessments (NJSA 2A:17-19), and household goods and furniture are not exempt from attachment for debt incurred in purchase thereof. (NJSA 2A:26-4).

Waiver of Exemption.

In attachments where value of property exceeds $1,000, failure of debtor to select goods and furniture to value of $1,000 on demand by attaching officer is deemed waiver of exemption. (NJSA 2A:26-4).

Earnings.

Except with respect to income withholding provisions of alimony, maintenance and child support payment orders (NJSA 2A:17-56.8 – 2A:17-56.34), execution can issue against wages, earnings or salary only when they amount to $48 or more per week (NJSA 2A:17-50), and may not exceed 10% thereof unless income of judgment debtor exceeds 250% of poverty level for individual, taking into account size of individual's family (NJSA 2A:17-56). See topic 8.05 Executions, subhead Wages. Wages of nonresident may not be attached at suit of nonresident creditor. (NJSA 2A:26-5).

Pensions and Insurance Benefits.

Benefits under disability or sickness insurance policies are exempt, except in actions for necessaries purchased after commencement of disability (NJSA 17:18-12); also, claims or payments due under Workers' Compensation Act (NJSA 34:15-29) and Unemployment Compensation Law (NJSA 43:21-15(c)), and contributions by workers to cash sickness benefits fund (NJSA 43:21-7[d][6]). Compensation payments that have been received are not exempt. (15 N. J. Misc. 313, 190 A. 853). However, unemployment compensation payments received but not mingled with other funds are exempt, except from debt for necessaries furnished during unemployment. (NJSA 43:21-15[c]). Payments due under many retirement benefit laws, such as pensions of certain municipal employees (NJSA 43:13-9, 43:13-37.5), schoolteachers (NJSA 18:13-112.53 et seq.), and firemen and policemen (NJSA 43:16A-17) are exempt.

Homestead Exemption.

No statutory provision.

8.07 FORECLOSURE:

See topic 8.13 Liens; category 20 Mortgages, topics 20.01 Chattel Mortgages, 20.04 Mortgages of Real Property.

8.08 FRAUDULENT SALES AND CONVEYANCES:

Uniform Fraudulent Transfer Act (1984; adopted 1988; effective 1989). (NJSA 25:2-20 – 25:2-34; L. 1988, c. 74); Uniform Fraudulent Conveyance Act (NJSA 25:2-7 – 25:2-19) and NJSA 14A:14-10 – 14A:14-12 repealed (NJSA 25:2-34; L. 1988, c. 74, § 1). Deeds of gift and transfers of goods, chattels or things in action in trust for donor's use are void as against creditors. (NJSA 25:2-1).

Remedies.

In action for relief against fraudulent transfer or obligation, creditor may obtain avoidance of transfer or obligation to extent necessary to satisfy claim, attachment or other provisional remedy against asset transferred or other property of transferee, injunction against further disposition by debtor or transferee of asset transferred or other property, appointment of receiver over such asset or other property, or other appropriate relief. (NJSA 25:2-29). Rule 4:27-2 now permits plaintiff to join in one action claim for money and claim to set aside conveyance fraudulent as to him, without first having obtained judgment establishing claim for money.

Bulk Sales.

Uniform Commercial Code—Bulk Transfers (NJSA 12A:6) repealed by L. 1994, c. 114, § 11, effective Jan. 10, 1995.

Consumer Fraud.

Deception or misrepresentation in connection with charitable solicitation or sale or advertisement of merchandise or real estate is declared unlawful and subject to injunction and fine. (NJSA 56:8-1 – 56:8-14). More severe punishments and fines may be imposed where deception or misrepresentation is directed at senior citizens or persons with disabilities. (NJSA 56:8-14.1 – 56:8-14.6). Any person who knowingly uses credit card fraudulently is guilty of third degree crime. (NJSA 2c:21-6[h]). For further discussion of consumer fraud issues, see category 3 Business Regulation and Commerce, topic 3.12 Consumer Protection.

8.09 GARNISHMENT:

There is no separate proceeding of garnishment to reach property of a debtor in the possession of a third person, nor is there any separate writ of garnishment. The relief is obtainable directly either under a writ of attachment (q. v.) or of execution (q. v.).

For limitations on garnishment of goods for which negotiable documents of title have been issued, see Uniform Commercial Code, NJSA 12A:7-602.

Earnings.

See topic 8.05 Executions, subhead Wages.

8.10 HOMESTEADS:

Form of homestead interest is established by creation of right of joint possession during marriage that attaches to real property acquired subsequent to May 28, 1980 and is used by married person and his or her spouse as their principal matrimonial residence and to which neither dower nor curtesy applies. (NJSA 3B:28-3).

8.11 JUDGMENT NOTES:

See category 3 Business Regulation and Commerce, topic 3.02 Bills and Notes.

8.12 LEVY:

See topics 8.02 Attachment, 8.05 Executions.

8.13 LIENS:

Auto Body Repair Facility.

When motor vehicle is repaired by auto body repair facility as result of damage to vehicle and (1) damage is reimbursable under policy of insurance or is otherwise reimbursable by third party and (2) proceeds of reimbursement are in form of negotiable instrument issued by insurer or other payor payable jointly to owner or lessee of vehicle and lienholder or lessor, auto body repair facility must provide lienholder or lessor with statement of repairs made. Statement must be attested by authorized representative of auto body repair facility and constitutes proof to lienholder or lessor that all repairs have been made by auto body repair facility. Color photograph of repaired vehicle must accompany statement. (NJSA 39:13-8[a]). If lienholder or lessor sells any motor vehicle to which repairs were made as provided above prior to payment or reimbursement of auto body repair facility that repaired said motor vehicle, except for amounts due lienholder or lessor under provisions of perfected lien or security interest, amount due to auto body repair facility for repairs shall supersede all other liens or outstanding interests, including those payable by insurer to owner or lessee of repaired motor vehicle. If insurer or other payor receives statement and request demanding payment from auto body repair facility, proceeds of sale or portion thereof must be directed to auto body repair facility. (NJSA 39:13-8[c]).

Environmental Liens.

Any expenditure by Department of Environmental Protection for cleanup and removal of hazardous substances pursuant to Spill Compensation and Control Act constitutes debt of discharger to Spill Compensation Fund and lien on all property owned by discharger when notice of lien is filed with clerk of Superior Court. Lien shall have priority over all other claims or liens filed against property except for residential dwellings of six units or less and property not subject of cleanup and/or removal, which shall have priority from day of filing of notice but shall not affect any valid lien, right or interest in property filed prior to filing of notice. (NJSA 58:10-23.11f[f]; see also 33 USC § 1321). Expenditures made out of Spill Compensation Fund as result of discharge of hazardous substance from vessel into waters of New Jersey are also debts and constitute maritime lien on discharging vessel. (NJSA 58:10-23.11f[g]). Lien has priority over all others except those previously filed under this section. (Id.).

Federal liens, other than tax liens, required or permitted to be filed under "Comprehensive Environmental Response, Compensation and Liability Act of 1980", and other federal liens, to be filed with county where property is situated. (NJSA 46:16-15).

Federal Liens on Real Property.

Notice of federal liens upon real property for which any Act of Congress or regulation requires or permits filing or recording in state office, except for federal tax liens pursuant to Internal Revenue Code, shall be filed in county recording office of county or counties where property is located. (NJSA 46:16-15, 46:16-16). No other attestation, certification, or acknowledgment is necessary. (NJSA 46:16-17). All notices received by filing officer are available for public inspection at fee of $2 per page. (NJSA 46:16-18). Fee for filing and indexing each notice of lien, certificate or notice affecting lien, or certificate of discharge or subordination is $8. Fee for any other notice is $5. (NJSA 46:16-19).

Garage keepers have lien for storing, repairing or furnishing supplies for motor vehicles, if done or furnished with consent of owner (including conditional vendee or mortgagor in possession) or owner's representative, subordinate to prior conditional sale or prior chattel mortgage properly recorded or prior security interest perfected in accordance with NJSA 12A:9 of Uniform Commercial Code. Loss of possession of vehicle or part does not destroy lien, but, after demand for payment of claim, vehicle or part may be seized in peaceable manner without process anywhere in state. Owner or other person entitled to possession may demand statement of amount claimed. If person considers amount claimed excessive, may offer what person considers reasonable. If return of car is still refused, person may deposit amount claimed with clerk of court of competent jurisdiction in county where motor vehicle or part thereof may be, together with $10 for costs in action in Superior Court, Law Division, Special Civil Part and $50 costs with any other court, and person is then entitled to possession pursuant to court process. Court may hear and determine in summary manner. (See Rule 4:67-1.) If no claim is asserted by garage keeper or if judgment goes against garage keeper on claim, judgment may be rendered against garage keeper for damages for seizure and detention. If owner does not bring proceedings for repossession, property may, after 30 days, and after two weeks publication once a week in a newspaper and five days' notice of sale posted in five public places in municipality where garage is located, be sold at public auction. (NJSA 2A:44-20 — 2A:44-24, 2A:44-26 — 2A:44-27, 2A:44-29 — 2A:44-31). No provision for redemption after sale.

Operators of aircraft hangars have a lien for storing, maintaining or repairing aircraft and for gasoline, accessories or other supplies furnished. Lien is superior to all other liens except for taxes. (NJSA 2A:44-1 – 2A:44-12). Lienor is required to file verified statement in county where aircraft is based, work is performed or materials supplied. (NJSA 2A:44-2).

Livery Stable Keepers.

See NJSA 2A:44-51, 2A:44-52.

Innkeepers.

Hotel, inn and boarding-house proprietors have lien against property of guests for bills due for rooms, board, cash advanced or other accommodations, which property may be retained without process until debt is discharged. Such property may be sold at public sale after notice published for three days in newspaper published in municipality. (NJSA 2A:44-47 – 2A:44-49). No provision for redemption after sale.

Issuer of Securities.

Issuer has lien on securities against purchaser if security is certificated and issuer's right to lien is conspicuously noted thereon, or if security is uncertificated, if right of issuer to lien is contained in initial transaction statements sent to purchaser, registered owner or registered pledgee. (NJSA 12A:8-209).

Repair or Construction of Chattels.

Common law possessory lien for labor or materials not affected by recovery of judgment. Lien may be enforced by levy and sale under execution upon judgment. Lien may be enforced without suit by selling, after amount due remains unpaid for three months, sufficient chattels at public auction to pay lien and expenses of sale. Notice of sale must be published once in each of two weeks preceding sale in newspaper circulating in county, posted in five public places in municipality in which chattels are located, and mailed to owner, if address known, not less than five days before sale. (NJSA 2A:44-32 – 2A:44-34). No provision for redemption after sale.

Watch and jewelry repairmen have possessory lien for work performed or materials furnished. Watch or jewelry may be sold if money unpaid for one year, after 30 days notice in writing to owner personally or by registered mail. If unknown, notice posted in two public places in municipality of lienor's business. Lien does not prevent action for debt. (NJSA 2A:44-174 – 2A:44-177). No provision for redemption after sale.

Processors.

Anyone in business of processing of fabrics and hides for others has lien upon property that comes into processor's possession. Lien not affected by recovery of judgment or taking of note for moneys due or extension of credit. Lien may be assigned. Where debt due in whole or in part for two months, lien may be enforced by public sale, after two weeks' publication once a week in newspaper published in county where property located. Notice of sale is posted in five public places, at least one being in municipality where property located, within 15 days but not less than five before sale, and five days' notice by mail to owner, at last known post-office address. Lien is paramount to that of title holder or prior lienor who consented to possession by processor. (NJSA 2A:44-157 – 2A:44-164). Processor of motion-picture films has lien for film laboratory work, labor, services, materials, or money advanced or loaned in connection therewith. (NJSA 2A:44-169 – 2A:44-173). No provision for redemption after sale.

Hospital has lien, at ward rates, for treatment and care of person injured as result of another's negligence, which lien is on such injured person's right of action and attaches to judgment, award or settlement, provided notice of lien is filed within 90 days after date of first treatment and prior to payment, in clerk's office of county where injuries occurred, and, within ten days after filing, copy of notice and statement of date of filing are sent by registered mail to or served personally on injured person and person alleged to be liable, if known or reasonably ascertainable. No lien if injuries come under Workers' Compensation Law. Hospital may enforce lien, within one year after payment to injured person or legal representative, by action at law against person making such payment. Lien discharged by hospital filing with county clerk duly acknowledged certificate setting forth payment. "Hospital" includes charitable or municipal hospitals. (NJSA 2A:44-35 – 2A:44-46). All liens filed against psychiatric facility's patient prior to Sept. 20, 2005 are extinguished and bear no legal effect. No new liens shall be filed by psychiatric facility against its patient on or after that date. (NJSA 30:4-80.6[a]).

Medicaid Assistance.

Department of Human Services may place lien on estate of deceased Medicaid recipient for assistance correctly paid out when recipient was age 65 or older (NJSA 30:4D-7.2 [a]), except where amount sought is less than $500, where deceased's gross estate is less than $3,000, where there is surviving spouse, or where there is surviving child who is under age 21, or blind, or permanently and totally disabled or where recipient became deceased on or after Apr. 1, 1995, if surviving spouse or surviving child under age 21 or is blind or permanently and totally disabled, unless assistance was incorrectly or illegally paid, or for third party liability recovery sought under NJSA 30:4D-1 et seq. (NJSA 30:4D-7.2a.[2]). Department may place lien on third party's property. (NJSA 30:4D-7.2[b]). Medicaid liens must be filed and recorded with clerk or register of deeds for county in which property is located. (NJSA 30:4D-7.4, 30:4D-7.6). Discharge of lien must be filed and recorded with clerk or register of deeds. (NJSA 30:4D-7.7). Persons affected by lien can challenge validity by bringing action against Department in Superior Court. (NJSA 30:4D-7.8).

Physician or dentist has lien, similar to hospital lien, for reasonable charges for treatment, but limited to 25% of any award, decision, judgment or settlement. Procedure same as for hospital lien. (NJSA 2A:44-35 – 2A:44-46).

State and County Institutions.

Every institution or other residential service maintained in whole or in part by state or county funds has lien for care and maintenance against real and personal property of person confined therein and of person chargeable by law with support and maintenance of such patient under court order or pursuant to NJSA 30:4-60b, in which case amount of lien shall not exceed amount of maintenance to be paid. Lien may be filed with county clerk or register as to real property within county or with clerk of Superior Court for state wide effect; to be effective against personal property in possession of third person, notice thereof must be given. (NJSA 30:4-80.1 – 30:4-80.7). County providing medical care and hospitalization to resident indigent in private hospital has lien on property of recipient; lien is perfected against real property by filing within two years after discharge from hospitalization with county clerk or register of deeds (if any) or, for state-wide effect, with Clerk of Superior Court; perfected against other property held for recipient's use by such filing and notice by certified mail to person so holding property. (NJSA 44:5-19.1 – 44:5-19.6).

Municipal lien for cost of proceedings, repairs, demolition, etc., with respect to buildings unfit for human habitation or use may be provided by ordinance against real property upon which such cost was incurred. (NJSA 40:48-25). Rates, rentals, connection fees and other charges associated with municipality's provision of sewerage services constitutes first lien against property that benefits from such services. (NJSA 40A:26A-12). Liens shall be levied in accordance with real property tax liens as provided in Tit. 54, c. 5. (Id.).

Monuments.

Person furnishing or placing monument in cemetery has lien for price thereof on filing notice with person in charge of cemetery. (NJSA 2A:44-149 – 2A:44-156).

Maritime lien is allowed against vessel and its apparel for debt contracted by owner or agent of such ship or vessel within state, for labor performed or materials furnished in state, in building, repairing, fitting, furnishing or equipping, or for supplies, or for towing, wharfage, drydockage and expenses of keeping same in storage in port in water or on land, including expenses of employing persons to watch vessel and for damage caused by negligence or willful misconduct of navigator of another vessel to extent of $20 or more. Lien enforced by action in Superior Court. Claimant is entitled to process of attachment. Lien preferred to all other liens except mariner's wages. (NJSA 2A:44-57 – 2A:44-63).

Construction Liens.

Construction liens for improvements to real property governed by NJSA 2A:44A-1 – 2A:44A-38, repealing NJSA 2A:44-64 – 2A:44-124, effective Apr. 22, 1994.

Any contractor, subcontractor or supplier who provides work, services, or material for improvement of real property is entitled to lien on owner's interest in property for value of work or services performed. (NJSA 2A:44A-3). No lien shall attach for materials furnished subject to security agreement. (NJSA 2A:44A-5[a]). Liens for public works contracted for or awarded by public entities governed by NJSA 2A:44-125 et seq. (NJSA 2A:44A-5[b]).

Amount of lien claim is limited to contract price, or any unpaid portion thereof, of claimant's contract for work, services, material, or equipment. (NJSA 2A:44A-9). Maximum amount for which owner will be subject to lien is total amount of contract price, less any payments made to claimant or any other contractor who has filed lien claim prior to receipt of claimant's lien claim. (NJSA 2A:44A-10[a], [b]).

Property Subject.

Lien extends to owner's interest in real property; for improvements to docks, wharves, piers, bulkheads, jetties, piling, boardwalks, etc., lien extends to owner's interest in lands in front of or upon which improvements are made as well as owner's interest in land or waters in front of land (NJSA 2A:44A-4[a]); for improvements involving removal and relocation of structure or part of structure, liens extend to owner's interest in land on which structure relocated (NJSA 2A:44A-4[b]); for improvements involving excavation, drainage, dredging, landfill, grading, filling, landscaping, etc., lien extends to owner's interest in land to which improvements made (NJSA 2A:44A-4[c]); for work performed solely within unit of condominium or cooperative, lien extends only to owner's interest in unit (NJSA 2A:44A-19[a]).

Filing and Recording of Lien Claim.

Lien claim must be signed, acknowledged, and verified by oath by claimant or authorized officer of claimant. (NJSA 2A:44A-6). Claim must be filed with county clerk 90 days following last work, services, material, etc., provided for which payment is claimed. (Id.). Claimant must serve owner with lien claim within ten business days of filing. (NJSA 2A:44A-7). Proper format for lien claim is prescribed by statute. (NJSA 2A:44A-8). Lien claim may be amended by filing prescribed form with county clerk. (NJSA 2A:44A-11).

County clerk shall maintain Construction Lien Book in which each lien claim, Notice of Unpaid Balance and Right to File Lien, and amendments thereto shall be entered (NJSA 2A:44A-13[a]), and shall maintain Construction Lien Index Book setting forth all such entries in alphabetical order (NJSA 2A:44A-13[c]). County clerk shall keep marginal notations as to discharge or amendment of each lien claim or Notice of Unpaid Balance and Right to File Lien. (NJSA 2A:44A-13[b]).

Fees.

County clerk shall charge fees for filing and recording construction liens: Notice of Unpaid Balance and Right to File Lien and amendments, $4.50; lien claim or amended lien claim, $4.50; discharge, subordination or release, $2; marginal notation, $1. (NJSA 2A:44A-13[d]).

Priorities.

Mortgage on real property shall have priority over any construction lien to extent that mortgage secures funds applied to: payments of amounts due to claimants who have filed lien claims or Notices of Unpaid Balance and Right to File Lien (NJSA 2A:44A-22[a]); all or part of purchase price of property (NJSA 2A:44A-22[b]); payments of prior valid lien or encumbrance (NJSA 2A:44A-22[c]); payments of State or municipal taxes, payments or assessments (NJSA 2A:44A-22[d]); payments of financing costs or fees (NJSA 2A:44A-22[e]).

For lien claim to have priority over creation, conveyance, lease or mortgage of interest in real property, claimant must have filed Notice of Unpaid Balance and Right to File Lien with county clerk prior to creation, conveyance, lease or mortgage. (NJSA 2A:44A-20[a]).

Notice of Unpaid Balance and Right to File Lien gives notice of anticipated lien claim to preserve rights and priority. Form of Notice of Unpaid Balance and Right to File Lien is prescribed by statute. (NJSA 2A:44A-20). Notice of Unpaid Balance and Right to File Lien need not be served on any party. (NJSA 2A:44A-20[b]). Party taking title or interest in property subject to Notice of Unpaid Balance and Right to File Lien is presumed to have notice of anticipated lien claim. (NJSA 2A:44A-20[c]). Notice of Unpaid Balance and Right to File Lien may be amended. (NJSA 2A:44A-20[g]).

Action to Enforce Lien.

When claimant brings action to enforce lien claim, claimant shall cause Notice of Lis Pendens to be filed with county clerk. (NJSA 2A:44A-14[c]).

Failure to bring action to enforce lien claim within one year of last provision of work, services, material or equipment or within 30 days of receipt of notice from owner requiring claimant to commence action results in forfeiture of lien claim. (NJSA 2A:44A-14[a]). Claimant who fails to file timely action to enforce lien claim and fails to immediately discharge lien claim shall be liable for costs of owner in defending or discharging lien claim. (NJSA 2A:44A-14[b]).

Claimant who files lien claim without basis, or willfully overstates amount of claim, or fails to file lien claim in proper form or manner shall forfeit all lien rights and right to file subsequent lien claim to extent of face amount and shall be liable for court costs and reasonable legal expenses, including attorneys' fees, incurred in defending against or causing discharge of lien claim. (NJSA 2A:44A-15[a]). If defense to lien claim is without basis, party shall be liable for costs and fees. (NJSA 2A:44A-15[b]).

Death of party in interest does not abate lien claim. (NJSA 2A:44A-17).

Waivers of construction lien rights are void unless given in consideration for payment for work, services, material or equipment, and only upon and to extent that payment is actually received. (NJSA 2A:44A-38).

Judgments on lien claims shall be filed with county clerk. (NJSA 2A:44A-24).

Payment of Lien Claims.

If judgment is against owner, writ of execution may issue to require sale of property to satisfy lien. (NJSA 2A:44A-25 – 2A:44A-26). All lien claims established by judgment are concurrent and shall be paid pro rata out of lien funds and proceeds of sale. (NJSA 2A:44A-23, 2A:44A-28). Any surplus funds from sale shall be distributed among defendant lien holders according to priority. (NJSA 2A:44A-29).

Discharge of Lien Claims.

When lien claim has been paid, satisfied, settled, or forfeited, claimant shall file with county clerk within 30 days certificate directing discharge of lien claim. (NJSA 2A:44A-30[a]). Claimant who fails to discharge claim shall be liable for damages, costs and fees. (NJSA 2A:44A-30[c]).

Lien claim may be discharged of record by county clerk upon execution and filing of surety bond or deposit of funds with clerk in amount equal to 110% of lien claim (NJSA 2A:44A-33[a][1]) or upon receipt of certificate from claimant discharging lien claim (NJSA 2A:44A-33[a][2]) or upon order of discharge by court (NJSA 2A:44A-33[a][3]). Discharge, subordination or release of lien claim shall be duly recorded by county clerk in properly indexed book. (NJSA 2A:44A-35).

Bonds.

When lien claim is filed, owner may execute and file bond equal to 110% of lien claim in favor of lien claimant as surety. (NJSA 2A:44A-31). Bond shall serve to discharge lien without any execution against property. (NJSA 2A:44A-32).

Residential Construction Liens.

Claimant must first file Notice of Unpaid Balance and Right to File Lien with county clerk (NJSA 2A:44A-21[b][1]) and must serve it on owner (NJSA 2A:44A-21[b][2]). Claimant must serve on owner demand for arbitration and commence expedited arbitration procedure through American Arbitration Association. (NJSA 2A:44A-21[b][3]). Arbitrator will determine validity and amount of lien, any setoffs or counterclaims, etc., within 30 days of receipt of claimant's demand for arbitration. (NJSA 2A:44A-21[b][4]-[7]). Upon determination by arbitration of valid lien, claimant shall file lien claim in that amount within ten days. (NJSA 2A:44A-21[b][8]). If Notice of Unpaid Balance and Right to File Lien is without basis, overstated, or deficient in form or manner of filing, claimant is liable for damages and costs suffered by affected parties. (NJSA 2A:44A-21[b][12]). Either party may appeal arbitrator's determination to Superior Court, Law Division. (NJSA 2A:44A-21[b][10]).

Claimant for residential construction lien may discharge proportionate share of lien upon receipt of partial payment of amount owed. (NJSA 2A:44A-18).

Redemption.

There is no right of redemption after sale.

In case of public works undertaken by public agency, any merchants, laborers and materialmen may have lien on labor and materials furnished to subcontractor by filing with clerk within 20 days of delivering materials or first performance. (NJSA 2A:44-128). Lien claimant may file verified notice of lien claim with agency before full performance or within 60 days of completion or acceptance of contractor's work. (NJSA 2A:44-129, 2A:44-132, 2A:44-133). Lien of laborer or materialman is prior to assignment by contractor unless assignee paid prior to filing of notice. (NJSA 2A:44-131). Lien of laborer has priority. (NJSA 2A:44-136, 2A:44-140). Jurisdiction for enforcement of claims is lodged with Superior Court, Chancery Division. (NJSA 2A:44-137). Suit to enforce claim must be brought within 60 days after completion or acceptance of contractor's work. Claimants who have filed claims shall be made parties and may preserve lien by setting up claim in answer. (NJSA 2A:44-138, 2A:44-139). Lien may be discharged by: (1) Filing certificate with financial officer of public agency, stating lien is discharged, (2) lapse of 60 days from completion or acceptance of work without enforcement by action or on failure to file timely answer in another claimant's action, (3) satisfaction of judgment in action to enforce lien or claim, or (4) final judgment of Superior Court. (NJSA 2A:44-142).

Contractors doing public work must furnish surety bond pursuant to NJSA 2A:44-143 – 2A:44-144 conditioned also for payment by contractors and subcontractors of materialmen and laborers. Claimants must furnish sureties with statement of claim one year from last date of work or material delivery to project and start suit on bond not earlier than 90 days, but within one year, after such acceptance. (NJSA 2A:44-143 – 2A:44-146). Form of bond specified. (NJSA 2A:44-147).

Workers' compensation payment is lien against employer. (NJSA 34:15-29). No claim for legal services or disbursements pertaining to workers' compensation unless there is approval by Superior Court or claimant files appropriate notice. (NJSA 34:15-6). See category 11 Employment, topic 11.02 Labor Relations, subhead Workers' Compensation Act.

Sexual Offender DNA Testing.

State has lien for costs of blood testing sample against property and income of any person required to have blood sample drawn for DNA testing. (NJSA 53:1-20.30).

For other liens discussed in various topics of this digest see topics 8.02 Attachment, Executions, Exemptions; categories 3 Business Regulation and Commerce, topics Carriers, Factors; Legal Profession, topic Attorneys and Counselors; Mortgages, topics Chattel Mortgages, Mortgages of Real Property; Property, topics Landlord and Tenant, Real Property; Taxation, topic Taxes.

Commercial Code.

See category 3 Business Regulation and Commerce, topic 3.09 Commercial Code.

8.14 MECHANICS' LIENS:

See topic 8.13 Liens. See generally "Construction Lien Law". (NJSA 2A:44A-1, et seq.).

8.15 PLEDGES:

Uniform Commercial Code (Tit. 12A) adopted.

Pledges governed by Uniform Commercial Code, Art. 9. (NJSA 12A:9-102[2]). Delivery of possession to pledgee is essential to perfect pledge. (NJSA 12A:9-305).

In pledge transaction, § 9-305 restates common-law rule of security that secured party may perfect security interest by taking possession of collateral.

Remedies of Pledgee.

See category 3 Business Regulation and Commerce, topic 3.09 Commercial Code. (NJSA 12A:9-501 – 12A:9-507). Pledge made as security for obligation of third party renders pledgor a surety to extent of pledged chattel. (71 N. J. Super. 110, 176 A.2d 508).

Other Statutory Provisions.

Fraudulent pledging of property borrowed or leased by pledgor is misdemeanor. (NJSA 2C:20-4). Loaning money secured by pledge of pistol or revolver is misdemeanor. (NJSA 2C:39-11). Stockholders in N. J. corporations or banks can vote pledged stock unless it has been transferred on books of corporation or bank. (NJSA 14A:5-17 and NJSA 17:9A-86).

8.16 RECEIVERS:

Receivers are appointed by Superior Court under its general equity powers in accordance with Rule 4:53. For appointment of statutory receiver for insolvent corporations, see category 2 Business Organizations, topic 2.03 Corporations. See also topic 8.05 Executions. Court may appoint temporary receiver in action for dissolution of partnership. (NJSA 42:4-7).

Proceedings.

Custodial receiver cannot be appointed without notice to or consent of adversary unless there is threat of immediate, substantial and irreparable injury, and in such case adversary may move for discharge of receiver on two days notice. (Rule 4:53-1).

Duties of Receiver.

Receiver must file inventory within three months after appointment and must account to court every Apr. 1 and Oct. 1 thereafter. (Rule 4:53-7[a]). Receiver appointed to wind up partnership must notify creditors and must file list of proved claims three months after appointment unless court orders otherwise. (Rule 4:53-6).

Special Kinds of Receivership.

Special statutory provisions govern proceedings involving insolvency of insurance company. In such instances Commissioner of Banking and Insurance acts as receiver. (NJSA 17:30C-1 et seq.).

Employment of Attorney.

Receiver may not employ attorney or accountant except on court order (Rule 4:53-3), but plaintiff's attorney may conduct cause until counsel for receiver is appointed (Rule 4:53-5).

Compensation.

In making allowances to receiver or attorney, court considers value of services and trouble and risk incurred, as well as results accomplished. (Rule 4:53-4). No compensation is allowed by court for services of plaintiff's attorney pending appointment of counsel for receiver. (Rule 4:53-5).

8.17 REDEMPTION:

See topics 8.05 Executions, Liens; categories 20 Mortgages, topic Mortgages of Real Property; Taxation, topic Property (Ad Valorem) Taxes, subhead Sale and Redemption.

8.18 SUPPLEMENTARY PROCEEDINGS:

See topic 8.05 Executions.

8.19 [RESERVED]

8.20 USURY:

See category 3 Business Regulation and Commerce, topic 3.19 Interest.

9 DISPUTE RESOLUTION

9.01 ALTERNATIVE DISPUTE RESOLUTION:

Lawyers are required to become familiar with Complementary Dispute Resolution Programs (CDR) and to inform their clients accordingly. (Rule 1:40-1).

Mandatory Dispute Resolution.

Pursuant to statute, court rule, or both, each vicinage must establish five specific nonbinding, mandatory CDR programs. These five programs are detailed below. Other mandatory CDR programs also may be established by vicinage. Form and nature of these latter programs vary from vicinage to vicinage.

Automobile arbitration is mandatory for all automobile tort actions. (NJSA 39:6A-25; Rule 4:21A-1[a][1]).

Personal injury arbitration is mandatory for all non-automobile related and non-malpractice personal injury actions. (NJSA 2A:23A-20; Rule 4:21A-1[a][2]).

Custody and Visitation Mediation.

Each vicinage is required to screen each custody and visitation case to determine whether mediation is in child's best interests. (Rule 1:40-5). Case may not be referred to mediation if preliminary or final domestic violence order is in effect. Cases involving domestic violence where no such order is in effect, or cases involving child abuse or sexual abuse, may be referred to mediation, provided those specific issues are not mediated.

Matrimonial Early Settlement Program.

Each vicinage must refer appropriate matrimonial cases, as determined by vicinage, to Matrimonial Early Settlement Program (MESP). (Rule 5:5-5). This Program helps participants resolve financial issues that accompany divorce. If settlement is not achieved from MESP, court shall order either mediation or other CDR event. (Rule 5:5-6).

Special Civil Part Mediation.

Mediation is mandatory for all small claims matters. (Rule 1:40-7). Small claims matters are all contract and tort actions (except professional malpractice, probate, Family Division, or Tax Court matters) and landlord-tenant disputes over rent, money damages, where amount in controversy is $3,000 or less. (Rule 6:1-2[a][2]).

Miscellaneous Mandatory CDR Programs.

Judge may require parties to attend mediation at any time following filing of complaint. Parties shall equally share fees and expenses of mediator subsequent to first mediation session. (Rule 1:40-4[a]-[b]). With consent of Assignment Judge, judge may refer matters to non-court administered CDR program. (Rule 1:40-4).

Some vicinages require that parties in certain cases not detailed above attend arbitration, mediation, or settlement proceedings. Depending on vicinage, such CDR programs are mandated for different types of case.

Almost every vicinage requires mediation of Municipal Court matters involving minor disputes. (Rule 1:40-8, am’d 2000, Rule 7.8-1). Such mediation is not allowed in actions involving serious injuries, repeated violence, psychological or emotional disability, persons who are also involved in disputes amongst themselves in Superior Court, domestic violence, and “complaints filed or contemplated to be filed pursuant to Title 39 (New Jersey Motor Vehicle Code)”. (Rule 1:40-8, am’d 2000). See also subhead Uniform Mediation Act, infra.

Voluntary Dispute Resolution.

Pursuant to New Jersey Alternative Procedure for Dispute Resolution Act (NJSA 2A:23A-1-30), essentially any civil matter can be referred to voluntary binding alternative dispute resolution if all parties agree in writing. Such agreement constitutes waiver of right to trial by jury and to appeal or review, except as specifically provided by Act. (NJSA 2A:23A-2[b]). For discussion of enforceability of contractual agreements to arbitrate dispute, see topic 9.02 Arbitration and Award.

Each vicinage offers variety of voluntary nonbinding CDR programs to facilitate resolution of disputes before trial, although availability of specific programs vary between vicinages. Programs include Case Evaluation Panels, Bar Panels, Early Settlement Panels, Settlement Conferences, and Summary Trials. In some instances, availability of voluntary CDR program is provided for by court rule. For example, automobile negligence and personal injury actions that are not subject to mandatory arbitration may be submitted to nonbinding arbitration on written stipulation of all parties. (Rule 4:21A-1[b]).

Juvenile Conference Committees may be established within county to hear matters involving minor criminal offenses by juvenile offenders. (Rule 5:25). Participation is voluntary. (Rule 5:25-1[d]). Purpose of committee is to forestall more serious future misconduct by obtaining cooperation of juvenile and his or her family in committee’s disciplinary recommendation. (Rule

5:25-1[c]). If any person interested in committee's proceeding is not satisfied with proceeding, matter shall be referred to court by committee. (Rule 5:25-1[d]).

Attorney fee disputes combine aspects of voluntary and mandatory alternative dispute resolution. If client chooses binding arbitration, attorney is required to arbitrate dispute. Fee disputes must be arbitrated if client so requests in writing or if client consents in writing to attorney's request for arbitration. (Rule 1:20A-3). Before initiating suit for fee, attorney must give client written notice of availability of arbitration. (Rule 1:20A-6). If attorney commences action to collect fees, client may request arbitration of dispute. (Rule 1:20A-3). Attorney bears burden of proving reasonableness of fee by preponderance of evidence. (Rule 1:20A-3[b][1]). No appeal on merits lies from arbitrator's determination. Appeal may lie for actual fraud by fee committee member, for committee's failure to follow procedural requirements for substantial procedural unfairness leading to unjust results, or for failure of committee member to be disqualified when required. (Rule 1:20A-3[c]). Appeal must be filed within 21 days of parties' receipt of Fee Committee's written arbitration determination. (Rule 1:20A-3[d]).

Uniform Mediation Act.

Adopted Nov. 22, 2004. (NJSA 2A:23C-1 – 2A:23C-13). Applies where mediation is required by statute, court rule or administrative agency rule. Parties referred to mediation by court, administrative agency or arbiter. Record of agreement to mediate demonstrates expectations of privilege against disclosure. Mediator holds self out to be mediator or person who provides mediation. (NJSA 2A:23C-3). Mediation communication privileged and not subject to discovery or admissible in evidence in proceeding unless waived or precluded under NJSA 2A:23C-5 or exemption arises under NJSA 2A:23C-6. (NJSA 2A:23C-4). Mediator may not make report regarding mediation to court, administrative agency or other authority that may rule on subject of mediation. (NJSA 2A:23C-7). Mediation communications are confidential to extent agreed by parties or provided by other state law or rule unless made during mediation session that is open or required by law to be open to public. (NJSA 2A:23C-8).

9.02 ARBITRATION AND AWARD:

Provision in written contract to settle by arbitration (a) any controversy that may arise therefrom or (b) refusal to perform whole or part of contract or written agreement to submit any existing controversy to arbitration is valid, enforceable and irrevocable, except upon such grounds as exist at law or in equity for revocation of contract. (NJSA 2A:24-1, NJSA 2A:24-2). Applicable to labor disputes. (3 N. J. Super, 558, 67 A.2d 362). Existing disputes between employer and employees may by mutual consent be submitted to board of arbitrators. (NJSA 34:13-1; NJSA 34:13A-7). See category 11 Employment, topic 11.02 Labor Relations, subhead Labor Disputes, for mediation of labor disputes. NJSA 39:6A-25 mandates arbitration of automobile negligence cases in which claims for noneconomic loss or recovery of uncompensated economic loss, other than for damages to property, are valued at $15,000 or less.

Uniform Arbitration Act not adopted.

Form and Requisites of Submission.

No particular form required except that agreement to arbitrate must be in writing. (NJSA 2A:24-1, 2A:24-2; NJSA 34:13-1).

Contracts to Arbitrate Future Disputes.

See first paragraph, supra.

Rescission.

See first paragraph, supra.

Enforcement of Agreement to Arbitrate.

On failure, neglect or refusal of party to perform written agreement for arbitration, superior court may in summary action direct arbitration to proceed as agreed. Alleged defaulter may demand jury trial on issue of existence of written agreement to arbitrate or failure to comply therewith. (NJSA 2A:24-3). Court action involving arbitrable issue will be stayed until arbitration had. (NJSA 2A:24-4).

Powers of Arbitrators.

Arbitrators may require attendance of any person as witness and to bring any book or written instrument. Subpoena issues in name of arbitrator. Court may compel disobedient witness to attend before arbitrator or punish for contempt. (NJSA 2A:24-6).

Award and Enforcement Thereof.

Award must be in writing, acknowledged or proved in same manner as deed for real estate and delivered to one of parties or attorney. Parties to agreement may designate court of record wherein judgment shall be rendered upon award made pursuant to such submission. (NJSA 2A:24-2, 2A:24-7). Party may within three months of delivery of award commence summary action for confirmation or vacation, modification or correction of award. (NJSA 2A:24-7). Award must be vacated, and rehearing directed if timely, where procured by corruption, fraud or undue means, in case of evident partiality or corruption in arbitrator, in case of misconduct of arbitrator in refusing to postpone hearing upon showing of sufficient cause or in refusing to hear pertinent and material evidence or other prejudicial misbehavior, or where arbitrator exceeded or imperfectly executed power. (NJSA 2A:24-8). Award must be modified or corrected in case of evident miscalculation of figures or evident mistake in description, where arbitrator awarded on matter not submitted unless affecting merits of matter submitted, and where imperfect in matter of form not affecting merits. (NJSA 2A:24-9). There is no provision for enforcement of award made pursuant to agreement to submit existing labor dispute to arbitration. (NJSA 34:13-1; NJSA 34:13A-7).

Judgment or Award.

Judgment confirming, modifying or correcting an award, or other judgment in any action under c. 24, has same effect as, and is subject to all provisions of law relating to, judgment in any other action and may be so enforced. (NJSA 2A:24-10).

10 DOCUMENTS AND RECORDS

10.01 ACKNOWLEDGMENTS:

Person acknowledging or proving instrument (including subscribing witnesses), may do so before any of following: attorney-at-law; notary public; county clerk or deputy county clerk; register of deeds and mortgages or deputy register; surrogate or deputy surrogate; any officer of U.S.; of state, territory or district of U.S., or of foreign nation authorized at time and place to take acknowledgments or proofs; foreign commissioner of deeds for New Jersey within jurisdiction of omission; foreign service or consular officer or other representative of U.S. to foreign nation, within that nation’s territory. (NJSA 46:14-6.1).

Certificate as to authority of notary may be obtained from county clerk of county where notary resides or where he has filed signature and certificate. (NJSA 52:7-16). Certificate of attorney-at-law may be obtained from clerk of Supreme Court (NJSA 2A:13-9) or, if registered, from county clerk (NJSA 2A:13-10). Fee for certificate of county clerk is $5. (NJSA 22A:2-29).

Officers of U.S. Armed Forces may take oath, affidavit, acknowledgment or proof of person in military service, merchant marine or who is outside U.S. by authority of U.S.

government during war or in time of emergency. Officer must certify rank and official designation and that such person is in military service or is outside U.S. by authority of U.S. government. (NJSA 38:23A-1).

General Requirements as to Taking.

Officer authorized to take acknowledgments must be satisfied that person acknowledging is person named in and who executed instrument; such person should be known to, or introduced by "someone" known and trusted by, officer. (NJSA 46:14-2.1; 81 N.J. Eq. 8, 85 A. 336).

General Requirements of Certificate.

Seal of officer taking acknowledgment or proof is unnecessary except where herein expressly stated otherwise. (NJSA 46:14-2.1). Statement of expiration of commission is not required by statute.

Corporations.

Execution of instrument may be acknowledged by corporate officer before any officer authorized to take acknowledgments such as notary public or attorney- at-law. (NJSA 46:14-2.1; 148 N.J. Super. 159, 372 A.2d 356).

Effect of Acknowledgment.

With minor exceptions, instruments must be acknowledged or proved to be recorded. (NJSA 46:15-1.1). Instruments acknowledged or proved are receivable in evidence without formal proof of authenticity of signatures (NJSA 2A:82-17), and are prima facie evidence of truth of contents (39 N.J. Super. 183, 120 A.2d 638).

Proof of Instruments Not Acknowledged or Proved.

If deed or other instrument cannot be acknowledged or proved for any reason, instrument may be proved in Superior Court by proof of handwriting or otherwise. (NJSA 46:14-4.1).

Fees.

For taking acknowledgment or proof, $2.50; for taking acknowledgement of grantor in transfer of real estate, $15; for taking acknowledgement of mortgagor, $25 (NJSA 22A:4-14); for certificate of authority of officer, $5 (NJSA 22A:2-29).

Deeds.

No deed transferring title to real property may be recorded unless (a) if transfer is subject to additional fee as provided in NJSA 46:15-7, statement of true consideration for transfer must be contained in deed, acknowledgment, proof of execution or appended affidavit; or (b) if transfer is exempt from additional fee, affidavit stating basis for exemption must be appended to deed. (NJSA 46:15-6). No deed shall be recorded with county recording office for property that age restriction applies to, unless certification required pursuant to P.L. 2008, C. 71 accompanies such filing and is recorded with deed as addendum thereto. (NJSA 46:15-6.2).

Forms.

Following form of acknowledgment may be used where taken either in N.J. or within territorial limits of U.S. If taken before Chief Justice or Associate Justice of Supreme Court of U.S., or attorney-at-law of N.J., no certificate of authority need be affixed:

Form

State of . . . . . ., County of . . . . . ., ss.

Be it remembered, that on this . . . . . . day of . . . . . ., (year) . . . ., before me, the subscriber, a (insert title), personally appeared John Doe and Mary R. Doe, his wife, who, I am satisfied are the grantors named in and who executed the within instrument and they did severally acknowledge that they signed, sealed and delivered the same as their act and deed for the uses and purposes therein expressed. (See subhead Deeds, supra). . . . . (Signature of officer) (It is advisable to give officer's official designation under signature and affix seal if officer has seal).

Form that may be used where taken before a notary public of any state of U.S. and if completed as indicated, no certificate of authority of notary need be affixed:

State of . . . . . ., County of . . . . . ., ss.

Be It Remembered, that on this . . . . . . day of . . . . . ., (year) . . . ., in the County and State aforesaid, before me, the subscriber, a Notary Public authorized to take acknowledgments and proofs in said County and State, personally appeared . . . ., who, I am satisfied is the grantor named in and who executed the foregoing instrument and he did acknowledge that he signed, sealed and delivered the same as his act and deed for the uses and purposes therein expressed. (See subhead Deeds, supra). (Signature of Notary with his official designation annexed to his signature and attested under his official seal).

Proof by subscribing witness may be in following form:

State of . . . . . ., County of . . . . . ., ss.

Be it remembered that on this . . . . . . day of . . . . . ., (year) . . . ., before me, the subscriber (here insert title of officer) authorized to take acknowledgments and proofs in said county and state, personally appeared John Doe, of full age, and to me well known, and who, being by me duly sworn according to law, on his oath, doth depose and make proof to my satisfaction that he saw Richard Roe, the grantor named in the within indenture, to him personally known, sign, seal and deliver the said indenture as his voluntary act and deed for the uses and purposes therein expressed; and that he, the said John Doe, subscribed his name to the same at the same time, as a subscribing witness. (See subhead Deeds, supra).

(Signature of subscribing witness).

Subscribed and sworn to before me at . . . . . . the day and year aforesaid.

(Signature of officer and official seal if he has one). A (official designation) of . . . . . . (name of State).

Deed of a corporation may be proved by a subscribing or attesting witness as follows:

STATE OF _________, COUNTY OF _________, SS.:

I CERTIFY that on ________, 20_, _________ ______________ personally came before me and this person acknowledged under oath, to my satisfaction, that:

(a) this person is the __________ secretary of __________ the corporation named in the attached Deed;

(b) this person is the attesting witness to the signing of the Deed by the proper corporate officer who is __________ the __________ President of the corporation;

(c) this Deed was signed and delivered by the corporation as its voluntary act duly authorized by a proper resolution of its Board of Directors;

(d) this person knows the proper seal of the corporation which was affixed to this Deed;

(e) this person signed this proof to attest to the truth of these facts; and

(f) the full and actual consideration paid or to be paid for the transfer of title is $__________ (such consideration is defined in N.J.S.A. 46:15–5).

____

(Print name of attesting

witness below signature)

Signed and sworn to before me on

this day of , (year) ,

Prepared by:___________________________

(Print name below signature)

Corporate acknowledgement

STATE OF _________, COUNTY OF _________, SS.:

I CERTIFY that on ________, (year) ___, __________ _____________ personally came before me and this person acknowledged under oath, to my satisfaction, that:

(a) this person signed, sealed and delivered the attached document as __________ of the corporation named in this document;

(b) the proper corporate seal was affixed; and

(c) this document was signed and made by the corporation as its voluntary act and deed by virtue of authority from its Board of Directors.

____

(name and title)

Prepared by:___________________________

(Print name below signature)

Alternative to Acknowledgment or Proof.

No statutory provision.

Validating Acts.

See category 21 Property, topic 21.06 Deeds, subhead Execution.

10.02 AFFIDAVITS:

Affidavits must run in first person and be divided into numbered paragraphs. (Rule 1:4-4[a]).

Person alleging he is conscientiously scrupulous of taking oath, may make solemn affirmation or declaration instead. (See statutory form in NJSA 41:1-6.) Certification in lieu of oath or affidavit is permitted. (Rule 1:4-4[b]).

Facsimile instead of original signature of affiant is permitted with certification of attorney. (Rule 1:4-4[c]; 239 N.J. Super. 268).

Within State.

Any oath, affirmation or affidavit, for any lawful purpose whatever, may be taken by following officers of State of New Jersey: Chief justice of state supreme court or justice or judge of court of record; master of Superior Court; municipal judges; mayor or alderman of cities, towns or boroughs; commissioner of commission-governed municipality; surrogate, register of deeds and mortgages, county clerk and their deputies; municipal clerks and clerks of boards of chosen freeholders; sheriffs of any county; members of boards of chosen freeholders; clerks of all courts; notary public; commissioner of deeds; attorney-at-law of State of New Jersey; members of state legislature. (NJSA 41:2-1). Seal of officer not necessary. (NJSA 41:1-7). Fee, $2.50. (NJSA 22A:4-14).

Outside State.

Any oath, affirmation or affidavit required or authorized to be taken for any lawful purpose (except official oaths and depositions required to be taken upon notice) may be taken before notary public of state, territory, nation, kingdom, or country in which same shall be taken, or before any officer authorized by New Jersey law to take acknowledgments of deeds in such state, territory, nation, kingdom or country. See topic 10.01 Acknowledgments. Official seal of officer administering oath is advisable. (NJSA 41:2-17; but see 77 N.J. Eq. 17, 76 A. 555).

Person in military service or spouse of such person or person in merchant marine or outside U.S. by authority of U.S. government during war or present national emergency may make affidavit before any commissioned officer of U.S. Army, Navy, Air Force or Marine Corps, who must recite in jurat rank and official designation and that such person is in military service or is person outside the limits of U.S. by authority of U.S. government. (NJSA 38:23A-1).

Authentication.

If affidavit is taken out of state by notary public who signs jurat and adds official signature and seal to form below, no other proof of authority is necessary; when other officer takes affidavit, acknowledgment must be annexed to officer's signature. See topic 10.01 Acknowledgments. (NJSA 41:2-17).

Form

STATE OF . . . .

COUNTY OF . . . . } ss:

. . . . . ., of full age and duly sworn according to law, upon oath deposes and says:

1. . . . . (insert facts).

(Signature of deponent).

Subscribed and sworn to before me, a notary public in and for the County of . . . . in the State of . . . . at . . . ., this . . . . day of . . . ., 20. . . . .

(Signature of Notary)

Notary Public in and for the County of . . . . . . and State of . . . . . .

Alternative to Affidavit.

No statutory provision. However, Rule 1:4-4[b] provides for certification in lieu of oath in connection with affidavits to be filed in any court proceeding as follows: “Certification in Lieu of Oath. In lieu of the affidavit, oath or verification required by these rules, the affiant may submit the following certification which shall be dated and immediately precede affiant’s signature: ‘I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are wilfully false, I am subject to punishment.’”

10.03 NOTARIES PUBLIC:

Eligibility.

Appointee must be 18 or over. (NJSA 52:7-12). Any notary public whose name changes from name used at time of commission must, before signing document as notary public, file statement, setting out circumstances of name change with Secretary of State and county clerk where notary is qualified or has filed certificate of commission. Such statement, or certified copy thereof, is evidence of right of notary public to continue to exercise powers and perform duties of notary public in his changed name. (NJSA 52:7-18).

Nonresident may be appointed, provided he resides in adjoining state and maintains office or is regularly employed in office in New Jersey. (NJSA 52:7-13).

Seal of notary is not necessary for oath, affirmation or affidavit. (NJSA 41:1-7).

Expiration of Commission.

Commission expires five years from date of appointment. (NJSA 52:7-11). Stamp stating date of expiration not necessary on any proof, acknowledgment or jurat signed by notary public.

Powers and Territorial Extent.

Notaries have authority to take acknowledgments (NJSA 46:14-6.1), take affidavits and to administer oaths within New Jersey (NJSA 41:2-1). Their authority is statewide. (NJSA 52:7-15).

Certificate of Authority.

County clerk of county of residence of notary, or of any county wherein certificate of qualification has been filed, may issue certificate of notary’s authority. (NJSA 52:7-16). Fee is $5. (NJSA 22A:2-29).

Fees.

For administering oath, taking affidavit, acknowledgment or proof of deed, $2.50; for oath, affidavit, proof and acknowledgement of grantors in transfer of real estate, $15; for oath, affidavit and acknowledgement of mortgagors, $25. (NJSA 22A:4-14).

10.04 RECORDS:

Instruments affecting title to real or personal property, when duly acknowledged or proved, may be recorded in register's office of county wherein property is situated and if there is no register in that county, then in county clerk's office of that county. Following counties have Register's Office: Camden, Essex, Hudson, Passaic and Union. Mechanics' liens and building contracts are filed in county clerk's office of county where land is situate. (Tit. 46, cc. 15-18). *For list of Counties and County Seats see first page for this state in Volume containing Practice Profiles Section.*

Requisites for Recording.

Generally, instruments to be recorded, acknowledgements, proofs, affidavits, and certificates must be written in English. Instruments affecting title or interest in real estate must be written in English or accompanied by translation into English, must be acknowledged, and must bear typewritten names under all signatures, including officer taking acknowledgement. (NJSA 46:15-1.1[1]-[4]). Deeds must include names and signature of preparer on first page and lot and block number or account number of subject property and must either contain statement of consideration paid for transfer in deed, acknowledgement, proof or appended affidavit or attach affidavit stating basis for exemption from applicable recording fees. Deeds for property upon which there is new construction must bear legend "NEW CONSTRUCTION" at top of first page of deed and grantor affidavit must be attached. (NJSA 46:15-6). No instrument required to be executed under seal to be recorded. (NJSA 46:15-1.1[b]). See also categories 5 Civil Actions and Procedure, topic Judgments; Estates and Trusts, topic Wills; Mortgages, topics Chattel Mortgages, Mortgages of Real Property; Property, topic Landlord and Tenant.

Certain non-testamentary trust instruments may be recorded although not acknowledged where fiduciary has or shall acquire interest in real property. (NJSA 46:16-5.1).

See also category 21 Property, topic 21.06 Deeds, subhead Execution.

Fee for recording any instrument is $30 for first page and $10 for each additional page; additional fee of $10 charged for preparing and transmitting to tax assessor abstract of any instrument evidencing title to realty. (NJSA 22A:4-4.1). Note: Some county clerks or registers also charge small fee for receipt and mailing. See category 21 Property, topic 21.06 Deeds, subhead Taxes for realty transfer fee imposed on grantor and collected upon recording.

Effect of Record.

Record of instruments permitted to be recorded by NJSA 46:16-1 is notice to subsequent judgment creditors, purchasers and mortgagees of execution of instrument and contents thereof. (NJSA 46:21-1). Such instruments, although not recorded, are valid except as against subsequent judgment creditors without notice, and subsequent bona fide purchasers and mortgagees for value, without notice, whose deed or mortgage is first recorded. (NJSA 46:22-1).

Torrens System of registering titles to real estate does not exist.

Transfer of Decedent's Title.

Probate records are sufficient to indicate passage to the devisees or heirs at law of decedent of title to decedent's real estate.

Vital Statistics.

Certificates of deaths, births and marriages are filed with local Registrar of Vital Statistics. (NJSA 26:6-6; c. 8, §§ 28, 41). Originals thereof are forwarded by Registrar to State Bureau of Vital Statistics in Trenton. (NJSA 26:8-25(g), 43). Certified copies (NJSA 26:8-62), obtainable from State Registrar of Vital Statistics, New Jersey Dept. of Health and Senior Services, P.O. Box 370, Trenton, N.J. 08625 (http://www.state.nj.us/health/vital/vital.shtml) for $25 plus fee of $1 for each additional year searched. (NJSA 26:8-64). Records of births, marriages and deaths from May 1848 through May 1878 may be obtained from Division of Archives and Records Management-Archives Section, P.O. Box 307, Trenton, N.J. 08625. Certified copies are prima facie evidence of facts therein stated. (NJSA 2A:82-20).

Presumption of Death.

Death of resident or nonresident presumed after five years absence or exposure to specific catastrophic event. Governor shall have power to certify event catastrophic. Section should not be construed to limit or abrogate common law special peril doctrine. (NJSA 3B:27-1). Action to declare person dead to be brought in Superior Court. (NJSA 3B:27-6).

Establishing Birth Records.

Where certificate of birth is not on file, one may be recorded by filing with State registrar certificate of attending physician, midwife or parent, or, if none available, certificate (with documentary proof) of person having knowledge of facts, or similar certificate of person whose birth is being recorded, with annexed affidavit executed before certain officials. (NJSA 26:8-38). Under presumption that person found in New Jersey as child of unknown parentage was born in New Jersey (NJSA 26:8-40.2), petition may be addressed to county court and, in certain cases upon notice to U.S. District Attorney for New Jersey to determine date and place of birth of applicant (NJSA 26:8-40.4). Copy of order of such court filed with State Registrar is evidence of birth as of said time and place. (NJSA 26:8-40.6).

Federal Census.

Notwithstanding contrary law, Federal census of 2000 is effective Jan. 1, 2002. Act does not determine effective date of census for purposes of reapportionment or redistricting following promulgation of 2000 Federal census, or for purpose of distributing of financial aid by State to any political subdivisions. (NJSA 52:4-5).

Corporate Records.

See category 2 Business Organizations, topic 2.03 Corporations, subhead Incorporation, License and Filing Fees.

Filing Under Commercial Code; Place; Fees.

Law governing perfection of security interests in both tangible and intangible collateral, whether perfected by filing or automatically, is law of location of debtor as determined by Title 9A, c. 9, § 307. For debtors that are registered organizations, such as corporations, limited liability companies and limited partnerships, debtor’s location will be state where organized. (NJSA 9A:9-307[e]).

Proper place of filing in order to perfect security interests under c. 9 of Uniform Commercial Code (Tit. 12A) is Division of Commercial Recording. However, where collateral is extracted (such as oil, gas and other minerals) or timber to be cut or where financing statement is filed as fixture filing and collateral is goods that are or are to become fixtures, proper place of filing is office designated for filing or recording of mortgage on related real property. (NJSA 12A:9-501).

Rules stated in NJSA 12A:9-502, 516 set forth requirements for financing statements.

Filing office must make available following information to anyone who requests it: (1) Whether there is on file on date and time specified by filing office, but not earlier than three business days before filing office receives request, any financing statement that: (A) Designates particular debtor or, if request so states, designates particular debtor at address specified in request; (B) has not lapsed under NJSA 12A:9-515 with respect to all secured parties of record; and (C) if request so states, has lapsed under NJSA 12A:9-515 and record of which is maintained by filing office under NJSA 12A:9-522(a); (2) date and time of filing of each financing statement; and (3) information provided in each financing statement. (NJSA 12A:9-523[c]).

Fees are as follows: filing original or continuation financing statement or any amendment of either, $25; filing termination statement, release or statement of assignment, $25; $1 per page for copy of any filed financing statement. (NJSA 12A:9-525[a]).

Fee for responding to request for information from filing office, including issuing certificate of search showing whether there is on file any financing statement naming particular debtor, $25. (NJSA 12A:9-525). Fee for informational status report (online only), $5.

Address for UCC filings via regular mail is: Division of Revenue, UCC Unit, PO Box 303, Trenton, NJ 08646 and for overnight delivery is: NJ Division of Revenue, UCC Unit, 255 West State Street, 3rd Floor, Trenton, NJ 08608. See also http://www.state.nj.us/treasury/revenue/fileucc.htm.

10.05 SEALS:

Tit. 46, c. 13 (Seals) was repealed in 1991. To extent parties wish to avail themselves of any benefits of sealing, refer to Tit. 1, c. 1. § 2.1, providing that instruments are deemed properly sealed when seal of individual or corporation has been printed, impressed or otherwise marked on document or when instrument is impressed with official seal of public officer, board, body or commission. Instrument lacking seal or recital thereof but otherwise valid shall be valid after being recorded for five years. (Tit. Val. c. 4, §§ 22.19, 22.20). See topic 10.04 Records.

Effect of Seal.

In action upon or set-off founded upon sealed instrument, seal is presumptive but rebuttable evidence of consideration, and fraud in, or want or failure of, consideration may be set up. (NJSA 2A:82-3). But where both parties intended that no consideration should be paid, instrument's validity is not affected by this statute. (40 N. J. L. 446).

Uniform Commercial Code.

Law of sealed instruments does not apply to written contracts or offers to buy or sell goods to which seal is affixed. (NJSA 12A:2-203).

10.06 TORRENS ACT:

Not adopted.

10.07 VITAL STATISTICS:

See topic 10.04 Records.

11 EMPLOYMENT

11.01 EMPLOYER AND EMPLOYEE:

See topic 11.02 Labor Relations.

11.02 LABOR RELATIONS:

Department of Labor supervises enforcement of laws concerning labor. It consists of Commissioner of Labor, and various divisions and bureaus. (NJSA 34:1-2; NJSA 34:1A-1 et

seq.).

Worker Health and Safety Act (NJSA 34:6A-1 – 34:6A-24) generally requires safe and healthful place of employment, and provides procedures for inspection, registration and enforcement. Public Employees Occupational Safety & Health Act (NJSA 34:6A-25 – 34:6A-50) generally requires public employers to provide health and safety standards which comply with Federal OSHA Standards. Worker and Community Right to Know Act establishes program for disclosure of hazardous substances in workplace and community. (NJSA 34:5A-1 – 34:5A-44).

Hours of Labor.

No statutory provision, except for street and elevated railroad employees, where 12 hour maximum day is prescribed. (NJSA 34:10-3).

Children.

Employment of children under 18 is limited to eight-hour day and 40-hour six-day week (with certain exceptions), and is further regulated according to age and occupation. (NJSA 34:2-21.1 et seq.).

Wages.

Statutes regulate the payment of wages. (NJSA 34:11-2 et seq.).

Minimum Wages and Overtime.

Minimum wage: $5.05 per hour as of Apr. 1, 1992, $6.15 per hour as of Oct. 1, 2005, and $7.15 per hour as of Oct. 1, 2006. (NJSA 34:11-56a 4). Minimum wage does not apply to part-time employees primarily engaged in care and tending of children, persons under 18, motor vehicle salesmen or outside salesmen. Employer must pay time and one half regular hourly wage for hours in excess of 40 hours in any week, except for bona fide executive, administrative or professional employees, farm laborers, hotel or bus company employees, drivers employed by limousine companies or employees engaged in labor relative to raising or care of livestock. Commissioner of Labor may appoint Wage Board to recommend minimum wages and overtime hours in any particular occupation, and Commissioner may make order establishing minimum wage in such occupation. (NJSA 34:11-56a et seq.).

Time and Manner of Payment.

Every employer employing any person in N. J. must pay employees (except bona fide executive, supervisory, and other special classifications of employees) at least twice a month on regular paydays designated in advance. Bona fide executive, supervisory, and other special classifications of employees may be paid, at minimum, once each calendar month on regularly established schedule. Every railroad, express, car-loading and car-forwarding company shall pay its employees once a week wages earned for seven-day period not more than 14 days prior to such payment. (NJSA 34:11-2, 34:11-4.2). If regular payday falls on nonwork day, payment shall be made on next following workday except where collective bargaining agreement otherwise provides. End of pay period for which payment is made shall not be more than ten working days before regular payday, but if regular payday falls on nonwork day when workplace not open for business, payment made on preceding workday. Payment must be made in cash or with checks on banks where suitable arrangements are made for cashing checks without difficulty and for full amount thereof. (NJSA 34:11-4.2). Employer, with consent of some or all of its employees, may deposit wages directly in employees' bank accounts. Employee may, on timely notice to employer, elect to cease having deposits made in this manner and to be paid through any other lawful method. (NJSA 34:11-4.2a). On termination of employment or suspension of work employer must pay all wages due, not later than regular payday for pay period during which termination or suspension took place. Employer may approximate wages due if employee was paid by incentive system, until exact sum due can be computed. If employee is suspended due to labor dispute involving employees in payroll area, employer has additional ten days to pay wages due. (NJSA 34:11-4.3). Wages due deceased employee may on demand be paid (in absence of actual notice of probate proceedings) without requiring letters testamentary or of administration to surviving spouse and others in designated order of preference. (NJSA 34:11-4.5).

Withholding or Diverting Wages.

Employer may not withhold or divert any wages except under circumstances established by statute, including employee benefit or retirement plans, company-operated thrift plans, employee personal savings accounts, union dues and charges, charities, and political committees and insurance or annuity programs. (NJSA 34:11-4.4).

Public Works Contracts.

Contract with N. J. or its political subdivisions exceeding "prevailing wage contract threshold amount" which calls for work to be paid for in whole or in part out of public body funds or for certain work performed on property leased by public body must provide that all laborers and mechanics employed shall be paid at least prevailing rate of wages for similar work in locality. Commissioner of Labor decides prevailing rate. Contract with public entity must provide entity with right to terminate contractor's or subcontractor's work if prevailing wages were not paid; contractor and its sureties will then pay any excess costs. Threshold amount for municipality contracts is $9,850 in work done during calendar year as of July 1, 1994 and is adjusted every five years; threshold amount for all other public work is $2,000. Violation of prevailing wage law constitutes disorderly persons offense. (NJSA 34:11-56.25 – 34:11-56.57).

Lien for Wages.

Personal property of manufacturer, distiller, brewer or producer of manufactured articles is subject, in hands of receiver, to lien in favor of employee who has bestowed labor or services upon such personal property for which wages are then due and owing. Lien is prior to any other claim. (NJSA 34:11-33).

Wage Disputes.

Employer must pay without condition and within time prescribed all wages conceded to be due. Employee's acceptance of these wages cannot serve as release for other disputed wages. (NJSA 34:11-4.8). Commissioner of Labor may investigate and determine wage disputes where amount does not exceed $30,000. Either party may appeal judgment of wage collection division to superior court within 20 days of decision; appellant must post bond unless judgment was partially in its favor or other statutory circumstance applies. (NJSA 34:11-58, 34:11-63).

Wage Assignments.

See category 8 Debtor and Creditor, topic 8.01 Assignments.

Child Labor.

Employment of children under 16 is prohibited, except that in certain instances they may work outside of school hours or during school vacations in specified callings. No minor under 18 may work longer than six days per week, more than 40 hours per week, more than eight hours per day, before 7:00 a.m. or after 7:00 p.m.; certain exceptions apply. (NJSA 34:2-21.2, 34:2-21.3).

Children under 18 (except those between 16 and 18 employed in agricultural pursuits and those between 14 and 18 employed at agricultural fair, horse, dog, or farm show when school is not in session) must procure employment certificate from local school official; before commencement of employment, employer must be supplied with such certificate which he retains for duration of employment. Employer must maintain records and post data in form approved by

Department of Labor. Employment of children under 18 is prohibited in designated occupations and in occupations or places of employment found by Commissioner, after hearing, to be hazardous or injurious to life, health, safety or welfare of such children. (NJSA 34:2-21.3; NJSA 34:2-21.5 – 34:2-21.10; NJSA 34:2-21.14 – 34:2-21.17).

Farm Labor.

Crew leaders must register with Department of Labor, inform farm workers of conditions of employment and maintain certain workplace records. Crew leaders must pay seasonal farm workers any wages due immediately upon end of period for which laborers were hired. (NJSA 34:8A-7 et seq.).

Family Leave Act (NJSA 34:11B-1 et seq.) provides that employees who have been employed for at least 12 months for not less than 1,000 hours are entitled to unpaid leave from their job for up to 12 weeks in any 24 month period due to: (1) birth of child of employee; (2) adoption of child; (3) serious health condition of family member. Additionally, beginning July 1, 2009, Act will provide six weeks of paid leave, concurrent with unpaid leave under FLA, giving employees two-thirds of their wages, up to $524 per week. Employee is entitled to be reinstated to position held before leave began, absent layoff, with same seniority and other benefits as previously enjoyed. Health insurance coverage continues during leave under same conditions as if working. Certain highly paid employees are exempted from Act’s coverage. Penalties for violation of law are $2,000 for first offense and $5,000 for subsequent offenses. Civil action may be brought by aggrieved party, with attorney’s fees and up to $10,000 punitive damages potentially awardable to individual plaintiff and up to $500,000 or 1% of net worth of defendant in punitive damages in case of class action.

Labor Unions.

Constitution and statutes protect employee’s right to join and belong to labor unions, and to organize and bargain collectively. (NJ Const., Art. 1, par. 19, NJSA 34:12-1, 34:12-5; NJSA 34:13A-1 et seq.). No “right-to-work” law. Labor organizations cannot expel or exclude from membership individuals based on race, creed, color, national origin, ancestry, age, marital status, domestic partnership status, affectional or sexual orientation, disability, sex, or because of liability for service in Armed Forces of United States. (NJSA 10:5-12[b]).

Labor Disputes.

State Board of Mediation has been established in Department of Labor to facilitate voluntary mediation and arbitration of labor disputes. (NJSA 34:13A-1 – 34:13A-13; NJSA 34:1A-23). Division of Public Employment Relations Commission and Division of Private Employment Dispute Settlement established for resolution of public and private employment disputes. (NJSA 34:13A-5.2, 34:13A-6). It is misdemeanor for any person or corporation to import strikebreakers, transport them within state, or supply them from without state. (NJSA 34:13C-1 et seq.).

Granting of injunctions in labor disputes is restricted; such injunctions may issue only on sworn oral testimony; temporary restraining order, if granted, void after five days. Jury trial for contempt is provided. (NJSA 2A:15-51 – NJSA 2A:15-58).

Public Utilities Disputes Act (NJSA 34:13B-1 et seq.) restricts the right to strike and provides for compulsory arbitration of labor disputes in public utilities. But cf. 340 U. S. 383, 71 S. Ct. 359, 95 L. Ed. 364.

Governor has power to seize public utility when strike, etc., will, in his or her opinion, impair operation and threaten public interest, health and welfare (NJSA 34:13B-13); and in case of such seizure, compulsory arbitration of disputes is provided. If public utility engages in or authorizes strike, lockout or work stoppage in violation of Act, penalty is $10,000 per day for duration of such conduct. (NJSA 34:13B-18 – 34:13B-21; NJSA 34:13B-23 – 34:13B-27).

Court may enjoin violation of Public Utilities Labor Disputes Act according to rules of practice governing action brought in name of State. (NJSA 34:13B-26).

Law Against Discrimination prohibits discrimination in employment because of race, creed, color, national origin or ancestry, age, liability for military service, marital status, affectional or sexual orientation, sex, disability, atypical hereditary cellular or blood trait, civil union status, domestic partnership status, gender identity or expression, nationality, genetic information or refusal to submit to genetic tests or to make results of genetic tests available to employer, because of liability for service in Armed Forces of United States, or because employer required employee to violate or forgo sincerely held religious practice or religious observance. (NJSA 10:5-12, 10:5-29.1). Discrimination in rate or payment of wages, because of sex, unlawful. Differential in pay between employees based on reasonable factor or factors other than sex does not constitute discrimination. (NJSA 34:11-56.2). Compulsory retirement upon attainment of particular age (except certain executive or policy-making employees) generally prohibited. (NJSA 10:3-1; NJSA 10:5-12). Discharge or discrimination in compensation, terms, conditions, or privileges of employment for displaying American flag on person or work station unlawful. (NJSA 10:5-12.6). Complainant may file with State Division on Civil Rights or proceed directly to Superior Court; all remedies available in common law tort actions are similarly available under Law Against Discrimination. Violators also subject to statutory penalty of up to $10,000 if not adjudged to have committed prior violation with preceding five years; up to $25,000 if adjudged to have committed one violation within preceding five years; up to $50,000 if adjudged to have committed two or more violations with preceding seven years. (NJSA 10:5-13, 10:5-14.1a). Independent contractors not within Act’s protections. (312 N.J. Super. 171, 711 A.2d 398; 383 N.J. Super. 270, 891 A.2d 673).

Employees may agree to arbitrate statutory discrimination claims if waiver of right to sue is clear and unequivocal and specifically apprises employee that right to judicial or administrative forum for statutory employment claims has been waived. (168 N.J. 124, 773 A.2d 665).

Conscientious Employee Protection Act prohibits employer from discharging, suspending or demoting public or private employee who discloses, or threatens to disclose, to supervisor or to public body activity, policy or practice of employer, co-employee, or another employer with whom there is business relationship that employee objectively reasonably believes violated law or rule or regulation promulgated pursuant to law; provides information to, or testifies before, any public body conducting investigation or hearing into any violation by employer or another employer with whom there is business relationship of law or rule or regulation thereof; or objects to, or refuses to participate in, any activity, policy or practice which employee reasonably believes is in violation of law or rule or regulation thereof, is fraudulent or criminal, or is incompatible with clear mandate of public policy concerning public health, safety or welfare or protection of environment. Act also extends to employees of health care professionals for reporting improper quality of patient care. (NJSA 34:19-3; 153 N.J. 163, 707 A.2d 1000). Act covers employer communications to employees regarding religious and political matters. (NJSA 34:19-9 – 34:19-14). Civil actions brought regarding violations of religious and political matters sections must be brought within 90 days of date of alleged violation. (NJSA 34:19-13).

Employee who discloses to public body activity, policy or practice of employer that is in violation of law or rule or regulation thereof, must first bring it to attention of supervisor by written notice and afford employer reasonable opportunity to correct activity, policy or practice; otherwise he will not be protected by Act from retaliatory action. Employee not required to inform employer if he is reasonably certain that activity, policy or practice is known to one or more supervisors or if he reasonably fears physical harm as result of disclosure, provided situation is emergency in nature. (NJSA 34:19-4). Employee may bring civil suit, within one year of violation of Act, for relief which may include injunction, reinstatement, lost wages and benefits, reasonable costs and attorneys' fees, punitive damages, or civil fine of not more than $10,000 for first offense and not more than $20,000 for each subsequent offense payable to State Treasurer for deposit in General Fund. Upon application by any party, jury trial will be directed. Court may order reasonable attorneys' fees and court costs to employer if employee brings action which has no basis in law or in fact. (NJSA 34:19-5, 34:19-6). Public entities not exempt under Tort Claims Act from awards for punitive damages under Conscientious Employee Protection Act. Statutes of limitations for claims run one year from last retaliatory act in instances of ongoing retaliation. (177 N.J. 434, 828 A.2d 883).

Employer must conspicuously display notices of its employees' protections and obligations under Act, including name of person or persons designated to receive written notice required prior to disclosure to public body. Employer may also have obligation to use other appropriate means to apprise employees of such information. (NJSA 34:19-7).

Millville Dallas Airmotive Plant Job Loss Notification Act governs procedures for plant closures and mass layoffs. Act requires employers with 100 or more employees to give at least 60 days advance notice of transfer or termination of operations, or mass layoff. Employer must provide notice to all employees facing termination and to certain government and union officials. (NJSA 34:21-1 et seq.).

Industrial home work is licensed and regulated by Commissioner of Labor; manufacture and distribution of certain articles are prohibited; such work is permitted only to employers maintaining factory in state; penalties for violations are prescribed. (NJSA 34:6-120 — 34:6-136.23).

Birth Certificates of Employees.

Employer who requires employees to furnish birth certificates for purposes of hiring, retention of employee or evaluating, promoting or advancing employment must, in case of veteran, accept honorable discharge from armed forces of the United States in lieu of such certificate. (NJSA 26:8-40.8).

Workers' Compensation Act.

Tit. 34, c. 15, as supplemented and amended. Major revisions effective Jan. 1, 1980 and Mar. 10, 1980.

Scope of Act.

This Act applies to all employments except casual employments (NJSA 34:15-36) and includes state, county and municipal employees, volunteer firemen and volunteer first-aid workers (NJSA 34:15-43, 34:15-74). Special benefits are provided for veterans in "on-the-job training." (NJSA 34:15-12.1 – 34:15-12.6).

Injuries Covered.

Injury must arise out of or in course of employment. Act compensates for (1) injuries that more likely than not would have occurred in workplace and (2) injuries due to uncontrollable circumstances not originating in but arising in course of employment. No award for injuries considered personal or idiopathic. (298 N.J. Super 580, 689 A.2d 1365).

Election of Remedies.

If, prior to any accident, contract of employment expressly so states or either employer or employee serves on other party written notice to that effect, Art. 1 of Act applies; otherwise parties are bound by Art. 2. (NJSA 34:15-9).

Art. 1 gives employee right to compensation by action at law, when injury or death is caused by accident arising out of and in course of employment, of which employer's actual or lawfully imputed negligence was natural and proximate cause, unless employee was willfully negligent. In such action, defenses of negligence of fellow employee and of assumption of risk, have been abolished. (NJSA 34:15-1, 34:15-2, 34:15-4).

Art. 2 presumes parties to have agreed to statutory remedy and gives employee right to compensation, when injury or death is caused by accident arising out of and in course of employment, without regard to employer's negligence, according to schedule contained in Act, except when injury is intentionally self-inflicted or when intoxication, unlawful use of controlled dangerous substance or willful failure to reasonably use required personal protective devices is natural and proximate cause of injury or if injury resulted from horseplay or skylarking instigated or participated in by injured employee; Art. 2 provides that agreement to be bound by that section constitutes surrender by parties of rights to any other method, form or amount of compensation or determination thereof. Remedy is exclusive except for intentional acts of employer. Injuries arising out of certain recreational, commutation and social activities excluded unless such activities are "regular incident of employment" and bestow benefit to employer beyond improving employee health and morale. (NJSA 34:15-7, 34:15-7.1, 34:15-8). Minors retain option to sue at common law for injuries arising out of employer's negligence. (NJSA 34:15-10). Cf. 113 N. J. 611, 552 A.2d 150 (1989) and 172 N.J. Super. 10, 410 A.2d 696, concerning minor's election of remedies.

Notice and Time of Claim.

Procedure as to giving employer notice of injury, obtaining Division of Workers' Compensation approval of settlement agreements, hearings by Division on disputed claims, etc. is set forth in Act. (NJSA 34:15-17, 34:15-18, 34:15-20, 34:15-22, 34:15-26, 34:15-49 – 34:15-69).

With certain exceptions, claims for compensation must be made within two years. (NJSA 34:15-27, 34:15-34, 34:15-41, 34:15-41.1, 34:15-51).

Rates of Compensation.

For schedule of compensation for disability, or computation of compensation to dependents in case of death, see NJSA 34:15-12, 34:15-13. Employer must furnish such medical, surgical and other treatment as is necessary to cure and relieve worker of effects of injury and restore function where possible. Furnishing treatment not construed as admission of liability. Employer must pay funeral expenses up to $3,500. (NJSA 34:15-13, 34:15-15).

Second Injury Fund benefits available when total permanent disability attributable, in part, to nonwork-related causes. (NJSA 34:15-95).

Benefits awarded to dependents of deceased workers and to total permanent disability and Second Injury Fund recipients prior to 1980 are adjusted to 1980 rates, subject to certain Social Security offsets. (NJSA 34:15-95, 34:15-95.4).

Certain minors under 18 without working papers entitled to double temporary and permanent disability, but employer's insurance carrier not liable for additional benefits. Any provision in insurance policy relieving employer of liability for extra compensation or death benefit is void. (NJSA 34:15-10).

Assignment of Claims and Payments.

Compensation rights under Workers' Compensation Law have same preference against employer's assets as claims for unpaid wages for labor. Compensation claims and payments are not assignable and are exempt from claims of creditors. Compensation payments may be set off against disability pension benefits or payments but not against employees' retirement pension benefits. (NJSA 34:15-29).

Insurance of Liability.

Any employer, subject to Art. 2 of Act, except state, municipality, county or school district, must insure employer's liability or satisfy Commissioner of Insurance of employer's financial ability to be self-insurer. (NJSA 34:15-70-95.3). For privilege of carrying on business of workers' compensation insurance, stock and mutual companies must semiannually contribute 1% of net written premiums to fund, administered by Commissioner of Banking and Insurance, to secure payment of workers' compensation claims in case of insolvency of insurance carrier. (NJSA 34:15-103 – 34:15-120). Effective Apr. 16, 1993, each self-insurer must also be member of New Jersey Self-Insurers Guaranty Association and contribute to assure payment to employees in case of insolvent member. (NJSA 34:15-120.15 et seq.). Commencing Jan. 1, 1989, on first day of each succeeding year, each company writing compensation or employers' liability insurance, and each self-insurer, is also required to pay annual surcharge set by statutory formula to Second Injury Fund for completing compensation payments to certain persons totally disabled but having partial permanent disability, work-related or not work-related, preexisting last compensable accident. Aggregate annual surcharge established by Commissioner of Labor based on prescribed percentage of moneys estimated to be payable from Second Injury Fund during next following calendar year. Allocable portion of aggregate annual surcharge so established for which policyholders and self-insured employers are responsible is prescribed. (NJSA 34:15-94, 34:15-95).

Determination of Awards.

Division of Workers' Compensation in Department of Labor has exclusive original jurisdiction of all claims arising under Act. (NJSA 34:15-49; NJSA 34:1A-11).

Determination of Division is final and conclusive, unless reopened by Division (NJSA 34:15-58), subject to appeal to Appellate Division of Superior Court (NJSA 34:15-66). Reversal warranted if findings are inconsistent with evidence and offend interests of justice. (296 N.J. Super. 146, 688 A.2d 368).

Enforcement of Awards.

Judgment of Division is filed with clerk of county where hearing was held and has same effect, and may be collected and docketed in same manner, as judgments of superior court. (NJSA 34:15-58).

Rights Against Third Person.

Where third person is liable to employee or employee's dependents for injury or death, existence of right of compensation from employer or insurance carrier under Act does not bar action of employee or employee's dependents. As to effect of recovery from such third person on lien or liability of employer or insurance carrier under Act, see NJSA 34:15-40.

Occupational Diseases.

Act gives right to compensation for occupational diseases peculiar to trade, occupation, process or place of employment. Deterioration due to aging process not compensable. No compensation available for injury or death caused by willful self-exposure to known hazard or by employee's willful failure to make use of protective device which employer requires and which employee disregards after repeated documented warnings. Claim must be filed within two years after date employee knew nature of disease and relation to employment. (NJSA 34:15-30 – 34:15-35). Noise-induced occupational hearing loss compensable under certain conditions pursuant to statutory formula. (NJSA 34:15-35.10 – 34:15-35.22).

Physicians.

Physicians and surgeons must itemize and certify medical bills on any legal claim for damages or workers' compensation, and may not make contingent fee arrangements in such cases. Medical practitioners also forbidden from charging in excess of standard fees or incremental costs. Violator is disorderly person. (NJSA 45:9-27.5 – 45:9-27.9).

Coverage for Discrimination.

Employer's liability portion of standard workers' compensation policy may cover damages arising out of workplace harassment and discrimination so long as employee's harm is linked to bodily injury. Policy exclusions purporting to bar coverage for discrimination claims found void on grounds of public policy. (155 N.J. 44, 713 A.2d 1014). Similar exclusion in standard comprehensive general liability policy generally deemed valid. (155 N.J. 29, 713 A.2d 1007).

Unemployment Compensation.

For benefit years commencing between Jan. 1, 1996 and Jan. 6, 2001, employees entitled if worked 20 weeks or earned at least 12 times statewide average weekly earnings or 1,000 times minimum wage in effect in year prior to receipt of benefits. For benefit years commencing after Jan. 6, 2001, employees entitled if worked 20 weeks or earned at least 1,000 times minimum wage in effect in year prior to receipt of benefits. For benefit years commencing before Jan. 7, 2001, employees engaged in production and harvesting of agricultural crops entitled if worked 20 weeks, earned at least 12 times statewide average weekly earnings or performed 770 hours of service in base year. For benefit years commencing on or after Jan. 7, 2001, employees engaged in production and harvesting of agricultural crops entitled if worked 20 weeks, earned at least 1,000 times minimum wage in effect in year prior to receipt of benefits or performed 770 hours of service in base year. (NJSA 43:21-1 et seq.). Weekly benefit rate is 60% of employee's average weekly wage, but not more than 562/3% of state-wide average weekly remuneration paid by employers subject to chapter. Total benefits in year limited to 26 times weekly benefit rate. (NJSA 43:21-3).

Extended Unemployment Benefits available in connection with job training and, under certain circumstances, education up to additional 26 weeks. (NJSA 43:21-57-65). State unemployment insurance extended benefit standards conform to federal standards. (NJSA 43:21-24.12, 43:21-24.20).

11.03 WORKERS' COMPENSATION LAW:

See topic 11.02 Labor Relations.

12 ENVIRONMENT

12.01 ENVIRONMENTAL REGULATION:

Pollution control generally governed by following statutes: Air Pollution Control Act (NJSA 26:2C-1 et seq.); Water Pollution Control Act (NJSA 58:10A-1 et seq.); Clean Ocean Act, (NJSA 58:10-23.25 et seq.); coastal wetlands pollution (NJSA 13:9A-1 et seq.); Freshwater Wetlands Protection Act (NJSA 13:9B-1 et seq.); Spill Compensation and Control Act (NJSA 58:10-23.11 et seq.); Soil Erosion and Sediment Control Act (NJSA 4:24-39 et seq.); Natural Areas System Act (NJSA 13:1B-15.12a et seq.); Solid Waste Management Act (NJSA 13:1E-1 et seq.); New Jersey Statewide Mandatory Source Separation and Recycling Act (NJSA 13:1E-99.11-99.32); Toxic Catastrophe Prevention Act (NJSA 13:1K-19 et seq.); Comprehensive Regulated Medical Waste Management Act (NJSA 13:1E-48.1 et seq.); Brownfield and Contaminated Site Remediation Act (NJSA 58:10B-1 et seq.); Global Warming Response Act (NJSA 26:2C-37 et seq.); and Electronic Waste Management Act (NJSA 13:1E-99.94 et seq.).

Other major environmental statutes include: Industrial Site Recovery Act (NJSA 13:1K-6 et seq.); Site Remediation Reform Act (NJSA 58:10C-1 et seq.); Water Supply Management Act

(NJSA 58:1A-1 et seq.); State Flood Control Facilities Act (NJSA 58:16A-50 et seq.); Safe Drinking Water Act (NJSA 58:12A-1 et seq.); Private Well Testing Act (NJSA 58:12A-26 et seq.); Water Quality Planning Act (NJSA 58:11A-1 et seq.); underground storage of hazardous substances (NJSA 58:10A-21 et seq.); Underground Storage Tank Finance Act (NJSA 58:10A-37.1 et seq.); Major Hazardous Waste Facilities Siting Act (NJSA 13:1E-49 et seq.); Worker Community Right to Know Act (NJSA 34:5A-1 et seq.); Environmental Rights Act (NJSA 2A:35A-1 et seq.); Commercial Landfill Regulatory Reform Act (NJSA 48:13A-7.24); Sanitary Landfill Facility Closure and Contingency Fund Act (NJSA 13:1E-100); Pinelands Protection Act (NJSA 13:18A-1 et seq.); Noise Control Act of 1971 (NJSA 13:1G-1 et seq.); Mercury Switch Removal Act of 2005 (NJSA 13:1E-99.82 et seq.); New Jersey Environmental Infrastructure Trust Act (NJSA 58:11B-1 et seq.). Toxic Packaging Reduction Act (NJSA 13:1E-99.44 et seq.). Environmental statutes also regulate hazardous discharge notification (NJSA 13:1K-15 et seq.), vessel transfer of hazardous liquids (NJSA 58:10-23.11f2), pipeline transportation of hazardous substances (Tit. 58, C. 10, § 47), and transfer of hazardous substances during non-daylight hours (NJSA 58:10-23.11f1).

General Supervision.

Assigned to Department of Environmental Protection (Department) which is headed by Commissioner. (NJSA 13:1D-1 et seq.).

Prohibited Acts of Pollution.

Discharging hazardous substances (NJSA 58:10-23.11 et seq.); causing air pollution by open burning of refuse; emission of smoke or fly ash, solid particles, sulfur compounds or other matter in excess of standards prescribed by Department pursuant to Air Pollution Control Act (NJSA 26:2C-1 et seq.); emitting motor vehicle exhaust in excess of standards (NJSA 26:2C-8.1 – 26:2C-8.5; NJSA 39:3-70.1); placing pollutants where they may drain into New Jersey waters except as permitted by NJSA 23:5-28; discharging pollutants into waters of New Jersey without permit (NJSA 58:10A-1 et seq.); discharging materials in ocean off coast of New Jersey without permit prior to Jan. 1, 1992 (NJSA 58:10-23.25 et seq.); discharging of solid, semi-solid or liquid wastes into ocean waters of State after Dec. 31, 1991, except by municipal treatment works, seafood processing facilities, public water supply desalinization plants, or aquaculture activities, and then only with permit (NJSA 58:10A-7.1); altering or polluting coastal wetlands (lowlands subject to tidal action) (NJSA 13:9A-4); roadside advertising except as permitted by NJSA 27:5-5; disposing, treating, storing or transporting hazardous waste except as permitted by NJSA 13:1E-1 et seq.; transporting, storing and disposing of special medical waste (defined) except as permitted by NJSA 13:1E-48.1 et seq.; sale, use, and burning of creosote and creosote-treated wood products (NJSA 13:1k-40); disposal of lead batteries except as permitted by NJSA 13:1E-200 et seq.; crushing or recycling end-of-life vehicles into scrap metal without previous removal of mercury switches or selling basal, oral or rectal mercury thermometers. Penalty imposed for violations. (NJSA 13:1E-99.82 – 13:1E-99.91).

Global Warming Response Act.—Authorizes auction of greenhouse gas allowances. (NJSA 26:2C-45). Authorizes Commissioner of Environmental Protection and President of Board of Public Utilities to participate with other states to further Regional Greenhouse Gas Initiative. Dept. will sell, exchange, retire, assign, allocate, or auction allowances. (NJSA 26:2C-47). Dispatch agreement facilities that are certified per NJSA 26:2C-49 are eligible to purchase allowances. (NJSA 26:2C-48). Owner or operator may certify as to facility's qualification as dispatch agreement facility via affidavit signed by both official representative and chief financial officer or equivalent. (NJSA 26:2C-49). Any signatory to sworn affidavit subject to civil penalties for making knowingly false or misleading statements per NJSA 2A:58-10 et seq., and court may assess amount of economic benefit accruing to violator. Penalties collected deposited to "Global Warming Solutions Fund." (NJSA 26:2C-50). Authorizes commissioner and board president to enter into agreements with appropriate representatives of other states and participate in any activity to further Act's purpose. (NJSA 26:2C-55).

Allows electric and gas public utilities to invest in energy efficiency and conservation programs and invest in or offer Class I renewable energy resources on regulated bases. (NJSA 48:3-98.1). Authorizes Board to provide funding for energy efficiency, conservation, and renewable energy improvements and direct gas and electric public utilities to undertake same. Gas and electric public utilities may recover costs. Board will develop action plan for immediate ratepayer relief within 90 days after second auction if price of allowances at two consecutive regional auctions exceeds $7 per allowance. (NJSA 26:2C-56).

By July 1, 2009, Board will adopt greenhouse gas emissions portfolio standard to mitigate leakage. Such regulatory mechanisms to mitigate leakage will allow transition period for basic generation service provider or electric power supplier to meet emissions portfolio standard or other mechanism or to transfer any customer to provider that meets emissions standard. No fee may be imposed for implementing and overseeing greenhouse gas emissions portfolio standard. Board may adopt electric energy efficiency portfolio standard and/or gas energy efficiency portfolio standard. (NJSA 48:3-87).

Spill Compensation and Control Act.

Dischargers or persons in any way responsible for discharge of hazardous substances strictly jointly and severally liable for cleanup and removal costs, except that where total amount of material containing hazardous substances discharged by such person is less than 110 gallons of liquid material or less than 200 pounds of solid materials, or if discharged hazardous material is solely municipal solid waste and originated from residence, small business or tax-exempt organization, such person not liable for clean-up and removal costs or remediation. Such exception shall not apply where discharged hazardous substance contributes significantly to cost of clean-up or where person responsible for discharge impedes clean-up, fails to comply with request for information or has been convicted of criminal offense. (NJSA 58:10-23.11g[c][1]; NJSA 58:10-23.11g). Owners who acquire property without knowledge of prior discharge and who conduct required due diligence are insulated from liability. (NJSA 58:10-23.11g[d][2] and [5]). Such owners also are not liable for damage to, or loss of, natural resources due to discharge of hazardous substances. (NJSA 58:10-23.11g). Any person who owns property on which there has been discharge prior to acquisition who knew or should have known of discharge after conducting due diligence is strictly liable for all cleanup and removal costs no matter by whom incurred. (NJSA 58:10-23.11g[d][2][b][i] and [5][b][i]). Owners and operators of vessels that have discharged hazardous substances into waters of New Jersey may be required to provide evidence of financial responsibility in order to avoid State’s impoundment of discharging vessel. (NJSA 58:10-23.11f[g][2]). Department may draw upon money available in Fund and act to remove hazardous substance discharge, or direct discharger to remove discharge. (NJSA 58:10-23.11f). Discharger who fails to comply with such directive is liable to Department for three times cost of removal. (NJSA 58:10-23.11f[a]). Spill Compensation Fund strictly liable for cleanup and removal costs and damages (with certain limitations) resulting from discharge of hazardous substances. (NJSA 58:10-23.11g). Claims must be filed with chief executive of fund not later than one year after discovery of damage. (NJSA 58:10-23.11k). Discharger or person who cleans up has private cause of action for contribution against all other dischargers who are liable for cleanup or other person liable for cost of cleanup. Under certain circumstances, discharger who cleans up can recover treble damages. (NJSA 58:10-23.11f). Dischargers or persons performing remediation may directly file treble damages claim with court. (NJSA 58:10-23.11f[a][3]). Certain nonparticipating secured creditors are exempt from liability under Act. (NJSA 58:10-23.11g4 et seq.). Holder of security interest who actively participates in management, including environmental compliance decisions, and operational aspects, of borrower’s enterprise, will be liable for any discharge, or threat of discharge, by that enterprise, of hazardous substance. (NJSA 58:10-23.11g5). Holder of security interest who did not participate in management of facility is not liable for cleanup costs or damages resulting from discharges of hazardous substances, even after foreclosure, if holder undertakes to sell, re-lease or otherwise divest itself of facility in reasonably expeditious manner. (NJSA 58:10-23.11g6).

Industrial Site Recovery Act.

Imposes preconditions on closure, sale or transfer of certain properties associated with manufacture, refining, transportation, treatment, storage, handling or disposing of hazardous substances or hazardous waste; preconditions include: notification to Department and clerk of municipality where property located of planned closure, sale, or transfer; execution of approved remedial action workplan for removal or storage of hazardous substances on premises, execution of remediation agreement acknowledging liability to remediate site, or approval by Department of declaration that there have been no discharges of hazardous substances or hazardous wastes on property or that such discharge had been cleaned up. If necessary, loans for cleanup can be obtained through remediation fund. Act does not apply to personal property. Penalties imposed for violations of Act include voiding of sale by transferee via action in Superior Court. (NJSA 13:1K-6 et seq.).

Brownfield and Contaminated Site Remediation Act.

All persons required to remediate contaminated sites must do so in accordance with rules and regulations established by Dept. for such remediation. (NJSA 58:10B-2, 58:10B-12). Dept. has adopted technical requirements for investigation and remediation of contaminated sites. (NJAC 7:26E-1 et seq.). Additionally, Dept. has established minimum remediation standards for soil contamination. (NJAC 7:26-1 et seq.). Subject to specified exemptions, any persons required to remediate contaminated sites must establish and maintain remediation funding source with sufficient amount to pay remediation costs. Dept. requires proof that funding source was established. Amount must be equal to or greater than cost estimate of remediation as approved by Dept., provided in remediation agreement, consent order, or court order, or agreed to by court. When estimate increases, remediation funding source amount must increase. Decreases in remediation funding source require Dept. approval. (NJSA 58:10B-3[a]). Person responsible for remediation, who established remediation funding source, may use remediation funding source to pay for actual cost of remediation. Remediation funding source may be in form of: (1) Remediation trust fund, (2) environmental insurance policy, (3) line of credit, or (4) self-guarantee. (NJSA 58:10B-3[b]).

Preferred redevelopment and inventory of Brownfield sites rather than further development of undeveloped land. (NJSA 58:10B-23.1-2). Provides financial and other incentives for remediating and returning to productivity, idle or abandoned commercial and industrial sites contaminated with hazardous substances. Act requires Dept. to issue covenant not to sue when it issues no further action letter (NFA) to person performing remediation. (NJSA 58:10B-13.1). Covenant releases person who performed remediation from all civil liability to State for additional remediation, for cleanup and removal costs associated with remediated site or for restoration of natural resources in connection with discharge on property. (NJSA 58:10B-13.1). NFA may specify engineering or institutional controls that must be used and maintained; covenant may be revoked if property is not maintained in compliance with NFA. Covenant applies to all successors in ownership of property and to all persons who lease or engage in operations on property. Covenant does not apply to any discharge that occurs subsequent to issuance of NFA, nor does it relieve person of obligation to comply with future laws. Covenant does not eliminate liability for persons liable for cleanup and removal costs pursuant to Spill Compensation and Control Act (Spill Act). (NJSA 58:10B-13.1).

Act amends innocent purchaser defense in Spill Act by eliminating liability to State or to any other person for contamination discovered at time of acquisition if: (1) Property was acquired subsequent to discharge of hazardous substances; (2) person performed remediation of site or relied upon valid final remediation document or no further action letter for remediation performed prior to acquisition or obtained approval of and complied with remedial action workplan; and (3) person maintained all engineering and institutional controls that may be required for property. (NJSA 58:10-23.11g). Liability is not eliminated for discharges off site, discharges that occur after acquisition of property, negligence that aggravates or contributes to pre-acquisition contamination, failure to comply with future laws, failure to maintain institutional or engineering controls, or failure to comply with terms of NFA.

Act adds new purchaser defense to Spill Act. (NJSA 58:10-23.11g). Person who acquires property on and after Jan. 6, 1998, is not liable for cleanup costs or damages under NJSA 58:10-23.11g, or under any other civil law, to any person other than State or federal government harmed by contamination on property or migration of contamination off property prior to acquisition if: (1) Person acquired property subsequent to discharge of hazardous substance; (2) person did not discharge hazardous substance, is not in any way responsible for discharge and is not corporate successor to discharger or to any person responsible for discharge or to anyone liable for cleanup costs; (3) person gave notice of discharge to Department upon discovery; and (4) person commences, within 30 days, remediation pursuant to Department oversight document executed prior to acquisition. (NJSA 58:10-23.11g). Provision does not eliminate liability for: (1) Discharges that occur after acquisition of property; (2) negligence that aggravates or contributes to harm inflicted upon any person; (3) failure to maintain institutional or engineering controls or to comply with provisions of NFA; (4) liability to clean up hazardous substances discharged on property or that may have migrated therefrom; or (5) future noncompliance with laws. (NJSA 58:10-23.11g).

Act amended Spill Act's contribution provision by permitting person performing remediation to file treble damages claim directly against discharger or other person responsible for discharge. (NJSA 58:10-23.11f). Good faith defense to treble damage claim is retained; one third of treble damage award goes to Spill Compensation Fund. (NJSA 58:10-23.11f). Party not liable for claims of contribution if clean up liability resolved, has paid compensation for damage or restoration of natural resources and: (i) Has either received no further action letter from state; or (ii) has entered into administrative or judicially approved settlement with state. (NJSA 58:10-23.11f). Dept. of Environmental Protection must provide 30 days notice of any such no further action letter or settlement in New Jersey Register and New Jersey Environmental Protection's website, and must provide written notice to other parties of whom Dept. has knowledge. (NJSA 58:10-23.11e2).

Act provides for financial assistance including property tax relief and "innocent party" grants. (NJSA 58:10B-6). Act permits certain child care centers to receive $1,500 grant from Hazardous Discharge Site Remediation Fund. (NJSA 52:27D-130.7). Developers not liable for contamination on property under NJSA 58:10-23.11g and who meet specified conditions may be reimbursed up to 75% of remediation costs associated with redevelopment project. (NJSA 58:10B-27). Innocent purchasers who undertake remediation of contaminated site before Jan. 1, 2007, are allowed credit against corporation business tax equal to 100% of eligible remediation costs, provided credits applied in single tax year not exceed 50% of tax liability otherwise due and not reduce tax liability less than statutory minimum. To be tax credit eligible, innocent purchaser must submit application to Dept. for review and certification of eligible remediation costs. (NJSA 54:10A-5.33). Establishment of Hazardous Discharge Site Remediation Fund dedicated for provision of financial assistance or grants to municipalities, counties, and redevelopment entities authorized to exercise redevelopment powers. (NJSA 58:10B-4). Except as provided in NJSA 52:27D-130.7, such financial assistance only for those who cannot establish remediation funding source for full amount of remediation. (NJSA 58:10B-5).

Site Remediation Reform Act.

Act establishes Licensed Site Remediation Professional (LSRP) program for oversight of remediation of contaminated sites. Act establishes Site Remediation Professional Licensing Board to establish and enforce requirements for LSRPs. Board consists of Department of Environmental Protection ("Department") Commissioner, State Geologist, and 11 residents appointed by governor with Senate's advice and consent. (NJSA 58:10C-3). Act requires that all LSRPs hold bachelor's degree in discipline related to site remediation or have license to remediate discharges from underground storage tanks and have at least eight years of full-time professional experience. (NJSA 58:10C-7[d]). LSRPs responsible for certifying all documents concerning remediation and for making decisions to meet health and environment standards of NJSA 58:10B-12. At conclusion of remedial activities, LSRPs issue “response action outcome” to person responsible for conducting remediation. (NJSA 50:10C-14). Department may invalidate response action outcome if it determines that remedial action not protective of public health, safety, or environment. (NJSA 58:10C-22). Department shall not audit response action outcome more than three years after filing with Department, unless undiscovered contamination found at subject site, or Licensing Board either investigates LSRP who filed response action outcome or revokes or suspends LSRP’s license. (NJSA 58:10C-25).

As of Nov. 3, 2009, all new remediation must be conducted by LSRP. As of May 7, 2012, all remedial activities, regardless of when commenced, must be conducted by LSRP. (NJSA 58:10B-1.3[b], [c]). Act amends provisions of Industrial Site Responsibility Act, Spill Compensation and Control Act, and Brownfield and Contaminated Site Remediation Act providing that remediation undertaken pursuant to those statutes must be conducted by LSRP.

Act provides that protection of public health, safety, and environment is highest priority in remediation process, which LSRPs are charged to ensure through various procedures. (NJSA 58:10C-16). Act limits sources of compensation and who may employ licensed professional. (NJSA 58:10C-16[x]-[z]).

Act specifies sanctions for professionals who violate licensing provisions. (NJSA 58:10C-17). Act allows Department to inspect and review all documents submitted by licensed professional. (NJSA 58:10C-21).

Department may assume direct oversight of remediation, in place of licensed professional, when site remediation has unacceptable duration or is otherwise noncompliant. (NJSA 58:10C-27). Act authorizes Department to establish mandatory time frames and procedures for remediation extension. (NJSA 58:10C-28).

Issuance by licensed professional of response action outcome yields covenant not to sue with respect to property in question, applicable to successors in interest, tenants, and users of property. (NJSA 58:10B-13.2)

Notification Requirement for Site Remediation.

Prior to initiation of remediation, person responsible for remediation of contaminated site must submit written notification of what remediation activities will take place, and address, lot, and block number of contaminated site to clerk of municipality and to county health dept.and local health agency where site located. (NJSA 58:10B-24.1). Upon request, responsible person must submit copy of remedial action workplan and any updates or status reports and copy of site health and safety plan to clerk of municipality where contaminated site located and to county health dept. and local health agency upon their request. (NJSA 58:10B-24.2). Person responsible for remediation must also notify public of plans to remediate contaminated site. (NJSA 58:10B-24.3). Department regulations set forth requirements for public notice of remediation of contaminated sites. (NJAC 7:26E-1.4).

Solid Waste Management Act.

Authorizes Department to establish licensing and other regulatory requirements for entities involved in collection, transportation and disposal of solid waste. (NJSA 13:1E-1 et seq.). Most all solid waste activities and facilities must possess approved registration statement. (NJSA 13:1E-5). Department reviews and approves registration statement for new or substantially modified solid waste facility to determine compliance with registration statement, engineering design and applicable laws, rules, or regulations. (NJSA 13:1E-9[a]). Fees must be paid to “Treasurer, State of New Jersey” in accordance with fee schedule provided in NJAC 7:26-4.3.

Any person who knowingly or recklessly transports hazardous waste to unauthorized facility will be subject to fine or, upon conviction, guilty of crime. (NJSA 13:1E-9[g] and [h]). All conveyances used in willful discharge of solid waste in violation of Solid Waste Management Act are subject to forfeiture. (NJSA 13:1E-9[j]). Counties required to develop and adopt Solid Waste Management Plans. (NJSA 13:1E-20).

Electronic Waste Management Act.

Requires television (beginning Jan. 1, 2009) and covered electronic device (beginning Feb. 1, 2009) manufacturers to pay $5,000 registration fee and $5,000 annual renewal fees to Dept. (NJSA 13:1E-99.96; -99.102). Act also requires participation in statewide television recycling program beginning Jan. 1, 2010. Each registered television manufacturer must pay its portion of reasonable costs for recycling. (NJSA 13:1E-99.97). Dept. will enter into agreements with authorized recyclers where no county/municipal recycling program exists. Act establishes The Used Television Recycling and Management Program Fund: moneys appropriated to pay counties or municipalities for television recycling costs incurred, fund State-used recycling and management program, and pay authorized recyclers. (NJSA 13:1E-99.98). Noncompliance results in prohibition from selling covered electronic device. (NJSA 13:1E-99.99).

Beginning Jan. 1, 2010, label on new covered electronic devices must show manufacturer's brand and be permanently affixed and visible. (NJSA 13:100). Any new covered electronic device must comply with provisions of Directive 2002/95/EC of EU. (NJSA 13:1E-99.101). By Jan. 30, 2011, Dept. will annually complete auditable sampling of covered electronic devices and determine total weight collected from consumers. (NJSA 13:1E-99.102). Manufacturers will pay fee for excess return share and arrange collection, transportation, and recycling of devices. (NJSA 13E:1E-99.103). Beginning Jan. 1, 2010, Act requires retailers to sell products only from registered manufacturers and provide clear recycling information to consumers. (NJSA 13:1E-99.104). Dept. will prepare plan every three years establishing per-capita collection and recycling goals and post annual report on website. (NJSA 13:1E-99.105). Recycling rate and registration fees may be reviewed not more than annually and not less than biennially. (NJSA 13:1E-99.106). Collection, transportation, and recycling service contracts granted in competitive bidding process per NJSA 52:34-6 et seq. Fees will be paid by Dept. upon proof that covered electronic device was collected from State-resident consumer in accordance with all applicable laws and that no fees were charged to consumer. (NJSA 13:1E-99.107). Collectors, transporters, and recyclers must comply with performance requirements to receive funds from Dept. and, at minimum, must comply with EPA's Plug-In to eCycling Guidelines for Materials Management. (NJSA 13:1E-99.108). As of January 1, 2010, covered electronic devices may not be disposed of as solid waste. (NJSA 13:1E-99.109). State (e.g. Attorney General and Dept.) may enforce Act; awards first offset enforcement expenses. (NJSA 13:1E-99.110). Dept. may charge reasonable fees for services performed and costs incurred under Act. (NJSA 13:1E-99.111). Dept. may participate in regional, multi-state compact consistent with Act's requirements. (NJSA 13:1E-99.112). Upon Dept.'s determination of equivalent national recycling program for covered electronic devices, Dept. Commissioner will notify Governor, President of Senate, Speaker of General Assembly, and Senate Environment Committee and Assembly Environment and Solid Waste Committee members. (NJSA 13:1E-99.113). By Jan. 1, 2013, Dept. will prepare report assessing success/failure of electronic waste management system. (NJSA 13:1E-99.114).

Imposed tax on solid waste generation to aid municipal and county recycling programs. (NJSA 13:1E-96.2). Levies on owner/operator of solid waste facility $3.00 per ton tax on all solid waste accepted for disposal or transfer. (NJSA 13:1E-96.5). All persons subject to recycling tax will register by Apr. 1, 2008, and render returns (due 20th day of 1st mo. following end of quarter) under oath to director quarterly. Failure to pay tax subject to penalties and interest per NJSA 54:48-1 et seq. Solid waste collectors are authorized to collect tax from customers/generators. (NJSA 13:1E-96.5). Recycling tax will not be due if State or federal law requires deposit or establishes refund value for beverage container. (NJSA 13:1E-96.6).

Private Well Testing Act.

Every contract of sale for real property whose potable water is supplied by private well, well that has less than 15 service connections, or well that does not regularly serve average of at least 25 individuals at least 60 days out of year, must include provision requiring, as condition of sale, testing of water supply. Closing of title is prohibited unless both buyer and seller certify at closing that they have received and reviewed water test results. (NJSA 58:12A-27). Water supply shall be tested for criteria set forth in NJSA 58:12A-28, as well as other criteria as set forth in regulations to be promulgated by Department. (NJSA 58:12A-28, 58:12A-29). Water test must be performed by laboratory certified by Department to test for drinking water contaminants. Test results may not be released to any person except for buyer, seller, any person authorized by them, Department, or any person designated by court order. (NJSA 58:12A-30). Lessor of real property whose potable water is supplied by private well shall test water supply at least once every five years, for same parameters required in contract for sale of real property. Within 30 days after receipt of test results, lessor shall provide copy of results to each rental unit on property. Lessor shall also provide most recent test results to new lessee. Lessor of seasonal use real property (defined at NJSA 46:8-19) must post test results in readily visible location inside unit or provide copy of most recent test results to lessee. (NJSA 58:12A-32).

Residential Development Solar Energy Systems Act requires developer constructing more than 25 units for owner occupancy to offer installation of solar energy system with each unit sold, wherever Board of Public Utilities finds that technically feasible. (NJSA 52:27D-141.3)

Toxic Catastrophe Prevention Act requires owner or operator of facility that handles extraordinarily hazardous substances to register with Department, develop acceptable risk management program or Extraordinarily Hazardous Substance Risk Reduction Work Plan and perform Extraordinarily Hazardous Substance Risk Assessment. Facilities subject to Toxic Catastrophe Prevention Act must have in place procedures and programs to avoid accidental release of extraordinary hazardous substances. Penalties imposed for violation of Act. (NJSA 13:1K-19 et seq.). Dept. requires, for each covered process at stationary source, owner or operator to complete initial inherently safer technology review. (NJAC 7:31-3.6).

Every employer will ensure that every container containing hazardous substance bears label indicating chemical name and Chemical Abstracts Service or trade secret registry number and that such label is affixed such that label remains intact and visible even in event of flood or other natural disaster. (NJSA 34:5A-14).

Comprehensive Regulated Medical Waste Management Act requires generator and transporter of regulated medical wastes to register with Department and pay fees to Dept. per fee schedule in NJAC 7:26-3A.8. (NJSA 13:1E-48.1 et seq.). Manifest system to be developed by Department in consultation with Department of Health. Manifests required for each shipment of regulated medical wastes released by generator to transporter for delivery to disposal facility. (NJSA 13:1E-48.4). Penalties imposed for violation of Act. (NJSA 13:1E-48.20).

Department, Department of Health, local board of health and county health department have authority to assess civil administrative penalties and petition Attorney General to bring criminal action for violations of Comprehensive Regulated Medical Waste Management Act. (NJSA 13:1E-48.20).

Counties required to prepare and adopt plan for disposal of sharps as component of Solid Waste Management Plan. (NJSA 13:1E-48.16a).

Enforcement.

Department may prosecute any violations of pollution laws and obtain injunctive relief, damages, penalties or some combination thereof. (NJSA 26:2C-14, 26:2C-19; NJSA 58:10-23.30;

NJSA 13:9A-9; NJSA 58:10A-10, 58:10A-32; NJSA 39:3-70.2; NJSA 13:9B-21; NJSA 13:1K-13.1, 13:1K-30; NJSA 13:1E-9, 13:1E-48.20). Grace period exists for correction of certain minor violations, whereby if compliance is achieved within stipulated period of time after notice is given to violator, no penalty shall be imposed. (NJSA 13:1D-127[c]). Person subject to order of Department may be required to post performance bond or other security in amount determined by Department to insure good faith compliance. Public bodies, agencies and authorities are exempt. Failure to comply within time period causes forfeiture to state fund unless such failure deemed excusable by Department. (NJSA 13:1D-9). Department can order removal, replacement or repair of any underground storage tank that discharges hazardous substances. (NJSA 58:10A-28). Violations of motor vehicle emission standards enforced by inspection by Division of Motor Vehicles in Department of Law & Public Safety. (NJSA 39:5-1 et seq.). Penalties imposed in summary proceeding pursuant to Penalty Enforcement Law of 1999. (NJSA 2A:58-10 et seq.). Any person may commence civil action in court of competent jurisdiction against any person alleged to be in violation of any statute, regulation or ordinance designed to prevent pollution and protect environment. (NJSA 2A:35A-4). Criminal prosecution available for purposely, knowingly, or recklessly violating Air Pollution Control Act. (NJSA 26:2C-19[f]). Criminal prosecution available for purposely, knowingly, recklessly or negligently violating Water Pollution Control Act or Act regulating underground storage of hazardous substances. (NJSA 58:10A-10[f]). Criminal prosecution available for purposely, knowingly or recklessly causing discharge of hazardous substance required to be reported under Spill Compensation and Control Act. (NJSA 2C:17-2[a][2]). Criminal prosecution available under Solid Waste Management Act for knowingly or recklessly transporting, generating, disposing, treating or storing hazardous waste without authorization from Department, or making false or misleading statements on hazardous waste application or other document required to be submitted to Department. Criminal prosecution available for transporting hazardous waste without submitting hazardous waste manifest to Department, regardless of intent. (NJSA 13:1E-9[g][1]).

Any civil action concerning remediation of contaminated site or closure of sanitary landfill facility commenced by State pursuant to environmental laws must be commenced within three years after cause of action accrued, unless otherwise provided by statute. Accrual is measured from Jan. 1, 2002, or remediation of contaminated site or closure of landfill, whichever is later. (NJSA 58:10B-17.1[a]). Civil action commenced by State for damage to, or loss of, natural resources due to discharge of hazardous substance shall be brought within five years and six months after cause of action accrued, unless otherwise provided by statute. Accrual is measured from Jan. 1, 2002, or until completion of remedial investigation of contaminated site or sanitary landfill facility, whichever is later. (NJSA 58:10B-17.1[b]).

Liability of persons performing hazardous-discharge-mitigation or cleanup services in accordance with procedures established pursuant to state or federal law limited to negligent acts during course of performing these services. (NJSA 58:10-23.11g1). Liability of persons performing public works contracts that include removal, cleanup, containment or discharge of hazardous waste limited to negligent acts or omissions. (NJSA 2A:58B-1 et seq.).

Immunity and Indemnification.

NJSA 2A:62A-7 et seq. and NJSA 58:10-23.11f(a)(3) provides immunity from liability for civil damages for persons who render assistance, care, or advice in course of responding to, or helping to mitigate dangers or threat of, hazardous discharge. Immunity not available to person responsible for hazardous discharge, or to any person responding to hazardous discharge for remuneration, nor with respect to liability for gross negligence or intentional misconduct related to response to hazardous discharge, nor to actions involving use of motor vehicle in responding to hazardous discharge.

Remediation of Condemned Property.

Grants authority for local government to petition Department of Environmental Protection, in writing, for authority to perform remediation of property that has been condemned pursuant to Eminent Domain Act of 1971. (NJSA 58:10B-3.1).

Civil Penalties.

Person who violates air pollution law may be fined not more than $10,000 for first offense, not more than $25,000 for second offense, and not more than $50,000 for third and each subsequent offense. (NJSA 26:2C-19). For altering or polluting freshwater wetlands without permit, fine is not more than $10,000 for each violation per day, and violator may be required to restore affected area to former condition. (NJSA 13:9B-21). Violation of moratorium on harvesting, landing, and possession of horseshoe crabs or their eggs without Dept.'s permit subjects individual to penalty of $10,000 for 1st offense, $25,000 for 2d and subsequent offenses. (NJSA 23:2B-20 et seq.). For violation of state environmental laws, fine of not more than $25,000 per violation per day. (NJSA 12:5-6; NJSA 13:1F-10; NJSA 13:9A-9; NJSA 13-9B-21; NJSA 13:19-18; NJSA 23:2A-10; NJSA 58:1A-16; NJSA 58:4-6; NJSA 58:16A-63; and NJSA 58:12A-10). For violation of Spill Compensation and Control Act, up to $50,000 per day of violation. (NJSA 58:10-23.11, 58:10-23.11u[c]). Additional penalties for violations involving discharges of 100,000 gallons or more of hazardous substance may be fined not more than $10,000,000. (NJSA 58:10-23.11u1). For violation of Water Pollution Control Act or act regulating underground storage of hazardous substances, up to $50,000 per day of violation. (NJSA 58:10A-10[e]). For violation of Toxic Catastrophe Prevention Act, up to $10,000 for first offense, $20,000 for second offense, and $50,000 for third and each subsequent offense. (NJSA 13:1K-30). For violation of Comprehensive Regulated Medical Waste Management Act, up to $50,000 per day of violation and up to $100,000 per day of violation of administrative court order issued pursuant to Act. (NJSA 13:1E-48.20). For violation of Solid Waste Management Act, up to $50,000 per violation and $100,000 per day of violation of administrative order issued thereunder. (NJSA 13:1E-9). Actions to recover penalties under NJSA 13:1E9; NJSA 13:1E-48.20; NJSA 26:2C-19; NJSA 34:5A-41; or NJSA 58:10A-10 may be commenced at any time and are no longer subject to ten-year statute of limitations. (NJSA 2C:1-6). For violation of Industrial Site Recovery Act, civil administrative penalties of up to $25,000 for first offense and $50,000 for subsequent offenses, and civil penalties of up to $25,000 per day. In addition, any officer or management official who knowingly directs or authorizes violation of Act personally liable for penalties. (NJSA 13:1K-13.1). Motor vehicle owner whose vehicle does not meet exhaust emission standards may be fined not less than $250 nor more than $1000 per day, per vehicle. (NJSA 39:3-70.2). For violation of Mercury Switch Removal Act, up to $7,500 for first offense, $10,000 for second offense, $25,000 for third and each subsequent offense. (NJSA 13:1E-99.89). For selling basal, oral or rectal mercury thermometers, up to $1,000 for each offense. (NJSA 13:1E-99.93).

Criminal penalties for violation of Freshwater Wetlands Protection Act, fine of up to $25,000 for first offense and $50,000 for second and each subsequent offense per day of violation. (NJSA 13:9B-21). For violation of Shorebird Conservation Act, fine of $10,000 for 1st offense, $25,000 for 2d and subsequent offenses. (NJSA 23:2B-21). Fine of not less than $5,000 and not more than $50,000 per day of violation and/or imprisonment for purposely, knowingly, or recklessly violating state environmental laws. (NJSA 12:5-6; NJSA 13:1F-10; NJSA 13:9A-9; NJSA 13:9B-21; NJSA 13:19-18; NJSA 23:2A-10; and NJSA 58:12A-10).

For violation of Water Pollution Control Act or Act regulating underground storage of hazardous substances, fine of not less than $25,000 nor more than $250,000 per day of violation, or imprisonment, or both; for permit violations, or discharges without permit, fine of not less than $50,000 nor more than $250,000, or, for corporation, fine of not less than $200,000, nor more than $1,000,000, or imprisonment, or both; for falsifying any document filed or required to be maintained, or tampering with or rendering inaccurate any monitoring device, fine of not less than $5,000 nor more than $75,000 per day of violation, imprisonment or both. (NJSA 58:10A-10[f]).

Criminal penalties for violation of Spill Compensation and Control Act; fine up to $150,000 or imprisonment, or both. (NJSA 2C:17-2; 2C:43-3, 2C:43-6).

For violation of Solid Waste Management Act, fine of up to $50,000 for first offense and $100,000 for second and each subsequent offense and restitution, imprisonment or both. (NJSA 13:1E-9).

For violation of Comprehensive Regulated Medical Waste Management Act, fine of up to $50,000 for first offense and $100,000 for second and each subsequent offense and restitution, imprisonment or both. (NJSA 13:1E-48.20).

Civil, civil administrative, or criminal penalties or fines assessed and collected for violation of state or federal environmental law and treble damages paid to Department pursuant to NJSA 58:10-23.11f, are not deductible expenses for purposes of State income and corporate taxes. (NJSA 54A:5-1 et seq.). Prosecution for any offense in following provisions must be commenced within ten years after date of discovery of offense by local law enforcement agency, county prosecutor or Department: NJSA 2C:17-2a(2) (Spill Compensation and Control Act); NJSA 13:1E-9 (Solid Waste Management Act); NJSA 13:1E-48.20 (Comprehensive Regulated Medical Waste Management Act); NJSA 26:2C-19 (Air Pollution Control Act); NJSA 34:5A-41 (Asbestos); NJSA 58:10A-10 (Water Pollution Control Act).

Permits.

Person must obtain permit to construct, install, or alter any equipment or control apparatus that may cause emission of any air contaminant. (NJSA 26:2C-9.2). Major stationary sources of air pollution require single facility-wide operating permit. (NJSA 26:2C-9.2). Person may be required to obtain permit to dispose of materials at sea (NJSA 58:10-23.29) and must obtain permit to: (a) discharge pollutants into waters of New Jersey (NJSA 58:10A-6a); (b) conduct any regulated activity on coastal or freshwater wetlands (NJSA 13:9A-4; NJSA 13:9B-1 et seq.); (c) transport certain radioactive material through New Jersey (NJSA 26:2D-18); or (d) replace, install, expand or substantially modify underground storage tank (NJSA 58:10A-24). Department must promptly process construction permit applications. (NJSA 13:1D-30). Comprehensive program is established for registration, regulation and monitoring of underground storage tanks used to store motor fuels and other hazardous substances (as defined). Exemptions may apply for smaller tanks used for noncommercial purposes, certain septic tanks and regulated pipelines or impoundments. (NJSA 58:10A-21 et seq.). No construction permits granted for child care centers or educational facilities for certain former industrial and commercial sites unless deemed safe by Department of Health and Senior Services. (NJSA 52:270-130.5).

13 ESTATES AND TRUSTS

13.01 ADMINISTRATION:

See topic 13.08 Executors and Administrators.

13.02 ADVANCEMENTS:

See topic 13.07 Descent and Distribution.

13.03 ALLOWANCES:

See topic 13.08 Executors and Administrators.

13.04 CLAIMS:

See topic 13.08 Executors and Administrators; category 5 Civil Actions and Procedure, topic 5.17 Pleading.

13.05 DEATH:

Person (whether resident of New Jersey or not), absenting himself from last known residence for continuous period of five years or who is exposed to catastrophic event certified by Governor, during which he has not been heard from, and whose absence is not satisfactorily explained after diligent search or inquiry is presumed dead. Person's death is presumed to have occurred at end of period unless there is sufficient evidence for determining that death occurred earlier or at time of catastrophic event (NJSA 3B:27-1), but estate received by reason of presumption shall be restored if, in later suit, such person be proved to be living (NJSA 3B:27-2); but executor, administrator or trustee is discharged from liability upon filing release and refunding bond of persons who would be entitled if such absentee were actually dead (NJSA 3B:27-3). Death may be judicially declared whether absentee is resident or nonresident, and if nonresident, decree shall only affect property in New Jersey. (NJSA 3B:27-6). Action for declaration may be brought in Superior Court by any person interested in absentee's estate and complaint must show interest. (NJSA 3B:27-6; Rule 4:93-1). See also category 21 Property, topic 21.01 Absentees.

Administration of estate of absentee, whether resident or not, may be granted after entry of judgment. (Rule 4:93-5). Superior Court may appoint one or more trustees to take charge of and manage New Jersey property. (NJSA 3B:26-2; 117 N. J. Super. 235, 284 A.2d 363). Distribution of property of absentee may be made under direction of court when absentee is presumed dead or sooner if death established by satisfactory evidence. (NJSA 3B:26-3). Absentee declared dead by court having any interest in real estate which has been or shall be sold, conveyed, mortgaged, assigned, leased, devised or otherwise aliened as though such person was actually dead, is forever barred from any claim of title. (NJSA 3B:27-4[b]). If he shall later be proved alive, he shall be entitled to just interest in rents, purchase price and other proceeds of such transaction which did not come into hands of person who gave value therefor without notice absentee was alive. (NJSA 3B:27-5).

Distribution of Trust Estate.

Where distribution of trust depends upon or is affected by death of beneficiary who has been presumed dead as above, trustee may distribute on bond being given and releases furnished. (NJSA 3B:27-3).

Survivorship.

Uniform Simultaneous Death Act (1940; adopted 1947). (NJSA 3B:6-1-7). Act does not apply to devolution of decedent's property under will or upon intestacy where New Jersey law provides that to take on devolution person shall survive decedent by 120 hours, or to living trusts, deeds, or contracts of insurance where provisions have been made for distribution of property different from Act. (NJSA 3B:6-6).

Action for wrongful death lies where decedent, had he survived, would have had cause of action for injury which caused death; is brought by administrator ad prosequendum (or, if decedent died testate, by executor or administrator c.t.a.); and must be brought within two years after death, provided normal limitation for personal injury has not already run before death; however, if death resulted from murder, aggravated manslaughter or manslaughter for which defendant has been convicted, found not guilty by reason of insanity or adjudicated delinquent, action may be brought at any time. (NJSA 2A:31-1 – 2A:31-3). Damages recoverable are limited to pecuniary injury, together with medical and funeral expenses incurred, and are for exclusive benefit of persons entitled to take any intestate property and in proportions to which they are so entitled. (But see 54 N. J. 194, 254 A.2d. 525.) Where some of those so entitled were dependent upon decedent at death, they take to exclusion of those not dependent in proportion court determines as fair and equitable. There is no specific limit of amount of recovery. (NJSA 2A:31-4, 2A:31-5). Reasonable funeral and burial expenses recoverable. (NJSA 2A:15-3).

Survival of Actions.

Actions against trespasser for trespass done to decedent's person or property survives death. (NJSA 2A:15-3). Actions against decedent for taking or carrying away or converting another's goods or chattels, or for trespass to another's person or property survive death. (NJSA 2A:15-4).

Death certificate is obtainable from State Registrar of Vital Statistics; minimum fee $4 plus $1 for each year more than one searched. (NJSA 26:8-62 – 26:8-64).

Uniform Anatomical Gift Act (1968; adopted 1969).—See topic 13.16 Wills.

Living Wills.

See topic 13.16 Wills.

13.06 DECEDENTS' ESTATES:

See topics 13.07 Descent and Distribution, Executors and Administrators, Wills; category 8 Debtor and Creditor, topic 8.10 Homesteads.

13.07 DESCENT AND DISTRIBUTION:

Real and personal estate not effectively disposed of by will passes to heirs under certain circumstances. (NJSA 3B:5-2). Debt owed to decedent charged only against intestate share of debtor. (NJSA 3B:5-11).

Intestate share of surviving spouse or domestic partner (as defined in NJSA 26:8A-3) is: (1) If no descendant or parent or if all of decedent's surviving descendants are descendants of surviving spouse or domestic partner and there is no other surviving descendant of surviving spouse or domestic partner, entire intestate estate; (2) if no surviving descendant but surviving parent, first 25% (but not less than $50,000 nor more than $200,000) plus ¾ of intestate estate balance; (3) if surviving descendant who are all descendants of surviving spouse or domestic partner and surviving spouse or domestic partner has surviving descendants who are not descendants of decedent or if any of decedent's surviving descendants are not descendant of surviving spouse or domestic partner, first 25% (but not less than $50,000 nor more than $200,000) plus ½ of intestate estate balance. (NJSA 3B:5-3).

Part of intestate estate not passing to surviving spouse or domestic partner or entire intestate estate if no surviving spouse or domestic partner passes: (1) To decedent's descendants by representation; (2) if no surviving descendants, to parents equally; (3) if no surviving descendants or parents, to descendants of parents by representation; (4) if no surviving descendant, parent or descendant of parent, but surviving grandparents: (a) one half each to surviving paternal and maternal grandparents equally, (b) if either both paternal or both maternal grandparents are deceased, one half to surviving grandparents and one half to surviving descendants of deceased grandparents by representation, (c) if no surviving grandparent or descendant of grandparent on either side, entire estate passes to decedent's relatives on other side in same manner as other half; (5) if no surviving descendant, parent, descendant of parent or grandparent, to surviving descendant of grandparents by representation (NJSA 3B:5-4); (6) if no surviving descendants of grandparents, to step-children or their descendants by representation.

Parent forfeits all right to intestate succession if parent: (1) Refused to acknowledge decedent or abandoned decedent when decedent was minor (under 18 years of age); (2) convicted of sexual assault, criminal sexual contact or endangering welfare of children against decedent; (3) convicted of attempt or conspiracy to murder decedent; or (4) abused or neglected decedent. If any parent is disqualified from taking share in estate of decedent, estate shall pass as though parent predeceased decedent. (NJSA 3B:5-14.1).

Person must survive decedent by 120 hours to inherit unless intestate estate would otherwise escheat to State of New Jersey. (NJSA 3B:5-1).

Surviving spouse or domestic partner not provided for in will executed after Aug. 31, 1978 before marriage receives no less than value of share spouse would have received if testator died intestate unless omission was intentional or provision was made outside will in lieu of testamentary provision. In satisfying share, devises to spouse applied first and other devises abate ratably. (NJSA 3B:5-15).

Surviving child not provided for in will executed prior to child's birth or adoption receives share unless: (1) Omission from will was intentional; or (2) provision for child outside will in lieu of testamentary provision. If testator had no living children when will executed, omitted child receives intestate share unless substantially all of estate devises to child's other parent. If testator had living children, omitted child takes share child would have received had testator included child in class with children to whom devises were made. Living child omitted because believed dead receives same share as after born child. Share taken from devisees under will ratably. (NJSA 3B:5-16).

Parent or guardian of anyone who has not attained 18 years of age, who is to receive part of intestate estate, or any other individual with standing, may apply to Superior Court for permission to place all, or any part, of funds passing to such issue in separate trust for exclusive benefit of such issue. (NJSA 3B:12-54.1).

Surviving Spouse.

Takes as indicated above. No right of dower or curtesy in real property if after May 28, 1980, person shall become seized of estate of inheritance. (NJSA 3B:28-2). See category 21 Property, topics 21.05 Curtesy and 21.08 Dower.

Half Blood.

Inherit same share as if they were of whole blood. (NJSA 3B:5-7).

Posthumous Children or Other Relatives.

Individual in gestation treated as living if survives 120 hours after birth. (NJSA 3B:5-8).

Illegitimate Children.

Person is child of his or her natural parents regardless of their marital status. Parent-child relationship may be established as set forth in NJSA 3B:5-10. See also NJSA 9:17-38 et seq.

Adopted Children.

See category 14 Family, topic 14.01 Adoption.

Advancements.

Lifetime gift by person dying intestate to one entitled to share in estate not advancement unless so declared in contemporaneous writing by decedent or acknowledged in writing by recipient. (NJSA 3B:5-13). Unless otherwise provided, advancement not part of intestate share of issue of recipient who predeceases decedent.

Election.

If married person or person in domestic partnership dies on or after May 28, 1980, surviving spouse or domestic partner of decedent domiciled in New Jersey may claim "elective share" defined by statute, against assets of decedent's "augmented estate," also defined by statute. Election, which may be waived, must be made by filing complaint in Superior Court within six months after appointment of personal representative. (NJSA 3B:8-1 et seq.).

Escheat.

NJSA 3B:5-5 now repealed. See category 21 Property, topic 21.01 Absentees, subhead Escheat.

Unknown Distributees and Unclaimed Property.

Fiduciary will make diligent inquiry, under circumstances, to identify and locate persons who may be distributees of estate. (NJSA 3B:5-5.1). Court may order additional actions to locate heirs. If none found, property presumed abandoned and handled in accordance with Uniform Unclaimed Property Act (1981; adopted 1989). (NJSA 3B:23-19, 3B:23-21).

Homicide of Decedent.

Individual who intentionally kills decedent does not receive any benefits of testate or intestate estate or property appointed by will of decedent and property passes as if killer had disclaimed. (NJSA 3B:7-1.1). Joint tenant who intentionally kills another joint tenant effects severance of interest of decedent, and share of decedent passes as decedent's property and killer has no rights of survivorship. (NJSA 3B:7-1.1[b][2]). Surviving spouse or domestic partner who intentionally kills decedent is not entitled to elective share. (NJSA 3B:7-1.1). Final judgment of conviction of intentional homicide is conclusive evidence of that fact and in absence of such conviction court may determine in civil suit by preponderance of evidence whether homicide was intentional. (NJSA 3B:7-6).

Disclaimers.

Heir may disclaim in whole or in part right of succession to any property or interest therein, or fractional part thereof, including future interest, by filing disclaimer as provided by statute. Disclaimer must be in writing and filed with Surrogate or Superior Court. (NJSA 3B:9-1 et seq.). Similar statutory arrangements are provided for disclaimers of present and future interests by grantee, donee, surviving joint tenant, beneficiary under insurance policy, etc., with respect to transfers made under non-testamentary instruments. (NJSA 3B:9-2).

13.07A ESTATES: (in property)

See category 21 Property, topic 21.16 Real Property.

13.08–13.09 [RESERVED]

13.10 EXECUTORS AND ADMINISTRATORS:

Uniform Fiduciaries Act (1922; adopted 1927). (NJSA 3B:14-52 et seq.); but see topic Trusts as to repealed sections.

Jurisdiction and Venue.

Jurisdiction of matters of probate and administration is in Chancery Division of Superior Court (NJ Const., Art. 6, § 3, par. 2; NJSA 3B:2-2, 3B:2-3, 3B:2-5), and surrogate's court (NJSA 3B:3-17; c. 10, § 1).

In case of resident decedent, venue lies in county where he resided at time of death. (NJSA 3B:3-24; Rules 4:3-2[a], 4:83-4). Foreign probate of will of New Jersey resident shall be without effect until New Jersey probate. (NJSA 3B:3-24).

If nonresident decedent left will probated elsewhere, probate may be had in Superior Court or in surrogate's court of any county if will is valid under New Jersey law. (NJ Const., Art. 6, § 3, par. 2; NJSA 3B:3-26). If nonresident decedent left will not probated in state or country which was decendent’s residence at death and no proceedings for probate are there pending, probate may be had in Superior Court or surrogate’s court in any county where real estate or other property or evidence of ownership thereof which the decedent owned at death is located at time of probate. (NJSA 3B:3-28). If nonresident died intestate, administration may be had in Superior Court or surrogate’s court in any county where property, real or personal, is located. (NJSA 3B:10-7). Venue before Superior Court in above instances or surrogate’s court is in county where decedent left any property or into which any property belonging to decedent’s estate may have come. (Rules 4:3-2[a], 4:83-4).

Preferences in Right to Administer.

Executor named in will, if competent, is entitled to letters testamentary on probate unless by executor’s own act he has deprived himself of the executorship. (3 N. J. Eq. 611). Surviving spouse, domestic partner, next of kin of decedent, or other proper person is preferred in that order for appointment as administrator of intestate (NJSA 3B:10-2); residuary legatee preferred as administrator c.t.a. (63 N.J. Super. 336, 164 A.2d 633). Residents are normally preferred over nonresidents of equal rank. (Rule 4:80-5).

Eligibility and Competency.

Infant cannot be administrator. (45 A. 980). Married woman is competent to act as executrix or administratrix, and if woman marries after her appointment her authority is unaffected. (NJSA 37:2-1). Qualified banks and savings banks of New Jersey as well as authorized out-of-state banks with branch office in New Jersey may be executors or administrators. (NJSA 17:9A-28). As to right of foreign banking institutions, see category 3 Business Regulation and Commerce, topic 3.01 Banks and Banking.

Qualification.

Executors or administrators may qualify on oath within New Jersey before any person authorized by law to administer oaths, and outside New Jersey before any person before whom depositions may be taken outside state. (Rules 4:96-1, 4:12-2, 4:12-3). Every executor and administrator, resident or nonresident, must file with court power of attorney for service of process. (NJSA 3B:14-47). Debtor of decedent may be appointed executor but appointment, unless will expresses otherwise, does not discharge debt. (NJSA 3B:10-14).

Exemption from Bond.

Every administrator, except administrator ad litem or surviving spouse where decedent’s entire estate is payable to surviving spouse, must give bond in such sum as court approves in view of value of estate. (NJSA 3B:15-1). Resident executor need give no bond unless will so requires or upon proof of danger to estate (12 N. J. Eq. 289, 296; NJSA 3B:15-4; NJSA 17:9A-30) but nonresident executor must give bond unless will provides otherwise (NJSA 3B:15-1[e]).

Issuance of letters may be by Superior Court. (NJ Const., Art. 6, § 3, par. 2; NJSA 3B:3-17). Surrogate’s court of proper county may issue letters testamentary and letters of administration unless caveat is filed or doubt arises on face of will or will is lost or destroyed or will is will of nonresident and has not been probated in jurisdiction of residence or application is to appoint administrator pendente lite or other limited administrator or dispute arises as to any matter or Surrogate certifies matter to be case of doubt or difficulty, in which case matter proceeds in Superior Court. (NJSA 3B:3-17; NJSA 3B:10-1; Rule 4:82). All orders, determinations and judgments of surrogate’s court or surrogate are subject to review in Superior Court, Chancery Division, Probate Part. (NJSA 3B:2-3; Rule 4:85-1). If executor or administrator of nonresident decedent fails to apply for letters within 60 days after death, administration of decedent’s real and personal property within state may be granted by Superior Court or surrogate’s court of county where property is located to some fit person at suit of creditor of decedent upon notice to foreign fiduciary. (NJSA 3B:10-8). In like circumstances pertaining to resident testator, common law rules prevail. On failure of eligible person to apply for letters of administration within 40 days of death of intestate decedent, letters may be granted to any fit person applying therefor. (NJSA 3B:10-2).

Removal.

Executor or administrator may be removed by court for disobedience to court order, misconduct, nonfeasance, abuse of trust, misapplication of estate, or mental incapacity or if he or she becomes nonresident and refuses to administer estate. (NJSA 3B:14-21).

Special Kinds of Administration.

Appointment of administrator c.t.a. or substituted administrator or substituted administrator c.t.a. not required if unadministered assets consist of money on deposit in bank, trust company or savings and loan association and do not exceed $1,000. (NJSA 3B:10-15, 3B:10-18). Substituted executor or administrator may be appointed to administer estate while executor or administrator is engaged in military service. (NJSA 3B:14-9). Administrator ad prosequendum for resident or nonresident intestate may be appointed without bond by Superior Court, or by surrogate's court of proper county in wrongful death cases. (NJSA 3B:10-11). Administration durante minori aetate, durante absentia, ad litem, temporary and pendente lite and any form of limited administration recognized. (NJSA 3B:1-1, 3B:1-2; NJSA 3B:10-12; and NJSA 3B:15-6).

General Powers and Duties.

In addition to the usual powers and duties (detailed in NJSA 3B:14-23), there is survivorship among executors and administrators. (NJSA 3B:14-1). Majority of fiduciaries who qualify may bring any action in courts of State. (NJSA 3B:14-38). Fiduciary has power to extend mortgages, and to lease property (for certain maximum specified periods). (NJSA 3B:14-23[e][3], [h]). Judgment appointing fiduciary, will, deed or other instrument may modify or limit powers granted fiduciary. (NJSA 3B:14-23).

As to permitted investments (NJSA 3B:20-1 et seq.), including Prudent Investor Act (NJSA 3B:20-11.1 et seq.; NJSA 3B:14-23, 3B:14-24; NJSA17:2-1 et seq.). Fiduciary shall invest and manage investments of decedent's estate as would prudent investor. (NJSA 3B:20-11.3). For application to courts for investment instructions, see especially NJSA 3B:20-7, 8. See also topic 13.15 Trusts.

Inventory normally not required unless ordered by court. (NJSA 3B:16-2). Representative is empowered to continue decedent's business where it is deemed advisable and advantageous for estate and persons interested therein. (NJSA 3B:14-23[v]).

Power to Compromise.

Executor or administrator may compromise any claim in favor of estate, trust or fiduciary or in favor of third persons and against estate, trust or fiduciary; including transfer inheritance, estate, income and other taxes. (NJSA 3B:14-23[m], Rule 4:95-3). But as to settlement of probate questions over objection of beneficiaries, see 112 N. J. Eq. 315, 164 A. 431.

Notice to Creditors.

Superior Court or surrogate may order executor or administrator to give public notice to decedent's creditors, by advertising same once within 20 days of order, in such newspaper or newspapers as order directs, to present their claims against estate in writing under oath within six months from date of order and by mailing such notice to each creditor of estate of which personal representative knows or which can be ascertained by reasonable inquiry. (NJSA 3B:22-4; Rule 4:80-8). Notice must state that order has been made and date thereof, on whose application and what directions it gives. (Rule 4:80-8).

Proof of Claims.

Must be presented to personal representative, in writing, under oath, specifying amount claimed and particulars of claim within nine months of death. Personal representative not liable to creditor for assets distributed if claim not timely presented. (NJSA 3B:22-4).

Unmatured Claims.

Liquidated claims payable in the future may be presented, less rebate of unaccrued interest. (NJSA 3B:22-5).

Secured claims need not be presented to protect security but must be presented in order to participate as to excess over security. (43 N. J. Eq. 636, 12 A. 530).

Claims on which actions were pending at time of decedent's death need not be presented. (8 N. J. Misc. 653, 151 A. 385).

Presentation of Claims.

See subhead Proof of Claims, supra. (NJSA 3B:22-4, 3B:22-14).

Remedies of Creditors Who File Late.

Creditor of solvent estate may present written and verified claim which was not timely presented, any time before remaining assets have been distributed or paid; if claim is not allowed by executor or administrator, creditor must bring action within one month after disallowance or be forever barred from any action against executor or administrator. (NJSA 3B:22-10 – 3B:22-16). In action against executor or administrator, failure to file refunding bond raises rebuttable presumption assets have not been distributed. (NJSA 3B:22-15). Barred creditor may recover on refunding bond (NJSA 3B:22-16) or from beneficiary to extent of what beneficiary received even if no refunding bond was given (121 N. J. Eq. 78, 188 A. 696).

Approval or Rejection of Claims.

If executor or administrator disputes claim timely presented to him he is under duty to give written notice thereof, within three months, to claimant or claimant's agent or attorney, and claimant must then institute action within three months of receipt of rejection or lose right of action against executor or administrator with respect to assets theretofore distributed or paid. (NJSA 3B:22-7, 3B:22-8).

Payment of Claims.

Personal representative of solvent estate may pay claims without consulting court. (119 N. J. Eq. 308, 182 A. 357, aff'd 121 N. J. Eq. 49, 187 A. 177). May also pay just claim not properly verified; but if on or before final accounting it appears to court that estate lacks sufficient assets to pay in full all claims equal in degree to that paid but not legally presented, executor or administrator shall be allowed only pro rata amount claimant would have received had he presented claim properly. (NJSA 3B:22-6).

Creditors of insolvent estates are to be paid pro rata after satisfaction of preferred claims from available assets at such times as seem convenient and just to court having jurisdiction, provided that creditor who fails to timely present claim shall be forever barred unless court extends time or estate proves sufficient or unaccounted for assets are discovered. (NJSA 3B:22-32 – 3B:22-38). Practice is governed by Rule 4:91 as follows: After time to present claim has expired, executor or administrator may commence action to have estate adjudged insolvent, representing to court under oath that to best of executor's knowledge decedent's real and personal estate is insufficient to pay debts and reporting duly presented claims, inventory and account. (Rule 4:91-1). Notice is given by registered or certified mail to all claimant creditors and interested persons at least one month before hearing. (Rule 4:91-2). After hearing upon inventory, accounting, exceptions and claims, court must make determination and final judgment. (Rule 4:91-3). Creditor or executor or administrator may elect to procure determination as to claim in plenary action. (Rule 4:91-4).

Priorities.

If applicable assets of estate insufficient to pay all claims in full, then claims shall be paid in following order: Reasonable funeral expenses; administration expenses; debts and taxes with preference under Federal or New Jersey laws including debts for reasonable value of services rendered to decedent by Office of Public Guardian for Elderly Adults; reasonable medical and hospital expenses of last illness, including compensation of attendants; judgments against decedent (in order of priority of entry); all other claims. No preference given to claims within class nor to claims due and payable over claims not due. (NJSA 3B:22-2).

Sales.

Executor or administrator possesses power to sell personalty by virtue of executor's office. (NJSA 3B:14-23[e][2]).

Decedent's real estate remains liable for debts for one year unless sold clear of lien with approval of court. (NJSA 3B:22-22). Action is on order to show cause. (Rules 4:67-1, 4:67-2). If estate is adjudged insufficient to pay debts, court may order executor or administrator to sell all or any part of estate. (NJSA 3B:22-35).

With respect to any real property owned by estate, in absence of contrary provisions in court order or will and subject to rights of surviving spouse, executor, administrator or administrator with will annexed may take possession, manage and collect rents, sell at public or private sale, lease for term not exceeding three years, mortgage and grant easements to adjoining owners and utilities. (NJSA 3B:14-23[e]). Abandonment or conveyance for nothing or nominal sum of real property by fiduciary is permitted on satisfying proper court that property is not worth protecting. (NJSA 3B:14-62 – 3B:14-65).

Generally, no confirmation by court of sale of real estate is required when sale is made pursuant to power of sale or statute (NJSA 3B:14-23[e]); but such confirmation is required where sale is made pursuant to court order or authorization and where, under certain circumstances, court may grant leave to executor to sell real estate free and clear of lien for decedent's debts which otherwise attaches for one year after decedent's death (NJSA 3B:22-22; Rule 4:65-6).

Revised Uniform Principal and Income Act.

Repealed. (NJSA 3B:19A-1 et seq.). See Uniform Principal and Income Act of 2001. (NJSA 3B:19B-1 et seq.).

Uniform Simplification of Fiduciary Security Transfers Act (1958; adopted 1959). (NJSA 14:18-1-12; Tit. 14A App.) and saved from repeal by Uniform Commercial Code (NJSA 12A:10-104).

Actions by Representative.

Executor or administrator may sue to recover debts due decedent. (NJSA 3B:14-38). If decedent dies while prosecuting action which does not abate at decedent's death, decedent's representative may be substituted for him as plaintiff. (Rule 4:34-1[b]).

Actions Against Representative.

Executors or administrators may be sued for debts of decedent. (NJSA 3B:14-39). However, except for funeral expenses, no actions may be brought against representative for six months after appointment, unless by special leave of court. (NJSA 3B:14-40). If action is pending against decedent at death which does not abate because of decedent's death, decedent's representative may be substituted for him as defendant. (Rule 4:34-1[b]). See category 8 Debtor and Creditor, topics 8.03 Creditors' Suits, 8.08 Fraudulent Sales and Conveyances.

Disclaimers.

Any devisee or beneficiary under will, appointee under power of appointment exercised by will, or any heir, including person succeeding to disclaimed interest, may disclaim in whole or in part right of succession to any property or interest therein, or fractional part thereof, including future interest, by filing disclaimer. Disclaimer must be in writing and filed with Surrogate or Superior Court. Disclaimers must be made before right to disclaim barred by acceptance of benefits or other circumstances. (NJSA 3B:9-1 et seq.).

Allowances.

There is no provision for allowances for support of widow and family other than a reservation, provided decedent's will does not state otherwise, of decedent's wearing apparel and up to $5,000 worth of decedent's personal property. (NJSA 3B:16-5). If reservation is set off, inventory and appraisal of personal estate is required within three months. (NJSA 3B:16-2).

Election by Surviving Spouse or Domestic Partner.

After May 28, 1980, surviving spouse or domestic partner of decedent domiciled in New Jersey may claim "elective share" defined by statute, against assets of decedent's "augmented estate," also defined by statute. Election, which may be waived, must be made by filing complaint in Superior Court within six months after appointment of personal representative. (NJSA 3B:8-1 et seq.).

Widow's Quarantine.

Until dower or curtesy is assigned to widow or widower, she or he may hold spouse's mansion house and the messuage thereto belonging rent-free. (NJSA 3B:28-8). No right of dower or curtesy in real property arises if after May 28, 1980, person shall become married or seized of estate of inheritance. (NJSA 3B:28-2, 3B:28-3).

Accounts.

Executors and administrators may settle or be required to settle accounts in Superior Court, but not within one year after appointment unless for special cause. (NJSA 3B:17-2). Most accounts are settled out of court on release where all parties are competent adults. (NJSA 3B:17-1). Within 60 days, representative removed or discharged by court order, however, must account (NJSA 3B:14-7) and surety on representative's bond may in some instances force accounting (NJSA 3B:15-10). Judgment allowing any intermediate or final account of executor or administrator shall be res judicata as to all statements and information therein or included as part thereof to which exceptions could have been, or were, taken, but which were not sustained, except as relief may be had from any civil judgment, and except as to assets remaining in representative's hands at close of period covered by account. (NJSA 3B:17-7 – 3B:17-8). Executor or administrator may compensate accountant from estate for preparation of accounting without reduction in commissions due to fiduciary. (NJSA 3B:14-23[x]). Accounting proceedings are settled in Superior Court. (NJSA 3B:17-2). Actions to settle accounts are commenced by filing of complaint and upon issuance of order to show cause. (Rule 4:87-1). Order to show cause, together with copy of complaint shall be mailed by registered or certified mail to all persons interested therein who reside in New Jersey at least 20 days before return date; to all other residents of U.S. at least 30 days before return date; and at least 60 days before return date to all other interested persons. (Rule 4:87-4[a]). Surety on fiduciary's bond is interested person. (Rule 4:87-4). Special provisions for notice to infants and incompetents who are represented by guardian ad litem if they have no New Jersey general guardian. (Rule 4:26-2; Rule 4:87-4). Five days before return of order to show cause interested person may serve exceptions in writing stating details and reasons therefor. (Rule 4:87-8).

Compelling Accounting.

Executor or administrator may be compelled to account in Superior Court. (NJSA 3B:17-2; Rule 4:87-1[b]).

Distribution of personal property of intestate is not permitted until one year after granting administration, except that distribution may be made six months after entry of order limiting creditors. (NJSA 3B:23-18). Court approval of distribution not required in solvent estates but after account settled court may direct distribution. (NJSA 3B:23-16, 3B:23-17).

As to time for payment of legacies and interest, see topic 13.16 Wills, subhead Legacies.

Insolvent Estates.

If decedent's estate, real and personal, is insufficient to satisfy all debts, estate must be distributed ratably among decedent's creditors, the preferred debts being first paid. (NJSA 3B:22-32).

Where secured claim exceeds security therefor, claimant is normally allowed dividend out of estate on excess. (NJSA 2A:46-4; 116 N. J. Eq. 201, 172 A. 502). See subhead Proof of Claims, catchline Presentation of Claims, supra.

Unknown Distributees.

Fiduciary will make diligent inquiry, under circumstances, to identify and locate distributees. (NJSA 3B:5-5.1). Court may order additional actions to locate and order property to which unknown distributees entitled held for two years from date of death or such other period. If not located within defined period, property divided among known heirs. (NJSA 3B:23-19; Rule 4:89-3). When fiduciary states final account, property unclaimed within period set by statute is held and distributed as ordered by court or otherwise presumed abandoned and handled in accordance with Uniform Unclaimed Property Act. (NJSA 3B:23-21). If unclaimed for period of ten years, such moneys are paid to State in accordance with Uniform Unclaimed Property Act. (NJSA 46:30B-9, 46:30B-41).

Distribution Withheld.

On proof that beneficiary would not have benefit of money or property distributable to him, court may direct same to be paid into court to be held until released by special order. (NJSA 3B:23-22).

Distributee must give refunding bond to be filed in court which granted probate or letters of administration. (NJSA 3B:23-24). Assets may not be transferred to testamentary trustee until letters of trusteeship have been issued. (NJSA 3B:23-23).

Liabilities.

Personal representative must act in good faith, within the scope of representative's powers, and with reasonable care, skill and caution in managing property of estate as would prudent investor. (NJSA 3B:20-11.3). If representative conforms to this standard he cannot be held liable for errors in judgment (117 N. J. Eq. 429, 176 A. 101; 89 N. J. Eq. 502, 104 A. 380) but has normal liability of fiduciary; representative is liable for nonfeasance as well as malfeasance (18 N. J. Eq. 229), and may be sued for waste or misapplication of estate (NJSA 3B:22-38). Representative is liable if in any way he uses his relationship with trust property for personal advantage. (38 N. J. Eq. 604). Fiduciary is not individually liable: (a) Unless otherwise provided in contract, for contract properly entered into in fiduciary capacity during administration of estate unless he fails to reveal fiduciary capacity and identify estate; (b) if he is not personally at fault for obligations resulting from ownership or control of estate or for torts committed during administration of estate. (NJSA 3B:14-31, 3B:14-32). Estate primarily liable for claims. Fiduciary liable to interested persons for damage or loss resulting from breach of duty to same extent as trustee of express trust if he improperly exercises power. (NJSA 3B:14-35).

Sale or encumbrance by fiduciary to himself, directly or indirectly is voidable by any person interested in estate who has not consented, unless duly authorized by will or contract of decedent or by court order. (NJSA 3B:14-36).

One who in good faith deals with fiduciary is protected as to exercise of power by fiduciary. Title or right acquired by person acting in good faith is not invalidated by misapplication of funds by fiduciary. (NJSA 3B:14-37).

Compensation of Representatives.

Commissions of personal representative and fiduciary appointed for property of absentee are as follows: Corpus commissions of 5% on first $200,000, 3½% on excess over $200,000 up to $1,000,000, 2% on excess and 1% for each additional fiduciary provided no one fiduciary shall be entitled to any greater commission than that allowed if there were but one fiduciary. (NJSA 3B:18-8, 3B:18-12, 3B:18-14). Additional corpus commissions may be allowed by court on intermediate or final accounting upon showing of unusual or extraordinary services. (NJSA 3B:18-16). Fiduciaries may annually, without court allowance, take corpus commissions on account up to 1/5 of 1% of value of corpus plus additional 1/5 of such commissions for each fiduciary more than one. (NJSA 3B:18-17; Rule 4:88-1). Commissions of 6% on income, including income withheld for payment of taxes, may be taken as income is received without court allowance. (NJSA 3B:18-13). Further reasonable compensation allowable for services required to be rendered, with respect to property which does not come into fiduciary’s hands, but which, for tax purposes, is includable in estate. (NJSA 3B:18-8 – 3B:18-11). Compensation provided by will shall be deemed full payment unless renounced in writing by fiduciary. (NJSA 3B:18-3).

Compensation of Attorneys.

Executor or administrator may make payments on account of counsel fees out of estate, subject to approval and allowance or disallowance by the court upon settlement of executor’s accounts. (Rule 4:42-9).

When Administration Unnecessary.

Where total estate, real and personal, of any intestate does not exceed $20,000, surviving spouse or domestic partner is entitled to same without administration and assets of estate up to $5,000 shall be free from lien of debts. (NJSA 3B:10-3). If no spouse or domestic partner survives, where total estate does not exceed $10,000, one of his or her heirs with consent of remaining heirs may distribute personalty to creditors and heirs without bond (NJSA 3B:10-4).

Small Estates.

See subhead When Administration Unnecessary, supra.

Foreign Executors or Administrators.

Executor or administrator under letters obtained in jurisdiction outside New Jersey may become a party plaintiff or defendant in any suit pending at death or brought thereafter in New Jersey court as if acting under New Jersey letters on filing with the court exemplified copy of record of executor’s appointment. (NJSA 3B:14-25 – 3B:14-29). Security for costs may be required if foreign representative is plaintiff in either of above instances. (NJSA 3B:14-28 – 3B:14-29). Issuance of local letters or action therefor terminates power of domiciliary foreign fiduciary but he may be allowed by court to exercise limited powers to preserve estate. (NJSA 3B:14-30). Before letters are granted in New Jersey, payment of debt to representative appointed by letters obtained in another state is valid and, upon filing of exemplified copy of record of representative's appointment, he can release lien or encumbrance held by decedent as if appointed in New Jersey. (NJSA 3B:14-25 – 3B:14-29; see 118 N. J. L. 606, 194 A. 185, indicating that foreign state must have jurisdiction to issue letters). For purpose of showing authority of foreign administrator to release or discharge lands from any mortgage, judgment, or other lien held by his intestate, any person may record and file exemplified copy of record of such administrator's appointment, with surrogate of county where land is situated or with clerk of Superior Court. (NJSA 3B:10-9). As to filing record of foreign probate proceedings, see topic 13.16 Wills.

New Jersey Administration of Foreign Estate.

See topic 13.16 Wills, subhead Foreign Probated Will; category 5 Civil Actions and Procedure, topic 5.26 Venue.

Uniform Anatomical Gift Act.

See topic 13.16 Wills.

13.11 [RESERVED]

13.12 INTESTACY:

See topic 13.07 Descent and Distribution.

13.13 [RESERVED]

13.14 PROOF OF CLAIMS:

See topic 13.08 Executors and Administrators; category 5 Civil Actions and Procedure, topic 5.17 Pleading.

13.15 TRUSTS:

Uniform Fiduciaries Act adopted with modifications; applicable to transactions since Mar. 7, 1927. (NJSA 3B:14-52 – 3B:14-61 et seq.). § 3 repealed by Uniform Simplification of Fiduciary Security Transfers Act. (NJSA 14:18-12; NJSA 3A:41-3.). §§ 4 and 5 of Uniform Fiduciaries Act are repealed by Uniform Commercial Code. (NJSA 12A:10-105), effective Jan. 1, 1963. Co-trustees hold as joint tenants. (NJSA 3B:11-3). See topic Executors and Administrators for certain provisions common to all fiduciaries.

Creation.

Trust of personalty may be created by parol. (110 N. J. Eq. 338, 160 A. 83, aff'd 112 N. J. Eq. 373, 164 A. 447). As to necessity of writing to create trust of realty, see category 3 Business Regulation and Commerce, topic 3.16 Frauds, Statute of.

Who May Act as Trustee.

Nonresident may act as trustee. As to limitation on foreign bank or trust company, see category 3 Business Regulation and Commerce, topic 3.01 Banks and Banking.

Qualification of Trustee.

Before exercising authority, testamentary trustee, original or substituted, must file and record in office where will is recorded a written and sworn acceptance of trusteeship and a power of attorney for service of process. (Rule 4:80-9; NJSA 3B:11-2; NJSA 3B:14-47). On filing of these documents, clerk issues letters of trusteeship. (Rule 4:80-9). On filing of complaint and acceptance of trusteeship, Superior Court may direct that letters issue to trustee of inter vivos trust or substituted trustee not otherwise provided by will. (Rule 4:84-4). Acceptance of trusteeship may be taken outside state. (Rule 4:96-1).

Accounting.

Trustee appointed by or receiving letters from court must account at such intervals as court may require, except trustee may settle first account within one year of appointment or as soon thereafter as practicable (NJSA 3B:17-3); trustee of non-testamentary trust may settle accounts in court (NJSA 3B:17-10). Upon failure to account or for other reasons, trustee may be compelled to do so. (Rule 4:87-1[b]). Trustee may compensate accountant from trust assets for preparation of accounting without reduction in commissions due to fiduciary. (NJSA 3B:14-23[x]). Trustee need not account if he files release or discharge executed by adult and mentally competent beneficiary, acknowledged as provided for deeds. (NJSA 3B:17-1). Schedules annexed to complaint or accounts are part thereof, and judgment allowing account, after due notice, generally binds interested parties. (NJSA 3B:17-7, 3B:17-8). Actions to settle accounts of executors, administrators, and testamentary and non-testamentary trustees are brought in county where fiduciary received appointment (Rule 4:87-1) and are generally settled in summary manner on order to show cause. Procedure is prescribed by Rules 4:87, 4:88, 4:83, 4:96-4, 4:28-4. Trustee may be compelled to account. (Rule 4:87-1[b]). Discharged or removed trustee must account within 60 days, or as court may direct. (NJSA 3B:14-7).

Distribution by Order of Court.

Court ordered distribution may be applied for when final account of testamentary trustee is filed, but notice is required, and court may not render judgment until after account is settled. (NJSA 3B:23-16; Rule 4:89-1). On proof that beneficiary of trust would not have benefit of money or property distributable to him, in special circumstances where payment to beneficiary should be withheld, or in case of trust with other than court appointed trustee, court may direct same to be paid into court to be held until released by court order. (NJSA 3B:23-22). Assets may not be transferred to testamentary trustee or substituted testamentary trustee until letters of trusteeship have been issued. (NJSA 3B:23-23).

Investments.

Prudent Investor Act (1994; adopted 1997). (NJSA 3B:20-11.1 et seq.) requires fiduciary to invest trust assets as would prudent investor. Investment decisions respecting individual assets evaluated in context of entire trust portfolio. No specific investment inherently imprudent. Fiduciary must consider, where relevant to trust and beneficiaries: general economic conditions; effect of inflation and deflation; tax consequences of investment decisions or strategies; role of each investment in overall trust portfolio; expected total return from income and appreciation; other resources of beneficiaries; need for liquidity, for regularity of income and for preservation or appreciation of capital; and asset's special relationship or special value (if any) to purposes of trust or to beneficiaries. (NJSA 3B:20-11.3). Fiduciary under duty of diversification unless fiduciary reasonably determines otherwise. (NJSA 3B:20-11.4). Within six months after accepting trust assets, fiduciary required to review assets and make determination with respect to retention or disposition of assets to bring trust portfolio into compliance. (NJSA 3B:20-11.7).

Fiduciary may delegate investment and management functions provided that fiduciary exercises reasonable care, skill and caution in: selecting agent with special investment skills and expertise; establishing scope and terms of delegation consistent with purpose of trust instrument; and periodically reviewing agent's actions to monitor agent's performance and compliance with scope of delegation. (NJSA 3B:20-11.10[a]). Fiduciary who properly delegates investment discretion not liable to beneficiaries or trust for decisions or actions of agent. (NJSA 3B:20-

11.10[c]). Agent submits to jurisdiction of New Jersey courts by accepting delegation from fiduciary. (NJSA 3B:20-11.10[d]). Agent shall owe trustee and beneficiaries same duty as fiduciary and shall be held to same standard as fiduciary. (NJSA 3B:20-11.10[b]). Fiduciary must provide advance written notice to income beneficiaries of trust prior to any delegation of investment and management functions, even to cofiduciary. (NJSA 3B:20-11.10[f]). Fiduciary who delegates is required to control overall costs of delegation, including making reduction in principal commissions otherwise allowable to fiduciary. (NJSA 3B:20-11.8).

May apply to court: (1) for direction as to sale, conversion or retention of securities received by him or (2) for permission to invest in nonlegals or investments not authorized by trust instrument, where, by reason of change in conditions, investment in or continuance of authorized investments might defeat objects of trust. (NJSA 3B:20-7, 3B:20-9, 3B:20-10). Unless specifically directed otherwise by instrument or court order, fiduciary who holds in trust securities issued by corporation, which has been recapitalized or reorganized, or which has been party to merger or consolidation, may exchange or convert securities so held for securities issued as incident to such recapitalization, etc. (NJSA 3B:20-18). Also see NJSA 27:12B-12; NJSA 27:19-32.2; NJSA 27:23-13; NJSA 17:2-9.3, 17:2-9.4; NJSA 40A:12A-35.

Securities in Name of Nominee.

Subject to terms of creating instrument, certain corporate fiduciaries may hold securities in name of nominee, but fiduciary is liable for loss caused by acts of nominee. (NJSA 3B:20-3, 3B:20-5).

Common trust funds provided for. (NJSA 17:9A-36 – 17:9A-46).

Gifts to Minors.

See category 14 Family, topic 14.10 Infants.

General Powers and Duties of Trustees.

In absence of contrary provision in judgment appointing fiduciary, in will, deed or other instrument, fiduciary’s powers described in NJSA 3B:14-23.

Sales.

In absence of contrary provision in judgment appointing fiduciary, in will, deed or other instrument, trustees have power to sell trust property. (NJSA 3B:14-23[e]).

Compensation of Trustee.

Commissions of fiduciaries acting as trustees under will or non-testamentary trustee are allowed as follows: On corpus such fiduciaries may annually, without court allowance, take sums in amount of $5 per $1,000 of corpus value on first $400,000 and $3 per $1,000 of corpus value in excess of $400,000; provided that banking institutions and savings and loan associations acting as fiduciaries are entitled to reasonable commissions, and provided further that fiduciaries are entitled to minimum corpus commissions of $100 annually. (NJSA 3B:18-25). If there are two or more fiduciaries, annual amount set forth above is increased by additional 1/5 of commissions for each fiduciary more than one. (NJSA 3B:18-25.1). In addition to such annual commissions on corpus, fiduciary may, upon termination of trust, or upon distribution of assets from trust, take commission on corpus distributed, including accumulated income which has been invested by fiduciary, in amount equal to annual commissions on corpus authorized by statute but not actually taken by fiduciary plus amounts equal to following percentages of value or corpus distributed depending on period of time between date when such corpus came into hands of fiduciary and date of distribution: If within five years, amount equal to 2% of value of corpus distributed; if between five and ten years, amount equal to 1½% of value of corpus distributed; if more than ten years, amount equal to 1% of value of corpus distributed. (NJSA 3B:18-28). Additional amount of

1/5 of corpus commissions is available for each additional fiduciary. (NJSA 3B:18-28). Court may, on intermediate or final accounting, allow additional corpus commissions upon showing of unusual or extraordinary services. (NJSA 3B:18-29). No commissions in excess of those specified by statute may be paid to testamentary trustee unless testator, in last will and testament or any codicil thereto, acknowledges that he is aware of commissions so specified and expressly authorizes payment of commissions in excess thereof. (NJSA 3B:18-31). Commissions of 6% on income, including income withheld for payment of taxes, may be taken by such fiduciaries as income is received without court allowance. (NJSA 3B:18-24).

Discharge.

Trustee may be discharged by court from duties of office except accounting and paying over assets unless prejudicial to trust or beneficiaries or discharge ought not be granted. Court must order just and equitable commissions. (NJSA 3B:14-18, NJSA 3B:14-19).

Uniform Simplification of Fiduciary Security Transfers Act adopted (NJSA 14:18-1-12; Tit. 14A App.) and was saved from repeal by Uniform Commercial Code as amended (NJSA 12A:10-104).

Revised Uniform Principal and Income Act.

Repealed. (NJSA 3B:19A-1 et seq.). See Uniform Principal and Income Act of 2001. (NJSA 3B:19B-1 et seq.). Except in certain specified instances, including where adjustment will diminish income interest of surviving spouse for which estate tax marital deduction would be allowed, trustee may adjust between principal and income, to amount not less than 3% nor more than 5% or such percentage as approved by U.S. Department of Treasury or Internal Revenue Service. (NJSA 3B:19B-4).

Abandonment of real property by trustee or other fiduciary is permitted if proven to court that property has such lack of value that it is not worth protecting and that abandonment is in best interest of beneficiaries. (NJSA 3B:14-62 – 3B:14-65).

Removal and Substitution of Trustees.

Superior Court, Chancery Division, has inherent power to remove and substitute trustees; statutory authority to remove trustee for cause is given to Superior Court, Chancery Division. (NJSA 3B:14-21). When certain trustees die, or refuse or become unable to act, Superior Court may appoint new trustee. (NJSA 3B:11-5). Where trustee removed or discharged by Superior Court before trust completed, another may be appointed. (NJSA 3B:11-6). Bond is required in either case. (NJSA 3B:15-1, 3B:15-2). Substituted trustee has same power as to investment, management, conversion, sale, etc., of trust property as had original trustee, unless instrument creating trust expressly provides otherwise. (NJSA 3B:11-7).

Substituted trustee may be appointed to administer trust while trustee is engaged in war service. (NJSA 3B:14-8 – 3B:14-17).

Perpetuities.

See category 21 Property, topic 21.12 Perpetuities.

Pour Over Trusts.

See topic 13.16 Wills, subhead Bequests and Devises to Inter Vivos Trusts.

Special needs trusts provided for. (NJSA 3B:11-36, 3B:11-37).

Trusts for domesticated animals provided for. (NJSA 3B:11-38).

Renunciation.

Disclaimers by joint tenants and beneficiaries under nontestamentary instrument or contract governed by NJSA 3B:9-1 et seq.; NJSA 46:2E-14. For beneficiary of testamentary trusts, see topic 13.16 Wills, subhead Disclaimers.

13.16 WILLS:

Any individual 18 years or more who is of sound mind may make will or appoint testamentary guardian. (NJSA 3B:3-1).

Testamentary Disposition.

There is no statutory limitation on proportion or amount of testator's estate which may be left to charity. Whole may be so left, subject, however, to curtesy and dower rights and right of election by surviving spouse.

Execution.

Every will, except as provided in NJSA 3B:3-3, must be in writing, signed by testator or in testator's name by some other person in testator's conscious presence and at testator's direction, and must be signed by at least two persons, each of whom witnessed either signing or testator's acknowledgment of signature or of will. (NJSA 3B:3-2).

Form of Attestation.

Following form may be used:

The foregoing instrument was signed, sealed, published and declared by . . . . , the testator therein named, as and for his last will and testament, in our joint presence, and we, at the same time, at his request, in his presence, and in the presence of each other, hereunto subscribe our names and residences as attesting witnesses.

Signed (name) . . . . (address) . . . .

Signed (name) . . . . (address) . . . .

Although not commonly used, following form complies with statutory execution requirements:

The foregoing instrument was signed by . . . ., the testator therein named, (or if applicable, signed in the name of . . . . in the testator's presence and at his direction) as and for his last will and testament and we, at his request, having witnessed the signing (or if applicable, his acknowledgment of the signature) (or if applicable, his acknowledgment of the will), hereunto sign our names and residences as attesting witnesses.

Signed (name) . . . . (address) . . . .

Signed (name) . . . . (address) . . . .

Writing Intended as Will.

Valid, whether or not witnessed, if signature and material provisions are in handwriting of testator. Clear and convincing evidence required to show decedent intended writing to constitute decedent's will, partial or complete revocation of will, alteration of will or revival of formerly revoked will. (NJSA 3B:3-3).

Nuncupative Wills.

Invalid. (NJSA 3B:3-2).

Revocation.

Will or any part thereof is revoked by subsequent will that revokes former will or part expressly or by inconsistency, or by revocatory act, including burning, tearing, canceling, obliterating or destroying same with intent and for purpose of revocation by testator or by another person in testator’s conscious presence and at testator’s direction. (NJSA 3B:3-13). Testator presumed to have intended subsequent will to replace prior will if complete disposition of estate made. Divorce or annulment after execution of will revokes any disposition or appointment of property made by will to former spouse, any provision conferring general or special power of appointment on former spouse, and any nomination of former spouse as executor, trustee or guardian, unless will expressly provides otherwise; property so devised to former spouse passes, and other provisions conferring some power on former spouse are interpreted, as if spouse disclaimed. Divorce or annulment also severs interests of former spouses in property held as joint tenants. (NJSA 3B:3-14).

Revival.

Revoked will or codicil is not revived except by re-execution or by duly executed codicil expressing intention to revive it. (NJSA 3B:3-15). If subsequent will that partly revoked prior will revoked by revocatory act, revoked part of prior will revived unless contrary evidence. Provisions revoked by divorce or annulment are revived by testator’s remarriage to former spouse or by revocation or suspension of judgment of divorce or annulment. (NJSA 3B:3-14).

Testamentary Gifts to Subscribing Witnesses.

Will or any provision thereof is not invalid because will is signed by interested witness. (NJSA 3B:3-8).

Bequests and Devises to Inter Vivos Trusts.

Governed by New Jersey Testamentary Additions to Trusts Law. (NJSA 3B:4-1). Generally pour over bequests and devises to inter vivos trusts are valid. (NJSA 3B:4-2 et seq., confirming and clarifying 102 N.J. Eq. 294, 140 A. 279). If statutory requirements are met, pour over devise or bequest is not invalidated by trust amendment after execution of will or, if will so provides, after death of testator. Additions to testamentary trust under will of prior decedent also permitted. (NJSA 3B:4-3 et seq.).

Incorporation by Reference, Separate Writing, and Events of Independent Significance.

Testator may incorporate by reference in will any writing in existence when will executed if writing identified and intent manifested in will. (NJSA 3B:3-10). Tangible personal property not otherwise disposed of by will may be disposed of by separate list written by or signed by testator if it describes items and devisees with reasonable certainty and if referred to in will. (NJSA 3B:3-11). Will may dispose of property by reference to acts and events which have significance apart from their effect upon dispositions made by will, e.g., revocation of will of another person. (NJSA 3B:3-12).

Testamentary Guardian.

See category 14 Family, topic 14.08 Guardian and Ward, subheads Eligibility and Competency and Appointment by Parent.

Probate.

Will of resident may be probated by Surrogate's Court of county of residence or in Superior Court. (NJSA 3B:3-24). Will of N.J. resident probated outside of State will be ineffective until or unless probate granted within N.J. (NJSA 3B:3-24).

Will, properly executed (see subhead Execution, supra), may be admitted to probate in common form upon proof of one of attesting witnesses or by some other person with knowledge of facts relating to proper execution by testator and attestation by one of witnesses. (NJSA 3B:3-19). Properly executed and acknowledged self-proved will (see subhead Self-proved Wills, infra) may be admitted in common form without further proof. (NJSA 3B:3-19). Writing intended as will may be admitted to probate only in manner provided by Rules of Court. (NJSA 3B:3-19).

No will may be admitted to probate until expiration of ten days after decedent's death though proceedings may be instituted any time after death. (NJSA 3B:3-22). Superior Court has original jurisdiction over probate matters (NJSA 3B:2-2), and can review orders or judgments of surrogate court (NJSA 3B:2-3). Surrogate of county wherein decedent was resident at time of death may, without notice of application, admit will to probate and grant letters testamentary thereon; but in case doubts arise on face of will, or caveat is filed, or dispute arises respecting existence of will, surrogate must not act except as ordered by Superior Court, Chancery Division, Probate Part, which court determines controversy. (NJSA 3B:2-3, 3B:2-5; NJSA 3B:3-17, 24). Chancery Division, Probate Part may compel discovery and production of will. (NJSA 3B:3-29). Upon proper cause being shown, executor who has probated will before judge of Superior Court, Chancery Division, in common form, may be required by judge of Superior Court, Chancery Division, to prove same will in solemn form. (65 N.J. Eq. 329, 55 A. 75). If subscribing witness resides or is out of New Jersey, court in which will is being probated may issue commission, with photocopy of will attached, directed to person authorized to administer oaths as prescribed by Rules, authorizing taking of deposition of such witness. (Rule 4:80-2[a]).

Special provision is made for probate of wills of members of Armed Forces when subscribing witnesses are not available (NJSA 3B:3-20) and for proving signatures of witnesses to will who are absent while in Armed Forces or Merchant Marine during war or national emergency (NJSA 3B:3-21).

Within 60 days from date of probate, executor or administrator c.t.a. must mail to all beneficiaries mentioned in will, spouse, heirs, next of kin and other persons, if any, entitled to letters, notice in writing stating that will has been probated and place and date of probate, name and address of executor or administrator c.t.a., and statement that copy of will will be provided upon request. Proof of mailing must be filed with Surrogate Court within ten days thereof. (Rule 4:80-6).

Seven years after probate of will, judgment of probate, unless set aside, is conclusive upon title to real estate. (NJSA 3B:3-31).

Self-proved Wills.

For properly executed will made self-proved simultaneous with execution, with acknowledgment by testator and affidavits of witnesses, each made before officer authorized to take acknowledgments and proofs of instruments entitled to record under New Jersey law, in form and content substantially as follows:

I, _____________, the testator, sign my name to this instrument this ________day of ________, 20____, and being duly sworn, do hereby declare to the undersigned authority that I sign and execute this instrument as my last will and that I sign it willingly (or willingly direct another to sign for me), that I execute it as my free and voluntary act for the purposes therein expressed, and that I am 18 years of age or older, of sound mind, and under no constraint or undue influence.

_______________ Testator

We, _____________, the witnesses, sign our names to this instrument and, being duly sworn, do hereby declare to the undersigned authority that the testator signs and executes this instrument as testator's last will and that testator signs it willingly (or willingly directs another to sign for the testator), and that each of us, in the presence and hearing of the testator, hereby signs this will as witness to the testator's signing, and that to the best of our knowledge the testator is 18 years of age or older, of sound mind, and under no constraint or undue influence.

_______________ Witness

_______________ WitnessState of_______________County of_______________

Subscribed, sworn to and acknowledged before me by _____________, the testator, and subscribed and sworn to before me by _____________and _____________, witnesses, this ________day of ________, 20 ____.

_______________ (Signed)

_______________ (Official capacity of officer)

Making Will self-proved after execution must comply with same formalities as for simultaneous self-proving wills, and the acknowledgments and proofs must be attached to the Will and in form and content appear substantially as follows:

State of_______________

County of_______________

We, _____________, _____________, and _____________, the testator and the witnesses respectively, whose names are signed to the attached or forgoing instrument, being duly sworn, do hereby declare to the undersigned authority that the testator signed and executed the instrument as his last will and that the testator had signed willingly (or willingly directed another to sign for the testator), and that testator executed it as testator's free and voluntary act for the purposes therein expressed, and that each of the witnesses, in the presence and hearing of the testator, signed the will as witness and that to the best of his or her knowledge the testator was at that time 18 years of age or older, of sound mind and under no constraint or undue influence.

_______________ Testator

_______________ Witness

_______________ Witness

Subscribed, sworn to and acknowledged before me by _____________, the testator, and subscribed and sworn to before me by _____________and _____________, witnesses, this ________day of ________, 20 ____.

_______________ (Signed)

_______________ (Official capacity of officer)

(NJSA 3B:3-4, 3B:3-5).

Contest.

Caveat filed in surrogate's court in county where decedent resided at death precludes probate until hearing on order to show cause, except by Superior Court on notice to caveator. (NJSA 3B:2-2, NJSA 3B:2-3, NJSA 3B:2-5). After ex parte probate in surrogate's court any person aggrieved may apply to Superior Court for order to show cause why judgment should not be set aside or modified and after ex parte probate in Superior Court similar application may be made to that court. Application must be made within four months thereafter, or six months thereafter in cases where moving party resided outside state at entry of judgment. (Rule 4:85-1, Rule 4:85-2).

Recording.

Surrogate records wills proved before Surrogate or Superior Court. (NJSA 2B:14-6 – 2B:14-8; NJSA 2A:5-18). Will devising real estate may be filed with surrogate in any county in which real estate sits. Once recorded such will, or certified copy thereof, shall be received in evidence in any cause involving title to real estate in that county as if said will had been originally admitted to probate before surrogate. (NJSA 3B:3-25).

Disclaimers.

Any heir, surviving joint tenant, devisee or beneficiary under will or appointee under power of appointment exercised by will, including person succeeding to disclaimed interest, may disclaim in whole or in part right of succession to any property or interest therein, or fractional share thereof, including future interest, by filing disclaimer. (NJSA 3B:9-2). Disclaimer must be in writing, signed, and acknowledged, must describe property or interest disclaimed (NJSA 3B:9-3), and must be filed with Surrogate or Superior Court where proceedings have been commenced for administration of estate (NJSA 3B:9-6). Disclaimer must be made before right to disclaim barred by acceptance of benefits or other circumstances. (NJSA 3B:9-4.2, 3B:9-4.9). Disclaimer barred if devisee or beneficiary exercises control, ownership, or voluntarily encumbers property. (NJSA 3B:9-9).

Legacies.

General pecuniary legacies bear interest beginning one year after first appointment of personal representative until payment, unless contrary intent indicated in will or court, for good cause, waives imposition of interest. Interest prescribed at average rate of return for preceding fiscal year of New Jersey Cash Management Fund. (NJSA 3B:23-11).

Unclaimed Legacies.

Assets remaining when fiduciary states final account presumed abandoned and handled in accordance with Uniform Unclaimed Property Act, NJSA 46:30B-1 et seq. (NJSA 3B:23-21). Escheat of unclaimed legacies follows general rules. See category 21 Property, topic 21.01 Absentees, subhead Escheat.

See also topic 13.08 Executors and Administrators, subhead Distribution.

Lapse.

Devise made to grandparent, stepchild or lineal descendant of grandparent of testator who is dead at time of execution of will or fails to survive testator or is treated as if he predeceased testator, goes to descendants of deceased devisee who survive testator by 120 hours (take by representation). (NJSA 3B:3-35). If devise other than residuary devise lapses it becomes part of residue. (NJSA 3B:3-36[a]). In absence of contrary intent by will where residue is devised to two or more persons and residuary devisee dies before testator and devisee's share is not saved from lapse, share passes to remaining residuary devisee or devisees proportionately. (NJSA 3B:3-37).

Children.

Surviving child not provided for in will executed prior to child’s birth or adoption receives share of estate unless: (1) Omission from will was intentional; or (2) provision for child outside will in lieu of testamentary provision. (NJSA 3B:5-16[a]). If testator had no living children when will executed, omitted child receives intestate share unless will devises substantially all of estate to child’s other parent. If testator had living children, omitted child takes share child would have received had testator included child in class with children to whom devises were made. Living child omitted because believed dead receives same share as after-born child. (NJSA 3B:5-16[c]). Share taken from devisees under will ratably. (NJSA 3B:5-16[d]).

Spouse.

Surviving spouse not provided for in will executed before marriage receives intestate share unless will made in contemplation of marriage, will expresses intent that it is effective notwithstanding any subsequent marriage or provision was made outside of will in lieu of testamentary provision. (NJSA 3B:5-15). Surviving spouse can further avoid disinheritance by claiming “elective share” against assets of decedent’s “augmented estate”. (NJSA 3B:8-1 et seq.). Election, which may be waived, must be made by filing in Superior Court within six months after appointment of personal representative. (NJSA 3B:8-12).

Election as to Dower and Curtesy.

Spouse to whom realty is devised takes same in lieu of dower or curtesy in any realty devised, even though not so expressed in will, but he or she may file with surrogate, within six months after probate of will, written refusal renouncing such devise, and is then entitled to dower or curtesy. (NJSA 3B:28-14).

There is no statutory provision as to effect of gift of personalty on dower or curtesy. If testator declares in express words that legacy to spouse is or is not in lieu of dower or curtesy, such declaration is conclusive. If expressed to be in lieu thereof, spouse may elect. In absence of express words, intention is to be ascertained “by reading the will from the four corners.” (98 N.J. Eq. 199, 129 A. 752).

No right of dower or curtesy in real property arises if after May 28, 1980, person shall become married or seized of estate of inheritance. (NJSA 3B:28-2).

Construction.

Meaning and effect of disposition is governed by law of state specified in will unless contrary to New Jersey public policy, but testator’s intent controls. (NJSA 3B:3-33). Unless contrary intention appears by will, in any devise or legacy, words “die without issue” or other words importing failure of person’s issue in person’s lifetime or at death, or indefinite failure of issue, is construed to mean failure of issue at death. (NJSA 3B:3-38). Devise of realty under will effective prior to July 4, 1934, to person for life and at death to heirs or issue, or to heirs of person’s body, goes after death of devisee for life, to children and their issue per stirpes in fee as tenants in common (see Comp. Stat. of 1910, p. 1921); for devise under will effective after July 4, 1934, Rule in Shelley’s Case has been abolished and words “heirs,” etc. are deemed to be words of purchase and not of limitation. (NJSA 46:3-14). Unless contrary is expressed, issue and descendants take by representation. (NJSA 3B:3-41).

Foreign Executed Wills.

Written will is validly executed if executed in compliance with laws of N. J. or in compliance with law of place where executed or where testator was domiciled, residing or national either at time of execution or at death. (NJSA 3B:3-9). Will of nonresident dying seized of real estate or personal property situated in New Jersey, which will has not been probated and for which no proceedings for probate are pending in place of testator’s residence at time of death, may be admitted to probate and letters issued by judge of Superior Court, Chancery Division, Probate Part, or Surrogate's Court, of any county in this state in which decedent's real estate is located. (NJSA 3B:3-28; Rule 4:80-1[a]).

Foreign Probated Will.

Will of nonresident probated elsewhere, if valid in accordance with laws of New Jersey, may be admitted to probate and letters issued thereon by surrogate of any county. (NJSA 3B:3-26).

Exemplified copy of will or of record thereof of nonresident probated elsewhere and of certificate or judgment for probate, and, if title to lands depends on conveyance by executor or administrator c.t.a., of record of grant of letters or of copy of letters, recorded in office of surrogate of any county has, if such will is valid under laws of New Jersey, same effect in respect of all lands of which testator died seized as if said will had been admitted to probate and said letters issued in New Jersey and all conveyances of such real estate by fiduciary, devisee or person claiming under devisee, are as valid as if said will had been admitted to probate in New Jersey. (NJSA 3B:3-27).

Simultaneous Death.

See topic 13.05 Death, subhead Survivorship.

Testamentary Trusts.

See topic 13.15 Trusts.

Uniform Anatomical Gift Act (1968; adopted 1969). (NJSA 26:6-57 – 26:6-65).

Homicide of Decedent.

Individual responsible for intentional killing of decedent forfeits all benefits with respect to decedent's estate, including intestate share, elective share, or share of omitted spouse/child. Interest passes as if killer had disclaimed. (NJSA 3B:7-1 et seq.). See topic 13.07 Descent and Distribution, subhead Homicide of Decedent.

Living Wills.

Written, signed and dated declaration, witnessed either by two subscribing adults (who shall attest that declarant is of sound mind and free of duress and undue influence) or acknowledged by declarant before notary public, attorney-at-law, or other person authorized to administer oaths, which may instruct physician to provide, withhold, or withdraw life prolonging procedures (including sustenance), if suffering terminal condition. (NJSA 26:2H-53 et seq.). There is no statutory prescribed form.

14 FAMILY

14.01 ADOPTION:

NJSA 9:3-37 et seq. effective Mar. 8, 1978 and applicable to actions for adoption commenced thereafter. Either adult or child may be adopted. Adopter of adult must be of full age; if married, his or her spouse must consent, or application may be by both jointly. (NJSA 2A:22-1). Adopter of adult must be ten years older than adoptee. (NJSA 2A:22-2). Adopter of child must be ten years older than adoptee and must be of full age. Court in interest of adoptee may waive any of foregoing requirements. (NJSA 2A:22-2; NJSA 9:3-43).

Consent Required.

Adult adoptee's request for adoption and, if desired, change of name must be filed with complaint. (NJSA 2A:22-2; Rule 5:11). In general with respect to child adoptees, investigation, report and recommendation by approved agency and review thereof by court, is required. Failure of approved agency to consent shall not preclude adoption. (NJSA 9:3-47). Consent of natural parent not prerequisite to adoption where no approved agency of state is involved. (63 N. J. Super. 98, 164 A.2d 65).

Approved agency may acquire custody of child by instrument of surrender executed and acknowledged by parent, guardian, approved agency of other states, by U.S. or foreign country which duly obtained authority to place child for adoption. Approved agency may not discriminate regarding selection of adoptive parents on basis of age, sex, race, national origin, religion or marital status. (NJSA 9:3-40, 41). Proceedings governed by Rule 5:10.

Conditions Precedent.

Child placed by approved agency must reside in adopter's home minimum of six months prior to institution of action. Action for adoption of child not placed by approved agency must be instituted with reasonable promptness. (NJSA 9:3-44, 9:3-47).

Jurisdiction and venue lie in Superior Court in county where adopting parent or adult adoptee resides, except that if child is placed for adoption through approved agency, proceedings may be in Superior Court of county where office of such agency is located, or if natural parents of adoptee child were divorced in New Jersey, proceedings must be in Superior Court (NJSA 2A:22-1; NJSA 9:3-42; Rule 5:10-1), unless such Court previously shall have awarded custody to approved agency.

Complaint.

In action for adoption complaint must be verified and must comply with requirements of Rules 5:10-3 (as to child) and 5:11 (as to adult). Notice of hearing required. (NJSA 9:3-45).

Proceedings.

If adoptee is adult, court may hear case upon oral testimony of parties and, if necessary, other persons. (Rule 5:11). If adoptee is child received from approved agency, final in camera adoption hearing shall be ten to 30 days from filing of complaint, unless longer period required for service of notice upon natural parents. Court must declare child ward of court, order approved agency to file report concerning surrender of child, evaluation of child, adopter, care received by child and adjustment of child and adopter as family members. (NJSA 9:3-47). If adoptee is child not placed by approved agency, upon filing complaint court shall appoint approved agency to file report concerning surrender of child and evaluation of child and adopter. Court may dispense with or limit scope of agency report in certain instances. In camera preliminary hearing shall be two to three months from filing of complaint. Court may enter judgment of adoption at conclusion of preliminary hearing in certain instances. Final hearing shall be six to nine months from date of preliminary hearing. Approved agency shall visit adopting home periodically to observe and evaluate care and adjustment of child. At least 15 days before final hearing, approved agency must file with court written report of findings, including recommendation concerning adoption. (NJSA 9:3-48). If child is ten or over, child's appearance is required at adoption hearing and child's wishes concerning adoption shall be considered by court. (NJSA 9:3-49). All proceedings, documents, testimony, orders, judgments and reports of investigation are filed under seal and are not open to inspection except by court order. Upon judgment of adoption, clerk certifies to State Bureau of Vital Statistics date of entry of judgment, names of natural parents of child appearing in record of proceedings, names of adopting parent or parents, date and place of child's birth, prior name and new name. (NJSA 9:3-52).

Effect of Adoption.

Adoptee, whether child or adult, acquires all rights, privileges and obligations of child of adopter born in lawful wedlock and loses all rights, privileges and obligations with respect to natural parents including right of inheritance, excepting that when, in case of child adoptee, adopter is stepfather or stepmother and adoption is consented to by mother or father, respectively, no relationships are terminated between child and such mother or father, nor rights of inheritance under intestate laws of this State through other parent, and further excepting that adult adoptee does not lose right of inheritance from natural parents and their kindred but adoptee’s right of inheritance from adopting parents is subject to certain limitations. Children by birth and by adoption inherit from and through each other as if all were born of same parents in lawful wedlock. (NJSA 2A:22-3; NJSA 9:3-50).

Establishment of Paternity.

Regarding children born out of wedlock, New Jersey Parentage Act establishes parent-child relationships for purposes of intestate succession and probate. (NJSA 3B:5-10; NJSA 9:17-38 et seq.).

Foreign Adoptions.

N.J. honors foreign adoptions verified by immigration visa. Upon application, new birth certificate must issue. (NJSA 9:3-43.1).

14.02 ALIMONY:

See topic 14.05 Divorce.

14.03 COMMUNITY PROPERTY:

System does not obtain in New Jersey.

14.04 DESERTION:

See topics 14.05 Divorce, 14.09 Husband and Wife.

14.05 [RESERVED]

14.06 DIVORCE:

Governing statute is NJSA 2A:34. Except where otherwise indicated, references are to sections of this statute.

Grounds.

Divorce from bonds of matrimony (absolute divorce) or from bed and board may be granted for: (1) Adultery; (2) willful and continued desertion for term of 12 or more months; (3) extreme cruelty, provided that no complaint for divorce on this ground shall be filed until after three months from date of last act of cruelty complained of, but proviso does not apply to counterclaim; (4) separation, provided that husband and wife have lived separate and apart in different habitations for at least 18 consecutive months, and there is no reasonable prospect of reconciliation (which shall be presumed after said 18-month period); (5) voluntarily induced addiction or habituation to any narcotic drug or habitual drunkenness for 12 or more consecutive months subsequent to marriage and next preceding filing of complaint; (6) institutionalization for mental illness for 24 or more consecutive months subsequent to marriage and next preceding filing of complaint; (7) imprisonment of defendant for 18 or more consecutive months after marriage, provided that if action commenced after defendant released, parties have not resumed cohabitation; (8) deviant sexual conduct voluntarily performed by defendant without consent of plaintiff; (9) irreconcilable differences which have caused breakdown of marriage for period of six months and which make it appear that marriage should be dissolved and that there is no reasonable prospect of reconciliation. (§ 2).

Both parties must join in requesting divorce from bed and board and present sufficient proof to warrant judgment of divorce from bonds of matrimony. In case of reconciliation thereafter parties may apply for revocation or suspension of judgment and grant of bed and board divorce shall in no way prejudice either party from applying to court for conversion of said divorce to divorce from bonds of matrimony, which application shall be granted as matter of right. (§ 3).

Recrimination, condonation, and clean hands doctrine are abolished as defenses to divorce from bonds of matrimony or from bed and board, and if both parties make out grounds for divorce, decree may be granted to each. (§ 7).

Citizenship Requirements.

None.

Residence Requirements.

See infra, subhead Jurisdiction and Process.

Jurisdiction and Process.

Superior Court has jurisdiction of all causes of divorce when either party is bona fide resident of New Jersey, may afford incidental equitable relief, and by rule of court may determine venue of matrimonial actions. Superior Court has jurisdiction of actions for alimony and maintenance when defendant is subject to personal jurisdiction of court, is resident of New Jersey or has tangible or intangible real or personal property within New Jersey. (§ 8). For purposes of divorce, either absolute or from bed and board, jurisdiction may be acquired by personal service of process upon defendant within or outside New Jersey, or if same cannot be obtained, jurisdiction may be acquired by publication, to be followed, where practicable, by notice to defendant or by additional substituted service upon defendant (Rules 5:4-1, 3), under following conditions: (a) When, at time cause of action arose, either party was bona fide resident of New Jersey, and has continued so to be down to time of commencement of suit, except that no suit for absolute divorce shall be commenced for any cause other than adultery, unless one of parties has been for one year next preceding commencement of suit bona fide resident of New Jersey; or (b) when, since cause of action arose, either party has become, and for at least one year next preceding commencement of suit has continued to be, bona fide resident of New Jersey. (§ 10).

Voluntary appearance, answer or acknowledgment of process by defendant or duly authorized attorney will confer full jurisdiction over defendant’s person. (§ 11; Rule 5:4-3).

Practice.

Matrimonial actions are commenced by filing complaint with Superior Court (Rules 4:2-2, 1:5-6), attaching thereto affidavit of noncollusion (Rule 5:4-2). Defendant may, by counterclaim, present to court having jurisdiction any cause of action against plaintiff cognizable under Divorce Act and any cause existing at time of service of counterclaim. (§ 12; Rule 5:4-2). Application for judgment is made to judge of Chancery Division of Superior Court or Advisory or Standing Master. Rules of Civil Practice of Superior Court generally apply to matrimonial actions. (Rule 5:1-1). Process is governed in detail by Rule 5:4. Co-respondent in adultery or deviant sexual conduct cases must be notified of pendency of action and of right to intervene. (§ 15; Rules 4:33-1, 5:4-2). Any person aged 16 or over may prosecute or defend in person, but parent or guardian of minor child or ward is not thereby precluded from prosecuting or defending on behalf of child or ward. (§§ 13-14). Venue generally is in plaintiff’s county of domicile at time cause of action arose, otherwise in defendant’s county of domicile at that time. (Rule 5:7-1).

Judgment.

If evidence is sufficient in action for divorce from bonds of matrimony, a final judgment is entered. Appeals can only be taken from a final judgment and only within 45 days from entering same. (§ 18, Rule 2:4-1[a]).

Judgment of divorce from bed and board has same effect on property rights as absolute divorce during its existence. (§ 6).

Resumption of Name or Assumption of any Surname.

On or after granting divorce from bonds of matrimony, court may allow either spouse to resume any name used by spouse before marriage; or to assume any surname. (§ 21).

Allowance for prosecution of action may be made in discretion of court, whether wife be plaintiff or defendant. (85 N.J. Eq. 407, 96 A. 887). Counsel fees may be allowed in court's discretion to either party whether successful or not. (Rule 4:42-9).

Alimony and Maintenance.

Pending suit for divorce, brought in New Jersey or elsewhere, or after judgment for divorce, wherever obtained, court has power to make orders as to alimony or maintenance of parties, including order to pay retainer on behalf of other party for expert or legal services where financial circumstances of parties so warrant, and may revise such orders from time to time as circumstances require. Court may award permanent alimony, rehabilitative alimony, and alimony for term of years to either party and in so doing shall consider, but not be limited to, specifically enumerated factors, including need and ability to pay of parties, duration of marriage, history of financial or nonfinancial contributions to marriage by each party (including contributions to care and education of children and interruption and deferral of career or educational opportunities), lifestyle of parties during marriage, and equitable distribution of property. When retirement benefits are treated as assets for equitable distribution purposes, income subsequently generated therefrom may not be considered in determining alimony. On all grounds except separation, court may consider proofs made in establishing such grounds and, upon requests for awards of rehabilitative or permanent alimony, court shall consider such proofs and make specific findings thereon. On grounds of institutionalization for mental illness, court may consider burden on taxpayers as well as ability of plaintiff to pay. In addition to alimony and maintenance, court may order equitable distribution of certain real and personal property acquired by either party during marriage and in so doing shall consider, but not be limited to, specifically enumerated factors. (§ 23). Party responsible for maintaining insurance coverage is required to continue coverage. (§ 23d).

On valid remarriage of spouse or death of payor spouse, permanent alimony shall terminate, except as to accrued arrearages. Remarriage of spouse receiving rehabilitative alimony is not cause for termination unless court finds that circumstances on which award was based have not occurred or payor spouse demonstrates agreement or good cause to contrary. Court retains right to order either spouse to maintain life insurance for protection of former spouse or children in event of death of payor spouse. (§ 25).

Attachment of property of spouse who is not found within New Jersey available to enforce judgment. (§ 26). Order of maintenance available for support of spouse and children unjustifiably abandoned by other spouse or in event one spouse divorces other spouse without securing personal jurisdiction over other spouse. (§ 24).

Division of Property of Spouses.

See subhead Alimony and Maintenance, supra.

Custody and Support of Children.

Superior Court may make orders respecting care, custody, education and maintenance of children of parties pending suit for divorce, brought in New Jersey or elsewhere, or after judgment for divorce, wherever obtained, and may revise same from time to time as circumstances require. (§ 23; Rule 5:8). In so doing, court shall consider, but not be limited to, specifically enumerated factors. (§ 23[a]). Court may sanction party for violating visitation order. (§ 23.2). Overdue child support obligations may not be modified retroactively except for period during pendency of application therefor. (NJSA 2A:17-56.23a). See also NJSA 9:2-2 and topic Infants herein. Parent's access to children's records permissible if in best interest of child and not to detriment of other parent. Either parent's place of residence shall not appear on records released. (NJSA 9:2-4.2).

Remarriage after final judgment of divorce is not prohibited.

Foreign Divorces.

No statutory provision.

Separation agreements between husband and wife are not enforceable except insofar as they provide for support. (115 N.J. Eq. 49, 169 A. 555). Either party may terminate separation by requesting resumption of marital relations, and party refusing will be deemed deserter. (66 N.J. Eq. 320, 58 A. 192). While operative, agreement is ordinarily bar to suit for divorce for desertion. (16 N.J. Eq. 275).

Annulment of Marriage.

See topic 14.11 Marriage.

14.07 DOMESTIC PARTNERS:

Domestic Partnership Act provides individuals who choose to live together in important personal, emotional and economic committed relationships with certain rights and benefits generally accorded to married couples. (NJSA 26:8A-2).

Establishment, Requirements.

To become domestic partners, Affidavit of Domestic Partnership must be executed and filed with local registrar along with payment of fee. To be eligible for domestic partnership, both persons must be at least 18 years of age, unmarried, of same sex, and unrelated by blood or affinity. Additionally, both persons must have common residence, joint responsibility for each other's common welfare and basic living expenses, and commitment to relationship of mutual caring. (NJSA 26:8A-4).

Liability for Debts.

Domestic partner not liable for debts of other partner contracted before establishment of domestic partnership, or contracted by other partner in own name during domestic partnership. (NJSA 26:8A-6[g]).

Contracts.

Domestic partner who contracts in own name liable to be sued separately in own name, and any property belonging to that partner liable to satisfy debt in same manner as if partner had not entered in domestic partnership. (NJSA 26:8A-6[g]).

Termination of domestic partnership may be granted for: (1) Infidelity; (2) willful and continued desertion for period of 12 or more consecutive months; (3) extreme cruelty, provided no complaint for termination on this ground shall be filed until after three months from date of last act of cruelty complained of, but proviso does not apply to counterclaim; (4) separation, provided that domestic partners have lived separate and apart in different habitations for at least 18 consecutive months, and no reasonable prospect of reconciliation exists (which shall be presumed after said 18-month period); (5) voluntarily induced addiction or habituation to any narcotic drug or habitual drunkenness for 12 or more consecutive months subsequent to establishment of domestic partnership and next preceding filing of complaint; (6) institutionalization for mental illness for 24 or more consecutive months subsequent to establishment of domestic partnership and next preceding filing of complaint; (7) imprisonment of defendant for 18 or more consecutive months after establishment of domestic partnership, provided that if action commenced after defendant released, parties have not resumed cohabitation. (NJSA 26:8A-10[a][2]). Superior court has jurisdiction over all proceedings related to termination of domestic partnership, including division and distribution of jointly held property. (NJSA 26:8A-10[a][1]). Upon termination of domestic partnership, partners, from that time forward, shall incur no obligations to each other as domestic partners. (NJSA 26:8A-6[b]).

Discrimination.

Employers, labor organizations, places of public accommodation, private clubs and associations, and persons with right to sell, rent, lease, assign or sublease real property may not discriminate on basis of domestic partner status. (NJSA 10:5-12).

Other Benefits.

Domestic partners entitled to visitation rights for hospitalized domestic partner (NJSA 26:2H-12.22), right to make medical or legal decision for incapacitated partner (NJSA 26:2H-58), and additional exemption from personal income tax (NJSA 54A:3-1) and transfer inheritance tax (NJSA 54:34-1) on same basis as spouse.

14.08 GUARDIAN AND WARD:

Jurisdiction and Venue.

In appointment of guardians as to minors or orphans, surrogate's court of county in which minor or orphan resides or, if a nonresident, has real or personal property therein has same power as superior court. (NJSA 3B:12-12, and Tit. 3B generally). Procedure is governed by Rule 4:82. Where dispute arises, or surrogate certifies case to be of doubt or difficulty, surrogate's court may not act without order of Superior Court, Law Division, Probate Part. (Rule 4:84-1). In case of incapacitated person respective superior court may determine incapacity and appoint guardian. (NJSA 3B:12-25). Procedure is governed by Rule 4:83. Commissioner of Human Services, or parent, spouse or relative of adult alleged incapacitated person receiving financial or other services, or other interested party, may file complaint in superior court in county furnishing services or in which such parent, spouse, relative or interested party resides for judgment designating him as legal guardian of person of such adult. (NJSA 30:4-165.7).

Eligibility and Competency.

No specific enumeration of necessary qualifications of guardians. Residents are given preference. (Rule 4:81-4). Guardian, whether resident or nonresident, must file with surrogate or clerk of court appointing him power of attorney for service of process. (NJSA 3B:14-47). To be eligible to become registered professional guardian and thereby serve as professional guardian of five or more wards who are incapacitated adults, person must satisfy list of specific enumerated requirements. (NJSA 52:27G-33).

Appointment by Parent.

With consent of the other, if alive, either parent may, by will, appoint guardian for unmarried children under 18 for duration or portion of minority. (NJSA 3B:12-13 – 3B:12-15-15). Before letters of guardianship are issued applicant must accept appointment. (NJSA 3B:2-6; Rule

4:81-5). Where guardian is appointed by will, court on application may nevertheless make such order as is best for infant. (NJSA 3B:12-17, 3B:12-34).

Appointment by Court.

Complaint in action for appointment of guardian for infant of 14 years or more must be signed by infant in presence of judge or surrogate or deputy surrogate. If infant is out of state, complaint must be acknowledged before judge of court of record, or, in a foreign country, before officer authorized by New Jersey law to take acknowledgments. (Rule 4:81-3). In action for appointment of guardian for orphan under 14 years, court may appoint next of kin or other proper person guardian of orphan until he attains 14 years and chooses another guardian. (NJSA 3B:12-21). Notice or renunciation not required where application is by person first entitled. (Rule 4:81-1). Court may appoint either parent or other suitable person guardian of real or personal estate of minor (NJSA 3B:12-21); but appointment and bond unnecessary where value of real and personal estate does not exceed $5,000, in which case either parent or suitable person is entitled to receive same for benefit of minor upon execution of affidavit before court (NJSA 3B:12-6 et seq.).

Where next of kin of resident minor are nonresident, court may take such action in respect to appointment of guardian as shall be to minor's advantage. (NJSA 3B:12-22). Special guardian may be appointed for nonresident minor possessed of real or personal property within New Jersey. (NJSA 3B:12-19). Special guardian may be appointed without bond when minor desires to enlist in Armed Forces and has no parent or guardian entitled to custody and control available to sign written consent required. (NJSA 3B:12-20).

Kinship Legal Guardian.

To enable relatives providing long-term care to children without court approved legal guardianship status to establish permanent legal arrangement (NJSA 3B:12A-1), application may be made to Superior Court, Chancery Division, Family Part for appointment of kinship legal guardianship in county where child resides or has personal property (NJSA 3B:12A-3). Kinship legal guardian shall have same rights as birth parent, except right to consent to adoption or name change for child. Birth parent shall retain obligation to pay child support and right to visitation. (NJSA 3B:12A-4). Petition shall contain kinship caregiver assessment including name and address of petitioner, circumstances of kinship relationship, whereabouts of birth parents, nature of parents' incapacitation, known wishes of birth parents, kinship caregiver ability to assume permanent care of child; known property and assets and assets of child, wishes of child, division report if child has open division case and is actively receiving services, certification that caregiver has been providing care for at least last 12 consecutive months, results of criminal history record background check and domestic violence central registry check of caregiver and any adult residing in caregiver's household, results from child abuse record check, results of caregiver's home review. (NJSA 3B:12A-5).

Upon petition court shall consider if proper notice was provided to child's birth parents, best interests of child, kinship caregiver assessment, recommendation of division, petitioner's ability to provide safe and permanent home for child, known wishes of child's parents, wishes of child if 12 years of age or older, suitability of kinship caregiver to raise child, ability of petitioner to assume full legal responsibility for child, commitment of petitioner to raise child to adulthood. Court shall not award kinship legal guardianship of child unless proper notice was served upon parents of child or solely because of parental incapacity. Court shall appoint kinship legal guardian if it finds that each parent's incapacity is serious in nature, parents' inability to perform parental functions is unlikely to change, division exercised reasonable but unsuccessful efforts to reunify child with parents, adoption of child is neither feasible nor likely; and awarding kinship legal guardianship is in child's best interests. (NJSA 3B:12A-6).

Dept. of Human Services must inform individuals known eligible to become kinship legal guardians of eligibility, responsibilities and services available and must inform current kinship legal guardian of services available (Tit. 30, c. 4c, § 89) effective Dec. 12, 2005.

Standby Guardian.

In order to enable custodial parent or legal custodian suffering from progressive chronic condition or fatal illness to make plans for permanent future care or interim care of child without terminating parental or legal rights (NJSA 3B:12-68), application may be made to Surrogate's Court for appointment of standby guardian of minor child in county where child resides or has personal property (NJSA 3B:12-70). Court may also appoint alternate standby guardian, if identified by petitioner, to act if appointed standby guardian dies, becomes incapacitated or otherwise refuses or is unable to assume duties of standby guardian after death, incapacity or debilitation of parent or legal custodian of minor child. Petition shall set forth which triggering event or events, such as death, incapacity or debilitation of custodial parent or legal custodian shall cause authority of appointed standby guardian to become effective. Petitioner shall not be required to submit medical documentation of parent or legal custodian's terminal status by attending physician. Petitioner shall not be required to appear in court if unable to appear, except upon Motion by Court or any party and for good cause shown. (NJSA 3B:12-72). Parent or legal custodian may revoke standby guardianship by executing written revocation, filing it with court where petition was filed and promptly notifying appointed standby guardian of revocation. (NJSA 3B:12-73).

Parent or legal custodian may also choose standby guardian by means of written designation that names standby guardian in event of designator's death, incapacity or debilitation. Written designation shall reasonably identify designator, minor child and standby guardian and shall be signed by designator in presence of two witnesses, who shall also sign designation. Designation shall state triggering event by which parent or legal custodian intends designated standby guardianship of minor child to be activated. Parent or legal custodian may designate alternate standby guardian in same document and by same manner as designation of standby guardian. Nothing in section shall be construed to involuntarily deprive any parent of parental rights. (NJSA 3B:12-74).

Bond is required from every guardian appointed by court. (NJSA 3B:15-1, 3B:15-2). Testamentary guardian must give bond unless otherwise directed by will, but bond is always required as to property from sources other than appointing parent or other than policy of life insurance on life of such parent. (NJSA 3B:12-16, 3B:12-33).

Inventory.

Guardian may, and if court requires, must, file inventory of property after three months from appointment. (NJSA 3B:16-8).

Powers and Duties.

Guardians have same powers as fiduciaries under wills (NJSA 3B:14-23, 24; 3B:1-1; 3B:20-1 et seq.) unless otherwise limited by court (NJSA 3B:12-37).

Guardian is not personally liable for the support of ward, merely having control of property and custody of ward; but is personally liable on contracts made on behalf of ward. (38 N.J. Eq. 446). Contracts between guardian and ward are viewed with suspicion. (99 N.J. Eq. 683, 133 A. 538).

As to abandonment of real property, see category 13 Estates and Trusts, topic 13.15 Trusts.

Protective Arrangements.

Court may, without appointing guardian for estate of minor or incapacitated person, when necessary or desirable to prevent waste or dissipation of property, and to meet foreseeable needs of minor or incapacitated person or those dependent upon him, establish protective arrangement respecting one or more specific transactions. In certain circumstances court may appoint special guardian to assist in accomplishment of protective arrangement. No such arrangement or appointment affects constitutional and statutory rights of incapacitated person to jury trial on question of incapacity. (NJSA 3B:12-1 et seq.).

Investments.

Same as permitted for trustees. See category 13 Estates and Trusts, topic 13.15 Trusts.

Securities in Name of Nominee.

See category 13 Estates and Trusts, topic 13.15 Trusts, subhead Securities in Name of Nominee.

Facility of Payment.

Under certain circumstances person under duty to pay money or deliver personal property to minor in amounts not exceeding $5,000 per annum may do so, without appointment of guardian of minor, by payment or delivery to: Minor, if married; parent or parents of minor; person having minor’s care and custody; guardian of person of minor; or financial institution for deposit in federally insured savings account in name of minor. No surety bond is required for amounts within statutory limit. Affidavit from recipient other than married minor or financial institution setting forth certain specified information must be obtained and filed with surrogate of county in which minor resides. (NJSA 3B:12-6 et seq.).

Gifts to Minors.

Separate statutory provisions govern commissions which may be taken on interim and final basis by fiduciaries acting as guardian. (NJSA 3B:18-23 et seq.). See topic 14.10 Infants.

Accounting.

Guardian must account in Superior Court, or if appointed by or letters received from surrogate’s or county court, then in county court, as such intervals as court may require (except that first account may be settled within one year after appointment), unless he files in court where appointed a release or discharge from ward if ward is of full age and mentally competent executed and acknowledged as provided for deeds of real estate to be recorded. Judgment allowing account is res adjudicata, with certain exceptions. (NJSA 3B:17-3, 3B:17-8).

Child Placement Review Act provides for periodic review by Superior Court of placement of children outside home by Division of Youth and Family Services. (NJSA 30:4C-50 et seq.).

Uniform Veterans’ Guardianship Law (1981; adopted 1981; effective 1982). (NJSA 3B:13-1 et seq.).

Insane Persons.

Determination of competency may be had without jury unless jury is demanded by or on behalf of incompetent, or directed by court. (NJ Const. Art. 1, par. 9; NJSA 3B:12-24; Rule 4:83-1, 4:67).

Expungement.

Persons discharged as recovered from institution or facility providing mental health services may apply to court for expungement of record of commitment. Not applicable to those criminally insane or incompetent to stand trial. (NJSA 30:4-80.8 et seq.).

Developmentally Disabled Persons.

Rights governed by Developmentally Disabled Rights Act, NJSA 30:6D-1 et seq.

Uniform Fiduciaries Law (1927; adopted 1927; re-enacted 1981). (NJSA 3B:14-52 et seq.), but see category 13 Estates and Trusts, topic Trusts as to repealed sections.

Uniform Simplification of Fiduciary Security Transfers Act adopted (NJSA 14:18-1 – 14:18-12) and was saved from repeal by Uniform Commercial Code (NJSA 12A:10-104).

14.09 HUSBAND AND WIFE:

Separate Property.

Married woman's real and personal property owned at time of marriage or thereafter acquired is her separate property as though she were single. (NJSA 37:2-12). Wife is entitled to earnings of her separate employment and investments thereof. (NJSA 37:2-13). Wife's separate property is not subject to the disposal of husband, nor liable for husband's debts. (NJSA 37:2-15). Suitable ornaments and wearing apparel received from husband become wife's separate property. (NJSA 37:2-14).

Contracts.

Married woman may contract in same manner and to same extent as though unmarried, and contracts are enforceable by and against married woman in her own name and apart from her husband. Contract affecting her own real property or that of husband is valid without husband's joinder or consent, but cannot affect husband's interest or right therein. (NJSA 37:2-16). Married woman may become bound as surety for husband or any other person. (109 N.J.L. 111, 160 A. 645). Contracts between husband and wife are valid and enforceable only in equity and only if fair and reasonable. (56 N.J. Eq. 265, 38 A. 954; 117 N.J. Eq. 475, 176 A. 571; 3 N.J. 161, 69 A.2d 302). But married woman may contract with husband, or with husband and others, for formation of partnership, limited partnership or partnership association, carry on business as a partner and be bound by partnership contracts to same extent as though unmarried. (NJSA 37:2-16.1).

Antenuptial Contracts.

All contracts made in contemplation of marriage remain in full force after marriage. (NJSA 37:2-4).

Liability for Debts.

Husband is not liable for wife's debts contracted before marriage, nor for debts contracted by her in her own name after marriage. (NJSA 37:2-10). He may be liable for necessaries for her support as at common law. (102 N.J.L. 166, 130 A. 555; 11 N.J. Super. 39, 77 A.2d 489).

Agency.

Marital relationship does not disqualify husband (71 N.J.L. 83, 58 A. 297) or wife (31 N.J.L. 182, aff'd 33 N.J.L. 463) from acting as agent of other.

Conveyance or Encumbrance of Property.

Married woman may execute and deliver any instrument relating to or affecting her estate, interest or right in her real property or in that of husband with same effect as if unmarried, and any such instrument is valid without husband's joinder or consent; but no conveyance, deed, contract or act of such married woman can affect any estate, interest or right of husband therein. (NJSA 37:2-17).

Husband or wife, living separate under final judgment founded upon his or her application, may convey, etc., without spouse joining, except realty received as gift through spouse. (NJSA 37:2-23, 37:2-24).

Either spouse may convey directly to the other real estate or any interest therein, and conveyance is valid although grantee spouse does not join in or acknowledge same and such conveyance extinguishes dower or curtesy interest if specifically released. Conveyance by either spouse to himself or herself and spouse of real estate held in fee in severalty shall be construed to vest an estate by the entirety in such husband and wife. (NJSA 37:2-18, 37:2-18.1).

Actions.

No interspousal immunity in automobile negligence actions. (56 N.J. 482, 267 A.2d 481). Otherwise, neither husband nor wife may sue other except in equity (NJSA 37:2-5; 123 N.J. Eq. 515, 198 A. 845); but as to partnership contracts see subhead Contracts, supra.

Married woman may sue or be sued, without joining her husband, in any case in which he would not be necessary party if he were not her husband. (NJSA 37:2-6).

Married woman may, without joining husband, sue for all torts committed by third persons against her or her separate property (NJSA 37:2-9); and is liable for her torts to third persons, and husband is not responsible for them except where he would be jointly responsible if marriage did not exist (NJSA 37:2-8). Married woman may recover from third party tortfeasor, including medical expenses paid by husband, despite husband's contributory negligence. (50 N.J. 365, 235 A.2d 465).

Judgments against wife operate as though she were single and do not affect any interest of husband in her real property. (NJSA 37:2-11).

Community property system does not obtain.

Desertion and Nonsupport.

If husband without cause abandons wife, and refuses or neglects to maintain and provide for her, Superior Court may order suitable support and maintenance. (NJSA 2A:34-24). Where husband cannot be found for service of process, Superior Court may attach husband's estate to compel appearance and performance of court's judgments. (NJSA 2A:34-26). Writ may be discharged by giving bond. (Rule 4:60-13).

Revised Uniform Reciprocal Enforcement of Support Act adopted. (NJSA 2A:4-30.24 – 2A:4-30.64). Civil enforcement by complaint in juvenile and domestic relations court.

For practice, see topic 14.05 Divorce.

14.10 INFANTS:

Age of majority, 18 for both sexes, effective Jan. 1, 1973. (NJSA 9:17B-3). "Minor," "minority" or "majority" in certain legal instruments executed prior to Jan. 1, 1973 construed to refer to age of 18 as delineating period of minority and age of majority. (NJSA 9:17B-4, effective July 31, 1978). Drinking age is 21. (NJSA 9:17B-1).

Ratification of obligations contracted during infancy, to which infancy would be a defense, must be in writing and signed by person to be charged therewith. (NJSA 25:1-6).

Bank Accounts.

Infants may open deposit accounts in banking institutions, and draw against same as though of age. (NJSA 17:9A-215).

Gifts of Securities to Minors Act.

"New Jersey Uniform Transfers to Minors Act" (1983; adopted 1987) (NJSA 46-38A), effective July 1, 1987. Uniform Gifts to Minors Act (NJSA 46:38-13, 46:38-30; NJSA 46:38-32 – 46:38-36; NJSA 46:38-38 – 46:38-41) shall be repealed on July 1, 2007. Any transfer of custodial property defined in new Act, made before effective date is validated. (NJSA 46:38A-54). "New Jersey Uniform Gifts to Minors Act" (1963; adopted 1964). (NJSA 46:38-13 – 46:38-41), effective June 1, 1964. Age of majority remains 21 unless other age (18-21) specified by donor, in spite of adoption of 18 year majority for other purposes. (NJSA 46:38-14). Gifts may be made of securities, money, life insurance and annuity contract. Provisions of new Act should be examined carefully as to forms and other requirements.

Actions.

Infant is represented in all actions by guardian appointed in New Jersey, or, if none or conflict of interest, by guardian ad litem appointed by court. (Rule 4:26-2). Male who has attained 18 years, or female who has attained 16 years may prosecute or defend any matrimonial action in person or by attorney. (NJSA 2A:34-13). Service of process upon infant under 14 years of age made by delivering papers to parent or guardian or adult member of family with whom he resides, or if such service cannot be made, then as provided by order of court. (Rule 4:4-4).

Custody and Maintenance.

Superior Court, Chancery Division, under its general equity jurisdiction, has superintendency over the concerns of infants, their custody, etc. (45 N.J. Eq. 283, 17 A. 831; 19 N.J. Eq. 481); and in addition has various statutory powers pertaining to their custody and maintenance, etc. (See NJSA 9:2-1 – 9:2-11). See also topic 14.05 Divorce.

Sale of Property.

Upon application and proof to Superior Court, Chancery Division, by guardian or guardian ad litem or person having vested interest in land, that infant's interests require sale of infant's interest in land, court may order such sale. (NJSA 3B:12-1; c. 14, § 23; Rule 4:94). Sale may be ordered as to real estate in which infant has future or contingent interest. (See NJSA 3B:12-1 et seq.) Married infant 17 years of age or older may join adult spouse in conveyance or mortgage of real estate and in execution of bonds or other obligations in connection therewith, which shall be valid and binding. (NJSA 37:2-30). See also topic 14.08 Guardian and Ward.

Compromise.

A minor not less than 15 years of age may enter into a compromise with respect to certain insurance contracts. (NJSA 17B:24-2).

Curfews.

Municipalities may ban unchaperoned juveniles under 18 from public places between 10 p.m. and 6 a.m. and during school hours. (NJSA 40:48-2.52).

Adoption.

See topic 14.01 Adoption.

Interstate Compact.

N.J. recognizes state's responsibility for supervision and return of juveniles who have fled proper guardians. (NJSA 9:238-1).

Uniform Securities Ownership by Minors Act not adopted.

Protective Services.

Recognizing need to better protect juveniles, Office of Children's Services and N.J. Child Welfare Training Academy established. Children's Services must continue to serve individuals aged 18 to 21 where individuals were being served after 16th birthday and have not sought termination of services, and where continuation of services is in individual's best interest. (NJSA 30:4C-1.1).

Uniform Child Custody Jurisdiction Act adopted. (NJSA 2A:34-28 et seq.).

Termination of Parental Rights.

Approved agency providing supervision of child may bring action in Superior Court seeking termination of parental rights. (NJSA 9:2-18). Court may terminate parental rights if it finds that parent is dead, mentally incompetent, or divorced from other parent on grounds of adultery, desertion or extreme cruelty. (NJSA 9:2-19).

14.11 MARRIAGE:

The common law rule fixing the age at which a female may consent to marriage at 12 years is in force. (92 N.J. Eq. 301, 112 A. 598).

Consent Required.

Marriage or civil union licenses may not be issued to minors under 18, if parents or guardian, if any, being of sound mind, do not give their written consent, witnessed by two persons. For minors under 16, this consent must be approved in writing by any judge of Superior Court, Chancery Division, Family Part. This approval must be filed with licensing officer. (NJSA 37:1-6).

License.

Marriage or civil union can be lawfully performed only after license obtained and delivered to official performing ceremony or, if marriage or civil union is to be performed by or before any religious society, institution or organization, license delivered to society, etc., or any officers thereof. License may be obtained in municipality where either party resides, or, if both are nonresidents, where ceremony is to be performed. Licenses are obtainable from clerk of cities of first class and registrar of vital statistics of other municipalities or their deputies. (NJSA 37:1-2, 37:1-3). No license may be issued if either party is infected with certain venereal diseases or if currently adjudicated mental incompetent. (NJSA 37:1-9).

Issuing official must require both parties to appear in person and make oath of the facts respecting legality of marriage or civil union. Parties' testimony must be verified by one witness. (NJSA 37:1-8). License must not be issued until 72 hours after application therefor except that (a) in cases of emergency, judge of county court or juvenile and domestic relations court may by order waive all or part of 72-hour period, and (b) if person is arrested on certain criminal charges and consents to marry female involved, license may issue immediately. License valid only for 30 days after issuance. (NJSA 37:1-4, 37:1-5). On reverse side of license is form for certificate of marriage or civil union to be executed by official performing ceremony and subscribed by him and two witnesses. (NJSA 37:1-17).

Duplicate licenses may be obtained when parties desire both civil and religious ceremonies. (NJSA 37:1-7).

Serological Test.

Pre-marital serological test repealed. However, test required on woman or on umbilical cord upon birth of child. (NJSA 26:4-49.1, 26:4-49.3; NJSA 37:1-20 – 37:1-26). Repealed by L. 1997, c. 230, § 4, eff. Aug. 25, 1997.

License fee is $3, plus $25 fee for Department of Human Services Trust Fund. (NJSA 37:1-12, 37:1-12.1, 37:1-12.2).

Ceremonial marriage and civil unions may be solemnized by judge of U.S. Court of Appeals for Third Circuit, judge of federal district court, U.S. magistrate, judge of municipal court, judge of Superior Court, judge of Tax Court, retired judge of Superior Court or Tax Court, or judge of Superior Court or Tax Court, former County Court, former County Juvenile and Domestic Relations Court, or former County District Court, who has resigned in good standing, surrogate of any county, county clerk, by any mayor or deputy mayor when authorized, or chairman of any township committee or village president, and every minister of every religion, and every religious society, institution or organization in this State may join together in marriage such persons according to its own rules and customs. All marriages, if otherwise valid, solemnized by person who purported to be minister of religion but was not at time of solemnization authorized as minister by rules and customs of religious society, institution or organization, as valid as if same had been solemnized by minister of religion. Persons intending to be married still required to obtain marriage licenses. (NJSA 37:1-13).

Civil Unions.

Same sex couples in New Jersey accorded those rights and benefits married heterosexual couples enjoy. (NJSA 37:1-28, 188 N.J. 415, 908 A.2d 196).

Marriage records are forwarded to State Bureau of Vital Statistics, at Trenton. (See category 10 Documents and Records, topic 10.04 Records, subhead Vital Statistics.)

Common law marriages may not now be contracted, but such marriages contracted prior to Dec 1, 1939, are recognized. (NJSA 37:1-10; 130 N.J.L. 457, 33 A.2d 599).

Proxy Marriages.

No provision.

Marriages by Written Contract.

No provision.

Prohibited Marriages.

Marriages between ancestors and descendants and all blood relations, whether of the whole or half blood, nearer than cousins, are absolutely void. (NJSA 37:1-1).

Foreign Marriages.

Common law marriage valid where contracted is valid in New Jersey. (52 N.J. Eq. 650, 30 A. 81). Marriage legally solemnized elsewhere is valid in New Jersey. (90 N.J. Eq. 299, 106 A. 646). Marriage invalid where contracted is so regarded here. (88 N.J. Eq. 192, 102 A. 246, aff’d on other grounds, 89 N.J. Eq. 549, 105 A. 239).

Annulment.

Judgments of nullity may be rendered by Superior Court: When either party has spouse living at time of marriage; when parties are related within degrees prohibited by law; when either party was at time of marriage physically and incurably impotent and applicant was ignorant thereof, or has not ratified marriage; when either party lacked capacity to marry due to want of understanding because of mental condition, influence of intoxicants, drugs or similar agents, or where there was lack of mutual consent to marriage, duress, or fraud as to essentials of marriage, and has not subsequently ratified marriage; or when party seeking annulment was under 18 and has not confirmed marriage after arriving at that age. (NJSA 2A:34-1, 8). Child born of parents who prior or subsequent to its birth have entered into a civil or religious marriage or consummated a common law marriage where such marriage is recognized as valid, in manner authorized by law of place where marriage takes place, is legitimate child of both natural parents notwithstanding that such marriage is void or voidable, or has been or shall be annulled or judicially declared void. (NJSA 2A:34-20).

Jurisdiction may be acquired if either party is bona fide New Jersey resident at time of commencement of action, and process is served upon defendant as prescribed by Court Rules. (NJSA 2A:34-9).

Uniform Parentage Act adopted, effective May 21, 1983. (NJSA 9:17-38 et seq.).

For practice, see topic 14.05 Divorce.

Record.

See category 10 Documents and Records, topic 10.04 Records, subhead Vital Statistics.

14.12 MARRIED WOMEN:

See topics 14.09 Husband and Wife, Marriage; categories 5 Civil Actions and Procedure, topic Evidence, subhead Witnesses; Debtor and Creditor, topic Homesteads; Documents and Records, topic Acknowledgments; Estates and Trusts, topics Executors and Administrators, Wills; Property, topic Dower.

15 HEALTH

15.00A ASSISTANCE PROGRAMS FOR SENIORS:

Respite Care Program assists eligible uncompensated caregivers in caring for elderly. (NJAC 8:82). Pharmaceutical assistance to aged and disabled governed by NJAC 8:83 et seq., medical day care by NJAC 8:86 et seq., and Adult Day Services for persons with Alzheimer’s provided by NJAC 8:92 et seq.

15.00B BLOOD HANDLING:

Generally governed by NJAC 8:8-1.1 et seq. All donors must be screened for early signs of AIDs, and blood tested for HIV-1, HIV-2 and HIV antigen. (NJAC 8:8-6.5). Preparation of all blood and blood components shall be consistent with, whichever is more stringent, CFR or Standards of American Association of Blood Banks. (NJAC 8:8-7.1[e]).

15.01–15.04 [RESERVED]

15.05 FOOD, DRUGS, DEVICES AND COSMETICS:

Labeling requirements in 21 CFR 1.1 et seq. adopted in NJAC 8:21-1.2 et seq. Licensing of drug distributors, warning labels, record keeping, new drugs, food storage and handling governed by NJAC 8:21 et seq.

15.05A HEALTH MAINTENANCE ORGANIZATIONS:

Governed by NJAC 11:24 et seq. Member rights governed by NJAC 11:24-9.1, point-of-service plans by NJAC 11:24-2.8, 11:24-14.2, provider agreements by NJAC 11:24-15.1.

15.05B MEDICAID:

Home Care Expansion Program as set forth in NJSA 30:4E-6 provides subsidized home care services to elderly whose income and resources exceed financial requirements for Medicaid. Pharmaceutical Assistance to Aged and Disabled helps some residents pay for medications. (NJAC 8:83 et seq.). Lifeline programs provide seniors with assistance with utilities expenses. (NJAC 8:83A 1.1).

15.05C NURSING:

Eligibility requirements referenced in NJSA 45:11-26.

15.05D PARENTAL NOTIFICATION OF ABORTIONS:

Physician performing abortion on unemancipated minor must give written notice to one parent unless minor obtains judicial waiver, medical emergency exists, or parent is present or has signed notarized statement acknowledging awareness of pending abortion. (NJAC 9:17A-1.1, et seq.).

16 INSURANCE

16.01 INSURANCE COMPANIES:

General Insurance Act is NJSA 17-17 et seq. and App. A. c. 7, §§ 1, 2; Life and Health Insurance Code is NJSA 17B-17 — 17B-31.

Insurance companies and their business practices, making of insurance rates and licensing of rating organizations are under supervision of Department of Banking and Insurance, chief officer of which is Commissioner of Banking and Insurance. (App. A, c. 7, § 1; NJSA 17:1-2; NJSA 29A-1 et seq.; NJSA 29B-1 et seq.). Insurance holding companies regulated by NJSA 17:27A-1 — 17:27A-14.

Deposits.

No New Jersey company (other than mutual company issuing insurance solely against damage or loss to property of insured member) may transact business until it has deposited with state or federally chartered banking institution having trust powers and its principal office in New Jersey, acting as custodian on behalf of Commissioner, eligible securities having market value of at least $100,000. Commissioner may require additional deposits up to sum of $250,000. (NJSA 17:20-1). No New Jersey insurer engaged in business of life and health insurance or annuity may transact business until it has deposited with such custodian banking institution acting on behalf of Commissioner, eligible securities having market value of at least $100,000. (NJSA 17B:18-37). Eligible securities may be held in physical form or purchased for insurer's account in Federal Reserve book-entry system. (NJSA 17:20-1; NJSA 17B:18-37). Company of foreign country cannot do business in New Jersey until it has deposited with proper officer of some state or states of U.S., not less than $200,000 nor less than capital required of New Jersey stock company transacting same kinds of business. (NJSA 17:32-3; NJSA 17B:23-3). Surety and indemnity companies of another state or country (not writing court bonds or recognizances, or bonds of contractors on public works) may do business in New Jersey under same requirements as other foreign insurance companies, but to do same surety and indemnity business as New Jersey companies, must deposit $50,000 in securities with State Comptroller and have on deposit $100,000 in securities with insurance superintendent of home state or, in case of company of foreign country, with proper officer of some state of U.S., and have unimpaired capital of $250,000; but company having $200,000 in securities on deposit with superintendent or other officer of home state need make no deposit in New Jersey. (NJSA 17:32-5).

Individuals, partnerships and associations must make same deposits as stock companies. (NJSA 17:49-1).

For recovery of deposit by corporation in dissolution, receivership, etc., see NJSA 17:20-3 and NJSA 17B:32-31 et seq.

Reports and Examinations.

Every company doing business in New Jersey must file annual financial statement under oath, and quarterly statements to be kept confidential, in format adopted by NAIC, and Commissioner can request information or conduct examination at any time. (NJSA 17:23-1; NJSA 17B:21-1). As to marine companies, see also NJSA 54:16-7.

On or before Mar. 1, all companies including foreign companies must make verified report to Commissioner in connection with annual tax (see subhead Premium Tax, infra) containing such information as may be necessary to enable Director of Division of Taxation to ascertain, fix and collect amount of annual tax to be paid by each company. (NJSA 54:18A-8).

Commissioner may prohibit certain unfair trade practices, after examination and hearing. (NJSA 17:29B-5 – 17:29B-7; NJSA 17B:30-16 – 17B:30-18).

Policies.

Certain statements and provisions are required in fire policies. (NJSA 17:36-5.15 – 17:36-5.20). Health service corporations must provide coverage for biologically-based mental illness under same terms and conditions as any other sickness. (NJSA 17:48-6v). Certain provisions must be contained in health and life policies. (NJSA 17B:25-3 – 17B:25-16). Life and health policies must provide for ten-day cancellation period following delivery with full refund of premiums paid therefor if cancellation is exercised by insured. (NJSA 17B:25-2.1; NJSA 17B:26-3.1). Benefits payable for death of insured shall be settled within 60 days of receipt of proof of death. (NJSA 17B:25-11[a]). Life insurer required to notify claimant of denial or need for additional investigation within 45 days following receipt of proof required by insurer. (NJSA 17B:25-11[b]). Uncontested portion of claim shall be paid within 60 days following receipt of required information by insurer. (NJSA 17B:25-11[d]). Insurer shall pay benefits of claim under investigation or deny claim within 90 days of receipt of document or information requested during investigation. (NJSA 17B:25-11[c]). Claim not under investigation shall be paid to claimant within 60 days of receipt of information by insurer. Payment of claim under investigation or denied but eligible for payment must be paid to claimant within 90 days following receipt of information by insurer or payment is overdue and accrues annual interest. (NJSA 17B:25-11[d]).

Group life insurance is heavily regulated and, with limited exceptions, may be permitted if: (i) Employer purchases policy to insure employees; (ii) creditor purchases policy to insure debtors; (iii) labor union purchases policy to insure union members; (iv) trust or trustees of fund established by two or more employers, or by two or more labor unions, or by combination of employers and labor unions, purchases policy to insure employees and/or members; (v) association or trust or trustees of fund purchases policy to insure members; (vi) credit union purchases policy to insure members; (vii) regulated financial institution or credit card issuer purchases policy to insure depositors, account holders or credit card holders of such policies; or (viii) State Policemen's Benevolent Association or Fraternal Order of Police purchases policy to insure members. (NJSA 17B:27-68 – 17B:27-75). Insurance of lives of minors provided for.

(NJSA 17B:24-2; NJSA 17:35-27). Contracts providing for varying dollar amounts of benefits reflecting investment results permitted and regulated. (NJSA 17B:28-1 – 17B:28-15). Every company must furnish policyholder accounting record of any compensation transaction. (NJSA 17:18-17). Group health insurance policy which provides for payment of certain medical expenses for dependents of insured must continue that coverage for 180 days after insured's death, subject to payment of appropriate premiums. (NJSA 17B:27-30). All health measures must offer individual health benefits coverage on community rated basis (NJSA 17B:27A-6). Insurable interests of individual or corporation for purpose of life or health insurance is defined at NJSA 17B:24-1.1. Insurable interest is created in, and special provision is made for, issuance of health insurance or dental service contract for former husband or wife upon certain conditions. (NJSA 17B:26-2i).

Certain policies of automobile insurance may be cancelled by insurer only upon compliance with specified statutory notice provisions and for reasons set forth in statute. (NJSA 17:29C-10 – NJSA 17:29C-12).

By regulation, Commissioner has prohibited nonrenewal or cancellation of certain commercial lines insurance policies, without prior approval of Commissioner. (N.J.A.C. 11:1-20.1 et seq.).

As to policy language generally, see category 3 Business Regulation and Commerce, topic 3.12 Consumer Protection, subhead Plain Language Requirements.

Licenses and Permits.

Person shall not sell, solicit or negotiate insurance in New Jersey unless person is licensed for that line of authority. (NJSA 17:22A-29). Insurer, which does not include insurer's officers, directors, employees, subsidiaries or affiliates, need not obtain insurance producer license. (NJSA 17:22A-30). Individual who applies for insurance producer license in this State who was previously licensed for same lines of authority in another state shall not be required to complete any prelicensing education or examination. (NJSA 17:22A-35). Insurer authorized to transact business in this State may, by written contract, appoint as its agent, person that holds valid insurance producer license issued in accordance with provisions of this act. (NJSA 17:22A-42).

Surplus Lines Insurance.

Procurence of surplus lines coverages from unauthorized insurers allowed if coverage is eligible for export, insurer qualifies as eligible surplus lines insurer, and other statutory conditions are met. Advisory organizations of surplus lines agents authorized, subject to approval of and examination by Commissioner of Insurance, for purposes, among others, of facilitating compliance with surplus lines laws and regulations, examination of surplus lines coverages, and making of reports and recommendations concerning financial condition of surplus lines insurers. (NJSA 17:22-6.40 et seq.).

Rates and making thereof are governed by statute under supervision of Department of Banking and Insurance. (NJSA 17:29A-1 et seq.; c. 50, § 15). Commercial lines insurance rates have been deregulated pursuant to certain statutory limitations and conditions. (Tit. 17, c. 29AA, § 1 et seq.).

Discrimination and rebates are prohibited. (NJSA 17:29A-15; NJSA 17B:30-13).

Directors, officers, and beneficial owners of more than 10% of any class of equity security of certain New Jersey stock companies must file statement of stock ownership on or before Jan. 31, 1966, or within ten days after becoming such or after end of month in which ownership has changed. Insider profits and short sales are regulated. (NJSA 17:17B-1 et seq.).

Agents and Brokers.

Licensing, regulation and supervision of agents, brokers and solicitors of domestic and foreign companies are governed by NJSA 17:22A-27 – 17:22A-37; c. 17, § 12; NJSA 17B:17-13.

Fraternal benefit societies selling life and health insurance to members must be licensed and approved by Commissioner. Fraternal benefit societies defined. (NJSA 17:44B-1 et seq.). Societies exempted from Act. (NJSA 17:44B-35).

Process Agent.

Company must maintain agent in charge of principal office upon whom process may be served. (NJSA 17:35-22; 17:44B-34). Companies not authorized to do business in New Jersey constitute Commissioner of Banking and Insurance attorney for service of process by doing certain acts. (NJSA 17:51-1 et seq.; NJSA 17B:33-2-7).

Rehabilitation and Liquidation.

Uniform Insurers Liquidation Act now applies to domestic, foreign and alien property and casualty insurance companies operating in N. J. (NJSA 17:30C-1[b]-[k], 4[a] and [c], 5, and 15-23). Certain priorities for distributing assets of insolvent insurer are established by statute. (NJSA 17:30C-26). Provision is made for early distribution of marshalled assets to New Jersey Guaranty Association (see subhead Property-Liability Insurance Guaranty Association, infra) and counterpart associations in other states. (NJSA 17:30C-31)

Mutual Life Companies.

Insurer must file plan to reorganize or convert mutual life insurer to stock life insurer with Commissioner. Public hearing scheduled upon Commissioner's approval of plan. (NJSA 17:17C-1 et seq.).

Health Insurance Claims.

Health insurance carrier (hereinafter "payer") must enact and adhere to utilization management systems whereby payer evaluates whether, or to what extent, to authorize medical procedures in accordance with specified guidelines. (NJSA 17B:30-48). Guidelines are to be made available via Internet website. (NJSA 17B:30-51). Any denial of request or limitation imposed by payer must be made by State-licensed physician within: (i) 24 hours for patients in emergency room or already admitted to hospital for inpatient care; or (ii) within 15 days for patients seeking outpatient care or prior authorization for inpatient hospital care. (NJSA 17B:30-52). If payer does not respond to request, request is deemed approved, and payer is responsible for payment of covered services delivered. (NJSA 17B:30-52).

Upon receiving electronic claim from provider, payer must either pay claim or notify provider of nonpayment within 30 days; for claims submitted by other means, payer must either pay or notify within 40 days. (NJSA 17:48-8.4). Notice of nonpayment may be given if: (a) Claim submission is incomplete; (b) required information to be submitted with claim is incorrect; (c) payer disputes amount claimed; or (d) there is strong evidence of fraud by provider and payer has initiated investigation into suspected fraud. (NJSA 17:48-8.4). For claims missing required data, payer must notify provider within seven days, and payer subsequently is afforded 30 days for electronically submitted claims or 40 days for claims submitted via other means to pay or notify of nonpayment once missing information is provided. (NJSA 17:48-8.4). Failure to pay or provide notice of nonpayment within allotted time results in overdue claim, which accrues interest at 12% per annum. (NJSA 17:48-8.4). Except in cases of fraud, payer has 18 months to seek reimbursement for overpayment of claim, and provider has 18 months to seek reimbursement for underpayment of claim. (NJSA 17:48-8.4).

Covered person or any health care provider acting on behalf of covered person and with person's consent may apply to Independent Health Care Appeals Program for review of decision to deny, reduce, or terminate benefit. (NJSA 26:2S-11). Consent may be obtained from or revoked by covered person at any time. (NJSA 26:2S-11). Health care provider acting on behalf of covered person must bear all costs associated with appeal and must provide notice of progress in appeals process to covered person. (NJSA 26:2S-11). Disputes not resolved by Independent Health Care Appeals Program will be submitted to non-appealable, binding arbitration by independent utilization review organization contracted by Commissioner of Banking and Insurance. (NJSA 26:2S-12). Organization shall examine all pertinent information and determine appropriate, medically necessary health services covered person should receive. (NJSA 26:2S-12). Organization's decision is final and binding on payer; if Commissioner determines that payer failed to comply with decision, Commissioner may impose such sanctions and penalties on payer as Commissioner deems appropriate. (NJSA 26:2S-12).

General Provisions.

Life, with certain restrictions, and other companies may reinsure their risks. (NJSA 17:18-5; NJSA 17B:18-63 – 17B:18-64).

Hospital and medical service corporations are regulated by NJSA 17:48-1 et seq., 17:48A-1 et seq.

Reciprocal or inter-insurance contracts are authorized and regulated by NJSA 17:50-1 et seq.

Insurance contracts, other than life and health contracts, which are subject to Life and Health Insurance Policy Language Simplification Act (NJSA 17B:17-17 et seq.), are subject to Plain Language Law, NJSA 56:12-1 et seq.

Except for life, marine, title, mortgage, workmen's compensation or employer's liability insurance, and certain mutual fire companies, limit of a single risk (except portion thereof reinsured) is 10% of company's net assets. (NJSA 17:18-9).

No person, firm or company may engage in insurance business in New Jersey except as agent of authorized person, etc., unless authority has been obtained from commissioner, after compliance with statutory requirements. (NJSA 17:49-1 et seq.).

No person may, by or as agent or otherwise, solicit, negotiate or effect contract of insurance in New Jersey unless specifically authorized. (NJSA 17:17-12).

Any insurance risk may be assumed through reinsurance. Extended reinsurance business requires approval of Commissioner. (NJSA 17B:18-65). Commercial Insurance Deregulation Act enacted to encourage price competition, and efficient and economic rating and marketing practices. (NJSA 17:29AA-1 et seq.).

Foreign Companies.

Company of another state or country may transact in New Jersey any classes of insurance permitted to New Jersey corporations upon: Filing with Department certified copy of its charter and sworn financial statement; satisfying Commissioner that it is legally organized under laws of its domicile to do the proposed business and that it has same paid up, unimpaired capital and surplus, or net cash assets, as would be required of New Jersey company; filing written power of attorney authorizing service of process on Commissioner; and annually obtaining Commissioner's certificate of authority to do business in New Jersey (but certificate may not issue if name closely resembles name of another company authorized to do business in New Jersey, unless name of state of incorporation is used). Such authority may be revoked by Commissioner if company violates the law or becomes unsound financially. Foreign companies may own New Jersey real estate to same extent only as New Jersey companies. (NJSA 17:32-1 et seq.). See also Life and Health Insurance Code, NJSA 17B:23-1 et seq. Foreign company is deemed to be doing insurance business in New Jersey if, with reference to persons or property in New Jersey, by mail or otherwise, it (a) Solicits or advertises for or negotiates or effectuates contract of insurance of any kind; (b) signs, delivers or transmits any such contract or application therefor; (c) transmits or receives any premium, commission, fee or payment for contract of insurance; (d) maintains or operates office for transaction of insurance business; (e) offers for sale contract of insurance; or (f) performs other acts incident to transaction of insurance business. (NJSA 17B:23-9; NJSA 17:32-19). For penalties for failure to secure authority to do business in New Jersey or for other violations of Act, see NJSA 17:32-10, 17:32-20; NJSA 17:33-2; NJSA 17B:23-10; 17B:21-2.

See also subhead Deposits, supra.

Fees for filing copy of charter, annual statements, etc., see NJSA 17:33-1 and NJSA 17B:21-7.

Health Service Corporation Conversion.

Health service corporation may convert to domestic stock insurer. (NJSA 17:48E-50). To qualify, health service corporation shall file application with commissioner. Concurrent with filing of application with commissioner, health service corporation shall submit petition to Attorney General. (NJSA 17:48E-51). Commissioner shall approve plan of conversion and issue certificate of authority to converted insurer to transact business in New Jersey as domestic stock insurer only if commission finds that plan of conversion meets all requirements of this act; upon conversion, converted insurer will meet applicable standards and conditions under this section; plan of conversion adequately protects existing contractual rights of subscribers; plan of conversion will promote best interests of health service corporation; plan of conversion is fair and equitable; plan provides for enhancement of operations of converted insurer; plan provides for transfer at or before effective time of entire fair market value of health service corporation to foundation; plan is not contrary to law; plan promotes public interest; and Attorney General concurs. (NJSA 17:48E-52). Health service corporation may, by action of not less than two-thirds of its board of directors, abandon or amend plan of conversion at any time before effective time. (NJSA 17:48E-60).

Unauthorized Companies.

Unauthorized insurer may qualify as eligible surplus lines insurer upon demonstration, through licensed surplus lines agent, that it complies with various capital, surplus and other statutory requirements. (NJSA 17:22-6.40 – 17:22-6.65).

Investments.

Regulated by NJSA 17:24-1 et seq. and NJSA 17B:20-1 et seq.

Retaliatory Laws.

New Jersey imposes upon insurance companies and reciprocal and interinsurance exchanges of other states and foreign countries, and their agents, doing business in New Jersey, same taxes, obligations, prohibitions and restrictions as are imposed by such governments upon New Jersey companies, etc., doing business therein, where same are in excess of those imposed by New Jersey. Taxes imposed on such companies or exchanges by any political subdivision of such governments are deemed to be additional taxes imposed by such governments; and New Jersey commissioner may compute rate thereof by dividing aggregate of such additional taxes paid within any such government, by the aggregate of the taxable premiums under the premium taxing statute of such government. Retaliatory provisions do not apply to ad valorem taxes on real or personal property, personal income taxes or special purpose assessments in connection with particular kinds of insurance. (NJSA 17:32-15; NJSA 17B:23-5).

Taxation of property of insurance companies is subject to general rules of taxation except that special rules apply to certain New Jersey companies.

Premium Tax.

Stock, mutual and assessment insurance companies, including foreign companies transacting business in New Jersey; health service corporations established pursuant to provisions of NJSA 17:48E-1 with respect to experience related and community rated health insurance and any life, accident, or health insurance company in which health service corporation owns stock, controls or otherwise becomes affiliated with, as provided in NJSA 17:48E-3, pay annual tax on Mar. 1 to Director of Division of Taxation. (NJSA 54:18A-1). Effective for calendar year 1980 and thereafter every foreign insurance company shall pay on or before Mar. 1, 1981 and each Mar. 1 thereafter amount equal to one-half of preceding year's tax and shall pay on or before June 1, 1989 and each June 1 thereafter amount equal to one-half of preceding year's tax. Each such payment shall be considered as partial payment of annual tax. Effective for calendar year 1980, every domestic insurance company shall pay on or before Mar. 1, 1981 amount equal to one-half of preceding year's tax as partial payment of 1981 annual tax. Effective for calendar year 1981 and thereafter, every domestic insurance company shall make installment payments on Mar. 1, 1982 and June 1, 1982 and each Mar. 1 and June 1 thereafter of amounts equal to one-half of preceding year's tax. Partial prepayments shall be credited against annual tax due on Mar. 1 of each year and any payments in excess of tax due shall be refunded. Partial payments are not applicable to premiums for fire insurance risks on properties in New Jersey paid to foreign insurance companies, or to marine insurance. (NJSA 54:18A-1).

All companies, except life insurance companies and except as to marine insurance and group accident and health insurance policies on residents of New Jersey, pay 2% upon taxable premiums collected during year ending Dec. 31 next preceding on all business in New Jersey less taxes on property exclusive of taxes on real estate and taxes under this section. Tax rate on taxable premiums under group accident and health insurance and legal insurance on residents of New Jersey is 1%. (NJSA 54:18A-2).

Life companies, except group accident and health insurance policies on residents of New Jersey, pay 2% upon taxable premiums collected during year ending Dec. 31 next preceding under all policies on residents of New Jersey, less amount of taxes on property, exclusive of taxes on real estate and taxes under this section. Tax rate on group accident and health insurance and legal insurance policies is same as specified above in preceding paragraph. (NJSA 54:18A-3).

"Taxable premiums" are defined as gross premiums except reinsurance less returned premiums on cancellations. (NJSA 54:18A-4). Subject to § 6 (see infra) taxable premiums specified in § 3 as to life companies is defined as gross premiums collected, except premiums for reinsurance and under policies issued in connection with funding of pensions, annuity or profit-sharing plan qualified or exempt under §§ 401, 403, 404 or 501 of U.S. Code and less returned premiums, dividends and discount on premiums paid in advance. (NJSA 54:18A-5).

If taxable premiums collected by any company, including all of its "affiliates" as defined in Insurance Holding Company Systems Law (NJSA 17:27A-1 et seq.), during any said year, exceed 12½% of total premiums collected by company and all of its affiliates during same year on all policies and contracts of insurance, whenever and wherever issued, "taxable premiums" of company shall not exceed 12½% of such total premiums. Taxable premiums of companies licensed in state prior to June 30, 1984 can be calculated without regard to premiums collected by affiliates. (NJSA 54:18A-6). On and after Jan. 1, 2005 these taxable premiums do not apply to health service corporations established pursuant to provisions of NJSA 17:48A-1 et seq. Health maintenance organizations pay annual assessment of 1% of net written premiums for fiscal years of 2005 and 2006; annual assessment increases to 2% for fiscal year of 2007 and each fiscal year thereafter. Assessments will be allocated to Health Care Subsidy Fund and used solely for providing charity care within state. (NJSA 26:2J-47).

Mutual and stock companies writing Workmen’s Compensation or employers’ liability insurance in New Jersey pay tax equal to ¼ of 1% of net premiums received for such insurance in order to defray expenses of carrying out provisions of Workmen’s Compensation Act. (NJSA 34:15-93).

Marine insurance companies pay tax of 5% on proportion of average underwriting profit from marine assurances. (NJSA 54:16-2 – 54:16-10).

All companies must file report by Mar. 1 of each year. (NJSA 54:18A-8). Insurer transacting marine insurance must also file report by Apr. 1. (NJSA 54:16-7).

Foreign fire insurance company must report annually to Treasurer of New Jersey State Firemen’s Association amount of premiums received or due from risks in its district and pay 2% thereof to such association. (NJSA 54:18-1).

Company writing workmen’s compensation or employers’ liability insurance in New Jersey and each self-insurer must contribute through Dec. 31, 1988 amount set by statutory formula to Second Injury Fund; from and after Jan. 1, 1989, policyholders and self-insured employers subject to annual surcharge. (NJSA 34:15-94, 34:15-95). See category 11 Employment, topic 11.02 Labor Relations, subhead Workers’ Compensation Act.

Stock and mutual carriers must also contribute, respectively, to stock and mutual funds, for privilege of carrying on workmen’s compensation insurance, at rate of 1% of net written premiums, whenever respective funds fall below 5% of loss reserves of all companies in respective categories. (NJSA 34:15-107 – 34:15-108).

Automobile Insurance—Excess Profits Law.

Subject to limited exceptions, all insurers authorized or admitted to transact private passenger automobile insurance business in New Jersey required to file annually with Commissioner commencing July 1, 1989, profits reports setting forth prescribed information. Insurers found to have excess profits required to establish fair, practical and nondiscriminatory plan for refund or credit to policyholders of excess profits. Excess profits deemed to exist if for three calendar-accident years (as defined) immediately preceding due date of profits report, sum of total actuarial gain and excess investment income of insurer for all private passenger automobile coverages combined exceeds 2.5% of earned premiums. (NJSA 17:29A-5.6 – 17:29A-5.16).

Unsatisfied Claim and Judgment Fund.

To maintain Fund company writing motor vehicle liability insurance in New Jersey may be assessed annually in proportion that its net direct written premiums bear to aggregate net direct written premiums of all insurers during preceding year. Except with respect to medical expense benefits, fund is used to insure payments up to $15,000 (one person’s injury or death in one accident), $30,000 (all personal injuries or deaths in one accident), and $5,000 (property damage) excluding first $500 where judgment arising out of ownership, maintenance or use of motor vehicle in New Jersey on or after Jan. 1, 1973 remains unsatisfied. Medical expense benefit payments subject to deductible of $250 on account of injury in any one accident and copayment of 20% of benefits payable between $250 and $5,000. Fund can be reached for death and personal injury claims, with above limits, in hit-and-run cases by action against Commissioner of Insurance. (NJSA 39:6-61 – 39:6-88).

Property—Liability Insurance Guaranty Association.

All licensed insurers admitted or authorized to write any kind of insurance to which Property-Liability Insurance Guaranty Act (NJSA 17:30A-1 et seq.) applies must become members of Association. Purpose of Association is to pay “covered claims,” as defined in Act, arising under certain policies of insurance written by member companies against whom order of liquidation has been entered with finding of insolvency. Following kinds of insurance are excluded from Act: Life, accident and health, medical malpractice, Workers’ Compensation, title, annuities, surety bonds, credit, mortgage guaranty, municipal bond, fidelity, investment return, pet health and ocean marine. Depending on type of insurance, Association honors covered claims up to 90 days following declaration of insolvency or, in certain circumstances, through policy expiration date. Commissioner may pay portion of or defer association’s obligations for covered claims based on monies available to association. Any person having covered claim that may be recovered from more than one insurance guaranty association must first exhaust rights under statute governing association of place of residence of policyholder or, for claims arising for damage to property with permanent location, from association of jurisdiction where property is located. Any obligation of association to defend insured shall cease upon association’s payment or tender of amount equal to lesser of association’s covered claim statutory limit or applicable policy limit. Funding of Association’s operations is accomplished by policy premium surcharges in amounts established by Commissioner of Insurance. (NJSA 17:30A-1 et seq.).

Surplus Lines Insurance Guaranty Fund is administered by Property-Liability Insurance Guaranty Association. Advisory Body comprised of representatives, surplus lines insurers and agents established to assist Association in administration of Fund. No unauthorized insurer shall be or become eligible surplus lines insurer unless it becomes member of Fund. Purpose of Fund is to pay “covered claims” as defined in Act, arising under certain insurance policies issued by certain eligible line insurers which become insolvent. Following kinds of insurance are excluded from Act: Workers’ compensation; title; surety bonds; credit; mortgage guaranty; municipal bond coverage; fidelity; investment return; and ocean marine. Also exempted is reinsurance of any kind. Fund is obligated to honor covered claims incurred up to 30 days after determination of insolvency or before policy expiration date if less than 30 days after insolvency. Fund’s obligation for covered claims is limited to $300,000 per occurrence. Commissioner is given authority to pay portion of or defer Fund’s obligations for covered claims based on monies available in Fund. Any person having covered claim that may be recovered from more than one insurance guaranty association must first exhaust rights under statute governing association of place of residence of policyholder or, for claims arising for damage to property with permanent location, from association of jurisdiction where property is located. Any obligation of fund to defend insured shall cease upon fund’s payment or tender of amount equal to lesser of fund’s covered claim statutory limit or applicable policy limit. Funding of operations is accomplished by statutory eligibility fee of $25,000 per member company and premium surcharges in amounts established by Commissioner of Insurance. (NJSA 17:22-6.70 et seq.).

New Jersey Self-Insurers Guaranty Association.

All employers which self-insure for purposes of workers’ compensation must be members of Association. Purpose of Association is to create Insolvency Fund to pay claims for compensation by insured employee of insolvent members. Injury must have occurred no later than 30 days after member of Association became insolvent. To be insolvent, member must have filed for bankruptcy relief under Title 11 or have receiver appointed for it by court of competent jurisdiction. Association’s Board of Directors must independently determine that member is insolvent based on its ability to pay compensation. Fund secures payment of claims by accessing members in proportion to member’s compensation payments during immediately preceding 12-month period ending June 30 to total compensation payments of all members during period not to exceed 1.5% of member’s total compensation payments during period. When Fund is not sufficient to make all payments owing, Association is authorized to borrow necessary funds. Association may purchase reinsurance. (NJSA 34:15-120.15 et seq.).

Life And Health Insurance Guaranty Association.

On July 15, 1991, state legislature enacted Life and Health Insurance Guaranty Association Act, P.L. 1991, c. 108, supplementing Tit. 17B. Purpose of Association is to protect specified persons from hardship because of impairment or insolvency of specified life and health insurance policies and annuity contracts. Insurers licensed in state to transact kinds of insurance for which Act provides coverage are assessed by board of directors created by Act. (NJSA 17B:32A-1 et seq.).

Special Joint Underwriting Association.

Commissioner has authority to establish one or more associations to assume unexpired policy obligations of insolvent insurance companies for insureds whose policies continue in force after insolvency. Membership consists of all direct insurers except those issuing ocean or marine, accident and health, workers' compensation, and title insurance, as well as annuities and certain surety bonds. (NJSA 17:30B-1 et seq.).

New Jersey Full Insurance Underwriting Association.

All insurers licensed to transact automobile insurance in New Jersey must become members of Association which will provide automobile coverage for those individuals who are unable to buy coverage in voluntary market. Association funded by net premiums earned, 80% of certain surcharges levied by Division of Motor Vehicles, surcharges levied by Association for accidents and motor vehicle conviction points, income from investment of monies collected by Association, and residual market equalization charge levied on all insured automobiles in voluntary and residual markets, exclusive of principal operators 65 years of age or older. Certain automobile insurance carriers will become servicing carriers, either through volunteering or conscription, and such carriers will issue policies in their name on behalf of Association while receiving servicing fee. There are also provisions for producers to contract with Association or be assigned as exclusive representatives of certain servicing carriers. (NJSA 17:30E-1 et seq.). Commissioner required to establish annually voluntary market target quotas to reduce number of private passenger automobile non-fleet exposures written through Association and to establish procedures for assignment of insureds by Association to member companies. (NJSA 17:30E-14).

Fair Automobile Insurance Reform Act of 1990 (L. 1990, c. 8, codified at various sections of Tits. 17, 39, 54 and 56 of N.J.S.A.).

Comprehensive revision of motor vehicle insurance system of New Jersey, providing, inter alia, for raising of revenue, creation of funding mechanisms, and dedicated source of revenue to fund operation of Department of Insurance. Significant provisions: address provision of medical expense benefits to persons injured in automobile accidents; guarantee persons who meet "good driver" criteria insurance coverage in voluntary market; phase-out New Jersey Automobile Full Insurance Underwriting Association (JUA) via Market Transition Facility, and replace with assigned-risk plan; retire JUA debt; provide new criteria that automobile insurers must use in setting rates; end State anti-trust exemption for automobile insurers; seek to decrease effect of fraud and other costs upon automobile insurance system; and provide mechanism for heightened enforcement of State's mandatory liability insurance system.

Automobile Insurance Cost Reduction Act.

Bill establishes "basic" policy that meets state's mandatory insurance requirement at substantially lower cost, and, inter alia, substitutes new verbal threshold intended to eliminate lawsuits for certain minor injuries. (NJSA 39:6A-1.1). Establishes dispute resolution mechanism regarding personal injury protection benefits. (NJSA 39:6A-5.1). Bill requires that insurers create new territorial rating plan. (NJSA 17:29A-48).

Commercial Insurance Deregulation.

Establishes rating systems for commercial insurance carriers. Companies may establish rates and supplementary rate information or may use rates and supplementary rate information prepared by rating organizations of which they are members so long as rates are not excessive, inadequate or unfairly discriminatory. Such rates are subject to Commissioner's review with respect to foregoing standards. (Tit. 17, c. 29AA, § 1 et seq.).

Direct Actions Against Insurer.

See category 23 Transportation, topic 23.01 Motor Vehicles, subhead Direct Actions.

No-Fault Insurance.

See category 23 Transportation, topic 23.01 Motor Vehicles, subhead No-Fault Insurance.

Health Care Quality Act.

Bill provides consumer protection for health insurance (e.g., managed care plans, indemnity carriers and network contractors), by establishing plain language disclosure requirements to help consumers choose health benefits plan. (NJSA 26:2S-1).

Obligation to Report Positive Test for Certain Diseases.

If insurer requires applicant to submit to medical testing as condition of issuing, extending or renewing policy, insurer must obtain applicant's written consent for test. If insurer determines that applicant has reportable communicable disease, insurer must notify applicant and Department of Health and Senior Services. (NJSA 17:23A-13.1).

16.02 SURETY AND GUARANTY COMPANIES:

Organization and regulation are governed by Insurance Companies Law. See topic 16.01 Insurance Companies. Their assets must exceed their liabilities, including capital stock, indebtedness and reserve of 50% of annual premiums. (NJSA 17:31-3). May organize for transacting both surety and guaranty business (NJSA 17:17-1 – 17:17-3), and certificate of authority of Commissioner is evidence of its qualification and sufficiency to act as surety (NJSA 17:31-5).

Rights and Powers.

May be organized to insure against loss from defaults of persons in positions of trust, public or private; loss or damage due to neglect or breach of duty or obligation; loss by banks, bankers, brokers, financial corporations and associations, of negotiable instruments, securities, deeds, mortgages, documents, bullion, currency, etc.; loss from bad debts; loss due to incumbrance upon or defects in titles to realty (NJSA 17:17-1); may execute any bond, undertaking, recognizance, guaranty or other obligation required or permitted by law or by charter, ordinances, rules or regulations of county, municipality, board, body, organization, court or public officer, to be given with surety or sureties for performance of any act, duty or obligation or refraining from any act; may act as surety on bond of public official of state or of county, municipality or school district, given pursuant to any law or ordinance (NJSA 1:1-2.2; NJSA 17:31-1); may enter into recognizances of bail (Rule 3:26-4).

Surety company's bond is not lien on its realty but lien may be acquired through attachment or other judicial proceeding or by judgment on such bond. (NJSA 17:31-4).

Fiduciaries may lawfully agree with surety companies for deposit of trust funds or assets in banks, withdrawal being subject to consent of surety or court order. (NJSA 17:31-2). In case of large estates and of certain estates of minors consisting of or likely to consist of proceeds of judgment where guardian has been appointed, amount of surety bond may be minimized or, in case of certain estates of minors, dispensed with by deposit of trust fund or securities subject to withdrawal only on court order. (NJSA 3B:15-11, 3B:15-16).

Title Insurance Act provides for licensing, qualification, regulation, examination, suspension and dissolution of title insurance companies; regulation of rates, agents and applicants; prohibition of commissions for procuring title insurance; conditions for admission of foreign title insurance companies; and prohibition of practice of law and of personal or controlled insurance. (NJSA 17:46B-1 et seq.). Banks and certain other lenders permitted to act as title insurance producers. (NJSA 17:46B-30.1).

Mortgage Guaranty Companies.

Mortgage Guaranty Insurance Act is NJSA 17:46A-1-11. Mortgage guaranty insurance may be transacted in New Jersey only by stock insurance company holding certificate of authority for transaction of such insurance and may be written only to insure loans secured by authorized real estate securities, as defined. Coverage limited to 25% of outstanding balance of loan insured. Such company must meet requirements of Act as to capital, surplus and contingency reserves and will be subject to limitations and restrictions of Act and rules and regulations that may be promulgated by Commissioner.

Foreign Companies.

In general, regulations applicable to foreign insurance companies (see topic 16.01 Insurance Companies) apply to foreign surety and guaranty companies. For requirements relative to admission, deposit of securities, etc., see NJSA 17:32-1 et seq.

17 INTELLECTUAL PROPERTY

17.01 TRADEMARKS AND TRADENAMES:

Trademark law based upon model state trademark bill, updated and substantially revised in 1995. L. 1995, c. 171, enacted July 5, 1995, effective Jan. 5, 1996. (NJSA 56:3-13a – 56:3-13.21). Any person who uses lawful mark in New Jersey may file application in office of Secretary of State. (NJSA 56:3-13.3). Registrations ten years old under prior acts and not renewed under new act subject to cancellation. (NJSA 56:3-13.8).

Effective Jan. 5, 1996, law is intended to provide system of trademark registration and protection substantially consistent with federal system. Interpretation and construction of Federal Trademark Act of 1946, as amended, 15 U.S.C. § 1051 et seq. (Lanham Act), shall be examined as persuasive authority for interpretation and construction of current New Jersey law. (NJSA 56:3-13a). Current law does not apply to lawsuits or registration applications pending on its effective date. Terms of existing ten-year registrations obtained under prior law are not affected, but renewals thereof required after effective date of current law will be for five years. Upon effective date of current law, improved remedies provided thereunder are available to protect registrations under both prior and current law. Secretary of State is authorized to adopt regulations to effectuate provisions of Act. (NJSA 56:3-13.21).

What May Be Registered.

Word, name, symbol, device or combination adopted and used to identify goods or services; but no mark may be registered if it consists of or comprises (a) immoral, deceptive or scandalous matter; (b) matter that may disparage or falsely suggest connection with person, living or dead, institutions, beliefs or national symbols or bring them in contempt; (c) flag or coat of arms of U.S., any state or municipality or foreign nation or simulation thereof; (d) name, signature or portrait of particular living individual, except with written consent; (e) mark that is merely descriptive or deceptively misdescriptive or geographically descriptive or deceptively misdescriptive or is primarily a surname unless distinctive of goods or services of registrant; or (f) resembles registered mark or mark or tradename previously used in N. J. by another and not abandoned, so as to be likely to confuse. (NJSA 56:3-13.2).

Registration.

Any person who uses mark in N. J. may file application for registration with Secretary of State in manner complying with requirements of Secretary of State, to be specified by administrative regulation, including using only form prescribed by Secretary of State. Filing fee is $50 plus $50 for each additional classification, payable to Secretary of State. (NJSA 56:3-13.3). See http://www.state.nj.us/treasury/revenue/regmark.htm. Secretary of State issues certificate of registration. (NJSA 56:3-13.4). For schedule of classifications, see http://www.state.nj.us/treasury/revenue/dcr/pdforms/classcat.pdf.

Duration.

Registration is effective for five years and may be renewed for additional five-year periods on application form to be furnished by Secretary of State filed within six months prior to expiration. Renewal fee is $50. Expedited handling available for additional charge. See http://www.state.nj.us/treasury/revenue/dcr/pdforms/tmsm.02.pdf. If not renewed, registration expires. Secretary of State is no longer required to notify registrants of necessity of renewal. Renewal applications must include verified statement that mark has been and is still in use and shall include specimen showing actual use of mark on or in connection with goods or services. (NJSA 56:3-13.5).

Assignment.

Mark is assignable with good will of business, or with that part of good will of business in which mark is used, by instrument in writing duly executed and may be recorded in office of Secretary of State upon payment of recording fee payable to Secretary of State. Assignment not filed for recording within 20 days of assignment or prior to subsequent purchase or transfer shall be void against subsequent purchaser for value. (NJSA 56:3-13.6).

Protection Afforded.

Common law rights preserved. Treble damages or treble profits of infringer recoverable, plus reasonable attorneys' fees, costs of suit, and prejudgment interest in case of knowing or bad faith trafficking in counterfeit marks. (NJSA 56:3-13.13, 56:3-13.16).

Penalties.

Any person who for himself or herself or for another files or registers any mark under provisions of act, by knowingly making any false or fraudulent representation or declaration, is liable to pay all damages sustained in consequence of such filing or registration, to be recovered by party injured thereby. (NJSA 56:3-13.10).

Classification.

Secretary of State shall establish classification system for goods and services that conforms to International Classification System adopted by U.S. Patent and Trademark Office. (NJSA 56:3-13.9a).

Multiple—Class Registrations.

Such applications are permitted. Applicant shall pay registration fee established by Secretary of State by administrative regulation for each class of goods or services included. (NJSA 56:3-13.9a).

Dilution.

Marks famous in New Jersey are protected by dilution cause of action. Owner of famous mark is entitled only to injunctive relief unless willful intent to trade on owner's reputation is proved, in which case all other remedies available under Act may be imposed. (NJSA 56:3-13.20).

Appeals from Actions by Secretary of State.

Applicant or registrant may appeal from certain actions by Secretary of State to Administrative Law Judge or to Superior Court in Mercer County. Grounds are refusal to register or renew and failure to follow any cancellation procedures stated in N.J.S. 56:3-13.8. Before appealing, request for reconsideration must be filed with Secretary of State, who must deny it. Notice of intent to appeal must be filed with Secretary of State at least ten days prior to filing appeal. (NJSA 56:3-13.3b).

Cancellation Petitions.

Third parties with standing may petition Secretary of State to declare void and remove from register of marks any mark subject to cancellation under NJSA 56:3-13.8. (NJSA 56:3-13.3b).

Special provision is made with respect to farm produce containers (NJSA 4:10-16-25) and other packages, milk cans, towels, aprons and kindred articles for hire, bottles, kegs and various articles in containers (NJSA 56:3-15, 56:17–23, 56:25–29, 56:32–49), and hotel names (NJSA 29:3-1 et seq.).

Business Names.

Person transacting business and using designation "and company" or "& Co." as part of firm or partnership name, or any assumed name other than real name or names of individual or individuals conducting such business, must file sworn statement in office of clerk of county in which such business is transacted and duplication thereof for filing in office of Secretary of State, setting forth name in which such business is conducted, nature of business, and full names and post office addresses of all persons conducting same. County clerk collects $30 filing fee and forwards duplicate to Secretary of State. If any one of such persons is not resident of this state, statement must contain power of attorney designating county clerk of county lawful attorney of such nonresident person upon whom legal process in any legal proceeding against said person arising out of conduct of said business may be served. (NJSA 56:1-1 – 56:1-3; NJSA 22A:2-29). Violation of foregoing is misdemeanor. (NJSA 56:1-4). This provision inapplicable to corporations (but see category 2 Business Organizations, topic 2.03 Corporations, subhead Alternate Names). Exceptions are made for partnerships using all partners' names. (NJSA 56:1-5).

17.02 TRADE SECRETS:

Generally governed by following statutes:

Rules of Evidence, NJSA 2A:84A-26, N.J. Evid. R. 514; Code of Criminal Justice, NJSA 2C:20-1; New Jersey Commercial Feed Law of 1970, NJSA 4:4-20.13; Environmental Cleanup Responsibility Act, NJSA 13:1k-29; New Jersey Hazardous Substances Labeling Act, NJSA 24:5A-6; Air Pollution Control Act, NJSA 26:2C-9; Worker and Community Right to Know Act, NJSA 34:5A-3, 34:5A-18; Examination and Copies of Public Records Act, NJSA 47:1A-1.2; Water Pollution Control Act, NJSA 58:10A-9, 58:10A-19. Uniform Trade Secrets Act—not adopted.

Trade secret is whole or any portion or phase of any scientific or technical information, design, process, procedure, formula or improvement that is secret and of value. Presumed secret when (1) owner takes protective measures to prevent it from becoming available to persons other than those selected by owner to have access for limited purposes (NJSA 2C:20-1[i]; NJSA 52:27F-3[r]); (2) owner has competitive advantage through its possession; or (3) certified as secret by government (NJSA 34:5A-3[u]). Trade secrets are privileged to owner of secret, agent or employee so long as nondisclosure will not conceal fraud or work injustice. (NJSA 2A:84A-26, N.J. Evid. R. 514). Deprivation or withholding of trade secret from its rightful owner is theft. (NJSA 2C:20-1[a], 1[g], 1[i]).

New Jersey Commercial Feed Law of 1970.

Disclosure or use of any trade secrets concerning agriculture and live stock feeding stuffs including methods, records, formulations or processes, is misdemeanor with fines of not less than $500 or imprisonment for not less than one year, or both. (NJSA 4:4-20.13[f]).

Industrial Site Recovery Act.

Department of Environmental Protection is required to protect confidential information disclosed to it pursuant to Industrial Site Recovery Act. (NJSA 13:1k-29[a]). Owner of facility claiming that information requested is trade secret that must be kept privileged so as not to competitively disadvantage facility may petition commissioner to withhold information. Burden of proof is on petitioner to demonstrate that trade secret is valid. Denial of petition may be appealed pursuant to Administrative Procedures Act, NJSA 52:14B-1 et seq. (NJSA 13:1k-29[b]).

Examination and Copies of Public Records Act.

Access to biotechnology trade secrets and related confidential information by state and local agencies and general public is available only as allowed by federal law. (NJSA 47:1A-1.2).

New Jersey Hazardous Substances Labeling Act.

Food and Drug Administration labeling regulations require that all food and drug containers be labeled as to content. Disclosure or use by any person to his own advantage of any trade secret information obtained in compliance with these regulations is prohibited. (NJSA 24:5A-6[d]).

Air Pollution Control Act.

Trade secret information obtained during inspection or determination is confidential and inadmissible in evidence except before Department of Health. (NJSA 26:2c-9[b]).

Pollution Prevention Act.

Trade secret information obtained through implementing and enforcing act is confidential and inadmissible in evidence in any court or any other proceeding. (NJSA 13:1D-46). Specific chemical identity of hazardous substances about which information is required may be omitted from pollution prevention plan or pollution prevention summary upon filing of trade secret claim with Department of Environmental Protection and Energy. (NJSA 13:1D-47).

Worker and Community Right to Know Act.

Employer who believes that compliance with this act will reveal trade secret involving hazardous substances (NJSA 34:5A-3[w], 34:5A-15) may file trade secret claim with Department of Health or Department of Environmental Protection. If approved, trade secret registry number (NJSA 34:5A-3[v]) is assigned and may be used in mandated labeling of hazardous substances (NJSA 34:5A-14, 34:5A-15) and in compliance with governmental surveys (NJSA 34:5A-8, 34:5A-15). Denial of petition may be appealed pursuant to Administrative Procedure Act, NJSA 52:14B-1 et seq. (NJSA 34:5A-15[d]). Owner may not make trade secret claim for substances on Department of Health's special hazard list that pose special hazard to health and safety. (NJSA 34:5A-5[b], 3[t]). Department of Health may release any information on pending or approved trade secret claims to physician when necessary for medical diagnosis or treatment provided physician signs confidentiality agreement. (NJSA 34:5A-15[e]).

Weights, Measures and Containers.

Owner of trade secret may request that trade secret in custody of weights and measures officer be exempt from disclosure pursuant to public records law. (NJSA 47:1A-1 et seq.). If information is required in judicial proceeding, court may seal record to protect trade secret information disclosed. (NJSA 51:1-61[g]).

Department of Environmental Protection.

Trade secrets obtained in course of departmental investigations shall be kept confidential, except that information is available for government use in enforcing state or federal environmental laws. (NJSA 13:1D-9[d]).

Water Pollution Control Act.

Information obtained from permits and applications may be disclosed to public except where information entitled to protection as trade secret. (NJSA 58:10A-9[c], 19). Access to trade secret information shall be limited to authorized government departments, agencies and employees. (NJSA 58:10A-6[o]).

18 LEGAL PROFESSION

18.01 ATTORNEYS AND COUNSELORS:

New Jersey bar is not integrated.

Jurisdiction over admission is vested in Supreme Court (NJ Const., Art. 6, § 2, par. 3), which appoints Board of Bar Examiners, to conduct examinations for attorneys and to prescribe rules, forms and procedures relating to admission. (Rule 1:23).

Eligibility.

No person may qualify as attorney without examination. No person may be admitted to examination unless applicant is over 18 years of age and presents certification of award of degree from accredited law school and satisfactory evidence of good standing as member of bar in every other jurisdiction that has ever admitted applicant to practice. (Rule 1:24-2). Attorney must maintain bona fide office for practice of law in this or any other state, territory of United States, Puerto Rico, or District of Columbia (Rule 1:21-1[a]), except for staff attorneys employed full time by agencies of federal government that have offices in New Jersey, who may represent interests of that agency in federal and state courts in New Jersey without maintaining bona fide law office in this state (Rule 1:21-1[d]). Bona fide office is place where clients are met, files are kept, telephone is answered, mail is received, and attorney or responsible person acting on attorney’s behalf can be reached in person and by telephone during normal business hours to answer questions posed by courts, clients or adversaries and to ensure that competent advice from attorney can be obtained within reasonable time. (Rule 1:21-1[a]).

Registration as law student not required.

Educational Requirements.

Applicant for attorney’s examination must show that applicant has been awarded Juris Doctor degree or equivalent by law school approved by American Bar Association. (Rule 1:24-2).

Clerkship.

For plenary license, applicant must complete Skills and Methods course approved by Supreme Court. (Rule 1:26).

Character.

Supreme Court appoints committee to investigate fitness to practice law of applicant. Committee must certify to Board of Bar Examiners as to fitness of applicant. (Rule 1:25).

Examination.

Attorney's examination given twice a year on dates fixed by Board of Bar Examiners. Fees are prescribed by Rule 1.24-1(a). Multi-State Bar Examination used; additional local subjects tested are contracts, torts, real property, constitutional law, criminal law, and legal ethics.

Admission of Foreign Attorney.

Requirements for admission of foreign attorney in good standing are same as for other applicants, except that under certain circumstances teachers at New Jersey law schools may be admitted without examination. All applicants must furnish certificate of good standing in any state in which applicant was ever admitted to practice. (Rules 1:27-2, 1:24-2[c]).

Admission Pro Hac Vice.

At court's discretion, attorney of another state may be admitted pro hac vice provided that all papers filed shall be signed by New Jersey attorney. (Rule 1:21-2).

Licenses and Authorized Practice.

Applicant who has passed examination and completed Skills and Methods course is issued certificate of plenary admission. (Rule 1.27-1).

Continuing Legal Education.

Credit for Courses Taken after Jan. 1, 2009. New Jersey Supreme Court is considering whether to impose continuing legal education (CLE) requirement on members of New Jersey Bar. To ensure that attorneys continue to participate in CLE programs while this decision is pending, Court on Aug. 13, 2009, gave notice that any continuing legal education program will grant credit for certain qualifying continuing legal education courses taken after Jan. 1, 2009. At minimum, following categories of courses will be awarded such credit: (a) Courses taken in satisfaction of requirements for New Jersey certified attorneys pursuant to Rule 1:39-2(d); (b) courses that satisfy skills and methods requirements of Rule 1:26; and (c) courses taken in satisfaction of another State's continuing legal education program. Maximum number of credit hours that will be awarded for courses taken prior to effective date of any new continuing legal education program may not exceed 24.

Privileges.

New Jersey attorney may sell or rent real estate incidental to normal practice of law without being issued real estate broker's license. (NJSA 45:15-4; 180 N.J. Super. 180, 434 A.2d 623).

Disabilities.

New Jersey attorney may not be surety on bond as security for costs, replevin bond, or bond in connection with proceeding in lieu of prerogative writ (NJSA 2A:13-3) and may not be bail in any action (NJSA 2A:15-45).

Liabilities.

Attorney of record is answerable for all clerk's fees. (Rule 1.5-6[e]). See also NJSA 22A:2-21 for attorney's liability for fees. See also category 5 Civil Actions and Procedure, topic 5.08 Costs.

Compensation.

Attorney associated in any matter, or in any manner, with attorney practicing outside of New Jersey must maintain and preserve for seven years separate records of fees received and expenses incurred in New Jersey practice. (Rule 1:21-6[g]). Member of bar may not bring suit for fees until member has delivered to client bill therefor. (NJSA 2A:13-6). See category 13 Estates and Trusts, topic 13.08 Executors and Administrators, subhead Compensation of Attorneys.

Lien.

After filing of complaint, or third party complaint or service of pleading containing cross-claim or counterclaim, attorney has lien for compensation on client's cause of action, which attaches to verdict, award or judgment and proceeds thereof and is not affected by settlement between parties. Court in which case is pending may determine and enforce lien. (NJSA 2A:13-5). This lien is in addition to common law general lien. (125 N.J. Eq. 230, 4 A.2d 88).

Attorney Ethics.

New Jersey has adopted American Bar Association's Model Rules of Professional Conduct as revised by New Jersey Supreme Court. (RPC 1.1 et seq.).

Discipline.

Supreme Court has jurisdiction over discipline of members of bar. (NJ Const., Art. 6, § 2, par. 3). Ethics committees appointed by Supreme Court in defined geographical areas investigate complaints and, if unethical or unprofessional conduct is found, forward recommendation to Disciplinary Review Board. (Rule 1:20-1 et seq., Rule 1:20-15). Supreme Court reviews all decisions of Board that recommend disbarment. (Rule 1:20-16[a]). Witnesses may be subpoenaed to appear before committee. (Rule 1:20-3[g]).

Professional Corporations.

See category 2 Business Organizations, topic 2.03 Corporations, subhead Professional Corporations.

19 MINERAL, WATER AND FISHING RIGHTS

19.01 MINES AND MINERALS:

Mine Safety Section, Dept. of Labor and Workforce Development enforces "Mine Safety Act" registration, regulating opening and safe operation of mines, quarries and pits through periodic inspections. Commissioner of Labor and Workforce Development has authority to order correction of unlawful or dangerous conditions, halt operations for noncompliance with Act and to charge annual registration tax of not less than $500 nor more than $3,000 per registration. Fees adjusted thereafter by Commissioner per schedules adopted by regulation. Violations under Act are $2,500 for first offense, not more than $5,000 for second offense, and not more than $10,000 for third and subsequent offenses. (NJSA 34:6-98.1 – 34:6-98.18).

20 MORTGAGES

20.01 CHATTEL MORTGAGES:

Uniform Commercial Code (Tit. 12A, c. 9; 1951, adopted 1963) replaces most chattel mortgage statutes. (NJSA 46:28-4 – 46:28-9; NJSA 46:28-11 – 46:28-13), except those pertaining to real estate mortgages covering personalty of railroads and public utilities (NJSA 46:28-10, 46:28-14).

References hereafter in this topic to “chattel mortgages” or “mortgages” refer only to such chattel mortgages as are governed by statutes cited herein.

See category 8 Debtor and Creditor, topic 8.15 Pledges.

Recording.

As to recording real estate mortgages covering personalty of railroads and public utilities, see NJSA 46:28-14; 46:33-1.

For recording fees, see category 10 Documents and Records, topic 10.04 Records.

Duration.

Mortgage covering personalty of railroad or public utility properly made, executed and recorded will remain valid against creditors of mortgagor, subsequent purchasers and mortgagees from time of recording, until cancellation. (NJSA 46:28-10).

Chattel mortgage made or assigned to husband and wife designated as such in instrument is held by them as tenants by entireties and not as joint tenants or tenants in common unless otherwise expressly provided or manifestly apparent from tenor of instrument. (NJSA 46:3-17.2, 46:3-17.3).

Execution.

No chattel mortgage, taken on household furniture then in possession of borrower, is valid unless chattel mortgage and financing statement are in writing and signed by borrower. If borrower is married, instruments must be signed by both husband and wife unless separated for previous five months. (NJSA 17:11C-39).

Removal of Property.

Mortgagee may, by legal proceedings, recover chattels removed from county, or prevent the removal of same, and, in either case, proper court will, to extent necessary to protect mortgagee, regulate disposition of such chattels and prescribe terms for possession thereof. (NJSA 46:28-1, 46:28-2). This does not apply to vessels, rolling stock of railroads or chattels which, in ordinary use at time of execution of mortgage, are taken from time to time out of county wherein they were when mortgaged. (NJSA 46:28-3).

Cancellation or Discharge.

Chattel mortgage may be cancelled or discharged in manner prescribed for release and cancellation of real estate mortgage. (NJSA 46:28-14). See topic 20.04 Mortgages of Real Property.

Sale by Mortgagee.

Chattel mortgage, after default, may be enforced by sale of mortgaged chattels. Such sale should be at public auction and should be advertised and conducted in same manner as sales of personal property under execution. Mortgagee is not entitled to more than amount of mortgage debt and costs, and surplus, if any, must be given to mortgagor. (14 N.J. Eq. 467; 17 N.J. Eq. 44; 40 N.J.L. 417).

Foreclosure by Court Proceedings.

Chattel mortgage may also be foreclosed by suit in equity. (17 N.J. Eq. 44).

Redemption.

After seizure of chattels by mortgagee, mortgagor has right to redeem prior to foreclosure or sale. (40 N.J.L. 417).

Foreign Mortgages.

Foreign chattel mortgage is of no effect in New Jersey unless statutory requirements as to recording are complied with. (5 N.J. Misc. 572, 137 A. 444). (Case decided before adoption of Uniform Commercial Code).

See also category 23 Transportation, topic 23.01 Motor Vehicles.

Forms.

For form of real estate mortgage, see topic 20.04 Mortgages of Real Property. For form of cancellation or discharge of real estate mortgage, see topic 20.04 Mortgages of Real Property.

Security Agreement.

No form of Security Agreement has been statutorily approved. The following form is illustrative.

Forms

This Agreement,

made the . . . . day of . . . . 20. . . .

Between . . . . residing or located at . . . . in the . . . . of . . . . in the County of . . . . . . and State of . . . . . . herein referred to as the Debtor;

And . . . . residing or located at . . . . in the . . . . of . . . . in the County of . . . . and State of . . . . herein referred to as the Secured Party:

Witnesseth, that Debtor hereby grants to Secured Party a security interest in the collateral described in Schedule A herein to secure payment of an indebtedness in the sum of ($. . . . .) . . . .
Dollars . . . . together with interest, payable in the following manner: . . . . and to further secure performance by Debtor of all other terms herein.

1. USE OF COLLATERAL. Debtor represents that the collateral will be used

( ) a. In business.

( ) b. For personal, family or household purposes.

( ) c. In farming operations.

a. FIXTURES. If the collateral is or will be attached to real estate prior to this loan or prior to the perfection of Secured Party's security interest, Debtor will furnish Secured Party with subordinations by all persons having any interest in the real estate. The names, addresses and interests of all persons whose interests are to be subordinated, are . . . .

b. GOODS USED IN MORE THAN ONE STATE. If the collateral is goods of a type which is normally used in more than one State, the chief place of business, if other than Debtor's address set forth above, is . . . .

2. DEBTOR WARRANTS AND COVENANTS THAT:

2.1 USE OF PROCEEDS OF LOAN. If the loan is to be used to pay, or the debt represents a portion of the purchase price of the collateral, Debtor either will use all the proceeds of the loan to pay the purchase price and for no other purpose, or authorizes Secured Party to pay the proceeds directly to the seller of the collateral and to pay premiums for the insurance set forth in Paragraph 2.4.

2.2 SELL, ETC. Debtor is the owner of the collateral free of any other lien or security interest and will not sell, exchange, lease or otherwise dispose of the collateral, nor permit any person other than Secured Party to acquire a lien or security interest therein or file a financing statement covering the collateral.

2.3 PRESERVATION. Debtor will maintain the collateral in good condition and repair and preserve it against loss, damage or depreciation in value other than by reasonable wear.

2.4 INSURANCE. Debtor will carry insurance on the collateral against damage or loss by fire, theft and other casualty, including collision, if applicable, in an amount not less than $. . . . . with responsible insurors authorized to do business in this State, loss to be payable to the parties as their respective interests may then appear. In the event of any loss or damage to the collateral, Debtor forthwith shall notify Secured Party in writing and file proofs of loss with the appropriate insurors. Debtor, upon request, shall deliver to Secured Party the policies or certificates of insurance.

2.5 TAXES. Debtor will pay when due, taxes and assessments or license fees of any nature relating to the collateral or its use.

2.6 AUTHORITY TO SECURED PARTY. Debtor authorizes Secured Party, if Debtor fails so to do, to do all things required of Debtor by Paragraphs 2.3, 2.4 and 2.5 herein and charge all reasonable expenses incurred by Secured Party to Debtor with interest at . . . .%.

2.7 REMOVAL AND INSPECTION. Debtor will not remove the collateral from the specified location, except in the normal course of business for temporary periods, without the prior written consent of Secured Party and will permit Secured Party to inspect the collateral at any reasonable time.

2.8 PERFECTION OF SECURITY INTEREST. Debtor will join with Secured Party in executing, filing and doing whatever may be necessary under applicable law, to perfect, continue and terminate Secured Party's security interest in the collateral, at Debtor's expense.

2.9 EXTENSIONS AND RELEASES. Debtor consents to any extension of time of payment. If this agreement secures a note, the note is a separate instrument and may be negotiated by Secured Party without releasing Debtor, the collateral or any guarantor or co-maker.

3. GENERAL.

3.1 GUARANTOR OR CO-MAKER. If there be more than one Debtor, guarantor or co-maker of a note or of this agreement the obligation of all shall be primary, joint and several.

3.2 NON-WAIVER BY SECURED PARTY. Failure of Secured Party to insist upon strict performance of any of the warranties and covenants of this agreement or to exercise any option herein conferred in any one or more instances shall not be construed as a waiver or relinquishment for the future of any such warranties, covenants or options, but the same shall be and remain in full force and effect.

3.3 NOTICES. All notices to either party shall be by mail or telegraph addressed to such party at the address set forth herein or previously changed in writing or by personal service upon such party or its proper corporate officer. Reasonable notice, when notice is required, shall be not less than . . . . days.

3.4 SEVERABILITY. Any part of this agreement contrary to the laws of this State or any State having jurisdiction shall not invalidate other parts of this agreement.

4. DEFAULT. Debtor shall be in default under this agreement upon the occurrence of any of the following:

4.1 NONPAYMENT OF PRINCIPAL AND INTEREST. Failure to pay the principal or any installment thereof or interest on the debt or note within . . . . days after the due date.

4.2 BREACH OF AGREEMENT BY DEBTOR. Failure by Debtor to keep, observe or perform any provision of this agreement.

5. ACCELERATION. The unpaid balance of the principal sum due and interest thereon shall immediately become due and payable at the election of Secured Party in the event of any of the following:

5.1 DEFAULT. As defined herein.

5.2 MISREPRESENTATION. Misrepresentation or material falsity of any certificate or statement made or furnished by Debtor to Secured Party in connection with this agreement.

5.3 INSOLVENCY OR TERMINATION. Termination or sale of business, insolvency or death of Debtor or commencement of any insolvency proceedings by or against Debtor.

5.4 INSECURITY. Depreciation or impairment of the value of the collateral, or a change in the financial status of Debtor, which jeopardizes the prospect of payment of the debt or performance of any of the covenants and conditions herein.

6. REMEDIES ON DEFAULT. In addition to all the rights and remedies herein for default, Secured Party shall have such other rights and remedies as provided by common law.

6.1 ASSEMBLING COLLATERAL. Upon any default and upon demand, Debtor agrees to immediately assemble the collateral and make it available to Secured Party at the place and at the time designated in the said demand.

6.2 COUNSEL FEES AND LEGAL EXPENSES. Upon any default Secured Party may charge Debtor such reasonable counsel fees, legal expenses and other charges incurred by Secured Party in taking and selling the collateral, rendering the surplus, if any.

All the terms, covenants and conditions herein contained shall be for and shall inure to the benefit of and shall bind the respective parties hereto, and their legal representatives, successors and assigns, respectively.

In all references herein to any parties, persons, entities or corporations the use of any particular gender or the plural or singular number is intended to include the appropriate gender or number as the text of the within instrument may require.

In Witness Whereof, Debtor and Secured Party have hereunto set their hands and seals, or caused these presents to be signed by their proper corporate officers and caused their proper corporate seal to be hereto affixed, the day and year first above mentioned.

SCHEDULE A

DESCRIPTION AND LOCATION OF

COLLATERAL

The following is a schedule of the items constituting the collateral referred to in this security agreement and the address where each item is and shall be located and if any item is or will be a fixture attached to real estate, the description of the real estate and the name and address of the owner of record thereof . . . . together with all accessories, substitutions, additions, replacements, parts and accessions affixed to or used in connection with the collateral.

20.02 COLLATERAL SECURITY:

See category 8 Debtor and Creditor, topic 8.15 Pledges.

20.03 MORTGAGES OF PERSONAL PROPERTY:

See topic 20.01 Chattel Mortgages.

20.04 MORTGAGES OF REAL PROPERTY:

In equity, mortgage is not conveyance; it creates lien on land, not estate in mortgagee. (101 N.J. Eq. 569, 139 A. 389).

Execution.

Mortgage need not be under seal. (NJSA 46:15-1.1[b]).

Joinder of husband in mortgage of wife’s interest in real property unnecessary, except to release dower or curtesy (which are no longer operative rules after May 28, 1980) and provided husband’s estate, interest or right not affected. (NJSA 37:2-16, 37:2-17; 51 N.J. Eq. 135, 26 A. 456, aff’d. 52 N.J. Eq. 587, 33 A. 50.) Spouses share right of joint possession in real property occupied jointly as principal marital residence, whether owned by one or both spouses. That property right may be released, extinguished or alienated only with consent of owning and non-owning spouse or by judgment of court. (NJSA 3B:28-3). It is advisable, therefore, that both spouses execute mortgage of real property even where mortgaged property is owned by only one spouse.

Witnesses are unnecessary but one is advisable.

Mortgages must be in English or accompanied by English translation (NJSA 46:15-1.1[a][1]) and acknowledged or proved (NJSA 46:15-1[a][3]). Instrument evidencing secondary mortgage loan must be identifiable by use of words “Secondary Mortgage Loan” printed prominently, in 14-pt. type or larger, centered and at top of promissory note or loan agreement. (NJSA 17:11C-78[a]).

Charges for Obtaining Mortgages.

When agreement for sale of real estate is conditioned upon purchaser's obtaining mortgage it is unlawful for any person to demand premiums, discounts, commissions and other such charges from any person named in the agreement for making of such loan or in connection with closing, unless provision therefor is made in agreement, or unless written notice thereof is served upon all parties within 12 days of closing, or upon signing agreement. (NJSA 46:10A-1). Person who violates act is disorderly person; treble damages may be recovered. (NJSA 46:10A-2). On loans secured by interests in real property charging of "points" is prohibited. (NJSA 46:10B-10). Discount points paid in connection with mortgage loans on one-to-six family dwelling, occupied or to be occupied by owner, deemed to be interest charged on loan. (NJSA 46:10B-11.1).

Representation of Borrower.

No banking or financial institution, or other licensed or authorized lender, may require borrower (where loan secured by real property, at least part of which is located in New Jersey) to employ lender's attorney or attorney specified by lender. (NJSA 46:10A-6[a]). Borrower may be required to pay reasonable fee for services of lender's attorney as disclosed by lender in loan commitment, but not when loan is primarily for personal, family or household purposes and secured by real property located in N.J. with one-to-four family residence. Borrower may select own attorney. (See NJSA 46:10A-6.)

Recording.

In order to constitute constructive notice, mortgage must be recorded in same manner as deed. (NJSA 46:21-1). See topic Records; category 21 Property, topic 21.06 Deeds.

Effect of Mortgage Modification Agreement on Title Insurance.

If holder of mortgage loan has insured holder's interest in real property securing mortgage loan with title insurance issued in accordance with NJSA 17:46B-1 et seq. and modification has been made in mortgage loan which continues priority of original mortgage as provided in NJSA 46:9-8.2, title insurance shall continue in effect whether or not modification agreement is recorded in county where mortgage is recorded, unless terms of title insurance policy explicitly provide that policy will not continue to apply if modification of mortgage loan takes place pursuant to NJSA 46:9-8.1 et seq. (NJSA 46:9-8.5).

Deeds of trust in place of mortgages are seldom used.

Mortgage made to husband and wife, designated as such, is held by them as tenants by entireties and not as joint tenants or tenants in common unless otherwise expressly provided or manifestly appearing from instrument. (NJSA 46:3-17.2 – 46:3-17.3).

Assignment.

Mortgages are assignable at law by writing, sealed or not. (NJSA 46:9-9). Assignment may be recorded after proper acknowledgment or proof (NJSA 46:16-1[d]), and recording is notice from time such assignment is left with county recording officer for record, to all persons concerned (NJSA 46:18-4).

Satisfaction.

Mortgages may be cancelled by record of recording officer of any county in which mortgage was recorded upon presentation to recording officer of original mortgage with endorsement on it authorizing its cancellation and bearing signature of mortgage holder, or that of any authorized signatory on behalf of holder if holder is corporation or other entity. (NJSA 46:18-5.1[a]). Mortgages may also be cancelled by filing with county recording officer instrument constituting satisfaction of mortgage meeting requirements for recordation. (NJSA 46:18-5.1[b]).

When mortgage is redeemed, paid and satisfied, mortgagee other than institution engaged in business of making or purchasing mortgage loans must within ten days notify mortgagor of its right to demand that mortgagee cancel mortgage of record upon payment of required fee, and mortgagee shall within 30 days of receipt of required fee apply to county recording officer to have mortgage cancelled of record and send to mortgagor copy of letter requesting cancellation. (NJSA 46:18-11.2[a]). Failure of mortgagee to comply within 15 business days of mortgagor's notice of non-compliance subjects mortgagee to fine of $50 for each day after 15-day compliance period that mortgage remains uncancelled; however, this fine must not exceed total of $1,000. (NJSA 46:18-11.3). Mortgagee also liable to mortgagor for cost of any legal action to have mortgage cancelled of record, but no attorneys' fees allowed unless 20 days written notice given to mortgagee prior to institution of suit. (NJSA 46:18-11.4). When mortgagee is institution in business of making or purchasing mortgage loans, its agents shall submit mortgage for cancellation of record within 30 days of receipt of all fees required to be paid by mortgagor, and send to mortgagor copy of letter requesting cancellation. (NJSA 46:18-11.2[b]). New Jersey attorney-at-law or person licensed as title insurance producer who has caused payment in full of mortgage not timely discharged may submit for recording satisfaction executed as agent for holder of mortgage together with affidavit. (NJSA 46:18-11.7).

Release of part of mortgaged property may be acknowledged or proved, and recorded. (NJSA 46:16-1[c]).

Foreclosure and sale are effected by action in Superior Court. (NJSA 2A:50-36). It is not necessary to join beneficiaries in suit brought by fiduciary in their behalf (NJSA 2A:50-13), nor to join beneficiaries as defendants where any interest, right, claim or title is held by fiduciary for their benefit (NJSA 2A:50-15, but constitutionality doubtful; 137 N.J. Eq. 92, 47 A.2d 320). To effect constructive notice of pendency of suit, notice of lis pendens must be filed with clerk or register of county where land is situated. (NJSA 2A:15-6). Mortgage may be foreclosed for unpaid interest due to date of decree or for installment of principal due with accrued interest, and also for unpaid municipal liens and insurance premiums, without merger of mortgage in decree. (NJSA 2A:50-39 – 2A:50-52). If mortgage is security for bond or note, suit must first be instituted to foreclose mortgage. (NJSA 2A:50-2). Foreclosure—first requirement not applicable to nonresidential mortgages and secondary mortgages by banking institutions and associations and licensed lenders where first mortgage not held by such secondary lender. (NJSA 2A:50-2.3).

Sale is made by sheriff or other officer by writ of execution (NJSA 2A:50-37), following notice set up in sheriff's office in county where land is situated and at premises to be sold, at least three weeks before sale, and published once per week for four consecutive weeks in two newspapers printed and published in county, one of which is at county seat or municipality having largest population; if there are not two such newspapers in county, newspapers circulating in county may be utilized (NJSA 2A:61-1). Party procuring execution must notify other parties appearing in action and owner of property at least ten days prior to sale. (Rule 4:65-2). Except for unpaid taxes or municipal liens, purchaser may be relieved from bid on satisfying court of existence of substantial defect in or cloud on title rendering same unmarketable, unless sheriff's advertisement sets forth defects in title and liens or encumbrances or unless court has directed that any lien or encumbrance that is due and payable be paid out of proceeds of sale. (NJSA 2A:61-16).

Sheriff delivers deed unless objection to sale is made within ten days after sale or before delivery of deed. Court may summarily dispose of objection and confirm sale and direct sheriff to deliver deed. (Rule 4:65-5). Sheriff must file report of sale with court within reasonable time thereafter. (NJSA 2A:50-19; Rule 4:65-6). For report of sale by any person as set out in Rule and objections thereto see Rule 4:65-6; NJSA 2A:61-8 – 2A:61-12.

Fair Foreclosure Act provides new procedures applicable to residential mortgage foreclosures. (NJSA 2A:50-53 et seq.).

Deficiency Judgments.

If on sale there is deficiency, suit on bond or note may be had for deficiency, if instituted within three months after sale, or after confirmation, if confirmation of sale is required, but no action may be instituted against any party answerable on bond or note unless he was joined in foreclosure proceedings. (NJSA 2A:50-2). Before starting suit for deficiency, notice thereof must be filed with clerk or register of county where land is. Where first mortgage has been foreclosed, suit on bond or note securing second mortgage must be commenced within one year after sale or confirmation of sale, if applicable. (NJSA 2A:50-6, 2A:50-8). Obligor on bond executed on or after Mar. 29, 1933, or on note executed on or after May 1, 1980, may file answer disputing amount of such deficiency, in which event both parties may introduce evidence of fair market value of mortgaged premises at time of foreclosure sale, and court determines deficiency by deducting fair market value of premises from debt. (NJSA 2A:50-3).

Court of equity has, under certain circumstances, refused to confirm sale until mortgagee stipulates that fair value of mortgaged property will be credited on decree and deficiency suit prosecuted only for balance. (See 113 N.J. Eq. 200, 166 A. 538; 117 N.J. Eq. 242, 175 A. 273.)

Mortgagor's failure to object to sale price after opportunity to do so prior to confirmation of sale precludes such objection in deficiency suit. (79 N.J. Super. 47, 190 A.2d 391, aff'd, 44 N.J. 525, 210 A.2d 401 and 83 N.J. Super. 497, 200 A.2d 506).

Prepayment in full of balance owing may be made at any time without penalty. (NJSA 46:10B-2).

Mortgagor may pay additional $50 or multiples thereof on principal provided that additional sum and principal payments required on mortgage loan do not exceed one-third of face amount of loan in any six-month period beginning with date of loan. Right is noncumulative and lapses if not exercised during any six-month period. (NJSA 46:10B-3).

Priorities.

Mortgage given by purchaser at time real estate is acquired to secure purchase money or any part thereof, and containing recital to that effect, has priority over any previous judgment obtained against purchaser. (NJSA 46:9-8). Priority of lien of loan or line of credit, except construction loan, which states maximum specified principal amount and which is secured by interest in real property (NJSA 46:9-8.1[a]) and which by its terms is subject to modification, as specified hereinafter, will relate back to and remain as it was at time of recording of original mortgage (NJSA 46:9-8.2). "Modification" means: (1) With respect to mortgage loan other than line of credit, change in interest rate, due date, or other terms and conditions of mortgage loan except advance of principal; or (2) with respect to line of credit, change in interest rate, due date, or other terms and conditions and advance of principal made pursuant to line of credit but only to extent that advance does not cause principal balance due to exceed principal amount stated in line of credit plus accrued interest; or (3) payments for taxes, assessments, and insurance and other payments made by mortgagee pursuant to terms of mortgage or line of credit are included with amounts that have priority pursuant to NJSA 46:9-8.2 and are not included in phrase "advance of principal". "Modification" does not include substitution in collateral. (NJSA 46:9-8.1[d]). Vendee's lien has priority over prior recorded mortgage if lender had knowledge of money paid toward purchase price prior to execution of mortgage. (164 N.J. 487, 753 A.2d 1112).

Redemption.

After foreclosure sale, mortgagor may redeem within ten day period fixed for objection or, if objection made, before filing of order confirming sale. (Rule 4:65-5; 56 N.J. 508, 267 A.2d 495). After redemption, mortgagee, if not institution in business of making or purchasing mortgage loans, must within ten days notify mortgagor of right to cancel mortgage by payment of required fee. Within 30 days of receipt of fee, mortgagee must apply to county recording officer to cancel mortgage and send copy of request letter to mortgagor. (NJSA 46:18-11.2[a]). If mortgagee is institution in business of making or purchasing mortgages, mortgagee must submit mortgage to county recording officer for cancellation within 30 days of receiving all fees required to be paid by mortgagor and send copy of request letter to mortgagor. (NJSA 46:18-11.2). Judgment in deficiency suit opens foreclosure, and renders property redeemable by suit brought within six months after entry of judgment for deficiency. (NJSA 2A:50-4). Effect of answer to deficiency action is to terminate any right to redeem from foreclosure sale. (NJSA 2A:50-5). Recovery of judgment on bond or note action where lien extinguished by foreclosure of prior mortgage does not open foreclosure and sale of said premises or result in any right of redemption. (NJSA 2A:50-9).

Home repair contracts are subject to detailed statutory requirements of Home Repair Financing Act as to form and enforcement. (NJSA 17:16C-62 et seq.).

Second mortgages are regulated and content thereof prescribed by NJSA 17:11C-51 et seq. Secondary mortgages must be in form of promissory note for closed-end loans and in form of loan agreement for open-end loans. (NJSA 17:11C-78[a]). Mortgage agreement for closed-end loan must provide for substantially equal payment periods calling for substantially equal payment amounts and may provide payment schedule that reduces or omits payments over periods when borrower’s income is reduced or suspended. (NJSA 17:11C-78[b]). Borrower cannot be required to sign secondary mortgage agreement that contains blank or empty spaces to be filled in later. (NJSA 17:11C-78[c], [d]).

Secondary mortgage loan agreements may not contain: Power of attorney to confess judgment; assignment of any salary or other compensation earned or to be earned; provision requiring payment for amounts other than unpaid balance of loan agreement; provision releasing person licensed under this Act from liability for any claim that borrower may have against person licensed under this Act under terms of promissory note or loan agreement; provision waiving borrower’s rights of action against person licensed under this Act, or subsequent holder, for illegal acts committed in collection of payments under promissory note or loan agreement; or acceleration clause. (NJSA 17:11C-79).

In connection with second mortgage loan, residential mortgage lender shall not charge any broker’s or finder’s fees or commissions, except as authorized by Act and expenses of foreclosure. However, charges may be imposed for: not more than three discount points as percentage of principal amount; and legal and title review fees. (17:11C-30). If residential mortgage lender charges or collects interest on second mortgage in excess of that permitted by act, lender may not collect interest or other charges in connection with loan. If lender willfully violates any provision of Act, borrower is entitled to three times amount of such interest and charges collected in excess of that permitted by law. (17:11C-31).

Borrower of secondary mortgage loan is entitled to, without charge: copy of any instrument, document or writing signed by borrower; closing statement itemizing individual amounts disbursed to or on behalf of borrower; amount of interest charge and receipt for cash payments. (NJSA 17:11C-32[a]-[c]). When secondary mortgage loan is repaid in full, borrower is entitled to: refund or credit of unearned portions of any insurance premiums; stamp on loan agreement stating that loan has been “Paid in Full” or “canceled”; and all releases, cancellations and other documents necessary to vest borrower with complete evidence of title to property. (NJSA 17:11C-30[f]).

Mortgage Escrow Accounts.

If mortgagor and mortgagee or their service organization have received notice of delinquent property taxes, after 21 days mortgagor may pay delinquent taxes, and after notifying mortgagee or their service organization in writing, may stop making scheduled payments into mortgage escrow account until amount withheld equals amount of delinquent tax mortgagor paid.

Forms.

Following may be used (but see NJSA 17:11C-78 et seq., regulating certain second residential mortgages and content thereof, and NJSA 56:12-1 et seq. [the Plain Language Law] with respect to mortgages executed by individuals):

Forms

Mortgage:

This instrument was prepared by:

. . . .

Name

. . . .

Signature

MORTGAGE

This Indenture, made, the . . . . . . day of . . . . . ., in the year of our Lord Two Thousand and . . . . . ., between . . . . . ., of the . . . . . . of . . . . . ., in the County of . . . . . . and State of . . . . . ., of the first part, and . . . . . ., of the . . . . . ., in the County of . . . ., and State of . . . ., of the second part; witnesseth, that the said party of the first part, for and in consideration of the sum of . . . . . . dollars, lawful money of the United States of America, to him in hand well and truly paid by the said party of the second part, at or before the sealing and delivery of these presents, the receipt whereof is hereby acknowledged, and the said party of the first part being therewith fully satisfied, contented and paid, has given, granted, bargained, sold, aliened, enfeoffed, conveyed, and confirmed, and by these presents does give, grant, bargain, sell, alien, enfeoff, convey and confirm to the said party of the second part, and to party's heirs and assigns, forever, ALL that (those) tract (s) or parcel (s) of land and premises hereinafter particularly described, situate, lying and being in the . . . . . . of . . . . . ., in the County of . . . . . . and State of New Jersey. (Insert description of property).

Together with all and singular the tenements, hereditaments and appurtenances thereunto belonging or in anywise appertaining, and the reversion and reversions, remainder and remainders, rents, issues, profits, privileges and advantages thereof; and also all the estate, right, title, interest, property, possession, claim and demand whatsoever, as well in law as in equity, of the said party of the first part, of, in and to the same, and every part and parcel thereof, with the appurtenances, to have and to hold, all and singular the above granted and described land and premises, with the appurtenances, unto the said party of the second part, heirs and assigns, to the only proper use, benefit and behoof of the said party of the second part, heirs and assigns forever; provided always, and it is agreed by and between the parties to these presents, that if the said party of the first part, heirs, executors or administrators, do and shall well and truly pay, or cause to be paid, to the said party of the second part, executors, administrators or assigns, the sum of . . . . . . Dollars, lawful money aforesaid, payable in . . . . . . year(s) from the date hereof, with lawful interest for the same, at the rate of . . . . . . per centum per annum, payable semi-annually, according to the condition of a certain Bond bearing even date herewith, made by the said . . . . . . to the said party of the second part, then and from thenceforth, these presents and said obligation, and everything herein and therein contained, shall cease and be void; anything herein and therein contained to the contrary in anywise notwithstanding. And the said . . . . . . for himself, his heirs, executors and administrators, does covenant and agree to pay unto the said party of the second part, heirs, executors, administrators or assigns, the said sum of money and interest as mentioned above and expressed in the conditions of said bond. And it is hereby expressly agreed that should any default be made in the payment of said interest, or of any installment of principal, or of any premium for insurance on said premises, or any part thereof, on any day whereon the same is made payable, or should any tax, assessment, water rate, or other governmental or municipal rate, charge, imposition or lien hereafter imposed or acquired upon the premises described in this mortgage, become due and payable, and should the interest, or any installment of principal, or any premium for insurance on said premises, or any part thereof, remain unpaid and in arrears for the space of 30 days, or said tax, assessment, water rate, or other governmental or municipal rate, charge, imposition or lien, or any or either of them, remain unpaid and in arrears for the space of 30 days, then, and from thenceforth, that is to say, after the lapse or expiration of either of the said periods, as the case may be, the aforesaid principal sum of money, with all arrearage of interest thereon, shall at the option of the party of the second part, executors, administrators or assigns, become due and payable immediately thereafter, although the period above limited for the payment thereof may not then have expired, anything hereinbefore contained to the contrary thereof in anywise notwithstanding, as by the said Bond or obligation and the conditions thereof, reference thereto being had, may more fully appear. And it is also agreed, by and between the parties to these presents, that if the said party of the second part, executors, administrators or assigns, shall, to protect mortgage title, pay said tax, assessment, water rate, or other governmental or municipal rate, charge, imposition or lien, then any such payment so made shall be a lien on the said mortgaged premises, added to the amount of the said Bond or obligation, and secured by these presents and payable on demand with legal interest. And the said party of the first part, for himself, heirs, executors and administrators, does covenant and grant to and with the said party of the second part, heirs, executors, administrators and assigns, as follows: (1) That the said party of the first part is seized of an indefeasible estate in fee simple in said premises and will warrant and forever defend the title thereof unto the said party of the second part, heirs and assigns, against all lawful claims whatsoever; (2) That the said party of the first part, heirs and assigns, shall and will not apply for, claim or be entitled to receive any deduction by reason of this mortgage, from the taxable value of the said lands and premises, or any deduction in or credit on the interest on this mortgage or on the moneys hereby secured, by reason of taxes paid; (3) That the said party of the second part, heirs and assigns, shall and may from time to time, and at all times after default shall be made in the performance of the proviso or condition herein contained, peaceably and quietly enter into, have, hold, use, occupy, possess and enjoy all and singular the above granted and bargained premises, with the appurtenances, without the let, suit, trouble, hindrance or denial of the said party of the first part, heirs, executors, administrators or assigns, or any other person or persons whatsoever; (4) That the said party of the first part, heirs, executors, administrators and assigns, shall and will keep the buildings erected and to be erected upon the lands above conveyed, insured against loss or damage by fire, in some safe and responsible Insurance Company or Companies, to be approved of by the party of the second part, executors, administrators or assigns, to an amount not less than . . . . . . dollars and assign the policies and certificates thereof to the said party of the second part, executors, administrators or assigns; and in default thereof, it shall be lawful for the said party of the second part, executors, administrators or assigns, to effect such insurance, and the premium and premiums paid for effecting the same shall be a lien on the said mortgaged premises, added to the amount of the said Bond or obligation and secured by these presents, and payable on demand with legal interest. Said policies shall be held by the party of the second part, executors, administrators and assigns, as collateral security to this mortgage; and in case of fire, the proceeds of said insurance may, at the option of the party of the second part, executors, administrators or assigns, be applied in reduction of the mortgage debt or paid over in whole or in part to the said party of the first part, heirs, executors, administrators or assigns, for use in restoring or replacing the damaged buildings or a part thereof; (5) That, in case the building or buildings upon the lands above conveyed shall at any time become and remain vacant and unoccupied for 90 consecutive days, and shall fall into a state of disrepair, the said party of the first part, heirs, executors, administrators and assigns shall and will, on 15 days written notice from said party of the second part, executors, administrators or assigns, repair said building or buildings to the satisfaction of said party of the second part, executors, administrators or assigns; (6) That the said party of the first part, heirs or assigns, shall and will not, without the prior written consent of the said party of the second part, executors, administrators or assigns, tear down, demolish or remove or make material structural changes or alterations in the building or buildings upon the lands above conveyed.

And it is also expressly agreed that, in case there shall be a default in the observance or performance of any of the foregoing covenants by the said party of the first part, heirs, executors, administrators or assigns, then the aforesaid principal sum of money, with all arrearage of interest thereon shall, at the option of the said party of the second part, heirs, executors, administrators or assigns, become due and payable, immediately thereafter, although the period above limited for the payment thereof may not then have expired, anything hereinbefore contained to the contrary thereof in anywise notwithstanding.

In witness whereof, the said party of the first part, has hereunto set his hand and seal, the day and year first above written.

(Signature of Mortgagor). . . . .(Seal).

Receipt of a true copy of this instrument, provided without charge, is hereby acknowledged

. . . .

Signed, Sealed and Delivered in the Presence of

(Signature of witness).

(Acknowledgment).

(See subhead Execution, supra, for additional requirements.)

Assignment of Mortgage:

Know All Men By These Presents, That . . . . . ., party of the first part, in consideration of the sum of . . . . . . lawful money of the United States of America, to . . . . . . in hand paid by . . . . . ., party of the second part, at or before the ensealing and delivery of these presents, the receipt whereof is hereby acknowledged, have granted, bargained, sold, assigned, transferred and set over, and by these presents do grant, bargain, sell, assign, transfer, and set over unto the said party of the second part . . . . . . Indenture of Mortgage bearing date the . . . . . . day of . . . . . . Two thousand . . . . . . made by . . . . . . on lands in . . . . . . to secure the payment of the sum of . . . . . . which mortgage is . . . . . . in the . . . . . . office of the County of . . . . . . in Book . . . . . . of Mortgages, pages . . . . . . Together with the bond or obligation therein described, and the money due and to grow due thereon, with the interest. To Have and to Hold, the same unto the said party of the second part . . . . . . or assigns for . . . . . . subject only to the proviso in the said Indenture of Mortgage mentioned: And . . . . . . do hereby make, constitute, and appoint the said party of the second part . . . . . . true and lawful attorney, irrevocable, in . . . . . . name, or otherwise, but at . . . . . . proper costs and charges, to have, use and take all lawful ways and means for the recovery of all the said money and interest; and in case of payment, to discharge the same as fully as . . . . . . might or could do if these presents were not made: And . . . . . . do hereby covenant, promise and agree, to and with the said party of the second part, that there is now due and owing upon the said Bond and Mortgage the sum of . . . .

In Witness Whereof, ... have hereunto set . . . . . . hand and seal the . . . . . . day of . . . . . . in the year of Our Lord Two thousand . . . . . .

(Signature of Assignor). . . . .(Seal).

Signed, sealed and delivered

in the presence of . . . .

(Signature of Witness)

(Acknowledgment).

Certain variations from the above are necessary where the assignor is a corporation.

Release of Part of Mortgaged Premises:

This Indenture, Made the . . . . . . day of . . . . . . in the year of Our Lord Two thousand . . . . . . between . . . . . . of the . . . . . . of . . . . . . in the County of . . . . . . and State of . . . . . of the First Part; and . . . . . . of the . . . . . . of . . . . . . in the County of . . . . . . and State of . . . . . . of the Second Part;

Whereas, by an Indenture of Mortgage, dated the . . . . . . day of . . . . . . in the year of Our Lord Two thousand . . . . . . for the consideration therein mentioned, and to secure the payment of the money therein specified, did convey certain lands and tenements, of which the lands hereinafter described are part, unto . . . . . . to secure the sum of . . . . . . dollars . . . . . . which mortgage is . . . . . . in the . . . . . . office of the County of . . . . . . in Book . . . . . . of Mortgages, page . . . . . .;

And Whereas, the said party of the first part, at the request of the said party of the second part, ha. . . . agreed to give up and surrender the lands hereinafter described, unto the said party of the second part and to hold and retain the residue of the mortgaged lands as security for the money remaining due on the said mortgage:

Now This Indenture Witnesseth, That the said party of the first part, in pursuance of the said agreement and in consideration of . . . . . . Dollars to . . . . . . duly paid at the time of the ensealing and delivery of these presents, the receipt whereof is hereby acknowledged, ha. . . . granted, released, quit-claimed and set over, and by these presents do. . . . grant, release, quit-claim and set over, unto the said party of the second part, all that part of the said mortgaged lands hereinafter particularly described, situate lying and being in the . . . . . . of . . . . . . in the County of . . . . . . and State of . . . . . . (description of property released).

Together with the hereditaments and appurtenances thereto belonging; and all the right, title and interest of the said party of the first part, of, in and to the same, to the intent that the lands hereby conveyed may be discharged from the said mortgage, and that the rest of the lands in the said mortgage specified, may remain to the said party of the first part, ... as heretofore. To Have and to Hold, the lands and premises hereby released and conveyed, to the said party of the second part, ... and Assigns to . . . . . . their only proper use, benefit and behoof forever, free, clear and discharged of and from all lien and claim under and by virtue of the Indenture of Mortgage aforesaid.

In Witness Whereof, the said party of the first part ha. . . . hereunto, etc.

(Signature of Releasor). . . . .(Seal).

Signed, sealed and delivered

in the presence of . . . .

(Signature of Witness)

(Acknowledgment).

Discharge of Mortgage:

Know All Men By These Presents, That . . . . . . do hereby certify, that a certain Mortgage bearing date the . . . . day of . . . . . . in the year of Our Lord Two thousand and . . . . . . made and executed by . . . . . . and . . . . . . in the office of the . . . . . . of the County of . . . . . . in Book . . . . . . of Mortgages, page . . . . . . on the . . . . . . day of . . . . . . (year) . . . ., at . . . . o'clock . . . . M., is paid and satisfied; and . . . . . . do hereby consent that the same may be discharged of Record.

Witness . . . . . . hand and seal this . . . . . . day of . . . . . . (year) . . . . .

(Signature of Dischargor). . . . .(Seal).

Witness:

. . . .

(Signature of Witness)

(Acknowledgment).

Consent to Cancellation (To be endorsed on mortgage):

The within mortgage having been fully paid and satisfied, the Register (Clerk) of . . . . . County is hereby authorized to cancel and discharge the same of record.

(Signature of holder of mortgage). . . . .

I hereby certify the above signature to be genuine.

. . . .(Official Seal)

(Signature of officer authorized to take acknowledgments. See topic Acknowledgments).

In the case of a corporation, the signatures on cancellation should be as follows:

(CORPORATION)

By . . . .

President.

(Seal) Attest:

. . . .

Secretary.

Fees.

For recording and discharge of mortgage, first page, $30; each additional page, $10. (NJSA 22A:4-4.1).

No certification as to genuineness of signatures is necessary in corporate cancellations.

Guaranteed Mortgages.

See category 16 Insurance, topic 16.02 Surety and Guaranty Companies.

New Jersey Housing and Mortgage Finance Agency.

Agency is public corporate body within Department of Community Affairs with authority to, among other things, make loans to institutional lenders, for new residential mortgages and residential rehabilitation and improvement loans. (NJSA 55:14K-11[a]); http://www.nj.gov/dca/hmfa). Such loans must be general obligations of institutional lenders and may be secured by pledge of or lien on collateral security; agency may require that collateral mortgages be insured by mortgage guaranty insurance company. (NJSA 55:14K-11[c] and [e]). Agency authorized to issue bonds and such bonds are negotiable within meaning of and for all purposes of Title 12A. (NJSA 55:14K-20).

Chattel Mortgages.

See topic 20.01 Chattel Mortgages.

Mortgage Bankers.

See category 3 Business Regulation and Commerce, topic 3.06 Brokers.

21 PROPERTY

21.01 ABSENTEES:

Care of Property.

If person owning property in New Jersey disappears or is confined or detained by foreign power, Superior Court, Chancery Division, may, in summary action, appoint one or more trustees to manage, conserve and dispose of said property. (NJSA 3B:26-1, 3B:26-2). Trustee must give bond in amount fixed by court. (NJSA 3B:15-1). Distribution of property of absentee can be directed by court after absentee presumed dead, or sooner on absentee's death being established; if absentee returns or need for management or protection ceases before distribution, trustee must restore property to absentee after deducting reasonable expenses. (NJSA 3B:26-3).

Escheat.

Uniform Unclaimed Property Act (1981; adopted 1989). (NJSA 46:30B-1 et seq.; L. 1989, c. 58). Act as adopted supplements New Jersey escheat law. (NJSA 2A:37-1 et seq.) in following material respects:

§ 2: Presumption of abandonment not applicable if there has been written communication between holder and apparent owner concerning unclaimed property during period that property remains unclaimed. (NJSA 46:30B-7.1).

§ 3: If records of holder show property payable or distributable to person other than owner but records do not show last known address of other person it is presumed that last known address of such other person is same as that of owner. (NJSA 46:30B-10.1).

§ 12: Property held by fiduciary or assignee and remaining unclaimed for 90 days after account of fiduciary or assignee is allowed or settled informally, is presumed abandoned. Unclaimed property held by fiduciary of intestate estate payable to unknown heirs of decedent shall be presumed abandoned 90 days after publication of notice as required in NJSA 3B:5-5. (NJSA 46:30B-37.1).

§ 13: Property deposited or paid into court or to county surrogate for benefit of minor which remains unclaimed by minor for two years after reaching majority, presumed abandoned. (NJSA 46:30B-41.1). Property held by any governmental entity which remains unclaimed for more than one year after it is payable or distributable, presumed abandoned. (NJSA 46:30B-41.2).

§ 14: Credit balance, customer overpayment, security deposit, refund, credit memorandum, unused ticket or similar instrument issued in ordinary course of business unclaimed three years after becoming payable is deemed abandoned. (NJSA 46:30B-42 – 46:30B-43).

§ 17: Adds Social Security account number or federal identification number of apparent owner to prescribed report information. (NJSA 46:30B-47[f]). Special provisions substituting reports by and posted in office of Clerk of Superior Court and county surrogates for mailed notice. (NJSA 46:30B-47.1, 46:30B-50.1).

§ 18: Paragraph (b)(3), (d) and (e) not adopted. Notice threshold of $100. (NJSA 46:30B-53).

§ 23: Revised and expanded: depository account denominated Unclaimed Personal Property Trust Fund; provisions added for unclaimed child support, investment of funds deposited, recordkeeping and confidentiality of certain records. (NJSA 46:30B-74 – 46:30B-76.3).

§ 24: Adds procedure for payment of claims made by alleged heirs of intestate decedent who assert entitlement to decedent’s property pursuant to NJSA 3B:5-5.1. (NJSA 46:30B-77).

§ 24(c): Rate of interest as fixed periodically by Administrator. (NJSA 46:30B-79).

§ 26: Covers only claims denied; no provision for nonaction. (NJSA 46:30B-84).

§ 31: Every holder and successor holder required to maintain records for five years after holder files report except as provided in NJSA 46:30B-96. (NJSA 46:30B-95, 46:30B-96.1).

§ 34: Paragraph (d) not adopted. Administrator authorized to waive penalties and interest or to reduce interest in appropriate circumstances. (NJSA 46:30B-105.3). Interest and penalties calculated from date unclaimed property originally payable or distributable. (NJSA 46:30B-105.2).

§ 35: Additional conditions imposed regarding compensation agreements concerning unclaimed property: agreement void if made within 24 months after property is paid or delivered to administrator; recovery fee not to exceed 20% of value of property (or 35% of value of property if agreement was entered into before property was presumed abandoned); recovery fee payable only if agreement in writing signed by apparent owner; minimum contents of agreement prescribed. (NJSA 46:30B-106).

For other matters relating to absentees or nonresidents, see categories 5 Civil Actions and Procedure, topic Process; Debtor and Creditor, topic Attachment; Estates and Trusts, topics Death, Executors and Administrators; Transportation, topic Motor Vehicles.

21.02 ADVERSE POSSESSION:

Character and Duration of Possession.

Right is statutory. (32 N.J. Super. 419, 108 A.2d 458). Possession of uncultivated tracts for 60 years and other realty for 30 years, uninterruptedly continued by occupancy, descent, conveyance or otherwise, however commenced, vests title and bars claims for recovery. (NJSA 2A:14-30). Thirty years possession uninterrupted as aforesaid, founded upon proprietary right duly recorded or purchased from person in possession and supposed to have title or from person in possession's agent, bars all prior locations and titles not followed by actual possession as aforesaid and vests title in actual possessor. (NJSA 2A:14-30). Possession must be adverse. (122 N.J. Eq. 425, 194 A. 286). Right of entry barred unless exercised within 20 years after right accrues. (NJSA 2A:14-6). Defense to action is actual, exclusive, adverse, hostile, uninterrupted possession, visible or notorious for 20 years with intention to claim title. (103 N.J.L. 340, 135 A. 890). New Jersey follows majority view that occupancy under mistake as to true boundary is hostile. (54 N.J. 378, 255 A.2d 258). No adverse possession of land owned by state or its subdivisions. (116 N.J.L. 227, 182 A. 917).

Easements may arise by prescription based on adverse use for 20 years. (7 N.J. 215, 81 A.2d 137). Such acquisition is of judicial origin. (32 N.J. Super. 419, 108 A.2d 458). See Tit. 2A:14-33 negating easement by prescription for telegraph or electric lines.

Disabilities.

Person outside U. S., minor, or person of unsound mind at time statutory right or title accrues, or person's heirs, may bring action within five years after return to U.S. or removal of disability even if 60- or 30-year period has expired. (NJSA 2A:14-32). Descent of interest wrongfully disseized does not bar right of entry of person having lawful title. (NJSA 2A:14-34).

See also category 5 Civil Actions and Procedure, topic 5.16 Limitation of Actions.

21.03 [RESERVED]

21.04 CONVEYANCES:

See topic 21.06 Deeds.

21.05 CURTESY:

On death of wife, widower takes life estate in one-half of real property whereof wife, or anyone to her use, was seized of an estate of inheritance at any time during coverture prior to May 28, 1980, to which widower shall not have released right of curtesy. Procedure for enforcing, admeasuring and determining curtesy is same as for dower. (NJSA 3B:28-1 et seq.). Foregoing applies only to property as to which coincidence of seizin and coverture began on or after Jan. 1, 1929. (138 N.J. Eq. 260, 47 A.2d 879).

Release, Assignment.

See topic 21.08 Dower.

Bar in case of adultery, etc., is same as in case of dower. (NJSA 3B:28-15, 3B:28-16). See topic 21.08 Dower.

Absolute divorce terminates right of curtesy. (96 N.J. Eq. 159, 124 A. 372).

Election between curtesy and testamentary provision, see category 13 Estates and Trusts, topic 13.16 Wills.

Abolishment.

Effective May 28, 1980, all rights of Dower and Curtesy are abolished with respect to real property occupied jointly as principal marital residence, regardless of whether property was acquired on or after said date. (NJSA 3B:28-1, 3B:28-3; 301 N.J. Super. 73, 693 A.2d 938). As to such property occupied jointly with his or her spouse acquired on or after May 28, 1980 as their principal matrimonial residence, every married person has right of joint possession during marriage, which right of possession may not be released, extinguished or alienated without consent of both spouses except by judgment of court of competent jurisdiction. (NJSA 3B:28-3).

21.06 DEEDS:

Execution.

As prerequisite to recording, all deeds must be in English or translated into English, bear signature, be acknowledged or proved, have all names typed below signatures, include name and signature of preparer on first page, contain reference to property's tax lot and block number as designated in year of conveyance on tax map of municipality, or account number. (NJSA 46:15-1.1). Deeds do not have to be executed under seal. (NJSA 46:15-1.1). Transfers of newly constructed property must bear words "NEW CONSTRUCTION" at top of first page of deed and must have grantor's affidavit annexed. (NJSA 46:15-6[c]; Form RTF-1 at http://www.state.nj.us/treasury/taxation/index.shtml). Failure to annex affidavit is disorderly persons offense. (NJSA 45:15-9). N.J.S.A. Val: 4-20.6 validates deeds recorded for five years, notwithstanding defect in acknowledgment or proof, except as to intervening interests. N.J.S.A. Val: 9-2.32 validates executors', administrators' or trustees' deeds recorded for five years, notwithstanding lack of recital of true consideration. No deed for property that age restriction applies to shall be recorded unless required certification (NJSA 45:22A-46.1 et seq.) accompanies filing and is recorded with deed as addendum thereto. (NJSA 46:15-6.2). If post office addresses of grantee or grantees of deed are not recited in instruments, registrar of deeds or mortgages or county clerk must obtain information from tax assessor's certificate or person leaving it for record and mark addresses on deed, including street and house number for individual or location or principal place of business for corporation. (NJSA 54:4-30). County clerk or registrar of deeds and mortgages must refuse to record any deed or other evidence of title unless post office address, street and house numbers, names of streets or avenues, or rural route numbers, are contained in or marked on face of deed offered for record. (NJSA 54:4-32). Spouse must join in execution to release curtesy, dower of right of joint possession. See topics 21.05 Curtesy, Dower; category 14 Family, topic 14.09 Husband and Wife, subhead Conveyance or Encumbrance of Property. Witness customary but not necessary. See also topic 21.16 Real Property.

Recordation.

Deeds may be recorded in office of county recording officer (register or clerk, see category 10 Documents and Records, topic 10.04 Records) of county wherein land is situated. (NJSA 46:16-1). If transfer is subject to this additional fee, statement of true consideration must be contained in deed, acknowledgment, proof of execution or appended affidavit. (NJSA 46:15-6[a]). If transfer is exempt from additional fee, affidavit stating basis for exemption must be appended to deed. (NJSA 46:15-6[b]).

Until duly recorded or lodged for recording, deed is void against subsequent judgment creditors without notice, and against subsequent bona fide purchasers and mortgagees for value without notice whose deed or mortgage shall have been first duly recorded, but unrecorded deed is otherwise valid and operative. (NJSA 46:22-1). In determining whether deed is void against subsequent judgment creditor, court must look at time when subsequent judgment was docketed and not when it was entered. (NJSA 46:22-1; 293 N.J. Super. 409, 680 A.2d 1121). For conveyances of new construction, 80% of state portion of basic fee is exempt, for consideration up to $150,000. (NJSA 46:15-10.1[b]).

When deed is duly executed, acknowledged or proved, and recorded or lodged for recording, record is thereafter notice to subsequent judgment creditors, purchasers and mortgagees, of execution of and contents of deed, except as otherwise provided by Tit. 12A, c. 9 (UCC). (NJSA 46:21-1).

Recording Fees.

Grantor must pay realty transfer fees comprised of basic fee, additional fee, general purpose fee and supplemental fee per rate schedule below. (NJSA 46:15-7 and 7.1; see http://www.state.nj.us/treasury/taxation/lpt/rtffaqs.shtml for combined fees).

Basic Fee.

$1.25 for every $500 (state portion); and $0.50 for every $500 (county portion). (NJSA 46:15-7[a][1]).

Additional Fee.

$0.75 for every $500 over $150,000. (NJSA 46:15-7[a][2]).

General Purpose Fee.

No fee up to $350,000; $0.90 for every $500 of consideration between $350,000 and $550,000; $1.40 for every $500 of consideration between $550,000 and $850,000; $1.90 for every $500 of consideration in excess of $850,000, up to $1,000,000; and $2.15 for every $500 of consideration over $1,000,000. (NJSA 46:15-7[a][3]).

Supplemental Fee.

$0.25 for every $500 of consideration up to $150,000; $0.85 for every $500 of consideration in excess of $150,000, up to $200,000; and $1.40 for every $500 of consideration over $200,000. (NJSA 46:115-7.1). Additional county fees payable under certain circumstances where conveyance is exempt from portion of state basic fee. (NJSA 46:15-7.1[b]).

Fee exemptions include transfers for less than $100, by or to U.S. government or State, transfers made solely to release security for debt, to confirm or correct previously recorded deed, on sale for delinquent taxes, between husband and wife or parent and child, and recorded within 90 days of entry of divorce decree. (NJSA 46:15-10; see § 10.1 for partial fee exemptions).

Mansion Tax.

Grantee pays 1% of consideration in excess of $1 million to record deed for: (i) Property designated Class 2 residential property; (ii) property that includes property Class 3A (farm property—regular) but only if property contains structure intended or suited for residential use; (iii) any property transferred in conjunction with any property in (i) or (ii) above; (iv) any property classified as Class 4A "commercial property"; or (v) property that is cooperative unit. (NJSA 46:15-7.2).

Operation and Effect.

Unless exception is made, deed conveyed is construed to include all grantor's interest, including fee simple if held, without use of words "heirs or assigns." (NJSA 46:3-13). Every deed of land includes, unless excepted, buildings, improvements, ways, woods, waters, watercourses, rights, liberties, privileges, hereditaments, appurtenances, reversions, remainders, rents, issues and profits. (NJSA 46:3-16).

Short forms of deed and covenants by grantor are authorized by statute. (NJSA 46:4-1 et seq.). Any deed or part thereof that does not conform to NJSA 46:4-1 – 46:4-10, is nevertheless valid and binds parties as if Tit. 46, c. 4 had never been enacted. (NJSA 46:4-11).

As to operation and effect of quit-claim deed, see Tit. 46, c. 5; 47 N.J. Eq. 365, 20 A. 497; 96 N.J. Eq. 321, 125 A. 15.

Taxes.

See subhead Recording Fees, supra.

Forms.

The following are in general use for the more usual types of deeds (see NJSA 56:12-1 et seq. [the Plain Language Law] with respect to deeds executed by individuals):

Forms

This instrument was prepared by:

. . . .

Name

. . . .

Signature

Bargain and Sale Deed.

This Indenture, made the . . . . . . day of . . . . . ., in the year of Our Lord One Thousand Nine Hundred and . . . . . ., between . . . . . ., of the . . . . . . of . . . . . . in the County of . . . . . . and State of . . . . . ., [for executor's or trustee's deed, insert:—executor of (trustee under) the last will and testament of . . . . . ., deceased, late of the . . . . . . of . . . . . . in the County of . . . . . . and State of . . . . . .], of the First Part; and . . . . . ., residing at . . . . . . in the . . . . . . of . . . . . . in the County of . . . . . . and State of . . . . . ., of the Second Part; witnesseth, that the said party of the first part, [for executor's or trustee's deed, insert:—under and by virtue of the power and authority to him given in and by said last will and testament, and] for and in consideration of . . . . . . lawful money of the United States of America, to him in hand well and truly paid by the said party of the second part, at or before the sealing and delivery of these presents, the receipt whereof is hereby acknowledged, and the said party of the first part being therewith fully satisfied, contented and paid, has given, granted, bargained, sold, aliened, released, enfeoffed, conveyed and confirmed, and by these presents does give, grant, bargain, sell, alien, release, enfeoff, convey and confirm to the said party of the second part, and to party's heirs and assigns forever, all that (those) tract(s) or parcel(s) of land and premises, hereinafter particularly described, situate, lying and being in the . . . . . .of . . . . . ., in the County of . . . . . . and State of New Jersey. (Insert description of property).

Together with all and singular the houses, buildings, trees, ways, waters, profits, privileges and advantages, with the appurtenances to the same belonging or in anywise appertaining; also all the estate, right, title, interest, property, claim and demand whatsoever, of the said party of the first part, [for executor's or trustee's deed, insert—and of the said testator], of, in and to, the same, and of, in and to every part and parcel thereof; to have and to hold, all and singular the above described land and premises, with the appurtenances, unto the said party of the second part, heirs and assigns, to the only proper use, benefit and behoof of the said party of the second part, his heirs and assigns forever;

In Witness Whereof, the said party of the first part has hereunto set his hand and seal the day and year first above written.

Signed, Sealed and Delivered in the

presence of

(Signature of witness)

(Acknowledgment)

(Signature of Grantor)

Seal

[For executor's or trustee's

deed, add:—executor of (trustee

under) last will, etc.]

Bargain and Sale Deed With Covenants Against Grantor's Acts.

Same as foregoing with insertion of following immediately before testimonium clause: And the said party of the first part does, for himself, heirs, executors and administrators, covenant and grant to and with the said party of the second part, heirs and assigns, that the said party of the first part has not done, caused, suffered or procured to be done any act, matter or thing whereby the title of the said party of the second part, hereby made or intended to be made, of, in, and to the above granted, bargained and described land and premises, with the appurtenances, or any part thereof, can or may be changed, charged, altered or defeated in any way whatsoever.

Warranty Deed.

Same as Bargain and Sale and with following inserted immediately before testimonium clause: And the said party of the first part does, for himself, heirs, executors and administrators, covenant and grant to and with the said party of the second part, heirs and assigns, that he, the said party of the first part is the true, lawful and right owner of all and singular the above described land and premises, and of every part and parcel thereof, with the appurtenances thereunto belonging; and that the said land and premises, of any part thereof, at the time of the sealing and delivery of these presents, are not encumbered by any mortgage, judgment or limitation, or by any encumbrance whatsoever, by which the title of the said party of the second part, hereby made or intended to be made, of, in and to the above described land and premises, can or may be changed, charged, altered or defeated in any way whatsoever; and also, that the said party of the first part now has good right, full power and lawful authority, to grant, bargain, sell and convey the said land and premises in manner aforesaid; and also, that the said party of the first part will warrant, secure, and forever defend the said land and premises unto the said party of the second part, heirs and assigns, forever, against the lawful claims and demands of all and every person or persons, freely and clearly freed and discharged of and from all manner of incumbrance whatsoever.

The word "heirs" is not necessary to convey a fee, but should be used. (NJSA 46:3-13). Restrictions based on race, creed, color, national origin, ancestry, marital status or sex, are void except with respect to residential facilities planned exclusively for or occupied exclusively by one sex, and public accommodations by nature reasonably restricted to persons of one sex, e.g., summer camps, dressing rooms, etc. Restriction based on religion becomes void when property ceases to be used for such purpose. (NJSA 46:3-23).

21.07 DEEDS OF TRUST:

See category 20 Mortgages, topic 20.04 Mortgages of Real Property.

21.08 DOWER:

From and after Jan. 1, 1929, on death of husband, widow takes life estate in one-half of real property whereof husband, or anyone to husband's use, was seized of estate of inheritance at any time during coverture prior to May 28, 1980 to which she shall not have released her right of dower. (NJSA 3B:28-1). Foregoing applies only to property as to which coincidence of seizin and coverture began on or after Jan. 1, 1929. (107 N.J. Eq. 372, 152 A. 665; 128 N.J. Eq. 469, 17 A.2d 161).

No dower in estate by joint tenancy except in favor of wife of surviving joint tenant. (41 N.J. Eq. 392, 5 A. 275).

Release.

Widow's right of dower may be released or relinquished by deed executed and acknowledged in manner provided by law for deeds to be recorded. (NJSA 37:2-18.1). Such deed may be made separate and apart from husband. (NJSA 37:2-17). Conveyance by married person directly to spouse releases inchoate or possible future curtesy or dower in lands conveyed if conveyance so provides. (NJSA 37:2-18).

Where person entitled to inchoate or consummate right or estate of dower, whether in possession or not, is mental incompetent and interest may be wasted or dissipated, Superior Court may, subject to appointment of guardian ad litem and without appointing guardian of estate, take certain action to meet needs of incompetent. (NJSA 3B:12-1).

Bar.

Dower may be barred by a valid devise of realty in will of husband (see category 13 Estates and Trusts, topic 13.16 Wills) or by adultery or jointure in certain cases. (NJSA 3B:28-14-19).

Absolute divorce terminates right of dower. (2 N.J. 513, 67 A.2d 161). Divorce from bed and board or legal separation from civil union, under certain circumstances, has same effect. (NJSA 2A:34-6).

Assignment.

If dower is not assigned within 40 days of husband's death or is unfairly assigned, widow may sue for and recover same with damages. (NJSA 3B:28-9). Widow, or certain other persons, may institute action in Superior Court for assignment of widow's dower. (NJSA 3B:28-10).

Election between dower and testamentary provision, see category 13 Estates and Trusts, topic 13.16 Wills.

Abolishment.

Effective May 28, 1980, all rights of dower and curtesy are abolished with respect to real property acquired subsequent to that date. (NJSA 3B:28-2). As to such property occupied jointly with his or her spouse acquired on or after May 28, 1980 as their principal matrimonial residence, every married person has right of joint possession during marriage, which right of possession may not be released, extinguished or alienated without consent of both spouses except by judgment of court of competent jurisdiction. (NJSA 3B:28-3).

21.09 ESCHEAT:

See topic 21.01 Absentees, subhead Escheat; categories 3 Business Regulation and Commerce, topic Banks and Banking, subhead Unclaimed Deposits; Estates and Trusts, topics Descent and Distribution, subhead Escheat, Wills, subhead Unclaimed Legacies.

21.10 LANDLORD AND TENANT:

Kinds of Tenancy.

Tenancy for life, years, year to year, month to month, at will and at sufferance are recognized.

Leases for more than three years are not enforceable unless premises, term and identity of lessor established in signed writing or real estate, term of lease, and identity of lessor and lessee are proved by clear and convincing evidence. (NJSA 25:1-12). Seal not necessary on lease, assignment, or surrender. (15 N.J.L. 116). Acknowledgment not necessary to validity of lease except for purpose of recording.

Recording.

Lease for life or term not less than two years or assignment thereof may be recorded. (NJSA 46:16-1). As to requirements on recording, see category 10 Documents and Records, topic 10.04 Records. Unless recorded, such leases are void against subsequent judgment creditors without notice and against bona fide purchasers and mortgagees for value without notice, whose deeds or mortgages are first duly recorded. (NJSA 46:22-1). However, lessee’s possession, if open, notorious and unequivocal, constitutes notice of right under which he occupies. (64 N.J. Super. 599, 166 A.2d 803).

Rent.

Landlord may sue for rent owing (NJSA 2A:42-11) or, where agreement is not by deed, for reasonable value of use and occupation not to exceed rent reserved by parol lease (NJSA 2A:42-13). When one year’s rent is due, landlord who has right to re-enter for nonpayment of rent may institute action for possession, and six months after judgment and execution, tenant who has not paid rent and costs, or filed complaint, is barred from relief in law or equity; mortgagee of leasehold who, within same period, fails to pay rent, costs and damages sustained by lessor is also barred. (NJSA 2A:42-7 – 2A:42-10). After notice in writing from landlord, undertenant must pay direct to landlord rent due upon undertenancy, not to exceed rent due from first tenant; distress is available against undertenant. (NJSA 2A:42-4). Rent controls on substandard multiple dwellings may be imposed by municipal ordinance under certain conditions, and tenants may be authorized to deposit rents with court-appointed administrator until substandard conditions remedied. (NJSA 2A:42-74 – 2A:42-97). Security deposits regulated. (NJSA 46:8-19 – 46:8-26). Upon finding for tenant in action for return of security deposit, tenant entitled to double recovery, costs and, in court’s discretion, reasonable counsel fees. (NJSA 46:8-21.1). Mobile home spaces and mobile homes constitute rental premises. (NJSA 2A:42-10.13).

Person to whom rent is due on first of month upon lease or other agreement shall allow period of five business days grace in which rent shall be paid. No delinquency or other late charge shall be made that includes grace period of five business days.

"Business day" shall mean any day other than Sat., Sun., state or federal holiday. (NJSA 2A:42-6.1).

See also category 22 Taxation, topic 22.10 Income Tax.

Truth-in-Renting Act.

Department of Community Affairs issues, after public hearing, statement in form and size suitable for posting, of legal rights and responsibilities of tenants and landlords of rental dwelling units. (NJSA 46:8-45). For responsibilities of landlords and tenants, see http://www.njhousing.gov/njhrc/owners/managers. (NJSA 46:8-45). Landlord must distribute copy to each tenant within 30 days after made available by Department and thereafter provide copy of current statement to each new tenant at or prior to occupancy by new tenant. (NJSA 46:8-46). Superior Court, Special Civil Part, in county where rental premises located has jurisdiction over proceedings. Process is in nature of summons or warrant and issues upon complaint of Commissioner of Department of Community Affairs, Attorney General or any other person. (NJSA 46:8-47). Landlord must not offer to any tenant or prospective tenant or enter into written lease including lease provision violating legal rights of tenants or responsibilities of landlords as established by State law at time lease signed. Tenant can petition court to terminate lease containing such provision. (NJSA 46:8-48).

Lien.

Tenant's goods may not be taken on execution, attachment or other process on behalf of third person, unless landlord is paid all rent owing but not exceeding one year's arrears. (NJSA 2A:42-1).

Summary Proceedings.

Except for residential lessees and tenants (other than those in owner-occupied premises with not more than two rental units, dwelling unit held in trust on behalf of and permanently occupied by developmentally disabled member of immediate family of person establishing trust or dwelling unit permanently occupied by developmentally disabled member of immediate family of unit's owner), tenant at will or sufferance, or for part of year, or for one or more years, may be removed by Superior Court, Special Civil Part, of county where premises are located: (1) When tenant holds over after term ends and after demand in writing served on him personally or at tenant's usual abode with member of tenant's family over 14 years of age, or, if this is not possible, by posting on door of demised premises; (2) when tenant holds over after default in payment of agreed rent; or (3) when tenant is so disorderly as to destroy peace of other tenants or neighborhood, or wilfully destroys or damages premises, or constantly violates landlord's rules (provided tenant has accepted said rules in writing or rules are made part of lease), or violates any covenant for violation of which right of re-entry is reserved, and holds over in possession after landlord has served written notice of termination of tenancy, with demand that tenant remove within three days from service of notice. (NJSA 2A:18-53).

Residential lessees and tenants (other than those in owner-occupied premises with not more than two rental units) may be removed by Superior Court, Special Civil Part of Law Division, only upon establishment of one of following grounds as good cause: (1) When tenant fails to pay rent, provided that any portion of rent used by tenant to continue utility service after receiving notice from public utility that service was in danger of discontinuation because of nonpayment by landlord is not deemed unpaid rent; (2) when tenant continues, after written notice to cease, to be so disorderly as to destroy peace and quiet of occupants or tenants living in said premises or neighborhood; (3) when tenant wilfully or by gross negligence causes or allows destruction, damage or injury to premises; (4) when tenant has continued, after written notice to cease, to substantially violate reasonable landlord's rules and regulations, provided they are part of lease at beginning of lease term or have been accepted by tenant in writing; (5) when tenant has continued, after written notice to cease, to substantially violate reasonable covenants or agreements in lease at beginning of lease term for which right of re-entry is reserved; (6) when tenant has failed to pay rent after valid notice to quit and notice of increase of rent, provided such increase is not unconscionable and complies with all laws and ordinances governing rent increases; landlord possesses burden of proving that increases in rent are not unconscionable. (See 294 N.J. Super. 601, 684 A.2d 83, overruling 217 N.J. Super. 552, 526 A.2d 295); (7) when landlord or owner seeks to permanently board up or demolish premises because of citations for substantial violations of housing codes affecting health and safety of tenants, and it is economically unfeasible to eliminate violations; simultaneous with notice of eviction, landlord must notify Department of Community Affairs of intention to institute proceedings, which then informs parties and court of feasibility of compliance without removal of tenant; (8) when landlord seeks to correct illegal occupancy after landlord cited by local or state housing inspectors and unfeasible to do so without removing tenant; (9) when governmental agency seeks to permanently retire premises from rental market pursuant to redevelopment or land clearance plan in blighted area; (10) when owner seeks to retire residential building or mobile home park from residential use; (11) when tenant refuses to accept, after written notice, reasonable changes of substance in terms and conditions of lease at its termination, including term thereof; (12) when tenant, after notice, habitually fails to pay rent; (13) when landlord or owner converts from rental market to condominium or cooperative; when tenant removed on such basis, no warrant for possession issued until Act complied with; (14) when owner of building constructed as or being converted to condominium or cooperative seeks to evict tenant or sublessee whose tenancy began after master deed or agreement establishing cooperative recorded, because owner contracts to sell unit to buyer who seeks to personally occupy it and contract of sale calls for unit to be vacant at closing. (NJSA 2A:18-61.1). No action can be brought against tenant under subsection (14) unless tenant given statement pursuant to NJSA 2A:18-61.9.

Such statement must be provided by owner who establishes initial tenancy with any person after master deed or agreement establishing cooperative recorded. Statement must be provided at time of application for tenancy and again at time of any rental agreement; (15) when owner of three or less condominium or cooperative units seeks to evict tenant whose initial tenancy began by rental after master deed or agreement recorded because owner seeks to personally occupy unit or has contracted to sell to buyer who seeks to personally occupy and contract for sale calls for unit to be vacant at time of closing; (16) when owner of building of three residential units or less seeks to personally occupy unit or has contracted to sell unit to buyer who wishes to personally occupy it and contract for sale calls for unit to be vacant at time of closing; (17) when landlord or owner conditioned tenancy on and in consideration for tenant's employment by landlord or owner as superintendent, janitor or other capacity and such employment terminated; (18) when tenant is adjudged guilty of, or enters guilty plea to, certain specified criminal offenses, or is found liable in certain specified civil actions, or knowingly harbors or harbored any such person on leased premises within period of two years after date of adjudication, conviction or release from incarceration whichever is later. (NJSA 2A:18-61.1). Written demand and notice for possession required prior to institution of suit; notice periods prescribed. (NJSA 2A:18-61.2). Residential leases (other than those in owner-occupied premises with not more than two rental units) must be renewed except for cause (as defined). (NJSA 2A:18-61.3). Summons is returnable between five and 30 days from date of service. (Rule 6:2-1). Tenant may cure default in rent payment by paying into court, together with accrued costs of proceedings. (NJSA 2A:18-55). Warrant for removal cannot issue until three days after entry of judgment for possession, except for certain seasonal rentals. (NJSA 2A:18-57). Warrant of removal issued by court: (1) Shall include notice to tenant of any right to apply for stay of warrant; (2) shall be executed not earlier than third day following day of personal service; and (3) shall be executed during hours of 8 a.m. to 6 p.m. unless court otherwise orders for good cause shown. Summary proceedings for possession shall not be joined with any other cause of action nor shall defendant file counterclaim or third-party complaint. (Rule 6:3-4). Interrogatories not permitted.

(Rule 6:4-3). Cases are carried on separate calendar and are normally heard on return day. (Rule 6:5-2). Default judgments may be entered by clerk upon affidavit. (Rule 6:6-3). Case is not reviewable on merits, but landlord is liable in civil action for unlawful proceedings. (NJSA 2A:18-59). On order of Superior Court judge, cases of sufficient importance may be removed to Superior Court, Law Division, for trial before jury unless waived and judgment therein is reviewable. (NJSA 2A:18-60, 2A:18-61).

Surrenders and Attornments.

Lease surrendered to secure renewal is valid without surrender of subleases. (NJSA 46:8-4). Attornments to strangers claiming title are void, with certain exceptions. (NJSA 46:8-1, 46:8-4).

Holding Over.

Tenant, or successor in possession, who willfully holds over after demand for possession in writing, is liable for double the yearly value of the property; if tenant holds over after giving notice of intent to quit, he is liable for double rent. (NJSA 2A:42-5, 2A:42-6). Tenant under lease for one month or longer who remains in possession of premises becomes tenant from month to month upon acceptance of rent by landlord unless otherwise agreed. (NJSA 46:8-10).

Termination of Nonresidential Tenancy.

Where notice is required to terminate tenancy, as a tenancy at will or from year to year, three months' written notice from landlord to tenant is sufficient (NJSA 46:8-9; NJSA 2A:18-56[a]); but common law rule requiring six months' notice from tenant to landlord is still in force (109 N.J.L. 54, 160 A. 314). Tenancy from month to month is terminated by one month's notice. (NJSA 2A:18-56[b]). Weekly tenancies are terminated by one week's notice, and notice must be to quit at end of recurring period. (40 N.J.L. 128; 123 N.J.L. 348, 8 A.2d 824). Tenancy for term other than at will, year to year or month to month terminated by giving one term's notice to quit. (NJSA 2A:18-56[c]). Tenancy at sufferance is terminable without notice to quit. (153 N.J. Super. 329, 379 A.2d 526).

Termination of Residential Tenancy.

Residential leases must be renewed except for cause. (NJSA 2A:18-61.3). Unless lease explicitly provides otherwise, lease for term of one or more years of property leased and used by lessee solely for purpose of providing dwelling place for himself and his family may be terminated, in event of death of such lessee or spouse, by notice given by such lessee, by executor or administrator, or by surviving spouse in event lease executed jointly by husband and wife. Termination effective on 40th day following receipt by lessor of written notice thereof and property must be vacated and possession turned over to lessor at least five working days prior thereto. (NJSA 46:8-9.1). Lease for term of one or more years of property leased and used by lessee solely as dwelling place for lessee and family also subject to early termination if lessee or spouse suffers disabling illness, accident or is over age of 62 and admitted into assisted living facility, nursing home, continuing care, retirement community or into low-income housing; or dwelling not handicapped-accessible by lessee or member of lessee's family provided that notice is given to lessor by lessee or lessee's spouse or other adult family member, on form provided by Director of Division of Housing and Development. (NJSA 46:8-9.2). Lease of residential property used solely as dwelling place for lessee and family is also subject to earlier termination if lessee is victim of domestic abuse, by providing lessor with written notice that lessee or child faces imminent threat of serious physical harm from another named person if tenant remains on premises, along with written evidence thereof (by copy of restraining order, law enforcement agency record, medical documentation, or other documentation from licensed social worker). (NJSA 46:8-9.6). Within 30 days after termination of lease, landlord shall return by personal delivery or certified mail tenant's security deposit with interest or earnings, less any charges of landlord, which must be itemized. If landlord fails to return security deposit in 30-day period, tenant entitled to double net amount of money wrongfully withheld. (NJSA 46:8-21.1; 338 N.J. Super 534, 770 A.2d 738). Within 15 business days after such lease terminates, landlord shall return upon demand any security deposit with interest or earnings, along with any advance rent paid, less any charges of landlord. (NJSA 46:8-21.1).

Fire.

If building on leased premises is injured by fire, rent is suspended until repairs made unless landlord repairs speedily; and, if buildings totally destroyed, lease terminates as of that time, unless parties otherwise agree. In either case, lessee must be without fault. (NJSA 46:8-6, 46:8-7).

Distress for Rent.

General law, Tit. 2A, c. 33. See category 5 Civil Actions and Procedure, topic 5.21 Replevin, subhead Distress for Rent.

Except as to real property used solely as a residence of tenant (NJSA 2A:33-1), distraint of goods on premises, while there or within 30 days after removal, including goods and chattels of tenant, livestock and products of soil (NJSA 2A:33-6), may be made for not more than one year's rent, within six months after rent due, or within six months after termination of lease if tenant still in possession, and during continuance of landlord's title or interest or within 30 days after termination if tenant has removed, or if landlord's title and interest shall have ceased (NJSA 2A:33-7, 2A:33-8). Distraint must be reasonable and goods must not be impounded in different places. (NJSA 2A:33-1, 2A:33-2). After distress taken, and notice thereof and of cause left on premises, if tenant does not take action to recover in ten days, then person distraining, on two days, notice to tenant, may cause goods to be inventoried and appraised by three sworn appraisers (NJSA 2A:33-9); and, on five days, notice in three public places in municipality, sold at public sale (NJSA 2A:33-10). Only property of tenant may be distrained. Goods may be impounded, appraised and sold on premises. (NJSA 2A:33-11). Overplus upon sale is reserved for tenant. (NJSA 2A:33-10). Further distress available for shortage. (NJSA 2A:33-15).

If distress made and goods sold, when no rent owing, tenant may recover double the value of goods, together with full costs of any action. (NJSA 2A:33-17).

All apparel and other goods not exceeding $1,000 in value, of tenant, are reserved for use of tenant's family or estate and shall not be sold as distress for rent. (NJSA 2A:17-19). Tenant, tenant's agent, tenant's attorney, or any member of family or appraisers may select which goods are exempt after appraisal. (NJSA 2A:33-12). Tenant may apply to sheriff or constable for appraisal on five days' notice if landlord fails to appraise within two days of tenant's request. (NJSA 2A:33-13).

Protection of Tenants.

Owners of multiple dwellings shall make available to their tenants information regarding Federal Crime Insurance. (NJSA 46:8-39). Failure to do so will result in penalty of not more than $200 for each offense. (NJSA 46:8-41). Every landlord shall file with municipal clerk in which property is located in case of one-dwelling unit rental or two-dwelling unit nonowner occupied premises, or with Bureau of Housing Inspection in Department of Community Affairs in case of multiple dwelling (as defined in NJSA 46:8-38[b]) and post on premises, statement containing name and address of owner, registered agent, agent for service of process, managing agent, building superintendent, individual representative of owner or managing agent in case of emergency, mortgagees, fuel oil dealer and grade of fuel oil used (if applicable). (NJSA 46:8-28). Failure to do so will result in penalty of not more than $500 for each offense. (NJSA 46:8-35). Managers of rental housing financed by State must arrange meetings every three months at which tenants can discuss complaints. (Tit. 55, c. 14K-7.3).

Senior Citizens and Disabled Protected Tenancy Act.

Adopted. (NJSA 2A:18-61.22 – 2A:18-61.39). Grants eligible senior citizen tenants and disabled tenants protected tenancy status whenever building or structure in which dwelling unit located is converted to condominium, cooperative, planned residential development or separable fee simple ownership.

Lien on Machinery, etc.

Rentor of mill, factory or loft has a lien on machinery or other chattels placed therein, prior to all encumbrances created after same were placed in rented premises, to extent of six months' rent. Lien may be enforced by sale at public auction after notice prescribed by statute. (NJSA 2A:44-165 – 2A:44-168).

21.11 LEASES:

See topic 21.10 Landlord and Tenant.

21.12 [RESERVED]

21.13 PERPETUITIES:

New Jersey adopted Trust Modernization Act of 1999 (NJSA 46:2F-9 – 46:2F-11), which replaced Uniform Statutory Rule Against Perpetuities (NJSA 46:2F-1 – 46:2F-8) as to interests created after July 8, 1999. Unless trust instrument created on or after July 8, 1999 explicitly revokes trustee's statutory power to sell trust property for benefit of beneficiary, presumption is that there is no restriction on length of trust.

NJSA 46:2F-9 abolishes common law rule against perpetuities. No interest created in real or personal property shall be rendered void by any common law or statutory rule against perpetuities. Further, future interest or trust is void if it suspends power of alienation for longer than 21 years after death of individual(s) then alive. (NJSA 46:2F-10). NJSA 46:2F-9 – 46:2F-11 apply to trusts, future property interests and powers of appointment created on or after July 8, 1999.

21.14 PERSONAL PROPERTY:

Tenancy by the entirety in personal property recognized if husband and wife acquired interests under written instrument designating both their names as husband and wife. (NJSA 46:3-17.2, 46:3-17.3).

21.15 POWERS OF ATTORNEY:

Powers of Attorney.

Conveyances of personalty and realty under powers of attorney are valid. (NJSA 46:6-1–6, N.J.L. 126, aff'd 45 N.J.L. 184; 121 N.J. Eq. 580, 191 A. 750). Power of attorney must be in writing, signed and acknowledged in manner set forth in NJSA 46:14-2.1. Generally, death, disability or insanity of principal revokes power, but death, disability or incompetence of principal who has executed written power of attorney does not revoke or terminate agency as to attorney in fact, agent or other person who, without actual knowledge of principal's death, disability or incompetence, acts in good faith under power of attorney or agency, and affidavit executed by attorney in fact or agent stating that attorney in fact did not have, at time of doing act pursuant to power of attorney, actual knowledge of revocation or termination of power of attorney by death, disability or incompetence, is conclusive in absence of fraud or gross neglect. (NJSA 46:2B-8.5). Whenever principal designates attorney in fact or agent by written power of attorney containing words “This power of attorney shall not be affected by subsequent disability or incapacity of the principal, or lapse of time” or “This power of attorney shall become effective upon disability or incapacity of principal” or similar words showing intent of principal that authority conferred shall be exercisable notwithstanding principal’s subsequent disability or incapacity, authority of attorney or agent is exercisable as provided in power on behalf of principal notwithstanding later disability or incapacity of principal. (NJSA 46:2B-8.2[b]).

Proxy Directive.

New Jersey Advance Directives for Health Care Act governs writings that designate representative to make decisions regarding health care to be provided to principal in event principal subsequently lacks decision-making capacity. (NJSA 26:2H-53-78). It should be signed and dated by declarant and witnessed either by two subscribing adults (who shall attest that declarant is of sound mind and free of duress and undue influence) or acknowledged by declarant before notary public, attorney-at-law, or other person authorized to administer oaths. (NJSA 26:2H-56).

21.16 REAL PROPERTY:

Under instrument effective prior to July 4, 1934, grantee or devisee who under Statute of Entails would have had legal or equitable estate in fee tail, takes estate for life, grantee’s or devisee’s children and their issue per stirpes taking as tenants in common subject to dower or curtesy of grantee’s or devisee’s spouse (see 1924 Cumulative Supplement to Compiled Statutes of 1910, p. 940); under instrument effective after July 4, 1934, such grantee or devisee takes fee simple estate (NJSA 46:3-15).

Grant or devise to two or more persons creates tenancy in common unless an intention to create joint tenancy and not tenancy in common is expressly stated therein (NJSA 46:3-17), except that grant or devise to trustees always creates joint tenancy (NJSA 3B:11-3) and grant or devise to husband and wife designated as such creates tenancy by entirety unless it is otherwise expressly stated in or manifestly apparent from instrument, even though husband or wife is grantor. (NJSA 46:3-17.2, 46:3-17.3). Joint tenancy may be created by conveyance from grantor to himself and others. (NJSA 46:3-17.1). Neither spouse may sever, alienate or otherwise affect interest in tenancy by entirety during marriage or upon separation without written consent of both. (NJSA 46:3-17.4). Absolute divorce changes tenancy by entirety to tenancy in common. (88 N. J. Eq. 101, 102 A. 256).

Dower and Curtesy Abolished.

All rights of dower and curtesy are abolished as to real property acquired by married persons during coverture after May 28, 1980. However, as to such property occupied jointly with his or her spouse as their principal matrimonial residence, every married person is entitled to right of joint possession with his or her spouse during marriage. Such right can be released, extinguished or alienated only upon consent of both spouses or by judgment of court of competent jurisdiction. (NJSA 3B:28-2, 3B:28-3). All rights of dower and curtesy which have been attached to real property prior to May 28, 1980 remain unaffected.

Rule in Shelley’s Case.

As to instrument effective prior to July 4, 1934, the Rule in Shelley’s case prevails except only in case of devise to person for life and then to person’s heirs or issue, and where devisee is survived by lineal descendants. In such case fee vests on devisee’s death in devisee’s children equally as tenants in common, issue of deceased child taking their parent’s share. (Compiled Statutes of 1910, p. 1921; 59 N.J.L. 241, 28 A. 587). As to instrument effective after July 4, 1934, Rule in Shelley’s case has been abolished. (NJSA 46:3-14).

Discrimination.

Generally, Law Against Discrimination prohibits discrimination in sale or rental of real property based on race, creed, color, national origin, ancestry, age, disability, nationality, marital status, sex, affectional or sexual orientation, familial status, gender identity or expression, source of lawful income used for rental or mortgage payments or nationality is prohibited. (NJSA 10:5-4). Except as to publicly assisted housing accommodations, act does not apply to rental of single apartment in two-family dwelling of which one unit is occupied by owner as residence, etc., or to rental of room or rooms to another by owner or occupant of one-family dwelling occupied by owner as residence, etc. (NJSA 10:5-5[n]). Refusal to rent or clause invalidating existing rental agreement or lease because tenant's family includes persons under 18 years of age prohibited, except for senior citizen housing or retirement communities. Representations of potential changes in area as to race, creed, color, national origin, ancestry, marital status, sex, affectional or sexual orientation, familial status, gender identity or expression, source of lawful income used for rental or mortgage payments, or nationality of owners or occupants and as to undesirable consequences thereof, prohibited. (NJSA 10:5-4 – 10:5-12; NJSA 10:5-3). Restrictions upon transfer or use of realty based on race, creed, color, national origin, marital status, sex, or ancestry are void. (NJSA 46:3-23). Construction of any multi-family dwelling without barrier-free access for the physically handicapped in accordance with State Uniform Construction Code (NJSA 52:27D-119 – 52:27D-141) prohibited as discriminatory. (NJSA 10:5-12.4).

Condominiums.

New Jersey condominium communities generally governed by Horizontal Property Act (Tit. 46, c. 8A) and Condominium Act (Tit. 46, c. 8B). Most governed by Condominium Act. Under Horizontal Property Act owners of building may record master deed, containing statutorily specified information and accompanied by plans of building and bylaws for its administration, whereby apartments may be individually conveyed and encumbered and themselves subject of ownership, entirely independent of other apartments in building. Individual titles recordable. (NJSA 46:8A-9, 46:8A-10, 46:8A-11, 46:8A-14, 46:8A-15). Apartment may be held in any form of real estate tenancy recognized by New Jersey law. (NJSA 46:8A-5). Owner of each apartment also has proportionate undivided interest in general common elements of building and is bound to contribute pro rata to their maintenance and repair. (NJSA 46:8A-6, 46:8A-8, 46:8A-18). Said common elements include land on which building is located, main walls, lobbies, foundations, installations of central services, elevators, walkways, parking areas, recreational areas, etc. (NJSA 46:8A-2[d]). Civil action may be brought by co-owner, if administrative bylaws, rules or regulations not complied with. (NJSA 46:8A-19). Apartments may, under specified conditions, be merged, regrouped or reconstituted into another horizontal property regime. (NJSA 46:8A-12, 46:8A-13). As to liens, encumbrances, and general liability of owner, see NJSA 46:8A-20 to 26. Horizontal Property Act not amended or repealed by Condominium Act. (NJSA 46:8B-2). Condominium Act provides for method of creation of condominium and sets forth certain minimal requirements regarding provisions contained in any master deed. (NJSA 46:8B-8 – 46:8B-11). Responsibility for administration and management of condominium vested in association to be provided for in master deed. (NJSA 46:8B-12). NJSA 46:8B-12.1 establishes requirements for election of members of governing board by unit owners. Requires members of association to act in furtherance of health, safety, welfare of residents, provide efficient procedures to resolve housing disputes and comply with reasonable requests to inspect records. (NJSA 46:8B-14). Association has power, among others, to levy and collect charges from unit owners for share of common expenses, reasonable fines, late fees, attorney's fees and upon sale of units, capital contributions, membership fees, or other contributions if authorized by master deed or bylaws. Fines may not be imposed unless written notice is given and dispute resolution procedures are provided. Unit owners may not be prohibited from seeking judicial relief for these charges. All funds collected by association must be maintained separately in association name, but reserve funds may be co-mingled with operating funds for investment purposes if accounted for separately. (NJSA 46:8B-15). Act provides that taxes, special assessments and other charges imposed by taxing authorities are to be separately assessed and collected on each unit as single parcel and not on condominium property as whole and further provides for certain liens on units in favor of association and limited priority over certain prior recorded mortgages and liens other than unpaid property or federal taxes. (NJSA 46:8B-19 – 46:8B-23). Procedures established in Act covering damage or destruction to, or taking by eminent domain of, condominium property and for termination of condominium. (NJSA 46:8B-24 – 46:8B-28). Rebuttable statutory presumption exists against validity of certain leases, including, e.g., leases concerning use by unit owners of parking, recreational or other common facilities or areas, if said leases contain specified elements. There is complete statutory prohibition against certain rights of first refusal contained in any contract of sale, master deed, or association by-laws afforded to developer or association upon resale, gift or devise by unit owner. (NJSA 46:8B-31 – 46:8B-37).

Cooperatives.

Cooperative Recording Act of New Jersey adopted in 1987. (NJSA 46:8D-1 – 46:8D-18). Provides title registration system for cooperative units. Plan of cooperative ownership created by recording in county recording office of county where land located of master declaration and master register of cooperative units allocated for separate occupancy; contents of master declaration and master register prescribed by statute. (NJSA 46:8D-5, 46:8D-6, 46:8D-7). Sale or transfer of cooperative share by proprietary lease or assignment thereof effected by recording transfer instrument or short form memorandum (with specified information) in appropriate county recording office. (NJSA 46:8D-11 – 46:8D-12). Perfection of lender lien governed by law designated in instrument and selected by lender for recordation, but lien of cooperative unit lender not perfected unless also recorded in master register for cooperative in appropriate county recording office. (NJSA 46:8D-14 – 46:8D-15). If Tit. 12A, c. 9 applies, lenders must record financing statement or security agreement in office of Secretary of State and in appropriate county recording office. (NJSA 46:8D-14[a]). No tenant may be removed from rental premises under NJSA 2A:18-61.1 on grounds of conversion into cooperative unless proposed conversion will result in creation of cooperative as defined in Act. (NJSA 46:8D-18[b]).

Real Estate Sales Full Disclosure Act.

Regulates disposition of land parcels situated outside New Jersey. Act not applicable to dispositions of interest in subdivision by owner for own account in single or isolated transaction; or wholly for industrial or commercial purposes; or of less than 100 lots, parcels, units or interests (except in case of condominiums, cooperatives, time-shares, retirement communities or homeowner associations); or where common elements or interests limited to provision of unimproved, unencumbered open space (unless required to be registered under federal law); or in development comprised of rental units (except time shares). (NJSA 45:15-16.27 et seq.).

New Jersey Real Estate Timeshare Act.

Act does not include timeshare plans that: consist of ten or fewer timeshare interests, extend three years or less, or cost $3,000 or less during entire timeshare term. (NJSA 45:15-16.53). Act also does not apply to offers or dispositions of securities or units of interests issued by real estate investment trusts regulated under State or federal statute. (NJSA 45:15-16.53).

Timeshare developers must: register with New Jersey Real Estate Commission, deposit with escrow agent all funds received during purchaser’s cancellation period (NJSA 45:15-16.57), prepare public offering statement (NJSA 45:15-16.59), and file annual reports (NJSA 45:15-16.60). Initial registration fee is $1,000 plus $50 per timeshare interest. Unless otherwise provided by New Jersey Real Estate Commission, fee must not exceed $7,500. (NJSA 45:15-16.64).

Purchaser of timeshare may cancel purchase contract within seven calendar days after receipt of public offering statement or execution of purchase contract, whichever date is later. (NJSA 45:15-16.67). Timeshare interest owner who refers 12 or fewer prospective purchasers of timeshare interests does not require license if owner receives non-monetary compensation and refrains from participating in negotiations regarding timeshare purchase. (NJSA 45:15-16.69).

Where person violates provision of Act, New Jersey Real Estate Commission may issue order requiring individual to cease unlawful practice. (NJSA 45:15-16.76). Commission may also bring action for injunctive relief. (NJSA 45:15-16.77). Person who violates Act or makes untrue statement of material fact or fails to state material fact will be fined at least $250 and at most $50,000 per violation. (NJSA 45:15-16.79).

All timeshare plans in effect on or after Oct. 31, 2006 and under “Real Estate Sales Full Disclosure Act” and “Planned Real Estate Development Full Disclosure Act” are registered under this Act and need only comply with requirements of NJSA 45:15-16.60. (NJSA 45:15-16.85).

Planned Real Estate Development Full Disclosure Act.

Regulates disposition of lands within New Jersey which are offered pursuant to common promotional plan providing for common elements in real property, including but not limited to property subject to Condominium Act. (NJSA 45:22A-21, 45:22A-22).

New Home Warranty & Builder Registration Act.

See category 3 Business Regulation and Commerce, topic 3.12 Consumer Protection, subhead New Home Warranty & Builder Registration Act.

Eminent Domain.

Eminent Domain Act of 1971. (NJSA 20:3-1 – 20:3-50). Regulates ascertainment and payment of compensation for property condemned or taken for public purposes by any entity, public or private.

Municipal Land Use Law.

Purpose of act is to encourage municipal action to guide appropriate use or development of lands in state in manner to promote health, safety, morals and general welfare. (NJSA 40:55D-1 et seq.).

Extensive regulation provides for administrative procedures, hearings and appeals (NJSA 40:55D-8 – 40:55D-22); fees assessed against nonresidential development for purpose of financing affordable housing for low, moderate and middle income households (NJSA 40:55D-8.1 — 40:55D-8.7); organization, membership and powers of municipal planning board (NJSA 40:55D-23 – 40:55D-27); preparation, contents and modification of master plan (NJSA 40:55D-28); preparation, adoption and review of capital improvements program (NJSA 40:55D-29 – 40:55D-31); establishment and alteration of official map and issuance of building permits and appeals therefrom (NJSA 40:55D-32 – 40:55D-36); ordinance requiring approval of subdivision plats by resolution of planning board; contribution for sewer, drainage and street improvements; open space organization; site plan regulation; site improvement standards; guarantees required; recording of final approval of major subdivision; penalties for sale before approval; condominiums and cooperative structures; certain fees required (NJSA 40:55D-37 — 40:55D-58); power to zone; conditional and nonconforming uses; notice requirements for hearing on ordinance amendments (NJSA 40:55D-62 – 40:55D-68); zoning board of adjustment and appeals thereto (NJSA 40:55D-69 – 40:55D-76); membership, appointment, allocation of expenses for regional planning boards (NJSA 40:55D-77 – 40:55D-88); periodic examination, moratoriums and interim zoning concerning municipal plans and regulations (NJSA 40:55D-89 – 40:55D-90).

Appraisers.

Real estate appraiser must be state licensed or certified to prepare or supervise appraisal assignment in regard to real estate in this state. Licensing and certification of real estate appraisers governed by NJSA 45:14F-1 – 45:14F-26.

See also topics 21.05 Curtesy, Deeds, Dower, Landlord and Tenant; categories 5 Civil

Actions and Procedure, topic Partition; Documents and Records, topic Records; Estates and Trusts, topics Descent and Distribution, Wills; Family, topic Husband and Wife; Mortgages, topic Mortgages of Real Property.

21.17 TRUST DEEDS:

See category 20 Mortgages, topic 20.04 Mortgages of Real Property.

22 TAXATION

22.01 ADMINISTRATION:

State Taxes.

Department of Treasury, Division of Taxation, is chief tax administration agency in New Jersey. Department of Banking and Insurance, with Department of Treasury, administers and collects tax on insurance companies. Department of Labor and Workforce Development administers and collects unemployment and disability tax.

County, School and Municipal Taxes.

Local taxing officers administer and collect general property tax, school tax and waste facilities tax.

Assessment of Taxes.

Majority of tax revenues are collected through voluntary self-assessment, in which taxpayer calculates tax in report or return and files report with correct tax payment. Director has broad powers to order examination of taxpayer's business, personal property, books and records in order to more accurately establish tax due. (NJSA 54:50-2).

Arbitrary Assessments.

If taxpayer fails to file report, Director can estimate and assess amount of tax due from any information which may be obtained. (NJSA 54:49-5).

Jeopardy Assessments.

If Director has reason to believe taxpayer is about to flee State or otherwise jeopardize tax obligation, immediate arbitrary assessment may be made, along with demand for immediate payment. (NJSA 54:49-7).

Lien of Taxes Payable to State.

Any tax payable to state is personal debt of taxpayer and becomes lien on all of taxpayer's property from due date, except as against bona fide purchaser for value; it is entitled to preference on insolvency or bankruptcy. (NJSA 54:49-1). Such tax bears interest at 3 percentage points above prime rate assessed for each month or fraction thereof compounded annually at end of each year. (NJSA 54:49-3). Director of Division of Taxation may release lien on property on terms (NJSA 54:49-13) and may make arbitrary assessment if collection or assessment is prejudiced, or any required report is not submitted. (NJSA 54:49-5 – 54:49-9). Claim for refund must be filed with Director of Division of Taxation within four years of payment, unless shorter period is specified in law imposing tax. (NJSA 54:49-14). Director of Division of Taxation has power to examine taxpayer's papers, hold hearings, subpoena witnesses, etc. (NJSA 54:50-1 – 54:50-7). Director of Division of Taxation may disclose information so secured to tax authorities of United States or of another state. (NJSA 54:50-9). State Treasurer has power to enter into reciprocal collection and offset indebtedness agreement with federal government. (NJSA 54:50-

9).

Franchise Tax.

Tax, penalties, and interest constitute lien on all property of corporation on and after Jan. 1 of the year next succeeding privilege year in which tax is due and payable, but lien is limited to ten years after Jan. 1 of year in which they become due and payable. (NJSA 54:10A-16).

On payable application, Director of Division of Taxation will issue certificate (fee $25) respecting existence or nonexistence of lien and is authorized to release lien (fee $5) where adequate consideration is paid. (NJSA 54:10A-29, 54:10A-30).

Penalties.

State Uniform Tax Procedure Law.

Provides uniform procedures and remedies for taxpayer and state regarding collection of any state tax. (Tit. 54, cc. 48-53). Extensive statutory provisions include interest of 3% above prime rate assessed each month and compounded annually on delinquent tax; added to tax is amount equal to 5% of underpayment (unless any part of underpayment due to reasonable cause); late filing of return penalty of $100 each month return delinquent, plus 5% per month, not to exceed 25% of underpayment (NJSA 54:49-4); deficiency assessment of 3% above prime rate. If failure to pay tax when due satisfactorily explained, Director of Division of Taxation may waive or remit payment of whole or part of any penalty and waive or remit payment of any interest charge in excess of 3% above prime rate including any such penalty or interest with respect to deficiency assessments. (NJSA 54:49-11). Reckless or negligent failure to file return or pay tax punishable as disorderly persons offense by $1,000 fine and six months imprisonment; failure to file return, failure to pay tax or filing false or fraudulent return with intent to evade or avoid payment of tax is crime of third degree, punishable by $7,500 fine and three-to-five years imprisonment. (NJSA 54:52-5 – 54:52-19).

Franchise Tax.

See catchline State Uniform Tax Procedure Law, supra. Also, failure to pay tax for three months entitles Attorney General of his or her own motion or upon request of Director to apply to Superior Court for injunction restraining exercise of franchise or transaction of business in New Jersey. (NJSA 54:10A-20). Failure of domestic corporation to pay tax for two years results in forfeiture of charter by proclamation of Secretary of State. (NJSA 54:11-1). Failure of foreign corporation to pay tax on or before Dec. 1 may result in revocation of certificate of authority by Secretary of State. (NJSA 54:10A-21).

Sales and Use Tax.

See catchline State Uniform Tax Procedure Law, supra. Penalty for late payment is 5% of tax due plus interest of 3% above prime rate compounded annually. (NJSA 54:32B-26).

Apple Tax.

Filing of false or fraudulent reports or taking action to evade or violate provisions of act or wilfully interfering with performance of duties by authorized official is subject to $500 fine for first offense and $1,000 for each offense thereafter. (NJSA 54:47D-7).

Alcoholic Beverage Tax.

Failure to file or filing of false report may be misdemeanor. (NJSA 54:47-3, 54:47-4).

Poultry Feed Tax.

Penalty for filing false or fraudulent return is $100 for first offense and $200 for any subsequent offense, plus tax due. (NJSA 54:47A-9).

White Potato Tax.

Penalty for filing false or fraudulent return is $50 for first offense, $100 for each violation thereafter. (NJSA 54:47B-8).

Asparagus Tax.

Penalty for filing false or fraudulent return is $100 for first offense and $200 for each offense thereafter. (NJSA 54:47C-9).

Motor Fuel Tax.

See catchline State Uniform Tax Procedure Law, supra. False statements to obtain or assist another in obtaining credit refund or reduction of liability in taxes imposed by c. 39A considered misdemeanor. Any other willful violation of c. 39A punishable by maximum fine of $500. (NJSA 54:39A-20).

Cigarette Tax.

Penalty for failure to obtain license is not more than $250; each day is considered separate violation and if convicted after having been convicted once, penalty may be double amount fixed for first violation. If person is convicted and does not pay penalty he may be imprisoned for not more than 90 days. (NJSA 54:40A-24).

Procedures for enforcement of penalties, see NJSA 54:49-1 et seq., and Tit. 2A, c. 58.

See also subheads detailing particular taxes, supra.

22.02 ALCOHOL, BEVERAGES AND TOBACCO TAXES:

Alcoholic Beverage Tax.

Imposed by NJSA 54:43-1, 54:43-2.

Cigarette Tax.

Tax of $0.135 for each cigarette is imposed on sale or use within State. (NJSA 54:40A-8). Each licensed retail dealer, distributor and wholesaler must file return showing amount of cigarettes in possession and pay appropriate tax. (NJSA 54:40A-1 — 54:40A-43).

Tobacco Products Wholesale Sales and Use Tax.

Tax of 30% is imposed on wholesale price for sale, use or distribution of tobacco product, other than moist snuff, which is taxed at rate of $0.75 per ounce on net weight. (NJSA 54:40B-3).

22.03 BUSINESS TAXES:

Bank Stock Tax.

See category 2 Business Organizations, topic 2.03 Corporations, subhead Franchise Tax, and category 3 Business Regulation and Commerce, topic Banks and Banking, subhead Taxation of Bank Stock.

Gross Receipts Tax.

Franchise Users.

Sewerage and water corporations using or occupying public streets, highways, roads or other public places and their property and franchises must pay annually for franchise to use such public streets, etc., in lieu of any other tax on franchise (except as provided in supplementary portions of statute, infra), excise tax of 5% of such portion of taxpayer's intrastate gross receipts as length of lines or mains of such taxpayer in New Jersey along, in or over any public street, etc., bears to whole length of taxpayer's lines or main; except that if gross receipts do not exceed $50,000 for calendar year, rate is 2%. Excise tax at 7% of gross receipts for calendar year of business over, on, in, through or from taxpayer's lines or mains in New Jersey is also levied. Director of Division of Taxation evaluates property of such taxpayer in, on or over public streets, etc., in each municipality. Taxes, as apportioned, are paid to municipalities. (NJSA 54:30A-54).

Sewerage and water corporations subject to taxes, computed supra, must also pay excise tax for franchise to operate and conduct business in State and to use public streets, highways, roads or other public places, levied at .625% of such proportion of gross receipts as computed supra; except that if gross receipts for calendar year do not exceed $50,000, rate is .25%. Excise tax of .9375% of gross receipts for calendar year of business over, on, in, through or from taxpayer's lines or mains in New Jersey is also levied. (NJSA 54:30A-54).

Insurance Company Tax.

See category 16 Insurance, topic 16.01 Insurance Companies.

Outdoor Advertising.

Effective July 1, 2007, no fee imposed on gross amount collected by retail seller for billboard advertising space. (NJSA 54:4-11.1).

22.04 CORPORATE TAXES:

Corporations are taxed on their property same as individuals, except as otherwise provided as to particular corporations. (NJSA 54:4-2).

Corporate Income Tax.

Franchise tax is imposed on every domestic corporation and every foreign corporation deriving receipts from sources in this state, entering into contracts in this state, or doing business in this state, except exempt corporations (see subhead Exempt from Franchise Tax, infra), must pay an annual franchise tax in lieu of all other state, county or local taxation upon or measured by intangible personal property used in business (NJSA 54:10A-2).

Franchise Tax Rate.

Tax is greater of tax on net worth (which has been phased out since July 1986) and on net income, or alternative minimum assessment. (NJSA 54:10A-5).

Effective for calendar year 2006, minimum tax based on corporation's New Jersey gross receipts as follows: receipts less than $100,000, $500; less than $250,000, $750; less than $500,000, $1,000; less than $1,000,000, $1,500; $1,000,000 or more, $2,000. (NJSA 54:10A-5). Tax on net income allocated to New Jersey is 9%, and 7.5% for corporations, other than S corporations, with entire net incomes of $100,000 or less, and 6.5% for corporations, other than S corporations with entire net incomes of $50,000 or less. For privilege periods ending on or after July 1, 2006 but before July 1, 2010, surcharge of 4% assessed on this tax liability. (NJSA 54:10A-5).

Tax paid by corporation registered and regulated under Investment Company Act of 1940 is $250. Tax on net income paid at above rate by real estate investment trust electing to report as such is measured by 4% of entire net income and 15% of entire net worth; for any other investment company electing to report as such, tax on net income at above rate is measured by 40% of entire net income and 40% of entire net worth, with minimum tax of $250. Investment company is one in which 90% of its business and of its gross assets in New Jersey are invested in securities for its own account but is not securities merchant or dealer and not banking or financial business corporation defined in § 4 of Act. Real estate investment trust is any corporation, trust or association qualifying and electing to be taxed as real estate investment trust under federal law. (NJSA 54:10A-4[f], [1], 5).

Entire net income is total net income from all sources and is prima facie the taxable income, before net operating loss and special deductions, for federal income tax purposes, except that certain income exempt under § 883 of Internal Revenue Code is excluded and all dividends received from 80%-owned subsidiaries and 50% of all other dividends of at least 50%-owned subsidiaries are excluded; any income from alien corporation limited to investing and trading in stocks and securities for its own account in this state is excluded, and no exclusion, deduction or credit is allowed for amount of any specific exemption or credit allowed by any federal income tax law, for any dividends or interest other than as above, for income taxes paid to U.S., state, foreign country, foreign state, foreign province, foreign territory or tax imposed hereby, for net operating losses sustained during any year other than year covered by report, and for amount by which Accelerated Cost Recovery System allowance exceeds amount of depreciation determined under Internal Revenue Code in effect prior to Jan. 1, 1981. Net operating losses for post-June 30, 2009 privilege periods in excess of deduction for dividends, may be deducted and carried forward for up to 20 privilege periods in computing entire net income. Carryover period of seven years for net operating losses incurred between July 1, 1984 and June 30, 2009. Carryover period extended to 15 years for net operating losses incurred by high technology businesses between July 1, 1998 and June 30, 2001. For 2002 and 2003, no deduction allowed for net operating loss carryover. For 2004 and 2005, deduction limited to amount that reduces entire net income otherwise calculated by 50%. Suspended net operating loss carryover extended for period equal to period for which disallowed. Entire net income may not include income of alien corporation limited to investing and trading in stock and securities for its own account in this State. No credit allowed for research and experimental expenditures qualified under NJSA 54:10A-5.24 unless also qualified under federal tax credit. Special depreciation claimed as federal deduction under federal Job Creation and Worker Act of 2002 (Pub. L. 107-147) not allowed. For property acquired after Sept. 10, 2001, depreciation determined pursuant to provisions of Internal Revenue Code in effect on Dec. 31, 2001. For Section 179 property placed in service on or after Jan. 1, 2004, amount expensed based on provisions of Internal Revenue Code in effect on Dec. 31, 2002. For taxable years beginning after Dec. 31, 2004, no deduction allowed for certain domestic production activities which otherwise deductible under § 199 of Internal Revenue Code. (NJSA 54:10A-4[k]). For computing entire net income, taxpayer cannot deduct interest expenses and costs and intangible expenses and costs directly or indirectly paid or in connection with direct or indirect transaction with related member. (NJSA 54:10A-4.4[b]). Interest deduction permitted to extent taxpayer establishes by clear and convincing evidence that transaction was not to avoid taxes, that interest was paid under arm's length contract, and related member was subject to tax on net income, including interest received from related member at rate equal or greater than three percentage points less than rate of tax applied to taxable interest; or where taxpayer establishes by clear and convincing evidence that disallowance of deduction is unreasonable or agrees with director to alternate method; or where taxpayer establishes by preponderance of evidence as disclosed on its tax return that interest was directly or indirectly paid, accrued or incurred to related member in foreign nation with U.S. income tax treaty in effect, or to independent lender where taxpayer guarantees debt which requires interest. (NJSA 54:10A-4[k][2][I]). Interest expenses and costs and intangible expenses and costs are permitted deductions where: expenses and costs are directly or indirectly paid, accrued or incurred to related member in foreign nation with U.S. income tax treaty in effect; or where taxpayer establishes by clear and convincing evidence that disallowance of deduction is unreasonable or agrees with director to alternate method; or where taxpayer establishes by preponderance of evidence that related member during same year received interest or intangible expenses and costs from person that is not related member and where transaction did not have principal purpose of tax avoidance. (NJSA 54:10A-4.4[c]). However, income from infrequent or extraordinary activities conducted in New Jersey subject to tax. (NJSA 54:10A-4[k][10]). Entire net income of gas, electric, and municipal electric corporations subject to NJSA 54:30A-49 prior to 1998 must be adjusted by substituting New Jersey depreciation allowance for federal tax depreciation with respect to assets placed in service prior to Jan. 1, 1998. Such depreciable assets are considered to be single asset account, tax basis being equal to carryover adjusted basis on Dec. 31, 1997, increased by excess of net carrying value over carryover adjusted basis on Dec. 31, 1997 of all assets and liabilities owned by gas or electric corporations. (NJSA 54:10A-4[k][7]).

Net Income.

For tax years ending on or before July 1, 2010, corporation not maintaining regular place of business outside New Jersey, other than statutory office, pays tax on entire net income. (NJSA 54:10A-6). Apportionment relief available in appropriate circumstances. (10 N.J. Tax 63). Allocation formula is used in computing New Jersey taxable net income of corporation. Generally, allocation factor is sum of property ratio plus twice sales ratio plus payroll ratio, divided by four. Ratios are based on ratios of New Jersey real and tangible personal property, gross receipts and payroll to total real and tangible personal property, gross receipts and payroll. (NJSA 54:10A-6). For years ending on or before June 30, 2010, New Jersey uses throwout rule; receipts from states where corporation is not taxed are excluded from denominator of ratio.

Alternative minimum assessment is calculated under either New Jersey gross receipts or New Jersey gross profits. New Jersey gross profits are New Jersey gross receipts reduced by returns and allowances attributable to New Jersey gross receipts, less cost of goods sold. New Jersey gross receipts are taxpayer’s receipts based on federal computation of net income from: sales of its tangible personal property where shipments are made to points within this state; services performed within state; rentals and royalties from property within state; and all other business receipts earned within state. During first privilege period taxpayer may elect whether alternative minimum assessment will be based on gross receipts or gross profits and will use same method for next four privilege periods. After fifth privilege period election can be changed to other method. (NJSA 54:10A-5[a]). No alternative minimum assessment for New Jersey S corporation, investment company, professional corporation or cooperatives under 26 U.S.C. § 1381. (NJSA 54:10A-5). For privilege periods after June 30, 2006, alternative minimum assessment tax is $0, except that taxpayers exempt pursuant to 15 U.S.C. § 381 et seq. (Pub. L. 86-272), 73 Stat. 555, such assessment shall continue unless taxpayer consents to tax under NJSA 54:10A-5a(e).

Alternative Minimum Assessment Rate.

First $2 million in gross receipts and $1 million in gross profits are exempt from alternative minimum assessment. Corporations electing gross receipts method with less than $20 million will pay .125% times gross receipts in excess of $2 million multiplied by 1.11111; tax is .175% times gross receipts in excess of $20 million but not over $30 million; tax is .3% times gross receipts in excess of $30 million but not over $50 million; tax is .35% times gross receipts in excess of $50 million but not over $75 million; tax is .4% times gross receipts over $75 million. Corporations electing gross profits method with less than $10 million will pay .25% times gross profits in excess of $1 million multiplied by 1.11111; tax is .35% times gross profits in excess of $10 million but not over $15 million; tax is .6% times gross profits in excess of $15 million but not over $25 million; tax is .7% times gross receipts in excess of $25 million but not over $37.5 million; tax is .8% times gross receipts over $37.5 million. Untaxed amounts of members of affiliated group or control group not to exceed $5 million of gross profits or $10 million of gross receipts, or where different computation methods are used five times amounts not subject to assessment of members. Alternative minimum assessment cannot exceed $5 million per privilege period. Where five or more taxpayers are part of affiliated group, sum cannot exceed $20 million. In such case, member's share under affiliated group will be calculated by formula. (NJSA 54:10A-5[a][b]).

Due Date.

Franchise tax is due and payable annually on or before 15th day of fourth month following end of year. Tax is due and payable on or before due date for filing return. Taxpayer must use same fiscal year as for Federal income tax purposes. (NJSA 54:10A-15). Changes in taxable income, or filing amended income tax returns, for Federal income tax purposes must be reported within 90 days. (NJSA 54:10A-13). "Privilege period" is calendar or fiscal accounting period.

Estimated Taxes.

Installment payments of estimated franchise tax for current fiscal or calendar year due in four equal payments due on 15th day of fourth, sixth, ninth and 12th months of taxable year. (NJSA 54:10A-15).

Where franchise tax is $500 or less, installment payment of only 50% is due at time of due date for annual return. (NJSA 54:10A-15.2). Taxpayer in bankruptcy or receivership or which has realized nonrecurring extraordinary gain or which estimates that it will have loss in current year may submit details to Director of Division of Taxation to estimate its tax and make installments based upon such estimate. (NJSA 54:10A-15.3). Failure to pay estimated tax equal to installments of 90% of tax shown on return subjects taxpayer to interest on underpayment of installment at per annum rate of 3%, assessed each month, compounded annually. Exceptions to addition to tax for underpayment of estimated tax are provided for installment payments based upon tax at current year's rates applied at preceding year's return information and for installment payments of 90% of tax based upon annualized net income for portion of year ending on last day of month preceding installment payment date or 100% of prior year tax. (NJSA 54:10A-15.4).

Applicability of Uniform Act.

Examination of returns and assessment of additional taxes and penalties subject to provisions of State Uniform Tax Procedure Law. (Tit. 54, c. 10A, 19.1).

Powers of Director.

Director of the Division of Taxation is empowered to adjust computation of entire net worth and entire net income and allocation thereof, to extend time for filing returns or payment of tax, but subject to payment of interest at rate of 3% above prime rate compounded annually and to promulgate rules and regulations. (NJSA 54:10A-8, 54:10A-10, 54:10A-19). If tax is not paid prior to extension date and if amount paid at time of filing of return was less than 90% of amount due, or 100% of prior year's tax, taxpayer is subject to penalty of 5% per month of underpayment, not to exceed 25% of underpayment. (NJSA 54:10A-19).

Appeal to Tax Court within 90 days from date of assessment, or taxpayer not appealing or protesting may file claim for refund of assessment paid. (NJSA 54:10A-19.2).

Exempt from franchise tax are corporations subject to tax pursuant to NJSA 54:30A-49 relating to sewerage and water corporations, certain municipal electric corporations and/or to tax assessed upon basis of gross receipts (other than retail gross receipts tax or alternative minimum assessment pursuant to NJSA 54:10A-5a) or insurance premiums collected; railway, canal corporations, certain production credit associations, agricultural co-operative associations; nonprofit cemetery corporations, nonprofit corporations without capital stock; non-stock corporations organized to provide mutual ownership housing under federal law or shareholder or member housing in retirement community; sewerage and water corporations; municipal electric corporations or utilities existing as of Jan. 1, 1995; and corporations which are licensed as insurance companies under laws of another state. (NJSA 54:10A-3).

Limited Liability Companies and Limited Partnerships.

Domestic or foreign limited liability companies and limited partnerships classified as partnerships for federal tax purposes or those subject to New Jersey income tax may obtain from members not exempt from franchise tax (see catchline Exempt from Franchise Tax, supra) consent to individually pay franchise tax on such member's share of company's or partnership's net income. Limited liability company or partnership which is not qualified investment partnership must pay share of company's or partnership's franchise tax attributable to any nonconsenting member, and company or partnership has right to recover from member taxes paid. Company must pay taxes attributable to nonconsenting members by 15th day of fourth month after last day of privilege period. (NJSA 54:10A-15.6, 54:10A-15.7). For privilege periods beginning in 2001, company's or partnership's tax liability for nonconsenting members reduced to 45% of amount otherwise due. (NJSA 54:10A-15.9).

Limited Liability Company and Limited Partnership Rate.

For privilege periods beginning Jan. 1, 2002, partnerships that are not qualified investment partnership or investment club and not listed on national stock exchange are subject to 6.37% tax on nonresident noncorporate partners shares multiplied by allocation factor pursuant to NJSA 54:10A-6, and must pay 9% tax on nonresident corporate partners shares multiplied by allocation factor pursuant to NJSA 54:10A-6. For privilege periods beginning Jan. 1, 2007, such tax payable in four equal installments due on 15th day of fourth, sixth, ninth months of privilege period and on 15th day of first month succeeding close of privilege period. (NJSA 54:10A-15.11). Amounts paid by partnership are credited to nonresident partners accounts based on each partner's share of allocated net income. (NJSA 54:10A-15.11).

Filing Fees.

Entity classified as partnership (partnership, limited liability partnership, limited liability corporation) other than investment club, or professional corporation, deriving income from New Jersey sources, and having more than two owners is subject to filing fee of $150 for each owner, up to maximum of $250,000. Investment club is entity, all owners of which are individuals, all assets of which are securities, cash or cash equivalent, with assets valued at lesser of $250,000 or $35,000 per owner of entity, adjusted for inflation beginning Jan. 1, 2003. (NJSA 54A:8-6).

Subchapter S Corporation.

Corporation may elect S status if it meets definition of S corporation pursuant to I.R.C. § 1361. (NJSA 54:10A-5.22).

Rate.

S corporations with net income in excess of $100,000 subject to following rate phase out: for privilege periods ending between July 1, 2001 and June 30, 2006, rate is 1.33%; between July 1, 2006 and June 30, 2007, rate is 0.67%. No tax on or after July 1, 2007. No tax on S corporations with net income of $100,000 or less for privilege periods ending on or after July 1, 2001. (NJSA 54:10A-5).

22.05 EMPLOYMENT TAXES:

Unemployment Compensation Tax.

Each employee contributes 0.1825% of wages from Jan. 1, 2002 through June 30, 2004, and 0.3825% of wages beginning July 1, 2004 to Unemployment Compensation Fund. Employee is also required to contribute 0.5% of wages to state disability benefits fund unless employer is covered by approved private disability plan or is otherwise exempt. Employees' tax is withheld by employer. No tax for either employer or employee is imposed on wages in excess of 28 times statewide average weekly remuneration; determination of average weekly remuneration for any year shall be set on Sept. 1 of previous year. (NJSA 43:21-7). Employer must make periodic returns and pay tax to Office of Assistant Commissioner for Finance and Controller of Department of Labor. Tax is personal debt of employer recoverable at law; as additional remedy, judgment may be entered in Superior Court, Law Division, by filing certificate of debt. (NJSA 43:21-26 – 43:21-56).

Temporary disability benefits, covering cases of nonoccupational sickness, accidents, etc., must be provided for by all employers subject to unemployment compensation tax. Such coverage may be obtained through either state plan or a private plan meeting certain statutory requirements when approved by Division of Employment Security in Department of Labor. (NJSA 43:21-25 – 43:21-56).

22.06 ENVIRONMENTAL TAXES:

Hazardous Substances Tax.

Tax imposed of .023¢ per barrel on hazardous substances (as defined by Department of Environmental Protection) transferred between major facilities. For transfer of hazardous substances other than petroleum or petroleum products, tax is 1.53% of fair market value of product. Tax rate may vary depending on balance in fund. Owners and operators of major facilities must register with Director of Division of Taxation within 20 days of first transfer and file monthly returns thereafter. (NJSA 58:10-23.11 et seq.). See category 12 Environment, topic 12.01 Environmental Regulation.

Litter Tax.

Manufacturer, wholesaler, or distributor of litter generating products is subject to tax of .03% and retailer which has annual retail sales of $250,000 or more is subject to tax of .0225%. Tax expired Dec. 31, 2000, but existing liens and assessments not affected by expiration. (NJSA 13:1E-99.1).

Recycling Tax.

Effective Apr. 1, 2008, owners or operators of solid waste facility subject to tax of $3 per ton on all solid waste accepted for disposal or transfer (excludes contracts awarded prior to Dec. 3, 2007 with respect to solid waste originating from out of state sources). Owners and operators of solid waste facilities and solid waste collectors must register with Director of Division of Taxation by Apr. 1, 2008. Tax used to fund recycling grants to municipalities or counties and to counties for preparation and implementation of solid waste management plans. (P.L. 2007, c.311).

22.07 ESTATE TAX:

For decedents dying after Dec. 31, 2001, where estate of resident decedent is subject to federal estate tax, tax in addition to inheritance tax is payable to New Jersey, equal to sum by which maximum credit allowable against such federal estate tax in effect on Dec. 31, 2001 or at election of responsible person for filing estate tax return pursuant to simplified system, on account of taxes paid to any state, which exceeds aggregate amount of all estate taxes actually paid to any state. (NJSA 54:38-1).

Apportionment of federal and New Jersey estate taxes, where property not subject to administration is included in taxable estate, is provided as to estates of persons dying intestate after December 31, 1950, and as to estates of persons dying leaving will executed or republished after that date, unless will provides otherwise. (NJSA 3B:24-1 – 3B:24-8).

Refund of tax erroneously or excessively paid may be applied for within three years from date of payment. (NJSA 54:38-3).

Valuation Date.

No separate valuation because of nature of estate tax. As to inheritance tax valuation date, see topic 22.12 Inheritance Tax, subhead Valuation Date.

Apportionment Against Inter Vivos Dispositions.

As to inheritance tax, no statutory provisions. As to federal and New Jersey estate taxes, see Introductory Paragraphs, supra.

Interstate Cooperation.

New Jersey will assist other jurisdictions in connection with collection of death taxes where such other jurisdictions give like assistance to New Jersey. (NJSA 54:37).

Director of Division of Taxation, with court approval, may compromise inheritance and estate taxes where doubt arises as to state of domicile of decedent, provided taxing authorities of other state make similar compromise agreements. (NJSA 54:38A-1, 54:38A-2).

22.07A GAMBLING AND ENTERTAINMENT TAXES:

Casino Control Act.

Annual tax equal to 8% of gross revenue is imposed on every casino licensee. (NJSA 5:12-144[a]). Gross revenue is total sum received from gaming operations by casino licensee, less total sum paid out as winnings to patrons and annual deduction based on promotional gaming credits redeemed. Returns must be made on calendar year basis and are due following Mar. 15th. Casino control tax is administered and collected by Casino Control Commission. (NJSA 5:12-63[d]).

Tax imposed on value of rooms, food, beverage or entertainment given away free or at reduced cost phased out by July 1, 2009 as follows: 4.25% in fiscal years 2004 through 2006, 3.1875% in year 2007, 2.125% in year 2008, and 1.0625% in year 2009, subject to stated minimum amount raised annually. (NJSA 5:12-148.1). Tax imposed of 8% on multi-casino progressive slot machine revenue. (NJSA 5:12-148.2). Adjusted net income of casino license subject to 7.5% tax. (NJSA 5:12-148.3). Fee of $3 per day imposed on each hotel room in casino. (NJSA 5:12-145.8). Fee of $3 imposed on each use of parking space in casino. (NJSA 5:12-173.2).

22.08 GASOLINE AND SPECIAL FUELS TAXES:

Motor Fuels Tax.

Imposed at rate of 10.5¢ per gallon of gasoline and other combustible fuel. (NJSA 54:39).

Motor Fuels Use Tax.

Tax is assessed against every motor fuel user including rental companies (except state agencies, subdivisions, etc., federal government operating vehicles, school buses, dealer and manufacturer vehicles operated under general registration plates, vehicles used by nonprofit corporations, farm vehicles not for hire and those used to transport farm labor, recreational vehicles such as motor homes, campers and buses used exclusively for personal pleasure by individual, and vehicles operated by New Jersey public utility or under contract or as subject to jurisdiction of New Jersey Transit Corporation or vehicles providing commuter bus service in New Jersey) who operates, contracts for, or leases qualified motor vehicle (defined as motor vehicle used, designed or maintained for transportation of persons or property and (i) having two axles and gross or registered weight in excess of 26,000 pounds, (ii) having three or more axles, regardless of weight, or (iii) if used in combination, when weight of such combination in excess of 26,000 pounds gross or registered weight.) within New Jersey at rate equivalent to rate per gallon of motor vehicle fuel tax now in effect (10.5¢ per gallon for gasoline [NJSA 54:39-27]), which tax shall exempt alcohol-blend motor fuel, calculated on amount of motor fuels used in its operations. Reports of entire operations must be made quarterly on or before last day of Jan., Apr., July and Oct. of each year to Director of Division of Motor Vehicles. Tax due on last day of month following end of tax quarter. (NJSA 54:39A-4, 54:39A-5).

Credit is given for fuel tax paid through fuel purchases in state by user or lessor if made within one year following end of reporting quarter in which fuel was pumped. Carryover credit permitted for eight calendar quarters. (NJSA 54:39A-8).

Identification marker and registration card must be acquired for every such motor vehicle operated in state. Fee is $5 per year. (NJSA 54:39A-10). Examination of returns, assessments, protests and appeals are generally in accordance with State Tax Uniform Procedure Law. (NJSA 54:48-1 et seq. and NJSA 54:39A-11).

Petroleum Products Gross Receipts Tax.

Requires refiners and distributors of petroleum products to pay 2.75% tax on gross receipts derived from first sale (not from export) of petroleum products within New Jersey. (NJSA 54:15B-1 – 54:15B-12). There is four cents-per-gallon tax rate for fuel oils, aviation fuels, and motor oils. (NJSA 54:15B-3).

22.09 GIFT TAX:

None; but inheritance tax applies to gifts in contemplation of death or to take effect at or after death (see topic 22.12 Inheritance Tax).

22.09A HOTEL AND MOTEL OCCUPANCY FEE:

Hotel and motel occupancy fee of 5% is imposed for occupancies beginning July 1, 2004. Combined occupancy fee, sales tax, and any local sales tax or tourism district improvement tax may not exceed 14%. If so, occupancy fee reduced. Fee 1% in cities with hotel tax. (NJSA 54:32D-1).

Certain municipalities may impose hotel tax not to exceed 1% from July 1, 2003 to July 1, 2004, and 3% thereafter. (NJSA 40:48F-1).

22.10 [RESERVED]

22.11 INCOME TAX:

New Jersey Gross Income Tax Act provides for taxation of gross incomes. Tax is administered and collected by Director of Division of Taxation in Department of Treasury. (Tit. 54A). Tax imposed on every individual, estate or trust having gross income in excess of $10,000; if married filing jointly, tax imposed if gross income exceeds $20,000 ($10,000 if married filing separately) beginning Jan. 1, 2001. (NJSA 54A:2-4).

Gross Income.

Salaries, wages, commissions, bonuses, tips, fees, other remuneration for services whether in cash or property; medical savings account payments or distributions unless excluded under IRC § 220; net profits from business, after costs and expenses incurred, but without deduction of taxes based on income; net gains or net income, less net losses, derived from sale, exchange or other disposition of property, real or personal, tangible or intangible, determined according to federal income tax purposes; for determination of gain or loss, basis of property is adjusted basis of Federal income tax; net gains or net income from rents, royalties, patents, copyrights; interest other than that on Federal obligations or those of New Jersey and its political subdivisions; dividends; gambling winnings; net gains or income from estates or trusts; income in respect of decedent; pensions and annuities to extent proceeds exceed contributions of taxpayer; rollovers of contributions from IRA, defined in IRC § 408(a) to Roth IRA; distributive share of partnership income; prizes and awards; rental value of residence or rental allowance furnished by employer; alimony and separate maintenance payments if required by decree, but not including support payments of minor children; net pro-rata share of S corporation income. (NJSA 54A:5-1). For years beginning on or after Jan. 1, 2009, New Jersey Lottery winnings from prize exceeding $10,000. (NJSA 54A:6-11).

Excludable Income.

Federal social security benefits; railroad retirement benefits; proceeds of life insurance contracts payable by reason of death; employees' death benefits if paid by or on behalf of employer for death of employee; gifts and inheritances but not income from any such property; amounts under workmen's compensation, accident or health insurance for personal injury or sickness; compensation paid by U.S. for service in Armed Forces of U.S. to individual not domiciled in State; amounts paid as housing and subsistence allowances to members of active and reserve components of Armed Forces of U.S. and to New Jersey National Guard members while on State active duty; scholarship and fellowship grants and amounts for travel, research or equipment incident thereto; portion of primary care provider's income earned in or in proximity to State designated Health Enterprise Zone (NJSA 54A:3-8); part of annuity, endowment or life insurance contract bearing same ratio as investment bears to return; amounts received under public or private plan for permanent and total disability; amounts received as annuity, endowment or life insurance contract, or pension, disability or retirement benefits received under public or private plan by one eligible to receive Social Security, up to $20,000 for married taxpayers filing jointly, $10,000 for married taxpayer filing separately, or $15,000 for individual filing as single taxpayer or individual filing as head of household or surviving spouse for federal income tax purposes, only if taxpayer has gross income of not more than $100,000; income received by person age 62 or over who has not received more than $3,000 from salaries, wages, tips, fees, commissions, bonuses, military pension payments or military survivor's benefit payments if otherwise eligible to receive social security, other remuneration for services rendered, net profits from business and distributive share of partnership income and net pro rata share of S-corporation income, up to $20,000 for married taxpayers filing jointly, $10,000 for married taxpayer filing separately, or $15,000 for individual filing as single taxpayer or individual filing as head of household or surviving spouse for federal income tax purposes, only if taxpayer has gross income of not more than $100,000;

lump sum "roll-over" distributions; unemployment insurance benefits; gains from sale or exchange of principal residences under circumstances similar to federal tax provisions, including gain exclusion of $250,000 for single filers and $500,000 for joint filers; on obligations issued by or on behalf of New Jersey or any county, municipality, school, or other district or agency, or those obligations which are statutorily free from New Jersey or local taxation under any law of New Jersey or under laws of U.S. distributions from qualified investment fund to extent attributable to interest or gain from New Jersey tax-exempt obligations, value of employee's qualified option under cafeteria plan if employee chooses not to elect to receive cash, earnings on education individual retirement account (IRC § 530) or qualified state tuition program account (IRC § 529), qualified distributions from qualified state tuition program, qualified expenditures for neighborhood and business child care centers, employer-provided commuter transportation benefits up to per employee limit ($1,120 for 1999 and thereafter), contributions to medical savings accounts excluded under IRC § 220; distributions from Roth IRA that are qualified or are rolled over to Roth IRA, income of victims who died in Sept. 11, 2001 terrorist attacks, Holocaust restitution and compensation, and amounts received as loan redemption under "Social Services Student Loan Redemption Program." (NJSA 54A:6-1 et seq.).

Personal Exemptions.

Each taxpayer allowed personal exemption of $1,000 as deduction from gross income; $1,000 for taxpayer's spouse or domestic partner not filing separately; $1,000 each for taxpayer or spouse age 65 or over or blind or disabled; $1,500 for each dependent who qualifies as dependent for federal income tax purposes. (NJSA 54A:3-1).

Rates.

Tax is 1.400% of taxable income not over $20,000; tax is $280 plus 1.750% of excess over $20,000 but not over $50,000; tax is $805 plus 2.450% of excess over $50,000 but not over $70,000; tax is $1,295.50 plus 3.500% of excess over $70,000 but not over $80,000; tax is $1,645 plus 5.525% of excess over $80,000 but not over $150,000; tax is $5,512.50 plus 6.370% of excess over $150,000 but not over $500,000; tax is $27,807.50 plus 8.970% of excess over $500,000. For married individuals filing separately, unmarried individuals other than individuals filing as head of household or as surviving spouse for federal income tax purposes, and estates and trusts, tax is 1.400% of taxable income not over $20,000; tax is $280 plus 1.750% of excess over $20,000 but not over $35,000; tax is $542.50 plus 3.500% of excess over $35,000 but not over $40,000; tax is $717.50 plus 5.525% of excess over $40,000 but not over $75,000; tax is $2,651.25 plus 6.370% of excess over $75,000 but not over $500,000; tax is $29,723.75 plus 8.970% of excess over $500,000. (NJSA 54A:2-1). Notwithstanding foregoing rates, for 2009 tax year income tax for married individuals filing joint return, unmarried individuals filing as head of household or as surviving spouse with income over $400,000 but not over $500,000 tax is $21,437.50 plus 8% of excess over $400,000; for taxable income over $500,000 but not over $1,000,000 tax is $29,437.50 plus 10.25% of excess over $500,000; for taxable income over $1,000,000 tax is $80,687.50 plus 10.75% of excess over $1,000,000. (NJSA 54A:2-1a).

Minimum Taxable Income.

Taxpayer not subject to tax if gross income is $20,000 for married filing jointly or individual filing as head of household or surviving spouse, $10,000 for married filing separately or $10,000 for unmarried individual or individual filing as head of household or surviving spouse.

Deductions.

Medical expenses of taxpayer, spouse or domestic partner and dependents are deductible to extent they exceed 2% of taxpayer's gross income. (NJSA 54A:3-3).

Medical insurance premiums are deductible if taxpayer is self-employed. (NJSA 54A:3-5).

Qualified conservation contributions are deductible. (NJSA 54A:3-6).

Property Tax Deduction: Credit.

Deduction from gross income allowed for resident homeowners for property taxes paid on home not to exceed $10,000 for 1998 and thereafter. (NJSA 54A:3A-17). For tax years beginning Jan. 1, 2009, taxpayer with gross income of more than $250,000 (and not 65 years or older, or not blind or disabled) not allowed deduction. Deduction for taxpayer with gross income of more than $150,000 but less than $250,000 (and not 65 years or older, or not blind or disabled) not to exceed $5,000. (NJSA 54A:3A-17[h]). Deduction from gross income also allowed for that portion of resident renter's rent which constitutes property taxes in same percentages and amounts as homeowners. Deduction for resident taxpayer eligible for homestead property tax reimbursement pursuant to NJSA 54:4-8.67 et seq. shall not exceed resident taxpayer's base year tax liability as determined therein. In lieu of deduction, resident taxpayers entitled to property tax credit if greater benefit results. Credit is determined by Worksheet F of Form NJ-1040. (NJSA 54A:3A-17).

Alimony and Separate Maintenance Payments.

Deduction for payments included as income in return of former spouse or spouse receiving separate maintenance pursuant to court decree. (NJSA 54A:3-2).

Credits.

Resident taxpayer allowed credit against tax for amount of income or wage tax imposed by another state or income taxable under Act. Credit shall not exceed proportion of tax due under Act that amount of taxpayer's income subject to tax by other jurisdiction bears to entire New Jersey income. No credit allowed for income from S-corporation. (NJSA 54A:4-1).

Losses.

Losses occurring in one category of gross income may be applied against other sources of gross income in same category for same year; net loss in one category may not be applied against income of another category. (NJSA 54A:5-2).

Nonresident Individuals.

Income under Act is that part of income derived from sources within State by reason of: ownership or disposition of interest of real or tangible personal property in State; trade, profession or occupation or rendition of personal services; share of income of unincorporated business, profession, enterprise or undertaking as result of work done, services rendered or other business activities conducted in State; intangible personal property used in trade, profession, occupation or business in State or as result of any lottery or wagering transaction in this state other than from New Jersey lottery or as S corporation income allocated to this state of New Jersey S corporation. (NJSA 54A:5-8). Income derived from pensions and annuities excluded. (NJSA 54A:5-8). Nonresident taxpayers of gross income tax are required to compute liability as though residents, then prorate liability by proportion of New Jersey source income to total income. (NJSA 54A:5-7).

Due Date.

Return due on or before Apr. 15 following close of calendar year; return for fiscal year taxpayer due on or before 15th day of fourth month after close of such fiscal year. Filing and/or payment due date of return may be extended to correspond with extended filing or payment due date of taxpayer's Federal return. (NJSA 54A:8-1). Taxpayer's taxable year under Act same as that for Federal income tax. (NJSA 54A:8-3).

Certain tax preparers required to file tax returns electronically. Tax preparers who fail to file electronically, as required, liable for penalty of $50 per return. (NJSA 54:49-3.1, 54:49-3.4).

Estimated Taxes.

For return periods beginning on or after Jan. 1, 1999, resident and nonresident individuals must make declaration estimated tax if net tax, after credits, is expected to exceed $400. Equal installment payments of estimated tax are due on 15th day of fourth, sixth, ninth, and 12th month of taxable year. (NJSA 54A:8-4). Underpayment for taxpayers who fail to make declaration of estimated gross income tax or fail to pay all or part of installment of estimated tax is excess of lesser of amount of installment due if estimated tax were equal to 80% of current year's tax, or 100% of preceding year's tax, over amount of installment payments already made. Where taxable income for preceding year exceeds $150,000 ($75,000 for married filing separately), 110% is substituted for 100%. (NJSA 54A:9-6). For sales of real property on or after Aug. 1, 2004, nonresident individuals, estates and trust must pay estimated tax based on amount of gain multiplied by highest income tax rate, but payment cannot be less than 2% of stated consideration on deed. Estimated tax paid with recording of deed. (NJSA 54A:8-9).

22.12 INHERITANCE TAX:

Transfer or inheritance taxes are governed by Tit. 54, cc. 33-37 and 38A, as amended and supplemented.

Tax imposed on transfer of all real and tangible personal property situated in New Jersey and all intangible personal property wherever situated (including interest in jointly owned property) of resident decedents, and on real and tangible personal property located in New Jersey of nonresident decedents, of value of $500 or over, transfer of which is made by will or intestate laws, or in contemplation of death (transfer of material part of estate without adequate valuable consideration within three years preceding death presumed to be in contemplation of death; transfer prior to three years conclusively presumed not in contemplation of death) or to take effect at or after death, and transfers of estates in expectancy or pursuant to powers of appointment created after July 4, 1909. (NJSA 54:34-1).

Valuation date is date of death. No optional valuation date provided. (NJSA 54:34-5).

Appraisal of property is generally at “clear market value.” (NJSA 54:34-5). Vested interests in remainder are taxable immediately; contingent or defeasible interests when beneficiary comes into enjoyment. Property subject to power of appointment is taxable when power is exercised but valued as of date of creation. (NJSA 54:36-4). Provision is made for compromise and immediate payment of tax on future estates in lieu of posting bond. (NJSA 54:36-6).

Compromise.

State Treasurer or Director of Division of Taxation may agree with representative of estate to alter, revise, compromise and settle claim or lien for past due inheritance taxes, and interest and penalties thereon, as to which he has determined that there is reasonable doubt concerning enforcement of lien or collectibility of tax provided representatives, heirs and beneficiaries waive defenses. (NJSA 54:38A-3; NJSA 52:18A-34).

Deductions.

Debts of decedent, unless owing for or secured by property outside of state not taxable in this state (except excess of debt over value of security), expenses of funeral and last illness, administration expenses, commissions and attorneys’ fees, foreign transfer taxes on taxable property and local taxes accrued to date of death are deductible; but not Federal Estate Tax. (NJSA 54:34-5).

Rates and Exemptions.

Full exemption for transfers from decedent to spouse, domestic partner, father, mother, grandparent, child or children adopted by decedent in conformity with laws of this State, or any of U.S. or of foreign country, stepchild or issue of any child or legally adopted child of decedent.

Brother, sister, son-in-law or daughter-in-law: first $25,000 is exempt; rates, 11% on any amount in excess of $25,000 up to $1,100,000 or any part thereof; 13% on next $300,000 or part thereof (excess over $1,100,000 up to $1,400,000); 14% on next $300,000 or part thereof (excess over $1,400,000 up to $1,700,000); 16% on excess over $1,700,000.

All others (including issue of stepchild or of child to whom decedent stood in relation of parent without legal adoption [41 N. J. Super. 345, 125 A.2d 153]): if transfer is less than $500, entirely exempt, if $500 or more, no exemption; rates 15% on first $700,000 or any part thereof; 16% on excess over $700,000. (NJSA 54:34-1, 54:34-2).

Exempt Transfers.

Property passing to New Jersey or political subdivision thereof for exclusively public purposes; to non-profit New Jersey educational institutions and such institutions in such other jurisdictions as grant equal exemption to such New Jersey institutions; and to legal representative of decedent, either directly or through intervening estate, by reason of war risk insurance or adjusted service certificate, is exempt. Life insurance paid to trustees under inter vivos and testamentary trusts is exempt. Life insurance payable to beneficiary other than decedent's estate is exempt. Any transfer, relinquishment, surrender or exercise at any time by resident or nonresident of any right to nominate or change beneficiary of any contract of insurance insuring life of such resident or nonresident is exempt. Any pension, annuity, retirement allowance or return of contributions from whatever source which is payable to surviving spouse or domestic partner as result of decedent's employment under qualified plan defined in §§ 401(a), (b) or (c) or 2039(c) of IRC is exempt. Any benefits paid by U.S. Government pursuant to Civil Service Retirement Act, Retired Serviceman's Family Protection Plan, or Survivor Benefit Plan to beneficiary other than decedent's estate or executor or administrator are exempt. (NJSA 54:34-4).

Complete exemptions are also granted to New Jersey churches, hospitals, orphan asylums, public libraries, Bible and tract societies, and to any institution or organization established and operated exclusively for religious, charitable, benevolent, scientific, literary or educational purposes. Exemptions will be granted to similar organizations of other jurisdictions only if such jurisdictions grant similar exemptions to New Jersey organizations of this type. (NJSA 54:34-4).

Nonresident Tax.

The tax on property of nonresident decedent subject to New Jersey tax, is that proportion of tax on whole estate (if it were taxable in its entirety in this state) which the property taxable in state bears to entire estate. (NJSA 54:34-3).

Filing of Tax Returns.

Returns for resident decedents (on forms furnished by Department) should be made to Transfer Inheritance Tax Branch, New Jersey Division of Taxation, P.O. Box 249, Trenton, NJ 08646-0249.

Appeal from assessment lies to Tax Court within 90 days after assessment; bond required. (NJSA 54:34-13).

Waivers are necessary for transfer of New Jersey real estate, stock in New Jersey corporations, and bank accounts, and to open safe deposit boxes, held by resident decedents (NJSA 54:35-19, 54:35-21) except in case of transfers (by will or joint ownership arrangements) by resident decedents dying on or after July 1, 1988 to surviving spouses, domestic partners, parents, grandparents, children (natural and adopted) and their issue and stepchildren, although in such cases Director of Division of Taxation may require affidavits or reports and records of transfer (NJSA 54:35-19, 54:35-21). Waivers as to property of resident decedent issue only on proof of original probate or grant of letters of administration in New Jersey. If original probate or administration is had elsewhere, Director of Division of Taxation so reports to Superior Court, Chancery Division, and awaits its order, but Director of Division of Taxation has discretion to issue waiver before court order if withholding would jeopardize collection of tax. (NJSA 54:35-23).

Lien.

Tax becomes lien on death, and remains such unless sooner paid, for 15 years after date of death. (NJSA 54:35-5).

Liability for Tax.

Executors, administrators, donees, vendees, trustees and grantees, are personally liable. (NJSA 54:35-2; NJSA 54:36-7).

Interest at 10% commences eight months after date on which tax is due and payable but may be reduced to 6% for sufficient cause. (NJSA 54:35-3). Bond in double amount of tax required if tax not paid within eight months after date on which tax is due. (NJSA 54:35-4).

Limitation of Actions for Tax.

In general, time within which state may institute proceedings for assessment and collection of tax is limited to 15 years. (NJSA 54:35-5.1).

Refund of tax erroneously paid may be applied for within three years from date of payment or from date of judgment establishing that decedent had no interest in property, provided such judgment rendered within 20 years of death. (NJSA 54:35-10).

22.12A PRODUCE AND FOOD TAXES:

Poultry Feed Tax.

Tax of 1¢ is imposed on sale, delivery or use of each 100 lbs. or fraction thereof of poultry feed. (NJSA 54:47A-1 – 54:47A-18).

Apple Tax.

Tax of 3¢ on each bushel sold for market as fresh apples, and on each 100 weight sold for processing other than as cider or apple juice is imposed on sale, delivery or use of apples produced within the state. (NJSA 54:47D-1 – 54:47D-16).

Asparagus Tax.

Tax of 2 mills on each pound, payable equally by grower and processor or distributor, is imposed upon asparagus produced and sold for processing within the state and tax of 2¢ on each standard crate is imposed upon the sale, delivery or use of asparagus produced within this state for fresh market. (NJSA 54:47C-1 – 54:47C-17).

Sweet Potato Tax.

Tax of 2¢ on each bushel sold for market as fresh-sweet potatoes and 2¢ per bushel for those sold for processing. (NJSA 54:47E-1 – 54:47E-17).

White Seed-Potato Tax.

Tax of 5¢ is imposed on sale, delivery or use of each 100 pounds or fraction thereof of seed potatoes. (NJSA 54:47B-1 – 54:47B-17).

22.13–22.15 [RESERVED]

22.16 PROPERTY TAXES:

Taxable Situs.

All property, real and personal, unless expressly exempt, is subject to taxation at its situs. Personal property does not include intangible personal property. Real property means all land, improvements, and includes personal property affixed to real property, unless removable or severable without material injury to real property or to personal property removed or severed, or not ordinarily intended to be so affixed permanently, or unless personal property is machinery, apparatus or equipment which is used or held for use in business and is neither structure nor machinery, apparatus or equipment, primary purpose of which is to enable structure to support, shelter, contain, or house persons or property. For these purposes, real property shall include pipe racks, and piping and electrical wiring up to point of connections with machinery, apparatus, or equipment of production process. (NJSA 54:4-1). Storage tank with capacity greater than 30,000 gallons is deemed real property. Fact that products are mixed, blended, heated or subjected to similar nonproduction process within storage tank shall not itself render tank personal property. (NJSA 54:4-1.12). With certain exceptions, lease of tax-exempt real estate to lessee whose property is not exempt makes leasehold taxable to lessee. (NJSA 54:4-2.3). See also topic 22.10 Income Tax.

Exemptions.

Granted with respect to public property and property devoted to military (NJSA 54:4-3.3, 54:4-3.5) and certain religious, charitable, educational and fraternal purposes (statutory limitation of exemption to New Jersey corporations held invalid 393 U.S. 117); (NJSA 54:4-3.6, 54:4-3.7, 54:4-3.15, 54:4-3.24, 54:4-3.26, 54:4-3.27, 54:4-3.52); certain recreational vehicles installed in campsite (NJSA 54:4-1.19); nonprofit educational TV stations (NJSA 54:4-3.6[a]); all lands and improvements thereon actually and exclusively used for conservation or recreation purposes, owned and maintained or operated for benefit of public by non-profit or tax exempt corporation (NJSA 54:4-3.64); dwelling of district superintendent of religious association corporation (NJSA 54:4-3.35); property owned by and devoted to purposes of certain firemen’s associations (NJSA 54:4-3.10); property owned by and devoted to purposes of certain veterans’ associations (NJSA 54:4-3.25); dwelling house and lot of certain disabled veterans and their widows and widows of resident servicemen killed in action (NJSA 54:4-3.30 – 54:4-3.33); any building, its pertinent contents and land certified to be historic site (NJSA 54:4-3.52); property and franchises of railroads and canals taxed under other laws (NJSA 54:4-3.11); personal property used in business of telecommunication carriers other than local exchange telephone companies (NJSA 54:4-2.49[a]); graveyards and burial grounds not exceeding ten acres, mausoleums, etc. (NJSA 54:4-3.9); ores and unrefined metals of nonresidents stopped in state for refining (NJSA 54:4-3.19); personal property stored in public warehouse (NJSA 54:4-3.20; but see 14 N. J. 112, 101 A.2d 555); motor vehicles registered in New Jersey (NJSA 54:4-3.21); boats used for pleasure and boats for which tax exemption certificate issued are exempt from personal property taxes, but no such exemption exists for power vessels held for sale by manufacturer, wholesaler or retailer (NJSA 54:4-3.55; NJSA 12:7-34.47[a]); real property exempted by municipality as environmental opportunity zone (NJSA 54:4-3.150 et seq.); excess in assessed valuation of property equipped with renewable energy system over assessed value of such property had it not been so equipped (NJSA 54:4-3.113b); commercially planted and growing crops, trees, shrubs and vines, while in the ground (NJSA 54:4-3.28); certain turnpikes (NJSA 54:4-3.18); certain veterans’ loans held by savings banks (NJSA 54:4-3.29); personal property of life insurance company which is subject to franchise tax (NJSA 54:4-20); right to public pension (NJSA 43:15A-53); amounts paid as old age assistance (NJSA 44:7-35); certain public housing corporations (NJSA 55:16-18, 55:16-19), Senior Citizen Housing (NJSA 55:14I-5), health care facilities for elderly (NJSA 54:4-3.6), certain renewal areas under “Long Term Tax Exemption Law” (NJSA 40A:20-1 et seq.), but pay 15% of gross rent instead; value of fallout shelter on dwelling house premises to extent of $1,000 (NJSA 54:4-3.48); and air and water pollution equipment certified by Commissioner of Health (NJSA 54:4-3.56). If claim is filed, $100 ($150 in 2001, $200 in 2002 and $250 in 2003 and beyond) deduction from taxes (due and payable in 1964 or thereafter) on real or personal property or both, of property of New Jersey veterans, including veterans of Korean conflict, Viet Nam conflict, Lebanon peacekeeping mission, Grenada peacekeeping mission, Panama peacekeeping mission, Operation “Desert Shield/Desert Storm” mission, Operation “Enduring Freedom” mission and Operation “Iraqi Freedom” mission and their widows (NJSA 54:4-8.10 et seq.); maximum of $250 deduction from taxes assessed against dwelling house of resident age 65 and over or permanently and totally disabled, having yearly income (including spouse’s income) not in excess of $10,000 (available to their surviving spouses if age 55 or over at death of deduction holder) (NJSA 54:4-8.40 et seq.). Sports and entertainment project constructed under redevelopment plan adopted by eligible city exempt from property taxation and special assessments. (NJSA 54:4-3.6g).

Assessment.

Every political division less than a county with power to tax is a taxing district. (NJSA 1:1-2).

General.

All property subject to taxation shall be valued and assessed at taxable value prescribed by law. (NJSA 54:4-1). Taxable value of real property, and tangible personal property not used in business, is assessed to owners as of Oct. 1 of year preceding year for which tax is assessed. (NJSA 54:4-23, 54:4-35). Taxable value for real property is that percentage of true value, not less than 20% nor more than 100%, fixed by county board of taxation to be applied uniformly throughout county (NJSA 54:4-2.25, 2.26), except that under certain circumstances, including appropriate application by owner, land actively used for agricultural or horticultural use shall be valued for such use rather than at true value, subject to a retroactive adjustment for two year period when such land is removed from said uses (NJ Const. Art. 8, § 1, par. 1, NJSA 54:4-23.6, 54:4-23.7, 54:4-23.8). Such percentage is required to be fixed on or before Apr. 1 of year preceding tax year (otherwise percentage is 50%) and remains in effect for not less than three years and until changed by county board. (NJSA 54:4-2.27). Real property assessment shall be reduced from true value of property by average ratio of assessed to true value of real property in taxing district pursuant to Director of Division of Taxation’s yearly determination of average ratio and common level range. (NJSA 54:1-35a, b and c). Director of Division of Taxation may order reassessment of any property or entire taxing district to secure uniform taxable valuation. (NJSA 54:1-26 – 54:1-30). Taxable value for personal property not used in business shall be that percentage of its fair market value as percentage level of taxation established for real property (NJSA 54:4-9.1) except that taxable value for tangible household goods and personal effects for household, if not exempt from tax under local option, shall be their value if they were sold as one lot (NJSA 54:4-9.2).

Changes in Assessment.

Where real property contains building erected, added to or improved between Oct. 1 and Jan. 1, tax assessor values real property as of Jan. 1; if resultant valuation exceeds preceding Oct. 1 assessment, excess is entered as added assessment against such property. Where real property contains building erected, added to or improved after Oct. 1, and completed between Jan. 1 and Oct. 1 following, tax assessor values real property as of first day of month following date of completion; if resultant valuation exceeds preceding Oct. 1 assessment, amount of excess assessment, prorated from date of completion of building, is entered as added assessment against such property. Tax based on such added assessment is payable on Nov. 1 of year of levy. (NJSA 54:4-63.1 – 54:4-63.11a). Similar procedure is provided as to real property ceasing to be tax-exempt by reason of change in use or ownership. (NJSA 54:4-63.26 – 54:4-63.29).

If building has been destroyed, demolished or altered by casualty or by intention so as materially to depreciate value after Oct. 1 and prior to Jan.1, assessor on application before Jan. 10 must assess same as of Jan. 1. (NJSA 54:4-35.1).

In any year or next succeeding year county board or assessor may assess taxable property omitted from assessment for particular year. (NJSA 54:4-63.12, 54:4-63.31).

If property valued and assessed as residential for at least three years is rezoned commercial or industrial, property shall continue to be valued and assessed as residential so long as owner at time of zoning change continues to occupy property as principal place of residence. (NJSA 54:4-23, 54:4-24).

Review of Assessment.

Appeal from assessment may be taken to County Board of Taxation; when appeal or complaint is filed during 19 days preceding Apr. 1, taxpayer or taxing district has 20 days from date of service to file cross-petition or counterclaim; assessment over $750,000 may be appealed directly to Tax Court. (NJSA 54:3-21). Appeal must be filed on or before later of Apr. 1 or 45 days from date bulk mailing of notification of assessment completed in taxing district or by May 1 with respect to municipal-wide revaluation or reassessment. Filing fee before County Board of Taxation as follows: Valuation less than $150,000, $5; less than $500,000, $25; less than $1,000,000, $100; $1,000,000 or more, $150. (NJSA 54:3-21.3). Filing fee before Tax Court $175 and $35 in small claims cases. (Rule 8:12). Taxpayer filing appeal from assessment must pay collector of taxing district total taxes assessed, in manner prescribed by NJSA 54:4-66 even though County Board of Taxation may relax tax payment requirement terms. (NJSA 54:3-27). County Board may apply to Director of Division of Taxation for extension of time to hear tax appeals. (NJSA 54:3-26.1).

Complaint to review County Board action in Tax Court within 45 days of judgment. (NJSA 54:51A-1[a]). All taxes and installments must be paid on date complaint is filed, but Tax Court may relax tax payment requirement terms. (NJSA 54:51A-1b). Tax Court also has important original powers of review and correction of county and state equalization tables. (NJSA 54:51A-4). Taxpayer successful in appeal entitled to refund of excess taxes paid plus 5% interest per annum, less any taxes or interest for other years, within 60 days of final judgment. (NJSA 54:3-27.2).

Payment of tax does not prejudice appeal. (NJSA 54:3-27).

Taxpayer who has paid taxes on property and thereafter obtained reduction of assessment, which has become final, may deduct appropriate amount from any taxes then due or to become due, provided such property is still assessed against same owner. (NJSA 54:4-69.2).

Payment.

Taxes are payable in four installments, on Feb. 1, May 1, Aug. 1, Nov. 1; each installment is delinquent after due date. (NJSA 54:4-66). Municipality may allow discount (not exceeding 6% per annum) for prepayment and charge interest (not exceeding 8% per annum on first $1,500 and 18% per annum on any amount in excess of $1,500) on delinquent taxes. (NJSA 54:4-67). Municipality may sell its entire property tax levy to third parties at public sale. (NJSA 54:4-67.1). Municipalities also are authorized to accept taxes due or to become due for any current year at any time in full or in installments. Discount of not more than ½ of 1% per month may be authorized on advance payments. (NJSA 54:4-68, 54:4-69).

A municipality may provide for payment of taxes in arrears for more than one year, by installments over a period not exceeding five years. (NJSA 54:5-19).

Collection.

Person assessed for personal property tax is personally liable therefor and it may be enforced by sale of personal property or against owner’s person. (NJSA 54:4-78 – 54:4-79). There is no personal liability for taxes on realty. (NJSA 54:4-79).

When real estate tax on income-bearing property, except home or farm occupied by owner from which he derives no rent, is delinquent for six months, tax collector of municipality may bring action in Superior Court, Chancery Division, to be appointed receiver of rents to satisfy delinquent taxes. Where property is encumbered by first mortgage, receiver must appoint mortgagee as receiver’s agent to collect rents and income and manage such property. (NJSA 54:4-123 – 54:4-136).

Municipality, on purchasing lands at tax sale and recording certificate of sale, may collect rents from property and apply same on amount due on tax sale certificate and subsequent municipal liens. (NJSA 54:5-53.1).

Lien.

Unpaid taxes on real estate are continuous and paramount liens on land for which assessed, and lien extends to all subsequent taxes, interest, penalties and costs thereafter accruing. (NJSA 54:5-6, 54:5-9).

Sale and Redemption.

If taxes on real estate are unpaid on 11th day of 11th month in fiscal year when same became in arrears, or, if later, last month of fiscal year property is sold at public auction on notice, posted, published and mailed to owner if address known. (NJSA 54:5-19 – 54:5-31). Sale is in fee subject to redemption at lowest rate of interest bid, not to exceed 18% per annum; if no other purchaser, sale is to municipality for redemption at not in excess of 18%. (NJSA 54:5-32, 54:5-34). Collecting officer issues certificate of sale which may be recorded as mortgage. (NJSA 54:5-46 – 54:5-50). On redemption, record may be cancelled by order of judge of Law Division of Superior Court. (NJSA 54:5-105). Municipality holding tax sale liens may provide for redemption by installment payments. (NJSA 54:5-65).

Where municipality is purchaser at tax sale, provision is made for sale of tax sale certificate issued in connection therewith at less than amount due thereon, provided that purchaser of such certificate forecloses equity of redemption and records final judgment in county wherein land is situate. Purchaser or purchaser’s heirs or assigns may foreclose on tax sale certificate which has been held at least 40 years by purchaser, heirs or assigns, provided that purchaser, or heirs or assigns, establish that property taxes have been paid by purchaser, heirs or assigns, in each year since purchase of tax sale certificate. (NJSA 54:5-114.4a). When municipality is purchaser at tax sale, money collected from property not needed for its operation must be used to remedy violations of state or local housing and health codes or any conditions dangerous to life, health or safety, unless public officer finds such action economically unfeasible due to structural unsoundness. Officer must then close or demolish building, or part thereof. Owner liable for health violations for 60 days after sale. Municipality may return possession to owner for correction of violations. (NJSA 54:5-53.1).

Right of redemption is barred unless person having interest in land redeems within two years from date of sale where notice to redeem is given him within 18 months from date of sale; where notice is not so given, he has right to redeem within six months after notice. Right of redemption is barred six months from date of sale when property is sold to municipality at tax sale, where notice to redeem is given within ten days of date of sale. Right of redemption is also barred at any time after expiration of the term of two years, by judgment of Superior Court, Chancery Division, foreclosing right (NJSA 54:5-86).

Title of purchaser at sale shall cease and certificate of sale shall be void at expiration of 20 years from date of sale, unless purchaser forecloses right to redeem by notice or civil action in equity. Limitation period of 20 years does not apply when purchaser can establish payment of all property taxes in each year since purchase of certificate. (NJSA 54:5-79).

Municipality holding tax sale certificate or tax lien title may summarily foreclose right of redemption. Proceeding is in rem. State or county may also take such action in name of municipality without action by municipality. (NJSA 54:5-104.29 – 54:5-104.75).

Abatement of Taxes.

If market value of property is less than principal sum of taxes past due, or if taxes are deemed to be illegal, municipality may so abate, revise and settle such taxes as it deems equitable, providing title or lien of tax sale purchaser is not affected; where past due taxes are on personal property alone, municipality may abate only if market value is less than principal sum of taxes. Revised amount must be paid within 60 days. (NJSA 54:4-99, 54:4-100, 54:4-101). Municipality may abate in designated redevelopment area with housing element and may condition abatement on redeveloper's setting aside affordable residential units or contributing to housing trust fund. (NJSA 40A:12A-4.1 et seq.).

Compromise of Municipal Charges.

Under conditions, similar to those under which abatement of taxes would be allowed, municipality may compromise all past due municipal charges by accepting conveyance of property unencumbered except for such charges and simultaneously executing lease to grantor or assignee which may contain option to purchase on limited terms; and unencumbered vacant land may be conveyed to municipality in settlement. (NJSA 54:4-109, 54:4-112, 54:4-114).

Homestead Rebate.

(NJSA 54:4-8.57 et seq.). For tax year 2006 and for tax years thereafter, each state resident entitled annually to homestead rebate or credit on dwelling house and land on which house is situated, or on dwelling house assessed as real estate situated on land owned by another, constituting place of domicile and principal residence. Life tenant, or tenant under lease for 99 years or more, or person who is entitled to take and actually takes possession of land and dwelling house under executory contract for sale thereof and under agreement with lending institution holding title as security for loan, or resident in continuing care retirement community pursuant to lifetime contract requiring resident to bear proportionate share of property taxes separate from other charges, deemed owner for purposes of Act. Resident homeowner age 65 or over at close of taxable year or blind or disabled whose gross income does not exceed $150,000 entitled to homestead rebate or credit equal to greater of (a) percentage (up to maximum of 20%) of 2006 property taxes paid not in excess of $10,000 or (b) amount (up to maximum of $1,200) by which their 2006 property taxes exceed 5% of their gross income. Resident homeowners under age 65 at close of taxable year and not blind or disabled and whose gross income does not exceed $75,000 entitled to rebate or credit equal to percentage (up to maximum of 20%) of 2006 property taxes paid not in excess of $10,000. Following resident tenants age 65 or over at close of taxable year or blind or disabled entitled to homestead rebate equal to amount by which their rent constituting property taxes exceeds 5% of their gross income plus $50 (up to maximum rebate of $860 in 2008, and indexed annually for cost of living), depending on their filing and status income: married tenants filing joint return, individuals filing as head of household or surviving spouse for federal income tax purposes, and nonresident alien heads of household if their gross income does not exceed $70,000; unmarried tenants other than those filing as heads of households or as surviving spouse for federal income tax purposes if their gross income does not exceed $35,000; and married tenants who file separate returns if they maintain same household and their combined gross income does not exceed $70,000. Resident tenants whose gross income does not exceed $100,000 entitled to $160 rebate for year 2008. Homestead rebates or credits based on qualifications met on Oct. 1.

Director of Division of Taxation determines annually whether homestead benefit will be in form of rebate or credit. No rebate allowed except upon application therefor on form prescribed by Director Division of Taxation. Application must accompany claimant's tax return. Rebate must be paid on or before Oct. 31, annually, and credit paid to local tax collector to coincide with next quarterly due dates of Aug. 1 and Nov. 1, to extent possible, unless claimant is delinquent in paying his or her property taxes. Rebate is not subject to garnishment, attachment, execution, or other legal process except for debts to state and child support.

Where title to property as to which homestead exemption is claimed is held by claimant and another or others, as tenants in common or joint tenants, claimant not allowed rebate or credit in amount in excess of claimant's proportionate share of taxes assessed against property, which proportionate share deemed equal to that of each other tenants unless shown that interests in question unequal, in which event claimants share is as shown. Nothing in Act precludes more than one tenant, whether title held in common or joint tenancy, from claiming homestead exemption from taxes assessed against property, but no more than equivalent of one full homestead rebate or credit in regard to such property allowed in any year. If claimants cannot agree as to apportionment thereof, rebate or credit is apportioned in proportion to their interest. Property held by husband and wife, as tenants by entirety, deemed wholly owned by each tenant, but only one homestead rebate or credit allowed such property in any year. Right to claim rebate or credit extends to property, title to which is held by partnership, to extent of partner's interest; also guardian, trustee, committee, conservator of fiduciary or any person otherwise entitled to claim rebate or credit, but not to property, title to which is held by corporation.

New Jersey Saver Rebate.

Residents who have paid homestead property taxes and who file application with Director of Taxation are allowed New Jersey Saver rebate. Rebate amount is equal to New Jersey Saver property value multiplied by New Jersey Saver school tax rate for municipality in which homestead is located. New Jersey Saver property value is equal to lesser of $45,000 or highest equalized property value, determined annually. 100% rebate effective beginning 2001 tax year. (NJSA 54:4-8.58[b]). Rebate paid Sept. 30 of following year. Qualifying residents will be paid greater of New Jersey Saver rebate or homestead rebate amount. New Jersey Saver rebate not available to tenants. Effective for tax year 2003, New Jersey Saver rebate folded into Homestead rebate.

Homestead Property Tax Reimbursement.

State resident 65 or older or disabled, single, or married, with annual income of $60,000 or less for tax year 2007, $70,000 or less in tax year 2008, $80,000 or less in tax year 2009, and owner of dwelling house and land on which it is situated, or of mobile home site, or of dwelling house assessed as real estate situated on land owned by another, or lessee of mobile home park on site on which resident owns manufactured or mobile home, or of condominium or continuing care retirement community unit, constituting place of domicile and principal residence, and has paid property taxes directly or through rent for ten consecutive years, including last three prior to reimbursement application is entitled to property tax reimbursement. (NJSA 54:4-8.67 et seq.). Life tenant or tenant under lease for 99 years or more, or person who is entitled to and actually takes possession of land and dwelling house under executory contract for sale thereof or under agreement with lending institution holding title as security for loan, or resident in continuing care retirement community pursuant to lifetime contract requiring resident to bear proportionate share of property taxes separate from other charges, deemed owner for purposes of Act.

Income limitations subject to cost of living adjustment. Property tax reimbursement calculated by difference between property tax due and paid, exclusive of improvements not included in assessment for base year, and amount of property taxes due and paid in base year. Base year means tax year 1997, if eligible, or tax year in which resident eligible for reimbursement.

Surviving spouse of deceased resident of State who was eligible for reimbursement, shall be entitled to same reimbursement so long as remains resident in same homestead to which reimbursement granted and meets eligibility requirements.

No reimbursement allowed except upon application therefor on form prescribed by Director of Division of Taxation. Application shall be filed on or before Apr. 15, 1999 for tax year 1998 and on or before June 1 of year following year for which claim made. Reimbursements, as calculated by Director, are mailed to eligible claimants on or before July 15 of next year, except where application filed between May 1 through June 1, in which case reimbursements mailed on or before Sept. 1. Where title to property as to which homestead exemption is claimed is held by claimant and another or others, as tenants in common or joint tenants, claimant not allowed rebate amount in excess of claimant's proportionate share of taxes assessed against property, which proportionate share deemed equal to that of each other tenants unless shown that interests in question unequal, in which event claimants share is as shown. Nothing in Act precludes more than one tenant, whether title held in common or joint tenancy, from claiming homestead exemption from taxes assessed against property, but no more than equivalent of one full homestead rebate in regard to such property allowed in any year. If claimants cannot agree as to apportionment thereof, rebate is apportioned in proportion to their interest. Property held by husband and wife, as tenants by entirety, deemed wholly owned by each tenant, but only one homestead rebate allowed such property in any year.

Right to claim rebate extends to property, title to which is held by partnership, to extent of partner's interest; also guardian, trustee, committee, conservator or fiduciary or any person otherwise entitled to claim rebate, but not to property, title to which is held by corporation; except that residential shareholder in cooperative or mutual housing cooperation shall be entitled to reimbursement if otherwise eligible, to extent of proportionate share of taxes assessed against corporation or other entity holding title. No eligible claimant shall be entitled to reimbursement on more than one homestead within State in same tax year.

Tenant's Property Tax Rebate.

Owner of real property containing building or complex of buildings of five or more housing units rented or leased or offered for rent or lease for residential purposes, except hotels, motels or other guest houses serving transient or seasonal guests, buildings or structures subject to tax abatement agreement on improvements, buildings or structures in municipalities where rent control ordinance does not provide automatic rent increase upon increase in property tax, dwelling units in residential cooperative, mutual housing corporation, certain condominium units, continuing care retirement community, residential health care facilities and assisted living residences, owner must provide property tax rebates to tenant thereof for each year in which owner receives property tax reduction. Owner occupation of building not factor in determining if property is qualified real rental property. Property tax reduction means difference between amount of property tax paid or payable on such property, in base year and current year, if less than amount paid in base year. Base year means calendar year 1998, unless certain events occur in subsequent year. (NJSA 54:4-6.3[c]). Municipal tax collector shall compute amount of property tax reduction for year for each property owner of qualified real rental property and shall provide notice to inform property owners receiving property tax reductions of amount thereof and obligations under Act. Copy shall be provided to rent leveling board or similar agency charged with regulating rents, or, where no such board exists, retained by tax collector. Property tax rebate for each tenant shall be computed by property owner by subtracting from calculated property tax deduction under NJSA 54A:4-6.5, amount equal to proportion of nonresidential rents and value of owner's or employee's personal occupancy bears to total rental value, and then dividing remaining property tax reduction proportionately among all residential tenants. Property tax rebate or credit for each dwelling unit must be paid monthly to tenants in residence of unit during calendar year. Property tax reduction shall, at option of owner, either be credited as rent reduction or paid directly to tenant. Amount of each monthly property tax rebate or credit must equal one-twelfth annual amount of rebate or credit with rounding to nearest dollar. Rebates shall be paid to tenant only for number of calendar months tenant has been in residency. Landlord shall use best efforts to obtain forwarding address of tenant entitled to rebate and has moved. Owner must adjust payment or crediting of rebate immediately upon receipt of and in accordance with revised notice of property tax reduction pursuant to NJSA 54:4-6.5, but no amount of rebate previously paid or credited may be recovered by owner. Person who is property owner of qualified real rental property must state on form required to be filed with rent leveling board or similar agency charged with regulating rent or, where no such board exists, with municipal tax collector, total property tax rebate paid with respect to qualified real rental property and must certify compliance with provisions of Act. Form must be filed within 30 days following notification by municipal tax collector of amount of property tax reduction. At such time municipal tax collector shall post in prominent place within property notice containing listing of specific amount of rent rebate per year and per month for each category of rent payable. Director of Division of Local Government services by regulation prescribes procedures for computing property tax reduction rebates in 1977 and thereafter and necessary forms used for notices required by Act. Property owner of qualified real rental property failing to provide tenant with property tax rebate in accordance with Act is liable to tenant for twice amount of property tax rebate to which tenant is entitled or $100, whichever is greater. Landlord failing to provide property tax rebates to tenants in accordance with Act or who knowingly or willfully fails to provide or post any notice, certification, information or statement required by Act liable for penalty of not more than $100 for each offense. Penalty collected and enforced by summary proceedings pursuant to Penalty Enforcement Law. (NJSA 2A:58-1 et seq.). Superior Court and municipal court of municipality in which qualified real rental property located has jurisdiction over such proceedings. Process is in nature of summons or warrant and is issued upon complaint of local law enforcement agency or tenant of qualified real rental property. Money received as result of said proceedings is paid to governing body of municipality in which qualified real rental property located. (NJSA 54:4-6.12).

Real Estate Transfer Fee.

See category 21 Property, topic 21.06 Deeds, subhead Taxes.

22.17 SALES AND USE TAXES:

Sales Tax.

Imposition.

Effective July 15, 2006, 7% sales tax levy is imposed upon receipts other than those paid with federal food stamps: (a) From every retail sale of tangible personal property (some restrictions for exempt organization-operated shop or store); (b) from sale of services (1) of processing customers’ personal property or digital property not for resale, except such services performed on tangible personal property delivered to purchaser outside New Jersey for use outside New Jersey, (2) of installing, maintaining or repairing in ordinary course of business tangible personal property or digital property not held for resale (excluding such services performed on tangible personal property delivered to purchaser outside New Jersey and receipts from laundering, cleaning, tailoring and shoe repairing and receipts from making capital improvement to existing land or buildings), (3) of storing of tangible personal property not held for resale, rental of safe deposit boxes and furnishing of storage space, (4) of maintaining, servicing or repairing real property (excluding services for capital improvements other than landscaping services and installing carpeting and other flooring, and repairs to heating units servicing three or less families, and services under contracts for terms exceeding 30 days for cleaning, garbage removal, sewer service and maintenance but wages paid by employers to employees for doing such work are not receipts subject to tax), (5) in connection with direct-mail advertising processing services, (6) utility service provided to persons in State, any right or power over which is exercised in State, (7) tanning services, (8) massage, bodywork or somatic services (except provided pursuant to doctor’s prescription), (9) tattooing, (10) investigation and security services, (11) information services, (12) transportation services originating in New Jersey and provided by limousine operator (except provided in connection with funeral services); (c) from sale of food and drink in restaurant or other eating establishment and food prepared for service as meal off premises (exemption for such food or drink sold to airline for consumption in flight); (d) of rents from hotel rooms in excess of $2 per day not rented to permanent hotel guests; (e) from admission charges exceeding 75¢ to any place of amusement in State (except admission charges where patron uses facilities such as swimming pool or bowling alley) and any admission or amusement charge for roof garden or similar place not taxed under (c); (f) (1) receipts from every sale, except for resale, of intrastate or interstate telecommunications charged to address in New Jersey, regardless of where services are billed or paid, (2) receipts from every sale, except for resale, of intrastate or interstate mobile telecommunication services billed by customer's home service provider to customer with place of primary use in New Jersey; (g) receipts from every sale, except for resale of prepaid telephone calling arrangements and recharge of arrangements; (h) initiation fees, membership fees or dues for access or use of property or facilities of certain health and fitness, athletic, sporting or shopping club; (i) receipts from parking, storing or garaging motor vehicle, excluding charges for certain residential, employee and municipal metered parking. Sales of tangible personal property to all contractors, subcontractors or repairmen of materials and supplies for use by them in building or repairing structures for others are retail sales. Contractors, subcontractors and repairmen required to pay tax directly to director, and vendors to them are exempted from collecting tax. (NJSA 54:32B-1 et seq.).

Exempt Sales.

Among many exemptions are prescription medicines and devices for preserving health or alleviating medical or dental conditions (other than equipment and supplies purchased for use in providing medical services for compensation, but not transferred to purchaser of services); food, food products, beverages (candy and carbonated soft drinks are not exempt); sales of disposable household paper products, including towels, napkins, toilet tissues, cleaning tissues, diapers, paper plates and cups purchased for household use; sales of tangible personal property sold through coin-operated vending machines at 25¢ or less; sales of food in schools and institutions of learning including clubs associated therewith; clothing other than clothing containing fur as major component; sales of production machinery, apparatus or equipment for use or consumption directly and primarily in publication or newspapers in newspaper production department, or in production of tangible personal property for sale by persons engaged in business of commercial printing, periodical, book, manifold business form, greeting card or miscellaneous publishing and typesetting, photoengraving, electrotyping and stereotyping and lithographic platemaking; sales, renting and leasing of certain commercial trucks, truck tractors, tractors, trailers, or semitrailers, and repair parts and replacement parts for such vehicles, provided vehicles are registered in New Jersey; services involving installation, maintenance, servicing, or repair rendered with respect to trucks, tractors, trailers or semitrailers by person who is not engaged, directly or indirectly, in regular trade or business offering such services to public; sales, repairs, or conversions of ships and barges exceeding 50 tons burden used in interstate and foreign commerce including component cargo containers or commercial fishing vessels and equipment or other vessels primarily engaged in commercial party boat sport fishing subject to annual inspection by U.S. Coast Guard and fuel, provisions, supplies, maintenance and repairs of such vessels (other than original equipping of new ship); sales of machinery, apparatus or equipment for use of consumption directly and primarily in production of tangible personal property by manufacturing, processing, assembling or refining; sales of machinery and equipment for use or consumption directly and primarily in operation or production of utility services, sewage systems and agricultural products (excluding energy, motor vehicles, parts with life of less than one year, and small tools or parts), sales of various telephone equipment to service provider (subject to regulatory approval); sales of machinery, apparatus, equipment or building materials used directly and primarily for cogeneration in cogeneration facility; sales of machinery, apparatus or equipment (other than that used in operation or construction of towers) to licensed commercial broadcaster or provider of cable/satellite television program services which is used or consumed in production of transmission of radio and television broadcasts; sales of tangible personal property used or consumed directly and primarily in production of video or film for sale; sales of tangible personal property, except energy, for use or consumption directly and exclusively in experimental or laboratory research and development; railroad locomotives and rolling stock and motorbuses and equipment which are used by common carriers or contract carriers for school children; motor fuels subject to tax under Gasoline Tax; school text books, subject to regulations of Director of Division of Taxation; renting, leasing or interchanging of trucks, tractors, and trailers by persons not regularly engaged in those businesses with persons engaged in regular trade or business involving carriage of freight by such vehicles; sales of gold and silver and storage thereof in form traded on any licensed contract market or board of trade or exchange; solar energy devices or systems; receipts from sales of buses for public passenger transportation, including repair and replacement parts and labor therefor, to bus companies whose rates are regulated by Interstate Commerce Commission or Department of Transportation or affiliate of said bus companies or to common or contract carriers for their use in transportation of children to and from school; sales of advertising or promotional materials for distribution by New Jersey direct mail advertising or promotional firm to out-of-state recipients including all processing services. Sales of aircraft including repair and replacement parts utilized by air carriers as defined by Civil Aeronautics Board having their principal place of operation in New Jersey; sales of tangible personal property purchased for lease if property, use of property or lessee is exempt from tax, but not subsequent lease of property for nonexempt use or to nonexempt person or if property converted to nonexempt use; sales of gas, other than natural gas, water, steam or fuel delivered to consumers through mains, lines, pipes or in containers or bulk; sales of motor vehicles, aircraft, boats or other vessels purchased by nonresident having no permanent place of abode in New Jersey, if vehicle, aircraft, boat or vessel will not be used in business in New Jersey and aircraft, boat or vessel will not be based in New Jersey during 12 months from purchase other than on transient basis or for repairs. Nonresident purchaser of vehicle, aircraft, boat or vessel must furnish affidavit of compliance with above conditions prior to delivery. Imprinting services performed on machinery, apparatus, or equipment for use or consumption directly and primarily in production of tangible personal property by manufacturing, processing, assembling or refining and exempt from tax (NJSA 54:32B-8.13); sale of electricity, or natural gas or utility service used to generate electricity, or used for cogeneration, for resale, if certain conditions met; sale or use of energy and utility service to or by certain persons or utility corporations; sale or use of energy and utility service to certain manufacturing facilities, if certain conditions met (NJSA 54:32B-8.1 et seq.); sale of firearm trigger locks and firearm vaults (NJSA 54:32B-8.51); sale, repair, alteration or conversion of certain ships (NJSA 54:32B-8.12); sale of wrapping supplies for incidental use in delivering personal property (NJSA 54:32B-8.15); sale of containers and sale of production and conservation services for certain farming operations (NJSA 54:32B-8.16); certain purchases and sales relating to Hurricane Floyd (NJSA 54:32B-3); certain rentals of property on which sales tax paid between related parties not engaged in regular trade of renting such property (NJSA 54:32B-8.53); sales at concession stands at state-owned residential Veterans' Facilities (NJSA 54:32B-8.54); certain vehicles certified pursuant to California Air Resources Board as zero emissions vehicle (NJSA 54:32B-8.55).

Exempt Organizations.

Except for motor vehicles sold by them, sales or amusement charges by or to types of organizations listed below are exempt: State, its agencies and political subdivisions; U.S., its agencies and instrumentalities insofar as it is immune from taxation as purchaser, user, or consumer or where it sells services or property of a kind not ordinarily sold by a private person; United Nations or similar international organizations; certain charitable and nonprofit organizations which have obtained certificates of tax immunity. (NJSA 54:32B-9).

Payment of Tax.

Customer liable for payment of tax, but vendor may advertise that vendor will pay tax for customer. (NJSA 54:32B-14). Vendor is liable for collection of tax. Vendor must obtain registration number from Director, Division of Taxation, State Department of Treasury. Returns are due on or before the 28th day of each calendar month for the whole of immediately preceding calendar month except Director by regulation may prescribe shorter filing and payment periods for classes of taxpayers. (NJSA 54:32B-17).

Special Procedure for Motor Vehicles and Boats.

Prior to registration of motor vehicles proof must be furnished on forms issued by Department of Motor Vehicles that tax has been paid. Department of Conservation and Economic Development has same provision for boats. (NJSA 54:32B-13[b]).

Use Tax.

Compensating use tax at 7% (effective July 15, 2006) is imposed on use of property described under Sales Tax. Storage or withdrawal from storage of tangible personal property by manufacturer or assembler is not taxable use. Exemptions and exceptions similar to Sales Tax. (NJSA 54:32B-6).

22.17A TRANSPORTATION TAXES:

Railroad Tax.

See category 3 Business Regulation and Commerce, topic 3.08 Carriers.

22.18 [RESERVED]

22.19 USE TAXES:

See topic 22.17 Sales and 22.18 Use Taxes.

22.20 UTILITIES TAX:

Transitional Energy Facility Assessment (TEFA).

Every gas and electric light, heat and power corporation, municipal or otherwise, subject to provisions of NJSA 54:30A-49 et seq. (gross receipts tax) prior to Jan. 1, 1998, or its successors or assigns shall annually pay TEFA. (NJSA 54:30A-103 et seq.). Assessments determined by Director of Division of Taxation. *Note:* Assessments for 2004 frozen through 2006, then phased out from 2007 through 2010.

Additional Assessment.

Municipal electric utility otherwise exempt from TEFA that collects sales tax or electricity sales not exempt from sales tax pursuant to NJSA 54:32B-8.46 shall also collect on each nonexempt sale in any year in which TEFA imposed, additional assessment, in place of TEFA, equal to TEFA rate surcharge that would have been applicable to that sale if that sale had been made by electric public utility, other than municipal electric utility.

Reporting.

(NJSA 54:30A-105).

Annual statements to Director due every Feb. 1 during assessment period, on such form as Director shall require, showing therms of natural gas and kilowatt-hours of electricity sold or transported for sale to ultimate consumers in State during prior calendar year; and TEFA unit rate surcharges (exclusive of provision for corporation business taxes included therein) applicable to prior calendar year.

Annual statement of taxation and assessment liability to Director due on or before Oct. 1 during assessment period, on such form as Director shall require showing actual TEFA liability from Jan. 1 through Sept. 30 and estimated liability from Oct. 1 through Dec. 31 for current calendar year.

Surcharge Reduction.

On or before Nov. 15 of every year in assessment period, State Treasurer shall, with cooperation of Board of Utilities, calculate percentage reduction in initial TEFA unit rate surcharges based upon formula set forth in NJSA 48:2-21.34.

Annual TEFA Statement.

On or before Apr. 1 during every year in assessment period, Director shall send to each corporation subject to TEFA statement showing TEFA liability for prior calendar year, estimated payment received for prior calendar year and any overpayment or underpayment of tax liability for that calendar year. Underpayments due to Director on or before May 15 of current year. Overpayments treated as estimated payments.

Payment.

Director shall annually, on or before May 10 of each year thereafter during assessment period, calculate and certify to corporation of assessment uniform TEFA to be paid. All payments shall be made in full on annual basis to State on May 15 of each year thereafter during assessment period. (NJSA 54:30A-119).

23 TRANSPORTATION

23.01 MOTOR VEHICLES:

Motor Vehicle Act is Tit. 39.

Motor vehicles are under supervision of New Jersey Motor Vehicle Commission. Commission is headed by Chief Administrator in Trenton, N. J. 08625. (NJSA 39:2A-4, 52:17B-3, 52:17B-3, 52:17B-19 – 52:17B-21).

Registration in New Jersey of all vehicles owned or leased (NJSA 39:1-1) (including motorcycles, snowmobiles, recreation vehicles, and all-terrain vehicles), except vehicles owned by nonresidents and registered elsewhere (see infra, subhead Foreign Motor Vehicles) required; however, resident acquiring and temporarily registering vehicle elsewhere may operate in New Jersey until temporary registration expires; passenger automobile registrations expire on last day of 12th calendar month following month issued (NJSA 39:3-4), and fee is based on manufacturer's shipping weight (NJSA 39:3-8) see http://www.state.nj.us/mvc/Vehicle/Fees.htm; other registrations generally expire on Mar. 31 of each year, fees being based on passenger capacity of omnibuses (NJSA 39:3-19), and gross weight of trailers and commercial vehicles (NJSA 39:3-8, 39:3-20). Person registering uninsured motor vehicle must pay fee into Unsatisfied Claim and Judgment Fund. (NJSA 39:6-63). For description of Fund, see category 16 Insurance, topic 16.01 Insurance Companies. Official markers must be displayed on front and rear, or on rear if only one is issued. (NJSA 39:3-33). Markers must be displayed not less than 12 inches nor more than 48 inches from ground in horizontal position and may not swing. Lessee in motor vehicle leasing agreement or owner of motor vehicle who obtains base set of personalized, courtesy or special license plates with special identifying marks may obtain and use second set in series for use upon another motor vehicle if owned or leased by that person. (NJSA 39:3-33b). Additional license required for solid fuel delivery vehicles (NJSA 51:8-5) and conveyances used to transport or deliver motor fuel (NJSA 54:39-41). Members of Armed Forces who have registered vehicle may obtain refund on certain conditions. (NJSA 39:3-22.1).

See also category 22 Taxation, topic 22.17 Sales and 22.18 Use Taxes, subhead Sales Tax.

Specialty License Plates.

New Jersey Motor Vehicle Commission shall, upon proper application, issue personalized license plates as provided in NJSA 39:3-27 et seq. See http://www.state.nj.us/mvc/Vehicle/Agriculture.htm.

For example, Commission may issue for motor vehicle owned or leased and registered in state special license plates bearing, in addition to markings and identification required by law, appropriate slogan and emblem to be designed by superintendent of State Police to honor law enforcement officers killed in line of duty in New Jersey. Commission shall collect for each set of plates issued application fee of $50, and annual renewal fee of $10, in addition to fees otherwise prescribed by law for registration of motor vehicles. Said fees shall be deposited into “Law Enforcement Memorial Fund.” Commission may issue for motor vehicle owned or leased and registered in State special license plates bearing, in addition to marking or identification otherwise required by law, slogan “Be An Organ Donor.” Application for plates shall be made to Commission who collects application fee of $50 and annual renewal fee of $10, in addition to fees otherwise prescribed by law for registration of motor vehicles. (NJSA 39:3-27.127). New Jersey Transplant Association shall contribute amount to be determined by Commission, not to exceed total of $50,000, to be used to offset initial costs. (NJSA 39:3-27.128). See http://www.state.nj.us/mvc/Vehicle/DedicatedPlates.htm. Commission shall notify eligible motorists of opportunity to obtain organ donor license plates (NJSA 39:3-27.129), and shall annually certify to Commissioner of Transportation average cost per license plate incurred in immediately preceding year (NJSA 39:3-27.130). Special fund known as “Organ and Tissue Donor Awareness Education Fund” is established in Department of Treasury. (NJSA 54A:9-25.17).

Operator’s license required; operator must not be under age of 18 for basic driver license; must qualify by examination; provisional license for unsupervised driving available at 17; student learner’s permit for supervised driving and limited operations in agricultural pursuits available at 16. (NJSA 39:3-10, 39:3-11.1). No person shall sit for examination for any permit or road test unless that person exhibits photo identification deemed acceptable by commission. (NJSA 39:3-10). Effective Feb. 1, 1991, each license application must contain licensee’s home or business address. (NJSA 39:3-9b). However, certain crime victims (NJSA 2C:12-10) may use post office box or address other than their own address (NJSA 39:3-96). Any person applying for license must surrender any current out-of-state license issued once New Jersey license is received. (NJSA 39:3-10). Operator not previously licensed in New Jersey or any other state is issued license on two-year probationary basis. (NJSA 39:3-10b). Operator’s license will be denied to persons who cannot demonstrate that their presence in U.S. is authorized under federal law. (NJSA 39:3-13.1). Fee is $24 for basic license; expires after 48 months. (NJSA 39:3-10f). Learner’s permit required. (NJSA 39:3-13, 39:3-13.1). Special license is necessary for operator of bus. (NJSA 39:3-10.1). License and registration must be in possession of operator and exhibited when requested by officer in performance of duties. (NJSA 39:3-29). Commission may, at its discretion and for good cause shown, issue licenses that expire on fixed date. Commission may fix expiration date based on period in which person is present to be in U.S. under federal immigration laws. (NJSA 39:3-10). Members of Armed Forces who hold valid license upon entering service in time of war or emergency are privileged under certain conditions for prescribed periods of time. (NJSA 39:3-11.5). Possessor of documents that falsely purport to be operator’s license or other document issued by government agency to verify person’s age, identity or any other personal identifying information is guilty of disorderly persons offense and may lose driving privileges for at least six months, up to two years. (NJSA 2C:21-2.1[d], 2C:21-2.1[e]). Person who knowingly exhibits or displays such documents is guilty of crime of fourth degree and may lose driving privileges for at least six months, up to two years. (NJSA 2C:21-2.1[c], 2C:21-2.1[e]). Person who knowingly sells or distributes such documents is guilty of third degree crime and may lose driving privileges for at least six months, up to two years. (NJSA 2C:21-2.1[a], 2C:21-2.1[e]). Each license and each renewal shall have digitalized color picture of licensee. (NJSA 39:3-10f).

No person to whom driver's license has been refused or whose driver's license or reciprocity privilege has been suspended or revoked, or who has been prohibited from obtaining driver's license, shall personally operate motor vehicle during period of refusal, suspension, revocation, or prohibition. (NJSA 39:3-40). Upon conviction for first offense, violator fined $500. Upon conviction for second offense, violator fined $750 and imprisoned in county jail for at least one but not more than five days. Upon conviction for third or subsequent offense, violator fined $1,000 and imprisoned in county jail for ten days. Upon conviction for third or subsequent offense, violator fined $1,000 and imprisoned in county jail for ten days. Upon conviction, court shall impose or extend period of suspension not to exceed six months and shall impose period of imprisonment for not less than 45 days or more than 180 days, if while operating vehicle in violation of this section, person involved in accident resulting in bodily injury to another person. (NJSA 39:3-40).

New Jersey Commercial Driver License Act.

Operators of commercial motor vehicles must pass knowledge and skills tests, to be adopted by Motor Vehicle Commission, which comply with standards under federal Commercial Motor Vehicle Safety Act of 1986. (NJSA 39:3-10). Commercial driver licenses will be issued only to New Jersey domiciliaries who operate or will operate commercial motor vehicle. Holder of out-of-state commercial driver license must apply to transfer it within 30 days of moving to New Jersey. (NJSA 39:3-10.17). Required fee for commercial driver license examination or learner's permit is $35. Fee for obtaining or renewing license, good for 48 months, is $32, plus $2 for each endorsement for different class of commercial vehicle. After issuance of commercial driver license, examination or learner's permit for additional endorsements is $10. (NJSA 39:3-10.30). Exempt from licensing provisions are operators of firefighting apparatus, operators of emergency or rescue equipment operated for purposes of first aid, ambulance, rescue squad or disaster control, non-civilian operators of U.S. Department of Defense or National Guard vehicles, or operators of farm vehicles used to transport farm products, machinery and supplies within 150 miles of person's farm. (NJSA 39:3-10k, 39:3-10[R]). Every owner of commercial motor vehicle must display gross vehicle weight rating (GVWR) on vehicle if GVWR is 26,000 lbs. or more and vehicle is registered or principally garaged in New Jersey. (NJSA 39:4-46).

Titles and Sales.

Purchaser must submit title papers to Commission within ten days. Certificate of ownership is issued by Commission; fee is $20. Every person must have certificate of ownership and registration certificate, or if foreign vehicle, evidence of registration and plates, or documents showing title to or right of possession for every motor vehicle in possession in this state. (NJSA 39:10-1 – 39:10-18). Seller must remove license plates and surrender them to Commission. (NJSA 39:3-30).

Auto Body Repair Facility.

Commission shall establish system for licensure of auto body repair facilities, which may provide for licenses based upon type or types of motor vehicles repaired by facility and equipment required for repair. Revenue received from application fees and renewals shall be annually appropriated to Department of Transportation. (NJSA 39:13-2). If auto body repair facility fails to maintain its equipment and facilities in good operating condition or operates without license (NJSA 39:13-4), Commission may issue and cause to be served upon auto body repair facility order requiring facility to cease and desist from violation and may impose upon facility civil penalty of not more than $5,000 for first offense, not more than $20,000 for second and each subsequent offense. In event of continued or serious violations, Commission may suspend license of facility and require it to cease operations during period of suspension. (NJSA 39:13-6).

Liens and Encumbrances.

Note: Uniform Trust Receipts Act repealed by Uniform Commercial Code (NJSA 12A:10-

105), effective Jan. 1, 1963.

For garage-keeper's lien, see category 8 Debtor and Creditor, topic 8.13 Liens. For lien of conditional vendor, see category 3 Business Regulation and Commerce, topic 3.25 Sales. For lien of mortgagee, see category 20 Mortgages, topic 20.01 Chattel Mortgages. Filing is required for motor vehicles required to be registered. (NJSA 12A:9-302). Filing provisions of Uniform Commercial Code do not apply to motor vehicles, except those constituting inventory. (NJSA 12A:9-103[2]-[3], 12A:9-302[3][b]; NJSA 39:10-8 – 39:10-11). Notice of security interest must appear on assignment of certificate of ownership; certificate of ownership issued by Commission will carry notation thereof. Commission maintains file, extracts of which are available to any person, of conditional sales contracts and chattel mortgages of motor vehicles. (NJSA 39:10-9, 39:10-11; NJSA 39:10-14). Provisions of NJSA 39:10 supersede, as to motor vehicles, normal refiling requirements applicable to conditional sales. (125 N. J. L. 319, 15 A.2d 321). Upon proper levy or attachment, persons surrendering possession must surrender title papers upon demand of Director, and person taking possession must notify Commission thereof. (NJSA 39:10-15).

Identification Marks.

Every motor vehicle must have and contain manufacturer's number. (NJSA 39:10-7).

Theft Prevention.

Registered owner of motor vehicle may sign informed consent form, with local chief law enforcement officer or designee present, indicating vehicle is not normally operated between 1 and 5 A.M. Owner can then obtain decal, which authorizes any police officer to stop vehicle during those times and request driver's license, registration and insurance card. If driver cannot produce these documents, officer shall investigate further to determine if driver is registered owner or has permission to operate vehicle. (NJSA 39:3-85.6).

Operation Prohibited.

By person without consent of owner; under influence of liquor or any controlled dangerous substance or prescription legend drug (unless obtained from duly licensed person), or while ability to operate impaired by consumption of alcohol; or without license. (NJSA 39:3-10, 39:3-40, 39:3-4 – 39:3-48, 39:3-50). Operation of motor vehicle without consent of owner (lessee) or riding in vehicle knowing it was taken without consent is punishable as fourth degree crime. Operation of motor vehicle without consent and in such manner that creates risk of injury to persons or property is punishable as third degree crime. (NJSA 2C:20-10). Operation of motor vehicle registration of which has been revoked is prohibited. (NJSA 39:3-40). Regulation of continuous service of driver of any bus or commercial vehicle will be governed by regulations to be adopted by Superintendent of Police in consultation with Federal Division of Motor Vehicles. (NJSA 39:9-2, am'd by P.L. 1991, c. 491). Certain dangerous loads are forbidden. (NJSA 21:1A-137; NJSA 27:12B-18; NJSA 32:1-154.8, 32:1-154.18). Transportation of radioactive or hazardous materials subject to regulation. (NJSA 39:5B-18-32). Use of wireless telephone or electronic communication device by operator of motor vehicle, including listening, talking or text messaging, is prohibited unless using hands-free setting. Fine is $100. Exceptions if operator reporting criminal act, road hazard or accident, or if operator's safety or safety of others endangered. (NJSA 39:4-97.3, am'd. by P.L. 2003, c.310; P.L. 2007, c.198).

Size and Weight Limits.

Regulated by Tit. 39, c. 3-passim. (NJSA 39:3-84).

Equipment Required.

Regulated by Tit. 39, cc. 3-4-passim.

Driver and front seat passenger of passenger automobile shall wear properly adjusted and fastened safety seat belt system, as defined by Federal Motor Vehicle Safety standard Number 209; driver shall so secure passenger in front seat who is five years of age but less than 18 years of age. (NJSA 39:3-76.2f). Operator must secure child under age of eight years with approved child passenger restraint system, except that child 18 months of age or more but under eight years of age must be secured in booster seat with safety belt in rear seat. (NJSA 39:3-76.2a).

Penalties provided for violation, except that enforcement of NJSA 39:3-2 only as secondary action when driver detained for other suspected motor vehicle violation or some other offense. (NJSA 39:3-76.2d, 39:3-76.2 j). Act does not change existing laws, rules or procedures pertaining to trial of civil action for damages or death sustained in motor vehicle accident. (NJSA 39:3-76.2h).

Lights Required.

Regulated by NJSA 39:3-46 – 39:3-66. Driver of motor vehicle required to activate interior light of vehicle when stopped by law enforcement officer at night and requested to activate light. (NJSA 39:4-57.1).

Compulsory inspection and correction of mechanism and equipment is provided for. (NJSA 39:8).

Accidents.

Operator must stop, render aid, give name, address, registration and license numbers and show insurance identification card to persons involved or to police if persons involved are not in condition to receive information, and in case of personal injury, death or apparent property damage of $250 or more, report accident to police immediately and make written report to Commission within ten days. (NJSA 39:4-129 – 39:4-131). Person who knowingly injures dog, cat, horse or cattle must stop and report same to police or to S. P. C. A. (NJSA 4:22-25.1). Commissioner of Transportation shall annually compile and make available to public information submitted to Commission concerning cellular telephones in motor vehicles involved in traffic accidents. Report shall note whether operator of motor vehicle was using cellular telephone when accident occurred. (NJSA 27:1A-5.19). Commission shall prepare and supply to police departments and other suitable agencies, forms for accident reports calling for sufficiently detailed information with reference to motor vehicle accident, including cause, conditions then existing, persons and vehicles involved, compliance with NJSA 39:3-76.2e et seq. by operators and passengers of vehicles involved in accident, whether operator of vehicle was using cellular telephone when accident occurred, and such other information as Commission may require. (NJSA 39:4-131).

Liability of Owner.

Generally, owner is liable for injury caused by negligence of operator only when latter is agent or servant of owner and acting within scope of authority. (105 N. J. L. 577, 146 A. 185). Proof of ownership raises permissive inference of fact that operator was driving as agent or servant of owner and within scope of employment. (119 N. J. L. 474, 196 A. 649; see also NJSA 39:4-129). Owner keeping car for family use liable for injury caused by negligence of member of family in course of such use. (86 N. J. L. 348, 91 A. 322; 101 N. J. L. 110, 127 A. 175. See also 76 N. J. L. 754, 71 A. 296).

Guests.

No statutory restriction of liability for injury to a gratuitous guest in car.

Financial Responsibility.

Where unpaid judgment for damages because of personal injury or death, or damage to property in excess of $500 due to ownership or use of car remains unpaid in U.S. for 60 days and no appeal is taken, Commission must suspend judgment debtor's operator's license and registration certificates on receiving copy of such judgment; in case of nonresident operator, privilege to operate vehicle here is withdrawn if judgment is unpaid, and Commission must transmit to licensing authorities of operator's home state copy of unsatisfied judgment. (NJSA 39:6-35, 39:6-36).

Within 90 days after receipt of a report of an accident within this state resulting in injury or death, or property damage in excess of $500, the Commission must suspend the license and registration of operators and owners of vehicles involved, and New Jersey operating privilege of nonresidents unless (a) there was in effect at the time of the accident an automobile liability policy with respect to the motor vehicle involved, or (b) the Commission has on file, within 20 days after the receipt of accident report, satisfactory evidence of the nonliability of the owner or operator concerned, or of the execution of a written agreement providing for installment payments with respect to all claims for injuries or damages. (NJSA 39:6-25).

For Unsatisfied Claim and Judgment Fund, see category 16 Insurance, topic 16.01 Insurance Companies.

See also infra, subhead Motor Vehicle Carriers.

Insurance.

Compulsory automobile liability insurance coverage required: $15,000 for injury to or death of one person in one accident; $30,000 for injury to or death of more than one person in one accident; $5,000 for property damage in one accident. (NJSA 39:6A-3). Policies are subject to rating system, which shall produce adequate and sufficient rates to meet plan's losses and expenses. (NJSA 17:29D-1).

No-Fault Insurance.

Effective Jan. 1, 1973, in event of automobile accident causing personal injury to named insured, other permitted drivers, other occupants of vehicle or pedestrians, insurer liable without regard to negligence or fault for: all reasonable resulting medical expenses; payment for loss of income by income producer of up to $100 weekly and $5,200 lifetime maximum; reimbursement of expenses for essential services ordinarily performed by non-income producer injured, up to $12 per day and $4,380 lifetime maximum. Medical expense benefit payments subject to deductible of $250 on account of injury in any one accident and copayment of 20% of any benefits payable between $250 and $5,000; no insurer or health provider providing benefits has right of subrogation for amount of benefits paid pursuant to such deductible or copayment. In event of death as result of automobile accident of income producer or one performing essential services, survivors receive benefits which would otherwise be due deceased as well as reasonable funeral expenses up to $1,000. (NJSA 39:6A-4). Insurer must pay above benefits within 30 days after receipt of appropriate written notice. General exemption from tort liability for bodily injury to person arising out of ownership, operation, maintenance or use of automobile in New Jersey unless person sustained personal injury resulting in death, dismemberment, significant disfigurement, fracture, loss of fetus, permanent loss or consequential limitation of use of body organ, member, function or system, significant limitation of use of body function or system, or medically determined injury or impairment of non-permanent nature preventing injured person from performing substantially all of material acts constituting usual and customary daily activities for not less than 90 days during 180 days immediately following injury or impairment; subject, however, to election of insured to assume full liability for noneconomic loss to any person as result of bodily injury arising out of ownership, operation, maintenance or use of automobile in New Jersey. Foregoing tort options applicable to automobile insurance policies issued or renewed on or after Jan. 1, 1989. (NJSA 39:6A-8).

Effective Jan. 1, 1991, no-fault medical expenses paid cannot exceed $250,000 per person per accident; medical benefits paid in excess of $75,000 may be reimbursable to insurer from Unsatisfied Claim and Judgment Fund. (NJSA 39:6A-4). Insured can opt, at appropriately reduced premium, to increase medical expense benefit deductible, or to eliminate all benefits except medical expenses; insured can also opt to have other health insurance provide primary medical expense coverage. (NJSA 39:6A-4.3). Insurer must pay benefits within 60 days after appropriate written notice.

Direct Actions.

In general, no direct action by injured persons against the insurer.

Foreign motor vehicles owned by nonresidents (except vehicles used for transportation of persons for hire, compensation or profit, vehicles regularly operated in carrying on business in this state and vehicles primarily for transportation of property) may be operated in this state during such portion of entire year as free operation of a similar type of vehicle belonging to resident of, and registered in, this state is permitted in state or country of nonresident or, provided a permit is obtained from Commission, during normal period of seasonal employment in agricultural pursuits. Intrastate operation of truck, tractor or trailer (except trailer drawn by tractor registered in this state) prohibited, but reciprocal arrangements with other states permitted. (NJSA 39:3-15, 39:3-15.1, 39:3-17; see 4 N. J. 346, 72 A.2d 851).

Resident owner can operate automobile registered under law of foreign country 20 days after import. (NJSA 39:3-4f).

Nonresident Operators.

Touring privileges of foreign vehicle extend to driver of such vehicle, provided driver has complied with laws of state or country of residence. Nonresident driver of New Jersey registered vehicle must be holder of license from state or country of residence and be 17 years of age or over and must have in possession registration certificate and driver’s license. (NJSA 39:3-17). Nonresident’s privilege of driving without New Jersey license continues for 60 days after establishing New Jersey residence. (NJSA 39:3-17.1). New Jersey is party to Interstate Driver’s License Compact under which it reports convictions of motor vehicle offenses to home state of offenders, if such state is party to Compact. Home state required by Compact to give same effect to conviction as if offense had occurred in home state. (NJSA 39:5D-4).

Service upon nonresident owner or operator of vehicle not licensed in New Jersey, or upon former resident of New Jersey, in civil action arising out of accident in New Jersey, may be made by service of process upon Motor Vehicle Commission, who thereupon sends notice of service and copies of summons and complaint to such nonresident. (NJSA 39:7-2, 39:7-3).

Nonresident must be required, by magistrate before whom he is brought as result of accident in New Jersey and as condition to release on bail or otherwise, to execute written power of attorney to Commission for acceptance of service of process in any civil suit by resident arising out of that accident. (NJSA 39:7-7).

Motor Vehicle Carriers.

Motor busses must have municipal permit and approval of Department of Transportation and, in general, must carry insurance; must pay license fee or franchise tax to municipality; busses in interstate commerce must also pay excise tax to state. Owners of busses operating interstate must file monthly mileage reports with Director and pay monthly franchise tax. (NJSA 48:2-1, 48:2-14; NJSA 48:4; NJSA 48:16-23 — 48:16-28). Taxicabs, autocabs, limousines and livery services must have municipal permit and, in general, must carry insurance. (NJSA 48:16-1 – 48:16-22). See also supra, subhead Operation Prohibited.

Driving While Intoxicated.

Person who operates motor vehicle while under influence of intoxicating liquor, narcotic, hallucinogenic or habit-producing drug, or operates motor vehicle with blood alcohol concentration of 0.08% or higher but less than 0.10% by weight of alcohol in defendant's blood or permits another person in one of above conditions to operate motor vehicle in defendant's custody or control shall be subject on first offense to fine of not less than $250 nor more than $400; period of detainment of not less than 12 hours nor more than 48 hours spent during two consecutive days of not less than six hours each day; in discretion of court, term of imprisonment of not more than 30 days; and immediate forfeiture of right to operate motor vehicle in New Jersey for three months. (NJSA 39:4-50[a][1][i]). Person shall forthwith forfeit rights to operate motor vehicle in N.J. for three months. For blood alcohol concentration of 0.10% or higher, fine is not less than $300 nor more than $500, period of detainment is not less than 12 hours nor more than 48 hours, and discretionary term of imprisonment is not more than 30 days. Forfeiture of driving privileges is for not less than seven months nor more than one year. (NJSA 39:4-50[a][1][ii]). For second violation, person shall be subject to fine of not less than $500 nor more than $1,000, shall be ordered by court to perform community service for period of 30 days, shall be sentenced to imprisonment for term of not less than 48 consecutive hours nor more than 90 days, shall forfeit right to operate motor vehicle in N.J. for two years, and shall be required to install ignition interlock device or shall have registration certificate and registration plates revoked for two years. (NJSA 39:4-50[a][2]). For third or subsequent violation, person shall be subject to fine of $1,000, shall be sentenced to imprisonment for term of not less than 180 days in county jail or workhouse, shall forfeit driving privileges for ten years, and shall be required to install ignition interlock device or shall have registration certificate and registration plates revoked for ten years. (NJSA 39:4-50[a][3]). See http://www.state.nj.us/mvc/Violations/dui.htm.

Gasoline Tax.

See category 22 Taxation, topic 22.08 Gasoline and Special Fuels Taxes.

Sales Tax.

See category 22 Taxation, topic 22.17 Sales and 22.18 Use Taxes.

23.02 RAILROADS:

See category 3 Business Regulation and Commerce, topic 3.08 Carriers.

23.02A COMMERCIAL CODE FORMS:

See Part III, Uniform and Model Acts, Commercial Code Amendments, National Forms.

1
NEW MEXICO LAW DIGEST

—Scope —

Revised for 2010 edition by

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(Citations, unless otherwise indicated, are to chapters, articles, and sections of New Mexico Statutes Annotated, 1978. Session laws are cited by year, chapter number and, where relevant, section number [s.s. indicates special session]. "LR" indicates Local Rules of the District Courts; "NMSC" indicates New Mexico Supreme Court;

“NMAC” indicates New Mexico Administrative Code; “NMSA” indicates New Mexico Statutes Annotated. Court rules are contained in separately numbered volumes of 1978 statutes. Parallel citations to the Pacific Reporter begin with 3 N. M.)

Note: Revisions include all legislation through Mar. 21, 2009 produced by regular legislative session for current year. Regular sessions of Legislature are held annually starting in Jan.

1 INTRODUCTION

1.01 GOVERNMENT AND LEGAL SYSTEM:

The State of New Mexico is a constituent state of the United States of America. For further discussion of the U.S. federal system, see Introduction to the Federal Government of the United States at the beginning of this volume. A great many laws are promulgated by the federal government of the United States and are not reflected in the topics below. See the Introduction to this volume for references to the federal law topics covered.

Like all but one of the United States, New Mexico has a common law legal system, with roots in English common law. For information on the courts and legislature of New Mexico, see category 6 Courts and Legislature.

1.02 [RESERVED]

1.03 HOLIDAYS:

Legal Holidays.

Jan. 1, 3d Mon. in Jan., 3d Mon. in Feb., last Mon. in May, July 4, 1st Mon. in Sept., 2d Mon. in Oct., Nov. 11, 4th Thurs. in Nov., Dec. 25. (NMSA 12-5-2).

Holidays Falling on Sunday.

If legal holiday falls on Sun., following Mon. is legal holiday. (NMSA 12-5-3).

Banks.

Legal holidays for banks are Jan. 1, 3d Mon. in Jan., 3d Mon. in Feb., Memorial Day, July 4, 1st Mon. in Sept., 2d Mon. in Oct., Nov. 11, 4th Thurs. in Nov., Dec. 25. If holiday on Sun., following Mon. is legal bank holiday; if holiday on Sat., preceding Fri. is legal bank holiday. (NMSA 58-5-7).

Legality of Transactions on Sunday or Holiday.

Bills, checks, and notes payable or presentable for acceptance on legal holiday or Sunday are payable or presentable on next succeeding business day. (NMSA 12-5-3).

1.04 OFFICE HOURS AND TIME ZONE:

New Mexico is in the Mountain (GMT -07:00) time zone. Office hours are generally from 8:30 a.m. to 5:30 p.m.

2 BUSINESS ORGANIZATIONS

2.01 AGENCY:

Common law rules govern generally.

2.02 ASSOCIATIONS:

Formation.

Articles must be filed with Public Regulation Commission, fee $50, and recorded in county where principal office is located, fee $1. (NMSA 53-4-6).

Rights and Powers.

Cooperative associations may be incorporated to transact any lawful business and have usual corporate powers. (NMSA 53-4-3, -4).

Liabilities.

Members are not liable for association's debts and subscriber's liability is limited to unpaid balance on shares or membership certificates. (NMSA 53-4-29).

Annual report to commission is required. (NMSA 53-4-34).

Penalties are imposed for use of “cooperative” as part of name of association unless it is a cooperative association under laws of New Mexico or some other state. (NMSA 53-4-37).

Actions.

An unincorporated association may sue or be sued in its common name to enforce for or against it any substantive right. (NMSA 53-10-6).

Dissolution.

Two-thirds vote of entire membership required. (NMSA 53-4-36).

Nonprofit Cooperative Marketing and Agricultural Associations.

(See NMSA 76-12-1 et seq.) NMSA 76-12-8 removes fee requirement for cooperative marketing associations filing articles of incorporation with County Clerk. Association shall pay corporation commission $50 together with license fee.

Professional Associations.

See topic 2.03 Corporations, subhead Professional Corporations.

Real Estate Trusts.

See topic 2.04 Joint Stock Companies.

2.03 CORPORATIONS:

As general rule, sections of New Mexico Business Corporation Act (NMSA 53-11-1 to NMSA 53-18-12) are derived from various versions of A.B.A. Model Business Corporation Act. Set forth below are deviations from 1971 version of Model Act. Supplements and 1984 revision of Model Act have not been adopted unless otherwise noted.

References to “Secretary of State” in Model Act were changed to “commissioner” in state statute.

General Supervision.

Public Regulation Commission has general supervision of all corporations. Appeal may be taken from its actions. See category 5 Civil Actions and Procedure, topic 5.03 Appeal and Error.

Definitions.

Model Act § 2 enacted except: Definition of “employee” omitted. Only first sentence of definition of “shareholder” adopted. Additional definitions of “annual report”, “franchise tax”, “fees”, “commission”, “address”, and “delivery” included. (NMSA 53-11-2).

Purposes.

Model Act § 3 enacted with addition of credit unions, savings and loan associations, railroads, and water works listed as exceptions thereto. (NMSA 53-11-3).

General Powers.

Model Act § 4 enacted; subsections (C) and (N) modified; added section (Q) authorizing directors to resist potential change in control of corporation under some circumstances. (NMSA 53-11-4).

Indemnification of Directors and Officers.

Model Act § 5 enacted; subsection (d) modified. (NMSA 53-11-4.1).

Right to Acquire and Dispose of Own Shares.

Corporation may acquire and dispose of its own shares, with limitations placed on “treasury shares”, defined therein. (NMSA 53-11-5).

Corporate Name.

Model Act § 8 with added requirement that identifying word or abbreviation such as “corporation” be separate, and with added provision for consent by holder of similar name or court finding of prior right to name. (NMSA 53-11-7). Name clearance apart from name registration unavailable.

Registered Name.

Fee is $1 per month. (NMSA 53-11-9).

Failure to Appoint or Maintain Registered Agent.

Penalty is revocation 60 days after notice, but corporation may apply for reinstatement within first two years after effective revocation. (NMSA 53-11-12).

Change in Registered Agent's Address.

Similar to Model Act § 13 except that it also requires filing of statement from successor agent acknowledging acceptance of appointment. Notice of change must be filed with commission. (NMSA 53-11-13).

Service of Process.

Second and third paragraphs of § 14 of Model Act omitted from state statute. (NMSA 53-11-14).

Preferred or Special Classes of Shares.

Model Act § 16 adopted except: (1) No power to vary voting rights between different series of class of stock and (2) reference to franchise taxes omitted. (NMSA 53-11-16).

Issuance of Shares.

Model Act § 18 modified. (NMSA 53-11-18).

Authorized Shares.

Each corporation has power to create and issue number of shares stated in its articles of incorporation (NMSA 53-11-15).

Stock.

Issuance of shares of preferred or special classes in series governed by NMSA 53-11-16.

Stock Certificate.

Must be signed by chairman or vice chairman of board or president or vice president and by treasurer or assistant treasurer, secretary or assistant secretary of corporation. (NMSA 53-11-23).

Payment for Shares.

State law deletes subsections (a) and (f) from § 19 of Model Act. (NMSA 53-11-19).

Shareholders' Preemptive Rights.

Model Act Alternative § 26A adopted except subsection (a) omitted. (NMSA 53-11-26).

Stock Rights and Options.

Model Act § 20 modified. (NMSA 53-11-20).

Uncertificated Shares.

Model Act § 23 modified to permit conversion of shares represented by certificates to uncertificated shares. (NMSA 53-11-23).

By-Laws.

Phrase “subject to repeal or change by action of the shareholders” omitted from Model Act § 27. Optional § 27A not adopted. (NMSA 53-11-27).

Meetings of Shareholders.

Similar to Model Act § 28. (NMSA 53-11-28).

Notice of Shareholders' Meeting.

Model Act § 29 adopted except attendance in person or by proxy waives notice of meeting, except where attendance is for raising such objection. (NMSA 53-11-29).

Voting Record.

State statute adds to § 31 of Model Act provision that list must be prepared at least ten days before each meeting and open to inspection at registered office of corporation. (NMSA 53-11-31).

Quorum of Shareholders.

Model Act § 32 adopted except quorum once obtained cannot be broken by voluntary withdrawal. (NMSA 53-11-32).

Voting of Shares.

Similar to Model Act § 33 except: (a) Cumulative voting if articles of incorporation so provide, (b) articles may grant bondholders power to vote on specified matters, including election of directors, (c) power of custodian for minor equated with that of trustee, (d) any general partner may vote shares in name of any general or limited partnership, (e) shares in name of life tenant may be voted by him, (f) shares in name of bankruptcy trustee may be voted by trustee. (NMSA 53-11-33).

Shares Held for Account.

53-11-51 allows procedure whereby shareholder may certify that he holds shares for account of specified person, for purposes certified. See also NMSA 53-11-15.1, which provides similar procedure.

Stockholders' Liabilities.

Holder or subscriber to shares under no obligation to corporation or its creditors with respect to shares other than to pay corporation full consideration for shares. (NMSA 53-11-25).

Voting Trusts and Agreements.

Follows Model Act § 34. (NMSA 53-11-34).

Board of Directors.

Model Act § 35 adopted (NMSA 53-11-35), except subsection D modified.

Number of Directors.

Follows Model Act § 36. (NMSA 53-11-36).

Vacancies.

Model Act § 38 enacted. (NMSA 53-11-38).

Removal of Directors.

Model Act § 39 modified. (NMSA 53-11-39).

Directors' Meetings.

Governed by NMSA 53-11-42.

Powers and Duties of Directors.

Set forth in NMSA 53-11-35.

Quorum of Directors.

Similar to Model Act § 40 except quorum once obtained continues despite voluntary withdrawals. (NMSA 53-11-40).

Director Conflicts of Interest.

Model Act § 41 adopted with modification. (NMSA 53-11-40.1).

Executive Committee.

Model Act § 42 substantially adopted. (NMSA 53-11-41).

Distributions to Shareholders.

Model Act § 45 adopted. (NMSA 53-11-44).

Loans to Employees and Directors.

Model Act § 47 omitted.

Liability of Directors.

Model Act § 48 adopted with modifications. (NMSA 53-11-46). Articles of incorporation may provide that director shall not be personally liable for monetary damages for breach of fiduciary duty as director, with certain limitations (NMSA 53-12-2).

Officers.

Corporations must have officers with titles and duties as per bylaws, and as many as necessary to enable corporation to sign instruments and stock certificates as required under Business Corporation Act. (NMSA 53-11-48).

Actions by Shareholders.

Model Act § 49 modified; last paragraph deleted. Action by beneficial owner permitted. Complaint to be verified, to allege particular efforts to obtain action by directors. No settlement without court approval. (NMSA 53-11-47). To maintain standing in derivative action, stockholder must own stock throughout duration of litigation. (116 N.M. 611, 866 P.2d 339).

Books and Records.

Model Act § 52 as revised through Aug. 1977 adopted except last paragraph. First sentence of 1978 amendment adopted with modifications. (NMSA 53-11-50).

Articles of Incorporation.

Similar to Model Act § 54 except no requirement of par value assessment in (d). Substantial modification of (h). Director's liability for breach of fiduciary duty may, in some circumstances, be limited in articles of incorporation. (NMSA 53-12-2).

Filing of Articles of Incorporation.

Model Act § 55 adopted except commission will not file articles until franchise taxes as well as fees paid, and statement from registered agent must be filed acknowledging acceptance of appointment. (NMSA 53-12-3).

Term of Corporate Existence.

If not perpetual, period of duration to be set forth in Articles of Incorporation. (NMSA 53-12-2).

Incorporators.

One or more persons, or domestic or foreign corporation, may act as incorporator(s) of corporation. (NMSA 53-12-1).

Organization Meeting of Directors.

Model Act § 57 adopted. (NMSA 53-12-5).

Procedure to Amend Articles of Incorporation.

Model Act § 59 adopted. (NMSA 53-13-2).

Articles of Amendment.

Model Act §§ 58, 61 and 62 substantially adopted. (NMSA 53-13-1, -4, -5).

Class Voting on Amendments.

Model Act § 60 substantially adopted. (NMSA 53-13-3).

Certificate of Amendment.

Similar to Model Act §§ 63 and 65 except, absent disapproval, amendment effective on delivery to commission or on postponed date stated therein. (NMSA 53-13-6, -8).

Restated Articles of Incorporation.

Model Act § 64 substantially adopted. (NMSA 53-13-7).

Procedure for Merger and Consolidation.

Model Act §§ 71, 72 adopted. For insurance companies, see category 16 Insurance, topic 16.01 Insurance Companies, subhead Supervision By. (NMSA 53-14-1, -2).

Procedure for Share Exchange.

Model Act § 72-A adopted. Also Model Act §§ 73-77 with modifications as to effect and effective date. (NMSA 53-13-13; NMSA 53-14-3 to -7).

Approval by Shareholders.

Model Act § 73 enacted. (NMSA 53-14-3).

Merger of Subsidiary Corporation.

Model Act § 75 substantially adopted. For insurance companies, see category 16 Insurance, topic 16.01 Insurance Companies, subhead Supervision By. (NMSA 53-14-5).

Effect of Merger or Consolidation.

Model Act § 76 adopted. (NMSA 53-14-6).

Sale of Assets Other Than in Regular Course.

Model Act § 79 enacted. (NMSA 53-15-2).

Right of Shareholders to Dissent.

Model Act § 80 adopted. (NMSA 53-15-3).

Rights of Dissenting Shareholders.

Model Act § 81 as am'd Sept. 24, 1977 substantially enacted except: (a) Fifteen day provision in second sentence, paragraph one changed to 25 days; (b) third sentence, first paragraph, contains reference to both ten and 25 days; (c) phrase “together with reasonable fees of legal counsel” added to end of last sentence, paragraph seven. (NMSA 53-15-4).

Voluntary Dissolution by Incorporators.

Model Act § 82 adopted except articles of dissolution not issued until Tax Administration Act and Unemployment Compensation Law complied with. (NMSA 53-16-1).

Voluntary Dissolution by Act of Corporation.

Model Act § 84 substantially adopted. (NMSA 53-16-3).

Revocation of Voluntary Dissolution Proceedings by Act of Corporation.

Model Act § 89 adopted. (NMSA 53-16-8).

Filing of Articles of Dissolution.

Model Act § 93 enacted except all taxes due state must also be paid. (NMSA 53-16-12).

Involuntary Dissolution.

Decree of involuntary dissolution issued by District Court of Santa Fe County; Model Act § 94 adopted, except that paragraphs (a), (d) and (e) omitted. (NMSA 53-16-13).

Notification to Attorney General.

Model Act § 95 adopted, omitting all reference to failure to file annual report, appoint or maintain registered agent and failure to pay franchise taxes. (NMSA 53-16-14).

Venue and Process.

Model Act § 96 enacted except suit may be commenced only in District Court of Santa Fe County. (NMSA 53-16-15).

Jurisdiction of Court to Liquidate Corporation.

Model Act § 97 enacted: district courts have power to liquidate corporations. (NMSA 53-16-16).

Procedure in Liquidation.

Model Act § 98 adopted except certain wage claimants have priority over other creditors and stockholders. (NMSA 53-16-17).

Qualifications of Receivers.

Model Act § 99 adopted. (NMSA 53-16-18).

Survival of Remedy After Dissolution.

Model Act § 105 enacted, except (a) Methods of dissolution not listed; (b) two-year limitation period omitted; (c) last sentence omitted. (NMSA 53-16-24).

Admission of Foreign Corporation.

Model Act § 106 adopted except acquiring non-operating mineral interests in transactions outside state does not constitute doing business. (NMSA 53-17-1).

Corporate Name of Foreign Corporations.

Model Act § 108 adopted except words “of banking or insurance” in paragraph A(2) changed to “which a corporation organized under the Business Corporation Act is not permitted to transact.” (NMSA 53-17-3).

Change of Name of Foreign Corporation.

Model Act § 109 adopted. (NMSA 53-17-4).

Application for Certificate of Authority.

Model Act § 110 substantially adopted; paragraph (k) has been rephrased. (NMSA 53-17-5).

Application for Readmission.

If corporation has previously applied for admission and has already furnished documents required by Model Act § 110, commission may waive refiling of those documents. (NMSA 53-17-7).

Change of Registered Officer or Agent of Foreign Corporation.

Model Act § 114 substantially adopted. (NMSA 53-17-10).

Service of Process on Foreign Corporation.

Second and third paragraphs of Model Act § 115 deleted. (NMSA 53-17-11).

Filing of Application for Withdrawal.

Model Act § 120 enacted with proviso that all state taxes must also be paid. (NMSA 53-17-16).

Revocation of Certificate of Authority.

Model Act § 121 enacted except that notice of revocation must also be mailed to principal office in state of incorporation. (NMSA 53-17-17).

Issuance of Certificate of Revocation.

Model Act § 122 adopted, but certificate must be issued in triplicate and one copy mailed to principal office in state of incorporation. Reinstatement provisions are also included. (NMSA 53-17-18).

Issuance of Certificate of Good Standing.

Certificate of good standing and compliance may be issued if corporation has paid all taxes and fees. (NMSA 53-18-3).

Transacting Business Without Certificate of Authority.

Civil penalty of $200 per offense added, Model Act § 124. (NMSA 53-17-20).

Model Act §§ 125-138 Omitted.

Annual reports governed by NMSA 53-5-4 et seq.; fees covered by NMSA 53-2-1 et seq.; franchise tax governed by NMSA 53-3-12 et seq.

Appeal from Commission.

Commission must give notice of disapproval of filed documents within 15 working days of delivery. (NMSA 53-8-91). Appeal must be filed with District Court of Santa Fe County within 30 days of decision. (NMSA 39-3-1.1).

Forms.

Use of forms furnished by commission not mandatory.

Incorporation Tax or Fee.

(1) Filing articles and issuing certificate of incorporation, $1 for each 1,000 shares of total amount of authorized shares, but in no case less than $100 or more than $1,000. (2) Filing articles and issuing certificate of amendment increasing total amount of authorized shares, difference between fee for total amount authorized and fee computed without including additional shares, but in no case less than $100 or more than $1,000. (3) Filing articles and issuing certificate of amendment not involving increase in authorized shares or restated articles of incorporation not involving increase in total amount of authorized shares, $100. (4) Filing articles of merger or consolidation or exchange, difference between fee computed as if merged corporation were new corporation and fee computed as to all merged corporations individually, or upon amount of shares exchanged, but not less than $200 or more than $1,000. (5) Filing application to reserve corporate name or transfer reserved name, $25. (6) Filing statement of change of address of registered office and/or registered agent, $25. (7) Filing statement of change of address of registered office, or change of agent, or both, $25. (8) Filing statement of establishment of series of shares, $100. (9) Filing statement of reduction of authorized shares, $100. (10) Filing statement of intent to dissolve or revocation of dissolution proceedings or articles of dissolution, $50. (11) Filing application of foreign corporation to amend certificate of authority and for issuance of amended certificate, $50. (12) Filing copy of articles of merger or application for certificate of authority for foreign corporation, not increasing total amount of authorized shares, $200. (13) Filing application for certificate of authority, $1 for each 1,000 shares of total amount of authorized shares which is represented in this state, not less than $200 or more than $1,000. (14) Filing articles of merger or consolidation increasing total amount of authorized shares surviving corporation is authorized to issue in excess of aggregate shares merging or consolidating corporations had authority to issue, $1 for each 1,000 shares of increase in total amount of authorized shares, but not less than $200 or more than $1,000. (15) Filing application of withdrawal of foreign corporation, $50. (16) Filing corporate annual report and supplemental annual report, $25. (17) Filing any other statement or report of any corporation, $25. (18) Issuing certificate of good standing and compliance, $50. (19) Issuing letter of reinstatement of domestic or foreign corporation, $200. (NMSA 53-2-1).

For certifying copies of documents, $1 per page, but in no case less than $10. In addition, $25 will be charged where commission provides copies to be certified. Commission may adopt rules establishing reasonable fees for expedited services and insufficient fund sources of payment. (NMSA 53-2-1).

Utilities pay annual fee to commission not to exceed.511% of its gross receipts from intrastate business only. Carriers pay fee not to exceed.256% of their gross receipts for intrastate business. For purposes of this statute, “utility” includes telephone companies and transmission companies but does not include public utilities subject to Public Utility Act. (NMSA 63-7-20[A]). Failure to pay these fees by date due results in interest accrual, penalties, and fines. (NMSA 63-7-20[B]). Similar fee on certain carriers. See category 3 Business Regulation and Commerce, topic 3.08 Carriers. (NMSA 63-7-20 et seq.).

Filing Fees.

For fees payable to commission, see subhead Incorporation Tax or Fee, supra. For recording with county clerk when instrument is photocopied, fee is $5 first page, $2 each additional page and equipment recording fee not to exceed $4 per filing. (NMSA 14-8-12.2).

Transfer of Stock.

Uniform Commercial Code applies. (NMSA 55-8-101 et seq.).

Uniform Transfers to Minors Act.

Adopted. (NMSA 46-7-11 et seq.).

Uniform Securities Ownership by Minors Act not adopted.

Uniform Simplification of Fiduciary Security Transfers Act enacted. (NMSA 46-8-1 et seq.).

Stock Transfer Tax.

None.

Reports.

Corporate report must be filed with commission within 30 days after issuance of certificate of incorporation or authority and biannually thereafter on or before 15th day of third month following end of taxable year. Corporation may apply to commission, by date report due, for extension to file required report; Commission, for good cause, may extend date of filing or for payment of fees for up to total of 12 months. Banks and insurance companies and nonprofit corporations are exempted from filing annual report. Supplemental report must be filed with commission within 30 days if change is made in location of registered office and name of agent upon whom process may be served, names and addresses of directors and officers of company and when term of office expires, or principal place of business. Dormant corporations may file statement with commission in lieu of corporate report. Dormant corporations must file statement of renewal every five years. Commission will refuse to file report of corporation delinquent in paying any fee or franchise tax, including penalties and interest. Penalty for failing to file timely report is $100. Failure to file within 60 days after mailing of notice of failure subjects corporation to cancellation of certificate of incorporation or certificate of authority without further proceedings. Penalty for failure to file timely supplemental report is $100 for either domestic or foreign corporation. (NMSA 53-5-1 et seq.).

Close Corporations.

No special statutory provisions.

Cooperative or Nonprofit Organizations.

Five or more natural persons may incorporate as a cooperative marketing association for agricultural products (NMSA 76-12-1 et seq.) or a nonprofit corporation to promote use of electrical energy. Cooperative nonprofit corporation engaged in rural electrification is taxed $10 for each 100 persons to whom electricity is supplied, in lieu of all other taxes. (NMSA 62-15-1 et seq.).

Non-Profit Corporation Act.

Effective July 1, 1976; nonprofit corporations having no capital stock are authorized for charitable, educational, social, and other purposes. Board of not less than three directors may have sole voting power. By-laws and articles of incorporation, amendment, dissolution, merger, or consolidation filed with corporation commission. Annual report required. (NMSA 53-8-1 et seq.).

Uniform Management of Institutional Funds Act.

As of time of this revision, New Mexico Uniform Management of Institutional Funds Act, NMSA 1978, §§ 46-9-1 to 46-9-12, has been repealed. It has been replaced by 2009 N.M. ALS 130, 2009 Laws of New Mexico c. 130, as set forth in House Bill 454, aa, approved on Apr. 7, 2009.

Foreign Corporations.

Fee for certificate of authority, see supra, subhead Incorporation Tax or Fee.

Real Estate.

No restrictions on foreign corporation acquiring, holding and disposing of real estate. Foreign corporations qualified to do business in state as public utilities pursuant to NMSA 62-3-1 et seq. have same rights and privileges as domestic corporations of like character, including power of eminent domain. (NMSA 62-1-1.1).

Actions.

See Model Business Corporation Act §§ 107, 124 (civil penalty added). (NMSA 53-17-2, -20).

Exception to Admission Requirements.

Any foreign corporation or foreign bank, without being admitted to do business in this state, may loan money in this state only on real estate mortgages, trust deeds and notes in connection therewith, to enforce said obligation, and to buy and sell the property so mortgaged. Such corporations, except banks and institutions whose shares or deposits are guaranteed by U.S. Government, must first appoint Secretary of State attorney for service of process. (NMSA 38-1-18). See subhead Transacting Business Without Certificate of Authority, supra.

Merger.

Model Act § 117 substantially adopted. (NMSA 53-17-13).

Foreign corporation may withdraw from state by complying with Model Business Corporation Act and paying all taxes and unemployment compensation contributions due. (NMSA 53-17-15, -16).

Taxation.

See infra, subhead Franchise Tax.

Taxation of Corporate Property.

No special provisions.

Tax Credit for Preservation of Cultural Property.

Adopted. (NMSA 7-2A-8.6).

Excise Tax.

See category 19 Mineral, Water and Fishing Rights, topic 19.01 Mines and Minerals.

Franchise Tax.

Imposed on every domestic corporation, every foreign corporation engaged in transaction of business in, into, or from state or deriving any income from property or employment within state, and every domestic or foreign corporation, whether engaged in active business or not, but having or exercising corporate franchise in state. (NMSA 7-2A-3). Rate is $50 per taxable year. (NMSA 7-2A-5.1). No franchise tax imposed on insurance companies paying premium tax to state or on certain employee-benefit trusts and nonprofit charitable organizations exempt from federal tax, unless organization receives income, subject to federal income tax as “unrelated business income”.(NMSA 7-2A-4).

Income tax is imposed on net income of domestic corporations and on net income of foreign corporations engaged in transaction of business in, into, or from state or deriving any income from property or employment within state. (NMSA 7-2A-3). Unitary corporation may file combined return under certain conditions. (NMSA 7-2A-8.3). Consolidated returns permitted if permitted for federal income tax. (NMSA 7-2A-8.4). No income tax imposed on insurance companies paying premium tax to state or on certain employee-benefit trusts and nonprofit charitable organizations exempt from federal tax. (NMSA 7-2A-4). Tax rate is 4.8% on income up to $500,000; $24,000 plus 6.4% of excess over $500,000 up to $1,000,000; and $56,000 plus 7.6% of excess over $1,000,000. (NMSA 7-2A-5). Credits for preservation of cultural property and provision of child care services allowed. (NMSA 7-2A-8.6, -14). Uniform Division of Income for Tax Purposes Act adopted. (NMSA 7-4-1 et seq.).

Intergovernmental Business Tax Credit addresses problem of dual taxation that arises when tribal and state governments impose tax on same activity. Taxpayer may take tax credit against state's corporate income tax for up to 75% tribal taxes paid on income derived from narrowly defined new business facilities. (NMSA 7-2A-16, NMSA 7-9-88.1, -88.2, NMSA 9-11-12.1, 12.2).

Professional Corporations.

Authorized for accountants, chiropractors, optometrists, dentists, osteopaths, podiatrists, architects, veterinarians, doctors of medicine, physicians and surgeons, attorneys, life insurance agents, and other personal services to the public which require obtaining of license or other legal authorization and which, but for the act, could not be performed by a corporation. (NMSA 53-6-1 et seq.).

Deeds.

See category 21 Property, topic 21.06 Deeds.

Model Non-Profit Corporation Act not adopted. (NMSA 53-8-1 et seq.).

Limited Liability Companies.

See topic 2.06 Limited Liability Companies.

2.04 [RESERVED]

2.05 JOINT STOCK COMPANIES:

Real estate trusts are authorized and regulated by NMSA 47-2-1 et seq. At least three trustees are required. Declaration containing information required by statute must be signed by all trustees and filed with county clerk where principal office is located. Declaration must be acknowledged. Operation is closely regulated by statute. Certificates of beneficial ownership are investment securities, and are subject to securities regulation and to Uniform Commercial Code. Process may be served on any trustee or on person in charge of principal office. Liability is limited to trust assets unless trustee is guilty of bad faith, gross negligence, etc. (NMSA 47-2-1 et seq.). Foreign trusts may be served with process in manner provided by NMSA 38-1-18.

See also topic 2.02 Associations; category 3 Business Regulation and Commerce, topic 3.24 Securities.

2.06 LIMITED LIABILITY COMPANIES:

Citations under this subheading refer to sections of New Mexico's Limited Liability Company Act. (NMSA 53-19-1 et seq.). Limited liability companies are unincorporated organizations of one or more persons formed pursuant to provisions of act. (NMSA 53-19-2[I]).

Name.

Limited liability company name shall contain words “limited liability company” or “limited company”—or abbreviation “L.L.C.”, “LLC”, “L.C.” or “LC”. (NMSA 53-19-3).

Purposes.

Limited liability companies may conduct or promote any lawful business or purpose, any such companies may be perpetual or limited to definite term. (NMSA 53-19-6).

Filing.

Organizers of limited liability companies shall file with state corporation commission original and one copy of articles of organization, affidavit of appointed registered agent, and any other required documents. (NMSA 53-19-9).

Filing Fees.

Fees charged by state corporation commission are: (a) articles of organization and issuing certificate of organization, $50; (b) amended or restated articles of merger and issuing certificate, $50; (c) articles of merger or consolidation and issuing certificate, $100; (d) articles of dissolution or revocation of dissolution, $25; (e) issuing certificates for purposes not otherwise specified, $25; (f) furnishing written information on any limited liability company, $25; (g) providing documents or instruments from commission's records, $1 per page, minimum $10, $25 for certification; (h) accepting application for reservation of name, $20; (i) filing statement of change of address of registered office or agent, $20; (j) filing agent's statement of change of address of registered agent, $20; (k) issuing registration to foreign limited liability company, $100; (l) filing amendment of registration of foreign limited liability company, $50; (m) filing application for cancellation of registration of foreign limited liability company, and issuing certificate of cancellation, $50. (NMSA 53-19-63).

Liability to Third Parties.

Members or managers of limited liability companies not liable for debts, obligations and liabilities of company. Person may be liable for any act or omission performed in his capacity as manager of limited liability company if there is basis for liability. (NMSA 53-19-13).

Liability to Company.

Members who have no management responsibilities not liable to company or other members by reason of act or omission as member. Members who have particular management responsibilities pursuant to articles of organization or operating agreement not liable to company or other members by reason of act or omission as member with management responsibilities unless act or omission constitutes gross negligence or willful misconduct. (NMSA 53-19-16).

Voting.

Unless altered by articles of organization or operating agreement, members who have contributed to capital of company vote in proportion to value of their contributions to capital of company. (NMSA 53-19-17).

Form of Contribution.

Membership interest may be issued in exchange for contribution of cash, property, services, promissory note or other written promise. (NMSA 53-19-20).

Property.

Acquired by company is property of company and not of members. Members have no interest in company property. (NMSA 53-19-29). Membership interest is personal property. (NMSA 53-19-31).

Withdrawal of Members.

Unless otherwise provided in articles of organization or operating agreement, members of company with perpetual existence can voluntarily withdraw by giving 30 days written notice to to other members. Member of company formed for definite term or particular undertaking has no right to withdraw voluntarily before expiration of that term or achievement of that undertaking. (NMSA 53-19-37).

Dissolution.

Company is dissolved upon happening of any of following: Event specified in articles of organization or operating agreement, upon written consent of members having majority share of voting power of all members, entry of decree of judicial dissolution. (NMSA 53-19-39). Procedures for winding up business of dissolved companies set forth in NMSA 53-19-42.

Foreign Limited Liability Companies.

Provisions relating to foreign limited liability companies contained in NMSA 53-19-47 to 56.

Merger or Conversions.

Provisions relating to merger or conversions of entities into or from limited liability companies contained in NMSA 53-19-59 to 62.3.

2.07 [RESERVED]

2.08 PARTNERSHIPS:

Uniform Partnership Act (§§ 54-1-1 through NMSA 54-1-46 and -48) repealed. Uniform Partnership Act (1994) adopted (NMSA 54-1A-101 et seq.) effective July 1, 1997. 1997 Amendments to Uniform Partnership Act relate primarily to limited partnerships and extent to which partners are liable for acts of partnership. Amendments permit general partner to elect limited liability partnership status by filing statement of qualification. Amendments provide for full shield of limited liability as opposed to limited shield offered by limited liability partnership. Insurance requirements are carried over from partial shield authorization of otherwise repealed statutes. (NMSA 54-1-47).

Revised Uniform Limited Partnership Act (1976), as amended in 1985, has been adopted (NMSA 54-2-1 et seq.), with exception of § 903 which was not adopted by New Mexico.

Foreign limited partnerships must register with secretary of state prior to transacting business and must appoint agent for service of process. In absence of appointment, secretary of state deemed appointed. Registration fee of $100. Laws of state under which organized govern internal affairs and liability of limited partners. Foreign limited partnership transacting business in state may not maintain any action in courts of this state until it has registered; however, failure to register does not impair validity of any act or contract and does not prevent partnership from defending any action. (NMSA 54-2-49 to NMSA 54-2-56).

3 BUSINESS REGULATION AND COMMERCE

3.00A ATHLETIC COMPETITION:

Governed by Professional Athletic Competition Act. (NMSA 60-2A-1 et seq.). New Mexico Athletic Commission has sole discretion, management, control and jurisdiction over all professional contests to be conducted in New Mexico. (NMSA 60-2A-8). Repealed effective July

1, 2012. *Note:* Commission will terminate on July 1, 2011, but will continue to operate under Act until July 1, 2012. (NMSA 60-2A-30). In 2007, New Mexico House passed amendment to NMSA 60-2A-1 giving Commission jurisdiction over unarmed combat contests. Bill is now with Senate Judiciary Committee.

3.01 BANKS AND BANKING:

Uniform Commercial Code adopted. See topic 3.09 Commercial Code.

Uniform Probate Code adopted, including revised Art. VI (multiple party accounts, etc.). (NMSA 45-1-101, et seq.).

Uniform Fiduciaries Act adopted. (NMSA 46-1-1, et seq.).

Regulated by.

Banking Act. (NMSA 58-1-1 et seq.).

Stockholders.

The act providing for double liability of stockholders in state banks has been repealed. (NMSA 58-1-1 et seq.). Section providing for fees for filing reports and certificates has been repealed. (NMSA 58-1-42).

Deposits.

Uniform Probate Code adopted.

Unclaimed Deposits.

Uniform Unclaimed Property Act (1995) adopted. (NMSA 7-8-1 et seq.). Repealed effective July 1, 1997 and recompiled. (NMSA 7-8A-1 et seq.). Amended (2003) to exclude child, spousal or medical support payments from definition of property under Act. See category 21 Property, topic 21.01 Absentees, subhead Escheat. In 2007, New Mexico Senate passed bill to amend NMSA 7-8A-2 to regulate gift certificates. Bill is now with House Judiciary Committee.

Collections.

Covered by Uniform Commercial Code—Bank Deposits and Collections. (NMSA 55-4-101 et seq.). (NMSA 55-4-104 and 55-4-105 were amended effective 1/01/10.)

Trust Companies.

Authorized to perform general fiduciary duties and regulated by NMSA 58-9-1 et seq.

Uniform Common Trust Fund Act, as am'd, in effect. (NMSA 46-1-13 to -16).

Foreign Banks.

Governed by Banking Act. (NMSA 58-1-1 et seq.). Foreign bank holding company, as defined, may take over New Mexico bank if bank in FDIC receivership, if no New Mexico banks or bank holding companies submit bids meeting FDIC minimum requirements, and if foreign company's bid is higher than any supplemental bids of New Mexico banks or bank holding companies. (NMSA 58-5-11).

With proper notice interstate acquisitions of domestic depository institutions that are savings institutions or of domestic holding companies whose subsidiary depository institutions are savings institutions are permitted. (NMSA 58-1B-1 et seq.).

With proper notice interstate acquisitions of domestic depository institutions that are banks or of domestic holding companies whose subsidiary depository institutions are banks are permitted. (NMSA 58-1B-1 et seq.).

Out-of-state depository institution or holding company could form new depository institution in New Mexico provided it has minimum capital stock structure of $7,500,000, inclusive of common capital and surplus and undivided profits. (NMSA 58-26-6).

Under NMSA 58-1B-1 through NMSA 58-1C-13, there can be no discrimination against out of state or foreign bank holding companies in any manner which would violate § 3(d) of Bankholding Company Act. (NMSA 58-13B-1 to -57 are repealed effective 1/01/10.)

Installment Loans.

See topic 3.17 Interest; subhead Installment Loans.

Savings and Loan Associations.

Regulated by Savings and Loan Act. (NMSA 58-10-1 et seq.).

Small Loan Businesses.

Regulated by New Mexico Small Loan Act of 1955. (NMSA 58-15-1 et seq.). Certain parts of Act were amended in 2007.

Small Business Investment Corporation (NMSA 58-29-1 et seq.) created as nonprofit, independent, public corporation for purpose of creating new job opportunities by providing capital for land, building and infrastructure and making debt and equity investments to support new or expanding businesses.

Credit Unions.

Regulated by NMSA 58-11-1 et seq. and NMSA 58-11A-1 et seq.

Consumer Credit Banks.

Permitted and regulated by Consumer Credit Bank Act. (NMSA 58-1A-1 et seq.).

Disclosure.

Bank may be held liable to third party for failure to disclose information concerning customer's account and financial condition under special circumstances, i.e., when bank communicates with third party, when not so obligated, bank may be required to disclose additional information so that initial communication not misleading. (108 N.M. 84, 766 P.2d 928).

3.02 BILLS AND NOTES:

Covered by Uniform Commercial Code—Negotiable Instruments. (NMSA 55-3-101 et seq.). (NMSA 55-3-103, -106, -116, -119, -305, -312, -419, -602, -604, -605 amended effective 1/01/10.)

Modification/Renewal/Extension of Notes.

These are not synonymous terms, although case law leaves distinction unclear. (109 N.M. 400, 785 P.2d 740).

Days of Grace.

No statutory provision.

Special Requirements.

There are no special requirements as to recitals in notes of particular kinds or based on particular considerations.

Judgment Notes.

It is a misdemeanor to take or attempt to recover on “cognovit note”. (NMSA 39-1-18).

Attorney Fees.

Provision in note for attorney fees will be enforced, but court will award only reasonable fee. (107 N.M. 704, 763 P.2d 1169).

Special Defenses.

See topic 3.12 Consumer Protection.

Release of Co-Makers.

If holder of note releases co-makers or co-debtors, release will discharge obligations of remaining debtors if done without their consent. (109 N.M. 400, 785 P.2d 740).

Holder in Due Course.

If bank has actual notice of senior lienholder's interest in property, such notice defeats holder in due course status. (126 N.M. 89, 966 P.2d 1172).

Accommodation Instruments.

Party is accommodation party if signs promissory note purpose of which to allow other signatory to enter into real estate contract with another seller and party will not benefit directly from transaction. (125 N.M. 25, 956 P.2d 824).

Discharge.

Common law contract defense may be raised by accommodation party. (125 N.M. 25, 956 P.2d 824).

Suretyship.

Some of common law rules of suretyship superseded by NMSA 55-3-605. (125 N.M. 25, 956 P.2d 824).

3.03 BILLS OF LADING:

See topic 3.08 Carriers.

3.04 BILLS OF SALE:

See topic 3.23 Sales.

3.05 BLUE SKY LAW:

See topic 3.24 Securities.

3.06 BROKERS:

Uniform Commercial Code adopted. See topic 3.09 Commercial Code.

Licenses.

Issuance, renewal, and surrender: see NMSA 61-29-11.

Bond.

No general requirements. See subhead, Real Estate Brokers, infra.

Real Estate Brokers.

License required. (NMSA 61-29-1). *Note:* Repealed effective July 1, 2012. Any person found to have acted without license in violation of c. 61, Art. 29 may be subject to civil penalty. (NMSA 61-29-17.2). *Note:* Repealed effective July 1, 2012. Suit in New Mexico courts for commission by unlicensed person is barred. (NMSA 61-29-16). *Note:* Repealed effective July 1, 2012. Agreement for commission must be in writing and signed by party to be charged. (NMSA 47-1-45). For regulated transactions after Jan. 1, 2000, no agency relationship exists between buyer, seller, landlord or tenant and brokerage unless parties agree in writing to relationship. (NMSA 61-29-10.1). *Note:* Repealed effective Jan. 1, 2012.

Mortgage Loan Brokers.

Covered by Mortgage Loan Company and Loan Broker Act, NMSA 58-21-1 et seq. (NMSA 58-21-1 to -23.2; -25, -29 were amended effective 7/31/09.)

3.07 BULK SALES:

See topic 3.09 Commercial Code and category 8 Debtor and Creditor, topic 8.08 Fraudulent Sales and Conveyances.

3.08 CARRIERS:

Uniform Commercial Code adopted. See topic 3.09 Commercial Code.

Rates.

Public Regulation Commission has power to supervise, regulate and control common carriers, including intrastate railroads, and to fix rates and prevent discrimination. (NMSA 63-7-1.1 et seq.). There are no statutory regulations as to elevators. Carriers, other than oil pipe lines, common or contract motor carriers or aircraft carriers transporting passengers or property for hire must pay to commission fee not to exceed.0256% of its gross receipts from business for preceding calendar year, which is entirely intrastate. (NMSA 63-7-20).

Limiting Liability.

No statutory provisions.

Bills of Lading.

Governed by Uniform Commercial Code. (NMSA 55-7-501 et seq.).

Lien.

All persons carrying goods for hire are deemed to be common carriers and have lien on all things carried for freight due, if payment was to have been made on delivery. (NMSA 48-3-8).

Motor Vehicle Carriers.

See category 23 Transportation, topic 23.01 Motor Vehicles.

3.09 COMMERCIAL CODE:

Uniform Commercial Code.—Adopted. (NMSA 55-1-101 et seq.)

Article 2 (Adopted 2005).

Article 2A (Adopted 1992).

Article 3 (Adopted 1992).

Article 4 (Adopted 1992).

Article 4A (Adopted 1992).

Article 5 (Adopted 1997).

Article 6 (Repealed 1992).

Article 7 (Adopted 2005).

Article 8 (Adopted 1996).

Article 9 (Adopted 2001).

See Uniform and Model Acts section for official text of Commercial Code.

Filing fees are as follows:

(a) for filing and indexing record in form prescribed by Secretary of State:

1(i): $20 for one to three pages.

1(ii): $40 for four to 25 pages.

1(iii): $100 for more than 25 pages, plus $5 per each page.

2: If not communicated in prescribed form, double above amounts.

3: If communicated electronically:

4(i): $10 for less than 15kb.

4(ii): $20 for more than 15kb.

(b) for filing and indexing initial financial statement:

(1) $100 if debtor is transmitting utility.

(2) $100 if in connection with manufactured home transaction. (NMSA 55-9-525).

Filing Places.

Office in which to file financing statement to perfect security interest or agricultural lien is governed by NMSA 55-9-501.

Acknowledgments not required, but in practice supplied, for any filing or recording in county real estate records. (NMSA 14-8-4).

As to security interests in motor vehicles, see category 23 Transportation, topic 23.01

Motor Vehicles, subhead Liens.

Forms.

See Part III, Uniform and Model Acts section, Commercial Code Amendments for National Forms.

See also topics 3.01 Banks and Banking, Bills and Notes, Brokers, Carriers, Contracts, Frauds, Statute of, Sales, Securities, Warehousemen; categories 2 Business Organizations, topic Corporations; Civil Actions and Procedure, topic Limitation of Actions; Debtor and Creditor, topics Assignments, Fraudulent Sales and Conveyances, Liens, Pledges; Documents and Records, topics Records, Seals; Mortgages, topic Chattel Mortgages.

3.10 CONDITIONAL SALES:

Covered by Uniform Commercial Code—Secured Transactions (NMSA 55-9-101 et seq.) which makes no distinction between conditional sale contracts and chattel mortgages. See category 20 Mortgages, topic 20.01 Chattel Mortgages.

3.11 CONSIGNMENTS:

Covered by Uniform Commercial Code. See topic 3.09 Commercial Code.

Artists' consignments covered by Artists' Consignment Act (NMSA 56-11-1 et seq.), giving priority to artists' share of proceeds over claims and secured interests of dealer's creditors, notwithstanding any provision of Uniform Commercial Code.

3.12 CONSUMER PROTECTION:

Advertising which is materially misleading is unlawful. (NMSA 57-15-1, -2). New Mexico House is currently considering bill that would expand protection to advertising done over phone or Internet. Attorney General may require production of misleading material. (NMSA 57-15-6).

Charitable Solicitations Act (NMSA 57-22-1 et seq.) authorizes attorney general to monitor, supervise, and enforce charitable purposes of charitable organizations and regulate professional fundraisers in state. Prohibits certain practices.

Cigarette Enforcement Act (57-2A-1 et seq.).—Prohibits sales or distribution of cigarettes with packaging not in compliance with federal law or not intended to be sold in U.S. (NMSA 57-2A-4, -10 amended effective 7/1/09.)

Credit Bureaus.

Upon request, credit bureau must disclose to consumer information in his credit report. (NMSA 56-3-2). Failure to correct any error is basis for civil liability. (NMSA 56-3-7). If credit has been refused because of report, credit bureau must make any necessary re-investigation at no cost to consumer. (NMSA 56-3-2). Credit Bureau is limited to time reports can be made on such matters as bankruptcies, judgments and convictions. (NMSA 56-3-6).

Credit Cards.

Credit card can be issued only on request of consumer unless it is renewal. (NMSA 56-4-3). Effective January 1, 2004, no receipt for credit card purchase shall contain more than five numbers from account number. (NMSA 56-4-3.1). Maximum liability of cardholder for unauthorized use is $50. (NMSA 56-4-4). See topic 3.17 Interest, subhead Installment Loans.

Drugs.

Pharmacists may substitute certain lower cost drugs for those prescribed. Savings must be passed on. (NMSA 26-3-3). House is currently considering bill to amend NMSA 26-3-3.

Motor Vehicle Retail Installment Sales Contracts.

Must be in writing, contain “notice” provision in ten point bold type and all writing must be in eight point type. Must also include statutory notice in 12 point bold type regarding liability insurance. Buyer may rescind before receipt of contract or motor vehicle. All fees and charges must be included and identified. In case of repossession, buyer is liable for damage, abuse, and loss to vehicle while in his possession. (NMSA 58-19-7). See category 23 Transportation, topic 23.01 Motor Vehicles, subhead Financing Contracts.

Uniform Deceptive Trade Practices Act.

Adopted, 1966 version with amendments. (NMSA 57-12-1 et seq.). NMSA 57-12-2 was amended effective 7/1/09 to clarify Act's applicability. Named “Unfair Practices Act”. Act prohibits deceptive and unconscionable trade practices. (NMSA 57-12-3). Chain referral sales techniques are prohibited. (NMSA 57-12-5).

Discrimination on basis of race, religion, color, national origin, ancestry, sex, sexual orientation, gender identity, spousal affiliation or physical or mental handicap is prohibited in extending credit. (NMSA 28-1-7). Door-to-door sales contract for consumer goods or services is rescindable for three business days. (NMSA 57-12-21). House is considering bill to amend NMSA 57-12-21.

Unsolicited facsimiles or emails prohibited unless opt-out information is included with communication. (NMSA 57-12-23).

Attorney general may bring action in name of state in county district court whenever he has reasonable belief that any person is using unfair practices and it is in public interest. He may petition court for injunctive relief and restitution. (NMSA 57-12-8).

Any private person likely to be damaged by unfair or deceptive trade practices may enforce Act. Remedies include injunctive relief, actual damages, treble damages, and attorney's fees. (NMSA 57-12-10). House passed bill to amend NMSA 57-12-10. Bill is now in Senate. Except for claims for injunctive relief, all parties named in action brought under Act will be required to participate in early mediation if so requested by either party in writing during 30 day period following service of summons and complaint on all parties named in action. (NMSA 57-12-10.F).

Motion Picture Fair Competition Act requiring trade screening enacted. (NMSA 57-5A-1 et seq.).

Unused Merchandise Ownership Protection Act (NMSA 57-9A-1 et seq.) provides that vendor of unused merchandise may not offer for sale baby food or infant formula or cosmetic, drug, or medical devices at open market without displaying written valid authorization from manufacturer or distributor of merchandise. Exempts certain persons and organizations.

Pyramid or Multilevel Sales.

Pyramid Promotional Schemes Act (NMSA 57-13-1 et seq.) defines such schemes (NMSA 57-13-2) and prohibits use thereof (NMSA 57-13-3). Act may be enforced by attorney general who may seek injunctive relief, restitution and civil penalties. (NMSA 57-13-4). Private parties may seek injunctive relief in addition to common law remedies. (NMSA 57-13-6). Violation of Act is fourth degree felony. (NMSA 57-13-7).

Plain Language.

Policy Language Simplification Act establishes minimum readability standards for most life and health insurance policies. It applies to all forms filed after June 30, 1983. No form is to be issued or delivered without Superintendent's approval. Superintendent has some discretion to lower standards and to extend dates given. (NMSA 59A-19-1 et seq.).

See also topic 3.23 Sales.

3.13 CONTRACTS:

Every contract in writing shall import a consideration in same manner as fully sealed instruments have heretofore done. (NMSA 38-7-2).

Absent agreement to contrary, provisions of contract are governed by law of place where contract was consummated (i.e. where last act necessary for its formation was performed). (109 N.M. 243, 784 P.2d 986).

Certain indemnity agreements for negligence arising from construction or mining are void. (NMSA 56-7-1, -2). See category 19 Mineral, Water and Fishing Rights, topic 19.01 Mines and Minerals.

Credit agreement in amount greater than $25,000, not primarily for personal, family or household purposes, made by certain financial institutions is not enforceable unless in writing and signed by party to be charged. (NMSA 58-6-5).

Federal Contract Clause jurisprudence is applicable in determining whether particular state law violates Contract Clause of New Mexico Constitution. (110 N.M. 750, 800 P.2d 184).

Damages for mental anguish caused by breach of contract are recoverable. (117 N.M. 306, 871 P.2d 962). Punitive damages may be recovered for breach of contract if breach was malicious, fraudulent, oppressive, or recklessly committed, with wanton disregard for nonbreaching party's rights. (109 N.M. 249, 784 P.2d 992).

Uniform Commercial Code adopted. See topic 3.09 Commercial Code.

See also categories 10 Documents and Records, topic Seals; Family, topics Husband and Wife, Infants.

3.14 FACTORS:

See topic 3.09 Commercial Code.

License Requirements.

License required for commission merchant dealing in farm produce. License fees and bonds required under Produce Marketing Act. (NMSA 76-15-1 et seq.). Broker—fee $100, bond $100,000; packer or dealer—fee $50, bond $50,000. (NMSA 76-15-15).

Liens.

No statutory provisions.

Consignment Agreements.

Artists' consignments governed by NMSA 56-11-1 et seq. No other statutory provisions except as such agreements may be covered by Uniform Commercial Code. See topic 3.09 Commercial Code.

Qualifying Nonresident Liquor Wholesalers or Manufacturers.

May obtain nonresident licenses in this state. (NMSA 60-6A-7). Nonresident licensees may sell only to licensed manufacturers and wholesalers. (NMSA 60-6A-7).

3.15 FRANCHISES:

Uniform Franchise and Business Opportunities Act not adopted.

Franchise Termination Act (NMSA 57-23-1 et seq.) relates to repurchase by supplier of goods purchased by dealer of farm tractors, farm implements or attachments or repair parts thereto after termination of franchise.

Alcoholic Beverages.

Failure of supplier to act in good faith in complying with terms or terminating franchise violates Liquor Control Act. Wholesaler may bring action against supplier for violation. (NMSA 60-8A-7 to -11, as amended).

Franchise Tax.

Corporate Income and Franchise Tax Act. Imposed on every domestic or foreign corporation having or exercising corporate franchise in N.M. except: Insurance companies paying premium tax, tax exempt trusts and tax exempt organizations. (NMSA 7-2A-1 et seq.). Rate is $50 per taxable year. (NMSA 7-2A-5.1). Income tax credit given for preservation of cultural property (NMSA 7-2A-8.6), and corporate-supported child care (NMSA 7-2A-14). NMSA 7-2A-8.6 was amended in 2007.

Motion Pictures.

Contracts restricting franchise to product of any producer or distributor for more than one year unlawful. (NMSA 57-5-9).

Motor Vehicle Dealers.

Franchising governed by NMSA 57-16-1 et seq.

Municipalities.

Action questioning privilege or franchise granted by municipal corporation must be brought within six years of grant. (NMSA 37-1-26).

Public Utilities.

Franchise ordinance not effective for at least 30 days; must be published at least twice not less than seven days apart; voters may petition for vote on granting franchise; expense of vote born by applicant; contract limited to 25 years. (NMSA 3-42-1).

Constitutional Restriction on Franchise Grant.

Legislature must not grant exclusive franchises. (N.M. Const. Art. 4, § 26).

3.16 FRAUDS, STATUTE OF:

English Statute of Frauds adopted as part of common law of New Mexico. (110 N.M. 559, 798 P.2d 160; 4 N.M. 336, 16 P. 275). See also topic 3.09 Commercial Code.

Contracts of Sale.

Common law applies, no special statutory provisions. See, however, topic Commercial Code.

Part Performance.

Common law applies, no special statutory provisions. See, however, topic Commercial Code.

3.16A GAMING:

Governed by Gaming Control Act. (NMSA 60-2E-1). Gaming activity is permitted in New Mexico only if it is conducted in compliance with and pursuant to Gaming Control Act or state or federal law that expressly permits activity or exempts it from application of state criminal law. (NMSA 60-2E-4).

3.16B HORSE RACING:

Governed by NMSA 60-1-1 et seq. *Note:* Repealed effective July 1, 2012. *Note:* Commission will terminate on July 1, 2011, but will continue to operate under Act until July 1, 2012.

3.17 INTEREST:

Legal rate for judgment for payment of money in absence of contract fixing different rate, 8¾%; legal rate for judgment based on tortious conduct, bad faith, intentional or willful acts, 15%. Unless judgment is based on child support, court has discretion to allow prejudgment interest up to 10% from service of complaint. (NMSA 56-8-4). Prejudgment interest statute (NMSA 56-8-4) applies to all damages awarded in personal injury actions, including those for non-pecuniary issues (113 N.M. 774, 833 P.2d 251). Prejudgment interest may be awarded for time after claim has accrued prior to filing of complaint under NMSA 56-8-3, which is meant to compensate plaintiff for damages from loss of use of funds, whereas, NMSA 56-8-4, which applies after complaint is filed, is meant to foster settlement and prevent delay. (117 N.M. 373, 872 P.2d 346).

Maximum Rate.

Rate agreed to in writing by parties. (NMSA 56-8-3; former usury statute, NMSA 56-8-11.1 repealed, eff. 6/14/91.)

Judgments.

Same rate of interest as provided in contract on which judgment based. In no case more than maximum rate on written contracts unless judgment based on tortious conduct, bad faith, or intentional or willful acts, 15%. (NMSA 56-8-4). When award remanded for new decision for excessiveness, new award to accrue interest from date of original judgment. (107 N.M. 768, 764 P.2d 1326).

Interest Against State.

56-8-4(D) read in pari materia with NMSA 41-4-19 prohibits awarding post-judgment interest on tort judgments against state. (125 N.M. 721, 965 P.2d 305). NMSA 41-4-19 was amended in 2007.

Punitive damages not subject to prejudgment interest. (124 N.M. 591, 953 P.2d 1089).

Open Accounts.

15% commencing 30 days after delivery of last article or service unless parties agree to higher amount. (NMSA 56-8-5).

Small Loans.

Repeal of Small Loan Act made permanent. (1983).

Broker-Dealer Loans.

Repeal of NMSA 58-14-37 made permanent. (1983).

Credit Union Loans.

Repeal of NMSA 58-11-17 made permanent. (1983).

Residential Home Loans.

Repeal of Residential Home Loan Act made permanent. (1983, c. 44).

Pawn Service Charge.

For 1st 30 days, maximum rate is $7.50 or 10% of amount loaned; thereafter, maximum rate is 4% per month. (NMSA 56-12-13).

Installment Loans.

Delinquency charges not to exceed 5¢ for $1 of each installment more than ten days in arrears, but in no case more than $10 on any one installment. (NMSA 58-7-6). Certain other charges can be added to principal. Willful violation is misdemeanor, and greater rate of charge knowingly received is forfeited in full. (NMSA 58-7-8). Repeal of rate limitations of Bank Installment Loan Act made permanent. (1983, c. 44).

See topic 3.23 Sales, subhead Retail Credit Sales and category 23 Transportation, topic 23.01 Motor Vehicles, subhead Financing Contracts.

Premium Loans and Policy Loans.

See category 16 Insurance, topic 16.01 Insurance Companies, subheads Premium Financing and Policy Loans.

Usury.

Knowing usury works forfeiture of entire amount of interest and if paid, borrower can recover twice the interest by suit within two years. (NMSA 56-8-13). “Knowledge” requires some conscious intent. (107 N.M. 223, 755 P.2d 67). Usury is misdemeanor. (NMSA 56-8-14). Corporations and limited partnerships and their members may not plead usury. (NMSA 56-8-21).

3.18 [RESERVED]

3.19 LICENSES, BUSINESS AND PROFESSIONAL:

Practically all pursuits are licensed. Uniform Licensing Act adopted. (NMSA 61-1-1 et seq.). Individual professions and pursuits governed by NMSA 61-2-1 to NMSA 61-33-10. Double taxation through licenses is prohibited.

Municipal corporations may assess and collect occupation and license taxes. (NMSA 3-38-1 et seq.). Boards of county commissioners have power to license and fix license tax for certain activities. (NMSA 4-37-1).

Commercial Travelers.

State licensing act repealed. Municipal and county licenses or taxes may be required.

See also category 22 Taxation, topic 22.03 Business Taxes.

Collection agency (NMSA 61-18A-1 et seq.), in order to obtain certificate of authority to do business, must file with Bureau of Revenue a surety bond in penal sum of at least $5,000, conditioned for payment of proceeds of any collection in accordance with agreement with client. (NMSA 61-18A-15). Failure to file bond and procure license is a misdemeanor. (NMSA 61-18A-6).

3.20 MONOPOLIES, RESTRAINT OF TRADE AND COMPETITION:

Contracts or combinations restricting trade declared illegal and trade monopolies are fourth degree felonies; contracts providing for same (excepting labor, agricultural, and horticultural organizations for mutual help) void and person damaged thereby given civil cause of action. (NMSA 57-1-1 et seq.).

Indirect purchaser suits allowed. (NMSA 57-1-3).

Price Discrimination Act.

Price discrimination is unlawful. (NMSA 57-14-1 et seq.).

Resale Price Agreements.

See category 17 Intellectual Property, topic 17.01 Trademarks and Tradenames.

See also topic 3.15 Franchises.

Unfair Trade Practices.

See topic 3.12 Consumer Protection, subhead Uniform Deceptive Trade Practices Act.

3.21 NEGOTIABLE INSTRUMENTS:

See topic 3.02 Bills and Notes.

3.22 RESTRAINT OF TRADE:

See topic 3.20 Monopolies, 3.22 Restraint of Trade and Competition.

3.23 SALES:

Covered by Uniform Commercial Code—Sales. (NMSA 55-2-101 et seq.).

Contracts of Sale.

Covered by Uniform Commercial Code—Sales. (NMSA 55-2-201 to-210).

Bill of sale required for sale of livestock on day of transaction. Duly executed bill of sale is instrument in writing by which owner or his authorized agent transfers to buyer title to livestock described in bill of sale and guarantees to defend title against all lawful claims. Must fully describe number, kind, marks and brand of each animal. (NMSA 77-9-21 to -22).

Conditions or Warranties.

Covered by Uniform Commercial Code—Sales. (NMSA 55-2-312 et seq.).

Consumer Protection.

See topic 3.12 Consumer Protection.

Product Liability.

Covered generally by Uniform Commercial Code. Warranties of seller extend to any natural person in family or household of buyer or guests of buyer if it is reasonable to expect such person may use, consume or be affected by goods and who is injured in person by breach of warranty. (NMSA 55-2-318). No implied warranty or strict liability for transmitting hepatitis or human immunodeficiency virus in whole blood, plasma, blood products, blood derivatives, human tissue or organs or any component thereof. (NMSA 24-10-5). Privity not required in suits on negligence theory. (79 N.M. 123, 440 P.2d 798). Strict liability adopted. (83 N.M. 730, 497 P.2d 732). May sue in either negligence or strict liability for defective product. (120 N.M. 372, 902 P.2d 54).

Transfer of Title.

Covered by Uniform Commercial Code. (NMSA 55-2-401 to -403).

Performance.

Covered by Uniform Commercial Code. (NMSA 55-2-501 et seq.).

Stoppage in Transit.

Covered by Uniform Commercial Code. (NMSA 55-2-705).

Remedies of Seller.

Covered by Uniform Commercial Code. (NMSA 55-2-701 to -710).

Remedies of Buyer.

Covered by Uniform Commercial Code. (NMSA 55-2-711 et seq.).

Conditional Sales.

Covered by Uniform Commercial Code—Secured Transactions. (NMSA 55-9-101 et seq.). See category 20 Mortgages, topic 20.01 Chattel Mortgages.

See also category 23 Transportation, topic 23.01 Motor Vehicles, subhead Liens.

Retail Credit Sales.

Covered by Retail Installment Sales Act (NMSA 56-1-1 et seq.).

Retail installment contracts must be in writing, dated, signed by buyer and a copy furnished to buyer or he is entitled to rescind contract before receiving goods. Contract must contain a notice in large type that buyer is entitled to a copy and not to sign before reading or if it contains blank spaces. Contract must specify names and addresses of parties, description of goods and 11 items pertaining to complete itemization of price, charges and financing terms including amount of time price differential, number of payments, amount and due date of each installment. (NMSA 56-1-2). Contract may not contain any blank spaces essential to transaction. With certain exceptions, these provisions apply to mail order sales.

Buyer is entitled to credit refund upon prepayment. Delinquency charges may not exceed 5% or $5 whichever is less and contract may provide for collection of attorney fees and costs. Buyer entitled to one free statement of account. Subsequent purchases may be consolidated with prior unpaid balance but subsequent payments are allocated to purchases earliest in time when seller retains a security interest. This provision does not apply when subsequent purchases improve or are attached to first purchase. (NMSA 56-1-2).

Time price differential is amount paid for privilege of purchasing over time regardless of how it is denominated or expressed. (NMSA 56-1-1).

Repeal of maximum time price differential in retail installment contracts and retail charge agreements made permanent.

All retail charge agreements shall state maximum amount and rate of time price differential to be paid and contain notice in large type that buyer is entitled to copy and not to sign before reading or if it contains blank statements. (NMSA 56-1-3).

Prohibited Provisions.

Several, most significant of which are those (1) allowing acceleration of maturity by holder in absence of buyer's default in performance of any of his obligations, (2) giving power of attorney to confess judgment in this state, (3) giving assignment of wages, (4) buyer agrees not to assert against seller or assignee a claim or defense arising out of sale. (NMSA 56-1-5).

Waiver of provisions of Act before or at time of sale or agreement invalid. (NMSA 56-1-7).

Violation of Act is misdemeanor (NMSA 56-1-8); bars recovery of any interest, official fees, or delinquency or collection charge (NMSA 56-1-9); and is subject to injunction (NMSA 56-1-10).

Compliance with Federal Truth in Lending Act (15 U.S.C. §§ 1601-1665), Regulation Z, and all other regulations promulgated thereunder, deemed to have complied with N.M. Retail Installment Sales Act, at least with reference to disclosure requirements. (NMSA 56-1-15).

Uniform Commercial Code also applicable.

Uniform Consumer Credit Code.

Portions of Code adopted.

Special provisions cover motor vehicle sales financing. (NMSA 58-19-1 et seq.). See category 23 Transportation, topic 23.01 Motor Vehicles, subhead Financing Contracts. See also topics 3.17 Interest, 3.12 Consumer Protection.

Bulk Sales.

See topic 3.09 Commercial Code and category 8 Debtor and Creditor, topic 8.08 Fraudulent Sales and Conveyances.

Sales of Businesses.

Not a transaction in goods; UCC does not apply. (121 N.M. 722, 918 P.2d 1).

Sales of Motor Vehicles.

See category 23 Transportation, topic 23.01 Motor Vehicles.

Sales of commercial feed regulated by NMSA 76-19-1 et seq.

False advertising prohibited. (NMSA 57-15-1 et seq.).

Distress Sales.

Holder of distress sale must obtain license from municipality or county. (NMSA 57-10-1 et

seq.).

Fair Trade Law repealed 1975.

3.24 SECURITIES:

Regulated by New Mexico Securities Act of 1986, NMSA 58-13B-1 et seq. This act is modeled after Uniform Securities Act of 1985, which was promulgated by National Conference of Commissioners on Uniform State Laws and is reproduced in Uniform and Model Acts section. Material provisions of New Mexico act are digested below; citations to Uniform Act are provided where appropriate.

Supervision.

Director of Regulation and Licensing Department, Santa Fe 87503. (NMSA 58-13B-44).

Regulatory Powers of Supervising Authority.

Director has general power to issue orders, make rules, and prescribe forms. (NMSA 58-13B-48). Securities are required to be registered. See subheads Securities Covered, Exempt Securities, Exempt Transactions, Registration of Securities, infra. (NMSA 58-13B-24). As to director's power to issue stop order, see Uniform Act § 306(a). (NMSA 58-13B-25[A]).

Broker-dealers, sales representatives, investment advisers, and investment adviser representatives, as defined in act, must be licensed (NMSA 58-13B-3 to -6), and director may examine records of such persons without prior notice (NMSA 58-13B-15). Director's power to deny, suspend, revoke, or otherwise limit license of broker-dealer, sales representative, investment adviser, or investment adviser representative has been codified as set out in Uniform Act § 212(a), subject to following modifications: (1) Violations described in Uniform Act § 212(a)(2)-(3) need not be willful (NMSA 58-13B-16[A][2][b]-[c]); (2) Uniform Act § 212(a)(4) amended to provide as follows: within past six years has pleaded guilty or nolo contendere to or been convicted of felony or misdemeanor arising out of transaction of securities, banking, or insurance business or involving any of various forms of theft, untruthfulness, or fraud, or illegal acquisition, counterfeiting, concealment, or conversion of funds, property, or securities (NMSA 58-13B-16[A][2][d]); (3) language of Uniform Act § 212(a)(5) modified (NMSA 58-13B-16[A][2][e]); (4) Uniform Act § 212(a)(8) expanded to include unethical or dishonest conduct in any investment-related activity (NMSA 58-13B-16[A][2][h]).

Director has power to conduct investigations by subpoenaing witnesses and compelling production of documents. (NMSA 58-13B-36). Without prior hearing, director may issue cease-and-desist order; with prior notice, director may also censure licensees, bar persons from association with licensed broker-dealers or investment advisers in state, or impose fines of up to $5,000 for each violation. (NMSA 58-13B-37). Director may apply to district court for enforcement against violators and would-be violators of Securities Act or rule or order thereunder. (NMSA 58-13B-38).

Prerequisites to Sales or Offerings.

All securities, unless specifically exempt, sold in exempted transaction or federal covered security, must be registered with director before being sold or offered for sale. (NMSA 58-13B-20).

Securities Covered.

Uniform Act § 101(16) adopted, subject to following modifications: (1) Exclusion codified in Uniform Act § 101(16)(i) not adopted; (2) New Mexico act includes any interest in oil, gas, or other mineral rights, but excludes landowner royalties in mineral production created through execution of lease of lessor's mineral interest. (NMSA 58-13B-2[X]). Act also applies to time shares deemed to be investment contracts. (NMSA 47-11-10).

Exempt Securities.

Uniform Act § 401 adopted, subject to following modifications: (1) Bracketed portion of Uniform Act § 401(b)(1) adopted with modifications (NMSA 58-13B-26[A]); (2) codification of Uniform Act § 401(b)(5) does not include securities issued by railroads or other common carriers (NMSA 58-13B-26[E]); (3) Uniform Act § 401(b)(6) amended to include certificates of participation in real property leases (NMSA 58-13B-26[F]); (4) Uniform Act § 401(b)(7)-(8) not adopted; (5) bracketed portion of Uniform Act § 401(b)(10) adopted as requirement that director may impose at his discretion (NMSA 58-13B-26[H]); (6) Uniform Act § 401(b)(14) not adopted. Any exemption may be denied or revoked by director. (NMSA 58-13B-28[A]).

Exempt Transactions.

Uniform Act § 402 adopted, subject to following modifications: (1) Uniform Act § 402(2) amended to impose additional conditions on nonissuer transaction in security by registered broker-dealer (NMSA 58-13B-27[B]); (2) Uniform Act § 402(3) amended to require that class of securities be outstanding in hands of public for not less than 180 days (NMSA 58-13B-27[C][1]); (3) Uniform Act § 402(4) amended to provide that director may impose additional requirements (NMSA 58-13B-27[C][2]); (4) Uniform Act § 402(5) amended to provide for requirement that customer acknowledge on specified form that sale was unsolicited (NMSA 58-13B-27[D]); (5) Uniform Act § 402(11) not adopted; (6) Uniform Act § 402(12) amended to permit collection of commission by agent registered under New Mexico act, and payment by subscriber if such payment is put in escrow until entire issue is subscribed (NMSA 58-13B-27[L]); (7) Uniform Act § 402(15)(iii), (16)(ii) amended to require that no stop order have been entered by director, SEC, or another state's securities agency, and no proceeding or examination that may culminate in stop order be pending, whether or not offeror is aware of such order, examination, or proceeding (NMSA 58-13B-27[P][2]); (8) Uniform Act § 402(17)(i) amended to also require written notice to director (NMSA 58-13B-27[Q][1]); (9) Uniform Act optional § 402(18) adopted (NMSA 58-13B-27[R]); (10) New Mexico act provides following additional exemptions: (a) nonissuer transaction involving security issued and outstanding and listed on national securities exchange registered under § 6 of Securities Exchange Act of 1934 or designated as national market system security by National Association of Securities Dealers, if such exchange or market system is approved by director, and subject to additional conditions director may impose (NMSA 58-13B-26[M]); (b) issuance, offer, and sale of securities by any corporation or limited liability company, or offer or sale of limited partnership interests by limited partnership, if total offering, including interest and installment payments, does not exceed $1,500,000, subject to additional qualifications (NMSA 58-13B-27[J]); (c) issuance, offer, and sale of securities by any corporation or limited liability company, or offer of limited partnership interests by limited partnership, if sale will not result in more than 25 security holders or limited partners, issuer reasonably believes that all purchases are for investment, no public advertising or general solicitation is used in connection with offer or sale, and no commission or other remuneration is paid for soliciting or selling to any person in New Mexico except to agents licensed under New Mexico act (NMSA 58-13B-27[K]); (d) any transaction involving leases or interests in leases in oil, gas, or other mineral rights between parties "engaged in the business of exploring for or producing oil and gas or other valuable minerals as an ongoing business," as that term is defined (NMSA 58-13B-27[S]); (e) certain transactions involving sale or offer of interests in and under oil, gas, or mining rights located in New Mexico or fees, titles, or contracts relating thereto, or such sale or offer of such interests, wherever located, made by entity principally operating in New Mexico, subject to qualifications (NMSA 58-13B-27[T]); (f) transactions connected with offering not exceeding $500,000 in aggregate during any 12 consecutive months, with not more than ten purchasers in New Mexico and resulting in not more than 50 beneficial owners of issuer, and other requirements (NMSA 58-13B-27[U]).

Registration of Securities.

Registration by Filing.

Uniform Act § 302 adopted, subject to following modifications: (1) Uniform Act § 302(a)(9) amended to require that listed defaults not have occurred during last three fiscal years before filing of registration statement (NMSA 58-13B-21[A][9]); (2) Uniform Act § 302(b)(4) amended to permit filing of copy or specimen of security (NMSA 58-13B-21[B][4]); (3) Uniform Act § 302(c) amended to make five-day waiting period absolute, to require that no stop order be in effect and no stop order proceeding be pending, and to delete specified methods of notifying director that federal registration statement has become effective (NMSA 58-13B-21[C]).

Registration by Coordination.

Uniform Act § 303 adopted, subject to following modifications: (1) All references to “telephone or telegram” deleted; (2) Uniform Act § 303(b)(1) amended to require only one copy of latest form of prospectus (NMSA 58-13B-22[B][1]); (3) Uniform Act § 303(b) amended to permit director to require additional information (NMSA 58-13B-22[B][5]); (4) Uniform Act § 303(c)(2) amended so that proviso speaks of five days after initial filing rather than ten days. (NMSA 58-13B-22[C][2]).

Registration by Qualification.

Uniform Act § 304 adopted, subject to following modifications: (1) Uniform Act § 304(b)(5) amended to require listed information with respect to promoter, control person, or affiliate, as those terms are defined by New Mexico act (NMSA 58-13B-23[B][5]); (2) Uniform Act § 304(b)(17) amended to require that statement of financial condition be certified by certified public accountant (NMSA 58-13B-23[B][16]); (3) New Mexico act requires filing of additional information for mining or oil securities (NMSA 58-13B-23[B][17]).

Fees for registration by any of the above methods are.1% of maximum aggregate offering price of securities offered for sale in state, but not less than $525 or more than $2,500 or $525 for corporate issuers claiming federal exemption for small corporate offerings under Rule 504 of Regulation D; fees not refundable in event of withdrawal or stop order. (NMSA 58-13B-24[B]).

Other provisions generally applicable to registration are codified as set out in Uniform Act § 305(d)-(p), subject to following modifications: (1) Uniform Act § 305(h) amended to include security issued to promoter, control person, or affiliate (NMSA 58-13B-24[G]); (2) Uniform Act § 305(k) amended to permit director to require delivery of additional materials to purchasers (NMSA 58-13B-24); (3) Uniform Act § 305(o)-(p) amended to specify that additional fee is three times fee otherwise payable (NMSA 58-13B-24[M] - [N]); (4) New Mexico act additionally provides that securities offered and sold pursuant to § 4(5) of Securities Act of 1933, and mortgage-related securities under § 3(a)(41) of Securities Exchange Act of 1934, must comply with act's registration requirements (NMSA 58-13B-24[O]).

On denial, suspension, and revocation of registration, see Uniform Act § 306. (NMSA 58-13B-25).

Licensing of Broker-Dealers, Sales Representatives, Investment Advisers, and Investment Adviser Representatives.

Governed by New Mexico Securities Act of 1986. Broker-dealers and sales representatives must be licensed. (NMSA 58-13B-3). Broker-dealer registered under Securities Exchange Act of 1934 and having no place of business in New Mexico is exempt from licensing if he effects transactions in state solely with issuer, other licensed or exempt broker-dealers, or financial or institutional investors, or if he is licensed in another state where he maintains place of business, and offers and sells in New Mexico solely to nonresidents who are existing customers. (NMSA 58-13B-4[A]). Director may exempt other broker-dealers by rule or order. (NMSA 58-13B-

4[A][2]). Sales representative is exempt if he acts for exempt broker-dealer, acts without compensation for issuer in effecting offer or sale of exempt securities or exempt transaction, or acts without compensation for issuer in effecting transaction with employees, partners, officers, or directors of issuer or its parent or subsidiaries. (NMSA 58-13B-4[B]). Director may exempt other sales representatives by rule or order. (NMSA 58-13B-4[B][4]). Investment advisers and investment adviser representatives must be licensed. (NMSA 58-13B-5). Investment adviser registered under Investment Advisers Act of 1940 is exempt if its only New Mexico clients are other investment advisers, broker-dealers, or financial or institutional investors, or if it has no place of business in New Mexico and during any 12 consecutive months does not direct business communications in New Mexico to more than five present or prospective clients other than broker-dealers, financial or institutional investors, or other investment advisers. (NMSA 58-13B-6[A]). Investment adviser representative is exempt if he works for exempt investment adviser. (NMSA 58-13B-6[B]). Director may exempt other investment advisors and investment advisor representatives by rule or order. (NMSA 58-13B-6[C]). Annual registration fees are $300 for broker-dealers and investment advisers, and $50 for sales representatives and investment adviser representatives. (NMSA 58-13B-9). Director may require examination of candidates for licensing (NMSA 58-13B-10) and may impose various post-licensing requirements (NMSA 58-13B-13). On director's power to deny, suspend, revoke, or otherwise limit licenses, see subhead Regulatory Powers of Supervising Authority, supra.

Bonds.

Director may by rule require furnishing of fidelity bond by broker-dealer, sales representative, investment adviser, or investment adviser representative. By rule, director will require licensed broker-dealer to maintain minimum net capital and prescribed ratio between net capital and aggregate indebtedness, and will require licensed investment adviser to maintain minimum net worth. (NMSA 58-13B-13).

Advertisements.

Director by rule or order may require filing of any prospectus, pamphlet, circular, form, letter, advertisement or other sales literature or advertising communication addressed or intended for distribution to prospective investors. (NMSA 58-13B-29).

Liabilities and Remedies.

For violation of New Mexico act, director may issue order imposing civil penalties (of up to $5,000 for each violation), issue cease and desist order, censure individual if that person is licensed broker-dealer, sales representative, investment adviser or investment adviser representative, or bar or suspend person from association with licensed broker-dealer or investment adviser in New Mexico. (NMSA 58-13B-37). Court may assess civil penalties (of up to $5,000 for each violation), order declaratory or injunctive relief, disgorgement, restitution, appointment of receiver or conservator for defendant or defendant's assets, and/or recovery by director of all costs of investigation and enforcement. (NMSA 58-13B-38). Willful violator of act or rule or order thereunder is guilty of third degree felony and may be fined $5,000 and/or imprisoned for three years. (NMSA 58-13B-39).

Person who offers or sells security in violation of specified sections of New Mexico act is liable to purchaser, except that no liability will exist if purchaser fails to file notice of claim exemption under NMSA 58-13B-27(K). (NMSA 58-13B-40). Upon tender of security, purchaser shall recover purchase price, interest, and costs and attorneys' fees, less income received on security. If purchaser no longer owns security, he may recover amount that would have been recoverable upon tender less value of security when purchaser disposed of it and interest from date of disposition. Person who purchases security in violation of specified sections of act is liable to seller for security itself, income received on security by purchaser less consideration paid, and costs and attorneys' fees. If purchaser no longer owns security, seller may recover excess of value of security when purchaser acquired it or disposed of it, whichever is greater, over consideration paid for security plus interest. Purchaser or seller of security whose price was affected by market manipulation may recover damages from manipulator, calculated as difference between sale or purchase price and price that would have prevailed in absence of manipulation, plus interest. Liabilities described above may be shared jointly and severally with control persons, partners, officers and directors, agents, employees, and broker-dealer or sales representatives, under certain circumstances. (NMSA 58-13B-40). Plaintiff must sue within five years of violation and within two years of time when he discovered or should have discovered it. (NMSA 58-13B-41). Violator may avoid civil action by making offer of complete rescission before suit is filed. (NMSA 58-13B-42). Rights and remedies described above are in addition to any others that may exist at law or equity. (NMSA 58-13B-43). Contract in violation of New Mexico Securities Act or of rule or order thereunder, or purporting to waive compliance with act, is unenforceable. (NMSA 58-13B-55).

Hearings and Appeals.

Director may issue written notice of intent or summary order without prior notice or opportunity for hearing. Upon receiving notice of such action, party has 15 days to request hearing; hearing is then set for 15 to 60 days after request. (NMSA 58-13B-53). Within 30 days after entry of final order, aggrieved person may appeal to District Court. (NMSA 58-13B-56).

Subdivision Offerings.

See category 21 Property, topic 21.16 Real Property, subhead Subdivisions.

Uniform Commercial Code adopted. See topic 3.09 Commercial Code.

Uniform Simplification of Fiduciary Security Transfers Act adopted in 1991. (NMSA 46-8-1 to NMSA 46-8-10).

Uniform Transfers to Minors Act adopted. (NMSA 46-7-11 et seq.).

3.25 STATUTE OF FRAUDS:

See topic 3.16 Frauds, Statute of.

3.26 TRUST RECEIPT SECURITY:

See category 8 Debtor and Creditor, topic 8.15 Pledges.

3.27 WAREHOUSEMEN:

Covered by Uniform Commercial Code—Documents of Title. (NMSA 55-7-101 et seq.).

Warehouseman of agricultural products must procure license from county clerk of county in which warehouse situated, and give $5,000 bond. (NMSA 56-6-2, -3).

Warehouseman may operate under this act or under United States Warehouse Act.

4 CITIZENSHIP

4.01 ALIENS:

Uniform Probate Code, with significant omissions and amendments, adopted. (NMSA 45-1-101 et seq.).

Property.

Aliens have full power and authority to acquire and hold real property and personal property by deed, will, inheritance or otherwise and to alienate, sell, or assign and transfer any property to their heirs or other persons, whether heirs or other persons are, or are not, citizens of U.S. (NMSA 45-2-111).

5 CIVIL ACTIONS AND PROCEDURE

—Scope —

Prefatory Note: This section focuses primarily upon rules of civil procedure for civil actions filed in state district courts. Local rules for each judicial district should always be consulted to identify additional procedural rules that may apply to civil actions. In addition, for actions filed in appellate courts, subsidiary courts or courts, administrative tribunals, procedural rules promulgated for those bodies should be examined.

5.01 ACCORD AND SATISFACTION:

Compromise.

No generally applicable statutory provision exists but statutory and case law should be consulted to determine whether particular action may be resolved through compromise.

Pleading.

There are no statutory provisions relating to accord and satisfaction, but a plea of this kind may be set up as affirmative defense by way of answer under Rules of Civil Procedure. (See Rule 1-008[c].)

Uniform Commercial Code adopted. See category 3 Business Regulation and Commerce, topic 3.09 Commercial Code.

5.02 ACTIONS:

There is but one form of action for the enforcement of private rights and redress of private wrongs, which is denominated civil action. (Rule 1-002). Rules of civil procedure are generally patterned after equivalent Federal Rules. See topic 5.19 Practice.

Equity.

The distinction between actions at law and suits in equity is abolished in so far as form and course of the proceeding is concerned. (29 N.M. 324, 222 Pac. 912, overruled on other grounds by 99 N.M. 788, 664 P.2d 986). Equity rules prevail over common law if conflict exists. (NMSA 38-1-4).

Common law as recognized in U.S. is rule of practice and decision (NMSA 38-1-3), except where superseded by constitution, statute or rule (96 N.M. 254, 629 P.2d 330).

Forms of Action.

No distinction made under rules.

Conditions Precedent.

No general provisions but statutory and case law should be consulted to determine if any administrative prerequisite for filing suit exists.

Commencement.

Actions in district courts commenced by filing complaint. (Rule 1-003). See also topics 5.20 Process and 5.26 Venue.

Parties.

Every action must be presented in name of real party in interest except that administrator, executor, guardian, trustee of express trust, party with whom or in whose name contract has been made for benefit of another or person expressly authorized by statute may sue without joining person for whose benefit suit is brought. (Rule 1-017). When subrogated insurers are required to be joined, that joinder shall not be disclosed to jury. (101 N.M. 148, 679 P.2d 816).

Permissive joinder of plaintiffs parallels federal rule (Rule 1-020), as does joinder of indispensable parties. (Rule 1-019). Joinder of plaintiffs for class action purposes also parallels federal rule. (Rule 1-023; see also Rule 1-023.1 [derivative actions by shareholders].) Party also may be added through amendment. (Rule 1-015). Misjoinder and nonjoinder of parties generally is not ground for dismissal of action. (See Rule 1-021.)

Statutory and case law that govern claim should be consulted to determine whether specific party joinder rules apply to claim. For example, in foreclosure proceedings, “unknown heirs, devisees or legatees” of deceased person may be joined (NMSA 39-5-15).

Class Actions.

Allowed if requirements under rule are met. (See Rule 1-023; see also Rule 1-023.1 [derivative action by shareholder].)

Intervention.

Allowed if requirements under rule are met. (See Rule 1-024.)

Interpleader.

Plaintiff or defendant exposed to multiple liability may interplead claims. (See Rule 1-022.)

Third Party Practice.

Allowed as of right if third party complaint filed within ten days after service of answer or reply. After ten days, permitted only upon order of court to bring in anyone who may be liable to plaintiff or defendant upon plaintiff's claim or defendant's counterclaim, irrespective of whether either plaintiff or defendant seeks affirmative relief from that party. (Rule 1-014; 103 N.M. 689, 712 P.2d 1351). Derivative or secondary liability to defendant, on basis of indemnity, contribution, or some similar theory, is one way for maintaining third-party action. (119 N.M. 554, 893 P.2d 450). Alleging comparative fault against third-party defendant is another. (103 N.M. 689, 712 P.2d 1351).

Joinder of Claims.

Plaintiff in complaint or in reply setting forth counterclaim or defendant in answer can join as many legal or equitable claims that exist against opposing party. (See Rule 1-018.) Like joinder of claims can occur when there are multiple parties if requirements of Rules 1-019; 1-020 and 1-022 are satisfied. (Rule 1-018). Like joinder of cross-claims or third-party claims can occur if requirements of Rule 1-013 and Rule 1-014 are satisfied. (Rule 1-018).

Splitting Causes of Action.

Court can sever claims (Rule 1-021), or order separate phases of trial (Rule 1-042).

Compulsory counterclaims must be asserted. (Rule 1-013). Case law should be consulted to determine whether preclusion doctrines, res judicata or collateral estoppel, are applicable to claim that might be split.

Consolidation of Actions.

Party may seek or court may order. (Rule 1-042).

Stay of Proceedings.

May be ordered in certain circumstances, including pendency of motion for new trial. (See Rule 1-062.)

Abatement and Revival.

Marriage, transfer of interest or conviction of crime will not abate a pending action on a survivable cause of action. (NMSA 37-2-3). Successors in office are automatically substituted for parties suing or sued in their official capacity. (Rule 1-025[D]). Generally, no pending actions, other than for libel, slander, malicious prosecution, assault, battery, or for nuisance abate on death of either party or both parties. (NMSA 37-2-4). Nor does such event abate action where there are several plaintiffs or defendants, even if cause of action does not survive, provided merits of controversy can be determined as to remaining parties. (NMSA 37-2-6). In addition to causes of action which survive at common law, causes of action for mesne profits, for injury to real or personal estate or for deceit or fraud survive death of person entitled to or liable for same. Cause of action for personal injury or death survives death of wrongdoer. (NMSA 37-2-1). Revivor is by order of court on motion suggesting death of party, or cessation of his powers (NMSA 37-2-8) and giving names and capacity of his representatives or successor. If representatives of defendant are nonresidents, and revivor has been ordered, notice may be published for them to appear and show cause why action should not be revived. (NMSA 37-2-9). Period for revival is limited to one year both as to plaintiffs and defendants, unless extended by consent. (NMSA 37-2-13).

See also topic 5.16 Limitation of Actions, subhead Death.

Limitation of.

See topic 5.16 Limitation of Actions.

Small Claims.

See category 6 Courts and Legislature, topic 6.01 Courts.

Administration.

See category 13 Estates and Trusts, topic 13.08 Executors and Administrators.

Termination of Actions.

Dismissal may be by notice of plaintiff prior to filing of answer, by stipulation or by order of court. Action will be dismissed without prejudice by court two years after filing of complaint if it appears plaintiff has failed to take action to obtain final determination. (Rule 1-041).

Prohibited Actions.

No specific provisions.

Direct Actions Against Insurer.

No statutory authorization. Common law allows direct action against insurer under same circumstances. (2004-NMSC-010, 89 P.3d 69). See category 23 Transportation, topic 23.01 Motor Vehicles, subhead Direct Actions.

5.03 APPEAL AND ERROR:

From Justices of Peace.

Office abolished. (NMSA 35-1-38).

From Metropolitan Courts.

Appeal may be taken to district court. (NMSA 34-8A-6 [deadline]; see also Rule 1-073 [procedures]; NMSA 39-3-1 [standard of review]).

From Magistrate Courts.

Appeal may be taken to district court. (NMSA 35-13-1 [deadline]; see also NMSA 39-3-1 [standard of review]; Rule 1-072 [procedures]).

From Municipal Courts.

Appeal may be taken to district court. (NMSA 35-15-7 [procedures]; see also NMSA 39-3-1 [standard of review]).

From Administrative Agencies Pursuant to Statutory Right to Review.

Appeal of final decision of administrative decision may be taken to district court pursuant to NMSA 39-3-1.1 if specific statute so provides. (NMSA 39-3-1.1). See also Rule 1-074 (procedures). *Note:* Statutes should be consulted to determine whether different appellate mechanisms or procedures apply to particular type of case. (E.g., appeals from New Mexico Human Rights Commission. See Rule 1-076.)

From Administrative Agencies if No Statutory Right to Review.

Party may be entitled to seek district court review of final decision of administrative agency pursuant to writ of certiorari. (See Rule 1-075.) New Mexico constitution and case law, should be reviewed to determine if grounds for filing writ of certiorari apply.

From Public Regulation Commission.

Any provider of telecommunications services (NMSA 63-9A-14; NMSA 63-9-16), (repealed) or other party in interest may appeal final orders to Supreme Court.

From Worker's Compensation Administration.

Any party in interest may appeal worker compensation judge's final compensation order. (NMSA 52-5-8).

From Labor Department.

Final decisions of board of review of employment security division or Secretary of the Labor Department. (Rule 1-077).

From Probate Courts.

Probate courts may issue only informal probate orders which are effective until superseded by order in formal testacy proceeding. (NMSA 45-3-302). Any interested person may file petition in formal testacy proceeding in district court to set aside informal probate.

From District Courts.

Appeals generally may be taken from district court to court of appeals or Supreme Court in accordance with their respective appellate jurisdictions following entry of final judgment or decision, any interlocutory order or decision which practically disposes of merits of action, or any final order after entry of judgment which affects any substantial rights. (NMSA 39-3-2 [civil actions]; NMSA 39-3-7 [special statutory proceedings]; see also NMSA 39-3-4 [explains which interlocutory order or decisions are appealable].)

Special rule applies to review by court of appeals of district court decisions relating to appeals taken pursuant to Rule 1-074 and NMSA 39-3-1.1. Party must file petition for writ of certiorari with court of appeals. (Rule 12-505[B]). Party may appeal denial of writ to Supreme Court. (Rule 12-505[J]).

Cross-appeals may be taken within 30 days after entry of any appealable judgment, decision or order or within 15 days after receipt of notice of appeal, whichever date is later. (NMSA 39-3-8).

Party has no right to appeal final judgment to challenge jurisdiction of trial court to issue nonfinal order. (1996-NMCA-054, 918 P.2d 13). Grant of new trial not appealable unless Supreme Court issues writ of superintending control. (1996-NMSC-066, 930 P.2d 783). Denial of summary judgment motion prior to entry of final judgment on merits sufficient to raise issue for appeal if facts not in dispute and basis of ruling was matter of law. (1997-NMCA-040, 940 P.2d 468).

Appeal may be taken from district courts to Supreme Court or to court of appeals by any person aggrieved by judgment of contempt. (NMSA 39-3-15). Motion made pursuant to Rule 60(B)(1) to correct error of law must be filed before time for appeal expires. (116 N.M. 501, 864 P.2d 317). Rule 60(B) motion must be filed in original cause of action in same court rendering challenged judgment and may not be relied on to launch collateral attack in different cause of action or different court. (1996-NMCA-102, 927 P.2d 23).

From Court of Appeals.

Supreme Court has appellate jurisdiction if court of appeals certifies that matter involves (1) significant question of law under constitutions of New Mexico or U.S., (2) conflict with Supreme Court precedent, (3) conflict with court of appeals precedent, or (4) issue of substantial public interest. (Rule 12-502). See also topic 5.05 Certiorari.

Appeal Bond.

Where appeal or writ of error is from judgment or decree of district court involving title to or possession of real or personal property, amount of bond must be fixed by trial court. (NMSA 39-3-9). Supersedeas bond must be filed in 60 days. Time may be extended for additional 30 days by judge of district court in case of appeal or by Supreme Court in case of writ of error. Costs are paid in advance. No bond for costs is required upon any appeal or writ of error.

Indigent Appeals.

In any appeal, court may grant free process, including costs of transcripts, to any appellant upon proper showing of indigency. (NMSA 39-3-12).

Stay of Proceedings.

No supersedeas or stay of execution from district court judgment in civil action or writ of error unless bond filed, within 60 days of entry of judgment, for double amount of judgment. Extension, not to exceed 30 days, for filing bond may be granted. (NMSA 39-3-22). If judgment is for other than fixed money damages, court will determine amount of bond. (NMSA 39-3-22). Automatic stay if appellant is state, county, or municipal corporation and no bond required. (NMSA 39-3-23). Discretionary stay if action is contested election, mandamus, removal of public officers, quo warranto or prohibition. Court deems terms and conditions. (NMSA 39-3-24). If appeal is from judgment involving title to or possession of real or personal property, court fixes bond for amount that will indemnify appellee for all damages. (NMSA 39-3-9). Application for stay of judgment, order of district court pending appeal, approval of supersedeas bond, or order involving injunction must be first made in district court. (Rule 12-207).

5.04 BONDS:

Sureties.

Surety bonds are required for public moneys and from certain state officials for performance of duties. Public officers subject to bond requirement cannot be sureties. (NMSA 10-2-1 et seq.).

Enforcement.

General law prevails.

5.05 CERTIORARI:

Jurisdiction.

Supreme Court may grant certiorari to district court where jurisdictional error has been committed and appeal will not lie. (41 N. M. 269, 67 P.2d 293). Certiorari to court of appeals may be granted. (NMSA 34-5-14).

Grounds.

Supreme Court has jurisdiction to review by certiorari any matter in which decision of court of appeals (1) is in conflict with decision of Supreme Court; (2) in conflict with decision of court of appeals; (3) involves significant question of law under constitutions of U.S. or New Mexico; (4) involves issue of substantial public interest. (Rule 12-502). Relief in nature of certiorari from district court to inferior judicial or quasi-judicial tribunals may be had in accordance with common law practice. (Const., art. 6, § 13).

Proceedings.

Application for writ must be filed with clerk within 20 days after final action of court of appeals. (Rule 12-502). Allowed on verified petition.

See also topic 5.03 Appeal and Error.

5.06 CHARITABLE IMMUNITY:

See topic 5.09 Damages.

5.07 COMMISSIONS TO TAKE TESTIMONY:

See topic 5.11 Depositions and Discovery.

5.08 COSTS:

In civil cases costs allowed as matter of course to prevailing party, except when express provisions of statute or rule or court order (Rule 1-054) provides to contrary. Costs against state, officers and agencies permitted only to extent allowed by law. (Rule 1-054).

Security for Costs.

Plaintiff may be required to give security or suffer abatement of action. (NMSA 39-2-14).

Liability of Attorney.

Attorney not liable for costs, except in disbarment proceedings where he is respondent or refused to make discovery. (NMSA 36-2-22; Rule 1-037).

Unusual Costs.

Court must justify taxing of unusual costs, e.g. attorney's travel expenses. (1996-NMCA-088, 923 P.2d 1187).

Costs on Appeal.

See generally, Rule 12-403.

5.09 DAMAGES:

Statutes and common law determine which types of damages or remedies may be recovered.

Sovereign immunity limited by NMSA 41-4-1 to -29. Statutory waiver of governmental immunity for valid written contracts includes implied contracts where party seeking enforcement can point to some writing incorporated into contract. (1996-NMSC-029, 918 P.2d 7, limited to context of employment law by 2001-NMCA-043, 28 P.3d 1104, cert. denied, 130 N.M. 484, 27 P.3d 476).

See also category 13 Estates and Trusts, topic 13.05 Death, subhead Action for Death.

Parental immunity has been abolished. (96 N.M. 27, 627 P.2d 869).

Compensatory.

Common law governs.

Punitive.

Punitive or exemplary damages are allowed in the following instances: (1) in contract or tort where wrongdoer has culpable mental state and conduct rises to willful, wanton, malicious, reckless, oppressive, or fraudulent level. (118 N.M. 266, 881 P.2d 11); (2) where producer or distributor of motion pictures who misrepresents merit or box office value of any motion picture and who fails or refuses to make adjustment therefor (NMSA 57-5-15); (3) action for wrongful death (NMSA 41-2-3, -4).

Must be specially pled. (Rule 1-009[G]).

Punitive damages cannot be recovered from estate of deceased tortfeasor. (117 N.M. 337, 871 P.2d 1343).

Statutory Multiple Damages.

Allowed in following actions: (1) double damages assessed against plaintiff in action of replevin where plaintiff fails to prosecute action without delay (NMSA 42-8-11); (2) treble damages allowed in action under Unfair Practices Act (NMSA 57-12-1 et seq.); (3) double damages allowed in trespass to surface of land only (NMSA 30-14-1.1; 1997-NMCA-032, 937 P.2d 979); (4) triple damages in action for drawing on worthless check (NMSA 56-14-1).

Comparative Negligence Rule.

Pure form adopted. (96 N.M. 682, 634 P.2d 1234). Joint and several liability for concurrent tortfeasors abolished, with certain exceptions. (NMSA 41-3A-1). Fault of tortfeasor may be compared with that of third person who (foreseeably) harmed plaintiff, even if third party is liable for intentional tort. (118 N.M. 1, 878 P.2d 319).

Uniform Contribution Among Joint Tortfeasors Act.

Adopted. (NMSA 41-3-1). See also subhead Comparative Negligence Rule, supra.

Medical Malpractice.

Damages limited to $600,000 for qualified health care providers excluding punitive damages, medical care and related benefits. (NMSA 41-5-6). Applies in default judgment; defaulting party admits liability only to his portion. (1997-NMSC-009, 933 P.2d 210).

No-Fault Insurance.

See category 23 Transportation, topic 23.01 Motor Vehicles, subhead No-Fault Insurance.

Dramshop Act.

Adopted. (NMSA 41-11-1). $50,000 damage cap unconstitutional. (107 N.M. 688, 763 P.2d 1153, overruled on other grounds by 1998-NMSC-031, 965 P.2d 305).

Damages awardable for various types of special tort claims including: bystander recovery (117 N.M. 28, 868 P.2d 673); fear of HIV exposure (121 N.M. 133, 909 P.2d 14); prima facie tort (109 N.M. 386, 785 P.2d 726); hedonics for wrongful death (117 N.M. 422, 872 P.2d 840); wrongful birth (111 N.M. 336, 805 P.2d 603); and loss of consortium (1998-NMSC-039, 968 P.2d 774).

5.10 DECLARATORY JUDGMENTS:

See topic 5.15 Judgments.

5.11 DEPOSITIONS AND DISCOVERY:

Federal Rules of Civil Procedure adopted. See topic 5.19 Practice.

Depositions.

Person may be deposed through oral examination or written questions. (Rule 1-026). Scope and timing of deposition must comply with standards set forth in Rule 1-026; Rule 1-030 (oral deposition) and Rule 1-031 (written questions).

Person may be deposed prior to commencement of action or during pendency of appeal, provided that applicable procedural requirements are met. (Rule 1-028).

Persons before whom deposition may be taken.

Deposition may be taken within or outside of state in accordance with conditions set forth in Rule 1-028. No deposition may be taken before person who is relative or employee or attorney or counsel for any of parties or who is financially interested in outcome of action. (Rule 1-029).

Use of Depositions.

May be used at trial, at hearing or on motion as provided in Rule 1-032.

Interrogatories.

Written interrogatories may be served upon any other party. (Rule 1-033). Scope, timing of, and responses to interrogatories must comply with requirements set forth in Rule 1-033. Party has option of producing business records as response. (Rule 1-033).

Production of Documents.

Requests for inspection of documents and other tangible items, as well as entry upon land, may be served on any other party. (Rule 1-034). Person who is not party may be compelled to produce documents or submit to inspection as provided in Rule 1-045. (Rule 1-034). Timing of and response to request must comply with requirements set forth in Rule 1-034. (See Rule 1-034.)

Physical or Mental Examination of Persons.

Permitted if requirements for obtaining court order under Rule 1-035 are met. (See Rule 1-035.) If requested by party opposing such order, examining physician must provide detailed written report. (Rule 1-035). Report and issuing physician may be discoverable under certain circumstances. (See Rule 1-035.)

Requests for admissions for matters within permissible scope of discovery under Rule 1-026 may be served upon party. (Rule 1-036). Form of requests must comply with standards set forth in Rule 1-036. (See Rule 1-036.) Admission is binding unless condition for withdrawal is satisfied. (See Rule 1-036.)

Stipulations Regarding Discovery Procedure.

Unless court orders otherwise or previous orders of court conflict, parties may by written stipulation provide that depositions may be taken before any person, at any time or place, upon any notice, and in any manner and when so taken may be used like other depositions; and may modify procedures provided in rules for other methods of discovery. (Rule 1-029).

Motion to Compel Response.

May be filed pursuant to Rule 1-037(A).

Sanctions.

May be sought if discovery response is not provided. (Rule 1-037). Sanctions may be monetary or directed at substance of nonresponsive party's case. (See Rule 1-037.)

Form of Deposition.

No statutory form. The following is sufficient:

Form

(Caption)

Deposition of. . . ., on behalf of the plaintiff (defendant) in the above entitled action now pending in the District Court of. . . . County, State of New Mexico, pursuant to the attached notice (stipulation) at the offices of. . . . on. . . ., 20. . . ., beginning at. . . . A.M. (or P.M.), before. . . ., a Notary Public in and for the County of. . . ., State of. . . . .

Appearances: (insert names of attorneys and whom they represent)

Proceedings

. . . ., a witness produced on behalf of the plaintiff (defendant) after having been first duly sworn, was examined and testified as follows:

Form of Certificate.

No statutory form. The following is sufficient:

Form

I, the officer before whom the foregoing deposition was taken, do hereby certify that the witness whose testimony appears in the foregoing deposition was duly sworn by me; that I personally recorded his (her) testimony; that said deposition is a true record of the testimony given by said witness; that I am neither attorney nor counsel for, nor related to or employed by any of the parties to the action in which this deposition is taken, and that I am not a relative or employee of any attorney or counsel employed by the parties hereto or financially interested in the action.

(Seal)

....

(Official title)

5.12 EQUITY:

See topic 5.02 Actions.

5.13 EVIDENCE:

Rules of evidence are substantially patterned after Federal Rules of Evidence. See State ex rel. Attorney General v. First Judicial Dist., 96 N.M. 254, 629 P.2d 330 (1981).

Polygraph examinations are admissible under Evid. Rule 11-707. (2004-NMSC-27, 96 P.3d 291).

Privileges.

See generally Evid. Rules 11-501 to 11-514; see also subhead Witnesses, infra.

Wiretaps.

Privileges and admissibility. (See generally NMSA 30-12-2 to -11.)

Spoilation of Evidence.

Claim recognized. (120 N.M. 645, 905 P.2d 185) (overruled on other grounds).

Witnesses.

See generally New Mexico Rules of Evidence; see also topic 5.11 Depositions and Discovery.

Privileged Communications.

Following communications generally are privileged by rule: communications between attorney and client or their respective representatives, Evid. Rule 11-504; between physician or psychotherapist and patient, Evid. Rule 11-504; between husband and wife, Evid. Rule 11-505; between enumerated individuals and member of clergy, Evid. Rule 11-506; communications between juvenile probation officer or social worker and child, Evid. Rule 11-509; communications between U.S. or subdivision thereof and informer, Evid. Rule 11-510; member of media and confidential source, Evid. Rule 11-514; see also NMSA 38-6-6 (privileges for attorney; spouse; public accountant and basis for waiver). Generally no person may be compelled to disclose contents of political ballot vote, Evid. Rule 11-507 and trade secret, Evid. Rule 11-508. Person, corporation or other entity required to make report by law is not required to disclose report if statute requiring creation of report so provides. (Evid. Rule 11-502). Communications made by deaf person through interpreter generally are privileged from disclosure. (NMSA 38-9-10).

Privilege Waiver.

Generally voluntary disclosure of privileged communication results in waiver of applicable privilege. (Evid. Rule 11-511; see also Evid. Rule 11-512 [admissibility of disclosed privileged communication] and Evid. Rule 11-513 [comment on privilege]).

Mental Competency Determination.

38-6-8 (retarded person) provides procedures for determining capacity of mentally retarded witness to testify, and sets forth specific alternatives for taking testimony of such witnesses.

Communications/Transactions with Deceased.

Dead Man Statute repealed.

Self-Incrimination.

N.M. Const., Art. II, § 15 (privilege against self-incrimination in criminal case).

Compelling Attendance.

See Rule 1-045; see also NMSA 38-8-1 (issuance of order for attendance at deposition pursuant to order from foreign jurisdiction); Rule 1-069 (issuance of subpoena for enforcement of judgment).

Witness Fees.

See NMSA 38-6-5 (per diem); see also NMSA 10-8-1 to NMSA 10-8-8 (per diem and mileage act).

5.14 INJUNCTIONS:

Overview.

Rule 1-066 generally governs procedures for obtaining preliminary or temporary injunction. Numerous statutory provisions address whether injunction may be issued to address certain circumstances.

Jurisdiction.

District courts have power to issue injunctions. (Rule 1-066).

Prerequisites.

Notice and hearing within ten days. (Rule 1-066).

Procedure.

Application to district court. Notice required for preliminary injunction. Affidavit on verified bill showing immediate and irreparable loss or damage required for temporary restraining order without notice, along with attorney's certification to efforts made to give notice and reasons why notice should not be required. (Rule 1-066).

Bond.

Generally required but may be waived by the court for good cause. (Rule 1-066).

Temporary Injunction.

Temporary restraining order may be granted on showing of immediate and irreparable harm. (Rule 1-066).

5.15 JUDGMENTS:

Every final judgment, except by default, must grant the relief to which the party in whose favor it is rendered is entitled, even though such relief is not demanded in his pleadings. (Rule 1-054).

Judgments by confession may be entered by the clerk in a summary proceeding without action by the court. But contract or stipulation for confession of judgment under power of attorney, given before cause of action has accrued, or giving consent to insurance of execution under power of attorney so given, is prohibited. (NMSA 39-1-9 et seq.).

See also category 3 Business Regulation and Commerce, topic 3.23 Sales, subhead Retail Credit Sales.

Judgment by Consent.

Consent contained in contract or writing is void. (NMSA 39-1-16).

Judgment on Pleadings.

See Rule 1-012(C).

Summary Judgment.

See Rule 1-056. Standard applied by New Mexico courts in summary judgment proceedings does not differ substantially from that applied by federal courts acting under Federal Rule of Civil Procedure 56. (126 N.M. 614, 973 P.2d 866).

Declaratory Judgment.

See Rule 1-057.

Default Judgment.

See Rule 1-055.

Offer of Judgment.

See Rule 1-068.

Docketing.

Clerks docket final judgments from district courts, court of appeals and supreme court. (NMSA 39-1-6).

Vacating Judgment.

Judgment may be vacated pursuant to Rule 1-060; see also Rule 1-061 (harmless error).

Judgment for Vesting of Title.

See Rule 1-070.

Final Judgments or Orders.

Rule 1-054 sets forth procedural rules that generally apply to entry of judgments, including related cost awards. Rule 1-058 sets forth rules that generally apply to preparation of final judgments and orders. Generally district court judge retains jurisdiction over judgment 30 days after it has been entered. (NMSA 39-1-1). Rules for subsidiary courts and local judicial districts also should be consulted because additional or different procedures or requirements may apply.

Liens.

Any money judgment rendered in state or federal district court in New Mexico becomes lien on real estate of judgment debtor from date of filing of certified transcript of judgment in office of clerk of county where such real estate is situated. (NMSA 14-9-9). If cause is appealed and supersedeas bond is filed and approved, lien ceases. (NMSA 39-1-6).

Enforcement of Judgment.

Generally must be enforced within 14 years after date of entry. (NMSA 37-1-2, NMSA 39-1-6). Procedure for execution and stay of execution are set forth in Rule 1-062.

Satisfaction.

See NMSA 39-1-6.1 to 2 for procedures and conditions for release of judgments.

Form for Satisfaction.

Form

For and in consideration of the sum of. . . . dollars, to be paid by. . . ., the defendant. . . ., in the above entitled action, full satisfaction is hereby acknowledged of a certain judgment rendered and entered in said cause, on the. . . . day of. . . ., 20. . . ., in favor of. . . ., the plaintiff, against said defendant, for the sum of. . . . dollars, with interest thereon from. . . ., at the rate of. . . . per cent, until paid, together with said plaintiff's costs and disbursements, amounting to the sum of. . . . dollars, and recorded in book. . . . of judgments at page. . . . . I hereby authorize and direct the clerk of said court to enter satisfaction of record of said judgment in the said action. Date this. . . . day of. . . ., 20. . . . . (Signature and acknowledgment).

Actions.

Actions on judgments may be brought within 14 years from date of judgment. (NMSA 37-1-2).

General Releases.

There is rebuttable presumption that general release benefits only those parties specifically designated in release. (120 N.M. 203, 900 P.2d 952).

Foreign Judgments.

Actions on foreign judgments may be brought within period of limitation in foreign jurisdiction, not to exceed 14 years, and not afterward. (NMSA 37-1-2). No execution may issue on foreign judgment based on cognovit note or other similar writing. (NMSA 39-1-17). Foreign judgments are entitled to full faith and credit. (115 N.M. 775, 858 P.2d 863).

Revised Uniform Enforcement of Foreign Judgments Act (1964 Act) adopted. (NMSA 39-4A-1 et seq.). Property is exempt from execution issuing from foreign judgment in favor of any state for failure to pay that state's income tax on benefits received from pension or retirement plan. (NMSA 39-4A-3).

Uniform Foreign Country Money Judgments Recognition Act adopted. (NMSA 39-4B-1 et seq.).

Uniform Foreign Money Claims Act adopted. (NMSA 39-4C-1 et seq.).

5.16 LIMITATION OF ACTIONS:

Uniform Probate Code, with significant omissions and amendments, adopted. (NMSA 45-1-101 et seq.).

Judgments.

Generally must be enforced within 14 years of entry. (NMSA 37-1-2). Judgments of court not of record must be brought within six years. (NMSA 37-1-3).

Personal Injury, Including Injury to Reputation.

Action generally must be brought within three years of injury. (NMSA 37-1-8). Discovery rule, or manifestation of injury rules recognized under common law, may affect timing of accrual of cause of action.

Medical Malpractice Covered by Medical Malpractice Act.

Unless recognized exception applies, statute of limitations on malpractice claims, including those for wrongful death, is three years from date of occurrence of act of malpractice. (121 N.M. 821, 918 P.2d 1321; NMSA 41-5-13). Minor under age of six years at time of occurrence has until age of nine to bring claim. (NMSA 41-5-13). Tolling provisions of Wrongful Death Act apply only to minors who suffer alleged act of malpractice and not to minors who are beneficiaries under Wrongful Death Act. (105 N.M. 444, 733 P.2d 1327).

Medical Malpractice Not Covered by Medical Malpractice Act.

Action must be brought within three years. (NMSA 37-1-8). If injury is latent, discovery rule generally controls when limitations period begins to run. (114 N.M. 248, 837 P.2d 442).

Wrongful Death.

See NMSA 41-2-2.

Bonds.

Action generally must be brought within three years. (NMSA 37-1-8).

Notes, Written Instruments and Written Contracts.

Action generally must be brought within six years. (NMSA 37-1-3). Agreement to defer payments excludes deferral period from computation of six-year period.

Accounts, unwritten contracts, injuries to or for conversion of personal property generally must be brought within four years. (NMSA 37-1-4). Accrual of cause of action may be affected by NMSA 37-1-7. On open account time runs from date of last item. (NMSA 37-1-6).

Breach of Contract of Sale of Goods.

Within four years after cause of action accrues. (NMSA 55-2-725).

Real Property.

To recover property taken or damaged by condemning authority without just compensation or final condemnation proceeding (except adverse possession, prescription or NMSA 42A-1-31) (no time limit); to recover condemned property after use for which it has been taken has been abandoned (three years) (NMSA 42A-1-31), to recover real estate based on certain defects relating to capacity of corporation, officer or fiduciary to execute recorded instrument (15 years) (NMSA 37-1-28); to recover real estate from one in continuous possession under color of title (ten years) (NMSA 37-1-21, -22); to recover damages for defective or unsafe condition of improvements to realty (ten years) (NMSA 37-1-27).

Fraud.

Action generally must be brought within four years. (NMSA 37-1-4). Accrual of cause of action may be affected by NMSA 37-1-7.

Estates.

Claim against decedent's estate which arose at or after death (four months) (NMSA 45-5-803), claim against decedent's estate which arose before death if notice to creditors properly given (two months) (NMSA 45-5-803).

State Governmental Entities.

Generally must be brought within two years: NMSA 37-1-23 (contracts); NMSA 41-4-15 (torts).

Local Governmental Entities.

Personal injury or death resulting from negligence of city, town, village or officer thereof (one year) (NMSA 37-1-24); contract, conversion trust (three years) (NMSA 37-1-24); municipal corporations calling into question any privilege or franchise granted (NMSA 37-1-3, -26).

Childhood Sexual Abuse.

Action must be commenced before latest of following dates: abused person's 24th birthday or three years from date person knew or had reason to know of childhood sexual abuse and childhood sexual abuse resulted in injury to person as established by competent medical or psychological testimony. (NMSA 37-1-30).

For other types of actions see generally NMSA 37-1-1 to NMSA 37-1-29, along with any statutes that govern claim.

Two Months.

Claim against decedent's estate which arose before death, if notice to creditors is properly given. (NMSA 45-3-803).

Actions Not Specifically Provided For.

Must be brought within four years. (NMSA 37-1-4).

Death.

If person entitled to cause of action dies within one year before expiration of limitation, his personal representative has one year after death to bring action. (NMSA 37-1-11).

New Actions.

If action fails for any cause except negligence in prosecution, a new suit commenced within six months is deemed continuation of first. (NMSA 37-1-14). This section does not apply to breach of contract suits against state. (109 N.M. 492, 787 P.2d 411).

Foreign Causes of Action.

If not barred in New Mexico, action may be maintained even though barred in foreign jurisdiction. (46 N.M. 210, 125 P.2d 717).

Disabilities of Plaintiff.

Minors, insane persons or persons under any legal disability have one year after termination of such disability within which to commence action. (NMSA 37-1-10). In tort actions against governmental entities or public employees minors under seven have until ninth birthday. Otherwise, two-year limitation applies. (NMSA 41-4-15). In medical malpractice actions, minors under six have until ninth birthday. Otherwise, three-year limitation applies. (NMSA 41-5-13). Paternity actions may be brought until three years after child reaches age of majority. (116 N.M. 398, 862 P.2d 1257).

Actions for Damages Due to Childhood Sexual Abuse.

Controlled by NMSA 37-1-30.

Absence or Concealment of Defendant.

Time during which debtor is absent from, or concealed within, the state is not included in computing the period of limitation. (NMSA 37-1-9).

Interruption of Statutory Period.

If commencement stayed by injunction or similar proceeding, period does not run. (NMSA 37-1-2). Period does not run during four month period following death of decedent either against creditors (NMSA 45-3-802), or decedent's estate (NMSA 45-3-109).

Filing Complaint in Improper Venue.

Tolls statute of limitations. (107 N.M. 463, 760 P.2d 155) (disagreed with on other grounds).

Revival of Barred Claims.

A cause of action founded on contract may be revived by a written admission of debt or new promise signed by the party to be charged or partial payment. (NMSA 37-1-16). Revival may be accomplished by entry of stipulated judgment in unrelated case. (106 N.M. 290, 742 P.2d 502).

Contractual Limitations.

No specific provision.

Pleading.

Defense of statute of limitations must be affirmatively pleaded. (Rule 1-008).

Exceptions.

Different rules may apply where limitation is either part of remedy or not contained in NMSA 37-1-1 et seq.

Uniform Commercial Code adopted. See category 3 Business Regulation and Commerce, topic 3.09 Commercial Code.

Discovery Rule.

Adopted by statute for fraud, mistake and injury to or conversion of property. (NMSA 37-1-7). Adopted under common law in certain contexts: 125 N.M. 615, 964 P.2d 176 (products liability); 118 N.M. 721, 885 P.2d 642 (legal malpractice); 114 N.M. 248, 837 P.2d 442 (medical malpractice); 86 N.M. 707, 526 P.2d 1300 (accountant malpractice); 112 P.3d 281, 2005 NMCA 61 (personal injury).

5.16A PARTITION:

See generally NMSA 42-5-1 to -9.

Jurisdiction and Venue.

In district court of county where land located. (NMSA 42-5-1; NMSA 38-3-1).

Proceedings.

Any one or more persons interested in any lands, tenements or hereditaments owned in joint tenancy, tenancy in common, or co-parcenary, by whatever right, whether they be in possession or not, may present a petition to the district court, praying for a division and partition of such premises. The court shall ascertain and declare the rights, titles and interests of all parties to such proceedings and render such decree as required by rights of parties, which is binding on all parties interested. (NMSA 42-5-1 et seq.).

Partition in Kind or Sale.

Partition must be in kind unless it appears that it cannot be done without great prejudice to owners. (NMSA 42-5-1, -7). Partition of leaseholds permitted. (122 N.M. 618, 930 P.2d 153).

5.17 [RESERVED]

5.18 PLEADING:

Rules of procedure are substantially patterned after federal rules of civil procedure.

Pleadings Permitted.

See generally Rule 1-007; see also Rule 1-012. Such rules, along with local judicial district rules, also should be consulted to determine whether page, exhibit or other types of filing limitations apply to particular pleading.

Complaint.

Civil action commenced by filing complaint with clerk of court. (Rule 1-003).

Answer generally due within 30 days after service of summons and complaint upon defendant. (Rule 1-012).

Defenses.

Must be set forth in pleading responding to claim. (See Rules 1-008 and 1-012.)

Counterclaims.

A pleading must state as a counterclaim any claim, not the subject of a pending action, which at the time of filing the pleading the pleader has against any opposing party, if it arises out of a transaction or occurrence which is the subject matter of the opposing party's claim and does not require for its adjudication the presence of third persons of whom the court cannot acquire jurisdiction, and may state as a counterclaim any other claim against an opposing party. (Rule 1-013).

Demurrer.

Not in use.

Amendment.

Pleading may be amended once as matter of course at any time before responsive pleading is served or, if no responsive pleading is permitted and action has not been placed on trial calendar, within 20 days after pleading is served. Otherwise pleading may be amended only by leave of court or by written consent of adverse party. Amendments shall relate back to original pleading if claim or defense asserted in amended pleading arose out of conduct, transaction or occurrence set forth in original pleading. Party shall plead in response to amended pleading within time remaining for response to original pleading or within ten days after service of amended pleading, whichever is longer. (Rule 1-015).

Verification.

Verification required in following actions: divorce (NMSA 40-4-6); habeas corpus (NMSA 44-1-3).

Service.

Copy of summons and copy of complaint must be served within reasonable time after complaint is filed. (Rule 1-004; 94 N.M. 738, 616 P.2d 1123). Service can be effected reasonable length of time after statute of limitations has run if complaint was filed on time. (94 N.M. 738, 616 P.2d 1123). Service of other pleadings may be effected by delivering or mailing copy of pleading to party or his attorney. (Rule 1-005).

Filing.

All pleadings must be filed with court clerk. (Rule 1-005). Facsimile filing and service of pleadings allowed if no fee required and less than ten pages. (Rule 1-005.1). Electronic filing and service of pleadings permitted on parties or attorneys who have agreed to be served by electronic transmission and if fee not required or paid at time of filing. (Rule 1-005.2).

Small Claims.

See category 6 Courts and Legislature, topic 6.01 Courts.

Frivolous Claims.

Attorney must sign all pleadings, such signature constituting certificate by attorney that there is good ground for pleading and it is not interposed for delay. (Rule 1-011). Frivolous or groundless claims penalized in actions alleging that agricultural operation is nuisance (NMSA 47-9-7), actions brought under New Mexico Securities Act (NMSA 58-13B-40), and actions brought under Unfair Insurance Practices Act (NMSA 59A-16-30[A]).

5.19 PRACTICE:

Governed by Rules of Civil Procedure patterned after Federal Rules of Civil Procedure.

See also topics 5.02 Actions, Appeal and Error, Depositions and Discovery, Injunctions, Judgments, Pleading, Process; category 8 Debtor and Creditor, topics 8.02 Attachment, 8.05 Executions, 8.09 Garnishment.

Discovery.

Patterned after Federal Rules. (Rule 1-026 to 1-037).

Demand for Admission of Facts.

Same as Federal Rules. (Rule 1-036).

Direct Actions Against Insurer.

No statutory authorization, but allowed when insurance is mandated by law. (126 N.M. 394, 970 P.2d 580). See category 23 Transportation, topic 23.01 Motor Vehicles, subhead Direct Actions.

Small Claims.

See category 6 Courts and Legislature, topic 6.01 Courts.

5.20 PROCESS:

General Requisites.

Summons must be directed to defendant, accompanied by copy of complaint, signed by clerk, and issued under seal of court and must contain (1) Names of parties and court and county in which filed; (2) direction to defendant to answer within 30 days after service or suffer default; and (3) name and address of plaintiff's attorney. (Rule 1-004). Special rules apply to service of writs. (See id.)

Who May Serve.

In civil actions service may be made by the sheriff of the county where defendant may be found, or any other person, not a party to the action, over 18 years of age. (Rule 1-004).

Service on Sunday.

No prohibition. (Rule 1-004).

Service on Individual.

Made by delivering papers to individual, or if he refuses to accept, leaving same at location where he has been found. If individual absent, process can be delivered to person over 15 years of age residing at individual's usual place of abode, and by mailing copies of process to defendant at his last known mailing address. (Rule 1-004[F][1]). No service allowed on person in state by extradition if civil action arises out of same facts as criminal proceedings. (NMSA 31-4-27).

Service on Infant.

Made by serving conservator of estate or guardian of person of minor if there is one. Otherwise by serving each person with legal authority over minor. Otherwise, may serve on person designated by court. (Rule 1-004[I]).

Service on Incompetent Person.

Made by serving conservator or guardian, when one has been duly appointed by court, otherwise on person designated by court. (Rule 1-004[I]). See subhead Personal Service on Individual, supra.

Service on Partnership.

Made by delivering copy of summons and complaint to any general partner. (Rule 1-004[G]).

Service on Corporations.

Service on a domestic or a foreign corporation may be made on officer, manager, general agent, or any other authorized agent. Also by mailing copy to defendant, if authorized by law and statute requires. (Rule 1-004[G]). Service may be had upon any corporation, when not otherwise possible, by serving Secretary of State. (NMSA 38-1-5 et seq.; NMSA 38-1-6.1).

Personal Service on Association.

Made by delivering copy of summons and complaint to officer, managing or general agent or other agent authorized to receive service of process. If authorized by law and statute requires, by also mailing copy to association. (Rule 1-004[G]).

Service on Railroads.

No special provision.

Service on Insurance Companies.

Process against insurance company may be served on Superintendent of Insurance when not otherwise possible. (NMSA 59A-5-31).

Personal Service on Joint Stock Company.

See category 2 Business Organizations, topic 2.04 Joint Stock Companies.

Service on State.

If State of New Mexico named, serve governor and attorney general. If any branch of state named, serve head of branch and attorney general. If officer or employee of state or branch named, serve named person and attorney general. (Rule 1-004[H]; NMSA 38-1-17).

Substituted Service.

If defendant is absent, service may be made by delivering copy to some person over 15 years old at his usual place of abode, and by mailing to defendant at his last known mailing address. (Rule 1-004[F]).

Service by Publication.

Permitted only by court order. (Rule 1-004[K]). Plaintiff or attorney must file sworn pleading or affidavit stating that service cannot reasonably be made as provided by Rule 1-004. Proposed notice must be attached to motion. This notice must be published in some newspaper published in county of forum, or if no newspaper published in such county, then in some newspaper in general circulation in county. Publication must continue once each week for three consecutive weeks.

Copy of summons and complaint shall be mailed to defendant if residence known. (Rule 1-004[G]).

Service Outside of State.

Personal service of copy of summons and complaint out of state is equivalent to publication and mailing. (Rule 1-004[M]). Any person whether or not citizen or resident who in person or through agent transacts any business, operates motor vehicle, commits tortious act or contracts to insure or lives in marital relationship within this state submits himself or his personal representative to jurisdiction of courts of this state as to any cause of action arising therefrom. Jurisdiction for divorce, separation, or annulment under this section includes right to decide alimony, child support and division of property. Under these circumstances, personal service outside state has same force and effect as personal service within state.(NMSA 38-1-16).

Service by Mail.

Permitted when serving individual, domestic or foreign corporation, partnership, or unincorporated association. Mail copy of summons and complaint (first class mail, postage prepaid) with two copies of notice and acknowledgment and return envelope, postage prepaid, addressed to sender. If service not acknowledged within 20 days of mailing, personal service required. Unless good cause shown, cost of personal service will be assessed to person served. (Rule 1-004). Form of notice and acknowledgment (Rule 1-004).

Service by Facsimile.

Party may file and serve any pleading or paper, subject to limitations in rule. (Rule 1-005.1).

Service by Electronic Transmission.

Documents may be filed and served by electronic transmission, subject to limitations in rule. (Rule 1-005.2).

NOTICE AND RECEIPT OF SUMMONS AND COMPLAINT

(name of court)

caption of case

NOTICE

TO: (insert the name and address of the person to be served)

The enclosed summons and complaint are served pursuant to Rule 1-004 of the New Mexico Rules of Civil Procedure.

You must sign and date the receipt. If you are served on behalf of a corporation, unincorporated association (including a partnership) or other entity, you must indicate under your signature your relationship to that entity. If you are served on behalf of another person and you are authorized to receive process, you must indicate under your signature your position or title.

If you do not complete and return the form to the sender within twenty (20) days, you (or the party on whose behalf you are being served) may be required to pay any expenses incurred in serving a summons and complaint in any other manner permitted by law.

If you do complete and return this form, you (or the party on whose behalf you are being served) must answer the complaint within thirty (30) days of the date upon which this notice was mailed, which appears below. If you fail to do so, judgment by default may be taken against you for the relief demanded in the complaint.

I declare, under penalty of perjury, that this Notice and Receipt of Summons and Complaint was mailed on (insert date).

....

Signature

....

Date of Signature

RECEIPT OF SUMMONS AND COMPLAINT

I received a copy of the summons and complaint in the above-captioned matter at (insert address).

....

Signature

....

Relationship to Entity/Authority to

Receive Service of Process

....

Date of Signature

Civil Forms 4-208.

Service in Action Arising Out of Public Contract.

Contract let by the state or any of its subdivisions, institutions or departments to nonresident for materials or supplies or doing public work in the state must provide for appointment of resident agent on whom process can be served. (NMSA 13-4-21). If no such agent is named, Secretary of State is deemed to have been designated. (NMSA 13-4-22).

Proof of Service.

Personal service when by sheriff or deputy, proof is by certificate; when by any other person, proof is by affidavit; if by mail, acknowledgment of service. (Rule 1-004[L]).

Nonresident Motorist.

See category 23 Transportation, topic 23.01 Motor Vehicles.

Long Arm Statute.

See subhead Personal Service Outside of State, supra.

5.21 REPLEVIN:

Any person having a right to immediate possession of any goods or chattels wrongfully taken or wrongfully detained, may bring an action of replevin for recovery and damages sustained thereby. (NMSA 42-8-1).

Proceedings.

Affidavit, hearing, and bond are required, unless plaintiff alleges demand for property and waives seizure and delivery. (NMSA 42-8-5 to -7).

Claims of Third Persons.

Third person asserting claim in goods may intervene in action and may give bond in order to obtain possession of goods. (NMSA 42-8-3).

Judgment or Order.

Hearing must be held without delay upon defendant's motion. Court can enter order for return of goods and award damages for unjust detention thereof. If seizure and delivery is waived, verdict, if for plaintiff, must fix value of property as well as damages for detention. Thereupon plaintiff is entitled to judgment for such damages and for either value of such property or return thereof, at his election. (NMSA 42-8-7).

Forms.

Following forms are authorized for use in connection with replevin actions (NMSA 42-8-16, -17):

STATE OF NEW MEXICO

COUNTY OF..........

(Name), Plaintiff

v.

(Name), Defendant } CIVIL DOCKET NO..........

AFFIDAVIT IN REPLEVIN

I, (...........), being duly sworn, state

plaintiff or attorney

that (..........) is lawfully entitled to the pos-

plaintiff

session of (..........); that the same was wrong-

property

fully taken or wrongfully detained by (. . . . .); that (. . . . .) has

defendant plaintiff

reason to believe that (. . . . .) may conceal, dispose of, or waste the property

defendant

or the revenue therefrom, or remove the property from the jurisdiction during the pendency of the action; that the right of action originated within one year; and that the following facts, from which it clearly appears that the above allegations are justified, are true:..........

Sworn..........

Plaintiff

Approved:

....

District Court Judge

(Name), Plaintiff

STATE OF NEW MEXICO

COUNTY..........

(Name), Plaintiff

v.

(Name), Defendant } CIVIL DOCKET NO...........

REPLEVIN BOND

We bind ourselves, our heirs, executors and administrators to the state of New Mexico in the sum of $. . . . on condition that the plaintiff will diligently prosecute this action to final judgment without delay, will return all property and pay to the defendant all money found due to him in this action, including all damages, and will keep harmless the officer executing the writ of replevin, upon completion of which this obligation is void.

....

Plaintiff (Principal)

....

Surety

....

Surety

Approved. . . . ., 20. . . . .

....

DISTRICT COURT JUDGE

5.22 SEQUESTRATION:

No special statutory provisions.

5.23 SERVICE:

See topic 5.20 Process.

5.24 STAY OF EXECUTION:

See topic 5.03 Appeal and Error; category 8 Debtor and Creditor, topic 8.05 Executions.

5.25 SUBMISSION OF CONTROVERSY:

No statutory provisions.

5.26 VENUE:

District Courts.

All legal proceedings must be brought in county or district where cause arose, contract was made or to be performed or indebtedness incurred, or party or parties thereto reside; except that transients or nonresidents, except for foreign corporations with a statutory agent, may be sued in any county and actions involving real property in county must be brought where land is situated. Where lands are in contiguous counties, suit affecting land may be brought in any of counties in which land is situated. Foreign corporations admitted to do business and which designate statutory agent in state on whom process can be served, can be sued only in county where plaintiff resides, or where contract sued on was made or to be performed or where cause of action originated or in county of residence of statutory agent. Suits against state officers shall be brought in county wherein their offices are located except that civil suits involving state educational institutions must be brought in district court of county where state education institution is located or where plaintiff resides. (NMSA 38-3-1). Filing complaint in improper venue tolls statute of limitations. (107 N.M. 463, 760 P.2d 155).

Change of venue in District Court may be granted for usual reasons. (NMSA 38-3-3).

Forum non conveniens inapplicable to motions to transfer lawsuit from one county to another. (122 N.M. 572, 929 P.2d 263).

Magistrate Courts.

Civil actions must be brought in county where plaintiff or defendant resides or may be found or where cause of action arose. (NMSA 35-3-5).

Probate Matters.

Venue for informal or formal testacy or appointment proceedings in county where decedent domiciled at death. If not domiciled in New Mexico, then in any county where property located at death. Further administration must be in county where letters issued. (NMSA 45-3-201).

Divorce, Separation Actions.

Venue is county where either party resides. (NMSA 40-4-4).

Specific Performance of Contract for Sale of Real Estate.

Venue is district court of county where any defendant resides, but if any defendant is a nonresident of state, venue is county where some part of real estate located. (NMSA 42-7-1).

Municipalities or Boards of County Commissioners.

Suits in which either of these is named as party defendant shall be brought in district court of county where municipality located or for which board acts, unless suit required by law to be brought in Santa Fe County. (NMSA 38-3-2).

Contract Provisions.

Agreement fixing venue is enforceable (135 N.M. 748, 93 P.3d 769).

Waiver.

Venue may be waived in many cases. (28 N.M. 259, 210 P. 231).

6 COURTS AND LEGISLATURE

6.01 COURTS:

Uniform Certification of Questions of Law Act.

Permitting federal court or appellate court of other jurisdiction to petition state supreme court to decide question of N.M. law. (NMSA 39-7-1 et seq.).

Uniform Probate Code, with significant omissions and amendments, adopted. (NMSA 45-1-101 et seq.).

Uniform Statute and Rule Construction Act.

Adopted 1997. Provides definitions for commonly used terms, offers guidelines for computing periods of time, and sets forth presumptive principles of statutory construction. (NMSA 12-2A-1 et seq.).

United States District Court.

Clerk's office: 333 Lomas, NW, Albuquerque 87102.

Fee of $350 required when complaint or notice of removal is filed.

Court sits at Santa Fe, Roswell, Albuquerque and Las Cruces.

Supreme Court.

Consists of at least five justices, appointed as provided in N.M. Const., Art. VI. One justice selected as chief justice. (Art. VI, § 4). Justices must be 35 years old, practiced for at least ten years, and resided in state for at least three years prior to appointment. (Art. VI, § 8).

Jurisdiction.

Appeals from district court judgments imposing sentence of death or life imprisonment shall be taken directly to Supreme Court. (Art. VI, § 2).

Supreme Court has appellate jurisdiction of cases (1) where such jurisdiction not specifically vested by law in court of appeals; (2) by certiorari where decision of court of appeals (a) in conflict with decision of Supreme Court (b) in conflict with decision of court of appeals (c) involves significant question of law under constitutions of U.S. or New Mexico (d) involves an issue of substantial public interest; (3) in matters certified by court of appeals to Supreme Court. Writs of certiorari must be filed within 20 days after final action by court of appeals and are deemed denied if not acted upon within 30 days. (NMSA 34-5-14).

Fee of $125 case docket fee payable to clerk of Supreme Court. (NMSA 34-2-5).

Court of Appeals.

Consists of at least seven judges, chosen as provided in N.M. Const., Art. VI. Qualifications same as for Supreme Court. (Art. VI, § 28). Three judges constitute quorum. (Art.

VI, § 28).

Jurisdiction.

Court of Appeals has jurisdiction to review on appeal: (1) any civil action not specifically reserved to Supreme Court; (2) all actions under Worker's Compensation Act, New Mexico Occupational Disease Disablement Law, Subsequent Injury Act and Federal Employers' Liability Act; (3) criminal actions except those involving sentence of death or life imprisonment; (4) post conviction remedy proceedings except those involving sentence of death or life imprisonment; (5) actions where fine or imprisonment imposed for violation of municipal or county ordinances; (6) decisions of state administrative agencies; and (7) decisions in any other action as may be provided by law. (NMSA 34-5-8). Order by director of worker's compensation administration not appealable to Court of Appeals. (121 N.M. 248, 910 P.2d 324).

Fees.

$125 docket fee. (NMSA 34-5-6).

State District Courts.

There are thirteen district courts, having original jurisdiction of all actions and appellate jurisdiction on cases originating in inferior courts and tribunals in their respective districts. (Art. VI, § 13). Judges appointed as provided in N.M. Const., Art. VI. Qualifications same as for Supreme Court except district judges shall have practiced for at least six years. District judges shall reside in district for which elected or appointed. (Art. VI, § 14). State is divided into following judicial districts:

First District.—Counties of Los Alamos, Rio Arriba and Santa Fe.

Second District.—County of Bernalillo.

Third District.—County of Dona Ana.

Fourth District.—Counties of Guadalupe, Mora and San Miguel.

Fifth District.—Counties of Chaves, Eddy and Lea.

Sixth District.—Counties of Grant, Hidalgo and Luna.

Seventh District.—Counties of Catron, Sierra, Socorro and Torrance.

Eighth District.—Counties of Colfax, Taos and Union.

Ninth District.—Counties of Curry and Roosevelt.

Tenth District.—Counties of DeBaca, Harding and Quay.

Eleventh District.—Counties of McKinley and San Juan.

Twelfth District.—Counties of Lincoln and Otero.

Thirteenth District.—Counties of Cibola, Sandoval and Valencia.

(NMSA 34-6-1).

Place of Sitting.

Bernalillo County: Second District; court sits at Albuquerque.

Catron County: Seventh District; court sits at Reserve.

Chaves County: Fifth District; courts sits at Roswell.

Cibola County: Thirteenth District; court sits at Grants.

Colfax County: Eighth District; court sits at Raton.

Curry County: Ninth District; court sits at Clovis.

DeBaca County: Tenth District; court sits at Fort Sumner.

Dona Ana County: Third District; court sits at Las Cruces.

Eddy County: Fifth District; court sits at Carlsbad.

Grant County: Sixth District; court sits at Silver City.

Guadalupe County: Fourth District; court sits at Santa Rosa.

Harding County: Tenth District; court sits at Mosquero.

Hidalgo County: Sixth District; court sits at Lordsburg.

Lea County: Fifth District; court sits at Lovington.

Lincoln County: Twelfth District; court sits at Carrizozo.

Los Alamos County: First District; court sits at Los Alamos.

Luna County: Sixth District; court sits at Deming.

McKinley County: Eleventh District; court sits at Gallup.

Mora County: Fourth District; court sits at Mora.

Otero County: Twelfth District; court sits at Alamogordo.

Quay County: Tenth District; court sits at Tucumcari.

Rio Arriba County: First District; court sits at Tierra Amarilla.

Roosevelt County: Ninth District; court sits at Portales.

Sandoval County: Thirteenth District; court sits at Bernalillo.

San Juan County: Eleventh District; court sits at Aztec.

San Miguel County: Fourth District; court sits at Las Vegas.

Santa Fe County: First District; court sits at Santa Fe.

Sierra County: Seventh District; court sits at Truth or Consequences.

Socorro County: Seventh District; court sits at Socorro.

Taos County: Eighth District; court sits at Taos.

Torrance County: Seventh District; court sits at Estancia.

Union County: Eighth District; court sits at Clayton.

Valencia County: Thirteenth District; court sits at Los Lunas.

Fees.

Clerk shall collect $117 fee for docketing any civil cause, whether original or reopened or by appeal or transfer from any inferior court. (NMSA 34-6-40). In districts with court established alternative dispute resolution program, clerk shall also collect fee of $15 on new or reopened civil cases except domestic relations cases. (NMSA 34-6-45). Districts which have established domestic relations mediation program have additional surcharge of $30 on all new and reopened domestic relations cases. (NMSA 40-12-6).

Probate Court.

There shall be Probate Judge for each county. (NMSA 34-7-1). Probate court and district court have concurrent, original jurisdiction over informal probate proceedings. (NMSA 45-1-302, -302.1). District Court has exclusive original jurisdiction over all other probate matters. (NMSA 45-1-302).

Fee.

Clerk of probate court entitled to docket fee of $30 to be paid by docketing party. (NMSA 34-7-14).

Metropolitan Courts.

In counties over 200,000 population, there are Metropolitan Courts (NMSA 34-8A-1) with civil jurisdiction to $10,000 (NMSA 34-8A-3). Jurisdiction is same as Magistrate Courts; in addition, jurisdiction is coextensive with county, except in municipalities with between 2,500 and 5,000 population, over all offenses and complaints pursuant to ordinance of county or municipality within county. (NMSA 34-8A-3). Judges must be member of bar and practiced in this state for at least three years. (NMSA 34-8A-4). Trial by jury available. (NMSA 34-8A-5). Supreme Court to adopt rules of procedure. Court of record for civil actions and criminal actions involving DWI or domestic violence. Aggrieved party may appeal to district court within 15 days after judgment rendered. (NMSA 34-8A-6). Appeal de novo for criminal matters other than DWI or domestic violence. (NMSA 34-8A-6). District court reviews civil appeals under “substantial evidence” standard. (99 N.M. 564, 661 P.2d 56). Metropolitan Court Rules are found at Rule 3-101 et seq. and 7-101 et seq.

Magistrate Courts.

All counties with less than 200,000 population have one Magistrate Court (NMSA 35-1-2), with civil jurisdiction to $10,000 (NMSA 35-3-3[A]), but no jurisdiction over actions for malicious prosecution, libel or slander; against public officers for misconduct in office, for specific performance of contracts for sale of real property; actions in which title or boundary to land in dispute; affecting domestic relations; or to grant injunctions, habeas corpus or extraordinary writs(NMSA 35-3-3[C]). Magistrates have jurisdiction: (1) In all misdemeanor cases and in any other criminal action where authorized by law to include holding preliminary examinations, and (2) over all offenses and complaints under ordinances of municipality if municipality has adopted effective ordinance to provide for magistrate jurisdiction; (3) in any criminal action in magistrate court which is beyond jurisdiction of magistrate court, magistrate may commit to jail, discharge or recognize defendant to appear before district court. (NMSA 35-3-4). Territorial limit of jurisdiction is coextensive with district in which magistrate serves. (NMSA 35-3-6). Limited contempt power. (NMSA 35-3-9). Upon issuance of bench warrants, magistrate court shall assess $100 fine against individual to be arrested. (NMSA 35-6-5). Trial by jury available, except for penalty assessment misdemeanors or for offenses that do not prescribe incarcerations as penalty. (NMSA 35-8-1; Rule 2-602, -603, 6-602). Magistrate court is not court of record. (NMSA 35-1-1). Judges must have high school education except in counties over 200,000 population, where they must be licensed attorneys. (NMSA 35-2-1). Right of appeal within 15 days of entry of judgment or final order to District Court, which conducts trial de novo. (NMSA 35-13-1, -2). Magistrate may be disqualified. (NMSA 35-3-7). Magistrate Court Rules are located at Rule 2-101 et seq. and 6-101 et seq.

Fee.

In civil actions $72 docket fee shall be collected. (NMSA 35-6-1).

Municipal Court.

Created. (NMSA 35-14-1). Jurisdiction extends to all offenses and complaints under municipal ordinances. (NMSA 35-14-2). Municipal Court Rules are located at Rule 8-101 et seq.

Justices of the Peace.

Office abolished effective Jan. 1, 1969. Jurisdiction transferred to magistrate courts. (NMSA 35-1-38).

Juvenile Courts.

In district court for each county there is division known as Children's Court. (NMSA 32A-1-5).

Small Claims Court.

Abolished, effective July 1, 1980. (NMSA 34-8-1).

6.02 LEGISLATURE:

Legislative power vested in Senate and House of Representatives. (Art. IV, § 1). Regular sessions are held annually, starting in January. Sessions held in even-numbered years may consider only budgets, appropriations, revenue bills, bills drawn pursuant to special messages of Governor, and bills of last previous regular session vetoed by Governor. (Art. IV, § 5).

Special or Extraordinary Sessions.

Governor has power to call special session not to exceed 30 days. (Art. IV, §§ 5, 6).

Initiative and Referendum.

Initiative restricted. (Art. XIX, § 3). Limited referendum permitted by Constitution. (Art. IV, § 1). Referendum petitions regulated by NMSA 1-17-1 et seq.

Lobbyists.

Regulated by NMSA 2-11-1 et seq.

Apportionment.

Statutory requirement that legislature apportion house of representatives once every ten years repealed by 1982 House Reapportionment Act. (NMSA 2-7-1 et seq.). No new frequency requirement enacted. Legislature must employ good faith effort to construct legislative voting districts on basis of actual population. (550 F. Supp. 13, affirmed by 459 U.S. 801).

6.03 REPORTS:

Supreme Court and Court of Appeals decisions are published in New Mexico Reports and Pacific Reporter.

Digests are: West's New Mexico Digest covering all volumes; Pacific Digest, covering all volumes.

CD-ROM now available for decisions from 1945.

6.04 STATUTES:

All laws up to and including the acts of 1978 are codified in New Mexico Statutes, Annotated, Compilation 1978. Subsequent statutes are in session laws and in supplements to 1978 Compilation. See also note at head of Digest.

Uniform Acts promulgated by National Conference of Commissioners on Uniform State Laws adopted are: **Alcoholism and Intoxication Treatment (titled Alcoholics and Intoxicated Persons; Detoxification) (1977); *Anatomical Gift, 1987 (1995), amended act adopted 2007; **Arbitration, 2000 (2001); Attendance of Witnesses from Without a State in Criminal Proceedings (1937); Certification of Questions of Law (1997); Child Custody Jurisdiction and Enforcement (2001); +++Commercial Code (1961) (revised Act adopted 2001, Secured Transactions); Common Trust Fund (1955); ++++Condominium (1982); **Conservation Easement (titled Land Use Easement Act) (1991); *Contribution Among Tortfeasors, 1939 (1947); *Controlled Substances, 1970 (1972); Criminal Extradition (1937); Custodial Trusts (1992); Declaratory Judgments (1975); Determination of Death (1993); Disclaimer of Property Interests, 1999 (2001); Division of Income for Tax Purposes (1965); *Durable Power of Attorney, 1984 amended (1995); Duties to Disabled Persons (1973); Electronic Transactions (2001); **Eminent Domain Code (1981); Enforcement of Foreign Judgments, 1964 (1989); Estate Tax Apportionment, 2003 (2005); *Evidence, Rules of, 1974; *Facsimile Signatures of Public Officials (1959); Federal Lien Registration, 1978 (1988); Fiduciaries (1923); Foreign-Money Claims (1991); Foreign Money-Judgments Recognition (1991); Fraudulent Transfer (1989); *Guardianship and Protective Proceedings (1976); Health-Care Decisions (1995) (amended to include right to die and other provisions); International Wills (1992); Interstate Family Support, 1995 (2005); Limited Partnership, 1976 (1988), amended act adopted 2007; Management of Institutional Funds (1997); Military Justice, Code of (1975); Minor Student Capacity to Borrow (1973); Multiple-Person Accounts (1992); Nonprobate Transfers on Death (1992); +++++Parentage, 1973 (1986); Partnership, 1997 (1997); Perpetuities, Statutory Rule Against (1992); Power of Attorney (2007); Premarital Agreement (1995); Principal and Income, 1997 (2005); ++++++Probate Code (1975); Prudent Investor (1995); Real Property Electronic Recording Act (2007); Residential Landlord and Tenant, (titled Uniform Owner-Resident Relations) (1975); **Securities, 1985 (1986); Simplification of Fiduciary Security Transfers (1991); *Simultaneous Death, 1993; Single Publication (1955); Statute and Rule Construction (1997); **Statutory Form Power of Attorney (1995); Statutory Rule Against Perpetuities (1992); Statutory Will (1991); Testamentary Additions to Trusts, 1991 (1993); TOD Security Registration (1992); Trade Secrets, 1985 (1989); Transfers to Minors (1989); **Trust Code (2003), amended 2007; Trustees' Powers (1976), repealed 2003; Trusts (1951), repealed 2003; Unclaimed Property, 1995 (1997); Vendor and Purchaser Risk (1997); Voting by New Residents in Presidential Elections (1971).

*Subsequent Uniform Amendments or new Uniform Acts not yet adopted.

**Substantially identical to Uniform Acts.

++See category 2 Business Organizations, topic Corporations for variations from A.B.A. Model Business Corporations Act.

+++See category 3 Business Regulation and Commerce, topic Commercial Code for variations from Uniform Act.

++++Condominium Act adopted with many modifications. See category 21 Property, topic 21.16 Real Property, subhead Condominiums.

+++++Parentage Act adopted with minor revisions. See category 14 Family, topic 14.10 Infants.

++++++Probate Code adopted with significant omissions and modifications. See category 13 Estates and Trusts, topic 13.16 Wills.

Other Uniform Acts adopted are: **Alcoholism and Intoxication Treatment (titled Alcoholism and Alcohol Abuse Prevention, Screening and Treatment Act) (1977); Motor Vehicle Registration (1929); Unauthorized Insurers (1951).

“Commission for the promotion of uniformity of legislation in the United States” created. (NMSA 2-4-1).

For text of Uniform Acts falling within the scope of the Martindale-Hubbell Law Digests see Uniform and Model Acts section.

For rules of statutory and constitutional construction see NMSA 12-2A-1.

6.05 UNIFORM LAWS:

For list of Uniform Acts in force in this state see topic 6.04 Statutes. For text of Uniform Acts within the scope of the Martindale-Hubbell Law Digests see Uniform and Model Acts section.

7 CRIMINAL LAW

7.00A BAIL:

See topic 7.01 Criminal Law.

7.01 CRIMINAL LAW:

Crimes governed by NMSA 30-1-1 et seq. Traffic and vehicle-related offenses governed by NMSA 66-8-1 et seq. Criminal procedure governed by NMSA 31-1-1 et seq. and Rules 5-101 et seq., Rules 6-101 et seq. and Rules 7-101 et seq. Criminal procedure for trial of minors is governed by NMSA 32A-2-1.

Indictment or Information.

Prosecution may be either by complaint, by indictment of grand jury or by information subscribed by district attorney. (Rule 5-201). Grand jury powers and procedures set forth in NMSA 31-6-1 et seq.

Bail.

All persons shall be bailable except for capital offenses when proof is evident or presumption great. (Const. Art. II, § 13). Failure to appear as required when released on bail or personal recognizance is crime. (NMSA 31-3-9).

Interstate Compact for Supervision of Parolees and Probationers repealed (2001). (NMSA 31-5-1 et seq.).

Medicaid Fraud Act adopted. (NMSA 30-44-1 et seq.).

DNA Identification.

Database is established of DNA records for convicted felons to be used to identify or exclude suspects during criminal investigations and to facilitate use of DNA records in registration of sex offenders. (NMSA 29-16-1 et seq.).

Uniform Criminal Extradition Act adopted. (NMSA 31-4-1 et seq.). Civil service cannot be made on one in state through extradition if civil case arises out of same facts as criminal proceedings. (NMSA 31-4-27).

Other Uniform Acts Adopted.

Attendance of Witnesses from Without State in Criminal Proceedings (NMSA 31-8-1 et seq.); Controlled Substances, with significant omissions and amendments, adopted (NMSA 30-31-1 et seq.).

8 DEBTOR AND CREDITOR

8.01 ASSIGNMENTS:

Subject to provisions of UCC, notes, bonds, due bills and all instruments in writing, by which maker promises to pay to another, or order or bearer sum of money, or by which he promises to pay sum of money in property or labor, or to pay or to deliver any property or labor, or acknowledges any money or labor or property to be due, are assignable by indorsement thereon or other writing. Assignee has right of action in his own name, subject to defenses or setoffs against assignor which arose before notice of assignment. (NMSA 56-5-1). Subject to UCC, assignment may be without recourse if it is specified as without recourse. (NMSA 56-5-2). Patient's claim for compensation under Medical Malpractice Act is not assignable. (NMSA 41-5-12). Assignment for benefit of creditors permitted upon posting bond and with duties imposed on assignee. (NMSA 56-9-1 et seq.). Claims may be assigned to collection agency subject to Collection Agency Regulatory Act. (NMSA 61-18A-1 et seq.).

Future contingent rights of re-entry, forfeiture and reversion are assignable. (NMSA 47-1-23).

Uniform Commercial Code adopted. See category 3 Business Regulation and Commerce, topic 3.09 Commercial Code.

Instrument Transferring Title.

All instruments affecting title to real property should be acknowledged. (NMSA 14-8-4, NMSA 14-9-1).

Filing.

Assignments of security interests should be filed with filing officer indicated in Uniform Commercial Code. (NMSA 55-9-514). Assignment of security interest in fixtures covered by mortgage that is effective as financing statement may be made only by assignment of mortgage per non-UCC law. (NMSA 55-9-514; see NMSA 14-9-1). See category 3 Business Regulation and Commerce, topic 3.09 Commercial Code. Filing fee is $20 for state's written form up to three pages; $40 for written record not in state's form. (NMSA 55-9-525).

Recording.

Instruments affecting title to real property must be recorded with County Clerk in county where property located. (NMSA 14-9-1).

Notice.

As to security interests, governed by Uniform Commercial Code. As to real property, instruments properly acknowledged and recorded are constructive notice to world. (NMSA 14-9-2).

Effect.

Assignment of security interest may be either in full or in part. (NMSA 55-9-514[b]).

Assignment of wages must be in writing, signed, acknowledged, and recorded in office of county clerk where money is to be paid. No more than 25% of disposable wages may be assigned. Copy of said assignment must be served on employer or one to make payment. (NMSA 14-13-11). See also category 3 Business Regulation and Commerce, topic 3.23 Sales, subhead Retail Credit Sales.

8.02 ATTACHMENT:

Actions in Which Allowed.

Creditor may sue debtor. If action is for debt or founded on contract, attachment may also be issued upon tort or other action ex delictu. (NMSA 42-9-1; NMSA 42-9-2).

Courts Which May Issue Writ.

A writ of attachment may be secured in district court or magistrate court. (NMSA 42-9-1; NMSA 35-9-1).

In Whose Favor Writ May Issue.

The remedy is available to creditor of debtor defendant. (NMSA 42-9-1).

Against Whom Writ May Issue.

May issue against property of creditor's debtor. (NMSA 42-9-2, NMSA 35-9-1).

Claims on Which Writ May Issue.

An attachment may issue on demands already due and not yet due as upon demands already due for debts founded on contract. If action is for debt or founded on contract, attachment may also be issued upon tort or other action ex delictu. (NMSA 42-9-1; NMSA 42-9-2; NMSA 35-9-1; 6 N.M. 415, 28 P. 773).

Grounds of attachment are that the debtor: (1) Is nonresident; (2) has concealed himself, absconded or absented himself from his usual place of abode in state so that ordinary process of law cannot be served on him; (3) is about to remove his property or effects out of state or has fraudulently concealed or disposed of his property so as to defraud, hinder, or delay creditors; (4) is about to fraudulently convey, or assign, conceal, or dispose of his property so as to hinder, or delay creditors; (5) has absconded or secretly removed his property into state with intent to defraud, hinder, or delay creditors, when debt was contracted out of state; (6) is a corporation having its principal place of business out of state, with no designated agent in state on whom process may be served; (7) fraudulently contracted debt or incurred obligation at basis of suit or obtained credit by false pretenses; (8) requested plaintiff or his assignor to render work, labor, or services, constituting subject-matter of debt; (9) contracted the debt for necessities of life. (NMSA 42-9-1, NMSA 35-9-1). Foreign corporation doing business in state without complying with requirements therefor is regarded as nonresident.

Proceedings to Obtain.

Plaintiff to file verified petition showing venue, jurisdiction, grounds for petition, and relief sought, and file along with bond and affidavit showing existence of one or more of aforementioned grounds of attachment. Prejudgment writ available upon special showing and procedures. (NMSA 42-9-4; NMSA 35-9-1; Rule 1-065).

Exemptions from Attachment.

Exemptions of personal property apply to attachment proceedings. Notice of right to claim exemptions must be given in all prejudgment attachment proceedings in same manner and time as required in execution proceedings. (Rule 1-065, 1-065.1, 2-803, 3-803). See topic 8.05 Executions.

Attachment Bond.

A plaintiff in attachment must give bond for double the amount of claim involved, unless, in district court attachment, court fixes a lesser amount. (NMSA 42-9-7, NMSA 35-9-1).

Property Subject to Attachment.

All property of debtor, of whatsoever nature, may be attached, except property specifically exempted from execution (see topic 8.06 Exemptions) and interest of beneficiary in spendthrift trust. (NMSA 42-9-4; NMSA 35-9-2 [only personal property may be attached in magistrate court]; Rule 1-065). For purpose of attachment, situs of debts and obligations is at domicile of obligor and situs of intangible interests in property is where such property is located. (NMSA 42-9-3).

Levy.

Writ is directed to the sheriff and is served as ordinary summons. When lands, tenements or real estate is attached, officer must briefly describe same in his return, and state that he attached all the right, title and interest of defendant to same, and must give notice to actual occupants, if any. (NMSA 42-9-15, NMSA 42-9-17, NMSA 35-9-2). For levy against real estate, officer must also file in office of county clerk a notice of levy, describing real estate levied on and showing title, number of case, and amount of debt or judgment. (NMSA 39-4-4, NMSA 39-4-6). When debt is satisfied, officer must file release. (NMSA 39-4-6). Subject to inconsistent provisions of UCC, when goods and chattels, moneys, effects or evidences of debt are to be attached, officer must seize same and keep them in his custody, if accessible, and if not accessible, must summons person in whose hands they may be as garnishee. When intangible interest in personal property in possession of someone other than defendant is attached, officer endorses his levy, describing property, on copy of writ and serves it on person or corporation in possession. (NMSA 42-9-17; see also NMSA 35-9-2).

Indemnity.

Statute does not give levying officer authority to require indemnity bond. (NMSA 42-9-1 et seq.; 20 N.M. 163; 148 P. 489).

Lien.

Attachment lien is not released by giving forthcoming bond to officer (NMSA 42-9-20;

NMSA 35-9-2; 2 N.M. 271), but attachment shall be discharged if, before judgment, defendant gives bond to plaintiff (NMSA 42-9-30; NMSA 35-9-4).

Priorities between successive attachments are according to dates of levies. (See 4 N.M. 343, 16 P. 617.) Attachment which has been levied has priority over judgment as to personalty not levied on under execution and as to real property in county in which no transcript of judgment has been filed in office of county clerk. (37 N.M. 267, 21 P.2d 96).

Sale.

Interest in realty must be sold by special master after publishing notice describing property, and giving time and place of sale and amount owed. (NMSA 42-9-36). Sale of personalty same as under ordinary execution. (NMSA 42-9-37; NMSA 39-5-1 et seq.).

Release of Property.

Property attached may be retained by the defendant, pending judgment, on giving forthcoming bond in double value of property (NMSA 42-9-20 [bond given to officer], NMSA 35-9-4 [bond given to plaintiff]); attachment of property is discharged if, before judgment, defendant gives bond to plaintiff (NMSA 42-9-30).

Third Party Claims.

Any person claiming any property, or a lien on any property which has been attached in any proceedings to which he is not a party, may intervene therein at any time before trial, by filing a petition under oath, setting up his right. (NMSA 42-9-29; see also Rule 1-024).

Vacation or Modification.

Writ may be amended to cure defect. Alias and pluries writs allowed in certain circumstances. (NMSA 42-9-14). If goods and chattels to be replevined are not found, action may proceed for conversion. Attachment to be dismissed and property released if material allegations are found for defendant, but dismissal of attachment does not abate suit. (NMSA 42-9-14; NMSA 42-9-32).

8.03 [RESERVED]

8.04 CREDITORS' SUITS:

Judgment liens may be foreclosed in same manner as mortgages. (NMSA 39-4-13).

Uniform Enforcement of Foreign Judgments Act (1964 Act) adopted. (NMSA 39-4A-1 et seq.). Property is exempt from execution issuing from foreign judgment in favor of any state for failure to pay that state's income tax on benefits received from pension or retirement plan. (NMSA 39-4A-3).

As of July 1, 2009, **Uniform Foreign Money-Judgments Recognition Act** (NMSA 39-4B-1 et seq.) has been repealed and replaced by Uniform Foreign Country Money Judgments Recognition Act, 2009 N.M. Laws, c. 142.

Uniform Foreign-Money Claims Act adopted. (NMSA 39-4C-1 et seq.).

8.05 EXECUTIONS:

Federal Rules of Civil Procedure are basis for procedure statute. See category 5 Civil Actions and Procedure, topic 5.19 Practice.

Kinds of Execution.

Derived from Federal Rules of Civil Procedure. Garnishment (NMSA 35-12-1 et seq.; Rule 1-065.2); execution writ (NMSA 39-4-1 et seq.; NMSA 39-5-1 et seq.; Rule 1-065 and -065.1); replevin (NMSA 42-8-1 et seq.; Rule 1-065); attachment (NMSA 42-9-1 et seq.; Rule 1-065); judgment lien on real property (NMSA 39-1-6); discovery in aid of execution (Rule 1-069). Available through district court. Not all execution forms available in courts of limited jurisdiction.

Exemptions.

See topic 8.06 Exemptions.

Time for Issuance.

Executions may issue at any time within seven years after rendition or revival of judgment. (NMSA 39-1-20). Writ issued upon request of prevailing party after judgment filed. (Rules 1-065, 1-065.1, 2-801, 3-801).

All property of debtor not exempt by law is liable to execution issued by any court (NMSA 39-4-1; NMSA 39-4-2), except no execution against land on magistrate court judgment (NMSA 39-4-2). Personal property is not affected by executions until levy. Court that issues has control even when sales are made in other counties. (NMSA 39-4-1).

Jurisdiction.

39-4-1 vests exclusive jurisdiction in court rendering judgment over matters growing out of levy or sale under execution. (1996-NMSC-053, 924 P.2d 1352).

Stay.

No provision for stay of execution except upon court order pending post-judgment motions, or upon appeal or writ of error. (Rule 1-062). See category 5 Civil Actions and Procedure, topic 5.03 Appeal and Error.

Lien.

Levy creates lien which remains until judgment satisfied. (See NMSA 42-9-20; 4 N.M. 343, 16 P. 617.) Lien created against real property upon filing of judgment transcript with county clerk of county where real property is situated. (NMSA 39-1-6, -7). Real property judgment lien is enforceable for 14 years. (NMSA 39-1-6).

Levy.

Officer must call upon debtor for payment, or to show him sufficient goods, chattels, effects and lands whereof same may be satisfied. If officer fails to find property sufficient to satisfy debt, he must notify all persons who may be indebted to defendant not to pay defendant, but to appear before court and make answer under oath concerning indebtedness, and thereafter like proceedings are had as upon garnishment. (NMSA 39-4-3).

Service and Return.

Writ shall be served by sheriff within 60 days from date issued. If not served within 60 days from date of issuance, alias or pluries writ may be issued. (NMSA 39-4-9; Rules 1-065.1; 2-801; 3-801).

Notice of Right to Claim Exemption.

No later than ten days before date of seizure of property to be sold, judgment creditor must serve each judgment debtor notice of right to claim exemptions and claim of exemption form pursuant to procedure in Rules. (Rules 1-065.1, 2-801, 3-801).

Claim of Exemptions; Waiver.

Judgment debtor who is natural person may claim statutory exemptions from execution by filing claim of exemption with court no later than ten days after service of notice of right to claim exemptions. If judgment debtor fails to file claim of exemption, judgment debtor is deemed to have waived right to claim exemptions. (Rules 1-065.1, 2-801, 3-801).

Priorities.

No statutory provision.

Claims of Third Persons.

Action in replevin will lie against officer for third party's property wrongfully seized under writ of execution, mesne, or other process; except under writ of replevin. (NMSA 42-8-3).

Satisfaction.

No special provisions.

Sale; Conditions Precedent to Sale.

If judgment debtor is natural person, no property may be sold prior to service of notice of right to claim exemptions or entry of order denying claim for exemption for property to be sold. (Rules 1-065.1; 2-801; 3-801). Notice of time and place of sale must be published for four weeks and six notices must be posted in county where property located. (NMSA 39-5-1). For property with less than $300 value, notice must be posted at least ten days before sale in five public places in county, including one at county courthouse and one at place of sale. (NMSA 39-5-4).

Sale is at public venue, between certain hours. (NMSA 39-4-9; NMSA 39-5-1). Where property being sold is perishable, after hearing, court may order property sold prior to running of time for notice, may order posting of security and may direct manner of sale. (NMSA 39-5-1.1). Real estate must be appraised and may not be sold for less than two-thirds of appraised value. (NMSA 39-5-5, -6).

Redemption.

The defendant may redeem real property within nine months after sale by paying to purchaser amount paid plus interest. (NMSA 39-5-21).

Supplementary Proceedings.

After entry of judgment, court may examine any person, including judgment debtor, regarding property of judgment debtor and his ability to satisfy judgment, pursuant to subpoena issued by clerk of court on request of judgment creditor. Judgment creditor may obtain discovery from debtor and any other person in aid of execution. (Rule 1-069).

Body Execution.

None.

8.06 EXEMPTIONS:

Every person may hold following property exempt: Personal property in amount of $500; one motor vehicle in amount of $4,000; clothing; furniture; tools of trade in amount of $1,500; books; medical-health equipment; jewelry in amount of $2,500; and proceeds from pension or retirement plan. (NMSA 42-10-1, -2). Homestead: $60,000, including $60,000 each for joint owners. (NMSA 42-10-9). $5,000 of benevolent association benefits to be paid to member's family. (NMSA 42-10-4).

Substitution.

For resident who does not own homestead, additional allowance of personalty or realty in sum of $5,000. (NMSA 42-10-10). See topic 8.10 Homesteads.

Debts against Which Exemptions Not Allowed.

Taxes and garnishments excepted from exemption. (NMSA 42-10-7). No exemption in personal property subject to UCC lien, except as to surplus value. (NMSA 42-10-6). Homestead and in-lieu-of-homestead exemptions do not apply to taxes, garnishment, or liens of mortgages or lessors, or recorded liens of labor or material furnished for dwelling house. (NMSA 42-10-11). See also topic 8.10 Homesteads.

Waiver of Exemption.

No statutory provision for waiving exemption in advance. Exemption is waived by statutory lien imposed for child support. (113 N.M. 129, 823 P.2d 929).

Insurance.

The cash surrender value of any life insurance policy, the withdrawal value of any optional settlement, annuity contract, or deposit with any life insurance company, all weekly, monthly, quarterly, semi-annual, or annual annuities, indemnities or payments of every kind from any life, accident, or health insurance policies, annuity contracts or deposits issued on the life of a citizen or resident of New Mexico, or made by any insurance company with such citizen are exempt from attachment, garnishment or legal process in favor of any creditor of the person whose life is insured or who is protected by said insurance or who receives or is to receive the benefit thereof, unless such policy, contract, or deposit was taken out, made or assigned in writing for the benefit of such creditor. (NMSA 42-10-3).

Earnings.

Proceeds from pension or retirement plan exempt. (NMSA 42-10-1, -2).

Necessity of Claiming Exemption.

Exemptions claimed at time of garnishment or execution. (Rules 1-065, 1-065.1, 1-065.2, 2-801, 3-801, 4-803, 4-808, 4-808A, 4-809). Exemption in lieu of homestead claimed at time of levy. (NMSA 42-10-10).

See also topic 8.09 Garnishment.

8.07 FORECLOSURE:

See topic 8.13 Liens; category 20 Mortgages, topic 20.04 Mortgages of Real Property.

8.08 FRAUDULENT SALES AND CONVEYANCES:

Uniform Fraudulent Conveyances Act repealed, effective June 16, 1989.

Uniform Fraudulent Transfer Act adopted without substantive revision. (NMSA 56-10-14 et seq.).

Remedies.

Threatened fraudulent conveyance is ground for attachment. (NMSA 42-9-1).

Bulk Sales.

Art. 6 of UCC repealed effective July 1, 1992.

8.09 GARNISHMENT:

Property Which May Be Reached.

All personal property, except certain exempt earnings (see subhead Earnings, infra), of debtor or due debtor in garnishee's possession or control. (NMSA 35-12-3).

Jurisdiction.

Writ may issue in magistrate court, metropolitan court or district court. (NMSA 35-12-19).

Proceedings to Obtain.

Writ may issue prejudgment or in aid of execution only upon filing of affidavit stating (1) defendant has no property in his possession within state subject to execution to satisfy amount, as relevant, claimed or amount of judgment, and (2) creditor believes garnishee is indebted to defendant and debt is not exempt, or garnishee holds personal property belonging to defendant. For prejudgment garnishment, creditor to file civil complaint and bond in double sum claimed, plus affidavit which may substitute one or more grounds for attachment (NMSA 42-9-1, NMSA 35-12-1, NMSA 35-9-1, 4-805) for (1) above. To execute judgment entered in another court in state, writ also requires filing civil complaint with certified copy of judgment. (NMSA 35-12-1). Creditor shall serve garnishee with copy of application for writ, writ of garnishment, copy of notice of right to claim exemptions, claim of exemption form (unless garnishment is for wages), and copy of answer by garnishee form. Garnishee must mail such documents to each judgment debtor on or before fourth business day following service of writ of garnishment. (NMSA 35-12-2; Rules 1-065.2, 2-802, 3-802, 4-803 et seq.).

Answer of Garnishee.

Garnishee must answer what, if anything, he is indebted to defendant and on what account; what effects of defendant are in his possession; and what other persons to his knowledge are indebted to or have effects of defendant. (NMSA 35-12-2). Garnishee shall answer writ of garnishment within 20 days of service and copy of answer must be mailed or delivered to judgment creditor and judgment debtor. (NMSA 35-12-4; Rules 1-065.2, 2-802, 3-802).

Service of Writ.

Writ of garnishment served wherever garnishee may be found in state and served in same manner as service of summons and complaint. (NMSA 35-12-2; Rules 1-065.2, 2-802, 3-802). Writ of garnishment issued by magistrate court must be served by judgment creditor on garnishee within 30 days of writ's issuance. (Rule 2-802).

Claim of Exemptions; Waiver.

Judgment debtor who is natural person (1) shall receive exemption from garnishment of wages to extent provided by law; and (2) may claim statutory exemption from garnishment other than wages by filing claim of exemption with court no later than ten days after service of notice of right to claim exemption by garnishee. If judgment debtor fails to file timely claim of exemption, right to claim exemptions is deemed waived. Judgment creditor may dispute claimed exemption by filing notice of dispute and request for hearing within ten days of service on judgment creditor of claim of exemption. Hearing on claim must be held within ten business days after filing notice of dispute and request for hearing. (Rules 1-065.2, 2-802, 3-802).

Practice.

Writ must be served on garnishee as civil summons. (NMSA 35-12-2; Rules 1-065.2, 1-004). If state is garnishee, writ must be served on Department of Finance and Administration, attorney general and head of agency, etc. involved and copy of writ must be delivered by certified or registered mail to defendant employee. (NMSA 38-1-17). Answer under oath must be made within 20 days. (NMSA 35-12-4; Rule 1-065.2). Failure to answer may result in default judgment against garnishee for full amount of judgment against defendant plus interest and costs. (NMSA 35-12-4). Garnishee is entitled to reasonable attorney fees and costs. (Rule 1-065.2).

Adverse Claims.

No specific provisions.

Judgment.

Judgment will be entered for plaintiff on answer admitting or trial determining garnishee indebted to defendant or in possession of defendant's personal property. (NMSA 35-12-4). If plaintiff prevails, he may be awarded costs and/or attorneys fees. (NMSA 35-12-16; Rule 1-065.2). For writ issued by magistrate court, interest accrues on judgment. To collect interest accruing after entry of writ, new application must be made. (Rule 2-802). Judgment on writ shall not enter unless hearing on disputed claim of exemption has been held. (Rules 1-065.2, 2-802, 3-802).

Earnings.

Future earnings may be reached. When garnishment used to enforce decree for child support, 50% of defendant's disposable earnings (wages less amounts required by law to be withheld) for any pay period are exempt. In all other situations, exemption is greater amount of defendant's disposable earnings: (a) 75% of disposable earnings for any pay period, or (b) 40 times minimum hourly wage rate. (NMSA 35-12-7).

Forms of Writs, Notices and Claim of Exemptions.

Applications for writs, writs, answers, notices of right to claim exemptions, claims of exemptions, notices of dispute of claimed exemptions and request for hearing, and judgments shall be substantially in form approved by New Mexico Supreme Court. (Rules 1-065.2, 2-802, 3-802, 4-805 to 4-809, 4-810A, 4-811, 4-812).

8.10 HOMESTEADS:

Any person is entitled to homestead exemption. (NMSA 42-10-9).

Limitation of Value.

Not to exceed $60,000 for each person. If homestead is owned jointly by two persons, each joint owner is entitled to $60,000. (NMSA 42-10-9).

Limitation of Area.

Homestead includes dwelling house and land occupied by debtor or dwelling house occupied and owned, leased or being purchased by debtor on land owned by another. (NMSA 42-10-9).

Debts or Liabilities against Which Exemption Not Available.

Homestead and in-lieu-of-homestead exemptions do not extend to taxes, garnishment, and recorded liens of mortgagees, lessors, or for laborers or materialmen for construction or repair of dwelling house. (NMSA 42-10-11).

Designation of Homestead.

No requirement of prior filing or recording.

Waiver of Exemption.

No statutory provision for waiver prior to levy. Consensual lien is waiver of exemption. (37 N.M. 546, 25 P.2d 209). Exemption from garnishment other than wages is waived if debtor fails to file timely claim of exemption. (Rule 1-065.2). Failure to claim exemption in answer to foreclosure suit is waiver of exemption. (NMSA 39-4-15; 98 N.M. 699, 652 P.2d 249).

Loss of Exemption.

No statutory provision.

Alienation or Encumbrance.

Both husband and wife must join in conveyance of real property. (NMSA 40-3-13).

Proceeds of Sale.

No statutory provision.

Rights of Surviving Spouse and Family.

Homestead is exempt from probate proceedings. (NMSA 42-10-9).

See also category 21 Property, topic Deeds, subhead Execution; also category 14 Family, topic 14.09 Husband and Wife.

8.11 [RESERVED]

8.12 LEVY:

See topics 8.02 Attachment, 8.05 Executions.

8.13 LIENS:

Uniform Commercial Code adopted. See category 3 Business Regulation and Commerce, topic 3.09 Commercial Code.

Abstractors have a lien on real estate for which they have prepared an abstract for the amount due for compiling and furnishing such abstract and costs incurred in enforcing lien. (NMSA 48-4-1). Claim to be recorded with county clerk where real property located within 90 days after certificate in abstract. (NMSA 48-4-2). Lien binds real estate for one year unless suit filed within that time. Procedure for foreclosing lien is same as foreclosure of real estate mortgages. (NMSA 48-4-4).

Artisans and mechanics have a lien on articles made, renovated, laundered or repaired by them for amount due for work. Have lien on things made or repaired for amount of work and can retain possession until paid. (NMSA 48-3-1).

Hospitals have lien on damages recovered by suit or compromise by patients injured in accidents not covered by workmen's compensation. (NMSA 48-8-1). Notice of lien is not effective until filed with county clerk of county where hospital located. (NMSA 48-8-2). Lien continues for one year after date of payment to patient, heirs, legal representatives. (NMSA 48-8-3[B]). Hospital enforcing its statutory lien on proceeds of personal injury settlement must pay its proportionate share of attorneys' fees and costs. (117 N.M. 357, 871 P.2d 1363).

Inn-keepers i.e. hotel, motel, trailer court or campground has lien on baggage and other property of their guests, which may be upon premises, for amount due for services and accommodations for transoccupancy. Enforce as other liens on personal property and per statutory procedures. (NMSA 48-3-13, -16).

Municipal Liens.

Special procedures for foreclosure of municipal liens. Provision for declaring total amount due and payable upon delinquency of any installment. Municipal lien defined, including improvement of sanitary facilities, utility services, refuse collection, sidewalk repair or construction. (NMSA 3-36-1 et seq.).

Agistors and those who furnish feed, shelter or pasture for stock or property of others have lien thereon. Agistor retains his lien, even if he has relinquished possession, if he files, before relinquishment, statement with clerk of county in which livestock are situated. Statement must declare his intention to retain lien and must describe livestock. (NMSA 48-3-7).

Motor Vehicles.

Those furnishing storage, repair, parts, towing, or wrecker service for any automobile, have lien on such automobile or parts for such storage, repairs, services, labor, and costs incurred in enforcing lien. One who does repairs or furnishes parts may detain vehicle in possession until lien is paid. No lien if vehicle released from possession. (NMSA 48-3-1, -19).

Oil and Gas Products Lien.

Purchase money security interest and lien imposed on oil and gas production to secure payment of purchase price, state royalty, and certain taxes. Perfection is by filing notice with county clerk. Purchase money security interest and lien expire one year after filing if action to enforce is not commenced. (NMSA 48-9-1 et seq.).

Aircraft.

Registration fee and any penalties that have accrued under Aircraft Registration Act constitute lien on aircraft from date fee was due. (NMSA 64-4-5.1). Lien for repair or service to aircraft. (NMSA 48-3-29).

Cooperative Agricultural and Marketing Associations.

Where marketing agreement between such association and its members is recorded, association is entitled to possession of crops as against holder of lien subsequently arising thereon. (NMSA 76-12-16).

Harvesters' Liens.

Individuals or companies harvesting crops have lien on crop for value of services upon filing with clerk in county where crop grown; lien waived if not filed within 21 days of completing harvest. (NMSA 48-5A-1 et seq.). Crop owner may petition court to cancel lien and may be required to post security therefor. (NMSA 48-5A-3).

Expense of Establishing Title.

Reasonable expense of suit brought by joint owner to establish title to land for himself and other co-owners is lien upon real estate of such co-owners. (NMSA 42-6-11).

Waiver, Loss or Extinguishment.

Bailees, except wholesalers and subcontractors, who repair, clean, adjust, service, or enhance value of certain personal property must retain possession of property and post notice to have lien for unpaid services. (NMSA 48-3-22, -23). Lien is lost if collateral security taken. (NMSA 48-3-11, -23).

Enforcement.

Procedure to foreclose lien (artisans, mechanics, motor vehicles, landlords, innkeepers, livery stables, lessors, agistors, common carriers, public accommodations, vehicle towing and storage, [48-3-1 through NMSA 48-3-20]) is same as foreclosure of chattel mortgage if suit be filed in court (see category 3 Business Regulation and Commerce, topic 3.09 Commercial Code); but where lien claimant has control or possession of property, lien may be foreclosed by sale at public auction, provided (1) that ten days notice to redeem, stating items of claim, is given and (2) that thereafter public advertisement of sale is made by posting six notices, or by publishing once each week for two successive weeks, 20 days before sale, in county in which sale is to be made. (NMSA 48-3-13, -14). Lien by possession can be enforced by foreclosure or sale three months after debt becomes due. (NMSA 48-3-22 et seq.).

Where property being sold is perishable, after hearing, court may order property sold prior to running of time for notice, may order posting of security and may direct manner of sale. (NMSA 39-5-1.1).

Alternative foreclosure procedure exists for municipal liens. (NMSA 3-36-6).

Autos registered in state must be held for 14 days in addition to ten-day notice of debt and 20-day notice of sale; those registered elsewhere must be held for 40 days in addition to ten- and 20-day notices. (NMSA 48-3-13, -14).

Redemption.

In case of sale under execution, there are nine months in which to redeem real property. (NMSA 39-5-21). No provision for redemption of personal property.

Federal Lien Registration Act.

Adopted. (NMSA 48-1-1 et seq.).

Mechanics' Liens.

Any person furnishing labor or material for construction, alteration or repair of any structure, including mine, building, wharf, bridge, ditch, flume, tunnel, fence, machinery, railroad, road, or aqueduct to create hydraulic power, or any other structure, has lien thereon for amount due him for such material or labor, if he files in office of county clerk proper lien claim. Principal contractors must file lien claims within 120 days, and subcontractors within 90 days after completion of contract.(NMSA 48-2-2, -6).

No requirement that subcontractor must complete its work at site. Subcontractor cannot merely supply goods, but must perform some act, using its skills and labor, to conform some material to contract specifications. (NMSA 48-2-2; 110 N.M. 761, 800 P.2d 195).

The claim must contain a statement of his demands, after deducting all just credit and offset, the name of owner or reputed owner if known, and the name of person by whom he was employed, or to whom he furnished the material, with statement of terms, time given and conditions of his contract, and description of property to be charged with the lien. It must be verified by oath. (NMSA 48-2-6).

Payment by owner of residence discharges all NMSA 48-2-2 liens unless prior to payment person entitled to lien filed lien pursuant to NMSA 48-2-6. (NMSA 48-2A-11).

Mechanics' and materialmens' liens are preferred to any lien, mortgage or other encumbrance which attached after construction begins, or which was unrecorded at time of commencement of construction, provided lienor had no notice of same (NMSA 48-2-5); in order for work to constitute “commencement” such work must have been done on “building, improvement or structure” upon which lien is claimed (112 N.M. 497, 816 P.2d 1119).

Procedure for foreclosure of mechanic's lien on real property is similar to foreclosure of real estate mortgage and similar period for redemption from foreclosure sale is allowed. See NMSA 48-2-14; category Mortgages, topic Mortgages of Real Property.

Court may be petitioned to cancel lien. After it has determined amount of sufficient security and security has been deposited with court, court may issue order canceling lien on real property and transferring lien to security. (NMSA 48-2-9). Lien remains valid for up to two years. (NMSA 48-2-10).

Public Works.

If contract price for public work exceeds $25,000, contractor must furnish bond conditioned upon faithful performance and payment of claims for labor and materials. Bond must be for 100% contract price unless reduced to not less than 50% of contract price by state. (NMSA 13-4-18).

Stop Notice Act creates special procedures applicable to liens against residential properties containing not more than four units. (NMSA 48-2A-1 to -12). Money held in escrow set up after payment of contract price to ensure punchlist completed is not “final payment” under NMSA 48-2A-11 so as to discharge materialmen's liens. (117 N.M. 429, 872 P.2d 847).

Attachment Lien.

See topic 8.02 Attachment.

Attorney's Lien.

No statutory provisions.

Carrier's Lien.

See category 3 Business Regulation and Commerce, topic 3.08 Carriers.

Chattel Mortgage Lien.

See category 20 Mortgages, topic 20.01 Chattel Mortgages.

Collateral Security.

See topic 8.15 Pledges.

Execution Lien.

See topic 8.05 Executions.

Factor's Lien.

See category 3 Business Regulation and Commerce, topic 3.14 Factors.

Judgment Lien.

See category 5 Civil Actions and Procedure, topic 5.15 Judgments.

Landlord's Lien.

See category 21 Property, topic 21.10 Landlord and Tenant.

Liens on Exempt Property.

See topic 8.06 Exemptions.

Liens on Homestead.

See topic 8.10 Homesteads.

Real Estate Mortgage Lien.

See category 20 Mortgages, topic 20.04 Mortgages of Real Property.

Tax Lien.

See category 22 Taxation, topics 22.15 Property Taxes; 22.18A Tax Liens, subhead Uniform Lien Registration Act.

Self-Service Storage Lien.

Written lease required for lien to attach. (116 N.M. 408, 862 P.2d 1267). Lien attaches on date of default and continues as long as facility owner has possession of stored property. After 90 days in default of written rental agreement, stored property can be sold, following notice procedures. (NMSA 48-11-1 et seq.).

8.14 MECHANICS' LIENS:

See topic 8.13 Liens.

8.15 PLEDGES:

Covered by Uniform Commercial Code—Secured Transactions. (NMSA 55-9-101 et seq.). Covered also by Pawnbrokers Act. (NMSA 56-12-1 et seq.). Pledged property may not be disposed of, except by redemption, until 90 days after debt is due. Pawnbroker is required to keep complete and accurate record of each transaction. (NMSA 56-12-11).

Remedies of Pledgee.

Covered by Uniform Commercial Code—Secured Transactions. (NMSA 55-9-101 et seq.).

8.16 RECEIVERS:

In attachment suits where safety of property or security of proceeds requires, district judge may appoint special receiver to take possession of same, after giving such bond and security as judge shall approve. (NMSA 42-9-26).

In assignment for benefit of creditors cases the judge may, at any time pending the action, compel the assignee to surrender to a receiver all property in his possession or under his control. (NMSA 56-9-4).

The district judge may appoint a receiver in any proceeding to liquidate assets of corporation. Any person aggrieved by proceedings of such receiver may appeal to court. (NMSA 53-16-17).

District court shall appoint receiver based upon written application for receiver, and may appoint receiver in other circumstances per statute. (NMSA 44-8-4).

8.17 REDEMPTION:

See topics 8.05 Executions, Liens; categories 20 Mortgages, topic Mortgages of Real Property; Taxation, topic Property (Ad Valorem) Taxes.

8.18 SUPPLEMENTARY PROCEEDINGS:

See topic 8.05 Executions.

8.19 [RESERVED]

8.20 USURY:

See category 3 Business Regulation and Commerce, topic 3.17 Interest.

9 DISPUTE RESOLUTION

9.01 ALTERNATIVE DISPUTE RESOLUTION:

Arbitration.

Uniform Arbitration Act adopted and applies to agreements made after July 1, 1971. Revised Uniform Arbitration Act adopted in 2001 governs agreements made on or after effective date or July 1, 2001. District court does not have authority to revise arbitration awards for errors as to law or facts, provided that award is fairly and honestly made and is within scope of submission. (115 N.M. 622, 857 P.2d 22).

In 2001, New Mexico adopted revised Uniform Arbitration Act based on revised act adopted by Uniform Law Commissioners in 2000. (NMSA 44-7A-1 et seq.). New Mexico's adoption of Uniform Arbitration Act became effective on July 1, 2001. Arbitration proceedings under several New Mexico statutes are governed by Uniform Arbitration Act. See NMSA 1-19-34.4(F) (Campaign Practices); NMSA 2-11-8.2(F) (Lobbyist Regulations); NMSA 10-7E-17(F) (Public Employee grievance procedures); NMSA 10-7E-18(A)(5) and (B)(2) (Public Employee Bargaining impasse resolution); NMSA 10-16A-6(D) (Financial disclosures of Public Officers and Employees). Although New Mexico statutes pertaining to uninsured motorist disputes recognize Uniform Arbitration Act, New Mexico Legislature did not make binding arbitration exclusive means of resolving uninsured motorist disputes. (NMSA 66-5-303; 2004-NMSC-002, 84 P.3d 65).

Question whether valid contract to arbitrate exists is question of state law. (2004-NMSC-013, 90 P.3d 466). Issues involving antitrust cannot be subject of arbitration proceeding because public interest mandates enforcement of antitrust laws. (93 N.M. 105, 597 P.2d 290, cert. denied, 444 U.S. 911). Once arbitration award is granted, whether or not by court-supervised process, Uniform Arbitration Act provides mechanism for courts to take jurisdiction to confirm award, to vacate, modify or correct award, within narrow statutory limits, to enforce arbitration agreement under act, and to enter judgment on award and to take appeals from various types of orders, including order confirming or denying confirmation of award, order modifying or correcting award or order vacating award without directing rehearing. (99 N.M. 297, 657 P.2d 624).

Any agreement contained in record which provides for arbitration is valid, enforceable and irrevocable unless principles of law or equity call for revocation of contract. (NMSA 44-7A-

7[A]). Provisions of New Mexico Uniform Arbitration Act allow for discovery (NMSA 44-7A-18[C]), award of attorney's fees and punitive damages (NMSA 44-7A-22[A], [B]) and consolidation of separate arbitration proceedings (NMSA 44-7A-11). One distinguishing feature of New Mexico Act is its definition of “disabling civil dispute clause” as provision that modifies or limits procedural rights of consumers, borrowers, tenants or employees in enforcing substantive rights against drafters of standard form contracts or leases. (NMSA 44-7A-1[B][4]). Act lists seven examples of such clauses, and provides that disabling dispute clause is unenforceable against and voidable by consumer, borrower, tenant or employee in arbitration dispute. (NMSA 44-7A-1[B][4][a-g]; NMSA 44-7A-5). On motion, court shall order parties to arbitrate where it finds enforceable agreement to arbitrate. (NMSA 44-7A-8[A], [B]). However, court may not order parties to arbitrate where it finds there is no enforceable agreement to do so. (NMSA 44-7A-8[C]).

Second Judicial District (which includes Albuquerque) is highly proactive in creating alternative dispute resolution programs. One such program is court-annexed alternative dispute resolution program. (LR2-601). This program includes both mandatory arbitration referral and voluntary arbitration referral. (LR2-603). This program does not include following categories of cases: appeals, Uniform Arbitration Act, extraordinary writs, adoption, commitment, conservatorship, guardianship, probate, Children's Code, domestic relations, worker's compensation, student loan, driver's license, election and tax. Assigned judge continues to have jurisdiction over case while in arbitration and can hear limited motions. (LR2-603[V][A]). After arbitrator has been appointed, arbitrator is normally required to make award within 120 days. (LR2-603[V][A][5]). Under LR2-603(V)(D)(5), arbitration award is not binding unless all parties so stipulate prior to filing of award. Appeal of arbitration award is de novo proceeding before assigned judge. (LR2-603[VI][C][2]).

Mandatory Dispute Resolution.

Rule 1-125 provides that in judicial districts with established domestic relations mediation program, court may, under certain circumstances and in certain types of domestic relations proceedings, order parties to participate in mediation or other court services. This may include ordering parties to attend information session, meet with counselor, or participate in priority or advisory consultation. (1-125). Rules 1-120 to 1-127, Rules of Civil Procedure for District Court, are intended to supersede any local rules. (1-120).

In Second Judicial District, referral to arbitration is mandatory where no party seeks relief other than money judgment and no party seeks amount in excess of $25,000, exclusive of punitive damages, interest, costs and attorney fees. (LR2-603[II][A]). However, court may deny referral to arbitration for good cause, either upon party's or court's own motion. (LR2-603[II][F]). Permissive referrals are made in any case where parties stipulate to arbitration. (LR2-603[III]).

Second Judicial District also requires court to refer every case involving dispute over any child-related issue, except child support, to court clinic mediation program unless either: (a) order from court exists which is stipulated by parties, or (b) good cause is shown why parties should not enter this program. (LR2-504[B]). Court may also order parties to submit to other court services, including advisory consultation, priority consultation, evaluation and decision-making. Parties outside of district can also participate in Second Judicial District's court clinic program provided referral order is signed by both assigned out-of-district judge and second judicial district presiding domestic relations court judge. (LR2-504[L]).

Fourth, Ninth and Thirteenth Judicial Districts have similar, but not mandatory, mediation programs. (LR4-702, LR9-703). (LR13-702 was withdrawn by Supreme Court Order No. 08-8300-009, effective Apr. 15, 2008.) See description of program in subhead Voluntary Dispute Resolution, infra.

Cases in Third Judicial District involving domestic relations disputes over custody or visitation of minor children are subject to mediation/evaluation of contested custody and visitation issues and are governed by procedures of domestic relations mediation program. (LR3-301). According to local rule, court may not hear child custody case unless submitted to mediation or determination made that mediation is not warranted. (LR3-301[F][2]).

In addition, Third Judicial District (includes Las Cruces) has mandatory settlement facilitation program in which cases are referred to settlement conference approximately 60 days before pretrial conference. (LR3-704[B][1]). Rule also allows any party to request settlement conference at any time. (LR3-704[A] and [B][2]). Cases generally not referred to alternative dispute resolution are those involving student loans, foreclosure without other issues, replevin without other issues, conservatorship, guardianship, adoption, petitions pursuant to Mental Health and Developmental Disabilities Code, elections, tax, appeals, license suspension, revocation and restoration, writ actions and cases where order of protection filed pursuant to Family Violence Protection Act. (LR3-703[B]).

Fifth Judicial District provides domestic relations mediation program “to assist the court, parents and other interested parties in determining the best interest of children involved in domestic relations cases.” (LR5-501). Litigants may be ordered to mediation by court. (LR5-501[C]).

Eleventh Judicial District requires all cases which involve child custody dispute to enter domestic relations mediation program. Mediation is required to be completed within 45 days of first meeting with mediator. (LR11-115).

Voluntary Dispute Resolution.

New Mexico statute NMSA 40-12-1 et seq. is New Mexico Domestic Relations Mediation Act. Under this Act, judicial district shall “create domestic relations mediation fund”. Money in fund is used to offset cost of operating domestic relations mediation program and supervised visitation program. (NMSA 40-12-4). While not mandatory, parents may request to participate in programs for consultation, evaluation or mediation. Court may order parents to enter any one of programs. There is sliding scale fee for participation in domestic relations mediation program. (NMSA 40-12-5).

Second Judicial District has also created several court-annexed alternative dispute resolution programs. Under LR2-601(C), all referrals to these programs require filing of written court order. Second Judicial District's settlement facilitation program allows court to refer cases to settlement conferences conducted by court-appointed settlement facilitators throughout year and during periodic “settlement weeks” scheduled by court. (LR2-602[A]). “Settlement week” is normally scheduled every Sept. (LR2-602[A]). This program does not apply to cases where lawsuit has not yet been filed, or to cases within following categories: appeals, extraordinary writs, court-annexed arbitration program (pending cases), adoption, commitment, conservatorship, guardianship, student loan, election and tax. (LR2-602[B]). Any party at any time can request referral to settlement conference by motion or letter directed to assigned judge. (LR2-602[C]). Additionally, judge may refer case to settlement conference at any time and without agreement of parties. (LR2-602[D]). Settlement conferences can only be canceled by written court order. (LR2-602[J]).

Eighth Judicial District allows court to order and refer case to settlement conference at any stage in its progress to resolution. (LR8-501).

Fourth, Ninth, and Thirteenth Judicial Districts have established domestic relations mediation programs. (LR4-702, LR9-703 and LR13-804, respectively). Programs established to determine best interests of children involved in domestic relations cases. (LR4-702[A]; LR9-703[A]). In Fourth Judicial District, referral to mediation is obtained either by request or if ordered by court. (LR4-702[C]). In Ninth Judicial District, referral to mediation is obtained by stipulation of parties or by order of court for good cause. (LR9-703[B]).

10 DOCUMENTS AND RECORDS

10.01 ACKNOWLEDGMENTS:

Uniform Law on Notarial Acts adopted. (NMSA 14-14-1 et seq.).

May be taken by following officers:

Within state: Notary public, judge, clerk or deputy clerk of any state court, person authorized by law of this state to administer oaths (NMSA 14-14-3) or magistrate (NMSA 35-3-1).

Outside State but within United States: Notary public, judge, clerk or deputy clerk of that jurisdiction or any other person authorized by law of that jurisdiction. (NMSA 14-14-4).

Outside of the United States: Judge, clerk, deputy clerk of court, commissioned officer on active duty in military service of U.S., officer of foreign service or consular officer of U.S. or any other person authorized by federal law. (NMSA 14-14-5). Also, if performed within jurisdiction of and under authority of foreign nation or multinational or international organization by notary, judge, clerk, deputy clerk of court of record or any other person authorized by law of that jurisdiction. (NMSA 14-14-6).

Persons in or with U.S. Armed Forces.

See topic 10.03 Notaries Public. (NMSA 14-14-5).

General Requirements of Taking.

Notarial officer shall determine from personal knowledge or satisfactory evidence that person making acknowledgment is person whose signature is on instrument. (NMSA 14-14-2[A]). “Satisfactory evidence” includes personal knowledge of person's identity, identification documents or oath or affirmation of credible witness personally known to notarial officer. (NMSA 14-14-2[F]).

General Requirements of Certificate.

Signed and dated by notarial officer, identification of jurisdiction, notarial officer's title or rank. If notarial officer is notary public, date of expiration of commission of office must also be indicated. Official stamp or seal may be included. (NMSA 14-14-7[A]).

Married Women.

No special requirements.

Attorneys in Fact.

No special requirements.

Corporations.

No special requirements.

Foreign Acknowledgments.

See subheads Outside State but within United States, Persons in or with U.S. Armed Forces, supra.

Effect of Acknowledgment.

Any instrument of writing, duly acknowledged and certified, may be filed and recorded. (NMSA 14-8-4).

Proof by Subscribing Witnesses.

No provision.

Authentication.

No provision.

Forms.

The following forms may be used so long as they contain general requirements of certificate. (NMSA 14-14-8).

A. for an acknowledgment in an individual capacity:

State of ____________________

(County) of ____________________

This instrument was acknowledged before me on (date) by (name(s) of person(s))

(Signature of notarial officer)

Title (and Rank)

[My commission expires:______]:

(Seal, if any)

B. for an acknowledgment in a representative capacity:

State of ____________________

(County) of ____________________

This instrument was acknowledged before me on (date) by (name(s) of person(s))

as (type of authority, e.g., officer, trustee, etc.) of (name of party on behalf of whom instrument was executed.)

(Signature of notarial officer)

Title (and Rank)

[My commission expires:______];

(Seal, if any)

C. for a verification upon oath or affirmation:

State of ____________________

(County) of ____________________

Signed and sworn to (or affirmed) before me on (date) by (name(s) of person(s) making statement).

(Signature of notarial officer)

Title (and Rank)

[My commission expires:______];

(Seal, if any)

D. for witnessing or attesting a signature:

State of ____________________

(County) of ____________________

Signed or attested before me on (date) by name(s) of person(s)).

(Signature of notarial officer)

Title (and Rank)

[My commission expires:______];

(Seal, if any)

and

E. for attestation of a copy of a document:

State of ____________________

(County) of ____________________

I certify that this is a true and correct copy of a document in the possession of ____.

Dated ____________________

(Signature of notarial officer)

Title (and Rank)

[My commission expires:______];

(Seal, if any)

Alternative to Acknowledgment or Proof.

No provision.

Validating Acts.

Formal defects in acknowledgments taken within or outside state that have been filed and are of record and have gone without challenge for period of ten years are validated. (NMSA 14-13-25).

10.02 AFFIDAVITS:

Administration of Oaths in General.

Secretary of State, county clerks, clerks of probate courts, clerks of district courts, clerks of magistrate courts with seal, and notaries public authorized to administer oaths and affirmations. (NMSA 14-13-3).

General Requirements as to Administration.

Affidavits may be taken before any person authorized to take acknowledgments (see topic 10.01 Acknowledgments).

General Requirements of Certificate.

Signed and dated by notarial officer, identification of jurisdiction, notarial officer's title or rank. If notarial officer is notary public, date of expiration of commission of office must also be indicated. Official stamp or seal may be included. (NMSA 14-14-7[A]).

Use of Affidavit.

Presence of signature and title of notary public on affidavit are prima facie evidence that signature of affiant is genuine and that person holds designated title. (NMSA 14-14-3). See topic 10.01 Acknowledgments, subhead Forms for form of notary act for affidavits.

Alternative to Affidavit.

No statutory provision.

10.03 NOTARIES PUBLIC:

Qualification.

Notary must be resident of New Mexico, at least 18 years old, able to read and write English, not convicted felon, nor have pleaded guilty or nolo contendere to felony and not have had notary commission revoked in past five years. (NMSA 14-12A-3). Application with $20 fee and bond for $10,000 is filed with secretary of state. (NMSA 14-12A-4). Appointment is made by governor for four year term. Appointment is evidenced by written commission. (NMSA 14-12A-5).

Authentication.

Must authenticate official acts and acknowledgments with seal or stamp. (NMSA 14-12A-18).

Seal.

Each notary must maintain stamp or seal containing name and words “Notary Public—State of New Mexico” and authenticate acts and acknowledgments with stamp or seal. (NMSA 14-12A-18).

Powers and Duties.

Notary may administer oaths, certify acknowledgments, jurats and copies. (NMSA 14-12A-7).

Expiration of Commission.

Notary, when certifying to any instrument, must state date of expiration of commission. (NMSA 14-12A-19).

Fees.

Maximum fee schedule is as follows: travel away from office, 30¢ per mile; acknowledgments, $5; oaths or affirmations, $5 per person; jurats, $5; copies, 50¢ per page with minimum total charge of $5. (NMSA 14-12A-16).

Consular officer, officer of foreign service, or commissioned officer on active duty in military. (NMSA 14-14-5).

10.04 RECORDS:

The county clerk is ex-officio recorder. *For list of Counties and County Seats see first page for this state in Volume containing Practice Profiles Section.*

Recordable Instruments.

Any instrument duly acknowledged and certified may be recorded. (NMSA 14-8-4).

Place of Recording.

County in which real estate located. (NMSA 14-9-1). For personal property, see category 3 Business Regulation and Commerce, topic 3.09 Commercial Code, subhead Filing Places.

Requisites for Recording.

Any instrument of writing, duly acknowledged and certified to, may be filed and recorded; provided, that judicial decrees, patents, any filing permitted or required by U.C.C. and land office receipts need not be acknowledged. (NMSA 14-8-4).

Necessity for Recording.

No writings or agreements affecting real estate are valid, except as to persons who have actual notice of same, until deposited in office of clerk to be recorded. (NMSA 14-9-3).

Recording Fees.

For schedule of recording fees see NMSA 14-8-12.2. See also categories 2 Business Organizations, topic Corporations, subhead Filing Fees; Mortgages, topic Mortgages of Real Property, subhead Recording Fees; Property, topic Deeds, subhead Recording Fees.

Foreign Conveyances or Encumbrances.

Any instrument may be filed if in writing, duly acknowledged and certified. (NMSA 14-8-4).

Effect of Record.

New Mexico is notice recording jurisdiction (NMSA 14-9-1), and constructive notice of existence and contents of instrument given by recordation (NMSA 14-9-2).

Filing Under Commercial Code.

See category 3 Business Regulation and Commerce, topic 3.09 Commercial Code, subheads Filing Fees and Filing Places.

Federal Lien Registration Act.

Adopted. (NMSA 48-1-1 et seq.).

Torrens system of land registration is not in effect.

Transfer of Decedent's Title.

Where decedent's estate is administered in New Mexico probated will is sufficient to show transfer of decedent's title. (NMSA 45-3-901). Persons entitled to property by family allowance, personal property allowance or intestacy may establish title by proof of descendent's ownership, his death and their relationship to decedent. (Id.). Informal probate of will which has been previously probated in another state or foreign country may be granted at any time upon written application by any interested person, together with deposit of authenticated copy of will and of order or statement probating it from office or court where first probated. (NMSA 45-3-303[D]).

Vital Statistics.

Records of births and deaths are kept by Vital Statistics Bureau, P.O. Box 968, Santa Fe, New Mexico 87504-0968, which furnishes certified copies of birth certificates, $10, and death certificates, $5. (NMSA 24-14-1 et seq.).

Delayed Birth Certificates.

Any person, by petition to any court of record in the state for an order to establish a public record of his birth and parentage, may establish such if the court is satisfied by the evidence at a hearing. (NMSA 24-14-16).

Abortions.

Report of induced abortions must be recorded with state registrar of vital statistics. (NMSA 24-14-18).

10.05 SEALS:

Uniform Commercial Code adopted. See category 3 Business Regulation and Commerce, topic 3.09 Commercial Code.

Corporate Seals.

All corporations have power to make, alter and use common seal. (NMSA 53-11-4[C]).

Effect of Seal.

Addition or omission of seal in no way alters force or effect of any instrument. (NMSA 47-1-6).

10.06 TORRENS ACT:

Not adopted.

10.07 VITAL STATISTICS:

See topic 10.04 Records.

11 EMPLOYMENT

11.01 EMPLOYER AND EMPLOYEE:

See topic 11.02 Labor Relations.

11.02 LABOR RELATIONS:

Promise by employee not to join or remain member of labor organization is unenforceable. (NMSA 50-2-4). Certain employees may absent themselves two hours for purpose of voting on election day. (NMSA 1-12-42). Employer may not coerce employees as to voting. (NMSA 1-20-13). Employer may not issue scrip in payment of wages. (NMSA 30-13-4). Discrimination in employment by reason of race, color, religion, sex, physical or mental handicap, or serious medical condition, age, national origin or ancestry, sexual orientation, or gender identity is prohibited. (NMSA 28-1-1 et seq.). Labor matters under jurisdiction of Labor and Industrial Commission. (NMSA 50-1-1 et seq.).

Human immunodeficiency testing as condition of employment prohibited unless absence of human immunodeficiency virus infection is bona fide occupational qualification of job in question. (NMSA 28-10A-1).

Hours of Labor.

With certain exceptions, maximum is 16 hours a day. (NMSA 50-4-30). Employees covered by minimum wage act must be paid time and one-half for hours worked in excess of 40 per week. (NMSA 50-4-22[D]).

Employment.

General rule: employment is for indefinite period and terminable at will of either party absent express agreement. (115 N.M. 665, 857 P.2d 776).

Retaliatory Discharge.

Must prove actual motive of employer. (121 N.M. 455, 913 P.2d 262). In actions involving discharge for reporting illegal activity, employees must show how actions furthered public interest. (121 N.M. 710, 917 P.2d 1382).

Wages must be paid at least semi-monthly in cash or its equivalent. Unpaid wages of discharged employee must be paid within five days where wages are a definite and fixed amount; otherwise within ten days. If not so paid upon timely demand, wages deemed to continue until paid, but not more than 60 days. (NMSA 50-4-2, -4). Minimum wage law provides for $6.50 per hour as of Jan. 1, 2008. Minimum wage will increase to $7.50 per hour as of Jan. 1, 2009. (NMSA 50-4-22). Employees who regularly receive more than $30 per month in tips, minimum wage is $2.13 per hour. (NMSA 50-4-22). All tips shall be retained by employee, except pooling of tips is permitted. Labor Commissioner may allow certain handicapped persons to work for less than regular minimum wage. (NMSA 50-4-23). There are many types of employees not covered by law. (NMSA 50-4-21).

Child Labor.

Employment of children under 14 years of age is prohibited. (NMSA 50-6-1).

Children under 16 years of age and over 14 may not be employed during hours when public school in district in which child resides is in session, except with certificate issued by city school Superintendent, school principal, or designated school official, when it is shown necessary, and that education and proper care are fully provided for. (NMSA 50-6-1, NMSA 50-6-2, NMSA 50-6-7).

Children under 16 are prohibited from certain occupations at any time (NMSA 50-6-4) and those under 18 prohibited from others (NMSA 50-6-5).

Labor Unions.

No “Right to work” law adopted.

Public Employee Bargaining Act.

Reenacted in 2003. (NMSA 10-7E-1 et seq.).

Labor Disputes.

Corrupt and Coercive Practices Act prohibits picketing to coerce employer or self-employed person to join or to contribute to labor organization or to recognize or to bargain with organization unless majority of employees favors such representation. It is also unlawful to prevent or hinder pursuit of any lawful work or employment. (NMSA 50-2-2).

Workers' Compensation Act.

Act applies to every employer of three or more workers (NMSA 52-1-6), except employers of private domestic servants and of farm and ranch laborers (NMSA 52-1-6, -16). Any employer to whom Act does not apply may elect to be subject to Act by filing in office of director, either sworn statement to effect that employer accepts provisions of this act or insurance or security undertaking as required by NMSA 52-1-4; NMSA 52-1-6. Act applies to all state and public employees. (NMSA 52-1-3, -3.1).

Exceptions to exclusivity provisions of Act have been created by 2001-NMSC-034, 131 N.M. 272, 34 P.3d 1148 and its progeny.

Act applies to every employee whose employer is within Act.

Act also applies to an employee injured outside state, provided: (1) His employment is principally localized in this state; (2) he is working under contract for hire made in this state in employment not principally localized in any state or localized in a state whose workmen's compensation laws are not applicable to his employer; (3) he is working under contract for hire made in this state for employment outside of U.S. and Canada; or (4) he is unpaid health professional deployed outside of state pursuant to Emergency Management Assistance Compact. (NMSA 52-1-64). Receipt of benefits under compensation law of another state does not bar a claim, but any such benefits received will be used as set-off. (NMSA 52-1-65).

Act also applies to nonresident employers employing workers in State provided (1) they are licensed under Construction Industries Licensing Act; or (2) they employ three or more workers within State. (NMSA 52-1-66).

§ 52-1-67(B) allows for express agreement concerning choice of law, enforceable even in absence of express agreement regarding where employment localized. (122 N.M. 819, 932 P.2d 509).

Acceptance of the Act constitutes surrender by employer and employee of all rights to any other method, form or amount of compensation or determination thereof, or any other right of action for personal injury or death of employee, except as provided by the Act. (NMSA 52-1-6).

Statutory Employer.

Where employer procures work to be done by contractor, except independent contractor, employer liable under Act. (NMSA 52-1-22). Statutory employer immune from tort liability as are other employers. (121 N.M. 657, 916 P.2d 1324). Independent contractor construed as common law term. (121 N.M. 657, 916 P.2d 1324). N.M. follows Restatement (Second) of Agency § 220(1) (1958) to determine whether contractor is independent contractor. (121 N.M. 657, 916 P.2d 1324).

Security or Certificate of Solvency.

Employer under Act must file in office of director of workmen's compensation administration evidence of workers' compensation insurance in form of certificate containing information required by regulation of director. (NMSA 52-1-4). Under Group Self-Insurance Act, two or more private employers engaged in same or similar business, in existence for not less than five years, and having combined net worth of $3,000,000 may pool their workmen's compensation liabilities under specified conditions, without being subject to Insurance Code. (NMSA 52-6-1 et seq.).

Act covers any injury by accident arising out of and in course of employment. (NMSA 52-1-19).

After injury, employer must furnish medical services, hospitalization, and artificial members where required. (NMSA 52-1-49). Employer selects health care provider for first 60 days, after 60 days nondeciding party may select unless agree otherwise. Procedure for change of health care providers contained in NMSA 52-1-49. Compensation for partial disability for certain enumerated injuries are specifically provided for. (NMSA 52-1-43). Compensation for death when there are no dependents is funeral expenses not to exceed $7,500, plus medical and hospital expenses and sums decedent should have been paid for compensation benefits to time of death. Compensation for death when there are dependents includes above plus weekly payments to dependents determined by number of dependents and relationship to decedent but not to exceed 662/3% of average weekly wage of deceased or 85% of average weekly wage in state, whichever is lower for 700 weeks. No dependent nor any class thereof other than widow, widower, or children may receive more than $7,500. (NMSA 52-1-46). Compensation benefits for disability or death shall not exceed amount equal to 700 multiplied by maximum weekly compensation payable at time of accidental injury. (NMSA 52-1-47). Failure of employer to furnish safety devices increases compensation 10%. (NMSA 52-1-10).

Benefits paid or owing shall be considered wages for purposes of securing support for minor dependent. Therefore, no order may be entered against such benefits which results in workman retaining less than $100 per week or weekly amount equal to 40 times federal minimum wage if required to support minor dependents. (NMSA 52-1-52).

Notice of injury must be given within 15 days, or if this is impossible, within maximum limit of 60 days. No notice required where employer or his agent in charge of work had actual knowledge of accident. (NMSA 52-1-29). Worker allowed to give notice within 15 days of when worker should have known of latent injury by exercising reasonable diligence. (122 N.M. 195, 922 P.2d 577).

Report of compensable accident must be filed with Director of Workmen's Compensation Administration within ten days after injury, on forms approved by Director (NMSA 52-1-58), and no claim for compensation may be barred prior to filing of such report (NMSA 52-1-59). Notice of date of first payment must be given by employer to Director within ten days. (NMSA 52-1-60). Failure to make report subjects employer to fine of not less than $25 nor more than $1,000. (NMSA 52-1-61).

Amendment of Judgment.

On motion of employer or other party bound by compensation order, hearing officer may, not more often than once every six months, review finding of total disability and diminish or terminate monthly payments. (NMSA 52-1-56). On motion of any party in interest within two years after date of last payment or denial of benefits, hearing officer may hold hearing and issue order terminating, continuing, reinstating, increasing, decreasing, or otherwise affecting any compensation order if specified grounds exist. (NMSA 52-5-9).

Failure to Pay.

In case employer fails to pay compensation, workman may, within one year, file claim therefor with Director. Time for filing claim is extended, but not for more than one year, while workman remains employed by employer who employed him at time of accidental injury. (NMSA 52-1-31). One year limitation begins to run 31 days after failure or refusal of employer to pay, provided he knows or has written notice of accident. (45 N.M. 75, 109 P.2d 790). Within 60 days of receiving claim, Director contacts all parties and issues recommendations for resolution. If no party objects to Director's recommendations within 30 days of receiving them, all parties are bound by them; if any party makes timely objection, claim is assigned to hearing officer for hearing. (NMSA 52-5-5). In latter case, parties have 20 days to respond to claim transmitted to them by Director, and hearing occurs within 60 days of such response. Hearing officer files decision within 30 days after hearing. Either party may appeal within 30 days after mailing of hearing officer's decision. (NMSA 52-5-7, -8).

Person to whom payment is between 30 days and one year overdue under existing compensation order may apply to Director for supplementary order declaring amount in default. (NMSA 52-5-10).

Loss of Right to Compensation.

If workman injured through negligence of a third person releases the tort-feasor, his right to compensation under the act is barred. (42 N.M. 626, 83 P.2d 457).

Employers' Liability Act.

None, other than Workers' Compensation Act.

Implied covenant of good faith and fair dealing applies to employment contracts that are not at-will. (117 N.M. 434, 872 P.2d 852). Sufficiently explicit promise by employer that termination will be for good cause only will be enforced. (115 N.M. 665, 857 P.2d 776).

Exhaustion of Administrative Remedies.

Party need file only with state agency or federal agency to exhaust administrative remedy prior to filing statutory discrimination suit. (121 N.M. 596, 915 P.2d 901).

Filing with EEOC is equivalent to filing with N.M. Human Rights Division for purpose of exhaustion of administrative remedies in statutory discrimination claim. (121 N.M. 596, 915 P.2d 901).

Implied Contracts.

Express disclaimer in policy manual might not defeat implied contract claim by at-will employee. (2001-NMCA-089, 33 P.3d 285).

Occupational Disease Disablement Law (NMSA 52-3-1 et seq.) is administered by Workers' Compensation Administration. Coverage and election of employer and employee and security requirements are approximately same as Workers' Compensation Act. (NMSA 52-3-2, -5, -9). Failure to comply with security requirements is misdemeanor. (NMSA 52-3-49). Employer must rehire disabled worker under certain conditions. (NMSA 52-3-49.1).

Diseases Within the Act.

Act applies to any disease peculiar to occupation and due to causes in excess of ordinary hazards of employment, including any disease resulting from radiation. (NMSA 52-3-33).

Right to compensation is exclusive when (1) both employer and employee are subject to the act; (2) disease was contracted in scope of employment; and (3) disablement or death is the result of occupational disease. (NMSA 52-3-8).

Liability of Employer.

Employer is liable only where there was a causal relation between the work of the employee and the resulting disablement or death and only where the last day of exposure of the employee was after passage of act. In case of silicosis or asbestosis employer is liable only if employee was exposed to silicon dioxide or asbestos dust within ten years preceding disablement and for 1,250 work shifts and disablement occurred within two years from last day of work for employer. Damages for death come under similar provisions save where compensation payments are on file with Director of Workers' Compensation Administration. Where payments are on file, limit for death from silicosis or asbestosis is five years, and for death from other occupational diseases limit is one year or three years where compensation has been awarded or paid. (NMSA 52-3-10, -32).

Compensation benefits and exceptions are same as for Workers' Compensation Act, supra. (NMSA 52-3-14 et seq.).

Exemption of Compensation.

Compensation under the act is exempt from claims of creditors and from attachment, garnishment, or execution. (NMSA 52-3-37).

Notice of Disablement or Death.

Notice must be given to employer in same manner as under Workers' Compensation Act, supra. (NMSA 52-3-19). Claim must be filed with Workers' Compensation Administration within one year after date of death or beginning of disablement, except that in cases of radiation injury or disability, claim may be filed within one year after employee knows or should know of injury or disability and its job-relatedness. If employer pays benefits before claim is filed, limitations period begins to run 31 days after cessation of payments. (NMSA 52-3-42).

Claims Procedure and Hearings.

Same as under Workers' Compensation Act, supra.

Loss of Right to Compensation.

Employer has the right to examine employee and if employee refuses, compensation is forfeited. If employee retards recovery, compensation may be reduced or stopped. If employee leaves locality, he must notify Director and obtain Director's consent to leave, or compensation will not be payable during his absence. Willful misconduct or self-exposure on part of employee will defeat his claim. (NMSA 52-3-39, -41, -45).

Reports.

Employer must file reports of claims with Director within ten days from time he received notice of disablement and must also report date of first payment of compensation within ten days after payment. Penalty for noncompliance is fine of from $25 to $1,000. (NMSA 52-3-51 to -53).

Retaliation Prohibited.

Retaliation against employee seeking benefits is prohibited. (NMSA 52-3-45.2). Workers' Compensation Act does not provide exclusive remedy for workers' claim for retaliatory discharge due to filing of worker's compensation claim. (117 N.M. 91, 869 P.2d 279).

Retirement fund is provided for aged or incapacitated employees of the State and of its subdivisions. (NMSA 10-11-1 et seq.).

Unemployment Compensation.

Unemployed individual is eligible if he has registered for work at and reports to employment office in accordance with regulations, is able to work and is available and actively seeking work, has been unemployed for waiting period of one week, has been paid certain minimum wages during base period, has reported to office of Division for purpose of examination and review of individual's availability for and search for work, and participates in reemployment services such as Job Search assistance services. (NMSA 51-1-5). Individual is disqualified for benefits if he left employment voluntarily without good cause; if he was discharged for misconduct; if he has failed without good cause to apply for or accept employment, disqualification shall include week such failure occurred and shall continue for duration of unemployment until he has earned wages in bona fide employment other than self-employment in amount equal to five times his weekly benefit amount otherwise payable as determined by commission; for any week of work stoppage due to labor dispute unless commission finds individual was not participating in or interested in labor dispute and does not belong to grade or class of workers participating in labor dispute; and for any week in which he receives benefits from another state or U.S. (NMSA 51-1-7). Benefits are computed in accordance with NMSA 51-1-4. Individuals receiving unemployment compensation may elect to have Federal Income Tax deducted (effective July 1, 1996). (NMSA 51-1-8.1).

Occupational Health and Safety Act adopted. Environmental Improvement Board can adopt regulations for employee's health and safety. Enforcement can include injunction and fine of up to $10,000, and can include imprisonment for up to six months if violation is willful and results in death and may include civil penalty up to $20,000 or imprisonment for up to one year, or both, for willful or repeated violations. (NMSA 50-9-9 et seq.). Act applies to every employer. Board has authority to inspect business, require reports from employer, issue subpoenas and complaints and conduct training programs for employees and employers. Discrimination based on employee's action to enforce this law illegal. (NMSA 50-9-25). Act does not preempt common law remedies for wrongful discharge. (117 N.M. 41, 868 P.2d 1266).

Preemption.

State regulation modifies any local standard, although compliance with state standard will not relieve person from obligation to comply with stricter local requirement. Occupational Health and Safety Act and regulations shall apply to places of employment subject to jurisdiction of U.S. Department of Labor, and not state act and regulations. (NMSA 50-9-22).

11.03 WORKERS' COMPENSATION LAW:

See topic 11.02 Labor Relations.

12 ENVIRONMENT

12.01 ENVIRONMENTAL REGULATION:

Department of Environment created. (NMSA 9-7A-1 et seq.).

General supervision is vested in Department of Environment. (NMSA 9-7A-1, -3, -4).

Environment Department given authority to regulate: food protection; water supply (including implementing capacity development program); liquid waste; air quality; radiation, noise, and vector control; and nuisance abatement; occupational health and safety; sanitation of public swimming pools and baths; medical radiation, health and safety certification for radiologic technologists; solid waste; hazardous wastes; and underground storage tanks. (NMSA 74-1-7). Environment Department also regulates water quality (NMSA 74-6-4[E]) along with Oil Conservation Division. (NMSA 70-2-12[B][15]).

Environmental Improvement Board created. (NMSA 74-1-1 et seq.). Environmental Improvement Board is responsible for promulgating rules and standards for food protection, drinking water, liquid waste, air quality, occupational health and safety, public pools, medical radiation, hazardous wastes, and solid waste. (NMSA 74-1-8[A]).

No regulation will be adopted by Environmental Improvement Board without public hearing held after 60 days notice published in newspaper. Interested persons may request in writing advance notice of hearings and may submit data, propose changes, and examine witnesses at hearing. Affected persons may appeal any adopted regulation to court of appeals. (NMSA 74-1-9).

Water Quality Control Commission created. (NMSA 74-6-1 et seq.). Water Quality Control Commission certifies permits under Clean Water Act, promulgates surface and ground water quality standards, and adopts management and abatement programs.

Hazardous Substances.

Hazardous Waste Act (NMSA 74-4-1 et seq.) to implement RCRA, Subtitle C. Environmental Improvement Board to regulate containment, transportations and disposal of hazardous waste generated within state with regulations equivalent to and no more stringent than federal RCRA regulations. (NMSA 74-4-4). Regulations adopted. (20.4.1 NMAC). Emergency Management Act provides task force and cooperative procedure for spills, accidents and contamination. (NMSA 12-12-17 et seq.). Violation of Hazardous Waste Act subject to civil (up to $10,000 per day) and criminal penalties. (NMSA 74-4-10, -11).

Radioactive Materials.

Radiation Protection Act (NMSA 74-3-1 et seq.); Radioactive and Hazardous Materials Act (NMSA 74-4A-1 et seq.). Must be registered with agency to possess, use, store, dispose of, manufacture, repair or alter or inspect radiation equipment; no use, possession, etc. of radioactive materials unless licensed by nuclear regulatory commission. (NMSA 74-3-8, -9). Civil penalty for each violation compliance order of Radiation Protection Act up to $15,000 per day. (NMSA 74-3-11.1). Person who knowingly violates Radiation Protection Act is guilty of misdemeanor punishable by imprisonment and fine up to $10,000. (NMSA 74-3-12.1).

Solid Waste.

Solid Waste Act adopted (NMSA 74-9-1 et seq.) to implement RCRA, Subtitle D. Environmental Improvement Board to regulate solid waste management, permitting and operation of solid waste facilities. Solid waste facilities, including landfills, transfer stations and waste incinerators subject to permitting and regulation under 20.9.2 NMAC. Environment Department required to consider adverse impact on community quality of life when permitting solid waste facility. (138 N.M. 133, 117 P.3d 939).

Solid Waste Authority Act adopted. (NMSA 74-10-1 et seq.). Board of Directors of Solid Waste Authority has power to borrow money and issue securities, purchase, trade, encumber and otherwise acquire property, levy and collect general ad valorem taxes, condemn property for public use, manage solid waste systems, purchase and sell securities, reinvest proceeds from sale of securities, contract with federal government, carry out investigations of solid waste facilities, and otherwise provide for sufficient funding and smooth operation of solid waste projects. (NMSA 74-10-12, -27).

Recycling and Illegal Dumping Act adopted. (NMSA 74-13-1 et seq.). Environmental Improvement Board and Environment Department to adopt regulations and administer program for management of scrap tires, manifest system, permitting scrap tire facilities and grant fund for abatement of illegal dumpsites.

Storage Tanks.

Ground Water Protection Act adopted. (NMSA 74-6B-1 et seq.). Underground and above ground storage tanks regulated by Environmental Improvement Board (NMSA 74-4-4C, -4.4) and Environment Department. Regulations adopted. (20.5.1 to.18 NMAC).

Natural Resources Trustee Act adopted. (NMSA 75-7-1 et seq.). Natural Resources Trustee shall represent State's interest under applicable federal environmental laws. (NMSA 75-7-2).

Pesticides.

Pesticide Control Act (NMSA 76-4-1 et seq.) administered by state department of agriculture (NMSA 76-4-2). Distribution, labeling, and registration of pesticides are closely regulated. (NMSA 76-4-4, -5, -6). Commercial pesticide applicators must be licensed. (NMSA 76-4-17).

Air Quality.

Air Quality Control Act (AQCA) (NMSA 74-2-1 et seq.) requires (a) permits for construction or modification of stationary sources emitting regulated air contaminants, and (b) operating permits (NMSA 74-2-7). Regulated air contaminants and applicable standards include those adopted pursuant to federal CAA as well as those adopted pursuant to AQCA. (NMSA 74-2-2[Q]). City of Albuquerque and Bernalillo County administer and enforce AQCA in Bernalillo County. (NMSA 74-2-4). Enforcement may be by either compliance order, which may suspend or revoke permit or assess penalty up to $15,000 per day, or civil action. (NMSA 74-2-12).

Water Quality.

Water Quality Act. (NMSA 74-6-1 et seq.). Authority over water quality management and promulgation of regulations vested in Water Quality Control Commission. (NMSA 74-6-4). Constituent agencies including Environment Department and Oil Conservation Division implement permitting and oversight of facilities. Water Quality Act establishes comprehensive scheme to regulate, permit and remediate discharges which may affect ground water quality. (20.6.2 NMAC). Environment Department authorized to impose permit conditions and all ground water in State is presumed to be protected. (Phelps Dodge Tyrone, Inc. v. NMWQCC, P.3d). Enforcement may be by either compliance order, which may suspend or revoke permit or assess penalty up to $15,000 per day, or civil action. (NMSA 74-6-10).

Environmental Justice.

All state agencies required to evaluate environmental justice issues when taking actions. (Executive Order 2005-056). Environment Department required to consider adverse impact on community quality of life when permitting solid waste facility. (138 N.M. 133, 117 P.3d 939).

Drinking Water.

Environment Department and Environmental Improvement Board implement Federal Safe Drinking Water Act. Regulations adopted. (20.6.2.1 to -5210, 20.7.10.1 to -704).

13 ESTATES AND TRUSTS

13.01 ADMINISTRATION:

See topic 13.08 Executors and Administrators.

13.0213.03

13.04 CLAIMS:

See topic 13.08 Executors and Administrators; category 5 Civil Actions and Procedure, topic 5.17 Pleading.

13.05 DEATH:

Uniform Determination of Death Act.

Adopted NMSA 12-2-4.

Death defined in NMSA 12-2-4. (NMSA 12-2-4[A]). NMSA 12-2-4 amended in 2007 but there was no change in definition of death.

Uniform Probate Code, with significant omissions and amendments, adopted. (NMSA 45-1-101 et seq.).

Person absent and unseen and unheard from for five years is presumed dead. (NMSA 45-1-107[E]).

Certificate of death may be obtained from New Mexico Vital Records, P.O. Box 26110, Santa Fe, New Mexico, 87502; (505) 827-2338; 24-hour information line (877) 284-0963; fee $5.

Survivorship.

Uniform Simultaneous Death Act has been substantially adopted as part of Uniform Probate Code. (NMSA 45-2-702; NMSA 45-1-201[A][47]; NMSA 45-2-104).

Action for death against any defendant other than a common carrier must be brought by personal representative of decedent. (NMSA 41-2-3). Only one collective claim for damages for wrongful death is permitted; each beneficiary does not have separate, divisible claim. (118 N.M. 100, 879 P.2d 101; 113 N.M. 686, 831 P.2d 985). Proceeds of judgment are not subject to decedent's debts (except hospital lien for medical expenses which are recoverable in wrongful death action [106 N.M. 167, 740 P.2d 1151]) if he is survived by parent, spouse, child, grandchild, brother or sister. Proceeds of judgment are distributed as follows, each class taking to exclusion of subsequent classes: If there be surviving spouse, and no child, then to such spouse; if there be surviving spouse and child or children or grandchildren, then one-half to surviving spouse and remaining one-half to children and grandchildren, grandchildren taking by right of representation; if there be no spouse, but child or grandchild, then to such child and grandchild by right of representation; if such deceased be minor, childless and unmarried, then to father and mother, who shall have equal interest in judgment, or if either of them be dead, then to survivor; if there be no father, mother, husband, wife, child or grandchild, then to surviving brother or sister, if there be any; if there be none of kindred hereinbefore named, then proceeds of such judgment shall be disposed of in manner authorized by law for disposition of personal property of deceased persons. (NMSA 41-2-3).

Action for death against common carrier may be brought as follows: (1) By surviving spouse of decedent; (2) if there be no surviving spouse or if surviving spouse fails to sue within six months after decedent's death, by decedent's minor child or children; (3) if decedent was a minor and unmarried, by his parents; (4) if decedent was over 21 years of age and unmarried, by dependent parents, brothers and sisters. The action may be brought by the personal representative of the decedent if no action is brought within nine months after his death by the husband or wife, father or mother, or children of the decedent. (NMSA 41-2-4).

Any action for death must be commenced within three years after death. (NMSA 41-2-2).

New Mexico does not recognize action for death of nonviable fetus. (120 N.M. 654, 905 P.2d 194).

Right to Die Act.

See topic 13.16 Wills, subhead Uniform Health-Care Decision Act.

Uniform Anatomical Gift Act.

See topic 13.16 Wills.

13.06 DECEDENTS' ESTATES:

See topics 13.07 Descent and Distribution, 13.08 Executors and Administrators, 13.16 Wills.

13.07 DESCENT AND DISTRIBUTION:

Uniform Probate Code, with significant omissions and modifications, adopted. (NMSA 45-1-101 et seq.).

Separate property undisposed of by will goes one-fourth to surviving spouse and remainder to decedent's issue. If no surviving issue, surviving spouse takes all separate property of intestate. One-half of community property over which decedent had power of testamentary disposition goes to surviving spouse, if undisposed of by will. (NMSA 45-2-102, -103). If no surviving spouse, all intestate property goes to decedent's descendants by representation. If no surviving spouse or issue, all property goes successively to following classes in priority listed: Decedent's parents; issue of parents; grandparents; issue of grandparents. (NMSA 45-2-103). Must survive decedent by 120 hours to take as heir. (NMSA 45-2-104).

Surviving Spouse.

Surviving spouse owns one-half of community property; other one-half can be disposed of by will. Entire community property is subject to community debts. (NMSA 45-2-805).

Half Blood.

Inherit same as whole blood. (NMSA 45-2-107).

Posthumous Children.

Inherit as if born during decedent's lifetime so long as child lives at least 120 hours after birth. (NMSA 45-2-108).

Illegitimate Children.

If not adopted, person born out of wedlock is child of natural parents. (NMSA 45-2-114). Parent-child relationship may be established under Uniform Parentage Act. (NMSA 40-11-1, et seq.).

Adopted children are treated as children of adoptive parents; adopted child's estate passes as would natural born child's estate. (NMSA 45-2-114).

Advancements.

For intestate decedent, as to all or portion of his estate, property given to heir in his lifetime is advancement only if so declared in writing by contemporaneous writing by decedent or written acknowledgment by heir. (NMSA 45-2-109).

Ademption.

Property given by testator during lifetime adeems only if: (1) Will so provides, (2) testator so declares, in contemporaneous writing, or (3) devisee so acknowledges in writing. (NMSA 45-2-609). Special rules apply for nonademption of securities and proceeds of sale, condemnation, casualty insurance, or replacement property. (NMSA 45-2-606).

Determination of Heirship.

After notice (NMSA 45-3-403) and hearing (NMSA 45-3-404, -408), district court with proper venue (NMSA 45-3-201) can determine decedent's heirs (NMSA 45-3-409).

Election.

No right to elect against terms of will except if will fails to provide for child or surviving spouse, child or his issue or spouse receives his intestate share unless omission was intentional or substantially all of estate was devised to other parent of omitted child. (NMSA 45-2-301, -302).

Escheat.

If no takers under NMSA 45-2-101 et seq. intestate estate passes to state. (NMSA 45-2-105).

Non-probate transfers on death. (NMSA 45-6-101). Non-probate transfer of real property on death. (NMSA 45-6-401).

13.07A ESTATES: (in property)

See category 21 Property, topic 21.16 Real Property.

13.0813.09

13.10 EXECUTORS AND ADMINISTRATORS:

Uniform Probate Code, with significant omissions and modifications, adopted. (NMSA 45-1-101 et seq.).

Formal and supervised estates administered by District Courts. (NMSA 45-1-302). Probate courts and district courts have jurisdiction over informal proceedings. (NMSA 45-1-302[c]). Venue is: (1) In county of decedent's domicile at death; or (2) if no New Mexico domicile, any county where decedent's property located at death. (NMSA 45-3-201).

Eligibility and Competency.

Following cannot serve as personal representatives: (1) Minors, (2) person found unsuitable by court, or (3) creditors unless appointed at least 45 days after decedent's death. (NMSA 45-3-203[F]).

Preferences in Right to Administer.

In appointment, preference is given: (1) Person named in probated will, (2) surviving spouse who is a devisee, (3) other devisees, (4) surviving spouse, (5) other heirs, (6) by application, any qualified person. (NMSA 45-3-203[A]).

Qualification.

Personal representatives must file bond if required and statement of acceptance of duties of office. (NMSA 45-3-601). If required and provision of will or order do not specify amount, bond must equal or exceed personal representative's sworn best estimate of decedent's personal estate and income from his personal and real estate during next year. (NMSA 45-3-604).

Exemption from Bond.

Testator may exempt personal representative from giving bond (NMSA 45-3-603[B]), but any creditor or person with interest in estate greater than $7,500 may demand bond (NMSA 45-3-605).

Issuance of Letters.

Five days after death of resident or 30 days after nonresident death and after application for informal appointment submitted under oath, probate court may appoint personal representative. (NMSA 45-3-307). District court can make formal determination of who is entitled to appointment. (NMSA 45-3-414).

Prior to issuance of letters, personal representative must file bond, if required, and written acceptance. (NMSA 45-3-601).

Removal.

Any interested person may petition for removal of personal representative for: (1) best interests of estate, (2) intentional and material misrepresentation by personal representative during appointment proceedings, (3) disregard of district court order, (4) incapability, (5) mismanagement, or (6) failure to perform any duty. (NMSA 45-3-611).

Special Kinds of Administration.

Supervised administration is authorized by NMSA 45-3-501, whereby personal representative must not make any distribution without prior order of District Court. (NMSA 45-3-504).

Public Administrators.

No statutory provisions.

Inventory and Appraisal.

Representative must file inventory within three months of appointment, containing a list of properties, their encumbrances, and their values, which may be estimated by representative. (NMSA 45-3-706).

General Powers and Duties.

Controlled by NMSA 45-3-701 et seq.

Notice of Appointment.

Within ten days of appointment, representative must give notice by delivery of his appointment by mail to heirs and devisees. (NMSA 45-3-705).

Notice to Creditors.

Within three months of appointment, representative must give written notice by mail or delivery to all known and reasonably ascertainable creditors. Within reasonable time after appointment, representative may publish notice once a week for two successive weeks in newspaper in county. (NMSA 45-3-801).

Presentation of Claims.

All claims which arose before decedent's death must be presented within shorter of (a) one year of decedent's death or (b) two months of notification to creditors by delivery, mail, or publication. All claims arising at or after death must be presented as follows: claim based on contract with representative, within four months after performance by representative is due; any other claim within four months after it arises. Excepted are enforcement of mortgages, pledges, or other liens and actions to establish decedent's or representative's liability covered by liability insurance. All claims not presented within these limits are barred. (NMSA 45-3-803).

Proof of Claims.

No particular form of proof of claim is prescribed. Written statement by claimant mailed or delivered to representative or filed with court is sufficient. (NMSA 45-3-804).

Approval or Rejection of Claims.

Representative may allow or disallow claim. No action by representative within 60 days after expiration of time for original presentation has effect of notice of allowance. Disallowed claims are barred unless claimant files petition for allowance or commences a proceeding within 60 days of mailing of notice of disallowance. (NMSA 45-3-806).

Payment of Claims.

Representative may pay claims upon expiration of earlier of (a) one year after decedent's death or (b) two months after notification to creditors by delivery, mail, or publication, after making provision for family and personal property allowances, claims already presented, and unbarred claims which may yet be presented, and costs and expenses. (NMSA 45-3-807).

Priorities.

(1) Costs of administration, compensation of representatives, their attorneys and their employees, (2) reasonable funeral expenses, (3) debts and taxes preferred under federal law, (4) expenses of last illness, (5) debts and taxes due under other New Mexico laws, (6) all other claims. (NMSA 45-3-805).

Sales.

See subhead General Powers and Duties, supra.

Actions by Representative.

Representative may prosecute and defend claims for protection of estate and representative in his duties. (NMSA 45-3-715[A][22]). Claims by decedent not barred by statute of limitations at his death are not barred until at least four months after death. (NMSA 45-3-109).

Actions against Representative.

Death of defendant abates actions for libel, slander, malicious prosecution, assault, assault and battery, nuisance and misconduct of a magistrate in office. (NMSA 37-2-4). All other actions may be continued against personal representative. (NMSA 37-2-5).

Any statute of limitations not measured from death or advertisement of claims against decedent is suspended during four months following death. (NMSA 45-3-802[B]). Claim in writing must be delivered or mailed to representative, or action must be commenced in any court having jurisdiction over representative. (NMSA 45-3-804). See subhead Presentation of Claims, supra.

Allowances.

(1) If decedent was domiciled in New Mexico, a family allowance of $30,000 is allowed to surviving spouse. If no surviving spouse, $30,000 is divided among minor and dependent children. Family allowance is exempt from and prior to all claims against estate. (NMSA 45-2-401

and 402); (2) If decedent was domiciled in New Mexico, spouse is entitled to allowance of personal property with value not in excess of $15,000. If no surviving spouse, decedent's children are entitled jointly to allowance. If assets are encumbered or insufficient, personal property allowances have priority over all claims against estate except family allowance. (NMSA 45-2-403).

Widow's Quarantine.

None.

Final Accounting and Settlement.

An estate may be settled by: (1) Petition for an order of complete settlement (NMSA 45-3-1001); (2) petition under an informally probated will (NMSA 45-3-1002); (3) except when under district court prohibition or supervision, a verified statement of representative that time limit for creditors' claims has expired and sent copy to all creditors and distributees, fully administered estate, and made full accounting to all distributees (NMSA 45-3-1003).

Consent Settlement.

Representative may compromise claims against estate. (NMSA 45-3-813).

Distribution.

Personal representative to settle and distribute estate without court order unless he presents questions to court. (NMSA 45-3-704). If administration is supervised, personal representative may not distribute without court orders. (NMSA 45-3-504).

Distribution If Abroad.

No statutory provisions.

Liabilities.

Representatives are not liable on contracts unless they fail to reveal their representative capacity, but they are liable for obligations and torts during administration if personally at fault. (NMSA 45-3-808).

Compensation of Representatives.

A representative is entitled to reasonable compensation for his services. Representative may renounce compensation set forth in will and be entitled to reasonable compensation unless compensation is set by contract with decedent or framed as a condition of nomination. Personal representative also may renounce his right to all or any part of compensation. Written renunciation of fee may be filed with court. (NMSA 45-3-719).

Foreign Executors and Administrators.

Such representatives exercise as to assets in New Mexico all powers of a local personal representative and maintain actions subject to any conditions imposed on nonresidents generally (NMSA 45-4-205), but only if no administration or petition for administration is pending in New Mexico. Petition for New Mexico administration terminates power of foreign personal representative. (NMSA 45-4-206[A]).

Summary Administration.

See subhead Small Estates, infra.

When Administration Unnecessary.

Any successor may collect property owed decedent at his death by affidavit asserting that estate is $30,000 or less; 30 days have elapsed since death; there is no personal representative; and he has right to payment. (NMSA 45-3-1201). Payment releases payor. (NMSA 45-3-1202).

Decedent's Bank May Pay.

Where no executor or administrator qualifies and gives notice to decedent's bank, bank may pay deposits of decedent up to $2,000 to surviving spouse or next of kin. (NMSA 58-1-8).

Small Estates.

If estate inventory value is less than family and personal property allowances, administration costs, expenses of last illness, and funeral expenses, representative may make immediate distribution and close estate by filing with district court verified statement that: (1) Estate did not exceed items above; (2) representative has distributed estate to those entitled thereto; and (3) representative has sent copy of closing statement to all distributees and to all creditors, either paid or barred, and has furnished full written accounting of administration to distributees affected thereby. (NMSA 45-3-1203, -1204). If no proceedings involving representative are pending in district court one year after filing of closing statement, representative's appointment is thereby terminated. (NMSA 45-3-1204).

Uniform Fiduciaries Act adopted. (NMSA 46-1-1 et seq.).

Uniform Principal and Income Act adopted. (NMSA 46-3A-101 et seq.).

Uniform Act for Simplification of Fiduciary Security Transfers adopted. (NMSA 46-8-1 et seq.).

13.11 [RESERVED]

13.12 INTESTACY:

See topic 13.07 Descent and Distribution.

13.13 [RESERVED]

13.14 PROOF OF CLAIMS:

See topic 13.08 Executors and Administrators; category 5 Civil Actions and Procedure, topic 5.17 Pleading.

13.15 TRUSTS:

Uniform Trust Code adopted. (NMSA 46A-1-101 et seq.). Amended in 2007.

Uniform Probate Code, with significant omissions and amendments, adopted. (NMSA 45-1-101 et seq.).

Kinds.

No special provisions.

Creation.

Controlled by NMSA 46A-4-401 et seq.

Construction of Instrument.

Controlled by NMSA 45-2-701 et seq.

Appointment of Trustee; Vacancy.

Proceeding may be brought in District Court for appointment of trustee. (NMSA 46A-7-704).

Eligibility and Competency.

Any person, corporation, partnership, association, joint stock company, business trust, unincorporated organization or two or more persons may act as trustee. (NMSA 46A-1-102, NMSA 46A-7-701). No statutory prohibition against foreign person or corporation acting as trustee. If engaged in trust business, person, legal entity or corporation must first be certified by State Commissioner of Banking. (NMSA 58-9-4).

Trustee's Bond.

Trustee need not provide bonds unless required by trust or District Court. (NMSA 46A-7-702).

Removal of Trustee.

Proceeding may be brought in district court to remove trustee. (NMSA 46A-7-706).

General Powers and Duties of Trustees.

Powers governed generally by Uniform Trust Code. (NMSA 46A-8-801 et seq.).

Sales.

Governed by trust instrument or by NMSA 46A-8-815.

Investments.

No special provisions.

Bequests and Devises to Inter Vivos Trusts.

See topic 13.16 Wills.

Accounting.

Uniform Trustees Accounting Act repealed in 1976.

Compensation.

No statutory provisions.

Discharge.

Court has power to remove trustee. (NMSA 46A-7-706).

Uniform Common Trust Fund Act adopted. (NMSA 46-1-13 to -16).

Uniform Principal and Income Act adopted. (NMSA 46-3A-101 et seq.).

Gifts to Minors.

See category 14 Family, topic 14.10 Infants.

Uniform Custodial Trusts Act adopted. (NMSA 45-7-501 et seq.).

Uniform Fiduciaries Act adopted. (NMSA 46-1-1).

Uniform Act for Simplification of Fiduciary Security Transfers adopted. (NMSA 46-8-1 et seq.).

Uniform Testamentary Additions to Trusts Act adopted as part of Uniform Probate Code. (NMSA 45-2-511).

Uniform Trustees Powers Act repealed in 2003.

Accumulations.

No statutory provisions.

Perpetuities.

See category 21 Property, topic 21.11 Perpetuities.

Real Estate Trusts.

See category 2 Business Organizations, topic 2.04 Joint Stock Companies.

Pour Over Trusts.

See topic 13.16 Wills, subhead Bequests and Devises to Inter Vivos Trusts.

Trust Companies.

Regulated by Trust Company Act, NMSA 58-9-1 et seq. Certificate of authority issued only to companies incorporated in state.

13.16 WILLS:

Uniform Probate Code, with significant omissions and amendments, adopted. (NMSA 45-1-101 et seq.).

Uniform International Wills Provisions adopted. (NMSA 45-2-1001).

Uniform Statutory Will Act adopted. (NMSA 45-2A-1 et seq.).

Any person of age 18 or over and in sound mind may make will. (NMSA 45-2-501).

Non-Probate Transfer on Death Provisions adopted. (NMSA 45-6-101 et seq.).

Uniform Statutory Rule Against Perpetuities adopted. (NMSA 45-2-901 et seq.).

Testamentary Disposition.

Spouse's power of testamentary disposition of community property is limited to one-half and joint tenancy property is not subject to testamentary disposition of decedent. (NMSA 45-2-805).

Execution.

Must be in writing, signed by testator or in his name in his presence and direction, and attested in his presence by two or more credible witnesses who see testator sign and sign as witnesses in presence of testator and each other. (NMSA 45-2-502; NMSA 45-2-504).

Deposit of Will with Court.

Allowed for safekeeping of will. (NMSA 45-2-515). Custodian of will who fails to provide will upon death of testator liable for damages, and subject to contempt. (NMSA 45-2-516).

Attestation Clause.

No particular form specified, except for self-proving wills. For form, see subhead Forms, infra.

Holographic Wills.

Not recognized. (NMSA 45-1-201[A][52]).

Nuncupative Wills.

Not recognized.

Revocation.

May be by subsequent valid will by express provision or inconsistency, or by being burned, torn, canceled, obliterated or destroyed, by testator or someone in his presence and by direction, with intent to revoke. (NMSA 45-2-507).

Divorce or annulment of marriage revokes provisions of will in favor of former spouse unless will expressly provides otherwise. (NMSA 45-2-804).

Revival.

Will annulled by second will is not made valid by annulment of second unless validity of first is acknowledged in writing or by circumstances of revocation of subsequent will. (NMSA 45-2-509).

Testamentary Gifts to Subscribing Witnesses.

Person generally competent to witness may witness will. Will not invalid because signed by interested witness. (NMSA 45-2-505).

Bequests and Devises to Inter Vivos Trusts.

Pour over wills are valid, provided (a) trust is identified in will and (b) terms of trust set forth in written instrument, other than will, executed before or concurrently with testator's will. Trust instrument may be amended subsequent to execution of testator's will or subsequent to testator's death without making pour over bequest invalid. (NMSA 45-2-511).

Testamentary Guardians.

See category 14 Family, topic 14.07 Guardian and Ward.

Probate.

Three procedures may be followed: (a) Informal probate by probate court (NMSA 45-3-301 et seq.), (b) formal probate by district court (NMSA 45-3-401 et seq.), or (c) supervised probate by district court (NMSA 45-3-501 et seq.).

Construction of Instrument.

Controlled by NMSA 45-2-701 et seq. Subject to specific exceptions, individual who does not survive event, including death of another individual, by 120 hours is deemed to have predeceased event. (NMSA 45-2-702). NMSA 45-2-703 controls choice of law regarding meaning and effect of instrument. Class gifts will be construed in accordance with rules for intestate succession. (NMSA 45-2-705). Rules for distribution of property “by representation” or “per stirpes” found in NMSA 45-2-709. Doctrine of worthier title abolished. (NMSA 45-2-710).

Contest.

Informal probate can be contested by petition in district court to prevent or set aside informal probate. (NMSA 45-3-401). In formal probate proceedings, written objections must be filed. (NMSA 45-3-404). After formal probate order, vacation or modification may be sought by (1) proponents of later offered will if without knowledge of its existence or actual notice of first proceeding, (2) heirs without knowledge of death or notice of proceedings, or (3) others for good cause. Time for filing petition to vacate or modify depends on proceedings used in first probate. (NMSA 45-3-412, -413).

Alleged decedent may always recover property if not dead, and if equitable. (NMSA 45-3-412[B]).

Except for fraud, actions against distributees to recover property improperly distributed is barred three years after decedent's death or one year after distribution, whichever is later. (NMSA 45-3-1006).

Terminating Administration.

Personal representative in formal or informal probate may petition court for order directing distribution at any time, and devisee may petition one year after appointment of personal representative except that either must wait until after time for presenting claims. (NMSA 45-3-1001, -1002). Except in supervised probate, personal representative may distribute without court approval and file closing statement with court. (NMSA 45-3-1003).

Ademption by satisfaction occurs only if expressly stated in will or contemporaneous writing by testator, or if devisee acknowledges satisfaction in writing. (NMSA 45-2-609).

When will has express or implied abatement order, shares of distributees abate in following order without difference between real and personal property: (1) Property not disposed of by will; (2) residuary devises; (3) general devises; and (4) specific devises. (NMSA 45-3-902).

Unclaimed Assets.

Representative must sell unclaimed share (NMSA 45-3-914) and distribute according to Uniform Unclaimed Property Act (NMSA 7-8A-1 et seq.).

Anti-lapse.

Subject to certain conditions, if devisee of kin fails to survive testator, devisee's surviving issue take in his place. (NMSA 45-2-603).

Omitted Spouse.

Omitted spouse who married testator after execution of will takes intestate share unless omission was intentional or testator made provision for spouse by transfer outside will with intent that such would be in lieu of testamentary provision. (NMSA 45-2-301).

Children.

Omitted child takes intestate share unless it appears from will that omission was intentional or that testator provided for child outside will with intent that such would be in lieu of testamentary provision. (NMSA 45-2-302). Children born after testator's death, and surviving at least 120 hours, inherit as if born during his lifetime. (NMSA 45-2-108).

Election.

No statutory election provision, but see category 14 Family, topic 14.09 Husband and Wife, subhead Community Property.

Contribution.

No statutory provision.

Renunciation.

No statutory provision.

Foreign Executed Wills.

Written wills valid if executed in compliance with (1) New Mexico requirements; (2) law of place where executed; or (3) law of testator's domicile at time of execution or death. (NMSA 45-2-506).

Foreign Probated Wills.

Ancillary administration unnecessary in most cases. There must be ancillary probate proceeding brought in New Mexico when will of out-of-state resident grants executor power to dispose of property located in New Mexico. (114 N.M. 18, 833 P.2d 1199). If no proceedings are pending in New Mexico, foreign personal representative may file authenticated copies of his appointment and any bond and his address in district court where decedent's property is located. (NMSA 45-4-204). Upon such filing, domiciliary foreign personal representative may exercise over assets in New Mexico all powers of local personal representative and may maintain actions subject to conditions imposed on nonresident parties generally. (NMSA 45-4-205). Any petition for local administration terminates power of foreign personal representative. (NMSA 45-4-206).

Will from a foreign jurisdiction which does not provide for probate may be proved in New Mexico by an authenticated certificate that copy is true copy of will operative under foreign law. (NMSA 45-3-409[B]).

Self-proved Will.

Will may be self-proved by acknowledgment in statutory form by testator and affidavits of witnesses before an officer authorized to administer oaths. (NMSA 45-2-504).

See form under subhead Forms, infra, to be executed before officer authorized to administer oaths under laws of New Mexico or state where execution occurs. (NMSA 45-2-504).

Uniform Rights of Terminally Ill Act.

Not adopted. Non-uniform Right to Die Act adopted (NMSA 24-7-1 et seq.) but repealed in 1997.

Uniform Health-Care Decision Act.

Originally adopted 1995; amended 1997, 2000. Amended Act consolidates relevant provisions affecting individual's major health-care decisions. Act provides when certain treatments may be withheld or withdrawn. (NMSA 24-7A-1 et seq.).

Simultaneous Death.

See topic 13.05 Death, subhead Survivorship.

Testamentary Trusts.

See topic 13.15 Trusts.

Forms

A. A will may be simultaneously executed, attested and made self-proved by acknowledgment thereof by the testator and affidavits of the witnesses, each made before an officer authorized to administer oaths under the laws of the state in which execution occurs and evidenced by the officer's certificate, under official seal, in substantially the following form:

I, __________________, the testator, sign my name to this instrument this ______ day of ____________, and being first duly sworn, do hereby declare to the undersigned authority that I sign and execute this instrument as my will and that I sign it willingly (or willingly direct another to sign for me), that I execute it as my free and voluntary act for the purposes therein expressed, and that I am eighteen years of age or older, of sound mind and under no constraint or undue influence.

____

Testator

We, __________________, ____________________, the witnesses, sign our names to this instrument, and being first duly sworn, do hereby declare to the undersigned authority that the testator signs and executes this instrument as his will and that he signs it willingly (or willingly directs another to sign for him), and that each of us, in the presence of the testator, and in the presence of each other hereby signs this will as witness to the testator's signing, and that to the best of our knowledge the testator is eighteen years of age or older, of sound mind and under no constraint or undue influence.

____

Witness

____

Witness

“The State of _____________________

County of _____________________

Subscribed, sworn to and acknowledged before me by __________________, the testator, and subscribed and sworn to before me by __________________ and _______________ ____, witnesses, this ______ day of ______________.

(Seal)

Signed _____________________

____

(Official Capacity of Officer)”

B. An attested will may be made self-proved at any time after its execution by the acknowledgement thereof by the testator and the affidavits of the witnesses, each made before an officer authorized to administer oaths under the laws of the state in which the acknowledgement occurs and evidenced by the officer's certificate, under official seal, attached or annexed to the will in substantially the following form:

“The State of ____________________

County of ____________________

We, ______________, ______________ and ______________, the testator and the witnesses, respectively, whose names are signed to the attached or foregoing instrument, being first duly sworn, do hereby declare to the undersigned authority that the testator signed and executed the instrument as the testator's will and that he signed willingly (or willingly directed another to sign for him), and that he executed it as his free and voluntary act for the purposes therein expressed, and that each of the witnesses, in the presence of the testator, and in the presence of each other signed the will as witness, and that to the best of our knowledge the testator was at that time eighteen years of age or older, of sound mind and under no constraint or undue influence.

____

Testator

____

Witness

____

Witness

Subscribed, sworn to and acknowledged before me by _________________, the testator, and subscribed and sworn to before me by ________________ and ________________, witnesses, this ______ day of ______________.

(Seal)

Signed ____________________

____

(Official Capacity of Officer)”

C. A signature affixed to a self-proving affidavit attached to a will is considered a signature affixed to the will if necessary to prove the will's due execution.

Uniform Anatomical Gift Act.

Adopted. (NMSA 24-6A-1 et seq.). This Act was repealed in 2007 and recompiled as Jonathan Spradling Revised Uniform Anatomical Gift Act. (NMSA 24-6B-1 et seq.).

Living Wills.

See subhead Uniform Rights of Terminally Ill Act, supra.

14 FAMILY

14.01 ADOPTION:

Interstate Compact on Placement of Children adopted. (NMSA 32A-11-1; with amendments concerning abuse and neglect in 1997).

Interstate Compact on Adoption and Medical Assistance adopted. (NMSA 40-7B-1).

Uniform Probate Code, with significant omissions and amendments, adopted. (NMSA 45-1-101 et seq.).

Any child may be adopted by any resident individual who has been approved by court as suitable adoptive parent pursuant to provisions of Adoption Act. (NMSA 32A-5-11). Stepparent or legally separated individual may also adopt. (NMSA 32A-5-11). In addition, any married individual may adopt without individual's spouse joining in adoption if court excuses failure of nonjoining spouse to join in adoption. (NMSA 32A-5-11). Nonresidents may adopt under same circumstances if adoptee is resident of New Mexico or was born in New Mexico, is less than six months old, and was placed by state-licensed department or agency. (NMSA 32A-5-11).

Consent Required.

Written consent, notarized or given in presence of judge, is required of: (1) Adoptee if 14 years of age or older, except when court finds that adoptee does not have mental capacity to give consent; (2) adoptee's mother; (3) adoptee's presumed adoptive parent; (4) presumed father of adoptee; (5) adoptee's acknowledged father; (6) department or agency to which adoptee was relinquished that has placed adoptee for adoption or that has custody of adoptee, unless court finds that adoption is in best interests of adoptee and that withholding of consent was unreasonable; (7) guardian of adoptee's parent, pursuant to Uniform Probate Code, when that guardian has express authority to consent to adoption. (NMSA 32A-5-17, NMSA 32A-5-21). When adoption involves Indian child, consent to adoption or relinquishment of parental rights must be obtained from “Indian custodian”. (NMSA 32A-5-17). If parent is minor, then consent or relinquishment executed shall not be subject to avoidance or resolution solely because parent is minor. (NMSA 32A-5-17).

Consent is implied if parent without justifiable cause: (1) Leaves adoptee without provision for child's identification for period of 14 days; (2) leaves adoptee with others, including other parent or agency, without provisions for support and without communication for period of three months if adoptee is under six years old or six months if adoptee is over age of six. (NMSA 32A-5-18). Consent cannot be implied unless parent has been served with notice. (NMSA 32A-5-18).

Consent is not required from: (1) Parent whose rights have been terminated; (2) parent who has relinquished child to agency for adoption; (3) biological father of adoptee conceived through rape or incest; (4) any person who fails to respond to given notice pursuant to provisions of NMSA 32A-5-27; (5) any putative father who has failed to register with putative father registry within ten days of child's birth and is not otherwise acknowledged father. (NMSA 32A-5-19). Only basis for withdrawing relinquishment of parental rights and consent to adoption that have been certified by children's court is fraud. (118 N.M. 563, 883 P.2d 149).

Form of consent or relinquishment is governed by NMSA 32A-5-21. Unconditional consents or relinquishments are preferred and therefore conditional consents or relinquishments must be for good cause and approved by court. (Id.).

Contents of petition are governed by NMSA 32A-5-26.

Conditions Precedent.

Final decree of adoption not entered until, inter alia, (a) all necessary consents, relinquishments, terminations or waivers have been obtained; (b) post-placement report has been filed with court; and (c) minor has resided in house of petitioners for 90 days if less than one year old at time of placement or 180 days if more than one year old. Court may for good cause waive residency requirement. (NMSA 32A-5-36).

Venue.

Petition may be filed in any county where petitioner resides, where adoptee is physically present at time petition is filed, where office of agency that placed adoptee for adoption is located, or where department office from which child was placed is located. (NMSA 32A-5-10).

Name.

Within 30 days after final decree of adoption, petitioner prepares application for birth certificate in new name of adoptee. (NMSA 32A-5-38). Petitioner then files this application with court. (Id.). Petitioner then forwards application to vital statistics registrar.

Decree.

Governed by NMSA 32A-5-36.

Effect of Adoption.

Adoptee and petitioner sustain legal relation of parent and child as if adoptee were biological child of petitioner. (NMSA 32A-5-37). In stepparent adoptions, adoptee shall take name designated by petitioner so long as spouse and child, if over age of 14, consent to new name. (Id.).

Access to records after adoption governed by NMSA 32A-5-40.

Setting Aside Adoption.

Final decree of adoption may not be collaterally attacked after one year from entry of decree, except that in any adoption involving Indian child, parent or custodian may petition court pursuant to provisions of federal Indian Welfare Act of 1978 to invalidate adoption. (NMSA 32A-5-36[K]). Adoption may be set aside thereafter, however, as violation of due process, if one parent not furnished proper notice of adoption proceeding. (107 N.M. 346, 758 P.2d 296).

Adoption of Adults.

Procedure for adopting adults, and effect of such adoptions, controlled by Adult Adoption Act. (NMSA 40-14-1, et seq.).

Termination of Parental Rights.

Considerations and procedure in NMSA 32A-4-28, -29.

14.02 ALIMONY:

See topic 14.05 Dissolution of Marriage.

14.03 COMMUNITY PROPERTY:

See topic 14.09 Husband and Wife.

14.04 DESERTION:

See topics 14.05 Dissolution of Marriage, 14.09 Husband and Wife.

14.05 DISSOLUTION OF MARRIAGE:

Grounds for Dissolution of Marriage.

Adultery, cruel and inhuman treatment, abandonment, or incompatibility. (NMSA 40-4-1).

Grounds for Legal Separation.

Proceedings for division of property, disposition of children or alimony may be instituted if parties are permanently separated and no longer live or cohabit together as husband and wife. (NMSA 40-4-3).

Citizenship Requirements.

New Mexico domicile required. (NMSA 40-4-5).

Residence Requirements.

Six months residence immediately preceding date of filing plus New Mexico domicile required. Military personnel stationed in state for six months satisfy requirement. (NMSA 40-4-5).

Jurisdiction.

District court. (NMSA 40-4-5).

Venue.

County where either party resides. (NMSA 40-4-4).

Process.

Long Arm Statute adopted. See category 5 Civil Actions and Procedure, topic 5.20 Process.

Pleading.

Petition must be verified. (NMSA 40-4-6).

Practice.

Many courts have Local Rules imposing special requirements.

Judgment or Decree.

No special provisions.

Temporary Alimony.

May be allowed by court. (NMSA 40-4-7).

Allowance for Prosecution of Suit.

Court may make such orders as will insure either party efficient preparation and presentation. (NMSA 40-4-7[A]).

Use of Life Insurance as Security.

Court may require party to retain former spouse or child as beneficiary on life insurance policy as security for various court ordered payments. (NMSA 40-4-7.1).

Permanent Alimony.

In dissolution of marriage, separation or support suits between husband and wife, court may make an allowance to either spouse of other spouse's separate property as alimony. Decree making such allowance has effect of vesting title of property in recipient. (NMSA 40-4-12). If this allowance is a sum or sums of money, decree making such allowance is a lien on realty of other spouse from time a certified copy of decree is filed for record in office of county clerk in county where realty is situated. (NMSA 40-4-13). This lien may be satisfied by execution or may be foreclosed under same procedure as is now allowed for foreclosure of judgment liens. (NMSA 40-4-16). District Court where decree was rendered may remove lien upon notice and good cause; court, in its discretion, upon removal of lien, may require bond for faithful performance of payment of alimony in accordance with decree. (NMSA 40-4-17). Enforcement of decree awarding alimony or support can be by attachment, garnishment, execution or contempt. (NMSA 40-4-19). Respondent's disposable income is subject to certain exemptions when enforcement is by garnishment. (NMSA 35-12-7).

Fact that party receiving alimony engages in live-in relationship similar to marriage does not terminate alimony or create presumption that it should be terminated. (121 N.M. 500, 914 P.2d 637).

Division of Property of Spouses.

On permanent separation, court has power to make division with or without dissolution of marriage. (NMSA 40-4-3). New Mexico is community property state. (NMSA 40-3-12).

Community property must be divided equally. (86 N.M. 107, 520 P.2d 263, rev'd in part on other grounds, 89 N.M. 282, 551 P.2d 638). It is then separate property from which court may make award in lieu of alimony. (54 N.M. 194, 217 P.2d 857; NMSA 40-4-12).

However, separate property acquired while domiciled in common law jurisdiction and brought to New Mexico is divided according to law of state of origin on division of such marital property. (91 N.M. 339, 573 P.2d 1194). Separate property acquired while domiciled in New Mexico can be awarded to other spouse only if justified as alimony.

Retirement benefits no longer must be divided only on pay-as-it-comes basis; court may award spouse all or part of his or her community interest. (116 N.M. 52, 860 P.2d 182).

Entire community property subject to community debts upon death of either spouse. (NMSA 45-2-805[B]).

Change of Wife's Name.

No specific provision, but power customarily exercised by courts.

Custody of Children.

Court has power to issue and modify orders relating to children. (NMSA 40-4-7). Court has power on its own motion or motion of parties to appoint guardian ad litem to represent child when custody is contested. Expenses, costs, and attorneys fees are allocated among parties as determined by court. (NMSA 40-4-8).

If minor is under age of 14, custody to be determined in accordance with best interests of child. Factors for court's consideration outlined in NMSA 40-4-9, -9.1. If minor is 14 years of age or older, court shall consider desires of minor as to with whom minor wishes to live before awarding custody. (NMSA 40-4-9).

Uniform Child Custody Jurisdiction and Enforcement Act adopted. (NMSA 40-10A-101 to -112, effective July 1, 2001; repealing NMSA 40-10-1 to NMSA 40-10-24).

Visitation.

Grandparents entitled to visitation rights by order of court entered at time of dissolution or on petition filed at any time after entry of decree. Rights to be determined in accordance with best interests of child. (NMSA 40-9-1 to -4).

Allowance for Support of Children.

Child support guidelines set forth in NMSA 40-4-11.1; guidelines are rebuttable presumption of amount; any deviation from guidelines to be supported by written finding in decree that application of guidelines would be unjust or inappropriate. (NMSA 40-4-11.1, -11.2). In dissolution of marriage, separation or support suits between husband and wife, court may make allowance of certain property of party or parties for maintenance, education and support of minor child or children of parties, and may vest title to this property in guardian appointed by court. (NMSA 40-4-14). If sum or sums of money is allowed, decree so allowing becomes lien on realty and personal property of party which must furnish child or children support. This lien is effective from time notice of order or copy of decree is filed for record in office of county clerk in county where any of property is situated. (NMSA 40-4-15). This lien may be satisfied by execution or foreclosed in same manner as allowed for foreclosure of judgment liens. (NMSA 40-4-16). Enforcement of decree awarding alimony or support can be by attachment, garnishment, execution or contempt. (NMSA 40-4-19). Interest accrues on delinquent child and spousal support payments. (NMSA 40-4-7.3). In regards to person delinquent in child support, New Mexico law complies with Federal Family Assistance and Personal Responsibility Act of 1996. (NMSA 40-4A-1 to NMSA 40-5A-13). Court may, for good cause, require parent liable for support of minor to assign part of parent's income or entitlements to person or public official entitled to receive support payments. (NMSA 40-4-11). If support debt is $100 or more, recovery can be had directly from state income tax refund of debtor. (NMSA 7-2C-3). Respondent's disposable income is subject to certain exemptions when enforcement is by garnishment. (NMSA 35-12-7).

Common law duty to support severely incapacitated children regardless of age. (123 N.M. 85, 934 P.2d 279).

Separation.

On permanent separation, either spouse may institute suit in district court for division of property, for custody of children, or for alimony, without asking for dissolution of bonds of matrimony. (NMSA 40-4-3). In such suit court may restrain use or disposition of property of either spouse; may provide for support of either party during pendency of suit and for expenses of suit in behalf of either party, and on final hearing, allow to either party a portion of other spouse's property, or such reasonable sum of money, as spousal support; and may provide for care, custody and maintenance of minor children, setting aside portions of property of parties for such purposes. (NMSA 40-4-7).

Remarriage.

No restrictions.

Foreign Dissolution of Marriages.

No statutory provisions.

Separation Agreements.

Must be in writing and executed and acknowledged. (NMSA 40-2-4).

Annulment of Marriage.

See topic 14.11 Marriage.

Effect of Dissolution of Marriage on Will.

See category 13 Estates and Trusts, topic 13.16 Wills, subhead Revocation.

14.06 DIVORCE:

See topic 14.05 Dissolution of Marriage.

14.07 [RESERVED]

14.08 GUARDIAN AND WARD:

Uniform Probate Code, with significant omissions and amendments, adopted. (NMSA 45-1-101 to -404).

Jurisdiction.

In district courts. (NMSA 45-1-302). Venue for guardianship of minor in district where minor resides or is present. (NMSA 45-5-205). Venue for appointing conservator for protection of property of persons under disability and minors in district where person to be protected resides or is present, but if not in state, in any district in state where person has property. Additionally, if person to be protected is admitted to institution pursuant to court order, venue is also in judicial district in which that court sits. (NMSA 45-5-403).

Selection of Guardian.

Parent or guardian of minor or incapacitated person may delegate powers regarding care, custody, or property of minor child or ward, except consent to marriage or adoption for up to six months by acknowledged power of attorney. (NMSA 45-5-104). Parent of minor may appoint by will, or other writing signed by parent and attested by at least two witnesses, guardian of unmarried minor. (NMSA 45-5-202). Minor of 14 or over may prevent appointment or cause it to terminate by filing in court written objection to appointment before it is accepted or after its acceptance. Objection may be withdrawn. (NMSA 45-5-203). Court shall appoint person nominated by minor, if minor is 14 years of age or older, unless appointment contrary to minor's best interests. (NMSA 45-5-206). Court may appoint individual or corporation with general power to serve as trustee or conservator. Priority list set forth in NMSA 45-5-410.

Eligibility and Competency.

Person whose appointment would be in minor's best interests shall be appointed. (NMSA 45-5-206).

Appointment of Guardian.

Testamentary appointment of guardian of minor effective after filing written acceptance. Notice of acceptance of appointment must be given to minor and custodian. (NMSA 45-5-202).

Court appointment at hearing after notice to minor, if 14 or more years of age, and person with principal care and custody during preceding 60 days and any living parent of minor. (NMSA 45-5-207). All parental rights of custody must have been terminated or suspended by circumstances or prior court order before guardian may be appointed for unmarried minor. (NMSA 45-5-204). Upon petition, after notice and hearing, court may appoint conservator for estate and financial affairs of minor upon finding that (1) minor's property requires management or protection that cannot otherwise be provided; (2) minor has or may have financial affairs which may be jeopardized or prevented by minority; or (3) funds needed for minor's support and education and protection desirable or necessary to obtain or provide funds. Court may also appoint conservator for person, other than minor, who has property that may be wasted or dissipated unless proper management provided or when protection necessary or desirable to obtain or provide funds necessary for support, care and welfare and person is either incapacitated or unable to manage for self by reason of confinement, detention by foreign power or disappearance. (NMSA 45-5-401).

Qualification.

Court may require conservator to post bond in amount of total value of property of estate in conservator's control, plus one year's estimated income, less value of securities deposited under arrangements requiring court order for removal, less value of property which cannot be sold or converged without court order, or as court otherwise directs. (NMSA 45-5-411).

Inventory.

Guardian of minor must report as required by court. (NMSA 45-5-209). Conservator must prepare complete inventory of estate within 90 days of appointment and maintain suitable records of administration of estate. (NMSA 45-5-418).

Powers and Duties.

Guardian of minor has same right and duties as a parent except guardian is not obligated to provide own funds for minor and is not vicariously liable to third persons for acts of ward solely by reason of relationship. (NMSA 45-5-209). Guardian of incapacitated person has same rights and duties as parent of unemancipated child but need not support ward out of own funds and is not vicariously liable to third persons for ward's acts. (NMSA 45-5-312). Conservator has wide ranging administrative and distributive powers to accomplish purpose of appointment, without court order. (NMSA 45-5-424, -425).

Compensation of Guardian.

Provided by estate of incapacitated person. (NMSA 45-5-105).

Investments.

No statutory provision for guardian of minor. Conservator has power, without court authorization or confirmation, to invest and reinvest funds of estate as trustee would. (NMSA 45-5-424).

Securities in Name of Nominee.

See category 13 Estates and Trusts, topic 13.15 Trusts, subhead Securities in Name of Nominee.

Real Estate.

See subhead Powers and Duties, supra.

Liabilities of Guardian.

Common law applies regarding liability of guardian of minor. Unless contract provides otherwise, conservator of property not individually liable on contract property entered into in fiduciary capacity unless conservator failed to reveal representative capacity and identify estate in contract. Otherwise, only liable in contract or tort if personally at fault. (NMSA 45-5-429).

Accounts.

Guardian of minor must report to court upon condition of ward and his estate as ordered by court upon petition of any interested party or as required by court rule. (NMSA 45-5-209).

Termination of Guardianship.

Upon guardian's death, resignation or removal, or upon minor's death, adoption, marriage, or majority. Resignation must be approved by court. (NMSA 45-5-210). Court may remove conservator for good cause, upon notice and hearing. Upon death, resignation or removal, court may appoint another conservator. Any interested person, or person for whom conservator appointed may petition court to terminate conservatorship. Court order required for termination. (NMSA 45-5-415, -430).

Insane Persons.

Any interested person may petition district court for appointment of guardian for person alleged incapacitated under Probate Code. Attorney, chosen by alleged incapacitated person or appointed by court, with duties of guardian ad litem, must represent person at hearing and court must appoint visitor to interview person seeking appointment and must appoint qualified health care professional to examine individual prior to hearing. (NMSA 45-5-303). Guardianship regulated by NMSA 45-5-301 to -315. Generally, any person deemed qualified by court may be appointed guardian for incapacitated person. (NMSA 45-5-311). Exceptions include operators or employees of boarding homes, residential care homes, nursing homes, group homes, or similar facilities. (NMSA 45-5-311).

Foreign Guardians.

Foreign guardians of minor consent to personal jurisdiction by accepting appointment. (NMSA 45-5-208). Foreign conservator, with all powers of local conservator, allowed, provided no local conservator has been appointed or no petition pending in state and authenticated copies of appointment and any official bond foreign conservator has given is filed with court. (NMSA 45-5-432).

Gifts to Minors.

See topic 14.10 Infants.

Uniform Common Trust Fund Act adopted. (NMSA 46-1-13 to -16).

Uniform Simplification of Fiduciary Security Transfers Act adopted. (NMSA 46-8-1 to -10).

Interstate Compact on Mental Health adopted. (NMSA 11-7-1 to -5).

14.09 HUSBAND AND WIFE:

Disabilities of Married Women.

Married women may sue and be sued as if unmarried. (NMSA 38-4-6).

Loss of Consortium.

This is recognized as cause of action when asserted by spouse. (117 N.M. 422, 872 P.2d 840). New Mexico courts also have expressed willingness to recognize loss of consortium claims by other family members such as parents, children or grandparents, if requisite elements of loss are demonstrated. (126 N.M. 263, 968 P.2d 774; 138 N.M. 289, 119 P.3d 169).

Unmarried persons may also assert loss of consortium claims if they can prove “intimate familial relationship” with injured or deceased person. (133 N.M. 579, 66 P.3d 948).

Separate Property.

Property acquired by either spouse before marriage; by gift, devise, bequest or descent;

designated by written agreement of parties; or in deed concerning property held by spouses as joint tenants or tenants in common; or designated by court with all rents, issues and profits thereof is separate property. (NMSA 40-3-8).

Property acquired during marriage by a woman by an instrument in writing in her name alone, or in her name and name of another party, not her husband, is presumed to be separate property if instrument was delivered and accepted prior to July 1, 1973. (NMSA 40-3-12).

Neither spouse has any interest in the separate property of the other, except that neither can be excluded from the other's dwelling. (NMSA 40-3-3).

Debts.

Separate debt is debt incurred before marriage or after dissolution of marriage; debt designated as separate by judgment or decree; debt contracted during marriage which identified to creditor in writing at time of its creation as separate debt; debt which arises from tort committed by spouse before marriage or after dissolution of marriage; or unreasonable debt incurred by spouse while living apart if so determined in final dissolution of marriage decree. (NMSA 40-3-9).

Community debt is debt contracted or incurred by either spouse during marriage which is not separate debt. (NMSA 40-3-9). In order for marital debt to constitute separate debt, either debtor spouse must so identify it in writing to creditor at time of its creation or judgment or decree entered by court must so designate it. (116 N.M. 254, 861 P.2d 935).

Contracts.

Either husband or wife may enter into any engagement or transaction with the other, or with any other person respecting property, which either might, if unmarried; subject to, in transactions between themselves, general common law which controls actions of persons occupying confidential relations with each other. (NMSA 40-2-2). Husband and wife cannot by any contract with each other alter their legal relations, except of their property, and except that they may agree in writing to immediate separation and make provisions for support of either of them and their children during their separation. (NMSA 40-2-8).

Antenuptial Contracts.

New Mexico has adopted Uniform Premarital Agreement Act. (NMSA 40-3A-1 to -10).

Actions.

Married women may sue and be sued as though unmarried. (NMSA 38-4-6). One spouse may sue other for marital wrongs, on contract concerning property rights or in tort. (87 N.M. 213, 531 P.2d 947).

Agency.

Either spouse may act as attorney in fact for the other. (12 N.M. 111, 75 P. 41).

Conveyance or Encumbrance of Property.

Either spouse may convey his or her separate property without the other joining, or dispose of the same by will. (NMSA 40-3-13). As to community property, see subhead Community Property, infra.

Desertion and Nonsupport.

If a spouse disappears for 30 days, remaining spouse may petition district court to engage alone in transactions for which joinder is required. Guardian ad litem is appointed for absent spouse, and notice of hearing must be published. After hearing, court may allow petitioner to engage alone in any transaction which normally requires joinder. Court must confirm transactions involving real property. (NMSA 40-3-16).

Revised Uniform Reciprocal Enforcement of Support Act (1968 Act) adopted. (NMSA 40-6A-100 to -903). Uniform Interstate Family Support Act effective July 1, 1995; recompiled effective June 17, 2005.

Community Property.

All property acquired by either spouse after marriage, except such as is hereinbefore specified as separate property (see subhead Separate Property, supra) constitutes community property. (NMSA 40-3-8).

Property acquired by either spouse during marriage is presumed to be community property. Property acquired during marriage by a woman by written instrument in her name alone or in her name and name of another not her husband is presumed to be her separate property if instrument was delivered and accepted prior to July 1, 1973; and presumption is conclusive in favor of a person dealing in good faith and for valuable consideration with a married woman, her legal representative, or her successor in interest. (NMSA 40-3-12). Husband and wife may take title to realty as joint tenants. (NMSA 47-1-36).

Quasi-Community Property.

All real or personal property, except separate property, wherever situated, acquired in any of following ways: by either spouse while domiciled elsewhere which would have been community property if spouse who acquired property had been domiciled in state at time of its acquisition; in exchange for real or personal property, wherever situated, which would have been community property if spouse who acquired property so exchanged had been domiciled in this state at time of its acquisition. (NMSA 40-3-8). For purposes of division of property incident to dissolution of marriage or legal separation quasi-community property shall be treated as community property if both parties are domiciliaries of New Mexico at time of dissolution or legal separation proceeding. (NMSA 40-3-8).

Disposition of Community Property.

Husband and wife must join in all deeds of community real property except from one spouse to other (NMSA 40-3-13) or where one spouse is prisoner of war or person missing in action (NMSA 40-3-5). Either party may manage and control personal community property, except where only one spouse is named in document of title or where one spouse is named in agreement with third party as having sole management and control. Where document or agreement names only one spouse as noted, only that spouse may manage or control that property. Both must join in transactions dealing with property where document of title is in names of both, and names are joined by word “and.” (NMSA 40-3-14).

Against public policy to allow one spouse to obligate community property on a contract of indemnity, and community property not liable for indebtedness incurred on a contract of indemnity, unless both husband and wife sign. (NMSA 40-3-4).

Upon death of spouse, one-half of community property as to which decedent could have exercised power of testamentary disposition passes to surviving spouse. (NMSA 45-2-102).

14.10 INFANTS:

All infants attain majority at age of 18 except age 21 is required for purchase of alcoholic beverages. (NMSA 28-6-1). Person must be at least 21 years old to purchase alcoholic beverages. (NMSA 60-7B-1).

Family Protection Services.

Provided pursuant to Family Support Act. (NMSA 32A-17-1 to -6). Persons representing or assisting children in specific situations required to receive cultural and other training. (NMSA 32A-18-1 to -4). Quality assurance office created to ensure achievement of purposes of Children's Code. (NMSA 32A-19-1).

Uniform Probate Code, with significant omissions and amendments, adopted effective July 1, 1976. (NMSA 45-1-101 to -404).

Emancipation.

Guardianship ceases with marriage, death, adoption, or majority of minor, or death, resignation or removal of guardian. (NMSA 45-5-210).

Disabilities.

In general common law rules apply. Banks may receive deposits and pay infants directly. (NMSA 58-1-5).

Ratification of Contracts.

In general the rules of common law apply to contracts of infants.

Bank Deposits.

A bank or savings and loan association may receive deposits directly from infants and pay same to their order. (NMSA 58-1-5; NMSA 58-10-59).

Conveyances, etc.

Married minor may join with spouse in all conveyances, leases and mortgages of community real estate with same effect as though minor spouse had attained majority. (NMSA 40-3-15).

Custody and Earnings.

Parents are equally entitled to custody of children and their earnings. If parents are separated court may award children to either or entrust them to another person. (NMSA 40-4-3, -9). Presumption that joint legal custody is in best interest of child. (NMSA 40-4-9.1).

Criminal Offenses.

Rights of infants charged with crimes and procedure for adjudication are regulated by Children's Code. (NMSA 32A-1-1 to -21).

Actions.

Infant may sue by general guardian, guardian ad litem or next friend. Cause of action to recover minor's future medical and nonmedical expenses belongs to both infant and parents; minor may recover such expenses so long as no double recovery results. (114 N.M. 2, 833 P.2d 1183). Suit against infant may not be further prosecuted until a guardian or other personal representative for the infant has been appointed (Rule 1-017[C]), except that married infant may prosecute to judgment or defend action against him or her by spouse without guardian or next friend (NMSA 38-4-7). Appointment of guardian ad litem may be made by court upon written request of infant defendant (if 14 years or older) or on written request of relative or friend. (NMSA 38-4-10).

Proceeding to establish parentage and compel support may be brought by any interested party. (NMSA 40-11-7).

Sexual exploitation of infants, through prostitution, pornography, possession of obscene visual or print medium involving child under 18 years old or otherwise, prohibited with criminal sanctions. (NMSA 30-6A-1 to -4).

Support of Minor.

Common law applies. Child support guidelines set forth in NMSA 40-4-11.1.

Parental Responsibility.

Person may recover from parent or guardian having custody or control of child who maliciously or wilfully destroys property or injures person. Recovery limited to actual damages not to exceed $4,000 plus attorneys' fees and court costs. (NMSA 32A-2-27).

Parent may be made party to complaint alleging that child is delinquent or in need of supervision. If child is adjudged delinquent or in need of supervision, parent may be ordered to submit to counselling, participate in probation or treatment program and pay reasonable cost of treatment and maintenance if financially able. (NMSA 32A-2-28).

Termination of Parental Rights.

Parental rights terminated judicially upon showing of neglect, abuse, or abandonment. (NMSA 32A-4-28).

Interstate Compact on Juveniles.

Adopted. (NMSA 32A-10-1 to -8).

Uniform Parentage Act. As of this revision, New Mexico Uniform Parentage Act, NMSA 40-11-1 to -23, has been repealed and replaced by 2009 New Mexico Laws c. 215, effective Jan. 1, 2010.

Uniform Securities Ownership by Minors Act not adopted.

Uniform Transfers to Minors Act adopted. (NMSA 46-7-11 to -34).

Adoption.

See topic 14.01 Adoption.

14.11 MARRIAGE:

Consent Required.

Consent of parents or guardian necessary when female or male under 18. Consent may be by presence of parent or guardian or authenticated certificate in writing. (NMSA 40-1-5). No marriage for males or females under 16 without order of children's court or family division of district court. Court may authorize marriage in settlement of action for support and to establish parentage, or when female is pregnant. (NMSA 40-1-6).

Medical Examination.

Required not more than 30 days prior to application for license. (NMSA 40-1-11).

License required, must be applied for in person by both prospective parties, is issued by county clerk of county where ceremony is to be performed and may be used when issued.

License must be filed for recording in county clerk's office after ceremony. (NMSA 40-1-10).

Waiting Period.

None.

Ceremonial marriage may be performed by judges, justices, and magistrates of any court established by constitution of New Mexico, U.S. constitution, laws of state or laws of U.S., ordained clergyman, or authorized representative of federally recognized Indian tribe, without regard to sect or rights of customs (NMSA 40-1-2), or in accordance with rites of any religious society (NMSA 40-1-3).

Reports of Marriages.

Marriage must be certified to county clerk by person performing ceremony within 90 days. (NMSA 40-1-15).

Record.

See category 10 Documents and Records, topic 10.04 Records, subhead Vital Statistics.

Common law marriages are not recognized. (38 N.M. 392, 34 P.2d 672).

All marriages celebrated beyond limits of state which are valid according to laws of country where celebrated or contracted shall be valid within state and have same force as if celebrated in accordance with laws of this state. (NMSA 40-1-4).

Proxy Marriages.

No statutory authorization. Opinion that such marriage valid given by Attorney General, but new ceremony when possible recommended. (Op. Att'y Gen. No. 4283, May 11, 1943).

Marriages by Written Contract.

No statutory authorization.

Prohibited Marriages.

All marriages between relations and children, including grandfathers and grandchildren of all degrees, brothers and sisters of half blood and full blood, uncles and nieces, aunts and nephews, are void. (NMSA 40-1-7). Children of such marriages deemed legitimate. (NMSA 40-1-9). No racial restrictions.

Foreign marriages recognized if valid where performed. (NMSA 40-1-4).

Annulment.

Action for annulment of marriage of infant under age of consent may be brought by the infant, his or her next friend or guardian, either parent, or the district attorney any time before the minor reaches legal age. (NMSA 40-1-9).

14.12 MARRIED WOMEN:

See topics 14.09 Husband and Wife, Marriage; categories 5 Civil Actions and Procedure, topic Evidence, subhead Witnesses; Debtor and Creditor, topic Homesteads; Documents and Records, topic Acknowledgments; Estates and Trusts, topics Executors and Administrators, Wills.

15 HEALTH

15.0115.04

15.05 FOOD, DRUGS, DEVICES AND COSMETICS:

Essentially the same as the Federal Food, Drug, and Cosmetic Act. As to food control provisions, see New Mexico Food Act NMSA 25-2-1 et seq., New Mexico Dairy Product Act (NMSA 25-7A-1 et seq.). As to drugs, devices, and cosmetics, see The New Mexico Drug, Device and Cosmetic Act, NMSA 26-1-1 et seq. Under Drug Product Selection Act, pharmacists are permitted to substitute certain lower cost drugs for those prescribed. (NMSA 26-3-1 et seq.).

Uniform Controlled Substances Act, 1970 version adopted. (NMSA 30-31-1 et seq.).

15.05A OTHER HEALTH MATTERS:

Public health concerns, including but not limited to HIV testing, hepatitis testing, immunizations, anatomical gifts, emergency medical services, vital statistics, and burial of indigents governed by Public Health Act. (NMSA 24-1-1 et seq.).

Advanced Health-Care Directives.

New Mexico has adopted Uniform Health Care Decisions Act (NMSA 24-7A-1 et seq.), allowing adults and emancipated minors to make health care decisions in advance, either orally or in writing.

Smoking Restrictions.

In its Clean Indoor Air Act (NMSA 24-16-1 et seq.), New Mexico prohibits smoking in any indoor work place or indoor public place or within reasonable distance from entrance, windows and ventilation systems to any enclosed areas where smoking is prohibited, except in smoking permitted areas designated by statute. Act also provides for penalties and whistleblower protections.

HIV Testing.

The Human Immunodeficiency Virus Testing Act (NMSA 24-2B-1 et seq.), requires informed consent for HIV testing, except as specified by statute, and provides for confidentiality of testing records.

Continuing Care Facilities.

The Continuing Care Act (NMSA 24-17-1 et seq.), provides for disclosure and inclusion of certain information in continuing care contracts in order that residents of long-term residential care facilities may make informed decisions concerning continuing care and to provide protection for residents and communities.

Controlled Substances.

The Controlled Substances Therapeutic Research Act (NMSA 26-2A-1 et seq.) establishes need for research and experimentation in use of marijuana to alleviate adverse symptoms of cancer chemotherapy and glaucoma.

Resident Abuse and Neglect.

The Resident Abuse and Neglect Act (NMSA 30-47-1 et seq.), establishes criminal penalties for anyone who abuses, neglects or exploits patient who resides in, or receives treatment from, care facility.

Dee Johnson Clean Indoor Air Act.

Smoking is prohibited in any indoor work place or indoor public place or in any means of public transit, not specifically exempted by Act. (NMSA 24-16-4).

Safe Haven for Infants.

Person may leave infant at hospital, within 90 days of birth, and not be subject to prosecution for abandonment, provided that infant is left in condition that would not constitute abandonment or neglect. (NMSA 24-22-1 et seq.).

Telecommunication for Medical Services.

New Mexico Telehealth Act recognizes need to provide medical information and services to medically underserved areas in state via telecommunication. (NMSA 24-25-1 et seq.). The New Mexico Telehealth Act provides for formation of commission with purpose of encouraging single, coordinated statewide effort to create telehealth system that increases access to care and strengthens health infrastructure. Act encourages health insurers, health maintenance organizations, managed care organizations and third party payors, as well as state's medical assistance program, to use and provide coverage for telehealth within scope of their plans and policies.

Health Insurance.

New Mexico's Insurance Code requires coverage for following situations (under specified circumstances) in health insurance policies and health care plans: handicapped children, hearing aid coverage for eligible children, newly born children, children born out of wedlock, and adopted children; childhood immunization, circumcision for newborn males, medically necessary early intervention services for children from birth through three years of age, genetic inborn error of metabolism, option for home health care coverage, mammograms, cytologic screening, human papillomavirus screening and vaccine, alpha-fetoprotein IV screening, diabetes, minimum hospital stay of 48 hours following mastectomy and lymph node dissection, FDA approved prescription contraceptive drugs or devices if there is prescription drug benefit in policy, diabetes, cancer clinical trials under circumstances specified by statute; smoking cessation treatment and regular part-time employees. (NMSA 59A-22-1 et seq.).

Coverage of Patient Costs Incurred in Clinical Cancer Trials.

Health plan shall provide coverage for routine patient care costs incurred as result of patient's participation in phase II, III or IV cancer clinical trial with specific qualifications. (*Note:* to be repealed effective July 1, 2009.) (NMSA 59A-22-43).

Health Maintenance Organizations.

The Health Maintenance Organization Law (NMSA 59A-46-1 et seq.), sets out requirements for formation of health maintenance organizations, as well as coverage requirements.

Patient Protection.

New Mexico enacted Patient Protection Act (NMSA 59A-57-1 et seq.) to regulate aspects of health insurance by specifying patient and provider rights and to ensure that managed health care plans treat patients fairly and arrange for delivery of good quality services.

Employee Abuse Registry Act.

Provider of home and/or community-based care services may not hire or contract with employee included in registry maintained by Department of Health. (NMSA 27-7A-3).

Detoxification Reform Act.

Intoxicated or incapacitated person may be committed to treatment facility at request of physician or police officer for protective custody, and shall not be considered to have been arrested or charged with any crime. (NMSA 43-2-8).

16 INSURANCE

16.01 INSURANCE COMPANIES:

N.M. Insurance Code (NMSA 59A-1-1 et seq.) codifies and partially repeals former law.

Insurance Division of Public Regulation Commission, of which Superintendent of Insurance is chief officer, has jurisdiction of collection of licenses, taxes and fees. (NMSA 59A-2-1). Insurance Division has exclusive jurisdiction over insurance rates and rate practices. (NMSA 59A-2-1).

Fees and other charges governed by NMSA 59A-6-1 et seq.

Regulated by Insurance Division of Public Regulation Commission. (NMSA 59A-2-1 et seq.). Insurance fraud prohibited. (NMSA 59A-16C-1 et seq.). Administrative and civil penalties are provided. (NMSA 59A-16-29). Certain prearranged medical (NMSA 59A-46-1 et seq.), dental (NMSA 59A-48-1 et seq.), and funeral (NMSA 59A-49-1 et seq.) plans are regulated as insurance. Code provisions also address motor clubs (NMSA 59A-50-1 et seq.) and bail bondsmen (NMSA 59A-51-1 et seq.). Capital and surplus requirements for companies transacting life or accident and health insurance set forth in NMSA 59A-5-16. Employers acting under Group Self-Insurance Act with respect to workmen's compensation liability not subject to Insurance Code. (NMSA 52-6-3).

Supervision by superintendent of insurance. (NMSA 59A-2-2). Superintendent, superintendent's representatives and persons delivering information to superintendent or representatives immune from liability for good faith conduct pursuant to c. 59A. (NMSA 59A-4-21). Mergers and acquisition of control of domestic insurers limited and must be approved by superintendent. Code itemizes permissible assets (NMSA 59A-8-2) and limits insurer investments and diversification (NMSA 59A-9-2, -5). Merger and consolidation of domestic stock insurers governed by NMSA 59A-34-36. Insurers must report material acquisitions and dispositions of assets to superintendent. (NMSA 59A-34-44, 45). Must also report distributions to shareholders within 15 business days of declaration. (NMSA 59A-37-19.1).

Rates.

Rate practice, filing and approval governed by Insurance Rate Regulation Law. NMSA 59A-17-1 et seq. Law provides for creation of consumer information system to provide and disseminate price and relevant information on readily available basis to purchasers of personal or commercial insurance.

Annual statements and quarterly reports must be filed with superintendent of insurance. (NMSA 59A-5-29, -29.1).

Policies.

Life, health, property, marine and transportation, wet marine, casualty, vehicle, surety, and title. (NMSA 59A-20-1 to NMSA 59A-30-15). See also category 3 Business Regulation and Commerce, topic 3.12 Consumer Protection, subhead Plain Language.

Service Contract Regulation.

Addresses portability, availability, and accountability of group and individual health insurance. (NMSA 59A-58-1 et seq.).

Kinds of insurance defined in NMSA 59A-7-1 et seq.

Premium financing is authorized and regulated in NMSA 59A-45-1 et seq.

Policy Loans.

Maximum interest rate regulated by NMSA 59A-20-10.

Discrimination.

No insurer may discriminate between individuals of the same class and equal expectation of life in the rates charged for any contract of life insurance, or life annuity, or in the dividends or other benefits payable thereon, or in any other terms and conditions of such contract. Nor may any insurer discriminate between individuals of the same class and of essentially the same hazard, in the amount of premium, fees, or rates charged for any policy or contract of life or health insurance, or in benefits payable thereunder. (NMSA 59A-16-11). Discrimination on other bases prohibited by NMSA 59A-16-12, -13.2.

Rebates.

Rebate of premiums or special favor or advantage in dividends or other benefits prohibited. (NMSA 59A-16-15).

Liens.

Voidable preferences and liens of insurance companies discussed in NMSA 59A-41-43.1.

Managing General Agents.

Licensing requirements, required contract provisions, duties, penalties and liabilities relating to managing general agents controlled by Managing General Agents Law. (NMSA 59A-12B-1 et seq.).

Insurance Brokers.

Provisions of Broker Controlled Insurer Law (NMSA 59A-12C-1 et seq.) apply to situations detailed in NMSA 59A-12C-3, -4.

Agents and Brokers.

No creditor can require a debtor to insure debt security with any particular broker. (NMSA 59A-16-14).

Code prescribes licensing procedures for agents, solicitors, brokers, adjusters, and others. (NMSA 59A-11-1 et seq.). Applicants complete forms prescribed by superintendent. (NMSA 59A-11-2). Procedure for licensing corporate applicants are described in NMSA 59A-11-3. Temporary (NMSA 59A-11-4) and vending machine (NMSA 59A-11-5) licenses provided.

Independent agents entitled to 180 days written notice of termination of appointment contract, including basis therefor, by property or casualty insurer. (NMSA 59A-11-13).

Process Agent.

Every insurance company must, prior to obtaining license, appoint Superintendent of Insurance and his successors its attorney, on whom may be served all process in any action or proceeding against it by a resident or where the cause of action arose in the state. (NMSA 59A-5-

31). Foreign insurance companies not authorized to do business in state appoint Secretary of State attorney for service of process by doing any of following acts in state by mail or otherwise: (1) Issuance or delivery of contract of insurance to resident of this state; (2) solicitations of applications for such contracts; (3) collection of premiums; (4) other insurance business as to any proceeding arising out of such contract. (NMSA 38-1-8).

Investments are regulated by NMSA 59A-9-1 et seq. Investments in subsidiaries governed by NMSA 59A-9-12.

Foreign Insurance Companies.

Foreign insurance company, before doing business in state, must comply with filing requirements detailed in NMSA 59A-5-21. Before license will issue, Superintendent will investigate management, methods, and condition of company to assure himself that it meets qualifications for license as set forth in NMSA 59A-5-12 et seq. Company must also file annual statements such as are required of domestic companies. (NMSA 59A-5-23).

Non-admitted insurers may do business through a surplus line broker subject to the provisions of NMSA 59A-14-1 et seq.

Company organized under laws of any country other than United States must deposit with Department of Insurance of some state of the United States where it is authorized insurer sum not less than minimum capital and surplus required of companies licensed in this state. (NMSA 59A-5-20).

Insolvency and Receivers.

Insurers Conservation, Rehabilitation, and Liquidation Law codified. (NMSA 59A-41-1 et seq.). Insurers Liquidation Act codified as part thereof. (NMSA 59A-41-17 to -23). Superintendent has broad powers over insurers in hazardous financial condition and is court appointed receiver in domiciliary insolvency. (NMSA 59A-41-18). Certain insurers are required to belong to Insurance Guaranty Association to assure payment of claims upon insolvency of property and casualty insurance. (NMSA 59A-42-1 et seq.; NMSA 59A-43-1 et seq.). Life Insurance Guaranty Association organized to protect policyholders of insolvent life insurance companies. (NMSA 59A-42-7 et seq.) NMSA 59A-46-13 sets forth net worth and deposit requirements for health maintenance organizations in order to protect health care providers and policy subscribers from insolvency of health maintenance organizations.

Insurance Holding System.

Companies permitted to enhance efficient management and permit capital expansion, provided system is disclosed to and approved by Superintendent. (NMSA 59A-37-1 et seq.).

Taxes, license fees, etc., imposed uniformly without favoring domestic companies. (NMSA 59A-6-1). Exception is reciprocity provision wherein higher fees imposed by foreign states upon this state's companies there engaged in business are likewise imposed on foreign businesses operating in this state. (NMSA 59A-5-33).

Nonresident agents licensed in this state to transact any form of life, accident, or health insurance business must pay taxes, fines, penalties, licenses or fees in excess of those imposed by this state where his or her state requires the same of residents of this state. (NMSA 59A-5-33; NMSA 59A-6-1).

Settlement of Claims.

Practices are regulated and certain practices prohibited. (NMSA 59A-16-20, -20.1, -21).

Gross Premium Tax.

Every insurance company doing business in this state must, in lieu of all other taxes except regular property taxes, pay each year 3.003% of gross premiums, membership and policy fees received or written by it, as reported in Schedule T and supporting schedules of its annual financial statement on insurance or contracts covering risks within this state. In addition, this section sets forth health insurance premium of 1% of gross health insurance premiums and membership and policy fees received by insurance company on hospital and medical expense incurred insurance, health care service plan and health maintenance organization contracts, less all return health insurance premiums during preceding year, less return premiums and premiums received for reinsurance on New Mexico risks. (NMSA 59A-6-2).

Privilege Tax.

$1,000 for approved application for certificate of authority, including filing of charter documents, financial reports, power of attorney, etc. $200 for each annual continuation of certificate of authority, $150 for reinstatement. Additional smaller miscellaneous fees for different categories of insurers. (NMSA 59A-6-1).

Alcohol Dependency Coverage.

All group health insurance carriers shall offer and make available benefits for treatment and care of alcohol dependency. (NMSA 59A-47-35).

Domestic Abuse.

Prohibition of discrimination based on past abuse. (NMSA 59A-16B-1 et seq.).

Mental Health Benefits.

All employer group health plans must offer coverage for mental health benefits. (NMSA 59A-23E-18).

Underwriting Association.

All insurers licensed to write and writing essential property insurance are required to be members of FAIR (fair access to insurance requirements) plan, underwriting association established pursuant to NMSA 59A-29-1 et seq.

Uniform Insurers Liquidation Act.

Codified at NMSA 59A-41-17 to -23.

Motor Vehicle Insurance.

Primary motor vehicle insurance coverage must be provided by person who uses demonstration or loaner vehicle from automobile dealership or repair shop. Person operating vehicle may assume primary responsibility for operator's vehicle insurance. (NMSA 59A-32-23).

Rental Car Insurance.

Licensing and insurance requirements for rental car companies and agents covered by “Rental Car Insurance Limited Producer License Act.” (NMSA 59A-32A-1 et seq.).

Direct Actions Against Insurer.

See category 23 Transportation, topic 23.01 Motor Vehicles, subhead Direct Actions.

No-Fault Insurance.

See category 23 Transportation, topic 23.01 Motor Vehicles, subhead No-Fault Insurance.

Copies of Insurance Code may be obtained from Secretary of State.

16.02 SURETY AND GUARANTY COMPANIES:

Surety and guaranty companies are under the supervision of the State Corporation Commission.

Powers.

When authorized to do business, a surety and guaranty company may become surety on any bond. (NMSA 46-6-1).

Forfeiture of Right to Do Business.

A surety and guaranty company forfeits the right to do business in the state upon neglecting or refusing to pay any guarantee when no appeal, writ of error or supersedeas has been taken within 30 days after the rendition of judgment or decree thereon. (NMSA 46-6-4).

Foreign companies must comply with the laws of the state as to foreign corporations (see category 2 Business Organizations, topic 2.03 Corporations), and the laws applicable to domestic surety companies. (NMSA 46-6-1 et seq.).

17 INTELLECTUAL PROPERTY

17.00A STATE OWNERSHIP OF PATENTS AND COPYRIGHTS:

Patent and Copyright Act provides that intellectual property created by state employee within scope of employment or when using state owned facilities or equipment is property of state, save educational institution employees. (NMSA 57-3C-1 et seq.; NMSA 57-3C-3).

17.01 TRADEMARKS AND TRADENAMES:

Trademark Act is intended to provide system of state trademark registration and protection consistent with federal system of trademark registration. (NMSA 57-3B-2).

Any person, firm, partnership, corporation, or other organization may register mark for goods or services of applicant. (NMSA 57-3B-5).

What May Be Used.

Anything may be used unless identical with or similar to one previously registered and subject to other limitations. (NMSA 57-3B-3 and NMSA 57-3B-4).

Registration.

Filed with Secretary of State. Fee is $25. (NMSA 57-3B-5).

Assignment must be in writing. May be recorded with Secretary of State. Fee is $25. (NMSA 57-3B-9).

Protection Afforded.

Registration is good for ten years from date of issuance. May be renewed for similar period subject to certain requirements. (NMSA 57-3B-8).

Infringement.

Unauthorized use is subject to civil action and may be enjoined. (NMSA 57-3B-14 and NMSA 57-3B-16).

Fraudulent Registration.

May be enjoined and subject to damages. (NMSA 57-3B-13 and NMSA 57-3B-16).

Injury to Business Reputation.

Dilution of distinctive quality of mark prohibited; may be enjoined and subject to damages. (NMSA 57-3B-15).

Tradenames.

Application must be signed by the applicant, partner, or officer of corporation or association applying for registration, as well as duly acknowledged and filed with Secretary of State. (NMSA 57-3B-5). Filing fee is $25.

17.02 TRADE SECRETS:

Uniform Trade Secrets Act adopted. (NMSA 57-3A-1 et seq.).

18 LEGAL PROFESSION

18.01 ATTORNEYS AND COUNSELORS:

Rules governing Bar Examinations and Admission to Bar are found at Rule 15-101 et seq.

All persons admitted to the bar must become members of the State Bar Association.

Jurisdiction over Admissions.

Board of Bar Examiners administers rules related to admission. (Rule 15-302, -401).

Eligibility.

Applicant for admission to bar must be: (1) 18 years of age, (2) graduate of formally accredited law school or graduate of any law school if he has practiced law in another state in four of six years preceding application, (3) of good moral character, (4) physically and mentally fit to practice law, (5) in good standing in any other jurisdiction where admitted to practice law, (6) professionally qualified for admission to N.M. Bar, and (7) in compliance with all child and spousal support orders imposed by court of competent jurisdiction. (Rule 15-103).

Registration as Law Student.

None required.

Educational Requirements.

Applicant must be graduate of school fully accredited by American Bar Association unless applicant has been actively engaged in full-time practice of law in foreign state for at least four of six years immediately preceding application. (Rule 15-103).

Petition for Admission.

Applicant must petition in duplicate on prescribed form available from Board of Bar Examiners. Filing deadlines are: Sept. 10 for Feb. exam and Jan. 10 for July exam, except for reexamination applicants, in which case deadlines are Jan. 10 and June 10 respectively. (Rule

15-104).

Application must include: (1) application completed under oath; (2) application fee (see below); (3) copies of both FBI and New Mexico Dept. of Public Safety identification records of applicant; (4) authenticated transcript from ABA accredited law school or additional documents if applicant is not graduate of accredited law school; (5) character and fitness statements from three licensed attorneys from any U.S. jurisdiction certifying that applicant is qualified for admission to bar. (Rule 15-104, -105).

Application fees are: Sum of $450 if applicant graduated from law school within 12 months prior to examination and has not engaged in practice of law; repeat applicants with up to date investigation reports—$100; all others $800. Graduated late fees for filing application after deadline. (Rule 15-105).

Examination.

Conducted by Board of Bar Examiners at such places as board may direct and, unless otherwise announced, commencing on Mon. before last Wed. in Feb. and July. (Rule 15-202). No limit to number of repeat examinations. (Rule 15-106). Multi-State exam and multi-state exam performance are included; Multi-State Professional Responsibility Exam is required but may be taken anywhere. (Rule 15-202, -204). No provision for accepting transfer of Multi-State scores from other jurisdictions. Areas of concentration which may be covered include: (1) Six multistate subjects; constitutional law, contracts and sales, criminal law and procedure, evidence, real property and torts; (2) administrative law; (3) agency; (4) business entities, including corporations and partnerships; (5) equitable remedies; (6) family law, including New Mexico community property; (7) federal jurisdiction and procedure; (8) Indian law, including subjects such as federal Indian law, criminal and civil jurisdiction in Indian country and Indian child welfare act under state and federal law; (9) secured transactions; and (10) wills, estates and trusts. (Rule 15-203).

Admission without Examination.

All applicants must take examination. (Rule 15-201).

Clerkship.

No requirement of serving clerkship a specified time before admission.

Admission Pro Hac Vice.

Attorneys of other states may assist resident counsel or otherwise participate with resident counsel in any action or proceeding. (NMSA 36-2-27; Rule 1-089.1).

Licenses.

No applicant recommended will be granted license until applicant has submitted certification by three members of bar of any state that applicant is morally, mentally and physically qualified for admission. (Rule 15-104). Licenses granted only to applicants who fulfill all requirements and pass examination. Attorneys from other states or District of Columbia may apply for limited non-renewable one year license for purpose of representing public defender clients or any governmental entity. (Rule 15-301.1). License entitles applicant to practice law in all courts of state. (Rule 15-302).

Fees.

Set annually by Board of Commissioners. Amount for new admittees prorated for number of full months remaining in calendar year. (Rule 24-102).

Continuing Legal Education.

Rules for Minimum Continuing Legal Education. 12 hours required, with at least one hour devoted to ethics and one hour devoted to professionalism. (Rule 18-201). Excess credits may be carried over, subject to limitations. (Rule 18-201). Regulations Implementing Continuing Education Requirements for State District and Appellate Court Judges. (Rule 18, App. A). See also Rules Governing Judicial Education. (Rule 25-101 to -104).

Privileges.

No unusual privileges granted.

Disabilities.

Attorneys cannot be sureties in any actions or proceedings in which they are of counsel except attorney may be jointly and severally liable with client for court reporting costs. (NMSA 36-2-13 and 13.1). No attorney who is partner or father, son, or brother of district attorney may appear in any action in which such district attorney is representing state as adverse party in such action. (NMSA 36-2-20). No district attorney or assistant may engage in private practice. (NMSA 36-1-4).

Liabilities.

For cost of actions, see category 5 Civil Actions and Procedure, topic 5.08 Costs.

Under certain circumstances (e.g. statutory beneficiaries), attorneys may have duty to non-client and can be held liable for breach of that duty. (120 N.M. 768, 907 P.2d 172).

Attorney may be liable for malpractice if his advice falls below standard of care for attorney of ordinary skill and capacity even though advice is not technically inaccurate. (121 N.M. 52, 908 P.2d 745).

Compensation.

Attorney fees not allowable unless fixed by statute or contract. Allowed by statute in following cases: (1) If personal representative defends or prosecutes any proceeding in good faith, he is entitled to receive from estate his necessary expenses and disbursements including reasonable attorneys' fees. (NMSA 45-3-720). Compensation of personal representatives and attorney has first priority against estate. (NMSA 45-3-805); (2) attorney for assignee of creditors (NMSA 56-9-52); (3) at court's discretion in cases involving domestic relations (NMSA 40-4-7); (4) attorney for garnishee or for plaintiff in garnishment proceeding (fee limited) (NMSA 35-12-16); (5) attorney for employee under Workmen's Compensation Law, in some circumstances (NMSA 52-1-54); (6) attorney for prevailing party foreclosing mechanic's and materialman's lien (NMSA 48-2-14); (7) attorney for prevailing party suing to recover on open account (NMSA 39-2-2.1); (8) attorney in parentage suit pursuant to court's discretion (NMSA 40-11-16) (as of this revision, NMSA 1978, § 40-11-16 has been repealed and replaced by 2009 Laws of New Mexico c. 215 § 19, effective 01/01/10); (9) attorney for prevailing insured suing unreasonable insurer (NMSA 39-2-1); (10) attorney for plaintiff against unauthorized foreign insurer (fee limited) (NMSA 38-1-10); (11) attorney for claimant under Occupational Disease Disablement Law, in some circumstances (NMSA 52-3-47); (12) attorney for prevailing debtor in certain deficiency actions (NMSA 39-2-2); (13) attorney for prevailing party in certain unfair trade practice cases (NMSA 57-12-10); (14) attorney for plaintiff against parent or guardian of minor who willfully or maliciously destroys property or injures person (NMSA 32A-2-27); (15) under certain conditions, court may order payment of guardian ad litem's attorney's fees. (NMSA 32A-1-19).

Lien.

No statutory provision. Priority of first attorney's lien over second attorney's lien to be resolved by trial court considering reasonableness of fees. (122 N.M. 439, 925 P.2d 1201; overruled in 1998-NMCA-079, 959 P.2d 973 [to extent it states that fee agreement must state explicit charging lien to be effective]).

Disbarment or Suspension.

Grounds: An attorney may be disbarred or suspended by the Supreme Court for any of the following causes arising after his admission to practice: (1) His conviction of felony or misdemeanor involving moral turpitude in which case the record of conviction is conclusive; (2) wilful disobedience or violation of an order of the court requiring him to do or forbear an act connected with or in the course of his profession and any violation of the oath taken by him or of his duty as such attorney; (3) corruptly or wilfully and without authority appearing as attorney for a party to an action or proceeding; (4) lending his name to be used as an attorney by another party who is not an attorney; (5) failing or refusing to account for money of his client coming into his hands as such attorney; (6) for any other act to which such a consequence is by law attached. (NMSA 36-2-18).

May be reinstated after two years has passed since disbarment or suspension. (NMSA 36-2-23).

Unauthorized Practice.

Fine not to exceed $500 or imprisonment for not more than six months, or both, for practicing or holding oneself out as an attorney without being duly licensed to practice. (NMSA 36-2-28).

Professional Corporation.

See category 2 Business Organizations, topic 2.03 Corporations, subhead Professional Corporations.

Specialty Certification Requirements.

Pay required fee, malpractice insurance, demonstrate knowledge of law and competence in specialty, NM license in good standing, show substantial involvement in specialty, continuing legal education and peer review. (Rule 19-201, et seq.).

Attorney Ethics.

American Bar Association Model Rules of Professional Conduct adopted, with modifications. (Rule 16-101 to -805).

Judicial Performance Evaluations.

Commission and procedures established for evaluating judges standing for retention, releasing of information about judicial performance to public prior to retention, and interim evaluations. (Rule 28-101 to -401).

19 MINERAL, WATER AND FISHING RIGHTS

19.01 MINES AND MINERALS:

New Mexico Mining Act adopted. (NMSA 69-36-1 et seq.). Creates Mining Commission and sets forth its regulatory powers. (NMSA 69-36-6, -7).

Energy, Minerals and Natural Resources Department has general supervisory power over mines and mining. (NMSA 9-5A-4). Report of mining operations must be furnished to department each year for previous calendar year. (NMSA 69-11-2).

Operation of Mines.

Indemnity agreements for negligence pertaining to any well for oil, gas or water or mine for any mineral are generally void. (NMSA 56-7-2). Underground and surface coal mining subject to specific regulations regarding reclamation (NMSA 69-25A-1 et seq. [delayed repeal until July 1, 2014]), as are abandoned mines which are also subject to reclamation plan (NMSA 69-25B-1 et seq.). Mine dewatering subject to specific regulation by State Engineer. (NMSA 72-12A-1 et seq.).

Safeguarding of Employees.

State mine inspector has power to give written notice that mine is unsafe, inspect and pass on adequacy and safety of hoisting apparatus, order tests on hoisting apparatus and arrange uniform system of mine bell signals. (NMSA 69-5-7).

Inspection of Mines.

Inspection and control of mines is under direct supervision of the State Inspector of Mines, who inspects and passes upon adequacy and safety of all hoisting apparatus; may require additional safety precautions; may demand test of safety catches or clutches of same once in every three months or whenever he may believe same to be defective; arranges uniform system of mine bell signals, and makes annual report to Governor. (NMSA 69-5-7, NMSA 69-8-5).

Mining claims bearing gold, lead or other valuable vein or lode deposits, may be acquired by: (1) Distinctly marking boundaries at each corner so they may be readily traced; (2) posting written notice conspicuously on location, including name of locator, intention of locating claim, and legal subdivision or metes and bounds description of claim; (3) written notice of location containing identifying information including map, narrative or sketch must be recorded in office of county clerk within 90 days after location made and notice placed on claim. (NMSA 69-3-1). Must report discovery of water to State Engineer and directors of state bureau of geology. (NMSA 69-3-6).

Leases.

Commissioner of Public Lands may issue oil and gas leases and leases for development, etc., of potassium, sodium, phosphorus, carbon dioxide gas and other minerals on any state lands. (NMSA 19-8-4, NMSA 19-10-1, -2). Oil and gas leases may be made for five years and as long thereafter as oil and gas in paying quantities shall be produced. (NMSA 19-10-3, 4). Lease forms at NMSA 19-10-4.1 to -4.3. Mineral leases may be made for three years and as long thereafter as minerals in paying quantities shall be produced, along with rentals. (NMSA 19-8-18). Application for lease to be made on forms prescribed by Commissioner. (NMSA 19-7-2). State reserves option to purchase any or all oil, gas, or minerals produced from leased land. (NMSA 19-14-1). Commissioner of Public Lands as to any oil or gas lease issued by him is authorized to enter into agreements whereby state is compensated for drainage of state lands by wells required to be offset under such leases. (NMSA 19-10-52). Commissioner of Public Lands may suspend lease on mineral lands for up to five years under certain conditions, including if market conditions require or if conditions preventing safe mining practices exist. (NMSA 19-8-8, NMSA 19-8-19.1).

Oil and Gas.

General supervisory powers for conservation of oil and gas and prevention of waste of potash are vested in oil conservation commission and division. (NMSA 70-2-6). Commissioner of Public Lands is authorized to execute oil and gas leases on state lands. (NMSA 19-10-1 et seq.). Statutory unitization provided under some circumstances. (NMSA 70-7-1 et seq.). Common purchasers of oil and gas are prohibited from discriminating in purchases. (NMSA 70-2-19). Gathering Line Land Acquisition Act, governs acquisition of easements for purpose of constructing natural gas or petroleum gathering line. (NMSA 70-3A-1 et seq.). Petroleum Products Standards Act enacted to guarantee adequate quality and quantity standards for petroleum products through various inspection, sampling, testing, and enforcement measures.

(NMSA 57-19-25, -26).

Geothermal Resources.

Oil Conservation Commission authorized to regulate geothermal resources. (NMSA 71-5-1 et seq.).

Taxes.

Mineral properties are assessed on basis of productivity and whether property is owned privately or by government. Value for tax purposes of productive mineral property is amount equal to 300% of annual net production value with exceptions of potash and uranium. (NMSA 7-36-23[C], -23[D]). Value for tax purposes of all nonproductive mineral property is computed on per acre basis based on recent bonus bids. (NMSA 7-36-23[E]). Totals for five year production are averaged except that owner may elect to have value computed on basis of year immediately preceding tax year only. (NMSA 7-36-23). Value for tax purposes of production potash mineral property is 50% of market value of production for prior year. (NMSA 7-36-24). Value for tax purposes of productive uranium mineral property is annual net production value. (NMSA 7-36-25).

Severance tax imposed on taxable value of natural resources as follows: Potash, 2½%; copper, ½%; timber, pumice, gypsum, sand, gravel, clay, fluorspar, and other nonmetallic minerals, lead, zinc, thorium, molybdenum, manganese, rare earth and other metals, 1/8%; gold and silver, 1/5%. (NMSA 7-26-5).

Tax on coal measured by quantity severed and saved and is incurred on sale, interstate transportation or consumption. (NMSA 7-26-6). Taxes include base tax and, in some circumstances, additional surtax. (NMSA 7-26-6, -6.2). Base tax rates are 57¢ per short ton of surface coal and 55¢ per short ton of underground coal. (NMSA 7-26-6). Surtax rates are currently 61¢ for surface coal and 59¢ for underground coal. (NMSA 7-26-6, -6.2).

Tax on uranium measured by full sales price per pound of quantity of U3O8 contained and recoverable in severed and saved uranium bearing material equal to 3.5% of taxable value. (NMSA 7-26-7).

Tax on oil and gas measured by volume of severed and sold products as follows: for natural gas, oil, other liquid hydrocarbons removed from natural gas at or near wellhead, carbon dioxide, helium, and non-hydrocarbon gases, 3¾% taxable value, except for certain specified projects and stripper well properties. (NMSA 7-29-4).

Conservation tax is levied against all severed and sold oil, natural gas, liquid hydrocarbon, uranium, coal, carbon dioxide, and geothermal energy at, generally, rate of.19% of taxable value of sold products. (NMSA 7-30-2; -4).

Privilege tax is levied against business of severing oil, liquid hydrocarbons removed from natural gas at or near wellhead, carbon dioxide, helium, and non-hydrocarbon gases at rate of 3.15% and for natural gas at rate of 4% of taxable value of such product except for certain specified projects and stripper well properties. (NMSA 7-31-4). Privilege tax also levied upon business of processing natural gas at variable rate. (NMSA 7-33-4).

Resources Excise Tax.

Excise tax imposed upon severer of potash ½%, molybdenum 1/8%, and all other natural resources ¾% of taxable value of resource. (NMSA 7-25-4).

Processors Tax.

Excise tax imposed upon processor of timber 3/8%, potash and molybdenum 1/8%, and all other natural resources ¾% of taxable value of resource. (NMSA 7-25-5).

Ad Valorem Tax.

Imposed on assessed value of oil, natural gas, liquid hydrocarbons, carbon dioxide, helium or non-hydrocarbon gas severed and sold from each production unit. (NMSA 7-32-2, -4). Also on value of equipment at each production unit. (NMSA 7-34-4). Also on copper mineral property when 75% or more of saleable mineral produced is copper. (NMSA 7-39-1 et seq.). Property subject to these taxes is exempt from property tax. (NMSA 7-36-7). See category 22 Taxation, topic 22.15 Property Taxes.

Gross Receipts Tax.

Some receipts relating to sale, processing, and severance of oil, natural gas, or liquid hydrocarbons are exempt from gross receipts tax. (NMSA 7-9-33, -34, -35, -36). See category 22 Taxation, topic 22.03 Business Taxes, subhead State Gross Receipts Tax.

19.01A WATER RIGHTS:

Water rights and land ownership are distinct property rights unless water beneficially used on that land for irrigation purposes. (NMSA 72-1-2, NMSA 72-5-22; 1996-NMCA-103, 925 P.2d 9).

20 MORTGAGES

20.01 CHATTEL MORTGAGES:

Covered by Uniform Commercial Code—Secured Transactions. (NMSA 55-9-101 et seq.).

Farm Products.

Covered by special filing provisions in addition to applicable UCC filing requirements. (NMSA 55-9-201[e], -301 et seq.; NMSA 56-13-1 et seq.).

Filing.

See category 3 Business Regulation and Commerce, topic 3.09 Commercial Code, subheads Filing Fees and Filing Places.

Public Utilities, Railroads.

Covered by special filing provisions in addition to applicable U.C.C. filing requirements. (NMSA 55-9-201[e], -301 et seq.; NMSA 62-13-1 et seq.).

What May Be Mortgaged.

Uniform Commercial Code, Secured Transactions, covers most kinds of personal property and fixtures including goods, documents, negotiable instruments, general intangibles, payment intangibles, chattel paper, mortgages, accounts, contract rights, farm products, commercial tort claims, healthcare insurance receivables, software, letters of credit, and extracted collateral. (NMSA 55-9-102).

Taxation.

No special provisions.

Acknowledgments not required except for almost any document to be recorded in county real estate records. (NMSA 14-8-4). Acknowledgment required for mortgages given by public utility or railroads and covering real or personal property situated in more than one New Mexico county. (NMSA 62-13-8).

Forms.

See end of Digest for forms in general use.

20.02 COLLATERAL SECURITY:

See category 8 Debtor and Creditor, topic 8.15 Pledges.

20.03 MORTGAGES OF PERSONAL PROPERTY:

See NMSA 55-9-102.

20.04 MORTGAGES OF REAL PROPERTY:

A mortgage passes no title, but merely creates a lien. (14 N.M. 300, 93 P. 706). Rights and duties under real estate contract are different than under mortgage. (1998-NMCA-043, 956 P.2d 824; NMSA 42-7-1 et seq.).

Acceleration.

Enforceable in both law and equity. (79 N.M. 404, 444 P.2d 589).

Due on Sale Clause.

Generally enforceable, with certain exceptions. (NMSA 48-7-15 et seq.).

Execution.

Mortgages are executed like deeds of conveyance. (NMSA 47-1-5; NMSA 47-1-29). Mortgages securing promissory notes, are customarily used.

Mortgage Loan Companies.

In order to transact business, need application and registration certificate. (NMSA 58-21-3).

Recording.

Mortgages shall be recorded with county clerk in county where real property is situated. (NMSA 14-9-1). Unrecorded mortgage does not affect title or interest in real property of third party without constructive knowledge of unrecorded mortgage. (NMSA 14-9-3; 37 N.M. 606, 27 P.2d 59). Mortgage must be acknowledged to be recorded. (NMSA 14-8-4). Recording in proper county of mortgages, etc. to secure payment of bonds by corporations distributing electricity, natural gas, and providing telephone and telegraph services constitutes notice of mortgage in that county. (NMSA 62-13-6). Mortgages, deeds of trust, etc., made to secure payment of bonds by any public utility, telephone company, or railroad, and covering property located in more than one county are to be filed with Secretary of State. (NMSA 62-13-8). (NMSA 62-13-1 et seq.).

Recording Fees.

$5 first page and $2 each additional page, plus “equipment recording fee” of not more than $4 for each instrument, that is determined by each county clerk. (NMSA 14-8-12.2).

Taxes.

No special taxes on mortgages or on recording.

Trust Deeds.

Only deed of trust created under Deed of Trust Act (NMSA 48-10-1 et seq.) is entitled to benefits given under Act, including non-judicial foreclosure. Deed also must conform with NMSA 47-1-39 NMSA 1978.

Future Advances.

May be secured by mortgages. Lien of mortgage has priority as to all advances, obligatory or discretionary, up to maximum amount stated in mortgage. (NMSA 48-7-9).

Priorities.

Mortgage has priority from time of recording. (NMSA 48-7-9). Mechanics' liens are superior if mortgage unrecorded at time of commencement of construction. (NMSA 48-2-5).

Insurance.

For single family homes, mortgagor may require proceeds payable to mortgagee to go into escrow account to repair or replace property provided it will restore value of property to balance remaining on secured obligation. (NMSA 48-7-10). For installment loans by certain lenders, lender may charge for actual insurance cost, but insurance shall be written by company licensed in state. Lender must not require insurance to be provided by any particular company as condition precedent to loan. If borrower fails to maintain insurance, it can be purchased by lender and charged to borrower. (NMSA 58-7-6).

Subordination Agreements.

No statutory provisions.

Assignment.

Must be recorded to be effective against mortgagor without actual notice or knowledge of assignment. Otherwise, payment to assignor will discharge mortgage. (At time of this revision, NMSA 1978, § 48-7-2 has been repealed and replaced by 2009 NM Laws c. 234.)

Release.

Partial release of property permitted. (NMSA 47-1-44).

Satisfaction.

On satisfaction of a debt secured by conveyance, it is the duty of the mortgagee, trustee, or assignee of such debt, to cause full satisfaction thereof to be entered with the recorder of the county where the instrument is recorded that secures the debt. (NMSA 48-7-4). If mortgagee dies, leaving minor heirs, executor or administrator, on payment of debt to estate, may release property. (NMSA 48-7-6).

Discharge.

Governed by statute. (NMSA 48-7-4).

Foreclosure.

Must be in judicial proceeding unless as allowed in Deed of Trust Act. (NMSA 48-7-7; NMSA 48-10-10). Sale may not be held until 30 days after entry of judgment or decree of foreclosure. (NMSA 39-5-17). Protection is afforded mortgagor for growing crops. (NMSA 39-5-16). Notice of sale must be published in newspaper in county where real property is located for four weeks with last publication at least three days prior to sale and also by posting six public notices in county. (NMSA 14-11-10; NMSA 39-5-1). Notice must include legal description and simple description. (NMSA 14-11-10.1). Intentional failure to notify junior lienholder of foreclosure judgment and sale does not foreclose junior lien. (111 N.M. 458, 806 P.2d 1048). Debtor may claim homestead exemption in court-approved sale of property to third party purchaser during foreclosure. (1998-NMCA-008, 124 N.M. 405, 951 P.2d 1066).

Deficiency Judgments.

No specific statutory provisions, but such judgments are normally granted. Provision is made for deficiency judgments when deed of trust is given as security. (NMSA 48-10-17). Under Deed of Trust Act, separate civil action may be commenced to recover deficiency judgment, subject to subsections D and E of NMSA 48-10-17. (NMSA 48-10-17). Otherwise, proceeds of sale are deemed to be in full satisfaction of debt. (NMSA 48-10-17). Additionally, deed of trust not encumbering real estate occupied by low-income household may, by express language, validly prohibit recovery of any balance due after trust real estate is sold or after deed of trust is foreclosed in manner provided by law for foreclosure of mortgages on real estate. (NMSA 48-10-17). Also, deficiency judgments prohibited under deed of trust encumbering real estate occupied by low-income household. (NMSA 48-10-17).

Moratorium.

None.

Redemption.

Property sold under judgment or decree of court may be redeemed within nine months by paying to purchaser amount paid by him with 10% interest from date of purchase, plus any taxes, interest, and penalties, plus payments made to satisfy any prior lien or mortgage paid by purchaser, with 10% interest per annum from date of payment. (NMSA 39-5-18). Parties may contract for shorter redemption period, not less than one month, but court, upon sufficient showing before judgment that redemption will be effected, can increase period to not more than nine months. (NMSA 39-5-19). Prior judgment liens revive and reattach to foreclosed property after redemption by mortgagor, but not to foreclosure property redeemed by mortgagor's assignee. (117 N.M. 7, 868 P.2d 652). No redemption rights for trustee's sale pursuant to Deed of Trust Act, except as provided for junior encumbrances in certain circumstances. (NMSA 39-5-18). However, after sale of trust real estate pursuant to NMSA 48-10-13, trust real estate may be redeemed by beneficiary, or by any junior encumbrancer, within nine months from date of sale. (NMSA 48-10-16). However, conflict exists with NMSA 48-10-14(B) providing that conveyance shall be without right of redemption.

Farm Lands.

Where suit is brought after Mar. 15 of any year, mortgagor cannot be dispossessed from farm lands until crop is harvested, unless mortgage provides otherwise. (NMSA 39-5-16).

Forms.

The following short forms may be used (NMSA 47-1-44):

Forms

Mortgage:

. . . ., for consideration paid, grant. . .. . to. . . . ., whose address is. . .. . the following described real estate in. . .. . County, New Mexico:

(description)

with mortgage covenants.

This mortgage secures the performance of the following obligation:

(Here attach copy of or summarize note or other obligation)

and is upon the statutory mortgage condition for the breach of which it is subject to foreclosure as provided by law. The amount specified for insurance as provided in the statutory mortgage condition is $. . . . . . and the hazard. . . . . to be insured against. . . . fire. . . . .

WITNESS. . . . . . hand. . . . . and seal. . .. . this. . . . . day of. . . . . ., (year). . . . .

..........(Seal)

(Here add acknowledgment(s))

Deed of Trust:

. . . ., for consideration paid, grant. . .. . to. . . . ., whose address is. . . . ., as trustee for. . . . ., whose address is. . . . ., beneficiary, the following described real estate in. . .. . county, New Mexico:

(description)

with mortgage covenants.

This deed of trust secures the performance of the following obligation:

(Here attach copy of or summarize note or other obligation)

and is upon the statutory mortgage condition for the breach of which it is subject to foreclosure as provided by law. The amount specified for insurance as provided in the statutory mortgage condition is $. . . . . ., and the hazard. . . . . to be insured against. . . . . fire. . . . .

WITNESS. . .. . . hand. . .. . and seal. . .. . this. . . . . day of. . . . . ., (year). . . . .

..........(Seal)

(Here add acknowledgment(s))

Release of Mortgage:

. . . ., mortgagee. . . . . under a certain mortgage executed by. . .. ., on the. . . . . day of. . . . . ., (year). . . . ., and recorded in Book. . . . . ., page. . . . . . of the records of. . . . . county, New Mexico, do. . . . . hereby discharge all of the real estate mentioned in said mortgage from the lien and operation thereof.

WITNESS. . . . . . hand. . . . . and seal. . . . . this. . . . . day of. . . . . ., (year). . . . .

..........(Seal)

(Here add acknowledgment(s))

Partial Release of Mortgage:

. . . ., mortgagee. . . . . under a certain mortgage executed by. . . . . on the. . . . . . day of. . . . . ., (year). . . . . and recorded in Book. . . . . ., page. . . . . . of the records of. . . . . county, New Mexico, do. . . . . hereby discharge the following portion only of the real estate described in said mortgage:

(description)

from the lien and operation thereof.

WITNESS. . . . . . hand. . . . . and seal. . . . . this. . . . . day of. . . . . ., (year). . . . .

..........(Seal)

(Here add acknowledgment(s))

Release of Deed of Trust:

. . . ., trustee under a certain deed of trust executed by. . . . . on the. . . . day of. . . . . ., (year). . . . ., and recorded in Book. . . . . ., page. . . . . . of the records of. . . . . county, New Mexico, does hereby at the written request of the beneficiary of said deed of trust, discharge all of the real estate mentioned in said deed of trust from the lien and operation thereof.

WITNESS. . . . . . hand. . . . . and seal. . . . . this. . . . . day of. . . . . ., (year). . . . .

..........(Seal)

(Here add acknowledgment(s))

Partial Release of Deed of Trust:

. . . ., trustee under a certain deed of trust executed by. . . . . on the. . . . day of. . . . . ., (year). . . . . and recorded in Book. . . . . ., page. . . . . . of the records of. . . . . county, New Mexico does hereby, at the written request of the beneficiary of said deed of trust discharge the following portion only of the real estate described in said deed of trust:

(description)

from the lien and operation thereof.

WITNESS. . . . . . hand. . . . . and seal. . . . . this. . . . . day of. . . . . ., (year). . . . .

..........(Seal)

(Here add acknowledgment(s))

Assignment of Mortgage:

. . . ., holder. . . . . of a mortgage from. . . . . to. . . . . dated. . . . . and recorded in Book. . . . . ., page. . . . . . of the records of. . . . . county, New Mexico, hereby assign. . . . . said mortgage and the obligation secured thereby to. . . . ., whose address is. . . . .

WITNESS. . . . . . hand. . . . . and seal. . . . . this. . . . . day of. . . . . ., (year). . . . .

..........(Seal)

(Here add acknowledgment(s))

Assignment of Deed of Trust:

. . . ., Beneficiary. . . . . . of a deed of trust from. . . . . to. . . . ., trustee for the undersigned dated. . . . . and recorded in Book. . . . . ., page. . . . . of the records of. . . . . county, New Mexico, hereby assign. . . . . the beneficial interest under said deed of trust and the obligations secured thereby to. . . . ., whose address is. . . . .

WITNESS. . . . . . hand. . . . . and seal. . . . . this. . . . . day of. . . . . ., (year). . . . .

..........(Seal)

(Here add acknowledgment(s))

For meaning of word “grant” see NMSA 47-1-32. For meaning of “mortgage covenants”, “statutory mortgage condition”, and “assign” see the extensive definitions in NMSA 47-1-40, -41, -43.

21 PROPERTY

21.01 ABSENTEES:

Uniform Probate Code, with significant omissions and amendments, adopted. (NMSA 45-1-101 et seq.).

Uniform Unclaimed Property Act (1995 Act) adopted. (NMSA 7-8A-1 to -31).

See also categories 3 Business Regulation and Commerce, topic Banks and Banking, subhead Unclaimed Deposits; Estates and Trusts, topic Descent and Distribution, subhead Escheat.

Nonresident Incompetent.

If no local conservator has been appointed, foreign conservator may file copies of his appointment and bond with district court where protected person's property is located, and thereafter act as local conservator. (NMSA 45-5-432).

Care of Property.

Court may appoint a conservator for estate of person detained by foreign power or who has disappeared. (NMSA 45-5-401). Bond may be required by court. (NMSA 45-5-411). Inventory and records of administration are required. (NMSA 45-5-418). Petitioners must give notice of conservatorship proceedings to others interested including person to be protected and certain relatives. (NMSA 45-5-405).

Process Agent.

See category 5 Civil Actions and Procedure, topic 5.20 Process.

Voting.

Absentee residents already registered, and residents covered by Federal Voting Assistance Act of 1955 even though not previously registered may vote by absentee ballot for all candidates and on all statewide issues (NMSA 1-6-1 to -25), in municipal elections (NMSA 3-9-3), and in irrigation district elections (NMSA 73-10-13). Absentee residents covered by Federal Overseas Citizens Voting Rights Act of 1975, even though not previously registered, may vote by absentee ballot for federal candidates in any federal election in New Mexico. Absentee ballots are obtainable from clerk of county of residence. (NMSA 1-6-4).

Escheat.

Uniform Unclaimed Property Act (1995 Act) adopted. (NMSA 7-8A-1 to -31). See categories 3 Business Regulation and Commerce, topic Banks and Banking, subhead Unclaimed Deposits; Estates and Trusts, topic Wills, subhead Unclaimed Legacies.

21.02 ADVERSE POSSESSION:

Character of Possession.

The party claiming adversely must claim under a writing describing the land so claimed and purporting to give him title thereto. (NMSA 37-1-22). Extrinsic evidence admissible to cure inadequacies in deed description to establish adverse possession. (108 N.M. 225, 770 P.2d 870). Boundary line may be established under doctrine of acquiescence. (95 N.M. 143, 619 P.2d 819). Doctrine of acquiescence not applicable to government land. (107 N.M. 96, 752 P.2d 1112). Possession may be exclusive even if land subject to nonpossessory rights; possession need not be absolutely exclusive if it is kind expected of owner under circumstances. (107 N.M. 435, 759 P.2d 1017).

Duration of Possession.

The prescriptive period for adverse possession is ten years, and to constitute adverse possession there must be an actual and visible appropriation of land, commenced and continued under a color of title and claim of right inconsistent with and hostile to the claim of another, and the party claiming adverse possession, his predecessors or grantors must have continuously paid all the taxes during the prescriptive period. (NMSA 37-1-22).

Land Grants.

Adverse possession for ten years, of lands granted by Spain, Mexico or the United States, entitles the persons so holding to a good and indefeasible title in fee simple subject to the rights of persons suffering disabilities. This provision as to land grants gives affirmative relief in the nature of a fee simple title. Persons claiming such possession or their predecessors must have paid all taxes during ten-year period. (NMSA 37-1-21).

Easements.

Same rules apply as to fee title. (56 N. M. 184, 241 P.2d 1209). Private prescriptive easement cannot be established over land owned by Federal government during prescriptive period. (108 N.M. 552, 775 P.2d 754).

Disabilities.

Persons have one year after the termination of disability (i.e., persons who are imprisoned, of unsound mind, or under age of majority) to commence action but no cumulative disability prevents bar of adverse possession and such disabilities must have existed when cause of action first accrued. (NMSA 37-1-22).

21.03 [RESERVED]

21.04 CONVEYANCES:

See topic 21.06 Deeds.

21.05 CURTESY:

Abolished.

21.06 DEEDS:

See topic 21.16 Real Property; categories 8 Debtor and Creditor, topic Homesteads; and Family, topic Husband and Wife, for types of estates.

Execution.

Deeds and other instruments affecting land must be in writing and signed. (NMSA 47-1-5). Seals are unnecessary. (NMSA 47-1-6). Filed and recorded instruments must be duly acknowledged to be considered of record. (NMSA 14-8-4). Husband and wife must join in all deeds of community property, except from one spouse to other. (NMSA 40-3-13). See also category 14 Family, topic 14.09 Husband and Wife. Witnesses are required only in case signature is by mark.

Recording.

In order to affect third persons without actual notice, a deed must be recorded in the office of the clerk of each county in which the land conveyed, or any part thereof, is situated. (NMSA 14-9-1, -3). See also category 10 Documents and Records, topic 10.04 Records.

Recording Fees.

Generally, $5 first page and $2 each additional page. (NMSA 14-8-12.2).

Operation and Effect.

The words “bargained and sold” used in conveyances of hereditary real estate, unless expressly restricted, are deemed to warrant: that grantor is possessed of irrevocable possession in fee simple to property so conveyed, that property is free from all encumbrances made or suffered to be made by grantor or any person claiming under him, and that, for greater security of grantee, his heirs and assigns, suits may be instituted same as if conditions were stipulated in said conveyance. (NMSA 47-1-14).

Description of real estate by reference to maps, plats, deeds or other instruments of record in county where such real estate is located is sufficient, provided time and place of recordation of instrument referred to is stated. (NMSA 47-1-46).

Taxes.

No taxes on deeds or recording.

Forms.

The following are statutory short forms (NMSA 47-1-44):

Forms

Warranty Deed:

. . . . for consideration paid, grant. . . . . . to. . . . . whose address is. . . . . the following described real estate in. . . . . county, New Mexico:

(description)

with warranty covenants.

WITNESS. . . . . . hand. . . . . and seal. . . . . this. . . . . day of. . . . . ., (year). . . . .

..........(Seal)

(Here add acknowledgment(s))

Warranty Deed (Joint Tenants):

. . . ., for consideration paid, grant. . . . . . to. . . . ., whose address is. . . . ., and. . . . ., whose address is. . . . . as joint tenants the following real estate in. . . . . county, New Mexico:

(description)

with warranty covenants.

WITNESS. . . . . . hand. . . . . and seal. . . . . this. . . . . day of. . . . . ., (year). . . . .

..........(Seal)

(Here add acknowledgment(s))

Special Warranty Deed:

. . . ., for consideration paid, grant. . . . . . to. . . . ., whose address is. . . . ., the following described real estate in. . . . . county, New Mexico:

(description)

with special warranty covenants.

WITNESS. . . . . . hand. . . . . and seal. . . . . this. . . . . day of. . . . . ., (year). . . . .

..........(Seal)

(Here add acknowledgment(s))

Quitclaim Deed:

. . . ., for consideration paid, quitclaim. . . . . to. . . . ., whose address is. . . . ., the following described real estate in. . . . . county, New Mexico:

(description)

WITNESS. . . . . . hand. . . . . and seal. . . . . this. . . . . day of. . . . . ., (year). . . . .

..........(Seal)

(Here add acknowledgment(s))

Quitclaim Deed (Joint Tenants):

. . . ., for consideration paid, quitclaim. . . . . to. . . . ., whose address is. . . . ., and. . . . ., whose address is. . . . ., as joint tenants the following described real estate in. . . . . county, New Mexico:

(description)

WITNESS. . . . . . hand. . . . . and seal. . . . . this. . . . . day of. . . . . ., (year). . . . .

..........(Seal)

(Here add acknowledgment(s))

In conveyance of real estate word “grant” shall be sufficient word of conveyance without use of words “give, bargain, sell and convey” and no covenant shall be implied from use of word, “grant.” (NMSA 47-1-32). In conveyance of real estate, words, “warranty covenants” shall have full force, meaning and effect of following words: “the grantor for himself, his heirs, executors, administrators and successors, covenants with the grantee, his heirs, successors and assigns, that he is lawfully seized in fee simple of the granted premises; that they are free from all former and other grants, bargains, sales, taxes, assessments and encumbrances of what kind and nature soever; that he has good right to sell and convey the same and that he will, and his heirs, executors, administrator and successors shall warrant and defend the same to the grantee and his heirs, successors and assigns forever against the lawful claims and demands of all persons.” (NMSA 47-1-37). In conveyance of real estate, words “special warranty covenants” shall have full force, meaning and effect of following words: “the grantor for himself, his heirs, executors, administrator and successors, covenants with the grantee, his heirs, successors and assigns that the granted premises are free from all encumbrances made by the grantor, and that he will, and his heirs, executors, administrators and successors shall warrant and defend the same to the grantee and his heirs, successors and assigns forever against the lawful claims and demands of all persons claiming by, through or under the grantor, but against none other.” (NMSA 47-1-38).

21.07 DEEDS OF TRUST:

See category 20 Mortgages, topic 20.04 Mortgages of Real Property.

21.08 DOWER:

Abolished.

21.09 ESCHEAT:

See topic 21.01 Absentees, subhead Escheat; categories 3 Business Regulation and Commerce, topic Banks and Banking, subhead Unclaimed Deposits; Estates and Trusts, topic Descent and Distribution, subhead Escheat.

21.10 LANDLORD AND TENANT:

Uniform Owner-Resident Relations Act (NMSA 47-8-1 to -52) governs rentals of dwelling units. Inequitable rental provisions not enforced. (NMSA 47-8-12). Agreements to waive rights not enforceable. (NMSA 47-8-16). Security deposit cannot be greater than month's rent if term is less than year. (NMSA 47-8-18[A][2]). Interest at passbook rate must be paid if deposit is more than month's rent. If deposit is not returned in full, its application must be itemized, and deposits cannot be retained for normal wear and tear. (NMSA 47-8-18[C]). Obligations of owner to maintain premises are detailed, and owner may arrange with resident to perform obligations of owner, but any such arrangement will not serve to diminish owner's obligations or allow owner to evict resident for material breach. (NMSA 47-8-20). Obligations of renter delineated. (NMSA 47-8-22). Owner can enter unit only upon consent of renter, which must be provided for inspection, emergency, abandonment, or court order. (NMSA 47-8-24). If owner breaches, renter may terminate lease or reasonably abate rent if notice of breach is given. (NMSA 47-8-27.1, -27.2). Renter's damages can be asserted as counterclaim in owner's action for rent or possession for nonpayment. (NMSA 47-8-30). In case of fire or casualty substantially impairing use of dwelling, renter may vacate upon notice, in which case rental agreement terminates as of date of vacating, or remain subject to fair rent of damaged structure, if continued rent is lawful. (NMSA 47-8-31). All remedies are available to owner upon breach by renter if owner gives renter notice of breach and allows cure. (NMSA 47-8-33). Owner cannot retaliate against renter who organizes tenants or complains to government, provided that renter is in compliance with rental agreement and Act. (NMSA 47-8-39). However, Act does not bar action by owner in retaliation for resident activity not specifically protected by Act. (1998-NMCA-094, 963 P.2d 542). Either party may seek writ of restitution in proper case. (NMSA 47-8-46).

Uniform Commercial Code Art. 2A.

Adopted. (NMSA 55-2A-101 et seq.).

Kinds of Tenancy.

Common law prevails.

Leases.

Since the original English Statute of Frauds is in force (4 N.M. 336, 16 P. 275), all leases must be in writing, except leases for less than three years from date of making same where rent reserved equals at least two-thirds of rental value (5 N.M. 576, 25 P. 781). As to recording, see category 10 Documents and Records, topic 10.04 Records.

Subletting.

Tenant of agricultural land may not sublet without landlord's consent. (NMSA 48-6-14).

Security Deposits.

Governed by NMSA 47-8-18.

Recording.

Leases are real estate. (NMSA 47-1-1). Leases of five years or more shall be recorded.

(NMSA 14-9-1).

Rent.

Landlord or operator of hotel, rooming house, apartment, trailer court, or campground has lien on personal effects for rent due. (NMSA 48-3-5, -7, -16).

Lien.

Landlords are given a lien on the property of tenants which remains on premises rented for rent due or to become due by terms of lease or any other agreement in writing unless premises is home or residence. (NMSA 48-3-5).

Upon sale of property covered by lien after insolvency, receivership or bankruptcy of tenant, landlord has preference as to proceeds of sale up to six months rent over all other creditors except wage claimants. (NMSA 48-3-6).

Person who removes or attempts to remove property on which there is lien from possessor of lien is guilty of misdemeanor. Maximum penalty, $50 fine, 30 days imprisonment or both. (NMSA 48-3-18).

Lessor of agricultural land has preference lien on tenant's property for any rent which may become due and for all money and value of all animals, tools, provisions, and supplies furnished to tenant. (NMSA 48-6-1). Tenant may not remove any crops or any animals, tools or provisions furnished by landlord without landlord's consent so long as any rental is due or advances unpaid. (NMSA 48-6-2).

Termination of Tenancy.

Lease voidable at option of lessor for lessee's violation of laws prohibiting prostitution or gambling. (NMSA 30-9-9, NMSA 30-19-11).

Holding Over.

Landlord has right of action for forcible entry or unlawful detainer for rentals other than dwelling units. (NMSA 35-10-1 to -6; NMSA 47-8-49). Landlord has right to action for possession or writ of restitution in case of dwelling units. (NMSA 47-8-40, -46).

Action for Possession.

For rentals other than dwelling units, landlord must give written notice to holdover tenant of intent to bring suit after expiration of three days from time of service of said notice: thereafter action of forcible entry and detainer will lie against such tenant. (NMSA 35-10-1 to -6). Same action lies where tenant fails to pay rent at stipulated time and where tenant from month to month or tenant at will continues in possession after 30 days notice to quit. (Id.). In case of dwelling unit, either party may seek writ of restitution from district or magistrate court in proper case. (NMSA 47-8-42).

Exemptions.

Occupancy in hotels, motels, and most institutions. Contracts for sale of dwelling unit.

Distress.

See subheads Rent, and Lien, supra.

Injuries.

Generally landlords are not liable for injuries suffered during tenancy. (1999-NMSC-039, 990 P.2d 197).

Oil, Gas and Mineral Leases.

Lessees who forfeit oil, gas, or mineral leases must, within 30 days from date of forfeiture, have lease released from county records and for failure to do so are liable to owner of premises for damages and statutory penalty of $100. (NMSA 70-1-3, -4). Forms for oil and gas leases of state land provided. (NMSA 19-10-4.1, -4.2, -4.3). See also category 19 Mineral, Water and Fishing Rights, topic 19.01 Mines and Minerals.

Mobile Home Park Act.

(NMSA 47-10-1 to -23). Governs rights and duties of landlords in mobile home parks, prescribes procedures, remedies and penalties and allows for alternative dispute resolution. (Id.). Tenancy requirements provide for written leases and notices to quit. (NMSA 47-10-3). Termination reasons and remedies for nonpayment of rent are outlined. (NMSA 47-10-5). Closed parks, selling fees, and agreements between landlords and sellers of motor homes for purpose of reserving spaces or inducing acceptance of mobile homes are prohibited. (NMSA 47-10-11, -12, -13).

21.1121.12

21.13 PERPETUITIES:

Uniform Statutory Rule Against Perpetuities adopted. (NMSA 45-2-901). Nonvested property interest invalid unless certain to vest or terminate no later than 21 years after death of individual then alive or interest either vests or terminates within 90 years after its creation. (NMSA 45-2-901[B]). Existing interests reformed. (NMSA 45-2-903).

Trusts created by an employer as part of a pension, stock bonus, disability, death benefit or profit-sharing plan for the exclusive benefit of his employees or their beneficiaries will not be deemed invalid by any rule against perpetuities, but may continue for such time as may be necessary to accomplish purpose for which created. (NMSA 45-2-904).

Accumulations.

No statutory provisions.

21.14 PERSONAL PROPERTY:

Tenancy by entirety not specifically recognized by statute.

Uniform Unclaimed Property Act adopted. (NMSA 7-8A-1 to -31).

Leasehold is real property, not personal property. (NMSA 47-1-1).

21.15 POWERS OF ATTORNEY:

Uniform Durable Power of Attorney Act.

Adopted, with amendments. (NMSA 45-5-501, -502).

Attorney in Fact.

Conveyance or mortgage of real estate may be executed by attorney in fact acting under duly acknowledged and recorded power of attorney. (NMSA 47-1-7).

Such conveyance or mortgage is valid when made to a bona fide purchaser even if donor of power is dead or has revoked power, as long as purchaser or encumbrancer had no actual knowledge and the death or revocation had not been recorded by an affidavit with the county clerk of the county where the property is located. (NMSA 47-1-8, -9).

Formalities.

Same as for instruments conveying real estate. (NMSA 47-1-7).

Members of Armed Forces.

No special statutory provisions.

21.16 REAL PROPERTY:

Tenancy in common and joint tenancy are recognized. Grant or devise to two or more persons creates tenancy in common unless it is expressly declared that they take as joint tenants. (NMSA 47-1-15, -35, -36). Entails abolished. (NMSA 47-1-17). Community property system is in effect but husband and wife may hold realty as joint tenants. (NMSA 47-1-36). See category 14 Family, topic 14.09 Husband and Wife.

Time share is deemed interest in real estate. (NMSA 47-11-3).

Leasehold is real property. (NMSA 47-1-1).

Real Estate Contracts.

Uniform Vendor and Purchaser Risk Act provides protection to purchasers of real property. (NMSA 47-1A-1 et seq.). Rights and duties under real estate contract are different than under mortgage. (1998-NMCA-43, 956 P.2d 824). After breach of real estate contract, seller must choose forfeiture or recovery for breach. (1998-NMCA-12, 953 P.2d 33).

Rule in Shelley's Case abolished. (NMSA 47-1-19).

Foreign Conveyances or Encumbrances.

No statutory provisions. See category 10 Documents and Records, topic 10.04 Records.

Pueblo Rights Doctrine no longer recognized in New Mexico. Water rights contained in colonization grants from antecedent sovereigns are limited by principle of beneficial use and are to be quantified by amount of water put to beneficial use by pueblo within reasonable time of first appropriation. (2004-NMSC-009, 89 P.3d 47).

Condominiums.

Building Unit Ownership Act permits individual ownership of units with undivided interest in common areas. Many special rules govern such individual and common ownership of buildings. (NMSA 47-7-1 to -28).

Uniform Condominium Act adopted with many modifications effective May 19, 1982 to condominiums created thereafter. (NMSA 47-7A-1 to NMSA 47-7D-20). Prior condominiums may elect to be subject to Condominium Act rather than Building Unit Ownership Act. (NMSA 47-7A-2). Significant modifications to Uniform Act include omission of §§ 1-110 (Uniformity), 4-113 to 4-116 (Warranties), and 5-101 to 5-110 (Administration and Registration).

Subdivisions.

Governed by provisions of Land Subdivision Act, NMSA 47-5-1 to -9, and New Mexico Subdivision Act, NMSA 47-6-1 to -29. Subdivision plats must be recorded with county clerk, and subdivision must be approved by county commission before sale or lease of land within subdivision. (NMSA 47-6-8). County commissions have authority to regulate. (NMSA 47-6-9). Regulated issues include water, utilities, waste, roads, and advertising. (NMSA 47-6-9). By order of court, Attorney General may obtain discovery from persons where there is reasonable cause to believe that such person may have information relevant to civil investigation for violation of New Mexico Subdivision Act. (NMSA 47-6-25.1). Purchasers have private cause of action for restitution, damages or specific performance for failure of developer to comply with act or with representations in disclosure statement, advertising and other documents. (NMSA 47-6-27.1).

See also topics 21.05 Curtesy, Deeds, Dower, Landlord and Tenant; categories 5 Civil Actions and Procedure, topic Partition; Debtor and Creditor, topic Homesteads; Documents and Records, topic Records; Family, topic Husband and Wife; Mineral, Water and Fishing Rights, topic Mines and Minerals, subhead Oil and Gas; Mortgages, topic Mortgages of Real Property.

Restrictive Covenants.

Cannot prohibit group home for persons who have tested positive for HIV virus. (121 N.M. 353, 911 P.2d 861).

21.17 TRUST DEEDS:

See category 20 Mortgages, topic 20.04 Mortgages of Real Property.

22 TAXATION

22.01 ADMINISTRATION:

State Taxes.

Governed generally by Tax Administration Act. (NMSA 7-1-1 et seq.). Department may inspect books and accounts of taxpayer at department's request. (NMSA 7-1-11).

Protest of Taxes.

Taxpayer must elect to either protest assessment and request hearing under NMSA 7-1-24 or claim refund under NMSA 7-1-26 after making payment. (NMSA 7-1-23). Hearing officer is designated by Secretary of Taxation. (NMSA 7-1-24). Petition for refund or abatement of improper tax can be granted by Secretary of Taxation with approval by Attorney General, or, if less than $10,000, without his approval. (NMSA 7-1-29).

Penalties.

Personal property is subject to levy and sale for taxes. (NMSA 7-1-31). Real property may be sold for delinquent taxes. (NMSA 7-1-31; NMSA 7-38-65). Penalty for negligent failure to pay tax or file return is addition of 2% per month, not to exceed 10%, of amount due. (Minimum $5 except for failure to pay income tax or oil and gas taxes.) With intent to defraud, penalty is addition of 50% ($25 minimum). (NMSA 7-1-69). Evasion is felony with fine of not less than $1,000 nor more than $10,000 and/or imprisonment of one to five years. (NMSA 7-1-72). Criminal and civil penalties are imposed for failure to report property for assessment. (NMSA 7-38-8).

Interstate Co-operation.

Multi-State Tax Compact, adopted. (NMSA 7-5-1 et seq.).

Relating to Public Lands.

No person is relieved from state tax liability by reason of residing or engaging in business within federal area, to extent permitted by federal law.

Taxpayer Bill of Rights.

(NMSA 7-1-1 et seq.). Created to protect New Mexico taxpayers during assessment, collection, and enforcement of any tax levied pursuant to Tax Administration Act. Taxpayers may be awarded costs and fees in certain instances. (NMSA 7-1-29.1). Taxpayer must receive written notice of audit commencement, except in fraud investigation. (NMSA 7-1-11.2). Secretary may determine after assessing facts and circumstances, not to bring action against spouse or former spouse for payment of tax liability in inequity would result.

22.02 ALCOHOL, BEVERAGES AND TOBACCO TAXES:

Alcoholic Beverage Taxes.

Imposed by NMSA 7-17-5. Counties and municipalities may also impose liquor license tax pursuant to NMSA 7-24-1 et seq.

Cigarette Tax.

Tobacco products tax imposed by NMSA 7-12A-3.

22.03 BUSINESS TAXES:

License or Occupation Taxes.

Licensed businesses pay license fee set by municipality bearing reasonable relation to regulation of business. (NMSA 3-38-1). Non-licensed businesses pay business registration fee of not more than $35. (NMSA 3-38-3). See also category 3 Business Regulation and Commerce, topic 3.18 Licenses, Business and Professional.

Fire Protection Excise Tax.

Certain counties may impose excise tax on persons doing business in county area for purpose of providing county fire protection. (NMSA 7-20E-15; NMSA 7-20E-16).

Bed Tax.

Repealed.

Franchise Taxes.

See category 2 Business Organizations, topic 2.03 Corporations.

State Gross Receipts and Compensating Tax.

Rates.

Excise tax equal to 5% of gross receipts is imposed on any person engaging in business in state. (NMSA 7-9-4). Interstate telecommunications gross receipts tax imposed. (NMSA 7-9C-1 et seq.).

Exclusions.

Gross receipts does not include cash discounts; certain taxes imposed by counties, municipalities, and Indian tribes; time-price differentials, or amounts received solely on behalf of another in disclosed agency capacity. (NMSA 7-9-3.5).

Exemptions.

Certain governmental units, nonprofit organizations, and businesses such as sale of farm products; banks and financial corporations; insurance, see category 16 Insurance, topic 16.01 Insurance Companies; motor vehicles, see category 23 Transportation, topic Motor Vehicles; employee wages and all other remuneration for personal service earned as employee; some persons or firms dealing with or in natural resources, see category 19 Mineral, Water and Fishing Rights, topic Mines and Minerals; isolated or occasional sales or leases of property or services not in usual course of business; certain sales of services to out-of-state buyers, half value of farm implements and aircraft (NMSA 7-9-77), receipts from sale of special fuel to bonded special fuel user or if delivered to supply tank of vehicle user of which must pay special fuel tax (NMSA 7-9-26; NMSA 7-16A-1 et seq.), materials sold for jewelry making up to $5,000 (NMSA 7-9-74), those subject to oil and gas emergency school tax or natural gas processors tax who sell to wholesalers, receipts from storing or using crude oil, natural gas or liquid hydrocarbons (NMSA 7-9-33), and many others (NMSA 7-9-12). Resale of mobile homes subject to prior gross receipts, compensating, or motor vehicle excise tax exempt. (NMSA 7-9-76.1). Exemption allowed for gasoline or special fuel to extent gasoline or special fuel taxes paid and not refunded. (NMSA 7-9-26). Campus book store sale of textbooks. (NMSA 7-9-13.4).

Credits.

Film production tax credit for up to 15% of direct production expenditures. (NMSA 7-2F-1).

Deductions.

Allowed under some circumstances for sale or lease of certain real or personal property, goods or services, or publications. (NMSA 7-9-45 et seq.). Allowed for receipts from transactions in interstate commerce to extent that imposition would violate U.S. Constitution. Receipts from transmitting messages interstate via radio or television broadcast deductible under some circumstances. (NMSA 7-9-55). Allowed for receipts from leasing or licensing of theatrical and television films and tapes. (NMSA 7-9-76.2). Allowed for certain loan transactions. (NMSA 7-9-61.1). Real estate contracts do not constitute loan transactions qualifying taxpayers for deductions under NMSA 7-9-61.1. (107 N.M. 540, 760 P.2d 1306). Allowed for sales of prescription drugs. (NMSA 7-9-73.2). Health care providers may deduct receipts from U.S. government or agency. (NMSA 7-9-77.1). Sale of software development services in rural areas. (NMSA 7-9-57.2). Allowed for sale of food at retail food store. (NMSA 7-9-92). Allowed for payments made by managed health care provider or health care insurer for commercial contract services or Medicare Part C services provided by health care practitioner acting within their scope of practice. Fee-for-service payments not included. (NMSA 7-9-93).

Registration.

All persons doing business with state must first register with Taxation and Revenue Department to pay tax. (NMSA 7-10-2 et seq.).

Administration.

Tax is administered by Taxation and Revenue Department pursuant to Tax Administration Act. (NMSA 7-1-1 et seq.).

Returns must be made out and payment received on or before 25th day of month following month in which taxable event occurs. (NMSA 7-9-11).

Compensating Tax.

Tax of 5% is imposed on persons using property in New Mexico or services rendered in New Mexico where transactions were not initially subject to gross receipts tax but, because of buyer's subsequent use of such property or services, should have been. This tax also applies to property manufactured by person using it in New Mexico and to property acquired outside state in transactions which would have been subject to gross receipts tax if they had occurred in state. (NMSA 7-9-7). Credit is allowed for tax paid on same property in another state and for gross receipts, sales, etc., taxes paid on certain construction materials. (NMSA 7-9-79). Reduction allowed for half value of farm implements and aircraft. (NMSA 7-9-77). Exemptions allowed for gasoline or special fuel to extent gasoline or special fuel taxes paid and not refunded. (NMSA 7-9-26). See NMSA 1978, §§ 7-9-1 to -112 (1966), as amended, for other exemptions and deductions.

Local Gross Receipts Tax.

Municipalities may also impose tax not to exceed 1.25% of gross receipts (NMSA 7-19D-9), municipal environmental services gross receipts tax not to exceed.0625% (NMSA 7-19D-10), and municipal infrastructure gross receipts tax not to exceed.25% (NMSA 7-19D-11). Counties may impose gross receipts tax of up to.375% on any person engaging in business in county. (NMSA 7-20E-12). See catchline County Hospital Emergency Gross Receipts Tax, infra. Counties may impose gross receipts tax of.05% on any business for education funding. (NMSA 7-20E-20).

County Hospital Emergency Gross Receipts Tax.

Counties may enact excise tax on.25% of gross receipts of persons engaging in business in county. Revenue is for current operations and maintenance of hospital owned by county. (NMSA 7-20E-12.1). County may enact tax not more than.25% on gross receipts for emergency communications and medical services. (NMSA 7-20E-22).

Provider Tax.

Lodger's Tax.

Municipal or county occupancy tax authorized by NMSA 3-38-14 et seq.

Premium Tax.

See category 16 Insurance, topic 16.01 Insurance Companies.

22.03A CONTROLLED DANGEROUS SUBSTANCES TAX:

Marijuana and Controlled Substances Tax.

None. Repealed. See topic 22.02 Alcohol, Beverages and Tobacco Taxes.

22.04 [RESERVED]

22.05 EMPLOYMENT TAXES:

Unemployment Compensation Tax.

Every employer who has paid wages in amount of $450 or more during calendar quarter or who employs for 20 weeks during calendar year one or more individuals, is required to pay to Employment Security Department, at times prescribed by it, contributions to Unemployment Compensation Fund. Rate of employer's contribution may vary from.1% to 5.4% depending upon employer and statewide loss experience. Employer's contributions may not be deducted from employees' wages and no contributions from employees are required. (NMSA 51-1-1 et seq.).

22.06 [RESERVED]

22.07 ESTATE TAX:

Taxable Estate and Exemptions.

Resident.

Tax imposed on entire “taxable estate” as defined in I.R.C. § 2051. (NMSA 7-7-2).

Nonresident.

Tax imposed on entire “taxable estate,” as defined in I.R.C. § 2051, located in New Mexico. Property located in New Mexico includes: (1) Debts arising from transactions in, or having business situs in, New Mexico; and (2) securities of any corporation or other entity organized under laws of New Mexico. Property is exempted to extent that property of residents is exempt from taxation under laws of state in which nonresident is domiciled. (NMSA 7-7-2, NMSA 7-7-4).

Rates of Tax.

Resident.

Tax is equal to maximum amount of credit for estate death taxes allowed by I.R.C. § 2011. Credit is allowed which is lesser of (1) Death taxes paid to other states which do not have reciprocal provisions allowing property to be taxed in state of decedent's domicile, to extent of tax credit thereby allowed against federal estate tax, or (2) federal credit multiplied by value of property subject to death tax imposed by other state and divided by value of decedent's gross estate, as defined by I.R.C. § 2031. (NMSA 7-7-2, NMSA 7-7-3).

Nonresident.

Tax is equal to maximum amount of credit for estate death tax allowed by I.R.C. § 2011, multiplied by value of property located in New Mexico and divided by decedent's gross estate, as defined by I.R.C. § 2031. (NMSA 7-7-2, NMSA 7-7-4).

Administration and Enforcement.

As provided in Tax Administration Act. (NMSA 7-1-1 et seq.).

When Due; Interest.

Tax is payable on or before date of filing of returns. (NMSA 7-7-6). Interest is due for late payment. (NMSA 7-7-7).

Returns and Reports.

Return pursuant to Estate Tax Act and copy of federal estate tax return must be filed on or before date federal estate tax return is required to be filed. (NMSA 7-7-5).

Liability for Failure to Pay Tax.

Any personal representative who distributes property without first paying, securing another's payment of, or furnishing security for payment of estate tax is personally liable for taxes due to extent of value of any property that may come or may have come into his possession. Any person who has control of property and delivers same to personal or legal representative of decedent outside of New Mexico without first paying, securing another's payment of, or furnishing security for payment of estate tax is liable for taxes on property so delivered. Personal representative may sell as much of any property as necessary to pay taxes due under Estate Tax Act. (NMSA 7-7-12). Personal representative can sell as much of any property specifically bequeathed or devised as is necessary to pay proportionate amount of taxes due on transfer of property and fees and expenses of sale, unless legatee or devisee pays personal representative proportionate amount of taxes due. (NMSA 7-7-11).

Final Settlement.

Not allowed until Bureau of Revenue files certificate with county clerk that tax has been paid or that no tax is due. (NMSA 7-7-8).

22.07A GAMBLING AND ENTERTAINMENT TAXES:

Gaming Tax.

Gaming activities tax imposed on gross receipts. (NMSA 60-2E-47).

22.08 GASOLINE AND SPECIAL FUELS TAXES:

Gasoline tax and gasoline inventory tax imposed by NMSA 7-13-1 et seq. Gasoline inventory tax rebate allowed in certain instances.

Special Fuels Tax.

Imposed by NMSA 7-16A-1 et seq., on use in motor vehicles of diesel fuel, kerosene, all other liquified fuels including liquified petroleum gases, and natural gas (except gasoline). Bulk storage user permits available. (NMSA 7-16A-8). Provides for imposition and collection of special fuel excise tax, special fuel inventory taxes, and tax on liquified petroleum gas. (NMSA 7-16A-2, 3, 4; NMSA 7-16B-4). Permit required for temporary users of special fuel not registered with department. (NMSA 7-16A-19).

Motor Carrier Fuels Tax.

See category 23 Transportation, topic 23.01 Motor Vehicles.

Oil and Gas Proceeds Withholding Tax.

Distribution pursuant to NMSA 7-1-6.1. Requires distribution of certain oil and gas proceeds to legislative retirement fund. (NMSA 7-1-6.43; NMSA 7-3A-1 et seq.).

Gasoline Tax Sharing Agreement.

Qualified tribes entitled to receive percentage of gasoline tax revenue. (NMSA 7-1-6.44; NMSA 67-3-8.1).

22.08A GENERATION SKIPPING TAX:

None. See topic 22.06 Estate Tax.

22.09 GIFT TAX:

None. See topic 22.06 Estate Tax.

22.10 [RESERVED]

22.11 INCOME TAX:

Introduction.

Income tax is imposed on net income of resident individuals, trusts and estates and on income from sources within state of nonresident individuals, trusts and estates engaged in transaction of business into or from state or deriving any income from property or employment within state. (NMSA 7-2-3). No income tax is imposed upon insurance companies which pay premium tax to state, or on trusts for exclusive benefit of employees and nonprofit organizations exempt from taxation under U.S. Internal Revenue Code. (NMSA 7-2-4; NMSA 7-2A-4).

Returns must be made by each individual, trust, estate, or other taxable entity deriving income from any business transaction, property or employment within state who is required by federal law to file federal tax return and who is not exempt from tax under state law. (NMSA 7-2-12). Returns are due 15th day of fourth month following close of taxable year. (NMSA 7-2-12).

Taxes Are Payable.

Tax due and payable 15th day of fourth month following close of taxable year. (NMSA 7-2-12). Time for payment may be extended. (NMSA 7-1-13).

Individuals in Military and Public Health Service of U.S.

No exemption is provided for members of armed forces. (NMSA 7-2-4).

Income Taxed—Individuals.

Net income defined as federal taxable income (other than amounts on which alternative minimum tax is calculated) adjusted to prevent taxation of amounts that state cannot tax under federal or state constitution or laws, and to exclude: (1) Amounts that vary depending on nature of return filed by individual, (2) federal itemized deductions in excess of such amounts, (3) amount of personal exemption claimed under § 151 of Internal Revenue Code, (4) income from obligations of U.S., and (5) other exclusions depending upon applicable taxable year. (NMSA 7-2-2).

Income Allocation.

Net income will be, prior to application of appropriate tax rates, apportioned as follows: (1) During first taxable year in which individual incurs tax liability as resident, only income earned after date he became resident and, in addition, income earned in New Mexico while nonresident will be allocated to New Mexico, (2) income other than compensation or gambling winnings will be apportioned as provided in Uniform Division of Income for Tax Purposes Act, NMSA 7-4-1 et seq., (3) compensation or gambling winnings of resident taxpayer will be allocated to this state, (4) compensation of nonresident taxpayer shall be allocated to this state to extent such compensation is for activities, labor or personal services within this state, provided, (a) if activities, labor or services are performed in this state for 15 days or less during taxable year, compensation may be allocated to taxpayer's state of residence, and (b) if special rules are met regarding manufacturing industry employees working within 20 miles of industrial border, compensation may be allocated to taxpayer's state of residence, (5) gambling winnings of nonresident shall be allocated to this state if gambling winnings arose from source within this state (NMSA 7-2-11), (6) nonbusiness income and deductions not otherwise allocated will be allocated according to regulations of secretary. Gambling winnings that are nonbusiness income and arise from sources within this State shall be allocated to this State. (NMSA 7-2A-8).

Rate depends on whether individual is married, head of household or single, and is graduated from 1.7% to 6.0%. (NMSA 7-2-7).

Exemptions are those allowed by Federal Internal Revenue Code with adjustments noted under catchline Net Income, supra. In addition, exemption is provided for individuals 65 and older or blind (limited to $8,000) (NMSA 7-2-5.2); medical care savings accounts (NMSA 7-2-5.6); and special needs child adoptions (NMSA 7-2-5.4). Total exemption for individuals 100+ years and not dependent. (NMSA 7-2-5.7).

Tax Credits.

Resident having income taxable in this state but derived from sources without this state and taxable by another state is entitled to credit for tax paid to such other state, but not in excess of 5½% of income on which tax to other state is determined. (NMSA 7-2-13). Certain low income resident taxpayers are entitled to rebates for state and local taxes paid. (NMSA 7-2-14). Credit allowed for taxpayers 65 years and older equal to amount of property tax due on principal residence which exceeds tax liability indicated in statutory table. (NMSA 7-2-18). If these credits exceed tax due, refund will be granted. Individual who has modified gross income of not more than double federal minimum may claim credit for expenses for dependent child day care necessary to enable gainful employment. Credit shall equal 40% of actual compensation paid up to $8 per day but shall not exceed $480 for each qualifying dependent or total of $1,200. (NMSA 7-2-18.1). Credit for up to $25,000 for one-half cost of preservation of registered cultural property. (NMSA 7-2-18.2).

Income Taxed—Corporations.

Special income tax is imposed upon corporations. See category 2 Business Organizations, topic 2.03 Corporations.

Withholding.

Employers who deduct and withhold portion of employee's wages under Internal Revenue Code must also withhold wages for state income tax. Payor of annuity or pension shall withhold amount from amount due if requested in writing. (NMSA 7-3-1 et seq.).

22.12 INHERITANCE TAX:

None. Repealed by enactment of estate tax. See topic 22.06 Estate Tax.

22.12A MINES, MINERALS AND FISHERIES TAXES:

Miners and Processors of Natural Resources.

See category 19 Mineral, Water and Fishing Rights, topic 19.01 Mines and Minerals.

22.13 [RESERVED]

22.14 MOTOR VEHICLE TAXES:

Motor Vehicle Usage Tax.

See category 23 Transportation, topic 23.01 Motor Vehicles.

22.15 [RESERVED]

22.16 PROPERTY TAXES:

Taxable Situs.

All tangible property in state is subject to taxation; except as otherwise provided. (NMSA 7-36-7).

Exemptions.

Property exempt from property taxation under Federal or State constitutions, and Federal law. Oil and gas property otherwise subject to valuation and taxation. Productive copper mineral property otherwise subject to valuation and taxation. See category 19 Mineral, Water and Fishing Rights, topic 19.01 Mines and Minerals, subhead Taxes. (NMSA 7-36-7). All property of U.S., state, counties, towns, cities, school districts and other municipal corporations, public libraries, community ditches and laterals thereof, all church property not used for commercial purposes, all property used for education or charitable purposes, all cemeteries not used for private or corporate benefit, and all state, county, municipal and district bonds (Const. Art. VIII, § 3) and livestock, certain private railroad cars, certain aircraft, certain vehicles, tangible property other than used in business, depreciated, or manufactured homes (NMSA 7-36-8). Property interests of lessee of project property held under lease from county or municipality under authority of industrial revenue or pollution control revenue bond or Metropolitan Redevelopment Code for as long as there is outstanding bond indebtedness. (NMSA 7-36-3, 3.1). Property interest in certain housing projects exempt until conveyed by city to non-exempt entity. (NMSA 3-45-19). Property interest of project purchaser under Industrial Revenue Bond Act for as long as purchaser remains liable to seller for any party of purchase prices. (NMSA 7-36-3). Head of family allowed exemption of up to $4,000 deducted from taxable value of residential property for 1993 and thereafter. (NMSA 7-37-4). New Mexico resident veteran or surviving spouse entitled to $2,000 exemption, deducted from taxable value of property, if veteran served in WWI or any armed conflict prior thereto, WWII, Korean War, or Vietnam War. (NMSA 7-37-5).

Head of family and veteran exemptions claimed and allowed in one year need not be claimed for subsequent years if no change in eligibility. (NMSA 7-38-17). Other real property exemptions under NMSA 7-36-7 for nongovernmental entities must be claimed to be allowed. Once allowed, they need not be claimed in subsequent years if no change in eligibility. Proof of eligibility must be filed with County Assessor before Mar. 1 of tax year in which exemption claimed. (NMSA 7-38-17).

State Tax Rates.

Maximum rates that may be set by Department of Finance and Administration are as follows: For use of each county for general purposes, $11.85 per $1,000 of net taxable value; for use of each school district for general operating purposes, 50¢ per $1,000 of net taxable value; for use of each municipality for general purposes, $7.65 per $1,000 of net taxable value. (NMSA 7-37-7). Revenues from various property taxes subject to limitation designed to soften effects of inflation on property valuation. (NMSA 7-37-7.1).

Local Tax Rates.

Counties, municipalities, and special boards and districts may levy additional taxes for particular purposes set forth in statutes (e.g., NMSA 3-41-2; NMSA 3-51-14; NMSA 4-48A-16; NMSA 4-50-2; NMSA 22-25-3; NMSA 22-26-3; NMSA 72-16-22; NMSA 72-17-22; NMSA 72-18-20; NMSA 73-1-21; NMSA 73-20-15, 17, 46; NMSA 76-3-2; NMSA 77-2-14, 15, 16, 19).

Assessment.

County Assessor has responsibility for valuation of all property subject to tax in county with following exceptions. Property tax department has responsibility for valuation of property used in conduct of following businesses: railroad; communication systems (which system or any part thereof is available for use by another person for consideration); pipeline; public utility and airline. Property tax department also has responsibility for valuation of certain mineral property, electrical generating plants and equipment used in construction. (NMSA 7-36-2). Property assessed at market value although there are some exceptions. Special method of valuation provided for residential property. (NMSA 7-37-7.1). Agricultural land valued by productivity, with value of improvements added, if this is requested. (NMSA 7-36-20). Special valuation of mineral interests (NMSA 7-36-23 et seq.), oil and gas distributing equipment (NMSA 7-36-27), water use equipment (NMSA 7-36-28), energy production and transmission equipment (NMSA 7-36-29), and certain other property (NMSA 7-36-30 et seq.). All property will be valued as of Jan. 1 of each tax year (NMSA 7-38-7), except livestock (NMSA 7-36-21). Property owners will report property to property tax department not later than last day of Feb. (NMSA 7-38-8). County Assessor will mail notice to each property owner informing him of net taxable value of property by Apr. 1. (NMSA 7-38-20). Property owner may protest value determined on property by filing petition with director of property tax department or county assessor, or by filing claim for refund after paying taxes or by filing claim for refund in district court. Property owner may also protest administrative fee by filing claim for refund after paying taxes. (NMSA 7-38-21, -39). Protest will be filed no later than 30 days after mailing of notice of valuation. (NMSA 7-38-22, -24). Protest will be decided within 120 days of date filed. (NMSA 7-38-23, -27).

Majority of voters in given school district may agree to impose additional property tax on property in their district to make capital improvements in public school buildings. (NMSA 22-26-1 et seq.).

See also category 19 Mineral, Water and Fishing Rights, topic 19.01 Mines and Minerals, subhead Taxes; and subhead Exemptions, supra.

Review of Assessment.

Property owner may appeal order made by director of property tax department or county valuation protests board by filing with court of appeals within 30 days of date order was made. (NMSA 7-38-28).

Payment.

Taxes $10 or over payable to county treasurer in two equal installments due Nov. 10 and Apr. 10 of following year. Counties may provide for single installment payment of taxes less than $10. No demand for payment is necessary. (NMSA 7-38-38). Taxes not paid within 30 days after due date will accrue interest at 1% per month. (NMSA 7-38-49). Penalty of 1% a month not to exceed 5% of delinquent taxes will also be imposed on delinquent taxes (minimum $5). Penalty of greater of 50% of property taxes due or $50 imposed for fraudulent nonpayment. Penalty may be suspended by county commissioners. (NMSA 7-38-50). Administrative fee is charged and enforced as tax (without interest or penalty) on tax bills less than $5 but greater than zero. (NMSA 7-38-36.1).

Collection.

County treasurer has responsibility for collection of taxes and penalties or interest due except for delinquent taxes, penalties and interest. (NMSA 7-38-42).

Lien.

Taxes imposed are personal obligation of property owner and personal judgment may be rendered against him. (NMSA 7-38-47). Real property taxes are lien against real property from Jan. 1 in year levied until taxes are paid. (NMSA 7-38-48).

Sale.

Three years from date real property taxes become delinquent, property may be sold by property tax department. Property owner must be notified at least 20 days and not more than 30 days before sale date by certified mail, return receipt requested, to latest property tax schedule address. (NMSA 7-38-65, -66). Sale will be by public auction in county where real property is located. Personal property may be seized for failure to pay tax thereon and county treasurer must sell property within 60 days of date seized by demand warrant. (NMSA 7-38-58). Ten days before sale, property owner must be notified. (NMSA 7-38-57).

Redemption.

All suits involving title to real estate held under state deed issued after tax sale must be brought in less than two years from date of sale. To defeat title issued by state, person must prove he had title and that either property was not subject to delinquent taxes or proper notice was not given or all taxes involved were paid prior to sale or all taxes involved were covered by installment agreement and all payments due were made timely. (NMSA 7-38-70).

Real Estate Conveyance Tax.

None.

22.17 SALES AND USE TAXES:

Sales Tax.

See topic 22.03 Business Taxes, subhead State Gross Receipts Tax.

Use Tax.

See topic 22.03 Business Taxes, subhead Compensating Tax.

Privilege Tax.

Imposed on boxing, wrestling, martial arts contests and exhibitions, and closed circuit telecasts. (NMSA 60-2A-2, 23, 26). Also imposed on business of persons, including Indians, Indian tribes and pueblos, to extent permitted by law, severing energy products in state at various rates of taxable value of such products. (NMSA 7-31-4).

22.18 STAMP AND SEAL TAXES:

Stamp Tax.

None, except that cigarette tax is paid by affixing stamps. (NMSA 7-12-2 et seq.).

22.18A TAX LIENS:

Uniform Lien Registration Act.

Adopted. (NMSA 48-1-1 et seq.).

22.19 USE TAXES:

See topic 22.03 Business Taxes, subhead State Gross Receipts and Compensating Tax.

23 TRANSPORTATION

23.01 MOTOR VEHICLES:

Uniform Acts adopted, with modifications: Motor Vehicle Certificate of Title and Anti-

Theft (NMSA 66-3-501 et seq.; NMSA 66-3-1 et seq.); Traffic on Highways (NMSA 66-7-2 et seq.); Operators' and Chauffeurs' License (NMSA 66-5-2 et seq.); Financial Responsibility Act (NMSA 66-5-201 et seq.).

Motor Vehicle Division of Taxation and Revenue Department, Manuel Lujan, Sr. Bldg., Santa Fe, New Mexico 87501, has general supervision. (NMSA 66-2-3 et seq.).

Vehicle license and registration required of resident vehicle owners (NMSA 66-3-1); issued by Division of Motor Vehicles. Number plates must be attached to rear, except on road or truck tractor where it must be on front. (NMSA 66-3-18). Vehicle registration expires on Dec. 31. Department may receive applications for renewal at any time prior to expiration of current registration. (NMSA 66-3-19). Certain veterans may receive reduced motor vehicle registration fee rate. (NMSA 66-6-7). Mobile home registration need not be renewed annually. New registration required only upon transfer of ownership. (NMSA 66-3-19). Vehicles owned and used in service of U.S. or another state need not be licensed in this state but must display signs or plates showing they are in such service. (NMSA 66-6-14). Temporary transportation permits issued to licensed dealers owning cars being imported into state or being transported between dealers intrastate. (NMSA 66-3-6). Nonresident owner of foreign vehicle of type subject to registration may use such vehicle in state for 180 days without registration provided it is validly registered in his place of residence. Owner presumed to be resident if employed in state for 30 days within 60-day period. (NMSA 66-3-301).

Registration of one-way rental fleet vehicles is provided for by NMSA 66-3-2.11.

Freight and utility trailers must be registered unless owned by nonresident using vehicle to transport certain farm produce, farmers and ranchers who transport to market certain farm produce, and persons who transport certain animals to and from fairs. (NMSA 66-3-1[A][7]).

Motor carriers can register fleet and pay alternate fee which is pro-rated according to number of miles travelled within state to total number of miles travelled by fleet within and outside state. This percentage is multiplied against registration fee which would normally be collected to determine fee. (NMSA 66-3-2.1).

Full-time nonresident student, even if employed, need not register vehicle provided it is registered in his place of residence and bears a nonresident student sticker issued by his school. (NMSA 66-3-301).

Certain motor vehicles owned by nonresident military personnel or contractors are exempt from registration. (NMSA 66-3-301; NMSA 66-3-303; Op. Att'y Gen. No. 75-43, July 30, 1975; Op. Att'y Gen. No. 71-98, Aug. 6, 1971; Op. Att'y Gen. No. 59-216, Dec. 30, 1959). Certain members of armed forces are exempt from license. (NMSA 66-5-14).

Special registration provided for off-highway motor vehicles. (NMSA 66-3-1003).

License refused to persons convicted of certain violations involving alcohol, drugs or narcotics; persons suffering from certain mental diseases; persons failing exam; persons who have not deposited proof of financial responsibility; or when director has good cause to believe granting license should be inimical to public safety. (NMSA 66-5-5). License granted to persons between 15 years and 18 years under certain circumstances. (Id.). Limited license available in some circumstances for transportation to employment and for other purposes. (NMSA 66-5-35).

Any person who operates motor vehicle within this state shall be deemed to consent to blood or breath test, or both, to determine alcoholic content of blood. Refusal to submit to test may result in loss of license. (NMSA 66-8-105 to -112).

Refusal to take breathalyser test sufficient for revocation (117 N.M. 785, 877 P.2d 1088), and state may lay foundation for introduction of breath and blood tests with non-live testimony (1998-NMCA 077, 960 P.2d 827). No due process right to take pre-hearing depositions in revocation cases. (1997-NMCA-099, 946 P.2d 1104, rev'd other grounds, 2000-NMCA-103, 14 P.3d 538).

Operator's license is required and may not be issued to any person under 18 years of age except that division may issue instructional permit to 15 year old and license to person 15 years and six months of age or older having satisfactorily completed accredited driver education program. (NMSA 66-5-5). No operator's license required of person holding chauffeur's license. (NMSA 66-5-2). Special licensing requirements exist for motorcycles. (NMSA 66-5-5). No license required of person operating farm machinery. (NMSA 66-5-4). Non-restricted license expires 30 days after applicant's birthday in fourth year or under certain circumstances in eighth year, after effective date of license. (NMSA 66-5-21). Each license is renewable within 90 days prior to its expiration. (NMSA 66-5-21).

Drivers of commercial vehicles may have their licenses suspended, revoked or cancelled for period of 30 days to life for various offenses, as detailed in NMSA 66-5-68.

Motorcyclist and passengers on motorcycles under 18 must wear protective helmets. (NMSA 66-7-356).

Titles.

Certificate of title required by owner of vehicle subject to registration; Division of Motor Vehicles supplies application forms. (NMSA 66-3-4). Application for certificate of title for previously unregistered vehicle purchased from dealer must be accompanied by manufacturer's certificate assigned by dealer to buyer. Application for certificate of title for vehicle sold to dealer in a state not requiring manufacturer's certificate must be accompanied by evidence of title accepted by such state. (NMSA 66-3-4). Application for owner's certificate must be made within 30 days of transfer of vehicle. (NMSA 66-3-103). Certificate need not be renewed annually and is valid until transfer of any interest contained therein. (NMSA 66-3-19). Non-negotiable certificate will be issued if original title cannot be obtained from out-of-state lienholder. (NMSA 66-3-11).

Sales.

To transfer title, owner must endorse on certificate of title an assignment of title, warranty of title, and statement of liens and encumbrances. Certificate of title and current registration must be delivered to purchaser or transferee at time of delivering vehicle. (NMSA 66-3-102). Manufacturer transferring unregistered vehicle to dealer must furnish dealer with manufacturer's certificate stating that vehicle has been transferred to said dealer and that such transfer is a first transfer in ordinary trade and commerce. (NMSA 66-3-118). Business practices between manufacturers, distributors, representatives, dealers and purchasers are closely regulated. (NMSA 57-16-1 et seq.; NMSA 57-16A-1 et seq.). See category 3 Business Regulation and Commerce, topic 3.15 Franchises. Civil and criminal penalties are provided for specified deceptive and coercive practices. (NMSA 57-16-16; NMSA 57-16A-1 et seq.). Manufacturer and dealer practices in transactions relating to mobile homes are regulated by NMSA 60-14-1 et seq., and mobile home dealers, manufacturers and installers are required to be licensed. (NMSA 60-14-17).

Lemon Law adopted. (NMSA 57-16A-1 et seq.). Only protects individual, nonbusiness consumers. (1998-NMCA-020, 953 P.2d 1104).

Liens.

Security interest in a vehicle required to be titled and registered in New Mexico is perfected only by filing an application for a certificate of title, and including in that application name and address of lienholder, date of execution of agreement, and maturity date of agreement. (NMSA 66-3-201 et seq.). Certificate of title last issued for vehicle must accompany application. New title will then be issued showing all liens on vehicle. (NMSA 66-3-10).

Security interest filed in any state which does not show all liens on certificate of title is valid against any person in New Mexico, other than parties or takers with actual notice. (NMSA 66-3-201).

Constructive notice created by filing of application for, and issuance of new title terminates 12 months after maturity of debt. (NMSA 66-3-202).

Financing Contracts.

Manufacturer may not contract with retailer to sell automobiles conditioned on exclusive financing of automobile paper or requiring sales to be financed in any particular manner. (NMSA 57-11-1). Motor Vehicle Sales Finance Act requires all sales finance companies to obtain an annual license from the state bank examiner, state and national banks excepted. (NMSA 58-19-3). License may be revoked for material misstatement, willful failure to comply with provision of act, defrauding retail buyer or fraudulent misrepresentation. (NMSA 58-19-4). Finance contracts must meet certain formalities. Provisions of Act do not apply to loan to refinance motor vehicle sale. (NMSA 58-19-10.1). Provisions of Act do not apply to motor vehicles with gross weight over 10,000 pounds purchased primarily for business or commercial purpose. (NMSA 58-19-2[A]). No maximum finance charge. “Late charge” of lesser of $15 or 5% may be charged for late payments. Willful violation of act is misdemeanor punishable by fine not exceeding $500 and may bar recovery of finance charge, delinquency and collection or other charges. In civil action involving deficiency, prevailing debtor may be allowed reasonable attorney fee set by court. Provisions of act may not be waived. (NMSA 58-19-1 et seq.). If contract is assigned, unless buyer has notice of assignment, payment made to last known holder shall be binding upon all subsequent holders. (NMSA 58-19-14).

Identification Marks.

Penalty for fraudulent defacing or alteration. (NMSA 66-3-508).

Operation prohibited by person under influence of intoxicating liquor, narcotic drugs, or other drugs to extent of preventing safe driving. (NMSA 66-8-102). See NMSA 66-8-102 for limits on blood alcohol content and penalties for violations.

Size Limits.

Regulated by NMSA 66-7-402, -403, -404.

Weight Limits.

Regulated by NMSA 66-7-410 et seq. Special permits may be obtained for emergency load or vehicle exceeding statutory maximum size or weight. (NMSA 66-7-413). Note special requirements for manufactured homes in § 413. Special permits for liquid hauling tanks. (§ 413.4). System of graduated penalties for carrying excess weight. (NMSA 66-7-411).

Equipment Required.

Regulated by NMSA 66-3-801 et seq. Limited requirements for antique cars. Child passenger restraint devices required for passengers under 12 years of age. (NMSA 66-7-369). Each passenger must use seat belt. (NMSA 66-7-372). Each person under 18 years of age must use proper restraint device as dictated by this statute. (NMSA 66-7-369).

Lights Required.

Regulated by NMSA 66-3-802 et seq.

Inspection.

None required. Statute does prohibit driving of motor vehicle that is not in good working order, or that would endanger driver or other persons. (NMSA 66-3-901).

Traffic Regulations.

Set forth in NMSA 66-7-4 et seq.

Accidents.

Driver in accident involving injury, death or vehicle damage must stop and supply person struck, driver, occupant or person attending struck vehicle with name, address and registration number; must show operator's license if requested, render reasonable aid, carry injured to doctor or hospital if requested or if need for treatment apparent (NMSA 66-7-203); if struck vehicle unattended, must stop, locate and notify operator or owner or leave note containing name, address of driver and owner and statement of circumstances in struck vehicle (NMSA 66-7-205); if damage solely to other property legally on or adjacent to highway, must take reasonable steps to locate owner or person in charge and supply name, address and registration number; also operator's license if requested. (NMSA 66-7-205).

Driver must give immediate notice of accident to police department, county sheriff or State Police (NMSA 66-7-206) and make written report to State Highway and Transportation Department within five days if injury, death or apparent property damage of $500 or more results. (NMSA 66-7-207). Immediate notice required by occupant if driver unable to give same. If driver is not owner and is unable to make written report, owner must make same within five days after knowledge of accident. (NMSA 66-7-208). Photocopy State Police Accident Report available for fee. (NMSA 29-2-25).

Liability for negligence of others according to common law rules. Entrustor of automobile to intoxicated person liable if acting with gross negligence or reckless disregard for safety. (1997-NMCA-068, 943 P.2d 571).

Landowners may be immune from liability for damages arising from off-highway motor vehicle-related accidents or injuries caused by landowner negligence under Off-Highway Motor Vehicle Act, NMSA 66-3-1013A, but no immunity exists for landowner's intentional acts. (1997-NMCA-114, 949 P.2d 287).

Guests.

No limitation of liability for injury based on guest classification. Former guest classification statute (NMSA 64-24-1) declared unconstitutional (88 N. M. 308, 540 P.2d 238).

Proof of Financial Responsibility.

Aside from drivers of small class of exempt vehicles, no person shall operate motor vehicle registered in New Mexico unless there is valid proof of financial responsibility. (NMSA 66-5-205). Financial responsibility may be evidenced by: (1) Evidence of motor vehicle liability policy; (2) surety bond; or (3) certificate of deposit of money. (NMSA 66-5-218).

Insurance.

Minimum limits for auto insurance under Mandatory Financial Responsibility Act are $25,000/$50,000/$10,000. (NMSA 66-5-215). Any insurance offered must provide uninsured motorist coverage, although named insured may reject such coverage. Coverage must provide for under insurance of adverse driver. (NMSA 66-5-301; 1997-NMCA-124, 950 P.2d 297).

Minimum limits are $25,000/$50,000/$10,000. Maximum limits are limits of insured's own policy protection. (NMSA 66-5-215). Insurance companies may limit uninsured motorist coverage to accidents occurring in New Mexico. (1997-NMCA-065, 942 P.2d 191).

Injuries resulting from intentional torts may fall within uninsured motorist coverage if there is sufficient causal link between driver's use of uninsured vehicle and plaintiff's injuries. (120 N.M. 813, 907 P.2d 994).

No-Fault Insurance.

Not adopted.

Motor clubs are subject to licensing and regulation by Superintendent of Insurance. (NMSA 59A-50-1 et seq.).

Foreign vehicles registered at place of residence of nonresident owner and displaying valid registration plates issued at said place need not be registered in this state for 180 days, unless such nonresident owner accepts employment or engages in trade, profession or occupation in this state. Nonresident carrying on business in this state must register all vehicles owned by him used in such business. (NMSA 66-3-301). Owner of foreign commercial motor carrier vehicle to be operated must stop at port of entry and pay all applicable fees and taxes on trip basis, submit to inspection and provide certain information. (NMSA 65-5-1, -2, -3). Nonresident commuting to work in this state need not register vehicle if his state extends like privilege to residents of this state. (NMSA 66-3-301). Members of U.S. Armed Forces may operate their personal passenger vehicles in this state without registration, subject to above limitations. (NMSA 66-3-303). There is exemption from payment of fees for nonresidents whose motor vehicles are properly registered or licensed in foreign state while such vehicles are engaged in interstate commerce within state, provided owners of vehicles registered or licensed within State of New Mexico are granted like exemption while engaged in interstate commerce in state in which motor vehicles of nonresidents are registered or licensed. (NMSA 66-3-301; NMSA 66-3-4).

Nonresident operator at least 15 years of age, duly licensed by his home state or country, may operate in New Mexico. Nonresident operator not required to be licensed by home state or country may operate without New Mexico license if he is over 18 years of age and is operator of vehicle registered in state or country of its owner but not for more than 180 days without New Mexico license. (NMSA 66-5-4). New Mexico has enacted nonresident violator compact. (NMSA 66-8-137.1).

Action against nonresident, or his executor, administrator or other personal representative, arising out of operation of motor vehicle on a highway of the state by him or his authorized chauffeur or agent, may be commenced by service of process on Secretary of State. Copy of process, with the complaint, order of court directing that service be made as provided and notice that process has been served on Secretary of State, must be delivered to defendant or his executor, administrator or other personal representative, personally, without the state. (NMSA 66-5-103, -104). Nonresident who commits tortious act within state may be served personally with process in other state. (NMSA 38-1-16).

Direct Actions.

There is no statutory authorization for direct action against insurer by injured person. Joinder of insurer may be allowed if insurance is required by statute, ordinance, regulation or as provided in insurance policy, unless applicable law forbids such joinder. (58 N.M. 517, 273 P.2d 376). If plaintiff is compelled by R. 1-017, 1-019, or 1-021 to join his insurer as party-plaintiff, insurer's joinder will not be revealed to jury. (101 N.M. 148, 679 P.2d 816). Under certain circumstances, insurance company may be joined in lawsuit against insured. (1998-NMSC-045, 970 P.2d 580; 2003-NMCA-103, 76 P.3d 639). Direct actions against insurance company are permitted. (2004-NMSC-010, 89 P.3d 69).

Motor Vehicle Carriers.

State Corporation Commission regulates motor vehicles operating as common or contract carriers within state, but not within municipalities alone. (NMSA 65-2A-1 to -40). Certificate necessary for common carrier. (NMSA 65-2A-8, -9). Permit necessary for contract carrier. (NMSA 65-2A-10). Interstate Carriers must have single state registration. (NMSA 65-2A-16). Commission has power to grant temporary authority. (NMSA 65-2A-11). Carrier must file ticket reclaim and COD bonds. Carrier must file statement and maintain prescribed amounts of financial responsibility. (NMSA 65-2A-18). Carrier, including interstate carrier, must appoint in writing resident agent for service of process but if does not do so, carrier is deemed to have appointed Secretary of State. (NMSA 65-2A-28).

State shall adopt rules and regulations not inconsistent with nor more stringent than applicable federal safety standards concerning hours of service of drivers. (NMSA 65-3-11).

Motor Vehicle Taxes.

Caravan Tax.

Owner of vehicles using highways of this state for compensation or for delivery to a purchaser or for purpose of sale in any state must obtain special permit unless such vehicles carry New Mexico registration or dealers' plates. $10 permit fee imposed on each vehicle transported under own power; $7 fee on vehicle carried, towed, or drawn by another vehicle. (NMSA 66-3-302).

Special Fuels Supplier Tax.

Imposed by NMSA 7-16A-1 et seq., on rack operators who receive diesel or kerosene used to propel motor vehicle.

Mobile Homes.

Initial registration with Motor Vehicle Dept. required; registration need not be renewed until transfer of title. (NMSA 66-3-19).

Gasoline Tax.

See category 22 Taxation, topic 22.08 Gasoline and Special Fuels Taxes.

23.02 RAILROADS:

See category 3 Business Regulation and Commerce, topic 3.08 Carriers.

24 Forms

Commercial Code Forms

(Click here to view)

1

NEW YORK LAW DIGEST

—Scope —

Revised for 2010 edition by **LexisNexis(R).**

(For explanation of abbreviations used in citations herein, see category 6 Courts and Legislature, topic 6.04 Statutes. Parallel citations to the North Eastern Reporter begin with 99 N. Y.)

Note: This revision is current through November 2009. Regular session of legislature convenes annually on first Weds. after first Mon. in Jan.

1 INTRODUCTION

1.01 GOVERNMENT AND LEGAL SYSTEM:

The State of New York is a constituent state of the United States of America. For further discussion of the U.S. federal system, see Introduction to the Federal Government of the United States at the beginning of this volume. A great many laws are promulgated by the federal government of the U.S. and are not reflected in the categories/topics below. See the Introduction to this volume for references to the federal law topics covered.

Like all but one of the United States, New York has a common law legal system, with roots in English common law. For information on the courts and legislature of New York, see category 6 Courts and Legislature.

1.02 [RESERVED]

1.03 HOLIDAYS:

Public holidays are: Jan. 1 (New Year's); 3d Mon. in Jan. (Dr. Martin Luther King, Jr. Day); Feb. 12 (Lincoln's Birthday); 3d Mon. in Feb. (Washington's Birthday); last Mon. in May (Memorial Day); 2d Sun. in June (Flag Day); July 4 (Independence Day); 1st Mon. in Sept. (Labor Day); 2d Mon. in Oct. (Columbus Day); Nov. 11 (Veteran's Day); 4th Thurs. in Nov. (Thanksgiving); Dec. 25 (Christmas) (if any of foregoing falls on Sun., except 2d Sun. in June, next day thereafter); general election day; and days appointed by President or Governor as day of general thanksgiving, general fasting and prayer, or other general religious observances. Half-holidays are from noon to midnight of each Sat. which is not public holiday. (N.Y. Gen. Constr. Law §24 [NYCLS]).

Days of commemoration enumerated. (N.Y. Exec. Law §168–a).

Banking Organizations.

By proper resolution of governing bodies, banks may remain closed on any Sat. throughout the year. (N.Y. Gen. Constr. Law §24-a[1] [NYCLS]). Governor may declare bank holidays in emergencies. (N.Y. Gen. Constr. Law §24-a[3] [NYCLS]).

Computation.

In computing specified period of days from certain day for act authorized or required to be done, calendar day from which reckoning made is excluded. If such period of time ends on Sat., Sun., or public holiday, act may be done on next business day. For periods of two days, intervening Sat., Sun. or public holiday is excluded from computation unless otherwise agreed. (N.Y. Gen. Constr. Law §§20 [NYCLS], 25-a[1] [NYCLS]).

1.04 OFFICE HOURS AND TIME ZONE:

New York is in the Eastern (GMT -05:00) time zone. Office hours are generally from 9 a.m. to 5 p.m.

2 BUSINESS ORGANIZATIONS

2.01 AGENCY:

In general, common law governs.

Real property may be conveyed by agent. See category 21 Property, topic 21.06 Deeds.

Bribery.

It is a misdemeanor to confer, offer or agree to confer, any benefit upon agent without consent of his principal with intent to influence conduct in relation to principal's business. (N.Y. Penal Law §180.00 [NYCLS]). It is also a misdemeanor to solicit, accept or agree to accept any such benefit. (N.Y. Penal Law §180.05 [NYCLS]).

Marine Ticket Agents.

It is a misdemeanor for a person issuing, selling or offering passage or accommodation on vessel to hold himself out as agent of owner or consignees of vessel unless he has written authority specifying principal's name, agent's name and office address, and unless such authority is conspicuously posted in such office. This does not apply to sale of passage tickets on board vessel or to office of owner or consignees. No such person may give or circulate false information regarding such passage sold or offered for sale. (N.Y. Gen. Bus. Law §§117-119).

Money Transfer Agents.

It is misdemeanor for person, including corporation, firm or unincorporated association, to represent himself to be agent of any company for purpose of receiving money for transmission or transmitting same to foreign countries, nor may any such person do business as such agent, unless duly authorized. Authorized agent will not transmit money received for transmission by him through any person, firm, or corporation other than through his principal. (N.Y. Gen. Bus. Law §§160-161, 166 [NYCLS]). These provisions do not apply to those under supervision of banking department. (N.Y. Gen. Bus. Law §165 [NYCLS]).

2.02 ASSOCIATIONS:

See also topic 2.05 Joint Stock Companies.

Actions.

An action or special proceeding may be maintained by or against president or treasurer of unincorporated association to recover property, or on any cause of action, maintainable by or against all members by reason of their interest or ownership therein, jointly or severally. (N.Y. C.P.L.R. 1025 [NYCLS]; N.Y. Gen. Ass'ns Law §§12, 13). Action may be maintained by such president or treasurer to recover from one or more members of such association their member(s) proportionate share of any moneys lawfully expended by association for benefit of such member(s), or to enforce any lawful claim of such association against such member(s). (N.Y. Gen. Ass'ns Law §12). On death, removal, resignation or incapacity of officer for or against whom suit is brought as provided above, court must direct suit to be continued, by or against his successor in office, or any other officer by or against whom it might have been originally commenced. (N.Y. Gen. Ass'ns Law §14).

Professional Associations.

See topic 2.03 Corporations, subhead Professional Corporations.

2.03 CORPORATIONS:

Business Corporation Law constitutes single, unified statute applicable to all domestic corporations organized for profit, and applies to those formed under Banking (N.Y. Banking Law §1002 [NYCLS]), Insurance (N.Y. Ins. Law §108), Railroad (N.Y. R.R. Law §6), Transportation (N.Y. Transp. Corp. Law §4), or Cooperative (N.Y. Coop. Corp. Law §5) Corporations Laws to extent provided under such laws. It applies to all foreign corporations organized for profit doing business here, except cooperative corporations, and applies to corporations having purpose or doing kind of business provided under banking, insurance, railroad or transportation laws to extent provided under such laws. Unless otherwise stated, sections noted are those of Business Corporation Law.

N.Y. Constitution states corporations may be created only under general laws, except for municipal purposes, and in cases where objects of corporation cannot be attained under general laws, in which case incorporation by special act permitted. All general laws and special acts passed for such purpose may be altered or repealed. (N.Y. Const. art. X, §1 [NYCLS]). Legislature cannot pass private or local bills granting to any private corporation any exclusive privileges, immunities or franchises or any exemption from taxation on real or personal property. (N.Y. Const. art. III, §17 [NYCLS]).

General Supervision.

Filings are made with New York Department of State, Division of Corporations, 41 State Street, Albany, New York 12231 (http://www.dos.state.ny.us). Attorney General has limited enforcement powers. (N.Y. Bus. Corp. Law §109 [NYCLS]).

Purposes.

Corporation may be formed for any lawful business purpose. (N.Y. Bus. Corp. Law §201[a] [NYCLS]). In time of national emergency, corporation may engage in any lawful business in aid thereof at request of competent government authority, notwithstanding purposes in certificate of incorporation. (N.Y. Bus. Corp. Law §201[c] [NYCLS]). Foreign corporation seeking to file with Department of State certificate of incorporation, merger or consolidation, or application to do business in N.Y., which states purpose of organizing wage-earners, serving as labor consultant or advisor, or acting as labor arbitrator or negotiator must obtain approval from industrial board of appeals. (N.Y. Bus. Corp. Law §201[b] [NYCLS]). In order to operate hospital or day care center, corporation must get approval of appropriate regulatory agency. (N.Y. Bus. Corp. Law §201[d] [NYCLS] and N.Y. Bus. Corp. Law §201[e] [NYCLS]).

Corporation Name.

Domestic corporation cannot be incorporated, and foreign corporation cannot be qualified to do business in N.Y. under reserved name or same name as existing corporation, limited liability company or limited partnership authorized to do business in N.Y., or under name so similar that would not distinguish it from names of such other entities. Name must contain word “corporation,” “incorporated,” “limited,” or abbreviation thereof. Foreign corporation must add such to name if need be. Certain words and phrases may not be used in corporation name: (a) Where use is prohibited or restricted by any statute, unless restrictions have been complied with, (b) in context which indicates or implies purpose or power not possessed by corporation, e.g. acceptance, annuity, assurance, bank, benefit, board of trade, bond, casualty, chamber of commerce, community renewal, doctor, endowment, exchange, fidelity, finance, guaranty, indemnity, insurance, investment lawyer, loan, mortgage, savings, surety, tenant relocation title, trust, state police, state trooper, union, underwriter, urban development, urban relocation, etc., unless approval of Superintendent of Banks or Superintendent of Insurance is attached to certificate of incorporation or application for authority or amendment thereof, except word “doctor” or “lawyer” may appear in name of professional corporation, (c) unless approval of state board of standards and appeals attached to certificate of incorporation, or application for authority or amendment thereof, following words: union, labor, council, industrial organization, in context which implies that corporation is organization of working men or women, or for performance or sale of services as labor or management consultant, or as negotiator or arbitrator in labor-management disputes, (d) unless approval of state department of social services attached to certificate of incorporation, or application for authority or amendment thereof, word “blind” or “handicapped”, (e) any words or phrases which tend to mislead public into believing that corporation is agency of U.S. or State of New York or public corporation, (f) any words or phrases, which, separately, or in context, are indecent or obscene, or will ridicule or degrade any person, group, belief, business or agency of government, or indicate or imply unlawful activity, (g) unless approval of attorney general attached to certificate of incorporation, or application for authority or amendment thereof, word “exchange,” (h) unless consent of commissioner of education attached to certificate of incorporation, any of following: school education, elementary, secondary, kindergarten, prekindergarten, preschool, nursery school, museum, history, historical, historical society, arboretum, library, college, university, other terms restricted by Education Law (N.Y. Educ. Law §224), conservatory, academy, institute, or abbreviation or derivative of such terms. Domestic and qualified corporations whose names include words “community renewal,” “tenant relocation,” “urban development,” or “urban relocation” must state in advertising, on letterheads, and in other public communications, “not a governmental agency.” (N.Y. Bus. Corp. Law §§301-2). But, corporation formed by reorganization, merger, consolidation or reincorporation may use name of prior corporation. Also, foreign corporation having same or similar name as existing corporation, or reserved name, may use its old name if Department of State finds: (1) Difference between such names exists in terms or abbreviations indicating corporate character or otherwise, (2) it has engaged in business as corporation for at least ten consecutive years under its said name, (3) its business is not same as its namesake's, (4) confusion and deception is minimal, and (5) it adds immediately under or following its name “a . . . . . . (state of incorporation) corporation.” (N.Y. Bus. Corp. Law §302 [NYCLS]).

Name of corporation may be reserved for 60 days (with renewals on written request) by application to Department of State. (N.Y. Bus. Corp. Law § 303[c] [NYCLS] and [d] [NYCLS]). Department of State accepts written requests concerning availability of names accompanied by fee of $5 for each name to be searched for availability. http://www.dos.state.ny.us/corp/bcfaq.htm#corpname. Fee to reserve name is $20. (N.Y. Bus. Corp. Law §104-A [NYCLS]).

Corporation may not conduct or transact business under any name other than name in its certificate of incorporation and generally accepted abbreviations thereof unless it has filed with Secretary of State certificate containing name under which it conducts business and other specified information, together with filing fee. Corporation must not file certificate for use of name including words restricted by N.Y. Bus. Corp. Law §301[a] [NYCLS] or Not-for-Profit Corporation Law (N.Y. Not-For-Profit Corp. Law §§301[a] [NYCLS], 404[w] [NYCLS]) without obtaining necessary approvals. Education corporation must obtain consent of board of regents to file certificate. Knowing failure to file certificate or knowing misstatement in certificate is misdemeanor and corporation is prohibited from maintaining any action in New York courts on any contract, account, or transaction made in name other than real name until certificate filed. (N.Y. Bus. Corp. Law §202[b] [NYCLS]; N.Y. Gen. Bus. Law §130[1][b] [NYCLS], [2][c] [NYCLS], [9] [NYCLS], [11] [NYCLS]).

Corporate Existence.

Term or duration may be perpetual or limited. (N.Y. Bus. Corp. Law §§202[a][1] [NYCLS], 402[a][9] [NYCLS]).

Incorporators.

One or more natural persons of age of 18 years or over may act as incorporator(s). (N.Y. Bus. Corp. Law §401 [NYCLS]).

Certificate of incorporation includes: (a) original certificate of incorporation or any other instrument filed or issued under any statute to form domestic or foreign corporation, as amended, supplemented or restated by certificates of amendment, merger or consolidation, or other certificates or instruments filed or issued under any statute; or (b) special act or charter creating domestic or foreign corporation, as amended, supplemented or restated. (N.Y. Bus. Corp. Law §102[a][3] [NYCLS]).

Certificate of incorporation, in English, entitled "Certificate of incorporation of . . . . (name of corporation) under N.Y. Bus. Corp. Law §402 [NYCLS]," must be signed by each incorporator, with his name and address included in such certificate and delivered to Department of State.

It must contain: (1) Name of corporation; (2) purposes for which it is formed (see infra for further discussion of purpose); (3) county within N.Y. in which office of corporation is to be located; (4) aggregate number of shares which corporation will have authority to issue; if such shares consist of one class only, par value of shares or statement that shares are without par value; or, if divided into classes, number of shares of each class and par value of shares having par value and statement as to which shares, if any, are without par value; (5) if shares are divided into classes, designation of each class and statement of relative rights, preferences and limitations of each class; (6) if shares of any preferred class are to be issued in series, designation of each series and statement of variations in relative rights, preferences and limitations between series insofar as same are to be fixed in certificate of incorporation, statement of any authority to be vested in board to establish and designate series and to fix variations in relative rights, preferences and limitations between series and statement of any limit on authority of board of directors to change number of shares of any series of preferred shares as provided in N.Y. Bus. Corp. Law §502[e] [NYCLS]; (7) designation of Secretary of State as agent of corporation upon whom process may be served, and post office address to which Secretary of State shall mail copy of such process; (8) if corporation has registered agent, his name, address within state, and statement that he is agent of corporation upon whom process against it may be served; and (9) duration of corporation, if other than perpetual. (N.Y. Bus. Corp. Law §402[a] [NYCLS]). As to corporate purposes it is sufficient to state (either alone or with other purposes) that purpose of corporation is to engage in any lawful act or activity for which corporations may be organized under N.Y. Bus. Corp. Law provided that it is also stated that corporation is not formed to engage in any act requiring consent of state agency without such consent first being obtained. (N.Y. Bus. Corp. Law §402[a][2] [NYCLS]).

Certificate may set forth provision eliminating or limiting personal liability of directors to corporation or its shareholders for damages for any breach of duty in such capacity; however, any such provision may not eliminate or limit: (1) Liability of any director if judgment or other final adjudication establishes that he acted in bad faith, with intentional misconduct or knowing violation of law, or that he personally gained in fact financial profit or other advantage to which he was not legally entitled, or that his acts violated N.Y. Bus. Corp. Law §719 [NYCLS] (concerning certain improper corporate actions by directors), or (2) liability of any director for any act or omission prior to adoption of such provision. (N.Y. Bus. Corp. Law §402[b] [NYCLS]). Certificate may set forth any provision not inconsistent with N.Y. Bus. Corp. Law or other N.Y. statutes relating to corporation business, affairs, rights or powers, or those of its shareholders, directors or officers, including any provision relating to matters required or permitted to be set forth in by-laws. (N.Y. Bus. Corp. Law §402[c] [NYCLS]). Accordingly, it may also provide for cumulative voting (N.Y. Bus. Corp. Law §618 [NYCLS]), limitations and restrictions on voting rights (N.Y. Bus. Corp. Law §613 [NYCLS]), division of directors into two, three or four classes whose terms of office expire at different times (N.Y. Bus. Corp. Law §704 [NYCLS]). Certificate of incorporation may also contain provisions specifying any or all of following: (a) That number of directors necessary for quorum be any specified number greater or less than majority but not less than one-third thereof (N.Y. Bus. Corp. Law §707 [NYCLS]); (b) actions by board may be taken without meeting if all members consent in writing to adoption of resolution authorizing action (N.Y. Bus. Corp. Law §708[b] [NYCLS]); (c) that members of board or committee thereof may not participate in meeting of such board or committee by means of conference telephone (or similar equipment) and that such participation shall not constitute presence in person at such meeting (N.Y. Bus. Corp. Law §708[c] [NYCLS]); (d) that proportion of votes of directors necessary for transaction of business or specified item of business shall be greater than majority (N.Y. Bus. Corp. Law §709[a][2] [NYCLS]); (e) that special meetings of shareholders may be called by any person so authorized by certificate of incorporation (N.Y. Bus. Corp. Law §602[c] [NYCLS]); (f) that holders of bonds issued, or to be issued by corporation, may have rights to inspect corporate books and records and vote in election of directors and on any other matters on which shareholders of corporation may vote (N.Y. Bus. Corp. Law §518[c] [NYCLS]); (g) that board, by resolution adopted by majority of entire board, may designate from among its members executive committee and other committees (each consisting of one or more directors), each of which, to extent provided for in resolution or in certificate of incorporation or by-laws, will have all authority of board, except that no such committee has authority as to following matters: (1) Submission to shareholders of any action needing shareholders' approval; (2) filling of vacancies in board of directors or in any committee; (3) fixing of compensation of directors for serving on board or any committee; (4) amendment or repeal of by-laws or adoption of new by-laws; or (5) amendment or repeal of any resolution of board which by its terms is not so amendable or repealable (N.Y. Bus. Corp. Law §712[a] [NYCLS]); and (h) that all officers or specified officers be elected by shareholders instead of by board (N.Y. Bus. Corp. Law §715[b] [NYCLS]).

Note: Above list is not all-inclusive.

Type of Execution, Filing and Effect of Certificate.

Certificate of incorporation must be subscribed and acknowledged by incorporators before officer authorized to take acknowledgments of deeds (see category 10 Documents and Records, topic 10.01 Acknowledgments), and filed in office of Secretary of State, who will make, certify and transmit copy to clerk of county where corporate office is to be located. County clerk will file and index such copy. (N.Y. Bus. Corp. Law §§104[g] [NYCLS], 402 [NYCLS]). Thereupon, corporate existence begins; however, certificate of incorporation may set forth date not more than 90 days subsequent to filing upon which corporate existence shall begin. Such certificate of incorporation is conclusive evidence that all conditions precedent have been fulfilled and that corporation has been formed except in action or special proceeding by Attorney General. (N.Y. Bus. Corp. Law §403 [NYCLS]).

Organization Tax.

Tax on 1/20 of 1% of amount of authorized par value stock (50¢ per $1,000), and 5¢ per share on shares without par value (minimum tax $10) is payable to Secretary of State on filing certificate. All taxes required by law to be paid before or upon incorporation and all filing fees must be paid before filing. (N.Y. Tax Law §180 [NYCLS]).

Filing Fees.

Together with the organization tax, there must be paid to Secretary of State filing fees for certificate of: incorporation, $125; amendment, restated certificate of incorporation, merger, consolidation, dissolution or termination, $60; certificate of change, $30, or for only a change of address, $5; application for foreign corporation's authority, $225; biennial statement, $9; reservation of name, $20. (N.Y. Bus. Corp. Law §104-A [NYCLS]; http://www.dos.state.ny.us/corp/corpfees.html).

License to Do Business.

No provision. Upon filing, certificate of incorporation is conclusive evidence of corporate existence except in action or special proceeding brought by Attorney General. (N.Y. Bus. Corp. Law §403 [NYCLS]).

Organization.

After corporate existence has begun, organizational meeting of incorporator must be held to adopt by-laws, elect directors to serve until first meeting of shareholders, and such other business as may arise. If there are two or more incorporators, meeting may be held at call of any incorporator who must give at least five days notice by mail to other incorporators setting forth time and place of meeting. Notice not needed for incorporator who attends meeting or signs waiver of notice. If more than two incorporators, majority constitutes quorum, and act of majority present at meeting at which there is quorum is act of incorporators. Incorporator may act in person or by proxy signed by incorporator or his attorney-in-fact. Any action permitted to be taken at organization meeting may be taken without meeting if each incorporator or his attorney-in-fact signs an instrument setting forth action so taken. (N.Y. Bus. Corp. Law §404 [NYCLS]). If incorporator dies or for any reason is unable to act, action may be taken on written consent signed by majority in interest of subscribers for shares whose subscriptions have been accepted. (N.Y. Bus. Corp. Law §§404 [NYCLS], 615 [NYCLS]).

Paid-In Capital Requirements.

There are no statutory provisions with respect to amount of capital which must be paid in before commencing business.

Amendment of Certificate.

Corporation, including one created by special act, may amend its certificate of incorporation, provided such amendment contains only such provisions as might be lawfully contained in original certificate of incorporation filed at time of making such amendment. (N.Y. Bus. Corp. Law §801[a] [NYCLS]). In particular, and without limitation upon such general power of amendment, corporation may amend its certificate of incorporation so as: (1) To change its corporate name; (2) to enlarge, limit or otherwise change its corporate purposes; (3) to specify or change location of corporation office; (4) to specify or change post office address to which Secretary of State shall mail copy of process against corporation; (5) to make, revoke or change designation of registered agent, or to specify or change address; (6) to extend duration of corporation, or, if corporation has exceeded its original duration, to revive its existence; (7) to increase or decrease aggregate number of shares, or shares of any class or series, with or without par value, which corporation has authority to issue; (8) to remove from authorized shares any class of shares, or any shares of any class, whether issued or unissued; (9) to increase par value of any authorized shares of any class with par value, whether issued or unissued; (10) to reduce par value of any authorized shares of any class with par value, whether issued or unissued; (11) to change any authorized shares, with or without par value, whether issued or unissued into different number of shares of same class or into same or different number of shares of any one or more classes or any series thereof, either with or without par value; (12) to fix, change, or abolish designation of any authorized class or any series thereof or any relative rights, preferences and limitations of any shares of any authorized class or any series thereof, issued or unissued, including any provisions in respect of any undeclared dividend, whether or not cumulative or accrued, or redemption of any shares, or any sinking fund for redemption or purchase of any shares, or any preemptive right to acquire shares or other securities; (13) as to shares of any preferred class then or theretofore authorized which may be issued in series, to grant authority to board or to change or revoke authority of board to establish and designate series and to fix number of shares and relative rights, preferences and limitations as between series; (14) to strike out, change or add any provision not inconsistent with N.Y. Bus. Corp. Law or any other statute relating to business of corporation, its affairs, its rights or powers, or rights or powers of its shareholders, directors or officers including any provision which is required or permitted to be set forth in by-laws, except that certificate of amendment may not be filed to reduce duration of corporation. (N.Y. Bus. Corp. Law §801[b] [NYCLS]). Corporation may reduce its stated capital by amendment of its certificate of incorporation under N.Y. Bus. Corp. Law §801 [NYCLS]. (N.Y. Bus. Corp. Law §802 [NYCLS]).

Amendments may be authorized by vote of board, followed by vote of majority of all outstanding shares entitled to vote thereon at meeting of shareholders, or such higher vote as certificate may require provided, however, that whenever certificate of incorporation requires action by board of directors, by holders of any class or series of shares or by holders of any securities having voting power, by vote of greater number or proportion than is required by N.Y. Bus. Corp. Law, provision of certificate of incorporation requiring such greater vote shall not be altered, amended or repealed except by such greater vote. (N.Y. Bus. Corp. Law §§803 [NYCLS], 616 [NYCLS]). Lower requirements for quorum or vote must meet higher share vote requirements if certificate specifically so requires for such change. (N.Y. Bus. Corp. Law §616[a][2] [NYCLS]). Alternatively, following changes may be authorized by board: (1) To specify or change location of corporation's office; (2) to specify or change post office address to which Secretary of State shall mail copy of process he has received; (3) to make, revoke or change designation of registered agent or to specify or change agent's address. (N.Y. Bus. Corp. Law §803[b][1]-[b][3] [NYCLS]). However, this section does not alter vote required by other sections for authorization of amendments nor authority of board to authorize them. (N.Y. Bus. Corp. Law §803[c] [NYCLS]). Notwithstanding any provision in certificate of incorporation, holders of shares of class are entitled to vote as class upon authorization of amendment, and amendment must be authorized not only by majority of votes of all outstanding shares entitled to vote but also by majority of votes of all outstanding shares of that class when proposed amendment would: (1) Exclude or limit existing voting rights or shares to vote on any matter; (2) change their shares under N.Y. Bus. Corp. Law § 801[b][10] [NYCLS], [11] [NYCLS] or [12] [NYCLS] or provide that their shares of any class or series thereof may be converted into shares of any other class or into shares of any other series of same class, or alter terms or conditions upon which their shares are convertible or change shares issuable upon conversion, if such action would adversely affect such holders; or (3) subordinate their rights by authorizing shares having preferences which would be in any respect superior to their rights. (N.Y. Bus. Corp. Law §804[a] [NYCLS]). If any such proposed amendment would adversely affect rights of holders of shares of only one or more series of any class, but not entire class, then only holders of those series whose rights would be affected are considered separate class for purposes of §804. (N.Y. Bus. Corp. Law §804[b] [NYCLS]). Amendment may be authorized by sole incorporator or majority of incorporators provided corporation has no shareholders of record, no subscribers for shares whose subscriptions have been accepted, and no directors. (N.Y. Bus. Corp. Law §803[d] [NYCLS]).

To accomplish amendment, form entitled “Certificate of amendment of the certificate of incorporation of . . . (name of corporation) under N.Y. Bus. Corp. Law §805 [NYCLS]” must be signed and delivered to Department of State. It must set forth: (1) Name of corporation and, if changed, its original name; (2) date its certificate of incorporation was filed; (3) each amendment effected thereby, setting forth subject matter of each provision of certificate of incorporation to be amended or eliminated, and full text of any provision or provisions to be substituted or added; (4) if amendment provides for any change or changes of issued or unissued shares, statement setting forth for each change: number, par value and class of issued shares changed and of unissued shares changed; number, par value and class of issued shares and of unissued shares resulting from such change; terms of change; (5) if any amendment reduces stated capital, then statement of manner in which same is effected and amounts from which and to which stated capital is reduced; (6) manner in which amendment of certificate of incorporation was authorized. (N.Y. Bus. Corp. Law §805 [NYCLS]). In case of authorization by sole incorporator or majority of incorporators pursuant to N.Y. Bus. Corp. Law §803[d] [NYCLS], certificate of amendment must state that corporation has no shareholders of record, no subscribers for shares whose subscriptions have been accepted, and no directors. (N.Y. Bus. Corp. Law §805[a][6] [NYCLS]). In case of change of shares, shares resulting from such change shall, upon filing of certificate of amendment, be deemed substituted for shares changed, in accordance with stated terms of change. (N.Y. Bus. Corp. Law §805[c] [NYCLS]).

Following provisions apply to amendments and changes except those pursuant to reorganization under act of Congress: (1) Stated capital in regards to shares without par value resulting from change of issued shares is amount of stated capital in respect of shares changed or, if such stated capital is reduced by the amendment, reduced amount stated in certificate of amendment. No corporation may change issued shares into both shares with and without par value, unless stated capital in regards to shares so changed, or, if such stated capital is reduced by amendment, reduced amount of stated capital stated in certificate of amendment, exceeds par value of shares with par value resulting from such change; and amount of such excess is stated capital in regards to shares without par value resulting from such change. (2) No corporation may increase aggregate par value of its issued shares with par value, unless, after giving effect to such increase, stated capital is at least equal to amount required by definition "to have any stated capital." (3) No reduction of stated capital may be made by amendment unless after such reduction stated capital exceeds aggregate preferential amount payable upon involuntary liquidation upon all issued shares having preferential rights in assets plus par value of all other issued shares with par value. (4) Any changes that may be made in relative rights, preferences and limitations of authorized shares of any class by any certificate of amendment which does not eliminate such shares from authorized shares, or change them into shares of another class, does not, for purpose of any statute or rule of law, effect issue of new class of shares. (5) No amendment or change affects any existing cause of action in favor of or against corporation or pending suit to which it is a party, or existing rights of persons other than shareholders; and in event corporate name is changed, no suit brought by or against corporation under its former name will abate for that reason. (6) Holder of adversely affected shares who does not vote for, or consent in writing to, such action has right to dissent and receive payment for shares if amendment: (a) alters or abolishes preferential right of such shares having preferences; or (b) creates, alters or abolishes provision or right of redemption of such shares or any sinking fund for redemption or purchase of such shares; (c) alters or abolishes any preemptive rights; or (d) excludes or limits right to vote on any matter except as such right may be limited by voting rights to new shares then being authorized of any existing or new class. (N.Y. Bus. Corp. Law §806[b] [NYCLS]).

Restated certificate of incorporation, to be entitled "Restated certificate of incorporation of . . . . . (name of corporation) under section 807 of the Business Corporation Law [NYCLS]," may be filed with Department of State, in which event it supersedes former certificate of incorporation, and becomes certificate of incorporation. (N.Y. Bus. Corp. Law §807 [NYCLS]). Whenever instrument is required to set forth date when certificate of incorporation was filed, date of original certificate of incorporation is intended. (N.Y. Bus. Corp. Law §104[c] [NYCLS]). Restated certificate of incorporation may include any amendments or changes which may be authorized by board without vote of shareholders, and corporation may also restate its certificate of incorporation to effect any amendments or changes authorized by required vote of holders of shares entitled to vote thereon. (N.Y. Bus. Corp. Law §807[a] [NYCLS]). Restated certificate of incorporation need not include statements as to incorporators, original subscribers for shares or first directors. (N.Y. Bus. Corp. Law §807[c] [NYCLS]).

When plan of reorganization of corporation has been confirmed by decree or order of court under applicable act of Congress relating to reorganization, corporation has authority without action of its shareholders or board to put into effect and carry out such plan. (N.Y. Bus. Corp. Law §808[a] [NYCLS]). If decree or order provides for formation of new domestic or foreign corporation to do business under name the same or similar to that of corporation being reorganized, certificate of incorporation of new domestic corporation or application of new foreign corporation must set forth that it is being delivered pursuant to such decree or order and must be endorsed with consent of court having jurisdiction of proceeding. On filing such new certificate of incorporation or application, reorganized corporation may no longer use former name except in connection with reorganization proceedings or as may be necessary to adjust and wind up its affairs, and it shall be deemed dissolved, or its authority to do business shall cease 30 days after such filing. (N.Y. Bus. Corp. Law §808[h] [NYCLS]). State approval otherwise required by law is not waived by above reorganization section. (N.Y. Bus. Corp. Law §808[i] [NYCLS]). All certificates of incorporation are subordinate to their creating statutes, and an amendment of creating statute constitutes an amendment of certificate of incorporation. (74 Misc.2d 540, 344 N.Y.S.2d 774).

Increase or Decrease of Authorized Capital Stock.

See subhead Amendment of Certificate, supra.

By-Laws.

Initial by-laws of corporation are adopted by incorporator(s). Subject to (N.Y. Bus. Corp. Law §613 [NYCLS]) (Limitations on right to vote), by-laws may be amended, repealed or adopted by majority of votes cast by shares entitled to vote in election of any directors, or by board under authority granted by certificate of incorporation, or by-law adopted by incorporator(s) or shareholders. By-laws adopted by board may be amended or repealed by shareholders. Any reference to “by-law adopted by the shareholders” includes by-law adopted by incorporator(s). (N.Y. Bus. Corp. Law §601[a] [NYCLS]). By-laws may contain any provision relating to business of corporation, conduct of its affairs, its rights or powers or rights or powers of its shareholders, directors or officers, not inconsistent with N.Y. Bus. Corp. Law or any other statute or certificate of incorporation. (N.Y. Bus. Corp. Law §601[b] [NYCLS]). A by-law adopted by shareholders may provide for classification of directors. (N.Y. Bus. Corp. Law §704[a] [NYCLS]). Among other things, by-laws: set place of shareholders' meeting (N.Y. Bus. Corp. Law §602[a] [NYCLS]); authorize persons to call special meetings (N.Y. Bus. Corp. Law §602[c] [NYCLS]); and fix record date for determination of shareholders eligible to vote (N.Y. Bus. Corp. Law §604[a] [NYCLS]).

Shares.

Corporations have power to issue number of shares stated in certificate of incorporation. Shares may be of one or more classes with or without par value, and certificate of incorporation shall include designation, voting, dividend, liquidation and other rights, preferences and limitations of shares. (N.Y. Bus. Corp. Law §501[a] [NYCLS]). If shares are divided into two or more classes, shares of each class must be designated. Shares entitled to preference as to dividends or assets may not be designated common shares, and shares not entitled to such preferences are common shares, and may not be designated preferred shares. (N.Y. Bus. Corp. Law §501[b] [NYCLS]). Subject to designation, relative rights, preferences, and limitations applicable to separate series, each share is equal to every other share of same class. With certain limitations, same rule applies to corporations owning or leasing residential premises and operating them on cooperative basis. (N.Y. Bus. Corp. Law §501[c] [NYCLS]).

If certificate of incorporation so provides, corporation may issue any class of preferred shares in a series. They must be designated to distinguish them from shares of all other series. (N.Y. Bus. Corp. Law §502[a] [NYCLS]). Relative rights, preferences and limitations of any series may be fixed in certificate of incorporation, subject to certain limitations, or fixed by board if so authorized in certificate of incorporation. (N.Y. Bus. Corp. Law § 502[b] [NYCLS], [c] [NYCLS]). Certificate of amendment authorized by board and stating number, designation, relative rights, preferences, and limitations of shares of series as fixed, must be delivered to Department of State as per N.Y. Bus. Corp. Law §805 [NYCLS], before issue of any shares of a series established by board of directors. (N.Y. Bus. Corp. Law §502[d] [NYCLS]).

Corporation may issue fractions of share either represented by certificate or uncertificated which entitle holder, in proportion to his fractional holdings, to exercise voting rights, receive dividends and participate in liquidating distributions. (N.Y. Bus. Corp. Law §509[a] [NYCLS]). Alternatively, corporation may pay fair value of fractions of share in cash as of time when those entitled to receive such fractions are determined, or may issue scrip in registered or bearer form, exchangeable as therein provided for full shares, but not entitling holder to any rights of shareholder except as therein provided (N.Y. Bus. Corp. Law § 509[b] [NYCLS], [c] [NYCLS]). Corporation may provide reasonable opportunity for persons entitled to share-fractions or scrip, to sell such or to purchase additional fractions or scrip as may be needed to acquire full shares. (N.Y. Bus. Corp. Law §509[d] [NYCLS]).

Subject to certain restrictions, corporation may provide in its certificate of incorporation for one or more classes or series of shares which are redeemable. (N.Y. Bus. Corp. Law §512[a] [NYCLS]). Shares that have been issued and have been purchased, redeemed or otherwise reacquired by corporation must be cancelled, if reacquired out of stated capital, or if converted shares, or if certificate of incorporation requires that such shares be cancelled. (N.Y. Bus. Corp. Law §515[a] [NYCLS]). Any shares reacquired but not required to be cancelled may be either retained as treasury shares or cancelled by board. (N.Y. Bus. Corp. Law §515[b] [NYCLS]). Unless otherwise provided in certificate of incorporation and subject to certain restrictions, corporation may also issue shares or bonds convertible, at option of holder, corporation or another person, or upon happening of specified event, into shares of any class or of any series of any class, cash, other property, indebtedness or other securities of same or another corporation. (N.Y. Bus. Corp. Law §519[a] [NYCLS]).

Certificates Representing Shares.

Shares of corporation may be represented by certificates or may be uncertificated. Certificates must be signed by chairman or vice chairman of board or president or vice president, and by secretary or assistant secretary or treasurer or assistant treasurer of corporation. Signatures on certificated shares may be by facsimile if countersigned by transfer agent or registered by registrar other than corporation itself or employee thereof or if shares listed on registered national securities exchange. (N.Y. Bus. Corp. Law §508[a] [NYCLS]). If corporation is authorized to issue shares of more than one class, certificate must state such on its face or back or must state that corporation will furnish shareholder on request, without charge, full statement of designation, relative rights, preferences and limitations of shares of each class authorized, and information as to preferred shares in series, if any. (N.Y. Bus. Corp. Law §508[b] [NYCLS]). Each certificate representing shares must state: (1) Corporation is formed under N.Y. law; (2) name of person(s) to whom issued; (3) number and class of shares and designation of series if any which certificate represents. (N.Y. Bus. Corp. Law §508[c] [NYCLS]). Unless articles of incorporation or by-laws provide otherwise, some or all of corporation's shares may be uncertificated. Corporation must send written notice to registered owners of uncertificated shares, containing information required to be set forth on certificates. (N.Y. Bus. Corp. Law §508[f] [NYCLS]).

Issuance of Stock.

Consideration for issue of shares must consist of money or other property, tangible or intangible, labor or services actually received by, or performed for, corporation or for its benefit or in its formation or reorganization, binding obligation to pay purchase price or subscription price in cash or other property, binding obligation to perform services having agreed value, or combination thereof. In absence of fraud in transaction, judgment of board or shareholders as to value of consideration received for shares is conclusive. (N.Y. Bus. Corp. Law §504[a] [NYCLS]). Shares without par value may be issued for such consideration as fixed by board unless certificate of incorporation reserves this right to shareholders. (N.Y. Bus. Corp. Law §504[d] [NYCLS]). Shares with par value require consideration not less than par value as fixed by board. (N.Y. Bus. Corp. Law §504[c] [NYCLS]). Certificates of shares may not be issued until full consideration determined to be stated capital pursuant to (N.Y. Bus. Corp. Law §506 [NYCLS]) has been paid in form of cash, services, property or combination thereof, and balance has been provided pursuant to N.Y. Bus. Corp. Law §504[a] [NYCLS], except where shareholders have approved plan for issue of rights or options to directors and employees pursuant to (N.Y. Bus. Corp. Law §505[e] [NYCLS],[f] [NYCLS]). (N.Y. Bus. Corp. Law §504[h] [NYCLS]).

Corporation, subject to certificate of incorporation, may create and issue rights or options entitling holders thereof to purchase shares of any class or series from corporation on such terms and conditions as fixed by board. (N.Y. Bus. Corp. Law §505[a][1] [NYCLS]). Issue of such rights or options to directors and employees as incentive to service or continued service with corporation, or to trustee on their behalf, must be authorized as required by policies of stock exchange or automated quotation systems on which corporation's shares are traded, or if not, at meeting of shareholders by majority of votes cast, or authorized by and consistent with plan which was authorized by such vote of shareholders. If, by certificate of incorporation, there are preemptive rights to any shares to be thus subject to rights or options, such issue or plan must also be authorized by majority of those entitled to exercise preemptive rights. (N.Y. Bus. Corp. Law §505[d] [NYCLS]). Plan adopted by shareholders must include terms and conditions upon which rights or options are to be issued and may authorize board to increase (by certificate of amendment) number of authorized shares to satisfy such rights and options. (N.Y. Bus. Corp. Law §505[e] [NYCLS], [g] [NYCLS]). In absence of preemptive rights, shareholder approval is not required for issuing rights or options to purchase shares in substitution for, or upon assumption of, rights or options issued by another corporation, if substitution or assumption is connected with such other corporation's merger or consolidation with or acquisition of its shares or all or part of its assets by corporation or its subsidiary. (N.Y. Bus. Corp. Law §505[d] [NYCLS]).

Consideration received for shares with par value will constitute stated capital to extent of par value of such shares. (N.Y. Bus. Corp. Law §506[a] [NYCLS]). “Stated Capital” means sum of: (a) par value of all shares with par value that have been issued, (b) amount of consideration received for shares without par value that have been issued, except such part of consideration therefor as may have been allocated to surplus in manner permitted by law, and (c) such amounts not included in (a) and (b) as have been transferred to stated capital, whether upon distribution of shares or otherwise, minus all reductions from such sums as have been effected in manner permitted by law. (N.Y. Bus. Corp. Law §102[a][12] [NYCLS]). Stated capital of corporation may be increased by resolution of board transferring all or part of corporation surplus to stated capital. Board may direct amount so transferred be stated capital as to any designated class or series of shares. (N.Y. Bus. Corp. Law §506[c] [NYCLS]).

Reasonable charges and expenses of formation or reorganization and sale or underwriting of corporation's shares may be paid or allowed by corporation out of consideration received in payment for its shares without thereby impairing fully paid and nonassessable status of such shares. (N.Y. Bus. Corp. Law §507 [NYCLS]).

Transfer of Stock.

Uniform Commercial Code governs. See category 3 Business Regulation and Commerce, topic 3.09 Commercial Code. For restrictions on sale of stock see category 3 Business Regulation and Commerce, topic 3.24 Securities.

Uniform Act for Simplification of Fiduciary Security Transfers repealed. See Uniform Commercial Code, Article 8.

Uniform Commercial Code adopted.

Stock Transfer Tax.

There is a stock transfer stamp tax of 2½¢ per share, except that where shares or certificates are sold, tax is 1¼¢ per share where selling price is less than $5, 2½¢ per share where selling price is $5 or more but less than $10, 3¾¢ per share where selling price is $10 or more but less than $20, and 5¢ per share where selling price is $20 or more. (N.Y. Tax Law §270[2] [NYCLS]). However, 100% rebate allowed on tax paid on transactions occurring on or after Oct. 1, 1981. (N.Y. Tax Law §280-a [NYCLS]). It is duty of persons making or effectuating sale or transfer, including buyer or transferee, to pay tax except where vendor or transferor is governmental entity or international organization which is not subject to tax. (N.Y. Tax Law §270[3] [NYCLS]). There is no tax on deposit of certificates as collateral security, on mere loan of certificates, on transfer from owner to custodian where shares are held subject to instruction of owner, or upon certain other transactions. (N.Y. Tax Law §270[5] [NYCLS]).

Bond Transfer Tax.

Repealed effective Mar. 2, 1976. (1976, N.Y. Laws c. 17).

Fixing Record Time for Determination of Stock Ownership.

For purposes of determining shareholders entitled to notice of, or to vote at, any meetings or to express consent to or dissent from any proposal without meeting, or for purposes of determining shareholders entitled to receive payment of any dividend or allotment of any rights, or for purposes of any other actions, by-laws may provide for fixing, or, in absence of such provision in by-laws, board may fix, record date not more than 60 nor less than ten days before date of such meeting, nor more than 60 days prior to any other action. (N.Y. Bus. Corp. Law §604[a] [NYCLS]). If not fixed: (1) Record date, for purposes of determining shareholders entitled to notice of or to vote at meeting of shareholders, will be close of business on day next preceding day on which notice is given, or, if none given, day on which meeting held; (2) record date for determining shareholders for any other purpose is at close of business on day on which resolution of board relating thereto is adopted. (N.Y. Bus. Corp. Law §604[b] [NYCLS]). When determination of shareholders of record entitled to notice of or to vote at any meeting of shareholders has been made, it shall apply to any adjournment unless board fixes new record date. (N.Y. Bus. Corp. Law §604[c] [NYCLS]).

Redemption of Shares.

Notwithstanding any authority in certificate of incorporation, corporation may not purchase own shares or redeem, convert or exchange its redeemable, convertible or exchangeable shares if corporation is then insolvent or would thereby be made insolvent. Repurchase, conversion or exchange price may not exceed applicable redemption, conversion or exchange price stated in certificate of incorporation, but may provide for accrued dividends to next dividend date following date set for redemption, conversion or exchange of such shares. Domestic corporation subject to N.Y. Bus. Corp. Law §912 [NYCLS] may not purchase more than 10% of its own stock from shareholder for more than market value thereof unless such purchase approved by affirmative vote of board of directors and by affirmative vote of majority of votes of all outstanding shares (unless certificate of incorporation requires greater percentage of votes of outstanding shares for approval); this provision not applicable where domestic corporation offers to purchase shares from all holders of stock or for stock which holder has been beneficial owner for over two years. (N.Y. Bus. Corp. Law §513 [NYCLS]).

Generally, no redeemable common shares other than such shares of open-end investment company or member corporation of registered national securities exchange may be issued or redeemed unless corporation at time has class of common shares that is not subject to redemption. Common shares of corporation, which directly or through subsidiary has license or franchise to conduct business, which license or franchise is conditioned on some or all of holders of its common shares possessing prescribed qualifications, may be made subject to redemption by such corporation to extent necessary to prevent loss of, or to reinstate, such license or franchise. (N.Y. Bus. Corp. Law §512[b] [NYCLS]). Shares of any class or series which may be made redeemable under N.Y. Bus. Corp. Law §512 [NYCLS] may be redeemed for cash, other property, indebtedness or other securities of same or another corporation, at such time or times, price or prices, or rate or rates, and with such adjustments, as shall be stated in certificate of incorporation. (N.Y. Bus. Corp. Law §512[c] [NYCLS]). Corporation may create sinking fund for redemption or purchase of its shares to extent permitted by N.Y. Bus. Corp. Law §513 [NYCLS]. (N.Y. Bus. Corp. Law §512[d] [NYCLS]).

Shareholders.

Anyone who is shareholder of record upon at least five days written demand, has right to examine, in person or by agent during usual business hours, minutes of shareholders' proceedings and record of shareholders, and to make extracts therefrom for any purpose reasonably related to such person's interest as shareholder. (N.Y. Bus. Corp. Law §624[b] [NYCLS]). Inspection may be denied to otherwise qualified shareholder if he refuses to furnish affidavit that inspection not sought for purpose other than business of corporation and that he has not within five years been involved in sale of any corporation's shareholder list. (N.Y. Bus. Corp. Law §624[c] [NYCLS]). Qualified shareholder may apply for order compelling inspection and granting such further relief as may be proper. (N.Y. Bus. Corp. Law §624[d] [NYCLS]).

With respect to corporations incorporated prior to Feb. 22, 1998, except as otherwise provided in certificate of incorporation, holders of equity shares (shares of any class, whether or not preferred as to dividends or assets, and having unlimited dividend rights) and holders of voting shares of any class have identical rights as to a proposed issuance of, or grant of rights or options to purchase, new equity or voting shares. With respect to corporations incorporated on or after Feb. 22, 1998, such preemptive rights are available only if expressly granted in certificate of incorporation. (N.Y. Bus. Corp. Law §622[b] [NYCLS], [c] [NYCLS]). When preemptive rights exist, holders (other than bondholders having voting rights under §518) have preemptive rights to purchase or acquire as many newly issued or granted shares as practicable, in such proportions as would retain their present position, and at prices no less favorable than price to be offered to others. (N.Y. Bus. Corp. Law §622[d] [NYCLS]). But, except as provided in certificate of incorporation, there may not be preemptive rights to shares or other securities offered for sale if they: (1) Are to be issued by board to effect merger or consolidation; (2) are to satisfy previously granted option rights of directors, officers and employees; (3) are to be issued to satisfy conversion or option rights theretofore granted by corporation; (4) are treasury shares; (5) are part of shares or other securities authorized in original certificate of incorporation, and are issued, sold or optioned within two years from filing of certificate; or (6) are to be issued under plan of reorganization approved in proceeding under any applicable act of Congress. (N.Y. Bus. Corp. Law §622[e] [NYCLS]).

Shareholders' Actions.

Derivative suit is one to procure judgment in favor of corporation and is brought in right of corporation. Plaintiff must be holder of shares, voting trust certificates of corporation, or beneficial interest in such shares or certificates at time of bringing action, and must show he was such at time of transaction of which he complains or that his interest devolved upon him by operation of law. Complaint must set forth with particularity plaintiff's efforts to secure initiation of suit by board, or reasons for not making such effort. Action may not be discontinued, compromised or settled without court approval, and anything received by judgment, compromise or settlement must be paid to corporation except reasonable expenses and attorney's fees allowed to plaintiff by court. (N.Y. Bus. Corp. Law §626 [NYCLS]). Corporation is entitled to request security to cover reasonable expenses which may be incurred by it if such action has been instituted by holder(s) of not more than 5% of outstanding shares of any class of stock or by holders of voting trust certificates or beneficial interest in shares representing not more than 5% of any class of such shares, unless shares, voting trust certificates and beneficial interest held by such holder(s) have market value in excess of $50,000. (N.Y. Bus. Corp. Law §627 [NYCLS]).

Shareholders' Liabilities.

Holder or subscriber for shares not liable to corporation other than unpaid portion of his subscription. Transferee, assignee of shares will not be personally liable if unaware that subscription had not been fully paid. Nor will person holding shares as collateral be personally liable. In such cases, transferor, assignor or pledgor remains liable. No fiduciary is liable as shareholder, but funds so held are liable. (N.Y. Bus. Corp. Law §628 [NYCLS]).

Ten largest shareholders, as determined by fair value of their beneficial interest, of every corporation, other than investment company registered as such under Investment Company Act of 1940, whose shares are not listed on national securities exchange or regularly quoted on over-the-counter market by one or more members of national securities association, are jointly and severally personally liable for all debts, wages or salaries due and owing to any laborers, servants, or employees other than contractors, for services rendered to corporation. Generally, latter persons must notify such shareholder in writing of intention to hold him liable or demand examination of record of shareholders within 180 days after termination of work. If, within such period, employee demands examination of records of shareholders, employee has 60 days from opportunity to examine records to give notice. Action to enforce such liability shall be commenced within 90 days after return of execution unsatisfied against corporation upon judgment recovered against it for such services. (N.Y. Bus. Corp. Law §630[a] [NYCLS]).

Shareholders' Meetings.

Meeting of shareholders must be held annually for election of directors and transaction of business on date and at place fixed by by-laws. If no place named, meeting at corporation office in N.Y. Special meetings may be called by board and by such person(s) as authorized by certificate of incorporation or by-laws. At such meetings, only business related to purpose stated in notice may be transacted. (N.Y. Bus. Corp. Law §602 [NYCLS]). Whenever shareholders are required or permitted to take action at meeting, notice must state place, date and hour of meeting, and unless it is annual meeting, indicate at whose direction meeting has been called. Notice of special meeting must also state purpose(s) for meeting. Notice of any meeting of shareholders may be written or electronic. If action is proposed to be taken which, if taken, would entitle dissenting shareholders to receive payment for their shares, notice of such meeting must include statement of that purpose and be accompanied by copy of N.Y. Bus. Corp. Law §623 [NYCLS] or outline of its material terms. Notice must be given, not less than ten nor more than 60 days before date of meeting, to each shareholder entitled to vote at such meeting. (N.Y. Bus. Corp. Law §605[a] [NYCLS]). Notice of meeting may be waived by written or electronic waiver of notice or by attendance at meeting without protesting lack of notice prior to conclusion of meeting. (N.Y. Bus. Corp. Law §606 [NYCLS]).

Statutory quorum (majority of votes of shares entitled to vote) may be decreased by certificate of incorporation or by-laws, but not below one-third. Certificate of incorporation may provide for greater quorum. When specified item must be voted by particular class or series, quorum requirements apply to holders of such class or series. When quorum is once present, it is not broken by withdrawals. (N.Y. Bus. Corp. Law §608 [NYCLS]).

Every shareholder of record is entitled to one vote per share (unless otherwise provided for in certificate). Treasury shares and shares held by another corporation (if majority of shares entitled to vote in election of directors of such other corporation is held by corporation), are not shares entitled to vote or to be counted in determining total number of outstanding shares. Shares held by administrator, executor, guardian, conservator, committee or other fiduciary other than trustee may be voted in person or by proxy without transfer of such shares into fiduciary's name. Shares may not be voted by trustee until transferred into trustee's name or nominee. Shares controlled by receiver may be voted by receiver without transfer if authority to do so is contained in order of court that appointed receiver. Shareholder whose shares are pledged is entitled to vote such shares until they have been transferred to pledgee's name or nominee. Redeemable shares which have been called for redemption are not deemed outstanding shares after date on which written notice of redemption has been sent to holders thereof and price deposited with bank or trust company with irrevocable instructions and authority to pay redemption price to holders on surrender of share certificates. Provision is also made for voting of shares held by fiduciaries, members of partnership, joint tenants, tenants in common, tenants by entirety, another domestic or foreign corporation, receivers, etc. (N.Y. Bus. Corp. Law §612 [NYCLS]).

Directors are elected by plurality of votes cast by shareholders entitled to vote, unless otherwise required by by-laws, certificate of incorporation or by statute. Whenever corporate action, other than election of directors, is to be taken by vote of shareholders, it must be authorized by majority of votes cast at shareholders' meeting by holders entitled to vote thereon unless otherwise required by certificate of incorporation, by statute, or by by-law adopted by shareholders. Except as otherwise provided in certificate of incorporation or by-law adopted by shareholders, abstention shall not constitute vote cast. (N.Y. Bus. Corp. Law §614 [NYCLS]). Whenever shareholders required or permitted to take any action by vote, such action may be taken without meeting, on written consent, setting forth action taken and signed by holders of all outstanding shares entitled to vote thereon, or, if certificate of incorporation so permits, signed by holders of outstanding shares having not less than minimum number of votes that would be necessary to authorize such action at meeting at which all shares entitled to vote thereon were present and voted, or, if no shareholders, by majority of subscribers for shares or by majority of incorporators. To be effective, such shareholder consent must be delivered to corporation in manner specified in statute. Prompt notice of taking of corporate action without meeting by less than unanimous written consent must be given to those shareholders who have not consented thereto in writing. (N.Y. Bus. Corp. Law §615 [NYCLS]).

Certificate of incorporation may contain provisions specifying that number of votes of shares represented at shareholders' meetings shall be greater than majority to constitute quorum, or that proportion of votes of shares must be greater than majority to transact business. Amendment of certificate to change or strike out such provision can be authorized only at meeting by vote of two-thirds of votes of shares entitled to vote, or of such greater proportion of votes of shares, class, or series as may be provided specifically in certificate. If certificate of incorporation contains such provision, notice of its existence must be conspicuous on face or back of every certificate for shares issued, unless such corporation has any class of equity security registered under §12 of Securities Exchange Act of 1934. (N.Y. Bus. Corp. Law §616 [NYCLS]). Every shareholder entitled to vote at meeting of shareholders or to express consent or dissent without meeting, may authorize another person(s) to act for him by proxy. Normally proxy is good for 11 months unless otherwise provided in proxy, revocable at pleasure of shareholder. Proxy entitled “irrevocable proxy” is such when held by any of following: (1) Pledgee; (2) purchaser or person who agreed to purchase shares; (3) creditor(s) of corporation who extend or continue credit to corporation in consideration of proxy, in which case proxy must state was given in consideration of such extension and continuation of credit, such amount of credit, and name of creditor(s); (4) person who has contracted to perform services as officer of corporation, if proxy required by contract of employment and proxy states it was given in consideration of such contract of employment, contracted period of employment, and employee's name; (5) person designated by or under agreement, in writing, between shareholders that their shares shall be voted as agreed under N.Y. Bus. Corp. Law §620 [NYCLS]. Even in above cases, proxy becomes revocable after pledge is redeemed, debt is paid, period of employment contracted for has terminated, agreement under (§620) has terminated, or, in cases under 3 and 4, above, by expiration of three years, after date of proxy or at end of any specified period, whichever period is less, unless renewed. Period of irrevocability can be renewed. Even an irrevocable proxy may be revoked by purchaser of shares without knowledge of irrevocability, unless notice of such appears conspicuously on face or back of certificate representing such shares. (N.Y. Bus. Corp. Law §609 [NYCLS]).

Certificate of incorporation may provide for cumulative voting in elections of directors. (N.Y. Bus. Corp. Law §618 [NYCLS]).

Voting Trusts.

Shareholder may transfer shares to voting trustee(s) under written agreement for purpose of conferring right to vote thereon for period not exceeding ten years. Share certificates must be surrendered, cancelled, and new certificates issued by corporation to such trustee(s) stating that they are issued under voting trust agreement. Entry of such ownership must be made in corporation records. Such trustee(s) may vote shares so transferred during term of such agreement. Trustee(s) must keep available for inspection (by holders of voting trust certificates) correct and complete books and records of account relating to the trust. Duplicate of such agreement must be filed in corporation office where it and record of voting trust holders are subject to same right of inspection by shareholders of record or holders of voting trust certificates as are corporation records under (N.Y. Bus. Corp. Law §624 [NYCLS]). (See subhead Shareholders, supra.) Agreement may be renewed by one or more holders of trust certificates at any time within six months before expiration of agreement for additional period not exceeding ten years, and such extension will not affect rights or obligations of any persons who do not join in extension agreement. (N.Y. Bus. Corp. Law §621 [NYCLS]).

Directors.

Except as authorized under (N.Y. Bus. Corp. Law §620 [NYCLS]), business of corporation must be managed under direction of its board of directors each of whom must be at least 18 years of age. (N.Y. Bus. Corp. Law §701 [NYCLS]). Board of Directors shall consist of one or more members. Number of directors may be fixed, increased, or decreased by by-laws or by action of shareholders or of board under specific provisions of by-law adopted by shareholders. However, no decrease can shorten term of any incumbent director. If board is authorized to change number of directors, must do so by vote of majority of entire board. (N.Y. Bus. Corp. Law §712 [NYCLS]). Directors must be elected at each annual meeting of shareholders to hold office until next annual meeting except as authorized by N.Y. Bus. Corp. Law §704 [NYCLS], which allows classification of directors. (N.Y. Bus. Corp. Law §703 [NYCLS]).

Newly created directorships resulting from an increase in number of directors and vacancies occurring for any reason except removal of directors without cause, may be filled by vote of a majority of directors then in office, even if less than quorum exists, unless certificate of incorporation or by-laws provide they are to be filled by vote of shareholders. Vacancies resulting from removal without cause may be filled only by shareholders, unless there is express authority granted to directors. Director elected to fill vacancy other than by shareholder vote must stand for election at next shareholder meeting at which directors are elected. Unless otherwise provided in certificate or by-laws, whenever certain class or series of shareholders are entitled to elect one or more directors by certificate, any vacancy that may be filled by majority of directors shall be filled by directors elected by such class or series, if any such directors are then in office. (N.Y. Bus. Corp. Law §705 [NYCLS]). Any director may be removed for cause by vote of shareholders, or by board if so provided in certificate or in by-law adopted by shareholders except where director was elected by cumulative voting, or by holders of shares of class or series, or by bondholders, when so entitled by certificate. If certificate or by-laws allow, any director may be removed without cause by vote of shareholders. Director elected by cumulative voting may not be removed when votes cast against his/her removal would be sufficient to elect him/her if voted cumulatively at election where same total number of votes were cast and entire board, or entire class of directors of which he/she is member, were being elected. Any director elected by class voting may be removed only by vote of holders of shares of applicable class or series, or holders of such bonds, voting as class. Action to procure removal of director for cause may be brought by attorney general or by holders of 10% of outstanding shares whether or not entitled to vote, and in such action, court may bar director, so removed, from reelection for fixed period. (N.Y. Bus. Corp. Law §706 [NYCLS]).

Certificate of incorporation or by-laws adopted by shareholders may provide that directors be divided into as many as four classes, all as nearly equal in number as possible. (N.Y. Bus. Corp. Law §704[a] [NYCLS]).

Directors' Meetings.

Unless otherwise provided by certificate of incorporation or by-laws, they may be held anywhere. Time and place of meetings may be fixed by by-laws or if not, by board. (N.Y. Bus.

Corp. Law §710 [NYCLS]). Majority of entire board is statutory number of quorum (N.Y. Bus. Corp. Law §707 [NYCLS]), and vote of majority present, if quorum present, at time of voting will be act of board (N.Y. Bus. Corp. Law §708[d] [NYCLS]). However, certificate may fix quorum at more or less than majority (by-laws can do latter), but not less than 1/3 of entire board, and certificate may require greater proportion of votes to constitute board action. (N.Y. Bus. Corp. Law §§707 [NYCLS], 709 [NYCLS]). Interested director may be counted present for quorum purposes. (N.Y. Bus. Corp. Law §713[c] [NYCLS]). If fixed by by-laws or board, regular meetings may be held without notice; special meetings are held on notice. Unless required by by-laws, notice (or its waiver) need not specify purpose of any meeting. (N.Y. Bus. Corp. Law §711 [NYCLS]). Unless otherwise restricted by certificate of incorporation or by-laws, any board member may participate in meetings by means of conference telephone (or similar equipment) and such participation shall constitute presence in person at meeting. (N.Y. Bus. Corp. Law §708[c] [NYCLS]). Unless restricted by certificate of incorporation or by-laws, action may be taken by unanimous written consent in lieu of meeting. (N.Y. Bus. Corp. Law §708[b] [NYCLS]).

Powers and Duties of Directors.

Director must perform his duties, including those of member of board committee on which he serves, in good faith and with that degree of care which ordinary prudent person in like position would use under similar circumstances. In performing his duties, director is entitled to rely on information, opinions, reports or statements, including financial statements and other financial data, prepared or presented by: (1) Officers or employees of corporation or of subsidiary of which corporation owns at least 50% of voting stock, whom director believes to be reliable and competent in matters presented, or (2) counsel, public accountants or other persons as to matters which director believes to be within such person's professional or expert competence, or (3) board committee upon which he does not serve as to matters within its designated authority, which committee director believes to merit confidence; provided that in all such cases he acts in good faith and with such degree of care and has no knowledge which would cause such reliance to be unwarranted. Person who so performs his duties shall have no liability by reason of being director. (N.Y. Bus. Corp. Law §717[a] [NYCLS]). In taking action, including action which may involve or relate to change in control of corporation to be effected through ownership of voting stock, by contract or otherwise, director may consider both long-term and short-term interests of corporation and shareholders and effects that corporation's actions may have in short term or long term upon: (1) Prospects for potential growth, development, productivity and profitability, or (2) current employees, or (3) retired employees or other beneficiaries, or (4) customers and creditors, or (5) ability of corporation to provide, as going concern, goods, services, employment opportunities and benefits and otherwise contribute to communities in which it does business. (N.Y. Bus. Corp. Law §717[b] [NYCLS]).

Liabilities of Directors.

Directors who vote for, or concur in, any of following actions will be jointly and severally liable to corporation for benefit of creditors and shareholders to extent of injuries due to: (1) Declaration of dividend or other distribution to extent not out of surplus or net profits(N.Y. Bus. Corp. Law §510 [NYCLS]); (2) purchase or redemption by corporation of its own shares in violation of N.Y. Bus. Corp. Law §513 [NYCLS]; (3) distribution of assets to shareholders after dissolution of corporation without paying or adequately providing for all known liabilities excluding untimely claims filed under art. 10 or 11; or (4) making of any loan to director in violation of N.Y. Bus. Corp. Law §714 [NYCLS]. Director will not be liable to corporation for such actions if, in circumstances, (s)he fulfilled duties of good faith and due care under N.Y. Bus. Corp. Law §717[a] [NYCLS]. Any director against whom claim is successfully asserted is entitled to contribution from other concurring directors, and has right of subrogation to corporation for all funds due to corporation. (N.Y. Bus. Corp. Law §719[c] [NYCLS]). Certificate of incorporation may eliminate or limit personal liability of director to corporation or its shareholders for damages for breach of duty in such capacity, provided no such provision may eliminate or limit: (1) Liability for acts or omissions which judgment or final adjudication adverse to him establishes bad faith, intentional misconduct, knowing violation of law, personal gain of financial profit to which such director was not legally entitled, or violation of N.Y. Bus. Corp. Law §719 [NYCLS]; or (2) liability for act or omission prior to adoption by corporation of such provision. (N.Y. Bus. Corp. Law §402[b] [NYCLS]).

Action may be brought against director or officer to procure judgment for the following relief: (1) Subject to any provision of certificate of incorporation eliminating or limiting personal liability of directors pursuant to N.Y. Bus. Corp. Law §402[b] [NYCLS], to compel defendant to account for his neglect, failure to perform or other violation of duties in management and disposition of corporate assets committed to his charge, or in acquisition by himself, transfer to others, loss or waste of corporate assets; (2) to set aside unlawful conveyance, assignment or transfer of corporate assets where transferee knew of unlawfulness; or (3) to enjoin proposed unlawful conveyance, assignment or transfer, where evidence is sufficient that one will be made. Such action may be brought by corporation, receiver, trustee in bankruptcy, officer, director or judgment creditor thereof or by shareholder, voting trust certificate holder, or owner of beneficial interest in shares thereof. (N.Y. Bus. Corp. Law §720 [NYCLS]).

Officers.

Certificate of incorporation may provide all officers or specified officers shall be elected by shareholders. Otherwise, board of directors elects or appoints officers as necessary or as provided in by-laws. Any two or more offices may be held by same person. (N.Y. Bus. Corp. Law §715 [NYCLS]).

Officers elected or appointed by board, may be removed by it with or without cause. Officers elected by shareholders may be removed with or without cause only by vote of shareholders, but board may suspend officers' authority for cause. Removal of officer without cause does not prejudice his contract rights if any. An action to procure removal of officer for cause may be brought by attorney-general or by 10% of votes of outstanding shares whether or not entitled to vote. Court may bar such officer from reelection or reappointment for period fixed by court. (N.Y. Bus. Corp. Law §716 [NYCLS]).

Liabilities of Officers.

Officer must perform his duties in good faith and with that degree of care which ordinary prudent person in like position would use under similar circumstances. In performing his duties, officer is entitled to rely on information, opinions, reports or statements prepared or presented by: (1) Officers or employees of corporation or of subsidiary of which corporation owns at least 50% of voting stock whom officer believes to be reliable and competent in matters presented, or (2) counsel, public accountants or other persons as to matters which officer believes to be within such person's professional or expert competence, provided that in so relying he acts in good faith and with such degree of care and has no knowledge which would cause such reliance to be unwarranted. Person who so performs his duties has no liability by reason of being officer. (N.Y. Bus. Corp. Law §715[h] [NYCLS]).

Indemnification of Directors, Officers and Employees.

Indemnification of directors and officers or advancement of expenses may be pursuant to statute, directly authorized by certificate of incorporation or by-laws or, under authority of certificate of incorporation or by-laws, allowed by: (i) Resolution of shareholders, (ii) resolution of directors, or (iii) agreement, but no indemnification may be made where director or officer was adjudged to have committed acts material to cause of action in bad faith or as result of active and deliberate dishonesty, or where he gained profit or advantage to which he was not legally entitled. (N.Y. Bus. Corp. Law §721 [NYCLS]). Corporation may indemnify other personnel by agreement or otherwise under law. (N.Y. Bus. Corp. Law §721 [NYCLS]). In actions by, or in right of corporation, it may indemnify any person made party to action by reason of fact that he was director or officer, against amounts paid in settlement and reasonable expenses necessarily incurred in connection with his defense or settlement of such action, if he acted, in good faith, for purpose he reasonably believed to be in, or, in certain specified cases, not opposed to, best interests of corporation. Indemnification not authorized for amounts paid in settling or otherwise disposing of threatened or pending action with or without court approval, nor expenses incurred in defending threatened or pending action which is settled or otherwise disposed of without court approval, nor any claim to which such person is adjudged to be liable to corporation unless Court determines otherwise. (N.Y. Bus. Corp. Law §722[c] [NYCLS]). In action brought by third party, i.e., not by or in right of corporation, whether civil or criminal, corporation may indemnify person made or threatened to be made party to action or proceeding, including one by entity which any director or officer of corporation served in any capacity at corporation's request, against judgment, fines, amounts paid in settlement and reasonable expenses actually and necessarily incurred, if such director or officer acted in good faith for purpose which he reasonably believed to be in or, in certain specified cases, not opposed to, best interests of corporation and, in criminal actions, had no reasonable cause to believe his conduct unlawful. Termination of any such civil or criminal action or proceeding by judgment, settlement, conviction or upon plea of nolo contendere, or equivalent, does not create presumption that such director or officer did not act, in good faith, for purposes which he reasonably believed to be in or, in certain specified cases, not opposed to, best interests of corporation or that he had reasonable cause to believe that his conduct was unlawful. (N.Y. Bus. Corp. Law §722[a] [NYCLS], [b] [NYCLS]).

Unless director or officer is successful on merits or otherwise, indemnification must be authorized only in the specific case upon finding that director or officer has met standard of conduct set forth in (N.Y. Bus. Corp. Law §§721-722): (1) By resolution of board acting by quorum consisting of directors not parties to such action, or (2) if such quorum unavailable, or if quorum of disinterested directors so directs, (A) by resolution of board on written opinion of independent legal counsel that indemnification is proper in circumstances, or (B) by resolution of shareholders. (N.Y. Bus. Corp. Law §723 [NYCLS]). If corporation provides no indemnification, court will award it to extent authorized under N.Y. Bus. Corp. Law §§722 [NYCLS] and 723[a] [NYCLS]. (N.Y. Bus. Corp. Law §724 [NYCLS]). Any indemnification made in advance must be repaid if defendant is ultimately found not entitled to it, or to extent that advance exceeded allowable indemnification. (N.Y. Bus. Corp. Law §725[a] [NYCLS]). Shareholders must be notified, within specified time limits, of any action taken with respect to indemnification of directors and officers through amendment of by-laws, resolution of directors, or agreement. (N.Y. Bus. Corp. Law §725[d] [NYCLS]).

Indemnification Insurance.

Generally, corporation has power to purchase and maintain insurance: (1) To indemnify corporation for obligations which it incurs as result of indemnification of directors and officers as required or permitted under N.Y. law, (2) to indemnify directors and officers when indemnified by corporation, and (3) to indemnify directors and officers in instances in which they may not otherwise be indemnified by corporation under provisions of N.Y. law provided contract of insurance covering such directors and officers provides, in manner acceptable to superintendent of insurance, for retention amount and for co-insurance (N.Y. Bus. Corp. Law §726[a] [NYCLS]); (b) no insurance under (a) may provide for any payment, other than cost of defense, to or on behalf of any director or officer: (1) If judgment or other final adjudication adverse to insured director or officer establishes that his acts of active and deliberate dishonesty were material to cause of action so adjudicated, or that he personally gained in fact financial profit or other advantage to which he was not legally entitled, or (2) in relation to any risk, insurance of which is prohibited under insurance law of N.Y.; (c) insurance under any or all of (a) may be included in single contract or supplement thereto; retrospective rated contracts are prohibited; (d) corporation must mail statement to its shareholders in respect of any insurance it has purchased or renewed under this section, specifying insurance carrier, date of contract, cost of insurance, corporate positions insured, and statement explaining all sums, not previously reported in statement to shareholders, paid under any indemnification insurance contract, within specified time limits; (e) foregoing is public policy of N.Y. to spread risk of corporate management, notwithstanding any other law of N.Y. or of any other jurisdiction including federal government. (N.Y. Bus. Corp. Law §726[b] [NYCLS]).

Principal Office.

"Office of corporation" is office stated in certificate of incorporation of domestic corporation or in application for authority of foreign corporation or amendment thereof, and need not be place where business is conducted. (N.Y. Bus. Corp. Law §102[a][10] [NYCLS]).

Process Agent.

Secretary of State is Agent of every domestic corporation and every authorized foreign corporation upon whom process against corporation may be served where action or proceeding has been brought within this state. (N.Y. Bus. Corp. Law §§102[a][11] [NYCLS], 304[a] [NYCLS]). An unauthorized foreign corporation amenable to process in N.Y. may also be served by serving Secretary of State as agent. (N.Y. Bus. Corp. Law §307[a] [NYCLS]).

Resident Agent.

In addition to Secretary of State, every domestic or authorized foreign corporation may designate registered agent upon whom process against such corporation may be served. Agent must be natural person who is resident of or has business address in N.Y., or domestic or foreign corporation of any type authorized to do business in this state. (N.Y. Bus. Corp. Law §305[a] [NYCLS]).

General Powers.

Each corporation, subject to any limitations provided for in N.Y. Bus. Corp. Law, other statutes of N.Y. or in its certificate of incorporation, has power in furtherance of its corporate purposes: (1) To have perpetual duration; (2) to sue and be sued in all courts and to participate in all actions and proceedings whether judicial, administrative, arbitrative or otherwise in like cases as natural person; (3) to have a corporate seal; (4) to purchase, receive, take by grant, gift, devise, bequest or otherwise, lease, or otherwise acquire, own, hold, improve, employ, use and otherwise deal in and with, real or personal property, or to any interest therein wherever situated; (5) to sell, convey, lease, exchange, transfer or otherwise dispose of, mortgage or pledge or create security interest in all or any of its property or any interest therein wherever situated; (6) to do same with bonds and other obligations, shares or other securities or interests issued by others, whether engaged in similar or different business, governmental or other activities; (7) to make contracts, give guarantees and incur liabilities, borrow money at such rate of interest as corporation may determine, issue its notes, bonds or other obligations, and secure its obligations by mortgage or pledge of its property to any interest therein wherever situated; (8) to lend money, invest and reinvest funds and take and hold real and personal property as security for payment of funds so loaned or invested; (9) to do business, carry on operations, have offices and exercise powers granted by N.Y. Bus. Corp. Law within or without U.S.; (10) to elect or appoint officers, employees and other agents and define their duties, fix their compensation and compensation of directors and to indemnify corporate personnel; (11) to adopt, amend or repeal by-laws relating to its business affairs, rights or powers, and those of its shareholders, officers or directors; (12) to make donations (irrespective of corporate benefit) for public welfare or community fund, hospital, charitable, educational, scientific, civic or similar purposes, and in time of war or other national emergencies, in aid thereof; (13) to pay pensions, establish and carry out pension, profit-sharing, share bonus, share purchase, share option, savings, thrift and other retirement, incentive and benefit plans, trusts and provisions for directors, officers and employees; (14) to purchase, receive, take or otherwise acquire, own, hold, sell, lend, exchange, transfer or otherwise dispose of, pledge, use and otherwise deal in and with its shares; (15) to be a promoter, partner, member, associate or manager of other business enterprises or ventures, or, to extent permitted in any other jurisdiction, to be an incorporator of other corporations of any type or kind; and finally (16) to have and exercise all powers necessary or convenient to effect any or all purposes for which corporation is formed. All powers (except that to make charitable donations) are subject to qualification that they be exercised in furtherance of corporate purposes. (N.Y. Bus. Corp. Law §202 [NYCLS]). Guarantee may be given by corporation, although not in furtherance of its corporate purposes, when such guarantee is authorized at meeting of shareholders by two-thirds of votes of all outstanding shares entitled to vote thereon. (N.Y. Bus. Corp. Law §908 [NYCLS]). Also, sale, lease, exchange or other disposition of all or substantially all assets of corporation, if not made in usual or regular course of business, must be authorized by board, and by vote of holders of majority of all outstanding shares for corporations incorporated after Feb. 22, 1998 or two-thirds of all outstanding shares for corporations in existence on Feb. 22, 1998 at meeting called for this purpose on notice to all shareholders. (N.Y. Bus. Corp. Law §909 [NYCLS]). Unless certificate of incorporation provides otherwise, no vote or consent of shareholders needed to authorize any mortgage or pledge of corporate assets. This may be done by board acting alone. (N.Y. Bus. Corp. Law §911 [NYCLS]).

No act of corporation and no transfer of real or personal property to or by corporation, otherwise lawful, shall be invalid by reason of fact that corporation was without capacity or power to do such act or to make, or receive such transfer, but such lack of capacity or power may be asserted: (1) By shareholder against corporation to enjoin doing of act; (2) by corporation in action against incumbent or former officer or director for loss or damage; or (3) by attorney-general in action or special proceeding to annul or dissolve corporation or to enjoin it from doing unauthorized business. (N.Y. Bus. Corp. Law §203 [NYCLS]).

Dividends.

Corporation may declare and pay dividends or make other distributions in cash, its bonds or property (including shares or bonds of other corporations) except when corporation currently insolvent, or would thereby be made insolvent, or when declaration, payment or distribution would be contrary to any restriction contained in certificate of incorporation. (N.Y. Bus. Corp. Law §510[a] [NYCLS]). “Insolvent” means unable to pay debts as they come due in usual course of debtor's business. (N.Y. Bus. Corp. Law §102[a][8] [NYCLS]). Dividends may be declared or paid out of surplus only, so that net assets remaining after such payment or distribution will at least equal amount of stated capital, or out of net profits for the fiscal year in which the dividend is declared and/or the preceding fiscal year; except that corporation engaged in exploitation of natural resources or other wasting assets, or formed primarily for liquidation of specific assets, may declare and pay dividends or make other distributions in excess of its surplus under certain conditions. (N.Y. Bus. Corp. Law §510[b] [NYCLS]).

Unclaimed Dividends.

See category 21 Property, topic 21.01 Absentees, subhead Escheat.

Sale or Transfer of Corporate Assets.

Pursuant to N.Y. Bus. Corp. Law §202[a] [NYCLS], corporation may sell, convey, lease, exchange, transfer or otherwise dispose of, mortgage or pledge, or create security interest in, all or any of its property or assets, even if not made in usual or regular course of business. (See subhead General Powers, supra.) If not in regular course of business, but approved as above, nonassenting shareholder has right to fair value of his shares and other rights and benefits as provided in N.Y. Bus. Corp. Law §623 [NYCLS]. Dissenting shareholder's right of appraisal may not be available if disposition of assets was wholly for cash, which is distributed within one year after transaction and corporation is dissolved. (N.Y. Bus. Corp. Law §§909 [NYCLS], 910 [NYCLS]).

Notice of shareholders' meeting to authorize disposition of all or substantially all of corporate assets other than in usual or regular course of business regularly conducted by corporation must be given to all shareholders, whether or not entitled to vote. (N.Y. Bus. Corp. Law §909[a] [NYCLS]).

Books and Records.

Corporation must keep correct and complete books and records of account, and keep minutes of proceedings of its shareholders, board and executive committee, if any, and, at N.Y. corporation office or at office of its transfer agent or registrar in this state, keep record containing names and addresses of all shareholders, number and class of shares held by each, and dates when they respectively became owners of record. Any of foregoing books, minutes or records may be in any form capable of being converted into written form within reasonable time. (N.Y. Bus. Corp. Law §624[a] [NYCLS]). See subhead Shareholders, supra, for requirements as to examination of books and records. Books of domestic corporation are presumptive evidence of facts therein stated in favor of plaintiff in action against corporation, its officers, directors or stockholders. (N.Y. Bus. Corp. Law §624[g] [NYCLS]). Courts also have power to compel production for examination of books and records of corporation. (N.Y. Bus. Corp. Law §624[d] [NYCLS]).

Reports.

No provision.

Corporate Bonds or Mortgages.

No corporation may issue bonds except for money, property, labor or service received by or performed for corporation or in its formation or reorganization, binding obligation to pay purchase price thereof in cash or property, binding obligation to perform services having agreed value, or combination thereof. In absence of fraud, board's valuation of consideration received is conclusive. (N.Y. Bus. Corp. Law §518[a] [NYCLS]). If distribution of bonds is made to shareholders, amount of surplus equal to principal of and accrued interest on bonds must be concurrently transferred to liabilities of corporation as consideration for issue, such as rights to inspect corporate books and records and to vote in election of directors. (N.Y. Bus. Corp. Law §518[b] [NYCLS]). Certificate of incorporation may confer certain rights similar to shareholders' rights on bondholders. (N.Y. Bus. Corp. Law §518[c] [NYCLS]). Board may authorize any mortgage or pledge of, or creation of security interest in, all or part of, or any interest in, corporate property. Unless required by certificate of incorporation, no shareholders' vote or consent is needed. (N.Y. Bus. Corp. Law §911 [NYCLS]).

Merger and Consolidation.

Two or more corporations may (1) Merge into single corporation which is one of constituent corporations, or (2) consolidate into a single corporation which is new corporation. One or more domestic corporations and one or more other business entities, or one or more foreign corporations and one or more other business entities, may as provided by any other applicable statute and N.Y. Bus. Corp. Law merge or consolidate into single domestic or foreign corporation or other business entity. “Other business entity” means any person other than natural person, general partnership (including registered limited liability partnership or registered foreign limited liability partnership) or domestic or foreign business corporation. (N.Y. Bus. Corp. Law §901[b][7] [NYCLS]). With approval of Supreme Court, domestic business corporation may be merged or consolidated into domestic corporation formed under N.Y. Not-For-Profit Corp. Law §201 [NYCLS] and authorized to do business under N.Y. Ins. Law art. 43 (domestic not-for-profit corporation to comply with Not-For-Profit Corporation Law and domestic business corporation to comply with N.Y. Bus. Corp. Law, and when merger or consolidation effected, corporation subject to Not-For-Profit Corporation Law). (N.Y. Bus. Corp. Law §904-b [NYCLS]). Board of each corporation proposing to participate in merger or consolidation must adopt plan. (N.Y. Bus. Corp. Law §902 [NYCLS]). Board of each constituent corporation upon adopting such plan of merger or consolidation must submit such plan to vote of shareholders. Notice of meeting is given to each shareholder of record whether or not entitled to vote, and plan of merger or consolidation is authorized at such shareholders' meeting (1) For corporations in existence on Feb. 22, 1998, where certificate of incorporation, expressly provides such and for corporations incorporated after

Feb. 22, 1998, by holders of majority of all outstanding shares entitled to vote thereon, or (2) for other corporations in existence on Feb. 22, 1998, by vote of holders of two-thirds of all outstanding shares entitled to vote thereon. Notwithstanding any provision in certificate of incorporation, holders of shares of class or series of class are entitled to vote together and to vote as separate class if both of following are satisfied: (1) Such shares will remain outstanding after merger or consolidation or will be converted into right to receive shares of stock of surviving or consolidated corporation or another corporation; and (2) certificate of incorporation of surviving or consolidated corporation or of such other corporation immediately after effectiveness of merger or consolidation would contain any provision which, is not contained in certificate of incorporation of corporation and which, if contained in amendment to certificate of incorporation, would entitle holders of shares of such class or such one or more series to vote and to vote as separate class thereon pursuant to (N.Y. Bus. Corp. Law §804 [NYCLS]). In such case, in addition to authorization by requisite number of votes of all outstanding shares entitled to vote, merger or consolidation must be authorized by majority of votes of all outstanding shares of class entitled to vote as separate class. (N.Y. Bus. Corp. Law §903[a] [NYCLS]). Despite shareholder authorization and at any time prior to filing certificate of merger or consolidation, such plan may be abandoned pursuant to provision, if any, contained in plan. (N.Y. Bus. Corp. Law §903[b] [NYCLS]). After adoption of plan of merger or consolidation by board and shareholders of each constituent corporation, unless merger or consolidation abandoned in accordance with N.Y. Bus. Corp. Law §903(b) [NYCLS], "Certificate of merger (or consolidation) of . . . . . and . . . . . into . . . . . (names of corporations) under N.Y. Bus. Corp. Law §904 [NYCLS] " must be signed on behalf of each constituent corporation and delivered to Department of State, setting forth matters specified in §904. Surviving or consolidated corporation must then cause copy of certificate certified by Department of State to be filed in each county where office or real property of constituent corporation, other than surviving corporation, located. (N.Y. Bus. Corp. Law §904 [NYCLS]). For mergers of corporations with other business entities, equivalent filing procedures with "Certificate of merger (or consolidation) of . . . . . and . . . . . into . . . . . (names of constituent entities) under section nine hundred four-a of business corporation law" to set forth matters specified in N.Y. Bus. Corp. Law §904-a [NYCLS]. (N.Y. Bus. Corp. Law §904-a [NYCLS]). For permitted mergers with not-for-profit corporations under N.Y. Bus. Corp. Law §904-b [NYCLS], equivalent filing procedures with "Certificate of merger (or consolidation) of . . . . . and . . . . . into . . . . . (names of corporations) under §904-b" to set forth matters specified in §904-b. (N.Y. Bus. Corp. Law §904-b [NYCLS]). Any domestic corporation owning at least 90% of outstanding shares of each class of another domestic corporation(s) may merge such other corporation(s) into itself or merge itself into such other corporation without shareholder authorization. Board of parent must adopt plan of merger setting forth details, manner and basis of converting shares of each subsidiary corporation into shares or securities of surviving corporation, and plan of merger must set forth name of each subsidiary and surviving corporation. If parent corporation is not surviving corporation, provisions must be made for pro rata issuance of shares of surviving corporation to shareholders of parent on surrender of any certificates, and statement of any changes in certificate of incorporation of surviving corporation as well as statement that proposed merger has been approved by shareholders of domestic corporation must be made. (N.Y. Bus. Corp. Law §905[a] [NYCLS]). If parent corporation is surviving corporation, unless waived, copy of plan of merger is given to all holders of shares of each subsidiary not owned by surviving corporation. (N.Y. Bus. Corp. Law §905[b] [NYCLS]). Upon filing of certificate of merger or consolidation by Department of State or on such subsequent date (within 30 days) as is set forth in such certificate, merger or consolidation is effective. In case of merger, certificate of incorporation of surviving corporation is automatically amended to extent changes in its certificate are set forth in plan of merger; in case of consolidation, statements set forth in certificate of consolidation which are required or permitted to be set forth in certificate of incorporation become its certificate of incorporation. (N.Y. Bus. Corp. Law §906 [NYCLS]).

One or more foreign corporations and one or more domestic corporations may be merged or consolidated into corporation of N.Y. or of another jurisdiction, if such merger or consolidation is permitted by laws of other jurisdiction. (N.Y. Bus. Corp. Law §907[a] [NYCLS]).

With respect to procedure, each domestic corporation is to comply with provisions of N.Y. Bus. Corp. Law relating to merger or consolidation of domestic corporation and each foreign corporation should comply with applicable provisions of its jurisdiction's law. (N.Y. Bus. Corp. Law §907[b] [NYCLS]). If surviving or consolidated corporation is domestic corporation, its certificate of merger or consolidation must be signed and delivered by it as provided in (N.Y. Bus. Corp. Law §904 [NYCLS]) or (N.Y. Bus. Corp. Law §905 [NYCLS]). In addition, certificate shall set forth as to each constituent foreign corporation jurisdiction and date of its incorporation and date when application was filed by Department of State. (N.Y. Bus. Corp. Law §907[d] [NYCLS]). If surviving or consolidated corporation formed under law of any other jurisdiction, it must comply with N.Y. Bus. Corp. Law provisions for foreign corporations doing business in N.Y. and deliver to Department of State its certificate setting forth information called for by (N.Y. Bus. Corp. Law §907 [NYCLS]), and effect of such is same as in case of merger or consolidation of domestic corporations, except insofar as foreign law provides otherwise. (N.Y. Bus. Corp. Law §907[e] [NYCLS]).

Shareholder of domestic corporation, by complying with N.Y. Bus. Corp. Law §623 [NYCLS] (see subhead Appraisal, infra), has right to fair value for shares and other benefits, provided he is entitled to vote but does not assent to plan of merger or consolidation to which corporation is party. Right to receive payment not available to shareholder of surviving corporation in merger of subsidiary corporation; nor to shareholder of surviving corporation in any other merger authorized here unless such merger creates, alters or abolishes any provision or right in respect of redemption of outstanding shares, or alters or abolishes any preferential or preemptive rights of such holder to acquire shares or other securities, or excludes or limits right of such holder to vote on any matter; nor to shareholder for shares of any class or series of stock, which shares or depository receipts at fixed record date were listed on national securities exchange or designated as national market system security, on interdealer quotation system by National Association of Securities Dealers, Inc. (N.Y. Bus. Corp. Law §910 [NYCLS]). Rights under N.Y. Bus. Corp. Law §623 [NYCLS] also available to shareholder of subsidiary corporation in merger authorized by N.Y. Bus. Corp. Law §905 [NYCLS] or N.Y. Bus. Corp. Law §907[c] [NYCLS] who files with corporation written notice of dissent under N.Y. Bus. Corp. Law §623[c] [NYCLS], and to shareholder not entitled to vote with respect to plan of merger or consolidation whose shares will be cancelled or exchanged in merger or consolidation for cash or other consideration other than shares of surviving or consolidated corporation or another corporation. (N.Y. Bus. Corp. Law §910 [NYCLS]).

Tax implications of corporate merger, consolidation or acquisition, including loss of credits and deductions, treatment of dividends, and sale of assets or stock of target corporation, are described in N.Y. Tax Law §§208[4] [NYCLS], [9] [NYCLS]; N.Y. Tax Law §§210[12] [NYCLS], [12-A] [NYCLS], [12-D] [NYCLS], [18] [NYCLS]; N.Y. Bus. Corp. Law §§ 612[b] [NYCLS]; 615[c].

Share Exchanges.

Two corporations may participate in consummation of plan for binding share exchanges. Such plan is subject to rules which parallel those detailed under subhead Merger and Consolidation, supra. (N.Y. Bus. Corp. Law §913 [NYCLS]).

Take-Overs.

Take-over bids (as defined) for equity securities of target company (as defined) organized under New York law and having its principal executive offices or significant business operation located in New York governed by N.Y. Bus. Corp. Law §§1600-1613. As soon as practicable on date of commencement of takeover bid, offeror required to file detailed registration statement with Attorney General at his N.Y. City office and deliver registration statement to target company at its principal executive offices. (N.Y. Bus. Corp. Law §1602[a] [NYCLS]). The Attorney General empowered to conduct such investigation as he deems necessary. (N.Y. Bus. Corp. Law

§1604[a] [NYCLS]). No solicitation or recommendation to accept or reject takeover bid may be made to offerees of target company until recommendation or solicitation is first filed with Attorney General at his N.Y. City office. (N.Y. Bus. Corp. Law §1602[c] [NYCLS]). Making or continuation of take-over bid may be prohibited until full compliance with law accomplished. (N.Y. Bus. Corp. Law §1604[b] [NYCLS]). Antifraud provision covers untrue statements or omissions of material fact. Criminal penalties for violation of law. (N.Y. Bus. Corp. Law §1605 [NYCLS]).

Domestic corporation may not engage in “business combination” with interested shareholder for five years following interested shareholder's stock acquisition unless business combination or acquisition approved by board of directors prior to stock acquisition. If good faith proposal made in writing to board of directors regarding business combination, board must respond in writing within 30 days or any shorter period required by Securities Exchange Act of 1934, as amended, setting forth reasons for decision regarding proposal. Board deemed to disapprove good faith proposal to purchase stock made in writing to board unless it responds affirmatively in writing within such period. (N.Y. Bus. Corp. Law §912[b] [NYCLS]). “Interested shareholder” is any person (other than subject corporation or subsidiary) who beneficially owns 20% or more of outstanding voting stock or affiliate or associate of such corporation who at any time within five-year period immediately prior to date in question beneficially owned 20% or more of then outstanding voting stock. Number of shares of voting stock deemed to be outstanding for purpose of determining whether person is interested shareholder includes shares deemed to be beneficially owned but does not include any other unissued shares of voting stock which may be issuable. (N.Y. Bus. Corp. Law §912[a][10] [NYCLS]). Further, domestic corporation may not engage at any time in business combination with interested shareholder other than: (1) Business combination approved by board of directors prior to interested shareholder's stock acquisition date, or where such acquisition was approved by board of directors prior to such date; (2) business combination approved by affirmative vote of holders of majority of outstanding voting stock not beneficially owned by interested shareholder or any affiliate or associate at meeting called for such purpose no earlier than five years after interested shareholder's stock acquisition date; or (3) business combination meeting requirements set forth in N.Y. Bus. Corp Law §912[c][3] [NYCLS] relating to consideration and other matters. (N.Y. Bus. Corp. Law §912[c] [NYCLS]). Exemption from foregoing restrictions applies if: (1) Corporation does not have voting stock registered under §12 of Securities Exchange Act, as amended, unless certificate of incorporation provides otherwise; (2) certificate of incorporation was amended to subject corporation to §912, if corporation did not have such registered voting stock on effective date of amendment, and if business combination with interested shareholder who has stock acquisition date prior to effective date of amendment; (3) original certificate of incorporation expressly elects not to be governed by §912, or corporation amended by-laws prior to Mar. 31, 1986 electing not to be governed by §912 or by vote of majority of votes of outstanding voting stock (but not those of interested shareholders, their affiliates and associates) expressly electing not to be governed by N.Y. Bus. Corp. Law §912 [NYCLS] (amendment not effective for 18 months after vote and not applicable to business combination with interested shareholder with stock acquisition date on or before effective date of amendment); (4) interested shareholder, who became interested shareholder inadvertently, as soon as practicable divests sufficient stock so no longer beneficial owner of 20% or more of outstanding voting stock, if would not at any time within five-year period preceding announcement of business combination have been interested shareholder but for inadvertent acquisition; or (5) interested shareholder beneficially owned 5% or more of outstanding voting stock on Oct. 30, 1985. (N.Y. Bus. Corp. Law §912[d] [NYCLS]).

Except as otherwise provided in (N.Y. Bus. Corp. Law §505 [NYCLS]) or certificate of incorporation, corporation may create and issue, whether or not in connection with issue and sale of any of its shares or bonds, rights or options entitling holders thereof to purchase from corporation, upon such consideration, terms and conditions as may be fixed by board, shares of any class or series, whether authorized but unissued shares, treasury shares or shares to be purchased or acquired or assets of corporation. (N.Y. Bus. Corp. Law §505[a][1] [NYCLS]). In case of domestic corporation that has class of voting stock registered with Securities and

Exchange Commission pursuant to §12 of Exchange Act, (15 U.S.C.§78 et seq.), terms and conditions of such rights or options may include, without limitation, restrictions or conditions that preclude or limit exercise, transfer or receipt of such rights or options held by interested shareholder or any transferee of any such interested shareholder or that invalidate or void such rights or options held by any such interested shareholder or any such transferee. Determinations of board of directors whether to impose, enforce or waive or otherwise render ineffective such limitations or conditions shall be subject to judicial review in appropriate proceeding in which courts formulate or apply appropriate standards in order to insure that such limitations or conditions are imposed, enforced or waived in best long-term interests and short-term interests of corporation and its shareholders considering, without limitation, prospects for potential growth, development, productivity and profitability of corporation. (N.Y. Bus. Corp. Law §505[a][2] [NYCLS]).

Dissolution.

Corporations incorporated after Feb. 22, 1998 may be dissolved by majority of votes of all outstanding shares entitled to vote thereon. For all other corporations, vote of two-thirds of all outstanding shares entitled to vote thereon necessary for dissolution. Corporation may adopt amendment of certificate of incorporation providing that dissolution shall be authorized at meeting of shareholders by specified proportion of shares entitled to vote thereon, provided that proportion may not be less than majority. (N.Y. Bus. Corp. Law §1001 [NYCLS]). However, certificate of incorporation, may contain provision that specified number of shareholders may require dissolution at will or upon occurrence of specified event. (N.Y. Bus. Corp. Law §1002[a] [NYCLS]). If so, each certificate for shares must bear reference to such provision. (N.Y. Bus. Corp. Law §1002[c] [NYCLS]).

"Certificate of dissolution of . . . (name of corporation) under N.Y. Bus. Corp. Law §1003 [NYCLS] " must be signed and delivered to Department of State. It must state corporation's name, date of certification, name and address of each officer and director, that corporation elects to dissolve, and manner in which dissolution was authorized. (N.Y. Bus. Corp. Law §1003 [NYCLS]). Department must not file such certificate unless consent of state Tax Commission is attached thereto. Upon such filing, corporation is dissolved. (N.Y. Bus. Corp. Law §1004 [NYCLS]). After dissolution, corporation must not do business except in winding up its affairs. Corporation must proceed to wind up its affairs with power to fulfill or discharge its contracts, collect or sell its assets for cash, discharge or pay its liabilities; and do all other acts appropriate to liquidate its business. (N.Y. Bus. Corp. Law §1005[a][2] [NYCLS]). Upon winding up affairs, any assets distributable to a creditor or shareholder who is unknown or cannot be found, or who is under disability and for whom there is no legal representative, shall be paid to state comptroller as abandoned property within six months from date fixed for payment of final liquidating distribution, and be subject to provisions of abandoned property law. (N.Y. Bus. Corp. Law §1005[c] [NYCLS]). When there are no shareholders upon dissolution, all subscriptions for shares shall be cancelled and all obligations of corporation to issue shares or pay subscriptions shall terminate. (N.Y. Bus. Corp. Law §1005[b] [NYCLS]).

Directors of dissolved corporation are not trustees of its assets; title to such assets remains in corporation until transfer by it in corporate name. Dissolution will not change quorum or voting requirements for board of directors or shareholders or provisions regarding election, appointment, resignation or removal of, or filling vacancies among directors, or officers, or provisions regarding amendment or repeal of by-laws or adoption of new by-laws. Dissolution of corporation does not affect any remedy available to or against such corporation, its directors, officers or shareholders for any right or claim existing or liability incurred before such dissolution except as provided in N.Y. Bus. Corp. Law §§1007 [NYCLS] and 1008 [NYCLS]. (N.Y. Bus. Corp. Law §1006[a][1]-[2] [NYCLS], [b] [NYCLS]). (N.Y. Bus. Corp. Law §1007 [NYCLS]) provides for notice of dissolution to creditors by publication in newspaper for two successive weeks together with mailing of such notice to last known address of each person believed to be a creditor or claimant against corporation. Notice requires claimants to present these claims in writing, in detail, at specified place, by specified date not less than six months after first publication. Any claims not timely filed except claims which are subject of litigation on date of first publication, are barred as against corporation, its assets, directors, officers and shareholders except to such extent as court may allow them against then remaining assets of corporation where creditor shows satisfactory reason for failure to file claim. Claims of N.Y. and U.S. are not required to be filed. Laborers' wages are preferred claims and entitled to payment before any other creditors out of corporation assets in excess of valid prior liens or encumbrances. (N.Y. Bus. Corp. Law §1007 [NYCLS]).

At any time after filing certificate of dissolution of corporation, supreme court (in judicial district where the office of corporation was located at date of dissolution) may suspend or annul the dissolution or continue liquidation proceeding, and make all such orders as it may deem proper in all matters in connection with winding up of corporation's affairs. (N.Y. Bus. Corp. Law §1008[a] [NYCLS]).

Attorney general may bring involuntary dissolution action for: fraudulent incorporation, exceeding authority, or other violations of law. (N.Y. Bus. Corp. Law §1101 [NYCLS]).

If majority of board adopts resolution finding that corporation assets not sufficient to discharge liabilities, or that dissolution would be beneficial to shareholders, it may present petition for dissolution. (N.Y. Bus. Corp. Law §1102 [NYCLS]). For same reasons shareholders may present petition. Shareholders' meeting to consider such resolution may be called by holders of shares representing 10% of votes of all outstanding shares entitled to vote, or by lesser proportion if certificate of incorporation authorizes such lesser proportion. Vote by majority of votes of all outstanding shares entitled to vote is sufficient (unless certificate requires a greater proportion). (N.Y. Bus. Corp. Law §1103 [NYCLS]).

Except as otherwise provided in certificate of incorporation under N.Y. Bus. Corp. Law §613 [NYCLS] (Limitations or Right to Vote), holders of shares representing one-half of all outstanding shares entitled to vote in election of directors may petition for judicial dissolution on one or more of following grounds: (1) That directors are so divided respecting management that action by board cannot be obtained; (2) that shareholders are so divided that election of directors cannot be obtained; or (3) that there is internal dissension and two or more factions of shareholders are so divided that dissolution would be beneficial to shareholders. (N.Y. Bus. Corp. Law §1104[a] [NYCLS]). Notwithstanding any provision in certificate of incorporation, any holder of shares entitled to vote at election of directors may present petition for dissolution on ground that shareholders are so divided they have failed to elect successors to directors whose terms have expired or would have expired, upon election and qualification of successors, for at least two consecutive annual meeting dates. (N.Y. Bus. Corp. Law §1104[c] [NYCLS]).

Holders of shares representing 20% of all outstanding shares of corporation (other than one registered under Investment Company Act of 1940) which has no shares that are listed on national securities exchange or regularly quoted in over-the-counter market and who are entitled to vote in election of directors may petition for judicial dissolution on following grounds: (1) Illegal, fraudulent or oppressive actions by directors or controlling persons toward petitioners, or (2) looting, waste or diversion of corporate assets for noncorporate purposes by directors, officers or controlling persons. (N.Y. Bus. Corp. Law §1104-a[a] [NYCLS]). No later than 30 days after filing of petition, directors or those in control of corporation must disclose to petitioners corporate financial books and records for three preceding years. (N.Y. Bus. Corp. Law §1104-a[c] [NYCLS]). Within 90 days from filing petition, or after such period with court permission, any other shareholder may elect to purchase petitioners' shares at fair value upon terms approved by court. Court may require posting of bond or security prior to actual purchase of petitioners' shares. (N.Y. Bus. Corp. Law §1118 [NYCLS]).

Upon certification of Tax Commission, Secretary of State can declare corporation dissolved for failure to file annual reports for two consecutive years or for nonpayment of assessed taxes for any two years. (N.Y. Tax Law §203-a[1] [NYCLS]). (See subhead Organization Tax, supra.)

Insolvency and Receivers.

Where money judgment against corporation has been rendered, and execution returned unsatisfied, judgment creditor may act to sequester corporation property and for distribution of it. (N.Y. Bus. Corp. Law §1201 [NYCLS]). Court may appoint temporary or permanent receiver with various duties and powers. (N.Y. Bus. Corp. Law §§1202-1216).

Close Corporations.

No specific statutory recognition. However, special needs of such corporations are provided for in the N.Y. Bus. Corp. Law.

One or more natural persons of the age of 18 years or over may act as incorporators. (N.Y. Bus. Corp. Law §401 [NYCLS]). Any action permitted to be taken at organization meeting may be taken without meeting if each incorporator or his attorney-in-fact signs instrument setting forth action so taken. (N.Y. Bus. Corp. Law §404[b] [NYCLS]). When shareholders are required or permitted to take any action by vote, such action may be taken without meeting on written consent signed by holders of all outstanding shares entitled to vote thereon. (N.Y. Bus. Corp. Law §615[a] [NYCLS]). Certificate may contain provision specifying greater requirement as to quorum and vote of shareholders (N.Y. Bus. Corp. Law §616 [NYCLS]), provision for voting by class or classes of shares (N.Y. Bus. Corp. Law §617 [NYCLS]) or greater requirement as to quorum and vote of directors. (N.Y. Bus. Corp. Law §709 [NYCLS]). Dissolution under provision in certificate of incorporation. (N.Y. Bus. Corp. Law §1002 [NYCLS]). Shareholders may petition for judicial dissolution. (N.Y. Bus. Corp. Law §§1103-1104-a).

Ten largest shareholders, as determined by fair value of their beneficial interest, of every corporation (other than a company registered under Investment Company Act of 1940) that does not have shares listed on national securities exchange or regularly quoted in over-the-counter market by one or more members of national or affiliated securities association, are jointly and severally personally liable for all debts, wages, or salaries due and owing to any of its laborers, servants or employees other than contractors, for services performed by them for such corporation. (N.Y. Bus. Corp. Law §630[a] [NYCLS]).

Appraisal.

Shareholder has right to receive payment for his shares if corporation: (a) Makes certain specified amendments to certificate of incorporation (N.Y. Bus. Corp. Law §806[b][6] [NYCLS]), (b) dissolves (N.Y. Bus. Corp. Law §1005 [NYCLS]), or (c) merges, consolidates, sells its assets, etc. (N.Y. Bus. Corp. Law §910 [NYCLS]). If plan of reorganization of corporation confirmed by order of court in proceeding under applicable act of Congress, shareholder has no right to receive payment for his shares, except as provided in plan of reorganization. (N.Y. Bus. Corp. Law §808[d] [NYCLS]).

Procedure to enforce right to receive payment for shares is set forth in N.Y. Bus. Corp. Law §623 [NYCLS]. Shareholder intending to exercise such rights if proposed corporate action is authorized at shareholders' meeting must file written objection before vote at shareholders' meeting. (N.Y. Bus. Corp. Law §623[a] [NYCLS]). Within ten days of shareholders' authorization, corporation must give written notice of such authorization by registered mail sent to each shareholder who filed written objection or from whom written objection was not required, except any shareholder who voted for or consented in writing to proposed action. (N.Y. Bus. Corp. Law §623[b] [NYCLS]). Within 20 days of notice, shareholder from whom written objection was not required who elects to dissent must file written notice of such election stating name and residence address, number and classes of shares as to which shareholder dissents and demand for payment of their fair value. (N.Y. Bus. Corp. Law §623[c] [NYCLS]). Shareholder may not dissent as to less than all his shares. (N.Y. Bus. Corp. Law §623[d] [NYCLS]). On consummation of corporation action, non-assenting shareholder ceases to have rights of shareholder except right to fair value of shares and to maintain action for relief on grounds that corporate action is illegal, irregular, or fraudulent. If notice of dissent withdrawn, or disposition rescinded, or court determines that shareholder not entitled to these payments, dissenter has no right to receive payment but all rights as shareholder are reinstated. (N.Y. Bus. Corp. Law §623[e] [NYCLS]). Within one month of notice of dissent, shareholder must submit certificates representing shares to corporation whose transfer agent should note on them that notice of election has been filed, and return certificates to shareholder. Shareholder failing to submit certificates may lose dissenter's rights. (N.Y. Bus. Corp. Law §623[f] [NYCLS]).

Within 15 days after expiration of period within which shareholder may file dissenting notice or within 15 days after proposed corporate action is consummated, whichever is later (but in no case later than 90 days from shareholder's authorization date) corporation (or surviving or new corporation in merger or consolidation) must make written offer to shareholder who has filed dissent to pay fair value for shares, which may be made conditional upon consummation of corporate action, if 90 days had elapsed after shareholders' authorization date. Offer must be made at same price per share to all dissenting shareholders of same class. If corporation and dissenter agree on fair value within 30 days, payment must be made within 60 days after making of offer, or consummation of proposed corporate action, whichever is later, upon surrender of certificates representing such shares. (N.Y. Bus. Corp. Law §623[g] [NYCLS]). If corporation fails to make offer or if dissenting shareholder fails to accept offer made, corporation or shareholder may petition supreme court to determine value of stock. Shareholder failing to bring such action may lose dissenter's rights. Unless court finds dissenting shareholder not entitled to payment, court must fix value of shares as of close of business on day prior to assenting shareholders' authorization date. In fixing fair value of shares, court must consider nature of transaction giving rise to shareholder's right to receive payment for shares and its effects on corporation and its shareholders, concepts and methods then customary in relevant securities and financial markets for determining fair value of shares of corporation engaging in similar transaction under comparable circumstances and all other relevant factors. Court determines fair value of shares without jury and without referral to appraiser or referee. Interest is assessed against corporation but may be denied if court finds shareholders' refusal to accept corporation's offer was arbitrary, vexatious or otherwise not in good faith. (N.Y. Bus. Corp. Law §623[h] [NYCLS]). Shares acquired by corporation on payment of agreed value become treasury shares or are cancelled as provided in N.Y. Bus. Corp. Law §515 [NYCLS], or in case of merger or consolidation, may be held and disposed of as plan of merger or consolidation otherwise provides. (N.Y. Bus. Corp. Law §623[i] [NYCLS]).

No payment may be made to dissenting shareholder when corporation is insolvent or would thereby be made insolvent. In such event, dissenter has 30 days from notice of inability to choose whether to withdraw dissent or retain status as claimant against corporation, subordinated to rights of its creditors, but superior to non-assenting shareholders, until liquidation or solvency. (N.Y. Bus. Corp. Law §623[j] [NYCLS]).

Shareholder who purchases shares after board of directors has approved and publicized merger plan not entitled to appraisal as to those shares. (4 Misc.2d 50, 152 N.Y.S.2d 807, modified on other grounds, 1 A.D.2d 1005, 153 N.Y.S.2d 533, app. denied, 2 A.D.2d 673, 153 N.Y.S.2d 554).

Foreign Corporations.

Foreign corporation may not do business in N.Y. until authorized by Secretary of State, at which time it may do only such business it was authorized to do in its jurisdiction of incorporation, and which may be done in this state by domestic corporation. Foreign corporation is not considered to be doing business in this state by reason of following activities: (1) Maintaining or defending any action or proceeding, or effecting settlement of claims or disputes; (2) holding meetings of directors or shareholders; (3) maintaining bank accounts; or (4) maintaining offices or agencies only for transfer, exchange and registration of securities, or appointing and maintaining trustees or depositaries with relation to its securities. This is not all-inclusive list. (N.Y. Bus. Corp. Law §1301 [NYCLS]).

Activities of foreign professional service corporations are subject to requirements of N.Y. Bus. Corp. art. 15-A (N.Y. Bus. Corp. Law §§1525-33). “Profession” includes practice as attorney, or as licensed physician, or professions designated in Tit. VIII of New York Education Law. (N.Y. Bus. Corp. Law §1525[b] [NYCLS]).

Attorney General may bring action to restrain foreign corporation from doing business without or beyond authority, and may also bring action to annul authority of foreign corporation if corporate existence has been dissolved or terminated in jurisdiction of its incorporation. Attorney General shall deliver certified copy of order of annulment to Department of State. Secretary of State must continue as agent for service of process against such foreign corporation in any action or special proceeding based upon liability incurred by corporation within state prior to filing certified copy of annulment order. (N.Y. Bus. Corp. Law §1303 [NYCLS]). Application entitled “Application for authority of . . . (name of corporation) under N.Y. Bus. Corp. Law §1304 [NYCLS] ,” must be signed and delivered to Department of State. It must set forth: (1) Name of foreign corporation; (2) fictitious name corporation agrees to use in N.Y., if applicable; (3) jurisdiction and date of incorporation; (4) purpose or purposes for which formed, it being sufficient to state that purpose of corporation to engage in any lawful act or activity for which corporations may be organized under N.Y. Bus. Corp. Law ., provided that it is also stated that corporation not formed to engage in any act requiring consent of state official, department, board, agency or other body without such consent first being obtained; (5) county within N.Y. in which its office is to be located; (6) designation of Secretary of State as agent for service of process against it, and post office address to mail such process; (7) (optional) registered agent's name and address, and statement that he is to be its agent upon whom process may be served; and (8) statement that foreign corporation has not done business without authority in this state, or else consent of state Tax Commission to filing of application. (N.Y. Bus. Corp. Law §1304[a] [NYCLS]). Application for authority must be accompanied by certificate (by authorized officer of jurisdiction of its incorporation) that it is existing corporation. (N.Y. Bus. Corp. Law §1304[b] [NYCLS]).

Authorized foreign corporation has such powers as permitted by laws of its jurisdiction of incorporation, but no greater than those of domestic corporation formed for business set forth in application for authority. (N.Y. Bus. Corp. Law §1306 [NYCLS]). Authorized foreign corporation may amend or change its application for authority in following respects (if amendments contain only such provisions as might have been contained in original application for authority): (1) To change its corporate name; (2) to change fictitious name filed pursuant to N.Y. Bus. Corp. Law §1301[d] [NYCLS], if applicable; (3) to delete fictitious name; (4) to adopt fictitious name when corporate name changed and not available in N.Y.; (5) to enlarge, limit or otherwise change business here; (6) to change office location; (7) to specify or change post office address to which Secretary of State shall mail process served on him; (8) to make, revoke, or change designation of registered agent or his address; (9) to change jurisdiction of incorporation. (N.Y. Bus. Corp. Law §1308 [NYCLS]). Above are accomplished by “Certificate of (amendment) (change) of application for authority of . . . (corporation) under N.Y. Bus. Corp. Law §1309 [NYCLS] or N.Y. Bus. Corp. Law §1309-A [NYCLS].”

Authorized foreign corporation may surrender its authority by “Certificate of amendment of certificate of surrender of authority of . . . (name of corporation) under (N.Y. Bus. Corp. Law §1310 [NYCLS]) ,” signed and delivered to Department of State. (N.Y. Bus. Corp. Law §1310[a] [NYCLS]). Authority of Secretary of State to receive process is continued, but that of registered agent is revoked. Department of State shall keep record of each process served on Secretary of State, and shall, upon request within ten years of such service, issue certificate under its seal certifying as to receipt of process. (N.Y. Gen. Bus. Law §352-a[3] [NYCLS]). Consent by state Tax Commission to surrender of authority must be attached to certificate. (N.Y. Bus. Corp. Law §1310[b] [NYCLS]). When authorized foreign corporation is dissolved or otherwise terminated or its authority cancelled in state of incorporation, certificate of its Secretary of State or certified copy of order or decree attesting to or directing dissolution of such foreign corporation and termination of its existence must be delivered to N.Y.'s Department of State. Filing of this certificate, order or decree has same effect as filing of certificate of surrender of authority. (N.Y. Bus. Corp. Law §1311 [NYCLS]).

Foreign corporation doing business without authority may not maintain any action or special proceeding here until such corporation has been authorized and has paid all fees, penalties, interest and franchise taxes for time during which it did unauthorized business. Failure to obtain authority does not impair validity of contracts or acts, or right of other party to maintain an action or special proceeding thereon, and foreign corporation may defend. (N.Y. Bus. Corp. Law §1312 [NYCLS]). Action or special proceeding of any type against foreign corporation may be maintained by resident or domestic corporation. It may be maintained by another foreign corporation or nonresident in following cases only: (1) To recover damages for breach of contract made or to be performed here or relating to property situated here at time of contract; (2) where subject matter of litigation is situated here; (3) where cause of action arose here, except where object of action or special proceeding is to affect title to realty situated elsewhere; (4) where a non-domiciliary would be subject to personal jurisdiction under N.Y. C.P.L.R. 302 [NYCLS]; (5) where defendant is foreign corporation doing business or authorized to do business in N.Y. Within meaning of this section, foreign corporation does not include corporation formed under laws of U.S. which maintains office in N.Y. (N.Y. Bus. Corp. Law §1314 [NYCLS]).

Resident shareholder, otherwise entitled (see subhead Shareholders, supra) to examine corporation's books may require foreign corporation here to produce records of shareholders for examination here. (N.Y. Bus. Corp. Law §1315 [NYCLS]). Voting trustee for shares of foreign corporation doing business in this state who has office or who has designated transfer agent within this state, must produce here, after appropriate demand for examination, record of voting trust certificate holders. (N.Y. Bus. Corp. Law §1316[a] [NYCLS]).

Except as otherwise provided, directors and officers of foreign corporation doing business here are subject to certain liabilities and action for misconduct to same extent as directors and officers of domestic corporation, except N.Y. Bus. Corp. Law §§719(a)(3) [NYCLS] and 720 [NYCLS]. (N.Y. Bus. Corp. Law §1317 [NYCLS]).

Foreign corporation must disclose to its New York shareholders of record certain information required of domestic corporation. (N.Y. Bus. Corp. Law §1318 [NYCLS]). Applicable to all foreign corporations are articles dealing with definitions, application, certificates, name, process, and provisions for indemnification of officers and directors, and insurance for indemnification of officers and directors, and those relating to dissenters' rights in mergers or consolidations of domestic and foreign corporations, derivative actions, and security for expenses therein and reorganization under act of Congress. (N.Y. Bus. Corp. Law §1319 [NYCLS]). If its shares are listed on national securities exchange, or less than one-half of its total business income for preceding three fiscal years (or such portion thereof as it was in existence) was allocable to New York for franchise tax purposes, foreign corporation exempted from several important provisions including provisions relating to voting trust records, liabilities of directors and officers, and liability for failure to disclose required information. (N.Y. Bus. Corp. Law §1320 [NYCLS]).

Name must conform to requirements for domestic corporations. See subhead Corporation Name, supra. Foreign corporation whose name is not acceptable for authorization under N.Y. Bus. Corp. Law §§301 [NYCLS] and 302 [NYCLS] may submit in its application for authority fictitious name under which it shall do business in N.Y. (N.Y. Bus. Corp. Law §1301[d]

[NYCLS]).

Qualification Fee.

Fee to Secretary of State for authority to do business is $225. (N.Y. Exec. Law §96[9][a]).

License Fee.

Every foreign corporation (except banking corporations, fire, marine, casualty and life insurance companies, cooperative fraternal insurance companies and building and loan associations) doing business in state must pay license fee of 1/20 of 1% of its issued par value capital stock and 5¢ on each share of its capital stock without par value employed by it within state. Measure of amount of capital stock employed in state is such portion of capital stock as gross assets, exclusive of obligations issued by U.S. and cash on hand and on deposit, employed within state are of gross assets, with same exclusions, wherever employed except that different mode of computation is provided in case of corporation subject to franchise tax. For purposes of taxation, capital invested in stock of another corporation must be deemed to be assets located where physical property represented by such stock is located. Minimum tax is $10. (N.Y. Tax Law §181[1] [NYCLS]).

Maintenance Fee.

Every foreign corporation (except for institutions listed in catchline License Fee, supra) subject to license fee must pay annual maintenance fee of $300 for each year or portion thereof for which it is authorized to do business in state; but fee reduced by 25% if imposed for period of more than six months but not more than nine months and by 50% if imposed for period of six months or less. Credit for fee allowed against corporation income and franchise taxes. (N.Y. Tax Law §181[2] [NYCLS]).

Real Estate.

A foreign corporation may acquire, hold, and convey real property in N.Y. in furtherance of corporate purposes in same manner as domestic corporation. (N.Y. Bus. Corp. Law §1307 [NYCLS]).

Receivership.

Where foreign corporation has been dissolved, ceased to do business, or whose corporate existence has terminated, has tangible or intangible assets in this state, any creditor or stockholder, or any person in whose behalf an order of attachment against corporation's property has been or may be issued, may bring an action, ex parte, in supreme court for appointment of receiver of such assets. (N.Y. Bus. Corp. Law §1202[a][4] [NYCLS]).

Taxes.

See category 2 Business Organizations, topic 2.03 Corporations.

Professional Corporations.

Corporation may be formed, for purpose of rendering professional services, by persons engaged in law, medicine, physiotherapy, dentistry, veterinary medicine, pharmacy, nursing, podiatry, optometry, engineering, architecture, landscape architecture, land surveying, public accounting, certified public accounting, certified shorthand reporting, and chiropractic. (N.Y. Bus. Corp. Law §1504 [NYCLS]; N.Y. Educ. Law tit. VIII). Professional service corporation cannot engage in any business other than rendering of professional services for which it was incorporated except that it may invest funds in real estate, mortgages, stocks, bonds and other types of investments. (N.Y. Bus. Corp. Law §1506 [NYCLS]). Shares cannot be issued or sold except to licensed professionals, except that they can be issued to persons who will engage in practice of profession within 30 days of issuance. (N.Y. Bus. Corp. Law §§1507 [NYCLS], 1511 [NYCLS]). Within six months of appointment of legal representative of deceased shareholder or of professional disqualification of shareholder, corporation must repurchase his shares at book value, unless shorter period or different method of valuation is provided by certificate of incorporation, by-laws, or agreement among corporation and all shareholders, or unless shares have been transferred to another qualified person. (N.Y. Bus. Corp. Law §1510 [NYCLS]). Provision has been made for member of same profession who is not employee of corporation to take shares in trust. (N.Y. Bus. Corp. Law §1511 [NYCLS]). Directors and officers must be authorized to practice profession which corporation is authorized to practice and must be shareholders or employees of corporation. (N.Y. Bus. Corp. Law §1508 [NYCLS]). Each shareholder, employee or agent of professional service corporation remains personally liable for negligent or wrongful acts or misconduct committed by him or any person under his direct supervision and control. (N.Y. Bus. Corp. Law §1505[a] [NYCLS]). Professional service corporations may be merged or consolidated pursuant to N.Y. Bus. Corp. Law §1516 [NYCLS]. Special regulations apply to foreign professional service corporations. (N.Y. Bus. Corp. Law §§1525-1533).

Deeds.

See category 21 Property, topic 21.06 Deeds.

Not-For-Profit Corporation Law (N.Y. Not-For-Profit Corp. Law) differs in various respects from Model Non-Profit Corporations Act. Many provisions of N.Y. Not-For-Profit Corp. Law are similar to corresponding provisions of N.Y. Bus. Corp. Law . Statute establishes four categories of not-for-profit corporations which may be organized for charitable, social, political, religious, business or other purposes. (N.Y. Not-For-Profit Corp. Law §201 [NYCLS]). N.Y. Not-For-Profit Corp. Law permits formation of not-for-profit corporations that cannot be formed under other corporate laws. (N.Y. Not-For-Profit Corp. Law §201[a] [NYCLS]). Since 1972, N.Y. Not-For-Profit Corp. Law has applied to religious corporations and since 1978 it has applied to membership cooperatives. (N.Y. Relig. Corp. Law §2-b; N.Y. Coop. Corp. Law §5). Approval of various state agencies may be required for incorporation. (N.Y. Not-For-Profit Corp. Law §404 [NYCLS]). Trade and business associations must obtain endorsement or consent of attorney-general to file certificate of incorporation. (N.Y. Not-For-Profit Corp. Law §404[a] [NYCLS]). Domestic, not-for-profit corporation that is private foundation as defined in not-for-profit corporation law and required by not-for-profit corporation law to make available for public inspection and annual return must publish notice of availability of return for inspection. (N.Y. Not-For-Profit Corp. Law §406[b-1] [NYCLS]). With certain exceptions, every not-for-profit corporation, authorized to act in New York that was in existence on Sept. 1, 1970, will be considered type B corporation unless it delivers to Department of State certificate of type of corporation or amends its certificate of incorporation (if domestic corporation) or it amends its certificate of authority (if foreign corporation). (N.Y. Not-For-Profit Corp. Law §§113[a] [NYCLS], 1302 [NYCLS]). Not-for-profit corporation may not conduct activities for pecuniary profit, except for incidental profits which must be applied to corporate activities, and not distributed. (N.Y. Not-For-Profit Corp. Law §§515-516). Not-for-profit corporations cannot have stock or shares but may issue membership certificates and cards. (N.Y. Not-For-Profit Corp. Law §501 [NYCLS]). Members may be required to make capital contributions (N.Y. Not-For-Profit Corp. Law §§502[a] [NYCLS], 503 [NYCLS]) but are not personally liable for debts of corporation except for unpaid portion of initiation fees, dues or assessments (N.Y. Not-For-Profit Corp. Law §517 [NYCLS]). Directors and officers may be entitled to indemnification or advancement of expenses. (N.Y. Not-For-Profit Corp. Law §§721-726). Directors and officers must discharge duties of their respective positions in good faith and with diligence, care, and skill that would ordinarily be exercised by prudent person. (N.Y. Not-For-Profit Corp. Law §717 [NYCLS]). Directors and officers may be liable to not-for-profit corporation for certain violations and misconduct. (N.Y. Not-For-Profit Corp. Law §§719-720-a). Directors and officers may rely in good faith on information presented by certain employees, experts and board committees. (N.Y. Not-For-Profit Corp. Law §717[b] [NYCLS]). Court approval may be required for merger (N.Y. Not-For-Profit Corp. Law §908[f] [NYCLS]) or dissolution and distribution of assets (N.Y. Not-For-Profit Corp. Law §§1002 [NYCLS], 1008 [NYCLS]). Effective Apr. 9, 2006, certain not-for-profit corporations subject to dissolution for failure to register or to file annual financial reports. (N.Y. Not-For-Profit Corp. Law §1014 [NYCLS]). Corporations formed under N.Y. Relig. Corp. Law may merge with corporations formed for religious purposes under N.Y. Not-For-Profit Corp. Law (N.Y. Not-For-Profit Corp. Law §910[a] [NYCLS]; N.Y. Relig. Corp. Law §2-b).

2.04 [RESERVED]

2.05 JOINT STOCK COMPANIES:

Definitions.

The term “joint stock association,” under the General Associations Law, includes every unincorporated joint stock association, company or enterprise having written articles of association and capital stock divided into shares, but does not include a corporation or business trust. Members are termed “stockholders.” The term “business trust” means any association operating a business under a written instrument or declaration of trust, the beneficial interest under which is divided into shares represented by certificates. (N.Y. Gen. Ass'ns Law §2).

Organization.

Articles of association of joint stock association may: (1) Provide that neither death of stockholder nor transfer of shares will cause dissolution; (2) prescribe number of directors, not less than three, to have sole management; or (3) contain any other provision for management not inconsistent with law. (N.Y. Gen. Ass'ns Law §3). Every such association transacting business in state must, within 60 days after formation and in each January thereafter, file with Secretary of State, and with clerk of county in which principal business is carried on, a written certificate signed and verified by president and treasurer stating its name, date of organization, number of stockholders, names and places of residence of officers and principal place of business. Failure to file such certificate renders officers jointly and severally liable to penalty of $50 for each day failure continues. (N.Y. Gen. Ass'ns Law §4).

Changes in Articles.

Changes not inconsistent with law may be made with consent of all stockholders, or otherwise, as such articles provide. Unless articles of association otherwise provide, changes in number of directors (to not less than three), in capital stock, or in term of existence, may be made with consent of holders of two-thirds of outstanding stock, provided such consent is given by vote, or by writing presented and filed, at a regular or special meeting. Notice of such meeting and of proposed change must be personally served on each stockholder at least 30 days, or mailed at least 60 days, before meeting. Amount of capital stock may not be reduced below the amount of paid-up capital stock, nor may it be reduced if liabilities exceed assets. (N.Y. Gen. Ass'ns Law §7). Any joint stock association transacting business in New York and organized under laws of New York on or before Jan. 1, 1964 may be incorporated under Business Corporation Law pursuant to provisions of N.Y. Gen. Ass'ns Law §7-a.

Dissolution.

A joint stock association may dissolve only pursuant to articles of association, by consent of all stockholders, by judgment of court for fraud in management, or for good cause shown. (N.Y. Gen. Ass'ns Law §5).

Power to Take and Convey Real Property.

A joint stock association, in name of its president, as president, may purchase, take, hold and convey such real property only as: (1) Is necessary for immediate accommodation in convenient transaction of business, (2) is mortgaged to it in good faith as security, or (3) it purchases at sales under judgments, decrees or mortgages held by it. (N.Y. Gen. Ass'ns Law §6). If application to court is required by law for leave to mortgage, lease or sell its real estate, the proceeding is governed by N.Y. Bus. Corp. Law art. 5 [NYCLS]. (N.Y. Gen. Ass'ns Law §8).

Process Agent.

Joint stock associations doing business within state must designate Secretary of State as agent on whom process may be served, and may not maintain action or special proceeding in state on any contract made in this state before such designation and payment of all fees, penalties and franchise taxes for years it did business without having filed certificate of designation. (N.Y. Gen. Ass'ns Law §18). Department of State shall keep record of each process served on Secretary of State, and shall, upon request within ten years of such service, issue certificate under its seal certifying as to receipt of process. (N.Y. Gen. Ass'ns Law §19-a).

Actions.

Action or special proceeding may be maintained by or against president or treasurer of an unincorporated association to recover property, or on a cause of action maintainable against all associates by reason of their interest or ownership therein, jointly or in common, or their liability therefor, jointly or severally. (N.Y. Gen. Ass'ns Law §13). Action may be maintained by president or treasurer against one or more members to enforce lawful claims of association. (N.Y. Gen. Ass'ns Law §12). On death, removal, resignation, or incapacity of officer by or against whom action is brought, court must order it continued by or against his successor or another officer. (N.Y. Gen. Ass'ns Law §14).

Officer against whom action is brought cannot be arrested. Judgment against him does not authorize execution against his property or person; nor does docketing thereof bind his real property, or chattels real. Execution on such judgment for sum of money must require satisfaction out of personal or real property belonging to association, or owned, jointly or in common, by all the members. (N.Y. Gen. Ass'ns Law §15).

If action is brought against officer, or counterclaim made in action brought by officer, another action for same cause may not be brought against members of the association until after final judgment and return of execution wholly or partly unsatisfied or unexecuted. After such return, party in whose favor execution was issued may maintain an action: (1) Where he was plaintiff, or defendant recovering on counterclaim, against members of association, and may recover as part of his damages costs of first action; or (2) where he was defendant, and case is not within subsection (1), to recover sum remaining uncollected against persons who composed association when action against him was commenced, or survivors of them. These provisions do not affect right of person in whose favor judgment in first action was rendered to enforce bond or undertaking given therein. (N.Y. Gen. Ass'ns Law §16). Provisions relating to actions by and against associations do not prevent actions being brought by or against all members thereof, except as stated above. Where action is brought against members of association as prescribed in §16, time between commencement of action by or against officer and return of first execution issued on final judgment rendered is not part of time limited by law for commencement of subsequent action. (N.Y. Gen. Ass'ns Law §17).

Injunction order suspending general and ordinary business of joint stock association with seven or more persons or suspending from office, or restraining from performance of duties, trustee, director or other officer, void unless granted by court, upon notice to proper officer or to trustee, director or other officer enjoined. (N.Y. Gen. Ass'ns Law §10).

N.Y. Gen. Ass'ns Law §10, N.Y. Bus. Corp. Law §§1113 [NYCLS], 1202 [NYCLS] and

N.Y. Bus. Corp. Law §§706 [NYCLS], 716 [NYCLS], regarding receivership, apply to action or special proceeding against New York joint stock association or trustee, director or officer thereof or foreign joint stock association doing business in state, or having within state, business agency, fiscal agency or other agency for transfer of stock. (N.Y. Gen. Ass'ns Law §9).

No objection may be taken by a defendant to proceedings in authorized action against one or more persons, as stockholders, because another person named as defendant in action is misnamed, dead, or not liable for any cause, provided latter is designated by his name as it appears on stockbooks. In such case, court may, before final judgment, upon motion of either party, amend pleadings and other papers, without prejudice to proceedings. (N.Y. Gen. Ass'ns Law §11).

Savings and Loan Associations.

They are subject to banking law. See category 3 Business Regulation and Commerce, topic 3.01 Banks and Banking.

Professional Associations.

See topic 2.03 Corporations, subhead Professional Corporations.

2.06 LIMITED LIABILITY COMPANIES:

New York Limited Liability Company Law ("Law"), effective Oct. 24, 1994, permits formation of limited liability company ("LLC"). (N.Y. Ltd. Liab. Co. Law §§101-1403).

Unless otherwise stated, section references are to the Law.

Articles of Organization Requirements.

One or more persons may act as organizer to prepare, execute and file articles of organization. (N.Y. Ltd. Liab. Co. Law §203[a] [NYCLS]). LLC is formed upon filing of articles of organization ("Articles") with Department of State. (N.Y. Ltd. Liab. Co. Law §203[d] [NYCLS]). Articles must include: (a) name, (b) county of principal office in New York, (c) specific date of dissolution, if any, (d) designation of Secretary of State as agent for service of process, (e) registered agent, if any, (f) whether all or specified members are to be liable for all or specified obligations of LLC, (g) any other provisions members elect to include for regulation of internal affairs. (N.Y. Ltd. Liab. Co. Law §203[e] [NYCLS]). Articles must be signed by organizer or organizers and include name and capacity of each signer. (N.Y. Ltd. Liab. Co. Law §207 [NYCLS]). LLC must publish notice containing substance of information in articles of organization in two newspapers for six successive weeks. Proof of publication must be filed with Department of State before LLC may maintain action or special proceeding in New York. Failure to file proof of publication with Department of State within 120 days after formation results in suspension of authority to conduct business in state. Suspension may be annulled upon compliance. (N.Y. Ltd. Liab. Co. Law §206[a] [NYCLS]).

Name of LLC must contain "Limited Liability Company", "L.L.C.", or "LLC", and must be distinguishable from name of any domestic LLC or authorized foreign LLC, including fictitious names and reserved names, filed with Department of State. Certain words and phrases may not be used. (N.Y. Ltd. Liab. Co. Law §204 [NYCLS]). Name may be reserved for 60 days by filing application with Department of State. (N.Y. Ltd. Liab. Co. Law §205[c] [NYCLS]).

Purpose.

LLC may be formed for any lawful business purpose except any business for which another statute requires some other business entity or natural person to be formed or used for such purpose. (N.Y. Ltd. Liab. Co. Law §201 [NYCLS]).

Registered Agent and Address.

Articles must designate county where principal office is to be located. (N.Y. Ltd. Liab. Co. Law §203[e][2] [NYCLS]).

Every LLC must designate, in Articles, Secretary of State as agent to accept service of process and designate post office address to which Secretary of State will mail any process served. (N.Y. Ltd. Liab. Co. Law §203[e][4] [NYCLS]). Any change of designated address must be filed with Department of State. LLC must file designated address with Department of State biennially. (N.Y. Ltd. Liab. Co. Law §301[e] [NYCLS]).

LLC may designate registered agent to accept service of process and agent's address in Articles. (N.Y. Ltd. Liab. Co. Law §203[e][5] [NYCLS]). Registered agent may change its address or resign by filing with Department of State. New agent may be designated by filing with Department of State. (N.Y. Ltd. Liab. Co. Law §§301-A [NYCLS], 302 [NYCLS]).

Amending Articles.

Articles may be amended by filing certificate of amendment with Department of State. Certificate of amendment must be filed within 90 days of: change in any statement in Articles, discovery of materially false or inaccurate statement in Articles or continuation of LLC after event of dissolution under N.Y. Ltd. Liab. Co. Law §701 [NYCLS]. Amendment is effective upon filing. (N.Y. Ltd. Liab. Co. Law §211[e] [NYCLS]).

Alternatively, LLC may, at any time file with Secretary of State single instrument restating text of Articles, as amended, to effect amendment to Articles. (N.Y. Ltd. Liab. Co. Law §214[a] [NYCLS]).

Amendment to Articles must be authorized by majority of members entitled to vote thereon, unless otherwise provided in operating agreement (“Agreement”). However, unless otherwise provided in Agreement, if LLC managed by one or more managers, then majority of managers may authorize: (1) Change in name or address of registered agent; (2) change of address to which Secretary of State will mail any process served; or (3) correction of any error in Articles. (N.Y. Ltd. Liab. Co. Law §213 [NYCLS]).

Certificate of Correction.

Articles, any certificate, or any other instrument may be corrected with respect to any informality or error apparent on face, incorrect statement, or defect in execution (except for change or correction of name of LLC) by filing certificate of correction with Department of State. Filing certificate of correction does not alter effective date of instrument corrected and does not affect any right or liability accrued before filing of certificate of correction. (N.Y. Ltd. Liab. Co. Law §212 [NYCLS]).

Powers.

In addition to powers enumerated in N.Y. Ltd. Liab. Co. Law §202 [NYCLS] , and subject to Articles, LLC may have and exercise all powers, not inconsistent with law, necessary or convenient to effect purposes for which LLC is formed. (N.Y. Ltd. Liab. Co. Law §202[q] [NYCLS]).

Operating Agreement.

Members must adopt written operating agreement (“Agreement”) relating to: (1) Business of LLC; (2) conduct of its affairs; and (3) rights, powers, preferences, limitations or responsibilities of its members, employees or agents. (N.Y. Ltd. Liab. Co. Law §417[a] [NYCLS]). Agreements may be entered before, at time of or within 90 days after filing Articles. (N.Y. Ltd. Liab. Co. Law

§417[c] [NYCLS]).

Membership Interest.

"Membership interest" means member's aggregate rights in LLC including right to share of profits and losses, right to receive distributions, and right to vote and participate in management. (N.Y. Ltd. Liab. Co. Law §102[r] [NYCLS]).

Limited Liability.

Neither member, manager nor agent is liable for obligations of LLC solely by reason of being such member, manager or agent or participating in conduct of business. However, member may be liable if Articles so provide and member either consented to or voted for such provision. (N.Y. Ltd. Liab. Co. Law §609 [NYCLS]).

Management.

Unless Articles provide otherwise, management of LLC is vested in members in proportion to their share of current profits with majority controlling. (N.Y. Ltd. Liab. Co. Law §§401[a] [NYCLS], 402[a] [NYCLS], [f] [NYCLS]). Except as provided in Agreement, if management is vested in members, then member exercising management powers is deemed to be manager and subject to duties and liabilities of manager. (N.Y. Ltd. Liab. Co. Law §401[b] [NYCLS]). If management is vested in members, then each member may bind LLC as its agent. (N.Y. Ltd. Liab. Co. Law §412[a] [NYCLS]).

Management by one or more managers is subject to any provisions in Articles or Agreement. (N.Y. Ltd. Liab. Co. Law §408[a] [NYCLS]). Articles may provide for classes or groups of managers having such relative rights, powers, preferences and limitations provided in Agreement. (N.Y. Ltd. Liab. Co. Law §419[a] [NYCLS]). Except as provided in Agreement, managers shall manage by affirmative vote of majority of managers or written consent of all managers. (N.Y. Ltd. Liab. Co. Law §408[b] [NYCLS], [c] [NYCLS]). Except as provided in Agreement, if management is vested in managers, then members shall vote annually in proportion to their share of profits to elect managers by majority vote. (N.Y. Ltd. Liab. Co. Law §413 [NYCLS]). Operating Agreement may set forth provisions regarding voting by managers. (N.Y. Ltd. Liab. Co. Law §419[b] [NYCLS]). Number of managers may be increased or decreased by amendment to and in manner provided in Agreement. (N.Y. Ltd. Liab. Co. Law §413[d] [NYCLS]). Managers may bind LLC as its agent. (N.Y. Ltd. Liab. Co. Law §412[b][2] [NYCLS]).

Manager must perform duties in good faith and with that degree of care that ordinarily prudent person in like position would use under similar circumstances. Manager entitled to rely on information, opinions, reports or statements of agents and employees of LLC, professionals and others as to matters within such person's competence, and other classes of managers as to matters within that class's designated authority. (N.Y. Ltd. Liab. Co. Law §409 [NYCLS]). Operating Agreement may eliminate liability of managers to LLC for breach of duty or provide indemnification to managers (or members or other persons) against any claims except where final adjudication adverse to manager establishes bad faith (material to adjudication in case of indemnification) or personal gain. (N.Y. Ltd. Liab. Co. Law §§417[a] [NYCLS], 420 [NYCLS]).

Members.

Articles may provide for classes of members with relative rights and powers provided in Agreement. (N.Y. Ltd. Liab. Co. Law §418[a] [NYCLS]). Except as provided in Agreement, each member votes in proportion to share of current profits. Except as provided in Agreement or Articles majority of votes cast required to take action, but majority of all members entitled to vote required to admit member, incur indebtedness outside ordinary course of business, and adopt or amend Articles or Agreement. Except as provided in Agreement, vote of majority of members entitled to vote needed to approve dissolution, transfer of substantially all assets, and merger or consolidation. (N.Y. Ltd. Liab. Co. Law §402 [NYCLS]). Except as provided in Agreement, meeting of members must be held annually. (N.Y. Ltd. Liab. Co. Law §403 [NYCLS]). Majority of members entitled to vote constitutes quorum, except as provided in Agreement, but, in any case, not less than one-third of members. (N.Y. Ltd. Liab. Co. Law §404 [NYCLS]). Except as provided in Agreement, written notice must be given of any meeting of members. (N.Y. Ltd. Liab. Co. Law §405[a] [NYCLS]). Except as provided in Agreement, action may be taken without meeting if members representing minimum vote needed consent in writing. Notice must be given to members entitled to vote who do not consent in writing. (N.Y. Ltd. Liab. Co. Law §407 [NYCLS]).

Contribution of members to capital of LLC may be in form of cash, property, services rendered, promissory note or other obligations to contribute them or any combination of foregoing. (N.Y. Ltd. Liab. Co. Law §501 [NYCLS]). If member fails to make required contribution, LLC may require member to contribute cash equal to value of contribution not made. (N.Y. Ltd. Liab. Co. Law §502[a] [NYCLS]). Except as provided in Agreement, obligation of member to make contribution may be compromised only by consent of all members. (N.Y. Ltd. Liab. Co. Law §502[b] [NYCLS]). Agreement may specify consequences to membership interest of any member failing to make required contribution. (N.Y. Ltd. Liab. Co. Law §502[c] [NYCLS]).

Agreement may provide for allocation of profit and losses among members. Unless so provided, profits and losses must be allocated on basis of value of contributions, not including defaulted obligations. (N.Y. Ltd. Liab. Co. Law §503 [NYCLS]).

Agreement may provide for allocation of distributions of cash or other assets among members and record dates for distribution. Otherwise distributions must be allocated on basis of value of contributions not including defaulted obligations. (N.Y. Ltd. Liab. Co. Law §504 [NYCLS]). LLC may not make distribution to member to extent liabilities of LLC, other than liabilities for which recourse of creditors is limited to specified property, would exceed fair market value of assets of LLC after distribution. (N.Y. Ltd. Liab. Co. Law §508[a] [NYCLS]). Except as provided in Agreement, member is entitled to fair value of membership interest upon withdrawal. (N.Y. Ltd. Liab. Co. Law §509 [NYCLS]).

Unless management is by managers, every member is agent of LLC and acts for apparently carrying on business of LLC are binding on LLC. (N.Y. Ltd. Liab. Co. Law §412[a] [NYCLS]).

Membership interest is personal property and member has no interest in specific property of LLC. (N.Y. Ltd. Liab. Co. Law §601 [NYCLS]). Agreement may provide that membership interest may be represented by certificate. Except as provided in Agreement, membership interest is assignable in whole or part and assignor ceases to be member but assignee only entitled to allocations of profit and losses and distributions. (N.Y. Ltd. Liab. Co. Law §603 [NYCLS]). Except as provided by Agreement, assignee may become member only by vote of majority of members not including assignor. (N.Y. Ltd. Liab. Co. Law §604[a] [NYCLS]). Assignor remains liable under Law and Agreement after assignment except for certain liabilities arising after assignment. (N.Y. Ltd. Liab. Co. Law §605 [NYCLS]).

Service of Process.

Service of process on Secretary of State as agent shall be by personal delivery at office of Department of State in Albany. Service of process is complete when Secretary of State is so served. (N.Y. Ltd. Liab. Co. Law §303 [NYCLS]).

Records.

LLC must maintain following records: (1) If managed by managers, name and mailing address of each manager; (2) name, mailing address, contribution and share of profits and losses of each member; (3) copy of Articles; (4) copy of Agreement; and (5) federal, state and local tax or information returns and reports for last three fiscal years. Subject to reasonable standards as may be set forth in Agreement, member may inspect and copy at own expense, for any purpose reasonably related to member's interest as member, above records, any financial statements for last three years and other information as is just and reasonable. If provided in Agreement, certain members or managers may keep confidential from other members for reasonable period information reasonably believed to be trade secrets, information disclosure of which is in good faith believed to be not in best interest of LLC, or information which LLC is required by law or agreement to keep confidential. (N.Y. Ltd. Liab. Co. Law §1102 [NYCLS]).

Derivative Actions.

No provision.

Withdrawal.

Member may withdraw only at time or upon happening of events specified in Agreement. Unless Agreement provides otherwise, member may not withdraw prior to dissolution and winding up of LLC. (N.Y. Ltd. Liab. Co. Law §606[a] [NYCLS]). Except as provided in Agreement, member entitled to fair value of membership interest, based upon right to receive distributions, within reasonable time of withdrawal. (N.Y. Ltd. Liab. Co. Law §509 [NYCLS]).

Merger and Consolidation.

Domestic LLC may merge with or consolidate into one or more LLCs or other business entities formed under laws of any jurisdiction with such LLC or other business entity being surviving or resulting domestic LLC or other business entity. (N.Y. Ltd. Liab. Co. Law §1001 [NYCLS]). Members of each domestic LLC or other business entity will adopt agreement of merger or consolidation setting forth consideration members of domestic LLC are to receive in exchange for membership interests. At least majority in interest of members of each domestic LLC must approve merger or consolidation, except as provided in Agreement which will not provide for approval by less than majority in interest of members entitled to vote. Any member entitled to vote may dissent prior to time vote taken by filing written notice with LLC. Dissenting member entitled to receive cash for fair value of membership interest, without taking into account effect of merger or consolidation, from surviving or resulting entity. (N.Y. Ltd. Liab. Co. Law §1002 [NYCLS]). Surviving or resulting entity must send to each dissenting member written offer to pay cash. (N.Y. Ltd. Liab. Co. Law §1005[a] [NYCLS]). Merger or consolidation effective no later than 30 days after filing of certificate of merger or consolidation by Department of State. Certificate of merger or consolidation must be filed with Department of State on behalf of each domestic LLC or other entity. (N.Y. Ltd. Liab. Co. Law §1003[b] [NYCLS]). All rights, property obligations and other things of constituent entities and actions and proceedings pending by or against constituent entities vest in surviving or resulting entity. (N.Y. Ltd. Liab. Co. Law §1004[a] [NYCLS]).

Partnership or limited partnership may convert to LLC and remain same entity as before conversion upon approval of agreement of conversion and filing Articles with Department of State. (N.Y. Ltd. Liab. Co. Law §§1006 [NYCLS], 1007 [NYCLS]).

Dissolution and Winding Up.

LLC is dissolved and its affairs must be wound up upon first to occur of: (1) Latest date on which LLC is to dissolve, if provided in Articles; (2) time or events specified in Agreement; (3) vote of at least majority in interest of members, unless Agreement provides different percentage; (4) date on which LLC no longer has any members; (5) decree of judicial dissolution pursuant to N.Y. Ltd. Liab. Co. Law §702 [NYCLS]. (N.Y. Ltd. Liab. Co. Law §701[a] [NYCLS]).

Articles of dissolution must be filed with Department of State within 90 days of dissolution and commencement of winding up. (N.Y. Ltd. Liab. Co. Law §705[a] [NYCLS]).

Unless otherwise provided for in Agreement, winding up of LLC may be conducted by members (without affecting liability of members) or by supreme court through receiver or trustee upon application by member. (N.Y. Ltd. Liab. Co. Law §703[a] [NYCLS]). Upon winding up, assets must be distributed as follows: (1) To creditors, including members who are creditors; (2) except as provided in Agreement, to members and former members in satisfaction of liability for distributions due upon withdrawal and under Agreement; and (3) except as provided in Agreement, to members first for return of contributions then respecting their membership interests in proportions in which members share in distributions. (N.Y. Ltd. Liab. Co. Law §704 [NYCLS]).

Foreign Limited Liability Companies.

Before doing business in New York, foreign limited liability company (FLLC) must make certain filings with Department of State and obtain certificate of authority. (N.Y. Ltd. Liab. Co. Law §§802 [NYCLS], 805 [NYCLS]). Doing business in New York does not include holding member or manager meeting, maintaining bank accounts, maintaining or defending action or special proceeding, or maintaining office for transfer of membership interests. (N.Y. Ltd. Liab. Co. Law §803[a] [NYCLS]). FLLC must designate Secretary of State as agent for receipt of service of process. FLLC must publish notice in two newspapers for six successive weeks in county of its office. Proof of publication must be filed with Department of State and certificate of authority must be received before FLLC may maintain action or special proceeding in New York. (N.Y. Ltd. Liab. Co. Law §§802 [NYCLS], 808 [NYCLS]). Failure to file proof of publication with Department of State within 120 days after filing application for authority results in suspension of authority to conduct business in state. Suspension may be annulled upon compliance. (N.Y. Ltd. Liab. Co. Law §802 [NYCLS]).

If authority to conduct business or existence ceases in jurisdiction of organization or upon merger or consolidation with another FLLC, FLLC must file certificate with Secretary of State of jurisdiction of organization attesting to such event or certified copy of court order directing such event with Department of State. (N.Y. Ltd. Liab. Co. Law §807 [NYCLS]).

If FLLC has resident member or income derived from New York sources, may be required to pay filing fee and file return with state of New York and possibly with New York City and/or other cities. (N.Y. Tax Law §1304-C [NYCLS]).

Professional Service Limited Liability Companies.

N.Y. Ltd. Liab. Co. Law §§1201 to 1216 [NYCLS] apply to professional service limited liability companies (“PSLLC”); other provisions of Law except N.Y. Ltd. Liab. Co. Law arts. 8 and 13 apply only to extent they do not conflict. (N.Y. Ltd. Liab. Co. Law §1213 [NYCLS]).

Purpose.

PSLLC for pecuniary profit may be formed for purpose of rendering professional services that members are authorized to practice. (N.Y. Ltd. Liab. Co. Law §1203[a] [NYCLS]).

Powers.

PSLLC may not engage in any profession other than those set forth in Articles. PSLLC may engage in any other business or activity for which LLC may be formed. (N.Y. Ltd. Liab. Co. Law §§1203[a] [NYCLS], 1206 [NYCLS]). PSLLC subject to regulation by appropriate state authority. (N.Y. Ltd. Liab. Co. Law §1203[d] [NYCLS], [e] [NYCLS]). Certain professional documents issued by PSLLC must be signed by or bear seal of professional in responsible charge of such document. (N.Y. Ltd. Liab. Co. Law §1204 [NYCLS]).

Formation Requirements.

Articles of organization (“Articles”) must be filed with Department of State and appropriate licensing authority. Articles must state profession or professions to be practiced and have attached certificates of licensing authority of New York or another state stating that each member and manager is authorized to practice profession for which PSLLC is being formed. Notice must be published in two newspapers for six successive weeks in county of its office. Proof of publication of notice must be filed with Department of State before PSLLC may maintain action or special proceeding in New York. PSLLC must designate Secretary of State as agent to receive service of process. (N.Y. Ltd. Liab. Co. Law §§1203 [NYCLS], 1213 [NYCLS]). Failure to file proof of publication with Department of State within 120 days after formation results in suspension of authority to conduct business in state. Suspension may be annulled upon compliance. (N.Y. Ltd. Liab. Co. Law §1203[c][2] [NYCLS]).

Name of PSLLC must end with words "Professional Limited Liability Company", "Limited Liability Company", "P.L.L.C.", "PLLC", "L.L.C.", or "LLC". (N.Y. Ltd. Liab. Co. Law §1212[b] [NYCLS]).

Limited Liability.

Member, manager and agent not liable for obligations of PSLLC. (N.Y. Ltd. Liab. Co. Law §§609 [NYCLS], 1213 [NYCLS]). However, member, manager, employee and agent liable for any negligent or wrongful act or misconduct committed by such person, or anyone under such person's direct supervision and control, while rendering professional services on behalf of PSLLC. (N.Y. Ltd. Liab. Co. Law §1205[a] [NYCLS]).

Members must be professionals (including professional organizations); at least one of whom is authorized by law to render professional service in New York. (N.Y. Ltd. Liab. Co. Law §§1203[a] [NYCLS], 1206 [NYCLS], 1207[a] [NYCLS]). All members must be licensed to practice in New York if PSLLC formed to provide medical, dental, veterinary, engineering, land surveying, architectural or landscape architectural services. Effective Sept. 1, 2004, all members must also be licensed to practice in New York if PSLLC formed to provide licensed clinical social work services. Effective Jan. 1, 2005, all members must be licensed to practice in New York if PSLLC formed to provide creative arts therapy, marriage and family therapy, mental health counseling, or psychoanalysis services. (N.Y. Ltd. Liab. Co. Law §§1203[a] [NYCLS], 1207[b] [NYCLS]).

Member may not sell or assign membership interest except to another professional eligible to become member. Sale or transfer must be approved by proportion of members provided in Agreement, but not less than majority, excluding member proposing transfer. Restrictions on transfer of membership interest must be conspicuously noted on any certificates representing membership interests. (N.Y. Ltd. Liab. Co. Law §1211 [NYCLS]).

No member may enter into any agreement vesting in another person authority to exercise voting power except with another member or person eligible to become member. (N.Y. Ltd. Liab. Co. Law §1207[c] [NYCLS]).

If any member, manager or employee of PSLLC, who has been rendering professional services to public becomes legally disqualified to practice profession within New York, such person shall sever all financial and employment interests (other than as creditor or under retirement program) in PSLLC. (N.Y. Ltd. Liab. Co. Law §1209 [NYCLS]). Within six months, or shorter time provided in Agreement, of death, disqualification or dissolution of member, PSLLC must either buy membership interest or permit transfer to person eligible to become member at book value or other price provided in Agreement. (N.Y. Ltd. Liab. Co. Law §1210 [NYCLS]).

Merger and Consolidation.

PSLLC may merge into or consolidate with another entity formed or recognized under laws of any state provided resulting entity is PSLLC, foreign PSLLC, or other business entity practicing same profession or professions in New York or state of formation. (N.Y. Ltd. Liab. Co. Law §§1213 [NYCLS], 1216 [NYCLS]).

Foreign Professional Service Limited Liability Companies.

N.Y. Ltd. Liab. Co. Law §§1301 to 1309 [NYCLS] apply to foreign professional service limited liability companies (“FPSLLC”); other provisions of Law (except for N.Y. Ltd. Liab. Co. Law §§802 [NYCLS] and 809 [NYCLS]) apply only to extent they do not conflict. (N.Y. Ltd. Liab. Co. Law §1305 [NYCLS]).

FPSLLC is PSLLC, whether or not denominated as such, formed under laws of jurisdiction other than New York each of whose members and managers is professional, and at least one member is authorized by law to render professional service in New York. If FPSLLC provides health, veterinarian, medical, dental, engineering, land surveying, architectural, or landscape architectural services, all members and managers must be licensed to practice in New York. Effective Sept. 1, 2004, if FPSLLC provides licensed clinical social work services, all members and managers must be licensed to practice in New York. Effective Jan. 1, 2005, if FPSLLC provides creative arts therapy, marriage and family therapy, mental health counseling, or psychoanalysis services, all members and managers must be licensed to practice in New York. (N.Y. Ltd. Liab. Co. Law §1301[a] [NYCLS]).

No FPSLLC may conduct any business in New York except for business for which it is formed and is authorized to do business in New York, provided that it may invest funds in any type of investment. (N.Y. Ltd. Liab. Co. Law §1304 [NYCLS]). FPSLLC and members, managers and employees rendering professional services in New York are subject to New York law and regulations of state authority governing such profession. (N.Y. Ltd. Liab. Co. Law §§1302[a] [NYCLS], 1303[a] [NYCLS], 1308[b] [NYCLS], 1309 [NYCLS]). Certain documents issued by FPSLLC must be signed by professional in responsible charge. (N.Y. Ltd. Liab. Co. Law §1302[b]-[g] [NYCLS]). FPSLLC may practice in New York only if all professions practiced could be practiced by single PSLLC organized in New York and only if state of domicile has reciprocal provision for New York PSLLC to apply for authority to do business. (N.Y. Ltd. Liab. Co. Law §1305 [NYCLS]).

Member, manager, employee or agent is liable for any negligent or wrongful act committed by such person, or anyone under such person's direct supervision, while rendering professional services in New York. (N.Y. Ltd. Liab. Co. Law §1303[a] [NYCLS], [b] [NYCLS]).

FPSLLC may apply for authority to do business in New York by filing application with Department of State that includes name to be used in New York, which must end with “Professional Limited Liability Company”, “Limited Liability Company”, “P.L.L.C.”, “PLLC”, “L.L.C.”, or “LLC”, and designation of Secretary of State as agent for receipt of service of process. FPSLLC must publish notice in two newspapers for six successive weeks in county where office is to be located. Proof of publication of notice must be filed with Department of State before FPSLLC may maintain action or special proceeding in New York. (N.Y. Ltd. Liab. Co. Law §1306 [NYCLS]). Failure to file proof of publication with Department of State within 120 days after application for authority results in suspension of authority to conduct business in state. Suspension may be annulled upon compliance. (N.Y. Ltd. Liab. Co. Law §1306[d] [NYCLS]).

If FPSLLC has resident member or income derived from New York sources, may be required to pay filing fee and file return with state of New York and possibly with New York City and/or other cities. (N.Y. Tax Law §§658 [NYCLS], 1301 [NYCLS], 1304-C [NYCLS]).

2.07 [RESERVED]

2.08 PARTNERSHIPS:

Uniform Partnership Act, Uniform Limited Partnership Act and Revised Uniform

Limited Partnership Act.

These acts have been adopted, with certain modifications. (N.Y. P'ship Law §§1-82, 90-119, 121-101 to 121-1300).

Formation.

Partnership results from contract between the parties, and incidents of relation as between them are subject to such agreements as they make. (20 N.Y.S.2d 244, aff'd, 264 A.D. 708, 34 N.Y.S.2d 526).

Partnerships may be formed not only by express agreement, but may grow out of transactions or relations in which word “partnership” is not uttered. (119 Misc. 676, 197 N.Y.S. 123, aff'd, 214 A.D. 715, 209 N.Y.S. 914).

Continuance of Partnership Business During Action for Dissolution or Accounting.

In action to dissolve partnership, for accounting between partners or affecting continued prosecution of business, court may authorize partnership business to be continued during pendency of action by one or more partners on their filing suitable undertaking. Court may ascertain value of partnership property, and interests of respective partners, by reference or otherwise, and direct accounting between any of the partners. Judgment may make such provision for payment to retiring partners for their interest, and with respect to rights of creditors, title to partnership property, and otherwise, as justice requires, with or without appointment of receiver, or sale of partnership property. (N.Y. P'ship Law §75).

Certificate to be Filed.

No persons may carry on or transact business as members of partnership or under fictitious name, unless they file in office of clerk of county or counties where business is to be transacted certificate executed and acknowledged by all partners setting forth business name and address, full name and residence address of all partners, and age of any infant partners. (N.Y. Gen. Bus. Law §130[1][a] [NYCLS]). Amended certificate must be filed after change in facts required to be stated within 30 days after there has been change in such facts. (N.Y. Gen. Bus. Law §130[3] [NYCLS]). Failure to comply does not affect rights of third persons. (N.Y. Gen. Bus. Law §130[8] [NYCLS]). However, knowing failure to comply with filing requirements is misdemeanor. (N.Y. Gen. Bus. Law §130[9] [NYCLS]). This provision does not apply to limited partnerships, law firms, corporations duly organized under laws of this state or lawfully doing business in this state, private bankers authorized to engage in business under banking law, nor does it limit liability of partners. (N.Y. Gen. Bus. Law §130[7] [NYCLS]). For fictitious corporate names, see topic 2.03 Corporations, subhead Corporation Name.

Continuance of Partnership or Business Name.

Partnership name may be continued where business of firm in New York having business relations with foreign countries, or which has transacted business in New York or in any other state or territory of U.S., is continued by any of partners or any of their assigns, appointees or successors in interest. Partnership can use name of corporation or partnership which has discontinued business, where majority of partners of discontinued partnership are members of new partnership, or where such majority, or majority of stockholders, in case of corporation, consents in writing. (N.Y. P'ship Law §80).

Whenever partnership or business name continues to be so used, sworn certificate stating names and residences of persons using such name must be filed in office of clerk of county where principal place of business is located, and copy thereof must be published. (N.Y. P'ship Law §81). Use of fictitious firm name is prohibited. (N.Y. P'ship Law §82).

Payment of Wages by Receivers.

On appointment of receiver of partnership, wages of employees of partnership are preferred to every other debt or claim. (N.Y. P'ship Law §71-a).

Partnership Interest in Hospital.

Transfer of partnership interest in hospital regulated. (N.Y. Pub. Health Law §2801-a[4] [NYCLS]).

Limited Partnership.

Revised Uniform Limited Partnership Act, as adopted in New York as art. 8-A of Partnership Law [NYCLS] ("Revised Limited Partnership Act"), applies to domestic limited partnerships formed on or after July 1, 1991, all foreign limited partnerships, and domestic limited partnerships formed prior to July 1, 1991 upon election or filing of amended certificate of limited partnership. (N.Y. P'ship Law §§121-1201, 121-1202).

Limited Partnership Act.

Under Uniform Limited Partnership Act as adopted in New York ("Limited Partnership Act"), in order to form limited partnership, members must file certificate in office of clerk of county in which principal office of partnership is located and publish certificate or notice containing its substance in two newspapers for six successive weeks. Certificate to state name, location, character of business, term, name and residence of each member of limited partnership ("LP") and designate general or limited partner status, contributions and profit shares of each limited partner and certain other rights of partners. (N.Y. P'ship Law §91).

Limited partner may bring derivative action in right of LP to procure judgment in its favor. (N.Y. P'ship Law §§115-a to 115-c).

Revised Limited Partnership Act.

In order to form limited partnership ("LP") certificate must be filed with Department of State and notice must be published in two newspapers for six successive weeks in county of LP's office. LP may not maintain action or special proceeding in New York until proof of publication is filed with Department of State. (N.Y. P'ship Law §121-201[c]). Certificate must designate Secretary of State as agent for service of process. (N.Y. P'ship Law §§121-104[a][b], 121-201[a][3]).

Name may not contain certain words. (N.Y. P'ship Law §121-102[a][3]).

LP must have written partnership agreement signed by all general partners. (N.Y. P'ship Law §§121-110[a], [b], 121-201[a]).

LP interest may be evidenced by certificate. (N.Y. P'ship Law §121-702[b]).

Merger or consolidation of LP requires agreement adopted by general partners and approval by at least majority of limited partners. (N.Y. P'ship Law §121-1102[a]). Certificate of merger or consolidation must be filed with Department of State. (N.Y. P'ship Law §121-1103[a]). Any limited partner may file written notice of dissent with LP and receive cash payment. (N.Y. P'ship Law §§121-1102[b], [c], [d], 121-1105). One or more LPs may merge with or consolidate into one or more limited liability companies. (N.Y. P'ship Law §121-1106).

In derivative action by one or more limited partners, plaintiff may be required to give security for reasonable expenses. (N.Y. P'ship Law §121-1003). In derivative action, LP may indemnify general partner provided no adjudication adverse to general partner finds general partner to have acted in bad faith or for personal gain. (N.Y. P'ship Law §121-1004).

Foreign Limited Partnerships.

Before doing business in New York, foreign limited partnership ("FLP") must make certain filings and obtain certificate of authority. Doing business in New York does not include holding partner meetings, maintaining bank accounts, maintaining or defending action or proceeding, or maintaining offices for transfer of partnership interests. FLP must designate Secretary of State as agent for receipt of service of process. FLP must publish notice in two newspapers for six successive weeks in county of LP's office. Proof of publication must be filed with Department of State before FLP may maintain action or special proceeding in New York. (N.Y. P'ship Law §§121-902, 121-907[a]). Failure to file proof of publication with Department of State within 120 days after filing application for authority results in suspension of authority to conduct business in state. (N.Y. P'ship Law §121-902[d]).

Name must contain words: "Limited Partnership", or "L.P." (N.Y. P'ship Law §§121-902, 121-102[a][1]).

FLP with authority to do business as of July 1, 1991, deemed to have received authority to do business under Revised Limited Partnership Act. (N.Y. P'ship Law §121-1201[c]).

If authority to conduct business or existence ceases in jurisdiction of organization or upon merger or consolidation with another FLP (N.Y. P'ship Law §121-906), FLP must file certificate with Secretary of State of jurisdiction of organization and file certified copy of such certificate with Department of State.

Registered Limited Liability Partnerships.

Art. 8-B of Partnership Law [NYCLS] permits formation of registered limited liability partnership ("RLLP") (N.Y. P'ship Law §§26, 121-1500 to 121-1506). RLLP is type of partnership without limited partners. (N.Y. P'ship Law §2). No partner of RLLP is liable (including by way of indemnification or contribution), for any obligation of, or chargeable to, RLLP or other partners, whether arising in tort, contract or otherwise, incurred, created or assumed by partnership while RLLP, except that (i) partner, employee and agent liable for negligent or wrongful act or misconduct committed by such person or anyone under such person's direct supervision and control while rendering professional services on behalf of RLLP, and (ii) all or specified partners liable for all or specified liabilities of RLLP to extent at least majority of partners agree unless otherwise provided in any agreement between partners. (N.Y. P'ship Law §26).

Partnership without limited partners may register as RLLP if (i) each partner is professional authorized by law to render professional service within New York, or (ii) each partner is professional at least one of whom is authorized by law to render professional service within New York. (N.Y. P'ship Law §121-1500[a]). RLLP and its partners subject to state regulations applicable to professionals. (N.Y. P'ship Law §121-1500[m], [n], [o], [q]).

In order to form RLLP, registration must be filed with Department of State. Registration must designate Secretary of State agent for receipt of service of process. If RLLP or partner subject to New York licensing authority, must file certified copy of registration with licensing authority. Notice must be published in two newspapers for six successive weeks in county of principal office. RLLP may not maintain action or special proceeding in New York until proof of publication is filed. Statement must be filed every five years. (N.Y. P'ship Law §121-1500). Failure to file proof of publication with Department of State within 120 days after formation results in suspension of authority to conduct business in state. Suspension may be annulled upon compliance. (N.Y. P'ship Law §121-1500[a][II][A]).

Name must contain words: "Registered Limited Liability Partnership", "Limited Liability Partnership", "R.L.L.P.", "RLLP", "L.L.P." or "LLP". (N.Y. P'ship Law §121-1501).

If limited liability partnership has resident partner or income derived from New York sources, must pay filing fee and file return with state of New York and possibly with New York City and/or other cities. (N.Y. Tax Law §§1301 [NYCLS], 1304-C [NYCLS]).

Registered Foreign Limited Liability Partnership.

In order for foreign limited liability partnership to transact business in New York as registered foreign limited liability partnership ("RFLLP"), must file notice with Department of State. Conducting business or activities does not include holding partner meetings, maintaining bank accounts and maintaining or defending action or proceeding. Notice must designate Secretary of State as agent for receipt of service of process. RFLLP must file notice and proof of publication in order to maintain action or special proceeding in New York. Statement must be filed every five years. RFLLP must file notice in two newspapers for six successive weeks in county of principal office. (N.Y. P'ship Law §121-1502). Effective June 1, 2006: (a) Only four successive weeks of publication required; and (b) failure to file proof of publication with Department of State within 120 days after effective date of notice results in suspension of authority to conduct business within state. Suspension may be annulled upon compliance. (N.Y. P'ship Law §121-1502[f][II][A]).

Name must contain words: "Registered Limited Liability Partnership", "Limited Liability Partnership", "R.L.L.P.", "RLLP", "P.L.L.", "PLL", "L.L.P." or "LLP". (N.Y. P'ship Law §121-1502[k]).

All partners of RFLLP must be professionals and at least one must be authorized to practice in New York. If RFLLP provides health, engineering, land surveying, architectural or landscape architectural services, all partners must be licensed in New York. (N.Y. P'ship Law §§2, 121-1502[q]).

Liability of partners of RFLLP determined by laws of jurisdiction that govern RFLLP provided that each partner, employee or agent is liable for own negligence and misconduct while performing professional services. (N.Y. P'ship Law §121-1502[l]). RFLLP and its partners subject to state regulations applicable to professionals. (N.Y. P'ship Law §121-1502[f], [n], [o], [p], [q]).

If foreign limited liability partnership has resident partner or income derived from New York sources, must pay filing fee and file return with state of New York and possibly with New York City and/or other cities. (N.Y. Tax Law §§658 [NYCLS], 1301 [NYCLS], 1304-C [NYCLS]).

Foreign limited partnership may not be denominated as RFLLP in New York. (N.Y. P'ship Law §121-1502[l]).

3 BUSINESS REGULATION AND COMMERCE

3.01 BANKS AND BANKING:

Unless otherwise stated, sections cited are those of Banking Law.

Individuals, partnerships and corporations subject to Banking Law are under supervision of Banking Department, head officer of which is Superintendent of Banks, appointed by Governor, with advice and consent of Senate. (N.Y. Banking Law §§10-12). Inside of Banking Department is Banking Board, consisting of 17 members including Superintendent of Banks. (N.Y. Banking Law §13 [NYCLS]). As to power of Banking Board to supervise and regulate banks generally, see N.Y. Banking Law §§10 [NYCLS], 14-14f. "Branch banking" is permitted subject to restrictions. (N.Y. Banking Law §105 [NYCLS]).

Annual Meetings.

Annual meeting of bank's stockholders shall be held within first four months of institution's fiscal year. (N.Y. Banking Law §6002[2] [NYCLS]).

Deposits.

Demand deposits are those payment of which can legally be required within 14 days. (N.Y. Banking Law §2[13] [NYCLS]). Time deposit is any deposit payment of which cannot legally be required within 14 days. (N.Y. Banking Law §2[12] [NYCLS]). Banks, trust companies, private bankers and savings banks may receive deposits. (N.Y. Banking Law §§96[1] [NYCLS], 161 [NYCLS], 234[1] [NYCLS]). Deposits are either general or special. General deposit is created by delivery of money to bank, whose property deposit becomes, creating debtor and creditor relationship. Special deposit is one delivered to bank to be returned or delivered intact on demand, title remaining in depositor. (80 N.Y. 82). Depositor placing funds in savings, share, certificate or deposit account may describe himself as trustee for another and thus create trust account which, unless revoked or terminated, will be paid to named beneficiary upon depositor's death. However, trust account may be revoked or terminated by depositor during his lifetime by withdrawal from or charges against account made by depositor or by acknowledged writing filed with bank which specifically names bank and beneficiary. (N.Y. Est. Powers & Trust Law §§7-5.1 to 7-5.7 [NYCLS]). Statutory provision for joint deposits exists (N.Y. Banking Law §675 [NYCLS]), and strict compliance with statutory form is necessary to create joint deposits (62 Misc.2d 896, 310 N.Y.S.2d 694). Such deposits are withdrawable by either one or by survivor of either. (N.Y. Banking Law §675 [NYCLS]). No special statutory law for escrow deposits. Additional provisions exist for deposits made by or in name of minor. (N.Y. Banking Law §§134[1] [NYCLS], 171[1] [NYCLS], 202-h[1] [NYCLS], 239[1] [NYCLS]). Special provisions exist for school deposits. (N.Y. Banking Law §258[2] [NYCLS]). Withdrawals from decedent's bank accounts are permitted. (N.Y. Banking Law §677 [NYCLS]). Banks, trust companies, savings banks, savings and loan associations and credit unions are required to insure deposits and share accounts. (N.Y. Banking Law §32[1] [NYCLS]). Disclosure of information relating to computation of interest on savings and time accounts are required by Banking Board rules. (N.Y. Banking Law §14-c [NYCLS]). Bank, trust company or national bank located in state (N.Y. Banking Law §138[2-a] [NYCLS]) or foreign banking corporation operating branch or agency in state (N.Y. Banking Law §204-a[3][c] [NYCLS]) are not required to repay any deposit made at foreign branch or office under certain enumerated circumstances unless express agreement to repay under such circumstances. No banking institution may assert set off against deposit account into which social security or supplemental income payments are deposited pursuant to direct deposit agreement or against any deposit account without prior or concurrent notice to depositor. (N.Y. Banking Law §9-g[1] [NYCLS]). No banking institution may impose service charge on any deposit account for loss of check or money which is properly deposited with bank and for which written receipt is issued. (N.Y. Banking Law §9-h [NYCLS]). No banking institution may charge fee for closing out of any account which was opened at least 180 consecutive days prior to its closing. (N.Y. Banking Law §9-i [NYCLS]). No banking institution may impose penalty for repayment of time deposit prior to maturity where depositor died or declared legally incompetent. (N.Y. Banking Law §9-i [NYCLS]). In disposing of records no longer needed containing information relating to identified customer or account, banking institution must use procedure reasonably calculated to assure no unauthorized review or reuse of records. (N.Y. Banking Law §9-j [NYCLS]). No banking institution may refuse to accept check, as deposit, solely because it contains two endorsements. (N.Y. Banking Law §9-p [NYCLS]). No banking institution may refuse to open deposit account based on geographic location of depositor's residence or place of business if within same county or city as banking office. (N.Y. Banking Law §9-r[1] [NYCLS]).

Interbank Deposits.

Bank or trust company may deposit up to 100% of its capital stock, surplus fund, and undivided profits with any other foreign or domestic banking corporation or private banker. (N.Y. Banking Law §106[1] [NYCLS]).

Confidentiality.

Banking institution must keep reports of examinations by state, federal or foreign agencies confidential, unless Superintendent of Banks authorizes publication. (N.Y. Banking Law

§36[10] [NYCLS]).

Unclaimed Deposits.

Lengthy statutory provisions exist as to what constitutes abandoned property held or owing by banking organizations. (N.Y. Aband. Prop. Law §§103, 300, 1313). On or before Aug. 1 of each year, banking organizations must make verified written report to State Comptroller with respect to abandoned property held or owing by them as of immediately preceding June 30. (N.Y. Aband. Prop. Law §301[1]). Records must be kept to establish accuracy of such report. (N.Y. Aband. Prop. Law §1412-a). Requirements with respect to publication of reports exist. (N.Y. Aband. Prop. Law §302). On or before Nov. 10 annually, banking organizations must pay to State Comptroller abandoned property specified in reports. (N.Y. Aband. Prop. Law §303[1]).

Franchise tax is imposed on banking corporations doing business in New York. (N.Y. Tax Law §1451 [NYCLS]). Tax is greater of 7.5% of entire net income allocable to New York, $250 or one of four minimum taxes. (N.Y. Tax Law §1455 [NYCLS]). In addition to franchise tax, 2½% surcharge on bank franchise tax due before deduction of credits for taxable years ending after June 30, 1989 and before July 1, 1990; 15% surcharge due after deduction of credits for taxable years ending after June 30, 1990 and before July 1, 1994; 10% surcharge due after deduction of credits for taxable years ending after June 30, 1994 and before July 1, 1995; 5% surcharge due after deduction of credits for taxable years ending after June 30, 1995 and before July 1, 1996; and 0% surcharge due after deduction of credits for taxable years ending after June 30, 1996 and before July 1, 1997. (N.Y. Tax Law §1455-A [NYCLS]). Temporary surcharge of 18% is imposed for taxable years beginning on or after Dec. 31, 1982 but ending Dec. 31, 2013 on banking corporations doing business in Metropolitan Commuter Transportation District. (N.Y. Tax Law §1455-B [NYCLS]).

Returns required to be filed by all banking corporations which have employees, including officers, in state. (N.Y. Tax Law §1462[a] [NYCLS]).

Stockholders' Liabilities.

When any bank or trust company is called on by Superintendent of Banks to make good amount of impairment of its capital, directors must immediately give notice to stockholders and assess stockholders amount necessary to make good deficiency, and may sell stock of nonpaying stockholders at public or private sale. (N.Y. Banking Law §114 [NYCLS]).

Bank Holding Company.

Bank holding companies may be formed upon compliance with the federal Bank Holding Company Act of 1956, and subject to the limitations contained in art. III-A of the Banking Law. (N.Y. Banking Law §§141-147).

Loans, interest and charges, investments and purchases of securities are regulated. (N.Y. Banking Law §§97 [NYCLS], 103 [NYCLS], 108 [NYCLS], 589 [NYCLS]). Sales of guaranteed educational loans are regulated. (N.Y. Banking Law §9-k [NYCLS]).

Collections.

Uniform Bank Collection Code has been supplanted by N.Y. U.C.C. Law art. 4.

Credit unions are regulated. (N.Y. Banking Law §§450-487).

Credit Cards.

Credit card cash advances are regulated. (N.Y. Banking Law §§108[5][a] [NYCLS], 202[5][a] [NYCLS]). Permissible interest charge on credit card transactions is regulated. (N.Y. Banking Law §108[5][b] [NYCLS]; N.Y. Pers. Prop. Law §413[3][a]). Additional charges and fees on credit card agreements are limited. (N.Y. Banking Law §108[5][e] [NYCLS]; N.Y. Pers. Prop. Law §413[3][c][ii], [5]). Change of credit card terms is regulated. (N.Y. Banking Law §108[5] [NYCLS], [6] [NYCLS]; N.Y. Pers. Prop. Law §413[3][e]). Payment of principal and advances is regulated. (N.Y. Banking Law §108[5][c] [NYCLS], [d] [NYCLS]).

Toll-free telephone number service established by Banking Department regarding information on rates, fees and charges must be published by each issuer of credit cards to state residents on each solicitation, application and monthly billing statement presented to such persons. (N.Y. Gen. Bus. Law §520-c[1] [NYCLS]). Issuers must return survey form collecting such information distributed by Superintendent of Banks no later than Apr. 1 annually. (N.Y. Gen. Bus. Law §520-c[2] [NYCLS]).

Credit Card Registration.

Such services are regulated as to disclosure and contract renewals. (N.Y. Gen. Bus. Law §§521-521-f).

Interest on Escrow Accounts.

Any mortgage investing institution which maintains an escrow account pursuant to any agreement executed in connection with a mortgage on an owner-occupied, one- to six-family residence or on any property owned by cooperative apartment corporation and located within state shall, for each quarterly period in which such escrow account is established, credit account with interest at rate of not less than 2% per year based on average of sums so paid for average length of time on deposit, or at higher rate if so prescribed by Banking Board pursuant to (N.Y. Banking Law §14-b [NYCLS]). (N.Y. Gen. Oblig. Law §5-601 [NYCLS]). Same rule applies where draft received by residence or cooperative apartment corporation from insurance carrier, as compensation for damage done to residence, is forwarded to mortgage investing institution. (N.Y. Gen. Oblig. Law §5-602 [NYCLS]).

Electronic Fund Transfers.

Banks which provide preauthorized electronic fund transfer services must provide customers with right to stop payment by giving written or oral notice within specified period of time to such transfer. (N.Y. Banking Law §9-s [NYCLS]).

Depositor's Agent.

Unless contrary intent clearly appears and prior to time settlement given by collecting bank for item becomes final, bank is agent or subagent of owner of item, and any settlement given is provisional. This applies regardless of form or lack of endorsement. (N.Y. U.C.C. Law §4-201[1]). After item endorsed “pay any bank” or the like, only bank may acquire rights of holder until item returned to customer initiating collection or until item specially endorsed by bank in person not a bank. (N.Y. U.C.C. Law §4-201[2]). Collecting bank must use ordinary care as specified. (N.Y. U.C.C. Law §4-202[1]).

Payments.

When bank sends or makes available to its customer statement of account accompanied by items paid in support of debit entries, customer must exercise reasonable care and promptness to discover unauthorized signature or alteration and must notify bank promptly thereof. (N.Y. U.C.C. Law §4-406[1]). Customer may otherwise be precluded as specified. (N.Y. U.C.C. Law §4-406[2]). Any withdrawal from a savings account or time deposit account made by means of unauthorized signature is wholly inoperative against person whose name is signed unless such person has authorized, ratifies or is precluded from denying withdrawal. Due care and diligence by bank is no defense to an action by depositor for recovery of unauthorized withdrawal. (N.Y. Banking Law §676 [NYCLS]).

Trust companies are subject to regulations similar to those concerning banks and are authorized to conduct the usual business of such companies. (N.Y. Banking Law §100 [NYCLS]).

Foreign trust companies are not permitted to maintain branch offices or agencies within state, but may act in certain fiduciary capacities if the state of domicile grants such right to New York trust companies and the requirements of N.Y. Banking Law §131 [NYCLS] are met. (N.Y. Banking Law §131[3] [NYCLS], [4] [NYCLS]).

Common trust funds (not Uniform Act) and short term investment common trust funds are provided for. (N.Y. Banking Law §100-c [NYCLS]).

Other businesses subject to regulation by Banking Law are: (1) Private bankers (N.Y. Banking Law §§160-181); (2) foreign banking corporations doing business in state (N.Y. Banking Law §§200-209); (3) New York business development corporations (N.Y. Banking Law §§210-220); (4) New York small business investment companies (N.Y. Banking Law §§228-a to 228-f [NYCLS]); (5) savings banks (N.Y. Banking Law §§229-260-b); (6) safe deposit companies and businesses (N.Y. Banking Law §§317-338); (7) licensed lenders (N.Y. Banking Law §§340-361); (8) licensed cashiers of checks (N.Y. Banking Law §§366-374); (9) savings and loan associations (N.Y. Banking Law §§375-413); (10) mutual savings and loan associations; mutual holding companies (N.Y. Banking Law §§447-447-d); (11) credit unions (§§450-487); (12) sales finance companies (N.Y. Banking Law §§491-502); (13) investment companies (N.Y. Banking Law §§507-520); (14) mutual trust investment companies (N.Y. Banking Law §§550-553); (15) insurance premium finance agencies (N.Y. Banking Law §§554-578); (16) budget planners (N.Y. Banking Law §§579-587); (17) licensed mortgage bankers (N.Y. Banking Law §§589-599); and (18) transmitters of money and money insurance funds (N.Y. Banking Law §§640-659).

Licensing of foreign corporations is required to do business within state under Banking Law, and Superintendent of Banks and Banking Board must be satisfied by investigation that it is in public interest to grant application. (N.Y. Banking Law §26 [NYCLS]). See N.Y. Banking Law §§200-209 for regulation of foreign banking corporations. For applicability of N.Y. Bus. Corp. Law to foreign corporations, see category 2 Business Organizations, topic 2.03 Corporations. Representatives of foreign banking corporations must be licensed. (N.Y. Banking Law §§221-a to 221-k [NYCLS]). Without permission of Superintendent of Banks, foreign banking representative offices are limited to following activities: solicitation of loans and in connection therewith, assembly of credit information, making of property inspections and appraisals, securing of title information, preparation of applications for loans including making recommendations with respect to action thereon, solicitation of investors to contract with bank for servicing of such loans; solicitation of new business and conduct of research. Any other activity which foreign banking corporation seeks to conduct at such office will be subject to prior written approval of superintendent by general regulation or upon application in such form as superintendent may prescribe. (N.Y. Banking Law §221-a[3] [NYCLS]).

Interlocking directors and executive officers are generally forbidden. (N.Y. Banking Law §§130[3] [NYCLS], 143[3] [NYCLS], 209 [NYCLS], 247[5] [NYCLS]).

Changes in control of business of license requires approval of Superintendent of Banks. (N.Y. Banking Law §370-a [NYCLS]).

3.02 BILLS AND NOTES:

Uniform Commercial Code became effective Sept. 27, 1964. Uniform Negotiable Instruments Law repealed by §3-101 of Uniform Commercial Code.

Unless different time is expressed in instrument, time for any presentment is determined in accordance with N.Y. U.C.C. Law §3-503.

Special Requirements.

A negotiable promissory note, consideration for which consists wholly or partly of right to make, use or sell invention claimed to be patented must contain the words “given for a patent-right” prominently and legibly written or printed on face of note above signature (N.Y. Gen. Bus. Law §552 [NYCLS]); and negotiable promissory note, consideration for which consists wholly or partly of purchase price or contract to purchase farm product at price which is at least four times present local market value, or of membership or interest in association, company or combination to produce or sell any farm product at fictitious rate, must be marked “given for a speculative consideration” or similar words prominently and legibly written or printed on face of note above signature; and to take or transfer such note not so marked with knowledge of its character, is misdemeanor. (N.Y. Gen. Bus. Law §553 [NYCLS]).

Judgment Notes.

A provision in a note authorizing confession of judgment thereon does not affect negotiability. (N.Y. U.C.C. Law §3-112[1][d]). But judgment by confession may not be entered thereon without compliance with all requirements for such judgment. See category 5 Civil Actions and Procedure, topic 5.15 Judgments, subhead Judgment by Confession.

Attorney Fees.

Clauses providing for payment of attorney's fee in case of nonpayment at maturity do not impair negotiability and are valid and enforceable. (N.Y. U.C.C. Law §3-106[1][e]).

3.03 BILLS OF LADING:

See topic 3.08 Carriers.

3.04 BILLS OF SALE:

See topic 3.23 Sales.

3.05 BLUE SKY LAW:

See topic 3.24 Securities.

3.06 BROKERS:

See also topic 3.24 Securities, subheads Bucket Shops, and Brokers and Agents; category 16 Insurance, topic 16.01 Insurance Companies, subhead Agents and Brokers.

Commissions.

Loan brokers commissions are restricted to ½ of 1%, except loans on real estate security; nor more than .38% for making or renewing any bond, bill, note, or other security given for such loan or forebearance, or for any counter bond, bill, note or other security concerning same. (N.Y. Gen. Oblig. Law §5-531[1] [NYCLS]).

Licensing.

Real estate brokers and salesmen must have license from Department of State to do business within the state. Broker's license can be granted only to citizen or aliens lawfully admitted for permanent U.S. residence. Persons convicted of felony are generally ineligible. Must be over 18 to be salesman, and over 20 to be broker. License will be granted only upon successful completion of approved real estate course requiring 120 hours' classroom work for broker's license and 75 hours for salesman's license or renewal of either broker's or salesman's license. New applicant for broker's license must prove that applicant has actively participated in real estate business as licensed salesman under licensed broker for two years, or that applicant has three years equivalent experience in real estate business. (N.Y. Real Prop. Law §§440-a [NYCLS], 441[1][a] [NYCLS], [b] [NYCLS], [c] [NYCLS]). Nonresidents are eligible. (N.Y. Real Prop. Law §442-[g] [NYCLS]). Upon death of licensee who is sole proprietor of brokerage house, surrogate may authorize his administrator or executor to use license for 120 days (plus one extension of 120 days) in order to complete any unfinished realty transactions then under negotiation. (N.Y. Real Prop. Law §441-a[8] [NYCLS]). Splitting of commissions is forbidden, except under certain circumstances. (N.Y. Real Prop. Law §442 [NYCLS]). Action for commissions cannot be maintained in N.Y. court unless plaintiff was licensed when cause of action arose. (N.Y. Real Prop. Law §442-d [NYCLS]).

Disclosure.

In residential transactions, agent must provide disclosure statement advising of nature of agency relationship to client and other party to transaction at times and in form set forth in N.Y. Real Prop. Law §443 [NYCLS].

See also topic 3.16 Frauds, Statute of.

Uniform Commercial Code adopted. See topic 3.09 Commercial Code.

3.07 BULK SALES:

See category 8 Debtor and Creditor, topic 8.08 Fraudulent Sales and Conveyances.

3.08 CARRIERS:

Uniform Commercial Code effective as of Sept. 27, 1964. See topic 3.09 Commercial Code.

Common carriers are under jurisdiction, control and supervision of Department of Transportation created under N.Y. Transp. Law art. 2.

Common Carrier.

Term “common carrier,” includes all railroad companies, street railroad companies, express companies, car companies, sleeping-car companies, freight companies, freight-line companies, baggage companies, transfer companies, carriers by water, and generally, any corporation or person owning, operating or managing any such agency for public use in conveyance of persons or property within state other than by use of ski tows and other passenger tramways operated at ski centers. Term does not include: express company, baggage company or transfer company, unless operated wholly or in part upon or in connection with railroad or street railroad; municipally owned ferry or ferry company leased by city; or water carrier unless operating in connection with railroad to form through route for continuous carriage between points within state. (N.Y. Transp. Law §2[6]).

Rates.

Common carriers must furnish safe and adequate service at just and reasonable charges. (N.Y. Transp. Law §96). Each common carrier must file tariff schedules on prescribed forms with the Department and provide for convenient public inspection. (N.Y. Transp. Law §98). Changes in rate, fare or charge may not be made without notice and publication unless Commissioner otherwise orders. (N.Y. Transp. Law §99). False billing is prohibited. (N.Y. Transp. Law §105). Rates and service may be fixed by Department after hearing. (N.Y. Transp. Law §119[1]).

Discrimination.

Common carrier may not, directly or indirectly, by special rate, rebate, drawback, or other device, charge person or corporation greater or lesser compensation for service rendered or to be rendered in transportation of passengers or property, than it charges other person or corporation for doing like and contemporaneous service in transportation of like kind of traffic under same or substantially similar circumstances and conditions except as authorized under Transportation Law. (N.Y. Transp. Law §101).

Common carrier may not make or give any undue or unreasonable preference or advantage to any person, corporation, locality, or particular description of traffic in any respect whatsoever, or subject any particular person, corporation, locality, or particular description of traffic, to any undue or unreasonable prejudice or disadvantage in any respect whatsoever. (N.Y. Transp. Law §102). Person who excludes citizen of this state from facility or privilege furnished by common carriers because of race, color, creed, national origin or previous condition of servitude is guilty of misdemeanor. (N.Y. Civ. Rights Law §44-a).

Liability.

Common carrier must, on demand, issue either receipt or bill of lading for property delivered to it for transportation. No contract, stipulation or clause in receipt or bill of lading may exempt common carrier from any liability for loss, damage or injury caused by it to property from time of its delivery for transportation until same has been received at destination and reasonable time has elapsed after notice to consignee of such arrival to permit removal of property. Common carrier liable for loss of or damage or injury to property caused by delay in transit due to negligence and has burden of proving delay not due to negligence. Common carrier liable for loss of or damage or injury to property carried as baggage whether in connection with transportation of owner or not, up to full value and regardless of character thereof, but value in excess of $150 must be stated on delivery to carrier, and written receipt stating value must be issued by carrier, who may make reasonable charge for assumption of liability in excess of $150 and for carriage of baggage exceeding one hundred and fifty pounds in weight on single ticket or receipt. Nothing above deprives any holder of such receipt or bill of lading of any remedy or right of action he may have under existing law. (N.Y. Transp. Law §109).

One who checked baggage at railroad station could not avoid being bound by limited liability provisions of contract by failure to read them. (42 Misc.2d 310; 247 N.Y.S.2d 913).

Bills of Lading.

Uniform Commercial Code governs. (N.Y. U.C.C. Law §§7-101 to 7-603). Optional language in N.Y. U.C.C. Law §7–403 adopted. For other options and deviations from N.Y. U.C.C. Law, see topic 3.09 Commercial Code.

Lien.

Uniform Commercial Code governs. (N.Y. U.C.C. Law §§7-307 to 7-308).

Elevators and Warehouses.

Maximum charges for handling and storing grain are no longer prescribed by statute.

Any person, owning or leasing, in whole or in part, any floating elevator used for loading grain, coal, sand or other material may, on application to and in discretion of, New York State Canal Corporation, be assigned place for and permitted to keep said floating elevator in waters of canal system for such time as may be necessary, for loading or unloading, provided it does not obstruct navigation. (N.Y. Canal Law §79).

Motor Vehicle Carriers.

See category 23 Transportation, topic 23.01 Motor Vehicles.

Cross Reference.

See category 2 Business Organizations, topic Corporations for applicability of N.Y. Bus. Corp. Law.

3.09 COMMERCIAL CODE:

The Uniform Commercial Code was adopted on Apr. 18, 1962, and became effective on Sept. 27, 1964. 1972 Official Amendments were adopted on Aug. 11, 1977, and became effective on July 12, 1978. 1977 Official Amendments were adopted, and became effective on Sept. 1, 1982. Art. 4A was adopted on June 2, 1990, and became effective on Jan. 1, 1991. 1987 Official Amendments (Article 2A, as amended 1990) were adopted, and became effective on June 30, 1995. 1994 Official Amendments (Revised Article 8) were adopted, and became effective on Oct. 10, 1997. 1995 Official Amendments (Revised Article 5) were adopted, and became effective on Nov. 1, 2000. Revised Article 9 of the Code was adopted on June 29, 2001, and became effective on July 1, 2001.

New York has not adopted changes made to 1962 Official Text of Uniform Commercial Code by Official Amendments to: Art. 1 in 2001, Arts. 3 and 4 in 2002, Art. 7 in 2003, and Arts. 2 and 2A in 2003. Please consult Official Text of Uniform Commercial Code and New York Code for guide to variations between these provisions of Uniform Commercial Code and New York law. As of this writing, New York State Assembly is considering Senate Bill 02260, which would adopt Official Amendments to Arts. 3 and 4 in New York.

Number of intentional variations from and additions to 1962 Official Text of Code and subsequent amendments thereto (reproduced in Uniform and Model Acts section) is considerable. Sections referenced below refer to Uniform Commercial Code as adopted by New York, and references to sections of Official Text not adopted in New York are preceded by initials OT (i.e., OT 1-234).

Variations appear in following sections:

4-A-101 et seq.—Article 4A adopted, effective Jan. 1, 1991. Hyphen added between “4” and “A”.

5-101 et seq.—Revised Article 5 (1995 Amendments) adopted, effective Nov. 1, 2000.

5-108(e)—Last two sentences omitted.

5-119—Official Text's Transition Provision “Applicability” added, provides that Amendments apply to letters of credit issued on or after effective date of Amendments.

5-120—Official Text's Transition Provision “Savings Clause” added, provides that transactions associated with letters of credit issued prior to effective date of Amendments are governed by statute or other law repealed by Amendments.

OT 6-101 et seq.—Article 6 of U.C.C. repealed.

8-101 et seq.—Revised Article 8 (1994 Amendments) adopted, effective Oct. 10, 1997.

8-102(e)—provides that following definitions in Article 9 apply to this article: “Cooperative interest” in N.Y. U.C.C. Law §9-102[a][27-b]; “Cooperative organization” in N.Y. U.C.C. Law §9-102[a][27-c]; “Cooperative record” in N.Y. U.C.C. Law §9-102[a][27-e].

8-105(e)—N.Y. U.C.C. Law §9-516[e] provides exception to rule that filing of financing statement under Article 9 is not notice of adverse claim to financial asset.

8-110(c)—cooperative interests excepted from provision.

8-113(b)—contract or modification of contract for sale or purchase of cooperative interest is void unless contract or some note expressing consideration is in writing, signed by party to be charged or their agent.

8-204(3)—restriction on cooperative interest set forth in cooperative record added as condition for restriction on transfer of security imposed by issuer.

8-209—for cooperative interests, adds condition that issuer's lien must be set forth in cooperative record.

OT 8-601 and 8-602—not codified.

8-601(b)—OT 8-603 designated as “601”. Oral modification or modification of contract entered into before Amendment takes effect does not become enforceable by reason of Revised 8-113.

8-602—cross-references to former Article 8, meaning or interpretation.

9-102(a)(11-a)—provides definition for “check”.

9-102(a)(27-a)-(27-f)—provides definitions relating to cooperative interests.

9-102(a)(66-a)—provides definition for “prove” with respect to fact.

9-102(a)(73)—cooperative record that provides that owner of cooperative interest has obligation to pay amounts to cooperative organization incident to ownership of that cooperative interest and which states that cooperative organization has direct remedy against that cooperative interest if such amounts are not paid is security agreement creating cooperative organization security interest.

9-108(e)(3)—description only by type of collateral defined in chapter is insufficient description of cooperative interests.

9-109(d)(8)—contract for annuity, including variable annuity, is insurance and hence is not subject to Article 9.

9-301(e)—perfection and priority of security interest in co-op is governed by substantive law of New York.

9-305(d)—makes N.Y. U.C.C. Law §§9-305[a]-[c] inapplicable to cooperative interests.

9-308(h)—cooperative organization security interest becomes perfected when cooperative interest comes into existence and remains perfected as long as it exists.

9-310(b)(11)—filing financing statement is not necessary to perfect security interest for cooperative organization security interest.

9-310(d)—filing financing statement is exclusive method of perfection in cooperative interest, except for cooperative organization interest.

9-313(j)—states that subsections (a) through (i) do not apply to cooperative interests.

9-314(d)—states that subsections (a) through (c) do not apply to cooperative interests.

9-317(e)—usual 20 days' grace given to purchase money financiers to file to protect against competing lien creditors and buyers does not apply to co-ops.

9-322(h)—with respect to all amounts secured, cooperative organization security interest has priority over all other security interests in cooperative interest. As for security interests in cooperative interests other than cooperative organization security interests, see N.Y. U.C.C. Law §9-323[h][2] for special rules for future advances.

9-323(h)—contains special rule for co-op financing that limits senior lender's ability to make future advances having priority over junior lender. To achieve priority, new rule requires that senior lender's financing statement disclose that its security agreement contains commitment to make future advances.

9-328(h)—states that subsections (a) through (g) do not apply to cooperative interests.

9-331(d)—states that subsections (a), (b), and (c) do not apply to cooperative interests.

9-403(a)—includes substance of certain provisions of Revised Article 3 with respect to negotiable instruments and bank deposits and collections.

OT 9-406(f)—invalidation of statutory and other noncontractual legal prohibitions on transfer of accounts and chattel paper is deleted.

9-406(g)—makes §9-406 defer to consumer protection law by expressly including nonstatutory rules of law.

9-406(h)—makes §9-406 inapplicable to claim or right to receive compensation for injuries or sickness or benefits under special needs trust.

OT 9-408(c)—invalidation of statutory and other noncontractual legal prohibitions on transfer of general intangibles, promissory notes and health-care-insurance receivables is deleted.

9-408(d)—excludes certain claims or rights to receive compensation for injuries or sickness and claims or right to receive benefits from Medicaid special needs trust.

9-501(a)—financing statement against co-op is filed with county filing office rather than with Department of State.

9-501(c)—provides definitions of terms “filing officer” and “recording officer”.

9-502(b)—applies description requirement to filing against cooperative interest unless cooperative addendum is filed with respect to cooperative interest.

9-502(b)(3)—description of property must include location of real estate by reference to book and page number in deed or mortgage index maintained in county clerk's office in county where property is situated or by street and number and town or city, or, if real estate is in city of New York, by county, except that if real estate is in city of New York or counties of Nassau or Onondaga, where block system of recording or registering and indexing conveyances is in use, statement must also specify block and lot number in which real estate is situated.

9-513(e)—upon authenticated demand with sufficient notice by debtor, secured party must deliver to cooperative interest settlement termination statement to debtor upon payment of debt.

9-515(h)—once cooperative addendum is filed, financing statement to which it relates is effective for 50 years, measured from date of filing of initial financing statement.

OT 9-516(b)(5)(C)(iii)—requirement that initial financing statement filed against organization must set forth organization's state identification number is deleted.

9-516(e)—filing that includes cooperative addendum covering cooperative interest constitutes notice of existence of security interest in cooperative interest as of date of filing of cooperative addendum, except as against purchaser of collateral which gives value in reasonable reliance on absence of record.

9-519(d)(3)—requires that real-property-related financing statements are indexed by block in New York City and other counties that use block system of recordation for real estate.

OT 9-520(d)—requirement that financing statement relating to more than one debtor is to be treated as separate financing statement against each debtor is deleted.

9-521(b)—gives NY Department of State power to promulgate acceptable forms for initial financing statements and amendments as opposed to national forms set forth in OT §9-521. Department of State has, by administrative action, adopted national forms.

9-521(c)—provides that NY Department of State has power to promulgate cooperative addendum form.

9-522(a)—alternative B adopted additional information required in financing statement against co-op is balanced by additional options for searchers.

9-523(c)—additional information required in financing statement against co-op is balanced by additional options for searchers.

9-523(e)—in responding to search request, filing office must report on any notice of federal tax lien on file with that offices against relevant debtor.

9-525—delegates to Department of State setting of filing fees.

9-604(e)—security interest in co-op is to be enforced only by N.Y. U.C.C. Law §9-601[a] and not under real estate law.

9-615(a)(1-a)—for cooperative organization security, secured party must apply or pay over for application cash proceeds of disposition under §9-610 to holder thereof in amount secured.

9-617(a)(3)—subordinate security interests and liens are discharged by Article 9 foreclosure sale other than liens created under any law of this state that are not to be discharged.

9-625(e)—imposes statutory penalty on lenders who do not comply with N.Y. U.C.C. Law §9-513.

9-710—adds section providing that local filing offices are not to accept any further filings except real-estate-related filings; requires local filing offices to maintain for searches all filings made under former law until at least July 1, 2008.

OT 10-101–10-105—renumbered N.Y. U.C.C. Law §§13-101 to 13-105.

13-101—Code operates prospectively from effective date specified in §13-105 (Sept. 27, 1964).

13-102(1)—incorporates by reference schedule of repealed acts.

13-102(2) and 13-102(3)—add new and more detailed transitional provisions.

13-103—provides for governing law in case of conflict.

13-104—provides that Uniform Act for the Simplification of Fiduciary Security Transfers (N.Y. Gen. Bus. Law art. 23-C [NYCLS]) is not repealed and that in case of conflict, provisions of N.Y. Gen. Bus. Law art. 23-C [NYCLS] will control.

11-101—defines “Original Article 9” and “Revised Article 9”.

Filing Fees.

Standard fees apply to approved forms as follows (N.Y. Comp. Codes R. & Regs. tit. 19, §143-5.1):

	On National UCC FinancingStatement Form UCC1
Financing Statement—Initial Filing	$40 for written document$20 for electronic filing
If financing statement or continuationis not filed in the office of theSecretary of State and coversreal estate in New York City	Block Fees apply—$2 for firstblock and lot indexed. $2 foreach additional block; $3 foreach additional lot.
If financing statement not filedin the office of the Secretaryof State and covers real estate inNassau County	Additional $10 for first blockindexed, plus $10 for eachadditional block indexed
	On National UCC Financing StatementAmendment Form UCC3
Termination	$40
Assignment	$40
Release	$40
Amendment	$40
	If request is made on NationalInformation Request Form UCC11
Certificate of Search	$25
Copies of Financing Statementsor other documents	$5 for one plain copy$10 for one certified copy

Forms.

For statutory form of financing statements, see N.Y. U.C.C. Law §9-521. Secretary of State has approved National U.C.C. Financing Statement Forms for Form UCC1, UCC1Ad, UCC3, UCC3Ad, UCC5 and UCC11. See N.Y. Comp. Codes R. & Regs. §143-1.3[a]. Initial filing statement filed against organization is not required to list organization's state identification number. See N.Y. U.C.C. Law §9-516[b]. Secretary of State has accepted New York standard form for financing cooperative change (UCC1CAd). (See N.Y. Comp. Codes R. & Regs. tit. 19, §143-1.3[a][5]). For forms see end of this Digest. For filing place see category 10 Documents and Records, topic 10.04 Records, subhead Filings Under Commercial Code: Place.

See also topics: Banks and Banking, Bills and Notes, Brokers, Carriers, Contracts, Factors, Frauds, Statute of, Sales, Securities, Warehousemen; categories Business Organizations, topic Corporations; Civil Actions and Procedure, topic Limitation of Actions; Debtor and Creditor, topics Assignments; Fraudulent Sales and Conveyances, Liens, Pledges; Documents and Records, topics Records, Seals; Mortgages, topic Chattel Mortgages.

3.10 CONDITIONAL SALES:

See topic 3.23 Sales.

3.11 CONSIGNMENTS:

See topic 3.14 Factors.

3.12 CONSUMER PROTECTION:

Recipient of unsolicited merchandise may treat it as unconditional gift, and use or dispose of it without obligation. Sending bills for such merchandise may be enjoined. Containers of such merchandise must be prominently marked in bold letters: “THIS IS A GIFT. PAYMENT NOT REQUIRED FOR THIS ITEM.” Unsolicited merchandise does not include goods received pursuant to existing membership or club arrangement. (N.Y. Gen. Bus. Law §396[2][a] [NYCLS], [b] [NYCLS]; N.Y. Gen. Oblig. Law §5-332 [NYCLS]).

In action for cash advance, goods, or services obtained through credit or debit card, it is defense that such card was not delivered, or unauthorized use occurred after holder notified issuer, or unauthorized use was in excess of liability under “Truth in Lending Act”. (N.Y. Gen. Bus. Law §514[1] [NYCLS]). Issuance of credit card in violation of “Truth in Lending Act” and regulations thereunder is misdemeanor. (N.Y. Gen. Bus. Law §515 [NYCLS]). Liability for unauthorized use of credit card or debit card is limited to extent provided by Federal “Truth in Lending Act” and regulations thereunder. (N.Y. Gen. Bus. Law §512 [NYCLS]). Application forms or preapproved written solicitations for credit cards regulated. (N.Y. Gen. Bus. Law §520 [NYCLS]). Seller of personal, family or household goods or services which accepts personal check, gift certificate, traveler's check or money order in payment is prohibited from recording credit card number on method of payment or elsewhere. (N.Y. Gen. Bus. Law §520-a[4] [NYCLS]). No person, firm, partnership, association, limited liability company, corporation or other entity accepting charge, credit or debit cards for transaction of business shall print expiration of charge, credit or debit card or more than last five digits of such number on electronically printed receipts. (N.Y. Gen. Bus. Law §520-a[4-a] [NYCLS]). Layaway plans regulated. (N.Y. Gen. Bus. Law §396-t [NYCLS]). Credit card surcharges prohibited. (N.Y. Gen. Bus. Law §518 [NYCLS]).

Creditor of account under consumer credit plan on which interest of $50 or more has been paid in any calendar year and who uses automated electronic billing must furnish obligor with notice containing option to require statement of such aggregate interest paid by obligor. Statement due by Feb. 15 of following year. (N.Y. Gen. Bus. Law §718[1] [NYCLS]).

Packaging and sale of household cleaning products regulated. (N.Y. Envtl. Conserv. Law §35-0101 et seq.). Packaging of food products regulated. (N.Y. Agric. & Mkts. Law §193). Unit price marking in retail food stores required. (N.Y. Agric. & Mkts. Law §214-h).

All trading stamps must bear legibly printed cash value. (N.Y. Gen. Bus. Law §571 [NYCLS]). Each company advertising or distributing trading stamps within state must register with Secretary of State, pay fee of $100 and post bond annually. (N.Y. Gen. Bus. Law §§572-575). If company defaults on redemption of its stamps, rightful holders of stamps may make claim against such bond. (N.Y. Gen. Bus. Law §576 [NYCLS]). No company may cease or suspend redemption of stamps without giving 90 days prior written notice to Secretary of State and to affected retailers. (N.Y. Gen. Bus. Law §577 [NYCLS]).

Buyer who orders goods or services from door-to-door salesman may cancel such order within three business days. (N.Y. Pers. Prop. Law §427). In door-to-door sale, seller must give buyer conspicuous written notice of right to cancel in form set forth in statute. (N.Y. Pers. Prop. Law §428).

Consumer credit reporting agencies required to furnish to consumer upon request, information contained in consumer's file. (N.Y. Gen. Bus. Law §380-d[a][1] [NYCLS]). Consumers denied credit within past 30 days entitled to receive written copy of their complete file without charge. (N.Y. Gen. Bus. Law §380-d[c] [NYCLS]).

Credit services business regulated. (N.Y. Gen. Bus. Law §§458-a to 458-k [NYCLS]).

Contracts for social referral and computer dating services regulated. (N.Y. Gen. Bus. Law §394-c [NYCLS]).

Assignee of retail installment contract or obligation is subject to all defenses and claims of buyer against seller, notwithstanding any agreement to contrary. (N.Y. Pers. Prop. Law §403[4]).

Retail installment credit agreements regulated. (N.Y. Pers. Prop. Law §413).

Creditors prohibited from discriminating on basis of race, creed, marital or military status, etc., in granting or renewing credit. (N.Y. Exec. Law §296-a).

Creditor who makes loan, proceeds of which were used in consumer sale, is subject to consumer's defenses against seller if any of specified relationships exist between seller and creditor. (N.Y. Gen. Bus. Law §§252-255).

Attorney general may bring action to enjoin repeated deceptive practices (N.Y. Gen. Bus. Law §349[b] [NYCLS]), to obtain restitution for defrauded consumers (N.Y. Exec. Law §63[12]; N.Y. Gen. Bus. Law §396-y [NYCLS]), and to enjoin price gouging on consumer goods or services during any abnormal disruption of market for such (N.Y. Gen. Bus. Law §396-r [NYCLS]).

All merchandise and service establishments must publicly display name of owner. (N.Y. Gen. Bus. Law §131 [NYCLS]).

Debt collection procedures regulated. (N.Y. Gen. Bus. Law §§600-603).

Certain disclosures required in retail sale of prescription drugs. (N.Y. Educ. Law §§6815, 6826).

Consumer has specified remedies set forth in statute for delayed furniture or major household appliance delivery. (N.Y. Gen. Bus. Law §396-u [NYCLS]).

Sales of outdated over-the-counter drugs or alteration, mutilation, or removal of expiration date of such drugs punishable by fine. (N.Y. Gen. Bus. Law §820 et seq. [NYCLS]).

Chain distributor or “pyramid” schemes prohibited. (N.Y. Gen. Bus. Law §359-fff [NYCLS]).

Mobile home sales regulated. (N.Y. Gen. Bus. Law §§720-724).

Maintenance agreements relating to retail sales of personal, family or household products must be available for buyer's review prior to purchase and copy thereof must be provided to buyer at time of purchase. (N.Y. Gen. Bus. Law §395-a[3] [NYCLS]). Maintenance agreements relating to retail sales items or services cannot be terminated at election of party providing parts or service during term of agreement except for nonpayment, or use of item primarily for commercial purposes, unless agreement so provides, or where buyer's residence changes beyond disclosed service area, except where buyer provides transportation or shipping. Prior to or upon delivery of agreement, buyer must be notified in writing that agreement may be cancelled for these reasons. (N.Y. Gen. Bus. Law §395-a[2] [NYCLS]).

Mail-order and telephone-order business regulated. (N.Y. Gen. Bus. Law §396-m

[NYCLS]).

Superintendent of Insurance must publish and make available by Oct. 1st of each year, free of charge to public, annual consumer guide on automobile insurance. (N.Y. Ins. Law §337).

Written disclosure required for repairs of 5% or greater value to new automobiles. (N.Y. Gen. Bus. Law §396-p[5] [NYCLS]).

Cable television services regulated. (N.Y. Pub. Serv. Law §§211-230).

Automobile repairs regulated. (N.Y. Veh. & Traf. Law §§398-398-k).

Sales of residential telephone equipment regulated. (N.Y. Gen. Bus. Law §349-b [NYCLS]).

Use of automatic dialing-announcing devices by telemarketers restricted. (N.Y. Gen. Bus. Law §399-p [NYCLS]). Persons using automatic dialing-announcing devices that place calls to certain emergency facilities (e.g., hospitals, fire companies, ambulances) can be liable for civil damages and penalties. (N.Y. Gen. Bus. Law §399-p[5] [NYCLS], [8] [NYCLS]). Telemarketers cannot make sales call to any consumer more than 31 days after telephone number appears on national do-not-call registry. (N.Y. Comp. Codes R. & Regs. tit. 21, §4603.1).

Travel agencies regulated. (N.Y. Gen. Bus. Law §§155-159-a). Certain credit practices involving travel services prohibited. (N.Y. Gen. Bus. Law §§523-526).

Storage of household goods regulated. (N.Y. Gen. Bus. Law §§605-610).

Unsolicited telefacsimile advertising regulated. (N.Y. Gen. Bus. Law §396-aa [NYCLS]).

Simulated checks regulated. (N.Y. Gen. Bus. Law 396 [NYCLS]–aa).

Seller or installer of urea-formaldehyde foam insulation must give to buyer or to owner of building where insulation is installed specified notice in statute that sale is cancelable within three days. (N.Y. Gen. Bus. Law §391-i [NYCLS]).

Every retail dealer who knowingly offers for sale “grey market” imported merchandise must conspicuously post appropriate disclosures. (N.Y. Gen. Bus. Law §218-aa[2] [NYCLS]).

Corporations and persons may be enjoined and/or civilly penalized for production, sale or distribution of false identification documents. (N.Y. Gen. Bus. Law §143[2] [NYCLS]).

Free gift, bonus or other inducement to purchase consumer goods regulated. (N.Y. Gen. Bus. Law §396-y [NYCLS]).

Tampering with consumer products subject to criminal penalties. (N.Y. Exec. Law §216-d).

Wrongful disclosure of video tape rental or sale records prohibited and subject to civil liability. (N.Y. Gen. Bus. Law §§670-675).

Sale of motorized wheelchairs regulated by “Wheelchair Lemon Law Bill of Rights”. (N.Y. Gen. Bus. Law §670[2] [NYCLS]).

Carbon monoxide detectors to be installed in certain dwellings, under uniform fire prevention and building code – provisions to be known as “Amanda's Law.” (N.Y. Exec. Law

§378).

Utility bills to be available in large-print format to customers. (N.Y. Gen. Bus. Law §399 [NYCLS]–zz) (N.Y. Pub. Serv. Law § 44).

Lemon Law.

New motor vehicles, including motorcycles, sold and registered in N.Y. State which fail to conform to all express warranties during earlier of first 18,000 miles of operation or two years from date of delivery must be corrected at no charge to consumer if proper notice is given by consumer to manufacturer, its agent or authorized dealer. If unable to repair or correct any defect or condition substantially impairing value of vehicle after reasonable number of attempts, manufacturer must, at consumer's option, either replace vehicle with comparable vehicle or accept return of vehicle and refund full purchase price or, if applicable, lease price and any trade-in allowance plus fees and charges (less allowance for consumer's use of vehicle). Any return of motor vehicle may, at option of consumer, be made to dealer or other authorized agent of manufacturer who either sold or attempted to repair defect, and such return not subject to further shipping charges. In addition to warranties offered by manufacturer, new car, if purchased and registered in N.Y. State, is warranted against all material defects until earlier of 18,000 miles or two years. (N.Y. Gen. Bus. Law §198-a [NYCLS]). Dealer may not sell used cars without written warranty for period of: (1) If vehicle has 36,000 miles or less, earlier of 90 days or 4,000 miles, or (2) if vehicle has over 36,000 miles but less than 80,000 miles, earlier of 60 days or 3,000 miles; (3) if vehicle has over 80,000 miles but no more than 100,000 miles, earlier of 30 days or 1,000 miles (if over 100,000 miles or purchase price is under $1,500, these provisions not applicable) (N.Y. Gen. Bus. Law §198 [NYCLS]–b[b][1]; dealer or agent is required pursuant to warranty to repair, or at dealer's election, reimburse consumer for reasonable cost of repairing covered defective part. (N.Y. Gen. Bus. Law §198-b[b][2] [NYCLS]). Informal dispute resolution mechanisms may be utilized to resolve issues arising under these provisions, but such mechanisms are regulated. (N.Y. Gen. Bus. Law §§198-a[g] [NYCLS], 198-b[f] [NYCLS]). Lemon law establishes “Lemon Law Bill of Rights”. (N.Y. Gen. Bus. Law art. 29K) forth requirements regarding warranties on motor vehicle parts. (N.Y. Gen. Bus. Law §§616-619).

Court may assess against dealer or manufacturer reasonable attorney's fees for services rendered to enforce collection of award granted against said dealer or manufacturer. (N.Y. Gen. Bus. Law §198-a[l] [NYCLS]).

Plain Language.

Effective Nov. 1, 1978, each written agreement for residential lease or for money, property or services for personal, family or household purposes involving less than $50,000 must be: (a) written in clear and coherent manner using words with common everyday meanings; and (b) appropriately divided and captioned by its various sections. Creditor, seller or lessor who fails to comply liable to consumer for actual damages plus $50. Total class action penalty limited to $10,000. Penalties not enforceable when both parties fully performed their obligations under agreement. (N.Y. Gen. Oblig. Law §5-702[a] [NYCLS]).

Insurance policies must be written in clear and coherent manner. (N.Y. Ins. Law §3102[c][1][A]). Certain small print consumer contracts excluded from evidence. (N.Y. C.P.L.R. 4544 [NYCLS]). Retail installment contracts must be in at least eight point type. (N.Y. Pers. Prop. Law §402[1]).

3.13 CONTRACTS:

Common law with regard to necessity for consideration has been modified in several respects by N.Y. Gen. Oblig. Law §§5-1101 [NYCLS], 1103, 1105, 1107 and 1109 , adopted Apr. 4, 1963, and effective Sept. 27, 1964, which replaced N.Y. Pers. Prop. Law §33. Agreement, promise or undertaking for purchase, sale, transfer, assignment or delivery of certificate or other evidence of debt or any share or interest in stock is not void or voidable, for want or nonpayment of consideration, or because vendor was not owner or possessor of certificate or other evidence of debt, share or interest at time contract was made. (N.Y. Gen. Oblig. Law §5-1101 [NYCLS]). Agreement, promise or undertaking to modify, change or discharge any contract, obligation, lease, mortgage or security interest in real or personal property, not invalid for absence of consideration if in writing and signed by party to be charged therewith. (N.Y. Gen. Oblig. Law §5-1103 [NYCLS]). Promise made in writing and signed by promisor not invalid on ground consideration is past or executed, if consideration is expressed in writing, is proved to have been given or performed and would be valid but for time when given or performed. (N.Y. Gen. Oblig. Law §5-1105 [NYCLS]). Written assignment signed by assignor may irrevocably transfer assignor's rights even where there is no consideration for assignment. (N.Y. Gen. Oblig. Law §5-1107 [NYCLS]).

Except as provided in N.Y. U.C.C. Law §2-205, written contract offer signed by offeror and stating that it is irrevocable for specified period may not be revoked for absence of consideration. Irrevocable offer failing to specify any period is irrevocable for reasonable period. (N.Y. Gen. Oblig. Law §5-1109 [NYCLS]).

See also topic 3.09 Commercial Code; category 14 Family, topic 14.10 Infants, subhead Contracts.

3.14 FACTORS:

Uniform Commercial Code.

Factors' Act (N.Y. Pers. Prop. Law §43) repealed by N.Y. U.C.C. Law. See N.Y. U.C.C. Law §9-101 et seq. For power of merchant to transfer rights of entruster, in goods entrusted to him, to buyers in ordinary course of business, see N.Y. U.C.C. Law §2-403[2].

License Requirements.

Biennial license required to operate food processing establishment. (N.Y. Agric. & Mkts. Law §251-z-3).

Lien.

Factors lien provisions (N.Y. Pers. Prop. Law §45 and former N.Y. Lien Law §182 [NYCLS]) repealed by Uniform Commercial Code. See N.Y. U.C.C. Law §9-101 et seq.

3.15 FRANCHISES:

Unlawful to offer or actually sell any franchise without first registering written “offering prospectus” with Department of Law. (N.Y. Gen. Bus. Law §683[1] [NYCLS]). Department of Law can exempt any person, franchise or transaction from compliance with such registration if not inconsistent with public interest. (N.Y. Gen. Bus. Law §684[1] [NYCLS]). Uniform Franchise and Business Opportunities Act has not been adopted.

3.16 FRAUDS, STATUTE OF:

Every agreement, promise or undertaking is void unless it or some note or memorandum thereof be in writing and subscribed by party to be charged therewith, if such agreement, promise or undertaking: (1) by its terms is not to be performed within one year from making or completed before end of lifetime; (2) is special promise to answer for debt, default or miscarriage of another person; (3) is made in consideration of marriage, except mutual promises to marry; (4) is subsequent or new promise to pay debt discharged in bankruptcy; (5) is contract or promise, with or without consideration, to assign or name beneficiary of life, health or accident insurance policy, except industrial insurance; (6) is contract to pay compensation to someone other than auctioneers, attorneys or licensed real estate brokers and salesmen for negotiating loan or purchase, sale, rental, exchange or lease of any interest in real property or in business (N.Y. Gen. Oblig. Law §5-701[a] [NYCLS]); (7) is contract to make testamentary provision or to establish trust; or (8) or is promise by personal representative to answer for debt or default of his decedent. (N.Y. Est. Powers & Trust Law §13-2.1[a] [NYCLS]). Notwithstanding N.Y. U.C.C. Law §2-201 , entry in sale book by auctioneer at time of sale specifying particulars of sale is equivalent to note of sale contract, subscribed by party to be charged. (N.Y. Gen. Oblig. Law §5-701[a][6] [NYCLS]). Notwithstanding paragraph one of N.Y. Gen. Oblig. Law §5-701[a] [NYCLS], agreement, promise, undertaking, or contract, which is valid in other respects and is otherwise enforceable, is not void for lack of note, memorandum, or other writing and is enforceable by way of action or defense provided that such agreement, promise, undertaking, or contract is qualified financial contract and there is sufficient evidence to indicate that contract has been made or parties thereto, by means of prior or subsequent written contract, have agreed to be bound by terms of such qualified financial contract from time agreement reached on those terms. (N.Y. Gen. Oblig. Law §5-701[b][1] [NYCLS]). Agreement to locate property held by Comptroller under Abandoned Property Law must be in writing and contain specified provisions. (N.Y. Aband. Prop. Law §1416[1]). Contract to make joint will, or not to revoke one, if executed after 9/1/83, must expressly state that instrument is joint will and contract. (N.Y. Est. Powers & Trust Law §13-2.1[b] [NYCLS]).

Sale of Goods.

Contract for sale of goods for price of $500 or more, is not enforceable even if seller makes substantial beginning toward manufacture or commitments for procurement before notice of repudiation, unless there is some writing, signed by party to be charged, sufficient to indicate that contract for sale has been made between parties. Writing is not insufficient simply because it incorrectly states terms agreed upon, but contract is not enforceable beyond quantity of goods shown in writing. Absent writing, contract is also enforceable if: (1) Goods are to be manufactured especially for buyer and are not suitable for sale to others in ordinary course of seller's business; or (2) written confirmation of contract between merchants sufficient against sender has been received, and party receiving it fails to object within ten days; or (3) payment for goods has been made and accepted, or goods have been received and accepted; or (4) party to be charged judicially admits that contract for sale was made. (N.Y. U.C.C. Law §2-201). Special requirements for modification, rescission or waiver of contracts. (N.Y. U.C.C. Law §2-209).

Sale of Securities.

Statute of frauds generally inapplicable to contract for sale or purchase of securities. Contract or modification thereunto for sale or purchase of cooperative interest void unless consideration is memorialized and subscribed by party to be charged. (N.Y. U.C.C. Law §8-113).

Security Agreement.

In certain circumstances, written security agreement authenticated by the debtor is necessary for the enforceability of a security interest. However, authenticated agreement may not be necessary when certain collateral (certificated security, deposit accounts, electronic chattel paper, investment property) is in possession or control of the secured party. (N.Y. U.C.C. Law §9-203).

Sale of Personal Property Not Otherwise Covered.

Contract for sale of personal property other than contract for sale of goods, securities, or security agreements, is not enforceable beyond $5,000 unless there is some writing signed by person to be charged or his agent indicating that contract for sale has been made between parties at a defined price and reasonably identifies subject matter thereof. (N.Y. U.C.C. Law §1-206[1]).

Sale or Lease of Real Estate.

Interest in real property other than lease for term not exceeding one year, and trust or power relating to real property, cannot be created, granted, assigned, or surrendered only by operation of law or by deed or conveyance in writing subscribed by person taking such action. This does not affect wills or prevent trust from arising or being extinguished by operation of law, nor declaration of trust from being proved by writing subscribed by declarant. Courts of equity can compel specific performance in cases of part performance. (N.Y. Gen. Oblig. Law §5-703 [NYCLS]).

Part Performance.

Doctrine of part performance may be invoked to avoid statute of frauds only if plaintiff's actions can be characterized as unequivocally referable to agreement alleged. Not sufficient that oral agreement gives significance to plaintiff's actions. (See Anostario v. Vicinanzo, 59 N.Y.2d 662 (1983), 450 N.E.2d 215; N.Y. Gen. Oblig. Law §5-703 [NYCLS].)

3.17 INTEREST:

Maximum Rate.

Rate upon loan or forbearance of money, goods or things in action is prescribed at 6% per annum. (N.Y. Gen. Oblig. Law §5-501[1] [NYCLS]; N.Y. Banking Law §14-a [NYCLS]). Rate charged by banks or trust companies on ordinary loans, with certain exceptions such as purchase of installment payment obligations, written or unwritten accounts receivable, personal property leases and loans against negotiable instruments pledged as collateral security, is subject to maximum rate. (N.Y. Gen. Oblig. Law §5-501[2] [NYCLS]; N.Y. Banking Law §§108[1]-[3] [NYCLS]). Interest charged by registered brokers or dealers for carrying debit balances not subject to this limitation or to criminal usury ceilings (N.Y. Penal Law §§190.40 [NYCLS], 190.42 [NYCLS]) if such debit balance is payable on demand and secured by securities or commodities upon which brokers or dealers may extend credit and if, on date when interest is charged or accrued, such interest is not greater than eight percentage points above average prime rate on short term business loans as published by Board of Governors of The Federal Reserve System for most recent week which was publicly available on previous business day (N.Y. Gen. Oblig. Law §5-525 [NYCLS]). In case of business and agricultural loans of $25,000 or more, banks and trust companies may charge rate of not more than 5% in excess of discount rate on 90-day commercial paper in effect at Federal Reserve Bank of New York. (N.Y. Banking Law §108[9] [NYCLS]). In case of loans or forbearances made to corporations for business or commercial purposes of $100,000 or more secured in compliance with N.Y. U.C.C. Law, banks and trust companies may charge rate of not more than 8% above prime rate. (N.Y. Gen. Oblig. Law §5-526[1] [NYCLS]). Any loan—except if secured by real property improved by one or two family residences—of $250,000 or more is subject only to criminal usury laws. Loans of $2,500,000 or more are totally free of laws regulating maximum interest that may be charged. (N.Y. Gen. Oblig. Law §5-501[6] [NYCLS]).

Holder of retail installment contract or obligation may receive credit service charge at rate or rates agreed to by buyer. (N.Y. Pers. Prop. Law §404[1]). Refinancing is permitted under specified terms and conditions. (N.Y. Pers. Prop. Law §409).

Subject to notice requirements, holder of retail installment credit agreement may receive service charge not exceeding rate agreed upon by seller and buyer. (N.Y. Pers. Prop. Law §413[3][a]). Retail installment agreement may provide for introductory rate of service charge if terms and ending date disclosed to buyer. (N.Y. Pers. Prop. Law §413[3][a]; N.Y. Banking Law §108[5][b] [NYCLS]). Rate of service charge may be reduced by seller if buyer given notice. (N.Y. Pers. Prop. Law §413[3][e]; N.Y. Banking Law §108[5][b] [NYCLS]). Retail installment credit agreement may provide for additional charges and fees described. Such charges and fees are interest for purposes of 12 U.S.C.§§85, 1463(g) and 1785(g). (N.Y. Pers. Prop. Law §413[5]; N.Y. Banking Law §108[5][e] [NYCLS]).

Annual interest statements required to be furnished to obligor under consumer credit plan on which interest of $50 or more has been paid in any calendar year if creditor maintains computerized or automated electronic system for periodic billing statements. Statement due by Feb. 15 of following year. (N.Y. Gen. Bus. Law §§717-719).

Judgments.

Money judgments bear interest at legal rate. Legal rate is 9%. (N.Y. C.P.L.R. 5003-5004). Money verdicts, reports or decisions for breach of contract, interference with possession or enjoyment of property, include interest at legal rate from date cause of action first existed or date damage incurred; interest in equitable actions at court's discretion. (N.Y. C.P.L.R. 5001-5004). Interest on such verdicts, reports or decisions runs to date of final judgment at legal rate and is included on total sum awarded. (N.Y. C.P.L.R. 5001[c] [NYCLS]).

Open Accounts.

No statutory provision for interest.

Small Loans.

Bank or trust company operating personal loan department may make loans and charge interest thereon at rate or rates agreed to by bank or trust company and borrower, with respect to any loan which is repayable at regular periodic intervals of not more than one month over period from date of loan not exceeding: (i) 37 months, if face amount of loan is for not more than $1,200, or (ii) any number of months agreed to by bank or trust company and borrower, (A) If face amount of loan is for more than $1,200; (B) if loan is for more than $1,200, and is made for commercial or business use or purpose or for investment in or purchase of unincorporated business or commercial enterprise; (C) if loan or loan commitment is made for educational purposes as specified in N.Y. Banking Law §108(5) [NYCLS]; or (D) if loan or advance of credit is made for purpose of financing alterations, repairs and improvements upon or in connection with, or as superintendent may authorize equipping of existing structures, and building of new structures, upon urban, suburban, or rural real property by owners thereof or by lessees of such real property under lease expiring not less than six months after maturity of loan or advance of credit or by lessees under proprietary leases from corporations or partnerships formed for purpose of cooperative ownership of real estate. Subject to limitations for loans under $1,200, bank or trust company may make installment loans for personal, education, business or commercial purpose or for investment in or purchase of unincorporated business or commercial enterprise at rate or rates agreed to by borrower. (N.Y. Banking Law §108[4][b] [NYCLS]). Subject to certain limitations relating to education and business loans, bank or trust company may agree to make advances on checks of depositor at rate or rates agreed to by borrower. (N.Y. Banking Law §108[5] [NYCLS]). Licensed lenders may charge, on loans up to $25,000, rate or rates of interest agreed to by licensee and borrower. (N.Y. Banking Law §§340 [NYCLS], 352 [NYCLS]). Credit union may charge interest, which may be taken in advance, on loans to members at rate or rates agreed to by credit union and borrower. (N.Y. Banking Law §453[5] [NYCLS]). Collateral loan brokers may charge interest for up to 15 months at 4% per month. Minimum charge of 25¢ per month is authorized. (N.Y. Gen. Bus. Law §46 [NYCLS]). *Caveat:* Federal law should be consulted to insure that N.Y. law is not preempted in regard to specific ceiling.

Usury.

Usurious bonds, bills, notes, etc., except bottomry and respondentia bonds and contracts, are void, and neither principal nor interest may be recovered (N.Y. Gen. Oblig. Law §5-511 [NYCLS]), but corporations (other than certain corporations whose principal asset is ownership of one or two-family dwellings) and associations and joint-stock companies having powers and privileges of corporation may not interpose defense of usury in any action (N.Y. Gen. Oblig. Law §5-521 [NYCLS]), except that such corporations, etc. may interpose defense of criminal usury as described in N.Y. Penal Law §190.40 [NYCLS] (N.Y. Gen. Oblig. Law §5-521[3] [NYCLS]). Borrower may recover from lender any interest paid in excess of legal rate. (N.Y. Gen. Oblig. Law §5-513 [NYCLS]). Borrower suing to recover money, goods, etc., taken in usurious transaction need not offer, and may not be required, to pay any interest or principal on sum or thing loaned. (N.Y. Gen. Oblig. Law §5-515 [NYCLS]). But in case of usurious loans by savings banks or savings and loan associations, only interest is forfeited, and recovery may be had of twice entire interest thus paid. (N.Y. Gen. Oblig. Law §5-511[1] [NYCLS]).

Taking security upon household furniture, etc., tools or implements of trade, wearing apparel or jewelry for usurious loans or pretended purchase thereof for purposes of taking security for such loans is a misdemeanor punishable by fine up to $500. (N.Y. Gen. Oblig. Law §5-524 [NYCLS]; N.Y. Pers. Prop. Law §414[1]). Wilful violation of retail installment sales law is misdemeanor. (N.Y. Pers. Prop. Law §414[1]). Criminal usury provisions (N.Y. Penal Law §§190.40 [NYCLS], 190.42 [NYCLS]) do not apply to charges and fees in retail installment credit agreement described in N.Y. Pers. Prop. Law §413[5]; N.Y. Banking Law §108[5][e] [NYCLS]; N.Y. Pers. Prop. Law §413[5]; N.Y. Banking Law §108[5][e] [NYCLS].

Annual interest statements must be supplied by certain creditors of accounts under consumer credit plans. (N.Y. Gen. Bus. Law §§717-719).

3.18 [RESERVED]

3.19 LICENSES, BUSINESS AND PROFESSIONAL:

Among those requiring state licenses or permits are: architects, barbers, chiropractors, dentists, pharmacists, hairdressers, masseurs, waxers, vintners, distillers, alcohol retailers, midwives, nurses, practitioners of medicine, veterinarians, firearms dealers, gunsmiths, fishermen, guides for wildlife activities, dealers of farm produce, operators of farm or food processing labor camps, manufacturers of frozen desserts, private investigators, employment agencies, engineers, certified public accountants, certified real estate appraisers, surveyors, insurance agents, junk dealers, milk dealers, resellers of tickets for admissions to theaters and similar public entertainments, pawn brokers, peddlers, plumbers, real estate brokers and salesmen, state lottery ticket agents, undertakers, X-ray technicians, insurance consultants, social workers, occupational therapists, physical therapists, speech pathologists, contractors dealing with asbestos, etc. Issuance and renewal of professional licenses are regulated in detail. (N.Y. Educ. Law §§6500-8709). State agency may refuse to renew license or similar authorization when person has failed to pay to or settle with such state agency amounts owed as fees, penalties or fines. (N.Y. Exec. Law §32). In addition, towns or villages may require vehicles running on streets, auctioneers, employment agencies, collateral loan brokers, junk and second hand dealers, operators of bingo games and other games of chance, peddlers, hotels, inns, boarding houses, garages, lodging houses, restaurants, retail business from boats, circuses, theatres, shows or other exhibitions or performances, billiard or pool rooms, bowling alleys, shooting galleries, skating rinks, amusement parks, riding stables or academies, garbage collection, or use of any public hall or opera house to be licensed.

3.20 MONOPOLIES, RESTRAINT OF TRADE AND COMPETITION:

Common law principles apply regarding monopolies and contracts in restraint of trade. New York Court of Appeals has termed New York's antimonopoly statute a “Little Sherman Act”, which should “generally be construed in light of Federal precedent”. (Anheuser-Busch, Inc. v. Abrams, 525 N.Y.S.2d 816, 820, 520 N.E.2d 535, 539 [1988]). Every contract, agreement, arrangement or combination which may establish or maintain monopoly, or restrain or unlawfully interfere with competition or free exercise of any activity in conduct of business, trade or commerce, or furnishing of any service in state is against public policy, illegal and void. This does not apply to co-operative associations, corporate or otherwise, of farmers, gardeners or dairymen, including live stock farmers and fruit growers, nor to contracts, agreements or arrangements made by such associations, nor to bona fide labor unions. This does not prohibit or restrict right of workingmen to combine in unions, organizations and associations, not organized for purpose of profit. (N.Y. Gen. Bus. Law §340 [NYCLS]). N.Y. Gen. Bus. Law §341 [NYCLS] provides for maximum fine of $100,000 or imprisonment for not longer than four years or both in case of natural persons, and maximum fine of $1,000,000 in case of corporations. There is three-year limitation on prosecutions under this section, although running of limitation shall be suspended during pendency of any civil or criminal proceeding instituted by federal government for federal antitrust violations and for one year thereafter. (N.Y. Gen. Bus. Law §342-c [NYCLS]). N.Y. Gen. Bus. Law §§342-47 provide procedure for criminal prosecutions and civil penalty actions to prevent violation of preceding sections. This includes issuing of subpoenas by attorney general requiring attendance before himself, deputy, or court of persons suspected of violation and requiring production of books, papers, etc. No person is excused from appearing and testifying without good cause. (N.Y. Gen. Bus. Law §343 [NYCLS]). State, its subdivisions and authorities and private persons may bring actions within four years after cause of action has accrued to recover treble damages, plus costs not to exceed $10,000 and reasonable attorneys' fees. (N.Y. Gen. Bus. Law §340[5] [NYCLS]).

Resale Price Agreements.

Resale price maintenance agreements affecting any subject of commerce are illegal. (N.Y. Gen. Bus. Law §§369-a [NYCLS], 369-[c] [NYCLS]). See category 17 Intellectual Property, topic 17.01 Trademarks and Tradenames.

Unfair Trade Practices.

It is unfair trade practice for credit services company to misrepresent in any manner its services, its ability to improve customer credit ratings, amount of credit to be received, or qualifications of its personnel; to make or advise consumer to make untrue or misleading statement to credit reporting agency; or to represent that it can procure credit card for consumer when it has no such authority. (N.Y. Gen. Bus. Law §458-h [NYCLS]). It is unfair trade practice for seller of health club services to misrepresent, among other things, its facilities, their personnel, location, or its equipment and services. (N.Y. Gen. Bus. Law §626 [NYCLS]).

3.21 NEGOTIABLE INSTRUMENTS:

See topic 3.02 Bills and Notes.

3.22 RESTRAINT OF TRADE:

See topic 3.20 Monopolies, 3.22 Restraint of Trade and Competition.

3.23 SALES:

Uniform Commercial Code has been adopted. See topic 3.09 Commercial Code.

Product Liability.

Seller's warranty whether express or implied extends to any person if it is reasonable to expect such person may use, consume or be affected by goods and is injured by breach of warranty. (N.Y. U.C.C. Law §2-318). However, plaintiff must be in privity of contract in product liability action based on implied warranty where recovery is sought for economic loss rather than for injury. (99 Misc.2d 212, 415 N.Y.S.2d 946).

Conditional Sales.

Governed by N.Y. U.C.C. Law. See topic 3.09 Commercial Code.

Contracts of Sale.

Contract for sale of goods may be in any manner sufficient to show agreement, including conduct by both parties which recognizes existence of such contract, even though one or more terms are left open. (N.Y. U.C.C. Law §2-204). Contract for sale of goods for price of $500 or more not enforceable unless there is some writing to indicate that contract for sale of goods has been made, and has been signed by party against whom it is to be enforced, or his agent or broker, absent specific circumstances as listed in statute that indicate contract was in fact made. (N.Y. U.C.C. Law §2-201). Statute of frauds applies to contract for sale of goods for price of $500 or more. (N.Y. U.C.C. Law §2-201[1]; see topic 3.16 Frauds, Statute of).

Retail Installment Sales Act.

Adopted in New York. (N.Y. Pers. Prop. Law §§401-422). All goods and services purchased on time, except motor vehicles and sales under control of state and federal agencies, are regulated. “Retail installment contract” is an agreement entered into in New York pursuant to which title to, property in or lien upon goods, which are subject matter of retail installment sale, is retained by retail seller as security, excepting certain federally insured transactions under Servicemen's Readjustment Act of 1944. (N.Y. Pers. Prop. Law §401[6]). “Retail installment obligation” is agreement entered into in New York pursuant to which buyer promises to pay in installments any part of cash sale price of goods or services, but not including retail installment contract or certain federally insured transactions under Servicemen's Readjustment Act of 1944. (N.Y. Pers. Prop. Law §401[7]). No retail installment contract or obligation may create any security interest in real or personal property other than goods which are subject of retail installment sale. (N.Y. Pers. Prop. Law §421).

Retail installment contract or obligation must be in writing and contain at top and above buyer's signature, “RETAIL INSTALLMENT CONTRACT” or “RETAIL INSTALLMENT OBLIGATION”; and “NOTICE TO THE BUYER” under which must appear instructions to buyer not to sign agreement until having read it, stating that buyer is entitled to completed copy of contract or obligation and stating that buyer has right to pay any outstanding balance in full in advance and under certain conditions to partial refund of credit service charge. (N.Y. Pers. Prop. Law §402[2]). Contract must contain certain other provisions including descriptive matter regarding sales price, service charges, insurance and other charges. All terms must be contained in one agreement except retail installment obligation for purchase from time to time of goods not more than $175 to which certain additional requirements apply. Any provision which provides for payment of attorney's fees or waiver of right to impose any counterclaim or offset arising out of breach of such contract by seller is void. (N.Y. Pers. Prop. Law §402).

Provisions require that no contract or obligation be signed by buyer when: it contains blank spaces to be filled in after it has been signed, except in certain cases (N.Y. Pers. Prop. Law §402[4]); forbids inclusion of certain clauses such as relief of seller from liability, acceleration of maturity absent default, waiver of right to trial by jury and granting of certain powers of attorney to seller (N.Y. Pers. Prop. Law §403[2]); and requires holder of agreement to provide yearly statements to buyer (N.Y. Pers. Prop. Law §407).

Merchandise certificates issued by retail seller generally must conform to requirements of retail installment contract or obligation and other requirements. (N.Y. Pers. Prop. Law §402A).

Separate provisions apply to retail installment credit agreements. (N.Y. Pers. Prop. Law §413). Subject to certain limitations and conditions, holder of retail installment credit agreement is subject to claims (except tort) and defenses arising out of purchase of goods and services under agreement. (N.Y. Pers. Prop. Law §413[13][a]).

Act also fixes credit service charge limitations. (N.Y. Pers. Prop. Law §§404, 413[3]). Waiver of provisions of Act is void. (N.Y. Pers. Prop. Law §416).

See also topic 3.17 Interest.

Sales of Motor Vehicles.

For special provisions, i.e., required form and assignability of contract, assignee of contract subject to claims and defenses of buyer, service and insurance charge limitation, covering conditional sale of motor vehicle for noncommercial or nonbusiness use, where purchase price is to be paid in installments, see Motor Vehicle Retail Installment Sales Act (N.Y. Pers. Prop. Law §§301-316); see also N.Y. Gen. Oblig. Law §7-401 [NYCLS] (buyer's right of redemption). There are also special provisions regulating sale of used motor vehicles (N.Y. Gen. Bus. Law §198-b [NYCLS]), sale of motor vehicles by automobile auctioneers (N.Y. Gen. Bus. Law §23 [NYCLS]) and sale of motor vehicles by automobile brokers (N.Y. Gen. Bus. Law §§736-744). Uniform Vehicle Certificate of Title Act is in effect. (N.Y. Veh. & Traf. Law §§2101-2135).

Dealer is obligated to sign contract in new motor vehicle sale and to include in contract amount of trade-in allowance. (N.Y. Gen. Bus. Law §396-q[1]-[2] [NYCLS]). Provision in contract allowing for increase in price after agreement is signed is void as against public policy. (N.Y. Gen. Bus. Law §396-p[1][b] [NYCLS]). If new motor vehicle is delivered to consumer without options or equipment ordered, dealer must offer to reduce price or specify waiting period to obtain such option or equipment if consumer is so willing. (N.Y. Gen. Bus. Law §396-q[4] [NYCLS]). Dealer required to provide written notification to consumer of certain repairs performed on car before initial sale. (N.Y. Gen. Bus. Law §396-p[5][a] [NYCLS]).

Guaranty of Payment.

Guaranty given to seller with respect to sale of goods amounting to $1,500 or less, sold for any use other than commercial or business, payment of which is secured by assignment of future earnings is not valid unless instrument of guaranty specifically describes transaction secured. Guaranty of future transactions is limited to transactions that take place within period of two years. (N.Y. Pers. Prop. Law §46-d). Guaranty given to seller of buyer's liabilities under retail installment contract or obligation is not valid unless guaranty is incorporated in or endorsed on contract or obligation, or identifies contract or obligation and specifies time balance thereof. No guaranty can be given to seller of buyer's liabilities with respect to any future retail installment contracts or obligations. (N.Y. Pers. Prop. Law §420). Holder of dishonored check given in payment for consumer transaction or retail credit account or obligation under retail installment contract may collect from, charge or add to outstanding account of person from whom such check was received. Charge, may not be more than lesser of amount agreed upon, if contracted for, or $20. (N.Y. Gen. Oblig. Law §5-328[2] [NYCLS]).

International Sale of Goods.

See N.Y. U.C.C. Law §2-323 for form of bill of lading required in overseas shipment.

Bulk Sales.

See category 8 Debtor and Creditor, topic 8.08 Fraudulent Sales and Conveyances.

Resale Price Agreements.

See category 17 Intellectual Property, topic 17.01 Trademarks and Tradenames.

Consumer Protection.

See topic 3.12 Consumer Protection.

3.24 SECURITIES:

Unless otherwise stated, sections cited are those of General Business Law.

N.Y. Gen. Bus. Law art. 23-A [NYCLS], §§352-359 [NYCLS]-h, regulates offering for sale and purchase of securities, commodities and other species of investments to public in and from New York State.

Uniform Commercial Code has been adopted. See topic 3.09 Commercial Code.

Supervision.

Blue Sky Law is enforced by Attorney General. (N.Y. Gen. Bus. Law §353 [NYCLS]). Administrative functions are vested in Bureau of Investor Protection and Securities.

Regulatory Powers of Supervising Authority.

Attorney General is given wide powers of investigation into fraudulent practices or violations of law in connection with issuance, exchange, purchase, sale, promotion, negotiation, advertisement and distribution of securities. Attorney General may subpoena witnesses and require production of documents or sworn statements for purpose of such investigations, bring action to enjoin fraudulent practices, secure appointment of receivers and prosecute persons charged with criminal offense in violation of laws applicable to fraudulent transactions. (N.Y. Gen. Bus. Law art. 23-A [NYCLS], §§352-359 [NYCLS]-h).

Prerequisites to Sales or Offerings.

See subhead Registration of Dealers, infra.

Securities to Which Act Applicable.

Attorney General has investigative authority over commodities, stocks, bonds, notes, evidences of interest or indebtedness and other securities including oil and mineral deeds or leases and any interests therein, negotiable documents of title, foreign currency orders, calls or options. (N.Y. Gen. Bus. Law §352 [NYCLS]).

Exempt Securities and Transactions.

Requirement that dealer file “further state notice” before selling any issue of securities is not applicable to any transaction relating to sale or offering for sale of any of following securities: securities issued or guaranteed by governments, foreign and domestic, and political subdivisions thereof; securities issued by national banks and corporations created by U.S.; securities issued or guaranteed by public service or utility corporations; securities issued by nonprofit corporations; capital stock of state banks; securities that are legal investments for savings banks or trust funds; securities which are underwritten or sold by corporations under supervision of superintendent of banks of New York State; securities, other than common stock, outstanding without any default for not less than five years; negotiable promissory notes, drafts and commercial paper provided that any such instrument mature in not more than 12 months from date of issue and shall be issued within three months after date of sale; bonds and mortgages representing undivided interests; securities, subject to certain limitations, listed on exchanges located in New York State; negotiable documents of title foreign currency orders and calls and options therefor; securities sold at judicial sale; and sales of securities pledged as security for debt, by or for account of pledgee or mortgagee, to liquidate bona fide debt. (N.Y. Gen. Bus. Law §359-f[1] [NYCLS]).

Attorney General may, upon application in writing, grant exemption from filing of dealer's state notice and registration statements, supplemental dealer's statements and payment of certain filing fees to persons who are dealers as defined in N.Y. Gen. Bus. Law §359-e [NYCLS] who are offering to sell, or selling, or offering to purchase, or purchasing in New York

State following securities: subject to enumerated limitations, securities of corporation that has been in existence for period of not less than ten years; securities fully listed on exchanges located in New York State; securities listed in preceding paragraph that are exempt from filing of further state notices; securities sold in limited offering to not more than 40 persons, but exemption may be granted for offerings made to more than 40 persons if within purposes of subdivision; and securities issued in connection with employees' stock purchase, savings, pension, profit-sharing, or similar benefit plan. (N.Y. Gen. Bus. Law §359-f[2] [NYCLS]).

Registration of Offerors.

See subheads Registration of Dealers and Registration of Securities, infra.

Registration of Securities.

It is unlawful to make intrastate offering of securities unless offering prospectus making full and fair disclosure of all material facts is first filed by issuer with Department of Law. (N.Y. Gen. Bus. Law §359-ff[1] [NYCLS]).

Registration of Dealers.

Dealers and brokers, before selling or offering to sell to public or purchasing or offering to purchase from public in or from New York State any securities issued or to be issued, must file in Department of State “state notice,” containing: (a) dealer's or broker's name; (b) his business or post-office address; and (c) if corporation, state or county of incorporation, and if partnership, names of partners. (N.Y. Gen. Bus. Law §359 [NYCLS]–e[8]). Furthermore, all persons including partners, officers, directors and salesmen employed by member of national securities exchange, broker-dealer registered with federal securities and exchange commission, or broker or dealer required to be registered under New York law, shall, as condition of employment, be fingerprinted. (N.Y. Gen. Bus. Law §359-e[12] [NYCLS]). Fee of $75 must be paid when filing “state notice.” (N.Y. Gen. Bus. Law §359-c[2] [NYCLS]).

Before offering, selling or purchasing in or from New York State, dealers, brokers and salesmen must file in Department of Law “broker-dealer statement” or “salesman's statement” on form prescribed by Attorney General. (N.Y. Gen. Bus. Law §359-e[3] [NYCLS]). Required fees for original statements and renewal statements are as follows: $1,200 for each broker-dealer's statement; $1,200 for each broker-dealer's statement filed by person, firm, association or corporation selling or offering for sale from or to public securities issued by it for any amount in excess of $500,000, and $300 if securities issued are for any amount of $500,000 or less; $300 for each broker-dealer's statement filed by person, firm, association or corporation solely for purpose of selling or offering for sale from or to public securities consisting of condominiums, shares of cooperative apartment corporations or commercial cooperative corporations, interests in homeowner's associations or interests in time share projects, plus $15 for each partner, officer, director or principal of any such firm, association or corporation. Fee of $150 shall be paid for each salesman's statement; $30 for each supplemental statement; $300 for each application granted pursuant to subdivision 2 of N.Y. Gen. Bus. Law §359-f [NYCLS]; and $225 for issuance of “no filing required letter”. No fee will be collected for filing supplemental statement by salesman canceling his prior registration. (N.Y. Gen. Bus. Law §359-e[5] [NYCLS]). In “broker-dealer statement,” Attorney General may also require information concerning applicant and applicant's partners, officers, directors or other principals thereof. (N.Y. Gen. Bus. Law §359 [NYCLS]–e[12]). It is unlawful for broker or dealer to employ unregistered salesman. (N.Y. Gen. Bus. Law §359 [NYCLS]–e[11]). Securities salesmen are required to pass uniform securities agent state law examination or uniform combined state law examination as administered by or on behalf of North American Securities Administrators Association, Inc., by any national securities association or national securities exchange unless such salesmen register solely for purpose of selling condominiums, shares of cooperative apartment corporations or commercial cooperative corporations, interests in homeowner associations or interests in timeshare projects. (N.Y. Gen. Bus. Law §359 [NYCLS]–e[3][b]). Salesman's registration is suspended when salesman is not associated with particular registered broker or dealer, or particular issuer. When salesman begins or terminates connection with broker or dealer, or begins or terminates activities making such person salesman, salesman and broker or dealer must notify Attorney General. (N.Y. Gen. Bus. Law §359 [NYCLS]–e[11]). "Broker-dealer statements" must be filed within 60 days prior to expiration of a four year period. Attorney General may provide for filing of supplemental statements to keep information reasonably current. (N.Y. Gen. Bus. Law §359-e[3][c] [NYCLS]). Attorney General may exempt dealers from above requirements in certain cases specified in N.Y. Gen. Bus. Law §359-f[2] [NYCLS] as stated in subhead Exempt Securities and Transactions, supra or provide alternative method of registration. (N.Y. Gen. Bus. Law §359-e [NYCLS]). Registered broker-dealers must maintain minimum net capital of not less than $5,000. (N.Y. Gen. Bus. Law §352-k[1] [NYCLS]).

With certain exceptions specified in N.Y. Gen. Bus. Law §359-f[1] [NYCLS] as stated in subhead Exempt Securities and Transactions, supra, each dealer must also file "further state notice" containing information, other than names of partners, required by "state notice," and containing name of securities and name and address of issuer of securities to be sold or offered for sale by such dealer. "Syndicate manager" with office in state satisfies this requirement by filing "further state notice" for all underwriters and dealers in selling group. (N.Y. Gen. Bus. Law §359-e[8] [NYCLS]). Fee of $75 must be paid when filing "further state notice." (N.Y. Gen. Bus. Law §359-c[2] [NYCLS]).

Registration of Investment Advisers.

Investment advisers, before giving advice, within or from New York State, for compensation to members of public as to value of securities or as to advisability of purchasing, selling or holding securities or before promulgating, as part of regular business, analyses or reports concerning securities, must file in Department of Law "investment adviser statement" on form prescribed by Attorney General. (N.Y. Gen. Bus. Law §359 [NYCLS]–eee[2], [3]). Renewal statements must be filed within 60 days prior to Jan. 1, each year. Person required to register as investment adviser may file original investment adviser statement after Jan. 1 of any year provided that filing must be made within ten days prior to his engaging in activities that require him to be registered as investment adviser. (N.Y. Gen. Bus. Law §359 [NYCLS]–eee[4]Broker or dealer whose performance of services as investment adviser without compensation is solely incidental to conduct of his business as broker or dealer is exempt from registration as investment adviser. (N.Y. Gen. Bus. Law §359-eee[8] [NYCLS]). Attorney general may prescribe alternative filing method which would allow advisers to centrally register with national securities association. Federally covered investment advisers must file with attorney general same documents that it filed with Securities and Exchange Commission.

Bucket Shops.

Making or offering, or assisting in making or offering of contract respecting purchase or sale, either upon credit or margin, of securities or commodities without intending bona fide purchase or sale of same, and intending (1) That such contract be settled on basis of public market quotations or (2) that such contract be settled when such market quotations reach certain figure is felony. Making or offering or assisting in making or offering of contract respecting purchase or sale of securities or commodities, either upon credit or margin, not intending bona fide receipt or delivery thereof, but intending settlement of such contract based on difference in public market quotations of or such prices at which such securities or commodities are bought or sold, or are asserted to be, bought or sold, is felony. Furthermore, keeping of place in which any such contracts are offered or made ("bucket shop") and exhibiting of quotations of prices to assist in making such contracts are also felonies. (N.Y. Gen. Bus. Law §351 [NYCLS]). Written statement containing names of persons from or to whom purchase or sale was made, and time when, place where, amount of, and price at which purchase or sale was made must be furnished within 48 hours of written demand by customer of securities or commodities. Failure to furnish such statement within such time is prima facie evidence that purchase or sale was illegal. (N.Y.

Gen. Bus. Law 351-b [NYCLS]).

Brokers and Agents.

See subhead Registration of Dealers, supra. Trading by broker against customer's orders, engaging in certain transactions as broker with knowledge of own insolvency, hypothecation of customer's securities without having lien thereon or any special property therein, or hypothecation of customer's securities for more than amount of lien thereon or other disposition thereof for broker's benefit without customer's consent and without having subject to broker's control securities of kind and amount to which customer is entitled for delivery to him upon demand and tender of amount due are misdemeanors. Broker must furnish customer statement of purchases and sales, describing securities involved, name of purchaser or seller, and day, and hours between which transaction took place. Refusal to deliver such statement within 24 hours of written demand or delivery of false statement is misdemeanor. (N.Y. Gen. Bus. Law §§339-c to 339-f [NYCLS]).

Licenses.

No provision. See subhead Registration of Dealers, supra.

Advertisements.

All sales literature and any advertisement offering investment advisory services intended to be delivered to clients or prospective clients of any investment adviser must be filed in Department of Law on date of publication. (N.Y. Gen. Bus. Law §359-eee[8] [NYCLS]). Advertising of securities is subject to investigation by Attorney General (N.Y. Gen. Bus. Law §352[1] [NYCLS]), and whoever attempts to deceive public by making, issuing or publishing any false or misleading statements or advertisements, circulars, letters or other publications is guilty of misdemeanor (N.Y. Gen. Bus. Law §339-a [NYCLS]).

Real Estate Syndication Offerings.

It is illegal for any person, partnership, company, trust, corporation or association to make or take part in public offering or sale in or from N.Y. State of securities consisting of participation interests or investments in real estate, mortgages or leases, including stocks, bonds, limited partnership interest, etc., until there is filed with Department of Law an “offering statement” or “prospectus” concerning the contemplated offering together with the payment of applicable statutory fees. (N.Y. Gen. Bus. Law §352-e[1] [NYCLS]). Contents of prospectus, procedure for filing, and prohibitions on use of selling literature are set forth in N.Y. Gen. Bus. Law §§352-e through 352-j [NYCLS] and regulations promulgated thereunder by Attorney General. Exemptions to N.Y. Gen. Bus. Law §352-e [NYCLS], f and g may be granted by Attorney General for offerings of securities: (1) Made to not more than 40 persons or (2) which have been fully registered with Securities and Exchange Commission or have been exempted from registration for reasons other than being intrastate offering to New York residents. (N.Y. Gen. Bus. Law §352-g [NYCLS]). See category 21 Property, topic 21.16 Real Property, subhead Condominiums.

Theatrical syndication financing is separately regulated. (N.Y. Arts & Cult. Aff. Law §§23.01-23.23). No offering of syndication interests in theatrical production company may be made, within or from New York State, without use of prospectus or offering circular disclosing material facts pertaining to particular venture. (N.Y. Arts & Cult. Aff. Law §23.03[3][a]).

Foreign Business Organizations.

If securities of foreign business organization are offered or advertised for sale in New York State, and such business organization has not filed (1) Designation of person upon whom process against it may be served, or (2) designation of Secretary of State as such person along with post office address to which Secretary of State shall mail copy of any process received, or (3) in lieu thereof, written instrument designating Secretary of State as person upon whom may be served any subpoena or other process directed to such organization and issued in any investigation, examination or proceeding pending or to be instituted under N.Y. Gen. Bus. Law art. 23-A [NYCLS], Attorney General may serve notice by mail upon such organization or upon any nonresident officer thereof, and may require in such notice: (1) That such organization or officer furnish verified written statement giving information therein specified relating to securities of such organization; or (2) that such organization, by its proper officer(s), appear within reasonable time from date of mailing of such notice at designated place within state for examination and produce at such examination designated books and papers of such organization. (N.Y. Gen. Bus. Law §352 [NYCLS]–a[1]). Proof of failure to furnish such statement, failure to appear with requested books and papers, or refusal to submit to examination or answer any proper question constitutes prima facie evidence that sale or offering for sale or advertisement of securities of such organization constitutes fraudulent practice within meaning of Article 23-A, and may in court's discretion be treated as basis for permanent injunction against continuance of such fraudulent practice. (N.Y. Gen. Bus. Law §352-a[2] [NYCLS]).

Nonresident Brokers, Dealers, Salesmen and Investment Advisors.

Person or business organization with principal place of business without the state or organized under laws of foreign state, doing business in state as broker, dealer, salesman or investment advisor or any partner, principal, officer or director of such broker, dealer, or investment advisor is deemed to have irrevocably appointed Secretary of State as agent upon whom may be served any summons, complaint, subpoena or other process directed to such person or business organization, or partner, principal, officer or director thereof, in any action, investigation or proceeding brought by Attorney General under N.Y. Gen. Bus. Law art. 23-A [NYCLS] arising out of or in connection with any transaction, matter or thing relating to practices or business of such person or business organization, or partner, principal, officer or director thereof. Such person or business organization, or any partner, principal, officer or director thereof may file duly acknowledged designation irrevocably appointing Secretary of State as agent upon whom may be served any such process. (N.Y. Gen. Bus. Law §352-b [NYCLS]).

Liabilities.

Civil and criminal penalties are provided for violations of N.Y. Gen. Bus. Law art. 23-A [NYCLS]. (N.Y. Gen. Bus. Law §359-g [NYCLS]). In addition, knowing or reckless publication of false or misleading statement in any advertisement with the intent to promote sale of securities or to increase consumption of services related thereto is misdemeanor. (N.Y. Penal Law §190.20 [NYCLS]). Reporting or publishing of fictional transactions in securities with intent to deceive, publication or issuance of false statements as to value, or facts affecting value, of securities, or as to financial condition of company issuing securities, and manipulation of prices of securities by fictitious transactions or devices are misdemeanors. (N.Y. Gen. Bus. Law §§339 [NYCLS], 339-a [NYCLS], 339-b [NYCLS]). In advertising or offering securities, representation that State, Department of Law or any officer thereof has recommended purchase of such securities is misdemeanor. (N.Y. Gen. Bus. Law §359-e[7] [NYCLS]). See also subhead Brokers and Agents, supra.

Take-Overs.

Take-over bids for specified equity securities will be governed by N.Y. Bus. Corp. Law §§1600-1613 (see category 2 Business Organizations, topic 2.03 Corporations, subhead Take-Overs.).

Franchise Agreements.

See topic 3.15 Franchises.

Pyramid Sales, Etc.

See N.Y. Gen. Bus. Law §§359-fff [NYCLS], 680 et seq. [NYCLS]

3.25 STATUTE OF FRAUDS:

See topic 3.16 Frauds, Statute of.

3.26 TRUST RECEIPT SECURITY:

See category 8 Debtor and Creditor, topic 8.15 Pledges.

3.27 WAREHOUSEMEN:

Uniform Commercial Code (N.Y. U.C.C. Law §7-201 et seq.) adopted effective Sept. 27, 1964. See topic 3.09 Commercial Code.

See also category 8 Debtor and Creditor, topic 8.13 Liens.

4 CITIZENSHIP

4.01 ALIENS:

War.

Aliens are subject to compulsory registration when U.S. is at war with foreign country or when in Governor's judgment public safety or necessity requires it. (N.Y. Exec. Law §8). In case of such war, aliens are prohibited from commencing action and statute of limitations is suspended. (N.Y. C.P.L.R. 209[b] [NYCLS]).

Property.

Aliens may take, hold (subject to same taxes, etc.) (N.Y. Real Prop. Law §16 [NYCLS]), transmit and dispose of real property like citizens, and their heirs and devisees take in same manner. (N.Y. Real Prop. Law §10[2] [NYCLS]). Right, title or interest in or to real property may not be questioned because of alienage of person through whom title was derived. (N.Y. Real Prop. Law §15 [NYCLS]).

Occupational Restrictions.

For restrictions (if any) on practice of various occupations, see N.Y. Educ. Law tit. VIII ; for temporary alien worker restrictions for physicians and dentists (N.Y. Educ. Law §6524[6] and 6604[6]) except as otherwise provided by law, aliens lawfully admitted for permanent residence in U.S. may hold positions in “competitive” (i.e., merit and fitness determined by competitive exam, N.Y. Civ. Serv. Law §44) class of civil service (N.Y. Civ. Serv. Law §53); may continue in competitive positions as employees of private enterprises acquired by state (N.Y. Civ. Serv. Law §45[1]); may engage in business of manufacturing or selling alcoholic beverages (N.Y. Alco. Bev. Cont Law §126[3],[4]). Aliens may not be gunsmiths or deal in firearms. (N.Y. Penal Law §400.00[1] [NYCLS]).

Other Restrictions.

Aliens may not vote (N.Y. Elec. Law §5-102[1]); are not qualified to serve as jurors (N.Y. Jud. Ct. Acts Law §510[1] [NYCLS]); may not receive letters to act as fiduciary if they are non-domiciliaries, except in case of foreign guardian as prescribed in N.Y. Surr. Ct. Proc. Act §1716[4] [NYCLS] or if they serve with one or more co-fiduciaries, at least one being New York resident (N.Y. Surr. Ct. Proc. Act §707[1][c] [NYCLS]); may not possess any dangerous or deadly weapons at any time (N.Y. Penal Law §265.01[5] [NYCLS]), subject to certain exceptions (N.Y. Penal Law §265.20 [NYCLS]).

Miscellaneous.

Aliens generally are entitled to same workers' compensation and volunteer fireman's benefits as citizens, with certain exceptions as to dependents in foreign countries. (N.Y. Workers' Comp. Law §17; N.Y. Vol. Fire. Ben. Law §17 [NYCLS]). There is provision for payment of awards, when desirable, to Nonresident Compensation Fund rather than to nonresident. (N.Y. Workers' Comp. Law §25–b; N.Y. Vol. Fire. Ben. Law §52 [NYCLS]). Aliens are not entitled to juries composed in part of aliens (N.Y. Civ. Rights Law §12); alien children's names, addresses, etc. are collected and furnished to local school boards to enforce compulsory schooling laws (N.Y. Educ. Law §305[9]); for provisions concerning admission to City University of New York, see N.Y. Educ. Law §6222. Foreign-trained nurses are eligible for supplementary professional courses leading to registered nurse license. (N.Y. Educ. Law §6453[1](1)).

5 CIVIL ACTIONS AND PROCEDURE

5.01 ACCORD AND SATISFACTION:

Compromise.—Where there is bona fide dispute as to validity or amount of claim, acceptance by one party of less than amount claimed, tendered as payment in full by other party, makes good accord and satisfaction. (238 N.Y. 362, 144 N.E. 641).

Pleading.

The defense of accord and satisfaction is affirmative defense that must be specially plead. (98 A.D.2d 913, 471 N.Y.S.2d 175).

Executory accord may not be denied effect because satisfaction is to occur at later date, provided promise of party against whom enforcement of accord is sought is in writing and signed by him or his agent. (N.Y. Gen. Oblig. Law §15-501[2] [NYCLS]).

See also category 3 Business Regulation and Commerce, topic 3.09 Commercial Code.

5.02 ACTIONS:

Forms of Action.

There is only one form of civil action. Formal distinction between actions at law and suits in equity have been abolished. (N.Y. C.P.L.R. 103[a] [NYCLS]).

Equity.

See subhead Forms of Action, supra.

Conditions Precedent.

See subhead Notice of Claim, infra.

Commencement of Action.

See topic 5.20 Process.

Special Proceedings.

Special proceedings are those authorized by and designated as such by N.Y. C.P.L.R.; e.g., determination of rights of adverse claimants to attached property (N.Y. C.P.L.R. 6221 [NYCLS]), proceedings relating to express trust (N.Y. C.P.L.R. 7701 [NYCLS]), writs of habeas corpus and certiorari (N.Y. C.P.L.R. 7001 [NYCLS]), or by Consolidated Laws; e.g., summary proceedings to recover real property and to punish for civil contempt and condemnation proceedings. General procedure relating to actions also applies to all special proceedings unless contrary provisions are contained in N.Y. C.P.L.R. 401-411 or in law authorizing particular special proceeding. (N.Y. C.P.L.R. 103[b] [NYCLS]).

Parties.

Except where court otherwise prescribes, executor, administrator, guardian of property of infant, committee of property of judicially declared incompetent, conservator of property of conservatee, trustee of express trust, insured person who has executed to his insurer either loan or subrogation receipt, trust agreement or similar instrument, or person with whom or in whose name contract is made for benefit of another, may sue or be sued without joining person for or against whose interest action is brought. (N.Y. C.P.L.R. 1004 [NYCLS]).

Joinder.

All persons who ought to be parties if complete relief is to be had or who might inequitably be affected by judgment must be made plaintiffs or defendants unless jurisdiction cannot be obtained over such a person, in which case, court may, when justice requires, allow action to proceed without joining such a person. When person who should be joined as plaintiff refuses to do so, he may be made defendant. (N.Y. C.P.L.R. 1001 [NYCLS]).

All persons may join in one action as plaintiffs if they assert any right to relief jointly, severally or in the alternative arising out of the same transaction, occurrence or series of transactions or occurrences and if any question of law or fact common to all of them would arise. (N.Y. C.P.L.R. 1002[a] [NYCLS]).

All persons may be joined in one action as defendants if there is asserted against them jointly, severally or in the alternative, any right to relief arising out of the same transaction, occurrence or series of transactions or occurrences and if any common question of law or fact would arise. (N.Y. C.P.L.R. 1002[b] [NYCLS]).

It is not necessary that each plaintiff be interested in obtaining, or that each defendant be interested in defending against, all relief demanded or as to every claim included in action. Court may order separate trials or make such other orders as will prevent party from being embarrassed, delayed, or put to expense by inclusion of party against whom he asserts no claim and who asserts no claim against him. (N.Y. C.P.L.R. 1002[c] [NYCLS]).

An action may be dismissed for nonjoinder of a necessary party, but misjoinder of parties is not grounds for dismissal. Court may add or drop parties at any stage of action upon just terms and may order any claim against party severed and proceeded with separately. (N.Y. C.P.L.R. 1003 [NYCLS]).

Class Actions.

Prerequisites to class action are: (1) Numerous members so that joinder is impracticable; (2) common questions of law and fact predominate; (3) claims or defenses of named representatives are typical of class; (4) named representatives will adequately protect interests of class; (5) proceeding as class action is superior to other available methods of adjudication. (N.Y. C.P.L.R. 901[a] [NYCLS]). Action to recover penalty or minimum measure of recovery which is created or imposed by statute will proceed as class action only if statute specifically authorizes such proceeding. (N.Y. C.P.L.R. 901[b] [NYCLS]).

Within 60 days after time to serve responsive pleading has expired for all persons named as defendants in action brought as class action, plaintiff must move for order to determine whether it is to be so maintained. (N.Y. C.P.L.R. 902 [NYCLS]). Court order permitting class action must describe class. Court may in its discretion limit class to those members who do not request exclusion from class within specified period of time after notice. (N.Y. C.P.L.R. 903

[NYCLS]).

Reasonable notice of commencement of class action must be given to class in such manner as court directs, except in class actions brought primarily for injunctive or declaratory relief unless court finds that notice is necessary to protect interests of represented parties and cost will not prevent action from going forward. (N.Y. C.P.L.R. 904[a] [NYCLS], [b] [NYCLS]). Judgments, whether or not favorable to class, shall include and describe those whom court finds to be members of class. (N.Y. C.P.L.R. 905 [NYCLS]).

Class action cannot be dismissed, discontinued, or compromised without court approval. Notice of proposed dismissal, discontinuance, or compromise must be given to all members of class in such manner as court directs. (N.Y. C.P.L.R. §908 [NYCLS]).

Intervention.

As of Right.

Upon timely motion, any person shall be permitted to intervene in any action where (1) statute grants such right, (2) representation of person who will or may be bound by judgment is or may be inadequate or (3) action involves disposition or distribution of, or title or claim for injury to, property and person may be adversely affected by judgment. (N.Y. C.P.L.R. 1012[a] [NYCLS]).

By Permission.

Upon timely motion, any person may be permitted to intervene in any action where (1) statute confers such right in court's discretion or (2) person's claim or defense and main action have question of law or fact in common. In exercising its discretion, court is to consider whether intervention will unduly delay action or prejudice substantial rights of any party. (N.Y. C.P.L.R. 1013 [NYCLS]).

Third Party Practice.

After service of his answer, a defendant (third-party plaintiff) may bring in nonparty (thereafter, third-party defendant), who is or may be liable for all or part of plaintiff's claim. Third-party summons and complaint and all prior pleadings served in action shall be served upon such person within 120 days of filing of answer. Third-party defendant may proceed against any person who is or may be liable to him for all or part of third-party claim. (N.Y. C.P.L.R. 1007 [NYCLS], 1011 [NYCLS]). Third-party defendant may assert against plaintiff any defense which third-party plaintiff has to plaintiff's claim and has all rights to counter-claim, cross-claim and appeal against other adverse parties to action. (N.Y. C.P.L.R. 1008 [NYCLS]). Within 20 days after service of answer to third-party complaint, plaintiff may amend his complaint without leave of court, and assert any claim he has against third-party defendant. (N.Y. C.P.L.R. 1009 [NYCLS]).

Interpleader.

A stakeholder is person who is or may be exposed to multiple liability as result of adverse claims and may bring action of interpleader against two or more claimants. Defendant stakeholder may bring in claimant not party to action by serving upon such claimant summons and interpleader complaint and all prior pleadings served in action. After time for all parties to plead has expired, stakeholder may move for order discharging him from liability in whole or in part to any party upon conditions imposed by court. If another action is pending in state court between claimant and stakeholder based on same claim, appropriate court may dismiss interpleader complaint and order consolidation or joint trial of actions or may make claimant party and stay pending action until final disposition of interpleaded action. (N.Y. C.P.L.R. 1006 [NYCLS]).

The text of an interpleader compact between N.Y. and other states was approved and adopted by L. 1962, c. 237, effective Sept. 1, 1963.

Consolidation of Actions.

Actions involving common questions of law or fact may by order be consolidated or court may order joint trial or make other orders to avoid unnecessary costs or delay. (N.Y. C.P.L.R. 602[a] [NYCLS]).

Severance of Actions.

In furtherance of convenience or to avoid prejudice, court may order severance of claims or separate trial of any claim or issue. Court may also order that any claim or issue be tried prior to trial of others. (N.Y. C.P.L.R. 603 [NYCLS]).

Where one action is pending in supreme court and another is pending in another court, supreme court, upon motion, may remove to itself action in other court and consolidate it or have it tried together with that in supreme court; where one action is pending in county court and another in city, municipal, district or justice court in same county, county court, upon motion, may remove to itself action in other court and consolidate it or have it tried together with that in county court. (N.Y. C.P.L.R. 602[b] [NYCLS]).

Stay of Proceedings.

Generally, court in which action is pending may in proper case grant stay of proceedings upon such terms as may be just. (N.Y. C.P.L.R. 2201 [NYCLS]).

Abatement and Substitution of Parties.

An action in which right sought to be enforced survives only to surviving plaintiffs or against surviving defendants does not abate upon death of one or more of the plaintiffs or defendants. (N.Y. C.P.L.R. 1015[b] [NYCLS]). If a claim for or against a party who died is not extinguished by his death the court will order a substitution of proper parties. (N.Y. C.P.L.R. 1015[a] [NYCLS]). If a person who is party in his capacity as public officer dies, action may be continued by or against his successor. (N.Y. C.P.L.R. 1019 [NYCLS]). If party is adjudicated incompetent or conservator has been appointed, court will order substitution of his committee or conservator. (N.Y. C.P.L.R. 1016 [NYCLS]). If receiver is appointed for party, or corporate party is dissolved, court will order substitution of proper parties. (N.Y. C.P.L.R. 1017 [NYCLS]). Upon transfer of interest, action may be continued by or against original parties unless court orders transferee to be substituted or joined. (N.Y. C.P.L.R. 1018 [NYCLS]). See also category 13 Estates and Trusts, topic 13.10 Executors and Administrators.

Survival of Cause of Action.

No cause of action for injury to person or property is lost because of death of person in whose favor action existed or of person liable for injury. Action may be brought or continued by or against personal representative of deceased person, although in such case punitive damages or penalties will not be allowed for injury to person. Cause of action arising from injury to third person is not lost by death of such persons. (N.Y. Est. Powers & Trust Law §11-3.2[b] [NYCLS]).

Limitation of.

See topic 5.16 Limitation of Actions.

Small Claims.

See category 6 Courts and Legislature, topic 6.01 Courts.

Discontinuance of Actions.

Except in case of voluntary discontinuance (N.Y. C.P.L.R. 3217[a] [NYCLS]), action cannot be discontinued by party asserting claim except upon order of court and upon terms and conditions court deems proper. “After case has been submitted to court or jury to determine facts court may not order action discontinued except upon stipulation of all parties appearing in the action.” (N.Y. C.P.L.R. 3217[b] [NYCLS]).

Administration.

See category 13 Estates and Trusts, topic 13.10 Executors and Administrators.

Direct Actions Against Insurer.

See category 23 Transportation, topic 23.01 Motor Vehicles, subhead Direct Actions.

Notice of Claim.

In certain actions against public corporation or officer, appointee or employee thereof, notice of claim must be served within 90 days after claim arises. See N.Y. Gen. Mun. Law §50-e(1)[a].

5.03 APPEAL AND ERROR:

Decisions of courts are reviewable by appeal which is taken by notice served on attorney for adverse party and filed in office where judgment of court of original instance is entered, except that where order granting permission to appeal is made, appeal is taken when such order is entered. When appeal is taken to Court of Appeals, clerk of court with which notice of appeal is required to be filed should send copy of notice to clerk of Court of Appeals. Similar requirement lies with clerk of Appellate Division when that court grants permission to appeal to Court of Appeals. (N.Y. C.P.L.R. 5515 [NYCLS]). Writs of error in both criminal and civil cases have been abolished.

To Court of Appeals.

In civil actions, appeal may be taken to Court of Appeals as of right: (1) from order of Appellate Division of Supreme Court which finally determines action, if (a) construction of state or federal constitution is involved; or (b) action was commenced in Supreme Court, County Court, Surrogate's Court, Family Court, Court of Claims or administrative agency and there is dissent by at least two justices on question of law in favor of party taking appeal; (2) from order of Appellate Division granting new trial or hearing or affirming such order in action commenced in any of courts designated in (1) (b) above, and appellant stipulates that, upon affirmance, judgment absolute shall be rendered against him; (3) directly from court of record of original jurisdiction which finally determines action, where only question involved on appeal is validity of statute of state under state or federal constitution; (4) from final judgment of court of original instance or from final determination of administrative agency, or from order of Appellate Division which finally determines appeal from such judgment or determination, where Appellate Division has made order on prior appeal which necessarily affects judgment and which satisfies requirements designated in (1) except that of finality. (N.Y. C.P.L.R. 5601 [NYCLS]). Appeal may be by permission of court in certain other cases. (N.Y. C.P.L.R. 5602 [NYCLS], 5713 [NYCLS]). Review by court of appeals is limited (except in special cases) to questions of law. (N.Y. C.P.L.R. 5501[b] [NYCLS]).

To Appellate Division.

For actions originating in supreme court or county court, appeal may be taken to appellate division as of right from any final or interlocutory judgment, except one entered subsequent to order of appellate division itself which disposes of all issues in action, and from most decisions granting or denying motions made on notice. (N.Y. C.P.L.R. 5701[a] [NYCLS]). Appeal may also be taken as of right where county court or supreme court has determined appeal from lower court. (N.Y. C.P.L.R. 5703[b] [NYCLS]). Rights of appeal directly to appellate division from all other courts are set by statutes governing practice in such courts. (N.Y. C.P.L.R. 5702 [NYCLS]).

To County Court.

Appeals in civil causes originating in uniform justice courts may be taken to county court, unless appellate term of supreme court has been established for such purpose. (N.Y. Uniform Just. Ct. Act §1701 [NYCLS]).

Time to Appeal.

In civil actions, appeal as of right must be taken within 30 days after adverse party serves appellant with copy of judgment or order and written notice of its entry. When appellant is party serving such papers, appeal must be taken within 30 days thereof. Where party must move for permission to appeal, such motion must be made within 30 days of service, as above, or within 30 days of notice that permission sought has been denied. Where one party has taken appeal, adverse party may then also appeal. Latter party must do so within greater of time period enumerated above or ten days after service of notice or motion. (N.Y. C.P.L.R. 5513 [NYCLS]).

Appeal Bond.

No security generally required to perfect appeals.

Stay of Enforcement.

Service of notice of appeal or affidavit of intention to move for permission to appeal stays all proceedings to enforce judgment where: (1) appellant or moving party is state or any political subdivision, officer or agency of state; (2) judgment or order directs payment of sum of money and undertaking in that sum is given to cover ultimate judgment or order; (3) judgment or order requires payment of sum of money in fixed installments and appropriate undertaking, as determined by court, is given; (4) judgment or order directs assignment or delivery of personal property and such property, or appropriate undertaking as determined by court, is placed in custody of court; (5) judgment or order directs execution of any instrument and it is executed and deposited in office where original judgment or order was entered; (6) appellant or moving party is in possession or control of real property which judgment or order directs to be conveyed or delivered and appropriate undertaking is given; (7) judgment or order directs performance of two or more of subparagraphs 2-6 and appellant complies with each respective subparagraph. (N.Y. CPLR 5519[a] [NYCLS]).If judgment or order appealed from is affirmed or modified, stay continues for five days after service upon appellant of notice of entry of order determining appeal. Where appeal is taken, or motion is made for permission to appeal from such order, stay continues until five days after service of notice of entry of order determining such appeal or motion. (N.Y. C.P.L.R. 5519[e] [NYCLS]).

5.04 BONDS:

An undertaking includes any obligation, whether or not principal is party, containing covenant by surety to pay required amount if any required condition is not fulfilled. (N.Y. C.P.L.R. 2501[1] [NYCLS]). If no condition is specified, condition will be that principal will discharge duties and fulfill obligations imposed by law or court order. If condition specifies that undertaking will be void on payment or performance of act, undertaking will be deemed to contain covenant to pay amount or perform act. (N.Y. C.P.L.R. 2502[c] [NYCLS]; N.Y. Gen. Oblig. Law §7.301). Undertaking also includes any deposit in legal tender of U.S. or in face value of unregistered bonds of U.S. or of state. (N.Y. C.P.L.R. 2501[2] [NYCLS]). Unless court orders otherwise, surety must be insurance company authorized to execute undertaking within state or natural person, except attorney, who must execute affidavit giving his full name and address and state that he is domiciled in state and is worth at least amount specified in undertaking exclusive of liabilities and of property exempt from application to satisfy judgment. (N.Y. C.P.L.R. 2502[a] [NYCLS]).

One instrument may contain two or more undertakings. (N.Y. C.P.L.R. 2502[b] [NYCLS]). Undertaking must be acknowledged in form required for deed to be recorded. (N.Y. C.P.L.R. 2502[d] [NYCLS]).

Where two or more persons are surety on undertaking in action or proceeding they are jointly and severally liable. (N.Y. C.P.L.R. 2511 [NYCLS]).

Unless court orders otherwise, undertaking which amounts to more than $1,000, which is not deposit of U.S. legal tender or U.S. or state unregistered bonds and where natural persons are surety, must be secured by real property in state worth, excluding encumbrances, amount of undertaking. Such undertaking creates lien when recorded in office of clerk or register of county where property is located. (N.Y. C.P.L.R. 2503[a] [NYCLS]). Required affidavit for undertakings secured by real property must contain, in addition to requirements of N.Y. C.P.L.R. 2502(a) [NYCLS], supra: (1) statement that surety or sureties solely own real property; (2) description of property sufficient to establish lien; (3) statement of total amounts of liens, unpaid taxes and encumbrances against property; and (4) statement of assessed value, market value, value of equity over and above all encumbrances, liens and unpaid taxes. (N.Y. C.P.L.R. 2503[b] [NYCLS]). Duplicate original of affidavit must be filed with clerk or register of county where real property is located. Certain other information must be entered on surety bond liens docket in clerk's office or register of county where real property is located. (N.Y. C.P.L.R. 2503[c] [NYCLS]). Lien is released after filing consent acknowledged by person for whose benefit lien was given or by order of court made on motion with notice or by court order. (N.Y. C.P.L.R. 2503[d] [NYCLS]).

Waiver of Undertaking.

Undertaking may be waived by written consent of all parties unless court orders otherwise. (N.Y. C.P.L.R. 2504[a] [NYCLS]).

Filing.

Undertaking and any required affidavit must be filed with clerk of court where action is triable, or, on appeal, in office where judgment of court of original instance is entered, and copy must be served on adverse party. Undertaking is effective when so served and filed. (N.Y. C.P.L.R. 2505 [NYCLS]).

If insurance company issues undertaking and certificate of qualification is not filed, exception to sufficiency of may be taken within ten days after receipt of copy of undertaking. (N.Y. C.P.L.R. 2506[a] [NYCLS]). Surety must then move to justify within ten days. Certificate of qualification issued pursuant to N.Y. Ins. Law §1111[b-d] will be accepted in lieu of justification. (N.Y. C.P.L.R. 2507[a] [NYCLS]).

Other sections of N.Y. C.P.L.R. concerning undertakings are: motion for new or additional security, (N.Y. C.P.L.R. §2508 [NYCLS]); control of assets by agreement with surety, (N.Y. C.P.L.R. §2509 [NYCLS]); discharge of surety on undertaking of fiduciary, (N.Y. C.P.L.R. §2510 [NYCLS]); undertaking by state, municipal corporation or public officer, (N.Y. C.P.L.R. §2512 [NYCLS]).

Surrogate Court Bonds.

Surrogate Court practice is governed by special provisions set out in N.Y. Surr. Ct. Proc. Act §§801-811.

5.05 CERTIORARI:

Relief previously obtained by writs and orders of certiorari, mandamus or prohibition is now obtained under Art. 78 proceeding. Whenever necessary to accomplish substantial justice, Art. 78 proceeding may be maintained against any and every court, tribunal, board, corporation, officer, or other person, or aggregation of persons exercising judicial or quasi-judicial functions, including members whose term of office has expired. (N.Y. C.P.L.R. 7801 [NYCLS], 7802 [NYCLS]).

Jurisdiction.

Art. 78 proceeding is brought in supreme court in any county within judicial district in which allegedly improper official action or inaction occurred or where principal office of respondent is located. If petition is directed against supreme court justice, judge of county court or court of general sessions, application must be made to appellate division and when petition is directed against certain named state agencies, application must be made to supreme court, Albany County. (N.Y. C.P.L.R. 506 [NYCLS], 7804 [NYCLS]). For contents of petition and requirements for notice and service to respondent, see N.Y. C.P.L.R. 7804 [NYCLS].

Time for Proceeding.

Unless shorter time is expressly provided elsewhere in law, proceeding body or officer must be instituted within four months after determination to be reviewed becomes final and binding, or after respondent's refusal to perform its duty, except that court may permit petition within two years if petitioner was under disability when determination became final. (N.Y. C.P.L.R. 217[1] [NYCLS]).

Extent of Review.

Art. 78 proceedings are available only to determine: (1) whether body or officer failed to perform duty enjoined upon it by law; (2) whether body or officer proceeded, is proceeding or is about to proceed without or in excess of jurisdiction; (3) whether determination was made in violation of lawful procedure, was affected by error of law or was arbitrary and capricious or abuse of discretion, including abuse of discretion as to measure or mode of penalty or discipline imposed; or (4) whether determination made as result of hearing held, and at which evidence was taken, pursuant to direction by law is, on entire record, supported by substantial evidence. (N.Y. C.P.L.R. 7803 [NYCLS]).

This procedure is generally not available to review determination: (1) made in civil action or criminal matter except order summarily punishing contempt of court committed in immediate view and presence of such court or judge; (2) which does not finally determine rights; (3) which can be adequately reviewed by appeal; or (4) which can be reheard by body or officer making determination. (N.Y. C.P.L.R. 7801 [NYCLS]).

5.06 CHARITABLE IMMUNITY:

See topic 5.09 Damages.

5.07 COMMISSIONS TO TAKE TESTIMONY:

See topic 5.11 Depositions and Discovery.

5.08 COSTS:

Party Who Wins Judgment, or Appeal, in Action.

Unless statute provides or court determines otherwise, party in whose favor judgment is entered is entitled to costs. (N.Y. C.P.L.R. 8101 [NYCLS]). Plaintiff is not entitled to costs if he brings action in higher court than is necessary and does not recover amount specified by law. (N.Y. C.P.L.R. 8102 [NYCLS]). See also N.Y. C.P.L.R. 8103 [NYCLS].

Amount of Costs.

Costs awarded in action is fixed. (N.Y. C.P.L.R. 8201 [NYCLS]). Amount of costs on motion or appeal to appellate division or court of appeals is determined by court subject to maximum dollar limits. (N.Y. C.P.L.R. 8202-04).

Additional allowances and disbursements may be awarded as of right or in court's discretion depending on type of action, relief requested or granted. (N.Y. C.P.L.R. 8301 [NYCLS]).

Security for costs is allowed as of right where plaintiff is not domestic corporation, foreign corporation licensed to do business in state or resident of state when motion is made. Court in its discretion may order security for costs in action by or against assignee or trustee for benefit of creditors, trustee, receiver, or debtor in possession in bankruptcy, committee of incompetent, official trustee or committee of person imprisoned in this state, executor, administrator, conservator, guardian ad litem, or receiver. (N.Y. C.P.L.R. 8501 [NYCLS]). Security for costs not allowed where permission to sue has been granted to poor person or plaintiff is petitioner in habeas corpus proceeding. (N.Y. C.P.L.R. 8501[a] [NYCLS]).

Proceedings are stayed pending furnishing of ordered security, and complaint may be dismissed if not furnished in 30 days. (N.Y. C.P.L.R. 8502 [NYCLS]).

Amount of security is $500 in counties within New York City, $250 in other counties, or such greater amount as court shall determine. (N.Y. C.P.L.R. 8503 [NYCLS]).

5.09 DAMAGES:

Common law generally prevails as to compensatory damages. Punitive damages are allowed in cases of actual malice, or such wanton or reckless action as to infer malice; and in such cases, motive and conduct of defendant may be considered by jury for purpose of assessment of damages. Punitive damages are allowable in personal injury actions based on negligence if such negligence amounts to flagrant misconduct. (27 A.D.2d 112, 276 N.Y.S.2d 173). Punitive damages can be recovered in action in equity where facts warrant. (12 N.Y.2d 329, 239 N.Y.S.2d 547, 189 N.E.2d 812). Upon proof of breach of contract, plaintiff entitled to nominal damages as matter of law. (286 N.Y. 398, 36 N.E.2d 637). Punitive damages are not recoverable in fraud and deceit actions unless fraud is aimed at public generally, is gross and involves high moral culpability. (19 N.Y.2d 249, 279 N.Y.S.2d 10, 225 N.E.2d 741).

Charitable Immunity.

Charities are not immune from tort liability. (2 N.Y.2d 656, 163 N.Y.S.2d 3, 143 N.E.2d 3).

Contributory Negligence Rule.

Culpable conduct by tort claimant will not bar recovery, but will diminish recoverable damages in proportion to culpable conduct of respective parties. (N.Y. C.P.L.R. 1411 [NYCLS]).

Uniform Contribution Among Tortfeasors Act.

Not adopted.

No-Fault Insurance.

See category 23 Transportation, topic 23.01 Motor Vehicles, subhead No-Fault Insurance.

See also category 13 Estates and Trusts, topic 13.05 Death, subhead Action for Death.

Sovereign Immunity.

State waives its immunity and subjects itself and its subdivisions to same liability that may be found against individuals and corporations in actions brought in state supreme court, for same acts. (N.Y. Ct. Cl. Act §8). Claims against state must be brought in court of claims. (N.Y. Ct. Cl. Act §9). However, municipality bears no liability for negligent performance by its agents of governmental functions, absent existence of special relationship between injured party and municipality. (90 N.Y.2d 966, 665 N.Y.S.2d 613, 688 N.E.2d 487). Claimant must comply with procedural limitations of Court of Claims Act. Neither workers' compensation law nor military law of state are repealed or altered in any way by state's waiver of immunity. (N.Y. Ct. Cl. Act §§8, 8-a).

5.10 DECLARATORY JUDGMENTS:

See topic 5.15 Judgments.

5.11 DEPOSITIONS AND DISCOVERY:

Disclosure.

There must be full disclosure of all matter which is material and necessary in prosecution or defense of action, regardless of burden of proof by all of following: party; officer, director, member, agent or employee of party; person possessing cause of action or defense asserted in action; person out of or about to depart from state, or who resides more than 100 miles from place of trial, or is too sick or infirm to attend trial; person authorized to practice medicine, dentistry or podiatry who has provided medical, dental or podiatric care to party demanding disclosure, or who has been retained by him as expert witness; or any other person, upon notice stating circumstances or reasons such disclosure is sought or required. However, following are not obtainable: privileged matter if objection is made thereto, attorney work product, and material prepared by party or his representative in anticipation of litigation or for trial, unless other party shows substantial need for material and that he is unable to obtain material or their equivalent without undue hardship. (N.Y. C.P.L.R. 3101[a]-[c] [NYCLS]). Each party shall upon request identify each person he expects to call as expert witness at trial and disclose in reasonable detail subject matter and facts and opinions on which expert is expected to testify, qualifications of expert, and summary of grounds for expert's opinion. Party may omit names of medical, dental or podiatric experts in action for medical, dental or podiatric malpractice. (N.Y. C.P.L.R. 3101[d] [NYCLS]). Party may obtain copy of his own statement. (N.Y. C.P.L.R. 3101[e] [NYCLS]). Party may obtain any insurance agreement which may satisfy part or all of judgment, but such information is not necessarily admissible at trial. (N.Y. C.P.L.R. 3101[f] [NYCLS]). With certain exceptions, full disclosure of any accident report prepared in regular course of business operations is required. (N.Y. C.P.L.R. 3101[g] [NYCLS]).

Disclosure Devices.

Disclosure may be obtained by one or more of following: depositions (upon oral questions, or if outside state, upon written questions (N.Y. C.P.L.R. 3102 [NYCLS]); interrogatories (N.Y. C.P.L.R. 3102 [NYCLS]); demands for addresses of persons including party, officer or member of party and any person who possessed cause of action or defense asserted (N.Y. C.P.L.R. 3102 [NYCLS], 3118 [NYCLS]); discovery and production of documents or property for inspection, testing copying or photographing (N.Y. C.P.L.R. 3102 [NYCLS], 3120 [NYCLS]); physical and mental examinations of persons (N.Y. C.P.L.R. 3102 [NYCLS], 3121 [NYCLS]); and requests for admissions as to matters of fact, papers, documents and photographs (N.Y. C.P.L.R. 3102 [NYCLS], 3123[a] [NYCLS]). Party may not serve written interrogatories on another party and also demand bill of particulars, except in matrimonial action. Party to action for damages for personal injury, injury to property or wrongful death predicated solely on negligence may not serve interrogatories on and conduct deposition of same party without leave of court. (N.Y. C.P.L.R. 3130[1] [NYCLS]).

Method of Obtaining Disclosure.

Unless otherwise provided by N.Y. C.P.L.R. or by court, disclosure shall be obtained by stipulation or on notice without leave of court. (N.Y. C.P.L.R. 3102[b] [NYCLS]). Before action is commenced, disclosure may be obtained only by court order. (N.Y. C.P.L.R. 3102[c] [NYCLS]). Except for judgment creditors seeking discovery to satisfy judgment, disclosure may be obtained only by order of trial court on notice after trial has commenced. (N.Y. C.P.L.R. 3102[d] [NYCLS]). In action in which state is party, disclosure shall be available as if state were private person. (N.Y. C.P.L.R. 3102[f] [NYCLS]).

Depositions upon oral examination may be taken on service of notice 20 days before examination, unless court orders otherwise, stating time and place of examination, and name and address of each person, if known, to be examined. Notice need not enumerate matters upon which the person is to be examined. (N.Y. C.P.L.R. 3107 [NYCLS]). Party to be examined may serve notice of at least ten days for examination of any other party, his agent or employee at same time and place. (N.Y. C.P.L.R. 3107 [NYCLS]). Depositions on written questions may be taken by service of notice on all parties designating officer who will take testimony as well as questions to be propounded, and within 15 days thereafter party so served may serve written cross-questions upon each party. Within seven days thereafter original party may serve written redirect questions upon each party, and within five days thereafter party so served may serve written recross-questions upon each party. (N.Y. C.P.L.R. 3109[a] [NYCLS]). Examination of person not party, or officer, director, member or employee of party, must be served by subpoena at least 20 days prior to examination. (N.Y. C.P.L.R. 3106[b] [NYCLS]). Deposition of person confined under legal process may be taken only by leave of court. (N.Y. C.P.L.R. 3106[c] [NYCLS]). Party desiring to take deposition of particular officer, director, member or employee shall include in notice or subpoena identity, description or title of such individual. (N.Y. C.P.L.R. 3106[d] [NYCLS]). Notice or subpoena may require production of books, papers, etc., in possession or control of person to be examined. (N.Y. C.P.L.R. 3111 [NYCLS]). If party, or person under party's control, refuses to comply with order for disclosure, court may issue specified penalties. (N.Y. C.P.L.R. 3126 [NYCLS]).

Deposition may be taken before any person in state authorized to administer oaths, etc., except attorney for party, employee of attorney or one disqualified by interest. (N.Y. C.P.L.R. 3113[a] [NYCLS]). Objections may be made, for first time, at trial. (N.Y. C.P.L.R. 3115[a] [NYCLS]). Examination and cross-examination of deponents proceeds as permitted in open court. If deponent is party called by adverse party, he may be cross-examined by his own attorney. Cross-examination need not be limited to subject matter of examination in chief. (N.Y. C.P.L.R. 3113[c] [NYCLS]). Parties may stipulate that deposition be taken by remote electronic means and that party may participate electronically. Stipulation must designate reasonable provisions to ensure that accurate record of deposition is generated and must provide for any provisions appropriate under circumstances. Unless otherwise stipulated to by parties, officer administering oath must be physically present at place of deposition and additional costs of conducting deposition by telephonic or other remote electronic means, such as telephone charges, must be borne by party requesting that deposition be conducted by such means. (N.Y. C.P.L.R. 3113[d] [NYCLS]). If deposition is to be taken pursuant to court order prior to commencement of action, court may appoint referee to take testimony. (N.Y. C.P.L.R. 3102[c] [NYCLS]). If deposition is taken upon written questions, questions are to be read by examining officer who shall also administer oath. All objections must be noted and deposition shall proceed subject to right of deponent to apply for protective order. (N.Y. C.P.L.R. 3113[b] [NYCLS]).

In action in which the mental or physical condition or blood relationship of a party is in controversy, a party may serve notice to submit to a physical, mental or blood examination by a designated physician. Notice shall specify time not less than 20 days after service and conditions and scope of examination. (N.Y. C.P.L.R. 3121[a] [NYCLS]).

Deposition shall be signed by deponent before any officer authorized to administer oath. Witness has 60 days in which to make changes to transcript. If witness fails to sign within 60 days, it may be used as fully as though signed. (N.Y. C.P.L.R. 3116[a] [NYCLS]).

Deposition taken within state in action pending outside state is governed by same rules as are employed for purpose of taking testimony in state. Supreme or county court may make orders in aid of taking such deposition. (N.Y. C.P.L.R. 3102[e] [NYCLS]).

Depositions Taken Outside State in Action Pending Within State.

Testimony may be taken before person authorized by real property law of state to take acknowledgments of deeds outside of state or to administer oaths by law of U.S. or of place where deposition is taken. (N.Y. C.P.L.R. 3113[a][2] [NYCLS]). Testimony may be taken in foreign country before any diplomatic or consular agent or representative of U.S. or person appointed by commission or under letters rogatory or officer of armed forces authorized to take acknowledgments of deeds. (N.Y. C.P.L.R. 3113[a][3] [NYCLS]).

Commission or letters rogatory may be issued where necessary or convenient for taking of deposition outside state. (N.Y. C.P.L.R. 3108 [NYCLS]).

Uniform Foreign Depositions Act.

Not adopted.

Commissions.

Commission may be issued for taking of deposition outside of state where necessary or convenient. (N.Y. C.P.L.R. 3108 [NYCLS]).

Deposition to perpetuate testimony may be taken before commencement of action, to aid in bringing of action, to preserve information, or to aid in arbitration, but only by court order. (N.Y. C.P.L.R. 3102[c] [NYCLS]).

Compelling Attendance of Witnesses.

Attendance of witness may be required by subpoena. (N.Y. C.P.L.R. 2301 [NYCLS]). Subpoenas may be issued by, among other persons, clerk of court, judge where there is no clerk, attorney general, attorney of record for party to action, administrative proceeding or arbitration, arbitrator, referee, or member of board, commission or committee authorized by law to hear, try or determine matter or to do any other act, in official capacity, in relation to which proof may be taken or attendance of person may be required. (N.Y. C.P.L.R. 2302[a] [NYCLS]). If subpoena is issued by judge, clerk or officer of court, failure to comply is punishable as contempt. (N.Y. C.P.L.R. 2308[a] [NYCLS]). If subpoena is not returnable in court, issuer, or person on whose behalf subpoena was issued, may move in supreme court to compel compliance. (N.Y. C.P.L.R. 2308[b][1] [NYCLS]). Failure to comply with subpoena issued pursuant to social service law ("child support subpoena") may result in penalty of no greater than $50. (N.Y. C.P.L.R. 2308[b][2] [NYCLS]).

Demand for Admission of Facts.

At any time after service of answer or after expiration of 20 days from service of summons, whichever is sooner, and not later than 20 days before trial, party may serve upon any other party written request for admission by latter of genuineness of any papers or documents, or correctness or fairness of representation of any photographs, or of truth of any matters of fact set forth in written request as to which party requesting admission reasonably believes there can be no substantial dispute at trial and which are within knowledge of such other party or can be ascertained by him upon reasonable inquiry. (N.Y. C.P.L.R. 3123[a] [NYCLS]).

Protective Orders and Supervision.

To prevent unreasonable annoyance, expense, embarrassment, disadvantage or other prejudice court may at any time or of its own initiative, or on motion of any party or of any person from whom discovery is sought, make protective orders denying, limiting, conditioning or regulating use of any disclosure device. (N.Y. C.P.L.R. 3103[a] [NYCLS]). Court may supervise all or part of disclosure procedure by judge or referee before whom all disclosure matters and applications shall be returnable, and orders of referee may be reviewed on application of party or witness. (N.Y. C.P.L.R. 3104[a] [NYCLS]).

5.12 EQUITY:

See topic 5.02 Actions.

5.13 EVIDENCE:

Witnesses.

Parties, and their wives or husbands, may testify as witnesses in their own behalf and are not excluded or excused by reason of interest in event. (N.Y. C.P.L.R. 4512 [NYCLS]). Person convicted of crime is competent, but conviction may be proved for purpose of affecting weight of his testimony. (N.Y. C.P.L.R. 4513 [NYCLS]).

See also topic 5.11 Depositions and Discovery.

Privileged Communications.

Lawyers (and their employees), physicians, dentists, podiatrists, registered professional or licensed practical nurses, chiropractors, clergymen, and other ministers of religion or duly accredited Christian Science practitioner may not, as rule, disclose information acquired in professional capacity. Such protected information does not lose its privileged character merely because it is transmitted by electronic means. Nor may “any person who obtains without the knowledge of the client evidence of a confidential communication made between the attorney or his employee and the client in the course of professional employment,” disclose such information. Disclosure is permitted, however, with permission or waiver of person who gave such information where disclosure of information so acquired by dentist is necessary for identification purposes; or where patient is child under 16. In last instance physician, dentist, podiatrist, or nurse may be required to testify to information so acquired, which indicates that patient has been victim or subject of crime. Physician or nurse shall disclose information as to mental or physical condition of deceased patient, acquired in professional capacity, except confidential communications and facts tending to disgrace memory of patient either in absence of objection by party to litigation or when privilege has been waived, on waiver by personal representatives of deceased patient or, if validity of will of deceased patient is in question, on waiver by executor named in the will, surviving spouse or any heir at law or next of kin of deceased patient, or any other party in interest, or in any litigation wherein interests of personal representative of deceased patient are deemed by trial judge to be adverse to those of estate, by any party in interest. Attorney, or his employees, shall be required to testify in any action involving probate validity or construction of will and to disclose information as to preparation, execution or revocation of any will or other relevant instrument, except that they may not disclose confidential communications tending to disgrace decedent's memory. (N.Y. C.P.L.R. 4503-4505).

Husband and Wife.

In any action founded on allegation of adultery, neither husband nor wife may testify against other except to prove marriage, disprove allegation of adultery or disprove defense, after evidence has been introduced tending to prove such defense. If adultery is proven, plaintiff is still not entitled to divorce if offense was committed by procurement of plaintiff, plaintiff forgave spouse who committed adultery, action was not commenced within five years after discovery by plaintiff of offense charged, or where plaintiff was also guilty of adultery under circumstances that defendant would have been entitled to divorce. Neither husband nor wife can be compelled to or may testify to confidential communication made during marriage without consent of other. (N.Y. C.P.L.R. 4502 [NYCLS]; N.Y. Dom. Rel. Law §171 [NYCLS]).

Communications or Transactions With Persons Since Deceased or Incompetent.

On trial of action or hearing on merits of special proceeding, party or person interested in event, or person from, through or under whom such party or interested person derives his interest or title by assignment or otherwise, shall not be examined as witness in his own behalf, or in behalf of party succeeding to his title or interest, against executor, administrator or survivor of decedent or committee of mentally ill person, or person deriving title or interest from, through or under decedent or mentally ill person, by assignment or otherwise, concerning personal transaction or communication between witness and decedent or mentally ill person, except where executor, administrator, survivor, committee or person so deriving title or interest is examined in his own behalf, or testimony of decedent or mentally ill person concerning same transaction or communication is given in evidence. Person is not deemed interested by reason of being stockholder or officer of any banking corporation which is party to action or proceeding or interested in event thereof, nor by reason of possible liability for costs taxable in action. Foregoing does not apply to action or proceeding arising out of ownership or operation of vessel, or aircraft, or motor vehicle accident, except as to conversations with decedent. (N.Y. C.P.L.R. 4519 [NYCLS]).

Self Incrimination.

Witness cannot be required to give answer which will tend to accuse witness of crime or expose him to penalty or forfeiture (N.Y. Const. art. 1, §6; N.Y. C.P.L.R. 4501 [NYCLS]; N.Y. Crim. Proc. Law §50.20 [NYCLS]), except in action by Attorney General for unlawful exercise of corporate rights and in certain official investigations and examinations in special proceedings, in which cases there is immunity from prosecution as to matters thus disclosed. (N.Y. C.P.L.R. 5211 [NYCLS]; N.Y. Bus. Corp. Law §109[b][2] [NYCLS]; N.Y. Canal Law. §132[2]; N.Y. Debt. & Cred. Law §16[2] [NYCLS]; N.Y. Bus. Corp. Law §1209[b] [NYCLS]; N.Y. Indian Law §60[2]; N.Y. Crim. Proc. Law §§50.20 [NYCLS], 50.30 [NYCLS]; N.Y. Pub. Serv. Law §20[2]). Witnesses may be compelled to answer questions notwithstanding self-incrimination by conferral of immunity by competent authority. (N.Y. Crim. Proc. Law §50.20[2] [NYCLS], [3] [NYCLS]). In criminal proceedings, defendant may testify in his own behalf, but his neglect or refusal to testify does not create any presumption against him. (N.Y. Crim. Proc. Law §60.15[2] [NYCLS]).

5.14 INJUNCTIONS:

Permanent injunctions may issue: (1) In cases in which they are authorized by statute, e.g. labor disputes (N.Y. Lab. Law §§807-808), violation of right to privacy (N.Y. Civ. Rights Law §51); and (2) in other cases in which they may be in accord with principles of equity jurisprudence.

Jurisdiction.

The power of injunction is an ordinary and inherent power of a court of equity. (277 N.Y. 368, 14 N.E.2d 439; 6 A.D.2d 108, 175 N.Y.S.2d 652). Supreme court has general original equity jurisdiction. (N.Y. Const. art. VI, §7[a] [NYCLS]). County courts and New York City Civil Court have such equity jurisdiction as may be provided by law. (N.Y. Const., art. VI, §§11 [NYCLS], 15 [NYCLS]).

Prerequisites and Procedure.

Governed by court and common law rules.

Bond.

See subhead Temporary Injunction, infra.

Temporary Injunction.

(1) Preliminary injunction may be granted upon notice to defendant (N.Y. C.P.L.R. 6311 [NYCLS]) where: (i) it appears that defendant is threatening, doing or causing act in violation of rights of plaintiff respecting subject of action, which act tends to render judgment ineffectual, (ii) plaintiff demands and is entitled to judgment restraining act which if not restrained during pendency will injure him (N.Y. C.P.L.R. 6301 [NYCLS]) or (iii) in connection with arbitration that is pending or that is to be commenced, if award which applicant seeks may be rendered ineffectual without such relief (N.Y. C.P.L.R. 7502[c] [NYCLS]). Prior to grant of injunction plaintiff other than state or domestic municipal corporation or public officer thereof (N.Y. C.P.L.R. 2512 [NYCLS]) shall give undertaking in amount fixed by court to indemnify party enjoined for damages and costs sustained by injunction if finally determined plaintiff not entitled thereto (N.Y. C.P.L.R. 6312[b] [NYCLS]). (2) Temporary restraining order may be granted without notice pending hearing on preliminary injunction where it appears immediate irreparable injury, loss or damage will result otherwise. Temporary restraining order may not be granted in action arising out of labor dispute or against public officer, board or municipal corporation of state to restrain performance of statutory duties. (N.Y. C.P.L.R. 6301 [NYCLS], 6313[a] [NYCLS]). Undertakings similar to those for preliminary injunctions may be required at discretion of court. (N.Y. C.P.L.R. 6313[c] [NYCLS]).

5.15 JUDGMENTS:

Judgments may be either interlocutory or final. (N.Y. C.P.L.R. §5011 [NYCLS]).

Money judgment is presumed satisfied after 20 years from time party was first entitled to enforce it. If acknowledgment or part payment made, judgment presumed satisfied after 20 years from last acknowledgment or payment. (N.Y. C.P.L.R. §211[b] [NYCLS]).

Judgment by confession may be entered, without action, for money due or to become due, or to secure plaintiff against contingent liability, or both. Defendant must make affidavit setting forth sum for which judgment may be entered, authorizing entry thereof and stating county where defendant resides, or, if defendant is not resident, county in which entry is authorized. If judgment is for money due or to become due, statement must set forth concisely facts out of which debt arose and show that sum confessed is justly due or to become due. If judgment is to secure plaintiff against contingent liability, facts constituting liability and showing that sum confessed does not exceed amount of liability must be concisely stated. (N.Y. C.P.L.R. 3218[a] [NYCLS]). Affidavit may be filed at any time within three years after execution, if defendant still living, with clerk of county which defendant designated in affidavit, and clerk must enter judgment in supreme court, as in action, covering sum confessed, with costs. Such judgment has, in general, same effect as judgment in action in supreme court. (N.Y. C.P.L.R. 3218[b] [NYCLS]). When debt for which judgment rendered is not all due, execution issues only for amount due and judgment is security for remainder. Successive executions may issue as further sums become due. (N.Y. C.P.L.R. 3218[c] [NYCLS]). One or more joint debtors may confess judgment for joint debt, due or about to become due, which may be enforced only against those who confessed it; enforcement is no bar to action against all joint debtors upon same demand. (N.Y. C.P.L.R. 3218[d] [NYCLS]).

Judgments may also be confessed in limited cases in certain lower courts, such as New York City Civil Court (N.Y. City Civ. Ct. Act §1403).

No judgment may be entered on affidavit executed prior to default in payment of installment on purchase of $1,500 or less of any commodities for any use other than commercial or business use on any plan of deferred payments of two or more installments. (N.Y. C.P.L.R. 3201 [NYCLS]).

Judgment Dismissing Causes of Action or Defenses.

Judgment in favor of any party or parties and against any party or parties, as to one or more causes of action or defenses may be rendered by the court, on motion that: (1) Movant's defense is based on documentary evidence; (2) court lacks jurisdiction over subject matter of cause of action; (3) party asserting cause of action has no legal capacity to sue; (4) another action pending between same parties for same cause; (5) arbitration and award, discharge in bankruptcy, collateral estoppel, infancy or other disability of moving party, payment, release, res judicata, statute of limitations, or statute of frauds; (6) improperly interposed counterclaim; (7) pleading fails to state cause of action; (8) lack of jurisdiction of person of defendant; (9) lack of jurisdiction where service out of state or, by publication; (10) absence of person who should be party; or (11) party is immune under (N.Y. Not-for-Profit Corp. Law §720(a) [NYCLS]). (N.Y. C.P.L.R. 3211[a] [NYCLS]). Either party may submit evidence which could be submitted on motion for summary judgment and court may treat motion as one for summary judgment. (N.Y. C.P.L.R. 3211[c] [NYCLS]). Motions based on grounds in (2), (7) or (10) above may be made at any time. Motions on grounds (1), (3), (4), (5) and (6) above must be made before service of responsive pleading is required, and such grounds, as well as grounds (8) and (9) above, are waived if not raised by such motion or in responsive pleading. Motion under any grounds other than (8) and (9) will waive those grounds. (N.Y. C.P.L.R. 3211[e] [NYCLS]).

Summary Judgment.

In any action, after issue has been joined, any party may move for summary judgment. (N.Y. C.P.L.R. 3212[a] [NYCLS]). In an action based on a judgment or instrument for payment of money only, plaintiff may serve with summons notice of motion for summary judgment and supporting papers in lieu of complaint. (N.Y. C.P.L.R. 3213 [NYCLS]). Motion for summary judgment (except in matrimonial actions) must be supported by affidavit, by copy of pleadings and by other available proof, such as depositions, written admissions, etc. Affidavit must: be made by person having knowledge of facts; recite all material facts; and show there is no defense or no merit to action. Motion must be granted where action, claim, counterclaim or defense is established sufficiently to warrant court as matter of law to direct judgment. (N.Y. C.P.L.R. 3212[b] [NYCLS]). Motion must be denied if any party shows facts sufficient to require trial of any issue of fact other than issue as to amount or extent of damages. If only triable issues of fact relate to damages, or if motion is based on any ground enumerated in N.Y. C.P.L.R. 3211[a] [NYCLS] or [b] [NYCLS]), court may order immediate trial of such issues. (N.Y. C.P.L.R. 3212[c] [NYCLS]). If it appears that any party other than moving party is entitled to summary judgment, court may grant it without cross-motion. (N.Y. C.P.L.R. 3212[b] [NYCLS]).

Declaratory Judgments.

Supreme court has power to render declaratory judgment having effect of final judgment as to rights and other legal relations of the parties to justiciable controversy whether or not further relief is or could be claimed. (N.Y. C.P.L.R. 3001 [NYCLS]). Party who has brought personal injury or wrongful death claim may maintain declaratory judgment action directly against insurer of other party. (N.Y. C.P.L.R. 3001 [NYCLS]). New York City Civil Court has jurisdiction in actions seeking declaratory judgment against insurer, if such involves obligation of insurer to indemnify or defend defendant in action where amount sought to be recovered does not exceed $25,000. (N.Y. City Civ. Ct. Act §212-a). Complaint should specify rights and other legal relations on which declaration is requested, and state whether further or consequential relief is or could be claimed and nature of any such relief claimed. (N.Y. C.P.L.R. 3017[b] [NYCLS]).

Default judgment may be entered in most actions if defendant fails to appear, plead or otherwise proceed within time required. Default may be entered in favor of defendant if court orders dismissal for failure to proceed. Default on claim for sum certain can be entered by clerk; otherwise, plaintiff must apply to court upon notice to any defendant who has appeared. Judgment must be entered within one year after default. (N.Y. C.P.L.R. 3215[a] [NYCLS]). In New York City Civil Court, default for failure to appear or answer must be on notice, with affidavit of service. (N.Y. City Civ. Ct. Act §1402). Administrative judge, upon proper showing that default judgment was obtained by fraud, misrepresentation, unconscionability, illegality, lack of due service, violations of law or where default judgment obtained in case where defendant uniformly would have been entitled to interpose such defenses, may bring proceeding upon such terms as may be just. Disposition of such proceeding must be determined by judge other than judge responsible for its initiation. (N.Y. C.P.L.R. 5015[c] [NYCLS]).

Offer of Judgment.

Except in matrimonial action, party may offer to allow judgment to be taken against him, including costs then accrued, until ten days before trial. If offer is rejected and claimant fails to obtain more favorable judgment, offeree must pay costs from time of offer. (N.Y. C.P.L.R. 3221 [NYCLS]).

Docketing.

Clerk must docket money judgment immediately after filing of judgment-roll. At request of any party, clerk must docket judgment affecting real property, or else enter it in section and block index. Transcript of docket of judgment in office of clerk of county where judgment entered, or transcript of judgment of Court of U.S. rendered or filed within N.Y., may be filed and docketed by clerk of any other county with same effect as judgment entered in supreme court of that county. (N.Y. C.P.L.R. 5018 [NYCLS]).

Relief from Judgment or Order.

Court may relieve party from judgment or order on grounds of: (1) Excusable default if such motion is made within one year after service of judgment or order with written notice of entry; (2) newly discovered evidence if different result probable and not discovered in time to move for new trial; (3) fraud, misrepresentation, etc., of adverse party; (4) lack of jurisdiction; (5) reversal, modification or vacatur of prior judgment or order on which it is based. (N.Y. C.P.L.R. 5015[a] [NYCLS]).

Motion for leave to renew or reargue prior motion, leave to appeal from or to stay, vacate or modify order shall be made, on notice, to judge who signed order, except that: (1) If order made upon default, motion may be made, with notice, to any judge of court; (2) if order made without notice, motion may be made, without notice, to judge who signed order, or, with notice, to any judge of court. (N.Y. C.P.L.R. 2221[a] [NYCLS]).

Motion for leave to reargue must be: (1) Specifically identified; (2) based on facts or law allegedly overlooked or misapprehended by court in determining prior motion; and (3) made within 30 days after service of order determining prior motion and written notice of its entry, although rule shall not apply to decisions rendered by appellate division or court of appeals. (N.Y. C.P.L.R. 2221[d] [NYCLS]).

Motion for leave to renew must: (1) Be specifically identified; (2) be based on new facts not offered in prior motion that would change prior determination; and (3) include justification as to why facts not previously offered in prior motion. (N.Y. C.P.L.R. 2221[e] [NYCLS]).

Combined motion for leave to reargue and to renew shall separately identify and support each item of relief sought. If motion granted, court may adhere to or alter original determination. (N.Y. C.P.L.R. 2221[f] [NYCLS]).

Lien.

A judgment wholly or partly for a sum of money is entitled to preference from time judgment is docketed by clerk in county in which property is located until ten years after filing of judgment-roll, or from time of filing with such clerk of notice of levy pursuant to execution until execution is returned. (N.Y. C.P.L.R. 5203[a] [NYCLS]). After ten years, lien may be extended by issuing execution and having notice recorded and indexed, or by motion of judgment creditor. (N.Y. C.P.L.R. 5235 [NYCLS], 5203[b] [NYCLS]).

From time of delivery of execution to the sheriff, judgment creditor's rights in personal property of debtor against which judgment may be enforced are superior to rights of any transferee, except as against purchasers in good faith before an actual levy, and except as to purchasers in good faith of intangible personal property after levy but without knowledge of levy. (N.Y. C.P.L.R. 5202 [NYCLS]).

Assignment of judgment may be entered in office of clerk of court of record acknowledged in recordable form. (N.Y. C.P.L.R. 5019[c] [NYCLS]). Assignment must be acknowledged at request of any assignee or of judgment debtor. (N.Y. Gen. Oblig. Law §13-103 [NYCLS]).

Satisfaction.

Satisfaction or partial satisfaction must be entered by clerk of court. Within ten years after entry of judgment attorney for judgment creditor may execute satisfaction-piece or partial satisfaction-piece. Clerk of court in which judgment was entered shall make entry of satisfaction or partial satisfaction on docket of judgment upon: (1) filing of satisfaction-piece or partial satisfaction-piece; or (2) upon order of court after motion when debtor unable to furnish satisfaction-piece; or (3) on deposit with such clerk of sum of money which satisfies judgment or partially satisfies judgment pursuant to court order made upon motion; or (4) upon filing of instrument specified in art. 8 of debtor and creditor law. Sheriff shall return execution to clerk from which execution was issued if such execution is partially or wholly satisfied. (N.Y. C.P.L.R. 5020-5021). Proceedings are also provided for marking discharge on docket of judgment against bankrupt or debtor. Such proceedings may be instituted after one year from discharge of his debts. (N.Y. Debt. & Cred. Law §150 [NYCLS]). Judgment debtor may prevent accrual of further charges by proof to court that payment was sent to creditor's last known address. (N.Y. C.P.L.R. 5020-a [NYCLS]).

Form of Satisfaction.

Form

(Title of action) State of . . . , County of . . . ss.: Whereas a judgment was on the . . . day of . . . 20. . entered in favor of . . . , plaintiff, against . . ., defendant, in the above named court in judgment book . . . page . . . for the sum of $. . . and was docketed on the . . . day of . . . 20. . in the office of the clerk of the County of . . . in judgment book . . . page . . . and said judgment has been . . . paid and $. . remains unpaid, and it is certified there are no outstanding executions with any sheriff or marshal in the State of New York; Therefore . . . . satisfaction of said judgment is hereby acknowledged and said clerk is hereby authorized and directed to make an entry of . . . satisfaction on the docket of the judgment. . . . . Plaintiff

(Acknowledgment)

Actions.

Except in case where co-obligor was not party, action upon money judgment entered in court of state may only be maintained between original parties to judgment where: (1) ten years have elapsed since first docketing of judgment; or (2) judgment was entered against defendant by default for want of appearance and summons was served other than by personal delivery to him or his agent; or (3) court in which action is sought to be brought so orders on motion. (N.Y. C.P.L.R. 5014 [NYCLS]).

Foreign Judgments.

Money judgments are generally given full force between parties to them subject or submitting to personal jurisdiction in state or country where given and may be the subject of direct action in this state. Jurisdiction of inferior court of foreign country or sister state must be alleged when suit on foreign judgment is brought in inferior court of New York. Record of the court, if it shows jurisdiction of person, is prima facie evidence of jurisdiction to render judgment. This rule also applies in case of judgment of justice of peace in another state. (N.Y. C.P.L.R. 4541 [NYCLS]).

Uniform Enforcement of Foreign Judgments Act adopted. (N.Y. C.P.L.R. 5401-5408).

Uniform Foreign Money-Judgments Recognition Act adopted. (N.Y. C.P.L.R. 5301-5309).

5.16 LIMITATION OF ACTIONS:

Except when otherwise prescribed by law, procedure in special proceedings shall be same as in actions. (N.Y. C.P.L.R. 103[b] [NYCLS]).

Actions are barred unless commenced within the following periods after accrual of cause of action (N.Y. C.P.L.R. 201 [NYCLS] and 203 [NYCLS]):

Twenty Years: To recover principal or interest on certain unsecured bonds as defined; on a money judgment unless there had been partial payment or written acknowledgment within that time; by state respecting real property, unless rents and profits were received therefrom within that time; by grantee of state respecting real property as prescribed; to enforce any order awarding support, alimony or maintenance. (N.Y. C.P.L.R. 211 [NYCLS]).

Ten Years: To recover real property or its possession; by state or subsequent patentee or grantee to recover premises where letters patent or grant of real property issued or made by state are declared void on specified grounds; to redeem real property from a mortgage; to recover amounts paid to or on behalf of alien for whom affidavit of support has been properly obtained. (N.Y. C.P.L.R. 212 [NYCLS]).

Seven Years: Any civil action for damages against defendant convicted of crime which is subject of civil action (computed from date of crime); supersedes shorter periods within N.Y. U.C.C. Law art. 2 or 5.2. (N.Y. C.P.L.R. 213-b [NYCLS]).

Six Years: Where no limitation is specifically prescribed; on a contractual obligation or liability express or implied, except as provided in N.Y. C.P.L.R. 213-a [NYCLS], U.C.C Law art. 2, or N.Y. Gen. Bus. Law art. 36 [NYCLS]–B, on sealed instrument; on bond or note secured by mortgage on real property and/or on mortgage of real property or any interest therein; by state for spoliation or misappropriation of public property (computed from discovery); for mistake; by or on behalf of corporation against directors, officers or stockholders for accounting, to procure judgment on ground of fraud, to enforce liability, penalty or forfeiture, or to recover damages for waste or injury to property or for accounting in conjunction therewith; for fraud greater of six years from date cause of action accrued or two years from time plaintiff or person under whom plaintiff claims discovered fraud, or could with reasonable diligence have discovered it. (N.Y. C.P.L.R. 213 [NYCLS]).

Five Years: For divorce or separation (except where defendant has abandoned plaintiff, has committed adultery, or—for divorce only—husband and wife have lived apart pursuant to separation decree or agreement for defined number of years). (N.Y. Dom. Rel. Law §210 [NYCLS]).

Four Years: For breach of contract for sale of goods (parties may agree to reduce statute of limitations to not less than one year) (N.Y. U.C.C. Law §2-725) and residential rent overcharge (N.Y. C.P.L.R. 213-a [NYCLS]).

Three Years: Against an officer for nonpayment of money collected upon an execution; to recover on a statutory liability, penalty or forfeiture except as provided in N.Y. C.P.L.R. 213 [NYCLS] and 215 [NYCLS]; to recover a chattel or damages for the taking or detaining chattel (N.Y. C.P.L.R. 214 [NYCLS]); to recover damages for injury to property except as provided in N.Y. C.P.L.R. 214-c [NYCLS]; to recover damages for personal injury except as provided in N.Y. C.P.L.R. 214-b [NYCLS], 214-c [NYCLS], 215 [NYCLS]; to recover damages for malpractice other than medical, dental or podiatric malpractice; or to annul marriage on ground of fraud. (N.Y. C.P.L.R. 214 [NYCLS]). Also, to enforce liability created under franchise law. (N.Y. Gen. Bus. Law §691 [NYCLS]).

Three Years From Discovery: Claims for personal or property injury caused by latent effects of exposure to any substance (computed from date of actual or reasonable discovery, whichever is earlier); superseding N.Y. C.P.L.R. 214 [NYCLS], but not applicable to medical and dental malpractice claims. (N.Y. C.P.L.R. 214-c [NYCLS]).

Two and One-Half Years: To recover damages for medical, dental or podiatric malpractice. (N.Y. C.P.L.R. 214-a [NYCLS]). Action for wrongful death on behalf of decedent whose death was caused by terrorist attacks on Sept. 11, 2001, must be commenced within 2½ years. (N.Y. Est. Powers & Trust Law §5-4.1 [NYCLS]).

Two Years: For wrongful death (N.Y. Est. Powers & Trust Law §5-4.1 [NYCLS]) (if criminal action has been commenced against same defendant with respect to same act or occurrence from which claim under N.Y. Est. Powers & Trust Law §5-4.1 [NYCLS] arises, executor or administrator shall have at least one year from termination of criminal action in which to maintain action (N.Y. Est. Powers & Trust Law §5-4.1[2] [NYCLS]) but see N.Y. C.P.L.R. 213-b [NYCLS]; to restrain violation or to recover damages for breach of certain covenants restricting use of land with respect to structures that may be built thereon (N.Y. Real Prop. Acts. Law §2001[1] [NYCLS]); for personal injury caused by exposure to phenoxy herbicides ("Agent Orange") while serving as member of armed forces in Indochina during certain time period, limitations period to be measured from date on which injury was or should have been discovered (N.Y. C.P.L.R. 214-b [NYCLS]).

One Year and Ninety Days: Action against city, county, town, village, fire or school district for personal injury, wrongful death or damage to real or personal property sustained by reason of negligence. (N.Y. Gen. Mun. Law §50-i). See topic 5.02 Actions, subhead Notice of Claim.

One Year: Against a sheriff, coroner or constable based on official act or omission, except nonpayment of money collected on execution; against an officer for escape of prisoner arrested or imprisoned by virtue of civil mandate; to recover damages for assault, battery, false imprisonment, malicious prosecution, libel, slander, false words causing special damages, or violation of right of privacy under N.Y. C.P.L.R. 215 [NYCLS]; to enforce statutory penalty or forfeiture; on arbitration award; to recover overcharge of interest or to enforce penalty for overcharge. (N.Y. C.P.L.R. 215 [NYCLS]) (if action governed by N.Y. C.P.L.R. 215 [NYCLS] arises from same event or occurrence as criminal action commenced against same defendant, action may be commenced within one year after termination of such criminal action (N.Y. C.P.L.R. 215[8] [NYCLS]); after entry upon real property (if commenced within ten years after right to enter descended or accrued) (N.Y. Real Prop. Acts. Law §501 [NYCLS]); to recover possession of real property consisting of strip of land not exceeding six inches in width on which stands wall of building erected on adjoining lot (N.Y. Real Prop. Acts. Law §611 [NYCLS]).

Four Months: Proceeding against body or officer unless shorter time is provided in law authorizing such proceeding; proceeding by employee against employee organization or employer subject to N.Y. Civ. Serv. Law §14 or N.Y. Lab. Law §20 [NYCLS] regarding organization's breach of duty of fair representation. (N.Y. C.P.L.R. 217 [NYCLS]).

Ninety Days: See topic 5.02 Actions, subhead Notice of Claim.

Sixty Days: On claim against estate, after presentation to and rejection in whole or in part by executor or administrator, but failure to bring claim within 60 days shall not be deemed waiver of claimant's right to jury trial. (N.Y. Surr. Ct. Proc. Act §1810 [NYCLS]).

No Time Limit: To limit certain existing possibilities of reverter and rights of entry restricting the use of land. (N.Y. Real Prop. Acts. Law §1954 [NYCLS]).

Abbreviation of Period to One Year After Notice: Action for a sum of money due under contract, to recover specific personal property within state or to enforce interest therein or lien thereon must be commenced by any claimant within one year after notice of pendency of action by another person asserting adverse claim to said sum or property, or to any part of said sum, exceeding $50. Such notice is given by defendant in pending action on order of court. This does not extend time within which claimant's action would otherwise be barred. (N.Y. C.P.L.R. 216 [NYCLS]).

New Actions.

Where action commenced by service, claim asserted in complaint is interposed against defendant or codefendant united in interest when summons served upon defendant. Where action would otherwise be commenced by service, action may be commenced without service of summons or pleadings upon filing statement signed and acknowledged by all parties specifying claims, defenses and relief requested. This latter procedure is now known as "the New York Simplified Procedure for Court Determination of Disputes." (N.Y. C.P.L.R. 203[b][1] [NYCLS], 3031 [NYCLS]). Action is also commenced when first publication of summons is made pursuant to order and publication is subsequently completed. (N.Y. C.P.L.R. 203[b][2] [NYCLS]). In action commenced by service, attempt to commence action in court of record is equivalent to commencement when summons is delivered to sheriff of county outside of New York City or is filed with clerk of that county within City of New York in which defendant resides, is employed or doing business, or otherwise where defendant is known to have last resided, been employed or engaged in business; or if defendant is corporation, to sheriff of county where it may be served or in which cause of action arose. But delivery or filing of summons must be followed within 60 days after expiration of time limited for actual commencement of action: (1) by personal service; (2) by first publication pursuant to order and completion of publication; or (3) where defendant dies within 60 days after period of limitation would have expired but for this provision and before summons is served or publication completed, by service of summons on executor or administrator within 60 days after letters are issued. (N.Y. C.P.L.R. 203[b][5] [NYCLS]). As to actions to be commenced in courts not of record, see N.Y. C.P.L.R. 203[b][6] [NYCLS]. As to commencement by order for provisional remedy, see N.Y. C.P.L.R. 203[b][3] [NYCLS].

Demand.

Except as provided in N.Y. U.C.C. Law art. 3, when demand is necessary to entitle party to maintain action, time begins to run when right to make demand is complete, except where: (1) trustee, agent, attorney or other fiduciary receives or detains money or property in which case time runs from date when person who has right to demand money learns facts on which right depends; and (2) deposit of money is repaid only on special demand, or personal property is not returned specifically or in kind at fixed time or on fixed contingency, in which case time must be computed from demand. (N.Y. C.P.L.R. 206[a] [NYCLS]).

Where commencement of action is stayed by court or by statutory prohibition, duration of stay is excluded from time allowed for commencement. (N.Y. C.P.L.R. 204[a] [NYCLS]).

Second Action.

Where action is timely commenced and is terminated otherwise than by voluntary discontinuance, failure to obtain personal jurisdiction over defendant, dismissal for neglect to prosecute or final judgment on merits, new action for same cause may be commenced within six months after such termination by plaintiff or his representative if cause survives and that defendant is served in those six months. (N.Y. C.P.L.R. 205[a] [NYCLS]). Where action for breach of contract for sale of goods is so terminated as to leave available remedy by another action for same breach, such other action may be commenced after expiration of time limited and within six months after termination of first action unless terminated voluntarily or by dismissal for neglect to prosecute. (N.Y. U.C.C. Law §2-725[3]).

Actions Arising Outside of State are barred in this state after expiration of time limited by laws either of this state or of state or country where action accrued, except that where cause of action originally accrued in favor of a resident of New York the time limited by its laws applies. (N.Y. C.P.L.R. 202 [NYCLS]). Where such cause of action, whether originally accrued in favor of a resident or nonresident, accrued in foreign country with which the U.S. or any of its allies was then or subsequently at war, or in territory then or subsequently occupied by such foreign country, period between commencement and termination of hostilities or occupation is not a part of time limited. This section does not apply to certain actions against a banking organization or superintendent of banks. (N.Y. C.P.L.R. 209[a] [NYCLS]).

Nonresidents.

Except as stated under subhead Actions Arising Outside of State, any action against a nonresident may be brought within the time as limited, supra; the statutes of limitations of defendant's foreign residence shall not apply. (N.Y. C.P.L.R. 202 [NYCLS]). Where person other than a person entitled to benefits of N.Y. C.P.L.R. 209[b] [NYCLS] is alien subject or citizen in country with which U.S. or any of its allies are at war, or territory occupied by such country, period of such residence or sojourn during which war or occupation continues is not part of time limited. (N.Y. C.P.L.R. 209[c] [NYCLS]).

Disabilities.

If a cause of action accrues to a person who is an infant or insane, and, if period of limitations is three years or more, period is extended until three years after disability ceases or three years after death of disabled person if such time is shorter. If period of limitations is less than three years, it is extended by period of disability. Time within which action must be commenced shall not be extended beyond ten years after action accrues, except, in any action other than for medical or dental malpractice, where person was under disability due to infancy. This section not applicable to actions to recover penalty or forfeiture, or against sheriff or officer for escape. (N.Y. C.P.L.R. 208 [NYCLS]).

Where person was unable to sue by reason of any party being alien, subject or citizen of country at war with U.S. or its allies, the time of the continuance of the disability is not a part of the time limited for commencement of the action, whether cause of action arose during or prior to war. (N.Y. C.P.L.R. 209[b] [NYCLS]).

Absence, Removal or Concealment.

Where defendant is absent from state when cause of action arises, statutory period does not begin to run until his coming into or return to the state. When he removes from state after cause of action accrues and remains continuously away for four months or more, or remains in the state under a false name, time of his absence or residence under false name is not part of the time limited. This does not apply where: (1) defendant has a designated agent in the state, whether voluntary or involuntary, (2) if defendant is foreign corporation and has officer or other person in state who may be served, or (3) while personal jurisdiction of defendant can be obtained without personal delivery of summons to him within New York. (N.Y. C.P.L.R. 207 [NYCLS]). Similar provision in previous statute as to absence from state when cause of action arises was held to apply to nonresident defendant. (242 N.Y. 413, 152 N.E. 246).

Except as provided in N.Y. U.C.C. Law art. 2, or in N.Y. C.P.L.R. 214-a [NYCLS], where period runs from time when facts were or could have been discovered, action must be commenced within two years after such actual or imputed discovery or within period otherwise provided computed from time when cause of action accrued, whichever is longer. (N.Y. C.P.L.R. 203[g] [NYCLS]).

Death.

Where person dies before time for commencing action expires and action survives, his representative may sue after expiration of such time and within one year after death. (N.Y. C.P.L.R. 210[a] [NYCLS]). If person against whom cause of action exists dies within or without state, time between death and expiration of 18 months thereafter is not part of time limited for commencement of action against executor or administrator. (N.Y. C.P.L.R. 210[b] [NYCLS]).

In action by executor or administrator to recover personal property wrongfully taken after death and before issuance of letters, or damages therefor, time within which action must be commenced is computed from date letters are issued or three years after death, whichever first occurs. Any distributee, next of kin, legatee or creditor under disability prescribed in N.Y. C.P.L.R. 208 [NYCLS] at time action accrued may commence action for damages or value of property within two years after disability ceases. (N.Y. C.P.L.R. 210[c] [NYCLS]).

Federal Antitrust Action.

Running of limitations period in action brought under N.Y. Gen. Bus. Law §§340 [NYCLS], 342 [NYCLS], 342-a [NYCLS] suspended by commencement by federal government of federal antitrust proceeding based on same matter during pendency of such proceeding and for one year thereafter; provided that state-law action must be commenced either within period of suspension or within otherwise applicable limitations period. (N.Y. Gen. Bus. Law §342-c [NYCLS]).

Revival of barred debt may be effected by part payment or written acknowledgment. (N.Y. Gen. Oblig. Law §17-101 [NYCLS]). Part payment on mortgage debt which is effective to revive debt or to extend time limited for action on debt also has effect of limiting time to commence action to foreclose mortgage run from date of payment unless accompanied by written disclaimer of intention stating otherwise. (N.Y. Gen. Oblig. Law §17-107[1] [NYCLS]).

Contractual limitations shorter than those provided by statute are permitted. (N.Y. C.P.L.R. 201 [NYCLS]).

Waiver.

Agreements in writing waiving, extending or promising not to plead statute of limitations, to have no effect except as specifically allowed by statute. (N.Y. Gen. Oblig. Law §17-103 [NYCLS]). Similar statutory provisions deal with promises and waivers affecting time limited for an action to foreclose a mortgage. (N.Y. Gen. Oblig. Law §17-105 [NYCLS]).

Pleading Statute.

Defense of limitations must be pleaded as affirmative defense (N.Y. C.P.L.R. 3018[b]

[NYCLS]), or raised by motion to dismiss (N.Y. C.P.L.R. 3211[a][5] [NYCLS]).

5.16A PARTITION:

Where two or more persons hold and are in possession of real property, as joint tenants or tenants in common, in which either of them has an estate of inheritance or for life or for years, any of them may maintain an action for partition. (N.Y. Real Prop. Acts. Law §901[1] [NYCLS]). If estate of decedent is owner of estate in common in real property, executor or administrator may bring partition action or intervene in pending partition action on behalf of estate if upon application surrogate approves. (N.Y. Real Prop. Acts. Law §901[4] [NYCLS]).

The subject of action for partition is covered in detail by N.Y. Real Prop. Acts. Law §§901-992.

Jurisdiction and Venue.

Action for partition of real property may be brought in county court, except in N.Y. City (N.Y. Jud. Ct. Acts Law §190 [NYCLS]), in county in which real property is situated (N.Y. C.P.L.R. 507 [NYCLS]).

Adverse Claims.

Such claims of title may be tried, but where defendant is not tenant in common, or joint tenant with plaintiff and puts in issue title or interest of plaintiff, all subsequent proceedings as to that defendant, including trial, judgment and execution, are same as if it were action to recover real property. (N. Y. Real Prop. Acts . Law §907 [NYCLS]).

Estate of Life Tenant.

Such estate cannot be affected without his consent by action brought by remainderman. (N.Y. Real Prop. Acts. Law §901 [NYCLS]).

Partition in Kind or Sale.

If property cannot be actually partitioned with due regard to all interests, it is sold and proceeds of sale distributed among those entitled according to their interests. (N.Y. Real Prop. Acts. Law §§901 [NYCLS], 922-25, 931 [NYCLS], 961 [NYCLS]).

Where a sale is ordered, and part of proceeds represent interest of any estate for life or for years, court may, in absence of agreement by all such interests, direct either distribution of all or part of proceeds, or investment of all or part, and payment to each claimant of interest on that portion of proceeds allocable to him. (N.Y. Real Prop. Acts. Law §968 [NYCLS]).

Liens.

Before interlocutory judgment for sale of real property is rendered, court shall ascertain, by reference or otherwise, existence of creditors' liens on any undivided share so sold unless clerk's certificate of search shows absence of liens (N.Y. Real Prop. Acts. Law §913 [NYCLS]); if such lien is found court must direct payment of such lien after portion of expenses allocable to such share is paid (N.Y. Real Prop. Acts. Law §§962-63).

5.17 [RESERVED]

5.18 PLEADING:

Unless court orders otherwise the only pleadings permitted are complaint, answer (which may include counterclaim and cross-claim), interpleader complaint, third-party complaint, reply to counterclaim denominated as such and answer to cross-claim that contains demand for answer, interpleader complaint and third-party complaint. (N.Y. C.P.L.R. 3011 [NYCLS]).

Requisites.

Pleadings are to be liberally construed (N.Y. C.P.L.R. 3026 [NYCLS]) but must give notice of transaction or occurrence intended to be proved and material elements of each cause of action or defense (N.Y. C.P.L.R. 3013 [NYCLS]). Separate causes or defenses must be separately stated and numbered, and may be stated alternatively or hypothetically and regardless of consistency. (N.Y. C.P.L.R. 3014 [NYCLS]). Complaint, counterclaim, cross-claim, interpleader complaint and third-party complaint must contain demand for relief which may be in alternative or of several different types (N.Y. C.P.L.R. 3017 [NYCLS]) and court may grant any type of relief except that default judgment may not exceed in amount or differ in type from that demanded in complaint (N.Y. C.P.L.R. 3017 [NYCLS], 3215[b] [NYCLS]). Actions and relief are not barred for inconsistency. (N.Y. C.P.L.R. 3002 [NYCLS]). Special damages must be itemized. (N.Y. C.P.L.R. 3043 [NYCLS]). Performance or occurrence of conditions precedent need not be pleaded and need not be proved unless performance or occurrence is specifically and particularly denied. (N.Y. C.P.L.R. 3015[a] [NYCLS]). Judgment, decision or similar determination may be pleaded without stating jurisdictional matter (N.Y. C.P.L.R. 3015[c] [NYCLS]), and in action on judgment extent to which it has been satisfied must be shown (N.Y. C.P.L.R. 3016[d] [NYCLS]).

Affirmative Defenses.

Party shall plead all matters which if not pleaded would be likely to take adverse party by surprise or would raise issues of fact not appearing on face of prior pleading, such as arbitration and award, collateral estoppel, culpable conduct claimed in diminution of damages under N.Y. C.P.L.R. 1401 [NYCLS], discharge in bankruptcy, facts showing illegality either by statute or common law, fraud, infancy or other disability of party defending, payment, release, res judicata, statute of frauds, or statute of limitations. (N.Y. C.P.L.R. 3018[b] [NYCLS]).

Complaint.

The corporate status of parties must be alleged. (N.Y. C.P.L.R. 3015[b] [NYCLS]). Complaint may be served with summons and if not so served must be served within 20 days after service of written demand therefor. Party who has not appeared must be served with subsequent pleadings asserting new or additional claims for relief. (N.Y. C.P.L.R. 3012[a] [NYCLS], [b] [NYCLS]). In action for payment of money or upon any judgment, motion for summary judgment permitted in lieu of complaint. (N.Y. C.P.L.R. 3213 [NYCLS]).

Responsive Pleading.

Statements in a complaint, cross-claim, third-party complaint or interpleader complaint are admitted unless denied, or party lacks knowledge or information sufficient to form belief as to truth thereof, or where no responsive pleading is permitted. (N.Y. C.P.L.R. 3018[a] [NYCLS]). Signatures on negotiable instruments are admitted unless specifically denied in pleading. (N.Y. C.P.L.R. 3015[d] [NYCLS]). Answer must be served 20 days after service of pleading to which it responds (N.Y. C.P.L.R. 3012[a] [NYCLS], [b] [NYCLS]), but within 30 days where party is served through his attorney or is served out of state pursuant to N.Y. C.P.L.R. 313 [NYCLS] or in certain other actions specified in N.Y. C.P.L.R. 3012[c] [NYCLS].

Counterclaim.

Defendant may set up by way of counterclaim any cause of action in favor of defendant(s), or person whom defendant represents against plaintiff(s) or person whom plaintiff represents or plaintiff and other persons. (N.Y. C.P.L.R. 3019[a] [NYCLS]). If plaintiff is trustee for another, existing claim against person beneficially interested may be allowed as counterclaim to extent of plaintiff's claim. (N.Y. C.P.L.R. 3019[c] [NYCLS]).

Cross-claim.

Cross-claim may be any cause of action in favor of one or more defendants or person whom defendant represents against one or more defendants, or person whom defendant represents or defendant and other persons alleged to be liable, including claim that party against whom it is asserted is or may be liable to cross-claimant for all or part of claim asserted in action against cross-claimant. (N.Y. C.P.L.R. 3019[b] [NYCLS]).

Frivolous Claims.

State has adopted rules imposing sanctions for frivolous conduct in civil litigation. (N.Y. Comp. Codes R. & Regs. tit. 22, §§130-1.1 to 130-1.5).

Reply.

If plaintiff desires to controvert counterclaim, he must serve reply (N.Y. C.P.L.R. 3011 [NYCLS]), which must be served within 20 days after service of pleadings containing counterclaim (N.Y. C.P.L.R. 3012[a] [NYCLS]). Unless cross-claim demands it, no answer is required, cross-claim being deemed denied or avoided. (N.Y. C.P.L.R. 3011 [NYCLS]).

Objections to Pleadings.

Only corrective motions addressed to a pleading are motions for a more definite statement where pleading is so vague or ambiguous that party cannot reasonably be required to frame a response and motions to strike unnecessary scandalous or prejudicial matter. (N.Y. C.P.L.R. 3024 [NYCLS]). Other objections may be raised by motion for judgment dismissing cause of action upon specified grounds (N.Y. C.P.L.R. 3211[a] [NYCLS]), or by motion to dismiss defense (N.Y. C.P.L.R. 3211[b] [NYCLS]). Only one such motion may be made and objections or defenses based upon some of grounds set forth in §3211[a] are waived unless raised by such motion or in responsive pleading. (N.Y. C.P.L.R. 3211[e] [NYCLS]). Where motion to dismiss is made opposing party must state if he desires to plead again and must set forth evidence in support of new pleading. (N.Y. C.P.L.R. 3211[e] [NYCLS]). Motion to dismiss directed against action involving public petition will be granted unless responding party demonstrates that action has substantial basis in law or substantial argument for its effect on existing law. (N.Y. C.P.L.R. 3211[g] [NYCLS]).

Extension of Time.

Court may extend time to appear or plead on showing of reasonable excuse for delay or default. (N.Y. C.P.L.R. 3012[d] [NYCLS]).

Amended or Supplemental Pleadings.

Pleading may be amended without leave of court once within 20 days after service thereof or at any time before period for answering pleading expires or within 20 days after service of pleading responding to it. (N.Y. C.P.L.R. 3025[a] [NYCLS]). Plaintiff may amend complaint within 20 days after service of answer to third-party complaint and assert claim against third-party defendant. (N.Y. C.P.L.R. 1009 [NYCLS]). Further amendment and supplemental pleadings may be made by leave of court or by stipulation of all parties. (N.Y. C.P.L.R. 3025[b] [NYCLS]).

Bill of particulars of a claim or the items of account alleged in the pleading, verified if pleading is verified or if with respect to a cause of action for negligence, must be served within 30 days after written demand by adverse party, failing which court may impose penalties. In any action or proceeding in which filing note of issue is required, party may amend his bill of particulars once as of course before trial, prior to filing note of issue. (N.Y. C.P.L.R. 3041 [NYCLS], 3044 [NYCLS], 3042 [NYCLS]). In personal injury actions, supplemental bills of particulars may be served on issue of continuing damages without leave of court until 30 days prior to trial. (N.Y. C.P.L.R. 3043[b] [NYCLS]). For particulars which may be demanded in personal injury action, see N.Y. C.P.L.R. 3043 [NYCLS].

Items of Claim.

In action on sale of goods, rendering of services or furnishing of materials, plaintiff may set forth in his verified complaint the items of his claim, and defendant must indicate by his verified answer the items, if any, which he disputes. (N.Y. C.P.L.R. 3016[f] [NYCLS]).

Verification.

If pleading is verified subsequent pleadings must be verified, except answers of infants or where party pleading would be privileged from testifying concerning allegations contained in pleading or unless otherwise specified by law. (N.Y. C.P.L.R. 3020[a] [NYCLS]). All dilatory defenses, answers of corporations in actions on instruments for absolute payment of money, and answers to complaints charging defendant with performance of certain acts to defraud creditors or with any fraud affecting a right or the property of another must be verified. (N.Y. C.P.L.R. 3020[b] [NYCLS], [c] [NYCLS]). Party entitled to verified pleading, who is served with one improperly verified, may treat same as nullity, provided he gives notice with due diligence to attorney of the adverse party that he elects so to do. (N.Y. C.P.L.R. 3022 [NYCLS]).

Verification of pleading must be by affidavit of party, or, if there are two or more parties united in interest and pleading together, by at least one of them who is acquainted with facts, except that: (1) Where party is a domestic corporation, verification must be by an officer thereof; (2) where the party is the state or a public officer in its behalf, verification may be made by any person acquainted with the facts; and (3) where party is a foreign corporation, or is not within county where attorney has office, or, if there are two or more parties united in interest and pleading together, where none of them, acquainted with facts, is within that county, or where the action or defense is founded on written instrument for payment of money only which is in possession of agent or attorney, or where all material allegations of pleadings are within personal knowledge of agent or attorney, verification may be by agent or attorney. (N.Y. C.P.L.R. 3020[d] [NYCLS]).

The affidavit of verification must be to effect that pleading is true to knowledge of deponent except as to the matters therein stated to be alleged upon information and belief, and that as to those matters he believes them to be true. Where made by person other than party he must set forth grounds of his belief as to all matters not stated on his knowledge, and reason why it is not made by party. (N.Y. C.P.L.R. 3021 [NYCLS]).

Service upon Attorney.

Except where otherwise prescribed by law or order of court, where a party has appeared by attorney all papers must be served on attorney by: (1) Personal delivery; (2) mail; (3) leaving papers at office; (4) leaving papers at residence if service at office impossible; (5) transmitting papers by facsimile, provided facsimile telephone number is designated by attorney for that purpose; (6) by electronic means where consent is given; or (7) by overnight delivery service. (N.Y. C.P.L.R. 2103[b] [NYCLS]).

Filing of Pleadings.

Generally not required. In Civil Court of N.Y. City proof of service of summons and complaint, notice of petition and petition or order to show cause and petition must be filed with clerk of court in county in which action is brought. (N.Y. City Civ. Ct. Act §409[a]).

Small Claims.

See category 6 Courts and Legislature, topic 6.01 Courts.

5.19 PRACTICE:

Civil practice is regulated by Civil Practice Law and Rules, various individual court acts and local rules of each court.

There is only one form of civil action. Distinctions between actions at law and suits in equity, and forms of those actions and suits, have been abolished (N.Y. C.P.L.R. 103[a] [NYCLS]).

Disclosure.

Full disclosure is afforded of all evidence material and necessary in prosecution or defense of an action, regardless of burden of proof. (N.Y. C.P.L.R. 3101[a] [NYCLS]). Following can be utilized as disclosure devices: Depositions upon oral questions or without state upon written questions, interrogatories, demands for addresses, discovery and inspection of documents or property, physical and mental examinations of persons, and requests for admission. (N.Y. C.P.L.R. 3102[a] [NYCLS]). See, generally, in this area, N.Y. C.P.L.R. 3101-3140 as am'd, (1993 N.Y. Laws c. 98).

Direct Actions Against Insurer.

See category 23 Transportation, topic 23.01 Motor Vehicles, subhead Direct Actions.

Small Claims.

See category 6 Courts and Legislature, topic 6.01 Courts.

Law Office Failure.

In appropriate cases, court shall not be precluded from exercising its discretion to excuse delay or default resulting from law office failure. (N.Y. C.P.L.R. 2005 [NYCLS]).

See also topics 5.02 Actions, Appeal and Error, Depositions and Discovery, Injunctions, Judgments, Pleading, Process; category 8 Debtor and Creditor, topics 8.02 Attachment, 8.05 Executions, 8.09 Garnishment.

5.20 PROCESS:

Civil action is commenced in state supreme court, county court, surrogate court, state district courts, New York City Civil Courts, and city courts by filing summons and complaint or summons with notice. (N.Y. C.P.L.R. 304 [NYCLS]; N.Y. Uniform Dist. Ct. Act §400; N.Y. City Civ. Ct. Act §400). However, commencement of action is by service of summons in: State district courts (N.Y. Uniform Dist. Ct. Act §400); New York City Civil Courts (N.Y. City Civ. Ct. Act §400); city courts (N.Y. City Civ. Ct. Act §400); and justice courts (N.Y. Uniform Just. Ct. Act §400 [NYCLS]). Special proceeding commences upon filing of notice of petition or order to show cause and petition. (N.Y. C.P.L.R. 304 [NYCLS]). Filing may be made in accordance with court rules, and fees paid by credit card. (N.Y. C.P.L.R. 304 [NYCLS]). Where action would otherwise be commenced by service of summons, if all parties submit statement of claims, defenses and relief sought, action may be started without such service. Under this method, however, parties waive their right to trial by jury. (N.Y. C.P.L.R. 3031 [NYCLS]). Personal service by first class mail generally authorized for service upon state agency, natural persons, partnerships and corporations if enclosed with copy of summons and complaint, two copies of statement of service by mail and form of acknowledgment of receipt with prepaid return envelope addressed to sender. (N.Y. C.P.L.R. 312-a[a] [NYCLS]). Defendant has 20 days in which to appear if summons personally delivered to him, by serving answer or notice of appearance, or by making motion which has effect of extending time to answer (motions to dismiss and corrective motions); if summons is served by any other means, defendant must appear within 30 days after service is complete. (N.Y. C.P.L.R. 320[a] [NYCLS]). In New York City Civil Court, defendant has 20 days to appear if summons is personally delivered to him within City of New York. (N.Y. City Civ. Ct. Act §402[a]). If summons is delivered by any other means, defendant must appear and answer within

30 days after proof of service is filed. (N.Y. City Civ. Ct. Act §402[b]). In justice court return day must in general be not less than six nor more than 30 days after service. (N.Y. Uniform Just. Ct. Act §402[a] [NYCLS]).

Summons must state court where action is brought, venue, title of action, nature of paper, basis of venue and, if based upon residence of plaintiff, plaintiff's address. It shall include names of all parties, index number of action, date of filing with clerk of court and must be endorsed with name, address and telephone number of plaintiff's attorney, if any. (N.Y. C.P.L.R. 305[a] [NYCLS], 2101[c] [NYCLS], [d] [NYCLS]). Corporations and voluntary associations must appear by attorneys. (N.Y. C.P.L.R. 321[a] [NYCLS]). Additional requirements apply in actions arising out of consumer credit transactions. (N.Y. C.P.L.R. 105[f] [NYCLS], 503[f] [NYCLS], 513 [NYCLS]; Rule 305[a]; N.Y. City Civ. Ct. Act §301[a]).

Who May Serve.

Except as otherwise prescribed by law or order of court, papers may be served by any person 18 years of age or over who is not a party. (N.Y. C.P.L.R. 2103[a] [NYCLS]). Process servers, other than attorneys or parties, are required to maintain specified records. (N.Y. Gen. Bus. Law §89 [NYCLS]–u to 89–cc).

Personal Service.

Service on natural person may be made by delivering copy of summons within state to person to be served; or by delivering summons within state to person of suitable age and discretion at actual place of business, dwelling place or usual place of abode of person to be served and by either mailing summons to person to be served at last known residence or mailing summons by first class mail to person to be served at his actual place of business in envelope bearing legend “personal and confidential” and not indicating on outside, by return address or otherwise, that such communication is from attorney or concerns action against person to be served, such delivery and mailing to be effected within 20 days of each other; proof of such service must be filed with clerk of court designated in summons within 20 days of either such delivery or mailing, whichever is effected later; service is complete ten days after filing. (N.Y. C.P.L.R. 308 [NYCLS]). Alternatively, such service may be made by first class mail with copy of summons and complaint, two copies of statement of service by mail and form of acknowledgment of receipt with prepaid return envelope addressed to sender; service is complete when party served mails or delivers signed acknowledgment to sender within 30 days of receipt. (N.Y. C.P.L.R. 312 [NYCLS]–a). If such service cannot be made with due diligence, personal service may be effected by affixing summons to door of actual place of business, dwelling place or usual place of abode within state and by mailing summons in manner described in preceding sentence, such affixing and mailing to be effected within 20 days of each other; proof of such service shall be filed with clerk of court designated in summons within 20 days of such affixing or mailing, whichever is effected later; service is complete ten days after filing. (N.Y. C.P.L.R. 308[4] [NYCLS]). If none of above methods is practicable, service of process may be made in such manner as court may direct. (N.Y. C.P.L.R. 308[5] [NYCLS]). Personal service may also be made by delivering copy of summons within state to person duly designated, in writing, executed and acknowledged in same manner as deed, with consent of agent endorsed thereon filed in office of county clerk, as person on whom summons may be served. (N.Y. C.P.L.R. 308 [NYCLS], 318 [NYCLS]). Where person to be served is infant or has been judicially declared incompetent or has had conservator appointed for him, special modes of service are provided. (N.Y. C.P.L.R. 309 [NYCLS]). Service of subpoena may be made in same manner as summons, except that where service is made by mailing and delivering subpoena to suitable person at business or abode or by mailing and affixing it to such place, no filing of proof of service is necessary and service is complete on later of mailing, and delivering or affixing such service. (N.Y. C.P.L.R. 2303[a] [NYCLS]).

Plaintiff Not Subject to Personal Jurisdiction.

Commencement of any action or proceeding in New York State by a person not subject to personal jurisdiction is deemed a designation by him of the attorney appearing in such action or, if none, the clerk of the court, as agent to receive process for determination of any claim or cause of action asserted during pendency of action for service of summons pursuant to §308, by any other party in such action, provided that cause of action or claim is one that could have been interposed by way of counterclaim had action been brought in supreme court. (N.Y. C.P.L.R. 303 [NYCLS]).

Personal Service on Partnership.

In action against partnership in partnership name, summons may be served upon any one partner within the state, or by first class mail. (N.Y. C.P.L.R. 310[a]-[b] [NYCLS], 312-a[a] [NYCLS]). Personal service upon partnership may be made within state by delivering summons to managing or general agent of partnership and mailing summons to last known residence or place of business of partnership. Proof of service must be filed within 20 days and service is complete ten days after filing. (N.Y. C.P.L.R. 310[b] [NYCLS]). Where service cannot be made with due diligence by above methods, it may be made by affixing copy of summons on door of actual place of business of partnership within state and by either mailing summons by first class mail to partner to be served at last known place of residence or office at partnership. Proof of service must be filed within 20 days and service is complete ten days after filing. (N.Y. C.P.L.R. 310[c] [NYCLS]). Personal service on partnership may also be made by delivery of summons to other agent or employee of partnership authorized to receive service or to any other person designated by partnership to receive process in writing filed in office of clerk where partnership located. (N.Y. C.P.L.R. 310[d] [NYCLS]). Execution upon judgment against partnership in such action may be collected out of property of partnership and property of persons summoned. (N.Y. C.P.L.R. 5201[b] [NYCLS]).

Personal service on limited partnership may be effected by delivering copy of process to managing or general agents or general partner in state, or to any agent or employee appointed or other person designated to receive service. (N.Y. C.P.L.R. 310-a[a] [NYCLS]). Limited liability partnership may also be served pursuant to N.Y. P'ship Law §121-1505. (N.Y. C.P.L.R. 310-a[c] [NYCLS]).

Personal service on domestic or foreign corporation may be effected by delivering copy of summons to an officer, director, managing agent or general agent, cashier or assistant cashier or any other agent authorized by appointment or by law to receive service or by first class mail. (N.Y. C.P.L.R. 311[a] [NYCLS], 312 [NYCLS]–a[a]). Service of summons and complaint or summons with notice must be made within 120 days after their filing. (N.Y. C.P.L.R. 306-b [NYCLS]). If service is impracticable within that time, court may, upon motion without notice, grant extensions. (N.Y. C.P.L.R. 311[b] [NYCLS]). Personal service may also be effected pursuant to N.Y. Bus. Corp. Law §306 [NYCLS] or N.Y. Bus. Corp. Law §307 [NYCLS]. (N.Y. C.P.L.R. 311[a][1] [NYCLS]).

Personal service on limited liability company may be effected by delivering copy of process to member of limited liability company in state, if management of limited liability company is vested in members; to manager of limited liability company in state, if management of limited liability company is vested in managers; or to any agent appointed or other person designated to receive process. Limited liability company may also be served pursuant to N.Y. Ltd. Liab. Co. Law art. 3. (N.Y. C.P.L.R. 311-a[a] [NYCLS]).

Personal service on unincorporated association must be made upon president or treasurer of association, but if labor organization, may also be made on vice-president, asst. treasurer, secretary, asst. secretary, or business agent. (N.Y. Gen. Ass'ns Law §13).

Personal service on joint stock associations must be made by delivering copy of summons to Secretary of State. (N.Y. Gen. Ass'ns Law §19). Secretary of State must be designated by all joint stock associations as agent to receive service of process. (N.Y. Gen. Ass'ns Law §18[2]).

Personal service on state agency, or on state officer sued solely in official capacity, where required to obtain personal jurisdiction over such agency or officer, may be made upon chief executive officer of such agency, or chief executive officer's designee, or by certified mail, return receipt requested to such officer, and personal service upon state. (N.Y. C.P.L.R. 307 [NYCLS]). Service by certified mail shall not be effective unless front of envelope bears legend “URGENT LEGAL MAIL” in capital letters. (N.Y. C.P.L.R. 307[2] [NYCLS]).

Service of Process Against Domestic or Authorized Foreign Corporation on Secretary of State.

Every domestic or authorized foreign corporation must designate or is deemed to have designated Secretary of State as agent for service. (N.Y. Bus. Corp. Law §304[a] [NYCLS]). In addition, every such corporation may designate a registered agent in the state upon whom process may be served. (N.Y. Bus. Corp. Law §305[a] [NYCLS]). Service may be made on registered agent as if such agent were a defendant. (N.Y. Bus. Corp. Law §306[a] [NYCLS]). However, service upon Secretary of State to obtain jurisdiction over domestic or authorized foreign corporation is valid only when action or proceeding is brought within this state. (N.Y. Bus. Corp. Law §§102[a][11] [NYCLS], 304[a] [NYCLS]). Process may be served on Secretary of State by personally delivering to and leaving with Secretary of State or a deputy Secretary of State or any person authorized by Secretary of State to receive such service, together with statutory fee, at office of Dept. of State at Albany, duplicate copies of such process, one of which Secretary of State must send, by certified mail, to corporation at address fixed for that purpose. (N.Y. Bus. Corp. Law §306[b] [NYCLS]). No fee shall be collected for process served on behalf of county, city, town or village or other political subdivision of state. (N.Y. Bus. Corp. Law §104-A[c] [NYCLS]).

Service of Process on Unauthorized Foreign Corporation.

Every foreign corporation not authorized to do business in state is subject to personal or other jurisdiction if and to extent a non-domiciliary would be subject to jurisdiction under N.Y. C.P.L.R. art. 3 [NYCLS]. Service of process may be made on Secretary of State in same manner as described above, except that one copy of such process shall be served. Notice and copy of process shall be: (1) Delivered personally without state to such foreign corporation, or (2) sent to such foreign corporation by registered mail return receipt requested. Proof of service, with process, must be filed within 30 days after: (1) Service, where service was effected by personal service, or (2) receipt of signed return receipt, other proof of delivery, or original envelope mailed, where service was effected by mailing. Service is complete ten days after filing, and has effect of personal service within state. (N.Y. Bus. Corp. Law §307 [NYCLS]).

Service by Publication.

Order directing service of summons upon defendant, by publication, may be obtained upon motion without notice if service cannot be made by another prescribed method with due diligence, in: (1) Matrimonial action, or (2) action in which complaint demands judgment that defendant be excluded from vested or contingent interest in or lien upon specific real or personal property within state; or that such interest or lien in favor of either party be enforced, regulated, defined or limited, or otherwise affecting title to such property, including action of interpleader or defensive interpleader; or (3) action in which levy upon property of person to be served has been made within state under order of attachment, or chattel of such person has been seized in action to recover chattel. (N.Y. C.P.L.R. 314 [NYCLS], 315 [NYCLS]).

Opening Default After Service Other Than by Personal Delivery.

Where summons is served other than by personal delivery within or without state and defendant served does not appear, defendant may be allowed to defend action within one year after he obtains knowledge of entry of judgment, but no more than five years after entry, on finding by court that defendant did not receive notice of summons in time to defend and has meritorious defense. (N.Y. C.P.L.R. 317 [NYCLS]).

Long Arm Statute.

As to a cause of action arising from any of following acts, court may exercise personal jurisdiction over any nondomiciliary, or his executor or administrator, who in person or through agent: (1) Transacts any business within state or contracts anywhere to supply goods or services in state; (2) commits tortious act other than defamation within state; (3) commits tortious act, other than defamation, outside state causing injury to person or property within state, if such nondomiciliary regularly does or solicits business, or engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered within state; or (4) owns, uses, or possesses real property within state. (N.Y. C.P.L.R. 302[a] [NYCLS]). Where personal jurisdiction is based on foregoing grounds, appearance does not confer jurisdiction as to causes of action not arising from enumerated acts. (N.Y. C.P.L.R. 302[c] [NYCLS]). Courts have personal jurisdiction over person obtaining judgment in foreign defamation proceeding. (N.Y. C.P.L.R. 302[d] [NYCLS]).

Proof of Service.

In general by affidavit, certificate of authorized public officer, written admission or signed acknowledgment form of person receiving same. (N.Y. C.P.L.R. 306 [NYCLS], 312-a [NYCLS]). Proof of service must be filed with clerk of court within 120 days of filing of summons to prevent dismissal. (N.Y. C.P.L.R. 306-b [NYCLS]). Actions so dismissed may be revived within 120 days of dismissal. (N.Y. C.P.L.R. 306-b [NYCLS]). Proof of service in actions with limitations period of four months or less must be made within 15 days to prevent dismissal, and may be revived within 15 days of dismissal. (N.Y. C.P.L.R. 306-b [NYCLS]).

General.

Provisions as to service of summons apply to actions in supreme court and with certain exceptions to all courts of record.

Nonresident Motorist.

See category 23 Transportation, topic 23.01 Motor Vehicles.

5.21 REPLEVIN:

Proceedings.

In action to recover chattel, plaintiff may require sheriff to seize chattel on delivery of affidavit, order of seizure, undertaking, and, if action not yet commenced, summons and complaint. (N.Y. C.P.L.R. 7102 [NYCLS]).

Affidavit.

It shall identify chattel to be seized and shall state: (1) That plaintiff is entitled to possession by virtue of facts set forth; (2) that chattel is wrongfully held by defendant named; (3) whether an action to recover the chattel has been commenced, the defendants served, whether they are in default, and, if they have appeared, where papers may be served upon them; (4) value of each chattel or class of chattels claimed, or aggregate value of all chattels claimed; (5) facts sufficient to establish probable cause to believe that property is located at place to authorize sheriff to break open, enter and search for chattel, and sufficient facts to establish probable cause that chattel located at specific place; (6) plaintiff knows of no defense to his claim; and (7) for order of seizure without notice, sufficient facts to establish that, without such order, chattel will become unavailable for seizure. (N.Y. C.P.L.R. 7102[c] [NYCLS]).

Undertaking.

It must be executed by sufficient surety acceptable to court and be in specified amount, not less than twice value of chattel. (N.Y. C.P.L.R. 7102[e] [NYCLS]).

Defendant, or third person claimant, even on lien only, may except to plaintiff's sureties and require justification within ten days after chattel seized. (N.Y. C.P.L.R. 7102[e] [NYCLS], [f] [NYCLS]).

Order of Seizure Service.

Order of Seizure deemed mandate of court and must direct sheriff to seize chattel described in affidavit. Sheriff must serve person from whom chattel is seized with copies of affidavit, order of seizure, and undertaking. Sheriff must also serve each defendant not in default personally with all of papers delivered to him by plaintiff. (N.Y. C.P.L.R. 7102[b] [NYCLS], [d] [NYCLS]).

Disposition.

After ten-day period sheriff must deliver chattel to plaintiff unless he has been served with notice of exception to surety, notice of motion for impounding order, or papers necessary to reclaim chattel. Failure of plaintiff's surety to justify requires sheriff to deliver chattel to person from whom it was seized. (N.Y. C.P.L.R. 7102[f] [NYCLS]).

Seizing, or Reclaiming or Returning Less Than All Chattels.

Where seizure of two or more chattels required, sheriff shall seize those which can be found. Any time before final judgment, plaintiff may require seizure of chattels not yet seized under same procedure as for first seizure. Value of chattels seized, as stated in plaintiff's affidavit, is value for subsequent undertakings in action. Less than all chattels seized may be impounded or reclaimed. (N.Y. C.P.L.R. 7104 [NYCLS]).

Reclaiming Chattel.

Person claiming right to possess chattel, except a defendant claiming only lien or security interest may serve sheriff and all parties with notice that he requires its return, undertaking as set forth in N.Y. C.P.L.R. 7102[e] [NYCLS] and affidavit stating his right to possession on facts set forth. Ten days after service sheriff must deliver chattel to claimant unless he has been served with notice of exception to surety or of motion to impound. Failure of claimant's surety to justify requires sheriff to deliver chattel to plaintiff. (N.Y. C.P.L.R. 7103[a] [NYCLS]).

Impounding Chattel.

Person claiming right to possession of chattel may impound it by motion, upon notice to sheriff and all parties, which must be granted when claimant, if found entitled to possession, would not be compensated adequately by payment of pecuniary value. Undertaking not less than $250 to indemnify sheriff for handling expenses must accompany motion. (N.Y. C.P.L.R. 7103[b] [NYCLS]).

Returning Chattel.

Defendant may obtain court order to return chattel, upon motion and notice, if chattel is exempt, if value of chattel greater in defendant's possession than in plaintiff's, if plaintiff would not be prejudiced and if interests of justice require. If chattel returned to defendant, court shall grant restraining order enjoining disposition of chattel except to plaintiff. (N.Y. C.P.L.R. 7103[c]

[NYCLS]).

Additional Parties.

A person who moves to impound or serves on plaintiff notice of reclamation or exception to surety becomes party to action, and within 20 days thereafter plaintiff must serve him with copy of complaint. (N.Y. C.P.L.R. 7103[d] [NYCLS]).

Perishable or Unique Chattel.

Court on motion may order sale of perishable property and may also enjoin sale, removal from state or other disposal of unique chattel until further order. (N.Y. C.P.L.R. 7105 [NYCLS], 7109 [NYCLS]).

Damages.

Damages for wrongful taking or detention or for injury to or depreciation of chattel may be awarded to party. (N.Y. C.P.L.R. 7108[a] [NYCLS]).

Final judgment must award possession to prevailing party. If he is not in possession on entry of judgment it must award value of chattel at time of trial (but may award possession if chattel is unique) less value of any interest of unsuccessful party, except under certain circumstances. (N.Y. C.P.L.R. 7108 [NYCLS], 7109[b] [NYCLS]).

5.22 SEQUESTRATION:

Where execution on final money judgment against corporation is returned wholly or partly unsatisfied, judgment creditor can sue to sequester and distribute corporation's property and to have a receiver appointed. (N.Y. Bus. Corp. Law §§1201 [NYCLS], 1202 [NYCLS]).

In matrimonial action property of defendant spouse in state may be sequestered and receiver appointed to take control of such property: (1) If such spouse is not within state or cannot be found therein or is concealing himself or herself therein, so that he or she is not amenable to process, or (2) in case of his or her failure to give security or to comply with directions of court as to providing for maintenance of spouse and children. (N.Y. Dom. Rel. Law §§233 [NYCLS], 243 [NYCLS]). See also category 8 Debtor and Creditor, topics 8.02 Attachment, 8.05 Executions, 8.16 Receivers.

5.23 SERVICE:

See topic 5.20 Process.

5.24 STAY OF EXECUTION:

See topic 5.03 Appeal and Error; category 8 Debtor and Creditor, topic 8.05 Executions.

5.25 SUBMISSION OF CONTROVERSY:

An action, except matrimonial, may be commenced by filing with clerk a submission of the controversy, acknowledged by all parties, and consisting of a case, containing a statement of facts upon which controversy depends, and a statement that the controversy is real and the submission is in good faith to determine the rights of the parties. (N.Y. C.P.L.R. 3222[a] [NYCLS]). Subsequent proceedings shall be had according to N.Y. C.P.L.R. except, among other things: that order of attachment, or preliminary injunction shall not be granted; if submission made to supreme court it shall be heard and determined by court or by appellate division or, with his consent, by specified judge or referee and if statement of facts is insufficient to enable court to enter judgment submission shall be dismissed or filing of additional statement allowed. (N.Y.

C.P.L.R. 3222[b] [NYCLS]).

5.26 VENUE:

Unless parties have otherwise agreed, place of trial shall be in county in which one of parties resided when action was commenced, or if none of parties is resident of New York, in any county designated by plaintiff. In addition, party resident in more than one county shall be deemed resident of each such county. (N.Y. C.P.L.R. 503[a] [NYCLS]). However, notwithstanding any requirements of law, place of trial of action may be in county designated by plaintiff, unless changed by order upon motion or by consent. (N.Y. C.P.L.R. 509 [NYCLS]). Residence of one serving in representative capacity (executor, administrator, trustee, conservator, guardian, receiver) is county of appointment or county of his actual residence. (N.Y. C.P.L.R. 503[b] [NYCLS]). Generally, residence of corporation is county of its principal office as stated in its certificate or county where action arose if corporation is railroad or common carrier. (N.Y. C.P.L.R. 503[c] [NYCLS]). Residence of unincorporated association, partnership, or sole proprietorship is any county in which its principal office is located, as well as county in which individual suing or being sued on behalf of association, partnership or sole proprietorship resides. (N.Y. C.P.L.R. 503[d] [NYCLS]). In action for sum of money only, brought by assignee other than assignee for benefit of creditors or holder in due course of negotiable instrument, assignee's residence is deemed same as that of original assignor at time of assignment. (N.Y. C.P.L.R. 503[e] [NYCLS]). In actions arising out of consumer credit transactions, where debtor is defendant, place of trial is county in which defendant resides, if one resides within state or county where such transaction took place if it is within state. (N.Y. C.P.L.R. 503[f] [NYCLS]). In action affecting status of real property, venue will lie in county in which any part of subject of action is situated. (N.Y. C.P.L.R. 507 [NYCLS]). In action to recover chattel venue will lie in county where property is located at commencement of action. (N.Y. C.P.L.R. 508 [NYCLS]).

Subject to N.Y. C.P.L.R. 506[b] [NYCLS] place of trial of all actions against counties, cities, towns and villages or any of their officers, boards or departments is, for county, in such county, for city (except New York City) town or village, in the county in which such city, town or village is situated, for New York City, in the county within the city where cause of action arose, or if it arose outside city, in New York County. (N.Y. C.P.L.R. 504 [NYCLS]). In action against a public authority, place of trial is in county where authority has its principal office or where it had facilities involved in the action, except that in action against New York City Transit Authority place of trial is in county in New York City where cause of action arose, or if it arose outside of city, in county of New York. (N.Y. C.P.L.R. 505[a] [NYCLS], [b] [NYCLS]).

Special proceeding may be commenced in any county within the judicial district where the proceeding is triable. (N.Y. C.P.L.R. 506[a] [NYCLS]). Proceeding against a body or officer must be commenced in any county within judicial district where respondent made determination complained of, or refused to perform required duty, or where proceedings were brought in course of which matter sought to be restrained originated or where material events took place, or where principal office of respondent is located, or if proceeding is against a justice of supreme or county court or court of general sessions, it must be commenced in the appellate division of the appropriate judicial department. (N.Y. C.P.L.R. 506[b][1] [NYCLS]). Proceedings against various executive departments of State of New York must be commenced in Supreme Court, Albany County. (N.Y. C.P.L.R. 506[b][2] [NYCLS]).

Change of Venue.

It can be ordered by court on motion where county designated is improper one; where there is reason to believe that impartial trial cannot be had in proper county; or to suit convenience of material witnesses where motion is filed with answer or before answer is served. (N.Y. C.P.L.R. 510 [NYCLS], 511 [NYCLS]).

Contract Provisions.

Agreement fixing place of trial, made before action is commenced must be enforced upon motion for change of place of trial, unless there is reason to believe that impartial trial cannot be had in proper county. (N.Y. C.P.L.R. 501 [NYCLS], 510 [NYCLS]).

6 COURTS AND LEGISLATURE

6.01 COURTS:

United States District Courts.

New York is divided into four judicial districts, as follows:

Southern District.

Clerk's office: U.S. Court House, 500 Pearl St., New York City 10007-1312.

Counties in this district are: Bronx, Dutchess, New York, Orange, Putnam, Rockland, Sullivan, and Westchester counties, and concurrently with Eastern District waters within Eastern District.

Filing fee is $350 for any party instituting any civil action, suit, or proceeding, whether by original process, removal, or otherwise, except for writ of habeas corpus actions, which cost $5. (28 U.S.C.§1914[a]).

Court sits at U.S. Court House, 500 Pearl St., New York City 10007-1312.

Eastern District.

Clerk's office: U.S. Court House, 225 Cadman Plaza, Room 130, East Brooklyn 11201.

Counties in this district are: Richmond, Kings, Queens, Nassau and Suffolk Counties, and concurrently with Southern District the waters within Counties of Bronx and New York.

Filing fee is $350 for any party instituting any civil action, suit, or proceeding, whether by original process, removal, or otherwise, except for writ of habeas corpus actions, which cost $5. (28 U.S.C.§1914[a]).

Court sits at U.S. Court House, 225 Cadman Plaza, East Brooklyn 11201.

Northern District.

Clerk's office: 100 South Clinton Street, Syracuse, N.Y. 13261-3767.

Counties in this district are: Albany, Broome, Cayuga, Chenango, Clinton, Columbia, Cortland, Delaware, Essex, Franklin, Fulton, Greene, Hamilton, Herkimer, Jefferson, Lewis, Madison, Montgomery, Oneida, Onondaga, Oswego, Otsego, Rensselaer, St. Lawrence, Saratoga, Schenectady, Schoharie, Tioga, Tompkins, Ulster, Warren, and Washington Counties.

Filing fee is $350 for any party instituting any civil action, suit, or proceeding, whether by original process, removal, or otherwise, except for writ of habeas corpus actions, which cost $5. (28 U.S.C.§1914[a]).

Court sits at Utica, at Auburn, at Syracuse, and at Albany.

Western District.

Clerk's office: U.S. Court House, 68 Court Street, Buffalo 14202.

Counties in this district are: Allegany, Cattaraugus, Chautauqua, Chemung, Erie, Genesee, Livingston, Monroe, Niagara, Ontario, Orleans, Schuyler, Seneca, Steuben, Wayne, Wyoming, and Yates, with waters thereof.

Filing fee is $350 for any party instituting any civil action, suit, or proceeding, whether by original process, removal, or otherwise, except for writ of habeas corpus actions, which cost $5. (28 U.S.C.§1914[a]).

Court sits at Buffalo and Rochester. Cases arising in the eight western counties of Allegheny, Cattaraugus, Chautauqua, Erie, Genesee, Niagara, Orleans, and Wyoming are normally assigned to judge sitting in Buffalo. Cases arising in the nine eastern counties of Chemung, Livingston, Monroe, Ontario, Schuyler, Seneca, Steuben, Wayne, and Yates are normally assigned to judge sitting in Rochester.

United States Court of International Trade.

Clerk's office: One Federal Plaza, New York, NY 10007.

Court sits at One Federal Plaza, New York, NY 10007.

Court of Appeals.

This is highest New York state court and consists of seven judges (chief judge and six associate judges) all of whom are appointed by governor to 14-year terms. Five judges constitute quorum, and concurrence of four is required to make decision. (N.Y. Const., art. VI, §2[a] [NYCLS]).

Jurisdiction.

Limited to review questions of law, except in two instances in which it reviews questions of fact: (1) Death penalty appeals; and (2) appeals from appellate division decisions reversing or modifying judgment below where appellate court finds new facts and enters new judgment. Right to appeal does not depend upon amount involved. (N.Y. Const., art. VI, §3[a] [NYCLS]; N.Y. C.P.L.R. 5501[b] [NYCLS]).

In civil cases, jurisdiction of court confined to appeals (A) as of right: (1) From final judgment or order of appellate division, action having commenced in supreme, county or surrogate court, family court, court of claims or administrative agency, when there is dissent by at least two justices on question of law in favor of party taking appeal; (2) from order of appellate division which finally determines action where construction of Constitution of State or of U.S. is directly involved; (3) from judgment of court of record of original instance which finally determines an action where only question involved on appeal is validity of statutory provision of State or of U.S. under Constitution of State or of U.S.; (4) from order of appellate division granting new trial or hearing, or affirming order granting new trial or hearing in action originally commenced in supreme, county or surrogate court or court of claims or an administrative agency, where appellant stipulates that, upon affirmance, judgment or order absolute shall be rendered against him; (5) from final judgment entered in court of original instance or from final determination of administrative agency or from final arbitration award, or from order of appellate division which finally determines appeal from such judgment, determination or award, where appellate division has made order on prior appeal in action which necessarily affects judgment, determination or award and which satisfies requirements of (1) or (2) except that of finality (N.Y. Const., art. VI, §3 [NYCLS]; N.Y. C.P.L.R. 5601 [NYCLS]); (B) (1) by permission of appellate division (a) from judgment or order of appellate division not finally determining action in which it is entered, (b) from judgment or order thereof in action commenced other than in supreme, county or surrogate's court, family court or court of claims or administrative agency; (2) either by permission of appellate division granted before application to Court of Appeals to appeal, and in case of refusal of such permission, by permission of Court of Appeals or by permission of Court of Appeals upon application directly to that court. Permission by Court of Appeals for leave to appeal shall be granted upon approval of two judges of Court of Appeals. (N.Y. C.P.L.R. 5602 [NYCLS]).

No appeal shall be taken to Court of Appeals from judgment or order entered upon decision of an Appellate Division of Supreme Court in any civil case or proceeding originally commenced in any court other than supreme court, county court, surrogate's court, family court, or court of claims, unless construction of N.Y. or of U.S. Constitution is directly involved therein, or unless Appellate Division of Supreme Court shall certify that in its opinion a question of law is involved which ought to be reviewed by Court of Appeals. (N.Y. Const., art. VI, §3[b][7] [NYCLS]). Appeals are allowed upon questions of law when required in interest of substantial justice. Appellate division, in allowing appeal from non-final judgments or orders, must certify particular determinative questions of law; where it allows appeal on other grounds, it shall certify only that questions exist which ought to be reviewed by Court of Appeals. (N.Y. Const., art. VI, §3[b][6] [NYCLS]: N.Y. C.P.L.R. 5602 [NYCLS]).

In criminal cases Court of Appeals hears appeals directly from trial court as matter of right where judgment involves death sentence (N.Y. Const., art. VI, §3[b] [NYCLS]; N.Y. Crim. Proc. Law §§450.70 [NYCLS], 450.80 [NYCLS]) and from intermediate appellate court either by right pursuant to N.Y. Crim. Proc. Law §450.90 [NYCLS] or by certificate pursuant to N.Y. Crim. Proc. Law §460.20 [NYCLS]. Appeal by right may be taken from any adverse or partially adverse order of intermediate appellate court except that appeal from order reversing or modifying judgment, sentence or order of trial court may be taken only if: (1) It is expressly stated by intermediate appellate court that reversal or modification was on law alone or upon law and such facts which, but for determination of law, would not have led to reversal or notification (N.Y. Crim. Proc. Law §450.90 [NYCLS]); or (2) appellant contends that correction action, as defined in N.Y. Crim. Proc. Law §470.10 [NYCLS], taken or directed by intermediate appellate court was illegal (N.Y. Crim. Proc. Law §450.90 [NYCLS]).

Court of Appeals sits at Albany.

Supreme Court.

This is highest state court of original jurisdiction, has general jurisdiction in law and equity (N.Y. Const., art. VI, §7 [NYCLS]), and is court of record (N.Y. Jud. Ct. Acts Law §2 [NYCLS]). State is divided for administration of this court into four judicial departments and 12 judicial districts. (N.Y. Const., art. VI, §§4 [NYCLS], 6 [NYCLS]; N.Y. Jud. Ct. Acts Law §§70 [NYCLS], 140 [NYCLS]). County seals are seals of this court unless special provisions are otherwise made by law. (N.Y. Jud. Ct. Acts Law §155 [NYCLS]).

There is an appellate division in each of four departments, consisting of seven justices of Supreme Court in First and Second Departments and five in each of other Departments, a majority of whom in each department must be residents of that department, but no more than five to sit in any case. Four justices constitute quorum and concurrence of three is necessary for decision. Governor designates presiding justice, resident of department, who acts as such during his official term, and associate justices, each of whom holds his position for term of not more than five years. (N.Y. Const., art. VI, §4 [NYCLS]; N.Y. Jud. Ct. Acts Law §71 [NYCLS]). Appeals may be taken to Appellate Division from Supreme and County Courts as of right: (1) From any final or interlocutory judgment except one entered subsequent to order of Appellate Division which disposes of all issues: (2) from order unless specified as not appealable as of right where decision on motion was made on notice and it (a) grants, refuses, continues or modifies provisional remedy, or (b) settles, grants or refuses application to resettle transcript or statement on appeal, or (c) grants or refuses new trial, or (d) involves some part of merits, or (e) affects substantial right, or (f) in effect determines action, or (g) determines state statute to be unconstitutional; (3) from order where motion it decided was made on notice refusing to vacate or modify prior order, if prior order would have been appealable as of right if made on notice (N.Y. C.P.L.R. 5701[a] [NYCLS]). Order is not appealable as of right where it: (1) Is made in proceeding against body or officer pursuant to art. 78; (2) requires or refuses to require more definite statement in pleading, or (h) grants or determines motion for leave to reargue or renew; or (3) orders or refuses to order that scandalous or prejudicial matter be stricken from pleading (N.Y. C.P.L.R. 5701[b] [NYCLS]). Appeals may be taken by permission from orders not appealable as of right in Supreme or County Court actions by permission of judge who made order or by permission of justice of Appellate Division in department to which appeal could be taken. (N.Y. C.P.L.R. 5701[c] [NYCLS]). Appeals may be taken from judgment or order from court other than Supreme Court or County Court in accordance with statute governing practice in such court (N.Y. C.P.L.R. 5702 [NYCLS]), from order of Appellate Term by permission (N.Y. C.P.L.R. 5703[a] [NYCLS]), and as of right from determinations of Special Term of Supreme Court and County Courts sitting as intermediate appellate courts (N.Y. C.P.L.R. 5703[b] [NYCLS]).

Appeals from supreme court, county court, appellate term or surrogate's court may be reviewed on questions of fact, questions of law, or both. (N.Y. C.P.L.R. 5501[c] [NYCLS]; N.Y. Surr. Ct. Proc. Act §2701[1] [NYCLS]).

Appellate division has original jurisdiction in certain cases, e.g., admission to or removal from practice (N.Y. Jud. Ct. Acts Law §90 [NYCLS]), petitions directed against a justice of the supreme court, a judge of a county court or court of general sessions (N.Y. C.P.L.R. 506[b][1] [NYCLS]) and trial of issue of law on submission of agreed statement of facts (N.Y. C.P.L.R. 3222 [NYCLS]).

Appeals from judgments or orders of Civil Court of the City of N.Y. or Criminal Court of City of N.Y. are heard in appellate division of supreme court in department in which action is pending, or in appellate term, if established, by not more than five nor less than three justices of supreme court designated by appellate division in each department and known as appellate term. (N.Y. Const., art. VI, §8 [NYCLS]; N.Y. City Civ. Ct. Act §1701; N.Y. City Crim. Ct. Act §101).

Appeal may be taken to appellate division from an order of appellate term which determines an appeal from a judgment or order of lower court by permission of appellate term or, in case of refusal, of appellate division. When permission to appeal is sought from an order granting or affirming the granting of a new trial or hearing, appellant shall stipulate that, upon affirmance, judgment absolute may be entered against him. (N.Y. C.P.L.R. 5703[a] [NYCLS]). Appeal may be taken to Appellate Division as of right from order of County Court or Special Term of Supreme Court which determines appeal from judgment of lower court. (N.Y. C.P.L.R. 5703[b] [NYCLS]).

Places of sitting of appellate divisions are as follows:

First Department.

Court sits at 27 Madison Avenue at 25th Street, Borough of Manhattan, New York City.

Second Department.

Court sits at 45 Monroe Place, Brooklyn.

Third Department.

Court sits at Justice Building, South Mall, Albany.

Fourth Department.

Court sits at 501 Hall of Justice, Civic Center Plaza, Rochester.

County Courts.

In each county, except those within City of N.Y., where its place is taken, in effect, in criminal matters by Criminal Court of City of N.Y. (N.Y. Const., art. VI, §15 [NYCLS]; N.Y. City Crim. Ct. Act §20) there is county court (N.Y. Const., art. VI, §10 [NYCLS]; N.Y. Jud. Ct. Acts Law §190 [NYCLS]). Upon order of judge or court, indictment, before plea of guilty, may be removed from supreme court to county court for that county, or from county court to Supreme Court. (N.Y. Crim. Proc. Law §230.10 [NYCLS]). County courts, as well as Criminal Court of City of N.Y., are courts of record. (N.Y. Jud. Ct. Acts Law §2 [NYCLS]).

County courts have jurisdiction in actions and special proceedings: (1) For partition of real property, for dower, for foreclosure, redemption or satisfaction of mortgage on real property, for foreclosure of lien arising out of contract for sale of real property, for specific performance of contract relating to real property, for enforcement or foreclosure of mechanic's lien on real property, for reformation or rescission of deed, contract or mortgage affecting real property, to compel determination of claim to real property under N.Y. Real Prop. Law art. 15 [NYCLS] where real property situated within county, to foreclose lien upon chattel in case specified in (N.Y. Lien Law §206 [NYCLS]) where lien does not exceed $25,000 and chattel is within county; (2) to recover judgment for money due on judgment rendered in same court in action in favor of executor, administrator or assignee of judgment creditor; (3) for any other cause where all defendants reside in county at time of commencement of action, or defendant has office for transaction of business in county and cause of action arose therein, or where defendant is foreign corporation doing business within county and cause of action arose therein, and complaint demands judgment for sum of money only not exceeding $25,000; (4) to recover chattels valued at not more than $25,000; (5) where supreme court has jurisdiction, for appointment of committee of person or property of incompetent wherever resident, or for sale or other disposition of real property situated in county of incompetent or infant, or for sale or other disposition of real property in county of domestic religious corporation; (6) where supreme court has jurisdiction, to review actions or determinations of state board of parole; (7) for any claim against restitution fund established by such court resulting from its criminal jurisdiction. (N.Y. Jud. Ct. Acts Law §190 [NYCLS]). County courts also have jurisdiction, concurrently with supreme and surrogate's courts, over petition to apply property of infant to infant's support, maintenance, or education. (N.Y. C.P.L.R. 1211[a] [NYCLS]).

Decisions of county courts are subject to review on appeal by Appellate Division of Supreme Court. (N.Y. C.P.L.R. 5701 [NYCLS]). County courts have jurisdiction on appeals from judgment of justice's court unless appellate term of Supreme Court has been established by appellate division and directed appeal to them. (N.Y. Uniform Just. Ct. Act §1701 [NYCLS]).

County judges are elected for a ten-year term. (N.Y. Const., art. VI, §10[b] [NYCLS]).

Surrogates' Courts.

Subject Matter Jurisdiction and Court Powers.

Surrogates' courts, one of which located in each county, exercise full and complete general jurisdiction in law and in equity to administer justice in all matters relating to affairs of decedents. (N.Y. Const., art. VI, §12[d] [NYCLS]; N.Y. Surr. Ct. Proc. Act §201[3] [NYCLS]). Court powers are purely statutory and include, but are not limited to following incidental powers to: (1) To open, vacate, modify, or set aside any decree or any order of court directing distribution of property of estate which was made prior to probate of and without knowledge of will which affects such distribution, and in same or different proceeding with notice to persons or fiduciaries of persons to whom property has been distributed, to make such further and different direction as to such distribution as justice may require, and as incident thereto, order refund of any property theretofore distributed erroneously; (2) transfer for trial in surrogate's court having jurisdiction any action or proceeding pending in any court other than supreme court, which affects or relates to administration of decedent's estate and to receive for trial any such action or proceeding pending in supreme court which may by order of latter court be transferred to surrogate's court on prior order of that court; (3) determine decedent's interest in any property claimed to constitute part of his gross estate subject to estate tax, or to be property available for distribution under his will or in intestacy or for payment of claims, and to determine rights of any persons claiming interest therein, as against decedent, or as between themselves, and to construe any instruments made by him affecting such property; (4) settle account of fiduciary of common trust fund as provided in banking laws; (5) entertain proceeding under N.Y. Est. Powers & Trusts Law §8-1.1 [NYCLS] (relating to dispositions for charitable purposes); (6) dismiss any proceeding which petitioner has neglected to prosecute diligently; (7) determine any unfinished business pending before its predecessor in office and to sign or certify papers or records left uncompleted or unsigned by its predecessor; (8) sign any decision, decree or order, with its usual signature or initials, and all decisions, decrees or orders heretofore or hereafter so signed shall be valid and binding; (9) determine any and all matters relating to lifetime trusts. (N.Y. Surr. Ct. Proc. Act §209 [NYCLS]).

Surrogate's court of any county has jurisdiction over estate of: (1) Any domiciliary of state at time of his death, disappearance or internment with proper venue being county of decedent's domicile at time of death, disappearance or internment. (N.Y. Surr. Ct. Proc. Act §205[1] [NYCLS]). Notwithstanding foregoing provisions of this section, surrogate's court of any county has jurisdiction over, and is proper venue for, proceedings of any decedent who was domiciliary of state at time of his or her death and who died as result of wounds or injury incurred as result of terrorist attacks on Sept. 11, 2001 (N.Y. Surr. Ct. Proc. Act §205[3] [NYCLS]); (2) any non-domiciliary decedent of state who leaves property in state, with proper venue being county (a) where decedent left property, or (b) where personal property belonging to decedent has since his death, disappearance or internment come into and remains unadministered; (3) any non-domiciliary of state who leaves cause of action against domiciliary of state, with proper venue being county of domicile of person against whom decedent left cause of action for wrongful death (N.Y. Surr. Ct. Proc. Act §206 [NYCLS]); (4) any lifetime trust which has assets in state, or of which grantor was domiciliary of state when proceeding concerning trust commenced, or of which trustee then acting resides, or has principal office in state, proper venue being county where (a) assets of trust are located, or (b) grantor domiciled when proceeding concerning trust commenced, or (c) trustee then acting resides, or has principal office (N.Y. Surr. Ct. Proc. Act §207 [NYCLS]). When estate or matter may lie in more than one county, because personal or real property of non-domiciliary decedent is located in more than one county, court where proceeding is first commenced with proper venue must retain jurisdiction, and matters relating to estate of non-domiciliary decedent pending in surrogate's courts of other counties must be transferred to it. Surrogate must transfer any proceeding to surrogate's court of proper county either on own motion or on motion of any party. (N.Y. Surr. Ct. Proc. Act §§205 [NYCLS], 206 [NYCLS], 207 [NYCLS]).

In Rem and In Personam Jurisdiction.

For purpose of conferring jurisdiction upon court, (1) debt or cause of action for wrongful death, in favor of non-domiciliary against domiciliary, is deemed personal property in county where domiciliary, or either of two or more such domiciliaries resides, or if other than natural person, such domiciliary has its principal office, except that debt evidenced by negotiable instrument is deemed for jurisdictional purposes personal property in county of situs of instrument; (2) insurance policy upon life of non-domiciliary decedent shall have situs of principal office in this state of company or corporation issuing policy; (3) share of stock of corporation of this state owned by non-domiciliary deemed personal property in county where corporation has its principal office; and (4) life insurance policy or share of stock owned by a non-domiciliary is nevertheless deemed personal property in county where policy or share of stock is situated. (N.Y. Surr. Ct. Proc. Act §208 [NYCLS]).

Every proceeding is special proceeding and is commenced by filing a petition. Personal jurisdiction of parties obtained by service of process upon parties, by submission to jurisdiction of court by waiver of issuance and service of process, by appearance of adult competent party in person or by attorney or by pleading. (N.Y. Surr. Ct. Proc. Act §203 [NYCLS]). In addition to bases for exercise of jurisdiction traditionally permitted by law, surrogate's courts may obtain jurisdiction over any non-domiciliary, or his fiduciary, respecting any matter within subject matter jurisdiction of court arising from any act or omission of non-domiciliary within state, either in person or through agent regardless of whether state affects real property or certain personal property in state in name of domiciliary decedent. Receipt and acceptance of property distributed as part of estate subject to jurisdiction of surrogate's court other than payment of taxes under art. 26 of tax law constitutes submission by recipient to court's jurisdiction concerning any matter of payment or distribution. (N.Y. Surr. Ct. Proc. Act §210 [NYCLS]).

Tolling of Statute of Limitations.

For purpose of computing statutory period of limitation under N.Y. C.P.L.R. art. 2 [NYCLS], proceeding deemed commenced upon filing of petition, provided service made upon any respondent filed within 120 days after filing of petition. (N.Y. Surr. Ct. Proc. Act §§102 [NYCLS], 301 [NYCLS]; N.Y. C.P.L.R. 203 [NYCLS], 306-b [NYCLS]). When process served by publication, first publication must be within 120 days of filing of petition. (N.Y. C.P.L.R. 203[b] [NYCLS]5[ii]; N.Y. Surr. Ct. Proc. Act §301[a] [NYCLS]).

Surrogate's Court Organization.

County judge outside City of New York is surrogate of his county except where separate surrogate has been or shall be elected. (N.Y. Jud. Ct. Acts Law §184[2] [NYCLS]). Court always open for transaction of business within its powers and jurisdiction. Surrogate appoints time and place of holding court. When he is also county judge, surrogate may hold court at same time and place as county court. (N.Y. Surr. Ct. Proc. Act §2601 [NYCLS]). In N.Y. County and Kings County there are two surrogates (N.Y. Jud. Ct. Acts Law §179 [NYCLS]), who must appoint and may alter times of holding terms and sessions of court for (a) trial of proceedings in which there is right to trial by jury, and (b) disposition of all other business (N.Y. Surr. Ct. Proc. Act §2602[2] [NYCLS]). Surrogates' courts are courts of record. (N.Y. Jud. Ct. Acts Law §2 [NYCLS]).

Family Court.

Established in each county (N.Y. Fam. Ct. Act §113 [NYCLS]), with exclusive original jurisdiction over: (1) Abuse and neglect proceedings, (2) support proceedings, (3) proceedings to determine paternity and for support of children born out of wedlock, (4) proceedings permanently to terminate custody by reason of permanent neglect, (5) proceedings concerning juvenile delinquency, and (6) whether person in need of supervision, treatment or confinement. (N.Y. Fam. Ct. Act §115[a] [NYCLS]). Family Court also has other jurisdiction provided by law, including jurisdiction over habeas corpus proceedings, applications for support and custody in matrimonial actions when referred by Supreme Court, conciliation proceedings, and proceedings concerning physically handicapped and mentally defective or retarded children. (N.Y. Fam. Ct. Act §115[b] [NYCLS]). Family Court may issue orders for protection of children and summons requiring court appearance. (N.Y. Fam. Ct. Act §§550 [NYCLS], 551 [NYCLS], 655 [NYCLS], 736 [NYCLS], 841 [NYCLS], 842 [NYCLS]; N.Y. Crim. Proc. Law §530.11 [NYCLS]). Family Court has jurisdiction over certain nonresidents in cases involving orders of protection. (N.Y. Fam. Ct. Act §154 [NYCLS]).

N.Y. Fam. Ct. Act art. 3 [NYCLS] establishes whether person is juvenile delinquent and to issue appropriate order of disposition for any person adjudged juvenile delinquent. (N.Y. Fam. Ct. Act §301.1 [NYCLS]).

Family Court has original jurisdiction concurrent with Surrogate's Court over adoption proceedings under N.Y. Dom. Rel. Law art. 7 . (N.Y. Fam. Ct. Act §641 [NYCLS]).

Court of Claims.

Court composed of judges appointed for nine years by Governor with consent of senate. (N.Y. Ct. Cl. Act §2).

Court has jurisdiction over nearly all claims against state, including private claims, and over any claims of state against claimant. (N.Y. Ct. Cl. Act §9). Claimant must comply with applicable provisions as to time to file claims and/or intention to file claims. (N.Y. Ct. Cl. Act §10). Claimant who timely serves notice of intention, but who fails to timely serve or file claim may apply to court for permission to treat notice of intention as claim. Court shall not grant application unless made before such claim would have been barred under N.Y. C.P.L.R art. 11 [NYCLS]. if brought against citizen, notice of intention was timely served and contains facts sufficient to constitute claim, and granting of application would not prejudice defendant (N.Y. Ct. Cl. Act §10[8]). Court may order interpleader or joinder of parties asserting conflicting interests to award for property appropriated by State. (N.Y. Ct. Cl. Act §22). Appeals from orders or judgments, or of referee to hear and determine of Court of Claims, may be taken to appellate division of Supreme Court in Department in which claims arose. (N.Y. Ct. Cl. Act §24). Appeal from judgment may be taken upon questions of law or fact or both, or for alleged excess or insufficiency of judgment. (N.Y. Ct. Cl. Act §24).

Court is of record. (N.Y. Jud. Ct. Acts Law §2 [NYCLS]).

City Courts.

Each City Court outside City of N.Y. court of record. (N.Y. Jud. Ct. Acts Law §2 [NYCLS]).

Civil Court of the City of New York.

N.Y. City Civil Court has jurisdiction over following classes of actions where value of subject matter does not exceed $25,000, exclusive of interest and costs: (1) Money actions, actions involving chattels and actions and proceedings for foreclosure of liens on personal property (N.Y. City Civ. Ct. Act §202); (2) actions where person or his agent, whether or not resident of City of N.Y., transacts any business within City of N.Y., or contracts anywhere to supply goods or services in City of N.Y., or commits tortious act within City of N.Y. (except action for defamation of character), or owns, uses or possesses any real property situated within City of N.Y. (N.Y. City Civ. Ct. Act §404[a]); (3) actions involving real property, provided real property or part of it is situated within county of N.Y. City in which action brought (N.Y. City Civ. Ct. Act §203); (4) summary proceedings to recover possession of real property located within City of N.Y., to remove tenants therefrom and to render judgment for rent due without regard to amount; Court also has jurisdiction over special proceedings by tenants of multiple dwellings in City of N.Y. for judgment directing deposit of rents and use thereof for purpose of remedying conditions dangerous to life, health or safety as authorized by art. 7(A) of N.Y. Real Prop. Acts. Law (N.Y. City Civ. Ct. Act §204); (5) interpleader and defensive interpleader as defined and governed by N.Y. C.P.L.R. providing amount in controversy or value of property involved does not exceed $25,000 (N.Y. City Civ. Ct. Act §205); (6) questions relating to arbitrability of controversies under N.Y. C.P.L.R. art.75 [NYCLS], which arise in action over which Court has jurisdiction and which has been duly commenced in Court, except that Court does not have jurisdiction of special proceedings set forth in N.Y. C.P.L.R. 7502[a] [NYCLS]a used to bring before court first application arising out of arbitrable controversy (N.Y. City Civ. Ct. Act §206); (7) small claims where subject matter does not exceed $5,000 exclusive of interest and costs and defendant either resides, is regularly employed or has office for transaction of business in N.Y. City (N.Y. City Civ. Ct. Act §§207, 1801); (8) counterclaims, where Court would have jurisdiction if sued upon separately; any counterclaim for money only without regard to amount; counterclaims for rescission or reformation of transaction upon which plaintiff's action is founded if amount in controversy does not exceed $25,000; or counterclaims for accounting between partners after dissolution of partnership, where book value of partnership assets does not exceed $25,000 (N.Y. City Civ. Ct. Act §208); (9) actions seeking provisional remedies of attachment, arrest and seizure of chattel with same powers as supreme court, except that Court may not issue injunction unless in connection with recovery of chattel (N.Y. C.P.L.R. 7102[d] [NYCLS], 7103[c] [NYCLS], 7109 [NYCLS]), prevention of waste or damage during pendency of action (N.Y. Real Prop. Acts. Law §211 [NYCLS]), enforcement of judgments (N.Y. City Civ. Ct. Act §1508), and enforcement of housing standards (N.Y. Mult. Dwell. Law §306 [NYCLS]; N.Y.C. Adm. Code §27-2121), however, no receiver may be appointed unless specifically authorized by statute (N.Y. City Civ. Ct. Act §§209, 1508; N.Y. C.P.L.R. 5221[a] [NYCLS]); (10) contempt—provisions of law governing civil and criminal contempts in like instances in Supreme Court apply in this Court, except that this Court does not have power to punish for contempt judge or justice of any court (N.Y. City Civ. Ct. Act §210); (11) actions for declaratory judgment with respect to obligation of insurer to indemnify or defend defendant where amount sought to be recovered does not exceed $25,000 (N.Y. City Civ. Ct. Act §212-a); (12) actions for rescission and reformation of particular transactions if amount in controversy does not exceed $25,000 (N.Y. City Civ. Ct. Act §213). Special housing part of Civil Court has jurisdiction over actions and proceedings involving enforcement of state and local laws for establishment and maintenance of housing standards. (N.Y. City Civ. Ct. Act §110). Civil Court is court of record. (N.Y. Jud. Ct. Acts Law §2 [NYCLS]).

District Courts.

District courts, where established, have jurisdiction over following classes of actions: (1) Money actions, actions involving chattels and proceedings for foreclosure of liens on personal property where amount exclusive of interest and costs does not exceed $15,000 (N.Y. Uniform Dist. Ct. Act §202); (2) mechanic's lien on real property located in district and to recover personal judgment for amount due, where lien does not exceed $15,000 exclusive of interest and costs (N.Y. Uniform Dist. Ct. Act §203[a][1]); (3) summary proceedings to recover possession of real property located in district, or to remove tenants therefrom and render judgment for rent due without regard to amount (N.Y. Uniform Dist. Ct. Act §204); (4) action of interpleader and defensive interpleader provided amount exclusive of interest and costs does not exceed $15,000 (N.Y. Uniform Dist. Ct. Act §205); (5) court shall have jurisdiction to enter judgment on award of arbitrators where relief awarded within court's jurisdiction, and to determine arbitrability of controversy in action within court's jurisdiction which has been duly commenced therein (N.Y. Uniform Dist. Ct. Act §206); (6) small claims, defined as claims for money only not in excess of $5,000 exclusive of interest and costs and defendant either resides, has regular place of business, or is regularly employed within district (N.Y. Uniform Dist. Ct. Act §§207, 1801); (7) counterclaims, subject matter of which would be within jurisdiction of court if sued upon separately; any counterclaim for money only without regard to amount; any counterclaim for rescission or reformation of transaction upon which plaintiff's cause of action founded provided amount exclusive of costs and interest does not exceed $15,000; if defendant fails to file counterclaim within five days of receiving notice of claim, claimant may obtain adjournment to later date (N.Y. Uniform Dist. Ct. Act §§208, 1803[c]); (8) provisional remedies, except that court may not issue injunction except in conjunction with actions for recovery of chattel, prevention of waste, or activity complained of violates local law or ordinance relating to land use, building regulation or fire prevention, or enforcement of judgment, or enforcement of housing standards, however, no receiver shall be appointed by this court unless related to enforcement of judgment, foreclosure of mortgage, or City's expenses in correcting nuisance or removing building demolition (N.Y. Uniform Dist. Ct. Act §§209, 1508); (9) contempt, provisions of law governing civil and criminal contempt in like instances in supreme court shall apply in this court, except that this court shall have no power to punish for contempt judge or justice of any court (N.Y. Uniform Dist. Ct. Act §210); (10) where several causes of action are asserted in complaint, and each of them would be within jurisdiction of court if sued upon separately. In such case judgment may be rendered by court in excess of $15,000 if such excess results solely because of such joinder. (N.Y. Uniform Dist. Ct. Act §211). District courts are courts of record. (N.Y. Jud. Ct. Acts Law §2 [NYCLS]).

Courts Not of Record.

Justice Courts.

Justice courts are of local civil jurisdiction limited in general to actions for sums not exceeding $3,000 exclusive of interest and costs. (N.Y. Uniform Just. Ct. Act §§103 [NYCLS], 201 [NYCLS], 202 [NYCLS]). Court has jurisdiction of summary proceedings to recover possession of real property located in whole or in part within municipality, to remove tenants therefrom and to render judgment for rent due without regard to amount. (N.Y. Uniform Just. Ct. Act §204 [NYCLS]). Court has jurisdiction of any counterclaim whose subject matter within its jurisdiction. If counterclaim for money it will be deemed waived as to excess. (N.Y. Uniform Just. Ct. Act §208 [NYCLS]).

Small Claims Court.

Small claims court is provided for by (N.Y. City Civ. Ct. Act art. 18) for New York City; (N.Y. City Civ. Ct. Act art. 18) for cities outside New York; (N.Y. Uniform Dist. Ct. Act art. 18) for Nassau and Suffolk Counties and (N.Y. Uniform Just. Ct. Act art. 18 [NYCLS]) for town and village courts throughout State. There is small claims court in each borough within New York City and each district in Nassau and Suffolk Counties, except First District.

Jurisdiction of causes of action for money only not in excess of $3,000 provided that defendant either resides, has office for transaction of business or regular employment, within city, district or municipality. (N.Y. Uniform Just. Ct. Act §1801 [NYCLS]). Where judge of county court transfers, pursuant to N.Y. C.P.L.R. 325[g] [NYCLS], small claim from town or village court having jurisdiction over matter to another town or village court within same county, court to which matter is transferred shall have jurisdiction to determine claim (N.Y. Uniform Just. Ct. Act §1801 [NYCLS]). Access to court denied to corporations (except municipal or public benefit corporation, school district or school district public library wholly or partially within municipal corporate limit), partnerships, associations, assignees or insurers (with respect to claims brought in its own name or in name of its insured whether before or after payment to insured on policy). Corporation may appear in defense of small claim action by attorney or by authorized officer, director or employee. (N.Y. Uniform Just. Ct. Act §1809 [NYCLS]).

Action is commenced by paying filing fee of $10 for claims seeking less $1,000, and $15 for claims greater than $1,000, plus cost of mailings to clerk. Clerk makes statement of person's claim, along with clear description of process for filing counterclaim, and sends it by ordinary first class and certified mail with return receipt requested to party complained against. (N.Y. Uniform Just. Ct. Act §1803 [NYCLS]). If defendant fails to file counterclaim within five days of receiving notice of claim, claimant may obtain adjournment to later date. (N.Y. Uniform Just. Ct. Act 1803[c] [NYCLS]). Claimant is deemed to have waived jury trial, but defendant may file demand with court one day before return date with required affidavit and undertaking. (N.Y. Uniform Just. Ct. Act §1806 [NYCLS]). Hearing conducted by court in manner it deems best suited to discover facts and do justice. (N.Y. Uniform Just. Ct. Act §1804 [NYCLS]). Where judgment remains unsatisfied, court clerk must, upon request, issue information subpoena and court has same power as supreme court to punish for contempt. (N.Y. Uniform Just. Ct. Act §1812[d] [NYCLS]).

Commercial Claims Part.

N.Y. City Civ. Ct. Act art. 28–A for New York City (eff. 1/1/91), N.Y. Uniform Dist. Ct. Act art. 28–A (eff. 1/1/89) and N.Y. Uniform City Ct. Act art. 28–A (eff. 1/1/89) creates commercial claims part for each of these courts. Corporation, partnership or association with principal office in City or State of New York may bring cause of action for money only not in excess of amount permitted for small claim, exclusive of interest and costs, provided defendant either resides or has office for transaction of business or regular employment within City or State of New York. (N.Y. Uniform City Ct. Act §1801-A; N.Y. Uniform Dist. Ct. Act §1801-A; N.Y. Uniform City Ct. Act §1801-A). Action commenced by paying filing fee ($25) plus costs of mailings, without service of summons. Claimants must file verified statement that no more than five such actions have been instituted during that month and statement of cause of action. Notice of claim sent by ordinary first class mail and certified mail with return receipt requested to party complained against. Notice should contain clear description of process for filing counterclaim which must be filed within five days of receiving notice of claim. Fee for filing is $5. If defendant fails to file within five days, defendant retains right to file counterclaim but claimant may request adjournment to later date. Party complained against shall be presumed to have received notice if, after either 21 or 30 days, (depending on whether commercial claims arise out of consumer transactions), ordinary first class mailing has not been returned as undeliverable. (N.Y. City Civ. Ct. Act §1803-A; N.Y. Uniform Dist. Ct. Act §1803-A; N.Y. Uniform City Ct. Act §1803-A). Early, informal and simplified hearing conducted by court in manner it deems best suited to do justice. (N.Y. City Civ. Ct. Act §1804-A; N.Y. Uniform Dist. Ct. Act §1804-A; N.Y. Uniform City Ct. Act §1804-A). Claimant is deemed to have waived jury trial, but any other party to action may file demand for jury prior to date he is to appear or answer, with affidavit and required jury fee and undertaking. (N.Y. City Civ. Ct. Act §1806-A; N.Y. Uniform Dist. Ct. Act §1806-A; N.Y. Uniform City Ct. Act §1806-A). Court may transfer claim to any other part of court. (N.Y. Uniform Dist. Ct. Act §1805-A; N.Y. City Civ. Ct. Act §1805-A; N.Y. Uniform City Ct. Act §1805-A). Claimant is deemed to waive right to appeal except either party may appeal on sole grounds that substantial justice has not been done. (N.Y. Uniform Dist. Ct. Act §1807-A; N.Y. City Civ.Ct. Act §1807-A; N.Y. Uniform City Ct. Act §1807-A).

Other Courts.

In the several cities of state there are certain municipal, city, police and recorders' courts, having limited local civil and criminal jurisdiction, and administrative tribunals having jurisdiction over traffic infractions. See Charters of various cities or Inferior Criminal Courts Act.

Small Claims Courts.

See subhead Courts Not of Record, supra.

6.02 LEGISLATURE:

Meets annually in January. (N.Y. Const., art. XIII, §4 [NYCLS]). Governor may call extraordinary sessions. (N.Y. Const., art. IV, §3 [NYCLS]). See generally N.Y. Const., art. III [NYCLS]. No initiative; referendum on certain local laws, constitutional amendments, creation of certain state debt, and grant of certain powers to public corporations.

6.03 REPORTS:

Current decisions of New York courts are reported in the “Official Edition of Law Reports and Session Laws” and also, unofficially, in the “New York Supplement” and “Northeastern Reporter.” The Official Edition is divided into three reports: New York (N.Y.) covering the Court of Appeals; Appellate Division (A.D.) covering the Appellate Division of the Supreme Court; and Miscellaneous (Misc.) covering the Supreme Court (trial and special terms) and lower courts of record. Very early decisions are contained in reports under name of actual reporters.

Digests.

Abbott's Digest (consolidated edition), 42 vols., Abbott's Digest 2d, 28 vols., West's Digest 3d, 43 vols., and West's Digest 4th, 51 vols., are confined to New York cases.

The New York Law Journal.

Official newspaper for courts of City of New York.

6.04 STATUTES:

The Consolidated Laws of 1909 contain most of the substantive statutes of New York. The law on a given subject is in a numbered chapter called by subject name. Other statutes, mostly private and local laws, appear in Unconsolidated Laws. Probate proceedings are governed by Surrogate's Court Procedure Act and Estates, Powers and Trusts Law. There are two procedural Codes, Civil Practice Law and Rules (formerly Civil Practice Act and Rules of Civil Practice) and Criminal Procedure Law. Laws enacted since 1909 have become part of Consolidated Laws, Codes, or Unconsolidated Laws.

Compilations.

One in general use is “McKinney's Consolidated Laws of New York, Annotated.” Separate volume with annual cumulative supplements is devoted to each law. Another compilation is “New York Consolidated Laws Service” with annual cumulative supplements.

Citations.

Consolidated Laws are customarily cited by name instead of by chapter number. This digest cites the Consolidated Laws and other statutes as follows:

Alco. Bev. Cont. Law

Alcoholic Beverage Control Law

Agric. Conserv. & Adj. Law

Agriculture Conservation and Adjustment Law

Alt. County Gov't Law

Alternative County Government Law

Arts & Cult. Aff. Law

Arts and Cultural Affairs Law

Agric. & Mkts. Law

Agriculture and Markets Law

Aband. Prop. Law

Abandoned Property Law

Bus. Corp. Law

Business Corporation Law

Banking Law

Banking Law

Ben. Ord. Law

Benevolent Orders Law

Ct. Cl. Act

Court of Claims Act

Coop. Corp. Law

Cooperative Corporations Law

County Law

County Law

Crim. Proc. Law

Criminal Procedure Law

C.P.L.R.

Civil Practice Law and Rules

C. P. R.

Code of Professional Responsibility

Civ. Rights Law

Civil Rights Law

Civ. Serv. Law

Civil Service Law

Canal Law

Canal Law

Com. Law

Commerce Law

Const.

Constitution

Correct. Law

Correction Law

Debt. & Cred. Law

Debtor and Creditor Law

Def. Em. A.

Defense Emergency Act

Dom. Rel. Law

Domestic Relations Law

Envtl. Conserv. Law

Environmental Conservation Law

Em. Dom. Proc. Law

Eminent Domain Procedure Law

Empl'rs Liab. Law

Employers' Liability Law

Educ. Law

Education Law

Elec. Law

Election Law

Eld. L.

Elder Law

Energy Law

Energy Law

Est. Powers & Trusts Law

Estates, Powers and Trusts Law

Exec. Law

Executive Law

Fam. Ct. Act

Family Court Act

Gen. Ass'ns Law

General Associations Law

Gen. Bus. Law

General Business Law

Gen. City Law

General City Law

Gen. Constr. Law

General Construction Law

Gen. Mun. Law

General Municipal Law

Gen. Oblig. Law

General Obligations Law

High. Law

Highway Law

Ins. Law

Insurance Law

Indian Law

Indian Law

Jud. L.

Judiciary Law

Lien Law

Lien Law

Ltd. Liab. Co. Law

Limited Liability Company Law

Lab. Law

Labor Law

Legis. Law

Legislative Law

Local Fin. Law

Local Finance Law

Mult. Dwell. Law

Multiple Dwellings Law

Mental Hyg. Law

Mental Hygiene Law

Mun. Home Rule Law

Municipal Home Rule Law

Mil. Law

Military Law

Mult. Resid. Law

Multiple Residence Law

Nav. Law

Navigation Law

Not-For-Profit Corp. Law

Not-for-Profit Corporation Law

N.Y.C. Adm. Code

New York City Administrative Code

N.Y.C. Bus. Tax Law

New York City Business Tax Law

N.Y.C. Char.

New York City Charter

City Civ. Ct. Act

New York City Civil Court Act

City Crim. Ct. Act

New York City Criminal Court Act

N.Y.C. Local Laws

New York City Local Laws

N.Y. Comp. Codes R. & Regs.

New York Code, Rules & Regulations

Penal Law

Penal Law

Pub. Auth. Law

Public Authorities Law

Pub. Bldgs. Law

Public Buildings Law

Priv. Hous. Fin. Law

Private Housing Finance Law

Pub. Health Law

Public Health Law

Pub. Hous. Law

Public Housing Law

P'ship Law

Partnership Law

Pub. Lands Law

Public Lands Law

Pub. Off. Law

Public Officers Law

Pers. Prop. Law

Personal Property Law

Parks Rec. & Hist. Preserv. Law

Parks and Recreation Law

Pub. Serv. Law

Public Service Law

Pub. Law

Public Law

Pub. Works Law

Public Works Law

Relig. Corp. Law

Religious Corporations Law

Rural Elec. Coop. Law

Rural Electric Cooperative Law

R.R. Law

Railroad Law

Real Prop. Acts. Law

Real Property Actions and Proceedings Law

Real Prop. Law

Real Property Law

Real Prop. Tax Law

Real Property Tax Law

Retire. & Soc. Sec. Law

Retirement and Social Security Law

Rapid Trans. Law

Rapid Transit Law

State Adm. Proc. Act

State Administrative Procedure Act

Second Class Cities Law

Second Class Cities Law

Surr. Ct. Proc. Act

Surrogate's Court Procedure Act

State Fin. Law

State Finance Law

State Law

State Law

Stat. Local Gov't

Statute of Local Governments

State Print. & Pub. Docs. Law

State Printing and Public Documents Law

Salt Springs Law

Salt Springs Law

Soc. Serv. Law

Social Services Law

Soil & Water Conserv. Dist. Law

Soil and Water Conservation Districts Law

Transp. Corp. Law

Transportation Corporations Law

Tax Law

Tax Law

Transp. Law

Transportation Law

Town Law

Town Law

U.C.C.

Uniform Commercial Code

Uniform City Ct. Act

Uniform City Court Act

Uniform Dist. Ct. Act

Uniform District Court Act

Uniform Just. Ct. Act

Uniform Justice Court Act

Unconsol. Laws

Unconsolidated Laws

Unif. Trial Ct. R.

Uniform Rules for the New York State Trial Courts

Vol. Fire. Ben. Law

Volunteer Firefighters' Benefit Law

Village Law

Village Law

Veh. & Traf. Law

Vehicle and Traffic Law

Workers' Comp. Law

Workers' Compensation Law

Uniform Acts which have been adopted are: Anatomical Gift (1968); † Attendance of Witnesses From Without a State in Criminal Proceedings (1936); † Child Custody Jurisdiction (1968); † Commercial Code (1964); † Controlled Substances (1970); † Criminal Extradition (1936); Disposition of Community Property Rights at Death (1971); † Enforcement of Foreign Judgments (1964); † Federal Lien Registration (1925); † Fiduciaries (1922); Foreign Money-Judgments Recognition (1962); † Fraudulent Conveyance (1918); † Gifts to Minors (1966); † Insurers Liquidation (1939); † Interstate Compromise of Death Taxes (1943); † Joint Obligations (Model) (1925); † Limited Partnership (1916, 1976); † Management of Institutional Funds (1978); † Motor Vehicle Certificate of Title and Anti-Theft (1955); † Partnership (1914); † Photographic Copies of Business and Public Records as Evidence (1949); † Principal and Income (1962); † Prudent Investor (1994); † Reciprocal Enforcement of Support (1950); † Reciprocal Transfer Tax (1928); † Simultaneous Death (1940); † State Administrative Procedure (1961) (Model); † Testamentary Additions to Trusts (1960); † Vendor and Purchaser Risk (1935); Voting by New Residents in Presidential Elections (1962).

† Adopted with significant variations or modifications. See appropriate topics.

Uniform Commercial Code was enacted in 1962 (L. 1962, c. 553), effective Sept. 27, 1964.

For text of Uniform Acts falling within scope of the Martindale-Hubbell Law Digests see Uniform and Model Acts section found in last volume of state digests.

7 CRIMINAL LAW

7.00A BAIL:

See topic 7.01 Criminal Law.

7.01 CRIMINAL LAW:

Penal Law defines crimes and Criminal Procedure Law governs practice.

Indictment or Information.

Criminal action commenced in criminal court by filing of information, simplified information, prosecutor's information, misdemeanor complaint, or felony complaint. Criminal action commenced in superior court by filing indictment. (N.Y. Crim. Proc. Law §100.05 [NYCLS]). Under some circumstances defendant may waive indictment and consent to be prosecuted by superior court, with consent of court and district attorney and provided defendant is not charged with Class A felony. (N.Y. Crim. Proc. Law §§195.10-195.40).

Bail.

Release on bail permitted before conviction as a matter of right in all cases of less than felony grade; and as a matter of discretion in all felony cases. (N.Y. Crim. Proc. Law §530.20 [NYCLS]).

After conviction for offense other than Class A felony, while pending sentence, bail may be issued. (N.Y. Crim. Proc. Law §§530.45[1] [NYCLS], 530.50 [NYCLS]).

Parole.

Crime victim has right to make victim impact statement in person or in writing before state board of parole each time inmate comes before such board. (N.Y. Crim. Proc. Law §440.50[1] [NYCLS]). Victim of violent felony offense as defined in N.Y. Penal Law §70.02 [NYCLS] may demand to be informed of escape, absconding, discharge, parole, conditional release or release to post-release supervision of inmate. (N.Y. Crim. Proc. Law §380.50[4] [NYCLS], [5] [NYCLS]). Parole eliminated for first-time violent felony offenders. (N.Y. Penal Law §§70.00[5] [NYCLS], 70.02[2][b] [NYCLS], [c] [NYCLS]).

Probation.

Interim probation supervision may be given, subject to N.Y. Penal Law §65.10[2] [NYCLS], [3] [NYCLS], [4] [NYCLS], [5] [NYCLS]. (N.Y. Crim. Proc. Law §390.30[6] [NYCLS]).

Interstate Compact for Supervision of Parolees and Probationers.

In effect. (N.Y. Crim. Proc. Law §410.80[3] [NYCLS]).

Uniform Criminal Extradition Act.

In effect. (N.Y. Crim. Proc. Law §§570.02-570.66).

Jury must retire to deliberate upon its verdict in place outside courtroom. (Eff. until 6/30/99). (N.Y. Crim. Proc. Law §310.10 [NYCLS]).

Appeal.

Mode of and time for perfecting appeal taken to intermediate appellate court from judgment, sentence, or order of criminal court determined by rules of appellate court's department. (N.Y. Crim. Proc. Law §460.70 [NYCLS]).

Provision is made for return of fingerprints and photographs, except for palmprints and fingerprints in case of disposition of harassment in the second degree by family member, and for sealing of record in criminal actions terminating either by conviction for noncriminal offense or by waiver of hearing. (N.Y. Crim. Proc. Law §160.55[1][a] [NYCLS]).

Restitution to crime victims by person convicted of criminal offense is provided for, under certain circumstances, by N.Y. Penal Law §60.27 [NYCLS]. (N.Y. Crim. Proc. Law §420.10 [NYCLS]). When court both orders restitution and imposes fine, payment of restitution shall take priority over payment of fine. (N.Y. Crim. Proc. Law §420.10[1][b] [NYCLS]).

Forfeiture.

Proceeds of certain crimes may be effected by appropriate state claiming authority pursuant to civil action provided for by N.Y. C.P.L.R. 1310-1352.

Death Penalty.

Upon conviction for first degree murder, separate sentencing proceeding held to determine whether defendant will be sentenced to death. (N.Y. Crim. Proc. Law §400.27[1] [NYCLS]).

Sex Crimes.

Sex Offender Registration Act enacted 1995. (N.Y. Correct. Law §168 et seq. [NYCLS]).

Caregiver Registration.

Criminal history checks for certain caregivers of children authorized. (N.Y. Exec. Law §837-n).

Controlled Substance Offenses

When the court imposes a sentence of imprisonment which requires a commitment to the department of correctional services upon a person who stands convicted of a controlled substance or marihuana offense, upon motion of the defendant, the court may issue an order directing that the department of correctional services enroll the defendant in the shock incarceration program. (N.Y. Penal Law § 60.04 [NYCLS]).

For operating as a major drug trafficker, the court shall impose an indeterminate term of imprisonment for an A-I felony. (N.Y. Penal Law § 70.71 [NYCLS]).

Criminal sale of a controlled substance to a child is a class B felony. (N.Y. Penal Law § 220.48).

8 DEBTOR AND CREDITOR

8.01 ASSIGNMENTS:

Any claim or demand can be assigned except: (1) Where it is to recover damages for personal injury; (2) where it is founded upon a grant made void by state statute, or upon a claim to or interest in real property, grant of which by transferor would be void by state statute; (3) where transfer thereof is expressly forbidden by state or federal law, or would contravene public policy. (N.Y. Gen. Oblig. Law §13-101 [NYCLS]). Judgment directing payment of money, recovered on any cause of action, may be transferred, but if vacated or reversed, transfer does not transfer cause of action unless transferable before judgment is recovered. Person who executes such transfer without acknowledging his signature before officer authorized to take acknowledgment of deed must acknowledge at request of his assignee or of subsequent assignee or of judgment debtor upon payment of officer's fees. (N.Y. Gen. Oblig. Law §13-103 [NYCLS]).

Assignability of life insurance effected by any person on his own life in favor of third person beneficiary is generally recognized. (N.Y. Ins. Law §3212[b], [e]).

Compensation/Benefits Due Under Workers' Compensation Law cannot be assigned except as specially provided. (N.Y. Workers' Comp. Law §33).

Public Contracts.

Every specification or contract made or awarded by state or any public department or official must contain clause prohibiting contractor from assigning such contract or his interest therein without previous written consent of department or official awarding same; if contractor assigns contract without written consent, department or official awarding contract must revoke and annul contract and shall be relieved of liability and assignee must forfeit all moneys earned under contract except as is required to pay employees; but this does not prevent assignment of such contract for benefit of creditors, made pursuant to statutes of state. (N.Y. State Fin. Law

§138).

Recording.

Written assignments of interests in realty, after acknowledgment, may be recorded in office of clerk of county where such real property is situated. If not recorded such assignments are void as against certain subsequent assignees. (N.Y. Real Prop. Law §§290 [NYCLS], 291 [NYCLS]).

Actions on Assigned Claims.

Assignee, except when otherwise specially provided by law, may sue in his own name on claim or demand assigned, as assignor might have done, subject to any defense or counterclaim existing against assignor before notice of transfer or against assignee. But this does not apply where rights or liabilities of party to claim or demand, which is transferred, are regulated by special provision of law. (N.Y. Gen. Oblig. Law §13-105 [NYCLS]). Assignee of motor vehicle retail installment contract shall be subject to all claims and defenses of buyer against seller, but assignee's liability must not exceed amount owed to assignee at time claim or defense asserted. (N.Y. Pers. Prop. Law §302[9]). If assignment made while action pending, action may be continued by or against original party unless court directs substitution or joinder of person to whom interest is transferred. (N.Y. C.P.L.R. 1018 [NYCLS]).

Assignment of Wages.

Validity.

No assignment of future earnings, securing indebtedness aggregating less than $1,000, is valid unless: (1) It is contained in a separate written instrument printed in at least 8-point type, with title “Assignment of Wages, Salary, Commissions or other Compensation for Services” and, over place for signature, notice “This is an Assignment of Wages, Salary, Commissions or other Compensation for Services,” both in at least 10-point bold type; (2) it specifically identifies and describes transaction; (3) it contains summary of certain sections of Personal Property Law; (4) if given as security, it secures only identified transaction or renewal thereof, for which no other assignment exists, except that under certain conditions, an assignment securing purchase of goods of $1,500 or less sold for noncommercial use may secure subsequent transactions. (N.Y. Pers. Prop. Law §46-c).

No assignment of future earnings is valid unless personally executed by assignor and unless copies of all papers executed by the assignor are delivered to him before assignment is filed with employer. (N.Y. Pers. Prop. Law §46-e).

Except as provided in N.Y. Banking Law art. IX, no assignment of future earnings is valid which is in consideration of loan of money at interest rate of more than 18% per annum except such charges as are permitted by N.Y. Gen. Oblig. Law §5-531 [NYCLS]. (N.Y. Pers. Prop. Law §46-f).

Filing and Collection of Assignments.

Except for assignments of earnings to a bank, trust company or credit union (N.Y. Pers. Prop. Law §49), no assignment may be filed with the assignor's employer until 20 days after written notice containing specified language has been mailed to or served upon assignor. Such notice may not be mailed until at least 21 days after default in payment due and must contain certain prescribed language. (N.Y. Pers. Prop. Law §48[1]). Such assignment must be filed with county clerk before it is filed with assignor's employer. (N.Y. Pers. Prop. Law §47). Certain provisions for filing and indexing are specified. (N.Y. Pers. Prop. Law §47-b).

Provisions are made for the refiling of assignments after two years and for cancellation or vacation by court order of filed assignments. (N.Y. Pers. Prop. Law §§47-c, 47-d, 47-e).

Assignments of future earnings are collectible from the employer at the time of payment beginning ten days after filing with the employer a true copy of assignment, authenticated by notary public or commissioner of deeds, with itemized statement of amount due setting forth date and amount of each payment made and, if public filing required, date of public filing. (N.Y. Pers. Prop. Law §48-a[1]).

If the assignment secures indebtedness aggregating less than $1,000, (a) not more than 10% of the assignor's earnings is collectible in any such month, (b) no amount is collectible if at time of filing with employee: (1) Any other assignment of future earnings is subject to payment or (2) garnishment against such earnings or order against assignor for installment payments to judgment creditor is in force, or (c) no portion of future earnings shall be withheld or paid to satisfy such assignment while portion of indebtedness secured by valid assignment securing or relating to indebtedness of less than $1,000, previously filed with employer, shall remain unpaid. (N.Y. Pers. Prop. Law §48-a[2]).

Court Assignment for Support.

Assignments by court order of wages for support of children and/or spouse may not be vacated pursuant to N.Y. Pers. Prop. Law §47-e). (N.Y. Pers. Prop. Law §47-e[4].

Exempt Earnings.

No portion of assignor's earnings may be withheld unless such earnings exceed $85 per week. (N.Y. Pers. Prop. Law §48-b).

8.02 ATTACHMENT:

Actions in Which Allowed.

Attachment may be granted upon application of plaintiff in any action (arbitration deemed action for this purpose (N.Y. C.P.L.R. 7502[c] [NYCLS]), except matrimonial action, where plaintiff has demanded and would be entitled, in whole or part, or in alternative, to money judgment against one or more defendants, on grounds specified below. See subhead Grounds, infra. (N.Y. C.P.L.R. 6201 [NYCLS]).

Property Subject.

Any debt or property against which money judgment may be enforced as provided in N.Y. C.P.L.R. 5201 [NYCLS] (see topics 8.05 Executions; 8.06 Exemptions) is subject to attachment. (N.Y. C.P.L.R. 6202 [NYCLS]).

Granting of Order.

Order of attachment may be granted without notice before or after service of summons and at any time prior to judgment. Order must specify amount to be secured by order, including interest, costs, and sheriff's fees and expenses, be endorsed with name and address of plaintiff's attorney, and directed to sheriff of any county or of City of New York where any property in which defendant has interest is located or where garnishee may be served. Order must direct sheriff to levy within his jurisdiction, before final judgment, upon subject property and debts as will satisfy amount specified in order. Order of attachment without notice must be followed, within five days, by motion to confirm on notice. (N.Y. C.P.L.R. 6211 [NYCLS]).

Confirmation of Order.

Where order of attachment without notice is granted pursuant to N.Y. C.P.L.R. 6201[1]

[NYCLS] (see subhead Grounds, infra) court shall direct that requested statement (N.Y. C.P.L.R. 6219 [NYCLS]) be served within five days upon plaintiff and that plaintiff move within ten days after levy for order confirming order of attachment. (N.Y. C.P.L.R. 6211[b] [NYCLS]).

Courts Which May Issue Writ.

Order of attachment, which may be granted without notice in supreme court or county court in any county of state (N.Y. C.P.L.R. 2212 [NYCLS], 2213 [NYCLS], 6211 [NYCLS]), may be granted upon motion at motion term or by justice out of court.

In Whose Favor Writ May Issue.

Except as noted hereafter (see subhead Grounds, infra) there are no restrictions on right of nonresident or foreign corporation to obtain attachment.

Defendant setting up counterclaim or cross-claim against co-defendant has same right to attachment of plaintiff's or co-defendant's property as if he had brought action against plaintiff or co-defendant on his claim. (N.Y. C.P.L.R. 6001 [NYCLS]).

Publication.

Seizure of property under order of attachment is ground for order of service of summons by publication, where service cannot be made by another prescribed method with due diligence. (N.Y. C.P.L.R. 314 [NYCLS], 315 [NYCLS]).

Grounds.

To procure order of attachment plaintiff must show that cause of action exists, that it is probable plaintiff will succeed on merits, that action against defendant is not matrimonial action, that plaintiff has demanded and would be entitled, in whole or part, or in alternative, to money judgment against one or more defendants, and that: (1) Defendant is foreign corporation not qualified to do business or nondomiciliary residing outside state; or (2) defendant resides or is domiciled in state and cannot be personally served despite diligent efforts; or (3) defendant, with intent to defraud creditors, or frustrate enforcement of judgment that might be rendered in plaintiff's favor, has assigned, disposed of, encumbered or secreted property, or removed it from state or is about to do any of these acts; or (4) action brought by victim or representative of victim of crime, as defined in N.Y. Exec. Law §621, against person or legal representative or assignee of person convicted of committing crime, seeking to recover damages sustained as result of crime pursuant to N.Y. Exec. Law §632[a]; or (5) cause of action based on judgment of U.S. court, or other judgment entitled to full faith and credit or qualified for recognition. Plaintiff also must show amount demanded from defendant above all counterclaims known to plaintiff. (N.Y. C.P.L.R. 6201 [NYCLS], 6212[a] [NYCLS]). Order of attachment granted in arbitrable controversy only if arbitration award otherwise rendered ineffectual. (N.Y. C.P.L.R. 7502[c] [NYCLS]).

Within ten days after granting order of attachment, plaintiff must file it, with affidavit, other papers upon which granted, and summons and complaint, or, unless time for filing extended, order is invalid. Provision exists for demand by defendant that all supporting papers be served upon him. (N.Y. C.P.L.R. 6212[c] [NYCLS], [d] [NYCLS]).

Attachment Bond.

Plaintiff must, before order will be granted, give undertaking which must be at least $500, specified part thereof conditioned that if defendant recovers judgment or it is finally determined that plaintiff was not entitled to attachment, plaintiff will pay all costs and damages including reasonable attorneys' fees, which defendant may sustain by reason of attachment, and balance conditioned that plaintiff will pay all sheriff's fees. Plaintiff's attorney not liable to sheriff for sheriff's fees. Surety not discharged without notice to sheriff. (N.Y. C.P.L.R. 6212[b] [NYCLS]).

Service of Summons.

Order of attachment granted before service is made on defendant against whom attachment is granted is valid only if, within 60 days after order granted, summons is served upon defendant, or service by publication is commenced (and subsequently completed). If defendant dies within 60 days after granting of order and before summons served upon him or publication completed, summons must be served on his executor or administrator within 60 days after issuance of letters. Upon such terms as may be just and upon good cause shown, court may extend time, not exceeding 60 days, within which summons must be served or publication commenced provided application for extension is made before expiration of time fixed. (N.Y. C.P.L.R. 6213 [NYCLS]).

Levy.

Sheriff must levy upon any interest of defendant in personal property, or upon any debt owed to defendant, by serving copy of order of attachment upon garnishee, or upon defendant if property to be levied upon is in defendant's possession or custody, in same manner as summons, with minor exceptions. (N.Y. C.P.L.R. §6214[a] [NYCLS]). Levy by service of order of attachment upon person other than defendant is effective only if, at time of service, he owes debt to defendant or is in possession or custody of property in which he knows, or has reason to believe, defendant has interest, or if plaintiff has stated in notice which is served with order that specified debt owed by person served to defendant or that defendant has interest in specified property in possession or custody of person served. All property in which defendant is known or believed to have interest then in and thereafter coming into possession or custody of such person, including any specified in notice, and all debts of such person, including any specified in notice, then due and thereafter coming due to defendant, are subject to levy. Unless court orders otherwise, person served with order must immediately transfer or deliver all such property, and pay all such debts upon maturity, to sheriff and execute any document necessary to effect payment, transfer or delivery. After such payment, transfer or delivery, property coming into possession or custody of garnishee, or debt incurred by him, are not subject to levy. Until such payment, transfer or delivery made, or until expiration of 90 days after service of order of attachment upon him, or of such further time as is provided by subsequent order of court served upon him, garnishee is forbidden to make or allow any sale, assignment or transfer of, or any interference with any such property, or pay over or otherwise dispose of any such debt to any person other than sheriff, except upon direction of sheriff or pursuant to court order. Garnishee, however, may collect or redeem instrument received by him for such purpose and he may sell or transfer in good faith property held as collateral or otherwise pursuant to pledge thereof or at direction of any person other than defendant authorized to direct sale or transfer, provided that proceeds in which defendant has interest be retained subject to levy. Plaintiff who has specified personal property or debt to be levied upon in notice served with order of attachment is liable to owner of property or person whom debt is owed, if other than defendant, for any damages sustained by reason of levy. (N.Y. C.P.L.R. 6214[b] [NYCLS]). Where property or debts have been levied upon by service of order of attachment, sheriff must take into his actual custody all such property capable of delivery and must collect and receive all such debts. If sheriff takes sufficient property into custody to satisfy amount specified in order of attachment, he must give notice to defendant and others to whom order of attachment was served. (N.Y. C.P.L.R. 6214[c] [NYCLS]). Plaintiff may commence special proceeding against garnishee served with order to compel payment, delivery or transfer to sheriff of such property or debts, or to secure judgment against garnishee. Notice of petition must also be served upon parties to action and upon sheriff. Garnishee may interpose any defense or counterclaim which he might have interposed against defendant. Court may permit any adverse claimant to intervene. (N.Y. C.P.L.R. 6214[d] [NYCLS]). At expiration of 90 days after levy made by service of order of attachment, or of such further time as court, upon motion on notice of plaintiff, has provided, levy is void except as to property or debts which sheriff has taken into his actual custody, collected or received or as to which proceeding has been commenced by plaintiff as aforementioned. (N.Y. C.P.L.R. 6214[e] [NYCLS]).

If plaintiff furnishes sheriff with satisfactory indemnity or indemnity amount fixed by court, sheriff, as alternative to method prescribed by §6214, must levy upon property capable of delivery by taking property into actual custody and forthwith serve copy of order of attachment upon person from whom property taken. (N.Y. C.P.L.R. 6215 [NYCLS]). Upon presentation by plaintiff of undertaking and affidavit establishing probable success on merits, court may order sheriff of county where chattel found to seize it and court may direct that if chattel not delivered to sheriff, he may break open, enter and search place specified in affidavit. Plaintiff shall have burden of establishing grounds for that order. This order may be granted without notice only if probable chattel will be transferred, concealed, disposed of, removed from state, or substantially impaired in value. If order granted without notice, plaintiff must move for confirmation of notice to defendant within five days after seizure. In alternative, court may grant restraining order that chattel not be removed, disposed of, or allowed to become subject to security interest or lien. (N.Y. C.P.L.R. 7102[d] [NYCLS]).

Sheriff levies upon interest of defendant in real property by filing with clerk of county in which property located notice of attachment indorsed with name and address of plaintiff's attorney and stating names of parties to action, amount specified in order of attachment and description of property levied upon. Clerk records and indexes notice in same books, in same manner and with same effect, as notice of pendency of action. (N.Y. C.P.L.R. 6216 [NYCLS]). This places all purchasers of property on notice, but does not prevent defendant from selling property. (145 A.D.2d 462, 535 N.Y.S.2d 633).

Priority.

Among two or more orders of attachment against same defendant priority is in order in which they were delivered to officer who levied upon property or debt. Same rule applies as between executions and orders of attachment delivered to same enforcement officer. Where two or more executions or orders of attachment against same defendant are delivered to different enforcement officers for levy, and personal property or debts of defendant are levied upon within jurisdiction of all such officers, proceeds are applied first to execution or attachment delivered to levying officer, and thereafter applied to executions and attachments delivered to other officers, if such officers make demand upon levying officer prior to distribution of proceeds in order of demand, except that executions for child support shall have priority over any other levy. Execution or attachment returned by officer before levy, or delivered to him after proceeds of levy have been distributed, cannot be satisfied out of such proceeds. (N.Y. C.P.L.R. 6226 [NYCLS], 5234 [NYCLS]).

Sale.

If urgency of case requires, court may direct sale or other disposition of property, specifying manner and terms thereof, with notice to all parties and garnishee. (N.Y. C.P.L.R. 6218[a] [NYCLS]).

Attaching Creditor's Rights.

Where plaintiff has delivered order of attachment to sheriff, plaintiff's rights in debt owed defendant or in interest of defendant in personal property not exempt from attachment are superior, to amount of attachment, to rights of any transferee, except: (a) transferee who acquired same before levy for fair consideration or without knowledge of order of attachment, or (b) transferee who acquired same for fair consideration after levy without knowledge thereof, while it was not in possession of sheriff. (N.Y. C.P.L.R. 6203 [NYCLS]).

Vacation or Modification.

Prior to application of property or debt to satisfaction of judgment, defendant, garnishee, or any person having an interest in property or debt attached, may move, on notice to each party and sheriff, for order vacating or modifying order of attachment. Court may give plaintiff reasonable opportunity to correct any defect. If, after defendant has appeared in action, court determines attachment not necessary to security of plaintiff, it must vacate attachment. Such motion does not, of itself, constitute appearance in action. Plaintiff has burden of proof to establish grounds of attachment, need for continuing levy, and probability of success. (N.Y. C.P.L.R. 6223 [NYCLS]).

Discharge, Annulment and Cancellation.

Defendant whose property or debt has been levied upon may move, upon notice to plaintiff and sheriff, for order discharging attachment as to all or part of property or debt upon payment of sheriff's fees and expenses. On such motion, defendant must give undertaking, in amount equal to value of property or debt sought to be discharged, that defendant will pay to plaintiff amount of any judgment which may be recovered in action against him, not exceeding amount of undertaking. Making motion or giving undertaking under this section does not of itself constitute appearance in action. (N.Y. C.P.L.R. 6222 [NYCLS]).

Order of attachment annulled when action in which it was granted abates or is discontinued, or judgment entered in favor of plaintiff fully satisfied, or judgment entered in favor of defendant. In latter case stay of proceedings suspends effect of annulment, and reversal or vacating judgment revives order of attachment. (N.Y. C.P.L.R. 6224 [NYCLS]).

Upon motion of any interested person, on notice to sheriff and each party, court may direct clerk of any county to cancel notice of attachment and may direct sheriff to dispose of, account for, assign, return or release any property or debt, or proceeds thereof, or any undertaking, or to file additional inventories or returns, subject to payment of sheriff's fees and expenses. Court must direct that notice of motion be given to plaintiffs in other orders of attachment, if any, and to judgment creditors of executions, if any, affecting any property or debt, or proceeds thereof, sought to be returned or released. (N.Y. C.P.L.R. 6225 [NYCLS]).

Third Party Claims.

Prior to application of property or debt to satisfaction of judgment, any interested person may commence special proceeding against plaintiff to determine rights of adverse claimants to property or debt. Service of process made by serving notice of petition upon sheriff and upon each party in same manner as notice of motion. Proceeding may be commenced in county where property was levied upon, or in county where order of attachment filed. Court may vacate or discharge attachment, void levy, direct disposition of property or debt, direct that undertakings be provided or released, or direct that damages be awarded. Where there appears to be disputed questions of fact, court must order separate trial, indicating person who shall have possession of property pending decision and undertaking, if any, which such person shall give. If court determines that adverse claim was fraudulent, it may require claimant to pay plaintiff reasonable expenses incurred in proceeding, including reasonable attorney's fees, and any other damages suffered by reason of claim. Commencement of proceeding does not subject claimant to personal jurisdiction except as to claim asserted. (N.Y. C.P.L.R. 6221 [NYCLS]).

8.03 [RESERVED]

8.04 CREDITORS' SUITS:

False claims act enacted. (N.Y. State Fin. Law §§ 87–194).

Restraining notice may be issued by clerk of court, attorney for judgment creditor as officer of court, or support collection unit designated by appropriate social services district, and is effective against judgment debtor or obligor under certain circumstances. (N.Y. C.P.L.R. 5222 [NYCLS]). Disclosure may be compelled by subpoena, subpoena duces tecum, or information subpoena by electronic means. (N.Y. C.P.L.R. 5223-5224). Money or other personal property in possession or custody of judgment debtor shall be applied against debt. (N.Y. C.P.L.R. 5225[a] [NYCLS]). Upon motion of judgment creditor, and notice to judgment debtor, court shall order judgment debtor to make installment payments when shown that judgment debtor is receiving or will receive money from any source, or is attempting to impede judgment creditor by rendering services without adequate compensation. (N.Y. C.P.L.R. 5226 [NYCLS]). In special proceeding, court may require person, who (a) is in possession or custody of money or other personal property in which judgment debtor has interest, or (b) is transferee of such property, where judgment debtor is entitled to possession of or judgment creditor's rights are superior to transferee's in such property, or (c) is, or will be, indebted to judgment debtor, to pay money or debt upon maturity to judgment creditor. (N.Y. C.P.L.R. 5225[b] [NYCLS], 5227 [NYCLS]). Court may appoint receiver of judgment debtor's property. (N.Y. C.P.L.R. 5228 [NYCLS]). Money judgment may be enforced against assignable cause of action held by judgment debtor. (N.Y. C.P.L.R. 5201[a] [NYCLS]). Certain personal property exempt from application for satisfaction of money judgments. (N.Y. C.P.L.R. 5205[a] [NYCLS]). See also topic 8.06 Exemptions.

8.05 EXECUTIONS:

Judgment or order may be enforced by execution: (1) Where it is for, or directs, payment of sum of money including support, alimony, or maintenance; (2) where it awards possession of real property; (3) where it awards possession of chattel. (N.Y. C.P.L.R. 5101 [NYCLS], 5102 [NYCLS]).

Exemptions.

See topic 8.06 Exemptions.

Issuance.

Execution may be issued from supreme court, county court or family court, in county in which judgment was docketed, and may be directed to sheriffs of one or more counties. (N.Y. C.P.L.R. 5230[b] [NYCLS]). Execution issued by New York City Civil Court may be levied only against personal property and shall be directed either to marshal or sheriff of City of New York. (N.Y. City Civ. Ct. Act §1504).

Time of Issuance.

Execution may be issued any time before judgment or order is satisfied or vacated. (N.Y. C.P.L.R. 5230[b] [NYCLS]). Money judgment is presumed satisfied 20 years from time it can first be enforced. (N.Y. C.P.L.R. 211[b] [NYCLS]). On death of judgment debtor no execution upon money judgment can be levied without leave of surrogate's court which granted letters testamentary or letters of administration upon estate. If such letters are not granted within 18 months after death, leave to issue execution or undertake enforcement procedures may be granted by any court from which execution could issue or in which enforcement procedure could be commenced. Judgment lien on real property at time of debtor's death expires two years thereafter or ten years after filing judgment-roll, whichever later. (N.Y. C.P.L.R. 5208 [NYCLS]).

Stay.

There is no statutory provision for stay where no appeal taken, but in practice stay may be obtained under some circumstances and on certain conditions. As to stay pending appeal, see category 5 Civil Actions and Procedure, topic 5.03 Appeal and Error.

Return.

With certain exceptions, see N.Y. C.P.L.R. 5231 [NYCLS], 5232[a] [NYCLS], execution must be returned to clerk of court from which it was issued or to support collection unit within 60 days after issuance unless served. Time within which to make return may be extended in writing by attorney for judgment creditor for additional 60-day periods. (N.Y. C.P.L.R. 5230[c] [NYCLS]).

Priorities.

Where judgment creditor delivers execution to sheriff, rights of creditor in debt or personal property subject to levy or order are superior to any transferee's except where transferee acquired debt or property for fair consideration before levy or without notice of order, or in case of levy, where transferee acquired debt or property not capable of delivery, for fair consideration after levy but without knowledge of levy. (N.Y. C.P.L.R. 5202[a] [NYCLS]). As among execution creditors, priority determined according to order in which executions are delivered to enforcement officer. Such executions for child support shall have priority over any other assignment, levy or process; or, where executions are delivered to different enforcement officers, execution delivered to levying officer has priority, and thereafter executions are satisfied in order of demands upon execution officer, except that such executions for child support shall have priority over any other assignment, levy, or process. (N.Y. C.P.L.R. 5234[b] [NYCLS]).

Levy.

Execution may be levied on either real or personal property of judgment debtor (N.Y. C.P.L.R. 5230[b] [NYCLS]), including any debt past due or yet to become due. (N.Y. C.P.L.R. 5201[a] [NYCLS]). Levy on real property is effected by docketing judgment with county clerk of county where real property is located and such constitutes ten-year lien. (N.Y. C.P.L.R. 5203 [NYCLS]). Sheriff must levy upon any interest of judgment debtor in real property, pursuant to execution other than one issued upon judgment for any part of mortgage debt upon property, after expiration of ten years and filing of judgment-roll. (N.Y. C.P.L.R. 5235 [NYCLS]).

Claims of Third Persons.

Any interested person may commence special proceeding against judgment creditor or other person with whom dispute exists to determine rights of adverse claimants to property or debt levied on by sheriff by serving notice of petition on sheriff and judgment creditor and such other person as court directs in same manner as notice of motion. (N.Y. C.P.L.R. 5239 [NYCLS]).

Sale.

Time and place of sale of personal property levied upon designated by sheriff. (N.Y. C.P.L.R. 5233[a] [NYCLS]). Six days notice by posting in three public places in town or city in which sale is to be held required except in New York City where notice may be given by publication. (N.Y. C.P.L.R. 5233[b] [NYCLS]). Court has discretion to order shorter notice because of urgency. (N.Y. C.P.L.R. 5233[c] [NYCLS]). Unless time extended by sheriff, sale of real property must be made at public auction, between 56th and 63rd day after first publication of notice of sale, and at such time and place, within county where property located, as in sheriff's judgment will bring highest price. (N.Y. C.P.L.R. 5[a]). Notice must be posted in three public places in town or city in which property is located at least 56 days prior to sale and copy of notice must be published in newspaper during specified periods. Further notice required to judgment debtors, and all persons with recorded interests in property. (N.Y. C.P.L.R. 5[c]). Failure to give notice does not affect validity of sale to good faith purchasers. (N.Y. C.P.L.R. 5233[b] [NYCLS], 5[c]).

Execution Against Income.

Execution effected by delivery of income execution to sheriff who, within 20 days, must serve it on judgment debtor. Income execution must contain statement as set forth in full in statute. (N.Y. C.P.L.R. 5231[d] [NYCLS], [g] [NYCLS]). If judgment debtor fails to pay installment pursuant to income execution served upon him/her for period of 20 days, or if service cannot be effected, sheriff shall levy by serving copy of execution on person from whom debtor is receiving money and such execution constitutes continuing levy thereon. (N.Y. C.P.L.R. 5231[e] [NYCLS]). Judgment debtor at any time may make motion for order modifying income execution. (N.Y.

C.P.L.R. 5231[i] [NYCLS]). Execution may be had against employees of municipal corporations or state. (N.Y. C.P.L.R. 5231[h] [NYCLS]).

Proceedings for Enforcement of Judgment.

Notice restraining transfer of debtor's assets may be served on judgment debtor or third person owing debt to or holding property of debtor, except employer where property consists of wages or salary. Notice shall be served personally, by registered or certified mail, or by regular mail or electronic means if issued by support collection unit. (N.Y. C.P.L.R. 5222[a] [NYCLS]). Disobedience of such notice is punishable as contempt of court. (N.Y. C.P.L.R. 5222[a] [NYCLS]). Limitations exist regarding effect of restraint on judgment debtor's banking account. (N.Y. C.P.L.R. 5222[h]-[k] [NYCLS]). Court may order debtor restrained after verdict but before judgment. (N.Y. C.P.L.R. 5229 [NYCLS]).

At any time before judgment is satisfied or vacated, judgment creditors may compel disclosure of matters relevant to satisfaction of judgment by serving subpoena on any person having such knowledge. (N.Y. C.P.L.R. 5223 [NYCLS]). Such subpoena may require attendance at deposition upon oral or written questions; or such subpoena may be accompanied by set of written questions together with return envelope, or in form of magnetic tape or other electronic means, and answers must be returned within seven days of receipt of questions; or such subpoena may require production of books and papers for examination. Depositions on oral or written questions or examination of books and papers may proceed upon not less than ten days notice and, if taken within state, at place specified in N.Y. C.P.L.R. 3110 [NYCLS]. If creditor seeks to examine debtor more than once within one year, he must obtain order for further examinations. (N.Y. C.P.L.R. 5224 [NYCLS]).

Judgment creditor may move, upon notice, for order directing payment by judgment debtor of money or property in his possession or in which he has interest to satisfy judgment. Notice of motion shall be served on judgment debtor in same manner as summons, or by registered or certified mail. (N.Y. C.P.L.R. 5225[a] [NYCLS]).

If property of judgment debtor is in possession of third person, judgment creditor may institute special proceeding to require payment of said property to satisfy judgment. Notice of proceeding must be served on judgment debtor in same manner as summons, or by registered or certified mail. Court may authorize debtor or third person to intervene in proceeding. (N.Y. C.P.L.R. 5225[b] [NYCLS]).

Where judgment debtor is receiving money or rendering services without adequate compensation in order to impede judgment creditor, judgment creditor may, upon motion and notice, request order that judgment debtor make specified installment payments to satisfy judgment. Notice of motion shall be served in same manner as summons, or by registered or certified mail. (N.Y. C.P.L.R. 5226 [NYCLS]).

Judgment creditor may commence special proceeding against third person who is or will become indebted to judgment debtor to require that person to pay judgment creditor in amount sufficient to satisfy judgment. Notice of proceeding shall be served in same manner as summons, or by registered or certified mail. Debtor or third party may intervene in proceeding. (N.Y. C.P.L.R. 5227 [NYCLS]).

Judgment creditor may, upon motion and notice, seek order requiring appointment of receiver. (N.Y. C.P.L.R. 5228 [NYCLS]).

Court may at any time, on own initiative or motion of interested party, make order denying, limiting, conditioning, regulating, extending or modifying use of any enforcement procedure. (N.Y. C.P.L.R. 5240 [NYCLS]).

8.06 EXEMPTIONS:

Certain enumerated articles of personal property which in some instances are limited as to value, are exempt from application to satisfaction of money judgment except where judgment is for purchase price of exempt property or was recovered by domestic, laboring person or mechanic for work performed by him in such capacity. (N.Y. C.P.L.R. 5205[a] [NYCLS]).

Insurance and Annuity Contracts.

Proceeds of certain life and accident insurance and annuity contracts are exempt from execution of satisfaction of debt or liability of insured. (N.Y. Ins. Law §3212), (N.Y. C.P.L.R. 5205[i] [NYCLS]).

Unemployment Insurance Law.

Unemployment benefits are exempt from levy, execution, attachment or other remedy for recovery of debt, as are workmen's compensation and disability benefits under employers' liability plan. (N.Y. Lab. Law §595 [NYCLS]; N.Y. Workers' Comp. Law §33; N.Y. Empl'rs Liab. Law §12).

Pensions of New York State employees (N.Y. Retire & Soc. Sec. Law §110 [NYCLS]), teachers (N.Y. Educ. Law §524), and certain police pension fund rights (N.Y. Unconsol. Law §16) also are exempt.

Firemen's Benefits.

Benefits payable to certain volunteer firemen or their beneficiaries are exempt. (N.Y. Gen. Mun. Law §206-b; N.Y. Vol. Fire. Ben. Law §23 [NYCLS]).

Partnerships.

Rights in specific partnership property exempt except for claim against partnership. (N.Y. P'ship Law §51[c]).

Burying Ground.

Up to one quarter of an acre, portion of which is actually used as family or private burying ground and containing no structure except one or more vaults or other places of deposit for dead, or mortuary monuments, and set apart as such, is exempt. (N.Y. C.P.L.R. 5206[f] [NYCLS]).

Members of Armed Forces.

Pay and bounty of noncommissioned officer, musician or private in armed forces of U.S. or New York; land warrant, pension or other reward granted by U.S. or state for services in armed forces; sword, horse, medal, emblem or device of any kind presented as testimonial for services rendered in armed forces of U.S. or state; and uniform, arms and equipments which were used by person in that service and war veterans' bonus do not apply to satisfaction of money judgment for support of child, spouse, or former spouse. (N.Y. C.P.L.R. 5205[e] [NYCLS]). Property purchased with such pension money is exempt to extent of pension money used. (169 Misc. 908, 8 N.Y.S.2d 294).

Right of Action.

Cause of action to recover damages for taking or injuring exempt personal property, is exempt, and money judgment and proceeds arising from such cause of action are exempt for one year after collection. (N.Y. C.P.L.R. 5205[b] [NYCLS]).

Savings and Loan Associations and Credit Unions.

Shares of members of savings and loan associations are exempt up to $600. (N.Y.

Banking Law §407 [NYCLS]).

Security Deposits.

Such deposits for rental of real property or for utility services to judgment debtor's residence or residence of judgment debtor's family, are exempt from application to satisfaction of money judgment. (N.Y. C.P.L.R. 5205[g] [NYCLS]).

Accounts.

New York state college choice tuition savings program trust fund payment monies are exempt, subject to certain limitations. (N.Y. C.P.L.R. 5205[j] [NYCLS]). Also exempt are banking institution accounts into which statutorily exempt payments are made electronically or by direct deposit. (N.Y. C.P.L.R. 5205[l]-[o] [NYCLS]).

Waiver.

As general rule, exemption cannot be waived by contract. (22 N.Y. 249, _N.E. 2d_, _ N.Y.S. 2d_)).

Necessity of Claiming Exemption.

Generally exemptions not identifiable as such by mere inspection may be waived unless claim made before sale. (69 A.D. 438, _N.E. 2d_, 74 N.Y.S. 984).

Exemption of Earnings.

See topic 8.05 Executions.

Homestead Exemption.

See topic 8.10 Homesteads.

8.07 FORECLOSURE:

See topic 8.13 Liens; category 20 Mortgages, topics 20.01 Chattel Mortgages, 20.04 Mortgages of Real Property.

8.08 FRAUDULENT SALES AND CONVEYANCES:

Uniform Commercial Code adopted. (N.Y. U.C.C. Law) See category 3 Business Regulation and Commerce, topic 3.09 Commercial Code.

Uniform Fraudulent Conveyance Act.

Adopted. (N.Y. Debt. & Cred. Law §§270-281). Additional provisions are as follows: (1) Conveyance by defendant without fair consideration in action for money damages is fraudulent to plaintiff without regard to intent if defendant fails to satisfy judgment. (N.Y. Debt. & Cred. Law §273-a [NYCLS]); (2) if debtor makes conveyance and transferee receives it, with actual intent to hinder or defraud creditors, creditor may recover reasonable attorney's fees in action against judgment debtor or his transferee to avoid such transfer (N.Y. Debt. & Cred. Law §276-a [NYCLS]). Other provisions cover fraudulent conveyances by insolvent persons (N.Y. Debt. & Cred. Law §273 [NYCLS]), persons in business (N.Y. Debt. & Cred. Law §274 [NYCLS]), and persons about to incur debts (N.Y. Debt. & Cred. Law §275 [NYCLS]); made with intent to defraud (N.Y. Debt. & Cred. Law §276 [NYCLS]); and of partnership property (N.Y. Debt. & Cred. Law §277 [NYCLS]).

Disposition of Property.

Such disposition for valuable consideration paid to one person in whole or in part by another presumed fraudulent as against creditors of payor at that time with resulting trust in favor of such creditors, unless fraudulent intent disproved. As between transferee and person paying consideration, title vests in transferee, unless transferee: (1) Takes such property, in his own name, as absolute transfer without consent or knowledge of payor; or (2) in violation of some trust, purchases property so transferred with money or property of another. (N.Y. Est. Powers & Trust Law §7-1.3 [NYCLS]).

8.09 GARNISHMENT:

See topics 8.02 Attachment and 8.05 Executions.

8.10 HOMESTEADS:

Debts Contracted Before Aug. 22, 1977.

Lot of land containing buildings not exceeding $2,000 in value, owned and occupied as principal residence by any person, may be designated as prescribed by statute as homestead, and recorded in “homestead exemption book” kept by county recording officer. (N.Y. C.P.L.R. 5206[a] [NYCLS], [b] [NYCLS]). Such homestead is exempt from sale on execution except on judgment for debt contracted before designation, or for purchase price thereof, but is not exempt from taxation or from sale for nonpayment of taxes or assessments. (N.Y. C.P.L.R. 5206[a] [NYCLS]). Exemption not lost for suspension of occupancy up to one year due to injury to premises. (N.Y. C.P.L.R. 5206[c] [NYCLS]).

Value of Homestead.

If value of homestead exceeds $2,000, lien of judgment attaches to surplus above that amount, but homestead may not be sold on execution until judgment in judgment creditor's action directs sale and enforcement of lien. (N.Y. C.P.L.R. 5206[e] [NYCLS]).

After Death of Owner.

Homestead exemption continues so long as property is occupied as residence for benefit of surviving children and spouse until majority of youngest surviving child and until death of surviving spouse. (N.Y. C.P.L.R. 5206[b] [NYCLS], [c] [NYCLS]).

Release or Waiver.

Cancellation of homestead exemption may be effected by owner executing and acknowledging a notice of cancellation and recording it in the same manner as notice of exemption, except that husband and wife jointly may convey or mortgage homestead. (N.Y. C.P.L.R. 5206[h] [NYCLS]).

Debts Contracted after Aug. 22, 1977 until Aug. 30, 2005.

Value of homestead exemption raised from $2,000 to $10,000. (N.Y. C.P.L.R. 5206[a] [NYCLS]). 1977 amendments modernized exemption by specifying distinct and enumerated types of qualifying property; increasing maximum amount; and deleting provisions requiring judgment debtor to file notice or conveyance with county clerk. (75 A.D.2d 477, 430 N.Y.S.2d 900).

Debts Contracted after Aug. 30, 2005.

Certain real property, to wit, land with dwelling, cooperative apartment shares, condominium apartment or mobile home, not exceeding value of $50,000 above liens and encumbrances, owned and occupied as principal residence by any person, is exempt from sale or execution except for purchase price thereof, but not exempt from taxation or sale for nonpayment of taxes or assessments. (N.Y. C.P.L.R. 5206[a] [NYCLS]). Exemption not lost for suspension of occupancy up to one year due to injury to premises. (N.Y. C.P.L.R. 5206[c] [NYCLS]).

Value of Homestead.

If value of homestead exceeds $50,000, lien of judgment attaches to surplus above that amount, but homestead may not be sold on execution until judgment in judgment creditor's action directs sale and enforcement of lien. (N.Y. C.P.L.R. 5206[d] [NYCLS], [e] [NYCLS]).

After Death of Owner.

Homestead exemption continues after death as before. (N.Y. C.P.L.R. 5206[b] [NYCLS]).

Release or Waiver.

Designation or cancellation provisions of former law repealed. (1977 N.Y. Laws c. 181).

8.11 JUDGMENT NOTES:

See category 5 Civil Actions and Procedure, topic 5.15 Judgments, subhead Judgment by Confession.

8.12 LEVY:

See topics 8.02 Attachment, 8.05 Executions.

8.13 LIENS:

Statute provides for mechanics' liens (N.Y. Lien Law §§3-39-c; N.Y. U.C.C. Law §9-101 et seq.) but statute will not inure to benefit of any person required to be registered as motor vehicle repair shop who is not so registered (N.Y. Lien Law §184[4] [NYCLS]). Labor and materials generally not basis for liens regarding property in condominium units and common elements (N.Y. Real Prop. Law §§339-l[2] [NYCLS], 339-z [NYCLS]) but may be basis for liens regarding chattel mortgages (N.Y. U.C.C. Law §9-101 et seq.); vessels (N.Y. Lien Law §80 [NYCLS]); monuments, gravestones, and cemetery structures (N.Y. Lien Law §§120-124); labor on stone (N.Y. Lien Law §§140-142); fabrication or manufacture of dies, molds, forms or pattern (N.Y. Lien Law §§150 to 154 [NYCLS]); service of stallions or bulls (N.Y. Lien Law §160 [NYCLS]); artisans' work (N.Y. Lien Law §180 [NYCLS]); property placed in self-storage facilities (N.Y. Lien Law §182 [NYCLS]); bailees of animals (N.Y. Lien Law §183 [NYCLS]); bailees of motor vehicles, motor boats or aircraft (N.Y. Lien Law §184 [NYCLS]); manufacturers and throwsters of silk goods (N.Y. Lien Law §185 [NYCLS]); bailees for hire (N.Y. Lien Law §186 [NYCLS]); truckmen and draymen (N.Y. Lien Law §187 [NYCLS]); motion picture film laboratories (N.Y. Lien Law §188 [NYCLS]); hospitals (N.Y. Lien Law §189 [NYCLS]); warehousemen (N.Y. U.C.C. Law §§7-206, 209, 210); carriers (N.Y. U.C.C. Law §§7-307, 308); public assistance and care on claims and suits for personal injuries (N.Y. Soc. Serv. Law §104-b [NYCLS]); state aid under Mental Hygiene Law (N.Y. Real Prop. Law §291-h [NYCLS]). See also N.Y. U.C.C. Law §9-301 et seq.

Liens for Support Arrears/Past Due Support.

The N.Y.S. Office of Temporary and Disability Assistance, or local social services district, or its authorized representative, on behalf of persons receiving services under N.Y. Soc. Serv. Law tit. 6–A, art. 3, must have lien against personal/real property owned by support obligor when such obligor has accumulated support arrears/past due support due for period of four months (N.Y. Lien Law §§65[1] [NYCLS], 211[1] [NYCLS]). N.Y. must accord full faith and credit to liens which arise in another state. (N.Y. Lien Law §§65[3] [NYCLS], 211[2] [NYCLS]).

Liens on Merchandise or Proceeds.

N.Y. U.C.C. Law effective Sept. 27, 1964. Art. 9 provides for filing statements to secure liens on merchandise or proceeds. See N.Y. U.C.C. Law §§9-301 through 9-305.

Enforcement.

Due process requires owner of property subject to lien be afforded hearing before permanently deprived of his property. (45 N.Y.2d 152, 408 N.Y.S.2d 39, 379 N.E.2d 1169). Owner may bring proceeding to determine validity of lien against personal property within ten days after service of notice of sale. (N.Y. Lien Law §201-a [NYCLS]; see generally N.Y. Lien Law §§200-210). Enforcement of liens against real property, e.g., mechanics' liens (N.Y. Lien Law §§24 [NYCLS], 41 [NYCLS]) regulated under N.Y. Lien Law §§40-65.

Liens for Amounts Due U.S.

Notices of liens upon real property for taxes due U.S., and certificates and notices affecting such, are filed in clerk's office of county where property situated, unless in N.Y., Bronx, Kings or Queens Counties where lien must be filed in that county's office of N.Y. City Register. (N.Y. Lien Law §240[1] [NYCLS]). For tangible and intangible personal property, notices and certificates concerning liens against corporations or partnerships filed in Secretary of State's office; in all other cases, filing in clerk's office of county where each lienee, if state resident, lives at time of lien notice, except in N.Y., Bronx, Kings or Queens Counties where filed at that county's office of N.Y. Register. If original notice of lien filed prior to July 3, 1966 in town or city clerk's office outside N.Y. City, certificates or notices affecting lien up to Sept. 1, 1968, must be filed in such office. After Sept. 1, 1968, such certificates and notices filed in county clerk's office where notice of lien was originally filed. (N.Y. Lien Law §240[2] [NYCLS]).

Mechanics' Liens.

Any contractor, subcontractor, laborer, materialman, landscape gardener, nurseryman, or person or corporation selling fruit or ornamental trees, roses, shrubbery, vines and small fruits, who performs labor or furnishes materials (including materials actually manufactured for but not delivered to real property) for improvement of real property with consent or at request of owner, or his agent, contractor or subcontractor, and any trust fund to which benefits and wage supplements are due or payable for benefit of such laborers, has lien for principal and interest of value, or agreed price, of such labor or materials on real property and such improvement, upon filing, in office of clerk of county where property is situated, notice in prescribed form. (N.Y. Lien Law §§3 [NYCLS], 10 [NYCLS]). Notice must be verified by lienor or his agent and meet statutory requirements. (N.Y. Lien Law §9 [NYCLS]). Term “owner” includes owner of fee or of lesser estate, lessee for term of years, vendee in possession under contract for purchase, any person having right, title, or interest in real property subject to sale under execution to enforce liens of judgments, holder of interest in or to municipal franchises, and purchaser at judicial sale, but if purchase not completed, lien created by his consent attaches to any deposit made by him and not to real property. (N.Y. Lien Law §2[3] [NYCLS]). Such notice may be filed at any time during progress of, or within eight months after final completion of, work or furnishing of materials. However, when lien on improvements on single family dwellings, notice may be filed within four months after completion of such work. (N.Y. Lien Law §10[1] [NYCLS]). Restrictions as to liens on realty covered by Condominium Act. (N.Y. Real Prop. Law §§339-l[2] [NYCLS], 339-z [NYCLS], 339-aa [NYCLS]).

Service of Notice.

Notice of lien must be served on owner within five days before or 30 days after notice has been filed. Failure to file proof of service of lien with county clerk within 35 days after notice of lien is filed terminates notice as lien. (N.Y. Lien Law §11 [NYCLS]). Lienor must also serve, within five days before or 30 days after filing, notice of lien with contractor, subcontractor, assignee or legal representative for whom he worked or to whom he provided materials, or if he is contractor or subcontractor to person, firm or corporation with whom contract was made or, if he worked for subcontractor, or sub-subcontractor to contractor as well. (N.Y. Lien Law §11-b [NYCLS]). Failure to file proof of service with county clerk within 35 days after notice of lien filed, terminates notice as lien. Lienor or person acting on his behalf who fails to serve copy of such notice will be liable for reasonable attorney's fees, costs, and expenses, as determined by court, incurred in obtaining such copy. (N.Y. Lien Law §11-b [NYCLS]).

Waiver.

Any waiver of mechanic's lien void, unless labor performed or materials furnished have been paid for or are being paid for at time of execution of waiver and waiver is in writing or if there is written agreement to subordinate, release or satisfy all or part of such lien made after notice of lien filed. (N.Y. Lien Law §34 [NYCLS]).

Extent of Lien.

Mechanic's lien in general extends to interest of owner at time of filing notice or thereafter acquired or interest transferred by owner by general assignment for benefit of creditors within 30 days before such filing; lien follows property removed after filing. In case of work done for or materials furnished to contractor or subcontractor for improvement, lien limited to sum earned and unpaid on contract at time of filing, and any sum subsequently earned. Owner not, except as specifically provided, required to pay, on account of all mechanics' liens, sum greater than value of labor or material remaining unpaid at time of filing notice. (N.Y. Lien Law §4[1] [NYCLS]). Where mechanic's lien arises from failure of lessee of right to explore, develop or produce natural gas or oil to pay for improvements made with consent of such lessee, such lien extends to improvements made for exploration, development and production of oil and gas and to lessee's interest therein but not to owner's right, title or interest in real property or improvements unless owner is also oil and gas developer and is party to agreement with party authorized to perfect lien arising from failure of developer to pay for improvements to property where oil or gas well located. (N.Y. Lien Law §4[2] [NYCLS] & [3] [NYCLS]).

Proceeds of Insurance.

Liens on insurance proceeds payable to owner, contractor or subcontractor and actually received or to be received by him because of destruction by casualty of improvement on which lienors have performed service are subject to liens in same order of priority as real property would have been had such improvements not been destroyed. (N.Y. Lien Law §4-a [NYCLS]).

Contracts for Building Loans.

Contracts must be in writing and be acknowledged, and must contain statement under oath, verified by borrower showing consideration paid, or to be paid, and showing all other expenses, if any, incurred, or to be incurred in connection therewith. On or before recording date of building loan mortgage made pursuant thereto, it must be filed in office of clerk of county where real property situated. In addition, any subsequent modification of any such building loan contract so filed must be filed within ten days after execution of such modification; otherwise, interests in land of parties to contract subject to subsequently filed mechanics' liens. Modification of such contract does not affect lien of one who performed or furnished materials or contracted to do so, or had performed or contracted to perform labor for improvement of real property prior to filing thereof. Requirements not applicable to mortgage taken by Home Owners' Loan Corporation. (N.Y. Lien Law §22 [NYCLS]).

Liens Under Contract for Public Improvements.

Liens for labor performed for or materials furnished to contractor, his subcontractor, or legal representative for public improvement under contract with state or public corporation may be secured on moneys applicable to construction of such improvement or awarded by court of claims as damages, to extent of amount due or to become due on such contract, by filing with head of department or bureau having charge of construction and with comptroller of state or financial officer of public corporation, or other officer or person charged with custody and disbursement of funds applicable to contract, verified notice in prescribed form prior to or within 30 days after completion and acceptance of improvement by state or public corporation. (N.Y. Lien Law §§5

[NYCLS], 12 [NYCLS]). Within five days before or simultaneously with filing notice, lienor must serve copy of notice of lien by certified mail on contractor, subcontractor or party with whom lienor contracted. Failure to file proof of service renders notice of lien null. Lienor or person on his behalf who fails to serve copy of notice of lien is liable for reasonable attorneys' fees, costs and expenses incurred in obtaining such copy. (N.Y. Lien Law §11-c [NYCLS]). Contractors, however, unlike laborers and materialmen, can have no lien against state. (243 N.Y. 140, 153 N.E. 28).

Priorities.

Lienors do not have priority on account of time of filing their respective notices of liens for materials furnished or labor performed in improvement of real property, but all liens have parity, except that laborers for daily or weekly wages have preference over all other general claims; and except that lien has priority over advances made on building loan mortgage after filing of notice of lien, but building loan mortgage, whenever recorded to extent of advance made before filing of such notice of lien, has priority over lien, provided mortgage or building loan contract contains covenant by mortgagor that he will receive advance secured thereby as trust fund to be applied first for paying cost of improvement before using any part of total of same for any other purpose. (N.Y. Lien Law §13[1]-[3] [NYCLS]).

No instrument of conveyance (with certain limited exceptions) recorded subsequent to commencement of improvement and before expiration of four months after completion thereof valid against liens filed within four months from recording of conveyance, unless instrument contains covenant by grantor that he will receive consideration for such conveyance and will hold right to receive such consideration as trust fund to be applied first for purpose of paying cost of improvement and that he will apply same first to payment of cost of improvement before using any part of total of same for any other purpose. Lien of vendee under executory contract for sale of land and improvement thereof by construction of building, to extent of amounts paid thereunder to vendor before filing of notice of lien, takes priority over liens filed after contract or memorandum is recorded if recorded contract or memorandum specifies total amount of payments made by vendee or required by contract to be made by vendee before conveyance of title. Mortgage taken by home owners' loan corporation has priority over all liens filed subsequent to date of recording such mortgage. (N.Y. Lien Law §13[2] [NYCLS] & [5] [NYCLS]).

Duration of Lien.

Mechanics' lien continues only one year after notice of lien has been filed, unless within that time suit is brought to foreclose lien and notice of pendency of such action filed is with county clerk's office; but such lien may be continued from year to year by filing extension to such lien with county clerk. If action not commenced to foreclose lien within such extended period (which may not exceed one year), such lien will be extinguished unless order granted by court of record or judge or justice thereof, continuing such lien. No lien will be continued by court order for more than one year, but new order and entry may be made in each of two successive years. Lien on real property improved or to be improved with single family dwelling may only be extended by order of court of record, or judge or justice thereof. (N.Y. Lien Law §17 [NYCLS]). Lien under contract for public improvement continues one year from time of filing notice thereof, unless action to foreclose commenced and notice thereof filed with comptroller or financial official of department concerned within that time. Such lien may also continue for more than one year if extension filed with comptroller of state or financial officer of public corporation. If action not commenced to foreclose lien within extended period (which may not exceed one year), such lien must be extinguished unless order granted by court of record or judge or justice thereof, continuing such lien. No lien will be continued by such order for more than one year, but new order and entry may be made in each of two successive years. (N.Y. Lien Law §18 [NYCLS]).

Assignment.

Mechanics' lien may be assigned by written instrument signed and acknowledged by lienor at any time before discharge thereof, and filed where notice of lien is filed. Unless assignment filed, assignee need not be made defendant in foreclosure action. Payments by owner to assignor, on account of lien, without notice of assignment and before same filed, are valid. (N.Y. Lien Law §14 [NYCLS]). Assignments of contracts to perform labor or furnish material to improve real property, orders drawn by contractors on owners for payment of money due thereunder, orders drawn by subcontractor or upon contractor or subcontractor for such payment, orders drawn by owner upon maker of building loan, and assignments of moneys due or to grow due under building loan contract must be filed in clerk's office of each county wherein real property improved or to be improved to which assignment or order relates is situated, containing specified information, within ten days after date of such assignment or order. (N.Y. Lien Law §15[1] [NYCLS]). This notice of assignment must be used only in case of money advanced or to be advanced to contractor or subcontractor upon assignment of contract for performance of labor or furnishing of materials for improvement of real property, or of money due therefor. (N.Y. Lien Law §15[2] [NYCLS]). Assignments of contracts, and orders for public improvements are invalid unless filed within 20 days of assignment with public instrumentality involved. (N.Y. Lien Law §16 [NYCLS]).

Funds and Rights of Action.

Funds received by owner for or in connection with improvement of real property, including home improvement loan, or by contractor under or in connection with contract for improvement, or home improvement, or contract for public improvement, or received by subcontractor under or in connection with subcontract made with contractor for such improvement of real property including home improvement contract or public improvement or made with any subcontractor under any such contract, and any right of action for any such funds due or earned or to become due or earned, constitute trust assets for purposes of N.Y. Lien Law §71 [NYCLS]. Owner, contractor or subcontractor is made trustee. Trust arises on receipt of any such funds and continues until trust claims are satisfied or trust funds fully applied. (N.Y. Lien Law §70[1]-[3] [NYCLS]). Holders of such claims are trust beneficiaries whether or not they have filed or are entitled to file notices of lien. (N.Y. Lien Law §71[4] [NYCLS]). Advances by vendees under contracts for sale and improvement of property subject to trust in favor of vendee as beneficiary subordinate to priority of trust claims under N.Y. Lien Law §71(3)(a) [NYCLS] (N.Y. Lien Law §§71 [NYCLS], 71-a[2][b] [NYCLS]); in certain cases, vendee may require interest-bearing escrow deposit or bond (N.Y. Lien Law §71-a[3][a]-[b] [NYCLS]). Payments received from owner by home improvement contractor prior to substantial completion of work under contract must be deposited within five business days in escrow account at bank, trust company, savings bank, or state or federal savings and loan association, or alternatively post bond or contract of indemnity. (N.Y. Lien Law §71-a[4][a] [NYCLS], [b] [NYCLS]). Trust assets of which contractor or subcontractor is trustee, held for payment of improvement costs and may be paid only to settle claims of subcontractors, laborers, architects, materialmen, etc. or to pay withholding and employment taxes, employment benefits or surety bonds. (N.Y. Lien Law §71[2] [NYCLS]). Payment of trust assets for other purposes before all trust claims paid constitutes diversion even though no claims have then arisen; rights of purchasers or holders in due course of notes are not affected. (N.Y. Lien Law §72[1] [NYCLS]). Persons who make loans or advances to trustee used for trust purpose are protected if they file “Notice of Lending” on day of advance or within five days after day of advance in office of county clerk in each county where real property improved or to be improved to which notice relates is situated, or in case of projects involving public improvement, notice filed with head of each department in charge of construction of improvement and with financial offices of each public corporation charged with custody and disbursement of funds, containing specified information, and obtain trustee's commitment to treat advances as trust funds; lenders must furnish to beneficiaries, on demand, verified statement of advances. Moneys received pursuant to Notice of Lending by owner, contractor or subcontractor may be deemed trust assets and may first be used for payment of trust claims prior to being used for any other purpose. (N.Y. Lien Law §73 [NYCLS]). Art. 3-A contains detailed requirements as to manner of holding trust assets and keeping accounts thereof; beneficiaries may examine trust records. (N.Y. Lien Law §§75 [NYCLS], 76 [NYCLS]). Beneficiaries as well as trustee may sue to enforce trust in representative action for all beneficiaries within one year from completion of improvements, or in case of subcontractors of materialmen, before expiration of one year from date when final payment under claimant's contract became due, whichever is later. (N.Y. Lien Law §77[2] [NYCLS] & [2] [NYCLS]). Wilful misappropriation of these trust funds is larceny if such funds were received by trustee as owner, contractor or subcontractor. (N.Y. Lien Law §79-a[1] [NYCLS]).

Discharge of Lien for Private Improvement.

Liens other than for labor performed or public improvement discharged: (1) By filing certificate of lienor where notice of lien filed, certificate of lienor duly acknowledged stating that lien satisfied in whole or in part; (2) by failure to begin action to foreclose, or to secure order continuing lien within one year from filing notice of lien; (3) by order of court vacating or cancelling such lien of record for neglect to prosecute same; (4) either before or after beginning of action by owner or contractor executing bond or undertaking in amount equal to 110% of such lien conditioned for payment of any judgment which may be rendered against property for enforcement of lien. Execution of any such bond or undertaking by any fidelity or surety company authorized by laws of this state to transact business, shall be sufficient; (5) on filing with clerk of county where property is situated transcript of judgment of court of competent jurisdiction, with proof of due service of notice of entry, showing final determination of action in favor of owner; or (6) by order of court, summarily discharging of record alleged lien upon application showing that no valid lien exists by reason of character of labor or materials furnished or that claimant failed to comply with provisions regarding notice or filing of lien. (N.Y. Lien Law §19 [NYCLS]). Such liens may also be discharged after notice of lien filed and before commencement of foreclosure action by depositing with county clerk in whose office notice of lien was filed sum equal to amount claimed in such notice with interest to time of such deposit. After foreclosure action commenced, lien may be discharged by payment into court, of agreed sum or such sum as court may order. (N.Y. Lien Law §§20 [NYCLS], 55 [NYCLS]; see also N.Y. C.P.L.R. art. 26 [NYCLS]).

Discharge of Lien for Public Improvement.

Liens for public improvement discharged: (1) By filing duly acknowledged or proved certificate of lienor stating lien discharged; (2) by failure to commence foreclosure action or to secure order continuing lien within one year (changed 2003) from filing notice of lien; (3) by satisfaction of judgment rendered in action to enforce lien; (4) by order of the court on application showing that no valid lien exists by reason of character of labor or materials furnished or that claimant failed to comply with requirements as to notice or filing of lien; or (5) by court order vacating or cancelling lien of record for lienor's failure to prosecute. (N.Y. Lien Law §21[1]-[3] [NYCLS], [7] [NYCLS], [8] [NYCLS]). Discharge of lien in following manner operates only to discharge from liability official with whom lien filed; for all other purposes lien valid and subsisting: (1) By contractor depositing with comptroller of state or financial officer of public corporation or person with whom notice filed, such sum of money (not less than sufficient to cover claim, interest for one year, and costs and expenses) as supreme court justice directs; (2) by executing bond or undertaking by contractor in amount equal to 110% of lien for payment of any judgment recovered in action to enforce lien; (3) by order of court on application showing that contractor has to his credit with state or public corporation sum in excess of amount claimed; or (4) by contractor having to his credit with state or public corporation sum at least one and one-half times amount of lien. (N.Y. Lien Law §21[3-a]-[6-a] [NYCLS]).

Foreclosure of mechanics' liens on real property is governed by N.Y. Lien Law §§40-65, and in many respects similar to foreclosure of mortgages.

Other Liens.

See topics 8.02 Attachment, Pledges, Executions, Exemptions, Homesteads; categories 3 Business Regulation and Commerce, topics Carriers, Factors; Civil Actions and Procedure, topic Judgments; Legal Profession, topic Attorneys and Counselors; Mortgages, topics Chattel Mortgages, Mortgages of Real Property; Property, topic Landlord and Tenant; Taxation, topic

Property (Ad Valorem) Taxes.

8.14 MECHANICS' LIENS:

See topic 8.13 Liens.

8.15 PLEDGES:

Uniform Commercial Code was adopted on Apr. 18, 1962 and became effective on Sept. 27, 1964. (N.Y. U.C.C. Law §§1-101, et seq.).

With exception of warehouseman's liens, carrier's liens, security interests in goods, innkeeper's liens (except those of an immigrant lodging-house), liens against personal property in legal possession of lienor may be satisfied by sale of such property according to provisions of law if lienor has legal possession. (N.Y. Lien Law §200 [NYCLS]).

Statutory Enforcement.

Notice of sale must be given with due diligence to owner or person for whose account property is held, and all persons who have given lienor notice of interest in property. Personal service of such notice must be made in county where lien arose; otherwise by mailing to owner's last known residence or post office address or if owner's place of residence or post office address is not known, then to last known place of residence or last known post office address of person for whose account same is then held personally, if such owner or person cannot, with due diligence, be found in such county or if the property affected, other than a security, is of a value of less than $100. Notice must state: (1) Nature of debt or agreement under which lien arose, with itemized statement of claim and time when due; (2) brief description of property against which lien exists; (3) estimated value of property; and (4) amount of lien at date of notice. Notice must require payment on or before specified date not less than ten days from service of notice, must state time and place of sale in case of default, and must state that proceeding may be brought within ten days under N.Y. Lien Law §201-a [NYCLS] if validity of lien or amount claimed is disputed. If agreement on which lien is based provides for continuous care of property, lienor is entitled to receive all sums which may accrue under agreement subsequent to notice and prior to payment or sale; and notice must contain statement that such additional sum is demanded. Lienor must verify notice to effect that lien is valid, debt on which it is founded is due and unpaid, and facts stated in notice are true to best of his knowledge and belief. (N.Y. Lien Law §201 [NYCLS]). Within ten days after service of notice of sale, anyone entitled to notice may commence special proceeding to determine validity of lien in any court which would have jurisdiction to render judgment equal to amount of lien. (N.Y. Lien Law §201-a [NYCLS]). Sale of personal property of value of $100 or more, or of any security, to satisfy lien thereon must be at public auction to highest bidder, and must be held in city or town where lien was acquired. After time named in notice under §201 or §201-a, notice of sale, describing property and stating name of owner or person for whose account it is held, and time and place of sale, must be published once a week for two consecutive weeks in newspaper published in town or city where sale is to be held, and sale must be held not less than 15 days from first publication. If no newspaper is published in such town, notice of sale must be posted at least ten days before sale in not less than six conspicuous places therein. If property to be sold is a security, such notice must contain statement of name of issuer or obligor, its state of organization or incorporation, amount and class of security and address of issuer or obligor last known to lienor. (N.Y. Lien Law §202[1] [NYCLS]). Such description of security shall be sufficient notice for purposes of public sale to satisfy lien thereon unless otherwise provided by agreement or statute. (N.Y. Lien Law §§202 [NYCLS], 202-a [NYCLS]). Sale of personal property of value of less than $100, other than security, to satisfy lien thereon, shall be made as heretofore provided or at bona fide private sale in city or town where lien was acquired. If latter course is followed, sale cannot occur until expiration of six months from time payment is required pursuant to notice under N.Y. Lien Law §201 [NYCLS] or N.Y. Lien Law §201-a [NYCLS], and until notice of sale has been posted in conspicuous place on premises where personal property was left or delivered by owner; provided, however, that notice is posted at least twenty days before such sale. Such notice shall either (a) contain name and address of owner and brief description of property, or (b) provide that all property left on or before specified date will be subject to sale, and shall also specify time and place of sale. (N.Y. Lien Law §202[2] [NYCLS]). Owner may redeem property at any time before sale by paying amount due and legitimate expenses incurred in serving notice and advertising sale, and is then entitled to possession of property. (N.Y. Lien Law §203 [NYCLS]). Lienor shall satisfy lien and expenses of advertisement and sale from proceeds of sale, balance to be held for and notice thereof to be given to owner or his representative personally or by mail. If such balance is not claimed within 30 days from day of sale, it must be deposited with treasurer or chamberlain of city or village, commissioner of finance of N.Y. City, or supervisor of town where sale was held, with lienor's affidavit stating name and place of business or residence of owner, property or articles sold, prices obtained therefor, due service of notice and manner of service, and that sale was legally advertised, stating manner. Copy of notice of sale and of notice served on owner must be filed with affidavit. On demand made within five years, such balance is paid to person entitled thereto, otherwise it is transferred to general funds of city, town or village. (N.Y. Lien Law §204 [NYCLS]). Pledgee may buy pledged property at public sale unless pledge agreement provides otherwise or property is pawned or pledged with collateral loan broker. (N.Y. Lien Law §202-b [NYCLS]). Collateral loan broker may charge limited service fee. (N.Y. Gen. Bus. Law §44[1] [NYCLS]).

Other Remedies.

Foregoing provisions do not preclude other remedies for enforcement of liens against personal property or bar right to recover balance due after sale. (N.Y. Lien Law §205 [NYCLS]). Lien on chattel may be foreclosed by action in any court of record, or not of record, which would have jurisdiction to render a judgment, in an action founded upon contract, for a sum equal to amount of the lien (N.Y. Lien Law §206 [NYCLS]), and proper officer may be ordered to seize and hold chattel pending final judgment in such action (N.Y. Lien Law §207 [NYCLS]). Such judgment must specify amount of lien or monetary obligation secured by the security interest, direct sale to satisfy same together with costs, provide for payment of any surplus to owner, and its safekeeping, if necessary, until claimed by owner, and may award payment by defendant personally liable. (N.Y. Lien Law §§207-209). Right to foreclose by action does not affect existing rights or remedies to foreclose without action, and does not apply where another method of enforcing lien upon chattel is specifically prescribed by law. (N.Y. Lien Law §210 [NYCLS]).

Pledgee's duty to adequately advertise sale of pledged property is not imposed by statute, but by general maxims of equity. Notwithstanding agreement to contrary, notice of pledgee's sale of pledged property must be reasonable and customary and contain enough information to alert investors and invite competition. (309 N.Y. 325, 130 N.E.2d 745). Pledgor and pledgee may agree on prescribed notice to pledgor or dispense with any notice to pledgor. (211 N.Y. 456, 105 N.E. 798).

Miscellaneous Provisions.

It is a misdemeanor: (1) For persons specified in (N.Y. Gen. Bus. Law §§90-91) to pledge merchandise for which pledgor has issued bill of lading, receipt or voucher, without written consent of holder of such bill, receipt or voucher (N.Y. Gen. Bus. Law §94 [NYCLS]); (2) to pledge borrowed or hired property without consent of owner in manner as to create risk that owner will not recover it or suffer pecuniary loss (N.Y. Penal Law §165.00[1][a] [NYCLS]); or (3) to take certain personal property as security for usurious loan, as defined by N.Y. Banking Law §14-a [NYCLS] (N.Y. Gen. Oblig. Law §5-524 [NYCLS]). Broker or brokerage firm who, without lien or any special property therein, pledges customer's securities without his consent, or who, with lien for indebtedness due him by customer, pledges customer's securities for more than amount due to him thereon without his consent and without having in his or its possession or subject to his or its control securities of kind and amount to which customer is entitled to delivery of on demand and tender of amount of indebtedness due, is guilty of misdemeanor. (N.Y. Gen.

Bus. Law §339-e [NYCLS]).

Except when other provisions are made by written agreement between parties, record holder of stock which he holds as pledgee or held as security, on demand and payment of necessary expenses, must issue to pledgor of such stock a proxy to vote or take other action thereon. (N.Y. Bus. Corp. Law §609[d] [NYCLS]).

8.16 RECEIVERS:

Temporary receiver of property may be appointed where property is subject of action in supreme or county court, upon motion of person having apparent interest in property before or after service of summons and at any time prior to judgment or during pendency of appeal where there is danger that property will be removed from state or lost, materially injured or destroyed. Defendant setting up counterclaim or cross-claim has right to receivership of plaintiff's or co-defendant's property as if he had brought action against plaintiff or co-defendant on his claim. (N.Y. C.P.L.R. 6401[a] [NYCLS]). Court may authorize receiver to take and hold real and personal property, and sue for, collect and sell debts or claims, upon such conditions and for such purposes as court shall direct. (N.Y. C.P.L.R. 6401[b] [NYCLS]). Receiver must give undertaking, in amount fixed by court making appointment, that he will faithfully discharge his duties. (N.Y. C.P.L.R. 6403 [NYCLS]). Upon motion of any party or upon its own initiative, court which appointed receiver may remove him at any time. (N.Y. C.P.L.R. 6405 [NYCLS]). Receiver may not sue or be sued without permission of appointing court. (32 A.D.2d 542, 299 N.Y.S.2d 750).

Court, in action by Attorney General to enjoin fraudulent practice in respect of stocks, bonds or other securities, may at any stage of proceeding appoint receiver to all property derived by defendants by means of such practices, including property with which such property has been mingled under certain circumstances. (N.Y. Gen. Bus. Law §353-a [NYCLS]).

Court, by or after judgment, may appoint receiver of property which is subject of action to carry judgment into effect or to dispose of property according to its directions. Unless court otherwise orders, such receivership is subject to same provisions as those governing temporary receivership. (N.Y. C.P.L.R. 5106 [NYCLS]).

Notice of motion for the appointment of receiver not required where action is for foreclosure of mortgage. (N.Y. Real Prop. Acts. Law §1325[1] [NYCLS]).

In foreclosure action, owner or lessee of mortgaged premises required to turn security deposits over to receiver if one has been appointed, such security deposits shall be subject to disposition by further court order according to N.Y. Gen. Oblig. Law §7-105[1] [NYCLS].

Court, upon motion of judgment creditor, may appoint receiver to administer, collect, improve, lease, repair or sell any real or personal property in which judgment debtor has an interest or to do any other acts designed to satisfy judgment. Court shall, as far as practicable, require notice be given to judgment debtor and to other judgment creditors. Receiver so appointed has no power to employ counsel unless expressly so authorized by order of court. (N.Y. C.P.L.R. 5228[a] [NYCLS]).

Compensation.

In addition to necessary expenses, receiver, if not judgment creditor, is entitled to such commissions, not exceeding 5% of sums received and disbursed by him, as court by which he is appointed allows. (N.Y. C.P.L.R. 8004[a] [NYCLS], 5228[a] [NYCLS]). Receivers appointed in proceeding by Attorney General to enjoin certain fraudulent practices entitled to such commissions or compensation fixed by court as just and equitable. (N.Y. Gen. Bus. Law §353-a [NYCLS]).

Party who moved for appointment of receiver may be directed to pay compensation, attorney fees, and necessary expenses to receiver when there are no funds in hands of receiver at termination of receivership. (N.Y. C.P.L.R. 8004[b] [NYCLS]).

8.17 REDEMPTION:

See categories 20 Mortgages, topic Mortgages of Real Property; Taxation, topic Property (Ad Valorem) Taxes, subhead Redemption.

8.18 SUPPLEMENTARY PROCEEDINGS:

See topic 8.05 Executions.

8.19 TRUSTEE PROCESS:

See topics 8.02 Attachment, 8.05 Executions.

9 DISPUTE RESOLUTION

9.01 ALTERNATIVE DISPUTE RESOLUTION:

Mandatory (Alternative) Dispute Resolution ("MDR").

Mandatory Court Ordered Arbitration.

Dispute resolution ("DR") by arbitration authorized by state statute (N.Y. C.P.L.R. 3405 [NYCLS]) and Rules of the Chief Judge of the State of New York (N.Y. Comp. Codes R. & Regs. tit. 22, §28.8). In courts and counties where arbitration is operational, arbitration is mandatory for all money actions not exceeding $6,000 ($10,000 within New York City), exclusive of costs and interest, although parties can stipulate to increase these amounts. (N.Y. Comp. Codes R. & Regs. tit. 22, §§28.1-28.2). Arbitrators are drawn randomly from list of practicing attorneys who have been admitted to practice in New York. (N.Y. Comp. Codes R. & Regs. tit. 22, §28.4[b]). They have general powers of courts, including subpoena powers (N.Y. C.P.L.R. 2302[a] [NYCLS]), to conduct hearing "with due regard to law and established rules of evidence", which are liberally construed to promote justice (N.Y. Comp. Codes R. & Regs. tit. 22, §28.8[a]). After award issued, party has right to jury trial de novo in court where action was commenced. (N.Y. C.P.L.R. 3405 [NYCLS]; N.Y. Comp. Codes R. & Regs. tit. 22, §28.12). At trial de novo, arbitrator may not be called as witness nor may arbitrator's award or report be admitted into evidence. If judgment upon trial de novo is not more favorable than arbitration award, demandant must pay costs to other party and cannot recover interest from time of award. (N.Y. Comp. Codes R. & Regs. tit. 22, §28.12[d], [e]). There is little consistency regarding manner in which cases are referred to arbitration. Referral may be at court's discretion, on voluntary basis or mandatory. (Interim Report of the Chief Judge's New York State Court Alternative Dispute Resolution ["ADR"] Project, Sept. 1, 1994).

Community Dispute Resolution Centers Program ("CDRCP").

Unit of New York State Unified Court System's Office of Management Support representing joint effort between state and local government to provide community forums for resolution of disputes as alternative to criminal, civil, and family court litigation. (N.Y. Jud. Ct. Acts Law §849-b [NYCLS]). Awards may enjoin future criminal activity or other conduct or may order restitution in amount up to limits of small claims courts and, in certain instances, up to $5,000. (N.Y. Jud. Ct. Acts Law §849-b[4][e] [NYCLS]). All case files of mediator confidential and not subject to disclosure in any judicial or administrative proceeding. Any communication relating to resolution of dispute during process by any participant, mediator, or other person present must be confidential. (N.Y. Jud. Ct. Acts Law §849-b[6] [NYCLS]).

Dispute resolution is required, or prohibited, for certain types of disputes.

Antitrust.

Matters involving enforcement of state antitrust laws, recognized as representing public policy of first magnitude, cannot be left to commercial arbitration. (21 N.Y.2d 621, 237 N.E.2d 223).

Mass Torts.

Most New York courts currently do not use ADR procedures for mass tort/products liability cases. (Interim Report of the Chief Judge's New York State Court ADR Project, Sept. 1, 1994). However, several justices in New York County Supreme Court have used Special Settlement Masters to resolve thousands of asbestos and DES mass tort cases. (Interim Report of the Chief Judge's New York State Court ADR Project, Sept. 1, 1994).

Orders Not to Resuscitate.

Each hospital must establish mediation system for purpose of mediating disputes regarding issuance of orders not to resuscitate. Persons appointed to participate in dispute mediation system shall not have authority to determine whether or not resuscitation order shall be issued. (N.Y. Pub. Health Law §2972[1][a] [NYCLS], [5] [NYCLS]).

Fee Disputes.

Mandatory fee arbitration in disputes between lawyers and clients in domestic relations cases in which representation began prior to June 1, 2001. (Administrative Order 177/01, N.Y. Comp. Codes R. & Regs. tit. 22, §136 repealed).

“HO”.

Small Claims Tax Assessment Review (“SCAR”).—Hearing Officers Program designed to provide Supreme Court avenue by which owners of one-, two-, and three-family owner-occupied residences, where equalized value of property does not exceed $450,000 or, in event such equalized value exceeds $450,000, total assessment reduction requested does not exceed 25% of assessed value of property, or, where property is unimproved and is not of sufficient size as determined by assessing unit or special assessing unit to contain one, two or three family residential structure who are unsuccessful in obtaining redress from their local Boards of Assessment Review, may challenge property tax assessment made by local tax assessing governmental unit, and thereby obtain refunds of excessive taxes. (N.Y. Real Prop. Tax Law §730 [NYCLS]).

HO need not be attorney, but may be licensed real estate broker or possess other qualifications established by Office of Court Administration. (N.Y. Comp. Codes R. & Regs. tit. 22, §202.58; N.Y. Real Prop. Tax Law §731 [NYCLS]).

Federal Statutes.

Where enforceability of arbitration clause is governed by Federal Arbitration Act (“FAA”), arbitrability of statutory discrimination claims determined by reference to Congress' intent with regard to alternative dispute resolution for those classes of claims. (81 N.Y.2d 623, 619 N.E.2d 998).

Provisions of FAA are controlling even if dispute itself arises under state law. If party seeks to avoid enforcement of arbitration clause governed by FAA, party must show congressional intent to preclude waiver of judicial forum for disputes based on particular statutory right. (81 N.Y.2d 623, 619 N.E.2d 998).

New York Courts have created various quasi-judicial positions to aid in administration of alternative dispute resolution as well as traditional court procedure.

Referee.

References to hear and determine, except in specified cases where traditionally there was no right to jury trial, must be on consent of parties. References of issues to referee to hear and report to court need not be on consent. (N.Y. C.P.L.R. 4317 [NYCLS]). Except by consent of parties, referee must be attorney but none may be judge. Court personnel, with exception of some, prohibited from serving as referee. (N.Y. C.P.L.R. 4312[1] [NYCLS], [4] [NYCLS]). Issues typically referred to referee are threshold issues of fact, including traverse hearings, applications for modification of support and maintenance awards, accounting proceedings, etc. (Interim Report of the Chief Judge's New York State Court ADR Project, Sept. 1, 1994).

Judicial Hearing Officer ("JHO").

JHO program not ADR program. Nevertheless courts view them as alternative programs for dispute resolution. (Interim Report of the Chief Judge's New York State Court ADR Project, Sept. 1, 1994).

Former judge or justice of Unified Court System, with at least one year of experience, other than former town or village justice, eligible to be appointed as JHO for renewable term of two years. (N.Y. Comp. Codes R. & Regs. tit. 22, §122.1). JHO has powers provided by law and cases assigned by appropriate administrative judge. JHO may supervise disclosure. (N.Y. Comp. Codes R. & Regs. tit. 22, §122.6). JHO can be appointed to serve as HO. Principal limitation on use of JHOs relate to jurisdiction. In civil cases, jurisdiction to hear and determine most matters requires consent of all parties, which is often difficult to obtain. (Interim Report of the Chief Judge's New York State Court ADR Project, Sept. 1, 1994).

Simplified Procedure.

Simplified Procedure for Court Determination of Disputes, while strictly speaking not ADR program, purpose and departure from normal case processing rules, warrants classification as ADR procedure. (Interim Report of the Chief Judge's New York State Court ADR Project, Sept. 1, 1994).

Action under Simplified Procedure can commence without service of summons, or continuation after service, without pleadings, by filing of statement signed by all parties specifying plainly and concisely claims, defenses and relief requested. Submission to procedure waives right to trial by jury. (N.Y. C.P.L.R. 3031 [NYCLS]).

Small claims procedures are not traditional ADR, but in many locations arbitrators are used. Arbitrators serve pro bono, features differ from legislated arbitration of N.Y. C.P.L.R. art. 75 [NYCLS]. (Interim Report of the Chief Judge's New York State Court ADR Project, Sept. 1, 1994).

Special Masters.

Chief Administrator of Court may authorize appointment of attorneys as special masters, who must serve without compensation, to preside over conferences and hear and report on applications to court. (Unif. Trial Ct. R. §202.14).

Voluntary (Alternative) Dispute Resolution ("VDR").

Announced policy of New York State favors and encourages voluntary dispute resolution, especially arbitration, as means of conserving time and resources of courts and contracting parties. To facilitate this, Legislature has assigned courts minimal role in supervising ADR practice and procedures.

Arbitration.

New York State has established general voluntary arbitration procedures as well as voluntary arbitration programs. (N.Y. Gen. Bus. Law 198-a[k] [NYCLS]; N.Y. C.P.L.R. art. 75 [NYCLS]).

Arbitrators are not obliged to give reasons for their rulings or awards. (21 N.Y.2d 621, 237 N.E.2d 223).

Claim need not be tenable in order to be arbitrable. (37 N.Y.2d 91, 332 N.E.2d 333).

Parties to arbitration contract are completely free to agree upon identity of arbitrators and manner in which they are chosen. (11 N.Y.2d 128, 182 N.E.2d 85).

Party to tripartite arbitration agreement may not appoint himself arbitrator, but corporate party may appoint member of its board of directors. (11 N.Y.2d 128, 182 N.E.2d 85).

Absent specific statute, arbitration must be entered into by agreement of parties. (N.Y. C.P.L.R. 7501 [NYCLS], 7511[b] [NYCLS]).

Bias/Disqualification.

In arbitration proceeding brought to challenge validity of restrictive covenants contained in employment agreement, which expressly specified party to be acting as arbitrator, arbitrator's acceptance of compensation from employer for his services was not sufficient to constitute bias. (46 N.Y.2d 623, 389 N.E.2d 456). Disclosed relationship between designated arbitrator and party will not in and of itself disqualify designee. (40 N.Y.2d 687, 358 N.E. 484). Arbitrator's known interest does not of itself disqualify him. (11 N.Y.2d 128, 182 N.E.2d 85).

Contractual Clause.

Clause in construction contract giving chief engineer power to determine classification, amount, and acceptability of work to be paid for under contract and making engineer's determination and estimate final and conclusive was not explicit, unequivocal agreement for alternate dispute resolution, and did not vest final authority for all legal determinations in chief engineer, binding other party thus foreclosing judicial review. (74 N.Y.2d 166, 542 N.E.2d 1097).

When resolution of all disputes under agreement is to take place by arbitration before employee of one contracting party, and bind only other party, requirement of explicit and unequivocal agreement regarding arbitration takes on great significance. (82 N.Y.2d 47, 623 N.E.2d 531).

Where clause expressly provided for judicial review under New York law, DR clause was valid and enforceable, even though specific person associated with one party was final arbiter of disputes arising out of contract. (82 N.Y.2d 47, 623 N.E.2d 531).

Reference to New York's art. 78 in DR clause of contract did not affect parties' choice of arbitrary and capricious standard of review of decisions of final arbiter of disputes under contract. (82 N.Y.2d 47, 623 N.E.2d 531).

Enforcement.

If dispute is submitted to DR and there is written agreement consenting to arbitration, resulting award will be enforceable regardless of nature of dispute and form of award. (150 Misc.2d 1031, 571 N.Y.S.2d 660).

It is contrary to public policy for court to give out-of-court agreement between unrepresented tenant and landlord, made after discussions with lay mediator, greater effect than would be accorded similar stipulation entered in open court before judge of Housing Court. (150 Misc. 2d 1031, 571 N.Y.S.2d 660).

Errors.

Arbitrator's award will not be vacated for errors of law and fact committed by arbitrator, even where arbitrator states intention to apply law and misapplies it. (46 N.Y.2d 623, 389 N.E.2d 456).

Federal Statutes.

If civil complaint presenting statutory violation comes within scope of broad arbitration agreement, court must enforce agreement unless Congress clearly manifested intent to preclude waiver of judicial remedies in statute. (78 N.Y.2d 76, 575 N.E.2d 98).

Congress adopted FAA to insure that courts would rigorously enforce private agreements to arbitrate, and established emphatic national policy favoring arbitration binding on all courts, state and federal. (78 N.Y.2d 76, 575 N.E.2d 98).

Parties are free to exclude controversies involving federal statutes from their agreement to arbitrate. (78 N.Y.2d 76, 575 N.E.2d 98).

Insurance.

Whether insurer entitled to reimbursement, for judgment rendered against it for failure to settle, or whether agreement applies only to judgment rendered against insurer within policy limits, is arbitrable. (37 N.Y.2d 91, 332 N.E.2d 333).

Judicial Action.

Arbitration awards can be vacated upon showing of: (1) Corruption, fraud or misconduct in procuring award; (2) partiality of arbitrator in same circumstances; (3) where arbitrator exceeded his/her power; (4) failure to follow proper procedures of ADR. Arbitration awards can also be vacated when party does not participate in arbitration and was not served with notice of intention to arbitrate, upon showing: (1) Valid agreement was not made; (2) agreement was not complied with; or (3) arbitration was time-barred. (N.Y. C.P.L.R. 7511[b] [NYCLS]).

Where arbitration agreement fails to appoint arbitrator, or replacement if necessary, court will appoint one. (N.Y. C.P.L.R. 7504 [NYCLS]).

Courts may modify award if: (1) There is miscalculation of figures or mistake in description of anything referred to in award; (2) arbitrators have awarded upon matter not submitted and awards can be corrected without affecting merits of decision; or (3) award is imperfect in form, but correct on merits. (N.Y. C.P.L.R. 7511[c] [NYCLS]).

Jurisdiction or Arbitral Authority.

Claims concerning liquidation of insolvent companies have been held to be beyond reach of arbitrator's discretion where state statute bestows upon State Supreme Court exclusive jurisdiction over proceedings. (4 N.Y.2d 245, 149 N.E.2d 885).

Wherever agreement to arbitrate is clearly expressed, subsequently resistant party will be deemed to have relinquished right to litigate disputes in courts and may be compelled, instead, to submit to arbitration. (66 N.Y.2d 341, 488 N.E.2d 67).

Where parties have expressly agreed to arbitrate their disputes, it remains to be determined whether subject matter of disputes is one that may be submitted to arbitration without violation of any law or public policy and, if so, whether it falls within scope of arbitration agreement. (66 N.Y.2d 341, 488 N.E.2d 67).

Where jurisdiction over particular type of dispute statutorily bestowed exclusively upon courts, or where judicial, as opposed to arbitral, enforcement of particular rights and prohibition mandated by public policy, agreement to arbitrate will not be given effect by courts. (66 N.Y.2d 341, 488 N.E.2d 67).

While specifically enumerated restriction upon arbitral authority will be upheld by courts, no such limitation upon either factual or legal dispute resolution will be inferred from broadly worded contractual provision expressly calling for arbitration of all disputes arising out of parties' contract. (66 N.Y.2d 341, 488 N.E.2d 67).

Generally, it is for courts to make initial determination as to whether dispute is arbitrable, i.e., whether parties have agreed to arbitrate particular dispute. However, ultimate disposition of merits reserved for arbitrators. Definitive analysis of scope of agreement must be left to arbitrators whenever parties have broadly agreed that any dispute involving interpretation and meaning of agreement should be submitted to arbitration. (37 N.Y.2d 91, 332 N.E.2d 333).

Whether insurer was entitled to reimbursement for judgment rendered against it for failure to settle or whether agreement applies only to judgment rendered against insurer within policy limits, arbitrable. (37 N.Y.2d 91, 332 N.E.2d 333).

Party to tripartite arbitration agreement may not appoint himself arbitrator, but corporate party may appoint member of its board of directors. (11 N.Y.2d 128, 182 N.E.2d 85).

Provisions of FAA are controlling even if dispute itself arises under state law. If party seeks to avoid enforcement of arbitration clause governed by FAA, party must show congressional intent to preclude waiver of judicial forum for disputes based on particular statutory right. (81 N.Y.2d 623, 619 N.E.2d 998).

Dispute resolution agreements which involve monetary settlements in exchange for discontinuation of proposed or settled criminal charges are not void. (150 Misc.2d 1031, 571 N.Y.S.2d 660).

Landlord-Tenant.

Local legislative body of any city, town, or village may by resolution create landlord-tenant relations council, to advise, counsel, and/or mediate problems and disputes and to improve relations between landlords and tenants. Such council shall resolve problems and disputes between landlords and tenants through mediation and discussion at meetings of council. (N.Y. Gen. Mun. Law §239-z[1]).

Landlord-tenant cases referred to mediation on discretionary or voluntary basis. Landlord-tenant cases more frequently referred to mediation than to arbitration. (Interim Report of the Chief Judge's New York State Court ADR Project, Sept. 1, 1994).

Lending.

Agreement to arbitrate, when sought to be enforced by lender, cannot divest courts of their jurisdiction to determine whether purported sales agreement is in fact usurious loan, and thus illegal. (17 N.Y.2d 445, 213 N.E.2d 887).

Mediation.

Agreement reached during landlord-tenant mediation viewed on same terms as housing court stipulation. (N.Y. Comp. Codes R. & Regs. tit. 22, §§208.41[n][2], 210.41[m][2], 212.41[m]

[2]; 150 Misc.2d 1031, 571 N.Y.S.2d 660).

Mediation award not subject to enforcement on summary judgment without further inquiry, even though resolution of cross complaints was sufficient consideration to support award, where parties did not consent to arbitrate, not make written waiver of right to hearing, and award was not presented for review with parties in open court. (150 Misc.2d 1031, 571 N.Y.S.2d 660).

Landlord-tenant cases referred to mediation on discretionary or voluntary basis. Landlord-tenant cases more frequently referred to mediation than to arbitration. (Interim Report of the Chief Judge's New York State Court ADR Project, Sept. 1, 1994).

Association of attorney and non-attorney to provide divorce mediation services which includes legal services is forbidden. (N.Y. Comp. Codes R. & Regs. tit. 22, §1200.18).

Lawyer asked to serve as impartial arbitrator or mediator in matters involving present or former clients may serve in either capacity provided such present or former relationship is first disclosed. (N.Y. Code of Professional Responsibility EC 5-20).

Lawyer who has undertaken to act as impartial arbitrator or mediator should not represent any of parties involved in that dispute, thereafter. (N.Y. Code of Professional Responsibility EC 5-20).

Mini-trials.

Under broad definition of arbitration as “form of procedure whereby differences may be settled”, agreement to settle disputes by mini-trial may be characterized as agreement to arbitrate or as contract to use confidential advisory process enforceable in equity. (Interim Report of the Chief Judge's New York State Court ADR Project, Sept. 1, 1994).

Miscellaneous.

DR agreement, like arbitration agreement, must be clear, explicit, and unequivocal and must not depend upon implication or subtlety. (74 N.Y.2d 166, 542 N.E.2d 1097).

Resulting award from dispute submitted to ADR enforceable if there is written agreement consenting to arbitration; successful party may obtain award on judgment regardless of nature of dispute. (N.Y. C.P.L.R. 7501 [NYCLS], 7511[b] [NYCLS]).

Public Policy.

Arbitration award which violates public policy will not be allowed to stand. (46 N.Y.2d 623, 389 N.E.2d 456).

Arbitrator's award which specifically enforces restrictive covenant, even to extent of enjoining individual from engaging in like employment for reasonable period of years in future, will not be vacated on public policy grounds. (46 N.Y.2d 623, 389 N.E.2d 456).

Where parties have expressly agreed to arbitrate their disputes, it remains to be determined whether subject matter of dispute is one that may be submitted to arbitration without violation of law or public policy and, if so, whether it falls within scope of arbitration agreement. (66 N.Y.2d 341, 488 N.E.2d 67).

Where jurisdiction over particular type of dispute statutorily bestowed exclusively upon courts, or where judicial, as opposed to arbitral, enforcement of particular rights and prohibition mandated by public policy, agreement to arbitrate will not be given effect by courts. (66 N.Y.2d 341, 488 N.E.2d 67).

Arbitrator's determination resolving dispute properly submitted to arbitration entailing misapplication of substantive rules of law will only be vacated if court concludes that it is totally irrational or violative of strong public policy. This imperviousness to judicial challenge equally applicable to commercial arbitration in public and private sector. (66 N.Y.2d 341, 488 N.E.2d 67).

DR agreements which involve monetary settlements in exchange for discontinuation of proposed or settled criminal charges are not void. (150 Misc.2d 1031, 571 N.Y.S.2d 660).

Referee.

Trial by referee done by consent of parties and any decision is binding on parties. Parties have great freedom to select private judge. (N.Y. C.P.L.R. 4301 [NYCLS], 4312 [NYCLS], 4317 [NYCLS], 4319 [NYCLS]).

Private judges have virtually all powers of court, including power to issue decision that will stand as decision of court and be appealable on same basis to Appellate Division. (N.Y. C.P.L.R. 4301 [NYCLS], 4319 [NYCLS]).

Parties can select either judicial hearing officer or private attorney as referee. Former compensated by state, while latter compensated by parties to lawsuit. (N.Y. C.P.L.R. 4301-4321).

Rules or Procedure.

Arbitrator is not bound to abide by, absent contrary provision in arbitration agreement, principles of law or rules or procedure which govern traditional litigation process. (46 N.Y.2d 623, 389 N.E.2d 456).

Small Claims Court.

Claims up to $5,000 by nonbusiness can be brought in small claims court, which provides informal and simplified procedures for adjudicating cases in court without need for legal representation. (N.Y. City Civ. Ct. Act, N.Y. Uniform Dist. Ct. Act, N.Y. Uniform City Ct. Act §§1801, 1809).

Claims up to $5,000 by corporation, partnerships, or associations can be brought as commercial claims in small claims court. (N.Y. City Civ. Ct. Act, N.Y. Uniform Dist. Ct. Act, N.Y. Uniform City Ct. Act §1801-A).

Small claims referred to mediation on discretionary or voluntary basis. (Interim Report of the Chief Judge's New York State Court ADR Project, Sept. 1, 1994).

State Statutes.

Commercial arbitration was not proper mechanism for determining whether price rebate was discriminatory and violated Donnelley Act even though contract between buyer and seller provided for arbitration of disputes. (N.Y. Gen. Bus. Law §340 et seq. [NYCLS], 21 N.Y.2d 621, _ N.E. 2d _).

Waiver.

Fact that defendants had moved to dismiss complaint before moving to compel arbitration did not waive right to compel arbitration. (78 N.Y.2d 76, 575 N.E.2d 98).

Assent by party to choice of arbitrator in face of that party's knowledge of relationship between other side and arbitrator is waiver of right to object. (40 N.Y.2d 687, 358 N.E.2d 484).

Stipulations settling landlord-tenant disputes are so favored that parties may waive nearly all statutory and constitutional rights. (150 Misc.2d 1031, 571 N.Y.S.2d 660).

9.02 ARBITRATION AND AWARD:

Uniform Arbitration Act not adopted.

Written agreement to submit any controversy thereafter arising between parties or any existing controversy to arbitration is enforceable, and confers jurisdiction on courts of New York to enforce it and enter judgment on award thereon. (N.Y. C.P.L.R. 7501 [NYCLS]). Submission to arbitration cannot be made where one of parties to controversy is infant, incompetent, or conservatee unless court having jurisdiction approves petition therefore brought by representative of such infant, incompetent or conservatee. (N.Y. C.P.L.R. 1209 [NYCLS]).

Form and Requisites of Submission.

Party may serve upon another party demand for arbitration or notice of intention to arbitrate, specifying agreement pursuant to which arbitration sought and name and address of party serving notice, or of officer or agent thereof if such party is association or corporation. Demand should also state that unless party served applies to stay arbitration within 20 days he will be precluded from objecting on basis that valid agreement was not made or has not been complied with and from asserting in court bar of limitation of time. Provision in arbitration agreement or arbitration rules which waives right to apply for stay of arbitration is null and void. (N.Y. C.P.L.R. 7503[c] [NYCLS]).

Partnership Claims or Liabilities.

Unless authorized by other partners or unless they have abandoned business, one or more but less than all partners cannot submit partnership claim or liability to arbitration. (N.Y. P'ship Law §20[3][e]).

Compelling Arbitration.

Where one party fails to perform under agreement to arbitrate, aggrieved party may apply for order compelling arbitration. Where there is no substantial question whether valid agreement was made or complied with, and claim sought to be arbitrated is not barred by limitation, order will be granted. (N.Y. C.P.L.R. 7503[a] [NYCLS]).

Selection of Arbitrators.

If arbitration agreement does not provide for method of appointment of arbitrator, or if agreed method fails or is not followed, or if arbitrator fails to act and his successor has not been appointed, court, on application of either party, must select arbitrator. (N.Y. C.P.L.R. 7504 [NYCLS]).

Stay of Court Proceedings.

Application may be made to court to stay pending or subsequent action, or so much of it as is referable to arbitration. (N.Y. C.P.L.R. 7503[a] [NYCLS]).

Waiver of Court Proceedings.

Participation in arbitration deemed to be waiver of any objection to arbitration. (N.Y. C.P.L.R. 7511[b][2][ii] [NYCLS]; 7506[f]). Procedural requirements of hearing can be waived by party either in original agreement to arbitrate, in any subsequent writing, or by participation in arbitration without objection. (N.Y. C.P.L.R. 7506[f] [NYCLS]).

Powers of Arbitrators.

Arbitrators and any attorney of record in arbitration proceeding have power to issue subpoenas and arbitrators have power to administer oaths. (N.Y. C.P.L.R. 7505 [NYCLS]).

Awards by Confession.

Award by confession may be made for money due, or to become due, within three months after parties verify statement containing authorization, sum of award or method of ascertaining it, and facts constituting liability. (N.Y. C.P.L.R. 7508[a] [NYCLS] and [b] [NYCLS]).

Objections to Award.

Award will be vacated on application of party who either participated in arbitration or was served with notice of intention to arbitrate, if court finds that rights of party were prejudiced by: (1) Corruption, fraud, or misconduct in procuring award; (2) partiality of arbitrator appointed as neutral, except where award was by confession; (3) arbitrator exceeded his power or so imperfectly executed it that final award upon subject matter submitted was not made; or (4) failure to follow applicable procedure, unless party applying to vacate continued with arbitration with notice of defect and without objection. (N.Y. C.P.L.R. 7511[b][1] [NYCLS]). Award will also be vacated on application of party who neither participated in arbitration nor was served with notice of intention to arbitrate, if court finds that: (1) Rights of party were prejudiced by one of above enumerated grounds; (2) valid agreement to arbitrate was not made; (3) agreement to arbitrate was not complied with; or (4) arbitrated claim was barred by limitation. Application to vacate or modify award must be made within 90 days after delivery of award. (N.Y. C.P.L.R. 7511[b][2] [NYCLS]).

One who has not participated in arbitration and who has not made or been served with application to compel arbitration but who has been served with notice of intention to arbitrate may apply for stay thereof on ground that valid agreement was not made or has not been complied with or that claim sought to be arbitrated is barred by limitation. (N.Y. C.P.L.R. 7503[b] [NYCLS]).

Other Motions Directed to Award.

Motions to modify awards may also be made upon grounds specified in N.Y. C.P.L.R. 7511[c] [NYCLS].

Judgment on Award.

Judgment shall be entered upon confirmation of award. (N.Y. C.P.L.R. 7514[a] [NYCLS]).

10 DOCUMENTS AND RECORDS

10.01 ACKNOWLEDGMENTS:

Certification of acknowledgment or proof of writing, except a will, in manner prescribed by law for taking and certifying acknowledgment or proof of conveyance of real property within state is prima facie evidence that it was executed by person who purported to do so. (N.Y. C.P.L.R. 4538 [NYCLS]). New York has not adopted Uniform Acknowledgment Act, Uniform Law on Notarial Acts, or Uniform Recognition of Acknowledgments Act.

Within State.

May be taken before justice of supreme court, official examiner of title, official referee or notary public anywhere in state; or, within district wherein such officer is authorized to perform official duties, before judge, clerk of court of record, county clerk or other recording officer of county, mayor or recorder of city, surrogate, special surrogate, special county judge, commissioner of deeds outside City of New York or commissioner of deeds of City of New York within the five counties comprising City of New York; or before justice of peace, town councilman, village police justice or judge of any court of inferior local jurisdiction in county containing town, village or city in which he is authorized to perform official duties. (N.Y. Real Prop. Law §298 [NYCLS]). Fee for authorized officials who take acknowledgments: $2 for one person, $2 for each additional person, and $2 for swearing each witness thereto. (N.Y. C.P.L.R. 8009[2] [NYCLS]). For provisions specially applicable to notaries, see topic 10.03 Notaries Public.

Outside State but Within United States or any Place over Which United States Exercises Jurisdiction or Control.

May be taken as prescribed by laws of this state, or of place where taken if accompanied by certificate of conformity, before any of following officers acting within his jurisdiction: (1) Judge or presiding officer of any court having seal or clerk or other certifying officer thereof; (2) mayor or other chief civil officer of city or other political subdivisions; (3) notary public; (4) any person authorized to take acknowledgment or proof of deeds to be recorded in place where acknowledgment or proof is taken; (5) commissioner of deeds appointed pursuant to laws of this state to take acknowledgment or proof without this state. Certificate of commissioner of deeds must state day on which and place in which acknowledgment or proof was taken and must be under his seal. (N.Y. Real Prop. Law §§299 [NYCLS], 299-a [NYCLS], 307 [NYCLS], 308 [NYCLS]).

Persons in or with U.S. Armed Forces.

May be taken, in case of persons serving in or with U. S. armed forces or by dependent of any such person, before commissioned officer in active service of U.S. armed services with rank of second lieutenant or higher in Army, Air Force, or Marine Corps, or ensign or higher in Navy or Coast Guard, or with equivalent rank in any other component part of armed forces of U.S. Certificate must state (1) rank and serial number of officer and command to which he is attached; (2) that person making acknowledgment or proof was at time serving with or accompanying U.S. armed services or dependent of such person; and (3) serial number of such person serving with or accompanying U.S. armed services but need not disclose place where acknowledgment or proof is taken. No authentication required. (N.Y. Real Prop. Law §300 [NYCLS]). For form of certificate of oath or affirmation, see N.Y. C.P.L.R. 2309[d] [NYCLS].

Outside U.S.

May be taken before: (1) Diplomatic or consular agent or representative of U.S. residing within country where acknowledgment or proof taken; (2) judge or other presiding officer, or clerk or officer of court having seal; (3) mayor or chief civil officer of any city or other political subdivision; (4) notary public; (5) commissioner of deeds appointed pursuant to laws of this state to take acknowledgments or proofs without state; (6) person residing in or going to place, specially authorized to take acknowledgments or proofs by commission issued under seal of New York supreme court; (7) person authorized by laws of place to take acknowledgments of conveyances of real property or to administer oaths in proof of execution thereof. (N.Y. Real Prop. Law §301 [NYCLS]). Acknowledgment pursuant to (§301) may be taken under law of New York State or by laws of country where taken if accompanied by certificate of conformity. (N.Y. Real Prop. Law §301-a[1] [NYCLS]).

General Requirements as to Taking.

Officer taking acknowledgment must know or have satisfactory evidence of identity of person making it. (N.Y. Real Prop. Law §303 [NYCLS]).

General Requirements of Certificate.

Certificate made without state, within or without U.S.: (a) if made by judge or other presiding officer of court having seal, or by clerk or other certifying officer thereof; (b) if made by commissioner of deeds appointed pursuant to laws of this state to take acknowledgments without this state; (c) if made in foreign country by any diplomatic, consular or representative officer of U.S., provided such certificates must be under seal of office, court legation or consulate to which such officer is attached. Any certificate required to be authenticated must be so authenticated in addition to being under seal as here provided. (N.Y. Real Prop. Law §308 [NYCLS]).

By Whom Conveyance Acknowledged or Proved.

Conveyance can be acknowledged only by person executing it or proved only by witness who subscribed his name as such at its execution. (N.Y. Real Prop. Law §292 [NYCLS]).

Married women may acknowledge as though unmarried. (N.Y. Real Prop. Law §302 [NYCLS]).

Corporations.

Acknowledgment of conveyance or other instrument by corporation must be made by officer or attorney in fact duly appointed, or in case of dissolved corporation, by some officer, director or attorney in fact duly appointed thereof authorized to execute same by board of directors of said corporation. (N.Y. Real Prop. Law §309 [NYCLS]).

Authentication of Acknowledgment or Proof Made Within the State.

Certificate of acknowledgment or proof, made within state, by commissioner of deeds, justice of peace, town councilman, village police justice or judge of any court of inferior local jurisdiction does not entitle conveyance to be read in evidence or recorded, except in county where officer taking acknowledgment is authorized to act, unless authenticated by a county clerk's certificate of said county. All certificates made by commissioner of deeds for City of New York must be authenticated by clerk of any county within said city in whose office such commissioner has filed certificate of his appointment and term of office under hand and seal of city clerk. Except as provided here, no certificate of authentication is required to entitle conveyance to be read in evidence or recorded in this state when acknowledged before any person authorized by law to take acknowledgment or proof in this state of conveyance of real property situated in this state. (N.Y. Real Prop. Law §310 [NYCLS]).

Authentication of Acknowledgment or Proof Made Without the State.

Certificate of acknowledgment or proof made within or outside U.S. by commissioner of deeds appointed to take such acknowledgments or proofs may not be read in evidence or recorded in this state unless authenticated by certificate of Secretary of State. (N.Y. Real Prop. Law §311[1] [NYCLS]).

Certificate made by notary in foreign country (other than Canada) may not, be read in evidence or recorded unless authenticated by certificate of: (a) clerk or other certifying officer of court in district where acknowledgment or proof is made, under seal of court, (b) recording officer in such district, (c) officer in charge of records of appointment of such notary or who has record of signature of such notary, or (d) consular officer of U.S. resident in such country where acknowledgment or proof was made. (N.Y. Real Prop. Law §311[2] [NYCLS]).

Certificate made by mayor or chief civil officer of city or other political subdivision, if not under seal of such city or political subdivision, may not be read or recorded unless authenticated by certificate of clerk of such city or political subdivision or by certificate of consular officer of U.S. resident in country where acknowledgment or proof is made. (N.Y. Real Prop. Law §311[3] [NYCLS]).

Certificate made by person authorized, by laws of District of Columbia or U.S. possession or dependency, or any foreign country, to take acknowledgments or proof of deeds to be there recorded other than presiding or certifying officer of court, mayor, notary, commissioner of deeds, or person specially authorized may not be read or recorded unless certificate is authenticated by certificate of: (1) Secretary of state of territory or of U.S., (2) certifying officer of court of district, (3) recording officer of such district, (4) officer in charge of official records showing that person taking acknowledgment or proof is such officer as he purports to be, or having record of signature of such person, (5) consular officer of U.S. resident in such country, or

(6) clerk of such city or political subdivision. (N.Y. Real Prop. Law §311[4] [NYCLS]).

Contents of Certificate of Authentication.

Officer authenticating must subjoin or attach to original certificate a certificate under his hand which must specify: (a) that when original certificate was made, officer making it was in fact such officer; (b) that authenticating officer (1) is acquainted with handwriting of officer making original certificate or (2) has compared signature of such officer upon original certificate with specimen signature filed in office of authenticating officer or filed pursuant to law elsewhere and that he believes signature on original certificate to be genuine; and, (c) if original certificate is required to be under seal, (1) that he has compared impression of seal affixed thereto with specimen impression thereof filed in his office or elsewhere pursuant to law and (2) that he believes impression of seal on original certificate is genuine. (N.Y. Real Prop. Law §312[2] [NYCLS]).

When the original certificate is made outside state but within U.S. or any territory, possession, or dependency thereof, certificate of authentication must also specify that person making such original certificate was, at time of making, authorized to take acknowledgments or proofs of deeds by laws of place where acknowledgment or proof is made. (N.Y. Real Prop. Law §312[3] [NYCLS]).

When original certificate is made by any person authorized to take acknowledgments by laws of foreign country, certificate must specify that person making such original certificate, at time of making, was authorized by laws of country where made, to take acknowledgments of conveyances of real estate or to administer oaths in proof of execution thereof. (N.Y. Real Prop. Law §312[4] [NYCLS]).

When original certificate is made by notary public, without state but within U.S. or its possessions, dependencies or protectorates, certificate must state in substance that, at time when such original certificate purports to have been made, person whose name is subscribed to certificate was such officer as he is therein represented to be. (N.Y. Real Prop. Law §312[2] [NYCLS]).

Certificate of Conformity.

Acknowledgment or proof taken outside of the state may be taken in manner prescribed by law of New York or of place where taken. In latter event, it must be accompanied by certificate that it conforms to such laws. Such certificate may be made by: (1) New York attorney residing in such place; (2) if taken within the U.S. or any place over which it exercises jurisdiction or control, attorney admitted to practice in such place; (3) if taken in a foreign country, consular officer of U.S. resident in such country, under seal of his office or consular officer of such country, resident in New York, under seal of his office; or (4) any person deemed qualified by: (a) any court of New York, if, in any action or proceeding pending before it, it is necessary to determine that such acknowledgment or proof conforms with law of such place or (b) Supreme Court of New York on application.

Signature to certificate of conformity is presumptively genuine and authority of signer is presumptively established by recital thereof in certificate.

Statement of judicial officer as to qualification of signer of certificate establishes his qualification regardless of power of court to make statement.

When instrument so acknowledged or proved is accompanied by certificate of conformity, and statement of judicial officer if required, acknowledgment or proof of instrument must be taken as equivalent to one taken in this state. (N.Y. Real Prop. Law §§299-a [NYCLS], 301-a [NYCLS]).

Deputies of officers authorized may take acknowledgments or proofs of conveyances of real estate, or authenticate certificates of such acknowledgment or proof. (N.Y. Real Prop. Law §313-a [NYCLS]).

Fees.

Notary public or any authorized officer administering oath or affirmation or taking acknowledgment, $2; county clerk authenticating acknowledgment or proof, 50¢; certificate of Secretary of State, $1. (N.Y. Pub. Off. Law §68-a [NYCLS]; N.Y. Exec. Law §§132-33, 136).

Forms

Form for Individual.

Statute contains various forms depending upon number and identity of persons and nature of instrument. (N.Y. Real Prop. Law §303 [NYCLS]). For proof of execution by subscribing witness known to officer:

[Venue]

On this ___ day of ___________, 20___, before me came _____________, personally known to me and to me known to be the subscribing witness within named, who, being by me sworn, did depose and say, that he resides in the town of ____________, [if residence is in a city give street and number] __________ county, that he knows _____________, the grantor, within-named, knows him to be the grantor who is described in and who executed the within instrument, that he was present and saw the said _____________ execute the same, and that he acknowledged to him the said _____________ [name of witness] that he, the said grantor, executed the same, and that he, the said _____________ [witness] thereupon subscribed his name as a witness thereto.

____

[Signature and title of officer]

[Seal]

Form of Proof; Subscribing Witness.

The following may be used (N.Y. Real Prop. Law §304 [NYCLS]):

State of New York

County of _________ } ss.

On this ___ day of ___________, 20___, before me personally appeared _____________ [name of subscribing witness], the subscribing witness to the foregoing instrument, to me personally known, who, first being duly sworn, did depose and say that _____________ [he or she] resides at _____________ [street address], in the City of _____________, State of New York; that _____________ [he or she] knows _____________ to be the person described in and who executed the foregoing instrument, that _____________ [name of subscribing witness] was present when said instrument was executed; that _____________ [he or she] saw said _____________ execute the foregoing instrument; and that _____________ [name of subscribing witness] at the same time subscribed _____________ [his or her] name thereto as witness thereof.

____

[Signature of witness]

Subscribed and sworn before me at ____________, New York, the day and year first above written.

____

[Signature of officer]

[Title]

____

[Notary public commission expiration date when appropriate]

[Seal]

Form for Corporation.

Must conform substantially with one of following forms (N.Y. Real Prop. Law §309 [NYCLS]):

(1)

State of New York

County of [________] } ss.

On the [___] day of [__________] in the year [____] before me personally came [_____________] to me known, who, being by me duly sworn, did depose and say that he/she/they [fig 1] reside(s) in [___________] (if the place of residence is in a city, include the street and street number, if any, thereof); that he/she/they is (are) the (president or other officer or director or attorney in fact duly appointed) of the (name of corporation), the corporation described in and which executed the above instrument; that he/she/they [fig 2] know(s) the seal of said corporation; that the seal affixed to said instrument is such corporate seal; that it was so affixed by authority of the board of directors of said corporation, and that he/she/they signed his/her/their [fig 3] name(s) thereto by like authority.

____

(Signature and office of person taking acknowledgment.)

or (2)

State of New York

County of [________] } ss.

On the [___] day of [__________] in the year [____] before me personally came [_____________] to me known, who, being by me duly sworn, did depose and say that he/she/they [fig 4] reside(s) in [___________] (if the place of residence is in a city, include the street and street number, if any, thereof); that he/she/they is (are) the (president or other officer or director or attorney in fact duly appointed) of the (name of corporation), the corporation described in and which executed the above instrument; and that he/she/they signed his/her/their [fig 5] name(s) thereto by authority of the board of directors of said corporation.

Alternative to Acknowledgment or Proof.

No general statutory provision.

10.02 AFFIDAVITS:

Persons authorized to take acknowledgments of deeds under real property law may take affidavits within state. (N.Y. C.P.L.R. 2309[a] [NYCLS]). See topic 10.01 Acknowledgments.

Affidavit taken outside state will be treated as if taken within state if accompanied by such certificate or certificates as would be required to entitle deed acknowledged outside state to be recorded within state if such deed had been acknowledged before officer who administered affidavit. (N.Y. C.P.L.R. 2309[c] [NYCLS]).

Affidavits administered within or outside state or U.S., by officer of U.S. armed forces authorized by real property law to take acknowledgment of deeds, shall state: (a) rank, serial number and command of officer taking affidavit, (b) that affiant at time was person enlisted or commissioned in or serving in or with U.S. armed services or was dependent of such person, or was attached to or accompanying U.S. Armed Forces, and (c) serial number of affiant or dependent. Place where such affidavit is taken need not be disclosed. (N.Y. C.P.L.R. 2309[d] [NYCLS]).

Form of jurat should be substantially as follows:

Form

State of . . . .

County of . . . . } ss.

Subscribed and sworn to before me this . . . . . . day of . . . . . ., (year) . . . . .

[Notarial seal if used]

. . . .

[Printed Name]

Notary Public, State of New York [Certificate filed in . . . . . . County andofficial number if qualified and filed in county within City of New York]

Commission expires . . . .

Alternative to Affidavit.

Statement of attorney admitted to practice in courts of state, or of physician, osteopath, or dentist, authorized by law to practice in state, who is not party to action, when subscribed and affirmed by him to be true under penalties of perjury, may be served or filed in action in lieu of and with same force and effect as affidavit. (N.Y. C.P.L.R. 2106 [NYCLS]).

See also topic 10.01 Acknowledgments, subhead Alternative to Acknowledgment or Proof.

10.03 NOTARIES PUBLIC:

Qualification.

Secretary of State may appoint as many notaries as he deems best. Notary must be U.S. citizen and be resident in state or have office or place of business in state at time of appointment. (N.Y. Exec. Law §130).

Authentication.

See topic 10.01 Acknowledgments, subhead Authentication of Acknowledgment or Proof Made Within the State.

Attorneys.

An attorney admitted to practice in state who is a notary may, in his own discretion, administer an oath or affirmation to or take the affidavit or acknowledgment of his client in respect of any matter, claim, action or proceeding. (N.Y. Exec. Law §135).

Seal.

Use of seal not required. (N.Y. Exec. Law §137).

Powers and Territorial Extent Thereof.

Notary has authority within and throughout state to: (1) Administer oaths and affirmations, take affidavits and depositions, receive and certify acknowledgments or proof of deeds and other instruments in writing; (2) demand acceptance or payment of foreign and inland bills of exchange, promissory notes and obligations in writing and protest same for nonacceptance or nonpayment; (3) for use in another jurisdiction, exercise such other powers and duties as by law of nations and according to commercial usage, or by laws of any other government or country may be exercised and performed by notaries, provided that when exercising such powers, notary must set forth name of such other jurisdiction. For any misconduct in performance of powers, notary shall be liable to parties injured for all damages sustained by them. (N.Y. Exec. Law §135).

Notary public who is stockholder, director, officer or employee of corporation may take acknowledgment or proof of any party to written instrument executed to or by such corporation, or administer oath to any other stockholder, director, officer, employee or agent of such corporation. But notary public shall not take acknowledgment or proof of written instrument by or to corporation of which he is stockholder, director, officer or employee, if such officer taking such acknowledgment or proof be party executing such instrument, either individually or as representative of such corporation, or have financial interest in subject of same. (N.Y. Exec. Law §138).

Recording Notarized Instruments.

No certificate of authentication is required to entitle a conveyance to be read in evidence or recorded in this state in any county when acknowledged or proved before a notary within the state. (N.Y. Real Prop. Law §310[2] [NYCLS]).

Notarial Fees.

(1) For administering oath or affirmation and certifying same when required, except where another fee is specifically prescribed by statute, $2; (2) for taking and certifying acknowledgments or proof of execution of written instrument, by one person, $2, and for each additional person, $2, for swearing each witness thereto, $2. (N.Y. Exec. Law §136).

Certificates.

Notary must attach to any certificate of acknowledgment or jurat to an affidavit: (1) Venue of his act, (2) signature, (3) printed, typewritten, or stamped statement in black ink setting forth his name, the phrase “Notary Public State of New York” or “Attorney and Counsellor at Law” if desired and applicable, “State of New York,” the county in which originally qualified and date on which commission will expire and, where required, any county in which certificate of official character is filed (“Certificate filed . . . County”); and official number (if certified in county within New York City) and date on which commission will expire. However, no act of notary shall be invalid for failure to comply. (N.Y. Exec. Law §137).

County Clerk's Certificate.

Issued by clerk of county where notary has qualified or filed certificate of official character with autograph signature, 50¢. (N.Y. Exec. Law 133). See topic 10.01 Acknowledgments, subhead Forms, for forms.

Commissioner of Deeds.

Must be appointed by common councils of cities within state and must hold office for two years from date of their appointment. (N.Y. Exec. Law §§139[1], 140[1]).

Officers of U. S. Armed Forces.

Certain officers of U. S. Armed Forces have power to take acknowledgments or proofs of members thereof. (N.Y. Real Prop. Law §300 [NYCLS]; N.Y. C.P.L.R. 2309 [NYCLS]). See topic 10.01 Acknowledgments, subhead Persons in or with U.S. Armed Forces.

10.04 RECORDS:

Records relating to real property are in the charge of the county clerks of the various counties except New York, Kings, Queens and Bronx Counties, wherein records are in charge of Register of New York City. *For list of Counties and County Seats see first page in Volume containing Practice Profiles Section for this state.*

Uniform Commercial Code has been adopted. (N.Y. U.C.C. Law §1-101 et seq.). See category 3 Business Regulation and Commerce, topic 3.09 Commercial Code.

Recordable Instruments.

“Conveyance” with reference to recording includes every written instrument by which any estate or interest in real property is created, transferred, mortgaged or assigned, or by which title to any real property may be affected, including instruments in execution of power, although power be one of revocation only, and instrument postponing or subordinating mortgage lien, but does not include will, lease for term not exceeding three years, executory contract for sale or purchase of lands, or instrument containing power to convey real property as attorney or agent. (N.Y. Real Prop. Law §290[3] [NYCLS]).

Executory contract for sale, purchase or exchange of real property, or instrument canceling such contract, or instrument containing power to convey real property, as agent or attorney for owner of property, acknowledged or proved, and certified, as conveyance to be recorded, may be recorded in office of recording officer of any county where any of real property it is related to is situated, and recording officer shall, upon request of any party, on tender of fees therefor, record same in his office. (N.Y. Real Prop. Law §294[1] [NYCLS]). Instead of recording executory contract or lease for term exceeding three years, memorandum thereof, executed by parties, and acknowledged or proved, and certified, in manner to entitle conveyance to be recorded, may be recorded. (N.Y. Real Prop. Law §§291-c [NYCLS], 294[2] [NYCLS]).

Place of Recording.

When real property divided into lots, plots, blocks or sites for purpose of offering same for sale to public, prior to offering, map thereof, with certificates of licensed surveyor and of payment of taxes attached, must be filed in office of county clerk or register of deeds, and duplicate copy of map filed in office of city, town or village clerk where property situated; and if property situated in county maintaining tax map department, copy must be filed therewith. Additional requirements are prescribed when property situated in certain counties. Owner subject to penalty of $25 for each lot sold by or for him prior to filing such map. (N.Y. Real Prop. Law §334 [NYCLS]). For transfer in New York County, Queens County, Bronx County or Kings County of either: (a) Real property on and after July 3, 2004; or (b) cooperative unit or controlling interest in entity owning real property on and after Sept. 7, 2004, certain required transfer tax forms may be prepared on-line at New York City Department of Finance's website (http://www.nyc.gov/html/dof/html/jump/acris.shtml#additional).

Effect of Recording.

Every conveyance not recorded is void as against any person who subsequently purchases or acquires by exchange or contracts to purchase or acquire by exchange, same real property or any portion thereof, or acquires by assignment rent to accrue therefrom, in good faith, and for a valuable consideration, from the same vendor or assignor, his distributees or devisees, and whose conveyances, contract or assignment is first duly recorded. It is further void against any lien arising from payments made in connection with contract made with same vendor, his/her distributees or devisees, if contract is made in good faith and first duly recorded. (N.Y. Real Prop. Law §291 [NYCLS]).

Requisites for Recording.

Must be acknowledged or proved. (N.Y. Real Prop. Law §291 [NYCLS]). Specific requirements of acknowledgments and proof. (N.Y. Real Prop. Law §§292 to 314-a [NYCLS]). Requirements for recording certain instruments vary. (N.Y. Real Prop. Law §§321 [NYCLS], 321-a [NYCLS], 325 [NYCLS], 331 [NYCLS]).

Fees.

Payable in advance to county clerk rendering service in capacity as clerk of Supreme or county court, in action pending in such court. See N.Y. C.P.L.R. 8020 [NYCLS].

Fee for producing in action originals of certain filed papers, where required by court order, or for producing certified photocopies of such papers: $20 per day, plus mileage fees of 12¢ per mile each way and necessary expenses of messenger, except that if subpoena duces tecum be served within City of New York and place of attendance is within City of New York, then actual transportation cost shall be charged instead of mileage fees. (N.Y. C.P.L.R. 8021[e] [NYCLS]).

Subject to review to Supreme Court, fees are fixed by county clerk for searching for any filed or recorded instrument, upon written request specifying kind of instrument, location by town, city or block if real property instrument, and names and period to be searched. (N.Y. C.P.L.R. 8021[a][9] [NYCLS]). County may opt by county law to increase fees for recording, entering or indexing certificate on any instrument from $5 to $20. (N.Y. C.P.L.R. 8021[a][4] [NYCLS]).

Fees of county clerks in general for services in connection with papers or instruments relating to real property and not filed under Uniform Commercial Code ("N.Y. U.C.C. Law") are: Filing any paper, document or other instrument of any nature which is required or permitted to be filed in office of county clerk, $5, except as otherwise expressly provided; filing and indexing any map, $10; affixing and indexing notice of foreclosure of mortgage, $10; recording, entering, indexing and endorsing certificate on any instrument, $5 and in addition $3 for each page or portion of page, and 50¢ for each additional town, city or block or other indices in which instrument is to be indexed; assignment of mortgage which assigns more than one mortgage, $3 for each mortgage assigned in excess of one; re-indexing recorded instrument, $2; copying and mailing any map, fixed by county clerk; entering cross-reference of record of any instrument on margin of record of other instrument, 50¢ for each cross-reference; examining record of each assignment of mortgage or other instrument recited in certificate of discharge of mortgage, 50¢; searching for any filed or recorded investment upon written request specifying kind of instrument, location if real property instrument and names and period to be searched, fixed by county clerk; filing notice of pendency of action or notice of attachment against real property, in counties within New York City, $35, and in all other counties, $15; filing and indexing notice of federal tax liens and certificates affecting such liens, payment shall be made in manner provided by N.Y. Lien Law §243 [NYCLS]. (N.Y. C.P.L.R. 8021[a] [NYCLS]).

Fees of county clerks in general for services other than in connection with papers or instruments relating to real property or filed under N.Y. U.C.C. Law are: filing any paper, document or other instrument of any nature which is required or permitted to be filed in office of county clerk, $5, except as otherwise expressly provided; filing any certificate, instrument or document in relation to corporation, or pursuant to N.Y. Pers. Prop. Law §49-a, or in relation to joint stock association, limited partnership, or continued use of firm name, or registration of hotel name, in counties within City of New York, $100, and in all other counties, $25; filing assignment or order for payment of wages, in counties within City of New York, $10 and in all other counties, $5; filing notice of mechanic's lien or notice of lending, in counties within City of New York, $30, and in all other counties, $15; filing, examining, and entering absolute bill of sale of chattels, or any instrument affecting chattels, in all counties except those of City of New York, $1.50; filing notice of hospital lien, $5; filing transcript of judgment in counties within City of New York, $25, and in all other counties, $10; filing and indexing certificate of appointment or official character of notary public or as commissioner of deeds, $10; filing assignment of money due on contract or order on owner, $25; filing building loan contract, in counties within City of New York, $50, and in all other counties, $25; recording any instrument required by statute to be recorded, in counties within City of New York, $10, and in all other counties, $5, and in addition, $3 for each page recorded except instruments of surrender and orders of commitment under §384 of Social Services Law [NYCLS], in counties within City of New York, $10, and in all other counties, $5; recording any instrument required by statute, additional fee of $5 to be paid monthly by county clerks to commissioner of education, after deducting 25¢ for deposit into New York State local government records management improvement fund, and additional $15, after deducting $0.75, for deposit to cultural education account. (N.Y. C.P.L.R. 8021[b] [NYCLS]).

Fees for certification, for issuing certificates, other papers, and copies of papers or records and for related services other than in connection with papers or instruments relating to real property or files under N.Y. U.C.C. Law as follows: issuing any certificate, except as otherwise expressly provided, in counties within City of New York, $10, in all other counties, $5; execution of judgment, $5; issuing transcript of docket of judgment or other lien, in counties within City of New York, $15, in all other counties, $5, issuing certificate of appointment of notary public, $5; issuing certificate authenticating official act by notary public, commissioner of deeds or other public officer, $3, except no fee for certificate on paper required by U.S. Veterans' Administration; issuing official receipt for any instrument affecting personal property, $2; certificate of exemplification, exclusive of certification, $10; preparing and certifying copy of marriage record, $5. (N.Y. C.P.L.R. 8021[c] [NYCLS]).

Fees of registrars for various services are: Filing notice of petition, $25; filing survey, map or plan of land to be registered, $20; filing survey, map or plan of registered land showing subdivision, $10; filing, entering and indexing any deeds, leases, or muniments of title, $10; filing, entering and indexing deeds or mortgages for transfer of registered land, $18; filing, entering and indexing assignments, modifications, subordinations, extensions or satisfactions of mortgage of registered land, $12; filing, entering, indexing liens, encumbrances or charges pending registration or subsequent thereto, $12 plus $50 for each certificate of title report on which any instrument creating or discharging any lien or encumbrance or change entered; filing, entering, indexing any instrument cancelling any liens, encumbrance or charge on certificate of title, $12 plus $50 for each certificate of title report on which any instrument creating or discharging any lien or encumbrance or change entered; filing, entering and indexing in all indexes certified copy of final order and judgment of registration and issuing certificate of title, $20 plus $5 for each additional parcel set forth in one certificate; filing and entering application for new owner's duplicate certificate of title where same has been lost or destroyed, $15; preparing and issuing new certificate of title combining two or more adjoining parcels, for each new certificate, $18; services of official examiner of title, 0.1% of value of property as determined by last local tax assessment, and $20 in addition thereto; furnishing printed forms or providing services for which fees are not specified, as set by registrar subject to court revision. (N.Y. Real Prop. Law §432 [NYCLS]).

Recording Taxes.

See category 22 Taxation, topic 22.13 Local and Municipal Taxes, subheads New York City Taxes and Mortgage Recording Tax.

Conveyances Acknowledged or Proved Outside New York State.

For purpose of recording, acknowledgments or proof of a conveyance of real property situated in New York may conform to laws of place where taken if accompanied by certificate. (N.Y. Real Prop. Law §§299 [NYCLS], 299-a [NYCLS]).

Fees for Searches of Records Not Filed Under U .C. C.

Fee for certifying search of records, other than those in action or relating to real property, for consecutive two-year period or fraction thereof: $5 per name searched; fee in counties within City of New York is $1 per consecutive two-year period or fraction thereof searched, where records to be searched are state census records. (N.Y. C.P.L.R. 8021[d] [NYCLS])

Torrens Act.

For registration of title, has been enacted; use thereof optional. (N.Y. Real Prop. Law §§370-436). Effective Jan. 1, 1997, title may no longer be registered under Act. (N.Y. Real Prop. Law §436 [NYCLS]). From Jan. 1, 1997 through Dec. 31, 1999, adverse instruments only may be filed. (N.Y. Real Prop. Law §436 [NYCLS]).

Transfer of Decedent's Title.

Fiduciary under will disposing of real property must cause certified copy to be recorded in each county in which any of testator's real property lies, other than county of testator's domicile, within 20 days after issuance of letters. (N.Y. Surr. Ct. Proc. Act §2506[2] [NYCLS]). See also category 13 Estates and Trusts, topic 13.10 Executors and Administrators, subhead Conveyance to Devisees or Heirs.

Filings Under Commercial Code: Place; Fees.

Proper place of filing in order to perfect security interest under art. 9 of Uniform Commercial Code as follows: (1) Office designated for filing or recording of record of mortgage on related real property, if collateral is as-extracted collateral or timber to be cut; or financing statement is filed as fixture filing and collateral is goods that are or are to become fixtures; or collateral is cooperative interest; or (2) office of Secretary of State, in all other cases, including case in which collateral is goods that are or are to become fixtures and financing statement is not filed as fixture filing; (3) office designated for filing financing statement to perfect security interest in collateral, including fixtures, of transmitting utility is office of Secretary of State; term “filing officer” or “recording officer” means county clerk of county, except in counties of Bronx, Kings, New York, and Queens where it means city register in county; and term “filing officer” includes Secretary of State where filing is made in department of state. (N.Y. U.C.C. Law §9-501). Fees of county clerks for services rendered pursuant to Part 4 of art. 9 of Uniform Commercial Code (“Part 4”) are lower of following figures if document on form conforming to standards prescribed by Secretary of State and higher fee if document otherwise conforms to requirements of Part 4,

(1) Filing, indexing and furnishing filing data for financing or continuation statement, $3, or, if statement otherwise conforms to requirements of Part 5, $4.50, plus if statement covers collateral which is crops or goods which are or are to become fixtures, 50¢, and in addition if real estate is in City of New York or County of Nassau, any block fees allowed by administrative code of City of New York or Nassau County, and 75¢ for each additional person, firm or organization beyond first; (2) filing and indexing assignment or statement of assignment of security interest included in or accompanying termination statement, $3 or, if statement otherwise conforms to requirements of Part 4, $4.50, plus 75¢ for each additional person, firm or organization beyond first; (3) filing and indexing termination statement, including sending or delivering financing statement and any continuation statement, statement of assignment or statement of release pertaining thereto, or acknowledgment of filing, $1.50 or $3 plus 75¢ for each name more than one against which termination statement required to be indexed; (4) filing, indexing and furnishing filing data for financing statement indicating assignment of security interest in collateral, $3 or, if statement otherwise conforms to requirements of Part 4, $4.50, plus 75¢ for each additional person, firm or organization beyond first; (5) filing, indexing and furnishing filing data about statement of assignment separate from financing statement, $3 or, if statement otherwise conforms to requirements of Part 5, $4.50, plus 75¢ for each additional person, firm or organization beyond first; (6) filing and noting statement of release of collateral, $3 or, if statement otherwise conforms to requirements of Part 5, $4.50, plus 75¢ for each additional person, firm or organization beyond first; (7) noting file number and date and hour of filing of original upon copy and delivering or sending copy to such person when filed statement contains more than one page or statement and copy are not on forms conforming to standards prescribed by Secretary of State, $1.50 for each filed page; (8) issuing certificate showing whether there is on file presently effective financing statement naming particular debtor and any assignment thereof or release of collateral pertaining thereto, $4.50 or if request for certificate is on form conforming to standards prescribed by Secretary of State or, otherwise, $7.50; (9) furnishing copy of any filed financing statement, continuation statement, termination statement, statement of assignment or statement of release, $1.50 for each filed page, provided that county clerk may furnish duplicate copies of microfilm records of all such statements filed during any month at less than $1.50. (N.Y. C.P.L.R. 8021[f] [NYCLS]). See also category 3 Business Regulation and Commerce, topic 3.09 Commercial Code, subhead Filing Fees.

Vital Statistics.

Birth and death certificates are filed in office of registrar located in local registration district. (N.Y. Pub. Health Law §§4130[2] [NYCLS], 4140[1] [NYCLS]). In general, local registrars are required to forward original records of births and deaths to designated local health units (N.Y. Pub. Health Law §4172[1] [NYCLS]); Provisions of this article except for provisions in (§4100[2] [i]), (§4103), (§4135[2]), (§4135-b), (§4174[8]), (§4138[1][b], [e]), and (§4179) do not apply in New York City after Aug. 8, 1996. (N.Y. Pub. Health Law §4104 [NYCLS]).

Establishing Birth Record.

Person born in State of New York, outside of New York City, may request search by State Commissioner of Health and certification by him. (N.Y. Pub. Health Law §4174 [NYCLS]). Person born in New York City should make application to City Department of Health, which will furnish forms and instructions. (N.Y.C. Admin. Code §17-169).

Records of Marriages.

Such records are required to be maintained by city or town clerk and originals are required to be forwarded to State Department of Health, except in New York City original records of marriages are maintained by city clerk. (N.Y. Dom. Rel. Law §§19 [NYCLS], 20 [NYCLS]). Marriage certificates are prima facie evidence of matter therein contained. (N.Y. Dom. Rel. Law §20-a [NYCLS]).

Certified Copies.

Records of birth, death, marriage, or divorce available from State Department of Health, Vital Records Section, Certification Unit, P.O. Box 2602, Albany, New York 12220-2602, except records relating to New York City. Transcripts of birth ($15) and death ($15) records for New York City available from Department of Health, Vital Records Bureau, 125 Worth St., Box 4, Room 133, N.Y., N.Y. 10013; marriage records ($5) may be obtained from city clerk at Office of the City Clerk, Municipal Building, One Center Street, Room 252, N.Y., N.Y. 10007.

Application fees for birth and death records from local registrars, $10 with exceptions (N.Y. Pub. Health Law §4173[3] [NYCLS]); for marriage certificates from town and city clerks, $5 including search of one year, $1 for second year and 50¢ for each additional year (N.Y. Dom. Rel. Law §19 [NYCLS]). Applicants for transcripts from State Department of Health, $30 for search and certification of birth or death, or for certification of marriage (if year known; otherwise must pay for records search). For any search of files for authorized research purposes, $20 per hour for marriage records plus $2 for each uncertified copy of extract. (N.Y. Pub. Health Law §4174 [NYCLS]; N.Y. Dom. Rel. Law §§20-a [NYCLS], 20-b [NYCLS]).

Lis Pendens.

Notice of pendency may be filed in any action in state court or U.S. court in which judgment demanded would affect title to, or possession, use or enjoyment of real property, except in a summary proceeding brought to recover possession of real property. Notice of pendency of action is constructive notice, from time of filing of notice, to purchaser from or incumbrancer against, any defendant named in notice of pendency. (N.Y. C.P.L.R. 6501 [NYCLS]). Notice must be filed in office of clerk of any county where property affected is situated at any time prior to judgment. (N.Y. C.P.L.R. 6511[a] [NYCLS]).

In action to foreclose upon mortgage, plaintiff, at least 20 days prior to final judgment directing sale, shall file in clerk's office of each county where mortgaged property is located, notice of pendency of action. (N.Y. Real Prop. Acts. Law §1331 [NYCLS]).

10.05 SEALS:

Effect of Seal.

Except as otherwise expressly provided by statute, presence or absence of seal on written instrument executed after Aug. 31, 1941, is without legal effect. (N.Y. Gen. Constr. Law §44-a [NYCLS]). Validity and negotiable character of instrument is not affected by fact that it bears seal. (See N.Y. U.C.C. Law §3-113.) Private seal of person, other than corporation, to any instrument or writing must consist of wafer, wax or other similar adhesive substance affixed thereto, or of paper or other similar substance affixed thereto, by mucilage or other adhesive substance, or of word “seal” or letters “L.S.” opposite signature. (N.Y. Gen. Constr. Law §44 [NYCLS]).

Corporate Seals.

Presence of corporate seal on written instrument purporting to be executed by authority of domestic or foreign corporation is prima facie evidence that instrument was so executed. (N.Y. Bus. Corp. Law §107 [NYCLS]). Stock certificates of stock corporation may be sealed with corporate seal, or facsimile thereof. (N.Y. Bus. Corp. Law §508[a] [NYCLS]). Seal of court, public officer or corporation may be impressed directly on instrument or writing to be sealed or on wafer, wax or other adhesive substance affixed thereto, or upon paper or other similar substance affixed thereto by adhesive substance, or may appear as facsimile, or be engraved or printed or reproduced in any other manner; facsimile, engraved or printed corporate seal on bond or other obligation for payment of money is permitted. (N.Y. Gen. Constr. Law §43 [NYCLS]). Where corporation has not adopted seal, instrument executed in its name, by proper officers under their private seals, is deemed to have been executed under corporate seal. (N.Y. Gen. Constr. Law

§45 [NYCLS]). Where certified copies of records or other papers are admissible in evidence, certificate must be attested by official seal, of officer, court, body, or board in whose custody original is required to be, except that no seal of court is necessary to present order or paper in same court. (N.Y. C.P.L.R. 4540 [NYCLS]).

10.06 TORRENS ACT:

See topic 10.04 Records.

10.07 VITAL STATISTICS:

See topic 10.04 Records.

11 EMPLOYMENT

11.01 EMPLOYER AND EMPLOYEE:

See topic 11.02 Labor Relations.

11.02 LABOR RELATIONS:

Labor on public works is limited to eight hours a day, five days a week except in cases of extraordinary emergency and must be paid rate of wages prevailing in the occupation and locality where work is performed. (N.Y. Lab. Law §220 [NYCLS]).

It is unlawful for any employer to knowingly administer or participate in administration of psychological stress evaluator examination to any employee or prospective employee as defined in N.Y. Lab. Law §733 [NYCLS]. (N.Y. Lab. Law §734 [NYCLS]).

The relation of master and servant is covered by Labor Relations Act, Workers' Compensation Law and Employers' Liability Law. Enforcement of these statutes is under direction of Department of Labor, at head of which is Commissioner of Labor appointed by Governor, or in case of Labor Relations Act, under Employment Relations Board. (N.Y. Lab. Law §§10 [NYCLS], 702 [NYCLS]).

Hours of Labor.

With certain exceptions, eight hours per day constitutes legal day's work. (N.Y. Lab. Law §160 [NYCLS]). With certain exceptions, one day off in seven is required. (N.Y. Lab. Law §161 [NYCLS]). Factory workers must receive 60 minutes for lunch; other employees must receive 30 minutes. Shorter meal periods require permit from Commissioner. Permit shall be in writing and conspicuously posted on main entrance of establishment. Such permit may be revoked at any time. (N.Y. Lab. Law §162 [NYCLS]). With certain exceptions, including newspaper couriers, farm laborers, babysitters, bridge caddies, child models and child performers, no minor 14 or 15 years of age enrolled in daytime school may be employed for more than three hours per school day, more than eight hours per nonschool day, more than 18 hours or six days per week, after 7 P.M. or before 7 A.M. except between (i) 21st day of June and Labor Day of that year (N.Y. Lab. Law §142 [NYCLS]), (ii) where such minor is employed as junior counselor or counselor in training at camp for children during months of June, July or Aug.

Construction Work.

Regulation of construction, excavation and demolition workers is found in N.Y. Lab. Law §§240-242.

Child Labor.

Minors under 16 years of age may not be employed in certain occupations. (N.Y. Lab.

Law §133 [NYCLS]). Employment certificate issued in accordance with education law is required to employ children of 16 or 17 years of age except in certain occupations. (N.Y. Lab. Law §132 [NYCLS]). Labor Law specifies permissible employment of minors under 14 years of age (N.Y. Lab. Law §130 [NYCLS]), 14-15 years of age (N.Y. Lab. Law §131 [NYCLS]), and 16-17 years of age (N.Y. Lab. Law §132 [NYCLS]).

Farm Labor.

Wage minimums and applicable regulations including investigatory powers, record keeping requirements and penalties are set forth in N.Y. Lab. Law art. 19-A [NYCLS], §§670-683 [NYCLS].

Female Labor.

Labor Law sections restricting employment opportunities for women are superseded by tit. VII of Federal Civil Rights Act of 1964. (42 U.S.C. §§ 2000e-1 to e-16).

Migrant Labor.

Employment transportation and maintenance of migrant labor is regulated by N.Y. Lab. Law §§212-a to 212-d [NYCLS].

Employment Agencies.

Such agencies are regulated by N.Y. Gen. Bus. Law §§170-194.

Industrial Home Work.

Such work is regulated by N.Y. Lab. Law art. 13 [NYCLS], §§350-363 [NYCLS].

Carnival, Fair and Amusement Park Safety.

Safety, operation, insurance, etc. is regulated by N.Y. Lab. Law art. 27 [NYCLS], §§870 [NYCLS]-a to 870-m.

Wages and salaries are preferred claims under an assignment for benefit of creditors to the extent of $1,000 for each employee, if earned in the three months preceding assignment (N.Y. Debt. & Cred. Law §22 [NYCLS]), and in case of insolvent insurers, $1,200 for each employee if earned within one year prior to commencement of proceeding against insurer (N.Y. Ins. Law §7434[a][1][iv]). As to individual liability of shareholders for wages of employees, see category 2 Business Organizations, topic 2.03 Corporations, subhead Shareholders' Liabilities.

Payment of Wages.

See generally N.Y. Lab. Law art. 6 [NYCLS]. In general, wages must be paid weekly or semi-monthly in cash except to executive, administrative or professional employees earning over $600 per week. Advance written consent of employee is required to pay by direct deposit in bank (N.Y. Lab. Law §§190-192) and permissible deductions are specified (N.Y. Lab. Law §193 [NYCLS]). Employer requiring refund, return or donation or contribution of any part or all of employee's wage, salary supplement or other things of value as condition of employment or continued employment commits misdemeanor, and is liable for civil penalty. (N.Y. Lab. Law §198-b [NYCLS]). Employee may file claim with Commissioner of Labor to take action regarding wage complaints. (N.Y. Lab. Law §196-a [NYCLS]). No discrimination is allowed in rate of pay for equal work because of sex. (N.Y. Lab. Law §194 [NYCLS]). Employer required to keep certain records and to notify and furnish statements to employees. (N.Y. Lab. Law §195 [NYCLS]).

With certain exceptions, employees are entitled to a minimum wage of $6.75 per hour. On Jan. 1, 2007, minimum wage will increase to $7.15, or, if greater, such other wage as may be established by federal law. (N.Y. Lab. Law §652 [NYCLS]). Wages for certain employees in connection with public works contracts are specially regulated. (N.Y. Lab. Law §§220-224). Wages for certain building service employees are specially regulated. (N.Y. Lab. Law §§230 to 239-a [NYCLS]).

Ordinary assignments of wages are strictly regulated. (N.Y. Pers. Prop. Law §46). See also category 8 Debtor and Creditor, topic 8.01 Assignments.

Labor Unions.

Employees have the right of self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing and to engage in concerted activities. (N.Y. Lab. Law §703 [NYCLS]). No “right to work” laws.

Labor Disputes.

It is an unfair labor practice for an employer to: (1) Spy upon employees' activities in exercise of their rights guaranteed by N.Y. Lab. Law §703 [NYCLS]; (2) engage in blacklisting individuals; (3) interfere with or dominate employee organization; (4) require employee or potential employee to join company union or to refrain from participation in another labor organization; (5) encourage membership in company union or discourage it in another labor organization; (6) refuse to bargain collectively and discuss grievances with employees' representatives; (7) engage in any other acts which interfere with, restrain or coerce employees in exercise of guaranteed rights; (8) discriminate against employee who has taken any action under this article; (9) distribute blacklist of employees who have exercised right under this article for purposes of preventing or ceasing employment; or (10) utilize state funding appropriated to train personnel regarding methods to discourage union organization or employees participating in union organization. (N.Y. Lab. Law §704 [NYCLS]). Representatives designated by Board after showing of majority interest or elected by majority of employees shall be exclusive representative of bargaining unit, provided that employee has right to present grievance to employer. (N.Y. Lab. Law §705[1] [NYCLS]). State Employment Relations Board is empowered and directed to prevent any employer from engaging in any unfair labor practice. (N.Y. Lab. Law §706[1] [NYCLS]). State Labor Relations Act is applicable to employees of nonprofit hospitals or residential care centers. (N.Y. Lab. Law §701 [NYCLS]).

Limitation on Discharge.

No discharge or layoff of employee because one or more wage assignments or income executions or because of pendency of action or judgment against employee for nonpayment of contractual obligation; employee may bring civil action for damages within 90 days; damages not to exceed six weeks wages; court may order reinstatement; no more than 10% of damages subject to claims, attachments or executions. (N.Y. C.P.L.R. 5252 [NYCLS]). No employer, public or private, may discharge, suspend or take other adverse employment action against employee who reports employer's violation of public law, rule or regulation which presents substantial and specific danger to public health and safety; provided that employee has first notified employer of violation and afforded employer reasonable time to take appropriate action. (N.Y. Civ. Serv. Law §75-b; N.Y. Lab. Law §740 [NYCLS]).

Termination.

Employer must notify in writing any employee terminated from employment of exact dates of termination and cancellation of employee benefits connected with termination no later than five working days after date of termination.

Failure to notify employee of cancellation of accident or health insurance subjects employer to additional penalty under N.Y. Lab. Law §217 [NYCLS].

Anti-Discrimination.

It is an unlawful discriminatory practice for an employer to discharge, refuse to hire or discriminate against an individual because of age, creed, sex, race, color, national origin, sexual orientation, military status, predisposing genetic characteristics, marital status or disability, and for labor organization to exclude or expel individual from its membership for such reasons. (N.Y. Exec. Law §296[1]). It shall be unlawful discriminatory practice for employer, licensing agency, employment agency or labor organization to refuse to provide reasonable accommodations to known disabilities of employee, prospective employee or member in connection with job or occupation sought or held or participation in training program. (N.Y. Exec. Law §296[3][a]). However, nothing contained in this subdivision shall be construed to require provision of accommodations which can be demonstrated to impose undue hardship on operation of employer's business, program or enterprise. (N.Y. Exec. Law §296[3][b]). It shall be unlawful discriminatory practice to act adversely upon any arrest or criminal action which was terminated in favor of such individual. (N.Y. Exec. Law 296[16]). Provisions of Retired and Senior Volunteer Program (RSVP) conform with federal law, National and Community Service Trust Act by allowing individuals 55 years of age and older to participate in programs. (N.Y. Elder Law §203).

Penalties.

Employer penalizing employee for complaint of employer violation is subject to $1,000 to $10,000 fine. (N.Y. Lab. Law §215[1] [NYCLS]).

The Workers' Compensation Law provides for securing and payment of compensation to employees or their dependents on account of disability or death resulting from accidental injuries or occupational diseases arising out of and in course of certain specified “hazardous employments” (N.Y. Workers' Comp. Law §§2, 3) and for payment of benefits for disabilities resulting from nonoccupational injuries and sickness (see subhead The Disability Benefits Law, infra). All employments, in which one or more employees are regularly employed in or about same establishment in hazardous employment either upon premises or away from plant of employer, are covered except, among others, persons engaged in nonmanual capacity in charitable, educational or religious institution. (N.Y. Workers' Comp. Law §§2, 3). Volunteer workers duly accepted in State service are deemed “employees” for purposes of Act. (N.Y. Workers' Comp. Law §2). Newsboys and certain domestic servants are deemed “employees” for purposes of this Act. (N.Y. Workers' Comp. Law §§2, 3). Public or not-for-profit corporation or association is “employer” of persons performing services in fulfillment of sentence of probation or conditional discharge. (N.Y. Workers' Comp. Law §3). Employments not listed as hazardous may be brought under law by employer. (N.Y. Workers' Comp. Law §3).

Black Car Operators' Injury Compensation Fund.

Black car operators are entitled to workers' compensation benefits, subject to certain limitations. All entities meeting definition of “Central Dispatch Facility” are required to contribute to fund. (N.Y. Workers' Comp. Law §§2, 11, 14-a, 18-b, 50).

Treatment and Care of Injured Employees.

Employee is entitled to medical care from first day and for as long as necessary to treat and care for injury arising out of or in course of employment. (N.Y. Workers' Comp. Law §13). With certain exceptions only physicians authorized to treat worker's compensation patients are entitled to payment. Within 45 days, employer must pay bill or notify hospital or physician in writing that bill is not being paid and explain why. (N.Y. Workers' Comp. Law §13-g[1]).

Fault of Employee.

Compensation is payable without regard to fault as cause of injury, but injuries occasioned solely by claimant's intoxication from alcohol or controlled substance while on duty or wilful intention to injure self or another, or voluntary participation in off-duty athletic activity not constituting part of claimant's work related duties (unless employer requires or compensates claimant's participation, or otherwise sponsors activity), are excepted. (N.Y. Workers' Comp. Law §10[1]).

Remedy Under the Law Exclusive.

Law is compulsory on employers conducting employments classified as hazardous. (N.Y. Workers' Comp. Law §10). Such employers are relieved from all liability for injury to or death of an employee except that imposed by this law (N.Y. Workers' Comp. Law §11) provided that such employers comply with requirement that they secure payment of compensation by insuring in state fund or with approved stock corporations, mutual corporations or reciprocal insurers, or by self-insurance, upon proof of ability to pay secured by depositing securities or cash with the chairman or by filing of irrevocable letters of credit or bond of surety company authorized to transact business in New York. (N.Y. Workers' Comp. Law §50). Failure of employer to insure is misdemeanor punishable by fine of not less than $1,000 nor more than $5,000, and where employer is corporation, its president, secretary and treasurer are liable therefor. Conviction of subsequent violation within 5 years of previous violation is felony punishable by fine of not less than $10,000 nor more than $50,000. (N.Y. Workers' Comp. Law §52[1]).

Failure to Insure.

If employer has failed to insure, employee or his representative has option to bring action at law for damages, in which employer cannot plead contributory negligence, assumption of risk or fellow servant rule. (N.Y. Workers' Comp. Law §11). Strict liability imposed on employer for failure to secure compensation. (N.Y. Workers' Comp. Law §52; 42 N.Y.2d 956, 398 N.Y.S.2d 139, 367 N.E.2d 645).

Written Notice.

Notice in writing must be given to employer within 30 days after injury and in case of death of such employee resulting from injury within 30 days after such death. Failure to give such notice, unless excused by board, bars claim under law. Failure to object to lack of notice at first hearing at which all are present is deemed waiver of such objection. (N.Y. Workers' Comp. Law §18).

Claim for Compensation.

Claims may be presented to Chairman of Workers' Compensation Board or employer at any time after expiration of first seven days of disability, or at any time after death, but (with certain specific exceptions) are barred if not filed with Chairman within two years after accident or death. (N.Y. Workers' Comp. Law §§20[1], 28). Failure to object at first hearing at which all are present waives defense of statute of limitations. (N.Y. Workers' Comp. Law §28). After mandatory review, with exception of minor uncontested claims, certain claims with short-term benefits must be transferred to conciliation bureau. (N.Y. Workers' Comp. Law §25[2-b]). Alternative dispute resolution system to resolve workers' compensation claims through collective bargaining agreements extends for five years until Dec. 31, 2010. (1995, c. 491, as am'd 1999, c. 464 effective Sept. 9, 1999, as am'd 2005).

Basis of Compensation.

Basis is average weekly wage of employee (N.Y. Workers' Comp. Law §14), with scale of compensation for different classes of partial disabilities (N.Y. Workers' Comp. Law §15). Compensation for permanent total disability or temporary total disability during disabled period is 662/3% of average weekly wage. (N.Y. Workers' Comp. Law §15). Compensation for permanent or temporary total or partial disability due to accident or disablement resulting from occupational disease varies according to date of occurrence, claimant's wages at time of occurrence and other factors. (N.Y. Workers' Comp. Law §15[6]). Contributions to special workers' compensation special disability fund for disability following previous permanent physical impairment may be assessed upon insurers, self-insurers, and state insurance fund. (N.Y. Workers' Comp. Law §15[8]). If injury causes death, compensation constitutes death benefit for reasonable funeral expenses and support of designated dependents in specified amounts in accordance with schedule prepared by chair. (N.Y. Workers' Comp. Law §16). Double compensation and death benefit allowed in cases of minors illegally employed. (N.Y. Workers' Comp. Law §14-a).

Controversion of Claim.

Employer not controverting employee's right to compensation should begin payments on or before 18th day after disability, or within ten days after employer first has knowledge of accident, whichever is greater, and should immediately notify chair that he has done so. (N.Y. Workers' Comp. Law §25[1][c]).

Claims are determined after investigation, and also a hearing, if either party demands one, at which parties may present evidence and be represented by counsel. Board's determination of facts is conclusive, but appeals may be taken by any party in interest on questions of law to appellate division of Supreme Court, Third Department, and in certain instances to the Court of Appeals. Appeal does not stay payment of benefits awarded. If decision was that of panel of board and there was dissent from such decision other than dissent sole basis of which is to refer case to impartial specialist, any party in interest may apply for review by full board within 30 days after notice of decision. (N.Y. Workers' Comp. Law §§20, 23). Upon its own motion or upon application of any party in interest, board may at any time modify, review or change any of its decisions or orders, provided that such review does not affect prior awards or compensation already paid. (N.Y. Workers' Comp. Law §22). It is unlawful to discriminate against employee who has claimed compensation. (N.Y. Workers' Comp. Law §120).

Aliens who are nonresidents, or about to become nonresidents, of United States or Canada are paid same compensation as residents, but compensation to dependents is paid only to spouse and children or (if no spouse or children) to parent whom employee supported in whole or in part for one year prior to accident. (N.Y. Workers' Comp. Law §17). As to proof of dependency of nonresident aliens, see (N.Y. Workers' Comp. Law §121-a).

Retirement credit is provided for periods of workers' compensation leave; certain members of New York City employees' retirement system who are Triborough bridge and tunnel members are eligible for coverage under this provision. (N.Y. Retire & Soc. Sec. Law §§513 [NYCLS], 609 [NYCLS]).

The Disability Benefits Law (Workers' Compensation Law, art. IX) provides for payment of cash benefits for disabilities resulting from non-occupational injury and sickness not arising out of and in course of employment. (N.Y. Workers' Comp. Law §§200-242). “Disability” is defined to include disability caused by or in connection with pregnancy. (N.Y. Workers' Comp. Law §201[9][B]). All employments within state or primarily localized within state are covered except, among others, executive officer of corporation who at all times during period owns all of issued and outstanding stock of corporation and holds all offices unless corporation has other employees who are required to be covered, services for state or political subdivision thereof, as clergyman, as teacher or volunteer in charitable institution, as farm laborers, as golf caddies, of casual nature, and as part-time labor while student. Executive officers who are covered under this law may elect to be excluded from its provisions. (N.Y. Workers' Comp. Law §201). Employers by whom one or more employees (or in case of personal or domestic employees in private home, one or more employees who work for minimum of 40 hours per week for such employer) are employed on each of at least 30 days per calendar year are covered. (N.Y. Workers' Comp. Law §202). Employers not covered including municipal corporations, or fire district or other political subdivision thereof, may voluntarily come under law and noncovered employees may be brought under Act if employer elects. (N.Y. Workers' Comp. Law §212[2]). Disability benefit rights are inalienable. (N.Y. Workers' Comp. Law §218).

Disability during employment is compensable, and amount of compensation varies according to date of occurrence of disability, and claimant's wages at time of occurrence. (N.Y. Workers' Comp. Law §204). Disability benefit shall be paid beginning with eighth consecutive day of disability, subject to conditions and limitations as to maximum and minimum amounts, duration, non-compensable disabilities, and non-duplication of benefits. (N.Y. Workers' Comp. Law §§204-206).

Disability during unemployment is compensable, subject to same conditions and limitations, and subject to further conditions and limitations as to duration and concerning eligibility for unemployment insurance benefits. (N.Y. Workers' Comp. Law §207).

Disability benefits are not payable for more than 26 weeks in one year or during any one period of disability, while claimant not under care of authorized licensed physician, dentist, etc., while claimant performing work for remuneration or profit, for disability commencing prior to eligibility, for disability caused by self inflicted injury, illegal act, or act of war, and under other specified circumstances. (N.Y. Workers' Comp. Law §205). Employees receiving or entitled to receive old-age insurance benefits may be exempt upon filing waiver. (N.Y. Workers' Comp. Law §235).

Contributions to Cost of Benefits.

Employee contributes ½ of 1% of wages, but not to exceed 60¢ per week, and employer contributes entire excess of cost above contributions by employees. (N.Y. Workers' Comp. Law §§209, 210, 214, 228). Employer may insure with State Insurance Fund, authorized insurer, or by approved self insurance. (N.Y. Workers' Comp. Law §211). Any employer not required to provide payments of disability benefits may voluntarily elect to become covered employer by complying with above contribution to cost of benefits requirements. (N.Y. Workers' Comp. Law §212).

Written notice and proof of claim to employer or chairman required within 30 days of commencement of disability. Additional proof of disability must be furnished to employer, carrier or chairman thereafter as may be required. Failure to provide notice and proof as herein provided does not invalidate claim, but no benefits are required to be paid for more than two weeks prior to receipt of proof unless shown not to have been reasonably possible to furnish such notice and proof and that such notice or proof was furnished as soon as possible; but proof must be furnished within 26 weeks of commencement of disability. Thirty day and 26 week periods of limitation for notice and proof of disability claim do not run against persons who are prevented from providing notice and proof due to mental incompetence or physical incapacity, or where claimant is minor. (N.Y. Workers' Comp. Law §217).

Presentation of claim must be to employer, carrier or chairperson. Disputed claims are resolved by Workers' Compensation Board. Within 26 weeks of written notice of rejection of claim, employee may file notice with chairperson that claim has not been paid, and submit proof of disability and unemployment. (N.Y. Workers' Comp. Law §221). In case of dispute as to whether employee's disability was caused by occupational or non-occupational accident, injury or disease, employee receives non-occupational disability benefits pending determination of claim for occupational disability benefits. (N.Y. Workers' Comp. Law §206[2]).

Employers' Liability Law applies only to employments which do not fall within Workers' Compensation Law. (N.Y. Empl'rs Liab. Law §17). It gives to employees, or executor or administrator of deceased employee who has left husband, wife or next of kin surviving him, in case of death, same right to compensation which they would have if not employees, for personal injuries arising from defects negligently permitted to occur in ways, works, machinery or plant, or from negligence of any person in service of employer who was intrusted with duty to maintain condition of machinery or plants. (N.Y. Empl'rs Liab. Law §2). Defense of assumption of risk is to large extent abolished. (N.Y. Empl'rs Liab. Law §4). Contributory negligence shall be defense to be so pleaded and proved by defendant. (N.Y. Empl'rs Liab. Law §5). With certain exceptions, no action for recovery of compensation for injury or death is maintainable unless written notice of time, place and cause of injury is given employer within 120 days after occurrence of accident causing injury or death, and action commenced within one year thereafter. (N.Y. Empl'rs Liab. Law §3). Law does not take away any pre-existing common-law right of action. (189 N.Y. 516, 81 N.E. 765).

If an employer and his employees file written consents to compensation plan with clerk of county in which consent is signed by employee, which plan is described in N.Y. Empl'rs Liab. Law §§9 to 15, inclusive, of the law, employees thereafter have no right of action except under the plan, unless injury was caused by failure of employer to obey a safety order, or the injury is caused by the serious or willful misconduct of the employer (N.Y. Empl'rs Liab. Law §8) or unless consent to plan has been cancelled by either party on 60 days' written notice. (N.Y. Empl'rs Liab. Law §13). Prompt notice of accident must be given to employer, and claim for compensation under plan made within six months, but no want of, or defect or inaccuracy of a notice shall be a bar to maintenance of proceedings under the plan unless employer can prove prejudice therefrom. (N.Y. Empl'rs Liab. Law §9). Disputes in connection with claims under the plan may be settled by agreement or by arbitration, or by an action at law conducted as if on a written contract. (N.Y. Empl'rs Liab. Law §11).

Unemployment Compensation.

A claimant shall be entitled to accumulate effective days for the purpose of benefit rights only if he has complied with the provisions regarding the filing of his claim and reported for work or otherwise given notice of the continuance of his unemployment. (N.Y. Lab. Law §590[1] [NYCLS]). Benefit rate is based on claimant's weekly benefit amount, subject to maximum benefit as calculated by department. (N.Y. Lab. Law §590[5] [NYCLS]). Employer contribution to fund is specified by statute. See N.Y. Lab. Law §§570 to 581-a [NYCLS], for provisions regarding contributions. Claimant remains eligible if attending training course approved by Commissioner; no approval unless specified factors are present. (N.Y. Lab. Law §599[1] [NYCLS]). Claimant remains eligible if employer participates in demonstration shared work program approved by Commissioner. (N.Y. Lab. Law §602 [NYCLS]). Victim of domestic violence voluntarily separating as result of such abuse may be deemed for good cause. (N.Y. Lab. Law §593[1] [NYCLS]). Individual filing new claim for unemployment benefits shall, at time of filing, be advised that among other things, unemployment benefits are subject to Federal, State and local income tax and voluntary withholding is permissible. (N.Y. Lab. Law §596[6] [NYCLS]).

A claimant who for reasons personal to himself or herself is unable or unwilling to work full time and who customarily worked less than the full time prevailing in his or her place of employment for a majority of the weeks worked during the applicable base period, shall not be denied unemployment insurance solely because the claimant is only seeking part time work. (N.Y. Lab. Law § 596 [NYCLS]).

Manpower Training Act.

State authorized to set up training programs for unemployed and underemployed. (N.Y. Lab. Law art. 23-A [NYCLS], §§820-823 [NYCLS]). Payment for attending such courses may be authorized in advance or by way of reimbursement. (N.Y. Lab. Law §821 [NYCLS]).

Displaced Homemakers Act.

See N.Y. Lab. Law art. 23-B [NYCLS]. State authorized to establish multipurpose service centers designed to assist homemakers in reentering job market, to provide job training and various other services. (N.Y. Lab. Law §825 [NYCLS]). Displaced homemakers are defined as individuals who have worked in home providing unpaid household services for family members, not gainfully employed and have been dependent on income of another family member but are no longer supported by such income, or have been dependent on federal assistance but are no longer eligible for such assistance, or are supported as parents of minor children by government assistance or spousal support. (N.Y. Lab. Law §826 [NYCLS]).

Job Training Coordination.

Council created by federal Job Training Partnership Act (Pub. L. No. 97-300) is given responsibility of coordinating entire range of workforce preparation programs in operation in state (N.Y. Exec. Law §970 et seq.).

Employee Ownership Assistance.

Job development authority may approve loans to encourage employees of plants about to be permanently closed or relocated to acquire such plants and continue to operate them as employee-owned enterprises. (N.Y. Pub. Auth. Law §§1836-a to 1836-g).

Public Employees.

Collective bargaining procedures for public employees set forth in N.Y. Civ. Serv. Law art. 14. Given right to organize but prohibited from striking. (N.Y. Civ. Serv. Law §§200-214).

11.03 WORKERS' COMPENSATION LAW:

See topic 11.02 Labor Relations.

12 ENVIRONMENT

12.01 ENVIRONMENTAL REGULATION:

General supervision of environmental conservation, pollution, and related problems is vested in Department of Environmental Conservation. (N.Y. Envtl. Conserv. Law §3-0301). Other agencies and officers have concurrent jurisdiction over various environmental matters.

Prohibited Acts of Pollution/Regulated Activities.

Commissioner of Environmental Conservation may, with advice and approval of State Environmental Board, adopt, amend or repeal environmental standards and establish rules and regulations for enforcement. (N.Y. Envtl. Conserv. Law §3-0301[2-a]). Department and commissioner may limit consumption of fuels and use of vehicles and take any other action deemed necessary to prevent and control air pollution emergencies. (N.Y. Envtl. Conserv. Law §3-0301[1][y]). At request of Commissioner, Attorney General may sue to enjoin violations of air pollution emergency rules and regulations and collect civil penalties. (N.Y. Envtl. Conserv. Law §71-2111). Specific acts of air pollution may be prohibited by order of Commissioner of Public Health. Discharge of deleterious or poisonous substance into public or private waters in quantities sufficient to injure fish life, protected wildlife or waterfowl, prohibited. (N.Y. Envtl. Conserv. Law §11-0503[1]). Direct application or use of pesticides or chemicals on or in surface waters regulated. (N.Y. Envtl. Conserv. Law §15-0313[4]). Discarding fish carcass or parts upon any public lands contiguous to and within 100 ft. of waters of this state or into waters within 100 ft. of land prohibited. (N.Y. Envtl. Conserv. Law §11-1321[6]). Air pollution control devices on motor vehicles are regulated. (N.Y. Veh. & Traf. Law §375[28] [NYCLS]). Use of substances harmful to ozone regulated. (N.Y. Envtl. Conserv. Law §§38-0101 to 38-0111). Packaging and sale of household cleaning products are regulated. (N.Y. Envtl. Conserv. Law §§35-0101 to 35-0109). Use of high levels of heavy metals in packaging products, sale or promotional use of packaging product or product within packaging containing high levels of heavy metals prohibited. (N.Y. Envtl. Conserv. Law §§37-0201 to 37-0213). Sale of batteries containing certain chemicals regulated. (N.Y. Envtl. Conserv. Law §27-0719). Transporters of “regulated” and low-level radioactive waste regulated by permit system. (N.Y. Envtl. Conserv. Law §27-0305). Substances hazardous to environment are regulated. (N.Y. Envtl. Conserv. Law §§37-0101 to 37-0107). Generators of hazardous waste must submit waste reduction plans to Commissioner of Environmental Conservation. (N.Y. Envtl. Conserv. Law §§27-0900; 27-0908). Facilities used for storage of hazardous substances are regulated. (N.Y. Envtl. Conserv. Law §§40-0101 to 40-0123). Disposal of solid waste is regulated. (N.Y. Envtl. Conserv. Law §§27-0101 to 27-0109). Inactive hazardous waste disposal sites and temporary nuclear waste repositories are regulated. (N.Y. Envtl. Conserv. Law §§27-1301 to 27-1321; N.Y. Pub. Health Law §§1389 [NYCLS]; En. L. §§18-101 to 18-113). Siting and management of permanent low-level radioactive waste disposal facilities are regulated. (N.Y. Envtl. Conserv. Law §§29-0101 to 29-0703). Mining of uranium is prohibited. (N.Y. Envtl. Conserv. Law §§22-1010 to 22-1070). Land use in tidal wetlands is regulated. (N.Y. Envtl. Conserv. Law §§25-0101 to 25-0601). State pollutant discharge elimination systems (SPDES) established. (N.Y. Envtl. Conserv. Law §§17-0801 to 17-0831). New and existing sources of non-point source water pollution are regulated. (N.Y. Envtl. Conserv. Law §§17-1401 to 17-1411). Projects drawing upon new or additional sources of water supply must apply for water supply permit from Department of Environmental Conservation. (N.Y. Envtl. Conserv. Law §§15-1501 to 15-1503). Erection and maintenance of any dam or other structure which impounds waters are regulated. (N.Y. Envtl. Conserv. Law §§15-0503, 15-0507, 15-0511). Bulk storage of petroleum is regulated. (N.Y. Envtl. Conserv. Law §§17-1001 to 17-1017). Incompatible land uses over primary groundwater recharge areas are regulated. (N.Y. Envtl. Conserv. Law §15-0514). Deposit requirements for beverage containers provided for in (N.Y. Envtl. Conserv. Law §§27-1001 to 27-1019). “Hazardous substances” and “pollutants” are defined in (N.Y. Envtl. Conserv. Law §71-1932). Hazardous waste disposal site owners may petition for site's deletion from site registry; administrative hearing may be held; public notice required prior to any deletion. (N.Y. Envtl. Conserv. Law §27-1305[4][c]). Programs for regulations of medical waste have been consolidated within Department of Health. (N.Y. Pub. Health Law §1389 et seq. [NYCLS]).

Conservation and Preservation.

Land use and development of Long Island Pine Barrens - Peconk Bay System regulated. (N.Y. Envtl. Conserv. Law §§57-0101 to 57-0137). N.Y. Natural Heritage Program enacted in 1993 to survey and research plant and animal species with emphasis on rare species. (N.Y. Envtl. Conserv. Law §§11-0539, 3-0302, 9-0105[19]). Environmental Conservation Law was enacted to conserve, improve and protect state's natural resources and environment, and control water, land and air pollution, in order to enhance health, safety, welfare and socioeconomic well-being of people of N.Y. State. (N.Y. Envtl. Conserv. Law §1-0101). Certain state lands are to be dedicated as state nature and historical preserves. (N.Y. Envtl. Conserv. Law §45-0101). The New York State Biodiversity Research Institute formed to survey biodiversity in New York State. (N.Y. Educ. Law §235-a). Environmental Protection Act enacted to regulate open space land conservation projects, landfill closures, waste reduction, recycling programs, park preservation and waterfront and coastal programs. (N.Y. Envtl. Conserv. Law §§54-0101 to 54-1303). Petroleum Overcharge Restitution Act of 1993 enacted to allocate funds received as restitution to State in programs to effectuate energy conservation. (1993 N.Y. Laws c. 598). Environmental laws were passed in 2008 encouraging installation of solar and wind power systems. (2007 N.Y. S.B. 8145; 2008 N.Y. S.N. 483; 2008 S.N. 7171).

State green building construction act enacted. (N.Y. Pub. Buildings Law §§ 80–83).

Enforcement.

Commissioner of Environmental Conservation, upon finding after investigation that any person is causing or engaging in a condition or activity which, in his judgment, presents imminent danger to public health or welfare, or is likely to cause irreversible or irreparable damage to natural resources, may issue summary order requiring such person to abate such condition or activity. As promptly as possible thereafter, and in any event within 15 days, Commissioner must give such person opportunity to be heard, and to prove that condition or activity in question does not have prohibited effect. (N.Y. Envtl. Conserv. Law §71-0301). Commissioner may, after notice and hearing, issue order to abate air pollution condition. (N.Y. Envtl. Conserv. Law §§19-0501 to

19-0511). At request of Commissioner of Environmental Conservation, Attorney General may sue to enjoin violation of air pollution regulations. (N.Y. Envtl. Conserv. Law §71-2107). Commissioner, after investigation, notice and opportunity to be heard, may issue, modify and revoke orders prohibiting violations of provisions regulating storage of hazardous substances; Attorney General, on his own initiative after consultation with Commissioner or at Commissioner's request, may initiate any action to enforce such provisions. (N.Y. Envtl. Conserv. Law §§71-4305, 40-0101 et seq.).

Penalties.

Wilful violation of an air pollution control statute, regulation or abatement order issued by Commissioner of Environmental Conservation is misdemeanor, punishable by fine, in case of first conviction, of not less than $375 nor more than $15,000 or by imprisonment for term not more than one year, or by both such fine and imprisonment, for each separate violation. If conviction is for offense committed after first conviction, such person shall be punished by fine not to exceed $22,500, or by imprisonment, or by both such fine and imprisonment. Each day on which violation occurs constitutes separate violation. (N.Y. Envtl. Conserv. Law §71-2105[1]). Violation of provisions regulating use of tidal wetlands is punishable by fine not to exceed $10,000. Injunction may also be issued. Restoration of wetlands may be required. Each day's continuance of violation constitutes separate violation. (N.Y. Envtl. Conserv. Law §71-2505). Violation of provisions regulating storage of hazardous substances punishable by fine not to exceed $25,000 for each day violation continues after opportunity to be heard and/or revocation of certificate; wilful violation is misdemeanor, punishable by fine and/or imprisonment after hearing. (N.Y. Envtl. Conserv. Law §71-4303). Any person who violates any provision relating to storage, disposal, or transportation of “regulated waste” or “solid waste”, as defined in N.Y. Envtl. Conserv. Law §27–0303, is subject to fine for each violation and additional fine for each day violation continues. (N.Y. Envtl. Conserv. Law §71-2703[3]). In addition, any person who violates provisions of state's Water Pollution Control Act (N.Y. Envtl. Conserv. Law art. 17) or any rule or regulation thereunder is liable for civil penalty not to exceed $37,500 per day for each violation and may be subject to criminal penalties. (N.Y. Envtl. Conserv. Law §§71-1929, 71-1933).

12.02 Water Law

Person withdrawing or operating withdrawal system with capacity to withdraw over 100,000 gallons of groundwater or surface water per day to file report with department. (N.Y. Envtl. Conserv. Law 15–3301).

13 ESTATES AND TRUSTS

13.01 ADMINISTRATION:

See topic 13.10 Executors and Administrators.

13.02 ADVANCEMENTS:

See topic 13.07 Descent and Distribution.

13.03 ALLOWANCES:

See topic 13.10 Executors and Administrators.

13.04 CLAIMS:

See topic 13.10 Executors and Administrators; category 5 Civil Actions and Procedure, topic 5.18 Pleading.

13.05 DEATH:

Person absent for continuous three year period, during which, after diligent search, person has not been seen or heard of or from, and absence not satisfactorily explained will be presumed, in action or proceeding involving property of such person, or contractual or property rights contingent upon his or her death or administration of his or her estate, to have died three years after date unexplained absence commenced. Exposure to specific peril of death may be sufficient basis for determination that absent person died less than three years after date absence commenced, or on such earlier date as clear and convincing evidences established is most probable date of death. Three year period not applicable in case in which different period has been prescribed by statute. (N.Y. Est. Powers & Trust Law §2-1.7 [NYCLS]).

Written finding of presumed death made by any person authorized by Federal Missing Persons Act is prima facie evidence of death, and date, circumstances and place of disappearance, or in case of merchant seaman, written finding of presumed death, made by Maritime War Emergency Board or by War Shipping Administration or their successors in connection with war risk insurance is prima facie evidence of death, and date, circumstances and place of disappearance. Official written report that person is missing, missing in action, interned in neutral country, or beleaguered, besieged, or captured by enemy or is dead or alive, made by officer or employee of U.S. legally authorized to make it by law is prima facie evidence of such fact. (N.Y. C.P.L.R. 4527 [NYCLS]).

Death of Life Tenant.

Remainderman may maintain proceeding to discover if life tenant of real property is dead. (N.Y. Real Prop. Acts. Law §1101 et seq. [NYCLS]).

Survivorship.

Where title to property or the devolution of property depends upon an individual's survivorship of the death of another individual, an individual who is not established by clear and convincing evidence to have survived the other individual by one hundred twenty hours is deemed to have predeceased the other individual. (N.Y. Est. Powers & Trust Law §2-1.6[a] [NYCLS]).

Action for Death.

Duly appointed representative may maintain action, if commenced within two years after death, for damages for wrongful act, neglect or default where decedent is survived by distributees against defendant who would have been liable to decedent by reason of such wrongful conduct had death not ensued; provided, however, that action on behalf of decedent whose death was caused by terrorist attacks on Sept. 11, 2001 (excluding participants and conspirators in such attack), must be commenced within two years and six months of decedent's death. (N.Y. Est. Powers & Trust Law §5-4.1[1] [NYCLS]). If criminal action has been commenced against same defendant with respect to same act or occurrence from which claim under (N.Y. Est. Powers & Trust Law §5-4.1 [NYCLS]) arises, representative shall have at least one year from termination of criminal action in which to maintain action, notwithstanding that time in which to commence such action has expired or less than a year remaining. (N.Y. Est. Powers & Trust Law §5-4.1[2] [NYCLS]). Punitive damages may be recovered in addition to compensatory and special damages if death occurs after Sept. 1, 1982, and if such damages would have been recoverable had decedent survived. If wrongful conduct alleged is medical or dental malpractice, jury may consider income taxes decedent would have been obligated to pay in determining sum otherwise available for support. (N.Y. Est. Powers & Trust Law §5-4.3 [NYCLS]). Compensation may include anticipated losses. (79 N.Y.2d 26, 580 N.Y.S.2d 147[1992], _N.E. 2d_). Recovery is exclusively for benefit of decedent's distributees and must be distributed in proportion to pecuniary injuries suffered. Where decedent is survived by parent or parents and spouse and no issue, parent or parents will be deemed to be distributees. (N.Y. Est. Powers & Trust Law §5-4.4[a] [NYCLS]). Decedent's distributees are those persons entitled to intestate distribution under N.Y. Est. Powers & Trust Law §§4-1.1 [NYCLS], 4-1.2 [NYCLS] (see topic 13.07 Descent and

Distribution). For purposes of wrongful death actions, nonmarital child is distributee of his father and paternal kindred, and father and paternal kindred are distributees of his nonmarital child as permitted by §4-1.2. (N.Y. Est. Powers & Trust Law §5-4.5 [NYCLS]). Reasonable expenses of action, or settlement, and if included in recovery or settlement, medical aid, nursing and attention incident to injury causing death, and funeral expenses and commissions of plaintiff may be deducted from proceeds. Reasonable expenses, other than counsel fees, expended in maintaining unsuccessful action are chargeable against assets of decedent's estate. (N.Y. Est. Powers & Trust Law §5-4.4 [NYCLS]). Amount which may be awarded as damages cannot be limited by statute. (N.Y. Const., art. I, §16 [NYCLS]). Distribution of proceeds of wrongful death action to infant or incompetent is governed by (N.Y. Surr. Ct. Proc. Act §2220 [NYCLS]).

Death Certificate.

Certified copies of death certificates may be obtained by certain related persons or under certain specified circumstances by writing to State Commissioner of Health, Albany (N.Y. Pub. Health Law §4174 [NYCLS]), or to clerk of court in city, town, village or county in which deceased died. Fees charged by clerks of various courts depend on particular locality and are not uniform. See also category 10 Documents and Records, topic 10.04 Records, subhead Vital Statistics.

Uniform Anatomical Gift Act.

See topic 13.16 Wills.

Living Wills.

See topic 13.16 Wills.

13.06 DECEDENTS' ESTATES:

See topics 13.07 Descent and Distribution, Executors and Administrators, Wills; category 8 Debtor and Creditor, topic 8.10 Homesteads.

13.07 DESCENT AND DISTRIBUTION:

See also topic 13.10 Executors and Administrators.

In case of intestacy, real property descends and personal property is distributed according to same rules.

Distribution of intestate decedent's estate as follows: (1) If decedent survived by spouse and issue, $50,000 and one-half of residue to spouse, balance to issue, by representation; (2) if decedent survived by spouse and no issue, whole to spouse; (3) if decedent survived by issue and no spouse, whole to issue, by representation; (4) if decedent survived by one or both parents and no spouse or issue, whole to surviving parent(s), except that parent who neglected or refused to provide for, or abandoned, child under 21 may not inherit from such child whether or not such child dies before 21 unless parental relationship and duties are subsequently resumed and continue until child's death, and, effective Jan. 1, 2007, parent may not inherit from child if parent has been subject of proceeding under N.Y. Soc. Serv. Law §384 [NYCLS]–b that resulted in order terminating parental rights or order suspending judgment and surrogate's court later determined parent disqualified for failure to comply with order during period of suspension, provided however, that this bar shall not apply to biological parent who places child for adoption based upon fraudulent promise not kept to arrange adoption or other fraud or deceit where, before child's death, the person or agency fails to arrange placement or petition for adoption and fails to comply with court imposed conditions for adoption. (N.Y. Est. Powers & Trust Law §4-1.4 [NYCLS]); (5) if decedent survived by issue of parents, and no spouse, issue or parent, whole to issue of parents by representation; (6) if decedent survived by grandparent(s) or their issue, and no spouse, issue, parent or issue of parents, one-half to surviving paternal grandparent(s), or if none, to their issue, by representation, and one-half to surviving maternal grandparent(s), or if none, to their issue, by representation; (7) if decedent survived by one or more great-grandchildren of grandparents, and no spouse, issue, parent, issue of parents, grandparent, children of grandparents or grandchildren of grandparents, one-half to great-grandchildren of paternal grandparents, per capita, and one-half to great grandchildren of maternal grandparents, per capita (N.Y. Est. Powers & Trust Law §4-1.1 [NYCLS]).

Incident to its determination of distributees entitled to share in estate, court may adjudge that person who might otherwise be distributee is dead or that no distributees other than those stated in record exist. In instances where distributee is entitled to money or property upon occurrence of specified event, specified event is time specified in will or lifetime trust. (N.Y. Surr. Ct. Proc. Act §2225 [NYCLS]).

In case of intestacy, occurring on or after Aug. 11, 1977, distributee may renounce all or part of his interest in property of decedent. Renunciation must be filed within nine months of effective date of disposition and is irrevocable. Affidavit must be submitted by renouncing party that no consideration has been or will be received from person whose interest is being accelerated, unless otherwise authorized by court. Renunciation on behalf of person under disability, infant, incompetent or deceased person requires court approval. Renunciation has same effect with respect to renounced share as though renouncing person had predeceased decedent and is retroactive to creation of disposition. (N.Y. Est. Powers & Trust Law §2-1.11 [NYCLS]).

As to duty of heir with respect to real property subject to lien, see topic 13.10 Executors and Administrators, subhead Liens.

Surviving spouse cannot inherit from deceased spouse where: (a) there has been final decree or judgment of divorce, of annulment or declaring nullity of marriage or dissolving such marriage on ground of absence, recognized as valid in N.Y.; (b) marriage was void as being incestuous, bigamous, or prohibited remarriage; (c) survivor has obtained in another jurisdiction final decree of judgment of divorce, of annulment or declaring nullity of marriage or dissolving such marriage on ground of absence, not recognized as valid in N.Y.; (d) there has been final decree or judgment of separation rendered against survivor, recognized as valid in N.Y.; (e) survivor abandoned decedent and such abandonment continued until time of death; or (f) surviving spouse who had duty and means to support decedent, though he or she had means or ability to do so failed or refused to provide for decedent, unless such marital duty was resumed and continued until death of spouse having need of support. (N.Y. Est. Powers & Trust Law §5-1.2 [NYCLS]).

Half Blood.

Such relatives and their representatives take equally with relatives of whole blood and their representatives. (N.Y. Est. Powers & Trust Law §4-1.1[b] [NYCLS]).

Posthumous Children or Other Issue.

Posthumous distributees of decedent conceived before his or her death but born alive thereafter take as if they were born during his or her lifetime. (N.Y. Est. Powers & Trust Law §4-1.1[c] [NYCLS]).

Nonmarital Children.

Such children and their issue inherit as though legitimate, from mother and maternal kindred, and father and paternal kindred (court has made order of filiation during lifetime of father declaring paternity or father signs instrument acknowledging paternity with appropriate formalities and files that instrument with state, or if paternity has been established by clear and convincing evidence and father has openly and notoriously acknowledged child or blood test administered to father along with other evidence which establishes paternity by clear and convincing evidence) and surviving spouse, issue, maternal kindred, and adjudicated or registered father and his kindred inherit as though legitimate from deceased child born out of wedlock. (N.Y. Est. Powers & Trust Law §4-1.2 [NYCLS]). If parents of child born out of wedlock intermarry, child inherits from both as though legitimate. (N.Y. Dom. Rel. Law §24[1] [NYCLS]).

Adopted Children.

As to right of inheritance by, from or through adopted children, see category 14 Family, topic 14.01 Adoption.

Determination of Heirship.

No statutory provisions.

Advancements.

Advancement is irrevocable gift intended by donor as anticipatory distribution in complete or partial satisfaction of donee's interest in donor's estate, either as distributee in intestacy or as beneficiary under existing will of donor. (N.Y. Est. Powers & Trust Law §2–1.5[a]). No advancement will affect distribution of donor's estate unless proved by contemporaneous writing signed by donor evidencing intention that gift is advancement, or by donee acknowledging such intention. (N.Y. Est. Powers & Trust Law §2–1.5[b]). When so proved, advancement is part of estate of donor for purpose of distribution. If advancement is equal to or greater than donee's intestate share or testamentary interest, donee or his successor in interest do not share in estate; if less than donee's interest, amount of advancement is deducted therefrom. (N.Y. Est. Powers & Trust Law §2-1.5[c] [NYCLS]). No advancement shall increase or decrease elective share of surviving spouse under (N.Y. Est. Powers & Trust Law §5-1.1 [NYCLS] or §5-1.1-A [NYCLS]) except to extent authorized therein. (N.Y. Est. Powers & Trust Law §2-1.5[e] [NYCLS]).

Election.

A widow's distributive share of her husband's property is in lieu of all dower rights therein. (N.Y. Est. Powers & Trust Law §4-1.1[e] [NYCLS]). See category 21 Property, topic 21.08 Dower.

As to election between distributive share and testamentary provision, see topic 13.16 Wills.

Renunciation.

See topic 13.16 Wills, subhead Renunciation of Disposition.

Escheat.

All lands the title to which fails from a defect of heirs revert to the people. (N.Y. Aband. Prop. Law §200).

13.07A ESTATES: (in property)

See category 21 Property, topic 21.16 Real Property.

13.0813.09

13.10 EXECUTORS AND ADMINISTRATORS:

Surrogate's Court.

Such court of any county has jurisdiction over estate of any: (1) Domiciliary of state at time of his death, disappearance or internment (venue in county of decedent's domicile at that time) (N.Y. Surr. Ct. Proc. Act §205[1] [NYCLS]); (2) non-domiciliary who left property within state, or cause of action for wrongful death against domiciliary of state. Proper venue in county (a) where decedent left said property, (b) where decedent has come into personal property since death, disappearance or internment and remains unadministered or (c) of domicile of person against whom non-domiciliary left cause of action for wrongful death (N.Y. Surr. Ct. Proc. Act §206[1] [NYCLS]); and (3) estate of any lifetime trust: (a) which has assets in state (venue in county where assets are located), (b) of which grantor was domiciliary of state at time of commencement of proceeding concerning trust (venue in county where grantor domiciled at time of commencement of proceeding concerning trust), or (c) of which trustee then acting resides in state or, if other than natural person, has its principal office in state (venue in county where trustee then acting resides, or, if other than natural person, has its principal office) (N.Y. Surr. Ct. Proc. Act §207[1] [NYCLS]).

Preferences in Right to Administer.

In case of intestacy, letters of administration must be granted in following order: (1) To distributees in following order: (a) surviving spouse; (b) children; (c) grandchildren; (d) father or mother; (e) brothers or sisters; and (f) other distributees with preference to person entitled to largest share in estate. Where eligible distributees are equally entitled under this part (1), letters may be granted to one or more, unless distributees are issue of grandparents (other than aunts and uncles) on only one side, then letters must issue to public administrator or chief financial officers of county. (N.Y. Surr. Ct. Proc. Act §1001[1] [NYCLS]). (2) If sole distributee has died or is infant, incompetent or conservatee, his fiduciary, conservator or committee, if he is eligible and qualifies must be granted letters, but court may deny letters to guardian or committee of person only. (N.Y. Surr. Ct. Proc. Act §1001[2] [NYCLS]). (3) Where all distributees have died or are infants, incompetents or conservatees, court may grant letters of administration to fiduciary, conservator or committee, with preference to fiduciary of distributee entitled to largest share in estate. Where fiduciaries or conservators or committees are equally entitled under this part (3), letters may be granted to one or more if such are eligible and qualify. (N.Y. Surr. Ct. Proc. Act §1001[3] [NYCLS]). (4) Where distributee who has died or is infant, incompetent or conservatee would have had prior right to letters except for death or disability, court may grant letters to his fiduciary, conservator or committee, if such is eligible and qualifies. Where no eligible distributee having prior or equal right to letters of administration will accept same and there are distributees who have died or are infants, incompetents or conservatees, court may grant letters to fiduciary of deceased distributee or committee or conservator of such other distributee, with preference to distributee entitled to largest share in estate. Where fiduciaries, conservators or committees are equally entitled, under this part (4), letters may be granted to one or more, if such are eligible and qualify. (N.Y. Surr. Ct. Proc. Act §1001[4] [NYCLS]). (5) Upon petition of distributee having prior or equal right to letters, court may grant letters jointly to eligible distributee(s) and to one or more eligible persons, whether distributees or not, including trust company or other corporation authorized to act. For apportionment of commissions payable to joint fiduciaries, see subhead Commissions, infra. (N.Y. Surr. Ct. Proc. Act §1001[5] [NYCLS]). (6) Letters may be granted to distributee or other eligible person upon acknowledged and filed consents of all eligible distributees, or if there are no eligible distributees, then on consents of all distributees, except that guardian of property of infant distributee, committee of property of incompetent distributee or conservator of property of conservatee may so consent on behalf of his ward. (N.Y. Surr. Ct. Proc. Act §1001[6] [NYCLS]). (7) Letters may be granted to trust company or other corporation authorized to act upon same conditions as in part (6). (N.Y. Surr. Ct. Proc. Act §1001[7] [NYCLS]). (8) When letters are not granted under (1) through (7), supra, and appointment is not made by consent as provided then letters must be granted in following order: (a) to public administrator or chief fiscal officer of county; (b) to petitioner, in discretion of court; or (c) to any other person or persons. (N.Y. Surr. Ct. Proc. Act §1001[8] [NYCLS]). (9) Letters may be granted in any case in which paper writing purporting to be will has been filed in court and proceedings for its probate have not been instituted within reasonable time or diligently prosecuted. (N.Y. Surr. Ct. Proc. Act §1001[9] [NYCLS]). Person having prior or equal right to petitioner may renounce his right and waive issuance and service of process by written instrument acknowledged and filed with clerk of court, except public administrator or chief fiscal officer may be excused from acting only upon court order. (N.Y. Surr. Ct. Proc. Act §1003[3] [NYCLS]).

Any person interested in estate of intestate or of person alleged to be deceased or any person to whose appointment as administrator all distributees consent (pursuant to N.Y. Surr. Ct. Proc. Act §1001 [NYCLS]) or public administrator, chief fiscal officer of county, creditor or person interested in action brought or about to be brought in which intestate or person alleged to be deceased, if living, would be proper party may present petition for letters to himself or to another person. (N.Y. Surr. Ct. Proc. Act §1002 [NYCLS]). Persons interested include any person entitled or allegedly entitled to share as beneficiary in estate, or trustee in bankruptcy or receiver of such person, not including creditors. (N.Y. Surr. Ct. Proc. Act §103[39] [NYCLS]).

Eligibility and Competency.

Letters may issue to a natural person or to person authorized by law to be fiduciary, except: (1) Persons ineligible, i.e.: (a) infant; (b) incompetent; (c) non-domiciliary alien, except one who is foreign guardian, or one who shall serve with one or more co-fiduciaries, at least one of whom is state resident; (d) felon; (e) one who does not possess qualifications required of fiduciary by reason of substance abuse, dishonesty, improvidence, want of understanding, or who is otherwise unfit for execution of office; and (2) person unable to read and write English language and declared ineligible by court in its discretion. (N.Y. Surr. Ct. Proc. Act §707 [NYCLS]). Person named as executor or testamentary guardian or trustee who is not required by will to give bond, shall be entitled to letters by giving bond as prescribed by law, although objection has been established to satisfaction of court that person is non-domiciliary. (N.Y. Surr. Ct. Proc. Act §710 [NYCLS]).

Trust company may, upon certain consents and notice, be appointed either to act alone or in association with person entitled. (N.Y. Surr. Ct. Proc. Act §1001 [NYCLS]; N.Y. Banking Law §100-a [NYCLS]). No corporation other than trust company may act as executor, administrator, guardian or trustee, except that foreign banking corporation or trust company authorized by law of state of its incorporation to act therein as executor, trustee, administrator or guardian may act as such in this state, provided state wherein such foreign corporation has its domicile accords similar rights therein to trust company of this state. (N.Y. Banking Law §131[3] [NYCLS]).

Qualification.

Before letters are granted to fiduciary, he must file in surrogate's court or family court: (1) Acknowledged instrument stating his domiciliary address and irrevocably designating clerk of court to receive service of any process issuing from court which may be made in like manner and with like effect as if served personally upon him, whenever person so receiving letters cannot be found and served within state after due diligence; (2) unless exempted, official oath to effect that he will, faithfully and honestly, discharge duties of his office and trust reposed in him and duly account for all moneys or other property which may come into his hands; oath must also describe his office and state he is not ineligible to receive letters; (3) such bond as may be required by law or by order of court; (4) in case of fiduciary exempted by law from taking oath and filing bond (e.g., trust company), acknowledged consent to accept its appointment; and (5) in case of foreign banking corporation or trust company organized under laws of another state, compliance with N.Y. Banking Law §131[3] [NYCLS] is required. (N.Y. Surr. Ct. Proc. Act §708 [NYCLS]).

Exemption from Bond.

No bond is required of executor unless: (1) Required by will or required by N.Y. Surr. Ct. Proc. Act §806 [NYCLS] (executor required to act as trustee); (2) objection has been established to satisfaction of court that executor named in will is non-domiciliary; (3) court requires bond for U.S. citizen who has become non-domiciliary; or (4) court requires bond on approving executor's removal of estate property from state. (N.Y. Surr. Ct. Proc. Act §710 [NYCLS]). For purpose of preliminary letters testamentary, where will explicitly dispenses with filing of bond, court shall grant letters without bond unless it determines that there are extraordinary circumstances warranting bond. (N.Y. Surr. Ct. Proc. Act §1412[5] [NYCLS]). Administrator must execute and file bond provided, however, that where person or persons about to be appointed is or are entitled to whole estate or where acknowledged consents that bond be dispensed with or fixed at reduced amount are executed and filed by all persons interested, court may dispense with bond or fix amount at sum adequate to protect creditors. If such consent be filed by some but not all interested persons such consent must specifically release any claim under bond required and court may fix amount at such sum as will adequately protect creditors and non-consenting persons interested. In order to ascertain amount of claims, court may, by notice published once a week for four consecutive weeks, require creditors to file claims by specified date at least 30 days after first publication. (N.Y. Surr. Ct. Proc. Act §805 [NYCLS]). Testamentary trustee appointed by will or court order and executor required to hold, manage or invest property for benefit of another, must, unless will provides otherwise, execute and file bond. (N.Y. Surr. Ct. Proc. Act §806 [NYCLS]). Whenever executor's or administrator's bond is required, amount, unless reduced or dispensed with by court, must be not less than: (1) Value of all personal property receivable by fiduciary; (2) estimated gross rents of real property receivable by fiduciary for 18 months; and (3) probable recovery in any cause of action prosecuted by fiduciary. Court may at any time increase or decrease bond of fiduciary when good reason therefor appears. If value of assets to be administered does not exceed $30,000 no bond is required. (N.Y. Surr. Ct. Proc. Act §801[1] [NYCLS]; N.Y. Surr. Ct. Proc. Act §1301 [NYCLS]). All bonds must be approved by court and filed with court's endorsement thereon. Each surety must file acknowledged instrument stating his domiciliary address and designating chief clerk of court and his successors to receive service of process; except corporate sureties deemed in compliance for all future matters once one acknowledged instrument filed, by its terms indefinite in duration and irrevocable. (N.Y. Surr. Ct. Proc. Act §802 [NYCLS]). Court may authorize bond with sole surety or with two or more sureties or may dispense with sureties when good reason therefor appears. (N.Y. Surr. Ct. Proc. Act §801[3] [NYCLS]). Person named as executor or testamentary guardian or trustee who is not required by will to give bond, shall be entitled to letters by giving bond as prescribed by law, although objection has been established to satisfaction of court that person is non-domiciliary. (N.Y. Surr. Ct. Proc. Act §710[2] [NYCLS]). Court may direct that all or part of assets of estate be delivered subject to further order of court to county treasurer or other fiscal officer, clerk of court or trust company, bank or safe deposit company and thereupon fix amount of bond considering remainder only of estate, and court order is required to withdraw assets from such custody. (N.Y. Surr. Ct. Proc. Act §803 [NYCLS]). Trust company appointed as fiduciary exempt from requirement to furnish bond, but court may on application exact security. (N.Y. Banking Law §100-a[5] [NYCLS]). Consent by trust company to accept its appointment must be filed in lieu of oath of office. (N.Y. Surr. Ct. Proc. Act §708[4] [NYCLS]). Where limited and restricted letters are granted, court may reduce or dispense with amount of security otherwise required according to circumstances. (N.Y. Surr. Ct. Proc. Act §702 [NYCLS]).

Issuance of Letters.

Letters granted to fiduciary upon qualification shall be issued in name of people of New York, attested in name of judge of court, sealed, and signed by court or chief clerk of court or authorized deputy. (N.Y. Surr. Ct. Proc. Act §701 [NYCLS]).

Removal.

No court except court which issues letters has power to suspend, modify or revoke them, so long as court issuing them has jurisdiction of estate or matter in which letters were issued. (N.Y. Surr. Ct. Proc. Act §701[3] [NYCLS]). Letters of an executor, administrator or other fiduciary may be suspended, modified or revoked by court, upon petition of co-fiduciary, creditor, person interested, person on behalf of infant or surety on bond of fiduciary, for following reasons: (1) Become ineligible or disqualified; (2) become unfit because of misconduct, dishonesty, drunkenness, improvidence or want of understanding; (3) refusal or neglect to obey lawful direction of court; (4) obtaining letters by false suggestion of material fact; (5) where by terms of will, deed or order, office was to cease upon contingency which has happened; (6) failure without sufficient reason to notify court of change of address within 30 days; (7) removal of estate property from state without prior court approval; (8) lack of qualifications required to be fiduciary by reason of substance abuse, dishonesty, improvidence, want of understanding, or otherwise unfit; (9) guardian has removed or is about to remove from state or interests of infant will be promoted by appointment of another guardian; (10) in case of testamentary trustee, violation or threatened violation of trust or insolvency or other reason making trustee unsuitable; (11) where supreme court would have cause to remove trustee or to suspend or modify his appointment; and (12) in case of fiduciary who fails to file account within such time and in such manner as directed by court. (N.Y. Surr. Ct. Proc. Act §711 [NYCLS]). Process must be issued to fiduciary against whom relief is sought and to such other persons as court may direct. (N.Y. Surr. Ct. Proc. Act §712 [NYCLS]). Letters of fiduciary may be suspended, modified or revoked by court without petition or issuance of process where: (1) Fiduciary cited to account neglects, without satisfactory excuse, to appear on return date, or having been ordered to account, fails to file account within such time and in such manner as directed by court; (2) process cannot be personally served on fiduciary who has absconded or is concealing himself; (3) fiduciary defaults in supplying information concerning assets or affairs of estate as ordered by court or has neglected or refused to obey order; (4) will or lifetime trust instrument under which letters issued declared invalid or ineffective by court of competent jurisdiction; (5) failure of administrator to give bond; (6) fiduciary convicted of felony, judicially committed or declared incompetent; (7) fiduciary fails to keep estate funds segregated or deposits them with any person, association or corporation authorized to do business under banking law in account other than as fiduciary; (8) in case of ancillary letters, domiciliary letters are revoked; (9) in case of temporary administrator, absentee reappears or is shown to be living or permanent fiduciary or committee has been appointed; and (10) where any of facts provided in N.Y. Surr. Ct. Proc. Act §711 [NYCLS] are brought to attention of court. (N.Y. Surr. Ct. Proc. Act §719 [NYCLS]).

Special Kinds of Administration.

Temporary Administration.

Such administration may be granted where delay occurs in granting letters or probating will of decedent or when person is alleged to be deceased, is absentee, or is internee. Petition may be presented by: (1) Person interested; (2) beneficiary or nominated executor under last will on file in court; (3) person who would have interest in property of absentee or internee if he or she were dead; (4) public administrator; (5) county treasurer; (6) creditor; or (7) person interested in action in which decedent would be proper party. (N.Y. Surr. Ct. Proc. Act §§901-902). Letters of temporary administration shall confer, subject to any limitation contained in instrument, all powers and authority with respect to real and personal property, and subject person to all duties and liabilities of administrator with respect thereto, except that they do not confer any authority to pay or to satisfy any testamentary disposition or intestate share. Temporary administrator is authorized to act as court orders. Court may limit, restrict, or authorize person named as it deems proper and necessary. (N.Y. Surr. Ct. Proc. Act §903 [NYCLS]). See also category 21 Property, topic 21.01 Absentees.

Preliminary Letters Testamentary.

Such letters may be issued to person named as executor in latest will. Preliminary executor has greater authority than a temporary administrator but less authority than an executor. Preliminary executor may reduce assets to his possession, may manage and sell any property specifically bequeathed or devised, and may allocate equitably expenses of so doing; court order or written consent of devisee or legatee may be required. (N.Y. Surr. Ct. Proc. Act §1412 [NYCLS]).

Administration With Will Annexed (“c.t.a.”).

Such administration may be granted where there is no executor named in will or selected by virtue of power contained therein, or no executor or administrator c.t.a. qualified to act. (N.Y. Surr. Ct. Proc. Act §1418 [NYCLS]).

Administration De Bonis Non ("d.b.n.").

Such administration may be granted when office of administrator becomes vacant for any reason. (N.Y. Surr. Ct. Proc. Act §§1007 [NYCLS], 1219 [NYCLS]).

Limited Administration.

Such administration may be granted restricting holder: (1) To enforce or prosecute action in favor of or defend action against decedent or his fiduciary; (2) if bond required for entire estate impractical, to administer only court specified property; (3) to settle any claim in favor of or against decedent or his fiduciary; (4) to perform act discharging estate from liability; (5) to account on behalf of decedent; (6) to complete or confirm transfer made by decedent; (7) to appear in and conduct action where decedent or his fiduciary is necessary or proper party; (8) to represent estate in transaction in which acting fiduciary could not act because of conflict of interest; (9) to commence or maintain any action or proceeding against fiduciary, in his or her individual capacity, or against anyone else against whom fiduciary fails or refuses to bring such proceeding; and (10) to any other purpose or act deemed by court to be appropriate and necessary. Court may reduce or dispense with security otherwise required. (N.Y. Surr. Ct. Proc. Act §702 [NYCLS]).

Ancillary Administration.

Written will which upon probate may operate upon property in N.Y. must be admitted to probate by court having jurisdiction upon proof will admitted to probate or established at testator's domicile. If probate or establishment subject to contest under law of testator's domicile, proof of no contest required. Will so admitted sufficient to operate on any property within terms of will, subject to limitations imposed by law of testator's domicile respecting legal capacity. Rights to take against will not affected. Will offered for ancillary probate based upon domiciliary probate may be contested only on grounds: (1) Conditions supra not satisfied, or (2) will denied probate in N.Y. (N.Y. Surr. Ct. Proc. Act §1602 [NYCLS]). Upon admission of will to probate under N.Y. Surr. Ct. Proc. Act §1602 [NYCLS] supra, court must, if such be requested, issue ancillary letters in following order: (1) Person appointed in will as executor respecting property in N.Y.; (2) person to whom domiciliary letters issued; (3) if domiciliary letters not issued, to person appointed by will to administer property wherever located; (4) person acting as administrator in domiciliary jurisdiction; or (5) person entitled under N.Y. Surr. Ct. Proc. Act to letters of administration c.t.a. Those entitled to appointment may designate another appointee. (N.Y. Surr. Ct. Proc. Act §1604 [NYCLS]). No property may be transmitted to testator's domicile or distributed to beneficiaries during period after probate when, according to law of testator's domicile, will subject to contest unless authorized by court granting ancillary probate upon proof that: (a) seven months have elapsed since N.Y. ancillary letters issued; or (b) no will contest is pending in testator's domicile; or (c) time provided for contest in domicile has expired or one year has expired since will was admitted to ancillary probate. Ancillary fiduciary who transmits assets to domicile or distributes to beneficiaries in good faith and pursuant to court order shall be discharged from liability even if probate or establishment of will is set aside or revoked. (N.Y. Surr. Ct. Proc. Act §1603 [NYCLS]). Upon proof that letters of administration have been issued by competent court in decedent's domicile or proof that such letters not granted under law of that jurisdiction but that person is acting to administer decedent's estate, court may issue ancillary letters of administration in following order: (1) Person appointed administrator or person acting to administer in domiciliary jurisdiction or (2) person entitled to original letters under N.Y. Surr. Ct. Proc. Act If no person named in (1) or (2) is willing to qualify or to designate person eligible they shall issue to person in succeeding provision among (1) and (2) who will qualify or to person designated by him who is eligible to receive letters. (N.Y. Surr. Ct. Proc. Act §1607 [NYCLS]). Person acting in decedent's domicile as executor or administrator or to administer estate according to law thereof may by acknowledged instrument designate and authorize appointment of person eligible to receive letters to act as ancillary administrator or ancillary administrator c.t.a.; if conflicting or joint plural designations made, or if two or more persons are entitled to letters jointly, court may appoint one or more of persons so designated or entitled. (N.Y. Surr. Ct. Proc. Act. §1608[1] [NYCLS]). Person to whom ancillary letters are issued must meet qualifications for fiduciary (N.Y. Surr. Ct. Proc. Act §708 [NYCLS], supra) except court may set penalty of bond as it deems just or, if dispensed with in will, dispense with filing of bond. (N.Y. Surr. Ct. Proc. Act §1608[2] [NYCLS]). If court is satisfied that there are no creditors who are N.Y. domiciliaries and that no N.Y. estate tax is assessable, ancillary letters may issue without bond, but court may first require supplemental process issue to creditors and persons claiming to be creditors who are N.Y. domiciliaries. (N.Y. Surr. Ct. Proc. Act §1608[3] [NYCLS]). Before granting ancillary letters, court may require person seeking same to serve by mail notice of application upon every domiciliary beneficiary who has not been served with process or appeared or waived process in ancillary proceeding. (N.Y. Surr. Ct. Proc. Act §1608[5] [NYCLS]). Corporate banking institution of any state, Puerto Rico, or U.S. territory or possession not entitled of right under banking law to receive ancillary letters may be authorized by court to receive such upon filing bond as required by court. (N.Y. Surr. Ct. Proc. Act §1608[6] [NYCLS]). Petition for ancillary probate or letters of any kind may be made by any creditor, public administrator, county treasurer or person interested, or to whom letters may issue, stating all of decedent's property in N.Y., value thereof, amount of security given on original appointment, name and post office address of each domiciliary creditor or person claiming to be creditor and, as far as ascertainable, amount of each claim. (N.Y. Surr. Ct. Proc. Act §1609[1] [NYCLS]). If ancillary letters be requested, process must issue to state tax commission, to all domiciliary creditors or persons claiming to be creditors and to such other persons entitled to letters or to designate appointee as court directs. Court may issue process generally to domiciliary creditors with service in manner directed by court. (N.Y. Surr. Ct. Proc. Act §1609[2] [NYCLS]). If petitioner prays for ancillary probate but does not ask that ancillary letters be issued, it shall be unnecessary to issue any process except to state tax commission. (N.Y. Surr. Ct. Proc. Act §1609[3] [NYCLS]). Any court of N.Y. having jurisdiction may direct person to whom ancillary letters issued to: (1) Pay from assets received in N.Y. debts of decedent due to creditors residing in N.Y. or (2) distribute remaining assets as justice requires after payment of creditors and expenses. Unless court directs distribution, ancillary fiduciary is required to transmit remaining assets to state or county where domiciliary letters granted to be disposed of pursuant to law thereof. (N.Y. Surr. Ct. Proc. Act §1610 [NYCLS]).

Public Administrators.

Office established by statute for counties of Erie, Monroe, Nassau, Onondaga, Suffolk and Westchester. (N.Y. Surr. Ct. Proc. Act §§1201 [NYCLS], 1202 [NYCLS]).

Inventory and Appraisal.

Fiduciary or attorney of record shall furnish court with list of assets constituting gross taxable estate, but separately listing those assets that were owned by decedent individually or in which decedent had partial interest, those assets owned jointly with right of survivorship, those assets held in trust, and those assets over which decedent had power to designate beneficiary. List of assets shall be filed with court by later to occur of following events: (1) Due date for filing of Form 706 Federal Estate Tax Return, including any extensions received for filing thereof; (2) if estate is not required to file Form 706, due date for filing of N.Y.S. Estate Tax Return, including any extensions for filing thereof; (3) if estate is not required to file N.Y.S. Estate Tax Return, six months from issuance of temporary or preliminary letters, limited letters, ancillary letters, full letters of administration or letters testamentary. (Uniform Rules for Surrogate's Court No. 207.20, http://www.nycourts.gov/rules/trialcourts/207.shtml.)

Disclosure of Assets.

Fiduciary, creditor or person interested may commence proceeding by petition to require fiduciary to supply information concerning assets or affairs of estate relevant to interest of petitioner when fiduciary has failed after written request made therefor to do so. (N.Y. Surr. Ct. Proc. Act §§2101-2102[1]).

General Powers and Duties.

Fiduciary may present to court with jurisdiction over estate petition showing knowledge or information and belief that any property or proceeds or value thereof which should be paid or delivered to him is: (a) in possession or control of person who withholds it from him; or (b) within knowledge or information of person who refuses to impart same or to disclose any other fact which will aid petitioner in making discovery of property; or (c) fiduciary has reason to believe, in possession or control of person described at (a) supra, or within knowledge or information of person described at (b) supra, and praying that inquiry be had respecting it and that respondent be ordered to attend, be examined and deliver property in his control. (N.Y. Surr. Ct. Proc. Act §2103 [NYCLS]). Fiduciary, including executor or administrator (see N.Y. Surr. Ct. Proc. Act §103[21] [NYCLS]) but not including trustee, guardian, or donee of power to manage during minority property vested in infant or voluntary administrator, may petition for court authorization for disposition of decedent's real property for purposes specified by statute even if proposed disposition is or appears to be authorized by will or by statute. (N.Y. Surr. Ct. Proc. Act §§1901-1904). Term “disposition” includes: (a) sale; (b) mortgage; (c) exchange; (d) lease; (e) confirmation of prior lease made without court approval; (f) release of right to award for taking of real property by eminent domain; (g) transfer to spouse or other beneficiary in full or partial satisfaction of interest or share of such person in decedent's estate; (h) entry into possession of any real property, receipt of rents thereof and application of them as directed by court; and, (i) upon approval by surrogate, bringing of or intervening in partition action. (N.Y. Surr. Ct. Proc. Act §1901 [NYCLS]). Real property may be disposed of for payment of: (1) Administration or funeral expenses; (2) debts of decedent, including judgment or other liens, excepting mortgage liens, existing thereon at time of decedent's death; (3) any transfer, estate or death tax; (4) any debt or legacy charged thereupon; (5) shares to persons entitled thereto; and (6) for any other purpose court deems necessary. (N.Y. Surr. Ct. Proc. Act §1902 [NYCLS]). Fiduciary under will of real property must cause certified copy thereof to be recorded in each county where real property of testator is situated within 20 days after letters are issued. (N.Y. Surr. Ct. Proc. Act §2506[2] [NYCLS]). Where decedent dies seized of real property after he has made contract for conveyance thereof remaining unexecuted at his death his fiduciary or successor may make deed reciting contract and conveying real property. (N.Y. Surr. Ct. Proc. Act §1921[1] [NYCLS]). Fiduciary of decedent must file written notice of disposition or transfer of real property belonging to decedent with local assessing officer and local tax office in locality where such property is located. (N.Y. Surr. Ct. Proc. Act §1923 [NYCLS]).

Fiduciary may petition for continuation of business other than a profession, of which decedent was sole owner. (N.Y. Surr. Ct. Proc. Act §2108 [NYCLS]).

Where one of two or more fiduciaries dies or is removed, or his letters are revoked, no successor is appointed but remaining fiduciaries may continue to act, unless instrument expressly provides to contrary. (N.Y. Surr. Ct. Proc. Act §706 [NYCLS]). Fiduciary may resign on accounting and complying with certain conditions. (N.Y. Surr. Ct. Proc. Act §§715-716). Personal representative of personal representative may not take charge of estate of decedent of first representative. (N.Y. Est. Powers & Trust Law §11-3.4 [NYCLS]). Fiduciary of deceased fiduciary may, however, account or be required to account for decedent's acts or doings as such fiduciary and for property of estate which had come into possession of latter. (N.Y. Surr. Ct. Proc. Act §2207[2] [NYCLS]). Commingling of trust funds by fiduciary is misdemeanor, but any bank or trust company acting as fiduciary may cause securities to be held in name of nominee, and any individual acting as fiduciary may direct bank or trust company to hold securities in name of nominee. Such securities must be kept separate from assets of such bank or trust company. (N.Y. Est. Powers & Trust Law §11-1.6 [NYCLS]). In general, real estate vests directly in heirs-at-law or devisees, subject to administration, payment of debts, etc. (see N.Y. Surr. Ct. Proc. Act §1902 [NYCLS]) and executor or administrator derives no title thereto by virtue of his office.

Upon application by fiduciary, court may authorize compromising or compounding of any debt, claim or demand, due or to become due and selling at public auction any uncollectible, stale or doubtful debt or claim. (N.Y. Surr. Ct. Proc. Act §1813[1] [NYCLS]). Statutory fiduciary powers are set forth in N.Y. Est. Powers & Trust Law §11-1.1 [NYCLS].

Certain provisions of Uniform Fiduciaries Act adopted. (See N.Y. Gen. Bus. Law §§359 [NYCLS]–i, 359–l.)

Notice of Appointment.

None required.

Investments are governed by Uniform Prudent Investor Act and Uniform Principal and Income Act. (N.Y. Est. Powers & Trust Law §11-2.3 [NYCLS]; §11-A). Fiduciary having special investment skill held to standard of prudent man possessing such special skills. (N.Y. Est. Powers & Trust Law §11-2.3[b][6] [NYCLS]).

Powers of Executor Before Issuance of Letters.

Executor may not dispose of any part of estate of testator before letters testamentary are granted to him, except to pay reasonable funeral expenses, nor interfere with estate except as necessary to preserve it. (N.Y. Est. Powers & Trust Law §11-1.3 [NYCLS]).

Presentation of Claims.

Claims should be presented to fiduciary on or before day fixed in notice to creditors or, if no notice published, within seven months from date of issuance of letters. Failure to present within such time relieves fiduciary from any liability to claimant with respect to assets paid out in payment of any lawful claims or of legacies or in making distribution to distributees (N.Y. Surr. Ct. Proc. Act §1802 [NYCLS]), but any claim presented before actual distribution (although after times mentioned) should share in same manner as though presented within time fixed for presentation.

Secured Claims.

Foregoing applies to secured claim, so far as any excess in case of insufficiency of security is concerned, but failure to present such claim does not affect right to enforce security.

Proof of Claims.

Every claim other than claims for expense of administration and claims of U.S. or state of New York must be in writing, with statement of facts and amount. Claimant may also be required to present affidavit that amount of claim is justly due, payments thereon have been credited, and there are no offsets and no security except as described.

Notice of claim required shall be presented by delivering copy to fiduciary personally or by certified mail return receipt requested addressed to fiduciary at place of residence stated in designation required by (N.Y. Surr. Ct. Proc. Act §708 [NYCLS]), or if notice has been published pursuant to 1801 (1993, c. 514, §39), at place specified therein or upon clerk of court pursuant to designation required under 708, whenever fiduciary cannot be found or served within state after due diligence. (N.Y. Surr. Ct. Proc. Act §1803[2] [NYCLS]). No claimant shall be entitled to enforce payment of claim in any proceeding in court unless claim be presented in accordance with provisions of this section, or unless it shall be based upon decree or order of court or valid judgment rendered by court of competent jurisdiction. (N.Y. Surr. Ct. Proc. Act §1803[3] [NYCLS]).

Contingent or Unliquidated Claims.

Whenever claim against decedent's estate is contingent or unliquidated or an outstanding bond, recognizance or undertaking upon which decedent was principal, surety or indemnitor and on which at time of his death liability is still contingent or unliquidated, claimant or surety may file with fiduciary an affidavit showing facts upon which contingent or unliquidated liability is based and probable amount thereof, and there must be no distribution without reservation of assets determined by court, by special proceeding or upon final accounting, to be adequate to pay contingent or unliquidated claim or difference between amount of claim and value of security and collateral to which creditor may resort. (N.Y. Surr. Ct. Proc. Act §1804[1] [NYCLS]). See, however, 129 Misc. 845, 223 N.Y.S. 470, regarding constitutionality of provisions relating to contingent claims.

Fiduciary must give prompt notice in writing to claimants as to allowance or rejection of claims. Notice rejecting claim must state reasons. If fiduciary fails to allow claim within 90 days from presentment, claim deemed rejected. If claim allowed process may issue to fiduciary requiring fiduciary to show cause why claim should not be paid. Court may dismiss petition or direct payment or satisfaction of claim in whole or in part and require refunding bond. (N.Y. Surr. Ct. Proc. Act §1806 [NYCLS]).

Form

(Proof of Claim)

SURROGATE'S COURT: COUNTY OF __________

[Add title of proceeding]

CLAIM AGAINST ESTATE

File No. __________

To [name of personal representative], Executor under the Last Will and Testament of _______, deceased.

You are hereby notified that there is due to me from the estate of _______, deceased, the sum of _____, ($_____) Dollars, for goods sold and delivered and services rendered as follows: [concisely state facts forming basis of claim].

Dated: ________, (year) __.

____

[Signature of Creditor]

____

[Address of Creditor]

Form

(*Affidavit in Support of Claim*)

SURROGATE'S COURT: COUNTY OF __________

[Add title of proceeding]

AFFIDAVIT

File No. __________

STATE OF NEW YORK

COUNTY OF NEW YORK } ss.:

______________, being duly sworn, deposes and says:

1. I reside at ___________, ___________ County, State of ___________.

2. The annexed claim against ___________, Deceased, is just and true, and that the several claims for goods sold and delivered and for services rendered therein charged for were actually delivered and furnished to the said ___________.

3. I know of no offsets and of no evidence of indebtedness.

4. No part of said claim has been paid, and the full amount thereof in the sum of ___________ ($________) Dollars is now actually due and owing to the deponent.

5. I hold no security.

[Signature]

____

[Type Name of Deponent]

[Jurat]

Payment of Claims.

Proceeding may be commenced by petition to require fiduciary to: (a) pay funeral expenses, if there are funds available for such after reservation for payment of administration expenses; (b) pay claim which has been allowed (regarding allowance of claims, see subhead Proof of Claims, supra); (c) deliver specific bequest or property to person entitled thereto or pay legacy, distributive share, interest in trust or claim for administration expense, and when trustee is unable to deliver personal property to person entitled, to pay value thereof; and (d) pay in advance any beneficiary all or part of any beneficial interest to which he is entitled when property of estate applicable to payment of debts, legacies and expenses exceeds by at least one-third amount of all known claims, legacies having priority and beneficial interests of same class and beneficiary needs such payment for his support or education or that of family. (N.Y. Surr. Ct. Proc. Act §2102 [NYCLS]).

If claim is undetermined on decree or debt is not yet due and person holding does not consent to present payment, decree shall direct fiduciary to retain sufficient funds to meet claim or demand when determined or payable. (N.Y. Surr. Ct. Proc. Act §1916 [NYCLS]).

If upon sale spouse, beneficiary or creditor of decedent becomes purchaser of any of decedent's real property, court may direct amount of elective share, legacy, distributive share or claim be used to pay purchase price. (N.Y. Surr. Ct. Proc. Act §1915 [NYCLS]).

At any time after issuance of letters of temporary administration, process may issue to temporary administrator requiring him to show cause why he should not pay petitioner's claim. (N.Y. Surr. Ct. Proc. Act §906 [NYCLS]). Any action or proceeding may be maintained against temporary administrator as if he were administrator. (N.Y. Surr. Ct. Proc. Act §905[2] [NYCLS]).

Claims Arising Out of Administration.

Claims based on contracts, obligations or torts committed during estate management may be asserted against estate by proceeding against personal representative in his fiduciary capacity, regardless of representative's personal liability. Representative individually liable only for failing to exercise reasonable care, diligence and prudence. (N.Y. Est. Powers & Trust Law §11-4.7 [NYCLS]).

Claims of Representative.

Fiduciary must not pay out of decedent's property any debt alleged owing to him by decedent until proved and allowed by court on judicial settlement of account, except fiduciary may petition at any time for such payment which court may authorize by ex parte order. Running of statute of limitations against debt owing to fiduciary or other cause of action in favor of fiduciary is suspended from death of decedent until first judicial settlement of account of fiduciary unless fiduciary was appointed on revocation of letters issued to another person, in which case running of statute is so suspended from issuance of letters to him until first judicial settlement of his account. (N.Y. Surr. Ct. Proc. Act §1805 [NYCLS]).

Priorities.

Funeral expenses, subject to payment of expenses of administration, must be preferred to all debts and claims against estate and must be paid out of first moneys received by fiduciary. Debts of decedent must be paid according to following order: (a) debts entitled to preference under laws of U.S. and N.Y.; (b) taxes assessed on property of deceased previous to death; taxes paid on real property must be reimbursed to estate by distributee or devisee receiving same unless will directs otherwise; (c) judgments docketed and decrees entered against decedent according to priority thereof; (d) all recognizances, bonds, sealed instruments, notes, bills, and unliquidated demands and accounts, with no preference between debts of same class, except those in class (c). Debt due and payable not entitled to preference over debts not due. Debts not due may be paid according to class to which they belong, discounted at legal interest rate for prepayment. Debt or claim of fiduciary has no preference over others of same class, except fiduciary may, with leave of court, surrender collateral securing claim and make payment as court directs. Preference may be given rents due or accruing on leases held by decedent at time of death over other debts in class (d) if court determines such preference will benefit estate. If estate is insolvent, secured creditor may participate in dividends only to extent of excess of his claim over amount of security, unless he surrenders security, in which case he may participate as to full amount of his claim. (N.Y. Surr. Ct. Proc. Act §1811 [NYCLS]). See also subhead Actions, infra.

Liens.

Where property, subject at time of death to any lien, security interest or other charge is specifically devised or bequeathed, or descends to distributee or where proceeds of any policy of insurance on life of decedent are payable to named beneficiary and such policy is subject to any lien, security interest or other charge, executor or administrator is not responsible for satisfaction of such encumbrance out of property of decedent, except for property taxes as provided in N.Y. Surr. Ct. Proc. Act §1811[2][b] [NYCLS] (see subhead Priorities, supra), unless will expressly or by implication indicates otherwise. General will provision for payment of debts not deemed such indication. (N.Y. Est. Powers & Trust Law §3–3.6[a]). Where property passes to two or more persons, interest of each bears its proportionate share of total encumbrance. (N.Y. Est. Powers & Trust Law §3-3.6[c] [NYCLS]).

Actions.

Commencement of suit for recovery of debt or obtaining of judgment thereon against fiduciary does not entitle this debt to preference over others of same class. (N.Y. Surr. Ct. Proc. Act §1811[3] [NYCLS]).

When claim is rejected in whole or part, all issues relating to its validity or enforceability must be tried upon accounting, unless claimant brings action in law or equity within 60 days. Failure to bring such action within 60 days shall not be deemed waiver of claimant's right to jury trial. (N.Y. Surr. Ct. Proc. Act §§1808 [NYCLS], 1810 [NYCLS]).

In certain cases, where fiduciary has knowledge or notice of claim which may be asserted and no written notice of claim has been presented to him, or validity of which is questioned, and no action or proceeding to enforce claim has been instituted fiduciary may present petition to court showing facts and praying that claimant or possible claimant be required to show cause why his claim should not be disallowed. (N.Y. Surr. Ct. Proc. Act §1809[1] [NYCLS]).

If claim improperly allowed, or fraudulently or negligently paid, any party adversely affected may file objections thereto at judicial settlement. (N.Y. Surr. Ct. Proc. Act §1807[1] [NYCLS]).

Judgment creditor may petition court for decree granting leave to issue execution against decedent's real property. (N.Y. Surr. Ct. Proc. Act §1812 [NYCLS]).

Proceedings enumerated in N.Y. Surr. Ct. Proc. Act are not exclusive and court is empowered in any proceeding, whether or not specifically provided for, to exercise any of jurisdiction granted to it by N.Y. Surr. Ct. Proc. Act or other provisions of law. (N.Y. Surr. Ct. Proc. Act §202 [NYCLS]).

Allowances.

If person dies leaving surviving spouse or children under age 21, following items are not assets of estate but vest in and must be set off to spouse or to decedent's children under age 21 if spouse does not survive or is disqualified: (1) Housekeeping utensils, musical instruments, sewing machine, household furniture and appliances, including but not limited to computers and electronic devices, used in and about house, fuel, provisions and clothing of decedent, not exceeding in aggregate value $10,000; (2) family bible, family pictures, video tapes, computer tapes, discs, and software used by such family, and books, not exceeding in value $1,000; (3) domestic animals with their necessary food for 60 days, farm machinery, one tractor and one lawn tractor not exceeding in aggregate value $15,000; (4) one motor vehicle not exceeding in value of $15,000; and (5) money or other personal property not exceeding in value $15,000, except that where assets are insufficient to pay reasonable funeral expenses of decedent, personal representative must apply such money or other personal property to defray any deficiency in such expenses. Value is fair market value less encumbrances affecting decedent's ownership. No allowance in money or other property if items described in (1), (2), (3) or (4) do not exist. Items (1) through (5) are deemed reasonably required for support of spouse or children under age 21 during settlement of estate. (N.Y. Est. Powers & Trust Law §5-3.1 [NYCLS]). Husband or wife is surviving spouse within N.Y. Est. Powers & Trust Law §5-3.1 [NYCLS] unless it is established satisfactorily to court having jurisdiction that: (1) Final decree or judgment of divorce, of annulment or declaring nullity of marriage or dissolving such marriage on ground of absence, recognized as valid under law of N.Y., was in effect when deceased spouse died; (2) marriage was void under domestic relations law as incestuous, bigamous or prohibited remarriage; (3) spouse procured final divorce decree or judgment outside of N.Y., where decree not recognized as valid in N.Y.; (4) final decree or judgment of separation, recognized as valid under law of N.Y., was rendered against spouse and was in effect when deceased spouse died; (5) spouse abandoned deceased spouse, and such abandonment continued until time of death; or (6) spouse with duty to support other spouse failed or refused to provide for other spouse though he or she had means or ability to do so, unless such marital duty was resumed and continued until death of other spouse. (N.Y. Est. Powers & Trust Law §5-1.2 [NYCLS]).

Widow's Quarantine.

Widow may remain in her husband's chief house 40 days after his death without liability for rent and meanwhile have her reasonable sustenance out of his estate. (N.Y. Real Prop. Law §204 [NYCLS]).

Accounting and Settlement.

Court may at any time, upon it appearing that it is for best interests of estate, require fiduciary to file intermediate or final account either on own initiative or on petition of: (a) creditor; (b) person interested; (c) public administrator or county treasurer; (d) any person on behalf of infant born after making of will when interested in estate; (e) fiduciary of deceased person interested; (f) surety on bond of fiduciary required to account; (g) successor or remaining fiduciary; (h) co-fiduciary; or (i) attorney general where part of estate may escheat to N.Y. (N.Y. Surr. Ct. Proc. Act §2205 [NYCLS]). Court may compel fiduciary to proceed with settlement of account. Pendency of proceeding to compel accounting does not preclude fiduciary from petitioning for voluntary accounting. (N.Y. Surr. Ct. Proc. Act §2206 [NYCLS]).

Fiduciary (other than guardian or trustee who are subject to certain other requirements under N.Y. Surr. Ct. Proc. Act §2208 [NYCLS]) may voluntarily present his account to be judicially settled where: (a) time for presentation of claims as fixed by published notice has expired or seven months have expired since original letters issued; (b) his letters have been revoked; (c) court at any time within six months after issuance of letters to original fiduciary entertains application by fiduciary for judicial settlement of his account and it appears from petition or account that disposition of decedent's real property will be necessary for payments and distributions as set forth in N.Y. Surr. Ct. Proc. Act §1902 [NYCLS] (see subhead General Powers and Duties, supra); or (d) his account has not been judicially settled within one year preceding application therefor and application is entertained. (N.Y. Surr. Ct. Proc. Act §2208[1] [NYCLS]). There is no statutory limitation for final settlement of estate.

Upon voluntary judicial settlement of account of fiduciary, process must issue to: (1) Unpaid creditors and persons claiming to be such; (2) surety on his bond; (3) co-fiduciaries not joining in petition; (4) successor if one has been appointed, in case where petitioner has been removed or his letters revoked; (5) attorney general where account pertains to trust income or principal of which may be required to be devoted to charitable purposes or where decedent died intestate as to any part of estate leaving one or more unknown distributees or one or more distributees whose whereabouts are unknown; (6) distributees where decedent, infant or beneficiary died intestate as to any property, except those who by acknowledged release appear to have been paid; (7) devisees and trustees of any trust created by will or lifetime trust instrument and legatees except those who by acknowledged release appear to be paid; release of infant or incompetent must be executed by guardian, committee or person to whom payment made pursuant to N.Y. Surr. Ct. Proc. Act §2220 [NYCLS] or (N.Y. Est. Powers & Trust Law §7-4.8 [NYCLS] or §11-1.1 [NYCLS]; (8) in case of guardian, process shall also issue to infant; (9) in case of trustee, process shall also issue to all persons entitled by terms of will, lifetime trust instrument, or operation of law to share in estate; (10) where accounting fiduciary also serves in separate capacity as fiduciary of deceased beneficiary of estate or as trustee or guardian of infant beneficiary, or as committee of incompetent, or as conservator of conservatee process must issue to accounting party in separate capacity and, unless accounting fiduciary has in said separate capacity one or more co-fiduciaries who are not his co-fiduciaries in his accounting capacity and to whom process will issue, also to all persons interested in estate of deceased beneficiary, infant, incompetent, conservatee or trust of which accounting party is trustee; (11) where person to whom process is required to issue has died, process shall issue to his fiduciary and, if none appointed, to all persons interested in estate of deceased as distributees, nominated fiduciaries or named as legatees or devisees under any will of decedent filed in court; (12) court may, for good cause shown, dispense with service of process on person provided value of his interest in estate does not exceed $500 but if service is so dispensed with, decree settling account will not be conclusive against such person unless prior to entry, he is served or waives service of process; and (13) notwithstanding provisions (1) through (12), if accounting officer is public administrator, county treasurer, or county officer succeeding to duties of county treasurer and there are no known beneficiaries or claimants as beneficiary and value of all interests in estate does not exceed $2,500, court may dispense with service of process on beneficiaries, but attorney general must be cited. (N.Y. Surr. Ct. Proc. Act §2210 [NYCLS]). Personal service of process may be made on any person either within or without state. Court may order other methods of service, including service by publication. (N.Y. Surr. Ct. Proc. Act §307[1] [NYCLS], [3] [NYCLS]). Except in cases of service by publication, or on consular official, citation must be served at least following number of days before return date: (a) ten days if person served within N.Y.; (b) 20 days if person served outside N.Y. but within U.S., District of Columbia, Puerto Rico, or U.S. possessions or territories; and (c) 30 days in all other cases. (N.Y. Surr. Ct. Proc. Act §308[1][a] [NYCLS]). If service by publication, return day must not be earlier than 28th day after first publication. If process served on consular official as provided in (N.Y. Surr. Ct. Proc. Act §308 [NYCLS]), service must be at least 30 days prior to return day. (N.Y. Surr. Ct. Proc. Act §§308-309). Under some circumstances, service upon infants under age of 14 years may be deemed complete upon filing petition. (N.Y. Surr. Ct. Proc. Act §309[3] [NYCLS]).

Consent Settlement.

Fiduciary may present petition to court showing names and addresses of all interested persons, that all taxes due have been paid, and that fiduciary has made full account and full disclosure in writing to all necessary persons (see subhead Accounting and Settlement, supra). Upon petitioner's filing acknowledged instruments executed by all such persons, approving account and releasing and discharging petitioner, court may issue decree releasing and discharging petitioner.

Distribution.

Subject to duty to retain sufficient assets to pay administration and funeral expenses, debts and taxes, personal representative may, but, except as directed by will or court decree or order, shall not be required to pay any testamentary disposition or distributive share before completion of publication of notice to creditors or, if no such notice is published, before expiration of seven months from time letters are granted. (N.Y. Est. Powers & Trust Law §11–1.5[a]). Whenever disposition is directed by will to be paid in advance of such publication of notice or expiration of such seven month period, personal representative may require bond providing for refund if: (1) Estate assets insufficient to pay debts or other testamentary dispositions entitled, under (N.Y. Est. Powers & Trust Law §13-1.3 [NYCLS]) (providing order in which assets appropriated), to payment equally with or prior to that of disposition paid in advance or, (2) if will, under which disposition paid, is denied probate. (N.Y. Est. Powers & Trust Law §11–1.5[b]). If, after publication of notice to creditors or expiration of seven months from time letters are granted, personal representative refuses upon demand to pay disposition or distributive share, person entitled thereto may maintain action or proceeding against such representative. (N.Y. Est. Powers & Trust Law §11–1.5[c]). Any interest on payment of disposition or distributive share shall, in case of disposition, be at rate fixed in will or, if none so fixed, in any case at rate of 6% per annum commencing seven months from time letters, including preliminary or temporary letters, granted. (N.Y. Est. Powers & Trust Law §11–1.5[d]). Upon application of legatee, court may fix interest at amount set forth in (N.Y. C.P.L.R. 5004 [NYCLS]) if delay in payment is unreasonable. (N.Y. Est. Powers & Trust Law §11-1.5[e] [NYCLS]). (See subhead Payment of Claims, supra.) Where legatee or distributee is unknown, court must direct payment to State Comptroller for such legatee's or distributee's benefit. (N.Y. Surr. Ct. Proc. Act §2222[1] [NYCLS]). If whereabouts of legatee, distributee, creditor or other person entitled to payment is unknown, fiduciary must pay legacy, distributive share or money due such person into court within six months from time of decree directing payment or from time legacy, distributive share or money is payable by terms of decree. (N.Y. Surr. Ct. Proc. Act §2223[1] [NYCLS]). If name or whereabouts of any person interested in estate as beneficiary or assignee cannot be ascertained and value of such person's interest does not exceed $1,000, court may direct by order payment into court for benefit of person or persons who may be entitled to share. On such payment, fiduciary is discharged from all liability as to amount paid. Notice of application for such order must be given in manner directed by court or court may dispense therewith. (N.Y. Surr. Ct. Proc. Act §2224 [NYCLS]).

Distribution If Abroad.

See subhead Payment Into Court for Beneficiary, infra.

Payment Into Court for Beneficiary.

Where alien legatee, distributee or beneficiary is domiciled or resident within a country to which checks or warrants drawn against funds of U.S. may not be transmitted by reason of any executive order, regulation or similar determination of U.S. government or any department or agency thereof, court must direct that money or property, to which such alien would otherwise be entitled, must be paid into court for benefit of said alien or person or persons who thereafter may appear to be entitled thereto. Where it appears beneficiary would not have benefit, use or control of money or other property due him, or in other special circumstances, decree may direct that such money or property be paid into court. (N.Y. Surr. Ct. Proc. Act §2218 [NYCLS]).

See also topic 13.16 Wills, subhead Payment of Legacies.

Conveyance to Devisees or Heirs.

If court finds it unnecessary to dispose of real property or any part thereof, it may nevertheless determine rights and interests of parties and direct conveyance to them in confirmation of their title or transferring property to them in full or partial satisfaction of their distributive share. (N.Y. Surr. Ct. Proc. Act §1907[5] [NYCLS]).

Commissions.

These, allowed to any fiduciary other than trustee, are as follows and are to be apportioned if there be more than one fiduciary: (a) for receiving and paying out first $100,000, 5%; (b) for next $200,000, 4%; (c) for next $700,000, 3%; (d) for next $4,000,000, 2½%; (e) for all sums over $5,000,000, 2%. (N.Y. Surr. Ct. Proc. Act §2307[1][a]-[e] [NYCLS]). Commissions for corporate executor may be as provided by will or agreement. (N.Y. Surr. Ct. Proc. Act §2307[1][f] [NYCLS]). Commission must be computed separately for receiving and paying out, at ½ statutory rates for receiving and ½ statutory rates for paying out. (N.Y. Surr. Ct. Proc. Act §2307[1] [NYCLS]). Value of any property and increment thereof received or distributed or delivered, except in case of specific legacy or devise, is considered money in computing commissions. (N.Y. Surr. Ct. Proc. Act §2307[2] [NYCLS]). Subject to (N.Y. Surr. Ct. Proc. Act §2313 [NYCLS]) regarding multiple commissions of executors or trustees under wills of persons dying, or lifetime trusts established, after Aug. 31, 1993, if gross estate equals or exceeds $300,000, each fiduciary is entitled to full compensation allowed sole fiduciary unless there be more than three, in which case compensation to which three would be entitled is to be apportioned. If gross estate equals or exceeds $100,000 but is less than $300,000, each fiduciary is entitled to full compensation allowed sole fiduciary unless there be more than two, in which case compensation to which two are entitled to be apportioned. If gross estate is less than $100,000 and there is more than one fiduciary, full compensation to which sole fiduciary is entitled shall be apportioned. Joint fiduciaries may agree in writing to different apportionment which shall not provide for more than one full commission for any fiduciary. (N.Y. Surr. Ct. Proc. Act §2307[5] [NYCLS]). Where fiduciary required to collect rents and manage real property, he is allowed 5% of gross rents collected in addition to commission, but there shall be only one such additional compensation regardless of number of fiduciaries. (N.Y. Surr. Ct. Proc. Act §2307[6] [NYCLS]). For wills of persons dying after Aug. 31, 1993, if there are more than two executors, no more than two commissions shall be allowed unless decedent specifically provided otherwise in signed writing. (N.Y. Surr. Ct. Proc. Act §2313 [NYCLS]).

Compensation of Attorney.

At any time during administration of estate, court may fix and determine compensation of an attorney for services rendered to a fiduciary or to a devisee, legatee, distributee or person interested or of any attorney who has rendered legal services in connection with his duties as fiduciary or in proceedings to compel delivery of papers or funds in hands of an attorney. Court may direct attorney to refund any amount received in excess of fair value of services. (N.Y. Surr. Ct. Proc. Act §2110 [NYCLS]). Attorney-executor may receive executor's statutory commission in addition to legal fees if written disclosure is provided to testator. (N.Y. Surr. Ct. Proc. Act §2307-a[1][b] [NYCLS]).

Payment of Debts Without Administration.

Bank deposits, insurance payments, government agency payments, pension payments and similar debts owed to a decedent may be paid under certain conditions to surviving spouse to extent of $30,000 in aggregate, to certain relatives to extent of $15,000 in aggregate or to distributees or creditors to extent of $5,000 in aggregate. (N.Y. Surr. Ct. Proc. Act §1310[2]-[4] [NYCLS]).

Foreign Personal or Other Legal Representatives.

Such persons of non-domiciliary decedent, duly appointed by law of any other state, territory or other jurisdiction of U.S. where decedent was domiciled, may sue in any court of N.Y. in his representative capacity in same manner and under same restrictions as person residing outside of N.Y. may sue, subject to certain conditions. (N.Y. Est. Powers & Trust Law §13-3.5 [NYCLS]). Status of person as infant or incompetent shall be determined by law of domicile when foreign fiduciary of such person is to receive personal property in possession or control of person in this state. (N.Y. Est. Powers & Trust Law §13-3.4[a] [NYCLS]).

See subhead Special Kinds of Administration, catchline Ancillary Administration, supra.

When Administration Unnecessary.

See subhead Small Estates, infra.

Small Estates.

In order, surviving spouse, competent adult child or grandchild, parent, brother or sister, niece or nephew, or aunt or uncle of decedent, or if there be none of such who will act, guardian of property of infant, or conservator or committee of property of any incompetent distributee, may apply to act as voluntary administrator of intestate's estate with less than $20,000 gross value exclusive of value of certain property which must be set off to family from estate. (N.Y. Surr. Ct. Proc. Act §§1301 [NYCLS], 1303 [NYCLS]). If none of foregoing named persons will act or if there are no known distributees within categories listed above, right to act as voluntary administrator will be given to chief fiscal officer of county except in those counties in which public administrator has been appointed. (N.Y. Surr. Ct. Proc. Act §1303 [NYCLS]). If decedent dies testate, named executor or alternate executor has first right to act as voluntary administrator. This summary procedure does not apply to any interest in real property in N.Y. owned by decedent. (N.Y. Surr. Ct. Proc. Act §1301 [NYCLS]). No bond required, but affidavit must be filed with court of county of decedent's domicile. (N.Y. Surr. Ct. Proc. Act §1304 [NYCLS]). Delivery to transfer agent, debtor and others of court certificate showing affidavit filed and receipt of administrator, and surrender of any evidentiary document constitutes discharge and complete release for payment of money or delivery of personal property. (N.Y. Surr. Ct. Proc. Act §1305 [NYCLS]). If required affidavit not filed by named executor within 30 days after last will and testament has been filed in surrogate's court, any adult person who would be entitled to petition for letters of administration with will annexed may file required affidavit and have right to act as voluntary administrator. (N.Y. Surr. Ct. Proc. Act §1303[b] [NYCLS]). Voluntary administrator may maintain action to recover delivery of property or to enforce contractual claim, and sell personal property and has normal powers of administrator except as provided. Amount claimed, together with all other assets of estate to be administered, cannot exceed monetary amount defined as small estate pursuant to N.Y. Surr. Ct. Proc. Act §1301[1] [NYCLS]. He may not enforce claim for wrongful death or personal injuries of decedent and his powers cease upon appointment and qualification of another fiduciary. (N.Y. Surr. Ct. Proc. Act §1306 [NYCLS]).

Uniform Fiduciaries Act.

Certain provisions adopted. (See N.Y. Gen. Bus. Law §§359 [NYCLS]–i, 359–l.)

Uniform Principal and Income Act.

Adopted and applies to any receipt or expense received or incurred after Jan. 1, 2002. (N.Y. Est. Powers & Trust Law §11-A-1.1 to 6.4 [NYCLS]). See N.Y. Est. Powers & Trust Law §11-2.1 et seq. [NYCLS] concerning treatment of receipts and expenses received or incurred prior to Jan. 1, 2002. But see N.Y. Est. Powers & Trust Law §11-2.4 [NYCLS] concerning definition of income as unitrust amount.

Uniform Simplification of Fiduciary Security Transfers Act.

Repealed. (N.Y. Gen. Bus. Law §§359 [NYCLS]–m to 359–w).

Uniform Anatomical Gift Act.

See topic 13.16 Wills.

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13.14 PROOF OF CLAIMS:

See topic 13.10 Executors and Administrators.

13.15 TRUSTS:

Creation.

Express trust may be created for any lawful purpose. (N.Y. Est. Powers & Trust Law §7-1.4 [NYCLS]). Conveyance of trust property and persons authorized to convey governed by N.Y. Est. Powers & Trust Law §7-2.1 [NYCLS]. Trusts may be created for certain charitable purposes. (N.Y. Est. Powers & Trust Law §§8-1.1 to 8-1.3 [NYCLS]). Right of beneficiary of express trust to receive income from property and apply it to use of, or pay it to, any person may not be transferred unless authorized by trust instrument except that, upon certain conditions, any amount in excess of $10,000 of annual income can be transferred to beneficiary's spouse, issue, ancestor, brother, sister, uncle, aunt, nephew or niece; beneficiary of such trust can also transfer any part or all of income to a person whom beneficiary is legally obligated to support. (N.Y. Est. Powers & Trust Law §7-1.5 [NYCLS]). Where trust created to receive income from property, and no valid direction for accumulation given, surplus income, beyond sum necessary for education and support of beneficiary, is liable to claims of creditors. (N.Y. Est. Powers & Trust Law §7-3.4 [NYCLS]).

Lifetime Trust.

After June 25, 1997, inter vivos trust is not invalid or merged because single individual, including creator, may become sole trustee and sole present beneficiary, provided one or more persons hold some beneficial interest, present or future, vested or contingent, in trust. (N.Y. Est.

Powers & Trust Law §7-1.1 [NYCLS]). Trust may be in writing and executed by creator (N.Y. Est. Powers & Trust Law §7-1.17[a] [NYCLS]). and, unless creator is sole trustee, assets capable of registration (such as stocks, bonds, bank accounts, etc.) require recording or registration in name of trust or trustee, and in case of other assets, written assignment describing such assets with particularity (N.Y. Est. Powers & Trust Law §7-1.18 [NYCLS]).

Sales, etc.

Sales, conveyances or other acts by trustee in contravention of trust expressed in instrument creating estate, except as authorized by law, are void. (N.Y. Est. Powers & Trust Law §7-2.4 [NYCLS]). Supreme court may, by order, on certain terms and conditions, authorize trustee to mortgage, lease or sell real property held in trust, and to acquire adjacent land or exchange trust property to improve boundary lines, and may confirm lease for more than ten years of real property held in trust. (N.Y. Real Prop. Acts. Law §§1601 [NYCLS], 1603 [NYCLS]).

Payments to Trustee.

Person in good faith transferring money or property to trustee, which trustee is authorized to receive, is not responsible for proper application of money or property. (N.Y. Est. Powers & Trust Law §7-3.3 [NYCLS]).

Termination.

When purpose for which express trust created ceases, estate of trustee ceases. (N.Y. Est. Powers & Trust Law §7-2.2 [NYCLS]). Trust of realty created for benefit of creditors ceases at expiration of ten years from time when created (except where different limitation contained in instrument creating it or especially prescribed by law); estate or interest remaining reverts to assignor. (N.Y. Est. Powers & Trust Law §7-1.8[a] [NYCLS]). Subject to certain conditions, trust estate does not descend to personal representative, distributees or devisees but, in absence of contrary directions, vests in Supreme Court or Surrogate's Court, as case may be, and trust shall be executed by person appointed by court. (N.Y. Est. Powers & Trust Law §7-2.3 [NYCLS]).

Revocation.

Creator of trust may revoke same on written consent, acknowledged or proved in manner required to entitle conveyances of real property to be recorded, of all persons beneficially interested. If instrument creating trust has been recorded, instrument and consents also must be recorded in same office of every county where instrument creating trust is recorded. For this purpose, however, gift or limitation in trust created on or after Sept. 1, 1951, in favor of class of persons described only as heirs, or next of kin, or distributees of creator of trust, or by other words of like import, does not create beneficial interest in such persons. (N.Y. Est. Powers & Trust Law §7-1.9 [NYCLS]).

Charitable Trusts.

No gift, grant, or devise for charitable purposes shall be invalid by reason of indefiniteness or uncertainty of persons designated as beneficiaries thereunder if valid in other respects. If no person named as trustee, title vests in court having jurisdiction over trust. (N.Y. Est. Powers & Trust Law §8-1.1[a] [NYCLS]). Supreme Court and, where disposition is made by will, Surrogate's Court in which such will is probated have control over gifts, grants and devises for charitable purposes and when circumstances have so changed as to render impracticable or impossible literal compliance with terms of instrument, court may order that such gift, grant or devise be administered or expended in such manner as in its judgment will most effectually accomplish general purpose of agreement, provided that if donor is alive, he must consent thereto. (N.Y. Est. Powers & Trust Law §8-1.1[c][1] [NYCLS]). Testamentary or lifetime trust wholly benefiting one or more charitable beneficiaries may be terminated by application of cy pres doctrine or if market value of trust assets is $100,000 or less and administration expense uneconomical when considered relative to income. (N.Y. Est. Powers & Trust Law §8-1.1[c][2]

[NYCLS]). Surrogate's court of county in which will is probated has jurisdiction with respect to testamentary charitable trusts. Jurisdiction of supreme court and surrogate's court to prevent failure of such gift, grant or devise and to give effect to general purpose not defeated by fact that beneficiary does not exist or lacks capacity to take at time gift, grant or devise would otherwise become effective, whether or not gift, grant or devise creates an express trust for such purpose. (N.Y. Est. Powers & Trust Law §8-1.1[d] [NYCLS]). Any accumulation of income from property conveyed in trust for charitable purpose subject to control of supreme court and surrogate's court of county where will is probated. In exercise of such control and supervision court may prohibit or limit any such accumulation notwithstanding authorization therefor in instrument creating trust or authority provided in N.Y. Est. Powers & Trust Law §8-1.7 [NYCLS] and may authorize such accumulation despite absence of direction in trust instrument. (N.Y. Est. Powers & Trust Law §8-1.1[e] [NYCLS]). Attorney General represents beneficiaries in all such cases, and must enforce rights by appropriate proceedings. (N.Y. Est. Powers & Trust Law §8-1.1[f] [NYCLS]). Supreme court or surrogate's court may, on notice served on Attorney General and interested parties, authorize sale, lease or mortgage of property when it has become or is likely to become unproductive or has depreciated in value, it is advisable to raise money to improve or erect buildings upon property, or it is expedient for any other reason. (N.Y. Est. Powers & Trust Law §8-1.1[g] [NYCLS]).

Bona Fide Purchasers.

Implied or resulting trust may not be alleged or established to defeat or prejudice title of purchaser for valuable consideration without notice. (N.Y. Est. Powers & Trust Law §7-3.2 [NYCLS]). See also category 8 Debtor and Creditor, topic 8.08 Fraudulent Sales and Conveyances.

Kinds.

Trust for care of domestic or pet animals are valid. Trust terminates at earlier of death of animal covered by trust or end of 21 years. (N.Y. Est. Powers & Trust Law §7-8.1[a] [NYCLS]). Principal or income may be used only for benefit of covered animal (N.Y. Est. Powers & Trust Law §7-8.1[b] [NYCLS]), and court may reduce amount of property transferred if it determines that amount substantially exceeds amount required for intended use (N.Y. Est. Powers & Trust Law §7-8.1[d] [NYCLS]).

Gifts to Minors.

Personal representative or trustee may make irrevocable transfer to custodian for benefit of minor as authorized in governing will or trust. (N.Y. Est. Powers & Trust Law §7-6.5[a] [NYCLS]).

Alienation of Future Income.

Future trust income generally not assignable. However, unless otherwise provided in instrument, income beneficiary may assign, within limited family group, income from any trust in excess of $10,000 of annual income. (N.Y. Est. Powers & Trust Law §7-1.5 [NYCLS]).

Appointment of Trustee.

Any person under 18, adjudged incompetent, non-domiciliary alien under certain conditions, felon, or person incompetent to execute trust by reason of substance abuse, dishonesty, improvidence, or want of understanding may not serve as executor, administrator, testamentary trustee or guardian. (N.Y. Surr. Ct. Proc. Act §707 [NYCLS]). Where objection made to non-domiciliary named executor, guardian or trustee not otherwise required to post bond under N.Y. Surr. Ct. Proc. Act §710 [NYCLS]) or N.Y. Surr. Ct. Proc. Act §806 [NYCLS], such trustee, executor or guardian entitled as of right to letters of authority upon posting bond. (N.Y. Surr. Ct. Proc. Act §710 [NYCLS]).

Powers of Courts.

Supreme court and surrogate's court have concurrent jurisdiction over inter vivos and testamentary trusts. (N.Y. Surr. Ct. Proc. Act §1509 [NYCLS]). Courts have power in general to: (1) Accept resignation of trustee (N.Y. Surr. Ct. Proc. Act §715 [NYCLS]; N.Y. Est. Powers & Trust Law §7-2.6[a][1] [NYCLS]); (2) remove trustee (N.Y. Surr. Ct. Proc. Act §711 [NYCLS]; N.Y. Est. Powers & Trust Law §7-2.6[a][2] [NYCLS]); (3) appoint trustee or successor (N.Y. Surr. Ct. Proc. Act §1502 [NYCLS]; N.Y. Est. Powers & Trust Law §7-2.6[a][3] [NYCLS]); and (4) suspend trustee who engaged in war service (N.Y. Surr. Ct. Proc. Act §717 [NYCLS]; N.Y. Est. Powers & Trust Law §7-2.5 [NYCLS]).

Investments.

Fiduciary having special investment skill held to standard of prudent man possessing such special skills. (N.Y. Est. Powers & Trust Law §11-2.3[b][6] [NYCLS]). Trustees have power to adjust between income and principal under certain circumstances. (N.Y. Est. Powers & Trust Law §11-2.3[b][5] [NYCLS]; N.Y. Est. Powers & Trust Law §11-A-1.3[a] [NYCLS]).

Securities in Name of Nominee.

Trustee may, under certain conditions, cause securities to be held in name of nominee. (N.Y. Est. Powers & Trust Law §§11-1.1[b][10] [NYCLS], 11-1.5[b] [NYCLS]).

Securities in Central Depository.

Trustee may, under certain conditions, deposit securities in clearing corporation. (N.Y. Est. Powers & Trust Law §11-1.9 [NYCLS]).

Accounting.

Accounts of trustees are settled by surrogate's court (N.Y. Surr. Ct. Proc. Act §2201 et seq. [NYCLS]) or by supreme court (N.Y. C.P.L.R. 7701-7704). Instrument settling account informally may be filed with office of clerk or register of county. (N.Y. Surr. Ct. Proc. Act §2202 [NYCLS], N.Y. C.P.L.R. 7705 [NYCLS]). Uniform Trustees' Accounting Act not adopted.

Uniform Simplification of Fiduciary Security Transfers Act.

Repealed. (N.Y. Gen. Bus. Law §§359 [NYCLS]–m to 359–w).

Common trust funds (not Uniform Act) and short term investment common trust funds provided for. (N.Y. Banking Law §100-c [NYCLS]).

Uniform Principal and Income Act.

Substantially adopted and applies to any receipt or expense received or incurred after Jan. 1, 2002. (N.Y. Est. Powers & Trust Law §11-A-1.1-6.4). See N.Y. Est. Powers & Trust Law §11–2.1 et seq. concerning treatment of receipts and expenses received or incurred before Jan. 1, 2002. But see N.Y. Est. Powers & Trust Law §11-2.1 [NYCLS] concerning definition of 1997 income as unitrust amount).

Uniform Fiduciaries Act.

Certain provisions adopted. (N.Y. Gen. Bus. Law §§359 [NYCLS]–i, 359–1). Statutory fiduciary powers provided for in N.Y. Est. Powers & Trust Law §11-1.1 [NYCLS].

Accumulations.

See category 21 Property, topic 21.13 Perpetuities.

Commissions.

Effective Aug. 6, 1984, separate statutory provisions apply depending whether trustee is individual trustee or corporate trustee. (N.Y. Surr. Ct. Proc. Act §§2308 [NYCLS], 2309 [NYCLS], 2312 [NYCLS]).

Individual Trustee.

Individual trustee defined as any trustee who is not corporate trustee. (N.Y. Surr. Ct. Proc. Act §103[26-a] [NYCLS]). Commissions allowed to individual trustee on settlement of accounts for testamentary trusts created under wills of persons dying on or before Aug. 31, 1956, and inter vivos trusts established on or before that date are: 3% for first $2,000; 1½% for next $10,000; 1¼% for all sums above $12,000; provided, however, that such commissions for receiving principal are not allowed on property received and increments realized on or after June 5, 1978. Commissions for paying out principal are 1%. (N.Y. Surr. Ct. Proc. Act §2308[1][b] [NYCLS]). In addition, effective for trust years beginning after Aug. 6, 1984, annual commissions of $10.50 per $1,000 on first $400,000 of trust principal; $4.50 per $1,000 on next $600,000; and $3 per $1,000 on all additional principal. (N.Y. Surr. Ct. Proc. Act §2308[2] [NYCLS]). If trustee authorized or required to accumulate income, and if it is not added to principal, income shall be deemed separate trust and trustee entitled to commissions as though income was principal for purposes of computing commissions. (N.Y. Surr. Ct. Proc. Act §2308[12] [NYCLS]; N.Y. C.P.L.R. 8005 [NYCLS]).

For inter vivos or testamentary trusts created after Aug. 31, 1956, annual commissions payable, based on value of principal at end of period, of: $10.50 per $1,000 on first $400,000 of principal; $4.50 per $1,000 on next $600,000; and $3 per $1,000 on balance of principal. Commissions for paying out principal are 1%. Commissions on accumulated income are 2% of first $2,500 and 1% of balance payable at time of distribution. (N.Y. Surr. Ct. Proc. Act §§2308 [NYCLS], 2309 [NYCLS]; N.Y. C.P.L.R. 8005 [NYCLS]).

Corporate Trustee.

Corporate trustee is any trust company or bank authorized to exercise fiduciary powers and any national bank having principal office in N.Y. and duly authorized to exercise fiduciary powers. (N.Y. Surr. Ct. Proc. Act §103[9-a] [NYCLS]). Unless will or trust instrument provides otherwise, corporate trustee of trust having principal value of more than $400,000 is entitled to “reasonable” annual and paying out commissions. Upon application of any party interested in trust, court having jurisdiction over trust may review reasonableness of commissions retained by corporate trustee, and any corporate trustee held to have received excessive compensation may be ordered to make appropriate refunds. Statute provides that under reasonableness standard, corporate trustee is entitled to at least compensation provided for individual trustees. For trust having principal value of not more than $400,000, corporate trustee entitled to annual commission of up to $12.35 per $1,000 of principal, but limited to paying commission of 1%. (N.Y. Surr. Ct. Proc. Act §§2309 [NYCLS], 2312 [NYCLS]).

Unless will or lifetime trust otherwise explicitly provides, annual commissions are payable one-third from income of trust and two-thirds from principal. (N.Y. Surr. Ct. Proc. Act §2309[3] [NYCLS]). However, in cases of certain charitable remainder trusts, annual commissions are payable from trust corpus after certain allowances are made, and trusts whose definition of income is defined as unitrust amount (see N.Y. Est. Powers & Trust Law §11-2.4 [NYCLS]) and not from income. (N.Y. Surr. Ct. Proc. Act §2309 [NYCLS]). N.Y. Surr. Ct. Proc. Act §2309[6] [NYCLS] sets forth rules concerning multiple commissions of trustees based on value of trust principal. For trusts created after Aug. 31, 1993, no more than two commissions are allowed unless decedent specifically provided in signed writing. (N.Y. Surr. Ct. Proc. Act §2313 [NYCLS]).

Perpetuities.

See category 21 Property, topic 21.13 Perpetuities.

Pour Over Trusts.

See topic 13.16 Wills, subhead Bequests and Devises to Inter Vivos Trusts.

Renunciation.

See topic 13.16 Wills, subhead Renunciation of Disposition.

13.16 WILLS:

Generally, the validity and effect of testamentary disposition of real property within N.Y. determined by N.Y. law, and of personal property within N.Y. determined by laws of domicile of testator at time of death. (N.Y. Est. Powers & Trust Law §3-5.1[b] [NYCLS]). Will disposing of personal property or real property situated in N.Y., made within or without N.Y. by domiciliary or non-domiciliary, is “formally valid” and admissible to probate in N.Y., if in writing and signed by testator, and otherwise executed and attested in accordance with local laws of: (1) N.Y.; (2) jurisdiction in which will was executed, at time of execution; or (3) jurisdiction in which testator was domiciled, either at time of execution or of death. (N.Y. Est. Powers & Trust Law §3-5.1[c] [NYCLS]).

Testamentary Capacity.

Every person 18 years of age or over, of sound mind and memory, may by will dispose of real and personal property and exercise power to appoint such property. (N.Y. Est. Powers & Trust Law §3-1.1 [NYCLS]).

Necessity for Writing.

Every will, except authorized nuncupative and holographic wills (see subhead Nuncupative or Holographic Will, infra), must be in writing. (N.Y. Est. Powers & Trust Law §§3-2.1[a] [NYCLS], 3-5.1[c] [NYCLS]). Holographic Will (see subhead Nuncupative or Holographic Will, infra) must be entirely in handwriting of testator. (N.Y. Est. Powers & Trust Law §3-2.2[a][2] [NYCLS]).

Execution and Attestation.

Except for authorized nuncupative and holographic wills (see subhead Nuncupative or Holographic Will, infra) every will must be in writing, and executed and attested in following manner: (1) Must be signed at end by testator or, in name of testator, by another person in his presence and by his direction and such other person must sign his own name and affix his residence address to will. Another person signing testator's name must not be counted as one of required witnesses to will; (2) signature of testator must be affixed to will in presence of each attesting witness, or must be acknowledged by testator to each of them to have been affixed by him or by his direction. Testator may either sign in presence of, or acknowledge his signature to each attesting witness separately; (3) testator must, at some time during ceremony or ceremonies of execution and attestation, declare to each of attesting witnesses that instrument to which his signature has been affixed, is his will; (4) there must be at least two attesting witnesses, each of whom must, at request of testator, sign his name and affix his residence at end of will. Failure of witness to affix his address does not affect validity of will. Failure of another person signing name of testator to affix his residence address does not affect validity of will but failure of such other person to sign his own name invalidates will. Procedure for execution and attestation of wills need not be followed in this precise order so long as all requisite formalities are observed during period of time in which, satisfactorily to surrogate, ceremony or ceremonies of execution and attestation continue. Formalities for execution and attestation of will must be completed within period of 30 days. (N.Y. Est. Powers & Trust Law §3-2.1 [NYCLS]).

The Usual Attestation Clause.

Such clause (which also recites formalities beyond those absolutely required) reads:

Form

SIGNED, SEALED, PUBLISHED, AND DECLARED by the above-named Testator, [Testatrix], ______, as and for his [her] Last Will and Testament, this ___ day of ______, (year) __, in the presence of us, the undersigned, who were all together with him [her] at such time and thereupon, we, at his [her] request and in his [her] presence and in the presence of each other, did sign our names as attesting witnesses thereto, and we do severally hereby certify that, at the time of the occurrences aforesaid, we, and each of us, were acquainted with the said Testator, [Testatrix] and knew of our own knowledge that he [she] was of sound and disposing mind, memory, and understanding, that he [she] was under no coercion or restraint, and that he [she] was in all respects fully competent to make a will.

_______________ residing at ______________________

_______________ residing at ______________________

_______________ residing at ______________________

Nuncupative or Holographic Will.

Such will is valid only if made by: (1) Member of armed forces of U.S. while in actual military or naval service during war, declared or undeclared, or other armed conflict in which members of armed forces are engaged; (2) person who serves with or accompanies an armed force engaged in actual military or naval service during such war or other armed conflict; or (3) mariner while at sea. (N.Y. Est. Powers & Trust Law §3–2.2[b]). Making and provisions of nuncupative will must be clearly established by two witnesses. Nuncupative or holographic will made by member of armed forces becomes invalid upon expiration of one year following discharge from armed forces. Such will made by mariner while at sea becomes invalid upon expiration of three years from time such will was made. If such will was made by person serving or accompanying armed force engaged in actual military or naval service, will becomes invalid upon expiration of one year from time he has ceased serving with or accompanying such armed force. (N.Y. Est. Powers & Trust Law §3–2.2[c]). If any of enumerated persons lacks testamentary capacity at time limited for validity of his will, such will continues being valid until expiration of one year from time such person regains testamentary capacity. (N.Y. Est. Powers & Trust Law §3-2.2[d] [NYCLS]).

Testamentary Direction as to Construction.

Whenever testator, not domiciled in N.Y. at time of death, provides in will that he elects to have disposition of his property situated in N.Y. governed by laws of N.Y., intrinsic validity of any such disposition is determined by laws of N.Y. (N.Y. Est. Powers & Trust Law §3-5.1[h] [NYCLS]).

"In Terrorem" Conditions.

Condition designed to prevent disposition from taking effect, if will contested by beneficiary is operative, despite presence or absence of probable cause for such contest, subject to following: (1) Such condition is not breached by contest establishing that will is forgery or that it was revoked by later will, if contest based on probable cause; (2) infant or incompetent may affirmatively oppose probate of will without forfeiting any benefit thereunder; and (3) following conduct, singly or in aggregate, must not result in forfeiture of any benefit under will: (a) assertion of objection to jurisdiction of court in which will was offered for probate; (b) disclosure to any of parties or to court of any information relating to any document offered for probate as last will, or relevant to probate proceeding; (c) refusal or failure to join in petition for probate of document as last will, or to execute consent to, or waiver of notice of probate proceeding; (d) preliminary examination, under §1404 of Surrogate's Court Procedure Act [NYCLS], of proponent's witnesses, person who prepared will, nominated executors, and proponents in probate proceeding; and (e) institution of, or joining or acquiescence in proceeding for construction of will or any provision thereof. (N.Y. Est. Powers & Trust Law §3-3.5[b] [NYCLS]).

Testamentary Disposition.

Such disposition of property may be made to any person having capacity to acquire and hold such property. (N.Y. Est. Powers & Trust Law §3-1.3[a] [NYCLS]).

Disposition of Property to Unincorporated Association.

Such disposition does not lapse because of lack of capacity if, within three years after probate, association becomes incorporated with power to take disposition. (N.Y. Est. Powers & Trust Law §3-1.3[b] [NYCLS]).

Disposition to Issue.

(a) Instruments executed prior to Sept. 1, 1992. Whenever disposition or distribution of property made to "issue," such issue, if in equal degree of consanguinity to common ancestor, take per capita, but if in unequal degree, per stirpes, unless contrary intention is expressed. Per stirpes disposition or distribution of property made to persons who take as issue of deceased ancestor in following manner: property so passing divided into as many equal shares as there are (i) surviving issue in generation nearest to deceased ancestor that contains surviving issue and (ii) deceased issue in same generation who left surviving issue, if any. Each surviving member in nearest generation is allocated one share. Share of deceased issue in such nearest generation who left surviving issue must be distributed in same manner to such issue. (N.Y. Est. Powers & Trust Law §§2-1.2[a] [NYCLS], 1-2.14 [NYCLS]).

(b) Instruments executed on or after Sept. 1, 1992. Wherever disposition of property made to "issue", such issue take by representation unless contrary intention expressed. "By representation" means disposition or distribution of property made in following manner to persons who take as issue of deceased ancestor: property so passing is divided into as many equal shares as there are (i) surviving issue in generation nearest to deceased ancestor which contains one or more surviving issue and (ii) deceased issue in same generation who left surviving issue, if any. Each surviving member in such nearest generation is allocated one share. Remaining shares, if any, are combined and then divided in same manner among surviving issue of deceased issue as if surviving issue who are allocated share had predeceased decedent, without issue. (N.Y. Est. Powers & Trust Law §§2-1.2[a] [NYCLS], 1-2.16 [NYCLS]).

Revocation.

Written will may not be revoked or altered, except by another written will, or other writing by testator clearly indicating intention to revoke or alter, and executed with same formalities required by law, or unless such will burnt, torn, cut, canceled, obliterated or destroyed with intent and for purpose of revoking same, by testator, or another person in his presence, or by his direction. Where act done by another, direction of testator, and fact of injury or destruction must be proved by at least two witnesses, neither of whom performed act of revocation. Written will may also be revoked by nuncupative or holographic will when such wills are valid. (N.Y. Est. Powers & Trust Law §3-4.1 [NYCLS]). With respect to wills executed prior to Sept. 1, 1930, if after making such will testator marries and spouse survives testator, surviving spouse entitled to same portion of testator's estate as would have passed to surviving spouse had testator died intestate, unless provision has been made for such survivor by antenuptial agreement in writing. Surviving spouse may waive rights under this section and accept in lieu thereof any benefits he may have received, in whatever status, under will. (N.Y. Est. Powers & Trust Law §5-1.3 [NYCLS]). As to wills executed after Aug. 31, 1930, see subhead Election Between Intestate

Share and Testamentary Provision, infra.

Bond or agreement to convey, and charge or encumbrance upon, or creation of security interest in property previously disposed of by will is not deemed revocation. (N.Y. Est. Powers & Trust Law §§3-3.6 [NYCLS], 3-4.2 [NYCLS]). Conveyance, settlement deed or other act of testator, by which property previously disposed of by will altered but not wholly divested, is not revocation unless terms thereof wholly inconsistent with previous testamentary disposition. (N.Y. Est. Powers & Trust Law §3-4.3 [NYCLS]).

Revival.

Destruction, cancellation or revocation of second will does not itself revive first will. Revival of prior will or one or more of its provisions may be effected by: (1) Execution of codicil which in terms incorporates by reference such prior will or one or more of its provisions; (2) writing declaring revival of prior will or one or more of its provisions, which is executed and attested in accordance with formalities prescribed by statute for execution and attestation of will; or (3) republication of prior will, whether to original witnesses or new witnesses, which requires re-execution and re-attestation of prior will in accordance with formal requirements for execution and attestation of wills. (N.Y. Est. Powers & Trust Law §3-4.6 [NYCLS]).

Effect of Divorce and Remarriage.

Provisions in will made by married testator relating to dispositions of property to his spouse or to appointment of his spouse as executor or trustee are automatically revoked by subsequent divorce or annulment from that spouse, unless express provision to contrary made. Such revoked provisions are revived by testator's remarriage to former spouse. (N.Y. Est. Powers & Trust Law §5-1.4 [NYCLS]).

Testamentary Gifts to Subscribing Witnesses.

Attesting witness to whom beneficial disposition of property made is competent witness and compellable to testify. Disposition or appointment to attesting witness is void unless there are, at time of execution and attestation, at least two other attesting witnesses who receive no beneficial disposition or appointment thereunder. If there are two other such attesting witnesses, disposition or appointment valid. Any attesting witness whose disposition is void, who would be distributee if will were not established, entitled to receive so much of his intestate share as does not exceed value of disposition made to him in will, such share to be recovered as follows: (1) In case void disposition becomes part of residuary disposition, from residuary disposition only; (2) if void disposition passes in intestacy, ratably from distributees who succeed to such interest. For this purpose void disposition is distributed as though attesting witness were not distributee. These provisions apply to witness to nuncupative will. (N.Y. Est. Powers & Trust Law §3-3.2 [NYCLS]).

Bequests and Devises to Inter Vivos Trusts.

Testator may by will dispose of or appoint all or any part of his estate to trustee of trust, terms of which evidenced by written instrument executed and acknowledged as required to record real property conveyance, prior to or contemporaneously with will execution, and such trust instrument identified in such will. (N.Y. Est. Powers & Trust Law §3–3.7[a]). Validity of disposition or appointment unaffected by fact that: (1) Trust is amendable or revocable; (2) right reserved in trust to exercise power or direct any distribution of principal or income; or (3) trust instrument not executed and attested with will formalities. (N.Y. Est. Powers & Trust Law §3-3.7[b] [NYCLS]).

Probate.

Petition for probate of will may be presented by any legatee, devisee, fiduciary, guardian or committee or conservator, by creditor or any other person interested in estate, or by any other person entitled to letters of administration with will annexed under N.Y. Surr. Ct. Proc. Act §1418

[NYCLS]; in addition, by party to action in which decedent if living would be proper party, or public administrator or county treasurer on order of court. (N.Y. Surr. Ct. Proc. Act §1402[1] [NYCLS]). Process must issue to following persons if not petitioners: (1) Distributees of testator; (2) person or persons designated in will as executor, except that person designated in will as substitute or successor executor in event designated executor cannot act or fails to qualify need not be served where designated executor is under no disability; (3) any person designated in will as beneficiary, executor, trustee or guardian, whose rights or interests are adversely affected by any other instrument offered for probate that is later in date of execution or which amends or modifies instrument offered for probate; (4) any person designated as beneficiary, executor, trustee or guardian in any other will of same testator filed in surrogate's court of county in which propounded will is filed whose rights or interests are adversely affected by instrument offered for probate; (5) if propounded will expressly refers to instrument which created power of appointment and purports to exercise such power of appointment, any persons designated in instrument that created such power of appointment whose rights or interests are adversely affected by instrument offered for probate; (6) testator in any case where petition alleges that testator is believed to be dead; (7) state tax commission in case of non-domiciliary testator; (8) where any person to whom process is required to be issued has died, process shall issue to his fiduciary and if none has been appointed, to all persons interested as distributees, nominated fiduciaries or named as legatees or devisees under any will of deceased filed in court; and (9) provisions of N.Y. Surr. Ct. Proc. Act §315 [NYCLS] shall apply to proceeding under this section. Process must set forth name of proponent and if will is nuncupative, that fact. (N.Y. Surr. Ct. Proc. Act §1403 [NYCLS]). Virtual representation available in probate proceedings, including situations where respective interests of persons entitled to successive estates are in income or in principal or both, provided such persons are beneficiaries of same trust or fund and have common interest in proving or disproving will and neither person would receive greater financial benefit if will were denied probate or admitted to probate. (N.Y. Surr. Ct. Proc. Act §315 [NYCLS]).

Written notice of probate and affidavit of mailing copy of notice to each person named or referred to in petition who has not been served or has not appeared or waived service of process and, in case of unnamed charitable organization or charitable bequest in unspecified amount, to Attorney General of the State of New York, must be filed before letters are issued. (N.Y. Surr. Ct. Proc. Act §1409[1] [NYCLS]).

Self-proved Wills.

Surrogate's courts are authorized to accept affidavit of attesting witnesses to will in lieu of testimony of witnesses to prove will, unless party entitled to process objects or court determines for any other reason that witnesses should be produced and examined. Affidavit may be made at request of testator, or, after his death, at request of executor named in will. In addition, at request of proponent of will, or, attorney of proponent, or any person interested in estate. Affidavit should contain facts which establish genuineness of will, validity of execution, and competence of testator at time of execution. Affidavit must be made before officer authorized to administer oath. (N.Y. Surr. Ct. Proc. Act §1406 [NYCLS]).

Courts generally accept such affidavit in proof of will except where: (1) Physical appearance of will requires explanation, i.e., where there are deletions, additions, interlineations or other alterations; (2) will has been signed by mark, or testator otherwise appears illiterate or unable to read English language; (3) will has been executed in counterparts and all counterparts have not been produced; (4) testator dies within three months of execution; (5) confidential relationship existed between testator and unrelated beneficiary; (6) testator blind or otherwise disabled, making execution in usual manner questionable; or (7) it appears will was not drawn and executed under supervision of attorney.

Form of affidavit:

[Caption]

In the County of ______, State of New York, on the ___ day of ________, (year) __, then and there personally appeared the within named ________, _______ and _______, who, being severally duly sworn, depose and say that they witnessed the New execution of the within Last Will and Testament of the within named Testator [Testatrix], _______; that said Testator [Testatrix] subscribed said Last Will and Testament and declared the same to be his [her] Last Will and Testament in their presence; that they thereafter subscribed the same as witnesses in the presence of said Testator [Testatrix] and in the presence of each other and at the request of said Testator [Testatrix]; that the said Testator [Testatrix] at the time of the execution of said Last Will and Testament appeared to them of full age and of sound mind, memory and understanding, not under any restraint or in any respect incompetent to make a will, could read, write and converse in the English language and was suffering from no defect of sight, hearing or speech, or from any other physical or mental impairment which would affect his [her] capacity to make a valid will; that said Last Will and Testament was executed as a single, original instrument and was not executed in counterparts; that they make this affidavit at the request of said Testator [Testatrix]; and that _____, an attorney-at-law admitted to practice in the State of New York, supervised the execution of said instrument in accordance with the statutory requirements of the Estates, Powers and Trusts Law.

____

Witness

____

Witness

____

Witness

[Jurat]

Contest.

Any person whose interest in property or estate of testator would be adversely affected by admission of will to probate may file objections to probate of will or any part, except that one whose only interest would be in commissions to which he would have been entitled if his appointment as fiduciary were not revoked by a later instrument may not file objections unless authorized by court. Objections must be filed on or before return day of process or on such subsequent day as directed by court, except where examination of attesting witnesses requested, in which case objections must be filed within ten days after completion of such examinations, or within such other time as fixed by stipulation of parties or court. (N.Y. Surr. Ct. Proc. Act §1410 [NYCLS]). If objections filed, proponent of will must, within 30 days after objections filed, submit to surrogate's court citation for issuance stating that will has been offered for probate, objections have been filed, and that such objections may be determined at trial, hearing, or conference on return date, and recite consequences of failing to appear. Citation must be served by proponent on each of persons named therein in same manner as required for service of process under N.Y. Surr. Ct. Proc. Act §§307 [NYCLS], 308 [NYCLS]. If proponent fails to submit citation, same may be filed by objectant or any other interested party. (N.Y. Surr. Ct. Proc. Act §1411[2] [NYCLS]). Proof of service except that service that may be made by mail as therein provided by any person must be made and filed in court at least two days before return date of citation. (N.Y. Surr. Ct. Proc. Act §1411[4] [NYCLS]). No person named in citation who fails to appear is entitled to further notice. If settlement is entered into and agreed by parties appearing, such settlement is binding on parties who fail to appear and such parties may have to contribute to settlement proportionately. (N.Y. Surr. Ct. Proc. Act §1411[6] [NYCLS]).

Living Wills.

Health Care Proxy law allows competent adults to appoint agents to make decisions regarding health care treatment in event of loss of decision-making capacity. (N.Y. Pub. Health Law §2981 [NYCLS]). Health care agent and medical personnel must act in accordance with patient's wishes, and living will provides evidence of patient's wishes. (72 N.Y.2d 517, 534 N.Y.S.2d 886, 531 N.E.2d 607).

Payment of Legacies.

Personal representative may in his discretion pay testamentary dispositions or distributive shares before completion of publication of notice to creditors, or, if no such notice published, before expiration of seven months from time of issuance of letters, provided sufficient assets are retained to pay debts, expenses, and taxes. When will directs that a disposition be paid in advance of such publication of notice or expiration of such seven month period, legatee may be required to give refunding bond. (N.Y. Est. Powers & Trust Law §11-1.5 [NYCLS]). Beneficiary may commence proceeding to require advance payment of any beneficial interest where needed for his support or education or of his family and where assets of estate applicable to payment of debts, legacies and expenses exceeded by one-third amount of all known claims and legacies of same class or those having priority. (N.Y. Surr. Ct. Proc. Act §2102[5] [NYCLS]). See also topic 13.10 Executors and Administrators, subhead Distribution.

Unclaimed Legacies.

Where person entitled to legacy or distributive share unknown, decree must direct fiduciary to pay (together with certified copy of decree) amount thereof to comptroller of state, for benefit of person or persons who may thereafter appear to be entitled thereto. (N.Y. Surr. Ct. Proc. Act §2222[1] [NYCLS]). Where appears that whereabouts of any legatee, distributee, creditor or other person entitled to payment from estate unknown, decree must direct administrator etc. to pay into surrogate's court money due to such person, but not later than six months from time decree is made or when money is payable by decree terms. (N.Y. Surr. Ct. Proc. Act §2223[1] [NYCLS]).

Renunciation of Disposition.

As to dispositions created or increased on or after Aug. 11, 1977, and as to future interests created or increased prior to that date, beneficiary of will, trust agreement, or of exercise of power of appointment may renounce all or part of his interest; provided that surviving joint tenant or tenant by entirety may not renounce portion of interest in joint property or property held by entirety which allocable to amounts contributed by tenant to interest of such property. Renunciation must be filed in office of clerk of court having jurisdiction over will or trust agreement within nine months after effective date of disposition. Affidavit must be submitted by renouncing party that no consideration has been or will be received from person whose interest accelerated. (N.Y. Est. Powers & Trust Law §2–1.11[b]). Renunciation may be made by (1) guardian of property of infant; (2) committee of incompetent; (3) conservator of conservatee; (4) guardian appointed under art. 81 of mental hygiene law; (5) personal representative of decedent; (6) attorney-in-fact of person under disability, when authorized under duly executed power of attorney. Such renunciation shall not be effective unless prior thereto authorized by court having jurisdiction over estate. Renunciation may be made by attorney-in-fact, when so authorized under duly executed power of attorney, without court authorization, unless renunciation causes property to be disposed of in favor of attorney-in-fact or spouse or issue of attorney-in-fact, in which case renunciation shall not be effective unless either (A) instrument appointing such attorney-in-fact expressly authorizes renunciation in favor of such attorney-in-fact, or (B) authorized by court with which renunciation must be filed. (N.Y. Est. Powers & Trust Law §2–1.11[c]). Unless creator of disposition has provided otherwise, renunciation has same effect as though renouncing person had pre-deceased creator or decedent or, if renounced interest is future estate, as though renouncing person had died at time of filing or just prior to its becoming estate in possession, whichever is earlier in time. If per stirpes distribution or distribution by representation of renounced interest would occur, renouncing person must be treated as having died on same date as, but immediately after, creator or decedent or, if renounced interest is future estate, as having died on same date as, but immediately after, its becoming estate in possession or, if time of filing is earlier in time, on same date as, but immediately after, such filing. (N.Y. Est. Powers & Trust Law §2-1.11[d] [NYCLS]).

Lapse.

In absence of contrary provision, for instruments executed prior to Sept. 1, 1992, testamentary disposition to issue or to brother or sister of testator who dies during testator's lifetime leaving issue surviving testator, does not lapse but vests in such surviving issue, adopted children, and their issue to extent they would be included in disposition to issue under N.Y. Est. Powers & Trust Law §2-1.3 [NYCLS] and N.Y. Dom. Rel. Law §117[2] [NYCLS], and nonmarital children of father legitimized per N.Y. Est. Powers & Trust Law §4-1.2 [NYCLS], per stirpes. (N.Y. Est. Powers & Trust Law §3–3.3[a][1]). Testamentary disposition made under instrument executed on or after Sept. 1, 1992 does not lapse but rests in such surviving issue by representation. (N.Y. Est. Powers & Trust Law §3-3.3[a][2] [NYCLS]).

Children.

Those of testator, born (or adopted [184 A.D. 476, 171 N.Y.S. 264, aff'd, 227 N.Y. 641, 126 N.E. 901]) after execution of will and not provided for by any settlement and neither mentioned nor provided for in any way in will, succeed, if testator has no child living when he executes his last will, to such portion of estate as would have passed to children had testator died intestate. If testator has one or more children living upon execution of last will, and no provision made therein for any such child, an afterborn child not entitled to share in estate; if testator provides for one or more children living at execution of last will, an afterborn child may share in estate, but his portion limited to disposition made to children under will. If testator provides for children living upon execution of will, and intent was to make limited provision that specifically applied only to children then living, after born takes intestate share of estate. (N.Y. Est. Powers & Trust Law §5-3.2 [NYCLS]). Children living when will executed may be disinherited by mere failure to provide for them in will.

Testamentary Guardian.

See category 14 Family, topic 14.08 Guardian and Ward, subhead Appointment by Parent.

Election Between Intestate Share and Testamentary Provision.

Where decedent dies on or after Sept. 1, 1992, personal right of election given to surviving spouse to take share of decedent's estate. (N.Y. Est. Powers & Trust Law §5-1.1-A[a] [NYCLS]). Decedent's estate includes following testamentary substitutes: (a) gifts causa mortis; (b) transfers of property (including releases and relinquishments of property interests) made after Aug. 31, 1992 and within one year of death to extent decedent did not receive consideration, other than gifts excluded from gift tax under I.R.C. §2503(b) or (e); (c) moneys deposited by decedent in name of decedent in trust for another; (d) moneys deposited after Aug. 31, 1996 by decedent in name of decedent and another person in joint bank accounts; (e) contributions by decedent to joint tenancy with right of survivorship or tenancy by entirety where disposition was made after Aug. 31, 1966 or where property held prior to date of death by decedent but which payable on death to person other than decedent or his estate; (f) any disposition by decedent to extent after Aug. 31, 1992 decedent retained power to revoke, consume, invade or dispose and to extent decedent did not receive consideration; (g) to extent of 50% of capital value thereof, moneys or other property payable under thrift, savings, retirement, pension, deferred compensation, death benefit, stock bonus or profit-sharing plan, account, arrangement, system or trust unless decedent designated beneficiary on or before Sept. 1, 1992; (h) any property over which decedent held presently exercisable general power of appointment immediately before his or her death, or which he or she released or exercised within one year of death in favor of any person other than himself or herself or his or her estate; and (i) transfer of security to beneficiary pursuant to N.Y. Est. Powers & Trust Law art. 13 [NYCLS], pt. 4. (N.Y. Est. Powers & Trust Law §5-1.1-A[b] [NYCLS]). Surviving spouse's elective share is greater of $50,000 (or, if value of net estate is less than $50,000, such value) or one-third of decedent's net estate. (N.Y. Est. Powers & Trust Law §5-1.1-A[a][2] [NYCLS]). In computing net estate, debts, administration expenses and reasonable funeral expenses will be deducted, but all estate taxes will be disregarded. Share of testamentary provisions (dispositions made by will, distributions of property pursuant to intestacy rules, and testamentary substitutes) to which surviving spouse entitled is his or her elective share reduced by value of any interest that passes absolutely to spouse by will, intestacy or testamentary substitute. Where decedent dies after Sept. 1, 1992 but before Sept. 1, 1994, following rules apply: surviving spouse has right to take elective share absolutely, where share does not exceed $50,000, in lieu of testamentary provision. (N.Y. Est. Powers & Trust Law §5–1.1–A[a][5]). Where elective share exceeds $50,000 and: (i) decedent has created by will life income trust for benefit of spouse in amount at least equal to elective share, or (ii) decedent has made absolute testamentary provision for less than $50,000 to spouse and also testamentary provision in trust with income payable to spouse for life in amount at least equal to difference between absolute amount and elective share, surviving spouse has limited right to take total amount of $50,000 absolutely. Where absolute testamentary provision of at least $50,000 absolutely made for surviving spouse, and testamentary trust provision with income payable to spouse for life in amount at least equal to balance of elective share, surviving spouse has no right of election. Where aggregate of absolute testamentary provision for spouse and principal of trust for spouse is less than elective share, surviving spouse has limited right to take difference between aggregate and elective share. Surviving spouse has limited right to withdraw $50,000 (inclusive of any absolute testamentary provision) if elective share is equal to or greater than $50,000. (N.Y. Est. Powers & Trust Law §5-1.1[c][1][D]-[K] [NYCLS]).

Right of election not available to surviving spouse where (1) final decree of divorce or of annulment, or judgment declaring nullity of marriage or dissolving marriage for absence, was in effect and recognized as valid in N.Y., or, if not so recognized, was obtained by surviving spouse; or (2) marriage was void as incestuous, bigamous, or prohibited; or (3) final decree of separation, recognized as valid in N.Y., was rendered against surviving spouse and such decree was in effect when deceased spouse died; or (4) surviving spouse abandoned deceased spouse, and abandonment continued until death; or (5) spouse failed or refused to provide for other spouse, unless marital duty was resumed and continued until death of spouse in need of support. (N.Y. Est. Powers & Trust Law §5-1.2 [NYCLS]). Right of election does not extend to decedent's proportionate interest in community property. (N.Y. Est. Powers & Trust Law §6-6.3 [NYCLS]).

Contribution.

Where surviving spouse elects against will, or afterborn child claims intestate share, each beneficiary other than surviving spouse must contribute pro rata to make up necessary fund, except that as to afterborn child, character of testamentary plan must be preserved to greatest extent possible. (N.Y. Est. Powers & Trust Law §§5-1.1[d][3] [NYCLS], 5-1.1-A[c][2] [NYCLS], 5-3.2[b] [NYCLS]; 160 Misc. 844, 290 N.Y.S. 822; see also, 224 N.E.2d 705; 278 N.Y.S.2d 192).

Foreign Executed Wills.

Will executed as prescribed by laws of N.Y., or of testator's domicile at time of execution or death, or place of execution at time of execution, admissible to probate, if in writing and signed by testator. Testamentary disposition of personal property intrinsically valid under law of jurisdiction in which testator domiciled at time will executed is not affected by subsequent change of domicile. (N.Y. Est. Powers & Trust Law §3-5.1[c] [NYCLS], [d] [NYCLS]).

Foreign Probated Wills.

Written will operable upon property in N.Y. must be admitted to probate by surrogate's court having jurisdiction over property upon proof that it has been admitted to probate at, or established under law of, testator's domicile and has not there been contested. (N.Y. Surr. Ct. Proc. Act §1602 [NYCLS]). See also topic 13.10 Executors and Administrators, subhead Special Kinds of Administration, catchline Ancillary Administration.

Authentication of Foreign Wills or Letters.

In any case in which foreign will or letters are required to be proved under Art. 16 of Surrogate's Court Procedure Act [NYCLS] (relating to foreign estates), will or letters must be authenticated as provided in Civil Practice Law and Rules. (N.Y. Surr. Ct. Proc. Act §1614 [NYCLS]).

Simultaneous Death.

See topic 13.05 Death, subhead Survivorship.

Testamentary Trusts.

See topic 13.15 Trusts.

Similar legislation to Uniform Anatomical Gift Act adopted. (N.Y. Pub. Health Law §§4300 to 4310 [NYCLS]).

14 FAMILY

14.01 ADOPTION:

Adoption is a judicial proceeding, and order of adoption is treated as judgment. (N.Y. Dom. Rel. Law §110 [NYCLS]).

Adult unmarried person or adult husband and adult wife together may adopt another person. Adult married person living apart from spouse pursuant to decree or judgment of separation, written separation agreement, or for at least three years prior to adoption proceedings who adopts another person will be sole adoptive parent and such adopted person shall not be deemed child or stepchild of non-adopting spouse for purposes of inheritance, support rights, or obligations. Adult or minor husband and wife, together or separately, may adopt child of either born out of wedlock. (N.Y. Dom. Rel. Law §110 [NYCLS]).

Consent Required.

(1) Of adoptive child if over 14 years of age unless court dispenses with it; (2) of parents or surviving parent of child conceived or born in wedlock; (3) of mother of child born out of wedlock; (4) of father of child born out of wedlock and (a) placed with adoptive parents more than six months after birth, but only if father maintained substantial contact with child, or (b) child is under six months at time placed for adoption, but only if father satisfied certain conditions showing he has maintained contact with child; (5) of any person or authorized agency having lawful custody of adoptive child. (N.Y. Dom. Rel. Law §111[1] [NYCLS]). No consent is required of parent: (1) Who evinces intent to forego parental or custodial rights and obligations by failing for six months to visit and communicate with child; (2) who has surrendered child to authorized agency for adoption; (3) for whose child guardian has been appointed; (4) who by reason of mental illness or retardation is unable to provide proper care for child; (5) who by execution of irrevocable instrument has denied paternity of child or has consented to other parent's surrender of child or has consented to child's adoption. (N.Y. Dom. Rel. Law §111[2] [NYCLS]). Notice of proposed adoption must be given to person whose consent to adoption is required and opportunity to be heard may be afforded to parent whose consent to adoption may not be required. Notice or process in adoption proceeding need not contain name of person seeking to

adopt child. (N.Y. Dom. Rel. Law §111[3] [NYCLS]). Notice must be given to man adjudicated to be, claiming to be, recorded on child's birth certificate as, living openly with mother and child while claiming to be, or identified by mother in written sworn statement as child's father. It must also be given to any man married to child's mother within six months after child's birth and to any person who has filed instrument acknowledging paternity with putative father registry. (N.Y. Dom. Rel. Law §111-a [NYCLS]). If adoptive child is over age 18, consent of parent not required and court in its discretion may dispense with consent of agency. (N.Y. Dom. Rel. Law §111[4] [NYCLS]). Adoptive child once adopted may be readopted directly from adoptive parents without consent of birth parents, but in such case court may require that notice be given birth parents. (N.Y. Dom. Rel. Law §111[5] [NYCLS]).

Jurisdiction.

Family Court has original jurisdiction concurrent with Surrogate's Court under N.Y. Dom. Rel. Law art. 7. (N.Y. Fam. Ct. Act §641 [NYCLS]).

Venue.

If adoption petition is filed pursuant to N.Y. Dom. Rel. Law §112[8] [NYCLS], N.Y. Soc. Serv. Law §383-c[10] [NYCLS] or N.Y. Soc. Serv. Law §384-b[11] [NYCLS], petition shall be filed in county where termination of parental rights proceeding or judicial surrender proceeding is pending. In any other agency adoption proceeding petition shall be filed in county where adoptive parents reside, or, if such adoptive parents do not reside in N.Y., in county where adoptive child resides or authorized agency has its principal office. (N.Y. Dom. Rel. Law §§115[2] [NYCLS], 113[3] [NYCLS]).

Condition Precedent.

Where adoptive child is under 18, no order of adoption may be made until such child has resided with adoptive parents for three months, unless court dispenses with this requirement. (N.Y. Dom. Rel. Law §112[6] [NYCLS]).

Religious Faith.

When practicable court must give custody only to persons of same religious faith as adoptive child. (N.Y. Dom. Rel. Law §113[3] [NYCLS]; N.Y. Soc. Serv. Law §373[3] [NYCLS]).

Procedure in Adoption from an Authorized Agency.

Appearances.

Adoptive parent or parents and adoptive child must appear for examination before judge or surrogate in county where adoptive parents reside or if parents reside outside state, in county where authorized agency has its principal office unless judge or surrogate in his discretion dispenses with personal appearance of adoptive child or adoptive parent who is on active duty in U.S. armed forces. (N.Y. Dom. Rel. Law §112[1] [NYCLS]).

Petition.

Adoptive parent(s) and adoptive child, if over 18, must present to court petition stating various facts, together with agreement of adoptive parents to adopt and treat child as their own and necessary consents. (N.Y. Dom. Rel. Law §112[2] [NYCLS], [3] [NYCLS]). Petition must be verified, agreements and consents acknowledged and necessary proof given before judge or surrogate; but where verification, agreement or necessary consent is duly acknowledged or proved and certified in form sufficient to entitle conveyance to be recorded in New York (except when executed and acknowledged in New York, no county clerk certificate required), order of adoption may be granted without personal appearance of such person or persons for good cause shown, which must be recited in order of adoption. (N.Y. Dom. Rel. Law §112[5] [NYCLS]). Full name of child must appear, not in petition, but in schedule verified by official of authorized agency annexed thereto. (N.Y. Dom. Rel. Law §112[3] [NYCLS]). Surname of child must not appear in title of any papers in proceeding, nor in documents signed by adoptive parents (N.Y. Dom. Rel. Law §112[4] [NYCLS]) nor may it be disclosed to adoptive parents except on court order (N.Y. Dom. Rel. Law §114[2] [NYCLS]).

Investigation.

Before making order of adoption the judge or surrogate must: (1) Inquire of Department of Social Services whether adoptive parent is subject of report; and (2) make disinterested person or authorized agency investigate allegations and any other relevant facts. Written report of investigation must be submitted before adoption order is made. (N.Y. Dom. Rel. Law §112[7] [NYCLS]).

Child in Custody of Authorized Agency.

Authorized agency may consent to adoption of minor whose custody and guardianship has been transferred to such agency or whose care and custody has been transferred to such agency pursuant to N.Y. Fam. Ct. Act §1055 [NYCLS] or N.Y. Soc. Serv. Law §384 [NYCLS]–a, where parents are deceased or where one parent is deceased and other parent is not entitled to notice pursuant to N.Y. Dom. Rel. Law §§111 [NYCLS], 111 [NYCLS]–a. Agreement of adoption is executed by agency. Proceedings must be instituted in county where adoptive parents reside or, if they are nonresidents of New York, in county where agency has its principal office. Neither agency nor any officer thereof need appear before court. Court may accept report of agency verified by one of its officers as report of investigation required by N.Y. Dom. Rel. Law §112 [NYCLS]. (N.Y. Dom. Rel. Law §113 [NYCLS]).

Procedure in Private Placement Adoption.

Proceedings.

Private placement adoptions effected in same manner as adoptions from authorized agency except: (1) Proceedings must be instituted in county where either adoptive parent resides or, if neither resides in New York, then county where adoptive child resides; (2) in addition to adoptive parents and adoptive child, all persons whose consent is necessary must appear for examination, but judge or surrogate may in his discretion dispense with appearance by adoptive child or adoptive parent on active duty in U.S. armed forces; (3) adoptive parents seeking to commence private-placement adoption prior to transfer in physical custody must be certified as qualified adoptive parents by court prior to filing petition; (4) agreement of adoption must be executed by adoptive parent(s); (5) certain additional information is required by petition or affidavit; (6) facts required in verified schedule in agency adoption shall be set forth in petition; and (7) child's surname may be disclosed to adoptive parents. (N.Y. Dom. Rel. Law §115 [NYCLS]). If custody is transferred to adoptive parent for purposes of adoption and consent to adoption has been executed, adoptive parent must file petition for adoption or for temporary guardianship pursuant to N.Y. Surr. Ct. Proc. Act §1725 [NYCLS] within ten court days of taking custody. (N.Y. Dom. Rel. Law §115-c [NYCLS]). Special provision similar to §115 relates to children brought into state including children whose adoption has already been finalized in country of their birth, outside U.S. This provision also provides for pre-adoption procedures to assure that federal immigration requirements are satisfied. (N.Y. Dom. Rel. Law §115-a [NYCLS]). Special provision makes consent irrevocable 45 days after execution of consent, or 20 days after receipt of notice pursuant to N.Y. Surr. Ct. Proc. Act §1725 [NYCLS], whichever is later. If birth parents revoke consent before end of 45 day period, birth parents have no custody right superior to that of adoptive parents. Hearing at which best interests of child are determined must be held if court receives notice from adoptive parents, within 15 days of date of notice of revocation, that they intend to oppose revocation. (N.Y. Dom. Rel. Law §115-b[6] [NYCLS]).

If adoptive child is under 18 no order of adoption can be made until three months after petition is filed unless spouse of adoptive parent is birth parent of child and child has resided with birth parent and adoptive parent for more than three months. Such period may be shortened by judge or surrogate for good cause which must appear in order of adoption. (N.Y. Dom. Rel. Law §116[1] [NYCLS]).

Investigation.

Prior to submission of petition for adoption, adoptive parents must submit petition for certification as qualified adoptive parents. Investigation must be made by qualified disinterested person. (N.Y. Dom. Rel. Law §115 [NYCLS]–d[1]). In addition, court will order criminal history record which will disqualify individuals with past convictions for certain felonies. (N.Y. Dom. Rel. Law §115 [NYCLS]–d[3–a]). Upon receiving investigation report and criminal history record, court may certify adoptive parents. Adoptive parents then may take physical custody of child and file petition for adoption. (N.Y. Dom. Rel. Law §115-d[6] [NYCLS]).

After receiving petition for adoption, court may order additional investigations of adoptive parents, and if investigations give apparent cause, may require adoptive parents to show cause why child should not be removed. If welfare of child requires it, court may return child to birth parent, place child with authorized agency, or transfer child to family court. (N.Y. Dom. Rel. Law §116[2] [NYCLS], [3] [NYCLS]).

Order.

If satisfied that best interests of adoptive child will be promoted thereby, court must make order approving adoption and may direct that child's medical history be furnished to adoptive parents, and if satisfied that no reasonable objection exists, must order change of name of adoptive child as requested. Fact that adoptive child was born out of wedlock must not appear in such order. Order must contain new name, date and place of birth of child. Order must be filed with court granting adoption and entered in books kept under seal. All papers pertaining to adoption must be kept as permanent court record, but must be sealed and kept from inspection. Order for access to records may be granted only by court making order of adoption or by justice of supreme court, and only after notice to adoptive parents and on good cause shown. Order for adoption may be opened, set aside or vacated. Certified copy of order may issue to agency in proceeding prior to sealing, but otherwise only on court order. No disclosure of surname of child to adoptive parents permitted except on court order. (N.Y. Dom. Rel. Law §114 [NYCLS]).

Name.

See subhead Order, supra.

Effect of Adoption.

After making order of adoption, birth parents of adoptive child are relieved of all parental duties. Child adopted after Mar. 1, 1964 does not retain right to inherit from birth family upon making of order of adoption but will inherit from his adoptive parents and their kindred. All inheritance rights by adopted child from his birth parents are terminated, except where birth parent remarries and consents to adoption of child in which case, adopted child only inherits through birth parent who has remarried and consented to adoption and not from other birth parent. Where adoptive parent is married to birth parent, or is birth grandparent or descendant of birth grandparent, adopted child can inherit through birth grandparents or descendants of birth grandparents dying after Aug. 31, 1987. Adopted and birth children have all rights of fraternal relationship, including inheritance from each other. Right of inheritance of adoptive child extends to distributees of such child. (N.Y. Dom. Rel. Law §117 [NYCLS]).

Wills of persons dying after Mar. 1, 1964 or inter vivos instruments theretofore executed which are subject to revocation or amendment are affected by this law, otherwise provisions of this section in effect prior to that date shall be applicable. (N.Y. Dom. Rel. Law §117 [NYCLS]).

Setting Aside Adoption.

See subhead Order, supra.

Surrogate Parenting.—Payments or receipts of payments of compensation in connection with surrogate parenting are prohibited, except for payments for reasonable medical expenses and payments in connection with adoption of child pursuant to N.Y. Soc. Serv. Law §374 [NYCLS] and disclosed pursuant to §115(8) of this Chapter. (N.Y. Dom. Rel. Law §123[1] [NYCLS]).

14.02 ALIMONY:

See topic 14.06 Divorce.

14.03 COMMUNITY PROPERTY:

System does not pertain in N.Y. As to estate tax on such property held under laws of another jurisdiction, see category 22 Taxation, topic 22.07 Estate Tax, subhead N.Y. Estate Tax Deductions for decedents dying before Feb. 1, 2000.

14.04 DESERTION:

See topics 14.06 Divorce, 14.09 Husband and Wife, subhead Support.

14.05 DISSOLUTION OF MARRIAGE:

See topic 14.06 Divorce.

14.06 DIVORCE:

This subject governed by Domestic Relations Law.

Grounds for Absolute Divorce.

Grounds include: (1) Cruel and inhuman treatment such that defendant's conduct so endangers plaintiff's physical or mental well-being as to render cohabitation unsafe or improper; (2) abandonment by defendant for one year; (3) imprisonment of defendant for three consecutive years after marriage; (4) adultery by defendant; or (5) living apart for one year pursuant to separation decree, judgment or written agreement, with satisfactory proof of substantial performance of same. (N.Y. Dom. Rel. Law §170 [NYCLS]).

Defenses.

Plaintiff is not entitled to divorce on ground of adultery if: (1) Offense was committed by procurement or with connivance of plaintiff; (2) offense has been forgiven, which may be proved affirmatively or by voluntary cohabitation with knowledge; (3) action is not commenced within five years after discovery of offense charged; or (4) plaintiff has also been guilty of adultery under such circumstances that defendant would have been entitled, if innocent, to divorce. (N.Y. Dom. Rel. Law §171 [NYCLS]).

Grounds for Legal Separation.

Grounds include: (1) Cruel and inhuman treatment such that defendant's conduct so endangers plaintiff's physical or mental well-being as to render cohabitation unsafe or improper; (2) abandonment by defendant; (3) neglect or refusal of defendant to provide for spouse where defendant chargeable with such support; (4) adultery by defendant, unless: (a) such offense is committed by procurement or with connivance of plaintiff, (b) there is voluntary cohabitation of parties with knowledge of offense, (c) action was not commenced within five years after discovery of offense charged, or (d) plaintiff has also been guilty of adultery under such circumstances that defendant would have been entitled, if innocent, to divorce; or (5) imprisonment of defendant for three consecutive years after marriage. (N.Y. Dom. Rel. Law §200 [NYCLS]).

Defenses.

Misconduct of plaintiff is valid defense in separation action. (N.Y. Dom. Rel. Law §202 [NYCLS]).

Revocation.

Upon joint application of parties, accompanied with satisfactory evidence of reconciliation, court that rendered judgment for separation may revoke it, subject to regulations and restrictions that court deems appropriate. (N.Y. Dom. Rel. Law §203 [NYCLS]).

Residence Requirements.

Action for divorce or separation may be maintained if: (1) Parties were married in state and either party is resident when action is commenced and for continuous period of one year immediately preceding; (2) parties have resided in state as husband and wife and either is resident when action commenced and for continuous period of one year immediately preceding; (3) cause occurred in state and either party has been resident for continuous period of one year immediately preceding commencement of action; (4) cause occurred in state and both parties are residents at time of commencement of action; or (5) either party has been resident for continuous period of two years immediately preceding commencement of action. (N.Y. Dom. Rel. Law §230 [NYCLS]). Person dwelling in state when action is commenced is deemed resident although spouse resides elsewhere. (N.Y. Dom. Rel. Law §231 [NYCLS]).

Jurisdiction.

Supreme Court has jurisdiction over matrimonial cases. (41 N.Y.2d 71, 390 N.Y.S.2d 875, 359 N.E.2d 384). Family Court has jurisdiction over various proceedings including applications for support, maintenance and distribution of marital property, and custody in matrimonial actions referred by Supreme Court. (N.Y. Fam. Ct. Act §§115 [NYCLS], 411 [NYCLS], 465 [NYCLS], 466 [NYCLS], 467 [NYCLS]).

Venue.

See category 5 Civil Actions and Procedure, topic 5.26 Venue.

Limitation of Actions.

No action for divorce may be maintained on ground that arose more than five years before commencement of action unless ground is abandonment, adultery or living apart. (N.Y. Dom. Rel. Law §210 [NYCLS]). Limitation period also applies to separation actions unless ground is abandonment or adultery. (N.Y. Dom. Rel. Law §210 [NYCLS]). Time-barred incidents are admissible to prove cause of conduct. (188 A.D.2d 953, 591 N.Y.S.2d 903).

Process.

Summons must contain words “Action for a divorce” or “Action for a separation” unless complaint is served with summons; affidavit of service must state that such notice appeared thereon. Affidavit must also state, in addition to usual requirements, what knowledge affiant has that person served was defendant named and how he acquired such knowledge. (N.Y. Dom. Rel. Law §232 [NYCLS]).

Confidentiality.

Documents in matrimonial action, including final judgment, may be released to nonparty only by court order. Anyone may obtain certificate of disposition of case, which shall be accepted as proof of dissolution of marriage by issuers of marriage licenses. Court may exclude nonparties from courtroom during testimony. (N.Y. Dom. Rel. Law §235 [NYCLS]).

Pleading.

Action commenced by filing summons. (N.Y. Dom. Rel. Law §232 [NYCLS]; N.Y. C.P.L.R. 304[a] [NYCLS]). When pleading adultery charges, answer need not be verified except as to any counterclaim contained in such answer. All other pleadings must be verified. (N.Y. Dom. Rel. Law §211 [NYCLS]).

Co-respondent may defend so far as issues affect him. (N.Y. Dom. Rel. Law §172[1] [NYCLS]).

Permanent Alimony.

In matrimonial proceedings after July 18, 1980, court may, in its discretion, require either spouse to support other as justice requires, having regard to specified considerations:,income and property of the respective parties, duration of marriage and age and health of both parties, present and future earning capacity of both parties, ability of party seeking maintenance to become self-supporting, reduced or lost lifetime earning capacity of party seeking maintenance as result of having foregone or delayed education or other career opportunities, presence of children, tax consequences to each party, and contributions of party seeking maintenance in various capacities including contribution to career of other party, wasteful dissipation of marital property, transfers or encumbrances made in contemplation of matrimonial action, and other factors court finds just and proper. (N.Y. Dom. Rel. Law §236 [NYCLS], Part B[6]). There shall be compulsory financial disclosure by both parties. (N.Y. Dom. Rel. Law §236 [NYCLS], Part B[4]). Court is required to set forth reasons for its decision. Absent maintenance agreement, court may annul or modify prior maintenance order or judgment upon showing of substantial change in circumstance, unless separation agreement remains in force, in which case court can modify upon showing of extreme hardship. (N.Y. Dom. Rel. Law §236 [NYCLS], Part B[9][b]). Either or both parents to pay temporary child support. (N.Y. Dom. Rel. Law §§236 [NYCLS], Part B[7][a], 240). Maintenance terminates on death or remarriage (valid or invalid) of recipient and order may be annulled if wife lives with another man and holds herself out as his wife. (N.Y. Dom. Rel. Law §§236 [NYCLS], Part B[1][a], 248). Alimony or maintenance may be suspended if custodial parent receiving it interferes with visitation rights. (N.Y. Dom. Rel. Law §241 [NYCLS]). In alimony, maintenance or support proceedings both parties must disclose their financial state. (N.Y. Dom. Rel. Law §236 [NYCLS], Part A[2]). Spouse may be required to give security for maintenance or support payments, and upon nonpayment his or her property may be sequestered and receiver appointed (N.Y. Dom. Rel. Law §§233 [NYCLS], 236 [NYCLS], Part B[9][a], 243; N.Y. Fam. Ct. Act §429 [NYCLS]) or court may direct entry of judgment against him or her for arrears plus interest (N.Y. Dom. Rel. Law §244 [NYCLS]) or he or she may be punished for contempt (N.Y. Dom. Rel. Law §245 [NYCLS]). Attorneys fees may be awarded for wilful failure to provide support and maintenance. (N.Y. Dom. Rel. Law §237[c] [NYCLS]). Wage or pension attachment authorized in certain cases. (N.Y. C.P.L.R. 5241 [NYCLS]). Remaining restrictions based on sex are of doubtful constitutionality. (440 U.S. 268).

Temporary Alimony.

Court may order temporary maintenance based on specific factors including: (1) Standard of living during marriage; (2) whether party seeking maintenance lacks sufficient property and income to provide for reasonable needs; (3) whether other party has sufficient property or income to provide for reasonable needs of spouse seeking maintenance; and (4) circumstances of case and of respective parties. (N.Y. Dom. Rel. Law §, Part B[6]).

Division of Property of Spouses.

See subhead Property Rights, infra.

Property Rights.

In proceedings commenced after July 18, 1980 for divorce or annulment (but not separation) or for distribution of property following foreign divorce, court shall determine respective rights of parties in “separate” and “marital” property and order disposition as follows: (1) “Separate” property shall remain such; (2) “marital” property shall be distributed equitably between parties, considering factors set forth in statute, and court must give reasons for factors it considered in its decision. “Marital property” means all property acquired by either or both spouses during marriage and before execution of separation agreement or commencement of matrimonial action, regardless of form in which title is held, except as otherwise provided in valid and enforceable agreement by parties. Marital property does not include “separate property”, which means: (1) Property acquired before marriage or property acquired by bequest, devise, or descent, or gift from party other than spouse; (2) compensation for personal injuries; (3) property acquired in exchange for or increase in value of separate property, except to extent such appreciation is due in part to contributions or efforts of other spouse; and (4) property described as such pursuant to valid and enforceable agreement by parties. Court, in its discretion, may make distributive award where equitable distribution is impracticable, burdensome, or contrary to law, or to supplement distribution of marital property. Court may fashion order regarding use and occupancy of marital home, regardless of ownership form. (N.Y. Dom. Rel. Law §, Part B[1]). Commencement of separation action does not terminate accrual of marital property. (80 N.Y.2d 553, 592 N.Y.S.2d 630, 607 N.E.2d 777).

Expenses.

Court may require either party to pay necessary expenses of other in prosecuting or defending action for divorce or separation (N.Y. Dom. Rel. Law §237[a] [NYCLS]) or in proceedings to enforce payment of alimony or support (N.Y. Dom. Rel. Law §238 [NYCLS]; N.Y. Fam. Ct. Act §438[a] [NYCLS]).

Change of Spouse's Name.

If divorce or annulment granted, each party may resume use of premarriage surname or other former surname. (N.Y. Dom. Rel. Law §240-a [NYCLS]).

Custody of Children.

In action for divorce or separation, court, by judgment or by prior or subsequent order, must give direction for custody and support and maintenance of any child as justice requires, having regard for circumstances of case, and of respective parties, and best interests of child. Property of either or both parents may be used. Such direction may be made notwithstanding refusal (except for lack of jurisdiction) to grant primary relief requested. On application and notice court may vary such direction even after entry of final judgment. Neither parent has prima facie right to custody of child. (N.Y. Dom. Rel. Law §240[1] [NYCLS]). Court required to consider specified factors when ordering child support. (N.Y. Dom. Rel. Law §240 [NYCLS][1–b][f]). Court required to consider domestic violence and certain convictions as factor in considering child custody and visitation proceedings. (N.Y. Dom. Rel. Law §240 [NYCLS]). Military service of either parent is cause for review of custody order and modification of order where in best interests of child. (N.Y. Dom. Rel. Law 240[a-2] [NYCLS]). Support orders of state with reciprocal support act may be registered in New York court, which will then treat them as though issued by New York court. Uniform Interstate Family Support Act adopted. (N.Y. Fam. Ct. Act §§580-101 to 580-905 [NYCLS]). Child custody proceedings filed in a court of competent jurisdiction in this state, involving a parent who is activated, deployed, or temporarily assigned to military service shall be governed by N.Y. Fam. Ct. Act § 651[f] [NYCLS] or N.Y. Dom. Rel. Law § 240[a-2] [NYCLS]. (N.Y. Military Law § 253).

Legitimacy.

If wife secures divorce, legitimacy of children born or begotten before action commenced is not affected. If husband secures divorce, legitimacy of children born or begotten before offense charged is not affected, but legitimacy of other children of wife may be determined as issue in action, presumption being in favor of legitimacy of children begotten before action commenced. (N.Y. Dom. Rel. Law §175 [NYCLS]).

Remarriage.

Whenever marriage has been dissolved by divorce, either party may marry again. (N.Y. Dom. Rel. Law §8 [NYCLS]). Under certain circumstances, before final judgment of divorce or annulment can be entered, parties must submit verified statement that verifying party has taken or will take all steps within his or her power to remove any barriers to remarriage of opposite party. (N.Y. Dom. Rel. Law §253[2] [NYCLS]).

Foreign Divorces.

Foreign state ex parte divorce must be recognized in N.Y. if adequate notice and opportunity to defend was given and plaintiff was domiciled in foreign state. (317 U.S. 287). Finding of domicile in ex parte divorce by foreign state may be readjudicated later by N.Y. court. (325 U.S. 226). Finding of domicile in divorce by foreign state where both spouses appeared may not be readjudicated later in N.Y. court if courts of foreign state would not hear such attack. (340 U.S. 581). Foreign ex parte divorce may not cut off defendant's right to support previously established in New York state (334 U.S. 541), and New York court may later grant alimony or maintenance despite foreign ex parte divorce obtained by spouse (N.Y. Dom. Rel. Law §, Parts A, B). See also subhead Custody of Children, supra.

Annulment or Dissolution of Marriage.

See topic 14.11 Marriage.

Antenuptial Contracts.

See topics 14.11 Marriage, 14.09 Husband and Wife.

14.07 [RESERVED]

14.08 GUARDIAN AND WARD:

Surrogate's court may appoint guardian to person, or property, or both, of infant who either: (1) Is domiciled in that county; (2) has sojourned therein immediately preceding application; or (3) has property situated therein. (N.Y. Surr. Ct. Proc. Act §§1701 [NYCLS], 1702 [NYCLS]).

Appointment of Guardian.

Petition for appointment of guardian may be made by any person on infant's behalf or by infant himself if 14 or older. Petition for appointment of guardian of property may also be made by public administrator of county in which infant resides when no one else available to serve. (N.Y. C.P.L.R. 1210[a] [NYCLS]; N.Y. Surr. Ct. Proc. Act §1703 [NYCLS]).

Selection of Guardian.

Same person may be guardian of both person and property. Selection is within court's discretion, and it may appoint person other than parent or petitioner's nominee. Court shall duly consider, when informed, whether infant, nominee of petitioner, petitioner, or any individual of majority who resides in home of proposed guardian is subject to N.Y. Soc. Serv. Law §412 [NYCLS] , statewide register of child abuse and maltreatment under Title 6 of Article 6 of New York Social Services Law [NYCLS] or is or has been subject of child protective proceeding under Article 10 of New York Family Court Act [NYCLS] which resulted in order finding that child is abused or neglected child. (N.Y. Surr. Ct. Proc. Act §1707[1] [NYCLS]). Guardian's term expires: (1) When infant attains age of 18; (2) after such other shorter period as surrogate's court may establish upon good cause shown; or (3) upon infant's marriage prior to attaining majority. (N.Y. Surr. Ct. Proc. Act §1707[2] [NYCLS]).

Qualification.

Property guardian must provide bond, unless guardian deposits property in financial institution subject to order of court and court approves joint control with financial institution. Court may also dispense with bond when it authorizes guardian to invest in government bonds, bills, or notes and directs deposit in joint custody with financial institution. Deposit or investment removed only with court order. (N.Y. Surr. Ct. Proc. Act §1708 [NYCLS]).

Natural Guardians.

A married woman is joint guardian of children with her husband. (N.Y. Dom. Rel. Law §81 [NYCLS]).

Appointment by Parent.

On death of either parent, survivor may dispose of custody of unmarried minor child during minority, or for any less time, to any person. Either parent, in lifetime of both, may by will, with written consent of other duly acknowledged, appoint such other parent and third person as guardians. Parent may validly provide by will for such guardian if at time of probate, other parent is dead, or adjudicated incompetent; if survivor becomes competent, he or she may seek revocation of appointment. If parents die simultaneously, then appointment of same person by both wills valid, but if wills make different appointments, surrogate's court shall determine which appointment will best serve welfare of infant. (N.Y. Dom. Rel. Law §81 [NYCLS]). Appointment presumed renounced if guardian does not qualify within three months of probate of will or recording of deed or if deed not recorded within three months of parent's death. (N.Y. Surr. Ct. Proc. Act §§1710 [NYCLS], 1711[1]-[2] [NYCLS]). Before guardian may act, will must be probated or deed recorded. (N.Y. Dom. Rel. Law §81 [NYCLS]). Guardian so appointed may take custody and charge of tuition of such minor, and may maintain an action for wrongful taking or detention of minor. Guardian must take custody and management of minor's personal estate and profits of his real estate, and may bring such actions in relation thereto as guardian in socage might. (N.Y. Dom. Rel. Law §82 [NYCLS]).

Guardianship in Socage.

Where a minor for whom no general guardian has been appointed acquires real property, guardianship in socage belongs to: (1) Parents jointly, or parent having legal or actual custody of infant; (2) surviving parent; or (3) if no father or mother, nearest and eldest relative. Rights of such guardian are superseded when testamentary or other guardian of property is appointed. (N.Y. Dom. Rel. Law §80 [NYCLS]).

Standby Guardians.

Surrogate's court may appoint standby guardian of person and/or property of infant whose authority becomes effective upon incapacity, consent or death of infant's parent or legal guardian; petition for judicial appointment only by parent or legal guardian; may designate standby guardian by means of written instrument whose authority becomes effective upon incapacity of infant's parent or legal guardian, or upon debilitation and consent of parent or legal guardian. Petition must state that petitioner suffers from either progressively chronic illness or irreversibly fatal illness and provide basis of such statement, without requiring identification of illness. (N.Y. Surr. Ct. Proc. Act §1726[3] [NYCLS]).

Guardianship by Agency.

Surrogate or family court judge may under certain circumstances appoint agency as guardian of destitute or dependent children. Surrender by parents of child to agency can be irrevocable after 30 days if instrument so states, and in any hearing arising out of surrender, parents have no superior custody rights. Best interests of child are determinative. (N.Y. Soc. Serv. Law §§383-84).

Duties of Guardian.

Court may direct guardian to apply infant's property to support and education (N.Y. C.P.L.R. 1211 [NYCLS]; N.Y. Surr. Ct. Proc. Act §1713[1] [NYCLS]; N.Y. Est. Powers & Trust Law §9-2.2[a] [NYCLS]) and agree to partition of infant's real property (N.Y. Real Prop. Acts. Law §1651 [NYCLS]). With approval of supreme court, guardian may exchange infant's real property, or any interest therein, for stocks and bonds of corporation formed to purchase same, where two-thirds in number and amount in interest of adults interested in such property have agreed to such exchange and certificate of incorporation prohibits investment in non-legals. (N.Y. Real Prop. Acts. Law §1641[1] [NYCLS]). Generally, guardian may sell personal property of infant without court order. (N.Y. Surr. Ct. Proc. Act §1723 [NYCLS]). If court enters dispositional order, counsel or law guardian must advise respondent in writing of right, reason, and procedure of appeal and serve and file necessary notice. (N.Y. Fam. Ct. Act §760[1] [NYCLS]).

Investments.

Such investments are governed by prudent man rule but fiduciary having special investment skill held to standard of prudent man possessing such special skills. (N.Y. Est. Powers & Trust Law §11-2.2[a][1] [NYCLS]). Investments in mutual funds authorized under certain conditions. (N.Y. Est. Powers & Trust Law §11-2.2[b] [NYCLS]).

Securities in Name of Nominee.

See category 13 Estates and Trusts, topic 13.15 Trusts, subhead Securities in Name of Nominee.

Gifts to Minors.

See topic 14.10 Infants.

Accounts.

Guardian of infant's property located within counties of New York City, Nassau, Orange, Suffolk and Westchester must account to court annually. (N.Y. Surr. Ct. Proc. Act §1719 [NYCLS]).

Marriage of Infant Ward.

Such marriage terminates guardianship of person but not guardianship of property. (N.Y. Dom. Rel. Law §84 [NYCLS]).

Waste.

Infant may maintain action for waste against guardian. (N.Y. Real Prop. Acts. Law §812 [NYCLS]).

Holding Over.

Guardian in possession of real property holding over is trespasser and liable for profits during wrongful occupation. (N.Y. Real Prop. Acts. Law §851 [NYCLS]).

Insane Person.

The settlement of estate on the death of incompetent person is same as that of any other person. No special statutes apply.

Incapacitated Persons.—Court may appoint guardian for person if court determines appointment necessary to provide for personal needs of that person, including food, clothing, shelter, health care, or safety and/or to manage property and financial affairs of that person, provided that person agrees to appointment or that person incapacitated as defined under Article 81 of New York Mental Hygiene Law. (N.Y. Mental Hyg. Law §81.02[a]). In deciding whether appointment necessary, court will consider report of evaluator, as required in (N.Y. Mental Hyg. Law §81.09[c][5]), and sufficiency and reliability of available resources, as defined in (N.Y. Mental Hyg. Law §81.03[e]) to provide for personal needs or property management without appointment of guardian. Appointed guardian will be granted only those powers necessary to provide for personal needs and/or property management of incapacitated person in such manner as appropriate to individual and must constitute least restrictive form of intervention. (N.Y. Mental Hyg. Law §81.02[a][2]). Both supreme court and county courts (outside New York City), have jurisdiction. (N.Y. Mental Hyg. Law §81.04[a]).

Art. 81 Proceeding.

Such proceeding is commenced by filing of petition with court by: (1) Alleged incapacitated person; (2) presumptive distributee of incapacitated person; (3) executor or administrator of estate incapacitated person may be beneficiary of; (4) trustee of trust incapacitated person may be beneficiary of; (5) person with whom incapacitated person resides; (6) person otherwise concerned with welfare of incapacitated person, including public agency; or (7) chief executive officer of facility in which person alleged to be incapacitated is patient or resident. (N.Y. Mental Hyg. Law §81.06). Upon filing petition with court, order to show cause and copy of petition will be served on those persons entitled to receive notice of petition to appoint guardian. (N.Y. Mental Hyg. Law §81.07[e], [g]). Petition must be verified under oath. (N.Y. Mental Hyg. Law §81.08[a]). Burden of proof on petitioner to show clear and convincing evidence. (N.Y. Mental Hyg. Law §81.12[a]). Court may appoint foreign guardian for incapacitated person not present in state. (N.Y. Mental Hyg. Law §81.18). At commencement of proceeding or at any subsequent stage of proceeding prior to appointment of guardian, court may appoint temporary guardian upon showing of danger in reasonably foreseeable future to health and well-being of alleged incapacitated person, or danger of waste, misappropriation, or loss of property of alleged incapacitated person. (N.Y. Mental Hyg. Law §81.23[a]). Court may issue temporary restraining order or injunction on any person, other than alleged incapacitated person, during period of person's incapacity. (N.Y. Mental Hyg. Law §81.23[b]). Guardian may be required to file bond. (N.Y. Mental Hyg. Law §81.25[a]). Court will establish plan for reasonable compensation of guardian. (N.Y. Mental Hyg. Law §81.28). When guardian ad litem applies to court for compensation for legal services, notice must be given to any attorney or person who appeared in proceeding for which guardian seeks allowance. (N.Y. Surr. Ct. Proc. Act §2111[1] [NYCLS]). Guardian must submit initial report to court no later than 90 days after issuance of commission to guardian (N.Y. Mental Hyg. Law §81.30[a]) and annual report thereafter (N.Y. Mental Hyg. Law §81.31).

Ancillary Letters of Guardianship.

Such letters may be issued to foreign guardian on petition to surrogate's court accompanied by proof that security has been given in foreign jurisdiction in at least value of personal property, and of rents and profits of real property of ward. (N.Y. Surr. Ct. Proc. Act §1716[1] [NYCLS]).

Uniform Fiduciaries Act.

Certain provisions adopted. N.Y. Gen. Bus. Law §§359 [NYCLS]–i, 359–1).

Uniform Simplification of Fiduciary Security Transfers Act.

Repealed. (N.Y. Gen. Bus. Law §§359 [NYCLS]–m through 359–w].

14.09 HUSBAND AND WIFE:

A married woman has all rights in respect to property, real or personal, and acquisition, use, enjoyment and disposition thereof, and to make contracts in respect thereto with any person, including her husband, and to carry on any business, trade or occupation, and to exercise all powers and enjoy all rights in respect thereto and in respect to her contracts, and be liable on such contracts and upon judgments, as if she were unmarried. (N.Y. Gen. Oblig. Law §3-301[1] [NYCLS]).

Antenuptial Contracts.

Written contracts in contemplation of marriage remain in full force after marriage. (N.Y. Gen. Oblig. Law §3-303 [NYCLS]). Agreements are valid and enforceable (whether made before or during marriage) if in writing, subscribed by parties and acknowledged or proven in manner required to entitle deed to be recorded. (N.Y. Dom. Rel. Law §, Part B[3]). Agreement may include contract to make testamentary provision of any kind, or waiver of right to elect against provisions of will; provide for ownership, division, or distribution of separate and marital property; provide for amount and duration of maintenance or other terms and conditions of marriage relationship subject to N.Y. Gen. Oblig. Law §5-311 [NYCLS], described below, provided such terms were fair and reasonable at time of making of agreement and not unconscionable at time of entry of final judgment; and provide for custody, care, education and maintenance of any child of parties subject to N.Y. Dom. Rel. Law §240 [NYCLS], which states that terms of custody, care, education and maintenance of any child of parties to matrimonial, separation or custody action will be directed by court in its discretion as justice requires, having regard for circumstances of case and of respective parties and for child's best interests. (N.Y. Dom. Rel. Law §, Part B[3]). Except as provided by (N.Y. Dom. Rel. Law), husband and wife cannot contract to alter or dissolve marriage or to relieve either spouse of liability to support other if in manner such that other spouse will become incapable of self-support and therefore be likely to become public charge. (N.Y. Gen. Oblig. Law §5-311 [NYCLS]).

Separate Property.

Property of wife is her sole and separate property and is not subject to husband's control or disposal or liable for his debts. (N.Y. Dom. Rel. Law §50 [NYCLS]).

Contracts of Married Woman.

Such contracts do not bind her husband and his property. (N.Y. Gen. Oblig. Law §3-305 [NYCLS]).

Agency.

Husband may constitute wife his agent, if facts warrant finding of authority. (61 A.D. 610, 70 N.Y.S. 19, 176 N.Y. 75, 68 N.E. 135).

Husband's Liability for Debts of Wife.

Husband's duty of support may make him liable for necessaries furnished to his wife. (165 N.Y. 435, 59 N.E. 270). Husband who acquires property of wife by antenuptial contract or otherwise, liable for her debts contracted before marriage to extent of property so acquired. (N.Y. Gen. Oblig. Law §3-307 [NYCLS]).

Rights of Action of Married Woman.

Married woman has cause of action in her own right for all wages, salary, profits, compensation, or other remuneration earned by her or derived from any business conducted by her, and husband has no right of action therefor unless she has otherwise expressly agreed with person obligated to pay. (N.Y. Gen. Oblig. Law §3-315[1] [NYCLS]). Married woman has right of action for injury to her person, property or character for injury arising out of marital relation as if unmarried. (N.Y. Gen. Oblig. Law §3-313[1] [NYCLS]). Any sums recovered in such action become separate property of wife. (N.Y. Gen. Oblig. Law §3-301[2] [NYCLS]).

Torts.

Married woman is liable for her torts, and husband is not liable therefor unless done by his actual coercion or instigation. (N.Y. Gen. Oblig. Law §3-313[1] [NYCLS]). No policy or contract shall be deemed to insure against any liability of insured because of death of or injuries to his or her spouse or because of injury to, or destruction of property of his or her spouse unless express provision relating specifically thereto is included in policy. This exclusion shall apply only where injured spouse, to be entitled to recover, must prove culpable conduct of insured spouse. (N.Y. Ins. Law §3420[g]).

Conveyances Inter Sese.

Husband and wife may convey real or personal property directly to one another without intervention of third party, and may partition or divide real property held by them as joint tenants, tenants in common or by entirety. If so expressed in instrument, dower (where right still exists—see category 21 Property, topic 21.08 Dower) and curtesy may be barred. (N.Y. Gen. Oblig. Law §3-309 [NYCLS]).

Marital relations of parties does not affect nature of transfer of personal property to them, regardless of source of consideration or identity of person making transfer. (N.Y. Gen. Oblig. Law §3-311 [NYCLS]).

Insurance.

Right of married person to insure life of spouse or another and to dispose of any interest in policy of insurance on their lives governed by Insurance Law and by statutes and rules of law governing rights of married person in respect to property and its acquisition, use, enjoyment and disposition. (N.Y. Dom. Rel. Law §52 [NYCLS]). See , N.Y. Ins. Law §§3212, 3420[g].

Community Property System.

Such system does not apply in N.Y.

Support.

Spouses liable for support of each other. (N.Y. Fam. Ct. Act §412 [NYCLS]).

Uniform Reciprocal Enforcement of Support Act.

Substantially adopted as Uniform Support of Dependents Law and repealed. (N.Y. Dom. Rel. Law §§30-43). Replaced by Uniform Interstate Family Support Act. (N.Y. Fam. Ct. Act art. 5-8).

Testimony.

See category 5 Civil Actions and Procedure, topic 5.13 Evidence, subhead Witnesses.

Domestic Violence.

N.Y. Fam. Ct. Act, N.Y. Crim. Proc. Law, N.Y. Dom. Rel. Law, N.Y. Pub. Health Law, amended by Family Protection and Domestic Violence Intervention Act of 1994 (effective Jan. 1, 1995). Family court and criminal court have concurrent jurisdiction over all family offenses, defined in N.Y. Fam. Ct. Act art. 8 [NYCLS], including harassment, menacing, reckless endangerment, assault and disorderly conduct, against spouse or children. (N.Y. Fam. Ct. Act §115[e] [NYCLS]).

14.10 INFANTS:

Age of majority is 18 for both sexes. (N.Y. Dom. Rel. Law §2 [NYCLS]).

Contracts.

Infant may disaffirm most contracts even after misrepresenting his age, if he disaffirms while infant or within reasonable time after reaching majority. (263 N.Y. 245, 188 N.E. 726). Exceptions include, among others, contracts: (1) For certain loans (N.Y. Gen. Oblig. Law §§3-101 [NYCLS], 3-103 [NYCLS]); (2) by married infant buying home (N.Y. Gen. Oblig. Law §3-101 [NYCLS]) or providing medical care for self or child (N.Y. Gen. Oblig. Law §3-102 [NYCLS]); (3) for services by or for infant performing artist or athlete, when judicially approved (N.Y. Gen. Oblig. Law §3-107 [NYCLS]; N.Y. Arts & Cult. Aff. Law §35.03); and (4) for life insurance by infant aged 14 years and six months or older (N.Y. Ins. Law §3207[a]).

Actions.

Infant may sue or be sued. Unless court appoints guardian ad litem, infant must appear by guardian of his property, or, if no such guardian, by parent having legal custody, or, if no such guardian or parent, by another person having legal custody or by adult spouse if married, or if no such person having legal custody or adult spouse, by guardian ad litem appointed by court on its own initiative or upon motion of infant if over 14, relative, friend, or guardian or conservator or other party to action of property committee. (N.Y. C.P.L.R. 1201 [NYCLS], 1202 [NYCLS]).

Power of Court to Direct Conveyance.

Court may direct conveyance of infant's real property, or interest therein, in certain cases. (N.Y. Real Prop. Acts. Law §1711 [NYCLS]).

Payment of Wages.

Such payment to minor valid unless claimed by notice in writing by parent or guardian within 30 days after commencement of service. (N.Y. Gen. Oblig. Law §3-109 [NYCLS]).

Support of Minor.

Each parent has support obligation. (N.Y. Fam. Ct. Act §413[1][a] [NYCLS]). No duty to support adopted child of spouse if such child was adopted after adopting spouse living separate and apart from nonadopting spouse pursuant to separation agreement or decree. However, failure to support infant under 16 years when able to do so may result in criminal liability. (N.Y. Penal Law §§260.05 [NYCLS], 260.06 [NYCLS]). Voluntary termination of employment, reduction of earning capacity or failure to diligently seek employment also constitute non-support, carrying criminal penalties. (N.Y. Penal Law 260.05[2] [NYCLS]).

Parental Responsibility.

For intentional torts of infant over ten years old, parent liable for up to $5,000, and in case of certain types of intentional torts against public officers, public property, and private individuals and property, unless child was emancipated from parent prior to occurrence of damage (N.Y. Gen. Oblig. Law §3-112[1] [NYCLS]).

Adoption.

See topic 14.01 Adoption.

Revised Uniform Gifts to Minors Act.

Act adopted and repealed. (N.Y. Est. Powers & Trust Law §§7-4.1 to 7-4.13 [NYCLS]).

Testamentary Capacity of Infant.

See category 13 Estates and Trusts, topic 13.16 Wills.

Marriage.

See topic 14.11 Marriage.

Arbitration of Controversy.

For controversy to which infant is party, see category 9 Dispute Resolution, topics 9.01 Alternative Dispute Resolution, 9.02 Arbitration and Award.

Disposition of Property.

For property to which infant is entitled, see N.Y. C.P.L.R. 1206 [NYCLS].

Settlement of Infant's Claim.

Such settlement requires court approval. N.Y. C.P.L.R. 1207 [NYCLS], 1208 [NYCLS] sets forth procedure. See also N.Y. Surr. Ct. Proc. Act §2220 [NYCLS].

Labor.

See category 11 Employment, topic 11.02 Labor Relations.

Termination of Parental Rights.

Guardianship and custody of destitute or dependent child may be committed to authorized agency or foster parent where it is found by clear and convincing evidence that child has been abandoned, severely or repeatedly abused or permanently neglected by natural parent or parents, or if parents by reason of mental illness and retardation are unable to provide proper and adequate care. (N.Y. Soc. Serv. Law §384-b [NYCLS]). Parent or guardian has right to legal representation prior to signing instrument transferring care and custody of child to authorized agency. (N.Y. Soc. Serv. Law §384-a[2][c] [NYCLS]).

14.11 MARRIAGE:

Any person under 14 may not marry. Knowingly issuing license to such person is misdemeanor. (N.Y. Dom. Rel. Law §15-a [NYCLS]). Marriage in violation of this section voidable, not void. (176 Misc. 850, 29 N.Y.S.2d 331). If it appears to clerk that either applicant is under 18, he must require documentary proof of actual age. (N.Y. Dom. Rel. Law §15[2] [NYCLS]).

Consent Required.

If person under 16, written approval of supreme court justice or judge of family court having jurisdiction over town or city in which application is made is also necessary. If parent of minor has been adjudicated incompetent, clerk may issue license upon production of judgment and consent of other parent. If minor's parents are divorced, consent of custodial parent sufficient. (N.Y. Dom. Rel. Law §15[3] [NYCLS]).

Medical Examination.

Test for sickle cell anemia may be required of certain applicants. (N.Y. Dom. Rel. Law §13-aa [NYCLS]).

License.

License must be obtained from town or city clerk and delivered (within 60 days) to clergyman, magistrate or judge who will officiate. (N.Y. Dom. Rel. Law §13 [NYCLS]). Both applicants must appear in person, provide certain facts and state that no legal impediment to right to marry exists. Previously married applicant must state in affidavit of application whether former spouse is dead or alive; if applicant divorced; and, if so, details of divorce. (N.Y. Dom. Rel. Law §15[1][a] [NYCLS]). Clerk issuing license must make information concerning rubella available to applicants. (N.Y. Dom. Rel. Law §13-d[1] [NYCLS]).

Waiting Period.

Marriage may not be solemnized within 24 hours after issuance of license but in emergency, court may authorize earlier solemnization. Order must be filed with clergyman or magistrate performing ceremony, who must file it with clerk issuing license. Marriage may not be solemnized more than 60 days after issuance of license. (N.Y. Dom. Rel. Law §13-b [NYCLS]).

Ceremonial Marriage.

Marriage must be solemnized by: (1) Clergyman or minister, or leader of certain ethical culture societies; (2) mayor of village or mayor, recorder, city magistrate, police justice or police magistrate of city (mayor and police justice only, in cities of over 100,000 and under 1,000,000 inhabitants), county executive, or, in first class cities of over 1,000,000 inhabitants, city clerk or any of his deputies or not more than four regular clerks designated by him; (3) judge of federal circuit court of appeals for second circuit, judge of federal district court for northern, southern, eastern or western district of N.Y., judge of U.S. court of international trade, federal administrative law judge presiding in state or justice or judge of unified court system, or certified retired town or village judge, or housing judge of The City of New York or retired housing judge or clerk of Appellate Division of supreme court in each judicial department, or county clerk of county wholly within cities having population of 1,000,000 or more; (4) retired city clerk who served for more than ten years in such capacity in city having population of one million or more; or (5) written contract of marriage signed by both parties and at least two witnesses, stating residence of each party and witnesses and date and place of marriage, and acknowledged before judge of court of record by parties and witnesses as required for acknowledgment of conveyance of real estate for record. Where either party is under 18, marriage can only be solemnized by certain authorities. (N.Y. Dom. Rel. Law §11 [NYCLS]). No particular ceremony is required when marriage is solemnized by clergyman or magistrate but parties must declare in presence of clergyman or magistrate and attending witness or witnesses that they take each other as husband and wife and at least one witness besides clergyman or magistrate must be present. Manner of solemnization of marriage of any denomination is not controlled by statute except such must be solemnized in manner heretofore practiced by such denomination. (N.Y. Dom. Rel. Law §12 [NYCLS]). In New York City, all persons authorized to perform marriage ceremony must register with city clerk. (N.Y. Dom. Rel. Law §11-b [NYCLS]).

Record.

See category 10 Documents and Records, topic 10.04 Records, subhead Vital Statistics.

Common Law Marriages.

Such marriages are now prohibited (N.Y. Dom. Rel. Law §11 [NYCLS]), but N.Y. recognizes common law marriages: (1) Entered into in N.Y. before Apr. 29, 1933 (288 N.Y. 211, 42 N.E.2d 491) or (2) valid where created (294 N.Y. 909, 63 N.E.2d 113).

Proxy Marriages.

Such marriages are not explicitly authorized by statute but are not contrary to public policy if valid in state where contracted. (192 Misc. 484, 77 N.Y.S.2d 246, aff'd, 275 A.D. 777, 87

N.Y.S.2d 707).

Voidable or Void Marriages.

Marriage voidable and may be annulled if either party thereto: (1) Is under age of 18 (at suit of such party or guardian, next friend or either parent of such party only, but granting of annulment in discretion of court); (2) is incapable of consenting to marriage for want of understanding; (3) is incapable of entering into married state from physical cause (suit must be brought within five years after marriage); (4) consented to marriage by reason of force, duress or fraud; or (5) has been irrevocably mentally ill for five years or more. (N.Y. Dom. Rel. Law §§7 [NYCLS], 140 [NYCLS]).

Marriage void: (1) When between following relatives (legitimate or illegitimate): (a) ancestor and descendant, (b) brother and sister (whole or half blood), or (c) uncle and niece or aunt and nephew (N.Y. Dom. Rel. Law §5 [NYCLS]); (2) if contracted by person whose spouse by former marriage living, unless former marriage has been annulled or dissolved. (N.Y. Dom. Rel. Law §§6 [NYCLS], 140 [NYCLS]).

Annulment.

Marriage cannot be annulled for nonage at suit of party of legal age when contracted, or of party who freely cohabited with another as spouse after attaining legal age. (N.Y. Dom. Rel. Law §140 [NYCLS]).

Trial by jury may be had in actions for annulment, unless such action based on physical incapacity. (N.Y. Dom. Rel. Law §143 [NYCLS]).

Under certain circumstances, before final judgment of divorce or annulment can be entered, parties must submit verified statement to effect that verifying party has taken or will take all steps within his or her power to remove any barriers to remarriage of opposite party. (N.Y. Dom. Rel. Law §253[3] [NYCLS]).

Residence Requirement.

Such requirements for action to annul voidable marriage or to declare nullity of void marriage are same as for actions for divorce or separation. See topic 14.06 Divorce, subhead Residence Requirements.

Custody and Child Support.

In action to annul voidable marriage or declare nullity of void marriage, court has same powers as in action for separation or divorce. See topic 14.06 Divorce, subhead Custody of Children.

Legitimacy.

If marriage is declared void or annulled, child born before or after marriage is legitimate child of both birth parents, for purposes of instrument executed after Apr. 30, 1969. (N.Y. Dom. Rel. Law §24 [NYCLS]).

Maintenance.

In action to annul marriage or declare nullity of void marriage, court has same powers as in action for separation or divorce. See topic 14.06 Divorce.

Dissolution.

Either party may have marriage dissolved after publication of notice and hearing on petition to supreme court showing that other party has been absent for five successive years without being known to petitioner to be living during that time, petitioner believes such party to be dead and diligent search has been made for evidence that such party is living, and none found. (N.Y. Dom. Rel. Law §221 [NYCLS]). Such relief available only if petitioner is resident and has resided in N.Y. for one year preceding commencement of action or matrimonial domicile was in N.Y. at time of disappearance. (N.Y. Dom. Rel. Law §220 [NYCLS]).

Antenuptial Contracts.

See topic 14.09 Husband and Wife.

14.12 MARRIED WOMEN:

See topics 14.06 Divorce, Husband and Wife, Marriage; categories 5 Civil Actions and Procedure, topic Evidence, subhead Witnesses; Debtor and Creditor, topic Homesteads; Documents and Records, topic Acknowledgments; Estates and Trusts, topics Executors and Administrators, Wills; Property, topic Dower.

15 HEALTH

15.03 DISEASES

AIDS/HIV

Testing to be anonymous. (N.Y. Pub. Health Law §2138 [NYCLS]). Test results to be confidential. (N.Y. Pub. Health Law §§ 2782 [NYCLS], 2785 [NYCLS]–a).

Commissioner authorized and directed to review any policy or practice instituted in facilities operated by the department of correctional services, and in all local correctional facilities regarding human immunodeficiency virus (HIV), acquired immunodeficiency syndrome (AIDS), and hepatitis C (HCV). (N.Y. Pub. Health Law § 206 [NYCLS]).

Informed Consent

The right of action to recover for medical, dental or podiatric malpractice based on a lack of informed consent is limited to those cases involving either (a) non-emergency treatment, procedure or surgery, or (b) a diagnostic procedure which involved invasion or disruption of the integrity of the body. (N.Y. Pub. Health Law § 2805 [NYCLS]–d).

No human research may be conducted in this state in the absence of the voluntary informed consent subscribed to in writing by the human subject. (N.Y. Pub. Health Law § 2442 [NYCLS]).

A practitioner may not administer, prescribe or dispense any such substance to any individual without first obtaining the informed consent of such individual, or where the individual lacks capacity to give such consent, a person legally authorized to consent on his or her behalf. (N.Y. Pub. Health Law § 3331 [NYCLS]).

Reporting

Each general hospital shall maintain a program capable of identifying and tracking hospital acquired infections for the purpose of public reporting. For hospital acquired infections for which the department requires tracking and reporting as permitted in this section, hospitals shall be required to report a suspected or confirmed hospital-acquired infection associated with another hospital to the originating hospital. Documentation of reporting should be maintained for a minimum of six years. (N.Y. Pub. Health Law § 2819 [NYCLS]).

16 INSURANCE

16.01 INSURANCE COMPANIES:

Regulation of Insurers.

Regulated by Chapter 28 of Consolidated Laws. Unless exempted, no one may do insurance business within state without license. (N.Y. Ins. Law §1102). Certain insurers are permitted to convert their form of ownership. (N.Y. Ins. Law §§7301-313). Reorganization of domestic mutual life insurer into domestic stock life insurer regulated by N.Y. Ins. Law §7312. Redomestication of foreign life insurance companies regulated by N.Y. Ins. Law §§7120, 7121. Property/casualty insurance companies regulated by N.Y. Ins. Law §§4101-4121. Co-operative property/casualty insurance companies regulated by N.Y. Ins. Law §§6601-6626. Captive insurance companies regulated. (N.Y. Ins. Law §§7001-7012). New York Property Insurance Underwriting Association established by Article 54. (N.Y. Ins. Law §§5401-5414). Legislation involving minimum standards for the form, content, and sale of health insurance, including standards for full and fair disclosure, became effective March 5, 2008. (N.Y. Comp. Codes R. & Regs. tit. 11, §52.1).

Supervision.

Overseen by Insurance Department headed by Superintendent of Insurance. (N.Y. Ins. Law §201). Superintendent must publish annual consumer guide ranking health insurers and entities certified pursuant to Article 44 of Public Health Law [NYCLS] from best to worst. (N.Y. Ins. Law §210[a]). Superintendent must make available to insurance brokers information regarding long term health care insurance coverage and New York State partnership for long term care insurance coverage. (N.Y. Ins. Law §210-a). Supervised by Howard Mills, Insurance Department, 25 Beaver St., New York, NY 10004.

Rates and Rating Organizations.

Regulated by N.Y. Ins. Law §§2301-2351. Superintendent deals with rates not in compliance with law and insurers with inadequate surplus. (N.Y. Ins. Law §§2301-2303, 4117).

Unfair Methods of Competition.

Unfair trade practices, rebates, discrimination and other misconduct in insurance business regulated. (N.Y. Ins. Law §§2401-2409, 2601-2615, 3433).

Annual Statements.

Must be filed with Superintendent of Insurance on or before Mar. 1. (N.Y. Ins. Law §307[a][1]).

Policies.

Regulated in detail. Life, accident or health insurance policies (including Medicare supplemental insurance), or contracts of annuity, issued or delivered in state, regulated by N.Y. Ins. Law §§3201-3237. Insurance companies must inform holders of life insurance policies with cash surrender values at least annually, and at policyholders' written request, of amount of cash surrender value. (N.Y. Ins. Law §3211[g]). Medical malpractice insurance rates regulated. (N.Y. Ins. Law §2343). Forms of policies of life, industrial life, group life, accident or health, group or blanket accident or health, or noncancellable disability insurance, and forms of fraternal benefit certificates and of annuity or pure endowment contracts or group annuity contracts and of credit insurance must be filed with and approved by Superintendent of Insurance and must in substance contain certain standard provisions. (N.Y. Ins. Law §§3101-3113, 3201, 3203, 3215-3223, 3445, 4220-4221, 4235). Specific life insurance policy and costs and benefits disclosures must be made to prospective policy purchasers and to policy holders. (N.Y. Ins. Law §3209). After June 1, 1980, Superintendent of Insurance will not approve industrial life, industrial accident or industrial health policies for delivery or issuance for delivery in N.Y. (N.Y. Ins. Law §3201[b][5]). Standard provisions for liability policies and standard form of fire policy prescribed. (N.Y. Ins. Law §§3404-3405, 3420). Anti-arson provision mandatory for policies covering fire or explosion except for owner occupied residential property of no more than four dwelling units. (N.Y. Ins. Law §3403[g][1]). Standard form of cancellation and/or renewal prescribed. (N.Y. Ins. Law §§3425-3428). Protection provided against arbitrary cancellation and notice of cancellation required. (N.Y. Ins. Law §§3425-3431). Product or system group insurance policies issued to manufacturer, distributor, or installer of product or system. (N.Y. Ins. Law §3446[a]). Security funds to protect insured from issuer's insolvency established. (N.Y. Ins. Law §§7601-7604). Life Insurance Guaranty Corporation of New York established to protect life insurance policyholders from insurer insolvency. (N.Y. Ins. Law §§7701-7718). Homeowners insurance policies regulated. (N.Y. Ins. Law §§3425[a][2], 2351 [expires June 30, 2006]). Automobile insurance regulated. (N.Y. Ins. Law §§3425[a][1], 3440). Insurers prohibited from refusing to renew motor vehicle liability policy solely upon age of vehicle unless decision based on sound actuarial principles. (N.Y. Ins. Law §3435-a[c]).

Insurance policies relating to maternity coverage and length of hospital stays regulated. (N.Y. Ins. Law §§3216[i][10], 3221[k][5], 4303[c]).

See also category 12 Environment, topic 12.01 Environmental Regulation.

Discrimination.

Prohibition regulated by N.Y. Ins. Law §§2324, 2606-2614, 3217, 3221, 4224, 4225, 4303, 4306, 4322, 4324, 4408, 6612.

Rebates.

Prohibition regulated by N.Y. Ins. Law §§2324, 2602, 4224, 6409, 6612.

Liens.

Payment of liens on proceeds of fire insurance policies regulated by N.Y. Ins. Law §3410.

Agents and Brokers.

Insurance agents, brokers, intermediaries, and consultants, with certain exceptions, are required to be licensed to do business in state. License and regulatory requirements are contained in N.Y. Ins. Law §§2101-2136.

Process Agent.

No foreign, domestic or alien insurer may be authorized to do business in state unless power of attorney is filed authorizing service of process upon Superintendent in action on contract issued or delivered, or on cause of action arising, in state. (N.Y. Ins. Law §1212). Substituted service on unauthorized insurers is provided by N.Y. Ins. Law §1213.

Investments regulated. (N.Y. Ins. Law §§ 1401-1414). Investments in insurance company subsidiaries regulated. (N.Y. Ins. Law §§1601-1612, 1701, 1705). Transactions within insurance holding company system regulated. (N.Y. Ins. Law §§1501-1510).

Foreign Insurance Companies.

Qualification to do Business.

Before being authorized to do business in New York, foreign insurer must file with Superintendent: (a) certified copy of its charter and by-laws, if any, in force, and certain other documents; and (b) power of attorney appointing Superintendent of Insurance as attorney within state for service of process. Superintendent may also require annual statement and examination of insurer's affairs. (N.Y. Ins. Law §§1101-1106, 1212). Foreign licensed mutual life insurer intending to reorganize or convert to stock life insurer must file plan with Superintendent. (N.Y. Ins. Law §1106[i]). No foreign insurer may be licensed to do any business in N.Y. not permitted to domestic insurers, nor may such insurer be licensed if it does any business anywhere in U.S. other than insurance or if it fails to comply substantially with requirements applicable to domestic insurers which Superintendent deems necessary. (N.Y. Ins. Law §1106[c]-[h]). Foreign and alien insurers that are (1) Subsidized or receive competitive advantage from foreign governmental entity, or (2) claim sovereign immunity, will not be authorized or licensed. (N.Y. Ins. Law §1102[h]). Certain foreign life insurers are deemed domestic insurers. (N.Y. Ins. Law §1501[d]). Foreign life insurance company may, upon satisfying certain requirements, redomesticate its corporate domicile to N.Y. (N.Y. Ins. Law §§7120, 7121). Making of insurance contract by mail, from outside N.Y., constitutes transaction of business for jurisdictional purposes. (N.Y. C.P.L.R. 302 [NYCLS]).

Deposits.

Every foreign insurer doing business in state must keep on deposit with Superintendent of Insurance, or with officer of home state designated by law for such purpose, same amount of securities which like domestic insurer transacting same kinds of insurance is required to deposit. Character of securities is prescribed by law. (N.Y. Ins. Law §1319). Alien insurers must have securities deposited or held as trusteed assets in amount at least equal to 150% of capital required to be maintained by domestic stock insurer licensed to do same kinds of insurance. (N.Y. Ins. Law §§1312, 1315, 1320, 1413).

Doing Business Without Authority.

Any person, firm, association or corporation acting as agent for an unauthorized foreign or alien (or domestic) insurer or otherwise effectuating such insurer's doing of an insurance business within the state is guilty of insurance business misdemeanor (N.Y. Ins. Law §109) and shall forfeit $500 for first offense and $500 for each month such action continues in addition to any penalty or forfeiture otherwise provided by law (N.Y. Ins. Law §2117[g]).

Reports Required.

Foreign insurer must submit annual statement required of all insurers by N.Y. Ins. Law §307 for Superintendent to renew license. (N.Y. Ins. Law §1103[b]).

Retaliatory Law.

When any state imposes more onerous conditions on any insurer organized or domiciled in N.Y., with regard to deposits, taxes, fines, penalties, fees for licenses or certificates of authority, or other sums exacted, than are required in N.Y., same requirements apply to insurers of such state in N.Y. (N.Y. Ins. Law §1112[a][1]).

Premium, Privilege and Franchise Taxes.

See category 22 Taxation, topic 22.04 Corporate Taxes, subheads Corporation and Franchise Taxes; Insurance Premium, Privilege and Franchise Taxes.

Uniform Insurers Liquidation Act.

Adopted. (N.Y. Ins. Law §§7408-7415).

Motor Vehicles.

Enforcement Fee.

Every insurance company must collect $10 per insured motor vehicle. (N.Y. Ins. Law §9110)

No-Fault Insurance.

See category 23 Transportation, topic 23.01 Motor Vehicles, subhead No-Fault Insurance.

Gap Insurance.

Defined and regulated. (N.Y. Ins. Law §§1113[a][26], 3427).

Direct Actions Against Insurer.

See category 23 Transportation, topic 23.01 Motor Vehicles, subhead Direct Actions.

Escheat.

Unclaimed insurance proceeds, other than life insurance proceeds, subject to escheat if unclaimed for three years. (N.Y. Aband. Prop. Law §§700-703, 1316). See also category 2 Business Organizations, topic Corporations for applicability of N.Y. Bus. Corp. Law.

Loss Reserves.

Certain required amounts of reserves for losses and loss expenses are deemed liabilities for purposes of determining financial condition of any property/casualty insurance company. (N.Y. Ins. Law §4117[a]).

Experimental projects in relation to: (1) Long term care health insurance plans; and (2) regional pilot projects for uninsured are regulated by N.Y. Ins. Law §§1117 and 1118, respectively.

Plain Language.

Insurance policies must be written in clear coherent manner. (N.Y. Ins. Law §3102[c][1]). See category 3 Business Regulation and Commerce, topic 3.12 Consumer Protection.

16.02 SURETY AND GUARANTY COMPANIES:

Unless otherwise stated, sections cited are those of Insurance Law.

Organization and supervision of fidelity and surety companies as defined in N.Y. Ins. Law §1113[16] provided for in Insurance Law, and such companies are subject to its general provisions. See topic 16.01 Insurance Companies.

Deposits.

No domestic property/casualty insurance company may transact surety insurance business until it has deposited with Superintendent of Insurance eligible securities in amount at least equal to lesser of $500,000 or amount required as paid-in capital or minimum surplus for kinds of insurance which such company is licensed to write, but not less than $400,000 for any stock company writing two kinds of insurance. (N.Y. Ins. Law §4104[a]). Surety insurance company, having only powers set forth in N.Y. Ins. Law §1113[16], must maintain minimum paid-in capital of $900,000 and have initial paid-in surplus of 50% of that amount. (N.Y. Ins. Law §4103[a][1]). (N.Y. Ins. Law §4103) also governs capital minimums where additional kinds of insurance carried on.

Certificate of Qualification.

Certificate of Superintendent of Insurance that such company is qualified to become surety or guarantor, which may be refused in the public interest, is conclusive evidence of qualification and sufficiency as surety under any N.Y. law, and shall be in lieu of any justification or requirement. (N.Y. Ins. Law §1111[c]). 'On notice to, and hearing of, such company Superintendent of Insurance may, at any time after issuance thereof, revoke certificate of qualification and publish notice of such revocation. (N.Y. Ins. Law §1111[d]).

No insurer, authorized to do business in this state, may make any insurance contract to owners or operators of motor vehicles as required by the Vehicle and Traffic Law unless Superintendent of Insurance has certified to Commissioner of Motor Vehicles that such insurer is qualified to issue such contracts, and Superintendent of Insurance may so certify to other persons. (N.Y. Ins. Law §1111[a]).

Rights and Powers.

Whenever bond, undertaking, recognizance, guaranty or like obligation is required or permitted under any N.Y. law, or whenever performance of any act, duty or obligation or refraining from any act is required or permitted to be secured or guaranteed, such bond or like obligation may be executed by any insurance company, authorized by law and by its charter to execute such instruments, and execution of such instrument by officer, attorney-in-fact or other authorized representative of such company fulfills such requirement. (N.Y. Ins. Law §1111[b][1]). However, designation by employee of state, public corporation or any public authorities of particular surety company for surety bonds or contracts of insurance on public building or construction contracts is prohibited. (N.Y. Ins. Law §2504[a]). No such employee, or his agent, shall negotiate, make application for, obtain or procure any of such surety bonds or contracts of insurance (except contracts of insurance for builders risk or owners protective liability) which can be obtained or procured by bidder, contractor or subcontractor. (N.Y. Ins. Law §2504[b]).

Limit of Risks.

With exception of transportation or warehousing bonds for United States Internal Revenue taxes, in which case limitation is 20%, no insurer doing business in state may expose itself to loss on single risk, or at any one time to an aggregate of risks on suretyship obligations guaranteeing the deposits of any single financial institution, in excess of 10% of its surplus to policyholders, unless protected as to excess as prescribed. These limitations do not apply to guaranties of title, marine risks, workers' compensation, employers' liability risks, mortgage guaranty risks or financial guaranty risks. (N.Y. Ins. Law §§1115, 4118). Residual value insurer must maintain certain specified surplus of aggregate net liability under guarantees. (N.Y. Ins. Law §1115[c]).

Title and Mortgage Guaranty Corporations.

Formation and regulation are governed by statutes similar to those controlling surety corporations. (N.Y. Ins. Law §§6401-6411, 6501-6508). Minimum paid-in capital is $500,000 and initial paid-in surplus is at least 50% thereof for title insurance corporations. (N.Y. Ins. Law §6402). Minimum paid-in capital is $1,000,000 and initial paid-in surplus of either $1,000,000 (stock insurance company) or $2,000,000 (mutual insurance company) for mortgage insurance companies. (N.Y. Ins. Law §6502[a][1]).

Foreign Surety and Guaranty Companies.

Foreign company must file with Superintendent of Insurance, a certified copy of its charter, by-laws, and statement as to its financial condition. Superintendent may also require proof in form of charter or directors' resolution that such company will not transact any business which a similar domestic company is prohibited from transacting, and may make or cause to be made an examination of its affairs. (N.Y. Ins. Law §1106[a]). Foreign company must appoint Superintendent to be its attorney upon whom process may be served. (N.Y. Ins. Law §1212[a]). In lieu of depositing securities with Department of Insurance, foreign company may show that satisfactory securities are deposited with proper state officer of state where organized. Such deposit shall be no less than amount required for similar domestic property/casualty insurance company. (N.Y. Ins. Law §4104[d]). Surety companies organized outside U.S. must have securities in proper amounts deposited with proper state officers of some state in this country. (N.Y. Ins. Law §1320[a]). If home state puts additional requirements on surety companies of this state, same requirements must be met before doing business in this state. (N.Y. Ins. Law §1112[a][1]).

Taxation.

No special provision.

17 INTELLECTUAL PROPERTY

17.01 TRADEMARKS AND TRADENAMES:

Under N.Y. Gen. Bus. Law §§360-360-r, "Trademarks" are intended to be consistent with federal system of trademark registration and protection under Trademark Act of 1946. (1996, c. 319, §1). "Trademark" is any word, name, symbol, or device used by person to identify and distinguish goods and to identify source of goods. (N.Y. Gen. Bus. Law §360[a] [NYCLS]). Trademark also includes signature or mark of artist on work of art. (N.Y. Arts & Cult. Aff. Law §33.01). "Service mark" applies to services rather than goods including titles, character and names used by person, and other distinctive features of radio or television programs. "Trade name" is any name used by person to identify business or vocation of such person. "Person" is natural person, corporation or other organization capable of suing and being sued in court of law. (N.Y. Gen. Bus. Law §360 [NYCLS]).

Registration.

A trademark or service mark may be registered by any person who used such mark, by filing form in office of Secretary of State and paying a fee. (N.Y. Gen. Bus. Law §360-b [NYCLS]). Trademark or service mark may not be registered if it is, among other things, merely descriptive or deceptively misdescriptive, geographical, immoral, deceptive, scandalous, disparaging, primarily surname or name or signature of living individual used without individual's consent. Mark which is descriptive, geographical, or primarily surname may be registered if it has become distinctive, as evidenced by use for five years. (N.Y. Gen. Bus. Law §360-a [NYCLS]). Each application for mark registration must refer to one or more classes of goods or services established by Secretary of State, who may require fee for each class. (N.Y. Gen. Bus. Law §360-i [NYCLS]). Upon registration, or assignment, certificate shall be issued by Secretary of State which is competent proof of registration in any court in N.Y. (N.Y. Gen. Bus. Law §360-d [NYCLS]).

Assignment.

Registration is assignable with goodwill of the business or any part of goodwill of business connected with use of mark. Assignment must be in writing; and in order to be valid against subsequent purchaser for value without notice must be recorded with Secretary of State. (N.Y. Gen. Bus. Law §360-f[a] [NYCLS]).

Common Law Rights.

Nothing herein shall adversely affect rights or enforcement of rights in marks acquired in good faith at any time at common law. (N.Y. Gen. Bus. Law §360-o [NYCLS]).

Expiration.

Registration expires ten years from registration date; renewable upon application, with fee, within six months before expiration. (N.Y. Gen. Bus. Law §360-e [NYCLS]). In certain cases registration must be cancelled by Secretary of State. (N.Y. Gen. Bus. Law §360-h [NYCLS]).

Fee.

For original, assignment, and renewal registration is $50. (N.Y. Gen. Bus. Law §§360-p [NYCLS], 360-f [NYCLS]).

Union Products.

Union or employee association may, in proper case, and upon notice by commissioner of labor to interested persons and unions, register with Commissioner of Labor device designating products made by members thereof. Fee of $10 charged for nonassignable certificate of registration. Registration may be denied on specified grounds after notice and hearing before industrial board of appeals. (N.Y. Lab. Law §208 [NYCLS]).

Unauthorized use, display, etc., of registered device is a misdemeanor and is also subject to civil injunction and action for damages; unauthorized imitation of registered device may be enjoined and is misdemeanor. (N.Y. Lab. Law §209 [NYCLS]).

Dairy Products.

County dairymen's association may file with office of Commissioner of Agriculture and Markets county trademark to be used for pure unadulterated butter or full-cream cheese made in such county. (N.Y. Agric. & Mkts. Law §69). Owner of specified milk containers may register designating mark with commissioner. (N.Y. Agric. & Mkts. Law §71). Unauthorized use of registered mark or containers is a misdemeanor and person shall be subject to fine not exceeding $200 and to imprisonment not exceeding six months on first offense. (N.Y. Agric. & Mkts. Law §41).

Penalties.

It is misdemeanor to manufacture, distribute or offer for sale counterfeit goods with intent to deceive, defraud or to evade lawful restriction on sale of goods. (N.Y. Penal Law §165.71 [NYCLS]). Preceding is felony if retail value of all such goods exceeds $1,000. (N.Y. Penal Law §§165.72 [NYCLS] and 165.73 [NYCLS]). Counterfeit goods may be seized by police. (N.Y. Penal Law §165.74 [NYCLS]). It is misdemeanor to imitate, counterfeit or use trademarks fraudulently in any one of many specified ways. (N.Y. Arts & Cult. Aff. Law §33.09). Knowingly fraudulent registration of trademark or service mark is compensable in damages to one injured thereby. (N.Y. Gen. Bus. Law §360-j [NYCLS]). Infringement of trademark or service mark is subject to injunction and compensable to owner thereof in damages and profits. (N.Y. Gen. Bus. Law §§360-k [NYCLS], 360-m [NYCLS]). Court has discretion to enter judgment for three times damages and profits and reasonable attorneys fees if infringement done with knowledge or bad faith. (N.Y. Gen. Bus. Law §360-m [NYCLS]). Likelihood of injury to business reputation or dilution of distinctive quality of mark or tradename may be in cases of infringement of registered or unregistered mark or cases of unfair competition despite absence of competition or confusion as to source of goods or services. (N.Y. Gen. Bus. Law §360-l [NYCLS]). These civil remedies are not to be construed as affecting registrant's right to prosecute under any penal law of state. (N.Y. Gen. Bus. Law §360-m [NYCLS]).

Resale Price Agreements.

Contract provisions purporting to restrain vendee from reselling at less than price stipulated by vendor or producer are not enforceable or actionable at law. (N.Y. Gen. Bus. Law §369-a [NYCLS]).

Tradenames.

Individuals, partnerships, limited partnerships, corporations, limited liability companies and unincorporated associations conducting business under assumed name or as partners must file notarized certificate with county clerk of every county where business is done (with Secretary of State if corporation, limited partnership or limited liability corporation), stating, among other things, business name and address, and full name and residence address of each person conducting business, including partners. (N.Y. Gen. Bus. Law §130[1] [NYCLS]). Certified copy of certificate must be displayed conspicuously on premises. (N.Y. Gen. Bus. Law §130[4] [NYCLS]). Noncompliance is misdemeanor and violators are prohibited from maintaining action or proceeding on contract, account or transaction made in unregistered name. (N.Y. Gen. Bus. Law §130[9]). Fee for filing certificate or amendment, is, in counties within N.Y. City, $100, and in all other counties $25; fee for filing with Secretary of State is $25 plus fee for each county where corporation or limited partnership does business. (N.Y. C.P.L.R. 8021[b][2] [NYCLS]; N.Y. Gen. Bus. Law §130[5] [NYCLS]).

Use of family names other than true names of persons carrying on business or their predecessor in interest is generally prohibited excluding certain exemptions. (N.Y. Gen. Bus. Law §130[2] [NYCLS]).

All retail and wholesale businesses, including corporations, must display full name of proprietor, or legally registered tradename, prominently outside of, on window of, or place where service is performed within premises except in case of lease of department in establishment where lessor is liable to customers on account of operations of such leased department. Noncompliance is misdemeanor. (N.Y. Gen. Bus. Law §131 [NYCLS]).

See also category 2 Business Organizations, topic 2.08 Partnerships.

17.02 TRADE SECRETS:

Information furnished to administrative agency may be registered with that agency as trade secret. Information deemed to be trade secret will be exempt from public disclosure. (N.Y. Lab. Law §877 [NYCLS]; N.Y. Comp. Codes R. & Regs. tit. 22, §7801.9; N.Y. Envtl. Conserv. Law §27-0919; N.Y. Pub. Auth. Law §1285-g; N.Y. Pub. Health Law §4805 [NYCLS]; N.Y. Pub. Serv. Law §§15, 16). New York State has not adopted Uniform Trade Secrets Act.

18 LEGAL PROFESSION

18.01 ATTORNEYS AND COUNSELORS:

The state bar is not integrated.

Jurisdiction over Admissions.

Person may be admitted to practice in any court of state only upon order of Appellate Division of Supreme Court. (N.Y. Comp. Codes R. & Regs. tit. 22, §520.1[a]). Race, creed, color, national origin or sex no bar to admission to practice. (N.Y. Jud. Ct. Acts Law §460 [NYCLS]). Attorneys admitted to practice in foreign countries may be licensed as legal consultants, subject to limitations set up by Court of Appeals. (N.Y. Jud. Ct. Acts Law §53[6] [NYCLS]).

Examination.

Applicants for examination must prove to satisfaction of State Board of Law Examiners: (1) Their date and place of birth and that they are over 21 years of age; (2) graduation from approved law school or four years of study of law in office of practicing attorney and partly in law school or approved study of law in foreign country (N.Y. Comp. Codes R. & Regs. tit. 22, §520.2). Law office study must include at least one year enrollment in approved law school, and law office study must include instruction by attorneys in subjects such as are offered in approved law schools. (N.Y. Comp. Codes R. & Regs. tit. 22, §520.4[b]). To receive credit for law office study, certificate must be filed by attorney with whom law office study is to be done at time of commencement of study. (N.Y. Comp. Codes R. & Regs. tit. 22, §520.4[e]).

Candidate must file with committee on character and fitness appointed by Appellate Division of Supreme Court evidence that he: (a) is of good moral character and possesses general fitness requisite for attorney, including affidavits of reputable persons setting forth in detail facts upon which such claim is based, number of such affidavits and qualification of persons acceptable as affiants to be determined by Appellate Division to which appellant has been certified; (b) has certificate from N.Y. State Board of Law Examiners that he has complied with rules relating to admission to practice. Each department of Appellate Division may adopt additional procedures for ascertaining moral character and fitness. (N.Y. Comp. Codes R. & Regs. tit. 22, §520.12[a]; N.Y. Jud. Ct. Acts Law §90 [NYCLS]).

Examinations are held twice a year, are of two days duration, and contain questions in both adjective and substantive law. Multistate Bar Examination is given as part of examination. Fee of $250 is required for each taking or retaking of examination. If dispensation is received from taking of examination, fee of $400 is required for credential review for admission on motion. There are special provisions covering eligibility for subsequent examinations upon failing examination. (N.Y. Jud. Ct. Acts Law §465[1] [NYCLS]; N.Y. Comp. Codes R. & Regs. tit. 22, §520.8; Board of Law Examiners Rules, §6000.6). Bar examination applicant requesting special arrangements must be provided with review procedure and, if special request denied, must be given appeal before full board prior to examination. (N.Y. Jud. Ct. Acts Law §460 [NYCLS]–b[1]).

Admission Without Examination.

Following may be admitted without examination in discretion of Appellate Division: Citizens of U.S., who are over 26 years of age and who are admitted to practice in highest law court of another state or territory of U.S., or District of Columbia, or of another common law country (such jurisdiction being one which would similarly admit attorney or counselor-at-law admitted to practice in New York) (N.Y. Jud. Ct. Acts Law §90[1][b] [NYCLS]) and for at least five of seven years immediately preceding application have practiced there, in some military or civilian legal service requiring admission to bar, as counsel or assistant counsel to corporation in state or territory of U.S. or of District of Columbia or of some common law country, or in some five year cumulation of aforementioned, or law school graduates who are either associate or full professors at accredited law school, having taught law full time for at least five of seven years immediately preceding application. All must produce certificate of admission to practice, proof of satisfactory legal and pre-legal education from N.Y. State Board of Law Examiners, and report of National Conference of Bar Examiners, together with other evidence as may be required. Out-of-state practitioners must also present letter of recommendation from judge of state's highest court. Law school professors must present certificate from dean of their law school, proving nature and extent of employment, and certificate from approved law school from which they graduated. (N.Y. Comp. Codes R. & Regs. tit. 22, §520.10).

Petition for Admission.

Upon certification by state board of law examiners that person has passed required examination, or that examination has been dispensed with, Appellate Division of supreme court in department to which person shall have been certified by state board of law examiners shall admit him to practice as attorney in N.Y. courts if satisfied that such person possesses character and general fitness required to be attorney, and provided that applicant has complied with rules of Court of Appeals and Appellate Divisions relating to admission. (N.Y. Jud. Ct. Acts Law §90[1][a] [NYCLS]).

Saving Clause.

Those rules in effect at time applicant commenced study of law shall determine his eligibility for admission, to extent that application was or would have been less restrictive or burdensome. (N.Y. Comp. Codes R. & Regs. tit. 22, §520.1[b]).

Admission Pro Hac Vice.

An attorney from another state, territory, district or country may be admitted pro hac vice in discretion of a court of record to participate in case in which he is employed. (N.Y. Comp. Codes R. & Regs. tit. 22, §602.2[a]). Person may be admitted pro hac vice to participate in any case while graduate student, graduate assistant, or teacher in criminal or poverty law litigation program in approved N.Y. State law school, or while employed with service providing legal assistance to indigents. (N.Y. Comp. Codes R. & Regs. tit. 22, §602.2[b]).

Licenses.

Applicant for admission to practice in New York must be examined and licensed to practice as prescribed by Article 15 of New York Judiciary Law [NYCLS]. Race, creed, color, national origin, alienage or sex shall constitute no cause for refusing any person examination or admission to practice. (N.Y. Jud. Ct. Acts Law §460 [NYCLS]).

Disabilities.

Attorney may not be surety unless court orders otherwise (N.Y. Comp. Codes R. & Regs. tit. 22, 2502).

Liabilities.

See category 5 Civil Actions and Procedure, topic 5.08 Costs.

Compensation of attorney is governed by agreement, express or implied. Contracts with guardians of infants for contingent fees are subject to approval of court. (N.Y. Jud. Ct. Acts Law §474 [NYCLS]). In the First and Second Departments, the amount of contingent fees in personal injury or wrongful death actions is regulated by court rule. In case of agreements for contingent fees in personal injury actions and certain other actions in the First, Second and, in certain cases, the Fourth Departments, statement of terms of the agreement and certain other facts must be filed. (N.Y. Comp. Codes R. & Regs. tit. 22, §§603.7, 691.20). Trustee of express trust who is attorney admitted to practice in New York is entitled to advance payment of fees for legal services rendered to trust. (N.Y. C.P.L.R. 8005 [NYCLS]).

Lien.

Attorney has lien on cause of action from commencement of action, special or other proceeding, in any court or before any state, municipal or federal department except Department of Labor, or from filing of counterclaim, which lien attaches to verdict, report, determination, decision, judgment or final order in his client's favor, and proceeds thereof in whatever hands they may fall, and cannot be affected by any settlement between parties before or after judgment or final order. (N.Y. Jud. Ct. Acts Law §475 [NYCLS]). If prior to commencement of action, special or other proceeding, attorney serves notice of lien in manner specified in N.Y. Jud. Ct. Acts Law §475-a [NYCLS], upon person or persons against whom his client has or may have claim or cause of action, attorney has lien upon claim or cause of action from time notice is given, which attaches to verdict, report, determination, decision or final order in his client's favor, except by Department of Labor, and to any money or property which may be recovered on account of such claim or cause of action; lien cannot be affected by any settlement between parties after such notice is given. (N.Y. Jud. Ct. Acts Law §475 [NYCLS]–a). Attorney also has common-law lien on papers, property and moneys of client in his possession. (237 N.Y. 467, 143 N.E. 647). Attorney's claim for any contingent interest in any recovery under compensation plan provided for in Employers' Liability Law is not enforceable lien unless amount thereof be approved in writing by justice of Supreme Court, or justice before whom case is tried. (N.Y. Empl'rs Liab. Law §12).

Disbarment or Suspension.

Appellate Division of Supreme Court may censure, suspend or remove from office any attorney for professional misconduct, malpractice, fraud, deceit, crime or misdemeanor, or any conduct prejudicial to administration of justice. (N.Y. Jud. Ct. Acts Law §90[2] [NYCLS]).

Unauthorized Practice.

It shall be unlawful for any corporation or association or any individual not admitted to bar to practice law. Exception is made for certain officers of societies for prevention of cruelty, certain law school graduates acting as assistants to N.Y. City Corporation Counsel or to district attorney, law students who have completed at least two semesters of law school, or law school graduates who have taken bar examination and have not been informed of failure, or law school graduates who have failed first bar examination, taken second examination, and not been notified of second failure, acting under supervision of State or subdivision or legal aid organization in conjunction with program approved by relevant Appellate Division and for charitable organizations created with approval of relevant Appellate Division to provide legal assistance to indigent persons. (N.Y. Jud. Ct. Acts Law §§478 [NYCLS], 484 [NYCLS], 485 [NYCLS], 495 [NYCLS]). Supreme Court may punish for criminal contempt any person unlawfully practicing or assuming to practice law. (N.Y. Jud. Ct. Acts Law §750[B] [NYCLS]). Attorney General may maintain action for injunction against unauthorized practice on his own information or on complaint of person or bar association, or bar association may maintain such action itself where good cause shown and proof that upon written request Attorney General has failed to act. (N.Y. Jud. Ct. Acts Law §§476 [NYCLS]–a, 476–b). Attorney General is also empowered to conduct investigations into unauthorized practice. (N.Y. Jud. Ct. Acts Law §476 [NYCLS]–c).

Withdrawal of Attorney in Pending Action.

Attorney of record for non-infant, non-incompetent party may be changed by filing of consent signed by party and retiring attorney. Attorney of record may be changed by court order upon motion or notice to client and attorneys of other parties. (N.Y. C.P.L.R. 321[b] [NYCLS]).

Registration of Attorneys.

Chief administrator of courts shall maintain official register of attorneys, which shall be public record and presumptive evidence that individuals named therein were admitted to practice as attorneys and counselors-at-law in courts of record of New York. (N.Y. Jud. Ct. Acts Law §468[1] [NYCLS]). Upon request, office of court administration must disclose whether person is registered as attorney. Where official register indicates that attorney has resigned from bar, or has been removed or suspended from practice by Appellate Division of Supreme Court and has not been readmitted to practice, that fact must also be disclosed. (N.Y. Jud. Ct. Acts Law §468[2] [NYCLS]). All attorneys admitted on or before Jan. 1, 1982, shall file biennial registration statement on or before Mar. 1, 1982. Attorneys admitted after Jan. 1, 1982, and on or before Jan. 1, 1986, shall file registration statement within 60 days of date of admission. Attorneys admitted after Jan. 1, 1986, must file registration statement prior to taking constitutional oath of office. Attorneys shall register biennially. Registration fee shall be $350, $60 which shall be deposited in “lawyers' fund for client protection.” (N.Y. Jud. Ct. Acts Law §468-a [NYCLS]; N.Y. State Fin. Law §97-t). No fee required of attorneys who certify that they are retired. (N.Y. Jud. Ct. Acts Law §468-a[4] [NYCLS]).

Attorney Ethics.

Code of Professional Responsibility of ABA was adopted by New York State Bar Association, as amended, in 1970. Disciplinary Rules of Code of Professional Responsibility were promulgated as joint rules of Appellate Division of Supreme Court as of Sept. 1, 1990.

Specialization.

Lawyer may not hold him/herself out as specialist except if specialty is in copyright, patents, or trademark. (N.Y. Comp. Codes R. & Regs. tit. 22, §1200.10[c]).

Professional Association (or Corporation).

See category 2 Business Organizations, topic 2.03 Corporations, subhead Professional Corporations.

19 MINERAL, WATER AND FISHING RIGHTS

19.01 MINES AND MINERALS:

Following minerals are property of people of this state: (1) All deposits of gold and silver in or upon private lands and lands belonging to state heretofore or hereafter discovered within state; (2) all deposits of minerals and fossils heretofore or hereafter discovered on state lands. (N.Y. Pub. Lands Law §81).

Exploration.

Commissioner of General Services may issue, upon written application by any U.S. citizen, permit, consent, or lease of such duration as commissioner may deem advisable, upon such terms and conditions as commissioner shall determine, to enter upon state lands for purpose of exploring for mines and minerals or for purpose of breaking up such lands and working any mine or extracting any mineral in such lands. In case of state lands other than unappropriated state land, no less than 30 days' notice to institution having jurisdiction over such lands from commissioner is required before any permit, consent or lease shall be issued. (N.Y. Pub. Lands Law §81[2]).

Requirements as to notice of discovery, filing fees, discovery bounty, state royalties, entry upon land to work mines, continuation, and termination of mining rights are found in N.Y. Pub. Lands Law §§82-84.

Safeguarding of Employees.

Commissioner of Labor must enforce rules and regulations for health and safety of persons employed in mines and must provide for inspection of mines. (N.Y. Lab. Law §21 [NYCLS]). Statutes regulating abandonment, blasting, storage, washrooms, riding on vehicles, ingress, egress, hoists, ventilation, ways around shafts, head house and trap doors and timbering. (N.Y. Lab. Law art. 15 [NYCLS]).

20 MORTGAGES

20.01 CHATTEL MORTGAGES:

Uniform Commercial Code, effective Sept. 27, 1964, repealed and replaced chattel mortgage statutes, N.Y. Lien Law §§230 to 239-1, except for §231, dealing with corporate mortgages, see subhead Corporate Mortgages on Real and Personal Property, infra, which was amended and renumbered N.Y. Lien Law §190 [NYCLS] by 1963, N.Y. Laws c. 1003, §45), eff. Sept. 27, 1964. For differences between New York Uniform Commercial Code and 1962 Official Text, see topic Commercial Code.

Installment Sales.

Special provisions, e.g., conformity with Federal Truth in Lending Act (15 U.S.C.§1601 et seq.), required form and assignability of contract, service charge and cost of insurance limitations, anticipation, refinancing and consolidation, are applicable to secured retail installment contracts for sale of goods other than motor vehicles (N.Y. Pers. Prop. Law §401 et seq.), and motor vehicles (N.Y. Pers. Prop. Law §301 et seq.). See also category 3 Business Regulation and Commerce, topic 3.23 Sales.

Corporate Mortgages on Real and Personal Property.

Financing statement need be filed only in Department of State to perfect security interest in personal property, including goods which are or are to become fixtures, under mortgage or supplemental mortgage covering real and personal property executed by a corporation and recorded as real property mortgage pursuant to N.Y. Lien Law §190 [NYCLS]. (N.Y. U.C.C. Law §9-501).

Refiling.

Validity of chattel mortgage perfected prior to Sept. 27, 1964 may be continued under Uniform Commercial Code by filing continuation statement signed by secured party in Department of State. Continuation statement should identify chattel mortgage, office and date of last filing, as well as filing number. Continuation statement should state chattel mortgage effective. Filing of chattel mortgage or renewal statement should be done before it would usually lapse or continuation statement signed by secured party identifying chattel mortgage, office where and date when last filing or refiling was made, filing number, or book or page, and statement that chattel mortgage is still effective should be filed (N.Y. U.C.C. Law §13-102[2]), except where no filing is required under N.Y. U.C.C. Law §13-102[3].

Enforcement.

In addition to other rights and remedies granted by Uniform Commercial Code or provided for by instrument, action may be maintained in proper court to foreclose lien on chattels for sum of money where such lien exists at time of action. On motion, such court may grant warrant for seizure of chattels pendente lite. Where applicable, procedure in action to foreclose mortgage on real property applies to foreclosure of chattel mortgage or other lien on personal property. (N.Y. Lien Law §§206-207).

Sale by Mortgagor.

To extent that Uniform Commercial Code does not apply, notice to owner and advertisement of sale must be made in accordance with N.Y. Lien Law §§200-202. Mortgagor of personal property who, with intent to defraud mortgagee or purchaser, sells, assigns, exchanges, secretes, injures or otherwise disposes of any part of property, or maliciously injures or destroys such property, is guilty of Class A misdemeanor. Buyer under conditional sales contract who, under claim of full ownership, with intent to defraud, sells, assigns, mortgages, exchanges, secretes, injures, destroys or otherwise disposes of goods subject to conditional sales contract, is guilty of Class A misdemeanor. (N.Y. Penal Law §§185.10 [NYCLS], 185.15 [NYCLS]).

Form.

There is no general statutory form of chattel mortgage. Formal requirements are prescribed for retail installment purchase money mortgages on motor vehicles (N.Y. Pers. Prop. Law §302) and other goods or services (N.Y. Pers. Prop. Law §402).

For statutory form of financing statement, see N.Y. U.C.C. Law §9-502. Secretary of State has approved standard forms of financing statement, financing statement change and request for information or copies. Failure to use approved forms will require additional filing fee. For filing fees, see category 3 Business Regulation and Commerce, topic 3.09 Commercial Code. Forms at end of this Digest are taken from Rules of Department of State. (May 1964, Apr. 1974 and May 1978).

20.02 COLLATERAL SECURITY:

See category 8 Debtor and Creditor, topic 8.15 Pledges.

20.03 MORTGAGES OF PERSONAL PROPERTY:

See topic 20.01 Chattel Mortgages.

20.04 MORTGAGES OF REAL PROPERTY:

Mortgage does not imply covenant for sum intended to be secured. (N.Y. Real Prop. Law §§249 [NYCLS], 251 [NYCLS]).

In certain cases involving loans for principal sum of $2,500,000 or more, mortgagee may exercise its option to acquire interest in encumbered property. (N.Y. Gen. Oblig. Law §5-334 [NYCLS]). If mortgagee with consent of owner of premises, acquires possession, action in ejectment by owner will not lie. His remedy is action to redeem, in which mortgagee in possession must account for rents and profits if any received by him and apply same to reduction of mortgage. (254 A.D. 514, 5 N.Y.S.2d 372, aff'd, 279 N.Y. 767, 18 N.E.2d 859).

Graduated payment mortgages are permitted, in certain circumstances and subject to certain terms and conditions, as of Oct. 1, 1980. (N.Y. Real Prop. Law §279 [NYCLS]). Credit line mortgages, which secure funds advanced from time to time, are valid provided mortgage specifies maximum aggregate amount of indebtedness secured thereby. Liens covering future advances which are made within 20 years of recording of credit line mortgage has same priority as if such advances had been made at time of recording. Banking Board is authorized to permit financial institutions to offer variable rate and renegotiable rate residential and cooperative apartment mortgages, except that such credit line mortgage of reverse mortgage loan type shall not be subject to 20 year limitation. (N.Y. Real Prop. Law §281 [NYCLS]). In addition authorized financial institutions may now offer reverse mortgages. (N.Y. Banking Law §6-h [NYCLS]; N.Y. Real Prop. Law §281[1][a] [NYCLS]). Increase in principal balance of mortgage due to additions of unpaid interest are secured so long as terms of repayment are set forth in mortgage. (N.Y. Real Prop. Law §291 [NYCLS]).

Execution.

Any conveyance of interest in real property, other than lease for term not exceeding one year, including mortgage, unless created by act or operation of law, must be in writing, subscribed by person conveying such interest or by his lawful agent who is authorized by writing. (N.Y. Gen. Oblig. Law §5-703[1] [NYCLS]).

Recording is not essential to validity of mortgage, but mortgage is void as against any subsequent purchaser or encumbrancer in good faith and for a valuable consideration whose deed, mortgage, contract to purchase or other instrument creating encumbrance, is recorded prior to the recording of the mortgage. (N.Y. Real Prop. Law §291 [NYCLS]).

Recording Fees.

See category 10 Documents and Records, topic 10.04 Records.

Taxes.

See category 22 Taxation, topic 22.16 Property Taxes, subhead Mortgage Tax.

Assignment.

Where mortgage is given as collateral security for bond or note, lien follows bond or note and if mortgage is assigned without bond or note it is considered in law as nullity. (284 A.D. 697, 134 N.Y.S.2d 521).

Written assignment of bond and/or mortgage is conveyance within meaning of recording act. (102 A.D. 163, 92 N.Y.S. 493). Recording of assignment of mortgage is not constructive notice to mortgagor, his heirs or personal representatives, or owner where assignment is recorded after recording of conveyance to such owner, so as to invalidate payment made by either of them to mortgagee or prior assignee of mortgage. (N.Y. Real Prop. Law §324 [NYCLS]).

Release.

After payment of authorized principal, interest and any other amounts due thereunder or otherwise owed by law has actually been made, mortgagee of real property, unless otherwise requested in writing by mortgagor or assignee of such mortgage, must execute and acknowledge before proper officer, satisfaction of mortgage, and thereupon within 30 days arrange to have satisfaction of mortgage: (a) Presented for recording to recording officer of county where mortgage is recorded, or (b) if so requested by mortgagor or mortgagor's designee, to mortgagor or mortgagor's designee. Delivery of satisfaction of mortgage may alternately be made in accordance with terms of N.Y. Real Prop. Law §275 [NYCLS]. (N.Y. Real Prop. Acts. Law §1921[1] [NYCLS]).

In case of mortgage secured by property improved by one-to-six family, owner occupied, residence or residential condo unit, if mortgagee fails within 90 days to deliver any of documents required under N.Y. Real Prop. Acts. Law §1921[1] [NYCLS], and if mortgage is not otherwise satisfied, mortgagee must be liable to such person in amount of $500 or economic loss to such person, whichever is greater. (N.Y. Real Prop. Acts. Law §1921[4] [NYCLS]).

Whenever mortgage permits owner of mortgaged property to obtain release of portion of property from lien of such mortgage, then upon: (1) Delivery of partial release from owner to mortgagee along with fees allowed for taking of acknowledgment of deed, (2) proof that all requirements in mortgage as conditions precedent to partial release have been satisfied, and (3) payment to mortgagee of all sums required under mortgage to obtain such partial release, such partial release must be executed and acknowledged by mortgagee before proper officer, and such partial release shall be in recordable form. (N.Y. Real Prop. Acts. Law §1921-a[1] [NYCLS]). If mortgagee refuses to comply with release provisions or mortgagor cannot with due diligence actually tender required money to mortgagee, mortgagor can petition court for partial release under certain conditions. (N.Y. Real Prop. Acts. Law §1921-a[2] [NYCLS], -a[3]).

Satisfaction.

Upon payment of mortgage (and upon request if credit line mortgage is satisfied), holder thereof, if so requested by payor, must execute and acknowledge satisfaction piece certifying that mortgage has been paid or satisfied. (N.Y. Real Prop. Acts. Law §1921[1] [NYCLS]). Satisfaction piece shall be given to mortgagor or his designee. (N.Y. Real Prop. Law §275[1] [NYCLS]). Upon subsequent recording of said satisfaction piece (except where mortgage records kept on microfilm), mortgage records will be marked “discharge”. (N.Y. Real Prop. Law §321[1] [NYCLS]). Upon mortgagee's failure or refusal to comply with satisfaction provisions, anyone with interest in mortgage or mortgaged premises can petition for order directing cancellation of debt or other obligation secured by mortgage. (N.Y. Real Prop. Acts. Law §1921[2] [NYCLS]). Court, in its discretion may award costs and reasonable attorneys' fees to applicant in absence of showing of valid reason for failure or refusal to execute satisfaction piece and deliver same and mortgage. (N.Y. Real Prop. Acts. Law §1921[7] [NYCLS]).

Trust Deeds.

Deeds intended as security are generally deemed mortgages, and there is no advantage in recording such deed, unless with deed is also recorded writing(s) explanatory of its being desired that deed only have effect of mortgage or conditional deed. (N.Y. Real Prop. Law §320 [NYCLS]). There is no statutory form for trust deeds as such.

Foreclosure of mortgage may be by action, unless final judgment in action has been rendered with respect to mortgage debt. (N.Y. Real Prop. Acts. Law §1301 [NYCLS]). Mortgage which contains the customary power of sale may be foreclosed by sale made by holder of mortgage after statutorily-prescribed notice of default and advertisement, unless action has been brought to recover debt. (N.Y. Real Prop. Acts. Law §§1401-1403) deemed repealed July 1, 2009. Even if action has been brought, however, foreclosure by sale may take place where such action has been discontinued or dismissed without prejudice to plaintiff, or if final judgment rendered in favor of plaintiff has been returned wholly or partly unsatisfied. N.Y. Real Prop. Acts. Law §1401 [NYCLS] deemed repealed July 1, 2009. In either case, sale must be at auction and holder of mortgage may buy. N.Y. Real Prop. Acts. Law §§1407-1408 deemed repealed July 1, 2009. In neither case is there any right to redeem after sale. N.Y. Real Prop. Acts. Law §1411 [NYCLS] deemed repealed July 1, 2009.

In action to foreclose, persons whose interests in the land are claimed to be subject and subordinate thereto must be made parties, except that trustees represent all beneficiaries and remaindermen and executors represent devisees. Any person liable to pay mortgage debt may be made defendant. (N.Y. Real Prop. Acts. Law §§1311-1313).

After final judgment in action to recover any part of mortgage, action for foreclosure may not be commenced until execution upon such judgment has been issued and returned wholly or partly unsatisfied. (N.Y. Real Prop. Acts. Law §1301[1] [NYCLS]).

While an action for foreclosure is pending, or after final judgment therein, no other action can be brought for recovery of any part of mortgage debt without leave of court in which prior action was brought. (N.Y. Real Prop. Acts. Law §1301[3] [NYCLS]). A waiver in writing of expiration of time limit for commencement of action, or promise not to plead such expiration, or promise to pay mortgage debt, is effective to make time limit for starting action run from date of such promise or waiver. (N.Y. Gen. Oblig. Law §17-105[1] [NYCLS]). Part payment effective to revive action to recover mortgage indebtedness is also effective to make time limit for commencement of action to foreclosure mortgage run from date of payment, unless payment is accompanied by written disclaimer of intention to affect time limited for foreclosure. (N.Y. Gen. Oblig. Law §17-107[1] [NYCLS]).

Deficiency Judgments.

Motion for deficiency judgment must be made within 90 days after foreclosure sale. On such motion, court must determine market value of premises as of date of sale and direct judgment for amount of mortgage debt, less market value or sale price, whichever is higher. (N.Y. Real Prop. Acts. Law §1371[1]-[2] [NYCLS]).

There can be no personal judgment against mortgagor in foreclosure action unless mortgage or note or bond contains express covenant to pay (N.Y. Real Prop. Law §249 [NYCLS]) or against grantee of mortgaged premises unless he has assumed mortgage debt (N.Y. Gen. Oblig. Law §5-705 [NYCLS]).

Foreclosure by advertisement (where there is a power of sale) is governed in detail by statute (N.Y. Real Prop. Acts. Law §§1401 et seq. [NYCLS]) deemed repealed July 1, 2009, provisions of which must be exactly followed.

Forms.

The following are some of the forms provided by statute (N.Y. Real Prop. Law §258 [NYCLS]). They are expressly permissive. All must be executed and acknowledged in same manner as deed. Covenants and other clauses in statutory form of mortgage are construed by N.Y. Real Prop. Law §254 [NYCLS].

Forms

Mortgage: This mortgage, made the . . . day of . . . , two thousand and. . , between . . . , (insert residence) the mortgagor, and . . . (insert residence), the mortgagee.

Witnesseth, that to secure the payment of an indebtedness in the sum of . . . dollars, lawful money of the United States, to be paid on the . . . day of . . . , two thousand and. . , with interest thereon to be computed from . . ., at the rate of . . . per centum per annum, and to be paid . . . , according to a certain bond or obligation bearing even date herewith, the mortgagor hereby mortgages to the mortgagee (description).

And the mortgagor covenants with the mortgagee as follows:

1. That the mortgagor will pay the indebtedness as hereinbefore provided.

2. That the mortgagor will keep the buildings on the premises insured against loss by fire for the benefit of the mortgagee; that he will assign and deliver the policies to the mortgagee; and that he will reimburse the mortgagee for any premiums paid for insurance made by the mortgagee on the mortgagor's default in so insuring the buildings or in so assigning and delivering the policies.

3. That no building on the premises shall be removed or demolished without the consent of the mortgagee.

4. That the whole of said principal sum and interest shall become due at the option of the mortgagee; after default in the payment of any installment of principal or of interest for . . . days; or after default in the payment of any tax, water rate or assessment for . . . days after notice and demand; or after default after notice and demand either in assigning and delivering the policies insuring the buildings against loss by fire or in reimbursing the mortgagee for premiums paid on such insurance, as hereinbefore provided; or after default upon request in furnishing a statement of the amount due on the mortgage and whether any offsets or defenses exist against the mortgage debt, as hereinafter provided.

5. That the holder of this mortgage, in any action to foreclose it, shall be entitled to the appointment of a receiver.

6. That the mortgagor will pay all taxes, assessments or water rates, and in default thereof, the mortgagee may pay the same.

7. That the mortgagor within . . . days upon request in person or within . . . days upon request by mail will furnish a written statement duly acknowledged of the amount due on this mortgage and whether any offsets or defenses exist against the mortgage debt.

8. That notice and demand or request may be in writing and may be served in person or by mail.

9. That the mortgagor warrants the title to the premises.

In witness whereof this mortgage has been duly executed by the mortgagor.

In presence of:

Combined Bond and Mortgage: This bond and mortgage, made the . . . day of . . , two thousand and . . . , between . . . (insert residence), herein referred to as the mortgagor, and . . . (insert residence), herein referred to as the mortgagee.

Witnesseth, that the mortgagor, do hereby acknowledge . . . to be indebted to the mortgagee in the sum of . . . dollars, lawful money of the United States, which the mortgagor do hereby agree and bind . . . to pay to the mortgagee . . . on the . . . day of . . . , two thousand and . . ., with interest thereon to be computed from . . . , at the rate of . . . per centum per annum, and to be paid . . . (insert terms of payment of interest and/or principal) and to secure the payment of which the mortgagor hereby mortgages to the mortgagee . . . (description).

And the mortgagor covenants with the mortgagee as follows:

1. That the mortgagor will pay the indebtedness as hereinbefore provided.

2. That the mortgagor will keep the buildings on the premises insured against loss by fire for the benefit of the mortgagee; that he will assign and deliver the policies to the mortgagee; and that he will reimburse the mortgagee for any premiums paid for insurance made by the mortgagee on the mortgagor's default in so insuring the buildings or in so assigning and delivering the policies.

3. That no building on the premises shall be removed or demolished without the consent of the mortgagee.

4. That the whole of said principal sum and interest shall become due at the option of the mortgagee: after default in the payment of any installment of principal or of interest for . . . days; or after default in the payment of any tax, water rate or assessment for . . . days after notice and demand; or after default after notice and demand either in assigning and delivering the policies insuring the buildings against loss by fire or in reimbursing the mortgagee for premiums paid on such insurance, as hereinbefore provided; or after default upon request in furnishing a statement of the amount due on the bond and mortgage and whether any offsets or defenses exist against the mortgage debt, as hereinafter provided.

5. That the holder of this bond and mortgage, in any action to foreclose the mortgage, shall be entitled to the appointment of a receiver.

6. That the mortgagor will pay all taxes, assessments or water rates, and in default thereof, the mortgagee may pay the same.

7. That the mortgagor within . . . days upon request in person or within . . . days upon request by mail will furnish a written statement duly acknowledged of the amount due on this bond and mortgage and whether any offsets or defenses exist against the mortgage debt.

8. That notice and demand or request may be in writing and may be served in person or by mail.

9. That the mortgagor warrants the title to the premises.

In witness whereof this bond and mortgage has been duly signed and sealed by the mortgagor.

In the presence of:

(Note. Use of the foregoing form is lawful but is optional and vests in parties thereto all rights and powers and imposes upon them all the duties and obligations as are now vested in and imposed upon the parties to a separate bond and/or mortgage but does not make unlawful or invalidate in any way the use of separate form of bonds and mortgages.) (N.Y. Real Prop. Law

§258 [NYCLS]).

Trustee Clause.

That the mortgagor will receive the advances secured by the mortgage and will hold the right to receive such advances as a trust fund to be applied first for the purpose of paying the cost of improvement, and that the mortgagor will apply the same first to the payment of the cost of the improvement, before using any part of the total of the same for any other purpose. Alternatively, the mortgage may provide that it is “subject to the trust fund provisions of section thirteen of the lien law.” (N.Y. Lien Law §13[3] [NYCLS][priority of liens]).

Assignment of mortgage (without covenant): Know that . . . , assignor, in consideration of . . . dollars, paid by . . . , assignee, hereby assigns unto the assignee, a certain mortgage made by . . . , given to secure payment of the sum of . . . dollars and interest, dated the . . . day of . . . , recorded on the . . . day of . . . , in the office of the . . . of the county of . . , in liber . . . of mortgages, at page . . , covering premises . . . , together with the bond or obligation described in said mortgage, and the moneys due and to grow due thereon with the interest,

To have and to hold the same unto the assignee, and to the successors, legal representatives and assigns of the assignee forever. And the assignor covenants that there is now owing upon said mortgage, without offset or defense of any kind, the principal sum of . . . dollars, with interest thereon at . . . per centum per annum from the . . . day of . . . two thousand and . . . In witness whereof, the assignor has hereunto set his hand and seal this . . . day of . . . , two thousand and . . .

In presence of:

Release of part of mortgaged premises: This indenture, made the . . . day of . . . , two thousand and . . , between . . . , party of the first part, and . . . , party of the second part,

Whereas, . . . by indenture of mortgage, bearing date the . . . day of . . . , two thousand and. . , recorded in the office of the . . . of the county of . . . , in liber . . . of mortgages, of section . . . , page . . . , on the . . . day of . . . , two thousand and . . , for the consideration therein mentioned, and to secure the payment of the money therein specified, did mortgage certain lands and tenements of which the lands hereinafter described are part, unto . . .,

And whereas, the party of the first part, at the request of the party of the second part, has agreed to give up and surrender the lands hereinafter described unto the party of the second part, and to hold and retain the residue of the mortgaged lands as security for the money remaining due on said mortgage,

Now this indenture witnesseth, that the party of the first part, in pursuance of said agreement, and in consideration of . . . dollars, lawful money of the United States, . . . paid by the party of the second part, does grant, release and quitclaim unto the party of the second part, all that part of said mortgaged lands described as follows: . . . (description),

Together with the hereditaments and appurtenances thereunto belonging, and all the right, title and interest of the party of the first part, of, in and to the same, to the intent that the lands hereby released may be discharged from said mortgage, and that the rest of the land in said mortgage specified may remain mortgaged to the party of the first part as heretofore,

To have and to hold the lands and premises hereby released and quitclaimed to the party of the second part, . . . and assigns, to . . . and their own proper use, benefit and behoof forever, free, clear and discharged of and from all lien and claim under and by virtue of the indenture of mortgage aforesaid.

In witness whereof, the party of the first part has signed and sealed these presents the day and year first above written.

In presence of:

Satisfaction of mortgage: Know all men by these presents, that . . . do hereby certify that a certain indenture of mortgage, bearing date the . . . day of . . . , two thousand and . . , made and executed by . . . , to secure payment of the principal sum of . . . dollars and interest, and duly recorded in the office of the . . . of the county of . . . , in liber . . . of mortgages, of section . . . , page . . . , on the . . . day of . . . , two thousand and . . , is paid, and do hereby consent that the same be discharged of record.

Dated the . . . day of . . . , two thousand and . . .

In presence of:

Note: The certificate of satisfaction of mortgage should contain a statement as to assignment, if any, with appropriate recording data. (N.Y. Real Prop. Law §321[3] [NYCLS]).

Chattel topic Mortgages.

See topic 20.01 Chattel Mortgages.

21 PROPERTY

21.01 ABSENTEES:

Where person over whose estate court would have jurisdiction has disappeared or is absent from place of abode without being heard from after diligent inquiry, such person must be considered absentee, and court, in best interests, may appoint temporary administrator, duly bonded (N.Y. Surr. Ct. Proc. Act §§103[47] [NYCLS], 805 [NYCLS], 901 [NYCLS]). Procedures for appointment (N.Y. Surr. Ct. Proc. Act §902[3] [NYCLS], [6] [NYCLS], [7] [NYCLS]) and final determination and distribution of absentee's estate (N.Y. Surr. Ct. Proc. Act §911 [NYCLS]) outlined.

Care of Property.

Temporary administrator obtains, subject to all duties and liabilities as such, all powers and authority with respect to taking possession of, securing and preserving all real and personal property of absentee. Temporary administrator not authorized to pay or satisfy any testamentary disposition or intestate share. (N.Y. Surr. Ct. Proc. Act §903[1] [NYCLS]).

Payment of Proceeds of Sale of Real Property.

On application to dispose of, or in action to compel conveyance of real property held by nonresident infant, court may order infant's portion of proceeds paid to general guardian of said infant if satisfied that guardian is entitled to receive same and is sufficiently bonded. (N.Y. Real Prop. Acts. Law §1765[3] [NYCLS]).

Partition.

In cases involving unknown defendant, defendant served with summons without state, and defendant served by publication, where such defendant has not appeared in partition action court shall direct defendant's portion to be paid into court and invested in permanent securities for his benefit, until claimed by defendant or his legal representative. (N.Y. Real Prop. Acts. Law §970 [NYCLS]).

Rights of Parties.

Prior to rendering interlocutory judgment in action where rights of parties are not controverted, or party is infant, unknown, absent, or defaulted defendant, court must ascertain, by reference or otherwise, rights, shares and interests of several parties. (N.Y. Real Prop. Acts. Law §911 [NYCLS]).

Mortgage Foreclosure.

When infant defendant has put in general answer by his guardian, or if any of defendants be absentees, order of reference must require referee to take proof of facts and circumstances alleged in complaint and examine plaintiff or agent, under oath, as to payments made. (N.Y. Real Prop. Acts. Law §1321[1] [NYCLS]).

Process Agent.

Person may be designated by natural person, corporation or partnership as agent for service in writing, executed and acknowledged in same manner as deed, with consent of agent endorsed thereon. Writing must be filed in office of clerk of county in which principal to be served resides or has principal office. Designation will remain in effect for three years from filing unless revoked by filing of revocation, or by death, judicial determination of incompetency or legal termination of agent or principal. (N.Y. C.P.L.R. 318 [NYCLS]). Parties to contract may agree to submit to personal jurisdiction in New York in action arising out of contract, and in furtherance of agreement, may designate agent to be served. (375 U.S. 311, 84 S. Ct. 411, 11 L. Ed. 2d 354). When appointment effective, statutes of limitation not tolled even though designator remains out of state for more than four-month period. (N.Y. C.P.L.R. 207 [NYCLS]).

Escheat.

Policy of the state to utilize escheated lands and unclaimed property for benefit of people of state. (N.Y. Aband. Prop. Law §102). All lands, title of which fails from defect of heirs, reverts or escheats to people. (N.Y. Aband. Prop. Law §200). Attorney General vested with power to recover escheated property. (N.Y. Aband. Prop. Law §201).

Unclaimed or abandoned property regulated according to person or institution in possession including: (1) Unclaimed property held or owing by banking organizations (N.Y. Aband. Prop. Law art. III); (2) unclaimed deposits and refunds for utility services (N.Y. Aband. Prop. Law art. IV); (3) unclaimed property held or owing for payment to security holders (N.Y. Aband. Prop. Law art. V); (4) unclaimed property held by brokers (N.Y. Aband. Prop. Law art. V-A); (5) unclaimed or unknown owner of court funds (N.Y. Aband. Prop. Law art. VI); (6) unclaimed life insurance funds (N.Y. Aband. Prop. Law art. VII); (7) unclaimed condemnation awards (N.Y. Aband. Prop. Law art. X); (8) escheat of property paid or deposited in federal courts (N.Y. Aband. Prop. Law art. XII); (9) unclaimed or abandoned property in possession, custody or control of U.S.A. (N.Y. Aband. Prop. Law art. XII-A); and (10) miscellaneous unclaimed property (N.Y. Aband. Prop. Law art. XIII). Other general provisions are in (N.Y. Aband. Prop. Law art. XIV).

Ancillary Administration of Estate of Nonresident.

See category 13 Estates and Trusts, topic 13.10 Executors and Administrators.

21.02 ADVERSE POSSESSION:

Character and Duration of Possession.

Title may be established by ten years adverse possession (N.Y. C.P.L.R. 212[a] [NYCLS]; N.Y. Real Prop. Acts. Law §501 [NYCLS]), but courts disfavor its being asserted as marketable title by grantors (224 N. Y. 343, 120 N.E. 737). Adverse possession by tenant against landlord cannot commence until after expiration of ten years after termination of tenancy; or, where there has been no written lease, until expiration of ten years after last payment of rent. (N.Y. Real Prop. Acts. Law §531 [NYCLS]). Adverse possession by one tenant in common against cotenant in common cannot commence until after expiration of 10 years of continuous exclusive occupancy by possessing cotenant, or immediately upon ouster by one cotenant of other cotenant. (N.Y. Real Prop. Acts. Law §541 [NYCLS]; 91 N.Y.2d 630, 674 N.Y.S.2d 259, 697 N.E.2d 160).

Under Written Instrument or Judgment.

In case of claim of title founded on written instrument or judgment or decree, where there has been continued occupation and possession for ten years of all or part of premises, under same claim, premises are deemed held adversely; but possession of one lot in tract divided into lots is not deemed possession of another lot. (N.Y. Real Prop. Acts. Law §511 [NYCLS]). Land is deemed to have been possessed and occupied where: (1) acts put a reasonable diligent owner on notice; (2) protected by substantial enclosure; or (3) used for supply of fuel or fencing timber, for husbandry or ordinary use of occupant. Where known farm or single lot has been partly improved, portion left not cleared or not enclosed, according to usual course and custom of adjoining country, is deemed occupied for same length of time as part improved and cultivated. (N.Y. Real Prop. Acts. Law §512 [NYCLS]).

Not Under Written Instrument.

In case of claim of title not founded on written instrument or judgment or decree, only the premises actually continuously occupied are deemed held adversely. (N.Y. Real Prop. Acts. Law §§521 [NYCLS], 522 [NYCLS]).

Easements.

Adverse possession statute is applicable to easements. (271 N.Y. 376, 3 N.E.2d 516).

Disabilities.

See category 5 Civil Actions and Procedure, topic 5.16 Limitation of Actions, subhead Disabilities.

21.03 CONDOMINIUMS:

See topic 21.16 Real Property.

21.04 CONVEYANCES:

See topic 21.06 Deeds.

21.05 CURTESY:

The common law estate by curtesy in real property of wife abolished. (N.Y. Real Prop. Law §189 [NYCLS]).

21.06 DEEDS:

Execution.

Estate or interest in real property, other than lease for term not exceeding one year, or any trust or power over or concerning real property, must be created by act or operation of law or by deed or conveyance in writing subscribed by person creating same, or by lawful agent, authorized by writing. (N.Y. Gen. Oblig. Law §5-703[1] [NYCLS]). Written contract to convey real property must describe it with such definiteness as will make it identifiable with reasonable certainty. (275 A.D. 429, 90 N.Y.S.2d 607). Grant in fee takes effect only from its delivery. Further, in order for deed to be effective against subsequent purchaser or incumbrancer, it must be either duly acknowledged before delivery or its execution and delivery must be attested by at least one witness. (N.Y. Real Prop. Law §§243-244).

One spouse need not join in conveyance of property owned by other, absent a dower right therein. See topic Dower for method of release thereof and property as to which dower may arise.

Residences of grantor and grantee must be stated, including street numbers, if any, and also city, town and village in which real property located, in order to entitle deed to record, though deed failing to comply with these requirements valid if actually recorded. Conveyance must be in English or be accompanied by English translation. (N.Y. Real Prop. Law §333 [NYCLS]). See also categories 8 Debtor and Creditor, topic Homesteads; Family, topic Husband and Wife.

Recording.

Conveyance, unless recorded in office of clerk (or register) of county where property situated, is void as against subsequent purchaser in good faith and for valuable consideration from same vendor, his heirs or devisees, provided such subsequent conveyance, contract or assignment is first duly recorded. To entitle conveyance to be recorded it must be acknowledged or proved. (N.Y. Real Prop. Law §291 [NYCLS]). In certain counties, duplicate of map referred to in document relating to real property must be filed therewith. (N.Y. Real Prop. Law §333-a [NYCLS]). If property for which map or plot plan is filed is located in county maintaining tax map department, duplicate copy of map or plot plan must be delivered to recording officer for filing with such department. (N.Y. Real Prop. Law §333-b[2] [NYCLS]). Recording officer shall not record any conveyance unless accompanied by transfer report form prescribed by state board of real property services and $50 fee. (N.Y. Real Prop. Law §333 [NYCLS]). In New York City, no deed, lease or memorandum of lease can be recorded unless accompanied by: (1) Registration statement and appropriate fees, if instrument refers to multiple dwelling, or (2) affidavit stating that instrument does not affect multiple dwelling and such registration not required. (N.Y.C. Admin. Code §§27-2097 to -2109). If instrument is lease or memorandum of lease of entire multiple dwelling, registration statements must be filed by both owner and lessee. (N.Y.C. Admin. Code §27-2102). Recording officers of Suffolk County are prohibited from recording any conveyance unless: (i) It contains in body thereof or endorsed thereon map designation of property maps of real property tax service agency of such county and (ii) it is accompanied by $3 certification fee for each parcel conveyed. (N.Y. Real Prop. Law §333[1-f] [NYCLS]).

Recording Fees.

See category 10 Documents and Records, topic 10.04 Records.

Operation and Effect.

All the grantor's estate passes unless it appears otherwise either expressly or by necessary implication; no greater estate passes than grantor possessed or could lawfully convey at delivery of deed, except that every grant is conclusive against grantor and those claiming under him, other than subsequent purchasers or incumbrancers in good faith and for value who acquire superior title by conveyance that has been first duly recorded. (N.Y. Real Prop. Law §245 [NYCLS]). No covenants are implied in conveyance of real property. (N.Y. Real Prop. Law §251 [NYCLS]).

Taxes.

N.Y. State real estate transfer tax imposed on each deed at time it is delivered by grantor to grantee when consideration or value of interest conveyed (exclusive of value of any lien or encumbrance remaining thereon at time of sale provided that, (i) property conveyed is a one to three family home or residential condominium or (ii) consideration is less than $500,000) exceeds $500, at rate of $2 for each $500 or fractional part thereof. (N.Y. Tax Law §1402[a] [NYCLS]). Additional 1% transfer tax, known as "mansion tax", imposed on grantee if consideration attributable to personal residence is $1,000,000 or more. (N.Y. Tax Law §1402-a [NYCLS]). New York City real property transfer tax imposed on each deed at time of delivery by grantor to grantee when consideration for real property and any improvement thereon (whether or not included in same deed) exceeds $25,000. With respect to conveyances made after Aug. 1, 1989, New York City tax is imposed as follows: (i) for one, two or three family houses and individual condominiums, 1% of consideration if $500,000 or less, and 1.425% of consideration if it exceeds $500,000; and (ii) for all other conveyances, 1.425% of consideration if $500,000 or less and 2.625% of consideration if it exceeds $500,000. Certain other rates apply to conveyances made before Aug. 1, 1989, and to transfers of leasehold interests, as more particularly set out in statute. Where any real property is situated partly within and partly without boundary of City of New York, consideration and net consideration subject to tax will be such part of total consideration and total net consideration attributable to that portion of such real property situated within City of New York or to interest in such portion. (N.Y.C. Admin. Code §11-2102).

In Broome County, additional transfer and recording taxes may be applicable. (N.Y. Tax Law §§1449 [NYCLS]–g, 253–e).

In Nassau County, additional transfer and recording taxes may be applicable. (N.Y. Tax Law §§1449 [NYCLS]–bb, 253–c).

Other specific counties and cities may be authorized to impose additional taxes. (N.Y. Tax Law §253 [NYCLS]–a[1].)

See category 22 Taxation, topic 22.16 Property Taxes, subhead Real Property Transfer Tax.

Forms.

The statute (N.Y. Real Prop. Law §258 [NYCLS]) prescribes permissive forms of deeds, some of which are as follows:

Form

(a) *Deed with full covenants (Individual):* This indenture, made the . . . day of . . , 20. . , between . . . (insert residence), party of the first part, and . . . (insert residence), party of the second part, Witnesseth, that the party of the first part, in consideration of . . . dollars, lawful money of the United States, paid by the party of the second part, does hereby grant and release unto the party of the second part, . . . and assigns forever, all . . . (description), together with the appurtenances and all the estate and rights of the party of the first part in and to said premises. To have and to hold the premises herein granted unto the party of the second part . . . and assigns forever. And the party of the first part . . . covenants as follows: First. That party of the first part . . . is seized of said premises in fee simple, and has good right to convey the same; Second. That the party of the second part shall quietly enjoy the said premises; Third. That the said premises are free from incumbrances; Fourth. That the party of the first part will execute or procure any further necessary assurance of the title to said premises; Fifth. That party of the first part . . . . will forever warrant the title to said premises. In witness whereof, the party of the first part has hereunto set his hand and seal the day and year first above written.

In presence of:

(b) *Bargain and sale deed (with covenants):* Same form as Deed with Full Covenants, supra except that covenants are omitted and replaced with following single covenant against grantor: And the party of the first part covenants that he has not done or suffered anything whereby the said premises have been incumbered in any way whatever.

(c) *Bargain and sale deed (without covenants):* Same form as catchline Deed with Full Covenants, supra except that covenants are omitted and words “heirs and assigns” are substituted for “. . . and assigns.”

(d) *Quitclaim deed:* Same form as catchline Deed with Full Covenants, supra except that covenants are omitted and words “remise, release and quitclaim” are substituted for “grant and release.”

(e) *Executor's deed and referee's deed in foreclosure and partition:* Substantially same form as catchline Deed with Full Covenants, supra, with such changes as character of grantor and circumstances of grant require.

The short form covenants set forth above are equivalent to the respective common law covenants which are set out in full in the statute. (N.Y. Real Prop. Law §253 [NYCLS]). Nonstatutory forms may be used (N.Y. Real Prop. Law §258 [NYCLS]), but recording officer may charge additional fee of $5 for recording deed containing long forms of covenants (N.Y. Real Prop. Law §327 [NYCLS]).

Lien Covenant.

To conform with provisions of N.Y. Lien Law §13 [NYCLS], it is desirable and sometimes imperative to insert in deeds of N.Y. real estate either a statement in substantially following form, “subject to the trust fund provisions of N.Y. Lien Law §13 [NYCLS]” (N.Y. Lien Law §13[3] [NYCLS]), or following covenant in deeds of New York real estate: AND party of first part, in compliance with N.Y. Lien Law §13 [NYCLS], covenants that party of first part will receive consideration for this conveyance and will hold right to receive such consideration as trust fund to be applied first for purpose of paying cost of improvement and that party of first part will apply same first to payment of cost of improvement before using any part of total of same for any other purpose (N.Y. Lien Law §13 [NYCLS]).

21.07 DEEDS OF TRUST:

See category 20 Mortgages, topic 20.04 Mortgages of Real Property.

21.08 DOWER:

Where parties married after Aug. 31, 1930, wife has no inchoate right of dower during coverture and no widow is endowed in any lands of her husband. Where parties married prior to Sept. 1, 1930, widow is endowed of one-third of all lands that her husband was seized of at any time during marriage prior to Sept. 1, 1930. (N.Y. Real Prop. Law §§190 [NYCLS], 190 [NYCLS]–b).

Release.

Act, deed, or conveyance by husband without assent of wife evidenced by her lawful acknowledgment, or judgment or decree against husband, or any laches, default, covin or crime of husband, does not prejudice right of wife to dower. (N.Y. Real Prop. Law §203 [NYCLS]). Divorced woman may release her inchoate right of dower by instrument in writing sufficient to pass real estate. (N.Y. Real Prop. Law §206 [NYCLS]). Wife may release her inchoate right of dower by attorney in fact in any case where she can personally release same (N.Y. Real Prop. Law §207 [NYCLS]), and she may execute power of attorney to her husband for that purpose (133 N.Y. 505, 31 N.E. 521).

Bar.

Wife shall not be endowed in case of divorce caused by her misconduct or dissolution of marriage because of absence of wife for five successive years, or if wife assents in antenuptial agreement to jointure or any pecuniary provision in lieu of dower. (N.Y. Real Prop. Law §§196 [NYCLS], 196-a [NYCLS], 197 [NYCLS], 198 [NYCLS], 199 [NYCLS]).

Extinguishment.

Owner of land subject to an inchoate right of dower may sue to extinguish it by paying its value in cash to owner of the right. (N.Y. Real Prop. Acts. Law §1911 [NYCLS]).

Election.

See category 13 Estates and Trusts, topic Descent and Distribution and/or topic 13.16 Wills.

21.09 ESCHEAT:

See topic 21.01 Absentees, subhead Escheat; categories 3 Business Regulation and Commerce, topic Banks and Banking, subhead Unclaimed Deposits; Estates and Trusts, topics Descent and Distribution, subhead Escheat, and Wills, subhead Unclaimed Legacies.

21.10 LANDLORD AND TENANT:

Uniform Commercial Code art. 2A.

Not expressly adopted in New York.

Leases.

Parole lease for longer than one year is void (N.Y. Gen. Oblig. Law §5-703 [NYCLS]), and lease for over three years is within recording statutes (N.Y. Real Prop. Law §290 [NYCLS]). See also category 3 Business Regulation and Commerce, topic 3.16 Frauds, Statute of, subhead Sale or Lease of Real Estate.

It is unlawful for owner, lessee, managing agent etc. of any housing accommodation to discriminate or to refuse to rent or lease to any person because of race, creed, color, disability, national origin, age, sex, familial status, or marital status, except in certain cases of owner-occupied one or two family houses, rooming houses, and senior citizen housing. (N.Y. Exec. Law §296[2], [5]). It is also unlawful to discriminate against or refuse to rent to person solely on ground that such person has child or children, except in certain federally-subsidized accommodations for senior citizens, one or two family owner-occupied dwelling houses or manufactured homes, or manufactured home parks intended and operated for persons 55 years of age or older. (N.Y. Real Prop. Law §237-a [NYCLS]).

It is unlawful for landlord to restrict occupancy of residential premises, by express lease terms or otherwise, to tenant or tenants or to such tenants and immediate family. Any such restriction in lease is void as against public policy. (N.Y. Real Prop. Law §235 [NYCLS]–f[2]). Provided that tenant or tenant's spouse occupies premises as his or her primary residence, any lease entered into by one tenant shall be construed to permit occupancy by tenant, immediate family of tenant, one additional occupant, and dependent children of occupant. (N.Y. Real Prop. Law §235 [NYCLS]–f[3]). Provided that at least one tenant or tenant's spouse occupies premises as primary residence, any lease entered into by two or more tenants shall be construed to permit occupancy by tenants, immediate family of tenants, and other occupants up to number of tenants specified in lease (excluding dependent children). (N.Y. Real Prop. Law §235-f[4] [NYCLS]).

Landlord is deemed to covenant and warrant that premises are fit for human habitation and reasonable use and not subject to certain dangerous conditions. Such condition caused by misconduct of tenant or lessee is not breach of covenant or warranty. (N.Y. Real Prop. Law §235 [NYCLS]–f[1]). Recovery of damages by lessee or tenant is excluded to extent that warranty of habitability is breached or cannot be cured by reason of strike or other labor dispute which is not primarily caused by landlord; provided landlord makes good faith attempt to cure breach, where practicable. (N.Y. Real Prop. Law §235-b[3] [NYCLS]). Agreement by lessee or tenant waiving above rights void as against public policy. (N.Y. Real Prop. Law §235-b[2] [NYCLS]).

Court may refuse to enforce lease if it finds, as matter of law, lease or any clause of lease to have been unconscionable at time made, or it may enforce remainder of lease without unconscionable clause or limit application of clause to avoid any unconscionable result. Parties to lease are afforded reasonable opportunity to present evidence as to its setting, purpose and effect to aid court in making determination when unconscionability is claimed. Act applicable to all leases regardless of when executed. (N.Y. Real Prop. Law §235-c [NYCLS]).

Every written agreement entered into after Nov. 1, 1978, for lease of space for residential purposes must be written in clear and coherent manner using words with common and everyday meanings and appropriately divided and captioned by sections. (N.Y. Gen. Oblig. Law §5-702 [NYCLS]).

Rent.—Landlord required to provide written receipt for payment of rent if payment is by other than personal check from tenant or, if by personal check, if tenant requests such receipt in writing. Receipt required to state date, amount, identity of premises, period for which rent is paid and signature and title of one receiving rent. (N.Y. Real Prop. Law §235-e [NYCLS]).

Security Deposits.

Money deposited as security for rental of real property as residence of judgment debtor or judgment debtor's family exempt from application to satisfaction of money judgment. (N.Y. C.P.L.R. 5205[g] [NYCLS]). Any such funds must be held in trust in accordance with certain terms. (N.Y. Gen. Oblig. Law §7-103[1] [NYCLS]). Transfer of security deposits upon conveyance of real property also regulated, as is liability of grantee or assignee of rental property for such security deposits. (N.Y. Gen. Oblig. Law §§7-105 [NYCLS], 7-107 [NYCLS], 7-108 [NYCLS]). Security deposit limited to one month's rent for any tenant age 65 years or older. (N.Y. Unconsol. Law c. 249-B).

Recording.

Lease for term exceeding three years may be recorded in office of clerk of county where real property is situated upon tender of lawful fees. If not recorded such is void against any subsequent purchaser in good faith and for valuable consideration who records first. (N.Y. Real Prop. Law §§290 [NYCLS], 291 [NYCLS]). In lieu of recording lease for term exceeding three years, there may be recorded with like effect memorandum of such lease in manner to entitle conveyance to be recorded. (N.Y. Real Prop. Law §291-c [NYCLS]). Where lease or memorandum of lease has been recorded, unrecorded agreement modifying lease or memorandum is void as against subsequent purchaser and tenant's possession shall not be deemed notice of modification unless agreement of modification or memorandum thereof is recorded prior to recording of instrument by which subsequent purchaser acquires his estate or interest. (N.Y. Real Prop. Law §291-cc[1] [NYCLS]).

Termination of Tenancy.

Tenancy at will or by sufferance is terminated by written notice of not less than 30 days which must be served by delivering to tenant or to person of suitable age and discretion residing on premises; or if neither can be found, by affixing it on conspicuous part of premises where it may be conveniently read. (N.Y. Real Prop. Law §228 [NYCLS]). Outside of New York City monthly tenancy or tenancy from month to month may be terminated by either party by notice at least one month prior to termination of term. (N.Y. Real Prop. Law §232-b [NYCLS]). In New York

City, monthly tenancy or tenancy from month to month is terminated on part of landlord by notice (in same manner as notice of petition in summary proceedings) in writing at least 30 days prior to termination of term. (N.Y. Real Prop. Law §232-a [NYCLS]). Warrant for removal of tenant may be vacated, for good cause shown, prior to execution thereof. (N.Y. Real Prop. Acts Law § 749[3]). Tenant must be given 72 hours notice before eviction. (N.Y. Real Prop. Acts. Law §749[2] [NYCLS]). Any tenant who is 62 years or older, or who will attain such age during term of lease or rental agreement, or spouse of such person residing with him or her may terminate leasehold or tenancy (subject to certain limited exceptions) if such person is relocating to (1) adult care facility; (2) residential health care facility; (3) subsidized low income housing; (4) senior citizen housing; or (5) residence of family member. (N.Y. Real Prop. Law §227-a[1] [NYCLS]).

Distraint.

Satisfaction of claims by distraint has been abolished.

Holding Over.

When tenant with term of over one month holds over after its expiration, holding over does not give landlord option to hold tenant for new term solely by virtue of such holding over. However, landlord can remove tenant, or if landlord accepts rent for any period subsequent to term's expiration, tenancy from month to month will be created unless lease provides otherwise. (N.Y. Real Prop. Law §232-c [NYCLS]).

Dispossession.

Tenant may be removed by special proceeding if holding over his term, if found objectionable by court, if has defaulted in payment of rent or taxes he has agreed to pay, if adjudicated bankrupt, if using premises for illegal activity, and in city having population of one million or more for making smoke or fire detector inoperable. (N.Y. Real Prop. Acts. Law §§711 [NYCLS], 715 [NYCLS]). Term “tenant” includes rooming house occupants and non-transient hotel occupants in possession for at least 30 days. (N.Y. Real Prop. Acts. Law §711 [NYCLS]). This special proceeding must be commenced by service of petition issued by attorney, judge, or clerk of court specifying time and place of hearing at least five and not more than 12 days before time at which petition to be heard. (N.Y. Real Prop. Acts. Law §§731 [NYCLS], 733 [NYCLS]). Procedures differ for special proceeding for nonpayment of rent. (N.Y. Real Prop. Acts. Law §732 [NYCLS]). Petition must be verified by person authorized to maintain proceeding and shall state interest in premises of both petitioner and respondent, describe premises, state facts upon which special proceeding is based, and state relief sought. (N.Y. Real Prop. Acts. Law §741 [NYCLS]). In New York City, if such proceeding is based upon claim that tenant has breached provision of lease, court must issue ten day stay of issuance of warrant, during which time tenant may correct breach. (N.Y. Real Prop. Acts. Law §753[4] [NYCLS]).

Right to Sublet or Assign.

Tenant in dwelling having four or more residential units, having given notice to landlord by certified mail of intention to sublet, has right to sublet, subject to written consent of landlord, which may not be unreasonably withheld upon compliance with terms of N.Y. Real Prop. Law §226-b [NYCLS]. Foregoing does not apply to public housing, or to proprietary leases for cooperative apartments. (N.Y. Real Prop. Law §226-b[2] [NYCLS], [3] [NYCLS]). Unless greater right to assign is conferred by lease, tenant renting residence may not assign without written consent of landlord, which consent may be withheld without cause provided tenant is released from lease upon 30 days notice if landlord unreasonably withholds consent. (N.Y. Real Prop. Law §226-b[1] [NYCLS]).

Uniform Residential Landlord and Tenant Act.

Not expressly adopted in New York.

Emergency Housing Rent Control.

Existence of public emergency requiring regulation of residential rents is matter for local determination within each city, town, or village. (N.Y. Unconsol. Law c. 249-B, §3[a]). In New York City rents and evictions in multiple dwellings are regulated. For most units constructed prior to 1947 and continuously occupied by same tenant and family since June 30, 1971 ("controlled units"), rent may be increased by application to State Division of Housing and Community Renewal upon grounds of: (1) Net annual return of rental income less than 6% of capital value; (2) increases in operating expenses by landlord under certain conditions; (3) voluntarily entered into lease between tenant and landlord subject to certain conditions. Increase must not exceed 15% over maximum rent in effect on effective date of such new lease; (4) substantial rehabilitation or major capital improvement since Mar. 1, 1959; (5) increase in adult occupants not members of tenant's immediate family or subletting without consent of landlord; or (6) unique circumstances resulting in rent substantially lower than rents generally prevailing in same area for substantially similar housing accommodations. (N.Y. Comp. Codes R. & Regs. tit. 9, §§2202.4-.12, 2203 et seq.; N.Y.C. Admin. Code §§26-405[g], 26-408). In most other units in buildings of six or more units ("stabilized units"), rent may be increased: (1) Upon end of lease term, pursuant to new one or two year lease, at increases prescribed annually by guidelines board, or by additional percentage as fixed annually by such board in event of vacancy; (2) monthly by 1/40th of cost of improvements to unit, if agreed by tenant or installed during vacancy; (3) monthly by 1/84th of cost of building-wide improvements, after review by Commissioner; (4) by amount equal to vacancy allowance upon subletting or assignment of lease; or (5) upon finding of hardship by Commissioner under either of two independent hardship criteria. (N.Y. Comp. Codes R. & Regs. tit. 9, §2522.4; N.Y.C. Admin. Code §26-511[c]). Owners who collect overcharges of rent are liable for treble damages based on overcharge. Not applicable to owners who merely fail to timely file rent registration statements. (N.Y.C. Admin. Code §26-516[a]). Further protections regarding rent increases are granted to elderly and disabled tenants in controlled units or stabilized units. (N.Y.C. Admin. Code §26-601 et seq.).

Controlled accommodations are decontrolled upon public hearing and finding by city rent agency that percentage of vacancies in particular class of housing accommodations is 5% or more. (N.Y.C. Admin. Code §26-414). Housing may also be decontrolled by order of Commissioner if: (1) Conversion has resulted in additional housing accommodations consisting of self-contained family units, but such decontrol does not apply to tenant in possession of original accommodations at time of conversion or (2) under certain circumstances following substantial demolition of building. (N.Y.C. Admin. Code §26-403[e][2][i][2], [e][2][i][6][iii]). As of July 7, 1993, for control and stabilized rental units, owners may petition for decontrol on following basis: (i) if housing accommodation is occupied by person with total annual income exceeding $175,000 in each of two preceding calendar years and has maximum rent of $2,000 or more per month; or (ii) maximum rent of $2,000 or more per month which is or becomes vacant on or after Apr. 1, 1997, provided landlord has not acted in bad faith towards tenant. Tenants with rent in excess of $2,000 per month will be required to complete income certification form to verify if income threshold has been exceeded. (N.Y.C. Admin. Code §§26-403[e][2], [j] & [k], 26-504.1 to 26-504.3; N.Y. Unconsol. Law c. 249, §2-a, c. 249-B, §5-a).

Generally no tenant of controlled or stabilized unit who continues to pay rent may be removed by action to evict or recover possession, or otherwise without a certificate of eviction, unless: (1) Tenant is violating a substantial obligation of his tenancy; (2) tenant is committing or permitting a nuisance or is damaging building or interfering with comfort and safety of others; (3) occupancy is illegal; (4) tenant, who had a lease expiring after May 1, 1950, has refused to execute a written extension for a term of not more than a year upon same conditions, as contained in prior lease insofar as consistent with law; (5) tenant unreasonably has refused landlord access; (6) lease has expired and tenant not occupying apartment as primary place of residence; or (7) owner has immediate and compelling necessity to use accommodation for use and occupancy of himself and/or his immediate family. (N.Y.C. Admin. Code §26-408[a]; N.Y. Comp. Codes R. & Regs. tit. 9, §2504.2).

Stabilized tenants not in default of lease obligations generally entitled to lease renewals at guideline increases, except: (1) Where unit is to be demolished or substantially rehabilitated; (2) unit is not primary residence of tenant; (3) withdrawal of unit from residential market; (4) personal use of owner (with similar restrictions as apply to controlled units). (N.Y. Comp. Codes R. & Regs. tit. 9, §2504.4).

For controlled units, landlord may apply to Division for certificate of eviction permitting landlord to pursue remedies at law on grounds that: (1) Landlord seeks housing for use by himself or immediate family where no member of tenant's household is 62 or older, has lived in building for 20 years or more or has physical or psychological impairment; (2) “eviction” cooperative or condominium plan has become effective and certain time periods have run; (3) landlord seeks housing for purposes of alteration, remodeling or demolition for certain purposes; (4) withdrawal of occupied housing accommodations from rental market subject to certain conditions. (N.Y.C. Admin. Code §26-408[b]').

Division may impose by administrative order, after hearing, civil penalty or division may apply to supreme court to enjoin illegal acts or practices or enforce compliance upon finding that any person has: (1) Demanded rent in excess of maximum allowed by law; (2) removed or attempted to remove tenant or refused to renew lease because of tenant's action or proposed action under law; or (3) harassed tenant by conduct including but not limited to disruption of essential services. (N.Y.C. Admin. Code §§26-412 to 26-413).

In City of New York landlord of stabilized units must furnish tenant with copy of fully executed lease or renewal lease with rider attached describing rights and duties of owners and tenants as provided under rent stabilization law of 1969. (N.Y.C. Admin. Code §26-511[d]).

In Nassau, Westchester and Rockland Counties certain housing accommodations are subject to statutory provisions and applicability varies from community to community. In addition, certain units in several upstate cities constructed prior to 1947 and continuously occupied since June 30, 1971 are controlled and certain other units in Albany are controlled. Stabilization and control rules for non-New York City units are similar, but not identical to, rules for New York City.

Commercial and Business Rent Control.

Expired on December 31, 1963.

21.11 LEASES:

See topic 21.10 Landlord and Tenant.

21.12 [RESERVED]

21.13 PERPETUITIES:

Real Property.

Absolute power of alienation suspended when there are no persons in being by whom absolute fee or estate in possession can be conveyed or transferred. (N.Y. Est. Powers & Trust Law §9-1.1[a][1] [NYCLS]). Every present or future estate is void in its creation, which suspends absolute power of alienation, by any limitation or condition for longer period than lives in being at creation of estate and term of not more than 21 years. (N.Y. Est. Powers & Trust Law §9-1.1[a][2] [NYCLS]). Remoteness of vesting may similarly invalidate. (N.Y. Est. Powers & Trust Law §9-1.1[b] [NYCLS]). Lives in being include child begotten before creation of estate but born thereafter. (N.Y. Est. Powers & Trust Law §9-1.1[a][2] [NYCLS]). Lives measuring permissible period must not be so designated or so numerous as to make proof of their end unreasonably difficult. (N.Y. Est. Powers & Trust Law §9-1.1[b] [NYCLS]). Trusts for exclusive benefit of employees created as part of stock bonus plan, pension plan, disability or death benefit plan, profit-sharing plan, trusts created under retirement plan, charitable trusts, trusts for care of cemeteries, cemetery lots, etc., and certain other educational and charitable uses are not subject to this rule. (N.Y. Est. Powers & Trust Law §§8-1.1 to 8-1.3 [NYCLS], 8-1.5 [NYCLS], 9-1.6 to 9-1.7 [NYCLS]).

Where an estate or interest would, except for the statute, be invalid because made to depend either for its vesting or its duration upon any person attaining or failing to attain an age in excess of 21 years, the age contingency shall be reduced to 21 years as to all persons subject to the same age contingency. (N.Y. Est. Powers & Trust Law §9-1.2 [NYCLS]). In construction of an instrument by which an estate or interest is created, rules of construction provided in statute govern for purpose of ascertaining intention of person by whom estate or interest was created with respect to matters determining period during which absolute power of alienation is suspended by such estate or interest. (N.Y. Est. Powers & Trust Law §9-1.3[a] [NYCLS]). It shall be presumed that such person intended estate or interest to be valid. (N.Y. Est. Powers & Trust Law §9-1.3[b] [NYCLS]). Where an estate or interest would, except for statute, be invalid because of possibility that person to whom it is given or limited may be a person not in being at time of creation of estate or interest, and such person is described in instrument as spouse of another person, without other identification, it shall be presumed that such phrase was intended to refer to person in being on effective date of instrument. (N.Y. Est. Powers & Trust Law §9-1.3[c] [NYCLS]). Where duration or vesting of estate or interest is conditioned upon probate of will, appointment of fiduciary, location of distributee, payment of debts, sale of assets, settlement of estate, or determination of questions relating to estate or transfer tax, or happening of any like contingency, it shall be presumed that person who created estate intended that such contingency must occur, if at all, within 21 years from effective date of instrument. (N.Y. Est. Powers & Trust Law §9-1.3[d] [NYCLS]). It is presumed that male can have child at 14 years of age or over, but not under that age, and that female can have child at 12 years of age or over, but not under that age or over age of 55 years. (N.Y. Est. Powers & Trust Law §9-1.3[e][1] [NYCLS]). Living persons may still offer evidence to establish whether or not he or she is able to have child at time in question. (N.Y. Est. Powers & Trust Law §9-1.3[e][2] [NYCLS]). Possibility that such person will have child by adoption is disregarded. (N.Y. Est. Powers & Trust Law §9-1.3[e][3] [NYCLS]). Where remainder is limited to take effect on death of any person without heirs, or heirs of his body or distributees or issue, word “heirs” or “heirs of the body” or “distributees” or “issue” is construed to mean heirs or issue living at death of person named as ancestor. (N.Y. Est. Powers & Trust Law §6-5.6 [NYCLS]).

An estate may be created to commence at a future time; an estate for life may be created in a term of years and a future estate limited thereon; a future estate may be limited after term of years, provided, if such future estate is contingent, that nature of contingency on which it is limited is such that future estate must vest within period permitted for suspension of absolute power of alienation; and a fee or lesser estate may be limited on a fee, subject to contingency which, if it should occur, must happen within period permitted for suspension of absolute power of alienation. (N.Y. Est. Powers & Trust Law §6-3.3 [NYCLS]).

Personal Property.

Period for which absolute power of alienation may be suspended is (since Sept. 1, 1930) same as that for real property. (198 Misc. 984, 99 N.Y.S.2d 820, aff'd, 277 A.D. 1114, 101 N.Y.S.2d 939, aff'd, 302 N.Y. 439, 99 N.E.2d 230). In other respects, limitations of future or contingent interests in personal property are subject to rules prescribed in relation to future estates in real property. (N.Y. Est. Powers & Trust Law §§9-1.1 to 9-1.3 [NYCLS]). Trusts for exclusive benefit of employees created as part of stock bonus plan, pension plan, disability or death benefit plan, or profit-sharing plan, trusts created under retirement plan, charitable trusts, trusts for care of cemeteries, cemetery lots, etc., and certain other educational and charitable uses are not subject to this rule. (N.Y. Est. Powers & Trust Law §§8-1.1 to 8-1.3 [NYCLS], 8-1.5 [NYCLS], 9-1.6 to 9-1.7 [NYCLS]).

Accumulations.

All directions for accumulation of income are void, except as allowed by statute. (N.Y. Est. Powers & Trust Law §9-2.1[a] [NYCLS]).

Direction for accumulation of income is valid if such accumulation is to begin and terminate within time allowed by above perpetuity statutes. Direction to accumulate for a longer period terminates upon such expiration. (N.Y. Est. Powers & Trust Law §9-2.1[b] [NYCLS]). Law governing validity of a direction for accumulation contained in an instrument exercising a power of appointment shall be law in effect at time of exercise of power or unqualified power to revoke is terminated, rather than law in effect at time of creation of power. (N.Y. Est. Powers & Trust Law §10-8.2 [NYCLS]).

Income arising from trusts for religious, educational or charitable purposes, trusts created by employers as a part of a stock bonus, pension, disability, death benefit or profit-sharing plan, income from which trusts goes to pay employees, may under certain conditions be permitted to accumulate. (N.Y. Est. Powers & Trust Law §§8-1.7 [NYCLS], 9-2.1 [NYCLS]).

21.14 PERSONAL PROPERTY:

Tenancy by entirety not recognized. (N.Y. Est. Powers & Trust Law §§6-2.1 to 6-2.2 [NYCLS]).

21.15 POWERS OF ATTORNEY:

Attorneys in Fact.

An instrument containing a power to convey real property as agent or attorney for owner of property, acknowledged or proved, and certified, in manner to entitle conveyance to be recorded, may be recorded in office of recording officer of any county in which any of real property to which it relates is situated. (N.Y. Real Prop. Law §294[1] [NYCLS]). For form of acknowledgment, see category 10 Documents and Records, topic 10.01 Acknowledgments.

Formalities.

Requirements for execution of valid power, including statutory short form of general power. (N.Y. Gen. Oblig. Law §5-1501B [NYCLS]; see topic Acknowledgments). Attorney-in-fact cannot convey any interest in land, except a lease for a year or less, unless written instrument creating authority empowers conveyance by attorney-in-fact of specific interest. (N.Y. Gen. Oblig. Law §5-703[1] [NYCLS]).

Form of Power of Attorney.

For statutory short form, see N.Y. Gen. Oblig. Law §5-1501 et seq. [NYCLS]

Formalities.

Requirements for valid power of attorney. (N.Y. Gen. Oblig. Law §5-1501B [NYCLS]).

Members of Armed Forces.

A power of attorney, in writing, given by a person who is, or after executing such power of attorney becomes, member of the Armed Forces or merchant seaman outside the continental limits of United States or who is assigned to duty by U.S. government outside continental limits in connection with military campaign shall not be revoked as to attorney-in-fact who acts under such power of attorney without actual knowledge or actual notice of principal's death. Affidavit of lack of such actual notice, in absence of fraud, is conclusive proof of nontermination of such power. No official or unofficial report of “missing” or “missing in action” constitutes actual notice. This section is not intended to alter or affect any provision for revocation or termination contained in such power of attorney. (N.Y. Gen. Oblig. Law §3-501 [NYCLS]).

Uniform Durable Power of Attorney Act.

Not adopted.

21.16 REAL PROPERTY:

Estates in real property are divided into fee simple absolute, fee on condition, fee on limitation, estates for life, estates for years, estates from period to period, estates at will and estates by sufferance. (N.Y. Est. Powers & Trust Law §6-1.1 [NYCLS]).

Estate granted or devised to two or more persons is tenancy in common unless expressly declared joint tenancy, except that every estate vested in executors or trustees is held by them in joint tenancy. Disposition of real property or disposition of shares of stock of cooperative apartment together with appurtenant proprietary lease on or after Jan. 1, 1996 to husband and wife creates tenancy by entirety, unless expressly declared joint tenancy or tenancy in common. Disposition of real property to persons who are not legally married to one another but who are described in disposition as husband and wife creates in them joint tenancy, unless expressly declared to be tenancy in common. (N.Y. Est. Powers & Trust Law §6-2.2 [NYCLS]).

Rule in Shelley's Case.

Rule has been abolished. (N.Y. Est. Powers & Trust Law §6-5.8 [NYCLS]).

Foreign Conveyances or Encumbrances.

See category 10 Documents and Records, topic 10.04 Records.

Condominiums.

Uniform Condominium Act not adopted. Unit ownership of condominium permitted. (N.Y. Real Prop. Law §339-h [NYCLS]). Lengthy statutory provisions exist concerning condominiums. (N.Y. Real Prop. Law §§339-d to 339-kk [NYCLS]). See category 3 Business Regulation and Commerce, topic 3.24 Securities, subhead Real Estate Syndication Offerings. Prospectus and offering literature must be filed with Department of Law before any public offering of interests in cooperative or condominium can be made in state. (N.Y. Gen. Bus. Law §352-e[2-a] [NYCLS], [2-b] [NYCLS]). Statutory provisions exist concerning bases for Attorney General's refusal to issue required letter. (N.Y. Gen. Bus. Law §352-e[2] [NYCLS], [2][b] [NYCLS]). Offering plans for untenanted condominiums may be eligible for expedited 30-day review. Lengthy statutory provisions exist concerning conversions to cooperative or condominium ownership. (N.Y. Gen. Bus. Law §§352-ee to 352-eeee [NYCLS]).

Board of managers of condominium, as agent of each unit owner who has given his written authorization, may file single complaint or application for review of real property assessments for consenting unit owners. (N.Y. Real Prop. Law §339-y[4] [NYCLS]). See also topics 21.05 Curtesy, 21.06 Deeds, 21.08 Dower, 21.10 Landlord and Tenant; category 3 Business Regulation and Commerce, topic 3.24 Securities; category 5 Civil Actions and Procedure, topic 5.16A Partition; category 8 Debtor and Creditor, topic 8.10 Homesteads; category 14 Family, topic 14.09 Husband and Wife; category 20 Mortgages, topic 20.04 Mortgages of Real Property.

Warranties on Sales of New Homes.

Housing merchant implied warranty implied in contract or agreement for sale of new home and survives passing of title. (N.Y. Gen. Bus. Law §777-a[1] [NYCLS]).

Uniform Simplification of Land Transfers Act.

Act not adopted.

See also topics: 21.05 Curtesy, 21.06 Deeds, 21.08 Dower, 21.10 Landlord and Tenant, 21.13 Perpetuities; category 5 Civil Actions and Procedure, topic 5.16A Partition; category 8 Debtor and Creditor, topic 8.10 Homesteads; category 10 Documents and Records, topic 10.04 Records; category 14 Family, topic 14.09 Husband and Wife; category 20 Mortgages, topic 20.04 Mortgages of Real Property.

Subdivided Lands.

Purchaser or lessee of subdivided lands, as defined in N.Y. Real Prop. Law §337 [NYCLS], has right to cancel agreement within seven days of execution by giving subdivider notice of such cancellation. Subdividers will return to purchaser or lessee all consideration paid or delivered on account of such agreement within ten days of receipt of such notice of cancellation. (N.Y. Real Prop. Law §337-c [NYCLS]).

21.17 TRUST DEEDS:

See category 20 Mortgages, topic 20.04 Mortgages of Real Property.

22 TAXATION

22.01 ADMINISTRATION:

Department of Taxation and Finance is revenue agency of State of New York and located at W.A. Harriman Campus, Albany, New York 12227. Under direction of Commissioner of Taxation and Finance, Department maintains treasury and administers state tax laws.

Taxpayer's Bill of Rights.

Relative rights and responsibilities of citizens and state are set forth in (N.Y. Tax Law §§3000-3038) to ensure equitable administration of tax law. Law was passed on Aug. 7, 1992 to safeguard taxpayer's rights, privacy and property during assessment, collection and enforcement.

Penalties.

Personal Income Tax.

Generally, if income tax not paid by date due whether time extension granted or not, or if declaration of estimated tax not filed or estimated tax not paid, interest is charged from due date to date paid at annual rate set by tax commission (minimum rate 6% per annum), compounded daily. (N.Y. Tax Law §§697[j] [NYCLS], 684 [NYCLS], 685[c] [NYCLS]). If tax return not filed by prescribed date including extensions, unless shown due to reasonable cause and not willful neglect, 5% of tax added for first month overdue plus additional 5% for each subsequent month up to maximum of 25%. (N.Y. Tax Law §685[a][1] [NYCLS]). If tax deficiency caused by negligence or intentional disregard but without intent to defraud, 5% of deficiency added (N.Y. Tax Law §685[b] [NYCLS]); if fraudulently caused, penalty is amount of two times the deficiency(N.Y. Tax Law §685[e] [NYCLS]). For willful failure to collect truthfully, account for and pay over tax, taxpayer liable to penalty of total amount of tax evaded, or not collected, or not accounted for and paid over. (N.Y. Tax Law §685[g] [NYCLS]). Additional penalty of up to $1,000 can be assessed by tax commission for any evasion with fraudulent intent. (N.Y. Tax Law §685[i] [NYCLS]). Taxpayer or person preparing return willfully attempting to evade tax guilty of misdemeanor. (N.Y. Tax Law §§695 [NYCLS], 1801 [NYCLS]). Additional penalties may be levied at local level.

Estate Tax.

With minor modifications, penalties for failure to pay estate tax are same as for failure to pay personal income tax. (N.Y. Tax Law §990[a] [NYCLS]).

Sales Tax.

Person who fails to file return or pay tax within time required is subject to penalty of 10% of tax due plus 1% of tax for each subsequent month or fraction thereof after first, not to exceed 30% in aggregate, unless tax commission finds delay excusable. Interest at greater of 14% per annum or at underpayment rate pursuant to N.Y. Tax Law §1142 [NYCLS] is imposed each month after due date. (N.Y. Tax Law §1145[a][1] [NYCLS]). If failure to file return or pay tax due to fraud, penalty is 50% of tax due plus interest at greater of 14% or underpayment rate of interest set pursuant to N.Y. Tax Law §1142 [NYCLS] is imposed. (N.Y. Tax Law §1145[a][2] [NYCLS]). In addition to other penalties, person who willfully fails to comply with requirements of filing, providing information, or charging customer tax is guilty of misdemeanor. (N.Y. Tax Law §§1145[b] [NYCLS], 1817 [NYCLS]).

Use Tax.

Same as catchline Sales Tax, supra.

Cigarette Tax.

If tax not paid when due, by any person other than agent, or distributor or other person treated as distributor pursuant to (N.Y. Tax Law §471-d [NYCLS]), penalty of 50% of tax plus 1% for each subsequent month or fraction thereof after first assessed unless excused by commissioner of Taxation and Finance. (N.Y. Tax Law §481[1][a][i][B] [NYCLS]). Agent or distributor subject to penalty of 10% of tax plus 1% for each subsequent month or fraction thereof (not to exceed 30% in aggregate) for failure to file or pay tax. (N.Y. Tax Law §481[1][a][i][A] [NYCLS]). Additional penalty of not more than $150 per 200 cigarettes in unstamped or unlawfully stamped packages may be imposed for amounts in excess of 1,000 cigarettes. (N.Y. Tax Law §481[1][b] [NYCLS]). Any person, other than agent, who willfully attempts to evade tax guilty of misdemeanor. (N.Y. Tax Law §1814[d] [NYCLS]). Person previously convicted two or more times, or offering for sale 10,000 or more cigarettes in unstamped or unlawfully stamped packages, or willfully attempting to evade tax on 10,000 or more cigarettes, is guilty of Class E felony. Class D felony if 30,000 or more cigarettes. (N.Y. Tax Law §1814[e] [NYCLS]).

Tobacco Products Tax.

If tax not paid when due, by any person other than agent, distributor or other person treated as distributor pursuant to N.Y. Tax Law §471-d [NYCLS], penalty of 50% of tax plus 1% for each subsequent month after first assessed unless excused by Commissioner of Taxation and Finance. (N.Y. Tax Law §481[1][a][i][B] [NYCLS]).

If person who is not tobacco products dealer or distributor possesses more than 250 cigars or more than five pounds of tobacco upon which tax has not been paid, Commissioner of Taxation and Finance may impose additional penalty of no more than $75 for each excess 50 cigars or each excess pound of tobacco or fraction thereof, up to maximum aggregate amount of $7,500. If tobacco products dealer or distributor possesses more than 50 cigars or one pound of tobacco upon which tax has not been paid, Commissioner can impose up to maximum aggregate amount of $15,000. (N.Y. Tax Law §481[1][b][i] [NYCLS]).

If, for purposes of sale, person who is not appointed tobacco products distributor imports or manufactures more than 50 cigars or more than one pound of tobacco, he is guilty of misdemeanor punishable by fine of not more than $5,000 or 30 days' imprisonment. If within any 90-day period amount imported or manufactured is 1,000 or more cigars or 500 or more pounds of tobacco person is guilty of misdemeanor. On third and subsequent convictions, violator is guilty of Class E felony regardless of amount of tobacco products involved. (N.Y. Tax Law §1814-a[a] [NYCLS]).

Alcoholic Beverage Tax.

Distributor failing to file return or pay tax due subject to penalty of 10% of tax plus interest at 1% for each subsequent month or fraction thereof after first (not to exceed 30%), unless commissioner of Taxation and Finance finds delay was excusable. If failure to pay tax is due to fraud, penalty is two times the amount of tax due plus interest at the underpayment rate of accrued interest at date of payment. (N.Y. Tax Law §§433 [NYCLS], 1813 [NYCLS]).

Gasoline Tax.

Failure to file return or pay any tax due subject to penalty of 10% of tax plus interest at 1% for each subsequent month or fraction thereof after first (not to exceed 30% in aggregate), unless commissioner of Taxation and Finance finds delay was excusable. Failure due to fraud results in penalty of two times the amount of tax due, plus interest at underpayment rate set by commissioner. (N.Y. Tax Law §289-b [NYCLS]). Willful attempt to evade or defeat tax is punishable as Class E felony. Willful failure to file return or report or to pay tax is punishable as misdemeanor. Filing of fraudulent returns, reports, statements or other documents is punishable as felony. (N.Y. Tax Law §1812 [NYCLS]).

Highway Use Tax.

Person failing to file return or pay tax due subject to penalty of 10% of tax plus interest at 1% for each subsequent month or fraction thereof after first not to exceed 30% in aggregate. If return fraudulent, or failure to file is with intent to evade, penalty is provided at two times tax due plus interest at date of payment. (N.Y. Tax Law §512 [NYCLS]).

Public Utilities Tax.

Persons failing to file return or pay tax when due subject to penalty of 5% if failure is not more than one month plus additional 5% for each additional month or fraction thereof, not exceeding 25% in aggregate, unless tax commissioner finds delay was reasonable. (N.Y. Tax Law §1085[a][1][A] [NYCLS]).

Unemployment Insurance Tax.

Making of a willfully false statement for purpose of obtaining benefit under law or reducing contributions is punishable as misdemeanor. (N.Y. Lab. Law §632[1] [NYCLS]). Willful failure to contribute to fund or refusal to permit inspection of documents for purposes of enforcing this law is also punishable as misdemeanor. (N.Y. Lab. Law §§633 [NYCLS], 634 [NYCLS]). Likewise, deduction from employee's compensation to pay employer's contribution to fund is punishable as misdemeanor. (N.Y. Lab. Law §635 [NYCLS]). Misdemeanor under terms of this law is punishable by maximum fine of $500, or imprisonment not exceeding one year, or both. (N.Y. Lab. Law §630 [NYCLS]).

Criminal Tax Fraud Acts

Criminal misdemeanor and felony punishment provided for tax fraud or attempt to evade in the first to fifth degrees. (N.Y. Tax Law §§1801 to 1807 [NYCLS]).

22.02 ALCOHOL, BEVERAGES AND TOBACCO TAXES:

Alcoholic beverage tax imposed by N.Y. Tax Law §424[1] [NYCLS].

Cigarette tax imposed by N.Y. Tax Law §471-a [NYCLS].

Tobacco products tax imposed by N.Y. Tax Law §471-b [NYCLS].

22.03 [RESERVED]

22.04 CORPORATE TAXES:

Corporation and Franchise Taxes.

See category 2 Business Organizations, topic 2.03 Corporations.

Franchise Taxes.

Domestic corporations, and foreign corporations doing business, employing capital, owning or leasing property, or maintaining office in New York, are subject to, unless specifically exempted, annual corporate franchise tax generally in amount equal to (i) greater of: (1) 7.5% of taxpayer's entire net income allocated to New York (for tax years beginning after June 30, 2001) (special rules apply for small business taxpayers); (2) 1.78 mills of taxpayer's business and investment capital allocated to New York, but not to exceed $350,000; (3) 2.5% of taxpayer's minimum taxable income base; or (4) $1,500 for taxpayers with gross payrolls of $6,250,000 or more; $425 for taxpayers with gross payrolls of $1,000,001 to $6,249,999; $325 for taxpayers with gross payrolls of $500,001 to $1,000,000; $225 for taxpayers with gross payrolls of $250,001 to $500,000; $100 for taxpayers with gross payrolls of $250,000 or less (except as stated below); and $800 for taxpayers with gross payrolls of $1,000 or less, total receipts within and without New York state of $1,000 or less, and average value or gross assets of $1,000 or less; plus (ii) 0.9 mill for each dollar of allocated subsidiary capital. (N.Y. Tax Law §210[1] [NYCLS]). For purposes of New York corporate franchise tax, term “corporation” includes associations, joint stock companies or associations, publicly traded partnerships treated as corporations for purposes of Internal Revenue Code and trusts. (N.Y. Tax Law §§208[1] [NYCLS], 209 [NYCLS]).

If taxpayer's taxable year is less than 12 months, amount prescribed pursuant to subsection (4) above is determined by annualizing taxpayer's gross payroll and total receipts and by reducing amounts otherwise prescribed by 25% if taxable period is of more than six months but not more than nine months, and by 50% if taxable period is of not more than six months.

If taxpayer conducts business partly outside New York, tax is apportioned by business allocation percentage based on ratio of taxpayers real and tangible personal property (both owned and rented), receipts, and payroll in New York to its totals of these items. (N.Y. Tax Law §210[1] [NYCLS], [3] [NYCLS]).

In general, for taxable years ending before Dec. 31, 2013, surcharge (for not more than 372 months) of 18% is imposed on portion of corporation franchise tax attributable to business activity carried on within Metropolitan Commuter Transportation District, which consists of City of New York and Counties of Dutchess, Nassau, Orange, Putnam, Rockland, Suffolk and Westchester. (N.Y. Tax Law §209-B[1] [NYCLS]). S Corporations are exempt from temporary transportation business tax surcharge. (N.Y. Tax Law §209-B[1] [NYCLS]). Corporations subject to other franchise taxes and following specified corporations are exempt from corporation franchise tax, agricultural cooperatives (N.Y. Tax Law art. 9 [NYCLS] §185); transportation and transmission corporations (N.Y. Tax Law §§183-184); insurance companies (N.Y. Tax Law art. 33 [NYCLS]); banks, trust companies, savings and loan associations, and other financial corporations (N.Y. Tax Law art. 32 [NYCLS]); and bank holding companies (N.Y. Tax Law art. 32 [NYCLS] §1462). Transportation and transmission corporations subject to temporary surcharges until Dec. 31, 2013. (N.Y. Tax Law §§183-a [NYCLS], 184-a [NYCLS]).

Anti-PIC (Passive Investment Company) Provisions.

For tax years beginning after 2002, when calculating corporate franchise tax taxpayer must add back any royalty payments made to related taxpayer that were deductible in calculating federal taxable income.

Nonprofit corporations, exempt from federal income tax under I.R.C. §501, are generally presumed to be exempt from franchise tax.

Real Estate Investment Trusts.

Real estate investment trust as defined for federal tax purposes (26 U.S.C.S.. §856), is subject to franchise tax measured by entire net income base, minimum taxable income base, or fixed dollar minimum, whichever is greater (N.Y. Tax Law §209[5] [NYCLS]).

Subchapter S Corporation.

Is subject to tax. Tax is equal to higher of entire net income base, or fixed dollar minimum tax, reduced by “Article 22 tax equivalent”. Effective Apr. 28, 1998, minimum tax imposed on S Corporations is $100. For tax years beginning after June 30, 2003, “Article 22 tax equivalent” rate is 7.1425% of entire net income base. (N.Y. Tax Law §§210[21] [NYCLS], 210[1][g] [NYCLS]). For tax years beginning in 2003, 2004 and 2005, N.Y. S Corporations are subject to only fixed dollar minimum tax.

What Constitutes Doing Business in State.

Foreign corporation is not deemed to be doing business, employing capital, owning or leasing property, or maintaining office in state by reason of: maintenance of bank account and/or ownership of securities deposited in safe deposit box or in custodian account, within state and/or pledged as collateral within state; maintenance of office in this state by one or more officers of or directors of corporations who are not employees of such corporation if corporation otherwise is not doing business in state and does not employ capital or own or lease property in state; by keeping of books or records in state if such are not kept by employees of such corporation and such corporation does not otherwise do business, employ capital, own or lease property or maintain office in state; by use of fulfillment services of nonaffiliated person in state; or by any combination of forgoing activities. (N.Y. Tax Law §209[2] [NYCLS]).

Liability for Tax.

Receiver, referee, trustee, assignee or other fiduciary or officer or agent appointed by any court, who conducts business of corporation, is subject to tax to same extent as though business were conducted by officers or agents. Dissolved corporation that continues to conduct business is also subject to tax. (N.Y. Tax Law §209[3] [NYCLS]).

Returns and Payments.

Franchise tax returns must be made, and tax paid, to State Tax Commission.

Report prescribed by Tax Commission must be filed on or before Mar. 15, or if on basis of fiscal year, within two and one-half months after close of fiscal year. (N.Y. Tax Law §211[1] [NYCLS]). Tax due when report required by N.Y. Tax Law §211 [NYCLS] is due. Penalty for failure to file return not due to reasonable cause or due to willful neglect is 5% of tax due for first month delinquent with additional 5% for each subsequent month or fraction thereof up to maximum of 25%. (N.Y. Tax Law §1085[a][1][a] [NYCLS]). Penalty for failure to pay tax due not to reasonable cause or due to willful neglect is 0.5% of tax due for first month delinquent with additional 0.5% for each subsequent month or fraction thereof up to maximum of 25%. (N.Y. Tax

Law §1085[a][2] [NYCLS]). Intentional failure to file annual report or to pay tax may be penalized by dissolution of domestic corporation or by annulment of foreign corporation's authority to do business in New York. (N.Y. Tax Law §§203-a [NYCLS], 203-b [NYCLS], 217[1] [NYCLS]).

Declaration of estimated tax and of estimated tax surcharge required if it is expected to exceed $1,000. Report due June 15th if on calendar basis, and on 15th day of sixth month if on fiscal basis. (N.Y. Tax Law §213-a[a] [NYCLS], [c] [NYCLS]). Installment payments of estimated taxes are provided. (N.Y. Tax Law §213-b [NYCLS]), some provisions expire and repealed Jan. 1, 2007 per (2002 N.Y. Laws c. 85, §5).

Special taxes must also be paid in event of changes in capital structure effected by charter amendment or merger or consolidation. (N.Y. Tax Law §180 [NYCLS]).

Special Reports.

At discretion of commissioner, any taxpayer, owning or controlling substantially all capital stock of one or more other corporations may be required or permitted to make consolidated report to Commissioner of Taxation and Finance. (N.Y. Tax Law §211[4] [NYCLS]).

Incorporation Tax.

See category 2 Business Organizations, topic 2.03 Corporations, subhead Organization Tax.

Stock Transfer Tax.

See category 2 Business Organizations, topic 2.03 Corporations, subhead Stock Transfer Tax.

Real Estate Mortgage Investment Conduits.

REMICs are exempt from all taxes imposed by New York Tax Law. (N.Y. Tax Law §8 [NYCLS]).

Insurance Premium, Privilege and Franchise Taxes.

Franchise tax is imposed on domestic alien and foreign insurance companies' income and capital allocated to New York (N.Y. Tax Law §§1501-1504), and on gross direct premiums less return premiums thereon written on risks located or resident in state (N.Y. Tax Law §1510 [NYCLS]) and subject to certain limitations (N.Y. Tax Law §1505 [NYCLS]). Temporary metropolitan transportation business tax surcharge on insurance corporations until Dec. 31, 2013. (N.Y. Tax Law §1505-a [NYCLS]). As of July 1, 1990, any person who purchases or renews taxable insurance contract from insurer not authorized to transact business in this state will be taxed at rate of 3.6% of premiums paid or to be paid, less returns thereon, for such insurance. This provision shall not apply to (1) U.S. government; (2) state of New York; (3) United Nations; (4) any foreign government; (5) taxable insurance contracts purchased through New York licensed excess line broker in accordance with N.Y. Ins. Law §2118; and (6) any taxable insurance contract described in subsections (b), (c) and (d) of N.Y. Ins. Law §2117. (N.Y. Tax Law §§1550-1557). There is also imposed fire department tax on policies of non-mutual, foreign and alien fire insurance companies, except in cities of New York and Buffalo (N.Y. Ins. Law §9104); mutual fire insurance companies are taxed under (N.Y. Ins. Law §9105).

Premium Taxes on Foreign Insurance Companies.

See category 16 Insurance, topic 16.01 Insurance Companies, subhead Foreign Insurance Companies.

Unrelated Business Income Tax.

Unrelated business income of tax exempt organizations and trusts is subject to annual tax of 9% of unrelated income allocated to this state, or $250, whichever is greater. (N.Y. Tax Law §290[a] [NYCLS]). The unrelated business taxable income subject to tax shall be such taxpayer's federal unrelated business income with following modifications: (1) Add amount of New York State unrelated business income tax; (2) subtract any refund or credit for overpayment for New York tax; (3) net operating loss deduction to be allowed will be same as net operating loss deduction allowed under I.R.C. §512[b][6] with following modifications and limitations: (i) Adjustments must be made to reflect modifications above described; (ii) no deduction allowed for net operation losses sustained during any taxable year beginning before Jan. 1, 1970, or during year in which taxpayer was not subject to tax; (iii) deduction may not exceed allowable federal deduction. (N.Y. Tax Law §292[a][3] [NYCLS]). Portion of unrelated business taxable income of taxpayer to be allocated within this state shall be determined by formula based on property, receipts and wages. (N.Y. Tax Law §293 [NYCLS]). Return and payment of tax is due on 15th day of fifth month following close of taxable year. (N.Y. Tax Law §294[a] [NYCLS]).

22.05 EMPLOYMENT TAXES:

Unemployment Insurance Tax.

“Contributions” imposed on employers who have paid remuneration of $300 or more ($500 or more in case of domestic service in private homes) in any calendar quarter. (N.Y. Lab. Law §560[1] [NYCLS]). Unless employer has paid no wages for four consecutive calendar quarters, coverage terminated only after written application to industrial commissioner. Any employer who has paid no wages for employment in this state during period of four consecutive payroll years shall cease to be employer liable for contributions as of end of the last of such payroll years. (N.Y. Lab. Law §562[3] [NYCLS]). Generally, subject employers contribute at maximum basic rate of 5.4% of wages paid with charge of 1% monthly for failure to pay. Contributions neither to be paid by wage deductions nor by employees directly. (N.Y. Lab. Law §570 [NYCLS]). Additional subsidiary contribution (rate up to 1%) and supplementary taxes varies with unemployment insurance fund balance. (N.Y. Lab. Law §577[2] [NYCLS]). Specific sections allow for commissioner assessment (N.Y. Lab. Law §571 [NYCLS]) and enforcement (N.Y. Lab. Law §573 [NYCLS]). Individuals receiving unemployment insurance benefits can elect estimated federal income tax withholding from such benefits. (N.Y. Lab. Law §596[6][a][3] [NYCLS]).

22.06 [RESERVED]

22.07 ESTATE TAX:

Tax imposed on transfer of New York taxable estate of resident and nonresident decedents; (N.Y. Tax Law art. 26 [NYCLS]) digested below and applicable if death on or after Apr. 1, 1963 (N.Y. Tax Law §§951-999). N.Y. Tax Law art. 26 [NYCLS] modeled after federal estate tax, but unification of estate and gift tax rates not adopted; final federal determinations conclusive, unless shown erroneous by preponderance of evidence. (N.Y. Tax Law §961[c] [NYCLS]; 97 Misc.2d 72 [1978]). Estate of specified terrorist victim dying on or after Sept. 11, 2001, but before Jan. 1, 2002, exemptions per (2002 N.Y. Laws c. 85, §5). Executor of every estate subject to federal tax must file with commissioner of taxation and finance copy of federal estate tax return (N.Y. Tax Law §977[b][1] [NYCLS]). For resident decedents dying after Feb. 1, 2000, returns must be filed if federal return must be filed. (N.Y. Tax Law §971[a][1] [NYCLS]). For nonresidents, return must be filed if federal return must be filed, but only if gross estate includes real or tangible property having situs in N.Y. (N.Y. Tax Law §971[a][2] [NYCLS]). All necessary forms may be obtained by calling (from within New York) (800) 462-8100 or (from outside New York) (518) 438-1073 between 8:30 a.m. and 4:25 p.m. or 24 hours per day on world wide web at http://www.tax.state.ny.us/forms/default.htm.

Estate tax returns are required to be filed within nine months after death of decedent. (N.Y. Tax Law §972[a] [NYCLS]). Estate tax becomes due and payable at time return is filed, but interest begins to accrue if tax is not paid at rate set by Commissioner or if no rate is set, at rate of 6% per annum. (N.Y. Tax Law §§974[b] [NYCLS], 684[a] [NYCLS] and 697 [NYCLS]).

Resident's Taxable Estate.

For estates of decedents dying on or after Feb. 1, 2000: N.Y. gross estate consists of federal gross estate, whether or not federal return required, excluding value of real or tangible personal property situated outside state, but including value of N.Y. situs property in which decedent had qualifying life income interest. (N.Y. Tax Law §954[a] [NYCLS]). New York gross estate shall be valued as of applicable federal valuation date or dates. (N.Y. Tax Law §954[b] [NYCLS]). Real property qualified under I.R.C. §2032A has same value for N.Y. gross estate as for federal estate tax purposes. (N.Y. Tax Law §954[b] [NYCLS]).

Valuation of Gross Estate.

Gross estate will be valued as of time of decedent's death, unless federal estate tax return is filed under alternate valuation. (N.Y. Tax Law §954[b] [NYCLS]).

Modification for Limited Powers of Appointment Created Prior to Sept. 1, 1930.

Value of N.Y. gross estate is increased by including value of property passing under limited power of appointment created before Sept. 1, 1930. (N.Y. Tax Law §957[a] [NYCLS]).

Tax Imposed.

For estates of decedents dying on or after Feb. 1, 2000, tax is amount equal to maximum credit for state death taxes allowable against federal estate tax under I.R.C. §2011, or, if decedent's estate is also subject to tax imposed by another state with respect to which such federal credit is allowed, N.Y. tax will be reduced proportionately. (N.Y. Tax Law §952[a] [NYCLS]).

Nonresident Estate Tax for Decedents Dying on or after Feb. 1, 2000: Tax imposed on transfer from any deceased individual who at death was not N.Y. resident, of real and tangible personal property having actual situs in N.Y. and either (i) includible in federal gross estate or (2) would be includible in his N.Y. gross estate pursuant to N.Y. Tax Law §957 [NYCLS] if decedent were resident of N.Y. (N.Y. Tax Law §960[a] [NYCLS]). Tax computed as if decedent were resident, but no credit allowance and value of any intangible personal property otherwise includible in decedent's N.Y. gross estate is not includible. (N.Y. Tax Law §960[b] [NYCLS]). No tax is imposed on personal property (except tangible personal property having actual situs in N.Y.) if transferor is resident of state or territory which provides by statute reciprocal exemption for nonresidents. Such states are: Alaska, Colorado, Iowa, Maryland, Michigan, Montana, Nebraska, Oklahoma, and South Dakota. (N.Y. Tax Law §960-a [NYCLS]).

General Credit.

For estates of decedents dying on or after Feb. 1, 2000, tax is amount equal to maximum credit for state death taxes allowable against federal estate tax under I.R.C. §2011, or if decedent's estate is also subject to tax imposed by another state with respect to which such federal credit is allowed, N.Y. tax will be reduced proportionately. (N.Y. Tax Law §952[a] [NYCLS]).

Estate Tax Determination.

Effective for decedents dying after May 25, 1990, estate tax is self-assessed and required to be paid without any notice or demand having been made. (N.Y. Tax Law §974 [NYCLS]). For estates of decedents dying on or after Feb. 1, 2000: Tax can be assessed at any time within six years after return was filed if estate omits from its federal gross estate, federal tax estate or N.Y. gross estate amount properly includible therein which is in excess of 25% of amount stated in return of federal gross estate, federal tax estate or N.Y. gross estate. (N.Y. Tax Law §990 [NYCLS]).

Apportionment of Federal and State Estate or Other Death Taxes

Equitable apportionment of all estate or other death taxes against testamentary and nontestamentary assets unless otherwise directed by will or other instrument. (N.Y. Est. Powers & Trust Law §§2-1.8[a] [NYCLS], 12-1.2 [NYCLS]). For estates of decedents dying on or after Feb. 1, 2000, decedent's estate may recover amount of estate tax incurred on property includible in gross estate by reason of I.R.C. §2044 from person receiving such property unless otherwise directed by will. (1999 N.Y. Laws c. 380, §1).

Interstate Cooperation.

When decedent's domicile disputed, procedure for compromise agreement affecting death taxes is available. (N.Y. Tax Law §978 [NYCLS]).

22.08 GASOLINE AND SPECIAL FUELS TAXES:

Tax on Gasoline and Similar Motor Fuel.

Imposed by N.Y. Tax Law art. 12-A [NYCLS]. Tax on producers of natural gas and oil, based on units of production. (N.Y. Real Prop. Tax Law §593 [NYCLS]) repealed Mar. 31, 2006; (1992 N.Y. Laws c. 540, §2).

22.09 GIFT TAX:

Gift Tax for Transfers on or after Jan. 1, 2000.

Gift tax imposed by N.Y. Tax Law art. 26-A [NYCLS] repealed effective Jan. 1, 2000. (1997 N.Y. Laws c. 389, §7).

Generation-skipping Transfer Tax.

Imposed upon every generation-skipping transfer which includes New York property in amount computed by multiplying maximum amount allowable as credit for state generation-skipping transfer taxes under I.R.C. §2604 by fraction, numerator of which is value of New York property included in generation-skipping transfer and denominator of which is value of all property included in generation-skipping transfer. (N.Y. Tax Law §1022 [NYCLS]). Each person liable for tax on any transfer occurring during calendar year must file generation-skipping transfer tax return before 15th day of fourth month after close of taxable year in which generation-skipping transfer occurred and pay tax due, or file return prescribed by Commissioner of Taxation and Finance and pay estimated generation-skipping transfer tax. (N.Y. Tax Law §1023[a] [NYCLS]).

22.10 HOTEL AND RESTAURANT TAXES

Localities authorized to impose hotel and motel taxes,at rate of 5% of the per diem rental rate for each room provided however, such tax shall not be applicable to a permanent resident of a hotel or motel. (N.Y. Tax Law § 1202 [NYCLS]–a et. seq.).

22.11 INCOME TAX:

Personal Income Tax.

Personal Income Tax Law is administered by Division of Taxation, Department of

Taxation and Finance, Albany, NY. All returns must be delivered, mailed, or transmitted to address or location as directed in appropriate forms and instructions. (N.Y. Comp. Codes R. & Regs. tit. 20, §152.12 [2006]).

N.Y. adopted a federal conformity statute in 1959 applicable to all tax years ending after Dec. 31, 1959. (N.Y. Const., art. III, §22 [NYCLS]).

Resident is defined as any individual domiciled in state (with exceptions) or maintaining permanent place of abode in state and spending in the aggregate more than 183 days of taxable year in state unless in active service in U.S. Armed Forces. (N.Y. Tax Law §605[b] [NYCLS]).

N.Y. taxable income for resident individual is N.Y. adjusted gross income, less N.Y. deduction, less N.Y. exemptions. (N.Y. Tax Law §611[a] [NYCLS]).

N.Y. adjusted gross income is federal adjusted gross income for resident individual, with numerous modifications. (N.Y. Tax Law §612[a] [NYCLS]). Following items are among those added to federal adjusted gross income: Interest on bonds of other states and of certain federal authorities; income taxes deductible in computing federal adjusted gross income and not credited against federal income tax; interest or dividend income on obligations or securities exempt from federal income tax but not from state income taxes; excess of certain “bonus” depreciation taken under I.R.C. §168[k] over I.R.C. §167 allowance; certain royalty payments made to related family members; sport utility vehicle expenses deducted under I.R.C. §179; expenses paid or incurred for production of income which is exempt from taxation in New York but taxable for federal purposes; and amounts deducted on federal return as alliance for percentage depletion. (N.Y. Tax Law §612[b] [NYCLS]). Following items are among those subtracted from federal adjusted gross income: Interest on federal obligations to extent includable in federal gross income; pensions of officers and employees of N.Y. State and its subdivisions, and pensions of U.S. officers and employees to extent includable in federal gross income; pensions and annuities of up to $20,000 received by individual 59½ years of age or older from employee retirement plan or IRA; certain disability income included in federal gross income; Social Security benefits to extent includable in federal gross income; gain on disposition of property if old N.Y. basis is higher than federal basis; any refund or credit for overpayment of taxes to extent properly included in gross income for federal income tax purposes, distributions to victims of Nazi persecution, contributions of up to $5,000 to family tuition account; and compensation for active military service in combat zone. (N.Y. Tax Law §612[c] [NYCLS]).

Deductions.

N.Y. deduction of resident individual is either: (a) N.Y. standard deduction, or (b) N.Y. itemized deduction (available only if taxpayer itemized federal deductions). (N.Y. Tax Law §613 [NYCLS]). Resident unmarried individual who is not head of household, nor surviving spouse, nor individual whose federal exemption is zero, may claim standard deduction of $7,500. (N.Y. Tax Law §614[a] [NYCLS]). Married people filing jointly and surviving spouses may claim standard deduction of $14,600. (N.Y. Tax Law §614[b] [NYCLS]). Heads of households may claim standard deduction of $10,500. (N.Y. Tax Law §614[c] [NYCLS]). Married individuals filing separately may claim standard deduction of $6,500. (N.Y. Tax Law §614[d] [NYCLS]). Dependents whose federal exemption amount is zero may claim standard deduction of $3,000. (N.Y. Tax Law §614[e] [NYCLS]). N.Y. itemized deduction for resident individual is total of deductions (other than federal deductions for personal exemptions) from federal adjusted income, minus federal deductions for: N.Y. State and certain city taxes; interest on indebtedness incurred to buy obligations or securities exempt from N.Y. tax but taxable for federal purposes; ordinary and necessary expenses incurred for collection or production of income exempt from N.Y. income tax but taxable for federal purposes; real property taxes imposed on renters; and certain deductions with respect to S Corporations. (N.Y. Tax Law §615[c] [NYCLS]). Federal itemized deductions are increased by: interest on indebtedness incurred to buy securities taxable for N.Y. but exempt for federal purposes; expenses incurred for production or collection of income taxable for New York but exempt for federal purposes; and certain college tuition expenses. (N.Y. Tax Law §615[d] [NYCLS]). Shares of modification items derived from partnership are determined pursuant to N.Y. Tax Law §617 [NYCLS]. Higher-income N.Y. taxpayers are allowed only percentage of their federal itemized deductions. (N.Y. Tax Law §615[f] [NYCLS]).

Exemptions.

N.Y. exemption of resident individual is $1,000 for each deduction to which resident entitled to under I.R.C. §151[c]. (N.Y. Tax Law §616 [NYCLS]).

N.Y. minimum taxable income is sum of federal tax preferences, with certain modifications, less: (1) Specific deductions of $5,000 for resident individuals filing jointly and $2,500 for married persons filing separately; (2) tax on N.Y. taxable income reduced by certain credits against tax; (3) to extent sum of federal tax preferences exceeds (1) and (2) above, any net operating loss, as determined for federal income carryover to succeeding taxable year. (N.Y. Tax Law §622 [NYCLS]).

Tax Credits.

Credits against tax include: Investment credit; household credit for taxpayers with household gross income not over $28,000 (for single individuals) or $32,000 (for married couples, surviving spouses, or heads of households); credit for certain household and dependent care expenses; earned income credit; real property tax circuit breaker credit; agricultural property tax credit; fuel cell or solar electric generating equipment credit and excess deductions credit. (N.Y. Tax Law §606[b] [NYCLS]). Also under N.Y. Tax Law §606 [NYCLS] are credits for: special additional mortgage recording tax; employment of persons with disabilities; alternative fuels; residential fuel oil storage tanks; qualified emerging technology company employment and capital; purchase of automated external defibrillator; college tuition; IMB energy tax; low income housing; “green” building; transportation improvements; long-term care insurance; Qualified Zone Enterprise (QEZE) property taxes; QEZE tax reduction; Brownfield redevelopment credit; environmental remediation insurance; and special provisions for property affected by Sept. 11, 2001 terrorist attacks. Residents are also allowed credit for taxes paid to other states. (N.Y. Tax Law §620 [NYCLS]).

Husband and wife who file separate federal returns must file separate state returns. Husband and wife who file joint federal return must file joint N.Y. return. Husband and wife who file no federal return may elect to file separate N.Y. returns. (N.Y. Tax Law §611[b] [NYCLS]).

Tax on nonresidents is similar to tax on residents except that it is based on items of income and deductions from N.Y. sources. (N.Y. Tax Law §§631 to 639 [NYCLS]). Income from N.Y. sources includes income from ownership of real or tangible personal property in N.Y., income from business, profession, trade or occupation in N.Y., income from intangible personal property to extent used in N.Y. business, profession, trade or occupation, and income from S Corporation if shareholder elects to have (N.Y. Tax Law §660 [NYCLS]) apply. Nonresidents who sell N.Y. real estate must pay estimated tax on gain. Deductions are same as allowed for residents, prorated by ratio of adjusted gross income from N.Y. sources to adjusted gross income computed as if taxpayer were N.Y. resident. (N.Y. Tax Law §631[b] [NYCLS], [c] [NYCLS]).

Resident estate is estate of decedent domiciled in N.Y. at time of death; resident trust is portion of trust consisting of property transferred by person domiciled in N.Y. at time property was transferred to trust (in case of irrevocable trust) or at time trust became irrevocable (in case of revocable trust which subsequently became irrevocable). (N.Y. Tax Law §605[b][3] [NYCLS]). Tax on resident estates and trusts is based on federal taxable income, with certain modifications. (N.Y. Tax Law §618 [NYCLS]). Resident trust is not taxable if: (1) All trustees are domiciled outside N.Y., (2) entire corpus of trust is located outside N.Y., (3) all income and gains of trust are from sources outside N.Y. (N.Y. Tax Law §605[b][3] [NYCLS]). Tax on nonresident estates and trusts is based on items of federal distributable net income derived from N.Y. sources, with certain modifications. (N.Y. Tax Law §633 [NYCLS]).

Withholding is required by every employer maintaining office or transacting business in N.Y. and making any payment of taxable wages. (N.Y. Tax Law §671[a] [NYCLS]).

Rates.

For taxable years between 2008 and 2012, amount of tax for single individuals and married couples filing separately determined in accordance with following table:

If N.Y. taxable income is:

Tax is:

Not over $8,000

4% of N.Y. taxable income

Over $8,000 but not over $11,000

$320 plus 4.5% of excess over $8,000

Over $11,000 but not over $13,000

$455 plus 5.25% of excess over $11,000

Over $13,000 but not over $20,000

$560 plus 5.9% of excess over $13,000

Over $20,000 but not over $100,000

$973 plus 6.85% of excess over $20,000

Over $200,000 but not over $500,000

$13,303 plus 7.85% of excess over $200,000

Over $500,000

$36,853 plus 8.97% of excess over $500,00

(N.Y. Tax Law §601[c][1] [NYCLS]).

For taxable years between 2008 and 2012, amount of tax for married couples filing jointly and resident surviving spouses determined in accordance with following table:

If N.Y. taxable income is:

Tax is:

Not over $16,000

4% of N.Y. taxable income

Over $16,000 but not over $22,000

$640 plus 4.5% of excess over $16,000

Over $22,000 but not over $26,000

$910 plus 5.25% of excess over $22,000

Over $26,000 but not over $40,000

$1,120 plus 5.9% of excess over $26,000

Over $40,000 but not over $300,000

$1,946 plus 6.85% of excess over $40,000

Over $300,000 but not over $500,000

$19,756 plus 7.85% of excess over $300,000

Over $500,000

$35,456 plus 8.97% of excess over $500,000

(N.Y. Tax Law §601[a][1] [NYCLS]).

For taxable years between 2008 and 2012, amount of tax for resident heads of household determined in accordance with following table:

If N.Y. taxable income is:

Tax is:

Not over $11,000

4% of N.Y. taxable income

Over $11,000 but not over $15,000

$440 plus 4.5% of excess over $11,000

Over $15,000 but not over $17,000

$620 plus 5.25% of excess over $15,000

Over $17,000 but not over $30,000

$725 plus 5.9% of excess over $17,000

Over $30,000 but not over $250,000

$1,492 plus 6.85% of excess over $30,000

Over $250,000 but not over $500,000

$16,562 plus 7.85% of excess over $250,000

Over $500,000

$36,187 plus 8.97$ of excess over $500,000

(N.Y. Tax Law §601[b][1] [NYCLS]).

In addition, N.Y. imposes tax table benefit recapture for individuals with high income. (N.Y. Tax Law §601[d] [NYCLS]).

On N.Y. minimum taxable income, 6% tax is imposed. (N.Y. Tax Law §602[b] [NYCLS]).

Return and tax are due on 15th day of fourth month following close of taxable year. (N.Y. Tax Law §651[a] [NYCLS]). Return must be made, and tax paid, to tax commission, under penalties for failure to file. (N.Y. Tax Law §§652 [NYCLS], 685 [NYCLS]). Section §685 penalty provisions to expire and will be repealed July 1, 2007. (2005 N.Y. Laws c. 59, §12[ii], [iii]). Any tax return preparer that prepares any return or claim for refund must sign return or claim, include preparer's identifying number, furnish copy of return or claim to taxpayer and retain copy for three years. (N.Y. Tax Law §658[g] [NYCLS]).

City Income Tax Surcharge.

Residents of N.Y. City must pay N.Y. City personal income tax that is imposed on N.Y. City taxable income. (N.Y. Tax Law §1301 [NYCLS]). N.Y. City taxable income is generally equal to N.Y. taxable income. (N.Y. Tax Law §1303 [NYCLS]). Credits are available for items including: certain accumulation distributions received by trust beneficiaries; household credit; portion of N.Y. City unincorporated business income tax; tax withheld from wages and amount of estimated tax paid. (N.Y. Tax Law §1310 [NYCLS]).

For taxable years beginning in 2005, base tax is computed in accordance with following table:

Resident married individuals filing joint returns and resident surviving spouses:

If city taxable income is:

Tax is:

Not over $21,600

2.907% of city taxable income

Over $21,600 but not over $45,000

$628 plus 3.534% of excess over $21,600

Over $45,000 but not over $90,000

$1,455 plus 3.591% of excess over $45,000

Over $90,000 but not over $150,000

$3,071 plus 3.648% of excess over $90,000

Over $150,000 but not over $500,000

$5,260 plus 4.05% of excess over $150,000

Over $500,000

$19,435 plus 4.45% of excess over $500,000

(N.Y. Tax Law §1304-D[a][1][A] [NYCLS]).

Resident heads of households:

If city taxable income is:

Tax is:

Not over $14,400

2.907% of city taxable income

Over $14,400 but not over $30,000

$419 plus 3.534% of excess over $14,400

Over $30,000 but not over $60,000

$970 plus 3.591% of excess over $30,000

Over $60,000 but not over $125,000

$2,047 plus 3.648% of excess over $60,000

Over $125,000 but not over $500,000

$4,418 plus 4.05% of excess over $125,000

Over $500,000

$19,606 plus 4.45% of excess over $500,000

(N.Y. Tax Law §1304-D[a][2][A] [NYCLS]).

Resident unmarried individuals, resident married individuals filing separate returns and resident estates and trusts:

If city taxable income is:

Tax is:

Not over $12,000

2.907% of city taxable income

Over $12,000 but not over $25,000

$349 plus 3.534% of excess over $12,000

Over $25,000 but not over $50,000

$808 plus 3.591% of excess over $25,000

Over $50,000 but not over $100,000

$1,706 plus 3.648% of excess over $50,000

Over $100,000 but not over $500,000

$3,530 plus 4.05% of excess over $100,000

Over $500,000

$19,730 plus 4.45% of excess over $500,000

(N.Y. Tax Law §1304-D[a][3][A] [NYCLS]).

In addition, New York City imposes tax table benefit recapture for individuals with high incomes for taxable years beginning after 2002 and before 2006. (N.Y. Tax Law §1304-D[b] [NYCLS]).

N.Y. Tax Law Art. 30-A [NYCLS] (N.Y. Tax Law §§1320-1333) authorizes cities with population of more than 180,000 but less than 215,000 to impose city income tax surcharge not to exceed 19.25% of net state tax on residents for taxable years beginning after 1983 and before 2012. (N.Y. Tax Law §1321 [NYCLS]). Cities imposing such income surcharge must also impose tax on earnings of nonresidents.

22.12 INHERITANCE TAX:

None. For estate tax, see topic 22.07 Estate Tax.

22.13 LOCAL AND MUNICIPAL TAXES:

New York City Taxes.

Income Tax on Residents.

Individuals, estates and trusts, resident in New York City are subject to a graduated income tax which conforms in most respects to the New York State income tax. (N.Y.C. Admin. Code §11-1701 et seq.). Minimum tax is 2.5% of City taxable income. (N.Y.C. Admin. Code §11-1702). In most cases City taxable income will be same as taxable income for New York State.

Tax surcharges authorized under N.Y.C. Admin. Code §11-1704 are suspended while current New York City tax rates are in effect. (N.Y. Tax Law §1304-D [NYCLS]).

Unincorporated Business Tax.

Unless specifically excluded, any trade, business or profession carried on in City by individual or unincorporated entity is subject to a tax of 4% on unincorporated business taxable income allocated to New York City. (N.Y.C. Admin. Code §11-503[a]). Several credits against tax available. (N.Y.C. Admin. Code §11-503[b]); film production credit expires Aug. 20, 2008. REMICs are specifically excluded from this tax and from General Corporation Tax. (N.Y.C.

Admin. Code §11-122). Unincorporated business taxable income is federal gross income, with certain modifications. (N.Y.C. Admin. Code §§11-506, 11-507). Where a business is conducted both within and without City, income is allocated to City by reference to taxpayer's books, or by formula based on taxpayer's City property, payroll and gross income. (N.Y.C. Admin. Code §11-508).

General Corporation Tax.

Entire net income of any foreign or domestic corporation, except certain specifically exempted trust, utility, housing and other companies, is subject to City corporation tax. (N.Y.C. Admin. Code §11-603). Entire net income is corporation's federal taxable income, determined without regard to any election under I.R.C. Subchapter S, with certain modifications. (N.Y.C. Admin. Code §11-602[8]). Where corporation's business is conducted both within and outside City, portion of entire net income is allocated to City using formula based on corporation's City property (both owned and leased), receipts and wages. (N.Y.C. Admin. Code §11-604). Tax is sum of: (1) Greater of (A) 8.85% of corporation's allocated entire net income allocated within City, (B) 0.15% (0.04% for cooperative housing corporations) of allocated business and investment capital, but in no event more than $350,000, (C) 8.85% of 30% of corporation's allocated entire net income, adjusted for payments to employees and shareholders and for net loss, or (D) $300; plus (2) 0.075% of allocated subsidiary capital. (N.Y.C. Admin. Code §11-604). Some provisions of N.Y.C. Admin. Code §11-604 expire Aug. 20, 2008; others effective until Dec. 31, 2008.

Sales Tax; Compensating Use Tax.

4 1/8% City sales and compensating use taxes are now imposed as state tax substantially identical to state sales and compensating use taxes (see topic 22.17 Sales and 22.19 Use Taxes, subhead Sales Tax) until City discharges all issued notes and bonds. (N.Y. Tax Law §1107 [NYCLS]). Provisions of N.Y. Tax Law §1107 [NYCLS] may expire in either 2006 or 2007. (N.Y. Laws c. 285, §4; 2005 N.Y. Laws c. 508, §3). In addition to basic sales and use taxes, i.e., those that parallel state taxes, New York City authorized to impose certain additional taxes up to 8% on receipts for certain services related to garaging of automobiles and 4.5% on receipts for certain credit, health and other personal services due to status as city having population of 1,000,000 or more. (N.Y. Tax Law §1212-A [NYCLS]).

Public Utility Excise Tax.

Every utility doing business in the city is taxed 2.35% on its gross income, except that operation of omnibuses is taxed 1.17% and operation of sleeping and parlor railroad cars or railroads other than street surface, rapid transit, subway and elevated railroads is taxed 3.52%. Every vendor of utility services is taxed 2.35% on gross operating income, except operation of omnibuses other than those used exclusively for school transportation of children under education law contracts is taxed at 1.17%. Any person to extent liable for tax under this law is exempt from City sales tax. (N.Y.C. Admin. Code §11-1102[a]).

Occupancy Taxes.

Tax ranging from 50¢ to $2 per day is imposed on occupancy of hotel room other than by permanent resident or other exempt occupant. (N.Y.C. Admin. Code §11-2502[a][2]).

Commercial rent or occupancy tax is imposed on rent from any city premises used for carrying on any business, profession, commercial activity or trade, with certain exceptions. Tax is 6% of annual rent reduced by 35% under certain circumstances. Premises with base rent of less than $249,999 per year are exempt. (N.Y.C. Admin. Code §§11-701, 11-702, 11-704).

Real Property Tax.

New York City Finance Department assesses all real property within city unless otherwise exempt. (N.Y.C. Admin. Code §11-201). Exemptions include buildings in course of construction under specified conditions (N.Y.C. Admin. Code §11-209[a]), certain housing occupied by low-income senior citizens (N.Y.C. Admin. Code §11-245.3), real property owned by persons with disabilities (N.Y.C. Admin. Code §11-245.4) and, partially, slum clearance, rehabilitation projects and non-profit organizations (N.Y.C. Admin. Code §§11-242 to 11-246). Taxable status for succeeding fiscal year is fixed on Jan. 5. (N.Y.C. Charter §1507). Notice of increased assessment must be given to owners within 30 days prior to final date for filing an appeal. (N.Y.C. Charter §1511).

Real Property Transfer Tax.

Unless exempted, tax is imposed on each deed or transaction effecting transfer of interest in real property or in entity which owns real property where consideration exceeds $25,000. (N.Y.C. Admin. Code §11-2102[a]). Rates range from 1% to 2.625%.

Tax on Transfer of Taxicab Licenses.

5% tax is imposed on consideration for transfer of taxicab license. (N.Y.C. Admin. Code §11-1402[a]).

Excise Tax on Beer and Liquor Distributors and Noncommercial Importers.

Tax is imposed on distributors and noncommercial importers of beer and liquor. Rate is 12¢ per gallon on beer and $.264 per liter on liquor sold or used in N.Y.C. (N.Y.C. Admin. Code §11-2056[a]). Additional tax at 25% of state liquor license fee imposed on retail licensee. (N.Y.C. Admin. Code §11-2402).

Cigarette Tax.

In addition to other taxes, basic rate of $.02 for each ten cigarettes or fraction thereof plus $.015 to $.02 for each ten cigarettes with rate determined by tar and nicotine content. (N.Y.C. Admin. Code §11-1302[a][3]).

Leaded Motor Fuel.

Tax of 1¢ per gallon imposed on all motor fuels containing ½ gram or more of lead alkyls per gallon. (N.Y.C. Admin. Code §11-2034).

Metropolitan Commuter Transportation District

Tax imposed on every taxicab owner of fifty cents per taxicab ride on every ride that originates in the city and terminates anywhere within the territorial boundaries of the MCTD. (N.Y. Tax Law § 1281).

Motor Vehicle Tax.

Unless exempted, $40 tax for commercial vehicle weighing 10,000 lbs. or less, $200 tax for commercial vehicles weighing more than 10,000 lbs. but not more than 12,500 lbs., $275 for commercial vehicles weighing more than 12,500 but not more than 15,000 lbs. and $300 for commercial vehicles weighing more than 15,000 lbs. (N.Y.C. Admin. Code §11-802[a][1][C]). Motor vehicles for passenger transportation are taxed at $400, if not medallion taxicab and $1,000 if medallion taxicab. (N.Y.C. Admin. Code §11-802[a][2]). $15 per year motor vehicle tax imposed at time of registration or renewal on city residents' passenger motor vehicles and on owner-lessors engaged in leasing passenger motor vehicles garaged in city. (N.Y.C. Admin. Code §11-2202).

Mortgage Recording Tax.

Tax is on each $100 and fraction thereof of debt secured by mortgages on property in City. Rates are: (1) $1/$100 for realty securing debt of less than $500,000, (2) $1.125/$100 on one-, two- or three-family homes and condominium units securing debt of $500,000 or more, (3) $1.75/$100 for all other mortgages on real property, and (4) $1 minimum tax if principal debt is less than $100. (N.Y.C. Admin. Code §11-2601[d]).

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22.16 PROPERTY TAXES:

All real property is taxable unless exempt by law; no personal property, whether tangible or intangible, is liable to taxation. (N.Y. Real Prop. Tax Law §300 [NYCLS]).

Exemptions.

Full and partial exemptions include real property of: U.S. (N.Y. Real Prop. Tax Law §400 [NYCLS]), N.Y. State (N.Y. Real Prop. Tax Law §404 [NYCLS]), municipal corporations (N.Y. Real Prop. Tax Law §406 [NYCLS]), school districts and boards of cooperative educational series (N.Y. Real Prop. Tax Law §408 [NYCLS]), certain special districts (N.Y. Real Prop. Tax Law §410 [NYCLS]), certain public authorities (N.Y. Real Prop. Tax Law §412 [NYCLS]), certain real property owned by or under direct jurisdiction, supervision or control of industrial development agencies (N.Y. Real Prop. Tax Law §412-a [NYCLS]), railroad real property owned by or under jurisdiction, supervision or control of specified industrial development agencies and leased to railroad company (N.Y. Real Prop. Tax Law §412-b [NYCLS]), public housing, publicly assisted housing and limited-profit nursing homes (N.Y. Real Prop. Tax Law §414 [NYCLS]), U.N., other similar international organizations, and their members (N.Y. Real Prop. Tax Law §§416 [NYCLS], 418 [NYCLS]), certain nonprofit organizations (N.Y. Real Prop. Tax Law §§420-a et seq. [NYCLS], 486 [NYCLS]), certain family residences and multiple dwelling units that have been constructed, reconstructed, converted and rehabilitated (N.Y. Real Prop. Tax Law §§421-a et seq. [NYCLS], 488-a [NYCLS]), certain not-for-profit housing companies (N.Y. Real Prop. Tax Law §422 [NYCLS]), certain real property which satisfies requirements for taxation for school purposes (N.Y. Real Prop. Tax Law §425 [NYCLS]), opera houses (N.Y. Real Prop. Tax Law §426 [NYCLS]), performing arts buildings (N.Y. Real Prop. Tax Law §427 [NYCLS]), real property held in trust by officers of religious denominations (N.Y. Real Prop. Tax Law §436 [NYCLS]), real property held by trustees for hospital, public playground and library purposes (N.Y. Real Prop. Tax Law §438 [NYCLS]), historical societies and certain historic property (N.Y. Real Prop. Tax Law §444 [NYCLS]), cemeteries (N.Y. Real Prop. Tax Law §446 [NYCLS]), certain real property used for professional major league sports (N.Y. Real Prop. Tax Law §429 [NYCLS]), certain real property held by or for veterans and their organizations (N.Y. Real Prop. Tax Law §§452 [NYCLS], 458 [NYCLS]), Indian reservations owned and occupied by Indian nation tribe or band (N.Y. Real Prop. Tax Law §454 [NYCLS]), certain improvements to real property and improvements to real property of persons who are physically disabled (N.Y. Real Prop. Tax Law §459 [NYCLS]), clergy (N.Y. Real Prop. Tax Law §460 [NYCLS]), incorporated associations of volunteer firemen (N.Y. Real Prop. Tax Law §464 [NYCLS]), volunteer firemen (N.Y. Real Prop. Tax Law §466 [NYCLS]), partial exemption for owners 65 or over including either husband or wife or siblings with combined owners' income up to certain limits, but in certain limited circumstances spousal income shall be disregarded (N.Y. Real Prop. Tax Law §467 [NYCLS]), real property held in trust solely for benefit of certain exempted senior citizens and real property in which person age 65 or over who holds life estate (N.Y. Real Prop. Tax Law §467 [NYCLS]), certain industrial waste treatment facilities and certain air pollution control facilities (N.Y. Real Prop. Tax Law §477 [NYCLS]), certain forest and reforested lands (N.Y. Real Prop. Tax Law §480 [NYCLS]), certain structures and buildings essential to operation of agricultural and horticultural lands (N.Y. Real Prop. Tax Law §483 [NYCLS]), reconstruction of historic barns (N.Y. Real Prop. Tax Law §483-b [NYCLS]), urban redevelopment corporations (N.Y. Real Prop. Tax Law §484 [NYCLS]), certain business investments (N.Y. Real Prop. Tax Law §485-b [NYCLS]), economic development zones (N.Y. Real Prop. Tax Law §485-e [NYCLS]), banking development districts (N.Y. Real Prop. Tax Law §485-f [NYCLS]), certain infrastructure pertaining to residential building lots (N.Y. Real Prop.

Tax Law §485-g [NYCLS]), certain solar or wind energy systems (N.Y. Real Prop. Tax Law §487 [NYCLS]), abatement for alterations and improvements to multiple dwellings to eliminate fire and health hazards (N.Y. Real Prop. Tax Law §489 [NYCLS]), railroads (N.Y. Real Prop. Tax Law §§456 [NYCLS], 489-a et seq. [NYCLS]). In 2002, RESCUE program credit, or "Residential Commercial Urban Exemption" was passed. (N.Y. Real Prop. Tax Law §485-a [NYCLS]). Pursuant to this new credit, cities with populations of 50,000 or more but less than 1,000,000 may offer exemptions to encourage conversion of commercial buildings in urban downtowns to mixed residential-commercial use.

Certain towns and counties may be partially exempt from local real property taxation, provided that the owner or owners of such real property enter into a conservation easement agreement. (N.Y. Real Prop. Tax Law § 491).

Assessment.

Annually, assessors in each tax district determine taxable status and assessment of real properties as of Mar. 1 with particular provisions for special franchises and transferred tax exempt property in counties, cities and towns (N.Y. Real Prop. Tax Law §§302 [NYCLS], 500 [NYCLS], 1540 [NYCLS]), and in villages as of Jan. 1 (N.Y. Real Prop. Tax Law §1400 [NYCLS]). Property is valued as of July 1 preceding assessment date. (N.Y. Real Prop. Tax Law §301 [NYCLS]). Assessor qualifications are specified as is form and preparation of assessment roll. (N.Y. Real Prop. Tax Law §§502 [NYCLS], 504 [NYCLS], 1402 [NYCLS]). By May 1 tentative assessment roll is to be prepared and forthwith published (N.Y. Real Prop. Tax Law §§506 [NYCLS], 1540 [NYCLS]); villages, generally by Feb. 1 (N.Y. Real Prop. Tax Law §1406[2] [NYCLS]). Completed assessment roll is prepared by July 1 (N.Y. Real Prop. Tax Law §516[1] [NYCLS]), villages, Apr. 1 (N.Y. Real Prop. Tax Law §1410[2] [NYCLS]). Nonresidents may request assessed valuation be mailed to them. (N.Y. Real Prop. Tax Law §§508[2] [NYCLS], 1404 [NYCLS]). Complaints may be filed with tax assessor or board of assessment review, whose members must disclose direct or indirect interest in property for which complaint has been filed. (N.Y. Real Prop. Tax Law §§523 [NYCLS], 524 [NYCLS]). Tax assessors within prescribed time period are required to mail to each owner of real property in their communities notice of increase in assessment or notice of change of status (i.e., from wholly exempt to taxable in whole or part or taxable in part to taxable in whole) and with such notice must be statement of date(s) and time(s) which board of assessment must meet to hear complaints with respect to assessments. (N.Y. Real Prop. Tax Law §§510 [NYCLS], 510-a [NYCLS], 511 [NYCLS]).

Review of Assessment.

Within 30 days of completion of roll, proceeding may be commenced against assessors to review assessment in Supreme Court of judicial district where assessment made (N.Y. Real Prop. Tax Law §§702 [NYCLS], 704 [NYCLS]) and such has preference over other civil proceedings (N.Y. Real Prop. Tax Law §700 [NYCLS]). Verified petition must allege and support that assessment is excessive, unequal or unlawful, or that real property is misclassified (N.Y. Real Prop. Tax Law §706 [NYCLS]) and comply with service requirements (N.Y. Real Prop. Tax Law §708 [NYCLS]). Court, upon pleadings or after hearing, can confirm or strike assessment, order correction of assessment or class designation upon roll (N.Y. Real Prop. Tax Law §720 [NYCLS]), order tax refund (N.Y. Real Prop. Tax Law §726 [NYCLS]), and grant costs or special allowances under certain circumstances (N.Y. Real Prop. Tax Law §722 [NYCLS]). Appeals may be taken as from any Supreme Court final order. (N.Y. Real Prop. Tax Law §724 [NYCLS]). Tax Appeals (N.Y. Tax Law §2000 et seq. [NYCLS]).

Forest Lands, Assessment.

Retroactive to Sept. 1, 1974, all certified forest land with taxable status on or after July 1, 1977 will be assessed according to N.Y. Real Prop. Tax Law §480-a [NYCLS]. "Forest lands" are lands exclusively used for forest crop production. Specific provisions exist concerning manner in which reduced assessments are to be established and requirements concerning harvesting of such forest lands. (N.Y. Real Prop. Tax Law §480-a [NYCLS]).

Payment and Collection.

Counties, cities, towns: By Dec. 31, County Board of Supervisors levies tax payable on assessment roll, annexes warrant authorizing and directing collection not later than Apr. 1, and delivers to district collecting officer. (N.Y. Real Prop. Tax Law §§900 [NYCLS], 904 [NYCLS]). Collecting officer publishes roll receipt, times and place for payment (N.Y. Real Prop. Tax Law §920 [NYCLS]) and mails to owner statement of amount due (N.Y. Real Prop. Tax Law §922 [NYCLS]). No interest charged if payment received or postmarked (N.Y. Real Prop. Tax Law §925 [NYCLS]) by later of Jan. 31 or 30 days after first publication of notice, otherwise interest (not less than 12% per annum) charged at 1/12 rate of interest as determined by Commissioner (N.Y. Real Prop. Tax Law §§924 [NYCLS], 924-a [NYCLS]). Governing body for any tax district is authorized to permit enforcing officer to effect cancellation in whole or in part of any interest, penalties or other charges on real property where such real property is subject to brownfield site clean-up agreement entered into by volunteer pursuant to N.Y. Envtl. Conserv. Law §27-1409. Provided that in cases where such interest, penalties, or other charges belong to municipal corporation within such tax district, no reduction or remission in whole or in part of such interest, penalties, or other charges shall be made without consent of municipal corporation affected. Generally, upon expiration of warrant, collecting officer returns to county treasurer affirmed account of unpaid taxes upon which 5% is added on other than undue installments. (N.Y. Real Prop. Tax Law §936 [NYCLS]). For real property taxes levied for fiscal years commencing on and after July 1, 1998, legislative bodies of counties, cities, or towns may provide by local law or ordinance for tax installment payment method specifying number of payments and dates due, such payments to be made to such county, city or town as tax collector. (N.Y. Real Prop. Tax Law §972 [NYCLS]). Towns may elect their collection method. (N.Y. Real Prop. Tax Law §973 [NYCLS]). Owners are allowed to elect to pay tax in installments, if permitted in jurisdiction, remitting first installment within five days of due date or total amount as previously described. If installments paid when due, no interest charged; otherwise, interest charged at rate determined under N.Y. Real Prop. Tax Law §924-a [NYCLS]. (N.Y. Real Prop. Tax Law §975 [NYCLS]). Owner resident is personally liable for taxes due, and upon refusal of payment after post-Jan. 31 collecting officer demand, personal property may be sold at public auction. (N.Y. Real Prop. Tax Law §926[1] [NYCLS], [2] [NYCLS]). Renters of certain residential real property are personally liable for taxes due. (N.Y. Real Prop. Tax Law §926-a[1] [NYCLS]). If tax over $10 is returned unpaid for lack of personal property, county treasurer or village mayor may institute court proceedings supplementary to execution to collect. (N.Y. Real Prop. Tax Law §990[1] [NYCLS]). It is duty of State Attorney General, upon being informed by county treasurer of any county having population of 100,000 or less, to bring action for sequestration in Supreme Court of real property of corporation neglecting or refusing to pay tax. (N.Y. Real Prop. Tax Law §992[1] [NYCLS]). Effective May 2003, governing body of any local government may provide for acceptance of tax via municipal Internet website. (N.Y. Real Prop. Tax Law §925-c [NYCLS]).

Villages.

Generally, by May 15 village board of trustees levies tax (N.Y. Real Prop. Tax Law §1420[1] [NYCLS]), and within five days warrant and tax roll are delivered to village treasurer (N.Y. Real Prop. Tax Law §1426 [NYCLS]). By June 1, roll receipt, location and times tax payable published (N.Y. Real Prop. Tax Law §1428 [NYCLS]), and statement of amount due mailed to owner (N.Y. Real Prop. Tax Law §1430 [NYCLS]). Generally, if tax not paid by July 1, 5% interest added for July plus additional interest at rate determined under N.Y. Real Prop. Tax Law §924-a [NYCLS] each month thereafter. (N.Y. Real Prop. Tax Law §1432 [NYCLS]). Trustees may provide for two installment payments and, further, for not more than 2% per year discount if second installment paid when first is due. (N.Y. Real Prop. Tax Law §1434 [NYCLS]).

Lien.

Generally tax assessed becomes lien on property as of Jan. 1 of fiscal year levied. (N.Y.

Real Prop. Tax Law §902 [NYCLS]). Tax liens created in same calendar year rank on parity and have priority over all liens of preceding years except as provided by law. (N.Y. Real Prop. Tax Law §§912 [NYCLS], 914 [NYCLS]). Village property tax is lien from first day of fiscal year for which levied. (N.Y. Real Prop. Tax Law §1422 [NYCLS]).

Sale.

New procedures for enforcement of collection of delinquent taxes were enacted in N.Y. Real Prop. Tax Law art. 11 [NYCLS] (Uniform Delinquent Tax Enforcement Act, N.Y. Real Prop. Tax Law §1100 [NYCLS]), which took effect in same time and manner as (1993 N.Y. Laws c. 602), which amended real property tax law relating to enforcement of collection of delinquent real property taxes. (N.Y. Real Prop. Tax Law art. 10 [NYCLS]). Rules apply to all counties, cities, towns and villages, unless on Jan. 1, 1993 they were authorized to enforce collection of delinquent taxes pursuant to local law, adopted local law no later than July 1, 1994 and filed such law no later than Aug. 1, 1994. (N.Y. Real Prop. Tax Law §1104 [NYCLS]).

Generally, ten months after lien date but not sooner than one month after receipt of return of unpaid taxes, enforcing officer, except in certain designated districts where time may be extended, commences foreclosure proceeding. (N.Y. Real Prop. Tax Law §§1122-1140). Enforcing officer executes list of parcels of real property affected by delinquent tax liens and files petition for foreclosure with county clerk where property located. (N.Y. Real Prop. Tax Law §§1122 [NYCLS], 1123 [NYCLS]). Notice of foreclosure is published by enforcing officer in each of three nonconsecutive weeks in two months period in at least two designated newspapers, detailing foreclosure date, effect of foreclosure, persons affected and rights of redemption. (N.Y. Real Prop. Tax Law §1124 [NYCLS]). On or before date of first publication of notice enforcing officer shall cause notice to be mailed to each owner by certified mail and by ordinary first class mail to other person whose right is affected by foreclosure, describing parcel, amount due and effect of foreclosure. (N.Y. Real Prop. Tax Law §1125 [NYCLS]). Persons, having legally protected interest in real property can file declaration of interest. (N.Y. Real Prop. Tax Law §1126 [NYCLS]). If persons having right to redeem or answer, fail to do so, property is foreclosed and such persons are barred of all rights, title and interest in and to parcel. (N.Y. Real Prop. Tax Law §§1131 [NYCLS], 1136 [NYCLS]). Such proceedings have preference over all other proceedings. (N.Y. Real Prop. Tax Law §1132 [NYCLS]).

Tax districts can make agreements with one another with respect to any parcel of real property upon which they respectively own tax lines in regard to disposition of such liens. (N.Y. Real Prop. Tax Law §1150 [NYCLS]). Enforcing officer of tax district can protect lien by entering into agreement or by bidding for and purchasing such parcel at any judicial sale. (N.Y. Real Prop. Tax Law §1152 [NYCLS]). Whenever tax district is vested with title to real property by virtue of foreclosure proceeding district is authorized to sell and convey real property so acquired with or without advertising for bids; sale has to be approved by majority vote of governing body, unless property sold at public auction. (N.Y. Real Prop. Tax Law §1166 [NYCLS]). Tax district when authorized to prosecute foreclosure can accept in lieu conveyance of interest of any person having right, title or interest of redemption. (N.Y. Real Prop. Tax Law §1170 [NYCLS]). Special provisions for parcels in which state has interest (N.Y. Real Prop. Tax Law §1176 [NYCLS]) and lands in forest preserve (N.Y. Real Prop. Tax Law §1178 [NYCLS]). Special provisions for sale of delinquent tax liens for tax districts. (N.Y. Real Prop. Tax Law §§1190 [NYCLS], 1192 [NYCLS], and 1194 [NYCLS]; 2000, c. 203, §14, effective Aug. 16, 2000). In general, under these provisions, local governments are authorized to sell delinquent tax liens to New York Municipal Bond Bank Agency.

Following sections of Real Property Tax Law repealed by (1993, c. 602, §4), effective Jan. 1, 1995; however, for enforcing prior tax liens, provisions continue in effect for four years after effective date, and tax districts may adopt local laws on redemption periods for 1995 and 1996 liens, liens from Jan. 1, 1995 and onwards must be redeemed before any earlier lien, and installment agreements arising under N.Y. Real Prop. Tax Law §1184 [NYCLS] apply to all outstanding liens.

Counties, Cities, Towns.

Generally, when tax on parcel of real property after return of account to county treasurer remains unpaid on Aug. 1, except in designated counties where time may be extended for specified periods, tax sale proceedings must be commenced to collect tax, interest, and parcel's share of advertising and sale expenses. (1993 N.Y. Laws c. 324, §1). When tax payments are by installment, sale proceedings are commenced one month after collecting officer return or one month after due date of last installment. (N.Y. Real Prop. Tax Law §972 [NYCLS]). Treasurer publishes notice for three nonconsecutive weeks in six-week period detailing sale date at end of previous period, sale location at county courthouse, parcels to be sold, owners, and aggregate amounts due. (1994 N.Y. Laws c. 532, §3). Prior to commencement of publication, notice of such sale shall be sent by first class mail to name and address of owner or occupant of each parcel to be sold, containing description of such parcel, amount due, and warning of sale if amount is not paid. (1994 N.Y. Laws c. 532, §3). On published day, treasurer commences sale and continues until sufficient amount sold of each parcel to pay amount due. Every purchaser receives certificate of sale after paying bid amount, due within 48 hours of last sale day. If unpaid for one month, all purchaser rights may be extinguished and any person may obtain certificate after paying original bid amount. If unpaid after three months, county automatically becomes purchaser as if it had bid (as permitted) successfully at sale. (1993 N.Y. Laws c. 602, §4). County may purchase at tax sale, without competitive bidding, for gross amount due. (1993 N.Y. Laws c. 602, §4).

Villages.

Generally, when board of trustees has elected to collect unpaid taxes by public sale, by Mar. 10 village treasurer must publish for three successive weeks list of property to be sold, aggregate amounts due, location and date of sale. (1993 N.Y. Laws c. 602, §4). Sale continues until sufficient amount of each parcel sold to pay aggregate amount owed. Purchaser has ten days to pay bid amount upon which treasurer issues certificate of sale. (1993 N.Y. Laws c. 602, §4).

Alternative Procedures for All Tax Districts.

Bulk tax sale of entire delinquent roll is authorized , but district must so elect by resolution. Notice requisites, individual parcel exclusion provision, 10% down payment, balance 30 days requirement, and bidder financial qualifications are specified , additional agreements are allowed between district and purchaser. (1993 N.Y. Laws c. 602, §4). District may foreclose on owned tax liens after proper notice by registered mail to record owner and mortgagee allowing 30 days or other fixed redemption period for payment of aggregate amount due to enforcing officer. (N.Y. Real Prop. Tax Law §1110 [NYCLS]). When district owns tax lien due and unpaid for at least four years, summary foreclosure without tax sale by action in rem is authorized. (N.Y. Real Prop. Tax Law §1120 [NYCLS]). After specified filing of list of eligible parcels in county clerk's office (N.Y. Real Prop. Tax Law §1122 [NYCLS]), enforcing officer publishes for six successive weeks required notice (N.Y. Real Prop. Tax Law §1124 [NYCLS]) and commences action according to required procedure (N.Y. Real Prop. Tax Law §1126 et seq. [NYCLS]).

Redemption.

Real property subject to delinquent tax lien may be redeemed by payment of delinquent tax liens and all charges before end of redemption period, which is in general two years after lien date. (N.Y. Real Prop. Tax Law §1110 [NYCLS]). Special rules for redemption of residential or farm property in certain tax districts (N.Y. Real Prop. Tax Law §1111 [NYCLS]) and property subject to more than one tax lien (N.Y. Real Prop. Tax Law §1112 [NYCLS]).

Counties, Cities, Towns.

Generally, at any time within one year from last day of sale, owner, occupant, or any other person may redeem real property sold for taxes by paying to county treasurer amount on sale certificate plus 10% annual interest computed from date of certificate. (1994 N.Y. Laws c. 532, §4). At least three months before end of one year redemption period, treasurer publishes for three nonconsecutive weeks in six-week period notice detailing unredeemed parcels and redemption amounts and sends such notice by first class mail to owner of parcel as name appears on tax roll. (1993 N.Y. Laws c. 602, §4). If parcel actually being used lawfully and exclusively, occupant or other person has prescribed additional redemption time as does holder of duly recorded mortgage. (1993 N.Y. Laws , c. 602, §4).

Sections of Real Property Tax Law in preceding paragraph repealed by (1993, c. 602, §4, eff. Jan. 1, 1995); however, for enforcing prior tax liens, provisions continue in effect for four years after effective date, and tax districts may adopt local laws on redemption periods for 1995 and 1996 liens, liens from Jan. 1, 1995 and onwards must be redeemed before any earlier lien, and installment agreements arising under N.Y. Real Prop. Tax Law §1184 [NYCLS] apply to all outstanding liens.

Villages.

Owner, occupant, or other person having interest in real property sold for taxes may redeem at any time prior to filing of notice of pendency of lien foreclosure action or prior to village treasurer conveyance by paying to treasurer amount on purchase certificate of sale plus interest no greater than 1% per month and other specified accrued charges. (1993 N.Y. Laws c. 602, §4). In all foreclosure actions, any person may redeem by payment of tax, interest, penalties, and other enumerated charges. (N.Y. Real Prop. Tax Law §§1112 [NYCLS], 1122 [NYCLS], 1124 [NYCLS]).

N.Y. Real Prop. Tax Law §§1456 [NYCLS] and 1464 [NYCLS] repealed by (1993 N.Y. Laws c. 602, §4, effective Jan. 1, 1995; however, for enforcing prior tax liens, provisions continue in effect for four years after effective date, and tax districts may adopt local laws on redemption periods for 1995 and 1996 liens; liens from Jan. 1, 1995 and onwards must be redeemed before any earlier lien, and installment agreements arising under N.Y. Real Prop. Tax Law §1184 [NYCLS] apply to all outstanding liens. Counties, cities or towns authorized to enact local law for collection of delinquent taxes under existing law, and N.Y. Real Prop. Tax Law art. 11 [NYCLS], not applicable unless local law is repealed. And certain villages authorized to adopt local law by Sept. 1, 1994, as long as it enforces collection of taxes becoming liens in 1995, 1996, and 1997 according to this title, as effective Dec. 31, 1994. Law must have been filed by Oct. 1, 1994.

Real Property Transfer Tax.

Tax imposed on conveyance of real property or interest therein at rate of $2 for each $500 when consideration exceeds $500. (N.Y. Tax Law §1402[a] [NYCLS]). In addition, 1% transfer tax is paid by grantee unless grantee is exempt, in which case it is paid by grantor when consideration for residential real property or interest therein is $1,000,000 or more. (N.Y. Tax Law §1402-a [NYCLS]).

Mortgage Tax.

Tax is imposed at rate of 50¢ per $100 of principal debt or obligation which is secured by mortgage on real property situated in New York State. (N.Y. Tax Law §253[1] [NYCLS]). Mortgage is defined to include every mortgage or deed of trust imposing lien on or affecting title to real property which may be part of security of debt, as well as executory contracts for sale of real property and contracts increasing indebtedness secured by prior mortgage. (N.Y. Tax Law §250[2][a] [NYCLS]). Exempt from tax are mortgages transferred, assigned or made to Home Owners' Loan Corporation or agricultural credit association. Federal home loans are also exempt. Mortgages which are not created for purpose of securing new or additional indebtedness are exempt from tax. (N.Y. Tax Law §252 [NYCLS]).

22.17 SALES AND USE TAXES:

Sales Tax.

4% sales tax is imposed (additional sales tax of 3/8 of 1% is imposed within territorial limits of Metropolitan Commuter Transportation District (N.Y. Tax Law. §1109 [NYCLS]) on variety of items. (N.Y. Tax Law §1105 [NYCLS], N.Y. Comp. Codes R. & Regs. tit. 20, §530.1). Sales tax of 4% imposed upon receipts from every retail sale of tangible personal property. (N.Y. Tax Law §1105[a] [NYCLS]). Sales tax of 4% also imposed on sales, excluding sales for resale, of: gas, electricity, refrigeration, certain intrastate telecommunications services and steam, and gas, electric, refrigeration and steam services. (N.Y. Tax Law §1105[b] [NYCLS]). 4% sales tax is also imposed upon receipts from every sale, except for resale, of following services: printed nonpersonal information services, excluding services of advertising, information services furnished to communication media in dissemination of news and meteorological services; processing of customer's personal property not for resale; installation or maintenance of personal property, with certain exclusions; maintenance of, but not additions or improvements to real property with certain exclusions; storing of personal property not for sale in regular course of business and rental of safe deposit boxes. (N.Y. Tax Law §1105[c][1]-[5] [NYCLS]). Also following services subject to sales tax: motor vehicle parking, garaging and storing; interior decorating and design except from N.Y. City sales tax if provided in N.Y. City; protective and detective services; and entertainment and information services. (N.Y. Tax Law §§1105[c][5]-[10] [NYCLS]). Wages paid by employers furnishing services listed above are specifically excluded from sales tax. (N.Y. Tax Law §1105[c] [NYCLS]). 4% sales tax is also imposed with certain exclusions upon receipts from retail sales of food and drink (N.Y. Tax Law §1105[d] [NYCLS]). 4% sales tax is imposed on any admission charge in excess of 10¢ or for use of any place of amusement in state, except horse races, boxing or wrestling matches, dramatic or musical arts, and motion picture theaters, admissions taxed under any other law of New York, admissions to sporting facilities in which patron is participant. Rents for occupancy of hotel rooms (except for permanent residents or where rent not more than $2/day) are subject to 4% sales tax. (N.Y. Tax Law §§1105[f][1] [NYCLS], [e] [NYCLS]). Sales tax is also applicable to dues of any social or athletic club, exclusive of initiation fee, in excess of $10 year, and initiation fee is also taxable if in excess of $10. (N.Y. Tax Law §1105[f][2] [NYCLS]). Dues of fraternal societies operating under lodge system, college or university fraternities and certain homeowners associations are exempted. (N.Y. Tax Law §1105[f][2][ii] [NYCLS]). Special tax on passenger car rentals imposed at rate of 6% in addition to sales tax. (N.Y. Tax Law §1160[a][1] [NYCLS]). Among exemptions from sales and use taxes are: certain foods and beverages (including all food purchased with food stamps), water delivered through pipes, drugs and medicines, prosthetic devices, newspapers and periodicals, certain agricultural property, caskets, certain utility machinery and equipment, commercial vessels and aircraft, airline fuel, property used for research and development, property sold by person at his residence (with certain limitations), certain property sold to contractor, subcontractor, or repairmen, trucks leased to authorized carriers, certain precious metal bullion held for investment purposes and portions of receipts from certain retail sales of alternative fuel vehicles or from retail sales of tangible personal property or services for installation of such alternative fuel system, packing materials, used mobile homes, commercial fishing vessels, certain use of natural gas, personal property sold in bulk vending machines for 10¢ or less, certain photocopies and car wash services provided by coin-operated machines, certain omnibuses, omnibus parts and services thereto, certain wines sold at wine tastings, use of certain temporary transportation devices, registered race horses and tractor trailers, and property sold to qualified empire zone enterprise. (N.Y. Tax Law §1115 [NYCLS]). In addition, following are exempt from sales and use tax: certain textbooks purchased by college students, computer system hardware use predominately in designing and developing certain computer software and Internet websites, machinery and other tangible personal property for use in operation of certain Internet data centers in N.Y., certain broadcasting machinery, pollution control equipment and Internet access charges by Internet provider. (N.Y. Tax Law §1115 [NYCLS]). Refund for such taxes may be claimed under certain conditions. (N.Y. Tax Law §1119 [NYCLS]). In addition, following organizations are exempt from sales and compensating use tax: New York State and its agencies, U.S. and its agencies, U.N., certain religions, charitable or scientific organizations, Indian tribes, N.Y. veterans organizations, credit unions, rural electric cooperatives, and health maintenance organizations. (N.Y. Tax Law §1116 [NYCLS]). Every vendor of tangible personal property, recipient of amusement charges and hotel operator is required to collect sales tax (N.Y. Tax Law §1131[1] [NYCLS]) and remit collections to Commissioner (N.Y. Tax Law §1137[a] [NYCLS]). Persons required to collect tax are personally liable for tax imposed, collected, or required to be collected. (N.Y. Tax Law §1133[a] [NYCLS]). This includes certain officers, directors and employees of corporations. (N.Y. Tax Law §1138[3][B] [NYCLS]).

Every person required to register with tax commission (N.Y. Tax Law §1134 [NYCLS]) whose taxable receipts total less than $300,000 (or, in case of automotive fuel distributor, whose taxable automotive fuel sales total less than 100,000 gallons) in each of preceding four quarters must file return within 20 days of last day of Feb., May, Aug. and Nov. of each year. (N.Y. Tax Law §1136[a]-[b] [NYCLS]). In addition, such persons whose taxable receipts in any of preceding four quarters total or exceed $300,000 (or, in case of automotive fuel distributor, whose taxable automotive fuel sales total or exceed 100,000 gallons) must file monthly return within 20 days of last day of each month. (N.Y. Tax Law §1136[a]-[b] [NYCLS]). Special rules apply to taxpayers who are liable for more than $500,000 of sales and use tax during any June 1 through May 31 period; they are required to make payments of sales use tax in excess of dollar threshold by electronic funds transfer or certified check. (N.Y. Tax Law §10 [NYCLS]).

Use Tax.

Generally, compensating use tax at rate of 4% is imposed (additional sales tax of ¼ of 1% is imposed within territorial limits of Metropolitan Commuter Transportation District (N.Y. Tax Law §1109 [NYCLS]) on every person using within state certain property and services described in subhead Sales Tax supra unless already subject to sales tax (N.Y. Tax Law §1110 [NYCLS]). Storage or withdrawal from storage by manufacturer is not to be considered use. (N.Y. Tax Law §1110[c] [NYCLS]). Personal property items used or incorporated into structure, building or real property by contractor, subcontractor or repairman subject to use tax if taxpayer does not also offer items for sale, as such, in regular course of its business. (N.Y. Tax Law §1110[e] [NYCLS]). Exemptions and exceptions to use tax are identical to those available under sales tax law except additional exemption from use tax for exempt tangible personal property, property used by purchaser prior to Aug. 1, 1965, property purchased by user while nonresident of N.Y., property which becomes part of product produced for sale, paper used in publication of newspapers and periodicals, among others. (N.Y. Tax Law §§1115 [NYCLS], 1116 [NYCLS], and 1118 [NYCLS]). Effective June 1, 1992, fee of $1 for each paging device used per month imposed on all users when provided for consideration; exemptions limited. (N.Y. Tax Law §1150[b][1] [NYCLS]). Filing requirements are similar to those under sales tax law (N.Y. Tax Law §1136[a] [NYCLS]), as are requirements for filing and payment of estimated use taxes (N.Y. Tax Law §1137-A[a] [NYCLS]). Use tax penalties. (N.Y. Tax Law §1145 [NYCLS]).

Highway Use Tax.

For privilege of using public highways except fee charging thruways, carrier must pay graduated tax based on mileage and gross weight or, if elected, on mileage and unloaded weight for trucks more than 18,000 lbs. gross weight or 8,000 lbs. unloaded weight and tractors more than 4,000 lbs. unloaded weight. (N.Y. Tax Law §§501 [NYCLS], 503 [NYCLS]). Currently, additional tax is imposed based on consumption of motor or diesel fuel within state on all public highways. (N.Y. Tax Law §503-a [NYCLS]).

22.18 STAMP AND SEAL TAXES:

Stamp Tax.

Tax commission will furnish stamps to evidence cigarette tax payment, and affix to cigarettes; see also category 2 Business Organizations, topic 2.03 Corporations, subhead Stock Transfer Tax.

22.18A TAX LIENS:

Uniform Federal Lien Registration Act Amended.

Not adopted. See topic 22.16a Property Taxes, subhead Liens for Taxes Due United States.

22.19 USE TAXES:

See topic 22.17 Sales and 22.19 Use Taxes.

22.20 UTILITIES TAX:

Public Utilities Tax.

Tax imposed on three types of utilities doing business in state: transportation and transmission companies, utilities performing certain enumerated types of activities, and telecommunication service providers. (N.Y. Tax Law §§183 [NYCLS], 184 [NYCLS], 186-a [NYCLS], and 186-e [NYCLS]). Transportation and transmission utilities are subject to tax on their capital amount at varying rates and to additional tax on gross earnings from State sources at rate of 0.00375%. (N.Y. Tax Law §§183 [NYCLS] and 184 [NYCLS]). Utilities under jurisdiction of Department of Public Services and certain other utilities are subject to additional annual franchise tax at varying rates according to activity performed within State. (N.Y. Tax Law §186-a [NYCLS]). Telecommunication companies are subject to annual excise tax on certain telecommunication income at 3.5% rate. (N.Y. Tax Law §186-e [NYCLS]). Metropolitan area surcharges also apply to utilities listed above.

See also topic 22.13 Local and Municipal Taxes, subhead New York City Taxes.

23 TRANSPORTATION

23.01 MOTOR VEHICLES:

Department of Motor Vehicles has general supervision of motor vehicles. It has its principal offices at Empire State Plaza, Albany, N.Y. 12228.

Vehicle Registration and Inspection.

Registration and inspection required, except vehicles transferred to welfare to work program authorized by N.Y. State Dept. of Labor, reinspection required after accident. (N.Y. Veh. & Traf. Law §301-a [NYCLS]). No motor vehicle may be registered unless application is accompanied by proof of financial security (described under subhead Insurance, infra). (N.Y. Veh. & Traf. Law §312[1][a] [NYCLS]). False statements, material alternations of records, or unlawful use of validating device in certificate of registration is misdemeanor. (N.Y. Veh. & Traf. Law §392 [NYCLS]). Knowing sale or purchase of false license, certificate of registration or number plate is misdemeanor for first offense and felony for subsequent offenses committed within ten years of prior offense. (N.Y. Veh. & Traf. Law §392-a [NYCLS]). Two number plates are required, one on rear of vehicle and one in front, except during registration years where only one plate is issued. One on rear for trailers. (N.Y. Veh. & Traf. Law §402[1] [NYCLS], [3] [NYCLS]). Purchaser or lessee of motor vehicle may operate it for five days with special dealer's plates under certain conditions. (N.Y. Veh. & Traf. Law §416 [NYCLS]). Registration required for snowmobiles, motorboats and limited use vehicles. (N.Y. Veh. & Traf. Law §§2222 [NYCLS], 2251 [NYCLS], 2261 [NYCLS]). Registration of motor vehicles for severely disabled persons is provided for in N.Y. Veh. & Traf. Law §404-a [NYCLS]. Registration of all terrain vehicles (ATV's) is provided for in N.Y. Veh. & Traf. Law §2282 [NYCLS].

Vehicle License—Members of the Armed Forces.

Provisions with respect to licensing of operators do not apply to member(s) of armed forces who has been issued licenses to operate motor vehicle or motorcycle by armed forces of U.S. Such person(s) is entitled to operate motor vehicle(s) or motorcycle(s) on public highways of this state only for period of 60 days after such person(s) has entered state. (N.Y. Veh. & Traf. Law §251[2] [NYCLS]). Exemption granted to such person from registration and license plate requirement is valid only for period of 45 days after such driver has entered state for purpose of travelling to either his place of residence or points of military duty. (N.Y. Veh. & Traf. Law §251[1] [NYCLS]). Provisions relating to registration of vehicles do not apply to vehicles owned by members of armed services or their dependents who are not residents of this state. (N.Y. Veh. & Traf. Law §251[3] [NYCLS]).

Operator's License.

Operator's or chauffeur's license required. Obtainable by anyone 18 years of age or over (or 21 years or over for Class A license or for commercial driver's license for transport of hazardous material) upon examination or, in discretion of Commissioner, without examination for applicant holding valid license from another jurisdiction. Commissioner shall issue clarified drivers' licenses, and such licenses shall be valid only for operation of type of vehicles specified for each such class of license. Any driver's license shall be considered probationary until expiration of six months following issuance thereof. Commissioner shall issue learner's permits, such permits to be valid only for specified class, and only when holder is in immediate supervision and control of a person at least 18 years of age who holds license valid in this state. Permit to drive while learning valid from its issuance until expiration of application for issuance of driver's license for which it was issued. Junior license may be obtained by minors who are at least 16 years of age. Operator's license may be issued to minor who is at least 17 and who has successfully completed driver's training course approved by state education department and Commissioner. (N.Y. Veh. & Traf. Law §§501-502). Licenses of persons in U.S. Armed Forces are extended until certain times after their discharge. (N.Y. Unconsol. Law c. 131, §116).

Commercial drivers' license required for operation of emergency vehicle. (N.Y. Veh. and Traf. Law § 501[2][d] [NYCLS]).

Suspension of License.

Licenses and registrations may be suspended, revoked, or renewal refused for various reasons. (N.Y. Veh. & Traf. Law §510 [NYCLS]). No registration of dealer may be suspended or revoked, or renewal refused, except upon notice to registrant and after opportunity to be heard. Temporary suspension allowed pending hearing upon written notice. (N.Y. Veh. & Traf. Law §415[9-a] [NYCLS]).

Vehicular assault and vehicular manslaughter are designated felonies by N.Y. Penal Law §§120.03 [NYCLS], 125.12 [NYCLS], and 125.13 [NYCLS].

Transfers.

Upon transfer or destruction of motor vehicle its registration expires and seller must remove plates from vehicle. Seller may thereafter, upon making application for such registration and payment of transfer fee, use same plates on another motor vehicle of same class. (N.Y. Veh. & Traf. Law §420[1] [NYCLS], [2] [NYCLS]). Upon death of owner, vehicle registration shall continue as valid until end of year or transfer of ownership, whichever occurs first. (N.Y. Veh. & Traf. Law §420[3] [NYCLS]).

Titles.

Vehicle owner, unless vehicle is excluded by N.Y. Veh. & Traf. Law §2102 [NYCLS], must apply to Commissioner for certificate of title within 30 days after transfer to him of vehicle. (N.Y. Veh. & Traf. Law §2104 [NYCLS]). Commissioner may refuse issuance of certificate of title on reasonable grounds (N.Y. Veh. & Traf. Law §2111 [NYCLS]), and may suspend or revoke certificate upon notice and hearing. Certificate may be temporarily suspended pending hearing. (N.Y. Veh. & Traf. Law §2124 [NYCLS]). Altering, forging or counterfeiting such certificates of title are all felonies. Permitting another, with fraudulent intent, to use or possess certificate is misdemeanor. (N.Y. Veh. & Traf. Law §2130 [NYCLS]).

Installment Sales.

See category 3 Business Regulation and Commerce, topic 3.23 Sales, subhead Retail Installment Sales Act.

Liens.

Upon written request of owner or of another lienholder named on certificate, lienholder must disclose pertinent information about security agreement in certificate of title; department of social services, or social services district, shall be deemed to have complied with this requirement upon disclosing name of obligor and amount of debt. (N.Y. Veh. & Traf. Law §2122 [NYCLS]). Security interest in vehicle is perfected by delivery to Commissioner of certificate of title, if any, and application for certificate of title containing name and address of lienholder and required fee, or notice of lien evidencing lien arising under N.Y. Lien Law §211 [NYCLS] and N.Y. Soc. Serv. Law §111-u [NYCLS]. Validity of security interests of vehicles brought into this state is determined by law of jurisdiction where vehicle was when security interest attached subject to various conditions. (N.Y. Veh. & Traf. Law §2118[c] [NYCLS]). Lienholder may assign his security interest to another without affecting his security interest, but those without notice of assignment remain protected when dealing with lienholder of record. (N.Y. Veh. & Traf. Law §2120 [NYCLS]).

Identification Marks.

Class E felony to alter identification marks of maker or knowingly to buy or sell vehicle or parts so altered for purpose of concealing or misrepresenting its identity. (N.Y. Penal Law §170.65 [NYCLS] and N.Y. Veh. & Traf. Law §421[2] [NYCLS]). Class E felony to knowingly possess vehicle or vehicle part which has vehicle identification mark defaced, altered or removed. (N.Y. Penal Law §170.70 [NYCLS]).

Odometer Alteration.

New vehicles sold in state after July 1, 1991 must be equipped with tamper-resistant odometer or speedometer. (N.Y. Veh. & Traf. Law §375[46] [NYCLS]). Failure of dealer to inform purchaser that car not equipped with tamper-resistant odometer may result in up to $1,000 fine for each violation. (N.Y. Veh. & Traf. Law §417-b[4][b] [NYCLS]).

Operation Prohibited.

By unlicensed person (N.Y. Veh. & Traf. Law §509 [NYCLS]) or intoxicated person or person whose ability to operate is impaired by use of a drug, as defined (N.Y. Veh. & Traf. Law §1192 [NYCLS]), or by person under age 21 after consuming alcohol, as defined (N.Y. Veh. & Traf. Law §1192-a [NYCLS]). Drivers of certain commercial vehicles driving under influence of alcohol or drugs are guilty of misdemeanor or felony punishable by fine, imprisonment, and certain other penalties. (N.Y. Veh. & Traf. Law §1193 [NYCLS]). Motor vehicles used in unlicensed operation of motor vehicle under certain circumstances may be seized and forfeited. (N.Y. Veh. & Traf. Law §511-c [NYCLS]).

Person operating vehicle involved in accident or in violation of provisions of Vehicle and

Traffic Laws may submit to breath test at request of police officer; refusal to submit is admissible at trial if sufficient warning given of effect of refusal. (N.Y. Veh. & Traf. Law §1194[2][f] [NYCLS]; 46 N.Y.2d 100, 412 N.Y.S.2d 845, 385 N.E.2d 584). Person operating vehicle in state shall be deemed to consent to chemical test of breath, blood, or urine or saliva if officer has reasonable cause to believe that operator is impaired by alcohol or drug. (N.Y. Veh. & Traf. Law §1194[2][a] [NYCLS]). License may be temporarily suspended without notice upon refusal to submit to chemical test, and may be revoked upon subsequent hearing. (N.Y. Veh. & Traf. Law §1194[2][b] [NYCLS], [c] [NYCLS]).

Operation prohibited while operator or passenger is consuming alcoholic beverages or in possession, with intent to consume, of open container containing alcoholic beverage. Does not apply to passenger vehicles operated pursuant to certificate or permit. Passenger vehicle is vehicle designed to carry ten or more passengers for profit or hire. (N.Y. Veh. & Traf. Law §1227 [NYCLS]).

Operation prohibited while operator is wearing more than one earphone attached to radio, tape player or other audio device. (N.Y. Veh. & Traf. Law §375[24-a] [NYCLS]).

Operation of motor vehicle prohibited unless driver is restrained by safety belt where vehicle required by law to be equipped with safety belt. (N.Y. Veh. & Traf. Law §§383 [NYCLS], 1229-c[3] [NYCLS]).

Operation of all terrain vehicles (ATV's) is regulated. (N.Y. Veh. & Traf. Law §§2280-2291; 2400-2413).

Fine and/or imprisonment may be imposed for failure to stop upon meeting or overtaking school bus. (N.Y. Veh. & Traf. Law §1174 [NYCLS]).

Size and Weight Limits.

Regulated by N.Y. Veh. & Traf. Law art. 10 [NYCLS].

Equipment Required.

Regulated by N.Y. Veh. & Traf. Law art. 9 [NYCLS].

Lights Required.

Regulated by N.Y. Veh. & Traf. Law §§375-76.

Windows and Windshields.

Regulated by N.Y. Veh. & Traf. Law §375[12] [NYCLS], [12-a] [NYCLS].

Bumpers Required.

Required for most vehicles of 1990 or newer model year. (N.Y. Veh. & Traf. Law §375[48] [NYCLS]).

Safety Belts.

Front required (1965 model or later), rear required (1967 model or later), one for each passenger (made 1968 or later). (N.Y. Veh. & Traf. Law §383 [NYCLS]). No person may operate motor vehicle in this state unless: (1) All back seat passengers under age 16 are restrained by safety belt and those under 4 by federally approved removable seat, and (2) all front seat passengers under age of 16 are restrained by safety belt and all those under 4 by federally approved removable seat and (3) operator is restrained by safety belt. (N.Y. Veh. & Traf. Law §1229-c[1]-[3] [NYCLS]). All persons over age of four who are seated in seat equipped with lap and shoulder belt must wear both belts. (N.Y. Veh. & Traf. Law §1229-c [NYCLS]). Foregoing rule does not apply to authorized emergency vehicles. (N.Y. Veh. & Traf. Law §1229-c[4][a] [NYCLS]). School buses manufactured for use in this state on or after July 1, 1987 must be equipped with seat safety belts and increased seat back padding on passenger seats. (N.Y. Veh. & Traf. Law §383[5][a] [NYCLS]).

Any person who violates seat belt law punishable by civil fine up to $50. (N.Y. Veh. & Traf. Law §1229-c[5] [NYCLS]). Effective Nov. 1, 2007, certain violations punishable by civil fine up to $100.

Seat belt law does not apply to taxis, liveries, and buses other than school buses. (N.Y. Veh. & Traf. Law §1229-c[9] [NYCLS]).

Noise.

Maximum allowable sound levels are specified in N.Y. Veh. & Traf. Law §386[3] [NYCLS].

Inspection.

Under direction of Superintendent of State Police, motor vehicles must be inspected as to equipment, loading, etc. (N.Y. Veh. & Traf. Law §§301 [NYCLS], 390 [NYCLS]). Comprehensive scheme of inspection exists for certain vehicles. (N.Y. Veh. & Traf. Law art. 5 [NYCLS]). Any peace officer having reason to believe vehicles described in N.Y. Veh. & Traf. Law §385 [NYCLS] are overloaded may stop and weigh same, and cause excess weight to be removed. (280 A.D. 698, 117 N.Y.S.2d 313).

Traffic Regulations.

Traffic infraction is not crime, and any punishment imposed is not penal or criminal, except for purposes of arrest without warrant in which case traffic infraction is deemed offense. (N.Y. Veh. & Traf. Law §155 [NYCLS]).

Accidents.

Person leaving scene of accident causing damage to real or personal property without giving identifying information to party sustaining damage or policeman or reporting accident to nearest police station or judicial officer, guilty of traffic infraction punishable by up to $250 or 15 days in jail, or both. Person leaving scene of accident causing personal injury to another, without giving identifying information to proper authorities guilty of Class A misdemeanor, or Class E felony if prior conviction for same offense, or if injury is serious, or results in death, of Class D felony. (N.Y. Veh. & Traf. Law §600 [NYCLS]). Where vehicle operator is involved in accident resulting in injury or death of person including that of operator or damage to property in excess of $1,000, operator, excepting police officer or firefighter on duty, must make written report to commissioner within ten days if report has been filed by owner of vehicle. If such operator be physically incapable of making such report and there be another participant in accident not incapacitated, such participant shall make report within ten days after such accident. If operator is unable to report, owner must report matter to commissioner within ten days after notice. Failure to report accident or failure to give correctly information required by commissioner in connection thereto shall constitute ground for suspension or revocation of operator's license. (N.Y. Veh. & Traf. Law §605 [NYCLS]). Accident report admissible as admission in subsequent litigation. (26 A.D.2d 83, 271 N.Y.S.2d 51).

Liability of Owner.

Owner of car liable for all injury caused by negligence of person using car with owner's permission, express or implied. Truck and trailer are deemed one vehicle; if separately owned, all owners are jointly and severally liable. (N.Y. Veh. & Traf. Law §388 [NYCLS]).

Guests.

There is no statute restricting liability for injury to a gratuitous guest.

Proof of Financial Responsibility.

Owner must furnish proof of financial security as prerequisite to registration of any motor vehicle. (N.Y. Veh. & Traf. Law §312 [NYCLS]); some provisions expire June 30, 2009.

Public motor vehicle liability security fund is established to guarantee payment of automobile liability insurance claims in event that insurance company becomes insolvent. (N.Y. Ins. Law §7601 et seq.; see also N.Y. Veh. & Traf. Law §370 [NYCLS]).

Due Care.

Every driver must exercise due care to avoid colliding with any bicyclist, pedestrian or domestic animal and must give warning by sounding horn when necessary. (N.Y. Veh. & Traf. Law §1146 [NYCLS]).

Insurance.

Commissioner, upon receipt of evidence that owner of motor vehicle not registered in state has operated or permitted it to be operated upon public highways of state while proof of financial security was not in effect with respect to it, will revoke such person's privilege for one year to operate any motor vehicle in state and privilege of operation in state of any motor vehicle owned by him; and upon receipt of evidence that person other than owner has operated motor vehicle registered in state, or unregistered, upon public highways of state with knowledge that proof of financial security was not in effect with respect to it, will revoke driver's license of such person if he is resident or, if not, his nonresident driving privileges, unless he had insurance coverage with respect to his operation of such vehicle comparable to an owner's policy of liability insurance. (N.Y. Veh. & Traf. Law §318[3] [NYCLS], [4] [NYCLS]). Proof of financial security is proof of ability to respond in damages for liability arising out of ownership, maintenance or use of motor vehicle as evidenced by owner's policy of liability insurance, providing minimum coverage in any one accident of $25,000 for bodily injury and $50,000 for death of one person, to limit of $50,000 for bodily injury and $100,000 for death of two or more persons, and $10,000 for property damage, by financial security bond or deposit, or by qualification as self-insurer provided, however, that such policy need not be for period coterminous with registration period of vehicle insured. (N.Y. Veh. & Traf. Law §311 [NYCLS]; some provisions expire June 30, 2009). Method of cancellation of insurance regulated. (N.Y. Veh. & Traf. Law §313 [NYCLS]; some provisions expire June 30, 2009). Rental vehicle insurance requirements are regulated by N.Y. Ins. Law §3440.

No-Fault Insurance.

Every owner's policy of liability insurance issued on motor vehicle (or owner maintaining other form of financial security) in satisfaction of financial security requirements of N.Y. Veh. & Traf. Law arts. VI or VIII must provide for payment of “first party benefits” equal to “basic economic loss” (up to $50,000 aggregate of: (i) medical, therapy and health services care [charges for such services generally to be consistent with those established by chairman of workers' compensation board for industrial accidents], (ii) loss of earnings up to $2,000 per month for up to three years, and (iii) all other reasonable expenses up to $25 per day for up to one year) less amounts recoverable due to such injury under state or federal benefit programs, amounts deductible under such insurance policy and 20% of lost earnings. (N.Y. Ins. Law §§5103[a], 5102, 5108). Such benefits shall be payable to: (1) Persons other than occupants of another motor vehicle or motorcycle for loss arising out of use or operation in New York of such motor vehicle; (2) named insured and members of his household, other than occupants of another motor vehicle or motorcycle, for loss arising out of operation of uninsured motor vehicle or motorcycle within

U.S. or Canada, or insured motor vehicle or motorcycle outside of New York and within U.S. or Canada; (3) New York residents not owning motor vehicle requiring coverage for first party benefits and not entitled, as member of household, to first party benefits under (2) above, for loss incurred arising out of use or operation of motor vehicle outside of New York and within U.S. or Canada; (4) estate of owner, operator or occupant of such motor vehicle, pedestrian injured by such motor vehicle, or any other person entitled to first party benefits (collectively, “covered person”) other than occupant of another motor vehicle or motorcycle, death benefit in amount of $2,000 for death of such person arising out of use or operation of such motor vehicle which is in addition to any first party benefits for basic economic loss. (N.Y. Ins. Law §5103[a][1]-[4]). Insurer may exclude from coverage person who intentionally causes his own injury, is injured as result of driving while intoxicated, or injured while committing unlawful act. (N.Y. Ins. Law §5103[b][1]-[3]). Owner's policy issued in New York must provide coverage in minimum amount required under laws of other states of U.S., and Canadian provinces. (N.Y. Ins. Law §5103[e]). Every insurer transacting business in New York, which sells policy providing motor vehicle liability insurance coverage, must include in each such policy coverage for payment of first party benefits when motor vehicle is used in New York. (N.Y. Ins. Law §5107[a]).

There is no right of recovery for pain and suffering (except in case of serious injury) or for basic economic loss in action by covered person against another covered person arising out of negligence in use or operation of motor vehicle in New York. (N.Y. Ins. Law §5104[a]). In action by covered person against noncovered person (where damages for personal injury may be recovered), insurer which paid or is liable for first party benefits has lien against any recovery to extent of benefits paid or payable by it to covered person; failure of covered person to commence action within two years gives insurer cause of action for amount of first party benefits paid against any person who may be liable to covered person for his personal injuries. (N.Y. Ins. Law §5104[b]).

Payments of first party benefits are payable within 30 days after claimant supplies proof of loss. (N.Y. Ins. Law §5106[a]). Every insurer shall provide claimant with option of submitting any dispute involving insurer's liability to arbitration; award by arbitrator, unless vacated or modified by master arbitrator, shall be binding. (N.Y. Ins. Law §5106[b]–[c]).

Foreign Vehicles.

Such vehicles registered in home state or country, and displaying licenses required by laws thereof may be operated without New York license or registration, provided home state allows like privileges to New York vehicles, and provided such vehicle not used to transport for hire or profit between points within state. (N.Y. Veh. & Traf. Law §250 [NYCLS]). If owner of foreign registered vehicle becomes resident of New York, vehicle must be registered in New York within 30 days. (N.Y. Veh. & Traf. Law §250[1] [NYCLS]).

Nonresident Operators.

If licensed in state of residence and over 18 (or over 16 with certain restrictions), nonresident may drive in state, but if becomes resident must obtain license within 30 days. (N.Y. Veh. & Traf. Law §250[2] [NYCLS]). Commissioner retains power to revoke or suspend driving privileges of nonresidents or unlicensed drivers to drive in state. (N.Y. Veh. & Traf. Law §250[2] [NYCLS]).

Actions against Nonresidents.

Summons in action growing out of accident involving nonresident, or resident who has remained outside state continuously for 30 days subsequent to accident or collision or motor vehicle owned by nonresident or absentee and operated with his permission or in his business may be served on Secretary of State, with same effect as if served on defendant personally. (N.Y. Veh. & Traf. Law §253[2] [NYCLS]). Plaintiff must send to defendant by certified or registered mail, return receipt requested, copy of summons and complaint and notice of service on

Secretary of State. (N.Y. Veh. & Traf. Law §§253[2] [NYCLS], 254 [NYCLS]).

Direct Actions.

Such actions by injured persons against insurer not allowed. (N.Y. Ins. Law §3420).

Motor vehicle carriers are regulated by Department of Transportation. (N.Y. Transp. Law §14). Generally must furnish public liability bond, $25,000 minimum for personal injury liability and $50,000 minimum for death and $10,000 maximum for property damage liability, for each vehicle. Foreign vehicles doing business in state are subject to this requirement. (N.Y. Veh. & Traf. Law §370[1][a] [NYCLS], [b] [NYCLS]). Carriers are liable in treble damages for injuries to highways if caused by excessive weight. (N.Y. High. Law §320). Every bus company must furnish safe and adequate service and facilities and may charge only reasonable rates. (N.Y. Transp. Law §§150-59).

Motor Vehicle Taxes.

Registration fee paid by owner (other than dealer or manufacturer) is in lieu of all state or local taxes imposed upon motor vehicles. (N.Y. Veh. & Traf. Law §401[10] [NYCLS]).

Gasoline Tax.

See category 22 Taxation, topic 22.08 Gasoline and Special Fuels Taxes.

Sales.

See category 3 Business Regulation and Commerce, topic 3.23 Sales, subhead Sales of Motor Vehicles.

Liability for Fines.

Liability of owners, operators and lessors for fines and penalties is governed by N.Y. Veh. & Traf. Law §239 [NYCLS].

Abandonment of vehicle punishable by fine not less than $250 nor more than $1,000. (N.Y. Veh. & Traf. Law §1224[7][a] [NYCLS]).

Certificate of Prior Use.

Dealer selling or transferring second-hand passenger vehicle must deliver to buyer certificate of prior use if dealer knows or has reason to know use was as taxicab, police vehicle, rental vehicle, driver education vehicle, or vehicle repurchased pursuant to N.Y. Gen. Bus. Law §§198-a [NYCLS] or §198-b [NYCLS]. (N.Y. Veh. & Traf. Law §417-a[1][a] [NYCLS]). Dealer selling or transferring any passenger motor vehicle must deliver written acknowledgment of prior use if dealer knows or has reason to know that such vehicle is not equipped with tamper-resistant odometer. (N.Y. Veh. & Traf. Law §417-b[1] [NYCLS]).

Lemon Law.

See category 3 Business Regulation and Commerce, topic 3.12 Consumer Protection.

Automobile Auctioneers.

See category 3 Business Regulation and Commerce, topic 3.23 Sales, subhead Sales of Motor Vehicles.

Mobile Telephones.

Operator of motor vehicle may not use mobile telephone to engage in call while driving on public highway except in emergency situation. Punishable by fine not more than $100. Use of hands-free mobile telephones is permitted. (N.Y. Veh. & Traf. Law §1225-c[2]-[4] [NYCLS]).

Text Messaging and Use of Portable Devices

Operation of motor vehicle while using a portable electronic device while vehicle is in motion is prohibited and punishable by fine of not more than $150. (N.Y. Veh. & Traf. Law § 1225 [NYCLS]–d).

23.02 RAILROADS:

See category 3 Business Regulation and Commerce, topic 3.08 Carriers.

24 Forms

Commercial Code Forms

(Click here to view)

1

NORTH CAROLINA LAW DIGEST

—Scope —

Revised for 2010 edition by **LexisNexis**(R).

(References, unless otherwise noted, are to General Statutes of North Carolina. Figures preceding hyphen are chapter numbers and those following hyphen are section numbers. Parallel citations to the South Eastern Reporter begin with 96 N.C.)

Note: Legislation is current for all Bills signed into law through July 1, 2009. Regular sessions of Legislature must be held biennially in Jan. of odd years. However, practice is to meet annually.

1 INTRODUCTION

1.01 GOVERNMENT AND LEGAL SYSTEM:

The State of North Carolina is a constituent state of the United States of America. For further discussion of the U.S. federal system, see Introduction to the Federal Government of the United States at the beginning of this volume. A great many laws are promulgated by the federal government of the United States and are not reflected in the topics below. See the Introduction to this volume for references to the federal law topics covered.

Like all but one of the United States, North Carolina has a common law legal system, with roots in English common law. For information on the courts and legislature of North Carolina, see category 6 Courts and Legislature.

1.02 [RESERVED]

1.03 HOLIDAYS:

Legal holidays are: Jan. 1 (New Year's Day), 3d Mon. in Jan. (Martin Luther King, Jr.'s Birthday), Jan. 19 (Robert E. Lee's Birthday), 3d Mon. in Feb. (Washington's Birthday), Mar. 25 (Greek Independence Day), Apr. 12 (Anniversary of signing of Halifax Resolves), May 10 (Confederate Memorial Day), May 20 (Anniversary of Mecklenburg Declaration of Independence), last Mon. in May (Memorial Day), Good Friday, July 4 (Independence Day), 1st Mon. in Sept. (Labor Day), 2d Mon. in Oct. (Columbus Day), Yom Kippur, Nov. 11 (Veterans Day), Tues. after 1st Mon. in Nov. in years in which general election is to be held, 4th Thurs. in Nov. (Thanksgiving Day), and Dec. 25 (Christmas Day). (NCGS 103-4).

Holiday Falling on Sunday.

When holiday falls on Sun., Mon. following is holiday. (NCGS 103-4). When day or last day for doing act required or permitted by law to be done falls on Sun. or holiday, act may be done next business day. (NCGS 103-5).

Banks.

Bank as defined in G.S. NCGS 53-1 or G.S. NCGS 53-136, or any branch or limited service facility thereof located in this state, may operate on such days and during such hours, and may observe such holidays, as bank's board of directors shall designate. (NCGS 53-77.1A).

1.04 OFFICE HOURS AND TIME ZONE:

North Carolina is in the Eastern (GMT -05:00) time zone. Office hours are generally from 9 a.m. to 5 p.m.

2 BUSINESS ORGANIZATIONS

2.01 AGENCY:

The common law doctrine of agency prevails.

Person trading as “agent” must disclose his principal to avoid liability. See category 17 Intellectual Property, topic 17.01 Trademarks and Tradenames.

2.02 ASSOCIATIONS:

Unincorporated association is body of individuals acting together for some common enterprise by methods and forms used by incorporated bodies, but without corporate charter. (231 N.C. 522, 58 S.E.2d 109).

Formation.

Articles of association for purposes expressed in charter and bylaws are contract between association and members and each member is deemed to have consented to all reasonable rules and regulations promulgated in accordance with its bylaws. (242 N.C. 136, 87 S.E.2d 18).

Rights and Powers.

Conveyance of property vests title in members as individuals, or in trustees for benefit of individuals. (231 N.C. 522, 58 S.E.2d 109). However, in order to bring suit concerning this property, it must be registered in accordance with G.S. NCGS 66-68. (100 N.C. App. 622, 397 S.E.2d 643).

Actions.

Unincorporated associations, organizations or societies, foreign or domestic, whether organized for profit or not, may sue or be sued under name by which they are commonly known or called or under which they are doing business. Judgments and executions against such association, organization or society will bind real and personal property to same extent as if incorporated. Unincorporated association, organization or society bringing suit in name by which it is commonly known and called must allege specific location of recordation required of businesses operating under assumed name. (NCGS 1-69.1; NCGS 66-68). Unincorporated non-profit associations are subject to c. 59B of G.S. Unincorporated association must appoint process agent. See category 5 Civil Actions and Procedure, topic 5.20 Process.

Professional Associations.

See topic 2.03 Corporations, subhead Professional Corporations.

2.03 CORPORATIONS:

N.C. Business Corporation Act after July 1, 1990.

N.C. Business Corporation Act, (G.S. c. 55) (hereinafter, “Act”), effective July 1, 1990, is based significantly on Revised Model Business Corporation Act (ABA, 1984) (hereinafter, “RMBCA”). For text of Revised Model Act, see Uniform and Model Acts Digest.

General supervision of corporations is in Secretary of State, 2 South Salisbury Street, Raleigh, N.C. 27601. (NCGS 55-1-30).

Purposes.

N.C. substantially adopts RMBCA §3.011 unless more limited purpose is set forth in its articles of incorporation; purpose of corporation is to engage in any lawful business. (NCGS 55-3-01[a]).

Name.

N.C. substantially adopts RMBCA name provisions, §§4.01-4.03. (NCGS 55D-20, -21, -23, -24). Additionally, person acquiring goodwill of corporation authorized to transact business in N.C. may reserve exclusive right to name of said corporation for period of ten years. (NCGS 55D-23[c]). Fee for reservation is $30. (NCGS 55-1-22).

Term of Corporate Existence.

As in RMBCA §3.02, corporate existence is perpetual unless articles of incorporation or this Act otherwise provide. (NCGS 55-3-02[a]).

Incorporators.

N.C. substantially adopts RMBCA §201; one or more persons may act as incorporator(s). (NCGS 55-2-01).

Articles of Incorporation.

N.C. substantially adopts RMBCA §2.02. (NCGS 55-2-02). Additionally, N.C. specifies that “improper personal benefit” for purposes of prohibiting director indemnification does not include director's reasonable compensation or other reasonable incidental benefit on account of service as director, officer, employee, independent contractor, attorney, or consultant of corporation. (NCGS 55-2-02[b][3]).

Filing of Articles.

N.C. adopts RMBCA §1.25 regarding procedure for filing articles of incorporation. (NCGS

55D-15[a], [b]).

Expedited filings are guaranteed upon receipt of additional $200 for filing by end of same business day of document's receipt prior to 12:00 noon E.S.T.; additional $100 for filing within 24 hours of receipt, excluding weekends and holidays. (NCGS 55D-11).

As in RMBCA §2.03, corporate existence begins when articles of incorporation become effective. (NCGS 55-2-03[a]). Document may specify delayed effective time and date, and if it does so document becomes effective at such time and date. Delayed effective date may not be later than 90th day after date filed. (NCGS 55D-13[b]).

Filing Fees.

On filing articles of incorporation, filing fee of $125 must be paid to Secretary of State. (NCGS 55-1-22).

Execution of Corporate Documents.

N.C. adopts RMBCA §1.20 provisions for executing corporate documents. (NCGS 55-1-20). Any signature on document may be facsimile or electronic signature in form acceptable to Secretary of State. Document may, but not need contain seal, attestation, acknowledgment, verification, or proof. (NCGS 55D-10).

Certificate of Existence.

N.C. adopts RMBCA §1.28. (NCGS 55-1-28).

Organization of Corporation.

N.C. substantially adopts RMBCA §2.05. (NCGS 55-2-05).

Amendment of Articles.

N.C. adopts RMBCA §10.01. (NCGS 55-10-01). Filing fee is $50. (NCGS 55-1-22).

Procedure.

Unlike RMBCA provisions, unless articles provide otherwise, board of directors may adopt any of following amendments to corporation's articles without shareholder approval: (1) To delete names and addresses of initial directors; (2) to delete names and addresses of initial registered agent or registered office if statement of change is on file with Secretary of State; (3) if corporation has only one class of shares outstanding, (a) change each issued and unissued authorized share of class into greater number of whole shares of class, or (b) increase number of authorized shares of class to extent necessary to permit issuance of shares as share dividend; (4) to change corporate name by substituting word “corporation”, “incorporated”, “company”, “limited”, or abbreviation thereof for similar word or abbreviation in name, or by adding, deleting, or changing geographical attribution for name; (5) to reflect reduction in authorized shares pursuant to G.S. NCGS 55-6-31(b) when corporation has acquired its own shares and articles of incorporation prohibit reissue of acquired shares; (6) to delete class of shares from articles of incorporation, as result of operation of G.S. NCGS 55-6-31(b), when there are no remaining authorized shares of class and articles of incorporation prohibit reissue of acquired shares; (7) to make any other change expressly permitted by Act to be made without shareholder approval. (NCGS 55-10-02). If corporation has issued shares, except as provided in G.S. NCGS 55-14A-01, amendment to articles of incorporation must be adopted by board of directors. Except as provided in G.S. NCGS 55-10-02, -07 and NCGS 55-14A-01, after adopting amendment board of directors must submit amendment to shareholders for approval. Board of directors must also transmit to shareholders recommendation that shareholders approve amendment, unless board of directors determines, because of conflict of interest or other special circumstances, it should not make such recommendation. In which event board of directors must communicate basis for that determination to shareholders with amendment. Board of directors may condition its submission of amendment on any basis. (NCGS 55-10-03). N.C. has substantially adopted RMBCA §10.04 regarding voting on amendments by voting groups. (NCGS 55-10-04). Holders of outstanding shares of class are entitled to vote as separate voting group on proposed amendment as specified in RMBCA §10.04; additionally, shareholders are entitled to vote as separate group if amendment would: (1) Increase or decrease aggregate number of authorized shares of class; or (2) change corporation into nonprofit corporation or cooperative organization. (NCGS 55-10-04).

Amendment Before Issuance of Shares.

N.C. adopts RMBCA §10.02. (NCGS 55-10-05).

Articles of Amendment must set forth information as specified in RMBCA §10.06. (NCGS 55-10-06).

Restated Articles of Incorporation.

N.C. adopts RMBCA §10.07 with additional requirements. (NCGS 55-10-07). If restated articles include new amendment requiring shareholder approval, all shareholders must be given notice of proposed shareholder meeting and amendments must be adopted and approved as provided in G.S. NCGS 55-10-03. Restated articles of incorporation may include statement of address of current registered office and name of current registered agent of corporation and no other. Corporation restating articles must deliver to Secretary of State for filing articles of restatement which must: (1) Set forth name of corporation; (2) attach as exhibit text of restated articles of incorporation; (3) state that restated articles consolidate all amendments into single document; and (4) if restated articles of incorporation contain new amendment to articles, include statements required by G.S. NCGS 55-10-06. (NCGS 55-10-07).

Bylaws.

N.C. adopts bylaw provisions of RMBCA §§2.06, 10.20, 10.21. (NCGS 55-2-06, -10-20, -1-22). Additionally, board of directors may not amend or repeal shareholder-adopted bylaw unless shareholder-adopted bylaw allows board to do so. (NCGS 55-10-20).

Stock.

Articles of incorporation must prescribe classes of shares and number of shares of each class that corporation is authorized to issue. If more than one class of shares is authorized, articles must prescribe distinguishing designation for each class, and, prior to issuance of shares of class, preferences, limitations, and relative rights of class must be described in articles. All shares of class must have preferences, limitations, and relative rights identical to those of other shares of same class, unless articles divide class into series. Requirement of identical rights within class may not be construed to conflict with any special voting rights specified elsewhere in Act. If class is divided into series, then all shares of any one series must have preferences, limitations, and relative rights identical to those of other shares in same series. Each series of class must be given distinguishing designation. Articles must authorize (1) One or more classes of shares that together have unlimited voting rights, and (2) one or more classes of shares (which may be same class or classes as those with voting rights) that together are entitled to receive net assets of corporation upon dissolution. Articles may authorize one or more classes or series within class of shares that: (1) Have special, conditional or limited voting rights, or no right to vote; (2) are redeemable or convertible as specified in articles (i) at option of corporation, shareholder, or any other person upon occurrence of designated event, (ii) for cash, indebtedness, securities, or other properties, (iii) in designated amount or amount determined in accordance with designated formula or by reference to extrinsic data or events; (3) entitle holders to distributions calculated in any manner, including cumulative dividends, noncumulative, or partially cumulative;

(4) have preference over any other class or series within class of shares with respect to distributions, including dividends and distributions upon dissolution. Noncumulative preferred shares of class or series within class, out of which shares were initially issued after June 30, 1957, and before Oct. 1, 1969, are entitled to dividend credit. Until such dividend credit is fully discharged, no dividend may be paid to any shares that are subordinate to such preferred shares as to dividends. (NCGS 55-6-01).

Stock Certificates.

N.C. adopts RMBCA §6.25. (NCGS 55-6-25).

Fractional Shares.

N.C. substantially adopts RMBCA §6.04. (NCGS 55-6-04).

Issuance of Stock.

N.C. adopts RMBCA §6.01. (NCGS 55-6-21).

Terms of Class or Series Determined by Board of Directors.

N.C. adopts RMBCA §§6.02 (NCGS 55-6-01, -02), 6.03 (NCGS 55-6-03).

Uniform Commercial Code adopted. (NCGS 25-1-101 to NCGS 25-11-108). See category 3 Business Regulation and Commerce, topic 3.09 Commercial Code.

Uniform Securities Ownership by Minors Act has not been adopted.

Uniform Simplification of Fiduciary Security Transfers Act repealed. (1997 N.C. Sess. Laws 181, §23).

Stock Transfer Tax.

There is no stock transfer tax imposed by this state.

Shareholders.

Shareholders' Agreements.

Agreement between two or more shareholders, if in writing and signed by parties thereto, may provide that in exercise of any voting rights of shares held by parties, including any vote with respect to directors, such shares will be voted as provided by agreement, as parties may agree, or as determined in accordance with procedures specified in agreement. Such agreement is valid for no more than ten years from date of execution and may be renewed. (NCGS 55-7-31[a]).

Shareholders' Preemptive Rights.

N.C. essentially follows RMBCA §6.30, with exception of §6.30(b)(5), relating to holders of shares with general voting rights but without preferential rights to distributions or assets. (NCGS 55-6-30). Additionally, shareholders of corporation incorporated before July 1, 1990, other than public corporation, have preemptive right to acquire unissued shares of corporation to extent provided in and subject to limitations of G.S. NCGS 55-6-30(b) and (c), except to extent that articles of incorporation expressly provide otherwise (NCGS 55-6-30[d]).

Tender Offers.

Repealed, eff. Oct. 1, 2001.

Shareholders' Actions.

N.C. adopts RMBCA §§7.41 (NCGS 55-7-41), 7.42 (NCGS 55-7-42), 7.44 (NCGS 55-7-44). Plaintiff must: (1) Allege that each plaintiff has been shareholder of corporation for at least one year; (2) bring action within two years of date of transaction of which he complains; and (3) upon court order, execute and deposit with clerk of court surety to indemnify corporation against expenses expected to be incurred by corporation in proceeding. (NCGS 55-7-48).

Shareholder's Liabilities.

N.C. adopts RMBCA §6.22. (NCGS 55-6-22).

Shareholder's Meetings.

N.C. substantially adopts RMBCA §§7.01 (NCGS 55-7-01), 7.02 (NCGS 55-7-02), 7.04 (NCGS 55-7-04), 7.05 (NCGS 55-7-05).

Failure to hold annual meeting at time stated in or fixed in accordance with bylaws, whether from lack of quorum or otherwise, substitute annual meeting may be called in accordance with G.S. NCGS 55-7-02 and any such meeting may be designated as annual meeting. Any matter relating to affairs of corporation that is appropriate for shareholder action is proper subject for action at annual meeting of shareholders, and unless required by some provision of Act, matter need not be specifically stated in notice of meeting. (NCGS 55-7-01[c, d]).

For non-public companies, special shareholder meeting may be called within 30 days after holders of at least 10% of all votes entitled to be cast on any issue proposed to be considered at proposed special meeting sign, date and deliver to corporation's secretary one or more written demands for meeting describing purpose or purposes for which it is to be held. (NCGS 55-7-02[a]).

Superior court of county where corporation's principal office is located may, after notice is given to corporation, summarily order meeting to be held: (1) On application of any shareholder if annual meeting of shareholders has not been held within 15 months after corporation's last annual meeting; or (2) on application of shareholder who signed valid demand for special meeting if notice of the special meeting was not given within 30 days of receipt of demand therefor or if corporation does not hold meeting. Court may fix time and place of meeting, determine shares entitled to participate, specify record date for determining shareholders entitled to notice of and to vote at meeting, prescribe form and content of meeting notice, fix quorum required for specific matters to be considered at meeting, enter other orders necessary to accomplish purpose or purposes of meeting, and award such reasonable expenses, including attorneys' fees, as it deems appropriate. (NCGS 55-7-03).

Action may be taken without meeting by shareholders' unanimous consent. Action may also be taken without meeting by shareholders having not less than minimum number of votes necessary to take action at meeting at which all shareholders entitled to vote were present and voted if so provided in articles of incorporation, corporation is not public corporation, action is evidenced by unrevoked written consents, and action is not election of directors at annual meeting (except in certain circumstances if cumulative voting is authorized). (NCGS 55-7-04). Corporation must give notice to shareholders who do not consent to amendment to articles of incorporation, plan of merger or share exchange, plan of conversion, sale, lease, exchange, or disposition of substantially all property of corporation's property, or dissolution at least ten days before action is taken, and in other cases, to all shareholders who have not consented who, if action had been taken at meeting would have been entitled to notice, within ten days.

Notice.

N.C. adopts RMBCA §7.05. (NCGS 55-7-05).

Record Date.

N.C. adopts RMBCA §7.07. (NCGS 55-7-07).

Voting List.

N.C. adopts RMBCA §7.20. (NCGS 55-7-20). Notice must be given to corporation before court summarily orders inspection or copying of shareholder's list. (NCGS 55-7-20[d]).

Voting Requirements.

N.C. has adopted RMBCA §§7.28 (NCGS 55-7-28), 7.25 (NCGS 55-7-25). Additionally, in absence if quorum at opening of any meeting of shareholders, such meeting may be adjourned from time to time by vote of majority of votes cast on motion to adjourn. (NCGS 55-7-25[a]).

N.C. substantially adopted RMBCA §§7.26, 7.27, but additionally permits bylaw adopted by shareholders to provide for voting by single voting group on particular matter or to establish greater quorum or voting requirements for shareholders. (NCGS 55-7-26, -27).

Voting of Shares.

N.C. follows RMBCA §7.21, but omits requirement that only shares are entitled to vote; NCGS 55-7-21.1 permits corporation to provide to holders of debt securities right to vote in certain circumstances. (NCGS 55-7-21).

N.C. has substantially adopted RMBCA §7.28. However, right to cumulative voting is preserved for substantially all corporations that had cumulative voting bylaw prior to July 1, 1990. (NCGS 55-7-28[e]). Shares otherwise entitled to vote cumulatively may not be voted cumulatively at meeting unless meeting notice or proxy statement accompanying notice conspicuously states cumulative voting is authorized or shareholder or proxy who has right to cumulate his votes announces in open meeting, before voting for directors starts, his intention to vote cumulatively; and if such announcement is made, chair shall declare that all shares entitled to vote have right to vote cumulatively. (NCGS 55-7-28[d][2]).

Proxies.

N.C. adopts RMBCA §7.22 with few revisions. N.C. allows more permissible forms of proxies than Model Act, including telephonic transmission under circumstances or together with information from which corporation can reasonably assume that appointment was made or authorized by shareholder. (NCGS 55-7-22[b]). Model Act was modified to permit proxy appointments of less than 11 months. (NCGS 55-7-22[c]). N.C. makes formerly irrevocable proxies revocable, but not automatically revoked, when interest with which such proxy was coupled is extinguished. (NCGS 55-7-22[f]).

Voting Trusts.

N.C. has adopted RMBCA §7.30. (NCGS 55-7-30).

Directors.

N.C. has adopted RMBCA §§8.01 (NCGS 55-8-01), 8.02 (NCGS 55-8-02), 8.04 (NCGS 55-8-04), 8.05 (NCGS 55-8-05). Corporation may dispense with or limit authority of board by describing in articles of incorporation or in valid shareholders' agreement who will perform some or all of duties of board. Such limitation of authority shall not be effective against persons who do not have actual knowledge of limitation. To extent articles of incorporation or valid shareholders' agreement vest authority of board in individual or group other than board of directors, such individual or group in exercise of such authority will be deemed to be acting as board of directors for all purposes of Act. (NCGS 55-8-01[c][d]).

Board of directors must consist of one or more individuals, with number specified in or fixed in accordance with articles of incorporation or bylaws. Number of directors may be increased or decreased by amendment or in manner provided in articles of incorporation or bylaws, but for corporation to which G.S. NCGS 55-7-28(e) applies, number of directors shall not be decreased unless either decrease is approved by shareholders in vote in which number of shares voting against proposal for decrease would not be sufficient to elect director by cumulative voting, or decrease is made pursuant to provision of articles of incorporation or bylaws fixing minimum and maximum number of directors and authorizing number of directors to be fixed or changed from time to time. Directors are elected at first annual shareholders' meeting and at each annual meeting thereafter unless terms are staggered. (NCGS 55-8-03).

Articles of incorporation or bylaws adopted by shareholders may provide for staggered terms. At each annual shareholders' meeting held thereafter, directors shall be chosen for term of two, three, or four years, as case may be, to succeed those terms which expire. (NCGS 55-8-06).

Resignation of Directors.

N.C. has adopted RMBCA §8.06. Resignation is effective when communicated unless writing specifies later effective date or subsequent event upon which it will become effective. (NCGS 55-8-07).

Removal of Directors.

N.C. has adopted RMBCA §8.08. Director may not be removed by shareholders at meeting unless notice of meeting states that purpose or one of purposes of meeting is removal of director. Unless otherwise provided in articles of incorporation or bylaw adopted by shareholders, entire board of directors may be removed from office with or without cause by affirmative vote of majority of votes entitled to be cast at any election of directors. (NCGS 55-8-08).

Superior court of county where corporation's principal office, or, if none in this state, its registered office, is located may remove director of corporation from office in proceeding commenced by either corporation or shareholders holding at least 10% of outstanding shares of any class if court finds that: (1) Director engaged in fraudulent or dishonest conduct, or gross abuse of authority or discretion, with respect to corporation; and (2) removal is in best interest of corporation. Court that removes director may bar director from reelection for period prescribed by court. Shareholder commencing proceeding under this section must make corporation party defendant. (NCGS 55-8-09).

Vacancy.

Unless articles of incorporation provide otherwise, if vacancy occurs on board of directors, including, without limitation, vacancy resulting from increase in number of directors or from failure of shareholders to elect full authorized number of directors: (1) Shareholders may fill vacancy; (2) board of directors may fill vacancy; or (3) if directors remaining in office constitute fewer than quorum of board, they may fill vacancy by affirmative vote of majority of all of directors, or by sole director, remaining in office. If vacant office was held by director elected by voting group of shareholders, only remaining director(s) elected by that voting group or holders of shares of that voting group are entitled to fill vacancy. Vacancy that will occur upon specific later date or subsequent event may be filled before vacancy occurs but new director may not take office until vacancy occurs. (NCGS 55-8-10).

Director Meetings.

N.C. has adopted RMBCA §8.20. Unless bylaws provide otherwise, special meetings of board of directors may be called by president or any two directors. (NCGS 55-8-20).

Action Without Meeting.

N.C. has substantially adopted RMBCA §8.21. (NCGS 55-8-21). Written consent to action without meeting can be given before or after action is taken. (NCGS 55-8-21[a]).

N.C. has essentially adopted RMBCA §8.22 regarding notice of meeting. (NCGS 55-8-22). However, Act requires five instead of two days' notice of meetings in absence of notice provision in articles of incorporation or bylaws. (NCGS 55-8-22[b]).

N.C. has adopted RMBCA §8.23 regarding waiver of notice. (NCGS 55-8-23).

Quorum and Voting.

N.C. has substantially adopted RMBCA §8.24. (NCGS 55-8-24). However, bylaw fixing low quorum must be adopted by shareholders. (NCGS 55-8-24[b]). Bylaw fixing greater quorum or voting requirement may not be adopted by vote of less than majority of directors then in office, and may not be itself amended by quorum or vote of directors less than quorum or vote therein prescribed or prescribed by shareholders pursuant to G.S. NCGS 55-10-22(b), (c).

Duties of Directors.

N.C. has substantially adopted RMBCA §8.30. (NCGS 55-8-30). Director shall discharge his duties: (1) In good faith; (2) with care ordinarily prudent person in like position would exercise under similar circumstances; and (3) in manner he believes to be in best interests of corporation. (NCGS 55-8-30[a]). Director is not entitled to rely on information, opinions, reports, or statements, including financial statements and other financial data, if he has actual knowledge concerning matter in question which makes reliance otherwise permitted unwarranted. (NCGS 55-8-30[c]). Director is not liable for action taken, or failure to take action, if he performed duties of his office in compliance with G.S. NCGS 55-8-30. Duties of director weighing change of control situation shall not be any different, nor standard of care any higher, than otherwise provided in G.S. NCGS 55-8-30. (NCGS 55-8-30[d]). Director's personal liability for monetary damages for breach of duty as director may be limited or eliminated in articles of incorporation only to extent permitted in G.S. NCGS 55-2-02(b)(3), and director may be entitled to indemnification against liability and expenses. (NCGS 55-8-30[e]).

Conflict of Interest.

“Conflict of interest transaction” is one with corporation in which director of corporation has direct or indirect interest. Conflict of interest transaction is not voidable by corporation solely because of director's interest in transaction if any one of following is true: (1) Material facts of transaction and director's interests were disclosed or known by board of directors or committee of board and they approved, authorized or ratified transaction; (2) material facts of transaction and director's interest were disclosed or known to shareholders entitled to vote and they authorized, approved, and ratified transaction; or (3) transaction was fair to corporation. Director of corporation has indirect interest in transaction if: (1) Another entity in which he has material financial interest or in which he is general partner is party to transaction, or (2) another entity of which he is director, officer, or trustee is party to transaction and transaction is or should be considered by board of directors of corporation. Conflict of interest transaction is authorized, ratified or approved if it receives affirmative vote of majority of directors on board or on committee who have no direct or indirect interest in transaction or of majority of shares (excluding shares owned by or voted under control of director who has direct or indirect interest in transaction and shares owned by or voted under control of entity described under G.S. NCGS 55-8-31[b][1, 2]).

Except as to loans and guarantees authorized by statute regulating any special class of corporations, corporation may not directly or indirectly lend money to or guarantee obligation of director of corporation unless: (1) Particular loan or guaranty is approved by majority of votes represented by outstanding voting shares of all classes, voting as single voting group, except votes of shares owned by or voted under control of benefitted director; or (2) corporation's board of directors determines that loan or guaranty benefits corporation and either approves specific loan or guaranty or general plan authorizing loans and guarantees. (NCGS 55-8-32).

N.C. generally follows RMBCA §8.33 regarding directors' liability for unlawful distributions. (NCGS 55-8-33). Unlike Model Act, any action under this section must be brought within three years of date on which effect of distribution was measured under G.S. NCGS 55-6-40(e) or (g), and rights of individual directors to contribution and reimbursement is not terminated unless it is commenced one year after liability of claimant has been adjudicated. (NCGS 55-8-33).

Officers.

N.C. has adopted RMBCA §8.40 with several changes. Corporation has officers described in bylaws or appointed by board of directors in accordance with bylaws. Same individual may simultaneously hold more than one office in corporation, but no individual may act in more than one capacity where action of two or more officers is required. (NCGS 55-8-40). As in RMBCA §8.41, each officer has authority and duties set forth in bylaws or, to extent consistent with bylaws, authority and duties prescribed by board of directors or by direction of officer authorized by board of directors to prescribe authority and duties of other officers. (NCGS 55-8-41).

N.C. has substantially adopted RMBCA §8.42. (NCGS 55-8-42). Director is not entitled to reliance on opinions of others if he has actual knowledge concerning matter in question that makes reliance unwarranted. (NCGS 55-8-42[c]).

Resignation and Removal of Officers.

N.C. has adopted RMBCA §8.431; however, officer may simply “communicate his resignation,” rather than giving formal notice. (NCGS 55-8-43).

Registered Office and Registered Agent.

N.C. has adopted RMBCA §§5.01 (NCGS 55-5-01, NCGS 55D-30), 502 (NCGS 55D-31), 5.03 (NCGS 55D-32), 5.04 (NCGS 55D-33). Sole duty of registered agent to entity is to forward to entity at its last known address any notice, process, or demand that is served on registered agent. (NCGS 55D-30[b]).

Corporation may change its registered office or registered agent by including in its annual report above information and any written consent required. (NCGS 55D-31[c]).

Statement of agent's resignation must be accompanied by certification from registered agent that he has mailed or delivered to entity at last known address written notice of resignation, and certification must include name and title of officer notified and address to which notice was mailed or delivered. (NCGS 55D-32[a]).

General Powers of Corporation.

N.C. has adopted RMBCA §3.04 (NCGS 55-3-04) regarding ultra vires. As in RMBCA §3.02, unless articles of incorporation or this chapter provide otherwise, every corporation has same powers as individual to do all things necessary or convenient to carry out its business affairs. (NCGS 55-3-02).

Distributions to Shareholders.

N.C. follows RMBCA §6.40. (NCGS 55-6-40). Shareholders may compel payment of dividends by bringing suit against directors, or against corporation with or without joining directors as parties. (NCGS 55-6-40[h]).

Sale of Assets Other than in Regular Course of Business.

Corporation may sell, lease, exchange, or otherwise dispose of all, or substantially all, of its property, not in regular course of business on terms and conditions and for consideration determined by board of directors, if board of directors proposes and shareholders approve transaction. For transaction to be authorized: (1) Board of directors must recommend transaction to shareholders unless board of directors determines that because of conflict of interest or other special circumstances it should make no recommendation, in which event board of directors must communicate basis for lack of recommendation to shareholders; and (2) shareholders entitled to vote must approve transaction. Corporation must notify each shareholder, whether or not entitled to vote, of proposed shareholders' meeting. Notice must also state that purpose, or one of purposes, of meeting is to consider sale, lease, exchange, or other disposition of all, or substantially all, property of corporation and contain or be accompanied by description of transaction. Unless articles of incorporation, bylaws, Shareholder Protection Act or board of directors require greater vote or vote by voting groups, transaction to be authorized must be approved by majority of all votes entitled to be cast on transaction. (NCGS 55-12-02).

Books and Records.

N.C. follows RMBCA §16.01. (NCGS 55-16-01).

Inspection of Records by Shareholders.

N.C. follows RMBCA §16.02 with several modifications. (NCGS 55-16-02). Right of inspection is limited to “qualified shareholders.”

“Qualified shareholder” of corporation is person who shall have been shareholder for at least six months immediately preceding his demand or who shall be shareholder of at least 5% of outstanding shares of any class. (NCGS 55-16-02[g]). Beneficial owners who wish to exercise inspection rights must have their ownership certified to corporation by record owner. (NCGS 55-16-02[f]). Shareholders of public corporation have no right to inspect or copy any accounting records of corporation or any records with respect to any matter corporation determines in good faith which may, if disclosed, adversely affect corporation in conduct of business or may constitute material non-public information. (NCGS 55-16-02[b][3]).

Scope of Inspection Right.

N.C. follows RMBCA §16.03. (NCGS 55-16-03).

Reports.

N.C. generally follows RMBCA §16.21 with modifications. (NCGS 55-16-22). Annual report requirements do not apply to professional corporations. (NCGS 55-16-22[a2]). Titles of officers must be included in annual report, but number of corporation's authorized and outstanding shares need not be disclosed. (NCGS 55-16-22[a3][4]). At option of filer, annual report may be filed directly with Secretary of State in electronic form. Annual report eligible to be delivered to Secretary of Revenue is due by due date for filing corporation's income and franchise tax returns; annual report required to be delivered to Secretary of State is due by 15th day of third month following close of corporation's fiscal year. (NCGS 55-16-22[e]). *Note:* Recently passed legislation would provide for electronic filing of annual report with Secretary of State. See N.C. Sen. 622 (June 19, 2003).

Corporate Bonds or Mortgages.

Corporation may mortgage or otherwise dispose of any of its property and issue notes, bonds or other obligations, and secure any of its obligations by mortgage or pledge of any of its property, franchises or income. (NCGS 55-3-02[a][5], [7]). Mortgage of corporate property may be made by board of directors without approval of shareholders, unless otherwise provided in articles of incorporation or bylaws adopted by shareholders. (NCGS 55-12-01[a]). Corporation may, as part of plan of reorganization under Art. 14A of c. 55 of G.S., authorize issuance of and fix terms and conditions of bonds or other obligations, whether or not convertible into shares of any class or bearing warrants of optional rights to acquire shares of any class. (NCGS 55-14A-01[a][8]). Articles of incorporation may confer upon holders of bonds or other obligations issued by corporation power to vote as shareholders, right to inspect corporate books and records, and any other rights shareholders may have. (NCGS 55-7-21.1).

Merger.

Domestic Corporations.—N.C. generally follows RMBCA §11.01. (NCGS 55-11-01). One or more corporations may merge into another domestic corporation if board of directors of each corporation adopts and its shareholders approve plan of merger. Plan of merger must set forth: (1) Name of each corporation planning to merge and name of surviving corporation into which each other corporation plans to merge; (2) terms and conditions of merger; and (3) manner and basis of converting shares of each corporation into shares, obligations, or other securities of surviving or any other corporation or into cash or other property in whole or part. Plan of merger may also set forth: (1) Amendments to articles of incorporation of surviving corporation; and (2) other provisions relating to merger. Provisions of plan of share exchange, other than provision required by G.S. NCGS 55-11-02(b)(1), may be made dependent on facts objectively ascertainable outside plan if plan of share exchange sets forth manner in which facts will operate upon affected provisions. Facts may include any of following: (1) Statistical or market indices, market prices of any security or group of securities, interest rates, currency exchange rates, or similar economic or financial data; (2) determination or action by corporation or by any other person, group or body; or (3) terms of, or actions taken under, agreement to which corporation is party, or any other agreement or document. (NCGS 55-11-01).

Shareholder Protection Act and Control Share Act.

Takeovers and business combinations regulated by G.S. NCGS 55-9-01 to -05 and G.S. NCGS 55-9A-01 to -09. Subject to certain exceptions, affirmative vote of holders of 95% of voting shares of corporation, considered as one class, required for adoption or authorization of business combination with another entity if, as of record date for determination of shareholders entitled to notice thereof and to vote thereon, other entity is beneficial owner, directly or indirectly of more than 20% of voting shares of corporation considered as one class. (NCGS 55-9-02, -03). Provision subject to certain exemptions, including that newly formed corporation after Apr. 23, 1987 may opt out of provision in initial articles of incorporation and that subject to 2000 N.C. Sess. Laws 140, §44, effective July 21, 2000, board of directors of corporation to which G.S. NCGS 55-9-02 was applicable on Sept. 1, 2000, shall have four month window from Sept. 1, 2000 to Dec. 31, 2000 to adopt bylaw stating that provisions of Art. shall not be applicable to corporation. (NCGS 55-9-05). Shares acquired in acquisition which gives shareholder effective voting control of 20% or more of outstanding shares entitled to vote have no voting rights, unless right to vote those shares is approved by majority of disinterested shareholders. (NCGS 55-9A-05).

Share Exchange.

N.C. follows limited version of RMBCA §11.03. Corporation may acquire all of outstanding shares of one or more classes or series of another corporation if board of directors of each corporation adopts and shareholders approve exchange. Plan of exchange must set forth: (1) Name of corporation whose shares will be acquired and name of acquiring corporation; (2) terms and condition of exchange; (3) manner and basis of exchanging shares to be acquired for shares, obligations, or other securities of acquiring or any other corporation or for cash or other property in whole or in part. If any shareholder of merging corporation has or will have personal liability for any existing or future obligation of surviving corporation in merger solely as result of owning one or more shares in surviving corporation, then authorization of plan of merger by merging corporation must require affirmative vote or written consent of that shareholder. Section does not limit acquisition of all or part of shares of one or more classes or series of corporation through voluntary exchange or otherwise. (NCGS 55-11-02).

Action on Plan.

N.C. follows RMBCA §11.04 with modifications. For plan of merger or share exchange to be approved: (1) Board of directors must recommend plan of merger or share exchange to shareholders, unless board of directors determines that because of conflict of interest or other special circumstances it should make no recommendation, in which event board of directors must communicate basis for lack of recommendation to shareholders; and (2) shareholders entitled to vote must approve plan. (NCGS 55-11-03[b]). Board may condition submission of proposed merger or share exchange on any basis. (NCGS 55-11-03[c]). Unless this chapter, articles of incorporation, bylaws or board of directors require greater vote or vote by voting groups, plan of merger or share exchange to be authorized must be approved by each voting group entitled to vote separately on plan by majority of all votes entitled to be cast on plan by that voting group and, for purposes of Shareholder Protection Act or any provision in articles of incorporation or bylaws adopted prior to July 1, 1990, merger shall be deemed to include share exchange. Provisions of plan of merger, other than provisions required by G.S. NCGS 55-11-01(b)(1) and (c)(1), may be made dependent on facts objectively ascertainable outside plan if plan of merger sets forth manner in which facts will operate upon affected provisions. Facts may include any of following: (1) Statistical or market indices, market prices of any security or group of securities, interest rates, currency exchange rates, or similar economic or financial data; (2) determination or action by corporation or by any other person, group or body; or (3) terms of, or actions taken under, agreement to which corporation is party, or any other agreement or document. (NCGS 55-11-03[e]).

Separate voting by voting groups is not required where consideration to be received in exchange for shares of that group consists solely of cash. (NCGS 55-11-02[f][1]).

Action by shareholders of surviving corporation on plan of merger is not required if: (1) Except for amendments which may be adopted by board of directors without shareholder approval, articles of incorporation of surviving corporation will not differ from articles before merger; (2) each shareholder of surviving corporation whose shares were outstanding immediately before effective date of merger will hold same number of shares, with identical designations, preferences, limitations, and relative rights, immediately after effective date of merger; (3) number of voting shares outstanding immediately after merger, plus number of voting shares issuable as result of merger, will not exceed by more than 20% total number of voting shares of surviving corporation outstanding immediately before merger; and (4) number of participating shares outstanding immediately after merger, plus number of participating shares issuable as result of merger, will not exceed by more than 20% total number of participating shares outstanding immediately before merger. (NCGS 55-11-02[g]). “Participation shares” means shares that entitle holder to participate without limitation in distributions and “voting shares” means shares that entitle their holder to vote unconditionally in elections of directors. (NCGS 55-11-03[h]).

After merger or share exchange is authorized, and any time before articles of merger or share exchange are filed, planned merger or share exchange may be abandoned, without further shareholder action, in accordance with procedure set forth in plan of merger or share exchange or, if none set forth, in manner determined by board of directors. (NCGS 55-11-03[i]). *Note:* Pending legislation would require shareholder approval by any shareholder who has or will have personal liability for any existing or future obligation of existing corporation solely as result of owning one or more shares in surviving corporation. See N.C. Sen. 324 (Apr. 13, 2005).

Merger of Subsidiary.

Subject to Shareholder Protection Act, N.C. follows RMBCA §11.05. (NCGS 55-11-04). *Note:* Shareholder approval for merger of subsidiary where articles of incorporation of parent or subsidiary require shareholder approval or where plan of merger contains one or more amendments to articles of incorporation of parent or subsidiary for which shareholder approval is required under NCGS 55-10-03. After plan of merger or plan of share exchange for acquisition of shares of domestic corporation has been authorized, surviving or acquiring corporation shall deliver to Secretary of State for filing articles of merger or share exchange. In case of merger, articles of merger shall set forth: (1) Name and state or country of incorporation of each merging corporation; (2) name of merging corporation that will survive merger and, if surviving corporation is not authorized to transact business or conduct affairs in this state, designation of mailing address and commitment to file with Secretary of State statement of any subsequent change in its mailing address; (3) any amendments to articles of incorporation of surviving corporation provided in plan of merger if surviving corporation is domestic corporation; and (4) statement that plan of merger has been approved by each merging corporation. In case of share exchange, articles of share exchange shall set forth: (1) Name of corporation whose shares will be acquired; (2) name and state or country of incorporation of acquiring corporation; (3) designation of its mailing address and commitment to file with Secretary of State statement of any subsequent change in its mailing address if acquiring corporation is not authorized to transact business or conduct affairs in this state; and (4) statement that plan of share exchange has been approved by corporation whose shares will be acquired and by acquiring corporation.

Articles of Merger or Share Exchange.

If surviving or acquiring corporation is not domestic corporation, surviving or acquiring corporation is deemed: (1) To agree that it will comply with requirements of G.S. NCGS 15-13-01 et seq. regarding dissenting shareholders; (2) surviving business entity is deemed to agree to service of process in this state for certain obligations as enumerated in statute; and (3) service of process on corporation shall then be made in duplicate and along with fee required by G.S. NCGS 55-1-22(b) to Secretary of State. (NCGS 55-11-05[a]; NCGS 55-11-06).

Merger or share exchange takes effect when articles of merger or share exchange become effective. (NCGS 55-11-05[b]).

Effect of Merger or Share Exchange.

N.C. follows RMBCA §11.07. (NCGS 55-11-06).

Merger or Share Exchange with Foreign Corporation.

One or more foreign corporations may merge with one or more domestic corporations, and foreign corporation may enter into share exchange with domestic corporation if: (1) Merger is permitted by law of state or country under whose law each foreign corporation is incorporated and to extent applicable, each domestic or foreign corporation complies with that law in effecting merger; (2) in share exchange, corporation whose shares will be acquired is foreign corporation, share exchange is permitted by law of state or country under whose law foreign corporation is incorporated and foreign corporation and acquiring domestic corporation comply with that law in effecting share exchange; (3) foreign corporation complies with G.S. NCGS 55-11-05 if it is surviving corporation of merger or acquiring corporation of share exchange; and (4) each domestic corporation complies with applicable provisions of G.S. NCGS 55-11-01 to -04 and, if it is surviving corporation of merger or acquiring corporation of share exchange, with G.S. NCGS 55-11-05. If merger is consummated without approval of subsiding corporation's shareholders, parent corporation shall, within ten days after effective date of merger, notify each shareholder of subsiding corporation. (NCGS 55-11-04).

Cross-Entity Mergers.

One or more domestic corporations may merge with one or more unincorporated entities, and if desired, one or more foreign corporations, domestic corporations, domestic nonprofit corporations, or foreign nonprofit corporations if (1) Merger is permitted by laws of state or country governing organization and internal affairs of each merging business entity; and (2) each merging domestic corporation and other merging business entity comply with requirements for merger set forth below. (NCGS 55-11-10[b]). Each merging domestic corporation and each other merging business entity must approve written plan of merger containing: (1) For each merging entity, name, type of business, and state or country whose laws govern organization and internal affairs; (2) name of surviving business entity; (3) terms and conditions of merger; (4) manner and basis for converting interests in each merging business entity into interests of surviving business entity or cash or other property; (5) if surviving business entity is domestic corporation, any amendments to its articles of incorporation made in connection with merger. (NCGS 55-11-10[c]). In case of domestic corporation, approval of plan of merger requires that plan of merger be adopted by its board of directors as provided in G.S. NCGS 55-11-03 and, unless shareholder approval is not required under subsection (g) of G.S. NCGS 55-11-03, be approved by its shareholders as provided in G.S. NCGS 55-11-03. If any shareholder of merging domestic corporation has or will have personal liability for any existing or future obligation of entity, then in addition to requirements of preceding sentence, approval of plan of merger by domestic corporation shall require affirmative vote or written consent of that shareholder. In case of each other merging business entity, plan of merger must be approved in accordance with laws of state or country governing organization and internal affairs of that merging business entity. (NCGS 55-11-10[c3]). After plan of merger has been approved by domestic corporation but before articles of merger become effective, plan of merger (i) may be amended as provided in plan of merger, or (ii) may be abandoned (subject to contractual rights) as provided in plan of merger, if there is no such provision, as determined by board of directors without further shareholder action. (NCGS 55-11-10[c]). After plan of merger has been approved by each merging domestic corporation and each other merging business entity as provided in (c) of this section, surviving business entity shall deliver articles of merger to Secretary of State for filing. Articles of merger shall set forth: (1) For each merging business entity, its name, type of business entity, and state or country whose laws govern its organization and internal affairs; (2) name of emerging business entity that shall survive merger and, if surviving business entity is not authorized to transact business or conduct affairs in this state, designation of its mailing address and commitment to file with Secretary of State statement and any subsequent change in its mailing address; (3) if surviving business entity is domestic corporation, any amendment to articles of incorporation as provided in plan of merger; and (4) statement that plan of merger has been approved by each merging business entity in manner required by law. (NCGS 55-11-10[d]). Merger takes effect upon effectiveness of articles of merger. Upon effectiveness: (1) Each other merging business entity merges into surviving business entity and separate existence ceases; (2) title to all real estate and other property is vested in surviving business entity; (3) surviving business entity has all liabilities of each merging business entity; (4) proceeding pending by or against any merging business entity may be continued as if merger did not occur, or surviving business entity may be substituted in proceeding for merging business entity whose existence ceases in merger; (5) if surviving business entity is domestic corporation, articles of incorporation and bylaws shall be amended as provided in article of merger; (6) interests in each merging business entity that are to be converted into interests, obligations, or securities of surviving business entity or into right to receive cash or other property are converted and former holders of interests are entitled only to rights provided to them in articles of merger, or if former holders of shares in domestic corporation, any rights they may have had under Art. 13 of G.S. c. 55; (7) if surviving business entity is not domestic corporation, it is deemed to agree that it will comply with requirements of G.S. NCGS 55-13-01, et seq. regarding dissenting shareholders. (NCGS 55-11-10[e]). If surviving business entity is not domestic limited liability company, domestic corporation, domestic nonprofit corporation or domestic limited partnership when merger takes effect: (1) Surviving business entity is deemed to agree to service of process in this state for certain obligations as enumerated in statute, and (2) service of process on corporation shall then be made in duplicate and along with fee required by G.S. NCGS 55-1-22(b) to Secretary of State. (NCGS 55-11-10[e1][2]).

Dissolution.

Corporation may be dissolved in any of following ways: (1) By filing with Secretary of State articles of dissolution and voluntary proceedings for dissolution (NCGS 55-14-01); (2) by administrative dissolution which may occur in any of following ways: (a) failure to pay any penalties, fees, or other payments within 60 days after due, (b) corporation is delinquent in delivering its annual report, (c) failing to maintain registered agent or registered office in this state for 60 days or more, (d) failing to notify Secretary of State within 60 days that registered agent or registered office has been changed, registered agent has resigned, or that registered office has been discontinued, (e) corporation's period of duration stated in articles of incorporation expires, or (f) corporation knowingly fails or refuses to answer truthfully and fully within time prescribed interrogatories propounded by Secretary of State (NCGS 55-14-20); and (3) by entry of decree of dissolution by superior court in proceedings for dissolution by Attorney General, shareholder, creditor or corporation. (NCGS 55-14-30).

N.C. follows RMBCA §14.05 on effect of dissolution. (NCGS 55-14-05). After end of tax year in which dissolution occurs, corporation is not subject to franchise tax unless it engages in business activities not appropriate to winding up and liquidating business. (NCGS 55-14-05[c]).

Receivership.

N.C. follows RMBCA §14.32 while omitting all references to custodians and custodianship because there is not established body of law in N.C. on appointment of custodians in these circumstances. (NCGS 55-14-32).

Dissent or Appraisal.

Shareholders are entitled to dissent from, and obtain payment of fair value of shares in event of any of following corporate actions: (1) Consummation of plan of merger to which corporation (other than parent corporation in merger whose shares are not affected under G.S. NCGS 55-11-04) is party unless (i) approval by shareholders of corporation is not required under G.S. NCGS 55-11-03(g) or (ii) shares are then redeemable by corporation at price not greater than cash to be received in exchange for such shares; (2) consummation of plan of share exchange to which corporation is party as corporation whose shares will be acquired, unless shares are then redeemable by corporation at price not greater than cash to be received in exchange for such shares; (2a) consummation of plan of conversion pursuant to G.S. NCGS 55-11A-10 to -13; (3) consummation of sale or exchange of all, or substantially all, of property of corporation other than as permitted by G.S. NCGS 55-12-01, including sale in dissolution, but not including sale pursuant to court order or sale pursuant to plan by which all, or substantially all, of net proceeds of sale will be distributed in cash to shareholders within one year after date of sale; (4) amendment of articles of incorporation that materially and adversely affects rights of dissenter's shares because it (i) alters or abolishes preferential right of shares, (ii) creates, alters, or abolishes right in respect of redemption, including provision respecting sinking fund for redemption or repurchase, of shares, (iii) alters or abolishes preemptive right of holder of shares to acquire shares or other securities, (iv) excludes or limits right of shares to vote on any matter, or to cumulate votes, other than amendment of articles of incorporation permitting action without meeting to be taken by less than all shareholders entitled to vote, without advance notice, or both, as provided in G.S. NCGS 55-7-04, (v) reduces number of shares owned by shareholder to fraction of share if fractional share so created is to be acquired for cash under G.S. NCGS 55-6-04, or (vi) changes corporation into nonprofit corporation or cooperative organization; or (5) any action taken pursuant to shareholder vote to extent articles of incorporation, bylaws, or board resolution provides that voting or nonvoting shareholders are entitled to dissent and obtain payment for their shares. (NCGS 55-13-02[a]). Shareholder entitled to dissent and obtain payment for shares may not challenge corporate action creating entitlement, including without limitation merger solely or partly in exchange for cash or other property, unless action is unlawful or fraudulent with respect to shareholder or corporation. (NCGS 55-13-02[b]). There is no right of shareholders to dissent from, or obtain payment of fair value of shares if affected shares are any class or series which, at record date fixed to determine shareholders entitled to receive notice of and to vote at meeting at which plan of merger or share exchange or sale or exchange of property is acted on, were (i) Listed on national securities exchange or designated as national market system security on interdealer quotation system by National Association of Securities

Dealers, Inc. or (ii) held by at least 2,000 record shareholders unless either: (1) Articles of Incorporation, bylaws, or resolution of board of directors of corporation issuing shares provide otherwise; or (2) in case of plan or merger or share exchange, holders of class or series are required under plan of merger or share exchange to accept for shares anything except: (a) cash, (b) shares, or shares and cash in lieu of fractional shares of surviving or acquiring corporation, or of any other corporation which, at record date fixed to determine shareholders entitled to receive notice of and vote at meeting at which plan of merger or share exchange is to be acted on, were either listed subject to notice of issuance on national securities exchange or designated as national market system on interdealer quotation system by National Association of Securities Dealers, Inc., or held by at least 2,000 record shareholders, or (c) combination of cash and shares as set forth in (a) and (b). (NCGS 55-13-02[c]).

N.C. generally follows RMBCA §13.20 regarding notice of dissenters' rights. (NCGS 55-13-20). In addition, if corporate action creating dissenters' rights is taken without vote of shareholders or is taken by shareholder action without meeting, corporation shall within ten days notify all shareholders entitled to assert dissenters' rights. (NCGS 55-13-20[b]). If corporation fails to comply with requirements of this section, such failure shall not invalidate any action taken; but any shareholder may recover from corporation any damage which he suffered from failure in civil action brought in his own name within three years after action was taken. (NCGS 55-13-20[c]).

N.C. follows RMBCA §13.21 regarding notice of intent to demand payment. (NCGS 55-13-21).

If proposed corporate action creating dissenters' rights under G.S. NCGS 55-13-02 is approved at shareholders' meeting, corporation shall mail written dissenters' notice to all shareholders who satisfied requirements of G.S. NCGS 55-13-21. Dissenters' notice must be sent no later than ten days after shareholder approval (or if no shareholder approval is required, after approval of board) of corporate action creating dissenters' rights and must: (1) State where payment demand must be sent and where and when certificates for certificated shares must be deposited; (2) inform holders of uncertificated shares to what extent transfer of shares will be restricted after payment demand is received; (3) supply form for demanding payment; (4) set date by which corporation must receive payment demand, which date may not be fewer than 30 nor more than 60 days after date of notice is mailed; and (5) be accompanied by copy of dissenters' rights provisions of Art. 13 of Act. (NCGS 55-13-22).

Shareholder sent dissenters' notice described in G.S. NCGS 55-13-22 must demand payment and deposit share certificates in accordance with terms of notice. Shareholder who demands payment and deposits share certificates retains all rights of shareholders until rights are cancelled or modified by taking of proposed corporate action. Shareholder who does not demand payment or deposit share certificates by date set in dissenters' notice is not entitled to payment for shares. (NCGS 55-13-23).

Corporation may restrict transfer of uncertificated shares from date demand for their payment is received until proposed corporate action is taken or restrictions are released under G.S. NCGS 55-13-26. Person for whom dissenters' rights are asserted as to uncertificated shares retains all rights of shareholder until rights are cancelled or modified by taking of proposed corporate action. (NCGS 55-13-24).

N.C. follows RMBCA §13.24 regarding payment. (NCGS 55-13-25).

If corporation does not take proposed action within 60 days after date set for demanding payment and depositing share certificates, corporation shall return deposited certificates and release transfer restrictions imposed on uncertificated shares. If after returning deposited certificates and releasing transfer restrictions, corporation takes proposed action, it must send new dissenters' notice under G.S. NCGS 55-13-22 and repeat payment demand procedure. (NCGS 55-13-26).

N.C. generally follows RMBCA §13.26 for procedure if shareholder dissatisfied with payment offer. (NCGS 55-13-28). Dissenter may demand payment of amount in excess of payment by corporation, if: (1) Dissenter believes that amount paid under G.S. NCGS 55-13-25 is less than fair value of shares or that interest due is incorrectly calculated; (2) corporation fails to make payment under G.S. NCGS 55-13-25; or (3) corporation, having failed to take proposed action, does not return deposited certificates or release transfer restrictions imposed on uncertificated shares within 60 days after date set for demanding payment. (NCGS 55-13-28).

Judicial Appraisal of Shares.

If demand for payment under G.S. NCGS 55-13-28 remains unsettled, dissenter may commence proceeding within 60 days after earlier of (i) Date payment is made under G.S. NCGS 55-13-25, or (ii) date of dissenters' payment demand under G.S. NCGS 55-13-28 by filing complaint with superior court division of general court of justice to determine fair value of shares and accrued interest. Dissenter who takes no action within 60-day period shall be deemed to have withdrawn dissent and demand for payment. Court shall have discretion to make all dissenters whose demands remain unsettled parties to proceeding as in action against their shares and all parties must be served with copy of complaint. Court may appoint one or more persons as appraisers to receive evidence and recommend decision on question of fair value. Parties are entitled to same discovery rights as parties in other civil proceedings. However, in proceeding by dissenter in corporation that was public corporation immediately prior to consummation of corporate action giving rise to right of dissent under G.S. NCGS 55-13-02, there is no right to trial by jury. Each dissenter made party to proceeding is entitled to judgment for amount, if any, by which court finds fair value of shares, plus interest, exceeds amount paid by corporation. (NCGS 55-13-30).

N.C. follows RMBCA §13.31 regarding court costs and counsel fees but provides that “the court shall assess the costs as it finds equitable.” (NCGS 55-13-31).

Foreign Corporations.

Certificate of Authority to Transact Business Required.

N.C. essentially follows RMBCA §15.01. (NCGS 55-15-01). Foreign insurance companies that are licensed by Commissioner of Insurance are not required to obtain certificate of authority from Secretary of State. (NCGS 55-15-01[d]).

Consequences of Transacting Business without Certificate of Authority.

No foreign corporation transacting business in this state without permission obtained through certificate of authority or through domestication under prior acts is permitted to maintain any action or proceeding in any court of this state unless foreign corporation obtains certificate of authority prior to trial. (NCGS 55-15-02[a]).

Foreign corporation failing to obtain certificate of authority as required by Act or prior acts then applicable shall be liable to state for years or parts thereof during which it transacted business in state without certificate of authority in amount equal to all fees and taxes that would have been imposed by law upon such corporation had it duly applied for and received such permission, plus interest and all penalties imposed by law for failure to pay such fees and taxes. In addition, foreign corporations will be liable for civil penalty of $10 for each day, not to exceed total of $1,000 for each year or part thereof, it transacts business in state without certificate of authority. Attorney General may bring actions to recover all amounts due. (NCGS 55-15-02[d]).

Notwithstanding this provision, failure of foreign corporation to obtain certificate of authority does not impair validity of corporate acts or prevent it from defending any proceeding in this state. (NCGS 55-15-02[e]).

Application for Certificate of Authority.

N.C. follows RMBCA §15.03. (NCGS 55-15-03). Filing fee is $250. (NCGS 55-1-22).

Amended Certificate of Authority.

N.C. follows RMBCA §15.04 and specifies method by which foreign corporation may apply for amended certificate of authority. (NCGS 55-15-04). Fee is $75. (NCGS 55-1-22).

Effect of Certificate of Authority.

N.C. generally follows RMBCA §15.05 but omits Model Act's provision against regulation by this State of organization or internal affairs of foreign corporation. (NCGS 55-15-05). Foreign corporation may qualify as executor, administrator, or guardian, or as trustee under will of any person domiciled in State at time of person's death.

Foreign corporation must appoint process agent and file such appointment with court. (NCGS 55-15-05[a]).

Registered Office and Registered Agent of Foreign Corporation.

N.C. follows RMBCA §§15.07, 15.08, 15.09. (NCGS 55-15-07, NCGS 55D-31, -32). Domestic corporation, limited liability company, limited liability limited partnership, registered limited liability partnership, foreign corporation, foreign limited liability company, or foreign limited liability partnership may change its registered office or registered agent by including in its annual report required by G.S. NCGS 55-16-22, NCGS 57C-2-23, NCGS 59-84.4, or NCGS 59-210 information and any written consent required by this section. (NCGS 55D-31[c]).

Statement of resignation by registered agent must include or be accompanied by certification that written notice of this resignation was mailed or delivered to corporation. (NCGS 55D-32[a]).

Service Entities.

Service of process, notice or demand required or permitted by law to be served on entity may be served on registered agent required by G.S. NCGS 55D-30. When entity required to maintain registered office and registered agent under G.S. NCGS 55D-30 fails to appoint or maintain registered agent in this state, or when its registered agent cannot with due diligence be found at registered office, or when Secretary of State revokes certificate of authority or statement of foreign registration of foreign entity authorized to transact business or conduct affairs in this state, Secretary of State becomes agent of entity upon whom any such process, notice or demand may be served. Service on Secretary of State is made by delivering to and leaving with Secretary of State duplicate copies of process, notice or demand and applicable fee. Service on entity under this section is effective for all purposes from and after date of service on Secretary of State. Nothing in this section affects right to serve any process, notice or demand required or permitted by law to be served upon entity in any other manner now or hereafter permitted by law. (NCGS 55D-33).

Withdrawal of Foreign Corporation.

N.C. follows RMBCA §15.20. (NCGS 55-15-20).

Withdrawal of Foreign Corporation by Reason of Merger, Consolidation, or Conversion.

Whenever foreign corporation authorized to transact business in this state ceases its separate existence as result of statutory merger or consolidation or converts into another entity, surviving or resulting entity shall apply for certificate of withdrawal for foreign corporation by delivering to Secretary of State for filing copy of articles of merger, consolidation, or conversion or certificate reciting facts of merger, consolidation, or conversion. If surviving or resulting entity is not authorized to transact business or conduct affairs in this state articles or certificate must be accompanied by application that sets forth: (1) Name of foreign corporation authorized to transact business in this state, type of entity and name of surviving or resulting entity, and statement that surviving or resulting entity is not authorized to transact business or conduct affairs in this state; (2) statement that surviving or resulting entity consents that service of process based upon any cause of action arising in this state, or arising out of business transacted in this state, during time foreign corporation was authorized to transact business in this state may thereafter be made by service thereof on Secretary of State; (3) mailing address to which Secretary of State may mail copy of any process served on Secretary of State under subdivision (2); (4) commitment to file with Secretary of State statement of any subsequent change in its mailing address. (NCGS 55-15-21[a]).

Grounds for Revocation of Certificate of Authority.

N.C. follows RMBCA §15.30. (NCGS 55-15-30). Additionally, Secretary may revoke certificate of authority if corporation is exceeding authority conferred upon it or corporation knowingly fails or refuses to answer truthfully and fully interrogatories propounded by Secretary of State. (NCGS 55-15-30[a][7], [8]).

Foreign corporation may appeal Secretary of State's revocation of certificate of authority to Superior Court of Wake County within 30 days after certificate of revocation is mailed to foreign corporation by Secretary of State. Appeal is commenced by filing petition with court and Secretary of State requesting court to set aside revocation. Petition must have attached to it copies of corporation's certificate of authority and Secretary of State's certificate of revocation. Appeal to superior court must be determined under such further evidence, notice and opportunity to be heard, if any, as court may deem appropriate under circumstances. Foreign corporation has burden of establishing it is entitled to have revocation set aside. Court's final decision may be appealed as in other civil proceedings. (NCGS 55-15-32).

Taxation of Corporate Property.

See category 22 Taxation, topic 22.10 Income Tax, subhead Income Taxed-Corporations.

Taxation of Corporate Stock.

No special provisions.

Franchise Tax.

Every domestic corporation and foreign corporation qualified to do business in state must file with Secretary of Revenue, on or before 15th day of third month following end of its income year, report and statement signed by either its president, vice-president, treasurer, assistant treasurer, secretary or assistant secretary and affirmed as provided by statute, containing facts and information as may be required by Secretary of Revenue, as shown by corporate books and records at close of income year. Report and statement must show total amount of capital stock, surplus and undivided profits of corporation and allocate proportion thereof to business in this state as follows: Where principal business of corporation conducted in state is dealing in tangible personal property, allocation to N.C. shall be based on ratio obtained by taking arithmetical average of ratios of property in N.C. to property everywhere, payrolls in N.C. to payrolls everywhere, and sales in N.C. to sales everywhere—for more detailed discussion of such ratios see allocation formula for determination of corporate income G.S. NCGS 105-130.4(j) et seq.—

provided, that if property and payroll factors are 100% attributable to N.C., total amount of capital stock, surplus and undivided profits shall be attributable to N.C., unless corporation is taxed on net income under laws of another state or would be taxed upon net income under laws of another state if such other state had same income tax laws as N.C. All other corporations shall apportion total amount of capital stock, surplus and undivided profits to N.C. by use of ratio of gross receipts in this state to gross receipts everywhere. Any corporation aggrieved by formula provided by statute may petition for review before Tax Review Board in same manner provided for petitions with respect to apportionment in income tax matters. Proportion so allocated may not be less than total assessed value (including total valuation returned for taxation of intangible personalty) of all real and personal property in this state of each such corporation as herein specified nor may it be less than corporation's total actual investment in tangible property in this state. At same time each such corporation must pay to Secretary of Revenue franchise tax at rate of $1.50 per $1,000 of proportion of capital stock, surplus and undivided profits so allocated to this state. (NCGS 105-122). *Note:* Pending legislation would establish exception to minimum tax base for “net loss corporation” which is defined as corporation that had no State net income on current tax return as result of net economic loss in current year or carryover loss from previous year. See N.C.H. (North Carolina House) 342 (Feb. 22, 2005).

Utilities are required to pay franchise or privilege taxes in accordance with G.S. NCGS 105-116.

Counties, cities or towns may not levy franchise taxes on domestic or foreign corporations taxed as above stated. (NCGS 105-122). Municipality that imposed license, franchise, or privilege tax on or before Jan. 1, 1947, on company taxed under this section may continue to impose tax in amount that does not exceed amount imposed as of that date. (NCGS 105-116). Other municipalities and counties may not impose license, franchise, or privilege as tax on company taxed under this section.

Parent, subsidiary or affiliate corporation doing business in this state must add to its capital stock, surplus and undivided profits used in this state all indebtedness owed to or endorsed or guaranteed by parent, subsidiary or affiliate of such corporation. (NCGS 105-122).

See category 22 Taxation.

Income tax on corporations, see category 22 Taxation, topic 22.10 Income Tax, subhead Income Taxed-Corporations.

Professional Corporations.

Individual or group of individuals (e.g., architects, attorneys-at-law, physicians, dentists, optometrists, osteopaths, chiropractors, veterinarians, podiatrists, psychologists, public accountants, occupational therapists, nurses, engineers, surveyors, landscape architects and foresters) rendering professional service for which such individuals are required by law to be licensed may incorporate. (NCGS 55B-1, et seq.).

Deeds.

See category 21 Property, topic 21.06 Deeds.

Model Non-Profit Corporation Act adopted with variations. (NCGS 55A-1, et seq.).

Limited Liability Companies.

See topic 2.06 Limited Liability Companies.

2.04 FOREIGN CORPORATIONS:

See topic 2.03 Corporations, subhead Foreign Corporations.

2.05 JOINT STOCK COMPANIES:

No legislation.

Professional Associations (or Corporations).

See topic 2.03 Corporations, subhead Professional Corporations.

2.06 LIMITED LIABILITY COMPANIES:

General Supervision lies with Secretary of State. (NCGS 57C-1-30).

Purpose.

May be formed to engage in any lawful business, unless more limited lawful purpose is set forth in its articles of organization. (55-C-2-01[a]). If business is subject to regulation under another N.C. statute, may be formed if permitted by and subject to such other statute. (NCGS 57C-2-01[a]-[b]). Example: professional services (NCGS 57C-2-01[c]).

Formation.

One or more persons may form by delivering executed articles of organization to Secretary of State; limited liability company may also be formed through conversion of another business entity pursuant to G.S. NCGS 57C-9A-01, et seq. (NCGS 57C-2-20[a]). (See subhead Conversion, infra.) Filing articles of organization is conclusive evidence of formation of limited liability company. (NCGS 57C-2-20[b][2]). Organization of limited liability company requires one or more initial members and any further action as may be determined by initial member or members. If initial members are not identified in articles of organization, organizers shall hold one or more meetings at call of majority of organizers to identify initial members. Unless otherwise provided in articles of organization or LLC Act, all decisions shall require majority vote. Unless otherwise provided in articles of organization organizers may take this action by unanimous written consent. (NCGS 57C-2-20[c]).

Powers.

Except as restricted by its articles of organization or by LLC Act, limited liability company has same powers as individual to do all things necessary to carry out its business. (NCGS 57C-2-02).

Name must contain words “limited liability company” or abbreviation thereof (NCGS 55D-20[a][2]), and must conform to certain other general provisions (NCGS 55D-20, et seq.). See topic 2.03 Corporations, subhead Name.

Articles of Organization.

Prescribed form must set forth: (1) Name that satisfies requirements listed above; (2) latest dissolution date if applicable; if not, then perpetual existence; (3) name and address of each person executing articles of organization and whether person is executing in capacity as member or organizer; (4) street address and, if different, mailing address, of initial registered office, county in which such office is located and name of registered agent; (5) street address, and mailing address if different from street address, of limited liability company's principal office, if any, and county in which principal office, if any is located; and (6) unless all members by virtue of status as members shall be managers, statement that, except as provided under management herein, members will not be managers by virtue of their status as members. (NCGS 57C-2-21[a]). May set forth any other provision not inconsistent with law. (NCGS 57C-2-21[b]).

Amendments to Articles of Organization.

Unless otherwise provided in articles of organization or written operating agreement, unanimous vote of members required to amend articles of organization or if no initial members are identified, by unanimous vote of organizers. (NCGS 57C-2-22[b]).

Filing Fees.

Articles of organization—$125; application for reserved name—$10; notice of transfer of reserved name—$10; application for registered name—$10; application for renewal of registered name—$10; limited liability company's statement of change of registered agent or registered office or both—$5; agent's statement of change of registered office for each affected limited liability company—$5; agent's statement of resignation—no fee; designation of registered agent or registered office or both—$5; amendment of articles of organization—$50; restated articles of organization without amendment of articles—$10; restated articles of organization with amendment of articles—$50; articles of conversion (other than articles of conversion included as part of another document)—$50; articles of merger—$50; articles of dissolution—$30; cancellation of articles of dissolution—$10; certificate of administrative dissolution—no fee; application for reinstatement following administrative dissolution—$100; certificate of reinstatement—no fee; certificate of judicial dissolution—no fee; application for certificate of authority—$250; application for amended certificate of authority—$50; application for certificate of withdrawal—$10; certificate of revocation of authority to transact business—no fee; articles of correction—$10; application for certificate of existence or authorization (paper)—$15; application for certificate of existence or authorization (electronic)—$10; annual report—$200; any other documents required or permitted to be filed by LLC Act—$10. (NCGS 57C-1-22[a]).

Registered Office and Registered Agent.

See topic 2.03 Corporations, subhead Registered Office and Registered Agent.

Admission of Members.

Unless articles of organization provide otherwise, persons executing articles of organization in capacity of member, and each person named in articles of organization as member, becomes member upon filing with Secretary of State. (NCGS 57C-3-01[a]). After formation of limited liability company, if acquiring interest directly from limited liability company, person may be admitted as member by (i) Being identified by organizers at organizational meeting described above or (ii) upon compliance with articles of organization or operating agreement or, if not provided in those documents, upon unanimous consent of all members. (NCGS 57C-3-01[b][1]). In case of assignee of interest of member, there must be compliance with provisions of G.S. NCGS 57C-5-04(a). (NCGS 57C-3-01[b][2]).

Assignment of Membership Interest.

Except as provided in articles of organization or written operating agreement, membership interest is assignable in whole or in part. Any such assignment does not dissolve limited liability company or entitle assignee to become or exercise any rights as member. Assignment entitles assignee to only distributions and allocations entitled to assignor but for assignment. Except as provided in articles of organization or written operating agreement, member ceases to be member upon assignment of all of his membership interest. (NCGS 57C-5-02).

Voting of Members.

Unless articles of organization or written operating agreement provide otherwise, affirmative vote of all members required to: (1) Adopt or amend operating agreement; (2) admit any person as member; or (3) sell, transfer, or otherwise dispose of all or substantially all of assets of limited liability company before dissolution. (NCGS 57C-3-03).

Management.

Unless articles of organization provide otherwise, all members by virtue of their status as members shall be managers of limited liability company, together with any other persons that may be designated as managers in, or in accordance with, articles of organization or written operating agreement. If articles of organization provide that all members are not necessarily managers by virtue of their status as members, then those persons designated as managers in, or in accordance with, articles of organization or written operating agreement shall be managers, but for any period during which no such designation has been made or is in effect, all members shall be managers. (NCGS 57C-3-20[a]). Unless otherwise provided in articles of organization or operating agreement, management of limited liability company vested in managers. (NCGS 57C-3-20[b]). Subject to alternative provisions in articles of organization or written operating agreement or Act, each manager has equal rights to manage and management decisions require approval of majority of managers. (NCGS 57C-3-20[b]). Unless LLC Act, articles of organization or written operating agreement provide otherwise, managers not required to be members. (NCGS 57C-3-21[1]). Managers are agents of limited liability company. (NCGS 57C-3-23).

Liability to Third Parties.

Members, managers, directors and executives, as such, not liable for obligations of limited liability company. Member, manager, director or executive may, however, become personally liable by reason of his own acts or conduct. (NCGS 57C-3-30[a]). Member is not proper party to proceedings by or against limited liability company, except where object of proceeding is to enforce member's right against or liability to limited liability company. (NCGS 57C-3-30[b]). If conflict arises between N.C. laws and laws of another jurisdiction regarding liability of member or manager of limited liability company organized and existing under G.S. c. 57c for debts, obligations, and liabilities of limited liability company, N.C. laws shall govern in determining liability. (NCGS 57C-3-30[d]).

Contributions.

May be cash, property, services rendered, promissory notes or other binding obligation to contribute cash or property or to render services. Unless otherwise provided in operating agreement, if noncash contributions, value to limited liability company will be fair market value of property on date contributed as agreed to by contributor and limited liability company. (NCGS 57C-4-01). Promise to contribute not enforceable unless in writing and signed by member. (NCGS 57C-4-02[a]). Except as provided in operating agreement, member is obligated to perform any enforceable promise to contribute cash or property or to render services, even if member is unable to do so. If member unable to contribute property or services as promised, then at option of limited liability company, member must contribute cash equal to unpaid balance thereof. (NCGS 57C-4-02[b]). Unless otherwise provided in operating agreement, member's obligation to make contribution can only be compromised by unanimous consent of members. Such compromise will not affect rights of creditors of limited liability company to enforce claim that arose prior to compromise. (NCGS 57C-4-02[c]).

Allocation of Income, Etc.

Income, gain, loss, deduction, or credit of limited liability company allocated among members in manner agreed to in operating agreement. (NCGS 57C-4-03). If operating agreement does not provide, then allocations made to members in proportion to agreed value of contributions of each member, as reflected in records of limited liability company, and considering variations of contributions during period for which allocations are made. (NCGS 57C-4-03).

Distributions.

Made in accordance with operating agreement. If not provided in operating agreement, interim distributions made as determined by managers in proportion to agreed value of contributions of member as of date of distribution or date determined by managers and within 90 days of distribution. (NCGS 57C-4-04). Unless otherwise provided in operating agreement, member cannot demand or receive distribution in any form other than cash, and no member may be forced to accept distribution of asset in kind unless all persons with interests in limited liability company receive at same time proportionate distribution of same asset. (NCGS 57C-4-05). No distribution may be made if limited liability company would not be able to pay its debts when they become due in usual course of business or total assets would be less than sum of total liabilities plus, unless operating agreement provides otherwise, amount needed to satisfy preferential distribution rights of those who have rights superior to rights of person receiving distribution. (NCGS 57C-4-06[a][1 and 2]).

Voluntary Withdrawal.

Member may withdraw only at time or upon happening of events specified in articles of organization or written operating agreement. (NCGS 57C-5-06).

Cessation of Membership.

Person ceases to be member of limited liability company upon: (1) Voluntary withdrawal; (2) removal pursuant to articles of organization or operating agreement; (3) unless otherwise provided in articles of organization or written operating agreement or with consent of all members, person's involvement in certain bankruptcy-related proceedings; (4) unless otherwise provided in articles of organization or written operating agreement or with consent of all members, person's death or incompetency; and (5) certain other instances relating to type of entity that is member (i.e. trusts, limited partnerships, etc.). Unless otherwise provided in this chapter, articles of organization or written operating agreement, person who has ceased to be member shall have only rights of assignee but shall not be released from his liability to limited liability company. (NCGS 57C-3-02).

Provisions of plan of conversion may be made dependent on facts objectively ascertainable outside plan of conversion if plan of conversion sets forth manner in which facts will operate upon affected provisions. Facts may include any of following: (1) Statistical or market indices, market prices of any security or group of securities, interest rates, currency exchange rates, or similar economic or financial data; (2) determination or action by converting business entity or by any other person, group or body; or (3) terms of, or actions taken under, agreement to which converting business entity is party, or any other agreement or document. Unless otherwise provided in articles of organization or written operating agreement, limited liability company is not dissolved upon withdrawal of last member if assignee or fiduciary of estate of last remaining member agrees in writing to continue within 90 days of event of withdrawal. (NCGS 57C-6-01). Procedure for winding up affairs set forth in statute. (NCGS 57C-6-04, et seq.).

Conversion.

Business entity other than domestic limited liability company may convert to domestic limited liability company if: (1) Conversion is permitted by laws of state or country governing organization and internal affairs of converting business entity; and (2) requirements as listed below are met. (NCGS 57C-9A-01). Converting business entity shall approve written plan of conversion containing (1) Name of resulting domestic limited liability company; (2) name of converting business entity, its type of business entity, and state or country whose laws govern its organization and internal affairs; (3) terms and conditions of conversion and (4) manner and basis for converting interests in converting business entity into interests of resulting domestic limited liability company or into cash or other property.

Dissolution.

Occurs when: (1) Period of duration expires; (2) on occurrence of events specified in articles of organization or written operating agreement; (3) upon written consent of all members; (4) unless articles of organization or written operating agreement provide otherwise at such time that limited liability company no longer has any members; or (5) upon entry of decree of judicial dissolution or filing by Secretary of State of certificate of dissolution. Plan of conversion may also contain other provisions relating to conversion. Plan of conversion must be approved in accordance with laws of state or county governing organization and business affairs of converting business entity. (NCGS 57C-9A-02). After plan of conversion approved, converting business entity shall deliver articles of organization to Secretary of State for filing that contain following (in addition to requirements of G.S. NCGS 57C-2-21). Articles of conversion must state: (1) That domestic limited liability company is being formed pursuant to conversion; (2) name of converting business entity and state or country whose laws govern its organization and internal affairs and (3) plan of conversion has been approved by converting business entity as required by law. Conversion is effective upon effectiveness of articles of organization. (NCGS 57C-9A-03). When conversion takes effect: (1) Converting business entity ceases its prior form of organization and continues in existence as resulting domestic limited liability company; (2) title to all real estate and other property continues vested in resulting domestic limited liability company; (3) all liabilities of converting business entity continue as liabilities of resulting domestic limited liability company; (4) proceeding pending by or against converting business entity may be continued as if conversion did not occur; and (5) interests in converting business entity that are to be converted into interests of resulting domestic limited liability company or into right to receive cash or other property are converted. Conversion shall not affect liability or absence of liability of any holder of interest for acts, or omissions, or obligations made or incurred prior to effectiveness of conversion. Cessation of existence of converting business entity shall not constitute dissolution or termination. (NCGS 57C-9A-04).

Merger.

Domestic limited liability company may merge with one or more domestic limited liability companies or other business entities if (1) Merger is permitted by laws of state or country governing organization and internal affairs of each of other merging business entities and (2) each merging domestic limited liability company and merging business entity comply with requirements as set forth below. (NCGS 57C-9A-20). Must meet requirements for plan of merger. (See topic 2.03 Corporations, subhead Merger, catchline Cross-Entity Mergers.) Plan of merger for merging domestic limited liability company must be approved as provided in articles of organization or operating agreement for approval of merger with type of business entity contemplated in plan of merger, or if no such provision, by unanimous consent of members. If any member of merging domestic limited liability company will have personal liability for any existing or future obligation of surviving business entity solely as result of holding interest in surviving business entity, then in addition to requirements of preceding sentence, approval of plan of merger by domestic limited liability company shall require consent of each such member. With each other merging business entity, plan of merger must be approved in accordance with laws of state or country governing organization and internal affairs of merging business entity. Provisions of plan of merger may be made dependent on facts objectively ascertainable outside plan of merger if plan of merger sets forth manner in which facts will operate upon affected provisions. (NCGS 57C-9A-21[a2]). Must file articles of merger with Secretary of State. (NCGS 57C-9A-22[a]). Merger takes effect upon effectiveness of articles or merger at time of filing or time specified. (NCGS 57-9A-22). If articles of merger are abandoned after being filed but before becoming effective, surviving entity to deliver to Secretary of State amendment reflecting abandonment of plan of merger. (NCGS 57C-9A-22[a]). See N.C. Sen. 324 (Apr. 13, 2005).

2.07 LIMITED PARTNERSHIP:

Revised Uniform Act (1976) has been adopted. (NCGS 59-101, et seq.).

2.08 PARTNERSHIPS:

Uniform Partnership Act (1914) has been adopted. (NCGS 59-31, et seq.).

Name.

Unless exempt under G.S. NCGS 66-68(c), before any partnership, other than limited partnership, may engage in business under assumed name, there must be filed in office of register of deeds in any county where partnership does business certificate giving name of partnership and name and address of each partner, and such certificate must be signed and duly acknowledged by each partner. (NCGS 59-84.1; NCGS 66-68).

All general or limited partnerships may sue or be sued under name by which they are commonly known and called, or under which they are doing business, and without naming any of individual members. (NCGS 1-69.1).

Dissolution of Partnership.

N.C. adopts §31 of Uniform Act. (NCGS 59-61).

Death of Partner.

To extent not inconsistent with Uniform Act, following provisions are still in effect:

On death of any partner surviving partner must within 30 days execute bond before clerk of superior court of county where partnership business was conducted with sufficient surety conditioned on faithful performance of his duties in settling partnership affairs. Amount of said bond is fixed by clerk, and settlement of estate and liability of bond are same as under laws governing administrators and their bonds. (NCGS 59-74). If surviving partner fails to give such bond, clerk must, on application of any person interested in estate of deceased partner, appoint collector of partnership who is governed by same law governing administrator of deceased person. (NCGS 59-75).

Surviving partner must make inventory of partnership assets and schedule of partnership liabilities with personal representative of deceased within 60 days of death of partner. (NCGS 59-76).

Surviving partner, within 30 days of death of partner, must notify all persons having claims against partnership which were in existence at time of death of partner, to exhibit same to surviving partner within six months from date of first publication of such notice. Notice must be published once a week for four consecutive weeks in newspaper qualified to publish legal advertisements, and published in county where partnership did business. If no newspaper is published in county, then surviving partner has option of running notice in newspaper having general circulation in county and posting notice at courthouse, or simply posting notice at courthouse and four other public places in county. (NCGS 59-78). All debts and demands against partnership, where one partner has died, are paid pro rata, except debts which are specific lien on partnership property. (NCGS 59-79). Surviving partner is not chargeable for any assets paid in satisfaction of any debts where subsequent action is brought on claim against partnership which was not presented within six months of first publication of notice to creditors. (NCGS 59-80).

Elaborate procedure is prescribed for purchase of partnership property by surviving partner. (NCGS 59-81).

Assignment of Interest in Partnership.

See category 8 Debtor and Creditor, topic 8.01 Assignments.

Limited Partnership.

Revised Uniform Act (1976) has been adopted. (NCGS 59-101, et seq.).

Foreign limited liability partnerships regulated by G.S. NCGS 59-90 to -94.

Tradename.

See category 17 Intellectual Property, topic 17.01 Trademarks and Tradenames.

3 BUSINESS REGULATION AND COMMERCE

3.01 BANKS AND BANKING:

Uniform Commercial Code adopted, effective July 1, 1967. (NCGS 25-1-101 to NCGS 25-11-108). See topic 3.09 Commercial Code.

Regulated by G.S. c. 53. Governor appoints Commissioner of Banks every four years, subject to General Assembly's joint resolution. Commissioner of Banks, in conjunction with Banking Commission, has charge of administration of banking laws and every corporation, partnership or individual doing banking business within this state is under his supervision. No person shall serve on commission for more than two complete consecutive terms. (NCGS 53-92, -104). Banking Commission has power to supervise, direct and review actions of Commissioner of Banks. Upon appeal of order, chairman of commission may appoint appellate review panel of not less than five members. Unless otherwise specified in G.S. 53, any party to order by commissioner may, within 20 days of order and upon written notice to commissioner, appeal order to commission. Upon notice of appeal, commissioner shall, within 30 days, certify to commission record on appeal. Party to proceeding before Banking Commission may, within 20 days after final order, appeal to superior court of Wake County for final determination of any question of law involved. (NCGS 53-92). Bank holding companies must register with Commissioner of Banks. (NCGS 53-227).

General Powers and Duties.

A duly incorporated bank may exercise all powers which are necessary to carry on business of banking, discounting or negotiating notes, drafts, bills of exchange and other evidences of debt, receiving deposits, buying and selling exchanges, and lending money on personal security or real property, issuing, advising, and confirming letters of credit, receiving money for transmission, becoming member of clearing house association, and providing bank service corporation services. It may take and receive interest at any legal rate on its loans. (NCGS 53-43).

Each bank must keep correct list of its stockholders and, when called on, file copy of same with Commissioner of Banks. (NCGS 53-108).

Statements to Depositors.

Depositor has duty to exercise due diligence in examination of statements of accounts and vouchers rendered by bank. (NCGS 53-76). Statement deemed finally adjusted and correctness conclusively presumed if not objected to within five years from date of rendition. (NCGS 53-75). See also G.S. NCGS 25-4-406 for effect of U.C.C.

Stockholders.

Upon notification by Commissioner of Banks that its capital has become impaired, officers and directors of bank must assess stockholders to cover impairment. If any stockholder fails to pay assessment, enough of his stock must be sold to pay assessment. (NCGS 53-42). If stockholder fails to pay installment on stock when required by law, directors of the bank must sell his stock and if not sold, shall be cancelled and deducted from bank's capital stock. (NCGS 53-41).

Trust Companies.

Any number of persons, not less than five, may organize corporation to engage in trust and fiduciary business. Such corporation is subject to same supervision and regulation as corporation engaged in banking business. (NCGS 53-2).

Uniform Common Trust Fund Act adopted with certain variations. (NCGS 36A-90 to -94). 1952 Official Amendment not adopted.

Establishment of Common Trust Funds.

Any bank or trust company acting as fiduciary in N.C. may create and maintain common trust funds for collective funds held in fiduciary relationship. Bank or trust company managing collective trust fund is not required to render court accounting.

Banks Acting as Fiduciaries.

Any bank licensed by Commissioner of Banks, where such powers or privileges are granted in its charter, may act as fiduciary without giving bond. (NCGS 53-159). Before issuance of such license, commissioner must be paid annual license fee as required by rule of Banking Commission, not to exceed $500, and commissioner must find bank solvent to amount not less than $100,000. (NCGS 53-160, -162).

Industrial banks may be organized by any number of persons, not less than five. (NCGS 53-137). Bank may charge and receive interest at rates not exceeding rates provided for in G.S. NCGS 24-1.1 and .2. (NCGS 53-141). Industrial banks are under supervision of Commissioner of Banks. (NCGS 53-144).

Collections.

Uniform Commercial Code adopted. (NCGS 25-1-101 to NCGS 25-11-108).

Foreign Banks.

N.C. Reciprocal Interstate Banking Act (NCGS 53-209, et seq.) provides out-of-state bank holding company that does not have N.C. bank subsidiary, other than one acquired in transaction involving assistance by Federal Deposit Insurance Corporation or in regular course of securing or collecting previously contracted debt, may acquire N.C. bank holding company or N.C. bank with commissioner's approval. Commissioner is to approve acquisition only if state that is out-of-state bank's principal place of business permits N.C. bank holding companies to acquire banks and bank holding companies in that state. Commissioner must apply to acquisition all restrictions that out-of-state bank's state would apply to N.C. bank's acquisition of bank or bank holding company in that state but would not apply to acquisition in that state by bank or bank holding company located there. Applicant must pay $5,000 application fee and $2,000 per bank acquired.

Out-of-state bank holding company that has N.C. bank subsidiary may acquire N.C. bank or bank holding company under same restrictions as above, minus fees. (NCGS 53-211).

Interstate Branch Banking.

Interstate branching is permitted under §§102 and 103 of Riegle-Neal Interstate Banking and Branching Efficiency Act of 1994, Pub. L. No. NCGS 103-328. Out of state bank that does not have branch in N.C. and that meets requirements of this article may establish branch in N.C. by: (1) De novo entry; (2) acquisition of existing branch; (3) merger or consolidation. Application must be filed with Commissioner of Banks. (NCGS 53-224.10).

Savings and Loan Associations.

Governed by G.S. NCGS 54B-1, et seq. Certain interstate mergers and acquisitions of savings and loan associations and savings and loan holding companies are permitted by G.S. NCGS 54B-48.1, et seq. Establishment of branches by out-of-state savings and loan associates permitted by G.S. NCGS 54B-265, et seq.

Savings Banks.

Governed by G.S. NCGS 54C-1, et seq. titled N.C. Savings Bank Interstate Branch Act. Establishment of branches by out-of-state savings banks permitted by G.S. NCGS 54C-199, et seq.

Deposits.

Funds may be deposited with bank subject to withdrawal or to be paid upon checks of depositor and are payable on demand unless provided otherwise. (NCGS 53-65).

Unclaimed Deposits.

Upon liquidation of bank after Commissioner of Banks has held unclaimed dividends in trust for depositors and creditors of liquidated bank for ten years, he is authorized to pay principal amount to State Treasurer to be held by it without interest until just claim is preferred. (NCGS 53-20[p]).

Joint deposit account may be established by agreement of any two or more persons. Tenants may draw upon part or all of account, but account is subject, within tenants' lifetimes, to their respective debts, relative to their contributions. Survivor(s) assume sole ownership, subject to certain claims upon deceased's portion. Deceased's portion cannot be applied to such claims until all other personal assets of estate have been exhausted. Any amount unused for satisfying claims remits to surviving joint tenant(s). (NCGS 41-2.1). Customers of savings and loans, savings banks, banks and credit unions may open joint accounts with right of survivorship, tentative trust accounts, or personal agency accounts. (NCGS 53-146.1 to .3; NCGS 54-109.57 and .58; NCGS 54-109.63; NCGS 54B-129 and -130; NCGS 54B-139; NCGS 54C-165-167).

Legal Holidays.

(See category 1 Introduction, topic 1.02 Holidays.) Governor, by and with advice and consent of Council of State, can name and set banking holidays. (NCGS 53-77).

3.02 BILLS AND NOTES:

Uniform Commercial Code adopted. See topic 3.09 Commercial Code.

Days of Grace.

Notice of dishonor is now covered by U.C.C. §§25-3-508 and NCGS 25-4-212 (for collecting banks).

Protection of Sureties or Indorsers.

After any note, bill, bond, or other obligation becomes due and payable, any surety, indorser, or guarantor thereof may give written notice to holder or owner of obligation requiring him to use all reasonable diligence to recover against principal and to proceed to realize upon any securities which he holds for the obligation. Surety, indorser, or guarantor shall also give notice to co-sureties, co-indorsers, and co-guarantors. This shall not apply to official bonds, or bonds given by any person acting in fiduciary capacity. Holder or owner of obligation shall on demand disclose to any surety, indorser, or guarantor of obligation names and addresses of all others who appear on obligation or of which he has knowledge. (NCGS 26-7).

Sheriff's return, when notice served by sheriff, or return receipt, when notice sent by registered mail, shall be prima facie evidence of giving of notice. (NCGS 26-8).

If holder or owner of obligation refuses or fails, within 30 days from service or receipt of such notice, to take appropriate action pursuant thereto, following persons shall be discharged on any such note, bond, bill or other obligation to extent prejudiced thereby:

(1) Surety, indorser or guarantor giving such notice; and

(2) All co-sureties, co-indorsers, or co-guarantors joining therein or adopting such notice; and

(3) All co-sureties, co-indorsers, or co-guarantors whose names or addresses such holder or owner of obligation failed to disclose on demand. (NCGS 26-9).

Special Requirements.

No special requirements as to recitals in notes of particular kinds.

Special Defenses.

See topic 3.12 Consumer Protection, subhead Retail Credit Sales, catchline Defenses.

Judgment Notes.

See category 5 Civil Actions and Procedure, topic 5.15 Judgments, subhead Judgments by Confession.

Attorneys' Fees.

Provisions in notes for payment of attorneys' fees of up to 15% of outstanding balance enforceable. (NCGS 6-21.2[1]). Provision for reasonable attorneys' fees construed to mean 15% of outstanding balance. (NCGS 6-21.2[2]). If debtor has defaulted or violated terms of security agreement and has refused, on demand, to surrender possession of collateral as authorized by G.S. NCGS 25-9-609, with result that secured party is required to institute ancillary claim and delivery proceeding to secure possession of collateral, no written notice by holder to debtor required before enforcement of provisions relative to payment of attorneys' fees in addition to outstanding balance. (NCGS 6-21.2[5]). After maturity, holder must notify debtor that provisions of note with respect to payment of attorneys' fees, in addition to payment of outstanding balance, will be enforced and debtor has five days to pay outstanding balance without incurring attorneys' fees. If outstanding balance paid within five days, obligation to pay attorneys' fees void. (NCGS 6-21.2[5]).

Treble Damages.

Person who knowingly makes check or draft drawn on bank that refuses to honor because of insufficient funds and refuses to pay same to payee within 30 days following written demand therefor, shall be liable for amount of check, service charges, and processing fee plus additional damages of three times amount of check, not to exceed $500 or be less than $100. Payee shall send defendant initial written demand for amount of check, service charges and fees and second written demand for amounts in first demand and treble damages. Both notices shall be in form set forth in G.S. NCGS 6-21.3(a). If payee sends second demand, payee may not file action to collect such amounts until 30 days following such demand notice. (NCGS 6-21.3[a]). Prevailing party may be awarded court costs and reasonable attorney's fees. (NCGS 6-21.3[b]). Affirmative defenses include full satisfaction of check, bank error, or that acceptor of check knew that there were insufficient funds. (NCGS 6-21.3[c]). Statutory remedy applies only if check was made with knowledge of insufficient funds. (NCGS 6-21.3[d]).

3.03 BILLS OF LADING:

See topic 3.09 Commercial Code.

3.04 BILLS OF SALE:

See topic 3.23 Sales.

3.05 BLUE SKY LAW:

See topic 3.24 Securities.

3.06 BROKERS:

Common law rules apply.

Uniform Commercial Code adopted. (NCGS 25-1-101 to NCGS 25-11-108). See topic 3.09 Commercial Code.

Licenses.

All loan agencies as defined by statute must buy license for privilege of conducting business at cost of $250 per year per location. (NCGS 105-88[a]). This requirement is not applicable to banks, industrial banks, trust companies, savings and loan associations, cooperative credit unions, business of negotiating loans on real estate as described in G.S. NCGS 105-41 or insurance premium finance companies licensed under Art. 35 of G.S. c. 58. (NCGS 105-88[b]). Upon issuance of loan, borrower must receive in writing statement showing amount received, amount to be paid back, time in which amount is due, and rate of interest and discount agreed upon. (NCGS 105-88[c]). Loan made by person who does not comply with G.S. NCGS 105-88 is not collectible at law under G.S. NCGS 105-269.13. (NCGS 105-88[d]). Except as provided under G.S. NCGS 160A-211 and G.S. NCGS 153A-152, counties, cities, and towns may levy license tax not to exceed $100 on businesses taxed under G.S. NCGS 105-88. (NCGS 105-88[e]).

Bond.

No general requirement that brokers must give bond except for loan brokers.

Real Estate Brokers.

Licensing provisions for both resident and nonresident real estate brokers and salesmen regulated by statute. No business entity in N.C. shall act as real estate broker or salesman without obtaining license from N.C. Real Estate Commission. Each applicant for license shall apply in writing and shall be at least 18 years of age and complete necessary education. Court has power to recommend, when necessary, revocation of licensee's certificate of license. Out of state applicants may receive licensing privileges. (NCGS 93A-1 to -10). This section must be strictly construed. Lease transaction involving local and out-of-state broker cooperating was not void against public policy because out-of-state broker was not licensed in N.C. (130 N.C. App. 541, 503 S.E.2d 401).

Loan Brokers.

Must provide statutory disclosure statement, obtain bond or establish trust account and file such documents with Secretary of State. Loan brokerage contracts must be in writing and signed by all contracting parties. Every loan broker must obtain surety bond issued by surety company authorized to do business in state, or maintain trust account with N.C. institution. No loan broker will collect any advance fees prior to closing of loan, not precluding reasonable and necessary fees payable to third parties for appraisal, property survey, title examination and credit reports. (NCGS 66-106 to -112).

3.07 BULK SALES:

Art. 6 of Uniform Commercial Code has been repealed. (2004 N.C. Sess. Laws 190).

3.08 CARRIERS:

There are three classes of carriers: (1) Private, (2) common, and (3) contract. Common carrier is one who holds himself out to public to carry persons or freight for hire. (NCGS 62-3[6], -260).

Rates.

Common carriers are generally subject to supervision of Utilities Commission, and rates are subject to its approval. (NCGS 62-30, -32, -152.1).

Discrimination.

Common carrier must serve all and must not discriminate between customers. (NCGS 62-140, 351 N.C. 223, 524 S.E.2d 10).

Limiting Liability.

Common carrier is insurer of goods entrusted to him and is liable for all loss not caused by act of God or public enemy. He may by contract limit his liability as an insurer, but cannot in any way limit his liability for his own negligence. (138 N.C. 68, 50 S.E. 557). His liability does not extend to loss caused by some act of owner or by inherent nature, quality, or defect of goods. Carrier's risk begins with receipt of goods for immediate transportation. When goods have reached their destination and are placed in a freight house, and consignee has had a reasonable opportunity to receive goods, liability of carrier as a carrier ceases and he is liable only as a warehouseman. See generally G.S. c. 62.

Bills of Lading.

See topic 3.09 Commercial Code.

Uniform Commercial Code adopted. See topic 3.09 Commercial Code.

Motor Vehicle Carriers.

See category 23 Transportation, topic 23.01 Motor Vehicles.

Liens.

See topic 3.09 Commercial Code.

3.09 COMMERCIAL CODE:

Uniform Commercial Code adopted, effective July 1, 1967. (NCGS 25-1-101 to NCGS 25-11-108). N.C. has adopted Revised Articles 1, 7 and 9.

In N.C. statutes, Commercial Code is referred to as “this chapter” rather than “this act.” Provisions of Official Text are incorporated in c. 25 of G.S. and are cited as NCGS 25-1-101 et seq. N.C. citations, other than chapter designation, correspond to provisions of 1962 Official Text. For 1962 Official Text, see Uniform and Model Acts section.

1972 Official Amendments adopted with variations.

1973 Official Amendment adopted.

1977 Official Amendments adopted with variations.

1987 Official Text, Article 2A, Leases, adopted.

1987 Official Amendments adopted with variations.

1989 Official Amendments adopted.

1994 Official Amendments adopted.

2001 Official Amendments adopted.

Material Variations and Optional Provisions in 1962 Official Text (effective July 1, 1976).

Revised Article 1 adopted (2006 N.C. Sess. Laws 112).

Variations to Article 2

§25-2-103(b)—Omitted.

§25-2-103(1)(d)—Additional sentence added to provide that any manufacturer of self-propelled motor vehicles is also "seller" with respect to buyers of its product to whom it makes express warranty, notwithstanding lack of privity between them for purposes of all rights and remedies available to buyers under this art.

§25-2-106 includes "layaway contracts" as contract and agreement. "Layaway contract" is herein defined.

§25-2-107—1972 Amendment adopted.

§25-2-202(a)—Updated reference to NCGS 25-1-303.

§25-2-210(2)—Amended to add "Except as otherwise provided in G.S. NCGS 25-9-406," preceding section.

§25-2-210(3)—Amended to insert new section: "The creation, attachment, perfection, or enforcement of a security interest in the seller's interest under a contract is not a transfer that materially changes the duty of or increases materially the burden of risk imposed on the buyer or impairs materially the buyer's chance of obtaining return performance within the purview of G.S. NCGS 25-2-210(2) unless, and then only to the extent that, enforcement actually results in a delegation of material performance of the seller. Even in that event, the creation, attachment, perfection, and enforcement of the security interest remain effective, but (i) the seller is liable to the buyer for damages caused by the delegation to the extent that the damages could not reasonably be prevented by the buyer, and (ii) a court having jurisdiction may grant other appropriate relief, including cancellation of the contract for sale or an injunction against enforcement of the security interest or consummation of the enforcement."

§25-2-318—N.C. applies Alternative A.

§25-2-326(2)—Amended to delete, "Except as provided in subsection (3)," preceding section.

§25-2-326(3)—Amended to delete entire subsection, decreasing remaining subsection numbers by one.

§25-2-502(1)—Amended to insert reference to subsection (3), and substituted "recover them from the seller if: (a) In the case of goods bought for personal, family, or household purposes, the seller repudiates or fails to deliver as required by the contract; or (b) in all cases, the seller becomes insolvent within ten days after receipt of the first installment on their price" for "recover them from the seller if the seller becomes insolvent within ten days after receipt of the first installment on their price."

§25-2-502(2)—Amended to insert new section: "The buyer's right to recover the goods under subsection (1)a. of this section vests upon acquisition of special property, even if seller had not then repudiated or failed to deliver."

§25-2-512(1)(b)—Amended to delete "the provisions of".

§25-2-702—1966 Official Amendment enacted.

§25-2-716(3)—Amended to add, "In the case of goods bought for personal, family, or household purposes, the buyer's right of replevin vests upon acquisition of a special property, even if the seller had not then repudiated or failed to deliver," as last sentence.

§25-2-718(2) adds (c) which reads:

(c) "at the election of the seller in the case of a layaway contract, the aggregate payments received by seller from buyer under the contract or fifty dollars ($50.00) whichever is smaller."

§25-2-725(3)—In paragraph (3) time after termination of first action is changed from six months to twelve months. Phrase "unless the termination resulted from voluntary discontinuance or from dismissal for failure or neglect to prosecute" at end of last sentence of (3) is deleted.

§25-2A-103(1)(e) amended to place $25,000 in blank.

§25-2A-103(1)(j) following sentence is added at end of (1)(j): "The term includes a motor vehicle operating agreement that is considered a lease under §7701(h) of the Internal Revenue Code."

§25-2A-103(3)—Amended to delete "Good faith". Definition references for "Account" (G.S. NCGS 25-9-102[a][2]), "Between merchants" (G.S. NCGS 25-2-104[3]), "Buyer" (G.S. NCGS 25-2-103[1][a]), "Chattel paper" (NCGS 25-9-102[a][11]), "Consumer goods" (NCGS 25-9-102[a][23]), "Document" (NCGS 25-9-102[a][30]), "Entrusting" (NCGS 25-2-403[3]), "General intangible" (NCGS 25-9-102[a][42]), "Instrument" (NCGS 25-9-102[a][47]), "Merchant" (G.S. NCGS 25-2-104[1]), "Mortgage" (G.S. NCGS 25-9-102[a][55]), "Pursuant to commitment" (G.S. NCGS 25-9-102[a][68]), "Receipt" (G.S. NCGS 25-2-103[1][c]), "Sale" (G.S. NCGS 25-2-106[1]), "Sale on approval" (G.S. NCGS 25-2-326), "Sale or return" (G.S. NCGS 25-2-326), and "Seller" (G.S. NCGS 25-2-103[1][d]).

§25-2A-104(1)(a) amended to read "certificate of title statute of this State" (G.S. NCGS 20-50, G.S. NCGS 75A-32, et seq.).

§25-2A-201(5)(c) and (d) added to read:

"(c) if there is other evidence of the parties' intent with regard to the lease term, the term so intended; or

(d) in the absence of evidence of the parties' intent, a reasonable lease term."

§25-2A-216—alternative A adopted.

§25-2A-303(3)—Amended to delete entire subsection, decreasing remaining subsection numbers by one.

§25-2A-304(1) second sentence reads:

“A lessor with voidable title has power to transfer a good leasehold interest to a good faith subsequent lessee for value, but only to extent set forth in preceding sentence.”

§25-2A-309(8)(i) reads “on default, expiration, termination, or cancellation of the lease agreement but subject to the lease agreement and this Article”.

§25-2A-311 not adopted.

§25-2A-404(1) phrase “the substitute performance *shall* be tendered and accepted.”

§25-2A-405(b) reads “if the *causes* mentioned in paragraph (a). . .”

§25-3-101, et seq.—adopted effective Oct. 1, 1995.

§25-3-116—Subsection (c) added “(c) Discharge of one party having joint and several liability by a person entitled to enforce the instrument does not affect the right under subsection (b) of this section of a party having the same joint and several liability to receive contribution from the party discharged.”

§25-3-118—Subsection (h) added “(h) A sealed instrument otherwise subject to this Article is governed by the time limits of G.S. NCGS 1-47(2).”

§25-3-307(b)(3)—Subsection is amended to provide that taker does not have notice of breach of fiduciary duty unless he knows of such breach “or knows such facts that his action on taking instrument is not in good faith.”

§25-3-311(c)—Subdivision (c)(2) omitted. Introductory language reads: “(c) subject to subsection (d), claim is not discharged under subsection (b) when claimant of organization proves. . .”

§25-3-416(a)(6)—Subdivision (a)(6) omitted.

§25-3-417(a)(4)—Subdivision (a)(4) omitted.

§25-3-504(a)(ii)—Phrase “or is dead or in insolvency proceedings” reversed to read “or is in insolvency proceedings or is dead”.

§25-3-506—Additional section added provides processing fees not exceeding $25 may be changed by person accepting check if check is not paid for insufficient funds. Section provides requirements if collection agency is seeking to collect processing fees.

§25-4-101, et seq.—Conforming amendments to Art. 4 adopted effective Oct. 1, 1995.

§25-4-104(a)(11)—“credit or by remittance” replaced with “credit, by remittance”.

§25-4-106—Alternative B adopted.

§25-4-202(b)—“reasonably longer time” in second sentence replaced with “longer reasonable time”.

§25-4-207(a)(6)—Subdivision (a)(6) omitted.

§25-4-207(a)(4)—Subdivision (a)(4) omitted.

§25-4-212(2)—Optional subsection adopted.

§25-4-401(c)—In second sentence, words "received at such time and in such manner as to afford the bank" replaced with "received at a time and in a manner that afforded the bank".

§25-4-402(b)—Sentence added at end: "This subsection does not preclude noncompensatory damages."

§25-4-404—Replace "obliged" with "obligated" in caption.

§25-4-405—Additional subsection (c) provides that "A transaction, although subject to this article, is also subject to G.S. NCGS 41-2.1, NCGS 53-146.1, NCGS 54-109.58 and NCGS 54B-129 and in case of conflict between provisions of this section and either of those sections, provisions of those control."

1989 Official Text, Article 4A, Funds Transfers, adopted, effective Oct. 1, 1993. Reference is made to "this Article" rather than "this chapter".

§25-5-118—Section differs from Uniform Commercial Code in that security interest does not extend to identifiable proceeds of collateral.

Article 6, Bulk Transfers, has been repealed. (2004 N.C. Sess. Laws 190).

Revised Article 7 adopted (2006 N.C. Sess. Laws 112).

Article 8—1994 Amendments adopted, effective Oct. 1, 1997.

§25-8-103(f)—Amended to substitute "G.S. NCGS 25-9-102(a)(15)" for "G.S. NCGS 25-9-115".

§25-8-106(d)—Amended to delete "or" at the end of subsection (d)(1), added "or" at the end of subsection (d)(2), and added subsection (d)(3): "Another person has control of the security entitlement on behalf of the purchaser or, having previously acquired control of the security entitlement, acknowledges that it has control on behalf of the purchaser."

§25-8-301(a)(3)—Amended to substitute "is (i) registered in the name of the purchaser, (ii) payable to the order of the purchaser, or (iii)" for "has been," and inserted "and has not been indorsed to the securities intermediary or in blank."

§25-8-302(a)—Amended to substitute "a purchaser " for "upon delivery" and deleted "to a purchaser, the purchaser" following "uncertificated security."

§25-8-510(a)—Amended to insert "In a case not covered by the priority rules in article 9 of this chapter or the rules stated in subsection (c) of this section."

§25-8-510—Amendments conforming to Uniform and Model Acts adopted with minor variations.

Revised Article 8, Part 6 (Transition Provisions) is omitted.

Revised Article 9 (Secured Transactions) adopted, effective July 1, 2001.

Reviser's Note: 2000 N.C. Sess. Laws 169, §1, effective July 1, 2001, rewrote art. 9 of c. 25 of U.C.C. This revised art. 9 supersedes revision of art. 9 by 1975 N.C. Sess. Laws 862, §1.

Some of the more significant changes include:

§25-9-102(a)(11)—Definition of "chattel paper" expanded with respect to licenses of software and inclusion of definition of "monetary obligation". Excluded from "chattel paper" are certain records evidencing right to payments related to credit cards. Multiple records including instrument taken together constitute chattel paper, but do not have to include security agreement or lease as in Uniform and Model Acts.

§25-9-102(a)(43)—Repealed.

§25-9-102(a)(45)—2001 Amendment not adopted. N.C. varies by expanding definition of "governmental unit" to include organizations created to facilitate issuance of notes, bonds, other evidences of indebtedness or payment obligations for borrowed money by, or in conjunction with, installment or lease purchase financings for N.C. or any political subdivision thereof, as evidence by documents creating such organization.

§25-9-102(a)—N.C. adopts, as subdivision NCGS 65-67, optional definitions for "Production-money crops," "Production-money obligation" and "Production of crops" provided by Model Provisions for Production-Money Priority (see 1998 Official Text, Appendix 11).

§25-9-103.1—N.C. adopts optional section on Production-Money Crops, etc., provided by Model Provisions for Production-Money Priority (see 1998 Official Text, Appendix 11).

§25-9-109(c)(2)—N.C. omits this section.

§25-9-109(d)(14)—N.C. varies by adding this subdivision providing that Article 9 does not apply to creation, perfection, priority, or enforcement of any lien on, assignment of, pledge of, or security in, any assets created, made, or granted by N.C. or political subdivision thereof, including assignment of rights as secured party in security interest granted by any party subject to Article 9 to N.C. or political subdivision thereof to secure indebtedness as further set forth therein. However, Article 9 does apply to security interests created by political subdivisions in equipment or fixtures.

§25-9-201(b)—N.C. inserts into bracketed sentences reference to Chapters 24 Interest, 25A (Retail Installment Sales Act) and 91A (Pawnbrokers Modernization Act of 1989) of General Statutes and Article 15 of Chapter 53 (N.C. Consumer Finance Act).

§25-9-309(14)—Section not adopted.

§25-9-311(a)(2)—N.C. inserts into bracketed sentences reference to G.S. NCGS 20-58 (automobiles) and NCGS 75A-41 (vessels).

§25-9-311(d)—N.C. does not include "or leasing" when referring to person in business of selling goods of that kind.

§25-9-324.1—N.C. adopts optional section on Priority of Production-Money Security Interests, etc., provided by Model Provisions for Production-Money Priority (see 1998 Official Text, Appendix II), and adds subsection (f) providing that creation or perfection of production-money security interest does not constitute default or other breach of any indebtedness where collateral is real or personal property.

§25-9-334—N.C. varies by giving precedence to G.S. NCGS 42-15 (Landlord's lien on crops for rents, advances, etc.) over subsection (i), and omitting subsection (j).

§25-9-406—N.C. varies by exempting, under subsection (i), from provisions of subsection (f) following G.S.: Article 44B of Chapter 1 (N.C. Structured Settlement Act); Chapter 15B (N.C. Crime Victims Compensation Act); Article 15 of Chapter 53 (N.C. Consumer Finance Act); Article 86 of Chapter 58 (N.C. Fireman's and Rescue Squad Workers' Pension Fund); Chapter 96 (Employment Security Law); Article 1 of Chapter 97 (N.C. Workers' Compensation Act); and Article 2 of Chapter 108A (Programs of Public Assistance). N.C. also varies by providing in subsection (j) blanket precedence for this section over inconsistent provisions of other N.C. law unless provisions of other law expressly refers to this section.

§25-9-407(a)(1) and (2)—N.C. varies by including any assignment or transfer of security interest.

§25-9-408—N.C. varies by including any assignment or transfer of security interest in subdivisions (a)(2) and (c)(2) and exempting, under subsection (e), from provisions of subsection (c) same G.S. exempted from §25-9-406(f), and by making for this section same provision made by §25-9-406(j) for that section. (See §25-9-406, supra.)

§25-9-501—N.C. designates office of Secretary of State as filing office.

§25-9-502—N.C. uses bracketed material in (c)(4), but omits it in (b)(2) and (3).

§25-9-512—N.C. applies Alternative A and omits bracketed material in (a)(2), and requires name of debtor to be provided as well as information specified in NCGS 9-502(b).

§25-9-513(d)—N.C. includes additional sentence that, unless as provided therein, termination statement that includes debtor is transmitting utility causes effectiveness of financing statement to lapse.

§25-9-515—N.C. varies by adding subdivision (b)(8) which provides that Secretary of State may reject record for filing upon determining that it is not created pursuant to Chapter 25 of General Statutes, or is otherwise intended for improper purpose.

§25-9-518—N.C. applies Alternative A. N.C. varies by adding subsection (b)(1), which requires Secretary of State, if certified correction statement alleges that record was wrongfully filed, to determine whether record should have been rejected under NCGS 25-9-516(b)(8), and if so, to cancel record.

§25-9-519—N.C. applies Alternative A. N.C. varies by setting cutoff date of subsection (b) forward to Jan. 1, 2003; omitting bracketed material in subsection (d); allowing filing office three, rather than two, days in subsection (h) to perform required acts; and applying subsection (i) only to subsection (b).

§25-9-520—N.C. varies by providing for cancellation of record under NCGS 25-9-518(b)(1) as well as refusal to file. N.C. omits bracketed material in subsection (b) and allows filing office three days rather than two days, for filing office to provide communication of cancellation or refusal to accept record. N.C. also adds subsection (e) providing for appeal of Secretary of State's decision under NCGS 25-9-518(b)(1).

§25-9-521—N.C. adopted national forms.

§25-9-522—N.C. applies Alternative A.

§25-9-523—N.C. omits bracketed material in subdivision (c)(1)(a) and applies second bracket (“a record …”) in subsection (d). N.C. allows filing office three, rather than two, days in subsection (e). N.C. omits subsection (f) and adds subsection (g) exempting from subsection (c) real-property-related filing offices described in §9-501(a)(1).

§25-9-525—N.C. applied following fees for filing and indexing record under subsection (a): $30 if record is in writing and less than two pages; $45 if record is in writing and more than two pages, plus $2 for each page over ten pages; $30 if record is communicated by another authorized medium. N.C. omits subsection (b) and applies Alternative A for subsection (c). Fee for information request under subsection (d) is $30, and upon request filing office will provide copy of any filed financing statement or statement of assignment for uniform fee of $2 per page.

§25-9-526—N.C. designates Secretary of State to adopt and publish rules to implement Article. N.C. omits bracketed material in subdivision (a)(2).

§25-9-527—N.C. omits this section.

§25-9-617(a)(3)—N.C. omits bracketed material.

§25-9-625(b)—N.C. omits language referencing §9-210.

§25-9-702—N.C. adds subsection (d) providing special rule that allows certain security interests excluded under former G.S. NCGS 25-9-104 and effective prior to July 1, 2001, but not meeting requirements for creation, etc. prior to July 1, 2001, shall remain valid, enforceable and perfected security interests.

§25-9-707—N.C. adds condition to subsection (e) that termination statement may not be filed under this section in register of deeds office unless it is office specified in §9-501. N.C. also adds subsection (f) stipulating that no separate fee shall be charged for filing or indexing concurrently filed termination statement under subdivision (c)(2).

§25-9-710—N.C. adds this section, which provides transitional provisions for maintenance and searching of records in local filing offices, as defined under former G.S. NCGS 25-9-401(1), under terms of former Article 9 through July 1, 2008.

§25-10-101—Inserts effective date June 30, 1967.

§25-10-102(1)—Following acts listed as repealed: Uniform Negotiable Instruments Act (G.S. NCGS 25-1 to -199); Uniform Warehouse Receipts Act (G.S. NCGS 27-1 to -53); Uniform Bills of Lading Act (G.S. NCGS 21-1 to -41); Uniform Stock Transfer Act (G.S. NCGS 55-75 to -98); Uniform Trust Receipts Act (G.S. NCGS 45-46 to -66); Agricultural Liens for Advances (G.S. NCGS 44-52 to -64); Bank Collections (G.S. NCGS 53-57 and -58); Bulk Sales (G.S. NCGS 39-23); Factor's Lien Acts (G.S. NCGS 44-70 to -76); Assignment of Accounts Receivable (G.S. NCGS 44-77 to -85).

§25-10-104(2)—Repealed effective Oct. 1, 1997.

§25-10-106—N.C. adds this section providing that security interests subject to Article 9 are not subject to Chapter 47 (Probate and Registration) of General Statutes.

Article 11—1972 Amendments adopted with following variations:

§25-11-101—Inserts effective date July 1, 1976.

§25-11-101.1—(additional section)—“Definitions.—(1) As used in this Article, ‘Old

Article 9' means G.S. NCGS 25-1-105, G.S. NCGS 25-1-201(9), G.S. NCGS 25-1-201(37), G.S. NCGS 25-2-107, G.S. NCGS 25-5-116, and Article 9 of Chapter 25 of the General Statutes of North Carolina Uniform Commercial Code, as they are in effect on June 30, 1976, immediately prior to the effective date of this act. (2) As used in this Article, 'new Article 9' means: G.S. NCGS 25-1-105, G.S. NCGS 25-1-201(9), G.S. NCGS 25-1-201(37), G.S. NCGS 25-2-107; G.S. NCGS 25-5-116, and Article 9 of Chapter 25 of the General Statutes of North Carolina, Uniform Commercial Code, as said provisions are enacted pursuant to this act, as of July 1, 1976, its effective date."

"New Code or UCC" is referred to as "new Article 9" throughout Article 11.

§25-11-102—Reference to original transition provision inserted as follows: "Article 10 of Chapter 25 of the General Statutes of North Carolina, Uniform Commercial Code, G.S. NCGS 25-10-101 through G.S. NCGS 25-10-106, thereof shall continue to apply to new Article 9, and for this purpose old Article 9 and new Article 9 shall be considered one continuous statute."

§25-11-103—Inserts effective dates and divides this section into two subsections.

§25-11-105—Inserts effective date. In subparagraph (4), adds phrase "or deed of trust" after every use of word "mortgage".

§25-11-106—In subparagraphs (2) and (4), deletes "[UCC]" and inserts following in lieu thereof: "Chapter 25 of the General Statutes, Uniform Commercial Code".

1995 Official Text, Article 5, Letters of Credit, adopted, effective Oct. 1, 1999.

Forms.

See Part III, Uniform and Model Acts section, Commercial Code Amendments, National Forms.

See also topics: Banks and Banking, Bills and Notes, Brokers, Carriers, Contracts, Factors, Frauds, Statute of, Sales, Securities, Warehousemen; categories Business Organizations, topic Corporations; Civil Actions and Procedure, topic Limitation of Actions; Debtor and Creditor, topics Assignments, Fraudulent Sales and Conveyances, Liens, Pledges; Documents and Records, topics Records, Seals; Mortgages, topic Chattel Mortgages.

3.10 CONDITIONAL SALES:

Uniform Commercial Code adopted. See topic 3.09 Commercial Code.

3.11 CONSIGNMENTS:

See topic 3.14 Factors.

3.12 CONSUMER PROTECTION:

Unfair methods of competition and unfair or deceptive acts or practices in or affecting commerce are unlawful. (NCGS 75-1.1).

"Unsolicited goods" statute adopted. (NCGS 75-27).

Retail Credit Sales.

Governed by N.C. Retail Installment Sales Act, G.S. c. 25A. Act covers sales of personal or domestic scope in which seller extends consumer credit, and amount financed does not exceed $25,000, and does not apply to any party or transaction not also subject to provisions of federal Consumer Credit Protection (Truth-in-Lending) Act. (NCGS 25A-1). Sets limits to various finance charges applied in installment sales. (NCGS 25A-15). Disallows as contract provisions confession of judgment (NCGS 25A-18), acceleration for other than breach of contract (NCGS 25A-19), and disclaimer of express warranty (NCGS 25A-20). Allows seller to take security interest only in certain kinds of property (NCGS 25A-23), and regulates release of security interests by seller upon payment of all sums by consumer (NCGS 25A-22). Sets limits to term of payment. (NCGS 25A-33). Prohibits referral sales, whether or not they are consumer sales. (NCGS 25A-37; 90 N.C. App. 198, 368 S.E.2d 60). Regulates home solicitation sales. (NCGS 25A-38 to -42). Restricts balloon payments. (NCGS 25A-34). Allows refinancing subject to certain conditions. (NCGS 25A-31A). Permits buyer to assert claims or defenses available against original seller, against assignee of seller or other holder of debt, up to amount originally paid by buyer, and requires notice of this condition on all consumer credit sale contracts. (NCGS 25A-25). Establishes penalties for violation by seller, including refund of finance charges, unpaid rebates or other excessive charges, voiding of contract, and payment of counsel fees. (NCGS 25A-44[1] to [5]). See topic 3.20 Monopolies, 3.22 Restraint of Trade and Competition.

Credit Rights of Women.

No married or unmarried woman can be denied credit if credit would be given to man possessing same assets, earnings, etc. (NCGS 25B-1). Upon written request, any reports delivered by credit reporting agencies shall contain separate credit histories of married persons as well as their joint history. (NCGS 25B-2). Women have right of action to enforce statutes giving credit rights by suing for actual damages plus attorneys' fees. Attorney General may bring action for injunction against violators. (NCGS 25B-3). Statutes are not to be construed to deprive any credit grantor of his right to deny credit or limit its terms based upon its evaluation of applicant's capability or willingness to repay or to require any credit grantor to give preferential treatment to any applicant because of sex or marital status. (NCGS 25B-4).

Consumer Finance Act.

Act requires statement which must be furnished to borrower in certain consumer loans at time loan is made and prohibits powers of attorney and confession of judgments. (NCGS 53-181). False or misleading advertising regarding rates, terms or conditions of loans is prohibited. (NCGS 53-183).

Insurance.

Unfair or deceptive acts and practices, including false advertising and discrimination in rates, in regard to insurance contracts are defined. (NCGS 58-63-15).

Closing-Out Sales.

Closing-out sales are regulated, including false advertising, replenishment of stock and continuation of business beyond termination date. (NCGS 66-76 to -83).

Credit Repair Services Act.

Act regulates businesses that provide assistance to consumers in obtaining credit or correcting erroneous credit histories. (NCGS 66-220 to -226).

Unearned Finance Charge Credits.

In consumer credit installment sale contract with amount financed of $5,000 or more secured by real estate or by residential manufactured home as defined in G.S. NCGS 143-145(7), any buyer may satisfy debt in full at any time before maturity, and in so satisfying debt, shall be credited with all unearned finance charges as computed on simple interest or actuarial method. If seller obtains judgment on debt arising out of consumer credit installment sale or if seller forecloses or repossesses collateral securing debt, seller shall credit buyer with all unearned finance charges as computed on simple interest or actuarial method as if payment in full had been made on date judgment was obtained or 15 days after foreclosure or repossession occurred, whichever is earlier. If seller obtains judgment and repossesses collateral, seller shall credit buyer with all unearned finance charges as if payment in full had been made on date of judgment or 15 days after repossession, whichever occurs earlier. (NCGS 25A-32.1).

Advertising.

Term “wholesale” may be used in advertising only when wholesale price established by independent agency or sales are to customers having certificates of resale. Use of term “wholesale” in company or firm name is prohibited, unless firm or corporation is principally engaged in sales at wholesale. (NCGS 75-29). Misleading or untruthful advertising by auctioneers is prohibited. (NCGS 85B-8). False advertising of store as optical place of business when it does not employ licensed optician is prohibited. (NCGS 90-252). Truth in Music Advertising Act prohibits advertising or conducting live musical performance or production using false, deceptive or misleading association between perdorming group and recording group. (NCGS 75-125–135) Use of automatic dialing and recorded message players is restricted. (NCGS 75-104). Restrictions exist concerning telephone solicitations. (NCGS 75-102 and -103). Work-at-home solicitations are restricted. (NCGS 75-31). Solicitations involving representations of winning prizes, being specially selected, and issuance of simulated checks and invoices are restricted. (NCGS 75-32 to 35).

Uniform Deceptive Trade Practices Act not adopted. But see G.S. c. 75 which governs monopolies, trusts and consumer protection.

Plain Language Law.

No plain language statute.

See topics 3.19 Interest; 3.23 Sales.

Truth in Music Advertising Act

Act prohibits advertising or conducting live musical performance or production by false, deceptive or misleading association between performing group and recording group. (NCGS 75-125–135)

3.13 CONTRACTS:

See topic 3.12 Consumer Protection; categories 10 Documents and Records, topic Seals; Family, topic Infants.

Unless otherwise agreed, where unsolicited goods are delivered to person, he has right to refuse to accept delivery of goods, and is not bound to return such goods, and if addressed to and intended for recipient, they shall be deemed gift to recipient, and may be used or disposed of without obligation to sender. (NCGS 75-27).

Uniform Commercial Code adopted. (NCGS 25-1-101 to NCGS 25-11-108). See topic 3.09 Commercial Code.

3.14 FACTORS:

If any person to whom goods are consigned embezzles or fraudulently or knowingly and willfully misapplies or converts to his own use or makes away with the same with intent to embezzle, or fraudulently or knowingly and willfully misapplies or converts to his own use any money, goods or other chattels, bank note, check or order for payment of money, etc., or any other valuable security he shall be guilty of felony. If value of property is $100,000 or more, person is guilty of class C felony. If value of property is less than $100,000, person is guilty of class H felony. (NCGS 14-90). Person engaged in business of selling used goods on consignment must keep certain records. (NCGS 66-67.2).

Uniform Commercial Code adopted. (NCGS 25-1-101 to NCGS 25-11-108). See topic 3.09 Commercial Code.

License Requirements.

See topic 3.18 Licenses, Business and Professional.

Liens.

Uniform Commercial Code adopted. See topic 3.09 Commercial Code.

Consignment Agreements.

See topic 3.09 Commercial Code.

3.15 FRANCHISES:

Uniform Franchise and Business Opportunities Act not adopted. Business Opportunity Sales Act requires seller of business opportunity to disclose certain information to prospective purchasers. Disclosure document must be filed with Secretary of State. Bond or trust account must be established in certain instances. (NCGS 66-94, et seq.).

3.16 FRAUDS, STATUTE OF:

Uniform Commercial Code adopted. (NCGS 25-1-101 to NCGS 25-11-108). See topic 3.09 Commercial Code.

Promises to Answer for Debts of Others.

No action may be brought whereby to charge an executor, administrator or collector upon special promise to answer damages out of his own estate, or to charge any defendant upon special promise to answer debt, default, or miscarriage of another person, unless agreement upon which such action is brought, or some memorandum or note thereof, is in writing and signed by party charged therewith, or some other person thereunto by him lawfully authorized. (NCGS 22-1).

Contracts for Sale of Realty.

All contracts to sell or convey any lands, tenements or hereditaments, or any interest in or concerning them, are void and of no effect, unless said contract or some memorandum or note thereof is put in writing and signed by the party to be charged therewith, or by some other person by him thereto lawfully authorized. (NCGS 22-2).

Mining Leases and Contracts.

All leases and contracts for leasing land for the purpose of digging for gold, or other minerals, or for mining generally of whatever duration, and all other leases and contracts for leasing lands, exceeding in duration three years from the making thereof, are void unless put into writing and signed by the party to be charged therewith, or by some person by him lawfully authorized. (NCGS 22-2).

Trusts.

Statute of Frauds is not applicable to parol and resulting trusts, which may be established by parol evidence. (222 N.C. 123, 22 S.E.2d 244; 215 N.C. 407, 2 S.E.2d 19).

Contracts With Indians.

(NCGS 22-3). Repealed, 1995.

Part Performance.

Doctrine of part performance is not recognized in this jurisdiction. (257 N.C. 696, 127 S.E.2d 557).

Promise to pay a debt discharged in bankruptcy will not be received in evidence unless in writing and signed by the party to be charged. (NCGS 22-4).

3.17 [RESERVED]

3.18 INFORMATION TECHNOLOGY, INTERNET AND NEW MEDIA:

Computer Programs and New Media products can be protected by copyright law, patent law or trade secrets law. Copyright and patent law are both areas of U.S. federal law. See category Intellectual Property for discussion of trade secrets law in N.C. Also see category Intellectual Property for discussion of trademark law.

Cyberstalking and Computer Viruses.

It is unlawful for person to use email or other electronic communication methods to convey threat of bodily harm to person or their family, or physical injury to their property. It is also unlawful to repeatedly use email for purpose of abusing, annoying, threatening, terrifying, or embarrassing any person, or to knowingly communicate false statement concerning death, injury, illness, disfigurement, or criminal conduct with intent to abuse, annoy, threaten, terrify, harass, or embarrass. Further, it is unlawful to knowingly permit electronic communication device under one's control to be used for these purposes. (NCGS 14-196.3). Unauthorized access, damage, denial of services and trespass by or to computer programs, computers, computer systems and computer networks are contained within definition of computer-related crimes. (NCGS 14-453, et seq.).

Cyber-Bullying

Unlawful for person to use computer or computer network to build fake profile or web site with intent to intimidate minor; pose as minor in internet chat room, email message or instant message; follow minor online or into internet chat room; post on internet private, personal or sexual information pertaining to minor; post real or doctored image of minor on internet; plant statement provoking third party to stalk or harass minor; copy or disseminate unauthorized copy of data pertaining to minor; sign up minor for pornographic internet site; or sign up minor for emailing lists or to receive junk email or instant messages. (NCGS 14–458.1

Digital Signatures.

Uniform Electronic Transactions Act, as amended and adopted, became effective in N.C. on Oct. 1, 2000. (NCGS 66-311, et seq.). Act applies only to transactions between two or more persons related to business, commercial (including consumer) and governmental matters. (NCGS 66-312[17]). Person is defined as individual, corporation, business trust, estate, trust, partnership, limited liability company, association, joint venture, governmental agency, public corporation, or any other legal entity. (NCGS 66-312[13]). N.C.'s Electronic Commerce Act (NCGS 66-58.1, et seq.) facilitates electronic commerce with public agencies and regulates application of electronic signatures when used in commerce with public agencies.

Internet Taxation.

Currently, N.C. does not tax Internet access charges. Sales of goods over Internet are treated same as sales of tangible personal property through more traditional channels and are, therefore, subject to rules of nexus and N.C.'s sales and use tax laws. (NCGS 105-164.49[A][1]). N.C. currently does not apply sales or use tax to charges made for information or software downloaded from Internet; however, legislation has been proposed to modify this rule. (House Bill 231).

Rural Access.

N.C. has created e-N.C. Authority to manage, oversee and monitor efforts to provide rural counties and urban distressed areas with affordable high-speed broadband Internet access. (NCGS 143B-437.44, et seq.).

UCITA

N.C. is still considering whether to propose any legislation to implement Uniform Computer Information Transactions Act.

Unsolicited Bulk Commercial Email.

Any person sustaining damages, including lost profits, arising from transmission of unsolicited bulk commercial electronic mail may, in lieu of actual damages, elect to recover lesser of $10 for each and every unsolicited bulk commercial email received, or $25,000 per day. Injured party is also entitled to recover attorneys' fees. Injured party shall not have cause of action against electronic mail service provider who merely transmits unsolicited bulk commercial electronic mail over its computer network, but injured electronic mail service provider may recover same damage as any other injured party in addition to recovering its attorneys' fees and costs. (NCGS 1-539.2A).

3.193.16

3.17 INTEREST:

Legal rate of interest shall be 8% per annum for such time as interest may accrue, and no more. (NCGS 24-1).

Judgments.

Interest on judgments is 8%. (NCGS 24-1). Interest on award in contract action shall be at contract rate if parties so provide in contract and if not at legal rate from time of breach. (NCGS 24-5; 152 N.C. App. 619, 568 S.E.2d 230).

Maximum Rate.

Except where otherwise provided by law, parties may contract in writing for payment of interest not in excess of: (1) Rate announced by Commissioner of Banks for following calendar month such rate being latest published noncompetitive rate as of 15th day of month for six-month U.S. Treasury bills plus 6% rounded to nearest ½ of 1% or 16%, whichever is greater, where principal amount is $25,000 or less (NCGS 24-1.1[a][1], -1.1[c]); or (2) any rate agreed upon by parties where principal amount is more than $25,000 (NCGS 24-1.1[a][2]). Parties to home loan may contract in writing: (1) For payment of interest as agreed by parties where principal amount is $10,000 or more (NCGS 24-1.1A[a][1]); (2) for payment of interest as agreed by parties if lender is approved as mortgagee by Secretary of Housing and Urban Development, Federal Housing Administration, Department of Veterans Affairs, national mortgage association or any federal agency or local or foreign bank, savings and loan association or service corporation wholly owned by one or more savings and loan associations permitted by law to make home loans, credit union or insurance company or state or federal agency, where less than $10,000

(NCGS 24-1.1A[a][2]); (3) where principal amount is less than $10,000 and lender is not one described above, parties may contract for payment of interest not in excess of 16% per annum (NCGS 24-1.1A[a][3]). Where lender is affiliate or subsidiary operating out of same office of licensee under N.C. Consumer Finance Act, lender may only charge interest on outstanding principal balance at rate announced by Commissioner of Banks. Such rate shall be latest published noncompetitive rate for U.S. Treasury bills for six months plus 6%, rounded up or down to nearest ½ of 1% or 15%, whichever is greater. Such lenders may not make home loan for term in excess of six months, requiring balloon payments. (NCGS 24-1.1A[a][4]). Subject to federal requirements, at time person applies with lender for home loan, lender shall provide applicant with information and examples of amortization of home loans reflecting various terms in form made available by Commissioner of Banks and, for fixed rate home loans only, shall provide person amortization schedule for person's home loan at closing. Commissioner of Banks shall develop and make available to home loan lenders materials necessary to satisfy provisions of this subsection. (NCGS 24-1.1A[a1]). No prepayment fees or penalties may be contracted by borrower and lender with respect to any home loan where principal amount borrowed is $150,000 or less, debt is incurred by borrower primarily for personal, family, or household purposes, and loan is secured by first mortgage or first deed of trust on real estate upon which there is located or to be located structure(s) designed for occupancy of one to four families, and borrower uses premises as principal dwelling. (NCGS 24-1.1A[b]). If home loan is described in subsection (a)(1) or (a)(2) of G.S. NCGS 24-1.1A, lender may charge borrower following fees and charges (in addition to interest and other fees and charges as permitted in this section and late payment charges as permitted in G.S. NCGS 24-10.1): loan application, origination, commitment and interest rate lock fees; fees to administer construction loan or construction/permanent loan, including inspection fees and loan conversion fees; discount points, but only to extent discount points are paid for purpose of reducing, and in fact result in bona fide reduction of, interest rate or time-price differential; assumption fees to extent permitted by G.S. NCGS 24-10(d); appraisal fees to extent permitted by G.S. NCGS 24-10(h); sums for payment of bona fide loan-related goods, products, and services provided or to be provided by third parties, sums for payment of taxes, filing fees, recording fees, and other charges, and fees paid or to be paid to public officials, and fees payable to federal government, and state or local government or any federal, state or local government agency in connection with any loan made pursuant to loan program sponsored by or offered through federal government, or any state or local government or any federal, state or local government agency, including loan guarantee and tax credit programs, to extent permitted by G.S. NCGS 24-8(d); and, additional fees and charges, however individually or collectively denominated, payable to lender which, in aggregate, do not exceed ¼ of 1% of principal amount of loan, or $150, whichever is greater. (NCGS 24-1.1A[c] and [c][1]). With exception of loan application, origination, and commitment fees and except as provided in NCGS 24-1.1A(g), all of charges listed just previously, including deferral fees under G.S. NCGS 24-1.1A(g)(2)(e) for deferring payment of all or part of one or more regularly scheduled payments, regardless of whether deferral results in extension of loan maturity date or date balloon payment is due, may be applied to deferral of loan payments, upon modification, renewal, extension, or amendment of any of terms of home loan as may be agreed upon by parties notwithstanding provisions of any N.C. law, other than G.S. NCGS 24-1.1E, limiting amount of such fees or charges. (NCGS 24-1.1A[c][2]). No lender on home loans under G.S. NCGS 24-1.1A(a)(3) may charge or receive any interest, fees, charges, or discount points other than: to extent permitted by G.S. NCGS 24-8(d), sums for payment of bona fide loan-related goods, products, and third-party provided services, and sums for payment of taxes, filing fees, recording fees, and other charges and fees, paid or to be paid to public officials; interest as permitted in G.S. NCGS 24-1.1A(a)(3); and late payment charges to extent permitted by G.S. NCGS 24-10.1. (NCGS 24-1.1A[c1]). No lender on home loans under G.S. NCGS 24-1.1A(a)(4) may charge or receive any interest, fees, charges, or discount points other than: fees described in G.S. NCGS 24-10; to extent permitted by G.S. NCGS 24-8(d), sums for payment of bona fide loan-related goods, products, and third-party provided services, and sums for payment of taxes, filing fees, recording fees, and other charges and fees, paid or to be paid to public officials; interest as permitted in G.S. NCGS 24-1.1.A(a)(4); and late payment charges to extent permitted by G.S. NCGS 24-10.1. (NCGS 24-

1.1A[c2]).

G.S. NCGS 24-1.2 was repealed effective Oct. 1, 1998, and G.S. NCGS 24-1.1(c) is applicable to variations or adjustments in rates occurring on or after that date regardless of date on which loan was made. (1998 N.C. Sess. Laws 119, §§1, 2, 4).

Notwithstanding any other provision of c. 24 of G.S. or any other provision of state law, any borrower in exempt loan transaction may agree to pay, and any lender, including bank, may charge and collect from borrower interest at any rate and fees and other charges in any amount that borrower agrees to pay, and as to such transaction claim or defense of usury is prohibited. (NCGS 24-9[b]). "Exempt loan" means: (1) Loan of $300,000 or more; (2) loan in which borrower is other than natural person; or (3) loan in which borrower is natural person taking loan primarily for other than personal, family or household purpose, subject to Truth in Lending Act (Tit. 1 Pub.L. 90-321; 82 Stat. 146; 15 U.S.C. §160, et seq.). (NCGS 24-9[a][3]).

Lenders may charge 1½% per month on unpaid portion of balance of previous month less payments or credit within billing cycle or average daily balance outstanding during current billing period under certain open-end credit plans (including revolving credit card plans and revolving charge accounts, but excluding direct loans), provided that no service charge is imposed if account is paid within 25 days from billing date but upon which there may be imposed annual charge not to exceed $24. (NCGS 24-11[a]). 30-day notice of proposed annual charge must be given to cardholder. (NCGS 24-11[e]). On revolving credit loans, if agreed to in writing by borrower, lenders may collect interest and service charges by application of monthly periodic rate computed on average daily balance outstanding during billing period, such rate not to exceed 1½ %. (NCGS 24-11[b]). Extension of credit under open-end plan with monthly periodic rate greater than 1¼% may not be secured, except this does not apply to consumer credit sales under G.S. c. 25A, Retail Installment Sales Act. (NCGS 24-11[c]).

Lenders may not charge or receive any benefit or valuable consideration in connection with a loan of less than $300,000 except collateral given as security and statutory fees and interest. (NCGS 24-8). Notwithstanding any contrary provision of N.C. law, any lender may collect money from borrower for payment of bona fide loan-related goods, products, and third-party provided services as well as for taxes, filing fees, recording fees, etc., paid or to be paid to public officials and for fees payable to federal government, and state or local government or any federal, state or local government agency in connection with any loan made pursuant to loan program sponsored by or offered through federal government, or any state or local government or any federal, state or local government agency, including loan guarantee and tax credit programs. (NCGS 24-8[d]). No lender can charge or receive any fees or discounts from any borrower unless otherwise allowed where principal amount is less than $300,000 and is secured by real property, which aggregate fees or discounts shall exceed 2% if construction loan on other than one or two family dwelling, and 1% on any other type of loan. (NCGS 24-10[a]). Notwithstanding foregoing, lender may charge or receive from borrower or agent for borrower, fees or discounts which in aggregate do not exceed 2% on loans when loans are secured by second or junior lien on real property. Fees or discounts are fully earned when loan is made and are not prepayment penalty under any state law. (NCGS 24-10[g]). Lenders may charge maximum prepayment fee of 2% for prepayments made after 30 days notice on loans in original principal amount of $100,000 or less where prepayment occurs within three years after first payment of principal. Thereafter there shall be no prepayment fee, nor shall there be any prepayment fee in connection with any repayment of construction loan. (NCGS 24-10[b]). Lender may charge to any person, persons, firm or corporation that assumes loan, fee not to exceed $400 where mortgage contains due on sale clause, provided that if original obligor is not released from liability, fee shall not exceed $125. (NCGS 24-10[d][1][a]).

Where mortgage does not contain due on sale clause, fee not to exceed $125. (NCGS 24-10[d][1][b]).

Late Fees.

Subject to limitations contained below, lender may charge party to loan governed by G.S. NCGS 24-1.1, -1.2, or -1.1A, late payment charge as agreed upon by parties. (NCGS 24-10.1[a]). No lender may charge late payment charge: (1) In excess of 4% of amount of payment past due; (2) in excess of amount disclosed to borrower pursuant to Federal Consumer Credit Protection Act, which in no event shall exceed 4%; (3) for any payment unless past due for 15 days or more; provided, if interest on each installment is paid in advance, no late payment charge may be charged until payment is 30 days past due or more; (4) more than once with respect to single late payment. If late payment charge is deducted from payment made and results in subsequent default on subsequent payment, no late payment charge may be imposed for such default. If late payment charge has been once imposed with respect to particular late payment, no such charge shall be imposed with respect to any future payment which would have been timely and sufficient but for previous default; provided that when borrower fails to make installment payment, and terms of loan agreement provide that subsequent payments must first be applied to past due balance, and borrower resumes making installment payments but has not paid all past due installments, then lender may enforce contract according to its terms, imposing separate late payment charge for each installment that becomes due until default is cured; (5) on any loan which calls for repayment of entire balance in single payment and not for installments of interest or principal and interest; or (6) unless lender notifies borrower within 45 days following date payment was due that late payment charge has been imposed for particular late payment which late payment must be paid unless borrower can show that installment was paid in full and on time. No late payment charge may be collected from any borrower if borrower informs lender that nonpayment of installment is in dispute and presents proof of payment within 45 days of receipt of lender's notice of late charge. (NCGS 24-10.1[b]). For home loans made under G.S. NCGS 24-1.1A(a)(2), lenders are permitted to cure loan documents which might violate statutory restrictions on late charges if: (1) No excess late fee has been assessed or collected and (2) lender provides written notice to borrower (within 90 days of date of execution of loan documents) that late payment charge shall be 4% or less. (NCGS 24-10.1[c]).

Removal of Interest Ceiling.

Notwithstanding above provisions: (1) Where principal amount is $10,000 or more, parties to home loan may contract for payment of interest as agreed upon by parties; (2) where principal amount is less than $10,000, parties to home loan may contract for payment of interest as agreed upon by parties, if lender is either: (i) approved as mortgagee by Secretary of Housing and Urban Development, Federal Housing Administration, Department of Veterans Affairs, national mortgage association or any federal agency, or (ii) local or foreign bank, savings and loan association or service corporation wholly owned by one or more savings and loan associations and permitted by law to make home loans, credit union or insurance company, or (iii) state or federal agency (NCGS 24-1.1A[a][2]); (3) where principal amount is less than $10,000 and lender is not described in (2) above, parties to home loan may contract for payment of interest not in excess of 16% per annum. (NCGS 24-1.1A[a][3]). No prepayment fees or penalties on such home loans can be contracted when principal amount borrowed is $100,000 or less, borrower is natural person, debt is incurred primarily for personal, family, or household purposes, and loan is secured by first mortgage or first deed of trust on real estate upon which structures designed for occupation of one to four families shall stand and borrower uses premises as primary dwelling place. (NCGS 24-1.1A[b]). Parties to home loan described in (1) or (2) above may agree to defer payment of all or part of one or more unpaid installments and for payment of interest as agreed upon by parties; parties may agree that deferred interest may be added to principal balance of loan. (NCGS 24-1.1A[g]). Except as restricted by G.S. NCGS 24-1.1E, lender may charge deferral fees as may be agreed upon by parties to defer payment of one or more installments; if loan is type described in (1) above, deferral fees shall be subject to limitation set forth in (2) above. (NCGS 24-1.1A[g]). Lender is prohibited from shifting any loss, liability, or claim of any kind to closing agent or closing attorney. (NCGS 24-1.1E[c][6]). Parties to home loan described in (1) or (2) above may agree in writing to mortgage or deed of trust which provides that periodic payments may be graduated during all or parts of term of loan or which provides that periodic disbursements of part of loan proceeds may be made by lender over period of time agreed upon by parties or which includes provisions for adding deferred interest to principal or charging interest on deferred interest. (NCGS 24-1.1A[h]).

Equity Lines of Credit.

Notwithstanding any provision of G.S. NCGS 24-1, et seq., parties to equity line of credit defined in G.S. NCGS 45-81 (see category 20 Mortgages, topic 20.04 Mortgages of Real Property) may contract in writing for payment of interest not in excess of rate announced by Commissioner of Banks for loans made for following calendar month such rate being latest published noncompetitive rate as of 15th day of month for six-month U.S. Treasury bills plus 6% rounded to nearest ½ of 1% or 16%, whichever is greater. Rates for equity lines of credit may be adjustable or variable provided that rate for given period does not exceed rate specified above. (NCGS 24-1.2A). Fees may be charged on equity lines of credit which in aggregate over life of contract based on maximum limit of line of credit do not exceed fees permitted by G.S. NCGS 24-10. (See subhead Maximum Rate, supra.) (NCGS 24-1.2A[b]).

Real Estate Loans Secured by Second Mortgages.

Where principal amount of loan does not exceed $25,000 and loan is repayable in not less than six nor more than 181 successive monthly payments substantially equal in amount and loan is secured in whole or part by security interest on real property, other than first security interest on real property (NCGS 24-12), lender may not receive directly or indirectly simple interest in excess of 1½% per month or annual rate equivalent of Federal Discount Rate plus 5%, whichever is greater (NCGS 24-14[a]). In addition, lender may include actual expenses paid to third parties. (NCGS 24-14[b]). Borrower shall have right to anticipate payment of debt in whole or part at any time without payment of interest penalty or any other fee or charge for such prepayment. (NCGS 24-14[e]). In addition to interest permitted above, lender may include in principal balance fees or discounts not exceeding 2% of principal amount less amount of existing loan by that lender to be refinanced, modified or extended and fees and discounts are fully earned when loan made and are not prepayment penalty. (NCGS 24-14[f]). G.S. NCGS 24-12, et seq. shall not apply to loans made under G.S. NCGS 24-1 to -11. (NCGS 24-12).

Small Loans.

Licensed small lenders may contract on loans not exceeding $3,000 for interest charges at rates not exceeding 36% per annum on that part of unpaid principal balance of any loan not in excess of $600 and 15% per annum on any remainder of such unpaid principal balance. (NCGS 53-173[a]). Method of computation of charges is governed by statute. Charges on loans shall not be paid, deducted or received in advance. Such charges shall be computed and paid as percentage of unpaid principal balance or portion thereof and computed on basis of number of days actually elapsed. Any loan payment will be applied to accrued balance first, then to principal. (NCGS 53-173[b]). Interest rates are limited to 8% per annum from date of judgment or maturity of loan. (NCGS 53-173[c], [d]). Contracts involving cash advance not exceeding $600 may not provide for scheduled repayment in substantially equal installments, more than 25 months from date of making contract. For loans in excess of $600 but not exceeding $1,500, term is no more than 37 months; for loans in excess of $1,500 but not exceeding $2,500, term is no more than 49 months; for loans in excess of $2,500, term is no more than 61 months. (NCGS 53-180[a]). No such loan can contain provisions requiring borrower to: (1) Assign earnings or (2) pay attorneys' fees (NCGS 53-180[b], [e]), and such loan agreements are enforceable with respect to default provisions only where (1) Borrower fails to make payments or (2) prospect of payment is significantly endangered or impaired. (NCGS 53-180[c]). Such lenders may also make installment loans up to $10,000 and not secured by mortgages or deeds of trust on real estate repayable in not less than six months nor more than 84 months in equal consecutive monthly installments and charge shall not exceed following actuarial rates: (a) For loan not exceeding $7,500, 30% per annum on part of unpaid principal balance not exceeding $1,000 and 18% per annum on remainder of unpaid principal balance. Interest shall be single simple interest rate applied to outstanding balance that would earn same amount of interest as above rates for payment according to schedule; (b) for loan exceeding $7,500, 18% per annum on outstanding principal balance, provided that borrower has right to prepay without penalty. Licensee under this art. has right to elect to make loans under this section by filing of written statement with commissioner. (NCGS 53-176). No licensee shall make any loan secured by real property. (NCGS 53-180[f]).

Open Account.

On extension of credit under open-end credit or similar plan (including revolving credit card plans, and revolving charge accounts, but excluding any loan made directly by lender under check loan, check credit or other such plan) under which no service charge shall be imposed upon consumer or debtor if account is paid within 25 days from billing date (but upon which there may be annual charge imposed not to exceed $24), there may be charged and collected interest, finance charges or other fees at rate in aggregate not to exceed 1½% per month on unpaid portion of balance of previous month less payments or credit within billing cycle or average daily balance outstanding during current billing period. (NCGS 24-11[a]). No person may charge discount or fee greater than 6% of accounts acquired from vendors or others providing services who participate in such plan. (NCGS 24-11[a2]). On revolving credit loans (including check loans, check credit or other revolving credit plans whereby bank, banking institution or other lending agency makes direct loans to borrower), if agreed to in writing by borrower, such lender may collect interest and service charges by application of monthly periodic rate computed on average daily balance outstanding during billing period, such rate not to exceed 1½%. (NCGS 24-11[b]).

Usury.

Penalty is forfeiture of all interest. Party who has paid usurious interest may recover double the interest paid, if suit is brought within two years or may set off or counterclaim for same amount in action against him on the debt. Party suing on usurious contract can recover no costs. (NCGS 1-53; NCGS 6-25; NCGS 24-2).

Any person lending money by note, chattel mortgage, conditional sale or otherwise, upon any article of household or kitchen furniture, or upon any assignment or sale of wages, earned or to be earned who takes, receives, reserves or charges a greater rate of interest than permitted by law, or refuses to give receipts for payment on interest or principal of such loan, or fails and refuses to surrender note and security when paid or when new note and mortgage given in renewal unless new mortgage states amount still due on old note and mortgage and that new mortgage is given as additional security, is guilty of a class 1 misdemeanor, and in addition is subject to G.S. NCGS 24-2. (NCGS 14-391). Insurance company may lend money and as condition require borrower to take life or property insurance and deposit it as collateral security for loan without incurring penalty for usury. (NCGS 58-3-45).

See also topic 3.12 Consumer Protection, subhead Retail Credit Sales.

Prepayment.

Borrower may prepay loan in whole or part without penalty if instrument does not state borrower's rights concerning prepayment or where provisions are not in accordance with law. (NCGS 24-2.4).

3.18 [RESERVED]

3.19 LICENSES, BUSINESS AND PROFESSIONAL:

License taxes are imposed for privilege of carrying on business or doing acts named, and are for 12 months, expiring on June 30 of each year. (NCGS 105-33).

For various businesses and occupations for which privilege licenses are required, and amount thereof, Revenue Act must be consulted. (NCGS 105-33, et seq.). Copies will be furnished upon application to Secretary of Revenue, Raleigh, N.C., 27640.

Collection Agencies.

Persons, firms, corporations and associations engaged in soliciting delinquent claims or engaged in asserting, enforcing or prosecuting delinquent claims, with certain exceptions as enumerated in G.S. NCGS 58-70-15, must secure permit from Commissioner of Insurance. (NCGS 58-70-1, -5, -15) Application fee is $1,000 (NCGS 58-70-35) and bond is required (NCGS 58-70-20). Upon written demand, applicant denied permit may request hearing to determine reasonableness of commissioner's action. (NCGS 58-70-30). Insurance Commissioner may apply for restraining order to restrain violations of statute and conviction of violation results in automatic suspension of permit. (NCGS 58-70-40).

Operating procedures, such as office hours (if not normal), statements furnished to collection creditors, trust account deposits and remittances, receipts, return of accounts to creditors, and application of funds where there is debtor-creditor relationship, are prescribed by statute. (NCGS 58-70-55, -60, -65, -70, -80, -85). Certain practices, such as threats, coercion, harassment, unreasonable publication of information regarding consumer's debts, deceptive representations to consumers, collections by unconscionable means, unauthorized practice of law, and sharing office space with attorneys or lending institutions, are prohibited. (NCGS 58-70-95, -100, -105, -110, -115, -120, -125). Engaging in prohibited collection activities may result in award of actual damages plus penalty of not less than $500 and not greater than $4,000 for each violation. (NCGS 58-70-130).

Attorneys-at-law handling claims and collections in their own name and not operating as collection agency under management of layman are not collection agencies and need not apply for permit to engage in collection activities. (NCGS 58-70-15[8]).

Rental Referral Agencies.

(NCGS 66-142, et seq.). Precious metal dealers. (NCGS 66-163, et seq.). Athlete agents. (NCGS 78C-85, et seq.).

Health and Medical Licenses.

See category 15 Health, topic 15.07 Licensure and Certification.

Mortgage Lenders

North Carolina Secure and Fair Enforcement (S.A.F.E.) Mortgage Licensing Act provides for licensing and regulation of mortgage brokers, mortgage lenders, mortgage servicers and mortgage loan originators. (NCGS 53-44.010 et seq.)

3.20 MONOPOLIES, RESTRAINT OF TRADE AND COMPETITION:

Restraints of Trade.

Every contract, combination in form of trust or otherwise, or conspiracy in restraint of trade or commerce, is illegal, and every person or corporation who makes such contract expressly, or who knowingly becomes a party thereto by implication, or who engages in such combination or conspiracy, is guilty of class H felony. (NCGS 75-1). Federal cases involving §1 of Sherman Act are instructive. Monopolization and attempted monopolization are also unlawful. (NCGS 75-2.1).

Unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are unlawful. (NCGS 75-1.1). Remedy for violation includes civil actions by Attorney General (NCGS 75-15.2) and treble damage actions by any person injured as result of violation (NCGS 75-16). Recovery may include attorney's fee. (NCGS 75-16.1). Civil action must be brought within four years after cause of action accrues. (NCGS 75-16.2).

Attorney General is vested with power, and required to investigate affairs of all corporations or persons doing business in state, which may be embraced within meaning of statute defining and denouncing trusts and combinations against trade commerce. (NCGS 75-9). In performing this duty he is vested with power at all times to require officers, agents and employees of any such business to submit themselves to examination by him, and produce for his inspection any of the books and papers of business. (NCGS 75-10). Full immunity from prosecution and criminal punishment by reason of anything disclosed is expressly extended to natural persons who assist with examination. (NCGS 75-11).

Limiting Right to Do Business.

No contract or agreement limiting right of any person to do business in state is enforceable unless agreement is in writing duly signed by party who agrees not to enter into such business within such territory; provided, nothing herein will be construed to legalize any contract or agreement not to enter into business in state, which contract is now illegal or made illegal by other statutes. (NCGS 75-4).

Motion Picture Fair Competition regulated by statute. (NCGS 75C-1, et seq.). Blind bidding for first run motion picture is prohibited. (NCGS 75C-3).

Resale Price Agreements.

See category 17 Intellectual Property, topic 17.01 Trademarks and Tradenames.

3.21 NEGOTIABLE INSTRUMENTS:

See topics 3.02 Bills and Notes; 3.09 Commercial Code.

3.22 RESTRAINT OF TRADE:

See topic 3.20 Monopolies, 3.22 Restraint of Trade and Competition.

3.23 SALES:

Bills of Sale.

A bill of sale need not be under seal and does not require registration. Retention of possession by seller is a badge of fraud.

Uniform Commercial Code adopted. (NCGS 25-1-101 to NCGS 25-11-108). See topic 3.09 Commercial Code.

Conditional Sales.

Uniform Commercial Code adopted. See topic 3.09 Commercial Code.

Conditions or Warranties.

See topic 3.09 Commercial Code.

Bulk Sales.

Uniform Commercial Code adopted. See topic 3.09 Commercial Code.

Contracts of Sale.

No statutory requirements as to type size. See topics 3.16 Frauds, Statute of; 3.12 Consumer Protection.

Product Liability.

This state requires privity of contract so as to bar cause of action for breach of implied warranty by ultimate consumer or buyer against remote seller or manufacturer, generally. (208 N.C. 1, 179 S.E.2d 30). Buyer, as defined by U.C.C., his guest, member of his family, guest of member of his family or his employee may bring action directly against manufacturer for breach of implied warranty despite lack of privity. (NCGS 99B-2). Privity is not necessary in products liability cases based on negligence. (271 N.C. 485, 157 S.E.2d 98)No action based upon or arising out of defect or failure in relation to product shall be brought more than 12 years after date of initial purchase. (NCGS 146.1).

Manufacturer or seller is not liable in product liability action if proximate cause of injury is alteration of product (including unintended use or failure to observe routine care and maintenance, but not including ordinary wear and tear) after product left control of manufacturer or seller unless alteration was in accordance with instructions of or made with express consent of manufacturer or seller. (NCGS 99B-3). Manufacturer or seller is not liable if: (1) Use of product was contrary to express instructions or warnings accompanying product, (2) user was aware of dangerous condition of product, or (3) user's failure to exercise reasonable care under circumstances was proximate cause of injury. (NCGS 99B-4). Seller is not liable, except in action for breach of express warranty, when product was acquired and sold in sealed container or when seller was not afforded reasonable opportunity to inspect product unless seller damaged or mishandled product, manufacturer is not subject to jurisdiction of N.C. courts, or manufacturer has been judicially declared to be insolvent. (NCGS 99B-2).

Retail Credit Sales.

See topic 3.12 Consumer Protection.

Consumer Protection.

See topic 3.12 Consumer Protection.

Sales of Motor Vehicles.

See category 23 Transportation, topic 23.01 Motor Vehicles.

Transfer of Title.

See topic 3.09 Commercial Code.

Delivery.

See topic 3.09 Commercial Code.

Stoppage in Transitu.

See topic 3.09 Commercial Code.

Remedies of Seller.

See topic 3.09 Commercial Code.

Remedies of Buyer.

See topic 3.09 Commercial Code.

3.24 SECURITIES:

Uniform Commercial Code adopted. (NCGS 25-1-101 to NCGS 25-11-108). See topic 3.09 Commercial Code.

Uniform Act for the Simplification of Fiduciary Security Transfers Act repealed, 1997 N.C. Sess. Laws 181, §23.

Uniform Securities Ownership by Minors Act not adopted.

N.C. Securities Act (hereinafter, "Act" or "N.C. Act") became effective on Apr. 1, 1975. Prior law exclusively governs all suits, actions, and prosecutions or proceedings which were pending or initiated on basis of facts or circumstances occurring before effective date of present Securities Act, except that no civil suit or action may be maintained to enforce any liability under prior law unless brought within any period of limitation which applied when cause of action accrued and in any event within two years after effective date of present Securities Act. Securities Act is based upon Uniform Securities Act (1956), as is set forth in Uniform and Model Acts section, but section numbers of N.C. Act do not correspond with those of Uniform Securities Act. Major distinctions between N.C.'s Act and Uniform Securities Act are outlined below.

Supervision.

Act is administered by Secretary of State of N.C. (administrator), 2 South Salisbury St., Raleigh, N.C. 27601, and he may delegate all or part of authority to Deputy Securities Administrator. (NCGS 78A-45).

Regulatory Powers of Supervisory Authority.

Administrator may by order deny, suspend, or revoke any registration upon certain findings. (NCGS 78A-39). Administrator may provide alternative method of registration to facilitate central depository to permit simultaneous registration for all states requiring registration. (NCGS 78A-40). See §204 of Uniform Securities Act in Uniform and Model Acts section.

Prerequisites to Sales or Offerings.

It is unlawful for any person to offer or sell any security in N.C. unless (1) It is registered under Securities Act, (2) security or transaction is exempted under G.S. NCGS 78A-16 or -17 of Act and such exemption has not been denied or revoked under G.S. NCGS 78A-18 of Act, or it is security covered under federal law. (NCGS 78A-24). No person may transact business in state as dealer or salesman unless registered under Act. No dealer is eligible for registration under Act, or for renewal of registration under Act, unless such dealer is registered as dealer with Securities and Exchange Commission under Securities Exchange Act of 1934. (NCGS 78A-36).

Security Defined.

Means any note, stock, treasury stock, bond, debenture, evidence of indebtedness, certificate of interest or participation in any profit-sharing agreement, collateral-trust certificate, pre-organization certificate or subscription, transferable share, investment contract, including without limitation any investment contract taking form of whiskey warehouse receipt or other investment of money in whiskey or malt beverages, voting-trust certificate, certificate of deposit for security, certificate of interest or participation in oil, gas, or mining title or lease or in payments out of production under such title or lease; viatical settlement contract or any fractional or pooled interest in viatical settlement contract; or in general, any interest or instrument commonly known as "security", or any certificate of interest or participation in, temporary or interim certificate for, receipt for guarantee of, or warrant or right to subscribe to or purchase, any of foregoing. "Security" does not include any insurance or endowment policy, funding agreement, as defined in

G.S. NCGS 58-7-16, or annuity contract under which insurance company promises to pay: (i) Fixed sum of money either in lump sum or periodically for life or for some other specified period, or (ii) benefits or payments or value that vary so as to reflect investment results of any segregated portfolio of investments or of designated separate account or accounts in which amounts received or retained in connection with contract have been placed if delivering or issuing insurance company has currently satisfied Commissioner of Insurance that is in compliance with G.S. NCGS 58-7-95. (NCGS 78A-2[11]).

Exempt Securities.

(For exempt securities, see §402[a] of Uniform Securities Act in Uniform and Model Acts section.) Act's exemptions, set forth in G.S. NCGS 78A-16, differ from Uniform Act in following subsections:

(5) Any security issued by and representing an interest in or debt of, or guaranteed by, any insurance company organized under laws of any state and authorized to do business in state; but exemption does not apply to an annuity contract, investment contract, or similar security under which promised payments are not fixed in dollars but are substantially dependent upon investment results of a segregated fund or account invested in securities unless issuing or delivering company has satisfied Commissioner of Insurance that it is in compliance with G.S. NCGS 58-7-95.

(9) Any security issued by any person organized and operated not for private profit but exclusively for religious, educational, benevolent, charitable, fraternal, social, athletic, or reformatory purposes, or as chamber of commerce or trade or professional association provided, however, that administrator may by rule or order impose conditions upon this exemption either generally or in relation to specific securities or transactions.

(11) Any interest in employees' stock purchase, stock option, savings, pension, profit-sharing or other similar benefit plan.

(12) Any bond or note secured by lien on vessels shown by policies of marine insurance taken out in responsible companies to be of value, after deducting any and all other indebtedness secured by prior lien, of not less than 125% of par amount of such bonds or notes.

(13) Any capital stock issued by professional corporation organized pursuant to provisions of N.C. Professional Corporation Act, G.S. c. 55B.

(14) Any security issued by (i) Any mutual association or agricultural marketing association organized or domesticated and existing under Subchapter IV or V, respectively, of G.S. c. 54; or (ii) any electric or telephone membership corporation organized or domesticated and existing under G.S. c. 117.

(15) Any security listed or approved for listing upon notice of issuance on exchange registered with Securities and Exchange Commission or quoted or approved for quotation upon notice of issuance on automated quotation system operated by national securities association registered with Securities and Exchange Commission, provided such security or class of securities, exchange or system is approved by rule of administrator; any other security of same issuer which is of senior or substantially equal rank; any security called for by subscription rights or warrants so listed or approved; or any warrant or right to purchase or subscribe to any of foregoing.

Exempt Transactions.

(For exempt transactions, see §402(b) of Uniform Securities Act in Uniform and Model Acts section of this volume.) Act's exemptions, set forth in G.S. NCGS 78A-17, differ from

Uniform Act in following subsections:

(2) Any non-issuer distribution other than by controlling person of outstanding security if: (a) Recognized securities manual contains names of issuer's officers and directors, balance sheet of issuer as of date within 18 months, and profit and loss statement for either fiscal year preceding that date or most recent year of operations, (b) registered dealer files with administrator such information relating to issuer as administrator may by rule or order require, or (c) security has fixed maturity or fixed interest or dividend provision and there has been no default during current fiscal year or within three preceding fiscal years, or during existence of issuer and any predecessors if less than three years, in payment of principal, interest, or dividends on security.

(5) Any transaction in a bond or other evidence of indebtedness secured by lien or security interest in real or personal property, or by agreement for sale of real estate or chattels, if entire security interest or agreement, together with all bonds or other evidences of indebtedness secured thereby, is offered and sold as unit.

(8) Any offer or sale to corporation which has net worth in excess of $1,000,000, bank, savings institution, trust company, insurance company, investment company as defined in Investment Company Act of 1940, pension or profit-sharing trust or other financial institution or institutional buyer, or to dealer, whether purchaser is acting for itself or in some fiduciary capacity.

(9) Any transaction pursuant to offer directed by offeror to not more than 25 persons (other than those designated in subdivision [8]) in state during any period of 12 consecutive months, whether or not offeror or any of offerees is then present in state, if seller reasonably believes that all buyers in state are purchasing for investment; however, administrator may by rule or order withdraw, amend, or further condition this exemption for any security or security transaction and establish fee to recover costs for any filing required, not to exceed $150.

(10) Any offer or sale of preorganizational certificates or subscriptions if: (i) No commission or other remuneration is paid or given directly or indirectly for soliciting any prospective subscriber; (ii) no public advertising or solicitation is used; (iii) number of subscribers does not exceed ten and number of offerees does not exceed 25; and (iv) no payment is made by any subscriber.

(11) Any transaction pursuant to an offer to existing security holders of issuer, including persons who at time of transaction are holders of convertible securities, nontransferable warrants, or transferable warrants exercisable within not more than 90 days of issuance, if: (i) No commission or other remuneration (other than a standby commission) is paid or given directly or indirectly for soliciting any security holder in state, or (ii) issuer first files notice specifying terms of offer and administrator does not by order disallow exemption within next ten full business days.

(13) Any offer or sale by domestic corporation of its own securities if: (i) Corporation was organized for purpose of promoting community, agricultural or industrial development of area in which principal office is located, (ii) offer or sale has been approved by resolution of county commissioners of county in which its principal office is located, and if located in or within two miles of municipality, by resolution of governing body of such municipality, (iii) no commission or other remuneration is paid or given directly or indirectly for soliciting any prospective buyer in state, and (iv) corporation is both organized and operated principally to promote some community, industrial, or agricultural development that confers public benefit rather than organized and operated principally to generate pecuniary profit.

(14) Any offer, sale or issuance of securities pursuant to employee's stock purchase, stock option, savings pensions, profit-sharing or other similar benefit plan which is exempt under provisions of G.S. NCGS 78A-16(11).

(15) Any offer or sale of limited partnership interests in partnership organized under N.C. Uniform Limited Partnership Act for sole purpose of constructing, owning and operating low and moderate income rental housing project located in N.C. if total amount of offering and total number of limited partners, both within and without this State for each such partnership, does not exceed $500,000 and 100 respectively. This exemption shall be allowed without limitation as to: (i) Number, either in total or within any time period, of separate partnerships which may be formed by same general partner or partners, sponsors or individuals in which partnership interests are offered; (ii) period over which such offerings can be made; (iii) amount of each limited partner's investment; or (iv) period over which such investment is payable to partnership. For purposes of this subdivision (15), term “low and moderate rental housing project” means: (a) Any housing project with respect to which mortgage is insured or guaranteed under §§221(d)(3) or (4) or §236 of National Housing Act, or any housing project financed or assisted by direct loan, mortgage insurance or guaranty, or tax abatement under similar provisions of federal, state or local laws, whether now existing or hereafter enacted; or (b) any housing project, some or all of units of which are available for occupancy by families or individuals eligible to receive subsidies under §8 of U.S. Housing Act of 1937, as amended, or under provisions of other federal, state or local law authorizing similar levels of subsidy for lower income families, whether now existing or hereafter enacted; or (c) any housing project with respect to which loan is made, insured or guaranteed under tit. V, §515, of Housing Act of 1949, or under similar provisions of other federal, State or local laws, whether now existing or hereafter enacted.

(16) Any offer to purchase or sell or any sale or issuance of security pursuant to plan approved by administrator after hearing conducted pursuant to G.S. NCGS 78A-30.

(17) Any transaction exempt pursuant to rules established by administrator creating limited offering transactional exemptions consistent with objectives of compatibility with federal limited offering exemptions and uniformity among states. Administrator may establish $150 fee to recover costs for any filing required by such rules.

(18) Any transaction incident to class vote by security holders, pursuant to articles of incorporation or similar organizational document or applicable statute governing internal affairs of entity, on merger, conversion, consolidation, share exchange, reclassification of securities, or sale of entity's assets in consideration of issuance of securities of another entity.

(19) Any offer or sale of any viatical settlement contract or any fractionalized or pooled interest therein by issuer in transaction that meets all of following criteria: (a) Underlying viatical settlement transaction with viator was not in violation of any applicable state or federal law, and (b) offer and sale of such contract or interest therein is conducted in accordance with such conditions as Administrator requires by rule or order, including conditions governing advertising, suitability standards, financial statements, investor's right of rescission, and disclosure of information to offerees and purchasers.

Administrator may establish fee to recover costs for any filing required by such rules, not to exceed $500.00.

Registration of Securities.

Provisions made for registration by notification, registration by coordination and registration by qualification, under various circumstances, all of which closely follow Uniform Securities Act.

Registration by Notification.

N.C. Act's provisions relating to registration by notification are substantially identical to those provisions contained in §302 of Uniform Securities Act in Uniform and Model Acts section, with following exceptions (NCGS 78A-25):

(a)(2) Any security (other than certificate of interest or participation in oil, gas, or mining title or lease or in payments out of production under such title or lease) registered for nonissuer distribution if (i) Any security of same class has been registered under Act or predecessor law within five years of date of filing registration statement, or (ii) security being registered was originally issued within five years of date of filing registration statement pursuant to exemption under Act or a predecessor law.

(a)(3) Any bonds or notes secured by first mortgage upon agricultural lands used and valuable for agricultural purposes (not including oil, gas or mining property or leases) and principal value of bonds or notes does not exceed 60% of the then fair market value of lands and improvements thereon.

(a)(4) Any bonds or notes secured by first mortgage on city, town or village real estate situated in any state or in Canada if principal value of bonds and notes does not exceed 60% of fair market value of land and improvements thereon and real estate is used principally to produce through rental a net annual income or has fair net rental value at least equal to annual interest on bonds and notes, plus not less than 3% of principal of said mortgage indebtedness.

(a)(5) Any bond or note secured by first lien on collateral pledged as security with bank or trust company as trustee, which bank or trust company is incorporated under laws of and subject to examination and supervision by U.S. or by a state of U.S., and which collateral shall consist of (i) Principal amount of first mortgage bonds or notes meeting requirements of G.S. NCGS 78A-25(a)(3) or NCGS 78A-25(a)(4) or (ii) principal amount of obligations of U.S. or (iii) cash equal to not less than 100% of principal secured, or (iv) principal amount of obligations meeting requirements of (i), (ii) or (iii) of this subsection in any combination.

(c) If no stop order is in effect and no proceeding is pending under G.S. NCGS 78A-29, registration statement under this section automatically becomes effective at three o'clock Raleigh, N.C. time in afternoon of tenth full business day after filing of registration statement or last amendment, or at such earlier time as administrator determines.

Registration by Coordination.

N.C. Act's provisions relating to registration by coordination are substantially identical to those of §303 of Uniform Securities Act in Uniform and Model Acts section, with following exceptions (NCGS 78A-26):

(b)(1) One copy of latest form of prospectus filed under Securities Act of 1933.

(b)(2) Copy of articles of incorporation and bylaws or their substantial equivalents currently in effect, copy of any agreements with or among underwriters, copy of any indenture or other instrument governing issuance of security to be registered, and specimen or copy of security.

Registration by Qualification.

Securities Act's provisions relating to registration by qualification are substantially identical to those provisions contained in §304 of Uniform Securities Act in Uniform and Model Acts section, with following exceptions (NCGS 78A-27):

(b)(3) With respect to every director and officer of issuer, or person occupying similar status or performing similar functions: remuneration paid during past 12 months or fiscal year and estimated to be paid during next fiscal year, directly or indirectly, by issuer (together with all predecessors, parents, subsidiaries, and affiliates) to all those persons in aggregate.

(b)(7) Capitalization and long-term debt (on both current and a pro forma basis) of issuer and any significant subsidiary including a description of each security outstanding or being registered or otherwise offered, and statement of amount and kind of consideration (whether in form of cash, physical assets, services, patents, goodwill, or anything else) for which issuer or any subsidiary has issued any of its securities within past three years or is obligated to issue any of its securities.

Fees.

Every person filing registration statement must pay filing fee of $2,000. (NCGS 78A-28). When registration statement is withdrawn before effective date or pre-effective stop order is entered under G.S. NCGS 78A-29, administrator will retain filing fee. (NCGS 78A-28). Registration statement relating to redeemable securities to be offered for period in excess of one year, other than securities covered under federal law, must be renewed annually by payment of renewal fee of $100 and by filing any documents or reports that administrator may by rule or order require. (NCGS 78A-28). In certain exempt transactions, filing fee is $150. (NCGS 78A-17[9]).

Registration of Dealers, Etc.

Unlawful for any person to transact business in N.C. as dealer or salesman unless registered under Act. (NCGS 78A-36). No dealer may be eligible for registration under Act, or for renewal of registration under Act, unless such dealer is at time registered as a dealer with Securities and Exchange Commission under Securities Exchange Act of 1934. (NCGS 78A-36). No salesman may be registered with more than one dealer. (NCGS 78A-36[b]). Unlawful for any dealer to employ salesman unless registered. (NCGS 78A-36). Dealers and salesmen may apply for registration by filing application with administrator together with consent to service of process. (NCGS 78A-37). Every applicant must pay registration fee of $300 in case of dealer and $75 in case of salesman. (NCGS 78A-37).

Bonds.

Administrator may by rule require registered dealers and salesmen to post surety bonds in amounts up to $100,000 for dealers and up to $10,000 for salesmen and may determine their conditions. Any appropriate deposit of cash or securities may be accepted in lieu of any bonds so required. No bond may be required of any registrant whose net capital, which may be defined by rule, exceeds $100,000. Every bond must provide for suit thereon by any person who has a cause of action under G.S. NCGS 78A-56 and, if administrator by rule or order requires, by any person who has cause of action not arising under Act. Every bond must also provide that no suit may be maintained to enforce any liability on bond unless brought within two years after sale or other act upon which it is based. (NCGS 78A-37).

Advertisements.

Administrator may by rule or order require filing of any prospectus, pamphlet, circular, form letter, advertisement or other sales literature addressed or intended for distribution to prospective investors, unless security or transaction is exempted by G.S. NCGS 78A-16 or -17, excluding NCGS 78A-17(9), (17) and (19), and exemption has not been denied or revoked under G.S. NCGS 78A-18, or unless security is covered under federal law or transaction is with respect to security covered under federal law. (NCGS 78A-49[d]). Certain provisions for advertisement of viatical settlement contracts. (NCGS 78A-14).

Liabilities.

Provisions are made for criminal penalties for dealers and other persons violating provisions of Act (NCGS 78A-57), and for civil liabilities to purchaser of persons who offer or sell in violation of Act (NCGS 78A-56). In addition to making available antifraud provisions similar to

§10(b) of Securities Exchange Act of 1934 (NCGS 78A-8) as does Uniform Securities Act, the N.C. Act makes following activities unlawful: management or ownership of telephone room where "telephone room" means enterprise in which two or more persons engage in telephone communications using two or more telephones in violation of G.S. NCGS 78A-8 or -12 (NCGS 78A-11); willful quotation of fictitious price for security (NCGS 78A-12); entry of order for sale or purchase of security to effectuate misleading appearance of activity (NCGS 78A-12); or employment of any other deceptive device to manipulate market in given security, including issuance with intent to deceive of false or misleading analyses, reports or financial statements (NCGS 78A-12).

Tender Offers.

See category 2 Business Organizations, topic 2.03 Corporations.

Franchising, Pyramid Sales, Etc.

Business opportunity sales regulated by G.S. NCGS 66-94, et seq. For profit discount buying clubs are regulated by G.S. NCGS 66-131, et seq. Pyramid and chain schemes prohibited by G.S. NCGS 14-291.2.

3.25 STATUTE OF FRAUDS:

See topic 3.16 Frauds, Statute of.

3.26 TRUST RECEIPT SECURITY:

See category 8 Debtor and Creditor, topic 8.15 Pledges.

Uniform Commercial Code adopted. See topic 3.09 Commercial Code.

3.27 WAREHOUSEMEN:

Uniform Commercial Code adopted. (NCGS 25-7-101 to -603). See topic 3.09 Commercial Code.

Bonds.

Every person or every corporation organized under G.S. NCGS 66-35 to become public warehouseman, except such as shall have capital stock of not less than $5,000, must give bond to clerk of superior court of county wherein warehouse is situated in amount not less than $10,000. (NCGS 66-36).

Insurance.

Every such warehouseman must, when requested in writing by party placing property with it on storage cause such property to be insured. (NCGS 66-38).

Licenses.

No specific requirement.

Lien.

See topic 3.09 Commercial Code.

4 CITIZENSHIP

4.01 ALIENS:

Property.

Resident aliens may take and hold property by purchase and descent or by operation of law and convey and transfer same as fully as citizens of state. Rights of nonresident aliens to take and hold property depend upon reciprocity. (NCGS 64-1, et seq.).

5 CIVIL ACTIONS AND PROCEDURE

5.01 ACCORD AND SATISFACTION:

In all claims, or money demands, of whatever kind, and howsoever due, where agreement will have been or will be made and accepted for less than amount demanded or claimed to be due, in satisfaction thereof, payment of such less amount according to any such agreement in compromise of whole, will be full and complete discharge of same, except that settlement of personal injury claim does not bar malpractice claim, and settlement of motor vehicle property damage claim does not bar or constitute admission of personal injury claim. (NCGS 1-540, -540.1, -540.2).

Uniform Commercial Code adopted effective July 1, 1967. See category 3 Business Regulation and Commerce, topic 3.09 Commercial Code.

Checks.

Cashing of check tendered in good faith with some indication on check that it is clearly intended (96 N.C. App. 59, 384 S.E.2d 689) as tender of full payment of unliquidated or disputed claim is held to be accord and satisfaction as matter of law (76 N.C. App. 115, 331 S.E.2d 738).

Compromise.

Compromise and settlement is affirmative defense which must be pleaded (249 N.C. 390, 106 S.E.2d 576) and defendant has burden to establish all facts to support plea (248 N.C. 710, 104 S.E.2d 861).

Pleading.

Accord and satisfaction is affirmative defense which must be pleaded. (NCGS 1A-1, R. 8[c]).

Pleading of accord by debtor implies it is fair in substance and honest in origin; estops debtor from later assuming inconsistent position to creditor's prejudice. (239 N.C. 409, 80 S.E.2d 23).

5.02 ACTIONS:

N.C.R.Civ.P. govern procedure in superior and district courts of N.C. in all civil actions and proceedings except when differing procedure is prescribed by statute. They also govern procedure in tort actions brought before Industrial Commission except when differing procedure is prescribed by statute. (NCGS 1A-1, R. 1).

Remedies are divided into civil actions and special proceedings. (NCGS 1-1).

Equity.

The distinction between actions at law and suits in equity is abolished. (NCGS 1A-1, R. 2).

Forms of Action.

One form of action, denominated a civil action. (NCGS 1A-1, R. 2).

Conditions Precedent.

Claims (other than upon bonds, notes, interest coupons, or for matters governed by different period) against local unit of government upon contract, obligation or liability arising out of contract, express or implied, must be made within two years. (NCGS 1-53).

Commencement.

See topic 5.20 Process.

Class Actions.

Class actions permitted if adequate representation is fairly insured and number makes joinder impractical. Similar but not identical to Fed.R.Civ.P. (NCGS 1A-1, R. 23).

Intervention.

Based on Fed.R.Civ.P. (NCGS 1A-1, R. 24).

Interpleader.

(See subhead Intervention, supra.) When funds subject to competing claims, court may order party in possession to deposit funds in interest bearing account or with clerk. Funds deposited with clerk will be invested. Judgment in action will provide for disbursement of principal and interest earned on funds while so deposited. (NCGS 1A-1, R. 22).

Third Party Practice.

Based on Fed.R.Civ.P. (NCGS 1A-1, R. 14).

Joinder of Causes of Action.

Same as Fed.R.Civ.P. (NCGS 1A-1, R. 18).

Splitting Causes of Action.

Damages resulting from single wrong must be recovered in one lawsuit. Damages from multiple wrongs may either be recovered in successive actions or single lawsuit. (333 N.C. 486, 428 S.E.2d 157).

Consolidation of Actions.

Based on Fed.R.Civ.P. (NCGS 1A-1, R. 42).

Severance of Actions.

Based on Fed.R.Civ.P. (NCGS 1A-1, R. 42).

Stay of Proceedings.

If, in any action pending in any court of this state, judge finds that it would work substantial injustice for action to be tried in court of this state, judge on motion of any party may enter order to stay further proceedings in action in this state. Moving party must stipulate his consent to suit in another jurisdiction which judge finds to be convenient, reasonable and fair place of trial. (NCGS 1-75.12).

Prosecution Bond.

Bond with sufficient surety in the sum of $200 or $200 deposit in lieu of bond is required on motion of defendant to clerk or judge, except actions by indigents (NCGS 1-109, -110), actions by state or its agencies, commissions or institutions, actions by counties, drainage districts, cities and towns (NCGS 1-109) or actions for divorce or alimony (NCGS 50-2). Judge may require prosecution bond in amount exceeding $200 statutory limit. (81 N.C. App. 263, 344 S.E.2d 64).

Parties.

Actions must be prosecuted in name of real party in interest. (NCGS 1-57; NCGS 1A-1, R. 17). Executor, administrator, guardian, trustee of express trust, parties with whom or in whose name contact has been made for benefit of another, and persons expressly authorized by statute, may sue in own name without joining persons for whose benefit action is brought (NCGS 1A-1, R. 17[a]); or when statute so provides, action for use or benefit of another shall be brought in name of state of N.C.

Nonresident may sue in same manner as resident (48 N.C. 64; 107 N.C. 449, 12 S.E. 427), including suit in forma pauperis (68 N.C. 320).

Those who are united in interest must be joined on same side, except that if one who should have been a plaintiff will not join, he may be made a defendant. Persons not united in interest must be joined when not doing so would result in prejudice to rights of parties or others. (NCGS 1A-1, R. 19). Rule governing permissive joinder is same as Fed.R.Civ.P. (NCGS 1A-1, R. 20).

Survival of Causes of Action.

All causes of action survive death of either party, except causes of action for libel, slander (other than slander of title), causes of action for false imprisonment, and causes of action where relief sought could not be enjoyed, or granting it would be nugatory, after death of person in whom cause of action exists. (NCGS 28A-18-1).

Abatement and Revival.

No action abates by death, if cause of action survives. No action abates by insanity or incompetency. In case of transfer of interest other than by death, action shall be continued in name of original party, but transferee may be joined upon motion. No action against receiver of corporation abates by death of receiver but it continues against corporation or new receiver. No action abates by death or resignation of public officer, but it continues against successor. No action abates by death after verdict is rendered. (NCGS 1A-1, R. 25).

Limitation of.

See topic 5.16 Limitation of Actions.

Small Claims.

See category 6 Courts and Legislature, topic 6.01 Courts, subhead Magistrates.

Termination of Actions.

Action is pending until final determination by judgment. (266 N.C. 610, 146 S.E.2d 817). Even then, it is pending for issuing and recalling execution, determining proper credits and other motions affecting judgment not involving fraud. (213 N.C. 369, 196 S.E. 340).

Prohibited Actions.

No special provisions.

Administration.

See category 13 Estates and Trusts, topic 13.09 Executors and Administrators.

Direct actions against insurer not authorized by statute.

5.03 APPEAL AND ERROR:

Writs of error in civil actions have been abolished. (NCGS 1-268). Review of judgment or order is by appeal or extraordinary remedies of certiorari, recordari, discretionary review, mandamus, prohibition, or determination of judge of superior or district court and supersedeas. (NCGS 1-268 and -269; NCGS 7A-31, N.C. R. App. P. NCGS 21-23). See topic 5.05 Certiorari.

Cases in Which Appeal May Be Taken.

Appeal can be taken from every judicial order for trial de novo (NCGS 7A-228) upon or involving a matter of law or legal inference, whether made in or out of session, which affects a substantial right claimed in any action or proceeding, or which in effect determines action and prevents a judgment from which an appeal might be taken, or discontinues action, or grants or refuses a new trial. (NCGS 1-277; NCGS 7A-27).

To What Courts Appeals Lie.

Appeals lie from clerk of superior court to superior court, from clerk of superior court to district court (NCGS 7A-251) and from magistrate's court to district court except as provided in G.S. NCGS 7A-28. (See category 6 Courts and Legislature, topic 6.01 Courts, subhead General Court of Justice.) Appeals lie from superior court and district court to court of appeals, except that appeal from judgment of superior court imposing sentence of death lies directly to supreme court. (NCGS 7A-27). Appeals of right lie from court of appeals to supreme court where there is substantial constitutional question, or where there is dissent except as provided in G.S. NCGS 7A-28. (NCGS 7A-30). From any final order or decision of Utilities Commission, Department of Health and Human Services, Industrial Commission, the N.C. State Bar, Property Tax Commission, Commissioner of Insurance, Board of Elections, or from Secretary of Environment and Natural Resources, appeal lies of right directly to court of appeals. (NCGS 7A-29[a]). From any final order or decision of Utilities Commission in general rate case, appeal as of right lies directly to supreme court. (NCGS 7A-29[b]).

Appeal Bond.

Written undertaking in amount of $250 or any lesser sum adjudged by court must be executed by appellant to secure costs of appeal (NCGS 1-285), unless appellant is indigent (NCGS 1-288). Provisions of this section do not apply to state of N.C., city or county, local board of education, officer thereof in his official capacity, or agency thereof. (NCGS 1-285[b]).

Stay of Proceedings.

Appeal from judgment directing payment of money does not stay execution of judgment unless written undertaking is given on part of appellant by one or more sureties to effect that, if judgment appealed from is affirmed, appellant will pay amount of judgment or that part of judgment affirmed and all damages awarded against appellant on appeal. (NCGS 1-289). If appellee in civil action brought under any legal theory obtains judgment directing payment or expenditure of money in amount of $25,000,000 or more and appellant properly seeks stay of execution, amount appellant required to execute to stay execution of judgment during entire period of appeal shall be $25,000,000. (NCGS 1-289[b]). If appellee proves by preponderance of evidence that appellant is utilizing limitation of G.S. NCGS 1-289(b) for purposes of (i) dissipating its assets, (ii) secreting its assets, or (iii) diverting its assets outside jurisdiction of courts of N.C. or federal courts of U.S. other than in ordinary course of business, then limitation of G.S. NCGS 1-289(b) shall not apply. (NCGS 1-289[c]). Appeal from judgment of magistrate does not stay execution if judgment is for recovery of specific property. Generally, no undertaking is required in appeals in summary ejectment actions (NCGS 7A-227); it shall be sufficient to stay execution of judgment for ejectment if defendant appellant pays to clerk of superior court any rent in arrears as determined by magistrate and signs undertaking that he or she will pay into office of clerk of superior court amount of contract rent as it becomes due (NCGS 43-34[b]). If magistrate finds amount of rent in arrears in dispute, defendant appellant shall not be required to pay to clerk amount of rent in arrears alleged to be in dispute to stay execution of judgment for ejectment pending appeal. (NCGS 42-34[b]). Execution may be stayed by order of clerk of superior court upon petition by appellant with undertaking in writing, executed by one or more sureties approved by clerk, to effect that if judgment is rendered against appellant sureties will pay amount thereof with costs awarded against appellant except as provided in art. 3 of G.S. c. 42. (NCGS 7A-227). Stay of execution does not affect judgment lien. (NCGS 1-296).

N.C.R.Civ.P. provide automatic temporary stay of execution following entry of judgment until expiration of appeal time and discretionary stays until final judgment as to all parties when multiple claims involved, on motion for new trial to alter or amend judgment for relief from judgment for judgment notwithstanding verdict, and motions relating to injunctions. Appellate court's power to grant stay is unlimited. (See G.S. NCGS 1-289 to -295.) (NCGS 1A-1, R. 62). See category 8 Debtor and Creditor, topic 8.05 Executions.

Extent of Review.

Except for matters within original jurisdiction of clerk as ex officio judge of probate, cases on appeal to district and superior courts are generally heard de novo and review extends to questions of law and fact. (NCGS 1-276; 62 N.C. App. 412, 303 S.E.2d 361). On appeal from superior or district court, review is confined to questions of law or legal inference. (NCGS 1-277, 218 N.C. 233, 10 S.E.2d 824).

Character of Hearing.

Supreme Court prescribes rules of appellate procedures and practice. (NCGS 7A-33). See subhead Extent of Review, supra.

Supersedeas shall not issue until undertaking is filed, or deposit made, to secure judgment sought to be vacated. Certiorari and recordari may issue upon undertaking to pay costs. (NCGS 1-269).

Judgment or Order on Appeal.

Appellate court may reverse, affirm or modify judgment or order appealed from in respect mentioned in notice of appeal and as to any or all of parties and may order a new trial. When judgment is reversed or modified appellate court may make complete restitution of all property and rights lost by erroneous judgment. Where judgment is rendered against appellant or person prosecuting writ of certiorari appellate court may enter judgment on undertakings made for prosecution of appeal. (NCGS 1-297). Certificate of determination issues to court from which appeal came for direction of further orders. (NCGS 1-298).

5.04 BONDS:

Sureties.

Any indemnity or guarantee company licensed to do business in the state may act as surety on official bonds. (NCGS 58-73-5). Surety corporation has same liability as individual surety. (200 N.C. 196, 156 S.E. 531).

Mortgage or Deposit in Lieu of Bond.

In lieu of bond or undertaking required to be given at commencement of an action, or at any stage thereof, party required to give bond may execute mortgage on real estate to party to whom bond is required to be given, conditioned to same effect as such bond or undertaking, with power of sale in case of breach of its conditions. (NCGS 58-74-25). Deposit of cash or securities of N.C. or U.S. may also be made in lieu of any bond or undertaking required. (NCGS 58-75-1).

Quia Timet Notice.

Surety may give written notice to bond holder of obligation to use all reasonable diligence to recover against principal. (NCGS 26-7[a]). Surety shall then notify all co-sureties. Co-sureties, co-endorsers, and co-guarantors may join in notice to bond holder within ten days. (NCGS 26-7[b]). Defendant as guarantor is not required to mitigate damages. (89 N.C. App. 395, 366 S.E.2d 592).

Model Payment and Performance Bonds.

Where project consists of state construction contracts greater than $300,000, performance and payment bond is required of any contractor with contract of $50,000 or more. In discretion of contracting body, performance or payment bond may be required on any state construction contract. (NCGS 44A-26). Surety liability under payment bond shall not exceed face amount. (NCGS 44A-29).

Bond for Attachment.

Before court issues order of attachment, plaintiff must furnish bond in amount fixed by court sufficient to protect defendant but no less than $200. (NCGS 1-440.10).

Enforcement.

Action on official bond of public officer, or on bond or obligation taken in course of proceeding at law, under direction of court, and payable to any clerk, commissioner, or officer of court for benefit of persons interested, may be brought in name of state, but pleadings must show real party in interest. (NCGS 58-76-1, -5, -10).

Motion for Judgment on Bond.

When officer collects or receives money by virtue or under color of his office, and fails to pay over same, on demand, to person entitled thereto, person aggrieved may move, in superior court, for judgment against officer and his sureties, and may recover sum detained by officer with damages at rate of 12% from time of detention to time of payment. (NCGS 58-76-15, -20).

5.05 CERTIORARI:

Writs of certiorari are authorized by statute. (NCGS 1-269).

Jurisdiction.

Supreme court and court of appeals have jurisdiction to issue writs in aid of their own jurisdiction or to supervise and control proceedings of inferior courts. Court of appeals can also issue writs to supervise and control proceedings of Utilities Commission and Industrial Commission. (NCGS 7A-32). Superior court may issue writ to subordinate court over which it exercises appellate jurisdiction. (168 N.C. 150, 83 S.E. 630).

Grounds.

Writ may issue where substantial wrong has been done in judicial proceedings, and no appeal is provided by law, or appeal provided proves inadequate. (168 N.C. 150, 83 S.E. 630).

Certiorari will be granted without regard to merits of cause where right to appeal has been lost through neglect of an officer, contrivance of opposite party, or improper conduct of inferior court. (51 N.C. 469).

Proceedings.

Certiorari granted only upon verified petition, containing statement of facts, specifying reasons for writ, and containing certified copies of judgment, order or opinion or parts of record essential to understanding of petition. Any party may respond to petition within ten days after service of petition upon him, unless court shortens time for good cause. Determination made upon basis of petition, response and supporting papers, and no briefs or oral arguments allowed unless ordered by court. (N.C.R.App.P. 21).

Review extends to jurisdictional or procedural irregularities or errors of law. (222 N.C. 441, 23 S.E.2d 897).

5.06 CHARITABLE IMMUNITY:

See topic 5.09 Damages.

5.07 COMMISSIONS TO TAKE TESTIMONY:

See topic 5.11 Depositions and Discovery.

5.08 COSTS:

Currently filing fees for most civil actions are as follows: superior court—$93; district court—$73; magistrate's court—$63. (NCGS 7A-305). In addition, witness fees, jail fees, counsel fees, expense of service of process by certified mail or publication, cost of appeal, fees for personal service, fees of mediators appointed by court or agreed upon by parties, fees of guardians ad litem, fees for court appointees, fees of interpreters, premiums for surety bonds, expenses for stenographic and videographic assistance related to taking depositions, cost of deposition transcripts, and certain fees of expert witnesses may also be recovered. (NCGS 7A-305). If plaintiff recovers, plaintiff is entitled to costs, but no allowance is made to cover expense of litigation, such as attorneys' fees, except in limited class of cases. (NCGS 1-109).

Suit as indigent authorized on proper showing and compliance with eligibility criteria. (NCGS 1-110; NCGS 6-24).

Attorneys' Fees.

In certain actions enumerated by statute, costs shall include reasonable attorneys' fees in such amounts as court in its discretion shall determine. (NCGS 6-21; 238 N.C. 632, 78 S.E.2d 745, which was explained in 84 N.C. App. 289, 352 S.E.2d 456). Where court determines there was unwarranted refusal of defendant insurance company to pay claim which was basis of suit, court may in its discretion award to litigant obtaining judgment reasonable attorneys' fees as part of costs. (NCGS 6-21.1).

Security for Costs.

Appellant must post bond of $250 or any lesser sum adjudged by court on appeal of civil case or special proceeding. (NCGS 1-285). Bond may be waived on application and affidavit on appeal by indigent. (NCGS 1-288).

Liability of Attorney.

Plaintiff may recover costs from attorney when compelled to pay costs as consequence of attorney's failure to file complaint in proper time. (NCGS 84-12). Courts have power to order counsel to pay costs in cases in which counsel has been guilty of gross negligence. (63 N.C. 309).

5.09 DAMAGES:

Compensatory.

Common law generally prevails.

Comparative Negligence Rule.

Not adopted. See, e.g., 116 N.C. App. 64, 446 S.E.2d 816 (1994).

Punitive.

May be awarded in discretion of trier of fact, where defendant is liable for compensatory damages and aggravating factor of fraud, malice or willful/wanton conduct is present. (NCGS 1D-15). Recovery limited to three times compensatory damages or $250,000, whichever greater. (NCGS 1D-25).

Charitable Immunity.

Doctrine of charitable immunity abolished by statute. (NCGS 1-539.9). Qualified immunity for volunteers of nonprofit charitable organizations or volunteer engaged in providing emergency services governed by G.S. NCGS 1-539.10.

Employer Immunity.

Qualified immunity for employer who discloses job related information about current or former employee to prospective employer. (NCGS 1-539.12).

Sovereign Immunity.

For torts, common law rules govern, but immunity may be waived by cities (NCGS 160A-485), counties (NCGS 153A-435), boards of education (NCGS 115C-42), and community colleges (NCGS 115D-24) by purchasing liability insurance to extent of insurance coverage. State Tort Claims Act (NCGS 143-291, et seq.) waives immunity of state agencies for negligent acts of officers, employees, involuntary servants or agents while acting within scope of office, employment, service, agency or authority, but recovery limited to $150,000, balance to be paid in accordance with G.S. NCGS 143-299.4 (NCGS 143-291[a1]).Cities of 500,000 or more authorized to waive immunity from civil liability in tort by passage of resolution expressing intent to waive sovereign immunity. (NCGS 160A-485.5)

For contracts, sovereign immunity is no defense to action for breach of duly authorized state contracts. (289 N.C. 303, 222 S.E.2d 412). However, contract entered into must be valid, i.e., authorized by law. (126 N.C. App. 241, 485 S.E.2d 61, reversed on other grounds, 348 N.C. 39, 497 S.E.2d 412). Sovereign immunity bars recovery on basis of quantum meruit in action against state upon quasi contract or contract implied in law. (348 N.C. 39, 497 S.E.2d 412). Moreover, in contract action against state, where administrative or judicial relief has been afforded through statutory provisions, sovereign immunity bars common law action for breach of that contract. (122 N.C. App. 113, 468 S.E.2d 523).

Uniform Contribution Among Tortfeasors Act (Revised) adopted. (NCGS 1B-1 to -6).

See category 13 Estates and Trusts, topic 13.05 Death, subhead Actions for Death.

5.10 DECLARATORY JUDGMENTS:

See topic 5.15 Judgments.

5.11 DEPOSITIONS AND DISCOVERY:

N.C.R.Civ.P., derived in large part from Fed.R.Civ.P., apply. (NCGS 1A-1). Depositions may not be filed with court unless ordered by court or until used in proceeding. Party taking deposition is responsible for its preservation and delivery to court if needed or ordered. (NCGS 1A-1, R. 5[d]).

After commencement of action, any party may take testimony of any person, including a party, by deposition upon oral examination or written interrogatories, regarding any matter not privileged, which is relevant to subject matter involved in pending action. (NCGS 1A-1, R. 26, 30, 31). Depositions may also be taken before action or pending appeal to perpetuate testimony. (NCGS 1A-1, R. 27).

In addition to, or instead of, stenographic means, testimony at deposition may be taken without order of court by other methods including videotape. (NCGS 1A-1, R. 30[b][4]). If method other than stenographic means will be used, notice must state methods, and any party may have testimony recorded by stenographic means. (NCGS 1A-1, R. 30[b][4]).

Sound-and-visual recording, or transcript of it, if any, transcript of sound recording, or transcript of deposition taken by stenographic means, shall be submitted to deponent for examination, and shall be reviewed by deponent, unless such examination and review are waived. (NCGS 1A-1, R. 30[e]).

Uniform Foreign Depositions Act not in force.

Within State for Use Within State.

Based on Fed.R.Civ.P. 26 and 30. Party desiring to take deposition upon oral examination must give notice in writing to every other party in action. If any party lives outside State, notice must be served on all parties at least 15 days prior to deposition, and ten days prior if all parties live within State. (NCGS 1A-1, R. 30[b][1]).

In addition to case of deposition of person confined in prison, hospital or mental institution, N.C. requires leave of court, granted with or without notice, if plaintiff seeks to take deposition prior to expiration of 30 days after service of summons and complaint upon any defendant, or service made under N.C.R.Civ.P. 4(e), except that leave is not required: (1) If defendant has served notice of taking deposition or otherwise sought discovery; or (2) if special notice is given as provided in N.C.R.Civ.P. 30(b)(2). (NCGS 1A-1, R. 30[a]).

Similarly to Fed.R.Civ.P. 30(b)(5), request for production of documents may accompany notice, pursuant to N.C.R.Civ.P. 34, except that such notice must be served at least 15 days earlier than normally required and any objections to such request must be served at least seven days prior to taking deposition. (NCGS 1A-1, R. 30[b][5]).

Similarly to Fed.R.Civ.P. 26(b)(1), parties may obtain discovery regarding any matter. N.C. specifically prohibits objection that examining party has knowledge of matters as to which testimony is sought. (NCGS 1A-1, R. 26[b][1]).

N.C.R.Civ.P. 26(b)(3) closely follows Fed.R.Civ.P. 26(b)(3).

N.C. allows deposition upon written questions. (NCGS 1A-1, R. 31).

Use of Deposition.

Deposition may be used at trial or hearing as under Fed.R.Civ.P., with following addition: Deposition of person called as witness may also be used as substantive evidence by any party adverse to party who called deponent as witness and it may be used by party calling deponent as witness, as substantive evidence of such facts stated in deposition as are in conflict with or inconsistent with testimony of deponent as witness. (NCGS 1A-1, R. 26, 32). However, G.S.

NCGS 8-83 lists 11 specific instances in which depositions may be read at trial or hearing, including depositions of certain federal and state officials. (NCGS 8-83).

Effect of Taking or Using Deposition.

Party does not make person his own witness for any purpose by taking his deposition. Introduction in evidence of deposition or any part thereof for any purpose other than that of contradicting or impeaching deponent makes deponent witness of party introducing deposition, but this shall not apply to use by adverse party of deposition under other provisions of this rule. At trial or hearing any party may rebut any relevant evidence contained in deposition whether introduced by him or by any other party. (NCGS 1A-1, R. 32[c]).

Within State for Use Elsewhere.

Person desiring to take deposition must present to a judge of superior or district court a commission, order, notice, consent or other authority under which deposition is to be taken, whereupon it is duty of judge to issue necessary subpoenas. Protective orders may be made upon proper application by person to whom subpoena is directed. Failure without adequate excuse to obey subpoena may be deemed contempt of court from which it was issued. Commissioner collects a sufficient sum to cover all costs and charges incident to taking of deposition, including witness fees. (NCGS 1A-1, R. 28, 26[c]).

Outside the State for Use Within State.

No special provisions.

De Bene Esse.

Based on Fed.R.Civ.P. 27(a). (NCGS 1A-1, R. 27[a]).

Perpetuating Testimony.

Based on Fed.R.Civ.P. 27. (NCGS 1A-1, R. 27).

Pending Appeal.

Based on Fed.R.Civ.P. 27. (NCGS 1A-1, R. 27).

Before Whom Taken.

Based on Fed.R.Civ.P. 28. (NCGS 1A-1, R. 28).

Commissions.

Based on Fed.R.Civ.P. 28, with some differences. (NCGS 1A-1, R. 28).

Compelling Attendance of Witnesses.

Notice of deposition sufficient to compel party's attendance. (NCGS 1A-1, R. 30[a], 31[a]). To compel attendance of nonparty, subpoena must be issued by clerk of superior court for county in which deposition is to be taken. Issued upon proof of service of notice of deposition. (NCGS 1A-1, R. 45[d]). Party deponent may be commanded to produce documents and things by N.C.R.Civ.P. 34 request. Nonparty witness may be so commanded by subpoena duces tecum specifying items to be produced. (NCGS 1A-1, R. 45[d], 34, 26[b]).

Service.

By sheriff, his deputy, coroner or any other person not less than 18 years of age who is not a party. Service of subpoena for production of documentary evidence may be made only by delivery of copy to person named therein or by registered or certified mail, return receipt requested. Service of subpoena for attendance of witness may be made by delivery of copy to person named therein; by telephone communication with person named therein by process officer only; or by mailing subpoena, registered or certified mail, return receipt requested, by process officer only. Personal service proved by return of process officer making service and by return under oath of any other person making service. Service by telephone proved by return of process officer noting method of service. Service by mail proved by filing return receipt with return. (NCGS 1A-1, R. 45[e]).

Punishment for Failure to Obey.

Failure to obey without adequate cause may be deemed a contempt of court from which subpoena issued. Failure by party without adequate cause to obey subpoena also subjects that party to sanctions as provided by N.C.R.Civ.P. 37(d). (NCGS 1A-1, R. 45[f]).

Return.

Based on Fed.R.Civ.P. 30, 31. (NCGS 1A-1, R. 30[e], [f], R. 31[b]).

Discovery.

Based on Fed.R.Civ.P. 26 to 37, with some differences. (NCGS 1A-1, RR. 26 to 37).

Demand for Admission of Facts.

Based on Fed.R.Civ.P. 36, with some differences, primarily providing for format of request and responses. (NCGS 1A-1, R. 36).

Interrogatories.

Based on Fed.R.Civ.P. 31, 33. (NCGS 1A-1, RR. 31, 33).

Protective Orders.

Based on Fed.R.Civ.P. 26(c)(3). (NCGS 1A-1, R. 26[c]).

Motion to Terminate or Limit Examination.

Based on Fed.R.Civ.P. 30(d). (NCGS 1A-1, R. 30[d]).

Record of Examination.

Based on Fed.R.Civ.P. 30(c). (NCGS 1A-1, R. 30[c]).

5.12 EQUITY:

See topic 5.02 Actions.

5.13 EVIDENCE:

Governed primarily by N.C.R.Evid. (8C). See topic 5.11 Depositions and Discovery.

Witnesses.

Ordinarily, no witness is disqualified to testify on account of interest. (NCGS 8-49).

Party to action may be examined as witness in behalf of self or adverse party. (NCGS 8-50).

See also topic 5.11 Depositions and Discovery. (8C, R.601).

Privileged communications are recognized between attorney and client (102 N.C. 137, 9 S.E. 286), physician and patient (NCGS 8-53), clergyman and communicant (NCGS 8-53.2), psychologist and client (NCGS 8-53.3), school counselor and student (NCGS 8-53.4), marital and family therapists and clients (NCGS 8-53.5), optometrist and patient (NCGS 8-53.9), and licensed nurse and patient (NCGS 8-53.13). Information is privileged if acquired in rendering professional social work (NCGS 8-53.7) or counseling (NCGS 8-53.8) services. Judge may require disclosure of above communications, if he deems necessary for proper administration of justice (NCGS 8-53, -53.3, -53.4, -53.5, -53.7, -53.8, -53.9, -53.13; 330 N.C. 587, 411 S.E.2d 604); however, judge's power to compel does not apply to communications made during marital counseling if action is for alimony or divorce (NCGS 8-53.6). Neither patient-physician privilege, patient-nurse privilege, nor psychologist-client privilege are grounds for excluding evidence of abuse or neglect of child under 16 or disabled adult. (NCGS 8-53.1 and .3). Journalist has qualified privilege against disclosure in any legal proceeding of any confidential or nonconfidential information, document, or item obtained or prepared while acting as journalist. (NCGS 8-53.11[b]). In order to overcome qualified privilege, any person seeking to compel journalist to testify or produce information must establish by greater weight of evidence that testimony or production sought: (1) Is relevant and material to proper administration of legal proceeding for which testimony or production is sought, (2) cannot be obtained from alternate sources, and (3) is essential to maintenance of claim or defense of person on whose behalf testimony or production is sought. (NCGS 8-53.11[c]). Notwithstanding G.S. NCGS 8-53.11(b) and (c), journalist has no privilege against disclosure of any information, document, or item obtained as result of journalist's eyewitness observations of criminal or tortious conduct, including any physical evidence or visual or audio recording of observed conduct. (NCGS 8-53.11[d]).

Husband and Wife.

In civil actions, spouse of either party is competent and compellable as witness, except regarding confidential communications, disclosure of which may not be compelled. (NCGS 8-56). Spouse of defendant is competent witness for defendant in criminal actions, but failure of defendant to call spouse as witness must not be used against him. Spouse is subject to cross-examination as are other witnesses. (NCGS 8-57[a]). Spouse of defendant competent but not compellable to testify for state against defendant except that spouse of defendant becomes both competent and compellable to so testify in certain enumerated types of domestic cases. (NCGS 8-57[b]; 340 N.C. 174, 456 S.E.2d 819). No husband or wife shall be compellable in any event to disclose any confidential communication made by one to another during marriage. (NCGS 8-57[c]). Spouses competent to give evidence concerning paternity of child born or conceived during their marriage. (NCGS 8-57.2). Husband-wife privilege not grounds for excluding evidence of child abuse or neglect. (NCGS 8-57.1).

Dead Man Statute.

Interested party must not be examined as witness in own behalf or in behalf of successor in interest, against executor of deceased person, committee of lunatic, or person deriving interest from deceased or lunatic, concerning oral communication between witness and deceased or lunatic except when: (1) Executor or person deriving interest is examined in own behalf on subject matter of oral communication; (2) testimony of deceased or lunatic on same subject also provided; (3) evidence of subject matter of oral communication offered by executor or successor in interest. (8C, R. 601[c]).

Self-Incrimination.

In all criminal actions, person may not be compelled to give self-incriminating evidence. (N.C. Const., art. 1, §23).

Compelling Attendance.

See topic 5.11 Depositions and Discovery.

Medical Charges.

When issue of hospital, medical, dental, pharmaceutical or funeral charges arises, injured party or guardian, administrator, or executor is competent to give evidence regarding amount of charges if records of charges accompany testimony. Testimony establishes rebuttable presumption of reasonableness of amount of charges. (NCGS 8-58.1).

5.14 INJUNCTIONS:

Jurisdiction.

The general jurisdiction of restraining orders and injunctions is vested in the judges of the superior courts, any one of whom may issue a restraining order or an injunction in any cause and anywhere in the state. (112 N.C. 589, 17 S.E. 519; NCGS 7A-245). All judges of superior court and judges of district court authorized to hear in-chamber matters have jurisdiction to grant injunctions and issue restraining orders in matters pending in their respective divisions. (NCGS 1-493).

Procedure.

No preliminary injunction may be issued without notice to adverse party. Temporary restraining order may be granted without written or oral notice to adverse party or that party's attorney only if: (i) It clearly appears from specific facts shown by affidavit or by verified complaint that immediate and irreparable injury, loss, or damage will result to applicant before adverse party or that party's attorney can be heard in opposition, and (ii) applicant's attorney certifies to court in writing efforts, if any, that have been made to give notice and reasons supporting claim that notice should not be required. Every temporary restraining order granted notice shall be endorsed with date and hour of issuance; shall be filed forthwith in clerk's office and entered of record; shall define injury and state why it is irreparable and why order was granted without notice; and shall expire by its terms within such time after entry, not to exceed ten days, as judge fixes, unless within time so fixed order, for good cause shown, is extended for like period or unless party against whom order is directed consents that it may be extended for longer period. (NCGS 1A-1, R. 65[a, b]).

Preliminary injunctions may be made by any judge of superior court or any judge of district court authorized to hear in-chambers matters when: (1) It appears from complaint that plaintiff is entitled to relief demanded and this relief or any part of it consists in restraining commission or continuance of some act, commission or continuance of which during litigation would produce injury to plaintiff; (2) during litigation it appears by affidavit that party thereto is doing, or threatens, or is about to do some act in violation of rights of other party respecting subject of litigation and tending to render judgment ineffectual; (3) during pendency of action it appears by affidavit of any person that defendant threatens or is about to remove or dispose of his property with intent to defraud plaintiff. (NCGS 1-485).

Permanent injunctions are granted under the general equity jurisdiction of the superior courts as at common law.

Bond.

See subhead Security, infra.

Security.

No restraining order or preliminary injunction will issue except upon giving of security by applicant, in such sum as judge deems proper, for payment of such costs and damages as may be incurred or suffered by any party found to have been wrongfully enjoined or restrained. No such security shall be required of state or of any county or municipality thereof, or any officer or agency thereof acting in an official capacity, but damages may be awarded against such party. In suits between spouses relating to support, alimony, custody of children, separation, divorce from bed and board, and absolute divorce no such security shall be required of plaintiff spouse as condition precedent to issuing temporary restraining order or preliminary injunction enjoining defendant spouse from interfering with, threatening, or in any way molesting plaintiff spouse during pendency of suit, until further order of court, but damages may be awarded against such party in accord with this rule.

Surety upon bond or undertaking submits himself to jurisdiction of court and irrevocably appoints clerk of court as his agent upon whom any papers affecting his liability on bond or undertaking may be served. His liability may be enforced on motion without necessity of independent action. Motion and such notice of motion as court prescribes may be served on clerk of court, who must mail copies to persons giving security and sureties thereof, if addresses known. (NCGS 1A-1, R. 65[c]).

Temporary Injunction.

See subhead Procedure, supra.

Form and Scope.

Every order granting an injunction and every restraining order must set forth reasons for its issuance; must be specific in terms; must describe in reasonable detail, and not by reference to complaint or other document, act or acts enjoined or restrained; and is binding only upon parties to action, their officers, agents, servants, employees, and attorneys, and upon those persons in active concert or participation with them who receive actual notice, in any manner, of order by personal service or otherwise. (NCGS 1A-1, R. 65[d]).

Damages or Dissolution.

Judgment or order dissolving injunction or restraining order may carry with it damages against party procuring injunction and sureties on his undertaking without showing of malice or want of probable cause in procuring injunction. Judge may determine damages or may direct that jury or referee do so. (NCGS 1A-1, R. 65[e]).

5.15 JUDGMENTS:

Judgments by confession may be entered without action for money due or to become due. Judgment by confession may also be had for alimony or for support of minor children, in which case defendant is subject to contempt proceedings for failure to make payment. Prior to entering judgment by confession, defendant must sign and verify statement containing amount for which judgment may be entered and authorizing entry of judgment for such amount. Statement must contain name and county of residence of prospective plaintiff and of defendant and show why defendant is or may become liable to plaintiff. Statement is then filed with clerk of superior court of county in which defendant resides, or has real property, or in county where plaintiff resides. Clerk then enters judgment for amount confessed, plus costs and disbursements. Statement, with judgment, constitutes judgment roll. Executions may be issued and enforced thereon in same manner as upon other judgments. (NCGS 1A-1, R. 68.1).

Declaratory Judgments.

Uniform Act has been adopted. (NCGS 1-253 to -267).

Consent Judgments.

Judgments by consent may be entered by clerks of superior court. (NCGS 1-209[2]).

Judgments on Pleadings.

Based on Fed.R.Civ.P. 12. (NCGS 1A-1, R. 12[c]).

Summary Judgment.

Based on Fed.R.Evid. 56. (9 N.C. App. 635, 177 S.E.2d 425). Claimant may move for summary judgment after 30 days from commencement of action or after service of motion for summary judgment by adverse party. (NCGS 1A-1, R. 56[a]). Defending party may move for summary judgment at any time. (NCGS 1A-1, R. 56[b]). Motion shall be served at least ten days before time fixed for hearing. Adverse party may serve opposing affidavits at least two days before hearing. If opposing affidavit is not served on other parties at least two days before hearing on motion, court may continue matter for reasonable period to allow responding party to prepare response, proceed with matter without considering untimely served affidavit, or take such other action as ends of justice require. For purpose of this two-day requirement only, service shall mean personal delivery, facsimile transmission, or other means such that party actually receives affidavit within required time. (NCGS 1A-1, R. 56[c]).

Judgments by Default.

Based on Fed.R.Evid. 55. (9 N.C. App. 640, 177 S.E.2d 332).

Clerk may enter judgment for sum certain or for sum which, by computation, can be made certain. (NCGS 1A-1, R. 55[b][1]). Judge must enter judgment in all other cases. Judge may conduct hearing or motion for judgment by default may be decided by court without hearing if motion specifically states as such provided that party against whom judgment is sought fails to serve written notice stating grounds for opposing motion within 30 days of service of such motion in accordance with this subdivision. (NCGS 1A-1, R. 55[b]). Bond required by plaintiff if defendant served by publication. (NCGS 1A-1, R. 55[c]).

Offer of Judgment.

Same as in Fed.R.Evid. 68, except offer not accepted within ten days of service will be deemed withdrawn. (NCGS 1A-1, R. 68[a]). In action arising on contract defendant may, with his responsive pleading, serve upon plaintiff offer in writing that if he fails in defense, damages be assessed at specified sum; and if plaintiff signifies his acceptance thereof in writing within 20 days of service and on trial has verdict, damages shall be assessed accordingly. If plaintiff does not accept offer, he must prove his damages as if it had not been made and if damages are less than amount offered, defendant may recover costs on question of damages. Offer must specify whether item includes costs, or costs will be separately taxed. (NCGS 1A-1, R. 68[b]). Costs incurred after offer of judgment should not be included in calculating “judgment finally obtained” under Fed.R.Civ.P. 68. (342 N.C. 349, 464 S.E.2d 409).

Docketing.

Any judgment affecting title to real property or requiring payment of money must be indexed and recorded on judgment docket of court. (NCGS 1-233).

Relief from Judgment or Order.

Based on Fed.R.Evid. 60. (NCGS 1A-1, R. 60; 288 N.C. 183, 217 S.E.2d 532).

Lien.

Judgment is lien on land of debtor within county where judgment of superior court is docketed and is bound for ten years from date of entry of judgment under G.S. NCGS 1A-1, Rule 58, in county where judgment was originally entered. (NCGS 1-47, -234).

Transcript of docketed judgment, properly certified by the clerk, may be filed in clerk's office of any other county, and will then become lien on debtor's real estate in such county from date of docketing in such county. (NCGS 1-234). Judgment docketed pursuant to G.S. NCGS 15A-1340.38 shall constitute lien against property of defendant and is effective as against third parties from and after indexing of judgment as provided in G.S. NCGS 1-233. (NCGS 1-234).

Judgments of appellate courts may be docketed in superior court of any county, and when so docketed their lien is same as judgments of superior court. (NCGS 1-235). Judgments and decrees of U.S. district courts within state may be docketed in superior courts for purpose of creating lien in county where docketed. (NCGS 1-237).

Personal property of the debtor is not bound until actually levied on under execution. (NCGS 1-313[1]).

Satisfaction.

Party may pay whole or any part of money judgment to clerk of court in which same was rendered, at any time thereafter, although no execution has issued on such judgment. (NCGS 1-239[a][1]). Judgment creditor must notify clerk of court of payment of money upon judgment within 60 days of receipt thereof or be subject to penalties, costs, and attorneys' fees. (NCGS 1-239[c]).

Actions.

No action may be brought upon a judgment or decree of any court of U.S. or of any state or territory thereof, more than ten years after date of its rendition, nor may such an action be brought more than once or have effect of continuing lien of original judgment. (NCGS 1-47).

Payment of Judgment by Joint Debtor.

Where judgment has been rendered against two or more persons or corporations who are jointly and severally liable, and one of judgment debtors pays judgment in full, that judgment debtor may have his right of contribution preserved by noting his reservation of that right on judgment docket. Such notation preserves lien of original judgment as against any judgment debtor who does not pay his proportionate part thereof to extent of his liability thereunder in law and equity, and provision is made for shares to be determined upon motion in cause and notice to all parties upon which jury shall try all issues of fact. (NCGS 1B-7).

Revival.

Only procedure whereby owner of judgment may obtain new judgment is by independent action thereon which must be commenced within ten years from rendition of first judgment. (See subhead Actions, supra.) Concept of a dormant judgment has no place under present statutory provisions. (241 N.C. 699, 86 S.E.2d 417).

Assignment of judgment must be entered on margin of judgment docket in order to be valid as against creditors of, or bona fide purchasers from, assignor. (NCGS 1-246).

Where assignment of judgment is duly executed by owner or owners and is recorded in office of clerk of superior court of county in which judgment is docketed and specific reference thereto is made on margin of judgment docket opposite judgment to be assigned, it operates as complete and valid assignment of judgment. (NCGS 1-246).

Uniform Enforcement of Foreign Judgments Act (1964) adopted 1989. (NCGS 1C-1701 to -1708).

5.16 LIMITATION OF ACTIONS:

Uniform Commercial Code adopted. (NCGS 25-1-101 to NCGS 25-11-108). See category 3 Business Regulation and Commerce, topic 3.09 Commercial Code.

Periods

Periods prescribed for commencement of actions other than for recovery of real property, are given under G.S. (NCGS 1-46 to -56):

Over Ten Years.

See category 21 Property, topic 21.02 Adverse Possession.Defect or failure in relation to product, within 12 years from date of initial purchase. (NCGS 1–46.1)

Within Ten Years.

Judgment or decree of any court, or justice of peace, sealed instruments, mortgages and deeds in trust, and actions against land surveyors (NCGS 1-47); sale or foreclosure of real property by municipality for special assessment liens (NCGS 160A-233); all other actions for relief not otherwise limited by G.S. NCGS 1-15 to -55 (NCGS 1-56).

Within Seven Years.

By creditor against personal or real representative of deceased person. (NCGS 1-49).

Within Six Years.

Against executor, administrator, collector or guardian on his official bond, for injury to any incorporeal hereditaments, against corporation or any stockholder on account of any dividend paid, and to recover damages arising out of defective or unsafe condition of improvements to real property.(NCGS 1-50).

Six Years. Statute of Repose.

With respect of limitation upon actions arising out of defective or unsafe condition of improvements to real property, G.S. NCGS 1-50(5) prescribes outside limitation of six years from later of last specific act or substantial completion, within which limitations of G.S. NCGS 1-52 and -53 continue to run. (NCGS 1-50[5][f]).

Within Five Years.

Against railroad company (NCGS 1-51), any objections by depositor to statement of account from bank (NCGS 53-75); and claims against dissolved corporation (NCGS 55-14-07).

Within Four Years.

For breach of contracts of sale under U.C.C. (NCGS 25-2-725). See also category 3 Business Regulation and Commerce, topic 3.20 Monopolies, 3.22 Restraint of Trade and Competition, subhead Unfair Methods of Competition.

Within Three Years.

(1) Upon contract, obligation or liability arising out of contract, except those otherwise provided for; (1a) upon official bond of public officer; (2) upon liability created by statute, unless otherwise provided; (3) for trespass upon real property, from date of original trespass; (4) for taking, detaining, converting, or injuring any goods or chattels, including for their specific recovery; (5) for criminal conversation or for any other injury to another, not arising on contract and not otherwise provided for; (6) against sureties of any executor, administrator, collector or guardian, on official bond of their principal; (7) against bail; (8) for fees due to any clerk, sheriff or other officer by judgment of court; (9) for relief on ground of fraud or mistake; (10) repealed 1977 N.C. Sess. Laws 886, §1; (11) for recovery of any amount under Fair Labor Standards Act of 1938; (12) action upon claim for loss covered by insurance policy subject to three year limitation in standard fire insurance policy for N.C. (see NCGS 58-44-16[f]); (13) against public officer for

trespass; (14) action under G.S. 75B (Discrimination in Business); (15) for recovery of taxes paid (see G.S. NCGS 105-381); (16) for personal injury or physical damage to property, unless otherwise provided, from date injury becomes or ought to have become apparent, within, however, ten-year statute of repose; (17) for right of way or use of any lands for utility service, unless inverse condemnation action commenced within three years of line's construction or Oct. 1, 1984, whichever is later; (18) against land surveyors; and (19) for assault, battery or false imprisonment. (NCGS 1-52). Action for alienation of affection or criminal conversation not to be brought after 3 years from last act of defendant giving rise to action. (NCGS 52-3)

Within Two Years.

(1) For recovery of penalty for usury, for wrongful death; and against local government other than upon bonds, notes, interest coupons or when limitation is otherwise provided for. (NCGS 1-53).

Within One Year.

(1) Upon statute, for penalty or forfeiture, where action is given to state alone, or in whole or in part to party aggrieved, or to common informer, except where statute provides otherwise; (2) for libel, slander, assault, battery, or false imprisonment; (3) against public officer for escape of prisoner; (4) for year's allowance of surviving spouse or children; (5) for deficiency judgment on any debt, promissory note, bond or other evidence of indebtedness after foreclosure of mortgage or deed of trust on real estate securing such evidence of indebtedness, provided, that any earlier limitation governs; (6) for recovery of damages under art. 1A of c. 18B of G.S. (Alcohol Sales to Minors); (7) to contest validity of title to real property acquired in any tax foreclosure, or to reopen or set aside judgment in such foreclosure, as provided in G.S. NCGS 105-377; (8) as provided in art. 14 of c. 126 of G.S. (Government Whistleblowers). (NCGS 1-54).

Within Six Months.

On contract, transfer, assignment, power of attorney or other instrument affecting unearned salaries or wages, whether sealed or not; for wrongful conversion or sale of leaf tobacco and for wrongful discharge or demotion due to proceedings under Workers' Compensation Act. (NCGS 1-55).

Within Two Months.

Action contesting validity of county zoning ordinance. (NCGS 1-54.1; NCGS 153A-348).

Foreign Causes of Action.

Where cause of action arose outside this state and is barred in state where it arose, it is barred here, except when cause of action originally accrued in favor of resident of this state. (NCGS 1-21).

New Actions.

Voluntary Dismissal.

(1) By stipulation. Subject to provisions of G.S. NCGS 1A-1, R. 23(c) and of any statute of this state, action or claim may be dismissed by plaintiff without order of court (i) By filing notice of dismissal at any time before plaintiff rests his case, or (ii) by filing stipulation of dismissal signed by all parties appearing in action. Unless otherwise stated, dismissal is without prejudice, except that notice of dismissal operates as adjudication upon merits if plaintiff has once dismissed in any other court previous action based on or including same claim. If dismissed without prejudice under G.S. NCGS 1A-1, R. 41(a)(1), new action based on same claim may be commenced within one year of such dismissal. (NCGS 1A-1, R.41[a][2]). (2) By order of judge.

Except as provided in G.S. NCGS 1A-1, R. 41 (a)(1), action or claim shall not be dismissed at plaintiff's instance save order of judge or as instances of justice require. Unless otherwise specified, dismissal is without prejudice and new claim based on same action may be filed within one year. (NCGS 1A-1, R. 41[a][2]).

Latent Injury.

See subhead Periods, catchline Within Three Years, clause 15, supra. (NCGS 1-52[16]).

Malpractice.

Except where otherwise provided, cause of action for malpractice arising out of performance of or failure to perform professional services will be deemed to accrue at time of occurrence of last act of defendant giving rise to cause of action, provided that whenever there is bodily injury to person, economic or monetary loss, or defect in or damage to property which originates under circumstances making injury, loss, defect or damage not readily apparent to claimant at time of its origin, and injury, loss, defect or damage is discovered or should reasonably be discovered by claimant two or more years after occurrence of last act of defendant giving rise to cause of action, suit must be commenced within one year from date discovery is made. Nothing in statute will be construed to reduce statute of limitations in any such case below three years, and in no event will action be commenced more than four years from last act of defendant giving rise to cause of action, provided that where damages are sought by reason of foreign object, which has no therapeutic or diagnostic purpose or effect, having been left in body, person seeking damages for malpractice may commence action therefor within one year after discovery thereof as hereinabove provided, but in no event may action be commenced more than ten years from last act of defendant giving rise to cause of action. (NCGS 1-15[c]).

Actions Not Specifically Provided For.

Limitation is ten years. (NCGS 1-56).

Disabilities of Plaintiff.

Person entitled to commence action (except in certain limited cases) who at time cause of action accrues is (1) Within age of 18 years, (2) insane or (3) incompetent, as defined under G.S. NCGS 35A-1101(7) or (8), may bring his action within times herein limited after disability is removed, except in action for recovery of real property, or to make entry or defense founded on title to real property, or to rents and services out of same, when he must commence his action or make his entry within three years next after removal of disability. Notwithstanding these provisions, action on behalf of minor for malpractice arising out of performance or failure to perform professional services shall be commenced within limitations of time specified in G.S. NCGS 1-15(c); provided, that if said time limitations expire before minor attains full age of 19 years, action may be brought before minor attains full age of 19 years. For those persons under disability on Jan. 1, 1976, as result of being imprisoned on criminal charge, or in execution under sentence for criminal offense, statute of limitations will commence and no longer be tolled from Jan. 1, 1976. (NCGS 1-17).

When two or more disabilities co-exist at the time the right of action accrues, or when one disability supervenes an existing one, the limitation does not attach until they are all removed. (NCGS 1-19).

No person may avail himself of a disability unless it existed when his right of action accrued. (NCGS 1-20).

Absence or Concealment of Defendant.

If, when cause of action accrues or judgment is rendered or docketed against a person, he is out of state, action may be commenced or judgment enforced within limitations prescribed after return of person into state, and if, after such cause of action accrues or such judgment is rendered or docketed, such person departs from and resides out of this state or remains continuously absent therefrom for one year or more, time of his absence is not a part of time limited for commencement of action or enforcement of judgment; provided, where cause of action did not accrue originally to a resident of this state, arose out of state and is barred in state in which it arose, it is barred in this state, except when cause of action originally accrued in favor of resident of this state. These provisions do not apply to extent that court of this state has jurisdiction over person. (NCGS 1-21).

Death of Person in Whose Favor or Against Whom Cause of Action Exists.

If person entitled to bring an action dies before expiration of time limited for commencement thereof and cause of action survives, action may be commenced by his representatives after expiration of that time and within one year from his death. If person against whom an action may be brought dies before expiration of time limited for commencement thereof and cause of action survives, an action may be commenced against his personal representative or collector after expiration of that time if action is brought or notice of claim upon which action is based is presented to personal representative or collector within time specified for presentation of claims. If claim upon which cause of action is based is filed with personal representative or collector within time above specified, and its validity is admitted in writing by him, it is not necessary to bring action upon such claim to prevent bar, but no action shall be brought against personal representative or collector upon such claim after his final settlement. (NCGS 1-22).

Interruption of Statutory Period.

The running of the statute may be interrupted, and a new date set from which the full period will run, by a part payment or by a writing, signed by the party to be charged thereby, containing an unconditional promise to pay the debt. A mere acknowledgment of the debt will not have such effect. (NCGS 1-26). Acknowledgment must be of whole debt (91 N.C. 33); acknowledgment of lesser debt only interrupts statute's running as to lesser amount (90 N.C. 401). This section applies to actions on contracts but not to judgments. (87 N.C. 404).

Revival of Barred Claims.

Part payment made and received under circumstances permitting the inference that the debtor did so in recognition of the existence of the debt and of his obligation to pay the same revives a debt otherwise barred by the statute of limitations and fixes new date from which statute of limitations begins to run. (228 N.C. 172, 45 S.E.2d 51).

Contractual limitations are permitted, if reasonable. See category 16 Insurance, topic 16.01 Insurance Companies, subhead Limitations on Time and Place of Suit.

Pleading.

Statute of limitations is an affirmative defense which must be pleaded. (NCGS 1A-1, R. 8[c]).

Miscellaneous Provisions.

The limitations prescribed in this synopsis apply to civil actions brought in the name of the state, or for its benefit, in the same manner as to actions by or for the benefit of private parties. (NCGS 1-30).

In an action brought to recover a balance due upon a mutual open and current account, where there have been reciprocal demands between the parties, the cause of action accrues from time of latest item, proved in account, on either side. (NCGS 1-31).

The statute of limitations does not run against any judgment owing by owner of property which is exempt for period of exemption. (NCGS 1C-1604).

A personal representative is not obliged to plead the statute of limitations. (NCGS 28A-19-11).

The statute does not run in favor of an undisclosed partner until he becomes known to the plaintiff. (NCGS 1-28).

No railroad, plank road, turnpike or canal company is barred of, or presumed to have conveyed, any real estate, right of way, easement, leasehold, or other interests in the soil that has been condemned, or otherwise obtained for its use, as right of way, depot, stationhouse or place of landing, by any statute of limitation or by occupation of same by any person whatever, except any railway removing its tracks from right of way and for period of seven years does not replace them or use right of way is presumed to have abandoned it. (NCGS 1-44, -44.1).

Title to abandoned railroad easements presumed vested in adjoining property owners. (NCGS 1-44.2[a]).

See category 13 Estates and Trusts, topic 13.16 Wills, subhead Contest.

Actions to Recover Real Property.

See category 21 Property, topic 21.02 Adverse Possession.

5.17 NEGLIGENCE:

See topic 5.09 Damages.

5.17A PARTITION:

Jurisdiction and Venue.

Proceeding for partition, actual or by sale, must be instituted in county where land or some part thereof lies. (NCGS 46-2).

Proceedings.

Partition proceedings are special proceedings and are commenced by a petition before clerk of superior court. (NCGS 46-1). Persons interested in premises may agree to mediation of partition. (NCGS 46-22.1)

Partition in Kind or Sale.

Partition may be had of real estate owned by joint tenants or tenants in common. (NCGS 46-3). Court shall order sale if it finds by preponderance of evidence that actual partition cannot be made without substantial injury to interested party. (NCGS 46-22). Likewise personal property may be partitioned. (NCGS 46-42, et seq.).

5.18 PLEADING:

Governed by N.C.R.Civ.P., derived in large part from Fed.R.Civ.P. (NCGS 1A-1). See topic 5.19 Practice.

Pleadings Permitted.

Complaint, answer, reply to counterclaim denominated as such, crossclaim, answer to crossclaim, third party complaint, third party answer. Reply alleging last clear chance permitted if answer alleges contributory negligence. Court may order reply to answer or third party answer.

(NCGS 1A-1, R. 7[a]). Application to court for order shall be by motion which, unless made during hearing or trial or at session at which cause is on calendar for that session, shall be made in writing, shall state with particularity grounds, and shall set forth relief or order sought. (NCGS 1A-1, R. 7[b][1]).

Frivolous Claims.

Court may impose sanctions upon attorney who signs pleading, motion or other paper, and represented party, or both, if such pleading, motion or other paper is in violation of N.C.R.Civ.P. 11. (NCGS 1A-1, R. 11[a]).

Complaint.

Must contain a short and plain statement of claim sufficiently particular to give court and parties notice of transactions, occurrences, or series of transactions or occurrences, intended to be proved showing that pleader is entitled to relief (NCGS 1A-1, R. 8[a]), and demand for judgment for relief to which he deems himself entitled. Relief in alternative or of several different types may be demanded. In all negligence actions, and in all claims for punitive damages in any civil action, wherein matter in controversy exceeds sum of $10,000, pleading should not state demand for monetary relief, but should state that relief demanded is for damages incurred or to be incurred in excess of $10,000. Any party may request of claimant written statement of monetary relief sought. (NCGS 1A-1, R. 8[a][2]). Punitive damages must be plead with particularity and are governed by specific state statute. (NCGS 1A-1, R. 9[k]; NCGS 1D-1).

Answer.

Substantially same as Fed.R.Civ.P. 8(b). (NCGS 1A-1, R. 8[b]).

Counterclaim.

Substantially same as Fed.R.Civ.P. 13. (NCGS 1A-1, R. 13).

Reply.

Substantially same as Fed.R.Civ.P. 7(a). If answer alleges contributory negligence, party may reply alleging last clear chance. (NCGS 1A-1, R. 7[a]).

Demurrer.

Not permitted. (NCGS 1A-1, R. 7[c]).

Amended or Supplemental Pleadings.

Based on Fed.R.Civ.P. 15. (NCGS 1A-1, R. 15).

Affidavits of Merit.

Based on Fed.R.Civ.P. 56. (NCGS 1A-1, R. 56[e]).

Affidavits of Defense.

Based on Fed.R.Civ.P. 56. (NCGS 1A-1, R. 56[e]).

Bills of Particulars.

Based on Fed.R.Civ.P. 12. (NCGS 1A-1, R. 12[e]).

Verification.

Not necessary unless required by specific rule or statute. (NCGS 1A-1, R. 11).

Filing and Service.

Based on Fed.R.Civ.P. 5. (NCGS 1A-1, R. 5). In seizure of property action, when no person is named as defendant, service shall be made upon possessor or custodian of property at time of seizure. (NCGS 1A-1, R. 5[a]).

Time.

Answer, answer to cross-complaint and reply, must be filed within 30 days after service. (NCGS 1A-1, R. 12). Computation and enlargement of time based on Fed.R.Civ.P. 6, with some differences. (NCGS 1A-1, R. 6[b]).

Proof of Claims.

No specific requirement provided for by statute.

Small Claims.

See category 6 Courts and Legislature, topic 6.01 Courts, subhead Magistrates.

Offer of Judgment.

Similar to Fed.R.Civ.P. 68. (NCGS 1A-1, R. 68). Allows for conditional offer of judgment for damages. (NCGS 1A-1, R. 68[b]).

5.19 PRACTICE:

Governed by N.C.R.Civ.P., derived in large part from Fed.R.Civ.P. (NCGS 1A-1).

Pre-Trial Conferences.

Based on Fed.R.Civ.P. 16. (NCGS 1A-1, R. 16). Required in medical malpractice actions. (NCGS 1A-1, R. 16[b]).

Direct Actions Against Insurer.

See category 23 Transportation, topic 23.01 Motor Vehicles, subhead Direct Actions.

Small Claims.

See category 6 Courts and Legislature, topic 6.01 Courts, subhead Magistrates.

See also topics 5.02 Actions, Appeal and Error, Depositions, Injunctions, Judgments, Pleading, Process; category 8 Debtor and Creditor, topics 8.02 Attachment, 8.05 Executions.

5.19A PRIVACY AND PUBLICITY:

Right of Privacy.

Courts recognize common law actions for intentional, highly offensive intrusion into solitude or seclusion of another. Punitive damages are available where aggravated conduct is present. (123 N.C. App. 20, 472 S.E.2d 350).

Right of Publicity.

Courts recognize common law actions for appropriation of individual's name or likeness for commercial advantage. (212 N.C. 780, 195 S.E. 55). Courts do not recognize common law actions for placing in false light before public. (310 N.C. 312; 312 S.E.2d 405). Courts do not recognize common law actions for truthful, public disclosure of private facts. (323 N.C. 259, 372

S.E.2d 711).

5.20 PROCESS:

Civil action is commenced by filing complaint with court or by issuance of summons if court grants request to file complaint within 20 days. (NCGS 1A-1, R. 3).

Process in a civil action is a summons to bring parties before court or execution to enforce judgment. N.C.R.Civ.P. derived in large part from Fed.R.Civ.P. (NCGS 1A-1, R. 4). See topic 5.19 Practice.

General Requisites.

Summons issued forthwith upon filing of complaint and in any event within five days. (NCGS 1A-1, R. 4[a]). It runs in name of state and is directed to defendant and notifies him to appear and answer within 30 days after service on him or plaintiff will appear and apply to court for relief demanded. (NCGS 1A-1, R. 4[b]).

By Whom Issued.

Summons must be signed by clerk, assistant clerk, or deputy clerk of court in county in which action is commenced. (NCGS 1A-1, R. 4[b]).

Who May Serve.

Sheriff of county where service is to be made or some other person duly authorized by law to serve summons within state. Outside state, any person not a party and at least 21, or anyone duly authorized to serve summons by law of place where service to be made. (NCGS 1A-1, R. 4[a]).

Personal Service on Individual.

Made by delivering a copy of summons and complaint to defendant or by leaving copies thereof at his dwelling home or usual place of abode, with some person of suitable age and discretion then residing therein; or by delivering copies to agent authorized by appointment or by law to be served or to accept service of process or by serving process upon such agent or party in manner specified by any statute; or by mailing copy of summons and complaint, registered or certified mail, return receipt requested, addressed to party to be served, and delivering to addressee; or by depositing with designated delivery service authorized pursuant to 26 U.S.C. §4502(f)(2) copy of summons and complaint, addressed to party to be served, delivering to addressee, and obtaining delivery receipt that may be electronic or facsimile; or by mailing copy of summons and complaint by signature confirmation provided by U.S. Postal Service, addressed to party to be served, and delivering to addressee. (NCGS 1A-1, R. 4[j][1]).

Personal Service on Minor.

Process must be served upon minor separately in any manner prescribed for service upon natural person, and upon parent or guardian having custody of child, or if there be none, upon any other person having care and control of child. If there is no parent, guardian, or other person having care and control of child when service is made upon child, then service of process must also be made upon guardian ad litem appointed to represent him. (NCGS 1A-1, R. 4[j][2][a]).

Personal Service on Incompetent.

If plaintiff actually knows that person under disability is under guardianship of any kind, process shall be served separately upon his guardian in any manner applicable and appropriate. If plaintiff does not actually know that guardian has been appointed when service is made upon person known to him to be incompetent to have charge of his affairs, then service of process must be made upon guardian ad litem who has been appointed pursuant to Rule 17. (NCGS 1A-1, R. 4[j][2][b]).

Personal Service on Partnership.

By delivering copy of summons and complaint to any general partner, or to any attorney-in-fact or agent authorized by appointment or by law, to be served or to accept service of process in its behalf or by mailing copy of summons and complaint, registered or certified mail, return receipt requested, addressed to any general partner, attorney-in-fact or agent authorized by appointment or by law to be served or to accept service of process in its behalf; or by depositing with designated delivery service authorized pursuant to 26 U.S.C. §7502(f)(2) copy of summons and complaint, addressed to any general partner or to any attorney-in-fact or agent authorized by appointment or by law to be served or to accept service of process in its behalf, delivering to addressee, and obtaining delivery receipt; or by leaving copies thereof in office of such general partner, attorney-in-fact or agent with person who is apparently in charge of office. (NCGS 1A-1, R. 4[j][7]).

Personal Service on Domestic or Foreign Corporations.

By delivering a copy of summons and complaint to an officer, director or managing agent of corporation, or by leaving copies thereof in office of one of above with person apparently in charge of office or by delivering copy of summons and complaint to an agent authorized by appointment or by law to be served or to accept service of process or by serving process upon such agent or party in manner specified by statute or by mailing copy of summons and complaint, registered or certified mail, return receipt requested, addressed to officer, director or agent to be served; or by depositing with designated delivery service authorized pursuant to 26 U.S.C. §7502(f)(2) copy of summons and complaint, addressed to officer, director, or agent to be served, delivering to addressee, and obtaining delivery receipt. (NCGS 1A-1 R. 4[j][6]).

Personal Service on Unincorporated Association.

By delivering copy of summons and of complaint to officer, director, managing agent or member of governing body of unincorporated association, organization, or society, or by leaving copies thereof in office of such officer, director, managing agent or member of governing body with person who is apparently in charge of office. (NCGS 1A-1, R. 4[j][8]).

Personal Service on Joint Stock Company.

No special provisions.

Personal Service in Summary Ejectment.

Officer receiving summons must mail copy of summons and complaint no later than end of next business day or as soon as practicable to defendant at his last known address in stamped envelope provided by plaintiff. Officer may, within five days of issuance of summons, attempt to telephone defendant requesting defendant either to visit officer personally to accept service or to schedule appointment for defendant to receive delivery of service from officer. If officer does not attempt to telephone defendant or attempt is unsuccessful or does not result in service to defendant officer must, within five days of issuance of summons, make at least one visit to place of abode of defendant at time reasonably calculated to find defendant at place of abode to attempt personal delivery of service. He must then deliver copy of summons and complaint to defendant or leave copies thereof at defendant's dwelling house or usual place of abode with person of suitable age and discretion then residing therein. If such service cannot be made officer shall affix copies to some conspicuous part of premises claimed and make due return showing compliance with this section. (NCGS 42-29).

Alternative Methods of Service.

Personal Service Outside State.

In same manner party would be served within state. Proper person for service outside this state shall be anyone who is not party and is not less than 21 years of age or anyone duly authorized to serve summons by law of place where service is to be made. Before default judgment may be had on personal service, proof of service must be provided in accordance with requirements of G.S. NCGS 1-75.10(a)(1). (NCGS 1A-1, R. 4[a], [j2][1]).

Service on Insurance Commissioner.

See category 16 Insurance, topic 16.01 Insurance Companies, subhead Process Agent.

Service by Mail.

Registered or certified mail generally permitted. See individual subheads on Personal Service, supra.

Service by Publication.

May be used when party cannot with due diligence be served by personal delivery or by registered or certified mail, except in actions involving jurisdiction in rem or quasi in rem. Notice of service of process by publication is published once a week for three successive weeks in newspaper qualified for legal advertising, in accordance with G.S. NCGS 1-597 and G.S. 598, circulated in area where party to be served is believed by serving party to be located. If no reliable information concerning location of party is available then in newspaper circulated in county where action is pending. If party's post office address is known or can with reasonable diligence be ascertained, copy of notice of service of process by publication must be mailed to him at or immediately prior to first publication. Upon completion of service, there must be filed with court affidavit showing publication and mailing, in accordance with requirements of G.S. NCGS 1-75.10(a)(2), circumstances warranting use of service by publication and information, if any, regarding location of party served. Notice of service of process by publication must designate court in which action has been commenced; title of action, which may be name of first plaintiff and first defendant; be directed to defendant sought to be served; state that pleading seeking relief against him has been filed or has been required to be filed by specified date; state nature of relief sought; require that defendant being so served to make defense to such pleading within 40 days after date stated in notice, exclusive of such date, which date so stated shall be date of first publication of notice, or date when complaint is required to be filed, whichever is later, and notify defendant that upon his failure to do so party seeking service of process by publication will apply to court for relief sought; in cases of attachment, state information required by G.S. NCGS 1-440.14; be subscribed by party seeking service or his attorney and give post-office address of such party or his attorney. Form is provided. (NCGS 1A-1, R. 4[j1]). In actions involving jurisdiction in rem or quasi in rem, where defendant is known, service by publication shall be satisfied if made in county where action is pending and proof of service is made in accordance with G.S. NCGS 1A-1, R. 4(j2). If defendant is unknown, he may be designated by description and process served by publication in manner specified for known defendant. (NCGS 1A-1, R. 4[k]).

Service in Foreign Country.

Alternative provisions for service in foreign country are also provided. (NCGS 1A-1, R. 4[j3]).

Long Arm Statute.

See subhead Alternative Methods of Service, supra.

Proof of Service.

Personal Service or Substitute Personal Service.

Before judgment by default may be had on personal service, proof of service must be provided as follows: if served by sheriff of county or lawful process officer in this state where defendant was found, by officer's certificate thereof, showing place, time and manner of service; or if served by any other person, his affidavit thereof, showing place, time and manner of service; his qualifications to make service; that he knew person served to be party mentioned in summons and delivered to and left with him copy; and if defendant was not personally served, when, where and with whom such copy was left. If service is made outside state, proof may in alternative be made in accordance with law of state where made. (NCGS 1-75.10[a][1]; NCGS 1A-1, R. 4[j2][1]). When officer's certificate on its face, shows legal service, that return is at least prima facie to show service in fact. Such return cannot be set aside unless evidence is clear and unequivocal. (245 N.C. 640, 97 S.E.2d 239; 293 N.C. 67, 235 S.E.2d 146).

Service by Registered or Certified Mail.

Before judgment by default may be had on service by registered or certified mail, signature confirmation, or by designated delivery service authorized pursuant to 26 U.S.C. §7502(f)(2) with delivery receipt, servicing party shall file affidavit with court showing proof of such service in accordance with requirements of G.S. NCGS 1-75.10(a)(4), G.S. NCGS 1-75.10(a)(5), or G.S. NCGS 1-75(6), as appropriate. This affidavit together with return or delivery receipt or copy of proof of delivery provided by U.S. Postal Service, signed by person who received mail or delivery if not addressee raises presumption that person who received mail or delivery and signed receipt was agent of address authorized by appointment or by law to be served or to accept service of process or was person of suitable age and discretion residing in addressee's dwelling house or usual place of abode. In event presumption described in preceding sentence is rebutted by proof that person who received receipt at addressee's dwelling house or usual place of abode was not person of suitable age and discretion residing therein, statute of limitation may not be pleaded as defense if action was initially commenced within period of limitation and service of process is completed within 60 days from date service is declared invalid. Service shall be complete on day summons and complaint are delivered to address. (NCGS 1-75.10[a][4]; NCGS 1A-1, R. 4[j2][2]). Service by electronic mailing not authorized. (NCGS 1A-1, R. 4[j6]).

Service by Publication.

Before judgment by default may be had on service by publication, serving party must file affidavit with court showing circumstances warranting use of service by publication, information, if any, regarding location of party served which was used in determining area in which service by publication was printed and proof of service, in accordance with G.S. NCGS 1-75.10(a)(2). (NCGS 1-75.10[a][2]; NCGS 1A-1, R. 4[j2][3]).

Written admission of defendant is proof of service and his signature or subscription of his name to admission is presumptive evidence of genuineness. (NCGS 1-75.10[a][3])

Nonresident Motorist.

See category 23 Transportation, topic 23.01 Motor Vehicles.

Service to Exercise In Rem or Quasi In Rem Jurisdiction.

If defendant is known, he may be served personally or by another appropriate method as set out above; if unknown, he may be designated by description and served by publication. (NCGS 1A-1, R. 4[k]).

5.21 REPLEVIN:

The remedy of claim and delivery has taken the place of common law action of replevin. (NCGS 1-472, et seq.).

Proceedings.

In an action of claim and delivery to recover the possession of personal property, plaintiff may at time of issuing summons, or at any time before answer, claim immediate delivery of such property at any time before judgment. (NCGS 1-472). He must file affidavit showing: (1) That plaintiff is owner of property claimed (particularly describing it) or is lawfully entitled to possession thereof; (2) that property is wrongfully detained by defendant; (3) alleged cause of detention thereof; (4) that property has not been taken for taxes, assessment or fine pursuant to statute, or seized under execution or attachment against property of plaintiff, or if so seized, that it is by statute exempt from such seizure; and (5) actual value of property. (NCGS 1-473).

Bond.

Plaintiff must give written undertaking, with sufficient sureties payable to defendant, approved by sheriff, in double value of property, for its return to defendant, if return thereof be adjudged, and for damages caused by deterioration and detention. If defendant excepts to sufficiency of sureties within three days after service of copies of affidavit and undertaking upon him, sureties must justify on notice or new sureties must be substituted. If defendant fails to except to sufficiency within time period, he is deemed to have waived all objection to them. (NCGS 1-475, -477).

Order.

Clerk of court, upon request of plaintiff, must issue a notice to defendant setting forth time and place for a hearing. Upon request of plaintiff, notice will contain an order enjoining defendant from willfully disposing of property, removing property from N.C., or damaging property. After service of notice upon defendant, clerk of court, upon plaintiff's request, must mail to defendant form by which defendant can waive his right to hearing. If signed and returned by defendant, clerk may waive necessity of hearing. Otherwise, clerk must conduct hearing. If, after hearing clerk believes plaintiff's evidence then, upon plaintiff's posting of bond, clerk must issue an order requiring sheriff to take property and deliver it to plaintiff. Act of clerk in issuing or refusing to issue order to sheriff is judicial act and may be appealed pursuant to G.S. NCGS 1-301.1 to judge of district or superior court having jurisdiction of principal action. Where debtor allegedly defaulted on payments under conditional sale contract, purchase money security agreement or loan secured by personal property, order expires in 60 days. (NCGS 1-474, -474.1).

Repossession.

If defendant does not except to sufficiency of sureties, defendant may retain property to abide result of action, on giving bond in same amount to deliver property to plaintiff, and pay damages and costs, if it be so adjudged. If defendant fails to do so, sheriff will deliver property to plaintiff at end of three days. (NCGS 1-478).

Claims of Third Persons.

Third person may intervene by filing affidavit of his title and right and by delivering to sheriff an undertaking for twice value of property specified in affidavit. Copy of this affidavit and undertaking will be served by sheriff on plaintiff and defendant at least ten days before return day of summons in action. (NCGS 1-482).

5.22 SEQUESTRATION:

When there is reason to believe that property subject of controversy will be destroyed, removed or disposed of by defendant pending suit, writ of sequestration is allowed to secure property until right thereto can be adjudicated either in law or in equity. (236 N.C. 153, 72 S.E.2d 221; NCGS 1-485).

See also topic 5.14 Injunctions.

Juries.

Court, in its discretion, may direct any jury, civil or criminal, to be sequestered while it has case or issue under consideration. (NCGS 9-17; NCGS 15A-1236).

Witnesses.

Court may order that witnesses be excluded in civil or criminal trial so that they cannot hear testimony of other witnesses. (NCGS 8C-1, R. 615; NCGS 15A-1225).

5.23 SERVICE:

See topic 5.20 Process.

5.24 STAY OF EXECUTION:

See topic 5.03 Appeal and Error; category 8 Debtor and Creditor, topic 8.05 Executions.

5.25 SUBMISSION OF CONTROVERSY:

Statutory authority for submission of controversy without action repealed by 1967 N.C. Sess. Laws 954, §4, effective Jan. 1, 1970.

5.26 VENUE:

Civil actions must be brought as follows: those principally concerning real property or right or interest therein, or for recovery of personal property when recovery of personal property is primary relief sought, in county where subject of action situated. (NCGS 1-76).

Actions to recover deficiency, which remains owing on debt after secured personal property has been sold to partially satisfy debt, must be brought in county in which debtor or debtor's agent resides or in county where loan was negotiated. (NCGS 1-76.1).

Actions for recovery of penalty, or for forfeiture imposed by statute, or against public officer for act done by him by virtue of his office or against person acting by his command or in his aid, in county where action arose. (NCGS 1-77).

On official bonds or against executors or administrators, in county where bond was given, if principal or surety is within county; if not, then in plaintiff's county. (NCGS 1-78).

In all other cases, where plaintiff or defendant or any of them may reside, and if none of the parties reside within state, then in any county that plaintiff may designate. (NCGS 1-82).

If action is commenced in wrong county it may be transferred to proper county. (NCGS 1-83).

Actions against foreign corporations, in any county in which cause of action arose, or in which corporation usually did business, or has property, or in which plaintiffs, or either of them, reside, in following cases: (1) By resident, for any cause of action; (2) by nonresident, in any county where he or they are regularly engaged in carrying on business; (3) by plaintiff nonresident, when cause of action arose or subject of action is situated in state. (NCGS 1-80).

Actions against railroad, either in county where cause of action arose or adjoining county, or where plaintiff resided at that time. (NCGS 1-81).

May be removed when there are probably grounds to believe that fair and impartial trial cannot be obtained in county. (NCGS 1-84).

Any person residing or stationed on military installation or reservation for one year or more is resident of county containing base and adjacent county, if person lives in adjacent county. (NCGS 1-82).

Residence of domestic corporations, limited partnerships, limited liability companies, and registered limited liability partnerships is where registered or principal office of corporation is located, or where corporation maintains place of business; if neither exists, residence shall include any place where corporation is regularly engaged in carrying on business. (NCGS 1-79).

Change of Venue.

The court may change the venue when: (1) The suit is not brought in the proper county; (2) the convenience of witnesses and the ends of justice would be promoted by such change; (3) judge has at any time been interested as party or counsel or (4) when plaintiff makes motion in divorce action and defendant has not been served. (NCGS 1-83).

Contract Provisions.

Contract provision specifying exclusive forum is valid. (333 N.C. 140, 423 S.E.2d 780).

5.27 WITNESSES:

See topic 5.13 Evidence, subhead Witnesses.

6 COURTS AND LEGISLATURE

6.01 COURTS:

United States District Courts.

Eastern District: Headquarters of Clerk: Raleigh 27601.

Counties composing Eastern District are, by Division:

Northern Division.

Bertie, Camden, Chowan, Currituck, Dare, Gates, Hertford, Northampton, Pasquotank, Perquimans, Tyrrell, Washington.

Eastern Division.

Beaufort, Carteret, Craven, Edgecombe, Greene, Halifax, Hyde, Jones, Lenoir, Martin, Pamilico, Pitt.

Western Division.

Cumberland, Franklin, Granville, Harnett, Johnston, Nash, Vance Wake, Warren, Wayne, Wilson, and that portion of Durham County encompassing Federal Correctional Institution, Butner, NC.

Southern Division.

Bladen, Brunswick, Columbus, Duplin, New Hanover, Onslow, Pender, Robeson, Sampson.

Court sits at Raleigh (Western Division Headquarters), Elizabeth City (Northern Division Headquarters), Greenville (Eastern Division Headquarters), Wilmington (Southern Division

Headquarters), Fayetteville, and New Bern.

Filing fees required are as follows: $150 by plaintiff upon instituting suit or party removing cause from state court.

Middle District: Headquarters of Clerk: Greensboro 27401.

Counties composing Middle District are, by Division:

Durham Division.

Chatham, Durham (excluding portion of Durham County encompassing Federal Correctional Institution, Butner, NC), Lee, Orange, Person.

Greensboro Division.

Alamance, Caswell, Guilford, Randolph, Rockingham.

Rockingham Division.

Hoke, Montgomery, Moore, Richmond, Scotland.

Salisbury Division.

Cabarrus, Davidson, Davie, Rowan, Stanly.

Winston-Salem Division.

Forsyth, Stokes, Surry, and Yadkin.

Court sits at Durham, Greensboro, Rockingham, Salisbury, and Winston-Salem.

Filing fees required are as follows: $150 by plaintiff upon instituting suit or party removing cause from state court.

Western District: Headquarters of Clerk: Charlotte 28202.

Counties composing Western District are, by Division:

Asheville Division.

Avery, Buncombe, Haywood, Henderson, Madison, Mitchell, Transylvania, Yancey.

Bryson City Division.

Cherokee, Clay, Graham, Jackson, Macon, Swain.

Charlotte Division.

Anson, Gaston, Mecklenburg, Union.

Shelby Division.

Burke, Cleveland, McDowell, Polk, Rutherford.

Statesville Division.

Alexander, Alleghany, Ashe, Caldwell, Catawba, Iredell, Lincoln, Watauga, and Wilkes.

Court sits at Asheville, Bryson City, Charlotte, Shelby, and Statesville.

Filing fees required are as follows: $150 by plaintiff upon instituting suit or party removing cause from state court.

Supreme Court of North Carolina.

Jurisdiction.

Supreme court has jurisdiction to review upon appeal any decision of courts below upon any matter of law or of legal inference, to decide issues and questions of fact in cases of an equitable nature where evidence is before it. It has power to issue any remedial writs necessary to give it a general supervision and control over proceedings of inferior courts. It has original jurisdiction to hear claims against state, but its decision is merely recommendation, no process in nature of execution issues thereon; they are to be reported to next session of general assembly for its action. (NCGS 7A-25, et seq.). Decisions of court of appeals upon review of valuation of exempt property under G.S. 1C are final and not subject to further review in supreme court. (NCGS 7A-28[b]).

Discretionary Review.

Appeal lies of right to supreme court from any decision of court of appeals rendered in case: (1) Which directly involves substantial question arising under Constitution of U.S. or of N.C.; or (2) in which there is dissent. (NCGS 7A-30). In any cause in which appeal is taken to court of appeals, except cause appealed from N.C. Industrial Commission, N.C. State Bar pursuant to G.S. NCGS 84-28, Property Tax Commission pursuant to G.S. NCGS 105-345, or Commissioner of Insurance pursuant to G.S. NCGS 58-2-80, or motion for appropriate relief or valuation of exempt property pursuant to G.S. NCGS 7A-28, supreme court may, in its discretion, on motion of any party to cause or on its own motion, certify cause for review by supreme court, either before or after it has been determined by court of appeals. (NCGS 7A-31[a]). Cause appealed to court of appeals from any of administrative bodies listed in preceding sentence may be certified in similar fashion, but only after determination of cause in court of appeals. (NCGS 7A-31[a]). State may move for certification for review of any criminal cause, but only after determination of cause by court of appeals. (NCGS 7A-31[a]). In causes subject to certification under G.S. NCGS 7A-31(a), certification may be made by supreme court before determination of cause by court of appeals when in opinion of supreme court: (1) Subject matter of appeal has significant public interest; (2) cause involves legal principles of major significance to jurisprudence of state; (3) delay in final adjudication and substantial harm is likely to result from failure to certify; or (4) work load of appellate division courts is such that expeditious administration of justice requires certification. (NCGS 7A-31[b]). In causes subject to certification under NCGS 7A-31(a), certification may be made by supreme court after determination of cause by court of appeals when in opinion of supreme court: (1) Subject matter of appeal has significant public interest; (2) cause involves legal principles of major significance to jurisprudence of state; or (3) decision of court of appeals appears likely to be in conflict with decision of supreme court. (NCGS 7A-31[c]).

Place of Sitting.

At Raleigh.

Court of Appeals.

Jurisdiction.

Court of appeals has jurisdiction to review on appeal any decision by superior courts, district courts, Utilities Commission, Industrial Commission, N.C. State Bar or appeal from Commissioner of Insurance, except where appeal lies of right direct to supreme court. It has power to issue any remedial writs necessary to give it general supervision and control over proceedings of inferior courts. (NCGS 7A-26, et seq.).

Place of Sitting.

At Raleigh.

Superior Courts.

Jurisdiction.

Superior courts have original jurisdiction of all civil actions whereof exclusive original jurisdiction is not given to some other courts, and of all criminal actions that constitute felonies. (NCGS 7A-240, -271). Exclusive original jurisdiction for probate of wills and for administration of decedents' estates is vested in superior court division and is exercised by superior courts and by clerks of superior court as ex officio judge of probate. (NCGS 7A-241). Superior courts are at all times open for transaction of business within their jurisdiction, except trial of issues of fact requiring jury.

Superior court is proper division for civil actions where amount in controversy exceeds $10,000, exclusive of interests and costs, and when title to real estate is involved. (NCGS 7A-243). Superior court is also proper division, without regard to amount in controversy, in following civil suits: (1) Where relief prayed for is injunctive relief; declaratory relief to establish validity of any statute, ordinance or regulation; or enforcement or declaration of any claim or constitutional right; (2) for hearing or trial of most special proceedings; (3) mandamus; (4) quo warranto; (5) condemnation actions and proceedings; (6) corporate receiverships; (7) review of decisions of most administrative agencies; and (8) appeals from clerk. (NCGS 7A-242 to -251). Any party aggrieved by appellate judgment of superior court in civil case may as of right appeal to court of appeals. (NCGS 7A-27).

In civil actions any party may move for transfer between trial divisions. Failure to move for transfer within time prescribed, however, is waiver of any objection to division, except that there is no waiver of jurisdiction of superior court division in probate of wills and in administration of decedents' estates. Transfer between divisions may be effected by any superior court judge on his own motion for purpose of efficient administration of trial divisions at any time before case is calendared for trial where pleadings clearly show case is pending in improper division. (NCGS 7A-257, -259).

Divisions and Districts.

State is divided into eight judicial divisions: first division containing superior court districts 1, 2, 3A, 6A, 6B, 7A, 7B and 7C; second division containing superior court districts 3B, 4A, 4B, 5A, 5B, 5C, 8A and 8B; third division containing superior court districts 9, 9A, 10A, 10B, 10C, 10D, 14A, 14B, 15A and 15B; fourth division containing superior court districts 11A, 11B, 12A, 12B, 12C, 13, 16A and 16B; fifth division containing superior court districts 17A, 17B, 18A, 18B, 18C, 18D, 18E, 19B, 19D, 21A, 21B, 21C, 21D and 23; sixth division containing superior court districts 19A, 19C, 20A, 20B, 22A, and 22B; seventh division containing superior court districts 25A, 25B, 26A, 26B, 26C, 27A and 27B; and eighth division containing superior court districts 24, 28, 29, 30A and 30B. (NCGS 7A-41).

(Divisions and Districts enumerated in G.S. NCGS 7A-41 reorganized and renumbered effective Jan. 1, 2009.)

Place of Sitting.

Alamance County: Fifteenth-A District; court sits at Graham.

Alexander County: Twenty-second-A District; court sits at Taylorsville.

Allegheny County: Twenty-third District; court sits at Sparta.

Anson County: Twentieth-A District; court sits at Wadesboro.

Ashe County: Twenty-third District; court sits at Jefferson.

Avery County: Twenty-fourth District; court sits at Newland.

Beaufort County: Second District; court sits at Washington.

Bertie County: Sixth-B District; court sits at Windsor.

Bladen County: Thirteenth District; court sits at Elizabethtown.

Brunswick County: Thirteenth District; court sits at Bolivia.

Buncombe County: Twenty-eighth District; court sits at Asheville.

Burke County: Twenty-fifth-A District; court sits at Morganton.

Cabarrus County: Nineteenth-A District; court sits at Concord.

Caldwell County: Twenty-fifth-A District; court sits at Lenoir.

Camden County: First District; court sits at Camden.

Carteret County: Third-B District; court sits at Beaufort.

Caswell County: Ninth-A District; court sits at Yanceyville.

Catawba County: Twenty-fifth-B District; court sits at Newton.

Chatham County: Fifteenth-B District; court sits at Pittsboro.

Cherokee County: Thirtieth-A District; court sits at Murphy.

Chowan County: First District; court sits at Edenton.

Clay County: Thirtieth-A District; court sits at Hayesville.

Cleveland County: Twenty-seventh-B District; court sits at Shelby.

Columbus County: Thirteenth District; court sits at Whiteville.

Craven County: Third-B District; court sits at New Bern.

Cumberland County: Twelfth-A, -B and -C Districts; court sits at Fayetteville.

Currituck County: First District; court sits at Currituck.

Dare County: First District; court sits at Manteo.

Davidson County: Twenty-second-B District; court sits at Lexington.

Davie County: Twenty-second-B District; court sits at Mocksville.

Duplin County: Fourth-A District; court sits at Kenansville.

Durham County: Fourteenth-A, -B Districts; court sits at Durham.

Edgecombe County: Seventh-B and -C Districts; court sits at Tarboro.

Forsyth County: Twenty-first-A, -B, -C and -D Districts; court sits at Winston-Salem.

Franklin County: Ninth District; court sits at Louisburg.

Gaston County: Twenty-seventh-A District; court sits at Gastonia.

Gates County: First District; court sits at Gatesville.

Graham County: Thirtieth-A District; court sits at Robbinsville.

Granville County: Ninth District; court sits at Oxford.

Greene County: Eighth-A District; court sits at Snow Hill.

Guilford County: Eighteenth-A, -B, -C, -D and -E Districts; court sits at Greensboro.

Halifax County: Sixth-A District; court sits at Halifax.

Harnett County: Eleventh-A District; court sits at Lillington.

Haywood County: Thirtieth-B District; court sits at Waynesville.

Henderson County: Twenty-ninth District; court sits at Hendersonville.

Hertford County: Sixth-B District; court sits at Winton.

Hoke County: Sixteenth-A District; court sits at Raeford.

Hyde County: Second District; court sits at Swan Quarter.

Iredell County: Twenty-second-A District; court sits at Statesville.

Jackson County: Thirtieth-B District; court sits at Sylva.

Johnston County: Eleventh-B District; court sits at Smithfield.

Jones County: Fourth-A District; court sits at Trenton.

Lee County: Eleventh-A District; court sits at Sanford.

Lenoir County: Eighth-A District; court sits at Kinston.

Lincoln County: Twenty-seventh-B District; court sits at Lincolnton.

McDowell County: Twenty-ninth District; court sits at Marion.

Macon County: Thirtieth-A District; court sits at Franklin.

Madison County: Twenty-fourth District; court sits at Marshall.

Martin County: Second District; court sits at Williamston.

Mecklenburg County: Twenty-sixth-A, -B and -C Districts; court sits at Charlotte.

Mitchell County: Twenty-fourth District; court sits at Bakersville.

Montgomery County: Nineteenth-B District; court sits at Troy.

Moore County: Nineteenth-D District; court sits at Carthage.

Nash County: Seventh-A District; court sits at Nashville.

New Hanover County: Fifth-A, -B and -C Districts; court sits at Wilmington.

Northampton County: Sixth-B District; court sits at Jackson.

Onslow County: Fourth-B District; court sits at Jacksonville.

Orange County: Fifteenth-B District; court sits at Hillsborough.

Pamlico County: Third-B District; court sits at Bayboro.

Pasquotank County: First District; court sits at Elizabeth City.

Pender County: Fifth-A, -B Districts; court sits at Burgaw.

Perquimans County: First District; court sits at Hertford.

Person County: Ninth-A District; court sits at Roxboro.

Pitt County: Third-A District; court sits at Greenville.

Polk County: Twenty-ninth District; court sits at Columbus.

Randolph County: Nineteenth-B District; court sits at Asheboro.

Richmond County: Twentieth-A District; court sits at Rockingham.

Robeson County: Sixteenth-B District; court sits at Lumberton.

Rockingham County: Seventeenth-A District; court sits at Wentworth.

Rowan County: Nineteenth-C District; court sits at Salisbury.

Rutherford County: Twenty-ninth District; court sits at Rutherfordton.

Sampson County: Fourth-A District; court sits at Clinton.

Scotland County: Sixteenth-A District; court sits at Laurinburg.

Stanly County: Twentieth-B District; court sits at Albemarle.

Stokes County: Seventeenth-B District; court sits at Danbury.

Surry County: Seventeenth-B District; court sits at Dobson.

Swain County: Thirtieth-A District; court sits at Bryson City.

Transylvania County: Twenty-ninth District; court sits at Brevard.

Tyrrell County: Second District; court sits at Columbia.

Union County: Twentieth-B District; court sits at Monroe.

Vance County: Ninth District; court sits at Henderson.

Wake County: Tenth-A, -B, -C and -D Districts; court sits at Raleigh.

Warren County: Ninth District; court sits at Warrenton.

Washington County: Second District; court sits at Plymouth.

Watauga County: Twenty-fourth District; court sits at Boone.

Wayne County: Eighth-B District; court sits at Goldsboro.

Wilkes County: Twenty-third District; court sits at Wilkesboro.

Wilson County: Seventh-B, -C Districts; court sits at Wilson.

Yadkin County: Twenty-third District; court sits at Yadkinville.

Yancey County: Twenty-fourth District; court sits at Burnsville.

General Court of Justice.

N.C. Judicial Department Act of 1965 was enacted to establish uniform system of courts throughout state. Act became effective in all 30 (currently 62) judicial districts by Jan. 1, 1971. (NCGS 7A-2).

Jurisdiction.

Except for impeachments and judicial powers vested in administrative agencies, judicial power of state is vested exclusively in general court of justice, a unified judicial system consisting of appellate division (supreme court, court of appeals), superior court division (superior courts), and district court division (district courts, magistrates). (NCGS 7A-3, -4).

North Carolina Business Court.

Complex business cases may be assigned to special superior court judge for complex business cases, designated by Chief Justice of N.C. Supreme Court under R. 2.2 of General Rules of Practice for Superior and District Courts. (See Order Adopting Rules for Designation of Complex Business Cases, 341 N.C. 737.) Chief Justice has designated one superior court judge as "special judge" to hear and decide these complex business cases. Litigants may seek designation "complex business case" by motion to presiding judge, senior resident superior court judge, or chief district court judge.

District Courts.

Jurisdiction.

District courts have allocated to them following types of cases: (1) Misdemeanors; (2) preliminary hearings in felony cases; (3) civil actions for money damages of $10,000 or less, exclusive of interest and costs; (4) without regard to amount in controversy, cases concerning divorce, alimony, annulment, equitable distribution of property, property settlement agreements, child custody and child support (concurrent with superior court) and domestic relations cases previously vested in domestic relations courts (including juvenile courts). (NCGS 7A-243, -244, -292). No jury trial in criminal matters, but there is right of appeal de novo to superior court. (NCGS 7A-26, -27).

Magistrates.

Jurisdiction.

Magistrate judges in district court have jurisdiction over small claims. Small claim is defined as case where (1) Amount in controversy does not exceed $5,000; (2) principal relief prayed for is (a) Monetary, (b) for recovery of personal property, (c) summary ejectment, or any combination of foregoing; and (3) plaintiff has requested assignment to magistrate. (NCGS 7A-210). Chief district judge may assign to any magistrate of his district (1) Action to enforce motor vehicle mechanic and storage liens arising under G.S. NCGS 44A-2(d) or NCGS 20-77(d) when claim arose in county in which magistrate resides and (2) any pending small action in his district if defendant is resident of magistrate's county. Small claim actions are instituted by complaint designated “Small Claim” and filed with clerk of superior court in which defendant resides. Small claim, if not assigned, is tried in district court. Sole remedy for party aggrieved is by appeal for trial de novo before district court judge or jury. (NCGS 7A-210 to -232). In addition, magistrates have authority to issue arrest and search warrants and perform many civil and nonjudicial functions formerly assigned by general law to abolished office of justice of peace. (NCGS 7A-273, -292).

Arbitration, Mediation.

Mediated settlement conferences are authorized, and in practice are virtually mandatory, in all superior court civil actions. Right to jury trial not restricted by this section. (NCGS 7A-38.1).

Some judicial districts provide for mandatory nonbinding arbitration of civil claims for monetary damages not exceeding $15,000, except actions on accounts. This procedure may be implemented in judicial district, in selected counties within district, or in court within district, if director of administrative office of courts, and cognizant senior resident superior court judge or chief district court judge of any court selected for this procedure, determine that its use may assist in economical and efficient administration of justice. Absolute right of appeal de novo if taken within 30 days after arbitration award. (NCGS 7A-37.1). See category 9 Dispute Resolution, topic 9.02 Arbitration and Award.

Cases involving custody or visitation disputes are subject to statewide custody mediation program comprised of local district programs. Purposes of Custody and Visitation Mediation Program shall be to provide services of skilled mediators to further goals expressed in G.S. NCGS 50-13.1(b). (NCGS 7A-494, -495).

Clerk, his deputies and assistants perform all clerical, administrative and fiscal functions for district and superior courts. All acts, orders, and judgments of assistant clerks are entitled to same faith and credit as that of clerk. (NCGS 7A-102). Clerk has power to accept written appearances, waivers of trial or hearing and pleas of guilty or admissions of responsibility in certain traffic offenses, hunting and fishing offenses under G.S. c. 113, boating offenses under G.S. c. 75A, littering offenses under G.S. NCGS 14-399(c), and alcohol offenses under G.S. c. 188 in accordance with schedule of offenses and fines promulgated by conference of chief district judges, and in such cases, to enter judgment and to collect fines and costs. (NCGS 7A-180). Clerk is also ex officio judge of probate and supervises administration of estates. (NCGS 7A-241). Clerk has exclusive jurisdiction over all proceedings involving appointment of guardians and administration by legal guardian or trustee of express trust or estate of ward.

6.02 LEGISLATURE:

Regular sessions must be held biennially in Jan. of odd years. (NCGS 120-11.1; N.C. Const., art. II, §11). However, practice is to meet annually.

Special or Extraordinary Sessions.

Governor has power to call extra sessions on extraordinary occasions, by and with advice of Council of State. (N.C. Const., art. III, §5[7]).

Initiative and referendum are not provided for with respect to legislature.

Lobbyists.

Regulated by G.S. 120C.

6.03 REPORTS:

Titles of N.C. reports are as follows: NCGS 1778-1797: 1st and 2d Martin (1 N.C. [Mart.]); NCGS 1798-1802: Taylor (1 N.C. [Tay.]), 1 vol.; NCGS 1800-1804: Conference by Cameron & Norwood (1 N.C. [Cam. & Nor.]), 1 vol.; NCGS 1789-1806: Haywood (e.g., 2 N.C. [1 Hayw.]), (NCGS 2-3); NCGS 1811-1816: 1st and 2d Carolina Law Repository (4 N.C. [Car. L. Rep.]); NCGS 1816-1818: 1st and 2d Taylor's N.C. Term Reports (4 N.C. [Taylor]); NCGS 1804-1813, NCGS 1818-1819: Murphey (e.g., 5 N.C. [1 Mur.]), 3 vols. (NCGS 5-7); NCGS 1820-1826: Hawks (e.g., 8 N.C. [1 Hawks]), 4 vols. (NCGS 8-11); NCGS 1826-1834: Devereux's Law (e.g., 12 N.C. [1 Dev.]), 4 vols. (NCGS 12-15); NCGS 1826-1834: Devereux's Equity (e.g., 16 N.C. [1 Dev. Eq.]), 2 vols. (NCGS 16-17); NCGS 1834-1839: Devereux & Battle's Law (e.g., 20 N.C. [3 & 4 Dev. & Bat.]), 4 vols. in 3 (NCGS 18-20); NCGS 1834-1839: Devereux & Battle's Equity (e.g., 21 N.C. [1 Dev. & Bat. Eq.]), 2 vols. (NCGS 21-22); NCGS 1840-1852: Iredell's Law (e.g., 23 N.C. [1 Ired.]), 13 vols.; (NCGS 23-35); NCGS 1840-1852: Iredell's Equity (e.g., 36 N.C. [1 Ired. Eq.]), 8 vols. (NCGS 36-43); NCGS 1852-1853: Busbee's Law (44 N.C. [Busb.]), 1 vol.; NCGS 1852-1853: Busbee's Equity (45 N.C. [Busb. Eq.]), 1 vol.; NCGS 1853-1862: Jones' Law (e.g., 46 N.C. [1 Jones]), 8 vols. (NCGS 46-53); NCGS 1853-1863: Jones' Equity (e.g., 54 N.C. [1 Jones Eq.]), 6 vols. (NCGS 54-59); NCGS 1863-1864: Winston's Law & Equity (60 N.C. [Win.]), 2 vols. in 1; NCGS 1866-1868: Phillips' Law (61 N.C. [Phil. Law]), 1 vol.; NCGS 1866-1868: Phillips' Equity (62 N.C. [Phil. Eq.]), 1 vol.; 1868-date: N.C. Reports, 1st vol. which is vol. 63, continuing to date; and N.C. App. Reports, 1968 to date.

Unofficial Reports.

N.C. decisions are reported in Southeastern Reporter of National Reporter System; Southeastern Reporter (S.E.) 1887 to 1939, Second Series (S.E.2d) 1939 to date.

Digests are West's N.C. Digest, Southeastern Digest, and Strong's N.C. Index. All are supplemented by pocket parts.

6.04 STATUTES:

Latest official compilation is General Statutes of North Carolina, published by Michie Company of Charlottesville, Va., Annotated. Cumulative supplements prepared under supervision of N.C. Department of Justice are issued biennially. (NCGS 164-1, et seq.). Supplements are issued biennially. As to the Revenue Act, see category 22 Taxation.

Uniform Acts of the National Conference of Commissioners on Uniform State Laws adopted.

Revised Anatomical Gift (adopted 2007) (NCGS 130A-412.3, et seq.); †Revised Arbitration (2000, adopted 2003) (NCGS 1-569.1, et seq.); Athlete Agents (2000, adopted 2003) (NCGS 78C-85, et seq.); Child Custody Jurisdiction and Enforcement (adopted 1979) (NCGS 50A-101, et seq.); †Commercial Code (adopted 1965) (NCGS 25-1-101, et seq.); †Common Trust Fund (adopted 1939) (NCGS 36A-90, et seq.); †Condominium (adopted 1986) (NCGS 47C-1-101, et seq.); Criminal Extradition (1936, adopted 1937, withdrawn by NCCUSL 1982) (NCGS 15A-721, et seq.); Custodial Trust (adopted 1995) (NCGS 33B-1, et seq.); Declaratory Judgments (adopted 1931) (NCGS 1-253, et seq.); †Disposition of Community Property Rights at Death (adopted 1981) (NCGS 31C-1, et seq.); †Electronic Transactions (adopted 2000) (NCGS 66-311, et seq.); †Enforcement of Foreign Judgments (1964, adopted 1989) (NCGS 1C-1701, et seq.); †Evidence, Rules of (1974, adopted 1983) (NCGS 8C-1, et seq.); Federal Lien Registration (adopted 1990) (NCGS 44-68.10, et seq.); Fiduciaries (adopted 1923) (NCGS 32-1, et seq.); Foreign-Money Claims (adopted 1995) (NCGS 1C-1820, et seq.); Uniform Foreign-Country Money Judgments Recognition Act (adopted 2009)(NCGS 1C-1850, et seq.); Fraudulent Transfer (adopted 1997) (NCGS 39-23.1, et seq.); Interstate Family Support (1996, adopted 1997) (NCGS 52C-1-100, et seq.); †Limited Partnership (1976, adopted 1986) (NCGS 59-101, et seq.); Management of Institutional Funds (adopted 2009) (NCGS 36E-1, et seq.); †Partnership (1914, adopted 1941) (NCGS 59-31, et seq.); †Photographic Copies of Business and Public Records as Evidence (adopted 1951) (NCGS 8-45.1, et seq.); Premarital Agreement (adopted 1987) (NCGS 52B-1, et seq.); †Principal and Income (1997, adopted 2003) (NCGS 37A-1-101, et seq.); †Prudent Investor (1994, adopted 1999) (NCGS 36A-161, et seq.); Simultaneous Death (1940, adopted 1947, revised 2007) (NCGS 28A-24-1, et seq.); Statutory Rule Against Perpetuities (1986, adopted 1995) (NCGS 41-15, et seq.); To Secure Attendance of Witnesses From Without a State in Criminal Proceedings (adopted 1937) (NCGS 15A-811, et seq.); Transfers to Minors (adopted 1987) (NCGS 33A-1, et seq.); †Trusts (adopted 1939) (NCGS 36A-60, et seq.); †Unclaimed Property (1995, adopted 1999) (NCGS 116B-51, et seq.); Vendor and Purchaser Risk (adopted 1959) (NCGS 39-37, et seq.).

†Adopted with significant modifications or additions. For Acts within scope of Digest, see appropriate topics.

For text of Uniform Acts within scope of the Martindale-Hubbell Law Digests, see Uniform and Model Acts section.

Other Uniform Acts adopted.

Boiler and Pressure Vessel (adopted 1975) (NCGS 95-69.8, et seq.); Boll Weevil Eradication (adopted 1975) (NCGS 106-65.67, et seq.); Conservation and Historic Preservation Agreements (adopted 1979) (NCGS 121-34, et seq.); Driver's License (adopted 1935) (NCGS 20-5, et seq.); Interstate Compact for Supervision of Adult Offenders (adopted 2002) (NCGS 148-65.4, et seq.); Relocation Assistance and Real Property Acquisition Policies (adopted 1971) (NCGS 133-5, et seq.); Sales and Use Tax Administration (adopted 2001) (NCGS 105-164.42A, et seq.); Standards for Manufactured Homes (adopted 1969) (NCGS 143-144, et seq.); Unauthorized Insurers (NCGS 58-28-45).

6.05 UNIFORM LAWS:

For list of Uniform Acts in force in this state, see topic 6.04 Statutes, supra. For text of Uniform Acts within the scope of the Martindale-Hubbell Law Digests, see Uniform and Model Acts section.

7 CRIMINAL LAW

7.01 CRIMINAL LAW:

Crimes and criminal procedure are governed by G.S. cc. 14, 15, and 15A. (c. 14–Criminal Law; c. 15–Criminal Procedure; c. 15A–Criminal Procedure Act). (See also c. 15B–N.C. Crime Victims Compensation Act; c. 20–Motor Vehicle Law.)

Accused persons are brought to trial by order for arrest, warrant for arrest, criminal summons, citation (NCGS 15A-301 to -305) and indictment and presentment (NCGS 15A-641[a], [c]).

Indictment or Information.

Procedure outlined by statute. (NCGS 15A-641, et seq.). Indictment or information filed with superior court will institute criminal proceedings against one person. (NCGS 15A-641[a], [b], NCGS 15A-642). Presentment does not institute criminal proceeding. (294 N.C. 304, 240 S.E.2d 355). Where defendant is not represented by counsel, or in any capital case, indictment may not be waived. (NCGS 15A-642[b]). Accused represented by attorney may waive indictment, if waiver is in writing and signed by defendant and attorney. (NCGS 15A-642[c]).

Bail.

Defendant in non-capital case has right to bail. (NCGS 15A-533[b]). In capital cases judge has discretionary power to permit bail. (NCGS 15A-533[c]). In certain drug trafficking cases, it will be presumed, subject to rebuttal, that no condition of release will assure appearance and judge must find reasonable assurance before releasing prisoner. (NCGS 15A-533[d]). When bail is permitted, conditions of release must be determined in accordance with G.S. NCGS 15A-534.

Special conditions or release may be applied to domestic violence (NCGS 15A-534.1), detention of impaired drivers (NCGS 15A-534.2), detention for communicable disease (NCGS 15A-534.3), sex offenses (NCGS 15A-534.4), and detention to protect public health (NCGS 15A-534.5).

Pending felony charge or, after conviction, awaiting sentencing or pending appeal, failure to appear is class I felony. (NCGS 15A-543[b]). If released in connection with misdemeanor charge, failure to appear is class 2 misdemeanor. (NCGS 15A-543[c]).

Upon execution of bail bond, defendant and each surety submit both to jurisdiction of court and consent to be bound by any notice, enforceable without any independent action. (NCGS 15A-544.1). If bond does not contain: (1) Defendant's name and mailing address, (2) any bondsman or surety's name and address, (3) names and license numbers of any bondsman and runners, and (4) name of any insurance company acting as surety, defendant's pretrial release may be revoked. (NCGS 15A-544.2). If released defendant fails to appear before court as required, court shall issue forfeiture (NCGS 15A-544.3) and serve notice via first-class mail within 13 days of forfeiture date (NCGS 15A-544.4). Unless set aside (NCGS 15A-544.5), forfeiture issued under G.S. NCGS 15A-544.3 becomes final without further action 150 days after notice given under G.S. NCGS 15A-544.4 (NCGS 15A-544.6). Final judgment of forfeiture is docketed as civil judgment, imposes lien on all real property of defendant and each surety, and prevents all sureties named in judgment from becoming surety on any future bail bond until judgment satisfied in full. (NCGS 15A-544.7). Relief from final judgment may be given for lack of notice or extraordinary circumstances, or upon outcome of successful hearing initiated by submission of written motion to court within three years from date of judgment. (NCGS 15A-544.8).

Bail bondsmen and runners must be qualified and licensed. (NCGS 58–71–1 et seq.)

Insanity Defense.

Defendant must give state notice of insanity defense, or expert testimony relating to mental disease, defect, or other condition bearing upon whether he had mental state required for offense charged. (NCGS 15A-959). Defendant has burden of proof. (323 N.C. 684, 374 S.E.2d 573).

Interstate Compact for the Supervision of Adult Offenders adopted. (NCGS 148-65.4, et seq.).

Uniform Criminal Extradition Act (1936) adopted. (NCGS 15A-721 to -750).

Remote Testimony in Criminal Proceedings

Child witnesses and witnesses with developmental disabilities or mental retardation may testify by remote testimony, outside of open forum and outside presence of parties, in criminal prosecutions. (NCGS 15A-1225.1, 1225,2)

Expunction of Records for First Offenders

First offenders under age of 18 years at time of conviction for certain gang offenses or not over age of 21 years at time of first conviction for certain drug or toxic vapors offenses may, upon petition, have offenses expunged from criminal records. (NCGS 15A-145.1–145.3)

Compensation to Innocent Victim.

Under N.C. Crime Victims Compensation Act, in certain circumstances, innocent victim of crime may be compensated. (c. 15B).

Crime Victim Credit Protection

Creditor owed money for services provided victim as result of criminally injurious conduct shall not communicate debt information to credit reporting agency pending application for compensation or pending appeal related to application for compensation under Crime Victims Compensation Act. (NCGS 15B-26)

Racial justice Act

No person sentenced to death shall be executed pursuant to judgment sought or obtained on basis of race. (NCGS 15A-2010–2012)

8 DEBTOR AND CREDITOR

8.01 ASSIGNMENTS:

Choses in action arising out of contract are assignable. Grantee or assignee of claim, other than negotiable security, before maturity, takes subject to all then existing defenses, and must sue in his own name. (NCGS 1-57).

Public assistance provided under following programs are not transferable or assignable at law or in equity: state-county special assistance for adults; food and nutrition services; foster care and adoption assistance; and low income energy assistance. (NCGS 108A-25, -36).

Uniform Commercial Code adopted, effective July 1, 1967. See topic Commercial Code.

Assignment of Accounts Receivable.

Uniform Commercial Code adopted, effective July 1, 1967. See category 3 Business Regulation and Commerce, topic 3.09 Commercial Code.

Assignment of interest in partnership entitles assignee to profits assignor would have been entitled to; does not dissolve partnership; in absence of agreement does not entitle assignee to interfere in management of partnership. (NCGS 59-57).

Instrument Transferring Title.

Assignment must designate assignor, assignee, and chose assigned. (259 N.C. 697, 131 S.E.2d 378).

Recording.

See category 10 Documents and Records, topic 10.04 Records.

Notice.

Assignment is valid transfer of title to debt, but debtor has no duty to pay transferee until notice is given. (236 N.C. 328, 72 S.E.2d 759).

Assignment of Wages.

Employer not bound by employee's assignment of future wages unless assignment is accepted by employer in written agreement to pay same. (NCGS 95-31).

Workmen's compensation claims are not assignable. (NCGS 97-21).

8.02 ATTACHMENT:

Attachment and garnishment is governed by G. S. NCGS 1-440.1 to .46.

Actions in Which Allowed.

Attachment may be had in any action, the purpose of which, in whole or in part, is to secure judgment for money, or in any action for alimony or for maintenance and support, or for support of minor children, but not in any other action. (NCGS 1-440.2).

Courts Which May Issue Writ.

Clerk or judge of appropriate trial division in county in which action has been or is being commenced may issue order of attachment. (NCGS 1-440.5).

In Whose Favor Writ May Issue.

No discrimination against nonresidents or foreign corporations with respect to obtaining attachments. (23 N.C. App. 676, 209 S.E.2d 839).

Against Whom Writ May Issue.

Attachment may issue against any defendant as to whom the necessary grounds (see subhead Grounds, infra) are shown to exist. (NCGS 1-440.3).

Claims on Which Writ May Issue.

Writ may issue only on one or more grounds specified by G.S. NCGS 1-440.3 and grounds must appear by affidavit or verified complaint. (NCGS 1-440.11; 229 N.C. 327, 49 S.E.2d 627).

Grounds.

Order for attachment may be issued when defendant: (1) Is nonresident; or (2) foreign corporation; or (3) domestic corporation whose president, vice-president, secretary or treasurer cannot be found in state after due diligence; or (4) is resident of state who, with intent to defraud his creditors or to avoid service of summons, (a) has departed or is about to depart from state or (b) keeps himself concealed therein; or (5) person or domestic corporation who or which, with intent to defraud his or its creditors, (a) has removed or is about to remove property from state or (b) has assigned, disposed of or secreted or is about to assign, dispose of or secrete property. (NCGS 1-440.3).

Proceedings to Obtain.

Plaintiff, or his agent or attorney, must file affidavit that plaintiff has commenced or is about to commence action, purpose of which in whole or in part is to secure judgment for money and amount thereof. Affidavit must also state nature of such action and grounds for attachment. If action is based on breach of contract, affidavit must state that plaintiff is entitled to recover amount for which judgment is sought over and above all counterclaims known to him; and if it is alleged as ground for attachment that defendant has done or is about to do any act with intent to defraud his creditors, affidavit must state facts and circumstances supporting such allegations. Verified complaint may be used as affidavit. (NCGS 1-440.11).

Attachment Bond.

Plaintiff must furnish bond in such amount as court deems necessary to afford reasonable protection to defendant, in no case to be less than $200. (NCGS 1-440.10).

Order of Attachment.

Upon giving of bond and filing of affidavit, court will issue order of attachment directing sheriff to attach and safely keep all property of defendant within sheriff's county which is subject to attachment, or so much thereof as is sufficient to satisfy plaintiff's demands, plus costs and expenses. (NCGS 1-440.12). Additional orders of attachment may be then or later issued, directed to sheriff of any county in which defendant may have property. (NCGS 1-440.13).

Levy.

Provision is made for levy on real property (NCGS 1-440.17), levy on tangible personal property in defendant's possession by seizure thereof (NCGS 1-440.18), levy on stock in corporations (NCGS 1-440.19), and levy on goods in warehouses (NCGS 1-440.20). Levy on other tangible personal property not in defendant's possession, or on any indebtedness to defendant or on any other intangible personal property, is made as provided by G.S. NCGS 1-440.25 relating to garnishment. Sheriff is not required to levy upon personal property before levying upon real property. (NCGS 1-440.15[b]).

Exemption.

Payments constituting aid to blind award not subject to levy under execution, attachment or garnishment. (NCGS 111-18).

Lien.

Upon securing order of attachment, plaintiff may cause notice of issuance of order to be filed with clerk of court in any county in which plaintiff believes defendant has real property. Clerk must enter notice on lis pendens docket. Where levy is made on real property, lien attaches and relates back to time of filing of notice of lis pendens. If no entry of issuance of order of attachment is made on lis pendens docket of county in which land lies prior to levy, lien attaches only from time of docketing of certificate of levy. Levy on tangible personal property in hands of garnishee creates lien from time of such levy. (NCGS 1-440.33[a, b, c]).

Priorities.

Priority of attachment liens is same as order in which attachments were levied, subject to provisions relating to time when lien of attachment begins with respect to real property. Simultaneous levies create simultaneous liens, and in such case proceeds are prorated among attaching creditors. (NCGS 1-440.33). Ad valorem liens on real property are superior to all other liens regardless of when acquired. (NCGS 105-356). Local ad valorem tax lien superior to all other liens, including state tax liens, regardless of when acquired. (114 N.C. App. 110, 441 S.E.2d 589, aff'd by equally divided court, 340 N.C. 104, 455 S.E.2d 158).

Release of Property.

Defendant may move court to discharge attachment upon his giving bond for property attached. Such motion constitutes general appearance if no prior general appearance has been made by defendant. Amount of bond must be double amount claimed by plaintiff or double value of property attached, whichever is less. Upon filing of satisfactory bond, court will issue order discharging attachment in accordance with defendant's motion. (NCGS 1-440.39).

Sale.

Before judgment, sheriff may apply to court for authority to sell property seized pursuant to order of attachment (1) If property is perishable or (2) if property is not perishable but (a) will materially deteriorate in value pending litigation or (b) will likely cost more than one-fifth of its value to keep pending final determination of the action and is not discharged from attachment lien by defendant's posting of bond within ten days after seizure. (NCGS 1-440.44).

Third Party Claims.

Any person other than defendant who claims property which has been attached, or any person who has acquired lien upon or interest in such property, whether acquired prior to or subsequent to attachment, may (1) Apply to court to have attachment order dissolved or modified, or to have bond increased, upon same conditions and by same methods as are available to defendant, or (2) intervene and secure possession of property in same manner and under same conditions as provided for intervention in claim and delivery proceedings. (NCGS 1-440.43).

Vacation or Modification.

At any time before judgment in principal action, defendant whose property has been attached may specially or generally appear and move court to dissolve order of attachment. When defect alleged as ground for motion appears upon face of record, motion is heard and determined upon record. When defect does not appear upon face of record, motion is heard and determined upon affidavits filed by plaintiff and defendant, unless prior to hearing jury trial demanded in writing by plaintiff or defendant. If jury trial demanded, issues are determined at trial of principal action unless judge on motion of any party for good cause shown orders earlier or separate trial. (NCGS 1-440.36). At any time before judgment in principal action, defendant may apply to court for order modifying order of attachment and motion is heard upon affidavits. (NCGS 1-440.37).

8.03 [RESERVED]

8.04 CREDITORS' SUITS:

See topics 8.02 Attachment, Executions, Foreclosure, Fraudulent Sales and Conveyances, Garnishment, Receivers; category 5 Civil Actions and Procedure, topic 5.21 Replevin.

After any note, bill, bond, or other obligation becomes due and payable, any surety, endorser, or guarantor thereof may give written notice to holder or owner of obligation requiring him to use all reasonable diligence to recover against principal and to proceed to realize upon any securities which he holds for obligation. (NCGS 26-7). Surety, endorser, or guarantor who gives notice to holder or owner of obligation must provide written notice of such notice to all co-sureties, co-endorsers, or co-guarantors, who shall have ten days after receipt to give written notice to holder or owner of obligation and co-sureties, co-endorsers, and co-guarantors that they join in or adopt given notice. (NCGS 26-7). If holder or owner of obligation refuses or fails within 30 days from service or receipt of such notice to take appropriate action pursuant thereto surety, endorser, or guarantor and all co-sureties, co-endorsers or co-guarantors joining therein are discharged to extent they are prejudiced thereby. (NCGS 26-9).

8.05 EXECUTIONS:

Clerk of superior court must issue executions on all unsatisfied judgments rendered in his court, in full force and effect, upon request of any party or person entitled thereto and upon payment of necessary fees; clerk must issue executions on all judgments of forfeiture of bonds in criminal cases within six weeks of judgment without request or fee advancement. Clerk may not issue execution unless: (1) Judgment debtor's exemptions have been designated; or (2) judgment debtor has waived exemptions as provided in G.S. NCGS 1C-1601(c); or (3) clerk determines exemptions are inapplicable to particular claim as authorized by G.S. NCGS 1C-1603(a)(3). (NCGS 1-305).

Kinds of Execution.

There are three kinds of execution: one against property; one against person; and one for delivery of possession of real or personal property or such delivery with damages for withholding same. (NCGS 1-303).

Exemptions.

See topic 8.06 Exemptions.

Time for Issuance.

A judgment may be enforced by execution, without application to the court, by the judgment creditor or, in case of his death, by his duly appointed personal representative, at any time within ten years after entry thereof. (NCGS 1-306, -339.48). Clerk of court will not issue execution unless notice has been served upon judgment debtor advising him of his right to set aside exempt property. If judgment debtor cannot be served, notice may be mailed to judgment debtor at his last known address. Proof of service may be made by filing certificate that notice was served indicating circumstances warranting use of service and date and address of service. Notice required before each execution. (107 N.C. App. 262, 419 S.E.2d 592 aff'd by 333 N.C. 785, 429 S.E.2d 716). Limiting claiming of constitution exemptions to 20 days after notice found unconstitutional. (107 N.C. App. 262, 419 S.E.2d 592). Not yet amended by legislature.

Execution may be issued no sooner than 30 days after entry of judgment. (NCGS 1A-1, R. 62; N.C. R. App. P. 3[c]). No execution may issue on any judgment until such judgment is docketed in county to which execution is to be issued. (NCGS 1-308).

Stay.

Execution is automatically stayed for 30 days following entry of judgment. (NCGS 1A-1, R. 62; N.C. R. App. P. 3[c]). Unless otherwise ordered by court, interlocutory or final judgment in action for injunction or in receivership action shall not be stayed during period after its entry and until appeal is taken or during pendency of appeal. In its discretion, court may stay execution pending disposition of motion for new trial or to alter or amend judgment, or motion for relief from or to set aside judgment, or when appeal is taken from judgment granting, denying, or dissolving injunction. Appellate courts have similar powers. (NCGS 1A-1, R. 62).

There is no provision for stay of execution from the superior court where no appeal is taken. As to stay pending appeal, see category 5 Civil Actions and Procedure, topic 5.03 Appeal and Error.

Levy.

If execution is against property of judgment debtor it does not become a lien on personal property until actual levy thereon by sheriff. (NCGS 1-313). When against specific property it is taken into possession by sheriff and delivered to party entitled thereto. (NCGS 1-313). Return on execution showing property levied upon is made by sheriff to clerk of court and docketed. (NCGS 1-321).

Lien.

See supra, subhead Levy.

Sale of real property under execution is governed by G.S. NCGS 1-309.

Notice of sale of real property shall be posted, in area designated by clerk of superior court for posting of notices in county in which property is situated, for at least 20 days immediately preceding sale. It should also be published once a week for at least two successive weeks in newspaper qualified for legal advertising published in county; or if there is no newspaper qualified for legal advertising in county, then in newspaper having general circulation in county. Period from date of first publication to date of last publication shall not be less than seven days, including Suns., and date of last publication shall be not more than ten days preceding date of sale. If real property to be sold is located in more than one county, then above provisions should be complied with in all counties property is located within. (NCGS 1-339.52). In sale under court order, judgment debtor must also be served with notice of sale at least ten days prior to sale. (NCGS 1-339.54). Notice of sale of personal property, except in case of perishable property as specified in G.S. NCGS 1-339.56, shall be posted, in area designated by clerk of superior court for posting of notices in county in which sale is to be held, for ten days immediately preceding date of sale. (NCGS 1-339.53). Property must be present at time of sale. (NCGS 1-339.45).

Redemption.

There is no right of redemption of property sold under execution, but upset bids are allowed for ten days after filing of report in sale of real estate. (NCGS 1-339.64).

Return.

Execution is returnable not more than 90 days from date of issuance (NCGS 1-310).

Priorities.

Interest covered by lien against personalty acquired by levy under execution of judgment cannot be superior to interest of judgment debtor in property. (230 N.C. 443, 53 S.E.2d 520).

Claims of Third Persons.

Intervenor must prove title to funds under execution by greater weight of evidence (214 N.C. 778, 1 S.E.2d 109), and intervenor seeking to restrain execution on certain chattels must show title or right to possession (253 N.C. 100, 116 S.E.2d 491). Owner may bring independent action to prevent sale of property under execution on judgment to which he was not a party. (251 N.C. 73, 110 S.E.2d 482).

Satisfaction.

Right to effect sale on execution ceases when, prior to time fixed for sale or prior to expiration of time allowed for submitting upset bid, payment is made or tendered to sheriff of judgment and costs plus fees, commissions and expenses incurred on account of sale or proposed sale, including costs incurred in caring for property levied on. (NCGS 1-339.57).

Supplementary Proceedings.

An order for examination of a judgment debtor may issue after execution has been returned unsatisfied. (NCGS 1-352). In addition, judgment creditor may prepare and serve written interrogatories concerning judgment debtor's property (NCGS 1-352.1). Court may order production of documents (NCGS 1-352.2[1]) or may permit entry upon designated land or other property, real or personal (NCGS 1-352.2[2]).

Before order is granted after return of execution, it must be shown by affidavit that: execution has been returned unsatisfied; there is no known property subject to levy; and there is property of debtor not subject to levy, or affected by any lien. (83 N.C. 338). After issuing execution and upon affidavit showing that debtor has property which he unjustly refuses to apply toward satisfaction of judgment, court may order examination of debtor and proceedings may be had for application of such property towards satisfaction of judgment. (NCGS 1-353).

Upon issuance or return of execution, examination of third party may be ordered where affidavit shows that such party is indebted to judgment debtor in amount exceeding $10. (NCGS 1-360). If clerk of superior court determines that debtor of judgment debtor is in possession of unencumbered property of judgment debtor or is indebted to judgment debtor in amount exceeding $10, execution shall issue against debtor of judgment debtor against such property or debt. (NCGS 1-360.1).

On examination, witnesses may be called. (NCGS 1-356). Incriminating answers are not privileged but may not be used against witness in criminal proceeding or prosecution. (NCGS 1-357). Court may forbid transfer or other disposition of, or any interference with, property of judgment debtor. (NCGS 1-358). Receiver for judgment debtor's property may be appointed. (NCGS 1-363).

Body Execution.

If action is one in which defendant might have been arrested, execution against the person of the judgment debtor may be issued after return or an execution against his property wholly or partly unsatisfied; but no execution may issue against the person of a judgment debtor unless an order of arrest has been served or unless complaint contains a statement of facts showing one or more of the causes of arrest required by law, whether such statement of facts is necessary to the cause of action or not; in latter case court record must show a finding of fact by judge or jury establishing the right of execution against the person. Such findings of fact must include finding that defendant either: (a) Is about to flee jurisdiction to avoid paying his creditors, (b) has concealed or diverted assets in fraud of his creditors, or (c) will do so unless immediately detained. If defendant appears at hearing on debt and judge has reason to believe that defendant is indigent, he must inform defendant that if he is indigent he is entitled to services of counsel, that he may petition for preliminary release on basis of his indigency, that if he does so he will have opportunity within 72 hours to suggest to judge his indigency for purposes of appointment of counsel and provisional release, and that judge will thereupon immediately appoint counsel for him if it is adjudged that he is unable to pay lawyer. If defendant appears at hearing on debt and judge provisionally concludes he is indigent, counsel should be appointed immediately pursuant to rules adopted by Office of Indigent Defense Services. (NCGS 1-311).

8.06 EXEMPTIONS:

Articles of personal property, up to amount determined by General Assembly, but not less than $500, to be selected by owner thereof, provided he be resident of state, are exempt from execution or other final process. (N.C. Const., art. X). Exemptions include: (1) $18,500 value in real property used as residence or in burial plot for debtor; however, unmarried debtor age 65 or older is entitled $37,000 value so long as property was previously owned by debtor as tenants by entirety or as joint tenants with right to survivorship and former co-owner is deceased; (2) $5,000 of any unused exemption amount to which debtor is entitled under homestead exemption; (3) $3,500 in vehicle; (4) $5,000, plus $1,000 for each dependent not to exceed $4,000 for dependents, for household effects; (5) $2,000 in tools of trade; (6) life insurance, health aids, personal injury or wrongful death damages; and (7) individual retirement plans, including Individual Retirement Accounts and Roth retirements accounts, individual retirement annuities, and accounts established as part of trust fund as described in Internal Revenue Code 408(a),(b),(c) respectively; (8) $25,000 in college savings plan, excluding funds placed in college savings plan account within preceding 12 months, except any contributions made consistent with debtor's past pattern of contributions; (9) retirement benefits under retirement plans of other states; and (10) alimony, support, separate maintenance, and child support payments. Constitutional exemptions cannot be waived except in certain limited situations. (NCGS 1C-1601[c]). Other exemptions are provided for by statute. (NCGS 1C-1601, et seq.). Exemptions provided in Bankruptcy Code, 11 U.S.C. §522(d), are not applicable to residents of North Carolina.

Debts Against Which Exemptions Not Allowed.

Exemption is not available against taxes, purchase price obligations or mechanics' or laborers' liens. Homestead exemption not available against taxes and purchase price obligations. (N.C. Const., art. X).

Earnings for the preceding 60 days are exempt, if necessary for support of family supported wholly or partly by debtor's labor. (NCGS 1-362).

See also topic 8.09 Garnishment.

Homestead Exemption.

See topic 8.10 Homesteads.

8.07 FORECLOSURE:

See topic 8.13 Liens; categories 3 Business Regulation and Commerce, topic Commercial Code; Mortgages, topic Mortgages of Real Property.

8.08 FRAUDULENT SALES AND CONVEYANCES:

Fraudulent sales and conveyances are regulated by G.S. NCGS 39-15 to -22. In general, statutory law is declaratory of common law, and following principles may be deduced from authorities: (1) If conveyance is not for value, i.e. voluntary, and grantor retains property fully sufficient and available to pay his debts then existing, and there is no actual intent to defraud, conveyance is valid; (2) if conveyance is not for value, i.e. voluntary, and grantor did not retain property fully sufficient and available to pay his debts then existing, it is invalid as to creditors. It cannot be impeached by subsequent creditors without proof of existence of debt at time of its execution, which is unpaid, but when this is established and conveyance avoided, subsequent creditors are let in and property is subjected to payment of creditors generally; (3) if conveyance is voluntary and made with actual intent on part of grantor to defraud creditors, it is void, although this fraudulent intent is not participated in by grantee, and although property sufficient and available to pay existing debts is retained; (4) if conveyance is upon valuable consideration and made with actual intent to defraud creditors on part of grantor alone, not participated in by grantee and of which he had no notice, it is valid; (5) if conveyance is on valuable consideration, but made with actual intent to defraud creditors on part of grantor, participated in by grantee or of which he has notice, it is void. (165 N.C. 224, 81 S.E. 162).

Conveyance of land or goods made with actual intent to defraud purchaser is void against purchaser and any bona fide purchaser therefrom. (NCGS 39-16). Bona fide purchasers without notice of fraud are protected (NCGS 39-19) and have like remedy and relief as creditors of transferor (NCGS 39-21).

Uniform Fraudulent Transfer Act adopted. (NCGS 39-23.1, et seq.).

Remedies.

Creditor may seek to have conveyance set aside and in same action establish his own claim as well as subject property conveyed in sale (185 N.C. 149, 116 S.E. 173) or creditor may elect to treat fraudulent conveyance as void and, after obtaining judgment on his claim, levy upon property and have it sold under execution (54 N.C. 49).

Bulk Sales.

Uniform Commercial Code adopted. See category 3 Business Regulation and Commerce, topic 3.09 Commercial Code.

Uniform Commercial Code adopted. (NCGS 25-1-101 to -108). See category 3 Business Regulation and Commerce, topic 3.09 Commercial Code.

8.09 GARNISHMENT:

Garnishment is not an independent action but is a proceeding ancillary to attachment. (NCGS 1-440.21).

Property Which May be Reached.

(1) Tangible personal property belonging to defendant but not in his possession, and (2) any indebtedness to defendant and any other intangible personal property belonging to him. (NCGS 1-440.21). Award under G.S. NCGS 111-18 to blind person is not subject to levy under execution, attachment or garnishment. (NCGS 111-18).

Grounds are same as in attachment. See topic 8.02 Attachment.

Jurisdiction is same as in attachment. See topic 8.02 Attachment.

Proceedings to Obtain.

Summons to garnishee will be issued by the court at the request of plaintiff at time of issuance of original order of attachment or at any time thereafter prior to judgment in principal action. (NCGS 1-440.22). Forms are prescribed by statute for summons to garnishee (NCGS 1-440.23) and notice of levy in garnishment proceedings (NCGS 1-440.24).

Answer of Garnishee.

Summons to garnishee requires garnishee to file verified answer within 20 days after service of summons. Answer must show whether, at time of service of summons or at any time between then and date of answer, garnishee was indebted to defendant or had any property of defendant in garnishee's possession and if so, amount and nature thereof; and whether, according to garnishee's knowledge, information or belief, any other person is indebted to defendant or has any property of defendant in his possession and if so, name of such person. (NCGS 1-440.23).

Practice.

Following issuance of summons, sheriff serves garnishee with notice of levy which creates a lien upon all property garnishee has in his possession for the account, use or benefit of defendant and upon all debts owed by garnishee to defendant. (NCGS 1-440.24). Garnishee is served with copy of order of attachment, summons to garnishee and notice of levy. (NCGS 1-440.25).

When garnishee denies claim, plaintiff is allowed 20 days in which to file a reply. Issues are tried by jury upon demand. (NCGS 1-440.29, .30). Normally, trial of these issues is at same time as trial of principal action unless judge, on motion of any party for good cause shown, orders earlier trial or separate trial. (NCGS 1-440.30).

Adverse Claim of Garnishee.

In his answer, garnishee may assert any right of set-off, lien or other valid claim amounting to interest in any property of defendant which garnishee has in his possession. No garnishee shall be compelled to surrender possession of any property of defendant upon which garnishee establishes lien or other valid claim which interest was acquired prior to service or summons to garnishee, and such property only may be sold subject to garnishee's lien or interest. (NCGS 1-440.28).

Judgment.

If garnishee fails to file verified answer as required, the court shall enter conditional judgment against garnishee for full amount for which plaintiff shall have prayed judgment against defendant, plus costs. Notice is then issued to garnishee to appear within ten days to show cause why conditional judgment should not be made final. If, after service of such notice, garnishee fails to appear within time named and file verified answer to summons to garnishee, or if such notice cannot be served upon garnishee because he cannot be found within county where original summons to such garnishee was served, clerk makes conditional judgment final. (NCGS 1-440.27). When garnishee in his answer admits indebtedness to defendant, judgment is entered against garnishee for amount which garnishee admits he owes to defendant, or full amount for which plaintiff has prayed judgment against defendant, plus costs, whichever amount is smaller. When garnishee admits in his answer possession of personal property belonging to defendant, with respect to which garnishee does not claim lien or other interest, clerk enters judgment against garnishee requiring him to deliver such property to sheriff. When garnishee admits in his answer that he had property of defendant when he was served with garnishment process but alleges that he, without having any lien or other interest in such property, disposed of or for other reasons does not have possession of such property at time of filing answer, judgment may be entered against garnishee for amount equal to value of property in question or for full amount for which plaintiff prayed judgment against defendant, plus costs, whichever amount is smaller. When garnishee alleges in his answer that debt or personal property due to be delivered by him to defendant will become payable or deliverable at future date and plaintiff, within 20 days, files reply denying allegation, issue shall be submitted to jury. If it is not denied, or is found to be fact at trial, that debt owed or personal property due to be delivered to defendant will become payable or deliverable at future date, judgment will be given against garnishee requiring him to turn over money or property on due or deliverable date, to plaintiff if money, or to sheriff to sell to satisfy plaintiff's claim, if personal property. (NCGS 1-440.28).

Payment to Defendant by Garnishee.

Garnishee who pays debt to defendant or delivers property to defendant after being served with garnishment process and while garnishment proceeding is pending, is not thereby relieved of liability to plaintiff. (NCGS 1-440.31).

Pursuant to judgment against garnishee, execution may be issued against such garnishee prior to judgment against defendant in principal action, or court may permit property to remain in garnishee's possession upon garnishee providing suitable bond. (NCGS 1-440.32).

Earnings in excess of statutory exemption (see topic 8.06 Exemptions) are subject to garnishment.

8.10 HOMESTEADS:

Every homestead is exempt from sale under execution or other final process. (N.C. Const., art. X, §2[1]). Other exemptions are covered by G.S. NCGS 1C-1601, et seq.

Limitation of Value.

Constitutional exemptions limited to $1,000 in real property and $500 in personal property. (NCGS 1C-1602).

Limitation of Area.

None.

Vacant Lots.

Where only real property owned by judgment debtor consists of vacant lots, he may claim his homestead therein. (210 N.C. 121, 185 S.E. 632).

Debts or Liabilities Against Which Exemption Not Available.

Exemption is not available against taxes, obligations created for purchase of premises or mechanics' or laborers' liens. (N.C. Const., art. X, §§2[1] and [3]).

Allotment of homestead available as alternative exemption to those provided in G.S. NCGS 1C-1601, et seq. (NCGS 1C-1602).

Designation of Homestead.

Clerk or district court judge must designate property to be exempt under procedure set out in G.S. NCGS 1C-1603. (NCGS 1C-1602).

Judgment debtor may have exempt property designated by motion after judgment has been entered against him. (NCGS 1C-1603[a][1]).

Claim of Exemption.

Homestead is exempt from sale under execution and other final process obtained on debt. (N.C. Const., art. X, §2[1]).

Waiver of Exemption.

Homestead exemption will be enforced whenever possible, but can be waived. (211 N.C. 707, 192 S.E. 99).

Loss of Exemption.

Once homestead is allotted it may lose its homestead character only by death, abandonment or alienation. (230 N.C. 338, 53 S.E.2d 277). Right to claim homestead may be lost by failure to assert it in apt time, by waiver or by estoppel. (216 N.C. 712, 6 S.E.2d 497). Homestead interest in land is terminated by owner's removal from state. (230 N.C. 74, 52 S.E.2d 219).

Alienation or Encumbrance.

Owner of homestead may convey it by deed, but no deed made by married owner of homestead is valid without signature and acknowledgment of his or her spouse. (N.C. Const., art. X, §2[4]).

Proceeds of Sale are distributed first to debtor to satisfy his exemption and excess is distributed as ordered. (NCGS 1C-1602).

Rights of Surviving Spouse and Family.

The homestead, after death of owner, is exempt from payment of debt during minority of any of his children. Homestead is also exempt from debts of homesteader during widowhood of surviving spouse, and rents and profits shall inure to benefit of surviving spouse until remarriage unless surviving spouse is owner of separate homestead. (N.C. Const., art. X, §2[2] and [3]).

8.11 JUDGMENT NOTES:

See category 5 Civil Actions and Procedure, topic 5.15 Judgments, subhead Judgments by Confession.

8.12 LEVY:

See topics 8.02 Attachment, 8.05 Executions.

8.13 LIENS:

Uniform Commercial Code adopted. (NCGS 25-1-101 to NCGS 25-11-108). See category 3 Business Regulation and Commerce, topic 3.09 Commercial Code.

Lien for Wages.

There is a lien on assets of insolvent corporations, partnerships and individuals, for two months' wages of employees. (NCGS 44-5.1).

Lien for Hospital, Medical, etc., Expenses.

Lien as provided under G.S. NCGS 44-49 shall also attach upon all funds paid to any person in compensation for or settlement of injuries, whether in litigation or otherwise. If attorney represents injured person, lien is perfected as provided under G.S. NCGS 44-49.

Lien for Milk Sold or Consigned.

Producer who supplies milk by consignment or sale will, upon compliance with G.S. NCGS 44-69.3, have lien upon tangible and intangible assets of distributor.

Lien for Past-Due Child Support.

If Department of Human Resources or obligee for past-due child support notifies insurance company that claimant or beneficiary under insurance contract owes past-due child support and provides certified copy of child support order and proof of arrearage, lien attaches to insurance proceeds. (NCGS 58-3-185).

Lien claims must be filed in office of clerk of superior court in county where labor was performed or materials furnished. (NCGS 44-38). Clerk of superior court keeps indexed record of liens filed in his office. (NCGS 7A-109).

Enforcement.

U.C.C. governs in many areas. See category 3 Business Regulation and Commerce, topic 3.09 Commercial Code.

Redemption.

No right of redemption exists after foreclosure of lien and sale.

Mechanics' Liens.

See subhead Statutory Liens on Personalty, infra.

Statutory Liens on Personalty.

Any person who tows, alters, repairs, stores, services, treats or improves personal property, other than motor vehicles, in ordinary course of business pursuant to express or implied contract with owner or legal possessor of personal property has lien upon property. This lien has priority over perfected and unperfected security interests. (NCGS 44A-2[a]). Any person who repairs, services, tows, or stores motor vehicles in ordinary course of his business pursuant to express or implied contract with owner or legal possessor of motor vehicle, except for motor vehicle seized pursuant to G.S. NCGS 20-28.3, has lien upon motor vehicle for reasonable charges for such repairs, servicing, towing, storing, or rental of substitute vehicle. This lien will have priority over perfected and unperfected security interests. Lessor of any nonresidential demised premises has lien on all furniture, household furnishings, trade fixtures, equipment and other personal property to which tenant has legal title and which remains on demised premises if: (1) Tenant vacated premises 21 or more days after expiration of paid rental period, and (2) lessor has lawful claim for damages against tenant. If tenant has vacated premises for 21 or more days after expiration of paid rental period, or if lessor has received judgment for possession of premises which is executable and tenant has vacated premises, then all property remaining on premises may be removed and placed in storage. If total value of all property remaining on premises is less than ($100), then it shall be deemed abandoned five days after tenant has vacated premises, and lessor may remove it and may donate it to any charitable institution or organization.

Lessor's Lien.

See subhead Statutory Liens on Personalty, supra.

When Lien Arises and Terminates.

Liens conferred under this article arise only when lienor acquires possession of property and terminate and become unenforceable when lienor voluntarily relinquishes possession of property upon which a lien might be claimed, or when an owner, his agent, a legal possessor or any other person having a security or other interest in property tenders prior to sale amount secured by lien plus reasonable storage, boarding and other expenses incurred by lienor. Reacquisition of property voluntarily relinquished will not reinstate lien. Liens conferred under this article do not terminate when lienor involuntarily relinquishes possession of property. (NCGS 44A-3, -42).

Enforcement of Statutory Lien on Personalty.

Enforcement by Sale.

If charges for which lien is claimed under this article remain unpaid or unsatisfied for 30 days (15 days for self-storage facility and ten days for towing and storage charges on motor vehicle) following maturity of obligation to pay any such charges, lienor may enforce lien by public or private sale. Lienor may bring action on debt in any court of competent jurisdiction at any time following maturity of obligation. Generally, failure to bring such action within 180-day period following commencement of storage constitutes waiver of right to collect storage charges which accrue after such period.

Waiver, Loss or Extinguishment.

Landlord can expressly or implicitly waive lien or by his acts and conduct be estopped from averting lien. (240 N.C. 66, 81 S.E.2d 129). Possessory liens generally terminate when lienor voluntarily relinquishes possession. (NCGS 45A-3). Role of property encumbered by statutory lien does not extinguish lien; instead, its obligations are collectible from proceeds of sale. (73 N.C. App. 438, 326 S.E.2d 292).

Statutory Liens on Real Property for Persons Dealing with Owner.

Any person who performs or furnishes labor or professional design or surveying services or furnishes materials pursuant to a contract, either express or implied, with owner of real property, for making of improvement thereon will, upon complying with G.S. 44A, have right to file claim of lien on real property to secure payment of all debts owing for labor done or material furnished pursuant to contract. (NCGS 44A-8).

Extent of Lien.

Claim of lien on real property authorized under article extend to improvement and to lot or tract on which improvement is situated, to extent of interest of owner. When lot or tract on which building is erected is not surrounded at time of making contract with owner by enclosure separating it from adjoining land of same owner, lot or tract to which any claim of lien on real property extends will be area reasonably necessary for convenient use and occupation of such building, but in no case will area include building, structure, or improvement not normally used or occupied or intended to be used or occupied with building with respect to which claim of lien on real property is claimed. (NCGS 44A-9).

Effective Date of Liens.

Liens granted by this article will relate to and take effect from time of first furnishing of labor or materials at site of improvement by person claiming lien. (NCGS 44A-10).

Perfecting Liens.

Liens granted by this article will be perfected as of time set forth in G.S. NCGS 44A-10 upon filing of claim of lien pursuant to G.S. NCGS 44A-12 and may be enforced pursuant to G.S. NCGS 44A-13. (NCGS 44A-11).

Filing Claim of Lien.

All claims of lien against real property must be filed in office of clerk of superior court in each county wherein such real property is located. (G.S. NCGS 44A-12[a], [b]). Statutory form of claim exists. (NCGS 44A-12[c]).

Statutory Liens for Persons Not Dealing With Owner.

Subcontractors and materialmen not dealing with owner of real property are divided into tiers, each being entitled to lien upon funds due to person above with whom he dealt and having subrogation rights moving up chain of tiers.

Liens Upon Funds.

Subcontractor has lien upon funds owed to entity immediately above him on construction chain. (NCGS 44A-18).

Liens Upon Real Estate.

Subcontractors may have liens upon real estate by subrogation to general contractor's rights. First tier subcontractors perfect their subrogation rights to contractor liens upon filing of notice and claim of lien. (NCGS 44A-23[a]). Second and third tier subcontractors who gave notice may also enforce contractors lien, but exceptions to this general rule do exist. (NCGS 44A-23[b]). Persons more remote than third tier have no such subrogation rights. (NCGS 44A-17, -18).

Priority.

Statutory liens on real property under this article have priority over all other interests or claims, including but not limited to liens arising from garnishment, attachment, levy, judgment, assignments, security interests, and voluntary or involuntary transfer. (NCGS 44A-22).

Action to Enforce Statutory Liens on Realty.

An action to enforce lien created by statute may be instituted in any county in which lien is filed. No such action may be commenced later than 180 days after last furnishing of labor or materials at site of improvement by person claiming lien. If title to real property against which lien is asserted is by law vested in receiver or trustee in bankruptcy, lien will be enforced in accordance with orders of court having jurisdiction over said real property. Judgment enforcing lien under this article may be entered for principal amount shown to be due, not exceeding principal amount stated in claim of lien enforced thereby. Judgment will direct sale of real property subject to lien thereby enforced. (NCGS 44A-13).

Discharge of Record Lien.

Any lien filed under this article may be discharged by any of following methods: (1) Lien claimant of record, his agent or attorney, in presence of clerk of superior court may acknowledge satisfaction of lien indebtedness, whereupon clerk of superior court will forthwith make upon record of such lien entry of such acknowledgment of satisfaction, which will be signed by lien claimant of record, his agent or attorney, and witnessed by clerk of superior court; (2) owner may exhibit instrument of satisfaction signed and acknowledged by lien claimant of record which instrument states that lien indebtedness has been paid or satisfied, whereupon clerk of superior court will cancel lien by entry of satisfaction on record of such lien; (3) by failure to enforce lien within time prescribed in this article; (4) by filing in office of clerk of superior court original or certified copy of judgment or decree of court of competent jurisdiction showing that action by claimant to enforce lien has been dismissed or finally determined adversely to claimant; (5) whenever sum equal to amount of lien or liens claimed is deposited with clerk of court, to be applied to payment finally determined to be due, whereupon clerk of superior court will cancel lien or liens of record; (6) whenever corporate surety bond, in sum equal to 1¼ times amount of lien claimed and conditioned upon payment of amount finally determined to be due in satisfaction of said lien, is deposited with clerk of court, whereupon clerk of superior court shall cancel lien of record. (NCGS 44A-16).

Motor Vehicles.

See category 23 Transportation, topic 23.01 Motor Vehicles, subhead Titles, Sales and Liens.

Attachment Lien.

See topic 8.02 Attachment.

Attorney's Lien.

See category 18 Legal Profession, topic 18.01 Attorneys and Counselors.

Carrier's Lien.

See category 3 Business Regulation and Commerce, topic 3.09 Commercial Code.

Collateral Security.

See topic 8.15 Pledges.

Execution Lien.

See topic 8.05 Executions.

Factor's Lien.

See category 3 Business Regulation and Commerce, topic 3.14 Factors.

Judgment Lien.

See category 5 Civil Actions and Procedure, topic 5.15 Judgments.

Landlord's Lien.

See category 21 Property, topic 21.10 Landlord and Tenant.

Liens on Exempt Property.

See topic 8.06 Exemptions.

Liens on Homestead.

See topic 8.10 Homesteads.

Real Estate Mortgage Liens.

See category 20 Mortgages, topic 20.04 Mortgages of Real Property.

Tax Lien.

See category 22 Taxation, topic 22.13 Property Taxes, subhead Lien.

Uniform Federal Lien Registration Act adopted. (NCGS 44-68.10 to .17).

RICO Lien.

During any civil proceeding under N.C. RICO Act, Attorney General may file in any county RICO lien notice against any person, which creates lien in favor of state against any real property or beneficial interest then or thereafter owned by person in county where filed. (NCGS 75D-13). RICO lien lasts until released by Attorney General or by court order. (NCGS 75D-14).

8.14 MECHANICS' LIENS:

See topic 8.13 Liens.

8.15 PLEDGES:

A pledge is a deposit as security for a certain sum, and is generally valid without registration. Distinction between pledge and mortgage of personal property is: (1) That in former title is retained by pledgor, while in latter it passes to mortgagee; and (2) that delivery of possession of property to pledgee is absolutely essential to pledge, although such delivery is not necessary for validity of mortgage. Property delivered as pledge to secure debt, and redelivered by pawnee to pawnor, may be sold by latter and good title passes. (192 N.C. 439, 135 S.E. 328). Pledge need not be recorded to take priority over later recorded lien. If pledged property consists of notes or accounts receivable which are delivered back to pledgor for collection, pledge is still valid provided that proceeds are not commingled with pledgor's other property and it is understood that pledgor holds such proceeds as agent for pledgee. (202 N.C. 604, 163 S.E. 676).

Uniform Commercial Code adopted. (NCGS 25-1-101 to NCGS 25-11-108). See category 3 Business Regulation and Commerce, topic 3.09 Commercial Code.

Remedies of Pledgee.

See category 3 Business Regulation and Commerce, topic 3.09 Commercial Code.

8.16 RECEIVERS:

Receiver may be appointed before judgment to preserve property during action and afterward to carry judgment into effect, to dispose of property according to judgment, to preserve property during appeal, when execution has been returned unsatisfied and judgment debtor refuses to apply his property in satisfaction of judgment, and, for corporations, when corporation becomes insolvent or suspends its ordinary business for want of funds, is in imminent danger of insolvency, has forfeited its corporate right, or its existence has expired by limitation. (NCGS 1-502, -507.1). (See category 2 Business Organizations, topic 2.03 Corporations.) In addition, receiver may be appointed where restitution is sought for violation of G.S. NCGS 75-1.1 (unfair or deceptive trade practices) or in cases involving partition of real property pursuant to G.S. NCGS 46-31. (NCGS 1-502). Provisions of G.S. NCGS 1-507.1 to .11 applicable to receivers of corporations are applicable, as near as may be, to receivers appointed under NCGS 1-502.

Jurisdiction.

Receiver may be appointed by any judge of superior or district court with authority to grant restraining orders and injunctions, except only superior court judge may appoint receivers of corporations. All motions to show cause are returnable as is provided for injunctions. (NCGS 1-501). See category 5 Civil Actions and Procedure, topic 5.14 Injunctions.

Proceedings.

Action should be commenced by filing complaint and issuing summons, and plaintiff may then apply for order appointing receiver. Notice to other party is required except in case of emergency. Judge shall require party making application for appointment of receiver to furnish bond payable to adverse party to secure payment by applicant of all damages, including reasonable attorneys' fees, incurred by adverse party by reason of appointment or acts of receiver if appointment is vacated or otherwise set aside. Judge may increase bond after appointment. (NCGS 1-502.1). (See subhead Jurisdiction, supra.) In all cases involving application for appointment of receiver upon ground that property or its rents and profits are in danger of being lost, or materially injured or impaired, or in cases involving insolvent corporation, and subject of action is recovery of money (judgment), judge has discretionary power to refuse appointment of receiver if party against whom application for appointment of receiver is being prosecuted posts financial undertaking payable to adverse party with two reputable sureties in amount double sum demanded by plaintiff. (NCGS 1-503).

Qualification.

Receiver must, prior to assuming his duties, execute and file with clerk an undertaking payable to adverse party with at least two sufficient sureties in penalty fixed by appointing judge conditioned for faithful discharge of his duties as receiver. (NCGS 1-504).

Powers and Duties.

Receiver has power to (1) Demand, sue for, collect, receive and take into his possession all goods, lands and other property of judgment debtor or corporation, (2) foreclose mortgages, deeds of trust and other liens, (3) institute suits for recovery of property or damages and be substituted as party plaintiff in place of judgment debtor or corporation in any pending suit or proceeding, (4) sell, convey and assign all rights, interests, and estate, (5) appoint agents, (6) examine persons and papers and pass on claims, and (7) do all other acts which might be done by judgment debtor or corporation, if in being, that are necessary for final settlement of unfinished business. (NCGS 1-507.2). Powers of receiver may be continued as long as court thinks necessary and receiver shall hold and dispose of proceeds of all sales of property under direction of court. (NCGS 1-507.2).

Compensation will be allowed for services and expenses of receiver of corporation and is within discretion of court, but may not exceed 5% of receipts and disbursements. (NCGS 1-507.9). In addition, court is authorized and empowered to allow counsel fees to attorney serving as receiver (in addition to commissions allowed to him as receiver) when such attorney renders professional legal services that are beyond ordinary routine and scope of receiver. (NCGS 1-507.9).

Discharge.

When it appears that all debts have been paid or provided for, court may, in its discretion, discharge receiver and decree that property of corporation reverts to it. (NCGS 1-507.10).

8.17 REDEMPTION:

See topics 8.05 Executions, Liens; categories 20 Mortgages, topic Mortgages of Real Property; Taxation, topic Property (Ad Valorem) Taxes.

8.18 SUPPLEMENTARY PROCEEDINGS:

See topic 8.05 Executions.

8.19 TRUSTEE PROCESS:

See topic 8.09 Garnishment.

8.20 USURY:

See category 3 Business Regulation and Commerce, topic 3.19 Interest.

9 DISPUTE RESOLUTION

9.01 ALTERNATIVE DISPUTE RESOLUTION:

Mandatory Dispute Resolution.

Effective Oct. 1, 1995, G.S. NCGS 7A-38.1 requires that all cases filed thereafter in superior court be referred to pretrial mediated settlement conference. G.S. NCGS 7A-38.3B also permits clerk of superior court to order mediation in any matter in which he has exclusive or original jurisdiction, except for matters under cc. 45 (Mortgages and Deeds of Trust) and 48 (Adoptions) of G.S. and matter in which jurisdiction of clerk is ancillary. Parties may select their mediator; however, if parties cannot agree on mediator or choose not to select their mediator, then mediator, certified by Dispute Resolution Commission, shall be appointed by clerk. Costs of mediation must be borne by named parties, interested persons and fiduciaries ordered to attend. Negotiations and statements made in mediated settlement cannot be subject of discovery and are inadmissible in any proceeding in action or other actions on same claim. Although parties, their attorneys, and others with authority to settle claims are required to attend conference, parties are not required to make any offer or settle case.

Statewide mandatory mediation process is not exclusive, and Clerk of Superior Court may order, at request of and with consent of parties, parties to attend and participate in any other settlement procedure authorized by rules of supreme court or by local superior court rules, in lieu of attending mediated settlement conference.

In federal court, E.D.N.C. sends cases to mediated settlement conference or summary jury trial at parties' request. In M.D.N.C., many cases are automatically selected for mediated settlement conference and other cases can be so designated by court or by selection of parties. In W.D.N.C., cases are ordered to mediated settlement conferences as matter of course.

Voluntary Dispute Resolution.

As policy matter, G.S. NCGS 7A-38.1 encourages use of dispute resolution methods other than mandatory mediation settlement conference. Senior resident superior court judge, at request of and with consent of parties, may order parties to attend and participate in any other settlement procedure authorized by rules of N.C. Supreme Court or by local superior court rules, in lieu of attending mediated settlement conference. For example, in District 26 (Charlotte, Mecklenburg County) local superior court rules provide for early neutral evaluation, arbitration and summary jury trials as alternatives to mediation. Additionally, where not prohibited by law, parties may voluntarily refer their case to binding arbitration. See topic 9.02 Arbitration and Award.

Alternative Dispute Resolution Jurisdictional Bodies/Commission.

Regulation of mediators and other neutrals is governed by G.S. NCGS 7A-38.2. Dispute Resolution Commission administers certification and qualification of mediators and other neutrals, and mediator and other neutral training programs. Supreme Court adopts rules and regulations governing the operation of Commission. (NCGS 7A-38.2).

Alternative Dispute Resolution Acts.

See generally subhead Mandatory Dispute Resolution, supra, and topic Arbitration and Award.

9.02 ARBITRATION AND AWARD:

Uniform Arbitration Act adopted and effective on agreements to arbitrate made between Aug. 1, 1973 and Dec. 31, 2003 (NCGS 1-567.1 to .20) unless all parties agree to be governed by Revised Uniform Arbitration Act. Revised Uniform Arbitration Act adopted and effective on agreements to arbitrate made after Jan. 1, 2004. (NCGS 1-569.1 to .31). International commercial arbitration governed by N.C. International Commercial Arbitration Act. (NCGS 1-567.30 to .67).

Forms and Requisites of Submission.

Forms used in arbitration proceedings must be approved by Administrative Office of the Courts. (Rules for Court Ordered Arbitration, R. 8[d]).

Contracts to Arbitrate Future Disputes.

Agreement to submit any subsequent controversy arising between parties is valid, enforceable and irrevocable except upon grounds of law or equity for revoking contract. (NCGS 1-569.6).

Judgment on Award.

Upon granting of order confirming, modifying or correcting award, judgment or decree shall be entered in conformity therewith and be docketed and enforced as any other judgment or decree. Cost of application and other proceedings subsequent thereto, and disbursements may be awarded by court. (NCGS 1-569.25).

Enforcement.

There are no provisions dealing specifically with enforcement of arbitration award; however, once judgment on award is entered, procedure for enforcement will be same as for any other judgment.

Revised Uniform Arbitration Act (2000) Adoption/Deviation.

Revised Uniform Arbitration Act was modified by following provisions: Immunity of arbitrators does not extend to automotive infractions (NCGS 1-569.14[f]); rules of evidence, except as to matters of privilege or immunities, inapplicable in arbitration proceedings (NCGS 1-569.15[f]); arbitrator may not hold party in contempt of any arbitrator's order made under G.S. NCGS 1-569.17, although court may hold parties in contempt of such order (NCGS 1-569.17[h]); arbitrator's ruling that denies request for preaward ruling not subject to trial court review (NCGS 1-569.18[b]), and after trial court award under G.S. NCGS 1-569.18, .19 or .28, no right of appeal from trial court orders and judgments on preaward rulings by arbitrator (NCGS 1-569.18[c]); arbitrator may award punitive damages or other exemplary relief when arbitration agreement so provides (NCGS 1-569.21[a][1]).

§3(c) of Revised Uniform Act was excluded.

§33 of Revised Uniform Act was excluded.

Mandatory Arbitration.

Mandatory Nonbinding Arbitration in State Court.

Some judicial districts may provide for mandatory arbitration of civil claims for monetary damages not exceeding $15,000, except actions on accounts. Rules of evidence, except privilege, are inapplicable. Absolute right of appeal de novo if taken within 30 days after award. (NCGS 7A-37.1).

Mandatory Nonbinding Arbitration in Federal Court.—E.D.N.C. ADR R. 101.3 provides for mediated settlement at request of parties. M.D.N.C. LR16.4(b) provides for mandatory mediated settlement conferences in contract, tort, civil rights, labor, property rights, antitrust, banks and banking, securities/commodities/exchange, and environmental matters. W.D.N.C. LR 16.2(A) provides for mandatory mediated settlement conference unless otherwise ordered by court.

Powers of Arbitrators.

Powers of arbitrator, whether appointed pursuant to method specified in agreement or appointed by court if agreed method fails or for any reason cannot be followed, are as specified in agreement to arbitrate. (NCGS 1-569.11[a]). Powers of arbitrators may be exercised by majority unless otherwise provided by agreement or by Uniform Act. (NCGS 1-569.13). On application of party or if application to court is pending, arbitrators may modify or correct award upon grounds stated in G.S. NCGS 1-569.24(a)(1) and (3), because arbitrator had not made final and definite award, or to clarify award. (NCGS 1-569.20).

Rescission.

Upon application of party court shall vacate award where (1) Award was procured by corruption, fraud or other undue means, (2) there was evident partiality by arbitrator appointed as neutral or corruption in any of arbitrators or misconduct by arbitrator prejudicing rights of any party, (3) arbitrators refused to postpone hearing upon sufficient cause being shown therefore or refused evidence material to controversy or otherwise so conducted hearing contrary to provisions of G.S. NCGS 1-569.15 so as to substantially prejudice rights of party, (4) arbitrators exceeded their powers, (5) there was no arbitration agreement, unless party participated in proceeding without raising objection under G.S. NCGS 1-569.15(c) not later than beginning of arbitration hearing, or (6) arbitration was conducted without proper notice of initiation of arbitration as required in G.S. NCGS 1-569.9 so as to prejudice substantially rights of party. (NCGS 1-569.23).

Jurisdiction Arbitration Acts.

None.

Credentials of/Qualifications of/Standards for Arbitrators.

See Rules for Court-Ordered Arbitration in N.C., R. 2.

Contracts With Arbitration Forum Selection Clauses.

Provision in contract entered into in N.C. or for improvement of property in N.C., or providing of materials therefor, requiring arbitration of dispute in another state is void as against public policy. This prohibition does not apply to nonconsumer loan transactions or to any arbitration of dispute commenced in another state pursuant to forum selection provision with consent of all parties to contract at time that dispute arises. (NCGS 22B-2 and -3).

9.02A MEDIATION:

See also topic 9.01 Alternative Dispute Resolution.

Jurisdictional Mediation Acts.

In general, see Rules Implementing Statewide Mediated Settlement Conferences in Superior Court Civil Actions (see also NCGS 7A-38.1) which govern mediation in N.C. State Court, and U.S. District Court for W.D.N.C. as supplemented by LR16.3. In E.D.N.C., mediation is governed by ADR R. 101.3. In M.D.N.C., LR83.10a to .10g govern mediation.

Credentials of/Qualifications of/Standards for Mediators.

Mediators must complete 40-hour trial court mediation training program certified by Dispute Resolution Commission and meet additional specified standards of training, experience and qualifications. (Rules Implementing Statewide, R. 8). For mediators in Custody and Visitation Program (see category 6 Courts and Legislature, topic 6.01 Courts, subhead Arbitration and Mediation), additional requirements apply. (NCGS 7A-494). Superior court judge presiding in county maintains directory of certified mediators available to mediate in county (Rules Implementing Statewide, R. 2[D]), and U.S. district courts maintain similar directories. E.D.N.C. (ADR R. 101.3[f][3][3]) and W.D.N.C. (LR16.3[B][1]) accept mediator certification standards of Rules Implementing Statewide, R. 8, but M.D.N.C. (LR83.10c[a]) modifies standards slightly.

10 DOCUMENTS AND RECORDS

10.01 ACKNOWLEDGMENTS:

Acknowledgment or proof of instruments may be taken by the following officers:

Within State.

Justices, judges, magistrates, clerks, assistant clerks and deputy clerks of general court of justice, and notaries public. (NCGS 47-1). Maximum fee is $5 per signature. (NCGS 10B-20).

Without State, Whether Within or Without United States.

Judge or clerk of a court of record; notary public; commissioner of deeds or of oaths; mayor or chief magistrate of an incorporated town or city; ambassador, minister, consul, vice-consul, consul general, vice-consul general, associate consul, or any other person authorized by federal law to acknowledge documents as consular officers, or commercial agent of U.S.; justice of the peace of any state or territory of U.S.; or, with respect to persons in U.S. Armed Forces, officer of U.S. Army, U.S. Air Force, Marine Corps, U.S. Navy, Coast Guard or Merchant Marine having rank of warrant officer or higher. (NCGS 47-2).

Persons in or with U.S. Armed Forces.

See subhead Without State, Whether Within or Without United States, supra.

General Requirements as to Taking.

An officer who is interested may not act. (113 N.C. 256, 18 S.E. 499; 124 N.C. 262, 32 S.E. 715).

General Requirements of Certificate.

Notarial act must be attested by signature of notary, readable appearance of notary's name, clear and legible appearance of notary's stamp or seal and statement of notary's commission expiration date. (NCGS 10B-14[b]). However, neither erroneous statement of notary's commission expiration date or unreadable impression of notary's name, nor failure to contain words North Carolina or N.C. or providing of correct information except for abbreviation of state, will invalidate notarial act. Notarized documents which contain any of preceding errors are given same legal effect as if errors had not occurred. (NCGS 10B-36).

Seal.

Where official taking acknowledgment or proof of execution of instrument has official seal he must set such seal to his certificate; if he has no seal he must certify under his hand and his private seal is not essential. No official seal is necessary when instrument is acknowledged or proved before register of deeds of county in which it is to be registered. (NCGS 47-5).

Married Women.

Law requiring privy or private examination has been repealed. (NCGS 47-14.1; 319 N.C. 347, 354 S.E.2d 471).

Attorneys-in-Fact.

Attorney-in-fact may sign instrument in name of principal by himself as attorney-in-fact or as attorney-in-fact for principal. For instrument to be executed under seal, power of attorney must have been executed under seal. (NCGS 47-43.1).

Corporations.

See subhead Other Forms for Corporations, infra.

Foreign Acknowledgments.

See subhead Without State, Whether Within or Without United States, supra.

Effect of Acknowledgment.

Register of deeds shall not accept for registration any instrument that requires proof or acknowledgment unless execution of instrument by one or more signers appears to have been proved or acknowledged before officer with apparent authority. Register of deeds shall accept instrument for registration that does not require proof or acknowledgment if instrument otherwise satisfies requirements of G.S. NCGS 161-14. Any document previously recorded may be re-recorded. Register of deeds is not required to verify or make inquiry concerning legal sufficiency of proof or acknowledgment, authority of any officer, or legal sufficiency of any document presented for registration. (NCGS 47-14).

Power of attorney, wherever made or concerning whatsoever matter, may, on acknowledgment or proof of same before competent official, be registered in county wherein property or estate which it concerns is situate, if such power of attorney relate to conveyance thereof; if it does not relate to conveyance of any estate or property, then in county where attorney resides or business is to be transacted. (NCGS 47-28).

Proof by Subscribing Witness.

Execution of any instrument required or permitted by law to be registered, which has been witnessed by one or more subscribing witnesses, may be proved for registration before any official authorized by law to take proof of such an instrument, by a statement under oath of any such subscribing witness that maker either signed instrument in his presence or acknowledged to him execution thereof. (NCGS 47-12).

If all subscribing witnesses have died or have left state or have become of unsound mind or otherwise incompetent or unavailable, execution of such instrument may be proved for registration, before any official authorized by law to take proof of such instrument, by statement under oath that affiant knows handwriting of maker and that purported signature of maker is in handwriting of maker, or by statement under oath that affiant knows handwriting of a particular subscribing witness and that purported signature of such subscribing witness is in handwriting of such subscribing witness. (NCGS 47-12.1).

Execution of an instrument may not be proved for registration by subscribing witness who is grantee or beneficiary therein nor by proof of his signature as such subscribing witness. (NCGS 47-12.2). Person taking proof must attach certificate to instrument which will be prima facie evidence. (NCGS 47-13.1).

Where grantor refuses to acknowledge an instrument which he has executed and delivered to grantee, grantee may, on motion before clerk of superior court of county in which instrument should be registered, have subpoena issued to grantor or witness to instrument requiring him to appear before clerk to give evidence concerning execution of instrument. (NCGS 47-11).

Authentication.

If proof or acknowledgment be certified under official seal of an officer taking outside the state, no further authentication is required. If acknowledgment is taken before nonresident official without seal, certificate is required of clerk of court of record of state, territory or country where official taking acknowledgment resides. (NCGS 47-45). Secretary of State and register of deeds in county in which notary public qualified may certify to commission of such notary. (NCGS 10B-9). Fee of Secretary of State is $10. (NCGS 147-37). Fee of register of deeds is $5 for comparing and certifying copy of any instrument filed for registration. (NCGS 161-10[a][10]). See infra, subhead Forms for Authentication.

Acknowledgment Form

North Carolina

. . . . County

I certify that the following person(s) personally appeared before me this day, each acknowledging to me that he or she voluntarily signed the foregoing document for the purpose stated therein and in the capacity indicated: [signer's name] as [title/office] of [company].

Date: . . . .

. . . .

Print Name: . . . .

Notary Public:

My commission expires:. . . . .[OFFICIAL SEAL]

Form for Attorney-in-Fact.

The following is sufficient, but does not exclude other forms which would be sufficient in law (NCGS 47-43):

North Carolina, ... County. I (here give name of official and his official title), do hereby certify that (here give name of attorney-in-fact), attorney-in-fact for (here give names of parties who executed the instrument through attorney-in-fact), personally appeared before me this day, and being by me duly sworn, says that he executed the foregoing and annexed instrument for and in behalf of (here give names of parties who executed the instrument through attorney-in-fact), and that his authority to execute and acknowledge said instrument is contained in an instrument duly executed, acknowledged, and recorded in the office of (here insert name of official in whose office power of attorney is recorded, and county and state of recordation), on the (day, month and year of recordation), and that this instrument was executed under and by virtue of the authority given by said instrument granting him power of attorney; that the said (here give name of attorney-in-fact) acknowledged the due execution of the foregoing and annexed instrument for the purposes therein expressed for and in behalf of the said (here give names of parties who executed the instrument through attorney-in-fact).

Witness my hand and official seal, this . . . . . . day of . . . . . . (month), ... (year).

(Official seal.)

. . . .

(Signature of officer.)

Forms for Proof by Subscribing Witness (NCGS 47-43.2). State of (name of state), . . . County I, (name of officer taking proof), a (official title of officer taking proof) of . . . . . County, (name of state), certify that (name of subscribing witness) personally appeared before me this day, and being duly sworn, stated that in his presence (name of maker) (signed the foregoing instrument) (acknowledged the execution of the foregoing instrument.) (Strike out words not applicable.)

WITNESS my hand and official seal, this the . . . . day of . . . . . . (month), ... (year).

. . . .

(Signature of officer taking proof)

. . . .

(Official title of officer taking proof)

My commission expires . . . . (Date of expiration of officer's commission)

Forms for authentication are as follows (NCGS 47-44 and -45):

I, A. B. (here give name and official title of the clerk of a court of record), do hereby certify that C. D. (here give name of the official who took the proof, etc. was at the time of signing the foregoing (or annexed) certificate a (here give the official title of the officer who took the proof, etc.) in and for the county of . . . . . . and State of . . . . . . (or other political division of the state, territory, or country, as the case may be), and that his signature thereto is in his own proper handwriting.

In witness whereof I hereunto set my hand and official seal, this . . . . . . day of . . . . . . (month). . . . . . . (year), A. D.

(L. S.)

. . . .

(Signature of clerk).

47-44: same ¶, but instead of “official” in ( ), use “justice of the peace or magistrate”

. . . .

(Signature of officer.)

Alternative to Acknowledgment or Proof.

No statutory provision.

Validating Act.

There are numerous provisions validating defective acknowledgments or improper registration of instruments. (NCGS 47-47 to -108.26).

10.02 AFFIDAVITS:

Any officer competent to take acknowledgment of deeds, and any judge or clerk of general court of justice, notary public, in or out of state, or magistrate, is competent to take affidavits for verification of pleadings, in any court or county in state and for general purposes. (NCGS 1-148; NCGS 10B-14[a]).

General Requirements as to Administration.

Officer has duty of ascertaining identity of person taking oath. (169 N.C. 333, 85 S.E. 418). Officer must not be interested party. (NCGS 10B-14[c]).

General Requirements of Jurat.

Affidavit should be authenticated under seal of officer before whom made; and officer who holds by commission should state when his or her commission will expire. (NCGS 10B-14[b]).

Use of Affidavit.

Required Uses: Complaint in shareholder's derivative suit must be verified by oath. (NCGS 1A-1, R. 23[b]). Affidavit is required in summary judgment hearing to show genuine issue for trial. (NCGS 1A-1, R. 56). Claimant against state department or agency must file with Industrial Commission affidavit setting forth specifics of claim. (NCGS 143-297).

Permitted uses: Affidavits have been made admissible by statute in following instances: As prima facie evidence of notice by publication or mailing to decedent's creditors (NCGS 28A-14-2); in proceedings for commitment to mental health facility, individuals can have affidavit taken by clerk or magistrate, and physicians can have affidavit taken by any authorized person. Affidavits may be used in support of motions, as prima facie evidence that notice of participation has been sent in proceeding of sale and resale (NCGS 46-28[b]), as prima facie evidence that newspaper publication of legal notice met statutory requirements (NCGS 1-598, -600[a]), to obtain preliminary injunction (NCGS 1-485) and where opposing party serves affidavits in opposition to motion for summary judgment (NCGS 1A-1, R. 56).

Form.

Usual form of heading and jurat or certificate is as follows:

Form

STATE OF NORTH CAROLINA, COUNTY OF . . . . ss. . . . . being first duly sworn deposes and says: (then follows statement of facts, followed by signature of affiant). Sworn to and subscribed before me, this the . . . . . . day of . . . ., 20. . . . . ., (adding officer's signature, office and seal).

My commission expires . . . .

Alternative to Affidavit.

No statutory provision.

10.03 NOTARIES PUBLIC:

Qualification.

Notary must receive commission from Secretary of State and take oath of office from register of deeds. (NCGS 10B-4, -9). Qualified person must fulfill following requirements: (1) Be at least 18 years of age; (2) reside or work in N.C.; (3) reside legally in U.S.; (4) speak, read and write English language; (5) possess high school diploma or equivalent; (6) complete approved course of study (members of Bar exempted); (7) obtain approved manual; and (8) submit application, available from register of deeds, that contains no significant misstatement or omission of fact and bears properly acknowledged signature of applicant. Except in counties with more than 15,000 active notaries, applicant must obtain recommendation of publicly elected official. (NCGS 10B-4[b]). Grounds for refusal governed by G.S. NCGS 10B-4(b). Following oath, notary signs Record of Notaries Public which constitutes official record of qualification of notary. Following signing of Record, register of deeds delivers to notary his/her commission. (NCGS 10B-9). $50 fee required for commission and recommission. (NCGS 10B-12).

Registers of deeds may act ex officio as notaries. Assistant or deputy registers of deeds may certify ex officio only (1) oaths and affirmations and (2) verifications or proofs. (NCGS 104-14[b]).

Officers of Armed Forces.

Active duty officers authorized by 10 U.S.C. §936 to perform notarial acts may do so for persons serving in or with U.S. forces, their spouses, and their dependants. (NCGS 10B-14[g]).

Authentication.

See topic 10.01 Acknowledgments.

Seal.

Official acts of notaries in state must be attested by their proper signatures; by readable appearance of their names, either from signature or otherwise; by clear and legible appearance of their notarial stamps or seals; and by statement of date of expiration of their commissions. (NCGS 10B-14[b]).

Powers and Duties.

Notaries have power to perform acknowledgments, oaths, affirmations, verifications and proofs. (NCGS 10B-14[a]).

Certificate of Authority.

See topic 10.01 Acknowledgments, subhead Authentication.

Territorial Extent of Powers.

Qualified notary may act in any part of state. (NCGS 10B-8).

Expiration of Commission.

Notaries are required to state, after each official signature, expiration date of their commission. (NCGS 10B-14[b][4]).

Fees.

Notaries public are allowed sum of $5 per signature for acknowledgments, $5 per person for oaths or affirmations without verification or proof and $5 per signature for verifications or proofs. (NCGS 10B-20).

10.04 RECORDS:

Register of deeds shall not accept for registration any instrument that requires proof or acknowledgment unless said proof or acknowledgment was executed before officer with apparent authority. Register of deeds shall accept instrument for registration that does not require proof or acknowledgment if instrument satisfies requirements of G.S. NCGS 161-14. Register of deeds shall not be required to verify or make inquiry concerning legal sufficiency of proof or acknowledgment, authority of any officer, or legal sufficiency of any document presented for registration. (NCGS 47-14[a]). If register of deeds denies registration, person offering instrument for registration may present instrument to judge who must examine instrument and under certain circumstances may order instrument to be registered. (NCGS 47-14[b]).

Application for order for registration pursuant to G.S. NCGS 47-14(b) shall be made to any judge of district court in district including county in which instrument is to be registered. (NCGS 47-14[c]).

For list of Counties and County Seats, see first page for this state in Volume containing Practice Profiles Section.

Uniform Commercial Code adopted. (NCGS 25-1-101 to NCGS 25-11-108). See category 3 Business Regulation and Commerce, topic 3.09 Commercial Code.

Recordable Instruments.

See subhead Place of Recording, infra.

Requisites for Recording.

In order to be recorded, a deed, contract or lease must be acknowledged by the person executing the same or proved by the oath of one or more witnesses. (NCGS 47-17). In addition, first page of deed or deed of trust must state name of either person or law firm which drafted instrument, except if instrument was prepared out of state. (NCGS 47-17.1). Special rules govern plats and subdivisions. (NCGS 47-30, -30.1).

Place of Recording.

Real Property.

In office of register of deeds there must be recorded all deeds, deeds of trust, deeds of release, quitclaim deeds, grants, transfers and mortgages of real property, leasehold mortgages, release of mortgages, powers of attorney to convey real estate, leases for longer term than three years, contracts and options relating to real estate and also certified copies of final judgments or decrees in partitions affecting title to real estate. Homestead exemptions in real property must also be recorded. (NCGS 47-18, -20). Deed of trust or mortgage of real or leasehold property must be recorded in county where land lies, or if land is located in more than one county, then in each county where any portion of land lies. (NCGS 47-20.1, .4).

Personal Property.

Uniform Commercial Code adopted, effective July 1, 1967. (See category 3 Business Regulation and Commerce, topic 3.09 Commercial Code.) Address of Secretary of State is: U.C.C. Section, P.O. Box 29626, Raleigh, N.C. 27626.

Wills.

Wills are recorded in office of clerks of superior court of counties where testators resided or where real estate affected may be situated. (NCGS 31-20, -39).

Bankruptcy records must be filed with any register of deeds in the state. (NCGS 47-29).

Recording Fees.

See category 21 Property, topic Deeds, subhead Recording Fees; and category 20 Mortgages, Mortgages of Real Property, subhead Recording Fees.

Effect of Recording.

Deeds, conveyances, contracts to convey, options to convey, leases of land for more than three years, mortgages, conditional sales, contracts of personal property, deeds of trust, shall be valid as against lien creditors and purchasers for value only from time of registration. Recording of written document containing assignment of leases, rents, issues or profits arising from real property will be valid and perfected from time of recording, but shall not include farm products as defined in G.S. NCGS 25-9-102(34), timber, proceeds from sale of farm products or timber, or proceeds from recovery or severance of any mineral deposits located on or under real property. (NCGS 47-20[b][1]). Assignee of collateral assignment entitled, not required, to receive any accrued and unpaid or subsequently accruing lease revenues, rents, issues or profits subject to assignment, without appointment of receiver. (NCGS 47-18, -20).

A duly certified copy of any deed or writing required or allowed to be registered, may be registered in any county, and registry or duly certified copy of any deed or writing when registered in county where land is situate may be given in evidence in any court. (NCGS 47-31).

Certified copy of record of any deed, mortgage, power of attorney, or other instrument required or allowed to be registered, or recorded, may be given in evidence in any court, and in state if original of such copy would be admitted as evidence. Party offering same will be entitled to possession of original, and will not account for nonproduction thereof, unless by rule or order of court, made upon affidavit suggesting some material variance from original in such registry, or other sufficient grounds, such party shall have been previously required to produce original, in which case same may be produced or its absence duly accounted for. (NCGS 8-18).

Torrens system of land registration is in effect in N.C. (NCGS 43-1, et seq.).

Transfer of Decedent's Title.

In case of a resident decedent, the probate records are sufficient to show transfer to decedent's heirs or devisees of his title to real estate located in the county where the estate is administered. With respect to other real estate, a certified copy of the will and probate thereof, or of administration proceedings affecting real estate, must be recorded in office of clerk of superior court of county where such real estate is situated. (NCGS 31-20).

In case of a nonresident testator, a duly certified copy of will and probate thereof must be recorded in office of clerk of superior court of county where real estate is located. (NCGS 31-27). In case of nonresident intestate, ancillary administration is necessary.

Filing Under Commercial Code.

Effective July 1, 2001, art. 9 of U.C.C. has been rewritten. Proper place to file in order to perfect security interest or agricultural lien is generally office of Secretary of State. (NCGS 25-9-501). Central filing with Secretary of State should also be default filing location for collateral in goods that are or are to become fixtures and financing statement is not filed as fixture filing. (NCGS 25-9-501[2]). If collateral is as-extracted collateral or timber to be cut, or financing statement is filed as fixture filing, filing location should be office designated for filing or recording of record of mortgage on related real property. (NCGS 25-9-501[1][a], [b]).

Filing of financing statement is not necessary to perfect security interest if it fulfills exception found in G.S. NCGS 25-9-310(b). Security interest in chattel paper, negotiable documents, instruments, or investment property may be perfected by filing (NCGS 25-9-312[a]), but security interest in deposit account or letter-of-credit right must be perfected by control (NCGS 25-9-314). Security interest in money may be perfected only by secured party's taking possession under G.S. NCGS 25-9-313.

Except as otherwise provided in G.S. NCGS 25-9-515 (b), (e), (f), and (g), filed financing statement is effective for period of five years after date of filing. (NCGS 25-9-515[a]). Effectiveness of filed financing statement lapses on expiration of period of its effectiveness unless within six months before lapse continuation statement is filed. (NCGS 25-9-515[c], [d]). Upon lapse, financing statement ceases to be effective and any security interest or agricultural lien that was perfected by financing statement becomes unperfected, unless perfected otherwise. If security interest or agricultural lien becomes unperfected upon lapse, it is deemed never to have been perfected as against purchaser of collateral for value. (NCGS 25-9-515[c]).

Fees.

See category 3 Business Regulation and Commerce, topic 3.09 Commercial Code.

Vital Statistics.

Certificates of births and deaths must be filed with local registrar of county in which event occurs who in turn furnishes register of deeds of such county with copies of birth and death certificates. (NCGS 130A-99, -101, -115). Register of Deeds sends record of marriages to State Registrar. (NCGS 130A-110).

Copy of marriage certificate can be obtained from State Registrar or Register of Deeds. (NCGS 130A-110). Certified copy of record of birth or death may be obtained from State Registrar for fee not to exceed $15 (NCGS 130A-93, -93.1), or from Register of Deeds of county of birth or death (NCGS 130A-99).

If child is legitimated under G.S. NCGS 49-10, new birth certificate shall be issued upon presentation of certified copy of order of legitimation. If child is legitimated by subsequent marriage under G.S. NCGS 49-12, new birth certificate shall be issued upon presentation of certified copy of marriage license issued to child's parents. (NCGS 49-13). New birth certificate shall also be made when written request is received by State Registrar to change sex on birth certificate because of sex reassignment surgery if request is accompanied by notarized physician's statement. (NCGS 130A-118).

Establishing Birth Records.

Person born in this state without recorded certificate of birth may file verified petition with clerk of superior court of county of his or her legal residence or place of birth, setting forth place and date of birth and parentage and seeking adjudication with respect thereto. Clerk sets date for hearing and conducts proceeding as special proceeding, and petitioner must present such evidence necessary to establish facts to satisfaction of court. If satisfactory evidence is presented court enters judgment establishing date and place of birth and parentage of petitioner, which is recorded in records of special proceedings. Clerk then certifies record to State Registrar who keeps record and copy must be certified to register of deeds of county in which petitioner was born. Fee must not exceed $2. (NCGS 130A-106).

Where person was abandoned as a child in this state, and name and address of parents and place of birth are unknown, if there is insufficient evidence to establish place of birth, such person is conclusively presumed to have been born in county where abandoned. (NCGS 130A-107).

Provision is also made for delayed registration one year or more after birth. (NCGS 130A-104).

Lis Pendens.

Anyone desiring benefit of constructive notice of pending litigation must file separate notice thereof in following cases: (1) Actions affecting title to real property; (2) actions to foreclose mortgage or deed of trust or to enforce any lien on real property; (3) actions in which real property is attached; and (4) actions seeking injunctive relief regarding sedimentation and erosion control for land-disturbing activity subject to requirements of Article 4, Chapter 113A NCGS. Notice must contain name of court in which action has been commenced or is pending, name of parties to action, nature and purpose of action, and description of affected property. Notice may be filed at or after commencement of action at or at anytime after real property is attached, or at or after filing of answer or other pleading where party states affirmative claim for relief in action requiring separate notice. Notice must be filed with and cross indexed by clerk of superior court of each county in which any part of property is located not excepting county in which action is pending. (NCGS 1-116 and -117).

From cross-indexing of notice of lis pendens, pendency of action is constructive notice to purchaser or incumbrancer of affected property. Purchaser or incumbrancer is bound by all proceedings taken after cross-indexing of notice. (NCGS 1-118).

10.05 SEALS:

Seal of signatory shall not be necessary to effect valid conveyance of interest in real property; provided that this section shall not affect requirement for affixing seal of officer taking acknowledgment of instrument. (NCGS 39-6.5).

Uniform Commercial Code adopted. (NCGS 25-1-101 to NCGS 25-11-108). See category 3 Business Regulation and Commerce, topic 3.09 Commercial Code.

10.06 TORRENS ACT:

See topic 10.04 Records.

10.07 VITAL STATISTICS:

See topic 10.04 Records.

11 EMPLOYMENT

11.01 EMPLOYER AND EMPLOYEE:

See topic 11.02 Labor Relations.

11.02 LABOR RELATIONS:

There is in the State Department of Labor a conciliation service which attempts to effect settlement of labor disputes. (NCGS 95-35, -36).

Hours of Labor.

See subhead Child Labor, infra.

Apprenticeship of persons at least 16 years is permitted by written voluntary agreement, which must be for period of not less than 2,000 hours with recommended minimum of 144 hours of related supplemental instruction per year. (NCGS 94-6). Apprenticeship council is created to aid Labor Commissioner in establishing standards, rules and regulations for apprentice agreement. (NCGS 94-2).

Child Labor.

Every employed youth under 18 must have employment certificate issued, subject to review by Department of Labor, by county directors of social services and such of their designees as are approved by commissioner unless specifically exempted. (NCGS 95-25.5[a]). Youth under 18 enrolled in grade 12 or lower cannot be employed between 11 p.m. and 5 a.m. when there is school next day except for 16 and 17 year olds with certain written approval. (NCGS 95-25.5[a1]. Youths 14 and 15 years old may work only in occupations permitted under Fair Labor Standards Act: (1) No more than three hours on day when school in session; (2) no more than eight hours on day when school not in session; (3) only between 7 a.m. and 7 p.m., except to 9 p.m. in summer when school is not in session; and (4) no more than 18 hours in any one week when school is in session for youth, and no more than 40 hours in any one week when school is not in session for youth; and (5) only outside school hours. Enrollees in apprenticeships or career exploration programs, however, may work up to 23 hours in any one week when school is in session, any portion of which may be during school hours. (NCGS 95-25.5[c]). No youth under 16 years may work more than five consecutive hours without 30 minutes rest. (NCGS 95-25.5[e]).

No youth under 18 years may work in hazardous occupations, as defined under Fair Labor Standards Act, or in any occupation which Commissioner of Labor declares to be detrimental to youths. (NCGS 95-25.5[b]).

No youth 13 years of age or less may be employed by employer. Except, youths 12 and 13 years old may work no more than three hours per day outside school hours distributing newspapers to consumers. No certificate required. (NCGS 95-25.5[d]).

Commissioner of Labor may waive any of above provisions for youths 13 years of age or older and authorize issuance of employment certificate if: (1) Letter from social worker, court, probation officer, county department of social services, N.C. Alcohol Beverage Control Commission or school official states factors showing hardship, and how best interest of youth is served by allowing waiver; (2) he determines that health and safety of minor would not be adversely affected; and (3) parent, guardian or other person in loco parentis consents in writing to proposed employment. (NCGS 95-25.5[f]).

Partial exemptions are available for youths employed as models, performers, stagehands in outdoor dramas, youths under 18 employed by their parents and youths employed in establishments subject to Fair Labor Standards Act. Youths must be 16 to work on premises where alcoholic beverages are sold and must be 18 to serve such beverages. Civil penalties for violations are provided by G.S. NCGS 95-25.23. (NCGS 95-25.5[g-k]).

As part of his employment, youth who holds driver's license valid for type of driving involved and who has completed state approved driver's education course may drive vehicle not exceeding 6,000 pound gross vehicle weight within 25 mile radius of his principal place of employment. (NCGS 95-25.5[l]).

Youths who are enrolled in institution of higher education may be employed by this institution provided employment is not hazardous. As used in this subsection, “institution of higher education” means any constituent institution of University of N.C., any N.C. community college, or any college or university that awards postsecondary degrees. (NCGS 95-25.5[m]).

See also G.S. NCGS 95-25.14 for certain other exemptions.

Female Labor.

See subhead Discrimination and Retaliation, infra.

Discrimination and Retaliation.

Public policy of state is to protect all citizens who seek employment without discrimination on account of race, religion, color, national origin, age, sex or handicap by employers which regularly employ 15 or more employees. (NCGS 143-422.2). This policy also applies to all state department agencies and local political subdivisions. (NCGS 126-16). Federal decisions guide state standards and practice for defining what constitutes discrimination in contravention of this public policy. (308 N.C. 131, 301 S.E.2d 78). Existence of separate, statutorily-based cause of action does not necessarily preempt claim based upon wrongful discharge in violation of G.S. NCGS 143-422.2. (835 F. Supp. 255). Public policy does not extend to protection of constitutional rights in private employment (126 N.C. App. 292, 484 S.E.2d 840) and no cases hold public policy prohibits retaliatory discharge. Employment discrimination against disabled persons is prohibited. (NCGS 168A-5; NCGS 128-15.3). N.C. National Guard members are entitled to reemployment rights upon honorable release from state duty. (NCGS 127A-201, et seq.). No employer may discharge or demote employee because he in good faith has filed or will file complaint, initiate investigation or testify with respect to: (1) Worker's Compensation Act; (2) N.C. Wage and Hour Act; (3) Occupational Safety and Health Act; (4) Mine Safety and Health Act; (5) discrimination against any person possessing sickle cell trait or hemoglobin C trait; (6) National Guard Reemployment Rights; or (7) discrimination against any person based on genetic testing or genetic information, or because he has missed work to comply with court ordered parental duties under Juvenile Code or exercise rights for relief from domestic violence under c. 50B of G.S. (NCGS 95-241). No employer may cause to be discharged, discharge, discipline or discriminate against employee who assisted Labor Commissioner or fire chief or who has testified in proceedings or requested in writing information about hazardous chemicals pursuant to toxic or hazardous substances statutes. (NCGS 95-196).

Lawful Products.

Discrimination is prohibited against persons lawfully using lawful products during nonworking hours. Employer can restrict use if related to bona fide occupational requirements, fundamental objectives of organization or violates substance abuse prevention programs. (NCGS 95-28.2).

Military Personnel.

Public interest and welfare must insure no discrimination against military personnel is practiced by any business. (NCGS 127B-10, -11, -12).

Witness Before Employment Security Commission.

No employer may discharge, demote or threaten person because that person has testified before Employment Security Commission. (NCGS 96-15.1 and .2).

Garnishment.

Payor employer must not discharge, refuse to employ or take disciplinary action against person solely due to obligation to pay child support by garnishment. (NCGS 110-136.8[e]). However, written statement signed by employer of obligor or employer's designee that sets forth obligor's gross income, as well as Employee Verification form produced by Automated Collection Tracking System that is signed by obligor's employer or his designee, shall be admissible evidence in any action establishing or modifying child support order. (NCGS 110-139[c1]). Employer may not discharge or use disciplinary actions against employee for garnishment due to public hospitals. (NCGS 131E-50).

Juror.

No employer may discharge or demote any employee for jury duty service of any type. (NCGS 9-32[a]).

School Leave Protection.

Employer must not discriminate against employee who takes up to four hours annual leave time to participate or attend activities at child's school. (NCGS 95-28.3[b]).

AIDS and HIV Infection.

Discrimination is prohibited against persons having AIDS or HIV infection on account of infection for determining suitability for continued employment. Nothing in this section prohibits employer from denying employment to job applicant based on confirmed positive test for AIDS virus infection. (NCGS 130A-148[i]).

Labor Unions.

Membership or nonmembership in labor organization as condition of employment is prohibited. (NCGS 95-78 to -84). Contracts between government and labor organizations concerning public employees are void. (NCGS 95-98). Strikes by public employees are prohibited. (NCGS 95-98.1).

Labor Disputes.

Procedures have been established for voluntary arbitration of labor disputes. (NCGS 95-36.1, et seq.). These are administered by Commissioner of Labor who maintains list of voluntary arbitrators. (NCGS 95-36.3 and .4). Arbitration award of such proceeding shall be final and binding on parties to proceedings. (NCGS 95-36.8[b]).

Wages.

Minimum Wage.

Subject to numerous exceptions, employers must pay minimum wage as set by Fair Labor Standards Act, 29 U.S.C. 206(a)(1). For certain exemptions, see G.S. NCGS 95-25.14.

Time and Mode of Payment.

Employers must pay all wages and tips accruing to employee on regular payday. (NCGS 95-25.6). Employees whose employment is discontinued must be paid all wages due by next regular payday, or if commission based, after amount becomes calculable after separation.

(NCGS 95-25.7). Employer must: (1) Notify employees at time of hiring of rate of promised wages, and day and place for payment of wages; (2) make available to employees, in writing or through posted notice, employment practices and policies regarding promised wages; (3) notify employees, in writing or through posted notice, of any changes in arrangements specified in (2) at least 24 hours prior to time of such changes except for retroactive wage and benefit increases; and (4) furnish each employee with itemized statement of deductions made under G.S. NCGS 95-25.8 for each pay period such deductions are made. (NCGS 95-25.13). There are limitations on items and amounts which may be withheld, diverted or deducted from wages (NCGS 95-25.8 to .11) and special provisions for vacation pay for current and terminated employees (NCGS 95-25.12). Actions for recovery of unpaid wages under G.S. NCGS 95-25.22 must be brought within two years. (NCGS 1-53; NCGS 95-25.22[f]).

As to assignment of wages, see category 8 Debtor and Creditor, topic 8.01 Assignments.

Workers' Compensation Law.

Workers' Compensation Act (NCGS 97-1, et seq.) applies to all employment, public and private, involving three or more employees, or involving one or more employees in activities related to radiation, except domestic service, agriculture (unless ten or more full-time nonseasonal agricultural workers are regularly employed by employer) and employment by individual sawmill and logging operator with less than ten employees who saws and logs less than 60 days in any six consecutive months and whose principal business is unrelated to sawmilling or logging. (NCGS 97-2). General Assembly sought to include alien individuals, who work without right of citizenship or green card, under protections of Workers' Compensation Act. (135 N.C. App. 296, 519 S.E.2d 777).

Every employer and employee is presumed to have accepted provisions of Act. (NCGS 97-3). Written notice of accident must be given to employer within 30 days after injury or death, setting forth name and address of employee, time, place, nature and cause of accident and of resulting injury or death, and must be signed by employee, or someone in his behalf, or, in case of death, by one of his dependents. (NCGS 97-22, -23). If employer and employee or his dependents fail to agree upon benefits within 14 days after employer has knowledge of injury or death, either party may apply to Industrial Commission for hearing and for ruling on matters at issue, which shall be held as soon as practicable. (NCGS 97-83). Any and all compensation barred unless (1) Within two years after accident, claim is filed with Industrial Commission or employee is paid compensation; or (2) claim is filed within two years after last payment of medical compensation when no other compensation has been paid and employer's liability has not been established under art. 1 of G.S. c. 97. (NCGS 97-24[a]).

“Injury” and “personal injury” mean only injury by accident arising out of and in course of employment, and shall not include disease in any form, except where results naturally and unavoidably from accident. With respect to back injuries which arise out of and in course of employment and are direct result of specific traumatic incident of work assigned, “injury by accident” must be construed to include any disabling injury to back arising out of and causally related to such incident. Injury includes damages to eyeglasses, hearing aids, dentures, or other prosthetic devices that function as part of body provided, however, that eyeglasses and hearing aids will not be replaced, repaired, or otherwise compensated for unless injury to them is incidental to compensable injury. (NCGS 97-2[6]).

Where incapacity is total, compensation is 662/3% of average weekly wages, with maximum per week of amount established annually to be effective Oct. 1, and minimum of $30 per week. In cases of total and permanent disability, employer is required to pay compensation for lifetime of injured employee. (NCGS 97-29). When death results within six years from compensable injury or occupational disease, or within two years of final determination of disability, whichever is later, compensation is 662/3% of average weekly wages, with maximum per week of amount established annually to be effective Oct. 1, and minimum of $30 per week, and burial expenses not exceeding $3,500 payable to whole dependents, partial dependents, or next of kin, as defined. Compensation payments due for death shall be paid for 400 weeks from date of death unless widow or widower cannot support self and then payments continue until death or remarriage. Payments due dependent child continue until child is 18. (NCGS 97-38). Compensation may be reduced in certain cases by receipt of unemployment benefits. (NCGS 97-42.1).

Act is administered by N.C. Industrial Commission, consisting of seven members. (NCGS 97-77). Award of commission is conclusive as to all questions of fact, but either party may within 30 days appeal errors of law to court of appeals. Commission may certify questions to court of appeals. (NCGS 97-86). If appeal taken results in ultimate award to employee, interest will be paid from date of initial hearing on claim at legal rate prescribed in G.S. NCGS 24-1. (NCGS 97-86.2). Award may be enforced by filing in superior court of county in which injury occurred certified copy of memorandum of agreement approved by Industrial Commission, order, decision, or award of commission, and said court will render judgment in accordance therewith, which judgment shall have same effect as though rendered in suit heard and determined by said court; provided, if judgment debtor shall file certificate duly issued by Industrial Commission showing compliance with G.S. NCGS 97-83 with clerk of superior court in county or counties where such judgment is docketed, then such clerk shall make upon judgment roll an entry showing filing of such certificate which shall operate as discharge of lien of said judgment, and no execution shall be issued thereon; provided, further, that if at any time there is default in payment of any installment due under award set forth in said judgment court may, upon application for cause and after ten days' notice to judgment debtor, order lien of such judgment restored, and execution may be immediately issued thereon for past due installments and for future installments as may become due. (NCGS 97-87). Industrial Commission has power to hold persons in contempt. (NCGS 97-80[g], [h]). Any person fraudulently obtaining or aiding another in obtaining compensation is guilty of class 1 misdemeanor. (NCGS 97-88.2[a]).

Worker's compensation claims are not assignable, are exempt from taxes, and are exempt from creditor claims. (NCGS 97-21).

See subhead Discrimination and Retaliation, supra.

Employers' Liability Act.

No separate legislation. See subhead Workers' Compensation Law, supra.

Occupational Diseases.

Injury or death resulting from those occupational diseases enumerated in G.S. NCGS 97-53 is compensable as resulting from injury by accident. (NCGS 97-52).

Unemployment Compensation.

An unemployed individual shall be eligible to receive benefits with respect to any week only if the commission finds that he has been totally, partially, or part-totally unemployed for waiting period of one week with respect to each benefit year, that he has been registered for work and continued to report at employment office as prescribed, that he has made proper claim for benefits, that he is able to work, available for work, and actively seeking work, and participated in reemployment services if referred by division. Person is not deemed able to work if receiving benefits under state or federal law based on temporary total or permanent total disability. (NCGS 96-13). Individual is not eligible for benefits during periods of bona fide disciplinary suspension. (NCGS 96-13[g][1]). As to claims filed on or after Sept. 5, 1999, benefit year shall not be required of any claimant if all following conditions met: (1) Benefits to be paid for unemployment due directly to major natural disaster, (2) President of U.S. has declared disaster pursuant to Disaster Relief Act of 1970, 42 U.S.C. 4401, et seq., (3) benefits are to be paid to claimants who would have been eligible to receive unemployment assistance if they had not been eligible to receive unemployment insurance benefits with respect to that unemployment, and (4) claimant files for waiver of waiting period week within 30 days after date of notification or mailing of notice of right to have waiting period week waived. Benefits paid as result of waiver of waiting period week shall not be charged to account(s) of base period employer(s) in accordance with G.S. NCGS 96-9(c)(2)d. Employment Security Commission shall implement regulations prescribing procedure for waiver of waiting period week in accordance with G.S. NCGS 96-4(b), including major industrial disasters. (NCGS 96-13[c]).

Individual shall be disqualified for benefits, for duration of his unemployment if he left work voluntarily without good cause attributable to employer; for duration of his unemployment if he was fired for misconduct in his work (misconduct is defined by statute); for period of not less than four weeks nor more than 13 weeks if fired for substantial fault on his part connected with work not arising to level of misconduct (substantial fault defined by statute); for duration of unemployment if determined employee discharged because license, certificate, permit, bond, etc. necessary for employment has been revoked, suspended or application denied for cause within employee's power to prevent; for duration of his unemployment if he failed without good cause to apply for work when so directed, or to accept same, or to return to his customary self-employment when so directed; for duration of his unemployment if he failed without good cause to attend vocational school or training program when so directed, or has discontinued his training course without good cause, or is separated from his training course or vocational school due to misconduct; for duration of unemployment if unemployed because individual's ownership share of employing entity was voluntarily sold. Any person disqualified for above reasons may have permanent disqualification removed if he returns to work for at least five weeks and is paid cumulative wages of at least ten times his weekly benefit amount, subsequently becomes unemployed through no fault of his own, and meets availability requirements of law. For good cause shown, commission may reduce disqualification period to time certain, but not less than five weeks. Other reasons for disqualification include unemployment caused by labor dispute in active progress, employee's ability to reasonably return to his customary self-employment, employee's refusal to return to work for former employer when recalled within four weeks from layoff, leaving work to accompany spouse to new place of residence, receipt of remuneration, receipt of unemployment benefits from federal or other state government. No disqualification if employee is unemployed because left work solely as result of lack of work caused by bankruptcy of employer. Leaving work as aggrieved party in domestic violence case constitutes good cause. Separation or discharge solely due to inability to work particular shift as result of undue family hardship shall constitute good cause for leaving work. (NCGS 96-14).

Occupational Safety and Health Law.

Occupational Safety and Health Act incorporates safety and health standards, rules and regulations promulgated under Federal Occupational Safety and Health Act of 1970 unless alternate standards, rules or regulations have been adopted by State Commissioner of Labor. (NCGS 95-131). Administration and enforcement of act lies with Director of Occupational Safety and Health Division. Director has right to make inspections and investigations, request issuance of citations and compel compliance with Act. (NCGS 95-133). Civil penalties may be assessed in varying amounts dependent on whether the violations are willful or repeat, serious violations, serious violations involving injury to employees, not serious violations or failure to correct or abate violations. Penalties shall be assessed with respect to size of business, gravity of violation, good faith of employer, record of previous violations and whether violation involves injury to employee. (NCGS 95-138). Willful violators of act whose violations cause death of employee also subject to criminal penalties upon first conviction of $10,000 or $20,000 dependent upon whether the employee was 18 years of age or older or under 18 years of age. Subsequent convictions punishable by fine of $20,000 or $40,000 dependent upon the age of employee. (NCGS 95-139).

Employer receiving a citation and notice of assessment of a civil penalty has 15 days from receipt of notice to notify director that citation and assessment will be contested, or that informal conference is requested. If no such notice is given to director then assessment is final and not subject to review by courts. If assessment is contested then hearing is conducted by three-man Occupational Safety and Health Review Commission, which thereafter issues order affirming, modifying or vacating director's citation or proposed assessment. (NCGS 95-137). Upon exhaustion of these administrative remedies, aggrieved party may seek judicial review. (NCGS 95-141). Each employer with experience rate modifier of 1.5 or greater must establish safety and health program. (NCGS 95-251). Such employers with more than 11 employees must establish safety and health committee in accordance with section. (NCGS 95-252).

11.03 WORKERS' COMPENSATION LAW:

See topic 11.02 Labor Relations.

12 ENVIRONMENT

12.01 ENVIRONMENTAL REGULATION:

General Supervision lies with Environmental Management Commission, 1617 Mail Service Center, Raleigh, N.C., 27699 and Dept. of Environment and Natural Resources, 1601 Mail Service Center, Raleigh, N.C., 27699. (NCGS 143-211). For respective powers and duties, see infra, generally.

State Environmental Policy.

Environmental Policy Act of 1971 (NCGS 113A-1 et seq.) declares continuing policy of N.C. to be to encourage wise, productive and beneficial use of its natural resources without damage to environment, maintain healthy and pleasant environment, and preserve natural beauty of N.C.; encourage educational programs to create public awareness of environment and related programs; require agencies to consider and report environmental aspects and consequences of actions involving expenditure of public moneys or use of public land; and provide means to implement these purposes. (NCGS 113A-2). To promote state policy to conserve and protect its natural resources and to create and maintain conditions under which man and nature can exist in harmony, while attaining widest range of beneficial uses of environment (NCGS 113A-3), every state agency shall include in every report on any action involving public moneys or use of public land detailed statement setting forth environmental impact of proposed action (NCGS 113A-4). N.C. has approved Southeast Interstate Low-Level Radioactive Waste Management Compact.

Interstate Environmental Compact Act adopted by 1971 Legislature. (NCGS 113A-21, et seq.). Signatory states declare that (1) Environment of every state is affected with local, state, regional, and national interests and its protection, under appropriate arrangements for intergovernmental cooperation, are public purposes of respective signatories; (2) certain environmental pollution problems transcend state boundaries and thereby become common to adjacent states requiring cooperative efforts; and (3) environment of each state is subject to effective control of signatories, and coordinated, cooperative or joint exercise of control measures is in their common interests. (NCGS 113A-23). Purposes of this compact are to (1) Assist and participate in national environment protection programs to promote intergovernmental cooperation for multistate action relating to environmental protection; and (2) to preserve and utilize functions, powers, and duties of existing state agencies of government. (NCGS 113A-23).

Scenic rivers system established to retain natural and scenic conditions in certain rivers and to protect their water quality. (NCGS 113A-30, et seq.). Acquisition of land or interest therein may be by donation, purchase with donated or appropriated funds, exchange or otherwise. Department of Administration may acquire land by exercising its power of eminent domain. (NCGS 113A-38). Individuals can donate to state permanent scenic easements which can be claimed as charitable contributions. (NCGS 113A-30, et seq.). No state department or agency may assist in construction of any project that would have directly adverse effect on any river that is designated component or potential component of State Natural and Scenic River System. (NCGS 113A-44).

Water and Air Quality Reporting.

Commission is authorized and directed to develop, adopt, modify, and revoke effluent standards or limitations and waste treatment management practices as it determines necessary to prohibit, abate, or control water pollution. (NCGS 143-215). All persons subject to water and air quality standards established pursuant to G.S. NCGS 143-215 who discharge wastes to waters or emit air contaminants to outdoor atmosphere must file at such frequencies as commission may specify and at least quarterly reports setting forth volume and characteristics of wastes discharged or air contaminants emitted daily or such other period of time as may be specified in appropriate regulations. (NCGS 143-215.63, et seq.). All persons subject to provisions of G.S. NCGS 143-215.1, .108, or .109 who cause such discharges or emissions shall establish and maintain adequate water and air quality monitoring systems and report data obtained therefrom to commission. (NCGS 143-215.66). No person subject to provisions of G.S. NCGS 143-215.1, .108, or .109 shall willfully cause or allow discharge of any wastes or air contaminants to waste-disposal systems or air-cleaning devices in excess of capacity of disposal system or cleaning device or any wastes or air contaminants which disposal system or cleaning device cannot adequately treat. (NCGS 143-215.67). Permits must be obtained from Environmental Commission before certain activities affecting water or air may be engaged in. (NCGS 143-215.1). Water Use Act provides for regulation of water use. (NCGS 143-215.11, et seq.). Withdrawal or transfer of 1,000,000 gallons or more per day of water from surface or groundwaters or between river basins must be registered with commission. (NCGS 143-215.22H). Certificate must be secured to transfer 2,000,000 gallons of water or more per day from one river basin to another, to increase amount of existing transfer of water from one river basin to another by 25% or more, if total transfer is 2,000,000 gallons per day or more, or to increase existing transfer of water from one river basin to another above amount approved by commission in certificate issued under G.S. NCGS 162A-7 prior to July 1, 1993. (NCGS 143-215.22L).

Penalties.

Any person who violates this provision or rules adopted by commission for its implementation shall be guilty of class 3 misdemeanor and shall be liable to penalty of not less than $100 nor more than $1,000 for each violation. Each day such person fails to comply after having been officially notified by commission shall constitute separate offense. (NCGS 143-215.69[a]). Commission may assess civil penalty against person who violates this provision or rules adopted by commission for its implementation. (NCGS 143-215.69[b]). Injunctive relief is also available to restrain further violation or require corrective action. (NCGS 143-215.69[c]).

Motor Vehicles' Emissions.

Technical standards for emissions prescribed by G.S. NCGS 20-128.1. Violators have 30 days to meet prescribed standards. Failure to comply is class 2 misdemeanor. (NCGS 20-128.1; NCGS 20-176).

Emissions inspection of motor vehicle requires passing both visual inspection to determine if emission control devices are properly connected and analysis of data provided by manufacturer-installed on-board diagnostic (OBD) equipment to identify any deterioration or malfunction in operation of vehicle that violates standards for model year of vehicle set by Environmental Management Commission. In certain urban counties, vehicles fewer than 25 model years old, but not 1996 or later model, are subject to analysis of exhaust emission to determine if exhaust emissions meet standard for model year of vehicle set by Environmental Management Commission, and in such counties 1996 or later models are subject to analysis of OBD data. When emissions inspection is performed on vehicle, safety inspection must be performed on vehicle as well. (NCGS 20-183.3[b1]).

Emission Control Devices on Motor Vehicles.

For model years after 1967, all automobiles registered must be equipped with emission control devices installed at time of manufacture unless other modifications approved by Department of Environment and Natural Resources, such as removing devices for purpose of converting motor vehicle to operate on natural or liquefied petroleum gas or are made to reduce air pollution. (NCGS 20-128).

Pollution Control Financing.

Industrial and Pollution Control Facilities Financing Act authorizes each county to establish Industrial Facilities and Pollution Control Financing Authority empowered to organize and establish projects designed to prevent, control, and eliminate environmental pollution and to provide industrial financing to alleviate unemployment, below average wages and below average per capita income. (NCGS 159C-1, et seq.).

Investigation of Impact of Proposed New and Expanding Industry.

Department of Commerce shall conduct evaluation, in conjunction with Department of Environment and Natural Resources, of effects on natural and economic environment of any new or expanding industry or manufacturing plant locating in N.C. (NCGS 143B-437).

Inactive Hazardous Sites.

Department of Environment and Natural Resources is charged with identifying, inventorying and monitoring inactive hazardous substance or waste disposal sites in N.C. (NCGS 130A-310.1). Environmental Management Commission must prioritize sites based on endangerment to environment and public health. (NCGS 130A-310.2). After public notice is given (NCGS 130A-310.34), remedial action plans may be initiated for such sites and responsible parties may be ordered to implement such plans (NCGS 130A-310.3). If secretary determines that imminent hazard exists, he may order any known responsible party to take immediate action to eliminate or correct condition, or he may take such action without issuing order. (NCGS 130A-310.5). Upon failure to comply with such order, state may act in that person's stead and seek reimbursement for funds expended in cleanup. (NCGS 130A-310.6 and .7). Responsible parties may conduct voluntary cleanup pursuant to consent agreement with department. Voluntary cleanup may be conducted with department oversight, or oversight by private registered environmental consultant. Upon completion of voluntary cleanup responsible party may receive “no further action” letter from department. (NCGS 130A-310.9).

Brownfields Property Reuse Act of 1997.

Act was enacted to encourage economic redevelopment of abandoned, idled or underused property where redevelopment is hindered by actual or possible environmental contamination. Act offers liability protection and flexible cleanup requirements to qualified buyers and sellers. (NCGS 130A-310.30, et seq.).

Brownfields Agreement.

Department may enter into brownfields agreement with prospective developer. Prospective developer shall provide department with information necessary to demonstrate that prospective developer, and any parent, subsidiary, or affiliate has substantially complied with (a) Terms of any brownfields or similar agreement to which they were party, (b) requirements applicable to any remediation in which applicant was previously engaged, and (c) federal and state laws, regulations, and rules for protection of environment. Prospective developer must also show that as result of such agreement, brownfields property will be suitable for uses specified in agreement while fully protecting public health and environment instead of being remediated to current standards, and that developer has or can obtain financial, managerial, and technical means to fully implement brownfields agreement and assure safe use of brownfields property.

(NCGS 130A-310.32). Brownfields agreement shall contain description of property that would be sufficient as description in instrument of conveyance, and statement of (1) Any remediation to be conducted on property, including specific areas, and methods to be employed; (2) any land-use restrictions that apply to brownfields property; (3) desired results of any remediation or land-use restrictions; (4) guidelines, including parameters, principles, and policies within which desired results are to be accomplished; and (5) consequences of achieving or not achieving those results. (NCGS 130A-310.32). See G.S. NCGS 105-277.13 concerning taxation on qualifying improvements on brownsfields.

Liability Protection.

Prospective developer who enters into brownfields agreement with department and complies with agreement shall not be held liable for remediation of areas of contaminants identified in agreement, as long as activities conducted on property by prospective developer do not increase risk of harm to public health or environment. (NCGS 130A-310.33).

Public Notice and Community Involvement.

Prospective developer who desires to enter into brownfields agreement shall notify public and community in which brownfields property is located of planned remediation and development activities. (NCGS 130A-310.34). In creating brownfields, department shall incorporate comments received to extent practical with particular consideration to scientific and technical information and analysis and written comment from units of local government with taxing jurisdiction over brownfields property. (NCGS 130A-310.34[d]).

Fees.

Prospective developer who submits proposed brownfields agreement for review by department must pay initial fee of $2,000. Prospective developer who enters into brownsfields agreement with department must pay fee equal to full cost to department and Department of Justice of all activities related to agreement, amount to be established as part of agreement. Fee must be paid in two installments, first upon entry into agreement and equal to actual costs thereto incurred by department and Department of Justice less initial $2,000 fee. Second installment, equal to remainder of agreed fee plus any additional costs incurred by department and Department of Justice, must be paid upon prospective developer's submission of final report certifying completion of remediation. (NCGS 130A-310.39).

Litter.

Person disposing of litter on public property, in water of state or on private property not owned by him, except in authorized location or container is guilty of class 3 misdemeanor. Violations generally punishable by fine of $250 to $2,000 together with community service depending on amount littered. Violations for amounts over 500 lbs. or any amount for commercial purposes, or hazardous waste, as defined in G.S. NCGS 130A-290, are class I felonies. Further if person sustains damage due to felony violation, that person entitled to three times actual damages or $200 whichever is greater, plus court costs and attorneys' fees, from violator. (NCGS 14-399).

Pesticide Controls.

Pesticide Law of 1971 details regulations for use, application, sale, disposal and registration of insecticides, fungicides, herbicides, defoliants, desiccants, plant growth regulators, nematicides, rodenticides and any other pesticides designated by N.C. Pesticide Board. (NCGS 143-434, et seq.).

Commissioner of Agriculture administers act, assisted by N.C. Pesticide Board and Pesticide Advisory Committee. (NCGS 143-437 to -439).

Act provides for registration of pesticides, licensing of pesticide dealers, licensing of pesticide applicators, licensing of pest control consultants, and reporting of shipments of pesticides. Violations are class 2 misdemeanors and violators may also be assessed civil penalty of up to $2,000. Violations may be punishable by seizure of stocks of pesticides, suspension or revocation of licenses. Each day of violation after written notification by board may be separate offense. (NCGS 143-434, et seq.; NCGS 143-456, -469).

Air Pollution.

Environmental Management Commission is charged with setting air quality standards, emission control standards, and classification for air contaminant sources. (NCGS 143-215.105, et seq.).

Permits are required of persons engaging in certain activities designated by statute. (NCGS 143-215.108 and .108A). Title V program implementation fees are assessed on annual basis. (NCGS 143-215.106A).

Control of Complex Sources.

Commission, according to its own criteria for controlling complex sources may disapprove, or permit only upon conditions it determines, construction or modification of any complex sources that will result in violation of ambient air quality standards or interfere with attainment of such standards in any area where air pollution abatement control program has been established. (NCGS 143-215.109).

Special Orders.

Commission may issue, modify or revoke special orders addressing specific causes of air pollution to persons responsible for causing or contributing to pollution. Special order that is issued without consent of person affected may be contested by that person by filing petition under G.S. NCGS 150B-23 within 30 days. If petition not filed within required time, order is final and not subject to review. (NCGS 143-215.110[a], [b]). Any person who installs air-cleaning device for purpose of alleviating air pollution in compliance with terms of permit issued pursuant to G.S. NCGS 143-215.108, special order, consent special order, assurance of voluntary compliance or similar document issued pursuant to this section, or final decision of Commission or court, rendered pursuant to either of said sections, shall not be required to take or refrain from any further action nor be required to achieve any further results under terms of this or any other state law relating to control of air pollution, for period to be fixed by Commission or court, so long as person remains in compliance. (NCGS 143-215.110[d]).

Compliance Bonds.

Special order may provide that bond or other surety be posted to ensure compliance. In event of noncompliance, bond is forfeited and deposited in general fund. (NCGS 143-215.110[e]).

Local air pollution control programs are certified by Environmental Management Commission. (NCGS 143-215.112).

Penalties include injunctive relief and civil fines not to exceed $25,000. Each day of violation after notification by secretary is separate offense. (NCGS 143-215.114A, .114C). Criminally negligent violations of act are class 2 misdemeanors punishable by fine not to exceed $15,000 per each day of violation or $200,000 for each 30 day period during which violation continues. Willful violations are class H felonies punishable by fine not to exceed $100,000 per each day of violation or $500,000 for each 30 day period during which violation continues; but, willful violations which knowingly place another person in imminent danger of death or serious bodily injury shall be class C felony, punishable by fine not to exceed $250,000 per each day of violation or $1,000,000 for each 30 day period during which violation continues. (NCGS 143-

215.114B).

Water Pollution.

Environmental Management Commission is authorized to establish water and groundwater quality standards and classifications. (NCGS 143-214.1).

Permits are required for certain activities which involve discharge of waste into waters of state. (NCGS 143-215.1). Discharge of radiological, chemical, biological warfare agent, or high level radioactive waste into state waters, or discharge of medical waste into open state or ocean waters is prohibited. (NCGS 143-214.2, .2A). Negligent dumping of medical waste is punishable by fine of up to $25,000 per day; willful violation is class F felony punishable by fine not to exceed $50,000 per day of violation. (NCGS 143-214.2A). Effluent standards and limitations for water quality discharge permits are established by Environmental Management Commission. (NCGS 143-215). Nutrient offset credits may be purchased to offset nutrient loadings to surface waters. (NCGS 143–214.26) The Department is required to establish storm water control best management practices and standards. (NCGS 143–214.7A) Commission is authorized and directed to implement storm water runoff rules based on following order of priority: (1) Classified shellfish waters; (2) water supply watersheds; (3) outstanding resource waters; (4) high quality waters; and (5) other waters where commission finds control is needed. (NCGS 143-214.7).

Water Supply Watershed Protection Act directs Environmental Management Commission to adopt rules for classification of watersheds with minimum statewide protection requirements. (NCGS 143-214.5). Act was declared unconstitutional delegation of legislative power. (123 N.C. App. 704, 475 S.E.2d 233, rev'd on other grounds, 346 N.C. 787, 488 S.E.2d 144).

Clean Coastal Water and Vessel Act requires large vessel marinas located on coastal waters designated as no discharge zones to either install and maintain pumpout facilities available for use by customers of marinas or contract with service providers to provide pumpout services. (NCGS 77-125–132)

Penalties include injunctive relief and civil fines not to exceed $25,000 per day. Civil penalties of more than $10,000, or in case of continuing violation, more than $10,000 per day, may only be imposed against violator who has been assessed civil penalty within five years preceding violation, and only if violation is determined to be intentional. (NCGS 143-215.6A). Criminally negligent violations of act are class 2 misdemeanors punishable by fine not to exceed $15,000 per each day of violation or $200,000 for each 30 day period during which violation continues. Willful violations are class I felonies punishable by fine not to exceed $100,000 per each day of violation or $500,000 for each 30 day period during which violation continues. (NCGS 143-215.6B).

Special Orders.

Environmental Management Commission is empowered to issue special orders to any person whom it finds responsible for causing or contributing to any pollution of air or of waters of state within area for which standards have been established. (NCGS 143-215.2, -215.110).

Animal Waste Management Systems.

Act establishes permitting program for animal waste management systems to protect water quality and provide technical assistance to farmers. Permits are required for farms with 250 or more swine, 100 or more confined cattle, 1,000 or more sheep or 30,000 or more confined poultry with liquid animal waste management system. (NCGS 143-215.10A, et seq.).

Solid and Hazardous Waste.

Commission of Health Services is authorized to adopt and Department of Environment and Natural Resources to enforce rules concerning management of solid and hazardous waste. (NCGS 130A-294). Department is authorized and directed to engage in research, conduct investigations and surveys, make inspections and establish statewide solid waste management program including permit system governing establishment and operation of solid waste management facilities. (NCGS 130A-294, et seq.). Applicants for new permit, renewal of permit, or substantial amendment to permit for sanitary landfill must request each local government having jurisdiction over any part of land on which sanitary landfill is located or to be located, to issue determination as to whether local government has in effect franchise, zoning, subdivision, or land-use planning ordinance applicable to landfill, and whether proposed or existing sanitary landfill would be consistent with applicable ordinances. (NCGS 130A-294[b1][4]). Notwithstanding subdivisions of G.S. NCGS 130A-294, no franchise is required for sanitary landfill used solely to dispose of coal-byproduct waste from investor-owned utility subject to G.S. NCGS 143-215.107D. (NCGS 130A-294[b1][5]).

Department is authorized to enforce rules establishing complete and integrated regulatory scheme for management of hazardous waste. (NCGS 130A-294[c]).

Fees.

Fee schedule applicable to generators and transporters of hazardous waste, and to hazardous waste storage, treatment, and disposal facilities is in place. (NCGS 130A-294.1).

Commercial hazardous waste facilities cannot obtain permits unless applicant has satisfied department that such facility is needed to meet current or projected hazardous waste management needs of state or to comply with terms of any interstate agreement for management of hazardous waste to which state is party. (NCGS 130A-295). Commercial hazardous waste treatment facilities cannot discharge directly or indirectly, through publicly owned treatment works, hazardous or toxic substance into surface water upstream from public drinking water supply intake unless there is dilution factor of 1,000 or greater at point of discharge into surface water under 7Q10 conditions. (NCGS 130A-295.01).

Inspectors.

Division shall employ full-time resident inspectors for each commercial hazardous waste facility so that at least one inspector is on duty at all times during which any component of facility is in operation, is undergoing any maintenance or repair, or is undergoing any test or calibration. (NCGS 130A-295.02).

Containers.

All hazardous waste shall be placed in containers for disposal, unless otherwise provided for by commission. Commission sets standards for design and construction of containers. (NCGS 130A-295.03).

Penalties include injunctions and administrative penalties of up to $15,000 per day in case of violation involving nonhazardous waste; up to $32,500 per day in case of first violation concerning hazardous waste; and up to $50,000 for second or further violation involving disposal of medical waste. (NCGS 130A-18, -22). Persons who violate act or rules are guilty of misdemeanor. (NCGS 130A-25). Knowing and willful violations constitute class I felonies which are punishable by fine not to exceed $100,000 per day of violation not to exceed cumulative total of $500,000 for each period of 30 days of continuing violation. (NCGS 130A-26.1).

Plastic Bag Management

General Assembly enacted legislation for 2010 to regulate distribution of plastic bags by retailers in counties containing barrier island or barrier peninsula to consumers for use in carrying, transporting, storing purchased goods. (NCGS 130A-309.120–NCGS 130A-309.125)

Recycling.

It is policy of state to obtain, to extent practicable, economic benefits from recovery of material and energy resources from solid waste stream. (NCGS 130A-309.04). Certain tax incentives for recycling facilities. (NCGS 105-129.25, et seq.). Property tax exemptions for real and personal property used in recycling or resource recovering of or from solid waste. (NCGS 105-275[8][b], [d]).

Oil Pollution and Hazardous Substances.

Oil Pollution and Hazardous Substances Control Act of 1978 (NCGS 143-215.75 et seq.) makes it unlawful to discharge or cause to be discharged, oil or other hazardous substances into or upon waters, tidal flats, beaches or lands within state, or into sewer, surface water drains or other waters that drain into waters of state (NCGS 143-215.83). North Carolina Environmental Management Commission is charged with enforcement of act. Hazardous substances are defined as any substance which when discharged in any quantity may present imminent and substantial danger to public health or welfare, pursuant to list designated by Administrator of U.S. Environmental Protection Agency pursuant to 33 U.S.C. 1321(b)(2)(A), although Environmental Management Commission may refuse to adopt changes made to U.S. EPA list on grounds that change is not consistent with standards for determining hazardous substances. (NCGS 143-215.77 and .77A). Persons owning or having control over oil or other discharged substances shall immediately notify department of nature, location, and time of discharge, including current and proposed containment measures (NCGS 143-215.85[a]) and shall immediately undertake to collect or contain discharge and restore area to condition existing prior to discharge (NCGS 143-215.84). If substance discharged is less than 25 gallons of petroleum (as defined in NCGS 143-215.94A), does not cause sheen on nearby surface water, and is discharged at distance greater than 100 feet from all surface water bodies, person owning or having control over petroleum has 24 hour window to clean spill without notifying department. If more than 25 gallons of petroleum are discharged, sheen is created, discharge occurs within 100 feet of any surface water body, or more than 24 hours elapse, person owning or controlling discharge shall immediately notify department. (NCGS 143-215.85[b]). Liability is limited for those persons who aid in cleanup (NCGS 143-215.93A), and all such persons having responsibility for discharge of oil or hazardous substances shall be joint and severally liable (NCGS 143-215.94).

Penalties for intentional or negligent discharge in violation of act include civil penalty not to exceed $5,000 for each violation and criminal penalties not to exceed $100,000 per each day of violation or $500,000 for each 30 day period during which violation continues unless such discharge knowingly places another person in imminent danger of death or serious bodily injury which shall be class C felony fined not more than $250,000 per day of violation not to exceed $1,000,000 for each 30 day period during which violation continues. (NCGS 143-215.88A, .88B).

Registration and permits are required by Act. (NCGS 143-215.83[c]). All oil terminal facilities located in N.C. must register with Secretary of Environment, Health and Natural Resources. In addition, no facility which is used or capable of being used for purpose of refining oil shall be initiated or constructed without first obtaining a permit from Environmental Management Commission. (NCGS 143-215.96, -215.100).

Penalties for violation of permit requirements include civil penalty not to exceed $10,000 and criminal penalty not to exceed $10,000. (NCGS 143-215.102).

Underground Storage Tanks.

Environmental Management Commission has duty and power to establish standards and adopt rules and regulations governing underground tanks storing oil or hazardous substances. (NCGS 143B-282[a][2]). Leaking Petroleum Underground Storage Tank Cleanup Act (NCGS 143-

215.94A, et seq.) addresses and creates two non-reverting funds to clean up leaks (NCGS 143-215.94B, .94D). Owner or operator of commercial petroleum underground storage tank shall deposit annual operating fee into commercial fund. Noncommercial fund consists of monies appropriated by General Assembly or available from grants or other monies paid or recovered on behalf of noncommercial fund. Upon determination that discharge or release of petroleum from underground storage tank has occurred, owner or operator shall notify department and immediately undertake to collect and remove discharge and restore affected area. If discharge or release is from commercial underground storage tank and owner or operator is identified and proceeded with cleanup, owner or operator may elect to have commercial fund pay or reimburse owner or operator for costs described in G.S. NCGS 143-215.94B(b) or (b1) that exceed amounts for which owner or operator are responsible. (NCGS 143-215.94E[b]). In situation in which owner or operator of commercial underground storage tank cannot be identified or located, or such owner or operator fails to notify department and immediately undertake to cleanup discharge or release and restore affected area, if current landowner notifies department and proceeds to remove discharge or release and restore affected area, landowner may elect to have commercial fund pay or reimburse any costs described in subdivisions (1), (2), (2a), (3) and (4) of G.S. NCGS 143-215.94B(b) or NCGS 143-215.94B(b1), that exceed amounts for which owner or operator is responsible. (NCGS 143-215.94E[b1]). In case of discharge or release from noncommercial underground storage tank or commercial underground storage tank eligible for Noncommercial Fund pursuant to G.S. NCGS 143-215.94D, owner or operator may elect to have Noncommercial Fund pay or reimburse owner or operator for costs described in G.S. NCGS 143-215.94D(b1) up to maximum of $1,000,000 per discharge or release. (NCGS 143-215.94E[c]). If discharge or release occurs from noncommercial underground storage tank and owner or operator cannot be identified or located, if current landowner notifies department and undertakes to collect and remove discharge or release and restore affected area, current landowner may elect to have noncommercial fund pay or reimburse current landowner for 90% of any costs described in subdivision (1) and (2) of G.S. NCGS 143-215.94D(b1) that exceed $5,000, not to exceed $1,000,000 per discharge or release. (NCGS 143-215.94E[c1]). Persons seeking payment or reimbursement from either fund must certify to department that costs are not eligible to be paid or reimbursed by or from any other source. (NCGS 143-215.94E[f1]). No owner or operator shall be reimbursed, and department shall seek reimbursement for any monies disbursed from either fund or expended by department if (1) Owner or operator willfully violated any substantive law, rule, or regulation applicable to underground storage tanks which are intended to prevent or mitigate discharges or releases or to facilitate early detection of discharges or releases; (2) discharge or release is result of owner's or operators willful or wanton misconduct; or (3) owner or operator has failed to pay annual tank operating fee due pursuant to G.S. NCGS 143-215.94C. (NCGS 143-215.94E[g]). Department requires each owner and operator of petroleum underground storage tank who is required to demonstrate financial responsibility under U.S. EPA rule to maintain evidence of financial responsibility of amounts not less than those required to be paid by owner or operator pursuant to G.S. NCGS 143-215.94E(b). Financial responsibility may be established by insurance, guarantee, surety bond, letter of credit, qualification as self-insurer, or any combination thereof. (NCGS 143-215.94H). Act also grants Department of Environment and Natural Resources power to require tank owners and operators to clean up leaks. Department may clean site where owner fails to act, and then sue to recover its costs. (NCGS 143-215.94G).

Permits.

Owners or operators of petroleum commercial underground storage tanks shall annually obtain operating permit from department. Permits are issued at time annual commercial underground storage tank operating fee is paid. (NCGS 143-215.94U).

Penalties include injunctive relief and civil penalties of not more than $10,000 per day, not to exceed $200,000 per 30 day period for continuous violations. (NCGS 143-215.94W). Persons who negligently violate these provisions are guilty of class 2 misdemeanor and may be fined no more than $15,000 per day, not to exceed $200,000 for each 30 day period. Knowing and willful violations constitute class I felonies, which may include fine not to exceed $100,000 per day or $500,000 per 30 day period. Any person who knowingly commits any of offenses set out in G.S. NCGS 143-215.94W(a) and knowingly places another person in imminent danger of death or serious bodily injury shall be guilty of class C felony, which may include fine not to exceed $250,000 per day or total of $1,000,000 per 30 day period during which violation continues. (NCGS 143-215.94X).

Dry-Cleaning Solvent Cleanup Act establishes Dry Cleaning Solvent Cleanup Fund to be administered by Environmental Management Commission. (NCGS 143-215.104A, et seq.). Commission has authority to delegate to department, to adopt rules, or to enter into collection contracts with private contractors to establish risk-based approach for assessment, prioritization, and remediation of dry cleaning solvent contamination resulting from release at facilities or abandoned sites. (NCGS 143-215.104D). While Environmental Management Commission and Commission on Health Services have discretion to adopt temporary rules to implement provisions of act until July 1, 2001, entire act has delayed repeal date of Jan. 1, 2022. (2000 N.C. Sess. Laws 19).

Identification and Labeling of Toxic and Hazardous Substances.

Hazardous Substance List.

All employers who manufacture, process, use, store, or produce hazardous chemicals, must keep Hazardous Substance List which contains following information for each hazardous chemical stored in quantities of 55 gallons or 500 pounds, whichever is greater: (1) Chemical name or common name used on material safety data sheet (MSDS) or container label; (2) maximum amount of chemical stored at facility at any time during year, using prescribed ranges, e.g. “class A” for quantities of less than 55 gallons or 500 pounds; and (3) area in facility in which hazardous chemical is normally stored and to what extent chemical may be stored at altered temperature or pressure. (NCGS 95-191[a]). Hazardous Substance List must be updated at least once a year; however, if chemical is deleted from or added to list, or if quantity changes sufficiently to cause chemical to be in different class as defined in G.S. NCGS 95-191(a)(2), employer must update list within 30 days. (NCGS 95-191[b]).

Material Safety Data Sheets.

Chemical manufacturers and distributors must provide material safety data sheets (MSDS's) to purchasers of hazardous chemicals in N.C. (NCGS 95-192[a]). Employers must keep most current MSDS received from manufacturers or distributors for each hazardous chemical purchased, and if not received, employer must request one in writing within 30 days after receipt of chemical. If MSDS is not received by employer within 30 days of request, he must notify commissioner of failure by manufacturer or distributor to provide MSDS. (NCGS 95-192[b]).

Labels.

Existing labels on incoming containers of hazardous chemicals may not be removed or defaced. All containers of hazardous substances must be clearly designated as hazardous. (NCGS 95-193).

Emergency Information.

Employer who normally stores any hazardous chemical in amount of at least 55 gallons or 500 pounds, whichever is greater, must provide presiding fire chief, in writing, (i) Name(s) and telephone number(s) of knowledgeable representative(s) of employer as emergency contact and (ii) copy of Hazardous Substance List. (NCGS 95-194[a]). Fire chief may inspect chemicals at facility on Hazardous Substance List in order to preplan fire department emergency response and to ensure usefulness and accuracy of Hazardous Substance List and labels. (NCGS 95-194[c]). Upon written request of fire chief, employer must prepare emergency response plan and fire chief may have access, upon written request, to any emergency response plan required under N.C. or federal statute. (NCGS 95-194[e]). Fire chief may provide information from Hazardous Substance List, emergency response plan, and MSDS's to relevant emergency personnel (fire, police or medical), but may not otherwise disclose information not available to public under G.S. NCGS 95-208. (NCGS 95-194[f]). Any knowing disclosure of any such information by emergency personnel for any purpose other than emergency planning is punishable as class 1 misdemeanor. (NCGS 95-194[g]).

Complaints, Investigations, Penalties.

Complaints of violations of this part shall be filed in writing with Commissioner of Labor. (NCGS 95-195[a]). Commissioner of Labor's representative may enter any facility to inspect and investigate complaints. (NCGS 95-195[b]). Employers must comply within 14 days of receiving written notification of violations, and employers not complying within this time period are subject to civil penalties of up to $1,000 per violation. Each day violation continues constitutes separate offense. (NCGS 95-195[c]).

Withholding Hazardous Substance Trade Secret Information.

Employer who believes that all or any part of information required under G.S. NCGS 95-191, -192, -194(b) or -194(d) is hazardous substance trade secret may claim it as such, but information must still be provided to fire chief, who must hold it in confidence. (NCGS 95-197[a]).

Medical Emergency and Nonemergency Situations.

Where medical emergency exists and specific chemical identity of hazardous chemical is necessary for emergency or first aid treatment, chemical manufacturer, importer, or employer must disclose that information to treating physician or nurse, regardless of existence of written statement of need or confidentiality agreement. (NCGS 95-198[a]). In nonemergency situations, chemical manufacturer, importer, or employer must, upon written request, state medical need for information, disclose specific chemical identity otherwise permitted to be withheld under this section to health professional, as defined in 13 N.C.A.C. 7F, providing medical or other occupational health services to exposed persons. (NCGS 95-198[b]).

Community Information on Hazardous Chemicals.

Process exists for any person in N.C. to request in writing from employer list of chemicals used or stored at facility. (NCGS 95-208).

Exemptions.

Above referenced requirements do not apply to: (1) Hazardous substances being transported in interstate commerce into or through N.C.; (2) products intended for personal consumption by employees in facilities; (3) retail food sale establishments and all other retail trade establishments in Standard Industrial Classification Codes 53 through 59, exclusive of processing and repair areas, except that employer must still provide emergency contact to fire chief; (4) any food, food additive, color additive, drug or cosmetic as such terms are defined in Federal Food, Drug and Cosmetic Act (21 U.S.C. 301, et seq.); (5) laboratory under direct supervision or guidance of technically qualified individual (although certain restrictions apply); (6) any farming operation which employs ten or fewer full-time employees, except that if farming operation normally stores more than greater of 55 gallons or 500 pounds, employer must provide emergency contact to fire chief; (7) any distilled spirits, tobacco, and untreated wood products; and (8) medicines used directly in patient care in health care facilities and health care facility laboratories. (NCGS 95-216).

Lead-Based Paint and Lead Poisoning in Children

North Carolina seeks to manage and abate effects of lead-based paint through Hazard Management Program and by requiring certification and accreditation of lead-based paint renovation activities. (NCGS 130A-453.1 et seq.) Legislation also provides for prevention of lead poisoning in children. (NCGS 130A-131.5 et seq.)

Sedimentation Controls.

Sedimentation Pollution Control Act of 1973 (NCGS 113A-50, et seq.) sets forth mandatory standards to be complied with by those undertaking land disturbing activities during periods of construction or improvements to land. Sedimentation Pollution Control Act of 1973 does not apply to (1) Activities including breeding and grazing of livestock on agricultural land for production of plants and animals useful to man; (2) activities on forestland for production of timber and timber products, conducted in accordance with Forest Practice Guidelines Related to Water Quality; (3) activities which require permit under Mining Act of 1971; and (4) for duration of emergency, activities essential to protect human life. (NCGS 113-52.01). Standards require such measures as use of buffer zones around lakes and natural waterways; use of adequate retainers where grading angles exceed natural angle of repose of soil; and installation of sedimentation and erosion control devices and planting of ground cover on graded tracts (NCGS 113A-57). No person may initiate any land disturbing activity on tract if more than one acre is to be uncovered, unless erosion and sedimentation control plan has been submitted 30 or more days prior to initiating activity to agency having jurisdiction. (NCGS 113A-57[4]). Act establishes Sedimentation Control Commission, which is charged with issuing regulations pursuant to, and enforcement of, Sedimentation Pollution Control Act. (NCGS 113A-54). As to land disturbing activities requiring prior approval, commission must either approve or disapprove erosion control plans within 30 days of receipt. Failure to approve or disapprove complete erosion and sedimentation control plan within 30 days of receipt shall be deemed approval. Commission must approve or disapprove revised plan within 15 days of receipt or it is deemed to be approved. (NCGS 113A-54.1). Cities are empowered to enforce erosion, sedimentation and floodway ordinances consistent with state law. (NCGS 160A-458 and -458.1).

Penalties include injunctive relief, and civil penalties of not more than $500 or $5,000 for violation of stop-work order may be assessed. In addition violations of act are punishable by criminal fines not to exceed $5,000. Act also permits civil action by any individual injured by violation of act and issuance of stop-work order by Secretary of Environment, Health and Natural Resources in case of intentional violation of act. (NCGS 113A-64, -65, -65.1, 66).

Toxic Substances.

Unlawful to dispose of toxic substances (heavy metals and halogenated hydrocarbons) or radioactive materials defined in G.S. NCGS 104E-5 into atmosphere, water or on land except where disposal conducted pursuant to federal or state law, regulation or permit. (NCGS 14-284.2).

Violation of statute is felony, punishable by fine not to exceed $100,000 per day of violation. (NCGS 14-284.2).

Waste Management Act of 1981 (NCGS 130A-291, et seq.) and N.C. Radiation Protection Act (NCGS 104E-1, et seq.) provide regulation of hazardous and radioactive waste facilities (NCGS 130A-291, et seq.; NCGS 104E-1, et seq.).

Land use regulated by Land Policy Act of 1974. (NCGS 113A-150, et seq.). Purpose of this act is to (1) Promote patterns of land use in accord with state land-use policy; (2) establish state policy to give local governments guidance and assistance in establishing and implementing local land planning and management programs; (3) establish state land-use policy providing essential public services to all persons within state and to assure that all citizens shall have, consistent with sound principles of land resource use, maximum freedom and opportunity to live and conduct their activities in locations of their choice; (4) condition distribution of certain federal and state funds on meeting State requirements for land planning; (5) coordinate all state programs having land-use impact; and (6) promote development of systematic methods for exchange of land-use, environmental, economic, and social information among all levels of government and among all agencies at all levels of government. (NCGS 113A-151).

Marine Fisheries.

Marine Fisheries Commission has power and duty to adopt rules and regulations for protection, preservation, and enhancement of commercial and sport fisheries resources of N.C. (NCGS 113-127, et seq.). To ensure conservation of marine and estuarine resources (NCGS 113-132), commission may limit local rules. (NCGS 113-133). Commission may also adopt rules to regulate coastal fisheries (NCGS 113-181, et seq.), and shellfish cultivation (NCGS 113-201, et seq.).

Coastal and Other Estuarine Areas.

Coastal Area Management Act of 1974 is a land, sea, and stream environmental law affecting all of coastal N.C. Act is administered by Coastal Resources Commission and is designed to effectively control environment through standards relating to issuance or nonissuance of permits and variances. (NCGS 113A-100, et seq.).

Permits are required of every person before undertaking any development in coastal area. (NCGS 113A-118). Applicant must file for permit both with Secretary of Environment and Natural Resources and with designated local official and must pay for processing of application fee not in excess of $400. (NCGS 113A-119, -119.1). Minor development projects proposed to be undertaken by local government that have not developed approved implementation and enforcement programs shall be considered and determined by Secretary of Environment and Natural Resources. (NCGS 113A-121[b]). Emergency permits may be issued in extraordinary situations; fees associated with emergency permits are waived. (NCGS 113A-118[f]). Variances may be issued upon findings specified in statute. (NCGS 113A-120.1). Effective Apr. 1, 2001, G.S. NCGS 113A-120.2 (concerning permits for certain non-water dependent uses for urban waterfront redevelopment in historically urban areas) expired. 2000 N.C. Sess. Laws, §2.2, as amended by 2000 N.C. Sess. Laws 140, §92.1(b), provides that Coastal Resources Commission is to adopt temporary rule to establish use standards for waterfront development in urban areas to replace G.S. NCGS 113A-120.2 when it expires. Commission's rule became effective Apr. 1, 2001, and shall remain effective until permanent rule enacted. After permit is filed, secretary issues public notice of proposed development. Thereafter permit is issued, denied, or is issued with variances. Appeals of permit denials are pursuant to quasi-judicial procedure in G.S. NCGS 113A-121.1, et seq. (NCGS 113A-118, 119). Commission may by rule designate classes of major and minor development for which general or blanket permit may be issued. (NCGS 113A-118.1[a]). General permits may be issued by commission under G.S. NCGS 113A-118.1(b). Individual permits carried out under provisions of general permits shall not be subject to mandatory notice provisions of G.S. NCGS 113A-119. (NCGS 113A-118.1[b]).

Penalties include injunctive relief and civil penalties of not more than $1,000 for minor development violation and $10,000 for major development violation. For each willful action or failure to act for which penalty may be assessed, commission may consider each day action or inaction continues after notice separate violation. Separate penalty may be assessed for each separate violation. (NCGS 113A-126). Knowing or willful violation of Act is Class 2 misdemeanor punishable by penalties assessed by commission, which will consider harm caused and cost of rectifying damage. (NCGS 113A-126).

Aquatic weed control regulated by Aquatic Weed Control Act of 1991. (NCGS 113A-220, et seq.).

Nature Preserves Act allows for maintenance of voluntarily protected natural areas as State Registry of Natural Heritage Areas. (NCGS 113A-164.1, et seq.).

Mountain ridge protection regulated by Mountain Ridge Protection Act of 1983. (NCGS 113A-205). Counties or cities may adopt and enforce ordinances regulating construction of tall buildings or structures on protected mountain ridges. (NCGS 113A-208). No advertisement or advertising structure shall be constructed or maintained within 1,000 feet of centerline of Blue Ridge Parkway except as specifically allowed under act. (NCGS 113A-165, et seq.).

12.02 [RESERVED]

12.03 WILDLIFE AND ENDANGERED SPECIES:

Endangered and threatened wildlife provided for under G.S. NCGS 113-331, et seq. Wildlife Resources Commission empowered to classify species as endangered or threatened and to implement conservation plan accordingly. (NCGS 113-333). Violation of commission regulations, including trafficking in protected wild species, punishable as misdemeanor. (NCGS 113-337).

13 ESTATES AND TRUSTS

13.01 ADMINISTRATION:

See topic 13.09 Executors and Administrators.

13.02 ADVANCEMENTS:

See topic 13.07 Descent and Distribution.

13.03 ALLOWANCES:

See topic 13.09 Executors and Administrators.

13.04 CLAIMS:

See topic 13.09 Executors and Administrators; category 5 Civil Actions and Procedure, Pleading.

13.05 DEATH:

Rebuttable presumption of death arises when one is absent from his domicile for seven years and is not heard from by anyone who naturally would hear were he alive, unless circumstances account for his not being heard from, but there is no presumption as to time of his death. (185 N.C. 5, 115 S.E. 885).

Survivorship.

Uniform Simultaneous Death Act (1940) adopted, revised 2007. (NCGS 28A-24-1 to -7).

Actions for Death.

Action for wrongful death vests in personal representative of deceased. When death of person caused by wrongful act, neglect or default of another, such as would have entitled deceased to action for damages had he lived, person or corporation that would have been liable and his personal representatives or collectors are liable to action for damages brought by personal representative or collector of decedent. Amount recovered is not liable to be applied as assets in payment of debts or legacies (except burial expenses, and hospital and medical bills to $4,500 but not exceeding 50% of amount of damages recovered minus attorneys' fees) but must be disposed of in accordance with Intestate Succession Act. Damages recoverable in such action may include: (1) Medical expenses; (2) pain and suffering; (3) reasonable funeral expenses; (4) present monetary value of decedent to persons entitled to damages; (5) punitive damages; and (6) nominal damages. (NCGS 28A-18-2). Wrongful death actions subject to two year statute of limitations. (NCGS 1-53).

In all actions for wrongful death, dying declarations of deceased admissible in evidence as provided for in G.S. NCGS 8-51.1. (NCGS 28A-18-2).

Death Certificate.

See category 10 Documents and Records, topic 10.04 Records, subhead Vital Statistics.

Revised Uniform Anatomical Gift Act (2007) adopted with minor additions. (NCGS 130A-412.3 to -412.33).

Living Wills.

See topic 13.16 Wills, subhead Living Wills.

Advance Directive for natural death may authorize withholding or withdrawing life-prolonging measures if two physicians determine that condition is terminal. Statutory form for living will located at G.S. NCGS 90-321(d1).

13.06 DECEDENTS' ESTATES:

See topics 13.07 Descent and Distribution, Executors and Administrators, Wills; category 8 Debtor and Creditor, topic 8.10 Homesteads.

13.07 DESCENT AND DISTRIBUTION:

See also topic 13.09 Executors and Administrators.

The N.C. law governing descent and distribution was completely rewritten by the Intestate Succession Act (G.S. c. 29) effective July 1, 1960, and applicable only to estates of persons dying on or after July 1, 1960.

Shares.

When intestate is survived by: (A) Spouse and children or descendants of deceased children, (1) spouse receives one-third real estate (2) children and descendants of deceased children receive two-thirds real estate, (3) spouse receives first $30,000 of personal property plus one-third of balance and (4) children and descendants of deceased children receive two-thirds of balance; (B) spouse and one child or its descendants, (1) spouse receives one-half real estate, (2) child or its descendants receive one-half real estate, (3) spouse receives first $30,000 of personal property plus one-half of balance and (4) child or its descendants receive one-half of balance; (C) when equitable distribution of property is awarded to surviving spouse pursuant to G.S. NCGS 50-20, subsequent to death of decedent, intestate share of surviving spouse is first determined as though no property had been awarded to surviving spouse in equitable distribution action, and is then reduced by value of marital estate awarded to surviving spouse in equitable distribution action.

Those persons surviving intestate, other than surviving spouse, shall take that share of net estate not distributable to surviving spouse, or entire net estate if there is no surviving spouse, as follows: (A) If intestate is survived by only one child or by only one lineal descendant of only one deceased child, that person shall take entire net estate or share, but if intestate is survived by two or more lineal descendants of only one deceased child, they shall take as provided in G.S. NCGS 29-16; (B) if intestate is survived by two or more children or by one child and any lineal descendant of one or more deceased children, or by lineal descendants of two or more deceased children, they shall take as provided in G.S. NCGS 29-16; (C) if intestate is not survived by child, children or any lineal descendant of deceased child or children, but is survived by both parents, they shall take in equal shares, or if either parent is dead, surviving parent shall take entire share; (D) if intestate is not survived by such children or lineal descendants or by parent, brothers and sisters of intestate, and lineal descendants of any deceased brothers or sisters, shall take as provided in G.S. NCGS 29-16; or (E) if there is no one entitled to take under preceding subdivisions of this section or under G.S. NCGS 29-14: (1) paternal grandparents shall take one half of net estate in equal shares, or, if either is dead, survivor shall take entire one half of net estate, and if neither paternal grandparent survives, then paternal uncles and aunts of intestate and lineal descendants of deceased paternal uncles and aunts shall take said one half as provided in G.S. NCGS 29-16, (2) maternal grandparents shall take other one half in equal shares, or if either is dead, survivor shall take entire one half of net estate, and if neither maternal grandparent survives, then maternal uncles and aunts of intestate and lineal descendants of deceased maternal uncles and aunts shall take one half as provided in G.S. NCGS 29-16, (3) if there is no grandparent and no uncle or aunt, or lineal descendant of deceased uncle or aunt, on paternal side, then those of maternal side who otherwise would be entitled to take one half as hereinbefore provided in this subdivision shall take whole, or (4) if there is no grandparent and no uncle or aunt, or lineal descendant of deceased uncle or aunt, on maternal side, then those on paternal side who otherwise would be entitled to take one half as hereinbefore provided in this subdivision shall take whole. (NCGS 29-15).

Division and Distribution.

No Surviving Spouse.

Distribution to classes is per stirpes (NCGS 29-15), and distribution within class is per capita (NCGS 29-16).

Collateral Succession.

There is no right of succession by collateral kin who are more than five degrees of kinship removed from an intestate except to prevent escheat. (NCGS 29-7). Degrees of kinship are computed by the civil law rule. (NCGS 29-5; NCGS 104A-1).

Surviving Spouse.

The following persons lose among other things all right of intestate succession, and all right to petition for elective share or administer estate of other spouse: (1) Spouse from whom or by whom absolute divorce or marriage annulment has been obtained or from whom divorce from bed and board has been obtained; or (2) spouse who voluntarily separates from other spouse and lives in adultery and such has not been condoned; or (3) spouse who willfully and without just cause abandons and refuses to live with other spouse and is not living with other spouse at time of such spouse's death (138 N.C. App. 318, 530 S.E.2d 883); or (4) spouse who obtains divorce validity of which is not recognized under laws of this state; or (5) spouse who knowingly contracts bigamous marriage; or (6) any person who is slayer of deceased, except that, if slayer has living issue who would have been entitled to interest in property if slayer had predeceased decedent, property shall be distributed to such issue, per stirpes (NCGS 31A-1, -3, -4).

See subheads, Shares, supra, and Election, infra.

Equitable Distribution.

Death of spouse after institution of action for equitable distribution, but before final judgment, abates action for divorce. (353 N.C. 220, 539 S.E.2d 621). In equitable distribution action, tenancy by entirety real estate purchased with one spouse's separate funds is marital property when premarital agreement so provides. (135 N.C. App. 369, 520 S.E.2d 74).

Parents.

Any parent who has willfully abandoned his child loses all right of intestate succession and all right to administer the child's estate except: (1) If parent resumed care at least one year before death of child; or (2) parent has been deprived of custody under court order and parent has substantially complied with court ordered contributions to child support. (NCGS 31A-2). Whether noncustodial parent abandoned minor child is jury question. (136 N.C. App. 183, 523 S.E.2d 684).

Half Blood.

No distinction is made between relations of the whole blood and relations of the half blood. (NCGS 29-3).

Posthumous Children or Other Issue.

Children of an intestate and other relatives born within ten lunar months after death of intestate inherit as if born during lifetime of intestate. (NCGS 29-9).

Illegitimates.

For purposes of intestate succession, an illegitimate child is treated as if he were legitimate child of his mother, so that he and his lineal descendants are entitled to take by, through and from his mother and his other maternal kindred, both descendants and collaterals, and they are entitled to take from him. In addition, for intestate succession purposes, an illegitimate child may take by, through and from: (1) Person who has been judicially determined to be father of child; and (2) person who has acknowledged himself to be father of such child in written instrument acknowledged before certifying officer and filed during his own and child's lifetime with clerk of court in county where father or child resides, so long as written notice of basis of his claim is given to personal representative of putative father within six months of first publication or posting of general notice to creditors. (NCGS 29-19). DNA analysis may be used as proof of paternity. (119 N.C. App. 204, 458 S.E.2d 1).

Adopted Children.

No distinction is made between adopted children and natural children with respect to right of adopted children to inherit by, through and from adoptive parents. Adopted child is not entitled by succession to any property, by, through, or from his natural parents or their heirs, except if natural parent has previously married, is married to, or shall marry adoptive parent. (NCGS 29-17). N.C. recognizes doctrine of equitable adoption. (347 N.C. 115, 489 S.E.2d 604).

Determination of Heirship.

Any person interested as or through executor, administrator, trustee, guardian or other fiduciary, creditor, devisee, legatee, heir, next of kin or cestui que trust, in administration of trust or of estate of decedent, infant, lunatic or insolvent may have declaration of rights or legal relations in respect thereto to ascertain any class of creditors, devisees, legatees, heirs, next of kin or others, to direct executors, administrators or trustees to do or abstain from doing any act, to determine any question arising in administration of estate or trust, or to determine apportionment of federal estate tax, interest, and penalties under art. 27 of c. 28A. (NCGS 1-255).

Advancements.

Advancements are taken into account in computing advancee's intestate share. (NCGS 29-23). However, gratuitous inter vivos transfer is presumed to be absolute gift and not advancement unless shown to be advancement. (NCGS 29-24). Value of property given as advancement is determined as of time when advancee came into possession, or at time of death of intestate, whichever occurs first. (NCGS 29-26). If advancee dies before intestate donor, advancement will be accounted as if it had been made directly to advancee's heir(s). (NCGS 29-27). Gift deed by grantee not related to aged, unrelated grantor likely to be challenged. (136 N.C. App. 768, 525 S.E.2d 809).

Election.

In lieu of intestate share or elective share, surviving spouse of intestate or surviving spouse who petitions for elective share by timely election may take life estate in one-third in value of all real estate of which deceased spouse was seized and possessed of estate of inheritance at any time during coverture, except that real estate in which surviving spouse has waived his or her rights by joining with other spouse in conveyance thereof or, because of quitclaim or other reason is not legally entitled to election. Regardless of value, such life estate may, at election of surviving spouse, include dwelling house and appurtenances thereto occupied by surviving spouse at time of death of deceased spouse if such dwelling house was owned by deceased spouse at time of death. Spouse also receives fee simple ownership in household furnishings. (NCGS 29-30).

Renunciation.

Person who succeeds to property interest by reason of death of another person, or duly authorized or appointed guardian, personal representative, or attorney-in-fact of person who succeeds to such property interest, may renounce all or part of right of succession to such property interest, including future interest, by filing written instrument under provisions of G.S. c. 31B. Renunciation may be of fractional share or any limited interest or estate provided no right of partial renunciation exists if instrument creating interest so provides. (NCGS 31B-1). Right of renunciation includes right to renounce fiduciary rights, privileges, powers. (NCGS 31B-1.1). Fiduciary, before or after renunciation, may institute proceeding to review whether renunciation compatible with fiduciary duties. (NCGS 31B-1,2) Written instrument must be filed with clerk of court of county in which proceedings have been or could be commenced for administration of estate of deceased or in county with court having jurisdiction to enforce instrument creating interest being renounced. In cases in which proceeding not commenced renunciation filed as estate matter. Renunciation of real property, or interest therein, must be registered(NCGS 31B-2).

Instrument renouncing present interest must be filed within time period required under applicable federal statute to be given effect for federal and state estate, inheritance and gift tax purposes. If no such federal statute, instrument must be filed within nine months after death of decedent or donee of power. Failure to file or register instrument of renunciation does not affect effectiveness as between person whose property being renounced and persons to whom property passes by reason of renunciation. (NCGS 31B-2). Instrument of renunciation must be delivered to person whose beneficial interest affected by renunciation. (NCGS 31B-2.1) Unless otherwise provided, property or interest renounced devolves as if renouncer predeceased decedent or donee of power. (NCGS 31B-3). Future interest takes effect as if renouncer predeceased decedent or donee of power. Renunciation relates back for all purposes to date of death. If created by testamentary disposition, devolution of property or interest renounced governed by G.S. NCGS 31-42(a) even though renouncer has not died before testator. If decedent dies intestate and renouncer has living issue, such issue will receive renouncer's share per stirpes. If renouncer has no issue, then share passes as if renouncer predeceased decedent. (NCGS 31B-3).

If renounced property treated pursuant to United States Internal Revenue Code as if property never transferred to person whose property or interest is renounced then renunciation effective renunciation. (NCGS 31B-4.1) Instrument waiving or barring right to renounce binding upon person waiving or barring right and all persons claiming through or under him. (NCGS 31B-4). If power of attorney does not expressly authorize the attorney-in-fact to renounce then attorney-in-fact does not have power or authority to renounce. (NCGS 32A-14.2)

Escheat.

On failure of heirs, the intestate estate will escheat to Escheat Fund. (NCGS 116B-2).

13.08 ELECTION:

See topic 13.16 Wills.

13.08A ESTATES: (in property)

See category 21 Property, topic 21.16 Real Property.

13.09 [RESERVED]

13.10 EXECUTORS AND ADMINISTRATORS:

Administration of estates of deceased persons was regulated by G.S. c. 28 until Oct. 1, 1975. New statute (G.S. c. 28A) governing administration of estates became effective on Oct. 1, 1975. Following is summary of new act:

Probate jurisdiction is exercised by clerk of superior court as ex officio judge of probate. (NCGS 28A-2-1).

Preferences in Right to Administer.

Letters of administration are granted in following order: (1) Surviving spouse; (2) any devisee of testator; (3) any heir of decedent; (3)(a) any next of kin, with person who is of closer kinship as computed pursuant to NCGS 104A-1 having priority; (4) any creditor to whom decedent became obligated prior to his death; (5) any person of good character in county of probate; (6) any other competent person of good character. (NCGS 28A-4-1[b]). Right to renounce and nominate another for appointment is recognized. (NCGS 28A-5-2).

Eligibility and Competency.

Following persons are incompetent to qualify as personal representatives or collectors: (1) Minors; (2) adjudged incompetents; (3) felons; (4) nonresidents who have not appointed resident agents; (5) corporations not authorized to act as personal representatives in N.C.; (6) persons who have committed acts barring their property rights under G.S. c. 31A; (7) illiterates; (8) persons found by clerk of court to be unsuitable; or (9) persons who have renounced. (NCGS 28A-4-2).

A surviving spouse or parent who has forfeited right to distributive share of deceased spouse's or child's personal estate (see topic 13.07 Descent and Distribution) forfeits also right to administer estate of deceased spouse or child. (NCGS 31A-1, and -2).

Foreign corporation may qualify in this state as executor, administrator, or guardian, or as trustee under will of any person domiciled in this state at time of that person's death only in accordance with applicable provisions of art. 24 of c. 53. Foreign corporation qualifying as testamentary trustee or executor shall appoint process agent and file such appointment with court as required by G.S. NCGS 28A-4-2(4). (NCGS 55-15-05[a]).

Bond.

Personal representatives must give bond of at least one and one-fourth times value of all personal property where bond is executed by authorized surety company or at least twice value of personal property where otherwise secured. If personal property exceeds $100,000, amount of personal property plus 10% must be given. (NCGS 28A-8-2). No bond is required of: (1) Resident executor, unless will requires; (2) nonresident executor (or resident executor who moves from this state subsequent to his appointment) who has appointed resident agent to accept service of process, when will excuses him from giving bond; (3) nonresident executor if resident executor qualifies as coexecutor and bond not required by will; (4) personal representative appointed solely to bring action for wrongful death of deceased until personal representative shall receive property into estate; (5) personal representative that is national banking association having its principal place of business in this state or that is bank licensed in this state; (6) personal representative of intestate who resides in this state when all heirs of decedent are over 18 years of age and file with clerk of superior court written waiver instrument agreeing to relieve personal representative from necessity of giving bond; (7) personal representative where he receives all property of decedent; or (8) administrator with will annexed who resides in state when all devisees are over 18 years of age and file with clerk of superior court written waiver instrument agreeing to relieve administrator of necessity of giving bond. (NCGS 28A-8-1).

Personal representative may deposit cash or securities of state of N.C. or U.S., in lieu of bond. (NCGS 58-75-1).

Qualification.

Before letters testamentary, letters of administration or letters of collection are issued to any person, such person must give bond if required by law and must take and subscribe to an oath or affirmation before clerk, or any other officer of any state or country authorized by laws of this state to administer oaths, that he will faithfully and honestly discharge duties of his office, which oath must be filed in office of clerk. (NCGS 28A-7-1). See subheads Eligibility and Competency, and Bond, supra.

Foreign personal representative may be granted ancillary letters in this state by (1) Filing certified or exemplified copy of letter of appointment with clerk, even if foreign personal representative is nonresident or a foreign corporation, and (2) giving required bond, as required under G.S. NCGS 28A-8-2. (NCGS 28A-26-3, and -4).

Ancillary Administration.

Any administration of estate of, and any probate of will of, resident decedent which takes place outside state shall be ancillary only. All assets, except real estate, subject to ancillary administration outside state must, to extent assets not necessary for requirements of ancillary administration, be delivered by ancillary personal representative to domiciliary personal representative for administration by domiciliary personal representative. Receipt of domiciliary personal representative fully acquits ancillary personal representative with respect to assets covered thereby. Domiciliary personal representative has exclusive right and duty to pay all federal and state taxes owed by decedent's estate and to make proper distribution of all assets including those collected from ancillary personal representative. (NCGS 28A-26-1).

Nonresident Decedents without Ancillary Administration within State.

If any resident of state is indebted to estate of nonresident decedent or has possession or control of personal property or instrument evidencing debt, obligation, stock or chose in action belonging to estate of nonresident decedent, he may pay debt or deliver such property or instrument to foreign personal representative of nonresident decedent upon being presented with certified or exemplified copy of letters of appointment and affidavit by foreign personal representative stating: (1) Date of death; (2) no administration or application therefore is pending in this state; and (3) domiciliary personal representative is entitled to payment or delivery. Such payment or delivery is not to be made if creditor of this state notifies by registered or certified mail resident debtor or person having possession of such property or instrument that debt should not be paid nor property delivered to domiciliary representative. If no ancillary administrator qualifies within 90 days from date of notice, resident debtor may pay debt or deliver property to nonresident domiciliary representative. (NCGS 28A-26-2).

Exemption from Bond.

See supra, subhead Bond.

Appointment of Resident Agent.

Nonresident personal representative qualifying in estate of a resident of this state must file with clerk written appointment of resident agent. (NCGS 28A-4-2). This applies as well to foreign corporations qualifying as discussed in subhead Eligibility and Competency, supra. (NCGS 55-15-05).

Issuance of Letters.

Prior to issuance of letters, person named as executor may carry out written instructions of decedent relating to his body, funeral and burial arrangements; provided that health care agent authorized by environmehealth care power of attorney has precedence in making such arrangements. Otherwise duties and powers of personal representatives commence upon appointment. (NCGS 28A-13-1).

Removal.

Personal representative's or collector's letters may be revoked, after a hearing, if personal representative or collector: (1) Is originally incompetent to serve under G.S. NCGS 28A-4-2 or has subsequently become disqualified; (2) obtained letters by false representation or mistake; (3) has violated a fiduciary duty through default or misconduct; or (4) has a private interest that would be adverse to a fair administration. (NCGS 28A-9-1). Repeated acts of uncondoned adultery must be proven to warrant revocation of letters of administration. (137 N.C. App. 564, 528 S.E.2d 618). Personal representative's or collector's letters may be revoked without hearing if: (1) In case of letters of administration or collector, will is subsequently admitted to probate; (2) in case of letters testamentary, will is set aside or subsequently will is admitted to probate revoking appointment; (3) personal representative or collector fails to furnish required bond or security; (4) nonresident personal representative refuses to obey any citation or notice; (5) trustee in bankruptcy, liquidating agent or receiver is appointed for personal representative or collector, or personal representative or collector has executed assignment for benefit of creditors; (6) personal representative fails to file inventories and accounts and cannot be found. (NCGS 28A-9-2).

Special Kinds of Administrators.

Administrator with will annexed has, whether or not succeeding previously appointed personal representative, same powers and duties, discretionary or otherwise, as if he had been named executor in will, unless contrary intent clearly appears from will. (NCGS 28A-13-8). Letters of administration must be granted by clerk of superior court, unless in his discretion he determines that best interests of estate otherwise require, in following order of preference: (1) Surviving spouse; (2) any devisee of testator; (3) any heir of decedent; (4) any next of kin, with priority determined by proximity of kinship as computed pursuant to G.S. NCGS 104-1; (5) any creditor to whom decedent became obligated prior to death; (6) any person of good character residing in county; (7) any person of good character not disqualified under G.S. NCGS 28A-4-2. (NCGS 28A-4-1[b]).

Administrator de bonis non and administrator de bonis non with will annexed have, unless contrary intent clearly appears from will, all powers and duties, discretionary or otherwise, of original personal representative. (NCGS 28A-13-7).

Collector appointed when, for any reason other than situation provided for in c. 28B or c. 28C concerning estates of military absentees and missing persons, delay is encountered in issuance of letters to personal representative or when, in any case, clerk of superior court finds that best interest of estate would be served by appointment of collector. Clerk may issue letters of collection to any person or persons not disqualified to act as personal representative under G.S. NCGS 28A-4-2. (NCGS 28A-11-1).

Limited personal representatives Person qualified to serve as personal representative or trustee serving under revocable trust created by decedent may file petition for appointment as limited personal representative to provide notice to creditors without administration of estate. (NCGS 28A-29–1–28A-29–5, 28A-21–2.2)

Ancillary Administration.

See subhead Foreign Personal Representative, supra.

Public Administrator.

There shall be a public administrator in every county, appointed by clerk of superior court (NCGS 28A-12-1), who may obtain letters of administration if person entitled does not appear in six months, or if decedent died intestate without known heirs or if person entitled requests clerk to do so (NCGS 28A-12-4).

Powers of Personal Representative or Fiduciary.

Personal representative has power to perform in reasonable and prudent manner every act which reasonable and prudent person would perform incident to collection, preservation, liquidation or distribution of decedent's estate so as to accomplish desired result of settling and distributing decedent's estate in safe, orderly, accurate and expeditious manner as provided by law, including: (1) Take possession, custody, or control of personal property of decedent; (2) retain assets owned by decedent pending distribution or liquidation; (3) receive assets from other fiduciaries or other sources; (4) complete performance of contracts entered into by decedent that continue as obligations of his estate, or to refuse to complete such contracts; (5) deposit, as fiduciary, funds of estate in bank; (6) make, as fiduciary, any form of investment allowed by law; (7) abandon or relinquish all rights in any property; (8) vote shares of stock or other securities in person or by general or limited proxy; (9) pay calls, assessments, and any other sums chargeable or accruing against or on account of securities; (10) hold shares of stock or other securities in name of nominee, without mention of estate in instrument representing stock or other securities or in registration records; (11) insure assets of estate; (12) borrow money for such periods of time and upon such terms and conditions as to rates, maturities, renewals and security as personal representative shall deem advisable; (13) renew obligations of decedent for payment of money; (14) advance his own money for protection of estate; (15) compromise, adjust, arbitrate, such on or defend, abandon, or otherwise deal with and settle claims in favor or against estate; (16) pay taxes, assessments, his own compensation or other expenses incident to collection, care, administration and protection of assets of estate; (17) sell or exercise stock subscription or conversion rights; (18) allocate items of income or expense to either estate income or principal; (19) employ persons to advise or assist him in performance of administrative duties; (20) continue any business or venture in which decedent was engaged at date of his death; (21) incorporate or participate in incorporation of any business or venture in which decedent was engaged at time of his death; (22) provide for exoneration of personal representative from personal liability in any contract entered into on behalf of estate; (23) maintain actions for wrongful death of decedent; (24) maintain any appropriate action or proceeding to recover possession of any property of decedent; (25) purchase at any public or private sale of any real or personal property belonging to decedent's estate or securing obligation of estate as fiduciary for benefit of estate; (26) sell or lease personal or real property as in art. 16 and 17 of this chapter; (27) enter into agreements with taxing authorities to secure benefit of federal marital deduction; (28) pay or satisfy debts and claims against decedent's estate; (29) distribute any sum recovered for wrongful death of decedent and to distribute all other assets available for distribution; (30) exercise such additional lawful powers as conferred upon him by will; (31) execute and deliver all instruments which will accomplish or facilitate exercise of powers vested in personal representative; (32) renounce in accordance with provisions of c. 31b of General Statutes. (NCGS 28A-13-3).

Inventory.

Personal representatives or collectors file within three months after qualification an inventory of all real and personal property coming into their hands. (NCGS 28A-20-1).

Notice to Creditors.

Personal representatives of a deceased person must advertise once a week for four consecutive weeks for claimants to exhibit their claims before him at or before certain date which must be at least three months from date of first publication of notice. Such notice must be delivered personally or by first-class mail within 75 days to known creditors of decedent unless personal representative recognizes claim as valid. Such notice is not required when only assets of estate consist of proceeds received for wrongful death. (NCGS 28A-14-1).

Presentation of Claims.

Creditors of decedent must present their claims which arose before death to personal representative, collector or clerk of superior court by date specified in general notice to creditors, or their claims become barred or, in those cases requiring delivery or mailing of notice, claims must be presented within 90 days of date of delivery or mailing, if 90 day period is later than date specified in general notice to creditors. (NCGS 28A-19-1, -3). Claims based on contract with personal representative or collector arising at or after death must be presented within six months after date on which performance by personal representative or collector is due and all other claims arising at or after death must be presented within six months after date on which claim arises, except to extent certain claims, proceedings or judgments are covered by insurance. (NCGS 28A-19-3). Time period to file claim against estate is suspended until personal representative qualifies. (356 N.C. 603).

Unmatured claims must be presented same as other claims. (NCGS 28A-19-3).

Proof of Claims.

There is no particular form required for proof of claims against decedent's estate. Claim must be in writing, state amount or item claimed or other relief sought, basis for claim and name and address of claimant. Claim presented by: (1) Delivery in person or by mail to personal representative, collector or clerk, such claim being deemed presented at time of delivery; (2) mailing registered or certified mail, return receipt requested to personal representative or collector, such claim being deemed presented from time receipt signed or refused; or (3) delivery to clerk of court of county in which estate is pending, and claim must be mailed first class by clerk to personal representative or collector, such claim being deemed presented from time of delivery to clerk. Personal representative or collector may require additional information or affidavit of claimant or other satisfactory evidence that claim is justly due, no payments have been made thereon, no offsets exist, or amounts and nature of any payments or offsets. (NCGS 28A-19-1, and -2).

Form.

See subhead Proof of Claims, supra.

Approval or Rejection of Claims.

See subheads Proof of Claims, supra, and Payment of Claims, infra.

Payment of Claims.

Personal representative or collector may pay, prior to date specified in general notice to creditors, such claims as he deems in best interest of estate if total assets are sufficient to pay all claims and charges against estate. (NCGS 28A-19-4). If a contingent claim is asserted, creditor and personal representative or collector may determine amount due by agreement, arbitration or compromise; clerk may order personal representative or collector to retain sufficient funds until claim is absolute. Clerk may order distribution of estate to heirs and devisees subject to claim becoming absolute. (NCGS 28A-19-5). If claim is disputed, claimant must, within three months after written notice of rejection by personal representative or after claim is due, commence action for recovery or claim will be barred. (NCGS 28A-19-15, -16).

Unmatured claims may be paid by personal representative with a rebate of interest thereon for time unexpired. (NCGS 28A-19-14).

Secured Claims.

If secured claims exceed security, creditor prorates with other creditors of same class as to excess. (NCGS 28A-19-6, -13).

Priorities.

Debts of decedent must be paid in following order: (1) Debts which by law have specific lien on property to amount not exceeding value of said property; (2) funeral expenses to extent of $2,500 not diminished by any Veterans Administration, social security or other federal governmental benefits awarded to estate or decedent's beneficiaries; (3) dues, taxes and claims with preference under laws of U.S.; (4) dues, taxes and claims with preference under laws of state and its subdivisions; (5) judgment of any court of competent jurisdiction within state, docketed and in force, to extent to which they are lien on property of decedent at death; (6) wages due to any employee employed by decedent, not extending more than 12 months next preceding death, or from time of employment if employed within current year; medical services within 12 months preceding death; drugs and medical supplies for treatment of last illness, not to exceed 12 months; (7) claim for equitable distribution; and (8) all other claims. (NCGS 28A-19-6). Claims may be satisfied other than by payment. (NCGS 28A-19-7). Every debt must be paid pro rata in its class. (NCGS 28A-19-13). Claims due personal representative are not preferred. (NCGS 28A-19-12).

Sales of Personal Property.

Personal representative has power to sell or lease personal property without court order at either public or private sale. No special reports are required and transaction need not be confirmed by clerk, but transaction must appear on next accounting. (NCGS 28A-16-1). Personal representative may purchase personal property of estate for his own benefit at public sale conducted under clerk's order if transaction is reported to and confirmed by clerk. (NCGS 28A-16-2). No sale or lease of household furnishing shall be made if surviving spouse occupies dwelling, until expiration of time, set forth in G.S. NCGS 29-30(c), for filing spouse's election. (NCGS 28A-16-3). Sales of personal property of decedent by collector can only be made upon order of clerk. (NCGS 28A-16-2).

Sales of Real Property.

Real property may be used to satisfy claims against estate even though personal property is also available, but personal representative must first determine that sale of real property selected is in estate's best interests. (NCGS 28A-15-1). When estate must sell realty to raise cash, liens against that realty must be paid before other claims, including costs of administration. (135 N.C. App. 699, 522 S.E.2d 583). To sell real property for payment of claims, personal representative must petition clerk, unless sale made pursuant to authority given by will. (NCGS 28A-17-1). All heirs and devisees must be made parties to proceeding and court must appoint guardian ad litem to represent unknown heirs. (NCGS 28A-17-4). Adverse claimants to property may be made or may become parties. (NCGS 28A-17-6). Clerk may order either judicial sale under art. 29A of G.S. c. 1 or private sale under G.S. NCGS 1-339.33 to .40. (NCGS 28A-17-7). If authority is given in will to sell real property, sale may be public or private and on such terms as personal representative deems to be most advantageous to those interested. (NCGS 28A-17-8).

Conveyances by heirs to bona fide purchasers for value and without notice are valid, even as against creditors, if made after two years from decedent's death or after final account approved. (NCGS 28A-17-12). If publication occurs within two years after death of decedent, all sales, leases or mortgages prior to first publication will be void as to creditors and personal representatives. Sales made after first publication, but prior to approval of final account will be void to creditors and personal representatives unless personal representative joins in sale, lease or mortgage. (NCGS 28A-17-12). See subhead Conveyances of Real Estate by Heir or Devisee, infra.

Actions by Representative.

All demands and rights to prosecute or defend any action, survive to and against personal representative or collector except: (1) Causes of action for libel, slander, except slander of title; (2) causes of action for false imprisonment; (3) causes of action where relief sought could not be enjoyed or would be nugatory after death. (NCGS 28A-18-1). Wrongful death action may be brought by personal representative (NCGS 28A-18-2) and is controlled by two year statute of limitations (NCGS 1-53). All actions and proceedings on behalf of estate must be brought by personal representative or collector in his representative capacity. (NCGS 28A-18-3). If person entitled to bring action dies before expiration of time limited for commencement thereof, and cause of action survives, personal representative or collector may commence action after expiration of that time and within one year from decedent's death. (NCGS 1-22).

Actions Against Representative.

If person against whom action may be brought dies before expiration of time limited for commencement thereof, and cause of action survives (see category 5 Civil Actions and Procedure, topic 5.02 Actions), action may be commenced against his representative or collector after expiration of that time if action is brought or notice of claim upon which action is based is presented to personal representative or collector within time specified for presentation of claims under G.S. NCGS 28A-19-3. If claim upon which cause of action is based is filed with personal representative or collector within time above specified, and its validity is admitted in writing by him, it is not necessary to bring action upon such claim to prevent bar, but no action shall be brought against personal representative or collector upon such claim after his final settlement. (NCGS 1-22). If claim is filed with and rejected by representative it may be referred to three or fewer arbitrators. (NCGS 28A-19-15). Rejected claim, not referred to arbitrators, is barred if action is not brought thereon within three months after written notice of rejection. (NCGS 28A-19-16). Action pending at decedent's death may be continued against representative or collector on motion at any time within time specified for presentation of claims, if cause of action survives. (NCGS 1A-1, R. 25).

Allowances.

Widow(er) is entitled to year's support of $10,000, and each child under 18 years old, under 22 years old and full-time student, or under 21 years old and is either declared mentally incompetent or totally disabled is entitled to year's support of $2,000. Payment for child will be distributed to parent or guardian. (NCGS 30-15 to -18).

Where personal estate of deceased spouse exceeds in value $20,000, larger year's allowance may be made to widow(er), in no case to exceed one-half of annual net income of deceased for three years next preceding death. (NCGS 30-29 to -31).

Application for allowance must be made within one year after deceased spouse's death. (NCGS 30-27). If administrator fails to reply within ten days of written request, surviving spouse may apply to magistrate or clerk. (NCGS 30-16).

Widow's Quarantine.

None.

Intermediate Accountings.

See infra, subhead, Final Accounting and Settlement.

Distribution to Absentee, Infants and Aliens.

Distributive shares due a minor without guardian may be delivered to clerk to be invested and managed by him, or clerk may appoint a guardian and deliver property to guardian, and shall be used solely for education, maintenance and support of legatee. (NCGS 28A-23-2).

If devise or legacy of personal property to person under age of 18 has total value of less than $1,500, and devisee or legatee is residing in same household with parent or guardian appointed prior to decedent's death, personal representative may distribute to parent or guardian devise or legacy. Such distribution shall only be made with prior approval of clerk of court who issued letters testamentary or of administration, and shall be used solely for education, maintenance and support of legatee. (NCGS 28A-22-7).

Aliens.

See infra, subhead Distribution if Abroad.

Distribution if Abroad.

Right of nonresident aliens to take a distributive share is based on reciprocity, and where it is determined that such nonresident aliens cannot take, their shares pass to other distributees capable of taking, or, if none, shares escheat. (NCGS 64-1, -3, -4).

Final Accounting and Settlement.

Unless extension is granted by clerk, personal representative or collector must file final account for settlement within one year after qualifying or within six months after receiving state estate or inheritance tax release, whichever is later. Final accounts may be filed after date specified in general notice to creditors if all debts and other claims have been paid. (NCGS 28A-21-2). Until final account has been filed, personal representative must file annual account by 15th day of fourth month after close of fiscal year. (NCGS 28A-21-1). When personal representative satisfies all claims, distributes estate and files final account, clerk shall review account and, if approved, shall order personal representative discharged from further liability. (NCGS 28A-23-1). Clause in power of attorney relieving attorney-in-fact from filing accountings with clerk will be honored. (136 N.C. App. 500, 524 S.E.2d 812).

Consent Settlement.

Family agreements for settlement of estates are favored by courts (251 N.C. 737, 112 S.E.2d 562), and when approved by court are enforceable in equity when all persons having any interest in estate are parties and are sui juris (232 N.C. 69, 59 S.E.2d 213).

Liabilities.

Personal representative is personally liable for his own torts even though committed in administration of estate. (239 N.C. 595, 80 S.E.2d 645). Liability for interest to distributees exists only if delay is found unreasonable. (222 N.C. 421, 23 S.E.2d 313).

Use of estate's funds for own interest creates liability for interest at highest legal rate. Rule applies to bank fiduciary for depositing funds from trust department into its commercial department. (217 N.C. 600, 9 S.E.2d 2).

No liability for loss incurred while managing farm (204 N.C. 538, 168 S.E. 823) or business (208 N.C. 657, 182 S.E. 151) under order of court if diligence and good faith are exercised. But administrator is liable for loss resulting from unauthorized operation of decedent's business. (244 N.C. 191, 92 S.E.2d 773).

Compensation of Representatives.

Personal representatives, collectors or public administrators are entitled to commission in discretion of clerk not exceeding 5% of receipts and expenditures which shall appear to be fairly made in course of administration; provided, clerk may fix commission where estate is $2,000 or less. This amount may be retained out of assets against creditors and all other persons. No compensation allowed if guilty of misconduct or default resulting in revocation of appointment. (NCGS 28A-23-3).

When Administration Unnecessary.

See subheads Small Estates and Summary Administration, infra.

Summary Administration.

When decedent dies testate or intestate leaving spouse as sole devisee or heir, surviving spouse may file petition for summary administration with clerk. This procedure is not available if decedent's will provides that it is not available, or if devise is in trust rather that outright. (NCGS 28A-28-1 and -2). If petition and supporting evidence comply with statute, clerk shall enter order to that effect and no further administration of estate is necessary, and spouse shall be deemed to have assumed all property, claims and liabilities (NCGS 28A-28-3).

Small Estates.

If intestate dies leaving personal property less liens and encumbrances thereon, not exceeding $10,000 in value (not exceeding $20,000 where affiant is surviving spouse and sole heir), 30 days after death any person indebted to decedent or possessing tangible personal property or instrument evidencing debt, obligation or chose in action of decedent must deliver same to public administrator or competent heir or creditor of decedent upon being presented certified copy of affidavit by such public administrator, heir or creditor filed with clerk in county where decedent was domiciled at death. Such affidavit is sufficient to transfer to affiant or his designee titles to motor vehicles, ownership rights in savings and checking accounts, share certificates in credit union, building and loan or savings and loan; ownership rights in stock or securities; and any other property owned by decedent. (NCGS 28A-25-1). When decedent dies testate leaving personal property less liens and encumbrances thereon not exceeding $10,000 in value (not exceeding $20,000 where affiant is surviving spouse and sole heir), 30 days after death any person indebted to decedent or having possession of tangible personal property or instrument evidencing debt, obligation, stock or chose in action belonging to decedent shall pay indebtedness or deliver tangible personal property or instrument evidencing debt, obligation, stock or chose in action to public administrator, executor, or competent devisee, heir or creditor upon being presented certified copy of affidavit of such public administrator, executor, devisee, heir or creditor, filed with clerk in county where decedent was domiciled at death. Such affidavit is sufficient to transfer to affiant or his designee titles to motor vehicles, and ownership rights in savings or checking accounts, share certificates in credit union, building and loan or savings and loan associations, stock or securities and any other property or contract right. (NCGS 28A-25-1.1). Any person dealing with affiant is discharged and released to same extent as if he dealt with qualified personal representative. (NCGS 28A-25-2). Affiant must pay widow(er)'s and children's allowances under G.S. NCGS 30-15 to -33, all debts and claims against decedent, distribute personal property to those entitled under will or intestate successors act, and file affidavit of such with clerk of superior court. Final affidavit must be filed within 90 days of date of filing qualifying affidavit. If affiant cannot file final affidavit within 90 days, he shall file report with clerk within that time period stating his reasons. Upon determining affiant has good reason not to file final affidavit within 90 days, clerk may extend time for filing up to one year from date of filing qualifying affidavit. (NCGS 28A-25-3). Clerk may compel compliance with art. 25 of G.S. c. 28A. (NCGS 28A-25-4). Clerk may require affiant to post bond. (NCGS 28A-25-4). Subsequently appointed personal representative or collector may succeed to rights of affiant upon petitioning clerk, and affiant must render personal property and accountings to such personal representative or collector. Copy of accounting shall also be filed with clerk having jurisdiction over personal representative or collector. (NCGS 28A-25-5).

As alternative to small estate settlement procedures, any person indebted to intestate may satisfy such indebtedness by paying amount of debt to clerk of superior court of county of domicile of intestate: (1) If no administrator has been appointed; (2) if amount owed by such person does not exceed $5,000; and (3) if sum tendered to clerk would not make aggregate sum which has come into clerk's hands belonging to intestate exceed $5,000. Receipt from clerk of payment made pursuant to this section is full release to debtor for payment so made. (NCGS 28A-25-6).

Conveyances of Real Estate by Heir or Devisee.

If first publication of notice to creditors occurs within two years of death of a resident or nonresident decedent, all sales, leases or mortgages of real property by heirs or devisees prior to such publication are void as to creditors and personal representatives. All sales, leases or mortgages made after first publication, but before approval of final account, are void as to creditors and personal representative unless personal representative joined in sale, lease or mortgage. If first publication or posting does not occur within two years after death of decedent, all sales, leases or mortgages by heirs or devisees of resident or nonresident decedent are valid as to creditors and personal representatives. (NCGS 28A-17-12).

Escheat.

See category 21 Property, topic 21.01 Absentees, subhead Escheat.

Revised Uniform Anatomical Gift Act (2007).

See topic 13.16 Wills.

Uniform Simplification of Fiduciary Security Transfers Act repealed. (NCGS 32-14 to -24).

Uniform Principal and Income Act (1997) adopted. (NCGS 37A-1-101, et seq.).

Uniform Fiduciaries Act adopted. (NCGS 32-1 to -13).

Uniform Simultaneous Death Act (1940) adopted, revised 2007. (NCGS 28A-24-1 to -7).

13.11 FIDUCIARIES:

See topics 13.09 Executors and Administrators, Trusts; category 14 Family, topic 14.07 Guardian and Ward.

13.12 INTESTACY:

See topic 13.07 Descent and Distribution.

13.1313.14

13.15 TRUSTS:

Chapter 36A has been repealed, and c. 36C, known as North Carolina Uniform Trust Code ("NCUTC"), has been enacted. NCUTC became effective Jan. 1, 2006, and applies to: (i) Trusts created before, on or after that date, (ii) all judicial proceedings concerning trusts commenced on or after that date, and (iii) all judicial proceedings concerning trusts commenced before that date unless court finds that application of particular provision of c. 36C would substantially interfere with effective conduct of judicial proceedings or prejudice rights of parties.

NCUTC applies to any express trust, private or charitable, with additions to trust, wherever and however created. "Express trust" includes testamentary and inter vivos trusts, regardless of whether trustee is required to account to Clerk of Superior Court. NCUTC also applies to any trust created for or determined by judgment or decree under which trust is to be administered in manner of express trust. NCUTC does not apply to constructive trusts, resulting trusts, conservatorships, estates, trust accounts as defined in G.S. NCGS 53-146.2, G.S. NCGS 54-109.57, G.S. NCGS 54B-130 and G.S. NCGS 54C-166, trust funds subject to G.S. NCGS 90-210.61, custodial arrangements under cc. 33A and 33B, business trusts providing for certificates to be issued to beneficiaries, common trust funds, voting trusts, security arrangements, liquidation trusts, and trusts for primary purpose of paying debts, dividends, interest, salaries, wages, profits, pensions, or employee benefits of any kind, or any arrangement under which person is nominee or escrowee for another. (NCGS 36C-1-102).

NCUTC is primarily default statute, provisions of which can be overridden in terms of trust. Ten separate items cannot be overridden: (1) Requirements for creating trust; (2) duty of trustee to act in good faith and in accordance with terms and purposes of trust and interests of beneficiaries; (3) requirement that trust and its terms be for benefit of its beneficiaries, and that trust have purpose that is lawful, not contrary to public policy, and possible to achieve; (4) power of court to modify or terminate trust; (5) effect of spendthrift provision and rights of certain creditors and assignees to reach trust; (6) effect of exculpatory term; (7) rights of person other than trustee or beneficiary; (8) periods of limitation for commencing judicial proceeding; (9) power of court to take any action and exercise any jurisdiction as may be necessary in interests of justice; (10) subject-matter jurisdiction of court and venue for commencing proceeding; and (11) requirement that exercise of powers in NCGS 36C-6-602.1(a) shall not alter designation of beneficiaries. (NCGS 36C-1-105[b]). NCUTC is supplemented by common law of trusts and principles of equity. (NCGS 35C-1-106).

Creation of Trust.

Trust may be created by: (i) Transfer of property by settlor to person as trustee during settlor's lifetime or by will or other disposition taking effect upon settlor's death including designation of trust as beneficiary of life insurance or other death benefits, (ii) declaration by owner of property that owner holds identifiable property as trustee unless transfer of title of that property is otherwise required by law, (iii) exercise of power of appointment in favor of trustee or (iv) judgment, order, decree of court. (NCGS 36C-4-401). Trust need not be evidenced by trust instrument, but creation of oral trust and its terms may be established only by clear and convincing evidence. (NCGS 36C-4-407). Trust is created only if settlor has capacity to create trust, settlor indicates intention to create trust, trust has definite beneficiary or is charitable trust, trust for care of animal, or trust for non-charitable purpose, trustee has duties to perform, and same person is not sole trustee and sole beneficiary. (NCGS 36C-4-402). Trust not created by will is validly created if its creation complies with law of jurisdiction in which trust instrument was executed, or law of jurisdiction in which, at time of creation settlor was domiciled, had place of abode, or was national, trustee was domiciled or had place of business, or any trust property was located. (NCGS 36C-4-403). Charitable trust may be created for relief of poverty, advancement of education or religion, promotion of health, scientific, benevolent, literary, governmental, or municipal purposes, or other purposes achievement of which is beneficial to community. (NCGS 36C-4-405).

Capacity required to create, amend, revoke, or add property to revocable trust, or to direct actions of trustee of revocable trust, is same as that required to make will. (NCGS 36C-6-601). All trusts are presumed revocable unless instrument creating trust expressly provides to contrary. (NCGS 36C-6-602). If expressly authorized by terms of revocable trust and as long as designation of beneficiaries to receive properties remains unaltered, agent may exercise certain powers of settlor including revocation of trust, amendment of trust, additions to trust, direction to dispose property of trust, and creation of trust. (NCGS 36C-6-602.1). While trust is revocable, rights of beneficiaries are subject to control of, and duties of trustee are owed exclusively to settlor. (NCGS 36C-6-603). Person may commence judicial proceeding to contest validity of trust that was revocable at settlor's death within earlier of: (i) Three years after settlor's death, or (ii) 120 days after trustee sent person copy of trust instrument and notice informing person of trust's existence, of trustee's name and address, and of time allowed for commencing proceeding.

Construction.

North Carolina's specific rules on construction of Wills also apply to construction of trusts. (NCGS 36C-1-112).

Perpetuities.

As to trusts, rule against perpetuities has been repealed. See NCGS 41-15 and 41-23 (2007).

Distribution.

When facts at time of distribution to trust are such that trust would be inoperative, including attainment of stipulated age by beneficiary, personal representative or trustee required to make distribution may distribute property directly to beneficiary without establishing trust. (NCGS 28A-22).

Accountings.

No trustee, including trustee appointed by Clerk of Superior Court, is required to account to Clerk of Superior Court unless trust instrument directs that trustee is required to account to Clerk of Superior Court or unless trustee is otherwise required by law to account to Clerk of Superior Court. (NCGS 36C-2-208). G.S. NCGS 36C-2-209 discusses qualification and accounting requirements for trustees of testamentary trusts and rules relating to registration or indexing of testamentary trusts.

Place of Administration.

Terms of trust may set forth jurisdiction or jurisdictions whose laws govern trust so long as that jurisdiction's law is not contrary to strong public policy of jurisdiction having most significant relationship to matter at issue. (NCGS 36C-1-107[a]). Trustee may change trust's principal place of administration without going to court if certain conditions are met. (NCGS 36C-1-108).

Nonjudicial Settlements.

Interested persons, as defined in NCUTC, may enter into binding nonjudicial settlement agreement with respect to any of following matters involving trust: (1) Approval of trustee's report or accounting; (2) direction to trustee to perform or refrain from performing particular administrative act or grant to trustee of any necessary or desirable administrative power; (3) resignation or appointment of trustee and determination of trustee's compensation; (4) transfer of trust's principal place of administration; and (5) liability of trustee for any action taken under items (1) through (4). Nonjudicial settlement agreement is valid only to extent it does not violate material purpose of trust and includes terms and conditions that could be properly approved by court.

Judicial Proceedings.

Art. 2 of NCUTC governs judicial proceedings concerning trusts. Court may intervene in administration of trust to extent that jurisdiction is properly invoked by party or is provided by law. Trust is not subject to judicial supervision, except as expressly provided in c. 36C relating to accountings to clerk and relating to qualifications and accountings of trustees of testamentary trusts.

Personal Jurisdiction.

By accepting trusteeship of trust having its principal place of administration in North Carolina, trustee submits personally to its jurisdiction in any matter involving trust. Additionally, beneficiary of trust, by accepting distribution from trust, submits personally to jurisdiction of courts of North Carolina regarding any matter involving trust. (NCGS 36C-2-202). Certain trust matters are within original and exclusive jurisdiction of Clerk of Superior Court while others are exclusively heard by Superior Court. (NCGS 36C-2-203). Nothing in c. 36C affects right of person to file action in Superior Court Division of General Court of Justice for declaratory relief under provisions of art. 26 of c. 1. Person also has rights of appeal under G.S. NCGS 36C-2-203.

Venue.

In any trust proceeding or action, whether brought before Clerk of Superior Court or Superior Court Division of General Court of Justice, following rules apply notwithstanding any other applicable Rule of Civil Procedure or provision of c. 1 of G.S.: (1) If trustee is required to account to Clerk of Superior Court, then unless terms of governing instrument provide otherwise, venue is place where accountings are filed; (2) if trustee is not required to account to Clerk of Superior Court, then unless terms of governing instrument provide otherwise, venue is: (a) In case of inter vivos trust, in any county of North Carolina in which trust has its principal place of administration or where any beneficiary resides, or (b) in case of testamentary trust, in any county of North Carolina in which trust has its principal place of administration, where any beneficiary resides, or in which testator's estate was administered; (3) unless otherwise designated in governing instrument, principal place of administration of trust is trustee's usual place of business where records pertaining to trust are kept, or at trustee's residence if trustee has no such place of business. In case of co-trustees, principal place of administration, if not otherwise designated in governing instrument, is: (a) Usual place of business of corporate trustee if there is but one corporate or co-trustee, or (b) usual place of business or residence of any of co-trustees; (4) if trust has no trustee, venue for judicial proceeding for appointment of trustee is in any county of North Carolina in which beneficiary resides, in any county in which trust property is located, in county of North Carolina specified in trust instrument, if any county is so specified, or if trust is created by will, in county in which decedent's estate was or is being administered.

Commencement of Proceedings and Pleadings.

G.S. NCGS 36C-2-205 sets forth manner in which trust proceeding is commenced and other procedural requirements. NCUTC incorporates procedures for pleading requirements that exist for special proceedings, but specifies that proceedings are to be docketed as estate matters. Clerk is not allowed to enter default judgment in trust proceeding. Consolidation is available for trust proceedings which are pending both before Clerk of Superior Court and civil action pending before Superior Court Division if they involve common question of law or fact. To consolidate matter, motion must be made to judge of Superior Court trial division. Similarly, parties can join claims for relief in civil action pending before Superior Court Division notwithstanding such joined claims may otherwise be within exclusive jurisdiction of Clerk. Notice to transfer trust proceeding must be served within 30 days after moving party is served with copy of pleading requesting relief. In charitable trust proceeding, Attorney General must be notified and given opportunity to be heard. Representation provisions of c. 36C apply to both trust proceedings before Clerk of Superior Court and in trial division of Superior Court. Any interested party or person representing interested party may waive notice by writing signed by person or person's attorney and filed in proceeding. (NCGS 36C-2-207).

Representation.

Notice to person who may represent and bind another person under c. 36C has same effect as if notice were given directly to other person. Consent of person who may represent and bind another person is binding on person represented unless person represented objects to representation before consent would otherwise have become effective. Except as otherwise provided in G.S. NCGS 36C-4-411 and G.S. NCGS 36C-6-602, person who may represent settlor who lacks capacity may receive notice and give binding consent on settlor's behalf. (NCGS 36C-3-301). Sole holder or all co-holders of power of revocation or presently exercisable general power of appointment, including one in form of power of amendment, shall represent other persons to extent that their interests, as permissible appointees, takers in default, or otherwise, are subject to power. (NCGS 36C-3-302). To extent that there is no conflict of interest between representative and person represented or among those being represented with respect to particular question or dispute: (1) General guardian or guardian of estate may represent and bind estate that guardian controls; (2) repealed by 2007 N.C. Sess. Law 106; (3) agent under power of attorney having authority to act with respect to particular question or dispute may represent and bind principal; (4) trustee may represent and bind beneficiaries of trust unless question or dispute involves internal affairs of trust; (5) personal representative of decedent's estate may represent and bind persons interested in estate; (6) parent may represent and bind parent's minor child if general guardian or guardian of estate for child has not been appointed. If disagreement arises between parents seeking to represent same minor child, parent who is beneficiary of trust that is subject of representation is entitled to represent minor child or, if no parent is beneficiary of trust that is subject of representation, parent who is lineal descendant of settlor is entitled to represent minor child, or if no parent is lineal descendant of settlor, guardian ad litem shall be appointed to represent minor child; (7) person may represent and bind that person's unborn issue. (NSGS 36C-3-303). Minor, incompetent or unborn individual, or person whose identity or location is unknown and not reasonably ascertainable, may be represented by and bound by another having substantially identical interest with respect to particular question or dispute, but only to extent that there is no conflict of interest between representative and person represented. (NCGS 36C-3-304). If court determines that interest is not represented under this Article, or that otherwise available representation might be inadequate, court may appoint guardian ad litem to receive notice, give consent, and otherwise represent, bind, and act on behalf of minor, incompetent or unborn individual, or person whose identity or location is unknown. Guardian ad litem may be appointed to represent several persons or interests. (NCGS 36C-3-305).

Modification or Termination of Non-charitable Trust.

Trust terminates to extent that trust is revoked or expires under its terms, no purpose of trust remains to be achieved, or purposes of trust have become unlawful, contrary to public policy, or impossible to achieve. (NCGS 36C-4-410). Trustee or beneficiary may commence proceeding to approve or disapprove proposed modification or termination. Non-charitable irrevocable trust may be modified or terminated upon consent of settlor and all beneficiaries, without court approval, even if modification or termination is inconsistent with material purpose of trust. (NCGS 36C-4-411). Non-charitable irrevocable trust may be terminated upon consent of all beneficiaries if court concludes that continuance of trust is not necessary to achieve any material purpose of trust. Non-charitable irrevocable trust may be modified upon consent of all beneficiaries, if court concludes that modification is consistent with material purpose of trust. Where beneficiaries of irrevocable trust seek to compel termination of trust and continuance of trust is necessary to carry out material purpose of trust, or where beneficiaries seek to compel modification of trust in manner that is inconsistent with its material purpose, trust may be modified or terminated, in discretion of court, only if court determines that reason for modifying or terminating trust under circumstances substantially outweighs interest in accomplishing material purpose of trust. If not all beneficiaries consent to proposed modification or termination of trust, modification or termination may be approved by court if court is satisfied that: (i) If all beneficiaries had consented, trust could have been modified or terminated under this section, and (ii) interests of beneficiary who does not consent will be adequately protected. (NCGS 36C-4-411). G.S. NCGS 36C-4-412 authorizes court to modify or terminate because of unanticipated circumstances or inability to administer trust effectively.. NCGS 36C-4-413 codifies and at same time modifies doctrine of cy pres, at least as applied in most states. This section authorizes court to apply cy pres not only if original means becomes impossible or unlawful but also if means become impracticable or wasteful. This section also creates presumption of general charitable intent. Authorizes trustee, executor, administrator or any interested party or Attorney General to maintain proceeding to enforce charitable trust, and also specifically authorizes settlor and qualified beneficiary to maintain such proceeding. NCGS 36C-4-414 authorizes court to modify or terminate trust if continued administration under trust's existing terms would be uneconomical. This section also authorizes trustee to terminate trust valued at less than $50,000. G.S. NCGS 36C-4-415 authorizes court to reform trust to correct mistake of law or fact. There is no comparable North Carolina statutory provision authorizing court to reform unambiguous trust to conform to settlor's intent. G.S. NCGS 36C-4-415 would permit introduction of parol evidence, even where contradicted by plain meaning of words in instrument, to show settlor's intent and existence of mistake of fact or law. However, evidence must be clear and convincing to protect against possibility of unreliable or fraudulent evidence.

Creditors' Claims.

Spendthrift provision in trust restricts beneficiary's creditor from attaching beneficiary's interest in trust until there is distribution to beneficiary. Additional protection is also given to discretionary and protective trusts. If there is no spendthrift, discretionary, or protective trust provision, creditor of beneficiary may attach distribution interest before it is distributed. NCUTC seeks to protect trustee who makes distributions from spendthrift, discretionary or protective trust to or for benefit of beneficiary from liability for distribution. (NCGS 36C-5-501). Only exception creditor to spendthrift, discretionary or protective trust allowed under NCUTC is for beneficiary's child who has judgment or court order against beneficiary for support or maintenance. (NCGS 36C-5-503). “Discretionary trust interest” means interest in trust that is subject to trustee's discretion, whether or not discretion is expressed in form of standard of distribution. Discretionary trust interest shall include interest in any one or any combination of following: (1) Trust in which amount to be received by beneficiary, including whether or not beneficiary, or class of beneficiaries, is to receive anything at all, is within discretion of trustee; or (2) trust in which trustee has no duty to pay or distribute any particular amount to beneficiary, but has only duty to pay or distribute to beneficiary, or apply on behalf of beneficiary, those sums that trustee, in trustee's discretion, determines are appropriate for support, education, or maintenance of beneficiary. Creditors of settlor of revocable trust may attach corpus of trust. In addition, creditor may reach maximum amount that may be distributed to settlor in irrevocable trust. Property subject to power of withdrawal is subject to creditors’ claims when holder exercises power. Lapse or release of power of withdrawal shall not cause holder to be treated as settlor of trust. Creditor may reach overdue mandatory distribution. (NCGS 36C-5-505 and 506).

Office of Trustee.

Person designated as trustee accepts trusteeship by substantially complying with method of acceptance provided in terms of trust or, if terms of trust do not provide method or method provided in terms is not expressly made exclusive, by accepting delivery of trust property, exercising powers or performing duties as trustee, or otherwise indicating acceptance of trusteeship. Person designated as trustee who has not yet accepted trusteeship may reject trusteeship. Designated trustee who does not accept trusteeship within 120 days, after receiving written notice to accept trusteeship is considered to have rejected trusteeship. (NCGS 36C-7-701). Trustee shall provide bond to secure performance of trustee's duties if: (1) Trust instrument was executed before Jan. 1, 2006, unless terms of trust instrument provide otherwise; (2) trust instrument was executed on or after Jan. 1, 2006, but only if terms of trust instrument require trustee to provide bond; (3) beneficiary requests trustee to provide bond, and court finds request to be reasonable; or (4) court finds that it is necessary for trustee to provide bond in order to protect interests of beneficiaries who are not able to protect themselves and whose interests otherwise are not adequately represented. However, in no event shall bond be required of trustee if governing instrument directs otherwise. (NCGS 36C-7-702). If beneficiary under revocable trust predeceases execution of trust and if beneficiary is grandparent or descendant of grandparent of settlor, predeceased beneficiary's issue who survives settlor takes beneficiary's place. (NSGS 36C-6-605). Dissolution of settlor's marriage by absolute divorce or annulment after executing revocable trust revokes all provisions in trust in favor of settlor's former spouse. (NCGS 36C-6-606). Revocable trust may be modified or terminated by court pursuant to methods of modification or termination of irrevocable trust set forth in GS NCGS 36C-4-411, et seq. Settlor is necessary party to such proceedings. (NCGS 36C-6-607).

Co-Trustees.

See G.S. NCGS 36C-7-703 for general rules applicable to co-trustees.

Eligibility and Competency.

Foreign corporation may qualify in this state as executor, administrator, or guardian, or as trustee under will of any person domiciled in this state at time of that person's death only in accordance with applicable provisions of art. 24 of c. 53. Foreign corporation qualifying as testamentary trustee or executor shall appoint process agent and file such appointment with court as required by G.S. NCGS 28A-4.2(4). Foreign corporation with valid certificate of authority has same but no greater rights and has same but no greater privileges as, and is subject to same duties, restrictions, penalties, and liabilities now or later imposed on, domestic corporation of like character. (NCGS 55-15-05).

Vacancy in Trusteeship.

Permits appointment of successor trustees by qualified beneficiaries even where trust instrument is silent on appointment of successor trustee. (NCGS 36C-7-704). Permits trustee to resign without court approval by giving notice to qualified beneficiaries, even where governing instrument does not address trustee resignation. (NCGS 36C-7-705). Removal of trustee may occur on several grounds based on malfeasance or on change of circumstances if not inconsistent with material purpose, but is only allowed by court approval if not directly provided for within governing instrument. Unless co-trustee remains in office or court otherwise orders, and until trust property is delivered to successor trustee or other person entitled to it, trustee who has resigned or been removed has duties of trustee and powers necessary to protect trust property. (NCGS 36C-7-707).

Trustee Fees.

Where terms of trust do not specify trustee's compensation, trustee may receive reasonable compensation from assets of trust, based upon enumerated factors such as time, responsibility and skill required of trustee. (NCGS 32-54). Trustee may pay expenses incurred (or in advance) out of trust assets without prior approval of Clerk of Superior Court. (NCGS 32-58). Trustee may give notice to qualified beneficiaries if annual amount of compensation exceeds four-tenths of one percent of principal value of assets as of last day of trust accounting year. Notice must contain statement that qualified beneficiaries have 20 days to object to reasonableness of compensation. (NCGS 32-55 and -56). Trustee or any beneficiary may initiate proceeding under c. 36C of G.S. for review of reasonableness of any compensation or expense reimbursement. (NCGS 32-57[a]).

Trustee Duties.

Upon acceptance of trusteeship, trustee shall administer trust in good faith, in accordance with its terms and purposes and interests of beneficiaries, and in accordance with c. 36C.

Self-Dealing and Conflicts of Interest.

Subject to rights of persons dealing with or assisting trustee, sale, encumbrance, or other transaction involving investment or management of trust property entered into by trustee for trustee's own personal account, or that is otherwise affected by conflict between trustee's fiduciary and personal interests, is voidable by beneficiary affected by transaction, without regard to whether transaction is fair to beneficiary, unless: (1) Terms of trust authorized transaction; (2) court approved transaction; (3) beneficiary did not commence judicial proceeding within time allowed; (4) beneficiary consented to trustee's conduct, ratified transaction, or released trustee; or (5) transaction involves contract entered into, or claim acquired by, trustee before person became or contemplated becoming trustee. In determining whether sale, encumbrance, or other transaction involving investment or management of trust property is affected by conflict of interest between trustee's fiduciary and personal interests, transaction is rebuttably presumed to be affected by conflict of interest if trustee enters into transaction with: (1) Trustee's spouse or parent of trustee's spouse; (2) trustee's descendants, siblings, ancestors, or their spouses; (3) agent, attorney, employee, officer, director, member, manager, or partner of trustee, or entity that controls, is controlled by, or is under common control with trustee; or (4) any other person or entity in which trustee, or person that owns significant interest in trust, has interest or relationship that might affect trustee's best judgment. Transaction between trustee and beneficiary that does not concern trust property, but that occurs during existence of trust or while trustee retains significant influence over beneficiary, and from which trustee obtains advantage, is voidable by beneficiary unless trustee establishes that transaction was fair to beneficiary. Trustee may delegate duties and powers that prudent trustee of comparable skills could properly delegate under circumstances. Trustee shall exercise reasonable care, skill, and caution in: (1) Selecting agent; (2) establishing scope and terms of delegation, consistent with purposes and terms of trust; and (3) periodically reviewing agent's actions in order to monitor agent's performance and compliance with terms of delegation. While trust is revocable, trustee may follow direction of settlor that is contrary to terms of trust, even if in doing so: (i) Trustee exceeds authority granted to trustee under terms of trust, or (ii) trustee would otherwise violate duty trustee owes under trust. Terms of trust may confer upon trustee or other person power to direct modification or termination of trust. (NCGS 36C-8-808).

Reporting.

Trustee is under duty to provide reasonably complete and accurate information as to nature and amount of trust property, at reasonable intervals, to any qualified beneficiary who is distributee or permissible distributee of trust income or principal. In response to reasonable request of qualified beneficiary, trustee is under duty to provide copy of trust instrument, provide reasonably complete and accurate information as to nature and amount of trust property, and allow reasonable inspections of subject matter of trust, accounts, and other documents relating to trust. Notwithstanding foregoing: (i) Duty of trustee shall not include informing any beneficiary in advance of transactions relating to trust property, and (ii) trustee is considered to have discharged trustee's duty as to qualified beneficiary for matters disclosed by report sent at least annually and at termination of trust to beneficiary that describes trust property, liabilities, receipts, and disbursements, including source and amount of trustee's compensation, and lists trust assets and their respective market values, including estimated values of assets with uncertain values. (NCGS 36C-8-813).

Abuse of Discretion.

Trustee abuses trustee's discretion in exercising or failing to exercise discretionary power if trustee acts with bad faith, acts dishonestly, acts with improper motive, even though not dishonest motive, or if trustee fails to use trustee's judgment in accordance with terms and purposes of trust and interests of beneficiaries. (NCGS 36C-8-814).

Powers of Trustee.

Trustee, without authorization by court, may exercise: (i) Powers conferred by terms of trust or, except as limited by terms of trust, (ii) all powers over trust property that unmarried competent owner has over individually owned property, (iii) any other powers appropriate to achieve proper investment, management, administration, or distribution of trust property, and (iv) any other powers conferred by c. 36C. (NCGS 36C-8-815). Specific powers are enumerated under G.S. NCGS 36C-8-816.

Liability of Trustee.

Violation by trustee of duty trustee owes under trust is breach of trust. To remedy breach of trust that has occurred or may occur, court may: (1) Compel trustee to perform trustee's duties; (2) enjoin trustee from committing breach of trust; (3) compel trustee to redress breach of trust by paying money, restoring property, or other means; (4) order trustee to account; (5) appoint special fiduciary to take possession of trust property and administer trust; (6) suspend trustee; (7) remove trustee; (8) reduce or deny compensation to trustee; (9) void act of trustee, impose lien or constructive trust on trust property, or trace trust property wrongfully disposed of and recover property or its proceeds; or (10) order any other appropriate relief. (NCGS 36C-10-1001). Trustee who commits breach of trust is liable for greater of amount required to restore value of trust property and trust distributions to what they would have been had breach not occurred or profit trustee made by reason of breach. Trustee is accountable for any profit made by trustee arising from administration of trust, even absent breach of trust. (NCGS 36C-10-1003). No proceeding against trustee for breach of trust may be commenced more than five years after first to occur of: (i) Removal, resignation, or death of trustee; (ii) termination of beneficiary's interest in trust, or (iii) termination of trust. (NCGS 36C-10-1005). Trustee is not liable for lack of knowledge of event affecting trust administration if trustee exercises reasonable care to learn of such events. (NCGS 36C-10-1007). Trustee is not liable to beneficiary for breach of trust if beneficiary consented to conduct constituting breach, released trustee from liability for breach, or ratified transaction constituting breach, unless: (1) Consent, release, or ratification of beneficiary was induced by improper conduct of trustee; or (2) at time of consent, release, or ratification, beneficiary did not have knowledge of beneficiary's rights or of material facts relating to breach. No consideration is required for consent, release, or ratification to be valid. (NCGS 36C-10-1009).

Certification of Trust.

Instead of furnishing copy of trust instrument to person other than beneficiary, trustee may furnish to person certification of trust containing following information: (1) Existence of trust and date trust instrument was executed; (2) identity of settlor, unless withheld under provision in trust instrument; (3) identity and address of currently acting trustee; (4) powers of trustee; (5) revocability or irrevocability of trust and identity of any person holding power to revoke trust; (6) authority of co-trustees to sign or otherwise authenticate and whether all or less than all are required in order to exercise powers of trustee; (7) trust's taxpayer identification number; and (8) manner of taking title to trust property. Any trustee may sign or otherwise authenticate certification of trust. Certification of trust must state that trust has not been revoked, modified, or amended in any manner that would cause representations contained in certification of trust to be incorrect. Certification of trust need not contain dispositive terms of trust. Recipient of certification of trust may require trustee to furnish copies of those excerpts from original trust instrument and later amendments that designate trustee and confer upon trustee power to act in pending transaction. Person who acts in reliance upon certification of trust without knowledge that representations contained in certification are incorrect is not liable to any person for so acting and may assume without inquiry existence of facts contained in certification. Knowledge of terms of trust may not be inferred solely from fact that person relying upon certification holds copy of all or part of trust instrument. Person who in good faith enters into transaction in reliance upon certification of trust may enforce transaction against trust property as if representations contained in certification were correct. Person making demand for trust instrument in addition to certification of trust or excerpts is liable for damages if court determines that person did not act in good faith in demanding trust instrument. This section does not limit right of person to obtain copy of trust instrument in judicial proceeding concerning trust. In transactions involving real property, person who acts in reliance upon certification of trust may require that certification of trust be executed and acknowledged in manner that will permit its registration in office of register of deeds in county where real property is located. Certification of trust need not contain trust's taxpayer identification number if that taxpayer identification number is also social security number of settlor. However, trust's taxpayer identification number shall be certified by trustee to person acting in reliance upon certification of trust in manner reasonably satisfactory to that person.

Minors.

Trust property distributable to minor upon termination of trust may be distributed to minor's guardian of estate or general guardian, to custodian for benefit of minor under North Carolina Uniform Transfer to Minors Act, or to trustee for benefit of minor under North Carolina Uniform Custodial Trust Act. (NCGS 36C-8-816[21]). Uniform Transfers to Minors Act adopted. (NCGS 33A-1 to 24). See category 14 Family, topic 14.10 Infants.

Pet Trusts.

G.S. NCGS 36C-4-408 covers trust for care of domestic or pet animal, which covers any animal living during settlor's lifetime.

Cemetery Lot.

G.S. NCGS 36C-4-409 allows creation of trust for another non-charitable purpose such as maintenance of cemetery lot.

Tax Status of Charitable Trusts.

See art. 4A of c. 36C. Art. 4A recodifies former G.S. NCGS 36A-54 and G.S. NCGS 36A-53(b) dealing with tax status of charitable trusts that are intended to preserve favorable tax treatment of gifts to such trusts.

Charitable Trust Administration Act.

See art. 4B of c. 36C. Art. 4B recodifies existing Charitable Trust Administration Act in art. 4A of former c. 36A.

Uniform Prudent Investor Act has been adopted. (NCGS 36C-9-901 to 907).

Investment and Deposit of Trust Funds located in art. 7 of c. 32.

North Carolina Community Trust Act located in c. 36D.

Uniform Common Trust Fund Act located in art. 14 of c. 53.

Accounting.

Uniform Trustees Accounting Act not adopted.

Bequests and Devises to Inter Vivos Trusts.

See topic 13.16 Wills.

Uniform Fiduciaries Act adopted. (NCGS 32-1 to -3 and NCGS 32-5 to -13).

Uniform Simplification of Fiduciary Security Transfers Act repealed. (NCGS 32-14, et seq.).

Pour Over Trusts.

See topic 13.16 Wills, subhead Bequests and Devises to Inter Vivos Trusts.

Renunciation.

See topic 13.07 Descent and Distribution.

Uniform Principal and Income Act (1997) has been adopted, with minor revisions, as c. 37A.

13.16 WILLS:

Any person of sound mind, at least 18 years old may make will. (NCGS 31-1).

Testamentary Disposition.

No limitations.

Execution.

No will is valid unless is complies with statutory requirements of G.S. c. 31. (NCGS 31-3.1). To bequeath personal property and devise real property, one may use appropriate attested will or holographic will. (NCGS 31-3.2[a]). (See subheads Attested Wills, Holographic Wills, infra.) Personal property may also be bequeathed by nuncupative will. (NCGS 31-3.2[b]). (See subhead Nuncupative Wills, infra.) Attorney drafting attested will or codicil to attested will must afix name and business address to will or codicil and indicate he or she is drafter. (NCGS 31–4.2) Simultaneous execution of will and power of attorney does not create fiduciary relationship. (135 N.C. App. 102, 518 S.E.2d 796).

Attestation Clause.

See subhead Forms, infra.

Witnesses.

Any person competent to be witness generally may witness will (NCGS 31-8.1), including executor of will (NCGS 31-9), and beneficiary to attested written nuncupative will (NCGS 31-10). If there are at least two disinterested witnesses to attested written or nuncupative will, benefits to beneficiary under will not void. (NCGS 31-10[a]). If not two such witnesses, interested witness and spouse take nothing under will, which is void as concerns them. (NCGS 31-10[a]).

Attested Wills.

Validity requirements: (1) Written, signed by testator or someone else signing testator's name in his presence and at his direction, and attested by at least two competent witnesses; (2) shown to be testator's instrument because signed by testator in witness' presence or testator acknowledged signature previously made; and (3) signed by witnesses in presence of testator. (NCGS 31-3.3). Probated only: (1) Upon testimony of at least two of attesting witnesses; or (2) if only one such witness available, upon testimony of witness, proof of handwriting of unavailable attesting witness and of testator, and other proof to satisfy clerk of superior court as to genuineness; or (3) if none of attesting witnesses available, upon proof of handwriting of at least two of unavailable witnesses and testator and other proof to satisfy clerk; or (4) upon showing will made self-proved. (NCGS 31-18.1[a]). Due execution established where evidence of foregoing inadequate by testimony of other competent witnesses as to requisite facts. (NCGS 31-18.1[b]). Witness is unavailable here if dead, not found in state, insane, physically unable or refusing to testify. (NCGS 31-18.1[c]).

Self-Proved Wills.

Any will may be simultaneously executed, attested, and made self-proved by acknowledgment of testator and affidavits of witnesses, both before officer authorized to administer oaths under law of state where execution occurs if evidenced by officer's certificate, under official seal, in proper form. (NCGS 31-11.6[a]). Attested will may be made self-proved if accompanied by proper form. (NCGS 31-11.6[b]). See subhead Forms, infra for appropriate forms.

Holographic Wills.

Validity requirements: (1) Written entirely in handwriting of testator, although immaterial printed material will not defeat will; and (2) subscribed by testator with name written on will in own handwriting; and (3) found after testator's death among valuables, in safe-deposit box or other place intended by testator for safekeeping. No attesting witness necessary. (NCGS 31-3.4). Probated only: (1) Upon testimony of at least three competent witnesses that validity requirements (1) and (2) described above are met; and (2) upon testimony of any witness that validity requirement (3) described above is met. (NCGS 31-18.2). Testimony of beneficiary as to conversations with decedent is inadmissible to establish decedent's intent to make holographic will. (348 N.C. 45, 497 S.E.2d. 692).

Soldiers' and Sailors' Wills.

The will of member of U.S. Armed Forces or Merchant Marine, will be admitted to probate (whether attested or not, if attesting witnesses are out of state at time of probate) on oath of at least three credible witnesses that signature to said will is in handwriting of testator. (NCGS 31-18.4).

Nuncupative Wills.

Validity requirements: (1) Made orally by person in last sickness or imminent peril of death who does not survive sickness or peril; and (2) declared to be one's will before two competent witnesses simultaneously present at making thereof and specially requested to bear witness thereto. (NCGS 31-3.5). Whether decedent was in last sickness at time of making nuncupative will is question for jury. (135 N.C. App. 354, 520 S.E.2d 96). No nuncupative will probated after six months from making unless reduced to writing within ten days after making. (NCGS 31-18.3[a]). Before probation: (1) Written notice must be given to surviving spouse and next of kin, should they desire to approve probate, by clerk of probation court; or (2) if surviving spouse or next of kin not known or notice cannot be given, notice to same effect must be published not less than once a week for four consecutive weeks in county newspaper. (NCGS 31-18.3[b]). Probation will occur only: (1) Upon testimony of at least two competent witnesses that testator made his will in their presence and (2) upon testimony of any competent witnesses that (1) of validity requirement described above is met. (NCGS 31-18.3[c]).

Living Wills.

N.C. permits patient or patient’s representative right to control decisions relating to rendering of patient’s own medical care, including decision to have life-prolonging measures withheld or withdrawn in instance of terminal condition. (NCGS 90-320 to -323). Life-prolonging measures, as specified by declarant, may be withheld or discontinued upon direction of attending physician if: (1) Declarant has so stated intentions in accordance with G.S. NCGS 90-321(c), (2) attending physician determines either declarant has incurable or irreversible condition that will shortly result in declarant’s death, becomes unconscious and will never regain consciousness, or suffers from advanced dementia which is not reversible, and (3) attending physician’s determination confirmed by other physician. Attending physician may rely upon signed, witnessed and proved declaration, expressing intent of declared, which shall be revocable by declarant in any way he can communicate such intent. (NCGS 90-321). (See subhead Forms, infra.). If no declaration executed (NCGS 90-322), patient meeting physical criteria above may have extraordinary brain death; irreversible cessation of total brain function may be sole basis for determination by physician that person has died (NCGS 90-323).

Revocation.

Written and nuncupative wills or parts thereof revocable by subsequent written will, codicil or revocatory writing executed in manner required for written wills. (NCGS 31-5.1, and .2). Written also revocable by destruction of will with intent to revoke by testator or person directed by testator in testator's presence. (NCGS 31-5.1). Nuncupative also revocable by subsequent nuncupative will (NCGS 31-5.2). Wills not revoked by subsequent marriage of maker; surviving spouse may petition for elective share when will made prior to marriage as spouse may petition for elective share when will made subsequent to marriage. (NCGS 31-5.3). Absolute divorce or annulment does not revoke will, only portions of it favoring former spouse, including power of appointment and appointment as executor unless will otherwise directs. Provisions revoked only by G.S. NCGS 31-5.4 are revived if testator remarries former spouse. (NCGS 31-5.4). No conveyance subsequent to execution of will relating to real or personal estate therein, except act revoking such will, may prevent operation of will regarding other real or personal estate under will at time of testator's death. (NCGS 31-5.6). No will or part thereof may be revoked except as described above. (NCGS 31-5.7).

Revival.

No will or any part thereof which has been revoked may be revived except by re-execution thereof or by incorporation thereof by reference in will subsequently executed or as provided in G.S. NCGS 31-5.8. (NCGS 31-5.8).

Testamentary Gifts to Subscribing Witnesses.

Any beneficial devise, estate, interest, legacy or appointment of or affecting any real and personal estate to an attesting witness or spouse of attesting witness is void as to such witness or spouse or any person claiming under either of them unless there are at least two other competent witnesses. Does not apply to beneficiary of holographic will who testifies to relevant facts. (NCGS 31-10). Statute contains no exception in favor of witness, or spouse of witness, who would be entitled to share in estate in case of intestacy. (NCGS 31-10). Corporation named as trustee is not disqualified because stockholder signs as witness. (NCGS 31-10.1). Gifts made to attorney-in-fact must be expressly authorized and must be in accordance with principal's personal history of making lifetime gifts. (NCGS 32A-2[14] and [15]).

Testamentary Gift to Attorney Drafting Will

Attorney drafting or attesting will or codicil may not be beneficiary under will or codicil unless attorney relative of testator within 5 degrees of kinship, present or former spouse of testator or parent, sibling, child of testator's present or former spouse. Bequest or devise in violation of statute void. Attorney to attach to will or codicil certification of compliance with statute. (NCGS 31–4.1)

Testamentary Additions to Trusts.

Will may devise property to trustee of trust established before testator's death, or of trust to be established at testator's death. Devise is not invalid because trust is amendable or revocable, or because trust or amendment thereto was not executed in manner required for wills, or because trust was amended after execution of testator's will or after testator's death. (NCGS 31-47). Equitable changes upon devised assets upheld. (136 N.C. App. 407, 526 S.E.2d 183).

Uniform Testamentary Additions to Trusts Act not adopted.

Probate.

(See subheads Attested Wills, Holographic Wills, Nuncupative wills, supra.). Will is not valid or effective to pass real or personal property as against innocent purchasers for value and without notice, unless it is probated or offered for probate within two years after death of testator or prior to approval of final account of duly appointed administrator whichever is earlier. (NCGS 31-12). If will is fraudulently suppressed, stolen, destroyed or has been lost and action commenced within two years from death of testator to obtain said will or establish same, then limitation of two years shall only begin to run from termination of said action. (NCGS 31-12).

Any executor named in will may apply to court for probation any time after death of testator. (NCGS 31-12). If no executor applies, within 60 days after death, beneficiary or other interested party may apply upon ten days' notice to executor. (NCGS 31-13). Clerk must notify all legatees and devises by mail and may compel, from any person, production of will. (NCGS 31-14 and -15). Probate proceedings commence by application for probate to clerk of superior court. (NCGS 31-16). If no objection is made, will is admitted to probate, and is conclusive of validity of will unless set aside by direct attack (NCGS 31-19), except that collateral attack is permitted if order improvidently granted or court imposed upon or misled (229 N.C. 8, 47 S.E.2d 488) or if will is so vague as to be nullity (233 N.C. 306, 63 S.E.2d 634). Clerk may not set aside probate on grounds that should be raised by caveat. (228 N.C. 405, 45 S.E.2d 526). Direct attack is barred after three years from probate, unless caveator is under disability, when bar attaches three years from removal of disability. (NCGS 31-32). Probate by solemn form is of two types. First is by formal caveat, whereupon clerk transfers case to superior court for trial, and all interested persons are cited to appear (NCGS 31-33), and such persons become bound whether they participate or not (15 N.C. 430, 27 Am. Dec. 208). Interested persons not cited may file second caveat. (195 N.C. 595, 143 S.E. 130). Probate by solemn form occurs also where propounder petitions clerk to cite interested persons to come and “see proceedings”. However, if issue of fact is raised, whether informally or by caveat, then case must be transferred to superior court for trial. (235 N.C. 27, 69 S.E.2d 25; NCGS 1-273). Admission of unprobated will into evidence to prove intent is prejudicial error even when abundance of other admissible evidence indicates same intent. (352 N.C. 146, 529 S.E.2d 454, rev'g 136 N.C. App. 162, 523 S.E.2d 139).

Contest.

At time of application for probate of will, and probate thereof in common form, or at any time within three years thereafter, any person entitled under such will or interested in estate may appear in person or by attorney before clerk of superior court and enter a caveat to probate of such will, provided that if any person entitled to file caveat be within age of 18 years or insane or imprisoned, such person may file caveat within three years after removal of such disability. (NCGS 31-32). Prosecution bond for costs in sum of $200 is required of caveator. (NCGS 31-33; and -34). When proper bond has been filed or when caveator has qualified as pauper, clerk transfers cause to superior court for trial. Caveator must then cause notice of proceeding to be given to all parties in interest to appear and make themselves proper parties to proceeding if they choose. (NCGS 31-33). Caveat suspends proceedings under will except preservation of property and collection of debts and payment of taxes and debts that are lien upon property of decedent as may be allowed by order of clerk of superior court. (NCGS 31-36).

Legacies may be paid at any time after payment of costs of administration, taxes and other valid claims against decedent's estate. (NCGS 28A-22-1). All claims, except contingent claims based on any warranty made in connection with conveyance of real estate and claims of U.S. and tax claims of state and its subdivisions, against decedent's estate which arose before death of decedent must be presented to personal representative or collector by date specified in general notice to creditors or be forever barred, except to extent certain claims are covered by insurance. (NCGS 28A-19-3). Cash pecuniary legacy bears interest after first year of administration or, where testator stood in loco parentis to legatee, from time of testator's death. (77 N.C. 426). Specific legacy of interest bearing security carries with it all interest accruing thereon from date of testator's death. (259 N.C. 255, 130 S.E.2d 387).

Lapses.

Unless will indicates contrary intent, if devisee predeceases testator, whether before or after execution of will, and if devisee is grandparent, or descendant thereof, of testator, then issue of predeceased devisee shall take in place of deceased devisee share in same manner that issue would take as heirs of deceased devisee under intestacy provisions in effect at time of testator's death; in case of class devise, issue shall take whatever share deceased devisee would have taken had devisee survived testator; in event deceased class member leaves no issue, devisee's share shall devolve upon members of class who survived testator and issue of any deceased members taking by substitution. (NCGS 31-42[a]). Unless will indicates contrary intent, if provisions of G.S. NCGS 31-42(a) do not apply to devise to devisee who predeceases testator, or if devise otherwise fails, property shall pass to residuary devisee or devisees in proportion to their share of residue; if devise is residuary devise, it shall augment shares of other residuary devisees, including shares of any substitute takers under G.S. NCGS 31-42(a); if there are no residuary devisees, then property shall pass by intestacy. (NCGS 31-42[b]).

Unclaimed Legacies.

See category 21 Property, topic 21.01 Absentees, subhead Escheat.

Children.

Children born or adopted after making of parent's will, or after-born illegitimates who have been “entitled” in accordance with G.S. NCGS 29-19, and whose parent dies without making any provision for them, are entitled to such share and proportion of parent's estate as if he or she had died intestate, unless parent made some provision for child in will, or it is clear from will that child was intentionally not provided for, or surviving spouse receives all of estate under will. (NCGS 31-5.5).

Adopted Children.

See subhead Children, supra; also category Family, topic Adoption, subhead Effect of Adoption.

Elective Share.

Surviving spouse of decedent who dies domiciled in this state has right to claim elective share, which means amount equal to (i) Applicable share of total net assets, as defined in G.S. NCGS 30-3.2(4), less (ii) value of property passing to surviving spouse, as defined in G.S. NCGS 30-3.2(2c). (NCGS 30-3.1[a]). Applicable share defined as: (1) If decedent is not survived by any lineal descendants, one-half of total net assets, (2) if decedent is survived by one child, or lineal descendants of one deceased child, one-half of total net assets, (3) if decedent is survived by two or more children, or by one or more children and lineal descendents of one or more deceased children, or by lineal descendants of two or more deceased children, one-third of total net assets. (NCGS 30-3.1[a]). If surviving spouse is second or successive spouse, and decedent has one or more lineal descendents surviving by prior marriage but there are no lineal descendants surviving by surviving spouse, above share reduced by one-half. (NCGS 30-3.1[b]). Petition for elective share must be filed during surviving spouse's lifetime, and be made within six months of issuance of letters testamentary or letters of administration. Unless extended, clerk of superior court will set hearing between two and six months from filing of petition. After notice and hearing, clerk shall determine if surviving spouse entitled to elective share. Clerk may order mediation. Clerk's decision and findings of fact may be appealed, but facts found by judge shall be final and conclusive upon any appeal to appellate division. (NCGS 30-3.4). Personal representative must apportion liability to surviving spouse for amount of elective share among responsible persons.

(NCGS 30-3.5). Right of surviving spouse to claim elective share may be waived, wholly or partially, before or after marriage, with or without consideration, by written waiver signed by surviving spouse. (NCGS 30-3.6). See also topic 13.07 Descent and Distribution, subhead Election.

Contribution.

Share of after-born, after-adopted or after-born entitled child, as provided by G.S. NCGS 29-9 and NCGS 31-5.5, is allotted to him out of any undevised real or personal property, or out of both, if there is enough undevised property for that purpose. If there is no or not enough undevised real or personal property, then whole of child's share, or deficiency, is made up from devised real or personal property, or from both. Portion contributed by devisee bears same ratio to his devise as after-born or after-adopted child's share bears to net estate. (NCGS 28A-22.2).

Testamentary Guardian.

See category 14 Family, topic 14.07 Guardian and Ward.

Renunciation.

See topic 13.07 Descent and Distribution.

Foreign Executed Wills.

Certified copy of will made by citizen or subject of any other state or foreign country, which has been duly probated in such state or country, may be admitted to probate in this state in any county wherein any property of testator is situated. However, a devise of real estate in this state by will of nonresident will not pass title to devisee, unless will is executed in accordance with laws of this state. (NCGS 31-27). See also topic 13.09 Executors and Administrators.

Foreign Probated Wills.

See subhead Foreign Executed Wills, supra.

Simultaneous Death.

See topic 13.05 Death, subhead, Survivorship.

Testamentary Trusts.

See topic 13.13 Trusts.

Residuary clause exercises general power of appointment. (136 N.C. App. 262, 523 S.E.2d 725). Lack of residuary clause and presumption against intestacy combine to vest remainder in ambiguous will. (138 N.C. App. 158, 530 S.E.2d 344).

Validity.

A will is valid if it meets the requisites of the law of this state either at the time of its execution or at the death of the testator. (NCGS 31-46). Seal not necessary. (NCGS 31-3.6).

Revised Uniform Anatomical Gift Act (2007) adopted with minor additions. (NCGS 130A-412.3 to -412.33).

Forms.

The following short form of a will may be used:

Following form may be included to execute, attest, and make self-proved a will before officer authorized to administer oaths:

I,. . . . ., the testator, sign my name to this instrument this . . . day of . . . . . ., ... and being first duly sworn, do hereby declare to the undersigned authority that I sign and execute this instrument as my last will and that I sign it willingly (or willingly direct another to sign for me), that I execute it as my free and voluntary act for the purposes therein expressed, and that I am eighteen years of age or older, of sound mind, and under no constraint or undue influence.

. . . .

Testator

We,. . . . . and . . . ., the witnesses, sign our names to this instrument, being first duly sworn, and do hereby declare to the undersigned authority that the testator signs and executes this instrument as his last will and that he signs it willingly (or willingly directs another to sign for him), and that each of us, in the presence and hearing of the testator, hereby signs this will as witness to the testator's signing, and to the best of our knowledge the testator is eighteen years of age or older, of sound mind, and under no constraint or undue influence.

. . . .

Witness

. . . .

Witness

THE STATE OF . . . .

COUNTY OF . . . .

Subscribed, sworn to and acknowledged before me by. . . . . . . the testator, and subscribed and sworn to before me by. . . . . . and . . . . . ., witnesses, this . . . . day of . . . ., ...

(SEAL)

(SIGNED) . . . .

. . . .

(OFFICIAL CAPACITY OF OFFICER)

(NCGS 31-11.6[a])

Attested written will executed as provided by G.S. NCGS 31-3.3 without self-proved provisions may at any time subsequent to its execution be made self-proved by acknowledgment of testator and affidavits of attesting witnesses, each made before officer authorized to administer oaths, and evidenced by officer's seal, by attaching to will in form and content substantially as follows:

STATE OF NORTH CAROLINA

COUNTY/CITY OF . . . .

Before me, the undersigned authority, on this day personally appeared . . . ., and . . . ., known to me to be the testator, and the witnesses, respectively, whose names are signed to the attached or foregoing instrument and, all of these persons being by me first duly sworn. The testator declared to me and to the witnesses in my presence: That said instrument is his last will; that he had willingly signed or directed another to sign the same for him, and executed it in the presence of said witnesses as his free and voluntary act for the purposes therein expressed; or, that the testator signified that the instrument was his instrument by acknowledging to them his signature previously affixed thereto.

The said witnesses stated before me that the foregoing will was executed and acknowledged by the testator as his last will in the presence of said witnesses, who, in his presence and at his request, subscribed their names thereto as attesting witnesses and that the testator, at the time of the execution of said will, was over the age of 18 years and of sound and disposing mind and memory.

. . . .

Testator

. . . .

Witness

. . . .

Witness

Subscribed, sworn and acknowledged before me by . . . . . ., the testator, subscribed and sworn before me by . . . . . . , ..., witnesses, this . . . . day of . . . ., A.D. . . . .

(SEAL)

(SIGNED) . . . .

. . . .

(OFFICIAL CAPACITY OF OFFICER)

(NCGS 31-11.6[b])

Form of nuncupative will:

The will of . . . . . ., of the city of . . . . . ., county of . . . . . ., State of North Carolina, made and declared by him on the . . . . . . day of . . . . . ., 20. . . ., at the house of his son,. . . . . . ., where he had been resident over ten days next before the making of his said will (or at his own house), and in his last sickness, in the presence of us, who were specially requested by him to bear witness thereto, and who have hereunto subscribed our names as witnesses: My will is, &c. (recite if possible the very words). These words or of the like effect, and the said deceased declared in the presence of the witnesses whose names are hereunto subscribed, with an intention that the same should stand for and be his last will and testament, and by the said A. B., bid the said witnesses (at least two) to bear witness that such was his last will.

. . . .

. . . .

Form of advance directive for natural death:

ADVANCE DIRECTIVE FOR A NATURAL DEATH ("LIVING WILL")

NOTE: YOU SHOULD USE THIS DOCUMENT TO GIVE YOUR HEALTH CARE PROVIDERS INSTRUCTIONS TO WITHHOLD OR WITHDRAW LIFE-PROLONGING MEASURES IN CERTAIN SITUATIONS. THERE IS NO LEGAL REQUIREMENT THAT ANYONE EXECUTE A LIVING WILL.

GENERAL INSTRUCTIONS: You can use this Advance Directive ("Living Will") form to give instructions for the future if you want your health care providers to withhold or withdraw life-prolonging measures in certain situations. You should talk to your doctor about what these terms mean. The Living Will states what choices you would have made for yourself if you were able to communicate. Talk to your family members, friends, and others you trust about your choices. Also, it is a good idea to talk with professionals such as your doctors, clergypersons, and lawyers before you complete and sign this Living Will.

You do not have to use this form to give those instructions, but if you create your own Advance Directive you need to be very careful to ensure that it is consistent with North Carolina law.

This Living Will form is intended to be valid in any jurisdiction in which it is presented, but places outside North Carolina may impose requirements this form does not meet.

If you want to use this form, you must complete it, sign it, and have your signature witnessed by two qualified witnesses and proved by a notary public. Follow the instructions about which choices you can initial very carefully. Do not sign this form until two witnesses and a notary public are present to watch you sign it. You then should consider giving a copy to your primary physician and/or a trusted relative, and should consider filing it with the Advanced Health Care Directive Registry maintained by the North Carolina Secretary of State: http://www.nclifethinks.org/ahcdr/

My Desire for a Natural Death

I, __________________, being of sound mind, desire that, as specified below, my life not be prolonged by life-prolonging measures:

1. When My Directives Apply

My directions about prolonging my life shall apply *IF* my attending physician determines that I lack capacity to make or communicate health care decisions and:

NOTE: YOU MAY INITIAL ANY OR ALL OF THESE CHOICES.

2. These are My Directives about Prolonging My Life:

In those situations I have initialed in Section 1, I direct that my health care providers:

NOTE: INITIAL ONLY IN ONE PLACE

3. Exceptions – "Artificial Nutrition or Hydration"

NOTE: INITIAL ONLY IF YOU WANT TO MAKE EXCEPTIONS TO YOUR INSTRUCTIONS IN PARAGRAPH 2.

EVEN THOUGH I do not want my life prolonged in those situations I have initialed in Section 1:

4. I Wish to be Made as Comfortable as Possible

I direct that my health care providers take reasonable steps to keep me as clean, comfortable, and free of pain as possible so that my dignity is maintained, even though this care may hasten my death.

5. I Understand my Advance Directive

I am aware and understand that this document directs certain life-prolonging measures to be withheld or discontinued in accordance with my advance instructions.

6. If I have an Available Health Care Agent

If I have appointed a health care agent by executing a health care power of attorney or similar instrument, and that health care agent is acting and available and gives instructions that differ from this Advance Directive, then I direct that:

NOTE: DO NOT INITIAL BOTH BLOCKS. IF YOU DO NOT INITIAL EITHER BOX, THEN YOUR HEALTH CARE PROVIDERS WILL FOLLOW THIS ADVANCE DIRECTIVE AND IGNORE THE INSTRUCTIONS OF YOUR HEALTH CARE AGENT ABOUT PROLONGING YOUR LIFE

7. My Health Care Providers May Rely on this Directive

My health care providers shall not be liable to me or to my family, my estate, my heirs, or my personal representative for following the instructions I give in this instrument. Following my directions shall not be considered suicide, or the cause of my death, or malpractice or unprofessional conduct. If I have revoked this instrument but my health care providers do not know that I have done so, and they follow the instructions in this instrument in good faith, they shall be entitled to the same protections to which they would have been entitled if the instrument had not been revoked.

8 .I Want this Directive to be Effective Anywhere

I intend that this Advance Directive be followed by any health care provider in any place.

9. I have the Right to Revoke this Direction

I understand that at any time I may revoke this Advance Directive in a writing I sign or by communicating in any clear and consistent manner my intent to revoke it to my attending physician. I understand that if I revoke this instrument I should try to destroy all copies of it.

This is the ___ day of _________, ____.

Signature of

Declarant ____________________________________

Type/print name ________________________________

I hereby state that the declarant, ________________, being of sound mind, signed (or directed another to sign on declarant's behalf) the foregoing Advance Directive for a Natural Death in my presence, and that I am not related to the declarant by blood or marriage, and I would not be entitled to any portion of the estate of the declarant under any existing will or codicil of the declarant or as an heir under the Intestate Succession Act, if the declarant died on this date without a will. I also state that I am not the declarant's attending physician, nor a licensed health care provider who is (1) an employee of the declarant's attending physician, (2) nor an employee of the health facility in which the declarant is a patient, or (3) an employee of a nursing home or any adult care home where the declarant resides. I further state that I do not have any claim against the declarant or the estate against the declarant.

Date: ________________________ Witness ________________________________

Date: ________________________ Witness ________________________________

___________ COUNTY, ____________ STATE

Sworn to (or affirmed) and subscribed before me this day by

____

(type/print name of declarant)

____

(type/print name of witness)

____

(type/print name of witness)

Date ____

(Signature of Notary Public)

*(Official Seal)*____________________, Notary Public

(Printed or typed name)

My commission expires: ____________

14 FAMILY

14.01 ADOPTION:

G.S. c. 48 controls adoptions.

Effective July 1, 1996, 1995 N.C. Sess. Laws 457 rewrote G.S. c. 48, but does not affect validity of adoptions pending or complete under prior law. (1995 N.C. Sess. Laws 457, 811).

Who May Adopt.

Any adult may adopt another individual as provided in G.S. c. 48 but spouses may not adopt each other. (NCGS 48-1-103). Any individual may be adopted. (NCGS 48-1-104). Minor may be placed for adoption only by (1) Agency, (2) guardian, (3) both parents acting jointly if parents married to each other and live together or one parent has legal and physical custody but neither has both, or (4) parent with legal and physical custody of minor, except as provided in (3) above. (NCGS 48-3-201).

Consent Required.

Following must consent to adoption of minor: (1) Minor to be adopted if 12 or over, and (2) mother of minor and any man who may or may not be biological father but (a) is or was married to mother if minor was born during marriage or within 280 days after marriage terminated, (b) attempted to marry mother before minor's birth though marriage declared invalid, (c) before filing has legitimized minor before law of any state, or (d) taken other enumerated steps to acknowledge paternity. All of above must also consent in agency placement unless individual has relinquished minor pursuant to G.S. NCGS 48-3-702. (NCGS 48-3-601). Man whose consent is required may execute consent to adoption, either before or after child is born. After six months from date of conception, mother may request court to determine if father's consent is required. If father doesn't respond within 15 days then court shall order that father's consent is not needed. If father responds then court must have hearing. Guardian of minor may execute consent at any time. (NCGS 48-3-604). Consent to adoption of any other minor may be revoked within seven days. If final day of revocation period falls on weekend or N.C. or federal holiday, then period shall extend to next business day. Consent may be revoked within five business days in direct placement if preplacement assessment is required and placement occurs before assessment is given to parent or guardian placing child. (NCGS 48-3-608). Consent void if obtained by fraud or duress, or adoptive parent and individual who executed consent voluntarily places it aside, or petition to adopt voluntarily dismissed with prejudice, or court dismisses petition to adopt. (NCGS 48-3-609).

Equitable Adoption.

N.C. recognizes doctrine of equitable adoption. (347 N.C. 115, 489 S.E.2d 604).

Jurisdiction.

Adoption shall be by special proceeding before clerk of superior court and (1) Adoptee must have lived in state for six consecutive months before adoption or from birth, or (2) prospective adoptive parent has lived in or been domiciled in state for six consecutive months before adoption, or (3) State agency or county Department of Social Services has legal custody of adoptee. State must not exercise jurisdiction if at time petition for adoption filed, court of another state is exercising jurisdiction in conformity with Uniform Child Custody Jurisdiction and Enforcement Act codified in art. 2 of G.S. 50A. This subsection does not apply if court of other state releases jurisdiction within 60 days of filing of petition for adoption. (NCGS 48-2-100).

Venue.

Petition may be filed with clerk of superior court in county in which: (1) Petitioner lives, or is domiciled, at time of filing, (2) adoptee lives, (3) office of agency placed adoptee is located. (NCGS 48-2-101).

Petition must contain: (1) Each petitioner's full name, current address, place of domicile if different from current address, and whether each petitioner has resided or been domiciled in this state for six months preceding filing, (2) marital status and gender of each petitioner, (3) sex, date and state or country of birth of adoptee, (4) full name by which adoptee is to be known, (5) that petitioner agrees to adopt and treat adoptee as petitioner's lawful child, (6) description and estimate of any property of adoptee, (7) if minor, length of time adoptee in physical custody of petitioner and if not, why, and how custody will be acquired, (8) any information required by art. 2 of G.S. c. 50A which is known to petitioner, (9) that petitioner has resources, including those available under subsidy for adoptee with special needs, to provide for care and support of adoptee, and (10) that any required assessment has been completed or updated within the 18 months before placement. Petition must also include all necessary consents, relinquishments and termination of parental rights and status of any required assessment. (NCGS 48-2-304[a][b]). Petition for adoption may be filed concurrently with petition to terminate parental rights. (NCGS 48-2-302). Spouse of petitioner must join in petition, unless declared incompetent or court waives requirement. (NCGS 48-2-301).

Proceedings.

Court may appoint attorney to represent parent or unknown alleged parent or may appoint attorney or guardian ad litem to represent interests of adoptee in contested proceeding. (NCGS 48-2-201). All proceedings heard without jury in closed court. (NCGS 48-2-202, -203). When spouses jointly petition to adopt and one spouse dies before final decree, adoption proceeds in name of both spouses and both names entered as adoptive parents on birth certificate. (NCGS 48-2-204). Notice of proceedings must be sent to all appropriate interested parties. (NCGS 48-2-401 to -407). Report to court will be made when petition for adoption of minor is filed to determine child's best interests. (NCGS 48-2-501).

Background Information.

Before placing minor for adoption, individual or agency placing minor must provide prospective adoptive parent written documentation of: date of birth, birth weight, and other reasonably available nonidentifying information about minor, biological parents' ages at time of minor's birth, heritage (race, nationality, ethnicity), education, and general physical appearance of biological parents. Nonidentifying information about health of minor, parents, and families relevant to adoption decision or to minor's health and development should be included, including prenatal and postnatal care of minor. (NCGS 48-3-205).

Criminal Checks.

Department shall ensure that criminal histories of all prospective adoptive parents seeking to adopt minor who is in custody or placement responsibility of county department of social services and of all individuals over 18 years of age residing in prospective adoptive home are checked prior to placement. Based on criminal history, determination of fitness to have such responsibility is determined. (NCGS 48-3-309).

Name.

Decree of adoption must state name by which adoptee is to be known, but cannot contain name of former parent of adoptee. (NCGS 48-2-606).

Effect of Adoption.

Adoption creates relationship of parent and child between petitioner and adopted individual and severs relationship between individual adopted and biological or previously adoptive parents. From date signing decree, adoptee may inherit real and personal property from adoptive parents via intestate succession and has same legal rights and obligations as child born legitimately to adoptive parents. Former parents relieved of legal duties to adoptee, except to make past due child support payments. (NCGS 48-1-106). Decree of adoption does not divest any vested property interest owned by adoptee immediately prior to adoption. (NCGS 48-1-107).

Visitation of Adopted Child.

Nothing in chapter deprives biological grandparent of visitation rights with adopted minor available under G.S. NCGS 50-13.2(b1), -13.2A, -13.5(j). (NCGS 48-1-106[f]).

14.02 ALIMONY:

See topic 14.05 Divorce.

14.03 COMMUNITY PROPERTY:

Uniform Disposition of Community Property Rights at Death Act adopted. (31C).

Application.

This chapter applies to disposition at death of following property acquired by married person: (1) All personal property, wherever situated: (a) which acquired as or became, and remained, community property under laws of another jurisdiction, or (b) all or proportionate part of that property acquired with rents, issues, or income of, or proceeds from, or in exchange for, that community property, or (c) traceable to that community property; (2) all or proportionate part of any real property situated in this state which was acquired with rents, issues or income of, proceeds from, or in exchange for, property acquired as or which became, and remained, community property under laws of another jurisdiction, or property traceable to that community property. (NCGS 31C-1).

Rebuttable Presumptions.

In determining whether this chapter applies to specific property following rebuttable presumptions apply: (1) Property acquired during marriage by spouse of that marriage while domiciled in jurisdiction under whose laws property could then be acquired as community property is presumed to have been acquired as or to have become, and remained, property to which this chapter applies; and (2) real property situated in this state and personal property wherever situated, acquired by married person while domiciled in jurisdiction under whose laws property could not then be acquired as community property, title to which was taken in form which created rights of survivorship, is presumed not to be property to which this chapter applies. (NCGS 31C-2).

Disposition of Community Property Upon Death.

Upon death of married person, one half of property to which this chapter applies is property of surviving spouse and is not subject to testamentary disposition by decedent or distribution under laws of succession of this state. One half of that property is property of decedent and is subject to testamentary disposition or distribution under laws of succession of this state. With respect to property to which this chapter applies, one half of property of decedent is not subject to surviving spouse's right to petition for elective share under provisions of art. 1 of G.S. c. 30, and is not subject to right to elect life estate under provisions of art. 8 of G.S. c. 29. (NCGS 31C-3).

Perfection of Title of Surviving Spouse.

If title to any property to which this chapter applies was held by decedent at time of death, or by trustee of revocable inter vivos trust created by decedent, title of surviving spouse may be perfected by order of clerk of superior court who appointed decedent's personal representative or by execution of instrument by personal representative or heirs or devisees of decedent with approval of said clerk. Neither personal representative nor court in which decedent's estate is being administered has duty to discover or attempt to discover whether property held by decedent is property to which this chapter applies, unless written demand is made by surviving spouse or spouse's successor in interest. (NCGS 31C-4).

Perfection of Title of Personal Representative, Heir or Devisee; Duty of Personal Representative.

If title to any property to which this chapter applies is held by surviving spouse at time of decedent's death, personal representative or heir or devisee of decedent may institute action to perfect title to property. Personal representative has no fiduciary duty to discover or attempt to discover whether any property held by surviving spouse is property to which this chapter applies, unless written demand is made by heir, devisee, or creditor of decedent. (NCGS 31C-5).

Written demand in this chapter shall be made by surviving spouse, spouse's successor in interest, or decedent's heirs or devisees not later than six months after decedent's will has been admitted to probate, or not later than six months after appointment of administrator if there is no will, or not later than six months after decedent's death if property to which this chapter applies is held in inter vivos trust created by decedent; and written demand by creditor of decedent shall be made within period for presentation of claim against decedent's estate as set out in art. 19 of G.S. c. 28A. (NCGS 31C-6[a]). Written demand in this chapter shall be delivered in person or by registered mail to personal representative. As used in this chapter, personal representative may also mean trustee of inter vivos trust created by decedent who has legal title to, or possession of, property to which this chapter applies. (NCGS 31C-6[b]).

Purchaser for Value or Lender.

If surviving spouse has apparent title to property to which this chapter applies, purchaser for value or lender taking security interest in property takes his interest in property free of any rights of personal representative or heir or devisee of decedent. (NCGS 31C-7[a]). If personal representative or heir or devisee of decedent has apparent title to property to which this chapter applies, purchaser for value or lender taking security interest in property takes his interest in property free of any rights of surviving spouse. (NCGS 31C-7[b]). Purchaser for value or lender need not inquire whether vendor or borrower acted properly. (NCGS 31C-7[c]). Proceeds of sale or creation of security interest shall be treated in same manner as property transferred to purchaser for value or lender. (NCGS 31C-7[d]).

Creditors' Rights.

This chapter does not affect rights of creditors with respect to property to which this chapter applies. (NCGS 31C-8).

Severing or Altering of Married Persons.

This chapter does not prevent married persons from severing or altering their interests in property to which this chapter applies. (NCGS 31C-9).

Limitations on Testamentary Disposition.

This chapter does not authorize person to dispose of property by will if it is held under limitations imposed by law preventing testamentary disposition by that person. (NCGS 31C-10).

Uniformity of Application and Construction.

This chapter shall be so applied and construed as to effectuate its general purpose to make uniform law with respect to subject of this chapter among those states which enact it. (NCGS 31C-11).

14.04 DESERTION:

See topics 14.05 Divorce; 14.09 Husband and Wife.

14.05 [RESERVED]

14.06 DIVORCE:

Divorces governed by G.S. c. 50.

Grounds for absolute divorce are continuous separation for one year (available to either spouse, whether or not there are children) and plaintiff or defendant has resided in state for at least six months and separation for three or more years without cohabitation by reason of incurable insanity of spouse. (NCGS 50-5.1, -6). Isolated acts of sexual intercourse do not toll one year statutory period. (NCGS 50-6).

Grounds for divorce from bed and board are: Abandonment; maliciously turning out of doors; cruel or barbarous treatment endangering life; indignities to person rendering life burdensome; rendering life unbearable by excessive use of alcohol or drugs; adultery. (NCGS 50-7).

Period of knowledge of existence of ground for divorce or separation, see subhead Pleading, infra.

Residence Requirements.

In all cases plaintiff or defendant must have been a bona fide resident of state or resident pursuant to military duty in state for six months preceding bringing of action. (NCGS 50-8, -18).

Jurisdiction.

District court is proper division for trial of civil actions and proceedings concerning annulment, divorce, alimony, equitable distribution of property, child support, child custody and enforcement of separation or property settlement agreements between spouses. (NCGS 7A-244).

Venue.

Suit for divorce must be instituted in county where either party resides. If plaintiff ceases to be resident of state, action may be removed to county in which defendant resides. (NCGS 50-3, -8).

Pleading.

Complaint must be verified and set forth that facts alleged in complaint as grounds for divorce have existed at least six months prior to filing of complaint (except where divorce is sought on ground of separation for one year or where action is for divorce from bed and board), and that party has been resident of state for six months preceding filing of complaint. Complaint must set forth names and ages of minor children, and, if none, it shall so state. When there are minor children of marriage complaint shall state social security number of plaintiff and, if known, that of defendant. (NCGS 50-8). Material facts in every complaint asking for divorce or annulment shall be deemed denied, whether or not denied in answer. Court may enter summary judgment for absolute divorce based on facts from affidavits, verified motion or other verified pleading. (NCGS 50-10).

Practice.

Issues of fact are determined by court unless either party demands jury trial. (NCGS 50-10).

No prosecution bond for costs required in action for divorce or alimony. (NCGS 50-2).

Judgment or Decree.

On determination that ground for divorce exists and has existed for the necessary period, final decree of divorce is immediately available. Attorney-in-fact for incompetent spouse appointed pursuant to durable power of attorney or guardian or guardian ad litem appointed for incompetent spouse may commence or defend any G.S. c. 50 action, but only competent spouse may commence action for absolute divorce. (NCGS 50-22).

Allowance for Prosecution of Suit.

See infra, subhead Alimony and Post Separation Support.

Alimony and Post Separation Support.

In action brought under G.S. c. 50, either party may move for alimony and/or post separation support. (NCGS 50-16.1A). Dependent spouse entitled to award of post separation support if court finds that dependent spouse unable to meet his or her reasonable needs and supporting spouse is able to pay. Judge shall consider marital misconduct of dependent spouse in deciding amount of and whether to award post separation support. (NCGS 50-16.2A). When judge considers marital misconduct of dependent spouse, any marital misconduct of supporting spouse shall also be considered in determining whether to award support and amount. Court must award alimony upon finding that one spouse is dependent, that other is supporting spouse, and that award of alimony is equitable under circumstances. Participation by dependent or supporting spouse in illicit sexual behavior respectively bars or mandates payment of alimony. Court has discretion to award alimony if both spouses participated in act of illicit sexual behavior. (NCGS 50-16.3A). Alimony or post separation support may be barred by provision of separation or premarital agreement, so long as agreement is performed. (NCGS 50-16.6). Alimony shall be in such amount as circumstances render necessary, having due regard to estates, earnings, earning capacity, condition, accustomed standard of living of parties and other facts of particular case. (NCGS 50-16.5). Orders may be modified by showing of changed circumstances including remarriage or cohabitation. (NCGS 50-16.9).

Judgment of divorce granted due to separation for one year or incurable insanity of one spouse does not affect rights of either spouse with respect to any pending action for alimony or post separation support. Judgment of absolute divorce does not impair or destroy right of spouse to receive alimony or post separation support or affect rights provided under any judgment granted before or at time of judgment for absolute divorce. (NCGS 50-11).

Temporary Alimony.

See supra, subhead Alimony and Post Separation Support.

Permanent Alimony.

See supra, subhead Alimony and Post Separation Support.

Division of Property of Spouses/Equitable Distribution.

Upon application of party and after divorce, court must determine what is marital property and provide for equitable distribution between parties. (NCGS 50-20). Claim may be filed at any time after parties separate. (NCGS 50-21) There must be equal division of marital property unless court determines that equal division is not equitable. Marital property is all property, acquired during marriage and before date of separation, except property acquired by bequest, devise, descent or gift, or traceable to separate property. (NCGS 50-20). Property valued as of date of separation. (NCGS 50-21). See infra, subhead Separation Agreements.

Pension and Retirement Benefits.

Marital property includes all vested and nonvested pension, retirement, and other deferred compensation rights. (NCGS 50-20). N.C. divorce does not annul beneficiary designation of life insurance policy. (132 N.C. App. 380, 512 S.E.2d 91).

Change of Wife's Name.

Any woman, after decree of absolute divorce may, upon application to clerk of court of county in which she resides or where divorce was granted, change name to: (1) Maiden name,

(2) surname of prior deceased husband, or (3) surname of prior living husband if she has children who have that husband's surname. Any woman may petition court to adopt any of above surnames in complaint or counterclaim for divorce. If woman, since her divorce, has adopted one of these surnames, her use and adoption of that name is validated. (NCGS 50-12).

Children.

Procedure in actions for custody and support of minor children must be as in civil actions, with certain exceptions. Action brought for custody or support of minor children may be maintained as follows: (1) As separate civil action; (2) joined with action for annulment, divorce (either absolute or from bed and board), or alimony without divorce; (3) as cross action in action for annulment, divorce (either absolute or from bed and board), or alimony without divorce; (4) by motion in cause in action for annulment or divorce (either absolute or from bed and board) or for alimony without divorce; (5) upon court's own motion in action for annulment, divorce (either absolute or from bed and board), or alimony without divorce; or (6) in any of foregoing judge may issue order requiring that minor child be brought before him. Service of process in civil actions for custody of minor children must be as in other civil actions. Motions for support of minor child in pending action may be made on ten days notice to other parties and after compliance with G.S. NCGS 50-13.5(e), and motions for custody in pending action may be made on ten days notice to other parties and after compliance with G.S. NCGS 50A-205. (NCGS 50-13.5).

Custody of Children.

Any parent, relative, or other person, agency, organization or institution claiming right to custody of a minor child may institute an action or proceeding for custody of such child. (NCGS 50-13.1). Order for custody of child shall award custody to person, agency, organization or institution as will best promote interest and welfare of child. No presumption between mother and father as to parent who will better promote child's interest and welfare but presumption in favor of natural parent over third persons. (NCGS 50-13.2). In any case where parent is denied reasonable visitation rights, trial judge must first make written findings of fact that parent being denied visitation rights is unfit person to visit child, or that such visitation rights are not in best interest of child. (NCGS 50-13.5[i]). Contested issues as to custody and visitation shall be set for mediation where there is program established under G.S. NCGS 7A-494. Mediation may be waived by court for good cause. Agreements reached by parties in mediation must be submitted to court and will become enforceable as court order, unless court finds good reason not to. (NCGS 50-13.1). In action in which custody of minor child has been determined, grandparents may intervene in action upon showing changed circumstances and are entitled to such custody or visitation rights as court deems appropriate. (NCGS 50-13.5[j]). Procedure in action for custody governed by statute. (NCGS 50-13.5).

Uniform Child Custody Jurisdiction and Enforcement Act substantially adopted to promote cooperation between courts in different states, ensuring safety and promoting best interests of children. (art. 2 of G.S. c. 50A).

Uniform Interstate Family Support Act (1996).

Adopted to promote cooperation between courts in different states, ensuring payment of all common law duties of support, all statutory duties of support, and duties growing out of judgments or decrees for alimony or child support. (88 N.C. App. 533, 363 S.E.2d 883, aff'd, 323 N.C. 603, 374 S.E.2d 237). District court division is court authorized to hear matters under this act. (NCGS 52C-1-102). Establishes bases for jurisdiction over nonresidents and procedure when exercising such jurisdiction. (NCGS 52C-2-201, -202). N.C. tribunal may request tribunal of another state to assist in obtaining discovery or may compel person over whom it has jurisdiction to respond to discovery issued by tribunal of another state. (NCGS 52C-3-317). Authorizes N.C. tribunal to issue support orders for nonresidents or agencies of another state. (NCGS 52C-4-401). Income-withholding order from another state is to be treated by employer as if it had been issued by tribunal of N.C. (NCGS 52C-5-501 to -503, NCGS 52C-6-603). If obligor is receiving unemployment compensation benefits in accordance with G.S. NCGS 96-17, income-withholding order from another state may be sent to N.C. Employment Security Commission without first registering with tribunal of N.C., though commission may not withhold amount in excess of 25% of obligor's benefits. (NCGS 52C-5-501[a]). Law of issuing state governs nature, extent, amount, and duration of current payments and other obligations of support and payment of arrears under order. (NCGS 52C-6-604).

Allowance for Support of Children.

Any parent, or any person, agency, organization or institution having custody of minor, or bringing action or proceeding for custody, or minor child by his guardian, may institute action for support. (NCGS 50-13.4). Payments ordered for support of minor child shall be in such amount as to meet reasonable needs of child for health, education, and maintenance, having due regard to estates, earnings, conditions, accustomed standard of living of child and parties, child care and homemaker contributions of each party, and other facts of particular case. Payments ordered for support of minor child shall be on monthly basis, due and payable on first day of each month. Requirement that orders be established on monthly basis does not affect availability of garnishment of disposable earnings based on obligor's pay period. Court shall determine amount of child support payments by applying presumptive guidelines established pursuant to G.S. NCGS 50-13.4(c1). However, upon request of any party, court shall hear evidence and from evidence, find facts relating to reasonable needs of child for support and relative ability of each parent to provide support. If, after considering evidence, court finds by greater weight of evidence that application of guidelines would not meet or would exceed reasonable needs of child considering relative ability of each parent to provide support, court may vary from guidelines. Payments ordered for support of child shall terminate when child reaches age of 18 except if: (1) Child is otherwise emancipated, payments shall terminate at that time; or (2) child is still in primary or secondary school when child reaches age 18, support payments shall continue until child graduates, otherwise ceases to attend school on regular basis, fails to make satisfactory academic progress towards graduation, or reaches age 20, whichever comes first, unless court in its discretion orders that payments cease at age 18 or prior to graduation. In case of graduation, or attaining age 20, payments shall terminate without order by court, subject to right of party receiving support to show, upon motion and with notice to opposing party, that child has not graduated or attained age of 20. (NCGS 50-13.4[c]). Procedure in action for support is governed by statute. (NCGS 50-13.5, .9; NCGS 50-30 to -39).

Remarriage.

No restrictions on remarriage after absolute divorce. Notice of appeal must be given within 30 days. (N.C.R.App.P. 3).

Annulment of Marriage.

See topic 14.11 Marriage.

Separation agreements are valid (NCGS 52-10.1), but agreement in deed of separation as to custody of child does not preclude court from exercising independent judgment as to care and custody of child (NCGS 49-7; NCGS 50-13). Before, during, or after marriage, parties may by written agreement duly executed and acknowledged, provide for distribution of marital property in manner deemed by parties to be equitable. (NCGS 50-20[d]). In absence of separation agreement, either spouse may petition for equitable distribution of marital property prior to divorce. (NCGS 50-20, -21). See subhead Division of Property of Spouses/Equitable Distribution, supra.

Antenuptial Contracts.

See topics 14.09 Husband and Wife, 14.11 Marriage.

Family Law Arbitration Act.

It is state policy to permit, by agreement of all parties, arbitration of all issues arising from marital separation or divorce, except for divorce itself, while preserving right of modification based on substantial change of circumstances related to alimony, child custody, and child support, consistent with G.S. cc. 50, 50A, 50B, 51, 52, 52B, and 52C; default rules for conduct of arbitration proceedings are contained in this act as well as assurance to access of courts of state for proceedings ancillary to arbitration. (NCGS 50-41 to -62). Such arbitration agreement, made in writing regarding controversies arising out of marital relationship, is valid, irrevocable, and enforceable, except to agreements made before marriage regarding child support and child custody. (NCGS 50-42). Act is not applicable to agreements made before Oct. 1, 1999, unless parties by separate written agreement after that date state otherwise. (NCGS 50-61).

Registration of Divorces and Annulments.

Each divorce and annulment of marriage granted by court of competent jurisdiction in N.C. is to be reported by clerk of court and filed with State Registrar. (NCGS 130A-111).

14.07 [RESERVED]

14.08 GUARDIAN AND WARD:

Selection of Guardian.

See subhead Eligibility and Competency, infra.

Eligibility and Competency.

Clerk of superior court has original jurisdiction for appointment of guardians of person, guardians of estate, or general guardians for both incompetent persons and minors who have no natural guardian. Clerk has authority to remove guardian for cause and must appoint successor guardian after removal, death, or resignation of guardian. (NCGS 35A-1203). Venue for appointment of guardian for incompetent person is in county in which person adjudicated incompetent unless clerk in county has transferred matter to different county. Venue for appointment of guardian for minor is in county in which minor resides or is domiciled. Venue for appointment of ancillary guardian for nonresident of N.C. who has guardian of estate or general guardian in state of his residence is in any county in which is located real estate in which nonresident ward has ownership or other interest. If nonresident ward has no such interest, venue is proper in any county in which nonresident owns or has interest in personal property. (NCGS 35A-1204). At any time clerk may, on motion filed, or on court's own motion, for good cause order that matter be transferred to different county. (NCGS 35A-1205). Applicant may submit to clerk name of potential guardian, and clerk may consider recommendations of next of kin or others. Individual may be appointed as general guardian, guardian of person, or guardian of estate whether or not that individual is N.C. resident, but nonresident must submit, in writing, statement of his willingness to submit to jurisdiction of N.C. courts on matters arising out of guardianship and must appoint resident agent for service of process. Corporation may be appointed as guardian only if it is authorized by its charter. Disinterested public agent is authorized and required to serve as guardian if appointed by clerk. (NCGS 35A-1213). When minor has no natural guardian or has been abandoned, and minor requires services from county department of social services, social services director in county in which minor resides or is domiciled shall be guardian of person of minor until appointment of guardian or entry of order by court awarding custody of minor or appointing general guardian for minor. (NCGS 35A-1220).

Appointment of Guardian.

See subhead ligibility and Competency, supra.

Testamentary Guardian.

Parents are presumed to know best interest of their children, and may by last will and testament recommend guardian for any of his or her minor children, whether born at parent's death or en ventre sa mere, for such time as children may remain under 18 years of age, unmarried and unemancipated, or for any less time. Such will may be made without regard to whether testator is adult or minor. Any will containing such provision must be strong guide to clerk of superior court in appointing guardian in absence of surviving parent and, if both parents make such recommendations, will with latest date must, in absence of other relevant factors, prevail. Clerk is not bound by recommendation if different appointment is in minor's best interest. (NCGS 35A-1225). In absence of natural guardian, Director of Social Services of county in which minor resides serves until appointment of general guardian. (NCGS 35A-1220).

Qualification.

Guardian must give bond if nonresident or surety if resident, approved by clerk, before receiving property of ward (NCGS 35A-1230); guardian must renew bond every three years unless executed by duly authorized surety company (NCGS 35A-1236). Guardian pursuant to will, if so directs, may be permitted to qualify and serve without giving bond. (NCGS 35A-1225).

Deposit of cash or securities in lieu of bond authorized. (NCGS 58-75-1).

Inventory.

Within three months of appointment, guardian must file inventory of estate of ward. Clerk may extend time for good cause up to six months from date of qualification. (NCGS 35A-1261).

Powers and Duties.

Guardian of person entitled to custody of person and must make provision for ward's care, comfort and maintenance, and must, as appropriate to ward's needs arrange for his training, education, employment, rehabilitation or habilitation. Guardian must take reasonable care of ward's clothing, furniture, vehicles, and other personal effects. Guardian may establish ward's place of abode granting preference to instate locales and non-treatment facilities. Guardian may give any consent or approval necessary to enable ward to receive medical, legal, psychological, or other professional care, counsel, treatment or service. He shall not consent to sterilization of mentally ill or retarded person. (NCGS 35A-1241).

General guardian or guardian of estate of incompetent ward or minor has power to perform in reasonable and prudent manner any act that reasonable and prudent person would perform incident to collection, preservation, and management and use of ward's estate. (NCGS 35A-1251, -1252). Specific powers and duties set out in G.S. NCGS 35A-1251 to -1253. General guardians and guardians of estate must file accountings within three months of appointment and annually thereafter so long as any of estate remains in his control. (NCGS 35A-1261, -1264). Guardian must file final account within 60 days of termination of guardianship. (NCGS 35A-1266). Guardian entitled to commission under same rules and restrictions as apply in case of executors, administrators and collectors under provisions of G.S. NCGS 28A-23-3. (NCGS 35A-1269).

Guardian must manage ward's estate reasonably, but with judicial approval may make gifts from ward's income or principal or declare an irrevocable trust, for public, religious, charitable, literary, scientific, historical, medical or educational purposes, provided that making of such gifts will not leave incompetent's remaining principal estate insufficient to provide reasonable support to maintain comfort and welfare of incompetent and dependents legally entitled to support from incompetent. (NCGS 35A-1251 to -1253 and NCGS 35A-1335 to -1355).

When filing accounts guardian must exhibit to clerk of court all investments and bank statements. (NCGS 35A-1268).

Investments.

See category 13 Estates and Trusts, topic 13.13 Trusts.

Securities in Name of Nominee.

See Uniform Trusts Act (NCGS 36A-60 to -84), and category Estates and Trusts, topic Trusts.

Sums owed minor children and incapacitated adults which do not exceed $25,000 may be paid into court. (NCGS 7A-111[e]).

Real Estate.

Guardian may not lease ward's land for more than three years without court order. (NCGS 35A-1251, -1252). Guardian must pay all taxes and assessments out of ward's estate. (NCGS 35A-1253).

Liabilities of Guardian.

Minor may recover funds disbursed by purported guardian when appointment void for want of jurisdiction. (211 N.C. 171, 189 S.E. 504). Guardian and surety are liable for funds received in official capacity and not accounted for. (225 N.C. 480, 35 S.E.2d 489). Liability also for losses incurred by deposit as permanent investment without requiring security from bank (203 N.C. 104, 164 S.E. 750), for losses caused by commingling funds (225 N.C. 480, 35 S.E.2d 489) where guardian is liable for interest at highest legal rate (217 N.C. 600, 9 S.E.2d 2) and for embarking in business ventures unless investments made in accordance with statute (225 N.C. 480, 35 S.E.2d 489). Guardian acting within statutory limits shall not be liable for damages by reason of authorizing professional or medical care resulting in damages because of negligence, if such authorization was not negligent and was made in good faith. (NCGS 35A-1241).

Accounts.

See subhead Powers and Duties, supra.

Termination of Guardianship.

See subhead Powers and Duties, supra.

Insane Persons.

Hearing for adjudication of incompetence is within jurisdiction of clerk of superior court and is initiated by petition. (NCGS 35A-1103, -1105, -1106). Notice of hearing must be given to alleged incompetent, alleged incompetent's counsel or guardian ad litem, next of kin and such other persons as are designated by clerk. (NCGS 35A-1108, -1109). Attorney shall be appointed guardian ad litem to represent supposed incompetent unless he retains his own counsel, in which event guardian ad litem may be discharged. (NCGS 35A-1107). Alleged incompetent has right, upon request, to trial by jury. (NCGS 35A-1110). Upon finding of incompetence, clerk must appoint guardian or transfer proceeding for appointment of guardian to any county identified in G.S. NCGS 35A-1103. (NCGS 35A-1112). Appointment of interim guardian governed by G.S. NCGS 35A-1114. Restoration to competency governed by G.S. NCGS 35A-1130, in accordance with rules adopted by office of Indigent Defense Services..

Guardianship of adult who lacks sufficient capacity to make or communicate important decisions concerning his person, family, or property because of mental illness, mental retardation, epilepsy, cerebral palsy, autism, inebriety, senility, disease, injury, or similar cause or condition is controlled by G.S. NCGS 35A-1210 to -1216.

Foreign Guardians.

Duly appointed guardian of ward who is nonresident of N.C. and entitled to any personal property in this state may, by petition filed before clerk of superior court of county in which property, or some portion thereof, is situated, apply to have such estate removed to residence of ward. Petitioner must show to court copy of his order of appointment and must prove sufficiency of his bond. (NCGS 35A-1281).

Clerk of superior court authorized to appoint ancillary guardian to protect and control real and personal property in state owned by nonresident ward. (NCGS 35A-1280).

See also category 2 Business Organizations, topic 2.03 Corporations, subhead Foreign Corporations.

Gifts to Minors.

See topic 14.10 Infants.

Uniform Simplification of Fiduciary Security Transfers Act repealed by 1997 N.C. Sess. Laws 181, §23.

Uniform Fiduciaries Act adopted. (NCGS 32-1 to -13).

14.09 HUSBAND AND WIFE:

The rights and obligations arising out of the marital status are regulated by N.C. Const., art. X, and by cc. 50, 52, 52B.

Separate Property.

A married person may hold property free from debts of his or her spouse. (N.C. Const., art. X, §4; NCGS 52-1).

Contracts and Conveyances.

Married woman can contract and deal to affect her real and personal property in same manner and effect as if unmarried, but every conveyance or other instrument affecting estate, right or title of any married persons in lands, tenements or hereditaments is subject to either elective share or elective life estate of either husband or wife as provided for in G.S. NCGS 29-30 and G.S. NCGS 30-3.1 to -3.6 unless waiver of such right to elect is made by execution of deed or of valid separation agreement authorizing conveyance without consent of other spouse. (N.C. Const., art. X, §4; NCGS 39-7, -13.4; NCGS 52-2). Following conveyances are valid without joinder of spouse of grantor: (1) Conveyance by one spouse to other of interest in real property owned by grantor alone; (2) conveyance by either spouse to both creates tenancy by entirety unless contrary intent expressed in conveyance; and (3) conveyance by one tenant in entirety to other dissolves estate by entirety in property conveyed. (NCGS 39-13.3).

Any married person under 18 is competent to: (1) Give up any right or interest in any property of other spouse, (2) jointly execute with other spouse, if said spouse is 18 or over, any instrument with respect to any property held by them jointly. (NCGS 39-13.2). See also topic 14.10 Infants, subhead Emancipation.

A married woman may become bound as surety for any person, including her husband. (168 N.C. 405, 84 S.E. 708).

Contracts between spouses not inconsistent with public policy are valid, and persons of full age about to be married and married persons may in writing, with or without valuable consideration, release and quitclaim such rights which they might respectively acquire by marriage in property of each other; and such releases may be pleaded in bar of any action or proceeding for recovery of rights and estate so released. No contract or release between spouses made during their coverture will be valid to affect any part of real estate of either spouse, or accruing income thereof for longer time than three years next ensuing making of such contract or release, unless it is in writing and is acknowledged by both parties before certifying officer. Such officer must be notary public, or justice, judge, magistrate, clerk, assistant clerk or deputy clerk of general court of justice, or equivalent or corresponding officers of state, territory or foreign country where acknowledgment is made. Such officer must not be party to contract. (NCGS 52-10).

Any married couple may execute separation agreement not inconsistent with public policy which will be legal, valid, and binding in all respects if in writing and acknowledged by both parties before certifying officer not party to contract. (NCGS 52-10.1).

See also category 21 Property, topic 21.06 Deeds.

Conveyance or Encumbrance of Property.

See subhead Contracts and Conveyances, supra.

Disabilities of Married Women.

Common law rights and disabilities of spouses are in force except insofar as they have been abrogated or repealed by statute. (230 N.C. 149, 52 S.E.2d 350). For example, husband and wife have cause of action against each other to recover damages sustained to their person or property as if they were unmarried. (264 N.C. 694, 142 S.E.2d 638; NCGS 52-10.1).

Purchase Money Mortgages.

A purchaser of real estate who does not pay full price at time of taking deed for title, may make mortgage for securing payment of such purchase money, or such part thereof as may remain unpaid, which shall be good and effectual against spouse as well as purchaser without requiring spouse to join in execution of such mortgage. (NCGS 39-13).

Torts.

Spouses have cause of action against each other to recover damages sustained to their person or property. (NCGS 52-5).

Agency.

Either spouse may act as attorney-in-fact for other. (N.C. Const., art. X, §4; NCGS 39-12).

Liabilities.

Every person is liable on contracts and for torts as though unmarried. (NCGS 52-2, -12).

Desertion and Nonsupport.

Willful abandonment or nonsupport of dependent spouse by supporting spouse or of children by spouse constitutes misdemeanor. (NCGS 14-322). Willful neglect of duty to support child will be deemed committed within state if child is within state when neglect occurs. (NCGS 14-325.1).

Community Property.

See topic 14.03 Community Property.

Tenancy by Entirety.

Spouses have equal right to control, use, possession, rents, income, and profits of real property held in tenancy by entirety. Neither spouse may bargain, sell, lease, mortgage, transfer, convey or encumber any property without written joinder of other spouse except where provision is made under G.S. NCGS 39-13, -13.3, -13.4 or G.S. NCGS 52-10. (NCGS 39-13.6).

Effective Jan. 1, 1996, 1995 N.C. Sess. Laws c. 538, §7(a) rewrote G.S. c. 52A, but does not affect pending actions, rights, duties, or liabilities or extinguish any penalty, forfeiture or liability under act. Uniform Interstate Family Support Act adopted effective Jan. 1, 1996, applicable to child support owed on or after that date. (NCGS 52C-1-100, et seq.).

Antenuptial Contracts.

Liability of married persons for any debts owing or contracts made or damages incurred before marriage shall not be impaired or altered by marriage. No person shall by marriage incur any liability for any debts owed by his or her spouse prior to marriage.

14.10 INFANTS:

Minors.

Common law definition pertaining to age abrogated; minor is any person not yet 18 years of age. (NCGS 48A-1 and -2). Age limit of 21 still applies to: (1) Purchase or consumption of fortified wine, spirituous liquor or mixed beverages (NCGS 18B-302[b][2]); and (2) eligibility to run for public office (N.C. Const., art. VI, §6). Seller has defense if can show purchaser produced certain enumerated identification showing age to be 21 or produces other facts reasonably indicating purchaser was required age. (NCGS 18B-302[d]). Age limit of 18 applies to purchase of any tobacco products or cigarette wrapping papers. Proof as enumerated in G.S. NCGS 14-313(b) shall be defense.

Emancipation.

By operation of law, child is emancipated upon marriage or upon becoming 18 years of age, unless, in latter case, child is so weak in mind or body that he is unable to support himself. (NCGS 48A-2; NCGS 7A-726). Custody rights of person incapable of self-support upon reaching majority are unaffected for so long as he or she remains incapable of self-support. (NCGS 50-13.8). However, parents are not obligated to support child who is incapable of self-support beyond 20th birthday. (93 N.C. App. 787, 379 S.E.2d 79 aff'd by 325 N.C. 703, 386 S.E.2d 200). Minors age 16 or older may petition court for judicial decree of emancipation. (NCGS 7A-717). Court will consider parental need for earnings of minor, minor's ability to function as adult, minor's need to contract as adult or to marry, minor's employment status, extent of discord in minor's family, minor's rejection of parental support and quality of such support. (NCGS 7A-721).

Blood Donation.

Individual 17 or more may donate blood without consent of parent or guardian, but any person under 18 may not sell his blood. (NCGS 130A-412.31).

Disabilities.

Contracts of minors are voidable, subject to making restitution, where possible, as at common law. Minor cannot be liable for misrepresentation of age. (185 N.C. 109, 116 S.E. 261).

Minors of 17 and over may enter into written contracts of indebtedness with persons and N.C. firms and corporations at rate of interest not exceeding contract rate authorized in G.S. c. 24, for sole purpose of higher education in N.C., and disbursed directly to institution or jointly to borrower and educational institution of higher learning. (NCGS 116-174.1).

Minor spouses of veterans are authorized to execute deeds and conveyances necessary to make fully available to veteran rights and benefits of Servicemen's Readjustment Act. (NCGS 165-18).

Medical Treatment.

Any minor may consent to licensed physician for diagnosis, treatment and prevention of venereal disease, pregnancy, drug abuse, or emotional disturbance. Any emancipated minor may consent to medical, dental and health treatment for himself or child. (NCGS 90-21.5). Physician may render treatment to minor without first obtaining consent and approval of parent or guardian where: (1) Parents or guardian cannot be located or contacted with reasonable diligence during time minor needs to receive treatment, or (2) where child's identity is unknown or securing approval would delay treatment so long as to endanger life of minor, or (3) where effort to contact parents or guardian would result in delay that would seriously worsen physical condition of minor, or (4) where parents refuse to consent and delay to obtain court order would endanger minor's life or seriously worsen physical condition. (NCGS 90-21.1). In emergency, minor who is mentally ill or substance abuser in need of treatment may be admitted to treatment facility upon his own written application which will serve as initiating document for hearing. (NCGS 122C-223).

Ratification of Contracts.

Contracts of minors can be ratified by silence for a reasonable time (three years) after attaining age of majority. (276 N.C. 279, 172 S.E.2d 19).

Actions.

Infants must sue or defend by guardian, testamentary guardian or guardian ad litem. (NCGS 1A-1, R. 17[b]). Compromise, approved by judge of superior court, in litigation in which infant is party is binding where made by guardian on facts and finding by court that such compromise is for best interest of infant. (203 N.C. 474, 166 S.E. 317). Fee of guardian ad litem is to be taxed as part of costs in defense action or proceeding when any defendants are infants or persons non compos mentis and have no general guardian. (NCGS 1A-1, R. 17).

Support of Minor.

Generally, parents are primarily liable for support of minor; person or entity standing in loco parentis secondarily liable. (NCGS 50-13.4). Misdemeanor for parent willfully to neglect or refuse to provide for minor. (NCGS 14-322[d]). Class 1 felony for parent willfully to abandon and fail or refuse to support minor for six months under specified circumstances. (NCGS 14-322.1). Willful neglect of duty to support child committed within state if child within state when neglect occurs. (NCGS 14-325.1).

Adoption.

See topic 14.01 Adoption.

Sale of infants' land may be had by proceedings in the superior court. (NCGS 35A-1301).

Termination of Parental Rights.

District court may issue order terminating parental rights if petition proves that grounds exist, unless court determines that such action not in best interests of child. Order completely and permanently terminates all rights and obligations of relationship, except child's right of inheritance until adoption. Bifurcated adjudication and disposition hearings. (NCGS 7B-1100, et seq.).

Uniform Transfers to Minors Act adopted effective Oct. 1, 1987. (NCGS 33A-1 to -24).

Age of majority under Act is 21. (NCGS 33A-1[11]).

Uniform Securities Ownership by Minors Act not adopted.

14.11 MARRIAGE:

All unmarried persons over age 18, except as specifically prohibited, may marry. (NCGS 51-2).

Consent Required.

Persons of either sex, between ages of 16 and 18, may marry after written consent obtained from parent, having full or joint legal custody of underage party, or from person, agency or institution having legal custody, standing in loco parentis or serving as guardian of person. Consent not required for emancipated minor if certificate or decree of emancipation is filed with register of deeds. (NCGS 51-2).

License.

No minister or officer may perform a ceremony of marriage unless a marriage license has been issued by register of deeds of county in which marriage is to take place. (NCGS 51-6). Initial fee is $60. (NCGS 161-10[a][2]).

The register of deeds may require party applying for marriage license to present certified copy of birth certificate or birth registration card before issuing license. Certified copies fee is $10 (NCGS 161-10[a][8]) plus possibility of access to vital records fee (NCGS 161-10[a][8a]) and costs of miscellaneous services (NCGS 161-10[a][19]). Each applicant must provide on application his or her social security number; if applicant does not have social security number and is ineligible to obtain one, applicant shall present sworn statement testifying to that fact to register of deeds who shall then issue license provided all other requirements are met. (NCGS 51-8).

Special License.

Register of deeds may issue marriage license to pregnant unmarried female between ages of 14 and 16 and putative father of child, or to unmarried male between ages of 14 and 16 and mother of child of which he is putative father, if certified copy of district court order authorizing such marriage has been filed with register of deeds. District court judge may issue such order only upon finding as fact and concluding as matter of law that underage party is capable of assuming responsibilities of marriage and that marriage serves best interest of underage party. Procedure for such determination provided in statute. (NCGS 51-2.1).

Requisites of Marriage.

Valid and sufficient marriage is created by consent of male and female person who may lawfully marry, presently to take each other as husband and wife, freely, seriously, and plainly expressed by each other in presence of other either: (1) (a) In presence of ordained minister of any religious denomination, minister authorized by church, district court judge of this state or another state, or magistrate; (b) with consequent declaration by minister, district court judge of this state, or magistrate that persons are husband and wife; or (2) in accordance with any mode of solemnization recognized by any religious denomination, or federally or state recognized Indian nation or tribe. (NCGS 51-1).

Reports of Marriages.

On or before 15th of month, register of deeds transmits to State Registrar record of marriage ceremonies performed in county during preceding calendar month. Upon request, State Registrar will furnish true copy of marriage record for fee. (NCGS 130A-110).

Record.

See category 10 Documents and Records, topic 10.04 Records, subhead Vital Statistics.

Common law marriages consummated in state not recognized in state (301 N.C. 479, 272 S.E.2d 349), but such marriages consummated in another state which validates same are recognized by this state (257 N.C. 416, 126 S.E.2d 83).

Prohibited Marriages.

Following marriages are prohibited and void between: any two persons nearer of kin than first cousins, or double first cousins or male person under 16 years of age and any female, or between female person under 16 years of age and any male (except as stated in subhead Special License, supra), or persons either of whom has husband or wife living at time of such marriage, or persons either of whom is at time physically impotent, or persons either of whom is at time incapable of contracting from want of will or understanding. (NCGS 51-3). Word “void” as used in G.S. NCGS 51-3 has been interpreted as meaning “voidable” except in respect to bigamous marriages. (73 N.C. App. 382, 326 S.E.2d 354). Marriages between individuals of same gender, whether created by common law, contracted, or performed outside of N.C., are not valid in N.C. (NCGS 51-1.2).

Proxy Marriages.

Marriage by telephone, correspondence, written consent, or proxy not valid. (Necessarily implied from NCGS 51-1).

Foreign marriage, if valid where contracted, is valid in this state (76 N.C. 242), unless it would be bigamous if contracted in this state (NCGS 14-183) or is between individuals of same gender (NCGS 51-1.2).

Annulment.

Prohibited marriages are declared void upon suit and decree in district court. (NCGS 51-3; NCGS 7A-244). Marriage followed by cohabitation and birth of issue may not, after death of either party, be declared void for any of aforementioned causes, except bigamy. (NCGS 51-3).

No marriage by persons either of whom may be under 16 years of age, and otherwise competent to marry, must be declared void when girl is pregnant or child born unless child is dead at time annulment is sought. (NCGS 51-3). Marriage not annulled on ground of nonage if parties to marriage have lived together as man and wife after having attained age of 16 years. (218 N.C. 245, 10 S.E.2d 807). When license to marry is procured by any person under 18 years of age by fraud or misrepresentation, parent of underage party, person, agency, or institution having legal custody or serving as guardian of underage party, or guardian ad litem appointed to represent underage party pursuant to G.S. NCGS 51-21(b) is proper party to bring action to annul marriage. (NCGS 51-2[c]). Marriage contracted under representation and belief that female is pregnant followed by separation within 45 days of marriage which separation continues for one year is voidable if no child will have been born to parties within ten lunar months of separation. (NCGS 51-3).

Waiting Period.

None. (NCGS 51-1).

Antenuptial Contracts.

Must be in writing and signed by both parties. (NCGS 52B-3). Enforceable without consideration. (NCGS 52B-3). May modify or eliminate spousal support except to extent necessary to avoid support under public assistance program. (NCGS 52B-7). Amendable by written agreement. (NCGS 52B-6). Not enforceable (1) If involuntary, or (2) if unconscionable when executed and was made without full knowledge of property or financial obligations of other party, where party did not waive right to disclosure of property or financial obligation of other party and had no opportunity to obtain knowledge of other party's financial status. (NCGS 52B-7).

Alienation of Affection and Criminal Conversation

Act of defendant occurring after separation of plaintiff and plaintiff's spouse with intent such separation remain permanent shall not give rise to action. Action shall not be commenced more than 3 years from last act of defendant giving rise to action. Action commenced against natural persons only. (NCGS 52-13)

14.12 MARRIED WOMEN:

See topics 14.09 Husband and Wife, Marriage; categories 5 Civil Actions and Procedure, topic Evidence, subhead Witnesses; Debtor and Creditor, topic Homesteads; Documents and Records, topic Acknowledgments; Estates and Trusts, topics Executors and Administrators, Wills; Property, topic Dower.

15 HEALTH

15.0115.04

15.05 FOOD, DRUGS, DEVICES AND COSMETICS:

Regulated generally by G.S. NCGS 106-120 to 145 (“North Carolina Food, Drug and Cosmetic Act”), this chapter covers following activities in regard to food, drug, medical device, or cosmetics: adulteration, misbranding, false advertising, refusal to permit inspections, improper labeling, counterfeiting, unauthorized use or revelation of trade secret, trademark infringement, misrepresentation, and improper substitution. Violations are punishable under G.S. NCGS 106-124 and -124.1.

Dispensing, distribution, sale and possession of controlled substances regulated by North Carolina Controlled Substances Act. (NCGS90–86 et seq.) Drug paraphernalia regulated by North Carolina Drug Paraphernalia Act and Drug Paraphernalia Control Act of 2009 (NCGS 90–113.20 et seq)

15.06 FRAUD AND ABUSE:

Referral Fees and Payment for Certain Solicitations Prohibited.

Art. 27 G.S. c. 90, prohibits referral fees and direct solicitation of any injured, diseased or infirmed person, or anyone in their household for period of time following onset of illness, disease or infirmity. (NCGS 90-400 to 402). Sanctions are specified in G.S. NCGS 90-402.

Self Referrals by Health Care Providers.

G.S. NCGS 90-28, prohibits self-referrals by healthcare providers, defined as any person who is licensed under c. 90 of General Statutes or otherwise engages in identified professions, where providers (or member of same group practice or group practice) is investor in entity referred to. (NCGS 90-406). Penalties are set out in G.S. NCGS 90-407. Both of these acts have identified disciplinary actions, penalties and fines associated with them.

15.06A INSURANCE:

Access to Medical Records.

N.C. statutorily grants patient right of access to his medical records, which are in possession of insurance entity, including HMO, or mental health facility. (NCGS 58-39-15, -45[a]; NCGS 122C-3, -53). Reasonable fee may be imposed to cover copying costs. (NCGS 58-39-45[d]).

Disclosure of Confidential Medical Information.

State restricts disclosure of confidential medical information by health care entities and exempts such records from disclosure under Public Records Act. (NCGS 132-1.2). State restricts disclosure of confidential medical information as to patient medical records in possession of Dept. of Insurance, as well as information in possession of Health Commissioner that relates to credentialing of medical professionals (NCGS 58-2-105); records in possession of Dept. of Health or local health departments (NCGS 130A-12); patient data in medical care database (NCGS 131E-214.3); medical information as to health care facilities (NCGS 131E-97); as to HMOs (NCGS 58-67-180). Additionally, there are statutes restricting disclosure, which govern other specified entities and medical conditions, such as cancer (NCGS 130A-208, -209); communicable diseases (NCGS 130A-135 to -140); drug dependency (NCGS 90-109.1); mental health or substance abuse (NCGS 122C-52).

Anti-Discrimination Policy in Choosing Providers.

Statutory right to choose providers includes services of optometrist, podiatrist, dentist, chiropractor, pharmacist, physician assistant, licensed marriage and family therapist, and others. (NCGS 58-50-30).

Joint Action to Insure Elderly.

Allows offering of additional insurance against financial loss from accident, sickness, or both. (NCGS 58-52-1 to -25).

Medicare Gap Insurance Minimum Standards.

Regulated generally by G.S. NCGS 58-54-1 to -50. Standards for policy provisions are identified in G.S. NCGS 58-54-10. Minimum standards for benefits, marketing practices, and other issues under policies are set forth in regulation. Disclosure standards are identified in G.S. NCGS 58-54-25.

Continuing Care Retirement Communities.

Regulated generally by G.S. NCGS 58-64-1 to -85. License required by G.S. NCGS 58-64-5, which is revocable for specified violations under G.S. NCGS 58-64-10. Disclosure statement requirements are set forth in G.S. NCGS 58-64-20, and penalties for not delivering appropriate disclosure statement to contracting party are enumerated in G.S. NCGS 58-64-70 (civil liability) and G.S. NCGS 58-64-75 (as to criminal liability for willful and knowing violation of CCRC Act). Provisions that must be in any contract involving CCRC are specified in G.S. NCGS 58-64-25.

Health Maintenance Organization Act.

Regulated generally under G.S. NCGS 58-61-1 to -185. Addresses coverage requirements, management and exclusive contracts (NCGS 58-67-30); powers of HMOs (NCGS

58-67-35); fiduciary responsibilities (NCGS 58-67-45); prohibited practices (NCGS 58-67-65); confidentiality of medical information (NCGS 58-67-180), among other topics.

Health Insurance Portability and Accountability.

Regulated generally by G.S. NCGS 58-68-25 to -75. Addresses both group and individual market reforms. Limits preexisting condition exclusions under G.S. NCGS 58-68-30. Prohibits discrimination against individual participants and beneficiaries based on health status pursuant to G.S. NCGS 58-68-35. Certain plans are excluded under G.S. NCGS 58-68-55 and NCGS 58-68-75.

15.07 [RESERVED]

15.08 LICENSURE AND CERTIFICATION:

Health Care Facilities.

Several chapters of N.C. General Statutes address inspection, licensing, and certification of various health care facilities. Adult care homes and maternity homes are inspected and licensed pursuant to provisions of c. 131D of General Statutes. Failure to obtain proper license may subject facility to specified civil and administrative penalties. Hospitals are subject to licensure requirements under "Hospital Licensure Act" set forth in G.S. NCGS 131E-75 to -99. Penalties for not obtaining proper licensure include fines and injunctive relief under G.S. NCGS 131E-81 and -82. Hospital Licensure Act also covers such issues as confidential information, risk management, and hospital privileges, among other topics. "Healthcare Facility Licensure Act" governs licensure of nursing homes (NCGS 131E-100 to -112), home health agencies (NCGS 131E-135 to 142), and ambulatory surgery centers (NCGS 131E-145 to 152). Healthcare Facility Licensure Act identifies requirements for inspections, medical or peer review, patients' rights (where applicable), adverse action on license, and various penalties and enforcement options for N.C. Department of Health and Human Services.

Certificate of Need.

Regulated generally by G.S. NCGS 131E-175 to 190. N.C. requires that person who wishes to offer or develop new institutional health service first obtain certificate of need. Considered to be new institutional health services include following: construction, development or establishment of new health services facility, offering of certain health services (such as bone marrow transplantation services or open-heart surgery services, among others); acquisition of certain equipment that is per se reviewable (cardio-angioplasty equipment or MRIs, among others); undertaking project exceeding $2,000,000 to develop or expand health service or facility; purchasing major medical equipment exceeding $750,000 in costs; developing diagnostic center for which costs exceed $500,000, among others, identified in G.S. NCGS 131E-176(16). Agency has 90 days to review certificate of need applications, which is extendable up to additional 60 days. Agency decisions may be challenged in contested case proceeding in which administrative law judge must make recommended decision in case within 270 days after petition is filed. Failure to obtain certificate of need when required results in variety of civil and administrative remedies being issued against healthcare provider, including injunctive relief in fines and penalties.

Licensure of Professionals.

Medical professions for which licensure is required in N.C. include: practice of medicine (NCGS 90-1 to -21); dentistry (NCGS 90-22 to -48.3); pharmacy (NCGS 90-85.2 to -85.41); optometry (NCGS 90-114 to -127.3); chiropractic (NCGS 90-139 to -157.3); nursing (NCGS 90-179.19 to -187.14); midwives (NCGS 90-178.1 to -178.7); veterinarians (NCGS 90-179 to -187.14); podiatrists (NCGS 90-202.2 to -202.14); practice of funeral service (NCGS 90-210.18A to -210.29A); dental hygiene (NCGS 90-221 to -233.1); opticians (NCGS 90-234 to -255.1); physical therapy (NCGS 90-270.24 to -270.40); psychology (NCGS 90-270.1 to -270.22); marriage and family therapy (NCGS 90-270.45 to -270.62); occupational therapy (NCGS 90-270.65 to -270.81); nursing home administration (NCGS 90-275.1 to -288); assisted living administrator (NCGS 90-288.10 to -288.30); speech and language pathologist and audiologist (NCGS 90-292 to -308); professional counselors (NCGS 90-329 to -344); dieticians and nutrition (NCGS 90-350 to -369); fee based practicing pastoral counselors (NCGS 90-380 to -395); acupuncture (NCGS 90-450 to -495); industrial hygiene (NCGS 90-515 to -516); athletic trainers (NCGS 90-522 to -540); massage and bodywork therapy (NCGS 90-620 to -636). Practice of any one of these medical and allied occupations without proper licensure results in imposition of fines and other penalties as stated within their respective acts.

15.0915.11

15.12 PUBLIC HEALTH:

Public Health Law.

Is governed by G.S. 130A. This statute governs maternal, children's and women's health issues (NCGS 130A-124 to -131.25); communicable diseases (NCGS 130A-133 to -201); chronic disease (NCGS 130A-205 to -233); asbestos hazard management (NCGS 130A-444 to -453); lead based paint hazard management (NCGS 130A-453.01 to 453.11); among others. N.C. requires reporting of some diseases and other conditions that may be hazardous to public health in this act. Act specifies variety of remedies, including right of entry upon premises of any place where public health hazard is going on, abatement of public health nuisance, abatement of eminent hazard, embargo, administrative penalties, succession and revocation of permit and program participation.

Healthcare Facilities Finance Act (G.S. NCGS 131A-1 to- 25), sets forth means of providing, refinancing, acquiring, constructing, equipping, and providing healthcare facilities through bonds or notes issued by N.C. Medical Care Commission under this act.

15.13 SMOKING REGULATIONS:

Smoking in Public Places.

Smoking regulated or prohibited in state government buildings and state vehicles, (NCGS 130A–491–495) restaurants and bars, (NCGS 130A-496, 497) public places by designating smoking and nonsmoking areas, (NCGS 143–595–601) school buildings, (NCGS 115C-407) community colleges, (NCGS 115D-20.1) long-term care facilities. (NCGS 131D-4.4) Local government may also regulate smoking. (NCGS 130A-498)

16 INSURANCE

16.01 INSURANCE COMPANIES:

Regulated by G.S. c. 58.

Supervision by Insurance Commissioner, Department of Insurance, Raleigh, N.C. 27699-1201. Jurisdiction of commissioner extends to persons providing coverage for medical, surgical, chiropractic, physical therapy, speech pathology, audiology, professional mental health, dental, hospital or optometric expenses whether by direct payment, reimbursement or otherwise unless person shows it is subject to exclusive jurisdiction of another state or federal agency or government. (NCGS 58-49-5).

Annual statements must be filed with commissioner. Commissioner may require statements to be filed semiannually, quarterly, or monthly. (NCGS 58-2-165). Each insurer authorized to transact business in state must file with National Association of Insurance Commissioners copy of its financial statements at times and in format required by commissioner. Foreign insurers domiciled in state with similar law are exempt. (NCGS 58-4-5). Insurers must have annual audit and file annual audited financial reports. (NCGS 58–10–185 et seq.) Commissioner may revoke license for failure to file. (NCGS 58-4-15).

Policies.

All contracts of insurance on property, lives or interests in this state are deemed made therein. (NCGS 58-3-1). Statements in application for policy are deemed representations, and unless material or fraudulent will not prevent a recovery on the policy. (NCGS 58-3-10).

The “Standard Fire Insurance Policy for North Carolina” is adopted by G. S. NCGS 58-44-16 except policies of automobile fire, theft, comprehensive and collision insurance and marine and inland marine insurance. Such form must be used in substance in this state by all fire insurance companies. Standard form of policy need not be used for effecting reinsurance between insurers. (NCGS 58-44-16). Permissible variations in standard form are authorized by NCGS 58-44-20, including combination policies by two or more companies. Binders or other contracts for temporary insurance may be made, orally or in writing, for period of 60 days. (NCGS 58-44-20). Policy issued to either husband or wife will cover property in which they share ownership. (NCGS 58-44-45).

Most automobile, residential real property, life and health insurance policies and benefit booklets are subject to readability and filing (with commissioner for approval) requirements prescribed in G.S. NCGS 58-38-1, et seq.

Life insurance policy loans regulated by G.S. NCGS 58-61-1, et seq. Continuation and conversion of group health insurance policies regulated by G.S. NCGS 58-53-1, et seq. Divorce in N.C. does not annul beneficiary designation of life insurance policy. (132 N.C. App. 380, 512 S.E.2d 91). Insured under Servicemember's Group Life Insurance (“SGLI”) program may change beneficiary notwithstanding state court order to contrary. (137 N.C. App. 112, 527 S.E.2d 340).

Long-term care insurance regulated by G.S. NCGS 58-55-1 to -35.

Rates.

Minimum premium rates charged by life insurance companies must be not less than those fixed by recognized mortality table. (NCGS 58-58-125).

N.C. Rate Bureau fixes rates for automobile, workers' compensation and employers' liability, and residential fire insurance. (NCGS 58-36-1[1]). All insurance companies writing such insurance in state must become members. (NCGS 58-36-5). Persons affected by rate must have opportunity to be heard. (NCGS 58-36-1[2]). Insurer may deviate from rates promulgated by bureau if insurer has filed proposed deviation with bureau and commissioner, if proposed deviation is based on sound actuarial principles, and if proposed deviation is approved by commissioner. (NCGS 58-36-30[a]).

Rebates.

No premium except that approved by Insurance Commissioner shall be accepted for a policy and no rebate shall be granted to insured except that set out in policy. (NCGS 58-33-85, -90).

Limitations on Time and Place of Suit.

No insurer, self-insurer, service corporation, HMO, MEWA, continuing care provider, viatical settlement provider, or professional employer organization licensed under this chapter shall make any condition or stipulation in its contracts concerning court or jurisdiction in which any suit or action on contract may be brought. No insurer, self-insurer, service corporation, HMO, MEWA, continuing care provider, viatical settlement provider, or professional organization licensed under this chapter shall limit time within which any suit or action referred to may be commenced to less than period prescribed by law. All conditions and stipulations forbidden by this section are void. (NCGS 58-3-35).

Proof of Loss.

A company which requires written proof of loss after notice of such loss has been given by insured or beneficiary must furnish blanks for that purpose. If such forms are not so furnished within 15 days after receipt of such notice, claimant shall be deemed to have complied with requirements of policy as to proof of loss, upon submitting, within time fixed in policy for filing proofs of loss, written proof covering the occurrence, character and extent of loss for which claim is made. (NCGS 58-3-40).

Lien of Judgment Against Insurance Company.

A final judgment recovered against an insurance company doing business in N.C. becomes a lien on all property, both real and personal, belonging to said company, situated in the state, and upon all funds which are due or which may become due to said company from any and all parties insured in said company.

Liens.

Insurance company loaning money may require life insurance on borrower assigned to company. (NCGS 58-3-45).

Agents, Brokers and Adjusters.

License Requirements.

No person may act as or hold himself out to be agent, broker, limited representative, adjuster, or motor vehicle damage appraiser unless duly licensed. (NCGS 58-33-26[a]). License requirements are governed by G.S. NCGS 58-33-30 and license fees by G.S. NCGS 58-33-125. Commissioner may issue temporary license without requiring examination in certain cases. (NCGS 58-33-66[a]). License applicants subject to criminal history records checks. (NCGS 58-33-48) Public adjusters also subject to licensure and regulation. (NCGS 58–33A-1 et seq.)

Persons Not Required to Have License.

N.C. does not require license for various classes of persons in most cases provided that such persons do not sell or solicit insurance. Such classes include certain persons associated with or employed by insurers (NCGS 58-33-26[n][1], [4], [9]), employers operating employee benefits program that may involve use of insurance issued by insurer (NCGS 58-33-26[n][3]), persons advertising across multi-state area of which N.C. is part, provided such persons do not sell insurance in N.C. (NCGS 58-33-26[n][5]), and insurers selling commercial property or casualty insurance to insured with risks in more than one state under that contract, provided insurer is licensed in state of insured's principal office (NCGS 58-33-26[n][6]).

Companies Authorized by State.

No licensed agent, broker, or limited representative shall sell, solicit, or negotiate anywhere in boundaries of this state, or receive or transmit application or premium of insurance, for company not licensed to do business in this state, except as provided in G.S. NCGS 58-25-5. (NCGS 58-33-26[h]). No agent shall place policy of insurance with any insurer unless agent has current appointment as agent for insurer in accordance with G.S. NCGS 58-33-40 or has valid temporary license issued in accordance with G.S. NCGS 58-33-66. (NCGS 58-33-26[i]).

Partnership and Corporation Requirements.

Business entity that sells, solicits, or negotiates insurance shall be licensed in accordance with G.S. NCGS 58-33-31(b). Every member of partnership and every officer, director, stockholder, and employee of business entity personally engaged in this state in selling, soliciting, or negotiating policies of insurance shall qualify as individual licensee. Business entity license expires Mar. 31 unless entity pays renewal fee. (NCGS 58-33-26[j]).

Fees and License Renewal.

License of broker, limited representative, adjuster, or motor vehicle damage appraiser shall be renewed on Apr. 1 each year, and renewal fees shall be paid. Commissioner is not required to print licenses for purpose of renewing licenses. Commissioner may establish for licenses “staggered” license renewal dates that will apportion renewals throughout each calendar year. If system of staggered licensing is adopted, commissioner may extend licensure period for some licensees. License renewal fees prescribed by G.S. NCGS 58-33-125 shall be prorated to extent they are commensurate with extensions. (NCGS 58-33-26[m]).

Fees.

There shall be no fee sharing with non-licensed or non-appointed persons. Only duly licensed persons may accept payment for services, provided that they may have their commission paid to partnership or corporation for which they work. (NCGS 58-33-82).

License Form.

License shall state name and identifying number of licensee, date of issue, kind or kinds of insurance covered by license, and such other information as commissioner deems proper. (NCGS 58-33-26[k]). License issued to agent authorizes him to act until license is otherwise suspended or revoked. (NCGS 58-33-26[l]).

License Suspension.

Commissioner may suspend, revoke, or refuse to issue or renew any license for cause. (NCGS 58-33-46). Commissioner must notify every appointing insurer about any suspension, revocation, or nonrenewal of license. (NCGS 58-33-50). Insurer or authorized representative of insurer that terminates appointment, employment, contract, or other insurance business relationship with producers shall notify commissioner within 30 days after effective date of termination. Within 15 days after making notification required, insurer shall mail copy of notification to producer at producer's last known address. (NCGS 58-33-56).

Adjusters.

Agent or limited representative may be authorized to act as adjuster, but may not adjust any loss where his remuneration for sale of insurance is dependent upon adjustment. Nonresident adjuster or motor vehicle damage appraiser may act in emergency up to 30 days. Commissioner to be notified at beginning of work. (NCGS 58-33-70).

Misrepresentations.

No licensee shall make or issue, or cause to be issued, any written or oral statement that willfully misrepresents or willfully makes incomplete comparison as to terms, conditions, or benefits contained in any policy of insurance for purpose of inducing or attempting to induce policyholder in any way to terminate or surrender, exchange, or convert any insurance policy. Any person who violates this section is subject to provisions of G.S. NCGS 58-2-70 and G.S. NCGS 58-33-46. (NCGS 58-33-75). Any person or entity who solicits, negotiates or sells insurance or acts as third-party administrator for unauthorized insurer is strictly liable for any losses or unpaid claims if unauthorized insurer fails to pay claim or loss. Liability imposed is joint and several. (NCGS 58-33-95).

Violation of G.S. c. 58.

Person licensed or certified under arts. 1 to 67 or 69 to 71 may be fined $100 to $1,000 for G.S. c. 58 violation which subjects his license to suspension or revocation. Each day violation continues is separate offense. (NCGS 58-2-70).

Discrimination in favor of any person is prohibited. (NCGS 58-3-120; NCGS 58-33-80). No insurer can base any standard or rating plan for private passenger automobiles or motorcycles upon age or sex of persons insured. No insurer shall deny insurance or refuse equivalent terms and coverage to person solely because of blindness, partial blindness, deafness or partial deafness. No insurer shall deny insurance or refuse equivalent terms and coverage to person because of race, color, or national or ethnic origin. (NCGS 58-3-25).

Information obtained in insurance transactions subject to standards governing its collection, use and disclosure. (NCGS 58-39-1, et seq.).

Unfair competition and any unfair or deceptive practice is prohibited. (NCGS 58-63-10). Acts which are deemed unfair are laid out in G.S. NCGS 58-63-15. Commissioner is authorized to investigate and issue “cease and desist” orders. (NCGS 58-63-20, -32). Each willful violation of such order is punishable by fine of not less than $1,000 nor more than $5,000. (NCGS 58-63-50).

Process Agent.

Nonresident licensee is deemed to have appointed commissioner his agent for receiving of service of legal process by obtaining license. (NCGS 58-33-30[h][2][d][1]). Commissioner may be served with or may accept service of legal process as agent for any domestic or foreign company. (NCGS 58-16-30).

Investments regulated by G.S. NCGS 58-7-160 to -205.

Foreign Insurance Companies.

No foreign or alien insurance company may be authorized to do business until it shall: (1) Deposit with commissioner certified copy of charter and statement of its financial condition; (2) satisfy commissioner that it is fully and legally organized under laws of its state or government to do business it proposes; (3) files with commissioner certificate that it has complied with laws of state or government under which it was organized and authorized to make contracts of insurance; (4) satisfy commissioner that it is substantially in compliance with G.S. NCGS 58-7-21, -26, -30, -31 and art. 13 of G.S. c. 58; (5) satisfy commissioner that it is in compliance with company name requirements of G.S. NCGS 58-7-35; (6) satisfy commissioner that operation of company in N.C. would not be hazardous to prospective policyholders, creditors, or general public; (7) satisfies commissioner that it is in substantial compliance with requirements of G.S. NCGS 58-7-37 pertaining to background of its officers and directors; and (8) files with commissioner instrument appointing commissioner as company's agent on whom any legal process under G.S. NCGS 58-16-30 may be served. This appointment is irrevocable as long as any liability of company remains outstanding in this state. Copy of this instrument, certified by commissioner, is sufficient evidence of this appointment; and service upon commissioner is sufficient service upon company. (NCGS 58-16-5).

Requirements for life insurance companies are governed by G.S. NCGS 58-16-15.

Kinds of Insurance.

Limits on domestic companies as to kinds of insurance they can issue apply to foreign and alien companies admitted to do business, provided that certain companies present since before 1945 may be allowed to continue their business practices. (NCGS 58-16-10).

Deposits.

Foreign or alien fire and/or marine insurance companies must maintain deposits with the commissioner in amount of $100,000 market value. (NCGS 58-5-5).

Foreign or alien fidelity, surety and casualty insurance companies must maintain deposits with the commissioner in amount of $50,000 market value. (NCGS 58-5-10).

Deposits are due upon admission to do business. (NCGS 58-5-15). They are limited to interest bearing bonds of U.S. or state of N.C. or its cities or counties, or certificates of deposit issued by any solvent bank domesticated in N.C. (NCGS 58-5-20).

Surplus Lines Insurance.

Persons licensed under G.S. NCGS 58-21-65 may procure surplus lines insurance on N.C. risks from insurers not licensed to do business in N.C. (NCGS 58-21-1, et seq.).

Retaliatory Laws.

When fines, penalties, licenses, fees, or deposits of money or securities required of N.C. insurance company doing business in another state, exceed levies upon insurance company of that state doing business in N.C., same levies may, in discretion of commissioner, be imposed by this state on all such insurance companies of such other state. (NCGS 58-16-25).

Privilege and License Taxes.

Insurance companies authorized to do business in the state must, on or before Mar. 1 of each year, obtain from the commissioner license, which shall become effective following July 1, and pay following annual fees: Farmers' mutual assessment fire insurance company, $25; fraternal order, $500; all other insurance companies, except mutual burial associations, $1,500. (NCGS 58-6-7).

Premium Tax.

Insurance companies must file with Secretary of Revenue within first 15 days of Mar. of each year report of gross premiums collected in this state during preceding calendar year and pay tax thereon according to rate schedule in G.S. NCGS 105-228.5.

Direct Actions Against Insurer.

See category 23 Transportation, topic 23.01 Motor Vehicles, subhead Direct Actions.

Uniform Insurers Liquidation Act repealed.

Plain Language in insurance policies governed by Readable Insurance Policies Act, G.S. NCGS 58-38-1, et seq.

16.02 SURETY AND GUARANTY COMPANIES:

Organization.

Surety, guaranty and fidelity companies are classified as insurance companies and are subject to regulation by Department of Insurance. See topic 16.01 Insurance Companies.

Release from Liability.

Company may be released from liability on any bonds, obligations or undertakings on same terms as are prescribed for release of individuals. (NCGS 58-73-15).

Failure to Discharge Judgment.

If surety company against which judgment is recovered fails to discharge same within 60 days from time of rendition, it forfeits right to do business in the state, and Insurance Commissioner must cancel its license. (NCGS 58-73-25).

Foreign Companies.

See topic 16.01 Insurance Companies.

Taxation.

See topic 16.01 Insurance Companies.

17 INTELLECTUAL PROPERTY

17.01 TRADEMARKS AND TRADENAMES:

Any person who uses trademark or service mark, or who controls nature and quality of goods or services in connection with which mark is used by another, may file for registration of such mark. (NCGS 80-3).

Timber marks, farm names, stamping of gold and silver articles, cattle and livestock brands, etc. (NCGS 80-15, -33, -40, -41, -45, et seq.).

For cream, milk and ice cream, see G.S. NCGS 106-253.

Employer's rights to inventions of employee governed by G.S. NCGS 66-57.1, et seq.

Mark Defined.

Any word, name, symbol, or device, or combination thereof, used to identify goods or services and to distinguish them from goods or services of others. (NCGS 80-1).

Registrability.

Mark may not be registered if it consists of non-registrable matter (i.e., scandalous, immoral, deceptive, disparaging or falsely suggestive of association; simulating governmental insignia; containing name, portrait or signature of living person without consent; merely descriptive, falsely descriptive, primarily geographically descriptive or deceptively misdescriptive of goods or services; primarily merely surname, unless distinctive as to user's goods or services; or likely to cause confusion with previously registered mark). (NCGS 80-2).

Registration.

Mark is registered with Secretary of State for registration fee of $75 and may cover goods or services for which mark is actually being used. (NCGS 80-3). Upon compliance with foregoing, Secretary of State registers mark and delivers to registrant certified copy of registration. (NCGS 80-4). Registration is effective for ten years, renewable for successive ten-year terms upon filing and payment of $35 fee within six months prior to expiration of term. (NCGS 80-5). Within six months following fifth year of initial ten-year term and each renewal term of registration, specimen statement verifying continued use must be filed with Secretary of State. (NCGS 80-5). Secretary of State shall cancel any registration which has: (1) Been voluntarily cancelled; (2) not been renewed; (3) been abandoned or found now incapable of serving as mark; (4) been registered by nonowner of mark; (5) been granted improperly; (6) been obtained fraudulently; (7) become generic name for goods or services or portion thereof for which it has been registered; (8) been obtained by false statements in application for registration; (9) been found so similar to another mark used in state as to likely cause confusion, mistake or deception, if other mark had been registered first by another person in U.S. Patent and Trademark Office and has not been abandoned; provided that registrant may keep registration if he proves he owns concurrent registration of mark with U.S. patent office covering entire area of state; or (10) been ordered cancelled by court of competent jurisdiction. (NCGS 80-8).

Infringement.

No reproduction, counterfeit, copy, or colorable imitation of mark may be used in sale, offering for sale, or advertising of goods or services or in connection with which such use is likely to cause confusion or mistake or to deceive as to origin of such goods or services. Nor may anyone apply such reproductions, counterfeits, copies, colorable imitations to labels, signs, prints, packages, wrappers, receptacles, or advertisements intended to be used upon or in conjunction with sale or distribution of goods or services. (NCGS 80-11).

Protection Afforded.

Violations of or causes of action arising under G.S. NCGS 80-10 or -11 after Dec. 01, 1995, constitute violations of G.S. NCGS 75-1.1, deceptive or unfair trade practices. (See G.S. NCGS 75-16 for description of available remedies.) Act does not affect registrant's rights acquired at common law. (NCGS 80-13).

Counterfeit trademark is mark that is used in connection with sale or offering for sale of goods or services that are identical to or substantially indistinguishable from goods or services with which mark is used or registered, and use of which is likely to cause confusion, mistake, or deception, with use occurring without authorization of owner of registered mark or owner of unregistered mark, when mark is used without authorization of owner and mark in question is identical to, or substantially indistinguishable from, symbols, signs, emblems, insignias, trademarks, tradenames, or words protected by Amateur Sports Act, 36 U.S.C. 220506 (2002). Use of counterfeit mark or possession, custody, or control of goods bearing counterfeit mark, intended for sale is felony if value of counterfeit goods exceeds $3,000. Possession, custody, or control of more than 25 items having counterfeit mark used thereon or in connection therewith creates presumption that those items were intended for sale. Use, possession, custody, or control of any object, tool, machine, or device used to produce or reproduce counterfeit marks is also felony. Penalties increase in severity based on retail sales value of goods bearing counterfeit mark. (NCGS 80-11.1).

Assignment.

Registration may be assigned upon filing and payment of $25 fee. Secretary of State must issue new certificate to assignee. (NCGS 80-6).

Resale Price Agreements.

Fair Trade Act repealed.

What May Be Used.

See subheads Mark Defined and Registrability, supra.

Tradenames.

Unless exempt under G.S. NCGS 66-68(c) as partnership or limited liability company engaged in rendering professional services as defined in G.S. NCGS 55B-2(6), before any person or partnership engages in business in any county under assumed name or name other than real name of owner or owners thereof, before any limited liability company engages in business in any county other than under name set up in articles of organization, or before any corporation engages in business under any name other than its corporate name, such person, partnership, limited partnership, limited liability company, or corporation must file certificate in office of register of deeds showing assumed name and true name of owner or owners and each owner's address. (NCGS 66-68[a]). Filing requirement does not apply when business maintains no place of business in county and is by mail, sample, or traveling agents. (NCGS 66-68[d]).

If owner is individual or partnership, certificate must be signed and acknowledged by individual owner or by each general partner. If owner is corporation, certificate must be signed in name of corporation. When general partner withdraws or new general partner joins, new certificate must be filed. (NCGS 66-68[c]). Any assumed name may be withdrawn or transferred when its owner ceases to engage in business in state under assumed name. (NCGS 66-68). Every partnership other than limited partnership must comply with assumed name statutes. (NCGS 59-84.1).

If any person transacts business as trader or merchant, with addition of words “factor”, “agent”, “& company” or “& Co.”, or conducts such business under any name or style other than his own, except in case of corporation, and fails to disclose name of his principal or partner by sign placed conspicuously at place where such business is conducted, all property, stock of goods and merchandise and choses in action purchased, used and contracted in course of such business is, as to creditors, liable for debts contracted in course of such business by person in charge of same. (NCGS 66-72).

Any person, partner, or corporation failing to file certificate as required by G.S. NCGS 66-68(a) or (c) shall be guilty of class 3 misdemeanor and shall be liable in amount of $50 to any person demanding that certificate be filed, if he fails to file certificate within seven days of demand. (NCGS 66-71).

17.02 TRADE SECRETS:

Trade Secret Protection Act adopted. (NCGS 66-152, et seq.).

Under N.C. Trade Secrets Protection Act, “trade secret” is defined as “business or technical information, including but not limited to formula, pattern, program, device, compilation of information, method, technique or process that: (a) Derives independent actual or potential commercial value from not being generally known or readily ascertainable through independent development or reverse engineering by persons who can obtain economic value from its disclosure or use; and (b) is subject of efforts that are reasonable under circumstances to maintain its secrecy.” (NCGS 66-152[3]).

Violation of Trade Secrets Protection Act is unfair and deceptive trade practice governed by G.S. NCGS 75-1.1, 108 N.C. App. 169; 423 S.E.2d 324.

Owner of trade secret has civil action for misappropriation of trade secret. (NCGS 66-153). Remedies include preliminary and permanent injunctions, actual damages and punitive damages and attorneys' fees if misappropriation willful and malicious. (NCGS 66-154). Three year statute of limitations for misappropriation claim from date when misappropriation was or reasonably should have been discovered. (NCGS 66-157).

18 LEGAL PROFESSION

18.01 ATTORNEYS AND COUNSELORS:

This subject is governed by G.S. c. 84.

North Carolina State Bar is integrated. Membership consists of all persons licensed to practice law in state, together with certain honorary members. No person other than a member (except attorneys of other states permitted to practice through comity and natural persons representing themselves) may practice law in this state. (NCGS 84-16).

Annual membership fee determined by state bar council, but must not exceed $300, plus surcharge of $50 toward North Carolina Public Campaign Fund. (NCGS 84-34).

Government of state bar is vested in council, consisting of councilor from each judicial district, additional councilors allocated on basis of lawyer population, and its elected officers. (NCGS 84-17).

Jurisdiction over Admissions.

Attorneys before being admitted to practice law must take oath prescribed for attorneys in open court before justice or judge of general court of justice. (NCGS 84-1).

Eligibility.

Applicant for admission to bar must be 18 years of age. (Rules Governing Admission to the Practice of Law §0501, adopted pursuant to NCGS 84-24).

Registration As Law Student.

Not required.

Educational Requirements.

Every applicant applying for admission to practice law in state of N.C., before being granted license to practice law, shall prove to satisfaction of board that said applicant has graduated from law school approved by council of N.C. State Bar or that said applicant will graduate within 30 days after date of written bar examination from law school approved by council of N.C. State Bar. There shall be filed with secretary certificate of dean, or other proper official of said law school, certifying date of applicant's graduation. List of approved law schools is available in office of secretary. (Rules Governing Admission to the Practice of Law §.0702).

Petition for Admission.

Application must be filed at offices of Board of Law Examiners by 1st Tues. in Jan. immediately preceding July bar examination and by 1st Tues. in Oct. immediately preceding Feb. bar examination. (Rules Governing Admission to the Practice of Law §.0403). Fee for residents taking examination is $600 for applicant who is not licensed attorney in any other jurisdiction and $1,200 otherwise. (Rules Governing Admission to the Practice of Law §.0404). Board of Law Examiners furnishes application blanks which indicate information desired and certificates of moral character required. (NCGS 84-24; Rules Governing Admission to the Practice of Law §§.0401-.0402). All applicants for admission to bar shall be fingerprinted to determine whether applicant has criminal conviction in N.C. or any other state or jurisdiction. (NCGS 84-24).

Examination.

See subhead Petition for Admission, supra.

Time of Examination.

Board may hold bar examinations at such times as it may see fit to do so. (NCGS 84-24). Exams currently offered in Feb. and July. (Rules Governing Admission to the Practice of Law

§.0902).

Multistate Bar Examination is used in addition to state examination. Subjects tested in state portion are: Business associations (including agency, corporations and partnerships), civil procedure, constitutional law, contracts, criminal law and procedure, evidence, family law, legal ethics, real property, security transactions including Uniform Commercial Code, taxation, torts, trusts, wills, decedents' estates and equity. (Rules Governing Admission to the Practice of Law §.0903).

Clerkship.

Not required.

Admission Without Examination.

Any attorney at law duly admitted to practice in another state, or territory of U.S., or District of Columbia, upon written application may, in discretion of board, be licensed to practice law in N.C. without written examination provided each such applicant shall: (1) File with secretary, upon such forms as may be supplied by board, typed application in duplicate which will be considered by board after at least six months from date of filing; (2) pay to board, with each application, fee of $1,500, no part of which may be refunded to applicant whose application is denied; (3) prove to satisfaction of board that applicant is duly licensed to practice law in state, or territory of U.S., or District of Columbia having comity with N.C. and that in such state, or territory of U.S., or District of Columbia, while so licensed therein, applicant has been for at least four out of last six years, immediately preceding filing of his application with secretary, actively and substantially engaged in full-time practice of law. (Rules Governing Admission to the Practice of Law §.0502).

Privileges.

Member of bar, when admitted, is licensed to practice law in all state courts. (NCGS 84-16).

Licenses.

Upon compliance with rules of board, and all orders of board, secretary, upon order of board, shall issue license to practice law in N.C. to each applicant as may be designated by board in form and manner as may be prescribed by board, and at such times as prescribed by board. (Rules Governing Admission to the Practice of Law §.1302).

Admission Pro Hac Vice.

Attorney of another state may be permitted to represent client in state courts, or before N.C. Utilities or Industrial Commissions, or Office of Administrative Hearings of N.C., on motion to court setting out name, address, bar membership number, and status as practicing attorney in another state. Statute requires client's statements that he has retained attorney and that attorney will represent client throughout proceeding unless excused by court and will submit to orders, jurisdiction and discipline of court and N.C. State Bar as if licensed in this state, statement showing that state in which attorney admitted has reciprocal provision for practice of members of bar of this state, statement showing association with resident attorney admitted to practice in this state who will appear personally, has agreed to file registration statement with N.C. State Bar, and upon whom effective service may be had in all matters concerned with proceeding or any disciplinary matter, with same effect as if personally made on foreign attorney within this state, and statement accurately disclosing all of attorney's disciplinary history, including public discipline by any court or lawyer regulatory organization and revocation of any pro hac vice admission, and $225 fee. (NCGS 84-4.1).

Liabilities.

Attorney is subject to control of court, and may be summarily required to account for and pay over moneys collected, and is liable to summary punishment for misconduct. He is guilty of embezzlement if he misappropriates his client's money or personal property. If an attorney commits any fraudulent practice, double damages may be assessed. (NCGS 84-13; 125 N.C. App. 660, 482 S.E.2d 6).

Lien.

The common law applies to attorneys' liens. A lien on a judgment or recovery is recognized. (182 N.C. 459, 109 S.E. 378).

Compensation.

There is no statute regulating the compensation of attorneys. Attorney-client fee contract upheld if reasonable and freely and fairly made. (286 N.C. 99, 209 S.E.2d 476).

Proof of Authority.

Attorney claiming to appear for any party may be required to produce and file in office of clerk of court a power of attorney signed by person or persons or some of them, for whom he is about to appear, or some person authorized on their behalf. (NCGS 84-11).

Disabilities.

No member of bar, in any case, suit, action or proceeding in which he appears as counsel, and no employee of general court of justice, employee of sheriff's department, or other law enforcement officer, shall act as surety in any suit, action or proceeding pending in any division of general court of justice. (Rules of Superior and District Courts. R. 20).

Disbarment or Suspension.

Council of the N.C. State Bar may admonish, reprimand, censure, suspend or disbar for: (1) Conviction of, or tender and acceptance of plea of guilty or no contest to, criminal offense showing professional unfitness; (2) violation of Rules of Professional Conduct adopted and promulgated by council of the N.C. State Bar in effect at time of act; or (3) knowing misrepresentation of any facts or circumstances surrounding any complaint, allegation or charge of misconduct; failure to answer any formal inquiry or complaint issued by or in name of the N.C. State Bar in any disciplinary matter; or contempt of council or any committee of the N.C. State Bar. (NCGS 84-28). These provisions do not abridge inherent powers of court to deal with its attorneys. (257 N.C. 534, 126 S.E.2d 581).

Attorney Ethics.

N.C. State Bar is vested with control of discipline, disbarment and restoration of attorneys in N.C. (G.S. c. 84). In 1985, state bar council adopted and N.C. Supreme Court approved N.C. Rules of Professional Conduct patterned after A.B.A.'s Model Rules of Professional Conduct, with certain modifications thereto.

Unauthorized practice of law may be investigated and prosecuted by state bar council or any committee appointed for that purpose. (NCGS 84-37).

Corporations and persons other than members of N.C. State Bar are, with certain exceptions, prohibited from practicing law. (NCGS 84-4, -5).

Mandatory Continuing Legal Education.

Active members of N.C. State Bar who are N.C. residents must complete 12 hours of approved continuing legal education annually. Of the 12 hours, at least two hours shall be devoted to area of professional responsibility or professionalism or any combination thereof, and at least once every three calendar years, each member shall be required to attend specially designed three-hour block course of instruction devoted to area of professional responsibility or professionalism or any combination thereof. Members may carry over up to 12 credit hours earned in one calendar year to next calendar year, which may include those hours counting towards annual two-hour credit requirement in professional responsibility or professionalism but not three-hour block course credit in professional responsibility and professionalism required triennially. Additionally, newly admitted active member to N.C. State Bar may include as credit hours which may be carried over to next succeeding year, any approved CLE hours earned after that member's graduation from law school. (Rules of N.C. State Bar, c. 1, subch. D, §.1518). Exemptions to CLE requirement are governed by Rules of N.C. State Bar, c. 1, subch. D, §.1517. Each active member of N.C. State Bar shall make annual written report to N.C. State Bar showing compliance or declaring exemption for preceding year in such form as board shall prescribe by regulation, unless board's records indicate that such member has been previously exempted and circumstances resulting in exemption are unchanged. It shall be responsibility of any previously exempted member whose circumstances have changed and who is therefore not presently qualified for exemption to notify board of such changed circumstances within 30 days after such becomes apparent and to satisfy fully requirements of these rules for year following such change in circumstances. (Rules of N.C. State Bar, c. 1, subch. D, §.1522).

Specialty Certification Requirements.

Certification is established in areas of Bankruptcy, Estate Planning and Probate, Real Property, Family, Criminal, Immigration, and Worker's Compensation. (Rules of N.C. State Bar, c. 1, subch. D., §§.1725 and 1800, et seq.).

Professional Associations.

See category 2 Business Organizations, topic 2.03 Corporations, subhead Professional Corporations.

19 MINERAL, WATER AND FISHING RIGHTS

19.01 MINES AND MINERALS:

The Mine Safety and Health Act of North Carolina was adopted effective Jan. 1, 1976. Agency designated to administer act is Department of Labor. (NCGS 74-24.1, et seq.).

It is made duty of Commissioner of Labor to develop, adopt, revise and promulgate safety and health standards for purpose of protection of life, promotion of safety and health, and prevention of “accidents” in mines. Commissioner is to appoint advisory council to assist him in development of safety and health standards for mines and to advise him on matters relating to safety and health in such mines. (NCGS 74-24.4, .6).

Operation of Mines.

Each mine is subject to provisions of act, and each operator of such mine must comply with all standards, rules, regulations, orders, and notices adopted or issued under act. Operator of such mine is responsible for health and safety of all miners in mine, and must assure insofar as practicable conditions of work and places of work free from hazards that are causing or likely to cause death or serious physical harm. (NCGS 74-24.3).

Safeguarding of Employees.

See subhead Operation of Mines, supra.

Inspection and Investigation of Mines.

Commissioner through director must make as many inspections and investigations in mines each year as are deemed necessary to effectively and accurately fulfill requirements of: (1) Obtaining, utilizing, and disseminating information relating to health and safety conditions, causes of "accidents" and causes of illnesses and physical impairments originating in such mines; (2) gathering information with respect to necessity for health and safety standards; (3) determining whether imminent danger exists; (4) determining whether or not there is compliance with safety and health standards or with any notice, order, or decision issued under act; (5) in carrying out requirements of (4), no advance notice of inspection will be provided to any mine operator, official, miner, representative of miners, or other person, except that commissioner or director may authorize giving of advance notice only when such notice is essential to effectiveness of inspection. (NCGS 74-24.7[a]). For purposes of making investigation of any "accident" relating to safety and health in mine, commissioner may hold hearings and may issue subpoenas for attendance and testimony of persons and production of relevant documents. (NCGS 74-24.7[c]). In event of "accident" occurring in mine, operator shall notify commissioner and shall take appropriate measures to prevent destruction of any evidence which would assist in investigating cause(s) thereof. In event of any "accident" occurring in mine where rescue and recovery work is necessary, commissioner shall take whatever action he deems appropriate to protect life of any person. (NCGS 74-24.7[d]). In event of any "accident" occurring in mine, commissioner may issue any orders he deems appropriate to insure safety of any person in mine, and operator shall obtain approval of commissioner or his authorized representative, when feasible, for any plan to recover any person in mine or to recover mine or to return affected areas of mine to normal. (NCGS 74-24.7[e]).

Whenever any miner or representative of miners has reasonable grounds to believe that a violation of safety or health standard exists, or that imminent danger exists, such miner or representative of miners may request inspection by giving notice to commissioner or director of such violation or danger. (NCGS 74-24.7[f]). If it is determined imminent danger exists, commission shall restrict activity in that area of mine. (NCGS 74-24.8).

Mandatory Reporting.

Under such regulations as he may prescribe, commissioner must require that: (1) Operators of mines which are subject to act submit, at least annually and at such other times as he deems necessary, and in such form as he may prescribe, reports of "accidents," injuries, occupational disease, and related data, and commissioner through director shall compile, analyze, and publish, either in summary or detailed form, information obtained; and all information, reports, orders, or findings, obtained or issued under act may be published or released to any interested person, and shall be made available for public inspection; (2) all "accidents" must be investigated by operator or his agent to determine cause and means of preventing recurrence. Records of such "accidents" and investigations must be kept, and information must be made readily available for inspection by commissioner or his authorized representative. Such records shall include man-hours worked and must be reported for periods determined by commissioner, but at least annually; and (3) operators of mines which are subject to act shall notify commissioner, before starting operations, of approximate or actual date mine operations will commence. Notification must include mine name, location, company name, mailing address, person in charge, and whether operations will be continuous or intermittent. When any mine subject to act is closed, operator must notify commissioner of such closure and indicate whether closure is temporary or permanent. (NCGS 74-24.13).

Criminal Penalties.

Any person who: (i) Willfully violates any standard, order, notice, decision, rule, or regulation issued under act, causing death or serious physical harm to another; (ii) knowingly makes any false statement, representation, or certification in any application, record, report, plan, or other document filed or required to be maintained pursuant to act or required by any order, notice, or decision issued under act; (iii) knowingly distributes, sells, offers for sale, introduces, or delivers any equipment, machinery, article, or apparatus which is represented as complying with provisions of act, or with any specification or regulation of commissioner applicable to such equipment, machinery, article, or apparatus and knowing it does not so comply shall be guilty of a class 2 misdemeanor. In any instance in which such offense is committed by corporation, officer or authorized representative of such corporation who knowingly permits such offense to be committed shall, upon conviction, be subject to same fine or imprisonment, or both. (NCGS 74-24.14).

The Mining Act of 1971.

General Assembly finds that extraction of minerals by mining is basic and essential activity making important contribution to economic well-being of N.C. and nation. General Assembly finds that conduct of mining and reclamation of mined lands as provided by act will allow mining of valuable minerals and will provide for protection of state's environment and for subsequent beneficial use of mined and reclaimed land. (NCGS 74-46, et seq.). Mining Commission is given authority to promulgate rules as may be necessary to administer act. (NCGS 74-63).

Permits are required for any operator desiring to engage in mining. Application must be accompanied by reclamation plan. (NCGS 74-50, -51). Prior to obtaining new or modifying existing mining permit, applicant or operator must first satisfy to department that reasonable efforts were taken to notify interested parties to land, including: (1) Chief administrative officer of mining county, (2) owners of record of land within 1,000 feet adjoining permitted area, and (3) owners of record of land lying directly across and contiguous to any highway; creek, stream, river, or other watercourse; railroad track; or utility or other public right-of-way within 1,000 feet of permit boundaries. (NCGS 74-50[b], -50[b][1]). Within 30 days upon receipt of mining permit application, department shall send notice to any appropriate state and federal agencies for review and comments. (NCGS 74-50[b][3]). Reclamation bonds are required, and applicant can submit either separate or blanket bond. (NCGS 74-54).

Penalties include injunctions, civil penalties of not more than $5,000 for failure to secure valid operating permit prior to engaging in mining and of not more than $500 per offense against any permitted operator who violates any provisions of act or rules; and criminal penalties of not less than $100 nor more than $1,000 for each offense. Each day of continuing violation constitutes separate offense. (NCGS 74-64).

Oil and Gas.

Any person, firm or corporation before making any drilling exploration for oil or natural gas must register with Department of Environment and Natural Resources or other appropriate state agency and must furnish bond in amount of $5,000. (NCGS 113-378). On Dec. 31 of each year or within ten days thereafter, every person, firm or corporation holding petroleum leases must file in office of register of deeds in county where land is located, list showing leases which have been renewed for ensuing year. (NCGS 113-414). Before any well is drilled, Petroleum Division of Department must be notified and sum of $50 paid for each well and permit granted. (NCGS 113-395). If owner's well gets out of control, division has right, after 24 hours from service of written notice by division on owner or person in possession, to undertake operations to control well. (NCGS 113-396). State may place limitations on production of oil or gas. (NCGS 113-394).

Uranium.

No person shall engage in exploration activity for discovery of uranium without having first obtained from department exploration permit which covers affected land and which has not terminated, been revoked, or otherwise become invalid. (NCGS 74-77). Each permit holder must maintain in force bond to be determined by Department of Environment and Natural Resources. (NCGS 74-79).

Taxes.

No special provisions.

Ancient Mineral Claims.

Fee simple title to certain oil, gas or mineral interests severed from fee simple title to surface land is extinguished if claims are not exercised or in adverse possession of another. (NCGS 1-42.1 to .8). Fee simple oil, gas or mineral interest may be preserved and kept effective by recording within two years after Jan. 1, 1986, written notice, sworn and subscribed before official authorized to take probate, which sets forth nature of oil, gas or mineral interest and gives book and page where recorded. (NCGS 1-42.9). Notice must be probated and recorded. (NCGS 1-42.9).

See also category 12 Environment, topic 12.01 Environmental Regulation.

20 MORTGAGES

20.01 CHATTEL MORTGAGES:

Uniform Commercial Code adopted. (NCGS 25-1-101 to NCGS 25-11-108). See category 3 Business Regulation and Commerce, topic 3.09 Commercial Code.

What May be Mortgaged.

Prior chattel mortgage law repealed. U.C.C. governs. See category 3 Business Regulation and Commerce, topic Commercial Code for material variations and optional provisions of 1962 official text.

Execution.

See category 3 Business Regulation and Commerce, topic 3.09 Commercial Code.

Filing.

Place and fees for filing governed by U.C.C. (NCGS 25-9-501 to -526).

Recording.

See category 3 Business Regulation and Commerce, topic 3.09 Commercial Code.

Removal of Property.

See category 3 Business Regulation and Commerce, topic 3.09 Commercial Code.

Future Advances.

See category 3 Business Regulation and Commerce, topic 3.09 Commercial Code.

Disposal of Property.

Misdemeanor to fraudulently dispose of personal property on which there is security interest by person with intent to defeat rights of secured party. Person's refusal to turn over secured property to secured party who is attempting to repossess property without judgment or order for possession, shall not, by itself, be violation of this section. (NCGS 14-114).

Motor Vehicles.

See category 23 Transportation, topic 23.01 Motor Vehicles, subhead Titles, Sales and

Liens.

Forms at end of Digest have been approved by Secretary of State.

Satisfaction or Discharge.

See topic 20.04 Mortgages of Real Property, subhead Satisfaction.

Sales Under Power.

Procedure governed by Commercial Code. (NCGS 25-9-601 to -627). See category 3 Business Regulation and Commerce, topic Commercial Code for material variations and optional provisions of 1962 official text.

20.02 COLLATERAL SECURITY:

See category 8 Debtor and Creditor, topic 8.15 Pledges.

20.03 MORTGAGES OF PERSONAL PROPERTY:

See topic 20.01 Chattel Mortgages; category 3 Business Regulation and Commerce, Commercial Code.

20.04 MORTGAGES OF REAL PROPERTY:

Forms.

Deed of trust is instrument normally used in N.C., standard form of which is at end of this Digest.

Title.

Legal title to property vests in mortgagee or, in case of a deed of trust, in trustee. Equitable title remains in mortgagor. (186 N.C. 191, 119 S.E. 210).

Substitution of Trustee.

Holders or owners of majority of debt may substitute trustees by recorded instrument. (NCGS 45-10).

Execution.

Since mortgages and deeds of trust are conveyances of interest in real property, and seal of signatory is not necessary to effect valid conveyance of interest in real property (NCGS 39-6.5), mortgages and deeds of trust are not required to be executed under seal.

As to purchase money mortgages, see category 14 Family, topic 14.09 Husband and Wife.

See also category 21 Property, topic 21.10 Landlord and Tenant, subhead Leases.

Recording.

Deeds must be acknowledged by grantor or signature proven by witness before registration. All properly executed and registered deeds shall be valid and pass title and estates without livery of seizin, attornment or other ceremony. (NCGS 47-17). Mortgages and deeds of trust must be registered in each county in which land lies and are only valid as against lien creditors or purchasers for valuable consideration from date of registration. (NCGS 47-20, -20.1). But mortgage is valid between parties without registration. (196 N.C. 784, 147 S.E. 307).

Recording Fees.

Fee for probate is $2 per acknowledgment. For registering or filing any instrument for which no other provision is made by this section, whether written, printed, or typewritten, fee shall be $12 for first page plus $3 for each additional page or fraction thereof. When document is presented for registration that consists of multiple instruments, fee shall be $10 for each additional instrument. Document consists of multiple instruments when it contains two or more instruments with different legal consequences or intent, each of which is separately executed and acknowledged and could be recorded alone. Deeds of trust, mortgages, and cancellation of deeds of trust and mortgages, whether written, printed, or typewritten, fee shall be $12 for first page plus $3 for each additional page or fraction thereof. When deed of trust or mortgage is presented for registration that contains one or more additional instruments, fee shall be $10 for each additional instrument. Deed of trust or mortgage contains one or more additional instruments if such additional instrument or instruments has or have different legal consequences or intent, each of which is separately executed and acknowledged and could be recorded alone. (NCGS 161-10).

Trust Deeds.

See subhead Execution, supra.

Future Advances.

Mortgage may secure future advances if security instrument shows it is given to secure future advances, amount of present obligations secured and maximum that may be secured at any one time, and period within which such future obligations may be incurred not to exceed 15 years from date of security instrument. (NCGS 45-68[1]).

Equity Lines of Credit.

Mortgage or deed of trust showing on face that it secures equity line of credit has same priority to extent of all advances secured as if advances had been made at time of execution notwithstanding that there is no balance outstanding from time to time. (NCGS 45-82). Provisions of G.S. NCGS 45-68, et seq. governing future advances (see subhead Future Advances, supra) do not apply to instrument which shows on face that it secures equity line of credit. (NCGS 45-83).

Priorities.

Mortgage is valid as against other lien creditors or subsequent purchasers when recorded. (NCGS 47-20; 214 N.C. 800, 200 S.E. 861). Mortgages filed at same time are equal. (207 N.C. 621, 178 S.E. 222).

Mortgages, deeds of trust, have same priority from date of registration to extent all future advances secured by them, as if advances made at time of execution.

Release.

See subhead Satisfaction, infra.

Satisfaction.

Registered deed of trust or mortgage may be discharged and released by recording record of satisfaction and if practical by cancellation in margin of record by register of deeds in accordance with methods set forth in G.S. NCGS 45-37(a).

Discharge.

See subhead Satisfaction, supra.

Foreclosure.

In all cases where clerks of superior court enter judgment by default final upon any debt secured by mortgage, deed of trust, or other conveyance of any kind, said clerks of superior court are authorized and empowered to order foreclosure of such mortgage, deed of trust or other conveyance, and order sale of property so conveyed upon such terms as appear to be just; and said clerks of superior court have all power and authority now exercised by judge of superior court to appoint commissioners to make such sales, to receive reports thereof, and to confirm report of sale of or to order resale, and to that end they are authorized to continue such causes from time to time as may be required to complete sale, and in final judgment in said causes they shall order execution and delivery of all necessary deeds and make all necessary orders disbursing funds arising from sales and may issue writs of assistance and possession upon ten days notice to parties in possession. (NCGS 1-209[5]).

Sales.

Procedure governed by art. 2A of G.S. c. 45.

Notice and Hearing.

Mortgagee or trustee granted power of sale under mortgage or deed of trust who seeks to exercise such power of sale must file with clerk of court notice of hearing. After notice of hearing is filed, it must be served upon each party entitled to notice under G.S. NCGS 45-21.16 As to owner occupied residential property clerk, after inquiry made of parties, may continue hearing upon finding that additional time or additional measures have reasonable likelihood of resolving delinquency without foreclosure. (NCGS 45-1.16C)

Power of sale in mortgage or deed of trust becomes inoperative when action to foreclose becomes barred by statute of limitations. (NCGS 45-21.12[a]). If notice of sale is published or posted within time allowed by statute of limitations, sale may be completed although such completion is effected after time when commencement of action to foreclose would be barred. (NCGS 45-21.12[b]). Foreclosure is barred when ten years have lapsed since forfeiture or since power of sale became absolute or since last payment and mortgagor had possession during entire ten years. (87 N.C. App. 481, 361 S.E.2d 409).

Deficiency judgment after foreclosure sale of real property under mortgage or deed of trust may be defeated, in whole or in part, by showing, in defense, that property purchased by mortgagee, payee or other holder of secured obligations was fairly worth amount of debt secured by it or that amount of bid was substantially less than its true value. (NCGS 45-21.36). Owner of any legal or equitable interest in property may secure injunctive relief against sale, at any time before rights of parties to sale become fixed under G.S. NCGS 45-21.29A, by application to judge of superior court, showing that amount bid is inadequate and inequitable and that completion of sale will result in irreparable damage to him, and giving bond to secure any person affected against damage resulting from granting of injunction. (NCGS 45-21.34).

Action for deficiency judgment must be commenced within one year after foreclosure sale. (NCGS 1-54[6]). Deficiency judgments abolished where mortgage secured by primary residence. (NCGS 45-21.38A)

Redemption.

After valid foreclosure sale by order of court, or by power of sale of mortgaged premises, there is no equity of redemption. (220 N.C. 120, 16 S.E.2d 662).

Chattel Mortgages.

See topic 20.01 Chattel Mortgages.

Mortgage Lenders, Licensing and Regulation

North Carolina Secure and Fair Enforcement (S.A.F.E.) Mortgage Licensing Act provides for licensing and regulation of mortgage brokers, mortgage lenders, mortgage servicers and mortgage loan originators. (NCGS 53-244.010 et seq.)

21 PROPERTY

21.01 ABSENTEES:

Care of Property.

If any person having an interest in property in N.C., unless listed as P.O.W. or M.I.A. (NCGS 28C-20), is absent and his whereabouts are unknown for period of 30 days or more, any interested person may commence civil action in superior court of either county of absentee's domicile or county where any of his property is located (NCGS 28C-2). Upon filing of complaint, judge may, for cause shown, appoint temporary receiver to take charge of property of absentee to conserve it pending hearing on complaint. Temporary receiver will post bond and, within 30 days after appointment, file inventory of property of absentee. (NCGS 28C-3). Upon filing of inventory by temporary receiver, judge will issue notice to all interested persons advising of appointment of receiver, setting out substance of complaint, and directing interested persons to file, within designated time, written statement of any interest claimed in property of absentee and to appear at designated time and place to show cause why permanent receiver should not be appointed. (NCGS 28C-4). Notice shall be served as prescribed by the N.C.R.Civ.P.; service by publication is required upon absentee and upon interested persons who cannot be found after exercise of due diligence. One copy of notice must be posted upon each parcel of land owned by absentee and one copy will be sent by registered or certified mail with return receipt requested to last known address of absentee. (NCGS 28C-5).

Absentee or any interested person may appear and show cause why permanent receiver should not be appointed. Judge may, after hearing, dismiss petition or make finding that absentee disappeared on stated date and appoint a permanent receiver. (NCGS 28C-6). Upon posting of bond by permanent receiver, judge will order temporary receiver to transfer and deliver custody and control of absentee's property to permanent receiver. (NCGS 28C-7). Permanent receiver will, under direction of judge, administer absentee's property as equity receivership with powers enumerated in G.S. NCGS 28C-8. Judge shall also order receiver to make search for absentee and will specify manner in which such search is to be conducted. (NCGS 28C-9).

Administration of Estate.

Upon appointment, permanent receiver must publish notice addressed to all persons having claims against absentee informing them to file their claims under oath within six months from date of first publication. (NCGS 28C-10).

At any time during receivership proceedings, upon application to judge by any party in interest, and upon presentation of satisfactory evidence, judge may make final finding and decree that absentee (a) Has been found, or (b) is dead. (NCGS 28C-1). After lapse of four years from date of finding of disappearance, if absentee has not appeared and no finding or decree is made in accordance with (a) and/or (b) above, judge may proceed to take further evidence and thereafter make final finding. Upon final finding of return of absentee, receivership shall be dissolved. (NCGS 28C-14). Upon finding that interest of absentee has ceased and devolved upon others by reason of his failure to appear and make claim, or upon finding that absentee is dead, judge will proceed to wind up receivership and terminate proceedings by administration of absentee's estate under will of absentee or under laws applicable to intestate succession as though absentee died intestate on date five years after date of his disappearance as determined by judge in his final finding and decree. (NCGS 28C-12 and -13). Laws of administration of decedents' estates are applicable (NCGS 28C-16); however, in each case of termination of receivership, except where absentee has returned, judge shall set aside portion of absentee's estate for "Absentee Insurance Fund." Percent set aside is prescribed by Treasurer of State on basis of actuarial experience. (NCGS 28C-19).

Person declared absentee and whose estate has been distributed under final finding and decree must personally appear before treasurer and make claim for reimbursement from "Absentee Insurance Fund" and superior court of Wake county may, where action is begun within three years from date of absentee's return, enter judgment ordering payment to claimant of such part of accumulated funds as in its opinion is found to be fair, adequate and reasonable under circumstances. (NCGS 28C-19).

Defense of Actions.

Persons absent from state and not personally served by process in state, in all actions except actions for divorce, annulment, certain actions to foreclose taxable certificates and actions against nonresident motorists where constructive service on Secretary of State is used (247 N.C. 586, 101 S.E.2d 423), may defend suit upon showing sufficient cause at any time before judgment; and upon good cause shown to defend after judgment at any time within five years, and within one year after notice of judgment. (NCGS 1A-1, R. 60 [b]). If judgment has been executed and subsequent defense is successful, restitution may be compelled. But title to property sold to purchaser in good faith under such judgment cannot be thereby affected; neither does this rule apply to funds distributed, nor to lands sold in partition, as to purchaser in good faith. (NCGS 1-108).

Process Agent.

See category 5 Civil Actions and Procedure, topic 5.20 Process.

Escheat.

When owner of real or personal property located in state dies wholly intestate or intestate as to any portion of his estate and where such deceased leaves no heirs, as defined in G.S. NCGS 29-2(b), intestate property will escheat to Escheat Fund. (NCGS 116B-2). For purposes of escheat, aforementioned provision applies to estate of person missing for 30 days or more and State Treasurer may bring action to have receiver appointed. (NCGS 116B-3).

Each sheriff and police department must keep record of all personal property acquired by seizure or otherwise, showing, if known, name of person from whom seized, date and place of acquisition and recital of circumstances of acquisition. (NCGS 15-11). If not claimed within 180 days, notice published one time in county newspaper advising that claim must be made within 30 days is sufficient authority for officer to sell property after first publishing proper notice of sale in county paper and at courthouse door and three other public places at least ten days before sale. (NCGS 15-12 to -14). Proceeds from sale (after costs and expenses of sale) are paid to treasurer of county board of education. (NCGS 15-15).

See also categories 3 Business Regulation and Commerce, topic Banks and Banking, subhead Unclaimed Deposits; Estates and Trusts, topic Descent and Distribution, subhead Escheat.

Military Absentees in Service.

Special provisions govern where absentee is listed as a prisoner of war or as missing in action. (NCGS 28B-1 to -10).

Service of Process on Absentee.

See category 5 Civil Actions and Procedure, topic 5.20 Process.

21.02 ADVERSE POSSESSION:

Character and Duration of Possession.

The state is barred by 30 years adverse possession of land under known and visible boundaries or by similar adverse possession for 21 years under color of title. Any person claiming under state is barred in same manner as state. (NCGS 1-35).

Individuals are barred by adverse possession of land by another person for 20 years, under known and visible lines and boundaries (NCGS 1-40), or by similar adverse possession under color of title for seven years (NCGS 1-38).

After entry to avoid adverse possession, action must be commenced within one year after making such entry, and within time prescribed. (NCGS 1-41).

When there has been relation of landlord and tenant, possession of tenant is deemed that of landlord until 20 years after end of lease; or, in case of no written lease, until 20 years after last payment of rent. (NCGS 1-43).

Easements.

Use of right of way across another's land must be under claim of right, open, hostile, and under definite boundaries to establish a right by prescription. (266 N.C. 257, 145 S.E.2d 873). Permissive use cannot ripen into easement by prescription. (248 N.C. 462, 103 S.E.2d 837).

Disabilities.

Person entitled to commence action who is at time cause of action accrued either infant, incompetent, or insane may bring his action within time limited by statutes, after disability is removed, except in action for recovery of real property, or to make entry or defense founded on title to real property, or to rent and services out of same, when he must commence his action, or make his entry, within three years next after removal of disability. For those persons under disability on Jan. 1, 1976, as result of being imprisoned on criminal charge, or in execution under sentence for criminal offense, statute of limitations will begin to run and no longer be tolled from Jan. 1, 1976. (NCGS 1-17).

When Adverse Possession Not Effective.

No railroad, plankroad, turnpike, or canal company may be barred by any statute of limitation whatever in relation to land obtained for its use as right-of-way (NCGS 1-44), nor can title to public way be acquired by adverse possession (NCGS 1-45). Title held by state and subject to public trust rights cannot be acquired by adverse possession. Public trust rights are rights held by state for use and benefit of people in common such as right to navigate, swim, hunt and fish watercourses and to freely use beaches and public access to beaches. (NCGS 1-45.1). Railroad removing tracks and not making any railroad use of right of way for seven years will be presumed to have abandoned right of way. (NCGS 1-44.1; 323 N.C. 609, 374 S.E.2d 265). Ownership of former railroad right of way presumed to vest in adjacent property owners. (NCGS 1-44.2).

21.03 CONDOMINIUMS:

See topic 21.16 Real Property.

21.04 CONVEYANCES:

See topic 21.06 Deeds.

21.05 CURTESY:

By Intestate Succession Act (G.S. c. 29) effective July 1, 1960, the estate of curtesy has been abolished. (NCGS 29-4). Under statute similar to common law dower, surviving spouse may take as his or her intestate share or elective share life estate in one-third in value of all real estate of which deceased seised and possessed in lieu of intestate or testamentary share. (NCGS 29-30). See category 13 Estates and Trusts, topics 13.07 Descent and Distribution, 13.16 Wills.

21.06 DEEDS:

For types of estates see topic 21.16 Real Property.

Execution.

Conveyance of real estate must be executed under seal. (108 N.C. 134, 140, 12 S.E. 902).

A conveyance is held to be in fee, whether or not the word “heirs” is used, unless a different intent is expressed or plainly indicated. (NCGS 39-1).

In order to waive elective life estate of either husband or wife as provided for in G.S. NCGS 29-30, every conveyance or other instrument affecting estate, right or title of any married person in lands, tenements or hereditaments must be executed by such husband or wife, and due proof or acknowledgment thereof must be made and certified as provided by law. (NCGS 39-7[a]). See category 14 Family, topic 14.09 Husband and Wife, subhead Contracts and Conveyances.

See also category 8 Debtor and Creditor, topic 8.10 Homesteads, subhead Alienation or Encumbrance.

Recording.

A conveyance of land, contract to convey, option to convey or lease of land for more than three years is not valid to pass any property interest as against lien creditors of, or purchasers for valuable consideration from, grantor until registered in county wherein land lies. (NCGS 47-18). In order to be registered, deed must be acknowledged by grantor or person executing same, or his signature proven by oath of one or more witnesses. (NCGS 47-17). Deed or deed of trust should indicate on first page either person or law firm who drafted it. (NCGS 47-17.1). See category 10 Documents and Records, topics 10.01 Acknowledgments, 10.04 Records.

Recording Fees.

Conveyances filed to be recorded must first be probated by register of deeds of county where filed for recordation. Fee for probate is $2. (NCGS 161-10). For registering or filing any instrument for which no other provision is made by this section, whether written, printed, or typewritten, fee shall be $12 for first page plus $3 for each additional page or fraction thereof. When document is presented for registration that consists of multiple instruments, fee shall be $10 for each additional instrument. Document consists of multiple instruments when it contains two or more instruments with different legal consequences or intent, each of which is separately executed and acknowledged and could be recorded alone. (NCGS 161-10).

Deed by Corporation.

See category 10 Documents and Records, topic 10.01 Acknowledgments, subhead Other Forms for Corporations.

Uniform Vendor and Purchaser Risk Act adopted. (NCGS 39-37, et seq.).

Taxes.

Excise Stamp Tax is imposed on transferor and collected by Register of Deeds. Amount is $1 on each $500 or fractional part thereof of consideration or value of property conveyed. Excise tax on instruments imposed by Art. 8E of c. 105 of G.S. applies to timber deeds and contracts for sale of standing timber to same extent as if these deeds and contracts conveyed interest in real property. (NCGS 105-228.30). Does not apply when no consideration passes from transferee to transferor. (NCGS 105-228.29).

Form.

For Warranty Deed form, see end of this Digest.

21.07 DEEDS OF TRUST:

See category 20 Mortgages, topic 20.04 Mortgages of Real Property.

21.08 DOWER:

By Intestate Succession Act (G.S. c. 29) effective July 1, 1960, the estate of dower has been abolished. (NCGS 29-4). Under statute similar to common law dower, surviving spouse may take as his or her intestate share or elective share life estate in one-third in value of all real estate of which deceased seised and possessed in lieu of intestate or testamentary share. (NCGS 29-30). See category 13 Estates and Trusts, topics 13.07 Descent and Distribution and 13.16 Wills.

21.09 ESCHEAT:

See topic 21.01 Absentees, subhead Escheat; categories 3 Business Regulation and Commerce, topic Banks and Banking, subhead Unclaimed Deposits; Estates and Trusts, topics Descent and Distribution, subhead Escheat, Wills.

21.10 LANDLORD AND TENANT:

Uniform Commercial Code Art. 2A adopted. (NCGS 25-2A-101 to -532). See category 3 Business Regulation and Commerce, topic Commercial Code for modifications.

Kinds of Tenancy.

“Estate for years” arises from contract and terminates upon expiration of term fixed by lease. (299 N.C. 498, 263 S.E.2d 604). “Tenancies from period to period” are estates which continue to renew themselves for applicable period until terminated by proper notice. (53 N.C. 430). “Tenancy at will” is held at will or pleasure of both landlord and tenant and either party can terminate at any time (215 N.C. 417, 2 S.E.2d 13). “Tenancy at sufferance” arises where one goes into possession of land lawfully but holds over without consent of the owner. (215 N.C. 417, 2 S.E.2d 13).

Leases for more than three years and all mortgages and deeds of trusts of a leasehold interest or other chattel must be in writing and, in order to be effective against third persons, must be recorded in office of register of deeds of county in which the land lies. (NCGS 47-18, -20, -20.4). Memorandum of lease may be recorded. (NCGS 47-118). Memorandum of option to purchase real estate may be recorded. (NCGS 47-119).

Security deposit statutes apply to those in business of renting or managing residential dwelling units, excluding single rooms, on weekly, monthly, or annual basis. (NCGS 42-56). Deposits permitted only for tenant's possible nonpayment of rent, damage to premises, nonfulfillment of rental period, unpaid bills which become lien, costs of re-renting premises after breach by tenant, costs of removal and storage of tenant's property after summary ejectment proceeding, or court costs in connection with terminating tenancy. Deposit shall not exceed two weeks' rent if tenancy is week to week, one and one-half months' rent if tenancy is month to month, and two months' rent for greater terms. (NCGS 42-51).

Security deposits from tenant in residential dwelling units shall be deposited in trust account with licensed and insured bank or savings institution located in state of N.C. or landlord may, at his option, furnish bond from insurance company licensed to do business in N.C. Security deposits from tenant may be held in trust account outside of state of N.C. only if landlord provides tenant with adequate bond in amount of said deposits. Landlord or his agent shall notify tenant within 30 days after beginning of lease term of name and address of bank or institution where his deposit is currently located or name of insurance company providing bond. (NCGS 42-50).

Upon termination of tenancy, deposit may be applied as permitted above or, if not, refunded to tenant. Landlord must itemize damage and mail or deliver same to tenant, with balance of security deposit, at least 30 days after termination of tenancy and possession by tenant. Landlord may not withhold part of deposit for normal wear and tear or for amount exceeding actual damages. (NCGS 42-52). Landlord may charge reasonable, nonrefundable fee for pets kept by tenant on premises. (NCGS 42-53).

If landlord fails to refund balance of deposit as required above, tenant may bring civil action for recovery of same. In addition, tenant may recover damages resulting from landlord's noncompliance, and if court finds that noncompliance was willful, it may allow reasonable attorney's fee. (NCGS 42-55).

Recording.

Lease of land to exceed three years in duration must be registered or it will not pass an interest valid against lien creditors, and purchasers for value. (NCGS 47-18).

Rent.

In all residential rental agreements in which definite time for payment of rent is fixed, parties may agree to late fee not to exceed greater sum of $15 or 5% of payment for monthly rental payments or $4 or 5% of payment for weekly rental payments, to be charged by lessor if any rental payment is five days or more late. For subsidized rent, only non-subsidized share of rent may be calculated in determining late fee. (NCGS 42-46[a]). Late fee under this section may be imposed only one time for each late rental payment. (NCGS 42-46[b]). In all verbal or written leases of real property of any kind in which is fixed definite time for payment of rent reserved therein, there shall be implied forfeiture of term upon failure to pay rent within ten days after demand is made by lessor or his agent on said lessee for all past-due rent, and lessor may enter and dispossess tenant without having declared such forfeiture or reserved right of reentry in lease. (NCGS 42-3). If lease of land, in which rent is reserved, payable at end of year or other certain period of time, is determined by death of any person during one of periods in which rent was growing due, lessor or his personal representative may recover part of rent which becomes due after death, proportionate to part of period elapsed before death, subject to all just allowances; and if any security was given for such rent it shall be apportioned in like manner. (NCGS 42-5). In residential rental agreements, tenant may not unilaterally withhold rent prior to judicial determination of right to do so. (NCGS 42-44[c]).

Lien.

The landlord has a first lien upon all crops raised upon the land for his rent (NCGS 42-15), and the removal of a crop by a lessee without notice to the landlord and satisfaction of all liens is class 1 misdemeanor (NCGS 42-22).

Any tenant who sells tobacco authorized to be sold and fails to account to the landlord to the extent of the net proceeds for all liens, rents, and advances is guilty of class 1 misdemeanor. (NCGS 42-22.1).

Landlord has lien on all furniture, household furnishings, trade fixtures, equipment and other personal property of tenant, including manufactured homes titled in name of tenant if occupying space for manufactured homes, if tenant has vacated for 21 days or more and landlord has claim for damages. Lien enforced by public sale. (NCGS 44A-2).

Distress.

There is no distress for rent. (NCGS 42-25.7).

Termination of Tenancy.

Tenancy from year to year may be terminated by notice given one month or more before end of current year of tenancy; tenancy from month to month by notice of seven days; tenancy from week to week by notice of two days. If tenancy only involves rental space for manufactured home, notice must be given 60 days before end of current rental period regardless of term of tenancy. (NCGS 42-14).

In case of accidental damage or destruction of demised premises, lessee may surrender his estate as set forth in statute. (NCGS 42-12).

Holding Over.

One who holds over and continues in possession of demised premises without owner's permission and after demand for its surrender, may be removed by summary eviction when: (1) His term has expired, (2) he has violated term of lease which violation allows termination under lease, (3) he is in arrears for payment of rent or (4) he has given lessor lien on part of crop and deserts premises or leaves them uncultivated. (NCGS 42-26). See subhead Kinds of Tenancy, supra.

Discrimination in sales and rental of housing because of race, color, religion, sex or national origin is prohibited except in certain enumerated circumstances. (NCGS 41A-4, -6).

Dispossession.

A tenant who holds over may be dispossessed by summary proceedings in court with a right to either party to appeal, but if tenant appeals he must pay rent periodically to clerk of superior court. (NCGS 42-26, -34). In summary ejectment action, tenant may raise defense of retaliatory eviction. (NCGS 42-37.1). Before removing tenant's personal property from demised premises pursuant to writ for possession of real property or order, sheriff must give tenant notice of approximate time writ will be executed, to be no more than seven days from sheriff's receipt thereof. (NCGS 42-36.2[a]).

Improper Surrender.

It is a misdemeanor for a tenant to surrender possession to a person other than his landlord. (NCGS 42-13).

Uniform Residential Landlord and Tenant Act not adopted.

21.11 LEASES:

See topic 21.10 Landlord and Tenant.

21.12 [RESERVED]

21.13 PERPETUITIES:

Uniform Statutory Rule Against Perpetuities supersedes common law rule. (NCGS 41-22).

Non-vested property interest is invalid unless, when interest is created, it is certain to vest or terminate no later than 21 years after death of individual then alive; or interest either vests or terminates within 90 years after its creation. (NCGS 41-15, et seq.).

21.14 PERSONAL PROPERTY:

Tenancy by entirety does not exist in personal property. (227 N.C. 396, 42 S.E.2d 468). As to tenancy by entirety in real property, see category 14 Family, topic 14.09 Husband and Wife.

21.15 POWERS OF ATTORNEY:

Attorneys-in-Fact.

Any conveyance or mortgage affecting real estate may be executed by attorney-in-fact acting under recorded power of attorney. (NCGS 47-43, -43.1).

Formalities.

Attorney-in-fact must be appointed by written instrument. (NCGS 32A-8, -12).

Uniform Durable Power of Attorney Act adopted with substantial modifications. (NCGS 32A-8, et seq.).

Following Statutory Short Form of General Power of Attorney may be used:

Notice: THE POWERS GRANTED BY THIS DOCUMENT ARE BROAD AND SWEEPING. THEY ARE DEFINED IN CHAPTER 32A OF THE NORTH CAROLINA GENERAL STATUTES WHICH EXPRESSLY PERMITS THE USE OF ANY OTHER OR DIFFERENT FORM OF POWER OF ATTORNEY DESIRED BY THE PARTIES CONCERNED.

State of ____________________.

County of __________________.

I ________________, appoint ________________ to be my attorney-in-fact, to act in my name in any way which I could act for myself, with respect to the following matters as each of them is defined in Chapter 32A of the North Carolina General Statutes. (Directions: Initial the line opposite any one or more of the subdivisions as to which the principal desires to give the attorney-in-fact authority.)

(1) Real property transactions . . . . .______

(2) Personal property transactions . . . . .______

(3) Bond, share, stock, securities and commodity transactions . . . . .______

(4) Banking transactions . . . . .______

(5) Safe deposits . . . . .______

(6) Business operating transactions . . . . .______

(7) Insurance transactions . . . . .______

(8) Estate transactions . . . . .______

(9) Personal relationships and affairs . . . . .______

(10) Social security and unemployment . . . . .______

(11) Benefits from military service . . . . .______

(12) Tax matters . . . . .______

(13) Employment of agents . . . . .______

(14) Gifts to charities, and to individuals other than the attorney-in-fact . . . . .______

(15) Gifts to the named attorney-in-fact . . . . .______

(If power of substitution and revocation is to be given, add: “I also give to such person full power to appoint another to act as my attorney-in-fact and full power to revoke such appointment.”)

(If period of power of attorney is to be limited, add: “This power terminates __________, ____.”)

(If power of attorney is to be a durable power of attorney under the provision of Article 2 of Chapter 32A and is to continue in effect after the incapacity or mental incompetence of the principal, add: “This power of attorney shall not be affected by my subsequent incapacity or mental incompetence.”)

(If power of attorney is to take effect only after the incapacity or mental incompetence of the principal, add: “This power of attorney shall become effective after I become incapacitated or mentally incompetent.”)

(If power of attorney is to be effective to terminate or direct the administration of a custodial trust created under the Uniform Custodial Trust Act, add: “In the event of my subsequent incapacity or mental incompetence, the attorney-in-fact of this power of attorney shall have the power to terminate or to direct the administration of any custodial trust of which I am the beneficiary.”)

(If power of attorney is to be effective to determine whether a beneficiary under the Uniform Custodial Trust Act is incapacitated or ceases to be incapacitated, add: “The attorney-in-fact of this power of attorney shall have the power to determine whether I am incapacitated or whether my incapacity has ceased for the purposes of any custodial trust of which I am the beneficiary.”)

Dated __________, ____

________________ (Seal)

Signature

State of ________________ County of ________________

On this _____ day of ____________, ________________, personally appeared before me, the said named __________ to me known and known to me to be the person described in and who executed the foregoing instrument and he (or she) acknowledged that he (or she) executed the same and being duly sworn by me, made oath that the statements in the foregoing instrument are true.

____

(Signature of Notary Public)

Notary Public (Official Seal)

My Commission Expires ________________

If statutory form is used (NCGS 32A-1), powers enumerated in G.S. NCGS 32A-2 are conferred (NCGS 32A-2). No power of attorney executed pursuant to provisions of art. 2 of G.S. c. 32A is valid subsequent to principal's incapacity or mental incompetence unless registered in office of register of deeds in county designated in power of attorney or if no county is designated in office of register of deeds of county in which principal has legal residence at time of registration or if principal has no legal residence in N.C., in some county in which principal owns property or county where one or more of attorneys in fact reside. (NCGS 32A-9).

21.16 REAL PROPERTY:

Estates recognized are: Fee simple; tenancy in common; joint tenancy; tenancy by entirety; life estate with remainder over. (NCGS 41-1, et seq.). Survivorship as incident of joint tenancies in estates of inheritance has been abolished except in partnerships, joint businesses or where expressly provided for in instrument creating joint tenancy. (NCGS 41-2).

Rule in Shelley's Case abolished. (NCGS 41-6.3).

Doctrine of worthier title abolished. (NCGS 41-6.2).

Uniform Vendor and Purchaser Risk Act adopted. (NCGS 39-37, et seq.).

Unit Ownership Act provides for creation of unit ownership in real property and defines its elements and manner in which same should be created, maintained, terminated and taxed. (NCGS 47A-1, et seq.). Renters of apartment buildings being converted to condominiums must be notified 90 days before being required to vacate. For 30 days after delivery of notice, person required to give notice must offer to convey each unit or proposed unit occupied for residential use to tenant who leases that unit. (NCGS 47A-36).

Time Share Act provides for regulation of developers and developments. (NCGS 93A-39, et seq.). Requires registration (NCGS 93A-40), public offering statements (NCGS 93A-44). Real property law applies (NCGS 93A-42) as well as securities laws (NCGS 93A-50). Purchasers have right to cancel for five days after execution of contract (NCGS 93A-45) and one year to bring claims against developer or original seller (NCGS 93A-59). Developers must release or subordinate all liens or provide bond prior to recording transfer of time share interest. (NCGS 93A-57).

Condominium Act provides for creation of condominiums and defines elements and manner in which same should be created, maintained, altered and terminated. (NCGS 47C-1-101, et seq.).

Marketable Title.

Real Property Marketable Title Act provides generally that if a person claims title to real property under chain of record title for 30 years, and no other person has filed notice of any claim of interest in property within 30-year period, then all conflicting claims based on any title transactions prior to 30-year period will be extinguished. (NCGS 47B-1, et seq.). Act notes certain exceptions. (NCGS 47B-3).

Discrimination because of race in loaning money for renting or selling housing is prohibited except in certain enumerated circumstances. (NCGS 41A-1, et seq.).

See topics 21.05 Curtesy, Deeds, Dower, Landlord and Tenant; categories 5 Civil Actions and Procedure, topic Partition; Debtor and Creditor, topic Homesteads; Documents and Records, topic Seals; Family, topic Husband and Wife; Mortgages, topic Mortgages of Real Property.

21.17 TRUST DEEDS:

See category 20 Mortgages, topic 20.04 Mortgages of Real Property.

22 TAXATION

22.01 ADMINISTRATION:

The Revenue Act of 1939 is complete act in itself, has been codified and is made continuing. (NCGS 105-1, et seq.). Copies of Act may be obtained from Secretary of State.

General supervision of state tax laws is under Department of Revenue.

Penalties.

List of state and certain local tax-related penalties can be found at NCGS 105-236(a). Penalties are waiveable under certain circumstances, occasionally as matter of right. Some of state tax-related penalties are as follows:

1. Bad Checks.

10% of check amount ($1,000 maximum).

2. Failure to Obtain License.

Failure to obtain required license prior to doing business can result in monthly penalty of 5% of licensing amount owed (25% maximum).

3. Failure to File Return.

5% of tax owed (25% maximum).

4. Failure to Pay Tax When Due.

10% of tax due.

5. Failure to Withhold Withholding Taxes.

Withholding agent who fails to withhold or remit taxes can be held liable for amount of taxes not withheld or not timely remitted, among other penalties. (NCGS 105-163.8).

6. Negligence, Fraud.

For negligence, 10% of tax owed, unless understated by 25% or more, in which case penalty is 25% of tax owed. However, in cases of intent to evade tax, fraud penalty can be imposed which increases penalty to 50%. Depending upon quantum of intent, tax in question, and party at issue (taxpayer, collecting party, principal or officer, etc.), conduct may also constitute crime (misdemeanor or felony).

7. Misuse of Exemption Certificates.

$250.

8. Failure to File Information on Returns.

$50, or disallowance of tax benefits claimed, depending on context.

9. Filing Frivolous Return.

$500; penalty applies where both of following tests are met: (a) Return fails to provide sufficient information to permit determination that return is correct, or contains information which positively indicates return is incorrect, and (b) evidences intention to delay, impede or negate state tax laws or purports to adopt position that is lacking in seriousness.

10. Suspension of Business Entity Charter/Qualification.

Corporations or Limited Liability Companies (LLCs) failing to file report or return, or pay state taxes or (in some cases) fees for 90 days may have their charter (articles of incorporation/organization), or certificate of authority to transact business as foreign entity suspended; reinstatement is possible. During revocation period, power to act as entity in North Carolina is supposedly invalidated (NCGS 105-230), though case law provides exceptions to this rule.

11. Local Property Taxes.

Failure to list taxable real or personal property, or to willfully aid or abet or attempt same, is misdemeanor, and may trigger other penalties. (NCGS 105-308). Property not listed by taxpayer but discovered by taxing authorities may be subjected to presumed ownership and taxability for preceding five tax years, as well as penalty of 10% of tax for first year, increasing by 10% for each subsequent year of non-listing. (NCGS 105-312).

12. Officer/Responsible Person Liability varies based upon facts and tax in question, but in general, given sufficient oversight (or deemed oversight) role over administration of tax, officer (particularly treasury-type officer) or other responsible person can be held personally liable for taxes, especially when taxes are collected and supposed to have been held in trust for state, as is case with sales and employment withholding taxes. (NCGS 105-163.8, -164.42I, -253, -383, -384).

22.02 [RESERVED]

22.03 BUSINESS TAXES:

Franchise Tax.

See category 2 Business Organizations, topic 2.03 Corporations.

Limited Liability Company.

Recognized effective Oct. 1, 1993. (c. 57C). Federal tax classification of entity is followed for state income tax purposes, though majority corporate members of LLC may be subjected to franchise tax on their distributive share of LLC's attributes, which effectively constitutes tax “on” LLC.

Privilege and License Taxes (Insurance).

See category 16 Insurance, topic 16.01 Insurance Companies. Other privilege and license taxes are imposed upon certain other industries.

Tax on Deposits.

See category 3 Business Regulation and Commerce, topic 3.01 Banks and Banking.

Excise Taxes.

Various products and services are subjected to specific excise taxes, including tobacco products, fuels, dry cleaning solvents, motor vehicles, tires, soft drinks, appliances, alcoholic beverages, forest products, amusements, short-term occupancies, installment paper, unauthorized substances (e.g., contraband drugs), etc.

22.04 [RESERVED]

22.05 EMPLOYMENT TAXES:

Unemployment Compensation Tax.

“Contributions” are required to Employment Security Commission as tax on employee wages. (NCGS 96-8[3], -9[a][1]). In most cases, “wages” is defined same as federal taxable wage base. (NCGS 96-8[13], -9[a][5]). Contributions are generally made quarterly, in arrears. (NCGS 96-9[a][1], [a][7]). Contribution rates vary according to benefit experience of employer; rate determinations are complicated and depend upon multiple factors. (NCGS 96-9[a], [b]). Special rules apply to nonprofit, governmental, and certain other employers. (NCGS 96-9[a][4], [a][4a], [d], [f], [h], [i]). Employer benefit experience ratings are transferable to business successor under certain conditions, including upon Employment Security Commission approval; however, anti-rate “dumping” laws prohibit high-rate businesses from forming new company, or from buying another company with lower rate, without true break in “continuity of control”. Dumping violations by businesses or tax advisors can trigger penalties and can constitute felonies. (NCGS 96-9[c][4], [c][5], [c][6], -18; NCGS 105-236).

22.06 [RESERVED]

22.07 ESTATE TAX:

Federally taxable estate is also subject to state estate tax if, at death, decedent was state resident or owned real or personal property located or sitused in state. Amount of tax is maximum credit for state death taxes allowed under Code, without regard to Code §2058 deductions or credits allowed under §2011-2015 of Code. If any property is located in another state and decedent was N.C. resident, tax is reduced by lesser of amount of death tax paid in other state or amount computed by multiplying credit by fraction, numerator of which is gross value of estate with tax situs in other state and denominator of which is value of decedent's entire gross estate. If any property is located in another state and decedent was not N.C. resident, tax is computed by multiplying credit by fraction, numerator of which is gross value of N.C. property and denominator of which is value of decedent's entire gross estate. “Gross value” is determined in federal estate tax proceedings. (NCGS 105-32.2).

Liability.

Taxes are paid from estate, but person who receives property from estate is liable for amount of estate tax attributable to that property. Personal representative of estate is liable for tax not paid within two years, though liability is limited to value of estate assets that were under control of representative. (NCGS 105-32.3).

Payment.

Unless extended or installment payment election is made, payment is due with estate tax return, which must be filed when federal estate tax return is filed. (NCGS 105-32.4, -32.5).

Lien attaches to estate real property and proceeds thereof. (NCGS 105-32.6).

22.07A GENERATION SKIPPING TAX:

Federally taxable generation-skipping transfers are subjected to state tax if original transferor is resident of N.C. at date of original transfer, or if transfer includes property located or sitused in state. Amount of tax is maximum credit for state generation-skipping transfer taxes allowed under §2604 of Code. (NCGS 105-32.7).

22.08 [RESERVED]

22.09 GIFT TAX:

Imposed by NCGS 105-188, et seq.

Tax applies to all direct and indirect gifts of any property, whether absolute or in trust, by donors residing in state or of property located or sitused in state, except gifts: For governmental purposes; for purely public, religious, charitable or educational purposes; not exceeding exclusion amount in §2503(b) of Code to any one donee during any calendar year, if gift of future interest or certain future interest gifts to minors; and to spouse. (NCGS 105-188).

When gift is made by one spouse to person other than donor's spouse, donor may claim both donor's annual exclusion and spouse's annual exclusion, if both spouses consent and are state residents when gift is made. Consent to share annual exclusion is irrevocable. (NCGS 105-188).

Tax is imposed on donor, who is entitled to exemption of $100,000 on gifts to lineal issue, lineal ancestors, stepchildren or adopted children, which may, at donor's option, be taken in single year or spread over multiple years. (NCGS 105-188).

Rates vary according to complicated schedule, based upon relationship of donee to donor and according to total gifts to particular donee during taxable year (regardless of gifts during any preceding year to other donees). (NCGS 105-188).

Returns and Payment.

Any donor who gives to donee future interest or taxable gift whose total value exceeds annual exclusion (see NCGS 105-188[d]) must file return and pay tax by Apr. 15 of next calendar year. (NCGS 105-197). If donor fails to pay tax when due, each donee is liable for tax on gifts. See topic 22.01 Administration, subhead Penalties. (NCGS 105-193).

Lien covers gifts for preceding ten years, but is destroyed by sale to bona fide purchaser for full consideration, but then attaches to remaining property to extent of gifted property's value. (NCGS 105-193).

22.10 [RESERVED]

22.11 INCOME TAX:

Income Taxed-Individuals.

Tax is imposed upon N.C. taxable income of every part- or full-year resident individual, and of every nonresident with either: income from N.C. sources or wages deemed to have been earned in N.C. (NCGS 105-134.2, -134.5). “N.C. taxable income” means taxable income as calculated for federal income tax purposes, subject to adjustments in NCGS 105-134.5 to -134.7. (NCGS 105-134.5). Income tax surtax, expiring Jan. 1, 2011, imposed in addition to tax imposed equal to percentage of tax paid by taxpayer for taxable year. (NCGS 105–134.2A) Individuals deriving income from or owning interests in companies “doing business” in North Carolina will generally be subjected to state personal income taxes, often by withholding at source of payment —regardless of individual's residence. (See, e.g., NCGS 105-130.21, 131.1, -131.2, -134.5[d], -134.6.) North Carolina generally follows federal personal income tax rules, and federal taxable income serves as starting point for state tax base. (NCGS 105-134.1, -154). Currently, highest marginal personal income tax rate is 8.25%. (NCGS 105-134.2). Unless extended, individual returns must be made on or before Apr. 15. (NCGS 105-155).

Withholding Tax.

Employer must withhold and remit state income taxes payable on employee wages, in amount which approximately equals income tax liability of employee, making allowance for exemptions, deductions and credits to which employee is entitled, and until remitted such taxes are held in trust for State. (NCGS 105-163.2). Individual must pay estimated income tax if total estimated income tax, reduced by withholdings, tax credits and deductions, exceeds statutory amount. Estimated tax is to be paid in four equal installments. (NCGS 105-163.15). Estimated income taxes are declared at same when corporation's first installment payment is due under NCGS 105-163.40 (generally, quarterly). (NCGS 105-163.39).

Income Taxed-Entities.

Businesses are subject to jurisdiction-sourced income based upon their “doing business” in N.C. For most corporations transacting multistate business, jurisdictional “doing business” standard is determined based upon percentage/formula representing portion of corporation's in-state sales, property and payroll over its aggregate sales, property, and payroll. (NCGS 105-130.4). Sales factor is generally double-weighted, such that businesses with material out-of-state sales are “rewarded” with lower state apportionment percentages. (NCGS 105-130.4[i]). Business may petition Tax Review Board for alternative apportionment formula upon showing and approval by TRB that alternative formula will more clearly reflect income attributable to business within N.C. (NCGS 105-130.4[t1]). Additionally, N.C. does not currently have “throwback” rule: sales of goods to customers in states that do not tax those sales, are not “thrown back” for inclusion in state apportionment formula, but instead escape formulary inclusion as “nowhere sales.” (NCGS 105-130.4). N.C. has become de facto “full apportionment” state, taking position that any and all income is apportionable business income to fullest extent permitted by U.S. Constitution. (NCGS 105-130.4[a]). Unlike some states, N.C. does not impose entity-level tax upon federal pass-through entities; instead, tax incidence falls upon investor. (NCGS 105-131.1, -134.5[d]). Unlike few states, N.C. does not require filing of state-level “S” election as condition to pass-through tax treatment. (NCGS 105-131.1). Currently, corporate income tax rate is 6.9%. (NCGS 105-130.3). An income tax surtax, expiring Jan. 1, 2011, imposed in addition to tax imposed equal to 3% of tax paid by taxpayer for taxable year. (NCGS 105–130.3B) Special rules apply to various regulated industries, including railroad and other carriers, certain utilities, international financial institutions and REITs and REMICs. (NCGS 105-130.4, -130.5[b][13], -130.11[d], -130.12).

Insurance companies paying tax based on gross premiums (see category 16 Insurance, topic 16.01 Insurance Companies) are exempt from tax on income from insurance business (NCGS 105-130.11[a][10]), as are most federally income tax exempt organizations. (NCGS 105-130.11).

Returns and Payment.

Unless extended, corporate returns are now generally due on or before 15th day of fourth month following close of income year. (NCGS 105-130.16, -130.17, -130.19). Consolidated and combined corporate returns are not permitted for affiliated groups, but may be required by state if income would otherwise be "distorted." (NCGS 105-130.6, -130.14). Taxing officials also have authority to recharacterize income, deny deductions, or otherwise alter reported income when they deem income to have been distorted—particularly in cases of inter-affiliate transactions (e.g., royalty payments). (NCGS 104-130.6 to -130.7A, -130.15).

Credits.

Several dozen credits against income and (in some cases) franchise tax liabilities are available. Credits tend to focus upon economic development incentives for in-state investment, construction, employment creation, and infrastructure usage; property donations or uses for public or socially beneficial purposes such as preservation or conservation; and certain taxpayers of preferential status (such as disabled persons). (See, e.g., G.S. c. 105, Arts. NCGS 3A-3J, NCGS 105-130.22 to -130.48, -151 to -151.28, -163.010 to -163.015.)

See topic 22.01 Administration, subhead Penalties.

22.12 INHERITANCE TAX:

Inheritance tax has been repealed, but there are estate and generation-skipping taxes. See topic 22.06 Estate Tax and Generation-Skipping Tax.

22.12A POLL TAX:

N.C. Const. prohibits poll or capitation tax. (N.C. Const., art. V, §1).

22.1322.15

22.16 PROPERTY TAXES:

All real and personal property within State is subject to taxation unless expressly excluded or exempted. (NCGS 105-274). All taxes must be uniform within given legislative classification. (N.C. Const., art. V, §2[2]).

Exemptions.

N.C. excludes from ad valorem taxation various classes of property in various circumstances. See, e.g., NCGS 105-275.

Property Taxed at Reduced Rates.

Additionally, certain properties are taxed at reduced rate and deductions may be allowed. See, e.g., NCGS 105-277 to -278.9.

Assessment.

All real and personal property must be appraised for taxation at its true value in money (essentially, fair market value) as far as practicable. (NCGS 105-283). While assessments are presumed correct, presumption is rebuttable by evidence of arbitrary or illegal method of valuation, and that assessment substantially exceeded true value. (287 N.C. 547, 215 S.E.2d 752).

Review of Assessment.

Review of decisions relating to assessment and appraisal is by appeal to Property Tax Commission, then to Court of Appeals, then to Supreme Court. (NCGS 105-290, -345 to -346; NCGS 7A-29 to -31). Legal arguments must have been raised at Commission hearing to be heard in appeal, and no new evidence will be accepted except upon motion and showing of cause and material prejudice. (NCGS 105-345.1, -345.2). Prevailing taxpayer receives interest on any overpayment. (NCGS 105-290[b][4]).

Payment.

Due Sept. 1, localities may establish discounts for early payment but no interest or penalty applies if paid by Jan. 6. If paid between Jan. 6 and Feb. 1, interest accrues at rate of 2%. After Feb. 1, interest accrues at rate of ¾% per month or fraction thereof. (NCGS 105-360).

Collection.

Collected by locally-appointed tax collectors. (NCGS 105-349, -350).

Liens and Enforcement.

Liens for one type of property taxes (realty or personalty) can give rise to liens on both types of property held by taxpayer. (NCGS 105-355[a], [b], -356[a], [b]). Real property tax liens arise immediately upon delinquency, and are exercised via foreclosure or power of sale, requiring notice to taxpayer and opportunity to pose objections. (NCGS 105-367 to -369, -374, -375, -381; 18 N.C. App. 641, 197 S.E.2d 626). In contrast, personal property tax liens arise only after levy (seizure or constructive seizure by public official at property location). (18 N.C. App. 641, 197 S.E.2d 626; see generally NCGS 105-366). Enforceability of liens following transfer of property is complicated and conflicted area of law. (Compare NCGS 105-348 [suggesting successors are bound and/or property may be levied on post-transfer] with 18 N.C. App. 641, 197 S.E.2d 626; 267 N.C. 68, 147 S.E. 603; 386 F.2d 199; NCGS 105-304, -366[d][3]b, -366[b][5], -366[b][9], -241[d][1] [suggesting contrary in cases under certain circumstances or as to certain property or as to specific type of property tax].) Revised Uniform Federal Lien Registration Act adopted. (NCGS 44-68.10 to .17).

Real Estate Conveyance Tax.

See category 21 Property, topic 21.06 Deeds, subhead Taxes.

22.17 SALES AND USE TAXES:

Sales tax is imposed by NCGS 105-164.4, et seq. on non-exempt, retail sales of tangible property (and growing number of taxable services) that are jurisdictionally sourced to N.C. Symmetric “use” tax is imposed on non-exempt in-state use, storage, distribution, or consumption, unless (generally) sales tax was already paid to another state. (NCGS 105-164.6). In either case, business is deemed to be “retailer” or “dealer” and must register as such with Department of Revenue. (NCGS 105-164.3[35], -164.4[c], -164.29).

Without planning, “layering” of tax can occur; additionally, absent careful attention to manner in which deliverables are both delivered and documented, “non-taxable” services may very well become part of sales taxable base. (See, e.g., NCGS 105-164.3[12], [37], -164.4D, -164.12B.)

Absent full/partial exemption, current combined state and local sales/use tax rate is 6.75% for most localities (7.25% for Charlotte/Mecklenberg, and 7.0% in handful of other counties). (NCGS 105-164.3[4a], -164.4[a], NCGS 105-465, -466, -483, -498).Local Government Public Transportation Sales Tax Act give counties and transportation authorities addition source of revenue to meet needs for financing local public transportation systems. (NCGS 105–506 et seq.)

Exemptions.

As codified under NCGS 105-164.13 to -164.14. There are dozens of sales and use tax exemptions (partial and full) and refunds that may apply to given situation, including full exemption for items properly documented as purchases for resale. Exemptions are strictly construed in favor of taxability, and many exemptions require strict adherence to documentation and/or other procedures as condition to exemption. (See, e.g., NCGS 105-164.26, -164.27A to -164.29A.)

Returns, Payment, and Collection.

Sales and use taxes are payable when return is due, which (for most businesses) is 20th day of calendar month following month in which taxable sale or use took place. (NCGS 105-164.16).

Retailer collects taxes from purchaser as trustee for state. Unpaid sales tax constitutes lien on all personal property of retailer business, as well as such property in hands of successor to such assets or business. Successor must either obtain tax clearance certificate prior to such succession or withhold from purchase price and remit tax owed. (NCGS 105-164.7, -164.38, -164.39).

22.18 STAMP AND SEAL TAXES:

Stamp Tax.

No stamps required on corporate stock, but Excise Stamp Tax imposed on transfers of realty. (105.228.29 and .30). See category 21 Property, topic 21.06 Deeds, subhead Taxes.

23 TRANSPORTATION

23.01 MOTOR VEHICLES:

The Uniform Act Regulating Traffic on Highways has been adopted with some amendments; and the Uniform Motor Vehicle Registration Act is closely followed. Considerable amendments were made by the Highway Safety Act, adopted in 1947. (1947, c. 1067).

Vehicle license required annually. Issued by the Div. of Motor Vehicles, Raleigh, N.C. 27697. (NCGS 20-40, -50, et seq.). Number plate must be displayed plainly readable from 100 feet during daylight. (NCGS 20-63[a], [c]). Vehicles 35 or more years old may bear license plates of year of manufacture. (NCGS 20-63[d]). Vehicles owned and operated by Government of U.S. are exempt from registration requirements. There are other exemptions for farm machinery, mopeds, etc. (NCGS 20-51).

Operator's license is required and is issued by Division of Motor Vehicles. (NCGS 20-7[a]). License for person under age 18 expires on person's 21st birthday. (NCGS 20-7[f1]). License for person at least 18 but less than 54 expires eight years after date of issuance. License for person over 54 expires five years from date of issuance. Commercial license that has North Carolina passenger (P) and school bus (S) endorsement expires on licensee’s birth date three years after date of issuance. (NCGS 20-7[f2]). New residents of N.C. have 60 days to obtain N.C. operator's license and 30 days to obtain N.C. commercial drivers license. (NCGS 20-7[a]). When name or address of person holding license changes, he must apply for duplicate license within 60 days. (NCGS 20-7.1).

Minimum Age and Eligibility.

Minimum age for operator's license (class C) is 16, and for commercial license (class A or B) it is 18. (NCGS 20-9[a]). Persons between 15 and 18 years old must: (1) Hold limited learner's permit for 12 months; (2) hold limited provisional license for six months; and (3) hold full provisional license until 18th birthday. Various restrictions apply to each license. (NCGS 20-11). Provisions are made for persons between 15 and 18 years old who hold restricted or unrestricted out-of-state licenses, or restricted or unrestricted federally-issued licenses, to obtain appropriate N.C. license. (NCGS 20-11[h] to [h3]). No one under 18 years old may drive public passenger-carrying vehicle. (NCGS 20-10).

N.C. license will not be issued to any person whose driving privilege in any other jurisdiction is cancelled, suspended or revoked, if cause(s) for such penalties would constitute lawful grounds for same penalties if committed in N.C., but such prohibition will not extend beyond 18 months. (NCGS 20-9[f]). N.C. license may be issued to person with disability, provided statutory requirements are met and person submits to physical exam. (NCGS 20-9[g]).

Armed forces members are exempt from license requirements while operating motor vehicle that is property of U.S. in service of U.S. (NCGS 20-8). Active duty military may renew license by mail, and license expires 60 days after holder returns to N.C. (NCGS 20-7[f]). Alternately, N.C. residents on active duty, including spouses and dependent children, may request military designation and renew license so designated by mail, not to exceed twice in their lifetime. This license is permanent and does not expire upon return to N.C. (NCGS 20-7[q]). Any required eye exam is waived for armed forces member serving in combat zone or hazardous area at time of license renewal via mail. (NCGS 20-7[r]).

Motorcycle operation requires driver's license (provisional or regular) with motorcycle learner's permit or driver's license (provisional or regular) with special endorsement. (NCGS 20-7[a1], [a2]). Any person at least 16 years of age can operate moped without license (NCGS 20-8[7]), but persons under 16 years old are not permitted to operate mopeds on highways or public areas (NCGS 20-10.1).

Registered Sex Offenders

Driver's license not issued to applicant living in state less than 12 months until National Sex Offender Public Registry searched to determine if applicant registered sex offender in another state. Commercial driver's license with P or S endorsement not issued to registered sex offenders. (NCGS 14–208.19A, 20–37.14A) Commercial driver's license with P or S endorsement revoked upon conviction of sex offense requiring offender to register as sex offender. (NCGS 20–17.9) Unlawful for registered sex offender to drive commercial passenger vehicle or school bus without appropriate commercial driver's license or while disqualified. (NCGS 20–27.1)

Titles, Sales and Liens.

Title to, lien on or interest in vehicle must be registered with Commissioner of Motor Vehicles, who must be notified of sales and transfers. Certificate of title must show whether possession is held by owner under lease, contract, conditional sale or other like agreement. Certificate of title must also list liens and encumbrances in order of priority. Bill of sale and manufacturer's certificate must be issued on sale of new car and assigned by endorsement to subsequent purchaser. (NCGS 20-52, -52.1, -72, et seq.). See also category 3 Business Regulation and Commerce, topic 3.09 Commercial Code.

Specially constructed vehicles, replica vehicles, street rods, custom-built vehicles, inoperable vehicles required to be titled. (NCGS 20–53.1) Motorized wheelchairs or similar vehicles weighing not more than 1,000 pounds and used for pedestrian purposes by handicapped person with mobility impairment under G.S. NCGS 20-37.5 are exempt from registration and certificate of title requirements. (NCGS 20-51[12]).

Sales.

See subhead Titles, Sales and Liens, supra.

Liens.

In addition to other liens described in this heading, any person who repairs, services, tows, or stores motor vehicles in ordinary course of business pursuant to express or implied contract with owner or legal possessor of motor vehicle has lien on motor vehicle for reasonable charges for repairs, servicing, towing, or storing, and such lien has priority over other perfected and unperfected security interests. (NCGS 44A-2).

Identification Marks.

It is felony for person to willfully destroy, remove, cover, alter, or add new serial numbers, transmission numbers or engine numbers, or to knowingly permit such conduct. (NCGS 20-109).

Odometer alteration regulated by Vehicle Mileage Act. (NCGS 20-340 to -350).

Operation Prohibited.

By persons who are: alcoholic; habitual user of narcotics; by incompetent (NCGS 20-9, -17.1); by persons under influence of impairing substance (NCGS 20-138.1); person whose license is in state of cancellation, suspension or revocation in any jurisdiction. (NCGS 20-9).

Size and Weight Limits.

Regulated by G.S. NCGS 20-116, -118, -118.1, -118.3.

Equipment Required.

Regulated by G.S. NCGS 20-115, et seq. Larceny of motor vehicle parts is felony if costs of repairing vehicles $1,000 or more. (NCGS 14–72.8) See also category 12 Environment, topic 12.01 Environmental Regulation.

Child Restraint Systems.

Every driver who is transporting one or more passengers of less than 16 years of age shall have all such passengers properly secured in child passenger restraint system or seat belt which meets federal standards applicable at time of its manufacture. (NCGS 20-137.1[a]). Child less than eight years of age and less than 80 pounds in weight shall be properly secured in weight-appropriate child passenger restraint system. In vehicles equipped with active passenger-side front air bag, if vehicle has rear seat, child less than five years of age and less than 40 pounds in weight shall be properly secured in rear seat, unless child restraint system is designed for use with air bags. (NCGS 20-137.1[a1]). Any driver found responsible for violation of G.S. NCGS 20-137.1 may be punished by penalty not to exceed $25, even when more than one child under 16 was not secured. No driver charged under this section for failure to have child under eight years of age properly secured in restraint system shall be convicted if he produces at time of his trial proof satisfactory to court that he has subsequently acquired approved child passenger restraint system. (NCGS 20-137.1[c]). Two driver's license points shall be assessed for violation of this section pursuant to G.S. NCGS 20-16, but no insurance points shall be assessed for violation of this section; nor shall violation constitute negligence per se or contributory negligence per se nor shall it be evidence of negligence or contributory negligence. (NCGS 20-137.1[d]).

Seat Belt Use Mandatory.

Each occupant must have seat belt fastened when vehicle is in forward motion on street or highway. Evidence of failure to use seat belt admissible only if failure of front seat occupant was reason for police action. Conviction of infraction under G.S. NCGS 20-135.2A has no consequence other than payment of $25 penalty for driver or front seat passenger and $10 penalty rear seat occupant, plus various specified court costs for driver or front seat passenger. (NCGS 20-135.2A).

Lights Required.

Regulated by G.S. NCGS 20-129, et seq.

Inspection.

Motor vehicles are subject to safety and emissions inspections in accordance with requirements of G.S. NCGS 20-183.2, et seq. Vehicle subject to emissions inspection if: (1) It is subject to registration with division under Art. 3 of G.S. c. 20; (2) it is not trailer whose gross weight is less than 4,000 pounds, house trailer, or motorcycle; (3) it is 1996 or later model; (4) repealed 1999 N.C. Sess. Laws 328, §3.11; (5) it either: (a) is required to be registered in emissions county, (b) is part of fleet that is operated primarily in emissions county, (c) is offered for rent primarily in emissions county, (d) is used vehicle offered for sale by dealer in emissions county, (e) is operated on federal installation located in emissions county and is not tactical military vehicle, and (f) is otherwise required by 40 C.F.R. part 51 to be subject to emissions inspection; (6) it is not licensed at farmer rate under G.S. NCGS 20-88(b); (7) it is not new motor vehicle, as defined in G.S. NCGS 20-286(10)a., and has been used motor vehicle, as defined in G.S. NCGS 20-286(10)b., for 12 months or more. However, motor vehicle that has been leased or rented, or offered for lease or rent, is subject to emissions inspection when it either: (a) Has been leased or rented, or offered for lease or rent, for 12 months or more, or (b) is sold to consumer-purchaser; and (8) it is not privately owned nonfleet motor home or house car, as defined in G.S. NCGS 20-4.01(27)(d2), that is built on single chassis, has gross vehicle weight of more than 10,000 pounds and is designed primarily for recreational use. (NCGS 20-183.2[b]).

Traffic Regulations.

Regulated by G.S. NCGS 20-138.1, et seq.

Accidents.

Driver or passenger of vehicle involved in accident or collision which has resulted in injury or death to any person shall remain at scene with vehicle, unless remaining at scene places driver, passenger, or others at significant risk of injury, until law enforcement officer completes investigation or authorizes vehicle to be removed. (NCGS 20-166[a]). Driver must also give name, address, driver's license number and license plate number of vehicle to person struck or driver and must provide assistance to injured person including calling for medical assistance if necessary or requested by injured person. (NCGS 20-166[b], -166.2[a]). If accident or collision results only in damage to property or results in injury or death, but only if other driver or passenger did not know or have reason to know of death or injury, driver or passenger must stop at scene and give name, address, driver's license number and license plate number. (NCGS 20-166[c], -166.2[b]). Negligent rendering of emergency assistance not actionable unless wanton or intentional. (NCGS 20-166[d]).

Reports and Investigations.

Driver of vehicle involved in collision resulting in reportable accident must immediately give notice of collision to local police if collision occurs in municipality or, if not, to office of sheriff or other qualified rural police of county in which collision occurred and, upon request, furnish proof of financial responsibility. (NCGS 20-166.1[a], [b]). In collisions with parked or unattended vehicles, driver must report to owner of such parked or unattended vehicle within 48 hours of collision. (NCGS 20-166.1[c]).

Liability of Owner.

For negligence of others only when present in car or car operated by his servant or agent within scope of authority and duty. (211 N.C. 639, 191 S.E. 331). Owner of car kept for family use liable for negligence of any member of family. (245 N.C. 387, 95 S.E.2d 880).

Proof of ownership of vehicle at time of accident is prima facie evidence that vehicle was used with owner's authority. Proof of registration is prima facie evidence of ownership and that owner assumed full responsibility for driver. (NCGS 20-71.1).

Guests.

There is no statute restricting liability for injury to a guest.

Proof of financial responsibility means proof of ability to respond in damages for liability arising out of operation of motor vehicle in amount of $30,000 for injury to one person, $60,000 for injury to more than one person and $25,000 for damage to property. (NCGS 20-279.1[11]). Such proof is required before operator's license will be issued (NCGS 20-7[c1]) or restored (NCGS 20-19[k]) or grant of limited driving privileges authorized (NCGS 20-16.1[g]). Operation of motor vehicle without financial responsibility, making false certification or giving false information is misdemeanor, punishable by fine or imprisonment in discretion of court. (NCGS 20-313, -313.1).

Suspension of License After Accident.

Operator's and owner's license shall be suspended within 60 days after notification of reportable accident unless operator or owner shall deposit security in sum determined by commissioner. (NCGS 20-279.5[b]). This does not apply to person qualifying as self-insurer or person covered by insurance with minimum coverage required for proof of financial responsibility. (NCGS 20-279.5[c]). Other exceptions found in G.S. NCGS 20-279.6.

Duration of Suspension.

Such suspension remains in effect until: (1) Required security is deposited; (2) person is released from liability; (3) one year elapses without institution of action for damages; or (4) written agreement providing for payment of damages (provided that license will be suspended in event of any default under such agreement). (NCGS 20-279.7).

Suspension of License for Failure to Pay Judgment.

If any final judgment for damages arising out of motor vehicle accident remains unpaid for 60 days, commissioner shall suspend license of judgment debtor. (NCGS 20-279.13). Suspension shall remain in effect until judgment is: (1) Stayed; (2) paid in full; (3) barred by statute of limitations; or (4) discharged by bankruptcy. (NCGS 20-279.14). Written consent of judgment creditor is also sufficient to allow debtor to retain license. (NCGS 20-279.13[c]). Sufficiency of judgment payments is governed by G.S. NCGS 20-279.15.

Text Messaging or Emailing While Driving

Unlawful for any person, while operating vehicle, to use mobile phone for text messaging or electronic mail. (NCGS 20–137.4A)

Registration.

No motor vehicle may be registered unless owner has financial responsibility for operation of motor vehicle at time of registration. Financial responsibility shall be liability insurance policy, or financial security bond or financial security deposit or by qualification as self-insurer. Owner must maintain such proof continuously throughout period of registration. (NCGS

20-309[a], [b]). Owner of commercial motor vehicle (NCGS 20-4.01[3d]) shall have financial responsibility for operation of motor vehicle in amount equal to that required for for-hire carriers transporting non-hazardous property in interstate or foreign commerce in 49 C.F.R. 387.9 (NCGS 20-309[a1]).

Lapse of Insurance.

When liability insurance is terminated by cancellation or failure to renew or owner's financial responsibility for operation is terminated, owner must surrender registration certificate and plates of vehicle to Division of Motor Vehicles unless financial responsibility is otherwise maintained. (NCGS 20-309[c]). To retain registration plate, owner shall, within ten days from date notice is given by division, either: (1) Certify to division that owner had financial responsibility effective on or prior to date of termination or (2) in case of lapse pay $50 civil penalty and certify that he now has financial responsibility, that he did not operate vehicle in question with knowledge of no financial responsibility and that such motor vehicle was not involved in crash during such period. (NCGS 20-309[e]). (Repealed effective July 1, 2008).

Action by Division When Notified of Lapse in Financial Responsibility.

With evidence that owner of motor vehicle registered (or required to be) in this State does not have financial responsibility for operation of vehicle, Division shall send owner letter notifying owner of evidence. Owner shall respond to letter within ten days, explaining how owner has met duty to have continuous financial responsibility and Division shall: (1) Correct its records, (2) penalize owner, (3) penalize owner and revoke registration, or (4) revoke registration pending response of owner if owner fails to respond within ten days. (NCGS 20-311[a]).

Insurance.

Motor vehicle liability policy required to cover liability of persons named as insureds resulting from ownership, maintenance or use of motor vehicle. Also covers damages sustained by insured as result of collision with uninsured or underinsured motor vehicle or in hit and run accident.(NCGS 20–279.21)

Foreign Vehicles.

Nonresidents are entitled to same exemptions with respect to registration of vehicles as their respective home states grant to residents of N.C., provided laws of home state have been complied with and proper registration plates are displayed. When resident carrier of this state interchanges properly licensed trailer or semi-trailer with resident of another state, and adequate records are filed, the N.C. carrier may use the outstate trailer same as if it is his own during time nonresident carrier uses the N.C. trailer. (NCGS 20-83).

Commissioner of Motor Vehicles may enter into reciprocity agreements with other jurisdictions with regard to registration and licensing of motor vehicles. (NCGS 20-4.4).

Nonresident Operators.

A nonresident at least 16 years old, having a driver's license issued by his home state, may operate a motor vehicle in this state in accordance with license restrictions and vehicle classifications that would be applicable to him under laws and regulations of his home state or country if he were driving in his home state or country. (NCGS 20-8[3]).

Actions Against Nonresidents.

Courts of this state have jurisdiction over all persons who cause injury to person or property by any act or omission within this state. (NCGS 1-75.4). Service of process may be made personally, by registered or certified mail, or by publication. (NCGS 1A-1, R. 4). Statute providing for service upon Commissioner of Motor Vehicles as agent for receipt of service of process for nonresident reenacted effective July 1, 1971. (NCGS 1-105, et seq.).

Motor vehicle carriers regulated by N.C. Utilities Commission (NCGS 62-259, et seq.) and monitored by Division of Motor Vehicles and Dept. of Crime Control and Public Safety (NCGS 20-376, et seq.). Carrier must hold such security bond, insurance or self-insurance for protection of public as required by Commission. (NCGS 62-268). Interstate motor carriers must register with base state, either file copy of certificate of authority issued by United States Dept. of Transportation or certify to Division that such certificate is not necessary, and verify insurance to Division. (NCGS 20-382). Intrastate motor carriers must register with and verify insurance to Division. (NCGS 20-382.1).

Golf Carts

Counties and cities authorized to regulate by ordinance operation of carts on public streets, roads, highways with 35 miles per hour speed limit and to require registration. (NCGS 153A-245, 160A-300.6)

Motor Vehicle Taxes.

See category 22 Taxation, topic 22.17 Sales and Use Taxes, subhead Sales Tax.

Gasoline Tax.

See category 22 Taxation, topic Gasoline and Special Fuels Taxes.

Direct Actions.

Not authorized by statute.

Motorboats or Vessels.

Family purpose doctrine, as applicable in tort cases arising from operation of motor vehicle, applies to tort cases arising from operation of motorboats and vessels. (NCGS 75A-10.1).

Motor vehicle dealers and manufacturers are regulated by G.S. NCGS 20-285, et seq.

Lemon Law.

State and private remedies are provided when motor vehicle manufacturers fail to conform to express warranties. (NCGS 20-351, et seq.).

23.02 RAILROADS:

See category 3 Business Regulation and Commerce, topic 3.08 Carriers.

23.02A COMMERCIAL CODE FORMS:

See Part III, Uniform and Model Acts, Commercial Code Amendments, National Forms.

24 Forms

Deeds

(Click here to view)

1
NORTH DAKOTA LAW DIGEST

—Scope —

Revised for 2010 edition by

NILLES, ILVEDSON, PLAMBECK & SELBO, LTD., of Fargo.

(Citations, unless otherwise indicated, refer to sections or chapters of North Dakota Century Code—Annotated; sessions laws are cited by year and chapter number. N.D.R.Civ.P. refers to North Dakota Rules of Civil Procedure. R. App. P. refers to Rules of Appellate Procedure. Parallel citations to the North Western Reporter begin with 1 Dak.)

Uniform Probate Code, adopted. (Title 30.1).

Note: This revision covers all Acts enacted by ND Legislature through its 2009 regular session. Effective date of newly enacted legislation is Aug. 1, 2009, unless otherwise noted.

1 INTRODUCTION

1.01 GOVERNMENT AND LEGAL SYSTEM:

The State of North Dakota is a constituent state of the United States of America. For further discussion of the U.S. federal system, see Introduction to the Federal Government of the United States at the beginning of this volume. A great many laws are promulgated by the federal government of the United States and are not reflected in the topics below. See the Introduction to this volume for references to the federal law topics covered.

Like all but one of the United States, North Dakota has a common law legal system, with roots in English common law. For information on the courts and legislature of North Dakota, see category 6 Courts and Legislature.

1.02 [RESERVED]

1.03 HOLIDAYS:

Legal holidays are Sundays, Jan. 1, 3rd Mon. in Jan., 3rd Mon. in Feb., Fri. preceding Easter Sun., last Mon. in May, July 4, first Mon. in Sept., Nov. 11, 4th Thurs. in Nov., Dec. 25 and any day appointed by President or Governor for public holiday. (NDCC 1-03-01). When Jan. 1, July 4, Nov. 11, or Dec. 25 falls on Sun., next day is holiday. (NDCC 1-03-02). When any of said days fall on Sat., preceding Fri. is holiday. (NDCC 1-03-02.1).

Sunday Closing.

Conducting business is prohibited between midnight Sat. and 12 noon on Sun. (NDCC c. 12.1-30).

1.04 OFFICE HOURS AND TIME ZONE:

North Dakota is in the Central (GMT -06:00) and Mountain (GMT - 7:00) time zones. Office hours are generally from 8 a.m. to 5 p.m.

2 BUSINESS ORGANIZATIONS

2.01 AGENCY:

Agency is the relationship which results where one person, called the principal, authorizes another, called the agent, to act for him in dealing with third persons. (NDCC 3-01-01).

An agency may be either actual or ostensible. (NDCC 3-01-03).

Any person having capacity to contract may appoint an agent and any person may be an agent. (NDCC 3-01-04).

An agent may be authorized to do any acts which his principal might do, except those to which the latter is bound to give his personal attention. (NDCC 3-01-05).

2.02 ASSOCIATIONS:

No statutory provisions.

Cooperative Associations are governed by NDCC c. 10-15.

2.03 CORPORATIONS:

General Supervision.

Secretary of State, Capitol Building, Bismarck, N. D. 58501, has general supervision over corporations and receives all filings.

Note: 1993 Legislature enacted legislation authorizing limited liability companies, including authority of foreign limited liability companies to do business in North Dakota. (NDCC 10-32). See topic 2.06 Limited Liability Companies.

Introductory Statement.

Effective July 1, 1985, N.D. adopted significant corporate law changes and departed somewhat from Model Business Corporation Act as revised in 1953 and 1957 prepared by Committee on Corporate Laws of American Bar Association. Because of substantial deviations from text any references to Model Act are deleted.

Purposes.

May be incorporated for any lawful business purpose or purposes. Unless provided in articles, corporation has general business purpose. (NDCC 10-19.1-08).

Name.

Must be in English letters or characters, contain word “corporation”, “incorporated”, “limited”, or “company” or abbreviation of above. Cannot be deceptively similar to another name and cannot contain word or phrase indicating purpose other than its business purpose. (10.19.1-13). Name can be reserved prior to incorporation. (NDCC 10-19.1-14).

Term.

Perpetual unless modified in articles. (NDCC 10-19.1-10).

Incorporators.

One or more individuals of 18 years of age or more. (NDCC 10-19.1-09).

Articles of Incorporation.

Must contain name of corporation, address of registered office and name and address of registered agent, aggregate number of shares authorized to issue, name and address of incorporators. May not limit right of cumulative voting. Numerous provisions govern corporation unless modified in articles. (NDCC 10-19.1-10). Director's liability to corporation for monetary damages for breach of fiduciary duty may be limited or eliminated in articles. (NDCC 10-19.1-50). Original Articles must be filed with Secretary of State. (NDCC 10-19.1-11). Proof of registered agent's consent to serve in that capacity must also be filed. (NDCC 10-19.1-15).

Incorporation Fee.

$100. (NDCC 10-19.1-147).

Filing Fee.

Included above. (NDCC 10-19.1-147).

License to do Business.

Corporate existence begins upon issuance by Secretary of State of certificate of incorporation. (NDCC 10-19.1-12).

Organization.

If first board is not named in articles, incorporators may elect or may act as directors until directors elected or shares issued. Incorporators or directors shall hold meeting or take written action for purposes of taking actions appropriate to complete organization of corporation. If meeting is held, three days notice must be given to each incorporator or director. (NDCC 10-19.1-30).

Paid-in Capital Requirements.

None.

Amendment to Articles.

Before issuance of shares by incorporators or board. (NDCC 10-19.1-18). After issuance of shares, by majority of voting power of shares present and entitled to vote. (NDCC 10-19.1-19). When different classes or series of shares, certain protections are given. (NDCC 10-19.1-20). Articles of amendment containing name of corporation, amendment, and date of adopting amendment. If restating in entirety, include statement that restated articles supersede original articles. (NDCC 10-19.1-21). Original must be filed. (NDCC 10-19.1-23). Procedures for amendment in court supervised reorganization described. (NDCC 10-19.1-25).

Bylaws.

Corporation may, but need not, have bylaws. Unless reserved by articles to shareholders, power to adopt, amend, or repeal bylaws is vested in board. Board may not amend regarding quorum for meeting of shareholders, procedures for removing directors or vacancies on board and certain other matters regarding directors. (NDCC 10-19.1-31).

Stock.

All shares must be of one class and one series unless articles establish or authorize board to establish more than one class or series. Must be common shares with right to vote unless articles create preference or nonvoting classes. Par value is 1¢ unless otherwise specified in articles. (NDCC 10-19.1-61).

Stock Certificates.

Must be signed by president or vice president and secretary. Certificate must state name of corporation, organized under law of N.D., name of person to whom issued, number and class of shares, and par value. Other requirements if corporation to issue more than one class. (NDCC 10-19.1-66).

Issuance of Stock.

Issued only when authorized by board. (NDCC 10-19.1-61). Subscriptions for shares must be in writing and signed by subscriber to be enforceable and irrevocable for six months unless otherwise stated in agreement. (NDCC 10-19.1-62). Consideration may be paid in money, other property, or labor or services actually performed for corporation. Corporation may issue only shares for which consideration has been fully paid. If otherwise issued, joint and several liability exists to shareholder or director who failed to vote against issuance, person to whom issued and any successor or transferee of interest. (NDCC 10-19.1-63).

Transfer of Stock.

Written restriction on transfer not manifestly unreasonable under circumstances and noted conspicuously on face or on back of certificate is enforceable. (NDCC 10-19.1-70).

Stockholder Meetings.

Regular meetings of shareholders may be held on annual or less frequent periodic basis, but need not be held unless required by articles or by-laws. If not held for 15 months, shareholder with 5% of voting power may demand meeting with notice to president or secretary, and board shall cause meeting to be called within 30 days. (NDCC 10-19.1-71). Special meetings may be called by president, two or more directors, person authorized by articles or by-laws, or shareholders holding 10% of voting power, however some matters require 25%. (NDCC 10-19.1-72). Provisions for 5% shareholder. Purpose to be stated in notice. Ten day notice required unless less provided in articles or by-laws. (NDCC 10-19.1-72, 73).

Stockholder Actions.

Majority of voting power of shares is quorum unless otherwise stated in articles or by-laws. Action on writing signed by all shareholders or by electronic communication is authorized. Board can fix date not more than 50 days to determine shareholders entitled to vote. Proxies authorized. (NDCC 10-19.1-75, 76, 76.2).

Directors.

Board must consist of one or more directors as set in articles or by-laws. Directors must be individuals. Director serves for indefinite term that expires at next regular meeting of shareholders unless fixed term provided in articles or by-laws. Fixed term may not exceed five years. No requirement that they be shareholders. (NDCC 10-19.1-33, 34, 35). Directors elected by shareholders and cumulative voting applies. (NDCC 10-19.1-39).

Director Meetings.

May be held as per articles or by-laws. Meeting must be at principal executive office unless another site selected. Any means of communication in which directors can simultaneously hear each other constitutes meeting. Director may call meeting on ten days notice. Purpose need not be stated. Quorum is majority unless otherwise stated in by-laws or articles. Withdrawal of one originally present does not defeat quorum. If director cannot be present he can give advance written support or opposition to matters before board. Action required or permitted to be taken at board meeting may be taken by written action signed by all directors. Articles or by-laws can provide for less than all. (NDCC 10-19.1-43—47).

Powers and Duties of Directors.

Business and affairs of corporation must be managed by board. (NDCC 10-19.1-32). Director may resign at any time by giving written notice to corporation. (NDCC 10-19.1-40). May fill vacancy on board if caused by death, resignation, removal or disqualification or from newly created directorships. (NDCC 10-19.1-42). Conflict of interest procedures regarding transactions between director and corporation provided for. (NDCC 10-19.1-51).

Officers.

Must consist of president, secretary and treasurer who must be elected by board. Any office may be held by same person and one may sign documents in both capacities. (NDCC 10-19.1-52, 55).

Liabilities of Officers.

Shall discharge office in good faith, in manner he reasonably believes to be in best interests of corporation and with care of ordinarily prudent person in like position. (NDCC 10-19.1-60).

Indemnification of Directors and Officers.

Corporation to indemnify for former or present official capacity, including attorney's fees. (NDCC 10-19.1-91).

General Powers of Corporation.

Described in NDCC 10-19.1-26. No act or transfer by corporation is invalid because corporation was without capacity to do such act or make or receive conveyance except same may be asserted by shareholder against corporation or corporation against officer, under certain circumstances, or attorney general. (NDCC 10-19.1-28).

Sale or Transfer of Assets.

Permitted upon vote of majority of directors present when in ordinary course of business. When not in ordinary course, majority of directors and approval of shareholders at regular or special meeting. (NDCC 10-19.1-104).

Books and Records.

Corporation shall keep share register not more than one year old, including record of dates certificates were issued. Corporation shall keep records of proceedings of shareholders and board for last three years, its articles, amendments currently effective, bylaws, financial statements for most recent interim period, reports to shareholders for last three years, names and addresses of directors and officers, voting trust and shareholder control agreements. (NDCC 10-19.1-84).

Dividends.

Board to authorize only if it determines that corporation will be able to pay its debts in ordinary course after making distribution. Rights, priorities and restrictions may be set in articles or bylaws. Shareholder who knows or should have known of improper distribution is liable to corporation. Action to be commenced within two years of distribution. Directors also liable. (NDCC 10-19.1-92, 94, 95).

Merger and Consolidation.

Plan of merger must contain names of corporations, name of survivor or acquiring corporations, terms, manner and basis of converting shares, any amendments to articles. Plan of merger must be approved by majority of directors present at meeting of each board. Written notice must be given to shareholders 14 days before meeting, stating purpose of meeting.

Holders of majority of voting power of all shares can approve. Provisions for not submitting to vote of shareholders. (NDCC 10-19.1-97, 98). Articles of merger to be filed with secretary of state. (NDCC 10-19.1-99). Filing fee, $50. Domestic corporation may merge with foreign corporation under same procedures if permitted by law of state of foreign corporation. (NDCC 10-19.1-103).

Dissolution.

May be dissolved by majority of incorporators if no shares issued by filing articles of dissolution containing corporate name, date of incorporation, statements that no shares have been issued, subscriptions have been refunded, and debts paid. (NDCC 10-19.1-106). May be dissolved after issuance of shares by shareholders on vote of majority of voting power of all shares and filing in duplicate notice of intent to dissolve. (NDCC 10-19.1-107, 108). Filing fee, $20. Original of articles of dissolution must be filed with secretary of state. (NDCC 10-91.1-113.1). Filing fee, $20. Involuntary or supervised voluntary dissolution by court available. (NDCC 10-19.1-114, 115).

Mandatory Provision & Transition.

After June 30, 1986, this chapter applies to all existing corporations incorporated under any chapter of this code. (NDCC 10-19.1-04). Any corporation that was not incorporated under, but has become governed by, this chapter, and continues performance, contract, conveyance or transfer that was otherwise lawful before corporation became governed by this chapter will remain valid and may be continued as required or permitted by statute. (NDCC 10-19.1-06).

Corporate Farming or Ranching.

All corporations and limited liability companies are prohibited from owning or leasing land used for farming or ranching and from engaging in business of farming or ranching, except as provided. “Corporation” includes any joint stock company or association. Special provisions for nonprofit organizations. Conversion to NDCC 10-06.1 corporation authorized.

“Farming or ranching” means cultivating land for production of agricultural crops or livestock, raising or producing of livestock or livestock products, poultry or poultry products, milk or dairy products, fruit or horticultural products. Does not include timber or forest products, or contract whereby processor or distributor of farm products or supplies provides grain, harvesting, or other farm services.

Cooperative corporations, 75% of whose members or shareholders are actual farmers or ranchers residing on farms or ranches or depending principally on farming or ranching for their livelihood, may acquire real estate and engage in cooperative farming or ranching.

Domestic corporation or limited liability company may engage in business of farming or ranching if following requirements are met: Not more than 15 shareholders or members; shareholders or members must be related within one of following degrees of kinship: parent, child, grandparent, grandchild, brother, sister, uncle, aunt, nephew, niece, great-grandparent, great-grandchild, first cousin, or is spouse of person so related; shareholders are individuals, except trust for benefit of qualifying individual or individuals or estate of decedent who was qualified individual may be shareholder; trusts or estates are not qualified if beneficiaries together with other shareholders are more than 15 in number; qualifying individual must be citizen of U.S. or permanent resident alien of U.S.; officers and directors must be shareholders actively engaged in operating farm or ranch and at least one of its shareholders or members shall reside on or operate farm or ranch; annual average of at least 65% of corporation’s gross income over previous five years, or for each year of its existence, if less than five years, shall be derived from farming or ranching; corporation’s income from rent, royalties, dividends, interest, and annuities does not exceed 20% of corporation’s gross receipts. (NDCC 10-06.1-12).

Any business corporation not engaged in farming which owns or leases land used in farming or ranching larger than 20 acres must file report with Attorney General. (NDCC 10-06.1-18). Attorney General may commence action to divest ownership if land owned in violation of law. (NDCC 10-06.1-24).

Minority shareholders protected. Annual reports filed with Secretary of State. Random compliance program to be conducted by attorney general. Violations of Act enforced in District Court. (NDCC c. 10-06.1).

Foreign Corporation.

Foreign corporations are governed by chapters NDCC 10-19.1-132 through NDCC 10-19.1-145.

Insolvency and Receivers.

The general principles of equity with respect to insolvency and receivers may be resorted to in proper cases.

Non-Profit Corporation.

Certain nonprofit organizations or trust may have farmland. Specific rules apply. (NDCC 10-06.1-09).

Fees and Penalties.

Failure to file annual report results in penalty of $20 if filed within 90 days or $60 if filed thereafter. (NDCC 10-19.1-147). Failure to file annual report within one year of due date results in involuntary administrative dissolution. (NDCC 10-19.1-146). Fees for filing documents and issuing certificates are: Filing articles of incorporation and issuing certificate, $100; amendments and certificate thereof, $20; articles of correction, $20; restated articles, $30; articles of conversion, $50; abandonment of conversion, $50; articles of merger or consolidation, $50; application to reserve corporation name, $10; notice of transfer of reserved corporate name, $10; consent to use of name, $10; statement of change of registered office and registered agent, $10; statement of establishment of series of shares, $20; statement of cancellation of shares, $20; statement of reduction of stated capital, $20; statement of intent to dissolve, $10; statement of revocation of voluntary dissolution, $10; filing articles of dissolution, $20; application of foreign corporation for certificate to do business in this state, $145; application of foreign corporation for amended certificate of authority, $40; filing articles of merger of foreign corporation, $50; filing application for withdrawal of foreign corporation, $20; filing annual report of domestic corporation, $25; and of foreign corporation, $25; all other statements and reports, $20; change of registered agent’s office address by agent, $10. Certified copies, $1 for every four pages or fraction thereof, $15 for certificate; service of process on Secretary of State as resident agent $10. (NDCC 10-19.1-147).

Property Tax.

Real and personal property of corporations, foreign and domestic, are subject to taxation within this state. (NDCC 57-02-03). Tangible properties are taxable where situated. (NDCC 57-02-15). All property of railroads and public utilities are assessed on a statewide basis by State Board of Equalization. (NDCC 57-05-01).

Taxation of Corporate Stock.

No special provisions.

Franchise Tax.

No provisions.

Income Tax.

See category 22 Taxation, topic 22.10 Income Tax, subhead Corporation Income Tax. As to gross premium tax on foreign insurance companies in lieu of income tax, see category 16 Insurance, topic 16.01 Insurance Companies.

Close Corporations.

Corporation which does not have more than 35 shareholders. (NDCC 10-19.1-01). Special provision for involuntary dissolution. (NDCC 10-19.1-115).

Appraisal.

No special statutory provisions.

Unclaimed Dividends.

No specific statute. See category 21 Property, topic 21.01 Absentees, subhead Escheat.

Uniform Securities Ownership by Minors Act adopted. (NDCC c. 14-10.1).

Uniform Commercial Code adopted, effective July 1, 1966. (Title 41). See category 3 Business Regulation and Commerce, topic 3.09 Commercial Code.

Professional Corporation.

Authorizes incorporation of persons practicing a licensed profession not previously allowed to incorporate. Professional Organizations Act. (NDCC c. 10-31).

Deeds.

See category 21 Property, topic 21.06 Deeds.

Non-Profit Corporation Act adopted. (NDCC 10-33).

Taxation.

See also category 22 Taxation, topics 22.03 Business Taxes, 22.10 Income Tax, 22.13 Property Taxes.

Limited Liability Companies.

See topic 2.06 Limited Liability Companies.

2.04 [RESERVED]

2.05 JOINT STOCK COMPANIES:

No legislation on this subject, except provisions as to excise tax on joint stock companies, as to which see topic 2.03 Corporations.

Professional Corporations.

See topic 2.03 Corporations.

2.06 LIMITED LIABILITY COMPANIES:

Limited liability companies may be organized for any lawful purpose, unless other statute requires organization under different law. Unless provided in its articles, limited liability company has general business purposes. (NDCC 10-32-04). One or more individuals at least 18 years of age may act as organizers of limited liability company. (NDCC 10-32-05).

Articles of organization must contain name, address of registered office and name and address of registered agent, name and address of organizer, effective date of organization, and statement stating years of existence if other than perpetual. Other statutory provisions apply unless modified in articles of organization. (NDCC 10-32-07).

Name must be in English language or in other language expressed in English letters and must contain words “limited liability company” or abbreviation “L.L.C.” or “LLC”. It may not contain word “corporation,” “incorporated,” “limited partnership,” “limited liability partnership,” “limited liability limited partnership,” or any abbreviations of these words. (NDCC 10-32-10). It may not contain words “limited” or “company” without association to words “limited liability company” or abbreviations of these words. (NDCC 10-32-10).

General powers of limited liability company are outlined in NDCC 10-32-23.

Membership interest is personal property and member has no interest in specific limited liability company property. (NDCC 10-32-28). Member, governor, manager, or agent of limited liability company is not personally liable for acts, debts, liabilities or obligations of limited liability company except under conditions and circumstances which corporate veil of corporation may be pierced under North Dakota law. (NDCC 10-32-29).

IRS issued private letter ruling that North Dakota limited liability company will be taxed as partnership. (Priv. Ltr. Rul. NDCC 94-25-013 [Mar. 23, 1994]).

2.07 [RESERVED]

2.08 PARTNERSHIPS:

North Dakota Uniform Limited Partnership Act (2001) (NDCC 45-10.2).

Name.

Every partnership transacting business under fictitious name or designation not showing names of persons interested as partners must file with Secretary of State, fictitious name certificate, stating fictitious name, names and address of all general partners of such partnership, brief description of nature of business, and address of principal place of business. (NDCC 45-11-01, 02). Commercial partnership established and transacting business in place outside U.S. may use partnership name used by it there without filing certificate described above, although it is fictitious or does not show names of persons interested as partners in such business. (NDCC 45-11-03).

Penalty for not complying is that partnership may not maintain an action on, or an account of, any contracts made or transactions had in partnership name, in any court of this state until such certificate is filed. (NDCC 45-11-04).

Out-of-State Partnerships.

General partnership doing business in N.D. must file fictitious name certificate before transacting business in N.D. (NDCC 45-11-01). Limited partnership shall register with Secretary of State. (NDCC 45-10.2-79).

Limited liability partnerships authorized. (NDCC 45-22).

Limited liability limited partnerships authorized. (NDCC 45-23).

3 BUSINESS REGULATION AND COMMERCE

3.01 BANKS AND BANKING:

Uniform Commercial Code adopted, effective July 1, 1966. (Title 41). See topic 3.09 Commercial Code.

General Supervision.

State banks are under general supervision of State Banking Board, State Credit Union Board and chief officer known as Commissioner of Financial Institutions. (NDCC 6-01-01).

Business of banking is limited to corporations organized under banking laws; otherwise no individual, firm, partnership or domestic or foreign corporation, except national banks, banks organized under laws of another state, domestic or foreign bank holding companies and their affiliates, and Bank of North Dakota, may transact business of banking. (NDCC 6-02-01).

Name.

All persons and corporations except those organized under banking laws are prohibited from using such words as bank, banker, banking, or other words of like import. (NDCC 6-02-01).

Deposits.

Bank may not pay interest on deposits at greater rate than authorized by Banking Board (NDCC 6-03-63); deposits made by minor may be repaid to minor without consent of guardian or conservator (NDCC 6-03-64); bank may not charge debt due to it against account of customer without legal process or his consent (NDCC 6-03-67); corporation, association, or society deposits payable to any person authorized by its board of directors or trustees (NDCC 6-03-64); deposits in trust for another without further written notice to bank, payable to person for whom deposit made upon death of trustee (NDCC 6-03-65); deposit in two names, payable to either or payable to either or survivor may be paid to either of said persons whether other be living or not (NDCC 30.1-31).

Unclaimed Deposits.

Considered abandoned are: (1) Demand, savings, matured time deposits with banking or financial organization, including deposit automatically renewable, and funds paid toward purchase of shares, mutual investment certificate or other interest unless, owner, within five years has taken certain prescribed steps, or with regard to matured time deposit, organization has mailed, return receipt requested and returned signed by owner, at least once every five years (NDCC 47-30.1-06); (2) sums payable on checks, drafts, and similar instruments held for three years (NDCC 47-30.1-05); (3) sums payable on traveller's checks held for 15 years (NDCC 47-30.1-04); (4) property in safety deposit boxes held for three years from expiration of rental period (NDCC 47-30.1-16). See category 21 Property, topic 21.01 Absentees, subhead Escheat.

Collections.

Uniform Commercial Code adopted. See topic 3.09 Commercial Code.

Loans.

No real estate loan of more than $250,000 may be made prior to appraisal being conducted by licensed or certified appraiser if required by federal 12 USC 3332, et seq. (NDCC 6-

03-05), except no appraisal or formal valuation is required for real estate loan of $250,000 or less (NDCC 6-03-05); real estate acquired through mortgage foreclosure may not be held for more than five years unless time extended by certificate of Commissioner (NDCC 6-03-09).

Total liability to bank of any borrower shall not exceed 25% of bank's common stock, surplus, and undivided profits (NDCC 6-03-59); bank may not loan on security of its own shares or on any holding company stock which controls association or banking institution, nor be purchaser or holder of any such shares, unless such security or purchase is necessary to prevent loss upon debt previously contracted in good faith. (NDCC 6-03-33).

Stockholders' Liability.

Stockholders liable for assessment to make good impairment of capital or deficiency in capital stock as required by articles or law. Assessment must not exceed 100% value of the stock in first year or 25% in succeeding years. (NDCC 6-03-22).

Debts of Bank.

Banks are exempt from process of attachment or execution; but if a bank fails or refuses to pay a valid judgment against it, not stayed by bond (see category 5 Civil Actions and Procedure, topic 5.03 Appeal and Error), the State Banking Board must declare it insolvent or in failing circumstances, cause a receiver to be appointed and wind up its affairs. (NDCC 6-08-06).

Trust Companies.

At least nine individuals, three of whom are residents of state may associate and form corporation for purposes of transacting business as annuity, safe deposit and trust companies and are granted powers usually incident to such corporations. (NDCC 6-05-01; NDCC 6-05-08). May invest in accordance with Prudent Man Rule. (NDCC 6-05-15). Investment and co-mingling of funds is regulated. (NDCC 6-05-15.1).

No individual, firm, company, co-partnership or corporation, either domestic or foreign, not organized under bank act nor subject to provisions thereof, excepting national banking corporations, state banks authorized under this chapter, state banks or trust companies authorized to engage in trust activities under another state's laws, and Bank of North Dakota, may in signs, letterheads, advertising, or in any other way, use word "Trust," or "Trust Company," or any other words of like import; and no person or concern may do any business in nature of trust company until such business is regularly organized under bank act. Any firm or corporation which, by reason of existing charter right under any prior statute, court may hold is not affected by bank act, and until expiry of its character must, during period of noncompliance permanently and continuously display in plain and permanent lettering on all its signs and all its printed or written matter words: "Not under the supervision of the State Banking Board or the Commissioner of Financial Institutions." (NDCC 6-05-02).

Uniform Common Trust Fund Act not adopted.

Subsidiary Trust Companies may be formed by owning bank holding company and bank or banks having main office in this State. (NDCC 6-05.1).

Common Trust Funds.

Allowed. (NDCC 6-05-15.2).

Taxation.

State has adopted method of taxation (NDCC 57-35.3); such tax is in lieu of all other taxes except taxes on real property, sales and use tax, motor vehicle fuel and special fuel taxes, and motor vehicle excise taxes (NDCC 57-35.3-04); rate of tax is 7% on its taxable income, with minimum of $50 (NDCC 57-35.3-03).

Foreign Banks.

Right to act as fiduciary. (NDCC 6-08-25). See categories 13 Estates and Trusts, topics Executors and Administrators, Trusts; Family, topic Guardian and Ward.

Uniform Probate Code adopted. (Title 30.1).

3.02 BILLS AND NOTES:

Uniform Commercial Code adopted effective July 1, 1966. (Title 41). See topic 3.09 Commercial Code.

Special Requirements.

None.

Judgment notes are not recognized by laws of this state. (Rule 68[c], N.D.R.Civ.P.).

Attorney's Fees and Collection Costs.

Provision therefor is against public policy and void. (NDCC 28-26-04).

Negotiability.

Variable interest rate does not render note nonnegotiable. (NDCC 41-03-12).

3.03–3.05 [RESERVED]

3.06 BROKERS:

Uniform Commercial Code adopted, effective July 1, 1966. (Title 41). See topic 3.09 Commercial Code.

Municipalities may license, tax and regulate brokers. (NDCC 40-05-01[51]).

Stock brokers are licensed under the Blue Sky Law. See topic 3.24 Securities.

Money Brokers.

Regulated by Department of Financial Institutions. Provides for regulation of persons engaged in business of finding lenders for persons desirous of obtaining funds. License required, fee for license and investigation, $800. Surety bond required, $25,000. Criminal penalty provided, class C felony. (c. NDCC 13-04.1).

Real Estate Brokers.

Regulated by State Real Estate Commission. (NDCC 43-23-02).

License required from Commission before person may act as broker or salesperson (NDCC 43-23-05); does not apply to attorneys, bank officer acting for bank, auctioneer at public auction, person acting under power of attorney where acts not of recurring nature, to public officers, where owner of property acts for self, bona fide owner or lessor, anyone acting as receiver, trustee, administrator, executor or guardian under authority of deed, trust, or will. (NDCC 43-23-07). Must register annually with Commission and pay annual fee prior to Dec. 31. Special provision for untimely removal application which must be completed by Mar. 1 of subsequent year. Any license not renewed by Mar. 1 must be cancelled. (NDCC 43-23-13.1).

Application for license must be in writing upon blanks prescribed by Commission. (NDCC 43-23-09).

Broker must have and maintain definite place of business within state. Salesperson license must designate name of broker employer. (NDCC 43-23-12).

Fees: Annual fee of not more than $200, as set by commission. (NDCC 43-23-13).

Continuing education required. (NDCC 43-23-08.2).

Insurance Brokers.

See category 16 Insurance, topic 16.01 Insurance Companies.

Subdivided Lands Disposition Act for registration of subdivided lands situated outside State which are offered for sale or disposed of in North Dakota. Provides for registration, exemptions, disclosures, public offering statements, fees, fraudulent practices, licensing of brokers, civil and criminal penalties. Act administered by State Real Estate Commission. (NDCC 43-23.1).

3.07 [RESERVED]

3.08 CARRIERS:

All contract and common carriers of persons and property except air carriers are subject to regulation by Public Service Commission along with all privately owned and operated public utilities, including telecommunications (special provisions for nonprofit companies), pipelines, electric, gas, heating and warehouses that market, store or handle agricultural products. (NDCC 49-02-01). Nonprofit public utilities owned by state or subdivision of state, except telecommunications, are subject to special provisions and other regulation by Commission. (NDCC 49-02-01.1).

Uniform Commercial Code adopted, effective July 1, 1966. (Title 41). See topic 3.09 Commercial Code.

Rates.

Public Service Commission shall supervise rates, and has power to originate, modify, and enforce rates and tariffs after notice and hearing. (NDCC 49-02-03).

Discrimination.

Rebates and discrimination in rates are prohibited. (NDCC 49-04-07; NDCC 49-10.1-02).

Limitation of Liability.

Common carrier cannot be exonerated from liability for negligence, fraud, or other wrongful act of carrier, or his servant, by any agreement made in anticipation thereof. (NDCC 8-07-07).

Bills of Lading.

See topic 3.09 Commercial Code.

Uniform Commercial Code adopted, effective July 1, 1966. (Title 41). See topic 3.09 Commercial Code.

Liens.

Carrier has lien upon property for transportation charges; if owner cannot be found, and charges remain unpaid for six months after arrival, or if owner refuses after notice for three months to pay charges, carrier may sell article at public auction by giving owner or consignee 15 days notice of the time and place of sale by mail and by advertising in a newspaper published in county where sale is made, and apply proceeds to expenses of sale, freight charges, and hold balance subject to order of owner or consignee. (NDCC 8-03-09).

Limitation on Actions by Common Carrier.

See category 5 Civil Actions and Procedure, topic 5.16 Limitation of Actions.

Motor Vehicle Carriers.

See category 23 Transportation, topic 23.01 Motor Vehicles.

3.09 COMMERCIAL CODE:

Uniform Commercial Code adopted. (Title 41).

Code as adopted in North Dakota is substantially same as 1962 Official Text of Code, as modified by 1966 Official Recommendations for Amendment and 1966 Official Recommendations for Optional Amendment, as found in Uniform and Model Acts section. North Dakota statute numbers have been adopted but bear no particular relationship to Uniform Code numbers.

1972 Official Amendments to Article 9 and conforming amendments to related sections adopted.

1977 Official Amendments to Article 8 adopted.

2001 Restatement of Article 9 effective July 1, 2001, and related statutes similarly amended to conform.

2003 Amendments of Art. 7 adopted.

Alternate provisions and options adopted are as follows (reference is made to Uniform Code number):

1-209

1966 Official Optional Amendment adopted.

2-318

1966 Official Optional Amendment Alternative C adopted.

2-702

1966 Official Amendment adopted.

3-121

	Alternate A adopted.
3-501	1966 Official Amendment adopted.
4-106	Optional language adopted.
4-202(1)(b)	Optional language adopted.
5-112(1)	Optional language omitted.
5-114	Optional language omitted.
7-209	1966 Official Amendment adopted.
7-403(1)(b)	Optional language omitted.

Filing fees (NDCC 41-09-96) in official version of Uniform Commercial Code are as follows:

Section	*Action*
Original statement	$15, plus $1 per additional page
Amendment, continuation, etc.	$10, plus $1 per additional page
Information search	$7 per debtor (5 entries), plus $2 for each additional 5 entries
Copies	$7 per debtor, plus $2 per page over 3 pages

Certified copies

$10 per debtor, plus $2 per page for attachments

Termination statement

$5 (NDCC 41-09-84).

Filing Office.

County Recorder for as-extracted collateral, timber and fixtures; County Recorder or Secretary of State in other cases; Secretary of State for collateral of transmitting utility. (NDCC 41-09-72).

Destruction of Lapsed and Terminated Financing Statements.

Filing Officer may destroy lapsed and terminated Financing Statements and related documents filed following one year from date of lapse or termination. (NDCC 41-09-93).

Seller’s Remedies on Discovery of Buyer’s Insolvency.

Notwithstanding provisions of section, producer of agricultural products upon discovery of buyer’s insolvency may reclaim products within ten days after receipt. If misrepresentation of solvency has been made to producer in writing within three months before delivery, ten-day limitation does not apply. Producer’s right to reclaim is not subject to rights of buyer in ordinary course of business or other good faith purchaser. (NDCC 41-02-81).

Bulk transfer provisions repealed by S.L. 1993, c. 410, § 1.

See also topics: Banks and Banking, Bills and Notes, Brokers, Carriers, Contracts, Factors, Frauds, Statute of, Sales, Securities, Warehousemen; categories Business Organizations, topic Corporations; Civil Actions and Procedure, topic Limitation of Actions; Debtor and Creditor, topics Assignments, Fraudulent Sales and Conveyances, Liens, Pledges; Documents and Records, topics Records, Seals; Mortgages, topic Chattel Mortgages; Transportation, topic Motor Vehicles.

3.10–3.11 [RESERVED]

3.12 CONSUMER PROTECTION:

False advertising regulated. (c. NDCC 51-12).

Credit Cards.

Liability of cardholder limited to $100 if issuer has given notice of liability and unauthorized use occurs before cardholder notifies issuer. (NDCC 51-14.1-02).

Restriction on Electronically Printed Credit Card Receipts.

Business accepting credit cards for transaction of business may not print on receipt provided to customer more than last five digits of card number nor expiration date. Effective 1/1/04 for electronic machines put into use after 12/31/03, otherwise section operative 1/1/07 for electronic machines first put into use before 1/1/04. (NDCC 51-07-27).

Consumer Fraud.

Deception, fraud, false pretense, false promise, or misrepresentation in sale or advertising declared unlawful; remedies to state as well as individual. (NDCC 51-15).

Home Solicitation Sales.

Buyer may cancel by written notice within three business days of signing of agreement; over 65 years of age—15 days for product purchased for more than $50; seller must return down payment or trade-in goods within ten days; buyer must return goods within 20 days upon demand of seller. (NDCC 51-18).

Transient Merchants.

License required from Attorney General. License fee, $200, and bond not less than $1,000 nor more than $50,000 with surety company authorized to do business in State. (NDCC 51-04-03). Exemption is provided for selling merchandise only in flea markets, fairs or similar activities regulated by city or county government, convention bureaus or other political subdivisions. (NDCC 51-04-08.1).

Uniform Deceptive Trade Practices Act not adopted.

Plain Language.

No statute.

Unsolicited telefacsimile advertising prohibited. (NDCC 51-07-23).

Identity Theft.

Consumers who suspect they have been victim of identity fraud may in good faith request that consumer reporting agency include fraud alert in their consumer file (NDCC 51-31-02) for minimum period of 90 days. Anyone conducting business in North Dakota who owns or licenses computerized data including personal information must disclose any breach in security. (NDCC 51-30-02). See also category 7 Criminal Law, topic 7.01 Criminal Law.

3.13 CONTRACTS:

See categories 10 Documents and Records, topic Seals; Family, topic Infants.

Uniform Commercial Code adopted, effective July 1, 1966. (Title 41). See topic 3.09 Commercial Code.

3.14 FACTORS:

A factor is an agent, who in the pursuit of an independent calling is employed to buy or sell property in his own name and is interested with the possession or control of property or is authorized to receive payment from the purchaser. (NDCC 3-06-01).

License Requirements.

No statutory provisions.

Powers and Duties.

In addition to the authority of agents in general a factor has actual authority, unless specially restricted: (1) To insure property consigned to him uninsured; (2) to sell on credit anything intrusted to him for sale except such things as it is contrary to usage to sell on credit, but not to pledge, mortgage or barter the same; (3) to delegate his authority to his partner or servant, but not to any person in an independent employment. (NDCC 3-06-02). Factor may sell property consigned to him on such credit as is usual, but having once agreed with purchaser upon terms of credit, may not extend it. (NDCC 3-06-02).

A factor has ostensible authority to deal with the property of his principal as his own in transactions with persons not having notice of the actual ownership. (NDCC 3-06-03).

A factor must obey the instructions of his principal to the same extent as any other employee, notwithstanding any advances he may have made to his principal upon the property consigned to him except that, if the principal forbids him to sell at the market price, he may nevertheless sell for his reimbursement after giving to his principal reasonable notice of his intention to do so and of the time and place of sale and proceeding in all respects as a pledgee. (NDCC 3-06-04).

Liabilities.

A factor who charges his principal with a guaranty commission upon a sale thereby assumes absolutely to pay the price when it falls due as if it were a debt of his own and not as a mere guarantor for the purchaser; but he does not thereby assume any additional responsibility for the safety of his remittance of the proceeds. (NDCC 3-06-05).

Lien.

Factor has general lien dependent on possession for all that is due to him as such upon all articles of commercial value that are entrusted to him by same principal. (NDCC 35-20-06).

Filing or Recording.

There are no provisions with respect to filing or recording notices or consignment agreements in order to protect lien of factor or commission merchant or rights of consignor.

Misapplication of Entrusted Property.

Person is guilty of misapplication of entrusted property if he disposes of, uses, or transfers any interest in property that has been entrusted to person as fiduciary, or in person’s capacity as public servant or officer, director, agent, employee of, or person controlling financial institution, in manner that person knows is not authorized and that person knows to involve risk of loss or detriment to owner of property or to government or other person for whose benefit property was entrusted. (NDCC 12.1-23-07). Severity of crime depends on value of misapplied property.

3.15 FRANCHISES:

Franchise Investment Law (51–19).—Unlawful to offer or sell unregistered, nonexempt franchise. (51–19–03).

Exemptions: (51–19–04). Offer to sell, purchase and actual sale and purchase of franchise may be exempt if certain factors are met. (NDCC 51-19-04).

Registration applications and Notices of Exemptions with specified information filed with Securities Commissioner. (51–19–04, 06, 07, & 08).

Filing Fees: (1) Registration Applications $250; (2) Notices of Exemption $100; (3) renewal of application $100; (4) amendment to application $50; and (5) renewal of exemption $50. (NDCC 51-19-17).

Advertisements offering nonexempt franchises must be timely filed. (51–19–10).

Civil liability for violation of registration requirements or commission of fraudulent or other prohibited practices includes actions for damages, rescission, and other appropriate relief, including attorney’s fees, and extends jointly and severally to anyone in direct or indirect control and any employee who aids materially in violation. (51–19–11, 12). Written offer of specified refund timely made may preclude civil action. (51–19–12). Statutes of limitation: No action may be brought after five years from date that aggrieved party knew or reasonably should have known about facts that are basis for alleged violation.

Criminal liability for willful violation is class B felony. (51–19–14).

Registration applicants must file irrevocable consent appointing Securities Commissioner attorney to receive lawful process. (51–19–15).

Automobile, Truck, Farm Implement and Parts Franchises.

In addition to contractual rights, upon cancellation or discontinuance of specified written agreement, franchisor, unless franchisee desires to keep merchandise, shall pay franchisee: (1) 100% of net cost of all current unused complete farm implements, machinery, attachments, automobiles, trucks, semi-trailers, lawn and garden equipment, including merchandise and tool transportation charges paid by retailer; (2) 90% of current net prices on specified repair parts, including superseded parts listed in current price lists or catalogs; and (3) 5% of current net price of all parts returned. (51–07–01).

Franchisor may not terminate, cancel, or fail to renew specified contract without good cause as defined by statute. (51–07–01.1). If franchisor fails to prove good cause, franchisee entitled to recover all special and general damages sustained, including attorney's fees, and injunctive relief where appropriate. (51–07–01.1).

Heavy Construction Equipment Franchises (51–20.1).—In addition to contractual rights, upon cancellation or discontinuance of specified written contract, franchisor, unless franchisee desires to keep equipment or parts, shall pay franchisee: (1) 100% of net cost of all unused, complete equipment; (2) 85% of current net prices on repair parts, including specified superseded parts listed in current price lists or catalogs; (3) 5% of current net price of all parts returned; and (4) freight charges paid by franchisee. (51–20.1–02 & 05).

Franchisor may not terminate, cancel, or fail to renew specified written contract without good cause as defined by statute. (51–20.1–03). If franchisor fails to prove good cause, franchisee entitled to recover all special and general damages sustained, including attorney's fees, and injunctive relief, where appropriate. (51–20.1–03).

Recreation Vehicles Franchises (c. 51–20).—In addition to contractual rights, upon cancellation or discontinuance of specified written agreement distributor shall pay to dealer: (1) 100% of net cost of all current year, unused, and complete recreation vehicles; (2) 85% of current net prices on repair parts, including superseded parts listed in current price lists or catalogs; (3) 5% of current net price of all parts returned as reimbursement for handling, packing, and loading of those parts; and (4) any freight charges on equipment or repair parts paid by dealer. (51–20–02).

Franchise Merchandise Return.

Except as otherwise provided in c.c. 51–07, 51–19, 51–20, and 51–20.1, and in addition to any contractual rights, upon cancellation or discontinuance of specified written agreement by franchisor or franchisee (if franchisee terminates because franchisor granted competing franchise in exclusive territory), franchisee is entitled to net cost of all new and unused merchandise and parts, subject to limitation that franchisee's recovery under contract, not exceed net cost of merchandise and parts, plus freight costs for their return and legal costs awarded by court. (c. 51–20.2).

3.16 FRAUDS, STATUTE OF:

Uniform Commercial Code adopted, effective July 1, 1966. (Title 41). See topic 3.09 Commercial Code.

All contracts may be oral except such as are specially required by statute to be in writing. (NDCC 9-06-02).

The following contracts are invalid unless some note or memorandum thereof is in writing and subscribed by the party to be charged, or by his agent: (1) An agreement that by its terms is not to be performed within a year from the making thereof; (2) a special promise to answer for the debt, default or miscarriage of another, except that a promise to answer for the obligation of another in any of the following cases is deemed an original obligation and need not be in writing: when the promise is made by one who has received property of another upon an undertaking to apply it pursuant to such promise, or by one who has received a discharge from an obligation in whole or in part in consideration of such promise; when the creditors parts with value or enters into an obligation in consideration of the obligation in respect to which the promise is made, in terms or under circumstances which render the party making the promise the principal debtor and the person in whose behalf it is made his surety; when the promise, being for an antecedent obligation of another, is made upon the consideration that the party receiving it shall cancel the antecedent obligation and accept the new promise as a substitute therefor, or upon the consideration that the party receiving it shall release the property of another from a levy under an execution on a judgment obtained upon the antecedent obligation, or upon a consideration beneficial to the promisor, whether moving from either party to the antecedent obligation or from another person, when a factor undertakes, for a commission, to sell merchandise and guarantee the sale; or when the holder of an instrument for the payment of money upon which a third person is or may become liable to him transfers the instrument in payment of a precedent debt of his, or for a new consideration, and in connection with such transfer, enters into a promise respecting such instrument; (3) agreement for leasing for longer period than one year, or for sale, of real property, or of interest therein; such agreement, if made by agent of party sought to be charged, is invalid unless authority of agent is in writing subscribed by such party; (4) agreement or promise for lending money or extension of credit in aggregate amount of $25,000 or greater; or (5) agreement or promise to alter terms of repayment or forgiveness of debt that is in aggregate amount of $25,000 or greater. (NDCC 9-06-04).

Contracts of Sale.

An agreement to sell real property binds the seller to execute a conveyance in form sufficient to pass the title to the property. (NDCC 47-10-02). An agreement to give the usual convenants binds him to insert in the grant convenants of seizin, quiet enjoyment, further assurance, general warranty, and against encumbrances. (NDCC 47-10-03).

Part Performance.

Court has power to compel specific performance of any agreement for sale of real property in case of part performance thereof. (NDCC 47-10-01).

3.17 [RESERVED]

3.18 INFORMATION TECHNOLOGY, INTERNET AND NEW MEDIA:

E-Commerce Recognized.

The Electronic Transaction Act was made effective July 31, 2001, applying to any electronic record or electronic signature, created, generated, sent, communicated, received or stored. (NDCC 9-16-03). Act does not require electronic transactions, but approves use of electronic transactions unless otherwise prohibited.

If law requires person to provide, send or deliver information in writing to another person, and parties have agreed to conduct transaction by electronic means, requirement is met if information is provided, sent or delivered by electronic record capable of retention and printing by recipient at time of receipt (NDCC 9-16-07), subject to applicability of other laws. This requirement cannot be waived by agreement, unless otherwise provided by law. (NDCC 9-16-07).

Digital Signature, Notarization and Acknowledgment.

Electronic record or signature is attributable to person if it was act of person. (NDCC 9-16-08). If law requires signature to be notarized or acknowledged, requirement is met if electronic signature is attached or logically associated with all other information required to be included by other applicable law. (NDCC 9-16-10).

3.19–3.16 [RESERVED]

3.17 INTEREST:

Legal rate in absence of contract fixing rate 6%. (NDCC 47-14-05).

Maximum Rate.

If contracted for in writing, not to exceed 5½% higher than current cost of money as reflected by average rate of interest payable on U.S. six-month treasury bills in effect for state for six months immediately prior to month in which transaction occurs, as computed and declared on last day of each month by State Banking Commission but not less than 7%; provided minimum interest charge of $15 may be made. Interest may not be compounded. Interest on interest overdue prohibited except when interest is overdue when contract is made. Limitations not applicable to bonafide licensed pawnbroker transactions not exceeding $1,000, and loans made to foreign or domestic corporation, or limited liability company, cooperative corporation or association, trust, or to partnership, limited partnership or association, which files state or federal partnership income tax return, nor to any loan or forbearance of money, goods or things in action, principal amount of which amounts to more than $35,000, nor to any loan made by lending institution which is regulated or funded by agency of state or of federal government. Without regard to interest rate limit, state chartered banks and Bank of North Dakota may charge interest at rate equal to maximum allowable rate which lawfully may be charged for particular type of loan by national banking associations or state or federally chartered savings and loan associations operating out of facilities located in this state. (NDCC 47-14-09).

Judgments carry same rate as provided in the original instrument on which action is based not in excess of maximum rate; if no provision for interest rate then prime rate published in Wall Street Journal on first Mon. in Dec. of each year plus 3% on judgments obtained beginning Jan. 1, 2006; prior years, rate is 12%. (NDCC 28-20-34).

Note must not provide higher rate of interest after maturity than before. Such higher charge does not constitute usury, or invalidate note, but excess is not collectible. (NDCC 47-14-05).

Account bears interest at legal rate from date when it would ordinarily be considered payable.

Consumer Finance Act.

Repealed in 2009. (NDCC 13-03.1).

Wholesalers and Manufacturers Accounts.

When selling to retailers and other persons may charge service charge of up to 1½% per month provided parties have entered into an agreement prior to transaction setting forth amount of service charge. Purchaser must be notified in writing at time of purchase of amount of service charge if account becomes overdue. (NDCC 51-07-14).

Revolving charge accounts are authorized for sale of merchandise if in writing. Service charge may not exceed amount agreed to by parties. Includes State or National Bank issuing Bank credit cards for advancement of monies or sale of goods or services thereunder. (c. NDCC 51-14).

Late Payment Charge on Accounts Receivable.

Creditor may charge, receive, and collect late payment charge in amount not to exceed 1¾% per month on money due on account from 30 days after obligation of debtor to pay shall have been incurred. May be charged only if at time obligation was incurred creditor did not intend to extend credit beyond 30 days and late payment of obligation was unanticipated. Provision does not apply to retail installment contracts and revolving charge accounts, medical and hospital bills if 90 days past due but only 1% per month with maximum of $25. (NDCC 13-01-14). Periodic statements must be furnished to debtor with required recitations.

Usury.

Taking or agreeing to take an illegal rate of interest, or compounding of interest or charging of interest on interest overdue is usury. Contract to pay interest on interest already overdue is not usury. (NDCC 47-14-09).

Penalty for usury is forfeiture of all interest and 25% of the principal; where usury paid, borrower may recover back double the interest paid and 25% of the principal by action commenced within four years after date of transaction. (NDCC 47-14-10). Usury is Class B misdemeanor. (NDCC 47-14-11).

Farm Operating.

Family Farm Survival Act (c. NDCC 6-09.9) rewarding participation loans with Bank of North Dakota. Maximum rate 1% less than Bank's base rate, as it may be established from time to time. (NDCC 6-09.9-03).

See also topic 3.21 Sales.

3.18 [RESERVED]

3.22 LICENSES, BUSINESS AND PROFESSIONAL:

Licenses are required for a large number of occupations and for transient merchants (c. NDCC 51-04-02), but are not required of commercial travelers. (NDCC 51-04-08). See topic 3.10 Consumer Protection.

Trading Stamps.

The use of trading stamps or their equivalent is not prohibited. Cash value must be stated. (NDCC 51-06-01; 02).

Collection Agencies.

Regulated by Department of Financial Institutions. License required; application for license on forms furnished by Department of Financial Institutions with surety bond of $20,000.

Investigation fee, $400. Annual license fee, $300.

Does not apply to attorneys, licensed real estate brokers, banks, trust companies, building and loan associations, credit unions, agencies of state or of federal government, abstract companies doing an escrow business, purchasing or taking accounts receivable for collateral purposes, creditors for own debts, individual as credit man on staff of employer not in collection agency business, or public officer under order of court. Penalty is Class C felony. (c. NDCC 13-05).

3.23 MONOPOLIES, RESTRAINT OF TRADE AND COMPETITION:

Combinations between individuals, corporations or associations to control price of product of soil or article of manufacture or commerce or cost of exchange or transportation prohibited. (Const., Art. XII, § 16).

Uniform State Antitrust Act adopted. (c. NDCC 51-08.1). Conspiracy between two or more persons in restraint of, or to monopolize, trade or commerce in relevant market is unlawful. (c. NDCC 51-08.1). Penalty: Civil penalties and injunction available. (NDCC 51-08.1-07).

Railroad corporations may not consolidate stock, property or franchises with parallel or competing lines. (Const., Art. XII, § 12). (Repealed.)

Cities.

State immunity from federal antitrust law extended to cities and governing bodies of cities exercising powers delegated by state law. (NDCC 40-01-22).

Discrimination Between Sections.

Person, firm, company, corporation or association, including limited liability company, engaged in production, manufacture or distribution of any commodity in general use, who discriminates between different sections, cities, etc., by differences in selling prices (not justified by differences in quality, grade or cost of transportation) for purposes of destroying business of competitor, is guilty of unfair discrimination. (NDCC 51-09-01). Penalties: Class A misdemeanor; contract void; annulment of corporate charter; revocation of permit or license. (NDCC 51-09-02, 03 and 04).

Farm Products.

Buyers are prohibited from discriminating between different sections, localities, communities, or cities by purchasing farm products at higher price or rate in one locality than is paid in another, after making due allowance for difference in transportation costs; does not apply where price is paid to meet lawful competition. (NDCC 4-14-02). Prohibition also extends to sellers of farm products who discriminate between different localities in selling prices. (NDCC 4-14-04). Penalties: Fine, imprisonment, annulment of charter, revocation of authority to do business, and permanent injunction. (NDCC 4-14-05; NDCC 4-14-07).

Unfair Trade Practices.

Advertising for sale, offer to sell, and sale of merchandise, at wholesale or retail, at less than cost with intent or effect to injure competitor is unlawful; violation is Class A misdemeanor and may be enjoined. Not applicable to bona fide clearance or liquidation sales, sales of perishables or imperfect or damaged goods, sales to charities, relief organizations or government, sales to meet legal competition, or judicial sales. (c. NDCC 51-10).

Resale Price Agreements.

See category 17 Intellectual Property, topic 17.01 Trademarks and Tradenames.

Uniform Trade Secrets Act adopted. (NDCC 47-25.1).

3.24–3.22 [RESERVED]

3.25 SALES:

Uniform Commercial Code adopted, effective July 1, 1966. (Title 41). See topic 3.09 Commercial Code.

Contracts of Sale.

For contracts which must be in writing see topic 3.16 Frauds, Statute of. No statutory limitation on type size. See subhead Conditional Sales, infra.

Bills of Sale.

A bill of sale or other instrument transferring title to personal property must be signed by the vendor in person, and in order to be eligible for filing must be signed by two witnesses or acknowledged by vendor before some official qualified to take acknowledgments. Any such instrument so witnessed or acknowledged is entitled to be filed in the office of the register of deeds of the county where the property or any part thereof covered by such instrument, is at the time so situated. The filing of such instrument shall operate as notice thereof to all subsequent purchasers and encumbrances of so much of said property as is at the time of such filing situated in the county wherein such instrument is filed. (NDCC 47-19-50; 51).

Product Liability.

Privity not required. (136 N.W.2d 805).

Conditional Sales.

Uniform Commercial Code adopted, effective July 1, 1966. (Title 41). See topic 3.09 Commercial Code.

Where vendor demands possession of goods or retakes same, purchaser may obtain order from judge of district court enjoining vendor from retaking or selling goods and directing that all further proceedings be in district court upon filing affidavit of defense. In such proceedings court may fix time for purchaser to make default good, and compliance operates to dismiss proceedings. Goods may be impounded by court pending proceedings. (NDCC 28-29-07; 08).

Retail Installment Sales Act adopted. Sets out specific requirements as to contents of contract. Seller who complies with disclosure provision is deemed regulated lender. (c. NDCC 51-13-03). Type Size: Eight point type on contract provisions and ten point type on various declarations. (NDCC 51-13-02). Act not applicable to sales where cash price exceeds $25,000 or use thereof is primarily for agriculture, business or commercial purpose, not personal, family, or household purpose. (NDCC 51-13-06.2).

Pyramid promotional and referral sales schemes prohibited. (c. NDCC 51-16.1).

Home solicitation sales regulated. (c. NDCC 51-18). See topic 3.10 Consumer Protection.

Sale of Checks Act (c. NDCC 51-17) repealed by S.L. 2005, c. 128, § 3.

Bulk Sales.

See topic 3.09 Commercial Code.

Motor Vehicles.

See category 23 Transportation, topic 23.01 Motor Vehicles, subhead Liens.

Revised Uniform Deceptive Trade Practices Act not adopted.

Transient Merchants.

See topic 3.10 Consumer Protection.

Consumer Protection.

See topic 3.10 Consumer Protection.

See also topic 3.19 Interest.

3.26 SECURITIES:

Uniform Commercial Code adopted, effective July 1, 1966. (Title 41). See topic 3.09 Commercial Code.

Securities Act of 1951 as amended affects supervision of issue and sale of securities. (c. NDCC 10-04). Applicable to limited liability companies.

Supervision.

Supervision of issuance and sale of securities vested in Securities Commissioner, Capitol Building, Bismarck, N. D. 58501. Commissioner authorized to issue opinion concerning applicability of c. NDCC 10-04 upon request with nonrefundable fee of $150. (NDCC 10-04-03).

Prerequisites to Sales of Offerings.

It is unlawful to sell or offer for sale any securities not exempt unless such securities have been registered in accordance with statute. (NDCC 10-04-04).

Regulatory Powers of Supervising Authority.

Commissioner has power to deny permission to sell where it appears to him that sale would work fraud or deception on purchasers, or proposed disposal is on unfair terms, or if proposed plan of business of applicant appears to be unfair, unjust or inequitable. Commissioner has power to acquire such information or examinations as he or she deems proper. (NDCC 10-04-08.1).

Securities to Which Act Applicable.

Securities include any note, stock, treasury stock, bond, debenture, evidence of indebtedness, certificate of interest or participation in any profit-sharing agreement, certificate of interest or participation in oil, gas, or mining title or lease or in payments out of production under such title or lease, collateral trust certificate, preorganization certificate or subscription, transferable share, investment contract, viatical or “life” settlement contract or fractionalized or pooled interest therein, program, contract, or other arrangement in which persons invest in common enterprise returns of which depend to any extent upon inducing other persons to participate or invest in enterprise, investment of money or money’s worth including goods furnished or services performed in risk capital of venture with expectation of profit or some other form of benefit to investor where investor has no direct control over investment or policy decisions of venture, voting-trust certificate, certificate of deposit for security, foreign currency commodity contract, or beneficial interest in title to property, profits, or earnings, or, in general, any interest or instrument commonly known as “security” or any certificate of interest or participation in, temporary or interim certificate for, receipt for, guarantee of, or warrant or right to subscribe to, or purchase, any of foregoing. (NDCC 10-04-02).

Exempt Securities.

Similar to Uniform Act changed on Jan. 1, 2009. (NDCC 10-04-05).

Exempt Transactions.

(1) Transaction by Executor, Administrator, Sheriff, Marshall, Guardian, Conservator, Receiver or Trustee in insolvency or bankruptcy. (2) Sale in good faith by pledgee of securities. (3) Isolated sale of any security made by or on behalf of a bona fide owner for owner’s account, such owner not being an issuer, underwriter, broker-dealer or agent, and such sale not being made in course of repeated and successive transactions of like character. (4) Securities dividends, or other distributions by corporation, cooperative, limited partnership, or limited liability company out of earnings or surplus, or sale or distribution of additional capital stock of corporation or cooperative to or among its stockholders or membership interest in limited liability company to members where no commission or other remuneration is paid, or given for soliciting or effecting such sale or distribution to stockholders. (5) Sale to institutional investor, federal covered investment advisor, or any other person exempted by rule of order adopted by commissioner. (6) Any transaction incident to vote by stockholders, pursuant to articles of incorporation, or applicable corporation statute on merger, consolidation, reclassification of securities, or sale of corporate assets in consideration of issuance of securities of another corporation; or any transaction incident to judicially approved reorganization in which security is issued in exchange for one or more outstanding securities, claims, or property interest, or partly in such exchange and partly for cash. (7) Transaction under offer to existing security holders of issuer. (8) Non issuer transaction by or through broker-dealer or agent, with certain conditions. (9) Any transaction pursuant to offer to not more than 35 persons in this state, during any 12 consecutive months, if seller reasonably believes all buyers in this state are purchasing for investment; there is no commission, except to dealer and agent registered in state in connection with offer or sale to resident of state; person claiming benefit of exemption obtains prior approval of commissioner, in writing, pays filing fee of $150 with application, provided commissioner may by rule or order withdraw or further condition this exemption; or increase or decrease number of offerees; any sale of common stock, preferred stock, limited liability company interest or limited partnership interests in this state during 12 consecutive month period if issuer reasonably believes all buyers in this state are purchasing for investment; there is no commission except customary commissions paid to registered dealer and agent in this state in connection with offer or sale to resident of state, issuer is organized and has principal place of business in this state; there is no advertising or general solicitation, except tombstone advertisements approved by Commissioner; offering disclosure document approved by Commissioner is delivered to offeree 72 hours prior to sale; gross proceeds do not exceed $5,000,000, issuer obtains Approval of Commissioner with filing fee of $150; and funds placed in escrow until offering sold; or sale pursuant to rule of Commissioner to further exemptions in Securities Act of 1933 and uniformity among states. (10) Sales of capital stock of corporation or limited liability company interests and dues in nonprofit corporation organized and operated for purposes of promoting community development. (11) Security issued in connection with employees’ stock purchase, savings, pension, profit-sharing, or similar benefit plan. (12) Sales of federal or state (including any political subdivision) securities, if offer for sale and sale is made by official or employee of issuing body or by official of Bank of North Dakota acting in official capacity or by bank or similar financial institution or association solely as accommodation to customer without receiving commission other than accommodation fee not to exceed $100. (13) Sale of capital stock or membership interests of venture capital corporation or limited liability company. (NDCC 10-04-05; 06). (14) Stock issued by professional corporation. (NDCC 10-31). (15) Sale of security issued by ND Education Association Dues Credit Trust to members of NDEA. (16) “Test the waters” prospectus under certain circumstances. (NDCC 10-04-06). (17) Sale of common stock, limited liability

company membership interests or limited partnership interests by person to person or other subscribers, not exceeding ten, for sole purpose of organization in this state. If securities are not acquired for purpose of resale to others for period of 12 months, advertising has not been published or circulated in connection with offer or sale, and all sales are consummated within ten days after date of organization. (NDCC 10-04-06). (18) Offer or sale of security issued by properly organized farming or ranching Limited Liability Company or corporation. (19) Any offer or sale of agricultural-related cooperative security, by or on behalf of agricultural product, for purpose of producing and selling agricultural products. (20) Transaction in note, bond, debenture, or other evidence or indebtedness secured by mortgage or other security agreement with restrictors. (21) Non-issuer transaction by federal covered investment adviser with assets greater than $100 million acting in exercise of discretionary authority. (NDCC 10-04-06).

Registration by Description.

Repealed by S.L. 2005, c. 97, § 22.

Registration by Announcement.

Securities that have been outstanding and in hands of public not less than one year as result of prior original registration and certain stock of life insurance companies that have been in continuous operation of 20 years are entitled to registration by announcement. Registered broker-dealer must file written announcement of intention to trade in securities with Commissioner showing: (a) Name of issuer and location of headquarters or principal office; (b) brief description of security including price and current earnings; (c) statement that security has been outstanding and in hands of public not less than one year; (d) balance sheet not more than 12 months old; (e) statement that security has been registered in North Dakota or by Securities and Exchange Commission. Such filing constitutes registration unless advised to contrary within 48 hours. Filing fee $25. Securities may then be sold for one year after such registration. (NDCC 10-04-07.1).

Registration by Qualification.

Certain securities may be registered by qualification. Registration good for one year. (NDCC 10-04-08).

Registration of Broker-Dealers, Agents, Investment Advisers, and Investment Adviser Representatives, Notice Filing by Federal Covered Advisors.

Broker-dealers, agents and investment advisers and investment adviser representatives must be registered on form prescribed by Commissioner. Certain Federal Covered Advisors must file notice filing with Commissioner. Written examination required of agents and advisers and, by rule of Commissioner, advisers. Broker-dealers, agents and advisers and, by rule of Commissioner, advisers must furnish bonds in form and amount approved by Commissioner. Registration fee and annual renewal fee prescribed are for each broker-dealer $200, for each agent $60, for each investment adviser or Federal Covered Advisor $100, and for each investment adviser representative $50. Registration may be revoked by Commissioner after hearing for violation of law, insolvency, fraudulent practice, or failure to file required statements. (NDCC 10-04-10). Every registered broker-dealer, agent, investment adviser, and investment adviser representative must maintain for three years records and accounts required by Commissioner. (NDCC 10-04-10.3).

Advertisements.

Advertising must be approved by Commissioner. (NDCC 10-04-08.2).

Liabilities.

Sales of securities made in violation of law are voidable at election of buyer. Anyone making sale, and every director, officer, salesperson, or agent of seller who participates is jointly and severally liable to purchaser for full amount of price, with costs and attorneys' fees if securities purchased are tendered. No action may be brought under this section for recovery of purchase price after five years from date that aggrieved party knew or reasonably should have known about facts that are basis for alleged violation. Purchaser can claim no rights if seller offers to take back securities and refund full amount paid, with interest, and purchaser does not accept offer within 30 days. Act does not limit other statutory or common law rights. (NDCC 10-04-17). Violation of Act is Class B felony. (NDCC 10-04-18).

Franchising, Pyramid Sales, Etc.

See Franchise Investment Law. (c. NDCC 51-19).

Uniform Securities Ownership by Minors Act adopted. (NDCC 14-10.1).

Subdivided Lands Disposition Act adopted. (c. NDCC 43-23.1).

3.27–3.26 [RESERVED]

3.28 WAREHOUSEMEN:

Uniform Commercial Code adopted, effective July 1, 1966. (c. NDCC 41-07). See topic 3.09 Commercial Code.

Warehouse Receipts.

Uniform Commercial Code adopted, effective July 1, 1966. (Title 41). See topic 3.09 Commercial Code.

Grain Storage.

Warehouses storing grain are governed by special law and are required to be licensed by Public Service Commission, must furnish bond of at least $5,000; grain storage receipt form is prescribed by statute, and charges and practices are regulated by law. Warehousemen are not required to receive grain for storage, but they must post in conspicuous place in warehouse publication notifying patrons of whether grain storage is available or whether grain will be accepted via cash or contract arrangement. Warehouses may not close without permission from Commission. (c. NDCC 60-02).

4 CITIZENSHIP

4.01 ALIENS:

Ownership of Property.

Aliens may take, hold and dispose of property, real or personal, within state, except there is prohibition against sale of agricultural lands to person not citizen of U.S. or Canada, and permanent resident aliens in some circumstances. Not applicable to lands acquired by devise, inheritance, as security for indebtedness, by process of law in collection of debt or enforcement of lien. Land must be disposed of within three years if acquired by collection of debt or enforcement of lien if acquisition would otherwise violate this section. Section not applicable where right to hold lands are secured by treaty or common carriers by railroads subject to jurisdiction of Interstate Commerce Commission. Section not applicable to foreign corporation or foreign limited liability company which acquires agricultural land for industrial site where construction contracts are entered into within 150 days after acquisition. Upon discontinuation of use of land for industrial purposes, land must be disposed of pursuant to corporate farming act. Other provisions of chapter requires enforcement, reports and penalty. (c. NDCC 47-10.1). Aliens may take by succession like citizens. (NDCC 30.1-04-12).

Recording Instruments.

§ 47-10.1-03, relating to prohibition of recording instruments transferring title to agricultural land to alien, repealed.

Foreign pharmacist graduate registration. (NDCC 43-15-15).

Person must hold valid North Dakota teacher's certificate in order to be permitted or employed to teach in any school in this state (NDCC 15.1-13-17), however all teaching applicants must take oath to support Constitution of the United States and Constitution of North Dakota. (NDCC 15.1-13-15).

Aliens are subject to jurisdiction of state. (NDCC 54-01-18).

5 CIVIL ACTIONS AND PROCEDURE

5.01 ACCORD AND SATISFACTION:

An accord is an agreement to accept in extinction of an obligation something different from or less than that to which the person agreeing to accept is entitled. (NDCC 9-13-04).

Uniform Commercial Code adopted, effective July 1, 1966. (Title 41). See category 3 Business Regulation and Commerce, topic 3.09 Commercial Code.

Only Full Execution Extinguishes.

Though the parties to an accord are bound to execute it, it does not extinguish the obligation until it is fully executed. (NDCC 9-13-06).

Acceptance is Satisfaction.

Acceptance by the creditor of the consideration of an accord extinguishes the obligation and is called satisfaction. (NDCC 9-13-05).

Accepted Part Performance Extinguishes.

Part performance of an obligation, either before or after breach thereof, when expressly accepted by creditor in writing in satisfaction of, or rendered in pursuance of agreement in writing for that purpose, though without any new consideration, extinguishes obligation. (NDCC 9-13-07).

Pleading.

Accord and satisfaction must be pleaded. (Rule 8[c], N.D.R.Civ.P.).

5.02 ACTIONS:

Rules of Civil Procedure govern all civil proceedings in district courts, except that existing statutes as to special proceedings and provisional remedies such as attachment, garnishment, injunctions, replevin (called "claim and delivery" in N.D.), certiorari, and receivers, are unchanged. See those topics, herein. See also topic 5.19 Practice.

Commencement.

See topics 5.20 Process, 5.17 Pleading.

Stay of Proceedings.

Court may stay proceedings under provisions of Soldiers' and Sailors' Civil Relief Act.

Class Actions.

Model Class Actions Rule adopted as Rule 23 of Rules of Civil Procedure.

Abatement and Revival.

Actions do not abate by death or disability of a party, or by transfer of any interest therein if cause of action survives or continues. (Rule 25[a], N.D.R.Civ.P.). No action or cause of action except for breach of promise, alienation of affections, libel or slander, will abate on death of a party or a person who might have been a party had such death not occurred. (NDCC 28-01-26.1). Action does not abate by death after verdict but case shall proceed in same manner as in cases where cause of action survives by law and substitution of parties shall be allowed. (Rule 25, N.D.R.Civ.P.).

Limitation of.

See topic 5.16 Limitation of Actions.

Small Claims.

See category 6 Courts and Legislature, topic 6.01 Courts.

Administration.

See category 13 Estates and Trusts, topic 13.08 Executors and Administrators.

Direct Actions Against Insurer.

See category 23 Transportation, topic 23.01 Motor Vehicles, subhead Direct Actions.

5.03 APPEAL AND ERROR:

Appeal from district court to Supreme Court in civil case may be taken as follows: from judgment or order within 60 days from service of notice of entry of judgment or order appealed from. (Rule 4[a] of Appellate Procedure).

Appeal may be taken by filing notice of appeal with Clerk of Court in which judgment or order appealed from is entered, specifying party or parties taking appeal, designating judgment, order, or part thereof appealed from and naming court to which appeal is taken. (Rule 3 of Appellate Procedure).

Appeal may be taken to district court from decision of Public Service Commission (NDCC 49-05-12) from local governing bodies (NDCC 28-34-01) and from decisions of administrative agencies within 30 days (NDCC 28-32-42).

Bonds.

District court may require appellant to file bond or provide other security in form and amount necessary to ensure payment of costs on appeal. (Rule 7 of Appellate Procedure).

Stay.

If stay of execution on money judgment is desired, supersedeas bond approved by Court required. (Rule 62[d], N.D.R.Civ.P.).

If judgment directs assignment or delivery of documents or personal property, execution is not delayed by appeal, unless things required to be assigned or delivered are brought into court or placed in custody of such officer or receiver as court shall appoint, or unless undertaking is entered into on part of appellant by at least two sureties in such sum as court shall direct to effect that appellant will obey order of appellate court on appeal. (Rule 62[f], N.D.R.Civ.P.).

If the judgment directs the execution of a conveyance, or other instrument, execution is not stayed by appeal unless such instrument is executed and deposited with the clerk with whom the judgment was entered, to abide the judgment of the appellate court. (Rule 62[g], N.D.R.Civ.P.).

On a judgment directing the sale or delivery of real property, execution is not stayed unless an undertaking is executed by at least two sureties in a sum fixed by the court to the effect that, during the possession of the property by appellant, he will not commit or suffer to be committed any waste thereon, and that if judgment is affirmed, he will pay value of use and occupation from appeal until delivery of possession. (Rule 62[h], N.D.R.Civ.P.).

There are other provisions for undertakings for abatement of nuisances and for other judgments where a stay is desired pending an appeal, and on appeal from intermediate orders an undertaking must be provided to comply with conditions imposed by the court, and there are appropriate provisions for undertakings on appeals from provisional remedies. (Rule 62[i-j-k], N.D.R.Civ.P.).

When appeal is taken from interlocutory or final judgment granting injunction, Court may suspend, modify, restore or grant injunction during appeal upon terms as to bond or otherwise as it considers proper for security of rights of adverse party. (Rule 62[c], N.D.R.Civ.P.).

Where appeal is taken by state or governmental subdivision, officer or agency, there is no bond requirement. (Rule 62[e], N.D.R.Civ.P.).

Orders Reviewable.

Following orders may be appealed to Supreme Court: (1) Affecting substantial right made in any action, when such order in effect determines action and prevents judgment from which appeal might be taken; (2) final order affecting substantial right made in special proceeding or upon summary application in action after judgment; (3) order which grants, refuses, continues or modifies provisional remedy, or grants, refuses, modifies or dissolves injunction, whether such injunction was issued in action or special proceeding or pursuant to provisions of section NDCC 35-22-04, or which sets aside or dismisses writ of attachment for irregularity; (4) grants or refuses new trial or sustains demurrer; (5) order which involves merits of action or some part thereof; (6) orders judgment on application therefore on account of frivolousness of demurrer, answer or reply; (7) orders made by district court or judge thereof without notice are not appealable; but orders made by district court after hearing upon notice, which vacate or refuse to set aside orders previously made without notice may be appealed to Supreme Court. (NDCC 28-27-02).

Judgment or Order on Appeal.

The Supreme Court has broad power to reverse, affirm or modify judgment or order in whole or in part; may order new trials of specific issue or issues; it may remand for taking of additional evidence, or for additional determination by lower court, and may render final judgment and direct its entry in lower court. (Rule 35 of Appellate Procedure).

5.04 BONDS:

Bonds may be given with individual sureties. (c. NDCC 32-02). Bonds of surety companies authorized to do business in this state may be given in lieu of personal bonds. In case of many public officials, cost of bonds is paid by municipality or other subdivision served.

Bonds for most public officials are required to be furnished by the state bonding fund. (NDCC 26.1-21).

Justification of Sureties.

There is no uniform rule on this subject. As to bonds on appeal see topic 5.03 Appeal and Error.

5.05 CERTIORARI:

Jurisdiction.

Writ may be granted by Supreme Court or by district court. (NDCC 32-33-01).

Grounds.

Where an officer, board, tribunal, or inferior court has exceeded its jurisdiction, and there is no appeal, nor, in the judgment of the court, any other plain, speedy, and adequate remedy, and when, it is deemed necessary to prevent miscarriage of justice, writ may be granted. (NDCC 32-33-01).

Proceedings to Obtain.

Application must be made on affidavit by party beneficially interested, and court may require notice of application to be given to adverse party, or may grant an order to show cause why it should not be allowed, or may grant writ without notice. (NDCC 32-33-02). Writ must be directed to inferior court, tribunal, board, or officer, or other person having custody of the records to be certified. (NDCC 32-33-03). Writ must command party to whom it is directed, to certify fully to the court at a specified time and place, a transcript of the record and proceedings, and other matters required by the writ. (NDCC 32-33-04). Writ must be served in same manner as summons. (NDCC 32-33-08).

Extent of Review.

Review cannot be extended further than to determine whether the inferior court, tribunal, board, or officer has pursued regularly its authority. (NDCC 32-33-09).

5.06 CHARITABLE IMMUNITY:

See topic 5.09 Damages.

5.07 [RESERVED]

5.08 COSTS:

Costs.

Costs are generally allowed to party recovering judgment. (NDCC 28-26-06 and NDCC 28-26-10, N.D.R.Civ.P. 54[e]). Attorney’s fees may be awarded only according to agreement, expressed or implied, or if action or responsive pleading is frivolous or not made in good faith. (NDCC 28-26-01 & 31).

Security for Costs.

Surety is responsible for all costs adjudged against plaintiff in court in which action is brought, or in any other court to which it may be carried, and also for costs of plaintiff’s witnesses whether plaintiff obtains judgment or not. (NDCC 28-26-26). Nonresident plaintiffs no longer need to furnish surety for costs before commencing action. ([28-26-25] repealed).

Liability of Attorney.

No statutory provision imposing liability for costs on attorney, but Supreme Court has sanctioned attorneys by requiring them to pay costs.

5.09 DAMAGES:

Statutes generally recognize common law rules as to compensation damages. (Ch. NDCC 32-03).

Exemplary damages may be allowed in following cases: for breach of obligation not arising on contract where defendant has been guilty of oppression, fraud or actual malice. Complaint may not seek exemplary damages. After filing suit, party may make motion to amend pleading setting forth legal basis and with one or more affidavits or deposition testimony showing factual basis for claim (NDCC 32-03.2-11); against public utility which wilfully violates law (NDCC 49-05-10); for injuries to domestic animals if resulting from gross negligence or wilful act (NDCC 36-21-13).

“Wrongful life” action prohibited. (NDCC 32-03-43).

Sovereign Immunity.

State and political subdivision limited tort liability. (NDCC 32-12.1; NDCC 32-12.2). Persons making claim must give written notice to Office of Management and Budget within 180 days, except death claims where notice must be given within one year. (NDCC 32-12.2-04). Action brought against political subdivision must be commenced within three years after claim accrued (NDCC 32-12.1-10); against State, three years (NDCC 28-01-22.1).

Charitable Immunity.

No statutory immunity. See also 74 N.D. 525, 23 N.W. 2d 247.

Comparative Fault Statute.

Fault includes negligent or reckless acts or omissions, including tort liability, dram shop, and product liability. (NDCC 32-03.2-01). Contributory fault does not bar recovery in action to recover damages for death or injury unless fault was as great as combined fault of all other parties. Liability is several only, except persons acting in concert are jointly liable. (NDCC 32-03.2-02).

Good Samaritan Act adopted. (NDCC 32-03.1).

Uniform Comparative Fault Act.

Not adopted.

No-Fault Insurance.

See category 23 Transportation, topic 23.01 Motor Vehicles, subhead No-Fault Insurance.

Uniform Contribution Among Tortfeasors Act (Revised) adopted (NDCC 32-38), but modified by court decision (276 N.W.2d 113).

See also category 13 Estates and Trusts, topic 13.02 Death, subhead Actions for

Death.

5.10 DECLARATORY JUDGMENTS:

See topic 5.15 Judgments.

5.11 DEPOSITIONS AND DISCOVERY:

Regulated by Rules of Civil Procedure which are substantially same as Federal Rules of Civil Procedure. See also topic 5.19 Practice.

Form.

The following caption may be used for authenticating depositions:

Form

Depositions of witnesses taken before me (name of officer and style of office) within and for the county of . . . . in the state of . . . . on the . . . . day of . . . . in the year . . . ., pursuant to the annexed notice (stipulation or commission), in an action pending in the (name the court) wherein . . . . is plaintiff and . . . . is defendant, on behalf of said plaintiff (or defendant, as the case may be). (Here state which of the parties were present and how represented by attorney). A. B. of the county of . . . . being first duly sworn by me, as hereinafter certified, deposes and says (or affirms, if the witness has conscientious scruples against taking an oath). (Insert deposition in the form of questions and answers).

Form of Officer's Certificate may be as follows:

State of . . . .

County of . . . . } ss:

I, the undersigned . . . . in and for the said County of . . . . in the State of . . . ., and duly authorized and acting as such, do hereby certify and return: That the above and foregoing deposition . . . . w . . . . taken by and before me pursuant to the notice of taking said deposition . . . . which is attached to said deposition . . . . and made a part thereof and that said deposition . . . . together with the exhibits therein mentioned and thereto attached constitutes all of the deposition . . . . of said witness . . . . and all of the proceedings had and taken in the taking of the said deposition . . . .; that at the taking of the said deposition . . . . the plaintiff . . . . appeared by . . . . attorney . . . . Esq., and the defendant . . . . appeared by . . . . attorney . . . . Esq., that the said witness . . . . before giving any evidence or testimony w . . . . first duly sworn to testify the truth, the whole truth, and nothing but the truth; that I am not related to any of the parties thereto, nor am I interested in the outcome of this action; that the said deposition . . . . was . . . . reduced to writing by me, the undersigned . . . .; that the said deposition . . . . w . . . . written and subscribed in the presence of the undersigned . . . .; that the said deposition . . . . was . . . . taken at the time and place specified in the said notice of taking deposition . . . . which is attached hereto and returned herewith as a part of said deposition . . . . .

Witness my hand and official seal this . . . . day of . . . . 20. . . . .

. . . .

(Official Title)

Uniform Foreign Depositions Act not adopted.

Within State for Use within State.

Resident required to attend only in county of residence, employment, transaction of business, or convenient location by order of court. (N.D.R.Civ.P. 45[c][3]).

Within State for Use Elsewhere.

Testimony may be taken and witness compelled to appear in same manner and process as if pending in this state.

Outside of State for Use within State.

Nonresident, by subpoena, may be required to attend in any county of state. (N.D.R.Civ.P. 45[c][3]).

Perpetuating Testimony.

Similar to Federal Rules. (N.D.R.Civ.P. 27).

Before Whom Taken.

Similar to Federal Rules, except may be taken before any officer authorized to administer oaths by laws of this state. (N.D.R.Civ.P. 28).

Commissions.

Similar to Federal Rules. (N.D.R.Civ.P. 28).

Compelling Attendance of Witnesses.

Subpoena by clerk of court under seal of court. Clerk may issue subpoena, or subpoena for production of documentary evidence signed and sealed but otherwise in blank to party requesting same, who must fill it in before service. Subpoena may also be issued by attorney for party to any action in name of court in like manner with same effect as if issued by clerk. (N.D.R.Civ.P. 45[a][2]).

Examination of Witnesses.

Similar to Federal Rules. (N.D.R.Civ.P. 30).

Return.

Similar to Federal Rules. (N.D.R.Civ.P. 30[f]).

5.12 [RESERVED]

5.13 EVIDENCE:

Witnesses.

Every person is competent to be witness, provided he has personal knowledge of matter or is expert and provided he first takes oath or affirmation; however, no judge may testify at trial over which he presides and no juror may testify at trial in which he sits. (N.D.R.Ev. 601, 602, 603, 605, 606).

See also topic 5.11 Depositions and Discovery.

Privileged Communications.

Without consent of his client, lawyer generally may not disclose confidential communications. (N.D.R.Ev. 502). Without consent of patient, physician or psychotherapist generally may not disclose confidential communications made for purpose of diagnosis or treatment. (N.D.R.Ev. 503). Without consent of client, addiction counselor generally may not disclose confidential communications made for purpose of diagnosis or treatment. (NDCC 31-01-06.4). Without consent of person making communication, clergyman may not disclose confidential communications made by person to clergyman in his professional character as spiritual advisor. (N.D.R.Ev. 505). Every person has privilege to refuse to disclose his vote at political election conducted by secret ballot. (N.D.R.Ev. 506). Person has privilege to refuse to disclose, and to prevent others from disclosing, trade secrets owned by him, provided exercise of privilege will not conceal fraud or otherwise work injustice. (N.D.R.Ev. 507). Where law of U.S. creates governmental privilege which courts must recognize under U.S. Constitution, privilege may be claimed as provided by law of U.S. (N.D.R.Ev. 508). U.S., states or subdivisions thereof may refuse to disclose identity of person who has furnished information relating to or assisting in investigation of possible violation of law to law enforcement officer or member of legislative committee conducting investigation. (N.D.R.Ev. 509). Public officer generally cannot be examined as to communications made to him in official confidence when public interests would suffer by disclosure. (NDCC 31-01-06[4]). Disclosure of news sources and information generally required only on court order and finding that failure to disclose would cause miscarriage of justice. Voluntary disclosure or consent to disclosure of any significant part of privileged matter constitutes waiver of privilege.

Husband and Wife.

An accused in criminal proceeding may prevent his spouse from testifying as to any confidential communication between accused and spouse except where one spouse is charged with crime against person or property of: (1) The other, (2) child of either, (3) person residing in household of either, or (4) third person, committed in the course of committing crime against any of them. (N.D.R.Ev. 504). This privilege may be waived by voluntary disclosure or consent to disclosure of any significant part of the privileged matter. (N.D.R.Ev. 510).

Communications or Transactions With Persons Since Deceased or Incompetent.

The “dead man’s” statute has been superseded and, except as noted above, every person is competent to be a witness. (N.D.R.Ev. 601).

Self-incrimination.

No person may be compelled to be a witness against himself in a criminal action. (NDCC 31-01-09).

5.14 INJUNCTIONS:

Rules of Civil Procedure similar to Federal Rules of Civil Procedure in effect and govern where statutory provisions affecting injunction make no provision.

Final injunction may be granted to prevent breach of obligation existing in favor of applicant, when pecuniary compensation would not afford adequate relief, when it would be difficult to ascertain amount of compensation which would afford relief, when restraint is necessary to prevent multiplicity of suits, or when obligation arises from trust. (NDCC 32-05-04). Injunction cannot be granted to stay judicial proceeding which is pending, unless necessary to prevent multiplicity of suits, to stay proceedings in court of U.S., to stay proceedings in any other state upon judgment of court of such state, to prevent execution of public statute by officers of law for public benefit, to prevent breach of contract, performance of which could not be specifically enforced, to prevent exercise of public or private office in lawful manner by person in possession, or to prevent legislative act by municipal corporation. (NDCC 32-05-05). Its use is restricted in labor disputes. (NDCC 34-08-03). Injunction cannot be granted to enforce penal law, except in case of nuisance, nor to enforce penalty or forfeiture. (NDCC 32-05-02). Injunction may be temporary or final. (NDCC 32-05-03).

Jurisdiction.

The Supreme Court in the exercise of its original jurisdiction may issue writ of injunction. (NDCC 27-02-04). District courts may issue injunctions. (NDCC 27-05-06).

Procedure.

Action for preventive relief is a civil action (NDCC 32-05-03), and is governed by general rules relative thereto. See topic 5.02 Actions.

Temporary Injunction.

An injunction by order may be made by the court in which an action is brought in any of the following cases: (1) When it appears by complaint that plaintiff is entitled to relief demanded, and such relief, or any part thereof, consists in restraining commission or continuance of some act, which during litigation would produce injury to plaintiff; (2) when during litigation, it appears that defendant is doing, or threatening, or is about to do, some act in violation of plaintiff's rights respecting subject of action, and tending to render judgment ineffectual; or (3) when during pendency of action, it shall appear by affidavit that defendant threatens, or is about to remove or dispose of his property, with intent to defraud his creditors. (NDCC 32-06-02). Such injunction may be granted at time of commencing said action, or at any time afterwards before judgment, upon it appearing satisfactorily by affidavit that sufficient grounds exist therefore; copy of affidavit must be served with injunction, and case must be heard upon its merits within six months. (NDCC 32-06-03). Injunction shall not be allowed after answer except on notice or upon order to show cause. (NDCC 32-06-04). Restraining order will not be issued ex parte or without hearing, unless it appears from moving papers that there exists emergency requiring immediate issuance of order. (NDCC 32-06-07). If temporary injunction is granted without notice, defendant may on notice apply to judge to vacate or modify same. (NDCC 32-06-09).

Bond.

Judge must require written undertaking on part of plaintiff with or without sureties to the effect that the plaintiff will pay to the party enjoined such damages, not exceeding an amount to be specified, as he may sustain by reason of the injunction, if court finally decides plaintiff was not entitled thereto. Damages may be ascertained by reference. (NDCC 32-06-05).

See also topic 5.19 Practice.

5.15 JUDGMENTS:

Judgment is final determination of rights of parties. (Rule 54, N.D.R.Civ.P.).

There are no statutory provisions for interlocutory judgments.

Judgment By Confession.

Judgment by confession may be entered without action, provided that defendant signs statement in writing, verified by his oath, stating the amount, authorizing entry of judgment, and stating concisely the facts out of which the debt arose. Upon presentation to the court, if found sufficient, the court shall make an order for judgment whereupon judgment is entered as any other judgment. Judgment by confession may not be secured except by compliance with this procedure. (Rule 68[c], N.D.R.Civ.P.).

Judgment by Consent.

No statutory provision, but by general practice judgment by consent may be entered by stipulation of the parties after commencement of action.

Judgment on Pleadings.

Rules of Procedure similar to Federal Rules. (12[c], N.D.R.Civ.P.).

Summary Judgments.

Rules of Procedure similar to Federal Rules. (Rule 56, N.D.R.Civ.P.).

Declaratory Judgments.

Uniform Act adopted. (c. NDCC 32-23; Rule 57, N.D.R.Civ.P.).

Default Judgments.

When defendant fails to answer or appear within the time prescribed, the court upon proof of default by affidavit may render judgment against defendant. If action is upon written instrument, same must be produced and filed. In other cases, proof must be submitted and court may in its discretion submit any question involved to a jury. If any appearance is entered by defendant, he must be given ten days notice of motion for default judgment in accordance with N.D.R.Ct.3.2(a). If summons was served by publication, plaintiff may be required to file satisfactory security to abide the order of the court relating to restitution of any property or money which may be collected in case defendant is thereafter permitted to defend and shall succeed in his defense. (Rule 55, N.D.R.Civ.P.).

Offer of Judgment.

Defendant may at any time more than ten days before trial serve offer to allow judgment to be taken against him for amount specified in his offer with costs then accrued; if accepted within ten days, either party may file offer and acceptance, and judgment is entered thereon. If offer is not accepted, it is deemed withdrawn, and evidence thereof is not admissible, and if adverse party fails to obtain a judgment more favorable than that offered, he shall be liable for costs from time of offer. (Rule 68[a], N.D.R.Civ.P.).

Docketing.

On filing judgment, clerk must docket the same in book known as Judgment Docket. (NDCC 28-20-13). Judgment must not be docketed against any person until affidavit of identification showing name, occupation, place of residence, and postoffice address of debtor has been filed. (NDCC 28-20-15). Judgments are docketed alphabetically. (NDCC 28-20-16).

Vacation or Modification.

Court in its discretion may upon such terms as may be just relieve party from judgment for (i) mistake, inadvertence, surprise or excusable neglect, (ii) new evidence, (iii) fraud, (iv) void judgment, (v) satisfied judgment, (vi) other justifiable reason. Motion must be within reasonable time and not more than one year after judgment for reasons (i-iii). Court on motion for new trial may vacate judgment. (Rule 60, N.D.R.Civ.P.). Court upon motion for judgment as matter of law may vacate or modify judgment. (Rule 60[b], N.D.R.Civ.P.). Judgment may be reversed, affirmed, or modified on appeal to Supreme Court. (Rule 35, R. App. P.).

Lien.

On docketing by the clerk, the judgment becomes a lien upon all real property except the homestead of every person against whom the judgment is rendered, which he may have in any county in which the judgment is docketed at the time of docketing, or which he shall thereafter acquire. Lien is valid for ten years. (NDCC 28-20-13). Lien may be renewed for an additional ten years by filing affidavit of renewal. (NDCC 28-20-21). Judgment is not a lien on personal property until levy of execution thereon. Transcript of judgment may be filed in any other county in state and impose lien upon debtor's real estate in such other counties upon such filing. (NDCC 28-20-13).

Revival.

Judgment for payment of money may be renewed by affidavit of judgment creditor or his agent or assignee at any time within 90 days next preceding expiration of ten years from first docketing of such judgment. Such affidavit must be filed in office of clerk of district court where originally entered, and clerk of court shall file copy of affidavit for renewal in each county where judgment was transcribed as requested by judgment creditor. (NDCC 28-20-22). Lien of judgment is extended for ten years by such renewal. (NDCC 28-20-23). If not renewed, or upon expiration of 20 years if renewed, clerk must cancel judgment. (NDCC 28-20-35).

Assignment.

Assignment of judgment must be in writing, and signed and acknowledged in the same manner prescribed for acknowledgment of deeds and must be presented to and filed by clerk of court where judgment is entered. (NDCC 28-20-20).

Satisfaction.

Judgment may be cancelled and discharged by clerk upon filing with him written satisfaction, which must be duly acknowledged. (NDCC 28-20-24). Return of execution wholly satisfied operates as satisfaction. (NDCC 28-20-25). Partial satisfaction may be made and entered. (NDCC 28-20-26). Form of satisfaction is as follows:

Form

(Title of case.) State of North Dakota, County of . . . . ss. I, ... acknowledge the satisfaction of a judgment rendered against . . . . in the District Court in and for the County of . . . . in an action wherein . . . . w . . . . Plaintiff . . . ., and . . . . w . . . . Defendant . . . . for . . . . Dollars and . . . . Cents, damages and costs, and docketed the . . . . day of . . . . One Thousand Nine Hundred and . . . . in the Clerk's office of the District Court in and for said County.

Dated the . . . . day of . . . . 20. . . . .

. . . .

. . . .

(Acknowledgment)

Actions.

Domestic judgment is enforceable by execution at any time within ten years, or if renewed, within renewal period. If judgment creditor in mortgage foreclosure does not proceed within 60 days after entry of judgment in foreclosure to serve special execution and proceed without delay to sheriff's sale, any other lienholder or other interested person may obtain special execution and proceed to arrange for sheriff's sale. (NDCC 28-21-01). (See category 8 Debtor and Creditor, topic 8.05 Executions.) Action may not be brought thereon within nine years from date of rendition without leave of court. (NDCC 28-01-34).

Revised Uniform Enforcement of Foreign Judgments Act adopted. (NDCC 28-20.1).

5.16 LIMITATION OF ACTIONS:

Uniform Commercial Code adopted, effective July 1, 1966. (Title 41). See category 3 Business Regulation and Commerce, topic 3.09 Commercial Code.

Uniform Probate Code and 1975, 1977 Amendments adopted. (Title 30.1).

Actions may be brought within the following period after the respective causes of action accrue:

Forty Years.

By the state for real property for the issues and profits thereof. (NDCC 28-01-01).

Twenty Years.

To recover real property or the possession thereof, plaintiff, his ancestor, predecessor or grantor must be seized or possessed of the premises within 20 years before the commencement of the action. (NDCC 28-01-04). Land contract vendee is barred from asserting any rights 20 years after the record of the contract unless written extension is recorded in which case ten years is allowed from last due date of his indebtedness. (NDCC 28-01-42). Entry upon real estate is not sufficient or valid as a claim unless action commenced within one year after making entry, and within 20 years from the time when the right to make such entry is descended or accrued. (NDCC 28-01-06). Bar extends to defense or counterclaim. (NDCC 28-01-05).

Ten Years.

Action upon a judgment or decree of any state or federal court; on contract contained in any conveyance or mortgage or instrument affecting the title to real property except a covenant of warranty, action on which must be commenced within ten years after the final decision against the title of the covenantor; proceeding to foreclose a mortgage on real estate, such ten year statute to run from last due date of the debt (NDCC 28-01-15); state income tax except in case of fraud (NDCC 57-38-38); products liability, except asbestos exposure, ten years after date of initial purchase for use or consumption or within 11 years of date of manufacture of product (NDCC 28-01.3-08) (held unconstitutional by Dickie v. Farmers Union Oil Co. of LaMoure, 611 N.W.2d 168 [N.D. 2000]). Design or construction of improvement to real estate or injury caused by deficiency in design or construction ten years after substantial completion; unless injury incurred in tenth year, then action must be commenced within two years of injury. (NDCC 28-01-44).

Six Years.

On contract, obligation or liability, oral or written, express or implied; liability created by statute other than penalty or forfeiture; trespass upon real property; taking, detaining or injuring goods or chattels; action for criminal conversation or for other injury to person or rights of another not arising upon contract; relief on ground of fraud both at law and in equity, cause of action in such case not to be deemed to have accrued until discovery of facts. (NDCC 28-01-16).

Four Years.

To recover penalty for usury. (NDCC 47-14-10). Action for breach of any contract for sale. (NDCC 41-02-104). Parties by agreement may reduce to not less than one year but may not extend. See category 3 Business Regulation and Commerce, topic 3.09 Commercial Code.

Three Years.

Against sheriff, coroner, or constable for liability incurred by acts or omissions as officer; upon statute for penalty or forfeiture if action is given to aggrieved party; foreclosure of construction lien. (NDCC 28-01-17). Claims for injury from asbestos exposure, three years from date injured person is informed of discovery of injury and its cause or after discovery of facts which would reasonably lead to such discovery, whichever is earlier. Claims by common carrier to recover transportation charges. (NDCC 8-08-11). Actions against state or employees or officials acting within scope of employment, unless otherwise specifically provided. (NDCC 28-01-22.1).

Two Years.

Libel, slander, assault, battery, false imprisonment, forfeiture or penalty payable to state, malpractice (will not be extended beyond six years for reasons of nondiscovery unless discovery was prevented by conduct of physician or hospital), wrongful death (statute runs from date of death unless death results from malpractice) and actions relating to alcoholic beverages (NDCC 28-01-18); actions for overtime, damages, fees or penalties under Fair Labor Standards Act (NDCC 34-01-13).

One Year.

Action against sheriff or officer for escape of prisoner (NDCC 28-01-19); proceeding to set aside adoption decree (NDCC 14-15-15).

One Hundred Eighty Days.

Actions for discriminatory practices relating to housing or public accommodations or services under Human Rights Act. (NDCC 14-02.4-19).

Three Hundred Days.

Actions for violation of Human Rights Act, except discriminatory practices relating to housing or public accommodations or services. (NDCC 14-02.4-19).

Thirty Days.

Action questioning validity of bonds or any tax levied pursuant thereto by municipalities. (NDCC 21-03-47).

No-Fault Insurance.

See category 23 Transportation, topic 23.01 Motor Vehicles, subhead No-Fault Insurance.

Actions Not Specifically Provided For.

Ten years. (NDCC 28-01-22).

New Actions.

If action is commenced within the time prescribed and judgment therein is reversed on appeal, the plaintiff, or if he dies and the cause of action survives, his heirs or representatives, may commence a new action within one year after the reversal. (NDCC 28-01-28). No action may be commenced on a judgment rendered in any court of this state between the same parties within nine years after its rendition without leave of court granted upon notice. (NDCC 28-01-34).

Foreign Cause of Action.

If a person shall be out of the state when a cause of action accrues against him, an action may be commenced in this state at any time within the terms limited by law for the bringing of an action on such cause of action after his return into this state. (NDCC 28-01-32).

Disabilities of Plaintiff.

Except for the recovery of real property or for a penalty or forfeiture, or against an officer for an escape, if plaintiff is under 18, insane, or imprisoned on a criminal charge for a term less than for life, when the cause of action accrues, the time of such disability is not a part of the time limited for the commencement of the action; however, the period cannot be extended more than five years except for infancy, nor can it be extended longer than one year after the disability ceases. (NDCC 28-01-25). In professional malpractice cases, extension of limitation due to infancy limited to 12 years. (NDCC 28-01-25).

Death of Plaintiff.

If a person dies before the expiration of the limitation period and the cause of action survives, an action may be commenced by his representatives after the expiration of that time and within one year from his death. (NDCC 28-01-26).

Death of Defendant.

If a person against whom an action may be brought dies before the expiration of the time limited for the commencement thereof, and the cause of action survives, and is not one based on a claim which may be filed in probate court, suit may be brought against personal representative after expiration of that time and within one year after issuance of letters to personal representative. (NDCC 28-01-26).

State of War.

If a party is a subject or citizen of a country at war with the United States, the time of the continuance of the war is not a part of the period of limitation. (NDCC 28-01-27).

Absence or Concealment of Defendant.

Absence from the state when cause of action accrues tolls the running of the statute until return to state; if defendant is present when cause of action accrues and departs from state and remains away for one year or more, the time of his absence is not part of the limitation period. This does not apply to foreclosure of real estate mortgages. (NDCC 28-01-32).

Interruption of Statutory Period.

Fraudulent concealment tolls running of statute until discovery, whereupon action may be brought within one year. (NDCC 28-01-24). When commencement of action is stayed by injunction or court order of statutory prohibition, the time of stay is not a part of the time limited. (NDCC 28-01-29). New acknowledgment or promise in writing or payment of principal or interest interrupts statutory period. (NDCC 28-01-36). In case of mutual open and current accounts with reciprocal demands, cause of action is deemed to have accrued from time of last item proved on either side. (NDCC 28-01-37).

Revival of Barred Claims.

New acknowledgment or promise if in writing or payment upon indebtedness revives claim. (NDCC 28-01-36).

Contractual Limitations.

Not permitted. (NDCC 9-08-05).

Pleading.

Limitations must be asserted only by answer. (NDCC 28-01-39).

See also category 8 Debtor and Creditor, topic 8.07 Fraudulent Sales and Conveyances.

5.16A PARTITION:

An action may be brought by one or more co-tenants holding or possessing real estate as partners, joint tenants or tenants in common in which one or more of them has or have an estate, for partition according to respective rights of the persons interested and for a sale of the property or a part thereof if a partition cannot be made without great prejudice to the owners. (NDCC 32-16-01).

Jurisdiction and Venue.

Action must be filed in district court. (NDCC 32-16-04). It must be commenced in county where land is situated. (NDCC 28-04-01).

Proceedings.

Summons must be directed to all of the joint tenants and tenants in common, and all persons having an interest of record, evidenced by lien, mortgage, judgment, or otherwise, and generally to all persons unknown claiming any interest in the property. (NDCC 32-16-05). Immediately after filing complaint, lis pendens must be filed in office of register of deeds, and from time of filing such notice, all persons are deemed to have notice of the pendency of the action. (NDCC 32-16-04). Service of summons may be made personally or by publication in accordance with general laws applicable to service of process. Notice must be attached to summons, stating that object of action is to obtain a partition and describing the property. (NDCC 32-16-06). Answers of defendants must set forth fully and particularly the origin, nature and extent of their interest in the property. (NDCC 32-16-07).

Partition in Kind or Sale.

If it appears that the property cannot be partitioned without great prejudice to the owners, the court may order a sale thereof; otherwise, upon making of requisite proof, it must order partition according to the respective rights of the parties as ascertained by the court, and the court shall appoint three referees therefor. (NDCC 32-16-12). Referees must divide property and allot several portions to the respective parties, quality and quantity relatively considered. (NDCC 32-16-13). The court may confirm, change, modify or set aside the report of the referees. (NDCC 32-16-15). The expenses of proceeding must be ascertained and allowed by the court, and apportioned among the different parties equitably. (NDCC 32-16-17). If property is ordered sold, sale must be made at public auction to the highest bidder on notice published in same manner as sale of property on execution. (NDCC 32-16-24). Terms of sale, whether cash or credit, must be fixed by court. (NDCC 32-16-25). Any person may purchase except referee, and guardian of infant party to action. (NDCC 32-16-32). General guardian of infant or other ward may agree to partition without action upon approval of county court. (NDCC 32-16-44). (Repealed.)

5.17 [RESERVED]

5.18 PLEADING:

Controlled by Rules of Civil Procedure substantially the same as Federal Rules of Civil Procedure.

Proof of Claim.

Claims of account should be itemized and should include debtor’s objections thereto, if any. Judgment by default entered on affidavit of proof. Ordinary rules of evidence applicable to all other claims.

See also topic 5.19 Practice.

Small Claims.

See category 6 Courts and Legislature, topic 6.01 Courts.

Frivolous Claims.

In civil actions court shall, upon finding that claim for relief was frivolous, award reasonable, actual and statutory costs, including reasonable attorney's fees to prevailing party, regardless of good faith of attorney or party making claim for relief, if their is such complete absence of actual facts or law that reasonable person could not have thought court would render judgment in their favor, provided prevailing party has in its responsive pleading alleged frivolous nature of claim. (NDCC 28-26-01). Allegations and denials in pleadings in court, made without reasonable cause and not in good faith and found to be untrue, subject pleading party to payment of expenses incurred by other party, including reasonable attorney's fees. (NDCC 28-26-31).

5.19 PRACTICE:

Governed by Rules of Civil Procedure. Rules of practice are substantially same as Federal Rules of Civil Procedure.

Supreme Court has power to make rules of pleading, practice and procedure. All statutes relating to practice and pleadings enacted by legislature are effective only as rules of court and may be amended or otherwise altered by Supreme Court. (NDCC 27-02-09).

Direct Actions Against Insurer.

See category 23 Transportation, topic 23.01 Motor Vehicles, subhead Direct Actions.

Small Claims.

See category 6 Courts and Legislature, topic 6.01 Courts.

Discovery.

N.D.R.Civ.P. 26 through 37.

Demand for Admission of Facts.

N.D.R.Civ.P. 36.

See also topics 5.02 Actions, Appeal and Error, Depositions and Discovery, Garnishment, Injunctions, Judgments, Pleading, Process; category 8 Debtor and Creditor, topics 8.02 Attachment, 8.05 Executions, 8.09 Garnishment.

5.20 PROCESS:

Rules of Civil Procedure, substantially the same as Federal Rules of Civil Procedure, control. Civil actions are commenced by service of summons.

Who May Serve.

Service of process may be made within State by any person of legal age not a party to nor interested in action and outside State by any person who may make service under law of this State or under law of place in which service is made or who is designated by court of this State. (Rule 4, N.D.R.Civ.P.).

Long Arm Statute.

State Court may exercise personal jurisdiction over person who acts directly or by agent as to any claim for relief arising from person's transacting business in State; contracting to supply or supplying service, goods, or other things within State; committing tort within State causing injury to another person or property within or without State; owning, having any interest in, using or possessing property in State; contracting to insure another person's property or other risk within State; acting as director, manager, trustee, or officer of corporation organized under laws of or having its principal place of business within State, or enjoying any other status or capacity within State, including cohabitation, or engaging in any other activity having such contact with this State that exercise of personal jurisdiction over person does not offend against traditional notions of justice or fair play or due process of law.

If jurisdiction over person is based solely upon contact, only claim for relief arising from bases enumerated therein may be asserted against him.

Service upon any person subject to personal jurisdiction of courts of State may be made outside State; in manner provided for service within State with same force and effect as though service has been made within State; in manner prescribed by law of place in which service is made for service in that place in action in any of its courts of general jurisdiction; by any form of mail addressed to person to be served and requiring signed receipt and resulting in delivery; as directed by foreign authority in response to letter rogatory; or as directed by order of court. (Rule 4[d][3], N.D.R.Civ.P.).

Service of Process on United States governed by NDCC 28-06.2.

Personal Service on Nonresident Motor Vehicle User.

See category 23 Transportation, topic 23.01 Motor Vehicles.

Proof of Service.

Proof of service may be made as follows: (1) If served by sheriff or other officer, by his certificate; (2) if by another person, by his affidavit; (3) in case of publication, by affidavit of publisher or publisher's designee, and affidavit of mailing copy of summons and complaint; (4) by written admission of defendant or by certificate of attorney showing he has made service. (Rule 4[i], N.D.R.Civ.P.).

Certificate, affidavit, or admission of service must state date, time, place, and manner of service. If served by one other than sheriff, affidavit shall also state that person serving is of legal age, not party to nor interested in action, and that he knew person served to be person named in complaint and summons. (Rule 4[j], N.D.R.Civ.P.).

5.21 REPLEVIN:

Action of replevin is styled Claim and Delivery by the Code.

Plaintiff in an action to recover possession of personal property at the time of issuing summons or any time before answer, may claim the immediate delivery of such property. (NDCC 32-07-01).

Proceedings.

Where delivery is claimed, affidavit must be made by plaintiff, or someone on plaintiff's behalf, stating that plaintiff is owner of property, describing it, or is lawfully entitled to possession thereof by virtue of special property therein, facts in respect to which must be set forth; affidavit must state that property is wrongfully detained by defendant, alleged cause of detention thereof if known, and that property has not been taken for tax assessment or fine pursuant to statute, nor seized under execution or attachment, or if so seized, it is by statute exempt, and actual value of property and that court order has been issued authorizing delivery and is attached, either pursuant to notice to defendant and hearing on order to show cause, or without notice to defendant if in addition to satisfying requirements for order to show cause, probable cause appeared to court that defendant gained possession of property by theft or fraud, property consists of one or more negotiable instruments or credit cards, property is perishable and will be irreparably damaged before hearing can be held, or property is in immediate danger of destruction, serious harm, concealment or removal from state or of sale to innocent purchaser. (NDCC 32-07-02). Plaintiff must endorse requisition to sheriff to take same; plaintiff must furnish bond with one or more sureties approved by sheriff in double value of property, whereupon sheriff seizes property, and if not rebonded, delivery may be made to plaintiff at expiration of three days. (NDCC 32-07-04 to 06).

Repossession.

Defendant within three days after service of papers may furnish sheriff with bond executed by two or more sureties in double the value of the property conditioned upon the return of the property to plaintiff if delivery is adjudged, and for the payment of such sum as for any cause may be recovered against the defendant, and thereupon property will be delivered to him by the sheriff. (NDCC 32-07-06).

Claims of Third Persons.

If property taken is claimed by a third person, and such person makes an affidavit of his title and right of possession thereto, stating the grounds, and serves the same on the sheriff, sheriff shall not be bound to keep property and deliver same to the plaintiff unless plaintiff upon demand indemnifies the sheriff against such claim by bond in the amount of the value of the property as specified in plaintiff's affidavit. (NDCC 32-07-10).

Judgment or Order.

Judgment for plaintiff may be for the possession or for the recovery of possession or for the value thereof in case delivery cannot be had, and for damages for the taking and detention thereof. If property has been delivered to plaintiff, and the defendant claims a return thereof, judgment for the defendant may be for a return of the property or the value thereof in case a return cannot be had, and for damages for the taking and detention thereof. (NDCC 28-20-07).

5.22 SEQUESTRATION:

No statutory provisions.

5.23–5.24 [RESERVED]

5.25 SUBMISSION OF CONTROVERSY:

No statutory provisions. See category 9 Dispute Resolution, topic 9.01 Arbitration and Award.

5.26 VENUE:

Court may change place of pre-trial hearing or proceeding. Court may change place of trial, subject to ten day right to object. (NDCC 28-04-09, NDCC 28-04-10).

Actions for following causes must be brought in county in which subject of action or some part thereof is situated, subject to power of court to change place of trial for cause: (1) For eminent domain; (2) recovery of real property or estate or interest therein; (3) for determination in any form of such right or interest and for injuries to real property; (4) for partition of real property; (5) for foreclosure of mortgage of real property. (NDCC 28-04-01). Actions on policy of insurance to recover for loss or damage to property insured, or for recovery of personal property distrained for any cause must be tried in county where property is situated. (NDCC 28-04-02). Actions against domestic corporations or LLC must be tried in county designated in plaintiff's complaint if such corporation or LLC transacts business therein. (NDCC 28-04-04).

Actions for the following causes must be tried in the county where the cause, or some part thereof arose, subject to the like power to change the place of trial: (1) For recovery of forfeiture imposed by statute; (2) against public officer or person specially appointed to execute officer's duties, for act done by virtue of his office, or against person who, by his command or his aid, does anything touching duties of such officer. (NDCC 28-04-03).

Actions against owner or driver of motor vehicle arising from negligence may be brought in county where action arose, or where defendant or a majority of defendants reside. (NDCC 28-04-03.1).

In all other cases, subject to power of court to change place of trial, action must be tried in county in which defendant or some of defendants reside when action commenced, but if none of defendants reside in state, it may be commenced in county which plaintiff shall designate in summons. (NDCC 28-04-05; NDCC 28-04-03.1).

Change of Venue.

Change of venue may be granted where action brought in wrong county, where impartial trial cannot be had in county where brought, or where convenience of witnesses and ends of justice promoted by change, and where in any county there appears to be insufficient jury business to hold a session of court. (NDCC 28-04-07, 39.1[b] N.D.R.Civ.P.).

6 COURTS AND LEGISLATURE

6.01 COURTS:

United States District Court.

Clerk's office: Fargo 58107; Bismarck 58502. Documents for Northeastern and Southeastern Division filed with Fargo office. Documents for Northwestern and Southwestern Division filed with Bismarck office. Electronic filing for most documents.

Northeastern Division is composed of following counties: Benson, Cavalier, Grand Forks, Nelson, Pembina, Ramsey, Rolette, Towner, Traill and Walsh.

Court sits at Grand Forks.

Northwestern Division is composed of following counties: Bottineau, Burke, Divide, McHenry, McKenzie, Mountrail, Pierce, Renville, Sheridan, Ward, Wells and Williams.

Court sits at Minot.

Southeastern Division is composed of following counties: Barnes, Cass, Dickey, Eddy, Foster, Griggs, La Moure, Ransom, Richland, Sargent, Steele and Stutsman.

Court sits at Fargo.

Southwestern Division is composed of following counties: Adams, Billings, Bowman, Burleigh, Dunn, Emmons, Golden Valley, Grant, Hettinger, Kidder, Logan, McIntosh, McLean, Mercer, Morton, Oliver, Sioux, Slope and Stark.

Court sits at Bismarck.

Filing Fee.

Deposit for filing case is $350.00; bankruptcy c. 7—$299.00; c. 11—$1,039.00; c. 12—$239.00.

Supreme Court may exercise appellate jurisdiction only, unless otherwise provided by law or constitution. In exercise of its appellate jurisdiction, Supreme Court may exercise such original jurisdiction to issue writs of habeas corpus, mandamus, quo warranto, certiorari and injunction. Original jurisdiction is to be exercised only in habeas corpus cases and those involving sovereign rights of state, or its franchises or privileges. (NDCC 27-02-04)

No law may be held unconstitutional by Supreme Court unless four of five judges concur in so holding. (Const., Art. VI, § 4).

Court sits at state capitol in Bismarck.

Temporary Court of Appeals.

May exercise appellate and original jurisdiction as delegated by Supreme Court. Three judge panels hear cases selected for hearing by Supreme Court. (c. NDCC 27-02.1). Active and retired judges and attorneys may be assigned to sit on panels.

District Courts.

District courts have original jurisdiction of all causes both at law and equity and appellate jurisdiction over all final judgments of municipal judges and from determinations of inferior officers, boards and tribunals pursuant to regulations prescribed by law. They have power to issue writs, process, and commissions provided by constitution or by law or which may be necessary for due execution of powers with which courts are vested. (NDCC 27-05-06). See also subhead Family Courts, infra.

Districts.—There are seven Judicial Districts as follows:

Northwest Judicial District is composed of following counties: Burke, Divide, McKenzie, Mountrail, Ward, and Williams.

Southwest District is composed of following counties: Adams, Billings, Bowman, Dunn, Golden Valley, Hettinger, Slope, and Stark.

South Central District is composed of following counties: Burleigh, Emmons, Grant, Kidder, Logan, McIntosh, McLean, Mercer, Morton, Oliver, Sheridan, and Sioux.

Northeast District is composed of following counties: Benson, Bottineau, Cavalier, McHenry, Pembina, Pierce, Ramsey, Renville, Rolette, Towner, and Walsh.

Northeast Central District is composed of following counties: Grand Forks and Nelson.

East Central District is composed of following counties: Cass, Steele, and Traill.

Southeast District is composed of following counties: Barnes, Dickey, Eddy, Foster, Griggs, LaMoure, Ransom, Richland, Sargent, Stutsman and Wells.

Court sits in County Seat of each county in each District. For list of counties and County Seats, see first page for this State in Volume containing Geographical Section. Resident cities for District Judges in each District are as follows:

Northwest District at Williston and Minot.

Southwest District at Dickinson.

South Central District at Mandan, Bismarck, Washburn and Linton.

Northeast District at Rugby, Devils Lake, Bottineau, Cavalier and Grafton.

Northeast Central District at Grand Forks.

East Central District at Fargo.

Southeast District at Jamestown, Valley City, Wahpeton, New Rockford, and Ellendale.

Clerk of District Court of each county located at County Seat of its respective county.

District courts have exclusive original jurisdiction in probate and testamentary matters, appointment of administrators and guardians, settlement of their accounts, etc. (NDCC 30.1-02-02).

Probate Courts.

Probate jurisdiction is exercised by district courts. (NDCC 30.1-02-02).

Small Claims Courts.

Jurisdiction exercised by Judges of district courts or referees appointed by presiding Judge of judicial district. Jurisdiction limited to cases for recovery of money or cancellation of agreement involving material fraud, deception, misrepresentation or false promise where value of agreement or amount claimed does not exceed $5,000. No garnishment or attachment shall issue from this court until after judgment is entered. (NDCC 27-08.1-01 & NDCC 27-08.1-08).

6.02 LEGISLATURE:

Meets biennially in January of odd years. People reserved power to propose and enact laws by initiative and referendum. (Const., Art. III, § 1).

Terms of office, allowable number of legislators in House and Senate and basic procedures for operation in Const., Art. IV.

Governor has power to convene legislative assembly on special occasions. (Const., Art. V, § 7).

Lobbyists.

(NDCC 54-05.1).

6.03 REPORTS:

Only decisions of the Supreme Court and Temporary Court of Appeals are reported by official court reporter. Official publications consist of Volumes 1 to 6 of Dakota Reports (Dakota Territory) covering period from 1861 to 1889, and Volumes 1 to 79 North Dakota Reports covering period from 1889 to 1953. Publication of North Dakota Reports now discontinued. Supreme Court began publishing opinions on Internet in 1997. (www.ndcourts.gov).

Unofficial Reports.

Decisions of Supreme Court appear in Northwestern Reporter.

Digests.

All reports are digested in Century and American Digests, and also in Northwestern Reporter Digest and Dakota Digest.

6.04 STATUTES:

Statutes are contained in North Dakota Century Code, and are available at www.ndcourts.gov.

Uniform Acts adopted are: Acknowledgment Act Amendment (1943); Act to Secure the Attendance of Witnesses from Without the State in Criminal Cases (1933); Adoption, Revised (1971, am'd 1989); 1987 Anatomical Gift (1989); Arbitration (2000); Athlete Agents (2000); Chemical Tests for Intoxication (1959); Child Custody Jurisdiction and Enforcement (1999); Commercial Code (1965, 1987, 1997, 1999, 2002); Article 9 Amendments (2001); Conflict of Laws-Limitations (1985): Revised Contribution Among Tortfeasors (1957); Controlled Substances (1971, amended 1987); Declaratory Judgments (1923); Determination of Death (1989); Disclaimer of Property Interests (1999); Division of Income for Tax Purposes (1965, revised 1997); Durable Power of Attorney (1985); Duties to Disabled Persons (1973); Electronic Transactions (1999); Enforcement of Foreign Judgments, Revised (1969); Estate Tax Apportionment (1973); Extradition and Rendition (1980); Facsimile Signatures of Public Officials (1965); Federal Lien Registration (1979, am'd 1989); Foreign-Money Claims (1991); Fraudulent Transfer (1984); Interstate Agreement on Detainers (1971); Interstate Compact for Adult Offender Supervision (2003); Interstate Compact for Juveniles (2003); Interstate Family Support (1997); Juvenile Court Act (1969); Limited Partnership (1976); Management of Institutional Funds (1975); Mandatory Disposition of Detainers (1971); Minor Student Capacity to Borrow (1971); Non-Profit Corporation (1959); Parentage (1975); Partnership (1959); Photographic Copies of Business and Public Records as Evidence (1951); Post-Conviction Procedure (1980); Premarital Agreement (1985); Principal and Income (1999); Preservation of Private Business Records (1999); Probate Code (1973, 1975, 1977, 1979, part 1982, 1987, 1989, 1999); Prudent Investor (1997); Reciprocal Enforcement of Support (1951, 1955, 1969, 1971, 1979); Recognition of Acknowledgments (1971); Rights of the Terminally Ill (1989); Securities Ownership by Minors (1961); Single Publication (1953); State Antitrust (1987); Status of Children of Assisted Conception (1989); Statutory Rule Against Perpetuities (1991); Testamentary Additions to Trusts (1973); Trade Secrets Act (1983 am'd 1989); Transfers to Minors (1985); Unclaimed Property (1985, revised 1987).

Uniform Commercial Code adopted, effective July 1, 1966. (Title 41). See category 3 Business Regulation and Commerce, topic 3.09 Commercial Code.

For text of Uniform Acts falling within the scope of the Martindale-Hubbell Law Digests see Uniform and Model Acts section.

7 CRIMINAL LAW

7.01 CRIMINAL LAW:

Procedure is governed by Code of Criminal Procedure (Title 29) and Rules of Criminal Procedure. Criminal Code is contained in Title 12.1. Prosecution is usually on information although in some instances it is by indictment. Penalty and sentencing provisions contained in c. NDCC 12.1-32.

Bail statutes NDCC 29-08-04 through NDCC 29-08-15, NDCC 29-08-17 through NDCC 29-08-21, and NDCC 29-08-23 through NDCC 29-08-25 superseded by N.D.R.Crim.P., Rules 46 & 58.

Uniform Crime Victims Reparations Act repealed.

Crime Victims Compensation Act adopted. (NDCC 54-23.4).

Uniform Act to Secure Attendance of Witnesses from Without a State in Criminal Proceedings adopted. Summons issued to compel witness to appear in another state. (NDCC 31-03-26 to NDCC 31-03-31). Power to subpoena witnesses provided in N.D.R. Crim. P. 17 and c. NDCC 31-03.

Chemical Test Statutes. Chemical Test for Intoxication, Implied Consent. (NDCC 39-20).

Uniform Controlled Substances Act adopted. (NDCC 19-03.1).

Criminal Responsibility and Post-Trial Responsibility Act adopted. (NDCC 12.1-04.1)

Uniform Juvenile Court Act adopted. (NDCC 27-20).

Uniform Post-Conviction Procedure Act adopted. (NDCC 29-32.1).

Uniform Extradition and Rendition Act adopted. (NDCC 29-30.3).

Uniform Mandatory Disposition of Detainers Act adopted. (c. NDCC 29-33).

Interstate Agreement on Detainers adopted. (c. NDCC 29-34).

Interstate Compact on Parolee Supervision repealed 2003.

Human Cloning prohibited. (NDCC 12.1-39).

Interstate Compact for Adult Offender Supervision adopted. (NDCC 12-65).

Interstate Compact for Juveniles adopted. (NDCC 12-66).

Fair Treatment of Victims and Witness Act amended & reenacted. (NDCC 12.1-34).

Child Victim and Witness Fair Treatment Standards adopted. (NDCC 12.1-35).

Use of Great Seal.

It is class B misdemeanor to copy or reproduce great seal of North Dakota on any stationery or business calling card. (NDCC 54-02-01).

Motion for DNA Testing Not Available at Trial.

Person convicted of crime may make motion for DNA testing to demonstrate person’s actual innocence if testing is to be performed on evidence secured in relation to trial which resulted in conviction; and evidence was not subject to testing because either technology for testing was not available at time of trial, or testing was not available as evidence at time of trial. (NDCC 29-32.1-15).

State Juvenile Services Coordinator Provision repealed. (NDCC 27-02-05.2).

Distribution of Substance or Device to Defraud Urine Test.

It is class A misdemeanor to willfully manufacture, advertise, sell, or distribute any substance or device that is intended to defraud urine test designed to detect presence of chemical or controlled substances. (NDCC 19-04-09).

Pilot Project in Pembina, Walsh, and Grand Forks Counties.

Mandatory drug abuse assessment and treatment for first-time drug offenders. (NDCC 19-03.1-45).

Aggravating Factors in Drug Offenses.

Person who violates NDCC 19-03.1-23 is subject to increased penalty, as provided in subsection 2, if at time of offense defendant had firearm in defendant's actual possession. (NDCC 19-03.1-23.1).

Controlled Substance Ingestion.

Person who intentionally ingests, inhales, or otherwise takes into body controlled substance is guilty of class A misdemeanor unless substance was obtained directly from practitioner or pursuant to valid prescription. (NDCC 19-03.1-22.3).

Hiring Individual for Sexual Activity prohibited. (NDCC 12.1-29-06).

Child Support Restitution and Collection.

Restitution to be required of certain offenders. (NDCC 12.1-32-16).

Identity Theft.

Person is guilty of offense if person uses or attempts to use personal identifying information of living or deceased individual to obtain credit, money, goods, services, or anything else of value without that individual's consent or authorization. If value exceeds $1,000, offense is class B felony. If value is $1,000 or less, offense is class C felony. Second or subsequent offense is class A felony. (NDCC 12.1-23-11).

8 DEBTOR AND CREDITOR

8.01 ASSIGNMENTS:

An assignment of a nonnegotiable contract for payment of money or personal property transfers all rights of assignor subject to all equities and defenses existing in favor of maker at time of endorsement. (NDCC 9-11-02).

Uniform Commercial Code adopted. (Title 41). See category 3 Business Regulation and Commerce, topic 3.09 Commercial Code.

Instrument Transferring Title.

Oral assignment is generally valid, but written assignment is customarily used. If contract assigned is secured by lien or mortgage, assignment should be executed and acknowledged with same formalities as a lien or mortgage.

Filing and Recording.

See category 3 Business Regulation and Commerce, topic 3.09 Commercial Code.

As to effect of recording assignment of mortgage, see category 20 Mortgages, topic 20.04 Mortgages of Real Property.

Effect.

Assignment vests in assignee legal title to instrument, subject to any equities or defenses existing at time of assignment (NDCC 9-11-02), and carries with it security given by lien or mortgage (NDCC 35-03-01.2).

Assignment of Wages.

No statutory provisions. See, however, category Family, topic Divorce, subhead Allowance for Support of Children.

8.02 ATTACHMENT:

Procedures enacted for prejudgment remedy of attachment as follows:

Actions in Which Allowed.

Actions on contracts, judgments or torts. When claim is based on tort, damages must exceed $50. (NDCC 32-08.1-03).

Against Whom Writ May Issue.

Any creditor may attach property of its debtor in cases, upon conditions and in manner prescribed in NDCC c. 32-08.1. Property of banks is exempt from attachment. (NDCC 6-08-06).

Claims on Which Writ May Issue.

Writ may issue in any action for recovery of money only, whether or not due, payable within this State.

Basis for Attachment: (a) Defendant is absent from State or concealed therein so that summons cannot be served; (b) defendant has disposed of or concealed, or is about to dispose of or conceal his property with intent to defraud creditors; (c) defendant has removed or is about to remove property out of state with intent to defraud creditors; (d) defendant fraudulently incurred obligation respecting which action is brought; (e) defendant is not resident of this State; (f) defendant is foreign or domestic corporation or limited liability company and no officer, manager, or agent thereof on whom to serve summons exists or resides in State or can be found; (g) action is against defendant as principal on official bond to recover money due State or some political subdivision thereof, or action is against defendant as principal upon bond or other instrument given as evidence of debt for or to secure payment of money embezzled or misappropriated by defendant as officer of State or of political subdivision thereof; (h) action is against defendant to recover purchase money for personal property sold to defendant in which case property must be specifically described, if one of conditions under subdivision (a) or (e) or (i) and one of conditions under subdivision (b) or (c) is also alleged; (i) action is against owner of motor vehicle for damages alleged to have been caused by negligence of such owner or duly authorized agent. Motor vehicle alleged to have been driven, occupied or owned by negligent driver or owner thereof at time of accident, may be attached if one of conditions under subdivision (a) or (e) and one of conditions under subdivision (b) or (c) is also alleged. In tort actions: (a) Defendant is not resident of State or his residence is unknown and cannot with due diligence be ascertained or (b) defendant is foreign corporation or foreign limited liability company.

Action may be maintained and writ issued on demand not yet due in any case mentioned in this section, except cases mentioned in subdivision (e), (f) or (g). Bond specified in NDCC 32-08.1-05 shall be for three times amount demanded. If writ is issued before maturity of debt and defense to writ is sustained, court shall render judgment for damages and costs against plaintiff. (NDCC 32-08.1-03).

Proceedings to Obtain.

Writ may be issued before final judgment on plaintiff's request and after summons and complaint is filed, only following hearing. Affidavit must state amount and basis for claim and that same is due upon contract, judgment or tort. Court may issue writ only if plaintiff has provided required affidavit, has executed sufficient bond and has made prima facie showing of right to attachment. Plaintiff shall provide defendant with copy of request for writ and accompanying affidavit and notice of time of hearing. (NDCC 32-08.1-02).

Writ may be issued on plaintiff's request prior to hearing if plaintiff's request is accompanied by affidavit stating basis and amount of claim against defendant and describing facts constituting basis for attachment under NDCC 32-08.1-03(a), (b), (c) or (d). Court may issue writ prior to hearing only if plaintiff demonstrates probability of success on merits, existence of one or more of grounds specified in NDCC 32-08.1-03(1)(a), (b), (c) or (d) and due to extraordinary circumstances, plaintiff's interests cannot be protected by appropriate court order other than by directing pre-hearing attachment. Defendant must be served immediately after attachment is completed with copy of plaintiff's request for writ, copy of affidavit and all other documents offered in support of request and notice of availability of hearing under NDCC 32-08.1-17. (NDCC 32-08.1-02.1).

Writ, if issued, must be directed to sheriff of county in which defendant's property is located and must require sheriff to attach all defendant's property within sheriff's county or as much thereof as may be sufficient to satisfy plaintiff's demand, together with costs and expenses. Writ must be in name of court and sealed and signed by its judge. (NDCC 32-08.1-02).

Bond.

Before writ be executed, bond on part of plaintiff in sum of at least $500 executed by sufficient surety shall be delivered to officer, to effect that if defendant recovers judgment, plaintiff shall pay all costs that may be awarded to defendant and all damages which he may sustain by reason of attachment. No bond necessary when state or political subdivision is plaintiff. (NDCC 32-08.1-05). If defendant is not satisfied with amount specified in bond, or with surety, defendant may upon five days' notice to plaintiff apply to judge for additional security and judge may require plaintiff to give and file another bond to be approved by him in such sum as he shall deem proper not exceeding appraised value of property attached. (NDCC 32-08.1-06).

Levy.

All property of defendant not exempt from execution may be attached. Personal property shall be attached as upon execution; real property by sheriff filing in office of county recorder copy of writ with his certificate that by virtue of original writ he has attached all interest of defendant in such real estate, describing same. (NDCC 32-08.1-09, 10).

Indemnity.

If there is reasonable doubt as to ownership of property or as to its liability to be attached, sheriff may require sufficient security from plaintiff to indemnify him for attaching such property. (NDCC 32-08.1-11).

Lien.

No statutory provision in Act, but see subhead Priorities, infra.

Priorities.

Attachments rank in order of times of levies. (NDCC 32-08.1-13.1). Lien of attaching creditor is superior to claims of subsequent purchasers or encumbrancers and as to land, superior to unrecorded conveyance or lien. (NDCC 47-19-41).

Release of Property.

Defendant may at any time before judgment, deliver to officer who attached property bond executed by adequate surety to effect that they will, on demand, pay to plaintiff amount of judgment with all costs that may be recovered against defendant, not exceeding sum specified in bond with interest. Bond shall be in amount alleged by plaintiff to be due. (NDCC 32-08.1-14). Officer shall give notice and copy of bond with notice of time when same was delivered to officer, to plaintiff who, within three days, may give notice to officer that he objects to or waives all objections to sureties. (NDCC 32-08.1-15).

Sale.

When property taken on writ is likely to depreciate in value before end of action, or keeping thereof could cause much loss or expense, court may order it sold in such manner as best interests of parties demand and money realized shall be held by sheriff in lieu of property sold. (NDCC 32-08.1-12).

Care of Property.

Officer shall deposit with court property seized and proceeds of sale to answer any judgment which may be recovered in such action, and shall, subject to court or judge direction, collect and deposit with court all debts, credits and effects of defendant. Retention, protection, and final disposition of property must be determined by court. (NDCC 32-08.1-13).

Vacation or Modification.

Upon five days' notice of motion court may at any time before trial of action, or release of property, vacate or modify writ of attachment for irregularity or other sufficient cause. (NDCC 32-08.1-16).

Answer to Writ; Trial.

Within ten days after notice of issuing of writ against defendant's property, defendant may, by special answer, deny existence of material facts stated in attachment affidavit, and may assert undue hardship as defense. Court shall try issue so raised before trial but in no event, later than 14 days after writ is issued. Plaintiff has burden of proving conditions for issuance of pre-hearing writ. If defendant has made assignment for benefit of defendant's creditors, defendant's assignee may answer and defend pursuant to this section. (NDCC 32-08.1-17).

Third Party Claims.

Any person not party to action whose property is attached may at any time, either before or after judgment, be made party upon application for purpose of removing or discharging attachment. Court may grant summary relief and may in proper cases try appropriate issues by jury. (NDCC 32-08.1-24).

8.03 [RESERVED]

8.04 CREDITORS' SUITS:

No statutory provisions.

8.05 EXECUTIONS:

Kinds of Execution.

Executions are of two kinds, one against the property of the judgment debtor, and another for delivery of possession of property and any damages for withholding same. (NDCC 28-

21-03).

Time for Issuance.

Execution on judgment may issue at any time within ten years after entry of judgment. (NDCC 28-21-01).

Execution Issuance.

Issued from court of county which entered judgment to sheriff of counties where judgment docketed. More than one execution may be issued at same time to different counties. (NDCC 28-21-05). Department of Human Services may issue execution for child support arrearage. (NDCC 28-21-05.2).

Stay.

No execution may be issued on judgments until expiration of ten days after notice of its entry if opposing party appeared, and ten days after entry of judgment by default. (Rule 62[a], N.D.R.Civ.P.). Entry of judgment upon decision of court or verdict of jury in civil action shall not be stayed, but court may stay execution of such judgment for such reasonable time as may be necessary to move for new trial or to perfect appeal. (Rule 62[b],[d], N.D.R.Civ.P.).

Lien.

An execution is not a lien on personal property before actual levy thereon. (NDCC 28-21-13).

Notice of Levy.—In all cases of levy upon personal property, officer must serve notice of levy in same manner as summons served in accordance with N.D.R.Civ.P. Such notice must have written or printed on its face further notice to debtor if exemptions are claimed or demanded, such claim must be made within ten days after service of notice. (NDCC 28-21-12).

Levy.

Sheriff may levy on person’s personal property upon receipt of certified copy of judgment against person, which has been docketed in any county, and proper notice has been given to debtor requiring payment of money or delivery of personal property. Judgment creditor may also proceed to enforce judgment by execution. (NDCC 28-21-05.1). When judgment creditor proposes to execute on moneys owed to judgment debtor by third party who is retaining money pursuant to garnishment, execution must be made between 20 and 360 days from date of service of garnishment summons. Execution may be served by judgment creditor’s attorney, sheriff or agent of either, through certified mail or personal service. Transcript need not be filed in county of sheriff to whom execution is directed. If claim for exemption filed on or before 20 days after date of service of garnishment summons, no execution may be made against money claimed exempt until court determination. (NDCC 28-21-04.2). All interests in property of judgment debtor not exempt by law, is subject to execution. (NDCC 28-21-08). Sheriff may elect not to seize property during time period debtor has to claim exemptions under c. NDCC 28-22 or if property cannot be removed immediately, by reason of bulk or otherwise. (NDCC 28-21-08). In such case, upon proper service of notice of levy, levy is valid and effectual as if property had been seized. Lien of writ of execution is effectual from time actual levy is made in accordance with statute. (NDCC 28-21-08 and NDCC 28-21-12). Pledged or mortgaged property may be levied on and interest of judgment debtor therein sold. (NDCC 28-21-09). Any person who has received notice of levy and fails to surrender and deliver property levied upon demand of sheriff is guilty of class B misdemeanor and may be guilty of contempt of court. (NDCC 28-21-12.1).

Exemptions.

See topic 8.06 Exemptions.

Return.

The execution shall be returnable to the clerk issuing it within 60 days after its receipt by an officer; except if sheriff's levy has been made within 60 days, then execution must be returnable to clerk within reasonable time following completion of property sale or 90 days after its receipt by officer. Court may extend execution to accommodate notice and hearing to determine issues of exemptions or ownership and to provide time for publication of notice of sale and property sale. (NDCC 28-21-07).

Priorities.

Execution takes effect as a lien on personal property as of time of actual levy, and is subject to liens and executions previously levied, filed, or recorded. (NDCC 28-21-13.1).

Satisfaction.

If execution is against property sheriff must levy upon and sell sufficient property to satisfy the judgment, with interest and costs, resorting first to personal property and then to real estate. (NDCC 28-21-06). He must pay to judgment creditor proceeds, or so much thereof as will satisfy execution. (NDCC 28-21-11).

Sale.

Personal property, other than crops or perishable property, shall be sold after publication of notice of time and place of sale, once each week for two successive weeks next before day of sale, in county's official newspaper. (NDCC 28-23-01). If levy is upon harvested crops at option of judgment creditor, such crops may be sold in nearest usual market after levy, at market price, without publishing notice of sale, but in such case notice of levy must state when and where crops may be sold; officer must hold crops six days before making sale if judgment debtor gives notice of intention to settle judgment. (NDCC 28-23-02). Perishable property may be sold pursuant to order of court, prescribing such notice, time, and manner of sale. (NDCC 28-23-03). In case of sale of real property, notice must be published in county's official newspaper where land is located once per week for three successive weeks and last publication must be at least ten days prior to making of sale. (NDCC 28-23-04). All sales of real property, or any interest therein, must be made at place designated by sheriff in notice. (NDCC 28-23-05). If owner of personal property levied upon so requests and agrees to keep property safe, sale shall be held on premises where property is seized. (NDCC 28-23-06). All sales must be made at public auction to highest bidder between hours of 9 A.M. and 4 P.M., and no more property shall be sold than is necessary to satisfy execution. Where sale is of personal property, capable of manual delivery, it must be within view of those who attend sale and must be sold in parcels as are likely to bring highest price. Where property consists of several known lots or parcels, each lot must be sold separately unless they constitute one parcel on which improvements have been constructed. Judgment debtor may direct order in which property shall be sold. (NDCC 28-23-07). Upon sale of real property purchaser is given certificate of sale by officer (NDCC 28-23-11), and when estate is less than leasehold of two years' unexpired term, sale is absolute. In all other cases real property is sold subject to redemption. (NDCC 28-23-11).

Redemption.

No statutory provision for redemption of sale of personal property. Real property, except leasehold of less than two years duration, is sold subject to redemption within one year after date of sale (NDCC 28-24-02), by payment of purchase price, plus insurance premiums, assessments, taxes and utilities paid by purchaser to protect title or premises, with interest at rate in original instrument on which judgment based. (NDCC 28-24-02, -07). Redemption may be made by judgment debtor or creditor having lien on property sold, or on some part of property, subsequent to that on which property was sold. (NDCC 28-24-01). Redemption is made by giving written notice of redemption to sheriff and at same time record duplicate in County Recorder's Office where land situated, with proof of right to redeem and payment of requisite amount. (NDCC 28-24-03). If no redemption is made, sheriff executes deed immediately after expiration of redemption period to purchaser, his assignee, or redemptioner. (NDCC 28-24-13). See category 20 Mortgages, topic 20.04 Mortgages of Real Property, subhead Redemption.

Supplementary Proceedings.

When execution is returned unsatisfied, judgment creditor is entitled to order for the examination of the judgment debtor in the county of his residence. (NDCC 28-25-01). Such examination may also be obtained at any time after issuance of execution and before its return on proof that judgment debtor has property which he unjustly refuses to apply to satisfaction of execution. (NDCC 28-25-01). As result of examination judge may order property not exempt from execution either in hands of debtor or any other person, to be applied toward satisfaction of judgment, except that earnings for 60 days preceding date of order cannot be so applied if it is made to appear that such earnings are necessary for use of debtor's family. If judgment debt is for guaranteed student loan, court may make specific findings on whether debtor has occupational or professional certificate, license or permit issued by state or any occupational or professional board, which debtor is required to obtain and court, based on principles of fairness, may suspend debtor's certificate, license or permit. (NDCC 28-25-11). Judge may by order appoint receiver and may issue injunction against transfer or other disposition of property of debtor. (NDCC 28-25-12). Judge may punish disobedience of orders as contempt. (NDCC 28-25-16).

Arrest of Defendant.

Where there is danger that debtor will leave the state or conceal himself and there is reason to believe he has property which he unjustly refuses to apply to the payment of the judgment, order of arrest may issue. (NDCC 28-25-05).

Defendant arrested in supplementary proceedings may be released on furnishing undertaking with sufficient sureties that he will from time to time attend before the Judge as directed, and that during the pendency of the proceedings he will not dispose of any part of his property not exempt from execution. (NDCC 28-25-05).

Banks.

Execution may not issue against a bank. (NDCC 6-08-06).

8.06 EXEMPTIONS:

Absolutely exempt from levy and sale are certain items of personal property. (NDCC 28-22-02). In addition to absolute exemptions, head of family may select additional $7,500 in exempt property (not to include real estate), and additional exemptions. (NDCC 28-22-03, -03.1, 05).

Debts Against Which Exemptions May Not Be Claimed.

Only absolute exemptions are allowed for wages of laborer or mechanic who is, or had been, employed by judgment debtor, for a debt incurred for property obtained under false pretenses, for fines, penalties or costs of criminal prosecutions, against nonresident, or against debtor who is leaving state or who has absconded. (NDCC 28-22-15). In action for forfeiture of bond in criminal cases exempt property of all kinds is limited to $500. (NDCC 28-22-16).

No property is exempt from execution or attachment in action for the purchase price. (NDCC 28-22-14).

Partnership or limited liability company can claim but one exemption; if any partner is head of family, one exemption may be claimed as such; otherwise exemption applicable to single person is available. (NDCC 28-22-13).

Bill of sale or security interest of exempt property must be signed by debtor and spouse if married. (NDCC 35-01-04).

Waiver.

Personal property exemption may not be waived in advance. (NDCC 9-08-01).

Necessity for Claiming.

Debtor must serve officer with verified written schedule of property claimed as exempt and all his other property. (NDCC 28-22-07). Wife or child over sixteen may do so if debtor does not. (NDCC 28-22-11). Right to exemption is lost unless claim therefor is made within ten days after service of notice of levy. (NDCC 28-22-06).

Earnings.

See topic 8.09 Garnishment.

Proceeds of insurance on absolute exemptions are exempt. (NDCC 28-22-02). Pensions, annuities, retirement plans and surrender value of life policies payable to wife, child or dependent relatives which have been in effect for at least one year are absolutely exempt to debtor to extent of $100,000 per account, up to $200,000 aggregate. Dollar limitation does not apply to extent that amounts are necessary for support of resident and dependents. Such accounts are not exempt from claims for spousal or child support. (NDCC 28-22-03.1). All pensions or annuities or retirement, disability, death, or other benefits paid or payable by, or amounts received as return of contributions and interest from, retirement system established pursuant to state law by state (with some exceptions), state agency, political subdivision of state, or firefighters relief association for retirement, annuity, pension, disability benefit or death benefit purposes are exempt. (NDCC 28-22-19).

Homestead Exemption.

See topic 8.10 Homesteads.

8.07 [RESERVED]

8.08 FRAUDULENT SALES AND CONVEYANCES:

Uniform Fraudulent Transfer Act adopted, effective July 1, 1985. (NDCC 13-02.1-01 et seq.).

Transfer is fraudulent as to present and future creditors if debtor made transfer with actual intent to hinder, delay or defraud any creditor, or without receiving reasonably equivalent value in exchange for transfer, and debtor was insolvent at time or debtor became insolvent as result of transfer. (NDCC 13-02.1-04).

Transfer is fraudulent if transfer was made to insider for antecedent debt, debtor was insolvent at time and insider had reasonable cause to believe that debtor was insolvent. (NDCC 13-02.1-05).

Statute of limitations is four years except with respect to transfers made to insider on antecedent debt in which case it is one year. (NDCC 13-02.1-09).

Bulk Sales.

See category 3 Business Regulation and Commerce, topic 3.09 Commercial Code.

8.09 GARNISHMENT:

Garnishment process may be issued after securing judgment against debtor in court of competent jurisdiction. (NDCC 32-09.1-02).

Property Which May Be Reached.

Action may be brought against any person, public corporation, U.S., State of North Dakota, or institution, department, or agency of state, indebted to or having any property in possession or under control, belonging to creditor's debtor. Exclusive procedure to execute on earnings of debtor held by employer. (NDCC 32-09.1-02).

Jurisdiction.

Garnishment may be brought in court having jurisdiction of subject of action.

Proceedings to Obtain.

At least ten days before issuance of garnishee summons against earnings of any person, creditor must serve upon debtor notice that garnishee summons may be issued, which notice provides, among other matters, opportunity to claim dependents. (NDCC 32-09.1-04). At any time after judgment, thereafter, garnishee summons may be issued against any third person as garnishee and personally served on garnishee. (NDCC 32-09.1-06). Garnishee must provide, among other information, written disclosure of its indebtedness to defendant. (NDCC 32-09.1-07). Plaintiff may not require disclosure of indebtedness or property of defendant in garnishee's possession or under garnishee's control to extent indebtedness or property exceeds retention amount consisting of: amount of judgment which remains unpaid and nine months interest thereon, and $125.00. Summons must include full name of defendant, defendant's place of residence, retention amount, and must state that garnishee shall retain property, earnings, or money in garnishee's possession until plaintiff causes writ of execution to be served upon garnishee or until defendant authorizes release to plaintiff, that after expiration of period of time of 360 days after service of summons, garnishee shall release all retained property and money to defendant and is discharged and relieved of all liability; employer may not discharge any employee because employee's property, money, or earnings are subject to garnishment, that any assignment of wages made by defendant on indebtedness to garnishee incurred within ten days before receipt of notice of first garnishment on underlying debt is void, defendant shall provide to garnishee within ten days after receipt of garnishee summons list, signed under penalty of prejury, of dependent family members who reside with defendant and their social security numbers, if any, to have maximum amount subject to garnishment reduced under NDCC NDCC 32-09.1-03(2), failure of defendant to provide list to garnishee within ten days after receipt of garnishee summons is presumed defendant claims no family members but he may provide list at later date, and if so, those exemptions will be in effect from date list is provided. (NDCC 32-09.1-07).

If creditor renews expiring continuing lien on wages, at least ten days but no more than 20 days before expiration of continuing lien, creditor may serve upon debtor notice that garnishee summons may be reissued for continuing lien on wages. Notice must be served personally or by first-class mail. Failure to serve renders subsequent garnishment void. (NDCC 32-09.1-04).

Practice.

Service upon State of North Dakota, or any state institution, department or agency, as garnishee, may be made upon Director of Office of Management and Budget together with disclosure fee of $25. (NDCC 32-09.1-05).

Creditors shall serve with garnishee summons a disclosure form. Garnishee summons and copies of all other papers served on garnishee must be served personally upon defendant in accordance with North Dakota Rules of Civil Procedure for personal service not later than ten days after service is made on garnishee. (NDCC 32-09.1-08). Garnishee, within 20 days of service, shall serve upon plaintiff, or plaintiff's attorney, written answers under oath to questions in garnishment disclosure form and to any written interrogatories served upon garnishee. (NDCC 32-09.1-09.1-07]).

Amount of garnishee's disclosure need not exceed retention amount. (NDCC 32-09.1-09). Written answers may be served personally or by mail. If disclosure is by corporation, it must be verified by some officer or agent having knowledge of facts. Statutes provide forms of notice before garnishment of earnings, summons and notice, and disclosure. Forms used must be substantially in statutory form. Disclosure fee is $25. (NDCC 32-09.1-10).

If garnishee denies having indebtedness to defendant or having property of defendant in possession, filing in court of copy of disclosure operates full discharge of garnishee. In 20 days from date of service of disclosure, filing of objections to disclosure or filing of motion or other proceeding operates as stay of discharge. Court may, upon proper showing, relieve plaintiff from operation of discharge after expiration of 20 days. Garnishee may be discharged if value of property held or indebtedness owing is less than $10. Garnishee may apply to court to be discharged as to property or indebtedness in excess of amount which may be required to satisfy plaintiff's judgment. (NDCC 32-09.1-11). Before or after written disclosure, any party to garnishment may obtain ex parte order requiring oral disclosure. If garnishee holds garnished property by title void as to defendant's creditors, garnishee may be charged for property although defendant could not have maintained action against garnishee for it, but in this and in all other cases where garnishee denies liability, plaintiff may move court at any time before garnishee's discharge on notice of both defendant and garnishee for leave to file supplemental complaint making garnishee party to action. If probable cause is shown, motion shall be granted and supplemental complaint served on both defendant and garnishee. Issues must be brought to trial and tried as in other actions. (NDCC 32-09.1-12).

Third Party May Intervene.

If it appears that any person not party to action has or claims interest in any of garnished property antedating garnishment, court may permit that person to appear and maintain that person's rights. If person does not appear, court may direct person be notified to appear or barred of claim. Notice may be served in manner as court directs, and person appearing or notified shall be joined as party and shall be bound by judgment against garnishee. (NDCC 32-09.1-13).

Liability of Garnishee.

If garnishee should fail to disclose as required, court upon proof by affidavit of creditor, may render judgment against garnishee for amount necessary to satisfy plaintiff's judgment with costs taxed but not to exceed retention amount. Creditor shall serve garnishee with copy of affidavit and notice of intent to take default judgment. Court may, upon good cause shown, remove default and permit garnishee to disclose on terms as may be just. (NDCC 32-09.1-14).

No judgment may be rendered against garnishee where judgment against defendant is less than $25, exclusive of costs, and garnishee shall be discharged. (NDCC 32-09.1-16).

If garnishee is discharged, judgment is no bar to action brought by defendant or other claimants against garnishee for same demand. (NDCC 32-09.1-17).

If amount required to be retained by garnishee is less than $10, garnishee may not retain sum but shall make disclosures otherwise required (NDCC 32-09.1-19) except as provided by earnings garnishment (NDCC 32-09.1-21).

Termination of Garnishment.

Garnishee summons lapses and garnishee is discharged of any liability upon expiration of 360 days after service of summons, or longer period of time either agreed to in writing by plaintiff and defendant or ordered by court. Upon lapse of garnishee summons, all earnings, money, property, and effects that garnishee has been retaining must be returned to defendant if defendant is otherwise legally entitled to receipt of them. (NDCC 32-09.1-20).

Earnings.

“Earnings” means compensation paid or payable for personal services, whether denominated as wages, salary, commission, bonus, or otherwise, and includes periodic payments pursuant to pension or retirement program and military retirement pay. “Disposable earnings” means that part of earnings remaining after deduction from earnings of any amounts required by other law to be withheld. “Earnings” does not include social security benefits or veterans’ disability pension benefits, except when benefits are subject to garnishment to enforce any order for support of dependent child. (NDCC 32-09.1-01).

Maximum part of aggregate disposable earnings for any workweek which is subject to garnishment may not exceed lesser of 25% of disposable earnings for that week or amount by which disposable earnings for that week exceed 40 times federal minimum hourly wage or any equivalent multiple thereof prescribed by regulation by secretary of labor in case of earnings for any pay period other than week, in effect at time earnings are payable. Maximum amount subject to garnishment for any work week must be reduced by $20 for each dependent family member residing with defendant. Within ten days after receipt of garnishment summons, defendant must provide to employer list signed under penalty of perjury, of names and social security numbers, if any, of dependents residing with defendant. If defendant fails to provide list, it is presumed defendant has no dependents but he may provide list at later date, and if so, those exemptions will be in effect from date list is provided. Restrictions do not apply in case of order of court for support of any person, order of any court of bankruptcy under c. XIII, or debt due for any state or federal tax. Maximum part of aggregate disposable earnings for any workweek which is subject to garnishment to enforce any order for support of any person shall not exceed: (a) Where such individual is supporting spouse or dependent child other than spouse or child with respect of whose support such order is used, 50% of disposable earnings for that week; (b) where such individual is not supporting spouse or dependent child other than spouse or child with respect to whose support such order is used, 60% of disposable earnings for that week, except 50% can be considered 55% and 60% can be considered 65%, if and to extent that earnings are subject to garnishment to enforce support order with respect to period which is prior to 12-week work period which ends with beginning of any such workweek. (NDCC 32-09.1-03).

Plaintiff may obtain 270-day continuing lien on wages by garnishment. Plaintiff obtaining lien shall mark on caption of garnishee summons “continuing lien” and furnished disclosure forms must include language of continuation. If disclosure provides less than $10 withheld, garnishee is not required to return subsequent disclosure forms until amount withheld exceeds $10. At termination of lien, plaintiff shall mail to garnishee additional copy of garnishment disclosure form upon which garnishee within ten days shall make further disclosure. (NDCC 32-09.1-21).

Defendant may claim exemptions from garnishment or execution by filing schedule of personal property exempt by statute within 20 days after service of summons. (NDCC 32-09.1-22). Debtor’s wages are exempt from process only to extent provided above in NDCC 32-09.1-03. (NDCC 28-22-18).

Claim of exemptions may be heard and determined by court at any time after claim is made, on three days’ notice to plaintiff. (NDCC 32-09.1-23).

8.10 HOMESTEADS:

Homestead may be claimed exempt by any person, whether married or unmarried, residing in this state. (NDCC 47-18-01).

Limitation of Value and Area.

Homestead consists of land and dwelling thereon in which homestead claimant resides and all other improvements not to exceed $100,000 in value, over and above liens or encumbrances or both. Lots or tracts of land must be contiguous. Homestead is exempt from judgment lien, execution or forced sale. (NDCC 47-18-01).

Debts or Liabilities Against Which Exemption Not Available.

A homestead is subject to execution or forced sale in satisfaction of judgments obtained on debts secured by mechanics', construction or laborers' liens for work done or performed or material furnished exclusively for improvement of homestead; on debts secured by mortgage on premises executed and acknowledged by both husband and wife, or an unmarried claimant; on debts created for purchase price thereof and for all taxes thereon; on all other debts if it exceeds in value $100,000 above encumbrances and then only to extent of such excess over encumbrances plus $100,000. (NDCC 47-18-04).

Designation of Homestead.

Claimant may make Declaration of Homestead, which when executed and acknowledged is recorded in office of recorder. Failure to make such declaration does not impair homestead right. (NDCC 47-18-17 to 20). If claimant is married, homestead may be selected from separate property of either spouse with consent of other spouse. (NDCC 47-18-03).

Loss of Exemption.

Homestead is absolutely exempt from all process, and such exemption is not presumed waived by failure or neglect of claimant to expressly claim exemption; levy and judicial sale of premises known to levying officer to be occupied as homestead is wholly inoperative and void, and judicial sale conveys no interest in property. Homestead right waivable on mortgage debt. (NDCC 47-18-05.1). Homestead right continues unless voluntarily abandoned. Such abandonment must be voluntary and without intention to return and reoccupy premises as home. Mere temporary absence is not abandonment.

Alienation or Encumbrance.

Homestead of a married person without regard to the value thereof cannot be conveyed or encumbered unless the instrument by which it is so conveyed or encumbered is executed and acknowledged by both husband and wife. (NDCC 47-18-05).

Proceeds of Sale.

If homestead is conveyed, or sold to satisfy lien, price thereof, or proceeds in excess of lien, not in excess of homestead exemption is exempt for one year. (NDCC 47-18-16). Sale and disposition of one homestead shall not prevent selection or purchase of another. (NDCC 47-18-21).

Rights of Surviving Spouse and Family.

Subject to the homestead estate and payment on decedent's debts, the homestead may be devised. (NDCC 47-18-29). Upon death of holder of legal title to homestead, a homestead estate shall survive, and until otherwise disposed of according to law, is set over to the following persons in the following order: (1) To the surviving spouse for life or until remarriage; (2) if there is no surviving spouse, to the decedent's minor child or children until the youngest attains majority; (3) if the surviving spouse dies before the youngest child attains majority, then to the decedent's minor child or children until the youngest attains majority. If surviving minor child dies before the homestead estate has been terminated, the estate is dealt with as though such child had not lived. (NDCC 30-16-02). The real property subject to homestead estate shall descend, subject to full satisfaction of such estate, exempt from decedent's debts except claims for county general assistance, old age assistance and relief for permanently and totally disabled and shall be distributed in the same manner in which real property not subjected to homestead estate is distributed, or as directed in decedent's will, but in no case shall homestead property descend or be distributed to any person other than surviving husband or wife and decedent's heirs in direct descending line until all of decedent's debts are fully paid. (NDCC 30-16-04). Upon death of owner, boundaries must be ascertained and set apart by court. It is not subject to debts of homestead claimant (with some limited exceptions). (NDCC 30-16-03). Court must make decree setting apart homestead. (NDCC 30-16-08). If homestead exceeds statutory limitation of value, order must determine excess, and property to extent of such excess must be subjected to payment of debts. (NDCC 30-16-09).

See also categories 14 Family, topic Husband and Wife; Property, topic Deeds.

8.11–8.12 [RESERVED]

8.13 LIENS:

Uniform Commercial Code adopted. (Title 41). See category 3 Business Regulation and Commerce, topic 3.09 Commercial Code.

Kinds of Liens Recognized.

Statutes provide for repairmen's liens (NDCC c. 35-13), garage keepers' storage liens (NDCC c. 35-14), miner's liens (NDCC c. 35-15), well or pipeline construction liens (NDCC c. 35-24), agister's liens (NDCC 35-17-01), hospital liens (NDCC c. 35-18), innkeeper's liens (NDCC c. 35-19), several miscellaneous liens (NDCC c. 35-20), construction liens (NDCC c. 35-27), agricultural processor's lien (NDCC c. 35-30); agricultural supplier's lien (NDCC c. 35-31), aircraft repair and maintenance lien (NDCC c. 35-32), self-service storage facility liens (NDCC c. 35-33), child support liens (NDCC c. 35-34), non-consensual common law liens (NDCC c. 35-35), portable storage unit property liens (NDCC c. 35-36) and oil and gas owner's sales liens (NDCC c. 35-37).

Factor's Liens.

Factor has general lien, dependent on possession, for all that is due to that person as factor upon all articles of commercial value that are entrusted to that person by same principal. (NDCC 35-20-06).

Federal Liens.

Uniform Federal Lien Registration Act adopted. (NDCC c. 35-29).

Lien on Crops.

Any person who processes any crop or agricultural product is entitled to lien upon crop or product processed. (NDCC 35-30-01). Any person who furnishes supplies used in production of crops, agricultural products or livestock is entitled to lien thereon. (NDCC 35-31-01).

Foreclosure.

Statutory liens on personal property may be foreclosed by action unless there is different procedure expressly provided by law with respect to specific lien being foreclosed. (NDCC 35-01-

29).

Waiver, Loss, or Extinguishment.

Sale of property in satisfaction of lien, or wrongful conversion by lien holder, extinguishes the lien. (NDCC 35-01-20). Where lien is dependent upon possession, voluntary surrender extinguishes lien. (NDCC 35-01-21). Most liens may be discharged if owner files bond with sufficient surety to pay amount claimed. (NDCC c. 35-21).

Who May Acquire.

Whether individual may acquire lien depends on kind of lien being sought.

Amount of Lien.

Amount of lien depends upon type of lien being sought, but generally is for reasonable value of work, service, skill and/or material provided. (NDCC 35-13-01, 35-14-01, 35-18-01, 35-27-02, 35-30-01, 35-32-01).

Construction Liens.

Any person who improves real estate, whether under contract with owner or owner's agent, trustee, contractor or subcontractor, has lien for price or value of contribution. (NDCC 35-27-02). Lien attaches from time first item of material or labor is furnished; however, as against bona fide purchaser, mortgagee or encumbrancer without notice, no lien attaches prior to actual and visible improvement. (NDCC 35-27-03).

Mingling of charges for materials to be used in the improvement of property of different persons except in cases of joint ownership or ownership in common defeats right to lien against either or any of such persons. (NDCC 35-27-10).

Construction lien is perfected by recording with county recorder, within 90 days after last contribution is made, verified account of amount due after allowing all credits, date first and last contribution was made, person with whom claimant contracted, and containing correct description of property. (NDCC 35-27-13).

Failure to file lien within 90 days does not defeat lien except as against purchasers or encumbrancers in good faith and for value, whose rights accrue after the 90 days and before any claim for lien is filed, and as against owner to extent of amount paid to contractor after expiration of 90 days and before filing of lien. (NDCC 35-27-14). Lien may not be filed more than three years after date first item of material is furnished. (NDCC 35-27-14). Construction liens have priority as follows: (1) for manual labor; (2) for materials; (3) subcontractors other than manual laborers; (4) original contractors. (NDCC 35-27-22). In addition to regular liens, where material or labor is furnished for erection of original complete and independent building, structure or improvement, whether on foundation or not, lien attaches to improvement in preference to prior title, claim, lien, encumbrance or mortgage upon land upon which improvement is erected. Upon foreclosure, improvement may be sold separately and removed from land within 30 days after sale. At time material is furnished for such improvement, seller must give purchaser written notice stating that seller claims right to foreclose lien and in event there is default in payment for improvement, to remove building from land regardless of whether or not building is placed on foundation. (NDCC 35-27-21). Action to foreclose construction lien may be brought in district court of county in which property is situated. Any number of persons claiming liens against same property may join in the action or separate actions may be consolidated before action to enforce lien is commenced. Written notice of intention to foreclose must be given to owner at least ten days before action commenced if given by personal service and at least 20 days if given by registered mail directed to owner's last known address. Deficiency judgment may be obtained. (NDCC 35-27-24). Owner may demand by written notice that action be commenced; if action not commenced within 30 days, lien is forfeited. (NDCC 35-27-25).

Other Liens.

For liens discussed elsewhere in this digest, see topics 8.02 Attachment, Executions, Exemptions, Homesteads, Pledges; categories 3 Business Regulation and Commerce, topic Carriers; Civil Actions and Procedure, topic Judgments; Legal Profession, topic Attorneys and Counselors; Mortgages, topics Chattel Mortgages, Mortgages of Real Property; Property, topic Landlord and Tenant; Taxation, topics Property Taxes, subhead Lien, Estate Tax, subhead Lien for Tax, Uniform Federal Tax Lien Registration Act.

8.14 [RESERVED]

8.15 PLEDGES:

Uniform Commercial Code adopted. (Title 41). See category 3 Business Regulation and Commerce, topic 3.09 Commercial Code.

Lien of a pledge is dependent upon possession. (NDCC 35-06-02). Increase of property is pledged with property. (NDCC 35-06-03). Lien upon property may be pledged to extent of that person's lien. (NDCC 35-06-04).

Pledgor and pledgee may deposit pledged property with third person, called pledgeholder, who must enforce rights of pledgee unless authorized by him to waive them. (NDCC 35-06-07).

Remedies of Pledgee.

When performance is due, pledgee may collect what is due pledge by sale of property pledged, subject to certain rules and exceptions. (NDCC 35-06-11).

8.16 RECEIVERS:

Receivers may be appointed by the court in which an action is pending or a judge thereof in the following cases: (1) In an action by a vendor to vacate a fraudulent purchase of property, or by a creditor to subject any property or fund to his claim, or in an action between partners or others jointly owning property; (2) in a foreclosure action where it appears that the mortgaged property is in danger of being lost, removed, or materially injured; (3) after judgment to carry the judgment into effect; (4) after judgment, to dispose of the property according to the judgment or to preserve it during the pendency of an appeal; when debtor refuses to apply his property to payment of a judgment; (5) where a corporation has been dissolved, or is insolvent, or is in danger of insolvency, or has forfeited its corporate rights; (6) in all other cases where receivers have been appointed by the usages of courts of equity. (NDCC 32-10-01).

Jurisdiction.

District courts are authorized to appoint receivers. (NDCC 27-05-06).

Proceedings.

Receivers may be appointed on motion, supported by verified complaint or affidavit upon notice to adverse parties. Court may appoint receiver upon ex parte application upon furnishing of adequate bond to indemnify defendant in case it is determined that appointment was procured wrongfully or without sufficient cause. (NDCC 32-10-02).

Eligibility and Competency.

No party or person interested can be appointed receiver therein without the written consent of opposing party filed with the clerk. (NDCC 32-10-02).

Qualification.

Receiver must be sworn to perform his duties faithfully and furnish bond with one or more sureties approved by court or judge in such sums as court may direct. (NDCC 32-10-03).

Powers and Duties.

Receiver has power under control of the court to bring and defend actions in his own name as receiver, to take and keep possession of the property, to receive rents, collect debts, to compromise the same, make transfers, and generally do such acts respecting the property as the court may authorize. (NDCC 32-10-04).

Compensation.

No statutory provisions; amount is discretionary with the court.

Investment of Funds.

Funds may be invested upon interest by order of court. No order can be made except upon consent of all parties. (NDCC 32-10-05).

Discharge.

No statutory provision.

9 DISPUTE RESOLUTION

9.01 [RESERVED]

9.02 ARBITRATION AND AWARD:

Uniform Arbitration Act adopted (1987, c. NDCC 32-29.2), repealed (2003, c. NDCC 280-30), readopted (2003, c. NDCC 32-29.3). As of July 31, 2005, applicable to all agreements to arbitrate regardless whenever made. (NDCC 32-29.3-03).

Validity of Agreements.

Recorded agreement to arbitrate is valid, enforceable, and irrevocable except if grounds for revocation exist. Court shall decide whether agreement to arbitrate exists. (NDCC 32-29.3-06).

Initiation of Arbitration.

Arbitration proceeding is initiated by giving notice in record to other parties to agreement in manner agreed by parties or, in absence of agreement, by certified or registered mail or by service authorized for commencement of civil action. Notice must describe nature of controversy and remedy sought. (NDCC 32-29.3-09).

Award, Enforcement Thereof, and Judgment Thereon.

Award must be in writing, signed by arbitrators joining in award. (NDCC 32-29.3-19).

Any party may apply to court to confirm award. (NDCC 32-29.3-22).

Court has power upon party motion to vacate award for corruption, fraud, partiality, or misconduct which prejudiced rights of party. (NDCC 32-29.3-23).

The court also has power to modify or correct award for evident miscalculation, mistake, or imperfection in matters of form on application within 90 days of delivery of award to applicant. (NDCC 32-29.3-24).

Judgment on award may be appealed. (NDCC 32-29.3-28).

10 DOCUMENTS AND RECORDS

10.01 ACKNOWLEDGMENTS:

Uniform Recognition of Acknowledgments Act adopted. (NDCC 47-19-14.8).

Within State.

May be taken by following officers: Judge or clerk of Supreme Court, or a notary public at any place within state; judge or clerk of a court of record, mayor of city, register of deeds, U.S. Commissioner, county auditor, township clerk, or city auditor, at any place in this state within judicial district, county, subdivision or city for which officer was elected or appointed. (NDCC 47-19-13, 14).

Proof by Witnesses.

When not acknowledged, proof of execution of an instrument may be made either: (1) By the parties executing it, or either of them; or (2) by subscribing witness; or (3) by proof of the handwriting of the parties and of a subscribing witness if there be one, when the parties and all subscribing witnesses are dead, when the parties and all subscribing witnesses are nonresidents of the state, when the places of their residence are unknown to the party desiring proof and cannot be ascertained by due diligence, when the subscribing witness conceals himself or cannot be found by the officer by use of due diligence in attempting to serve subpoena or attachment, or in case of continued failure or refusal of the witness to testify for the space of one hour after witness’s appearance; and proof must show existence of one or more of conditions mentioned above, that witness testifying knew person whose name purports to be subscribed and is well acquainted with signature and that it is genuine; and that witness testifying personally knew person who subscribed instrument as witness and is well acquainted with signature and that it is genuine, and place of residence of witness. (NDCC 47-19-21 to 24).

Authentication.

Officers taking and certifying acknowledgments, either within or without the state, or proof of instruments for record, must authenticate their certificates by affixing their signatures followed by the name of their office, and seal of office, if by the laws of the territory, state or country where taken or by authority of which they are acting, they are required to have official seals. Judge or clerks of court of record must authenticate that officer’s certificate by affixing seal of court, and mayor of city by seal. (NDCC 47-19-32). No other or further authentication is necessary either within or without state.

When Officer Disqualified.

No officer authorized to take acknowledgments may do so if officer, or officer’s spouse, or partnership of which officer is member is party to instrument (NDCC 47-19-33); but officer is not disqualified to do so by reason of being officer, director, employee or stockholder of corporation (NDCC 47-19-34).

Form

Individual: State of North Dakota, County of . . . . ss: On this . . . . day of . . . . in the year . . . . before me personally appeared . . . . known to me (or proved to me on oath of . . . .) to be the person who is described in and who executed the within instrument, and acknowledged to me that that person (or they) executed the same. (Signature and official title).

Attorney-in-fact: State of North Dakota, County of . . . . ss: On this . . . . day of . . . . in the year . . . . before me (here insert the name and quality of the officer), personally appeared . . . ., known to me (or proved to me on the oath of . . . .) to be the person who is described in and whose name is subscribed to the within instrument as the attorney in fact of . . . . and acknowledged to me that that person subscribed the name of . . . . thereto as principal and that person's own name as attorney in fact.

Deputy: State of North Dakota, County of . . . . ss: On this . . . . day of . . . ., in the year . . . . before me, a . . . ., in and for said county, personally appeared . . . ., known to me to be the person who is described in and whose name is subscribed to the within instrument as deputy sheriff of said county and acknowledged to me that that person subscribed the name of . . . . thereto as sheriff of said county and that person's own name as deputy sheriff.

Corporation: State of North Dakota, County of . . . . ss: On this . . . . day of . . . . in the year . . . . before me (here insert the name and quality of officer), personally appeared . . . ., known to me (or proved to me on oath of . . . .) to be the president (or other officer or person) of the corporation that is described in and that executed the within instrument, and acknowledged to me that such corporation executed the same. (NDCC 47-19-27 to 30).

Alternative to Acknowledgment or Proof.

No statutory provision.

Validating Act.

Acknowledgments and other written instruments affecting title to real property in this state taken or certified in good faith and filed or recorded in proper counties for five years or more are legal and valid, notwithstanding laws to contrary. Acts of notary or other officer done in good faith in taking or certifying acknowledgment are legal and valid, whether officer was qualified by law to do so or not. (NDCC 1-04-01; 03).

Foreign Acknowledgments.

See subhead Uniform Recognition of Acknowledgments Act, supra.

Fees.

See topic 10.03 Notaries Public.

10.02 AFFIDAVITS:

Officers Authorized to Administer Oath.

Oaths may be administered by judges of supreme court, district court, and clerks and deputies thereof; county auditor, recorder and deputies, county commissioners, and public administrator within their respective counties; notary public; city auditor, municipal judge, township clerk within clerk's city or township; sheriff and deputy within sheriff's county in cases prescribed by law or by Supreme Court. (NDCC 44-05-01).

An affidavit may be made in or out of this state before any person authorized to administer an oath. (NDCC 31-04-07).

Prohibition on Self-Interested Administration.

Officer may not certify affidavit if officer be party to instrument or member of any partnership or limited liability company which is party to instrument, nor may one take affidavit of one's spouse. (NDCC 47-19-33).

General Requirements and Form of Jurat.

Customary form of jurat for affidavits is as follows:

Form

"Subscribed and sworn to before me, on . . . . day of . . . ., 20. . .

Notary Public

>>>>>>>>>>>>>>>>>

(signature of notary).

My commission expires . . . ."

(Notary's Seal)

Notary must affix seal and date of expiration of his commission. (NDCC 44-06-12). For fees, see topic 10.03 Notaries Public.

A judge or clerk of court of record must authenticate certificate by seal of court, and mayor of city by seal of city. (NDCC 47-19-32).

Alternative to Affidavit.

No statutory provision.

Use of Affidavit.

An affidavit may be used to verify a pleading, prove service of process, obtain provisional remedy, obtain examination of witnesses, obtain stay of proceedings, or upon a motion, and in any other case permitted by law. (NDCC 31-04-05).

See topic 10.01 Acknowledgments.

10.03 NOTARIES PUBLIC:

Notaries public are empowered to administer oaths, take depositions and issue subpoenas in connection therewith, take acknowledgments and protest commercial paper.

Before entering upon the duties of office notary public must provide official seal, depositing impression of it with oath and bond ($7,500) in office of Secretary of State. (NDCC 44-06-03). After every acknowledgment, notary must legibly print, stamp or type name and date of expiration of notary's commission. (NDCC 44-06-12). Notary must notify Secretary of State within 60 days of change of address. (NDCC 44-06-02). Notary may exercise functions of office anywhere in state. (NDCC 44-06-01).

Fees.

May charge up to $5 per notarial act. (NDCC 44-06-14).

Certificate of Authority.

See topic 10.01 Acknowledgments, subhead Authentication.

10.04 RECORDS:

Uniform Commercial Code adopted, effective July 1, 1966. (Title 41). See category 3 Business Regulation and Commerce, topic 3.09 Commercial Code.

The office of the county recorder in each county has charge of all records relating to property.

Recordable Instruments.

All instruments affecting title to or possession of real property may be recorded. (NDCC 47-19-01).

Member of armed service may record discharge papers in office of recorder of county in which that individual resides. (NDCC 37-01-34).

Necessity for Recording.

Generally all instruments are valid as between the parties without recording (NDCC 47-19-46), but must be recorded to protect the rights of the parties against subsequent purchasers and encumbrancers, judgment and attachment creditors (NDCC 47-19-41).

Place of Recording.

Instruments affecting title to real property must be recorded by recorder in county in which real property is situated. (NDCC 47-19-07). *For list of Counties and County Seats see first page for this state in Volume containing Practice Profiles Section.*

Requisites for Recording.

Before an instrument can be recorded, its execution must be established by acknowledgment or by proof of subscribing witness. (NDCC 47-19-03; see topic 10.01 Acknowledgments). Any instrument affecting title to or possession of real property may be recorded. (NDCC 47-19-01).

Deed may not be recorded if postoffice address and existing street address of each grantee is not shown. (NDCC 47-19-05). Mortgage may not be recorded unless it contains postoffice address of mortgagee, and adequate statement as to amount of indebtedness and terms of interest; no assignment of mortgage which does not contain postoffice address of assignee may be recorded. (NDCC 35-03-04). All real estate instruments must have legal description considered adequate by County Recorder. (NDCC 11-18-05). See also category 21 Property, topic 21.06 Deeds.

Recording Fees.

Deeds, mortgages and all other instruments not specifically provided herein, $10 for first page and $3 for each additional page. Page means one side of single legal sheet of paper not exceeding 8½ inches in width and 14 inches in length. If in use of one-page document it is necessary to place recording information on reverse side, it will be considered additional page; plats, irregular tracts, or annexations, $10 for one lot plus 10¢ for each additional lot if document lists more than five sections, $1 for each additional section; for filing any instrument; certified copies of any recorded instrument, $5 for first page and $2 for each additional page; copy of any filed instrument, $1. (NDCC 11-18-05).

Foreign Conveyances and Encumbrances.

Notarial acts performed by person authorized in place where performed recognized as valid, unless notarial act is performed by person authorized by laws of foreign country. (NDCC 47-19-14.2).

Effect of Record.

Deposit and recording of an instrument duly proved and certified are constructive notice of execution of such instrument to all purchasers and encumbrancers subsequent to deposit; a certified transcript of such record or a copy of such instrument is admissible in evidence in all courts and may be read in evidence without further proof. (NDCC 47-19-45).

Filing under Commercial Code.

Under Uniform Code timber to be cut or fixtures where mortgage on real property would be filed; in all other cases in office of recorder in any county in this state or in office of Secretary of State. (NDCC 41-09-72). Must indicate Social Security Number or Tax I.D. Number of Debtor. (NDCC 41-09-73).

Fees.

Filing and indexing original statement, $15; plus $1 per additional page; certified copies of recorded instrument, $7; certificate requesting information on specific filings, $7 first five entries, $2 each additional five entries or fraction thereof; completing certificate requesting copies, $10 per debtor plus $2 per page for attachments. (NDCC 41-09-96).

Torrens Law.

Repealed.

Vital Statistics.

Report of all deaths must be registered within 15 days in registration district in which they occur. (NDCC 23-02.1-19). Certificate of birth for each live birth occurring within State must be filed with state registrar. (NDCC 23-02.1-13). Report of all marriages must be filed with county recorder who, after recording same, transmits report to Registrar of Vital Statistics. (NDCC 14-03-22).

Establishing Birth Records.

Application in accordance with regulations of state department of health to have recorded a delayed proof of birth of any person born in state. (c. NDCC 23-02.1-15). On filing of satisfactory proof, birth will be recorded and certificate issued. Any U.S. citizen who has resided in this state for one year may obtain judicial determination of date of his birth and place of his birth, by proceedings in district court. (NDCC 32-37-01 to 06).

Certified copies of birth and death obtainable from Bureau of Vital Records, Bismarck, ND 58501. Fee $5 for death certificate, $5 for birth certificate, $2 for additional copies requested at same time. (NDCC 23-02.1-29).

10.05 SEALS:

Abolished.

Uniform Commercial Code adopted, effective July 1, 1966. (Title 41). See category 3 Business Regulation and Commerce, topic 3.09 Commercial Code.

Corporate Seals.

Corporation may, but need not, have corporate seal. (NDCC 10-19.1-27).

11 EMPLOYMENT

11.01 [RESERVED]

11.02 LABOR RELATIONS:

All matters relating to labor laws, rules and regulations are under direction of Commissioner of Labor. (NDCC 34-05-01.2). Employment having no specified term may be terminated at will of either party on notice to other. (NDCC 34-03-01). Every employment is terminated by expiration of its appointed term, extinction of its subject, death of employee or employer, or employer's or employee's legal incapacity to act; death or legal incapacity of employer does not terminate employment if such employment is coupled with an interest. (NDCC 34-03-02; 03).

No employer in state can refuse to hire any individual solely upon ground of age. (NDCC 34-01-17).

Discrimination because of race, color, religion, sex, age, mental or physical disability, marital status, receipt of public assistance, national origin, or participation in lawful activity off employer's premises during nonworking hours which is not in direct conflict with essential business-related interests of employer prohibited by Human Rights Act. (NDCC 14-02.4 et seq.).

Hours of Labor.

No minor 14 or 15 years of age may be employed or permitted to work in any occupation except in domestic service and farm labor before hour of 7 A.M. or after hour of 7 P.M., except that such hours may be extended to 9 P.M. from June 1 through Labor Day, nor more than 18 hours during school weeks, nor more than three hours on school days, nor more than 40 hours during nonschool weeks, nor more than eight hours on nonschool days. (NDCC 34-07-15). Employers in business that sells merchandise at retail must provide one day rest in seven to employees. Violation is class B misdemeanor. (NDCC 34-06-05.1).

Wages.

Commissioner of Labor is authorized to ascertain and declare standards of minimum wages for employees in any occupation in this state. (NDCC 34-06-03). Employee who quits for good cause or is dismissed for good cause is entitled to such proportion of compensation which would have become due upon full performance of employment as services performed bear to services obligated to be performed. (NDCC 34-03-09). If employee dies and employer is indebted to him for wages, if no representative of his estate has been appointed, employer must pay same to surviving spouse upon request upon furnishing proof of relationship; and employer shall require claimant(s) to acknowledge receipt of such payment in writing; payments made by employer in this manner operate as discharge to extent of such payment. (NDCC 34-01-12). See category 8 Debtor and Creditor, topic 8.01 Assignments.

Equal pay for men and women for comparable work done and penalties for violation thereof. (NDCC 34-06.1-03 and c. NDCC 14-02.4).

Child Labor.

Commissioner of Labor may ascertain and declare standard of condition of labor for minors in any occupation. (NDCC 34-06-03). Commissioner may prepare and adopt rules and regulations. (NDCC 34-06-04). In no case may minor under 14 years of age be employed in any occupation except farm labor, domestic service, or in employment by minor's parent, guardian, or grandparent or in any occupation whatsoever when public schools are in session. (NDCC 34-07-01). No minor under 16 may be employed on any job or any other employment that may be considered dangerous to life or limb. (NDCC 34-07-16).

Safety Regulations.

Workforce Safety and Insurance has full power and jurisdiction over every employment and place of employment subject to provisions of workmen's compensation law, and shall issue and enforce all necessary and proper rules and safety regulations. (NDCC 65-03-01). Employer who fails to comply within 20 days after notice is guilty of a misdemeanor and his premium rating may be penalized by bureau. (NDCC 65-03-02). Employees who report illegal activities are afforded job protection. (NDCC 34-01-20).

Labor Unions.

Employees have right to organize for collective bargaining and other lawful purposes. (NDCC 34-12-02). The right of persons to work must not be denied or abridged on account of membership or nonmembership in any labor union or labor organization, and all contracts in negation or abrogation of such rights are invalid, void and unenforceable. (NDCC 34-01-14). Unlawful for labor organization to discriminate. (NDCC 14-02.4-05).

Termination of Employment at Will—Notice Required.

Employment having no specified term may be terminated at will of either party on notice to other. (NDCC 34-03-01).

Right to Work State.

Right of persons to work may not be denied or abridged on account of membership or nonmembership in any labor union or labor organization, and all contracts in negation or abrogation of such rights are invalid, void, and unenforceable. "Agency shop" and dues "check off" of nonunion member as condition of employment or continued employment is prohibited. (NDCC 34-01-14; 219 N.W.2d 860 [ND 1974]).

Public Employees.

Nonbinding mediation of labor disputes available through agreement of parties. (c. NDCC 34-11). Public employees may not be prohibited from engaging in political activity except when on duty or acting in official capacity. (NDCC 34-11.1-02). No agency or appointing authority may require or coerce any agency employee to participate in any activity or undertaking unless activity or undertaking is related to performance of official duties. (NDCC 34-11.1-05).

Discrimination on basis of race, color, religion, sex, national origin, age, presence of mental or physical disability, status with regard to marriage or public assistance, or participation in lawful activity off employer's premises during nonworking hours not in direct conflict with essential business-related interests of employer, housing and public accommodations, and credit transaction, is prohibited. (NDCC 14-02.4-01). Employee may file complaint with State Department of Labor within 300 days of alleged act of wrongdoing. (NDCC 14-02.4-19). Private right of action, except those for public services or accommodations, must be commenced within 90 days after Department of Labor issues its written notice of conclusion of administrative action. Claims for discriminating practices with regard to housing or public accommodations or services must be brought within 180 days of alleged act of wrongdoing. (NDCC 14-02.4-19). If collective bargaining agreement or employment contract provides for non-judicial process for recourse for discriminatory acts, non-judicial process must be completed prior to judicial review or other proceedings. (NDCC 14-02.4-19). Relief available includes injunctions, equitable relief, and back pay limited to no more than two years from date of filing of complaint. Attorneys' fees also available to prevailing party. (NDCC 14-02.4-20).

Equal Pay.

Discrimination on basis of sex in paying wages to employees of one sex at lesser rate than rate paid to employees of opposite sex for comparable work on jobs which have comparable requirements is prohibited. (c. NDCC 34-06.1).

Worker's Compensation Act.

Worker's compensation is provided by state fund under direction of Workforce Safety and Insurance. (NDCC 65-01). Self-employed and volunteer organizations not otherwise provided for may contract for coverage. (NDCC 65-07-01).

Bureau classifies all employments and fixes rates. (NDCC 65-04-01). Employers are obligated to file reports and pay premiums. (NDCC 65-04-04).

Statewide average weekly wage shall mean determination made by Job Service of North Dakota on July 1, of each year.

Employees required to be covered include all private employment and elective officials of State, aliens, poor relief workers unless engaged in repaying relief monies and minors legally or illegally employed (NDCC 65-01-02), except Act does not apply to workers in agriculture or domestic service or employment of common carrier by railroad or employment in transportation by nonresidents where route does not go into state for more than seven miles or to clergy and employees of religious organizations. (NDCC 65-01-02).

Contributing employer who complies with law is relieved of all liability for personal injury and death sustained by employees, and persons entitled to compensation have recourse only to the fund and not to the employer. (NDCC 65-01-08).

Presentation of Claims.

Claims for disability or death must be made within one year after injury or within two years after death. When actual date cannot be determined date of injury shall be first date that reasonable person knew or should have known injury was related to employment. (NDCC 65-05-01). Claims must be made on forms furnished by Bureau and contain all information required by it. (NDCC 65-05-02).

Determination on Claims.

Workforce Safety and Insurance has full power and authority to hear and determine all questions on claims. (NDCC 65-05-03).

If claim is denied, appeal may be taken to district court. (NDCC 65-10-01).

Payment of Claims.

It is the duty of the Bureau to pay all claims which have been allowed out of the worker's compensation fund. (NDCC 65-05-05). Employer shall reimburse bureau for medical expenses related to compensable injury to employee that occur after July 31, 1995, to maximum of $350. (NDCC 65-05-07.2). Compensation not paid unless period of disability is of five days' duration or more; application required. (NDCC 65-05-08).

Subrogation to Rights of Employees.

Where death or injury is due to act or omission of some third person, the fund is subrogated to rights of employee and the Bureau may sue to recover damages. (NDCC 65-01-09).

Compensation for Disability.

If injury causes temporary or permanent total disability, fund must pay to claimant during such disability weekly compensation equal to 662/3% of claimant's weekly wage subject to minimum of 60% and maximum of 125% of state's average weekly wage, and in case of temporary or permanent total disability, additional sum of $15 per week for each dependent child (as defined in NDCC 65-01-02), not to exceed his net wage after deduction for taxes earned at time of injury. (NDCC 65-05-09). Permanent total or temporary total disability benefits are reduced by amount equal as nearly as practicable to one-half of Social Security Act benefit of injured employee. Amount of offset initially computed remains same throughout period of eligibility and is not affected by any increase or decrease in federal benefits. Offset becomes effective Jan. 1, 1980, provided it meets criteria necessary to offset federal benefits under Tit. II of Social Security Act. (NDCC 65-05-09.1). Provision is made for supplementary benefits to persons receiving worker's compensation permanent total disability benefits or death benefits under previous benefit allowances. (c. NDCC 65-05.2).

First Report of Injury.

Employees must give notice (oral or written) of injuries to employers within seven days. (NDCC 65-05-01.2). Employers must report injuries to Bureau within seven days. (NDCC 65-05-01.4). Employee failure to report is factor in determining compensability but does not guarantee denial of claim. (NDCC 65-05-01.3). Employer's failure to report to Bureau is admission by employer that alleged injury may be compensable. (NDCC 65-05-01.4).

Bureau shall pay injured employee's attorneys' fees when employee has prevailed in binding dispute resolution or after administrative hearing. (NDCC 65-02-08).

Interpretation.

Cases subject to judicial review must be reviewed solely on merits of action or claim. This title may not be construed liberally on behalf of any party to action or claim. (NDCC 65-01-01).

Third-Party Payment to Bureau.

In cases of monetary recovery from third party determined to be responsible for accident, Bureau must credit employer's account based on amount recovered by Bureau. (c. NDCC 65-04; NDCC 65-05-07.2).

Compensable Injury.

Means injury by accident arising out of and in course of employment which must be established by medical evidence supported by objective medical findings. (NDCC 65-01-02[10]). It includes injuries due to heart attack or other heart-related disease, stroke, and mental or physical injury precipitated by mental stimulus, which must be causally related to employee's employment, with reasonable medical certainty, and which must have been at least 50% precipitated by unusual stress. (NDCC 65-01-02[10][a][3]). Compensable injury does not include mental injury arising from mental stimulus. (NDCC 65-01-02[10][b][10]).

PPI (Permanent Partial Impairment).

Minimum eligibility requirement of whole body impairment of 16%. (NDCC 65-05-12.2). Funds used to pay PPI awards for impairments of 15% or less will be reallocated to award greater benefits to more seriously injured workers. Findings of impairment must be both permanent and caused by compensable injury. Workers must reach "maximum medical improvement", that is, recover as fully as expected by their doctor, before they may be evaluated for PPI award. PPI awards will not be available for injuries that cause only pain and no loss of function. Objective medical findings will be required for award for loss of functions resulting from injury. (c. NDCC 65-05).

Aggravation of an injury or disease existing prior to a compensable injury shall be allowed by the Bureau and compensation therefor paid out of the fund for such proportion of the disability as arose out of such aggravation. (NDCC 65-05-15).

Compensation for Death.

Fund pays spouse 2/3 of weekly wage not to exceed state's average weekly wage until death or remarriage plus $10 per week for each dependent child; plus $2,500 to spouse, guardian or children of deceased and $800 for each dependent child. (NDCC 65-05-17).

Additional Allowances.

In addition, fund must allow for hospital, medical and surgical service and supplies, including artificial limbs, braces, glasses or appliances, or provide rehabilitation services. (NDCC 65-05-07). In case of death, fund will pay burial expenses not to exceed $10,000. (NDCC 65-05-26). Rehabilitation allowance. (NDCC 65-05.1—01). Supplementary benefits. (NDCC 65-05.2-02).

Occupational Diseases.

Compensation must be allowed for any disease caused by hazard to which employee is subjected in course of employment and is incidental to character of business. (NDCC 65-01-02).

Lump sum settlement may be allowed by Bureau (NDCC 65-05-25); also marriage settlement to spouse (NDCC 65-05-21).

Remedy Under Act Exclusive.

Payment of compensation or other benefits to an injured employee or his dependents is in lieu of any and all rights of action against the employer. (NDCC 65-05-06).

Agreement to waive rights under the Workmen's Compensation Act is invalid. (NDCC 65-01-10).

Assignment of claim for compensation is void except child support, reimbursement of unemployment benefits, claim by bureau for payments made due to clerical error, mistake of identity, innocent misrepresentations by or on behalf of recipient or other similar circumstances; bureau adjudication, board or court order payment was made under erroneous adjudication; fraud, overpayment. (NDCC 65-05-29).

Claims for compensations are exempt from claim of creditors. (NDCC 65-05-29).

If employer fails to comply with the act, he is not entitled to benefits of the law, and is liable to his employees for damages suffered by reason of injury sustained in course of employment and to personal representatives of such employees where death results from such injuries, and is deprived of defenses of fellow-servant rule, assumption of risk, or contributory negligence, and is also liable for the premiums taxable against his payroll. (NDCC 65-09-01; NDCC 65-09-02). If employer fails to comply, employee may in lieu of suit against employer by civil action file application with Bureau for award. (NDCC 65-09-02). Any employer who was uninsured at time of injury to employee, for which Bureau has made award, shall be entitled to benefits of this title, but shall be liable for premiums, plus penalties and interest due on such premiums, plus penalty of 25% of all premiums due during most recent year of noncompliance. (NDCC 65-04-33).

Nonresident Public Contractors.

See category 8 Debtor and Creditor, topic 8.11 Liens, subhead Mechanics' Liens, catchline Public Works.

Employers' Liability Act.

See subhead Workmen's Compensation Act, supra. Every employer is required to implement employee information program to inform about hazardous substances to which they are exposed.

Unemployment Compensation.

Governed by cc. NDCC 52-01; NDCC 52-03 and NDCC 52-06. Employees performing services for employer in employment subject to law are entitled to benefits. (c. NDCC 52-06). Generally, employer is subject to law if in any calendar year he paid for services in employment wages of $l,500 or more, or which for some portion of a day in each of 20 different calendar weeks, whether or not consecutive, had in employment at least one individual. (NDCC 52-01-01). For rates see category 22 Taxation, topic Unemployment Compensation Tax.

12 ENVIRONMENT

12.01 ENVIRONMENTAL REGULATION:

Noise.

State Health Council Bismarck, N. D. 58501, has been authorized to make rules and regulations concerning noise that is hazardous to health and safety following public hearings and subject to appeal to courts. Violation is class A misdemeanor and subject to injunction. (Repealed in 1991).

Water Pollution.

State Water Pollution Control Board under supervision of State Department of Health. State Department of Health is designated as State Water Pollution Control Agency for all purposes of Federal Water Pollution Control Act. Department and Board have authority to adopt rules and regulations and hold public hearings concerning same. (NDCC 61-28-05). Enforcement is by Department of Health, Bismarck, N. D. 58501. Provisions for hearings under Administrative Agencies Practice Act and appeal to District Court is provided. (NDCC 61-28-07). Penalties include injunctions; wilful violation of chapter, or any permit, condition or limitation is punishable by fine of not more than $10,000 per day of violation, or by imprisonment for not more than one year or both. Any person who is found to have criminally negligently violated chapter subject to fine of not more than $10,000 per day per violation, imprisonment up to six months or both. Any person who knowingly makes any false statement, representation or certification, or who falsifies, tampers with, or knowingly renders inaccurate any monitoring device or method required to be maintained under chapter, shall upon conviction be punished by fine of not more than $5,000 per day per violation or by imprisonment for not more than six months or both. Any person who violates chapter or any permit, condition, or limitation implementing chapter, shall be subject to civil penalty not to exceed $5,000 per day of such violation. (c. NDCC 61-28).

Safe Drinking Water Act of 1977.

Act will be fulfilled consistent with provisions of federal Safe Drinking Water Act of 1974. (c. NDCC 61-28.1).

Enforcement.

N. D. Environmental Law Enforcement Act. (c. NDCC 32-40). State Department of Health may recover costs to state of environmental emergency from responsible parties. (c. NDCC 23-31).

13 ESTATES AND TRUSTS

13.01 ADMINISTRATION:

See topic 13.08 Executors and Administrators.

13.02–13.04 [RESERVED]

13.05 DEATH:

Person not heard from for seven years raises presumption of death. (NDCC 31-11-03[26] & NDCC 31-11-04).

Uniform Simultaneous Death Act repealed. Uniform Probate Code also adopted. (NDCC 30.1-04-04 & NDCC 30.1-09.1-02). Requires heir to survive decedent for 120 hours.

Uniform Anatomical Gift Act. (c. NDCC 23-06.6).

Uniform Determination of Death Act. (c. NDCC 23-06.3).

Uniform Rights of the Terminally Ill Act repealed.

Actions for Death.

An action lies for the death of a person through the wrongful act, negligence or default of another. (NDCC 32-21-01). Action may be brought by the following persons, in the order named: (1) Surviving husband or wife; (2) surviving children; (3) surviving father or mother; (4) surviving grandparent; (5) personal representative of decedent; (6) person having primary physical custody of decedent before wrongful act. If person entitled to sue refuses or neglects to sue within 30 days after demand from person next in order, latter may sue. (NDCC 32-21-03). Action must be commenced within two years after claim for relief accrues. (NDCC 28-01-18). Damages recoverable are not limited. (NDCC 32-21-02). Economic and noneconomic damages are recoverable. (NDCC 32-03.2-04). Amount recovered is not liable for debts of decedent, but inures to exclusive benefit of heirs in such shares as judge before whom case is tried fixes in order for judgment. (NDCC 32-21-04).

Death Certificate.

See category 10 Documents and Records, topic 10.04 Records, subhead Vital Statistics.

13.06 [RESERVED]

13.07 DESCENT AND DISTRIBUTION:

Uniform Probate Code adopted (Title 30.1) with following exceptions:

Sections relating to Uniform Probate Code Art. II (1990) (c. NDCC 30.1-04 et seq.) provisions pertaining to elective share of surviving spouse, spouse and children unprovided for in will, applicable law at time of death, rules of construction applicable to donative dispositions, general provisions concerning probate and non-probate transfers, evidence of death, definitions, interstate succession, exempt property and allowances, wills, will contracts, custody and deposit of wills, and rules of construction applicable to wills amended by 1993 legislature effective Aug. 1, 1995. Sections relating to Uniform Probate Code Art. VI (1989) (c. NDCC 30.1-31) provisions pertaining to non-probate transfers on death amended by 1993 legislature effective Aug. 1, 1995.

Amendments by 1999 legislature effective Aug. 1, 1999. Amendments by 2009 legislature effective Aug. 1, 2009.

Disclaimer of Property Interests.

Disclaimer allowed. (NDCC 30.1-10.1-09).

Homestead.

N. D. definition retained. (NDCC 47-18-01). See category 8 Debtor and Creditor, topic 8.10 Homesteads.

Exempt Personal Property.

Entitlement to surviving spouse of $15,000. (NDCC 30.1-07-01).

Property Collectible by Affidavit.

Value of entire estate, less liens or encumbrances, does not exceed $50,000. (NDCC 30.1-23-01).

Death.

Person absent for seven years is presumed dead. (NDCC 30.1-01-04).

Adopted Children.

See category 14 Family, topic 14.01 Adoption.

Escheat.

Property held by fiduciaries for three years is considered abandoned unless some concern and/or interest has been expressed by owner within period. (NDCC 47-30.1-12).

See also category 21 Property, topic 21.01 Absentees, subhead Escheat.

13.07A ESTATES: (in property)

See category 21 Property, topic 21.16 Real Property.

13.08–13.09 [RESERVED]

13.10 EXECUTORS AND ADMINISTRATORS:

District court of each county has exclusive original jurisdiction in all probate and testamentary matters. (NDCC 30.1-02-02). If decedent was resident of this state, proceedings must be had in county of his domicile. (NDCC 30.1-13-01). If decedent was not domiciled in this state, proceedings may be had in any county of state in which any of his property is situated. (NDCC 30.1-13-01).

Uniform Probate Code adopted. (Title 30.1).

Position of registrar does not exist; court or clerk of court, when authorized, will handle those duties.

Priority Among Persons Seeking Appointment as Personal Representative.

Order of priority among persons seeking appointment: (1) Person nominated as personal representative in will, (2) surviving spouse of decedent who is devisee, (3) other devisees of decedent, (4) surviving spouse of decedent, (5) other heirs of decedent, (6) trust company, and (7) 45 days after death, any creditor. (NDCC 30.1-13-03).

Public Administrators.

Presiding judge of judicial district in which county is located may appoint public administrator. (NDCC 11-21-01). Where county has adopted county manager plan, county manager acts as such. (NDCC 11-09-29). Public administrator files oath and bond. (NDCC 11-21-04). Under certain circumstances, public administrator has duty and power to act as guardian or conservator. (NDCC 11-21-05). He has same general powers as special administrator, guardian or conservator. (NDCC 11-21-06).

Allowances.

See category 8 Debtor and Creditor, topic 8.10 Homesteads.

Exempt Personal Property.

Entitlement to surviving spouse of $15,000. (NDCC 30.1-07-01).

Eligibility and Competency.

Foreign bank or trust company may be appointed personal representative only if foreign jurisdiction extends reciprocal privilege to North Dakota and then only if foreign bank or trust files appropriate documentation, pays applicable fees, and appoints Secretary of State as process agent. (NDCC 6-08-25, 26).

Avails of Life Insurance Payable to Representatives or Estate.

Avails of life insurance policy or contract payable by any mutual aid or benevolent society, when made payable to deceased, to personal representatives, or to his heirs, or to his estate, shall not be subject to debts of decedent upon death of insured except by special contract. Such avails must be inventoried as a part of estate of decedent and shall be considered as part of general assets of estate. Insured may transfer avails of such life insurance either by will or contract. (NDCC 26.1-33-40).

Uniform Simplification of Fiduciary Security Transfers Act repealed.

Uniform Fiduciaries Act not adopted.

Uniform Principal and Income Act adopted. (c. NDCC 59-04.2).

Uniform Anatomical Gift Act adopted. (c. NDCC 23-06.6).

Ante-Mortem Probate allowed. (NDCC 30.1-08.1).

13.11–13.14 [RESERVED]

13.15 TRUSTS:

District courts have jurisdiction to supervise administration of all trust estates. (NDCC 59-10-02).

Uniform Probate Code adopted. (Title 30.1).

North Dakota Uniform Trust Code adopted. (c. NDCC 59-09 through NDCC 59-19).

Kinds.

Trusts are classified as either express or implied. An express trust is an obligation arising out of personal confidence reposed in and voluntarily accepted by one for benefit of another. Implied trust is one which is created by operation of law. (NDCC 59-09-06).

Creation.

Trust may be created by transfer of property to another person as trustee during settlor's lifetime or by will or other disposition taking effect upon settlor's death, declaration by owner of property that owner holds identifiable property as trustee, or exercise of power of appointment in favor of trustee. (NDCC 59-12-01). Trust is created only if settlor has capacity to create trust, settlor indicates intention to create trust, trust has definite beneficiary or is charitable trust, trust for care of animal, or trust for noncharitable purpose; trustee has duties to perform; and same person is not sole trustee and sole beneficiary. (NDCC 59-12-02). Trust may be created only to extent its purposes are lawful and possible to achieve. Trust and its terms must be for benefit of its beneficiaries. (NDCC 59-12-04).

Eligibility as Trustee.

No statutory provisions, except that foreign bank or trust company may act only if foreign jurisdiction extends reciprocal privilege and then only if foreign bank or trust company files appropriate documentation, pays applicable fees and appoints Secretary of State as process agent. (NDCC 6-08-25).

Bond.

Trustee shall provide bond only if court finds that bond is needed to protect interests of beneficiaries or is required by terms of trust and court has not dispensed with bonding requirement. Court may modify or terminate bond at any time. (NDCC 59-15-02).

Removal of Trustee.

District court may remove any trustee on motion of any interested person showing good cause or on its own initiative. (NDCC 59-15-06). Court may remove trustee if trustee has committed serious breach of trust; if lack of cooperation among cotrustees substantially impairs administration of trust; if because of unfitness, unwillingness, or persistent failure of trustee to administer trust effectively, court determines that removal of trustee best serves interests of beneficiaries; or if there has been substantial change of circumstances or removal is requested by all of qualified beneficiaries, court finds that removal of trustee best serves interests of all beneficiaries and is not inconsistent with material purpose of trust, and suitable cotrustee or successor trustee is available. (NDCC 59-15-06).

General Powers and Duties of Trustees.

Trustee may exercise powers conferred by terms of trust and, except as limited by terms of trust, all powers over trust property which unmarried owner who is not incapacitated person has over individually owned property, any other powers appropriate to achieve proper investment, management, and distribution of trust property, and any other powers conferred by law. (NDCC 59-16-15).

Trustee may collect trust property, accept or reject additions to trust property, acquire or sell property, exchange, partition, or otherwise change character of trust property, deposit or invest trust money, borrow money, mortgage or pledge trust property, continue business or other enterprise, exercise rights of absolute owner over stocks and other securities, deal with real property, enter into lease grant option involving sale, lease, or other disposition of trust property or acquire option for acquisition of property, insure property of trust against damage or loss, abandon, distribute, or decline to administer property of no value or of insufficient value to justify its collection or continued administration, pay or contest any claim, settle claim by or against trust, and release, in whole or in part, claim belonging to trust, pay taxes, assessments, compensation of trustee and of employees and agents of trust, and other expenses incurred in administration of trust, exercise elections with respect to federal, state, and local taxes, select mode of payment under any employee benefit or retirement plan, annuity, or life insurance payable to trustee and exercise rights thereunder, make loans out of trust property, including loans to beneficiary on terms and conditions trustee considers to be fair and reasonable under circumstances, pledge trust property to guarantee loans made by others to beneficiary, sign and deliver contracts and other instruments, as well as all other acts allowed by law. (NDCC 59-16-16).

Investments.

Uniform Prudent Investor Act repealed. Trustees must comply with prudent investor standards contained in c. NDCC 59-17 and prudent investor rule set forth in NDCC 59-16-02 through NDCC 59-16-07. Prudent investor rule may be expanded, restricted, eliminated or otherwise altered by trust. (NDCC 59-17-01).

The general statutes governing investments of corporate fiduciary are NDCC 6-05-15; NDCC 6-05-15.1.

Securities in Name of Nominee.

No specific statutory authority.

Gifts to Minors.

See category 14 Family, topic 14.10 Infants.

Accounting.

Trustee must render annual account and court may order special accounts at any time. (NDCC 59-16-13).

Compensation.

Instrument creating trust may make provision for compensation. If no provision is made, trustee is entitled to reasonable compensation. (NDCC 59-15-08). Compensation may be reviewed by court. (NDCC 59-15-08).

Discharge.

Trustee may be discharged from his trust by extinction of trust, by completion of his duties, by such means as are prescribed in declaration of trust, by consent of beneficiary if he has capacity to contract, by judgment of a court that he is of unsound mind, or by order of court. Trustee may resign. (NDCC 59-15-05). Trustee may be removed by court order. (NDCC 59-15-06).

Common trust funds allowed. (NDCC 6-05-15.1).

Accumulations.

No statutory limitation.

Perpetuities.

See category 21 Property, topic 21.11 Perpetuities.

Pour Over Trusts.

See topic 13.16 Wills, subhead Bequests and Devises to Inter Vivos Trusts.

Uniform Principal and Income Act adopted. (c. NDCC 59-04.2).

Uniform Fiduciaries Act not adopted.

Simultaneous Death Act.

See topic 13.02 Death.

13.16 WILLS:

Uniform Probate Code adopted. (Title 30.1).

Capacity.

Any adult of sound mind may make will. (NDCC 30.1-08-01). Any person of unsound mind, if actually restored to capacity, may make will even though his restoration to capacity is not determined judicially. (NDCC 14-01-03).

Testamentary Disposition.

No limitation as to amount which may be given to religious, charitable, or similar institutions.

Bequests and Devises to Inter Vivos Trusts.

See Uniform Probate Code. (NDCC 30.1-08-11).

Uniform Anatomical Gift Act adopted. (c. NDCC 23-06.6).

Testamentary Trusts.

May be named as beneficiary of insurance policy, pension and profit sharing plans and similar employee benefits. (NDCC 26.1-33-41). See topic 13.11 Trusts.

Simultaneous Death.

See topic 13.02 Death, subhead Uniform Simultaneous Death Act.

Unclaimed Legacies.

See topic 13.06 Descent and Distribution, subhead Escheat.

Renunciation.

See topic 13.06 Descent and Distribution.

Ante-Mortem Probate allowed. (c. NDCC 30.1-08.1).

Living Wills.

Health Care Directives allow competent adults to appoint health care agent and provide health care instructions for use if and when incapacity occurs. (c. NDCC 23-06.5).

14 FAMILY

14.01 ADOPTION:

Revised Uniform Adoption Act adopted (c. NDCC 14-15), including provision regarding release of adoption information (NDCC 14-15-16).

Parent is entitled to legal counsel during all stages of proceeding to terminate parental rights if minor is to be placed for adoption by licensed child-placing agency. (NDCC 14-15-19.1).

Termination of parental rights does not terminate duty of parents to support child before child's adoption, unless that duty is specifically terminated by court. Termination of child support obligation under this section does not relieve parent of duty to pay unpaid child support. (NDCC 14-09-08.21).

Uniform Parentage Act adopted. (c. NDCC 14-20).

Out of state child placing licensing requirements. (NDCC 50-12-02.1).

Adoption tax deduction. (NDCC 57-38-01.2).

Child Procurement.—Penalty. (NDCC 12.1-31-05). Class C felony.

Health insurance coverage for newborn and adopted children. (NDCC 26.1-36-07).

Assistance for adopted children with special needs. (NDCC 50-09-02.2).

Assignment of children disallowed without court order. (NDCC 14-10-05).

No facility may advertise children for adoption without license. (NDCC 50-11-06).

Interstate Child Placement Compact adopted. (NDCC 14-13).

Child Placement Agencies. (NDCC 50-12-01 to NDCC 50-12-17).

Identification of genetic parents and siblings. Hearings and records in adoption proceedings confidential with disclosure provided by law. Nonidentifying information regarding genetic parents shall be furnished to adoptive parents or adopted adults. At discretion of child-placing agency and with consent of all parties, limited exchanges may take place between genetic parents, adoptive parents and adopted child. Adopted person 18 years old may request Department of Human Services to initiate disclosure of information on genetic parents and siblings. Genetic parents and siblings have similar right of disclosure after adopted child reaches 21 years. Disclosure of party's identifying information may not occur unless party consents. (NDCC 14-15-16).

14.02–14.05 [RESERVED]

14.06 DIVORCE:

Grounds for Absolute Divorce.

Divorce may be granted for any of the following causes: (1) Adultery; (2) extreme cruelty; (3) willful desertion; (4) willful neglect; (5) abuse of alcohol or controlled substance; (6) conviction of felony; (7) irreconcilable differences. (NDCC 14-05-03). Willful desertion, willful neglect or habitual intemperance must have continued for one year in order to constitute ground for divorce. (NDCC 14-05-09).

Grounds for Legal Separation.

Court may grant temporary or permanent separation decree for any cause for which divorce may be decreed. (NDCC 14-05-03.1).

Citizenship and Residence Requirements.

Divorce may not be granted unless plaintiff has in good faith been resident of state for six months next preceding commencement of action or entry of decree of divorce. (NDCC 14-05-17). If plaintiff has not been resident of this state for six months proceeding commencement of action separation or divorce may be granted if plaintiff has been resident for six months immediately preceding entry of decree of separation or divorce. (NDCC 14-05-17).

Pleading.

No special provisions as to pleadings; defendant may counterclaim for divorce or legal separation. (Rule 13, N.D.R.Civ.P.).

Practice.

In actions for divorce, presumption of law that domicile of husband is domicile of wife does not apply. (NDCC 14-05-18). See also category 6 Courts and Legislature, topic 6.01 Courts, subhead Family Courts.

Judgment or Decree.

Final judgment or decree is entered immediately; there is no provision for an interlocutory judgment or decree.

Temporary Support, Attorneys Fees and Primary Residential Responsibility.

Court upon application of any party, may issue order which in its discretion may require either party to pay as alimony any money necessary for support of other party or of minor children of marriage and attorneys fees. Court may also award temporary primary residential responsibility of minor children to party. Court may also issue domestic violence protection provided application was submitted. (NDCC 14-05-23).

Allowance for Prosecution of Suit.

Court in its discretion may require either party to pay attorney’s fees. (NDCC 14-05-23).

Division of Property of Spouses.

See subhead Permanent Alimony and Division of Property, infra.

Domestic Violence.

Action for protection order may be brought by any family or household member on verified application; hearing within 14 days; service on respondent at least five days before hearing; court may restrain contact or exclude respondent from dwelling; custody and support may be addressed. Court may include in order provision for domestic violence protection. First violation of order is Class A misdemeanor and constitutes contempt of court. 2d or subsequent violation is Class C felony. (NDCC 14-07.1-02, NDCC 14-07.1-03, NDCC 14-07.1-06, NDCC 14-07.1-10).

Permanent Alimony and Division of Property.

When divorce is granted, court shall make equitable distribution of property and debts of parties, and may compel either of parties to pay spousal support for any period of time. Court may modify such orders. (NDCC 14-05-24; NDCC 14-05-24.1). Court may order either or both parents to provide necessary support for their children. (NDCC 14-09-08). Court may require either party to give reasonable security for providing maintenance or making any other payments required, and may enforce same by appointment of receiver or any other remedy applicable. (NDCC 14-05-25). Where husband or wife has separate estate sufficient to give proper support, court in its discretion may withhold any allowance to that person out of separate property of other spouse. Court may assign homestead to innocent party either absolutely or for limited time. (NDCC 14-05-25). Supreme Court has held that in determining question of alimony or division of property, court will consider ages of parties; their earning ability; duration of and conduct of each during marriage; their station in life; circumstances and necessities of each; health and physical condition; their financial circumstances as shown by property owned, its value and income producing capacity and whether accumulated or acquired before or after marriage. (52 N.W. 2d 107; 139 N.W. 2d 845; NDCC 14-05-24.1). Enforceable by civil contempt proceedings. (NDCC 14-05-25.1).

Primary Residential Responsibility of Children.

Court before or after judgment may make such directions for parenting rights & responsibilities of children as may seem necessary or proper, and may vacate and modify the same at any time. Court may award support, attorney's fees, and primary residential responsibility at any time during pending action for divorce. (NDCC 14-05-22, 23). Primary residential responsibility determination based on statutory factors. (NDCC 14-09-06.2). Parent with primary residential responsibility for child may not change child's residence to another state except upon court order or with consent of non-custodial parent. Court order not required if other parent has not exercised parenting time for one year or has moved to another state and is more than 50 miles from residence of parent with primary residential responsibility. (NDCC 14-09-07).

Grandparent Visitation Rights.

Grandparents and great-grandparents of unmarried minor may be granted reasonable visitation. Grandparents have standing to bring action to enforce visitation rights. (NDCC 14-09-05.1).

Allowance for Support of Children.

Parents shall give their children support and education suitable to child's circumstances. Court may compel either or both parents to provide support of their children. (NDCC 14-09-08). Court shall require that payments be made to state disbursement unit. (NDCC 14-09-08.1). Each judgment which includes order for support but which does not require immediate income withholding, must include statement of delinquency in payment of support or approved request of obligee will result in income withholding order. (NDCC 14-09-09.12).

Periodic review of child support orders no less frequently than 36 months, exceptions. (NDCC 14-09-08.4).

Interstate income withholding. (NDCC 14-09-09.18 et seq.).

Liability for Support.

Person legally responsible for support of child who fails to provide support, subsistence, education, or other necessary care, is liable for reasonable value of support provided by any person, institution, agency, or county social service board; payment of public assistance creates presumption that such payment equals reasonable value of physical and custodial care or support. (NDCC 14-08.1-01).

Support Order to be Judgment.

Order directing payment for support of child is judgment by operation of law, entitled to full faith and credit and not subject to retroactive modification. Failure to comply with child support order constitutes contempt of court. (NDCC 14-08.1-05).

Awarding Primary Residential Responsibility.

Order for Primary Residential Responsibility of child must award primary residential responsibility to person or agency, organization or institution as will, in opinion of judge, promote best interests and welfare of child. No presumption as to who will better promote best interests and welfare of child. Parental rights & responsibilities determination based on statutory factors. (NDCC 14-09-06.2).

Child Support Guidelines.

Department of Human Services to establish child support guidelines to assist courts in determining amount that parent should be expected to contribute toward support of child. (NDCC 14-09-09.7). Support amount set by North Dakota Administrative Code. (NDAC NDCC 75-02-04.1). Guidelines contained within.

Remarriage.

Effect of judgment decreeing divorce is to restore parties to unmarried persons, but neither party to divorce may remarry except as permitted by decree of court granting divorce. Court should specify in decree whether either or both may remarry, and if so, when. Court may modify decree at any time thereafter. (NDCC 14-05-02).

Foreign Divorce.

Foreign decree of divorce or annulment in this state is void if parties to marriage were domiciled in North Dakota at time decree rendered. If person obtains foreign decree and was domiciled in state within less than 12 months prior to obtaining decree and resumes North Dakota residence within six months after obtaining decree, it is prima facie evidence person did not abandon North Dakota domicile prior to obtaining decree. (NDCC 14-05-08.1).

Separation Agreement.

Separation by consent with or without the understanding that one of the parties will apply for divorce is not desertion. (NDCC 14-05-06). Husband and wife may contract in writing for immediate separation and make provision for maintenance of either and of children. (NDCC 14-07-07).

Grounds for Denying Divorce.

Divorce must be denied upon showing of condonation or limitation and lapse of time. (NDCC 14-05-10). Where there is unreasonable time before commencement of action, there is presumption of connivance, collusion, or condonation, but such presumption may be rebutted by evidence showing reasonable grounds for delay; otherwise there are no limitations of time for commencing actions for divorce. (NDCC 14-05-16).

Revocation of Decree for Separation.

Decree for separation may be revoked by court at any time on application of either party on notice to adverse party. If it appears to court that reconciliation is improbable, court may revoke such decree, and in lieu thereof may render decree of absolute divorce, and at same time make final division of property, alimony, and further orders with reference to minor children. (NDCC 14-05-29).

Annulment of Marriage.

See topic 14.11 Marriage.

Uniform Premarital Agreement Act adopted 1985; see topic 14.11 Marriage.

Displaced homemaker program provides counseling, job training, and services for divorced or separated homemakers. (NDCC 14-06.1).

Domestic Violence. (NDCC 14-07.1).

Uniform Child Custody Jurisdiction and Enforcement Act adopted. (NDCC 14-14.1).

14.07 [RESERVED]

14.08 GUARDIAN AND WARD:

District court of each county has jurisdiction in all guardianship matters. (NDCC 30.1-02-02). Venue for guardianship proceedings is where proposed ward resides or is present and expected to remain. Proposed ward may demand change of venue. (NDCC 30.1-28-02). Venue to appoint guardian for minor is county where minor resides or present. (NDCC 30.1-27-05). Venue for proceeding for protection of property of person under disability and minors is county where person resides or county where property located. (NDCC 30.1-29-03).

Uniform Probate Code and 1975, 1977, 1979, part of 1982, 1989 and 1991 Amendments adopted. (Title 30.1).

Testamentary Appointment of Guardian.

Effective on filing of guardian's acceptance with court and written notice to minor and person having care. (NDCC 30.1-27-02).

Foreign Guardian.

Foreign bank or trust company may be appointed only if foreign jurisdiction extends reciprocal privilege and then only if Secretary of State is appointed process agent. (NDCC 6-08-25; NDCC 6-08-26). Foreign guardian may satisfy, assign, or foreclose mortgage, judgment or other lien. (NDCC 35-01-25).

Gifts to Minors.

See topic 14.10 Infants.

Uniform Fiduciaries Act not adopted.

14.09 HUSBAND AND WIFE:

The separate and mutual rights and liabilities of husband and wife are as follows: (1) Neither as such is answerable for the acts of the other; (2) the earnings of one spouse are not liable for debts of other. Earnings and accumulations of either spouse and minor children living with either spouse or in one spouse's custody while husband and wife are living separate from each other, are separate property of each spouse; (3) they are jointly and severally liable for debts contracted by either while living together, for necessary household supplies of food, clothing, fuel, medical care, shelter and education of minor children; (4) separate property of either is not liable for debts of other each being liable for own debts contracted before or after marriage. (NDCC 14-07-08).

Husband and wife have mutual duty to support each other out of their individual property and labor. (NDCC 14-07-03).

Liabilities of Married Person.

Any person after marriage with respect to property, contracts, and torts has same capacity and rights, is subject to same liabilities as before marriage. (NDCC 14-07-05).

Separate Property.

Neither the husband nor the wife has any interest in the property of the other, but neither can be excluded from the other's dwelling. (NDCC 14-07-04).

Contracts.

Either husband or wife may enter into contracts with each other or with third persons which either might enter into if unmarried. (NDCC 14-07-06).

Actions.

Either spouse may sue or be sued in his or her own name. (NDCC 14-07-05). One spouse may sue other for tort or otherwise. (62 N. D. 191; 242 N. W. 526).

Agency.

One spouse may act as agent or attorney in fact for the other (NDCC 3-01-04; NDCC 14-07-06), except for conveyance of homestead. See category 8 Debtor and Creditor, topic 8.10 Homesteads. (NDCC 47-18-05).

Conveyance Or Encumbrance of Property.

Either spouse may convey, transfer or encumber their separate property without consent or joinder of the other, except that both must join in conveyance or encumbrance of homestead or of household goods or exempt personal property. (NDCC 14-07-05; NDCC 35-01-04; NDCC 47-18-05).

Desertion and Nonsupport.

Every husband or wife who without lawful excuse deserts his or her spouse with intent to abandon or abandons child whom legally responsible for spouse, or who willfully fails to furnish food, shelter, clothing and medical attention as is reasonably necessary to spouse or minor child who is under age of 18, and unable to support self, is guilty of felony. (NDCC 14-07-15; 16). Court may accept bond for future support and suspend sentence unless condition of bond is violated. (NDCC 14-07-19; 20; 21). Civil suit may be brought by spouse or child on bond. (NDCC 14-07-21).

Revised Uniform Reciprocal Enforcement of Support Act (1968) repealed by S.L. 1995, c. 157, § 4.

Community Property.

System not adopted.

Antenuptial Contracts.

Uniform Premarital Agreement Act adopted 1985; see topic 14.11 Marriage.

Marriage Surname.

Every person has right to adopt any surname by using that surname constantly and without intent to defraud. (NDCC 14-03-20.1).

14.10 INFANTS:

All persons 18 years of age and over are adults. Drinking age is 21.

Emancipation.

Parent may relinquish to child right of control and to earnings. (NDCC 14-09-17). Authority of parent ceases upon marriage of minor, appointment of guardian of person or upon minor attaining age of majority. (NDCC 14-09-20).

Support of Minor.

Parents shall give their children support and education suitable to child’s circumstances. (NDCC 14-09-08).

Parental Responsibility.

Minor’s negligent operation of motor vehicle imputed to person who signed his or her application. (NDCC 39-06-09).

Parents not liable for other torts of minor and minor civilly liable for wrong done by him (NDCC 14-09-21), except parent is liable for up to $1,000 plus taxable court costs for malicious or willful destruction of property caused by minor child living with parent (NDCC 32-03-39).

Assignment of children prohibited. (NDCC 14-10-05).

Disabilities.

Minor may not give delegation of power, nor make contract relating to real property or to personal property not in his immediate possession or control. (NDCC 14-10-09). With these exceptions minor may make any contract, subject to disaffirmance. (NDCC 14-10-10).

Disaffirmance of Contracts.

Contract made by minor under 18 may be disaffirmed by him either before becoming of age or within one year thereafter. (NDCC 14-10-11). Minor may not disaffirm a contract for reasonable value of necessary support. (NDCC 14-10-12).

Revised Uniform Transfers to Minors Act adopted. 1966 Amendments adopted. Age of adult under Act is 21. (c. NDCC 47-24.1).

Uniform Securities Ownership by Minors Act adopted. (c. NDCC 14-10.1).

Actions.

Minor may enforce his rights by civil action, or may be sued, but court must appoint guardian ad litem for him. (NDCC 14-10-04; N.D.R.Civ.P. 17b).

Termination of Parental Rights.

Parental rights may be terminated if in best interests and welfare of child, as defined in NDCC 14-15-19. Provides criteria and procedures for termination of rights by court order following petition and judicial finding of abandonment or unfitness of parents. Court order terminates all rights and obligations.

Uniform Parentage Act repealed by S.L. 2005, c. 135, § 11, reenacted in c. NDCC 14-20.

Adoption.

See topic 14.01 Adoption.

Uniform Minor Student Capacity to Borrow Act adopted. (NDCC 14-10.2).

14.11 MARRIAGE:

Age of consent, 18; 16-18 years consent of parents required. License shall not be issued to person under 16. (NDCC 14-03-02).

License.

Marriage may not be solemnized without license. No person shall solemnize marriage until parties to marriage produce license issued no more than 60 days prior to date by county recorder in which either party or parents of either reside or is temporarily domiciled or by county recorder where marriage is to be solemnized. Member of armed forces of U.S. stationed within state shall be deemed resident of county where he/she is stationed. (NDCC 14-03-10).

License Application.

Each applicant shall submit notarized affidavit showing that each is over 18 together with documentary evidence of age; whether or not either or both parties have been divorced together with certified copy of decree; and written consent under oath of either parent, if parents are living together, or parent having legal custody, surviving parent, or guardian of person under 18 necessary. (NDCC 14-03-17).

If county recorder is satisfied there is no legal impediment to marriage and applications have complied with provisions of NDCC 14-03 clerk shall issue license. (NDCC 14-03-19). No prohibition against immediate marriage after license is issued.

Ceremonial Marriage.

Marriages may be solemnized by all judges of courts of record, by municipal judges, county recorder, ordained ministers of gospel; priests; clergy licensed by recognized denomination and by any person authorized by rituals and practices of any religious persuasion. (NDCC 14-03-09).

Reports of Marriages.

License and certificate must be returned to office which issued it within five days after marriage. (NDCC 14-03-21). Original certificate and license is retained as part of official's records. (NDCC 14-03-24). County recorder transmits record to registrar of vital statistics who records same in his office. (NDCC 14-03-22).

Record.

See category 10 Documents and Records, topic 10.04 Records, subhead Vital Statistics.

Proxy Marriages.

Not authorized.

Marriages by Written Contract.

Not authorized.

Common law marriages are invalid. (NDCC 14-03-01; 569 N.W.2d 280).

Prohibited Marriages.

All marriages between: Ascendant and descendant of any degree; brother and sister; uncle and niece; aunt and nephew; first cousins (whole or half blood, legitimate or illegitimate) are void. (NDCC 14-03-03).

Foreign Marriages.

All marriages contracted outside of this state but which are valid according to the laws of the state or country where contracted, are valid in this state; but this does not apply when a resident of this state contracts a marriage in another state which is prohibited by the laws of this state. This only applies to marriages between man and woman. (NDCC 14-03-08).

Annulment.

Marriage may be annulled by an action in the district court in the following cases: (1) Where party who seeks annulment is under the age of legal consent, or if of such age as to require consent of parents or guardian, such marriage was contracted without such consent, unless after attaining legal age, parties freely cohabited; (2) where husband and wife of either party was living, and former marriage was then in force; (3) where either party was of unsound mind, unless such party after coming to reason, freely cohabited; (4) where the consent of either party was obtained by fraud, unless such party afterwards, with full knowledge, freely cohabited; (5) where consent of either was obtained by force, unless such party afterwards freely cohabited; (6) where either party was at the time of marriage physically incapable of entering into the marriage state, and such incapacity continues and appears to be incurable; (7) where the marriage was incestuous. (NDCC 14-04-01). No statutory provisions as to residence requirements; general rules of court procedure are applicable. When a marriage is annulled, children begotten before the judgment are legitimate and succeed to the estate of both parents. (NDCC 14-04-03). Court must award custody of children of marriage annulled upon ground of fraud or force to party based on best interests of child, as set forth in c. NDCC 14-09. (NDCC 14-04-04). Judgment of nullity of marriage is conclusive only against parties to action and those claiming under them. (NDCC 14-04-05).

Action for annulment on ground of non-age must be brought within four years after arriving at age of consent. (NDCC 14-04-02).

See also category 6 Courts and Legislature, topic 6.01 Courts, subhead Family Courts.

Antenuptial Contracts.

Uniform Premarital Agreement Act adopted. Must be document signed by both parties; enforceable without consideration; right of child to support must not be adversely affected; may modify spousal support; choice of law; effective upon marriage; amended or revoked only by agreement signed by both parties. (NDCC 14-03.1-02, -03, -04, -05).

15 HEALTH

15.01–15.04 [RESERVED]

15.05 FOOD, DRUGS, DEVICES AND COSMETICS:

Pharmaceuticals and pharmacists are controlled by provisions of NDCC cc. 43-15, 43-15.1, 43-15.2 and 43-15.3. Controlled substances, including authority of Board of Pharmacy controlled by NDCC c. 19-03.1.

Profession of cosmetology is controlled by NDCC c. 43-11. Matters pertaining to misbranding, false advertising and food and drug administration issues are controlled by NDCC c. 19-02.1. Food issues are also subject to provisions of NDCC c. 19-02.1.

15.05A NURSING:

Licensure, competency, training and discipline of registered nurses and licensed practical nurses are governed by North Dakota Board of Nursing. (NDCC c. 43-12.1).

15.06–15.11 [RESERVED]

15.12 PUBLIC HEALTH:

Health Care Directive allows competent adult to appoint agent to make health care decisions. (NDCC c. 23-06.5).

HMO's are subject to documentary, filing and financial requirements set forth in NDCC c. 26.1-18.1. Comprehensive health association plans governed by NDCC c. 26.1-08. Federal Health Care Quality Improvement Act of 1986 adopted by and applicable in North Dakota. (NDCC 23-12-12).

Statutory authority to designate smoking areas. (NDCC 23-12-10).

16 INSURANCE

16.01 INSURANCE COMPANIES:

Commissioner of Insurance, Capitol Building, Bismarck, N. D. 58501, has general supervision of all insurance companies. (NDCC 26.1-01-01, 02, 03). Procedure for service of process upon Commissioner defined. (NDCC 26.1-01-04).

Policies.

Form of life insurance policies is restricted. (NDCC 26.1-33-03). Suicide is no defense after policy has been in force for one year (NDCC 26.1-33-37) and must provide two-year incontestable period and 31-day grace period for every premium after first (NDCC 26.1-33-05). Revised 1943 New York standard form of fire insurance policy must be used. (NDCC 26.1-39-06). Form of annuity contract restricted. (NDCC 26.1-34-01). Form of accident and health policy restricted. (NDCC 26.1-36-03). Credit life and credit accident and health insurance regulated. (NDCC 26.1-37). Procedure for approval, disapproval and withdrawal of approval for form of policy by commissioner prescribed. (NDCC 26.1-30-20). Sale of insurance from vending machines restricted. (NDCC 26.1-28-01).

Rates.

All industry bills approved by National Association of Insurance Commissioner's, June 12, 1946, regulating rates of fire, marine, inland marine casualty and surety business, have been adopted. Insurance rates regulated and authorization of cooperative ratemaking. (c. NDCC 26.1-25).

Discrimination.

Any company which practices discrimination against individual risks in issue or cancellation of policies may have its certificate of authority revoked after hearing by Insurance Commissioner. (NDCC 26.1-04-16, 17). Life insurance company or fraternal society must not permit any distinction or discrimination between insureds of same class with equal expectation of life in amount or payment of premiums or rates charged, or in dividends or benefits, or other terms and conditions of policy. (NDCC 26.1-04-03[7], 05).

Unfair Insurance Practices.

Unfair methods of competition and trade practices prohibited. (NDCC 26.1-04-02, 03).

Insurance Loss History Information.

Insurers are prohibited from considering certain events when surcharging, declining, or canceling personal insurance coverage, including insured's inquiries into whether policy will cover loss, or prior filing of claim in specified circumstances. (NDCC 26.1-25.2-03). Insurer must disclose that it will use applicant's claims history in determining how to act on policy. (NDCC 26.1-25.2-05).

Rebates.

Insurance company or fraternal society may not offer, promise or pay any rebate of any premium payable on the policy or the agent's commission thereof. No insured person may receive or accept any rebate of the premium or any part of agent's commission. (NDCC 26.1-04-03[8], 05, 06).

Licensing of Producers and Consultants.

Qualifications and procedures for licensing persons who sell, solicit and negotiate insurance contained in c. NDCC 26.1-26. Words "agent" and "broker" have been abandoned and categories are now insurance producer, insurance consultant and surplus lines insurance of producer without licenses prohibited and class C felony. (NDCC 26.1-26-03). Payment to, or acceptance of commissions by, person without license is prohibited. (NDCC 26.1-26-04). Nature of qualifications, examinations, residence, appointment and bonding requirements and exceptions to requirements, fees, continuing education, licensing and termination of licenses and other policies and procedures for each type of producer or consultant set forth in c. NDCC 26.1-26.

Liability of Unauthorized Company.

Insurance company operating without certificate of authority from state will be held to its insurance contracts. (NDCC 26.1-02-07). Insurance company and any person who assisted in procurement of contract are liable to insured for full amount of claim. (NDCC 26.1-02-08). Criminal penalty for entering into unauthorized insurance transaction is class C felony. (NDCC 26.1-02-25).

Fees.

See NDCC 26.1-01-07. Fee of $20 for written examination on two lines of insurance or less if administered by commissioners or actual cost if administered by testing service; $10 for issuance and each annual renewal of surplus lines insurance producer and consultant license; $100 for issuance of license to insurance producer; $10 for insurer's appointment or renewal of appointment of insurance producer. (NDCC 26.1-01-07). Appointment of surplus lines producer, insurance producer and insurance consultant terminates upon failure to pay prescribed annual renewal fee before May 1. (NDCC 26.1-26-32).

Process Agent.

Commissioner to be designated by insurance producer, insurance consultant and surplus lines insurance producer as attorney for service of process. (NDCC 26.1-26-21).

Investments.

Investments of domestic insurance companies governed by NDCC 26.1-05-18, 19.

Report.

Every company doing business in this state must file an annual report not later than Mar. 1 in each year, showing its condition and business for year ending on preceding Dec. 31. (NDCC 26.1-03-07).

Foreign Insurance Companies.

Foreign insurance company must not transact business in this state until it has deposited with Commissioner of Insurance certified copy of its articles, a statement of its financial condition sworn to by its officers, filed proof of its legal organization, that its capital stock and surplus are at least equal to that of domestic companies, filed proof that its capital or net assets are well invested, and immediately available for payment of losses, that it does not insure on any single hazard sum larger than one-tenth of its net assets, and adopted name not similar to existing name. (NDCC 26.1-11-01). Fee for filing articles $25; annual statement $25; certificate of authority $100 for original, $50 for renewal or amendment. (NDCC 26.1-01-07). All accident and health companies doing business on assessment plan must deposit amount of one regular assessment sufficient to pay average loss or losses occurring to members of this state during time allowed it for collection of assessments. (NDCC 26.1-11-05). If company does business without qualifying, its contracts are null and void on behalf of company, but contract may be enforced against such company. (NDCC 26.1-02-07). Foreign companies must file annual statement including therein business transacted within U.S. not later than Mar. 1st in each year, and shall file supplemental statement of business transacted without U.S. not later than Dec. 1st in each year. (NDCC 26.1-03-07). Company owned or controlled by any foreign government may not be licensed. (NDCC 26.1-02-04).

Unauthorized Foreign Companies.

The solicitation, issuance or delivery of policies or collection of premiums, by mail or otherwise, operates as a statutory appointment of Insurance Commissioner as process agent, subjecting such company to suit in this state. (NDCC 26.1-02-10 and NDCC 26.1-11-10, 11, 12, 13).

Retaliatory Laws.

Whenever the laws or regulations of any other state or of any foreign country, or of any province require of any foreign insurance company or of any agent thereof any deposits of securities in such state, country or province for protection of policyholders or others, or any payments for taxes, fines, penalties, certificates of authority, licenses, or fees, or the performance of any duties or acts exceeding those required by the laws of this state, then companies organized therein which do business in this state are required to make the same deposits in this state and do all other acts required by such foreign law. (NDCC 26.1-11-06).

Premium Tax.

Every insurance company, except fraternal benefit society, doing business in this state, must pay tax on gross amount of premiums, assessments, membership fees, subscriber fees, policy fees and finance and service charges received in this state during preceding calendar quarter equal to 2% as to life insurance, 1.75% as to accident and health insurance, and 1.75% as to all other types of insurance. (NDCC 26.1-03-17). Insurance companies paying such tax are exempt from income tax. (NDCC 57-38-09).

Automobile Warranties.

Except as issued by a manufacturer, automobile dealer or third party administrator who issues automobile warranty, contract shall maintain policy of insurance providing coverage for warranty obligations. (NDCC 26.1-40-18).

Title Insurance.

This field of contracts is declared to be insurance. (c. NDCC 26.1-20).

Direct Actions Against Insurer.

See category 23 Transportation, topic 23.01 Motor Vehicles, subhead Direct Actions.

Uniform Insurers Liquidation Act not adopted.

No-Fault Insurance.

N. D. Auto Accident Reparations Act; maximum amount of no-fault benefits to one person as a result of an accident is $30,000; insurer required to make available benefits for excess economic loss up to total of $80,000. “Secured persons” are exempt for non-economic loss unless “serious injury”. (c. NDCC 26.1-41).

Takeovers/acquisitions regulated. (NDCC 26.1-06).

Health Maintenance Organizations (c. NDCC 26.1-18.1) and legal expense insurance (NDCC 26.1-43) and organizations for prepaid legal services authorized (c. NDCC 26.1-19).

Declaratory judgment action to determine insurer’s duty to defend authorized. (NDCC 32-23-06).

Medical Malpractice.

Reports required to Insurance Commissioner. (NDCC 26.1-01-05).

Independent External Review.

Every insurance company or HMO that offers accident and health insurance must establish independent external review mechanism to determine whether medical care was medically necessary to claim as submitted by provider. (NDCC 26.1-36-44).

16.02 SURETY AND GUARANTY COMPANIES:

Guarantor and surety contracts are insurance transactions. (NDCC 26.1-02-06). Any number of persons, not less than seven, may form surety corporation and its existence may be perpetual. (Tit. 26.1).

Rights and Powers.

Corporation has all the general powers and privileges of corporations (see category 2 Business Organizations, topic 2.03 Corporations), and also has special power and authority to lease, acquire, purchase, own, mortgage, sell and convey real and personal property, and to insure and guarantee fidelity and faithful performance of duties and obligations of public officers, companies or corporations, with limitations regarding real property. (NDCC 26.1-05-01, 02, 20).

Agents.

Agents of foreign and domestic surety companies must have license from Commissioner of Insurance. (NDCC 26.1-26). Such agents are licensed same as insurance producer. Countersignature of resident agent not required unless foreign state requires. (NDCC 26.1-11-07).

Foreign Companies.

Foreign corporation, to qualify to act as surety or guarantor, must comply with the requirements of law applicable to foreign insurance companies. Must appoint Commissioner of Insurance as its process agent. (c. NDCC 26.1-11).

Taxation.

Foreign surety companies must at time of making annual statement of business, pay to the Insurance Commissioner 1¾% of gross premiums, fees, or charges received in this state during preceding year upon all bonds or undertakings written by it within this state. Quarterly estimated premium taxes required. (NDCC 26.1-03-17).

17 INTELLECTUAL PROPERTY

17.01 TRADEMARKS AND TRADENAMES:

One who produces or deals in a particular thing or conducts a particular business may appropriate to his exclusive use as a trademark any form, symbol or name not appropriated by another, but may not exclusively appropriate any designation or part of designation relating only to name, quality, or description of the thing or business, or the places where it is produced or carried on. Trademark may be registered in office of Secretary of State, and is there recorded and after recording registrant has exclusive right to use thereof. Filing fee $30 for one class of goods and $20 for each class thereafter. (NDCC 47-22-02; 03).

Protection extends for ten years but may be successively renewed for ten year periods without limit. (NDCC 47-22-05).

Prohibited trademarks enumerated. (NDCC 47-22-02).

Assignment.

Assignment allowed with transfer of good will of a business. Assignment must be in writing and filed with Secretary of State. Fee $30. (NDCC 47-22-06).

Protection Afforded and Infringement.

Any person who shall use without the consent of the registrant or reproduce or copy any trademark shall be liable in civil action for damages as set forth in statute. (NDCC 47-22-11, NDCC 47-22-12).

Trade Names.

Any name other than true name of owner which is not same as or deceptively similar to any other trade name, domestic or foreign corporation name, domestic or foreign limited liability company name or domestic or foreign limited partnership, limited liability partnership or limited liability limited partnership name authorized to do business in state or which is not otherwise reserved or registered with Secretary of State may be registered with Secretary of State on forms prescribed by Secretary of State, and is good as trade name for five years and may be renewed within 90 days before its expiration date by registering. (c. NDCC 47-25). Filing fee $25. (NDCC 47-25-04). If interest of anyone engaged in business under trade name changes or someone else acquires interest therein, assignment of ownership interest must be registered within 90 days after change occurs. (NDCC 47-25-06).

See also category 2 Business Organizations, topic 2.07 Partnerships.

18 LEGAL PROFESSION

18.01 ATTORNEYS AND COUNSELORS:

All attorneys are by law members of the integrated State Bar Association. (NDCC 27-12-02).

Jurisdiction Over Admission.

Power to admit to practice as attorneys and counselors in courts of state, vested in

Supreme Court. (NDCC 27-11-02).

Eligibility.

An applicant for admission to practice must be at least 18 years old, of good moral character. (Rule 1 of Admission to Practice).

Registration as Law Student.

Law student must file Board of Law Student Registration Application by Oct. 1 of applicant's second year of laws school, or in no event later than 14 months after applicant's first day of first year of law school, unless applicant pays late registration fee and files late application no later than last established filing date of application for bar examination. (Rule 5 of Admission to Practice).

Educational Requirements.

Received juris doctor or equivalent part time course in law resulting in equivalent degree from law school approved or provisionally approved accreditation by ABA. (Rule 1 of Admission to Practice).

Examinations for admission are conducted by State Bar Board appointed by Supreme Court. Fee, $150 minimum. Multi-State Bar Examination (MBE), Multi-State Professional Responsibility Examination (MPRE), Multi-State Essay Examination (MEE), and Multi-State Performance Test (MPT) in use. Admission based prior MBE score accepted from another jurisdiction only if achieved scaled score of 150 or more within two years, provided admitted in jurisdiction in which MBE was taken. Applicant must achieve scaled score of 80 on MPRE no more than five years from date of application.

Yearly license fee of not to exceed $400 as determined by State Bar Association is payable to Secretary of State Bar Board. (NDCC 27-11-22).

Admission Without Examination.

Any person may be admitted without examination upon proof that he meets requirements of Rule 1, has been admitted to bar of some other state, and has practiced law therein for not less than five years and has for at least four of last five years immediately preceding application actively engaged in private practice of law, judge, teaching of law or full-time legal work. (Rule 6 of Admission to Practice).

Admission Pro Hac Vice.

Nonresident attorney admitted and licensed in another jurisdiction may occasionally be permitted to appear as counsel in North Dakota trial court if attorney designates associate, simultaneously files motion and supporting affidavit with trial court and State Board of Law Examiners, remits fee required for attorney who has been licensed in this state for five years or more or certifies attorney has paid fee to State Board of Law Examiners during that calendar year, and obtains permission from court. Appearance before North Dakota appellate court requires updated supporting affidavit if attorney previously appeared in same matter before trial court, or follow same procedure as for trial court if appearance is in matter in which attorney had not previously obtained permission to appear. Effective 3/1/05 Rule 11.1 superceded by incorporation into Admission to Practice R.3. (Rule 3 Admission to Practice).

Powers.

An attorney and counselor has power generally to execute written instruments necessary or proper in the action which has already been commenced, to bind his client to any agreement, and to receive money for his client. (NDCC 27-13-02).

Compensation.

No statutory regulations.

Disabilities.

Attorney may not be a surety in any action or proceeding pending in this state. (NDCC 27-13-03).

Lien.

An attorney has lien for general balance of compensation in and for each case upon: (1) money in his hands belonging to his client in case; (2) money due his client in hands of adverse party, or attorney of such party, in action or proceeding in which attorney claiming lien was employed, from time of giving notice in writing to such adverse party or attorney of such party, if money is in possession or under control of such attorney, which notice must state amount claimed and in general terms for what services. After judgment in any court of record such notice may be given and lien made effective against judgment debtor by entering same in judgment docket opposite entry of judgment. (NDCC 35-20-08).

Disbarment.

Certain grounds on which an attorney may be disbarred are enumerated; but such enumeration is not a limitation on powers of court to suspend or disbar for any professional misconduct. (NDCC 27-14-02).

Unauthorized Practice.

No one may practice law without a certificate of admission to bar and annual license from state bar board. (NDCC 27-11-01). Attorney may not practice in jurisdiction where doing so violates regulation of legal profession in that jurisdiction. (N.D.R.P.C. 5.5).

Attorney Ethics.

North Dakota Rules of Professional Conduct have been adopted in substantially same form as American Bar Association Rules of Professional Conduct. Rules for Lawyer Discipline, and Standards for Imposing Lawyer Sanctions have been adopted by North Dakota Supreme Court.

Causes for suspension or revocation of lawyer’s certificate of admission to bar are provided by statute. Suspension or revocation may occur for willful violation of duties of attorneys, willful violation of court order relating to lawyer’s professional practice, conviction of offenses relating to custody of client’s property or funds, or commission of “any other act which tends to bring reproach upon the legal profession.” (NDCC 27-14-02).

Complaints against attorneys are filed with secretary to disciplinary board of North Dakota Supreme Court. (N.D.R. Lawyer Discipl. 3.1A). Investigations of complaints conducted by disciplinary counsel or members of state bar association inquiry committees. (N.D.R. Lawyer Discipl. 3.1D). Recommendations for disposition of complaints made by inquiry committees, which have authority to conduct additional investigation, dismiss, issue admonition, offer consent probation, or initiate formal proceedings before disciplinary board. (N.D.R. Lawyer Discipl. 2.4E).

Mandatory Continuing Legal Education.

Each attorney shall complete at least 45 hours of approved course work in each three-year period, at least three hours of which must be in ethics or professional responsibility. (NDRCLE 3).

Specialty Certification Requirements.

None.

Professional Association or Corporation.

See category 2 Business Organizations, topic 2.03 Corporations, subhead Professional Corporation.

19 MINERAL, WATER AND FISHING RIGHTS

19.01 MINES AND MINERALS:

There are numerous provisions for regulation of mining, and protection of miners, most covered under Title 38, NDCC.

Reservation of Mineral Rights.

All reservations or transfers of minerals include all minerals except those specifically excepted. (NDCC 47-10-24, 25). During period NDCC 1969-1983 may include only minerals specifically named.

Oil and Gas.

Industrial Commission has jurisdiction and authority necessary to enforce statutes governing mining and gas and oil production. (NDCC 38-08-04).

Termination or Forfeiture of Mineral Leases.

Holder must record surrender of terminated or forfeited lease within 15 days, in default of which lessor may serve a 20-day notice of election to void lease, and unless lessee within 20 days files an affidavit showing lease still effective, County Recorder must cancel same. (NDCC 47-16-36).

Dormant minerals forfeited to surface owner after 20 years unless used or protected by recording prior to end of 20-year period set forth in NDCC 38-18.1-02. (NDCC 38-18.1).

Water Rights.

Rights and controls governed by Title 61, NDCC.

Fishing rights governed by Title 20.1, NDCC.

Taxes.

See category 22 Taxation, topic 22.03 Business Taxes, subheads Oil and Gas Taxes, Coal Taxes.

20 MORTGAGES

20.01 CHATTEL MORTGAGES:

Uniform Commercial Code adopted, effective July 1, 1966. (Title 41). Security interests in personal property are governed by Uniform Commercial Code. (NDCC c. 41-09).

What May Be Mortgaged.

Security interest can be taken in virtually all personal property. (NDCC c. 41-09). See category 3 Business Regulation and Commerce, topic 3.09 Commercial Code.

Agricultural Mortgages.

Security interests on unmatured and growing crops are prohibited and void, except where given to U.S., state, or any county, or agency thereof, any banks, savings and loan, industrial loan company, credit union, agricultural cooperative, or agricultural lending agency, or where given as security for money advanced by loan to pay government crop insurance; prohibition does not apply to liens given as security for purchase price or rental of land on which crops are grown. (NDCC 35-05-01). Security interest attaches only to crop next maturing unless after acquired property clause is included and following language appears in bold print or is conspicuous: “This security agreement covers crops now growing. This security agreement also covers future crops to be grown in current year or any year thereafter.” Priority given to operating fund lender in future years. (NDCC 35-05-01.1).

After-acquired Property.

Security agreement may create or provide for security interest in after-acquired collateral, with exception of consumer goods (unless debtor acquires rights in consumer goods within ten days of secured party giving value) and commercial tort claim. (NDCC 41-09-14).

Liens on Future Interest.

Agreement may be made to create lien on property not yet in existence, or not yet acquired, in which case lien agreed upon attaches when party agreeing to give it acquires an interest therein. (NDCC 35-01-05).

Future Advances.

Security agreement may provide that collateral secures, or that accounts, chattel payments, payment intangibles, or promissory notes are sold in connection with, future advances or other value, regardless of whether advances or value is given pursuant to commitment. (NDCC 41-09-14).

Floating Stock.

See category 3 Business Regulation and Commerce, topic 3.09 Commercial Code.

Mortgage of Household Goods.

Purchase-money security interests allowed in consumer products. (NDCC 41-09-03). See category 3 Business Regulation and Commerce, topic 3.09 Commercial Code.

Mortgage of Exempt Property.

See category 3 Business Regulation and Commerce, topic 3.09 Commercial Code.

Subordination Agreements.

No statutory provisions but regarded as valid. See category 3 Business Regulation and Commerce, topic 3.09 Commercial Code.

Assignment of Notes Secured.

No statutory provisions but generally allowed.

Requisites of Instrument.

Security agreement must sufficiently identify personal property to be secured. (NDCC 41-09-08). Financing statement in general use is in form section below.

Execution of Instrument.

Unless electronically filed, financing statement must be signed by debtor and secured parties. (NDCC 41-09-73).

Filing or Recording.

Depending on type of personal property to be secured, financing statement is filed either in County Recorder's office or Office of North Dakota Secretary of State. (NDCC 41-09-72).

Refiling or Extension.

Financing statement may be amended. (NDCC 41-09-83). Financing statement may be extended. (NDCC 41-09-86).

Release, Satisfaction and Discharge.

Financing statement can be terminated by filing amendment. (NDCC 41-09-83).

Foreclosure by Court Proceedings.

Lien on personal property may be foreclosed by action in district court. (NDCC 32-20-01). If plaintiff is not in possession of property, judge of court at any time before judgment may issue warrant to sheriff to seize and safely keep property to abide final judgment. Warrant may be issued upon filing of verified complaint in foreclosure or affidavit stating that affiant has good reason to believe that seizure is necessary to prevent removal, destruction or concealment of property, and filing of undertaking, with sufficient surety, guaranteeing defendant against all costs and damages which he may sustain if judgment is not obtained, which must be at least amount claimed in complaint, but in no case less than $100. (NDCC 32-20-02, 04). Judgment must find amount due on lien and direct sale of property to satisfy lien; sale held in same manner as sale of personal property under execution. (NDCC 32-20-05).

Sale by Mortgagee.

Sheriff must give notice of sale (except for sale of crops or perishable property) by publishing notice once per week for two consecutive weeks in county's official newspaper. (NDCC 28-23-01). All sales must be made at public auction held between 9 a.m. and 4 p.m. (NDCC 28-23-07).

Redemption.

No statutory provisions.

Foreign Mortgages.

Foreign security interests are generally governed by NDCC c. 41-09, except to extent statute of another state, country or governmental unit expressly governs creation, perfection, priority, or enforcement of security interest created by state, country or governmental unit. (NDCC 41-09-09).

Taxation.

No statutory provisions.

Forms

Financing Statement form in general use is a two page form. Submit original and one copy to any county recorder's office or the Secretary of State. Filing date, number, time and office are inserted on form by filing officer and returned to secured party.

Each page is 8½” x 11” and has space for following information:

1. Debtor(s) (Last Name first) and mailing address and SSN or EIN:

2. Additional information regarding organization of debtor, to include type of organization, jurisdiction of organization, organizational ID number, if any;

3. Secured Party(ies) Name, address, phone number and SSN or Federal ID #:

4. For Filing Officer (Date, Time, Number and Filing office):

5. This Financing Statement covers the following types (or items) of property: goods to become fixtures, timber, minerals or the like (including oil and gas), and accounts resulting from sale of minerals at well head or mine head;

6. Name, address, phone numbers, SSN or Federal ID # of Assignee of Secured Party;

7. Description of collateral;

8. Products of collateral are also covered: Yes or No;

9. Legal descriptions;

10. Name of record owner of real estate (if debtor does not have an interest of record);

11. Recording party contact person and phone number;

12. Signature of Debtor not required unless form to be filed in farm products central notice.

Statements of Termination, Assignment, Continuation, Release, Subordination, Amendment, or Update are also on a two page form with space for following information:

1. This statement refers to Original Financing Statement, File No.:

   Date Filed:

2. Current Debtor name and SSN or Federal ID #;

3. Requested Change:

TERMINATION UCC and/or CNS. The Secured Party no longer claims a security interest under the financing statement bearing the filing number listed above. No fee is required for filing a termination statement.

ASSIGNMENT Partial or Full. The Secured Party listed below assigns to the Assignee whose name, address, telephone number and SSN/TIN is listed, Secured Party’s rights under the financing statement bearing the file number listed above in the described collateral. If a partial assignment, described Collateral assigned below. If a full assignment indicate “ALL COLLATERAL” below.

CONTINUATION UCC and/or CNS. The original financing statement bearing the file number listed above is continued for an additional five years. (Effectively only if submitted within six months prior to expiration date).

RELEASE   Secured party releases the collateral described below.

SUBORDINATION   The Secured Party subordinates its priority position in the collateral described as provided in the subordination agreement referred to below.

AMENDMENT   Financing statement bearing the file number listed above is amended as described below.

UPDATE   Financing statement bearing the file number listed above is updated as described below.

4. List Assignment information, collateral to be Released, Subordination information, Amendment description and other information;

5. Additional information regarding organization debtor: type of organization, jurisdiction of organization, and organizational ID, if any;

6. Name of Secured Party of record authorizing this Amendment;

7. Signature of debtor and Secured Party is not required unless for CNS filings.

Security Agreement.

Forms of security agreements employed in other states generally will be adequate for use in North Dakota provided minimum standards of NDCC c. 41-09 are met.

Caveat: North Dakota has adopted a Retail Installment Sales Act (NDCC c. 51-13) which may be applicable to financing arrangement contemplated. See category 3 Business Regulation and Commerce, topic 3.23 Sales, subhead Conditional Sales, catchline Retail Installment Sales Act.

20.02 [RESERVED]

20.03 MORTGAGES OF PERSONAL PROPERTY:

See topic 20.01 Chattel Mortgages; category 3 Business Regulation and Commerce, topic 3.09 Commercial Code.

20.04 MORTGAGES OF REAL PROPERTY:

Mortgage is contract by which specific property is hypothecated for performance of an act without necessity of change of possession. (NDCC 35-03-01.1). Lien of a mortgage is special, unless otherwise agreed, and is independent of possession. Every transfer of an interest in property, other than in trust, made as security, is a mortgage. Mortgage is lien upon property mortgaged in hands of everyone claiming under mortgagor subsequent to its execution, except purchasers and encumbrancers in good faith without notice and for value. Mortgage does not entitle mortgagee to possession, but after execution of mortgage, mortgagor may agree to change of possession without new consideration. After-acquired title inures to benefit of mortgagee. Any interest in property which is capable of being transferred may be mortgaged. (NDCC 35-03-01.2).

The lien theory prevails.

Execution.

A mortgage of real property can be created, renewed or extended only by writing, executed with the formalities required in the case of a grant of real property. (NDCC 35-03-01. See category 21 Property, topic 21.06 Deeds.) Seal and witnesses are not necessary; acknowledgment is not necessary to validity of mortgage (except mortgage of homestead), but is necessary to entitle mortgage to be recorded. (NDCC 35-03-02). In addition to requirements of signature and acknowledgment, no mortgage may be recorded unless it contains postoffice address of mortgagee. (NDCC 35-03-04). Spouse must join in mortgage on homestead. (NDCC 47-18-05). See also category 14 Family, topic 14.09 Husband and Wife.

Homestead.

Mortgages on homestead executed after June 30, 1991, except purchase money mortgages and mortgages on property of 40 acres or less, must contain following conspicuously printed statement which must be separately dated and signed by mortgagors: "I understand that homestead property is in many cases protected from the claims of creditors and exempt from judicial sale, and that by signing this contract, I voluntarily give up my right to this protection for this property with respect to claims based upon this contract." (NDCC 47-18-05.1).

Recording.

Lack of recording does not affect validity as between the parties, but if mortgage is not recorded, it is void against any subsequent purchaser or encumbrancer in good faith for valuable consideration, or against an attachment of judgment lien. Constructive notice to third persons is not given until instrument recorded. (NDCC 47-19-41). Recording must be in office of recorder where real estate is situated. Provision made for recording master mortgage. (NDCC 47-29-01). See also category 10 Documents and Records, topic 10.04 Records.

Recording Fees.

Fee charged for recording documents effecting title to real property is $10 for first page and $3 for each additional page (subject to some limited exceptions). (NDCC 11-18-05).

Taxes.

No taxes on mortgages or recording thereof.

Trust Deeds.

No statutory provisions; trust deed is considered a mortgage under statutory definition. (NDCC 35-03-01.1). Not generally used.

VA Loans.

Mortgages guaranteed by VA must have following statement signed at time of loan application:

"I understand that the veterans' administration may attempt to hold me liable for the guarantee it offers the lending institution on this mortgage. I understand that it may be alleged that I may remain liable for the amount guaranteed by the veterans' administration if this mortgage is foreclosed or if the property is sold by me without first obtaining an approved release of liability from the veterans' administration. I also understand that it may be alleged that North Dakota law governing deficiency judgments may not apply to the collection of loans guaranteed by the veterans' administration. By signing this statement, I am indicating that the contents of this statement have been explained to me by a loan officer representing the lending institution offering this mortgage loan." (NDCC 35-03-01.3).

Future Advances.

Mortgagee may advance funds or make additional optional loans secured by real estate on which mortgagee has mortgage lien, if mortgage so provides. Such advances or loans are deemed merged into mortgage and mortgagee shall retain lien of same status and priority as existing mortgage. (NDCC 35-01-05.2).

Priorities.

Mortgage given for the purchase price of real property has priority over all other liens created against the purchaser subject to the operation of the recording laws. (NDCC 35-03-10). The recording of a mortgage operates as notice to all subsequent purchasers and encumbrancers. (NDCC 35-03-07). Generally, mortgages rank in order of recording.

Subordination Agreements.

No statutory provisions. Generally considered valid.

Assignment.

Assignment of mortgage must contain post office address of assignee. (NDCC 35-03-04). Assignment of debt secured by mortgage carries security with it. (NDCC 35-03-01.2). Assignment of mortgage may be recorded in same manner as mortgage, and record thereof operates as notice to all persons subsequently deriving title to the mortgage from the assignor; but where mortgage secures note, bond or other instrument, actual notice must be given to mortgagor or his successors, failing in which payments made to the person holding such instrument are valid. (NDCC 35-03-05.1).

Release.

No statutory provisions applicable to release of part of property covered, but such releases are in common use.

Satisfaction.

Recorded mortgage must be discharged upon the record by the recorder upon presentation of certificate of discharge signed by the mortgagee or successors in interest, which must be signed and acknowledged as conveyance of real property. Certificate must describe mortgage and real estate and state that same has been paid or otherwise satisfied and discharged. If signed by personal representative, certified copy of letters must also be recorded; if signed by attorney in fact, power of attorney must be recorded. (NDCC 35-03-16). Foreign executor, administrator or guardian may satisfy mortgage by recording authenticated copy of letters; heir or legatee of deceased nonresident mortgagee may satisfy mortgage by recording authenticated copy of judgment or decree of foreign court transferring ownership to such heir or legatee. (NDCC 35-01-25). When mortgage on real property has been satisfied, owner of mortgage must immediately upon demand of owner of property execute and record certificate of discharge duly acknowledged; owner of mortgage who refuses to do so is liable to owner of property for all damages and in addition penalty of $100. (NDCC 35-01-27). Mortgages may be released by officer or agent of title insurance company. (NDCC 35-03-19).

Foreclosure.

Mortgage may be foreclosed by action in district court. (NDCC c. 32-19). Foreclosure may not be commenced unless statutory written notice before foreclosure is served at least 30 days prior to commencing action, by registered mail on record title owner. (NDCC 32-19-20). Notice must give description of real estate including street address, date and amount of mortgage, amount due for principal, interest and taxes, and statement that if amount is not paid within 30 days proceedings will be commenced to foreclose (NDCC 32-19-21) and shall contain statement as to time for redemption. Period of redemption is generally 60 days after sheriff's sale. (NDCC 32-19-18). If default is cured during 30-day period after service of notice, mortgage is reinstated. (NDCC 32-19-28). Foreclosure by exercise of power of sale is abolished except on mortgages held by state or any agency. (NDCC 35-22-01). If property is abandoned, mortgagee can petition court for order giving immediate possession. (NDCC 32-19-19). See subhead Agriculture Foreclosure.

Agriculture Foreclosure.

Foreclosure on agricultural real estate follows same procedure as other foreclosures with following exceptions: deficiency judgment must be in separate action to determine fair value; action for deficiency must be brought within 90 days after sheriff's sale; execution to collect cannot be issued more than three years after judgment. (NDCC 32-19-06.2).

Redemption period on agricultural land is one year after filing summons and complaint but not less than 60 days after sheriff's sale. (NDCC 32-19-18).

Trustee.

On application of mortgagee on any action for foreclosure of mortgage upon commercial building including apartments of two or more units, court, upon ten days' notice to mortgagor, may upon good cause being shown, appoint a trustee to take possession of premises. Any person other than mortgagee, its agents or employees, may act as trustee, if court deems them qualified. Trustee shall take possession of premises, pay to extent funds are available, all utilities, taxes, and insurance, receive rentals from tenants, remove tenants for nonpayment of rent, or for other cause, rent premises. Appointment terminates on expiration of period of redemption, redemption of premises by mortgagor, voluntary dismissal of foreclosure action, or removal by court. (NDCC c. 32-19.2).

Sales.

All sales under judgment of foreclosure must be made by the sheriff of county in which premises, or some part, is situated. Sale must be made upon same notice and in same manner prescribed by law for sale of real property upon execution. (NDCC 32-19-08). Possession may not be delivered to purchaser until expiration of period of redemption, and debtor or owner of premises is entitled to possession, rents, use and benefit of property sold during such period. (NDCC 32-19-06). Officer gives purchaser certificate of sale subject to redemption. (NDCC 32-19-09). Proceeds of sale must be applied to payment of costs, expenses and debts secured by mortgage, and surplus if any is paid to owner of land. (NDCC 32-19-10; 11).

Deficiency Judgments.

The court has power to ascertain amount due on mortgage. No action may be brought on debt secured by first mortgage on residential property but holder of indebtedness secured by second mortgage executed after Aug. 1, 1993 may waive foreclosure and sue on note (NDCC 32-19-07); no deficiency judgment may be established in action to foreclose mortgage on residential property with four or fewer units of up to 40 acres containing homestead. (NDCC 32-19-03). Deficiency judgment may be sought on commercial property on mortgages executed after Aug. 1, 1993, based on appraisal. (NDCC 32-19-06.1).

Redemption.

Redemption from foreclosure sale may be made by: (1) The judgment debtor or his successors in interest; and (2) a creditor having a lien by judgment, mortgage or otherwise on the property sold, or on some part thereof, subsequent to that on which the property was sold. Persons mentioned in the second class are termed redemptioners. (NDCC 28-24-01).

Time Allowed for Redemption.

Judgment debtor or redemptioner may redeem from purchaser at sheriff's sale in foreclosure proceeding during applicable period of redemption. (NDCC 28-24-02). Period of redemption usually expires 60 days after sheriff's sale, except for agricultural land. (NDCC 32-19-18). If property is redeemed by redemptioner, another redemptioner, even after expiration of redemption period, may redeem from last redemption within 60 days after such last redemption. (NDCC 28-24-04).

Amount to be paid to purchaser to redeem is amount of purchase price with interest at rate provided in original instrument upon which judgment is based, together with amount of any insurance premiums, assessment, taxes, utilities or other items paid to protect title or premises which purchaser may have paid after purchase. (NDCC 28-24-02). If redemption is made by creditor having lien, he must also pay amount of any other lien which purchaser holds prior to that of redemptioner. (NDCC 28-24-02). Holder of certificate of sale may pay taxes and premiums on insurance policies covering improvements during redemption period, and cost thereof with interest are added to amount required to be paid upon redemption if written notice verified by affidavit is served on sheriff. (NDCC 28-24-07).

A subsequent redemptioner may redeem from the first redemptioner by paying the amount advanced by the latter, with interest and taxes, together with the amount which the first redemptioner has stated he is willing to allow on the claim under which he redeemed. (NDCC 28-24-03).

Effect of Redemption by Debtor.

If the debtor redeems, the effect of the sale is terminated, and he is restored to his estate, and upon making redemption, the officer must execute and deliver to him a certificate of redemption which must be recorded. (NDCC 28-24-06).

Proceedings by Redemptioner.

Redemptioner must give written notice of redemption to sheriff and record a duplicate in the office of county recorder; he must state the amount that he will credit on his claim against the debtor on making redemption. (NDCC 28-24-03).

Redemptioner must serve sheriff with certified copy of docket of judgment if he is a judgment creditor, or if he redeems upon a mortgage or other lien, a note of the record thereof certified by county recorder, copy of any assignment necessary to establish his claim, verified by affidavit, and an affidavit showing the amount then actually due on his lien. (NDCC 28-24-05).

Court may restrain the commission of waste on property during redemption period. (NDCC 28-24-12).

If property is not redeemed, sheriff must deliver deed of conveyance to purchaser or to creditor making redemption from him on expiration of redemption period. (NDCC 28-24-13).

Form of Mortgage.

The standard form is as follows (NDCC 35-03-05):

Form

This indenture, made this . . . . day of . . . . A.D. 20. . . . between . . . . whose postoffice address is . . . ., of the county of . . . . and State of North Dakota, part . . . . of the first part, and . . . ., whose postoffice address is . . . ., of the county of . . . . and State of North Dakota, party of the second part:

Witnesseth, that the said part . . . . of the first part, for and in consideration of the sum of . . . . dollars to . . . . in hand paid by the said party of the second part, the receipt whereof is hereby acknowledged, do . . . . by these presents grant, bargain, sell and convey to the said party of the second part, ... heirs, executors, and administrators, successors and assigns, forever, all the following described real estate in the county of . . . . and State of North Dakota, described as follows, to-wit: . . . . . .

To have and to hold the same, together with all the hereditaments and appurtenances thereunto belonging or in any wise appertaining, unto the said party of the second part, ... heirs, executors, administrators, successors and assigns, forever.

And the said part . . . . of the first part, do . . . . covenant with the said party of the second part, ... heirs, executors, administrators, successors and assigns, as follows: That . . . . he . . . . ha . . . . good right to convey the same, that the same are free from all encumbrances: (exceptions, if any) . . . . and that the said party of the second part, ... heirs, executors, administrators, successors and assigns, shall quietly enjoy and possess the same, and that the said part . . . . of the first part will warrant and defend the title to the same against all lawful claims, hereby relinquishing and conveying all right of homestead and all contingent claims and rights whatsoever in and to the said premises.

Provided, nevertheless, that if the said part . . . . of the first part, ... heirs, executors or administrators, shall well and truly pay, or cause to be paid, to the said party of the second part, ... heirs, executors, administrators, successors or assigns, the sum of . . . . dollars and interest according to the conditions of . . . . note . . . . of even date herewith, as follows . . . . payable at the . . . . with interest from date until maturity, at the rate of . . . . per cent, per annum, payable . . . . annually and shall also keep and perform all and singular the covenants and agreements herein contained, then this deed to be null and void, and the premises hereby conveyed to be released at the cost of the said part . . . . of the first part; otherwise to remain in full force and effect.

And the said part . . . . of the first part do . . . . covenant and agree with the said party of the second part, ... heirs, executors, administrators, successors and assigns, to pay the said sum of money and interest thereon as above specified; to pay as a part of the debt hereby secured, in case of each or any foreclosure or commencement of foreclosure of this mortgage, all costs and expenses and statutory attorney's fees in addition to all sums and costs allowed in that behalf by law; to permit no waste, and to do or permit to be done, to said premises, nothing that may in any manner impair or weaken the security under this mortgage; to pay all taxes or assessments that may be assessed against or be a lien on said premises, or any part thereof, or upon this mortgage or note . . . . or the legal holder thereof, before the same shall become delinquent; to keep the buildings on said premises insured for . . . . dollars, in companies acceptable, with loss payable to, the Mortgagee or . . . . assigns; and in case of failure so to pay said taxes or assessments, or any of the agreements hereunder, or in case there exists any claim, lien or encumbrance upon said premises, which is prior to this mortgage, the said party of the second part, ... heirs, executors, administrators, successors or assigns may at . . . . option, pay and discharge such taxes or other obligation and the sum or sums of money which may so be paid, with interest from the time of payment at the same rate as said principal sum, shall be deemed and are hereby declared to be a part of the debt secured by this mortgage and shall be immediately due and payable. It is further agreed and understood that this mortgage shall also cover any renewal note for the above described indebtedness or any portion thereof.

But if default shall be made in the payment of said sum of money, or interest, or the taxes, or any part thereof, at the time and in the manner hereinbefore or hereinafter specified for the payment thereof, the said part . . . . of the first part, in such cases do . . . . hereby authorize and fully empower the said party of the second part, ... heirs, executors, administrators, successors or assigns, to sell the said hereby granted premises and convey the same to the purchaser, in fee simple agreeably to the statute in such case made and provided, and out of the moneys arising from such sale to retain the principal and interest which shall then be due on said note . . . . and all taxes upon said lands, together with all costs and charges, and statutory attorney's fees, and pay the overplus if any to the said part . . . . of the first part, ... heirs, executors, administrators or assigns. And if default be made by the part . . . . of the first part in any of the foregoing provisions it shall be lawful for the party of the second part, ... heirs, executors, administrators, successors or assigns or . . . . attorney to declare the whole sum above specified to be due.

In testimony whereof, the said part . . . . of the first part has . . . . hereunto set . . . . hand the day and year first above written.

Signed and delivered in the presence of: (two witnesses).

(Witnesses) (Signatures)

(Acknowledgment)

Validating Act.

Deeds, leases, mortgages, assignments and satisfactions made in good faith and filed or recorded in proper counties for a period of five years or more, are valid for all purposes. (NDCC 1-04-01). Failure to show P.O. address prior to Jan. 1, 1955, validated. (NDCC 1-04-22).

21 PROPERTY

21.01 ABSENTEES:

If heir, devisee or claimant cannot be found, personal representative shall distribute share of missing person to his or her conservator, if any, otherwise to unclaimed property administrator under NDCC c. 47-30.1. (NDCC 30.1-20-14).

Care of Property.

Uniform Unclaimed Property Act adopted. (NDCC c. 47-30.1).

Escheat.

Uniform Unclaimed Property Act adopted. (NDCC 47-30.1).

Distribution, redemption or payment based on security of domestic cooperatives unclaimed after six years may be forfeited to co-op as contributed capital by action of board of directors and notice to last known address of owner. (NDCC 10-15-34.1).

See also category 13 Estates and Trusts, topic Descent and Distribution, subhead Escheat; and category 3 Business Regulation and Commerce, topic 3.01 Banks and Banking, subhead Unclaimed Deposits.

Process Agent.

See category 23 Transportation, topic 23.01 Motor Vehicles.

21.02 ADVERSE POSSESSION:

Occupancy for any period confers a title sufficient against all except the state and those who have title by prescription, accession, transfer, will, or succession. (NDCC 47-06-01).

Character of Possession.

To constitute adverse possession under a claim of title founded on a written instrument, or on a judgment or decree, land is deemed to be possessed and occupied if land is: (1) Usually cultivated or improved; (2) protected by a substantial enclosure; (3) although not enclosed, used for supply of fuel, or fencing timber, for the purpose of husbandry, or ordinary use of occupant. (NDCC 28-01-09).

Where a known farm or single lot is partly improved, the portion left uncleared or unenclosed is deemed occupied the same as the part that is improved or cultivated, but where the premises consist of two or more contiguous lots, possession of one is not deemed possession of any other. (NDCC 28-01-09).

Where occupant, or those under whom he claims, enters into possession of the premises under a claim of title exclusive of any other right, founding such claim on a written instrument as being a conveyance, or upon a judgment or decree of a competent court, and there has been a continued occupation and possession of the premises, or some part thereof, under such claim for 20 years, the premises are deemed to be held adversely. (NDCC 28-01-08).

Where title is not claimed under a written instrument or decree, land is deemed to be held adversely only if it is (1) protected by a substantial enclosure or (2) usually cultivated and improved. (NDCC 28-01-11).

Possession of tenant is deemed to be possession by landlord until the expiration of 20 years from the termination of tenancy, or where there has been no written lease, until the expiration of 20 years from the date of the last payment of rent. (NDCC 28-01-12).

Duration of Possession.

Valid title to real property is vested in any person who shall have been in actual, open, adverse, and undisputed possession of land under such title for period of ten years if person has also paid all taxes and assessments legally levied thereon. (NDCC 47-06-03).

No action for recovery of real property, or possession thereof, may be maintained unless plaintiff, his ancestors, predecessor, or grantor was seized or possessed of the premises within 20 years before the commencement of such action. (NDCC 28-01-04).

Easements.

Easement may be acquired by adverse possession for same periods of time. (NDCC 47-06-02, -03).

Disabilities.

Period of minority, insanity, or imprisonment for crime for a term less than life, is not a part of the time limited for the commencement of an action, or the interposing of a defense based upon adverse possession, but the time so limited cannot be extended more than ten years after the disability ceases, or after the death of the person so disabled. (NDCC 28-01-14).

21.03–21.04 [RESERVED]

21.05 CURTESY:

No estate by curtesy. (NDCC 14-07-09).

21.06 DEEDS:

See topic Real Property for types of estates.

Execution.

An estate in real property, other than an estate at will or for a term not exceeding one year, can be transferred only by operation of law or by an instrument in writing, subscribed by the party disposing of the same, or by his agent, duly authorized in writing, and must be acknowledged in order to record it in the county recorder's office where land is situated. (NDCC 47-10-01). Deeds do not require seals or witnesses. (NDCC 47-10-05). Spouse must join in conveyance of homestead; otherwise not necessary. (NDCC 47-18-05). See also categories 8 Debtor and Creditor, topic Homesteads; Family, topic Husband and Wife.

Recording.

In order to entitle a deed to be recorded, it must contain post-office address and any known street address if within boundaries of city of each grantee named therein (NDCC 47-10-07; NDCC 47-19-05), must be duly acknowledged or proved by a subscribing witness (NDCC 47-10-05) and all delinquent taxes and assessments on property must be paid (NDCC 11-18-02). Grantee must certify on face of deed one of following: Report of full consideration paid for property conveyed has been filed with State Board of Equalization or county recorder; statement of full consideration paid for property conveyed; statement designating one of following exemptions applicable to transaction: Property owned or used by public utilities; property classified as personal property; sale where grantor and grantee are same family or corporate affiliate, if known; sale which resulted as settlement of estate; sales to or from government or governmental agency; forced sales, mortgage foreclosures, and tax sales; sales to or from religious, charitable, or nonprofit organizations; sales where there is indicated change of use by new owners; transfer of ownership of property for which is given quitclaim deed; sales of property not assessable by law; agricultural lands of less than 80 acres; transfers pursuant to judgment. (NDCC 11-18-02.2). Deed by metes and bounds description must either identify who prepared description or that description came from previously recorded document. (NDCC 47-19-03.1).

Recording Fees.

Fee charged for recording documents effecting title to real property is $10 for first page and $3 for each additional page (subject to some limited exceptions). (NDCC 11-18-05).

Covenants.

From the use of the word "grant" in a conveyance, it is presumed that a fee simple title is intended to pass (NDCC 47-10-13) and the grantor for himself and his heirs covenants that he has not conveyed the same estate to any other, and that he has not given or suffered any lien or encumbrance to attach thereto (NDCC 47-10-19).

Reservation of Coal Rights.

In all deeds, grants or conveyances of title to surface of real property executed on or after July 1, 1983, in which all or any portion of minerals are reserved or excepted, all minerals, of any nature whatsoever, shall be construed to be reserved or excepted except those minerals specifically excluded by name and their compounds or byproducts. (NDCC 47-10-25).

Form.

A grant of an estate in real property may be made in substance as follows (NDCC 47-10-06):

Form

This grant, made this . . . . day of . . . . in the year 20. . . ., between A. B., of . . . ., County of . . . ., State of . . . ., grantor, and C. D., whose P.O. address is . . . ., County of . . . ., State of . . . ., grantee, witnesseth: That the said grantor hereby grants to the grantee, in consideration of . . . . Dollars, now received, the real property, situate in . . . . County and bounded or described as follows: (description).

Witness the hand of the first party, A. B.

. . . .

However, forms of deeds customarily used contain covenants of warranty.

Warranty deed may be in following form:

THIS INDENTURE, Made this . . . . . . day of . . . . . ., 20. . . ., between . . . . . . grantor, whether one or more, and . . . . . . grantee, whether one or more, whose post office address is . . . .

WITNESSETH, For and in consideration of the sum of . . . . . . Dollars, grantor does hereby GRANT to the grantee all of the following real property lying and being in the County of . . . . . ., State of North Dakota, and described as follows, to wit: . . . .

And the grantor for himself, his heirs, executors and administrators, does covenant with the grantee that he is well seized in fee of the land and premises aforesaid and has good right to sell and convey the same in manner and form aforesaid; that the same are free from all encumbrances, except installments of special assessments or assessments for special improvements which have not been certified to the County Treasurer for collection, ... and the above granted lands and premises in the quiet and peaceable possession of the grantee, against all persons lawfully claiming or to claim the whole or any part thereof, the grantor will warrant and defend.

WITNESS, The hand of the grantor:

(Acknowledgment)

Where it is intended to convey to grantees as joint tenants language indicating that intent is necessary and should provide that property is being conveyed to grantees as joint tenants, and not as tenants in common.

Quitclaim deed may be in following form:

THIS INDENTURE, Made this . . . . . . day of . . . . . . 20. . . ., between . . . . . . grantor, whether one or more, and . . . . . . grantee, whether one or more, whose post office address is . . . .

For and in consideration of the sum of . . . . . . Dollars, grantor does hereby QUIT CLAIM to the grantee all of the following real property lying and being in the County of . . . . . ., and State of North Dakota, and described as follows, to wit: . . . .

WITNESS, The hand of the grantor:

(Acknowledgment)

Validating Act.

All deeds affecting title to real property, made in good faith and filed or recorded in the counties for a period of five years or more, are valid for all purposes. (NDCC 1-04-01). Failure to show P. O. address prior to Jan. 1, 1955, validated. (NDCC 1-04-22).

Taxes on Deeds.

No statutory provisions.

21.07 [RESERVED]

21.08 DOWER:

No dower. (NDCC 14-07-09).

21.09 ESCHEAT:

See topic 21.01 Absentees, subhead Escheat; categories 3 Business Regulation and Commerce, topic Banks and Banking, subhead Unclaimed Deposits; Estates and Trusts, topic Descent and Distribution, subhead Escheat.

21.10 LANDLORD AND TENANT:

Leasing is a contract by which one gives to another temporary possession and use of real property for reward, and the latter agrees to return such possession to the former at a future time. (NDCC 47-16-01).

Kinds of Tenancies.

Tenancies are classified as estates for years, estates of inheritance or perpetual estates, estates for life, or estates at will. (NDCC 47-04-02).

Leases.

Lease for longer period than one year must be in writing, subscribed by party to be charged or by his agent also authorized in writing. (NDCC 9-06-04). Leases are valid between parties without acknowledgment, but may not be recorded unless acknowledged. (NDCC 47-19-03). Seals are abolished and witnesses are not necessary. (NDCC 9-06-11).

Security Deposits.

Owner who requires security deposit shall deposit money in federally insured interest bearing savings or pass book account established for benefit of tenant. Deposit and interest accruing shall be paid to tenant upon termination of lease subject to owner’s right to apply deposit and accrued interest toward damages, unpaid rent and other repairs or cleaning which were lessee’s responsibility. Deposit cannot exceed one month’s rent, unless there will be pet on premises. Lessor liable for treble damages if security deposit withheld without reasonable justification. Deposits and interest shall be transferred to grantee of lessor interest. (NDCC 47-16-07.1).

Recording.

Unless possession is taken by tenant, lease must be recorded in the office of register of deeds where land is situated to protect against the rights of third persons without notice. (NDCC 47-19-07; 41).

Rent.

When there is no contract or usage to the contrary, the rent of agricultural and wild land is payable yearly at the end of each year; rent of lodgings at the end of each month; other rents quarterly at the end of each quarter from the time the lease takes effect. (NDCC 47-16-20). In all leases from month to month, the landlord may change the terms of the lease to take effect at the expiration of the month, upon giving notice in writing at least 30 days before the expiration of the month, and such changes become operative if the tenant continues to hold the premises after the expiration of the month. (NDCC 47-16-07).

Lien for Rent.

Landlords of mobile home lots have lien on unpaid rent. (NDCC 35-20-17). No other statutory provision, and there is no lien unless reserved in the contract.

Termination of Tenancy.

Tenancy at will, however created, may be terminated by giving notice of not less than one month. (NDCC 47-17-01). Such notice must be in writing and served on person in possession. (NDCC 47-17-02). Other tenancies terminate by the expiration of the term, by mutual consent of the parties, by the acquisition of a superior title by the lessee, or by destruction of the property leased. (NDCC 47-16-14). Lessor may terminate lease if lessee uses or permits use of property leased contrary to agreement of parties, or does not make such repairs as lessee is bound to make. (NDCC 47-16-16). Lessee may terminate if lessor does not fulfill lessor's obligations within reasonable time after request, or when greater part of property leased is destroyed from any cause other than negligence of lessee. (NDCC 47-16-17). Only when lease is terminable at pleasure of one of parties to contract is it terminated by death or incapacity of other. (NDCC 47-16-18). Lease may be terminated if entered into in reliance on fraudulent representation. (NDCC 47-16-07.4).

Holding Over.

If lessee of real property remains in possession after expiration of hiring and lessor accepts rents from lessee, parties are presumed to renew hiring on same terms and for same time not exceeding one year. (NDCC 47-16-06). If hiring is for term not specified by parties, it is deemed to be renewed for time required by law, unless one of parties gives notice to other of his intention to terminate same, at least as long before expiration thereof as term of hiring itself, not exceeding 30 days, except that in month to month tenancies, or unless parties have agreed in writing to longer notice period, either party may terminate with 30 days notice at any time and rent shall be payable to and including date of termination. If landlord changes terms of lease by notice, tenant may terminate lease at end of month by giving at least 25 days' notice. (NDCC 47-16-15). Lease of property other than lodgings, in places where there is no usage on subject, it is presumed to be for one year from its commencement unless otherwise expressed in lease. (NDCC 47-16-05).

Limitations on Leases.

No lease of agricultural land may be made for more than ten years, nor of city property for more than 99 years. (NDCC 47-16-02).

Farm Leases.

A farm lease containing a provision reserving title to crops produced until the conditions of the lease have been complied with must be filed in office of county recorder prior to July 1st in year in which crops are raised to render such reservation effective as to subsequent purchasers and encumbrances. (NDCC 47-16-03).

Dispossession.

Action for eviction to recover possession of real estate is maintainable in district court where lessee in person or by subtenant holds over after termination of his lease or expiration of term, fails to pay his rent for three days after same shall be due, fails to leave after expiration of period of redemption, wrongfully continues in possession upon entry of partition judgment, violates material term of lease, or tenant disturbs peace of other tenants. (NDCC 47-32-01). Three days written notice of intent to evict must be given before proceedings can be instituted.

(NDCC 47-32-02). Notice of eviction can be served as summons is served, or, if tenant cannot be found, then by Sheriff posting notice conspicuously on premises. (NDCC 47-32-02).

Distress.

No statutory provisions.

21.11–21.12 [RESERVED]

21.13 PERPETUITIES:

Accumulation of Income.

No statutory prohibition.

Uniform Statutory Rule Against Perpetuities adopted. (NDCC 47-02-27.1 to NDCC 42-02-27.5).

21.14 PERSONAL PROPERTY:

Tenancy by entirety not permitted.

21.15 POWERS OF ATTORNEY:

Attorneys in Fact.

Attorneys in fact may be authorized to sell or encumber real or personal property of principal. (NDCC 3-01-05). If transaction relates to real estate, power of attorney, duly signed and acknowledged, must be recorded in office of county recorder. Power of attorney to sell or encumber personal property must be executed in presence of two witnesses or acknowledged by qualified party if to be filed in office of County Recorder. (NDCC 47-19-50). No statutes regulating powers of attorney of members of armed services.

Revocation.

Power of Attorney remains effective on principal’s disability if power of attorney, in writing, contains words, “This power of attorney is not affected by subsequent disability or incapacity of the principal or by lapse of time,” or “This power of attorney becomes effective upon the disability or incapacity of the principal,” or similar words showing intent of principal that authority conferred is exercisable not withstanding principal’s subsequent disability or incapacity. If court subsequently appoints conservator, guardian of estate or other fiduciary charged with management of principal’s property, attorney in fact is accountable to him, as well as to principal, and fiduciary has power to revoke or amend power of attorney that principal would have had if not disabled or incapacitated. Principal may nominate, by power of attorney, conservator or guardian of principal’s estate or person. Death, disability or incompetence of principal does not revoke or terminate agency of attorney in fact without actual knowledge of death, disability or incompetence. (NDCC c. 30.1-30).

Uniform Durable Power of Attorney Act adopted. (NDCC 30.1-30).

Durable Power of Attorney For Health Care.

Every competent adult has right to make decisions relating to adult’s own health care, including decision to have health care provided, withheld, or withdrawn. (NDCC 23-06.5-01).

21.16 REAL PROPERTY:

Estates in real property are classified as follows: (1) Estates of inheritance, or perpetual estates; (2) estates for life; (3) estates for years; (4) estates at will. (NDCC 47-04-02).

Every estate of inheritance is a fee, and every such estate when not defeasible or conditional, is a fee simple or an absolute fee. (NDCC 47-04-04).

Estates tail are abolished; and every estate which would be at common law adjudged to be a fee tail is a fee simple, and if no valid remainder is limited thereon, is a fee simple absolute. (NDCC 47-04-05).

Estates of inheritance and for life are called estates of freehold; estates for years are chattels real; and estates at will are chattel interests, but are not liable as such to sale on execution. (NDCC 47-04-03).

An estate during the life of a third person, whether limited to heirs or otherwise, is a freehold. (NDCC 47-04-07).

Tenancies in common and joint tenancies are recognized. Tenancies by the entirety are not recognized. (NDCC 47-02-05).

The rule in Shelley's Case is abolished. (NDCC 47-04-20).

Reinstatement of Contract of Sale.

When a contract for the sale of land or an equity therein has been cancelled by the vendor by written notice, the purchaser or his assignee has six months if amount due at date of notice is more than 2/3 of original indebtedness or one year in any other case after service of notice of cancellation to cure default, and upon his curing default and paying cost of service of notice, contract is reinstated and has same force and effect as though no default had occurred. (NDCC 32-18-04). Contracts for sale of land may also be cancelled by court action.

Foreign Conveyances or Encumbrances.

No statute recognizing validity of conveyances made according to laws of foreign states which do not conform to local law.

Easements, Servitudes or Non-appurtenant Restrictions on Use of Real Property.

Easements, servitudes or non-appurtenant restrictions on use of real property which become binding after July 1, 1977 are subject to regulation, which shall be deemed part of any agreement for such interests in real property, whether or not contained therein. Same must be properly described and set out area of land covered. No increase in area subject to easements, servitudes or non-appurtenant restrictions shall be made except by negotiation between owner of easement, servitude or non-appurtenant restriction and owner of servient tenement. Duration of same must be specifically stated and in no case shall exceed 99 years. (NDCC 47-05-02.1).

Subdivided Lands Disposition Act.

Subdivision of land is regulated by county. (NDCC c. 11-33.2).

22 TAXATION

22.01 ADMINISTRATION:

State Tax Commissioner, Capitol Building, Bismarck, N. D. 58501, from whom all forms can be obtained, exercises general supervision of administration of tax laws. (NDCC 57-01-02).

Multistate Tax Compact adopted. (NDCC 57-59).

Penalties.

See topics detailing particular taxes.

Nonresident Public Contractors.

See category 8 Debtor and Creditor, topic 8.11 Liens, subhead Mechanics' Liens, catchline Public Works.

Federal Tax Liens.

See category 8 Debtor and Creditor, topic 8.11 Liens.

22.02 ALCOHOL, BEVERAGES AND TOBACCO TAXES:

Alcoholic beverages tax imposed by NDCC 5-02, NDCC 5-03.

Tobacco products tax imposed by NDCC 57-36.

22.03 BUSINESS TAXES:

Business and Corporation Privilege Tax.

Repealed for taxable years beginning on or after Jan. 1, 1981. (1979, c. 612).

Limited Liability Company Tax.

LLC formed under ND law and treated as partnership for federal income tax purposes, taxed as partnership. If not treated as partnership for federal income tax purposes, then treated as corporation for state tax purposes. (NDCC 57-38.1-17.2).

Corporate Taxes.

See categories 2 Business Organizations, topic Corporations; Business Regulation and Commerce, topic Banks and Banking; Insurance, topics Insurance Companies, Surety and Guaranty Companies.

Coal Taxes.

Privilege tax on coal conversion facility. (c. NDCC 57-60).

Coal severance tax imposed by c. NDCC 57-61.

Oil and Gas Taxes.

Oil extraction tax imposed by c. NDCC 57-51.1.

Oil and gas gross production tax imposed by c. NDCC 57-51.

22.03A CONTROLLED DANGEROUS SUBSTANCES TAX:

Marijuana and Controlled Substances Tax.

Controlled substance tax repealed by 1995 legislature.

22.04 [RESERVED]

22.05 EMPLOYMENT TAXES:

Unemployment compensation tax is imposed on employers at a variable rate to be redetermined annually by formula adopted Jan. 1, 2000, which may be reduced according to benefit experience of each employer. Tax applies to compensation paid each employee based on average annual wage and Federal Unemployment and Tax Act. No tax on employees. Law is administered by Job Service North Dakota, to which quarterly reports and payments must be made, and conforms generally to Federal Social Security Act. (NDCC 52-01 to NDCC 52-06). NDCC 52-02-05 repealed.

Penalties.

Interest at rate of 1½% per month from due date. Any employer who fails to submit timely contribution and wage report shall pay penalty equal to 5% of contributions due for each month until report is submitted. Penalty for first month of first delinquent report in calendar year may not be less than $100. Penalty for subsequent months may not exceed 20% of contributions due. Maximum penalty may not exceed $500 for any single report. If action is necessary to effect collection, employer bears cost of action. Owners of a corporation or LLC may be personally liable for delinquent contributions. (NDCC 52-04-11; 12).

22.06 [RESERVED]

22.07 ESTATE TAX:

Imposed on transfer of estate of every decedent, in trust or otherwise. (NDCC 57-37.1-02).

Administration.

State Tax Commissioner has complete jurisdiction over enforcement and collection of tax, and prescribes rules, regulations and forms. (NDCC 57-37.1-17).

Amount of Tax.

Amount equal to maximum tax credit allowable for state death taxes against federal estate tax imposed with respect to that part of decedent's estate which has taxable situs in this state. If only portion of decedent's estate has taxable situs in this state, maximum tax credit shall be determined by multiplying entire amount of credit allowable against federal estate tax for state death taxes by percentage which value of portion of decedent's estate which has taxable situs in this state bears to value of entire estate. Property valued under I.R.C. 2032A for Federal estate tax purposes has same value for N.D. estate tax. (NDCC 57-37.1-04).

Assessment of tax is made by State Tax Commissioner. (NDCC 57-37.1-19).

Payment.

It is duty of personal representative (NDCC 57-37.1-15) to pay tax, but beneficiaries also are personally liable therefor and tax remains a lien until paid or a bond for payment given, except as against personal property which has passed to a bona fide purchaser for value (NDCC 57-37.1-09). Tax payable to State Tax Commissioner. (NDCC 57-37.1-08).

Apportionment Against Inter Vivos Dispositions.

Unless will provides otherwise, tax shall be apportioned among all persons interested in estate in proportion that value of interest of each person interested bears to total value of interests of all persons interested in estate. (NDCC 30.1-20-16).

Waivers for transfer of corporate stock may be obtained from State Tax Commissioner, Bismarck.

Penalties and Due Date.

Taxes due at death of decedent. If not paid within 15 months thereafter interest accrues at 12% per annum. (NDCC 57-37.1-07). Penalty for false statement or report is Class A Misdemeanor. (NDCC 57-37.1-16).

Lien for Tax.

Beneficiaries to share burden of tax. (NDCC 57-37.1-09, 09.1).

Interstate Cooperation.

Multistate Tax Compact adopted. (NDCC 57-59).

22.07A EXCISE TAXES:

Motor Vehicles.

Excise tax of 5% of purchase price of any motor vehicle purchased or acquired in or outside of State of North Dakota for use on streets and highways of state and required to be registered in this state. Exempt to extent that purchase price includes motor vehicle or other personal property as trade-in or if transferred by way of gift between husband or wife or parent and child or brothers and sisters and inheritance and certain business reorganizations. Credit allowed for tax on sale or use by another state if similar credit allowed for tax imposed by this section. (NDCC 57-40.3). Motor vehicles acquired through purchase or gift by any nonprofit, county or local historical societies are exempt from excise tax. (NDCC 57-40.3-04).

22.08 GASOLINE AND SPECIAL FUELS TAXES:

Motor fuel tax imposed by c. NDCC 57-43.1. Tax refunded for fuel purchased for industrial or agricultural purposes. (NDCC 57-43.1-03).

Special fuels defined as all combustible gas and liquids for motor vehicles, other than motor vehicle fuels, aviation fuels, or antifreeze, tax imposed by c. NDCC 57-43.2 and c. NDCC 57-43.3.

Aviation fuel tax imposed by NDCC 57-43.3.

22.09 GIFT TAX:

None.

22.10 [RESERVED]

22.11 INCOME TAX:

Individual Income Tax.

Individuals, estates, and trusts are subject to tax on taxable income at rates found at c. NDCC 57-38-30.3. Adjustments to taxable income can be found at c. NDCC 57-38-01.2 and NDCC 57-38-30.3.

Nonresidents are taxed on income from property owned or business carried on in the state (NDCC 57-38-03), but their income from land contracts, mortgages, stocks, bonds, securities or sale of intangibles is not taxed (NDCC 57-38-05).

Employer must withhold for income taxes from employee. (NDCC 57-38-59).

Provision for payment of estimated income tax. (NDCC 57-38-62).

Return must be filed with State Tax Commissioner by Apr. 15.

Tax is personal debt of taxpayer (NDCC 57-38-44) and may be made lien on all his property if tax commissioner files notice of lien with Secretary of State. (NDCC 57-38-48). Income from personal or professional services performed in this state is taxable in ND regardless of residence of person except if person returns to his home outside of state at least once a month and his state taxes his income and allows similar exclusion for residents of ND. (NDCC 57-38-04).

Penalties.

Greater of 5% of amount due or $5, plus interest at rate established by NDCC 57-38-45. Fine of up to $1,000 for intent to evade requirements of chapter. Criminal penalty for violation of Act, Class A misdemeanor. (NDCC 57-38-45).

Corporation Income Tax.

Domestic corporations and foreign corporations doing business in state are subject to tax on taxable income from business conducted in state, subject to certain adjustments, at following rates: 2.6% on first $3,000; 4.1% on $3,000 to $8,000; 5.6% on $8,000 to $20,000; 6.4% on $20,000 to $30,000; 7% on $30,000 to $50,000. (NDCC 57-38-30). Return must be filed with, and tax paid to, State Tax Commissioner on or before 15th day of fourth month following close of calendar or fiscal year. (NDCC 57-38-34). Tax is payable on last day for filing return. Corporate tax credit for new industry allowed under certain conditions. (NDCC 57-38-30.1).

Penalties.

See subhead Individual Income Tax, catchline Penalties, supra.

As to other corporate taxes based on income, see categories 2 Business Organizations, topic Corporations; Business Regulation and Commerce, topic Banks and Banking; Insurance, topics Insurance Companies, Surety and Guaranty Companies.

22.12 INHERITANCE TAX:

None.

22.13–22.15 [RESERVED]

22.16 PROPERTY TAXES:

Taxable Property.

All property subject to taxation unless expressly exempted by law. (NDCC 57-02-03).

Exempt Property.

Property owned exclusively by the United States, state, county and municipalities, inalienable property of Indians; lands used for burying grounds or cemeteries; property owned by educational institutions; houses used for public worship, including dwelling of pastor, buildings and contents belonging to institutions of public charity, including religious or charitable hospitals, and all real estate not exceeding two acres in area owned by any religious organization, upon which there is building where church services are held, including residence of pastor and property used as parking lot by persons attending religious services (NDCC 57-02-08); property of agricultural fair associations, if organized as nonprofit corporation; real and personal property of lodges, chapters, farmers' clubs, commercial clubs, and like organizations, except that part not used exclusively for meetings or that used for conduct of business at profit; land used as public park or monument ground for military organizations; armories, national guard properties, farm buildings and improvements located on lands used for agricultural purposes only, and does not include any commercial, industrial, retail or wholesale buildings located on agricultural lands; property owned by corporation for purpose of promoting athletic and educational needs, and not organized for profit; moneys and credits, except moneyed capital which is so invested or used as to come into direct competition with money invested in bank stock; reduction in assessed valuation on residences, fixtures and improvements are allowed under certain circumstances for persons 65 years of age or older; paraplegic, disabled veteran, or any veteran who has been awarded specially adapted housing by Veterans Administration, up to $120,000 in value; permanently and totally disabled person permanently confined to use of wheelchair, or unremarried surviving spouse, disabled veteran honorably discharged or retired with 50% or greater disability, qualifying blind persons, other paraplegic persons; reduction or amount of reduction is dependent on income of recipient; homestead tax credit for real estate taxes and special assessments available for persons 65 years of age or older with limited income (NDCC 57-02-08; NDCC 57-02-08.1; NDCC 57-02-08.8); all personal property, other than railroads, required to be assessed by State Board of Equalization; and that of N. D. nonprofit corporations not otherwise exempt; installations, machinery and equipment of systems designed to utilize solar, wind or geothermal energy; fixtures, buildings, and improvements or co-operative or nonprofit corporation organized under state law to furnish potable water to its members and customers for use other than irrigation of agricultural land (NDCC 57-02-08; NDCC 57-02-08.1); minerals in earth that are subject at removal to oil and gas production tax or coal severance tax; up to $75,000 in value of single family residence, condominium or townhouse, exclusive of land on which it sits, for two years after commencement of construction provided governing body has approved exemption, taxes and assessments not delinquent and builder or first owner still owns property; used for athletic or recreational activities owned by political subdivision and leased to nonprofit corporation; building on state land used for student research; fixtures, buildings and improvements by licensed provider of childhood services. (NDCC 57-02-08).

Assessment.

Real property is listed and assessed every year with reference to its value on Feb. 1 of that year. (NDCC 57-02-11). All items of taxable property are assessed at their true and full value. (NDCC 57-02-27.1). True and full value of agricultural lands is defined as "capitalized average annual gross return" and is determined in accordance by formula. (NDCC 57-02-27.2). Assessed valuation on residential property is 9% of full and true value, agricultural property 10%, commercial, air carrier transportation and railroad property and centrally assessed property, 10%, with resulting amount known as taxable valuation. (NDCC 57-02-27). Assessor must list and value exempt real estate. (NDCC 57-02-14). All taxable tangible personal property shall be assessed in taxing district where it is located. Moneyed capital which is taxable shall be listed and assessed against owner at his place of business. (NDCC 57-02-15). Railroad property is assessed by State Board of Equalization at its annual meeting in August of each year. (NDCC 57-05-01). Public utilities are likewise assessed by State Board of Equalization. (NDCC 57-06-05). Oil and gas gross production tax of 5% of gross value at well levied in lieu of all ad valorem taxes. (c. NDCC 57-51).

Review of Assessment.

Governing body of each township or city constitutes Board of Equalization. City meets on

2d Tues. of Apr. of each year and township on 2d Mon. of Apr. of each year to review assessments. (NDCC 57-09-01; NDCC 57-11-01). Such boards have power to equalize and adjust all assessments made by assessor; Board of County Commissioners of each county constitutes a Board of Equalization in each county which meets within first ten days in June of each year, and it has power to make further adjustments. (NDCC 57-12). State Board of Equalization meets in Aug. of each year and equalizes assessments as between different counties of state. (NDCC 57-13-03).

Payment and Penalty.

Real and personal property taxes and special assessment become due on Jan. 1st following the year for which the taxes were levied. The first half of the real estate and personal property taxes and yearly installments of special assessment become delinquent after Mar. 1 following, and if not paid by that date are subject to penalty of 3%, and on May 1 additional penalty of 3%, and additional penalty of 3% on July 1, and additional penalty of 3% on Oct. 15; second installment becomes delinquent after Oct. 15, and if not paid on that date is subject to penalty of 6%. Interest at 12% assessed on unpaid property taxes after Jan. 1 of year following year in which taxes become due and payable. (NDCC 57-20-01). Taxes are payable to county treasurer of each county (NDCC 57-20-07); 5% discount is allowed on real estate taxes if paid in full on or before Feb. 15th of each year. (NDCC 57-20-09).

Collection.

County treasurer is collector of all taxes. (NDCC 57-20-07).

Where taxes are delinquent for one year, rents thereon may be ordered paid to county treasurer on application to district court, after notice and hearing. (NDCC 57-21-01). Sheriff may collect personal property taxes by distraint. (NDCC 57-22-04). Personal property taxes may be entered and extended as a lien on real estate after same become delinquent. (NDCC 57-22-22). Such taxes when extended have priority over all other liens placed of record subsequent to date of such entry. (NDCC 57-22-23). Personal property tax may be collected by court action. (NDCC 57-22-24). Tax sales on real property covered by c. NDCC 57-28.

Lien.

Personal property taxes shall be a lien on all personal property in the possession of the person assessed from and after the date the assessment is made. (NDCC 57-22-13). Taxes on real property are a perpetual, paramount lien against all persons except the United States and the state. (NDCC 57-02-40). As between vendor and purchaser taxes become a lien on real estate from and after Jan. 1st following the year for which such taxes were levied. (NDCC 57-02-41).

Sale.

When personal property is seized by sheriff under process of distraint, sheriff advertises and sells the same at public auction after ten days posted notice. (NDCC 57-22-04).

Redemption.

When land is not redeemed, court shall give notice of foreclosure of tax lien for all property for which two or more years have passed. (NDCC 57-28-01). Tax lien foreclosure date is Oct. 1 after service of notice of foreclosure. (NDCC 57-28-02). Such notice is given by registered mail (NDCC 57-28-04), and notice must be published (NDCC 57-28-06). After date of foreclosure, tax deed issues to county. (NDCC 57-28-09).

Person serving in armed forces or merchant marine omitted.

Real Estate Conveyance Tax.

None.

22.17 SALES AND USE TAXES:

Sales Tax imposed by c. NDCC 57-39.2.

Use Tax imposed by c. NDCC 57-40.2.

Farm Machinery Gross Receipts Tax.

3% tax on gross receipts from all retail sales, including leasing or renting, of farm machinery or irrigation equipment used exclusively for agricultural purposes. (NDCC 57-39.5-02).

Manufacturing Equipment Sales and Use Tax.

Gross receipts from sales of machinery or equipment used directly in manufacturing of tangible personal property for wholesale, retail or lease and machinery or equipment used directly in recycling tangible personal property (NDCC 57-39.2-04.3) are exempt from sales tax.

22.18 STAMP AND SEAL TAXES:

Stamp Tax.

No requirement for documentary stamps.

22.18A TAX LIENS:

Uniform Federal Tax Lien Registration Act.

Adopted. (c. NDCC 35-29).

23 TRANSPORTATION

23.01 MOTOR VEHICLES:

State Highway Commissioner Bismarck, N. D. 58501 has general supervisory powers. (NDCC 39-01).

Uniform Acts in force, with certain amendments are: Chemical Tests for Intoxication (NDCC 39-20-01); Motor Vehicle Registration (NDCC 39-02; NDCC 39-04); Operators' License (c. NDCC 39-06); Traffic Complaint and Summons (NDCC 29-05-31).

Vehicle license issued by Motor Vehicle Registrar, required annually, includes mobile home. (NDCC 39-18-03). Number plates must be displayed front and rear. (NDCC 39-04-11). Registration card must be carried in driver's compartment. (NDCC 39-04-55). Passenger motor vehicles owned and operated by nonresident military personnel stationed in this state need not be licensed, provided vehicle is registered in home state and current home state plates are displayed on vehicle. (NDCC 39-04-18[2][i]).

Operator's license issued by Highway Commissioner is required. (NDCC 39-06-01). Applicant must be 16 years of age (NDCC 39-06-03), except in restricted cases (NDCC 39-06-05 and NDCC 39-06-17). Operation, registration and use of all-terrain vehicles controlled by NDCC 39-29-01, et seq.

Nonresident Operator.

Nonresident operator, at least 16 years of age, who has in possession valid license from home state or country may operate motor vehicle in this state. (NDCC 39-06-02).

Titles and Sales.

Motor Vehicle Registrar issues certificate of title. (NDCC 39-05). On sale certificate must be endorsed to purchaser, who must present it to registration department and obtain new certificate. (NDCC 39-05-17). Body damage disclosure statement is required. (NDCC 39-05-17.2). Salvage certificates of title are required. (NDCC 39-05-20.2, NDCC 39-05-20.4).

Liens.

No security interest in a motor vehicle which is not inventory held for sale shall be valid against subsequent purchaser and encumbrancer of property in good faith and for value unless security interest is clearly indicated on certificate of title or unless certificate is in possession of secured party. (NDCC 35-01-05.1).

Identification Marks.

Class C felony to alter or remove serial numbers or knowingly to deal with car so altered. (NDCC 39-05-28).

Operation Prohibited.

By habitual drunkard or user of narcotic drugs; person under influence of narcotics or intoxicants; minor under 16, except minor of 14 may receive restricted license on written recommendation of parent or guardian; one physically or mentally incapable of driving; if driver's license is revoked; one adjudged mentally incompetent, feeble-minded or insane; four convictions in any two year period for violation of highway laws; one unable to furnish proof of financial responsibility. (NDCC 39-06-03). Administrative decision in another state of DUI where blood alcohol is .08% results in license being suspended pursuant to NDCC 39-20-04.1. (NDCC 39-06-32). Upon operator's resolution of underlying cause of suspension, suspension becomes part of operator's driving record but is not available to public. (NDCC 39-06-32).

Equipment Required.

Regulated by NDCC 39-21. See also infra, subhead Motor Vehicle Carriers.

Size and Weight Limits.

Regulated by NDCC 39-12.

Lights Required.

Regulated by NDCC 39-21.

Inspection.

Records of department are open to inspection. (NDCC 39-02-05).

Accidents.

Driver must stop, give assistance if necessary, and give driver's name and address, name of motor vehicle insurer and vehicle registration number. (NDCC 39-08-06). If accident results in injury or death or property damage to apparent extent of $1,000 or more, must report accident to local police department if accident occurs within municipality, otherwise to office of county sheriff or state highway patrol. Name of motor vehicle insurer and policy number must be furnished to investigating officer; if driver does not have required insurance information to furnish to officer, driver must supply said information to Driver's License Division within five days of accident. (NDCC 39-08-09). During period of physical incapacity, accident notice is not required from person incapacitated. Other vehicle occupants or vehicle owner are required to give notice of accident and insurance information not given by driver. (NDCC 39-08-11). Car involved in accident may be attached in action against owner under some circumstances. (NDCC 32-08.1-03).

Chemical Tests for Intoxication.

Use of highways declared to be implied consent to use of chemical tests to determine alcohol or drug content of blood. (NDCC 39-20-01). Suspension limits .08%, .002% if under 21 years. (NDCC 39-20-04.1).

Child Restraint Device Requirement.

Children under seven, unless meeting height and weight requirements, must be in child restraint system. (c. NDCC 39-21-41.2).

Seat belt use required by NDCC 39-21-41.4.

Liability of Owner.

Owner is liable for negligence of agents or servants acting within scope of their employment. (NDCC 3-03-09). Family purpose doctrine has been adopted.

Guests.

Guest Statute (NDCC 39-15) declared unconstitutional and repealed.

Financial Responsibility.

A “Financial Responsibility Act” has been adopted. (NDCC 39-16; NDCC 39-16.1).

Insurance is not required in first instance, but owner or driver of motor vehicle involved in accident resulting in injury to or death of person or property damage in excess of $1,000, must, if unable to show that automobile liability insurance policy or bond in authorized company with limits of at least $25,000 for any one person and at least $50,000 for any two or more persons killed or injured in any one accident and at least $25,000 for property damage was in force at time of accident, either furnish proof of financial ability to pay damages by depositing adequate security or surety bond with State Highway Commissioner (up to maximum of $25,000), or file proof with the Commissioner that all claims have been settled or that he has been finally adjudicated not to be liable. Failure to meet foregoing requirements within 90 days requires Commissioner to suspend license, or, if nonresident, the privilege of operating motor vehicle in state.

If any person fails within 30 days to satisfy any judgment arising out of ownership, maintenance or use of motor vehicle, Commissioner must suspend license or, if nonresident, the privilege of operating motor vehicle in state, until judgment satisfied and proof of financial responsibility for future accidents filed. Discharge in bankruptcy following judgment does not relieve judgment debtor from requirements of Act. (NDCC 39-16.1-03).

Whenever Commissioner revokes license of any person under any other law of state, or a nonresident’s operating privilege by reason of a conviction or forfeiture of bail, such license or privilege shall remain revoked until proof of financial responsibility is furnished. Required proof may be given by filing with Commissioner a certificate of insurance in authorized company, bond, or certificate of deposit of money or securities in sum of $25,000. Required proof is in all cases for period of at least three years. (NDCC 39-16.1-07, NDCC 39-16.1-08).

Act is not applicable to any motor vehicle owned and operated by U.S., State, or its subdivisions, or municipalities. (NDCC 39-16.1-22).

Insurance.

See subhead Financial Responsibility, supra. Driving or permitting one’s vehicle to be driven without liability insurance prohibited. (NDCC 39-08-20).

No-Fault Insurance.

N. D. Auto Accident Reparation Act. (NDCC 26.1-41). Maximum amount of basic no-fault benefits payable to any one person for all economic loss incurred from accidental bodily injury shall not exceed $30,000. (NDCC 26.1-41-01[2]). Stacking of basic no-fault benefits prohibited. (NDCC 26.1-41-14).

Owner of motor vehicle registered in this state, or owner of motor vehicle operated in this state, shall provide security for payment of basic no-fault benefits. (NDCC 26.1-41-02).

Basic no-fault benefits shall be paid, without regard to fault, for economic loss resulting from accidental bodily injury sustained by owner, any relative of owner while occupying any motor vehicle; or while pedestrian as result of being struck by motor vehicle other than secured vehicle; and by any other person struck by secured vehicle while pedestrian. (NDCC 26.1-41-06). Secured motor vehicle is one on which security required by no-fault statute was in effect at time of accident. (NDCC 26.1-41-01[19]).

If no-fault benefits have not been paid, action may be commenced not later than two years after injured person suffers loss and either knows or should have known that loss was caused by accident, or not later than four years after accident, whichever is earlier. (NDCC 26.1-41-19).

Uninsured and Underinsured Motorist Coverage.

All motor vehicle liability policies delivered or issued in State must contain uninsured motorist coverage. (NDCC 26.1-40-15.1 to 15.3). Stacking of uninsured and underinsured motorist benefits prohibited. (687 NW2d, 226).

Foreign vehicle registered in any other state or territory and displaying license plates required by laws of home state may operate without license or registration, provided that owners or operators are not residents of N. Dak. and are not employed in N. Dak. (NDCC 39-04-18).

Action against nonresident on account of damage claim arising out of use of motor vehicle in this state by such nonresident or his agent may be commenced by service of process on Director of D.O.T. Act applies to resident who is absent six months or more following accident. Act applies even if accident occurs on private property. (NDCC 39-01-11).

Direct actions not allowed against insurer by injured persons.

Motor Vehicle Taxes.

License fees on vehicles are in lieu of all other taxes. (NDCC 39-04-38). Included in each license fee is $1 to provide fund to pay unsatisfied judgments resulting from motor vehicle accidents (NDCC 26.1-23-03) and on vehicles initially registered with State, $2 for Abandoned Motor Vehicle Disposal Fund (NDCC 39-26-12).

Gasoline Tax.

See category 22 Taxation, topic 22.08 Gasoline and Special Fuels Taxes.

—Scope —

Revised for 2010 edition by **LexisNexis**.(R)

(Section [“§”] References, unless otherwise noted, are to Baldwin's and Page's Ohio Revised Code Annotated, as supplemented by current services and replacement volumes. “S.Ct. Prac.R.” followed by roman numeral refers to Rules of Practice of the Supreme Court of Ohio; “Civ.R.” followed by Arabic numeral refers to Ohio Rules of Civil Procedure; “App.R.” followed by Arabic numeral refers to Ohio Rules of Appellate Procedure; “Sup.R.” followed by Arabic numeral refers to Rules of Superintendence for the Courts of Ohio; “Crim.R.” followed by Arabic numeral refers to Ohio Rules of Criminal Procedure; “Ev.R.” followed by Arabic numeral refers to Ohio Rules of Evidence; “Gov.BarR.” followed by roman numeral refers to Supreme Court Rules for the Government of the Bar of Ohio; “Juv.R.” followed by Arabic numeral refers to Ohio Rules of Juvenile Procedure; “OSTE” followed by Arabic numeral refers to Ohio State Bar Association's Ohio Standards of Title Examination; “Adm. Code” followed by Arabic numeral refers to Ohio Administrative Code. See further category Courts and Legislature, topics Reports, Statutes.)

Note: General Assembly shall convene in first regular session on first Mon. of Jan. in odd-numbered year, or on succeeding day if first Mon. of Jan. is legal holiday, and in second regular session on same date of following year.This revision includes 2009 legislation adopted, approved by the Governor, and effective Oct. 2009 and prior.

1 INTRODUCTION

1.01 [RESERVED]

1.02 COMMON LAW:

Used to determine legislative intent. (R.C. §1.49). Common law offenses abrogated. (R.C. §2901.03). Rule of common law that statutes in derogation must be strictly construed, not applicable to remedial laws of state. (R.C. §1.11). Principles supplement rules of evidence, and rules of evidence construed to state principles unless change expressly intended. (Ev.R. 102). Privilege of witness, person, state or political subdivision governed by statute or common law. (Ev.R. 501). Common law marriage occurring in Ohio before Oct. 10, 1991 recognized. (R.C. §3105.12). Duties of real estate agent determined by common law unless specified in c. 4735 or modified by agreement. (R.C. §4735.52). Codified for elements of action for piercing corporate veil, abrogated for action and remedies for piercing corporate veil in asbestos claims. (R.C. §2307.98). Qualifying rights in trademarks or service marks, acquired in good faith at common law, recognized. (R.C. §1329.67). Common law defenses denied to employers not complying with workers' compensation law. (R.C. §4123.77). Legislation granting immunity to state and officers or employees (R.C. §3753.10), codifying riparian rights (R.C. §1501.30-.35), governing trusts (cc. 5801 to 5811), water pollution control legislation (c. 6111) and asbestos control legislation (c. 3752) do not abridge rights of action or remedies in equity or common law (R.C. §§5801.05, 6111.08, 3752.18).

1.031.00

1.01 GOVERNMENT AND LEGAL SYSTEM:

The State of Ohio is a constituent state of the United States of America. For further discussion of the U.S. federal system, see Introduction to the Federal Government of the United States at the beginning of this volume. A great many laws are promulgated by the federal government of the United States and are not reflected in the topics below. See the Introduction to this volume for references to the federal law topics covered.

Like all but one of the United States, Ohio has a common law legal system, with roots in English common law. For information on the courts and legislature of Ohio, see category 6 Courts and Legislature.

1.02 [RESERVED]

1.03 HOLIDAYS:

Legal holidays are: Jan. 1; 3d Mon. in Jan.; 3d Mon. in Feb.; day designated in 5 U.S.C. 6103, for commemoration of Memorial day, last Mon. in May; July 4; 1st Mon. in Sept.; 2d Mon. in Oct.; Nov. 11; 4th Thurs. in Nov.; Dec. 25; and any other day recommended by governor or president. (R.C. §1.14).

First Tues. after 1st Mon. in Nov., between hours of 12 o'clock noon, e.s.t., and 5:30 p.m., e.s.t. (R.C. §5.20).

Every Sat. from 12 o'clock noon to 12 o'clock midnight. (R.C. §5.30).

Any financial institution may close on any certain weekday designated by its board of directors after proper notice. Such weekday is a holiday for the purposes of the negotiable instruments. Any act required or permitted to be performed at or by such institution may be performed on next succeeding business day without liability or loss of rights resulting from such delay. (R.C. §5.41).

Holiday Falling on Sunday.

If any day designated as legal holiday falls on Sun., next succeeding day is legal holiday. (R.C. §1.14).

Holiday Falling on Saturday.

No statutory provision.

Legality of Transactions on Saturday, Sunday or Holiday.

Written contracts entered into Sat. afternoons (R.C. §5.30), Sundays, and other holidays, are valid if not prohibited by statute (2 O.S. 387).

Any financial institution may, at its option, outside of regular banking hours or on a day which is in whole or in part a holiday, pay, certify, or accept negotiable or non-negotiable instruments including a demand instrument dated on the holiday on which it is presented for payment, certification, or acceptance, and transact any other business which would be valid if done on a business day during regular banking hours. (R.C. §5.40).

1.04 OFFICE HOURS AND TIME ZONE:

Ohio is in the Eastern (GMT -05:00) time zone. Office hours are generally from 9 a.m. to 5 p.m.

2 BUSINESS ORGANIZATIONS

2.01 AGENCY:

Common law rule governs. See category 21 Property, topic 21.15 Powers of Attorney.

2.02 ASSOCIATIONS:

Organization of unincorporated associations is not regulated by statute, although specific provision is made for associations for transaction of insurance business. See category 16 Insurance, topic 16.01 Insurance Companies.

Formation.

Association may adopt constitution or articles of association and all necessary bylaws, rules and regulations in order to carry into effect purposes for which it was organized. (18 O.App. 66).

Rights and Powers.

Any unincorporated lodge or other subordinate body of any society or order, duly chartered by its grand lodge, may hold real estate for its own use and benefit. (R.C. §1715.43).

Liabilities.

To hold member liable for debts of association it must be shown that he consented to or acquiesced in creation thereof. (22 O.S. 159).

Actions.

Any unincorporated association may contract or sue on behalf of its members and, on its own behalf, be sued as entity under name by which it is commonly known and called. (R.C. §1745.01).

Dissolution.

Unincorporated association's constitution or bylaws govern dissolution.

Professional Associations.

Groups of persons authorized to practice as certified or licensed public accountants, architects, attorneys, chiropractors, dentists, mechanotherapists, pharmacists, optometrists, doctors of medicine and surgery, doctors of osteopathic medicine and surgery, doctors of podiatric medicine and surgery, professional engineers, psychologists, veterinarians, occupational therapists, registered or licensed nurses, physical therapists and practitioners of limited branches of medicine or surgery as specified in R.C. § 4731.15 may form professional association. (R.C. §1785.01). In general, c. 1701 applies to professional associations. (R.C. §1785.08).

Legal Professional Associations authorized. (Gov. R. III). See category 18 Legal Profession, topic 18.01 Attorneys and Counselors.

Shareholders.

Only those legally authorized to practice same profession as association may be issued, sold or transferred its stock. (R.C. §§1785.05, 1785.07). Shareholders must be reported to Secretary of State within 30 days of June 30 in each even-numbered year. (R.C. §1785.06).

2.03 CORPORATIONS:

General Corporation Law (R.C. §§1701.01-1701.99) (“Act”) governs corporations for profit. Non-Profit Corporation Law (R.C. §§1702.01-1702.60, 1702.99) is not included in this digest. See topic 2.06 Limited Liability Companies.

General Supervision.

Supervisory and regulatory powers over corporate organization and business are conferred upon Secretary of State, Business Services Division, 180 East Broad Street, Columbus, Ohio 43215. Telephone: (614) 466-3910 or (877) 767-3453. Website: http://www.sos.state.oh.us/SOS/businessServices.aspx. (R.C. §§111.16-111.17); Division of Securities, 77 South High Street, 22nd Floor, Columbus, Ohio 43215. Telephone: (614) 644-7381. Website: http://www.com.ohio.gov/secu/. (R.C. §1707.01 et seq.); and Department of Taxation, 30 East Broad Street, 22nd Floor, Columbus, Ohio 43215. Telephone: (800) 282-1780 (individual taxpayer assistance) or (888) 405-4039 (business taxpayer assistance). Website: http://tax.ohio.gov/. (R.C. §5703.01 et seq.).

Purposes.

With exception of corporations for which special provisions are made, corporation for profit may be formed under General Corporation Law for any lawful purpose or combination of purposes, including practice of profession. (R.C. §1701.03). See also topic 2.02 Associations, subhead Professional Associations.

Name must end with or include “Company,” “Co.,” “Corporation,” “Corp.,” “Incorporated,” or “Inc.” (R.C. §1701.05). Name must distinguish corporation from any other corporation, limited liability company, limited liability partnership, and limited partnership authorized to do business in Ohio, and from exclusive trade names unless written consent of such other entity, evidenced by writing signed by any authorized officer of other entity, is filed, or right to use name has been acquired from such other corporation by judicial sale or transfer and certified copy of court order or decree is filed. Name may not indicate or imply that corporation is connected with governmental agency. See also category 17 Intellectual Property, topic 17.01 Trademarks and Tradenames, subhead Trade Names, Fictitious Names.

Name Reservation.

Person wishing to reserve name for proposed corporation, or corporation intending to change its name, may apply in writing with Secretary of State for exclusive right to use specified name; fee $50. (R.C. §111.16[S][1]). Secretary of State must approve name if s/he finds that it is available for use. Applicant then has exclusive right to such name for 180 days beginning with day of approval. Right is transferable in writing. (R.C. §1701.05[E]).

Informal name clearance available by phone without fee.

Term of Corporate Existence.

Legal existence of corporation begins upon filing of articles or on later date specified in articles that is not more than 90 days after filing. Period of existence is perpetual unless articles otherwise provide. (R.C. §1701.04).

Incorporators.

One or more persons without regard to residence, domicile or state of incorporation may form corporation. (R.C. §1701.04).

Articles of Incorporation.

Incorporators must sign articles which must contain following: name of corporation; place in Ohio where principal office to be located; authorized number and par value of shares with par value and authorized number of shares without par value (except that articles of banking, safe deposit, trust, or insurance corporations cannot authorize shares without par value); express terms, if any, of shares, and if shares are classified: (a) Designation of each class, and authorized number and par value, if any, of shares of each class and (b) express terms of shares of each class; if corporation is to have initial stated capital, amount of that stated capital. Articles may set forth purpose of corporation; initial directors; any lawful provisions defining, limiting or regulating exercise of authority of corporation, incorporators, directors, officers, shareholders or holders of any class of shares; any provision which may be set forth in regulations; provision specifying period of existence of corporation if it is to be otherwise than perpetual; provision eliminating right of shareholders to vote cumulatively in election of directors; and any additional provision permitted by General Corporation Law. (R.C. §1701.04).

Filing of Articles of Incorporation.

Incorporators must file articles in office of Secretary of State. (R.C. §1701.04).

Incorporation Tax or Fee.

Secretary of State must charge and collect for filing and recording articles of incorporation, including designation of agent, on shares of capital stock, with or without par value: 10¢ per share on first 1,000 shares; 5¢ per share on next 9,000; 2¢ per share on next 40,000; 1¢ per share on next 50,000; ½¢ per share on next 400,000; ¼¢ per share on all shares in excess of 500,000; minimum fee, $125; maximum fee, $100,000. (R.C. §111.16). Fees may be paid by credit card. Any credit card number or expiration date of any credit card are not subject to disclosure under c. 149 of Revised Code. (R.C. §111.16).

Filing Fees.

See subhead Incorporation Tax or Fee, supra.

License to Do Business.

Upon submitting articles that comply with Act, Secretary of State endorses on articles approval, filing date and file number, and returns evidence of filing of articles to person who had filed articles. (R.C. §1701.04, 1701.08). See also topic 2.04 Foreign Corporations.

Organization.

If initial directors named in articles, initial directors must hold organizational meeting after incorporation to receive subscriptions, appoint officers, adopt regulations and carry on other business brought before meeting. If initial directors not named in articles, incorporator must either receive subscriptions or hold organizational meeting to elect directors, whereupon initial directors complete organization. (R.C. §1701.09, 1701.10).

Paid-in Capital Requirements.

If initial stated capital set forth in articles, corporation may not commence business until amount of specified stated capital has been paid in. Violation does not invalidate corporate transactions but makes incorporators and directors participating therein liable for debts up to amount of deficiency in paid-in stated capital until paid in. (R.C. §1701.12).

Amendment of Articles.

In general, articles may be amended in any respect if articles as amended set forth provisions required in, and only such provisions as may properly be in, original articles filed at time of adopting amendment except for eliminating right of shareholders to vote cumulatively or changing corporation into nonprofit corporation. (R.C. §1701.69). If initial directors are not named in articles, before subscriptions to shares have been received and before incorporators have elected directors, incorporators may adopt amendment to articles by writing signed by them. If initial directors named in articles or incorporators elect directors and have not received subscriptions, then before subscriptions to shares have been received, directors may adopt amendment to articles.

Directors may adopt amendment to articles in following cases: (1) in determining express terms of any class or series of shares before issuance of any shares of that class or series when and to extent authorized by articles, and when no shares of series created by such amendment have been issued directors may adopt amendment to reduce number of shares in series or eliminate from articles references to series and make other changes required by the elimination of series; (2) in respect of unissued or treasury shares, when and to extent authorized by articles, and have limited right to adopt amendment authorizing additional shares required for conversion or option rights; (3) whenever shares are redeemed or are surrendered to or acquired by corporation upon conversion, exchange, purchase or otherwise, directors may adopt amendment to reduce authorized number of shares by number so redeemed, surrendered, or acquired; (4) when all authorized shares of class have been redeemed, or surrendered to or acquired by corporation, or when change of issued or unissued shares has been made by amendment to articles, directors may adopt amendment to eliminate from articles all references to such shares and to make other appropriate changes; (5) after merger or consolidation, to eliminate provisions relating exclusively to such merger or consolidation; (6) to change name of corporation unless otherwise provided in articles; (7) to change place in Ohio where principal office of corporation is to be located; (8) when directors have declared dividend or distribution on any class of outstanding shares of corporation to be paid in shares of same class, directors may adopt amendment to proportionately increase authorized number of shares of class subject to certain conditions; (9) to change each issued and unissued authorized share of outstanding class into greater number of shares of that class and to proportionately increase authorized number of shares of that class subject to certain conditions; and (10) concurrently with adoption amendment described in (8) and (9) above, directors may adopt amendment decreasing par value of issued and unissued shares of particular class to extent necessary to prevent increase in aggregate par value of outstanding shares of class. It must be noted that (6)-(10) above do not apply to corporation with 100 or fewer shareholders unless corporation was created on or after May 16, 2002 or articles have been amended to make them applicable. (R.C. §1701.70). If amendment is adopted by directors pursuant to R.C. §1701.70, corporation shall send notice of amendment and copy or summary thereof, by mail, overnight delivery service, or any other means of communication authorized by shareholder to whom sent, to each shareholder of record of corporation as of date on which directors approved amendment. Notice shall be sent to shareholders within 20 days after filing of certificate of amendment with Secretary of State. (R.C. §1701.73). Shareholders may adopt, at meeting held for such purpose, any amendment by vote of two-thirds (or, if articles so provide, any other proportion not less than majority) of voting power on such proposal. Certain amendments also require approval by two-thirds, or other proportion not less than majority, of shareholders of each class entitled to vote thereon. (R.C. §1701.71). Articles may be amended to eliminate right of cumulative voting by shareholder action. (R.C. §1701.69[B][10]). In lieu of or in addition to amendments, amended articles, which in general must contain all statements required in original articles, can be adopted by same action or vote. (R.C. §1701.72). Certificate setting forth, among other things, resolution adopting amendment or amended articles, statement of manner of adoption, and, if adoption by incorporators or directors, statement of basis for such adoption must be filed in office of Secretary of State, and amendment then takes effect. (R.C. §1701.73).

Dissenting holders of preference shares may recover fair cash value of shares on written demand within ten days after taking of vote adopting amendment: (1) If shares are changed into shares of another class or terms of shares are changed, and shareholders of class are substantially prejudiced thereby and articles do not permit amendment; or (2) if rights to accrued undeclared cumulative dividends or distributions are discharged, adjusted or eliminated. Relief is also granted if corporation for profit is changed into nonprofit corporation, and, as to corporations incorporated before Jan. 1, 1971, to dissenting holders of shares of any class if corporate purposes are substantially changed and articles do not expressly provide therefor, or if provision is made for such change. (R.C. §§1701.74, .85).

For filing and recording certificate of amendment to or amended articles of incorporation, which do not increase corporation's authorized capital stock, fee is $50. (R.C. §111.16).

Increase or Decrease of Authorized Capital Shares.

Articles may be amended to increase or decrease number of authorized shares of any class. (R.C. §1701.69). See subhead Amendment of Articles, supra.

In case of increase in number of authorized shares, fee is charged similar to rates above described (see subhead Incorporation Tax or Fee, supra), less credit at said rates for number of shares previously authorized to be issued by corporation or by domestic corporations consolidation or merger of which is effected. (R.C. §111.16).

Fifty dollar fee is charged for increase in number of shares of foreign corporations represented in Ohio. (R.C. §111.16).

Regulations and By-Laws.

Regulations, consistent with Act and articles, may be adopted (1) if initial directors named in articles, directors may adopt regulations within 90 days after corporation formed, or (2) if initial directors not named in articles, shareholders may adopt at meeting by at least majority of voting power or written consent by at least 2/3 of voting power. Regulations may be amended or new regulations adopted by like vote or consent of shareholders or, if articles or regulations so provide, by vote or consent of holders of shares entitling them to exercise greater or lesser proportion but not less than majority of such voting power. Regulations may include restrictions on transfer and right to transfer shares of issuing public corporation to any person in control share acquisition, including necessary consent of directors and/or shareholders. (R.C. §§1701.10, .11, .831). Shareholders may adopt or authorize directors to adopt emergency regulations operative only when governor proclaims attack on U.S. or nuclear, atomic or other disaster exists. Persons dealing with corporation not charged with constructive notice of regulations. (R.C. §1701.11). For their own governance, directors may adopt bylaws not inconsistent with articles or regulations. (R.C. §1701.59).

Shares.

Express terms of shares may include statements specifying any of following: dividend or distribution rights; liquidation rights, preferences and price; redemption rights and price; sinking fund requirements; voting rights, preemptive rights; conversion rights; restrictions on issuance of shares; rights of alternation of express terms; division of any class of shares into series; designation and authorized number of shares of each series; rights of directors to adopt amendments to articles determining express terms of any class or series of shares before issuance of any shares of that class or series; and any other relative, participating, optional or other special rights and privileges of, and qualifications or restrictions on, rights of holders of shares of any class or series. (R.C. §1701.06).

Share Certificates.

Certificate for shares must state: (1) That corporation is organized under laws of Ohio; (2) name of person to whom issued; (3) number of shares represented; (4) if shares of corporation are classified, designation of class, and series, if any, of shares represented by certificate; (5) on face or back of certificate, statement of express terms, if any, or summary thereof, of shares represented by certificate, and, if shares of corporation are classified, statement of express terms, or summary thereof, of shares of other classes, or statement that shares of other classes are authorized and that statement of their express terms will be sent to shareholder upon request. No restriction on right to transfer shares and no reservation of lien thereon is effective against transferee unless there has been compliance with R.C. §1308.11 and unless such restriction is stated or summarized on face or back of certificate, or summarized with statement that copy of such restriction, or copy of articles or regulations if restriction therein, will be sent to shareholder upon request. (R.C. §1701.25).

Issuance of Shares.

Directors have authority, except as otherwise provided by law, articles or regulations, to determine time when, terms under which, and considerations for which corporation will issue, dispose of, or receive subscriptions for, its shares (including treasury shares). (R.C. §1701.14). Unless otherwise provided in articles, and subject to specified conditions, directors may grant options to subscribe for or purchase shares of any authorized class (R.C. §1701.16) and may provide plans for sale of shares or grant of options to employees (R.C. §1701.17). Shares can be issued only for money or property actually transferred or services actually rendered; notes or other obligations or agreements to perform services do not constitute payment. (R.C. §1701.18). Shareholders do not have preemptive right to acquire unissued shares except to extent articles so provide. (R.C. §1701.15).

Shares with par value (other than treasury shares) cannot be issued for less than par, but may be issued as fully paid at such discount from par not to exceed reasonable compensation for sale, underwriting or purchase of such shares. Except in case of convertible shares or obligations, par shares cannot be issued in certain transactions if as result aggregate liabilities of corporation plus its stated capital would exceed its aggregate assets or any such existing excess would be increased. (R.C. §1701.18). Stated capital of each outstanding share with par value may not be less than (but may exceed) its par value. Stated capital of all shares issued otherwise than upon conversion, change, exchange, merger, consolidation or reorganization is amount of consideration for such shares, unless portion which is to constitute stated capital is specified; any excess over such portion is capital surplus. Portion of consideration that constitutes stated capital for shares having preference on involuntary liquidation may not be less than lesser of entire consideration for such shares or amount of preference. (R.C. §1701.30).

Transfer of Shares.

Restrictions on transfer must be noted conspicuously on certificate to be effective regardless of notice. (R.C. §1701.25).

Record Dates.

Subject to contrary provision in articles or regulations, directors may fix record date to be date not earlier than day date is set and not more than 60 days preceding event for which date is set for purposes of (1) notices, (2) payment of any dividend or distribution, (3) rights of purchase, subscription, or exchange of shares or (4) participation in execution of written consents, waivers or releases. Directors may close transfer books during all or part of such period. Where directors fail to set record date for meeting, persons calling such meeting may set record date. Where no record date is set, it is taken to be day preceding date of notice or date of meeting, as appropriate. Record date for change of shares is date of filing amendment with secretary of state. (R.C. §1701.45).

Uniform Simplification of Fiduciary Security Transfers Act has not been adopted in Ohio.

Share Transfer Tax.

None.

Shareholders.

Shares of stock are personal property, and shareholder is entitled to one or more certificates certifying number and class of shares held by him. No certificate may be executed or delivered until shares are fully paid. (R.C. §1701.24).

Unless instrument creating trust forbids, fiduciary has power to do all things an individual shareholder might do. (R.C. §2109.40).

Shareholders' Actions.

Shareholders may enforce claims against corporation, majority shareholders, directors or officers by direct claim or by derivative action if plaintiff adequately represents interests of shareholders. (Civ.R. 23.1).

Shareholders' Liabilities.

Except as set forth in Title LVII, neither shareholder nor subscriber is personally liable for any liabilities of corporation in absence of enforceable agreement. (R.C. §1701.18). Shareholders are liable only for agreed consideration for stock subscribed for or purchased by them (Const. Art. XIII, §3; R.C. §1701.18) and to extent they knowingly receive any dividend, distribution or payment made contrary to law or articles (R.C. §1701.95).

Shareholders' Meetings.

Unless articles or regulations otherwise provide, unanimous written action may be taken without meeting. (R.C. §1701.54). Unless another date is provided for in articles or regulations, annual meeting for election of directors and consideration of reports must be held on first Mon. of fourth month following close of each fiscal year. When annual meeting not held or directors not then elected, they may be elected at special meeting called for that purpose. (R.C. §1701.39). Meetings may be called by: (1) Chairperson of board, (2) president, or, in case of his absence, death or disability, vice president authorized to exercise authority of president, (3) directors by action at meeting, or majority of them acting without meeting, (4) persons who hold 25% of all shares outstanding and entitled to vote, unless articles or regulations specify smaller or larger proportion but not in excess of 50%, (5) such other officers or persons as articles or regulations may authorize. Articles or regulations may provide for meetings outside Ohio or may authorize directors to determine that meeting shall not be held at any physical place but instead may be held solely by means of communications equipment. (R.C. §1701.40). Unless articles or regulations specify longer period, written notice stating time, place, if any, and purposes of meeting and means, if any, by which shareholders can be present and vote at meeting through use of communications equipment must be given by personal delivery or mail, overnight delivery service, or any other means of communication authorized by shareholder to whom notice is given, not less than seven nor more than 60 days before date of meeting. (R.C. §1701.41). Notice may be waived in writing (which includes telegram, cablegram, electronic mail or other transmission capable of authentication) before or after meeting or by attendance at meeting without protesting lack of proper notice. (R.C. §1701.42). Unless articles or regulations otherwise provide, shareholders present in person, by proxy, or by use of communications equipment at any meeting of shareholders shall constitute quorum for such meeting. (R.C. §1701.51).

Voting Trusts.

Voting trust agreements permitted but no such agreement may be made irrevocable for more than ten years, unless voting or consenting rights granted thereby are coupled with interest in shares to which such rights relate, except that if agreement so provides, such irrevocable grant may from time to time be extended for additional periods of not more than ten years each, on vote or assent of beneficial owners of not less than majority of shares deposited under such agreement. (R.C. §1701.49).

Directors.

Where all shares owned by one or two shareholders, number of directors may not be fewer than number of shareholders. Otherwise there must be at least three directors. Directors have such qualifications, if any, as are stated in articles or regulations. (R.C. §1701.56). Directors need not be residents of Ohio or shareholders unless articles or regulations so provide.

Directors are elected at annual meeting of shareholders (R.C. §1701.39) and unless articles or regulations adopted pursuant to R.C. §1701.10(A)(1) provide for different term (which may not exceed three years from date of election and until successor is elected), each director shall hold office until next annual meeting of shareholders and until successor is elected, or until director's earlier resignation, removal or death (R.C. §1701.57). They may be elected at special meeting called for that purpose. (R.C. §1701.39).

If shareholders have right to vote cumulatively, unless articles or regulations otherwise provide, all directors or all directors of class or any individual director may be removed by vote of holders of majority of voting power entitled to elect directors in place of those to be removed; unless all directors or all directors of class are removed, no individual director may be removed if votes of sufficient number of shares are cast against his removal which, if cumulatively voted at election of directors or all directors of class, would be sufficient to elect at least one director. If shareholders do not have right to vote cumulatively, unless articles or regulations otherwise provide, all directors, or all directors of particular class, or any individual director may be removed from office, without cause, by vote of holders of majority of voting power entitled to elect directors in place of those to be removed. In case of issuing public corporation whose directors are classified pursuant to R.C. §1701.57, shareholders may effect removal, in either case, only for cause. Remaining directors, though less than majority of whole authorized number, may by majority vote fill vacancy for unexpired term. (R.C. §1701.58).

Unless articles or regulations fix number of directors or provide manner in which number may be fixed or changed, number may be fixed or changed at meeting of shareholders called to elect directors, at which quorum is present, by vote of holders of majority of shares represented at meeting and entitled to vote on such proposal, but no reduction in number of directors shall have effect of shortening term of any incumbent director. Alternatively, articles or regulations may authorize directors to change number of directors, may specify manner in which directors shall make such change or limitations upon their use of this authority and may authorize directors who are in office to fill any such newly created director's position. (R.C. §1701.56).

Classes.

Articles or regulations may provide for classification of directors into two or three classes consisting of not less than three directors each, except that where only one or two shareholders own all shares of corporation, class of directors may have less than three, but not less than number of shareholders entitled to elect directors of such class. Terms of office of several classes need not be uniform but no director's term may exceed three years. (R.C. §1701.57).

Committees.

Regulations may provide for creation by directors of committees of one or more directors and may authorize delegation of any of authority of directors to such committees except that of filling vacancies among directors or in any committee of directors. Alternate members may be appointed. Unless otherwise provided by articles, regulations or order of board, committee meetings may be held through any communications equipment if all persons participating can hear each other. Act by any committee shall be effective as act of directors. (R.C. §1701.63).

Directors' Meetings.

Unless articles or regulations otherwise provide, unanimous written action may be taken without meeting. (R.C. §1701.54). Meetings may be called by chairperson of board, president, any vice president or any two directors and may be held within or without Ohio unless articles, regulations or bylaws otherwise provide. Directors not physically present may participate by means of communications equipment. (R.C. §1701.61). Unless otherwise provided in articles, regulations or bylaws or during emergency, notice of meeting must be given at least two days before meeting and need not specify purpose (R.C. §1701.61), and notice may be waived in writing (which includes telegram, cablegram, electronic mail or other transmission capable of authentication) before or after meeting or by attendance at meeting without protesting lack of proper notice (R.C. §1701.42).

Unless articles or regulations otherwise provide, and subject to exceptions applicable in emergency, majority of whole authorized number of directors is necessary to constitute quorum for transaction of business, except that majority of directors in office constitutes quorum for filling vacancy. Act of majority at meeting at which quorum is present is act of board unless articles, regulations, or bylaws require greater number. (R.C. §1701.62).

Powers and Duties of Directors.

Directors exercise authority of corporation except where action by shareholders is required. Director must perform duties in good faith, in manner he reasonably believes to be in or not opposed to best interests of corporation, and with care that ordinarily prudent person in like position would exercise in similar circumstances. Director may rely on information, opinions, reports or statements, including financial statements and data, prepared or presented by other directors, officers or employees of corporation, counsel, public accountants or duly established committees of directors on which director does not serve, provided director reasonably believes such persons are competent in matters presented, or director reasonably believes matters are within person's professional or expert competence or that such committee merits confidence. In determining best interest of corporation, director may consider: (1) Long term and short term interests of corporation and shareholders, including possibility that interests may be best served by continued independence of corporation; (2) interests of corporation's employees, suppliers, creditors and customers; (3) economy of state and nation; and (4) community and social considerations. Director shall not be found to have violated his duties under this section unless violation is proved by clear and convincing evidence. Director shall not be considered acting in good faith if he has knowledge that would cause reliance on such information, opinions, reports or statements to be unwarranted. Director shall not be liable in damages, by virtue of his position, unless it is proved by clear and convincing evidence that he acted or failed to act with deliberate intent to cause injury to corporation or with reckless disregard for best interests of corporation, except that articles or regulations may provide, by specific reference to R.C. §1701.59, that section does not apply. (R.C. §1701.59). Dealings between directors and corporation generally permitted if fully disclosed to other directors, or shareholders entitled to vote thereon and authorized or approved by disinterested directors or shareholders or if dealings were fair as to corporation at time it was approved by directors or shareholders. (R.C. §1701.60).

Liabilities of Directors.

See subhead Powers and Duties of Directors, supra. If corporation commences business before amount of stated capital specified in articles as that with which it will begin business has been paid in, incorporators and directors participating therein are jointly and severally liable for corporation's debts up to amount of deficiency in paid-in stated capital, until amount specified in articles has been paid in. (R.C. §1701.12). Directors may incur liability for false statements or entries (R.C. §1701.93) or for improper dividends, distributions or loans (R.C. §1701.95).

Director's liability for breach of fiduciary duty as transferee of real or personal property is limited to actual knowledge of conduct of transferor that would constitute breach of transferor's fiduciary responsibilities, unless instrument governing him or her directs otherwise. (R.C. §5815.42).

Officers.

Elected by directors. Corporation must have president, secretary and treasurer and may have such other officers as deemed necessary. Chairperson of board must be director and unless articles or regulations otherwise provide no other officer need be a director. Any two or more offices may be held by same person, but no officer shall execute, acknowledge or verify any instrument in more than one capacity if such instrument is required by law, articles, regulation or bylaws to be executed, acknowledged or verified by two or more officers. Unless articles or regulations otherwise provide, all officers shall be elected annually and as between themselves and corporation shall respectively have such authority and perform such duties as determined by directors. Officers may be removed, with or without cause, by directors, without prejudice to contract rights of such officers. Election for given term or general provision in articles, regulations or bylaws with respect to term is not deemed to create contract rights. Directors fill vacancies in any offices. (R.C. §1701.64).

Liabilities of Officers.

Corporate officers may be held personally liable for actions of corporation if officers take part in commission of act or if they specifically directed particular act to be done, or participated or cooperated therein. (97 O. App. 158, 124 N.E.2d 158). Dealings between officers and corporation generally permitted if fully disclosed to directors or shareholders entitled to vote thereon and authorized or approved by directors or shareholders or if dealings were fair as to corporation at time it was approved by directors or shareholders.

Indemnification of Directors and Officers.

Corporation is permitted to indemnify directors, officers, employees and agents within prescribed limits and must indemnify them under certain circumstances. Generally, if it is determined that director, officer, employee or agent acted in good faith and in manner he reasonably believed to be in or not opposed to best interests of corporation and, with respect to any criminal action or proceeding, had no reasonable cause to believe that his conduct was unlawful, indemnification is discretionary except as otherwise provided by articles, regulations or by contract and except with respect to advancement of expenses of directors. Director, subject to certain exceptions, is entitled to mandatory advancement of expenses, including attorneys' fees, incurred in defending any action, including derivative actions, brought against director, provided that director agrees to cooperate with corporation concerning matter and to repay amount advanced if it is proved by clear and convincing evidence that his act or failure to act was done with deliberate intent to cause injury to corporation or with reckless disregard for corporation's best interests. Indemnification with respect to expenses is required to extent such person succeeds on merits or otherwise. Indemnification is not authorized by corporation in derivative action (1) of judgments or amounts paid in settlement (as distinct from defense costs), (2) of director, officer, employee or agent after finding of negligence or misconduct absent court order or (3) of director in action involving only unlawful loans, dividends or distributions of assets. Statutory right to indemnification is not exclusive and corporation may, among other things, purchase insurance to indemnify those persons. (R.C. §1701.13).

Principal Office.

Articles must state place in Ohio where principal office is located (R.C. §1701.04) and such information must also be included in annual report to Department of Taxation (R.C. §5733.03).

Resident Agent.

Appointment of statutory agent upon whom process, notice or demand against corporation may be served must be filed with articles or with agreement of merger or consolidation. (R.C. §§1701.04, .07, .78-.81). Such agent may be natural person, or domestic corporation or foreign corporation licensed in Ohio and authorized by its articles to act as agent. Residence or business address of agent must be in Ohio. Change of agent or change of address must be filed; fee $25. (R.C. §1701.07).

General Powers of Corporations.

Ohio corporations have usual authority of corporations and all authority incidental to purposes stated in articles. No limitation of authority may be asserted in any action except (1) By state against corporation, or (2) by or on behalf of corporation against director, officer, or shareholder as such, or (3) by shareholder as such or by or on behalf of holders of shares of any class against corporation, director, officer, or any shareholder as such, or (4) in action involving alleged overissue of shares. (R.C. §1701.13).

Payment of dividends, or making of distributions of assets to shareholders, or purchase or redemption of shares, contrary to law or articles, and loans to officers, directors or shareholders, other than in usual course of business, are forbidden. Causes of action arising out of violations must in general be sued on within two years. (R.C. §1701.95).

Corporation may purchase its own shares: (1) If they are subject to redemption, (2) to compromise debt, claim or controversy, (3) from subscriber whose shares have not been paid for in full, (4) for sale to employees or trustee on their behalf, (5) if corporation has reserved right or is obligated to repurchase, (6) to avoid or eliminate fractional shares, (7) pursuant to repurchase rights in articles, (8) from dissenting shareholder, (9) when authorized by vote of holders of 2/3 of shares, (10) when authorized by articles or by vote of holders of proportion of shares involved, as provided in articles; provided, that corporation is not insolvent and would not thereby be rendered insolvent and that after such purchase its assets would not be less than its liabilities plus stated capital. (R.C. §1701.35).

Donations for the public welfare or for charitable, scientific or educational purposes are expressly authorized. (R.C. §1701.13).

Dividends.

May be paid in cash, property, or shares of corporation from surplus of corporation. No dividend may be paid if corporation is insolvent or would be rendered insolvent. (R.C. §1701.33). Surplus is excess of assets over liabilities plus stated capital. Earned surplus and capital surplus are also defined. (R.C. §1701.32). Unclaimed dividends are not collectible after six years. (R.C. §1701.34). If articles allow, surplus may be calculated without reference to depletion of wasting-asset corporation. (R.C. §1701.33).

Unclaimed Dividends.

See category 21 Property, topic 21.01 Absentees, subhead Escheat.

Sale or Transfer of Corporate Assets.

Subject to business combination restrictions (c. 1704), corporation may sell, lease or otherwise dispose of all or substantially all its assets for money, shares, bonds or other consideration, when and as authorized by directors and by affirmative vote of shareholders exercising two-thirds of voting power, or if articles provide, greater or lesser proportion but not less than majority of such voting power, and by shareholders of any particular class as required by articles. Shareholders, by same vote as is required to authorize transaction, may grant authority to directors to establish terms of transaction and to amend certain terms of transaction. Notice of meeting must be given to all shareholders whether or not entitled to vote and accompanied by copy or summary of terms of transaction. Action to set aside conveyance on ground that statutory requirements not complied with is barred if not filed within 90 days. Dissenting holders of shares of any class, whether or not entitled to vote, may recover fair cash value of their shares. If resolution of dissolution is adopted pursuant to R.C. §1701.86, directors may dispose of all, or substantially all, of corporation's assets without necessity of shareholder's authorization. (R.C. §§1701.76, .85).

Books and Records.

Any shareholder, upon written demand stating specific purpose, has right to examine in person or by agent at reasonable time and for reasonable and proper purpose, the articles, regulations, books and records of account, minutes, records of shareholders, and voting trust agreements, if any, on file with corporation, and to make copies thereof. Any written demand by acquiring person to examine records of shareholders for purpose of communicating with shareholders of issuing public corporation in connection with meeting of shareholders called pursuant to R.C. §1701.831 shall be deemed to have been made by shareholder of issuing public corporation for reasonable and proper purpose. (R.C. §1701.37). Forfeitures are imposed for failure to maintain or produce certain books and records. (R.C. §§1701.37, .94).

Reports.

Financial statements must be made to shareholders annually. Consolidated financial statement may be used. (R.C. §1701.38). Reports must also be made, in such form as Tax Commissioner prescribes, annually between Jan. 1 and Mar. 31. Tax Commissioner will furnish corporations, on request, copies of forms prescribed. (R.C. §5733.02). Reports must state name of corporation; incorporation state or country; location of principal office; names and addresses of president, secretary, treasurer and statutory agent; kind of business; date of beginning of annual accounting period; and all other information that Tax Commissioner requires for proper administration and enforcement. (R.C. §5733.03).

See also category 22 Taxation, topic Property Taxes.

Corporate Bonds or Mortgages.

In carrying out purposes stated in its articles, corporation may borrow money and issue, sell and pledge notes, bonds, and other evidences of indebtedness, and secure its obligations by mortgage, pledge, or deed of trust of all or any of its property, and guarantee or secure obligations of any person. (R.C. §1701.13).

Directors may authorize any mortgage, pledge, or deed of trust of all or any of corporate property for purpose of securing payment or performance of any obligation or contract. Consent of shareholders not necessary unless required by articles. (R.C. §1701.65).

Merger and Consolidation.

Merger or Consolidation into Surviving or New Domestic Corporation.

Subject to business combination restrictions (c. 1704), one or more domestic or foreign corporations may be merged into surviving domestic corporation or one or more domestic or foreign corporations may be consolidated into new domestic corporation. If foreign corporation involved, laws where such corporation exists must permit merger or consolidation. Statutes prescribe mandatory and permissive requirements for merger or consolidation agreements. (R.C. §1701.78). If one or more entities is not corporation, then similar requirements apply. (R.C. §1701.781).

Merger or consolidation agreement must be approved by directors of each domestic constituent corporation and by shareholders of each domestic constituent corporation, except surviving corporation in case of merger, and by each foreign constituent corporation in accordance with laws of State under which it exists. Directors alone of surviving corporation may approve consolidation but where merger involved shareholders of surviving corporation must approve merger if articles or regulations require vote, agreement conflicts with or changes articles or regulations, or authorizes action requiring shareholder action, merger transfers 1/6 or more voting power to shareholders of other constituent corporations, or agreement makes changes in directors requiring vote. Affirmative approval of 2/3 voting shares, or such other proportion but not less than majority, or vote by classes, as articles may provide, required to adopt agreement. If agreement would have effect which if accomplished by amendment to articles would require class vote to such amendment, vote of holders of such class required, and if agreement would authorize corporate action requiring specified shareholder vote agreement must be adopted by such affirmative vote. (R.C. §1701.78).

Merger or consolidation may be abandoned by directors of any constituent corporation prior to filing necessary certificate if authorized by agreement or by same vote of shareholders required to adopt agreement. Agreement of merger or consolidation may provide that directors of constituent corporations have authority to amend certain terms of agreement at any time prior to filing agreement. (R.C. §1701.78).

Merger or Consolidation into Surviving or New Foreign Corporation.

Subject to business combination restrictions (c. 1704), Ohio corporations may merge or consolidate with corporations of other states into surviving or new foreign corporation if permitted by laws of state of each foreign constituent corporation. Requirements of merger or consolidation agreement specified by statute. Approval of directors and shareholders of domestic corporation governed by R.C. §1701.78. See supra, subhead Merger or Consolidation into Surviving or New Domestic Corporation. Surviving or new foreign corporation must consent to be sued in Ohio and must name secretary of state as statutory agent. If surviving or new foreign corporation is to transact business in Ohio, statement to that effect and appointing statutory agent must be filed. (R.C. §1701.79).

Merger of Domestic or Foreign Subsidiaries.

Subject to business combination restrictions (c. 1704), domestic or foreign subsidiaries may be merged into domestic or foreign parent corporation provided parent owns at least 90% of each class of shares of each subsidiary, at least one constituent corporation is domestic corporation, and, as to domestic parent, shareholder approval is not required by R.C. §1701.78(D). Agreement must be approved by directors of constituent corporations but not by shareholders. Requirements for merger agreement generally governed by R.C. §1701.78 and R.C. §1701.79. (R.C. §1701.80).

Merger of Domestic or Foreign Corporation into Domestic Subsidiary.

Subject to business combination restrictions (c. 1704), domestic or foreign corporation may be merged into domestic corporation provided domestic surviving corporation is subsidiary of one of constituent corporations and parent constituent corporation owns at least 90% of each class of shares of surviving subsidiary corporation. Statute prescribes mandatory and permissive requirements for merger agreement. Agreement must be approved by directors of each domestic constituent corporation, by shareholders of each domestic constituent corporation in accordance with R.C. 1701.78, and by any foreign constituent corporation in accordance with laws of state under which it exists. See supra, subhead Merger or Consolidation into Surviving or New Domestic Corporation. Within 20 days after directors' approval of agreement, surviving corporation must send notice of approval and summary of agreement to each shareholder of surviving corporation, other than parent of surviving corporation. (R.C. §1701.801).

General Requirements:

Certificate containing agreement or copy and statement of manner of adoption must be signed by authorized officer, at least one general partner of any constituent partnership, and by authorized representative of each constituent entity and filed with secretary of state. Foreign constituent corporation must also file as required by state of incorporation. Merger or consolidation becomes effective upon filing or on date agreement specifies. (R.C. §1701.81).

Surviving or new corporation succeeds to all assets, property, rights, privileges, immunities, powers, franchises, authority of and obligations belonging to each constituent entity and is liable for all obligations including rights of dissenting shareholders of each constituent corporation. Liens limited to property so affected immediately prior to merger or consolidation remain unimpaired. Action to set aside merger or consolidation for noncompliance with Revised Code must be brought within 90 days of effective date of merger or consolidation. (R.C. §1701.82).

Dissenting shareholders of domestic corporation being merged or consolidated, dissenting shareholders of surviving corporation entitled to vote on agreement or merger, dissenting shareholders of domestic subsidiary corporation into which is being merged one or more foreign corporations, and dissenting shareholders except parent corporate shareholder of domestic subsidiary being merged into domestic or foreign parent are entitled to fair cash value of their shares if certain statutory requirements and procedures are followed. Shareholder and corporation may agree on fair cash value or suit may be filed in Common Pleas and court may appoint one or more appraisers to determine fair cash value. Fair cash value determined as of day prior to date when shareholders voted or directors adopted agreement, if no shareholder vote required. Voting and dividend or distribution rights terminate as to shares of dissenters. (R.C. §§1701.84, 1701.85).

Fee is $125 for filing and recording certificate of merger or consolidation, plus additional amount if number of authorized shares is increased. (R.C. §111.16[D]).

Share Exchanges or Acquisitions.

Combination and Majority Share Acquisition.

Combination is defined as transaction not a merger or consolidation where either (1) Voting shares of domestic corporation are issued or transferred in consideration in whole or part for transfer to it or its subsidiary of all or substantially all assets of one or more domestic or foreign corporations, or (2) voting shares of foreign parent corporation are issued or transferred in consideration in whole or part for transfer of such assets to one or more of its domestic subsidiaries. Majority share acquisition is defined as acquisition of shares of domestic or foreign corporation entitling holder to exercise majority voting power in election of directors by either (1) domestic corporation in consideration in whole or part for issuance or transfer of its voting shares or (2) domestic or foreign subsidiary in consideration in whole or part for issuance or transfer of voting shares of its domestic parent. (R.C. §1701.01[Q], [R]). Certain control bid tender offers are subject to review by Division of Securities. (R.C. §1707.041). Cause of action exists for recovery of profits realized from disposition of equity securities by person who, within 18 months before disposition, made proposal (or publicly disclosed intention or possibility of making proposal) to acquire control of issuer of equity securities. (R.C. §1707.043).

To effect combination or majority share acquisition, directors of acquiring corporation must authorize transaction. Shareholder authorization is required if (1) Articles or regulations of acquiring corporation so stipulate or (2) transaction involves issuance or transfer of such stock of acquiring corporation as will entitle holders thereof to 1/6 or more of voting power in election of directors. Where shareholders vote, 2/3 affirmative vote is required unless articles provide for greater or lesser proportion, which may not be less than majority. Affirmative vote by class also regulated by articles. Directors may abandon transaction if authorized by terms of acquisition.

Action to set aside combination or majority share acquisition must be brought within 90 days after completion of transaction. (R.C. §1701.83). Dissenting shareholders of acquiring corporation entitled to vote on transaction have appraisal rights. (R.C. §1701.84).

Control Share Acquisition.

(A) Unless articles or regulations of issuing public corporation provide that R.C. §1701.831 does not apply to control share acquisitions of shares of such corporation, any control share acquisition of issuing public corporation shall be made only with prior authorization of shareholders of such corporation in accordance with such section; (B) any person who proposes to make control share acquisition shall deliver acquiring person statement to issuing public corporation at issuing public corporation's principal executive offices. Such acquiring person statement shall set forth all of following: (1) Identity of acquiring person, (2) statement that acquiring person statement is given pursuant to R.C. §1701.831, (3) number of shares of issuing public corporation owned, directly or indirectly, by acquiring person, (4) range of voting power, described in division (Z)(1)(a), (b), or (c) of R.C. §1701.01, under which proposed control share acquisition would, if consummated, fall, (5) description in reasonable detail of terms of proposed control share acquisition, (6) representations of acquiring person, together with statement in reasonable detail of facts upon which they are based, that proposed control share acquisition, if consummated, will not be contrary to law, and that acquiring person has financial capacity to make proposed control share acquisition; (C)(1) within ten days after receipt of acquiring person statement that complies with division (B) of this section, directors of issuing public corporation shall call special meeting of shareholders of issuing public corporation for purpose of voting on proposed control share acquisition. Unless acquiring person and issuing public corporation agree in writing to another date, such special meeting of shareholders shall be held within 50 days after receipt by issuing public corporation of acquiring person statement. If acquiring person so requests in writing at time of delivery of acquiring person statement, such special meeting shall not be held sooner than 30 days after receipt by issuing public corporation of acquiring person statement. Subject to division (C)(2), such special meeting of shareholders shall not be held later than any other special meeting of shareholders that is called, after receipt by issuing public corporation of acquiring person statement, in compliance with R.C. §§1701.76, 1701.78, 1701.79, 1701.81, 1701.83, 1701.791, or 1701.801; (C)(2) if acquiring person changes percentage of class of shares being sought, consideration being offered, extends expiration date of tender offer for shares being sought, or otherwise changes terms of proposed control share acquisition, then directors of issuing public corporation may reschedule special meeting required by division (C)(1). If proposed control share acquisition is to be made pursuant to tender offer, then meeting may be rescheduled to date that is not later than expiration of offer. If proposed control share acquisition is to be made other than pursuant to tender offer, meeting may be rescheduled to date that is not later than ten business days after notice of change is first given to shareholders; (D) notice of special meeting of shareholders shall be given as promptly as reasonably practicable by issuing public corporation to all shareholders of record as of record date set for such meeting, whether or not entitled to vote at meeting. Such notice shall include or be accompanied by both of following: (1) Copy of acquiring person statement delivered to issuing public corporation pursuant to this section, (2) statement by issuing public corporation, authorized by its directors, of its position or recommendation, or that it is taking no position or making no recommendation, with respect to proposed control share acquisition; (E) acquiring person may make proposed control share acquisition if both of following occur: (1) Shareholders of issuing public corporation who hold shares of such corporation entitling them to vote in election of directors authorize such acquisition at special meeting held for that purpose at which quorum is present by affirmative vote of majority of voting power of such corporation in election of directors represented at such meeting in person or by proxy, and majority of portion of such voting power excluding voting power of interested shares represented at meeting by person or proxy. Quorum shall be deemed to be present at such special meeting if at least majority of voting power of issuing public corporation in election of directors is represented at such meeting in person or by proxy, (2) such acquisition is consummated, in accordance with terms so authorized, not later than 360 days following shareholder authorization of control share acquisition; (F) except as expressly provided in this section, nothing in this section shall be construed to affect or impair any right, remedy, obligation, duty, power, or authority of any acquiring person, any issuing public corporation, directors of any acquiring person or issuing public corporation, or any other person under laws of this or any other state or of U.S. (R.C. §1701.831).

Transactions Affecting Control (Merger Moratorium).

C. 1704 prohibits, with some exceptions, any merger, consolidation, combination, or majority share acquisition and any of certain other sales, leases, distributions, dividends, exchanges, mortgages, pledges, transfers, or other dispositions of assets between or involving issuing public corporation (or any subsidiaries of issuing public corporation) and any interested shareholder (or any affiliate or associate of interested shareholder) for three years following date on which such person first becomes interested shareholder. (R.C. §1704.02). After three year period, issuing public corporation may participate in such transactions only if, among other things, transaction receives appropriate shareholder approval or meets specified criteria ensuring certain shareholders receive fair value. (R.C. §1704.03). Issuing public corporation means Ohio corporation (i) with 50 or more shareholders, (ii) with its principal place of business, its principal executive offices, assets having substantial value, or substantial percentage of its assets within Ohio, (iii) that is required to file reports with Securities and Exchange Commission and (iv) to which no valid R.C. §1701.591(H) close corporation agreement applies. (R.C. §§1701.01[Y],. 1704.05[A]). Interested shareholder means, with certain exceptions, any person who has right to exercise 10% or more of voting power of issuing public corporation in election of directors. (R.C. §1704.01[C][8]). C. 1704 does not apply if directors of issuing public corporation have approved transaction or if transaction falls within R.C. §1704.05 exempt transactions. (R.C. §1704.02[A]). Articles of incorporation of issuing public corporation may be amended so that §1704 does not apply (R.C. §1704.05[F]), while corporations not qualifying as issuing public corporations may provide in Code of Regulations that §1704 does apply (R.C. §1704.06[B]).

Tender Offers.

See category 3 Business Regulation and Commerce, topic 3.24 Securities, subhead Tender Offers.

Dissolution.

Voluntary Dissolution.

Corporation may be voluntarily dissolved: (1) By incorporators or majority of them where minimum stated capital, if any, not subscribed; (2) by directors where corporation adjudged bankrupt or has made general assignment for benefit of creditors or, by leave of court when receiver has been appointed in general creditors' suit or suit in which affairs of corporation are to be wound up or when substantially all assets have been sold at judicial sale or otherwise; or when articles have been canceled for failure to file annual franchise or excise tax returns, or failure to pay franchise or excise tax, and such corporation has not been reinstated or does not desire to be reinstated; or when period of existence specified in articles has expired; (3) by vote of holders of shares entitled to exercise 2/3 of voting power, or such other proportion though less than majority, as articles may provide, and by such vote of holders of shares of any particular class as is required by articles. When resolution is adopted, certificate on prescribed form must be filed with Secretary of State. Upon filing certificate (within 30 days after adoption of resolution or upon any date specified in resolution as date when certificate is filed) together with affidavit containing statement of counties of state in which corporation has personal property and evidence showing payment of all sales, use, highway use, franchise, and personal property taxes and unemployment compensation and workmen's compensation contributions (or in lieu of such evidence affidavit containing statement of date upon which each particular department, agency, or authority was advised in writing of scheduled effective date of dissolution and was advised in writing of acknowledgment by corporation of applicability of R.C. §1701.95), corporation is dissolved. (R.C. §1701.86). It must cease to carry on its business and may do only such acts as are required to wind up its affairs; for such purpose it continues as corporation. (R.C. §1701.88). Notice of voluntary dissolution must be published weekly for two successive weeks and mailed or given to all known creditors and claimants. (R.C. §1701.87). Directors may dispose of all, or substantially all, of assets of corporation without shareholder's authorization. (R.C. §1701.76). Jurisdiction of common pleas court may be invoked with respect to affairs of voluntarily dissolved corporation. (R.C. §1701.89).

For filing and recording certificate of dissolution, fee is $50. (R.C. §111.16).

Involuntary Dissolution.

Corporation may be judicially dissolved: (1) In action by holders of shares entitled to dissolve corporation voluntarily, where either (a) articles have been canceled or period of existence has expired, and dissolution is necessary for protection of shareholders, (b) corporation is insolvent or cannot afford security to creditors, and dissolution is necessary for protection of creditors, or (c) objects have failed, been abandoned, or become impractical; (2) in action by one-half of directors or holders of one-half of voting power, where either (a) board with even number of members is dead-locked and shareholders cannot break deadlock, or (b) holders of shares are deadlocked and cannot elect successors to uneven number of directors; (3) in action by holders of number of shares entitled to dissolve corporation voluntarily, where dissolution is shown beneficial to interests of shareholders; or (4) in action by prosecuting attorney of county where corporation has principal office when it is determined corporation was organized or used to further specified criminal activities or to corrupt law enforcement or other public officers. Dissolution is by order of common pleas court of county where principal corporate office is located, on grounds specified in statute, or by order of Supreme Court or court of appeals in action in quo warranto. (R.C. §1701.91).

Insolvency and Receivership.

Insolvent corporation may be judicially dissolved, see subhead Dissolution, supra. Receiver for winding-up may be appointed: (a) In voluntary dissolution, on cancellation of articles, or expiration of period of existence (R.C. §1701.90); (b) in involuntary dissolution, upon filing of petition for dissolution or on judgment dissolving corporation (R.C. §1701.91). Any officer, director, shareholder or other person may be appointed receiver. Receiver has all authority vested in directors and officers, and exercises same subject to court orders, and may be required to qualify by giving bond. If receiver appointed after dissolution, cancellation of articles or period of existence expires, all claims or liens of creditors, claimants or shareholders are determined on day receiver was appointed. (R.C. §1701.90). Receiver may also be appointed: (a) In actions affecting corporate property when property is in danger of being lost, removed, or injured; (b) in foreclosure actions when property affected is in danger of being lost, removed, or injured or is probably insufficient to discharge debt; (c) after unsatisfied judgment against corporation; (d) when corporation is insolvent or in imminent danger of insolvency. (R.C. §2735.01).

Receiver may also be appointed where substantial violation of securities code prejudicial to purchasers or holders of securities is shown in action by director of commerce to enjoin such violations. (R.C. §1707.27).

Close Corporations.

Close corporation agreement may contain provisions regulating any aspect of internal affairs of corporation or relations of shareholders among themselves, including following: (1) Regulation of management and affairs of corporation; (2) right of one or more shareholders to dissolve corporation; (3) voting requirements; (4) designation of officers and directors; (5) authority of any individual who holds more than one office to execute any instrument in more than one capacity; (6) terms and conditions of employment; (7) declaration and payment of dividends; (8) elimination of board of directors or delegation to one or more shareholders all or part of authority of directors; (9) authority of any shareholder to examine and copy corporation's records or documents without necessity of stating any purpose; (10) prohibition or limitation upon issuance or sale by corporation of any of its shares without approval of all holders; (11) arbitration of issues on which shareholders are deadlocked; (12) dispensing with annual meeting of shareholders. In order to qualify as close corporation agreement, agreement shall meet following requirements: (1) Every person who is shareholder shall have consented to agreement in writing; (2) agreement shall be set forth in articles, regulations, or in other written instruments; (3)

agreement shall include statement that it is to be governed by R.C. §1701.591. No close corporation agreement is invalid among parties on any of following grounds: (1) It is attempt to treat corporation as if it were partnership; (2) agreement provides for conduct of affairs of corporation that would otherwise be unlawful; (3) agreement interferes with authority or discretion of directors. If close corporation agreement provides that there shall be no board of directors, shareholders shall have all liabilities of directors. Existence of close corporation agreement shall be noted conspicuously on face or back of every share certificate. No close corporation may issue shares in uncertificated form, and any article, regulation, or resolution of directors of a close corporation providing for issuance of shares in uncertificated form is ineffective during period close corporation agreement is in effect. Close corporation agreement becomes invalid if shares of corporation are listed on securities exchange or regularly traded in over-the-counter market. Close corporation agreement, in discretion of court of equity, is enforceable by injunction, specific performance, or other relief. (R.C. §1701.591).

Appraisal.

See subheads Merger and Consolidation; Share Exchanges or Acquisitions, catchline Combination and Majority Share Acquisition, supra.

Foreign Corporations.

Foreign corporation must, before transacting business in Ohio, hold unexpired and uncanceled license issued by Secretary of State. (R.C. §1703.03). Exception made for corporations engaged in Ohio solely in interstate commerce, including installation, demonstration or repair of machinery sold by them in interstate commerce, credit unions, title guarantee and trust companies, insurance companies, bond investment companies or public utility companies engaged in Ohio in interstate commerce. (R.C. §1703.02). Foreign corporation that is bank, savings bank, or savings and loan association chartered under laws of U.S., main office of which is located in another state, must submit notice on prescribed form to Secretary of State. (R.C. §1703.031[A]). Foreign corporation which transacts business in Ohio without license is conclusively presumed to designate Secretary of State its agent for service of process. (R.C. §1703.191).

License.

To obtain license foreign corporation must file with Secretary of State certificate of good standing or subsistence dated not earlier than 90 days prior to filing of application from Secretary of State of its state of incorporation, and sworn application setting forth name of corporation, and if said corporate name is not available in Ohio, tradename under which it will do business, name of state under laws of which it was incorporated, location and complete address of principal office, name of county and city, village or township in which principal office is to be within Ohio, appointment and address of agent for service of process, irrevocable consent to service of process on agent so long as authority of agent shall continue and to service of process upon Secretary of State in event agent cannot be found and under other circumstances. (R.C. §1703.04). Application fee $125. (R.C. §111.16[I][1]). Temporary license good for six months available on application to Secretary of State with fee of $125. (R.C. §1703.13).

Name.

No application for license will be accepted if it appears that name of foreign corporation is prohibited by law or is not distinguishable from name of any other corporation, limited liability company, limited liability partnership, and limited partnership, domestic or foreign, authorized to transact business in Ohio, unless there also is filed with Secretary of State, on form prescribed by Secretary of State, consent of such other entity, signed by authorized officer, except that applicant foreign entity may be authorized to transact business in Ohio if it files with Secretary of State statement by authorized officer directing entity to apply for license to transact business under assumed name or names and stating that said entity will transact business in Ohio only under such assumed name. (R.C. §1703.04). Exclusive and transferable use in Ohio of name (if proper) of existing or proposed foreign corporation may be reserved for 180 days by application to Secretary of State, and payment of $50 fee. (R.C. §1703.06).

Any foreign corporation may register its corporate name if such name is available under R.C. §1703.04 by filing application with Secretary of State with $50 fee. Registration effective for one year and may be renewed for additional one year terms by filing application prior to expiration of current term with $25 fee. (R.C. §§1703.31, 111.16[S]).

Surrender of Authority.

Foreign corporation may surrender license to do business by filing with Secretary of State certificate of surrender on prescribed form setting forth its name, state under laws of which it is incorporated, and that it surrenders its license (or, in lieu thereof, certificate of proper official of its state of incorporation that corporation has been dissolved or its existence otherwise terminated), and address to which Secretary of State may mail any process against such corporation. Must provide evidence that all Ohio taxes are paid. Filing fee of $50 must be paid to Secretary of State. (R.C. §§1703.17, 111.16[N][2]). Before such surrender, franchise tax report for year of withdrawal must be made to Tax Commissioner and taxes must be paid or secured. (R.C. §5733.02).

Agent for service of process must be maintained by foreign corporation licensed to do business in Ohio. Agent may be natural person or a domestic or foreign corporation if residence or business address is maintained in Ohio. Articles of agent corporation must authorize it to act as such agent. Name and address of agent must be stated in annual report filed with Department of Taxation. For any change in agent, must file written appointment of new agent with Secretary of State. (R.C. §1703.041).

General Powers.

Foreign corporation cannot transact business in Ohio which could not lawfully be transacted by Ohio corporation. (R.C. §1703.15).

Penalties are provided for transaction of business in state by foreign corporation or its agents, without compliance with above provisions. Noncompliance prevents maintenance by corporation of any action in any court of Ohio until requirements complied with. (R.C. §§1703.28-.29).

Real Estate.

There are no restrictions on right to acquire or hold real property.

Nonprofit Corporations.

Special provisions for foreign nonprofit corporations are not included in this digest.

Reports on prescribed form must be made annually between Jan. 1 and Mar. 31 (R.C. §5733.02) including data required of domestic corporations and also show location of principal place of business in Ohio and name and address of officer or agent in charge of business done in Ohio (R.C. §5733.03). During same period annual reports must also be filed with Tax Commissioner for benefit of Secretary of State. These reports must include, in addition to some of data in tax reports, number of issued shares and address of person to whom statements of license fees due may be mailed. Filing fee $25. (R.C. §111.16).

Fees and Taxes.

Fee for license to transact business in Ohio by foreign corporation is $125. Fee for amendment of foreign license application is $50. (R.C. §111.16).

Taxation of Corporate Property.

Property of corporations is subject to taxation same as property of individuals. (Const., Art. XIII, §4). See category 22 Taxation.

Taxation of Corporate Shares.

See category 22 Taxation, topic Property Taxes.

Franchise Tax.

Domestic and foreign corporations are subject to tax for each calendar year in which they exercise corporate franchise or in which they do business, own capital or property, have nexus in or with state under U.S. Constitution, or hold certificate of compliance in Ohio on Jan. 1. (R.C. §5733.01[B]).

Qualifying Pass-Through Entities.

Generally, qualifying pass-through entities are subject to franchise tax of 6.8% (2005), 5.1% (2006), 3.4% (2007), 1.7% (2008), or 0% (2009 and after). Qualifying pass-through entities that are financial institutions are subject to franchise tax of 8.5%. (R.C. §5733.41).

Exempt Corporations.

Public utility companies subject to excise tax (R.C. §5733.09; see subhead Special Excise Taxes, infra); insurance, fraternal, beneficial, bond investment, and other corporations subject to report and filing requirements with superintendent of insurance (R.C. §5733.09; see topic Insurance, subhead Privilege Tax); dealers in intangibles subject to taxation under R.C. §5707.03 (R.C. §5733.09); S-corporations (R.C. §5733.09); municipal corporations (R.C. §5733.10); bankrupt corporations or those in receivership except for portion of year in which their franchises were unencumbered and except for minimum tax of $1,000 in case of corporations having gross receipts for taxable year of at least five million dollars or employing at least 300 employees and $50 in case of all other corporations (R.C. §5733.06); real estate investment trusts, regulated investment companies, and real estate mortgage investment conduits (R.C. §5733.09[C]); credit unions (R.C. §1733.43); and corporations not for profit except certain cooperatives (R.C. §5733.01[A], c. 1729). Dividends from corporation exempted by reason of special taxation provisions are specially treated in computation of owner's net income. (R.C. §5733.04[I]).

Computation of Tax.

Tax is higher of: (1) 5.1% on first $50,000 and 8.5% of excess of net income during preceding year, allocated or apportioned to Ohio (R.C. §§5733.06[A], [B]; 5733.05[B]); or (2) 4 mills times value of capital, surplus, undivided profits and reserves apportioned to Ohio (R.C. §§5733.06[C]; 5733.05[A]); (3) financial institutions subject to tax, equal to portion of value determined under R.C. §5733.05(A) multiplied times 15 mills (1998 and before), 14 mills (1999) or 13 mills (2000 and after). (R.C. §5733.06[D]).

Net income is derived from federal taxable income before operating loss deduction and special deductions. (R.C. §5733.04[I]). Taxable year and method of accounting are those used for federal purposes. (R.C. §5733.031). Rents, royalties, capital gains and losses, and dividends are allocated according to source (R.C. §§5733.05[B][1]; 5733.051); other income is apportioned by formula reflecting property, payroll and sales in Ohio (R.C. §§5733.05[B][2], [C]). Related corporations may elect or be required to combine income. (R.C. §5733.052). Special rules relate to treatment of net foreign source income (R.C. §5733.04[I][2]) and gains and losses from related entities (R.C. §5733.04[I][12]) and related members (R.C. §§5733.042, .055).

Surtax will be collected for funding state's litter prevention and recycling program.

Maximum surtax $5,000 per year. (R.C. §5733.066).

Surtax will be collected for privilege of manufacturing or selling litter stream products in Ohio. (R.C. §5733.065). Litter stream products include alcoholic beverages, soft drinks and containers or packaging materials used in transferring or serving said products as well as tobacco products, matches, candy and gum (R.C. §5733.065[A]). Surtax will be equal to greater of .22% of that portion of taxpayer's issued and outstanding shares of stock that is subject to rate set forth in R.C. §5733.06(B) or .14 mills times value of taxpayer's issued and outstanding shares of stock, up to maximum of $5,000 (R.C. §5733.065[C]). Manufacturer of litter stream products pays tax only if sales in Ohio during taxable year exceed 5% of taxpayer's total sales in state for such period or if taxpayer's total sales of litter stream products in Ohio exceed $10,000,000. (R.C. §5733.065[D][1]). Corporation selling litter stream products pays tax only if its sales of such products in Ohio during taxable year constitute more than 5% of its total sales in Ohio during such period. (R.C. §5733.065[D][2]). Corporation engaged in retail sale of food or beverages for off premises consumption pays tax only if such sales for off premises consumption exceed 5% of taxpayer's total annual sales during taxable year. (R.C. §5733.065[D][3]).

Credit equal to lesser of 50% of any cash donations made during taxable year will be allowed to certain Ohio nonprofit corporations organized prior to Jan. 1, 1987 and whose sole purpose is to promote and encourage recycling or to municipalities, counties and/or townships receiving grants pursuant to R.C. §1502.05. (R.C. §5733.064).

Investment Credit.

Investment credit against tax is lesser of: (1) Amount of tax otherwise due or (2) difference between: (A) tangible personal property taxes paid by taxpayer in taxable year on engines, machinery, tools and implements acquired on or after Jan. 1, 1978, used or designed to be used in refining or manufacturing and listed for taxation under R.C. §5711.16, and (B) such tax on such property had it been listed and assessed at 20% of its value between 1984 and 1988, incrementally increasing to 25% for 1993 and thereafter. Generally, unused credit may be carried over for three tax years, so long as taxpayer continues to own property. Credit is available only if such supporting information as Tax Commissioner may require is provided. (R.C. §5733.061).

Returns and Payments.

Annual report must be filed with tax commissioner between Jan. 1 and Mar. 31 on form prescribed and furnished by tax commissioner, accompanied by payment of balance due after payment of estimated tax. (R.C. §5733.02). Contents of report are governed by R.C. §5733.03. If taxpayer does not file report in Jan. it must file declaration of estimated tax before Jan. 31, accompanied by payment of entire estimated tax if such estimated tax is not in excess of minimum tax provided in R.C. §5733.06 and no extension of time has been granted. (R.C. §5733.021).

Refunds must be applied for within three years (or in certain circumstances within 90 days) from ascertainment of error or illegality. (R.C. §§5733.12, .26).

Failure to Make Report or Pay Tax.

See category 22 Taxation, topic 22.01 Administration, subhead Penalties. Personal liability of corporate officers for failure to file returns or pay Ohio sales tax limited to officers having control or supervision of, or who are charged with responsibility of, filing returns and making payments. (44 O.S.3d 197, 542 N.E.2d 651).

Municipal income taxes are in addition to Franchise (Income) Tax. See category 22 Taxation, topic 22.10 Income Tax, subhead Municipal Income Tax.

Professional Corporations.

See topic 2.02 Associations, subhead Professional Associations.

Deeds.

See category 21 Property, topic 21.06 Deeds.

Model Non-Profit Corporation Act.

Not adopted.

2.04 FOREIGN CORPORATIONS:

See topic 2.03 Corporations.

2.05 JOINT STOCK COMPANIES:

Real estate investment trusts subject to requirements of c. 1747.

See topic 2.07 Partnerships; category 16 Insurance, topic 16.01 Insurance Companies. No further statutory provisions.

Professional Associations.

See topic 2.02 Associations, subhead Professional Associations.

2.06 LIMITED LIABILITY COMPANIES:

C. 1705 provides for formation of limited liability company ("LLC").

General Supervision.

Secretary of State, Business Services Division, 180 East Broad Street, Columbus, Ohio 43215. Telephone: (614) 466-3910 or (877) 767-3453. Website: http://www.sos.state.oh.us/SOS/businessServices.aspx.

Formation.

Legal existence of LLC begins upon filing with Secretary of State articles of organization (R.C. §1705.04) together with appointment of and acceptance by agent for service of process (R.C. §1705.06) or on later date specified in articles of organization that is not more than 90 days after filing (R.C. §1705.04[A][3]). Secretary has prescribed forms for all LLC filings.

Purposes.

LLC may be formed for any lawful purpose, except that if Act contains special provisions for formation of certain corporation (other than professional association c. 1785), LLC may not be formed for that purpose. (R.C. §1705.02).

Powers.

LLC may sue and be sued. Unless otherwise provided in articles, LLC may make donations, purchase and sell property interests, make contracts, form or acquire control of other domestic or foreign LLCs, be owner or participant in other profit or nonprofit enterprises or ventures, conduct its affairs in Ohio and elsewhere, render professional service authorized under cc. 4703, 4733, 4725, 4734, 4732, 4723, 4729, R.C. §§4755.40 - 4755.53, R.C. § 4731, borrow money, issue evidence of indebtedness, secure indebtedness on any lawful business, purpose or activity except that if Act contains special provisions for formation of certain corporation (other than professional association c. 1785), LLC may not be formed for that purpose. (R.C. §1705.03).

Name.

Must include “Limited Liability Company” without abbreviation or “LLC”, “L.L.C.”, “Limited”, “Ltd.”, or “Ltd”. Name must be distinguishable on records of Secretary of State from name of domestic or foreign LLC, corporation, limited liability partnership, or limited partnership unless consent of other entity is also filed. Name may be reserved for 180 days by application to Secretary of State; reservation is transferable. (R.C. §1705.05).

Articles of Organization.

Must state LLC's name and duration (if duration not stated, then perpetual) and may state other desired provisions. (R.C. §1705.04). Secretary has prescribed form of Articles.

Filing Articles of Organization.

To form LLC, Articles of organization shall be signed and filed (R.C. §1705.04) and one or more authorized persons must execute and file Articles and appointment of statutory agent with Secretary of State. (R.C. §§1705.04, 1705.06).

Registered Office and Registered Agent.

LLC must continuously maintain agent for service of process in Ohio. Agent must be resident individual, domestic corporation, or licensed foreign corporation. Appointment, acceptance of appointment, changes in agent's address or appointment of new agent must be filed with Secretary of State. (R.C. §1705.06).

Management.

Unless otherwise provided in operating agreement (“Agreement”), management of LLC is vested in members in proportion to their contributions, as adjusted from time to time to reflect any additional contributions or withdrawals by members. (R.C. §1705.24). If management is reserved to members, each member is agent and member's actions in carrying on business in usual way binds LLC. (R.C. §1705.26). Agreement may give members or group of members right to vote per capita. (R.C. §1705.26). Agreement may provide that LLC is operated under direction of managers; in such case, each manager is agent and manager's action in carrying on business in usual way binds LLC. (R.C. §§1705.25, 1705.29). Member or manager is entitled to rely on information from persons reasonably believed to be reliable and competent, including members, managers or employees of LLC and counsel and accountants. (R.C. §1705.30). Members and, to extent authorized, managers, may adopt bylaws for their own regulation. (R.C. §1705.27).

Dissolution.

LLC is dissolved upon occurrence of: expiration of period, if any, fixed in Agreement or Articles; any events specified in Agreement; consent of all members to dissolution; withdrawal of member from LLC formed before Dec. 3, 1999 whose Articles and Agreement do not provide that R.C. §1705.43(C) applies unless continued with consent of all remaining members or under right to continue stated in writing in Agreement; or entry of decree of judicial dissolution. (R.C. §1705.43). Upon winding up assets are distributed in following order: to creditors and, unless otherwise provided in Agreement, to members for distribution liabilities, for return of contributions and with respect to membership interests. (R.C. §1705.46).

Filing Fees.

To Secretary of State on filing (i) name reservation, $5 (R.C. §1705.05[F]) and (ii) Articles, $125 (R.C. §111.16[F]).

2.06A LIMITED PARTNERSHIPS:

See topic 2.07 Partnerships.

2.07 [RESERVED]

2.08 PARTNERSHIPS:

Uniform Partnership Act adopted. (R.C. §§1775.01-.42).

General Partnership.

Formation.

General partnership (“GP”) is association of two or more persons to carry on as co-owners of business for profit. (R.C. §1775.05; see R.C. §1775.06 for rules determining existence of GP.) It is not necessary that contract establishing GP be in writing.

Name.

Every partnership transacting business in Ohio under fictitious name or under designation not showing all partners in partnership must file with county recorder of county in which its principal office or place of business is situated and of each county in which it owns real property. (R.C. §1777.02). On every change of members, partnership must file new certificate with county recorder. (R.C. §1777.03). Any GP doing business under fictitious name which has not registered fictitious name as trade name or cannot do so because name is not available for registration must file certificate with Secretary of State, setting forth name and business address of GP and all partners. (R.C. §1329.01).

Rights and Liabilities of Partners Inter Se.

Subject to GP agreement, partners share equally in profits and contributions toward losses, partners have equal rights in management, majority of partners decides ordinary matters concerning GP except unanimous consent for act in contravention with GP agreement, and unanimous consent to add new partner. (R.C. §1775.17).

Rights and Liabilities of Partners as to Third Persons.

Every partner is agent of partnership for business purpose. Act of partner apparently carrying on business of partnership, binds partnership unless partner has in fact no authority to act for partnership in particular matter and person dealing with partner knows partner lacks authority. (R.C. §1775.08). Admission or representation of partner concerning partnership affairs within scope of authority is evidence against partnership. (R.C. §1775.10). Notice to any partner of partnership matter constitutes notice to partnership except where partner commits fraud on partnership. (R.C. §1775.11). Partnership generally liable for losses sustained by third party for act or omission of any partner acting in ordinary course of business. (R.C. §1775.12). All partners jointly and severally liable for acts and omissions of other partners and jointly liable for all other debts and obligations of partnership. (R.C. §§1775.13, 1775.14). When person represents self as partner in existing partnership or with one or more persons not actual partners, that person is liable to any person to whom such representation has been made, who has given credit to actual or apparent partnership. Person representing self as partner in partnership is agent of those persons who consent to such representation and binds them in same extent and in same manner as though person so represented were a partner in fact, with respect to persons who rely upon representation. (R.C. §1775.15).

Dissolution.

Partnership dissolves upon expired term or completed undertaking, express will of any partner if no term or undertaking, express will of all partners before or after expired term or completed undertaking, expulsion of partner under partnership agreement, any event making partnership business unlawful, death of partner, bankruptcy of partner or partnership or court decree. (R.C. §1775.30). Except for winding up partnership, dissolution terminates all authority of partner to act for partnership with respect to other partners, except as to third persons, partner may bind partnership after dissolution. (R.C. §§1775.32 - 1775.39).

Administration of Partnership Property.

On death, partner's right to partnership property vests in surviving partners (or legal representative in last surviving partner). (R.C. §1775.24). Unless otherwise agreed, upon dissolution, partnership property may be applied to discharge partnership liabilities and surplus applied to pay cash net amount owed partners. (R.C. §1775.37).

Limited Partnership.

Uniform Partnership Act adopted, c. 1782.

Formation.

Limited partnership (“LP”) formed by two or more persons (must have at least one general partner and one limited partner) under R.C. §1782.01(H).

Name.

LP name must include “Limited Partnership”, “L.P.”, “Limited” or “Ltd.” and may not contain name of limited partner except in limited circumstances. (R.C. §1782.02). Any LP doing business under fictitious name which has not registered fictitious name as trade name or cannot do so because name is not available for registration must file certificate with Secretary of State, setting forth (a) name and business address of general partners, (b) if LP existing before July 1, 1994 and not registered with Secretary of State under c. 1782, name of Ohio county in which its certificate of limited partnership or application for registration as foreign limited partnership is filed and (c) if limited partnership existing on or after July 1, 1994, form of entity and state of formation. (R.C. §1329.01[D][1]).

Conduct of Business.

LP may carry on any business that partnership without limited partners may conduct, except banking and insurance. (R.C. §1782.06). Limited partner is not liable as general partner, unless limited partner takes part in control of business. (R.C. §1782.19). General partner in LP has liabilities of partner in GP to LP, limited partners and persons other than LP or limited partners. (R.C. §1782.24).

Duties of general partner similar to duties of director of corporation. (R.C. §1782.241). Dealings between partners and limited partnership generally permitted if fully disclosed to all partners before partner is admitted to partnership; is fully disclosed in writing to all partners and dealing is fair to limited partnership and disinterested general partners authorize dealing by majority vote; or dealing is fair as to limited partnership as of time dealing is approved by majority of disinterested limited partners. (R.C. §1782.242).

Dissolution.

LP dissolved upon events specified in certificate of LP, upon events specified in LP agreement, written consent of all partners, withdrawal of general partner unless at least one general partner remains and LP provisions enable business to carry on with remaining general partner(s), or court decree. LP not dissolved due to general partner withdrawal if within 90 days of withdrawal, partners agree to continue business and appoint one or more general partners. (R.C. §§1782.44, 1782.45).

Foreign Limited Partnership.

Before transacting business in Ohio, foreign LP must file with Secretary of State application for registration setting forth name of state and date of formation, name and address of agent for service of process, statement that Secretary of State is also agent for service, address of principal office, names and addresses of general partners, and address of office where names, addresses and capital contributions of limited partners are kept. (R.C. §1782.49). Upon filing, Secretary of State assigns file number; filed application is deemed to be certificate of registration. Foreign LP can register under any name, whether or not it is named in state of organization, that could be used by domestic LP. Corrections to registration must be filed promptly with Secretary of State. Foreign LP which fails to register cannot maintain action in any court; failure to register does not impair contract or make limited partner liable as general partner. (R.C. §1782.54).

Out-of-State Partnerships.

Organization and internal affairs of partnership and limited liability of partners in foreign limited partnership are governed by laws of state of partnership's organization. (R.C. §1775.05). Before transacting business in Ohio, foreign limited liability partnership must file with Secretary certificate setting forth partnership name, jurisdiction of organization, address of principal or registered office in Ohio, name and address of statutory agent and statement of partnership business. (R.C. §1775.64). Failure to register does not affect validity of contracts, but foreign limited liability partnership may not maintain action in Ohio until registered. (R.C. §1775.65).

3 BUSINESS REGULATION AND COMMERCE

3.01 BANKS AND BANKING:

Uniform Commercial Code adopted. See topic 3.09 Commercial Code, subheads Action on Official Amendments and Material Variations, Blanks Filled in and Optional Provisions in Code Sections.

Regulated by cc. 1101 to 1133—banks; cc. 1151 to 1157—savings and loan associations; and cc. 1161 to 1165—savings banks.

Shareholders may be held liable for pro rata assessment for deficiencies in capital under sanction of forced sale of shares (R.C. §1121.52), but such assessment is not personal debt (Const., Art. XIII §3). Assessments by building and loan associations are governed by its constitution and bylaws. (R.C. §1151.21).

Deposits

Deposits must be entered only in terms of U.S. money. (R.C. §1109.11).

Checking Accounts.

Financial institution must require applicant for personal, family or household checking account to provide current address and identification document containing applicants' full name, birth date, and signature. All checks for such accounts must contain date on which account was opened on face of check. (R.C. §1349.16). Person who fails to or falsely provides information required by financial institution to open account is presumed to have purpose to defraud. (R.C. §2913.11[D]).

Joint Deposits.

Payment to either depositor, whether other is living or dead, releases bank (R.C. §1109.07) or association (R.C. §1151.19) from further liability. Existence of joint and survivorship account raises rebuttable presumption that joint owners share equally, or that survivorship intended. Realities of ownership govern disposition of account in dispute between estate fiduciary, or others, and holder of surviving interest. (11 O.S. 2d 182, 228 N.E. 2d 609; 24 O.S. 2d

137, 265 N.E.2d 287).

Deposits in Trust.

In absence of further notice of existence of trust, bank (R.C. §1109.06) or association (R.C. §1151.191) may pay to beneficiary upon death of trustee.

Deposits payable on death are authorized for natural persons. (R.C. §§1109.06-.07).

Deposits by minor may be made in minor's own name or by trustee in his behalf, whether account is for benefit of minor alone or for minor together with other persons. Minor has no special privilege. (Bank, R.C. §1109.09; Association, R.C. §1151.26).

Terms and conditions governing deposits must be contained in statement given to each depositor, whose acceptance thereof constitutes assent. (R.C. §1109.05).

Unclaimed Deposits.

See category 21 Property, topic 21.01 Absentees, subhead Escheat.

Withdrawals.

Savings account may be withdrawn pursuant to terms and conditions of deposit contract. Demand deposits may be received subject to withdrawal or payment on check, order or other authorization. (R.C. §1109.05).

Records.

Any party requesting financial records must pay bank for all actual and necessary costs directly incurred in searching for, reproducing, or transporting these records. (R.C. §9.02[B]).

Bank Deposits and Collections (Uniform Commercial Funds Transfers).

Uniform Commercial Code governs. (R.C. §§1304.01-1304.85).

Electronic transactions and signatures governed by c. 1306.

Collective investment funds are expressly authorized by statute. (R.C. §1111.14). Assets included in fund must not be prohibited by instrument creating fiduciary relationship, and consent of co-fiduciaries must be in writing.

Trust Company.

No corporation may solicit or engage in trust business unless it meets requirements of R.C. §1111.02. Foreign trust companies may transact trust business if they meet requirements of R.C. §1111.02. No corporation may engage in trust business until it has deposited with Treasurer of State $100,000 in securities approved by Superintendent of Financial Institutions and satisfies bonding, capital and other requirements. (R.C. §§1111.04-1111.05). Any corporation, other than national bank with trust powers or federal savings association with trust powers, proposing to solicit or engage in trust business in Ohio must apply to Superintendent of Financial Institutions to be licensed as trust company. (R.C. §1111.06[A]). Trust company may receive and hold moneys or property, in trust or on deposit, from executors, administrators, assignees, guardians, trustees, corporations or individuals. (R.C. §1111.11).

Foreign Banks.

Bank incorporated under law of or with principal place of business in another state may establish or acquire banking office for conduct of banking business in Ohio. (R.C. §1117.01).

Bank incorporated under law of foreign country can operate representative office, agency or branch to conduct limited banking activities. (R.C. §1119.01 et seq.). Bank incorporated under law of another state or foreign country (and national bank with main office in another state) must obtain license (or, in case of national bank, give notice) as foreign corporation to transact business in Ohio. (R.C. §1703.01 et seq.).

3.02 BILLS AND NOTES:

Uniform Commercial Code adopted. See topic 3.09 Commercial Code, subheads Action on Official Amendments and Material Variations, Blanks Filled in and Optional Provisions in Code Sections.

Attorney Fees.

See topic 3.09 Commercial Code, subhead Material Variations, Blanks Filled in and Optional Provisions in Code Sections.

Judgment Notes.

Cognovit judgments are allowed pursuant to warrant of attorney to confess judgment contained in instrument except instrument arising out of consumer loan or consumer transaction. (R.C. §2323.13). Jurisdiction for cognovit judgment lies in municipal court having territorial jurisdiction over place where any maker resides or where warrant was signed if municipal court has jurisdiction of subject matter; otherwise in any competent court having similar territorial jurisdiction. Instruments containing warrant of attorney must state immediately above or below space provided for signature of makers or person authorizing confession of judgment, in type size or distinctive marking making it appear more conspicuously than anything else in instrument:

"Warning—BY SIGNING THIS PAPER YOU GIVE UP YOUR RIGHT TO NOTICE AND COURT TRIAL. IF YOU DO NOT PAY ON TIME A COURT JUDGMENT MAY BE TAKEN AGAINST YOU WITHOUT YOUR PRIOR KNOWLEDGE AND THE POWERS OF A COURT CAN BE USED TO COLLECT FROM YOU REGARDLESS OF ANY CLAIMS YOU MAY HAVE AGAINST THE CREDITOR WHETHER FOR RETURNED GOODS, FAULTY GOODS, FAILURE ON HIS PART TO COMPLY WITH THE AGREEMENT, OR ANY OTHER CAUSE." (R.C. §2323.13).

In action on instrument arising out of consumer loan or consumer transaction subject to prohibition of cognovit provisions, special language must appear in summons, and plaintiff is entitled to accelerated trial date. (R.C. §2323.13).

Specific Defenses.

Holder in due course defense abrogated in consumer transactions where goods or services purchased pursuant to purchase money loan installment note or retail installment contract (R.C. §1317.031), except in transactions with public utilities, financial institutions, insurance companies, and attorneys or physicians and their clients or patients (R.C. §1317.01[P]). See topic 3.23 Sales.

Waiver of defenses in retail installment contract is void. (R.C. §1317.14).

3.03 BILLS OF LADING:

See topic 3.08 Carriers.

3.04 BILLS OF SALE:

See topic 3.23 Sales.

3.05 BLUE SKY LAW:

See topic 3.24 Securities.

3.06 BROKERS:

Uniform Commercial Code adopted. See topic 3.09 Commercial Code, subheads Action on Official Amendments and Material Variations, Blanks Filled in and Optional Provisions in Code Sections. Other statutes govern: dealers in securities (see topic 3.24 Securities); insurance brokers (see category 16 Insurance, topic 16.01 Insurance Companies); livestock dealers (R.C. §§943.01 - 943.99); real estate appraiser board and certification of appraisers (R.C. §§4763.01- 4763.99); second hand dealers and junkyards (R.C. §§4737.01- 4737.99); hearing aid dealers (R.C. §§4747.01- 4747.99); manufactured home brokers (R.C. §4517.27); motor vehicle dealers (R.C. §§4517.01- 4517.99); precious metals dealers (R.C. §§4728.01- 4728.99); pawnbrokers (R.C. §§4727.01- 4727.99); fur dealers (R.C. §1533.23); watercraft dealers (R.C. §1547.543); and retail dealers and wholesale distributors of tires (R.C. §§3734.90- 3734.99).

Real estate brokers including rental location agents (R.C. §4735.01[A] and 4735.01 [U]), must take examination and be licensed by Ohio real estate commission (R.C. §§4735.02, 4735.07 - 4735.08) and renew license every three years (R.C. §§4735.10, 4735.14).

Agency relationship between licensee and seller or buyer or both buyer and seller in real estate transaction may be established in Ohio. (R.C. §§4735.51-.69). Prior to performing duties of agent licensee must provide to client(s) written brokerage policy on agency prescribed by superintendent of real estate. (R.C. §§4735.56, .57). Agency relationship is not formed or implied when licensee provides information regarding lenders, inspectors, attorneys, insurance agents, surveyors, draftspersons, architects, schools, shopping facilities, places of worship, or information obtained from property listing service or public records to non-clients. (R.C. §4735.69).

Dual agency is formed when: (i) licensee or brokerage represents both purchaser and seller as clients in same real estate transaction or (ii) management level licensee represents client in in-company transaction after both seller and purchaser have consented in writing to dual representation on dual agency disclosure statement described in R.C. §4735.57. (R.C. §4735.70). No licensee or brokerage shall participate in dual agency relationship unless consent of both seller and buyer is obtained in writing after appropriate disclosures are made. (R.C. §4735.71).

Continuing Education Requirements.

Licensees must complete 30 hours of continuing education every three years (R.C. §4735.141); certain exceptions pertaining to physically handicapped and older licensees apply.

Real estate recovery fund established to compensate persons damaged by real estate brokers or salespersons in violation of chapter providing for licensing of such persons. (R.C. §4735.12). Fund does not apply to: bonding company which was not principal in real estate transaction, actions arising from property management accounts held for property owners, and person suing for commission or fee pursuant to R.C. §4735.01(A) or 4735.01(C).

Nonresidents.

Licenses may be granted to nonresidents, but they must maintain place of business in state and consent that suits may be filed against them in Ohio by service on superintendent of real estate. (R.C. §4735.17). Out-of-state commercial broker or salesperson may perform services for fee with respect to commercial real estate without license if broker or salesperson meets certain requirements, including working in cooperation with Ohio broker and consenting to suit in Ohio. (R.C. §4735.022).

Sanctions for violation of R.C. §4735.18 are as follows: (i) revocation of license, (ii) suspension of license for specified term, (iii) imposition of fine, not to exceed $5,000 per violation, (iv) public reprimand or (v) completion of additional continuing education course work. (R.C. §4735.051[I]).

Revocation.

License may be revoked for making misrepresentations or false promises, acting for more than one party to transaction without consent of all parties in writing after disclosure form is signed by both parties, failure to account for money received, any dishonest or illegal dealing, having violated provisions of R.C. §4735, etc. (R.C. §4735.18).

Actions.

Broker can not sue for commissions if he was not licensed when cause of arose. (R.C. §4735.21).

Mortgage Brokers.

No person may act as mortgage broker unless person has obtained certificate of registration from superintendent of financial institutions and maintains office in Ohio. (R.C. §1322.02). Certificate of registration must be renewed annually. (R.C. §1322.04). Mortgage brokers must obtain corporate surety bond. (R.C. §1322.05). Second-mortgage broker also must obtain certificate of registration. (R.C. §1321.52). Requirements, fees and exceptions for engaging in second mortgage lending. (R.C. §1321.53).

Financial institutions and associated real estate brokerage companies regulated by statute and by superintendent of real estate or director of commerce. (R.C. §1349.11).

Investment Securities.

Uniform Commercial Code governs (R.C. §§1308.01- 1308.61); see also topic 3.24 Securities.

3.07 BULK SALES:

See topic 3.09 Commercial Code, subhead Action on Official Amendments.

3.08 CARRIERS:

Intrastate carriers are subject to jurisdiction of Public Utilities Commission of Ohio. (R.C. §4905.04). Uniform Commercial Code adopted. See topic 3.09 Commercial Code, subheads Action on Official Amendments and Material Variations, Blanks Filled in and Optional Provisions in Code Sections.

Licenses.

Commission may prescribe rules affecting motor transportation companies, notwithstanding provisions of any ordinance, resolution, license, or permit of any township, municipal corporation and county, or county. In case of conflict, order or rule of Commission prevails. (R.C. §4921.04).

Rates.

Railroad company may demand passenger fare, not exceeding 3¢ per mile for distance of more than five miles. Fare must always be made that multiple of five nearest reached multiplying rate by distance. (R.C. §4965.50). If notice is given, company may make additional charge of 10¢ when fare is paid on train and ticket office where passenger boarded train was open 30 minutes before departure. (R.C. §4965.51).

Discrimination.

In event of car shortage, discrimination in distribution of cars is forbidden, but preference may be given to shipments of live stock or perishable property. (R.C. §4907.41).

Liability.

Company receiving property at point within this state, for transportation within state, must issue bill of lading and is liable to holder for any loss or damage to such property caused by it, or any common carrier to which such property may be delivered, or over whose lines such property may pass, any rule or contract by original company to which property was delivered for transportation, exempting such company from liability to contrary notwithstanding, and recovery may be had direct from company to which merchandise was delivered for transportation in first instance. (R.C. §4965.54).

Limitation of Actions.

Action by carrier for recovery of charges, or any part thereof, or against carrier for recovery of overcharges, arising out of intrastate transportation of persons or property in Ohio, must be commenced within three years after cause of action arose. Cause of action with respect to shipment of property is deemed to accrue on delivery or tender by carrier. (R.C. §2305.13).

Bills of Lading.

Uniform Commercial Code governs. (R.C. §§1307.01-1307.40).

Liens.

Carrier has lien on goods covered by bill of lading for charges subsequent to date of receipt of goods for storage or transportation. (R.C. §1307.22[A], UCC 7-307). Time, place and manner of enforcement of carrier lien regulated in R.C. §1307.23, UCC 7-308.

Motor Vehicle Carriers.

See category 23 Transportation, topic 23.01 Motor Vehicles.

3.09 COMMERCIAL CODE:

Uniform Commercial Code adopted effective July 1, 1962. See Part III, Uniform and Model Acts. Code is set forth in Ohio Revised Code cc. 1301 to 1305 and 1307 to 1310. Last digit of chapter numbers corresponds to first nine articles of Code; however, numbering and style of sections in Ohio Revised Code is different from Code and Ohio Revised Code section numbers do not correspond with Code sections except in c. 1309. For example, Code §5-102(a)(1) appears as R.C. §1305.01(A)(1) in Ohio Revised Code. Art. 2A is set forth in c. 1310 and Art. 4A is incorporated at end of c. 1304 as R.C. §§1304.51- 1304.85. Ohio Revised Code makes numerous wording and statutory reference changes to conform Code to Ohio codification style and combines or changes order of various sections, particularly definition provisions. Changes are not intended to be substantive. C. 1309 (Revised Art. 9), however, follows Code section numbering and “was drafted in conformity with the precise language of” proposed Revised Art. 9. For example, §9-103(e)(3)(A) appears as R.C. §1309.103(E)(3)(a).

Action on Official Amendments.

1962 Amendments adopted. 1966 Amendments not adopted. 1972 Amendments to Art. 9 adopted effective Jan. 1, 1979. 1977 Amendments to Art. 8 adopted effective Sept. 20, 1984. 1989 Amendments as to Art. 4A adopted effective Oct. 23, 1991. 1987 and 1990 Amendments as to Art. 2A adopted effective Nov. 6, 1992. 1990 Amendments as to revised Arts. 3 and 4 adopted effective Aug. 19, 1994. 1989 Amendments repealing Art. 6 adopted effective Aug. 15, 1996. 1994 Amendments as to revised Art. 8 adopted effective Jan. 1, 1998. 1995 Amendments as to revised Art. 5 adopted effective July 1, 1998. Revised Art. 9 (2000) and conforming amendments adopted effective July 1, 2001.

Material Variations, Blanks Filled in and Optional Provisions in Code Sections (Code section is shown first and corresponding Ohio Revised Code section is shown second):

§1-201(37)—§1301.01(KK): Language added in par. 1 that "lease purchase agreement" is never intended as security; R.C. §1351.01 defines lease purchase agreement as lease of personal property by individual for personal use with four months renewable term and permits lessee to acquire ownership.

§1301.21 (no comparable Code provision): commitment in contract of indebtedness for payment of reasonable attorney fees on enforcement is enforceable, but only for commercial indebtedness over $100,000.

§2-316(3)—§1302.29(C): Para. 4 added which limits implied warranty as to disease in certain sales of livestock between merchants.

§2-318—§1302.31: Alternative A adopted.

§2A-103(1)(e)—§1310.01(A)(5): Optional words at end of definition not adopted.

§2A-216—§1310.23: Alternative C adopted.

§4-106—§1304.05: Alternative A adopted.

§4-303(a)(1)—§1304.29(A)(1): Word "certifies" is changed to "deposits."

§7-204—§1307.09: Subsection (4) omitted.

§7-403(1)(b)—§1307.27(A)(2): Optional wording adopted.

§8-603(b)—Appears as §4(B) of H.B.170 effective Jan. 1, 1998 (uncodified).

§9-109—§1309.109: Subsections (c)(2) and (c)(3) omitted. References added in subsection (d)(2): "including any lien created under any provision of Chapter 926., sections R.C. 1311.55 to R.C. 1311.57, sections R.C. 1311.71 to R.C. 1311.80, section R.C. 1701.66, or Chapter 4585, of the Revised Code." New subdivision (D)(14) added: "A transfer by a government, state or governmental unit." New division (E) added: "The granting of a security interest in all or any part of a lottery prize award or consideration is subject to the prohibition of division (C) of section R.C. 3770.07 of the Revised Code. The sale, assignment, or other redirection of a lottery prize award for consideration is subject to the provisions of division (D) of section R.C. 3770.07 and sections R.C. 3770.10 to R.C. 3770.14 of the Revised Code."

§9-201(b)—§1309.201(B): Reference inserted: "c. 1317 (retail installment loans), R.C. §§1321.01-1321.33 (small loans), and divisions (A), (B) and (C) of R.C. §1321.99 (small loans-penalties)."

§9-311(a)(2)—§1309.311(A)(2): References inserted: cc. 1547 (watercraft, vessels and waterways), 1548 (watercraft certificates of title), 4505 (certificate of motor vehicle title law), 4519 (special vehicles) and 5309 (registration of land titles).

§9-334(j)—§1309.334(J): "Division I of this section prevails over any inconsistent statutes not specifically enumerated under division (D)(2) of R.C. §1309.109 of the Revised Code and applicable by their terms."

§9-406—§1309.406: Subsection (j) provides: "Divisions (D) and (F) of this section do not apply to: (1) A claim or right to receive compensation for injuries or sickness as described in section 104(a)(1) or (2) of the Internal Revenue Code, as amended; or (2) a claim or right to receive benefits under a special needs trust as described in the 'Omnibus Budget Reconciliation Act of 1933,' 107 Stat. 312, 42 U.S.C. 1396p(d)(4) as amended." New division (K) added: "Divisions (D), (F), and (J) of this section apply only to a security interest created on or after July 1, 2001. Nothing in this section shall supersede the provisions of sections R.C. 2323.58 to R.C. 2323.587 (transfer of structured settlement payment rights) of the Revised Code. This section shall be interpreted consistently with sections R.C. 2323.58 to R.C. 2323.587 of the Revised Code."

§9-408(e)—§1309.408(E): "Divisions (D) and (F) of this section do not apply to: (1) A claim or right to receive compensation for injuries or sickness as described in section 104(a)(1) or (2) of the Internal Revenue Code, as amended; or (2) a claim or right to receive benefits under a special needs trust as described in the 'Omnibus Budget Reconciliation Act of 1933,' 107 Stat. 312, 42 U.S.C. 1396p(d)(4) as amended."

§1309.408(F): New division (F) added: "Divisions (A), (C), and (E) of this section apply only to a security interest created on or after July 1, 2001. Nothing in this section shall supersede the provisions of sections R.C. 2323.58 to R.C. 2323.587 (transfer of structured settlement payment rights) of the Revised Code. This section shall be interpreted consistently with sections R.C. 2323.582, R.C. 2323.587 of the Revised Code."

§9-501(a)(2)—§1309.501(A)(2): Includes "secretary of state or any office duly authorized by secretary of state."

§9-501(b)—§1309.501(B): Provides for filing in office of secretary of state.

§9-502(b)(3)—§1309.502(B)(3): Optional language adopted.

§9-502(c)(4)—§1309.502(C)(4): Optional language adopted.

§9-512(a)—§1309.512(A): Alternative B adopted; uses only term "filed" and includes phrase "and time."

§9-516(b)—§1309.516(B): Subsec. (b)(5)(iii) omitted. New subdivision (B)(8) added: "The secretary of state refuses to accept the record for filing or recording in compliance with division (A) of section R.C. 111.24 of the Revised Code."

§9-518(b)—§1309.518(B): Alternative B adopted; uses only term "filed" and includes phrase "and time."

§9-519(d)—§1309.519(D): Phrase "it must be filed for record and" included.

§9-519(f)—§1309.519(F): Alternative B adopted; uses only term "filed" and includes phrase "and time".

§9-519(h)—§1309-519(H): Phrase "but not later than two business days after the filing office receives the record in question" omitted.

§9-519(i): No provision adopted.

§9-520(b)—§1309.520(B): Phrase ", in the case of a filing office described in division (A)(2) of section R.C. 1309.501 of the Revised Code," included.

§9-522(a)—§1309.522(B): Alternative B adopted; uses only term "filed" and includes phrase "and time."

§9-523(c)(1)(A)—§1309.523(C)(1)(a): Phrase "or, if the request so states, designates a particular debtor at the address specified in the request" included.

§9-523(d)—§1309.523(D): Includes phrase "a record that can be admitted into evidence in the courts of this State without extrinsic evidence of its authenticity."

§9-523(f)—§1309.523(F)(1): "At least weekly, the filing officer shall offer or sell or license to the public on a non-exclusive basis, in bulk, copies of all records filed in it under sections R.C. 1309.501 to R.C. 1309.527 of the Revised Code, in a medium determined by the secretary of state."

§1309.523(F)(2) to (F)(4): Provisions added authorizing secretary of state to adopt rules for limiting and imposing charges for "bulk commercial special extraction requests."

§9-525(a)—§1309.525(A): "Except as provided in division (C) of this section, the fee for filing and indexing a record under sections R.C. 1309.501 to R.C. 1309.527 of the Revised Code is twelve dollars."

§9-525(d)—§1309.525(B): Fee for responding to request is $20; language added: "However the fee otherwise required under division (B) of this section is five dollars if the request is limited to communicating only whether there is on file any financing statement naming a particular debtor and the name of the secured party or record relating thereto. Division (B) of this section does not require that a fee be charged for remote access searching of the filing office data base."

§9-525(e)—§1309(C): Designation of (e) changed to (C).

§1309.525(D): Provision added: "Any person may request from the secretary of state a copy of any financing statement naming a particular debtor, owner, or lessee, and of any statement of assignment of the financing agreement, that is on file with the secretary of state. The request shall be made in writing to the secretary of state and the secretary of state shall charge and collect a fee of five dollars for each copy requested."

§9-526(a)—§1309.526(A): Secretary of state to adopt rules in accordance with c. 119.

§9-526(b)—§1309.526(B): Reference to secretary of state added.

§9-527—§1309.527: Secretary of state to report to general assembly by Dec. 31 in each even-numbered year.

§1309.528: Provision added to allocate filing fees to payment of operating expenses and for equipment and training in connection with filings.

§1309.529: Provision added for distribution of portion of filing fees to county recorders.

§9-612(b)—§1309.612(B): Phrase "in a transaction other than a consumer transaction," preceding "a notification of disposition sent" omitted.

§9-614(3)—§1309.614(B): In notice form, bracketed sentence added: "We will charge you $__ for the explanation if we sent you another written explanation of the amount you owe us within the last six months.”

§9-626(a)—§1301.626(A): Phrase “other than a consumer transaction” omitted.

Filing Fees.

See category 10 Documents and Records, topic 10.04 Records, subhead Filing Under Uniform Commercial Code.

See also topics: Banks and Banking, Bills and Notes, Brokers, Carriers, Contracts, Factors, Frauds, Statute of, Sales, Securities, Warehousemen; categories Business Organizations, topic Corporations; Civil Actions and Procedure, topic Limitation of Actions; Debtor and Creditor, topics Assignments, Fraudulent Sales and Conveyances, Liens; Documents and Records, topics Records, Seals; Mortgages, topic Chattel Mortgages.

3.10 CONDITIONAL SALES:

See topic 3.23 Sales.

3.11 CONSIGNMENTS:

See topic 3.14 Factors.

3.12 CONSUMER PROTECTION:

Uniform Consumer Sales Practice Act (R.C. §§1345.01- 1345.13) amended (R.C. §1345.01). Prohibits unfair, deceptive or unconscionable acts or practices. (R.C. §§1345.02, 1345.03). Consumers have right to bring individual action for rescission or damages with reasonable attorneys fees awarded to prevailing party. (R.C. §1345.09). Class actions can be brought by consumers or Attorney General. (R.C. §§1345.07, 1345.09). Ohio Attorney General is enforcing authority and can conduct investigations and issue subpoenas (R.C. §§1345.06, 1345.07) and has rule making authority (R.C. §1345.05). Common Pleas, Municipal and County Courts have jurisdiction within their respective monetary limits. (R.C. §1345.04). Act does not apply to transactions between attorneys, physicians, dentists, veterinarians or certified public accountants or public accountants and their clients or patients (R.C. §1345.01[A]) or practices required or specifically permitted under other laws, dissemination of information by publishers, broadcasters and printers acting without knowledge of violation of Act, or to claims for personal injury (R.C. §1345.12).

Substantive rules have been promulgated dealing with advertising practices, pricing practices, sale of motor vehicles, repairs and services, home insulation, nondelivery and substitution of goods, and other subjects.

Specific statute restricting supplier's right to switch consumer's provider of natural gas or telecommunications services without verified consent of consumer. (R.C. §1345.02[E]).

Private Remedies.

Consumers may rescind transaction or recover actual economic damages plus amount not exceeding $5,000 in noneconomic damages. (R.C. §1345.09[A]). For act or practice declared to be deceptive or unconscionable, consumer may rescind transaction or recover, but not in class action, three times amount of consumer's actual economic damages or $200, whichever is greater, plus amount not exceeding $5,000 in noneconomic damages. In class action under Civil Rule 23, as amended, consumer may recover damages or other appropriate relief. (R.C. §1345.09[B]). Consumer may seek declaratory judgment, injunction, or other appropriate relief . (R.C. §1345.09[D]). Consumer not precluded from also proceeding with cause of action under any other theory of law. (R.C. §1345.09[H]).

Penalties.

Civil penalty up to $5,000 per day for violation of court injunction. (R.C. §1345.07[A]). Civil penalty of not more than $25,000 if person engages in act or practice found to be unfair, deceptive or unconscionable by rule or by court. (R.C. §1345.07[D]).

Home solicitation sales of consumer goods or services for purchase price in excess of $25 regulated. Transactions covered involve negotiations and agreements effected at buyer's residence and do not include follow-up visits by sellers having fixed business location in state where buyer initiated contact, transactions initiated by buyer to meet emergency situation, and certain home repair contracts requested by buyers. (R.C. §1345.21). Consumer goods and services do not include real estate, securities or commodities sales, or insurance or automotive sales or services, or property sold at auction. Buyer has right to cancel contract except for emergency goods or services within three days; contract must clearly so state and contain detachable cancellation notice for buyer's use. (R.C. §§1345.22 - 1345.23). Property delivered by seller or traded in by buyer must be returned; buyer has right to recover trade-in value, and may retain goods which seller fails to pick up within 20 days. (R.C. §§1345.26 - 1345.27).

Anti-Pyramid Sales Act prohibits scheme by which one pays consideration for opportunity to receive compensation for introducing another person into program or after introducing another into program (R.C. §1333.91[A]) and prohibits person from proposing, planning, preparing or operating pyramid sales plan (R.C. §1333.92). Injured persons may recover amount of consideration paid plus attorneys fees. (R.C. §1333.93). Enforcing authority is Ohio Attorney General. Act provides for criminal penalties (R.C. §1333.99[G]) and civil penalty of up to $5,000 per day for violation of injunction (R.C. §1333.94).

Business Opportunity Plans.

R.C. §§1334.01-.99 deals with Business Opportunity Plans. Sellers or brokers of business opportunity plan (R.C. §1334.01[D]) must provide disclosure statement containing prescribed information (R.C. §1334.02) at least ten business days prior to execution of any agreement relating to such business plan. Code prohibits certain practices including representations to potential investors unless seller has substantiating data and provides such data to potential investors at least ten days prior to execution of agreement. (R.C. §1334.03). Every agreement relating to business opportunity plan must be written, signed by purchaser and delivered to purchaser at time of signing, and must contain certain prescribed terms; buyer has right to cancel within five days. (R.C. §1334.06). Attorney General has authority to investigate and issue subpoenas relating to investigations (R.C. §1334.07) to seek injunctions, temporary restraining orders or declaratory judgments, bring class actions, and seek appointment of referees or receivers (R.C. §1334.08[A], [B]). Civil penalties of $5,000 per violation, up to aggregate of $100,000. (R.C. §1334.08[D]). Private actions for rescission of transaction, recovery of damages of $10,000 or three times amount of actual damages, whichever is more, or for class action under Civil Rule 23. (R.C. §1334.09). Certain transactions exempt. (R.C. §§1334.12,.13,.14).

Prepaid entertainment contracts for dance studio lessons, social referral services, martial arts training and health spa services must, among other requirements, be in writing and contract must include certain statutory provisions. (R.C. §1345.42). Buyer has right to cancel within three days and must receive prescribed written notice of such right. (R.C. §1345.43). Seller of services must post bond with state where facility is under construction and not available for service at time buyer signs contract. (R.C. §1345.421).

Hearing Aids; Assistive Devices.

R.C. §§1345.30-.31 allow consumer purchasing hearing aid to return it to retailer within 30 days for full refund, regardless of reason for return. (R.C. §1345.30[B]). Retailer must provide receipt to consumer which includes statutorily prescribed legend of consumer's right to return hearing aid. (R.C. §1345.30[C]). Assistive devises, products designed to improve functional capabilities of individual with disability, must be covered by express one year written warranty covering full cost of replacement and consumer's collateral costs. (R.C. §1345.91). If manufacturer or supplier fails to repair assistive devise, consumer is entitled to full refund less reasonable allowance for use. (R.C. §1345.92).

Odometer Rollback and Disclosure Act prohibits disconnecting, setting back or other alteration of odometers, except for repair purposes (R.C. §4549.42); requires disclosure of true odometer reading by transferor of vehicle (R.C. §4549.46); prohibits operation of motor vehicle with disconnected or nonfunctional odometer with intent to defraud (R.C. §4549.44). Attorney General is enforcing authority (R.C. §§4549.47 - 4549.48) and transferees have right to bring individual actions for damages (R.C. §4549.49). See category 23 Transportation, topic 23.01 Motor Vehicles.

Uniform Deceptive Trade Practices Act (1969) adopted with some modifications. (R.C. §§4165.01-.04). There is duplication between provisions of Consumer Sales Practice Act, c. 1345 supra, and c. 4165.

Invention Development Protection Act requires written contract for invention development services. Developer must provide written description of services. Provides for revocation by either party within four days of execution of contract. (R.C. §1345.62). Developer must keep records of persons to whom idea submitted. (R.C. §1345.64). Developer must maintain bond or deposit with Secretary of State. (R.C. §1345.67).

Discrimination.

It is unlawful discriminatory practice to refuse to consider combined income of husband and wife for purpose of extending mortgage credit to one or both (R.C. §4112.02[H][6]); or to discriminate against applicant for credit in granting, withholding, extending, or renewing credit, or in fixing rates or terms thereof, or to refuse to maintain separate credit accounts or separate credit reporting files or engage certain other credit practices on basis of race, color, religion, sex, military status, marital status, national origin, handicap, age or ancestry (R.C. §4112.021).

Creditor, on applications for credit with only intrastate distribution, must print, in type same size as rest of form, following notice: “The Ohio laws against discrimination require that all creditors make credit equally available to all credit worthy customers, and that credit reporting agencies maintain separate credit histories on each individual upon request. The Ohio Civil Rights Commission administers compliance with this law.” For application with multi-state distribution, notice may be mailed to applicant with notice of acceptance or rejection of application. (R.C. §4112.021[B][1][g]).

It is unlawful for building and loan association to refuse to buy from, sell to or trade with any person because such person is being blacklisted or boycotted by any foreign corporate or governmental entity. (R.C. §1153.05).

Trademarks.

See category 17 Intellectual Property, topic 17.01 Trademarks and Tradenames.

Packaging, labeling and selling following articles regulated: fertilizers, c. 905; seeds and plants, c. 907; bakery goods, c. 911; milk and milk products, c. 917; meat and poultry, c. 918; horse meat, c. 919; herbicides, experimental poisons, and pesticides, c. 921; livestock feeds, c. 923; eggs, fresh fruits and vegetables, c. 925; nursery stock, c. 927; diseased animals, c. 941; garbage fed swine and poultry, c. 942; trademarked timber, c. 981; stuffed toys and bedding materials, c. 3713; canned fruits and vegetables, maple sugar and syrups, vinegar food, drugs, cosmetics and dietary supplements, c. 3715 (Pure Food and Drug Law); hazardous substances, c. 3716; barbiturates and narcotic drugs, c. 3719; turpentine, paint, flaxseed and linseed oil and petroleum products, c. 3741; fireworks and explosives, c. 3743; beer and malt beverages, R.C. §§4301.21, .22; and wine, R.C. §§4301.13, .23.

Credit Card.

Unsolicited issuance of card, except for replacement or renewal, creates no liability for use except that authorized by card holder. (R.C. §1319.01).

Consumer Credit Protection Act prohibits, except under specific circumstances, any person from recording credit card account numbers when check is presented for payment (R.C. §1349.17[A][1]) and from recording telephone or social security account numbers when payment is made by check or credit card agreement (R.C. §1349.17[A][2]).

Consumer credit mortgage loan statute requires creditor give certain disclosures (R.C. §1349.26) and prohibits certain terms and practices (R.C. §1349.27).

Financial Institutions.

Banks, credit unions, savings and loan associations must provide depositors with written schedule of rate of interest on deposits and charges which may be imposed on accounts prior to accepting initial deposit into any savings account which is subject to making of withdrawals by automatic transfer; must also give notice of imposition of new charges or increases in existing charges and state circumstances under which money in account may become unclaimed funds.

Hotel and inn operation governed by c. 3731.

Retail Installment Sales.

Liquidated damages for breach of layaway arrangement is limited to lesser of $25 or 10% of good's value. (R.C. §1317.21[A]).

Small Loans.

See topic 3.19 Interest.

Trading stamps must show cash value and must be redeemed on presentation. (R.C. §§1333.01-.02).

Unsolicited merchandise constitutes gift to one who neither orders nor requests it. (R.C. §1333.60).

Weights and measures governed by R.C. §§1327.46 - 1327.49.

Other Safeguards.

Prepaid service contract for dance studio lessons, social referral services, martial arts training and health spa services must, among other requirements, be in writing, and buyer has three days to cancel if it extends over one year period or has purchase price in excess of $200. (R.C. §§1345.41-.50). Failure to comply with requirements constitutes deceptive act in connection with consumer transaction. (R.C. §1345.48).

Consumers' counsel is appointed by Consumers' Counsel Governing Board and represents consumers with regard to applications, complaints and hearings on public utility rates before Public Utilities Commission. (R.C. §4911.15).

Plain Language.

Required by statute for insurance policies. (R.C. §§3902.01-08; R.C. §3915.05).

Motor Vehicle "Lemon Law".

Requires motor vehicle manufacturers to replace vehicles or grant refunds to consumers after reasonable number of attempts by manufacturers to repair any warranty nonconformities in their motor vehicles. (R.C. §§1345.71-.81).

3.13 CONTRACTS:

Agreements in construction contracts indemnifying against liability for damages to person or property resulting from sole negligence of indemnitee are void. (R.C. §2305.31). Provisions in real estate construction contract that law of another state applies or that litigation, arbitration or other dispute resolution is to occur in another state void. (R.C. §4113.62[D]).

Uniform Commercial Code adopted. See topic 3.09 Commercial Code, subheads Action on Official Amendments and Material Variations, Blanks Filled in and Optional Provisions in Code Sections.

3.14 FACTORS:

Uniform Commercial Code adopted. See topic 3.09 Commercial Code, subheads Action on Official Amendments and Material Variations, Blanks Filled in and Optional Provisions in Code Sections.

Commission merchant, immediately on making sale, must render itemized statement to consignor showing gross amount of sale, freight and other charges which consignee may reasonably incur and net proceeds of sale. (R.C. §4711.01). Penalty provided for failure to render itemized statement or willfully rendering false statement. (R.C. §4711.99).

3.15 FRANCHISES:

Offer of franchises governed by Ohio Business Opportunity Act. (R.C. §§1334.01 - 1334.99). See topic 3.12 Consumer Protection, subhead Business Opportunity Plans. Ohio has not adopted Uniform Franchise and Business Opportunities Act.

Specific statutes govern relationship between suppliers and distributors of alcoholic beverages. (R.C. §§1333.82 - 1333.87).

Specific statute governs fair competition for cable television franchises. (R.C. §§1332.01 - 1332.10).

Specific statute governs relationship of suppliers and dealers of farm machinery. (R.C. §§1353.01 - 1353.06).

Motor Vehicle Dealerships.

Franchisor must give notice of intent to establish additional dealership or relocate existing dealership to all existing dealers for same line or make in ten-mile radius of proposed dealership, except that notice need not be given for relocation of existing dealership within one mile of existing location and certain other relocations and reopenings. (R.C. §§4517.50[A], 4517.01[DD]). Existing dealers may file protest with Motor Vehicle Dealers Board, which is authorized to hold hearings and determine if there is good cause for not permitting new dealership to be established or relocated. (R.C. §4517.50[A]). Dealer may be terminated, discontinued, or not renewed by franchisor only for good cause, upon at least 90 days notice, except notice may be given 15 days in case of dealer insolvency or bankruptcy, engaging in unlawful business practices or ceasing business operations. (R.C. §§4517.54, 4517.55). Prior to effective date of proposed termination, discontinuance or nonrenewal, dealer may file protest with Board. (R.C. §4517.54[C]). Where transfer of all or controlling interest in dealership is subject to franchisor's approval, dealer must provide franchisor with written notice of such transfer and with information about transferee. (R.C. §4517.56[A]). Franchisor must have good cause for disapproving transfer (R.C. §4517.56[D]) and must provide dealer with written notice of disapproval, stating objective criteria used to evaluate transferee and criteria which transferee failed to meet (R.C. §4517.56[B]). Transferor-dealer or transferee may file protest with Board within 90 days of franchisor notice of disapproval. (R.C. §4517.56[C]). Franchisor must approve transfer after hearing on protest if Board determines good cause for disapproval does not exist. (R.C. §4517.56[E]). Good cause does not include fact that: (1) Transferee or prospective management does not reside in market area; (2) prospective transferee not intending to be employed full-time in dealership; (3) prospective transferee holds license for different make or line of vehicle or same vehicle at another location; (4) franchisor previously determined to discontinue franchise; or (5) proposed transferee proposes to relocate and relocation facility meets franchisor facility standards. (R.C. §4517.56[E]). Franchisor required to give franchisee written notice of delivery and preparation obligations prior to delivery of new motor vehicles to retail buyers (R.C. §4517.53), adequate compensation of dealers for warranty and recall work (R.C. §4517.52), standards for franchisor's conduct (R.C. §4517.59), indemnification of dealers by franchisors (R.C. §4517.60) and notice by franchisor to dealer of material damage (over 6% of MSRP) to any motor vehicle that has been corrected after manufacturing process (R.C. §4517.61). Dealer or prospective transferee may seek double actual damages, plus court costs and reasonable attorney's fees, from franchisor for noncompliance with statute. (R.C. §4517.65[A], [B]).

3.16 FRAUDS, STATUTE OF:

No action may be brought on loan agreement between financial institution and debtor unless agreement is in writing and signed by party against whom action is brought or signed by debtor and accepted by financial institution. Credit card and certain small loan (c. 1321) transactions are excluded. Does not apply to loan agreements primarily for personal, household, or family purposes where loan is less than $40,000 or is secured by interest in debtor's primary residence. (R.C. §1335.02).

Assignment or grant of lease of or estate of interest in lands must be in writing signed by or on behalf of party making assignment or grant.

No action may be brought: (1) To charge person on promise to answer for debt of another person; (2) to charge any executor or administrator upon any special promise to answer damages out of his own estate; (3) to charge any person on agreement made on consideration of marriage; (4) on any contract for sale of lands, or any interest in or concerning them; (5) on any agreement that is not to be performed within one year unless agreement on which such action is brought is in writing and signed by or on behalf of party to be charged. (R.C. §1335.05).

No action may be brought to charge physician, surgeon, osteopath or podiatrist on promise relating to medical prognosis unless promise is in writing and signed by party to be charged. (R.C. §1335.05).

Prepaid service contracts for dance studio lessons, social referral service, martial arts training and health spa service must, among other requirements, be in writing and signed by both buyer and seller. (R.C. §§1345.41, 1345.42).

Sales Commissions.

Time at which commissions are due sales representatives is determined according to: (1) terms of contract, if contract is written and unambiguous, (2) past practice of parties, if contract is unwritten or ambiguous, (3) customary practice in industry, if (1) or (2) cannot be used. (R.C. §1335.11).

Sales of Goods.

Uniform Commercial Code adopted. See topic 3.09 Commercial Code, subheads Action on Official Amendments and Material Variations, Blanks Filled in and Optional Provisions in Code Sections.

3.17 [RESERVED]

3.18 INFORMATION TECHNOLOGY, INTERNET AND NEW MEDIA:

Electronic Transactions, Signatures and Records.

Uniform Electronic Transactions Act adopted (c. 1306); except §§3(c), 3(d), 17, 18, 19, 20, and 21 of Act not adopted in Ohio. Electronic record or signature satisfies legal requirement that record, signature, or contract be in writing. (R.C. §1306.06). Act not applicable to wills, codicils, testamentary trusts, transactions governed by c. 1301 (other than R.C. §§1301.07 - 1301.12), commercial paper, bank deposits and collections, letters of credit, warehouse receipts, bills of lading and other documents of title, investment securities or secured transactions. (R.C. §1306.02[B]). Use of electronic records or signatures not mandatory. (R.C. §1306.04). Act sets forth rules regarding: electronic records retention (R.C. §§1306.07, 1306.11); when electronic records or signatures are attributable to person (R.C. §1306.08); use of electronic means for notary, acknowledgment, verification or oath (R.C. §1306.10); use of electronic records as evidence (R.C. §1306.12); use of electronic agents in formation of contracts (R.C. §1306.13); when electronic records deemed sent and received (R.C. §1306.14); and control of transferable records (R.C. §1306.15). Ohio version of Act also sets forth rules regarding: electronic contracts with consumers (R.C. §§1306.16, 1306.19) and security procedures (R.C. §§1306.17 - 1306.18). State agencies and courts not required to use or permit electronic records or signatures but may adopt rules regarding their use. (R.C. §§1306.20 - 1306.22). Rules regarding use of electronic records and signatures in transactions with state agencies generally. (O.A.C. 123:3-1-01). Use of electronic signatures in health care records governed by R.C. §3701.75.

Securities.

Limited securities exemption for offer, but not sale, of securities over Internet if offer indicates that securities are not being offered to person in Ohio, offer is not directed to person in Ohio, and no sales are made in Ohio, unless registered or exempt and required offering documents delivered to Ohio buyers. (O.A.C. 1301:6-3-03[E][8]). Electronic securities filings. (O.A.C. 1301:6-3-09.3). Ohio securities dealer's license not required for distribution of information regarding products or services through Internet if not directed to person in Ohio and contains required legend. (O.A.C. 1301:6-3-14[A][5]). Dealer must obtain license before direct communication with person in Ohio. (O.A.C. 1301:6-3-14[A][5][d]). Additional requirements if salesperson distributes information through Internet. (O.A.C. 1301:6-3-14[A][5][e]).

Advertising and Websites.

Statutes and administrative rules govern websites and Internet advertising of persons in business of viatical settlements (R.C. §3916.17); real estate brokers and salespersons (c. 4735; O.A.C. 1301:5-1-02); dentists (O.A.C. 4715-13-01); psychologists (O.A.C. 4732-17-01[B][3][b]); and motor carriers of household goods (O.A.C. 4901:2-19-14). Definition of obscene “material” used in chapter on sex offenses (c. 2907) includes image or text appearing on computer monitor and similar devices. (R.C. §2907.01[J]). Statute governs content, requirements and prohibitions for electronic mail advertisements and penalties for violations. (R.C. §2307.64).

Telemedicine.

Physician who practices medicine in Ohio from another state through use of any communication requires telemedicine certificate. (R.C. §4731.296).

Online Drug Sales.

Sales and offers to sell dangerous drugs over Internet, information to be included on seller's Internet site, and treatment of personal information collected by drug distributors over Internet governed by administrative rule. (O.A.C. 4729-9-24).

Telecommunications.

Policies regarding rates for basic local exchange services, cable television services and public telecommunications services set forth in R.C. §§4927.01-.04.

Computer Programs, Software, Database Protection.

See category 17 Intellectual Property, topic 17.02 Trade Secrets.

3.193.16

3.17 INTEREST:

Maximum rate permitted on bond, bill, promissory note, other instrument in writing, for forbearance or payment of money at future time is 8% (R.C. §1343.01[A]) and in other cases when money becomes due and payable upon any bond, bill, note, or other instrument in writing, upon any book account, verbal contracts, settlements, judgments, orders or decrees of any judicial tribunal arising out of tortious conduct, contract or other transaction is determined pursuant to R.C. §5703.47 (R.C. §1343.03[A]). Discount points on residential mortgage loans limited by R.C. §1343.011.

Exceptions to maximum rate exist for bonds, bills, promissory notes and other written instruments where amount of principal exceeds $100,000 (R.C. §1343.01[B][1]); for debts owed to brokers or dealers registered under Securities Exchange Act of 1934 for carrying debit balance in customer account if balance is payable on demand and secured by stocks, bonds or other securities (R.C. §1343.01[B][2]); for mortgage loans approved, insured or guaranteed by any federal agency or by federal national mortgage association, federal home loan mortgage corporation or farmers home administration (R.C. §1343.01[B][3]); for all other mortgage loans and land installment contracts except that interest rate must not exceed 8% of discount rate on 90 day commercial paper in effect at fourth district federal reserve bank (R.C. §1343.01[B][4]); for instruments payable on demand or in one installment which are not secured by household furnishings or other goods used for personal, family or household purposes (R.C. §1343.01[B][5]); and loans for commercial, agricultural, or industrial enterprises carried on for investment or profit (R.C. §1343.01[B][6]).

Judgments.

Interest on judgment runs at federal short-term rate (R.C. §1343.03[A]), except for judgment on bonds, bills, notes or other instruments in writing containing stipulation for payment of interest at some other lawful rate, in which case interest on judgment is computed at rate specified in instrument. (R.C. §1343.02). Interest in civil action based on tortious conduct or contract to be computed from date of judgment, decree or order to date money paid and shall be federal short-term rate in effect on date judgment, decree or order is rendered. (R.C. §1343.03[B]). Prejudgment interest may be available in tort action from date plaintiff gave defendant written notice that cause of action accrued or from date plaintiff filed complaint if court determines lack of good faith effort to settle by party required to pay. (R.C. §1343.03[C]). Interest not paid on “future damages”. (R.C. §1343.03[C][2]).

Small Loans.

Loans of $5,000 or less are governed by c. 1321. Licensed lender may charge interest, calculated according to actuarial method, not to exceed 28% annually on unpaid balance up to $1,000, and 22% annually on unpaid balance exceeding $1,000. Loans may be interest-bearing or precomputed. (R.C. §1321.13[A]).

For interest-bearing loans, each payment is applied first to unpaid charges and fees, then to accumulated interest with remainder to unpaid principal balance. Interest cannot be compounded. (R.C. §1321.13[C][1], [2]).

Precomputed loans shall be repayable in substantially equal and consecutive monthly installments of principal and interest combined, with certain exceptions. Provisions for prepayment, default charges and deferment charges are included. (R.C. §1321.13[D]).

Violations of law result in forfeiture to borrower twice amount of interest contracted for. (R.C. §1321.14).

Check Cashing.

Specific statute governs activities of check cashing business, including fees that may be charged and damages that may be claimed on default. (R.C. §§1315.21-1315.99).

Open-End Loans.

Open-end loans are permissible. Rates are not to exceed those set under R.C. §1321.13(A). Interest is to be computed according to one of two prescribed methods. Account may be terminated by written notice to other party when there is no unpaid balance. (R.C. §1321.16).

Second Mortgages.

Licensed lender may charge interest not exceeding 21% per year on unpaid principal balances. Loans may be interest bearing or precomputed with payments to be applied in accordance with statute. Recording fees and certain closing costs may be charged in addition to interest. (R.C. §1321.57). Points and prepayment penalties allowed on loans secured by real estate. (R.C. §1321.57[G]).

Retail Installment Sales.

See topic 3.23 Sales, subhead Retail Installment Sales Act.

Usury.

If contract requires more than rate allowed by law, excess interest payments are applied to principal. (R.C. §1343.04, 39 O.S. 12). If licensed lender of small loans charges more than law permits, contract is void and he cannot collect any principal, interest or other charges. (R.C. §1321.02).

When usury is incorporated in negotiable paper, maker who has been compelled to pay a holder in due course may recover from the one who originally exacted usury (R.C. §1343.05); and borrower may recover any excess interest paid to licensed lender of loans (R.C. §1321.13[D][3]); but otherwise, after full payment of debt, usury paid cannot be recovered (26 O.S. 207).

Usury defense does not apply to corporate debts. (R.C. §1701.68).

Assessments by building and loan association are not deemed usury. (R.C. §1151.21).

3.18 [RESERVED]

3.19 LICENSES, BUSINESS AND PROFESSIONAL:

State licenses are required for numerous businesses and occupations and municipalities and counties are authorized to require licenses for various businesses and occupations.

Athletic Agents.

Certificate of registration from Ohio athletic association needed to represent student athlete. (R.C. §4771.06). Prohibited from contracting with student athlete unless contract is written, all inclusive, contains specific language on first page and warning near place for signature, and presented to official responsible for student athlete's athletic program. (R.C. §4771.02[A]). Continuing education (R.C. §4771.10), surety bond (R.C. §4771.11) and trust account (R.C. §4771.12[B]) required. Arbitration provision in agent contract void unless pursuant to labor union rule. (R.C. §4771.02[B]). Agent contract with Ohio student athlete governed by Ohio law. (R.C. §4771.04). Person, including institution of higher education, damaged by athlete agent's violation of chapter may bring civil action for compensatory, punitive, and exemplary damages and equitable relief. (R.C. §§4771.19 - 4771.20). However, punitive damages may not be awarded against surety.

Commercial Travelers.

No license required.

Collection Agencies.

No statutes concerning collection agencies as such, but they cannot engage in activities which constitute practice of law. (R.C. §4705.01).

Health and Medical Licenses.

See category 15 Health, topic 15.08 Licensure and Certification.

3.20 MONOPOLIES, RESTRAINT OF TRADE AND COMPETITION:

Combination of two or more legal persons to restrict trade or commerce, limit or reduce production or increase or reduce price of merchandise or commodity, prevent competition, fix prices, set minimum prices, otherwise directly or indirectly preclude free and unrestricted competition or refuse to buy, sell or trade because person is blacklisted or boycotted by foreign corporate or governmental entity is unlawful and void. (R.C. §1331.01). Special provisions govern foodstuffs (R.C. §1331.05), dairy products (R.C. §1331.15), and insurance companies (R.C. §3901.11). Complying agricultural cooperative associations (R.C. §1729.70) and labor groups (63 O.App. 157, 25 N.E.2d 853) are excepted.

Remedies.

Criminal penalties are established by R.C. §§1331.02, .04, .05, 15, .99. Attorney general is enforcement official (R.C. §109.81), with authority to issue investigative demands for documents, testimony or responses to written interrogatories to persons he has reasonable cause to believe may be in possession, custody or control of documents or facts relevant to any investigation being conducted (R.C. §1331.16). Procedure is governed by R.C. §§1331.09, 1331.13. Court may order revocation of license of foreign corporation or franchise of Ohio corporation violating monopoly laws. (R.C. §§1331.07, 1331.11). Civil remedies include avoidance of contract (R.C. §1331.06) and treble damages and costs (R.C. §1331.08).

Cause of action is barred unless commenced within four years except for actions brought by Attorney General or prosecuting attorney. (R.C. §1331.12).

Unfair Trade Practices.

Uniform Deceptive Trade Practices Act adopted. (R.C. §§4165.01 - 4165.04). See topic 3.12 Consumer Protection. There are no general provisions concerning price discrimination other than in sales of dairy products (R.C. §1331.15) and sales below cost of cigarettes (R.C. §§1333.11 - 1333.211).

Resale Price Agreements.

See category 17 Intellectual Property, topic 17.01 Trademarks and Tradenames.

3.21 NEGOTIABLE INSTRUMENTS:

See topic 3.02 Bills and Notes.

3.22 RESTRAINT OF TRADE:

See topic 3.20 Monopolies, R.C. 3.22 Restraint of Trade and Competition.

3.23 SALES:

Uniform Commercial Code adopted. See topic 3.09 Commercial Code, subheads Action on Official Amendments and Material Variations, Blanks Filled in and Optional Provisions in Code Sections.

For provisions governing sales of motor vehicles, see category 23 Transportation, topic 23.01 Motor Vehicles.

Contracts of Sale.

Uniform Commercial Code governs. (R.C. §1302.01 et seq.).

Bills of Sale.

There are no statutory requirements as to bills of sale except in regard to sales of motor vehicles. See category 23 Transportation, topic 23.01 Motor Vehicles.

Conditions or Warranties.

Uniform Commercial Code governs. (R.C. §1302.01 et seq.).

Conditional sales governed by Uniform Commercial Code, Art. 9. (R.C. §1309.101 et seq.).

Distribution of human blood or organs is classified as service, not sale. (R.C. §2108.30).

Jurisdiction Based on Sale of Goods.

See category 5 Civil Actions and Procedure, topic 5.20 Process, subhead Personal Service Outside the State.

Product Liability.

R.C. §§2307.71 - 2307.81 defines product liability claim as civil action to recover compensatory damages from manufacturer or supplier arising from: (1) Design, formulation, production, construction, creation, assembly, rebuilding, testing or marketing of product; or (2) any warning or instruction, or lack of warning or instruction, associated with product; or (3) any failure of that product to conform to any relevant representation or warranty. (R.C. §2307.71[A][13]). Manufacturer is liable for compensatory damages based on product liability claim if plaintiff establishes, by preponderance of evidence: (1) that product was defective in manufacture or construction as described in R.C. §2307.74; (2) that product was defective in design or formulation as described in R.C. §2307.75; (3) that product was defective due to inadequate warning or instruction as described in R.C. §2307.76 or because product did not conform to representations made by manufacturer as described in R.C. §2307.77; (4) that defect was proximate cause of harm for which plaintiff seeks compensatory damages; and (5) that manufacturer designed, formulated, produced, created, made, constructed, assembled, or rebuilt product. (R.C. §2307.73[A]). Supplier is liable for its own negligence or if product does not conform to representations made when product left supplier's control. (R.C. §2307.78[A]). Supplier is liable as if it were manufacturer in eight specific circumstances. (R.C. §2307.78[B]). Statutes concerning contributory negligence, industry or enterprise liability, and limits on noneconomic compensatory damages have been repealed.

Retail Installment Sales Act applies to every retail installment contract to sell specific goods and every consumer transaction and retail sale of specific goods where price may be paid in installments. (R.C. §1317.01[A]). Act does not include certain lease-purchase agreements as defined in R.C. §1351.01(F) nor layaway arrangement as defined in division (S) of R.C. §1317.01. (R.C. §1317.01[A]). Goods defined as all things movable at time of identification for sale or identification to contract for sale and purchased primarily for personal, family or household purposes. (R.C. §1317.01[C]).

Form of Contract.

Every such sale must be evidenced by writing, copy of which must be delivered to buyer, at time of its execution. (R.C. §1317.02). Seller may require promissory note and security agreement. (R.C. §1317.03). See topic 3.02 Bills and Notes; category 20 Mortgages, topic 20.01 Chattel Mortgages. Contract must state: (1) Cash price, (2) amount of down payment, (3) unpaid balance, (4) cost to buyer of any insurance which buyer has agreed to procure, (5) principal balance owed on contract, (6) finance charge, (7) time balance owed by buyer to seller, number of payments required and amount and date of each payment to be made. (R.C. §1317.04). If insurance is to be purchased by seller, seller must deliver policy to buyer. (R.C. §1317.05). Retail seller may charge and receive finance charge which cannot exceed greater of: (1) $8 annually for each $100 balance, with service charges of 50¢ per month for first $50 of principal balance and 25¢ per month for each of next five $50 units of principal balance, provided that this provision applies only to contracts with principal balance of $700 or less; or (2) precomputed base finance charge of not more than amount obtained by applying 1½% per month to unpaid portion of unpaid principal balance determined to be outstanding from time to time according to terms and schedule of payments in contract. (R.C. §1317.06). Such base finance charge and service charges may be computed on basis of full month for any fractional period in excess of ten days. No base finance and service charge for less than ten days. (R.C. §1317.06). R.C. §§1317.01 - 1317.11 do not apply to any sale in which base finance and service charge does not exceed $15. (R.C. §1317.06[A]). Contracts may provide for delinquency charges and are permitted 5¢ for each dollar for payment more than ten days late, with maximum of $3 for one installment. Interest may be charged on any installment not paid in full on or before its scheduled due date at rate not to exceed 1½% per month. Payments must be in equal installments and may not be accelerated on account of default unless default continues for at least 30 days. Balloon payments not permitted unless buyer's income is seasonal or irregular. (R.C. §1317.06[C]). As alternative to finance and interest charges permitted in R.C. §1317.06 parties may contract for delinquent charges in any amount provided that contract contains statement that informs consumer of amounts and conditions of delinquent charges. (R.C. §1317.062). Such delinquent charges are not included in determining whether maximum annual interest rates have been exceeded. (R.C. §1317.062[C]). Contract may evidence indebtedness for only: (1) Time balance, (2) delinquent payment charges, (3) taxes and any recording or fee paid by seller and (4) customary documentary service charge, if it does not exceed $250. (R.C. §1317.07). Seller generally may not acquire security interest in other goods (R.C. §1317.071); see category 20 Mortgages, topic 20.01 Chattel Mortgages, subhead Types of Property Subject to Security Interests.

Repossession governed by R.C. §1317.12, 1317.13. See category 20 Mortgages, topic 20.01 Chattel Mortgages, subhead Remedies.

Buyer's Remedies.

Any contract evidencing debt or security interest for more than is allowed by R.C. §§1317.06 or 1317.07 or that includes any charge prohibited by R.C. §§1317.01-1317.11 is unenforceable, but buyer must prove that overcharge is willful or that seller or holder of retail instrument has been notified in writing of overcharge, and has failed within ten days to give buyer full credit. Correction of overcharge within 60 days after execution of contract is conclusive proof of lack of willfulness. If buyer has paid charges in excess of those allowed he may sue and recover total amount paid. (R.C. §1317.08).

Holder in due course defense abrogated in consumer transactions where goods or services purchased pursuant to purchase money loan installment note or retail installment contract. Buyer may assert certain defenses against creditor which buyer is entitled to assert against seller. Borrower must disclose to creditor if loan proceeds will be applied to consumer transaction if creditor, in writing, requests such information. If borrower fails to so disclose, creditor not subject to borrower's defenses. Borrower must affirmatively assert defenses in accordance with statute; waiver of defenses void. (R.C. §§1317.031, 1317.032, 1317.14).

Assignment, Collection, and Prepayment.

Notwithstanding provisions of any retail installment contract retail buyer may satisfy in full before maturity any unpaid installments and in that event is entitled to refund. Amount of such refund shall represent at least as great proportion of total finance charge, less acquisition cost of $10, as sum of periodical time balances, after date of prepayment, bears to sum of all periodical time balances under schedule of payments in original contract. (R.C. §1317.09).

Criminal Penalties.

Any person who willfully violates any provision shall be fined not more than $1,000 or imprisoned not more than one year, or both. (R.C. §1317.99).

Consumer Protection.

See topic 3.12 Consumer Protection.

Bulk Sales.

See topic 3.09 Commercial Code, subhead Action on Official Amendments.

Sales of Motor Vehicles.

See category 23 Transportation, topic 23.01 Motor Vehicles.

International Sales of Goods.

U.S. is contracting state to United Nations Convention on the International Sale of Goods. Therefore, CISG applies as law of contracts in contracts for sale of goods between parties whose places of business are in different contracting states. See Selected International Conventions section in Martindale-Hubbell Law Digest.

3.24 SECURITIES:

The Securities (or Blue Sky) Act (R.C. §1707.01 et seq.) divides securities and transactions in securities into following classes: (1) Those not requiring registration; (2) those to be registered by description; (3) those to be registered by qualification; (4) those to be registered by coordination. Act does not apply to sale of real estate. (R.C. §1707.01[B]).

Uniform Commercial Code adopted. (cc. 1301 to 1310). See topic 3.09 Commercial Code.

Supervision.

Division of Securities administers Blue Sky Act. (R.C. §1707.23). Principal executive officer of Division is Commissioner of Securities. (R.C. §1707.46). Address is 77 South High Street, 22nd Floor, Columbus, Ohio 43215. Telephone: (614) 644-7381. Website: http://www.com.ohio.gov/secu/.

Regulatory Powers of Supervising Authority.

Division may adopt rule when federal securities law or regulation contains provision not found in Blue Sky Law. Rule adopted under this authority and not revoked by Commissioner, lapses and has no further force and effect 18 months after rule's effective date. (R.C. §1707.201). Division may suspend registration by description or qualification of any securities or right of any dealer or issuer to buy, sell or deal in any security, if Division finds: (1) Violation of Code provisions or orders of Division, (2) certain fraudulent practices, or (3) issuer is insolvent and sells securities under registration or qualification. (R.C. §1707.13). Division has general power to: (1) Require additional reports, (2) examine any investment adviser, investment adviser representative, or any seller, dealer, salesperson or issuer of any securities; (3) require production of documents and testimony, (4) refuse, suspend or revoke licenses, (5) initiate criminal proceedings, (6) require any dealers to immediately furnish copies of prospectuses, circulars or advertisements or require any investment adviser to immediately furnish copies of brochures, advertisements, publications, analyses or reports to Division; (7) require any dealers to mail to Division, prior to sale, notices of intention to sell, in respect to all securities which are not exempt under R.C. §1707.02 or which are sold in transactions not exempt under R.C. §1707.03 or R.C. §1707.04; (8) issue and serve cease and desist orders, (9) issue and initiate contempt proceedings. (R.C. §1707.23). Exercise of one remedy does not require or preclude exercise of any other remedy. (R.C. §1707.23[I]). Division may apply to court of common pleas for contempt proceedings, to enjoin issuance or sale of securities or to enjoin violations of Code or for injunction implementing cease and desist orders where such orders are violated. (R.C. §§1707.24-.26).

Prerequisites to Sales or Offerings.

No person shall act as dealer, unless such person is licensed as dealer by Division. (R.C. §1707.14). No person shall sell or offer any security which is not exempt or subject of exempt transaction and has not been registered. (R.C. §1707.44[C][1]).

Securities to Which Act Applicable.

Securities are certificates or instruments or any oral, written, or electronic agreement, understanding, or opportunity, representing title to or interest in, or is secured by lien or charge upon, capital, assets, profits, property, or credit of any person or of any public or governmental body, subdivision or agency. (R.C. §1707.01[B]). Securities include shares of stock, certificates for shares of stock, uncertificated securities, limited liability company membership interests, voting-trust certificates, warrants and options to purchase securities, subscription rights, interim receipts and certificates, notes, all forms of commercial paper, and certain other certificates, rights, and instruments. (R.C. §1707.01[B]).

Exempt Securities.

Securities exempt from registration include following: Certain U.S., other government and government agency securities; securities of any foreign government with which U.S. is maintaining diplomatic relations; securities issued or guaranteed by national banks or state banks, savings and loan associations, savings banks; credit unions; interim certificates for securities themselves exempt or registered; securities listed or designated on approved stock exchanges or on approved tiers of national quotation system; securities issued by public utility under supervision of public commission or officer; certain equipment trust securities; commercial paper and notes if not offered directly or indirectly for sale to public (public is defined by regulation to include sales other than to officers and directors of issuer, of parent corporation of issuer, or of corporate general partner of issuer; general partners of issuer; persons who directly or indirectly control management and policies of issuer by ownership of voting securities, by contract or otherwise; or not more than ten persons in Ohio during any 12 month period, provided issuer reasonably believes person is purchasing for investment, no advertising other than offering circular delivered by issuer is used, aggregate commission for sale does not exceed 10% of initial offering price and any commission is paid only to licensed dealers and salesmen); securities issued by insurance companies regulated by any state; any security (except one which is evidence of indebtedness) issued by person or corporation not organized for profit; securities which have been outstanding for not less than five years, on which there has been no default for five years immediately preceding sale; and industrial development bonds. (R.C. §1707.02).

Exempt Transactions.

Transactions which can be carried on without registration include: sale of real estate (R.C. §1707.01[B]), isolated sales by bona fide owners; sales over certain Ohio stock exchanges; sales by trustee or other fiduciary made under court authority, or otherwise authorized; sales to issuer or dealer or to institutional investor; sales of securities pledged to secure debts; sales at public auction by corporation to enforce delinquent subscription; giving of any conversion right, subscription right, warrant, option to purchase security or right to receive security upon exchange which are or at exercise will be exempt or registered or subject matter of exempt or registered transaction; sales of notes, bonds or other evidences of indebtedness secured by mortgage on real estate, leasehold (except oil, gas or mining leasehold) or tangible personal property, or evidencing indebtedness based on conditional sale contract, if they are all sold to single purchaser, at single sale; delivery of securities by issuer thereof on exercise of conversion rights, warrants or options, provided they were subject matter of exempt transaction when granted; sale at profit of not more than 2% of securities by bank, savings and loan association, savings bank or credit union organized under laws of U.S. or of Ohio; distribution by corporation of its securities to its shareholders as dividend, any distribution or exchange of any security of issuer or its wholly owned subsidiary by issuer with its security holders, or sale of preorganization subscriptions for shares of stock of corporation prior to its incorporation if no remuneration is given; exchange of securities for securities, claims or property interests under plan of reorganization or refinancing approved by court pursuant to bankruptcy or other federal act, or by any state court of competent jurisdiction; with certain exceptions, sales by licensed dealer of securities theretofore issued and outstanding; sale of any equity security (stock of corporation or membership interest of limited liability company) by issuer where total number of purchasers in Ohio does not exceed ten during one-year period ending on date of sale, no advertising is used, issuer reasonably believes purchaser is purchasing for investment, and aggregate commissions, discounts and other remuneration does not exceed 10% of initial offering price paid to dealers or salesmen registered in Ohio; good faith sales representing interests in or under profit-sharing or participation agreements relating to Ohio oil or gas wells, not issued by corporation, if no more than five beneficial owners, securities represent interest in only one gas or oil well, purchasers receive certificate which discloses costs relating to offering, and total costs do not exceed 25% of aggregate interests in such wells; sale of money order, travelers check or similar instrument; sale by licensed dealer of securities being registered under Blue Sky Act and Securities Act of 1933 provided no sale is consummated prior to registration; execution of order for purchase of securities by licensed dealer under certain conditions; sale of any security where transaction is exempt from registration under §4(2) of Securities Act of 1933 and aggregate commission, discount and other remuneration does not exceed 10% of initial offering price and is paid to dealers or salesmen registered in Ohio, and issuer or dealer files report within 60 days after sale and pays filing fee of $100 for first filing and $50 for each subsequent filing during calendar year;

sale pursuant to statutory provision or provisions of articles of incorporation or other controlling instrument where there is submitted to vote of security holders plan or agreement for reclassification, merger or consolidation, combination or transfer of assets to another person if securities to be issued are effectively registered and sold under Securities Act of 1933 or securities holders receive, at least 20 days prior to their meeting, information substantially equivalent to that required in proxy statement prepared under §§14(a) or 14(c) of Securities Exchange Act of 1934; sale of any security where Division by rule finds that registration is not necessary or appropriate in public interest or for protection of investors; limited offering made pursuant to Rule 505 of Regulation D when no commission or remuneration given to persons soliciting or selling except persons licensed in Ohio, aggregate commission price does not exceed 12% of initial offering price, no knowledge of disqualifying activities, issuer files notice with Commissioner of Securities not later than five days before earlier of first use of offering document in Ohio or first sale and pays $100 filing fee; limited offering made pursuant to Rule 506 of Regulation D when commission or remuneration given only to persons licensed in Ohio and issuer files Form D notice with Division within 15 days of first sale in Ohio and pays $100 filing fee; and sales to accredited investors as defined pursuant to Rule 501 of Regulation D when issuer files with Division notice of offering within 15 days after notice of offering is made to public and issuer pays $100 filing fee. (R.C. §1707.03).

Reorganizations.

If Division approves, upon hearing, plan of reorganization or refinancing of Ohio corporation or corporation having principal place of business in Ohio, securities issued under plan and transactions in such securities are exempt from all registration under Blue Sky Act. (R.C. §1707.04).

Registration of Offerors.

Ohio does not require registration.

Registration of Securities.

By Description.

Following transactions in securities may be carried on after registration by description: (1) Sale of its securities by corporation when no part of securities to be sold is issued directly or indirectly in payment or exchange for intangible property or for property not located in Ohio, and when total commission, remuneration, expense, or discount in connection with sale of such securities does not exceed 3% of initial offering price thereof; (2) good faith sale of its securities by any corporation when such securities are sold to not more than maximum of 35 purchasers (not including purchasers of at least $100,000 or any director or executive officer of issuer), aggregate commission or other remuneration does not exceed 10% of initial offering price, and such securities are issued and disposed of for sole account of issuer; (3) good faith sale of securities representing interest in partnership, limited liability company, limited partnership, partnership association, syndicate, pool, trust, trust fund, or other unincorporated association if securities are sold to not more than 35 purchasers maximum (not including purchasers of at least $100,000, or any trustee, general partner, director, or executive officer of issuer or member/manager of limited liability company), aggregate commission or other remuneration does not exceed 10% of initial offering price; (4) offering and sale of additional securities of corporation, made by it to its own security holders exclusively, when no commission or other remuneration is paid. Issuer engaging in any of above transactions is not deemed to be dealer. Any commission, discount, or other remuneration shall be paid only to dealers or licensed salespersons. Following individuals are deemed to be single purchaser of security: (a) Husband and wife; (b) child and its parent or guardian; (c) corporation, limited liability company, partnership, association or other unincorporated entity, joint stock company, or trust, but only if such purchaser was not formed for purpose of purchasing security. (R.C. §1707.06).

Transactions requiring registration by description involve paying fee and filing information with Division setting forth name of issuer, description of securities, amount and price of securities and proof that securities are subject matter of transaction specified in R.C. §1707.06. Registration is effective seven days after division receives description on applicable forms and filing fee of $50. (R.C. §1707.08).

By Coordination.

Securities may be registered by coordination where registration statement has been filed pursuant to §6 of Securities Act of 1933 or notification form and offering circular have been filed pursuant to Regulation A of Securities and Exchange Commission and registration statement is filed with Division. Registration becomes effective simultaneously when federal registration statement becomes effective or at time offering may otherwise commence in accordance with rules of Securities and Exchange Commission provided all conditions under statute and rules are met. Registration by coordination involves paying fees and filing information with Division, including all documents filed with Securities and Exchange Commission. Filing fee $100; registration fee 1/10 of 1% of aggregate amount offered in Ohio, $100 minimum, $1,000 maximum. (R.C. §1707.091).

By Qualification.

All other securities must be registered by qualification, which involves paying fee and filing detailed information with Division about issuer, its business, assets, liabilities, income and expenses and securities to be sold. Division may make examination of issuer and transaction as prerequisite to qualification of securities. Filing fee $100; registration fee 1/10 of 1% of aggregate amount being offered in Ohio, $100 minimum, $1,000 maximum. (R.C. §1707.09).

Securities required to be registered by qualification may be provisionally registered by qualification and sold pending full qualification upon consent in writing by Division conditioned on filing, within 30 days, of application for full qualification or for registration by description if within such time such securities become entitled to registration by description. (R.C. §1707.10).

Securities Notice Filings.

Investment companies that are registered with or have filed registration statement with Securities and Exchange Commission under Investment Company Act of 1940 shall file with Division: (1) copy of investment company's federal registration statement as filed with Securities and Exchange Commission or form U-1 or NF of North American Securities Administrators Association; and (2) filing fee of $100 and fee equal to 1/10 of 1% of aggregate price of securities to be sold in Ohio, but not less than $100 and not more than $1,000. (R.C. §1707.092).

Electronic Filings.

Division may, by rule, provide for electronic filing or submission of any form, document, material or information that is required or permitted to be filed with or submitted to Division. (R.C. §1707.093).

Consent to Suit.

In order to achieve registration, corporate issuer not domiciled in Ohio, or unincorporated issuer having principal place of business outside Ohio, must file irrevocable consent designating Secretary of State as agent for service of process or pleading; stating that actions growing out of sale of securities, giving of investment advice, or fraud committed by person on whose behalf consent is submitted may be commenced against person, in county in Ohio in which cause of action may arise or where plaintiff in action may reside; and stipulate that service on Secretary of State shall be taken in all courts to be as valid and binding as if service had been made upon person on whose behalf consent is submitted. (R.C. §1707.11).

Registration of Dealers.

Registration of Dealers.

Dealers must be licensed by Division and no person not licensed may act as dealer other than in transactions through or with licensed dealer, except in certain transactions exempt from registration, or when such person is issuer and securities are of specified type or transaction in one which can be registered by description. (R.C. §1707.14). Dealer with revenues in any 12 month period of $150,000 or more and more than 100 retail customers must, with certain exceptions, be registered as broker or dealer with Securities and Exchange Commission. (R.C. §1707.14). Attorney, accountant or engineer who incidental to his profession brings together potential buyer and seller without receiving commission or fee not deemed to have participated in sale for purposes of Act. (R.C. §1707.431). Dealer does not mean: any issuer, including any officer, director, employee, partner, member/manager or trustee of any issuer that sells its own securities provided there is no remuneration for sale; any attorney or accountant whose activities are incidental to practice; any person that, for others, engages in purchase or sale of majority interest in issuer; any person that brings issuer and investor together and whose compensation is not based on sale of securities; any bank or any person Division by rule exempts from definition. (R.C. §1707.01[E]).

Brokers and Agents.

Registration of Salespersons.

Every salesperson of securities must be licensed by Division and employed, authorized, or appointed by licensed dealer specified in salesperson's license. (R.C. §1707.16). Dealers must employ only licensed salespersons. (R.C. §1707.15).

Registration of Investment Advisers.

No person shall act as investment adviser unless such person is licensed by Division; is registered under §203 of Investment Advisers Act of 1940 (and pursuant to R.C. §1707.141[B], has filed with Division copy of documents that were filed with Securities and Exchange Commission and paid notice filing fee); has no place of business in Ohio and only Ohio clients are investment companies, other investment advisers, licensed dealers, banks, insurance companies, employee benefit plans with assets of at least $1,000,000, government agencies or instrumentalities or institutional investors; has no place of business in Ohio and during preceding year had no more than five clients that are residents of Ohio, other than those described in preceding clause; is charitable organization or trustee, director, officer, employee or volunteer of such organization who provides investment advice in limited circumstances; or is church plan, eligible to establish and maintain such plan or any trustee, director, officer, employee or volunteer of such plan who provides investment advice in limited circumstances. (R.C. §1707.141). Investment adviser does not mean: any attorney, accountant, engineer or teacher whose activities are incidental to profession; publisher of newspaper, news magazine or business or financial publication of general circulation; one who acts solely as investment adviser representative; bank holding company; bank, receiver, conservator or other liquidating agent; licensed dealer or salesperson whose activities are incidental to business; any person who renders advice only on securities that are obligations of U.S. or in which U.S. has interest and are designated as exempt by Securities Exchange Act of 1934; any person excluded from definition of investment adviser pursuant to §202(a)(11)(A) to (E) of Investment Advisers Act of 1940; person who acts solely as state retirement system investment officer or as bureau of workers' compensation chief investment officer; or any other person division designates by rule. (R.C. §1707.01[X]).

Registration of Investment Adviser Representatives.

No person shall act as investment adviser representative unless: licensed by Division; licensed as investment adviser by Division and does not act as investment adviser representative for another investment adviser unless licensed to act for that investment adviser; employed by investment adviser registered under §203 of Investment Advisers Act of 1940 and has no place of business in Ohio; or employed by investment adviser that is exempted from licensure. (R.C. §1707.161). Investment adviser representative means supervised person, as defined in R.C. §1707.01(DD), of investment adviser meeting certain client criteria. (R.C. §1707.01[CC]). Investment adviser representative does not mean: supervised person that does not regularly solicit, meet with, or communicate with investment adviser clients; supervised person that advises as to value of securities or as to advisability of purchasing securities or issues or promulgates analyses or reports concerning securities only by means of written materials or oral statements which are not meant to meet needs of specific individuals or accounts. (R.C. §1707.01[CC]).

Licenses.

Dealers.

Application for dealer's license must be made in writing to Division setting forth: (1) Name and address of applicant; (2) location and addresses of all places of business; (3) general description of business of applicant; done prior to application, including list of states in which applicant is licensed dealer; and (4) any additional information Division deems necessary to determine applicant's business repute and qualifications to act as dealer. One natural person who is principal, officer, director, general partner, manager or employee of dealer must pass examination designated by Division. (R.C. §1707.15[C]). License renewable each year upon filing of application for renewal and payment of $200. (R.C. §1707.17[B][1]).

Salespersons.

Application for salesperson's license must be made to Division setting forth: (1) name and complete residence and business addresses of applicant; (2) name of dealer employing or intending to employ applicant; and (3) applicant's age and education, experience in selling securities, any past licensure. Division shall by rule require applicant to pass examination designated by Division. (R.C. §1707.16). License renewable each year upon filing of application for renewal and payment of $60. (R.C. §1707.17[B][2]).

Investment Advisers.

Subject to certain exceptions, application for state registration of investment adviser must be made to Division and includes part 1 of electronic Form ADV and filing fee of $100 (R.C. §1707.17[B]) submitted through IARD. In addition, applicant that is natural person must also submit standard impression sheet for fingerprints and demonstrate minimum competency and business repute. (R.C. §1707.151; O.A.C. 1301:6-3-15.1). Investment adviser license expires on Dec. 31 of each year. (R.C. §1707.17[A][2]). Renewals for following year, including $100 fee (R.C. §1707.17[B]), must be submitted through renewals program of IARD to avoid cancellation of license. Any updates or amendments to Form ADV must be made through IARD. (O.A.C. 1301:6-3-15.1).

Subject to certain exceptions, investment advisers registered with Securities and Exchange Commission and operating in Ohio must make annual electronic notice filing with Division through IARD consisting of Part 1 of electronic Form ADV and filing fee of $100. (O.A.C. 1301:6-3-14.1; R.C. §1707.17[B][3], [4]). Notice filing expires on Dec. 31 of year for which it is filed and can be renewed by submitting $50 fee through IARD. (O.A.C. 1301:6-3-14.1). Any updates or amendments must be timely made through IARD. (O.A.C. 1301:6-3-14.1).

Investment Adviser Representatives.

Subject to certain exceptions, application for investment adviser representative's license must be made to Division and includes Form U-4, filing fee of $35 (R.C. §1707.17[B][5]), fingerprint card and demonstration of certain minimum competency standards. (R.C. §1707.161; O.A.C. 1301:6-3-16.1).

Bonds.

None are required.

Advertisements.

No person, with purpose to deceive, shall make, issue, publish or cause to be made, issued or published any statement or advertisement as to value of securities, or as to alleged facts affecting value of securities, or as to financial condition of any issuer of securities, when person knows that such statement or advertisement is false in any material respect. (R.C. §1707.44[J]).

Liabilities.

Blue Sky Act creates no new civil liabilities and does not limit or restrict common law liabilities for deception or fraud except in certain circumstances. (R.C. §1707.40).

Any person who offers by written circular, prospectus or advertisement, any security for sale or receives profits from such sale is liable to any person relying on such document for loss sustained by reason of falsity of any material statement therein or for omission therefrom of material facts. Defenses are lack of actual or constructive knowledge or having reasonable grounds to believe statement to be true or omitted fact not to be material. (R.C. §1707.41). Liability extends to directors of liable corporations. No action against director of issuer based on R.C. §1707.41 can be brought more than two years after plaintiff knew or had reason to know that actions of person or director were unlawful or more than five years after purchase of securities, whichever is shorter, provided that action to enforce right of contribution must be brought within two years after payment of judgment for which contribution is sought. (R.C. §1707.41).

Any person who advises another person to purchase any security with intent to secure financial gain to self and receives any commission or reward for advice or services without disclosing to purchaser interest in such sales shall be liable to purchase for amount of purchaser's damages. No suit shall be brought under this section more than one year subsequent to purchase. (R.C. §1707.42[A]). Investment adviser or investment adviser representative who acts in violation of Blue Sky Act shall be liable for damages resulting from violation in action at law in court of competent jurisdiction. No action can be brought against investment adviser or investment adviser representative more than five years after rendering of investment advice or two years after discovery of facts constituting violation, whichever is shorter. (R.C. §1707.42[B]).

Sale or contract for sale made in violation of Blue Sky Act is voidable at election of purchaser unless he refuses timely offer of seller to rescind sale. Seller and every person who aided in making such sale are jointly and severally liable to purchaser in action at law for amount paid, on return of securities, unless court decides that violation did not materially affect protection contemplated by violated provision. (*Note:* By case law, failure to register per se materially affects protection contemplated). No action to recover purchase price or action otherwise based upon sale of securities in violation of c. 1707 can be brought more than two years after plaintiff knew or had reason to know actions of person or director were unlawful or more than five years from date of sale or contract for sale, whichever is shorter. (R.C. §1707.43). Excusable neglect recognized when technical errors occurred when filed, securities may be deemed exempt, qualified or registered as though timely and properly filed. (R.C. §1707.391).

Tender Offers.

Control Bids.

Control bid means purchase of or offer to purchase any equity security of subject company from Ohio resident if either (1) after purchase of that security, offeror would be directly or indirectly beneficial owner of more than 10% of any class of issued and outstanding equity securities of issuer; or (2) offeror is subject company, there is pending control bid by person other than issuer and number of issued and outstanding shares of subject company would be reduced by more than 10%. Control bid must be proceeded by filing with Division and delivering to subject company information on details of offer, background of offering company, source and amount of funds or other consideration for acquiring any equity security, plans for business or corporate change of subject company, arrangements concerning equity securities of subject company, organization and operations of offeror, and other data required by regulations of Division to make full, fair and effective disclosure to offerees. Section also applies to control bids by subject company when another bid is pending for its shares. If Division determines disclosures inadequate, it can issue suspension order within five days after filing of information. If bid is suspended, Division must hold hearing within ten days of order. Hearing process must be completed no later than 14 days after suspension ordered. No offeror may acquire shares from Ohio resident within two years after offer unless resident is given opportunity to sell shares on same terms as earlier offer. Control bid does not include bids by dealer for own account in ordinary course of business, offer made in good faith to exchange or acquire securities for sole account of offeror and not involving public offering under federal law, or offer made in good faith to acquire securities for sole account of offeror from no more than 50 persons. Section does not apply when offeror or subject company is public utility or public utility holding company, bank or bank holding company, or savings and loan holding company and take-over bid is subject to approval by appropriate agency or authority under federal law. (R.C. §§1707.01, 1707.041).

Control Bids—Prohibited Actions.

Person who makes or opposes control bid shall not knowingly (1) make any untrue statement of material fact or omit to state material fact necessary in order to make statements made not misleading, (2) engage in any act which operates as fraud or deceit, or (3) engage in any manipulative act or practice. Person who makes or opposes control bid to offerees in Ohio or who realizes any profit which inures to or is recoverable by domestic corporation under R.C. §1707.043 is conclusively presumed to have designated Secretary of State as its agent for service of process in any action or proceeding under c. 1707. Person who makes or opposes control bid is subject to liabilities and penalties applicable to seller, and offeree is entitled to remedies applicable to purchaser, as set forth in R.C. §§1707.41, .45. (R.C. §1707.042).

Control Bids—Recoverable Profits.—Profit realized from disposition of equity securities of domestic corporation listed on exchange or quoted in over-the-counter market by person who, within 18 months of disposition, made proposal or publicly disclosed intention or possibility of making proposal to acquire control of corporation may be recovered by corporation, unless sole purpose of proposal was to acquire control and there were reasonable grounds to believe control would be acquired, purpose was not to affect trading market to increase profit or decrease loss and did not materially affect price or value of market trading, or aggregate profit did not exceed $250,000. If corporation fails to sue to recover profits, shareholder may sue on its behalf. Section does not apply to corporation if its articles or regulations so provide. (R.C. §1707.043).

Subdivision Offerings.

Model Land Sales Practices Act not adopted in Ohio.

Franchising, Pyramid Sales, Etc.

See topic 3.15 Franchises; see also topic 3.12 Consumer Protection, subhead Anti-Pyramid Sales Act.

Uniform Simplification of Fiduciary Security Transfers Act not adopted.

3.25 STATUTE OF FRAUDS:

See topic 3.16 Frauds, Statute of.

3.26 TRUST RECEIPT SECURITY:

See category 8 Debtor and Creditor, topic 8.15 Pledges.

3.27 WAREHOUSEMEN:

Uniform Commercial Code adopted. (cc. 1301 to 1310). See topic 3.09 Commercial Code.

Sales of warehouse receipts for intoxicating liquor are subject to Ohio Securities Act and are carefully regulated. (R.C. §1707.34). See topic 3.24 Securities.

Bonds.

None.

Licenses.

None.

4 CITIZENSHIP

4.01 ALIENS:

May hold, possess and enjoy lands, tenements and hereditaments within this state, either by descent, devise, gift or purchase, as fully and completely as any citizen of the United States or this state can do, and no person who is capable of inheriting is deprived of the inheritance by reason of any of his or her ancestors having been aliens. (R.C. §2105.16).

Alien dependents of employee killed in Ohio who reside in foreign country are entitled to same workers' compensation benefits as dependents residing in Ohio. (R.C. §4123.90).

Only H liquor permits may be issued to noncitizens or entities which are not majority owned by citizens. (R.C. §4303.29).

Property.

Filing of information with Secretary of State is required by nonresident alien who acquires any interest, either in his own name or in another's name, in real property located in Ohio that is in excess of three acres or has market value greater than $100,000 or any interest in and to minerals and any mining or other appurtenant rights that has value greater than $50,000. Individual filing fee $5. Filing required by corporations or other business entities created or organized under laws of any state or foreign nation or whose principal place of business is in foreign country, in which nonresident alien owns 10% or more of shares of stock or in which 40% or more of shares of stock or other interests is owned by more than one nonresident alien when such corporation or business entity acquires any interest in real property meeting above stated criteria. Corporate filing fee $25. Forms available from Secretary of State. Changes in ownership or control of companies or in status of individuals or in ownership of real property must be reported to Secretary of State. (R.C. §5301.254). Penalty for failure to comply is fine of not less than $5,000 or more than 25% of value of real property or mineral rights so owned. (R.C. §5301.99).

See categories 7 Criminal Law, topic Criminal Law, subhead Advisements to Aliens; Estates and Trusts, topic Executors and Administrators, subhead Distribution if Abroad.

5 CIVIL ACTIONS AND PROCEDURE

5.00A LEGISLATIVE NOTE:

Tort Reform Legislation Declared Unconstitutional.

Tort reform legislation enacted in 1997 was declared unconstitutional by Ohio Supreme Court in 1999. (86 O.S.3d 451, 715 N.E.2d 1062). As result, in 2001 Ohio Legislature repealed, amended and in some cases renumbered statutes affected, and in many cases re-enacted legislation in effect prior to 1997. This Digest describes only that current legislation.

5.01 ACCORD AND SATISFACTION:

Compromise.

Within Uniform Commercial Code.

Claim is discharged upon debtor's proof of claimant's obtaining payment of debtor's instrument tendered with conspicuous statement in good faith as full satisfaction of unliquidated or disputed claim. (R.C. §1303.40[A]). Claimant can avoid discharge by tender of repayment within 90 days. (R.C. §1303.40[B]). Uniform Commercial Code §1-207, permitting claimant to obtain payment on tendered instrument and still reserve rights, not applicable to accord and satisfaction. (R.C. §1301.13[B]).

Outside Uniform Commercial Code.

Common law principles of accord and satisfaction apply to noncommercial claims. (66 O.S.3d 229, 611 N.E.2d 794).

Partners and Other Joint Debtors.

Partner may compromise individual liability to creditor of partnership on dissolution of partnership without discharging liability of other partners to creditor, and without affecting right of other partners to call upon compromising partner for ratable portion of joint debt. (R.C. §§1779.09, .10). Provisions relating to compromising partners apply to any other joint debtor compromising individual liability on joint debt. (R.C. §1779.11).

Pleading.

Accord and satisfaction is affirmative defense which must be pled. (Civ.R. 8[C]; 66 O.S.3d 229, 611 N.E.2d 794).

5.02 ACTIONS:

Ohio Rules of Civil Procedure, based on Federal Rules of Civil Procedure, adopted 1970. See topic 5.19 Practice.

Equity.

Both legal and equitable remedies available according to nature of case.

Forms of Action.

One form of action, known as civil action. (Civ.R. 2).

Conditions Precedent.

Generally, none for commencement of action.

Commencement.

See topic 5.20 Process.

Parties.

Proper Parties.

Real party in interest and interests of minors and incompetents treated substantially same as Federal Rules 17(a) and 17(c). (Civ.R. 17[A] and 17[B]).

In action involving future claim of unborn child, interest represented or defended by court-appointed trustee, and state attorney general shall be served and represent interest of unborn child if beneficiary of interest is charitable trust. (R.C. §2307.131).

Necessary Parties.

Persons needed for just adjudication substantially same as Federal Rule 19(a). (Civ.R. 19[A]).

Persons having following claims specifically required to be joined in same action: wrongful death claim and survival injury claim of decedent; injury claim of husband or wife and spouse's loss of consortium claim; minor's injury claim and parent's loss of consortium claim; employee's injury claim and employer's property damage claim. (Civ.R. 19.1).

All persons claiming interest that would be affected by declaratory judgment action must be joined in declaratory judgment action. Specifically, state attorney general must be joined in action involving constitutionality of statute; and municipality or township must be joined in action involving validity of municipal ordinance or township resolution. (R.C. §2721.12).

Joinder Procedure.

Substantially same as Federal Rules 19, 20 and 21, with addition of procedure for joinder of persons having certain related claims. (Civ.R. 19, 19.1, 20, 21). See catchline Necessary Parties, supra.

Class Actions.

Substantially same as Federal Rules 23(a) through 23(e). (Civ.R. 23[A] through 23[E]). Claims of class members are aggregated in determining jurisdiction of court. (Civ.R. 23[F]). Determination that action may or may not be maintained as class action is final appealable order. (R.C. §2505.02[B][5]). Uniform Class Actions Act not adopted. There is immediate right of appeal from class certification. (R.C. §2505.02[B][5]).

Intervention.

Substantially same as Federal Rules 24(a) and 24(b). (Civ.R. 24[A] and 24[B]). Procedure substantially same as Federal Rule 24(c) except that court duty to notify attorney general in actions involving constitutionality of statute deleted. (Civ.R. 24[C]). See subhead Parties, catchline Proper Parties, supra.

Interpleader.

Substantially same as Federal Rule 22(1). (Civ.R. 22). When subject of action is sum of money or thing capable of delivery, party may deposit it with court upon notice to other parties and leave of court.

Third Party Practice.

Substantially same as Federal Rules 14(a) and 14(b). (Civ.R. 14).

Joinder of Causes of Action.

Substantially same as Federal Rule 18. (Civ.R. 18).

Splitting Causes of Action.

Single cause of action cannot be split into several claims and separate actions, except where insurer has acquired by assignment or subrogation right to recover money it has advanced to pay for property damage (167 O.S. 221, 147 N.E.2d 599). Where person suffers both personal injuries and property damage as result of same tortious act, only single cause of action arises. (70 O.S.3d. 6, 635 N.E.2d 1233).

Consolidation of Actions.

Substantially same as Federal Rule 42(a). (Civ.R. 42[A]).

Severance of Actions.

Substantially same as Federal Rule 42(b). (Civ.R. 42[B]).

Stay of Proceedings.

Determination of whether to stay proceedings while action pending and before judgment generally rests within court's discretion. (81 O.S.3d 334, 691 N.E.2d 282). Stay required until arbitration held in accordance with agreement to arbitrate. (R.C. §2711.02). Party entitled to extraordinary writ of prohibition from appellate court when trial court about to exercise judicial power not authorized by law and no other adequate remedy exists in ordinary course of law. (88 O.S.3d 447, 727 N.E.2d 900).

Abatement and Revival.

Death.

In addition to causes of action surviving death at common law, also surviving are actions for injury to person or property, fraud or deceit and mesne profits (lost profits during period owner wrongfully denied possession of property), and may be brought after death of party. (R.C. §2305.21).

Death of either party while action pending does not abate action except actions for libel, slander, malicious prosecution, nuisance or misconduct in office of county court judge. (R.C. §2311.21). Procedures for substituting personal representative of decedent in pending action or on appeal substantially same as Federal Rule 25(a) and Federal Appellate Rule 43(a). (Civ.R. 25[A]: App.R. 29[A]). Attorney for party has duty to suggest death on record within 14 days of actual knowledge. (Civ.R. 25[E]).

Incompetency.

Procedures for substituting representative party adjudged incompetent while action pending or on appeal substantially same as Federal Rule 25(b) and Federal Appellate Rule 43(b). (Civ.R. 25[B]; App.R. 29[B]).

Transfer of interest while action pending does not abate action; procedure for continuation of action by or against original party or by substitution substantially same as Federal Rule 25(c). (Civ.R. 25[C]). Procedure for substitution on appeal substantially same as Federal Appellate Rule 43(b). (App.R. 29[B]).

Public Officer.

Separation from office, while action pending, of public office holder named as original party in official capacity does not abate action; procedures for automatic substitution of successor in pending action or on appeal substantially same as Federal Rule 25(d) and Federal Appellate Rule 43(c)(2). (Civ.R. 25[D]; App.R. 29[C][1]).

Guardianship.

Change in guardian or termination of guardianship does not abate pending action if ward's right survives; successor guardian, deceased ward's representative or ward, as case requires, made party in same manner as on death of party. (R.C. §2111.17).

Other Pending Action.

Pending action in another Ohio court of concurrent jurisdiction involving substantially same parties and cause of action abates second action and permits its dismissal. (103 O.S. 492; 134 N.E. 443; 37 O.App.3d 43, 523 N.E.2d 516). Remedy of prohibition against proceeding with second action available, applying jurisdictional priority rule. (172 O.S. 70, 173 N.E.2d 343; 74 O.S.3d 120, 656 N.E.2d 684).

Limitation of.

See topic 5.16 Limitation of Actions.

Small Claims.

See category 6 Courts and Legislature, topic 6.01 Courts.

Termination of Actions.

Judgment is final determination of rights of parties in an action.

Prohibited Actions.

Breach of promise to marry, alienation of affections, criminal conversation, seduction of any person 18 years of age or older who is not incompetent. (R.C. §2305.29).

Administration.

See category 13 Estates and Trusts, topic 13.09 Executors and Administrators.

Direct Actions Against Insurer.

See category 23 Transportation, topic 23.01 Motor Vehicles, subhead Direct Actions.

5.03 APPEAL AND ERROR:

Appellate Court System.

Appellate Courts are Supreme Court and Courts of Appeals. (Const. Art. IV, §§2, 3). Supreme Court prescribes rules of procedure for these courts. (Const. Art. IV, §5; App. R. 1). In case of conflict between statutes governing procedure and rules, rules govern. (Const. Art. IV, §5). Lower courts also have limited appellate jurisdiction; see subhead Other Courts, infra.

Supreme Court has appellate jurisdiction in cases originating in courts of appeals and certain administrative agencies (Const. Art. IV, §2; R.C. §§4903.12, 5717.04); in cases decided by courts of appeals involving substantial constitutional question or question of public or great general interest at court's discretion, and judgments certified by courts of appeals as being in conflict with judgments of other courts of appeals (Const. Art. IV, §§2, 3; S.Ct. Prac.R. II).

Notice of appeal to Supreme Court (1) from courts of appeals (other than certified conflict cases) must be filed with Supreme Court, together with memorandum in support of jurisdiction, within 45 days after court of appeals files judgment entry for journalization (S.Ct. Prac.R. II.2); (2) from courts of appeals certifying conflict, with Supreme Court within 30 days after court of appeals certifies conflict (S.Ct. Prac.R. IV); (3) from Board of Tax Appeals, with Supreme Court and board within 30 days after entry of order (R.C. §5717.04, S.Ct. Prac.R. II.3); (4) from Public Utilities Commission or Power Siting Board, with Supreme Court and commission or board within 60 days after order on motion for rehearing (R.C. §§4903.11, 4906.12, S.Ct. Prac.R. II.3).

Courts of appeals have appellate jurisdiction in cases originating in inferior courts of record within their districts (Const. Art. IV, §3; R.C. §§1901.30, 2501.02) and in Board of Tax Appeals, concurrent with Supreme Court (R.C. §5717.04).

Other Courts.

Common pleas courts are limited to review of proceedings of administrative officers and agencies. (Const. Art. IV, §4, implemented as to certain agencies, R.C. §§119.12, 2506.01, 4301.31, and as to county commissioners. R.C. §2305.01). See category 6 Courts and Legislature, topic 6.01 Courts, subhead Courts of Common Pleas.

Municipal courts and county courts have appellate jurisdiction in appeals from mayor's courts. (R.C. §1905.22). Notice of appeal of mayor's court orders or judgments must be filed within ten days. (R.C. §1905.23).

Appeal must be perfected by filing of notice of appeal with court or agency from which appeal is taken and, if leave to appeal is required, with appellate court (R.C. §2505.04) within 30 days after entry of matter for review (R.C. §2505.07). Notice of appeal of certain administrative rulings must be filed with court of common pleas within 15 days. (R.C. §119.12).

Appeal Bond.

See subhead Stay of Proceedings, infra.

Stay of Proceedings.

Stay conditioned on execution of supersedeas bond in sum not less than cumulative total for all claims covered by judgment plus interest, subject to $50 million cap excluding interest and costs (Civ.R. 62[B], App.R. 7, R.C. §§2505.09, 2505.14, 2505.16). Bond not required of trust fiduciary, state, political subdivision, public officer or in nonmonetary administrative related appeals. (R.C. §2505.12).

Extent of Review.

Appeals on questions of law and fact are abolished. (App.R. 2).

Final Appealable Order.

Only final order may be appealed. Final order either affects substantial right which determines action and prevents judgment, affects substantial right made in special proceeding or upon summary application in action after judgment, vacates or sets aside judgment or grants new trial, grants or denies provisional remedy, or determines that action may or may not be maintained as class action. (R.C. §2505.02).

Provisional Remedy.

Proceeding ancillary to action, including, but not limited to, proceeding for preliminary injunction, attachment, discovery of privileged matter, or suppression of evidence. (R.C. §2505.02[A][3]).

Character of Hearing.

Review based on record. (App.R. 9). Oral argument may be waived by agreement of parties and with approval of court. (App.R. 21).

Ohio Rules of Appellate Procedure are based generally on Federal Rules of Appellate Procedure. Appeals from Board of Tax Appeals and from juvenile court are partially excepted. (App. R. 1, 13-33; R.C. §5717.04). Notice of appeal must be filed in trial court or Board of Tax Appeals within 30 days after entry of judgment or order appealed from (App. R. 3, 4; R.C. §5717.04); time is suspended by certain post-judgment motions (App. R. 4).

Judgment or Order on Appeal.

Where appellant is entitled to have judgment in his favor as matter of law or where judgment is against manifest weight of evidence in non-jury cases, court of appeals may enter final judgment or remand case to lower court with instructions to render appropriate judgment or order. Where it finds judgment should be modified as matter of law, it may do so. In other cases where court of appeals finds error prejudicial to appellant, it must remand to trial court for further proceedings. (App. R. 12). Where appellate court pronounces final judgment, it does not have power to issue execution on judgment but must instead send mandate to court below for execution, which then proceeds as though judgment were its own. (R.C. §2505.39).

5.04 BONDS:

Surety or guaranty companies complying with law are authorized to execute bonds required by law. (R.C. §3929.14).

Sureties must be residents of this state, worth double sum to be secured above their debts, and have property liable to execution in Ohio equal to sum secured. (R.C. §1341.01). One authorized by law to approve surety may require surety to testify as to his sufficiency. (R.C. §1341.02).

Enforcement.

Any person injured by forfeiture of bond may bring suit thereon and may join sureties. (R.C. §2307.06).

Any action on any bond, given pursuant to statute, must be brought within ten years after cause accrued. (R.C. §2305.12).

Bonds on public projects are subject to specific rules and forms. (R.C. §§153.54-.571).

5.05 CERTIORARI:

Writ abolished in civil cases. As to appeal with leave of court, see topic 5.03 Appeal and Error, subhead Appellate Court System, catchline Supreme Court.

5.06 CHARITABLE IMMUNITY:

See topic 5.09 Damages.

5.07 COMMISSIONS TO TAKE TESTIMONY:

See topic 5.11 Depositions and Discovery.

5.08 COSTS:

General rule for award of costs is similar to Federal Rule. (Civ.R. 54).

Security for Costs.

Nonresident of county where action is brought, partnership suing in firm name, or insolvent corporation must provide security for costs (R.C. §2323.30); local rule may require security in any action (R.C. §2323.31) except one brought by administrator or executor in county of appointment (R.C. §2323.32). Security is also required in certain actions by taxpayers. (R.C. §§309.13, 733.59).

Security may be in form of surety undertaking or bond (R.C. §§2323.30, 3929.14) or cash (R.C. §2323.31).

Liability of Attorney.

No provision except in cases dismissed for his nonattendance or any other neglect of duty. (R.C. §4705.06).

5.09 DAMAGES:

There is no limit on amount of compensatory damages for economic loss in tort action. (R.C. §2315.18[B]). Compensatory damages for noneconomic loss may not exceed $250,000 or amount equal to three times economic loss, as determined by trier of fact, to maximum of $350,000 for each plaintiff or $500,000 for each occurrence. (R.C. §2315.18[B]). Exception for permanent and substantial physical deformity, loss of use of limb, or loss of bodily organ system, or permanent physical functional injury that prevents injured person from independently caring for self. (R.C. §2315.18[B]). In determining award of compensatory damages for noneconomic loss, trier of fact must not consider: (1) evidence of defendant's alleged wrongdoing, misconduct, or guilt; (2) evidence of defendant's wealth or financial resources; (3) all other evidence offered for purpose of punishing defendant, rather for compensatory purpose. (R.C. §2315.18[C]). Where plaintiff prevails in action to recover damages for injury or loss to person or property, court in nonjury trial and jury in jury trial must return general verdict accompanied by answers to interrogatories specifying: (1) total compensatory damages recoverable by plaintiff; (2) portion of total compensatory damages representing damages for economic loss; (3) portion of total compensatory damages representing damages for noneconomic loss. (R.C. §2315.18[D]).

Punitive or exemplary damages are not recoverable from defendant in tort action unless actions or omissions of defendant demonstrate malice or aggravated or egregious fraud, or that defendant as principal or master knowingly authorized, participated in, or ratified actions or omissions of agent or servant that so demonstrate. (R.C. §2315.21[C]). Punitive damages are limited to two times compensatory damages. (R.C. §2315.21[D]). Limit does not apply where defendant acted purposefully and knowingly as described in R.C. §2901.22. (R.C. §2315.21[D]).

Punitive damages not awarded in product liability claim unless proof by clear and convincing evidence of flagrant disregard for safety of others. (R.C. §2307.80).

Generally punitive damages are not recoverable in contract actions (104 O.S. 372, 136 N.E. 145) unless proof of tort committed independently, but in connection with, breach of contract, accompanied by wanton, reckless, malicious or oppressive conduct. (146 O.S. 414, 66 N.E.2d 224).

Criminal Acts.

Damages in civil action include exemplary and attorney fees. (R.C. §§2307.60–61).

Comparative Negligence Rule.

Contributory negligence not bar if contributory negligence was not greater than combined negligence of all other persons from whom complainant seeks recovery and of all other persons from whom complainant does not seek recovery. (R.C. §2315.33). Compensatory damages must be reduced by percentage of contributory negligence. (R.C. §2315.33). Express or implied assumption of risk is complete bar to recovery of damages in product liability claim. (R.C. §2307.711).

Charitable Immunity.

Abolished. (12 Ohio St. 3d 210, 466 N.E.2d 867).

Sovereign Immunity.

Waived, except as provided for Office of State Fire Marshall in R.C. §3737.221. (R.C. §2743.02). Political subdivisions and employees are generally immune from liability for governmental function and entitled to any defense or immunity available at common law (R.C. §2744.03); no limitation on compensatory damages except damages (in actions other than wrongful death) not representing actual loss limited to $250,000 per person; no punitive damages. (R.C. §2744.05[A], [C]).

No-Fault Insurance.

See category 23 Transportation, topic 23.01 Motor Vehicles, subhead No-Fault Insurance.

Contribution.

Except as otherwise provided in R.C. §§2307.25-.28, if one or more persons are jointly and severally liable in tort for same injury, there may be right of contribution even though judgment has not been recovered against any or all of them, but only if tortfeasor seeking contribution has paid more than its proportionate share of common liability. No tortfeasor is required to contribute beyond its proportionate share. No right of contribution for intentional wrongdoers. (R.C. §2307.25).

Death.

See category 13 Estates and Trusts, topic 13.05 Death, subhead Actions for Death. See also category 14 Family, topic 14.10 Infants, subhead Parental Responsibility.

5.10 DECLARATORY JUDGMENTS:

See topic 5.15 Judgments.

5.11 DEPOSITIONS AND DISCOVERY:

Ohio Rules of Civil Procedure are based on Federal Rules. See topic 5.19 Practice. Depositions in criminal cases are governed by Crim. R. 15. Special provisions govern videotape depositions. See Civ.R. 30(B)(3) and 40; Sup.R. 13.

Uniform Foreign Depositions Act has been adopted. (R.C. §2319.09).

Within State for Use within State.

Federal Rules of Civil Procedure form basis for state rule. (Civ.R. 30 and 45).

Within State for Use Elsewhere.

Uniform Foreign Deposition Act governs. (R.C. §2319.09).

Outside of State for Use within State.

Federal Rules of Civil Procedure form basis for state rule. (Civ.R. 30). Subpoena procedure for nonparty witness dependent upon law of foreign state.

De Bene Esse.

Federal Rules of Civil Procedure form basis for state rule.

Perpetuating Testimony.

Rule similar to federal rule governs. (Civ.R. 27). Material variations: Petition to perpetuate is filed in common pleas court for county of residence of any expected adverse party; notice normally must be at least 28 days before date of deposition; use of deposition is subject to more detailed limitation based upon opportunity to cross-examine and availability of witness than under federal rule.

Telephone.

Telephone deposition is available by stipulation or court order. (Civ.R. 30[B][6]).

Videotape.

Sup.R. 13 provides that notice procedures for Civ.R. 30(B)(3) depositions are sufficient if notice specifies videotape deposition will be taken pursuant to Sup. R. 13. (Sup.R. 13[A][2]). Unless waived by witness and parties, witness must view videotape immediately after completion and sign certification to that effect. (Sup.R. 13[A][7]). Party may request that court rule upon objections within 14 days of filing of deposition or within such reasonable time as stipulated by parties. (Sup.R. 13[A][11]). All objections should be made to court before trial and must be made before presentation of videotape at trial. Court shall rule on any objections, presently not ruled on, before videotape is shown. Any objections sustained result in exclusion of testimony at trial. (Sup.R. 13[A][15]). Various videotape formats are permitted under Sup.R. 13(C)(1).

Before Whom Taken.

Depositions may be taken:

Within state before person authorized to administer oath by laws of state, person appointed by court where action is pending, or person agreed upon by written stipulation of parties. (Civ.R. 28 [A]). Notary public shall be appointed and commissioned as notary public for state. (R.C. §147.01). See category 10 Documents and Records, topic 10.03 Notaries Public.

Outside state before person authorized to administer oaths in place where deposition is taken, person appointed by court in which action is pending, person agreed upon by written stipulation of all parties, or, in foreign country, by any consular officer of U.S. within his consular district. (Civ.R. 28[B]).

Disqualification.

Similar to Federal rule except parties may agree otherwise. (Civ.R. 28[C]).

Commissions.

See subhead Before Whom Taken, supra.

Compelling Attendance of Witness.

Federal Rule forms basis for state rule. Civ.R. 45(C) provides for protection of persons subject to subpoena and largely tracks Federal Rule 45(c). Civ.R. 45(D) addresses duties of persons responding to subpoenas. Material variations: Service of subpoena may be by sheriff, bailiff, coroner, clerk of court, constable, or deputy of any of them, by attorney at law, or by other person designated by order of court not a party and not less than 18 years of age; residence service of subpoena is allowed; provision in federal rule governing attendance by nonresident of district is omitted; and no provision is made for subpoena directed to witness in foreign country. Sanctions and penalties for contempt are governed by Civ.R. 45(E) and notaries' contempt powers are set forth in R.C. §147.07.

Examination of Witnesses.

Federal Rules of Civil Procedure form basis for state rules. (Civ.R. 30).

Return.

Federal Rules of Civil Procedure form basis for state rules. (Civ.R. 45).

Forms.

Preamble: Deposition of . . . ., taken as if under (direct or cross) examination before . . . ., a notary public within and for the State of Ohio, at (place, time, and date), pursuant to notice (and, where applicable, stipulation or subpoena), on behalf of the (plaintiff or defendant) in this cause.

(List of appearances follows.)

. . . ., of lawful age, called by the (plaintiff or defendant) for the purpose of (direct or cross) examination, as provided by the Ohio Rules of Civil Procedure, being by me first duly sworn, as hereinafter certified, deposed and said as follows:

(Counsel may stipulate as to waiver of formalities of service, notice, and filing and qualifications of reporter. Upon completion of testimony parties may waive signature.)

Certificate:

State of Ohio . . . .

County of . . . . } SS

I, ..., a notary public within and for the State of Ohio, authorized to administer oaths and to take and certify depositions, do hereby certify that the above named . . . . was by me, before the giving of his deposition, first duly sworn to testify the truth, the whole truth, and nothing but the truth; that the deposition as above set forth was reduced to writing by me by means of (stenotype, etc.), and was later transcribed into typewriting under my direction; that this is a true record of the testimony given by the witness and was subscribed by the witness in my presence; that the said deposition was taken at the aforementioned time, date, and place, pursuant to notice (and, where applicable, subpoena or stipulation of counsel); and that I am not a relative or an employee or attorney of any of the parties, or a relative or employee of such attorney or financially interested in this action.

IN WITNESS WHEREOF, I have hereunto set my hand and seal of office at (city and date).

. . . .

(Signature)

Discovery.

After commencement of action in state court, and in some instances prior to filing of action, parties may obtain discovery through depositions, interrogatories, requests for production of documents and things or permission to enter upon land or other property, for inspection and other purposes, physical and mental examinations and requests for admission. (Civ.R. 26[A] et seq.).

Demand for Admission of Facts.

Federal Rules of Civil Procedure form basis for state rule. (Civ.R. 36). Material variations: answer or objections must be served within 28 days unless otherwise ordered by court. Requests for admission may be served after commencement of action.

Interrogatories.

Federal Rules of Civil Procedure form basis for state rule. (Civ.R. 33). Material variation: Answer or objections must be served within period designated by party submitting interrogatories, not less than 28 days after service of interrogatories.

5.12 EQUITY:

See topic 5.02 Actions.

5.13 EVIDENCE:

See topic 5.11 Depositions and Discovery.

Witnesses.

Generally all persons are competent witnesses except persons of unsound mind, and children under ten years of age who appear incapable of receiving just impressions of facts and transactions respecting which they are examined, or of relating them truly. (R.C. §2317.01). Competency of medical witnesses governed by R.C. §2743.43.

See also topic 5.11 Depositions and Discovery.

Privileged Communications.

Following persons may not testify in certain respects: (A) Attorney, concerning communication made to him by client in that relation or his advice to client, except that attorney may testify by express consent of client, or if deceased, by express consent of surviving spouse, executor or administrator and except that, if client voluntarily testifies or waives privilege pursuant to R.C. §2151.421, attorney may be compelled to testify on same subject; (B) physician or dentist, concerning communication made to him by his patient in that relation or his advice to his patient, except where patient waives privilege pursuant to R.C. §2151.421, or patient, guardian or other legal guardian gives express consent, if patient deceased, by express consent of spouse, executor or administrator, or if medical claim as defined in R.C. §2305.113, wrongful death claim or claim under c. 4123 if filed by patient, personal representative or guardian, in civil action concerning certain court-ordered treatment or services for children under c. 2151, in criminal action concerning results of tests to determine concentration of alcohol or controlled substance in patient at time relevant to criminal offense, in criminal action against physician or dentist, if communication was between patient who has since died in dispute addressing competency of deceased or whether deceased was victim of fraud, undue influence or duress when relevant document was executed; (C) cleric when cleric remains accountable to authority of cleric's church, denomination or sect, concerning confession made or any information confidentially communicated to cleric for religious counseling purpose in cleric's professional character, except by express consent of person making communication unless disclosure in violation of sacred trust, or by compulsion if person making communication voluntarily testifies or is deemed to have voluntarily testified under R.C. §2151.421 unless disclosure in violation of sacred trust; (D) husband or wife concerning communication made to one another, or act done in presence, unless communication or act done in presence of third person, and even if marital relation has ceased to exist; (E) person who assigns his claim or interest concerning matter in respect to which he would not, if party, be permitted to testify; (F) person who, if party, would be restricted in his evidence under R.C. §2317.03, when property or thing is sold or transferred by executor, administrator, guardian, trustee, heir, devisee, or legatee; (G) school guidance counselor, professional clinical counselor, professional counselor, social worker, independent social worker, marriage and family therapist, independent marriage and family therapist or social work assistant concerning confidential communication made to client in that relation or advice to that client unless communication or advice indicates clear and present danger to client or other persons, client gives express consent or, if deceased, surviving spouse or executor or administrator of estate gives express consent, client voluntarily testifies, court determines information communicated by client not germane to counseling relationship, court rules testimony is relevant in action brought against school, its administration, or any of its personnel by client, or action concerns certain court-ordered treatment or services for children under c. 2151; (H) mediator acting under R.C. §3109.052(A) mediation order or other order in divorce or family proceeding; (I) communications assistant providing telecommunications relay services pursuant to R.C. §4931.35 or Title II of 47 U.S.C. 225, concerning communication made through such relay service; (J) chiropractor in civil proceeding concerning communication by patient or advice to patient, unless patient gives express consent, or if patient deceased, by express consent of spouse or executor or administrator of estate, or if medical claim as defined in R.C. §2305.113, wrongful death claim, or claim under c. 4123 is filed by patient, representative, or guardian; (K) critical incident stress management team member concerning communication received from person receiving crisis response services or advice; or (L) employee assistance professional concerning communication made to employee assistance professional in official capacity by client. (R.C. §2317.02).

Husband and Wife.

See catchline Privileged Communications, supra.

Communications or Transactions with Persons Since Deceased or Incompetent.

Party's right to testify is limited when adverse party is guardian or trustee of either deaf and dumb, or insane person, or of child of deceased person, or is executor, administrator, or claims or defends as heir, grantee, assignee, devisee, or legatee of deceased person. (R.C. §2317.03).

Self-incrimination.

On trial of criminal causes, person charged with offense may, at own request, be witness, but not otherwise. (R.C. §2945.43). Witness may be compelled to testify where court grants immunity from prosecution. In such cases, witness also obtains use immunity with respect to prosecution for other offenses. (R.C. §2945.44).

Compelling Attendance.

See topic 5.11 Depositions and Discovery.

5.14 INJUNCTIONS:

General.

Injunction may be granted at time of commencement of action or thereafter before judgment. Injunction is binding upon parties, their representatives, agents and attorneys who have notice of order (R.C. §2727.03; Civ.R. 65) and disobedience is punishable as contempt (R.C. §2727.11).

Jurisdiction.

Injunction may be granted by Supreme Court, courts of appeals in their districts, common pleas and probate courts in causes pending in such courts. Probate judge may issue injunction in actions pending therein or in actions pending in common pleas or court of appeals in county in absence of judges of those courts. (R.C. §2727.03).

Prerequisites.

No preliminary injunction issued without serving reasonable notice on adverse party. (Civ.R. 65). See also subhead Bond, infra.

Procedure.

Federal Rules of Civil Procedure form basis for state rule. (Civ.R. 65).

Bond or deposit in lieu of bond fixed by court and must be filed before injunction or restraining order effective. Bond secures to party enjoined damages he sustains if order or injunction should not have been granted. (Civ.R. 65).

Temporary Restraining Order.

Federal Rules of Civil Procedure form basis of state rule. (Civ.R. 65).

See also category 11 Employment, topic 11.02 Labor Relations, subhead Labor Disputes.

5.15 JUDGMENTS:

Ohio Rules of Civil Procedure, based upon Federal Rules. See topic 5.19 Practice.

Judgment is any decree or order from which appeal lies.

Judgment by Confession.

See category 3 Business Regulation and Commerce, topic 3.02 Bills and Notes, subhead Judgment Notes.

Judgment by Consent.

Similar to Federal Rules, no specific rule authorizing or prohibiting consent judgments. See also subheads Judgment by Confession, supra; Default Judgments, infra.

Judgments on Pleadings.

After pleadings closed party may move for judgment on pleadings. Motion heard by court before trial. (Civ.R. 12).

Summary Judgments.

Federal Rules of Civil Procedure form basis for state rule. (Civ.R. 56).

Declaratory Judgments.

Uniform Act adopted (R.C. §§2721.01-.21); Civ.R. 57. *Note:* Party may not pursue declaratory judgment against tortfeasor's insurer until judgment for damages is awarded against tortfeasor. (R.C. §2721.02). Attorney fees may not be awarded unless authorized by common law or other provision of Revised Code. (R.C. §2721.16).

Default Judgments.

Default judgment may be granted against party from whom affirmative relief sought when he has failed to plead or defend; no default taken against minor or incompetent unless represented by guardian who has appeared in action. Notice of application for judgment served on defaulting party who has appeared in action. Default judgment cannot exceed in amount or differ in kind from relief sought in demand for judgment in pleading. (Civ.R. 54-55).

Offer of Judgment.

If offer refused it may not be filed with court for purposes of proceedings to determine costs. (Civ.R. 68).

Docketing.

Upon return of general verdict court signs judgment entry and clerk enters it. Judgment effective when filed for journalization. (Civ.R. 58). Clerk keeps complete index of judgments. (R.C. §2323.29).

Vacation or Modification.

Federal Rules of Civil Procedure form basis for state rule. (Civ.R. 60; Civ.R. 54[B]).

Lien.

Judgment rendered by any court of general jurisdiction within state, including district courts of U.S., is lien on land of each judgment debtor from time when separate certificate is filed with clerk of common pleas court of county where land is situated, except that it does not become lien on registered land until certificate, or certified copy of judgment, is filed in office of county recorder and memorial of same is entered upon register of last certificate of title to land. Any judgment issued by court of record may be transferred to any other court of record, and proceedings for collection may be had as if it had been issued by transferee court. (R.C. §2329.02).

Lien on land, without filing such certificate, and on goods and chattels, is acquired when seized in execution. (R.C. §2329.03).

Judgments of probate courts, municipal courts, county courts and other courts inferior to court of common pleas can be made liens on land only by filing certificate, as above. When certificate is filed, execution may be issued out of common pleas court as if that court had rendered judgment. (R.C. §2329.04).

Judgment of Supreme Court is lien on land from time when certificate thereof is filed in manner set forth above. Goods and chattels bound when seized in execution. (R.C. §2329.05).

If execution is not taken or certificate of judgment filed within five years from date of judgment or issuance of last execution or filing of last certificate, judgment becomes dormant. Applicable period to judgments in favor of state is ten years from date of judgment or fifteen years from date of issuance of last execution or filing of last certificate, whichever is later. If judgment has become lien by filing in another county and if no execution is issued for its enforcement within such county or no further certificate of such judgment is filed in said county, within five years from issuance of last execution or filing of last certificate in said county, judgment ceases to operate as lien upon land within such county. If judgment in favor of state has become lien by filing in another county judgment will not become dormant. (R.C. §2329.07).

When certificate is duly filed lien of common pleas court judgment continues through any appeals until final determination of action in Supreme Court. (R.C. §2329.06). Judgment lien is not removed or vacated by appeal (R.C. §2329.06), or by filing of motion for relief from judgment (Civ.R. 60).

Revival.

Dormant judgments may be revived in court where rendered. (R.C. §2325.15). If no sufficient cause is shown to contrary, judgment or finding is revived and execution may issue for amount due and unsatisfied in same manner as judgments or findings rendered in any other action. (R.C. §2325.17).

Action to revive must be brought within ten years from time judgment became dormant, but infant or person imprisoned or of unsound mind, when judgment became dormant, also has period of ten years after disability removed within which to act. (R.C. §2325.18). For purpose of calculating interest due on revived judgment, interest must not accrue and must not be computed from date judgment became dormant to date judgment revived. (R.C. §2325.18[B]).

After rendition of judgment, if party dies, such judgment may be revived by action or by motion and personal representatives of such deceased person may be made parties. (R.C. §2325.19).

Assignment of judgment on execution docket transfers right of assignor to assignee until such assignment is set aside. (103 O.S. 489, 134 N.E. 654).

Satisfaction can be shown on docket, on form prescribed by clerk. Satisfaction by separate instrument may be as follows:

Form

(Title of action).

Whereas a judgment in the amount of . . . . . . Dollars was recovered by the plaintiff against the defendant on the . . . . day of . . . . . .; and whereas said judgment was paid on the . . . . . . day of . . . . . .; it is hereby acknowledged that the judgment in the above entitled action has been satisfied and the same is hereby canceled and discharged.

. . . .

(Signature of plaintiff's attorney).

(Acknowledgment).

Foreign Judgments.

See category 8 Debtor and Creditor, topic 8.05 Executions, subhead Foreign Judgments.

Revised Uniform Enforcement of Foreign Judgments Act (1964) adopted. (R.C. §§2329.021-.12).

5.16 LIMITATION OF ACTIONS:

Actions are barred unless commenced within the following periods after the respective causes of action accrued:

Twenty-one years: To recover real property (R.C. §2305.04).

Fifteen years: On written contract (R.C. §2305.06) except contract for sale of goods.

Ten years: On official bond of officer, assignee, trustee, executor, administrator or guardian, or bond given pursuant to statute (R.C. §2305.12); any action not otherwise provided elsewhere for, except action on foreign judgment (R.C. §2305.14). On product liability claim against manufacturer or supplier of product. (R.C. §2305.10). To revive dormant judgment. (R.C. §2325.18).

Six years: On contract not in writing, express or implied; on liability created by statute, other than penalty or forfeiture. (R.C. §2305.07). Against officials or sureties for damages under Torrens Act. (R.C. §5310.12).

Five years: Judgment becomes dormant as lien upon real property unless new execution is issued or new certificate filed. (R.C. §2329.07). See topic 5.15 Judgments, subhead Lien. Civil or administrative actions brought under certain environmental laws. (R.C. §3745.31). For identity fraud. (R.C. §2305.09[C]).

Four years: For trespass upon real property; for taking, detaining, or recovery of personal property; for fraud; for injury to rights of plaintiff not arising on contract, and not otherwise enumerated; for relief on ground of physical or regulatory taking of real property. (R.C. §2305.09). For breach of contract for sale of goods, Uniform Commercial Code governs. (R.C. §1302.98). Application for refund of income tax erroneously or illegally paid. (R.C. §5747.11). Asbestos abatement action brought by a board of education. (R.C. §2305.091). For violation of Valentine Anti-Trust Act (R.C. §1331.12); for misappropriation of trade secrets (R.C. §1333.66). Civil action brought under anti-trust law, R.C. §1331.01 et seq. (R.C. §1331.12).

Three Years: For recovery of charge by or overcharge from carrier (R.C. §2305.13); for recovery or refund of municipal income taxes (R.C. §718.06); for refund of illegal, erroneous, or excessive taxes paid by corporation (R.C. §5733.12).

Two years: For bodily injury or injury to personal property (R.C. §2305.10); for death (see category 13 Estates and Trusts, topic Death); certain actions by employees against employers (see category 11 Employment, topic 11.02 Labor Relations, subheads Wages, Discrimination, catchline Notice of Claim); action for annulment on certain grounds (R.C. §3105.32); execution of deficiency judgment following foreclosure of homestead property (R.C. §2329.08); forcible entry and detainer (R.C. §1923.01); most claims against State for which sovereign immunity has been waived (R.C. §2743.16); contesting change in percentage interests of common areas of condominium (R.C. §5311.052). Patient's assault and battery claim brought against mental health professional. (R.C. §2305.115).

One year: For libel, slander, malicious prosecution, false imprisonment or certain professional malpractice other than action upon medical, dental, optometric, or chiropractic claim; for statutory penalty or forfeiture (R.C. §2305.11); for assault or battery (R.C. §2305.111); upon statute for penalty or forfeiture (R.C. §2305.11); against bank which has debited account on unauthorized signature or endorsement (R.C. §1304.35); nonconsensual abortion (R.C. §2305.11); action for contribution against joint or several tortfeasor (R.C. §2307.26); action by Ohio Civil Rights Commission against employer for discriminatory practices (see category 11 Employment, topic 11.02 Labor Relations, subhead Discrimination, catchline Notice of Claim).

If judgment for plaintiff is reversed, plaintiff may commence new action within one year. (R.C. §2305.19).

For medical, dental, optometric, or chiropractic malpractice, except that, if prior to expiration of one-year claimant gives written notice to defendant, action may be commenced within 180 days after notice. Unless claimant is minor or of unsound mind pursuant to R.C. §2305.16, such action shall not be commenced more than four years after occurrence of act or omission constituting alleged malpractice, except if person exercising reasonable care could not have discovered injury within four-year period, then claimant may commence action not more than one year after injury was discovered or should have been discovered in exercise of reasonable care (R.C. §2305.113).

For action to enforce judgment against or settlement with joint tortfeasors. (R.C. §2307.26). For filing amended corporate tax report (R.C. §5733.031) or for filing application for tax refund (R.C. §5733.031).

120 Days: Change in taxable income due to change in method of accounting. (R.C. §§5733.031, 5747.10-.11).

90 Days: Shareholder action to set aside corporate merger, combination, consolidation, or majority share acquisition. (R.C. §§1701.82-.83). Refund for illegal, excessive, or erroneous taxes pursuant to R.C. §5733.0611 if taxpayer alleges that collection of taxes violate Ohio or U.S. Constitution. (R.C. §5733.12).

60 Days: Amended tax return with underpayment and application for refund. (R.C. §§5747.10-11).

Uniform Commercial Code adopted. See category 3 Business Regulation and Commerce, topic 3.09 Commercial Code, subheads Action on Official Amendments and Material Variations, Blanks Filled in and Optional Provisions in Code Sections.

Actions not specifically provided for must be brought within ten years. (R.C. §2305.14).

Foreign Cause of Action.

Ohio law governs if brought in Ohio.

Disabilities of Plaintiff.

If, when cause of action accrues, person in whose favor it accrues is infant, or of unsound mind, statutory period does not commence to run until disability is removed. If, after accrual, he becomes of unsound mind and is adjudicated as such or is confined in institution on diagnosis of condition causing unsoundness of mind, period of adjudication or confinement tolls period of limitations. (R.C. §2305.16). Action to revive judgment must be brought within ten years after removal of disability (R.C. §2325.18) and time to bring action to recover real property cannot be extended beyond ten-year period for more than ten years after such removal (R.C. §2305.04). Action against officials or sureties under Torrens Act must be brought within two years after disability is removed. (R.C. §5310.12). When interests of two or more parties are joint and inseparable, disability of one inures to benefit of all. (R.C. §2305.16).

Absence or Concealment of Defendant.

The Ohio Tolling Statute (R.C. §2305.15) has been ruled unconstitutional as to tolling against corporations located outside state for absence from state as imposing impermissible burden on interstate commerce in decision by U.S. Supreme (484 U.S. 923). Tolling Statute held enforceable as to period individual temporarily leaves state for non-business reasons. (89 O.S.3d 540, 733 N.E.2d 1132). Tolling for absconding or concealment to avoid service of process. (R.C. §2305.15; 97 O.App.3d 621, 647 N.E.2d 221). Time imprisoned person spends incarcerated is not computed as any part of any period of limitation as provided in R.C. §2305.09 (for torts of trespass, recovery of personal property, fraud and other injuries not arising on contract nor enumerated in other sections), R.C. §2305.10 (product liability, bodily injury and injury to personal property), R.C. §2305.11 (libel, slander, malicious prosecution, false imprisonment, professional malpractice and upon statute for penalty or forfeiture), R.C. §2305.113 (medical, dental, optometric, or chiropractic malpractice), or R.C. §2305.14 (other actions for relief not otherwise provided) within which person must bring action against imprisoned person. (R.C. §2305.15[B]).

Interruption of Statutory Period.

Running of statute may be suspended by mutual agreement of parties. (42 O.S. 18).

Revival of Barred Claims.

A cause of action on contract, barred by limitations, may be revived by a written acknowledgment of promise to pay, signed by the party to be charged, or by a partial payment. (R.C. §2305.08).

Contractual limitations are permitted, if reasonable. (76 O.S. 52, 80 N.E. 955).

Pleading.

The defense of limitations must be pleaded specially. (Civ.R. 8).

See also category 3 Business Regulation and Commerce, topic 3.24 Securities, subhead Violation of Act.

5.17 NEGLIGENCE:

See topic 5.09 Damages.

5.18 PLEADING:

Ohio Rules of Civil Procedure adopted by Supreme Court and effective July 1, 1970. Legislation provides courts will determine whether any of prior governing statutes are effective if Rules do not cover given situation. Ohio Revised Code sections in conflict with or superseded by Rules are repealed effective July 1, 1971. (H.B. 1201). See topic 5.19 Practice.

To extent clearly inapplicable, Rules do not apply to procedure (1) Upon appeal to review any judgment, order or ruling; (2) in appropriation cases; (3) in forcible entry and detainer; (4) in small claims court; (5) in uniform reciprocal support actions; (6) in commitment of mentally ill; (7) in special statutory proceedings. (Civ.R. 1, 86). Rules are similar to Federal Rules of Civil Procedure.

General Requirements.

Pleading contains caption designating court, title to action, case number and name of pleading. Pleadings must be on 8½ x 11 inch paper. Complaint includes names and addresses of all parties; names alone sufficient in other pleadings. Averments of claim and defense limited to statement of single set of circumstances and must be set forth in numbered paragraphs. Each claim founded upon separate transaction or occurrence and each defense other than denials should be stated in separate count or defense. Statements may be adopted by reference in other portions of a pleading. When claim or defense founded upon account or written instrument copy must be attached to pleading, or reason for omission stated. Copy becomes part of pleading for all purposes. Complaint containing medical, dental, optometric, or chiropractic claim, as defined in R.C. §2305.113, must include one or more affidavits of merit provided by expert witness relative to each defendant for whom expert testimony is necessary to establish liability. (Civ.R. 10).

Pleading contains short and plain statements and must be simple, concise and direct. No technical forms of pleading or motions are required. Alternative or hypothetical claims or defenses permitted regardless of consistency or whether based on legal or equitable grounds. All pleadings construed so as to do substantial justice. (Civ.R. 8).

If amount sought is more than $25,000, and claim is not based on written instrument, party shall so state but shall not specify amount in demand for judgment. (Civ.R. 8).

Pleading or motion on behalf of minor or incompetent must set forth minority or incompetency where such fact not previously disclosed. (Civ.R. 8).

Pleadings Permitted.

Same as Federal Rule 7. (Civ.R. 7).

Complaint.

Short and plain statement showing right to relief and demand for judgment. (Civ.R. 8, 13, 14).

Answer.

State defenses and admit or deny averments of adverse party. Denial must fairly meet substance of averments denied and may be on basis of want of knowledge or information. Denials may be to specific averments or general as to all or part of averments. Certain affirmative defenses must be pleaded. Averments to which response is required are admitted when not denied; averments to which no response is required are taken to be denied or avoided. (Civ.R. 8).

Counterclaim or Set-Off.

Rule governing counterclaims same as Federal Rule 13. (Civ.R. 13). When defendant's cause of action against plaintiff is barred by statute of limitations it may be set-off against plaintiff's claim as recoupment. (11 O.S.3d 75, 463 N.E.2d 1246).

Reply to counterclaim substantially same as Federal Rules 8(a) and 12(a). (Civ.R. 8[A] and 12[A]).

Demurrer.

Demurrers are abolished and all matters formerly raised by demurrer are now raised by motion to dismiss, to strike, or for summary judgment. (Civ.R. 12[B], [F], 56).

Amended and Supplemental Pleadings.

Party may amend pleading once as matter of course before responsive pleading is served, or if no responsive pleading is permitted, before action is placed on trial calendar and within 28 days after amended pleading is served. Other amendments permitted only with leave of court. Response to amended pleading is required within remaining period for responses to original pleading or 14 days after service of amendment, whichever is longer, or as court orders. Trial court may allow pleadings to be amended to conform to evidence, and may grant continuance to enable opposite party to meet new evidence. (Civ.R. 15[A]).

Supplemental pleadings may be permitted by court to set forth transaction, occurrences or events happening since date of original pleading. (Civ.R. 15[E]).

Affidavits of Merit and Defense.

Either party may file affidavits in support of claim or defense in connection with motions for summary judgment. (Civ.R. 56).

Verification.

Pleadings need not be verified; attorney representing party, or party with no attorney, signs and states address. Signature of attorney or pro se party constitutes certificate that he has read pleading, motion or other paper, that to best of his knowledge, information and belief there is ground to support it, and it is not interposed for delay. Willful violations of Rule punishable. Sanctions may be taken if scandalous or indecent matter is inserted. (Civ.R. 11).

Service.

Except for original service of complaint and summons, pleadings are served on party represented by attorney by service on attorney, unless service upon party ordered by court, which may be by mailing or facsimile transmission to attorney's last known business address or by delivery to him personally or by leaving copy at his office with his clerk or some person in charge, or if no one is in charge or present, in some conspicuous place therein. If office is closed or attorney has no office, copy may be left at his usual place of abode with some person of suitable age and discretion residing therein. Service by mail complete upon mailing. Service by facsimile transmission complete upon transmission. (Civ.R. 5[B]).

Filing.

All papers after complaint required to be served upon party shall be filed with court within three days after service, but discovery pleadings shall not be filed except upon order of court, for use as evidence, or to be considered in motions to compel or prevent discovery (local rules may vary). (Civ.R. 5[D]). Proof of service must be endorsed on papers and date and manner of service stated. Filings are made with clerk of court or with judge if judge orders. (Civ.R. 5[D]).

Time.

Answer to complaint is served within 28 days after actual service of summons and complaint, or within 28 days after completion of service by publication. Answer to cross-claim is served within 28 days after service of cross-claim. Reply to counterclaim in answer is served within 28 days of service of answer; answer to amended complaint and reply to amended counterclaim in answer are served within 14 days after service of amended pleading, or within time remaining for response to original pleading, whichever is longer; reply ordered by court is served within 28 days after service of order, or as order directs. (Civ.R. 12[A]).

Written motion is served within seven days of date for hearing. (Civ.R. 6). Briefs opposing motion governed by local court rule. (Civ.R. 7).

If motion to dismiss filed under Civ.R. 12 is denied, responsive pleading is served within 14 days after notice of court's denial. If motion granted, responsive pleading is served within 14 days after service of pleading complying with court's order. (Civ.R. 12).

Third-party complaint may be served without leave of court within 14 days after service of answer; thereafter leave of court by motion required. (Civ.R. 14).

Court may generally extend time for filing pleading or paper with or without motion if request made prior to expiration of time. Otherwise, time may be extended on showing of excusable neglect. (Civ.R. 6).

Small Claims.

See category 6 Courts and Legislature, topic 6.01 Courts.

5.19 PRACTICE:

Ohio Rules of Civil Procedure are substantially same as Federal Rules.

Small Claims.

See category 6 Courts and Legislature, topic 6.01 Courts.

See also topics R.C. 5.02 Actions, Appeal and Error, Depositions and Discovery, Evidence, subhead Witnesses, Injunctions, Judgments, Pleading, Process; and category 8 Debtor and Creditor, topics 8.02 Attachment, 8.05 Executions, and 8.09 Garnishment.

5.20 PROCESS:

Governed by Ohio Rules of Civil Procedure which are similar to Federal Rules. See topic 5.19 Practice. Civil action is commenced by filing complaint if service obtained within one year. (Civ.R. 3).

General Requisites.

Summons is issued by clerk when party files complaint. Summons contains names and addresses of court, parties and plaintiff's attorney, is accompanied by copy of complaint and directs defendant to answer under penalty of default judgment. (Civ.R. 4). Special provisions govern actions against natural persons on instruments arising out of consumer loans or transactions. (R.C. §2323.13).

Who May Serve.

When process is to be served personally, Common Pleas and higher court process served by sheriff of county where defendant resides or may be found, municipal court process by bailiff, or sheriff where defendant does not reside or cannot be found within county of municipal court's territorial jurisdiction. Person 18 years old or more and not a party may be designated by court to serve process. (Civ.R. 4.1).

Personal Service on Individual.

Written request to clerk required for personal service upon competent person 16 years or older. Person serving locates person to be served and tenders copy of process and accompanying documents to him. When unable to serve process within 28 days after clerk issued process server must return process to clerk. (Civ.R. 4.1).

Personal Service on Infant.

If person under 16, service is on guardian or one of following with whom minor lives or resides: father, mother, or individual having care of minor (Civ.R. 4.2). If minor has no guardian nor lives or resides with parent or person giving care, service is made on individual. (Civ.R. 4.2).

Personal Service on Incompetent Person.

Service is on guardian or incompetent himself if no guardian. When no guardian but incompetent confined, service is on official of institution responsible for incompetent's custody. (Civ.R. 4.2).

Personal Service on Partnership.

Service is on partner, limited partner, manager or member, or by certified mail on entity at usual place of business. (Civ.R. 4.2).

Personal Service on Domestic or Foreign Corporation.

Service is on statutory agent or person appointed to receive process, or by certified mail on corporation at usual place of business, or on officer, manager or general agent. (Civ.R. 4.2).

Foreign Insurance Company.

Process agent. See category 16 Insurance, topic 16.01 Insurance Companies.

Personal Service on Association.

Unincorporated Association.

Service is on officer or by certified mail upon entity at usual place of business. (Civ.R. 4.2).

Professional Association.

Service is on shareholder or by certified mail on corporation at corporate offices. (Civ.R. 4.2).

Personal Service Outside the State.

Service may be made on person, firm, association, corporation or legal representative or entity who is nonresident of Ohio or absent resident of Ohio. Claim which is subject of complaint must arise from defendants: (a) transacting business in Ohio; (b) contracting to supply goods or services in Ohio; (c) causing tortious injury in Ohio by act or omission in Ohio; (d) causing tortious injury in Ohio by act or omission outside Ohio if defendant regularly does or solicits business here, engages in persistent course or conduct or derives substantial revenue from goods used or consumed or services rendered here; (e) causing tortious injury in Ohio by act committed outside Ohio with intent to injure; (f) causing tortious injury by criminal act, when any element of act committed to Ohio; (g) causing injury in Ohio by breach of express or implied warranty made in sale of goods outside Ohio, where seller might reasonably expect injured person to use, consume or be affected by goods in Ohio provided tests of (d) met; (h) having interest in, use or possession of Ohio real estate; (i) contracting to insure person, property or risk in Ohio; (j) once living in marital relationship in Ohio, as to obligations for alimony, custody, child support or property settlement, if other spouse still resides here. (Civ.R. 4.3, R.C. §2307.382). In addition, exercise of jurisdiction must comport with fair play and substantial justice. (82 O.S.3d 309, 695 N.E.2d 751). Service made by certified mail or personally by anyone 18 years of age or older not party who is designated by court. (Civ.R. 4.3). Alternative modes of service in foreign country provided. (Civ.R. 4.4 and 4.5).

Service by Mail.

Unless court so orders or plaintiff requests personal or residential service, most service of process, domestic or foreign, is by certified mail, return receipt requested. Clerk sends copy of process and accompanying documents to addressee with instructions to forward. (Civ.R. 4.1-4.3).

Substituted Service.

When requested in writing by plaintiff residential service may be issued. Copy of process and accompanying documents left at person's usual place of residence with individual of suitable age and discretion residing there. (Civ.R. 4.1).

Service by Publication.

Permitted in actions authorized by law (R.C. §2703.14) when residence of defendant unknown and affidavit filed. When residence known service governed by Civ.R. 4.1, 4.3(B) and 4.5.

Party or counsel files affidavit that residence unknown and cannot be ascertained. Clerk directs publication of notice to defendant in newspaper of general circulation in county where complaint filed, containing name and address of court, case number, name of first party on each side, last known address of person whose residence is unknown, summary of object of complaint, relief demanded and notifying defendant to answer within 28 days of date of last publication. Publication is weekly for six successive weeks and service completed on date of last publication. (Civ.R. 4.4).

Long Arm Statute.

See subhead Personal Service Outside the State, supra.

Proof of Service.

Personal Service: Person serving process endorses and returns to Clerk. Clerk enters fact on appearance docket. Mail Service: Clerk enters date of mailing and date of receipt returned on appearance docket. Residential Service: Person making residential service endorses and returns to Clerk. Clerk enters fact on appearance docket. Out of State Service: Same as personal or mail service. Service by Publication: Affidavit of publisher and copy of notice published filed with court. (Civ.R. 4.1-4.5).

Service Refused.

Clerk notifies serving party or counsel in writing. Serving party or counsel may then file written request with clerk for service by ordinary mail. Clerk sends copy of summons and accompanying documents to defendant by ordinary mail and enters fact of mailing on record. (Civ.R. 4.6).

Failure of Service.

Party or counsel notified by clerk in writing. (Civ.R. 4.1-4.3). In case of out-of-state mail process, service is complete if party or counsel files affidavit stating facts indicating use of reasonable diligence in ascertaining whereabouts of person to be served. (Civ.R. 4.3).

Time Limit for Service.

Complaint may be dismissed without prejudice upon motion or court's own initiative with notice if Ohio resident defendant is not served within six months of filing. (Civ.R. 4[E]).

Nonresident Motorist.

See subhead Personal Service Outside the State, supra, and category Transportation, topic Motor Vehicles.

5.21 REPLEVIN:

Replevin is an action for recovery of specific personal property. (R.C. §2737.02).

Proceedings.

Affidavit.

Order for delivery of property to movant will be issued when affidavit is filed showing: (A) description of specific personal property claimed and approximate value of each item or category of property claimed; (B) specific interest of movant in property and, if interest is based upon written instrument, copy of that instrument; (C) manner in which respondent came into possession of property, reason that detention is wrongful and, to best of knowledge of movant, reason, if any, that respondent may claim detention is not wrongful; (D) use to which respondent has put property, as determined by movant after such investigation as is reasonable in circumstances; (E) extent, if any, to which movant is or will be damaged by respondent's detention of property; (F) to best of movant's knowledge, location of property; (G) that property was not taken for tax, assessment, or fine pursuant to statute, or seized under execution of judgment against property of movant or, if so seized, that it is statutorily exempt from seizure. (R.C. §2737.03).

Bond.

Levying officer shall not take property unless movant gives bond to respondent that he will duly prosecute action and in case of adverse decision pay costs and expenses of care of property. (R.C. §§2737.10, .15).

Action on bond of either movant or respondent, may include sureties thereon, or sureties may be required to defend after judgment in main proceedings. (R.C. §2737.18).

Order of possession issued by court shall not be effective until movant files with court bond to respondent, executed by movant's surety, in amount twice approximate value of property described in order, to effect that, should judgment be issued against movant, movant will return property taken or pay value so assessed, at election of respondent, and also pay damages suffered by respondent as result of taking and detention of, and any injury to property, and costs of action. (R.C. §2737.10).

In lieu of bond, movant may deposit with clerk of court cash in amount equal to approximate value of property. (R.C. §2737.11).

When movant obtains possession of property, but fails to prosecute action to final judgment, on application of respondent, court may order return of property and shall assess damages caused to respondent by deprivation of possession of property, amount of which, with costs of action, shall be awarded to respondent by judgment of court. (R.C. §2737.15).

Officers may use any lawful means to enter any building or enclosure to obtain the property when not delivered upon demand. (R.C. §2737.17).

Repossession.

May recover property taken by filing bond by surety in same amount as bond filed by movant. If movant has not filed bond, amount shall be twice approximate value of property as stated in affidavit filed. (R.C. §2737.11).

Judgment or Order.

If property is not taken, or is returned for want of bond, action may proceed as for damages only. (R.C. §§2737.14, .18). Damages may be awarded in connection with finding for either movant or respondent. (R.C. §§2737.14, .18). Respondent may recover damages if movant fails to prosecute. (R.C. §2737.15).

5.22 SEQUESTRATION:

No statute; see category 8 Debtor and Creditor, topics 8.02 Attachment, 8.05 Executions, 8.09 Garnishment, and 8.16 Receivers.

5.23 SERVICE:

See topic 5.20 Process.

5.24 STAY OF EXECUTION:

See topic 5.03 Appeal and Error; category 8 Debtor and Creditor, topic 8.05 Executions.

5.25 SUBMISSION OF CONTROVERSY:

Parties to question which might be subject of civil action may agree upon case containing facts upon which controversy depends, and submit it to any court of competent jurisdiction, which court must determine case and render judgment as if action were pending. (R.C. §2315.09).

5.26 VENUE:

General Rule.

Venue generally is proper in any of following counties: (1) where defendant resides; (2) where defendant has principal place of business; (3) where defendant conducted activity giving rise to claim for relief; (4) if action is against public officer in official capacity, where officer maintains principal office; (5) if subject of action is real or tangible personal property, where any part is situated; (6) where all or part of claim arose; (7) in action under long-arm jurisdiction (see topic 5.20 Process), where plaintiff resides; (8) in action against fiduciary, in county of appointment; (9) in actions for divorce, annulment or alimony, in county where plaintiff is and has resided for 90 days; (10) in actions for civil protection order, in county in which petitioner resides; (11) in actions involving asbestos, silicosis, or mixed dust disease claims, only in county where all exposed plaintiffs reside, county where all exposed plaintiffs were exposed to asbestos, silica, or mixed dust, or county where defendant has principal place of business; (12) in action having no available forum under foregoing, where plaintiff resides, has principal place of business or regularly conducts business activity; (13) in all other cases, where defendant is subject to attachment (see category 8 Debtor and Creditor, topic 8.02 Attachment) or has agent to receive service of process. (Civ.R. 3).

Change of Venue.

In cases where venue is not proper under general rules and upon timely assertion of defense of improper venue, court must transfer action to county in which venue is proper and may assess costs, including attorney fees, against party selecting improper venue; court may transfer case brought in improper venue on own motion in default of answer. (Civ.R. 3, 12). Court may, on motion of party or on own motion, determine that neither forum nor any other forum in state is proper and that there is proper forum in some other jurisdiction and stay proceedings conditioned upon acceptance of jurisdiction in action in other forum by all defendants. (Civ.R. 3). Common law doctrine of forum non conveniens is not in conflict with Civil Rules and can be applied in court's discretion. (53 O.S.3d 73, 559 N.E.2d 477).

Contract Provisions.

Absent fraud or overreaching, forum selection clause in commercial contract between business entities is enforceable unless enforcement would be unreasonable or unjust. (66 O.S.3d 173, 610 N.E.2d 987).

5.27 WITNESSES:

See topic 5.13 Evidence, subhead Witnesses.

6 COURTS AND LEGISLATURE

6.01 COURTS:

United States District Courts.

State is divided into two districts, each having a district court.

Northern District.

Clerk's office: Carl B. Stokes U.S. Courthouse, 801 W. Superior Avenue, Cleveland, Ohio 44113-1830. Telephone: (216) 357-7000. Website: http://www.ohnd.uscourts.gov/Clerk_s_Office/clerk_s_office.html.

Eastern Division is composed of following counties: Ashland, Ashtabula, Carroll, Columbiana, Crawford, Cuyahoga, Geauga, Holmes, Lake, Lorain, Mahoning, Medina, Portage, Richland, Stark, Summit, Trumbull, Tuscarawas and Wayne.

Court sits at Cleveland, Akron and Youngstown.

Western Division is composed of following counties: Allen, Auglaize, Defiance, Erie, Fulton, Hancock, Hardin, Henry, Huron, Lucas, Marion, Mercer, Ottawa, Paulding, Putnam, Sandusky, Seneca, Van Wert, Williams, Wood and Wyandot.

Court sits at Toledo.

Southern District.

Clerk's office: Joseph P. Kinneary, U.S. Courthouse, Room 260, 85 Marconi Blvd., Columbus, Ohio 43215. Telephone: (614) 719-3000. Website: http://www.ohsd.uscourts.gov/clerksoffice.htm.

Eastern Division is composed of following counties: Athens, Belmont, Coshocton, Delaware, Fairfield, Fayette, Franklin, Gallia, Guernsey, Harrison, Hocking, Jackson, Jefferson, Knox, Licking, Logan, Madison, Meigs, Monroe, Morgan, Morrow, Muskingum, Noble, Perry, Pickaway, Pike, Ross, Union, Vinton and Washington.

Court sits at Columbus.

Western Division is composed of following counties: Returnable to the Cincinnati Court: Adams, Brown, Butler, Clermont, Clinton, Hamilton, Highland, Lawrence, Scioto and Warren. Returnable to the Dayton Court: Champaign, Clark, Darke, Greene, Miami, Montgomery, Preble and Shelby.

Court sits at Cincinnati and at Dayton.

Filing Fees: With Clerk: By plaintiff on beginning any suit, whether civil or admiralty, $350 except fee is $5 on application for writ of habeas corpus; notice of appeal, $455. See http://www.ohnd.uscourts.gov/Clerk_s_Office/Fee_Schedule/fee_schedule.html and http://www.ohsd.uscourts.gov/feeschedule.htm.

Supreme Court of Ohio.

Supreme Court is composed of Chief Justice and six justices. Clerk's office: Supreme Court of Ohio, 65 South Front Street, 8th Floor, Columbus, Ohio 43215-3431. Telephone: (614) 387-9530. Website: http://www.sconet.state.oh.us/Clerk_of_Court/default.asp.

Original jurisdiction is: Quo warranto, mandamus, habeas corpus, prohibition, procedendo, any cause on review as may be necessary to complete determination, and admission, discipline, and other matters relating to practice of law. (Const., Art. IV, §2[B]).

Appellate jurisdiction from courts of appeals is matter of right in cases in which death penalty has been affirmed, cases originating in courts of appeals, and cases involving questions arising under Constitution of U.S. or of Ohio. Court has mandatory jurisdiction in decisions certified by courts of appeals as being in conflict with those of other courts of appeals. It has discretionary jurisdiction in other felony cases and in cases of public or great general interest.

(Const., Art. IV, §2[B]). Court has exclusive appellate jurisdiction from Public Utilities Commission (R.C. §4903.12) and appellate jurisdiction concurrent with courts of appeals from Board of Tax Appeals (R.C. §5717.04).

Rule Making.

Court prescribes rules of court practice and procedure, subject to legislative power of disapproval. (Const., Art. IV, §5).

Court sits at Columbus.

Courts of Appeals.

There are 12 judicial districts, each having its separate court of appeals consisting of three-judge panels. (Const., Art. IV, §3; R.C. §2501.01).

Court sits at county seats of various counties (Const., Art. IV, §3[A]; R.C. 2501.03) but may have principal seat in one county in district (R.C. §2501.181).

Original jurisdiction is similar to that of supreme court. (Const., Art. IV, §3[B]).

Appellate jurisdiction consists of cases originating in inferior courts of record within district (R.C. §§1901.30, 2101.42, 2501.02, 2743.20) and is concurrent with that of supreme court in appeals from Board of Tax Appeals, where property taxed is situated or where taxpayer resides within district (R.C. §5717.04). Appeals may be on questions of law or, in certain appeals from juvenile court, on law and fact. (R.C. §2501.02).

Districts.

Districts are as follows:

First District is composed of Hamilton county.

Second District is composed of Champaign, Clark, Darke, Green, Miami and Montgomery counties.

Third District is composed of Allen, Auglaize, Crawford, Defiance, Hancock, Hardin, Henry, Logan, Marion, Mercer, Paulding, Putnam, Seneca, Union, Van Wert, Wyandot and Shelby counties.

Fourth District is composed of Adams, Athens, Gallia, Highland, Hocking, Jackson, Lawrence, Meigs, Pickaway, Pike, Ross, Scioto, Vinton and Washington counties.

Fifth District is composed of Ashland, Coshocton, Delaware, Fairfield, Guernsey, Holmes, Knox, Licking, Morgan, Morrow, Muskingum, Perry, Richland, Stark and Tuscarawas counties.

Sixth District is composed of Erie, Fulton, Huron, Lucas, Ottawa, Sandusky, Williams and Wood counties.

Seventh District is composed of Belmont, Carroll, Columbiana, Harrison, Jefferson, Mahoning, Monroe and Noble counties.

Eighth District is composed of Cuyahoga county.

Ninth District is composed of Lorain, Medina, Summit and Wayne counties.

Tenth District is composed of Franklin county.

Eleventh District is composed of Ashtabula, Geauga, Lake, Portage and Trumbull counties.

Twelfth District is composed of Brown, Butler, Clermont, Clinton, Fayette, Madison, Preble and Warren counties.

Courts of Common Pleas.

There is a court of common pleas in each county. (Const., Art. IV, §4).

Original jurisdiction consists of civil cases where amount in dispute exceeds $500, subject to transfer to municipal court where amount is less than $1,000 (R.C. §2305.01) and all crimes and offenses except minor offenses (R.C. §2931.03).

Appellate jurisdiction is limited to review of administrative officers and agencies (Const., Art. IV, §4) and includes: decisions of county commissioners (R.C. §2305.01); orders and decisions of agencies of political subdivisions (R.C. §2506.01); rules and orders of state agencies (R.C. §§119.12, 4123.512, 4301.31) except Board of Tax Appeals (R.C. §5717.04) and Public Utilities Commission (R.C. §4903.12).

Jurisdiction in liquor licensing matters and most rulings of other state agencies is in Franklin County common pleas court (R.C. §§119.12, R.C. 4301.31); that in orders of state agencies affecting other licensing issues, in county of appellant's residence or place of business but in Franklin County if none in Ohio (R.C. §119.12); that in workers' compensation, in county where injury occurred or contract of employment was made if injury occurred outside Ohio (R.C. §4123.512); that in appeals from agencies of political subdivision, in county of subdivision's principal office (R.C. §2506.01).

Probate jurisdiction is exercised by probate division of common pleas court. (Const., Art. IV, §4[C]; R.C. §2101.24).

Counties and Place of Sitting.

Adams County: Court sits at West Union.

Allen County: Court sits at Lima.

Ashland County: Court sits at Ashland.

Ashtabula County: Court sits at Jefferson.

Athens County: Court sits at Athens.

Auglaize County: Court sits at Wapakoneta.

Belmont County: Court sits at St. Clairsville.

Brown County: Court sits at Georgetown.

Butler County: Court sits at Hamilton.

Carroll County: Court sits at Carrollton.

Champaign County: Court sits at Urbana.

Clark County: Court sits at Springfield.

Clermont County: Court sits at Batavia.

Clinton County: Court sits at Wilmington.

Columbiana County: Court sits at Lisbon.

Coshocton County: Court sits at Coshocton.

Crawford County: Court sits at Bucyrus.

Cuyahoga County: Court sits at Cleveland.

Darke County: Court sits at Greenville.

Defiance County: Court sits at Defiance.

Delaware County: Court sits at Delaware.

Erie County: Court sits at Sandusky.

Fairfield County: Court sits at Lancaster.

Fayette County: Court sits at Washington Court House.

Franklin County: Court sits at Columbus.

Fulton County: Court sits at Wauseon.

Gallia County: Court sits at Gallipolis.

Geauga County: Court sits at Chardon.

Greene County: Court sits at Xenia.

Guernsey County: Court sits at Cambridge.

Hamilton County: Court sits at Cincinnati.

Hancock County: Court sits at Findlay.

Hardin County: Court sits at Kenton.

Harrison County: Court sits at Cadiz.

Henry County: Court sits at Napoleon.

Highland County: Court sits at Hillsboro.

Hocking County: Court sits at Logan.

Holmes County: Court sits at Millersburg.

Huron County: Court sits at Norwalk.

Jackson County: Court sits at Jackson.

Jefferson County: Court sits at Steubenville.

Knox County: Court sits at Mount Vernon.

Lake County: Court sits at Painesville.

Lawrence County: Court sits at Ironton.

Licking County: Court sits at Newark.

Logan County: Court sits at Bellefontaine.

Lorain County: Court sits at Elyria.

Lucas County: Court sits at Toledo.

Madison County: Court sits at London.

Mahoning County: Court sits at Youngstown.

Marion County: Court sits at Marion.

Medina County: Court sits at Medina.

Meigs County: Court sits at Pomeroy.

Mercer County: Court sits at Celina.

Miami County: Court sits at Troy.

Monroe County: Court sits at Woodsfield.

Montgomery County: Court sits at Dayton.

Morgan County: Court sits at McConnelsville.

Morrow County: Court sits at Mount Gilead.

Muskingum County: Court sits at Zanesville.

Noble County: Court sits at Caldwell.

Ottawa County: Court sits at Port Clinton.

Paulding County: Court sits at Paulding.

Perry County: Court sits at New Lexington.

Pickaway County: Court sits at Circleville.

Pike County: Court sits at Waverly.

Portage County: Court sits at Ravenna.

Preble County: Court sits at Eaton.

Putnam County: Court sits at Ottawa.

Richland County: Court sits at Mansfield.

Ross County: Court sits at Chillicothe.

Sandusky County: Court sits at Fremont.

Scioto County: Court sits at Portsmouth.

Seneca County: Court sits at Tiffin.

Shelby County: Court sits at Sidney.

Stark County: Court sits at Canton.

Summit County: Court sits at Akron.

Trumbull County: Court sits at Warren.

Tuscarawas County: Court sits at New Philadelphia.

Union County: Court sits at Marysville.

Van Wert County: Court sits at Van Wert.

Vinton County: Court sits at McArthur.

Warren County: Court sits at Lebanon.

Washington County: Court sits at Marietta.

Wayne County: Court sits at Wooster.

Williams County: Court sits at Bryan.

Wood County: Court sits at Bowling Green.

Wyandot County: Court sits at Upper Sandusky.

Juvenile Courts.

Juvenile court is court of record within court of common pleas. (R.C. §2151.07). Except in counties in which there are divisions of domestic relations within common pleas, probate court judges preside over juvenile court within probate court. Juvenile court is division of court of common pleas, division of domestic relations, in Erie, Franklin, Henry, Lorain, Richland, Stark, Trumbull, Portage, Clermont, Warren, and Licking Counties. (R.C. §2301.03). In Cuyahoga, Hamilton, Lucas, Mahoning, Montgomery, Summit, Butler, Lake and Greene Counties, juvenile courts are separate divisions of common pleas. (R.C. §§2151.07, 2151.08, 2153.01).

Juvenile court has exclusive original jurisdiction concerning any child who is juvenile traffic offender, or delinquent, unruly, abused, neglected, and/or dependent child and person having care of child; as well as to determine custody of any child not ward of another court. It has original jurisdiction to determine cases of misdemeanors charging adults with contributing to delinquency, neglect or dependency of child; or with any act with respect to child which is violation of state law or municipal ordinance; or with desertion, abandonment or failure to provide support to any child for which he is legally responsible, and to determine paternity of child alleged to be illegitimate and to provide for support and disposition. Any juvenile court order for child support shall comply with R.C. §§3113.21 to R.C. 3113.219 of revised code. (R.C. §2151.23).

Municipal Courts.

Municipal courts of varying jurisdiction have been established in following municipal corporations: Akron, Alliance, Ashland, Ashtabula, Athens, Auglaize County (Wapakoneta), Avon Lake, Barberton, Bedford, Bellefontaine, Bellevue, Berea, Bowling Green, Bryan, Cambridge, Campbell, Canton, Carroll County (Carrollton), Celina, Champaign County (Urbana), Chardon, Chillicothe, Circleville, Clermont County (Batavia), Cleveland, Cleveland Heights, Columbiana County (Lisbon), Columbus, Conneaut, Coshocton, Crawford County (Bucyrus), Darke County (Greenville), Dayton, Defiance, Delaware, East Cleveland, East Liverpool, Eaton, Elyria, Erie County (Milan), Euclid, Fairborn, Fairfield, Findlay, Fostoria, Franklin, Franklin County (Columbus), Fremont, Gallipolis, Garfield Heights, Georgetown, Girard, Hamilton, Hamilton County (Cincinnati), Hillsboro, Hocking County (Logan), Holmes County (Millersburg), Huron, Ironton, Jackson County (Jackson), Kenton, Kettering, Lakewood, Lancaster, Lawrence County (Chesapeake), Lebanon, Licking County (Newark), Lima, Lorain, Lyndhurst, Madison County (London), Mansfield, Marietta, Marion, Marysville, Mason, Massillon, Maumee, Medina, Mentor, Miami County (Troy), Miamisburg, Middletown, Mount Gilead, Mount Vernon, Napoleon, New Philadelphia, Newark, Newton Falls, Niles, Norwalk, Oakwood, Oberlin, Oregon, Painesville, Parma, Perrysburg, Port Clinton, Portage County (Ravenna), Portsmouth, Rocky River, Sandusky, Shaker Heights, Shelby, Sidney, South Euclid, Springfield, Steubenville, Stow, Struthers, Sylvania, Tiffin, Toledo, Upper Sandusky, Urbana, Vandalia, Van Wert, Vermilion, Wadsworth, Warren, Washington Court House, Wayne County (Wooster), Willoughby, Wilmington, Xenia, Youngstown, and Zanesville. (R.C. §1901.01, .02).

Original jurisdiction extends to most civil actions in which amount is less than $15,000, exclusive of interest and costs. (R.C. §1901.17). Jurisdiction also extends to misdemeanors and violations of city ordinances. (R.C. §§1901.01 - 1901.43).

County courts with limited jurisdiction and authority are found in any county where jurisdiction of municipal court or courts is not coextensive with boundaries of county. (R.C. §1907.01).

These courts have exclusive original jurisdiction in civil actions for recovery of sums up to $500 and original jurisdiction in civil actions for recovery of sums up to $15,000. (R.C. §1907.03). Courts are found in following counties (seats of court in parenthesis): Adams (West Union), Ashtabula (Jefferson, Geneva), Belmont (Bellaire, Martins Ferry, St. Clairsville), Brown (Georgetown), Butler (Hamilton, West Chester, Oxford), Columbiana (Lisbon, East Palestine, Salem), Darke (Greenville), Fulton (Swanton, Wauseon), Hardin (Ada), Harrison (Cadiz), Highland (Greenfield), Holmes (Millersburg), Jackson (Jackson), Jefferson (Dillonvale, Wintersville, Toronto), Lawrence (Chesapeake), Mahoning (Canfield, Sebring, Youngstown, Austintown), Meigs (Pomeroy), Monroe (Woodsfield), Montgomery (Dayton, New Lebanon, Huber Heights), Morgan (McConnelsville), Morrow (Mount Gilead), Muskingum (Zanesville), Noble (Caldwell), Paulding (Paulding), Perry (New Lexington), Pike (Waverly), Putnam (Ottawa), Sandusky (Clyde, Woodville), Trumbull (Brookfield, Cortland), Tuscarawas (Uhrichsville), Vinton (McArthur) and Warren (Lebanon).

Small claims courts with limited jurisdiction and authority for maximum claims of

$3,000 exclusive of costs and interest are established by each municipal and county court. Counterclaim or cross-claim of $3,000 or less does not affect jurisdiction. Magistrate appointed by court conducts proceedings. Representation by attorney permitted. (R.C. §§1925.01, .02).

County Prosecuting Attorney may designate any employee of County Department of Job and Family Services to act as prosecutor's representative in commencement and prosecution in any action on behalf of Department. (R.C. §1925.18).

Territorial jurisdiction and venue are concurrent with those of establishing court. Jurisdiction limited to civil actions for recovery of taxes and money only, other than libel, slander, replevin, malicious prosecution, abuse of process actions, actions for punitive damages and actions on claims brought by assignees or agents. (R.C. §1925.02).

Action is commenced when plaintiff or attorney appears before designated court official and states plaintiff's and defendant's places of residence, military status of defendant, and nature and amount of claim. Filing fee determined by establishing court. No right to jury trial. Hearing is held 15 to 40 days after commencement of action. (R.C. §1925.04).

Notice of hearing is served on defendant as in civil actions but not by substituted or published service or warrant of attorney. Statutory notice form enacted. (R.C. §§1925.02, .05).

Depositions permitted by leave of court. Witnesses may be subpoenaed. (R.C. §§1925.09, .11).

Deferred payment of judgment may be ordered by court at defendant's request or in court's own discretion. Judgment creditor may institute proceedings in aid of execution to satisfy judgment as in ordinary civil actions. (R.C. §§1925.06, .13). Judgment of court may be modified or vacated. (R.C. §1925.14).

Voluntary conciliation procedures may be established by rule of court. (R.C. §1925.03).

Mayor's courts exist in some cities. Jurisdiction includes traffic violations, parking violations, and violations of ordinances. (R.C. §1905.01).

Court of Claims.

Court consists of those judges of Supreme Court, Courts of Appeal and Common Pleas Courts, or eligible retired judges thereof, sitting by assignment of Chief Justice of Supreme Court. (R.C. §2743.03[B]).

Original jurisdiction extends to civil actions for claims against Ohio for which sovereign immunity has been waived by statute. Cases commenced in other courts in which counterclaim is made against State or State is made third party defendant are removed to Court of Claims. (R.C. §§2743.03[A], [E]).

Court normally sits in Franklin County but may convene in any county for cases on removal, at direction of Chief Justice of Supreme Court. (R.C. §2743.03[B]).

Court also has appellate jurisdiction to order awards of reparations for economic loss arising from criminally injurious conduct. (R.C. §§2743.03[C][4], 2743.52).

Filing of civil action in Court of Claims waives any cause of action, based on same act or omission, which filing party has against any state officer or employee. (R.C. §2743.02[A]). Clerk of Court of Claims determines claims against State of $2,500 or less except that actions removed to Court of Claims are heard and determined by judge of that court. (R.C. §2743.10[A]).

6.02 LEGISLATURE:

General Assembly shall convene in first regular session on first Mon. of Jan. in odd-numbered year, or on succeeding day if first Mon. of Jan. is legal holiday, and in second regular session on same date of following year. (Const. Art. II, 8, Art. XVII, §1; R.C. §101.01).

Special or extraordinary sessions may be convened on extraordinary occasions by proclamation of governor stating purpose. (Const. Art. III, §8). Business at such sessions is limited to purpose stated in proclamation or message.

Initiative and referendum are provided for. (Const. Art. II, §§1-1d; R.C. §3519.01 et seq.).

Lobbyists.

Regulation of lobbyists is provided for. (R.C. §§101.70-.99).

6.03 REPORTS:

Historical Background to Reports.

Official reporting of decisions began in 1823 for Supreme Court; in 1913 for selected decisions of Courts of Appeals (designated District Courts 1851-1883, Circuit Courts 1883-1912, Courts of Appeals 1913 to date); and in 1965 for selected decisions of trial courts and other specialized courts. Numerous unofficial reporters published since 1831 and containing officially and unofficially reported decisions at all levels.

Official Reports.

Supreme Court.

Ohio Reports (1821-1851), 20 vols. (herein Ohio); Ohio State Reports (1852-1964), 177 vols. (herein O.S.); Ohio St.2d (1965-1982), 70 vols. (herein O.S.2d); Ohio St.3d (1982 to date), 89 vols. (herein O.S.3d).

Courts of Appeals.

Ohio Appellate Reports (1913-1964), 120 vols. (herein O.App.); Ohio App.2d (1965-1982), 70 vols. (herein O.App.2d); Ohio App.3d (1982 to date) 135 vols. (herein O.App.3d).

Trial Courts and Specialized Courts of Original Jurisdiction.

Ohio Miscellaneous Reports (1965-1982), 70 vols. (herein O.Misc.); Ohio Misc.2d (1982 to date), 106 vols. (herein O.Misc.2d).

Advance Sheets.

All officially reported decisions, with official citation and pagination, appear in weekly Ohio State Bar Association Report.

Unofficial Reports.

Including Official Citations.

Northeastern Reporter (1885-1936), 200 vols.; N.E.2d (1936 to date), 731 vols.; Ohio Opinions (1934-1957), 60 vols.; (herein O.O.); O.O.2d (1957-1976), 75 vols.; O.O.3d (1977-1982), 24 vols; Ohio Bar Reports (1982-1987) 31 vols.

Without Official Citations.

Ohio Decisions Reprint (1840-1893), 13 vols.; Ohio Circuit Court Reports, vols. 1-22 (1885-1901); Ohio Circuit Decisions, vols. 1-12 (1885-1901); Ohio Circuit Court Decisions, vols. 13-35 also constituting Ohio Circuit Court Reports, vols. 23-45 (1901-1918); Ohio Circuit Court Reports, New Series, vols. 1-26 (1903-1917) continued as Ohio Court of Appeals Reports, vols. 27-32 (1917-1922); Ohio Nisi Prius Reports (1894-1901), 8 vols.; Ohio Nisi Prius Reports, New Series (1903-1934), 32 vols.; Ohio Decisions (1894-1896), 3 vols.; Ohio Decisions, Nisi Prius (1894-1920), 31 vols.; Ohio Law Reporter (1903-1934), 40 vols.; Ohio Law Abstract (1923-1964), 95 vols.

Unreported Appellate Decisions.

Unpublished opinions of Courts of Appeals available on LEXIS and WESTLAW and considered persuasive authority in appellate district rendered. (Rule 2[G], Supreme Court Rules For Reporting of Opinions).

Digests.

West's Ohio Digest (1803 to date), 70 vols. with annual supplements.

6.04 STATUTES:

Revised Code of Ohio, effective Oct. 1, 1953, replaces General Code and contains all laws of general and permanent nature. Revised Code affects classification, arrangement and numbering of General Code and is not intended to change substantive law. (R.C. §1.30). Rules of statutory construction governed by R.C. §§1.41-.64. Session laws (cited Ohio Laws or O. L.) Vol. 101 to date, contain all legislation subsequent to 1910.

Page's Ohio Revised Code Annotated contains all laws of general nature including acts passed by General Assembly in 1953, and is kept up to date with pocket supplements, and Page's Ohio Revised Code Legislative Bulletin.

Baldwin's Ohio Revised Code Annotated (1953 Edition), contains all laws of general nature and is supplemented by pocket supplements and Baldwin's Ohio Legislative Service.

Revised Code is divided into titles, chapters and sections and numbered by decimal system. First and second digits to left of decimal indicate chapter, third and fourth to left indicate title and digits to right of decimal indicate section number. New legislation of general and permanent nature is assigned new number, or else given section number which it replaces or amends.

Uniform Acts.

Adoption Act (1977); Anatomical Gift, 1968 Act (1969); Anatomical Gift, 1987 Act (1991); Attendance of Witnesses From Without a State in Criminal Proceedings (1937); Certification of Questions of Law, 1967 (1988); Child Custody Jurisdiction (1977); Commercial Code (1962): Article 2A-amended version (1992), 1990 Revision of Art. 3 (1994), 1990 Amendments to Art. 4 (1994), 1989 revisions to Art. 4A (1991), 1995 Revision of Art 5 (1997) 1994 Revision of Art. 8 (1997), 1972 Revision of Art. 9 (1979), and 1999 Revision of Art. 9 (2001), Repealed Art. 6 without adopting 1989 Revision (1996); Consumer Sales Practices (1972); Controlled Substances (1970); Crime Victims Reparations (1975); Criminal Extradition (1937); Deceptive Trade Practices, 1966 Act (1969); Declaratory Judgments (1933); Determination of Death (1982); Duties to Disabled Persons (1976); Electronic Transactions (2000); Enforcement of Foreign Judgments, 1964 Act (1983); Evidence, Rules of, 1974 (1980); Fiduciaries (1943); Foreign Depositions (1949); Foreign-Money Claims (1994); Foreign Money-Judgments Recognition (1985); Fraudulent Transfer (1990); Gifts to Minors (1961); Interstate Family Support, 1996 Act (1997); Limited

Partnership, 1976 Act (1985); Management of Institutional Funds (1975); Military Justice, Code of (1961); Nonprobate Transfers on Death (1993); Parentage (1982); Partnership, 1914 Act (1949); Photographic Copies of Business and Public Records as Evidence (1939); Principal and Income, 1962 Act (1987); Prudent Investor Act (1999); Reciprocal Enforcement of Support, 1968 Act (1972); Recognition of Acknowledgments (1974); Rights of the Terminally Ill, 1989 Act (1991); Simultaneous Death (2002); Statutory Construction (Model) (1972); Testamentary Additions to Trusts, 1960 Act (1992); TOD (Transfer on Death) Security Registration (1993); Trade Secrets (1994); Transfers to Minors (1986); Veterans Guardianship (1947).

For text of Uniform Acts printed in Martindale-Hubbell Law Digests see Uniform and Model Acts section.

6.05 UNIFORM LAWS:

For list of Uniform Acts in force in this state see topic 6.04 Statutes.

7 CRIMINAL LAW

7.00A BAIL:

See topic 7.01 Criminal Law.

7.01 CRIMINAL LAW:

Crimes are governed by tit. 29; other crimes are defined in various regulatory statutes. Criminal procedure is governed by Ohio Rules of Criminal Procedure (Crim. R.); as to juveniles, Ohio Rules of Juvenile Procedure (Juv. R.).

Indictment or Information.

Felonies are prosecuted by indictment, but when offense is not punishable by death or life imprisonment defendant may waive indictment and proceed on information signed by prosecuting attorney. Misdemeanors may be prosecuted by indictment or information in Common Pleas Court, by complaint in other courts. (Crim. R. 7).

Indictments or information must meet standards of form and sufficiency. (R.C. 2941.01–2941.35)

Bail.

All persons are bailable except one charged with capital offense where proof evident or presumption great and where person poses substantial risk of serious physical harm to another or to community. (Const. Art. I, §9). Conditions may be imposed. (Crim. R. 46).

Advisements to Aliens.

Court must give aliens certain advisements prior to plea of guilty or no contest to felony or misdemeanor. (R.C. §2943.031).

Interstate Compact for Adult Offender Supervision enacted. (R.C. §5149.21).

Uniform Criminal Extradition Act.

R.C. §2963.01 et seq.

8 DEBTOR AND CREDITOR

8.01 ASSIGNMENTS:

Uniform Commercial Code adopted. (cc. 1301 to 1310). See category 3 Business Regulation and Commerce, topic 3.09 Commercial Code, subheads Action on Official Amendments and Material Variations, Blanks Filled in and Optional Provisions in Code Sections.

In general all rights, vested or contingent, are assignable. (7 O.S. 432). Cause of action not reduced to judgment for personal tort which does not survive (49 O.S. 60, 30 N.E. 197) and contract in which personality of one of parties is material (13 O.App. 281) are not assignable.

Mechanics' liens and claims for such liens are assignable. (R.C. §1311.21). See bound volume version of R.C. §1311.22 for projects contracted for before Jan. 1, 1992. For assignment of mortgages, see category 20 Mortgages, topic 20.04 Mortgages of Real Property.

Instrument Transferring Title.

No lease or other interest in land may be assigned except in writing. (R.C. §1335.04).

Filing regarding matters prior to July 1, 2001, where necessary (R.C. §1309.21), is governed by third alternative subsection (1) and original subparagraphs (2), (3), (4) and (6) of §9-401 (R.C. §1309.38). Local filing is with county recorder; central filing, Secretary of State. For matters on or after July 1, 2001, R.C. §§1309.309, .310, and .501 govern.

Notice to obligor is not necessary to validity of assignment of debt or chose in action in absence of statute to contrary. (22 O.S. 398; 20 O.C.C. 136; 167 F 486).

Effect.

Right of counterclaim is not impaired by assignment. (R.C. §2309.19).

Wages or Salary.

No assignment of, or order for, wages or salary is valid; union check-offs and assignments pursuant to court order for support of minor children excepted and so long as not revoked by employee, deductions for payroll deduction plan with employer. (R.C. §1321.32).

Accounts Receivable.

Assignments of accounts receivable for security are governed by Uniform Commercial Code (R.C. §§1309.01-.50) for matters through 6-30-01; for matters on and after 7-1-01 Revised Article 9 governs (R.C. §§1309.101-.709).

Fee for filing, indexing and furnishing filing data for financing statement are set forth under R.C. §1309.525.

Unemployment compensation benefits may not be assigned. (R.C. §4141.32).

Voluntary Assignments for Benefit of Creditors.

See R.C. §§1313.01-.59.

8.02 ATTACHMENT:

Actions in Which Allowed.

Any civil action for the recovery of money. (R.C. §2715.01).

Courts Which May Issue Writ.

Court of common pleas, county court (R.C. §1907.33) or municipal court (R.C. §1901.13).

When Writ May Issue.

At or after commencement of action. (R.C. §2715.01).

In Whose Favor Writ May Issue.

Any plaintiff, including nonresident or foreign corporation.

Against Whom Writ May Issue.

See subhead Grounds, infra for attachment.

Claims on Which Writ May Issue.

No requirement that claim sued on be payable in state. See also infra, subhead Attachment Before Debt Due.

Grounds for attachment against property other than personal earnings in court of common pleas are that defendant or one of several defendants: (1) is foreign corporation which has not qualified to do business in state; (2) is not resident of state; (3) has absconded with intent to defraud creditors; (4) has left county of residence to avoid service of summons; (5) so conceals self that summons cannot be served; (6) is about to remove property, or part thereof, out of jurisdiction of court, with intent to defraud creditors; (7) is about to convert property, or part thereof, into money for purpose of placing it beyond reach of creditors; (8) has property or rights in action which defendant conceals; (9) has assigned, removed or disposed of, or is about to dispose of, property or part thereof, with intent to defraud creditors; (10) has fraudulently or criminally contracted debt, or incurred obligation, for which suit is about to be or has been brought; (11) that claim is for work or labor. (R.C. §2715.01).

Attachment will not be granted on grounds (1) or (2) unless claim is for debt or demand arising on contract, judgment, or decree, or for causing damage to property or death or personal injury by negligent or wrongful act. (R.C. §2715.01).

Attachment through garnishment granted against personal earnings only after judgment obtained by plaintiff. (R.C. §§2715.01, 2716.01).

Proceedings to Obtain.

See following.

Affidavit must be filed by plaintiff, his agent or attorney showing: (1) Nature and amount of his claim, and if claim is based on written instrument, copy of that instrument; (2) facts that support at least one of grounds for attachment (R.C. §2715.01); (3) description of property sought and its approximate value, if known; (4) location of property; (5) after reasonable investigation, use to which defendant has put property and that property is not exempt from attachment or execution; and (6) name of person possessing property (R.C. §2715.03).

Notice.

Initiated by plaintiff filing praecipe for issuance of notice; notice of filing of motion for order of attachment shall be given to defendant detailing exempt benefit payments and wages and giving opportunity for hearing before order of attachment may issue. Notice must also advise of alternative of posting bond. (R.C. §2715.041).

Hearing is limited to consideration of probable cause to support motion and whether any of defendant's property is exempt from attachment. (R.C. §2715.043).

Attachment Without Notice.

Notice and hearing are not required prior to order of attachment if court finds probable cause and delay will cause plaintiff irreparable injury in circumstances of present damages of property being immediately disposed of, concealed or placed beyond court jurisdiction or value of property will be impaired substantially by delay. Notice and opportunity for hearing must follow issuance of order of attachment. (R.C. §2715.045).

Statutory demand must be served upon debtor after judgment obtained before order for attachment of personal earnings is granted. (R.C. §2716.02). See topic 8.09 Garnishment.

Orders to Different Counties.

Orders of attachment may issue to sheriffs of different counties. (R.C. §2715.06).

Attachment Bond.

Bond or cash deposit in twice value of property to be attached, to effect that upon judgment against plaintiff, plaintiff will return property taken or pay value of property, at election of defendant, plus damages to defendant as result of taking and detention of and any injury to property and costs. Bond is not required when ground of attachment is that defendant is foreign corporation or not resident of this state. (R.C. §2715.044).

Attachment Before Debt Due.

Before claim is due, creditor may sue and attach debtor's property when debtor (1) has sold or otherwise transferred or disposed of his property with fraudulent intent to cheat or defraud creditors or hinder or delay them in collection of their debts; (2) with such fraudulent intent is about to make such sale or other transfer or disposition of property; or (3) with such fraudulent intent is about to remove property or material part thereof. (R.C. §2715.50). See Attachment Without Notice, supra.

Exemptions.

See topic 8.06 Exemptions.

Levy.

Levying officer must go to place where defendant's property is and make true inventory and appraisement which shall be set forth in his affidavit and returned with order. When real property is attached, officer must leave with occupant thereof, or if there is no occupant, in conspicuous place thereon, copy of order. When personal property is attached, officer must take it into custody and hold it subject to order of court and deliver copy of order to defendant. (R.C. §2715.09).

Indemnity.

No statute authorizing officer to demand indemnity before levying.

Lien.

Order of attachment shall bind property from time of service. (R.C. §2715.19).

Priorities.

Attachments against same defendant must be executed in order received by officer (R.C. §2715.08) and orders of attachment shall bind property attached from time of service (R.C. §2715.19).

Release of Property.

Attachment must be discharged if judgment in action in attachment is for defendant (R.C. §2715.36) and may be discharged on motion (R.C. §2715.44) on ground that affidavit is insufficient (70 O.S. 328, 71 N.E.2d 707), that facts stated are not true (29 Ohio St. 538), that attachment was obtained by illegal means or fraud (8 O.C.C. 674) or, in common pleas court, that plaintiff has failed to give additional security as ordered by court (R.C. §2715.43).

Attachment must be discharged on giving of bond in double amount of plaintiff's claim that defendant will perform judgment of court. In lieu of bond defendant may deposit with clerk of court cash in amount equal to approximate value of property or amount of bond of plaintiff if he filed bond, whichever is less. (R.C. §2715.26). When plaintiff's claim is for causing death or personal injury by negligent or wrongful act, bond required shall be in such amount as is fixed by court where action is pending. (R.C. §2715.27). Officer making levy must return property to person in whose possession it was found, on giving such bond in double appraised value of property. (R.C. §2715.10).

After order issues, if defendant dies or defendant corporation loses charter, proceedings continue. (R.C. §2715.42).

Disposition of Property.

In cases in common pleas court receiver may be appointed to collect evidences of debt and may bring suit. (R.C. §§2715.20-.21). On notice of appointment defendant's debtors become liable to plaintiff and must account to receiver. (R.C. §2715.22). If no receiver is appointed levying officer has powers and duties of receiver. (R.C. §2715.24).

Sale.

Attached property may be sold while suit is pending when, because of perishable nature or cost of keeping it (R.C. §2715.25), sale would benefit parties. If judgment is entered for plaintiff, property is sold as if taken on execution. (R.C. §2715.37).

Third Party Claims.

Tried as in case of property taken on execution and claimed by third person. (R.C. §2715.40).

Vacation or Modification.

See subhead Discharge, supra.

8.03 [RESERVED]

8.04 CREDITORS' SUITS:

Proceedings in Aid of Executions available to judgment creditors include debtor's exams (R.C. §2333.09), asset freeze orders and receivers (R.C. §2333.22), and creditors' bills to reach certain equitable interests and certain other intangible assets (R.C. §2333.01).

See topics R.C. 8.02 Attachment, Executions, Fraudulent Sales and Conveyances, Garnishment and Receivers; category 13 Estates and Trusts, topic 13.09 Executors and Administrators.

8.05 EXECUTIONS:

Kinds of Executions.

Execution against property (R.C. §§2329.01-.94), execution against person (R.C. §§2331.01-.16) (see subhead Body Execution, infra), proceedings in aid of execution (R.C. §§2333.01-.28) (see subhead Supplementary Proceedings, infra).

Writ is issued by clerk only on praecipe (R.C. §2303.11), contains specific description of property (R.C. §2327.02) and commands levy on debtor's goods and chattels or if none, that debtor's land be levied and sold pursuant to order (R.C. §§2329.09-.091).

Exemptions.

See topic 8.06 Exemptions.

Time for Issuance.

Execution may be issued immediately on rendition of any judgment (11 O.S. 593), including judgment of probate court (R.C. §2101.35). Execution cannot lawfully be issued on dormant judgment which has not been properly revived. (R.C. §2329.07).

Notice and Hearing.

Upon appointment by court, levying officer immediately executes writ and serves judgment debtor with prescribed notice and hearing request form. Judgment debtor must return form requesting hearing within five days of its service. If timely returned, judgment debtor shall receive hearing to determine defenses or exemptions. (R.C. §2329.091).

Stay.

On proper conditions for security of adverse party, court may stay execution of, or any proceedings to enforce judgment pending disposition of motion for new trial, motion for relief from judgment, during pendency of motion for relief from judgment, or motion for judgment n.o.v. (Civ.R. 62). Party may obtain stay of execution of judgment or proceedings to enforce judgment pending appeal by giving adequate supersedeas bond approved by court. (Civ.R. 62). See also category 5 Civil Actions and Procedure, topic 5.03 Appeal and Error. As to stay of execution from county court, see infra, subhead County Courts.

Lien.

See category 5 Civil Actions and Procedure, topic 5.15 Judgments.

Levy.

On receiving writ, officer levies on any personal property at once, or if none, he so indicates and thereupon levies on debtor's lands. (R.C. §2329.11).

Lands and tenements, including vested legal interests therein, permanent leaseholds renewable forever and goods and chattels not exempt by law, are subject to be taken on execution. (R.C. §2329.01).

If different writs entitled to no preference as to each other are received, levy is made on separate parcels, if land can be divided. (R.C. §2329.42). Execution on judgment of any court inferior to court of common pleas cannot issue against real estate until certificate thereof is filed with clerk of common pleas court, in which case execution issues from common pleas court. (R.C. §2329.04).

Real property may be conveyed by special master or master commissioner when sold by master under order of court appointing him or if party required to convey it refuses to do so and master is directed to convey on his failure (R.C. §2329.34), or judgment itself may operate as conveyance (Civ.R. 70).

Return.

On returning writ, officer endorses his proceedings thereon. Clerk records endorsement in execution docket and it becomes part of court record. (R.C. §2329.28). Execution from common pleas court is returnable within 60 days from its date. (R.C. §2329.53). If execution is fully satisfied, officer must make return within three days after collecting money thereon. (R.C. §2329.29). See also infra, subhead County Courts.

Priorities.

When two or more writs against same debtor are delivered to officer on same day, there is no preference. In such cases proceeds are distributed in proportion to their respective amounts. In all other cases, writ first delivered to officer must be first satisfied. (R.C. §2329.10).

Forthcoming Bond.

Officer may take bond of defendant, conditioned that property levied on will be forthcoming at time of sale, and thereupon, permit defendant to retain possession of property. (R.C. §2329.12).

Claims of Third Persons.

When personal property levied upon is claimed by third person, officer notifies judge of county, who causes five disinterested persons, having qualifications of electors, to appear and determine claimant's right. (R.C. §2329.84). If this jury finds for claimant, restitution is made and recovery of his costs is allowed; if against claimant, finding is for person for whose benefit execution was issued. (R.C. §2329.85).

Satisfaction.

Not covered by statute.

Sale.

Goods and chattels levied upon by execution of court of record shall not be sold until: (a) judgment creditor who seeks sale or judgment creditor's attorney: (i) causes written notice of date, time, and place of sale to be served in accordance with divisions (A) and (B) of Civ.R. 5 (pertaining to service and filing of pleadings and other papers subsequent to original complaint) upon judgment debtor and each other party to action in which judgment giving rise to execution was rendered and, (ii) at least three days prior to date of sale, files with clerk of court that rendered judgment, copy of written notice with proof of service endorsed on copy in form described in division (D) of Civ.R. 5. (R.C. §2329.13[A][1][a]). Service of written notice is not required on any party who is in default for failure to appear in action in which judgment giving rise to execution was rendered. (R.C. §2329.13[A][1][b]) and officer who levies on goods and chattel gives public notice of date, time, and place of sale for at least ten days before day of sale by advertisement in newspaper of general circulation in county. (R.C. §2329.13[A][2][a]). If goods to be sold are merchandise or inventory of trade or business, if sale is to satisfy judgment in favor of state or one of its political subdivisions for delinquent taxes, public notice of sale shall be given by advertisement in newspaper of general circulation in county once a week for three weeks preceding date of sale. In case of goods used in connection with trade or business, notice of location, date, and nature of sale also shall be conspicuously posted on premises where trade or business is carried on and on premises where goods to be sold are kept if they are located elsewhere. (R.C. §2329.13[A][2][b]). Similar due process requirements must be met before sale of lands and tenements except that written notice of time, date, and place of sale upon being served shall be filed with clerk of court that rendered judgment giving rise to execution at least seven calendar days prior to date of sale (R.C. §2329.26[A][1]) and officer taking lands and tenements gives public notice of date, time and place of sale for at least 30 days before date of sale by advertisement in newspaper of general circulation in county (R.C. §2329.26[A][2]) by advertisement in newspaper at least once weekly for three consecutive weeks (R.C. §2329.27[A]). If court to which execution is returnable enters order confirming sale of goods and chattels (R.C. §2329.13[B][3]) or of lands and tenements (R.C. §2329.27[B][3]), order shall be deemed judicial finding (i) sale complied with written notice requirements and public notice requirements of respective applicable sections of Revised Code, and (ii) that all parties entitled to notice received adequate notice of date, time, and place of sale. Order bars filing of any further motions to set aside sale. (R.C. §§2329.13[B][4][b] and 2329.27[B][3][B).

Lands must be appraised (R.C. §2329.17), and may not be sold for less than two-thirds of appraised value (R.C. §2329.20). If unsold for want of bidders, plaintiff may have new appraisement or execution. If twice appraised and unsold, court may set amount for which sale may be made. (R.C. §2329.51). Lands must be sold in county where situated, and, unless court otherwise orders, at court house. (R.C. §2329.39). If court so orders, they may be sold for one-third cash, one-third in one year and balance in two years, with interest on deferred payments and secured by mortgage on purchased property. (R.C. §2329.09).

All execution sales are public auctions, unless court otherwise orders. (R.C. §2329.15). After lands have been sold under writ of execution, if court is satisfied that sale was in accordance with law, it confirms sale and directs officer to deliver deed to purchaser. Court may stay confirmation of sale to permit property owner time to redeem property or for any other appropriate reason. In these instances, sale must be confirmed within 30 days after termination of stay of confirmation. (R.C. §2329.31).

Alias execution may issue against personal property or land unsold for want of bidders. (R.C. §§2329.14, .40).

Redemption.

Judgment debtor may redeem his real estate from sale before confirmation of sale by court, by depositing with clerk sufficient money to pay judgment, interest and costs. (R.C. §2329.33). There is no redemption of personal property sold under execution.

Supplementary Proceedings.

On plaintiff's affidavit that debtor has property which he refuses to apply on judgment, debtor may be required to appear before judge or referee and answer concerning his property. (R.C. §§2333.09-.10).

Judge may order any of judgment debtor's property, not exempt by law, to be applied on judgment but earnings of judgment debtor for personal services shall be applied only in accordance with R.C. §§2329.66, 2329.70 and c. 2716 (R.C. §2333.21), or appoint receiver of judgment debtor's property (R.C. §2333.22), who may be directed to sell debtor's interest in any real estate (R.C. §2333.24).

Body Execution.

Execution against person of judgment debtor may issue upon any judgment for payment of money when debtor: (1) Has removed or is removing his property out of court's jurisdiction with intent to prevent collection; (2) fraudulently conceals his property with like intent; (3) has assigned, disposed or converted his property to defraud creditor or prevent execution thereon; (4) fraudulently contracted debt upon which judgment was taken; (5) when judgment was rendered for money lost by gaming, betting or wagering; (6) was arrested on order before judgment and has not been discharged as insolvent debtor, or order has not been set aside. (R.C. §2331.02). *Note:* Ohio Constitution Art. I 15 states that no person shall be imprisoned for debt in any civil action unless in cases of fraud.

Foreign Judgments.

Judgment of any court entitled to full faith and credit in this state may be filed with clerk of court of common pleas and enforced in same manner as judgment of Ohio court of common pleas. (R.C. §§2329.021, 2329.022). Filing requires foreign judgment authenticated in accordance with §1738, Title 28, United States Code, filing fee amount of which varies from county to county and affidavit stating name and last known address of judgment debtor and judgment creditor. Notice of filing sent by judgment creditor to judgment debtor by mail sufficient if proof of such mailing is filed with clerk. No execution shall issue until 30 days after filing of foreign judgment. (R.C. §§2329.023, 2329.025). Debtor may apply for stay of enforcement. (R.C. §2329.024). Conclusive judgments in foreign countries enforceable as judgments from other states. (R.C. §2329.91).

County Courts.

Execution and proceedings in aid of execution in county court shall be in accordance with cc. 2327, 2329, 2331 and 2333 of Revised Code and with any other provisions of Revised Code that relate to execution and proceedings in aid of execution in courts of common pleas. Provisions of c. 2329 of Revised Code relating to third party claims to property that is subject of execution also apply in county courts. (R.C. §1907.47).

Any county court judge may issue executions on judgments on docket of judge of same district, who is unable to issue them in consequence of sickness, absence, or other cause. (R.C. §1907.48).

8.06 EXEMPTIONS:

Residents of Ohio may hold following property exempt from execution, garnishment, attachment or sale to satisfy judgment or order: (1) up to $5,000 for residence used by person or dependent of person (lien for health care services rendered or health care supplies provided to person or his/her dependent may not be enforced until residence property is sold or otherwise transferred by owner in accordance with other applicable laws to person other than surviving spouse or minor children of judgment debtor); (2) up to $1,000 in one motor vehicle; (3) up to $200 in any particular item for wearing apparel, beds and bedding, and up to $300 in each item for one cooking unit and one refrigeration or other food preservation unit; (4)(a) up to $400 in cash on hand, money due and payable, money to become due within 90 days, tax refunds, and money on deposit with bank, savings and loan association, credit union, public utility, landlord, or other person (this item applicable only in bankruptcy proceedings and may include portion of personal earnings not exempt under clause 13 below), (b) up to $200 in any particular item in household furnishings, household goods, appliances, books, animals, crops, musical instruments, firearms, and hunting and fishing equipment that are held primarily for personal, family or household use of person, and (c) up to $400 in one item of jewelry and up to $200 in every other item of jewelry. None of items in this section include items listed in clause 3 above. Total exemptions claimed under clause 4(b) and (c) above shall not exceed $2,000 if residence exemption is not claimed under clause (1) above or $1,500 if residence exemption is claimed; (5) up to $750 in all implements, provisional books, or tools of profession, trade or business; (6)(a) person's interest in beneficiary fund of benevolent association or society, to extent set forth in R.C. §2329.63, (b) in contracts of life or endowment insurance or annuities payable to spouse or children or dependents, or others exempted by R.C. §3911.10, (c) in policy of group insurance or proceeds thereof, (d) in money, benefits, charity, relief or aid to be paid by fraternal benefit society, and (e) in benefits under policies of sickness and accident insurance to extent of $600 per month during disability and all lump sum payments for losses insured under those policies; (7) professionally prescribed or medically necessary health aids; (8) burial lot; (9) moneys paid or payable for living maintenance or rights; workers' compensation; unemployment compensation; cash assistance payments under Ohio Works First Program; benefits and services under Title IV-A prevention, retention and contingency program; and disability financial assistance payments; (10)(a) right to pension, benefit, annuity, retirement allowance or accumulated contribution, right to participant account in any deferred compensation program offered by Ohio public employees deferred compensation board, governmental unit or municipal corporation, with certain exceptions, and right to benefit from Ohio public safety officer's death benefit fund, (b) right to pension, annuity or similar plan or contract not including stock bonus or profit-sharing plan or payment included in clause 6(b) above or clause 10(a) above on account of illness, disability, death, age or length of service to extent reasonably necessary for support of person or dependents, with certain exceptions, and (c) right in assets held in or payments under any individual retirement account or annuity, Roth IRA, educational individual retirement account, Keogh or “H.R. 10” plan that provides benefits by reason of illness, disability, death or age to extent reasonably necessary for support of person or dependents, with certain exceptions; (11) right to receive spousal support, child support, allowance or other maintenance to extent reasonably necessary for support of person or dependents; (12) right to receive or payments received during preceding 12 calendar months from: (a) award of reparations to extent exempted by R.C. §2743.66(D), (b) payment on account of wrongful death of individual of whom person was dependent, to extent reasonably necessary for support of person or dependents, (c) payment not to exceed $5,000 on account of personal bodily injury, not including pain and suffering or compensation for actual pecuniary loss, of person or individual for whom person is dependent, subject to certain exceptions, and (d) payment for loss of future earnings of person or of whom person is or was dependent, to extent reasonably necessary for support of debtor or dependents; (13) personal earnings of person owed to person in amount equal to greater of: (a) if paid weekly, 30 times current federal minimum hourly wage; if paid bi-weekly, 60 times such wage; if paid semi-monthly, 65 times such wage; if paid monthly, 130 times such wage; (b) 75% of disposable earnings owed to person, subject to certain exceptions; (14) right to certain partnership property; (15) seal and official register of notary public; (16) interest in tuition unit or payment under R.C. §3334.09 pursuant to tuition payment contract; (17) any other property that is specifically exempted from execution, attachment, garnishment or sale by federal statutes other than “Bankruptcy Reform Act of 1978”; and (18) $400 in any property (applicable only in bankruptcy proceedings). (R.C. §2329.66).

Debts Against Which Exemptions Not Allowed.

No real or personal property is exempt from specific mortgage, security interest or lien thereon. No claim for less than $400 for labor is exempt. (R.C. §2329.661).

Exemption is not allowed as against unpaid taxes reduced to judgment. (R.C. §5719.08).

Waiver of Exemption.

Agreements to waive exemptions are void. (R.C. §2329.661).

Necessity of Claiming Exemption.

Certain articles are absolutely exempt, while others must be selected by debtor in order to be held exempt. (R.C. §§2329.63 - 2329.83).

Proceeds of Insurance.

Contracts for life or endowment insurance or annuities, payable to spouse or children or dependent or creditor, together with their proceeds, are exempt from claims of insured's creditors. (R.C. §3911.10). Policies of group insurance and proceeds thereof, before and after payment, are exempt from claims against employee or anyone else having right thereunder. (R.C. §3917.05). Workers' compensation, before payment, except support payments ordered withheld by court or child enforcement agency (R.C. §4123.67), and unemployment compensation benefits (R.C. §4141.32) are exempt.

Earnings.

Exempt personal earnings provided for in R.C. §2329.66 not subject to payment of cost of proceedings brought to recover judgment for debt or to satisfy judgment for debt. (R.C. §2329.67).

Homestead Exemption.

See topic 8.10 Homesteads.

Exemptions from Taxation.

See category 22 Taxation.

Allowances from Estate of Decedent for Support of Widow and Family.

See category 13 Estates and Trusts, topic 13.09 Executors and Administrators.

8.07 FORECLOSURE:

See topic 8.13 Liens; category 20 Mortgages, topics R.C. 20.01 Chattel Mortgages, R.C. 20.04 Mortgages of Real Property.

8.08 FRAUDULENT SALES AND CONVEYANCES:

Uniform Commercial Code adopted. (cc. 1301 to 1310). See category 3 Business Regulation and Commerce, topic 3.09 Commercial Code, subheads Action on Official Amendments and Material Variations, Blanks Filled in and Optional Provisions in Code Sections.

Uniform Fraudulent Transfer Act adopted (R.C. §§1336.01 - 1336.11), supplemented by provisions governing transfers with design to prefer one or more creditors (R.C. §§1313.56 - 1313.59).

Remedies.

Uniform Act governs. (R.C. §1336.07). Receiver may be appointed to take charge of all assets of debtor (R.C. §1313.56), irrespective of maturity of claims of participating creditors. (32 O.S. 228; see also state preference law R.C. §§1313.56 - 1313.59).

Bulk Sales.

See category 3 Business Regulation and Commerce, topic 3.09 Commercial Code, subhead Action on Official Amendments.

Bulk Transfer Law repealed effective 8-15-96. (R.C. §1306.01 et seq.).

8.09 GARNISHMENT:

Property Which May Be Reached.

Personal property in possession of third person (R.C. §§2715.091, 2716.01, 2716.03) including certain public officers (R.C. §2715.12). c. 2715 governs prejudgment garnishment by attachment, c. 2716 governs post judgment garnishment. (See topics R.C. 8.02 Attachment, R.C. 8.05 Executions.) Garnishment of personal earnings limited to excess of amount of judgment over amount of personal earnings exempt from execution, attachment, or sale to satisfy judgment or order, or so much of excess as will satisfy judgment. (R.C. §2716.02). Debts which are subject of agreement for debt scheduling between defendant and budget and debt counseling service not subject to garnishment unless any payment to be made thereunder is due and unpaid for more than 45 days after date due or unless plaintiff has previously been notified by budget and debt counseling service that debt scheduling agreement has been canceled. (R.C. §2716.03). Garnishments of investment securities are also subject to Uniform Commercial Code. See category 3 Business Regulation and Commerce, topic 3.09 Commercial Code.

Jurisdiction.

See category 6 Courts and Legislature, topic 6.01 Courts.

Proceedings to Obtain Garnishment of Property Other than Personal Earnings.

Action in garnishment of property other than personal earnings may be commenced upon filing in appropriate common pleas court, municipal court or county court, affidavit by plaintiff (prejudgment) or judgment creditor, or his/her attorney, setting forth name of defendant (prejudgment) or judgment debtor, and name of garnishee and that affiant has reasonable basis to believe garnishee may have property of defendant or judgment debtor other than personal earnings (R.C. §2715.091) and that is not exempt under law of this state or U.S. (R.C. §2716.11).

Garnishment of Property Constituting Judgment Debtor's Personal Earnings.

Affidavit.

Action in garnishment of personal earnings may be commenced by filing affidavit made by plaintiff, or his/her attorney setting forth name of judgment debtor, that affiant has good reason to believe and does believe that person, partnership, or corporation named in affidavit as garnishee has property of judgment debtor that is not exempt under R.C. §2329.66, that demand in writing has been made as required by R.C. §2716.02, that payment demanded in notice required by R.C. §2716.02 has not been made, and that payment had not been made in amount sufficient to prevent garnishment of personal earnings in amount described in R.C. §2716.02, that affiant has no knowledge of any application by judgment debtor for appointment of trustee so as to preclude garnishment of judgment debtor's personal earnings, that affiant has no knowledge that debt to which affidavit pertains is subject of debt scheduling agreement of such nature that it precludes garnishment of personal earnings of judgment debtor. (R.C. §2716.03). Proof of service of statutory demand is filed with affidavit. (R.C. §§2716.04 - 2716.05). Forms for order of garnishment, notice to judgment debtor, and notice to garnishee to answer are statutory. (R.C. §§2716.02, .031, .05-.08).

Statutory demand is prerequisite for garnishment of personal earnings. Demand must be served personally by court or by sending to judgment debtor by certified mail, return receipt requested, or by regular mail, which shall be evidenced by properly completed and stamped certificate of mailing by regular mail, addressed to judgment debtor′s last known place of residence between 15 and 45 days before order is sought. Form for demand is statutory. (R.C. §2716.02).

Answer of garnishee must be filed with Court of Common Pleas of county in which he resides, or if he resides out of state, with that of county where served or where action is pending (R.C. §§2715.13, 2716.21) and if action is pending in another court, clerk of Common Pleas Court is to transmit answer to such other court. (R.C. §2715.14). Form for answer is statutory (R.C. §§2715.041, 2715.045, 2716.05) as are interim and final reports and answers of garnishees (R.C. §2716.07 - 2716.08).

Answer day in garnishment by attachment is computed in same manner as answer to complaint. (R.C. §2715.29). (See category 5 Civil Actions and Procedure, topic 5.18 Pleading, subhead Time.) Answer day in garnishment after judgment is five business days after receipt of order and notice of personal earnings or if order and notice pertains to property other than personal earnings, then on or before date set for hearing as indicated on notice. (R.C. §2716.21). Answer in garnishment by attachment must disclose property and credits of defendant held by garnishee and amount owed by garnishee to defendant, whether due or not. (R.C. §2715.29). Failure to answer constitutes contempt (R.C. §§2715.31, 2716.21), and plaintiff may proceed against garnishee by civil action (R.C. §§2715.33, 2716.21).

Practice.

Order of attachment binds garnishee for all property of defendant held by him, all amounts due defendant from garnishee from time of service of order. (R.C. §§2715.19, 2715.29). Garnishee shall pay amount due into court (R.C. §2715.30), and in case of property, court may require delivery of property into court or permit substitution of bond (R.C. §2715.32).

Adverse Claims.

Garnishee is subject to subsequent attachments (R.C. §2715.17), but payment on primary claim is defense to further liability in amount thus paid (R.C. §2715.30).

Judgment cannot be rendered against garnishee until judgment has been rendered in main action. (R.C. §2715.35).

Earnings.

Frequency.

Order of garnishment of personal earnings is continuous order that requests garnishee to withhold specified amount from judgment debtor's personal earnings during each pay period following garnishee's receipt of order until judgment, interest and costs are paid in full. Rules governing termination of orders and priority of orders are contained in statute. (R.C. §2716.041).

Exemptions.

See topic 8.06 Exemptions.

Garnishment of earnings by attachment granted only after plaintiff obtains judgment. (R.C. §§2715.01, 2716.03).

Trusteeship.

Judgment debtor upon whom statutory demand has been served may apply to County or Municipal Court within whose jurisdiction he resides, or, if nonresident, in whose jurisdiction his place of employment is located, for appointment of Clerk of Court as trustee to receive and distribute nonexempt portion of personal earnings to creditors. Application must include names, addresses and amounts owing to secured and unsecured creditors. As long as debtor maintains payments to trustee, earnings are exempt from further garnishment, though creditors may levy against nonexempt property. If trusteeship is dismissed for nonpayment, debtor may not reapply for period of six months. (R.C. §2329.70). Judgment debtor may also contact budget and debt counseling service for purpose of entering into agreement for debt scheduling and thereby avoid future garnishments for personal earnings. (R.C. §2716.03).

Support Payments.

On motion of court or interested party, personal earnings may be attached for payments for support of minor children under decree entered by any court in state. Service on employer and employee is by personal ordinary first class service. Exemptions under garnishment of earnings statutes are not applicable. (R.C. §3121.03).

8.10 HOMESTEADS:

Each person domiciled in Ohio may hold exempt from execution, garnishment, attachment or sale to satisfy judgment or order person's interest in one parcel or item of real or personal property that person or dependent of person uses as residence. (R.C. §2329.66[A]).

Limitation of Value.

Exemption cannot exceed $20,200 in exempted property. (R.C. §2329.66[A][1][a] and [b]; 2007 Ohio SB 281). On Apr. 1, 2010, and on first day of Apr. in each third calendar year after 2010, dollar amounts in this section must be adjusted to reflect change in consumer price index as published by U.S. Department of Labor. (R.C. §2329.66[B]; 2007 Ohio SB 281).

Limitation of Enforceability.

Enforcement of judgment lien arising from judgment or order regarding money owed for health care services rendered or health care supplies provided to person or dependent of person is effectively deferred until property used as residence is sold or transferred to person or entity other than surviving spouse or surviving minor children of surviving spouse. (R.C. §2329.66[A][1]).

Debts or Liabilities Against Which Exemption Not Available.

Does not extend to judgment on mortgage or security agreement or claim for less than $400 for manual work or labor, vendor's lien, mechanic's lien, real estate tax lien, or mortgage lien and does not affect or invalidate any sale of personal property, security interest or pledge therein or lien created thereby. (R.C. §2329.661).

Claims of Exemption.

Claim of exemption is personal privilege and must be claimed by parties entitled to it before property is sold. (42 O.S. 139).

Waiver of Exemption.

All promises, agreements, or contracts to waive exemptions are void. (R.C. §2329.661[B]).

Loss of Exemption.

See subhead Claims of Exemption, supra.

See categories 21 Property, topics Curtesy, Deeds, Dower and/or Real Property; Family, topic Husband and Wife.

8.11 JUDGMENT NOTES:

See category 3 Business Regulation and Commerce, topic 3.02 Bills and Notes.

8.12 LEVY:

See topics R.C. 8.02 Attachment; R.C. 8.05 Executions.

8.13 LIENS:

Uniform Commercial Code has been adopted. See category 3 Business Regulation and Commerce, topic 3.09 Commercial Code, subheads Action on Official Amendments and Material Variations, Blanks Filled in and Optional Provisions in Code Sections.

Artisans who make improvements on personal property entrusted to them for that purpose have common law lien (107 O.S. 583, 140 N.E. 306), which depends on possession by artisan and is lost if possession is yielded (46 O.S. 560, 22 N.E. 869). Right to artisan's lien codified by R.C. §1333.41 as bailees for hire with right to sell to recover charges, and by specifically directed statutes, for example: care of animals (R.C. §§1311.48 - 1311.51), aircraft (R.C. §§1311.71 - 1311.80), dry cleaned articles (R.C. §§1333.22 - 1333.28), die, mold, pattern, or form (R.C. §§1333.29-.31). Motor vehicles are specifically excluded from bailee for hire statutes (R.C. §1333.41[E]) and remain subject to common law artisan's liens.

Chattels.

See category 20 Mortgages, topic 20.01 Chattel Mortgages.

Innkeeper has a lien on property belonging to or under control of guests for proper charges due innkeeper (R.C. §4721.04), enforceable by sale at public auction after expiration of 60 days (R.C. §4721.05).

Judgment for recovery of sums lost in gaming is lien on building in which such sums were lost, if owner thereof knowingly permitted building to be used for gaming purposes. (R.C. §3763.06).

Vendor of land has a lien thereon for so much of purchase price as remains unpaid. Lien is not effective as against purchaser or encumbrancer unless there is recital of lien in deed or in some instrument of record executed with same formalities as a deed. Lien is waived if vendor takes mortgage for part of purchase price. (R.C. §5301.26).

Watercraft navigating waters within or bordering Ohio are subject to lien for materials, supplies, or labor furnished in building, repairing, furnishing or equipping thereof; for insurance; and wharfage contracted for by vessel′s owner, steward, consignee or other agent; damages arising out of contract of transportation; injuries to person or property inflicted by such craft; or damage done by officer of watercraft or under his sanction to passenger or employee. (R.C. §4585.01). This lien is in addition to lien arising by operation of General Maritime Law. Such lien may attach although liability arises beyond jurisdiction of state. (R.C. §4585.02). Such liens are subordinate to any prior security interest noted on certificate of title or in security agreement associated with manufacturers or importers certificate that is retained in accord with R.C. §1548.20. (R.C. §4585.01). Lienholder may sue owner, one who contracted debt, or craft itself. (R.C. §4585.03). In suit against craft itself, craft may be seized at once (R.C. §4585.04) and such attachment is equivalent to service of process (R.C. §4585.09).

Mechanics' Liens.

Mechanic's lien may be acquired by person who, under express or implied contract with owner, part owner or lessee, performs work or labor or furnishes material in furtherance of any improvement (R.C. §1311.02); digging, drilling, boring, operating, completing, or repairing any oil or gas well or injection well, or altering, repairing or constructing any oil derrick, oil tank or leasehold production pipeline (R.C. §§1311.02, 1311.021) or for construction, alteration or repair of any street, turnpike, road, sidewalk, way, drain, ditch or sewer (R.C. §§1311.02, .03); or by person performing manual labor for employer (R.C. §1311.34) or coal mining labor (R.C. §1311.23).

Property Subject.

Lien attaches to structure built or improved (R.C. §1311.09) and to all interest in land that owner, part owner, or lessee at time first labor was performed or materials furnished may have or subsequently acquire (R.C. §1311.02). Lien for drilling, operating or repairing oil, gas or injection well attaches to leasehold or mineral estate, to oil and gas produced, from proceeds thereof, and to all materials used in connection with leasehold or mineral estate (R.C. §1311.021); lien for labor in mining coal attaches to mine itself, all rights of owner or lessee who own mines, and all personal property used in business or mining (R.C. §1311.23); for manual labor performed for employer, to all real property of employer (R.C. §1311.34). Liens on residential property (R.C. §1311.011), condominium property (R.C. §5311.13), oil and gas well facilities (R.C. §1311.021), railroads (R.C. §§1311.38 - 1311.47), and public works (infra) are subject to special provisions.

Private Nonresidential Property Improvements.

In order to inform lien claimants of their obligations necessary to preserve their lien rights and to force claimants to comply with these obligations, owner, part owner or lessee must, prior to performance of any labor or work or furnishment of any materials in furtherance of improvement, record in county recorder's office Notice of Commencement and post copy of same at conspicuous place at improvement site. (R.C. §1311.04).

In order to perfect liens in connection with improvements to real property (private commercial projects), lien claimant must: (a) within 21 days after performing first labor or work or furnishing first materials, or within 21 days after recording of Notice of Commencement, whichever is later, serve upon owner, part owner or lessee and original contractor Notice of Furnishing, except that no subcontractor or materialman in privity of contract with original contractor need serve Notice of Furnishing upon original contractor (R.C. §1311.05); (b) within 75 days after lien claimant's last provision of labor or material, prepare and record affidavit of lien by filing affidavit in office of county recorder wherein improved property is located, showing net amount due, description of property, name and address of person for whom labor or work was performed or material furnished, name of owner, part owner, or lessees if known, name and address of lien claimant, and first and last dates that lien claimant performed any labor or work or furnished any material to improvement giving rise to lien (R.C. §1311.06); and (c) within 30 days after filing affidavit, serve copy on owner, part owner or lessee of improved property or his designee, or if unable to serve affidavit in accordance with R.C. §1311.19, post copy conspicuously on premises within ten days after expiration of 30 day period (R.C. §1311.07).

Private Residential Improvements.

In case of home construction contracts, owner is exempt from Notice of Commencement requirement (R.C. §1311.04) and lien claimant is exempt from Notice of Furnishing Requirement (R.C. §1311.05). In order to perfect liens in connection with contracts for purchase of or improvement to any single or double-family dwelling or condominium unit, claimant must (a) within 60 days from date on which last work was performed or material furnished, file affidavit of lien stating amount due, description of property, name and address of one for whom work was performed or materials furnished, name and address of owner, part owner or lessee, name and address of lien claimant, and first and last dates work performed or material furnished (R.C. §1311.06); and (b) serve affidavit upon owner, part owner or lessee within 30 days after filing or if unable to serve affidavit in accordance with R.C. §1311.19, post copy conspicuously on premises within ten days after expiration of 30 day period (R.C. §1311.07).

If original contractor's, subcontractor's, materialman's, or laborer's lien is perfected against owner, part owner, or lessee of single or double family dwelling or condominium unit after payment in full of home construction contract or home purchase contract, lien is invalid. If original contractor's, subcontractor's, materialman's or laborer's lien is perfected against such owner, part owner, or lessee after payment in part of home construction or home purchase contract, lien is valid only as to lienor's pro rata share of amount still due under such home construction or home purchase contract and laborer's lien has priority. Amount still due is determined after deducting from unpaid balance cost to complete home construction or home purchase contract. (R.C. §1311.011).

Priority.

Liens generally take priority from date that first work or labor is performed or materials furnished on primary contract. (R.C. §1311.13). Lien of subcontractor is superior to that of principal contractor with respect to same work, labor, or material. Liens filed by laborers, materialmen and subcontractors to principal contractor or subcontractor have priority over all other liens. (R.C. §1311.15). As to mortgages, see category 20 Mortgages, topic 20.04 Mortgages of Real Property, subhead Future Advances. Employee's lien for wages is superior to prior lien of attachment and certain mortgages (R.C. §1311.34); lien for labor and materials against railroad is superior to all other liens and subsists for one year from filing, or until action to enforce lien is fully adjudicated (R.C. §1311.41). Lien has priority over perfected real estate broker's lien. (R.C. §1311.91).

Duration.

Generally, six years from filing of R.C. §1311.06 affidavit (R.C. §1311.13), unless (a) lienor fails to serve upon owner Notice of Furnishing as required by R.C. 1311.05; (b) lienor fails to file affidavit of lien as required by R.C. §1311.06; (c) lienor fails to commence suit within 60 days after service and recording of notice by owner to do so (R.C. §1311.11); or (d) owner, etc. provides bond, cash receipt, general obligation of U.S. or state government, obligation insured by U.S. agency or other reasonable security in double amount of lien or one and one half times amount of lien exceeding $5,000 (R.C. §1311.11). Failure by lienor to release void or satisfied lien within 30 days after adjudication or satisfaction subjects lienor to damages. (R.C. §1311.20).

Enforcement is by foreclosure and sale. See category 20 Mortgages, topic 20.04 Mortgages of Real Property, subheads Foreclosure and Sale. Attorney fees may be allowed to lienor from fund. (R.C. §1311.16).

Public Improvements.

Officers contracting for public improvement must require bond from contractor in amount equal to bid amount. (R.C. §153.54). Claimant must furnish surety on this bond statement of amount due not later than 90 days after acceptance of public improvement; suit may be commenced against surety not less than 60 days and not more than one year after acceptance. (R.C. §153.56). Special provisions govern bonds required with contracts for highway improvements (R.C. §5525.16) and for construction, alteration or repair of state buildings (R.C. §153.05).

Persons performing labor or furnishing material may acquire claim on bond funds by (a) initially serving upon principal contractor Notice of Furnishing within 21 days after first performing labor or furnishing materials at public improvement site (R.C. §1311.261); (b) within 120 days of performance of last labor or furnishment of materials, serving upon public authority affidavit of lien stating amount due and unpaid for labor or work performed and materials furnished, when last labor or work was performed or materials furnished, and post office address of claimant (R.C. §1311.26); and (c) within 30 days after serving upon owner affidavit required by R.C. §1311.26, filing copy of affidavit with county recorder in county where public improvement is situated (R.C. §1311.29). Compliance with (a) preserves claimant's right to file claim against public authority (R.C. §1311.261); compliance with (b) requires detention from payment due principal contractor of amount up to balance remaining on contract not to exceed claim (R.C. §1311.28); and compliance with (c) entitles filing claimant to priority against other subcontractors, laborers, and materialmen who fail to file prior to date that any payment is due and to share pro rata with those who have filed prior to such date (R.C. §1311.29). If lien claimant performed work or furnished materials to subcontractor of principal contractor, claimant must furnish copy of affidavit to subcontractor within 20 days after service of same upon public authority. (R.C. §1311.31).

Where public authority serves principal contractor with copy of claimant's affidavit within five days after receipt by public authority, together with notice, principal contractor is deemed to assent to claim unless he notifies agency in writing of intention to dispute within 20 days after receipt by contractor, in which case public authority may pay claimant directly. (R.C. §1311.31). Upon receipt of R.C. §1311.26 affidavit, public authority, principal contractor or subcontractor may notify claimant to commence suit within 60 days and failure to comply voids lien; principal contractor, subcontractor or interested party may void lien against funds due by serving and filing with public authority notice to commence suit accompanied by bond in one and one half amount of claim. (R.C. §1311.311).

Prior to performance of any work or furnishing of any material, public authority must prepare and make available to public Notice of Commencement. (R.C. §1311.252).

Motor Vehicle Liens.

See category 23 Transportation, topic 23.01 Motor Vehicles, subhead Liens and Security Interests.

For other liens discussed under other categories and topics, see topic 8.02 Attachment; categories 3 Business Regulation and Commerce, topics Banks and Banking, Carriers, Factors; Civil Actions and Procedure, topic Judgments; Employment, topic Labor Relations; Legal Profession, topic Attorneys and Counselors; Mortgages, topics Chattel Mortgages, Mortgages of Real Property; Taxation, topic Taxes.

8.14 MECHANICS' LIENS:

See topic 8.13 Liens.

8.15 PLEDGES:

Uniform Commercial Code adopted. See category 3 Business Regulation and Commerce, topic 3.09 Commercial Code, subheads Action on Official Amendments and Material Variations, Blanks Filled in and Optional Provisions in Code Sections.

Remedies of Pledgee.

Uniform Commercial Code governs (R.C. §1309.47 prior to 7-1-01 and R.C. §1309.610 on and after 7-1-01), subject to Small Loan Acts where applicable (R.C. §1321.01 et seq.).

8.16 RECEIVERS:

Jurisdiction.

Receiver may be appointed by Supreme Court or judge thereof, court of appeals or judge thereof in his district, common pleas court or judge thereof in his county, or probate court, in causes pending in such courts respectively, in following cases: (1) in action by vendor to vacate fraudulent purchase of property, or by creditor to subject property or fund to his claim, or between partners or others jointly owning or interested in any property or fund, on application of plaintiff, or of any party whose right to or interest in property or fund or proceeds thereof, is probable, and when it is shown that property or fund is in danger of being lost, removed or materially injured; (2) in action by mortgagee, for foreclosure of his mortgage, and sale of mortgaged property, when it appears that mortgaged property is in danger of being lost, removed or materially injured, or that condition of mortgage has not been performed, and property is probably insufficient to discharge mortgage debt; (3) after judgment, to carry judgment into effect; (4) after judgment, to dispose of property according to judgment, or to preserve it during pendency of appeal, or when execution has been returned unsatisfied, and judgment debtor refuses to apply property in satisfaction of judgment; (5) when corporation has been dissolved, or is insolvent, or in imminent danger of insolvency, or has forfeited its corporate rights; (6) in all other cases where receivers have heretofore been appointed by usages of equity. (R.C. §2735.01).

In addition, instances of authority for appointment of receiver appear in other sections of Ohio Revised Code: County treasurer to become receiver of land to collect taxes (R.C. §323.49); in attachment proceedings (R.C. §§2715.20-.25); in proceedings in aid of execution (R.C. §2333.22); in state preference law (R.C. §§1313.56-.59); as to partnership, in event of partner's death (R.C. §1779.06); as one provisional remedy of surety (R.C. §1341.21); for unemployment compensation employer contributions (R.C. §4141.27); upon violation of state securities law (R.C. §1707.27); in proceedings for sale of real or personal property under lien of judgment of environmental division of municipal court or lien for machinery, material, fuel furnished, or labor performed in those cases (R.C. §1901.183); and to take possession and control of and actions concerning any building found to be public nuisance (R.C. §3767.41).

Eligibility and Competency.

No party, attorney or person, interested in an action shall be appointed receiver therein, except by consent of parties. (R.C. §2735.02).

Qualifications.

Receiver, before he enters upon his duties, must execute bond with surety approved by court, judge, or clerk, in such sum as court directs, to effect that he will faithfully discharge his duties and obey orders of court. (R.C. §2735.03).

Powers and Duties.

Under control of court, receiver may bring and defend actions, take and keep possession of property, receive rents, collect or compromise demands, make transfers, and generally do such acts as court authorizes. (R.C. §2735.04).

Compensation.

Allowance for services is with discretion of court appointing receiver. (7 O. L. Abs. 92). Receiver's fees and attorney for receiver's fees are costs payable on allowance from the court. (28 O. L. Abs. 481).

Discharge.

In absence of express provision authorizing discharge of receiver, court has power to vacate or terminate appointment on showing of changed conditions and best interest of estate or to change person who is receiver. (31 O.S. 1; 19 O. L. Abs. 314). Parties interested may move for discharge of receiver. (22 O. App. 197, 153 N.E. 226). On final decree in cause, functions of receiver are terminated. Receiver becomes trustee of property for person entitled thereto under decree. Upon transfer of property to such person, receiver is formally discharged by order of court having jurisdiction. (57 O. App. 246, 13 N.E.2d 368). See also Civ.R. 66.

8.17 REDEMPTION:

See topics R.C. 8.05 Executions, Pledges; categories 20 Mortgages, topic Mortgages of Real Property; Taxation.

8.18 SUPPLEMENTARY PROCEEDINGS:

See topic 8.05 Executions.

8.19 TRUSTEE PROCESS:

See topic 8.09 Garnishment.

8.20 USURY:

See category 3 Business Regulation and Commerce, topic 3.19 Interest.

9 DISPUTE RESOLUTION

9.01 ALTERNATIVE DISPUTE RESOLUTION:

Mandatory (Alternative) Dispute Resolution.

Supreme Court requires trial courts to consider adoption of mandatory arbitration procedures. (Sup.R. 15).

Trial Court.

Number of common pleas courts have adopted mandatory arbitration provisions by rule. These rules generally provide that cases except those involving title to real estate, equitable relief or appeals, may be submitted by court to arbitration subject to maximum dollar limit unless parties otherwise agree. Rules provide for report and award of arbitrators, which is final unless appealed to court for de novo review.

Appellate Court.

App.R. 20 provides that appellate courts may require prehearing conference to consider simplification of issues and other matters to aid in disposition of proceeding. Prehearing conference provisions adopted in many Courts of Appeals by local rule.

Voluntary (Alternative) Dispute Resolution.

Voluntary arbitration is governed by R.C. §§2711.01-2711.16. Nonbinding arbitration of medical, dental, optometric and chiropractic malpractice claims is governed by R.C. §§2711.21-2711.24 and by local rules of certain common pleas courts. Voluntary arbitration and conciliation of international commercial agreements is provided for in R.C. §2712.01 et seq.

Statutes authorize courts to establish by rule procedures for resolution of disputes, including mediation, for civil actions and proceedings within jurisdiction of court. (R.C. §1907.262-County; R.C. §1901.262-Municipal; R.C. §2101.163-Probate). Number of courts have adopted rules on alternative dispute resolution. Typically, these rules provide for use, by agreement of parties, of mediation, neutral evaluation programs, private judging and other ADR methods. Ohio Supreme Court ruled that legislation enacting these statutes was unconstitutional because it violated one-subject provision of Ohio Constitution (Art. II, §15D). (86 O.S.3d 451, 715 N.E.2d 1062). However, section for probate courts was reenacted separately in 2004.

Where parties agree, court may refer case to voluntarily retired judge whose decision is binding but reviewable for errors of law on ground judgment is against weight of evidence. (R.C. §2701.10).

Alternative Dispute Resolution Commission.

Ohio commission on dispute resolution and conflict management. (R.C. §179.02).

Alternative Dispute Resolution Acts.

None.

See topics 9.02 Arbitration and Award; 9.02A Mediation.

9.02 ARBITRATION AND AWARD:

Form and Requisites of Submission.

Written agreement to submit to arbitration is necessary. (R.C. §2711.01).

Contracts to Arbitrate Future Disputes.

Arbitration agreements are enforceable except as to title and possession of real estate;

other real estate controversies may be arbitrated. (R.C. §2711.01).

Appointment of arbitrator must be by method set forth in agreement. Where no method is established or established method fails, either party may apply to common pleas court to appoint arbitrator. (R.C. §2711.01).

Forms for submitting issues are not specified by statute. Arbitrators may generally establish rules of procedure. (R.C. §2711.06).

County in which arbitration will be held may be designated in parties' agreement. (R.C. §2711.08).

Special provisions apply to contracts to arbitrate medical, dental, optometric, and chiropractic claims. (R.C. §§2711.21 - 2711.24).

Rescission allowed only on grounds allowing rescission of ordinary contract. (R.C. §2711.01). Summary procedure for trying issues of enforceability may be had before court of common pleas. Either party may demand jury trial on issue of making of agreement or issue of failure to perform agreement. (R.C. §2711.03).

Powers of Arbitrators.

Majority of arbitrators may fix time and place of hearings; adjourn from time to time and place to place; subpoena persons and papers; and, by petition to common pleas court, order taking of depositions. (R.C. §§2711.06-.07). Arbitrators have broad authority to fashion remedies unless agreement states otherwise. (R.C. §2711.10; 63 O.S.3d 403, 588 N.E.2d 802).

Award and Enforcement.

Form of Award.

Award must be in writing, signed by majority of arbitrators, and delivered to each party. (R.C. §2711.08). Arbitration award is final and binding unless statutory exceptions in R.C. §§2711.10 or .11 apply.

Confirmation by Court.

Within one year of award, on application by any party, common pleas court must confirm award unless it is vacated, modified, or corrected. Notice of application given to adverse party at least five days before hearing. (R.C. §2711.09).

Vacation of award allowed if: (a) Award procured by fraud, corruption, or undue means; (b) partially or corruption of arbitrators; (c) prejudicial misconduct of arbitrators; or (d) arbitrators exceeded by imperfectly executed powers. (R.C. §2711.10).

Modification of award allowed if: (a) evident material miscalculation of figures or material mistake in description; (b) award made on matter not submitted; (c) award imperfect as to form not affecting merits. (R.C. §2711.11).

Motion to modify, vacate, or correct award must be filed within three months of delivery of award to parties. Motions must be served on adverse parties of their attorneys in same manner as motion in civil action. (R.C. §2711.13).

Appeal.

C. 2711 provides exclusive statutory remedy for appealing arbitration awards to common pleas courts. (R.C. §2711.01; 71 O.S.3d 620, 646 N.E.2d 813).

Judgment on award is entered upon application for confirmation. (R.C. §2711.09).

Mandatory Arbitration.

Some common pleas courts have adopted mandatory arbitration by rule.

See topic Alternate Dispute Resolution, subhead Mandatory (Alternative) Dispute Resolution.

Uniform Arbitration Act.

Not adopted; Ohio provisions are similar. (R.C. §2711.01 et seq.).

Qualification of Arbitrators.

Sup.R. 15 requires court to establish list of qualified attorneys who have consented to serve as arbitrators in mandatory arbitrations.

See topics 9.01 Alternative Dispute Resolution; 9.02A Mediation.

9.02A MEDIATION:

Jurisdictional Mediation Acts.

None. Court jurisdictional statutes authorize courts to establish dispute resolution programs, including mediation.

Uniform Mediation Act adopted. (R.C. §§2710.01 - 2710.10).

See topic Dispute Resolution.

Qualifications of Mediators.

Courts may establish credentials of mediators as part of dispute resolution programs. Specific qualifications are required for common pleas court division mediators in cases involving allocation of parental rights and responsibilities. (Sup.R. 16).

10 DOCUMENTS AND RECORDS

10.01 ACKNOWLEDGMENTS:

Uniform Recognition of Acknowledgments Act adopted. (R.C. §§147.51 - 147.58).

Within State.

Acknowledgment of deed, mortgage, land contract, lease or memorandum of trust may be taken by notary public, judge or clerk of court of record, county auditor, county engineer, county court judge, or mayor. (R.C. §5301.01). Representatives of certain veterans' organizations may be appointed commissioners to administer oaths, take acknowledgments and attest execution of any instruments of writing for Veterans' Administration. (R.C. §147.32). Fee for acknowledgment is $2. (R.C. §2303.20).

Outside State but within United States.

Acknowledgment may be taken by any person authorized under laws of place of taking. (R.C. §§147.51; 5301.06). Signature, rank, or title and serial number, if any, of person are sufficient proof of authority. (R.C. §147.52[A]).

Outside U.S.

Acknowledgment may be taken by any person authorized under laws of place of taking. (R.C. §§147.51; 5301.06). For sufficiency of proof of authority of such persons, see R.C. §147.52(B).

Persons in or with U.S. Armed Forces.

Statute permitting commissioned officer of armed forces of U.S. to take acknowledgments in Ohio repealed effective May 31, 1988. Notarial acts by members of U.S. armed forces effective if performed outside Ohio pursuant to laws of place of taking. (R.C. §147.51).

General Requirements as to Taking.

Interested parties to instrument cannot take acknowledgment of other parties to instrument. (58 O.S. 86, 50 N.E. 437).

Person taking acknowledgment must know person acknowledging or have satisfactory proof of identity. (R.C. §147.53).

Acknowledgment taken by notary after expiration of term or resignation is valid. (R.C. §147.12). Acknowledgment taken by notary public outside of county for which commissioned, for lands located outside such county, is null and void. (112 O.S. 30, 146 N.E. 389).

General Requirements of Certificate.

Person taking acknowledgment must certify it and subscribe his name and indicate title. (R.C. §§147.52 - 147.53, 5301.01).

Seals to be used by various officials are prescribed by R.C. §147.04. Notary seal is not necessary to validity of acknowledgment. (19 O.S. 291).

Married Persons.

Acknowledge as provided in R.C. §5301.01. (R.C. §5301.04).

Attorneys in Fact.

See category 21 Property, topic 21.15 Powers of Attorney.

Corporations.

Officer who executes deed on behalf of corporation is proper person to acknowledge it. (R.C. §147.541).

Foreign Acknowledgments.

See subhead Outside U.S.

Effect of Acknowledgment.

Certificate of acknowledgment is conclusive evidence of facts stated, in absence of fraud, for which alone it is impeachable. (11 O.S. 203).

Proof by Subscribing Witness.

Fact that officer subscribed as witness does not cure omission to subscribe certificate acknowledgment. (20 O.S. 119).

Authentication of certificate of person taking acknowledgment outside of this state but within U.S. is not required. (R.C. §147.52). In foreign country, proof of authority of person authorized under law of that country to take acknowledgments is necessary. (R.C. §147.52). Clerk of common pleas court authenticates certificate of acknowledgment taken in this state for use in other states. Fee is $2. (R.C. §2303.20[N]).

Forms.

Statutory short forms of acknowledgment set forth in R.C. §147.55. Following forms may be used:

Individual: State of . . . ., County of . . . ., ss: Before me, a notary public (or justice of the peace, etc.), in and for said county, personally appeared the above named . . . ., who acknowledged that he (she or they) did sign the foregoing instrument, and that the same is his (her or their) free act and deed. In testimony whereof, I have hereunto subscribed my name at . . . ., this . . . . day of . . . ., (year) . . . . .

Attorney in Fact: Change the above to read: . . . . . . personally appeared A. B., to me known to be the person who executed the foregoing instrument on behalf of C. D., and acknowledged that he executed the same, as the free act and deed of said C. D. . . . . . . (then as above).

Corporation: State of . . . ., County of . . . ., ss: Before me, a notary public (or justice of the peace, etc.), in and for said county, personally appeared . . . . . . and . . . . . ., known to me to be the persons who, as president and secretary (or other proper officers), respectively, of . . . . . ., the corporation which executed the foregoing instrument, signed the same, and acknowledged to me that they did so sign said instrument in the name and upon behalf of said corporation as such officers, respectively; that the same is their free act and deed as such officers, respectively, and the free and corporate act and deed of said corporation; that they were duly authorized thereunto by its board of directors; and that the seal affixed to said instrument is the corporate seal of said corporation. In testimony whereof, I have hereunto subscribed my name, and affixed my official seal (if officer has seal), at . . . . . ., this . . . . . . day of . . . . . ., (year) . . . . .

Validating Acts.

When any deed is of record for more than 21 years in office of recorder of county in which real estate is situated and is defective because it was not properly witnessed, or such instrument contained no certificate of acknowledgment, or certificate of acknowledgment was defective in any respect, such deed and record is cured of defects and is effective as if such deed had been legally executed and acknowledged. (R.C. §5301.07).

Alternative to Acknowledgment or Proof.

No statutory alternative.

10.02 AFFIDAVITS:

An affidavit may be made in or out of the state before any person authorized to take or administer oaths (whether attorney in case or not). (R.C. §2319.04). Clerk of court of common pleas must charge $1 for taking each affidavit. (R.C. §2303.20[L]). See category 5 Civil Actions and Procedure, topic 5.11 Depositions and Discovery.

General Requirements as to Administration.

Except in affidavit for replevin (R.C. §2737.03), attachment (R.C. §2715.03), or publication (Civ.R. 4.4), authentication of affidavit is subject to same limitations as that of deposition (R.C. §2319.04; see category 5 Civil Actions and Procedure, topic 5.11 Depositions and Discovery).

General Requirements of Jurat.

Jurat must show that affiant was sworn; that affidavit, if given orally, was reduced to writing by proper person, naming him; and that affidavit was signed in presence of certifying officer (R.C. §2319.04; Civ.R. 30). Affidavit made outside of state may be in form authorized by laws of place of taking. (Civ.R. 28).

Statement of expiration date of commission not required by law but is customarily included.

Use of Affidavit.

Affidavit may be used to take testimony of witness (R.C. §2319.01[A]), verify pleading, prove service of summons, notice of other process, or obtain provisional remedy, examination of witness, stay, or upon motion, and in any other case permitted by law (R.C. §2319.03), and as evidence of facts concerning title to real estate. (R.C. §5301.232).

Disqualification.

Affidavits may not be taken before relative, employee, or attorney of any party, or relative or employee of such attorney, or financially interested person. (Civ.R. 28[C]). Notary public should be disqualified to administer oath to party where notary is directly interested, legally or materially, in validation of instrument which oath accomplishes. (165 O.S. 483).

Form

Form.

State of . . . . . ., County of . . . . . ., ss. A. B., being first duly sworn, says that . . . .

(Signature.)

Sworn to before me and subscribed in my presence at . . . ., this . . . . . . day of . . . . . ., (year) . . . . .

(Signature and title of officer.)

Alternative to Affidavit.

No statutory alternative.

10.03 NOTARIES PUBLIC:

Qualification.

Other than attorneys admitted to practice in Ohio must be citizens of Ohio, age of 18 or over, appointed by Governor for term of five years. Attorneys hold office during their term of practice in state. All notaries must take oath indorsed on commission. (R.C. §§147.01, 147.03). See topic 10.04 Records, subhead Foreign Conveyances or Encumbrances.

Authentication.

See topic 10.01 Acknowledgments, subhead Authentication.

Seal.

Notary must seal in specified form. (R.C. §147.04). Notary's name must be printed, typewritten or stamped near notary's signature on document signed by him. (R.C. §147.04).

Powers and Duties.

Notary has power to administer oaths, to take and certify depositions, to take and certify acknowledgments of deeds, mortgages, liens, powers of attorney and other instruments and to receive, make and record notarial protests. (R.C. §147.07).

Instruments of protest of accompanying bill of exchange or promissory note constitute prima facie evidence of facts certified. (R.C. §147.09).

Certificate of Authority.

See topic 10.01 Acknowledgments, subhead Authentication.

Territorial Extent of Powers.

Notary public may act throughout state. (R.C. §147.07).

Expiration of Commission.

Notary holds office for term of five years unless commission revoked. Attorney admitted to practice law in Ohio holds office as notary as long as attorney is resident of Ohio or has principal place of business or primary practice in Ohio, attorney is in good standing before Ohio supreme court, and commission is not revoked. (R.C. §147.03). Notaries not required to state date of expiration of their commissions on their certificates. (R.C. §147.02).

Fees.

Protest of bill of exchange or promissory note, $1 and expenses in going beyond corporate limits of municipal corporation to make presentment or demand; recording instrument required to be recorded, 10¢ for each 100 words; certifying affidavit, acknowledgment $1.50; certifying deposition, swearing witnesses, and other official services, usual and customary fees and expenses may be established by court reporter or other authorized person under Civ.R. 28, unless parties agree to higher fees. (R.C. §§147.08, 2319.27).

Commissioner of Deeds.

No statutory provision. Former statutory provisions repealed.

Officers of U.S. Armed Forces.

Any commissioned officer in active service and others authorized by armed forces may perform notarial acts for his dependents, U.S. merchant seaman, U.S. armed forces members, and others accompanying U.S. armed forces. (R.C. §147.51). Notarial acts performed under prior statute, between Jan. 1, 1941 and Jan. 1, 1974, are validated. (R.C. §147.39).

10.04 RECORDS:

County Recorder shall keep six separate sets of records as follows: deeds, mortgages, powers of attorney, plats, leases and living wills. (R.C. §317.08).

Uniform Commercial Code adopted. See category 3 Business Regulation and Commerce, topic 3.09 Commercial Code, subheads Action on Official Amendments and Material Variations, Blanks Filled in and Optional Provisions in Code Sections.

Use of Personal Information by State and Local Agencies.

Private individual may inspect personal information about himself maintained by state or local government agency, except adoption records, information in putative father registry under R.C. §3107.062, or information collected and compiled in anticipation of civil or criminal action or proceeding. (R.C. §1347.08). State or local government agencies may use personal information in system only in manner consistent with stated purpose of system. (R.C. §1347.07). State agencies must adopt rules regulating access to confidential personal information, and a person harmed by violation of those rules may bring an action in the court of claims. (R.C. 1347.15) Director of Administrative Services has primary enforcement and rule making authority. (R.C. §1347.06).

Election records are open to public inspection at office of county Boards of Election during normal office hours. (R.C. §§3501.13, 3599.161).

Recordable Instruments.

For provisions concerning instruments which must be recorded see categories 8 Debtor and Creditor, topic Liens; Mortgages, topic Mortgages of Real Property; Property, topics Deeds, and Powers of Attorney. Affidavits on facts relating to title may be recorded. (R.C. §5301.252).

Place of Recording.

For list of Counties and County Seats see first page of this state Volume contained in Practice Profiles Section.

Requisites for Recording.

To be effective as to subsequent bona fide purchasers without notice, deeds and instruments of writing for conveyance or encumbrance of lands, including land contracts and options to purchase real estate during period of validity of option, containing accurate and complete legal description of land, must be recorded in office of recorder of county where property is situated. (R.C. §§317.08; 5301.25; 5313.02).

Instruments presented for recording must be sufficiently legible and on paper of quality which permits reproducing by photographic or microphotographic processes. County Recorder, prior to recording, may require original document or true copy of document which does not satisfy requirements. Notice imparted by recording or filing instrument is not affected if County Recorder accepts instrument that subsequently is found not to satisfy requirements. Provision does not apply to wills or death certificates. (R.C. §317.112).

Documents must meet paper size and format requirements. Nonconforming documents must be accepted, but county recorder must charge a ten dollar service fee and a ten dollar housing trust fund fee. (R.C. 317.114)

Mortgages are excepted; first to be filed takes priority regardless of notice. (R.C. §5301.23).

Declaration submitting property to condominium ownership, accompanied by diagram of property and copy of bylaws, must be filed with county recorder of county in which property is situated before conveyance of any interest therein. (R.C. §5311.06). Acknowledgment by grantor, mortgagor, vendor, lessor (R.C. §5301.01) or attorney in fact (R.C. §1337.01) required for admission to record (R.C. §5301.25[A]). See topic 10.01 Acknowledgments.

Person Preparing.

No instrument by which title to real estate or personal property, or any interest therein or lien thereon, is conveyed, created, encumbered, assigned or otherwise disposed of, can be received for record or filing by county recorder unless name of person who, and governmental agency, if any, which, prepared such instrument appears at conclusion of such instrument and such name is either printed, typewritten, stamped, or signed in a legible manner. An instrument will be in compliance with this section if it contains a statement in following form: “This instrument was prepared by (name).” This section does not apply to any instrument executed prior to its effective date (1955) nor to: any decree, order, judgment, or writ of any court; any will or death certificate; any instrument executed or acknowledged outside of this state. (R.C. §317.111).

Surveyor.

Instruments executed and acknowledged in Ohio conveying or encumbering land that has been surveyed must show name of person making survey, which may be in form: “A survey of this property was made by (name).” (R.C. §5301.25). Affidavit of registered surveyor reconciling conflicts and ambiguities in recorded descriptions may be filed. (R.C. §5301.252).

Reference to Previous Instrument.

Grant, reservation, agreement creating easement, or recorded lease of any interest in land shall contain reference to volume and page in Official Records of instrument under which grantor claims title, but omission of such reference shall not affect validity of same. (R.C. §§5301.011, 319.20).

Endorsement by Auditor.

Deed of absolute conveyance of land or any conveyance of mineral right must be presented to auditor and endorsed “transferred” or “transfer not necessary” prior to recording. (R.C. §317.22).

Recording Fees.

Corporation.

10¢ per share on first 1,000 shares; 5¢ per share on next 9,000; 2¢ per share on next 40,000; 1¢ per share on next 50,000; ½¢ per share on next 400,000; ¼¢ per share on all shares in excess of 500,000. Minimum fee—$125; maximum fee—$100,000. (R.C. §111.16).

Recording Mortgages or Deeds, Powers of Attorney or other Written Instruments.

$28 for first two pages and $8 for each additional page thereafter. Fee for each additional grantor and grantee would be $4 each. (R.C. §317.32).

Assignment or Satisfaction of Mortgage.

$28 for first two pages, $8 for each additional page. (R.C. §317.32).

Cancellation, Release, or Assignment of Land Contract.

$28 for first page, $8 for each additional page. (R.C. §317.32).

Manual or Typewritten Marginal Entries.

$8. (R.C. §317.32).

Entering Marginal Reference by Separate Recorded Instrument.

$28 for first two pages and $8 for each additional page (R.C. §317.32), plus $4 for each marginal reference set out in instrument (R.C. §317.32).

Recording Maps or Plats or Certifying Copy from Record.

Up to 10¢ per square inch, minimum fee, $40. (R.C. §317.32). Up to 4¢ per square inch for certified copy, minimum fee $2. (R.C. §317.32). For manually recording plat not exceeding six lines $4, for each additional line, 20¢. (R.C. §317.32).

Facsimile Transmission of Document.

$2 for each 8½" × 14" page for local transmission; $4 for each 8½" × 14" page for long distance transmission. (R.C. §317.32).

Notices of Federal Tax Liens.

Files with county recorder. $5 for filing and indexing each notice of lien; $3 for filing discharge or release of lien. (R.C. §317.09).

Copies or Certifications.

$2 per page and $1 for certification. (R.C. §317.32).

Recording Zoning Resolutions or Amendments.

Resolutions, $50 including text and maps regardless of size or length. Amendments, $20 regardless of size or length of amendments. (R.C. §317.32; 2007 Ohio HB 562).

Recording living wills, durable power of attorney for health care or both, minimum fee $28, maximum fee $40. (R.C. §317.32).

Copies of Instruments Conveying or Extinguishing Agricultural Easements.

$2 per page. (R.C. §317.32). Paid by Office of Farmland Preservation, Dept. of Agriculture. (R.C. §§317.32; 5301.691[G]).

Recording Taxes.

See category 22 Taxation.

Statement of Value.

In triplicate prepared by grantee or grantee's representative must accompany instrument conveying real property or manufactured or mobile home presented to auditor unless transfer is exempt from conveyance fee, in which case statement of reason for exemption is required. (R.C. §319.202). See category 22 Taxation, topic Property Taxes.

Recorded land contracts may be canceled, partially released by vendor or vendee, or assigned by marginal notation on either original document or record copy, or by deed or other instrument executed with formalities of deed. Notation on margin of record copy must be attested to by county recorder. (R.C. §5301.331). Vendor is responsible for recording of land contract. (R.C. §5313.02). Oil and gas leases, licenses and assignments must contain permanent parcel number to permit sectional indexing in certain counties. (R.C. §5301.09).

Successor Trustee or Co-trustee.

Of trust owning real property as soon as practical after death, resignation or other means of termination of prior trustee must file affidavit with county recorder stating same. (R.C. §5302.171). Affidavit must contain name of prior trustee, death certificate in case of death of prior trustee, names and addresses of all remaining trustees and real property description. (R.C. §5302.171).

Prior to Transfer of Real Property by Trust.

Trustee, grantee, agent or attorney of trustee must file with county auditor affidavit which sets forth location of trust instrument, powers of trustee regarding transfer of real property, name of grantor of real property to trust. (R.C. §317.22[B]).

Boundary Survey.

Must be prepared and submitted to county auditor with respect to land to be conveyed which is part of grantor's land or whenever legal description of land to be conveyed differs from legal description of land in most recent conveyance of all or part of land to be conveyed. (R.C. §§315.251, 5713.02).

Foreign Conveyances or Encumbrances.

Uniform Recognition of Acknowledgments Act, adopted. (R.C. §§147.51-.58). All deeds, mortgages, power of attorney, instruments for conveyance or encumbrance of lands, treatments, or hereditaments executed and acknowledged, or proved, in any other state, territory, or country in conformity with laws of such state, territory or country, or laws of Ohio, are valid as if executed in Ohio pursuant to relevant statutes. (R.C. §§5301.06; 1337.01 - 1337.03; 5301.01- 5301.04).

Effect of Record.

Gives constructive notice to all persons dealing with land of properly recorded instruments in chain of title. (R.C. §5301.25[A]). Unrecorded instrument unenforceable against subsequent bona fide purchaser for value without actual knowledge of prior unrecorded conveyance or encumbrance. (19 O.S.3d 66, 482 N.E.2d 946).

Torrens Act.

Adopted. (R.C. §§5309.01-.98). Persons having legal or equitable estate in fee in and to whole of any parcel of land may, for purpose of clearing title, have title registered in county where land is situated (R.C. §5309.05), except in counties where land registration has been abolished (R.C. §5310.41). No estate less than fee simple, nor any mortgage lien, or charge, shall be registered unless fee in same land shall have been first or be at same time registered. (R.C. §5309.06). Outstanding lesser estates noted on certificate of title and duplicate with exceptions. (R.C. §5309.06).

Upon the original registration of land there shall be paid to the clerk of the court one-tenth of 1% of the assessed value of the land on the basis of the last assessment for general taxation for the purpose of an assurance fund. (R.C. §5310.05). In addition to this fee there are fees of proceeding. (R.C. §5310.15).

The probate court and common pleas court have concurrent jurisdiction under this act and in counties having three or more common pleas judges, one or more may be selected to act as judge in land registration cases. (R.C. §5309.02).

Owner of registered real estate may withdraw land from registration by filing affidavit with county recorder. (R.C. §5309.68).

Transfer of Decedent's Title.

Unless land is registered under Torrens system, every executor or administrator must file in probate court an application for a certificate of transfer of his decedent's real estate. Court issues such certificate for each county recorder where real estate is situated. If administration of estate of less value than $35,000 ($100,000 if decedent is survived by spouse) is dispensed with, court order directing transfer of real estate may be substituted for certificate of transfer. When a person who made a written contract for sale and conveyance of real estate dies before its completion, his interest in such contract and record title may be transferred to legatees, devisees or heirs at law entitled to his interest therein, in same manner as provided for transfer of real estate. Application and certificate for such transfer must recite that said real estate is subject to such written contract. (R.C. §§2113.61, 2113.03).

If land passes by intestacy and no administration is had, the heirs may apply for certificate of transfer in the probate court in the county where decedent resided (R.C. §2113.61), or they may present to the auditor of the county in which real estate is situated their affidavit containing certain information, in which case the auditor makes the transfers in accordance with the facts shown in the affidavit and the affidavit is filed with the county recorder and recorded in the record of deeds (R.C. §317.22).

If decedent is a nonresident of Ohio and ancillary administration is had, the ancillary administrator makes application for transfer of real estate in this state in the same manner as in the administration of estates of resident decedents. (R.C. §2129.19). If there is no ancillary administration, the heirs may present an affidavit to the county auditor, in the manner above outlined. (R.C. §317.22).

If decedent's land was registered under Torrens system, his heirs or devisees may make application to the court for registration of the decedent's title in such heirs or devisees according to their respective rights and interests. (R.C. §5309.45).

Filing Under Uniform Commercial Code.

Place of filing determined by R.C. §1309.501. Filings mailed to Secretary of State: P.O. Box 669, Columbus, Ohio 43216. Address for overnight courier service is Secretary of State, Business Services Division, 180 E. Broad St., 16th Floor, Columbus, Ohio 43215. It may also be filed electronically. Filing office in counties is county recorder. Fee for filing original or amended financing statement and other records is $12. (R.C. §1309.525[A]). Recorder can also charge fee of $4 for each name indexed in real estate mortgage records. (R.C. §317.32[E]). (Practice on fees varies among counties; it is advisable to contact recorder office in advance). Fee for information as to financing statements naming particular debtor is $20; $5 for search limited to names only. (R.C. §1309.525[B]). Fee for copies of financing statements or assignments is $5. (R.C. §1309.525[D]). Uniform forms of financing statement and amendment set forth in R.C. §1309.521. Secretary of State office provides information by telephone, (877) 767-3453, or at its website: http://www.sos.state.oh.us/.

Vital Statistics.

Records of births, deaths and other vital statistics are kept by Office of Vital Statistics (R.C. §3705.01) and are also maintained in local registration districts (R.C. §§3705.07-.11).

Birth and death records are obtained from Office of Vital Statistics, P.O. Box 15098, Columbus, Ohio 43215-0098. Telephone: (614) 466-2531. Website: http://www.odh.ohio.gov/vitalstatistics/vitalstats.aspx. Fee: $16.50 for each certified certificate. Certificates may be obtained through mail, in person, or online. Certified abstract of marriage may be obtained from probate court of county of marriage $0.15; certified copy of journal entry of divorce, Court of Common Pleas granting divorce, $1 per page. (R.C. §3705.24).

Establishing Birth Record.

A person born in Ohio whose birth is not recorded, or record of whose birth has been lost or destroyed or is inaccurate, may obtain registration of birth or correction of record by proceedings in probate court of county of his birth, his residence or his mother's residence at time of birth. (R.C. §3705.15).

Application to correct record must be supported by affidavit of attending physician, if available; otherwise by affidavits of two persons having knowledge of the facts or such other evidence as the court deems sufficient. Filing fee, $2. If applicant is minor, either parent or guardian must sign application. (R.C. §3705.15).

Applicant for registration of unrecorded birth must be examined in open court and evidence must include testimony of two witnesses or clear and convincing documentary evidence. If applicant or a witness is unable to appear, court may authorize taking his deposition. Filing fee, $3. (R.C. §3705.15).

Adopted children are issued birth certificates in name of adoptive parents. Original certificate bearing names of natural parents are sealed and may be examined only on order of court granting adoption. Index records to original are destroyed. (R.C. §3705.12). See category 14 Family, topic 14.01 Adoption.

Lis Pendens.

Where subject of real estate is located in more than one county or in county other than where action commenced, plaintiff's attorney must cause certificate copy of complaint to be filed with county recorder of each county or additional county where land located in order to invoke doctrine. (Civ.R. 3[F][5]).

10.05 SEALS:

Private seals are abolished and are of no effect. (R.C. §§5.11; 1302.06).

Uniform Commercial Code adopted. See category 3 Business Regulation and Commerce, topic 3.09 Commercial Code, subheads Action on Official Amendments and Material Variations, Blanks Filled in and Optional Provisions in Code Sections.

Corporate Seals.

Corporation may adopt, use and alter seal at will and use facsimile. (R.C. §1701.13[B]).

Effect of Seal.

Failure to affix corporate seal does not affect validity of instrument. (R.C. §1701.13[B]).

10.06 TORRENS ACT:

See topic 10.04 Records.

10.07 VITAL STATISTICS:

See topic 10.04 Records.

11 EMPLOYMENT

11.01 EMPLOYER AND EMPLOYEE:

See topic 11.02 Labor Relations.

11.02 LABOR RELATIONS:

Statutes governing relation between master and servant cover freedom to affiliate with labor organizations (R.C. §4113.02); minimum wages (R.C. §§4111.01-.13); wage discrimination and nondiscrimination in employment (R.C. §4111.17), etc. Industrial Commission (administrator of workers' compensation) investigates, prescribes and enforces, safety devices, standards for construction of places of employment, and other methods to protect safety and welfare of employees. (R.C. §4121.13). Ombudsman investigates complaints of employers or claimants relating to processing of claims for workers' compensation benefits, investigates complaints or answers employer inquiries relating to premiums. (R.C. §4121.45).

Collective bargaining rights for public employees are controlled by c. 4117.

Collective bargaining agreement successor clause is binding on successor employer until expiration date of agreement but not for more than three years from date of agreement. It does not apply to any public employer or employer subject to National Labor Relations Act. (R.C. §4113.30).

Hours of Labor.

Day's work in mechanical, manufacturing, or mining business consists of eight hours and must be so enforced unless contract expressly provides otherwise. (R.C. §4113.01).

Wages earned in first half of month must be paid by first of following month; wages earned in last half of month must be paid by 15th of following month. (R.C. §4113.15). No exemption of any subject corporation, contractor, person, or partnership by special contract with employee and no assignments of future wages. (R.C. §4113.16). Sale of goods to employee, or payment in goods, at prices higher than market value, or deduction from wages for damage to tools or machinery (except by contract), is prohibited. (R.C. §4113.19). Actions for wages take precedence in the order of trial. (R.C. §2311.07). Statute of limitations for action for unpaid minimum wages or unpaid overtime compensation, is two years. (R.C. §2305.11).

Minimum Wage.

Beginning Jan. 1, 2007, every employer must pay their employees wage rate of not less than $6.85 per hour. On Sept. 30, 2007, state minimum wage rate must be increased effective following Jan. 1 by rate of inflation for 12-month period prior to that Sept. according to consumer price index or its successor index for all urban wage earners and clerical workers for all items as calculated by federal government rounded to nearest 5¢. Employees under age of 16 and employees of businesses with annual gross receipts of $250,000 or less for preceding calendar year must be paid wage rate of not less than that established under federal Fair Labor Standards Act or its successor law. Employer may pay less than, but not less than half, minimum wage rate if employee receives tips that, combined with wages, are equal to or greater than minimum wage rate for all hours worked. Provisions inapplicable to employees of solely family owned and operated business who are family members of owner. State may issue licenses to employers authorizing payment of lower wage rate to individuals with mental or physical disabilities that may otherwise adversely affect their opportunity for employment. (Const. Art. II, §34a). Every employer, as defined in Const. Art. II, §34a, must pay employees wage rate not less than wage rate specified in Const. Art. II, §34a. Director of commerce must adjust wage rate annually as specified in Const. Art. II, §34a. (R.C. §4111.02). Director of commerce may permit employment of apprentices at wage rate not less than 85% of applicable minimum wage rate. (R.C. §4111.07).

Child Labor.

Employment of children regulated as to age (R.C. §§4109.02, .04), hours (R.C. §4109.07) and kinds and places of employment (R.C. §§4109.05, .06). Age and schooling certificates are issued by school authorities. (R.C. §§3331.01, 4109.03). Record and posting requirements are set by R.C. §§4109.08, .11.

Liens and Preferences.

Employees have lien on employer's real property, superior to certain other liens and to homestead or other exemptions. Claims for labor performed within three months prior to appointment of assignee, receiver or trustee, have priority over other claims except taxes and costs of administration. (R.C. §1311.34). Lien is waived unless itemized statement filed, within 30 days from expiration of three months from performance of labor, with recorder of county where labor performed; lien lasts one year. (R.C. §1311.35). Laborers in coal or other mines have lien for wages on mine and personal property used in mining. (R.C. §§1311.23, 1565.14).

Migrant Agricultural Workers.

Agricultural labor camp must be licensed by Director of Health. (R.C. §§3733.43, .46). Camps must be inspected for compliance with health and safety rules. (R.C. §3733.45). Violators are subject to prosecution and to injunctive powers of court. (R.C. §§3733.47, 3733.471).

Discrimination in payment of wages on basis of race, color, religion, sex, disability, age, national origin, or ancestry prohibited. (R.C. §4111.17).

Discrimination by employers, employment agencies and labor organizations based on race, color, religion, sex, national origin, disability, age or ancestry is prohibited. (R.C. §4112.02). Age discrimination against employees 40 or older also prohibited by R.C. §4112.14.

Notice of Claim.

Claimants may file charge with Civil Rights Commission within six months or may file direct civil action. (R.C. §§4112.05; R.C. 4112.99). Filing charge with Commission not prerequisite for pursuing discrimination claim directly in court. (2006 Ohio 6772). Requirement of election of remedies applies only to age discrimination claims. (R.C. §4112.08; 147 Ohio App. 3d 38, 2002 Ohio 609, 768 N.E.2d 726). If Commission issues complaint, it must do so within one year after complainant files charge. (R.C. §4112.05[B][7]). All claims may be brought directly in court by claimant. (R.C. §4112.99). Actions under R.C. §4112.99 subject to six-year statute of limitations. (70 O.S.3d 281, 638 N.E.2d 991). Two year statute of limitations for discrimination claims against state. (2007 Ohio 1883). Age discrimination action under R.C. §4112.02 must be instituted within 180 days after alleged unlawful discriminatory practice occurred (R.C. §4112.02[N]), but six-year limitations period applies to age discrimination actions pursuant to R.C. §4112.14 (2005 Ohio 1860). Charges of housing discrimination complaints under R.C. §4112.02(H) must be filed with Commission within one year after commission of alleged unlawful discriminatory practice. (R.C. §4112.05[B][1]).

Labor Unions.

No special statutory provisions govern employer-union relationship, but see subhead Labor Disputes, catchline Public Employees, infra. No “right to work” law is in effect.

Labor Disputes.

No State Labor Relations Act. But see catchline Public Employees, infra.

Injunctions.

Ordinarily, strike or peaceful picketing cannot be enjoined (108 O.S. 61, 140 N.E. 899), but mass picketing and strike violence can be enjoined.

Public Employees.

Labor relations law of public employees is governed by State Employment Relations Board (“SERB”). (c. 4117). Three member SERB certifies labor unions, decides appropriate bargaining unit, conducts representation elections, handles unfair labor practice charges, and administers negotiation and impasse resolution process for public employees. (R.C. §4117.02, .04, .05, .06, .07, .11, .12, .14). Decisions regarding unfair labor practice charges are appealable to common pleas court. (R.C. §4117.13). Unit determinations are not appealable. (R.C. §4117.06[A]). Public employees, with certain exceptions, have right to strike; employer can seek injunction against lawful strike where “clear and present danger” to health and safety of public is shown. (R.C. §4117.16[A]).

Employee medical records must be furnished to employee by employer, health care professionals, hospitals or laboratories upon written request; cost not to exceed 25¢ per page. Bureau of Workers' Compensation enforces obligation. (R.C. §4113.23).

Employer of one or more employees must file annually with Bureau of Workers' Compensation report showing number of employees employed in year at each kind of employment, aggregate wages paid and other information Commission requires. (R.C. §4123.26).

Employers, including those not otherwise subject to Unemployment Compensation Act, must furnish to Director of Job and Family Services information required to carry out purposes of act, including data as to number of employees, wages paid and changes in employment and reasons therefor. (R.C. §4141.20).

Employment at Will.

Unless otherwise agreed, employment is at-will. (73 O.S.3d 571, 653 N.E.2d 381). Exceptions are recognized based upon contract, implied contract, and promissory estoppel. (73 O.S.3d 571, 653 N.E.2d 381). Employer may be held liable in tort for discharging employee in violation of public policy. (2007 Ohio 4921). Employers may not retaliate against those who file or pursue Workers' Compensation claims. (R.C. §4123.90).

Workers' Compensation Law.

Constitution provides for workers' compensation, compulsory contributions from employers, and administration by state. (Const. Art. II, §35).

Industrial Commission, composed of three members appointed by Governor (R.C. §4121.02), has responsibility for adjudication of claims and establishment of adjudicatory policy. One member is appointed by Governor as chairperson or chief executive officer and is responsible for all administrative matters. (R.C. §4121.03). Chairperson appoints executive director who acts as chief administrative officer. (R.C. §4121.03). Industrial Commission Nominating Committee makes recommendations to Governor for appointment to Commission. (R.C. §4121.04).

Bureau of Workers' Compensation has been created and is managed by Administrator of Workers' Compensation, who is appointed by Governor. (R.C. §4121.121). Bureau of Workers' Compensation Board of Directors has been created and consists of 11 members, all appointed by Governor. Specific qualifications for certain members. (R.C. §4121.12).

Board may contract with outside actuarial firms and other professional persons to assist in measuring performance of workers' compensation system and with outside firms to conduct management and financial audits. (R.C. §4121.125).

Administrator subject to Board's approval, classifies occupations or industries with respect to degree of hazard, determines risks of different classes and fixes rates of premium of risks of same (R.C. §4123.29), and with advice and consent of Board, fixes lowest possible rates of premium consistent with maintenance of a solvent fund (R.C. §4123.34), appoints adjudicating committee to hear specified matters within 60 days of request, protest, petition as long as filed within 24 months of notice of determination about which request, protest, petition filed (R.C. §4123.291), grants and revokes right of self-insurance (R.C. §4123.35), commutes payments of compensation and determines applications for final settlement in state fund claims (R.C. §§4123.64-.65), investigates and establishes specific safety requirements (R.C. §4121.13), appoints all investigators and conducts investigations on other issues (R.C. §§4121.13-.29), operates safety and hygiene fund (R.C. §4121.37), rehabilitates injured workers (R.C. §4121.61), administers various funds (R.C. §§4131.01 - 4131.06, 4123.411 - 4123.419). National Council on

Compensation Insurance (NCCI) industry classification system adopted. (R.C. §4123.29; O.A.C. 4123-17-08).

Employers and Employees Subject to Act.

Employers include the state and each county, municipal corporation, township and school district and every person, firm, and private corporation, including any public service corporation, that employs one or more workmen regularly in same business or in same establishment. (R.C. §4123.01).

No later than 30 days after formation of professional employee organization, such organization must register with Bureau on forms provided by Administrator. Following registration, each organization will register annually on or before 31st day of Dec. (R.C. §4125.05).

Employees are all persons in service of above named employers including household and casual workers who earn $160 or more in cash per calendar quarter from single employer. (R.C. §4123.01). Employee, workman or operator does not mean duly commissioned minister of church or any officer of family farm corporation. (R.C. §4123.01). Police and firemen may be excepted under certain circumstances. (R.C. §4123.02). Persons performing labor or providing services pursuant to construction contract are employees if ten of listed criteria apply.

Employees of any independent contractor or subcontractor who has neither paid required premium nor elected to be self-insurer are considered employees of person contracting with such contractor, unless such employees or their legal representatives or beneficiaries elect, after injury or death, to regard such contractor as employer. (R.C. §4123.01).

Complying employers, whether subject to Act or not, are not liable in damages at common law or by statute for any injury, disease or bodily condition whether compensable under Act or not. (R.C. §§4123.73-.74).

Employer and employee may agree in writing to be bound by laws of Ohio, or of another state, where all or some portion of work is or is to be performed in state or states other than Ohio. Such agreement, filed with Bureau within ten days of execution, is effective regardless of place where injury occurred or disease contracted. Benefits or damages recovered by employee or his dependents under laws of another state are credited against amount of any compensation or benefits awarded in Ohio. Nonresident employees insured under laws of another state cannot receive compensation or benefits under Ohio law on account of injury, disease, or death arising out of employment while temporarily in Ohio. (R.C. §4123.54).

Agreement by employee to waive rights under Act void except blind employee may waive rights to compensation in cases where his injury or disability may be directly caused by or due to blindness (R.C. §4123.80) and employee may waive rights under Act when injured through voluntary participation in employer sponsored recreation or fitness activity (R.C. §4123.01[C]).

Acceptance or Rejection of Act.

Noncomplying employers, during period of noncompliance, are liable in damages and cannot avail themselves of common law defenses of (1) fellow servant rule, (2) assumption of risk, and (3) contributory negligence. (R.C. §4123.77).

Employee of noncomplying employer or of self-insurer failing to pay compensation may elect to file application with Industrial Commission or Bureau of Workers' Compensation for compensation from state fund, state enforcing reimbursement from employer. Does not bar action under R.C. §4123.77 by employee against noncomplying employer, but employee must repay state fund for compensation and benefits paid. (R.C. §4123.75). Service of process may be made upon Secretary of State against any nonresident employer who engages in activity within state or any resident employer who subsequently becomes nonresident or cannot be found. (R.C. §4123.751).

When application is filed with Commission against noncomplying employer or self-insurer failing to pay compensation, Bureau of Workers' Compensation must file affidavit and copy of application with county recorder(s) where employer's property is located; affidavit must show date application filed, name and address of employer and fact that employer is non-complying employer; recorder records affidavit as mortgage on real estate and also files same as chattel mortgage; affidavit constitutes valid lien upon all real property and tangible personal property of such employer within county. (R.C. §4123.76).

Noncomplying employer may be enjoined from further operation by injunctive action brought by Attorney General, Administrator of Workers' Compensation, or any employer complying with Act who is not self-insured. (R.C. §4123.79).

Noncomplying employer may be assessed by Commission for amount of premium applicable to period of non-compliance, assessment upon becoming final having force and effect of judgment. (R.C. §4123.37).

Self-Insuring Employer's Guaranty Fund.

Self-insured employers required to contribute. Provides for payment of compensation and benefits to employees of self-insured employers to cover default in payment. (R.C. §4123.351).

Self-Insuring Employers Evaluation Board.

Established to handle complaints of misconduct against self-insured employers and questions as to whether self-insured employer continues to meet minimum standards. (R.C. §4123.352).

Employer's Insurance.

Contracts and agreements insuring employer against loss or liability for compensation under Act are void except in the case of self-insuring employer, who may purchase insurance against loss in excess of at least $50,000 from any one disaster or event. (R.C. §4123.82).

Records and Reports.

Employer must record all injuries and occupational diseases, fatal or otherwise, received or contracted by employees and resulting in seven days or more of total disability and report to Bureau of Workers' Compensation. (R.C. §4123.28). Payroll records to be preserved by employer for five years and be available for inspection by Bureau. (R.C. §§4123.23-.24).

Definition of Injury.

Injury includes any injury, whether caused by external accidental means or accidental in character and result, received in the course of, and arising out of, the injured employee's employment. Injury does not include psychiatric conditions except where arisen from compensable injury or occupational disease suffered by employee or third party (91 O.S.3d 38, 741 N.E.2d 121), injury or disability caused primarily by natural deterioration of tissue, organs or body parts, or injury sustained through voluntary participation in employer sponsored recreation if employee signs waiver (R.C. §4123.01). Employer may be liable under common law for employee's mental injury suffered without physical injury. (82 O.S.3d 463, 696 N.E.2d 1029).

Notice of Claim.

Claims are barred unless presented as provided in Act within two years after injury or death, or employer has paid wages in lieu of compensation for total disability or employer is self-insured and (a) either notice has been given to Industrial Commission or Bureau of Workers' Compensation or employer has furnished treatment by licensed physician or (b) sufficient compensation or benefits have been paid or furnished; or written or facsimile notice of death has been given to Commission or Bureau. (R.C. §4123.84). Two year notice requirement not applicable to residual conditions, and claims considered within Industrial Commission's continuing jurisdiction. (86 O.S.3d 29, 711 N.E.2d 225).

Hearing on Claim.

Claims and appeals under cc. 4121, 4127 or 4131 may be filed with Office of Industrial Commission of Bureau of Workers' Compensation. (R.C. §4123.51).

Within seven days after receipt of any claim, Bureau must provide written notice to claimant and employer. In state fund claims, Administrator shall issue order allowing or denying claim no later than 28 days after sending seven day notice. Notwithstanding any time limitation for issuance of order, if medical examination of claimant is required by statute, Administrator will schedule claimant for examination and issue order no later than 28 days after receipt of report of exam. (R.C. §4123.511[B][1]). Appeal may be taken from decision of Administrator within 14 days after receipt of his decision. Administrator must refer self-insured claims to District Hearing Officer within seven days after claim is filed with Bureau. District Hearing Officer shall hear disputed claim within 45 days after notice of appeal, and issue decision within seven days after hearing. Appeal may be taken from decision of District Hearing Officer within 14 days of receipt of decision. File is then referred to Staff Hearing Officer, who must hold hearing within 45 days after filing of notice of appeal, and issue decision within seven days after hearing. Appeal may be taken from decision of Staff Hearing Officer within 14 days of receipt of decision. Third level appeal to Commission is discretionary. If Commission or designated Staff Hearing Officer on behalf of Commission decides to hear appeal, Commission must hold hearing within 45 days after filing of notice of appeal, and issue its order within seven days after hearing. If Commission or designated Staff Hearing Officer on behalf of Commission decides not to hear appeal, Commission must issue order within 14 days after filing of notice of appeal. (R.C. §4123.511). Any party may appeal Commission order not pertaining to extent of disability to Court of Common Pleas in county where injury occurred, or if outside state, in county where contract of employment made. (R.C. §4123.512). Relief is available for failure of both party and representative to receive actual notice of hearing or decision. (R.C. §4123.522). Commission has power to enter into personal service contract with attorney licensed to practice in Ohio to serve on temporary basis as District or Staff Hearing Officer if hearing spike occurs. (R.C. §4121.351).

Commission may establish alternative dispute resolution process for claims if determined necessary and all necessary parties volunteer and agree to enter into process. (R.C. §4121.36).

Commission has continuing jurisdiction over claims for five years from last payment of compensation or from date of death, or five years from date of injury or date of last payment of medical benefits, whichever later. No change, modification, finding or award can be made for back period in excess of two years prior to date of filing application therefor. (R.C. §4123.52).

Administrator may, but is not required to, appear and participate in administrative hearings. If employer is represented, Administrator cannot introduce testimony or raise arguments cumulative of employer's. Administrator may only appeal questions of law or issues of fraud when employer is represented at hearing. (R.C. §4123.511[G][3]). District and Staff Hearing Officers are required to be licensed to practice law in Ohio. (R.C. §§4121.34, .35).

Right to Compensation.

Compensation payable to every employee injured or contracting an occupational disease and to dependents of employee killed in course of employment or dying as a result of occupational disease so contracted in course of employment, wherever such injury has occurred or occupational disease has been contracted, provided same not purposely self-inflicted or caused by employee's being intoxicated or under influence of controlled substance not supplied by physician. (R.C. §4123.54).

No compensation payable for first week after injury received or occupational disease contracted and no compensation allowed for first week of total disability, whenever occurring, unless and until employee totally disabled for continuous period of two weeks or more. (R.C. §4123.55).

Compensation payable to wholly or partly dependent persons or to prospective dependents. No person considered wholly or partly dependent unless member of family of deceased employee and surviving spouse, lineal descendant, ancestor, or brother or sister. (R.C. §4123.59).

Compensation before payment exempt from all claims of creditors and from any attachment or execution, except child support. Claims for compensation and claims for premiums have same preference as claim for taxes against employer's property held by assignee, receiver or trustee. (R.C. §4123.67). Maximum benefit amounts set forth by statute are subject to annual adjustment based upon statewide average weekly wage. (R.C. §4123.62).

Administrator or Commission may require any employee claiming right to receive compensation to submit to medical examination, vocational examination, or vocational questionnaire and if employee refuses to submit or obstructs same claim for compensation will be suspended during period of refusal or obstruction. (R.C. §4123.53).

Amount of Compensation.

Temporary total disability payments based upon 662/3% of average weekly wage, not to exceed statewide average weekly wage, but not less than 331/3% of minimum statewide average weekly wage or full wage if employee's wage is less than minimum just stated, provided that for first 12 weeks of total disability, employee receives 72% of his full weekly wage, not to exceed lesser of statewide average weekly wage or 100% of employee's “net take home weekly wage”. After 200 weeks of temporary total disability payments, Bureau medical section shall schedule claimant for exam for evaluation to determine whether or not temporary disability has become permanent. Benefits from nonoccupational disability insurance to which employer has made entire contribution may be set off against recovery. (R.C. §4123.56). Amount of benefits employee can receive reduced if person receiving Social Security retirement benefits. (R.C. §4123.56[D]). Where employee awarded temporary total benefits for same period he received unemployment compensation, Bureau shall pay amount of award to Director of Job and Family Services who will credit appropriate employer's account. Employee who has returned to lower paying job because of disability may receive 662/3% of his weekly wage loss not to exceed statewide average weekly wage and not to exceed 200 weeks. (R.C. §4123.56). Effective 5/15/97, wage loss guidelines promulgated. (O.A.C. 4125-1-01). Wage loss compensation payable from surplus fund also available to rehabilitated claimants. (R.C. §4121.67).

Permanent total disability payments are: 662/3% of average weekly wage, not to exceed 662/3% of statewide weekly wage and not less than 50% of statewide weekly wage or employee's weekly wage if less than minimum stated, unless weekly benefits when combined with disability benefits received pursuant to Social Security Act are less than statewide average weekly wage, in which case maximum payments are equivalent to statewide average weekly wage. (R.C. §4123.58). Effective 1/1/97, permanent total disability guidelines were promulgated. (O.A.C. 4121-3-34).

For injuries that occurred prior to Aug. 22, 1986, partial disability payments are based upon 662/3% of earning capacity, not to exceed statewide average weekly wage with $17,500 maximum or, depending on claimant's election, permanent partial disability payments are based upon 662/3% of average weekly wage, but not more than maximum equal to 331/3% of statewide average wage, as defined in R.C. §4123.62(C), per week regardless of average weekly wage, for number of weeks which equals claimant's percentage of disability times 200 weeks. Compensation for certain specific injuries is detailed in separate schedule. (R.C. §4123.57). For injuries that occurred after Aug. 21, 1986, loss of earning capacity award not available. Permanent partial awards shall not include consideration of nonmedical factors and shall be based on medical or clinical findings reasonably demonstrable. (76 O.S. 3d 44, 665 N.E.2d 1123).

Eligible employees who agree to undergo rehabilitation may receive weekly living maintenance payments for aggregate period of six months in amounts not exceeding temporary total payments, but not less than 50% of state average weekly wage. (R.C. §4121.63). Administrator may extend living maintenance payments beyond six months. Surplus fund is source of living maintenance payments. (R.C. §4121.66).

Compensation for Death.

Death benefits in case of dependents and depending upon degree of dependency are: 662/3% of average weekly wage, not to exceed 662/3% of statewide average weekly wage, and not less than 50% of statewide average weekly wage, except where death is due to injury or disease inflicted after Dec. 2, 1975 or where at time of death claimant was receiving total disability benefits, in which case maximum death benefits are amounts equal to statewide average weekly wage. Such weekly payments continue until death or remarriage of dependent spouse. If remarried, dependent spouse receives lump sum equal to two years of such weekly payments. Other provisions apply to dependents until they reach 18 years of age (25 if full time student) or until mental or physical incapacity no longer present, and to partly dependent persons. (R.C. §4123.59). Requirements for compensation other than death: None. Portion of statute imposing them unconstitutional. (41 O.S.2d 120, 322 N.E.2d 880).

Additional Compensation.

Claimant entitled to medical, nurse and hospital services and medicine as Commission deems proper; includes replacement, repair, or adjustment of artificial teeth or other denture, eye glasses and hearing aids. (O.A.C. c. 4123-6). Administrator oversees implementation of workers' compensation qualified health plan system, must certify managed care organizations, provide medical management and cost containment services in health partnership program, and may recertify external vendors. (R.C. §4121.44). In case of death from industrial accident or disease, funeral expenses not to exceed $5,500, are allowed. (R.C. §4123.66).

Occupational Diseases.

Compensation for designated occupational diseases contracted in course of employment are compensable. (R.C. §§4123.01[F], .68). Nonscheduled occupational diseases also compensable; defined as disease contracted in course of employment, which by its causes and characteristics of its manifestation or condition of employment results in hazard which distinguishes employment in character from employment generally, and employment creates risk of contracting disease in greater degree and in different manner from public in general. (R.C. §4123.01[F]). Disease that meets definition of occupational disease is compensable even if not specifically listed in schedule. (R.C. §4123.68). In general, statutes as to compensation for injury or death control. (R.C. §4123.69). Injury does not include preexisting condition that has not been substantially aggravated. (R.C. §4123.01[C][4]). If preexisting condition is substantially aggravated by injury, no compensation or benefits are payable after condition has returned to level that would have existed without injury. (R.C. §4123.54[G]). Claims barred if not presented within two years after disability due to disease began or within such longer period as does not exceed six months after diagnosis of disease or within two years after death occurs. (R.C. §4123.85).

Coal Worker's Pneumoconiosis (Black Lung Disease) Fund administered separately by Bureau of Workers' Compensation. (R.C. §§4131.01- 4131.06).

Marine Industry Fund administered by Bureau of Workers' Compensation and offers coverage to marine industry employees for their liability under Longshoremen's and Harbor Worker's Compensation Act Amendments of 1972. (R.C. §§4131.11- 4131.16).

Disabled Workers' Relief Fund.

Employees permanently and totally disabled as result of injury or disease sustained in course of employment, receiving monthly compensation as Workers' Compensation and Social Security disability benefits of less than $342 adjusted annually entitled to difference from Disabled Workers' Relief Fund. (R.C. §§4123.411- 4123.419).

Handicap Reimbursement.

Subject to monetary cap, commission reimburses employer for compensation or benefits paid to handicapped employee industrially injured whose handicap contributed to injury. (R.C. §4123.343).

Violation of Specific Safety Requirement (VSSR).—Employees may receive additional award of 15 to 50% of maximum award when injury or death caused by employer's violation of specific safety requirement. (Const. Art. II, §35). Act provides civil penalty up to $50,000 against employer who violates more than one specific safety rule within same 24 month period. (R.C. §4121.47). Elements of VSSR claim are: (1) Existence of specific safety requirement enacted by Commission or General Assembly which requirement applies to appropriate industry (131 O.S. 375, 3 N.E.2d 52); (2) employer fails to comply with requirement (43 O.S.2d 114, 330 N.E.2d 904); (3) condition created by said failure proximately causes compensable injury (37 O.S.3d 162, 524 N.E.2d 482). Statute of limitations for VSSR claim is two years. (R.C. §4123.84).

Employment Intentional Tort.

Employer not liable to employee or dependent survivors of deceased employee for damages resulting from intentional tort committed by employer during course of employment unless tortious act was committed with intent to injure another or with belief that injury was substantially certain to occur. (R.C. §4123.84[A]).

Discriminatory Acts Prohibited.

Employers must not discharge, demote, reassign, or punish any employee because such employee filed, instituted, pursued or testified in any proceeding under Workers' Compensation Act for injury or occupational disease occurring in course of and arising out of his employment with employer. (R.C. §4123.90). Employee's claim barred unless employer receives written notice of claimed violation within 90 days of alleged discriminatory act and employee files court action in common pleas court of county of employment within 180 days of alleged discriminatory act. (R.C. §4123.90). Subject to certain conditions and offsets, employee may obtain reinstatement with back pay, lost wages and reasonable attorney fees. (R.C. §4123.90).

Occupational Diseases.

See subhead Workers' Compensation.

Statutory Immunity.

Compliance with Workers' Compensation Act precludes liability in damages under Act to own employee for injury, disease or death received or contracted in course of or arising out of employment whether or not compensable. (Const. Art. II, §35; R.C. §4123.74).

Fraud.

No person may, with purpose to defraud or knowing that he is facilitating fraud, receive benefits he is not entitled to; make false statement in order to secure benefits or payment for goods and services; alter, falsify, destroy, conceal or remove any document necessary to establish validity of claim, or right to payment for goods and services; or conspire to defraud Bureau or self-insured employer. Criminal penalties imposed for violation of this section. (R.C. §2913.48).

Subrogation.

R.C. §4123.82 does not bar employer, whose employee has suffered injuries in course of and arising out of employment, from recovering damages from third party tortfeasor. (10 O.S.3d 126, 461 N.E.2d 1299). Payment of compensation or benefits creates right of recovery in favor of statutory subrogee against third party. (R.C. §4123.931).

Employment Intentional Tort.

See subhead Workers' Compensation, catchline Employment Intentional Tort, supra.

Unemployment Compensation.

Employment entitling persons to benefits includes all services for wages, whether executive, managerial, or manual. Services must be: (1) localized in Ohio; or (2) not localized in any state but partially in Ohio with base of operations or place of control in Ohio, or, if person is resident of Ohio, base of operations not in any state where services are partially performed; or (3) under other circumstances where administrator approves election of employer as to Ohio residents.

Any employer who separates within any seven day period 50 or more employees because of lack of work and these individuals, upon separation, will be unemployed as defined in R.C. §4141.01 shall furnish notice to Director of Job and Family Services, giving dates of separation and number of individuals being separated. Such notice must be furnished at least three working days prior to first date of separation. At time of separation employer must also furnish to Director or to individual being separated remuneration and separation information necessary to determine individual's benefit rights. (R.C. §4141.28).

Employers.

“Employer” generally means state, its instrumentalities, its political subdivisions and their instrumentalities, Indian tribes, and any individual or type of organization including any partnership, limited liability company, association, trust, estate, joint-stock company, insurance company, or corporation, whether domestic or foreign, or receiver, trustee in bankruptcy, trustee, or successor thereof, or legal representative of deceased person who met statutory criteria subsequent to Dec. 31, 1971, or in case of political subdivisions or their instrumentalities, subsequent to Dec. 31, 1973. (R.C. §4141.01). Nonprofit organizations and political subdivisions liable for contributions may elect to form groups for computation purposes. (R.C. §4141.241).

Contributions must be paid by employer. (R.C. §4141.23). As of each computation date, Director of Job and Family Services must determine contribution rate of each contributing employer for next succeeding contribution period. Director must also determine standard rate of contribution or experience rate for each contributing employer. Contributing employer qualifies for experience rate only if there have been four consecutive quarters, ending on preceding June 30, throughout which employer's account was chargeable with benefits. Employer that does not qualify for experience rate must be assigned standard rate of contribution, which is R.C. 2.7% for contribution periods beginning on and after Jan. 1, 1998, except that rate for employers engaged in construction industry is average contribution rate computed for construction industry or rate of

R.C. 2.7%, whichever is greater. If employer's account has negative balance, schedule is used to determine contribution rate for next contribution period. (R.C. §4141.25).

Payments are due and payable to Department of Job and Family Services on last day of month succeeding the end of each quarterly period. (R.C. §4141.23).

Secretary of State is authorized to accept service of process in any civil action under the act against any nonresident employer. (R.C. §4141.41).

Railroads.

Substantially same provisions as are contained in general Employers' Liability Act apply to defective cars, locomotives and appurtenances thereto, and to employees engaged in train operations. (R.C. §§4973.02-.09). Hours of service of train crews and telegraph operators are limited. (R.C. §4973.11).

11.03 WORKERS' COMPENSATION LAW:

See topic 11.02 Labor Relations.

12 ENVIRONMENT

12.01 ENVIRONMENTAL REGULATION:

General Supervision.

Rests mainly with Ohio Environmental Protection Agency (OEPA), headed by Director of Environmental Protection (Director). (R.C. §3745.01). Director administers laws and regulations pertaining to chemical emergency planning, community right-to-know, and toxic chemical release reporting; cessation of chemical handling operations; prevention, control, and abatement of air and water pollution; public water supply; comprehensive water resource management planning; products that contain mercury as defined in R.C. §3734.61; and disposal and treatment of solid waste, infectious waste, construction and demolition debris, hazardous waste, sewage, industrial waste, and other wastes. (R.C. §3745.01). Appeal from Director's decisions is to Environmental Review Appeals Commission. (R.C. §3745.02). Commission may conduct de novo hearings on appeal and may require attendance of witnesses and production of written or printed materials. (R.C. §3745.05). Appeal from Commission to Court of Appeals where Court is confined to record certified by Commission. (R.C. §3745.06).

Air Pollution.

Director develops programs for prevention, control and abatement of air pollution, and conducts research and investigations relating to control of air pollution. Director also adopts, modifies and repeals regulations for prevention, control and abatement of air pollution and prescribes ambient air quality, emission standards for air contaminants, issues permits and variances, or denies same, for existing or new physical facilities or parts thereof that may cause or contribute to air pollution, and prescribes procedures and prohibitions to take effect in air pollution emergency associated with atmospheric temperature inversion. (R.C. §§3704.03 - 3704.04). Political subdivisions may also adopt and enforce air pollution control measures not in conflict with state statutes or standards and regulations of Director. Board of Health of city may enter into contract with governmental agency or political subdivision to obtain air pollution control or supervision of any sewage disposal system. (R.C. §§3704.11, 3709.085).

Air Quality Development Authority initiates programs to provide for conservation of air as natural resource and to prevent or abate pollution. Ohio air quality development authority may initiate, construct, maintain and operate air quality projects and may make loans to persons for acquisition or construction of air quality facilities. Such projects cannot be inconsistent with standards applicable under Federal Clean Air Act. (R.C. §§3706.03, 3706.04). Agricultural air pollution is permitted. Such pollution is permitted if activities are conducted outside municipal corporation and in manner so as not to have substantial, adverse effect on public health, safety or welfare. (R.C. §§3704.01, 3767.13).

Water Pollution.

Defined as placing any sewage, sludge, sludge materials, industrial waste or other wastes in waters of state. (R.C. §6111.01[A]).

Director of Environmental Protection adopts standards of water quality after public hearing, adopts rules for compliance with federal statutes and standards of performance, reviews plans for development and control of water resources within watershed districts, certifies applications for federal licenses or permits to conduct activities which may result in any discharge into waters of state for compliance with federal standards, administers and enforces publicly owned treatment works pretreatment program. (R.C. §6111.03).

County or municipal legislative authority that owns or operates treatment works or sewerage system has primary authority to adopt and administer rules respecting operation, repair and maintenance of such facilities, rates and charges to users of system, industrial water pollution control facilities discharging into its systems and establishment, operation and administration of its publicly owned treatment works pretreatment program. (R.C. §6111.032).

Ohio Water Development Authority is responsible for initiation, construction and operation of certain water development projects, designed in part to prevent or abate pollution of water resources. (R.C. §6121.03). It also establishes and operates sewage system in area where existing governmental or private disposal system loses permit from Director of Environmental Protection. (R.C. §6121.041).

Solid Waste.

Director of Environmental Protection prepares state solid waste management plan. (R.C. §3734.50). County Commissioners establish and maintain solid waste management districts. (R.C. §3734.52).

Sludge.

Director of Environmental Protection issues permits for use, treatment, disposal of and otherwise regulates sludge. (R.C. §6111.03).

Other Supervision.

Regional water and sewer districts (§6119) and county sanitary districts (§6115) are organized in part for control of water pollution and have rule-making authority secondary to OEPA. Board of directors of sanitary district may make and enforce necessary regulations pertaining to use of public corporations and persons of works and improvements of district. (R.C. §§6115.23, 6119.08).

Department of Natural Resources.

Chief of division of water is responsible for prevention of shore erosion and consequent pollution of Lake Erie and adjacent and connected waterways. (R.C. §1506.38). Diversion of certain waters of Lake Erie prohibited without permit issued by director. (R.C. §1501.32). Division of forestry administers, protects and acquires public forests. (R.C. §§1503.01 - 1503.99). Division of natural areas and preserves acquires system of natural preserves for scientific research, as habitats for natural life and as places of beauty. (R.C. §§1517.01- 1517.99). Division of Mineral Resources Management is responsible for prevention of pollution to soil, water, air and natural resources from oil and gas drilling and disposal of brine (R.C. §§1509.01 - 1509.99) and supervises reclamation of strip and surface mined land (R.C. §§1513.01 - 1513.99; 1514.01 - 1514.99). Ohio Soil and Water Conservation Commission is concerned with programs to alleviate agricultural and urban sedimentary pollution and, with division of soil and water districts, operations of soil and water conservation districts. (R.C. §§1501.20; 1515.01 - 1515.99). See category 19 Mineral, Water and Fishing Rights, topic 19.01 Mines and Minerals. Director administers canal lands. (R.C. §§1520.01 - 1520.99).

Ohio Department of Health.

Designated Ohio radiation control agency. (R.C. §3748.02). Director of Health administers laws relating to health and sanitation and rules of Department. (R.C. §3748.04). Public Health Council adopts, and may amend or rescind, rules of general application and for asbestos hazard abatement or evaluation. (R.C. §§3701.34; 3710.02).

County commissioners are responsible for county water supply systems (R.C. §§6103.01-.99) and removal of drift, timber and other obstructions from rivers, watercourses and creeks (R.C. §6151.14).

Ohio Low-Level Radioactive Waste Advisory Committee.

Advises Governor and General Assembly on implementation of Midwest Nuclear Compact. (R.C. §3747.03).

Ohio is member of Ohio River Sanitation Compact, designed to control and abate pollution in Ohio River drainage basin (R.C. §§6113.01 - 6113.04); Great Lakes Basin Compact, designed in part to control pollution in Great Lakes (R.C. §§6161.01- 6161.03); and Midwest Interstate Compact on Low-Level Radioactive Waste (R.C. §§3747.01 - 3747.03).

Department of Development.

Responsible for involving all other appropriate state agencies in developing programs for energy conservation. (R.C. §1551.05).

Prohibited Acts of Pollution.

Air Pollution.

Emissions of air contaminants in violation of standards adopted by Director without permit or variance or in violation of conditions of permit or variance prohibited. (R.C. §3704.05). Agricultural air pollution is permitted. (R.C. §§3704.011, 3767.13).

Nonsmoking Areas in Places of Public Assembly.

In places of public assembly such as private theaters, auditoriums and structures, all buildings and structures owned by state, and each portion of building or enclosed structure having seating capacity of 50 persons or more, but not including restaurants and bars, nonsmoking areas must be maintained. It is unlawful to smoke in any such designated area. (R.C. §3791.031).

Water Pollution.

Placing of sewage, sludge, sludge materials, industrial or other wastes where they pollute waters of state prohibited except where Director of Environmental Protection has issued permit, though such prohibition does not apply to discharge of: (1) unpolluted water used in processing sand, gravel or other aggregates, (2) water injected into well incidental to production of oil or gas, or sewage, industrial and other wastes injected into well in compliance with liquid disposal permit,

(3) fertilizers on to land, (4) excrement of domestic and farm animals on to land, (5) sewage and industrial wastes into governmental sewage system, (6) septic tanks or other disposal systems for disposal or treatment of sewage from single-family, two-family, or three-family dwellings in compliance with sanitary code and R.C. §3707.01, and (7) exceptional quality sludge generated outside Ohio and contained in bags of 100 pounds or less capacity. Act of pollution is public nuisance. Discharge in excess of permit specifications prohibited. (R.C. §6111.04).

Strip-mining measures to alleviate or prevent stream pollution by diverting surface and ground waters, to minimize discharge of acid mine drainage and to reclaim land specified in R.C. §§1513.01-.99.

Hazardous Wastes.

Operation of hazardous waste facility or treatment, storage of hazardous waste in solid waste facility are prohibited without permit issued in accordance with statute. Storage, treatment, or disposal of hazardous wastes, both off or on premises, and transport thereof to any other premises is prohibited except to facility operating under permit issued pursuant to statute or facility in another state or county operating under license or permit issued in accordance with applicable statutes or laws. Allowing emission of noxious odors from hazardous waste facility prohibited. Filling, grading, excavating, building, drilling or mining on land where hazardous waste facility was operated prohibited unless first authorized by Director. (R.C. §3734.02).

Littering.

Discarding of trash, garbage, waste, other litter on public or private property not owned by person or in waters of state prohibited unless pursuant to permit or license, as part of collection drive, or generated there and deposited in litter receptacle. (R.C. §3767.32).

Beverage Containers.

Sales of beverages in metal containers that open by removing part of container without using separate opener is prohibited. (R.C. §1502.07).

Aerosol Spray Cans.

Sale of aerosol spray cans using fluorocarbon compounds as propellants is prohibited. (R.C. §3704.15).

General Prohibitions, Nuisances.

Maintaining structure for trade or business or keeping animal that occasions noxious exhalation or noisome or offensive smells prohibited when injurious to individuals or public health, comfort or property. Keeping offal, filth or noisome substances prohibited when injurious to individuals or public. Corruption of watercourse, stream or water, or rendering them unwholesome or impure prohibited. (R.C. §3767.13).

Intentional deposit of coal, coal products refuse and drainage from cheese factory into river, lake, pond or stream prohibited. Discharge of petroleum and petroleum products into river, ditch, drain or watercourse prohibited. (R.C. §3767.14).

Placing carcasses of dead animals, offal from animals or fish, and privy contents upon land or water prohibited. (R.C. §3767.16).

Defiling wells, springs, brooks or reservoirs of water works with carcasses or putrid, nauseous or offensive substances prohibited. (R.C. §3767.18).

Abandoning motor vehicles on nonowned land or public roadway prohibited. (R.C. §4513.64). Junk motor vehicles on private property must be covered in structure or removed.

(R.C. §4513.65).

Disposal of wastes, garbage, rubbish and refuse in ditch, stream, river, lake, pond or other watercourse prohibited. (R.C. §3767.32).

Erection of billboards adjacent to certain roadways regulated. (R.C. §§5516.01 - 5516.99).

Junk yards within specified distances of roadways must be fenced or view obscured by plantings. (R.C. §4737.07).

Enforcement.

Air Pollution.

Director may require installation of monitoring devices, and maintenance of records and reports containing data as to location, size and height of emission outlets, rate, duration and composition of emissions and any other pertinent information. (R.C. §3704.03[I]).

Upon written complaint by any person or upon own initiative, Director investigates alleged acts of air pollution. Attorney General upon request of Director prosecutes violation of regulations pertaining to emissions of air contaminants and air pollution emergencies. Injunctive, civil penalty, or other appropriate relief is sought. (R.C. §3704.06). Determinations by Director cannot be used as evidence in private civil actions nor do they create presumptions which inure to benefit of anyone other than state. (R.C. §3704.09).

Water Pollution.

Director may on his own investigate alleged acts of pollution, but must investigate upon written complaint by any person. Director or representatives may enter public or private property to inspect and investigate and can apply to common pleas court for warrant permitting entrance and inspection when owner refuses access. (R.C. §6111.05).

Attorney General on request of Director must prosecute person who pollutes or violates order of Director, and must bring action for injunction against person polluting or threatening to pollute water, or violating or threatening to violate lawful orders of Director. (R.C. §6111.07).

Department of Health is responsible for enforcement of statutes governing its activities and duty and its regulations. (R.C. §3701.57).

Solid Waste, Hazardous Waste.

Upon complaint of board of health, legislature or Director, state attorney general, county prosecutor, or city law director may seek judicial enforcement of statute or regulations, through prosecutors or civil actions for injunctions. Local board of health may suspend, deny or revoke license of solid waste facility for violation of statute or regulation; Director has comparable jurisdiction over hazardous waste facilities. (R.C. §3734.02). Annual license fee replaced by $.30 per cubic yard or $.60 per ton fee for debris disposal at solid waste facilities and construction and demolition debris facilities. (R.C. §3714.07[A][1]). Hazardous waste facilities may be monitored by employees of OEPA by appointment of Director. (R.C. §3734.31).

Sanitary Districts: Board of Directors of district may make regulations and enforces compliance with its regulations through civil actions and by mandamus. (R.C. §6115.23).

Statute of Limitations.

Five year statute of limitations for actions for civil or administrative penalties brought under certain environmental laws. (R.C. §3745.31).

Penalties.

Air Pollution.

Fine up to $25,000 or imprisonment up to one year for each violation. Each day of violation after conviction is separate offense. (R.C. §3704.99).

Nonsmoking Areas in Places at Public Assemblies.

Person who smokes in area of place of public assembly designated as nonsmoking is guilty of minor misdemeanor. (R.C. §3791.031).

Water Pollution.

Any person who violates R.C. §6111.07 shall pay civil penalty of no more than $10,000 per day of violation. Each day of violation is separate offense. Any person who purposely violates R.C. §6111.10 shall pay civil penalty of $50 for first violation, and not more than $500 for subsequent violations. (R.C. §§6111.07[A], .09[A]).

Strip and Surface Mining.

Fine of $5,000 plus $1,000 per acre affected for mining without license, and fine from $100 to $1,000 for first offense, $200 to $5,000 or six months imprisonment for subsequent violations of mining statutes or adopted rules, or orders of chief of reclamation, including those pertaining to pollution and reclamation. (R.C. §§1513.99, 1514.99).

Nuisance Statutes.

Various penalties consisting of fines and imprisonment imposed for violations. (R.C. §§3767.99; 4513.99).

Sanitary Districts.

Penalty for violation of regulations is $500-$1,000 for each offense. Person or entity willfully failing to comply with regulations pertaining to construction and use of water supply and sewer systems liable for damages. (R.C. §6115.23).

Solid Waste Disposal Facilities.

Penalty for violation of statutes and regulations is fine up to $50,000 and imprisonment up to four years. (R.C. §3734.99).

Littering.

Violation of R.C. §§3767.13, .19, .30, or .32 is misdemeanor of third degree; and if there is violation of R.C. §3767.32, court may also order violator to remove litter from property or waters. (R.C. §3767.99[C]).

Beverage Containers.

Violation of R.C. §1502.99 is minor misdemeanor with each day of violation separate offense.

Junk Yards.

Fine of $25 to $1,000 for failure to fence or obscure view. (R.C. §4737.99).

Billboards.

Fine of $100 to $5,000 and cost of removal for violation of statutes regulating erection and maintenance of billboards. (R.C. §5516.99).

Permits.

Air Quality.

Director issues permits and variances for emissions in excess of adopted standards and regulations, as well as installation and operating permits for certain types of existing or new physical facilities or part thereof. (R.C. §3704.03[F], [G], [H]). In case of application for variance, Director considers whether compliance with adopted standards and regulations is impractical, technically infeasible, or economically unreasonable, whether emissions of applicant have little effect on ambient air quality and do not endanger or threaten to endanger human health, whether compliance would produce serious hardship without equal or greater public benefit. Rules prohibit variance from any emission limitation applicable to source pursuant to installation permit and prohibit issuance of variances that conflict with federal Clean Air Act. Director may also require plans, specifications and other data. (R.C. §3704.03[H]).

Water Quality.

Director issues sludge management permits and permits for discharge of sewage, industrial and other wastes in waters of state, and for installation, modification or operation of disposal systems. Permit must be denied if it would conflict with area-wide waste treatment management plan. Director considers technical feasibility and economic reasonableness of removing polluting properties from such wastes, conditions calculated to result from such action, and their relation to benefits to people of state and accomplishment of purposes of Water Pollution Control Act. Permit must specify volume and strength of sewage and wastes which may be discharged. Permit must specify that representatives of Director may enter holder's premises to determine compliance with statutes, regulations of Director and terms of permit. (R.C. §6111.03[J]).

Isolated Wetlands.

Three categories of isolated wetlands in Ohio from lowest quality category 1 to highest category 3. (O.A.C. 3745-1-54).

Director shall issue general isolated wetland permits to cover fills to category 1 and 2 isolated wetlands of ½ acre or less (R.C. §6111.021[A][1]-.022[A]) and may issue individual permits for fills to category 1 and 2 isolated wetlands greater than ½ but not more than three acres (R.C. §6111.021[A][2]-.023[A]). General permit requires submission of application for level 1 review (R.C. §6111.022[B]) and fill may be denied within 30 days if result will be significant impact on state water quality (R.C. §6111.022[C]). Individual permit requires more comprehensive application and demonstration of necessity for fill, avoidance, practicable alternatives, etc. (R.C. §6111.023[A], [B]) and must be issued or denied within 90 days (R.C. §6111.023[C]). Fill of category 2 isolated wetland of greater than three acres or of category 3 isolated wetland requires individual permit (R.C. §6111.024[A]) and more comprehensive (level 3) review (R.C. §6111.024[B]) and must be issued or denied within 180 days (R.C. §6111.024[C]). All fills under general and individual permits require mitigation at varying ratios. (R.C. §6111.027).

Notice of receipt of individual permit application is published and may result in public hearing. (R.C. §6111.026[C]). Issuance of permit constitutes issuance of §401 water quality certification. (R.C. §6111.021[C]).

Hazardous Waste.

Director approves all applications for operation of hazardous waste disposal facility, holds public hearings thereon, and adjudicates disputed facts prior to issuing or denying permit. State law preempts all county and local actions which may limit or impair Director's action. Operation, closure and long term care of hazardous waste disposal facility subject to rules and supervision of Director. (R.C. §3734.05). Director may adopt guidelines and standards more stringent than federal standards in certain situations and may prohibit disposal of hazardous wastes if certain conditions are found. (R.C. §3734.12). Director must list annually names of persons generating hazardous waste and amount of hazardous waste generated. (R.C. §3734.121). Director may take special remedial measures where facility constitutes imminent and substantial danger to public health. (R.C. §3734.02[J]). Transporters of hazardous wastes must be registered with and certified by Director (R.C. §3734.15) and consent to jurisdiction in writing (R.C. §3734.131). State fees collected by owner or operator of facility and remitted to Director for use in administering statute. Fees range from $2 to $9 per ton depending on on-site or off-site disposal and landfill or deep well injection, plus another 10% collected and paid to local government. Hazardous waste disposal facilities using deep well injection are exempt from annual hazardous waste facility deep well injection fee if facilities: (1) Pay annual hazardous waste facility permit fee; and (2) comply with Solid, Infectious, and Hazardous Waste Law and rules adopted under it. (R.C. §3734.02[E][2]). (R.C. §3734.18). Special requirements for disposal of acute hazardous wastes. (R.C. §3734.141). Acceptance of waste from outside of state prohibited unless facility has on file copy of transporters consent to jurisdiction form. (R.C. §3734.131).

Strip-mining.

License requirements set out in R.C. §1513.07.

Solid Waste.

License from board of health and approval of Director required to erect and operate disposal facilities. (R.C. §3734.05).

Infectious Wastes.

Generators of 50 pounds or more of infectious wastes during any one month are required to register with OEPA and comply with other provisions of R.C. §3734.021. Transporters of infectious waste are required to obtain registration certificate from Director and comply with other provisions of R.C. §3734.022. Acceptance of waste from outside of state prohibited unless facility has on file copy of transporter's consent to jurisdiction form. (R.C. §3734.131).

Applications.

Persons seeking permits for off-site facilities submit disclosure statements to Director and Attorney General. Applied to changes in ownership. (R.C. §§3734.41-.47).

Cessation of Regulated Operations.

C. 3752 requires owner or operator of “reporting facility” to notify OEPA within 30 days following cessation of “regulated operations”. (R.C. §3752.04). Owner or operator must also designate contact person, secure site and maintain security and post warning signs. Within 90 days, owner or operator must make additional submissions to OEPA, including copies of most recent emergency and hazardous chemical inventory forms, MSDS sheets, and must lawfully dispose of “regulated substances” off-site and certify to OEPA that those steps have been taken. (R.C. §3752.06). After submission of 90 day certification, OEPA conducts inspection of facility. “Regulated substances” are extremely hazardous substances, hazardous substances, flammable substances and petroleum. (Hazardous substances in quantities of 500 pounds or more and hazardous substances in amounts of 10,000 pounds or more on premises when operations cease trigger statute.) Oil or gas production operations, equipment, petroleum, owned by public utility and underground storage tanks are specifically exempted from statute. (R.C. §3752.02). First mortgage holder or fiduciary who learns that its mortgagor has ceased operations must also secure and post warning signs, maintain security and notify OEPA that facility has been abandoned. (R.C. §3752.11). Fines for violation can run as high as $25,000 for each day of violation and up to four years in jail. (R.C. §§3752.17, .99).

Voluntary Action Program.

C. 3746, Voluntary Action Program ("VAP"), provides for private cleanups of contaminated sites. Eligible sites (e.g. those not already subject to RCRA, CERCLA, etc.) which meet applicable standards (generic or risk-based) for contaminants can be pronounced clean by OEPA certified professional (consultant who meets certain education and experience requirements) using OEPA certified laboratory. (R.C. §3746.02). Certified professional, following Phase I performed in compliance with VAP or VAP compliant Phase II, and remediation if necessary, issues "no further action" letter ("NFA") to site owner or other volunteer who can then deliver it to OEPA and request Covenant Not to Sue ("CNS"), which protects site from enforcement by OEPA with respect to environmental issues addressed by NFA and CNS. (R.C. §§3746.10-.12). C. 3746 also (i) provides for private right of cost recovery against parties who caused or contributed to contamination cleaned up by volunteer under VAP; (ii) contains lender liability protection similar to that in effect at federal level; and (iii) establishes financial incentives for cleanups. (R.C. §3746.23).

13 ESTATES AND TRUSTS

13.01 ADMINISTRATION:

See topic 13.09 Executors and Administrators.

13.02 ADVANCEMENTS:

See topic 13.07 Descent and Distribution.

13.03 ALLOWANCES:

See topic 13.09 Executors and Administrators.

13.04 CLAIMS:

See topic 13.09 Executors and Administrators.

13.05 DEATH:

Presumption of death arises when person without being heard from has disappeared and is continually absent from place of domicile for five years or for a period of less than five years if person at beginning of period of absence was exposed to specific peril of death (R.C. §2105.35); or when armed services with respect to person on active duty makes finding of death pursuant to 37 U.S.C. 551. Interested survivors, including attorney general, must file complaint in probate court of county of presumed decedent's last residence to establish death. (R.C. §§2121.02 - 2121.04). See also topics 13.07 Descent and Distribution, and 13.09 Executors and Administrators.

Survivorship.

If it is not established by clear and convincing evidence that one of two co-owners with right of survivorship in specified real or personal property survived other co-owner by 120 hours, property shall pass as if each person survived other person by 120 hours. (R.C. §2105.34). Person is not deemed to have predeceased another, even if did not survive by 120 hours, if any of following apply: (1) governing instrument deals with simultaneous deaths, (2) governing instrument indicates person is not required to survive event by specified period, (3) governing instrument requires person to survive event by specified period, (4) imposition of 120 hour requirement causes nonvested property interest or power of appointment to be invalid under R.C. §2131.08, and (5) 120 hour requirement would result in unintended failure or duplication of disposition (R.C. §2105.36).

Actions for Death.

Civil action for wrongful death must be brought by personal representative of deceased and recovery inures exclusively to surviving spouse, children, parents of decedent, and other next of kin. Parent who abandoned minor child who is decedent shall not receive any benefit. (R.C. §2125.02). Interspousal immunity no bar to action by spouse. (2 O.S.3d 149, 443 N.E.2d 511). Such actions are not barred by judgment in related personal injury action. (144 O.S. 593, 60 N.E.2d 700). If death was caused by act in another state whose laws permit recovery, recovery may be had in this state. (R.C. §2125.01).

Civil action must be brought within two years after death (R.C. §2125.02[D][1]), but if timely commenced, and judgment for plaintiff is reversed or plaintiff fails otherwise than on merits, and statute of limitations has expired, new action may be commenced within one year from such reversal or failure subject to R.C. §2125.02. (R.C. §2125.04). If action is based on statute of another state, statute of limitations of such other state governs. (R.C. §2125.01).

Civil action may not be brought if decedent had been compensated for those injuries prior to death, executed valid release for injuries, and injuries had been sustained under circumstances which could be basis for wrongful death action. (R.C. §2125.01). Action may not be brought if judgment for damages compensating for injuries was entered in civil action which was fully satisfied prior to decedent's death, and those injuries sustained under circumstances which could be basis for wrongful death action. (R.C. §2125.01).

Damages for wrongful death may include compensatory damages, loss of support, loss of services, loss of society, loss of prospective inheritance, and mental anguish. (R.C. §2125.02[B]). Damages must be distributed to beneficiaries. Court that appointed personal representative must adjust amount received by each beneficiary equitably, according to pecuniary injury, loss, age and condition of each, except when beneficiaries are on equal degree of consanguinity to decedent, they may adjust shares of damages among themselves, with court being authorized to do so if beneficiaries fail to act. No damages may be distributed to parent who abandoned minor child who is decedent. Court may place in trust portion of damages received by any beneficiary under 25 years of age, to be held for benefit of such beneficiary until such person reaches 25 years of age, and court may order distribution in accordance with trust provisions. Trustee subject to approval by each adult beneficiary and by guardian of each minor beneficiary of trust. (R.C. §2125.03).

Civil action for wrongful death involving product liability claim may not accrue later than ten years from date product delivered to first purchaser or first lessee. (R.C. §2125.02[D][2]). Does not apply if manufacturer or supplier engaged in fraud contributing to harm alleged. Does not bar civil action against manufacturer or supplier who made express or written warranty for period longer than ten years.

If decedent cannot bring action for wrongful death due to disability under R.C. §2305.16, civil action may be brought within two years after disability removed. (R.C. §2125.02[D][2][e]).

Action may be brought if product involved substance or device described in R.C. §2305.10 and decedent's death resulted from exposure during ten year period. Claimant has two years to bring claim after being informed by competent medical authority. (R.C. §2125.02[D][2][g]).

Survival of personal injury actions is recognized. (R.C. §2305.21). Such actions are brought on behalf of decedent's estate and are distinct from wrongful death actions, although such actions may be joined. (Civ.R. 18[A]).

Death Certificate.

See category 10 Documents and Records, topic 10.04 Records, subhead Vital Statistics.

Uniform Anatomical Gift Act.

See topic 13.16 Wills.

Living Wills.

See topic 13.16 Wills.

13.06 DECEDENTS' ESTATES:

See topics 13.07 Descent and Distribution, 13.09 Executors and Administrators, and 13.16 Wills.

13.07 DESCENT AND DISTRIBUTION:

All property of an intestate, both real and personal, except as otherwise provided by law, descends and is distributed as follows, each class of which having member living taking to exclusion of subsequent classes: (1) If no spouse, to children and/or lineal descendants of deceased child or children per stirpes; (2) if surviving spouse and child/children are lineal descendants of surviving spouse, all to surviving spouse; (3) if surviving spouse and one child or child's lineal descendants and surviving spouse is not natural or adoptive parent, $20,000 plus ½ of balance of interstate estate and remainder to child or child's lineal descendants, per stirpes; (4) if surviving spouse and more than one child or child's lineal descendants and surviving spouse is natural or adoptive parent of one, but not all children, $60,000 plus 1/3 of balance of interstate estate. If surviving spouse or adoptive parent of none of children, $20,000 plus 1/3 of balance of interstate estate; (5) no children or their lineal descendants, all to surviving spouse; (6) parents equally or all to surviving parent; (7) brothers and sisters of whole or half blood and/or lineal descendants of deceased brothers and sisters; (8) one-half to maternal grandparents or survivor of them, and one-half to paternal grandparents or survivor of them; (9) if both maternal or both paternal grandparents are deceased, their one-half goes to their lineal descendants, or if there be no such descendants, to surviving grandparent or grandparents or their lineal descendants; (10) next of kin of equal degree, no representation among next of kin more remote than descendants of grandparents; (11) stepchildren or their lineal descendants; (12) if no stepchildren or their lineal descendants, escheat to state. (R.C. §2105.06). Next of kin are determined according to civil law rules. (R.C. §2105.03).

When all who inherit are of equal degree of consanguinity to intestate, they take per capita; when of unequal degree, they take per stirpes. (R.C. §§2105.12 - 2105.13).

Surviving spouse takes share of estate as follows: If child/children lineal descendants of surviving spouse, all to spouse; if one child and surviving spouse not natural or adoptive parent, $20,000 plus ½ of estate; if more than one child and surviving spouse is natural or adoptive parent of one, but not all, $60,000 plus 1/3 of balance of interstate estate; if surviving spouse not natural or adoptive parent of any child, $20,000 plus 1/3 of estate; if no children or their linear descendants, then whole estate. (R.C. §2105.06).

Surviving spouse is entitled to receive two automobiles from estate if not transferred by joint ownership with right of survivorship, not transferred to transfer-on-death beneficiary under R.C. §2131.13 or otherwise disposed of by will. Value not to exceed $40,000. Automobile is not considered estate asset and is not included in estate inventory. (R.C. §2106.18).

Half-blood and whole blood share alike. (R.C. §2105.06). There is no difference in intestate succession between ancestral and nonancestral property or between real and personal property. (R.C. §2105.01).

Posthumous children or other issue inherit like other children. (R.C. §2105.14).

Illegitimate children inherit and transmit property from, to and through mother. (R.C. §2105.17). Parent who abandons child is not entitled to inherit from abandoned minor that dies intestate. (R.C. §2105.10).

Adopted Children.

See category 14 Family, topic 14.01 Adoption.

Determination of heirship may be had in probate court where property passes by intestate succession (R.C. §2123.01) on petition of executor or administrator (R.C. §2123.02) or any interested party (R.C. §2123.06).

Person interested in administration of trust, or of estate of decedent, may have declaration of rights or legal relations to ascertain any class of creditors, devisees, legatees, heirs, next of kin or others. (R.C. §2721.05).

Declaration of Heirship.

A person may designate another as his heir by filing declaration in probate court, and such person thereafter stands in same relation to declarant as child born in lawful wedlock. (R.C. §2105.15). Such heir will inherit from, but not through (150 O.S. 34, 80 N.E.2d 493), declarant. Declarant may have designation vacated after lapse of one year. (R.C. §2105.15).

Advancements.

Property given during lifetime to heir is considered advancement only if so declared in contemporaneous writing by decedent, or so acknowledged in writing by heir. If heir predeceases decedent, property is not taken into account in computing intestate share of heir's issue, unless declaration or acknowledgment provides otherwise. (R.C. §2105.051).

Election.

Surviving spouse may elect to receive as part of share of estate entire interest of decedent spouse in mansion house, including its household goods and any adjacent farm land used in conjunction with it. Election must be made before or at time final account is rendered. Election may be made in estate relieved from administration under R.C. §2113.03 if made at time of or prior to entry of order relieving estate from administration. If surviving spouse dies prior to making election, conclusive presumption arises that no election was made. Opportunity to elect terminates upon surviving spouse's death. (R.C. §2106.10).

Election between intestate share and testamentary provision, see topic 13.16 Wills.

Renunciation.

Any person (or fiduciary on his behalf) may renunciate or disclaim testamentary or inter vivos succession to or gift of property by written instrument filed with Probate Court (testamentary interest), recorded (real estate) or delivered to trustee (inter vivos trust) within nine months after effective date of donative instrument or later occurrence of event upon which taker and his interest become ascertainable. Time for disclaimer extended as to minors and incompetents. (R.C. §5815.36).

Escheat.

Real and personal property escheats to state when there is no person living to inherit it. (R.C. §2105.06).

13.08 ELECTION:

See topic 13.16 Wills.

13.08A ESTATES: (in property)

See category 21 Property, topic 21.16 Real Property.

13.09 [RESERVED]

13.10 EXECUTORS AND ADMINISTRATORS:

Letters of administration granted by probate court of county where decedent resided at time of death; letters testamentary by court which admitted will to probate. (R.C. §2113.01). If person is presumed to be dead because absent for five years, or less than five years if person was exposed to specific peril of death upon disappearance, or is declared dead by armed services, administration of estate is to be instituted and carried on as if presumed decedent were in fact dead. (R.C. §§2121.01 - 2121.09). Standard probate forms are required to be used in proceedings in probate courts. (Civ.R. 73[H]).

Preferences in Right to Administer.

Testator may confer power to nominate executor in his or her will and waive bond. (R.C. §2107.65). Letters of Administration are granted in following order of preference: (1) To surviving spouse if resident of Ohio; (2) to one of next of kin resident of Ohio; (3) if no such persons, or if they are incompetent, unsuitable, or neglect to take out letters within reasonable time, then to such suitable resident of Ohio, or Attorney General or Attorney General's designee, if Department of Job and Family Services is seeking to recover medical assistance from deceased. (R.C. §2113.06).

Eligibility and Competency.

Nonresident may not be appointed administrator. (R.C. §2109.21[A]). Nonresident may act as executor or trustee if related to maker of will by consanguinity or affinity or is resident of state allowing appointments of nonresidents without such relationships. (R.C. §2109.21[B]). Resident, including person married before or after qualification or appointment, may be executor or administrator. (R.C. §2109.22). Infant cannot act, and if he is nominated as executor, administration with will annexed may be granted during his minority, unless there is another executor who will act. (R.C. §2113.13). Executor of executor has no authority to administer estate of first testator. (R.C. §2113.14). See also infra, subhead Foreign Executor or Administrator.

After appointment in state of decedent's domicile, foreign corporation may qualify as executor or administrator of property in Ohio, if laws of such other state give Ohio trust companies similar privileges. (R.C. §2109.21[B]).

Qualification.

Executor or administrator must execute written acceptance of duties and acknowledgment of penalties for failure to perform. Probate court then issues letters of appointment. (R.C. §2109.02).

Bond Amount.

Amount of bond fixed by court, not less than double value of personal estate and annual real estate rentals. (R.C. §2109.04[A][1]). Court can reduce bond for good cause shown (R.C. §2109.04[A][4]); permit deposit of estate personal property with bank and reduce bond accordingly (R.C. §2109.13); or increase bond when in court's opinion interests of estate demand increase (R.C. §2109.06). Executor or administrator who is sole residuary legatee or distributee can give bond based upon obligation to pay estate costs, debts and legacies. (R.C. §2109.10).

Exemption from Bond.

Surviving spouse not required to give administrator's bond where spouse entitled to entire net proceeds of estate. (R.C. §2109.07[A][1]). Administrator not required to give bond if no will, administrator next of kin and administrator entitled to entire net proceeds of estate. (R.C. §2109.07[A][2]) Court shall appoint executor without bond if testator exempts, unless court determines interest of estate demands bond. (R.C. §2109.04[A][2]).

Testamentary trustees subject to same bond requirements as executors and administrators. (R.C. §2109.05).

Sureties can be released upon application if executor or administrator gives new bond. (R.C. §2109.18).

Issuance of Letters.

When will is approved and allowed, court issues letters testamentary to named executor if suitable, competent, accepts and gives bond. Otherwise court will grant letters with will annexed to devisee or legatee who would be entitled to administer estate if no will, or to some other suitable person. (R.C. §2113.05).

Removal.

Probate court may remove executor or administrator for failure to give new bond within required time (R.C. §2109.06); for failure to give new bond after release of surety (R.C. §2109.18); for failure to account at times required; for neglect of duty, incompetency, fraudulent conduct, or because interest of trust demands (R.C. §2109.24); for nonresidence (administrator only) (R.C. §2109.21); for judgment against, under R.C. §2109.52 (R.C. §2109.53); for failure to return inventory (R.C. §2115.03); because there exists between him and estate unsettled claim which might lead to controversy or litigation (R.C. §2113.18); or for failure to bring action for wrongful death, if court determines prima facie case can be made (R.C. §2113.18); or testamentary trustee may be removed for good cause upon written application of more than one-half of persons having interest in estate (R.C. §2109.24).

Special Kinds of Administration.

Ancillary administration may be had if nonresident decedent leaves property in Ohio. Administration is granted where property is located or debtor of decedent resides, and extends to entire estate within Ohio. (R.C. §2129.04). In general, procedure is same as in administration of estates of resident decedents. (R.C. §2129.10).

Within five months after his appointment ancillary administrator must send domiciliary administrator certificate showing all assets and liabilities of estate in Ohio. (R.C. §2129.15). Residue of personal property and proceeds of real estate sold to pay debts, remaining after creditors and expenses of administration are paid, is paid to domiciliary administrator or to persons entitled thereto, as court directs. (R.C. §2129.23). If no domiciliary administration has been commenced, ancillary administration proceeds as though decedent had been resident of Ohio. (R.C. §2129.11).

Administrator de bonis non is appointed with will annexed if there is one, when office of executor or administrator becomes vacant before estate is fully administered. (R.C. §§2113.14,

2113.19).

Special administrator is appointed to collect and preserve effects of decedent if there is delay in granting letters testamentary or of administration. (R.C. §2113.15 - 2113.17).

Public Administrators.

None.

Inventory and Appraisal.

Within three months of appointment, executor or administrator must file inventory and appraisal (except where value of asset is readily ascertainable without appraiser) of real estate located in this state, goods, and other property based on value as of date of death (R.C. §2115.02), verified by his oath and certified by appraiser (R.C. §2115.15). Executor or administrator, subject to approval of court, appoints one appraiser, and, subject to approval, may appoint separate appraiser of property located in another county (R.C. §2115.06) who, after notice to surviving spouse (unless waived) (R.C. §2115.04), assists in preparing inventory and appraisal (R.C. §2115.05).

Fee for appraisals may be agreed upon between fiduciary and appraiser with approval of probate judge. (R.C. §2115.06).

Court sets inventory and appraisal for hearing and gives notice. Exceptions must be filed five days before hearing. (R.C. §2115.16). When inventory is approved appraisal of real estate is conclusive for all purposes except estate taxes unless reappraisal is ordered by court. (R.C. §2115.17).

General Powers and Duties.

Executor or administrator must as far as he is able collect assets of estate within 13 months after date of appointment, and if further time is required for collection, court on application may extend time not more than six months from time of each application except where estate taxes cannot be determined and paid within six months. (R.C. §§2113.25 - 2113.28).

Executor or administrator may continue decedent's business as owned by decedent as sole proprietor for four months following appointment or as court directs and with limited authority to bind estate. (R.C. §2113.30). Administrator with court approval, or executor authorized by will, may compromise claims for or against estate. (R.C. §2117.05). If no one within reasonable time after appointment of personal representative has taken over management of decedent's real estate, executor, administrator, heir or devisee may apply to probate court for order authorizing executor or administrator to assume such duties. (R.C. §2113.311).

No personal representative can invest estate funds except with court approval or authorization in will and, except as otherwise provided by law or will, investments are limited to those permitted for trust funds. (R.C. §§2109.37 - 2109.371). See topic 13.15 Trusts. Nevertheless personal representative may retain any part of estate received by him even if not of class or percentage permitted by fiduciaries. (R.C. §2109.38). Fiduciary entitled to distribute share treated like other beneficiaries and may receive distribution in kind. (R.C. §2109.39). He has power of individual with respect to securities held by him, including power to participate in corporate merger or reorganization. (R.C. §2109.40). Representative may deposit securities in federal reserve bank, clearing corporation, or securities depository and certificates may be merged or held in bulk with others. (R.C. §2131.21).

Notice of Appointment.

Fiduciary shall within two weeks of admission of will to probate give notice to surviving spouse, to persons entitled to inherit under intestate and to legatees and devisees named in will. (R.C. §2107.19). Notice of appointment is not for benefit of creditors. (77 O. S. 218, 82 N.E. 1075). If deceased was alien and left heirs residing in foreign country, notice of proceedings is given by registered mail to nearest consular representative of country of which deceased was citizen. (R.C. §2113.11).

Presentation of Claims.

Claims must be presented to executor or administrator within one year after death of decedent (R.C. §2117.06) and if representative so requires must be accompanied by written proof and affidavit of claimant (R.C. §2117.08).

Unmatured claim must be presented like any other claim. (R.C. §2117.06). Secured claim need not be presented to protect security if lien is evidenced by public record or actual possession (R.C. §2117.10) but must be presented to participate in general assets (R.C. §2117.06).

Contingent claim must be presented within one year after date of death of decedent, or two months after accrual, whichever is later. (R.C. §2117.37).

Claims of executor or administrator against estate must be presented to court within three months of representative's appointment. If claim amounts to $500 or more, court must set matter for hearing and direct representative to give notice to all persons interested in estate. (R.C. §2117.02).

Proof of Claims.

Executor or administrator may require written proof in support of claims against estate and also affidavits of claimants that claims are justly due. (R.C. §2117.08).

Form.

(Proof of claim where required by administrator or executor, R.C. §2117.08).

Form

. . . ., being first duly sworn, deposes and says that he is the holder of a claim in the original amount of $. . . . . against the estate of . . . ., deceased; that payments in the amount of $. . . . . have been made in part payment of claim; that such claim is subject to a counterclaim in the amount of $. . . . .; leaving a balance of $. . . . . that is justly due him from said estate.

Affiant says that he holds security for the payment of such claim as follows: . . . .

(Where claim is not yet due) The maturity date for such claim is: . . . .

(Where claim arises out of tort) Such claim arises in tort as the result of the following events on (date): . . . .

(If preference in payment is claimed) Such claim is entitled to be preferred against certain other claims against the estate of the said . . . . because . . . .

Further affiant sayeth naught.

. . . .

(Signature of claimant)

(Jurat; see category 10 Documents and Records, topic 10.02 Affidavits.)

Approval or Rejection of Claims.

Executor or administrator must allow or reject all claims within 30 days after presentation but failure to do so will not prevent doing so thereafter nor prejudice rights of any claimant. On demand of creditor, executor or administrator must furnish claimant with memorandum of such allowance. (R.C. §2117.06[D]).

Allowed claim may be later rejected. Claim is deemed rejected if representative does not comply with demand for allowance within five days. (R.C. §2117.11). Interested party may compel rejection of claim on giving bond approved by probate judge. (R.C. §2117.13).

Hearing on Claims.

Court may and on representative's motion must hold hearing on claims against estate that have been presented and any other known valid debts. Order disapproving allowance of claim has effect of rejection. Order confirming allowance or classification of claim has effect of judgment and is final as to all persons with notice of hearing and as to claimants subsequently presenting claims. (R.C. §2117.17).

Payment of Claims.

Representative may proceed to pay debts due from estate. In case of insolvency, creditor who has been paid according to law cannot be required to refund. (R.C. §2117.15).

Unmatured claim may, and on demand of holder must, if assets are available, be paid, less discount to maturity if it does not bear interest before maturity. If creditor refuses to accept payment, assets may be reserved, depreciation in which is at creditor's risk. (R.C. §2117.28).

If assets in hands of personal representative are insufficient to pay claim, unpaid balance may be collected from distributees of estate (R.C. §2117.37 - 2117.42), but claimant's suit must be commenced within six months after claim accrues or, in case of part payment by representative, within two months after last such payment. (R.C. §2117.41).

Priorities.

Debts are paid in following order: (1) Costs and expenses of administration; (2) bill of funeral director not exceeding $4,000 and such other funeral expenses as are approved by court; (3) allowance made to surviving spouse and minor children; (4) debts entitled to preference under laws of U.S.; (5) expenses of last sickness; (6) additional amount not exceeding $2,000, for funeral and burial expenses that exceed $4,000 and which are included in bill of funeral director; (7) personal property taxes and personal obligations to State and its subdivisions; (8) debts for manual labor for decedent performed within one year preceding death, not exceeding $300 to one person; (9) other debts for which claims have been presented and finally allowed. Such part of bill of funeral director as exceeds $6,000 and such part of claim for manual labor as exceeds $300 must be included as debt under (9). Any natural person or fiduciary who pays claim shall be subrogated to rights of that creditor proportionate to amount of payment and entitled to reimbursement in accordance with priority of payments. (R.C. §2117.25). Devisee or heir takes real estate subject to liens thereon for unpaid taxes or assessments. (R.C. §2113.52).

Sales.

When satisfied it is in best interests of estate, probate court at any time after approval of inventory or inventory and appraisal, may authorize executor or administrator to sell, at public or private sale, at fixed price or for best price obtainable, and for cash or on such terms as court may determine, any part or all of personal property belonging to estate except: (1) such as surviving spouse desires to take at appraised value; (2) such as is specifically bequeathed, when sale of such property is not necessary for payment of debts, unless consent of persons entitled thereto be obtained; (3) property as to which distribution in kind has been demanded prior to sale by surviving spouse or other beneficiary entitled to such distribution in kind; and (4) property which court in its discretion directs not be sold pursuant to wish expressed by decedent in will. (R.C. §2113.40).

Executor or administrator without court order may sell and transfer, without recourse, any promissory notes secured by mortgage and mortgage securing them at not less than face value with accrued interest. (R.C. §2113.44). No court order is required to sell property pursuant to authority conferred by will. (R.C. §2113.39). Unless restricted by will or law, representative may, without court authority, sell at public or private sale, grant options to sell, exchange or otherwise dispose of real estate if: (1) surviving spouse and beneficiaries or heirs (all of whom must be of majority age) give written consent to general power of sale and such is filed with court; (2) sale is made at price of at least 80% of appraised value. (R.C. §2127.011).

Real estate may be sold after approval of probate court to pay debts if personal property is insufficient. (R.C. §2127.02). When personal property is insufficient to pay debts and also legacy which is charge on real estate, such real estate may be sold after approval of probate court. (R.C. §2127.03). In probate court, sale can be subject to mortgage if mortgagee consents, but consent releases estate from liability for deficiency. (R.C. §2127.20). Court may determine equities of parties and priorities of liens and order distribution of proceeds accordingly. (R.C. §2127.18). Proceeds of sale distributed as follows: (1) discharge costs and expenses; (2) pay taxes and assessments; and (3) remainder to payment of legacies and debts of estate. (R.C. §2127.38). Executor with testamentary power of sale may proceed by court action or under will. (R.C. §2127.01). All persons entitled to share in estate, acting together, may compel representative to commence action for authority to sell real estate. (R.C. §2127.04[A]).

Surviving spouse has limited right to purchase property not specifically devised or bequeathed at appraised value. (R.C. §2106.16).

Actions by Representative.

In general, representative may sue on any claim due decedent. Fiduciary may bring action in his own name without joining with him person for whose benefit it is prosecuted. (Civ.R. 17). Action for wrongful death must be brought in name of personal representative of deceased person. (R.C. §2125.02[A][1]). No tort actions are abated by death except libel, slander, malicious prosecution and nuisance. (R.C. §§2311.21, 2305.21).

Actions Against Representative.

With certain exceptions, no action may be brought against representative until five months after appointment or such further time as may be allowed for collection of assets. (R.C. §2117.30). If claim is rejected, action thereon or on part rejected is barred unless commenced within two months after rejection or, if claim is unmatured, within two months after maturity. (R.C. §2117.12). See subhead Presentation of Claims, supra.

If representative does not pay person whose claim has been allowed or whose claim or interest in estate has been established by court order, such person may sue in probate court for sum due. (R.C. §2109.59). Representative's sureties may be made parties to suit (R.C. §2109.59); if not, judgment is only prima facie evidence in any action against sureties (R.C. §2109.61).

Actions Pending against Decedent at Time of Death.

Representative having actual knowledge of action pending against decedent before his death must file notice of appointment in such action within ten days after acquiring knowledge. Failure to file notice within ten day period does not extend claim period. (R.C. §2117.06[E]). Attorney of record for party prior to his death in action commenced prior to death must file notice of such death and serve copy of notice as provided in Civ.R. 5 within 14 days after acquiring knowledge of death of decedent. (Civ.R. 25[E]).

Allowances.

$40,000 allowance for support to surviving spouse and/or minor children. (R.C. §2106.13[A]). Application for allowance for support must be filed within five months from issuance of appointment letters. (R.C. §2106.13[D]). If surviving spouse selected two automobiles under R.C. §2106.18 this allowance for support shall be reduced by value of automobile having lower value of two automobiles selected. (R.C. §2106.13[C]). Money or property set off as allowance shall be considered estate assets. (R.C. §2106.13[A]).

Widow or widower may remain in mansion house of deceased consort free of charge for one year, except that such real estate may be sold sooner to pay debts of decedent in which event surviving spouse is compensated from estate to extent of fair rental value for unexpired term. (R.C. §2106.15).

Widow's Quarantine.

None.

Intermediate Accountings.

No partial account required where sole legatee or heir is fiduciary, or where no legatee or heir is under legal disability and all waive accounting in writing. Where sole legatee or heir is executor or administrator no final and distributive account shall be filed, and executor or administrator is discharged by filing certificate of termination. In all other cases executor or administrator must account within nine months after appointment and thereafter at least yearly until estate is settled. Accounting must be rendered upon order of probate court or upon motion of any person interested in estate. (R.C. §§2109.30, 2109.301).

Every account is set for hearing. (R.C. §2109.32). Personal representative may serve notice of hearing upon any interested person. Court after notice to fiduciary may order that additional notice be served. (R.C. §2109.33).

Final Accounting and Settlement.

Final account must be rendered within 30 days after completing administration or within such time as court orders. Court may issue, and on application of interested party or any next of kin of any ward must issue, citation to fiduciary pursuant to Civ.R. 4.1 to 4.6 to compel filing of overdue account, inventory, certificate of notice of probate of will, or report. (R.C. §2109.31[A]). Penalties provided for if fiduciary fails to file account, inventory, certificate of notice of probate of will, or report prior to date specified in citation. (R.C. §2109.31[C]). Six months after appointment, fiduciary shall render final and distributive account unless: (1) Ohio estate tax return must be filed, (2) will contest action has commenced, (3) surviving spouse filed election, (4) administrator or executor is party to civil action, (5) estate insolvent, or (6) court approval. (R.C. §2109.301[B][1]). Copy of account must be provided to each heir of intestate estate or to each beneficiary of testate estate. (R.C. §2109.32[B][1]). Hearing must be set not earlier than 30 days after filing account. (R.C. §2109.32[A]). Probate court may not approve final account of executor or administrator until: (1) Three months have passed since death of decedent; (2) surviving spouse has filed election to take under or against will or time for so doing has expired. (R.C. §2109.32[B][3]). On approval of any account, personal representative and his sureties are relieved from liability unless order is vacated: (a) For fraud, within one year after discovery, or if affected person is under disability, within one year after removal of disability, whichever is later; (b) for any other cause, by person affected not party to accounting proceeding, without limitation as to time; (c) for other cause, by fiduciary at any time before settlement of final account. (R.C. §2109.35). Injured party may proceed against distributees who have received assets improperly. (R.C. §2109.35).

Consent Settlement.

Not addressed by statutes.

Distribution.

At any time after appointment, and if no action pending challenging will, representative may distribute to heirs or beneficiaries part or all of assets; but if distribution is made before one year, claim period or spouse's elective period has expired, distributee and representative may be personally liable for premature distribution. (R.C. §2113.53). Five months after appointment, if spouse has made election, legatee may apply for court order requiring distribution. (R.C. §2113.54). Recipient may be required to give bond for return of assets received if necessary to satisfy claims. (R.C. §§2113.53, 2113.54). Fiduciary is not liable for any distribution made as provided above except that order may be vacated under R.C. §2109.35 relating to accounts. (R.C. §2113.56).

Beneficiary's debt to estate may be set off against his share. (R.C. §2113.59).

Distribution if Abroad.

Where it appears that legatee, distributee, or beneficiary of trust, not residing within U.S. or its territories, will not have benefit or use or control of money or other property due from estate because of circumstances prevailing at place of residence of such person, probate court may direct that such money be paid into county treasury to be held in trust, or probate court may direct that such money or other property be delivered to trustee for such legatee, distributee, beneficiary of trust or such persons who may thereafter be entitled thereto. (R.C. §2113.81, held unconstitutional, 303 F.Supp. 660, if applied on any basis other than statutory law of foreign country involved).

When person entitled to money or other property invested or paid into county treasurer, or to trustee under R.C. §2113.81, satisfies probate court of his right to receive distribution, court must order county treasurer or trustee to pay distribution to such person. (R.C. §2113.82).

Liabilities.

Executor or administrator will be chargeable with all property coming into his hands to be administered (R.C. §2113.31) but will not be accountable for decrease or destruction of any part of estate without his fault (R.C. §2113.32) nor for debts due deceased which remain uncollected without his fault (R.C. §2113.33). If he neglects to sell personal property as required by law, or disposes of property for his own benefit, he will be charged at double value affixed by appraisers. (R.C. §2113.34).

Executor's or administrator's liability for breach of fiduciary duty as transferee of real or personal property is limited to actual knowledge of conduct of transferor that would constitute breach of transferor's fiduciary responsibilities, unless instrument governing him directs otherwise. (R.C. §5815.24).

Compensation of Representatives.

Compensation is 4% on first $100,000, 3% on next $300,000 and 2% on balance of estate, determined with reference to personal property and income received and accounted for, and proceeds of real estate sold under testamentary power. Further commission of 1% allowed on real estate not sold and property not subject to probate administration, except joint and survivor property. (R.C. §2113.35). Compensation for extraordinary services governed by R.C. §2113.36. Services in land sale proceedings are compensated as court deems fit. (R.C. §2127.38). Attorney fees are set by court rule. (R.C. §2113.36).

When Administration Unnecessary.

After probate of will, if any, and upon application of interested party and after notice to surviving spouse and heirs, and after notice by publication unless waived, court, when satisfied that estate does not exceed $35,000 in value, or does not exceed $100,000 and decedent's spouse is entitled to inherit all assets of estate by testate or intestate succession, and that creditors will not be prejudiced, may relieve estate from administration and direct delivery and transfer of assets to those entitled to them. If estate does not consist entirely of money, securities and like property, value of estate will be determined by sole appraiser. (R.C. §2113.03).

Prior to issuance of letters testamentary or letters of administration, employer may pay wages of decedent, where wages do not exceed $2,500, without requiring such letters to be issued, to (in order of preference): (1) Surviving spouse; (2) one or more children 18 years or older; (3) father or mother of decedent. (R.C. §2113.04).

Estates of presumed decedents administered as estates of known decedents, with special provisions governing rights and duties of legatees, devisees, purchasers and presumed decedent if latter reappears within three years of granting decree of his death. (R.C. §§2121.05-.09).

Small Estates.

See subhead When Administration Unnecessary, supra.

Foreign Executors or Administrators.

May be sued as such in Ohio. (R.C. §2113.70). May be required to secure amounts due heirs or legatees. (R.C. §2113.73). If resident or having assets in Ohio, they may be compelled to make distribution according to laws of state of appointment. (R.C. §2113.72).

Foreign executor or administrator may sue in such capacity in like manner and under like restrictions as nonresident is permitted to sue. (R.C. §2113.75). In absence of administration proceedings in Ohio, he may sell real estate for payment of debts or legacies in manner prescribed for executor or administrator residing in state. (R.C. §2129.25). In such case he may file in probate court in county in which decedent's real estate is located, authenticated copy of letters of appointment. Claims of creditors must be presented to court within one year after date of death of decedent or be barred as lien on real estate. If claims so filed remain unpaid after reasonable notice, ancillary proceedings may be had. (R.C. §2129.02). Person having no knowledge of ancillary administration in Ohio may pay or deliver to foreign executor or administrator money, debts or other personal property belonging to decedent. (R.C. §2129.03).

See also topic 13.16 Wills, subhead Foreign Probated Wills.

Uniform Fiduciaries Act adopted. (R.C. §§5815.04 - 5815.11).

Revised Uniform Principal and Income Act adopted in slightly different form. (R.C. §§5812.01-.52).

Uniform Simplification of Fiduciary Security Transfers Act not adopted.

Uniform Anatomical Gift Act.

See topic 13.16 Wills.

13.11 FIDUCIARIES:

See topics 13.09 Executors and Administrators, and Trusts; also category 14 Family, topic 14.08 Guardian and Ward.

13.12 INTESTACY:

See topic 13.07 Descent and Distribution.

13.13 LIVING WILLS:

See topic 13.16 Wills.

13.14 PROOF OF CLAIMS:

See topic 13.09 Executors and Administrators; also category 5 Civil Actions and Procedure, topic 5.18 Pleading.

13.15 TRUSTS:

Uniform Probate Code not adopted.

Kinds.

Living trusts or inter vivos trusts are not governed by probate code. (R.C. §2109.01). However, probate court has concurrent jurisdiction with general division to hear disputes involving inter vivos trusts. (R.C. §2101.24[B][1][b]). There are few statutes as to living trusts except those governing conduct of corporate trustees. Corporate trustee of living trust may invest in, or loan trust funds on, securities and obligations enumerated in R.C. §1111.13.

Surviving spouse has no dower in corpus and cannot reach living trust as part of spouse's distributive share on election to take against will. (R.C. §2106.01).

Spendthrift trusts will be enforced in Ohio. (62 Ohio St. 3d 39, 577 N.E.2d 1077).

Charitable Trusts.

Unless excepted, every charitable trust, established or active in state, must be registered with Attorney General, and annual reports must be filed. (R.C. §§109.26, .31).

Attorney General has power to investigate and enforce charitable trusts and must be made party to any proceeding to terminate trust, to depart from purposes of trust or to apply cy pres doctrine, to construe trust instrument or to determine validity of will providing for charitable trust. (R.C. §§109.24, 109.25).

Certain charitable trusts and nonprofit corporations are empowered to comply with requirements of §§507 through 509 and 664(D)[1] or [2], IRC 1954, as added by §101(a) of Tax Reform Act of 1969. (R.C. §§109.231, 109.232).

Totten trusts are recognized in banks. (R.C. §1109.07).

Foreign Trusts.

Trusts created by foreign will may be executed after will is admitted to record in this state. (R.C. §2129.27). Trustee named in foreign will or appointed by foreign court, may execute trust but must give bond. (R.C. §§2129.28 - 2129.29).

Creation of trust requires (1) declaration of trust, (2) intention to create trust, and (3) conveyance of property to trust. (129 O.S. 323).

Appointment of Trustee.

If no trustee is named by will, or one named refuses to serve, probate court may appoint trustee. (R.C. §2109.26). Testamentary trustee's account is heard and reviewed by probate court. (R.C. §2109.32[A]).

Before entering upon execution of trust, testamentary trustee must receive letters of appointment from probate court. Trustee must execute written acceptance of his duties and acknowledge that he is subject to removal for failure to perform duties and to possible penalties for conversion of trust property. Written acceptance may be filed with application for appointment. (R.C. §2109.02).

Eligibility and Competency.

Testamentary trustee may be nonresident of Ohio if related to maker by consanguinity or affinity, or resides in state allowing nonrelative nonresident to be trustee. (R.C. §2109.21[B][1]). Married person may be trustee. (R.C. §2109.22). Trust companies accepting Ohio property are subject to capital and deposit requirements. See category 3 Business Regulation and Commerce, topic 3.01 Banks and Banking, subhead Trust Company.

Qualification.

Individual trustee must file bond in twice amount of personal estate and annual real estate rentals. If instrument creating trust dispenses with bond, court may nevertheless require bond if interest of trust demands it. (R.C. §2109.04).

Removal of Trustee.

Court may accept resignation of trustee, may remove him for good cause with not less than ten days notice, and may remove trustee other than testamentary trustee on application of more than one-half of those having interest in trust estate. (R.C. §2109.24).

General Powers and Duties of Trustees.

Trustee, unless instrument creating trust forbids, has power with respect to securities held by him to do anything an individual holder might do. (R.C. §2109.40). Trustee may deposit securities in federal reserve bank, clearing corporation, or securities depository and certificates may be merged or held in bulk with others. (R.C. §2131.21).

Corporate trustee may not deal with itself in respect to trust property. Individual trustees may not deal individually with estate unless instrument creating trust allows such dealing and probate court approves. All fiduciaries may make advances to trust when authorized by trust instrument or by probate court. (R.C. §2109.44). Trustee may not make personal use of trust funds and for any loss arising from such misuse both trustee and his bond are liable in an action brought within one year after termination of trust or discovery of loss. (R.C. §2109.43).

Trustee's liability for breach of fiduciary duty as transferee of real or personal property is limited to actual knowledge of conduct of transferor that would constitute breach of transferor's fiduciary responsibilities, unless instrument governing him or her directs otherwise. (R.C. §5815.24).

Sales.

Testamentary trustees have same power as executors and administrators to sell property pursuant to authority conferred by will and no court order is required. (R.C. §2113.39).

Investments by fiduciaries are regulated by R.C. §§1109.10, 1109.20, 1109.39, R.C. §§1111.13, 1111.14, and R.C. §§2109.37, 2109.371, 2109.372, 2109.38, 2109.41, 2109.42.

Securities in Name of Nominee.

Ohio chartered bank or trust company and national banks located in Ohio are authorized to hold securities in nominee form and are liable for loss caused by acts of nominee. (R.C. §1111.22).

Bequests and Devises to Inter Vivos Trusts.

See topic 13.16 Wills.

Accounting.

Every fiduciary appointed by probate court, other than executor or guardian, including trustee of testamentary trust, must render biennial accounts to court which appointed him. Trustee must file final account within 30 days after termination of trust, or within such period as court may order. Account must show receipts and disbursements, separately identified as to principal and income, and must be upon signature and oath of trustee. Trustee must exhibit to court securities shown in account, or certificate of person in possession or passbook or certified bank statement. Trustee may distribute assets and include report thereof. (R.C. §2109.33). Hearing must be set not earlier than 30 days after filing of account. (R.C. §2109.32[A]). Uniform Trustees' Accounting Act not adopted.

Compensation.

Set by court rule.

Discharge.

Court shall order account approved and settled and trustees discharged, if, at hearing, court finds trust has been fully and lawfully administered and that assets have been distributed properly. (R.C. §2109.32[A]). Order of court upon settlement of account has force and effect of judgment and may be vacated only for fraud or good cause shown. (R.C. §2109.35). See also topic 13.09 Executors and Administrators, subhead Final Accounting and Settlement.

Uniform Common Trust Fund Act adopted, but substantially modified. (R.C. §§1109.20 - 1109.26). See category 3 Business Regulation and Commerce, topic 3.01 Banks and Banking.

Revised Uniform Principal and Income Act.

Adopted in slightly different form. (R.C. §§5812.01 - 5812.52).

Gifts to Minors.

See category 14 Family, topic 14.10 Infants.

Uniform Fiduciaries Act adopted. (R.C. §§5815.04 - 5815.11).

Uniform Simplification of Fiduciary Security Transfers Act not adopted.

Accumulations.

Common law governs.

Perpetuities.

See category 21 Property, topic 21.13 Perpetuities.

Pour Over Trusts.

See topic 13.16 Wills, subhead Bequests and Devises to Inter Vivos Trusts.

13.16 WILLS:

Any person of 18 years or over, of sound mind and memory and not under restraint may make will. (R.C. §2107.02).

Testamentary Disposition.

Every devise of lands conveys all estate of devisor, unless it clearly appears that he intended to convey less estate. (R.C. §2107.51). Rule in Shelley's case does not apply. (R.C. §2107.49).

General residuary clause, or will making general disposition of all testator's property, does not exercise power of appointment unless specific reference is made to power. (R.C. §2107.521).

Execution.

Except oral wills, all wills, or agreements to make will, devise or bequest, must be in writing, but may be handwritten or typewritten. Will must be signed at end by testator making it or by some other person in testator's conscious presence and at testator's express direction, and be attested and subscribed in conscious presence of testator, by two or more competent witnesses, who saw testator subscribe, or heard testator acknowledge testator's signature. (R.C. §2107.03; 2007 Ohio SB 302). No agreement to make will or to make a devise or bequest by will is enforceable unless in writing. Such agreement must be signed by maker or by some other person at maker's express direction. If signed by person other than maker, instrument must be subscribed by two or more competent witnesses who heard maker acknowledge that it was signed at maker's direction. (R.C. §2107.04.) No person under 18 years of age shall witness will or witness agreement to make will or devise or bequest by will. (R.C. §2107.06).

Document or memorandum in existence when will is executed may be incorporated by reference if referred to as in actual existence. (R.C. §2107.05).

Codicil must be executed in same manner as will. (R.C. §2107.01).

Attestation Clause.

Attestation is essential. (R.C. §2107.03).

Form

I, A. B., of . . . ., Ohio, being of full age and sound mind and memory, do make, publish and declare this to be my last will and testament, hereby revoking all wills and codicil by me heretofore made. (Continue with directions as to payment of debts, disposition of estate, nomination of executor, etc.). In witness whereof, I have hereunto set my hand to this instrument which I declare to be my last will and testament at . . . ., Ohio, this . . . . day of . . . ., (year) . . . . . A.B.

Signed by the said A. B., and by him acknowledged to be his last will and testament, before us, and in our presence, and by us subscribed as attesting witnesses in his presence and at his request and in the presence of each other, at . . . . . ., Ohio, this . . . . . . day of . . . . . ., (year) . . . . .

T. S. residing at . . . .

R. W. residing at . . . .

Holographic wills are not recognized. To be valid still must be executed and witnessed pursuant to R.C. §2107.03.

Nuncupative Wills.

Oral will made in last sickness is valid as to personal estate if reduced to writing and subscribed by two competent disinterested witnesses within ten days after speaking of testamentary words, and if testator was of sound mind and memory and not under any restraint, and if he called upon some person present to bear testimony to said disposition as his will. (R.C. §2107.60). Such will must be offered for probate within six months after testator's death. (R.C. §2107.60). Oral will is void if beneficiary named is witness. (47 O.S. 191, 24 N.E. 267).

Revocation.

Will may be revoked by tearing, canceling, obliterating or destroying it with intention of revoking it, by testator himself, or by some person in his presence or by his written direction; or by some other will or codicil in writing, properly executed. (R.C. §2107.33[A]). Duly executed written will cannot be revoked by nuncupative or oral will (8 Ohio 144). Partial revocation, except by codicil, is not recognized. (48 O.S. 211, 31 N.E. 743).

Unless will provides otherwise, subsequent divorce or separation under separation agreement settling property rights revokes dispositions to former spouse of property, or general or special powers of appointment, and nominations of former spouse as executor, trustee or guardian. Property passes and powers are interpreted as if spouse failed to survive decedent. (R.C. §2107.33[D], [E]).

Will executed by unmarried person is not revoked by subsequent marriage. (R.C. §2107.37).

Revival.

Once revoked, will cannot be revived except by formalities of original execution. (110 O.S. 105, 143 N.E. 561). Revocation of later will does not revive earlier will unless terms of revocation show such intention, or earlier will is duly republished. (R.C. §2107.38).

Devises, bequests and powers of appointment to spouse, revoked by divorce or separation, are revived by testator's remarriage to former spouse or upon termination of separation agreement. (R.C. §2107.33[E]).

Testamentary Gifts to Subscribing Witnesses.

Devise or bequest to one of only two witnesses to will is void and witness is competent to testify; but if witness would have been entitled to share of estate in case will was not established, he takes so much of such share as does not exceed bequest or devise to him. (R.C. §2107.15).

Bequests and Devises to Inter Vivos Trusts.

Testator may by will devise, bequeath or appoint real or personal property to trustee of trust evidenced by written instrument signed before or simultaneously with will and which is identified in will. (R.C. §2107.63). Trust instrument may be amended after execution of will without re-execution unless will provides otherwise. (R.C. §2107.63).

Testamentary Guardian.

See category 14 Family, topic 14.08 Guardian and Ward.

Probate.

Probate Court shall admit will to probate if it appears from face of will, or if Court requires (in its discretion) testimony of witnesses to will and it appears from that testimony execution of will was valid. (R.C. §2107.18). When will has been admitted to probate, executor promptly must give notice of probate of will to surviving spouse (if known to applicant) and to persons who would be entitled to inherit from testator under statutes of descent and distribution, if he had died intestate; person entitled to notice may waive right to receive notice. Executor is required to file affidavit with Probate Court of that notice. (R.C. §2107.19).

No will is effectual to pass real or personal estate until it is duly admitted to probate or record. (R.C. §2107.61).

Unrevoked will may be probated if lost, destroyed or spoliated after death or insanity of testator if can prove that will was executed following will formalities and contents by clear and convincing evidence. (R.C. §2107.26).

Venue.

Probate of will of resident of Ohio may be had only in county in which testator was domiciled. (R.C. §2107.11).

Record.

Upon being admitted to probate, will is filed and recorded in book kept for that purpose. (R.C. §2107.20). Authenticated copies of will and order of probate are recorded in office of probate judge of each county where real estate devised by will is situated, effect of which is same as if probate of will had been had in such county or counties. (R.C. §2107.21).

Self-proved Wills.

No provision.

Living Wills.

Written witnessed declaration by competent adult may instruct physician to provide, withhold or withdraw life sustaining treatment (including nutrition and/or hydration) if suffering from terminal condition and/or in permanently unconscious state. (R.C. §§2133.01- 2133.15). Statute effective Oct. 10, 1991. Valid durable power of attorney for health care may be created in accordance with R.C. §§1337.11-.17.

Contest.

Person interested in will or codicil admitted to probate may contest its validity by civil action in probate court of county in which will or codicil was admitted to probate. (R.C. §2107.71). Will contest generally must be brought within three months after executor files certificate with Probate Court that notice has been given to interested parties, unless person is under legal disability. (R.C. §2107.76). Generally, rules of civil procedure govern. (R.C. §2107.72). Notice of action must be given to all devisees, legatees, heirs and other interested parties. Necessary parties include devisees, legatees, heirs and executor. (R.C. §2107.73). Order of probate constitutes prima facie evidence of attestation, execution and validity of will or codicil. (R.C. §2107.74).

Legacies.

Property specifically bequeathed may be delivered to legatee if he secures its redelivery on demand. (R.C. §2113.51).

General legacies bear no interest unless will so provides. (R.C. §2113.531).

Where executor selects assets in kind to satisfy marital deduction gift and market value at time of satisfaction is not specified as basis for valuation, assets selected must have value fairly representative of appreciation or depreciation of estate in aggregate. (R.C. §5815.21).

Unclaimed Legacies.

Legacies unclaimed prior to filing of final account may on order of probate court be (a) invested under direction of probate judge for two years (R.C. §2113.64), then turned into county treasury (R.C. §2113.65), or (b) turned directly into county treasury (R.C. §2113.64). Owner may withdraw funds turned into treasury on satisfying probate court of right to do so (R.C. §2113.67). Funds turned into treasury do not draw interest. (R.C. §2113.65).

Lapse.

Where devise or bequest of real or personal property is made to relative of testator, who was dead when will was made or died thereafter, leaving issue surviving testator, such issue take property as devisee or legatee would have, if living. If such devisee or legatee left no issue surviving and gift was of residuary estate to him and one or more relatives, residuary estate is distributed among such other relatives unless will makes different disposition. (R.C. §2107.52).

Children.

If, after execution of will, testator has child born alive, adopts child or designates heir in manner provided by law or child or designated heir absent and reported to be dead proves to be alive, and no provision is made by will or by settlement for such child or heir or his issue, and will shows no intention to disinherit, such child or heir (or his issue of he predeceases testator) takes share of estate which he would have taken if testator had died intestate, and legacies and devises in will abate proportionately or in such other manner as may be necessary to give effect to testator's intent as shown by will. (R.C. §2107.34). Except as just stated, child or other heir not provided for by will disposing of testator's entire estate has no rights in estate.

Adopted Children.

See category 14 Family, topic 14.01 Adoption, subhead Effect of Adoption.

Election.

When surviving spouse is sole legatee or devisee under will, no election is required, but one may be made. In all other cases, surviving spouse must elect to take under provisions of deceased spouse's will, or under statute of descent and distribution. (R.C. §2106.01). Election must be made in person and within one month of notice from court, unless court, on motion made prior to expiration of one month period and for good cause shown, allows further time. If no action is taken by surviving spouse within one month from service of citation to elect, it is conclusively presumed that spouse elects to take under will. (R.C. §2106.04). If election is made to take under statute and will does not expressly provide that there shall be no acceleration of remainder or other interests, balance of net estate is disposed of as if spouse predeceased testator. If proceedings to construe or contest will are begun within time allowed for making election, election may be made within three months after disposition of proceedings. (R.C. §2106.01).

Election to take under will bars surviving spouses' right to intestate share of property passing under will, unless will clearly shows that provision therein is in addition to intestate share, but does not bar rights in property as to which decedent dies intestate nor, unless will provides otherwise, right to remain in home or right to allowance for support. (R.C. §2106.05).

As to inter vivos trusts in effect at death, see topic 13.15 Trusts, subhead Living Trusts.

Mediation.

Probate judge may establish procedures for dispute resolution for any dispute between parties. Any procedures so adopted shall include, but are not limited to mediation and may charge fees and costs authorized under R.C. §2101.16. (R.C. §2101.163).

Contribution.

Unless will provides otherwise, when devise or bequest is taken for payment of testator's debts, other devisees and legatees must contribute, so that loss falls pro rata on all (R.C. §2107.54).

Renunciation.

Any person may renunciate or disclaim, by written instrument timely delivered, filed, or recorded, in whole or in part his succession to any property. (R.C. §5815.36). Time to disclaim is extended for minors and incompetents.

Foreign Executed Wills.

Authenticated copies of wills of nonresidents of Ohio, executed and proved according to laws of any state or territory of U.S., relative to any property in this state, may be admitted to record in probate court of any county in this state where any part of such property is situated, and such authenticated copies so recorded have same validity as wills made in this state. (R.C. §2129.05). Copy of such will and of order to record it may be filed and recorded in office of probate judge of any other county where such property is situated, with same effect as if authenticated copy were proved and admitted to record by court in such county. (R.C. §2129.05).

Will, executed and proved and allowed in any country other than U.S., and territories thereof, according to laws of such foreign state or country, may be allowed and admitted to record in this state (R.C. §2129.06), upon notice to all persons interested (R.C. §2129.07[A]), but no operation or effect is given to will of alien different from what it would have had if originally proved and allowed in this state (R.C. §2129.07[B]).

Will executed and proved according to law of state or territory of U.S. or of foreign country cannot be contested in this state, but if contested and set aside in state, territory, or country in which executed and proved, it will have no validity in this state from time final order or decree setting it aside is filed in office of probate judge of county in this state in which will is recorded. (R.C. §2107.48).

Foreign Probated Wills.

Will of nonresident may be admitted to probate in any county where any real or personal property of testator is located, provided that it has not theretofore been admitted to probate in Ohio or in state of testator's domicile. Intangible personal property is deemed to be located where instrument evidencing debt. stock, or chose in action is located, or if no such instrument, where debtor resides. (R.C. §2107.11). Such will must have been duly attested and executed according to law in force at time of its execution in state where executed, or law in force at time of death in this state or in state of testator's domicile at time of death. (R.C. §2107.18).

See also topic 13.09 Executors and Administrators, subhead Foreign Executor or Administrator.

Simultaneous Death.

See topic 13.05 Death, subhead Survivorship.

Testamentary Trusts.

See topic 13.15 Trusts.

Uniform Anatomical Gift Act adopted. (R.C. §§2108.01-.99).

14 FAMILY

14.01 ADOPTION:

Persons who may adopt include husband and wife together, at least one of whom is adult; unmarried adult; unmarried minor parent of person to be adopted; and married adult without other spouse joining in petition if: (1) Other spouse is parent of person to be adopted and supports adoption; (2) petitioner and other spouse are separated; or (3) failure of other spouse to join in or support adoption is found by court to be by reason of prolonged unexplained absence, unavailability, incapacity, or circumstances making it impossible or unreasonably difficult to obtain support or refusal of such spouse. (R.C. §3107.03).

Persons who may be adopted are any person under age 18 ("minor") and person 18 years or older ("adult") if: (1) adult is totally and permanently disabled; (2) adult is determined to be mentally retarded; (3) as minor adult had relationship with petitioners of child-foster caregiver or child-stepparent, and consents to adoption; or (4) adult was, at time of eighteenth birthday, in permanent custody of public children services agency or private child placing agency, and adult consents to adoption. (R.C. §3107.02).

Person seeking to adopt minor must utilize authorized agency or attorney to arrange adoption. (R.C. §3107.011).

Consent Required.

Unless consent is not required (under R.C. §3107.07), written consent to adoption of minor must be given by: (1) mother; (2) father if he was married to mother when child was conceived or born, or if child is his by adoption, or if child has been established to be his by acknowledgment of paternity and that acknowledgment has become final or court proceeding or if father has been determined by court or administration proceeding to be parent; (3) putative father (whether putative father's consent to adoption of child born prior to Jan. 1, 1997, required shall be determined by R.C. §§3107.06 and 3107.07 as existed on 9-18-96); (4) person or agency having permanent custody or authorized by court to consent; (5) juvenile court if legal guardian or custodian is not authorized by law or court order to consent; (6) child, if over 12, unless consent is not required by court (R.C. §§3107.06, 3107.07).

Persons from whom consent is not required include (1) parent if court finds failure to communicate or support for one year before filing of adoption petition or placement of minor in home of petitioner, (2) putative father if he fails to register in Putative Father Registry within specified time limits or is found not to be father or to have abandoned minor or mother, (3) parent who entered into permanent custody surrender agreement (if specified conditions for consent have been complied with), (4) parent whose parental rights have been terminated by order of juvenile court, (5) parent married to petitioner and who supports adoption, (6) father or putative father convicted of rape which resulted in conception of minor, (7) guardian or custodian of incompetent parent who does not respond in 30 days to request for consent or who withholds consent unreasonably, (8) guardian or custodian of person to be adopted, except parent, who does not respond in 30 days to consent or who withholds consent unreasonably, (9) spouse of person to be adopted if talk of consent due to unexplained absence, unavailability, incapacity, or circumstances that make it impossible or unreasonably difficult to obtain consent, (10) parent, legal guardian or lawful custodian in foreign country, if person to be adopted released for adoption pursuant to laws of country in which person resides, (11) any guardian, custodian, or other party with temporary custody of child, and (12) any court, agency or other person that does not file objection within 14 days after service of notice of petition. (R.C. §3107.07). (*Note*: new provisions on putative father consent apply only to child born after Dec. 31, 1996.)

Department of Job and Family Services establishes and maintains Putative Father Registry. Putative father must register within 30 days after minor's birth. Registry must be searched as part of adoptive process. (R.C. §§3107.062 - 3107.065).

Consent may be executed any time after 72 hours after birth. Person to be adopted must execute consent in presence of court. Except for parents, consents can be executed in presence of person authorized to take acknowledgments. Court cannot accept parent's consent unless parent appears in court (parents are not required if minor under six months and both parents consent, stepparent adopting parent not married to stepparent, or parent of minor to be adopted resides in another state), signs required components and any selected discretionary components of consent form and meets with assessor to receive Department of Job and Family Services prescribed materials and discuss adoption process unless child to be adopted by stepparent or other parent resides in another state (not less than 72 hours before signing). Department of Job and Family Services consent form has six components, each component to be signed separately; required components are (1) acknowledgment parent understands information release procedures, (2) election to authorize or not authorize release of identifying information and (3) statement by mother as to expenses of pregnancy; discretionary components authorize providing additional information, photographs and first name of parent. (R.C. §§3107.08 - 3107.083). Prescribed consent form must also be signed in connection with voluntary permanent custody agreement. (R.C. §3107.071). Consent may be withdrawn before entry of interlocutory order or entry of final decree of adoption when no interlocutory order has been entered if court finds after hearing that withdrawal is in best interest of person to be adopted and court authorizes withdrawal of consent. (R.C. §3107.084[B]).

Placement by Institution.

Agreement placing child in permanent custody of public children services agency or private child placing agency for care or placement of children may authorize agency to appear in adoption proceedings and consent to adoption with same effect as though parents or guardian were before court and had consented. (R.C. §5103.15). Court cannot approve agreement unless parent appears in court (unless child under six months and agreement filed with court) completes prescribed Department of Job and Family Services consent form and meets with assessor within 72 hours before signing agreement. Unless parents consent to placement and probate court approves placement after home study or unless parents are deceased or have abandoned child, placement for adoption must be through public children services agency or institution certified by Department of Job and Family Services, or custodian in foreign state or country certified by division of social administration to have authority under its law to place children for adoption. (R.C. §§5103.151, 5103.152, 5103.16).

Ohio is party to Interstate Compact on Placement of Children. (R.C. §5103.20).

Jurisdiction.

Probate court has jurisdiction. (R.C. §3107.01).

Venue.

County in which child was born or in which petitioner, child or parent reside, petitioner is stationed for military service or agency having permanent custody is located. (R.C. §3107.04).

Petition is governed by rules of civil procedure and must contain: Name, date and place of birth of person to be adopted; name to be used for adoptee; date of placement of minor and name of person who placed him; name, age, place and duration of residence of petitioner; marital status, with date and place of marriage, of petitioner; relationship to petitioner of adoptee; statement that petitioner has facilities and resources suitable to provide for nurture and care of adoptee and that petitioner desires to establish parent-child relationship with adoptee; description and estimate of value of all property of adoptee; and name and address, if known, of any person whose consent is required but who has not consented, and facts that explain lack of consent. (R.C. §3107.05[A]).

Certified copy of birth certificate and copies of required consents and relinquishments of consents, if any, must be filed with clerk. (R.C. §3107.05[B]). Petition must be filed within 90 days after minor placed in home of person seeking adoption. (R.C. §3107.051).

Proceedings.

Court sets time and place for hearing. For minors, hearing must take place at least 30 days after date child was placed in home of petitioner. At least 20 days before hearing court gives notice of same to any juvenile court, agency, or person whose consent to adoption is required but who has not consented, certain persons whose consent is not required and who have not consented, and any guardian, custodian, or other party who has temporary or permanent custody of child. (R.C. §3107.11).

Pre-finalization assessment and report by accessor not required if petitioner is minor's stepparent unless ordered by court. Assessor must conduct prefinalization assessment of minor and petitioner and file report before final order is entered; report includes adjustment of minor and petitioner to adoptive placement, present and anticipated needs of minor and petitioner, physical, mental, and developmental condition of minor, minor's biological family background, reasons and circumstances of placement, for Indian child compliance with Indian Child Welfare Act of 1978, 25 U.S.C. 1901 et seq., and attitude of minor toward adoption. (R.C. §3107.12). Final decree cannot be issued and interlocutory order cannot become final until person to be adopted has lived in adoptive home at least six months after placement by agency, or at least six months after Department of Job and Family Services or Court informed of placement and Department of Job and Family Services or Court has had opportunity to observe or investigate adopted home, or, in case of adoption by stepparent, until at least six months after filing of petition or until child has lived in home for six months. (R.C. §3107.13).

Petitioner and adoptee must appear at hearing unless excused for good cause. Court may continue hearing from time to time to permit investigation. (R.C. §3107.14).

All hearings are held in closed court and all papers and records are subject to inspection only under specified circumstances. (R.C. §3107.17).

Within 30 days after adoption decree becomes final, if adopted person born in Ohio or outside U.S., court shall forward certificate of adoption, prescribed Department of Job and Family Services consent form, and statement as to whether person became available for adoption before Sept. 18, 1996, to Department of Health; if adopted person born in another state, certificate of adoption is sent to vital statistics office of that state within 30 days after adoption decree becomes final. (R.C. §3107.19).

Decree.

If court finds required consents have been obtained and adoption in best interest of person to be adopted, it may issue final decree or interlocutory order. Interlocutory order becomes final decree on date specified therein which must fall within six to 12 months from date of order, and provides for observation, investigation and further report on adoptive home. If requirements for final decree are not satisfied or court vacates interlocutory order, or if court finds that adoptee was placed in home in violation of law, court dismisses petition and may determine proper person or agency to have permanent or temporary custody. (R.C. §3107.14). Interlocutory order while in force, has same legal effect of final decree, and, if vacated, it is void ab initio. (R.C. §3107.15[D]).

Appeals are subject to rules of appellate procedure. Appeals are on expedited basis. (R.C. §3107.16[A]).

Effect of Adoption.

Final decree of adoption and interlocutory order which has become final issued by Ohio court or decree of another jurisdiction recognized by Ohio have following effects: except with respect to spouse of petitioner and relatives of spouse, to relieve biological or other legal parents of all parental rights and responsibilities and to terminate all legal relationships between adopted person and his relatives so that he is stranger to them for all purposes including inheritance and interpretation or construction of documents, statutes and instruments, whether executed before or after decree, which do not expressly include person by name or some designation not based on parent and child or blood relationship; and to create relationship of parent and child between petitioner and adopted person, as if person were legitimate blood descendant, for all purposes, including inheritance and applicability of statutes, documents and instruments, whether executed before or after decree, which do not expressly exclude adopted person from their operation or effect, except that where adopted person is age 18 or older at time of adoption, adopted person and his lineal descendants are not included as recipients of gifts, devises, bequests, or other transfers of property, including transfers in trust to class of persons, for purposes of inheritance and applicability of statutes, documents, and instruments unless document or instrument expressly included adopted person by name or expressly states that it includes person age 18 or older at time person adopted. (R.C. §3107.15[A]). If parent of adopted person dies without relationship of parent and child having been previously terminated and spouse of living parent thereafter adopts child, child's rights through decreased parent for all purposes are not affected. (R.C. §3107.15[B]).

Setting Aside Adoption.

Subject to disposition of appeal, upon expiration of one year after adoption decree is issued, decree cannot be questioned by any person, including petitioner, upon any ground, including fraud, misrepresentation, failure to give required notice, or lack of jurisdiction of person or subject matter, unless, in case of adoption of minor, petitioner has not taken custody of minor, or, in case of adoption of minor by stepparent, adoption would not have been granted but for fraud by petitioner or petitioner's spouse, or in case of adoption of adults, adult had no knowledge of decree within such one-year period. (R.C. §3107.16[B]).

14.02 ALIMONY:

See topics 14.06 Divorce; 14.09 Husband and Wife.

14.03 COMMUNITY PROPERTY:

System does not apply in Ohio.

14.04 DESERTION:

See topics 14.06 Divorce;14.09 Husband and Wife.

14.05 DISSOLUTION OF MARRIAGE:

See topic 14.06 Divorce.

14.06 DIVORCE:

Subject is governed generally by c. 3105.

Grounds for Absolute Divorce.

Divorce is granted for any of following causes: (1) That either party had husband or wife living at time of marriage; (2) willful absence of adverse party for one year; (3) adultery; (4) extreme cruelty; (5) fraudulent contract; (6) any gross neglect of duty; (7) habitual drunkenness; (8) imprisonment of adverse party in penitentiary at time of filing complaint; (9) procurement of divorce outside this state, by husband or wife, by virtue of which party who procured it is released from obligations of marriage, while same remain binding upon other party; (10) when parties have lived apart without cohabitation for uninterrupted period of one year; and (11) incompatibility, unless either party denies. (R.C. §3105.01). Condonation or recrimination is not bar to divorce. (R.C. §3105.10[C]).

Grounds for Legal Separation.

Legal separation is granted regardless of whether parties are living separately for any of following causes: (1) either party had spouse living at time of marriage; (2) willful absence from adverse party for one year; (3) adultery; (4) extreme cruelty; (5) fraudulent contract; (6) any gross neglect of duty; (7) habitual drunkenness; (8) imprisonment of adverse party in state or federal penal institution at time of filing complaint; (9) when parties have lived apart without cohabitation for uninterrupted period of one year; (10) incompatibility, unless denied by either party. (R.C. §3105.17).

Residence Requirements.

Plaintiff in action for divorce or annulment must be resident of state six months. (R.C. §3105.03). One spouse in action for dissolution of marriage must be resident of state for six months. (R.C. §3105.62). Residence of spouse does not preclude action for divorce or legal separation. (R.C. §3105.04).

Jurisdiction.

Common pleas courts have jurisdiction over all divorce, legal separation and dissolution proceedings. (R.C. §§3105.10, 3105.61).

Venue is determined by Civ.R. 3 for divorce, dissolution and annulment actions. (R.C. §3105.03).

Process.

Service required to be by publication in divorce, annulment or legal separation actions if defendant's residence is unknown or if defendant is not resident of state or is resident of state but temporarily absent. (R.C. §3105.06). Both parties in action for dissolution of marriage shall be considered defendants for service of process. (R.C. §3105.62).

Judgment or decree is final when granted, there is no provision for interlocutory decree but court may order conciliation period not to exceed 90 days after 30 days from service of summons or anytime after filing for dissolution. (R.C. §§3105.10, .091). When divorce is procured by means of fraud practiced by successful party, court has power to vacate its decree and set aside divorce at subsequent term of court. (155 O.S. 226, 98 N.E.2d 401).

Temporary Spousal Support.

Court may grant spousal support to either party for his or her sustenance and make order for support and custody of minor children of marriage or by adoption during pendency of action. (R.C. §3105.18, Civ.R. 75[M]).

Award of Attorney's Fees.

Court may award all or part of reasonable attorney's fees and litigation expenses to either party if equitable. Court considers various relevant factors to determine appropriateness. Such fees may be designated as spousal support under R.C. §3105.18. (R.C. §3105.73).

Permanent spousal support, payable in gross or in installments and in either real or personal property, may be allowed to either party Court considers various factors prior to grant of spousal support. (R.C. §3105.18). Person or corporation having possession of, control of, or claiming interest in property, real or personal, out of which another seeks alimony, may be made party defendant (Civ.R. 75[B]) and either party may be enjoined from disposing of his or her property pending adjustment of spousal support (Civ.R. 75[H]). Continuing order for periodic payments may be modified, if circumstances have changed for either party and separation agreement or decree specifically authorizes court to modify terms. (R.C. §3105.18).

Division of Property of Spouses.

Marital property shall be divided equally unless court determines inequitable at such time court will consider various factors as set forth in R.C. §3105.171(F). Each spouse retains separate property unless court makes written finding of fact otherwise. Court may also make distribution award in lieu of division of marital property to achieve equity. (R.C. §3105.171).

Restoration of Name.

When divorce is granted, court of common pleas shall, if person so desires, restore any name person had before marriage. (R.C. §3105.16).

Children.

Court may make an order for support and custody of children during pendency of action for divorce or legal separation. (Civ.R. 75[M]). It may make such order for disposition, care and maintenance of children as it deems just, and may grant shared parenting upon petition by both parents, or residential parent to either parent. It may order parties or children to submit to medical, psychological or psychiatric exam and if court finds with respect to any child under 18 that custody to neither parent is in best interests of child, court may commit child to relative or certify copy of its findings to juvenile court for further proceedings and juvenile court has exclusive jurisdiction. Grounds for modification of custody decree prescribed by statute. (R.C. §§3109.04-.05).

Court may order either or both parents to support or help support children. In determining amount reasonable or necessary for child support, including medical needs of child, court must comply with c. 3119. (R.C. §3109.05[A][1]). Court must include in support order requirement that one or both parents provide for health care needs of child to the satisfaction of court, and court must include in support order requirement that all support payments be made through Office of Child Support in Department of Job and Family Services. (R.C. §3109.05[A][2]).

Duty of support to child imposed pursuant to court child support order continues beyond child's eighteenth birthday only if: (1) child is mentally or physically disabled and incapable of supporting or maintaining himself or herself; (2) child's parents have agreed to continue support beyond child's eighteenth birthday pursuant to separation agreement incorporated into decree of divorce or dissolution; or (3) child continuously attends recognized and accredited high school on full-time basis on and after child's eighteenth birthday. (R.C. §3119.86[A][1]) Duty of support to child imposed pursuant to administrative child support order continues beyond child's eighteenth birthday only if child continuously attends recognized and accredited high school on full-time basis on and after child's eighteenth birthday. (R.C. §3119.86[A][2]).

Assignment of wages for the support of minor children must be made pursuant to court order. (R.C. §1321.32).

Administrator of bureau of unemployment services must deduct and withhold child support obligations from unemployment benefits distributed to persons obligated to pay such support. (R.C. §§3121.07, 4141.28).

Methods of ensuring collection of support and arrearages include withholding or deduction of income or assets of obligor, cash bond, and order to seek employment or participate in work activity. (R.C. §§3121.02, .03) On issuing or modifying support order, issuing any withholding or deduction notice described in R.C. §3121.03, or issuing order described in R.C. §3121.03(C) or (D), court or child support enforcement agency shall require that support payments be made to the Office of Child Support in Department of Job and Family Services as trustee for remittance to person entitled to receive payments. (R.C. §3121.44). Procedures of child support enforcement agency upon default of obligor under child support order are set forth in c. 3123.

Child support enforcement agency may, in providing for service of process of notice or order, contract with sheriff or private person or entity to accomplish objectives of support enforcement program. (R.C. §3125.141).

Remarriage.

There are no restrictions on remarriage of divorced persons.

Antenuptial Contract.

See topic 14.09 Husband and Wife.

14.07 DOMESTIC PARTNERS:

Marriage may only be entered into by one man and one woman. Marriage between persons of same sex void ab initio. Public acts or judicial proceedings of state extending statutory benefits of legal marriage to nonmarital relationships between persons of same sex or different sexes void ab initio. Marriage by persons of same sex in foreign jurisdiction not recognized. Public act, record, or judicial proceedings of any other state, country, or foreign jurisdiction extending specific benefits of legal marriage to nonmarital relationships between persons of same sex or different sexes not recognized. (R.C. §3101.01). See topic 14.11 Marriage, subhead Common Law Marriage.

14.07A GRANDPARENTS:

Parent, guardian, or custodian of child may create power of attorney granting grandparent of child with whom child resides authority over care, custody, and control of child. (R.C. §3109.52).

Power of attorney form must be identical in form and content to that provided in R.C. §3109.53 and must comply with R.C. §§3109.54-.80.

14.08 GUARDIAN AND WARD:

Probate court has exclusive jurisdiction to appoint and remove guardians, direct and control their conduct, and settle their accounts. (R.C. §2101.24). “Guardian” includes, but is not limited to limited guardian, interim guardian, emergency guardian, and agency under contract with department of developmental disabilities. “Conservator” means conservator appointed by court in order of conservatorship. (R.C. §2111.01).

Selection of Guardian.

Minor over 14 may select any suitable person as guardian. (R.C. §2111.12[A]). Surviving parent may appoint guardian of minor children by will. (R.C. §2111.12[B]). Guardian of estate named in parent's will has preference over guardian selected by minor, but court may use its own judgment as to guardian of person. (R.C. §2111.12[B]). Guardian may be nominated through durable power of attorney or through writing before two witnesses and notarized. (R.C.

§§1337.09, 2111.121).

Eligibility and Competency.

Unless expressly designated so to act, no administrator or executor of last will, prior to approval of his final account, may be appointed guardian of estate, or of person and estate of any ward interested in estate, except that surviving spouse may be administrator or executor of deceased consort and also guardian of person and estate or of estate only of minor child. But executor or administrator may be guardian of person only. (R.C. §2111.09). State department of developmental disabilities may be designated guardian, trustee, or protector for incompetent person. (R.C. §§2111.01; 5123.55-.59).

Guardian must be resident of county where appointed, except that court may appoint nonresident of county who is resident of Ohio as guardian of person, or of estate, or of both, and except that guardian named in parent's will or selected by minor over 14 or nominated through durable power of attorney or in appropriate writing may be nonresident of county or state. (R.C. §2109.21[C]).

Appointment of Guardian.

Court may appoint guardian of person, or estate, or both, of a minor or incompetent if ward is resident of county or if ward has legal settlement in county. If application for appointment of guardian or limited guardian is made by court's own motion or by interested party, court must conduct hearing on matter of appointment. Court may deny guardianship based upon finding that less restrictive alternative to guardianship exists. (R.C. §2111.02). Where main purpose of appointment of guardian is to administer funds awarded by veterans administration to ward, no court costs shall be charged in appointment proceeding or in proceedings made in pursuance of appointment, unless value of estate, including amount due under award exceeds $1,500. (R.C. §2111.02). Physicians may be appointed by court to examine alleged incompetent. (R.C. §2111.031).

Power to Nominate.

Person may nominate another to be appointed guardian of his person and/or estate, or guardian of the person and/or estate of one or more of the nominator's minor or incompetent adult children, and waive bond through writing witnessed by two persons and notarized or through durable power of attorney, and such nominated persons will be appointed in subsequent guardian proceedings. (R.C. §2111.121[A]).

Limited Guardian.

Court may appoint limited guardian with specific limited powers. (R.C. §2111.02[B][1]).

Interim Guardian.

If guardian appointed temporarily or permanently resigns, court may appoint ex parte interim guardian for period no longer than 15 days. (R.C. §2111.02[B][2]).

Emergency Guardian.

Court may appoint ex parte emergency guardian when minor or incompetent has not been placed under guardianship, emergency exists and immediate action is required to prevent significant injury to person or his estate, for maximum 72 hours. (R.C. §2111.02[B][3]).

Conservator.

Competent adult who is physically infirm may petition court to place his person, and/or his property, under conservatorship with court. Petitioner either may grant specific powers to conservator or may limit powers granted by law to conservator or court, but may not limit powers granted to court under R.C. §2111.021, nor requirements for bond. All sections governing guardianship shall apply to conservatorship except those limited by petitioner. (R.C. §2111.021).

Qualification.

Person applying for appointment as guardian must file statement showing condition of ward's estates and other pertinent facts. (R.C. §2111.03). He must give bond (1) unless otherwise provided by will, although court may still require one, or (2) unless court dispenses with bond in case local children services representative or agency in contract with state department of developmental disabilities serves as trustee for ward. (R.C. §§2109.04; 5123.59). If probable value of ward's estate is less than $10,000, court may waive or reduce bond. (R.C. §2109.04[A][4]).

Guardian of person only may be exempted from bond and account filing requirements. (R.C. §§2109.04[A][3]; 2109.30). Bond of guardian of estate must be double amount of personal estate and annual real estate rentals which will come into his hands. (R.C. §2109.04[A][1]).

Inventory.

Guardian of estate must file inventory within three months after appointment. (R.C. §2111.14[A]). Court may require that any inventory be supported by evidence that it is true and accurate. (R.C. §2111.141).

Powers and Duties.

Guardian of estate must pay and collect debts owing by and to ward. He may sue and defend in behalf of ward and, with court's approval, settle and adjust assets received in kind from executor or administrator (R.C. §2111.14). He may sell any personal property (R.C. §2111.20) and with approval of court may settle claims for injury to ward's person or property and when ward is entitled to maintain action for damages or any other relief based on any claim. (R.C. §2111.18). Procedure for approval of settlement of claims for injuries or wrongful death to minor controlled by rule. (Sup.R. 68).

Guardian of person must protect, control, maintain and educate ward, and may authorize medical or other professional care for ward, but no part of estate may be used for his support or education without approval of court. (R.C. §§2111.13; 2111.131).

Guardian of unwed ward must give informed consent to abortion. (R.C. §2919.12[B]).

Guardian's liability for breach of fiduciary duty as transferee of real or personal property is limited to actual knowledge of conduct of transferor that would constitute breach of transferor's fiduciary responsibilities, unless instrument governing him or her directs otherwise. (R.C. §5815.24).

Investments.

Guardian may make investments permitted for trust funds and, with approval of court, invest in productive real estate in Ohio, provided neither guardian nor any member of his family has any interest in such real estate. (R.C. §§2109.37-.371).

Securities in Name of Nominee.

See category 13 Estates and Trusts, topic 13.15 Trusts, subhead Securities in Name of Nominee.

Real Estate.

Guardian may lease ward's real estate for not exceeding three years without approval of court (R.C. §2111.25), and may also make leases for such periods and on such terms as court which appointed him approves (R.C. §2111.26). Proceedings to lease are same as in action to sell real estate. (R.C. §2111.29).

Guardian of estate may obtain authority to sell real estate by proceedings applicable to sales of real estate of decedents. See category 13 Estates and Trusts, topic 13.09 Executors and Administrators, subhead Sales.

Liabilities of Guardian.

Generally guardian or conservator not personally liable for debts of ward unless (1) agrees to be liable; (2) debt was for support and other legal relationship gives rise to duty to support; (3) guardian's or conservator's negligence gave rise to debt; (4) act beyond authority of guardian or conservator gave rise to debt. (R.C. §2111.151).

Accounts.

Required at least once every two years. Final account required within 30 days after completion of administration of estate. Account may be waived by court in certain circumstances specified in statute. (R.C. §2109.302).

Termination of Guardianship.

Guardian may be removed for failure to file inventory account and for drunkenness, neglect, incompetency, fraud, interest of estate or other cause. (R.C. §2109.24). Guardian other than one named in parent's will, selected by minor over 14, or nominated in writing, may be removed when no longer resident of county, and must be removed if no longer resident of state. (R.C. §2109.21[C]).

When ward moves from Ohio to another state, and guardian is there appointed, guardian in this state may be removed. (R.C. §2111.41). Marriage of ward terminates guardianship as to person, but not as to estate. (R.C. §2111.45).

Guardian may apply to probate court for termination of guardianship where whole estate of ward, or of several wards jointly under same guardianship, does not exceed $10,000 in value. (R.C. §2111.05).

Upon written request by ward, ward's attorney or interested party after 120 days from guardian's appointment, hearing shall be held concerning need for guardianship and burden of proving incompetence is on applicant or guardian, by clear and convincing evidence. (R.C. §2111.49[C]).

Insane Persons.

On own motion, or that of interested person, or court, court may appoint guardian for any incompetent. Hearing must be held and finding of incompetency made by clear and convincing evidence prior to appointment. (R.C. §2111.02[C]).

Unless guardian is agency under contract with department of developmental disabilities or as otherwise ordered, such guardian becomes guardian of ward's minor children. (R.C. §2111.02[A]). Application must set forth: (1) Name, age and residence of subject, (2) facts justifying guardianship, and (3) names, ages, relationship, and addresses of next of kin. (R.C. §2111.03). Service of notice of hearing must be made on subject and next of kin residing in state of appointment. (R.C. §2111.04). At time of service of notice upon alleged incompetent, court shall appoint investigator to investigate circumstances of alleged incompetent, and to communicate to alleged incompetent his rights. (R.C. §2111.041).

Foreign guardian of foreign ward may receive property of ward from person in Ohio. (R.C. §2111.42). He may bring actions and collect judgments as though appointed in this state, on giving security for costs (R.C. §2111.43), and may make application to sell real estate in Ohio (R.C. §§2111.44, 2127.42).

Gifts to Minors.

Ohio Transfers to Minors Act. (R.C. §§5814.01 - 5814.09). See topic 14.10 Infants.

Uniform Fiduciaries Act.

See category 13 Estates and Trusts, topic 13.15 Trusts.

Uniform Simplification of Fiduciary Security Transfers Act not adopted.

14.09 HUSBAND AND WIFE:

Husband and wife cannot alter their legal relationship, except that they may agree to separation, providing in agreement for support of either and their children during separation. (R.C. §3103.06). Neither is answerable for acts of the other. (R.C. §3103.08).

Disabilities of Married Woman.

Disabilities are removed. (R.C. §3103.05).

Separate Property.

Neither husband nor wife has any interest in property of other, except right of support, dower, and to remain in mansion house after death of either. (R.C. §3103.04). Hence, either spouse may take, hold or dispose of his or her separate property (R.C. §3103.07) without joinder of other, though joinder is necessary to bar dower rights in real property.

Contracts.

Each may enter into any engagement or transaction with the other or with any other person which either might if unmarried, subject in transactions between themselves to general rules which control actions of persons occupying confidential relations with each other. (R.C. §3103.05).

Antenuptial Contracts.

Must be in writing to be enforceable. (R.C. §1335.05). Valid and enforceable: (1) If entered into freely without fraud, duress, coercion, or overreaching; (2) if there was full disclosure; (3) if terms do not promote or encourage divorce or profiteering by divorce. (11 O.S.3d 99, 464 N.E.2d 500). Also, in judicial review of antenuptial agreement at subsequent separation or divorce proceedings, provisions for maintenance or sustenance spousal support must meet test of conscionability at time of divorce or separation. (11 O.S.3d 99, 464 N.E.2d 500). Antenuptial agreement to which decedent was party is valid unless action to set it aside is commenced within four months after appointment of estate representative, or unless it is otherwise attacked within such period. (R.C. §2106.22). Antenuptial agreement will not be set aside unless provision for surviving spouse is wholly disproportionate to amount he or she would receive under statute and spouse was misled as to property. (69 O.S.2d 234, 431 N.E.2d 667).

Actions.

Married woman may sue and be sued as if she were unmarried, and her husband need be joined with her only when action is in favor of or against both (R.C. §2307.09), and her property is liable for any judgment obtained against her, with benefit of all exemptions provided by

Statute (R.C. §§2323.09, 2329.66). Marriage of female does not abate an action, and if husband is necessary party, he may be joined therein. (Civ.R. 19, 19.1, 20, 25[c]). Husband and wife may sue each other (30 O.App. 298, 163 N.E. 507), probably even tort (158 O.S. 107, 107 N.E.2d 337).

Agency.

Either spouse may act as agent or attorney in fact for the other. (102 O.S. 105, 130 N.E. 505).

Conveyances or Encumbrance of Property.

Married persons execute conveyances in same manner as if single (R.C. §5301.04), but deed should also be executed by spouse with words of grant or release to bar dower (R.C. §§5302.05, .07, .11).

Desertion and Nonsupport.

Married persons are primarily responsible for support of family including children over 18 years of age attending high school and other children provided for by court-issued child support order. Where spouse fails to support other spouse or minor child, any other person acting in good faith may provide necessaries and recover their value from other spouse or parent. If decedent has purchased irrevocable pre-need funeral contract, deceased spouse's duty of support does not include funeral expenses, unless assumed by contract. (R.C. §3103.03).

Revised Uniform Reciprocal Enforcement of Support Act adopted (c. 3115). Enforcement is through action in any court of record. (R.C. §3115.08). Department of Job and Family Services is state information agency. (R.C. §3115.21).

Community property system does not apply.

14.10 INFANTS:

All persons attain majority at age 18 (R.C. §3109.01), except with respect to beer or intoxicating beverages where age is 21 (R.C. §4301.63).

Emancipation.

Minor may apply to probate court for finding of emancipation and authority for direct settlement of personal injury or property damage claim. Release given after such a finding includes any claims of parents or guardian. (R.C. §2111.181).

Employment of infants is restricted. (See category 11 Employment, topic 11.02 Labor Relations.)

Contracts of infant, except those authorized by law or entered into in performance of legal duty or for purchase of necessities, are voidable at election of infant and may be disaffirmed by him at any time before or within reasonable time after reaching his majority. (119 O.S. 575, 165 N.E. 93). Minor who is eligible for loan under Serviceman's Readjustment Act of 1944 or Veteran Readjustment Assistance Act of 1952, and spouse of such minor whether or not a minor, is authorized, in his or her own name and without order of court or intervention of guardian or trustee, to execute any instruments, to take title to real property, or to borrow money thereon and to do all other acts necessary to make fully available to such person, his or her family or dependents, all rights and benefits under Act, as if such minor husband or wife had attained age of 18 years. (R.C. §3109.02).

Ratification of Contract.

After reaching majority, infant may ratify contracts entered into during infancy; such ratification need not be in writing.

Actions.

Where minor has a representative, representative may sue or defend on behalf of minor. Otherwise he may sue by next friend or defend by guardian ad litem; if minor is not otherwise represented court must appoint guardian ad litem. (Civ.R. 17). Parties to actions for divorce, annulment or alimony who are 18 or older may sue or defend in own name.

Parental Responsibility.

If child is found delinquent and placed on probation, and if court finds parent having custody failed or neglected to subject child to reasonable parental control and authority and such failure is proximate cause of acts of child, court may require such parent to post bond of not more than $500, conditioned on faithful discharge of probation. Upon commission of second act or violation of probation, bond may be forfeited. If child is adjudicated delinquent child, court may issue order requiring parent, guardian or custodian to exercise appropriate controls over child to ensure child complies with probation. Willful failure to comply with order is contempt of court. (R.C. §2152.61). Owner of property willfully destroyed by minor under 18 may recover up to $10,000 compensatory damages and costs of suits, or person willfully and maliciously assaulted by minor under 18 may recover up to $10,000 compensatory damages and costs of suit, from parents having custody and control of such minor. No prior finding of delinquency of minor is required. (R.C. §§3109.09, .10). Person who suffers injury or loss to person or property as result of minor under 18 committing vandalism, desecration or ethnic intimidation in violation of R.C. §§2909.05, 2927.11, or 2927.12 may recover up to $5,000 in compensatory damages and costs of suit from parents having custody and control of such minor. (R.C. §§3109.09, 2307.70).

Adoption.

See topic 14.01 Adoption.

Uniform Child Custody Jurisdiction and Enforcement Act adopted. (R.C. §§3127.01 - 3127.53).

Uniform Transfers to Minors Act adopted. (R.C. §§5814.01 - 5814.09). Adds life or endowment insurance policies, annuity contracts, benefit plans, real estate, tangible property, proceeds of life or endowment insurance policy, annuity contracts or benefit plans, and intangible personal and other types of property to subject matter. Act also applies to transfers, defined as dispositions other than by gift. (R.C. §5814.01). Liability of financial institution to minor is specially limited. (R.C. §5814.06). Age of majority for purposes of act is 21. Custodian must deliver custodial property to minor at age 21 unless written instrument associated with transfer to custodian provides for payment between ages of 18 and 21. (R.C. §5814.04[D]). Makes provisions for appointment of successor custodian. (R.C. §5814.07).

14.11 MARRIAGE:

Males may marry at age of 18 and females at age of 16. Marriage may only be entered into by one man and one woman. (R.C. §3101.01).

Consent Required.

In order to marry, a person under the age of 18 must have the consent of parents, guardian or institution or person awarded permanent custody. However, where one parent resides in a foreign country, has neglected or abandoned such minor for a period of one year or longer immediately preceding minor's application for a license, has been adjudged incompetent, is an inmate of a state mental or penal institution, has been permanently deprived of custody of such minor by a court exercising juvenile jurisdiction or has been deprived of the custody or control or both of such minor by the appointment of a guardian of the person of the minor by any court of competent jurisdiction, minor is not required to obtain consent of such parent. (R.C. §3101.01[A], [B]).

Any consent required under R.C. §3101.01 must be personally given before the judge or a deputy clerk, or certified under the hand of the person consenting by two witnesses, one of whom must appear before the judge and make oath that he saw the person, whose name is annexed to the certificate, subscribe, or heard him acknowledge it. (R.C. §3101.02).

Where minor has no parent, guardian or custodian whose consent is required, judge of juvenile court where female resides may give consent in probate court on application by minor. Juvenile court may also give consent on behalf of minor female who is pregnant, or where illegitimate child has been born, but consent of parents of minor is required. (Juv.R. 42).

Same sex marriage against strong public policy of state and has no legal force or effect. If attempted, is void and shall not be recognized. (R.C. §3101.01[C]).

Extension or recognition by state of benefits of legal marriage to nonmarital relationships between persons of same or different sexes against strong public policy of state. (R.C. §3101.01[C]).

Any public act, record or judicial proceeding outside this state that extends benefits of legal marriage to nonmarital relationships shall have no legal force or effect and shall not be recognized. (R.C. §3101.01[C]).

Medical Examination.

None required.

License is required. Both applicants must appear personally, unless excused by reason of illness, in probate court in county where either resides, or if neither is Ohio resident, where marriage is to be performed. Each must state under oath his or her name, age, residence, place of birth, occupation, father's name, mother's maiden name and name of person expected to solemnize marriage if previously married, names of parties to any such marriage, any minor children and, if divorced, jurisdiction date and case number of decree. Where applicant is under 18 years of age, applicants must state they have had marriage counseling. Immediately on receipt of application for license court must place parties' record in book kept for that purpose and, if satisfied that there is no legal impediment thereto and one or both parties are present, probate judge shall grant such license. (R.C. §3101.05).

Marriage license is effective and authorizes the performance of a marriage ceremony only within 60 days after it is issued. (R.C. §3101.07).

No license can be granted if either applicant is under influence of intoxicating liquor or controlled substance, or is infected with communicable syphilis. (R.C. §3101.06).

Waiting Period.

None.

Ceremonial Marriage.

Marriage may be solemnized by ordained minister of any religious society or congregation within state who has license from Secretary of State (R.C. §3101.10), by any county court judge in accordance with R.C. §1907.18, municipal court judge, in accordance with R.C. §1901.14, probate judge in accordance with R.C. §2101.27, mayor of municipal corporation in any county in which such municipal corporation wholly or partly lies, superintendent of state school for deaf, or any religious society in conformity with rules and regulations of its church. (R.C. §3101.08).

Marriage Certificate.

A certificate of every marriage solemnized must be transmitted to the probate judge in the county where the license was issued within 30 days after solemnization. (R.C. §3101.13). Person who is not party to marriage, in circumstance that both parties to marriage are deceased, to file correction application to probate court of county in which marriage certificate was filed. (R.C. §3101.15).

Record.

Certificates of marriage filed with the probate judge must be consecutively numbered and recorded in the order in which they are received. (R.C. §3101.13). See category 10 Documents and Records, topic 10.04 Records, subhead Vital Statistics.

Common Law Marriage.

After Oct. 10, 1991, common law marriages are prohibited, but common law marriages that occurred prior to that time in Ohio remain valid. Also, common law marriages that are valid in state where they came into existence, remain valid, until terminated by death, divorce, dissolution of marriage, annulment or other judicial determination. (R.C. §3105.12[B]). See topic 14.07 Domestic Partners.

Prohibited Marriages.

Persons nearer of kin than second cousins may not intermarry. (R.C. §3101.01[A]).

Foreign marriages will be recognized in Ohio if valid where performed and not expressly prohibited by the laws of Ohio. (168 Ohio St. 357, 155 N.E.2d 206).

Annulment.

Marriage may be annulled for following causes existing at time of marriage: (1) Petitioner was under age, unless such party cohabited with other after attaining legal age; (2) former spouse was living and such former marriage was and continues in force; (3) either party has been adjudicated mentally incompetent, unless such party cohabited with other after competency restored; (4) consent of either party was obtained by fraud, unless such party with knowledge of facts cohabited with other; (5) consent of either party was obtained by force, unless afterwards such party cohabited with other; or (6) marriage was never consummated. (R.C. §3105.31). Plaintiff must have resided in state for six months. Venue determined by Civ.R. 3. (R.C. §3105.03).

Antenuptial Contracts.

See topic 14.09 Husband and Wife.

14.12 MARRIED WOMEN:

See topics 14.09 Husband and Wife, Marriage; categories 5 Civil Actions and Procedure, topic Evidence, subhead Witnesses; Debtor and Creditor, topic Homesteads; Documents and Records, topic Acknowledgments; Estates and Trusts, topic Executors and Administrators; Property, topic Dower.

15 HEALTH

15.01 ABORTIONS:

Informed Consent.

Performance or inducement of abortion without informed consent of pregnant woman prohibited. (R.C. §2919.12[A]). Regulation of form and content of consent and liability of noncomplying physician and employer in R.C. §2317.56.

Facilities must display signs stating that consent must be voluntary and without coercion. (R.C. 3701.791)

Minors.

Knowing performance or inducement of abortion upon pregnant, unmarried, unemancipated woman under 18 prohibited unless at least one special enumerated circumstance applies. (R.C. §2919.12[B][1]).

Parental Notification.

Woman who is pregnant, unmarried, under 18, and unemancipated may file complaint in certain juvenile courts requesting issuance of order authorizing her to consent to performance or inducement of abortion without notification of parents, guardian, or custodian. (R.C. §2151.85).

Partial Birth Feticide.

Civil liability recognized. (R.C. §2307.53).

State funds cannot be expended for policy, contract or plan providing coverage, benefits, or services related to non-therapeutic abortion. (R.C. §124.85).

Viability.

Abortion of unborn human being after viability prohibited unless physician determined same is necessary to prevent death of pregnant woman or serious risk of substantial and irreversible impairment of major bodily function. (R.C. §2919.17[A]). Civil liability for terminating or attempting to terminate pregnancy after viability is recognized. (R.C. §2307.52).

15.02 ADMINISTRATION:

Department of Health consists of Director of Health and Public Health Council. (R.C. §3701.02).

15.03 DISEASES:

AIDS.

Persons designated by Public Health Council must promptly report cases of AIDS, AIDS-related conditions, and confirmed positive HIV test to Department of Health. (R.C. §3701.24[B]).

Occupational Diseases.

See category 11 Employment, topic 11.03 Workers' Compensation Law.

15.04 DURABLE POWER OF ATTORNEY:

General.

Can be created only in writing and with words “This power of attorney shall not be affected by disability of the principal or lapse of time” or words of similar import, or when principal expressly states that power of attorney shall become effective at later time or upon occurrence of specified event including disability, incapacity, or adjudged incompetency of principal. (R.C. §1337.09).

Health Care.

Can be created under R.C. §1337.12.

15.05 FOOD, DRUGS, DEVICES AND COSMETICS:

Regulated generally by Pure Food and Drug Law. (c. 3715). Specific standards adopted for bread and flour (R.C. §§911.31 - 911.99), meat (R.C. §§918.01 - 918.15), horse meat (c. 919), poultry (R.C. §§918.21 - 918.31), soft drinks (R.C. §§913.22 - 913.28) and dairy products (c. 917).

Uniform Controlled Substances Act (1970) adopted, with variances. (c. 3719). See also category 6 Courts and Legislature, topic 6.04 Statutes, subhead Uniform Acts. Dangerous drugs regulated (R.C. §§4729.51 - 4729.70), as are dietary supplements (R.C. §§3715.80 - 3715.86).

15.06 FRAUD AND ABUSE:

Director of Health or designee may enter, examine, and survey all grounds, vehicles, and buildings in furtherance of statutory duties set forth in R.C. §3701.04 or where director has reason to believe violation of any health law or rule exists. (R.C. §3701.06).

15.07 HEALTH INSURANCE BENEFITS:

Regulated by Health Insuring Corporation Law. (c. 1751).

Supervision.

Superintendent of Insurance must examine health insuring corporation concerning fulfillment of contractual obligations and compliance with applicable law. (R.C. §§1751.34; 3901.07). Director of Health must examine health insuring corporation concerning adequacy of health services. (R.C. §1751.34).

Rates.

Regulated as to contractual periodic prepayment and non-group and conversion premium rates. (R.C. §1751.12[A]).

Investments.

Health insuring corporation funds must be invested in securities or other permissible assets. (R.C. §§1751.25, .26; R.C. 3925.08).

Complaint procedures concerning any matter relating to services provided by health insuring corporations are regulated. (R.C. §1751.19). Complaints regarding health insuring corporation's decision to deny, reduce, or terminate coverage for health care services are subject to R.C. §1751.83.

Utilization review by health insuring corporations of clinical necessity, appropriateness, efficacy, or efficiency of health care services is regulated. (R.C. §§1751.77 - 1751.89).

Quality assurance programs must be prepared by health insuring corporations providing basic health care services. (R.C. §§1751.73 - 1751.75).

Payment of claims by health insuring corporations regulated. (R.C. §§3901.38-

3901.501).

Solicitation documents sent by health insuring corporations are regulated. (R.C. §1751.31).

Coverage.

Regulated as to children (R.C. §1751.61), mammography and cytologic screening (R.C. §1751.62), exclusive of digitization or computer-aided detection (R.C. §1751.62[A][2]), maternity benefits (R.C. §1751.67), prescription drugs (R.C. §1751.66), effect of workers' compensation election (R.C. §1751.55), effect of supplemental sickness or accident policy (R.C. §1751.56), and required renewal of policies (R.C. §1751.57). Continuing coverage of dependent adult children (R.C. §1751.14), reservists called to active duty (R.C. §1751.54), and terminated employees (R.C. §1751.53) regulated.

Discrimination based on race, color, sex, age, religion, military status, status as recipient of medicare or medicaid, health status, medical condition, claims experience, receipt of health care, medical history, genetic information, evidence of insurability, or disability is prohibited as to enrollment, disenrollment, or quality of health services rendered. (R.C. §1751.18).

Unfair or deceptive acts by health insuring corporations are prohibited. (R.C. §1751.20).

Open enrollment for health insuring corporations is regulated. (R.C. §1751.15).

Right to Cancel.

Enrollees may cancel within 72 hours of signing agreement or offer to enroll. (R.C. §1751.31[F]). Health insuring corporations may cancel if enrollee commits fraud or intentionally misrepresents material fact, and cancellation is not based on health status, medical condition, claims experience, receipt of health care, medical history, genetic information, evidence of insurability, or disability. (R.C. §1751.18[B]).

Evidence of Coverage.

Every health insuring corporation subscriber is entitled to evidence of coverage. (R.C. §1751.11[A]). Evidence of coverage must not be inequitable, untrue, misleading, or deceptive, and must contain certain information. (R.C. §1751.11[C]-[E]).

Required Information.

Each health insuring corporation must provide subscribers description of itself, its method of operation, its service area, its most recent provider list, its complaint procedure, and its utilization review procedure. (R.C. §1751.33).

Conversion of Policies.

Regulated as to conversion from group to individual policy (R.C. §1751.16) and from non-group to direct payment policy (R.C. §1751.17).

Privacy of Records.

Information obtained by health insuring corporation concerning diagnosis, treatment, or health of enrollee or applicant must be held in confidence and may not be disclosed, except in limited circumstances. (R.C. §1751.52). Medical information releases must clearly explain what information may be disclosed. (R.C. §1751.521).

Genetic Screening or Testing.

Health insuring corporations must not, in processing application for coverage or determining insurability, require individuals to submit to, consider results of, inquire as to results of, or make any adverse decision because of genetic screening or testing. (R.C. §1751.64[B]). No questions concerning genetic screening or testing may be asked when developing medical histories of applicants for coverage. (R.C. §1751.64[C]). Coverage must not be canceled or refused because of genetic screening or testing. (R.C. §1751.64[D]). Benefits must not be limited because of genetic screening or testing. (R.C. §1751.64[E]).

Long-Term Care Insurance.

Regulated by Long-Term Care Insurance Act. (R.C. §§3923.41 - 3923.51).

15.08 LICENSURE AND CERTIFICATION:

Health Care Facilities.

Standards adopted for maternity boardinghouses (c. 3711), hospice care (c. 3712), nursing homes and residential care facilities (c. 3721), adult care facilities (c. 3722), community alternative homes (c. 3724), and hospitals (c. 3727). Certificate of need program enacted. (R.C. §§3702.51 - 3702.68).

Managed Care Organizations.

Department of Job and Family Services may enter into contracts with managed care organizations to provide health care services to medical assistance recipients under care management system established under R.C. §5111.16. (R.C. §5111.17). Department shall appoint temporary manager for managed care organization under contract with department if organization has repeatedly failed to meet substantive requirements specified under certain federal laws and may impose other sanctions. (R.C. §5111.173).

Professionals.

Regulations relating to following health care professionals have been adopted: dentists and dental hygienists (c. 4715), embalmers and funeral directors (c. 4717), nurses (c. 4723), optometrists and dispensing opticians (c. 4725), pharmacists (c. 4729), physician assistants (c. 4730), physicians (c. 4731), psychologists (c. 4732), chiropractors (c. 4734), occupational therapists, physical therapists and athletic trainers (c. 4755), counselors, social workers, marriage and family therapists (c. 4757), chemical dependency professionals (c. 4758), dietitians (c. 4759), anesthesiologist assistants (c. 4760), respiratory care (c. 4761), acupuncturists (c. 4762), radiation technicians (c. 4773), occupational safety or industrial hygienists (c. 4777), and orthotists, prosthetists and pedorthists (c. 4779).

15.09 LIVING WILLS:

Declarant may authorize use or continuation, withholding or withdrawal, of life-sustaining treatment when declarant is in terminal condition, permanently unconscious state, or either, may authorize withholding or withdrawal of nutrition or hydration when in permanently unconscious state, and may designate one or more persons who are to be notified by declarant's attending physician when life-sustaining treatment would be withheld or withdrawn under declaration. (R.C. §2133.07).

15.10 ORGAN DONATIONS:

Declarant may make anatomical gift of all or part of declarant's body by specifying intent in writing. (R.C. §2133.16[B]).

15.10A PATIENTS' BILL OF RIGHTS:

Enacted for adult care facilities (R.C. §3722.12), with respect to hospitalization of mentally ill (R.C. §5122.29). Informed consent requirements for surgical and medical procedures are enacted in R.C. §2317.54. Patients treated under auspices of Department of Alcohol and Drug Addiction Services retain civil rights and liberties. (R.C. §3793.14). Patients, their personal representative, or other authorized person may request access to patient's medical records. (R.C. §3701.74).

15.11 [RESERVED]

15.12 PUBLIC HEALTH:

Various public health programs are administered by Department of Job and Family Services, Department of Mental Health, Department of Rehabilitation and Correction, and Department of Mental Retardation and Developmental Disabilities under Tit. 51 (Public Welfare) of Ohio Revised Code.

15.13 SMOKING REGULATIONS:

Smoking by Children.

Children cannot smoke unless accompanied by parent or guardian or participating in research protocol. (R.C. §2151.87). Smoking by pupils in school districts prohibited. (R.C. §3313.751).

Smoking in Public Places.

Smoking prohibited in designated no smoking areas. (R.C. §3791.031). Health care facilities may not designate more than half their rooms as smoking areas. (R.C. §3791.031[B]).

Smoking in Other Places.

Smoking prohibited in underground coal (or other gaseous) mines (R.C. §1567.65), asbestos hazard abatement work areas (R.C. §3710.08[C][4]), and at self-service gas stations (by operator of pump) (R.C. §3741.14[B][1]). Smoking restricted in nongaseous underground mines and area surrounding mine surface structures (R.C. §1567.65), in fireworks manufacturing plants (R.C. §§3743.06[C], .60[I]), in child day-care centers (R.C. §5104.015), and on fireworks wholesaler's premises (R.C. §§3743.19[D], .61[I]).

Cigarettes are subject to tax. (c. 5743).

Distribution.

No manufacturer, wholesaler, or retailer may distribute tobacco products to any person under 18. (R.C. §2927.02[B][1]). No person may distribute pack containing less than 20 cigarettes. (R.C. §2927.02[B][4]). Tobacco products must not be distributed in any place without conspicuous sign stating that distribution of tobacco products to persons under 18 is illegal. (R.C. §2927.02[B][2]). Distribution of tobacco products from vending machines prohibited, unless either facility where machine located is not open to general public and persons under 18 are generally not permitted access, or person owning machine can observe machine purchases at all times. (R.C. §2927.02[C]).

16 INSURANCE

16.01 INSURANCE COMPANIES:

Regulated by Title 39, Rev. Code. Unclaimed benefits and dividends: see category 21 Property, topic 21.01 Absentees, subhead Escheat.

Supervision by Superintendent of Insurance as chief executive officer and director of Department of Insurance, 50 W. Town Street, Third Floor, Suite 300, Columbus, Ohio 43215. Telephone: (614) 644-2658. Website: http://www.ohioinsurance.gov/. (R.C. §3901.011). Title guaranty and trust company whose business function is issuance of title insurance is supervised by Superintendent of Insurance. All insurers authorized to transact business in Ohio must file with National Association of Insurance Commissioners annually. (R.C. §3901.42).

Rates.

Regulated as to fire, marine and title insurers, except mutual protective associations and insurance of inland marine risks customarily not written according to manual rates (c. 3935); casualty and motor vehicle insurance (c. 3937); and credit life and credit accident and health insurance (c. 3918).

Annual statements for both domestic and foreign insurance companies must be filed with Superintendent of Insurance on Jan. 1 of each year or within 60 days thereafter (R.C. §§3907.19, 3909.10, 3919.16, 3929.30), except that mutual protective insurance associations must file annual statements within 60 days after Jan. 1 of each year (R.C. §3939.09).

Minimum Capital and Surplus.

Regulated as to initial certification and renewal. (R.C. §3929.011). Minimum reserves regulated. (R.C. §3929.012).

Policies.

Policy terms are regulated in following cases: life insurance (R.C. §§3915.05, 3915.12), credit life insurance and credit accident and health insurance (R.C. §3918.03), automobile insurance (R.C. §3937.31), casualty insurance (R.C. §3937.01), rental of aircraft (R.C. §4561.25), and title insurance (R.C. §3953.28).

Limits on Liability.

Regulated as to property, casualty and reinsurance. (R.C. §3929.02).

Discrimination based on race is prohibited in issuance of life insurance policies (R.C. §§3911.16, .17) and on any basis as between members of same insured class in issuance of life (R.C. §3911.18) and sickness and accident (R.C. §3923.15) policies. Knowing use of underwriting standards or rates that unfairly discriminate against handicapped persons is unlawful. (R.C. §3999.16).

It is unfair and deceptive act in business of insurance to: Refuse to issue or renew or to cancel any policy on basis of sex or marital status of insured, prospective insured, policyholder or applicant (R.C. §3901.21[L]); to unfairly discriminate between individuals of same class and hazard in rates, benefits or eligibility requirements on any policy of insurance other than life insurance (R.C. §3901.21[M]); to refuse to make available disability income insurance solely because applicant's principal occupation is that of managing household (R.C. §3901.21[N]); to refuse after reasonable waiting period with respect to individual accident and sickness insurance policy issued to individual not “federally eligible individual” as defined in 45 C.F.R. 148.103 or non-related group sickness and accident insurance policy, and not to exceed 270 days, to make maternity benefits available to policyholder for individual(s) to be covered where insurer makes such benefits available under similar individual or group sickness and accident insurance policy (R.C. §3901.21[O]); or to charge different premium rates, on private passenger automobile insurance to persons residing in municipality based solely on location of residence of insured within those limits or to use “pattern settlement” as basis of offer or settlement (R.C. §3901.21[P]); or to refuse to issue or renew policy or to limit benefits solely because of blindness or partial blindness (R.C. §3901.21[Q]); or to market insurance product, other than insurance required by law, in making student loan guaranteed by state or federal government (R.C. §3901.21[R]); or to deny health insurance coverage to natural or adopted child of named insured or subscriber solely on basis that child does not reside in household of named insured or subscriber (R.C. §3901.21[S]); or due solely to actual or expected health condition, to terminate or fail to renew health policy of “small employer” or exclude or cause exclusion of individual from coverage under existing employer-provided health insurance except as to “late enrollee” (R.C. §3901.21[T]); or negligently or willfully to place coverage for adverse risks with certain carrier (R.C. §3901.21[U]); or by various means to cause placement of coverage for adverse risks with another carrier (R.C. §3901.21[V]); or to fail to comply with provision of Revised Code by engaging in any unfair, discriminatory reimbursement practice (R.C. §3901.21[W]); or to establish intentionally unfair premium for insurance policy financed under premium finance agreement of insurance premium finance company (R.C. §3901.21[X]); or to limit, refuse to issue, cancel or refuse to renew policy of life insurance or health insurance for reason that insured or applicant is or has been victim of domestic violence (R.C. §3901.21[Y]).

Rebates are generally prohibited (R.C. §§3933.01-.99) and specifically prohibited with respect to life policies (R.C. §3911.20).

Immunity.

In absence of fraud or bad faith, no person is subject to liability by virtue of filing reports providing information relative to suspected fraudulent acts. (R.C. §3999.31).

Liens.

Assignment of life insurance policy by insured and named beneficiary creates lien in favor of assignee. (127 O.S. 531, 191 N.E. 782).

Agents and Brokers.

NAIC Producer Licensing Model Act, adopted. (R.C. §§3905.01 - 3905.12). Agent must secure license for line of authority to sell insurance in state. (R.C. §3905.02). Exceptions to license requirement at R.C. §3905.03. Resident individual applying for insurance agent license must take written examination (R.C. §3905.04) and is subject to continuing educational requirements (R.C. §3905.481).

The Ohio Insurance Producers Licensing Act specifically grants reciprocity to nonresident insurance agent applicants (R.C. §3905.08[A]) if (i) individual or entity is currently licensed as resident in good standing in his or her home state; (ii) individual or entity has submitted proper request for licensure and has paid required fees; (iii) individual or entity has submitted or transmitted to state insurance regulators application for licensure that individual or entity submitted to his or her home state, or in lieu thereof, completed Uniform Application; (iv) applicant has not committed any act that is ground for denial, suspension or revocation of license under R.C. §3905.14; (v) applicant is of good reputation and character; and (vi) individual or entity's home state awards nonresident producer licenses to residents of granting state on same basis. (R.C. §3905.07).

Applicant for surplus line broker license must have both property and casualty license. (R.C. §3905.30). Surplus line broker license must be renewed annually. (R.C. §3905.30).

Process Agent.

Foreign insurance companies authorize any agent of company in Ohio to accept service of process. (R.C. §§3909.05, 3919.21, 3927.03). Life insurance companies must appoint agent for service in each county in which they establish an agency. (R.C. §§3909.09, 3909.15).

Investments.

Regulated by R.C. §§3907.14; 3925.05, .08.

Insurance holding company systems authorized. (R.C. §§3901.32 - 3901.37).

Foreign insurance companies must secure certificate of authority from Superintendent of Insurance before transacting business in Ohio. (R.C. §§3909.01, 3919.21, .22, 3927.01). Such companies must have actual capital equal to that required of domestic companies, and all must be paid up and invested as required by laws of state where organized. (R.C. §§3909.02, 3927.02). Foreign mutual protection companies or associations must be 105% solvent. (R.C. §3919.10). Ocean marine reinsurance may be placed with companies not qualified to do business in state. (R.C. §3931.12).

Deposit.

Before doing business such companies must deposit $100,000 ($50,000 in some cases [§3929.01]) in securities with Superintendent or with financial officer of state where organized designated to receive them (R.C. §§3909.03, 3927.06), and must also file with superintendent copy of charter and statement showing name, place located, capital and detailed statement showing condition of company's affairs (R.C. §§3909.04, 3919.21, 3927.04). Such companies must file annual detailed statements as to their condition in manner and form adopted by superintendent pursuant to R.C. §3901.77. (R.C. §§3909.06, 3909.10; 3919.25, 3919.38; 3927.08).

Effect of Unauthorized Transactions.

Any transaction of insurance business within Ohio by company not authorized to transact business herein constitutes appointment of Superintendent of Insurance as agent for service of any notice, order or process in proceeding arising out of insurance contract thus secured or for recovery of penalty. (R.C. §3901.26). Before such company may plead in action against it, it must file judgment bond or procure certificate of authority to transact business in this state. (R.C. §3901.18).

Retaliatory Laws.

When any state or nation imposes taxes, fees, penalties, obligations or prohibitions on Ohio insurance companies or their agents, including requirements on agents for counter signatures and fees or commissions, exceeding those imposed on foreign insurance companies in Ohio, same requirements are imposed on companies of such state or nation doing business in Ohio and on their agents. (R.C. §§3901.86, 5729.06).

Premium Tax.

See subhead Privilege Tax, infra.

Privilege Tax.

Annual franchise tax on privilege of being insurance company is levied on each domestic insurance company. (R.C. §5725.18). In month of May, annually, Treasurer of State charges each domestic insurance company franchise tax computed in accordance with following as applicable: (1) with respect to domestic insurance company that is health insuring corporation, 1% of all premium rate payments received, exclusive of payments received under Medicare Program or pursuant to Medical Assistance Program, as reflected in its Annual Report for preceding calendar year; and (2) with respect to domestic insurance company not health insuring corporation, 1.4% of gross amount of premiums received from policies covering risks within this

State exclusive of premiums received under Medicare Program established under Title XVIII of "Social Security Act," 49 Stat. 620 (1935), 42 U.S.C. 301, as amended, or pursuant to Medical Assistance Program established under c. 5111. of Revised Code, as reflected in annual statement for preceding calendar year, and, if company operates health insuring corporation as line of business, 1% of all premium rate payments received from that line of business, exclusive of payments received under Medicare Program established under Title XVIII of "Social Security Act," 49 Stat. 620 (1935), 42 U.S.C. 301, as amended, or pursuant to Medical Assistance Program established under c. 5111. of Revised Code, as reflected in annual statement for preceding calendar year.

Gross amount of premium rate payments or premiums used to compute applicable tax is subject to deductions prescribed by R.C. §5729.03 of Revised Code for foreign insurance companies. Objects of such tax are those declared in R.C. §5725.24 of Revised Code, to which only such tax shall be applied. Such tax shall not be less than $250.

Annual franchise tax on privilege of being insurance company. (R.C. §5725.18). In month of May, annually, Treasurer of State charges each domestic insurance company, that is not health insurer, franchise tax of 1.4% of premiums received from policies covering risks in state. Health insurance corporations have tax of 1% of premium rate payments. Gross amount of payments and premiums are subject to deductions prescribed by R.C. §5729.03 for foreign insurance companies. Minimum tax of $250.

Annual franchise tax on foreign companies is governed by R.C. §5729.03. Fire insurance companies doing business in Ohio pay annual additional tax of .75% of gross premiums. (R.C. §3737.71).

Direct Actions Against Insurer.

See subhead Process Agent, supra, this topic, and category Transportation, topic Motor Vehicles, subhead Direct Actions.

Insurers Supervision, Rehabilitation, and Liquidation Model Act adopted. (R.C. §§3903.01 - 3903.59).

Plain Language.

Required by statute for certain insurance policies. (R.C. §§3902.01 - 3902.08; 3915.05).

16.02 SURETY AND GUARANTY COMPANIES:

Rights and Powers.

Companies may transact enumerated types of insurance including fidelity, surety, title to real estate and other liability insurance. (R.C. §§3929.01, 1735.01). Surety company may be sole surety in some cases. (R.C. §3929.14). Security deposits for benefit of policyholders of domestic companies are specified in R.C. §§1735.03, 3929.01, .07, .10.

Foreign Companies.

See topic 16.01 Insurance Companies, subhead Foreign Insurance Companies. Security deposits for benefit of policyholders specified in R.C. 3929.01, .07 and .11.

Taxation.

See topic 16.01 Insurance Companies, subhead Privilege Tax.

17 INTELLECTUAL PROPERTY

17.00A DISCOVERIES AND INVENTIONS:

State Colleges and Universities.

All rights to and interests in discoveries or inventions, including patents thereon, resulting from research or investigation conducted in connection with facilities of any state college or university shall be sole property of such college or university. No other parties may have ownership rights or interests except as may be determined by board of trustees of such college or university. Board of trustees may establish rules under which college or university employee may solicit or be given financial interest in firm or entity to which institution has granted some or all rights to discovery or invention. (R.C. §3345.14).

17.01 TRADEMARKS AND TRADENAMES:

Trademarks and Service Marks.

Registration of any word, name, symbol or device used to identify and distinguish services or goods manufactured, sold or advertised, or otherwise distributed in Ohio may be made by submitting verified application to Secretary of State with specimen of mark as used in commerce and $125 filing fee. (R.C. §§1329.54, 1329.56). Such trademark or servicemark must not be immoral, deceptive, scandalous, merely descriptive or deceptively misdescriptive, include governmental symbols or unauthorized names, likenesses or signatures, disparage persons or institutions, mislead public or cause confusion or mistake or to deceive because of resemblance to another mark registered in Ohio or U.S. Patent and Trademark Office. (R.C. §1329.55). Registration of trademark or service mark under R.C. §§1329.54 - 1329.67 effective for ten years; may be renewed for additional ten years by application filed within six months prior to expiration of initial term; renewal fee $25. (R.C. §1329.58). All changes of registrant's business address must be recorded by filing such changes on form prescribed by Secretary of State; fee $25. (R.C. §1329.601).

Any name, mark or device produced upon any article or supply intended for reuse in the normal course of trade, and used to indicate ownership of those articles or supplies, may be registered with the Secretary of State by filing a verified statement, submission of specimen and payment of fee of $125. (R.C. §§1329.41, 1329.42). Registration effective for ten years; may be renewed for additional ten years, application filed within six months prior to expiration of initial term; renewal application shall be accompanied by specimen of mark as actually used and shall contain brief description of mark as it appears on specimen; renewal fee $25. Registrant of name, mark or device must record all changes of business address with Secretary of State on prescribed form; fee $25. (R.C. §1329.421).

Timber dealer may adopt trademark by submitting statement executed with formality of deed for filing with clerk of court and Secretary of State. (R.C. §981.01). Copy must be published once a week for four consecutive weeks in county of applicant's office or place of business. (R.C. §981.02). Trademark must be stamped on timber (R.C. §981.03) and is prima facie evidence of ownership (R.C. §981.04).

Right of Publicity.

Protected as property right which is transferable and descendible, cause of action for unauthorized commercial use of individual's persona; four year statute of limitations. (R.C. §§2741.01 - 2741.99).

Assignment.

Any trade name or fictitious name and its registration shall be assignable by duly executed instrument on prescribed form and may be recorded with Secretary of State who shall issue new certificate in name of assignee for remainder of term of registration or last renewal thereof; $25 fee. (R.C. §1329.06).

Certificate for filing name, mark or device under R.C. §§1329.41 - 1329.53 and benefits thereunder are assignable; written assignments on prescribed form may be recorded with Secretary of State who may issue new certificate; $25 fee. (R.C. §1329.45).

Trademark or service mark and its registration are assignable in connection with goodwill of business in which marks are used; must be in writing duly executed on prescribed form and may be recorded with Secretary of State; $25 fee. (R.C. §1329.60). Any assignment is void against subsequent purchaser without notice unless recorded within three months or prior to subsequent purchase. (R.C. §1329.60).

Infringement.

Fines for unauthorized labeling or misuse of any registered names or marks of ownership for articles or supplies or deceptive trade practices are provided. (R.C. §1329.99).

Injunctive relief and damages may be obtained for the infringement of any registered mark. (R.C. §§1329.65 - 1329.66, R.C. §§4165.02 - 4165.03). Damages available to those injured by fraudulent filings. (R.C. §1329.64).

Trade Names, Fictitious Names.

Individual, partnership, corporation, professional association, limited liability company or other entity, must register either trade name or report use of fictitious name under which operations are conducted with Secretary of State on prescribed form with filing fee of $50. (R.C. §1329.01). Filing effective for five years; renewable for five years; fee $25. (R.C. §1329.04). Change of business address of holder must be reported on form prescribed by Secretary of State; filing fee is $25. (R.C. §1329.07). Report of use of fictitious name must be filed within 30 days of first use. (R.C. §1329.01). Secretary of State shall not file trade name registration if application falsely implies status of incorporation, connection with government agency, or if trade name not distinguishable upon records of Secretary of State from previously registered trade names, corporate names or any trademark or service mark previously recorded and not abandoned, without written consent of owner. (R.C. §1329.02). Secretary of State shall use standards in R.C. §1701.05 on corporate names to determine if names are distinguishable. (R.C. §1329.02). No person doing business under trade name or fictitious name may commence or maintain action in such name in any court in Ohio or on account of any contracts or transactions in such name until it has complied with R.C. §1329.01, and, if partnership, with R.C. §1777.02. Actions may be commenced against user of fictitious name or trade name regardless of whether such name has been registered. (R.C. §1329.10).

Deceptive Trade Practices.

Injunctive relief and monetary damages for deceptive trade practices including passing off goods or services as those of another, causing likelihood of confusion or misunderstanding as to source, sponsorship, approval or certification of goods or services, or causing likelihood of confusion or misunderstanding as to affiliation, connection, association with or certification by another. (R.C. §§4165.01-.04).

17.02 TRADE SECRETS:

Uniform Trade Secrets Act.

Adopted. (R.C. §§1333.61-.69).

Actual or threatened misappropriation may be enjoined (R.C. §1333.62) and damages, actual plus unjust enrichment, or reasonable royalty, plus punitive or exemplary for willful and malicious misappropriation (R.C. §1333.63) and attorney fees (R.C. §1333.64) may be awarded. Action must be brought within four years after misappropriation is discovered or should have been discovered. (R.C. §1333.66).

"Misappropriation" means any of following: (1) acquisition of trade secret of another by person who knows or has reason to know that trade secret was acquired by improper means; (2) disclosure or use of trade secret of another without express or implied consent of other person by person who did any of following: (a) used improper means to acquire knowledge of trade secret, (b) at time of disclosure or use knew or had reason to know that knowledge of trade secret that person acquired was derived from or through person who had utilized improper means to acquire it, was acquired under circumstances giving rise to duty to maintain its secrecy or limit its use, or was derived from or through person who owed duty to person seeking relief to maintain its secrecy or limit its use, (c) before material change of their position, knew or had reason to know that it was trade secret and that knowledge of it had been acquired by accident or mistake. (R.C. §1333.61).

"Trade secret" means information, including whole or any portion or phase of any scientific or technical information, design, process, procedure, formula, pattern, etc., or business information, financial information, or listing of names, addresses, or telephone numbers, that (1) derives independent economic value from not being known or ascertainable by others and (2) is subject of reasonable efforts to maintain its secrecy. (R.C. §1333.61).

Employee who, in course and within scope of his employment received confidential information, shall not knowingly, without consent of his employer, furnish or disclose such information to any person not privileged to acquire it. (R.C. §1333.81). Employee who violates R.C. §1333.81 is guilty of misdemeanor of first degree. (R.C. §1333.99[F]).

Trade secrets submitted to Ohio State Department of Development, Industrial Technology and Enterprise Advisory Board, or to Ohio technology transfer agents in connection with activities of Ohio technology transfer organization are not open to public inspection. (R.C. §122.36).

18 LEGAL PROFESSION

18.01 ATTORNEYS AND COUNSELORS:

Attorneys are governed by Supreme Court Rules for the Government of the Bar of Ohio (Gov.BarR.) and ABA Code of Professional Responsibility (1969).

Attorney Ethics.

Ohio has not adopted American Bar Association Model Rules of Professional Conduct. Ohio's Code of Professional Responsibility was adopted in 1970.

Jurisdiction over admission to the bar is vested in the Supreme Court. (R.C. §4705.01).

Eligibility.

Candidate must be 21 years old, be approved as to character, passed multi-state professional responsibility examination and examination conducted by Ohio Board of Bar Examiners, and taken oath of office. (Gov.BarR. I-1). Legal intern certificates available for law school students upon receiving two-thirds of credits required for graduation for representation of indigent persons under supervision of qualifying attorney. (Gov.BarR. II).

Registration as Law Student.

By Nov.15 in applicant's second year of law school candidate must file with Ohio Supreme Court Clerk Application to Register as Candidate for Admission to the Practice of Law, accompanied by: (1) Law school dean's certificate showing beginning of legal study; (2) transcript showing earning of bachelor's degree from college; (3) fingerprint card; (4) registration fee of $75; (5) character investigation and report fee in amount charged by National Conference of Bar Examiners; (6) character questionnaire; (7) authorization and release forms. Additional fee of $200 is imposed if application is not filed by Nov. 15 in applicant's second year of law school; and (8) evaluation fee of $150 if undergraduate or legal education is received outside U.S. (Gov.BarR. I-2).

Educational Requirements.

Bachelor's degree from accredited college or university and degree from approved law school. (Gov.BarR. I-1).

Application for Examination.

By Nov. 1 preceding examination if applicant intends to take Feb. examination and by Apr. 1 preceding examination if applicant intends to take July examination, candidate must file application for examination with Supreme Court Clerk, accompanied by (1) affidavit of study of Code of Professional Responsibility, Rules for the Government of the Bar, and Code of Judicial Conduct; (2) affidavit that applicant has not engaged in unauthorized practice of law; (3) certificate from applicant's law school certifying that dean or associate dean of law school does not have knowledge of any information that would cause him or her to doubt applicant's character, fitness, and moral qualifications to practice law; (4) completed supplemental character questionnaire, in duplicate, in form prescribed by Board of Commissioners on Character and Fitness, updating information on applicant's character, fitness, and moral qualifications furnished at time of registration as candidate for admission under §2 of this Rule; (5) non-refundable fee of $330 if the examination application is filed on or before the dates set forth above, or $430 if either applies: (a) application for Feb. examination filed after first day of Nov. but on or before tenth day of Dec. or (b) application for July examination is filed after first day of Apr. but on or before tenth day of May; and (6) non-refundable fee in amount charged by National Conference of Bar Examiners for the Multistate Performance Test items. Notwithstanding timely filing of applicant, no applicant may take examination unless Board of Commissioners on Character and Fitness has issued final approval at least three weeks prior to examination. At least 30 days before examination, applicant must also submit certificate of law school that he has received law degree and has completed at least ten classroom hours of instruction in Code of Professional Responsibility and at least ten hours of instruction in legal ethics and one hour of instruction on substance abuse. (Gov.BarR. I-3).

Examination.

Conducted by Board of Bar Examiners appointed by Supreme Court. Lasting two and one-half days exam will be held in Feb. and July each year in Columbus on dates consistent with dates designated by National Conference of Bar Examiners for administration of Multistate Bar Examination and Multistate Performance Test. Each examination consists of five half-day sessions over two and one-half days. Two of half-day sessions consist of MBE prepared by National Conference of Bar Examiners; one half-day session consists of two MPT items prepared by National Conference of Bar Examiners; two half-day sessions consist of 12 essay questions prepared by Board of Bar Examiners, consisting of at least one, but no more than two, questions in each of following subjects: Business Associations (including Agency, Partnerships, and Corporations), Civil Procedure, Commercial Transactions, Constitutional Law, Contracts, Criminal Law, Evidence, Legal Ethics, Property (Real and Personal), Torts and Wills. (Gov.BarR. I-5).

Multi-State Professional Responsibility Examination must be taken and passed before or after Bar Examination. (Gov.BarR. I-6).

Reexaminations are allowed upon filing with Ohio Supreme Court Clerk of application with (1) affidavit that applicant has not engaged in unauthorized practice of law; (2) completed supplemental re-examination character questionnaire; (3) non-refundable fee of $275; and (4) fee in amount charged by National Conference of Bar Examiners for the Multistate Performance Test items. Board of Commissioners on Character and Fitness must reissue final approval at least three weeks before examination. Admission may be restricted by physical limitations of hall. Applications must be received by Nov. 1 preceding examination if applicant intends to take Feb. examination and by Apr. 1 preceding examination if applicant intends to take July examination. (Gov.BarR. I-7).

Clerkship.

No requirement.

Admission without examination may be allowed on filing Application for Admission to the Practice of Law Without Examination on form provided by Supreme Court and include: (1) affidavit that applicant has not engaged in unauthorized practice of law; (2) affidavit that applicant has studied Rules for the Government of the Bar of Ohio, Code of Professional Responsibility, and Code of Judicial Conduct; (3) affidavit that applicant is citizen or resident alien of U.S. and intends to engage in practice of law in Ohio actively on continuing basis; (4) certificate from admissions authority in jurisdiction from which applicant seeks admission, demonstrating that applicant has taken and passed bar examination and has been admitted to practice of law in that jurisdiction; (5) certificate of good standing from each jurisdiction in which applicant is admitted to practice law, dated no earlier than 60 days prior to submission of application; (6) affidavit that demonstrates that applicant has engaged in practice of law in manner prescribed by rule, including description of applicant's practice of law, dates of such practice, and, if applicable, description of applicant's employment subsequent to ceasing such practice; (7) affidavit from applicant's employer or employers verifying applicant's full-time practice of law for at least five full years out of last ten years or, if applicant has been self-employed, affidavit from attorney who is member of bar in jurisdiction in which applicant practiced and who knows applicant, verifying applicant's full-time practice of law; (8) such other evidence, as may be reasonably requested by Court; (9) certificate by attorney admitted to practice of law in Ohio who will present applicant to Court, stating that applicant is of good moral character and recommending applicant for admission to practice of law in Ohio without examination; (10) fingerprint identification; (11) questionnaire for use by National Conference of Bar Examiners, Board of Commissioners on Character and Fitness, and regional or local bar association admissions committee in conducting character investigation of applicant; (12) fee of $1250; (13) fee in amount charged by National Conference of Bar Examiners for its character investigation and report; and (14) certificates or official transcripts evidencing compliance with other portions of Rule. Applicant who has taken and failed Ohio Bar examination may not be admitted without examination. Applicant who has been approved cannot engage in practice of law until Ohio attorney has presented applicant to Ohio Supreme Court during regular session. (Gov.BarR. I-9).

Admission Pro Hac Vice.

Customarily allowed, although no specific rule applies.

Licenses.

Active attorneys must file Certificate of Registration furnished by Supreme Court Clerk before Sept. 1 of each odd-numbered year and include (1) trust account number; and (2) $350 fee. (Gov.BarR. VI).

Disabilities.

Code of Professional Responsibility governs.

Liabilities.

Attorneys are liable for neglect of duty. (R.C. §4705.06).

Professional Liability Insurance.

Lawyer shall inform client if lawyer does not maintain professional liability insurance of at least $100,000 per occurrence and $300,000 in aggregate. (DR 1-104).

Compensation.

Contingent fee agreements in tort action shall be reduced to writing, signed by both parties and produced to client. Signed closing statement required. (R.C. §4705.15).

Lien.

Attorney has common law retaining lien upon client's papers, books, documents, and money in his possession (72 O.App.3d 293, 594 N.E.2d 657) which has been produced for his client by his effort (36 O.App.3d 219, 523 N.E.2d 332).

Disbarment or Suspension.

Attorney may be suspended or removed from office for misconduct or unprofessional conduct in office involving moral turpitude or for conviction of crime involving moral turpitude. (R.C. §4705.02). Jurisdiction over complaints of misconduct lies with Board of Commissioners on Grievances and Discipline, whose rulings are enforced by show cause orders issued by Supreme Court. (R.C. §4705.02, Gov.BarR. V).

Unauthorized Practice.

No person may practice law unless admitted to bar (R.C. §4705.01) and one not so admitted who holds himself out as attorney is subject to fine (R.C. §4705.07). Internships are provided for. (Gov.BarR. II).

Mandatory Continuing Legal Education.

Every attorney authorized to practice law in Ohio must complete at least 24 hours of approved continuing legal education every two years. (Gov.BarR. X). At least two and half of 24 hours must be related to legal ethics and professional responsibility and shall include at least 30 minutes of instruction on substance abuse. (Gov.BarR. X). Each attorney registered to practice law in Ohio must file biennial report verifying compliance with this rule. Attorney whose last name begins with letter A through L must report compliance with rule on or before thirty-first day of Jan. of even-numbered years for preceding two calendar years. Attorney whose last name begins with letter M through Z must report compliance with rule on or before thirty-first day of Jan, of odd-numbered years for preceding two calendar years. (Gov.BarR. X). Newly admitted lawyer must complete new lawyer training course within one year. (Gov.BarR. X).

Specialty Certification Requirements.

Registered as active attorney per Gov.BarR. VI and certified under standards of approved certifying agency. Standards must include substantial involvement in specialty field during preceding three years, recommendations from attorneys or judges familiar with attorney's competence and objective evaluation of attorney's knowledge of specialty field.

Legal Professional Associations.

Attorneys otherwise authorized to actively practice may practice law through legal professional association, corporation, legal clinic, limited liability company or limited liability partnership. Name of legal professional association or legal clinic must end with “Co., L.P.A.” or have immediately below it words “A Legal Professional Association”. Name of corporation, limited liability company or registered partnership must include required descriptive designation. Participation in legal professional association, corporation, legal clinic, limited liability company or registered partnership does not relieve attorney of or diminish any obligation under Code of Professional Responsibility. Financial responsibility and professional liability insurance rules apply to such organizations and they cannot be used to limit liability for malpractice. (Gov.BarR. III).

19 MINERAL, WATER AND FISHING RIGHTS

19.01 MINES AND MINERALS:

See also category 12 Environment, topic 12.01 Environmental Regulation.

Supervision.

Division of Mineral Resources Management has jurisdiction over all mines and quarries. (R.C. §1561.02). Deputy mine inspectors are assigned to districts made up of coal or other mineral bearing townships as designated by Chief. (R.C. §1561.05).

Mine Examining Board supervises qualification of mine supervisory personnel and conducts inspections. (R.C. §§1561.11 - 1561.13).

Inspection.

Each inspector examines mines in his district, at intervals not exceeding three months and must specifically order compliance with provisions of act being violated. In case danger is found imminent, he must safeguard employees by notice to any person in charge and by stopping all work, if necessary, until condition is remedied. He must give written notice of any dangerous or defective matter or practice to owner or lessee of mine and recommend changes. If inspector orders compliance with any provision of law and is assured by mine superintendent that such order will be complied with, inspector must revisit mine within reasonable period to check and must report his findings to chief, Division of Mineral Resources Management, on form provided, and must take action necessary to enforce compliance. (R.C. §§1561.31-.34). Miners also may, not more than once a month, appoint safety committee from their number to inspect mine and make report to Division of Mineral Resources Management. (R.C. §1565.11).

Operation of Mines.

Operator of underground mine must: (1) Keep certified copy of map of mine at mine site (R.C. §1563.03 et seq.); (2) comply with construction regulations (R.C. §1563.12); (3) maintain at least two openings to each seam worked separated by natural strata of at least 100 feet (R.C. §1563.14); (4) make air tight break-throughs at various points (R.C. §1563.17); (5) provide two separate traveling ways from interior workings of mine (R.C. §1563.18); (6) provide minimum clearance of 14 inches on all sides of trolleys (R.C. §1563.20). If operating gaseous mine under R.C. §1563.02, must have sufficient number of workers holding foreman of gaseous mines or fire boss certificates. (R.C. §1563.24). Maps of new mines showing projected working areas must be filed with chief at time of second opening of new mine (R.C. §1563.03), on which surveys taken at extension for 400 ft. but not more often than every six months are plotted (R.C. §1563.04).

Strip mines are coal mines in which earth cover is removed and where mineral seam is penetrated from surface excavation. (R.C. §1513.01). Strip and surface mining are under supervision of chief of Division of Mineral Resources Management, who has power to make rules implementing statute, issue licenses, permits and orders, implement requirements for land reclamation and implement provisions of Federal Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. 1201. (R.C. §§1513.02, 1513.11).

No licensed operator can engage in strip mining without permit. Detailed application must be filed and include complete plan and map for mining and reclaiming mine site. (R.C. §1513.07). Surety bond, cash or certificate of deposit required equal to amount of $2,500 times number of acres of land upon which operator will conduct mining. Minimum bond is $10,000. Periodic mining operation reports also required. (R.C. §§1513.08 - 1513.09).

Performance standards consist of reclamation and land restoration including waste piles, release from bond and time limits. Failure to reclaim results in loss of surety deposit and subjects operator to civil penalties. (R.C. §§1513.16, 1513.99).

Orders of chief of Division of Mineral Resources Management may be appealed to reclamation board of review (seven members) and thereafter to court of common pleas for Franklin County, and higher courts. (R.C. §§1513.13 - 1513.14). Attorney General or any municipal or county prosecuting authority may prosecute any person who fails to perform any duty imposed by §1513 or who violates any order, rule or condition of permit issued by chief. Attorney General may institute civil action to enforce compliance with statute. Anyone injured by violation of statute or rules may bring action for damages, including attorneys' fees and witness fees. (R.C. §1513.15).

Underground coal mines must comply with Federal Surface Mining Control and Reclamation Act of 1977. 30 U.S.C. 1201.

Surface mining and in-stream mining of minerals other than coal and reclamation of affected lands similarly regulated after July 1, 1975. (c. 1514).

Safeguarding of Employees.

Mine operator must maintain following: Proper ventilation for men and animals working in mines (R.C. §1567.09 et seq.), adequate fire protection for shafts (R.C. §1567.54), sanitary working conditions (R.C. §1563.23), adequate and safe lighting (R.C. §1567.58), program to improve roof control which must be approved by Chief (R.C. §§1563.33-.34), arrangements for medical services including first aid equipment and emergency medical assistance and transportation (R.C. §1567.61), and doors (R.C. §1563.16). Regulations govern lowering and hoisting of men in vertical shafts (R.C. §1567.45 et seq.), operation of locomotives (R.C. §1567.38), use of gasoline, naphtha, kerosene, fuel, oil or gas engine (R.C. §1567.35), or electricity (R.C. §§1567.17-.20), handling of explosives (R.C. §1567.22 et seq.), use of smoking materials (R.C. §1567.65).

In case of fatal accident, operator of mine must give immediate notice, by telephone or telegraph, to Chief, Division of Mineral Resources Management, and to district inspector, and within 24 hours must send full written report to Division of Mineral Resources Management. (R.C. §1565.12). If major accident occurs, investigation and report are made by officials of Division of Mineral Resources Management. (R.C. §§1561.36 - 1561.37).

Chief, Division of Mineral Resources Management, may order abatement of law violation or condition constituting threat to miners' health or safety. (R.C. §1561.47). It is minor misdemeanor to violate order. (R.C. §1561.99).

Oil and Gas.

Leases.

Trading in oil and gas leases is subject to Securities Act. See category 3 Business

Regulation and Commerce, topic 3.24 Securities.

Summary procedure is provided for cancellation of recorded oil and gas leases where lessee has breached any covenant therein. Lessor or successor may: (1) serve lessee or his successor by registered mail or publication with notice describing lease and stating his intention of filing affidavit of forfeiture if lessee does not release lease of record within 30 days, and (2) between 30 and 60 days thereafter, file affidavit of forfeiture with County Recorder. Within 60 days of notice or publication, lessee must notify Recorder that he claims lease has not been forfeited; otherwise lease is canceled of record. (R.C. §5301.332).

Supervision.

Chief of Division of Mineral Resources Management, Department of Natural Resources, has jurisdiction over oil and gas production (R.C. §1509.03) including any such drilling and production facilities in urbanized areas (R.C. §1509.03), supervising oil and gas well inspectors (R.C. §1509.04). Rulings are subject to appeal to Oil and Gas Commission (R.C. §1509.36) and from Board of Commission to Court of Common Pleas of Franklin County (R.C. §1509.37).

Chief may order immediate suspension of drilling, operating or plugging activities if there exists condition that Chief believes presents imminent danger to public health or safety or results in or is likely to result in immediate substantial damage to natural resources or for nonpayment of fee. (R.C. §1509.06). Chief must deny permit where operation will result in violations of c. 1509 that will present imminent danger to public health or safety or damage to environment, provided that where permit can reasonably be expected to prevent violations, Chief shall issue permit. (R.C. §1509.06).

Permits to drill, deepen, plug, reopen, or convert wells are issued by Chief of Division of Mineral Resources Management on application showing: (a) Name and address of owner and if corporation, of statutory agent; (b) signature of owner or agent; (c) names and addresses of persons holding royalty interests; (d) location; (e) name and number of well; (f) geological formation to be tested and depth of well; (g) type of drilling equipment; (h) if injection drilling, identity of injection zone and composition of liquid; (i) if new well, sworn statement that applicant has supplied notice to adjacent homeowners located within 500 feet of well's surface location if surface will be less than 500 feet from boundary of drilling unit and more than 15 occupied dwelling units are located less than 500 feet from surface location of well, excluding dwelling located on real property included in drilling unit (notice must: (i) Contain statement detailing applicant's filing with Division of Mineral Resources Management, (ii) identify applicant's name and proposed well location, (iii) include Division's name and address, (iv) contain statement directing comments regarding application to Division; (j) plan for restoration of land surface disturbed by drilling operations, in compliance with R.C. §1509.072; (k) description by name or number of county, township and municipal streets, roads and highways that applicant anticipates will be used for access to and egress from well site; (l) other relevant information as prescribed by rule. (R.C. §1509.06[A]). Wells must be drilled and operated in accordance with plans, sworn statements, and other information submitted in approved application. (R.C. §1509.06[E]). Each application must be accompanied by map prepared by registered surveyor showing location of well, and if well is located within excavation or workings of mine, map must also identify mine and operator. (R.C. §1509.06[A]). Where application is under pooling agreement, copy must be submitted to Division. (R.C. §1509.26). Permit must be conspicuously posted at well site. (R.C. §1509.05).

Oil or gas, as well as sand, gravel, stone or other minerals or substances cannot be removed from bed of Lake Erie until permit or lease has been issued. (R.C. §1505.07).

Certificate of insurance certifying owner has liability insurance coverage of at least $300,000 bodily injury coverage and $300,000 property damage to be filed with Division of Mineral Resources Management and maintained until all wells are plugged and abandoned as required by law. (R.C. §1509.07).

Surety bond, cash or negotiable certificates of deposit are required in amount set by Chief and conditioned upon compliance with c. 1509 until plugging, restoration, or abandonment of well, except well for injecting or removing gas from storage reservoirs. Chief may accept proof of financial responsibility of owner in lieu of surety bond. (R.C. §1509.07).

Fees.

To drill in township with population fewer than 5,000 or revision or reissuance of permit, $250; 5,000 or more but fewer than 10,000, $500; 10,000 or more but fewer than 15,000, $750; 15,000 or more or municipal corporation regardless of population, $1,000. (R.C. §1509.06[G]). To expedite application, $500. (R.C. §1509.06[D]). To plug well, $50. (R.C. §1509.13).

Wells in coal bearing townships, as designated by Chief of Division of Mineral Resources Management (R.C. §1561.11), are specially regulated (R.C. §1509.08). Well penetrating mining operation is subject to additional requirements. (R.C. §1509.18).

Logs must be filed in duplicate with Division of Mineral Resources Management within 30 days of completion of drilling showing (a) Purpose of well; (b) character, depth and thickness of geological formations; (c) details of casing; and (d) reference elevation from which measurements were taken. Geophysical logs, if made, must be filed with Division no more than six months after completion. (R.C. §1509.10).

Drilling Units.

Chief of Division of Mineral Resources Management may establish appropriate devices, minimum distances wells may be located from water wells, streets, roads, highways, rivers, lakes, streams, ponds, other bodies of water, railroad tracks, public or private recreational areas, zoning districts, and buildings or other structures, and procedures to prevent and contain discharges of oil. (R.C. §1509.23[A]). Chief may also establish minimum acreage and distance requirements for wells and drilling unit requirements. (R.C. §§1509.24 - 1509.25). Owners may be required to pool units where tracts of land are of insufficient size or shape or where necessary for efficient exploitation. (R.C. §§1509.27 - 1509.29).

Production reports for calendar year must be filed with Chief of Division of Mineral Resources Management on or before Mar. 1 of following year. (R.C. §1509.11).

Plugging, Abandonment and Restoration.

Well incapable of producing oil or gas in commercial quantities (except wells producing oil or gas for domestic purposes or otherwise lawfully used) must be plugged under written order by Chief to owner. (R.C. §1509.12). Permit to plug (R.C. §1509.13) and report of abandonment (R.C. §1509.14) are required. Plugging methods are specified. (R.C. §1509.15). Restoration of land surface is mandatory. (R.C. §1509.072).

Underground Gas Storage.

Before gas may be stored underground, operator must file map of reservoir with Division of Mineral Resources Management showing boundary of reservoir, amending such map at six month intervals or whenever boundaries are changed. (R.C. §1571.02). Copies of such maps must be mailed to operators of coal mines within 10,000 feet of boundary of reservoir. (R.C. §1571.04). Where reservoirs underlie coal mines or are within 2,000 feet of boundary of coal mine, operator must plug or recondition storage wells. (R.C. §1571.05).

Enforcement.

County prosecutor or state attorney general may prosecute actions under statute.

Violators may be fined $100 to $1,000 for first offense and $200 to $2,000 for each subsequent offense. (R.C. §1509.99).

Civil Penalties.

Attorney general, upon request of Chief of Division of Mineral Resources Management, may bring civil action, with penalty of not more than $4,000 for each violation of statute, rules of orders. (R.C. §1509.33).

Brine.

Management of brine regulated by statute. (R.C. §1509.22).

Transporters of brine must register with Chief of Division of Mineral Resources Management. (R.C. §1509.222). Owners may not use unregistered transporters. (R.C. §1509.223). Chief may suspend or revoke license of transporter for violations of R.C. §§1509.22, .222, .223. (R.C. §1509.224).

Local officials may permit application of brine to streets within limits. (R.C. §1509.226).

Surety bond, cash or negotiable certificates of deposit are required in amount of $15,000 for damages resulting from violations of transportation statutes. (R.C. §1509.225).

Civil penalties specifically enumerated (R.C. §1509.33); additional penalties enumerated in R.C. §1509.99.

Longwall Mining.

Permits issued on application to Chief of Division of Mineral Resources Management showing: (a) Company name; (b) mine name; (c) mine location; (d) mine address; (e) mine telephone number; (f) name, title and telephone number of person submitting plan; (g) mine identification number; (h) roof control plan; (i) ventilation plan; (j) methane and dust control plan; (k) other information required by Chief. (R.C. §1567.69).

Roof support recovery plans must be submitted to Chief (R.C. §1567.70); face roof support units must include specified equipment and working face conveyer must have safe crossover (R.C. §1567.74).

Operators must provide: (a) Two-way communication facilities (R.C. §1567.57); (b) de-energizing devices and lockout devices (R.C. §1567.72); (c) methane monitors (R.C. §1567.73); (d) hydraulic equipment safety measures (R.C. §1567.76); (e) first aid equipment (R.C. §1567.77); (f) accessible travel route from tailgate end of working face (R.C. §1567.78); (g) instructions to employees as to hazards (R.C. §1567.79).

Operation of working face conveyor regulated. (R.C. §1567.74).

Insurance.

State has mine subsidence insurance fund to insure against loss caused by structural failure in mines. (R.C. §3929.52).

See also category 12 Environment, topic 12.01 Environmental Regulation.

20 MORTGAGES

20.01 CHATTEL MORTGAGES:

Uniform Commercial Code adopted. (cc. 1301 to 1310). See category 3 Business Regulation and Commerce, topic 3.09 Commercial Code, subheads Action on Official Amendments and Material Variations, Blanks Filled in and Optional Provisions in Code Sections.

Filing.

See category 10 Documents and Records, topic 10.04 Records, subhead Filing Under Uniform Commercial Code.

20.02 COLLATERAL SECURITY:

See category 8 Debtor and Creditor, topic 8.15 Pledges.

20.03 MORTGAGES OF PERSONAL PROPERTY:

See topic 20.01 Chattel Mortgages.

20.04 MORTGAGES OF REAL PROPERTY:

Mortgages are usually given to secure an indebtedness evidenced by a note or bond. Lien theory of mortgages generally applies.

Execution.

Mortgage must be acknowledged before someone authorized to take acknowledgments. (R.C. §5301.01).

Married persons execute in same manner as if single. (R.C. §5301.04). Mortgage should be executed by grantor's husband or wife to bar dower. Mortgage of lands within this state executed outside of Ohio valid if executed in accordance with laws of Ohio or place were executed. (R.C. §5301.06). See category 10 Documents and Records, topic 10.01 Acknowledgments. Defectively executed mortgage considered contract to make mortgage and enforceable between parties, executors, administrators, heirs or devises. (8 Ohio St. 1). Proper execution and recording required to receive priority. (26 Ohio St. 471). Unrecorded mortgage enforceable between parties. (3 Ohio St. 471).

Recording.

Mortgage must be recorded in office of recorder of county where premises are situated and takes effect from time it is delivered to recorder for record. (R.C. §5301.23[A]). Mortgage presented for record shall contain current address of mortgagee. Omission of such address does not affect validity. (R.C. §5301.23[B]). Amendments, supplements, modifications or extensions take effect when presented for recording. (R.C. §5301.231[A]). Amendments, supplements, modifications or extensions shall contain current address of mortgagee. Omission of such address does not affect validity. (R.C. §5301.231[B]). Instrument to be recorded must contain statement at conclusion of preparer's name. (R.C. §317.111). Mortgage must be refiled for record within 21 years after date of mortgage or stated due date of sum secured, whichever is later. (R.C. §5301.30). See subhead Future Advances, infra. See category 10 Documents and Records, topic 10.04 Records.

Master mortgage form signed by person causing instrument to be recorded but not otherwise acknowledged may be recorded, indexed by grantee, and incorporated by reference in subsequent fully executed mortgage instruments. (R.C. §§5302.15, 5302.16).

Recording Fees.

See category 10 Documents and Records, topic 10.04 Records, subhead Recording Fees.

Taxes.

None.

Trust deeds and deeds of trust treated as mortgages if purpose of conveyance is to secure debt. (42 O.S. 94). Deed with trust clause is, in legal effect, mortgage required to be recorded as to rights of third persons. (62 O.S. 564; 57 N.E. 450).

Future Advances.

Recorded mortgage, given for definite future advances which mortgagee is obligated to make is entitled to priority for full amount of such advances over subsequent mortgage recorded after prior mortgage but before such future advances. (101 O.S. 34, 126 N.E. 820). See catchline Open-End Mortgage, infra.

Open End Mortgage.

Where mortgage deed states intention to secure future advances up to stated limit and contains at its beginning “Open-end mortgage,” mortgage constitutes lien from date of filing for record for full amount of unpaid indebtedness up to stated limit plus interest and sums advanced to protect property, regardless of time that loan advances were made, except as to advances made both (a) without obligation and (b) after receipt by mortgagee of written notice of attachment of lien or encumbrance, or provision of labor, material, machinery or fuel for improvement of mortgaged premises. (R.C. §5301.232). See category 8 Debtor and Creditor, topic 8.13 Liens.

Construction Mortgage.

Mortgage to improve real estate or pay encumbrances thereon, which contains mortgagee's address and empowers him to do things provided by law to be done in such cases, is prior to mechanics' liens subsequently recorded and is lien from time of record for amount ultimately so used, regardless of time when money is advanced. (R.C. §1311.14).

Conventional Mortgage.

Protracted disbursements for improvement of real property take priority only as of date of disbursement rather than date of recording unless mortgagee is obligated to disburse definite and certain sums under definite conditions or in particular manner. (11 O.S.2d 195; 228 N.E.2d 841).

Priorities.

Priority of mortgage lost as to subsequent bona fide purchasers involving mortgages 21 years after date of mortgage or stated maturity, whichever is later. (R.C. §5301.30). Mortgages take effect when delivered for recording. (R.C. §5301.23). When two mortgages on same premises are presented same day, first presented shall be first recorded and have preference. (R.C. §5301.23[A]). Vendor has lien for unpaid purchase price as against vendee (R.C. §5301.26) which is superior to dower (51 O.App. 169; 200 N.E. 142). Vendor's lien must be reserved in deed or purchase money mortgage promptly recorded to establish priority over third parties. (R.C. §5301.26). Mortgage must be properly executed and recorded to receive priority. See topic Documents and Records, topic Records.

Subordination Agreements.

Any mortgagee may waive priority of his mortgage in favor of any other designated mortgage or lien by writing upon his mortgage or by separate instrument duly recorded. (R.C. §5301.35).

When holder of second mortgage agrees to cancellation of first mortgage and making of new one and waives his priority in favor of new first mortgage, he is estopped from later repudiating his act. (30 O.App. 49, 164 N.E.2d 125). Mortgagee by conduct or silent acquiescence subordinate to subsequent lessee. (15 Ohio Op. 3d 203). Second mortgages are regulated under Ohio's Second Mortgage Security Loan Act. (R.C. §§1321.51 - 1321.60). See category 3 Business Regulation and Commerce, topic 3.19 Interest.

Assignment.

Mortgagee's interest freely assignable. (R.C. §§5301.28; 5301.31, 5301.32). Except in those counties in which separate instrument is required, mortgage may be assigned or partially released in writing, on instrument itself or upon margin of record thereof. (R.C. §5301.31). Such assignment or partial release need not be witnessed or acknowledged, but if made upon margin of record of original mortgage must be attested by county recorder. (R.C. §5301.31). Assignment or partial release may also be made by separate instrument, which must be executed in same manner as deed. (R.C. §5301.32). No assignment can be recorded unless it contains current mailing address of assignee. (R.C. §§5301.31, 5301.32). Assignment must be recorded to be effective against third persons without notice thereof. (71 O.S. 173, 72 N.E. 884). In counties using microfilm records, recorder may require that assignments, partial releases and satisfactions be by separate instrument, not marginal notation. (R.C. §5301.28). Original instrument bearing proper endorsement qualifies as separate instrument. (R.C. §§5301.28, 5301.32).

Release.

Mortgagee may release mortgage in whole or in part either by marginal notation on record or by recorded marginal notation on original instrument or by witnessed and acknowledged separate instrument. (R.C. §§5301.28, 5301.34).

Satisfaction.

Defective satisfaction on record for 21 years is cured of defects. (R.C. §5301.29). Mortgagee must record satisfaction within 90 days of satisfaction, at no charge to mortgagor. (R.C. §5301.36).

When judgment, final order, or decree in action or proceeding satisfies mortgage in whole or in part, clerk of court in which judicial proceedings are had must enter memorandum of proceedings upon record of mortgage. (R.C. §§5301.39 - 5301.40).

Discharge.

Mortgage must be discharged upon record by county record when presented certificate executed by mortgagee or assigns, acknowledged and witnessed as provided in R.C. §5301.01, certifying that mortgage has been fully paid and satisfied. (R.C. §5301.34).

Foreclosure.

Court of common pleas has general equitable jurisdiction over foreclosure of mortgages. (62 O.S. 401; 57 N.E. 55). Venue proper in county in which property, or any part thereof, is situated. (Civ.R. 3[B][5]). On decree of foreclosure being entered an order of sale issues. (R.C. §2323.07). If premises are unsold for want of bidders, court may, on motion of plaintiff or defendant, order new appraisement and may order sale for one-third in cash and balance later. (R.C. §2329.52). When property is situated in more than one county, court may direct sheriff of each to sell land in his county, or one officer to sell whole. (R.C. §2323.07). Receiver may be appointed when it appears that property is in danger of being lost, removed or injured, or that condition of mortgage has not been performed and property is insufficient to discharge mortgage debt. (R.C. §2735.01). Land installment contract vendor has similar remedy against defaulting vendee after contract has been in force for five years or vendee has paid 20% of purchase price. (R.C. §§5313.05-.07).

Sales.

When mortgage is foreclosed or specific lien enforced, sale of property must be ordered. (R.C. §2323.07). Sale must be held at courthouse in county where land situated unless otherwise ordered. (R.C. §2329.39).

When real property to be sold is in one or more tracts, court may order officer who makes sale to subdivide, appraise and sell them in parcels, or sell any one of tracts as whole. (R.C. §2323.07). No land shall be sold for less than two-thirds of appraised value. (R.C. §§2329.20, 2329.17).

Deficiency Judgment.

Personal judgment for debt may be recovered along with foreclosure decree. (Civ.R. 18). Deficiency judgment on mortgage on mortgagor's home becomes void two years after confirmation of foreclosure sale completed after rendition of judgment; but execution, proceedings in aid of execution and action to reach property concealed with intent to defraud creditors, if commenced within two years, are not affected, and provisions of statute are waived if waiver is signed by debtor during two years and filed with clerk of court during same period. (R.C. §2329.08).

Moratorium.

None. See Service Members Civil Relief Act at 50 U.S.C.S. Appx. §§501 et seq.

Redemption.

In sales of real estate under order of sale issued in action to foreclose mortgage, debtor may redeem from sale at any time before confirmation of sale by depositing in hands of clerk amount of judgment, costs, and interest. (R.C. §2329.33).

Forms.

Mortgage given as security (R.C. 5302.12):

. . . ., . . . (Marital status), of . . . . (current mailing address), for . . . . dollars paid, grant(s), with mortgage covenants, to . . . ., of . . . . (current mailing address), the following real property:

(Description of land or interest in land or encumbrances, reservations and exceptions, if any).

(A reference to the last recorded instrument through which the mortgagor claims title. The omission of reference does not affect the validity of the mortgage).

This mortgage is given, upon the statutory condition, to secure the payment of . . . . . . dollars with interest as provided in note of the same date.

“Statutory Condition” is defined in section R.C. 5302.14 of the Revised Code and provides generally that, if the mortgagor pays the principal and interest secured by this mortgage, performs the other obligations secured by this mortgage and the conditions of any prior mortgage, pays all the taxes and assessments, maintains insurance against fire and other hazards, and does not commit or suffer waste, then this mortgage shall be void.

. . . . . ., wife (husband) of said mortgagor, releases to the mortgagee all rights of dower in the described real property.

Executed this . . . . . day of . . . . . .

____

(Signature of Mortgagor)

(Execution in Accordance with Chapter 5301 of the Revised Code).

. . . .

(Acknowledgment: See category 10 Documents and Records, topic 10.01 Acknowledgments.)

Assignment (to be endorsed on the instrument):

. . . . . . County, ... (State), ... (Date)

For value received, the undersigned hereby sells, assigns and transfers unto . . . . . (name of assignee) of . . . . (current mailing address) all right and title to and interest in the within mortgage and the land and note described therein.

. . . . . ., wife (husband) of assignor, releases to the assignee all rights of dower in the described real property.

____

(Signature of Assignor)

Assignment (by separate instrument):

Know all men by these presents, that . . . . . . (name of assignor), of . . . . . . (current mailing address), for . . . . . . Dollars paid, do(es) hereby sell, assign, transfer, and set over to . . . . . . (name of assignee), of . . . . . . (current mailing address), his (her) successors, executors, administrators, and assigns, a certain mortgage deed bearing the date . . . . . . day of . . . . ., executed and delivered to . . . . (name of assignor) by . . . . . . (name of original mortgagor) and recorded in volume . . . . . ., page . . . . . . of . . . . . . County records on the . . . . . . day of . . . . . ., at . . . . . . o'clock . . . . M., together with the promissory note secured thereby and referred to therein; and all sums of money due and to become due thereon. And . . . . . . (name of assignor) do(es) covenant with the said . . . . . . (name of assignee), his (her) successors, executors, administrators, and assigns, that the sum of . . . . . . Dollars is owing and unpaid on said note and mortgage, and that . . . . . . (name of assignor) has (have) a good right to sell and assign the same.

. . . . . . , wife (husband) of assignor, releases to the assignee all rights of dower in the described real property.

Executed this . . . . . . day of . . . . .

____

(Signature of Assignor)

. . . .

. . . .

(Acknowledgment: See category 10 Documents and Records, topic 10.01 Acknowledgments.)

This instrument prepared by: (Name).

Release of part of property:

Know all men by these presents, that . . . . . . (name of mortgagee), of . . . . . . (current mailing address), for a valuable consideration, the receipt of which is hereby acknowledged, do(es) hereby release and discharge from the operation of a certain mortgage deed executed by . . . . . (name of mortgagor) to said mortgagee, dated . . . . . . day of . . . . . . and recorded in volume . . . . . ., page . . . . . ., of . . . . . . County records of mortgages, such part of the property described as follows:

(Description of land or interest in land or encumbrances, reservations and exceptions, if any).

Provided, however, that this release shall not be construed to waive or in any manner affect or invalidate the lien of said mortgage deed upon the residue of the real property described therein.

. . . . . ., wife (husband) of assignor, releases to the assignee all rights of dower in the described real property.

Executed this . . . . . day of . . . . . .

____

(Signature of Mortgagee)

. . . .

(Acknowledgment: See category 10 Documents and Records, topic 10.01 Acknowledgments.)

This instrument prepared by: (Name).

Satisfaction, (to be endorsed on the instrument):

. . . . . . County, ... (State), ... (Date)

The conditions of this mortgage have been complied with and the same is hereby satisfied and discharged.

____

(Signature of Mortgagee)

Satisfaction (by separate instrument):

Know all men by these presents: That . . . . . . (name of mortgagee), of . . . . . . (current mailing address), do(es) hereby certify that a certain mortgage deed dated . . . . . . day of . . . . . ., and recorded on the . . . . . day of . . . . . . in the . . . . . . County record of mortgages, volume . . . . . ., page . . . ., executed by . . . . . . (name of mortgagor) to mortgagee on the following described real estate:

(Description of land or interest in land or encumbrances, reservations and exceptions, if any) has been fully paid and satisfied, and the recorder of said county is authorized to discharge the same of record.

Executed this . . . . day of . . . . .

____

(Signature of Mortgagee)

. . . .

(Acknowledgment: See category 10 Documents and Records, topic 10.01 Acknowledgments.)

This instrument prepared by: (Name).

21 PROPERTY

21.01 ABSENTEES:

When person owning property in state has disappeared and has not been heard from, after diligent inquiry and for at least three months, with reasonable ground to believe owner is dead, cannot return or refuses to return to home, and property requires attention, supervision, and care, or is needed for maintenance of dependents, probate court may, on application of spouse or next of kin, appoint trustee to take charge of property except property not otherwise in care of agent or attorney in fact by written instrument. (R.C. §2119.01).

Care of Property.

Trustee may take possession of property, collect debts, and retain and invest absentee's estate without order of probate court. Power to retain and invest must be exercised in accordance with cc. 2113 to 2125. (R.C. §2119.03[C]). See category 13 Estates and Trusts, topic 13.15 Trusts. On application to court, trustee may apply income and principal to support of dependents, and, under order of court, may bring and defend suits on behalf of absentee, compromise claims, and pay debts necessary for protection of dependents. (R.C. §2119.03). Trustee may mortgage, sell, or lease absentee's real property for payment of such debts. (R.C. §2119.04). See category 13 Estates and Trusts, topic 13.09 Executors and Administrators, subhead Sales.

Termination of trust occurs on absentee's return and application to probate court or upon appointment of executor, administrator or guardian for absentee. (R.C. §2119.05).

Notice of Trust.

Before appointing trustee for absence, notice of filing of application must be published and mailed to spouse and next of kin of absentee residing in state and to absentee at last known address and to such others as court may direct. (R.C. §2119.02).

Escheat.

Unclaimed funds and intangible property held by legal person residing in Ohio, by entity formed under laws of Ohio or having office or principal place of business in Ohio, or owned by person whose last known address was in Ohio, or records do not indicate last known address, escheat to state. (R.C. §§169.01, 169.05). Period for escheat is one, two, three, five, seven, or 15 years for various categories of intangible properties. (R.C. §169.02).

Reports and Payments.

Holder must file annual report with Director of Commerce before Nov. 1 listing unclaimed funds and property held on preceding June 30. (R.C. §169.03[C]). Reports must be accompanied by payment of 10% of principal and accrued earnings, except for aggregate amounts of $50 or less in which case 100% shall be paid. (R.C. §169.05[A]). At option of Director of Commerce, balance may be retained by holder with interest to state or paid to director of commerce for deposit as agent for mortgage funds with financial organization. (R.C. §169.05[A]). Penalties for failure to report: $100 per day. (R.C. §169.12).

Notices of unclaimed funds or property are published in county of owner's last known residence (R.C. §169.06[A]); holder must notify owner at last known address before filing annual report. (R.C. §169.03).

Claims by owners for escheated funds are filed with Director of Commerce. (R.C. §§169.07, 169.08).

Expiration of statute of limitations against owner's claim after Mar. 1, 1968, does not relieve holder of duty to report and give notice. (R.C. §169.03[H]).

Decedent without Heirs.

Property escheats if decedent has no next of kin, stepchildren or their lineal descendants. (R.C. §2105.06).

Escheated property of Ohio citizen or corporation in another state may be claimed by attorney general as attorney in fact for owner. (R.C. §109.41).

See also categories 3 Business Regulation and Commerce, topic Banks and Banking, subhead Unclaimed Deposits; Estates and Trusts, topic Wills, subhead Unclaimed Legacies.

21.02 ADVERSE POSSESSION:

Character of Possession.

Possession must be actual, notorious, continuous, and exclusive. (17 O.S. 130). Some cases suggest possession must also be hostile and under claim of right. (86 O.App. 121, 90 N.E.2d 172).

Duration of Possession.

Possession must be continued for 21 years. (R.C. §2305.04).

Easements.

Prescription of easements is governed by rules similar to those for adverse possession. (111 O.S. 341, 145 N.E. 479).

Disabilities.

If person entitled to bring action is minor, or of unsound mind at time action accrues and disability is removed after passage of 21 years, period of possession is extended to ten years from removal of disability. (R.C. §2305.04). Disability for unsound mind beginning after action accrues extends period (R.C. §2305.16); see category 5 Civil Actions and Procedure, topic 5.16 Limitation of Actions, subhead Disabilities of Plaintiff.

21.03 CONDOMINIUMS:

See topic 21.16 Real Property.

21.04 CONVEYANCES:

See topic 21.06 Deeds.

21.05 CURTESY:

Common law curtesy is abolished. (R.C. §2103.09). Husband has dower interest. See topic 21.08 Dower.

21.06 DEEDS:

Execution.

Deed must be signed by grantor and acknowledged before person authorized to take acknowledgments. (R.C. §5301.01). See categories 10 Documents and Records, topic Acknowledgments; Debtor and Creditor, topic Homesteads.

Married persons execute in same manner as if single (R.C. §5301.04), but deed must recite marital status of grantor (OSTE R.C. 3.6) and be executed by spouse of grantor with words of grant or release in order to bar dower (16 Ohio 191). See category 14 Family, topic 14.09 Husband and Wife, subhead Conveyances or Encumbrance of Property.

Outside of State.

Deed executed outside state valid if executed in accordance with laws of Ohio or place where executed. (R.C. §5301.06).

Powers of Attorney.

See topic 21.15 Powers of Attorney.

By Corporation.

Failure to affix corporate seal does not affect validity of any corporate instrument. (R.C. §1701.13[B]).

By Trust.

With certain exceptions (R.C. §§1746.01-.99; 1747.01-.99) Ohio law does not recognize trusts as entities capable of holding title to property in own name. Use of words such as “trustee” or “agent” after grantee's name does not constitute notice that trust or agency exists or that grantee's powers are limited, and bona fide purchaser from grantor takes title free from claims of undisclosed beneficiaries and is not responsible for application of purchase money. (R.C. §5301.03). When title held by trustees of disclosed trust, purchasers on notice that trust exists (R.C. §5301.03) and must make due inquiry as to power of trustee to convey. Power of trustee must be evidenced by recording trust agreement, affidavit setting forth operative provisions or memorandum of trust. (OSTE R.C. §3.18).

Transfer on Death Deed.

Permits owner of real property, or of interest in real property, to execute “transfer on death” deed that designates grantee (who may be grantor property owner) and one or more beneficiaries to take title to real estate upon grantee's death, without having to go through probate. (R.C. §5302.22). See subhead Operation and Effect and Forms, infra.

Recording.

To be effective as to subsequent bona fide purchasers without notice, deeds must be recorded in the office of the recorder of county where the property is situated. (R.C. §5301.25). Recording instrument not entitled to be recorded due to failure to observe recording formalities does not serve as constructive notice to subsequent bona fide purchasers but may show equitable right and be actual notice. (45 O.App. 203). Statute sets forth instruments county recorder is required to record when properly presented. (R.C. §317.08). Name of person who prepared instrument must appear on document to be recorded. (R.C. §317.111). New legal descriptions must set forth name of surveyor. (R.C. §5301.25). Written standards governing conveyances in each Ohio county are promulgated by such county's auditor and engineer. (R.C. §319.203). Deed or other instrument executed or certified in language other than English cannot be recorded by county recorder unless it is accompanied by complete and certified English translation. See categories 10 Documents and Records, topic Records; Taxation, topic Property Taxes.

Recording Fees.

See category 10 Documents and Records, topic 10.04 Records.

Operation and Effect.

Use of word “grant” is sufficient word of conveyance without additional language. (R.C. §5302.03). Use of terms of inheritance or succession is not necessary to create fee simple estate; every conveyance conveys whole interest which grantor could convey unless contrary intention appears (R.C. §5301.02), including all rights, easements, privileges and appurtenances (R.C. §5302.04). Unbroken chain of title or record to any interest in land for 40 years or more constitutes marketable record title. (R.C. §5301.48). “General warranty covenants” have effect of covenants between grantor and grantee and his heirs, assigns, and successors that grantor is lawfully seized in fee simple of granted premises; that they are free from all encumbrances; that he has good right to sell and convey premises; and that he warrants and will defend premises to grantee and his heirs, assigns and successors against lawful claims and demands of all persons. (R.C. §5302.06). “Limited warranty covenants” have effect of covenants between grantor and grantee and his heirs, assigns, and successors that granted premises are free from encumbrances made by grantor and that he warrants and will defend premises to grantee and his heirs, assigns, and successors against lawful claims and demands of all persons claiming through grantor but against no other. (R.C. §5302.08). “Fiduciary covenants” have effect of covenants between grantor and grantee, his heirs, assigns, and successors that grantor is duly appointed, qualified, and acting fiduciary described in deed, is authorized to make conveyance, and has complied with requirements of statutes governing proceedings in sale of premises. (R.C. §5302.10). “Transfer on death” deed creates present interest as sole owner or as tenant in common in grantee and transfer on death interest in beneficiary or beneficiaries. (R.C. §5302.22).

Taxes.

See category 22 Taxation, topic Property Taxes, subhead Real Estate Conveyance Tax.

Forms.

General Warranty Deed.

. . . . . . (Marital status), of . . . . . County, ... (State), for valuable consideration paid, grant(s), with general warranty covenants, to . . . . . ., whose tax mailing address is . . . . . ., the following real property:

(description of land or interest therein and encumbrances, reservations, and exceptions, if any)

Prior instrument reference: Volume . . . . ., Page . . . . . .

. . . . . ., wife (husband) of grantor, releases all rights of dower therein.

Executed this . . . . . day of . . . . . .

____

(Signature of Grantor)

. . . .

(Acknowledgment: See category 10 Documents and Records, topic 10.01 Acknowledgments.)

This instrument prepared by: (Name).

A survey of this property was made by: (Name). (R.C. §5302.05)

Limited Warranty Deed.

. . . . . . (Marital status), of . . . County, ... (State), for valuable consideration paid, grant(s), with limited warranty covenants, to . . . . . ., whose tax mailing address is . . . . . ., the following real property:

(description of land or interest therein and encumbrances, reservations, and exceptions, if any)

Prior instrument reference: Volume . . . . ., Page . . . . . .

. . . . . ., wife (husband) of grantor, releases all rights of dower therein.

Executed this . . . . . day of . . . . . .

____

(Signature of Grantor)

. . . .

(Acknowledgment: See category 10 Documents and Records, topic 10.01 Acknowledgments.)

This instrument prepared by: (Name).

A survey of this property was made by: (Name). (R.C. §5302.07)

Deed of Executor, Administrator, Trustee, Guardian, Receiver, or Commissioner.

. . . . . ., executor of the will of . . . . . ., (administrator of the estate of . . . . . .) (trustee under . . . . . .) (guardian of . . . . . .) (receiver of . . . . . .) (commissioner), by the power conferred by . . . . . ., and every other power, for . . . . . . dollars paid, grants, with fiduciary covenants, to . . . . . ., whose tax mailing address is . . . . . ., the following real property:

(description of land or interest therein and encumbrances, reservations, and exceptions, if any)

Prior instrument reference: Volume . . . . . ., Page . . . . . .

Executed this . . . . . . day of . . . . . .

____

(Signature of Grantor)

. . . .

(Acknowledgment: See category 10 Documents and Records, topic 10.01 Acknowledgments.)

This instrument prepared by: (Name).

A survey of this property was made by: (Name). (R.C. §5302.09)

Quit Claim Deed.

. . . . . . (Marital status), of . . . . . ., County, ..., for valuable consideration paid, grant(s) to . . . . . ., whose tax mailing address is . . . . . ., the following described real property:

(description of land or interest therein and encumbrances, reservations, and exceptions, if any)

Prior instrument reference: Volume . . . . . ., Page . . . . . .

. . . . . ., wife (husband) of the grantor, releases all rights of dower therein.

Executed this . . . . . . day of . . . . . .

____

(Signature of Grantor)

. . . .

(Acknowledgment: See category 10 Documents and Records, topic 10.01 Acknowledgments.)

This instrument prepared by: (Name).

A survey of this property was made by: (Name). (R.C. §5302.11)

Survivorship Deed.

. . . . . . (Marital status), of . . . County, ... (State), for valuable consideration paid, grant(s), (covenants, if any), to . . . . . . (marital status) and . . . . . . (marital status), for their joint lives, remainder to the survivor of them, whose tax mailing addresses are . . . . . ., the following real property:

(description of land or interest therein and encumbrances, reservations, and exceptions, if any)

Prior instrument reference: Volume . . . . ., Page . . . . . .

. . . . . ., wife (husband) of grantor, releases all rights of dower therein.

Executed this . . . . . day of . . . . . .

____

(Signature of Grantor)

. . . .

(Acknowledgment: See category 10 Documents and Records, topic 10.01 Acknowledgments.)

This instrument prepared by: (Name).

A survey of this property was made by: (Name). (R.C. §5302.17)

Transfer on Death Deed.

. . . .(Marital status), of . . . . County, ... (for valuable consideration paid, if any), grant(s) to (with covenants, if any), to . . . . . . whose tax mailing address is . . . . . ., transfer on death to . . . . . ., beneficiary(s), the following real property;

(Description of land or interest in land and encumbrances, reservation, and exceptions, if any.)

Prior instrument reference: . . . .

. . . . .wife (husband) of the grantor, releases all rights of dower therein.

Executed this . . . . . day of . . . . . .

____

(Signature of Grantor)

. . . .

(Acknowledgment: See category 10 Documents and Records, topic 10.01 Acknowledgments.)

This instrument prepared by: (Name).

A survey of this property was made by: (Name). (R.C. §5302.22)

21.07 DEEDS OF TRUST:

See category 20 Mortgages, topic 20.04 Mortgages of Real Property.

21.08 DOWER:

(c. 2103). Spouse who has not relinquished or been barred from it, has estate for life in one-third of all real property of which deceased spouse was seized as estate of inheritance at any time during marriage. (R.C. §2103.02). In case of encumbrance, dower is computed on basis of amount thereof. (R.C. §2103.02). Spouse of owner of real property may be made party to any action involving judicial sale of real property to satisfy creditors' claims and spouse's dower interest may be subject to sale without said spouse's consent, with court determining present value and priority of dower interest. (R.C. §2103.041). These provisions do not apply to tax lien (R.C. §2103.02) or sale for delinquent taxes (R.C. §5721.19[F][1]). For provisions dealing with conveyance in lieu of dower, eviction, adultery, fraud, waste and assignment of dower, see R.C. §§2103.03 - 2103.08.

Release.

Dower interest terminates and is barred upon death of deceased spouse, except to extent that any real property was conveyed by decedent during marriage without surviving spouse relinquishing or being barred from dower. (R.C. §2103.02).

Bar.

All dower interest of either spouse terminates and is barred upon granting of absolute divorce by court of competent jurisdiction within or without Ohio. (R.C. §§2103.02, 3105.10[D]).

Election.

For surviving spouse's right of inheritance, which can be asserted against will, see category 13 Estates and Trusts, topics 13.07 Descent and Distribution; 13.16 Wills, subhead Election; 13.15 Trusts, subhead Kinds, catchline Living Trusts.

21.09 ESCHEAT:

See topic 21.01 Absentees, subhead Escheat; categories 3 Business Regulation and Commerce, topic Banks and Banking, subhead Unclaimed Deposits; Estates and Trusts, topics Descent and Distribution, subhead Escheat; Wills, subhead Unclaimed Legacies.

21.10 LANDLORD AND TENANT:

Lease is conveyance by owner of estate to another of portion of interest for term less than that held and passes present interest in land for period specified. (116 O.S. 631).

Uniform Commercial Code Act 2A.

Adopted. (R.C. §1310.01).

Kinds of Tenancy.

Tenancies may be from month to month, from year to year, for years (R.C. §5321.17), at will (27 O.S. 478) or at sufferance (44 O.S. 576).

Leases.

Statute of frauds requires all leases and assignments of leases to be in writing (R.C. §1335.04), but oral lease for three years or less is effective if possession is taken and rent paid thereunder (7 O.S. 157).

Lease of estate or interest in real property must be signed by grantor, mortgagor, vendor or lessor and signing must be acknowledged before officer authorized to take acknowledgments. (R.C. §5301.01).

Entry under void lease for term exceeding three years and payment of rent creates tenancy from year to year under terms of lease, except as to duration. (57 O.S. 161, 49 N.E. 344).

Rental agreement or lease for residential property may be written or oral. (R.C. §5321.01[D]).

Security Deposits.

Personal obligation in nature of pledge between landlord and tenant and does not run with land. (78 O.App.3d 340). At end of term, residential tenant entitled to balance of deposit after landlord deduction for unpaid rent and damages. (105 O.S. 264). If in excess of greater of $50 or one month's rent, bears interest at 5% per annum, paid annually, so long as tenant remains in possession minimum of six months. (R.C. §5321.16[A]). Upon termination of rental agreement, landlord may apply security deposit to payment of past due rent and charges. Any deduction must be itemized by landlord in written notice to tenant within 30 days after termination of rental agreement and delivery of possession. (R.C. §5321.16[B]). Tenant may recover liquidated damages and attorneys' fees for noncompliance. (R.C. §5321.16[C]).

Recording.

Leases must be recorded in office of recorder of county in which premises are situated and until so recorded or filed for record are fraudulent as to subsequent bona fide purchasers. (R.C. §5301.25). Memorandum of lease may be recorded in lieu of lease but is constructive notice only of information contained in memorandum. (R.C. §5301.251).

Recorded lease may be canceled or partially released or assigned by lessor or lessee as in case of mortgages, and for same fees. (R.C. §5301.33).

Rental agreements covering residential premises are commonly not recorded.

Rent.

Obligation to pay rent may be express agreement or implied from relocation of parties (15 O.S. 186), and is dependent on premises being fit for occupancy (R.C. §5301.11). Residential rental agreement may include any term relating to rent not inconsistent with c. 5321. (R.C. §5321.06). Tenant of residential premises having four or more dwelling units may terminate rental agreement, or withhold rent and deposit with court after giving written notice to landlord and affording him reasonable opportunity to correct violations of obligations imposed by terms of rental agreement or of R.C. §5321.04 affecting health, safety, welfare and convenience of tenant. (R.C. §5321.07). Tenant must act in good faith; court determines whether deficiency complained of has been corrected and may apply rent deposited to correct deficiency or release rent, less costs, to landlord. (R.C. §§5321.07, 5321.10).

Lien.

Landlords have no lien on tenants' goods. Lease for nonresidential premises may provide for lien on tenants' personal property (19 O.S. 145; R.C. §5321.15); financing statement of lease provisions should be filed to make lien effective against bona fide purchaser without notice.

Termination of tenancies in nonresidential premises by abandonment, surrender, merger, forfeiture, waste or according to terms of lease is controlled by common law rules. Notice to quit is not necessary to terminate tenancy from year to year arising from tenant holding over his term. (60 O.S. 427, 54 N.E. 473).

Duties of landlords and tenants of residential premises are fixed by statute and rental agreements; right to terminate such tenancies because of violation of statutes and breach of agreements is governed by c. 5321.

Duties of operators and tenants of manufactured home parks, recreational vehicle parks, recreation camps, and temporary park-camps are fixed by statute and rental agreement. (R.C. §§3733.01-.02; 3729.01-.13).

Holding Over.

When tenant holds over after expiration of any year, landlord has option to treat him as tenant for another year or as trespasser. (60 O.S. 427, 54 N.E. 473). Possession may be recovered from any tenant or manufactured home park residents holding over term by action of forcible entry and detainer. (R.C. §§1923.02, 1923.04).

Dispossession.

Tenants holding over term, those under oral tenancy in default of payment of rent, tenants or residential premises who breach obligation of R.C. §5321.05 which materially affects health and safety, those who breach obligation imposed by written rental agreement, those that court determines, by preponderance of evidence, engaged in violation of type described in R.C. §1923.02(A)(6)(a)(i) relating to controlled substances; and those who would be deprived of use of premises because of repairs or demolition in compliance with building, housing or safety codes, may be evicted by action of forcible entry and detainer (R.C. §§1923.01-.02; 5321.03), following three days notice in form specified by statute (R.C. §1923.04). Action is brought in municipal or county court or court of common pleas and is barred if not brought within two years. (R.C. §1923.01). Trial may be had ten days after service of summons; content and method of service of summons are governed by statute; answer for other claims due 28 days after service complete. (R.C. §1923.06). Counterclaims may be asserted, including claims for damages and amounts recoverable under rental agreements or c. 5321. (R.C. §1923.061). Possession may be secured by action in ejectment (R.C. §5303.03) brought within 21 years after cause of action accrued (R.C. §2305.04). Vendor on land installment contract may bring action of forcible entry and detainer against defaulting vendee unless contract has been in force five years or 20% of purchase price has been paid. (R.C. §5313.07).

Distress.

Common law remedy of distress is not recognized in Ohio. (15 Ohio St. 186).

Uniform Residential Landlord and Tenant Act.

Not adopted. Ohio Landlord-Tenant Act at c. 5321.

Rent Withholding.

Tenant of residential premises having four or more dwelling units may terminate rental agreement, or withhold rent and deposit with court after giving written notice to landlord and affording him reasonable opportunity to correct violations of obligations imposed by terms of rental agreement or of R.C. §5321.04 affecting health, safety, welfare and convenience of tenant. (R.C. §5321.07). Tenant must act in good faith; court determines whether deficiency complained of has been corrected and may apply rent deposited to correct deficiency or release rent, less costs, to landlord. (R.C. §§5321.07 - 5321.10).

21.11 LEASES:

See topic 21.10 Landlord and Tenant.

21.12 PARTITION:

Tenants in common, survivorship tenants and coparceners of any estate in lands, tenements or hereditaments within state may be compelled to make or suffer partition thereof. (R.C. §5307.01).

Tenant in common or coparcener may recover from another his share of rents and profits received by such tenant in common, or coparcener, from estate, or may maintain action for waste against another, but no parcener has any privileges over another in any election, division, partition or matter to be made or done, concerning lands which have descended. (R.C. §5307.21).

Personal property may be partitioned, by civil action, upon equitable principles. (104 Ohio App. 473, 145 N.E.2d 462).

Jurisdiction and Venue.

Proceedings may be had in any county in which part of estate is situated. (R.C. §5307.02).

Proceedings.

Person entitled to partition of estate may file his petition in court of common pleas, setting forth nature of his title, pertinent description of lands, etc., of which partition is demanded, and naming each tenant in common, coparcener or other person interested as defendants. Court has right to appoint between one and three suitable, disinterested persons to effect partition. (R.C. §5307.04). When title to such estate came to such person by descent or devise upon death of inhabitant of this state, partition thereof will not be ordered by court within one year from date of death of such person, unless petition sets forth and it be proved that all debts and claims against estate of such decedent have been paid or secured to be paid or that personal property of deceased is sufficient to pay them. (R.C. §5307.03).

Partition in Kind or Sale.

In case partition is ordered and estate cannot be divided without injury to its value, just valuation is determined and one or more of parties may elect to take estate at such appraised value, upon paying to other parties their proportion of such appraised value. (R.C. §5307.09).

In case no election to take is made property is sold by sheriff at public auction (R.C. §5307.11) and money arising from sale distributed to parties entitled thereto, in lieu of their respective parts and proportions of estate (R.C. §5307.14). When widow is entitled to dower in such estate dower must be assigned to her except: (1) When assignment of it already has been made; (2) when by answer she has elected to be endowed out of proceeds of sale; and (3) when right of dower extends only to undivided interest in estate. (R.C. §5307.17).

Partition of Condominium Property.

See category 21 Property, topic 21.16 Real Property, subhead Condominiums.

21.13 PERPETUITIES:

Common law rule against perpetuities is adopted by statute, subject to statutory exceptions: (1) For purposes of determining whether rule is violated, time of creation of interest subject to reserved power of revocation is at time that reserved power expires; (2) interest violating rule must be reformed to approximate most closely intention of creator without violating rule; (3) in determining whether interest would violate rule or reforming interest, period of perpetuities must be measured by actual rather than possible events. Statutory exceptions apply only to wills of decedents dying after Dec. 31, 1967 and inter vivos instruments executed after Dec. 31, 1967. (R.C. §2131.08). Certain trusts are exempt from rule against perpetuities including trust created by employer as part of stock bonus, pension, disability or death benefit or profit-sharing plan for benefit of employees (R.C. §2131.09), business trust (R.C. §1746.14), real estate investment trust (R.C. §1747.09), and certain testamentary and inter vivos trusts, trusts created by will or general power of appointment. (R.C. §2131.09).

Accumulations.

Common law rules prevail.

See category 13 Estates and Trusts, topic 13.15 Trusts, subhead Accumulations.

21.14 PERSONAL PROPERTY:

Tenancy by entirety in personal property does not exist.

21.15 POWERS OF ATTORNEY:

See generally c. 1337.

Attorneys in Fact.

Principal authorizes to take actions principal would be legally authorized to take. (32 O.S. 514).

Durable Power of Attorney for Health Care may designate competent adult as attorney in fact, to make health care decisions for principal at such time that principal has lost capacity to make informed health care decisions for himself. Attending physician and administrator of nursing home in which principal receives care cannot be designated as attorney in fact. Employee or agent of attending physician and/or health care facility in which principal receives care can only be designated attorney in fact if related by blood, marriage or adoption to principal or is member of same religious order. (R.C. §§1337.11-.17). May be recorded. (R.C. §317.32[K]). Conflicts between Durable Power of Attorney for Health Care, living will declaration (R.C. §2133.02), or do-not-resuscitate identification (R.C. §§2133.21 - 2133.26) are resolved by statute (R.C. §§1337.12, 2133.03). See category 13 Estates and Trusts, topic 13.16 Wills.

Formalities.

Power of attorney for conveyance, mortgage or lease of any estate or interest in real property must be signed, attested, acknowledged, and certified in same manner as deed (R.C. §1337.01) and must be recorded in county where property is located before instrument signed by virtue of power of attorney is recorded (R.C. §1337.04). Power of attorney for transfer of personal property, in order to be admitted to record as provided in R.C. §1337.07, must be signed, witnessed and acknowledged in same manner as deeds. (R.C. §1337.06). Any person may record, and county recorder must keep record of, power of attorney to transfer personal property. (R.C. §1337.07, .08). Recorder's fees for power of attorney authorizing transfer of personal property same as allowed by R.C. §317.32 for other instruments. (R.C. §1337.10).

Revocation.

Insanity or mental incapacity of principal revokes or suspends power. (23 O.O.2d 19; 190 N.E.2d 70). Death or incompetency of principal who has executed written power of attorney does not revoke power and authority of attorney who acts in good faith without knowledge. (R.C. §1337.091).

Subsequent disability, incapacity, incompetency of principal or lapse of time does not affect power of attorney where written power states “This power of attorney is not affected by disability of the principal or lapse of time.” (R.C. §1337.09[A]). Written power of attorney stating that it shall become effective at later time or upon occurrence of specified event, becomes effective at said time or upon occurrence of said event, notwithstanding later disability, incapacity, incompetency of principal. (R.C. §1337.09[B]). Durable power of attorney allows principal to appoint attorney as guardian of his estate, person or both, authorize appointed guardian to nominate successor guardian, and waive bond. (R.C. §1337.09[D]). At any time prior to conveyance, mortgage, or lease, grantor, mortgagor, or lessor may revoke power. (R.C.

§1337.02). Power of attorney for conveyance, mortgage or lease of interest in real property cannot be revoked unless revoking instrument is also recorded. (R.C. §1337.05).

Uniform Durable Power of Attorney Act.

Not adopted.

Members of Armed Forces.

Notarial acts by members of armed forces in connection with power of attorney performed between Jan. 1, 1941 and Jan. 2, 1974 valid in conformity with prior statute. (R.C. §147.39).

Real Estate Deed.

Deed of real estate duly executed by person acting for another under power of attorney is not invalid because he, instead of principal, is named in deed as such attorney as grantor. (R.C. §1337.03).

21.16 REAL PROPERTY:

Following estates are recognized: Estate in fee simple (R.C. §5301.02); estate in fee tail (R.C. §2131.08); estate for life; estate pur autre vie; estate for years; estate from year to year; estate in remainder; estate in reversion; estate on condition; tenancy in common (R.C. §5302.19); tenancy at sufferance (44 O.S. 576); tenancy at will (27 O.S. 478); tenancy for years; tenancy from year to year; tenancy from month to month (R.C. §5321.17); and survivorship tenancy. (R.C. §5302.17 and R.C. §5302.20). Estate by entireties created prior to Apr. 4, 1985 are recognized. (R.C. §5302.21).

Rule in Shelley's Case.

Abolished. (R.C. §2107.49).

Foreign Conveyances or Encumbrances.

Deed executed outside of state valid if executed in accordance with laws of Ohio or place where executed. (R.C. §5301.06). See topic 21.06 Deeds, subhead Execution.

Condominiums.

Permitted. (c. 5311).

See also topics 21.05 Curtesy, Deeds, Dower, Landlord and Tenant, Perpetuities; categories 5 Civil Actions and Procedure, topic Partition; Debtor and Creditor, topic Homesteads; Documents and Records, topic Records; Family, topic Husband and Wife; Mortgages, topic Mortgages of Real Property.

21.17 TRUST DEEDS:

See topic 21.06 Deeds; category 20 Mortgages, topic 20.04 Mortgages of Real Property.

22 TAXATION

22.01 ADMINISTRATION:

Department of Taxation and tax commissioner have general supervision of administration of tax laws. (R.C. §5703.01 et seq.). Board of Tax Appeals hears appeals from decisions and actions of any tax administrative agency. (R.C. §5703.02).

Assessment of Personal Property.

Department of Taxation directs and supervises all assessments, which are managed through office of county auditor. (R.C. §5711.24).

Property subject to tax is all tangible personal property located and used in business in State of Ohio, with certain exemptions. (R.C. §§5709.01[B][1], .04-.19).

Date of Return.

Taxpayers must make return of their personal property, both tangible and intangible, annually between Feb. 15 and Apr. 30, except one becoming taxpayer after Jan. 1, who must make return within 90 days after commencing business. County auditor may extend time not exceeding 45 days. (R.C. §5711.04).

Place of Listing.

Personal property used in business must be listed in taxing district where business is carried on; all other taxable personal property, in municipality or county where owner resides. (R.C. §5711.07). Taxpayer with taxable property with aggregate taxable value in excess of ten thousand dollars and required to be listed in more than one county must make combined return to Commissioner listing taxable property in this state. (R.C. §5711.13). Persons failing to make proper and complete return are subject to penalty. (R.C. §§5711.27-.28).

Persons Required to Make Return.

Everyone must return all taxable property owned, including income from investments held for him by fiduciary. Guardian makes return for his ward, parent for minor child, personal representative for estate of deceased person and receivers and trustees in bankruptcy for debtor. Personal property used in business in this state by agent or fiduciary must be returned by such fiduciary, but warehouseman need not return property stored with him. Trustee must return all taxable property held in trust, except investments and other intangible property yielding income. (R.C. §5711.05).

Federal Election.

Instead of listing income yielding investments, taxpayer may file summary of his federal income tax return with affidavit as to income received not subject to income tax but taxable in Ohio. (R.C. §5711.10).

Corporations are taxed like individuals, but are not required to list their investments in stock of other corporations or in their own stock. (R.C. §5709.02). If taxable property required to be listed in more than one county, corporation shall file combined return to tax commissioner. (R.C. §5711.13).

Valuation.

Returns are made with respect to ownership or control and valuation as of Jan. 1. (R.C. §5711.03). For listing and rates of personal property tax, see R.C. §5711.22.

Deposits, moneys, income from investments, unproductive investments, and credits and other taxable intangibles must be listed at their full value. (R.C. §5711.22[A]).

Foreign Trade Zone.

Tangible personal property used solely for display or demonstration purposes shall be exempt from personal property taxation while held in foreign trade zone established under 19 U.S.C. 81a as am'd. (R.C. §5709.44).

Collection of Personal Property Taxes.

One-half tax is due when return is filed; all payments are made to county treasurer. (R.C. §5719.02). Entire tax must be paid by Sept. 20, but time for payment may be extended pursuant to R.C. §5719.031.

Interstate Cooperation.

Interstate compromise agreements pertaining to inheritance, succession and estate taxes authorized in event of disputed domicile. (R.C. §5731.35).

Penalties.

Criminal Penalties in General.

Persons violating tax statutes or rule promulgated by Tax Commissioner subject to fine of $25 to not more than $1,000 when no other penalty is provided. (R.C. §5703.99).

Personal Property Tax.

Failure to make return or list all property: up to 50% of value of assessment shall be added as penalty, unless taxpayer amends or supplements return within 60 days of specified filing date, when penalty is 5% of previously undisclosed value. Penalty may be waived if failure was due to reasonable cause. (R.C. §5711.27). Commissioner may abate any penalty imposed under R.C. §5711.27 in whole or in part on showing by taxpayer of reasonable cause. (R.C. §5711.28).

Real Property Tax.

10% of taxes, assessments and recoupment charges for nonpayment when due and additional cumulative 10% penalties for successive periods of delinquency. (R.C. §323.121). Interest will be computed on delinquent taxes at rate of federal short-term rate on Oct. 15th of preceding year. (R.C. §§323.121, R.C. §5703.47). No interest will be charged on delinquent taxes if paid in full within ten days of deadline or if valid delinquent tax contract has been entered into for payment of delinquent taxes. (R.C. §323.121). Delinquent taxes may be paid without payment of current taxes. (R.C. §323.132). When delinquent taxes are unpaid at time settlement is made between county treasurer and auditor under R.C. §321.24, land is classified as delinquent (R.C. §5721.01) and is subject to foreclosure proceedings (R.C. §5721.18). See topic Property Taxes, subhead Sale of Real Estate.

Intangibles Tax.

Financial institutions failing to collect and pay taxes due on nonwithdrawable shares of stock or which fail to pay taxes due on withdrawable shares, and dealers in intangibles failing to collect and pay taxes due on shares are liable, as penalty, for gross amount of taxes due. Additional penalty of $100 per day is assessed for delay. (R.C. §§5719.11, 5719.13).

Financial Institutions Tax.

Failure to make timely payment: 5% penalty (if payment is made within ten days of due date), otherwise 10% penalty. (R.C. §5725.22). Failure to make proper and complete return subjects party in error to forfeiture of not more than $100 plus costs. (R.C. §§5725.12, 5725.17).

Public Utilities Tax.

Failure to make timely payment of taxes: 5% penalty (if payment is made within ten days of due date), otherwise 15% penalty. (R.C. §5727.42). Failure to file tax report: $50 per month for each month or part thereof until filed, not to exceed $500. (R.C. §5727.60). Failure to file report or pay taxes for 90 days: Cancellation of authority to do business within state. (R.C. §§5727.54 - 5727.55). Tax commissioner is authorized to petition for judgment for amount due (R.C. §5727.57), and attorney general is authorized to commence action in quo warranto (R.C. §5727.58).

Highway Use Tax.

Highway use tax repealed effective June 1, 1991 in conjunction with Ohio becoming member of International Registration Plan. (R.C. §§4503.60 - 4503.66).

Foreign Insurance Companies Tax.

Foreign insurance company refusing to pay taxes levied: penalty of not more than $500 per month (R.C. §5729.11) or it may have its license to do business in State revoked by Superintendent of Insurance (R.C. §5729.10).

Personal Income Tax.

Failure of taxpayer or employer to file return or remit tax due, except estimated tax and except failure due to reasonable cause and not willful neglect may result in assessment. (R.C. §5747.13). Officer or employee responsible for filing withholding returns or payments is personally liable for failure to do so. (R.C. §5747.07[G]). Any employer or taxpayer filing late or incorrect return will be assessed based upon any information in commissioner's possession. (R.C. §§5747.13[A], 5747.15). Taxpayer must object to assessments in writing within 60 days or assessment becomes conclusive. (R.C. §5747.13[B]). Taxpayer who timely files return, paying amount computed therein, may refrain from paying tax assessment before filing applications for review and correction. (R.C. §5747.13[E]). Interest rate for tax underpayments, assessments and overpayments will be federal short-term rate on Oct. 15th of preceding year. (R.C. §§5747.09, 5747.11, 5703.47).

Penalty for false or fraudulent return: felony of fourth degree. (R.C. §§5747.99, 2929.14, 2929.18). Penalty for other violations of income tax statutes, or rules or regulations of tax commissioner: $100 to $5,000 fine. (R.C. §5747.99).

Estate Tax (Additional Tax).

Taxes not paid on or before nine months from date of decedent's death shall bear interest at rate of federal short-term rate on Oct. 15th of preceding year. (R.C. §§5731.23, 5703.47).

Corporation Franchise (Income) Tax.

Failure to pay tax and underpayment of tax: unpaid taxes bear interest at rate prescribed by R.C. §5703.47. (R.C. §§5733.26, 5733.29). Failure to file annual report and to pay tax (except estimated taxes): penalty of $50 per month not to exceed $500 or 5% of tax required to be shown on report for each month elapsing between due date and date report is actually filed, or between date tax is due and date of actual payment, not to exceed 50% in aggregate. All or any part of penalty assessed may be abated if failure to file or pay is due to reasonable cause and not willful neglect. (R.C. §5733.28). Articles of incorporation or certificate of authority to do business in Ohio may be canceled for failure to file report or pay tax upon expiration of 90 days from date prescribed by law for filing report or paying tax. (R.C. §5733.20). Tax commissioner, through attorney general, may sue for judgment for amount of taxes and penalties due, for enforcement of lien in favor of state, and for injunction to restrain delinquent corporation from doing business in Ohio (R.C. §5733.23), or may bring quo warranto proceedings to forfeit and annul delinquent corporation's privileges and franchises (R.C. §5733.24). Penalty for doing business after cancellation of articles of incorporation or certificate of authority to do business for failure to report or pay taxes: $100 to $1,000 fine. (R.C. §5733.99).

Corporation which timely files return, paying amount computed therein, may refrain from paying tax assessments before filing applications for review and correction. (R.C. §5733.11[E]). Corporation must object to assessment in writing within 60 days or deficiency becomes conclusive. (R.C. §5733.11[B]). Interest rate for tax underpayments will be federal short-term rate on Oct. 15th of preceding year. (R.C. §§5733.11[C], 5703.47).

Motor Vehicle Fuel Tax.

Failure by dealer to submit proper monthly tax report required by R.C. §5735.06 or make timely payment of taxes is subject to additional charge not exceeding 10% of tax liability for that month, or $50 plus additional 15% penalty for each assessment (R.C. §5735.12) plus interest at rate prescribed under R.C. §5703.47 (R.C. §5735.12). Criminal penalties for violation of Motor Vehicle Fuel Tax in R.C. §5735.99.

Fuel Use Tax.

Operation of commercial car without obtaining use permit required by R.C. §5728.02, not less than $25 nor more than $100, unless penalty expressly provided elsewhere. (R.C. §5728.99). Assessment made by commissioner for failure to file return, incomplete return, incorrect return, with added 15% penalty. (R.C. §5728.10). Objections to assessment must be made in writing within 60 days or assessment becomes final. (R.C. §5728.10). Once final, assessment shall bear interest rate of federal short-term rate on Oct. 15 of preceding year. (R.C. §§5728.10, 5703.47).

Grain Handling Tax.

Same penalties as applicable for personal property tax. (R.C. §5737.06).

Sales Tax.

Failure to remit tax, mandatory loss of license for minimum two years. (R.C. §5739.99). Vendor is personally liable for sales tax collected but not remitted and for failure to collect tax, although consumer may also be assessed if facts so require. (R.C. §5739.13). Failure to file two consecutive monthly returns or three returns within 12-month period: Commissioner may require bond in amount of average tax liability for one year or suspend vendor's license. (R.C. §5739.30[B]). Consumer's refusal to pay full tax or to comply with tax regulations, or presentation of false certificate indicating exempt sale; or vendor's failure to collect full tax or to comply with tax regulations, or granting of unauthorized tax rebate; First offense, fine of $25 to $100; each subsequent offense, if corporation, fine of $100 to $500; if individual, fine of $25 to $100; or imprisonment up to 60 days, or both. (R.C. §5739.99). Failure to file proper report: fine of $100 to $1,000, or imprisonment up to 60 days, or both. (R.C. §5739.99). Interest on unpaid tax at rate specified in R.C. §5703.47. (R.C. §5739.132).

Use Tax; Storage Tax.

Seller is personally liable for failing to collect or collecting and failing to remit use or storage tax. (R.C. §5741.11). Consumer's refusal to pay full tax, or to comply with tax regulations, or presentation of false certificate of exemption or seller's failure to collect full tax, or to comply with tax regulations, or granting of unauthorized rebate: First offense, fine of $25 to $100; each subsequent offense, if corporation, fine of $100 to not more than $500; if individual, fine of $25 to not more than $100 or imprisonment for not more than 60 days, or both. (R.C. §5741.99). Failure to make proper return: Fine of not more than $500. (R.C. §5741.99). Interest on unpaid tax at rate specified in R.C. §5703.47. (R.C. §5739.132).

Cigarette Tax.

Cigarettes upon which tax is not paid are subject to seizure and sale. Tax Commissioner is authorized to retain as tax revenues proceeds from sale in excess of costs incurred. (R.C. §5743.08). Criminal penalties for violation of Tobacco Products Tax in R.C. §5743.99.

Tax on Bulk Sales of Malt Beverages.

Failing to pay taxes levied on sale of beer, wine, and mixed beverages: 30% penalty. (R.C. §4305.131). Making false entries for inspection by tax commissioner or hindering his inspection: fine of $25 to $100. (R.C. §4305.99).

Tax on Bottled Beverages.

Bottled beverages upon which tax is not paid are subject to seizure and sale. Tax commissioner is authorized to retain sufficient proceeds from sale to cover taxes due, 50% penalty, and costs. (R.C. §4307.09).

Natural Resource Severance Tax.

Failure to file return or to pay tax, up to 25% of amount assessed (R.C. §5749.15); failure to file return or filing or causing to be filed incomplete, false or fraudulent return: fine of not more than $2,500 and imprisonment for six months to not more than five years, or both (R.C. §§5749.99, 2929.14, 2929.18).

22.02 ALCOHOL, BEVERAGES AND TOBACCO TAXES:

Beer tax imposed by R.C. §4301.42. Reports and advance payments governed by R.C. §4301.47 and R.C. §4303.33.

Wine tax imposed by R.C. §§4301.43-.44. Reports and advance payments governed by R.C. §4301.47 and R.C. §4303.33.

Cigarette tax imposed by R.C. §5743.02.

22.03 BUSINESS TAXES:

Franchise Taxes.

See category 2 Business Organizations, topic 2.03 Corporations.

22.04 CORPORATE TAXES:

See category 2 Business Organizations, topic 2.03 Corporations.

22.05 EMPLOYMENT TAXES:

Unemployment Compensation Tax.

See category 11 Employment, topic 11.02 Labor Relations, subhead Unemployment Compensation.

22.06 [RESERVED]

22.07 ESTATE TAX:

Estates of residents dying on or after July 1, 1968, are subject to estate tax. (R.C. §5731.02). Value of gross estate to include all personal and real property except real property situated and tangible personal property having situs outside state, to extent of decedent's interest at date of death or on alternate valuation date (six months from date of death) if federal estate tax return must be filed. (R.C. §5731.01). Gross estate includes: Property subject to retained life estate (R.C. §5731.06); reversion exceeding 5% of value (R.C. §5731.07); transfer subject to reserved right to alter, amend or revoke (R.C. §5731.08); annuities (R.C. §5731.09); joint and survivor property except to extent survivor other than spouse shows contribution (R.C. §5731.10); one-half of joint and survivor property passing to spouse (R.C. §5731.10); property subject to general power of appointment (R.C. §5731.11); and property in which decedent had income interest for life (R.C. §5731.131). Gross estate does not include proceeds of life insurance payable to beneficiary (including trustee) other than decedent's estate. (R.C. §5731.12).

Estates of nonresident decedents are subject to estate tax to extent of tangible personal property and real property having situs or situated in Ohio, and intangible personal property employed in business in Ohio. (R.C. §§5731.19, .34).

Value of gross estate property is price at which property would change hands between buyer and seller both having reasonable knowledge of relevant facts and under no compulsion to buy or sell. (R.C. §5731.01[B]). Rulings and regulations of federal estate tax applicable for determining fair market value where not expressly contrary to statute. (R.C. §5731.01). Valuation of qualified farm property, election and additional tax upon disposition of qualified farm property contained in R.C. §5731.011.

Exemptions allowed in determining taxable estate include: (1) Marital deduction, if decedent survived by spouse, which is lesser of (a) amount allowed as marital deduction for Federal estate tax purposes, or such amount that would otherwise be allowed if Federal estate tax return were required to be filed, (b) greater of one-half difference between value of gross estate and deductions allowed under R.C. §5731.16 or $500,000; prior to July 1, 1991, $1,000,000 after June 30, 1991; unlimited marital deduction after June 30, 1993; (2) pay and allowance of member of armed forces missing in action in Viet Nam and recently declared dead. (R.C. §§5731.15, .01). See category 13 Estates and Trusts, topic 13.09 Executors and Administrators, subhead Allowances.

Deductions from gross estate include (1) Funeral expenses; (2) administration expenses to extent paid or actually will be paid, exclusive of year's allowance and property exempt from administration; (3) claims against estate outstanding and unpaid at decedent's death; (4) unpaid mortgages or debts with respect to property included in decedent's gross estate; and (5) expenses of administering property included in estate but not subject to claims. Income taxes on income received after decedent's death, property taxes not accrued before decedent's death and estate, succession, legacy or inheritance taxes are not deductible. (R.C. §5731.16). Deductions for broad charitable, humanitarian and governmental uses, not reduced by proportionate share of death taxes, are allowed if possibility of gift, legacy, devise or transfer becoming effective is not so remote as to be negligible. (R.C. §5731.17).

Rates of tax on transfer of taxable estates of resident decedents (R.C. §5731.02):

Amount	*Rate*
On first $40,000	2% of taxable estate
$40,001 to $100,000	$800 plus 3% of excess over $40,000
$100,001 to $200,000	$2,600 plus 4% of excess over $100,000
$200,001 to $300,000	$6,600 plus 5% of excess over $200,000
$300,001 to $500,000	$11,600 plus 6% of excess over $300,000
Over $500,000	$23,600 plus 7% of excess over $500,000

Credit is allowed of lesser of $500 or amount of tax for persons dying before 2001; lesser of amount of tax or $6,600 for persons dying before 2002; and lesser of amount of tax due or $13,900 for persons dying on or after Jan. 1, 2002. (R.C. §5731.02). Rates of tax on transfer of taxable estates of nonresident decedents determined by finding fraction, numerator of which is value of Ohio situs property and denominator is value of decedent's property wherever situated, multiplying fraction by value of all Ohio property and applying tax rates of R.C. §5731.02. (R.C. §5731.19).

Additional estate tax on taxable estates of resident and nonresident decedents is levied to recover difference between basic estate tax and Federal estate tax state death tax credit, utilizing rate schedule from Internal Revenue Code. Additional tax is credited with Ohio estate tax and estate, inheritance, legacy or succession taxes paid to other states. Administration of additional tax is similar to that of basic estate tax. (R.C. §§5731.18, 5731.19, 5731.24).

Returns, When and to Whom Made.

No return required if value of gross estate $25,000 or less or there is release from administration. Fiduciary or person in possession of taxable property must file estate tax return with probate court within nine months of decedent's death. Returns are forwarded to Tax Commissioner. (R.C. §5731.21).

Determination of Tax.

At filing Tax Commissioner promptly determines correctness of returns and values of property and may subpoena witnesses. Employees of county auditor or probate court offices may be designated as agents to assist Tax Commissioner. Commissioner and fiduciary may agree to have correctness of any item determined in accordance with final determination for Federal tax purposes. (R.C. §5731.26). Tax Commissioner shall certify correctness of tax return and amount of tax, or shall issue deficiency, refund or penalty letter, with copies to fiduciary, auditor and probate court. Person required to file return has 60 days in which to take exceptions. Hearing on exceptions is had in probate court, with right of appeal. (R.C. §§5731.27, 5731.30 - 5731.32).

Time and Mode of Payment.

Basic estate tax is due at expiration of nine months from date of death. At election of person required to file return, tax plus 3% interest on value of reversionary or remainder interests may be postponed until six months after termination of precedent interests. Additional estate tax due 60 days from final determination of Federal estate tax liability. (R.C. §§5731.23 - 5731.25). Claims for refund may be made by person in possession of property or transferee within three years of date return required to be filed. (R.C. §5731.28).

To What Officer Payment Made.

Tax is paid to treasurer of county in which return is required to be filed. (R.C. §5731.23).

Who Liable for Payment.

Tax is lien upon all property subject to tax unless tax is restricted, transferred or discharged. Lien is (1) discharged as to property applied to costs and expenses of administration, property exempt, or property allowed to widow or children for 12 months support; (2) transferred to money or other property received from purchaser when fiduciary sells estate property to pay debts, expenses and taxes, or to bona fide purchaser; and (3) restricted, transferred or discharged as to certain property when authorized by tax commissioner in writing, or upon order of probate court. Fiduciary, person in possession or transferee of taxable property, except bona fide purchaser, is personally liable for tax to extent that collection of tax is reduced by his omission to perform statutory duty. Fiduciary is not required to transfer property to legatee, devisee or heir until tax on such property, or on any other property of decedent which has been or is to be transferred to such person, his spouse or minor child, is collected or deducted and paid. (R.C. §5731.37). Delinquent taxes may be reduced to judgment. (R.C. §5731.42). Penalty for failure to file tax return is 5% of tax due if one month late, plus 5% per additional month with 25% maximum. (R.C. §5731.22). Interest on underpaid tax imposed at Federal short-term rate. (R.C. §§5731.23, 5703.47). No liability for payment of basic and additional estate taxes and interest or penalties may be determined later than three years from date returns required to be filed. Liens on real property for estate taxes expire ten years from decedent's death. (R.C. §5731.38).

No corporation organized or existing under laws of Ohio may transfer shares of stock belonging to decedent without written consent of Tax Commissioner. Financial institutions may transfer up to ¾ of deposits or other property of decedent which they hold without written consent of Tax Commissioner. Safety deposit box contents, with exception of last will, deed to burial plot, insurance policies and papers of no monetary value, may not be released unless inventory is made in presence of Tax Commissioner or his agent, and written consent is obtained. Proceeds of annuities and taxable insurance policies in excess of $2,000 qualifying as employer death benefit may not be paid without Tax Commissioner's release. (R.C. §5731.39).

Institutions or persons releasing, transferring or paying assets of decedent without required written consent of Tax Commissioner are liable for tax and interest due on such assets plus statutory penalty. (R.C. §5731.39). Consent of Tax Commissioner not required for release or transfer of intangible property of decedent not domiciled in Ohio. (R.C. §5731.40).

Apportionment Against Inter Vivos Dispositions.

No statute.

Apportionment Against Testamentary Dispositions.

In absence of tax-charging clause in will providing otherwise, Federal and Ohio estate taxes (including generation-skipping tax) are apportioned proportionately among all persons interested in estate. (R.C. §§2113.86, .861). Tax attributable to interests other than under residuary clause is charged first against residuary interests not covered by marital deductions, orphan's deduction or charitable deduction; then against residuary interest which is covered by marital or charitable deduction; finally against specific bequests. (R.C. §2113.86[B]).

22.07A EXCISE TAXES:

Excise taxes on public utilities, see category 2 Business Organizations, topic 2.03 Corporations.

22.08 GASOLINE AND SPECIAL FUELS TAXES:

Gasoline tax imposed on all dealers in motor vehicle fuel, rates of which increase by R.C. §§5735.05, 5735.25, 5735.29, 5735.30. Monthly reporting requirements in R.C. §5735.06. Penalties and assessments contained in R.C. §§5735.12, 5735.121.

22.09 GIFT TAX:

None; estate tax applies to gifts in contemplation of death or intended to take effect after death. (R.C. §5731.05).

22.10 [RESERVED]

22.11 INCOME TAX:

On Whom Imposed.

State personal income tax is imposed on individuals, trusts and estates residing in or earning or receiving income in Ohio. (R.C. §§5747.01, 5747.02). “Resident” includes individual domiciled in Ohio. (R.C. §5747.01). There are three classifications for determining domicile. Individual who has no more than 120 contact periods in Ohio during year and who has at least one abode outside Ohio during entire year is not domiciled for tax purposes. Individual who has less than 183 contact periods during year but more than 120 contact periods is presumed to be domiciled. Individual who has at least 183 contact periods during year is presumed to be domiciled. (R.C. §5747.24[D]). Tax derived from income is levied against corporations; see category 2 Business Organizations, topic 2.03 Corporations, subhead Franchise (Income) Tax.

Pass-Through Entities.

Withholding tax is levied on every qualifying pass-through entity having at least one qualifying investor who is individual and on every qualifying trust having at least one qualifying beneficiary who is individual. Withholding tax is imposed on sum of adjusted qualifying amounts of qualifying pass-through entity's qualifying investors who are individuals and on sum of adjusted qualifying amounts of qualifying trust's qualifying beneficiaries, at rate of 5% of that sum. (R.C. §5747.41).

Income Subject to Tax.

Adjusted gross income for Ohio purposes is derived from federal adjusted gross income as follows: (1) Add interest or dividends on obligations or securities of any other state or of any non-Ohio political subdivision or authority; (2) add interest or dividends on obligations of any authority, commission, instrumentality, territory, or possession of U.S. exempt from federal income taxes but not from state income taxes; (3) deduct interest or dividends on obligations of U.S. and its territories and possessions or of any authority, commission, or instrumentality of the U.S. to extent included in federal adjusted gross income but exempt from state income taxes under laws of U.S.; (4) deduct disability and survivor's benefits to extent included in federal adjusted gross income; (5) deduct benefits under Title II of Social Security Act and tier 1 railroad retirement benefits to extent included in federal adjusted gross income under I.R.C. §86; (6) add, in case of taxpayer who is beneficiary of trust that makes accumulation distribution as defined in I.R.C. §665, add, for beneficiary's taxable years beginning before 2002 or after 2004, portion, if any, of such distribution that does not exceed undistributed net income of trust for three taxable years preceding taxable year in which distribution is made to extent that portion was not included in trust's taxable income for any of trust's taxable years beginning in 2002, 2003 or 2004; (7) deduct amount of wages and salaries, if any, not otherwise allowable as deduction but that would have been allowable as deduction in computing federal adjusted gross income for taxable year, had targeted jobs credit allowed and determined under I.R.C. §§38, 51, and 52 not been in effect; (8) deduct any interest or interest equivalent on public obligations and purchase obligations to extent included in federal adjusted gross income; (9) add any loss or deduct any gain resulting from sale, exchange, or other disposition of public obligations to extent included in federal adjusted gross income; (10) regarding tuition credits purchased under Revised Code §3334: (i) for credits that have not been refunded pursuant to termination of tuition payment contract, deduct/add amount of income/loss related to credits, to extent included in calculation of federal adjusted gross income, and (ii) for credits that have been refunded pursuant to termination of tuition payment contract deduct/add excess/deficit of total purchase price of tuition credits refunded over amount of refund, to extent such amount was not included in calculation of federal adjusted gross income; (11) deduct, to extent not otherwise allowable as deduction or exclusion in computing federal or Ohio adjusted gross income, amount paid for medical care insurance and qualified long-term care insurance for taxpayer, taxpayer's spouse, and dependents, and deduct to extent not otherwise deducted or excluded in computing federal or Ohio adjusted gross income, amount paid for medical care in excess of 7.5% of federal adjusted gross income; (12) deduct any amount included in federal adjusted gross income solely because amount represents reimbursement or refund of expenses that in previous year taxpayer had deducted as itemized deduction pursuant to I.R.C. §63 and add any amount not otherwise included in Ohio adjusted gross income for any taxable year to extent attributable to recovery of any amount deducted or excluded in computing federal or Ohio adjusted gross income in any year; (13) deduct any portion of deduction in I.R.C. §1341(a)(2), for repaying previously reported income received under claim of right if certain conditions satisfied; (14) deduct amount equal to deposits made to, and net investment earnings of, medical savings account; (15) add amount equal to funds withdrawn from medical savings account, and net investment earnings on those funds, when funds withdrawn were used for any purpose other than to reimburse account holder for, or to pay, eligible medical expenses, and add amounts distributed from medical savings account; (16) add any amount claimed as credit under R.C. §5747.059 with regard to tax imposed on qualifying pass-through entities or qualifying pass-through trusts if certain conditions satisfied; (17) deduct amount contributed by taxpayer to individual development account program established by county department of human services for purpose of matching funds deposited by program participants; (18) beginning in 2001, for taxpayers below certain income levels, deduct amounts paid for qualified tuition and fees paid to eligible institution for taxpayer, taxpayer's spouse, or any dependent of taxpayer; (19) add any reimbursement received of any amount so deducted in (18) above in any previous taxable year to extent amount is not otherwise included in Ohio adjusted gross income; (20) add five-sixths of amount of depreciation expense allowed under I.R.C. §168(k) including taxpayer's proportionate or distributive share of amount of depreciation expense allowed under I.R.C. §168(k) to pass-through entity in which taxpayer has direct or indirect ownership interest and add five-sixths of amount of qualifying §179 depreciation expense allowed to any pass-through entity in which person has direct or indirect ownership; (21) deduct one-fifth of amount added for each of five succeeding taxable years, and add five-sixths of amount of qualifying §179 depreciation expense, including person's proportionate or distributive share of amount of qualifying §179 depreciation expense allowed to any pass-through entity in which person has direct or indirect ownership (net operating loss carryforward and carryback shall be reduced proportionately by such amounts claimed under §§168 and 179); (22) deduct reimbursements for life insurance proceeds; (23) deduct death benefits paid by adjutant general; (24) deduct military pay and allowances received by taxpayer during taxable year for active duty service in United States army, air force, navy, marine corps, or coast guard or reserve components thereof or national guard; (25) deduct amount of qualified organ donation expenses incurred by taxpayer during taxable year, not to exceed $10,000; (26) deduct amounts received by taxpayer as retired military personnel pay for service in United States army, navy, air force, coast guard, or marine corps or reserve components thereof, or national guard, or received by surviving spouse or former spouse of taxpayer under survivor benefit plan on account of taxpayer's death; (27) deduct amount taxpayer received during taxable year from military injury relief fund created in R.C. §5101.98. (R.C. §5747.01[A]). Ohio taxable income of estates and trusts are derived from federal taxable income plus additions to and subtractions from federal taxable income. (R.C. §§5747.01[S], 5747.02).

Exemptions.

Personal exemption for taxpayer and taxpayer's spouse shall be $750 in 1996, $850 in 1997, $950 in 1998, and $1,050 in 1999 and forward, adjusted to reflect certain increases in gross domestic product deflator. Personal exemption for each dependent shall be $850 in 1996, and $1,050 in 1997 and forward (R.C. §5747.025) and credit of $20 times number of exemptions allowed for taxpayer, spouse and dependents (R.C. §5747.022).

Rates.

Taxes computed on adjusted gross income less exemptions for individuals or taxable income for estates for taxable year beginning in 2008 as follows: $5,000 or less, .618%; $5,000-$10,000, $30.90 plus 1.236% in excess of $5,000; $10,000-$15,000, $92.70 plus 2.473% in excess of $10,000; $15,000-$20,000, $216.35 plus 3.091% in excess of $15,000; $20,000-$40,000, $370.90 plus 3.708% in excess of $20,000; $40,000-$80,000, $1,112.50 plus 4.327% in excess of $40,000; $80,000-$100,000, $2,843.30 plus 4.945% in excess of $80,000; $100,000-$200,000, $3,832.30 plus 5.741% in excess of $100,000; more than $200,000, $9,573.30 plus 6.24% in excess of $200,000. (R.C. §5747.02).

Taxes computed on adjusted gross income less exemptions for individuals or taxable income for estates for taxable year beginning in 2009 and thereafter: $5,000 or less, .587%; $5,000-$10,000, $29.35 plus 1.174% in excess of $5,000; $10,000-$15,000, $88.05 plus 2.348% in excess of $10,000; $15,000-$20,000, $205.45 plus 2.935% in excess of $15,000; $20,000-$40,000, $352.20 plus 3.521% in excess of $20,000; $40,000-$80,000, $1,056.40 plus 4.109% in excess of $40,000; $80,000-$100,000, $2,700.00 plus 4.695% in excess of $80,000; $100,000-$200,000, $3,639.00 plus 5.451% in excess of $100,000; more than $200,000, $9,090.00 plus 5.925% in excess of $200,000. (R.C. §5747.02).

Credit for Tax on Income Not Allocable to Ohio.

Credit is allowed for tax otherwise due on portion of adjusted gross income not allocable to Ohio, but not to exceed portion of total tax that adjusted gross income allocated elsewhere bears to total adjusted gross income. (R.C. §5747.05[A]).

Income is classified as business income, that arises from regular course of trade or business, including earnings from real property, tangible property, intangible property held or traded in regular course of trade or business operation including income from partial liquidation of business, including gain or loss from sale or other disposal of goodwill (R.C. §5747.01[B]) and nonbusiness income, which consists of all income other than business income. (R.C. §5747.01[C]).

Residents allocate to Ohio adjusted gross income all nonbusiness income (R.C. §5747.20[A]) and proportion of business income and business deductions computed by formula reflecting property, payroll and sales in Ohio (R.C. §5747.21).

Nonresidents allocate to Ohio adjusted gross income all nonbusiness income earned for services performed in Ohio and derived from designated property generally located or utilized in Ohio (R.C. §5747.20[B]); nonresidents allocate business income in same manner as residents (R.C. §5747.21).

Partnership business income and deductions are allocated to Ohio as though in hands of partnership under R.C. §5747.21 and then, as thus allocated, to each partner in proportion to his right to share in income; nonbusiness income and deductions are first allocated according to right of each partner to share in that income and then allocated to this state under R.C. §5747.20. (R.C. §5747.22). Trust income is allocated by similar rules, except that share of beneficiary in business income is limited to distribution made to beneficiary. (R.C. §5747.23).

Credit for Taxes on Income Levied by Other Jurisdictions.

Resident taxpayer also receives credit for tax levied by another state or Dist. of Col. upon or derived from income included in his adjusted gross income, but not to exceed portion of total tax that adjusted gross income subject to such tax bears to total adjusted gross income. (R.C. §5747.05[B]).

Investment Credit.

Investment credit against tax is lesser of: (1) Amount of tax otherwise due or (2) difference between: (A) tangible personal property taxes paid by taxpayer in taxable year on engines, machinery, tools, and implements acquired on or after Jan. 1, 1978, used or designed to be used in refining or manufacturing and listed by taxpayer for taxation under R.C. §5711.16, and (B) such tax on such property had it been listed and assessed at 25% of its value. Unused credit may be carried over for three tax years, so long as taxpayer continues to own property. Credit is available only if such supporting information as Tax Commissioner may require is provided. (R.C. §5747.051).

Retirement income credit is given for retirement benefits or distributions from pension or profit-sharing plans ranging from $0 to $200, depending on amount of retirement income received. (R.C. §5747.055).

Child care credit of 25% is given to taxpayers with adjusted gross income of less than $40,000; except that, for taxable years beginning on or after Jan. 1, 1997, amount of credit for taxpayer with adjusted gross income of less than $20,000 shall equal federal credit for which taxpayer is eligible, in any case without regard to any limitation imposed by I.R.C. §26. (R.C. §5747.054).

Political contribution credit to certain candidates up to $100 on joint return. (R.C. §5747.29).

Miscellaneous Credits.

Taxpayer 65 or older has $50 credit against tax. (R.C. §5747.05[C]). Taxpayer who receives lump sum retirement payment during tax year may take credit based on life expectancy. (R.C. §§5747.05[E]; 5747.055[C], [E]). Taxpayer who legally adopts minor child has $1,500 credit against tax. (R.C. §5747.37).

Reciprocal tax agreements are authorized. (R.C. §5747.05[A]).

Withholding.

Employers maintaining offices or transacting business in Ohio and paying compensation to employees on whom Ohio income tax is imposed must withhold for each payroll period an amount prescribed by regulation of Tax Commissioner. Certain occupations, including domestics and agricultural labor, are exempted. (R.C. §5747.06[A]). Fiscal officer may withhold from nonresidents from states listed in R.C.§ 5747.05(A) nonresident employee compensation equivalent to tax reasonably estimated to be due to employee's state of residence. (R.C. §5747.061[B]). Penalty for failure to withhold; see topic 22.01 Administration, subhead Penalties. Employer must furnish information return for calendar year to each employee on or before Jan. 31 of succeeding year or within 30 days after date compensation was last paid if employment terminated prior to end of calendar year. (R.C. §5747.06[B]).

Returns and payments are filed with Tax Commissioner of Ohio. (R.C. §5747.04).

Withholding returns and payments are filed: (1) if amount withheld during partial week is $100,000 or more, by first banking day thereafter generally by electronic funds transfer; (2) if amount withheld for preceding 12 month period ending June 30 was $84,000 or more, but less than $180,000, within three banking days after close of partial weekly withholding period during which employer is required to withhold amounts under §5747; (3) otherwise, no later than ten banking days after last day of month. (R.C. §5747.07[B], [C]).

Annual returns and payments of balances due must be filed on or before Apr. 15 of each year. (R.C. §5747.08[G]). Taxpayers reporting on fiscal year basis (R.C. §5747.01[F], [N]) file on 15th of fourth month after end of fiscal year (R.C. §5747.09[B]). Taxpayers filing joint federal income tax returns must file joint state income tax returns. (R.C. §5747.08[E]).

Declarations of estimated tax must be filed on or before Apr. 15 or 15th of fourth month after end of fiscal year by taxpayers whose estimated tax exceeds probable amount withheld by more than $300. Payments are quarterly. (R.C. §5747.09).

Amended returns accompanied by any additional payment of tax shall be filed not later than 60 days after adjustment has been agreed to for federal income tax purposes. (R.C. §5747.10).

Refunds of excess amounts withheld or paid as estimated tax must be claimed within four years after payment. State pays interest at rate per annum prescribed by R.C. §5703.47 on overpayments, amounts paid illegally or erroneously and amounts paid on illegal, erroneous or excessive assessment. (R.C. §5747.11).

Interest and penalties, see topic 22.01 Administration, subhead Penalties.

Municipal Income Tax.

Municipalities may levy uniform taxes on income and net profits earned therein (R.C. §§718.01, .02); such taxes are in addition to state income tax (R.C. §5747.02[C]). Military pay and allowances for members of armed forces and other miscellaneous types of income specified by statute are exempt. (R.C. §718.01).

22.12 INHERITANCE TAX:

Applies only to estates of decedents dying before June 30, 1968. See appendix to tit. 57. See topic 22.06 Estate Tax.

22.12A MINES, MINERALS AND FISHERIES TAXES:

Natural Resource Severance Tax.

Imposed by R.C. §§5749.01-.99.

22.13 [RESERVED]

22.14 MOTOR VEHICLE TAXES:

See category 23 Transportation, topic 23.01 Motor Vehicles.

22.14A PRODUCE AND FOOD TAXES:

Grain Handling Tax.

Imposed by R.C. §5737.03. Excise tax is levied on grain handled in business in lieu of property taxes. (R.C. §5737.03). Returns governed by R.C. §5737.04.

22.14B REAL AND PERSONAL PROPERTY TAXES:

Assessment of Real Estate.

County auditors, under direction of commission of tax equalization, are assessing officers of their respective counties. (R.C. §5713.01).

Proceedings.

Auditor must assess all real estate in county every sixth year and at any time property has changed in value. (R.C. §5713.01). Valuation is at true or taxable value, or agricultural use value, determined by rules prescribed in c. 5713 and by commission of tax equalization (R.C. §§5713.03, .04), and must be uniform throughout state (R.C. §5715.01) except as to agricultural land, to which special rules apply (R.C. §§5713.30-.37). True value is sale price of arm's length transaction within reasonable time before or after tax lien date, unless improvement is added or casualty loss occurs. (R.C. §5713.03). On 2d Mon. in June of each year, auditor delivers assessments to Board of Revision, which revises and corrects assessments, then returns lists to auditor, who prepares duplicate. (R.C. §5715.16). Notice of completion of revision and equalization must be published (R.C. §5715.17), including notice of return of tax exempt property to tax list and duplicate (R.C. §5713.082). Auditor may give additional notices of changes in valuation (R.C. §5715.18) and Board of Revision must give notice before increasing valuation (R.C. §5715.12). See subhead Exemptions, infra.

Collection of Real Estate Taxes.

Taxes on real estate for first half of year are due Dec. 31; for second half, June 20 of next following year; both installments are payable to county treasurer. (R.C. §323.12). Time of payment may be extended. (R.C. §323.17).

Delinquent taxes are subject to penalty of 10% (R.C. §323.121), and delinquencies may be paid in installments over five years. (R.C. §323.31).

Real and Personal Property Taxable.

Real property, personal property located and used in business in this state (except patterns, jigs, dies and drawings held for use and not for sale, and motor vehicles [R.C. §5701.03]), domestic animals, boats and interests therein, aircraft not used in business wholly in another state, other than those properly licensed in accordance with R.C. §§4561.17-.21, and all moneys, credits, investments (which do not include stock in instrumentality of federal government, stock in insurance or financial institution, interest-bearing obligations of state or federal government, interests in land and rents and royalties therefrom, and employment and insurance contracts and employee benefit plans [R.C. §5701.06]), deposits and other intangible property of residents are subject to taxation (R.C. §§5709.01-.02). Deposits representing funds required to be collected or withheld as taxes upon persons other than depositor by federal, state or local governmental authority, and deposits not used in business representing funds belonging beneficially to nonresidents, whether or not such funds are on deposit in or outside Ohio, and intangible property of organizations of religious, charitable, scientific, literary, health, hospital, or educational purpose are exempt from taxation. (R.C. §§5709.04-.041).

Exemptions.

Unmanufactured tobacco is exempt from taxation for state purposes to extent of value, or amounts, of any unpaid nonrecourse loan or loans thereon granted by U.S. Government or any agency thereof. (R.C. §5709.01). School houses, churches, public colleges and academies (R.C. §5709.07); graveyards, except lands held with view to profit (R.C. §5709.14); real or personal property belonging to state or U.S. (R.C. §5709.08); public recreational facilities (R.C. §5709.081); nature preserves (R.C. §5709.09); lands and buildings belonging to county, township, city or village, for support of poor, real and tangible personal property of institutions used exclusively for charitable purposes and land used by organizations described in Internal Revenue Code §501(c)(3) for housing for qualified low-income families, and retirement or nursing homes belonging to tax-exempt organizations and occupied by persons who retired from uncompensated service to charitable, religious, fraternal or educational institution (R.C. §5709.12); improvements made for public purpose to municipal lands leased to others (R.C. §5709.41); property used for support of children's homes (R.C. §5709.13); other public grounds of cities, villages or townships used exclusively for public purposes (R.C. §5709.10); water works belonging to city or village (R.C. §5709.11); soldiers monuments and monumental buildings (R.C. §5709.15); $100 of aggregate listed value of domestic animals taxable as personal property of resident of this state (R.C. §5709.19); intangible property arising from sale of grain or soybean by person engaged in agriculture from intangibles tax (R.C. §5709.02); sewer, water or electrical service on real property within agricultural district and used for agricultural production (R.C. §929.03); lands used for monuments or memorials to distinguished deceased persons (R.C. §5709.16); lands held by soldiers memorial associations, monumental building associations or cemetery associations, as may be necessary and proper to carry out objects of such associations, except rental property (R.C. §5709.17); prehistoric earth works or historic buildings, preserved in commemoration of historic events, dedicated to public uses, and not held for profit (R.C. §5709.18); Enterprise Zone Agreements entered into prior to July 1, 1994. (R.C. §§5709.62, .63, .64). There is no exemption for members of Armed Services.

Approved facilities (including air pollution, energy conversion, noise pollution, solid waste energy conversion, thermal efficiency improvement and industrial water pollution control

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facilities) are exempt from personal property taxation and are not considered as improvements on land for real property taxation or assets for determination of corporation franchise income tax, and their transfer is not subject to sales or use taxes. (R.C. §5709.25). Approval certificates are transferable. (R.C. §5709.27).

With approval of board of education of district, board of township trustees may create “incentive district” and declare improvements to land parcels exempt from taxation. (R.C. §5709.40).

Approved solar, wind and hydrothermal energy systems installed prior to Dec. 31, 1985 are exempt from real property taxes. (R.C. §5709.53).

Homestead.

Real property taxes may be reduced on homestead of persons 65 or older, permanently and totally disabled, and qualifying surviving spouse of deceased person who was permanently and totally disabled or 65 or older. (R.C. §§323.151-.152). Applications or reapplications for reduction are obtained from county auditor between 1st Mon. in Jan. and 1st Mon. in June. (R.C. §§323.153, .154).

Tax Rates.

Real estate and tangible personal property are taxed at same rate (R.C. §319.31) and are subject to same regulations (R.C. §5705.03). No real or personal property taxes are collected if amount is $2 or less. Aggregate tax on any property may not exceed 10 mills, except on specific authorization. (Const. Art. XII, §2; R.C. §5705.02). Taxes are levied annually by various subdivisions (R.C. §5705.03) and rates are adjusted and finally determined by county budget commission (R.C. §5705.32). Majority of voters in regional transit authority territory may approve property tax not to exceed five mills per year for periods up to ten years. (R.C. §306.49).

Real Estate Tax Liens.

State has first lien on all real property for taxes due which attaches on first day of Jan. annually and continues until taxes are paid. (R.C. §§5719.01, 5721.10).

County treasurers may collect delinquent real property taxes by selling certificates entitling bearer to liens against property in amount of delinquency. (R.C. §5721.31).

Purchaser of land at tax sale has lien for purchase price and for all legal taxes afterward paid by him thereon. (R.C. §5723.16).

Co-owner or any person having lien on real estate may pay taxes due and have first lien for amount paid. (R.C. §§323.45, .48).

Assessments for streets, sewers and other governmental purposes are lien on lands assessed from date of assessment, but lien expires after two years unless it is certified to county auditor for entry on tax list for collection, or action is brought to enforce it. (R.C. §§729.10, 727.34).

Personal Property Tax Liens.

Personal property subject to taxation may be seized and sold for taxes (R.C. §5719.01) and on filing of proper notice, unpaid taxes become lien on real property (R.C. §5719.04).

Taxes on shares of stock of bank or dealer in intangibles are lien thereon from Jan. 1 in each year until paid. (R.C. §5719.13). Taxes on bank deposits are lien thereon as of day fixed for listing of such deposits. (R.C. §5719.11).

Intangibles Tax.

Applicable only to dealers in intangibles: Following property shall be listed and assessed at its fair value: shares of stockholders in incorporated dealer in intangibles having actual place of business in this state, to extent represented by capital employed in this state; shares of stockholders, partners, or members of unincorporated dealer in intangibles having actual place of business in this state, capital stock of which is divided into shares held by owners, to extent represented by capital employed in this state; and property representing capital employed in this state by unincorporated dealer in intangibles whose capital stock is not divided into shares, having actual place of business in this state. (R.C. §5725.13).

Exclusion from State Income Tax.

See topic 22.10 Income Tax, subhead Income Subject to Tax.

Federal Election.

Taxpayer may elect, for period of no less than three years, to file return based upon investment income reported for federal income tax. (R.C. §5711.10).

Real Estate Conveyance Tax.

See subhead Real Estate Transfer Tax, infra.

Real Estate Transfer Tax.

Transfers of real estate are taxed at rate of 10¢ per $100 or a fraction thereof, with minimum tax of $1. Following transfers are excepted: (a) To or from U.S., State of Ohio, or any instrumentality, agency, or political subdivision of either; (b) solely in order to provide or release security for debt; (c) confirming or correcting deed previously executed and recorded; (d) to evidence gift in trust or otherwise, whether revocable or irrevocable between husband and wife or parent and child or spouse of either; (e) sale for delinquent taxes or assessments; (f) pursuant to court order to extent that transfer is not result of sale; (g) pursuant to reorganization of corporations or unincorporated associations or pursuant to dissolution of corporation, to extent corporation conveys property to stockholder as distribution in kind of corporation's assets in exchange for stockholder's shares in dissolved corporation; (h) by subsidiary to parent corporation for no consideration, nominal consideration or in consideration of cancellation or surrender of subsidiary's stock; (i) by lease, unless lease is for term of years renewable forever; (j) when value of real property or interest conveyed does not exceed $100; (k) when occupied residential property being transferred to builder of new residence in course of trade; (1) transfers other than for purpose of and as step in prompt sale of property to others; (m) when no money or other valuable and tangible consideration readily convertible into money is paid and transfer is not gift; (n) transfers of real estate by decedent's representative; (o) to trustee acting on behalf of minor children of decedent; (p) of easement or right of way having value not exceeding $1,000; (q) property sold to surviving spouse by estate at appraised value; (r) transfers without consideration to or from certain charitable or public service organizations exempt from federal income taxation; (s) transfers among heirs at law or devisees, including surviving spouse of common decedent, when no consideration in money is paid and transaction is not gift; (t) to trustee of trust, when grantor of trust has reserved unlimited power to revoke trust; (u) to grantor of trust by trustee of trust, when transfer is made to grantor pursuant to exercise of grantor's power to revoke trust; (v) to beneficiaries of trust if fee was paid on transfer from grantor of trust to trustee; (w) to corporation for incorporation into sports facility; (x) transfers where grantor is also grantee; and (y) from a county land reutilization corporation to a third party. (R.C. §319.54[G][3]). Grantee is responsible for preparation and delivery to auditor of statement in triplicate declaring value of property transferred as prerequisite to filing. (R.C. §319.202). (See category 10 Documents and Records, topic 10.04 Records, subhead Requisites for Recording.) Counties may levy additional tax up to 30¢ per $100 on transfers of real estate located wholly or partly within boundaries. (R.C. §322.02).

Redemption.

All land upon which taxes, assessments, interest, penalties or charges are delinquent may be redeemed before foreclosure proceedings are instituted or after institution of such proceedings, prior to entry of confirmation of sale by tendering to county treasurer amount sufficient to pay taxes, assessments, penalties, charges, and costs incurred in foreclosure proceedings. (R.C. §5721.25). Title of purchaser is incontestable after confirmation of sale. (R.C. §5721.19[F]).

If all taxes and penalties on forfeited land are paid before sale, state relinquishes its claim and land is reentered on tax records in name of property owner. (R.C. §5723.03).

Review of Real Estate Assessments.

Taxpayer may file complaint of overvaluation, undervaluation, illegal valuation of any property on tax duplicate, or recoupment charge made against land formerly used for agricultural purposes, with county auditor, who transmits complaints to Board of Revision for hearing and decision within 90 days. Changes in valuation of $17,500 or greater are accompanied by special notification and complaint provisions. Complaint must be made on or before Mar. 31st of ensuing tax year or date of closing of collection for first half of current year. (R.C. §5715.19). Appeal from Board of Revision may be taken within 30 days of decision to Board of Tax Appeals (R.C. §5717.01) or to common pleas court (R.C. §5717.05). Complaints regarding liability or exemption of property may be made by taxpayer to Board of Tax Appeals before Dec. 31 of year in which determination is made. (R.C. §5715.27). Assessments are reviewed annually by Board of Tax Appeals. (R.C. §§5715.23, 5715.24).

Sale of Real Estate.

Lien for taxes, assessments, and penalties must be enforced after one year in name of county treasurer by foreclosure proceeding. (R.C. §5721.10). See category 20 Mortgages, topic 20.04 Mortgages of Real Property, subhead Foreclosure. Delinquency list is published by county auditor after Aug. settlement (R.C. §5721.03), and one year after publication, auditor files delinquent tax certificate with prosecuting attorney (R.C. §5721.13), who commences action within reasonable time, which, if exceeding three years, makes action in rem (R.C. §5721.18). Board of Tax Appeals may act in place of local authorities in collection matters. (R.C. §5703.02). Rent receivership by treasurer is permitted where taxes are six months delinquent. (R.C. §323.49). Direct forfeiture occurs if lands are twice offered for public sale without buyers. (R.C. §5723.01).

Sale of Personal Property.

Taxable personal property may be sold for taxes. (R.C. §5719.01). County treasurer may distrain sufficient goods belonging to taxpayer and sell them at public sale (R.C. §5719.081), or he may collect taxes by civil action (R.C. §5719.08) in which debtor is not entitled to stay of execution or to exemptions (R.C. §5719.08).

22.1522.16

22.17 SALES AND USE TAXES:

Sales Tax.

Tax is based upon aggregate of state, county and transit authority taxes in effect.

Schedules for combined total sales tax set forth in statute (R.C. §5739.025[A], [B], [C]), provided that on and after July 1, 2005, rate of tax shall be 5½% (R.C. §5739.02[A][1]).

Each retail sale is taxed, except as hereinafter stated.

Vendor is taxed at percentage equal to aggregate rate of all local sales taxes on all except exempt sales, with credit given for all sales taxes collected and remitted by him. (R.C. §5739.10). For transactions occurring on or after July 1, 1980, vendor may deduct amount of bad debts, as defined in statute, which have been charged off as uncollectible on vendor's books and on which tax was paid in preceding tax period. Vendor must provide evidence to support any claim for bad debt. (R.C. §5739.121).

Exemptions.

Tax does not apply to: (1) Sales to state or political subdivisions; (2) sales of food for human consumption off premises where sold; (3) sales of food to students in facilities maintained by educational institutions; (4) sales of newspapers, and of magazine subscriptions shipped by second class mail, and sales or transfers of magazines distributed as controlled circulation publications; (5) furnishing, preparing, or serving of certain meals without charge by employer to employee provided employer records meals as part compensation for services performed or work done; (6) certain sales of motor fuel upon receipt, use, distribution, or sale of which in this state tax is imposed by law of this state; (7) sales of natural gas by natural gas company, of water by water-works company, or of steam by heating company, if in each case thing sold is delivered to consumers through pipes or conduits, and all sales of communications services by telegraph company and sales of electricity delivered through wires; (8) casual sales by person, or auctioneer employed directly by person, except as to such sales of motor vehicles, watercraft or outboard motors, watercraft documented with U.S. coast guard, snowmobiles, and all-purpose vehicles; (9) sales of services or tangible personal property, other than motor vehicles, mobile homes, and manufactured homes, by churches, organizations described in §501(c)(3) of Internal Revenue Code by nonprofit organizations operated exclusively for charitable purposes; (10) sales not within taxing power of this state under Constitution of U.S.; (11) except for certain transportation services by aircraft or motor vehicles, transportation of persons or property unless transportation is by private investigation or security service; (12) sales to nonprofit organizations; (13) building and construction materials and services sold to construction contractors for incorporation into (a) structure or improvement to real property under construction contract with political subdivision, (b) structure or improvement to real property that are accepted for ownership by political subdivision, (c) horticulture structure or livestock structure for person engaged in business of horticulture or producing livestock, (d) house of public worship or religious education, or building used exclusively for charitable purposes, (e) into building under construction contract with organization described in §501(c)(3) of Internal Revenue Code when building is to be used exclusively for organization's exempt purposes, (f) original construction of sports facility, (g) real property outside this state if such materials and services, when sold to construction contractor in state in which real property is located for incorporation into real property in that state, would be exempt from tax on sales levied by that state; (14) sales of ships or vessels or rail rolling stock used or to be used principally in interstate or foreign commerce; (15) sales of products or services to persons primarily engaged in manufacturing, mining, farming or certain other related activities, to persons engaged in making retail sales, or to persons who purchase material for use primarily in packaging tangible personal property produced for sale; (16) sales of food to persons using food stamp coupons; (17) sales to persons engaged in farming, agriculture, horticulture, or floriculture; (18) sales of prescription drugs to humans; (19) sales of various prosthetic devices and medical equipment for humans pursuant to prescription; (20) sales of emergency and fire protection vehicles and equipment to nonprofit organizations for use solely in providing fire protection and emergency services for political subdivisions of state; (21) sales of tangible personal property manufactured in Ohio, if sold by manufacturer to retailer for use outside of Ohio; (22) sales of services provided by state or any of its political subdivisions; (23) sales of motor vehicles to nonresidents of this state; (24) sales to persons engaged in preparation of eggs; (25) sales of water to consumer for residential use, except sale of bottled water, distilled water, mineral water, carbonated water, or ice; (26) fees charged for inspection or reinspection of motor vehicles; (27) sales to persons licensed to conduct food service operation of tangible personal property used to prepare food for human consumption for sale, to preserve food that has been or will be prepared for human consumption, or to clean tangible personal property used to prepare or serve food for human consumption; (28) sales of animals by nonprofit animal adoption services or county humane societies; (29) sales of service to 501(c)(3) nonprofit corporation that conducts research and development in library technology and provides computerized or automated services to public, charitable, or educational libraries; and sales of tangible personal property that is used for such purposes; (30) sales and installation of agricultural land tile; (31) sales and erection or installation of portable grain bins; (32) sales of property incorporated in motor vehicles that are primarily used for transporting tangible personal property belong to others by person engaged in highway transportation for hire, except for packages and packaging used for transportation of tangible personal property; (33) sales to state headquarters of any veterans' organization; (34) sales of tangible personal property and services to telecommunications service vendors, mobile telecommunications service vendors, or satellite broadcasting service vendors; (35) sales of newspaper inserts, catalogues, coupons, flyers, gift certificates, or other advertising material that prices and describes tangible personal property offered for retail sale to be used in making retail sales, sales of preliminary materials such as photographs, artwork, and typesetting that will be used in printing advertising material, and sales of automatic food vending machines that preserve food with shelf life of 45 days or less by refrigeration and dispense it to consumer; (36) sales to person engaged in business of horticulture or producing livestock of materials to be incorporated into horticulture structure or livestock structure; (37) sales of personal computers, computer monitors, computer keyboards, modems, and other peripheral computer equipment to teachers; (38) sales to professional racing team of motor racing vehicles, repair services for motor racing vehicles, or items of property that are attached to or incorporated in motor racing vehicles; (39) sales of used manufactured homes and used mobile homes; (40) sales to provider of electricity; (41) sales to person providing certain transportation services by aircraft or motor of tangible personal property and services used directly and primarily in taxable services under that section; (42) sales where purpose of purchaser is to do any of following: (a) to incorporate thing transferred as material or part into tangible personal property to be produced for sale by manufacturing, assembling, processing, or refining; or to use or consume thing transferred directly in producing tangible personal property for sale by mining, or directly in rendition of public utility service, (b) to hold thing transferred as security for performance of obligation of vendor, (c) to resell, hold, use, or consume thing transferred as evidence of contract of insurance, (d) to use or consume thing directly in commercial fishing, (e) to incorporate thing transferred as material or part into, or to use or consume thing transferred directly in production of, magazines distributed as controlled circulation publications, (f) to use or consume thing transferred in production and preparation in suitable condition for market and sale of printed, imprinted, overprinted, lithographic, multilithic, blueprinted, photostatic, or other productions or reproductions of written or graphic matter, (g) to use thing transferred primarily in manufacturing operation to produce tangible personal property for sale, (h) to use benefit of warranty, maintenance or service contract, or similar agreement to repair or maintain tangible personal property, if all of property that is subject of warranty, contract, or agreement would not be subject to tax imposed by this section, (i) to use thing transferred as qualified research and development equipment, (j) to use or consume thing transferred primarily in storing, transporting, mailing, or otherwise handling purchased sales inventory in warehouse, distribution center, or similar facility when inventory is primarily distributed outside Ohio to retail stores of person who owns or controls warehouse, distribution center, or similar facility, (k) to use or consume thing transferred to fulfill contractual obligation incurred by warrantor pursuant to warranty provided as part of price of tangible personal property sold or by vendor of warranty, maintenance or service contract, or similar agreement, (l) to use or consume thing transferred in production of newspaper for distribution to public, (m) to use tangible personal property to perform certain services if property is or is to be permanently transferred to consumer of service as integral part of performance of service; (43) sales conducted through coin operated device that activates vacuum equipment or equipment that dispenses water to consumer for consumer's use on premises in washing, cleaning, or waxing motor vehicle; (44) sales of replacement and modification parts for engines, airframes, instruments, and interiors in, and paint for, aircraft used primarily in fractional aircraft ownership program, and sales of services for repair, modification, and maintenance of such aircraft, and machinery, equipment, and supplies primarily used to provide those services; (45) sales of telecommunications service that is used directly and primarily to perform functions of “call center”; (46) sales by telecommunications service vendors of 900 service to subscriber; (47) sales of value-added non-voice data service; (48) sales of machinery, equipment, and software to qualified direct selling entity for use in warehouse or distribution center primarily for storing, transporting, or otherwise handling inventory held for sale to independent salespersons who operate as direct sellers and held primarily for distribution outside this state; (49) sales of materials, parts, equipment, or engines used in repair or maintenance of aircraft or avionics systems of aircraft, and sales of repair, remodeling, replacement, or maintenance services at federal aviation administration certified repair station in this state performed on aircraft or on aircraft's avionics, engine, or component materials or parts; (50) sales of full flight simulators that are used for pilot or flight-crew training, sales of repair or replacement parts or components, and sales of repair or maintenance services for such full flight simulators. (R.C. §5739.02[B]).

When and to Whom Payable.

Every vendor must be licensed by Department of Taxation and must collect tax at time price is paid or delivered. (R.C. §5739.02). Vendor may obtain vendor's license by submitting to county auditor of each county applicant desires to engage in business vendor's license application and fee. (R.C. §5739.17). Such collection will be waived if vendee obtains permit from Tax Commissioner permitting payment by vendee directly to Treasurer of state. Direct payment permit is granted only under circumstances which normally make it impossible at time of purchase to determine how purchased article will be used. (R.C. §5739.031).

Use Tax.

Tax at same rate as sales tax, including optional county and regional transit authority taxes where applicable, is levied on storage, use or consumption of tangible personal property not otherwise subject to sales tax, provided that on and after July 1, 2005, rate of tax is 5½%. (R.C. §5741.02).

Seller is responsible for collection of tax and is personally liable for failure to collect or file, and such personal liability extends to any of seller's employees having control or supervision of or charged with responsibility of filing returns and making payments, or any of its officers, members, managers, or trustees who are responsible for execution of seller's fiscal responsibilities. (R.C. §§5741.04, .11, .25). Tax Commissioner may require prepayment or security for payment. (R.C. §5741.06). Consumer remains liable unless tax has been paid to seller. (R.C. §5741.02). Seller of tangible personal property not holding vendor's license must register with Tax Commissioner. (R.C. §5741.17).

Exemptions.

(1) Goods or services on which sales tax has been paid; (2) goods or services, acquisition of which would not be subject to sales tax (see subhead Sales Tax, supra); (3) goods or services exempt under federal law; (4) goods in transient use by nonresident tourist or vacationer, or nonbusiness use within this state by nonresident of this state, if property so used was purchased outside this state for use outside this state and is not required to be registered or licensed under laws of this state; (5) goods or services rendered upon which taxes have been paid to another jurisdiction to extent of amount of tax paid to such other jurisdiction; (6) used manufactured homes or used mobile homes; (7) drugs that are or are intended to be distributed free of charge to licensed practitioner; (8) computer equipment and software leased from outside state, initially received in state by third party that will deliver property to consumer outside state within 90 days; (9) tangible personal property held for sale by person not for own use and

donated without charge to: (a) Nonprofit operated exclusively for charitable purposes in state or (b) state or political subdivision in state for exclusively public purpose. (R.C. §5741.02[C]).

22.18 STAMP AND SEAL TAXES:

Stamp Tax.

No documentary stamp tax, but certain special taxes are paid by affixing stamps.

22.18A TAX LIENS:

Uniform Federal Lien Registration Act not adopted.

22.19 USE TAXES:

See topics 22.15 Sales and 22.19 Use Taxes.

22.20 UTILITIES TAX:

See c. 5727.

23 TRANSPORTATION

23.01 MOTOR VEHICLES:

General supervision is by Ohio Bureau of Motor Vehicles, P.O. Box 16520, Columbus, Ohio 43216-6520, Telephone: (614) 752-7500, Website: http://www.ohiobmv.com/. As used in cc. 4503 (licensing of motor vehicles), 4505 (certificate of motor vehicle title law), 4507 (driver's license law), 4509 (financial responsibility), 4511 (operation of motor vehicles), 4513 (traffic laws-equipment; loads), 4515 (venue; guest statute), and 4517 (motor vehicle dealers), "motor vehicle" means any vehicle, including mobile homes and recreational vehicles. Generally, for purposes of licensing and certification, "motor vehicle" includes manufactured homes, mobile homes, recreational vehicles, and trailers and semitrailers whose weight exceeds 4,000 lbs. (R.C. §4505.01). Electric Personal Assistive Mobility Devices are subject to limited driving restrictions and local regulation. (R.C. §4511.512).

Vehicle registration required annually with registration based upon motor vehicle owner's date of birth and by assignment of date(s) by registrar. (R.C. §§4503.10, 4503.101). Registration shall be made either by mail, in person or electronically. (R.C. §4503.102). Applicant must present proof of ownership (R.C. §§4503.16, 4503.10) and pay license tax (R.C. §§4503.02, 4503.04, 4503.11), sign statement evidencing proof of financial responsibility (R.C. §4503.20) and, in case of noncommercial trailer weighing less than 4,000 lbs., present proof of weight (R.C. §4503.041). There is no exemption for members of armed forces. Disabled veterans and congressional medal of honor recipients pay no registration fee, service fee or county or municipal motor vehicle tax. (R.C. §§4503.173, 4503.41, 4503.43). Certain school buses are exempt from tax. (R.C. §4503.17). Registration is amended upon application by surviving spouse, or surviving corporation in case of merger or consolidation. (R.C. §4503.12). Passenger cars must bear stickers with name of county in which owner resides. (R.C. §4503.21).

Operator of commercial car must display certificate of registration on vehicle or be ready to exhibit it upon demand of any peace officer. (R.C. §4549.18).

Vehicles must display one plate on front and rear of vehicle, except manufacturer of motor vehicles or dealer, vehicles in transit, and owner or operator of motorcycle, motorized bicycle, manufactured home, mobile home, trailer, or semitrailer shall display in rear only. (R.C. §4503.21). Handicapped persons may obtain license plates or removable windshield placard containing wheelchair symbol. (R.C. §4503.44). Fees for such plates or placards are waived for disabled veterans and active duty members of armed forces. (R.C. §4503.44). Persons with court-ordered limited driving privileges must display restricted driving plates. (R.C. §4503.231).

Operators and passengers in commercial tractors, passenger cars, commercial cars or trucks are required to wear restraining devices. (R.C. §4513.263[B]). Violators can be fined and driver is responsible for ensuring that passengers wear restraining devices. (R.C. §4513.263[B], [G]). Law enforcement officers are prohibited from stopping vehicle solely to inspect for violation of this statute. (R.C. §4513.263[D]).

Child restraint system required for passengers under four years of age or under 40 lbs, and booster seats required for children shorter than 4'9” and under age 8. (R.C. §§4511.81, 4511.99).

Social Security numbers shall not be placed on motor vehicle certificate of registration. (R.C. §4503.10[A][7]).

Manufacturers, dealers, and distributors (R.C. §4503.27); owners of vehicles or motorized bicycles used for demonstration for purposes of sale or lease, repossessed vehicles, and vehicles held or transported by insurance companies or persons, firms, or corporations engaged in salvage or scrap operations, vehicles owned by or in possession of Ohio nonprofit corporation for testing (R.C. §4503.31); and persons, firms, and corporations in business of transporting vehicles (R.C. §4503.33) are subject to special registration requirements.

Upon application and proof of purchase, temporary tags may be obtained for 30 days pending transfer of motor vehicle. Fee $2 plus a $3.50 service fee. (R.C. §4503.182).

Operator's License.

All persons operating motor vehicles on public highways must be licensed (R.C. §4507.02), must sign statement evidencing proof of financial responsibility (R.C. §4507.212) and must display license on demand of peace officer or in case of accident (R.C. §4507.35). No license may display social security number, unless requested by person licensed. (R.C. §4501.31). Temporary instruction permits issued to persons age 15 years and six months. (R.C. §4507.05). Removable “student driver” sticker issued with temporary instruction permit. (R.C. §4507.232). Probationary license may be issued to persons 16-18 years of age, and restricted license under hardship conditions to persons 14-15. (R.C. §4507.071). Licenses and temporary instruction permits may be revoked or denied to persons under age 18 who withdraw or are habitually absent from school, if adjudicated unruly or for certain traffic offenses. (R.C. §§4510.32, 4507.08). Application of minor under age 18 must be signed by person having custody. (R.C. §§4507.07, .08). Applicants under age 18 must present proof of satisfactory completion of approved driver education or training course. (R.C. §4507.21). Applicants for issuance or renewal of license who are under age 26 are deemed to have consented to Bureau of Motor Vehicles to forward applicant's information to Military Selective Service system, if so required. (R.C. §4507.062). Licenses are not to be issued to any person who is alcoholic or is addicted to controlled substances, or who has impaired ability to operate motor vehicle due to narcotics addiction, physical or mental disability or disease, who is unable to understand highway warnings or traffic signs or directions given in English language, whose driver's license is under cancellation, revocation, or suspension in any jurisdiction until expiration of one year after license was cancelled or revoked or period of suspension ends, who is under Class 1 or 2 suspension, who is not resident or temporary resident of state, or to person against whom arrest warrant of municipal or county court is outstanding. (R.C. §4507.08). Licenses must be renewed on birthday of applicant in fourth year after date issued. (R.C. §4507.09). Subject to R.C. §4507.12 every driver's license shall be renewable at any time prior to its expiration and up to 90 days after expiration upon payment of fee. Registrar of Motor Vehicles shall notify each driver by regular mail of license expiration within 45 days after date of expiration. (R.C. §4507.09). Each person licensed shall notify Registrar if any change in address in writing within ten days following that change. (R.C. §4507.09). Licenses may be suspended or revoked and license plates impounded on conviction of certain offenses or when holder is adjudged mentally incompetent (R.C. §§4507.023, .16, .164, .17, .20, and 4511.203), or upon accumulation of 12 or more points for traffic violations within two year period (R.C. §4510.037). Holder may attend classes to reduce points, or petition court for appeal of determination and suspension based on accumulation of points. (R.C. §4510.037). Holder may not operate motor vehicle on public road after suspension expires without meeting license reinstatement requirements. (R.C. §4510.21). Limited driving privileges may be granted by court, if not otherwise prohibited by statute. (R.C. §§4510.02, 4510.021, 4510.13). Occupational driving privileges can be granted to juvenile who has been convicted of third violation, if holder will attain 18 years during time of probation and occupation warrants. (R.C. §§4507.31, 4510.032). Operation of motorcycle requires special endorsement (R.C. §4507.02), except if drug or alcohol abuse charge is involved, then treatment or intervention program must be completed.

Members of armed forces on active duty and furnished with driver's permit are exempt when operating official motor vehicles, and members of armed services licensed at commencement of active duty are exempt during period of active duty and for six months thereafter. (R.C. §4507.03).

Chauffeur's license is not issued to person under age of 18. (R.C. §4507.08). All licenses must bear color photograph, distinguishing number, personal information, signature of licensee, and any indications of any restrictions placed by registrar. (R.C. §4507.13). Registrar can disclose personal information only with licensee's consent.

It is unlawful to permit motor vehicle to be driven by unlicensed operator. (R.C. §4511.203).

Titles.

Manufacturer or importer of new motor vehicle must give dealer manufacturer's or importer's certificate and no dealer may acquire new motor vehicle without obtaining such certificate. (R.C. §4505.05). No one can acquire right, title, claim, or interest in motor vehicle until such person is issued certificate of title or manufacturer's or importer's certificate. Certificate of title for motor vehicle may include transfer on death designation of beneficiary (R.C. §§2131.13; 4505.04), or certificate of title is assigned in accordance with R.C. §4505.03. Certificate of title forms specified in R.C. 4505.07 and must contain mileage disclosure statement in form specified in R.C. §4505.06. See category 3 Business Regulation and Commerce, topic 3.12 Consumer Protection, subhead Odometer Rollback and Disclosure Act. Abandoned vehicles can be sold with salvage title or as scrap. (R.C. §§4513.60 - 4513.65). Insurance company which sells unrepairable vehicle must obtain salvage certificate of title. (R.C. §4505.11). Automobile dealers may be authorized by Registrar of Motor Vehicles to serve as Electronic Motor Vehicle Dealer and issue electronic certificates of title. (R.C. §4503.035). When owner of motor vehicle must apply for certificate of title, owner may elect whether or not to receive physical certificate of title. If application submitted electronically, clerk issues electronic certificate of title unless physical certificate requested. (R.C. §4505.021). If person sells any motor vehicle to Electronic Motor Vehicle dealer, and seller does not have physical certificate of title, then seller does not need to present such dealer with physical certificate of title if seller signs form issued by registrar that attests to person's identity and assigns vehicle to dealer. (R.C. §4505.032). In all other cases, motor vehicle may not be transferred without physical certificate of title. (R.C. §4505.032).

Sales.

Within 30 days after delivery, application for certificate of title must be filed with clerk of court in county in which applicant resides or, if applicant is nonresident, in which transaction was consummated. Application must be accompanied by fee prescribed in R.C. §4505.09, duly assigned outstanding certificate of title, if no certificate has been issued, by manufacturer's or importer's certificate, or by certificate of title of another state from which motor vehicle was brought into Ohio. If vehicle was last registered in another state, application must also be accompanied by physical inspection certificate required by R.C. §4505.061. Evidence of payment of sales tax or use tax must be presented with application unless purchaser is nonresident of Ohio and vehicle will be registered outside Ohio. (R.C. §4505.06). If there is lien on vehicle, clerk delivers certificate to holder of first lien. (R.C. §4505.08).

In case of transfer by operation of law, inheritance, devise of bequest, bankruptcy, insolvency, replevin, execution sale, or repossession, clerk of county in which last certificate was issued, upon written notice to debtor, and upon surrender of prior certificate, or affidavit of person entitled to possession with copy of court order or instrument on which claim is based, issues new certificate of title. (R.C. §4505.10).

Liens and Security Interests.

Security agreements affecting motor vehicles subject to certificate of title law are exempt from filing requirements under Uniform Commercial Code. (R.C. §4505.13). Such security interests are valid against creditors of debtor and subsequent purchasers, lienholders, and other secured parties. Such interests take priority in order of notation. (R.C. §4505.13).

Possession of Certificate.

Clerk delivers certificate to applicant unless vehicle is subject to liens, in which case he delivers to holder of first lien. (R.C. §4505.08).

Discharge.

Holder of certificate must note discharge over his signature and present certificate to clerk of county for cancellation. (R.C. §4505.13). If dealer to whom certificate of title is being transferred is satisfying lien on title, then dealer shall send to lienholder discharge request that includes request for funds to fully discharge lien and accurate information concerning vehicle. Upon receiving discharge request, lienholder must send dealer certificate of title, with notation of discharge on face of certificate, within seven business days of crediting funds, or if certificate cannot be delivered, affidavit stating that lien has been discharged together with payment for duplicate certificate of title.

Lienholder is liable to dealer for late fee of $10 per day for each certificate of title or affidavit and required payment conveyed more than seven business days but less than 21 business days, and from then on, $25 per day until required delivery occurs. (R.C. §4505.13).

Registrar must make title information available electronically to public. (R.C. §4505.141).

Fees.

Certificate of title, $5. Additional fee for late application, $5. Notation of lien, $5. Certified copy of certificate of title, $5, memorandum certificate, $5. (R.C. §4505.09).

Foreign Certificates of Title.

Out-of-state certificate of title is entitled to full faith and credit in Ohio, provided that according full faith and credit to such certificate does not do violence to established policy of Ohio as expressed in its statutes. (173 Ohio St. 387, 183 N.E.2d 135).

Size and weight limits regulated by R.C. §§4513.30-.34 and R.C. §§5577.01-.14, .99.

Equipment required regulated by R.C. §§4513.03-.29.

Inspection.

State Highway Patrol officer may stop and check vehicle for compliance with c. 4513 and either issue official inspection sticker or order vehicle removed from highway if found defective. Vehicles bearing valid certificates of inspection issued by another state or political subdivision of Ohio having inspection program conforming to Ohio standards are exempt from Highway Patrol inspection. Operators of 15 or more motor vehicles may qualify service departments as official inspection stations. (R.C. §4513.02).

School and commercial buses are subject to special inspection requirements. (R.C. §§4511.761; 4513.50 - 4513.53). Motor vehicles previously registered in other states are subject to inspection on registration (R.C. §4505.061); see subhead Foreign Vehicles, infra. Restored motor vehicles must be inspected by State Highway Patrol prior to issuance of title. Fee for inspection of restored vehicle, $50. (R.C. §4505.111). Fire safety inspectors can inspect any vehicles. (R.C. §3737.14).

Ohio has enacted and entered into Nonresident Violator Compact (R.C. §§4510.71, 4510.72), providing methods for enforcing traffic violations committed by Ohio residents in foreign jurisdictions.

Motorized Bicycles.

May be operated by persons 14 or 15 years of age holding valid probationary motorized bicycle license or any person 16 years of age or older with valid commercial driver's license. Licenses are issued after test is passed. (R.C. §§4507.01, 4511.521). Operators under 18 must wear helmet; motorized bicycles must have rear view mirror and other equipment in accordance with rules of Director of Highway Safety. (R.C. §4511.521). Motorized bicycles manufactured after 1968 must have electronic directional signals. (R.C. §4513.261).

Accidents.

Driver involved must stop, and give name and address, and if not owner, owner's name and address, and license plate number of motor vehicle. If such information is not furnished owner or person in charge of damaged vehicle, driver must report to local police or county sheriff within 24 hours. If damaged vehicle is unoccupied, written information must be attached to it. (R.C. §§4549.02, 4549.021). In case accident results in damage to real property or personal property attached thereto or legally upon or adjacent to public road or highway, driver of vehicle must notify owner of property of damage thereto and of vehicle's registration number and his name and address. If unable to locate owner, driver must within 24 hours notify local police of city or village or sheriff of county where accident occurred. (R.C. §§4549.021, .03). Driver must display operator's license to peace officer or other driver in collision. (R.C. §4507.35).

Authorities may remove vehicles or personal property blocking roads as a result of an accident (R.C. 4513.66)

Liability of owner for negligence of another person arises only out of relationship of master and servant or principal and agent (100 O.S. 186, 126 N.E. 66) or out of owner's negligence, as by entrusting vehicle to incompetent driver (107 O.S. 501, 140 N.E. 338). Family car doctrine has not been adopted. (100 O.S. 186, 126 N.E. 66).

Person signing application of minor under 18 for driver's license is responsible for any negligence or misconduct committed by minor while under 18, unless minor or other person has filed proof of financial responsibility. (R.C. §4507.07).

Guest Statute.

None. Statute unconstitutional. (43 O.S.2d 195, 331 N.E.2d 723).

Proof of financial responsibility must be maintained and presented to peace officer enforcing traffic laws and presented at any court appearance required by traffic offense. (R.C. §4509.101). Must also present proof of financial responsibility if randomly selected by registrar to provide such verification. Must have coverage limits of $12,500 (single) or $25,000 (multiple) bodily injury and $7,500 property. (R.C. §4509.01[K]). Failure to comply results in impoundment of registration and not less than 90-day suspension of driver's license. (R.C. §4509.101).

In any motor vehicle accident resulting in bodily injury or property damage in excess of $400 report must be filed by driver within six months of accident if other driver uninsured at time of accident. (R.C. §§4509.01, .06-.10). Proof of financial responsibility must accompany report. (R.C. §4509.101[B]). Upon notice from registrar, operator must deposit security with registrar to satisfy judgments arising from accident. (R.C. §§4509.13, 4509.17). Insurance policies, indemnity bonds, government or municipal bonds, or cash is sufficient. (R.C. §§4509.11 - 4509.30). If security not posted, license or registration can be suspended or revoked. (R.C. §4509.17). This act also applies to nonresidents. (R.C. §§4509.291, 4509.33). Insurance companies must offer uninsured and underinsured motorists coverage in amount equivalent to direct liability coverage for bodily injury or death. Named insured may reject such coverage or may require coverage in accordance with schedule of optional lesser amounts approved by Superintendent of Insurance, which amount must be no less than limits set forth in R.C. §4509.20. Insurer cannot limit recovery under policy based on insured's lack of injuries. (R.C. §3937.18). Specific civil penalties for violation of financial responsibility law. (R.C. §4509.101).

Insurance is not compulsory. See subhead Proof of Financial Responsibility, supra.

Uninsured/Underinsured Motorists Coverages.

Effective Oct. 31, 2001, Ohio Legislature eliminated requirement of former R.C. §3937.18 of mandatory offer of uninsured/underinsured motorist coverages, in response to Ohio Supreme Court decisions extending unintended coverage under business automobile and general commercial liability policies to employees and employee families. See, 85 O.S.3d 541, 709 N.E.2d 1161; 85 O.S.3d 660, 710 N.E.2d 1116; 86 O.S.3d 557, 715 N.E.2d 1142; 90 O.S.3d 445, 739 N.E.2d 338.

Foreign Vehicles.

Nonresident owner of vehicle registered in another state or country is exempt from registration requirements if such other state or country grants similar exemption for vehicles registered in Ohio. (R.C. §4503.37).

Application for registration of motor vehicle last previously registered in another state must be accompanied by physical inspection certificate. (R.C. §4505.061).

Nonresident operators and chauffeurs, if legally permitted to drive in their own state, may drive in Ohio without an Ohio license, but may be required at any time to establish identity and prove lawful possession of and right to operate vehicle. (R.C. §4507.04).

Action for Injury.

In case of injury to person or property through negligence of owner or operator, injured person may bring action against owner or operator in county where injury occurred, and summons may be issued to any county in Ohio in which defendant resides. (R.C. §4515.01).

Nonresident of Ohio, being owner or operator of motor vehicle, who operates it or has it operated within Ohio, or any resident, being licensed operator or owner of a motor vehicle, who becomes nonresident or conceals whereabouts, thereby constitutes Secretary of State as irrevocable agent for service of process. Appointment binding upon operators, administrators and executors. Process must be served on Secretary of State, and copy thereof, with endorsement of such service, sent by registered mail to defendant at last known address or, if defendant is deceased to administrator or executor. Court may order continuance if needed for defendant to appear and defend. (Civ.R. 4.3; R.C. §2703.20).

Direct actions against insurer not authorized until 30 days after final judgment against insured person, firm or corporation is entered. Successful party may file supplemental petition joining liability insurer as new party defendant. Insurer may assert coverage defenses against injured party. Declaratory judgment by injured party binding on insured. (R.C. §3929.06). Contents of insurance agreements subject to discovery (Civ.R. 26); see category 5 Civil Actions and Procedure, topic 5.11 Depositions and Discovery.

Motor Vehicle Carriers.

Public Utilities Commission has authority to supervise and regulate motor transportation companies in state operating as common carriers for compensation over public highways. (R.C. §§4921.04-.05). No such company may commence operations without obtaining a certificate of public convenience and necessity from Commission (R.C. §4921.10), filing with Commission record of its authority from Interstate Commerce Commission to operate in interstate or foreign commerce in Ohio (R.C. §4919.78), and proof of liability insurance, freight cargo insurance, surety bond or self-insurance (R.C. §4919.78). Application must contain full information concerning principal office, physical property to be used, route and proposed time and rate schedules. (R.C. §4921.08). Published notice of filing of application for such certificate or amendment thereto or for abandonment of route is required. (R.C. §4921.09). No certificate can be issued until applicant has filed with Commission a liability insurance certificate, policy or bond satisfactory to Commission. (R.C. §4921.11). Reciprocity certificates for licensing or registration available for certain owners or drivers registered in other states or countries. (R.C. §§4503.37; 4507.101).

Commission also supervises those engaged in private motor carriage of persons or property. (R.C. §§4923.02 - 4923.03). Carrier must obtain permit from Commission. (R.C. §4923.04). Any special contract of carriage must accompany application for permit (R.C. §4923.05) and carrier's charges must be those shown in contracts filed with Commission (R.C. §4923.07). Change in number of carrying capacity of motor vehicles or in number or terms of contracts can be made only on notice or application to Commission. (R.C. §4923.14). Commission may revoke, alter, or suspend or amend permit. (R.C. §4923.14).

Motor Vehicle Taxes.

Fuel use permit must be obtained for every commercial car or tractor with three or more axles, which operates on public highways. (R.C. §5728.02). Each such vehicle is taxed at rate imposed under c. 5735 plus additional 3¢ per gallon fuel tax until July 1, 2004, reduced to 2¢ per gallon from July 1, 2004 through June 30, 2005. (R.C. §5728.06). On and after July 1, 2005, tax shall be imposed in same amount as motor fuel tax imposed under c. 5735. (R.C. §5728.06). In addition, motor transportation companies, common carriers and private or contract motor carriers are taxed for each vehicle. (R.C. §§4921.18, 4923.11). Reciprocal certificates do not apply to taxes. (R.C. §4503.37). Tax commissioner may enter into cooperative reciprocal agreements providing for imposition of fuel use taxes on apportionment of allocation basis with proper authority of any state. (R.C. §5728.05). Tax rates after state's entry into international registration plan set forth in R.C. §4503.042.

Varying license tax is also levied on all motor vehicles (R.C. §4503.04), and every automobile manufacturer, dealer or distributor must register each place of business (R.C. §4503.27) and is taxed $25 for each taxing district in which he has place of business (R.C. §4503.09).

Gasoline Tax.

See category 22 Taxation, topic 22.08 Gasoline and Special Fuels Taxes.

Motor Vehicle Dealerships.

See category 3 Business Regulation and Commerce, topic 3.20 Monopolies, 3.22 Restraint of Trade and Competition.

23.02 RAILROADS:

See category 3 Business Regulation and Commerce, topic 3.08 Carriers.

1
OKLAHOMA LAW DIGEST

—Scope —

Revised for 2010 edition by

McAFEE & TAFT A Professional Corporation, of Oklahoma City and Tulsa, Oklahoma.

(References, unless otherwise noted, are to Oklahoma Statutes, 2001, cited by titles and sections. Figure preceding hyphen indicates title; figure or figures following indicate sections. References to O.S.L. are to Oklahoma Session Laws.)

Note: This revision includes 2009 session laws adopted and approved by Governor. Legislature meets in regular session each year commencing first Mon. in Feb.; regular session must adjourn on last Fri. in May.

Note: This revision incorporates legislation through June 4, 2009.

1 INTRODUCTION

1.01 [RESERVED]

1.02 COMMON LAW:

Common law, as modified by constitutional law, statutory law and judicial decisions, remains in force in aid of general state statutes. Common law rule that statutes in derogation thereof must be strictly construed is not applicable to any general state statute; rather, all such statutes must be liberally construed to promote their object. (12 O.S. § 2).

1.031.00 [RESERVED]

1.01 GOVERNMENT AND LEGAL SYSTEM:

The State of Oklahoma is a constituent state of the United States of America. For further discussion of the U.S. federal system, see Introduction to the Federal Government of the United States at the beginning of this volume. A great many laws are promulgated by the federal government of the United States and are not reflected in the topics below. See the Introduction to this volume for references to the federal law topics covered.

Like all but one of the United States, Oklahoma has a common law legal system, with roots in English common law. For information on the courts and legislature of Oklahoma, see the category Courts and Legislature, infra.

1.02 [RESERVED]

1.03 HOLIDAYS:

Designated Holidays.

Each Sat., Sun., New Year's Day (1st day of Jan.), Martin Luther King, Jr.'s Birthday (3d Mon. in Jan.), President's Day (3d Mon. in Feb.), Memorial Day (last Mon. in May), Independence Day (July 4), Labor Day (1st Mon. in Sept.), Veterans' Day (Nov. 11), Thanksgiving Day (4th Thurs. in Nov.), day after Thanksgiving Day, Christmas (Dec. 25), Mon. before Christmas if Christmas is on Tues., or Fri. after Christmas if Christmas is on Thurs. Any act authorized, required, or permitted to be performed on such holiday may be performed on next succeeding business day, and no liability or loss of rights of any kind shall result from delay. (25 O.S. § 82.1).

Additional holidays (optional closing by banks and government offices) specified in 28 O.S. § 82.2. Any act authorized, required or permitted to be performed on any such holiday may and shall be performed on that day same as on any business day; provided any state, national or federal reserve bank, building and loan association, credit union, state, federal, county or municipal office may close on any such holiday and, in that event, any act authorized, required or permitted to be performed at or by such bank, building and loan association, credit union, public office or public official may be performed on next succeeding business day and no liability or loss of rights of any kind shall result from delay.

Holiday Falling on Sunday.

Succeeding Mon. is holiday. (25 O.S. § 82.1).

Holiday Falling on Saturday.

Preceding Fri. is holiday. (25 O.S. § 82.1).

Legality of Transactions on Saturday, Sunday, or Holiday.

No provision of Oklahoma law commanding a suspension of business on holiday. (431 P.2d 403).

Computation of Time.

Sat., Sun. or legal holiday not included as last day of period computed; instead, period runs until end of next day which is not Sat., Sun. or legal holiday. If period of time prescribed or allowed is less than seven days, intermediate Sats., Suns. and legal holidays are excluded from computation. (12 O.S. § 2006).

1.04 OFFICE HOURS AND TIME ZONE:

Oklahoma is in Central (GMT -06:00) time zone. Office hours vary; but are generally from 8 a.m. to 5 p.m., 8:30 a.m. to 5:30 p.m., or 9 a.m. to 6 p.m.

2 BUSINESS ORGANIZATIONS

2.01 AGENCY:

Common law rules generally govern. Statutory provisions for indemnification of corporation's agents and employees. (18 O.S. § 1031). Admissibility of statements of party's agent or servant governed by evidence code. (12 O.S. § 2801). Attorney-client privilege extends to confidential communications with representatives of attorney and representatives of client; trade secret privilege may be claimed by agent or employee. (12 O.S. § 2502, 12 O.S. § 2508). Damages for breach of warranty of agent's authority deemed amount that could have been recovered and collected from principal if warranty had been complied with, plus reasonable expenses of legal proceedings taken to enforce act of agent against principal. (23 O.S. § 39).

See category 21 Property, topic 21.15 Powers of Attorney.

2.02 ASSOCIATIONS:

See topics 2.08 Partnerships and 2.06 Limited Liability Companies.

Formation; Rights and Powers.

Associations, joint stock companies, and business trusts cannot conduct business in state without license. Annual franchise tax is $1.25 for each $1,000 or portion thereof of value of capital stock employed in state. Reports similar to those required of corporations must be made. (68 O.S. § 1201 et seq.). Use of trade names permitted. (18 O.S. § 1140-1141). Statutory provision for certain unincorporated associations, including cotton exchanges, grain exchanges, boards of trade and similar institutions. (15 O.S. § 568).

Actions.

Unincorporated association may be sued without naming individuals composing association, and service of process may be had on any member of association, or if service cannot be had in state, service by publication is authorized. (12 O.S. § 182). Action may be brought by or against members of unincorporated association as class. (12 O.S. § 2023.2).

Farming or Ranching.

No person, corporation, association or any other entity can engage in farming or ranching, or own or lease any interest in land to be used in business of farming or ranching, unless requirements of 18 O.S. § 955 are met.

Professional Associations.

Professional Entity Act (18 O.S. § 801 et seq.) governs domestic corporations, limited partnerships and limited liability companies formed for purpose of rendering professional service. See topic 2.03 Corporations, subhead Professional Corporations.

2.03 CORPORATIONS:

Oklahoma General Corporation Act (18 O.S. § 1001-1144) is applicable to every private corporation formed or qualified to transact business, and to all securities thereof, except that provisions of Act relating to qualification of foreign corporations do not apply to insurance companies, subject to jurisdiction of Insurance Commissioner, and foreign transportation companies, subject to jurisdiction of Corporation Commission (18 O.S. § 1002). Nonprofit corporations also are subject to provisions of 18 O.S. § 863-866. Additional provisions concerning religious, charitable and educational corporations. (18 O.S. § 543-601).

General Supervision.

Secretary of State, State Capitol Building, Oklahoma City, Oklahoma 73105, exercises general supervision over corporations.

Purposes.

Corporation may be formed under Act to conduct or promote any lawful business or purposes, except buying, acquiring, trading or dealing in real estate other than real estate located outside incorporated cities, towns and additions thereto (see infra, subhead Real Estate Ownership) or engaging in farming or ranching except as provided (see infra, subhead Farming or Ranching). Banks (6 O.S. § 301), insurance companies (36 O.S. § 606), domestic public utilities (tit. 17) and railroads (66 O.S. § 1) are subject to additional requirements (18 O.S. § 1005[B]), as are professional corporations (18 O.S. § 801-819).

Name.

See subhead, Certificate of Incorporation, infra. Corporation doing business in state under name other than its corporate name must file trade name report with Secretary of State. Such name must be distinguishable from name of any domestic or qualified corporation, reserved name, limited partnership name or trade name. (18 O.S. § 1140). Amended trade name report must be filed if false or erroneous statement in original report, change in kind of business transacted under trade name, or change in or additional address where business is to be carried on under trade name. (18 O.S. § 1140.3). If corporation or other business entity ceases doing business in state under trade name or transfers ownership of trade name to another corporation or business entity, it must file report with Secretary of State withdrawing trade name or specifying transfer. (18 O.S. § 1140.1, 1140.2). Secretary of State shall not accept for filing any statement or certificate containing corporate name which is not distinguishable from name or trade name of any other corporation, limited partnership, trade name or reserved name unless there is filed with Secretary of State: (1) Written consent of other corporation, limited partnership or holder of reserved or trade name to use name (with addition of one or more words which make name distinguishable, unless consenting entity states that it is about to change its name, cease to do business, withdraw from state or be wound up), (2) certified copy of final decree establishing prior right to use such name, or (3) in case of foreign corporation, resolution adopting fictitious name not prohibited for use in state. (18 O.S. § 1141). Exclusive right to corporate name may be reserved, by application filed with Secretary of State, for 60 days. (18 O.S. § 1139). Availability of name may be ascertained by telephone, without fee.

Term of existence for business corporation is perpetual unless limited by certificate of incorporation to lesser term. (18 O.S. § 1016). Corporation with limited term of existence may extend its existence by filing certificate in accordance with 18 O.S. § 1120. All corporations whether expired by their own terms or dissolved, shall continue for term of three years for winding up business. (18 O.S. § 1099).

Incorporators.

Any person, partnership, association or corporation, regardless of residence or domicile may form corporations; provided that at least three persons, partnerships, associations or corporations are required to incorporate not-for-profit corporation. (18 O.S. § 1005).

Certificate of incorporation must state: (1) Name, which shall contain one of words “association”, “company”, “corporation”, “club”, “foundation”, “fund”, “incorporated”, “institute”, “society”, “union”, “syndicate”, or “limited” or abbreviations thereof, or words or abbreviations of like import, and which must distinguish it upon records of Secretary of State from: (i) Names of other corporations, whether domestic or foreign, then existing or which existed at any time during preceding three years, (ii) names of partnerships, whether general or limited, or domestic or foreign, then in good standing or registered or which were in good standing or registered at any time during preceding three years, (iii) names of limited liability companies, whether domestic or foreign, then in good standing or registered or which were in good standing or registered at any time during preceding three years, (iv) trade names or fictitious names filed with Secretary of State, or (v) corporate, limited liability company, or limited partnership names reserved; (2) address (including street, number, city and county), of corporation’s registered office in state, and name of corporation’s registered agent; (3) nature of business or purposes to be conducted or promoted; (4) total number of shares of all classes of stock which corporation shall have authority to issue and, if applicable, number of shares of each class; (5) par value of each class of shares or statement that they are without par value; (6) statement of powers, preferences, rights, qualifications, limitations or restrictions as to any class of stock; (7) name and mailing address of incorporator or incorporators; (8) if powers of incorporator or incorporators are to terminate upon filing of certificate of incorporation, names and mailing addresses of persons who are to serve as directors until first annual meeting of shareholders or until their successors are elected and qualified; and (9) if corporation is not-for-profit, that corporation does not afford pecuniary gain to its members, name and mailing address of each trustee or director, number of trustees or directors to be elected at first meeting and, if corporation is church, street address of church location. (18 O.S. § 1006[A]).

Certificate of incorporation may also contain any provision for management of business and for conduct of affairs of corporation, and any provision creating, defining, limiting and regulating powers of corporation, directors, and shareholders, if such provisions are not contrary to laws of Oklahoma; any provision required or permitted to be stated in bylaws; authorization of binding compromise or arrangement between creditors or shareholders upon majority vote of ¾ in value of creditors or shareholders affected and approval by district court; grant of preemptive right to subscribe for any additional issues of stock; requirement, for corporate action, of vote of larger portion of stock than otherwise required; provision limiting duration of corporation to specified date (otherwise, perpetual); provision imposing personal liability for debts of corporation on shareholders or members to specified extent and upon specified conditions (otherwise no personal liability except for their own conduct and acts); provision for eliminating or limiting personal liability of director to corporation or shareholder, for monetary damages for breach of fiduciary duty, provided such immunity shall not extend to breach of duty of loyalty, acts or omissions not in good faith or which involve intentional misconduct or knowing violations of law, violations under 18 O.S. § 1053, or transactions from which director derived improper personal benefit. (18 O.S. § 1006[B]).

Certificate of incorporation need not set forth any powers conferred on corporation by provisions of Oklahoma General Corporation Act. (18 O.S. § 1006[C]).

Execution.

One signed instrument must be delivered to Office of Secretary of State. Certificate of incorporation must be signed by incorporator and acknowledged either (i) by person or one of persons signing instrument that it is his act and deed or act and deed of corporation, as case may be, and that facts stated therein are true; such acknowledgment shall be made before person who is authorized by law of place of execution to take acknowledgments of deeds and who, if he has seal of office, shall affix it to instrument, or (ii) by signature, without formal acknowledgment of signing party(s), in which case such signature constitutes affirmation or acknowledgment under penalties of perjury that instrument is his act or deed or act and deed of corporation and facts stated therein are true. (18 O.S. § 1007).

Incorporation Fees.

See infra, subhead Filing Fees.

Filing fees, payable to Secretary of State, for certificate of incorporation, 1/10 of 1% of capital stock (no par shares considered as $50 par stock), but not less than $50; for certification of incorporation of not for profit corporation, $25; for amended certificate of incorporation, consolidation, merger, reorganization, revival, extension or dissolution, $50 plus 1/10 of 1% of any increase in authorized capital in excess of $50,000; for certificate to foreign corporation to do business in state, 1/10 of 1% of capital invested in state during current year, but not less than $300; for amended certificate of qualification, consolidation, merger or withdrawal of foreign corporation doing business in state, $200; for document filed in office of Secretary of State, $25;

for reservation of corporate name, $10; for issuing extra copy of any certificate not requiring any extra filing, $10; for issuing any other certificate, $10; written report of record search, $5; receiving filing or indexing annual certificate of foreign corporation, $10; preclearance of any document for filing, $50; response by telecommunication to inquiry, $5; change of name, address or resignation of registered agent, $25. (18 O.S. § 1142). See, 28 O.S. § 111 for certain additional fees.

Facsimile Signature.

When authorized by rules of Secretary of State, any signature on instrument authorized to be filed with Secretary of State may be facsimile, conformed, or electronically transmitted. (18 O.S. § 1007).

License to Do Business.

No provisions, as such. License means authority under which foreign corporations are permitted to transact business in state. (Const. art. 9, § 1). See subhead Foreign Corporations, infra.

Organization.

After filing of certificate of incorporation incorporators, or board of directors if named in certificate of incorporation, shall hold meeting for purposes of adopting bylaws, electing directors (if of incorporators), electing officers (if of directors) and doing any other or further acts to perfect organization of corporation, and to transact such other business as may come before meeting. Two days written notice of meeting shall be given unless waived. Attendance at meeting constitutes waiver. Any action permitted at organizational meeting may be taken by means of written instrument if signed by all incorporators or directors as case may be. (18 O.S. § 1012).

Paid in Capital Requirements.

None.

Amendment of Certificate.

Certificate of incorporation may be amended in any and as many respects as may be desired, so long as such amended certificate contains only provisions as would be lawful and proper to insert in original certificate of incorporation filed at time of filing amendment. (18 O.S. § 1077[A]). Board of directors shall adopt resolution setting forth amendment, declaring its advisability, and either calling special meeting of shareholders entitled to vote or directing that amendment be considered at next annual meeting. Holders of outstanding shares of class shall be entitled to vote as class upon proposed amendment if amendment would increase or decrease aggregate number of authorized shares of such class, increase or decrease par value of shares of such class or alter or change powers, preferences or special rights of shares of such class so as to affect them adversely. Certificate setting forth amendment shall be executed, acknowledged and filed with Secretary of State in accordance with 18 O.S. § 1007. (18 O.S. § 1077[B]). Certified copy of amendment to certificate effecting name change must be filed with county clerk of each county in which corporation has recorded interest in real property. (18 O.S. § 1144). Additional requirements in case of change of name, mailing address, authorized capital or business purpose, or merger or consolidation. (18 O.S. § 1131).

Increase or Decrease of Stated Capital.

Authorized capital stock of corporation may be increased or decreased by amendment to certificate of incorporation. (8 O.S. § 1077[A]). By resolution of board of directors, capital may be reduced, provided that assets of corporation remaining after such reduction shall be sufficient to pay any debts of corporation for which payment has not been otherwise provided. (18 O.S. § 1079).

Bylaws may contain any provision, not inconsistent with law or certificate of incorporation, relating to business of corporation, conduct of its affairs and rights or powers of shareholders, directors, officers or employees. Original bylaws may be adopted, amended or repealed by incorporators, by initial directors if they were named in certificate of incorporation, or, before corporation has received any payment for any of its stock, by its board of directors. After corporation has received any payment for its stock bylaws shall be adopted by board of directors.

Stock.

Every corporation may issue one or more classes of stock or one or more series of stock within any class thereof. Stock may be with or without par value. Stock may be common, preferred or special and may have such voting powers, full or limited, or no voting powers as designated. (18 O.S. § 1032[A]). Nonstock corporations subject to different provisions (e.g., 18 O.S. § 1060).

Stock of any class or series may be made subject to redemption by corporation at its option or at option of holders of stock or upon happening of specified event; provided, however, immediately following any redemption, corporation shall have outstanding one or more shares or one or more classes or series of stock, which share(s) shall have full voting powers. (18 O.S. § 1032[B]). Only such stock may be redeemed by corporation. (18 O.S. § 1041[A][3]).

Stock shall have such preferences, powers, rights, qualifications, limitations or restrictions as may be stated in certificate of incorporation or in resolution or resolutions providing for issuance of such stock adopted by board of directors pursuant to authority expressly vested in it by provisions of certificate of incorporation. Certificate of designations setting forth copy of such resolution or resolutions of board of directors shall be executed, acknowledged and filed in accordance with 18 O.S. § 1007. (18 O.S. § 1032[A] and [G]).

Stock Certificates.

Board of directors may provide that any or all classes or series of stock be uncertificated shares. However, every holder of stock represented by certificates is, upon request, entitled to certificate. Otherwise, shares of corporation shall be represented by certificates. Stock certificates must be signed by chairman or vice-chairman of board, or president or vice-president, and by treasurer or assistant treasurer or secretary or assistant secretary. Corporation shall not have power to issue certificate in bearer form. (18 O.S. § 1039). If corporation is authorized to issue more than one class of stock or more than one series of any class, powers, designations, preferences and relative, participating, optional or other special rights of each such class or series shall be set forth in full or summarized on face or back of certificate; provided, however, in lieu thereof, corporation may set forth statement that corporation will furnish without charge to each shareholder who so requests powers, designations, preferences, and relative, participating, optional or other special rights of each class of stock or series thereof and qualifications, limitations or restrictions of such preferences and/or rights. (18 O.S. § 1032[F]).

Issuance of Stock.

Stock may be issued for cash, any tangible or intangible property or any benefit to corporation, or any combination thereof, except for services to be performed. At least that amount of consideration determined to be capital must be received along with binding obligation of subscriber or purchaser to pay balance. (18 O.S. § 1033). Shares of stock with par value may be issued only for at least par value. (18 O.S. § 1034). Corporation may issue whole or any part of its shares as partly paid and subject to call for remainder of consideration to be paid therefor. (18 O.S. § 1037).

Transfer of Stock.

Governed by Uniform Commercial Code. (12A O.S. § 8-101 et seq.). See category 3 Business Regulation and Commerce, topic 3.09 Commercial Code. Restrictions on transfer of securities are permitted if noted conspicuously on certificate or if notice is sent to holders of uncertificated shares. (18 O.S. § 1055).

In order to determine shareholders entitled to distributions or exercise certain rights board of directors may fix record date not more than 60 nor less than ten days before date of any special meeting, nor more than 60 days prior to any other action. If no record date is fixed record date shall be close of business next preceding day on which notice was given, or, if notice is waived, close of business on day board adopts resolutions relating thereto. (18 O.S. § 1058).

Uniform Simplification of Fiduciary Security Transfers Act not adopted.

Stock Transfer Tax.

None.

Shareholders.

Generally have such rights, powers, obligations and duties as set forth in certificate of incorporation. When shareholder pays any debt of corporation for which he may become liable pursuant to provisions of Oklahoma General Corporation Act, he may recover amount so paid corporation. (18 O.S. § 1125).

Shareholders' Actions.

In any derivative suit instituted by shareholder, it must be averred that plaintiff was shareholder at time of transaction of which he complains or that his stock thereafter devolved upon him by operation of law. (18 O.S. § 1126). Petition must be verified and must allege with particularity efforts, if any, made by shareholder to obtain action he desires. (12 O.S. § 2023.1).

Shareholders' Liabilities.

Shareholders or members are not personally liable for payment of corporation's debts, except as set forth in certificate of incorporation and except as they may be liable by reason of their own conduct or acts. (18 O.S. § 1006 [B][6]). When shareholder has received stock not paid in full, shareholder or subscriber is bound to pay unpaid balance for which shares were issued or to be issued. (18 O.S. § 1037).

Shareholders' Meetings.

Meetings of shareholders may be held at such place as may be designated by or in manner provided for in certificate of incorporation or bylaws, or, if not so designated, as determined by board of directors. If authorized to determine place of shareholders meeting, board of directors may determine that meeting shall not be held at any place but may instead be held solely by means of remote communications. Unless directors are elected by written consent in lieu of annual meeting, annual meeting of shareholders must be held for election of directors on date and at time designated by or in manner provided for in bylaws. Shareholders may, unless certificate of incorporation otherwise provides, act by written consent to elect directors; provided, however, that if consent is less than unanimous, action by written consent may be in lieu of holding annual meeting only if all of directorships to which directors could be elected at annual meeting held at effective time of action are vacant and are filled by such action. Special meetings may be called as authorized in certificate of incorporation or by bylaws. All elections of directors shall be by written ballot, unless otherwise provided for in certificate of incorporation. (18 O.S. § 1056).

Each shareholder entitled to vote at meeting of shareholders or to express consent or dissent to corporation action in writing without meeting may authorize another person or persons to act by proxy. (18 O.S. § 1057).

Board may fix record date not more than 60 nor less than ten days before date of meeting. If no record date is fixed, record date shall be close of business next preceding day on which notice was given or, if notice is waived, close of business on day preceding day in which meeting is held. Board may fix record date for consent without meeting which shall not precede date of resolution fixing record date and not be more than ten days after such resolution date. If no record date fixed by board, record date is first date on which signed written consent setting forth action taken or proposed is delivered to corporation. (18 O.S. § 1058).

Unless otherwise provided in certificate of incorporation or bylaws, majority of shares entitled to vote, present in person or represented by proxy, shall constitute quorum; affirmative vote of majority of shares present in person or represented by proxy and entitled to vote shall be act of shareholders in all matters other than election of directors; and directors shall be elected by plurality. In no event shall quorum consist of less than one-third of shares entitled to vote, except that where separate vote by class or series is required, quorum shall consist of no less than one-third of shares of such class or series. (18 O.S. § 1061).

Stock ledger shall be only evidence as to who are shareholders entitled to vote at any meeting of shareholders. At least ten days before every meeting, complete list of shareholders entitled to vote at meeting, arranged in alphabetical order, and showing address of each shareholder and number of shares registered in name of each shareholder shall be prepared. List must be open to inspection for ten days prior to meeting during ordinary business hours at corporation’s principal place of business, or reasonably accessible electronic network, provided that information required to gain access to list is provided with notice of meeting. (18 O.S. § 1064).

Written notice of any meeting must be given not less than ten nor more than 60 days before date of meeting. Notice must state place, if any, date and hour of meeting, means of remote communication, if any, by which shareholders and proxy holders may be deemed to be present and vote at meeting, and in case of special meeting, purpose or purposes for which meeting is called. When meeting is adjourned to another time or place, unless otherwise required by bylaws, notice need not be given of adjourned meeting if time, place and means of remote communication, if any, by which shareholders and proxy holders may be deemed to be present and vote at meeting are announced at meeting at which adjournment is taken, unless adjournment is for more than 30 days. (18 O.S. § 1067).

Unless otherwise provided for in certificate of incorporation, any action required to be taken at annual or special meeting may be taken by means of consent in writing, setting forth action so taken, if signed by holders of outstanding stock having not less than minimum number of votes that would be necessary to authorize or take such action at meeting at which all shares entitled to vote thereon were present and voted and delivered to corporation. Telegram, cablegram or electronic transmission consenting to action to be taken and transmitted by shareholder, member, or proxy holder shall be deemed to be written, dated and signed. Date on which telegram, cablegram or electronic transmission is transmitted deemed date on which consent was signed. For domestic corporation with stock listed on national security exchange or registered under 12(g) of Exchange Act with 1,000 shareholders, unanimous consent required, unless otherwise provided in certificate of incorporation. Written consent must bear date of signature of each signatory thereto. Prompt notice of actions so taken, if other than unanimous, shall be given to those shareholders who have not consented in writing. (18 O.S. § 1073).

Cumulative voting may be authorized by certificate of incorporation. (18 O.S. § 1059).

Voting Trusts.

Shareholders may, by agreement in writing, create voting trusts for any period of time not exceeding ten years. Agreement shall be filed in registered office of corporation and after such filing, certificates of stock or uncertificated stock shall be issued to voting trustee or trustees. Stock certificates so issued, if any, shall state that they are issued pursuant to such agreement and that fact shall be noted in stock ledger. Trustees shall execute and deliver to beneficiaries voting trust certificates, which shall be transferable. In event there are two or more persons designated as voting trustees, vote shall be determined by majority of trustees, unless otherwise provided in agreement, and, if equally divided, vote of such stock shall be divided equally among trustees. (18 O.S. § 1063).

Directors.

Board shall consist of one or more members, each of whom shall be natural person. Unless otherwise specified in certificate of incorporation, number of directors may be fixed in bylaws. Directors need not be shareholders unless required in certificate of incorporation bylaws. Any director may resign at any time upon written notice to corporation, which is effective when delivered unless resignation specifies later effective date or date determined upon happening of event or events. (18 O.S. § 1027[B]).

Directors may be divided into one, two or three classes, with staggered terms. Certificate of incorporation may confer upon holders of any class or series of stock right to elect one or more directors who have such voting powers as shall be stated in certificate of incorporation. (18 O.S. § 1027[D]).

Any director or entire board of directors may be removed, with or without cause, by holders of majority of shares entitled to vote at election of directors, except, cause must be shown in cases of classified board (18 O.S. § 1027[D]) and where corporation has cumulative voting and votes cast against removal would be sufficient to elect director (18 O.S. § 1027[H]).

Except as otherwise provided in certificate of incorporation or bylaws, vacancies may be filled by majority of directors then in office although less than quorum. Where vacancy is of class of directors, vacancy shall be filled by majority of directors elected to such class. If at any time corporation shall have no directors, any officer or shareholder, or executor, administrator, trustee or guardian of shareholder or other fiduciary may call special meeting of shareholders or apply to district court for decree ordering election. (18 O.S. § 1068).

Directors' Meetings.

Any action permitted to be taken at meeting of board of directors may be taken without meeting if all members of board consent thereto in writing or by electronic transmission. Meetings may be held outside of state. Members of board may participate in meeting by means of conference telephone or similar communication equipment and such participation shall constitute presence in person at meeting. (18 O.S. § 1027[F]). Majority of total number of directors shall constitute quorum unless certificate of incorporation or bylaws require greater number or unless bylaws provide for lesser number (provided that at least one-third must be quorum). (18 O.S. § 1027[B]). Certificate of incorporation of non-stock corporation may provide that less than one-third of members of governing body may constitute quorum. (18 O.S. § 1027[G]). Vote of majority of directors present at meeting at which quorum is present shall be act of board, unless certificate of incorporation or bylaws require greater number.

Common or interested directors may be counted in determining presence of quorum. Contract or transaction authorized is not void or voidable solely by reason of presence or participation by interested director or officer if relationship or interest is disclosed or known to board or committee and is approved by affirmative votes of majority of disinterested directors or shareholders as case may be, or if transaction is fair as of time it is authorized. (18 O.S. § 1030).

Powers and Duties of Directors.

Business and affairs of every corporation shall be managed by or under direction of board of directors except as otherwise provided in Oklahoma General Corporation Act or in certificate of incorporation. By resolution passed by majority of whole board, one or more committees, consisting of one or more directors, may be appointed. Such committee, to extent provided in resolutions or bylaws, has and may exercise all powers and authorities of board, except, no committee shall have power or authority to amend certificate of incorporation (but may adopt certificate of designation for shares of stock), adopt agreement of merger or consolidation, recommend sale, lease or exchange of all or substantially all of assets, recommend dissolution of corporation or revocation of dissolution, or amend bylaws. Such committees may also not declare dividend, issue stock or cause short-form merger unless expressly provided so in resolutions or bylaws or certificate of incorporation. Unless otherwise provided in certificate of incorporation, bylaws, or resolution of board of directors designating committee, committee may create one or more subcommittees, each to consist of one or more members of committee, and delegate to subcommittee any or all powers and authority of committee. (18 O.S. § 1027).

Liabilities of Directors.

Member of board or committee designated by board is fully protected in relying in good faith upon records of and information, opinions, reports or statements to corporation as to matters such member reasonably believes to be in such reporting person’s competence. (18 O.S. § 1027[E], 1051). Directors are jointly and severally liable for any unlawful payment of dividend or unlawful stock purchase or redemption for period of six years after transaction to corporation and to its creditors in event of its dissolution or insolvency unless such director was absent when action was taken or who dissented from act or resolution, and caused his dissent to be entered on books of proceedings at time of action or immediately after he has notice of act. (18 O.S. § 1053).

Officers.

Corporation shall have such officers with such titles and duties as stated in its bylaws or in resolutions of board of directors not inconsistent with bylaws and as may be necessary to enable it to sign instruments and stock certificates in accordance with Oklahoma General Corporation Act. Any number of offices may be held by same person unless certificate of incorporation or bylaws provide otherwise. Any officer may resign at any time upon written notice to corporation. Vacancies are to be filled in accordance with bylaws or by board of directors in absence of such provisions. (18 O.S. § 1028).

Liabilities of Officers.

No member of board of nonprofit corporation is personally liable for breach of fiduciary duty, provided such immunity does not extend to breach of duty of loyalty, act or omission not in good faith or which involves intentional misconduct or knowing violation of law or transactions from which director derived improper personal benefit. (18 O.S. § 867).

Indemnification of Directors and Officers.

Corporation has power to indemnify any person who was or is party or is threatened to be made party to any threatened, pending or completed action, suit or proceeding (except action by or in right of corporation), by reason of fact that he is or was director, officer, employee or agent of corporation, or is or was serving at request of corporation as director, officer, employee or agent of another corporation, partnership, joint venture, trust or other enterprise, against expenses and amounts paid in settlement if he acted in good faith and in manner he reasonably believed to be not in or not opposed to best interest of corporation (with respect to any criminal action, had no reasonable cause to believe his conduct was unlawful). Corporation may indemnify person who is or was director, officer, employee or agent for expenses (including attorneys’ fees) in connection with derivative action except where such person has been adjudged to be liable to corporation, unless otherwise ordered by court in which such action or suit was brought. To extent present or former director or officer has been successful on merits, he or she shall be indemnified against expenses, including attorney fees. Corporation has power to purchase and maintain insurance on behalf of any person who is or was director, officer, employee or agent of corporation, or is or was serving at request of corporation in such capacity for any other entity or enterprise. (18 O.S. § 1031).

Registered Office.

Every corporation shall have and maintain in this state registered who may be domestic corporation itself, individual resident of state, domestic or qualified foreign corporation, limited liability company, or limited partnership. Every foreign corporation transacting business Oklahoma must have and maintain Secretary of State as its registered agent in state, but also may maintain additional registered agent in state. (18 O.S. § 1022).

Registered Agent.

Every corporation shall have and maintain in this state registered agent who may be domestic corporation itself, individual resident of state, domestic or qualified foreign corporation, limited liability company, limited liability partnership, or limited partnership. Every foreign corporation transacting business in Oklahoma must have and maintain Secretary of State as its registered agent in state, but also may maintain additional registered agent in state. (18 O.S. § 1022). Registered agent may be changed by resolution of board of directors. In this event certificate certifying change shall be filed with Secretary of State. Registered agent may resign and appoint successor registered agent by filing in name of corporation certificate with Secretary of State stating name and address of successor agent. Affected corporation must attach statement to certificate ratifying and approving such change of registered agent. In event corporation has no registered agent and successor is not appointed within 30 days, Secretary of State shall be deemed to be registered agent of such corporation. (18 O.S. § 1026). Registered agent designated by foreign corporation for service of process may resign by filing with Secretary of State signed statement of unwillingness to continue acting as registered agent for service of process. Agent may also file statement changing name or address. Capacity of registered agent terminates 30 days after filing statement. (18 O.S. § 1133).

General Powers of Corporation.

Every corporation has power to have perpetual succession by its corporate name (unless limited by certificate of incorporation); sue, be sued and participate in all judicial, administrative, arbitrative or other proceedings, in its corporate name; have corporate seal; purchase, receive, take, give, lease, acquire, own, hold, improve, employ, use and otherwise deal in and with real personal property, except as otherwise provided by laws of Oklahoma (see infra, subhead Real Estate Ownership); appoint or elect such officers or agents as required; adopt, amend or repeal bylaws; wind up and dissolve; conduct its business, carry on its operations and have offices and exercise its powers within or without state of Oklahoma; make donations; be incorporator, promoter or manager of other corporations; participate with other entities in any transaction, undertaking or arrangement which participating corporation would have power to conduct by itself; transact any lawful business which corporation’s board of directors shall find to be in aid of governmental authority; make contracts, including notes, guaranties and mortgages, incur liabilities and issue notes, bonds and other obligations; lend money for its corporate purposes, invest and reinvest its funds, and take, hold and deal with real and personal property as security for payment of funds so loaned or invested; pay pensions and establish and carry out pension, profit sharing, stock option, stock purchase, stock bonus, retirement, benefit, incentive and compensation plans and trusts; provide insurance for its benefit on life of any of its directors, officers or employees or on life of any shareholder for purpose of acquiring at his death shares of its stock owned by said shareholder; renounce in its certificate of incorporation or by action of board of directors any interest or expectancy of corporation in, or being offered opportunity to participate in, specified business opportunities or specified classes or categories of business opportunities that are presented to corporation or its officers, directors or shareholders; deal in and with bonds and other obligations of or shares or other securities or interest in any other corporation, partnership, association, or individual, or by any government or agency or instrumentality thereof; lend money to or guarantee any obligation of or otherwise assist any officer or other employee of corporation or of its subsidiary whenever, in judgment of directors, such loan, guaranty or assistance may reasonably be expected to benefit corporation; to indemnify its officers, directors, employees and agents; and to issue one or more classes of stock or one or more series of stock within any class. (18 O.S. § 1016, 1017, 1029, 1031, 1032).

Corporation cannot purchase or redeem its own shares when capital of corporation is impaired or such purchase or redemption would cause impairment, with certain exceptions; purchase, for more than price at which they may then be redeemed, any of its shares which are redeemable at option of corporation; or redeem any of its shares unless such redemption is provided for in certificate of incorporation. (18 O.S. § 1041).

No act of corporation and no conveyance or transfer of real or personal property to or by corporation shall be invalid by reason of fact that corporation was without capacity or power to do such act or to make or receive such conveyance or transfer. (18 O.S. § 1018).

Farming or Ranching.

Except as provided in 18 O.S. § 954 and 18 O.S. § 954.1, no foreign corporation and no domestic corporation except such as qualifies under 18 O.S. § 951, may engage in business of farming or ranching or own or lease any interest in land to be used for farming or ranching, nor may such corporation own, lease or hold, directly or indirectly, agricultural lands in excess of amounts reasonably necessary for its business purposes. Certain specific farming and ranching activities are excluded from coverage of statute. (18 O.S. § 954, 955).

Real Estate Ownership.

No corporation of any sort may own any real estate located in state outside incorporated city, town or addition thereto, except: Such as is necessary and proper for carrying on business for which corporation is formed; naked title held by trust company, as trustee, as security for indebtedness, or as trustee of trust for benefit of natural persons; real estate mortgage held to secure loan or debt; real estate acquired by foreclosure of mortgage or in collection of loan or debt, which must be disposed of within seven years; and real estate acquired for lease or sale to any other corporation, if latter corporation could legally acquire in first instance. (Okla. Const. Art. 22, § 2; 18 O.S. § 1020). On or before Apr. 1, every corporation holding real estate in contravention of Act must file with clerk of county where realty is located, annual statement in duplicate containing legal description, date and method of acquisition and last assessed valuation. Penalty is provided. (18 O.S. § 1020).

Deeds.

See category 21 Property, topic 21.06 Deeds.

Dividends may be paid upon any shares, subject to any restrictions in certificate of incorporation, from surplus or, if no such surplus exist, out of net profits for fiscal year in which dividend is declared and/or preceding fiscal year. No dividend may be declared and paid out of net profits upon any shares while amount of its capital is less than aggregate amount of capital represented by issued and outstanding stock of all classes having preference upon distribution of assets. (18 O.S. § 1049). Dividends may be paid in cash, property or in shares of corporation's capital stock. If dividend is to be paid in unissued capital stock, board shall direct that there be designated as capital in respect of such shares amount which is not less than aggregate par value of par value shares being declared as dividend and, in case of shares without par value being declared as dividend, such amount as shall be determined by board of directors. (18 O.S. § 1052).

Unclaimed Dividends.

Uniform Unclaimed Property Act adopted. (60 O.S. § 651—60-688).

See also category 21 Property, topic 21.01 Absentees, subhead Escheat.

Sale or Transfer of Corporate Assets.

Every corporation, at any meeting of its board, may sell, lease or exchange all or substantially all of its property and assets, including property and assets of any subsidiary of corporation, upon such terms and conditions and for such consideration as its board of directors or governing body deems expedient and for best interest of corporation, when and as authorized by resolution adopted by holders of majority of outstanding stock of corporation entitled to vote thereon or, if corporation is non-stock corporation, by majority of members having right to vote for election of members of governing body. 20 days notice must be given prior to such meeting. (18 O.S. § 1092).

Books and Records.

Corporation is required to prepare at least ten days before every meeting of shareholders complete list of shareholders entitled to vote at meeting, arranged in alphabetical order, showing address of shareholders and number of shares registered in name of each shareholder. (18 O.S. § 1064). Any shareholder, or his attorney or other agent, upon written demand under oath stating purpose thereof, shall have right during usual hours for business to inspect for any proper purpose corporation’s stock ledger, list of its shareholders, and its other books and records, and to make copies or extracts therefrom. (18 O.S. § 1065). Records of corporation may be maintained in form of any information storage device, provided that records so kept can be converted into clearly legible paper form within reasonable time. (18 O.S. § 1069).

Corporate Bonds or Mortgages.

Corporation may issue its notes, bonds and other obligations, and secure its obligations by mortgage, pledge or other encumbrance of all or any of its property, franchises and income. (18 O.S. § 1016[13]). Corporation may confer upon holders of any bonds, debentures or other obligations power to vote and any other rights which shareholders of corporation have or may have. If certificate of incorporation so provides, holders of such bonds, debentures or other obligations may be deemed shareholders and, with respect to any action which requires vote of shareholders, may divest other holders of capital stock of their right to vote (18 O.S. § 1066) except with respect to class votes on amendments to certificate (18 O.S. § 1077[B][2]). Except as otherwise provided in certificate of incorporation, authorization or consent of shareholders is not required for corporation to mortgage or pledge its property and assets. (18 O.S. § 1093). Usury is not defense for any bond issued or assumed by corporation. (18 O.S. § 1129).

Merger and Consolidation.

Any two or more Oklahoma corporations may merge into single corporation or may consolidate into new corporation formed by consolidation upon resolution of board of directors approved by majority vote of total number of outstanding shares of capital stock of each corporation. Resolutions of board of directors must approve agreement of merger or consolidation and declare its advisability. Agreement must provide: (i) Terms and conditions of merger or consolidation; (ii) mode of carrying merger or consolidation into effect; (iii) in case of merger, such amendments or changes in certificate of incorporation of surviving corporation as are desired (or statement as to which certificate of incorporation is adopted if no amendment); (iv) in case of consolidation, that certificate of incorporation of resulting corporation is attached; (v) manner of converting or canceling shares of each of constituent corporations; and (vi) such other details or provisions as are deemed desirable. 20 days notice of meeting is required to be given to shareholders, whether voting or nonvoting. Certified agreement shall be filed with Secretary of

State or certificate of merger or consolidation complying with provision of 18 O.S. § 1081(C). Agreement of merger or consolidation may contain provision allowing board of directors to terminate agreement notwithstanding approval by shareholders prior to time agreement, or certificate filed with Secretary of State in lieu thereof, becomes effective; provided, if agreement is terminated or amended after filing, but before agreement or certificate has become effective, certificate of termination or amendment of merger or consolidation must be filed. Unless otherwise required by certificate of incorporation shareholder vote of surviving corporation is not required if agreement of merger does not amend certificate of incorporation of such corporation; each share of stock of surviving corporation outstanding immediately prior to merger is to be identical outstanding or treasury share after merger; and either no shares of common stock or no obligations convertible into stock are to be issued pursuant to plan of merger or authorized unissued shares or treasury shares of surviving corporation to be issued under plan of merger plus those initially issuable upon conversion of any other rights issued under such plan do not exceed 20% of outstanding shares prior to merger. (18 O.S. § 1081[F]). Unless otherwise required by certificate of incorporation, no vote of shareholders of constituent corporation is required to authorize merger with or into single direct or indirect wholly owned subsidiary of constituent corporation if specified requirements are satisfied. (18 O.S. § 1081[G]).

Oklahoma corporation may merge or consolidate with foreign corporations if permitted by laws of jurisdiction of incorporation of such foreign corporations. Agreement of merger or consolidation shall be adopted, approved, executed and acknowledged by each of constituent corporations in accordance with laws under which it was formed. Certified agreement shall be filed with Secretary of State or in lieu thereof, certificate of merger. If surviving corporation is to be governed by laws of any other jurisdiction it shall agree that it may be served with process in Oklahoma and shall appoint Secretary of State as its agent to accept service of process. (18 O.S. § 1082).

Parent corporation owning 90% or more may merge with or into its subsidiary by filing certificate of ownership and merger setting forth copy of resolution of its board of directors to merge and date of adoption thereof. If parent corporation does not own all of outstanding stock of subsidiary resolution must state terms and conditions of merger, including securities, cash, property or rights to be issued, paid, delivered or granted by surviving corporation. If parent corporation is not surviving corporation resolution must provide for pro rata issuance of stock of surviving corporation to holders of stock of parent corporation and certificate of ownership and merger must state that it has been approved by majority of outstanding stock of parent corporation entitled to vote (after 20 days notice). (18 O.S. § 1083).

Oklahoma General Corporation Act also permits merger or consolidation of domestic non-stock corporations, whether or not organized for profit (18 O.S. § 1084), merger or consolidation of domestic and foreign non-stock, not-for-profit corporations (18 O.S. § 1085), merger or consolidation of domestic stock and non-stock corporations, whether or not organized for profit (18 O.S. § 1086), merger or consolidation of domestic and foreign stock and non-stock corporation (18 O.S. § 1087), and merger or consolidation of Oklahoma corporation with other business entities, including domestic or foreign partnership (general or limited), limited liability company, business trust, common law trust, or other unincorporated business. Charter of resulting entity must be attached to certificate of consolidation if business entity other than corporation is resulting entity. (18 O.S. § 1090.2, 54 O.S. § 310.1).

Surviving or resulting corporation possesses all rights, privileges, powers and franchises and is subject to all restrictions, disabilities and duties of each of constituent corporations. Surviving or resulting corporation is vested with all property and debts of each of corporations. (18 O.S. § 1088). All actions or proceedings against any of constituent corporations survive. (18 O.S. § 1090).

Certified copy of certificate or agreement of merger or consolidation or certificate of ownership or merger filed with Secretary of State must be filed with county clerk of each county in which surviving or resulting corporation has recorded interest in real property. (18 O.S. § 1144).

Secretary of State will charge fee of $50 for filing of certificate of merger plus additional fee if authorized capital is increased above $50,000 (see subhead Filing Fees, supra). Secretary of State will also charge $100 fee for acting as registered agent, per annum. (18 O.S. § 1142).

Merger of corporation and business entity. (18 O.S. § 1090.2).

Conversion of business entity. (18 O.S. §§ 1090.4 and 1090.5).

Share Exchanges or Acquisitions.

Corporations may acquire all or part of outstanding shares of one or more other corporations, if board of each corporation adopts agreement of acquisition which sets forth: (i) Name(s) of acquiring corporation(s) and acquired corporation(s); (ii) terms and conditions; (iii) manner and basis of exchange; (iv) amendments or changes in certificate of incorporation; and (v) other provisions as directors deem advisable. Shareholders of corporation whose shares are being acquired are entitled to vote. Must be approved by majority of outstanding stock entitled to vote. If shares of particular class are being acquired, holders are entitled to vote as class, whether or not otherwise entitled to vote. Upon receiving requisite approvals, secretary or assistant secretary is to certify such fact on agreement and agreement or certificate is to be filed with Secretary of State. Shareholder whose shares are to be acquired has appraisal rights. If acquiring corporation is not Oklahoma corporation, it must agree to service of process and appoint Secretary of State service agent. (18 O.S. § 1090.1).

Tender Offers.

See category 3 Business Regulation and Commerce, topic 3.24 Securities, subhead Tender Offers.

Business Take-Over Act.

See category 3 Business Regulation and Commerce, topic 3.24 Securities, subhead Control Share Acquisition.

Business Combination With Interested Shareholder.

Corporation shall not engage in business combination with interested shareholder for three years, unless board approves transaction resulting in person becoming interested shareholder, interested shareholder owns at least 85% of outstanding voting stock, or combination approved by board and at least 2/3 of outstanding voting stock of disinterested shareholders. Provisions of statutes can be restricted by certificate of incorporation and bylaws under certain conditions. Statute does not apply to corporation which does not have stock listed on national securities exchange, quoted on NASDAQ stock market, or held of record by 1,000 shareholders, unless otherwise provided in certificate of incorporation. Certain transactions are excluded from coverage. “Interested shareholder” means: (1) any person, other than corporation and any direct or indirect majority-owned subsidiary of corporation, that owns 15% or more of outstanding voting stock of corporation, or is affiliate or associate of corporation and was owner of 15% or more of outstanding voting stock of corporation at any time within immediately prior three-year period, and (2) affiliates and associates of person. (18 O.S. § 1090.3).

Dissolution.

Corporation may be dissolved by either resolution adopted by board of directors and subsequent approval by majority of outstanding stock of corporation entitled to vote or upon consent of all shareholders entitled to vote in writing. Certificate stating that dissolution has been authorized and setting forth names and residences of directors and officers shall be filed with

Secretary of State among other things. Upon filing of either certificate or consent corporation is dissolved (unless other effective date is specified in certificate or consent, not to exceed 90 days pursuant to 8 O.S. § 1007[D]). (18 O.S. § 1096). Dissolved corporation continues for three years or for such longer period as district court may direct, for purposes of winding up its business. (18 O.S. § 1099). Any creditor or shareholder may apply to district court, upon showing of good cause, for appointment of trustee or receiver for corporation which as deemed dissolved. (18 O.S. § 1100). At any time prior to expiration of three years following dissolution of corporation (or longer period if directed by district court) corporation may revoke dissolution. (18 O.S. § 1119). Fee of $50 will be charged by Secretary of State for filing certificate of dissolution. (18 O.S. § 1142[A] [15]).

Oklahoma General Corporation Act also provides for dissolution of corporation having only two shareholders each owning 50% of stock engaged in prosecution of joint venture (18 O.S. § 1094), dissolution of corporation before beginning business (18 O.S. § 1095) and dissolution of not-for-profit, non-stock corporation (18 O.S. § 1097).

Insolvency and Receivers.

Shareholder or shareholders who have been registered owners for period of not less than six months of not less than 10% of entire outstanding stock of corporation which is insolvent or creditor whose claim has been reduced to judgment and execution thereof has been issued for such insolvent corporation may apply to district court of county in which registered office is located for appointment of receiver. (18 O.S. § 1106). Receiver so appointed is vested with title of corporation to all property (trustee or receiver must file within 20 days copy of order of appointment with county clerk in each county in which any real estate is situated). (18 O.S. § 1107). Receiver must file in district court in which proceeding is pending full and complete itemized inventory of all of assets of corporation. (18 O.S. § 1109). District court shall establish what notice shall be given to creditors and creditors shall make proof of claim with district court. (18 O.S. § 1110). Receiver may dispute, within 30 days, any claim made by creditor. Creditor or claimant whose claim has been disallowed in whole or in part may appeal to district court within 30 days thereafter. (18 O.S. § 1111). District court may permit receiver to sell perishable or deteriorating property which is subject to lien, validity, extent and legality of which is disputed, free and clear of such liens. (18 O.S. § 1112). Employees performing labor or services in regular employ of corporation and producers of agricultural and dairy products shall have lien on assets of insolvent corporation for amount of wages or payments due them (not exceeding four months' wages or payments). (18 O.S. § 1115). Plan of reorganization pursuant to bankruptcy proceedings under statute of U.S., confirmed by court of competent jurisdiction, may be put into effect without further approval by shareholders or directors. (18 O.S. § 1118).

Close Corporations.

No special statutory provisions governing.

Appraisal.

Holder of shares of any class or series of stock of constituent corporation are entitled to appraisal by district court of fair value of his shares in event of merger pursuant to provisions of 18 O.S. § 1081, 1082, 1086, or 1087. No appraisal rights are available if shares were listed on national securities exchange or held of record by more than 2,000 shareholders. In addition, no appraisal rights are available if merger did not require approval of shareholders pursuant to "subsection E of Section 81" (sic) (should be subsection F). (18 O.S. § 1091 [B] [2] [b]). These exceptions to appraisal rights are not available if such holders are required to accept for such stock anything except: (a) Stock of surviving or resulting corporation; (b) stock of any other corporation listed on national securities exchange or held of record by more than 2,000 shareholders; (c) cash in lieu of fractional shares; or (d) any combination of above. Minority shareholders of subsidiary Oklahoma corporation into parent corporation pursuant to 18 O.S. § 1083 have appraisal rights.

Where shareholder approval of merger or consolidation is required corporation must give 20 days' notice to shareholders of their appraisal rights and include copy of 18 O.S. § 1091. Each shareholder electing to demand appraisal shall make written demand prior to vote on merger or consolidation. Proxy or vote against merger or consolidation shall not constitute such demand. Where approval is pursuant to consent without meeting or where parent merges with or into subsidiary corporation must notify shareholders within ten days after effective date of merger and shareholders have 20 days after date of mailing notice to demand, in writing, for appraisal. Within 120 days after effective date of merger or consolidation either surviving corporation or any shareholder who has made adequate demand for appraisal may file petition in district court demanding determination of value of stock. Shareholder has right within 60 days after effective date of merger to withdraw his demand for appraisal. (18 O.S. § 1091).

Foreign Corporations.

No foreign corporation shall do business in Oklahoma until it has filed with Secretary of State certificate evidencing its corporate existence from jurisdiction of its incorporation and statement setting forth mailing address of corporation's principal place of business, name and street address of its additional registered agent in this state, if any, aggregate number of authorized shares, itemized by classes, par value and series, statement, current within six months prior to filing, of assets and liabilities of corporation, business it proposes to do in this state and that it is authorized to do that business in jurisdiction of its incorporation, and statement of maximum amount of capital (as defined) to be invested by such corporation in state during current fiscal year together with filing fee of 1/10 of 1% of maximum amount of such capital invested by such corporation in state, provided, corporation shall not be required to pay fee on amount in excess of authorized capital, and minimum fee is $300. (18 O.S. § 1130). Secretary of State shall not accept for filing statement or certificate containing corporate name which is same as or indistinguishable from name of any other corporation, limited partnership, trade name or fictitious name. See subhead Name, supra.

Every foreign corporation, on anniversary of its qualification in Oklahoma each year, shall file certificate of its president, vice-president or other managing officers, stating amount of capital it had invested in state and amount of capital previously paid upon.

If amount of capital so invested exceeds amount formerly paid upon, corporation shall pay additional fee equal to 1/10 of 1% of excess capital so invested. Foreign corporation shall not be required to pay fee based on amount in excess of its authorized capital, or to file such certificate after it has paid fee on its total authorized capital. (18 O.S. § 1142[13]). Secretary of State also charges fee of $100 per year for acting as registered agent. (18 O.S. § 1142[14]).

Certificate as to change of name, mailing address, authorized capital or business purposes shall be filed within 30 days after such change. Certificate of proper officer of state or county of incorporation of foreign corporation which is survivor of merger shall be filed within 30 days after such merger. (18 O.S. § 1131). Fee of $200 is payable to Secretary of State upon filing such certificates, provided, however, certificate merely reflecting change of mailing address is $10. (18 O.S. § 1142[12]).

Foreign corporation does not need to comply with 18 O.S. § 1130 or 1131 if: (i) It is mail order business accepting orders outside of Oklahoma; (ii) if it employs salesmen to solicit orders in state and all orders are subject to approval at offices outside Oklahoma and all goods are shipped from outside Oklahoma and no sales, repairs or replacements are made from stock on hand in Oklahoma; (iii) it delivers into Oklahoma, by contract consummated outside Oklahoma, machinery, plants or equipment construction, erection or installation of which requires supervision of technical engineers and as part of contract agrees to furnish such services; (iv) its business operations are wholly interstate; (v) it is insurance company; (vi) if it creates, as borrower or lender, or acquires, evidences of debt, mortgages or liens on real or personal property; or (vii) it secures or collects debts or enforces any rights in properties securing same. (18 O.S. § 1132).

Any foreign corporation doing business without complying with Oklahoma General Corporation Act is subject to penalty for each offense, as is any agent of foreign corporation. (18 O.S. § 1134).

Foreign corporation may withdraw from State of Oklahoma by filing with Secretary of State certificate of withdrawal executed by authorized officer of corporation and acknowledged in accordance with 18 O.S. § 1007; filing copy of certificate of dissolution issued by proper official of jurisdiction of its incorporation; or filing with Secretary of State copy of order or decree of dissolution made by any court of competent jurisdiction. In each instance address to which Secretary of State may mail any process must be provided.

Failure of foreign corporation to qualify, when required, will prevent such corporation from maintaining any action in Oklahoma until such qualification has been made. Failure to qualify will not prevent foreign corporation from defending any action nor impair validity of any contract or act. (18 O.S. § 1137).

See also subheads: Name; Registered Office; Registered Agent; General Powers of Corporation; Real Estate Ownership, supra.

Taxation of Corporate Property.

See category 22 Taxation, topics 22.10 Income Tax; 22.13 Property Taxes.

Franchise Tax.

All corporations, associations, joint stock companies and business trusts operated for profit doing business in state must pay franchise tax of $1.25 for each $1,000, or fraction thereof, of capital used or invested in state. Minimum fee is $10, maximum is $20,000. Tax is payable July 1, or, at option of taxpayer, on last day of income tax year of taxpayer; penalties for delinquency in filing return. (68 O.S. § 1208). Franchise tax statement also must be filed with return. (68 O.S. § 1210). Tax does not apply to national and state banks, banking holding companies to extent of capital of owned bank, building and loan associations, small business investment companies (Federal Small Business Act of 1958), credit unions, trust companies, insurance, surety and bond companies, nonprofit corporations or to any corporation for fiscal year during which incorporating or qualifying fee has been paid. Every corporation subject to tax must file with Oklahoma Tax Commission between July 1 and Aug. 31 of each year report showing amount of its authorized capital stock, amount paid up, number of units, value of each unit, value of all property, value of property owned or used in state on Dec. 31 last, total amount of business transacted during year, total business transacted in state, location of office or offices, names of officers and directors and residence and address of each as of June 30. Failure to obtain license subjects directors and officers to liability for all debts incurrent within state as well as criminal prosecution.

Capital includes outstanding capital stock, surplus, undivided profits, bonds, notes, debentures or other evidence of indebtedness maturing more than three years after issuance. Amount of capital employed in this state is that portion which equals proportion which property owned, or business done, or both, in state bears to total property owned or business done or both. Where business of corporation is controlled from within state value of its intangibles is apportioned entirely to this state unless business situs has been established elsewhere. (68 O.S. § 1201, et seq.).

Income Tax.

See category 22 Taxation, topic 22.10 Income Tax.

Professional Corporations.

Professional Entity Act (18 O.S. § 801 et seq.) governs domestic corporations, limited partnerships and limited liability companies formed for purpose of rendering professional service, including personal service rendered by one or more physicians, osteopaths, chiropractors, podiatrists, optometrists, veterinarians, architects, attorneys, dentists, certified public accountants or public accountants, psychologists, physical therapists, registered nurses, professional engineers, land surveyors, occupational therapists, speech pathologists or therapists, audiologists, registered pharmacists, licensed perfusionists, licensed professional counselors, licensed marital and family therapists, licensed dieticians, and social workers. Name of professional entity must end with one or more of words or abbreviations permitted in applicable associated acts, modified by “professional” or some abbreviation of combination; e.g., “P.C.”, “P.L.P.”, or “P.L.L.C.”. Oklahoma General Corporation Act is made applicable where not in conflict. Space does not permit complete analysis and Act itself should be consulted.

Model Non-Profit Corporation Act not adopted. Nonprofit corporations are subject to provisions of 18 O.S. § 863-68.

2.04 FOREIGN CORPORATIONS:

See topic 2.03 Corporations.

2.05 JOINT STOCK COMPANIES:

Formation, Rights, Powers and Liabilities.

Joint stock company cannot conduct business in state without license. State tax procedure code (68 O.S. § 201 et seq.) and franchise tax code (68 O.S. § 1201 et seq.) apply to joint stock companies organized under laws of state or qualified to do or doing business in state. Reports similar to those required of corporations must be made. (68 O.S. § 202[g][3]; 68 O.S. § 1201). Joint stock companies must keep records within state showing ownership of stock, shares, indebtedness, bonds or other pecuniary interest in company; before transferring stock or other interest after death of record owner, must give notice of such transfer and obtain waiver from Tax Commission. (68 O.S. § 813).

Professional Corporations (or Corporations).

See topics 2.02 Associations, 2.03 Corporations.

2.06 LIMITED LIABILITY COMPANIES:

Oklahoma Limited Liability Company Act (“Act”) permits formation of limited liability company (“LLC”). (18 O.S. § 2000-2060).

Articles Requirements.

One or more persons may form LLC by filing executed articles of organization (“Articles”) with Secretary of State (“Secretary”). Articles must state LLC’s: (a) Name, (b) term of existence, which may be perpetual, and (c) street address of principal place of business, wherever located, and name and street address of registered agent, which must be identical to LLC’s registered office in state. (18 O.S. § 2004, 2005). If LLC establishes two or more series of members, managers, or membership interests having separate rights, powers, or duties, notice of limitation of liability may be required. (18 O.S. § 2005).

Name.

LLC’s name must include designation “limited liability company” or “limited company” or abbreviation “LLC”, “LC”, “L.L.C.”, or “L.C.” and may not imply LLC is organized for purpose not stated in Articles. “Limited” may be abbreviated as “LTD” and “Company” may be abbreviated as

"CO". LLC's name must be distinguishable from names of other entities and trade or fictitious names filed with Secretary, unless written consent of other entity or holder of trade name is obtained. (18 O.S. § 2008). Name may be reserved by submitting application and filing fee to Secretary. (18 O.S. § 2009).

Effective Date.

Unless later effective date or time, which shall be specified date or time not later than 90 days after filing, is provided in Articles, Articles are effective, and LLC is formed, at time of filing of Articles with Secretary of State. (18 O.S. § 2007).

Continuity of Life.

Articles may provide that existence of LLC is perpetual. (18 O.S. § 2005). Every domestic LLC and foreign LLC registered to do business in state must file certificate by anniversary date of filing of articles of organization or registration each year with Secretary of State, which confirms it is active business and includes its principal place of business address. LLC that does not file certificate within 60 days after date due ceases to be in good standing. Article of LLC deemed to be canceled if LLC fails to file certificate within three years of date due. (18 O.S. § 2055.2). Limited liability company's existence as separate legal entity continues until cancellation of articles of organization and completion of its winding up, if any. (18 O.S. § 2004[B][1]).

Purpose.

LLC may be organized and conduct business for any lawful business purpose, whether or not for profit, except as domestic insurer. (18 O.S. § 2002).

Registered Office and Agent, Principal Office.

Domestic LLC must maintain registered office, which may be same as principal place of business, and agent for service of process (which may be domestic LLC itself). Registered agent must maintain business office identical with registered office that is open during regular business hours to accept service of process and otherwise perform functions of registered agent. Change of LLC's principal office or registered agent's identity or street address must be filed with Secretary. (18 O.S. § 2010). Fee of $40 payable to Secretary of State on July 1 of each year for acting as registered agent. (18 O.S. § 2055). Failure to pay registered agent fee for period of three years results in cancellation of Articles. (18 O.S. § 2055.1). Unless otherwise provided in operating agreement, LLC must keep following information at its principal place of business: (1) Current and past list of full name and last-known mailing address of each member and manager; (2) copies of records indicating members' relative voting rights; (3) copy of Articles and any amendments; (4) copies of LLC's federal, state and local income tax returns and financial statements for three most recent years; (5) copies of operating agreements and any amendments; (6) information concerning members' capital contributions and events of dissolution. (18 O.S. § 2021).

Amending or Correcting Articles.

Amendment to Articles must be signed by manager and state: (a) Name of LLC, (b) filing date of original Articles, and (c) amendment to Articles. (18 O.S. § 2011).

To correct technical errors or improper execution, articles of correction may be executed by manager and filed with Secretary. (18 O.S. § 2012, 2006). Articles of correction must state title of original document, name of each original party, original filing date, and provision in original and corrected form or reason original execution was defective. (18 O.S. § 2012).

Powers.

Generally, LLC may act in any way consistent with purposes set forth in Articles and not contrary to law. LLC may sue and be sued; make contracts, incur liabilities and borrow money; pledge or dispose of assets; acquire and hold any interest in real or personal property, wherever located; issue obligations and secure them with any or all of its assets; own stock or other interests in business entities; invest and lend money and hold property as security; appoint agents and define their duties; be promoter, stockholder, partner, member, associate, or agent of any corporation, partnership. LLC, joint venture, trust or other enterprise; indemnify and hold harmless any member, agent, or employee from claims, except for acts or omissions that constitute willful misconduct or recklessness; and make and alter operating agreements. (18 O.S. § 2003).

Operating Agreement.

Act contains many provisions that apply if no contrary provisions are stated in Articles or operating agreement (“Agreement”). (18 O.S. § 2001[16]). Effect of operating agreement governed. (18 O.S. § 2012.2[A]).

Limited Liability.

No member or manager of LLC is personally liable for LLC’s obligations merely by being member or manager. (18 O.S. § 2022).

Management.

Unless otherwise provided in Articles, LLC shall be managed by one or more managers who may be members. (18 O.S. § 2013). If more than one manager, management decisions are by majority vote of managers on per capita basis, unless Articles or Agreement provides otherwise. (18 O.S. § 2018). Managers are elected or removed by majority of members, unless otherwise provided in Articles or Agreement. (18 O.S. § 2014). Manager may resign in accordance with Agreement or if Agreement does not provide for resignation, upon notice to LLC. (18 O.S. § 2014[3]). Members may participate in management without sacrificing limited liability status. Each manager is agent with authority to bind LLC for transactions in usual course of business, including buying, selling, or mortgaging assets. LLC is not bound by manager’s transaction with third party if third party has knowledge of manager’s lack of authority. Unauthorized acts of manager bind LLC regarding third parties acting in good faith and without knowledge of manager’s lack of authority. (18 O.S. § 2019).

Unless otherwise provided in Articles or Agreement, managers must account to LLC for any benefit received or personal use of LLC property without informed consent of members. Managers have duty to act in good faith, with ordinary care and in LLC’s best interests. Managers may reasonably rely on: (a) Employees of LLC, (b) professional advisors to LLC, and (c) committees comprised of other managers. (18 O.S. § 2016). Articles or Agreement may limit members’ or managers’ liability and provide for indemnification of members or managers for judgments, penalties, settlements, or fines incurred for negligent breaches of their duties to LLC. LLC may not limit liability or indemnify manager for: (a) Breach of manager’s duty of loyalty to LLC, (b) act by manager not in good faith, or (c) improper benefit manager receives. (18 O.S. § 2017, 2003). Articles or Agreement may define scope of duties owed by members or managers to LLC, if not unreasonable. If Articles or operating agreement allow company to operate without designated managers, all members of LLC are deemed managers for purposes of Act, with all duties and liabilities of managers. (18 O.S. § 2015). Member of member-managed LLC may resign in accordance with Agreement or, if Agreement does not provide for resignation, upon notice to LLC. (18 O.S. § 2015[b]).

Transfer of Property.

Property titled to LLC may be transferred by any manager in name of LLC. If property is held in name of manager or member of LLC in that capacity it may be transferred by such person. If such person is proved not to bind LLC property may be recovered. However, if LLC property is held in person's name with no indication of existence of LLC, LLC has no claim. (18 O.S. § 2019.1).

Members' Interests, Rights, and Duties.

Member may contribute property, cash, services, or promissory note to LLC; but, contribution not required to be admitted as member or to receive membership interest in LLC. (18 O.S. § 2023). Member failing to make agreed contributions is obligated at option of LLC to contribute agreed amount in cash. Member's obligation to make agreed contribution may be compromised only as provided in Agreement or upon unanimous consent of other members. Creditors may under certain circumstances enforce member's obligation to make capital contribution. (18 O.S. § 2024).

Members may, in Agreement, allocate LLC's profits and losses among themselves in any way. In absence of Agreement, profits and losses of LLC allocated to members in proportion to each member's capital interest, and distributions made from LLC according to each member's proportionate right to share in profits. (18 O.S. § 2025).

Except as otherwise provided in Act, member is entitled to distributions from LLC before dissolution and winding up of LLC to extent and at times upon which members agree or as provided in Agreement. (18 O.S. § 2026).

Distribution not allowed if, after distribution, (a) LLC would be unable to pay debts as they become due, or (b) amount of LLC's liabilities plus any preferred liquidation rights superior to distributee's would exceed LLC's total assets. (18 O.S. § 2030). If member receives improper distribution, LLC may recover amount for up to three years. (18 O.S. § 2031).

Member's ownership interest in LLC is personal property and member has no interest in specific assets of LLC (18 O.S. § 2032). Unless otherwise provided in Agreement, membership interest is not transferable, but economic rights associated with membership interest may be assigned in whole or in part. Assignment of member's interest does not automatically entitle assignee to all rights and privileges held by assignor. Generally, assignment of member's interest only transfers assignor's right to share of LLC's profits, losses, and distributions. Unless assignee of interest becomes member by virtue of that interest, assignor continues to be member, unless assignor is removed as member either in accordance with Agreement or, after having assigned all of membership interest, by affirmative vote of members who have not assigned their interests. Assignment does not release member from liability. (18 O.S. § 2033). Granting of security interest in member's interest will not cause member to lose membership, unless otherwise provided in Articles or Agreement. Assignee of membership interest may become member only if: (a) Membership is provided for in Agreement, or (b) members representing majority of capital interests not subject to assignment consent in writing. Member who assigns entire interest ceases to be member when assignee becomes member. (18 O.S. § 2035).

Agreement may provide for expulsion of member, with or without cause, which shall include reasonable provision for distributable interest. (18 O.S. § 2036).

Farming or Ranching.

LLCs formed pursuant to Oklahoma Limited Liability Company Act may engage in farming or ranching or may own or lease any interest in land to be used for farming or ranching. To qualify, (1) There may be no more than ten members in LLC unless excess number are related and (2) at least 65% of LLC's gross receipts must be derived from farming, ranching or extraction of minerals. (18 O.S. § 955).

Records.

For purposes reasonably related to his membership interest, member may, at his own expense, inspect and copy any of LLC’s records during normal business hours. Member may also obtain upon reasonable demand, (a) Complete information regarding financial condition of LLC, (b) copy of LLC’s state and local income tax returns and financial statements, and (c) any other “just and reasonable” information regarding affairs of LLC. Member also has right to formal accounting of LLC’s affairs if just and reasonable. (18 O.S. § 2021).

Derivative Action.

Member may sue on behalf of LLC only if: (a) Member unable to cause LLC to sue on its own behalf (18 O.S. § 2051); (b) member demanded LLC to sue on its own behalf (18 O.S. § 2052); (c) those able to cause LLC to sue have wrongfully refused or have failed to respond to demand; (d) member is member at time of suit and was member at time of alleged wrong or is assignee of member who was; and (e) member fairly and adequately represents interests of other members. (18 O.S. § 2051). If member receives anything as result of action, that amount must be turned over to LLC, but court may award member his expenses in pursuing suit. (18 O.S. § 2053). If member brought action without reasonable cause, court may require him to pay defendants’ reasonable expenses. (18 O.S. § 2053).

Withdrawal.

Unless Agreement specifically permits power to withdraw voluntarily, member may not withdraw at any time. If Agreement specifically provides power to withdraw voluntarily, but withdrawal occurs as result of wrongful conduct of member, member’s voluntary withdrawal constitutes breach of Agreement. (18 O.S. § 2036).

Voting.

Unless otherwise provided in Articles or Agreement, members may vote in proportion to their adjusted capital contributions to LLC. (18 O.S. § 2020[A]). Generally, members may vote only in limited circumstances. Unless otherwise provided in Articles or Agreement, majority vote of members required to approve (1) sale, exchange, lease, mortgage, pledge, or other transfer of all or substantially all assets of LLC; (2) merger of LLC with another LLC or other business entity; (3) amendment to Articles or Agreement. (18 O.S. § 2020[B]). Unless otherwise provided in Articles or Agreement, unanimous vote or consent of members is required to approve: (1) Dissolution of LLC, (2) amendment to Articles or Agreement that reduces term of existence of LLC; that reduces required vote of members to approve dissolution, merger or sale, exchange, lease, mortgage, pledge, or other transfer of all or substantially all assets of LLC; that permits member to voluntarily withdraw from LLC; or that reduces required vote of members to approve amendment to Articles or Agreement reducing vote previously required. (18 O.S. § 2020[D]).

Merger.

LLC may merge with another LLC or “any other business entity”. (18 O.S. § 2054[A]). Majority of members and of each class of members must approve. Dissenting members have no appraisal rights, but have right to withdraw and receive fair market value of interest on date of withdrawal. Entity surviving merger must file articles of merger with Secretary and must include detailed information required by Act. Upon consummation of merger, resulting entity succeeds to all of rights and obligations of merged entities. (18 O.S. § 2054).

Conversion.

Procedures for conversion of LLC to domestic or foreign corporation, partnership, whether general or limited, business trust, common law trust, or other unincorporated association specified. (18 O.S. § 2054.2). Procedures for conversion of other business entities to LLC. (18 O.S. § 2054.1).

Dissolution and Winding Up.

LLC is dissolved upon earlier of: (1) Latest date of dissolution stated in Articles; (2) occurrence of events specified in Agreement; (3) written consent of all members; (4) at any time there are no members; (5) entry of decree of judicial dissolution under 18 O.S. § 2038; or (6) upon application by member if district court determines it is not reasonably practicable for LLC to operate in conformity with its Articles or Agreement. LLC continues in existence after dissolution, regardless of whether articles of dissolution are filed, but may carry on only activities necessary to wind up its business or affairs and liquidate its assets. (18 O.S. § 2037, 2038). LLC may be wound up by: (a) Managers or (b) if any member has engaged in questionable conduct, by district court upon application of any member. Persons winding up LLC may: (1) Prosecute and defend suits; (2) settle and close business; (3) dispose of and transfer LLC property; (4) discharge liabilities; and (5) distribute remaining assets. (18 O.S. § 2039). Member may apply to district court to wind up affairs of LLC. Upon winding up, assets distributed in following order: (a) To creditors of LLC, including members who are creditors; (b) to members or former members to satisfy claims for declared distributions or payments upon withdrawal; (c) return of members' contributions; (d) remaining assets to members in same proportion as members' interests. (18 O.S. § 2040). Upon commencement of winding up, members or managers must file articles of dissolution with Secretary, setting forth: (a) Name of LLC, (b) filing date of Articles, (c) reason for dissolution, (d) effective date of dissolution unless same as date of filing, and (e) any other information decided upon by members or managers. (18 O.S. § 2041).

Foreign LLC Qualification.

Foreign LLC must file with Secretary most of same information required to be provided in domestic LLC's Articles. Foreign LLC's internal affairs governed by law of state of organization. Foreign LLC will not be denied registration in Oklahoma based on any difference between laws of LLC's state of organization and Oklahoma law. Foreign LLC registered to do business in Oklahoma has all rights and privileges of Oklahoma LLC. (18 O.S. § 2042). Name of foreign LLC must meet requirements specified in 18 O.S. § 2008 and 2045. Before transacting business in Oklahoma, foreign LLC must register with Secretary. To register, foreign LLC must pay requisite fee; provide acceptable documentation of its organization under another state's laws; and submit application containing: (a) Its name; (b) state of organization; (c) name and street address of registered agent in this state; (d) appointment of Secretary as agent to accept service of process if no other agent has been appointed or can be found; (e) address of principal office; and (f) other appropriate information required by Secretary. (18 O.S. § 2043, 2045). Foreign LLC authorized to transact business in state must file certificate attesting to occurrence of merger if it is surviving LLC and merger changes any statement in application of registration or involves any other foreign business entity authorized to transact business in states. Foreign LLC must also file statements concerning change of name or address of registered agent. (18 O.S. § 2046). Foreign LLC may withdraw from state by filing application for withdrawal with Secretary. (18 O.S. § 2047). Certain listed activities do not constitute transacting business in Oklahoma. (18 O.S. § 2049).

Revocation of Registration.

Secretary of State may revoke LLC's certificate of registration and cancel its authority to do business in state for failure to pay annual registered agent fee prescribed by 18 O.S. § 2055. Secretary of State must give at least 30 days' notice of intent to revoke. After such notice, LLC is subject to penalty of $25 per day, not to exceed $500 per offense. If, within three years of revocation, LLC tenders penalties and any registered agent fees due, Secretary of State must rescind revocation and return LLC to active status. (18 O.S. § 2055.1).

Uniform Limited Cooperative Association Act (18 O.S. § 440-101) adopted.

2.07 LIMITED PARTNERSHIP:

See topic 2.08 Partnerships.

2.08 PARTNERSHIPS:

Revised Uniform Partnership Act adopted. (54 O.S. § 1-100 et seq.). Act governs all partnerships and limited liability partnerships (LLP). (54 O.S. § 1-1206). Except as otherwise provided by act, relations among partners and between partners and partnership are governed by partnership agreement. To extent partnership agreement does not otherwise provide, act governs such relations. (54 O.S. § 1-103). Unless displaced by particular provisions of act, principles of law and equity supplement act. (54 O.S. § 1-104).

Formation.

Statement of partnership authority may be filed in office of Secretary of State; filing fee of $100 for statement, $50 for amendment or cancellation. Any signature on instrument authorized to be filed with Secretary of State may be by facsimile. (54 O.S. § 1-105). Partnership may become LLP by filing statement of qualification with Secretary of State. If partnership does not have office in state, statement must include name and street address of agent for service of process. (54 O.S. § 1-1001). Partnership must file statement of change of name or address of registered agent. (54 O.S. § 305.1).

Name.

Partnership name may not be same as or indistinguishable from name of any other partnership, corporation, limited liability company or limited partnership, trade name or fictitious name, or other name reserved with or on file with Secretary of State, absent written consent of holder of name, or certified copy of final decree establishing prior right of such partnership or holder of partnership name to use name in this state. (54 O.S. § 1-105). Name of LLP must end with “Registered Limited Liability Partnership”, “Limited Liability Partnership”, “R.L.L.P.”, “L.L.P.”, “RLLP” or “LLP”. (54 O.S. § 1-1002).

Except as otherwise provided by law, every partnership transacting business in state under fictitious name, or designation not showing names of persons interested as partners in business, must file for recording with Secretary of State certificate stating names in full of all members of partnership, their places of residence and mailing addresses, and mailing address and physical office address of partnership. Certificate must be signed by at least two partners. Amended certificate must be filed on every change in members. These provisions do not apply to partnership or limited partnership transacting business under name filed with Secretary of State in compliance with other law. (54 O.S. § 81, 83, 84). If partnership ceases to transact business in state under fictitious name, it must file certificate of cancellation of name with Secretary of State. (54 O.S. § 84.1).

Foreign Limited Liability Partnership.

Before transacting business in state, foreign LLP must file statement of foreign qualification. Statement must contain name of foreign LLP that satisfies requirements of state or other jurisdiction under whose law it is formed and, if different from legal name of partnership, name under which partnership will conduct business ending with “Registered Limited Liability Partnership”, “Limited Liability Partnership”, “R.L.L.P.”, “L.L.P.”, “RLLP” or “LLP”. If there is no office of partnership in state, statement also must include name and street address of partnership’s agent for service of process, which must be individual who is resident of this state or other person authorized to do business in this state. (54 O.S. § 1-1102). If foreign LLP transacts business in state without statement of foreign qualification, Secretary of State is its agent for service of process with respect to right of action arising out of transaction of business in state. (54 O.S. § 1-1103). Activities not constituting transacting business specified. (54 O.S. § 1-1104).

Rights and Liabilities of Partners Inter Se.

Partnership may maintain action against partner for breach of partnership agreement, or for violation of duty causing harm to partnership. (54 O.S. § 1-405). Law of jurisdiction in which partnership has its chief executive office governs relations among partners and between partners and partnership. Law of this state governs relations among partners and between partners and partnership and liability of partners for obligation of LLP. (54 O.S. § 1-106). Law under which foreign LLP is formed governs relations among partners and between partners and partnership and liability of partners for obligations of partnership. (54 O.S. § 1-1101).

Rights and Liabilities of Partners as to Third Persons.

Partnership may sue and be sued in its firm name. LLP or foreign LLP transacting business in state must provide security for claims against it based upon acts, errors or omissions arising out of conduct of business of partnership. (54 O.S. § 1-309). After partnership has been dissolved, actions may be brought by and against partnership to enforce obligations that arose before dissolution, partnership being deemed to continue for purpose of suit. Where dissolution is caused by death of partner, action to enforce obligation that arose before dissolution may be brought by or against partnership in its firm name, or by or against surviving partners, or by or against surviving partners and estate of deceased partner; if action is brought against partnership in firm name, estate of deceased partner may be made party to action. (12 O.S. § 1082).

See category 5 Civil Actions and Procedure, topics 5.02 Actions, subhead Survival, Abatement and Revival, and 5.15 Judgments, subhead Death of Party after Verdict or Judgment.

Limited Partnership.

Uniform Limited Partnership Act of 2008 (54 O.S. § 500-101 et seq.) governs limited partnerships except limited partnerships formed before Nov. 1, 2007 may be subject to certain aspects of prior law. (54 O.S. § 500-1206). Statute should be consulted to determine substantive differences from Revised Uniform Limited Partnership Act. For example, Uniform Limited Partnership Act of 2008 provides for existence of limited liability limited partnerships in which general partner not personally liable for debts. (54 O.S. § 500-404[c]).

Name of limited partnership that it is not limited liability limited partnership must contain phrase “limited partnership” or abbreviation “L.P.” or “LP”. May not contain phrase “limited liability limited partnership” or abbreviation “LLLP” or “L.L.L.P.” Name of limited liability limited partnership must contain phrase “limited liability limited partnership” or abbreviation “LLLP” or “L.L.L.P.” and may not contain abbreviation “L.P.” or “LP.” Either may contain name of any partner. Absent authorization by Secretary of State under limited circumstances, name must be distinguishable from name of each person other than individual incorporated, organized or authorized to transact business in state. (54 O.S. § 500-108). Contents of certificate of limited partnership outlined. (54 O.S. § 500-201).

Foreign limited partnership must register with Secretary of State and designate and continuously maintain in state agent for service of process (54 O.S. § 500-114[b]).. Laws of state of organization govern relations among partners and between partners and partnership and liability of partners as partners for partnership obligation. (54 O.S. § 500-901). Application for certificate of authority must contain statutorily required information. (54 O.S. § 500-902). Registration fee is $300; amendments or cancellation fee is $100. (54 O.S. § 172-180). Fee of $100 payable to Secretary of State on July 1 each year for acting as registered agent. (54 O.S. § 350.1). Failure to pay registered agent fee for period of three years results in cancellation of certificate of limited partnership. (54 O.S. § 350.1, 311). Fee of $25 for filing certificate of change of location of registered office or change of registered agent of domestic or foreign limited partnership. Foreign or domestic limited partnership must file statement of change of name or address of registered agent. (54 O.S. § 305.1, 353.1, 353.2). Domestic and foreign limited partnerships registered to do business in state must file annual report each year with Secretary of State, (54 O.S. § 500-210). Secretary of State may dissolve limited partnership or revoke certificate of authority of foreign limited partnership that fails to deliver its annual report or fails to pay any fee, tax or penalty due within 60 days after due date. (54 O.S. §§ 500-809, 500-906).

Conversion, Merger of Partnerships or Limited Partnerships.

Procedures for and effect of conversion of other organizations to limited partnership, conversion of limited partnership to other organization, and merger of partnerships specified. (54 O.S. §§ 500-1101 to 500-1113).

Farming or Ranching.

Partnerships and limited partnerships cannot engage in farming or ranching, or own or lease interests in land to be used in business of farming or ranching, unless each partner is person or entity enumerated in paragraphs 1 O.S. § 5 of 18 O.S. § 955, there are not more than ten partners (unless partners in excess of ten are related as lineal descendants or are or have been related by marriage or adoption to lineal descendants), and at least 65% of partnership's annual gross receipts are derived from farming or ranching, or from allowing others to extract minerals underlying lands held by partnership. (18 O.S. § 955).

Uniform Limited Cooperative Association Act enacted. (18 O.S. § 441-101 et seq.).

3 BUSINESS REGULATION AND COMMERCE

3.01 BANKS AND BANKING:

Oklahoma Banking Code adopted. Space does not permit complete summary. Act should be consulted. (6 O.S. § 101 et seq.).

Oklahoma Savings and Loan Code adopted. Space does not permit complete summary. Act should be consulted. (18 O.S. § 381.1 et seq.). Savings and loan associations governed by Oklahoma General Corporation Act (18 O.S. § 1001 et seq.), except when inconsistent with Savings and Loan Code (18 O.S. § 381.26). Industrial loan companies regulated. (6 O.S. § 510 et seq.). Money services businesses regulated. (6 O.S. § 1512 et seq.).

Deposits and collections are governed by Uniform Commercial Code (12A O.S. § 4-101 et seq.). Except as otherwise provided in Oklahoma General Corporation Act (18 O.S. § 1001 et seq.), transfer of stock and certificates of stock of bank or trust company governed by Uniform Commercial Code–Art. 8, Investment Securities (12A O.S. § 8-101 et seq.). See topic 3.09 Commercial Code.

Regulated by.

State Banking Board, composed of State Banking Commissioner and six other persons appointed by Governor, has supervision and control of issuing of bank charters and administration of banking laws. (6 O.S. § 202). State Banking Commissioner has supervision and control over savings and loan associations. (18 O.S. § 381.5). State bank may become member of Federal Reserve System; member bank continues to be subject to state supervision and examination, but is not required to carry or maintain reserve other than that required under Federal Reserve Act. (6 O.S. § 403.1).

Credit unions regulated. (6 O.S. § 2001-2022).

Stockholders' Liability.

Preferred stockholders are exempt from assessment. (6 O.S. § 703). Preferred stockholders entitled to receive cumulative dividends only if provided for in bank or trust company's certificate of incorporation or amendment thereto. (6 O.S. § 709). Common stock is assessable if capital impaired; stock of defaulting shareholders may be sold to pay assessment. (6 O.S. § 220).

Deposits.

Deposit in name of two or more persons may be paid by bank or savings and loan association to either, whether other is living, or whether one of such persons is minor. Payment is release of bank from liability. (6 O.S. § 901). Deposit in name of minor may be paid to minor. (6 O.S. § 903, 381.41a). Minor may be sole and absolute owner of deposit account. (6 O.S. § 903.1, 381.41a). Deposit in trust for another, in event of death of trustee, may be paid to beneficiary. Deposit made using terms "Payable Upon Death" or "P.O.D." payable on death of account owner to one or more designated P.O.D. beneficiaries, which shall be trust, individual or nonprofit organization. Change in designation valid only when executed by owner of fund in manner prescribed. (6 O.S. § 901, 6 O.S. § 2025, 18 O.S. § 381.39, 18 O.S. § 381.39a, 18 O.S. § 381.40). Deposit which is in form in trust for another is deemed Totten Trust; written revocation required. (6 O.S. § 902, 18 O.S. § 381.40a). Deposit by husband and wife for business purposes may be treated as sole proprietorship account rather than partnership account, unless formal partnership has been formed. (6 O.S. § 907). Procedure for perfection of security interest in deposit account. (12A O.S. § 1-9-312). Custody of unit-collateral securities in "security-depository" bank authorized. (62 O.S. § 516.6). Procedure specified for permitting spouse, parent, adult descendant or person named as executor to open and examine contents of safe deposit box leased by decedent; lessor must give notice to Tax Commissioner (68 O.S. § 812), but has no duty to conduct inventory of contents of safe deposit box (6 O.S. § 1308).

Collections.

Governed by Uniform Commercial Code. (12A O.S. § 4-101 et seq.). See topic 3.09 Commercial Code.

Unclaimed Deposits.

Uniform Unclaimed Property Act (1981) substantially adopted. (60 O.S. § 651-87).

See also category 21 Property, topic 21.01 Absentees, subhead Escheat.

Lien.

Banker has lien on customer's property in his possession, for balance due in course of business. (42 O.S. § 32). Lessor of safety deposit box has lien upon contents of lessee's box for past due rentals and any expense incurred in opening of box and replacement of locks; procedure specified for notice and sale of contents. (6 O.S. § 1310).

Acquisition and Conveyance of Real Estate by Bank or Trust Company.

(6 O.S. § 414).

Fiduciary Duty.

Unless bank has expressly agreed in writing to assume special or fiduciary duties or obligations, no such duties or obligations will be imposed on bank with respect to depositor, borrower, guarantor or surety and no special or fiduciary duty shall be deemed to exist. (6 O.S. § 425). Bank or trust company that makes investments or reinvestments of assets maintained in its trust department or trust company in securities of management investment company or investment trust must comply with Uniform Prudent Investor Act. (60 O.S. § 175.55, 60 O.S. § 175.60 et seq.). Banks and certain other financial organizations with trust powers may employ affiliates within financial institutions to provide brokerage and other services. (60 O.S. § 175.11a). Before bank or trust company transacts fiduciary business within state, it must deposit cash or interest-bearing securities with Commissioner as security in accordance with statutory schedule. (6 O.S. § 1004).

Trust Companies.

May act as fiscal agents, accept and discount commercial paper, accept drafts, issue letters of credit, act as trustee and guardian (property or securities held as fiduciary to be kept separate) and establish commercial, banking and savings department with approval of Banking Board and under its supervision, with power to receive money on deposit, as well as commercial and savings deposits from minors or incompetents. Stockholders liable for amount equal to stock owned. (6 O.S. § 1001). Bank or trust institution serving as trustee of bond issue of public body in state must have representative trust office and trust officer in state. (6 O.S. § 427).

See category 13 Estates and Trusts, topic 13.15 Trusts.

Uniform Common Trust Fund Act adopted in substance. (60 O.S. § 162). Official Amendment adopted with substantial modifications. Bank or trust should use model statutory support trust substantially in form provided by statute for purpose of receiving money donated as public service to assist beneficiary in payment of medical, financial, educational or other similar needs. (6 O.S. § 3010).

Foreign Banks.

Any foreign corporation or banking association which has its principal office in another state, authorized to act as trustee under wills and voluntary trust agreements in state where it has its principal office, may apply and act in such capacities in this state in ancillary proceedings, if similar domestic corporations or banking associations having their principal office in this state, which are authorized in this state to so act, are permitted to act in like capacity.

Any bank, bank holding company, trust company, or business association without charter to engage in banking in Oklahoma must register with Bank Commissioner all of its bank or trust-related activities in Oklahoma, and those of its subsidiaries or affiliates. (6 O.S. § 104). Transacting banking business is prohibited except as authorized by Oklahoma or national charter. (6 O.S. § 1401).

International banks regulated. (6 O.S. § 1601 et seq.).

Multistate Trust Institutions Act (6 O.S. § 1701 et seq.) permits banks and other depository institutions, foreign banks and trust companies to engage in trust business on multistate and international basis, subject to specified requirements.

Merger.

Upon approval by Banking Board, state bank may merge with parent company, one or more nonbank subsidiaries of parent bank holding company, one or more subsidiaries of state bank. State bank must be surviving entity; merger also must meet other restrictions. (6 O.S. § 1111). Requirements for interstate merger transactions specified. (6 O.S. § 501.1).

Branch Banking.

Banks enjoy unlimited statewide branching by acquisition of other banks or savings and loans or branches of either, up to maximum size of 20% of deposits in Oklahoma. Banks may establish unlimited number of full-service branches, except for branches on premises of affiliate engaged in commercial activities in which bank may not engage under federal law (6 O.S. § 501.2) and “detached facilities” (engaging in everything but loan approval) (6 O.S. § 415). Automated teller machines are permitted statewide for any bank, savings association or credit union. Other entities may install and operate after filing registration statement. (6 O.S. § 422). Out-of-state banks permitted to establish de novo branch in state in limited circumstances. (6 O.S. § 501.1). Loan production and deposit production offices for banks and out-of-state banks permitted is statutory and Banking Board requirements satisfied. (6 O.S. § 424).

Bank Holding Companies.

Bank holding company may acquire banks if it would control not more than 20% of deposits in Oklahoma. (6 O.S. § 502). Oklahoma-based banks may be acquired by any out-of-state holding company provided certain federal approvals are obtained. (6 O.S. § 506).

Financial Privacy Act (6 O.S. § 2201-2208) enacted to maintain privacy and confidentiality of records of customers of financial institutions. Includes procedures for quashing subpoena of government authority for customer's financial records, other notice and challenge procedures. Requires payment of specified costs to financial institution for assembling, reproducing or providing financial records of customer, including search and processing costs, reproduction costs, transportation costs, and other directly incurred costs. Use of loan information in solicitations prohibited except where otherwise publicly available. (6 O.S. § 1418).

3.02 BILLS AND NOTES:

Uniform Commercial Code adopted, replacing Uniform Negotiable Instruments Act. (12A O.S. § 3-101 et seq.). See topic 3.09 Commercial Code. Days of grace abolished. (48 O.S. § 176).

Attorney Fees.

Stipulation in note for attorney's fee is enforceable if reasonable. (59 Okla. 237, 158 Pac. 927).

Judgment notes are recognized if they comply with the statutory requirements as to judgments by confession. See category 5 Civil Actions and Procedure, topic 5.15 Judgments.

Uniform Consumer Credit Code enacted. (14A O.S. § 1-101 et seq.). See category 8 Debtor and Creditor, topic 8.03 Consumer Credit.

3.03 BILLS OF LADING:

See topic 3.08 Carriers.

3.04 BILLS OF SALE:

See topic 3.23 Sales.

3.05 BLUE SKY LAW:

See topic 3.24 Securities.

3.06 BROKERS:

Real estate sales associate or broker or salesman must obtain license and attend continuing education courses as condition of renewal or reactivation of license. (59 O.S. § 858-301, 307 O.S. § 2). Obligations of brokers regulated. (59 O.S. § 858-101 et seq.). Commercial real estate brokers entitled to lien for commission, which attaches to real estate. Notice of lien required to be filed. (42 O.S. § 201 et seq.). Mortgage brokers and mortgage loan originators regulated. (59 O.S. § 2095 et seq.).

Broker engaged in buying and selling securities governed by Uniform Commercial Code. (12A O.S. § 8-301 et seq.). See topic 3.09 Commercial Code. See also topic 3.24 Securities, subhead Registration of Brokers, Reports.

Mortgage Broker Licensure Act. (59 O.S. § 2081 to 2091).

3.07 BULK SALES:

See topic 3.09 Commercial Code.

3.08 CARRIERS:

Everyone who offers to public to carry persons, property or messages is common carrier. Also those engaged in business of transporting natural gas or crude oil for hire or otherwise by pipe line are common carriers. (13 O.S. § 4; 52 O.S. § 24, 56).

State Corporation Commission (three members) has general supervision and control of carriers (Const., art. IX, pars. 15 O.S. § 35; 17 O.S. § 61, 74), and general supervising control over rate fixing and approval of tariffs.

Rates.

Railroad, express, telegraph and telephone companies are required to keep schedules of regular rates open for inspection. (13 O.S. § 11). Discrimination is prohibited. (52 O.S. § 24, 56).

Liability.

Common carrier of valuables is not liable for more than $50 for loss of or injury to any one package, unless notified, by mark on package or otherwise, of nature of freight. Common carrier of coal is liable for deficiencies in weight, less natural shrinkage. (13 O.S. § 134, 151 O.S. § 7).

Limiting Liability.

Obligations of common carrier cannot be limited by general notice, but may be limited by special contract, except as to liability for gross negligence, fraud, or wilful wrong. (13 O.S. § 14, 15).

Bills of Lading.

Governed by Uniform Commercial Code. (12A O.S. § 7-301 et seq.). Assent to any modification of the carrier's rights or obligations, other than as to rate of hire, and time, place and manner of delivery, may be manifested only by signature of consignor or consignee to bill of lading. (13 O.S. § 16).

Liens.

Common carrier lien is fixed by Uniform Commercial Code. (12A O.S. § 7-301). Carrier of passengers has lien upon his luggage for payment of fare. (13 O.S. § 46). Such liens may be enforced by civil action in district court, and sale of property after judgment. (42 O.S. § 172, 175).

Motor Vehicle Carriers.

See category 23 Transportation, topic 23.01 Motor Vehicles.

3.09 COMMERCIAL CODE:

Uniform Commercial Code adopted. (12A O.S. § 1-101 et seq.). Section numbers of Okla. Statutes correspond to those of 1962 Official Text. See Uniform and Model Acts section.

Deviations in substance from 1962 Official Text in Okla. Statutes are following:

(1) § 2-316(3). Implied warranties of merchantability and fitness not applicable to sales of livestock or its unborn young (other than horses) provided seller offers evidence that all state and federal health regulations complied with.

(2) § 2-725 (1) and (3). Statute of limitations for breach of contract for sale is five

years and one year after termination of an initial action. (12A O.S. § 2-725 [1], 725 [3]).

(3) §§ 1-9-320.1-320.7. Provides laws governing protection of buyers of farm products. Added to comply with Food Security Act of 1985.

(4) § 1-9-406 (d)(2). Legal restrictions on assignment not applicable to claims or rights to receive compensation for injuries or sickness or to claims or rights to receive benefits under special needs trust.

(5) § 1-9-406(j). Omitted.

(6) § 1-9-408(e). Legal restrictions on assignment not applicable to claims or rights to receive compensation for injuries or sickness or to claims or rights to receive benefits under special needs trust.

(7) § 1-9-502(b)(3). Reference to constructive notice omitted.

(8) § 1-9-502(e). Filing of financing statement under 9 O.S. § 501 does not constitute record notice against subsequent purchase or encumbrance of real estate unless it contains legal description of real estate adequate for trust index.

(9) § 1-9-502(f). Financing statement, or any filing related to it, that complies with § 9-502 is sufficient and may be recorded and shall be effective as financing statement even if it does not comply with execution and acknowledgment requirement of other Oklahoma statutes.

(10) § 1-9-519(f). Alternative B adopted and modified to include reference to Oklahoma tract index.

(11) § 1-9-521. Oklahoma statutes add new subsection (c): form that filing office may not refuse to accept must conform to format prescribed for form by National Conference of Commissioners on Uniform State Laws.

(12) § 1-9-522. Alternative B adopted and modified to include reference to Oklahoma tract index.

(13) § 9-525. Oklahoma provides fee amounts in table in 9 O.S. § 525.1.

(14) § 9-525.1. Oklahoma Fee Table.

(15) § 9-526.1. Oklahoma procedures for adopting rules.

(16) § 9-527. Provides county clerk of Oklahoma County must report annually on or before Jan. 1 to Governor and Legislature.

(17) § 9-601(a)(1). § 686 of Title 12 of Oklahoma statutes not applicable to enforcement of claim, security or agricultural lien except as provided in § 1-9-604.

(18) § 9-707. Section heading amended to read “Persons Entitled to File Initial Financing Statement.”

(19) § 1-9-170. Oklahoma statutes add section providing certain definitions.

Other Deviations.

Following options and alternatives in 1962 Official Text have been exercised: § 4-202 (1b), Optional phrase adopted; § 4-212, Optional subsection (2) adopted; § 5-112 (1), Optional phrase adopted; § 5-114, Optional subsections (4) and (5) adopted.

Farm Products.

Oklahoma has adopted amendments to Uniform Commercial Code establishing central filing system for protection of buyers of farm products in response to Federal Food Security Act of 1985. Amendments have been approved by U.S. Department of Agriculture. See references above to §§ 1-9-320.1-320.7.

Permanent Editorial Board's Recommendations for Amendments.

§ 2-702—1966 Official Amendment enacted.

§ 3-501—1966 Official Amendment enacted.

Permanent Editorial Board's Recommendations for Optional Amendments.

§ 2-318—1966 Official Optional Amendment not enacted.

1972 Official Amendments.

Adopted.

1973 Official Amendment.

Adopted.

1977 Official Amendments.

Adopted.

1990 Conforming Amendments to Articles 1 and 4.

Adopted.

1990 Official Amendments to Article 4.

Adopted, with Alternative B of § 4-106 adopted.

2002 Official Amendments to Articles 3 and 4. Adopted.

Revised Article 1—General Provisions.

Adopted, including conforming amendments to other articles.

Article 2A—Leases.

Adopted, including 1990 Amendments.

Revised Article 3—Negotiable Instruments.

Adopted, with addition of § 3-312 dealing with lost, destroyed or stolen cashier's checks, teller's checks or certified checks.

Article 4A—Funds Transfers.

Adopted.

Revised Article 5—Letters of Credit.

Adopted, with related amendments to Arts. 1, 2, and 9.

Revised Article 6—Bulk Sales.

Repealed.

Revised Article 7—Documents of Title.

Adopted, including conforming amendments to other articles.

Revised Article 8 (1994)—Investment Securities.

Adopted, with related amendments to Art. 9.

Revised Article 9—Secured Transactions.

Adopted.

Filing Fees.

See category 10 Documents and Records, topic 10.04 Records, subhead Filing Under Commercial Code.

See also topics: Banks and Banking, Bills and Notes, Brokers, Carriers, Contracts, Factors, Frauds, Statute of, Sales, Securities, Warehousemen and categories Business Organizations, topic Corporations; Civil Actions and Procedure, topic Limitation of Actions; Debtor and Creditor, topics Assignments, Consumer Credit, Fraudulent Sales and Conveyances, Liens, Pledges; Documents and Records, topics Records, Seals; Mortgages, topic Chattel Mortgages.

3.10 CONDITIONAL SALES:

See topic 3.23 Sales.

3.11 CONSIGNMENTS:

See topic 3.14 Factors.

3.11A CONSUMER CREDIT:

Uniform Consumer Credit Code enacted. (14A O.S. § 1-101 et seq.). See category 8 Debtor and Creditor, topic 8.03 Consumer Credit.

3.12 CONSUMER PROTECTION:

Aftermarket Crash Parts Regulation Act.

Regulates use of aftermarket crash parts on motor vehicles. (15 O.S. § 951-956).

Bedding Regulation Act.

(63 O.S. § 1001.1 et seq.). Additional requirements for retailers of bunk beds. (63 O.S. § 1-0002.1).

Consumer Protection Act adopted. (15 O.S. § 751-765). Unlawful practices specified in act parallel those in Revised Uniform Deceptive Trade Practices Act § 2 with exception that Oklahoma act omits paragraphs (8) and (12) and prohibits advertisements “under the guise of obtaining sales personnel”, employment of “bait and switch” advertising, conducting “closing out sale” without license, resuming same business within year after such sale, falsely stating that services, replacements or repairs are needed, misrepresenting mail solicitation as invoice or billing statement, offers to purchase mineral or royalty interest through offer that resembles oil and gas lease, makes deceptive use of another's name, falsely states or implies that person, product or service is recommended or endorsed by third person, falsely states that information about consumer has been provided by third person, and violations of other specified acts. (15 O.S. § 753). Attorney General or district attorney given power to obtain declaratory judgment, injunction or restraining order, actual damages (and penalties, for unconscionable contract), or recover expenses and investigation fees. (15 O.S. § 756.1). Attorney General also has investigatory (15 O.S. § 757-758) and supervisory (15 O.S. § 762) powers. Violator is liable to aggrieved consumer for actual damages and litigation costs. (15 O.S. § 761.1). If violation is unconscionable, violator is liable to aggrieved customer for civil penalty of up to $2,000 per violation. Upon petition to court, Attorney General may recover civil penalty to inure to State of up to $10,000 per violation from any person who willfully violates terms of any injunction or court order. (15 O.S. § 761.1).

Credit Card Numbers.

Entire credit card number on electronically printed receipts prohibited in accordance with timetable set forth in statute. (15 O.S. § 752A).

Credit Services Organization Act.

Regulates credit services organizations. (24 O.S. § 131 et seq.).

Consumers Disclosure of Prizes and Gifts Act.

Prohibits untrue use of words "prize" or "gift" or notifying person as advertising that person has won prize and must pay money or rent goods or services to receive it. See act for related prohibited practices. (21 O.S. § 996.1 et seq.).

Credit Reports.

Consumer reporting agency, credit bureau or similar agency which furnishes credit report or rating may include information on tax liens only when information is obtained directly from Tax Commission, and must use due diligence in updating status of tax lien. Consumer reporting agency may contact Department of Human Services and request information as to whether specified persons are at least two months past due in paying child support. (56 O.S. § 240.7).

Credit unions regulated. (6 O.S. § 2001-2022).

Defective Assistive Device Act.

Provides rights and remedies against manufacturer or seller of any assistive device that enables disabled person to communicate, see, hear or maneuver. (15 O.S. § 910-910.4).

Emergency Price Stabilization Act.

Prohibits excessive price increase in sale, rent, lease of goods, services, dwelling units or storage space during period of emergency in emergency area. (15 O.S. § 776.5).

Gift Certificate and Gift Card Disclosure Act.

(15 O.S. § 795 et seq.).

Health Spa Act.

(59 O.S. § 2000 et seq.).

Home Repair Fraud Act.

Certain acts by those engaged in home repair declared fraudulent. (15 O.S. § 765.1 et seq.). Contracts for construction of new residence, or alteration, repair of or addition to, existing residence may contain notice requirements before suit brought. (15 O.S. § 765.6).

Home solicitation regulated. (14A O.S. § 2-501-505). See topic 3.23 Sales.

Homeowners Insurance.

Lenders may not condition financing residential mortgages or providing other financing arrangements on procurement of homeowners' insurance in amount that exceeds replacement value of dwelling and its contents. (36 O.S. § 3639.3).

Identify Theft.

Obtaining name, address, social security number, date of birth, place of business or employment, debit, credit or account numbers, drivers license number, or any other personal identifying information of another person without consent and with intent to use or sell information to obtain credit, goods, property or service is felony offense. (21 O.S. § 1533.1). Consumers may request security freeze on consumer report. (24 O.S. § 149 et seq.).

Lemon Law.

Provides rights and remedies for repair of new motor vehicle that does not conform to all applicable express warranties. (15 O.S. § 901).

Plain Language.

See category 16 Insurance, topic 16.01 Insurance Companies, subhead Policies.

Rental-Purchase Act.

Requires licensing of lessors and disclosures to consumers; provides remedies with respect to personal property leased to consumers. (59 O.S. § 951 et seq.).

Telephone Sales.

Unlawful telemarketing practices specified. (15 O.S. § 775A.4). Registry established for consumers who do not wish to receive telephone sales calls. Telephone sales calls to such consumers prohibited. (15 O.S. § 775B.1 et seq.). Use of certain automatic dialing devices prohibited. (15 O.S. § 775A.4).

Uniform Deceptive Trade Practices Act adopted. (78 O.S. § 51 to 55). See topic 3.20 Monopolies, 3.22 Restraint of Trade and Competition.

Unsolicited Goods, Wares or Merchandise Act.

Unsolicited sending of goods, wares, or merchandise deemed unconditional gift. (15 O.S. § 721). Unordered goods sent by organization making retail sales within 45 days after person has terminated his membership in organization by certified mail, return receipt requested, also deemed unconditional gift. (15 O.S. § 722).

3.13 CONTRACTS:

Uniform Commercial Code adopted. See topic 3.09 Commercial Code. See also categories 8 Debtor and Creditor, topic Consumer Credit; Documents and Records, topic Seals; Family, topic Infants.

Definition and requisites (15 O.S. § 1-2); parties and capacity (15 O.S. § 11-34); consent, acceptance and revocation (15 O.S. § 51-75); object, legality, consideration (15 O.S. §

101-115); manner of creating contracts (15 O.S. § 131-139); interpretation of contracts (15 O.S. § 151-177); unlawful contracts (15 O.S. § 211-220); extinction of contracts (15 O.S. § 231-242).

Special provisions governing dealer agreements for selling and retailing specified equipment, including repurchase of inventory by manufacturers, wholesalers and distributors after termination of contract. (15 O.S. § 245-251). Special provisions governing customer's rights and title to any die, mold, form or pattern in possession of molder; providing for possessory lien, transfer of title within specified time, subject to customer's rights under federal patent, copyright or unfair competition law. (15 O.S. § 691-694).

Remedies for Breach.

Measure of damages (23 O.S. § 21-40); liquidated damages (15 O.S. § 214-215); rescission (15 O.S. § 232-235). See topic 3.09 Commercial Code.

Copyright.

Contracts for payment of royalties by proprietor to copyright owner or performing rights society are subject to specified requirements. (15 O.S. § 790).

3.14 FACTORS:

Factors lien governed by Uniform Commercial Code. (12A O.S. § 9-102). See topic 3.09 Commercial Code.

License Requirements.

Factors dealing in farm products doing gross annual commission business of more than $5,000 per year must be licensed by State Market Commission and give bond of $5,000, which Market Commission may require increased according to volume of business. (2 O.S. § 634).

Lien.

Factor's lien is among security devices governed by Uniform Commercial Code. (12A O.S. § 9-102). Lien is enforceable in same manner as other liens for labor (42 O.S. § 41). In order to protect lien as against innocent purchasers or encumbrancers, factor must, within 60 days after last performance of any service on personal property, file verified lien statement in office of county clerk of county where property is situated and lien does not attach to personal property which has passed into possession of an innocent purchaser for value before statement has been filed or purchaser has received notice of intention to file. (42 O.S. § 98, 132).

Consignment Agreements.

No statutory provision.

3.15 FRANCHISES:

Business Opportunity Sales Act.

(71 O.S. § 801 et seq.). Unlawful to sell business opportunity as defined in Act without first filing with Administrator of State Department of Securities disclosure document and consent to service of process, and paying filing fee of $250. (71 O.S. § 806, 807). Under Act, business opportunity is contract between seller and purchaser wherein seller agrees to provide products, equipment, supplies or services enabling purchaser to start business and seller makes specified representations. (71 O.S. § 802[3][a]). Certain offers, sales and business opportunities exempt from Act. (71 O.S. § 802[3][b], 803). Contract or agreement of sale must be in writing, must set forth terms and conditions. Copy of agreement must be given to purchaser at time of signature. (71 O.S. § 809). If provisions of act are violated, Administrator may suspend or revoke

registration, enjoin further sales, and refer violations to Attorney General or district attorney for criminal prosecution. (71 O.S. § 810, 814, 823). Purchaser may sue for rescission, damages, interest, costs and attorneys fees. (71 O.S. § 824).

Uniform Franchise and Business Opportunities Act not adopted.

See topics 3.20 Monopolies, 3.22 Restraint of Trade and Competition, 3.24 Securities.

Franchised vehicle dealer must give notice to manufacturer or distributor of sale, transfer or assignment of franchise agreement or business and assets of dealership. (47 O.S. § 565.3).

3.16 FRAUDS, STATUTE OF:

Uniform Commercial Code adopted. See topic 3.09 Commercial Code.

No executor or administrator is chargeable upon any special promise to pay debt of decedent, unless the agreement for that purpose or some memorandum or note thereof is in writing and signed by him. (58 O.S. § 521).

Following contracts are invalid unless contract (or some note or memorandum) is in writing and signed by party to be charged, party's agent, or single-party broker: (1) agreement that by its terms is not to be performed within year from its making; (2) special promise to answer for debt, default or miscarriage of another, except as otherwise provided (see 15 O.S. § 321-344 regarding guaranty agreements); (3) agreement made upon consideration of marriage, other than mutual promise to marry; (4) lease agreement for more than one year, or for sale of real property or of interest therein; such agreement, if made by agent of party to be charged, is invalid unless agent's authority is in writing and signed by party to be charged. (15 O.S. § 136).

Agreement for sale of goods, chattels or things in action and agreement for sale of securities governed by Uniform Commercial Code. (12A O.S. § 1-206; 2 O.S. § 201; 8 O.S. § 319).

Guaranty must be in writing and signed by guarantor, unless promise to answer for obligation of another is deemed original obligation of promisor in cases provided by statute. (15 O.S. § 324, 325).

3.17 [RESERVED]

3.18 INFORMATION TECHNOLOGY, INTERNET AND NEW MEDIA:

Electronic Transactions.

Uniform Electronic Transactions Act (UETA) adopted. (12A O.S. § 15-101 et seq.). Parties can agree to conduct transactions by electronic means, subject to specified exceptions. UETA excludes laws governing creation and execution of wills, codicils or testamentary trusts, Uniform Commercial Code (other than §§ 1-107 and 1 O.S. § 206, and Arts. 2 and 2A). Electronic record satisfies requirement that record be in writing, and electronic signature satisfies requirement for signature. UETA also provides rules regarding changes and errors in transmission of electronic record.

Electronic Commerce.

Computer software considered "goods" under Uniform Commercial Code if software is embedded in and becomes part of goods. Otherwise, software is general intangible. (12A O.S. §

1-9-102).

Use of Computer.

Unlawful to use computer, computer system or computer network for fraud, deceit or extortion or willfully to gain or attempt to gain unauthorized access to, damage, disrupt, change, use or take possession of computer, computer system or computer network. Also unlawful to willfully use computer, computer system or computer network to annoy, abuse, threaten or harass or to put other person in fear of physical harm or death. (21 O.S. § 1953). Attorney General or district attorney may subpoena witnesses and documents prior to institution of proceeding. (21 O.S. § 1959). Downloading obscene material or child pornography is felony. (21 O.S. § 1021). Attorney General or law enforcement officer may obtain court order requiring interactive computer service provider to remove child pornography from server. (21 O.S. § 1040.80).

Security Breach Notification Act (24 O.S. § 161 et seq.) requires entities owning or licensing computer date that includes personal information to disclose any breach of system's security to state residents whose unencrypted and unredacted personal information was or is reasonably believed to have been accessed and acquired by unauthorized person.

Email Messages.

Unlawful to transmit electronic mail messages with false or with no Internet domain name, or that contain false, malicious or misleading information that purposely or negligently injures person. Also unlawful to sell, give or otherwise distribute software primarily designed or produced for purpose of facilitating or enabling falsification of electronic mail transmission information. Unsolicited commercial electronic mail messages also regulated. (15 O.S. § 776.1 et seq.).

Unlawful to transmit electronic mail messages with intent to incite, and likelihood of inciting, violence because of a person's race, color, religion, ancestry, national origin or disability. (21 O.S. § 850). Interception of electronic communications unlawful. (13 O.S. § 176.3).

Web Pages.

Unlawful to create web page or Internet domain name represented as legitimate online business without authorization of registered owner. (15 O.S. § 776.10).

Telecommunications Services.

Unlawful to knowingly obtain or attempt to obtain, or knowingly assist other person in obtaining or attempting to obtain, cable, information or telecommunications service, including Internet service, without lawful payment. Unlawful knowingly to interfere with or connect to cable, information, or telecommunications service, including Internet, without authority of operator of service. Also unlawful to manufacture, import, sell, rent, assist in selling or renting, or use device designed to facilitate these unlawful actions. (21 O.S. § 1737).

Oklahoma Telecommunications Act of 1997.

Grants Oklahoma Corporation Commission authority to regulate certain telecommunications activities. (17 O.S. § 139.101 et seq.).

Oklahoma Online Bidding Act.

Governs online procurement of goods and services by state agencies. (74 O.S. § 84.450 et seq.).

3.193.16 [RESERVED]

3.17 INTEREST:

Legal rate, 6%; permitted by contract, any rate as may be authorized by law, now in effect or enacted subsequently. (15 O.S. § 266).

Uniform Consumer Credit Code enacted. (Title 14A). See category 8 Debtor and Creditor, topic 8.03 Consumer Credit.

Judgments.

See category 5 Civil Actions and Procedure, topic 5.15 Judgments, subhead Interest.

Open account bears interest from time indebtedness accrued. (134 Okla. 25, 272 Pac. 414).

Retail Installment Sales.

Uniform Consumer Credit code adopted. See category 8 Debtor and Creditor, topic 8.03 Consumer Credit.

Small Loans.

Uniform Consumer Credit Code adopted. See category 8 Debtor and Creditor, topic 8.03 Consumer Credit.

Pawnshops.

Oklahoma Pawnshop Act (59 O.S. § 1501-1513) governs interest allowable.

Usury.

Maximum interest rates defined by Uniform Consumer Credit Code. See category 8 Debtor and Creditor, topic 8.03 Consumer Credit. Maximum legal interest on non-supervised "consumer" loans is 10%. (14A O.S. § 3-201). Maximum rate on unpaid balance of supervised "consumer" loans: up to $300, 30%; over $300 to $1,000, 21%; over $1,000, 15%. (14A O.S. § 3-508A). Special rules apply to certain supervised loans having cash advance of $100 or less. (14A O.S. § 3-508B). Rate on all other loans is contract rate, not to exceed 45%. (14A O.S. § 3-605). These usury limits have been superseded by federal law as to agricultural and business loans of $25,000 or more. (12 U.S.C. § 86a).

State banks are required to report rate of interest charged, retained, reserved or collected upon loans in excess of legal rate; and charters of banks willfully loaning money in violation of interest laws may be cancelled. (15 O.S. § 272).

3.18 [RESERVED]

3.19 LICENSES, BUSINESS AND PROFESSIONAL:

Legislature may provide for levy and collection of license taxes (Const., art. X, par. 12) and state licenses are required for numerous businesses or occupations. See, e.g., topics Brokers, Factors; category Insurance, topic Insurance Companies, subhead Licenses and Fees. Cities may levy license taxes on practically all lines of business carried on therein. (11 O.S. § 651).

Master Business License System Act (74 O.S. § 5058.1 et seq.) provides optional "one-stop" system to acquire and maintain state licenses necessary to conduct business. Business License Information Office of Department of Commerce is clearinghouse for state license information; however, persons may deal directly with appropriate state agency in obtaining information or applying for license if preferred.

3.20 MONOPOLIES, RESTRAINT OF TRADE AND COMPETITION:

Monopolies and discrimination are forbidden. (Const., IX, 45). Every act, contract, combination or conspiracy in restraint of trade or commerce is illegal. (79 O.S. § 1). Antitrust Reform Act (79 O.S. § 201 et seq.) prohibits certain acts that restrain or monopolize trade or commerce; refusal of access to certain facilities; certain discrimination in prices.

Remedies.

Attorney General must sue in Supreme Court to enjoin any person or association engaged in any quasi-public business or having virtual monopoly of any business with the intent of destroying competition or restraining trade, or may proceed to forfeit the personal property of such person or association to the state. (79 O.S. § 21). On filing of suit the court may issue an injunction against defendant or appoint a receiver to take charge of the property or business. (79 O.S. § 22). Defendant may stay appointment of receiver or have receiver discharged by giving an undertaking approved by the court conditioned on payment of all damages and costs which may be assessed against defendant. (79 O.S. § 24). Any party injured in his business or property by any act, etc. in restraint of trade or commerce may recover treble damages from offending party provided suit is commenced within four years after accrual or discovery of cause of action whichever is later. (79 O.S. § 1).

Foreign Corporations.

Violation of statutory provisions by a foreign corporation forfeits its license to do business in the state. (79 O.S. § 26).

Unfair Discrimination.

It is unlawful for any person, firm or corporation engaged in production, manufacture, distribution, purchase or sale of any commodity of general use, or rendering any service to the public, or engaged in the sale or furnishing of advertising service or space for advertisements in publications, directly or indirectly to discriminate between different persons, firms or corporations, or between different sections, communities or cities of the state, in respect to selling or buying prices if the effect or intent is to establish a monopoly, to hinder or restrain trade or to destroy competition. Due allowance is made for difference in quantity and cost of transportation. It is unlawful for one engaged in sale or furnishing of advertising in publications to sell or furnish the same at a price less than cost if the effect or intent is to establish or maintain a monopoly, hinder competition, restraining trade or destroy competition of an established publisher doing business in the same community. (79 O.S. § 2, 6).

Deceptive Trade Practices.

Person engages in a deceptive trade practice when in course of his business, vocation, or occupation, he: (1) Passes off goods or services as those of another; (2) knowingly makes false representation as to source, sponsorship, approval, or certification of goods or services; (3) knowingly makes false representation as to affiliation, connection, association with, or certification by another; (4) uses deceptive representations or designations of geographic origin in connection with goods or services; (5) knowingly makes false representation as to characteristics, ingredients, uses, benefits or quantities of goods or services or false representation as to sponsorship, approval, status, affiliation, or connection of a person therewith; (6) represents that goods are original or new if they are not; (7) represents that goods or services are a particular standard, quality, or grade, or that goods are a particular style or model, if they are another; (8) disparages goods, services, or business of another by false or misleading representation of fact; (9) advertises goods or services which differ from those offered for sale in the advertisements; (10) advertises goods or services with intent not to supply reasonably expectable public demand, unless advertisement discloses a limitation of quantity; (11) makes false or misleading statements of fact concerning reasons for, existence of, or amounts of price reductions; (12) advertises price of item after deduction of rebate, unless actual selling price is advertised and notice of mail-in rebate requirement is given; (13) misrepresents geographic location of supplier by listing fictitious business name or assumed business name in local telephone directory; or (14) lists fictitious business name or assumed business name in directory assistance data base misrepresenting geographic location of supplier. (78 O.S. § 53).

Contracts in Restraint of Trade.

Every contract by which one is restrained from exercising a lawful business is to that extent void, except that when the good will of a business is sold or a partnership dissolved, one may agree to refrain from carrying on a similar business within a specified county and any county or counties contiguous thereto or specified city or town, so long as any person deriving title to good will or partnership business shall carry on similar business therein. (15 O.S. § 217-19).

Unfair Sales Act.

It is a misdemeanor to advertise, offer to sell, or sell, any merchandise at wholesale or retail at less than cost with intent and purpose to induce the purchase of other merchandise or of unfairly diverting trade from a competitor, where the result is to tend to deceive any purchaser, or to substantially lessen competition, or to unreasonably restrain trade, or to tend to create a monopoly. Cost is defined as invoice cost or replacement cost, whichever is lower, less trade discounts, plus freight, cartage, taxes and, in absence of proof of lesser cost of doing business, a markup of 6% in the case of a retailer and ¾ of 1% in the case of a wholesaler. Person injured by violation of Act may have injunctive relief and recover damages. Act does not apply to sales of seasonable merchandise sold at clearance sale, perishable merchandise sold to forestall loss, sales of damaged merchandise, liquidation, judicial or auction sales, sales to a governmental institution, or sales made to meet competitor’s price. (15 O.S. § 598.1-598.11).

Resale price agreements as to trademarked commodities, see category 17 Intellectual Property, topic 17.01 Trademarks and Tradenames.

3.21 NEGOTIABLE INSTRUMENTS:

See topic 3.02 Bills and Notes.

3.22 RESTRAINT OF TRADE:

See topic 3.20 Monopolies, 3.22 Restraint of Trade and Competition.

3.23 SALES:

Governed by Uniform Commercial Code. (12A O.S. § 2-101-2-725). See topic 3.09 Commercial Code.

Bills of Sale.

No statutory form. Any form which would be sufficient at common law is sufficient.

Conditions or Warranties.

Express and implied warranties recognized.

Product Liability.

No privity requirement for person in family or household of buyer or who is guest in buyer’s home if reasonable that such person may use, consume, or be affected by the product. (12A O.S. § 2-318). No Okla. cases establishing privity requirement in other situations.

Retail Credit Sales.

See category 8 Debtor and Creditor, topic 8.03 Consumer Credit.

Consumer Protection.

Uniform Deceptive Trade Practices Act adopted with modifications. (78 O.S. § 51 et seq.). Consumer Protection Act enacted. (15 O.S. § 751-765). See topic 3.12 Consumer Protection.

Conditional sale of personal property is governed by Uniform Commercial Code. (12A O.S. § 9-101 et seq.). For filing requirements see category 20 Mortgages, topic 20.01 Chattel Mortgages, subhead Filing.

Bulk Sales.

See topic 3.09 Commercial Code.

Sales of Motor Vehicles.

See category 23 Transportation, topic 23.01 Motor Vehicles.

3.24 SECURITIES:

Oklahoma Uniform Securities Act of 2004 (71 O.S. § 1-101 et seq.) is substantially Uniform Securities Act which appears in Uniform and Model Acts section. Space does not permit showing all variations. Act itself should be consulted.

Uniform Commercial Code adopted including Art. 8 (1994 Revision)—Investment Securities. (12A O.S. § 8-101 et seq.). See topic 3.09 Commercial Code.

Uniform TOD Security Registration Act adopted. (71 O.S. § 901 et seq.). See category 13 Estates and Trusts, topic 13.06 Decedents' Estates.

Supervision.

Oklahoma Securities Commission (71 O.S. § 1-601), which appoints Securities Administrator (71 O.S. § 1-608). Offices of Department of Securities (public branch of Securities Commission) at 120 N. Robinson, Oklahoma City 73102.

Regulatory Powers of Supervising Authority.

Preregistration of securities is mandatory unless security is federally covered security or otherwise exempted. (71 O.S. § 1-301). Administrator can issue stop order denying effectiveness to or suspending or revoking effectiveness of any registration statement if said statement does not meet requirements of Act. (71 O.S. § 1-306). Administrator may deny or suspend application or condition, limit, or revoke certain exemptions under Act. (71 O.S. § 1-204). Administrator may issue stop order suspending offer and sale of federal covered security, except federal covered security under § 18(b)(1) of Securities Act of 1933, if Administrator finds that there is failure to comply with notice or fee requirement with respect to offer or sale of federally covered security. (71 O.S. § 1-302).

Prerequisites to Sales or Offerings.

Unlawful to offer or sell any security in this state unless it is registered under Act or security is exempted under Act, or is federal covered security (i.e., any security described as covered security in § 18(b) of Federal Securities Act of 1933). (71 O.S. § 301). Unlawful to use any prospectus, pamphlet, circular, form letter, advertisement, sales literature, or other advertising communication related to security or investment advice, except sales and advertising literature relating to federal covered security, federal covered investment adviser, or securities exempted by 71 O.S. § 1-201, 202 or 303 of Act, unless it has been filed with and approved by Administrator. (71 O.S. § 1-504). Fee of $50 for review and approval of each sales literature package. (71 O.S. § 1-612). Investment certificate issuers are subject to registration provisions of Act as well as certain other special provisions. (71 O.S. § 1-308).

Securities Defined.

Means any note, stock, treasury stock, security future, bond, debenture, evidence of indebtedness, certificate of interest or participation in any profit-sharing agreement, collateral trust certificate, preorganization certificate or subscription, transferable share, investment contract, voting trust certificate, certificate of deposit for security, fractional undivided interest in oil, gas, or other mineral rights, put, call, straddle, option, or privilege on security, certificate of deposit, or group or index of securities, including interest therein or based on value thereof, put, call, straddle, option, or privilege entered into on national securities exchange relating to foreign currency, or, in general, interest or participation in, temporary or interim certificate for, receipt for, guarantee of, or warrant or right to subscribe to or purchase any of foregoing. “Security” also includes investment of money or money’s worth in risk capital of venture with expectation of some benefit to investor where investor has no direct control over investment or policy decisions of venture. “Security” does not include any insurance or endowment policy or annuity contract under which insurance company promises to pay money either in lump sum or periodically for life of some other specified period. “Security” also does not include interest in contributory or noncontributory pension or welfare plan subject to Employee Retirement Income Security Act of 1974. (71 O.S. § 1-102).

Exemptions.

Exempt securities are specified in 71 O.S. § 1-201, which is similar to § 201 of Uniform Securities Act. Exempt transactions are specified in 71 O.S. § 1-202, which is similar to § 202 of Uniform Securities Act. Space does not permit showing all variations; Oklahoma Act itself should be consulted. With narrow exceptions, Act does not apply to any company defined in or coming within provisions of 17 O.S. § 181-188 (regarding securities of public utilities), or to issuance of any security as defined in Act by any such company; nothing in Act repeals or modifies provisions of 17 O.S. § 188. Administrator, by order, may deny or revoke certain exemptions with respect to specific security or transaction. (17 O.S. § 1-204). Burden of proving exemption, exception, preemption, or exclusion from definition is upon person claiming it. (17 O.S. § 1-503).

Registration of Securities.

Provision made for registration by notification, coordination or qualification under various circumstances. (71 O.S. § 1-302-304). Filing of registration statement requires initial examination fee of $200 plus filing fee computed upon aggregate offering price of securities. (71 O.S. § 1-612[B]). Registration statement effective for one year from effective date, or for any longer period designated in order under Act during which security is being offered. (71 O.S. § 1-305). Investment certificate issuers are subject to registration provisions of Act as well as certain other special provisions. (71 O.S. § 1-308).

Registration of Brokers, Reports.

Unlawful for any person to transact business in state as a broker-dealer, agent, investment adviser or investment advisor representative, unless registered under Act or exempt from registration as provided in Act. (71 O.S. § 1-401-404). Federal covered investment adviser must make notice filing consenting to service of process in state. Notice filing for federal covered investment adviser expires at midnight on Dec. 31 of each year. (71 O.S. § 1-405).

Every registered broker-dealer and investment adviser must file such financial or operating reports as Administrator prescribes by rule. Administrator may require that certain information be furnished or disseminated to clients or prospective clients. (71 O.S. § 1-410).

Fees.

Include broker-dealer registration or renewal, $300; broker-dealer agent or issuer agent or broker-dealer principal registration or renewal, $50; broker-dealer agent on inactive basis, $10; investment advisor registration or renewal, $300; mailing list, $30 per year; review and approval for sales literature package, $50; post-registration reports, $50; exemption notification or request, $250; interpretive opinion or no-action request, $250; affidavit request, $10; service of process on Administrator, $10; amendments to registration statements or notice filing involving changes to issuer's application or notice filing, $50, plus filing fee for any additional securities being registered; notice filing fee for federal covered security under § 18(b)(4) of Securities Act of 1933, $250. (71 O.S. § 1-612[A]).

Advertisement.

See subhead Prerequisites to Sales or Offerings, supra.

Liabilities.

Provisions made for civil liability to buyer of persons who offer or sell in violation of Act. (71 O.S. § 408).

Tender Offers.

Take-over Disclosure Act.

(71 O.S. § 451 et seq.). Take-over offer to acquire equity securities of target company from resident of state pursuant to tender offer or request or invitation for tenders must comply with requirements of Act if, after acquisition, offeror would directly or indirectly be beneficial owner of more than 10% of any class of outstanding equity securities of target company. Target company defined as issuer of publicly traded equity securities of which at least 20% are beneficially held by residents of state and which has substantial assets in state. (71 O.S. § 452). Take-over offer is not effective unless offeror files with Administrator registration statement containing prescribed information, delivers copy of registration statement to target company by certified mail, and publicly discloses material terms of proposed offer. Filing fee for registration statement is $500. (71 O.S. § 453, 458). Copies of solicitation materials also must be filed with Administrator and sent to target company or offeror. (71 O.S. § 454). Take-over offer made to shareholders in state must be on substantially same terms as offer made to shareholders outside of state; other limitations on actions of offeror specified. (71 O.S. § 456). Administrator may summarily suspend effectiveness of take-over offer upon determination that registration statement does not comply with statutory requirements, and may issue cease and desist order or seek injunction to enforce compliance with Act. (71 O.S. § 453, 459). Civil remedies and criminal penalties for violation of Act also are provided. (71 O.S. § 460, 461).

Multination Corporation Take-over Bids.

Except as otherwise provided, acquisition by multinational corporation of or offer by multinational corporation to acquire any equity security of multinational corporation organized under laws of state or having principal place of business and substantial assets within state must comply with specified filing and disclosure requirements if, after acquisition, offeror would directly or indirectly be record or beneficial owner of more than 10% of any class of issued and outstanding equity securities of such corporation. (71 O.S. § 414 et seq.).

Control Share Acquisition.

Acquisition of control shares regulated. (18 O.S. § 1145 to 1155). With certain exceptions person who acquires, directly or indirectly, shares or voting rights of issuing public corporation which, when added to all other shares or voting rights of corporation owned of record or beneficially by such person, entitle person to exercise voting power of 20% or more in election of directors, acquires only such voting rights with respect to such shares as are granted by remaining shareholders, excluding officers and excluding directors who are also employees, in meeting called for that purpose. Acquisition of shares pursuant to solicitation of proxies subject to Regulation 14A of Exchange Act or Oklahoma General Corporation Act is excluded. Issuing public corporation means domestic corporation that has: (1) Class of securities subject to § 15(d) of Exchange Act, (2) 1,000 or more shareholders, (3) either (a) more than 10% of shareholders reside in Oklahoma, (b) more than 10% of shares are owned by Oklahoma residents or (c) more than 10,000 shareholders reside in Oklahoma. Corporation may elect coverage of act in certificate of incorporation. If acquired shares are granted full voting rights, all shareholders have dissenters' rights.

See also category 2 Business Organizations, topic 2.03 Corporations, subhead Business Combination With Interested Shareholder.

Uniform Simplification of Fiduciary Security Transfers Act not adopted.

Uniform Securities Ownership by Minors Act not adopted.

Model Land Sales Practices Act adopted with substantial modification. (71 O.S. § 601 et seq.).

Business Opportunity Sales Act (71 O.S. § 801 et seq.) governs disclosure requirements for franchises and other specified business opportunities.

See also topic 3.15 Franchises.

3.25 STATUTE OF FRAUDS:

See topic 3.16 Frauds, Statute of.

3.26 TRUST RECEIPT SECURITY:

Governed by Uniform Commercial Code. (12A O.S. § 9-102). See topic 3.09 Commercial Code; category 8 Debtor and Creditor, topic 8.15 Pledges.

3.27 WAREHOUSEMEN:

Governed by Uniform Commercial Code. (12A O.S. § 7-201-210). See topic 3.09 Commercial Code.

Warehouseman is defined as person operating public warehouse where nonperishable grains and/or field seeds, farmers' stock peanuts and/or broomcorn are received for storage or handling for re-storage, and State Board of Agriculture is charged with enforcement of act regulating warehouses. (2 O.S. § 9.21).

Bonds.

Corporate surety bond in an amount which the Board determines sufficient to protect the public, and not less than $25,000, must be filed. Amount may be changed by Board at any time. (2 O.S. § 9.22).

License for one year is issued by Board for fee of $100, and may, after hearing, be cancelled for violation of act or rule of Board. (2 O.S. § 9.22).

Insurance must be maintained on all grains and seeds for full market value thereof. (2 O.S. § 9.26).

Warehouse receipts governed by Uniform Commercial Code. (12A O.S. § 7-101 et seq.). See topic 3.09 Commercial Code.

Inspection and Grading.

All commodities received by a warehouseman must be inspected and graded, and stored with commodities of a similar grade received as near the same time as may be. (2 O.S. § 9.33). Act does not apply to persons operating public warehouses under the United States Warehouse Act.

4 CITIZENSHIP

4.01 ALIENS:

Alien may be employed by state in a few capacities (74 O.S. § 255), but may not practice as attorney, unless has declared intention to become citizen of U.S. (5 O.S. § 1).

Property.

Alien has such rights to personal property as are accorded citizen of U.S. by nation to which belongs. (60 O.S. § 121).

No alien, except bona fide resident of state, may acquire title to or own land in state. (Const. art. 22, § 1; 60 O.S. § 121, 122). Resident alien owning realty who ceases to be bona fide inhabitant of state, or nonresident alien who acquires realty by devise, descent, or foreclosure proceeding involving such alien's lien on said property, may continue to hold such property for five years only (60 O.S. § 122, 123); after that time, property is subject to escheat. Bona fide conveyance before escheat proceedings are instituted conveys good title, but conveyance in trust to evade statute is void. (60 O.S. § 124). If judgment of escheat is rendered, land is sold and proceeds held subject to order of owner for one year, after which, if unclaimed, they are paid to state treasury. (60 O.S. § 125-7).

Aliens may take in all cases by succession, subject to foregoing limitations. (84 O.S. § 229).

5 CIVIL ACTIONS AND PROCEDURE

5.01 ACCORD AND SATISFACTION:

Accord and satisfaction is executed agreement in satisfaction of claim, and while payment of less than unliquidated claim may discharge same, rule is otherwise where claim is liquidated. Consideration need not be money, but may be property or other things of value. Execution of executory agreement may constitute satisfaction.

Accord and satisfaction should be pleaded. (12 O.S. § 2008).

Uniform Commercial Code adopted. See category 3 Business Regulation and Commerce, topic 3.09 Commercial Code.

5.02 ACTIONS:

Oklahoma Pleading Code (12 O.S. § 2001 et seq.) patterned after Federal Rules of Civil Procedure. See topics 5.19 Practice, 5.18 Pleading.

Equity.

Pleading code governs procedure in district courts of state in all civil actions, whether at law or in equity, except where statute specifies different procedure. (12 O.S. § 2001). Equitable relief governed by statutes includes injunctions (12 O.S. § 1381 et seq.) and specific performance (e.g., 12 O.S. § 687).

Forms of Action.

One form of action, known as “civil action”. (12 O.S. § 2002).

Conditions Precedent.

Notice of claim against state or political subdivision must be given pursuant to statute. (51 O.S. § 156).

Commencement.

Civil action is commenced by filing petition with district court. (12 O.S. § 2003). See topics 5.18 Pleading, 5.20 Process.

Parties.

Action must be prosecuted in name of real party in interest, except that executor, administrator, trustee of express trust, person with whom, or in whose name contract is made for benefit of another, or person expressly authorized by statute, may bring action without joining person for whose benefit same is brought. (12 O.S. § 2017).

Any person having interest in subject matter and in relief demanded may be joined as plaintiff, or if interest is adverse to plaintiff, or if necessary party, as defendant. (12 O.S. § 2019, 2020).

See also categories 13 Estates and Trusts, topic Executors and Administrators; Family, topics Husband and Wife, Infants.

Class Actions.

One or more class members may sue or be sued as representative parties on behalf of all if: (1) Joinder of all members is impracticable; (2) there are common questions of law or fact; (3) claims or defenses of representative parties are typical; and (4) representatives will fairly and adequately protect class interests. Action may be maintained as class action if all four prerequisites are met and: (1) Prosecution of separate actions would create risk of inconsistent or varying adjudications establishing incompatible standards of conduct for opposing party or create risk of disposing of interests of nonparty members or substantially impairing or impeding their ability to protect their interests, (2) final injunctive or declaratory relief is appropriate for class as a whole because of opposing party’s conduct, or (3) common questions of law or fact predominate and class action is superior to other available methods for fair and effective adjudication of controversy. (12 O.S. § 2023). Court’s duties to class in attorney fee award hearing regulated. (5 O.S. § 7.1). As soon as practicable after commencement of class action, court must determine whether it is to be so maintained and order certifying class actions must define class, class claims, issues or defenses, and appoint class counsel. Certification orders are subject to de novo review standard. Classes are limited to residents of state or nonresidents who meet certain requirements. Settlements, appointment of class counsel, and awards of attorneys fees governed. (12 O.S. § 2023).

Uniform Class Actions Act not adopted.

Intervention.

Anyone may move to intervene when statute confers right, or person claims interest in subject of action and is so situated that disposition of action may impair or impede ability to protect that interest, or person's claim or defense and main action have common questions of law or fact. State may intervene in cases involving constitutionality of state statute affecting public interest. (12 O.S. § 2024).

Interpleader is provided for in any action where plaintiff may be exposed to multiple liability. (12 O.S. § 2022).

Third Party Practice.

Defending party may serve third-party summons and petition upon person who is or may be liable to defendant for all or part of plaintiff's claims or who is liable to defendant on claim arising out of transaction or occurrence that is subject matter of plaintiff's claim. (12–2014).

Splitting Causes of Action.

Common law governs res judicata.

Joinder, Consolidation and Severance.

Party asserting claim in action may join as many claims, legal or equitable, as that party has against opposing party. Actions pending before same court involving common questions of law or fact may be heard or tried jointly, or consolidated. Claims or issues may be severed by court for separate trials for convenience or to avoid prejudice. (12–2018).

Survival, Abatement and Revival.

In addition to causes of action that survive at common law, actions for mesne profits, for injury to person or to real or personal estate, and for deceit or fraud survive death of person entitled to or liable for same. (12 O.S. § 1051). No pending action abates by death of either or both parties, except actions for libel, slander or malicious prosecution, which abate by death of defendant; however, such actions do not abate after jury verdict or decision by court, unless new trial is ordered. (12 O.S. § 1052).

Wrongful Death.

Personal representative of deceased may maintain action against wrongdoer for wrongful death or, if wrongdoer is also deceased, against personal representative; action must be commenced within two years. (12 O.S. § 1053).

Enforcement of Contracts.

If person either jointly or jointly and severally liable on contract or obligation dies before action is brought to enforce contract or obligation, and cause of action survives, decedent's estate may be joined as party to action to enforce contract or obligation. (12 O.S. § 1084).

Death of Partner.

When partner dies after suit is brought by or against partnership, action will not abate, whether brought by or against partnership in firm name or in names of partners. Not necessary to make representative of deceased partner party to action, although representative may be substituted if decedent was named as party plaintiff or was served with process; however, judgment cannot be enforced against decedent's estate if partner died before verdict was rendered and representative was not made party to action. (12 O.S. § 1082).

Death of Nonresident.

When nonresident subject to jurisdiction of court in this state dies, action continues and personal representative must be substituted as party to action if: (1) Personal representative is served in this state with notice of substitution as party to action; or (2) cause of action arose in this state and personal representative is given actual notice by mail or by personal service outside of this state of substitution as party to action. Action may continue as proceeding in rem if reasonable effort is made to notify personal representative of existence of action. (12 O.S. § 1085).

Substitution of Parties.

Procedure specified for substitution of parties in event of death, incompetency, transfer of interest, or death or separation from office of public officers. (12 O.S. § 2025).

See topic 5.15 Judgments, subhead Death of Party After Verdict or Judgment. See also categories 2 Business Organizations, topic Partnerships, subhead Dissolved Partnerships; Estates and Trusts, topics Death, and Executors and Administrators, subhead Actions Against Representative.

See also category 13 Estates and Trusts, topic 13.09 Executors and Administrators.

Termination.

Actions are terminated by judgment (12 O.S. § 681) or dismissal, voluntary or involuntary. (12 O.S. § 682-4). Court may dismiss action for failure to perform statutory conditions or for failure to prosecute (12 O.S. § 682-3), and party has right to dismiss, with or without prejudice, prior to pretrial hearing. (12 O.S. § 683-4). However, if dismissal occurs, and case is refiled, court may assess costs and attorney fees incurred by defendant in previous action and stay proceedings in refiled action until plaintiff complies with order. (12 O.S. § 684).

Limitation of.

See topic 5.16 Limitation of Actions.

Direct Actions Against Insurer.

See category 23 Transportation, topic 23.01 Motor Vehicles, subhead Direct Actions.

Small Claims.

See category 6 Courts and Legislature, topic 6.01 Courts.

Governmental Tort Claims Act.

State or political subdivision is liable for loss resulting from its torts or torts of its employees acting within scope of their employment subject to limitations and exemptions specified in act. Liability under act is exclusive and in place of all other liability at common law or otherwise. (51 O.S. § 151 et seq.).

See topic 5.09 Damages, subhead Sovereign Immunity.

5.03 APPEAL AND ERROR:

Generally.

Supreme Court may reverse, vacate or modify judgments, final orders and other specified orders of district courts. (12 O.S. § 952). Recorded written order, judgment, or decree is prerequisite to appellate review. (12 O.S. § 32.2, 696.2). Appeal from certain types of interlocutory orders of trial court, without awaiting final determination in cause, is provided for. (12 O.S. § 993, 994).

From Municipal Court.

Appeals may be taken from municipal court to district court. Such appellate court trial is de novo as to law and fact. (11 O.S. § 27-129).

From Tribunal, Board or Officer.

Appeal lies to district court from any tribunal, board or officer exercising judicial functions and whose jurisdiction is inferior to that of district court, unless otherwise provided. Proceedings for review of judgment or final order commenced by filing petition in district court of county where judgment or order was rendered within 30 days from date copy is mailed to appellant. (12 O.S. § 951).

From District Court.

Appeal made by petition in error filed within 30 days from date judgment, decree or order prepared in conformance with 12 O.S. § 696.3 is filed with district court clerk. Filing accomplished by delivery to Clerk of Supreme Court or by mailing certified or first-class mail. Where matter was taken under advisement, petition in error must be filed within 30 days from date of mailing of file-stamped copy to appealing party. (12 O.S. § 990A). Record on appeal must be complete and ready for filing within time prescribed by court rule. (12 O.S. § 990A). Designation of record must include signed acknowledgment from court reporter if transcript is requested, or signed statement by attorney that transcript has not been ordered. (12 O.S. § 990A). Procedure for attorney fees on appeal regulated. (12 O.S. § 696.4). In cases reversed and remanded on appeal, Chief Justice of Supreme Court may appoint different district court judge or associate district court judge to preside over remanded case. (20 O.S. § 95.10). Certain orders may be appealed prior to final determination of cause. (12 O.S. § 993).

Supersedeas or Stay.

See topics 5.04 Bonds; Judgments, subhead Stay of Enforcement; see also category 8 Debtor and Creditor, topic 8.05 Executions, subhead Stay of Execution.

See Oklahoma Supreme Court Rules (tit. 12, c. 15, App. 1).

See category 6 Courts and Legislature, topic 6.01 Courts.

5.04 BONDS:

Surety on any undertaking provided for by statute, unless surety company, must be resident of state, and worth double sum to be secured, over all debts, liabilities and exemptions, and must qualify by affidavit on bond. In certain cases, parties may require additional security upon showing of insufficiency of sureties. (12 O.S. § 62). First mortgage upon improved real estate may be accepted in lieu of bond to extent of 50% of value. (12 O.S. § 63).

Any bond or undertaking required under statutes is sufficient when executed solely by corporation incorporated under laws of United States or of any state, having power to guarantee fidelity of persons holding positions of public or private trust and to execute and guarantee bonds and undertakings in judicial proceedings. (18 O.S. § 481).

Judgment may be rendered against surety on cost bond, on motion. If judgment affirmed on appeal, appellate court (before mandate has issued) may order judgment on supersedeas bond or other security in amount of judgment plus interest, appeal costs and allowable appeal-related attorneys' fees. Unless bond is executed by entity with suretyship powers, bond shall be for double amount of money damages awarded; however, court may hold hearing to determine if posting of bond for twice amount of money damages awarded would cause substantial economic harm to judgment debtor. (12 O.S. § 990.4). Separate actions required on other bonds.

See topics 5.15 Judgments, subhead Stay of Enforcement; 5.14 Injunctions, subhead Bond; 5.21 Replevin, subhead Bonds. See also category 8 Debtor and Creditor, topic 8.02 Attachment, subheads Attachment Bond and Discharge of Attachment.

5.05 CERTIORARI:

Common law writ of certiorari lies to bring up record of inferior court or tribunal to superior court for investigation as to jurisdictional errors only when there is no adequate remedy by appeal. Both Supreme Court and district courts have power to issue this writ. (Const., art. VII, §§ 2, 10; 181 Okla. 34, 72 P.2d 510). Technical form of writ of certiorari is abolished. (12 O.S. § 980). Form and requirements for application to assume original jurisdiction and petition for certiorari to Oklahoma Supreme Court governed by court rules. (tit. 12, c. 15, App. 1, Rules 1.179-1.184, 1.191).

5.06 CHARITABLE IMMUNITY:

See topic 5.09 Damages.

5.07 COMMISSIONS TO TAKE TESTIMONY:

See topic 5.11 Depositions and Discovery.

5.08 COSTS:

Costs are allowed to prevailing party in actions for recovery of money only, or for recovery of specific real or personal property, unless otherwise specifically provided by statute. (12 O.S. § 928-9). In other actions costs may be awarded and apportioned at discretion of court. (12 O.S. § 930, 942, 1190). Items allowed as costs specified by statute. (12 O.S. § 942, 28 O.S. § 102, 28 O.S. § 151 et seq.). Attorneys' fees allowed by statute in many types of civil actions (e.g., 12 O.S. § 936 to 941, 12 O.S. § 1141, 12 O.S. § 1580; consult index to statutes for complete listing of attorneys' fee statutes); amount to be set by court and taxed as costs. State may be liable for costs, including filing fees and service fees, as nonprevailing party. (12 O.S. § 66). See also category 6 Courts and Legislature, topic 6.01 Courts, subhead Small Claims Divisions.

Security for Costs.

See 28 O.S. § 152 et seq. for costs required when civil action filed in district court. No deposit required if affidavit made stating person has just cause of action and unable by reason of poverty to give deposit. See category 6 Courts and Legislature, topic 6.01 Courts, subhead Fees.

5.09 DAMAGES:

Compensatory and punitive damages are governed by statute. (23 O.S. § 1 et seq.). Noneconomic losses are regulated. (23 O.S. § 61.2).

Punitive Damages.

Awards of punitive damages fall in three categories, and are subject to following evidentiary requirements and limitations (23 O.S. § 9.1):

Category I.

If jury finds by clear and convincing evidence that defendant's conduct evinced reckless disregard for rights of another, punitive damages are limited to $100,000 or amount of actual damages awarded, whichever is greater.

Category II.

If jury finds by clear and convincing evidence that conduct of defendant was malicious and intentional, punitive damages are limited to greater of: (a) Twice amount of actual damages awarded, (b) $500,000, or (c) economic benefit derived by defendant from conduct. Under this category, court must reduce any award for punitive damages by amount defendant has previously paid as result of all punitive damage verdicts entered in any court of this state for same conduct.

Category III.

If jury finds by clear and convincing evidence that defendant acted intentionally and with malice and court finds evidence beyond reasonable doubt that defendant acted intentionally and with malice and engaged in conduct life-threatening to humans, then punitive damages in any amount deemed appropriate by jury may be awarded.

Under each category, issue of punitive damages is considered in separate proceeding after jury has made finding that defendant has been guilty of reckless disregard for rights of others or has acted intentionally and with malice towards others, and awarded actual damages.

Any award of punitive damages not made in accordance with statutory requirements is void and constitutes reversible error. (23 O.S. § 9.1).

Appeals of punitive damages do not require appeal bonds. (12 O.S. § 990.4).

Comparative Negligence Rule.

Adopted. (23 O.S. § 13,14). Joint and several liability among tortfeasors does not apply except for cases in which defendant’s responsibility is determined to be greater than 50% or in which any joint tortfeasor acted willfully, wantonly or with reckless disregard for consequences, in which case liability is joint and several as to such tortfeasor. (23 O.S. § 15). Uniform Comparative Fault Act not adopted.

Limitation of Liability.

Statutes limiting liability, types of actions that may be brought, and/or available remedies include Affordable Access to Health Care Act (63 O.S. § 1-1708.1A); Common Sense Consumption Act (76 O.S. § 33 to 36); Y2K Protection Act (15 O.S. § 1021 to 1024); Good Samaritan Act (76 O.S. § 5 to 5.5); Limitation of Liability for Farming and Ranching Land Act (2 O.S. § 16-71.1 et seq.); Volunteer Medical Professional Services Immunity Act (76 O.S. § 32 et seq.); Volunteer Health Practitioners Act (63 O.S. § 684.14 to 684.24); Livestock Activities Liability Limitation Act (76 O.S. § 50.1); Asbestos and Silica Claims Priorities Act (76 O.S. § 60 to 71); Innocent Successor Asbestos-Related Liability Fairness Act (76 O.S. § 72 to 79); and Professional Review Bodies Act (76 O.S. § 26 to 29). Other limitations applicable to food donations (76 O.S. § 5.6), emergency medical treatment and care (76 O.S. § 5A, 76 O.S. § 5.7), entry upon land for recreational purposes (2 O.S. § 16-71), unauthorized entry upon land or entry for purpose of committing criminal act (76 O.S. § 16.1), and sales of firearms (76 O.S. § 51 to 54). Architects or professional engineers rendering volunteer services in certain emergencies. (76 O.S. § 5.8).

Charitable Immunity.

Common law doctrine of charitable immunity abrogated. (186 Okla. 687, 100 P.2d 244). Qualified or limited immunity provided by statute for volunteers who perform duties for charitable or not-for-profit corporations. (76 O.S. § 31).

Sovereign immunity waived to extent and in manner provided in Governmental Tort Claims Act. (51 O.S. § 151 et seq.). State and its political subdivisions are liable for their torts or torts of employees acting within scope of their employment, subject to certain exceptions. Maximum liability for property damage is $25,000 per claimant; for other claims limits are

$100,000 per claimant ($200,000 for claims arising from medical negligence), $1,000,000 per occurrence. State or political subdivision is not required to pay or indemnify any employee for any punitive or exemplary damages rendered against employee, or to pay for any defense, judgment, settlements, costs, or fees paid or covered by insurance. (51 O.S. § 151 et seq.).

Any state governmental entity is liable for damage or injury to persons or property caused by its officers, servants, agents, contractors, or employees in storing, spraying, or applying pesticide. Maximum liability for property damage is $25,000 per claimant; for other claims limit is $50,000 per claimant. (2 O.S. § 3.89, 3.94).

State and its political subdivisions are liable up to $175,000 for wrongful criminal felony conviction. (51 O.S. § 154).

Uniform Contribution Among Tortfeasors Act (Revised).

Adopted. (12 O.S. § 832). Statute also governs indemnification between manufacturers and seller. (12 O.S. § 832.1).

See also category 13 Estates and Trusts, topic 13.05 Death, subhead Actions for Death.

5.10 DECLARATORY JUDGMENTS:

See topic 5.15 Judgments.

5.11 DEPOSITIONS AND DISCOVERY:

Oklahoma Discovery Code generally based upon Rules 26 O.S. § 37, Federal Rules of Civil Procedure. (12 O.S. § 3224 et seq.). See topic 5.19 Practice.

Discovery Methods, Scope and Limits.

Parties may obtain discovery by one or more of following methods: depositions upon oral examination or written questions (12 O.S. § 3230, 3231); written interrogatories to parties (limited to 30, absent stipulation or court order) (12 O.S. § 3233); request for production of documents or things (limited to 30, absent stipulation or court order) or permission to enter upon land or other property for inspection and other purposes (12 O.S. § 3234); request for physical and mental examination of persons (12 O.S. § 3235); and requests for admission (limited to 30, absent stipulation or court order) (12 O.S. § 3236). Parties may, by written stipulation, modify procedures governing or limitations placed on discovery; court approval required for stipulations extending time for responses to written discovery requests if extension would interfere with time set for completion of discovery. (12 O.S. § 3239). Party, if requested to do so, must produce copy of insurance agreement under which person carrying on insurance business may be liable to satisfy part or all of judgment which may be entered in action or to indemnify or reimburse for payments made to satisfy judgment. Parties must make certain initial disclosures within 60 days of service of process, including computation of damages and make available for inspection and copying documents upon which computation is based, including materials bearing on nature and extent of injuries suffered. (12 O.S. § 3226).

Subpoena for Production or Inspection.

If subpoena commands production of documents and things from nonparty or inspection of premises of nonparty but does not require attendance of witness, subpoena must specify date for production or inspection at least seven days after date of service and must include specified language. Leave of court required if plaintiff seeks to serve subpoena for production of documentary evidence on nonparty earlier than 30 days after service of summons and petition on any defendant. (12 O.S. § 2004.1).

Experts.

Discovery of facts known and opinions held by expert may be obtained through interrogatories in addition to deposition of expert. (12 O.S. § 3226[B]).

Claims of Privilege or Protection.

If information otherwise discoverable is withheld under claim of privilege or protection as trial preparation material, party must make claim expressly and describe nature of documents, communications or things not produced or disclosed in manner that, without revealing information itself privileged or protected, will enable other parties to assess applicability of privilege or protection. (12 O.S. § 3226[B]). Confidentiality and discovery of peer review information maintained by health care facility subject to specified limitations and requirements. (63 O.S. § 1-1709.1).

Protective Orders.

Upon motion by party or person from whom discovery is sought, and for good cause shown, court in which action is pending (or, on matters relating to deposition, district court in county where deposition is to be taken), may enter order to protect party or person from annoyance, harassment, embarrassment, oppression or undue delay, burden or expense. Motion for protective order must be accompanied by certification that moving party has in good faith conferred or attempted to confer with other affected parties in effort to resolve dispute without court action. Protective order that has effect of removing from public record material obtained by discovery must contain specified provision. (12 O.S. § 3226[C]). Protective orders also authorized for abusive discovery. (12 O.S. § 3226.1).

Supplementation of Responses.

Duty to seasonably amend prior response to interrogatory, request for production or request for admission under specified circumstances. (12 O.S. § 3226[E]).

Motion for Order Compelling Discovery.

Motion may be made to court in which action is pending, or, on matters relating to deposition, to court in county where deposition is being taken. Motion must include statement that moving party has in good faith conferred or attempted to confer with person or party failing to make discovery in effort to secure information or material without court action. When taking deposition, proponent of question may complete or adjourn examination before applying for order. Reasonable expenses, including attorney's fees, may be assessed as part of order granting or denying motion. (12 O.S. § 3237).

Depositions.

After commencement of action, any party may take deposition of any person, including party. Unless otherwise agreed by parties or ordered by court, deposition cannot last more than six hours and must be taken only between hours of 8:00 a.m. and 5:00 p.m. on day other than Sat., Sun. or holiday. Court may grant extension of time limits if court finds that witness or counsel has been obstructive or uncooperative or finds extension to be in interest of justice. Leave of court is necessary if person to be examined is confined in prison or if, without written stipulation of parties, (1) Person to be examined already has been deposed in case, or (2) party seeks to take deposition earlier than 30 days after service of summons and petition on any defendant, unless notice contains certification, with supporting facts, that person to be examined is expected to leave state and will be unavailable for examination in state unless deposed before that time. Request for leave of court must include statement that requesting party has in good faith conferred or attempted to confer with opposing parties to obtain written stipulation. (12 O.S. § 3230).

By Whom Taken.

Within Oklahoma, depositions shall be taken before officer authorized to administer oaths by laws of place where examination is held, or before person appointed by court in which action is pending. Person so appointed has power to administer oaths and take testimony. No deposition shall be taken before person who is relative or employee or attorney or counsel of party, or relative or employee of such attorney or counsel, or who is financially interested in case. (12 O.S. § 3228).

Notice to take deposition must be given to all parties in writing, and state time and place of taking of deposition, and name and address of each person to be examined, if known, or if unknown, general description sufficient to identify him or particular class or group to which he belongs. Notice shall be served in order to allow adverse party sufficient time, by usual route of travel, to attend, and three days for preparation, exclusive of day of service. If subpoena duces tecum is to be served, notice must include designation of materials to be produced. If witness to be deposed is corporation, partnership, association, or governmental agency, notice must describe matters to be examined with reasonable particularity, and party must then designate one or more officers, directors, or managing agents, or other persons who will testify on its behalf. (12 O.S. § 3230C). Subpoena may be issued and signed by court clerk or by attorney authorized to practice law in Oklahoma, as officer of Oklahoma state court. If action is pending outside Oklahoma, clerk of district court in county in which deposition is to be taken shall issue subpoena. Proof of service of notice to take deposition constitutes sufficient authorization for issuance of subpoenas for persons named or described in notice. (12 O.S. § 2004.1).

Place of Taking Deposition.

Witness is obligated to attend deposition in county of his residence, county adjoining county of his residence, or county in which he is served with subpoena. Party may also be deposed in county in which action is pending or in which notice is served upon him. (12 O.S. § 3230B). Attendance of witness may be compelled by subpoena. (12 O.S. § 3230A).

Subpoena for Deposition.

Subpoena may be issued and signed by court clerk or by attorney authorized to practice law in Oklahoma, as officer of state court. If action is pending outside state, clerk of district court in county in which deposition is to be taken shall issue subpoena and, upon application, may issue additional orders to aid in discovery. Proof of service of notice to take deposition constitutes sufficient authorization for issuance of subpoena for person named or described in notice. (12 O.S. § 2004.1).

Failure to Attend or to Serve Subpoena.

If party giving notice to take deposition fails to attend and proceed, or fails to serve subpoena on witness who fails to attend for that reason, and another party attends pursuant to notice, court may order party giving notice to pay attending party’s reasonable expenses including attorney’s fees. (12 O.S. § 3230H).

Taking and Authentication.

By written stipulation of parties or by court order, deposition may be recorded by nonstenographic means, and may be taken by telephone. (12 O.S. § 3230C). Deposition to be recorded by officer or in his presence. (12 O.S. § 3230D). Transcribed deposition shall be submitted to witness unless witness and parties waive examination. (12 O.S. § 3230F). Witness shall sign deposition unless parties waive signing by stipulation or witness ill, cannot be found or refuses to sign. (12 O.S. § 3230F). If not signed within 30 days of submission, officer must sign, stating reason witness did not sign. (12 O.S. § 3230F).

Objections made at time of examination as to qualifications of officer, manner of taking deposition, evidence presented, conduct of party, or any other aspect of proceeding must be noted by officer on record; however, examination must proceed, with testimony being taken subject to objections. (12 O.S. § 3230[D]). Objection to evidence during deposition must be stated concisely and in nonargumentative and nonsuggestive manner. Deponent may be instructed not to answer only where information sought is not discoverable by law, when necessary to preserve privilege, to enforce limitation on evidence directed by court, to present motion limiting scope and manner of deposition, or to move for protective order. If court finds person's conduct has frustrated fair examination of deponent, court may impose appropriate sanction upon responsible persons, including reasonable costs and attorneys' fees incurred by any parties as result. (12 O.S. § 3230[E]).

Objections relating to notice, qualification of officer, manner of taking deposition, form of questions, conduct of parties, completion or filing, or other objections as to errors which might be obviated, removed or cured if promptly presented, are waived unless made at time of examination or, for latent errors or irregularities, as soon as they are known or could be discovered with reasonable diligence. Objections as to competency, relevancy, or materiality are not waived by failure to object during deposition unless ground of objection might have been obviated or removed if presented at deposition. (12 O.S. § 3232C). All other objections as to admissibility may be made when deposition is offered as though witness were present and testifying. (12 O.S. § 3232B).

Review by Witness; Changes; Signing.

Deponent must be given opportunity to review deposition transcript unless examination and reading are waived by deponent and by parties. After notification by officer that transcript is available, deponent has 30 days to review it and sign statement reciting any changes in form or substance and reasons given by deponent for making them. Officer must indicate in certificate to deposition whether any review was requested and, if so, must append any changes made by deponent during period allowed. (12 O.S. § 3230[F]).

Certification and Filing; Copies.

On stenographic deposition, officer must certify officer's qualification to administer oaths (including certificate number), that witness was duly sworn, that deposition is true record of witness's testimony, and that officer is not relative or employee or attorney of any party, or relative or employee of attorney, and is not financially interested in action. Officer must seal stenographic deposition in envelope endorsed with title of action and marked "deposition of (here insert name of witness)" and send it to attorney who arranged for deposition, who must store it under conditions protecting against loss, destruction, tampering, or deterioration. Except on court order or stipulation, or unless deposition is attached to motion or response thereto or is needed for use in trial or hearing, depositions are not filed with court clerk. (12 O.S. § 3230[G]).

Costs and Fees.

Attorney who takes deposition bears all expenses, including cost of transcription, and, upon request, must furnish one copy of deposition (or videotape or other recording, if deposition was recorded on videotape or by other non-stenographic means) to adverse party or parties, free of charge. (12 O.S. § 3230[G]). Attendance and travel fees for witness must be paid as provided in 12 O.S. § 400; party deponent must attend deposition without payment or tender of attendance or travel fees. (12 O.S. § 3230[I]). Costs of depositions may be taxed as costs of case. (12 O.S. § 3230[J]).

5.12 EQUITY:

See topic 5.02 Actions.

5.13 EVIDENCE:

Oklahoma Evidence Code (12 O.S. § 2101 et seq.) patterned after Federal Rules of Evidence.

Evidentiary effect of recorded document. (16 O.S. § 53). See category 10 Documents and Records, topic 10.04 Records.

Witnesses.

All persons with personal knowledge of matter are competent except judge or juror in that case. (12 O.S. § 2601). Oklahoma Evidence Code (12 O.S. § 2101 et seq.) substantially follows Federal Rules of Evidence with regard to competency of witnesses. Expert witnesses may testify if testimony is based on sufficient facts or data, is product of reliable principles and methods, and witness has applied principles and methods reliably to facts of case. (12 O.S. § 2702). In criminal proceeding, court, upon motion, must conduct hearing to determine whether testimony of minor witness (under 16 years of age) should be closed to public. If court deems appropriate, testimony of minor witness may be taken in chambers or location other than courtroom. (12 O.S. § 2611.2). Uniform Child Witness Testimony by Alternative Methods Act (12 O.S. § 2611.3) allows use of alternative methods of child testimony in court proceedings.

Privileged Communications.

Attorney, accountant, physician, psychotherapist, interpreter or clergyman may not testify as to confidential communication to him in his professional capacity. (12 O.S. § 2502, 2502.1, 2503, 2505, 2506). Communications to crime stopper organizations privileged, unless exculpatory to criminal defendant. (12 O.S. § 2510.1). Communications made by participant or counselor in peer support counseling session conducted by law enforcement agency or emergency services provider for public safety personnel or emergency services personnel is privileged. (12 O.S. § 2506.2). Newsman granted privilege from disclosure of published or unpublished information or its source. (12 O.S. § 2506). Accused in criminal proceedings has privilege to prevent spouse from testifying as to confidential communication. No privilege when spouse is charged with crime against person or property of: Other; child of either; person living in either's household; or third person, while accused was committing crime against any of persons above. (12 O.S. § 2504). Standard of proof for establishment of privileges defined. (12 O.S. § 2105).

Compelling Attendance.

Witnesses may be subpoenaed for trial any place within state. (12 O.S. § 2004). Witness may be subpoenaed for deposition in county of his residence, adjoining county, or county where he is located when served. (12 O.S. § 3230). Subpoena may be issued and signed by court clerk or by attorney authorized to practice law in Oklahoma, as officer of Oklahoma state court. (12 O.S. § 2004.1). Witness attendance and travel fees specified. (28 O.S. § 81, 82). If witness is subpoenaed and qualifies and testifies as expert, party seeking expert testimony must also pay reasonable expert witness fee. (28 O.S. § 81).

Uniform Act to Secure Attendance of Witnesses from Without a State in Criminal Proceedings adopted. (22 O.S. § 721 et seq.).

5.14 INJUNCTIONS:

Writ of injunction has been abolished. (12 O.S. § 1381). By statutes, injunction can issue to enjoin inter alia, unauthorized banking business (6 O.S. § 252); unlawful transaction of business by insurance companies (36 O.S. § 72); combinations in restraint of trade (79 O.S. § 22); enforcement of void judgment; illegal levy or collection of any tax, charge or assessment; maintenance of nuisance (12 O.S. § 1397); unauthorized use of trademarks or labels (78 O.S. § 9); removal of property to defraud creditors (12 O.S. § 1382); unauthorized operation of health maintenance organization or prepaid health plan (63 O.S. § 2511); violation of Barber Act (59 O.S. § 98), Blue Sky Law (71 O.S. § 51), building regulations (11 O.S. § 409), Dentistry Act (59 O.S. § 277), orders of Fraternal Insurance Board (36 O.S. § 263), Itinerant Merchants Act (47 O.S. § 436), law against non-intoxicating beverages (37 O.S. § 162n), oil and gas conservation laws or regulations (52 O.S. § 116), orders of mine inspectors (45 O.S. § 42), Motor Carrier Act (47 O.S. § 172), Food and Drug Act (63 O.S. § 310), Unfair Sales Act (15 O.S. § 595), Small Loan Act (15 O.S. § 280.23), and zoning regulations (11 O.S. § 409).

Temporary injunction may be granted when it appears that plaintiff is entitled to have restrained commission or continuance of some act which during litigation can injure plaintiff, or when it appears during litigation that defendant is doing, or threatens to do, some act in violation of plaintiff's rights respecting subject of action and tending to render judgment ineffectual. (12 O.S. § 1382).

Jurisdiction is in district court. (12 O.S. § 1383).

Procedure.

Injunction may be granted where it appears by affidavit that plaintiff is entitled thereto. (12 O.S. § 1383). Temporary restraining order may be granted without notice to adverse party under limited conditions. (12 O.S. § 1384-1). No temporary injunction may be issued without notice to adverse party. (12 O.S. § 1384.1). Order of injunction is issued by clerk of court granting injunction; is addressed to party enjoined; is served upon him by sheriff (12 O.S. § 1387); and becomes binding from time party has notice thereof and bond of applicant is executed and approved (12 O.S. § 1388). If party found in violation of injunction and placed in contempt, may be punished by fine not exceeding $200 a day or by confinement for not longer than six months, or both. (12 O.S. § 1390).

Bond to secure party enjoined against damages, in an amount to be fixed by the court, must be filed by applicant and approved by the clerk of the court granting the injunction, unless otherwise provided by special statute. (12 O.S. § 1392).

Hearing.

At hearing for application for injunction each party may read and file affidavits. (12 O.S. § 1393).

5.15 JUDGMENTS:

Judgment by Confession.

Person indebted or against whom cause of action exists may, with assent of creditor or person having such cause of action, confess judgment. Debt or cause of action must be briefly stated in judgment or in writing filed as pleading. Affidavit of the defendant must be filed, stating facts on which indebtedness is due and owing. Attorney may confess judgment if authorized by warrant of attorney with proper acknowledgment, which must be filed with court clerk. Judgment entered by confession constitutes lien from date of entry and may be enforced like other judgments. (12 O.S. § 689 to 695).

Conditions in contracts by which party is restricted from enforcing contractual rights by usual legal procedures are void. (15 O.S. § 216). Thus, although confessions of judgment involving bail bond forfeitures have been upheld (455 P.2d 690), cognovit notes (or "judgment notes") have not been recognized as enforceable in Oklahoma.

Uniform Consumer Credit Code enacted. (Title 14A). See category 3 Business Regulation and Commerce, topic 3.11A Consumer Credit.

Judgment by Consent.

No special provision but recognized as appropriate procedure. (504 P.2d 875).

Judgment on Pleadings.

No separate provision but comparable dispositive motions allowed. (12 O.S. § 2012).

Summary Judgment.

Party may move for judgment on grounds that depositions, affidavits, and other material show there is no substantial controversy as to any material fact. (12 O.S. § 2056).

Declaratory Judgments.

Uniform Declaratory Judgments Act adopted in substance. District court may, in cases of actual controversy, determine rights, status, and other legal relations, whether or not relief is or could be claimed, except that no such determination may be made concerning liability or nonliability for damages on account of alleged tortious injury to persons or to property, or for compensation alleged to be due under Workmen's Compensation laws. Any determination has force and effect of a final judgment and it is reviewable in same manner as other judgments. (12 O.S. § 1651-1657). Venue for declaratory judgments defined. (12 O.S. § 1653).

Default judgment may not be different in kind from nor exceed in amount that prayed for in demand for judgment or notice, together with costs, and may not be rendered on service by publication until proof made and approved by court and filed. (12 O.S. § 2004). Default judgment or order, based on service by publication only may be opened and defendant let in to defend within three years on proof of lack of actual notice, but title of purchaser in good faith will not be affected. (12 O.S. § 2004). Default judgment establishes liability, but proof of unliquidated damages is required. (12 O.S. § 688).

Offer of Judgment.

Defendant in action to recover money only, may, before trial, serve written offer allowing judgment to be taken for amount specified therein. If plaintiff fails to accept offer and judgment is not more than defendant offered, plaintiff must pay defendant's costs from time of offer. (12 O.S. § 1101). Special provisions affect offer of judgment in actions for negligent or wilful damage to tangible personal property. (12 O.S. § 940).

In actions for personal injury, wrongful death, discrimination in employment, public accommodations or housing (25 O.S. § 1101 et seq.) or retaliatory discharge in violation of Workers' Compensation Act (85 O.S. § 5) where plaintiff demands more than $100,000 or defendant makes offer of judgment more than $100,000, and in other civil actions, offer of judgment may be made up to ten days before trial and is deemed rejected if plaintiff does not file written acceptance or rejection of offer, or counteroffer of judgment, within ten days of offer. Offer is deemed to include any costs or attorneys fees otherwise recoverable unless offer expressly provides otherwise. If offer is not accepted and judgment awarded plaintiff is less than offer, defendant is entitled to reasonable litigation costs and attorney fees from date of offer until date of judgment. If offer is not accepted and judgment awarded exceeds plaintiff's counteroffer, plaintiff may recover costs and fees from date of counteroffer until date of judgment. (12 O.S. § 1101.1).

Entry and Form of Judgment.

Judgment must be reduced to writing in conformance with 12 O.S. § 696.3, signed by court, and filed with court clerk. Court may prepare written judgment or direct counsel for party to prepare draft for court's signature. File-stamped copy of judgment, decree or appealable order must be served on all parties, including those in default for failure to appear. Mailing judgment to party in default for failure to appear sufficient if accomplished by mailing to last known address.

(12 O.S. § 696.2). Judgment must include any prejudgment interest. However, postjudgment motion may be made for attorney's fees and costs within 30 days after filing of original judgment or disposition of other posttrial motion. (12 O.S. § 696.3, 12 O.S. § 696.4).

Interest.

Postjudgment Interest.

Unless otherwise specified by contract, all judgments (including court-awarded costs and attorney fees) bear interest at annual rate equal to average Treasury Bill rate for preceding calendar year plus two percentage points. Postjudgment interest accrues from earlier of date judgment is rendered as expressly stated in judgment or date judgment is filed with court clerk at rate in effect for calendar year during which judgment is rendered until end of that calendar year, or until judgment is paid, whichever first occurs. Interest rate for each succeeding calendar year, until judgment is satisfied or released, is annual rate in effect for judgments rendered during each such year. Judgments against state and political subdivisions bear interest at same annual rate but not to exceed 10% per year; judgment, inclusive of postjudgment interest, cannot exceed total amount of liability of governmental entity pursuant to Governmental Tort Claims Act (51 O.S. § 151 et seq.). (12 O.S. § 727).

Prejudgment Interest.

On verdict for damages for personal injuries or injury to personal rights, interest at annual rate equal to average Treasury Bill rate for preceding calendar year is added from 24 months after date suit was commenced to earlier of date verdict is accepted by trial court as expressly stated in judgment or date judgment is filed with court clerk. Computation of prejudgment interest begins with annual rate in effect for preceding calendar year. Judgments against state and political subdivisions bear prejudgment interest at same annual rate but not to exceed 10% per year; judgment, inclusive of prejudgment and postjudgment interest, cannot exceed total amount of liability of governmental entity pursuant to Governmental Tort Claims Act (51 O.S. § 151 et seq.). (12 O.S. § 727.1).

Prejudgment interest at annual rate of 6% may be added to verdict for damages for breach of contract from date amount was due to date of judgment if claim is liquidated and damages can be ascertained without trial. (23 O.S. § 6). Other statutes provide for recovery of prejudgment interest in specific cases (e.g., 23 O.S. § 22, 52 O.S. § 570.10).

Recording.

Judgment or decree of court of competent jurisdiction adjusting rights to real estate, duly certified, may be filed and recorded in office of county clerk with like effect as deed duly executed and acknowledged. (16 O.S. § 31).

Vacation or Modification of Judgment.

District Court may vacate or modify own judgments for specified causes within one to three years, with time depending on cause for vacation or modification. (12 O.S. § 1031, et seq.).

Lien.

Judgments of courts of record of this state and U.S. not subject to Uniform Federal Lien Registration Act (68 O.S. § 3401 et seq.) become liens on real estate of judgment debtor from time required Statement of Judgment is filed in office of county clerk in county where property is located; however, judgment liens on homestead are exempt from forced sale. Filing or recording of judgment itself is not effective to create general money judgment lien upon real estate, but certified copy of judgment may be recorded for purpose of giving notice of its contents. (12 O.S. § 706, 770; 16 O.S. § 15). Ordinary money judgment is not lien on personal property until levy of execution thereon.

Judgment lien may be released in whole or in part by filing Release of Judgment Lien with county clerk. Lien of judgment that has been satisfied by payment or otherwise discharged but not released by judgment creditor will be released by court upon written motion. (12 O.S. § 706).

Judgment against decedent, dying after verdict or decision on issue of fact but before judgment is rendered, is not lien on real property of decedent, but is payable in due course of administration. (12 O.S. § 1081, 58 O.S. § 347).

Execution and Enforcement.

See category 8 Debtor and Creditor, topics 8.02 Attachment, 8.05 Executions, 8.07 Foreclosure, and 8.09 Garnishment.

Stay of Enforcement.

Except in specified actions, automatic ten-day stay of execution or enforcement after judgment or final order is filed with court clerk; asset hearing proceedings not stayed, court may impose any conditions necessary for protection of property or interest subject of action. (12 O.S. § 990.3). After ten-day stay, party may obtain stay of enforcement of judgment while post-trial motion is pending, during time in which appeal may be commenced in any court in or outside state or while appeal is pending in any court in or outside state by filing written undertaking with court clerk and posting supersedeas bond or other security. Bond may not exceed $25,000,000. Executors, administrators and guardians who have given bond in state are not required to post supersedeas bond to stay of enforcement of judgment. Appeals of punitive damages do not require appeal bonds. (12 O.S. § 990.4). Execution of judgment or final order against state, county, municipality or other political subdivision of state is automatically stayed without execution of supersedeas bond until any appeal has finally been determined. (12 O.S. § 66, 995). If money judgment is appealed, judgment lien ceases if judgment debtor makes cash deposit with court clerk sufficient to cover entire amount of judgment, including interest, costs and any attorneys fees, together with costs and interest on appeal. Amount shall be determined by court order upon application of judgment debtor. (12 O.S. § 706.2, 706.3).

See also category 8 Debtor and Creditor, topic 8.05 Executions, subhead Stay of Execution.

Priority.

Unless execution is issued and levied within one year after judgment becomes final, priority of lien on real estate is lost as against other judgment creditors. (12 O.S. § 801).

Dormancy.

Judgment (except against a municipality) becomes dormant and ceases to be a lien five years from date judgment becomes final (if no execution or garnishment summons issued) or from date of last execution or garnishment summons. (12 O.S. § 735; 38 P.2d 533).

Death of Party After Verdict or Judgment.

If party dies after verdict is rendered, judgment may be rendered on verdict although representative or successor of decedent has not been substituted. If plaintiff dies after verdict or judgment in his favor, his representative or successor may be substituted upon motion made before judgment becomes dormant and before action is taken to enforce judgment. Delay in substituting representative or successor does not affect validity of judgment lien. If defendant dies after verdict or judgment in favor of plaintiff, judgment shall be filed with representative of decedent within time allowed for filing other claims and shall be payable in due course of administration. (12 O.S. § 1081). When partner dies after judgment has been rendered in favor of or against partnership of which decedent was member, judgment may be enforced in favor of or against partnership and against estate of deceased partner although estate of deceased partner is not made party to judgment. (12 O.S. § 1082). See topic 5.02 Actions, subhead Survival, Abatement and Revival.

Assignment of judgment passes both legal and equitable title. (34 Okla. 801, 127 Pac. 483).

Satisfaction.

Judgment is satisfied by judgment creditor filing instrument directing clerk to release judgment of record or upon motion filed by judgment debtor. When judgment is released court clerk shall prepare certificate of release for filing with county clerk. (12 O.S. § 706).

Revised Uniform Enforcement of Foreign Judgments Act adopted. (12 O.S. § 719-26).

Structured Settlement Protection Act (12 O.S. § 3238 et seq.) requires certain disclosures to be made to payee under structured settlement before rights can be transferred and requires prior court approval of transfer of structured settlement payment rights. Requires transfer agreement by resident of state to designate Oklahoma law as governing disputes and disallows transferee to confess judgment or consent to entry of judgment against payee. Applies to all transfer agreements entered into on or after Nov. 30, 2001.

Uniform Foreign Country Money-Judgments Recognition Act adopted. (12 O.S. § 718.1 et seq.).

Uniform Foreign-Money Claims Act adopted. (12 O.S. § 729.1 et seq.).

5.16 LIMITATION OF ACTIONS:

Uniform Commercial Code adopted. (Title 12A). See category 3 Business Regulation and Commerce, topic 3.09 Commercial Code.

Actions are barred unless brought within the following periods after the respective causes of action accrued:

Fifteen Years.

For recovery of real property not otherwise specified (12 O.S. § 93);

Five Years.

For recovery of real property sold under process or order of court, by defendant or heirs or devisees, or persons claiming under them by title acquired after the judgment or order, time running from recording deed or from final judgment in partition proceedings where no sale had; for recovery of real property sold for taxes except where lands exempt from taxation by Act of U.S.A.; on contracts in writing (sealed or unsealed); on domestic judgment; on official, attachment or injunction bonds; and all actions not otherwise specified. (12 O.S. § 93, 95). On written and oral contracts for sale of goods under Uniform Commercial Code the period of limitations is five years but parties may reduce such period to one year by agreement. (12A O.S. § 2-725). Action in tort to recover damages from design, planning or construction of improvement to real property. (12 O.S. § 109). Uninsured motorist policy action. (Uptegraft v. Home, 662 P.2d 681 [Okla. 1983]). Actions based on intentional conduct brought for injury suffered as result of criminal actions may be brought while offender is incarcerated, or within five years after release, if offender was serving time for offense on which action was based. (12 O.S. § 95).

Four Years.

Action for injury to business or property caused by acts, etc. in restraint of trade or commerce; time runs from accrual or discovery of cause of action whichever is later. (79 O.S. § 25).

Three Years.

On contracts not in writing; on accounts stated or open accounts; on liabilities created by statute other than forfeitures or penalties and action on a foreign judgment. (12 O.S. § 95).

Two Years.

For recovery of real property sold for taxes, time running from recording of deed; for forcible entry and detainer, or detainer only; for trespass on real property or to recover same; for taking, detaining or injuring personal property; for injuries not arising from contracts, including torts not otherwise specified; for fraud, time running from discovery; for childhood sexual abuse, time running from discovery but tolled until child reaches age 18 or until five years after perpetrator is released from correctional facility or jail, whichever is later (12 O.S. § 95); for wrongful death (12 O.S. § 1053); for medical malpractice, time running from date plaintiff knew or should have known of death, injury, or condition complained of (76 O.S. § 18); for fraud, time running from discovery (12 O.S. § 95); for willful violation of Standards for Workplace Drug and Alcohol Testing Act, time running from discovery of alleged violation or exhaustion of administrative remedies (40 O.S. § 563); for indemnification claims under Good Samaritan Act (76 O.S. § 5.5).

One Year.

Actions for libel, slander, assault, battery, malicious prosecution, false imprisonment, and for statutory forfeitures or penalties not otherwise specified and action to cancel a decree of adoption. (12 O.S. § 95). Action on statutory fire insurance policy. (36 O.S. § 4803[G]). Actions by inmates. (12 O.S. § 95).

180 Days.

Tort actions against state or political subdivision must be commenced within 180 days after denial of claim. (51 O.S. § 156).

Notice to State, Subdivisions.

Must present claim to state or subdivision within one year of date of loss. (51 O.S. § 156).

New Action.

If judgment for plaintiff is reversed or he fails in his action otherwise than on the merits, new action may be commenced within one year thereafter. (12 O.S. § 100).

Foreign Causes of Action.

Period of limitation applicable to claim accruing outside State shall be either that prescribed by law of place where claim accrued or by law of Okla., whichever last bars claim. (12 O.S. § 105).

Uniform Statute of Limitations on Foreign Claims Act adopted. (12 O.S. § 104 through 12 O.S. § 108).

Setoff or counterclaim arising out of same transaction or occurrence as claim of opposing party is not barred by statute of limitation, even if barred at time petition was filed, unless counterclaim was time barred before opposing party's claim arose. (12 O.S. § 2013).

Disabilities.

Person under disability when cause of action accrues may bring action within following times after disability removed: Action to recover real property, two years; other actions, one year. (12 O.S. § 94, 12 O.S. § 96). Action for medical malpractice injury to incompetent or minor under 12 years old must be brought within seven years of infliction of injury. If incompetent adjudged competent, then action must be brought within one year of adjudication of competency, but in no event less than two years after injury. For minors 12 years old and older, action must be brought within one year after attaining majority but in no event less than two years after injury. (12 O.S. § 96).

Absence or Concealment.

Time does not run in favor of party who is out of state or who conceals self so that cannot be sued; however, this rule does not apply if personal jurisdiction can be acquired by service outside state or by publication. (12 O.S. § 98).

Interruption of Statutory Period.

In case of claim founded on contract, partial payment or written acknowledgment or promise to pay, signed by party to be charged, fixes new date from which full statutory period runs. (12 O.S. § 101).

Revival of Barred Claims.

Part payment or written acknowledgment after debt has become barred revives debt for full statutory period. (46 Okla. 773, 149 Pac. 878).

Contractual Limitations.

Time within which action may be brought may not be limited by contract (15 O.S. § 216), except period of limitation in contracts for sale of goods may be reduced to one year by agreement as provided in Uniform Commercial Code. (12A O.S. § 2-725).

Pleading.

Statute of limitation must be pleaded, though petition which shows on its face that action is barred may be dismissed, upon motion, for failing to state claim upon which relief can be granted. (12 O.S. § 2008, 2012).

5.17 NEGLIGENCE:

See topic 5.09 Damages.

5.17A PARTITION:

Jurisdiction of partition is in court having general equity jurisdiction (Const., art. 7, § 10), in county where estate or a part thereof is situated (12 O.S. § 131-2).

Parties and Pleadings.

Petition must describe property and respective interests of owners, if known, or, if interests or owners are unknown, these facts must be set forth. (12 O.S. § 1501-2). If partition for mineral estate only, petition must allege and plaintiff must prove that development objective is frustrated and Corporation Commission order would not effectuate objective. Creditors having lien on any portion of property may be made parties. (12 O.S. § 1503). Answers of defendants must state amount and nature of their respective interests, and may deny interests of any other party. (12 O.S. § 1504).

Proceedings.

After interests of all parties are ascertained, court makes order specifying the same, and directing partition, and appoints three commissioners to make partition, who must take an oath, and make partition of the property among the parties according to their interests, if such partition can be made without manifest injury, but if not, make a valuation and appraisement thereof, and report their proceedings to court. Any party may file exceptions to such report. If partition is made by Commissioners and no exceptions are filed, court renders judgment that such partition be and remain firm and effectual. (12 O.S. § 1505-1511).

Partition in Kind or Sale.

If partition cannot be made, any party or parties may elect to take property at appraisement, and may receive a deed thereto on payment to other parties of their proportion of appraised value. Such election must be filed within 20 days of filing of report. If no party elects to take same, or if several elect in opposition to each other, court orders property sold in manner of sales under execution. In such case property must bring at least two-thirds of its appraised value, and sale must be approved by court. (12 O.S. § 1512-4). If property cannot be partitioned in kind and value does not exceed $5,000, court may dispense with regular proceedings and order sheriff of county to sell property at not less than two-thirds of appraised value. (12 O.S. § 1517).

Costs, attorney's fees and expenses are taxed among parties, according to their interests. (12 O.S. § 1515).

Probate Partition.

District court has power to order partition or sale of real estate under its probate jurisdiction in administration of estates. (58 O.S. § 641). Such partition may be had on petition of any person interested. Three commissioners must be appointed by court, and notice given to all persons interested. Procedure and method of partition is substantially same as in equitable action for partition in the district court. (58 O.S. § 641-51).

5.18 PLEADING:

Oklahoma Pleading Code (12 O.S. § 2001 et seq.) is patterned after Rules 1 O.S. § 25 of Federal Rules of Civil Procedure. See topics 5.02 Actions, 5.19 Practice, 5.20 Process.

Pleadings Permitted.

Pleadings, under code, are: Petition and answer, reply to counterclaim, answer to cross-claim, third-party petition, and third-party answer. (12 O.S. § 2007).

Claim for relief must contain short and plain statement showing pleader is entitled to relief and demand for judgment for relief he deems himself entitled. (12 O.S. § 2008). Demands for judgment in excess of amount required for diversity jurisdiction in federal court or for punitive damages must state that amount sought is in excess of amount required for diversity jurisdiction. (12 O.S. § 2008). If plaintiff does not make such demand, defendant may file motion to clarify damages. Plaintiff must prove by preponderance of evidence that its claim will not exceed jurisdictional amount for diversity jurisdiction. If court finds that it is more likely than not that damages will exceed such amount, pleadings must be amended. (12 O.S. § 2009).

Answer must contain general or specific denial of each allegation of petition controverted by defendant, statement of any matter constituting avoidance or affirmative defense, statement of any cross-claim, counterclaim or setoff, and nature of any relief to which defendant may be entitled. Defendant may set forth as many grounds of defense as he may have, stating and numbering each separately. (12 O.S. § 2008, 2010). In products liability actions, if defendant alleges product was inherently unsafe, defense must be pled as affirmative defense. (76 O.S. §

57).

Counterclaim or Crossclaim.

Pleader shall state as counterclaim any claim existing at time of pleading which he has against opposing party if it arises out of transaction or occurrence which is subject matter of opposing party's claim and does not require presence of third parties not subject to court's jurisdiction. Pleader may state any other counterclaim he has against opposing party. All cross-claims are permissive. (12 O.S. § 2013).

Amendments.

Party may amend pleading once without leave of court before responsive pleading is served, or if no responsive pleading is permitted, within 20 days after pleading is served. All other amended or supplemental pleadings may be filed with leave of court. (12 O.S. § 2015).

Time.

Answer or other responsive pleading, including motion, or demurrer of defendant must be filed within 20 days after service. (12 O.S. § 2012). Filing of reservation of time extends answer date to 20 days from last date for answering; however, certain defenses are waived. (12 O.S. § 2012). Certain pleadings not timely filed due to excusable neglect may be filed out of time with permission of court. (12 O.S. § 2006). In computing time period prescribed by rules, day from which period begins to run is not included, but last day is included, unless legal holiday or day court clerk's office is not open to regularly scheduled time. If prescribed time period is less than 11 days, intermediate holidays and days court clerk's office is not open until regular closing time are excluded from computation. (12 O.S. § 2006).

Verification, Signing.

Verification unnecessary unless specifically required by statute (e.g., 12 O.S. § 2023.1). Every pleading, written motion and other paper must be signed by at least one attorney of record, in attorney's individual name, or by party, if not represented by attorney. Signature constitutes certification of specified representations to court. Limited sanctions may be imposed for violation of section upon separate motion or by court's initiative. Section is not applicable to discovery disclosures and papers subject to 12 O.S. § 3226 through 3237. (12 O.S. § 2011). In actions not arising from contract, upon granting motion to dismiss, motion for summary judgment, or posttrial motion, court must determine whether nonprevailing party's claim or defense was frivolous and, if so, enter judgment awarding prevailing party its costs and attorney fees incurred with respect to frivolous claim or defense. (12 O.S. § 2011.1). Sanctions may also be imposed for filing frivolous tort actions after judgment is awarded after decision on merits, motion to dismiss, or motion for summary judgment. (12 O.S. § 2012). In actions alleging professional negligence, plaintiff must attach affidavit to petition attesting that he or she has consulted and reviewed facts of claim with qualified expert, obtained written opinion that facts support finding of professional negligence and that plaintiff has concluded that claim is meritorious and based on good cause. (12 O.S. § 19).

Service, Filing.

See topic 5.20 Process. All papers after petition required to be served upon party (or upon party's attorney) must be filed with court clerk before service or within reasonable time thereafter, and must include statement setting forth names of persons served and date, place and method of service. Duplicates are acceptable for filing, and papers may be filed by facsimile transmission or other electronic transmission directly to court or court clerk as permitted by court rule. (12 O.S. § 2005).

Proof of Claim.

No statutory provision for proof of claims filed from another state. If claim is based on written instrument, original instrument should accompany claim with itemized statement of amount due. If based on open account, an itemized statement of account should be furnished. If based on foreign judgment, copy of judgment should be furnished attested by court clerk, accompanied by certificate of judge of such court that clerk has custody of records and by certificate under state seal that court is duly constituted, specifying the general nature of its jurisdiction, and verifying the court seal.

Small Claims.

Generally, 12 O.S. § 1751 et seq. See category 6 Courts and Legislature, topic 6.01 Courts.

Frivolous Claims.

Any attorney who signs pleading, motion or other paper (1) Without reading it, (2) without believing, after reasonable inquiry, that it is well grounded in fact and is warranted by existing law or good faith argument for extending, modifying or reversing existing law, or (3) without believing that it is not interposed for any improper purpose (such as to harass, cause unnecessary delay or needlessly increase cost of litigation), will be sanctioned appropriately by court, as may party represented by attorney. Sanctions may include order to pay opposing party's reasonable expenses incurred because of filing violative document, including reasonable attorney fees. (12 O.S. § 2011). Assertion of frivolous claims or defenses in certain other instances will make non-prevailing party, including state, subject to order to pay opposing party's costs, including reasonable attorney fees, in action. (12 O.S. § 941; 12 O.S. § 995).

Entry of Appearance.

Counsel and unrepresented parties must file entry of appearance. Pro hac vice motions regulated for out-of-state counsel. Motions to withdraw also governed. (12 O.S. § 2005.2).

Confidentiality.

If order directs withholding or removal of pleadings or other material from public record, certain requirements must be met. Protective order regulated. (51 O.S. § 24A.29).

5.19 PRACTICE:

Code of Civil Procedure has been adopted. (tits. 12, 18, 20, 21, 22, 25, 28, 38, 39, 67, 76). Oklahoma Pleading Code was adopted in 1984 and is patterned after Rules 1 O.S. § 25, Federal Rules of Civil Procedure. (12 O.S. § 2001 et seq.). Jury panels are regulated and attorneys should consult Oklahoma's unusual jury selection rules before making final trial schedule. (38 O.S. § 21, 38 O.S. § 28, 38 O.S. § 28.1). Jury qualifications are also regulated by statute. (38 O.S. § 28).

Issues of law are tried to the court. Issues of fact arising in actions for recovery of money or specific real or personal property are tried by jury unless waived by parties. All other issues of fact are tried by the court subject to its power to submit to the jury any issue or issues of equitable cognizance, for advice only. (12 O.S. § 556, 557). Jurors paid out of local court fund: (1) Fee of $20 for each day's attendance before court of record, and (2) mileage going to and returning from jury service each day pursuant to State Travel Reimbursement Act (74 O.S. § 500.1 et seq.). (28 O.S. § 86).

Small Claims.

See category 6 Courts and Legislature, topic 6.01 Courts, subhead Small Claims.

See also topics 5.02 Actions, 5.03 Appeal and Error, 5.08 Costs, 5.11 Depositions and Discovery, 5.13 Evidence, subhead Witnesses, 5.14 Injunctions, 5.15 Judgments, 5.16 Limitation of Actions, 5.18 Pleading, 5.20 Process, and 5.26 Venue. In addition, see category 8 Debtor and Creditor, topics 8.02 Attachment, 8.05 Executions, and 8.09 Garnishment.

5.20 PROCESS:

Oklahoma Pleading Code (12 O.S. § 2001 et seq.) is patterned after Rule 1 O.S. § 25 of Federal Rules of Civil Procedure. Process, including issuance, form and service of summons, is governed by 12 O.S. § 2004.

Issuance and Form of Summons.

Court clerk issues summons when petition is filed. Summons must be signed by clerk under seal of court, contain name of court and names of parties, be directed to defendant, state name and address of plaintiff's attorney, if any, otherwise, plaintiff's address, and time within which defendant is required to appear and defend. Copy of petition must be attached to and served with summons. Summons must notify defendant that judgment by default will be rendered for relief demanded in petition if defendant fails to appear. (12 O.S. § 2004[A], [B], [D]).

Service by Personal Delivery.

Process, other than subpoena, is served by sheriff or deputy sheriff, person licensed to make service of process in civil cases, or person specifically appointed by court for that purpose, as follows (12 O.S. § 2004[C][1]):

Individual.

Service made upon individual, other than infant less than age 15 or incompetent person, by delivering copy of summons and petition personally, by leaving copies at person's dwelling or usual place of abode with person then residing there who is age 15 or older, or by delivering copy of summons and petition to agent authorized by appointment or by law to receive service of process. Service made upon incarcerated inmate by delivering copy of summons and petition to warden or superintendent of institution where inmate is housed.

Infant or Incompetent Person.

Service made on infant less than age 15 by serving summons and petition personally and upon either of infant's parents or guardian or, if they cannot be found, upon person having care or control of infant or with whom infant lives; and upon incompetent person by serving summons and petition personally and upon incompetent person's guardian.

Corporation, Partnership or Unincorporated Association.

Service made by delivering copy of summons and petition to officer, managing or general agent, or any other agent authorized by appointment or by law to receive service of process and, if agent is one authorized by statute to receive service and statute so requires, by also mailing copy to defendant.

Personal service on incorporated association or trust may be had by service upon any one of individuals composing same, except that in case of common law trust, process must be served upon one if individuals designated as trustee. (12 O.S. § 182).

Political Subdivision.

Service made upon state, county, school district, public trust or municipal corporation or other governmental organization thereof subject to suit, by delivering copy of summons and petition to officer or individual designated by specific statute, or upon chief executive officer or clerk, secretary or other official with duty to maintain official records of organization.

Service by Mail.

Summons and petition may be served on individual, corporation, partnership or unincorporated association, or political subdivision by certified mail, return receipt requested and delivery restricted to addressee. Such service may be made by plaintiff's attorney, any person authorized to serve process, or by court clerk. Service by mail effective on date of receipt or, if refused, on date of refusal of summons and petition by defendant. Service by mail cannot be basis for entry of judgment by default unless record contains return receipt showing acceptance by defendant or returned envelope showing refusal of process by defendant. (12 O.S. § 2004[C][2]).

Service by Publication.

Named defendant may be served by publication where verified pleading or affidavit states that with due diligence service cannot be made by any other method. Service by publication may be made on unknown successors of named defendant, named decedent, or dissolved association or corporation where verified pleading or affidavit states that affiant does not know and with due diligence cannot ascertain: (1) Whether person named as defendant is living, and, if dead, names or whereabouts of successors, if any; (2) names or whereabouts of unknown successors, if any, of named decedent; (3) whether named defendant association, partnership, or corporation continues to legally exist, or name or whereabouts of its officers or successors; (4) whether person designated as trustee in record continues to be trustee, or names or whereabouts of successor trustee; names or whereabouts of owners or holders of special assessment or improvement bonds, or any other bonds, sewer warrants or tax bills. (12 O.S. § 2004[C][3]).

Service on Secretary of State.

Service of process on domestic corporation may be made by serving Secretary of State as corporation's agent if: (1) No registered agent for corporation is listed in records of Secretary of State; or (2) neither registered agent nor officer of corporation could be found at registered office of corporation when service of process was attempted. (12 O.S. § 2004[C][4]). Secretary of State is agent in this state for service of process on nonqualifying foreign corporations. (18 O.S. § 1136).

Service by Acknowledgment.

Acknowledgment on back of summons or voluntary appearance of defendant is equivalent to service. (12 O.S. § 2004[C][5]).

Service by Other Methods.

If service cannot be made by personal delivery or by mail, individual or corporation, partnership or unincorporated association may be served as provided by court order in any manner reasonably calculated to give defendant actual notice of proceedings and opportunity to be heard. (12 O.S. § 2004[C][6]).

Territorial Limits of Effective Service.

Service of summons and petition may be made anywhere within this state. Court of this state may exercise jurisdiction on any basis consistent with Constitution of this state and Constitution of U.S. When exercise of jurisdiction is authorized, service of process may be made outside state: (1) By personal delivery in manner prescribed for service within this state, (2) in manner prescribed by law of place in which service is made for service in that place in action in any of its courts of general jurisdiction, (3) by certified mail as provided in 12 O.S. § 2004(C)(2), (4) as directed by foreign authority in response to letter rogatory, (5) by publication when permitted by 12 O.S. § 2004(C)(3), or (6) as directed by court. (12 O.S. § 2004[E], [F]).

Return.

Person serving process must make proof of service thereof to court within time during which person served must respond to process; however, failure to make proof of service does not affect validity of service. (12 O.S. § 2004[G]).

Time Limit for Service.

If service of process is not made upon defendant within 180 days after filing of petition, action must be dismissed as to that defendant without prejudice. Action cannot be dismissed if summons was served on defendant within 180 days after filing of petition and court later holds that summons or its service was invalid. After court quashes summons or its service, new summons may be served on defendant within time specified by judge. If new summons is not served within specified time, action deemed to have been dismissed without prejudice as to that defendant. (12 O.S. § 2004[H]).

Service on Several Defendants.

Where liability joint, service on less than all defendants supports judgments enforceable against joint property and separate property of defendants served but not of those not served. Where liability several, judgment may be taken against defendants served without prejudice to rights of those not served. (12 O.S. § 178).

See also categories 16 Insurance, topic Insurance Companies, subhead Process Agent; Transportation, topic Motor Vehicles, subhead Actions Against Nonresidents.

Opening Default Judgment.

Judgment obtained by publication may be opened up within three years, upon notice, and filing of affidavit that party had no actual notice of action while pending, answer and by payment of costs; but title to property, subject of judgment, is not affected in hands of purchaser in good faith. (12 O.S. § 2004). Judgment obtained by service on Secretary of State only may be set aside upon motion within one year of notice of default judgment but in no event more than two years after default judgment. (12 O.S. § 2004).

Long Arm Statute.

See subhead Territorial Limits of Effective Service, supra.

Nonresident Motorist.

See subhead Territorial Limits of Effective Service. See also topic 5.26 Venue; category 23 Transportation, topic 23.01 Motor Vehicles, subhead Actions Against Nonresidents.

5.21 REPLEVIN:

Plaintiff, in action to recover possession of specific personal property, may claim immediate delivery of property at commencement of suit. No actions may be brought against city, county, state or employees of same if claim arises out of incarceration. Upon filing of verified petition, notice shall be issued by clerk upon defendant notifying him of plaintiff’s claim to immediate delivery and defendant’s right to object by written response to plaintiff’s attorney within five days of service. In case of no response, clerk will issue order for delivery. (12 O.S. § 1571).

Proceedings.

Plaintiff, his agent or attorney, must file verified petition describing property claimed, and alleging that plaintiff is owner of property, or has special ownership or interest therein, stating facts in relation thereto, and that he is entitled to immediate possession of property; that property is wrongfully detained by defendant; that it was not taken in execution on any order or judgment against plaintiff, or for payment of any tax, fine or amercement assessed against him, or by virtue of order of replevin or any other mesne or final process issued against plaintiff; or if taken by judicial process, that it is exempt; value of each article; and prayer requesting court to issue order for immediate delivery of property. (12 O.S. § 1572).

Bonds.

Before issuance of order plaintiff must file undertaking with one or more sureties to be approved by clerk, in double value of property stated in petition, conditioned that plaintiff will duly prosecute action and pay all costs and damages which may be awarded against him, and if property is delivered to him, will return same to defendant if return is adjudged. (12 O.S. § 1573). Upon application of either party with notice, court may hold hearing to determine property value: if different from petition, court determined value controls. (12 O.S. § 1573.1).

Repossession.

Defendant may release property by furnishing to sheriff bond in double value of property stated in petition, within 24 hours after seizure. (12 O.S. § 1577).

Order is issued by clerk; sheriff must seize property. Order may be directed to other counties than one where action is brought. Several orders may issue at same time or successively. (12 O.S. § 1581-4). Attachment may be issued on order of court or judge in vacation, in aid of replevin. (12 O.S. § 1583). Order for delivery issued without affidavit and bond may be set aside by clerk and plaintiff is liable for damages. (12 O.S. § 1584).

Judgment for plaintiff may be for possession or recovery of possession or value of property in case delivery cannot be had, and for damages for detention. If property has been delivered to plaintiff, judgment for defendant may be for return of property or value thereof in case return cannot be had, and for damages for taking and withholding same. (12 O.S. § 1580).

5.22 SEQUESTRATION:

No statutes or decisions on subject.

See category 8 Debtor and Creditor, topics 8.02 Attachment, 8.05 Executions, 8.09 Garnishment, 8.16 Receivers.

5.23 SERVICE:

See topic 5.20 Process.

5.24 STAY OF EXECUTION:

See topics 5.03 Appeal and Error, 5.15 Judgments, subhead Stay of Enforcement. See also category 8 Debtor and Creditor, topic 8.05 Executions.

5.25 SUBMISSION OF CONTROVERSY:

Parties to dispute may, without filing civil action, submit agreed facts on which controversy depends to any court that would have jurisdiction if action had been brought. If it appears by affidavit that controversy is real and proceedings in good faith to determine rights of parties, court must hear and determine case and render judgment, with costs, as if action were pending. Judgment may be enforced and is subject to reversal in same manner as if rendered in action, unless otherwise provided in submission. (12 O.S. § 1103 to 1105).

5.26 VENUE:

Venue Statutes Are Cumulative.

All venue statutes are cumulative and any action brought under any such statute may be maintained where brought. (12 O.S. § 143). Venue for declaratory judgment actions defined. (12 O.S. § 1653).

Real Property Actions.

Action for recovery of real property or any estate or interest therein, for partition of real property, for sale of real property under mortgage or other encumbrances or lien, or to quiet title, establish trust in, remove cloud on, set aside conveyance of, or enforce or set aside agreement to convey real property, must be brought in county where the subject of action is situated. (12 O.S. § 131). Action involving real property situated in two or more counties may be brought in any county in which any part of land is situated, except action to recover possession, which may be so brought only if property in controversy constitutes entire tract. Action for specific performance may be brought where land lies, or where any defendant resides or may be summoned. (12 O.S. § 132).

Action for recovery of fine, forfeiture, or penalty imposed by statute, or against public officer for act done by virtue of, or under color of office, or neglect of official duty, or upon his official bond, must be brought in county where cause of action or some part thereof arose. (12 O.S. § 133).

Action against domestic corporation, other than those mentioned above, may be brought in county in which it is situated or has its principal office or place of business, or where principal officers reside or may be summoned, or where cause of action or some part thereof arose, or in any county where codefendant of such corporation may properly be sued. (12 O.S. § 134).

Action against transportation or transmission company may be brought in any county where any person resides upon whom service may be made under law, or in county where cause of action or some part thereof may have accrued or in any county in which lines or structures of corporation may be. (12 O.S. § 135).

Action against nonresident of state may be brought in any county in which there is property of or debts owing to such defendant, or where defendant may be found, or in any county where codefendant may properly be sued. (12 O.S. § 137). If all defendants are nonresidents of state, action may be brought in county where cause of action arose or in county where plaintiff or one of plaintiffs resides. If one or more defendants is resident of state, action must be brought in county where venue would be proper as to resident defendant or one of resident defendants, if several. (12 O.S. § 187).

Action against foreign corporation may be brought in county where cause of action arose, where plaintiff resides, where corporation has its principal place of business, where corporation has property or debts owing to it, where corporation has agent appointed for service of process, or where codefendant may properly be sued. (Const, art. 9, § 43; 12 O.S. § 137; 18 O.S. § 471).

Action against a foreign insurance company may be brought in any county where cause of action or any part thereof arose or where plaintiff resides or where defendant has agent. (12 O.S. § 137).

Action against foreign insurance company not authorized to do business in this state, on contract of insurance with resident of this state, may be brought in county in which plaintiff is resident or in which cause of action arose. (36 O.S. § 111). Venue of specified acts defined as doing insurance business in state is Oklahoma County. (36 O.S. § 6103.2).

Action on open account, on written or oral contract for purchase of goods, labor or services, or for collection of any note or other instrument of indebtedness may be brought in county in which debt was contracted or note or other instrument was given, or in any county in which venue otherwise properly lies. (12 O.S. § 142).

All other actions must be brought in county where one of defendants resides, resided at time claim arose, or may be summoned. (12 O.S. § 139). Venue, where defendant is unincorporated association, shall be same as that provided for in actions involving domestic corporations. Civil actions for damages resulting from use or operation of motor vehicles or operation of boats on waters of state where defendant resided in Oklahoma at time of injury may be brought either in county where service can be obtained or in any county where damages or part thereof were sustained. When service cannot be obtained in state it may be secured in manner provided for service upon nonresident motorists. (12 O.S. § 141). See category 23 Transportation, topic 23.01 Motor Vehicles.

Change of Venue.

Venue may be changed by court on application of either party when it appears that fair trial cannot be had in county where suit is pending. (12 O.S. § 140). Upon motion of party or upon court's own motion, court can stay, transfer or dismiss case either within or outside state based on forum non conveniens. Factors governing court's decision outlined. (12 O.S. § 140.2). Upon order by court to transfer case, clerk of court collects new filing fee for court to which case is transferred. (12 O.S. § 140.1).

See category 13 Estates and Trusts, topic 13.09 Executors and Administrators, subhead Jurisdiction and Venue.

6 COURTS AND LEGISLATURE

6.01 COURTS:

United States District Courts.

State is divided into three districts, each having a district court. Deposit of $150 to cover costs is required on commencement of action or removal of action from state court.

Northern District.

Clerk's office: 411 U.S. Courthouse, 333 West 4th Street, Tulsa, OK 74103. (Phone: 918/581-7796).

Counties composing Northern District are the following: Craig, Creek, Delaware, Mayes, Nowata, Osage, Ottawa, Pawnee, Rogers, Tulsa and Washington.

Court sits at Tulsa, Vinita, Pawhuska, Bartlesville, and Miami.

Eastern District.

Clerk's office: P.O. Box 607, Muskogee, OK 74402. (Phone: 918/687-2471).

Counties composing Eastern District are following: Adair, Atoka, Bryan, Cherokee, Choctaw, Coal, Carter, Haskell, Hughes, Johnston, Latimer, LeFlore, Love, McCurtain, McIntosh, Marshall, Murray, Muskogee, Okfuskee, Okmulgee, Pittsburg, Pushmataha, Pontotoc, Seminole, Sequoyah and Wagoner.

Court sits at Muskogee, Okmulgee, Hugo, McAlester, Ardmore, Ada, Poteau and Durant.

Western District.

Clerk's office: 200 N.W. 4th Street, Room 1210, Oklahoma City, OK 73102. (Phone: 405/609-5000).

Counties composing Western District are following: Alfalfa, Beaver, Beckham, Blaine, Caddo, Canadian, Cimarron, Cleveland, Comanche, Cotton, Custer, Dewey, Ellis, Garfield, Garvin, Grady, Grant, Greer, Harmon, Harper, Jackson, Jefferson, Kay, Kingfisher, Kiowa, Lincoln, Logan, Major, McClain, Noble, Oklahoma, Payne, Pottawatomie, Roger Mills, Stephens, Texas, Tillman, Washita, Woods and Woodward.

Court sits at Oklahoma City, Enid, Guthrie, Lawton, Chickasha, Pauls Valley, Shawnee, Woodward, Mangum and Ponca City.

State Supreme Court.

Jurisdiction.

Supreme Court has appellate jurisdiction throughout state in all civil cases at law and in equity. (Const. VII, 2). Its original jurisdiction includes control of all inferior courts, commissions and boards. (Const., VII, 2). Court may issue writs of habeas corpus, mandamus, quo warranto, certiorari, prohibition, and such other remedial writs as may be provided by law. (Const., VII, 2). Supreme Court has exclusive original jurisdiction of cases involving removal of state capital or any state charitable or educational institution (20 O.S. § 14), of cases involving creation and division of counties (19 O.S. § 24) and location of county seats (19 O.S. § 87), of ouster proceedings against state officers not subject to impeachment and against local officers (51 O.S. § 92) and of applications by state agencies for approval of bonds, notes or other evidences of indebtedness (20 O.S. § 14.1).

Court sits at Oklahoma City. Clerk's office: Room B-2, State Capitol Bldg., 2300 N. Lincoln, Oklahoma City, OK 73105, or P.O. Box 53126, Oklahoma City, OK 73152. (Phone: 405/521-2163). $200 filing fee for any petition, application or matter invoking jurisdiction of Supreme Court, including application for reinstatement to Oklahoma Bar Association; $100 filing fee for petition for certiorari to Court of Civil Appeals; $20 fee for attorney certificate of good standing; copy and certification costs as in district courts. See subhead District Courts, catchline Fees, infra.

Court of Criminal Appeals.

Jurisdiction.

This court has exclusive appellate jurisdiction, in state, in all criminal cases appealed from the courts of record. (20 O.S. § 40). It has original jurisdiction to issue writ of habeas corpus, and under law, such writs as may be necessary to the exercise of its jurisdiction. (20 O.S. § 41).

Court sits at Oklahoma City. Clerk's office: Room B-2, State Capitol Bldg., 2300 N. Lincoln, Oklahoma City, OK 73105, or P.O. Box 53126, Oklahoma City, OK 73152. (Phone: 405/521-2163). $50 filing fee for any petition, application or matter invoking jurisdiction of Court of Criminal Appeals; copy and certification costs as in district courts. See subhead District Courts, catchline Fees, infra.

Revised Uniform Certification of Questions of Law Act adopted. (20 O.S. § 1601.1 et seq.). Supreme Court or Court of Criminal Appeals may answer question of law certified to it by U.S. court, appellate court of another state, or of federally recognized Indian trial government, or of Canada or Mexico, if answer may be determinative of issue in pending litigation in certifying court and there is no controlling decision of Supreme Court or Court of Criminal Appeals, constitutional provision or statute of state.

Court of Civil Appeals.

Each division of Court of Civil Appeals has jurisdiction to determine or otherwise dispose of cases assigned to it by Supreme Court, and its final decisions are neither appealable to Supreme Court nor subject to re-examination by another division. Supreme Court may recall case from Court of Civil Appeals; it may review decisions of Court of Civil Appeals when majority of its justices direct certiorari be granted. Court of Civil Appeals has power to issue writs of habeas corpus, mandamus, quo warranto, certiorari and prohibition, in cases assigned to it by Supreme Court. (20 O.S. § 30.1).

Court of Civil Appeals consists of 12 judges, two elected from each Congressional district. Court consists of four permanent divisions of three judges, two in Tulsa and two in Oklahoma City. Supreme Court may convene temporary divisions. Clerk's office: Room B-2, State Capitol Bldg., 2300 N. Lincoln, Oklahoma City, OK 73105, or P.O. Box 53126, Oklahoma City, OK 73152. (Phone: 405/521-2163).

District Courts.

Original jurisdiction of district courts extends to all cases, probate, civil and criminal, except where exclusive jurisdiction is by constitution or by law conferred upon some other court. (Const., VII, 10). Local rules of district courts may not conflict with state statutes and must be in writing and posted on Supreme Court's website to be enforceable. (20 O.S. § 91.8). District courts have general appellate jurisdiction over judgments and final orders of tribunals, boards or officers exercising judicial functions and inferior in jurisdiction to district courts, except where laws provide appeal to some other court. (12 O.S. § 951). Equity, motion, or nonjury terms of court shall be held at least every 60 days; dates to be fixed by each judge at his discretion. (20 O.S. § 96). District court also has power to establish conservation districts, for purpose of: (a) Preventing floods; (b) regulating stream channels; (c) reclaiming or filling overflowed lands; (d) providing for irrigation; (e) regulating flow of streams; (f) diverting or eliminating water courses. (82 O.S. § 541). Also to review orders of Mining Inspector. (45 O.S. § 425). Supreme Court may authorize business docket for municipalities with population in excess of 300,000. (20 O.S. § 91.2, 20 O.S. § 91.7).

Districts and Counties.

District judges of each judicial district have power of assignment of associate district judges and special judges within their district. (20 O.S. § 120). There are twenty-six districts, some of which include two or more counties. (20 O.S. § 92.1-92.27).

Fees.

Civil actions for amount of $10,000 or less: $147. Civil actions for amount of $10,000 or more: $160. Garnishment: $20. Continuing wage garnishment: $60. Post judgment proceedings: $30. Posting notices: $30. Service of process by sheriff in civil case: $50. Filing of motion for summary judgment: $50. Jury fee: $349. Issuance of summons: $5. Court reporter fee: $20. Notice of renewal of judgment: $20. Divorce action filing fee: $140. Modification or vacation of divorce decree: $40. Probate and guardianship proceedings: $132. Adoption proceeding: $102. Preparation and transmission of record for appellate review for jury trial: $300. Preparation and transmission of record for appellate review for nonjury trial: $200. See 28 O.S. § 31, 152, 153 and 155.1 for these and other specified fees. Fees may be paid by credit or debit card. (28 O.S. § 151). Payment of additional $2 fee is required upon filing of document that opens each civil case, for maintenance of alternative dispute resolution system. (12 O.S. § 1809). Additional $10 fee charged on certain civil cases for Lengthy Trial Fund as well as $10 fee for Oklahoma Court Information System Revolving Fund and $6 fee for Law Library Fund. (28 O.S. § 86, 28 O.S. §

152). Filing of bail bond: $35. (59 O.S. § 1316).

Records.

Clerk of each court must file and preserve all papers delivered to clerk for filing, except clerk may refuse to file any document if clerk believes that document constitutes sham legal process, as defined by 21 O.S. § 1533. Person aggrieved by refusal of court clerk to file document may petition district court for writ of mandamus. At time of refusal, aggrieved person must file notice of refusal, with copy of refused instrument attached, to toll any applicable statute of limitations in event such person prevails in mandamus action. (12 O.S. § 29).

Court clerk authorized to dispose of specified records by first offering records to Archives and Records Division of Dept. of Libraries for preservation as historical research materials, and by destroying those not accepted. Required time periods for retention of judicial records specified. (20 O.S. § 1005, 1005.1).

Probate Courts.

Original probate jurisdiction is in district courts. See category 13 Estates and Trusts, topic 13.09 Executors and Administrators, subhead Jurisdiction and Venue.

Court of Tax Review.

Court of tax review consists of three district judges designated by Governor. This court hears and determines all protests against legality and correctness of taxes and levies. Appeals are taken to Supreme Court. (68 O.S. § 24104-24108).

Small Claims Divisions.

No special courts so designated. Actions are governed by Small Claims Procedure Act. (12 O.S. § 1751-1773).

Suits Authorized Under Small Claims Procedure.

Actions for recovery of money, including subrogation claims, but excluding libel or slander, replevin or interpleader, where value of property or amount sought to be recovered, exclusive of attorneys fees and other court costs, does not exceed $6,000. If claims for possession of personal property and to recover money are pled in alternative, joinder of claims is permitted if neither value of property nor total amount sought to be recovered, exclusive of attorneys fees and other costs, exceeds $6,000. No action may be brought under small claims procedure by collection agency or agent or assignee of claim, except that action may be brought against insurer or third-party administrator by health care provider (see 36 O.S. § 6552) who is assignee of benefits available under insurance policy, trust, plan or contract. No action may be brought by inmate or for claim against city, county or state or their employees arising out of incarceration, probation, parole or community supervision. (12 O.S. § 1751).

Filing and Service of Claim.

Action initiated by plaintiff or plaintiff's attorney filing affidavit with court clerk in specified form, which includes order directing defendant to appear. (12 O.S. § 1753). Clerk is to mail copy of affidavit and order to defendant by certified mail, return receipt requested, unless plaintiff requests service by sheriff or other authorized person. Date for appearance of defendant stated in order shall not be more than 30 days or less than ten days from date of order. Order must be served upon defendant at least seven days prior to date specified for appearance. (12 O.S. § 1756).

Counterclaim or Setoff.

No formal pleading other than claim and notice is required, but defendant may state new matter which constitutes counterclaim or setoff by filing verified answer in specified form. Copy of answer must be delivered to plaintiff in person and filed with court clerk not later than 72 hours prior to hour set for first appearance of defendant in action. (12 O.S. § 1758). Fee of $20 for filing counterclaim or setoff. (28 O.S. § 152.1).

Transfer of Actions From Small Claims Docket.

On defendant's motion, action may be transferred to another docket of court, if motion is filed and notice is given to opposing party by mailing copy of motion at least 48 hours prior to time fixed in order for defendant to appear or answered and $50 deposit is paid. (12 O.S. § 1757). If amount of claim, counterclaim or setoff exceeds $6,000, action must be transferred to another docket of district court, unless both parties agree in writing to trial of claim under small claims procedure. (12 O.S. § 1759). If action is transferred to another docket of district court, plaintiff must file petition conforming to standards for pleadings prescribed by Oklahoma Pleading Code (12 O.S. § 2001 et seq.) within 20 days after timely filing of claim, counterclaim or setoff. Defendant's answer is due within 20 days after filing of petition and plaintiff's reply is due within ten days after filing of answer. (12 O.S. § 1759).

Fees.

$45 fee for filing affidavit for recovery of money, replevin or interpleader up to $1,500. $83 fee for filing affidavit for recovery of money, replevin or interpleader in excess of $1,500. $20 fee for filing counterclaim or setoff. (12 O.S. § 1764).

Costs and Attorneys Fees.

Prevailing party is entitled to costs of action, including costs of service of order for appearance of defendant and costs of enforcing judgment. (12 O.S. § 1765). In uncontested cases, attorneys fees allowed shall not exceed 10% of judgment. (12 O.S. § 1751). Plaintiff is entitled to attorneys fees if action is transferred from small claims docket on defendant's motion and plaintiff ultimately prevails. (12 O.S. § 1757).

State Industrial Court.

Jurisdiction of all actions to recover for personal injuries arising under Workers' Compensation Law is in Workers' Compensation Court. (85 O.S. § 71-84). This Court may be addressed at Denver N. Davidson Bldg., 1915 Stiles Ave. in Oklahoma City.

6.02 LEGISLATURE:

Legislature consists of Senate and House of Representatives. State is apportioned into 48 senatorial districts. Number of representatives from each county determined by formula based on population. Legislature meets in regular session each year commencing first Mon. in Feb.; regular session must adjourn on last Fri. in May. Governor may convene special sessions. Rights of initiative and referendum are reserved to people.

Members of Senate must be 25 years of age, members of House must be 21 years of age at time of election; members must be qualified electors and reside in their respective counties or districts during term of office. Federal and state officers and persons convicted of felonies are not eligible to serve as members of legislature. Member elected to office after Jan. 1, 1991, eligible to serve no more than 12 years; member already in office entitled to complete term and eligible to serve additional 12 years thereafter. Years in legislative office need not be consecutive and years of service in both Senate and House of Representatives are added together and included in determining total number of years in office. (Const., art. V. § 1, 9A, 10a, 17, 17A, 18, 26, 27).

Lobbyists are regulated. (74 O.S. § 3901 et seq.).

6.03 REPORTS:

Decisions.

Supreme Court in “Oklahoma Reports,” volumes 1 to 208; Criminal Court of Appeals in “Oklahoma Criminal Reports,” volumes 1 to 97. Decisions of both courts, following above, now officially reported in “Oklahoma Decisions” beginning with corresponding volume 259 Pacific Reporter, Second Series. Pacific Reporter, First and Second Series, covers all decisions.

Supreme Court rules require mandatory public domain citation for all opinions after May 1, 1997, and allow permissive public domain citation for all opinions since 1890, including Oklahoma Territory and Indian Territory. (tit. 12, c. 15, App. 1, Rule 1.200). Supreme Court intends to provide all Oklahoma case law in searchable format, cited in public domain, on OSCN, its public access web-based information system: www.oscn.state.ok.us. OSCN also provides mechanism for conversion of citations to Pacific Reporter and public domain citations. Citation to Pacific Reporter remains mandatory, and parallel citations will be provided both in Pacific Reporter and on OSCN.

Digests.

Oklahoma and Pacific.

6.04 STATUTES:

Latest official compilation is Oklahoma Statutes, 2001, which contains all unrepealed statutes up to and including legislative session of 2001. Subsequent enactments are published in Supplements to Oklahoma Statutes 2001. Unofficial compilation is Oklahoma Statutes Annotated (West) which is kept up to date with pocket supplements.

Uniform Acts of National Conference of Commissioners on Uniform State Laws.

Acts adopted (with year of adoption) are Advance Directive Act (2006); Arbitration, Revised (2005); Attendance of Witnesses From Without a State in Criminal Proceedings, Act to Secure (1949); Certification of Questions of Law (1973); Certification of Questions of Law, Revised (1997); †Child Custody Jurisdiction (1980); Child Custody Jurisdiction and Enforcement (1998); †Commercial Code (1961, with subsequent revisions); †Common Trust Fund (1953); Consumer Credit Code (1968 Act) (1969); †Contribution Among Tortfeasors (1978); †Controlled Substances (1970 and 1990 Acts) (1971 and 1990); Criminal Extradition (1949); †Deceptive Trade Practices (1964 Act) (1965); †Declaratory Judgments (1961); †Determination of Death (1986); Durable Power of Attorney (1988); †Duties to Disabled Persons (1975); Electronic Transactions (2000); Enforcement of Foreign Judgments (1964 Act) (1968); †Evidence, Rules of (1974 Act) (1978); †Facsimile Signatures of Public Officials (1959); Federal Lien Registration (1988); Foreign-Money Claims (1989); Foreign Country Money-Judgments Recognition (2009); Fraudulent Transfer (1986); †Insurers Liquidation (1975); Interstate Family Support (1994); Limited Cooperative Association Act (2009); Limited Partnership (1951); Limited Partnership, Revised (1984); Management of Institutional Funds Act (1992); Military Justice, Code of (1963); †Minor Student Capacity to Borrow (1970); Notarial Acts (1985); Parentage Act (2006); Partnership, Revised (1997); Post-Conviction Procedure (1966 Act) (1970); Preservation of Private Business Records (1965); Principal and Income (1998); Prudent Investor (1995); Prudent Management of Institutional Funds (2007); Reciprocal Transfer Tax (1968); Rendition of Prisoners as Witnesses in Criminal Proceedings (1989); Rights of the Terminally Ill (1989 Act) (1992) (renamed Advance Directive Act); †Securities (1956 Act) (1959); Simultaneous Death (1940 Act) (1959); †State Administrative Procedure (1963); State Code of Military Justice (2007); Statute of Limitations on Foreign Claims (1965); Statutory Form Power of Attorney (1998); Testamentary Additions to Trusts (1961); TOD Security Registration (1994); †Trade Secrets (1986); Transfers to Minors (1986); Unclaimed Property (1981 Act) (1981); Vendor and Purchaser

Risk (1965); Veterans' Guardianship (1945).

†Adopted in substance. See appropriate topics.

The Oklahoma Trust Act (1941) substantially adopts, with modifications, both Uniform Principal and Income Act and Uniform Trust Act.

For text of Uniform Acts falling within the scope of the Martindale-Hubbell Law Digests see Uniform and Model Acts section.

For National Article 9 Forms, see Uniform and Model Acts section, Commercial Code Amendments.

"Uniform Acts" from Other Sources.

Chemical Test for Intoxication (47 O.S. § 751 et seq.); Desertion and Nonsupport (21 O.S. § 853, 854); Discrimination (25 O.S. § 1101 et seq.); Disposition of Criminal Cases on Merits (22 O.S. § 1145.1 et seq.); Disposition of Unclaimed Property (60 O.S. § 651 et seq.); Environmental Permitting Act (27A O.S. § 2-14-101 et seq.); Fresh Pursuit (22 O.S. § 221 et seq.); Genetic Tests to Determine Paternity (10 O.S. § 501 et seq.); Interstate and International Procedure (12 O.S. § 1701.05, 1703.02); Motor Vehicle Code (47 O.S. § 1-101 et seq.); Out of State Parolee Supervision (57 O.S. § 347 et seq.); Principal and Income (60 O.S. § 175.1 et seq.); Conservation Easement Act (60 O.S. § 49.1).

6.05 UNIFORM LAWS:

For list of Uniform Acts in force in this state see topic 6.04 Statutes. For text of Uniform Acts within the scope of the Martindale-Hubbell Law Digests see Uniform and Model Acts section.

7 CRIMINAL LAW

7.00A BAIL:

Bail is compulsory; except where crime charged is punishable by death and guilt is evident or presumption thereof is great. (Const., art. II, § 8). Legislature has allowed denial of bail for defendants charged with certain enumerated offenses. (22 O.S. § 1101). Excessive bail is not permitted. (Const., art. II, § 9). Act regulating bail bondsmen and bail bonds for crimes for which punishment may exceed $20 fine and/or 20 days imprisonment. (59 O.S. § 1301 et seq.). Bail on appeal allowed except for certain felonies. (22 O.S. § 1077). Bail bondsmen regulated. (59 O.S. § 1301 et seq.).

7.01 CRIMINAL LAW:

Crimes and punishments are governed by Penal Code (tit. 21) and criminal procedure by Code of Criminal Procedure (tit. 22). Criminal Discovery Code (22 O.S. § 2001 et seq.) governs procedure for discovery in all criminal cases. Classes of persons not capable of committing crimes include children under age seven; children over age seven but under age 14, in absence of proof that at time of committing act or neglect charged, child knew its wrongfulness; and persons impaired by mental retardation or mental illness (including persons temporarily or partially deprived of reason), upon proof that at time of committing act charged, person was incapable of knowing its wrongfulness. (21 O.S. § 152). See Juvenile Code (10 O.S. § 7301-1.1 et seq.) regarding cases involving persons under age 18.

Truth in Sentencing Act (21 O.S. § 12 et seq.) requires persons committing criminal offense on or after July 1, 1999, to serve certain percent of imposed sentence; limits eligibility for credits reducing length of sentence, provides for sentencing in accordance with certain ranges of punishment, subject to power of court to suspend or defer sentence.

Indictment or Information.

Every felony must be prosecuted by indictment or information in the district or superior court, misdemeanors by information, provided the district court may direct any misdemeanor be presented to the grand jury. (22 O.S. § 301).

Uniform Criminal Extradition Act adopted. (22 O.S. § 1141.1-1141.30).

Uniform State Code of Military Justice adopted. (44 O.S. § 3200 et seq.).

Crime Victims Compensation Act adopted. (21 O.S. § 142).

Sex Offenders Registration Act (57 O.S. § 581 et seq.) requires persons residing, working or attending school in state who have been convicted or received suspended sentence or any probationary term in this state or in another jurisdiction for offense involving sexual abuse or sexual exploitation to register with Department of Corrections and local law enforcement authority in area where person resides or intends to reside and previously resided. Unlawful for registrant to reside within 200 feet of school. (57 O.S. § 590).

Violent Crime Offenders Registration Act (57 O.S. § 591 et seq.) requires registration of persons convicted of certain violent crimes.

Juvenile Sex Offenders Registration Act (10 O.S. § 7308-1.1 et seq.) requires registration of juvenile sex offenders if court finds that offender represents ongoing serious or aggressive threat to public or children under 16 years of age.

Sex offenders whose victims under 13 years of age prohibited from being within 300 feet of elementary and junior high schools, licensed child care facilities and playgrounds. (21 O.S. § 1125).

Protection from Domestic Abuse Act.

(22 O.S. § 60 et seq.). All orders issued pursuant to Act have statewide and nationwide validity unless modified by court.

8 DEBTOR AND CREDITOR

8.01 ASSIGNMENTS:

Chose in action arising out of contractual obligation or violation of property right may be assigned. (60 O.S. § 313). Assignment of claims not arising out of contract prohibited, except as otherwise provided by state law regarding transfer of claims through subrogation. (12 O.S. § 2017). Parent having right to recover damages for injury to minor child may assign such right to child. (10 O.S. § 17.1).

Assignment for Collection.

Assignment of claim to person outside state for purpose of collection in courts outside state by attachment, garnishment or other process, or out of wages or personal earnings of debtor, where creditor, debtor, and person or corporation holding money sought to be reached are all within jurisdiction of state courts, is prohibited. Violation is a misdemeanor and assignor is liable to debtor in amount of account claimed, with actual expenses and attorney's fees. (24 O.S. § 91-3).

Assignment of Wages.

See category 3 Business Regulation and Commerce, topic 3.11A Consumer Credit.

Assignment of accounts receivable is governed by Uniform Commercial Code. (12A O.S. § 9-102 et seq.). See category 3 Business Regulation and Commerce, topic 3.09 Commercial Code.

8.02 ATTACHMENT:

Grounds for Attachment.

Plaintiff in action for recovery of money may, at or after commencement of action, have attachment against property of one or more defendants if defendant: (1) Is foreign corporation or nonresident of state, and cause of action arose in state or is for debt or demand arising upon contract, judgment or decree; (2) has absconded with intention to defraud creditors; (3) has left county of residence to avoid service of summons; (4) so conceals self that summons cannot be served; (5) is about to remove all or part of defendant's property out of jurisdiction of court, with intent to defraud creditors; (6) is about to convert all or part of defendant's property into money for purpose of placing it beyond reach of creditors; (7) has concealed property or rights in action; (8) has assigned, removed or disposed of, or is about to dispose of, all or part of property with intent to defraud, hinder or delay creditors; (9) fraudulently contracted debt, or fraudulently incurred liability or obligations for which suit is brought; (10) damages for which action is brought are for injuries arising from commission of felony or misdemeanor; or (11) debtor has failed to pay price or value of article or thing delivered, which by contract debtor was about to pay upon delivery. (12 O.S. § 1151).

Proceedings.

Plaintiff must file verified application and attachment affidavit stating facts showing: (1) Nature of claim, (2) that claim is just, (3) amount affiant believes plaintiff ought to recover, and (4) existence of one or more grounds for attachment. Defendant must be served with notice (with copy of application attached) that order of attachment of property is requested and that written objection must be filed within five days of receipt of notice. If written objection is filed, court must set matter for prompt hearing at request of either party. (12 O.S. § 1152). Plaintiff cannot have judgment on claim before it is due, but proceedings on attachment may be conducted without delay. (12 O.S. § 1243, 1244).

Attachment Bond.

Before order of attachment is issued by court or clerk, plaintiff must execute undertaking, not less than double amount of plaintiff's claim, to secure payment to defendant of all damages sustained if order of attachment is wrongfully obtained, including reasonable attorney's fees. Bond not required if State is plaintiff. (12 O.S. § 1153). Defendant may request additional security by plaintiff at any time before judgment. (12 O.S. § 1240).

Order of Attachment, Property Liable.

Order of attachment must be directed and delivered to sheriff and require sheriff to attach property of defendant in sheriff's county, not exempt by law from being applied to payment of plaintiff's claim, to be stated in order. Orders of attachment may be issued to sheriffs of different counties. (12 O.S. § 1154, 1155, 1157). Property exempt from attachment, execution or other forced sale is specified by statute. (31 O.S. § 1 et seq.). See topic 8.05 Executions.

Execution and Return of Order.

If there are several orders of attachment against defendant, orders must be executed in order in which they are received by sheriff. Officer, with two householders, who must be first sworn or affirmed by officer, must make inventory and appraisement of all property attached, which must be signed by officer and householders, and returned with order. (12 O.S. § 1158).

Same officer may make different attachments of same property, and one inventory and appraisement is sufficient; not necessary to return same with more than one order. (12 O.S. § 1221). Order must be returned 20 days after it is issued. (12 O.S. § 1156). Return must show property attached, time it was attached, and all undertakings given under it. (12 O.S. § 1223).

When real property is attached, officer must leave copy of order with occupant, or, if no occupant, copy of order must be posted in conspicuous place on property. Third parties' interests in real property cannot be affected until copy of attachment order and legal description are recorded by county clerk of county where property is located. When personal property is attached, and sheriff can get possession, sheriff must take property into custody, and hold it subject to order of court. (12 O.S. § 1159).

Disposition of Property.

Court may direct sale of property during pendency of action, where, because of perishable nature or cost of keeping it, sale would benefit parties. (12 O.S. § 1229). Court may compel delivery of attached property to sheriff for sale. (12 O.S. § 1236). If judgment is rendered for plaintiff, property remaining in hands of officer, after applying monies arising from sale of perishable property, and so much of personal property and real property, if any, as may be necessary to satisfy judgment, must be sold by order of court, under same restrictions and regulations as if such property had been levied on by execution, and proceeds applied to satisfy judgment and costs. Any surplus of attached property or its proceeds must be returned to defendant. If proceeds are insufficient to satisfy judgment, execution may issue for residue as in other cases. (12 O.S. § 1235).

Redelivery on Bond.

Sheriff must deliver attached property to person in whose possession it was found, if such person executes bond or other undertaking to plaintiff, in presence of sheriff, in double appraised value of property, that property or its appraised value in money will be available to answer judgment of court in action. (12 O.S. § 1160).

Bond to Discharge Attachment.

If, at any time before judgment, defendant or other person on defendant's behalf executes undertaking to plaintiff in double amount of plaintiff's claim as stated in plaintiff's affidavit, to be approved by court, to effect that defendant will perform judgment of court, attachment must be discharged, and restitution made of any property taken under it or proceeds thereof. (12 O.S. § 1230).

Discharge of Attachment.

Defendant may, at any time before judgment on reasonable notice to plaintiff, move to discharge attachment as to all or part of property attached. Motion must be heard within five days after date filed. (12 O.S. § 1241, 1242). If judgment is rendered for defendant, attachment must be discharged and property attached, or its proceeds, must be returned to defendant. If attachment is discharged on motion prior to final judgment, defendant may, upon proper supplemental answer, recover his damages, as in other cases for wrongful attachment. (12 O.S. § 1234).

8.03 CONSUMER CREDIT:

Uniform Consumer Credit Code adopted. (14A O.S. § 1-101 et seq.). Section numbers of Okla. Statutes correspond to 1968 Official Text. Oklahoma Code should be consulted specifically due to complexity of subject.

Omitted from Okla. Statutes following sections of Official Text: §§ 1-105, 1 O.S. § 107(4), 1 O.S. § 203, 2 O.S. § 312, 3 O.S. § 311, 4 O.S. § 103(2), 6 O.S. § 104(1)(f) and (1)(g), and 6 O.S. § 116. Parts 3 and 4 of Art. 6 have been omitted and a Part 5 has been added which provides for a Department of Consumer Affairs. (§ 6-501 et seq.). Many sections and subsections covering adjustment of dollar amounts have been deleted but their purpose has been accomplished by Oklahoma's version of § 1-106.

All sections covering consumer related sales and loans have been omitted (§§ 2-602 to 2 O.S. § 604, 3 O.S. § 602 to 3 O.S. § 604), and all references thereto in §§ 1-303, 2 O.S. § 102, 2 O.S. § 103, 2 O.S. § 605, 3 O.S. § 102, 3 O.S. § 104, 3 O.S. § 605 and 6 O.S. § 102.

Sections Adopted in Substance.

§§ 3-503, 3 O.S. § 504, 3 O.S. § 505, 3 O.S. § 506, 3 O.S. § 507, 3 O.S. § 509, 3 O.S. § 511, 3 O.S. § 512, 6 O.S. § 108 have been adopted in substance; space does not permit showing all variances. Oklahoma Act should be consulted.

Major Deviations from Official Text.

§ 1-106, providing adjustments for dollar amounts, substantially follows 1974 Official Text. By specific reference, § 1-106 accomplishes same purpose as following subsections of 1968 Official Text, none of which appear in Oklahoma version: §§ 2-104(3); 2 O.S. § 106(3); 2 O.S. § 201(7); 2 O.S. § 203(4); 2 O.S. § 207(5); 2 O.S. § 407(4); 2 O.S. § 602(4); 3 O.S. § 104(2); 3 O.S. § 203(5); 3 O.S. § 203.1; 3 O.S. § 508(6); 3 O.S. § 510(2); 3 O.S. § 511(2); 3 O.S. § 514(2); 3 O.S. § 602(3). § 1-106 also applies to §§ 2-413 and 3 O.S. § 508B.

Note: Space does not permit showing all other deviations. Oklahoma Code should be consulted.

Following options and alternatives in Official Text have been exercised: § 2-404 alternative B adopted and 3 months changed to 30 days; § 2-413 alternative B adopted, with an exception added; § 3-404 alternative B adopted; §§ 4-107(1), 4 O.S. § 108(4), 4 O.S. § 111, 4 O.S. § 112, 4 O.S. § 203 substitute Insurance Department for Commissioner of Insurance; § 4-112(2) local administrative procedure act referred to; § 5-202(6) 30 days put in blank; § 5-301(1) $500 put in blank; § 5-301(2) $5,000 put in blank; § 5-301(3) $500 substituted for $100; § 6-103 Administrator defined as Administrator of Consumer Affairs as provided for in Article 6, Part 5; § 6-104(1)(e) and § 6-107 local administrative procedure act referred to.

§ 1-109 Prohibiting discrimination in extension of credit on basis of sex or marital status.

Following additions have been adopted:

§ 1-110 Issuer of credit card used in extension of credit in sales transactions in which seller is person other than card issuer may not prohibit seller from offering discount to card holder to induce payment by other means.

§ 2-211 In all sales discount to induce payment by cash, check or similar means rather than by use of open-end credit card account is not credit service charge (§ 2-109) if discount is offered to all prospective buyers clearly and conspicuously in accordance with regulations of Administrator. No surcharge may be imposed on cardholder who elects open-end credit card account. Seller who provides discount otherwise than in accordance with regulations of Administrator must make disclosures therein required. Sellers registered with U.S. Treasury as money-transmitter providing electronic funds transmission services may charge different price for service based on mode of transmission under certain conditions.

Credit Services Organization Act (24 O.S. § 131 et seq.) prohibits certain actions by credit services organizations and regulates activities and representations of such organizations and their agents and representatives.

Deferred Deposit Lending Act (59 O.S. § 3101 et seq.) regulates practice of deferred deposit lending.

8.04 CREDITORS' SUITS:

At any time after judgment, creditor may maintain action to subject any property or equitable interest of judgment debtor, unless expressly excluded by law from reach of creditors, to payment of judgment. (12 O.S. § 841).

8.05 EXECUTIONS:

Execution may issue only from court in which judgment was rendered. It is issued by clerk and is directed to sheriff of county to which execution is to issue. (12 O.S. § 731).

Kinds of Executions.

Executions are of three kinds: (1) Against property of judgment debtor; (2) for delivery of possession of property with damages and costs; (3) executions in special cases. (12 O.S. § 732).

Exemptions.

See topic 8.06 Exemptions.

Time for Issuance.

Execution may issue ten days after judgment is filed with court clerk. (12 O.S. § 990.3). If certain post trial motions filed, judgment is stayed until ten days after motions ruled upon. (12 O.S. § 990.4). If execution does not issue within five years of date of judgment, judgment becomes unenforceable. (12 O.S. § 735). Where deed, mortgage, note or contract contains "appraisement waived" provision, execution cannot issue until six months after judgment thereon. (12 O.S. § 760).

Stay of Execution.

Money judgments may be stayed by filing bond. Bond amount determined by court; generally, amount is twice amount of judgment, but can be adjusted downward if special circumstances exists. Stays in equitable actions may be granted by trial or appellate court. (12 O.S. § 990.4). Judgments against state or subdivisions are automatically stayed. (12 O.S. § 990.5). Generally, no execution may be taken until ten days after judgment, decree or order is filed with court clerk. Asset hearing proceedings are not stayed. (12 O.S. § 990.3). Ten-day automatic stay does not apply to specified actions, including divorce, custody and real property actions. Responsibility of judgment creditor or creditor's counsel to ensure that no execution or other proceeding for enforcement of judgment is sought or taken within ten-day stay. (12 O.S. § 990.3).

Property Subject to Execution.

Lands, tenements, goods and chattels, not exempt by law are subject to payment of debts and liable to be taken on execution and sold. (12 O.S. § 733). After judgment, any property of judgment debtor, including any equitable interest he may have, unless by law expressly excluded from being reached by creditors, is subject to satisfaction of judgment. (12 O.S. § 841). Rights or shares which any person may have in a domestic corporation or foreign corporation doing business in state may be taken on execution or order of sale. (12 O.S. § 891-6).

Levy must first be made upon goods and chattels; if there are none available, upon lands and tenements, which may be levied upon and sold subject to liens. (12 O.S. § 751).

Chattels, if subject to chattel mortgage duly filed, may be levied upon only after payment of the mortgage or deposit of the amount thereof with the county clerk. (46 O.S. § 67).

Indemnity.

Officer may refuse to levy against property claimed by third persons unless plaintiff furnishes indemnity bond. (12 O.S. § 755).

Return.

Execution must be returned within 60 days. (12 O.S. § 802).

Priorities.

There is no priority between executions issued on same day or during term in which judgments were rendered. (12 O.S. § 737).

Claims of Third Persons.

If property of debtor is subject to claims or liens of third persons, it may be levied upon, appraised and sold subject to such claims and liens. (12 O.S. § 751).

Sale of personalty must be on ten days notice by publication (12 O.S. § 757), and sale of realty must be on 30 days notice by publication and posting (12 O.S. § 764). Sale of realty must be confirmed by the court (12 O.S. § 765), and if judgment in satisfaction of which realty was sold, be reversed, title is not defeated, but restitution in money must be made by plaintiff (12 O.S. § 774).

Appraisement of realty must be by three disinterested persons, and sale must bring at least two-thirds of appraised value. (12 O.S. § 759).

Redemption.

See category 20 Mortgages, topics 20.01 Chattel Mortgages and 20.04 Mortgages of Real Property, subhead Redemption.

Supplementary Proceedings.

Where execution is returned unsatisfied, judgment debtor may be required to appear and answer concerning his property (12 O.S. § 842-4), and may be arrested and held for examination on satisfactory proof of danger of his leaving state (12 O.S. § 804-5). Debtor may also be required to answer as to income, liabilities, and produce documents. Creditor may obtain such information through written discovery. (12 O.S. § 842). Court authorized to issue contempt citation for failure to appear and, if personal service made on judgment debtor to appear, bench warrant for judgment debtor’s arrest. (12 O.S. § 842).

8.06 EXEMPTIONS:

Following property, subject to certain limitations, is exempt from attachment, execution and forced sale with respect to all persons: Pension money of disabled veterans (31 O.S. § 7); insurance (36 O.S. § 3631.1, 4026); home (or house trailer); household and kitchen furniture, including personal computer and related equipment; guns not exceeding $2,000 in value; cemetery lots; implements of husbandry; tools, apparatus and books of trade or profession not exceeding $10,000 in value; books and pictures; and wearing apparel not exceeding $4,000 in value; health aids; wedding and anniversary rings not exceeding $3,000 in value; interest in one motor vehicle, not exceeding $7,500 in value; all provisions and forage on hand; certain enumerated farm animals and equipment; right to receive alimony or support payments; and interest in claim for damages for personal bodily injury, death, or workers’ compensation, not to exceed $50,000; interests in tax exempt or tax-deferred retirement fund; individual development accounts; educational individual retirement accounts; earned income tax credits; and Oklahoma College Savings Plan accounts. (31 O.S. § 1).

Substitution.

There is no provision with respect to a debtor holding exempt money or other articles in place of articles specifically exempted but not owned by him.

Exemptions do not apply to nonresident or debtor removing his family from state. (31 O.S. § 3).

Debts Against Which Exemptions Not Allowed.

Exemption of homestead does not apply where debt is for purchase money, work and material used in construction or improvements, and taxes. Personal property is not exempt from attachment or execution for wages of clerk, mechanic, laborer or servant. (31 O.S. § 6).

Waiver of Exemption.

Right of exemption is personal privilege which may be waived, but legislature may change or amend terms of this article. (Const., art. 12, § 3). Exemption of earnings may be waived by assignment or contract in any form evidencing intent to waive. Personal property exemption may be waived by owner mortgaging or in any other way encumbering it.

Earnings.

Except in garnishment proceedings for collection of child support (see 12 O.S. § 1170 et seq.), debtor is entitled to exemption of 75% of all current wages or earnings for personal or professional services earned during preceding 90 days. (31 O.S. § 1). After execution, attachment or garnishment is issued, debtor may file application with court requesting exemption from such process by reason of undue hardship of portion of earnings from personal services necessary for maintenance of family supported by debtor. (31 O.S. § 1.1).

Uniform Consumer Credit Code enacted. (Title 14A). See topic 8.03 Consumer Credit.

Homestead Exemption.

See topic 8.10 Homesteads.

8.07 FORECLOSURE:

See topic 8.13 Liens; see also category 20 Mortgages, topics 20.01 Chattel Mortgages and 20.04 Mortgages of Real Property.

8.08 FRAUDULENT SALES AND CONVEYANCES:

Uniform Fraudulent Transfer Act adopted. (24 O.S. § 112 et seq.).

8.09 GARNISHMENT:

Creditor may proceed by garnishment against any person who is indebted to or has in his possession or control any property belonging to creditor’s debtor. (12 O.S. § 1171-1196).

Uniform Consumer Credit Code adopted. See topic 8.03 Consumer Credit.

Property Which May Be Reached.

Garnishee is liable from service of garnishment summons for all property (including property held under conveyance void as to creditors), moneys, credits and effects of debtor in garnishee's possession or control and all debts due or to become due to debtor except those exempt by law from execution, up to amount of creditor's claim as disclosed by garnishment affidavit. Garnishee is not liable on negotiable instrument, as public officer, or as sheriff or other officer for money collected for defendant under execution or judicial process. Judgment may be given for money owing buy not yet due, and garnishee is then liable to pay or deliver same when it becomes due. (12 O.S. § 1185-6).

Jurisdiction is in any court of record having civil jurisdiction. (12 O.S. § 1171).

Proceedings to Obtain.

Garnishment proceedings are commenced by filing affidavit on form prescribed by Administrative Director of Courts. Affidavit may be filed by plaintiff or his attorney at or before time garnishment summons is filed. (12 O.S. § 1172, 1176, 1178.2).

Prejudgment Garnishment.

Defendant must be given notice of issuance of garnishee summons, date of issuance and name of garnishee. (12 O.S. § 1174). Garnishee summons cannot be issued prior to judgment until: (1) Defendant is served with garnishment affidavit and notice that defendant may object to issuance of summons by filing written objection with court clerk and delivering or mailing copy to plaintiff or plaintiff's attorney within five days of service of such notice, and (2) plaintiff has filed undertaking executed by sufficient surety, approved by clerk or court, in sum not less than double amount of plaintiff's claim conditioned to pay all damages (including reasonable attorney's fee) if garnishment order is wrongfully obtained. If no objection is filed within five-day period, and if undertaking has been executed, clerk must issue garnishee summons. If written objection is filed, court must set matter for prompt hearing. (12 O.S. § 1172.1).

Post-judgment Garnishment.

If garnishment summons is issued in action after judgment is filed, court clerk must attach to summons notice of garnishment and exemptions (see 12 O.S. § 1174[C]) and application for defendant to request hearing. Court must issue order determining exemption and directing distribution of funds, as appropriate. Garnishee must pay funds directly to judgment creditor, unless otherwise ordered by court or required by federal law or regulation to be paid to court clerk. (12 O.S. § 1172.2).

General Garnishment.

Garnishment summons must be served on garnishee with copy of judgment creditor's affidavit, garnishee's answer form, notice of garnishment and request for hearing, and claim for exemptions in manner provided (see 12 O.S. § 2004) and must be returned with proof of service within ten days. Within ten days after service of garnishment, garnishee must file answer with court clerk and pay or deliver to judgment creditor or his attorney indebtedness or property belonging to or owed to defendant with copy of answer. Garnishment summons and affidavit are lien on defendant's property due at time of service of summons, to extent property is not exempt from garnishment. (12 O.S. § 1173.3, 1178.2).

Noncontinuing Earnings Garnishment.

Judgment creditor may obtain noncontinuing lien on earnings. (12 O.S. § 1173, 1178).

Continuing Earnings Garnishment.

Judgment creditor may obtain continuing lien on earnings. Garnishment summons served on garnishee is lien on defendant's property due at time of service or effective date of summons, to extent property is not exempt from garnishment. Lien attaches to subsequent nonexempt earnings until one of following occurs: (1) Total earnings subject to lien equals balance of judgment against defendant owing to plaintiff; (2) employment relationship is terminated; (3) judgment against defendant is vacated, modified or satisfied in full; (4) summons is dismissed; or (5) 180 days from date of service of affidavit and summons have elapsed. Continuing earnings garnishment may be suspended or modified for specific time within effective period of garnishment by written agreement of parties filed with court and mailed to garnishee. (12 O.S. § 1173.4). Lien has priority over subsequent garnishment liens or summonses, regardless of whether amounts withheld by garnishee are reduced by court or by agreement of parties. (12 O.S. § 1173.4).

Garnishment for Collection of Child Support.

Court may issue order for income assignment for collection of child support. Amount withheld by payor for income assignment for collection of child support pursuant to garnishee summons has priority over any prior or subsequent garnishments of same wages. (12 O.S. § 1173.1). Upon filing of affidavit and undertaking and, when hearing is required, after such hearing, where garnishment is for collection of child support, garnishee summons is issued by judge of district court if prejudgment garnishment is sought or by court clerk if post-judgment garnishment is sought and served upon garnishee. (12 O.S. § 1173.2, 1178.1). If post-judgment noncontinuing earnings garnishment or continuing earnings garnishment is issued against defendant already subject to income assignment for child support, garnishee must determine maximum percentage of defendant's disposable earnings (see 12 O.S. § 1171.2) and then deduct actual percentage of defendant's disposable earnings actually withheld under income assignment. Resulting percentage is amount to be withheld by garnishee, not to exceed 25%. (12 O.S. § 1173[I]).

See also category 14 Family, topic 14.06 Divorce, subhead Custody and Support of Children, catchline Child Support.

Practice.

At any time before final order or judgment against garnishee, defendant may defend or join in defending proceedings against garnishee. Garnishee at his option may join with defendant in defense of principal action. Issues between plaintiff and garnishee tried as in civil action except no trial can be had in garnishment until plaintiff has recovered judgment in principal action, and if judgment is for defendant, garnishment action will be dismissed, unless plaintiff perfects appeal, in which event garnishment is continued until disposition of such appeal. (12 O.S. § 1181-2). Garnishee may be examined by judgment creditor in any manner prescribed by discovery code. (12 O.S. § 1183).

Discharge of Garnishee.

Defendant may secure discharge of garnishee by filing bond with two sureties, copy of which must be served on plaintiff. Unless objection to sufficiency of sureties is made within three days thereafter, it is deemed to be waived. Filing of such bond constitutes general appearance by defendant. (12 O.S. § 1188).

Adverse Claims.

If garnishee's answer discloses that person other than defendant claims property, court may order such claimant to be interpleaded as defendant, require garnishee to deliver property to court, and give him discharge. (12 O.S. § 1184).

Judgment.

Proceedings against garnishee are deemed action against defendant and garnishee, and all provisions for enforcing judgment are applicable thereto, except that no trial of garnishment action can be had until plaintiff secures judgment in principal action. Judgment against garnishee discharges him from obligation to defendant for all goods and money paid pursuant to judgment. Court may adjudge recovery of any indebtedness, conveyance, or delivery to sheriff, or any officer appointed by judgment, of any property disclosed or found to be liable to be applied to plaintiff's demand, or by judgment pass title thereto, and can order a sale of property, and dispose of proceeds thereof, or any money or other things paid over or delivered to clerk or officer. (12 O.S. § 1182). No judgment may be rendered against state, county, city, town, board of education, school board or any municipal corporation as garnishee, but individual employee thereof served may be held liable for willful failure, neglect or refusal to answer. (12 O.S. § 1194).

Costs.

In case of trial between judgment creditor and garnishee, costs are awarded to judgment creditor and against garnishee if judgment creditor recovers more than garnishee admits in his answer; otherwise costs are awarded to garnishee and against judgment creditor. In trial to determine amount of child support owed, where any liability by garnishee is disclosed, costs are awarded to judgment creditor and against defendant, including reasonable attorney's fee. In all other cases court has discretion to award costs in favor of or against any party. Judgment creditor represented by attorney is entitled to fee of $50 or $100 for prosecuting specified garnishments, not to exceed $150 in any 12-month period. (12 O.S. § 1190).

Earnings.

In pre-judgment garnishment, 75% of natural person's total earnings in last 90 days, and 100% of earnings derived from personal services is exempt, except as specifically provided by statute. (12 O.S. § 1171.1).

As to post-judgment garnishment, 75% of natural person's current earnings (in last 90 days) for personal services is exempt, except as provided by statute. (31 O.S. § 4).

Debtor can claim other 25% exempt for next 90 days by filing verified application with court that same is necessary for use of family supported wholly or partly by his labor.

Person awarded child support in divorce action is treated more liberally and may garnish up to 60% of debtor's earnings, before or after judgment. (12 O.S. § 1171.2; 31 O.S. § 4).

Notice of order to be served on plaintiff or attorney, personally or by certified mail. (31 O.S. § 1.1).

Concealing Property.

Fraudulent concealing of property or failure to disclose truly all real and personal property, when lawfully ordered by a court to make disclosure in garnishee proceedings is a misdemeanor.

8.10 HOMESTEADS:

Home or house trailer that is principal residence is exempt from attachment or execution against resident owner. (31 O.S. § 1).

Limitation of Area.

Rural homestead consists of not more than 160 acres in one or more parcels to be selected by owner. (31 O.S. § 2). Rural homestead annexed by city or town and occupied and used for both residential and commercial agricultural purposes cannot consist of more than 160 acres in one or more parcels to be selected by owner. (31 O.S. § 2; Const., art. XII, § 1).

Limitation of Value.

Urban homestead owned and occupied as residence only or used for both residential and business purposes cannot exceed one acre. At least 75% of total square foot area of improvements for which homestead exemption is claimed must be used as principal residence to qualify for exemption. If more than 25% of total square foot area of improvements is used for business purposes, homestead exemption amount cannot exceed $5,000. (31 O.S. § 2; Const., art. XII, § 1).

Exemption does not apply in favor of nonresident or debtor who is in act of moving family from state or has absconded with family (31 O.S. § 3), nor against debt due for purchase money thereof, for taxes or other legal assessments thereon or for work or materials used for improvements thereon (Const., art. XII; 31 O.S. § 5).

Claim of Exemption.

Either spouse must inform the officer holding the process of the exemption claimed on the property. (58 Okla. 598, 160 Pac. 502).

Waiver of homestead rights may result only from conveyance or incumbrance as aforesaid, incurring indebtedness for improvements, abandonment by both parties with intent never to return or acquisition of another homestead. (44 Okla. 612, 145 Pac. 1163).

Conveyance or incumbrance of homestead (whether separate property or community property) may be only by instrument executed jointly by husband and wife (16 O.S. § 4) and subsequent abandonment of homestead does not validate separate conveyance. District court may authorize conveyance or mortgage of homestead held in joint tenancy where one spouse incapacitated. (16 O.S. § 7-10). Spouse in whose name title stands may convey where other spouse had abandoned him or her for more than one year or taken residence out of state. (16 O.S. § 6). In case of death of one spouse, see category 21 Property, topic 21.16 Real Property, subhead Joint Tenancy.

Proceeds of sale of homestead, to extent of exempt value, are exempt for a reasonable time to permit investment in other property. (127 Okla. 4, 259 Pac. 561).

Rights of Surviving Spouse and Family.

Homestead is not subject to administration. On death of either spouse the other may occupy it during lifetime, and on death of both spouses children may possess and occupy it until youngest becomes of age (58 O.S. § 311) when it is distributed like other real estate.

8.11 JUDGMENT NOTES:

See category 3 Business Regulation and Commerce, topic 3.02 Bills and Notes.

8.12 LEVY:

See topics 8.02 Attachment, 8.05 Executions.

8.13 LIENS:

Uniform Commercial Code adopted. As to applicability to various liens see 12A O.S. § 9-102. See category 3 Business Regulation and Commerce, topic 3.09 Commercial Code.

Loss or Extinguishment.

Lien is extinguished by lapse of time within which action may be brought on principal obligation (42 O.S. § 23), or by voluntary restoration of property to owner, where lien is dependent upon possession (42 O.S. § 25).

Enforcement.

Lien may be enforced by civil action in district court of county where property is situated, and action must be brought within one year from date of filing lien. (42 O.S. § 172). Where action is brought by subcontractor, original contractor must be made defendant, and if he fails to defend owner may defend at his expense, and owner is entitled to retain from contractor amount of all such claims, costs and expenses until final adjudication. (42 O.S. § 173). Where judgment is rendered enforcing lien, real estate or other property is ordered sold, without prejudice to any prior encumbrancer, owner or other person not party (42 O.S. § 175), and court must fix reasonable attorney's fee, to be taxed as costs in action (42 O.S. § 176).

Attachment Lien.

See topic 8.02 Attachment.

Attorney's Lien.

See category 18 Legal Profession, topic 18.01 Attorneys and Counselors.

Bankers' Lien.

See category 3 Business Regulation and Commerce, topic 3.01 Banks and Banking.

Carrier's Lien.

See category 3 Business Regulation and Commerce, topic 3.08 Carriers.

Chattel Mortgage Lien.

See category 20 Mortgages, topic 20.01 Chattel Mortgages.

Collateral Security.

See topic 8.15 Pledges.

Commercial Real Estate Broker's Lien.

See category 3 Business Regulation and Commerce, topic 3.06 Brokers.

Execution Lien.

See topic 8.05 Executions.

Factor's Lien.

See category 3 Business Regulation and Commerce, topic 3.14 Factors.

Inmates.

Claims in form of lien from inmate or former inmate arising from prosecution, incarceration, or supervision of inmate shall not be accepted by any clerk or official, unless accompanied by valid order from court of competent jurisdiction. (57 O.S. § 566.5).

Judgment Lien.

See category 5 Civil Actions and Procedure, topic 5.15 Judgments.

Landlord's Lien.

See category 21 Property, topic 21.10 Landlord and Tenant.

Liens on Exempt Property.

See topic 8.06 Exemptions.

Lien for Federal Taxes.

Revised Uniform Federal Tax Lien Act enacted. (68 O.S. § 24300-24302.4). Notice of lien of Federal taxes may be filed by collector in office of county clerk.

Liens on Homestead.

See topic 8.10 Homesteads.

Liens on Mines and Mining Property.

See category 19 Mineral, Water and Fishing Rights, topic 19.01 Mines and Minerals.

Mechanics' Liens.

Person who, under written or oral contract with owner of land, performs labor, furnishes material or leases or rents equipment used on said land for erection, alteration or repair of building or improvements thereon, or who performs labor in putting fixtures, machinery or attachments in or on such building or improvements, has lien upon all of building and improvements, and upon land if owned by person with whom such contract was made, which is preferred to all other liens thereon attaching subsequent to commencement of such building, furnishing or putting up of such fixtures, machinery or attachments, or making of such repairs or improvements. (42 O.S. § 141). Lien on behalf of corporation may be signed and verified by any officer or agent without attestation, seal, or acknowledgment. (42–154).

Procedure to Perfect.

Lien claimant must file, within four months after date on which last material or equipment was furnished or work done, in office of county clerk of county in which land situated, statement, verified by affidavit, setting forth amount claimed and items thereof as nearly as practicable, names of owner, contractor and claimant, and description of property subject to lien. (42 O.S. § 142).

No lien affecting property presently occupied as dwelling by owner is enforceable unless, prior to first performance of labor or first furnishing of materials, original contractor provided one of owners written notice containing specified language. (42 O.S. § 142.1).

Lien by or Through Subcontractor.

Person who furnishes material or leases or rents equipment or performs labor as subcontractor, artisan or day laborer in employ of contractor, may obtain similar lien, in same manner, and to same extent, as original contractor for amount due him; artisan or day laborer in employ of and any person furnishing material to subcontractor, may obtain similar lien, in same manner, and to same extent, as subcontractor, for amount due him. Claim must be filed within 90 days after material or equipment was last furnished or labor last performed, and notice thereof served on owner. Owner of land affected by such lien is not liable to claimant for more than he contracted to pay original contractor. Risk of payments to original contractor is on owner until expiration of time for filing liens and owner is not liable to contractor until expiration of such time. (42 O.S. § 143). Prior to filing lien statement, but no later than 75 days after date material, services, labor or equipment was supplied, claimant must send notice to last-known address of original contractor and property owner. Pre-lien notice is only required when aggregate claim is more than $2,500; pre-lien notice requirements do not apply to residential projects or oil and gas well liens. Claimant must furnish notarized affidavit along with lien statement to county clerk where lien is filed. (42 O.S. § 142.6, 146). Within one business day after lien statement is filed, county clerk must mail notice to property owner. (42 O.S. § 143.1).

Discharge of lien may be accomplished by depositing in office of county clerk where lien has been filed cash or bond for 125% of lien claim; clerk notifies lien claimant, who may object to bond within ten days after notice mailed. (42 O.S. § 147.1).

Public Works.

Contractor for public building or other public work, in sum exceeding $1,000, must give bond to state, in not less than total amount of contract, conditioned for payment of all indebtedness incurred for material or labor in performing contract. Bond must be filed with contracting agency, and any person to whom any sum is due for material or labor may sue on bond within one year from completion of work, but not thereafter. (61 O.S. § 1, 2).

Construction contractors should also be aware of application of Fair Pay for Construction Act, which regulates payment methods on commercial construction projects. (15 O.S. § 621 et seq.). Details of regulations are beyond scope of this section.

Molders' Lien.

See category 3 Business Regulation and Commerce, topic 3.13 Contracts.

Oil and Gas Lien.

See category 19 Mineral, Water and Fishing Rights, topic 19.01 Mines and Minerals.

Real Estate Mortgage Lien.

See category 20 Mortgages, topic 20.04 Mortgages of Real Property.

Tax Lien.

See category 22 Taxation, topics 22.01 Administration, subhead Lien; 22.13 Property Taxes, subheads Levy, Liens, Sale and Redemption.

Hospitals' Lien.

Every hospital in Oklahoma as well as certain medical diagnostic imaging facilities, which furnishes emergency medical or other service to any patient injured in accident not covered by Workmen's Compensation, shall, if such injured party shall assert claim against another for damages on account of such injuries, have lien upon that part going to such patient of any recovery or sum collected by such patient, or his heirs, personal representatives or next of kin in case of his death, whether by judgment, settlement or compromise to amount of reasonable and necessary charges of such hospital for care of such patient in such hospital up to date of payment of such damages; however, this lien is inferior to any lien or claim by any attorney for handling claim. (42 O.S. § 43). No such lien shall be effective unless filed with county clerk of county where hospital is located, on mechanic's lien docket, prior to payment of any money to such injured person; nor unless hospital also sends copy of such notice to person alleged to be liable to injured party prior to any payment for such injuries. Hospital shall also send copy of notice to insurer of person liable, if known, patient upon whom such service has been performed, and attorney for patient. Lien may be enforced by civil action in district court of county where lien was filed. Action must be brought within one year after hospital becomes aware of judgment, settlement or compromise of injured person's claim. (42 O.S. § 44).

Physicians' and Professional Persons Engaged in Healing Arts' Lien.

(42 O.S. § 46). Action to enforce lien must be brought within one year after physician becomes aware of final judgment, settlement or compromise of injured person's claim.

Vendors' Lien.

One who sells real property has a vendor's lien thereon, independent of possession, for unpaid purchase price, subject to rights of purchasers in good faith, without notice. (42 O.S. § 26). Purchase price mortgage given at time of conveyance has priority over all other liens created against purchaser, subject to operation of recording laws. (42 O.S. § 16). Absolute transfer by seller of contract for payment of purchase price waives lien. (42 O.S. § 27). Uniform Commercial Code governs vendor's lien on personal property. (12A O.S. § 2-702).

Warehouseman's Lien.

Governed by Uniform Commercial Code. (12A O.S. § 7-209). Statutory lien arises in favor of Oklahoma Commodity Storage Indemnity Fund following suspension, revocation or surrender of charter, license or bond of warehouse where nonperishable grains or seeds are stored. (2 O.S. § 9-24).

Other liens are granted to: Artisan (42 O.S. § 91A); servicer of farm equipment (42 O.S. § 91.2); blacksmiths, wheelwrights and horseshoers (42 O.S. § 131); inn, hotel, boardinghouse and rooming-house keepers (15 O.S. § 501); landlords (41 O.S. § 42); laborers (42 O.S. § 92, 3, 5, 6); Oklahoma Department of Human Services for payments of medical assistance to inpatients of nursing homes (56 O.S. § 200b); persons furnishing labor, money, materials or supplies for production, altering or repair of personal property (42 O.S. § 97-102); railroad employees, including mechanics, builders, artisans and others (42 O.S. § 161-4); threshers (42 O.S. § 111, 115); agriculture suppliers (42 O.S. § 47); insurance agents paying premiums (42 O.S. § 146); possessor of abandoned vehicle (47 O.S. § 907); towing or storage of vehicle authorized by public agency (47 O.S. § 962). Lien can be filed against real property for nonpayment of certain costs incurred by county in eradicating specified noxious weeds. (2 O.S. § 3-220).

8.14 MECHANICS' LIENS:

See topic 8.13 Liens.

8.15 PLEDGES:

Pledges are among security devices governed by Uniform Commercial Code. (12A O.S. § 9-102). See category 3 Business Regulation and Commerce, topic 3.09 Commercial Code.

Remedies of Pledgee.

Governed by Uniform Commercial Code. (12A O.S. § 9-201 et seq.).

Trust Receipts Security.

Governed by Uniform Commercial Code. (12A O.S. § 9-102).

Pawnshops regulated by Oklahoma Pawnshop Act. (59 O.S. § 1501).

8.16 RECEIVERS:

Appointment.

Receiver may be appointed by judge of Supreme Court or district court: (1) In action by vendor to vacate fraudulent purchase of property, by creditor to subject any property or fund to creditor's claim, or between partners or others jointly owning or interested in any property or fund, upon application of party whose right to or interest in property or fund, or proceeds thereof, is probable and property or fund is in danger of being lost, removed or materially injured; (2) in action by mortgagee for foreclosure of mortgage and sale of mortgaged property or in connection with mortgagee foreclosing mortgage by power of sale (see 46 O.S. § 40 et seq.) (a) where it appears mortgaged property is in danger of being lost, removed or materially injured, or (b) that condition of mortgage has not been performed, and that property is probably insufficient to discharge mortgage debt, or (c) that condition of mortgage has not been performed and mortgage instrument provides for appointment of receiver; (3) after judgment, to carry judgment into effect; (4) after judgment, to dispose of property according to judgment, or to preserve it during pendency of appeal, or in proceeding in aid of execution, when execution has been returned unsatisfied, or when judgment debtor refuses to apply property in satisfaction of judgment; (5) in cases when corporation has been dissolved, or is insolvent, or in imminent danger of insolvency, or has forfeited its corporate rights; (6) in all other cases where receivers have been appointed by courts of equity. (12 O.S. § 1551).

Other proceedings in which receiver may be appointed include attachment proceedings (12 O.S. § 1224-5); quo warranto proceeding against corporations (12 O.S. § 1538); dissolution proceedings against corporations (18 O.S. § 1100-1114); proceedings against savings and loan associations (18 O.S. § 381.63); proceedings against persons or associations engaged in unreasonable restraint of trade (79 O.S. § 21-24).

Persons Eligible.

No party or attorney or person interested in action may be appointed receiver except by consent of all parties. (12 O.S. § 1552). Trust company may act as receiver. (6 O.S. § 1001).

Oath and Bond.

Before assuming duties, receiver must take oath and give bond to be approved by court. (12 O.S. § 1553).

Powers.

Receiver has, under control of court, power to bring and defend actions in own name, as receiver; to take and keep possession of property, to receive rents, collect debts, compound for and compromise same, make transfers, and generally to do such acts respecting property as courts may authorize. Funds in hands of receiver may be invested upon interest, by order of court, if all parties to action consent. (12 O.S. § 1554-1555).

8.17 REDEMPTION:

See categories 20 Mortgages, topics Chattel Mortgages and Mortgages of Real Property, subhead Redemption; Taxation, topic Property (Ad Valorem) Taxes, subhead Sale and Redemption.

8.18 SUPPLEMENTARY PROCEEDINGS:

See topic 8.05 Executions.

8.19 TRUSTEE PROCESS:

See topic 8.09 Garnishment.

8.20 USURY:

See category 3 Business Regulation and Commerce, topic 3.19 Interest.

9 DISPUTE RESOLUTION

9.01 ALTERNATIVE DISPUTE RESOLUTION:

See topics 9.02 Arbitration and Award, 9.02A Mediation.

Mandatory (Alternative) Dispute Resolution.

District court may order settlement conference upon its own motion. (tit. 12, c. 2, App. 1, Rule 5[L]). Under local court rules for Seventh Judicial District (Oklahoma City metropolitan area), district court may order mediation or nonbinding arbitration on its own motion. (Rules 47, 48).

Voluntary (Alternative) Dispute Resolution.

District court may order settlement conference at request of any party. (tit. 12, c. 2, App. 1, Rule 5[L]). Under local court rules for Seventh Judicial District (Oklahoma City metropolitan area), district court may order mediation or nonbinding arbitration on motion of any party or by agreement of parties. (Rules 47, 48).

Alternative Dispute Resolution Jurisdictional Bodies/Commissions.

Making of agreement providing for arbitration in state confers jurisdiction on any court of competent jurisdiction of state to enforce agreement and to enter judgment on award thereunder. (15 O.S. § 802). Procedures and Guidelines of Oklahoma County Bar Association Fee Grievance and Ethics Committee provide for arbitration of fee disputes by Committee panel.

Alternative Dispute Resolution Acts.

Uniform Arbitration Act.

(15 O.S. § 1851 et seq.). See topic 9.02 Arbitration and Award.

Choice in Mediation Act.

(12 O.S. § 1831 et seq.). See topic 9.02A Mediation.

Dispute Resolution Act.

(12 O.S. § 1801 et seq.). See topic 9.02A Mediation.

District Court Mediation Act.

(12 O.S. § 1821-1825). See topic 9.02A Mediation.

9.02 ARBITRATION AND AWARD:

Forms and Requisites of Submission.

On application of party showing agreement to submit controversy to arbitration, and opposing party's refusal to arbitrate, court shall order parties to proceed with arbitration, unless court finds no agreement to arbitrate exists. (12 O.S. § 1858).

Judgment on Award.

Making of agreement providing for arbitration in state confers jurisdiction on any court of competent jurisdiction in state to enter judgment on arbitration award. (12 O.S. § 1877). Upon application of party to agreement, court must confirm award unless grounds are urged for vacating, modifying or correcting award. (12 O.S. § 1873).

Enforcement.

Court having jurisdiction over parties and controversy has jurisdiction to enforce arbitration agreement. (12 O.S. § 1877).

Mandatory Arbitration.

See topic 9.01 Alternative Dispute Resolution, subhead Mandatory (Alternative) Dispute Resolution.

Powers of Arbitrators.

Powers include issuing provisional remedies (12 O.S. § 1859), awards granting summary disposition (12 O.S. § 1866), subpoenas, authorization of depositions, protective and other discovery orders (12 O.S. § 1868), conducting hearing, rendering final award (12 O.S. § 1870), modifying or correcting award (12 O.S. § 1871).

Rescission.

Written agreement to submit controversy to arbitration is valid, enforceable and irrevocable, except upon such grounds as exist at law or in equity for revocation of any contract. (12 O.S. § 1857).

Uniform Arbitration Act Adoption/Deviation.

Uniform Arbitration Act adopted. (12 O.S. § 1851 et seq.). Court appoints one arbitrator, unless arbitration agreement provides otherwise. (12 O.S. § 1864). Act does not apply to collective bargaining agreements or to contracts which reference insurance, except contracts between insurance companies. (12 O.S. § 1855[D]).

Jurisdictional Arbitration Acts.

Court having jurisdiction over parties and controversy has jurisdiction to enforce agreement and award. (12 O.S. § 1877). Venue determined according to statute. (12 O.S. § 1858). Court may compel arbitration. (12 O.S. § 1858). Separability doctrine rejected. (915 P.2d 910 [Okla. 1996]).

Credentials of/Qualifications of/Standards for Arbitrators.

Neutral arbitrators required by agreement to arbitrate may not hold conflict of interest. (12 O.S. § 1862). Parties may agree as to method of selecting arbitrator or, if no agreement for method exists, court may appoint. (12 O.S. § 1862). Arbitrator must disclose facts bearing on impartiality. (12 O.S. § 1863). Parties relatively free to select individuals as arbitrators, but certain minimum standards of knowledge, impartiality and moral character are required that tend to equate private arbitrator with public judge. (618 P.2d 925 [Okla. 1980]). Arbitrators not required to be completely impartial or disinterested, but must be able to adjudicate dispute fairly and impartially. (861 P.2d 1000 [Okla. Civ. App. 1993]).

9.02A MEDIATION:

See topic 9.01 Alternative Dispute Resolution.

Jurisdictional Mediation Acts.

Choice in Mediation Act.

(12 O.S. § 1831 et seq.). Any county, municipality, accredited law school, school district, board, commission, department or agency of state or its political subdivisions authorized to establish programs for purpose of providing mediation services pursuant to act. Choice in Mediation Act supplements and implements Dispute Resolution Act.

Dispute Resolution Act.

(12 O.S. § 1801 et seq.). Rules and procedures implementing act. (tit. 12, c. 37, App.).

Any county, municipality, accredited law school or state agency is authorized to establish programs for purpose of providing mediation services pursuant to act. Written consent to dispute resolution proceedings required. Any applicable statute of limitation is tolled during mediation period.

District Court Mediation Act.

(12 O.S. § 1821-1825). District court, by agreement of parties, may refer any civil case, including any domestic relations case, or any portion of case for mediation. Specific provisions concerning participants, qualifications and duties of mediator, responsibilities of parties, and confidentiality of communications made during mediation process apply to any mediation ordered by court under act. Referral to mediation may be made at any time case is pending. Nothing in act precludes parties from agreeing to participate in any alternative dispute resolution process, including mediation, independent of act or any related court order.

Mediation available to any party to claim under Workers' Compensation Act. (85 O.S. § 3.10).

Credentials of/Qualifications of/Standards for Mediators.

Under District Court Mediation Act, court may maintain list of qualified mediators to assist parties in selection of mediator. To be placed on list, individual must meet certain minimum requirements. (12 O.S. § 1825).

10 DOCUMENTS AND RECORDS

10.01 ACKNOWLEDGMENTS:

Uniform Law on Notarial Acts adopted. (49 O.S. § 111 to 121). See topic 10.03 Notaries Public.

Within State.

May be taken before notary public, county clerk, or clerk of district court. (16 O.S. § 35). Notary public and court clerk fees are specified by statute. (28 O.S. § 31; 47).

Outside State but Within United States, Its Possessions and Canada.

May be taken before any notary public, clerk of a court of record, or commissioner of deeds. (16 O.S. § 35).

Other Foreign Countries.

May be taken before any court of record or clerk of such court, or any U. S. consul. (16 O.S. § 35).

Persons in Military Service.

Acknowledgment of person in U. S. military service, and of his or her spouse if the instrument requires a joint or separate acknowledgment of the spouse, may be taken before any officer in such service of rank of Sergeant or higher, and, if such person is engaged in U. S. naval service, before any officer of rank of Petty Officer or higher, and, if such person is engaged in any other armed service of the U. S., before any officer of a rank corresponding to those aforementioned. No authentication of an officer's certificate required, but officer must sign his name and set forth his rank or title, branch of service, and home address. Such acknowledgments of military persons and spouses made since Sept. 8, 1939, are validated. (72 O.S. § 50.1-50.4).

Married Women.

There are no special provisions as to married women, but where persons acknowledging are husband and wife this fact should be shown specifically in the certificate of acknowledgment.

Attorney In Fact.

Power of attorney for conveyance of real property, or for execution or release of any mortgage, must be executed, acknowledged, and recorded in manner required for deeds and mortgages, and must be recorded in county where land is situated. (16 O.S. § 20).

Corporations.

Every deed or other instrument affecting real property, executed, by a corporation, must be acknowledged by the officer or person subscribing name of corporation. (16 O.S. § 95).

General Requirements of Certificate.

Notary public must authenticate all his official acts with notarial seal containing his name and place of residence, and must add to official signature the date of expiration of his commission. (49 O.S. § 5).

Authentication.

No authentication of authority of officer taking acknowledgment, whether within or without the state, is required, except his seal of office. (16 O.S. § 35). Secretary of State authenticates certificates made within this state for use elsewhere; fee $3.

Clerk of district court of county in which notary public resides is authorized to certify that person is notary public and authorized to act during time commission is in force. Fee $3. (49.2).

Necessity and Effect.

Not necessary to validity of deed or other instrument relating to real estate as between parties (16 O.S. § 15), but necessary to entitle instrument to record (16 O.S. § 26). Duly acknowledged instrument admitted in evidence without further proof. (16 O.S. § 27).

Forms.

Every acknowledgment must be under the seal of the officer taking the same. (16 O.S. § 35). Notary public must add to official signature date of expiration of commission and commission number. (49 O.S. § 5).

Forms

Form for Individual.

Acknowledgment of instrument affecting real estate must be substantially in form provided for in Uniform Law on Notarial Acts (49 O.S. § 111) or substantially in following form: State of Oklahoma: . . . . . . County: ss: Before me, ..., in and for this state, on this . . . . . . day of . . . . , personally appeared . . . . . . to me known to be the identical person(s) . . . . . . who executed the within and foregoing instrument, and acknowledged to me that . . . . . . executed the same as . . . . . . free and voluntary act and deed for the uses and purposes therein set forth.

. . . . Notary Public. (Seal)

My commission expires . . . .

My commission number is . . . .

If grantor signs by mark, insert in above form after words “foregoing instrument” words “by the person’s mark in my presence and in the presence of . . . . . . and . . . . . . as witnesses,” and one of two attesting witnesses must write grantor’s name near mark. (16 O.S. § 34).

Form for Corporation.

Deed or other instrument affecting real property executed by corporation must be acknowledged by officer or attorney in fact substantially in form provided for in Uniform Law on Notarial Acts (49 O.S. § 111) or substantially in following form (16 O.S. § 95): State of Oklahoma: . . . . . . County: ss: Before me, a . . . . . . in and for this state, on this . . . . . . day of . . . . . ., personally appeared . . . . . ., to me known to be the identical person who subscribed the name of the maker thereof to the foregoing instrument as its (attorney in fact, president, vice-president, chair or vice-chair of the board of directors or mayor, as the case may be) and acknowledged to me that . . . . . executed the same as . . . . . free and voluntary act and deed, and as the free and voluntary act and deed of the corporation for the uses and purposes therein set forth.

Statutory Short Forms of Acknowledgment.

Uniform Law on Notarial Acts (49 O.S. § 111, et seq.) adopted. Hence, short forms of acknowledgment therein set forth may be used for purposes indicated.

Validating Acts.

All written instruments executed and acknowledged in conformity with law of any state, territory, or foreign country are validated. (16 O.S. § 37 b). See also supra, subhead Persons in Military Service.

Alternative to Acknowledgment or Proof.

No statutory provision.

10.02 AFFIDAVITS:

May be used to verify pleading; to prove service of summons, notice, or other process in action; to obtain provisional remedy, examination of witness, or stay of proceedings; on a motion; in other cases permitted by law. (12 O.S. § 431). May be made before any person authorized to administer oaths, in or out of state. (12 O.S. § 432). Person conscientiously scrupulous of taking oath may affirm with same effect. (12 O.S. § 72).

Form

State of Oklahoma . . . . . . County, ss: John Jones, of lawful age, being by me first duly sworn according to law, deposes and says: . . . .

Sig. . . . .

Subscribed and sworn to before me this . . . . . . day of . . . . . ., 20 . . . .

(Seal)

. . . . .Notary Public.

My commission expires on . . . .

My commission number is . . . .

Alternative to Affidavit.

Statement under penalty of perjury allowed, except to verify deposition and certain oaths. Statement not applicable to acknowledgments required for instruments affecting real property. (12 O.S. § 426).

10.03 NOTARIES PUBLIC:

Uniform Law on Notarial Acts adopted. (49 O.S. § 111 to 121).

Notary Commission.

Applicant for notary commission must be 18 years of age, U.S. citizen, and employed within or legal resident of state. Felony conviction is grounds for removal. Term of commission, issued by Secretary of State, is four years. Fee for new commission is $25; renewal fee is $20. Same day filing service available for additional $25. Commission must be filed in office of Secretary of State, together with oath of office, notary's loyalty oath, notary's official signature, impression of notary's official seal, and bond of $1,000; filing fee of $10. (49 O.S. § 1, 2). Notary must use seal to authenticate all official acts, attestations and instruments, and must add date of expiration of commission and commission number to official signature. (49 O.S. § 5). Notary fee for each certificate and seal is 25¢. (28 O.S. § 47).

Powers.

Notary has authority within any county in state to make proof and acknowledgment of deeds and other written instruments, administer oaths, demand acceptance or payment of bills and notes and protest same, and other powers and duties provided by law and commercial usage. Notary cannot notarize own signature. (49 O.S. § 6).

Certificate of Authority.

See topic 10.01 Acknowledgments, subhead Authentication.

10.04 RECORDS:

Secured interests are governed by Uniform Commercial Code. (12A O.S. § 9-101 et seq.). See category 3 Business Regulation and Commerce, topic 3.09 Commercial Code. Also see category 20 Mortgages, topic 20.01 Chattel Mortgages, subhead Filing.

County clerk is ex officio register of deeds. (19 O.S. § 225). *For list of Counties and County Seats see first page for this state in Volume containing Practice Profiles Section.*

Requisites for Recording.

All instruments affecting in any way title to real estate must be recorded in order to give notice to innocent purchasers and encumbrancers for value, and to be entitled to record, they must be acknowledged before a notary public or some other person authorized to take acknowledgments (16 O.S. § 26) and must under signature affixed thereto, bear printed or typed name of signer thereof (19 O.S. § 261). Instrument must be original or certified copy of original instrument, plainly printed, typed or handwritten, clearly legible in English language, xerographically reproducible, with specific legal description and such information as required for indexing (19 O.S. § 287, 291), and must list mailing address of grantee, mortgagee, assignee or other designated party to which instrument is to be delivered after recording. If instrument contains more than 25 legal descriptions requiring separate entries in indexes, descriptions must be sorted by addition, block and lot if platted property, or by township, range, and section if described by governmental survey description. Unless otherwise provided by law, documents filed of record cannot be larger than 8½” × 14”; top margin must be at least 1” and all other margins at least ½”. Documents must provide area free of printed information sufficient to accommodate affixation of required documentary stamps (68 O.S. § 3201), required certification of payment of mortgage taxes (68 O.S. § 1901 et seq.), and recording information (16 O.S. § 28, 19 O.S. § 298). Recording of affidavit relating to real property. (16 O.S. § 82). County assessor may allow filing of plats, subdivision plats, or re-plats in digital electronic format. (19 O.S. § 288.3). Electronic documents presented in compliance with Uniform Electronic Transaction Act are acceptable for filing. (19 O.S. § 298.1). Recording for additions and subdivisions within municipalities have particular requirements governed by statute. (11 O.S. § 41-101 et seq.).

Sham Legal Process.

County clerk may refuse to file any instrument presented for filing if clerk believes that instrument constitutes sham legal process, as defined by 21 O.S. § 1533. Any person aggrieved by clerk’s refusal to file instrument may petition district court for writ of mandamus to compel clerk to record instrument. At time of refusal, person aggrieved must file notice of refusal, with copy of refused instrument attached, with county clerk for purpose of preserving priority of filing. (19 O.S. § 267).

Recording Fees.

County clerk, as register of deeds, charges following fees: first page $8, each additional page, $2; certifying photographic copy, $1 per page; mechanics’ or materialmen’s liens, for recording, $10; for notice, $8; for each additional page or exhibit, $2. Actual cost of postage also charged. (28 O.S. § 32). Additional fee of $1 per legal description in excess of 25 legal descriptions per page. (19 O.S. § 298). Fee for recording nonconforming instruments pursuant to 19 O.S. § 298 is $25 for first page and $10 for each additional page. (28 O.S. § 32).

Electronic Records and Signature Act (15 O.S. § 963-968) does not require persons to use or permit use of electronic records or signatures; however, except as otherwise provided, record or signature cannot be denied legal effect, validity or enforceability solely because it is in form of electronic record or electronic signature.

Act does not apply to rules of law relating to: (1) Creation or execution of will; (2) creation, performance or enforcement of indenture, declaration of trust, or power of attorney; (3) mortgages, conveyances, surface and mineral leases, rights-of-way, and easements of real property; (4) persons licensed as professional land surveyors or professional engineers (59 O.S. § 475.1 et seq.), or persons licensed as architects or licensed landscape artists (59 O.S. § 46.1 et seq.); and (5) rules of law expressly requiring written record when application of act would cause result inconsistent with intent as expressed by rule of law.

Transaction subject to act also is subject to Uniform Commercial Code and any applicable rules of law relating to consumer transactions or consumer protection. See category 3 Business Regulation and Commerce, topics 3.09 Commercial Code and 3.12 Consumer Protection.

Uniform Real Property Electronic Recording Act (16 O.S. §§ 28, 86.1 et seq.) allows use of electronic documents and signatures, including notarizations, for purposes of satisfying laws requiring original documents, signatures or seals.

In any legal proceeding, admissibility into evidence of electronic record or electronic signature is determined by rules of evidence. (12 O.S. § 2101 et seq.).

Use of photostatic records is permitted by vote of county commissioners. (67 O.S. § 91). Custodian of records may permit records to be removed for purpose of copying. (67 O.S. § 301).

Release of Filed Information over Telephone.

County clerk may release over telephone any information requested from files open to public inspection in clerk's office, including Uniform Commercial Code information. Fee of $3 may be charged for each individual phone request answered over telephone. (19 O.S. § 264).

Orders in Bankruptcy Proceedings.

Certified copies of orders of federal courts in bankruptcy proceeding may be filed and recorded in office of county clerk and thereupon constitute constructive notice. (19 O.S. § 262).

Effect of Record.

Every conveyance of real property acknowledged or approved, certified and recorded as prescribed by law is constructive notice of its contents to subsequent purchasers, encumbrancers or creditors, from time of filing for record. (16 O.S. § 16). Any person with legal capacity to own land, who has unbroken chain of title of record to an interest in land for 30 years or more, has marketable title, subject to certain exceptions. All other outstanding interests declared null and void. If 30 year period expired prior to July 1, 1972, period extended to July 1, 1972. (16 O.S. § 71 et seq.). Stray instrument does not create root of title pursuant to 16 O.S. § 71 et seq. if otherwise valid, uninterrupted chain of title traceable to instrument that is root of title is apparent from record, and current owner under such chain of title records affidavit alleging possession of property and that parties claiming under stray instrument own no interest. Provision not applicable to person or entity claiming valid interest under stray instrument who files notice of such claim with county clerk of county where land or interest is located within specified time period. (16 O.S. § 76).

If recorded in county clerk's office in proper county, instrument containing any of following defects is deemed valid after expiration of five years from filing of instrument for record: (1) Instrument not signed by proper representative of legal entity; (2) representative not authorized to execute instrument on behalf of legal entity; (3) power of attorney not filed of record for attorney in fact executing instrument; (4) record does not show seal of legal entity; (5) instrument is not acknowledged; (6) deed or conveyance does not bear endorsement of approval by appropriate governmental planning authority having jurisdiction; or (7) any defect in execution, acknowledgment, recording or certificate of recording of instrument. (16 O.S. § 27a).

Recorded signed document relating to title to real property creates rebuttable presumptions with respect to title, as specified in statute. (16 O.S. § 53). Rebuttable presumption that facts stated in recorded affidavit are true as they relate to real estate, its use, or its ownership. (16 O.S. § 82).

See also Simplification of Land Titles Act (16 O.S. § 61 et seq.) as to acquisition of marketable title by certain kinds of purchasers for value of interest in real estate as against certain kinds of adverse claimants, wherein determinative time period is ten years. Space limitations preclude analysis herein.

Transfer of Decedent's Title.

Certified copy of judgment or decree of district court, in exercise of its probate jurisdiction, making distribution of real property or determining any matter affecting title to real property must be recorded in office of county clerk of county in which property affected is situated. (58 O.S. § 711).

Filing Under Commercial Code.

See categories 3 Business Regulation and Commerce, topic Commercial Code; Mortgages, topics Chattel Mortgages, subhead Filing. Proper place to file financing statement is as follows: (a) For consumer goods, farm equipment, farm products, livestock, or accounts or general intangibles relating to sale of farm products, filing is in county clerk's office of county where debtor resides (or if debtor not resident of state then in county where goods are kept), and in addition when collateral is crops filing must be made in county clerk's office of county where land is located; (b) for timber, minerals, accounts described in § 9-103(5), or fixtures, filing is in office where real estate mortgage would be recorded; and (c) in all other cases filing is in office of county clerk of Oklahoma County. (12A O.S. § 9-401). However, to perfect security interest in collateral of transmitting utility, filing to be made in office of Secretary of State, 101 State Capitol, Oklahoma City, Oklahoma 73105. Filing fee for financing statement, continuation statement, or termination statement is $10. (12A O.S. § 9-403).

Vital Statistics.

See topic 10.07 Vital Statistics.

Medical Records.

Any former or current patient of doctor, hospital, or other medical institution is entitled to access to and copies of information contained in patient's medical records upon request and tender of expense of copies. Cost of copies of X-rays or other photograph or image cannot exceed $5 or actual cost of reproduction, whichever is less. Cost of other copies cannot exceed $0.25 per page. Patient may be charged for actual cost of mailing requested records, but not for searching, retrieving, reviewing and preparing such records. Special requirements and restrictions for obtaining psychological or psychiatric records. (76 O.S. § 19).

Lis Pendens.

As to actions in federal or state court involving real property, notice of pendency of action, identifying case and court and giving legal description of affected land, is filed of record in office of county clerk in county where land is situated. (12 O.S. § 2004.2).

Open Records Act adopted. (51 O.S. § 24A.2-24A.19). Ensures and facilitates public right of access to and review of most government records.

10.05 SEALS:

Uniform Commercial Code adopted. Contracts for sale of goods, seal inoperative. (12A O.S. § 2-203). Commercial paper, seal does not render instrument nonnegotiable. (12A O.S. § 3-113). See category 3 Business Regulation and Commerce, topic 3.09 Commercial Code.

All distinctions between sealed and unsealed instruments are abolished. (15 O.S. § 139).

When the seal of a court, public officer, corporation or person is required by law to be affixed to any process, commission, paper or instrument, the word "seal" includes an impression of such seal upon the paper alone, as well as upon wax, or a wafer affixed thereto. (25 O.S. § 30). Signature of judge sufficient. (20 O.S. § 297).

Every deed or other instruments affecting real estate, executed by a corporation, except when executed by an attorney in fact, must be attested by the secretary, assistant secretary or clerk of such corporation with the corporate seal attached. (16 O.S. § 94).

10.06 TORRENS ACT:

None.

10.07 VITAL STATISTICS:

Records of births and deaths are kept in Bureau of Vital Statistics, 1000 N.E. 10th, Oklahoma City, Oklahoma 73117. State Commissioner of Health sets fee for copies of certificates. (63 O.S. § 1-301 et seq.). Fees: Marriage license (obtained from county courthouse), $2; birth certificate, $5; death certificate, $5.

Person whose birth has not been recorded may petition district court of county where he resides or was born for order establishing time and place of his birth and his parentage, and furnish evidence thereof by testimony, affidavits and records. Such order is binding on all State agencies. Certified copy is filed in Bureau of Vital Statistics, and registrar thereof must issue certified copy. (63 O.S. § 560.7).

11 EMPLOYMENT

11.01 EMPLOYER AND EMPLOYEE:

See topic 11.02 Labor Relations.

11.02 LABOR RELATIONS:

Supervision of laws in relation to labor in transportation, mechanical and manufacturing industries is vested in Commissioner of Labor. (40 O.S. § 1). Occupational Health and Safety Standards Act. (40 O.S. § 401 et seq.). Employment Security Act adopted. (40 O.S. § 1-101 et seq.).

Hours of Labor.

Children under 16 may not work in gainful occupation, other than agriculture or domestic service, more than three hours a day on school day (eight hours on nonschool day or, if employer not covered by Fair Labor Standards Act, on school day which precedes nonschool day) or 18 hours in a week when school in session (40 hours in a week when not in session, or if employer not covered by FSLA and attendance is not compulsory). (40 O.S. § 75).

Child Labor.

No child under 16 may be employed in any occupation or establishment unless permitted by Federal Fair Labor Standards Act of 1938 as am'd. No person under 16 may be employed in such occupations between 7 P.M. and 7 A.M. (9 P.M. to 7 A.M. in summer and, if employer is not covered by Fair Labor Standards Act, on school day which precedes nonschool day). (40 O.S. § 71, 76 O.S. § 7). Children under 15 may not be employed in any occupation injurious to health or morals or especially hazardous to life or limb (Const., art. 23, § 3); prohibited occupations specified (40 O.S. § 72.1).

Discrimination.

Anti-discrimination Act (25 O.S. § 1101 et seq.) provides for execution within State of policies in federal Civil Rights Act of 1964, Age Discrimination in Employment Act of 1967, and § 504 of Rehabilitation Act of 1973. Human Rights Commission authorized to receive, investigate, conciliate, hold hearings on and pass upon complaints alleging violations. (25 O.S. § 1501 et seq.). Private right of action under act only for discrimination based on handicap (25 O.S. § 1901); however, act does not provide exclusive remedy for discrimination or abrogate common-law claims.

Employer of 15 or more persons, or contractor or subcontractor furnishing materials or labor for any state entity, engages in discriminatory practice if he refuses to hire, fires, discriminates as to compensation or terms of employment, or otherwise adversely affects status of employee because of race, color, religion, sex, national origin, age, or handicap, unless action is related to occupational qualification. Statute does not apply to employment in domestic service, or by immediate family members. (25 O.S. § 1302). Similar prohibitions against discriminatory practices by employment agencies and labor organizations. (25 O.S. § 1303, 1304, 1308).

Act does not preclude bona fide seniority or merit systems, professionally-developed ability tests, or compulsory retirement for person employed in bona fide executive or high policymaking position with entitlement to retirement benefits of at least $44,000. (25 O.S. § 1309). Act does not require preferential treatment of individual or group on account of imbalance with respect to total number or percentage of persons of any race, color, religion, sex, national origin, age or handicap; however, plan to eliminate or reduce such imbalance may be adopted and carried out if plan is filed with Human Rights Commission and not disapproved. (25 O.S. § 1310).

Not unlawful employment practice: (1) To differentiate in employment, compensation, terms, conditions or privileges of employment between male and female employees if such differences are otherwise required or permitted by state or federal law; or (2) to provide differences in annuity, death and survivors' benefits between widows and widowers of employees pursuant to plan. (25 O.S. § 1311).

Employer may not discharge smoker or require him to refrain from smoking during nonworking hours. (40 O.S. § 500).

Labor Unions.

Recognize collective bargaining. (21 O.S. § 1265.11). Right to Work laws defeated by vote of people May 5, 1964. Public school teachers and other school district employees may designate organization to negotiate with school district as to terms and conditions of employment, with impasse to be referred to fact finding committee which shall make recommendations to parties; it being illegal for such teachers or employees to strike. (70 O.S. § 509-1 et seq.). It is misdemeanor for any person, partnership, agency, firm, corporation, labor organization or officer or agent thereof to knowingly recruit, procure, supply or refer any person who has customarily and repeatedly offered himself for employment in place of employees involved in strikes or lockouts for employment in place of employee in business or industry where strike or lockout exists. It is also misdemeanor to recruit, solicit, or advertise for replacements for employees involved in strike or lockout, without adequate notice to such person that there is strike or lockout at place of employment and that employment offered is in place of employee involved in strike or lockout. (40 O.S. § 199.1-199.4). Collective bargaining by municipal employees regulated. (11 O.S. § 51-200 et seq.).

Private employment agencies charging fee for their services are placed under supervision of the Commissioner of Labor, from whom license must be obtained. License fee is $100, and bond in sum of $5,000 must be furnished. (40 O.S. § 52 et seq.).

Wages must be paid to employees of every employer semi-monthly, and payment must be in lawful U.S. money, including payment by electronic means. Exception applies to exempt employees and employees of certain non-private foundations. (40 O.S. § 165.2). Commissioner of Labor authorized to assess fines for violation of wage requirements. (40 O.S. § 165.2a). Minimum wage is current federal minimum wage. (40 O.S. § 197.2). Tips, gratuities, meals or lodging received by employee may count as up to 50% of minimum wage. (40 O.S. § 197.16). Payments which do not constitute wages specified. (40 O.S. § 1-218).

Upon termination of employment, employer must pay employee's wages in full (including accrued vacation pay where employer has established policy granting employees paid vacation), less offsets and less any amount over which bona fide disagreement exists, at next regular designated payday. Penalty for failure to pay wages due is 2% of unpaid wages per day up to amount equal to unpaid wages; violation of statute is misdemeanor. (40 O.S. § 165.3). In case of bona fide disagreement, employer must provide written explanation within 15 days upon receipt of wage claim form or written demand. (40 O.S. § 165.4). Upon employee's death, if employee did not designate beneficiary of wages and benefits, earned wages up to $3,000 are payable to employee's surviving spouse or dependent children or their guardians or conservators of their estates, in equal shares, without necessity of probate action. (40 O.S. § 165.3a).

Lien.

Employees have lien on assets of insolvent corporation for four months salary or wages. (42 O.S. § 40). Same lien for workmen's compensation award. (85 O.S. § 49).

Blacklisting is prohibited. Public service corporations or contractors working for them must issue service letters to employees discharged or quitting work. (40 O.S. § 171).

Oklahoma Professional Employer Organization Recognition and Registration Act.

Governs professional employer organizations, including registration requirements. (40 O.S. § 600.1 et seq.).

Whistleblower Act.

Prohibits retaliation against government employees for reporting wrongful government activities. (74 O.S. § 840-2.5).

Workers' Compensation Act.

See topic 11.03 Workers' Compensation Law.

Unemployment Compensation.

Unemployed individual eligible if he makes claim for benefits in accordance with Oklahoma Employment Security Commission regulations; has registered and reported with local employment office; has been unemployed for one week; and has been during base period paid prescribed minimum wages for insured work. (40 O.S. § 2-201 et seq.). Work for limited duration specified by employer or employee will not entitle employee to benefits. (40 O.S. § 2-404.1). Benefits denied for individuals accepting accelerated buyout in excess of $100,000 of written employment contract from employer. (40 O.S. § 2-419). Supplemental employment benefit plans regulated. (40 O.S. § 1-225 et seq.).

Standards for Workplace Drug and Alcohol Testing Act (40 O.S. § 551 et seq.). Employers who choose to conduct drug or alcohol testing of job applicants and persons employed in state are governed by act. Drug or alcohol testing required by and conducted pursuant to federal regulation is exempt from act.

Employer-Owned Vehicles.

Searches of employer-owned vehicles must occur on employer's property or search warrant required. (40 O.S. § 200).

Military Service.

Officers and employees of any private employer who are members of reserve components or any other component of U.S. Armed Forces are entitled to leave of absence from private civilian employment for period of ordered active or inactive duty or service without loss of status or seniority. During such leave of absence in any federal fiscal year, private employer may elect to pay officer or employee amount equal to difference between full regular pay and military pay. Durational limit of protected military service provided by section shall not be less than provided by federal law. Officer or employee may bring action against employer for damages in district court for non-compliance with statute. (72 O.S. § 48.1).

11.03 WORKERS' COMPENSATION LAW:

Compensation is provided for injuries arising out of and in course of employment. (85 O.S. § 2.1). Persons employed as domestic servants or casual workers, if household's gross annual payroll less than $10,000, persons covered by act of Congress, persons employed in agriculture or horticulture by employer with gross annual payroll less than $100,000 and licensed real estate sales associate or broker are excluded. (85 O.S. § 2.1). Employer with five or less total employees, all of whom are related by blood or marriage to employer, is exempt from act. (85 O.S. § 2.6). Youth sports league exempt from federal income taxation also is exempt from act. (85 O.S. § 2.7). Municipal employees may be covered by vote of governing body of town or city. (11 O.S. § 16.3). Compensation is exclusive, except in case of failure to secure payment of compensation, when employee or his legal representative may maintain action for damages free from defenses of assumption of risk, contributory negligence, and fellow servant rule. (85 O.S. § 12).

Administrator of Act is under Administrator of Workers' Compensation. Notice of injury must be given to employer within 30 days of injury or employee receives medical attention from licensed physician during 30 day period from date of injury. Rebuttable presumption that injury from occupational disease or injury caused by repeated trauma does not arise from employment unless employee gives oral or written notice to employer within 90 days of employee's separation from employment. (85 O.S. § 24.2). Request for Assistance must be filed with Administrator within two years from date of injury. (85 O.S. § 43). Mediation available to any party to claim. (85 O.S. § 3.10).

Administrator, immediately upon receipt of Request for Assistance form, will assign matter to facilitator chosen by parties. Claim referred directly to Chief Magistrate if employer denies claim is compensable. If assigned to Magistrate, hearing set within seven days. (85 O.S. § 3.4). Appeals may be taken to Supreme Court within 20 days from award or decision of Magistrate. (85 O.S. § 3.6).

Employer may not discharge or, except for nonpayment of premium, terminate group health insurance of employee because employee has in good faith filed claim, retained lawyer for representation regarding claim, instituted workers' compensation proceeding, or testified in any such proceeding that relates to employee's past or present employment, or elected to participate or not participate in certified workplace medical plan. Employer cannot discharge employee during period of temporary total disability solely on basis of absence from work; however, employer is not required to rehire or retain employee determined to be physically unable to perform assigned duties. (85 O.S. § 5).

Employers must insure, or establish ability to pay to satisfaction of Court, which may require a bond as security. (85 O.S. § 61). Employer may secure workers' compensation to employees through approved workers' compensation equivalent insurance product. (85 O.S. § 65).

Claims for compensation may not be assigned, released or commuted, and are exempt from all claims of creditors and from all process for collecting of debts, which exemption may not be waived. Compensation may be paid only to employee or, in case of his death after award, due to cause other than injury for which award was made, to certain specified heirs. If injury results in death, unaccrued portion of award shall abate. (85 O.S. § 48). Employee hired in state injured outside state compensated under law of this state. (85 O.S. § 50).

Employee convicted of misdemeanor or felony and sentenced to term of incarceration of 90 days or more forfeits temporary total disability benefits upon motion of employer or employer's insurer and court order; benefits for permanent total disability or temporary partial disability paid during period of incarceration must be deposited to account established for distribution to State Department of Corrections for costs of incarceration. (85 O.S. § 22).

Worker's compensation fraud is felony punishable by imprisonment up to five years and/or fine up to $5,000. (21 O.S. § 1663).

If compensation or installment are not paid within ten days. Court may order certified copy of award filed with county clerk of any county and entered on judgment docket of district court, and thereupon it has effect of judgment on which execution may issue against employer or insurance carrier. (85 O.S. § 42).

12 ENVIRONMENT

12.01 ENVIRONMENTAL REGULATION:

General Supervision.

State agencies with supervision over environmental matters under Environmental Quality Act (27A O.S. § 1-101 et seq.) include Water Resources Board, Corporation Commission, Dept. of Agriculture, Conservation Commission, Dept. of Wildlife Conservation, Dept. of Mines, Dept. of Public Safety, Dept. of Labor, Dept. of Environmental Quality and Dept. of Civil Emergency Management.

Regulations.

Environmental Quality Code (27A O.S. § 2-1-101 et seq.) includes Clean Air Act (27A O.S. § 2-5-101 et seq.), Water Quality Act (27A O.S. § 2-6-101 et seq.), Pollutant Discharge Elimination System Act (27A O.S. § 2-6-201 et seq.), Water Supply Systems Act (27A O.S. § 2-6-301 et seq.), Hazardous Waste Management Act (27A O.S. § 2-7-101 et seq.), Central Interstate Low-Level Radioactive Waste Compact (27A O.S. § 2-8-101 et seq.), Radiation Management Act (27A O.S. § 2-9-101 et seq.), Solid Waste Management Act (27A O.S. § 2-10-101 et seq.), Waste Reduction and Recycling Act (27A O.S. § 2-11-101 et seq.), Lead-Based Paint Management Act (27A O.S. § 2-12-101 et seq.), Uniform Environmental Permitting Act (27A O.S. § 2-14-101 et seq.), Brownfields Voluntary Redevelopment Act (27A O.S. § 2-15-101 et seq.), Computer Equipment Recovery Act (27A O.S. § 2-11-601 et seq.), and Carbon Sequestration Enhancement Act (27A O.S. § 3-4-101 et seq.).

Other environmental regulations include Concentrated Animal Feeding Operations Act (2 O.S. § 9-201 et seq.), Lead-Impacted Communities Relocation Assistance Act (10 O.S. § 7601 et seq.), Underground Storage Tank Regulation Act (17 O.S. § 301 et seq.), Petroleum Storage Tank Reform Act (17 O.S. § 321 et seq.), Asbestos Control Act (40 O.S. § 451 et seq.), Hazardous Liquid Transportation System Safety Act (52 O.S. § 47.1 et seq.), Liquified Petroleum Gas Research, Marketing and Safety Act (52 O.S. § 420.20-.30), Alternative Fuels Conversion Act (74 O.S. § 130.1 et seq.), and Rural Water, Sewer, Gas and Solid Waste Management Districts Act (82 O.S. § 1325.1 et seq.).

Oklahoma Water Resources Board regulates stream water use (82 O.S. § 105.1 et seq.) and has authority to allocate ground water resources by issuing permits limiting amount of water taken from ground for nondomestic purposes (82 O.S. § 1020.1 et seq.). Board is authorized to promulgate rules known as Oklahoma Water Quality Standards, which establish classifications of uses of state's waters. (82 O.S. § 1085.30). See category 19 Mineral, Water and Fishing Rights, topic 19.01A Water Law.

Corporation Commission of Oklahoma has authority and duty to make and enforce rules and regulations governing handling and disposal of salt water, mineral brines, waste oil and other substances used or produced in drilling and processing of oil and gas in Oklahoma for prevention of pollution of surface and subsurface water. (52 O.S. § 139 et seq.). It also regulates underground and aboveground storage tanks. (17 O.S. § 301 et seq., 401 et seq.).

State Department of Transportation has authority to prohibit outdoor advertising devices visible from public highways. (69 O.S. § 1271 et seq.). State Transportation Commission prescribes rules and regulations for screening junkyards and scrap metal processing facilities visible from public highways. (69 O.S. § 1251 et seq.).

State Department of Mines and Mining prescribes rules and regulations requiring reclamation of land disturbed by surface coal mining operations (45 O.S. § 742.1 et seq.) and other mining operations (45 O.S. § 725). See category 19 Mineral, Water and Fishing Rights, topic 19.01 Mines and Minerals.

State Conservation Commission is entitled to enter on property adversely affected by past coal mining practices to alleviate adverse effects; monies spent thereon may become lien against property. (45 O.S. § 740.1 et seq.).

Each county's Board of County Commissioners may enact ordinances and regulations to restrict and control noise, dust and traffic associated with landfills accepting over 200 tons of solid waste per day in unincorporated portions of county. (19 O.S. § 339.4).

Acquisition of Wetlands.

Acquisition of lands classified as wetlands by Secretary of Army, over objection of landowner, requires consent of majority of state legislature; State Dept. of Transportation and Turnpike Authority are exempt from requirement. Any restricted use of land in state as result of classification of such land as wetland by Secretary of Army constitutes acquisition of easement. Such easement, if over objection of landowner, may be acquired only after approval of wetlands plan by state legislature that includes just compensation. (80 O.S. § 1).

Prohibited Acts of Pollution.

See statutes referenced under subhead Regulations, supra. Space does not permit complete listing of prohibited acts of air, water, surface and subsurface pollution and statutes themselves should be consulted. See subhead Penalties, infra.

Enforcement.

Enforcement of rules and regulations promulgated by agencies set out under subhead General Supervision, is carried out through administrative procedures of particular agency. Regulations of each agency should be consulted for enforcement procedures.

Penalties.

Violation of provisions of Environmental Quality Code, or of order, permit, license, or rule issued or promulgated under Code is misdemeanor punishable by fine of $200 to $10,000 for each violation and/or imprisonment for up to six months. Administrative and civil penalties also provided. (27A O.S. § 2-3-504 to 506). Additional penalties provided for violation of Clean Air Act (27A O.S. § 2-5-110, 111, 116, 117), Solid Waste Management Act (27A O.S. § 2-10-801, 2 O.S. § 10-1001), Hazardous Waste Management Act (27A O.S. § 2-7-129, 130), Pollution Discharge Elimination System Act (27A O.S. § 2-6-205, 206) and other water quality provisions (27A O.S. § 2-6-901). Criminal penalties for knowingly and willfully filing false complaint with state environmental agency or knowingly and willfully misrepresenting material information to state environmental agency relating to complaint. (27A O.S. § 1-1-204).

Unlawful to throw, leave or deposit trash within 100 yards of state highway or county road, except in approved solid waste disposal site. (21 O.S. § 1205). Environmental Crimes Act (21 O.S. § 1230.2 et seq.) defines unlawful hazardous waste transportation, management, disposal and concealment as misdemeanors or felonies and provides maximum fines from

$5,000 to $100,000. Fines doubled for repeat violation or if financial profit from violation.

Permits.

Permit must be obtained from Dept. of Environmental Quality for specified activities, including: (1) Discharge of any pollutant into state waters (27A O.S. § 2-6-205); (2) construction of sewer systems, treatment plant or solid waste fills, or permitting sewage or waste to flow into state waters (27A O.S. § 2-6-401); (3) underground injection of hazardous and nonhazardous liquids, except for injection purposes of brine recovery, saltwater disposal or secondary or tertiary oil recovery (27A O.S. § 2-6-701); (4) construction or operation of hazardous waste processing facilities—proof of adequate liability insurance required (27A O.S. § 2-7-115, 116); (5) land application of nonhazardous sludge (27A O.S. § 2-10-401 to 405); (6) disposal site accepting more than 200 tons per day of solid waste generated more than 50 miles from disposal site (27A O.S. § 2-10-801 et seq.); and (7) emission of air contaminants (27 O.S. § 2-5112).

Corporation Commission issues permits for underground storage tanks containing regulated substance (17 O.S. § 308) and for aboveground tanks containing flammable liquid (17 O.S. § 405).

See also categories 19 Mineral, Water and Fishing Rights, topics Mines and Minerals and Water Law; Property, topic Real Property.

13 ESTATES AND TRUSTS

13.01 ADMINISTRATION:

See topic 13.09 Executors and Administrators.

13.02 ADVANCEMENTS:

See topic 13.07 Descent and Distribution.

13.03 ALLOWANCES:

See topic 13.09 Executors and Administrators.

13.04 CLAIMS:

See topics 13.05 Death, 13.09 Executors and Administrators. See also category 5 Civil Actions and Procedure, topic 5.02 Actions, subhead Survival, Abatement and Revival, and topic 5.15 Judgments, subhead Death of Party After Verdict or Judgment.

Governmental Tort Claims Act.

(51 O.S. § 151 et seq.).

Small claims, generally 12 O.S. § 1751 et seq. See category 6 Courts and Legislature, topic 6.01 Courts.

13.05 DEATH:

Person absent and unheard from for seven years is presumed to be dead, and letters testamentary or of administration on his estate may be issued by district court. (58 O.S. § 941).

Official notice of death by or from any department of U.S. Government constitutes prima facie evidence of fact of death in administration or probate proceedings, or proceeding for adjudication of fact of death of any life tenant or joint tenant of real estate, where such person shall have been in military, naval or maritime service of the United States at time of death, but no decree of distribution shall be entered in such administration or probate proceedings until after two years from reported death. (58 O.S. § 713).

Adjudication of Death.

District court of county of residence of decedent or county where land is situated may determine the fact of death of a life tenant or joint tenant and terminate estate of decedent, on petition of remainderman or survivor and after notice. (58 O.S. § 911).

Survivorship.

Uniform Simultaneous Death Act adopted. (58 O.S. § 1001 et seq.). See topics 13.07 Descent and Distribution, 13.09 Executors and Administrators, 13.16 Wills. See also category 8 Debtor and Creditor, topic 8.10 Homesteads.

Actions for Death.

When death of one is caused by wrongful act or omission of another, action against wrongdoer (or his personal representative if he be deceased) may be maintained by personal representative of decedent if decedent might have maintained action for injury if not fatal. Damages recoverable include medical and burial expenses, payable to whoever paid expenses, whether person, governmental agency, or estate; pecuniary loss to survivors based, inter alia, upon age, occupation, earning capacity, health habits, and probable duration of decedent’s life, payable exclusively to surviving spouse and children, or next of kin, according to their loss; mental pain and anguish suffered by decedent, distributable to surviving spouse and children, or next of kin, in same proportion as decedent’s personal property; loss of consortium, payable to surviving spouse; grief and loss of companionship of children and parents of decedent, distributed according to their grief and loss. Punitive damages, recoverable in certain cases, are distributed to surviving spouse and children, or next of kin, in same proportion as decedent’s personal property. All of above are distributed after payment of legal expenses and costs. (12 O.S. § 1053). If decedent was resident of another state, or if no personal representative is appointed, action may be brought by surviving spouse, or, if none, by next of kin of deceased. Action must be commenced within two years. (12 O.S. § 1053-4). This right of action may not be abrogated, and amount recoverable is not subject to statutory limitation. (Const., art. XXIII, § 7).

Death Certificate.

See category 10 Documents and Records, topic 10.07 Vital Statistics.

Oklahoma Uniform Anatomical Gift Act. (63 O.S. § 2200.1 et seq.).

Living Wills.

See topic 13.16 Wills, subhead Living Wills.

13.06 DECEDENTS’ ESTATES:

See topics 13.07 Descent and Distribution, 13.09 Executors and Administrators, 13.16 Wills. See also category 8 Debtor and Creditor, topic 8.10 Homesteads.

Uniform TOD Security Registration Act adopted. (71 O.S. § 901 et seq.). Act allows owners of investment securities to make non-probate transfer to named beneficiary on owner’s death without granting ownership rights to beneficiary prior to owner’s death.

Nontestamentary Transfer of Property Act (58 O.S. 1251 et seq.) allows owners of interests in real estate to title interests through transfer-on-death form by recording deed, in format provided by statute, signed by record owner and designating grantee beneficiary. Deed effective to transfer ownership upon death of owner. Deed revocable and beneficiary may be changed during owner's lifetime. Deed provision not revocable by provisions of will.

Procedure for return of abandoned property from Tax Commission when owner is deceased. (60 O.S. § 674.2).

13.07 DESCENT AND DISTRIBUTION:

Intestate property descends and is distributed: (a) To surviving spouse (1) with no issue, and if no parent or brother or sister, all; (2) with no issue but parent or parents, brother or sister, all property acquired during coverture by joint industry and one-third of remaining estate; (3) with issue, if all of surviving spouse, one-half of entire estate, otherwise one-half of property acquired during coverture by joint industry and equal part in property not acquired during coverture by joint industry with living children and lawful issue of deceased children, by representation. (b) Remainder, or all if no surviving spouse goes: (1) to issue, equally if in same degree, otherwise by representation; (2) if no issue, then to decedent's parents equally or their survivor; (3) if no issue or parent, then equally to issue of decedent's parents by representation; (4) if no issue, parent, nor issue of parents then half to paternal grandparents or grandparent or, if none survive, equally to issue of any paternal grandparent by representation, and other half in like manner to maternal grandparents or issue of maternal grandparent, but if decedent survived by grandparents or issue of grandparent on only one side then entire estate to such survivors; (5) if no issue, parent, issue of parents, grandparent, nor issue of grandparent, to next of kin in equal degree. (c) If no spouse, issue, parent, issue of parents, grandparent, issue of grandparent, nor kindred, then estate escheats to state for support of common schools. (84 O.S. § 213). Heir may disclaim any part of interest within nine months of intestate's death. Property so disclaimed passes as though disclaimant had predeceased intestate. (84 O.S. § 22-24).

Surviving Spouse.

See introductory paragraph.

Half blood inherit equally with whole blood, except that if property came to decedent by gift, devise or descent from ancestor those not of blood of such ancestor are excluded. (84 O.S. § 222).

Illegitimate is heir of mother and vice versa. Same applies in case of father who has adopted child, acknowledged it in writing, received it into his home, or who has been judicially determined to be parent. Issue of dissolved marriage are legitimate. (84 O.S. § 215-6).

Posthumous children are considered as living at the death of their parents (84 O.S. § 228), and inherit the same as other children.

Advancements.

Any estate, real or personal, given by decedent in his lifetime, as an advancement to any child or other lineal descendant, is a part of estate of decedent for purpose of division and distribution thereof among his issue, and must be taken by such child, or other lineal descendant, toward his share of estate of decedent. (84 O.S. § 223). All questions as to advancements made or alleged to have been made by decedent may be heard and determined by district court, and must be specified in decree assigning and distributing estate; and final judgment or decree of district court, or in case of an appeal, of Supreme Court, is binding on all parties interested in estate. (58 O.S. § 661).

Determination of Heirship.

District court may determine who are heirs of a decedent, on application, after service on parties in interest, by publication if their names or residences be unknown. If one year has elapsed without proceedings for administration of decedent's estate, district court may, without administration, determine heirship in any action concerning real property inherited from decedent. (84 O.S. § 251-270).

Adopted Children.

See category 14 Family, topic 14.01 Adoption, subhead Effect of Adoption.

Executors and Administrators.

See topic 13.09 Executors and Administrators.

Renunciation.

See topics 13.15 Trusts, subhead Disclaimer; 13.16 Wills, subhead Disclaimer.

Escheat.

On failure of heirs, the estate escheats to the state for support of schools. (84 O.S. § 213, 84 O.S. § 271). See category 21 Property, topic 21.01 Absentees, subhead Escheat.

13.08 ELECTION:

See topic 13.16 Wills.

13.08A ESTATES: (in property)

See category 21 Property, topic 21.16 Real Property.

13.09 [RESERVED]

13.10 EXECUTORS AND ADMINISTRATORS:

Jurisdiction and Venue.

Probate jurisdiction is in district court of county: (1) Of which decedent was a resident of the time of his death; (2) in which a nonresident of the state died leaving estate therein; (3) in which any part of the estate is situated, in case of a nonresident who died outside of the state or in a county where he left no property, in which case court in which application for letters testamentary or administration is first made has exclusive jurisdiction of the settlement of the estate. (58 O.S. § 5, 6). District court with jurisdiction and venue of administration of any estate has unlimited concurrent jurisdiction and venue to hear and determine: (1) in whom title to any property (whether real, personal, tangible, intangible, or any combination) is vested; (2) rights with respect to property as to all persons and entities; (3) whether or not property is subject to jurisdiction of court in decedent's estate; and (4) issues relating to trusts or issues involving guardian or ward that may arise. In such proceedings, service of notice and process is required as in other cases and provisions of Oklahoma Pleading Code (12 O.S. § 2001 et seq.) must be followed (58 O.S. § 1).

Joining Proceedings.

Administration proceedings, probate proceedings, or administration and probate proceedings may be joined and united in one proceeding: (a) Where estate left by one or more such deceased persons has been or is to be received from another such person; (b) where two or more such deceased persons died seized of undivided interests in property; or (c) where heir or heirs of deceased persons are the same. (58 O.S. § 714).

Preferences in Right to Administer.

Executor named in will is entitled to letters if competent. (58 O.S. § 101-8). Right to administration is in following order: Surviving spouse or appointee; children; parents; brothers or sisters; grandchildren; next of kin entitled to share in distribution; creditors; any competent person. (58 O.S. § 122; 58 O.S. § 123-6; 68 O.S. § 823-4).

Competency.

Nonresident may act as executor or administrator, but must appoint service agent residing in county of administration. (58 O.S. § 162). Married woman, not otherwise disqualified, may act. (32 O.S. § 15; 58 O.S. § 102, 126). No person may serve if under age of majority, convicted of infamous crime or adjudged incompetent by court to execute the trust. (58 O.S. § 102, 126). Bank or trust company having trust powers organized under laws of Oklahoma may act as executor or administrator. (6 O.S. § 1001-2). National banks having trust powers, and state banks and trust companies having trust powers located in states which reciprocally allow similar Oklahoma institutions to exercise trust and fiduciary powers therein under no greater restrictions than those imposed by Oklahoma appear to have power to so act; however some question may exist as to this. (See 6 O.S. § 1002 as am’d and 18 O.S. § 476 et seq.) However, foreign corporation or banking association having authority in state where principal office is located may serve in ancillary proceedings if reciprocity extended by that state. (18 O.S. § 476).

Proceedings for Issuance of Letters of Administration.

Petition for letters of administration must be in writing, signed by applicant or his counsel, and filed with judge of court, stating facts essential to give court jurisdiction of case, and names, ages and residence of heirs of decedent, and value and character of property. Thereupon court must set a day for hearing petition. Notice of hearing must be given by mailing copies to all heirs at least ten days before date set for hearing; provided that if name or address of any heir is unknown, in addition to such mailing to all heirs whose names and addresses are known, notice of hearing must be published in one issue of a newspaper in county at least ten days before hearing; provided further, that if petition asks for appointment of some person entitled thereto and is accompanied by waiver of all persons having prior right to appointment or if petitioner has prior right of appointment, then no notice shall be given and court shall proceed to hear petition. Any person interested may contest petition by filing a written opposition thereto on ground of incompetency of applicant, or may within any time after 30 days after administrator has been appointed assert his own rights to administration and pray that letters be issued to himself. (58 O.S. § 127-129).

Proceedings for Issuance of Letters Testamentary.

See topic 13.16 Wills, subheads Probate and Foreign Probated Wills.

Presumption of Death.

Petition for letters testamentary or administration may include allegations of time and circumstances when absentee was last seen or heard from; that absentee has not been seen or heard from for continuous period of seven years by persons likely to have had contact with absentee and that his location is unknown; and description of search or inquiry concerning location of absentee. Hearing is not less than 30 days from date of filing petition. Notice of hearing must be given by publication for three consecutive weeks in both county where action is filed and location where absentee was last heard from, and by mailing notice to absentee and to all known relatives and other persons interested in estate at last-known addresses at least 20 days prior to date of hearing. Upon hearing and entry of proper proofs, court shall enter decree that absentee is legally dead and shall issue letters testamentary or administration and administer estate as if death had occurred. (58 O.S. § 943, 944, 945).

Qualification.

Any person to whom letters testamentary or of administration are issued must give bond to State of Oklahoma with two or more sufficient sureties, to be approved by judge of district court. Bond must be joint and several and sum determined by court; court may order that no bond be required. (58 O.S. § 171).

Executor or administrator must take oath that he will perform his duties according to law as condition precedent to issuance of letters. (58 O.S. § 161).

Removal.

Executor or administrator may be removed for failure to give sufficient bond or security (58 O.S. § 183, 187), for waste or mismanagement (58 O.S. § 234), or, in the case of an administrator, if a will is proved or allowed (58 O.S. § 218).

Special administrator is appointed where: There is delay in granting general letters or such letters are granted irregularly; general appointee fails to file bond as required; representative dies or is suspended or removed. Appointment may be made without notice. Person entitled to general letters has preference. Appointee must give bond and may take charge of estate and exercise powers necessary for its preservation. (58 O.S. § 211-17).

Administrator C. T. A. is appointed where necessary and has same power over estate as executor. (58 O.S. § 109). Executor presumed to renounce where he fails to apply for letters within 30 days after learning of testator’s death. (58 O.S. § 108).

Surviving Spouse as Executor and Sole Heir.

If will names surviving spouse as executor and sole heir, surviving spouse may elect to follow certain simplified probate procedures, other provisions notwithstanding. Specific language should be consulted. (58 O.S. § 1101-1106).

Inventory and appraisal of entire estate, and designation of homestead and exempt personal property must be made and returned to court by representative within two months after appointment. Time to file inventory and/or appraisement may be extended for good cause. Personal representative may fulfill appraisement requirement by stating his or her opinion of value of estate described in inventory. (58 O.S. § 281-9). Personal representative can request court for order that no inventory and appraisement be required, but court must order same if written demand is made therefor by any heir, devisee, legatee, creditor having filed claim, guardian, conservator, guardian ad litem, or other person having interest in estate. (58 O.S. § 281).

Powers and Duties.

Executor or administrator must take possession of all decedent’s estate, both real and personal (except homestead and property not assets) and collect debts.

He may be authorized by court to carry on going business of decedent not disposed of by will. (58 O.S. § 263).

Executor or administrator, with approval of district court, pursuant to notice, application and hearing, may make oil, gas and other mining leases of lands of estate for a term not to exceed ten years and as long thereafter as oil, gas or other minerals may be produced in paying quantities. (58 O.S. § 924, 929.1 et seq.). Where bonus value of oil and gas to be conveyed does not exceed $150, executor or administrator may make oil and gas lease without notice or court proceedings other than approval by judge of district court endorsed on instrument of conveyance with finding by court that bonus value of lease does not exceed $500. (58 O.S. § 928.1).

Executor or administrator with approval of district court, is authorized to sell mineral leaseholds and to enter into any transaction related to operation or development of such leasehold and to enter into contracts covering easements across lands of decedent for party walls, pipelines, transmission lines, upstream flood control dams and lakes, and state and county highways. (58 O.S. § 929.1, 931).

Executor or administrator may make loans and advances, or purchase obligations representing loans or advances, which are eligible for insurance by Federal Housing Administration and may obtain such insurance; and may invest in notes or bonds secured by mortgage or trust deed insured by Federal Housing Administrator and in obligations of national mortgage associations. (6 O.S. § 2041).

With approval of district court, executor or administrator may borrow money to pay debts, family allowance, administration expenses and state or federal inheritance, estate or income taxes, mortgage, or renew mortgages on, decedent's real estate as security for repayment, and invest in U.S. Government obligations. (58 O.S. § 264, 385, 385a, 581).

Notice to Creditors.

Executor or administrator must, within two months after issuance of letters, file notice to creditors with district court clerk in probate case stating that claims against deceased will be forever barred unless presented to such executor or administrator at his residence or business or place of business of his attorney as specified in notice by presentment date. Presentment date shall be date certain at least two months following both date notice is filed and date of first publication thereof which publication must occur on or before tenth day after filing of notice. Notice shall be given by publication in some newspaper in county in which probate is filed once each week for two consecutive weeks and by mail to all known creditors of decedent at their respective last known addresses.

Form.

Statutory notice to creditors form (58 O.S. § 331):

Form

All creditors having claims against A B, deceased, are required to present the same, with a description of all security interests and other collateral (if any) held by each creditor with respect to such claim, to the named personal representative at ______ (address of the personal representative or attorney for the personal representative) on or before the following presentment date: ______, or the same will be forever barred.

C D, Personal Representative for

the Estate of A B, deceased.

or

E F, Attorney for Personal

Representative

Dated ______, 20____

However, if decedent has been dead for five or more years prior to commencement of probate proceeding (or where regular proceedings have been dispensed with under 58 O.S. § 241) presentment date can be reduced to date certain at least one month following both date notice is filed and date of first publication thereof which publication must occur on or before tenth day after filing of notice. (58 O.S. § 331).

Also, executor or administrator must file affidavit of mailing and, if applicable, of personal delivery, and affidavit of publication must be filed with district court clerk. Affidavit of mailing, and, if applicable, of personal delivery, shall be made by executor or administrator and shall state words to effect he has personally, or by and through his attorney, mailed notice by first-class mail to all creditors of decedent known to him on date notice was filed with district court clerk. Affidavit shall also state identities and last-known addresses of such creditors and date notice was mailed or delivered. If decedent had no known creditors or had one or more creditors whose addresses were not known to executor or administrator as of date notice was filed, there shall be filed affidavit to effect that no mailing is required and reasons therefor. (58 O.S. § 332).

“Known creditors” shall mean those creditors of decedent actually known to executor or administrator or reasonably ascertainable by him as of date notice to creditors is filed. “Reasonably ascertainable creditors” shall be those whose identities, last-known addresses and claims can be determined by reasonably diligent efforts. If reasonable under circumstances, such efforts shall include executor’s or administrator’s conducting search of decedent’s personal effects after his death and prior to filing of notice to creditors. (58 O.S. § 331.1).

Secured Creditors.

Financial institution with valid security interest in goods or chattels of decedent that has commenced repossession after default must use diligent efforts to notify decedent’s heirs and personal representative of repossession. (58 O.S. § 292).

Presentment of Claims.

All claims arising upon contracts entered into prior to decedent’s death, whether same be due, not due or contingent, must be presented on or before presentment date stated in notice to creditors; provided, if it appears in affidavit of claimant to satisfaction of executor or administrator and judge of district court, duly noted on claim, that claimant had no notice by reason of being out of state and that copy of notice to creditors was not mailed to claimant, claim may be presented at any time before final decree of distribution is entered. Right of foreclosure upon real estate is not limited in any case, but no deficiency remaining unsatisfied after foreclosure shall be claim unless it was properly presented. (58 O.S. § 333).

A money judgment recovered against decedent before his death must be presented to the executor or administrator like any other claim; but lien of such judgment on decedent’s real estate is not destroyed by his death. (58 O.S. § 346).

Proof of Claims.

Every claim shall be signed by claimant or claimant’s authorized representative. Every claim which is due when presented to executor or administrator must state exact amount claimed and shall state with reasonable particularity nature and source of claim, and if claim is secured by security interest, mortgage or other lien which has been filed or recorded according to law, brief description of such interest, mortgage or lien and of collateral covered thereby shall be stated in claim. If claim be not due when presented, or be contingent, particulars of such claim must be stated. Executor or administrator may require satisfactory vouchers or proofs or other evidence to be produced in support of claim. If estate is insolvent, no greater rate of interest shall be allowed upon any claim, after first publication of notice to creditor, than allowed by law on judgments obtained in district court. (58 O.S. § 334).

If executor or administrator is creditor of decedent, his claim must be presented for allowance or rejection to judge of district court not later than presentment date stated in notice, and its allowance by judge is sufficient evidence of its correctness, and it must be paid like other claims in due course of administration. (58 O.S. § 351).

Approval or Rejection of Claims.

When a claim is presented to executor or administrator, he must endorse thereon his allowance or rejection and date thereof. If he allows claim, it must be presented, with date of such presentment noted thereon to judge for his approval, who must, in same manner, endorse upon it his allowance or rejection. If executor or administrator rejects claim, in whole or in part, he shall mail notice of such rejection to creditor, by regular, first-class mail, to creditor's address last-known to executor or administrator, not later than five days following date of such partial or total rejection. If executor or administrator refuses or neglects to endorse his allowance or rejection for 30 days after its presentment, claim shall be deemed rejected on 30th day after such presentment regardless of date on which claim may have been actually rejected. If judge refuses or neglects to endorse his allowance or rejection on claim, allowed by executor or administrator, within 30 days after claim is presented to judge, such refusal or neglect is equivalent to rejection on 30th day after presentment of claim to judge. If claim is presented to executor or administrator prior to first publication of notice, it shall be considered validly presented, shall be deemed to have been presented on date of first publication and shall not be acted upon by executor or administrator prior to such date; and executor or administrator shall not be required to give notice to creditor by mail, other than notice of rejection if applicable. If personal representative rejects claim but refuses or neglects to mail notice of rejection not later than five days following rejection, 45 day limitation of actions does not begin until personal representative mails notice of rejection to creditor's last known address. (58 O.S. § 337).

Every claim allowed by executor or administrator, and approved by judge, must, within 30 days after approval by judge, be filed in district court and ranked among acknowledged debts of estate, to be paid in due course of administration. (58 O.S. § 338).

When it shall appear upon settlement of accounts of any executor or administrator that debt against deceased has been paid without following presentment of claims procedure, and it shall be proved by competent evidence to satisfaction of district court that such debt was justly due but for claimant's failure to properly present claim, was paid in good faith, that amount paid was true amount of such debt over and above all payments or setoffs, and that estate is solvent, it shall be duty of court to allow payment of such debt in settlement of accounts, and payment of such debt shall not constitute breach of fiduciary duty of executor or administrator. (58 O.S. § 335).

Special Finding in Final Decree.

Final decree issued by district court shall contain finding in substantially following form: That notice to creditors as required by applicable statutes was given by executor or administrator, including notice by mail to all creditors, if any, known to executor or administrator as of date notice was filed with district court clerk for county in which probate is pending, at their respective last-known addresses; and that all claims not filed within time permitted for presentation of claims are nonsuited, void and forever barred, except as otherwise approved in this decree pursuant to 58 O.S. § 335. Final decree which fails to contain this finding shall be voidable.

Payment of Claims.

Upon settlement of the accounts of the administrator or executor at the end of the year, the court must make an order for the payment of the claims. If insufficient funds exist to pay all claims, court must specify amount to be paid each claimant. (58 O.S. § 595). Amount of claims not yet due, contingent or disputed, is paid into court to be distributed when parties become entitled thereto. A creditor whose claim has been allowed, but is not yet due, may consent to deduction of interest for the time claim has to run, and be paid accordingly. (58 O.S. § 596).

Priorities.

The debts of the estate must be paid in the following order: (1) funeral expenses; (2)

expenses of last sickness; (3) family allowance by court; (4) taxes to the United States or state, county or city; (5) debts having preference under the laws of the United States or of this state; (6) judgments rendered against the decedent in his lifetime which are liens upon his property and mortgages in the order of their date; (7) claims presented or proved within four months after first publication of notice to creditors; (8) all other demands against the estate. (58 O.S. § 591). In case of secured claim excess over amount realized from security prorates with other creditors of same class. (58 O.S. § 346).

Sales.

If petition of personal representative includes request that identity of heirs, devisees and legatees be determined and notice of hearing such petition reflects such request, then court may determine identity of all heirs, devisees and legatees, and any guardian or conservator of any minor or incompetent heir, devisee or legatee; and such determination shall be conclusive for purpose of acting upon any petition which includes waivers or consents of heirs, devisees and legatees. Request for such determination can be made in initial petition seeking appointment of personal representative, or at any time during course of administration. (58 O.S. § 240). Thereafter, upon filing of petition accompanied by verified written consents by all heirs, devisees and legatees (other than contingent), and persons authorized to act for such person under legal disability, court can issue order authorizing personal representative to sell, grant, lease, mortgage or encumber real or personal property (including minerals) and to execute documents of conveyance without further judicial authorization or return of sale or court confirmation of such sale. Authorized transaction passes title to purchaser without court confirmation. If petition is filed after three months of date of admission of will to probate and neither appeal nor contest of admission is pending, and, if will has residuary clause, consents of heirs, who are neither devisees nor legatees, shall not be required. (58 O.S. § 239). Sales not authorized under foregoing procedure must comply with statutory requirements summarized hereafter.

If will grants power of sale, personal representative may sell or otherwise deal with any property without court order, but return of sale must be made. No title passes unless sale is court confirmed. (58 O.S. § 462). If there is no will or there is no will with power of sale, court authorization of sale must first be obtained, except in cases of perishable and other personal property likely to depreciate, which may be sold without court order; filing of return of sale and obtaining court confirmation not required to pass title to purchaser. (58 O.S. § 387).

Personal property may be sold by public auction at courthouse door, at site of property, or at residence of decedent, after ten days notice by publication (58 O.S. § 391.1); or property may be sold at private sale after ten days notice by publication (58 O.S. § 391.2). Executor or administrator must make sworn return on any sale of personal property, and court must fix time for hearing, of which ten days notice must be given by publication. If proceedings were unfair or sum bid disproportionately low, court may vacate sale and direct another. (58 O.S. § 391.1, 391.2).

Real property must be sold upon application of executor or administrator stating that sale will be in best interest of estate (58 O.S. § 412), order of court for hearing at time not less than ten days nor more than four weeks from date thereof (58 O.S. § 413); notice of hearing by publication in one issue of newspaper of general circulation published in county; hearing not to be less than ten days from publication, with copy being personally served on any general guardian, and on heir, legatee or devisee who is resident of county, at least ten days before hearing and mailing to all such persons who are nonresidents of county (58 O.S. § 414); hearing (58 O.S. § 415); and order of sale (58 O.S. § 418). Sale must be at public auction unless court finds it would benefit estate to sell at private sale. (58 O.S. § 419). Notice of public sale must be published for two successive weeks in each county where land to be sold is situated and county where order is made, with day of sale to be at least ten days from date of first publication. (58 O.S. § 421). Sale must be made in county where realty is situated (58 O.S. § 422). Similar notice required in private sales. Notice must state day on or after which sale will be made and place where bids will be received. (58 O.S. § 423). No private sale may be confirmed unless at least 90% of appraised value is offered. (58 O.S. § 424). Executor or administrator must make sworn return on any sale of realty, and court must fix time for hearing, of which notice of ten days must be given by publication. If it appears that sum exceeding by 10% best bid may be obtained, court may vacate sale and direct another. (58 O.S. § 426). If it appears sale was fair and legal, and that bid was not disproportionate to value and that greater sum cannot be obtained, court must confirm sale and direct conveyance to be made. If purchase price is not forthcoming, court may order re-sale. (58 O.S. § 428). Unless sale is made pursuant to 58 O.S. § 239, conveyances must thereupon be executed by personal representative and refer to order of court confirming sale. (58 O.S. § 429).

Actions by Representative.

Executor or administrator may bring actions on contract, for waste, trespass or conversion, or for recovery of real or personal property or possession thereof. (58 O.S. § 251-4, 290 O.S. § 1). In case of deficiency of assets he must sue to recover property fraudulently conveyed by decedent. (58 O.S. § 259-60). In a proper case creditors may require executor or administrator to bring attachment suit.

Actions Against Representative.

If action is pending against decedent at time of his death, plaintiff must present his claim to executor or administrator for allowance or rejection, and no recovery may be had in action unless it is proved that such presentation was made. (58 O.S. § 343).

Actions maintainable against decedent for recovery of property or on contracts may be maintained against his representative. Action may be maintained against representative where decedent had wasted, destroyed, taken, carried away or converted, or committed trespass against property of another. (58 O.S. § 254).

Suit on rejected claim must be brought as ancillary proceeding in probate or as independent action against executor or administrator within 45 days after date of rejection, or within two months after it becomes due, if it be not then due. Judgment rendered against executor or administrator on any claim against estate only establishes claim as if allowed by executor or administrator. Certified transcript of judgment must be filed in district court to entitle it to payment in due course of administration. (58 O.S. § 338-44).

Allowances.

On death of either husband or wife, survivor may continue to possess and occupy the whole homestead, which is not, in any event, subject to administration or to payment of debts except such as are secured by lien thereon; and on death of both husband and wife the children may continue to possess and occupy the homestead until youngest child becomes of age. In addition thereto, the following property must be immediately delivered to such surviving husband or wife and child or children, and is not to be deemed assets, namely: All family pictures; a pew in any house of worship; lot or lots in any burial ground; the family Bible and all school books; other books used as a part of the family library not exceeding $100 in value; all wearing apparel and clothing of decedent and his family; provisions for the family for one year, either provided or growing; fuel for one year; all household and kitchen furniture, including stoves, beds, bedsteads, and bedding. (58 O.S. § 311). In addition there must be set apart to the surviving spouse or minor child or children of decedent, all such personal property or money as is exempt by law from levy and sale upon execution. (58 O.S. § 312). If the amount set apart as aforesaid be insufficient for support of widow and children, the court may in its discretion make reasonable allowance out of the estate for maintenance of the family, according to their circumstances, during settlement of the estate. (58 O.S. § 314).

Widow’s Quarantine.

None.

Accounts.

If heirs, devisees and legatees are determined in accordance with 58 O.S. § 240 (see subhead Sales, supra), consents can be filed waiving filing of any accounting specified in consents or necessity for presentation to court for approval of such accounting; provided waivers or consents may be withdrawn at any time and thereafter all acts must be in accordance with regular statutory procedures. (58 O.S. § 239). Executor or administrator must render account under oath at final accounting or at any other time required by court. (58 O.S. § 541). In rendering account, executor or administrator must, upon request of court or interested party, file vouchers or other proof of payment for all charges, debts, claims and expenses paid. (58 O.S. § 550). Final account must stand for hearing not less than 20 days after filing, and notice must be given. (58 O.S. § 533). If waived in writing by all persons entitled to distribution or if personal representative is sole recipient, no itemized accounting of income and expenses is required in final accounting. (58 O.S. § 541). All matters of account may be controverted by heirs. (58 O.S. § 555). Settlement of account is conclusive on all persons interested. (58 O.S. § 556).

Settlement.

If debts are paid upon first distribution, court may order distribution of remainder and settlement. If not, or the estate is not in proper condition, the court may give a reasonable extension. (58 O.S. § 561). When the period has expired, or there are sufficient funds to meet debts, or all property has been sold, executor or administrator must render account and pray for settlement. (58 O.S. § 612).

Distribution.

At any time after three months from issuing of letters testamentary or of administration, any heir, devisee or legatee may present to the court his petition for the share of the estate to which he is entitled, to be given to him upon his giving bond, with security, for the payment of his proportion of the debts of the estate. (58 O.S. § 621). Notice of the application must be given to the executor or administrator. and to all persons interested in the estate. (58 O.S. § 622). If at the hearing it appears that the estate is but little indebted, and that the share of the party applying may be allowed to him without loss to the creditors of the estate, the court must make an order in conformity with the prayer of the applicant, requiring each heir, devisee or legatee to give bond conditioned for payment of his proportion of the debts of the estate, and the executor or administrator to deliver the whole or any part of the estate, designating it, to which the applicant is entitled. (58 O.S. § 624).

Upon final settlement of accounts of executor or administrator, or at any subsequent time, upon application of executor or administrator, or of any heir, devisee or legatee or judgment creditor thereof, court must proceed to distribute residue of estate among persons entitled thereto. (58 O.S. § 631, 634.1). Order or decree of court must name persons and proportion or parts to which each shall be entitled; and such persons may demand and sue for and recover their respective shares. Such decree is conclusive upon rights of heirs, devisees or legatees, but subject to appeal. (58 O.S. § 632).

Investments.

Pending settlement of estate, personal representative can invest without court order, unless contrary to will, in U.S. obligations and accounts fully insured by U.S. (58 O.S. § 581).

Distribution if Abroad.

No special provision in Oklahoma. Provision for appointment of agent to take charge for benefit of absent person, if necessary. (58 O.S. § 671). Court may order deposit with clerk in trust of money for heir, legatee, etc., where whereabouts unknown, or where will not accept and receipt for in 90 days, or when heir or legatee to whom payment has been directed has died during pendency of probate proceedings, and no person shall within 90 days thereafter become qualified personal representatives of such heir or legatee. (58 O.S. § 693).

Liabilities.

After estate is fully administered, court must make decree discharging representative from all liability. (58 O.S. § 691). Representative is liable for whole of estate at value of appraisement contained in inventory, and for profit and income therefrom. (58 O.S. § 522). When decree for payment of debts is made, he is personally liable to each creditor for amount of his claim. (58 O.S. § 597). He is not accountable for debts due decedent which are uncollected through no fault of his (58 O.S. § 524), nor for loss on sale of any part of estate based on appraised value if sale was justly made (58 O.S. § 523), but fraudulent sale renders him liable for double value of realty sold (58 O.S. § 492).

Compensation.

Administrator, and executor whose compensation is not provided for in will or who renounces such compensation, is allowed commissions on amount of whole estate accounted for by him, excluding property not ranked as assets, at following rates: 5% on first $1,000; 4% on next $5,000; 2½% on excess over $6,000. Further allowance, not exceeding above rates of commission, may be made by district judge for extraordinary services. (58 O.S. § 525).

When Administration Unnecessary.

If value of estate appears not to exceed $150,000, inventory must be ordered. If inventory reveals estate $150,000 or under, court upon application of representative, must dispense with regular proceedings. Court orders notice to creditors, and hearing of final account, distribution and discharge. Notice to creditors and notice of final account, etc., may be combined in one notice. Notice must be mailed to creditors in accordance with 58 O.S. § 331 and published two consecutive weeks, creditors must file claims within 30 days after publication of notice, and hearings must be set not less than 35 days after first publication. (58 O.S. § 241-243).

Alternatively, if value of estate is less than or equal to $175,000, or decedent has been deceased for more than five years, or decedent resided in another jurisdiction at time of death, court upon application of representative must dispense with regular proceedings. Combined notice to creditors of final accounting, determination of heirship, distribution and discharge must be published in newspaper once a week for two consecutive weeks, and must be mailed to creditors in accordance with 58 O.S. § 331 and to interested persons not less than 30 days prior to date of final hearing. Final account and petition for distribution shall follow presentment date by at least five days and precede final hearing by at least 20 days. At final hearing, court can admit will; allow final accounting; determine heirship, legatees and devisees; distribute estate; and discharge personal representative and surety on bond if applicable. (58 O.S. § 245-247).

Alternatively, ten days after death of decedent any person indebted to decedent or having possession of tangible personal property or instrument evidencing debt, obligation, stock chose in action or stock brand belonging to decedent must pay or deliver such item to successor of decedent upon presentment of affidavit stating decedent's total estate located in state does not exceed $20,000, no application for appointment of personal representative is pending or has been granted in any jurisdiction, successor is entitled to payment or delivery, and all taxes have been paid or provided for. Person paying or delivering such items is discharged and released to same extent as if such person dealt with personal representative of decedent. (58 O.S. § 393).

Small Estates.

See subhead When Administration Unnecessary, supra.

Foreign executor or administrator may prosecute or defend actions in state courts. (58 O.S. § 262). Where necessary to carry out will of nonresident testator, court may order property or proceeds of sale thereof delivered to foreign executor. (58 O.S. § 633).

Foreign Probated Wills.

See topic 13.16 Wills.

Uniform Fiduciaries Act not adopted.

Revised Uniform Principal and Income Act not adopted. Uniform Principal and Income Act adopted in substance. (60 O.S. § 175.26-175.36).

Uniform Simplification of Fiduciary Security Transfers Act not adopted.

Oklahoma Uniform Anatomical Gift Act. (63 O.S. § 2200.1A et seq.).

13.11 FIDUCIARIES:

See topics 13.09 Executors and Administrators, and Trusts; also category 14 Family, topic 14.07 Guardian and Ward.

13.12 INTESTACY:

See topic 13.07 Descent and Distribution.

13.13 LIVING WILLS:

See topic 13.16 Wills.

13.14 PROOF OF CLAIMS:

See topic 13.09 Executors and Administrators; also category 5 Civil Actions and Procedure, topic 5.18 Pleading.

13.15 TRUSTS:

Oklahoma Trust Act is based on Uniform Principal and Income Act (1931) and Uniform Trusts Act. Cite to Oklahoma Trust Act is 60 O.S. § 175.1 through 60 O.S. § 175.57. Oklahoma also has adopted Uniform Prudent Investor Act (60 O.S. § 175.60, 60 O.S. § 175.72) and Uniform Principal and Income Act (1997) (60 O.S. § 175.101, 60 O.S. § 175.602).

Creation.

Trust may be created in relation to real and/or personal property for any purpose for which contract may be made. It may be created by declaration of owner of property that he holds it in trust for another person or for himself and another person, by transfer inter vivos by owner to another person as trustee for transferor or third person, by transfer in trust by will, by appointment by person having power of appointment to another person as trustee or by promise by one person to another; but no trust in relation to real property is valid unless created by written instrument subscribed by trustor or his agent thereto authorized by writing or by instrument under which trustee claims estate affected. (60 O.S. § 175.6).

Eligibility and Competency.

Trustee includes bank or trust company having trust powers as well as natural person. (6 O.S. § 1002, 60 O.S. § 175.3).

Jurisdiction.

District Court of county where trustees or any co-trustee resides has original jurisdiction of trust agreement and its enforcement and on death of sole or surviving trustee and in absence of specific provision for appointment of his successor, power vests in District Court, which likewise has power to remove trustee. (60 O.S. § 175.23).

Powers of trustee follow office and not person unless so specifically provided in instrument creating trust. (60 O.S. § 175.16). Powers of corporate trust companies specified. (6 O.S. § 1001). Powers of co-trustees, unless otherwise provided in trust instruments, specified. (60 O.S. § 175.17).

In absence of contrary or limiting provisions in trust agreement or subsequent order or decree of court of competent jurisdiction, trustee of express trust may exchange, develop, improve or plat real property; grant options and sell real or personal property; lease real property, including oil and gas leases; compromise and settle claims against trust estate or trustee as such; abandon worthless or valueless property; pay costs or assessments on account of stock; exercise stock subscription or conversion rights; participate in foreclosures, reorganizations and mergers; consent to corporate sales, leases and encumbrances; to borrow money or create indebtedness or obligation except as limited by other provisions of title; and generally to execute any deed or other instrument and do all things in relation to such trust necessary or desirable for carrying out any of above powers, or incident to purposes of trust; employ attorneys, accountants, agents and brokers necessary in administration of trust. (60 O.S. § 175.24). Trustee may appoint natural or corporate trustee to act as to portion of trust estate having situs in jurisdiction in which trustee is not qualified to act. (60 O.S. § 175.54).

No trustee may, directly or indirectly, buy or sell any property for trust from or to itself or affiliate or any officer or director of such trustee or affiliate or from or to himself, relative, employer, partner or other business associate, except that national bank or state bank and trust company, as trustee, may sell stock to one or more of its officers, stockholders or directors on order by court of competent jurisdiction that sale will be for best interests of trust estate. (60 O.S. § 175.11).

Sales.

Sale of trust property in breach of trust to person for value without notice, actual or constructive, under recording act and who is not knowingly taking part in illegal transaction, vests property in purchaser free of trust. (60 O.S. § 175.7). Grant, deed, conveyance, lease, easement, encumbrance, assignment, or release by trustee of express trust of real property binds trust in favor of purchasers or encumbrancers for value who have neither actual notice of restrictions on trust nor constructive notice of such restrictions by recordation of trust instrument in county where real property is located. Knowledge of trust imposes no duty to inquire as to terms of trust instrument. (60 O.S. § 175.45).

Liabilities of Trustee.

Trustee may be personally liable on contract executed as trustee, if contract does not exclude such personal liability (60 O.S. § 175.18), and may be held personally liable for any tort, but has right of exoneration or reimbursement where tort was common incident of kind of business properly engaged in for trust, or even though not within that classification where trustee was not guilty of actionable negligence in incurring liability. If tort increased value of trust property, he may be reimbursed to extent of increase in value of trust property. Where instrument vests in cotrustee authority to direct making or retention of investments, excluded trustee not liable except for negligence in carrying out directed action. (60 O.S. § 175.19). To remedy breach of trust, court may: (1) Compel trustee to perform duties, (2) enjoin trustee, (3) compel trustee to redress breach by paying money, (4) order trustee to account, (5) appoint receiver or temporary trustee, (6) suspend or remove trustee, (7) reduce or deny trustee compensation, (8) impose equitable lien or constructive trust, or (9) grant any other appropriate remedy. Beneficiary can surcharge trustee for damage to trust estate or profit made by trustee because of breach. Court may award attorney fees and costs to any party as justice and equity may require. Claim against trustee is barred if no claim commenced within two years after receipt by beneficiary of report or statement adequately disclosing existence of claim and its time limitation; or, if no report or statement is received, within two years after termination of trust relationship. Report or statement can be delivered to adult personally, or if lacking capacity, to conservator, guardian or agent with authority; or to minor's guardian, conservator, or, if none, parent who does not have conflict of interest. For revocable trust, duties of trustee are owed exclusively to settlor and arise only for other beneficiaries on death or incapacity of settlor. Exculpatory provisions in trust agreement excusing trustee for bad faith breach or as result of abuse by trustee are unenforceable. Trustee is not liable for breach consented to, released by, or ratified by informed beneficiary. Trustee must be personally at fault to be liable. Trustees who dissent in writing can avoid liability. (60 O.S. § 175.57).

Income from spendthrift trusts is not subject to voluntary or involuntary alienation by beneficiary, except that notwithstanding any provision of trust, income due or to become due is subject to enforceable claims under laws of this state, or judgments for support of husband, wife or child of beneficiary, or for necessary services rendered or necessary supplies furnished to beneficiary, and all income due or to accrue in excess of $25,000 per annum is subject to garnishment by creditors of beneficiary and alienable by him. (60 O.S. § 175.25).

Investments.

Unless otherwise restricted by court order, will or trust agreement, trustee may invest in any property, real, personal, or mixed, in which individual may invest, exercising judgment and care which men of prudence, discretion and intelligence exercise in management of their own affairs in regard to permanent, as distinguished from speculative, disposition of their funds, considering probable income and safety of their capital. Trustee may not buy or sell property and investments from or to himself, and may retain any property originally received into trust without liability. (60 O.S. § 161-163).

Farming or Ranching.

Unless all beneficiaries qualify under 18 O.S. § 955, trust may not engage in business of farming or ranching or own or lease any interest in land to be used in farming or ranching. (18 O.S. § 955).

Securities in Name of Nominee.

Trustee may hold stock in name of nominee, with certain restrictions. (60 O.S. § 175.15).

Bequests and Devises to Inter Vivos Trusts.

See topic 13.16 Wills, subhead Bequests and Devises to Inter Vivos Trusts.

Gifts to Minors.

See category 14 Family, topic 14.10 Infants.

Accounting.

Trustee not required by statute to make periodic accountings. He must make full disclosure and any person affected by administration of trust can bring action in District Court for an accounting. (60 O.S. § 175.23).

Family Wealth Preservation Trust Act.

Allows creation of revocable or irrevocable trust of up to $1,000,000 as well as income and increase in value of corpus for benefit of qualified beneficiaries and invested in Oklahoma-based assets to be exempt from execution. Trust subject to fraudulent transfer principles, child-support judgments, and certain pre-existing liens. (31 O.S. § 10 et seq.).

Uniform Principal and Income Act (1997) adopted in substance. (60 O.S. § 175.101-175.602). Act is automatically applicable to estates and trusts existing on effective date of act except as provided in will, trust or act.

Uniform Simplification of Fiduciary Security Transfers Act not adopted.

Uniform Fiduciaries Act not adopted.

Charitable Fiduciary Act (60 O.S. § 301.1 et seq.) authorizes charitable religious, educational and eleemosynary organizations to act as fiduciary and clarifies powers of such organizations when acting in permitted fiduciary capacity.

Uniform Common Trust Fund Act adopted in substance. (60 O.S. § 162). Official Amendment adopted with substantial modifications.

Uniform Prudent Investor Act adopted. (60 O.S. § 175.61 et seq.).

Uniform Prudent Management of Institutional Funds Act adopted. (60 O.S. § 300.12 et seq.).

Medical Savings Account Act (63 O.S. § 2621-2623). Resident of state or employer may deposit contributions to medical savings account established to pay eligible medical expenses of account holder and dependents. Account must be established as trust and placed with trustee. Maximum allowable deposit for each taxable year specified. Contributions made to and interest earned on account exempt from taxation as adjusted gross income (see 68 O.S. § 2358).

Suits Against Trusts.

Any trust may be sued by its particular appellation without naming individuals composing trust, and may be served by serving any individual designated as trustee. (12 O.S. § 182-3).

Resignation.

Trustee may resign and District Court having jurisdiction may accept his resignation and discharge him from trust on such terms as may be required. (60 O.S. § 175.38).

Revocation.

Trust is revocable by trustor unless instrument creating it makes it irrevocable, and any trust may be revoked by trustor on consent of all living persons having vested or contingent interests (by purchase) therein; but this does not apply to spendthrift trust unless created by trustor for own benefit. (60 O.S. § 175.41).

Termination.

Trustor of trust may, in its creation, prescribe to whom real or personal property to which trust relates shall belong on failure or termination of trust and may transfer or devise such property subject to execution of trust. (60 O.S. § 175.42). When purpose for which express trust was created ceases, estate of trustee also ceases. (60 O.S. § 175.49).

Compensation.

Trustee is entitled to compensation in amount provided for in trust agreement, or if no provision is made, he may charge and deduct reasonable compensation for services rendered and responsibilities assumed. (60 O.S. § 175.48).

Resulting Trusts.

When transfer of real property is made to one person, and consideration therefor is paid by or for another, trust is presumed to result in favor of latter. (60 O.S. § 137).

Accumulations.

No statutory limitation on accumulation of income.

Perpetuities.

See category 21 Property, topic 21.12 Perpetuities.

Pour Over Trusts.

See topic 13.16 Wills, subhead Bequests and Devises to Inter Vivos Trusts.

Disclaimer.

See generally 60 O.S. § 751 et seq.

Interests Disclaimable.

Beneficiary may disclaim any legal or equitable interest in real or personal property, any fractional share thereof, any power to appoint or to consume property, or any other right or privilege relating thereto which would otherwise pass to him as grantee, as donee, by assignment or conveyance, as beneficiary of inter vivos trust or insurance contract, by exercise or nonexercise of nontestamentary power of appointment, or otherwise under any nontestamentary instrument. (60 O.S. § 751).

Procedure.

After creation of interest, but not more than nine months after beneficiary is finally ascertainable and interest is indefeasibly vested, written disclaimer must be filed in state court having jurisdiction and venue; disclaimer must be signed, witnessed, and acknowledged as provided for deeds of real estate. (60 O.S. § 751, 753 O.S. § 54).

Effect.

Disclaimed interests never vest in beneficiary. Disclaimers are effective irrespective of express or implied spendthrift provisions or similar restrictions. (60 O.S. § 757).

Bars to Right to Disclaim.

Assignment, conveyance, encumbrance, pledge or other disposition of interest by beneficiary, or contract therefor, or judicial disposition or sale before disclaimer; insolvency of beneficiary; or written waiver of right to disclaim, will bar right to disclaim. (60 O.S. § 756).

See topic 13.16 Wills, subhead Disclaimer, for interests in testamentary trusts.

13.16 WILLS:

Capacity and Limitations.

Every person over age of 18, of sound mind (84 O.S. § 41), including married woman (84 O.S. § 42), may, by last will, dispose of all his estate, real and personal, except that will is subservient to any antenuptial marriage contract in writing, and no spouse may devise or bequeath away from other so much of estate of testator that other spouse would receive less in value than undivided ½ in property acquired by joint industry of husband and wife during coverture. No person may by will dispose of property which could not be alienated, encumbered or conveyed by testator while living, except that homestead may be devised by one spouse to other. (84 O.S. § 44). Person who has had guardian or conservator appointed may make will if subscribed and acknowledged in presence of district court judge and such will is valid in all other respects. (84 O.S. § 41).

Execution.

Every will (other than nuncupative) must be in writing, and every will (other than holographic or nuncupative) must be executed and attested as follows: (1) It must be subscribed at end thereof, by testator, or some person, in his presence and by his direction, must subscribe his name thereto; (2) subscription must be made in presence of attesting witnesses, or be acknowledged by testator to them, to have been made by him or by his authority; (3) testator must at time of subscribing or acknowledging same, declare to attesting witnesses, that instrument is his will; (4) there must be at least two attesting witnesses, each of whom must sign his name as witness at end of will at testator’s request and in his presence; (5) will or codicil may be made “self-proved” at time of execution or any subsequent date during lifetimes of testator and witnesses and testimony of witnesses at probate, unless contested, made unnecessary by acknowledgment of testator and witnesses before officer authorized to administer oaths, or written declaration of testator and written declarations of attesting witnesses. Any person falsely executing written declaration as witness or misrepresenting his or her identity with intent to defraud is deemed guilty of perjury and subject to penalties prescribed by law. Self-proved testamentary instrument will be admitted to probate without testimony of any subscribing witness, unless contested, but otherwise will be treated no differently than will or codicil not self-proved. Self-proved testamentary instrument may be revoked or amended by codicil in same fashion as will or codicil not self-proved and may be contested as will not self-proved. (84 O.S. § 55). Statutory form for self-proving affidavit and certificate is as follows:

State of Oklahoma)

County of . . . .)   SS.

Before me, the undersigned authority, on this day personally appeared . . . . . ., ..., and . . . . . ., known to me to be the testator and the witnesses, respectively, whose names are subscribed to the annexed or foregoing instrument in their respective capacities, and, all of said persons being by me first duly sworn, said . . . . . ., testator, declared to me and to the said witnesses in my presence that said instrument is his last will and testament, or a codicil to his last will and testament, and that he had willingly made and executed it as his free and voluntary act and deed for the purposes therein expressed; and the said witnesses, each on his oath stated to me, in the presence and hearing of the said testator, that the said testator had declared to them that said instrument is his last will and testament, or codicil to his last will and testament, and that he executed same as such and wanted each of them to sign it as a witness; and upon their oaths each witness stated further that they did sign the same as witnesses in the presence of the said testator and at his request and that said testator was at that time eighteen (18) years of age or over and was of sound mind.

____

Testator

____

Witness (signature)

____

Name and Residence (printed)

____

Witness (signature)

____

Name and Residence (printed)

Subscribed and acknowledged before me by the said . . . . . ., testator, and subscribed and sworn before me by the said . . . . . ., and . . . . . . witnesses, this . . . . . . day of . . . . . ., 20. . . . . .

. . . .

(Official capacity of officer)

(SEAL) (84 O.S. § 55).

Alternatively, statutory form for self-proving written declaration without certificate is as follows:

We the undersigned are the testator and the witnesses, respectively, whose names are subscribed to the annexed or foregoing instrument in their respective capacities, and we do hereby declare that said __________, testator, declared to said witnesses that said instrument is his last will and testament or a codicil to his last will and testament, and that he willingly made and executed it as his free and voluntary act and deed for the purposes therein expressed; and said witnesses further declare that the said testator declared to them that said instrument is his last will and testament or codicil to his last will and testament, and that he executed same as such and wanted each of us to sign it as a witness; and that we did sign the same as witnesses in the presence of the said testator and at his request and that said testator was at that time eighteen (18) years of age or over and was of sound mind, all of which we declare and sign under penalty of perjury this _____ day of __________.

____

Testator

____

Witness (signature)

____

Name and Residence (printed)

____

Witness (signature)

____

Name and Residence (printed)

Witness to written will must write, with his name, his place of residence; and person who subscribes testator's name by his direction must write his own name as witness to will. (84 O.S. § 56).

Execution of codicil referring to previous will has effect to republish will as modified by codicil. (84 O.S. § 57).

Attestation Clause.

There is no statutory form for attestation of wills but following is usually used:

Form

A. B. subscribed the foregoing will in our presence, and at the time declared this to be his last will and testament, and we, at his request, in his presence, and in the presence of each other, signed our names hereto as witnesses, this . . . . . . day of . . . . . ., 20 . . . . . ., at . . . . . . (Signatures and places of residence of at least two witnesses).

Nuncupative Will.

To make such will valid and entitle it to probate, following requisites must be observed: (1) Estate bequeathed must not exceed $1,000 in value; (2) will must be proved by two witnesses who were present at making thereof, one of whom was asked by testator at time to bear witness that such was his will, or to that effect; (3) testator must at time have been in actual military service in field, or doing duty on shipboard at sea, and either case, in actual contemplation, fear or peril of death, or testator must have been at time in expectation of immediate death from injury received same day. (84 O.S. § 46).

Holographic wills are recognized. (84 O.S. § 54).

Mutual Wills.

Conjoint or mutual is valid, but it may be revoked by any of testators in same manner as any other will. (84 O.S. § 52).

Revocation.

Will is revoked by writing of testator declaring such revocation, executed with same formality as required for execution of will; also by being burnt, torn, cancelled or destroyed with intention of revoking same, by testator himself, or by some person in his presence and by his direction. (84 O.S. § 101). If testator marries after making will and has issue of such marriage, will is revoked unless provision is made for such issue or intentional omission is indicated therein. If testator is divorced, all provisions of will in favor of divorced spouse are revoked. Annulment has same effect as divorce. There is no such revocation if decree of divorce or annulment is vacated or if testator remarries former spouse. (84 O.S. § 114).

Bequests and Devises to Inter Vivos Trusts.

Testator may devise property by will to trustee of trust established by instrument independent of will. (84 O.S. § 301 et seq.).

Uniform Testamentary Additions to Trusts Act adopted. (84 O.S. § 301 et seq.).

Probate.

Custodian of will must deliver it to district court having jurisdiction of estate (see topic 13.09 Executors and Administrators) within 30 days after he is informed that maker thereof is dead. (58 O.S. § 21).

Any executor, devisee or legatee named in will, or any other person interested in estate, may at any time after death of testator petition court having jurisdiction to have will proved, whether same is in writing, in his possession or not, or is lost, or destroyed, or beyond jurisdiction of state, or nuncupative will. (58 O.S. § 22).

Petition for probate of will must show: (1) Jurisdictional facts; (2) whether executor consents to act; (3) names, ages, and residence of heirs, legatees, and devisees of decedent, so far as known to petitioner; (4) probable value and character of estate; (5) name of person for whom letters testamentary prayed. Petition must be in writing and signed by applicant or his attorney. (58 O.S. § 23).

When petition is filed, court must fix day for hearing thereof within not less than ten nor more than 30 days. Notice of hearing must be given by mailing copies thereof, at least ten days before hearing, to all heirs, legatees and devisees at their last known place of residence; provided that if name or address of any of them is unknown, in addition to such mailing to all such whose names and addresses are known, notice of hearing must be published in one issue of newspaper in county at least ten days before hearing. Notice need not be given to legatee and devisee whose bequest conditioned upon another person's predeceasing testator who, in fact, survives testator. If legatee and devisee is express or testamentary trust, notice to trustee is required but not to beneficiaries of trust. (58 O.S. § 25, 26). After hearing court must set forth its finding of facts and conclusions of law in writing and render judgment based thereon admitting or refusing to admit will to probate. (58 O.S. § 42).

If no person appears to contest probate, court may admit will to probate on testimony or affidavit of one subscribing witness only. (58 O.S. § 30). Holographic will may be proved as other writings. (58 O.S. § 31). In proceeding to probate will, depositions of witnesses outside of county may be taken and used by either proponent or contestant. (58 O.S. § 43).

Lost Will.

Copy of lost or destroyed will may be probated upon proof of its execution and validity, and of its provisions by two credible witnesses. Testimony must be reduced to writing, signed by witnesses, filed and preserved. (58 O.S. § 81 et seq.).

Self-Proved Wills.

See subhead Execution, supra.

Contest.

Any person interested may appear and contest will by filing written grounds of opposition to probate, and issues arising therefrom must be tried and determined by court. (58 O.S. § 29, 41).

Will admitted to probate may be contested within three months thereafter by any person interested in estate by filing sworn petition, in court in which will was proved, alleging that evidence discovered since probate shows: (1) That will of later date revoking or changing former will has been discovered; or (2) that some jurisdictional fact was wanting; or (3) that testator was not competent, or free from duress, menace, fraud, or undue influence when will allowed was made; or (4) that former will was not duly executed and attested. (58 O.S. § 61).

Legacies and Devises.

In specific devise or legacy, title passes by will, but possession may only be obtained from personal representative; and he may be authorized by district court to sell property devised or bequeathed (84 O.S. § 7) to pay debts or obligations or in best interests of estate (58 O.S. § 387-392, 411 O.S. § 2; 84 O.S. § 2).

Legacies are due and deliverable at expiration of one year after testator's death (84 O.S. § 12), and bear interest from that time, except that legacies for maintenance or to testator's widow bear interest from testator's death (84 O.S. § 13).

At any time after four months from issuance of letters, devisee or legatee may petition for payment or delivery of his legacy or devise on giving security for payment of his portion of debts of estate. (58 O.S. § 621-4).

Unclaimed Legacies.

See topic 13.09 Executors and Administrators, subhead Distribution If Abroad; category 21 Property, topic 21.01 Absentees, subhead Escheat.

Disclaimer.

See generally 84 O.S. § 22 et seq.

Interests Disclaimable.

Beneficiary may disclaim any legal or equitable interest in real or personal property, any fractional share thereof, any power to appoint or to consume property, or any other right or privilege relating thereto which would otherwise pass to disclaiming party by intestate succession, devise, legacy, bequest, by exercise or nonexercise of testamentary power of appointment, by renunciation and election to take against will, as beneficiary of testamentary trust, or otherwise under testamentary instrument. (84 O.S. § 22).

Procedure.

After creation of interest, but not more than nine months after beneficiary is finally ascertainable and interest is indefeasibly vested, written disclaimer must be filed in district court in which relevant estate has been or is to be administered. Disclaimer must be signed, witnessed, and acknowledged as provided for deeds. (84 O.S. § 22, 24 O.S. § 25).

Effect.

Disclaimed interests never vest in beneficiary. Disclaimers are effective irrespective of express or implied spendthrift provisions or similar restrictions. (84 O.S. § 28).

Bars to Right to Disclaim.

Assignment, conveyance, encumbrance, pledge or other disposition of interest by beneficiary, or contract therefor, or judicial disposition or sale before disclaimer; insolvency of beneficiary; or written waiver of right to disclaim, will bar right to disclaim. (84 O.S. § 27).

See topic 13.15 Trusts, subhead Disclaimer.

Testamentary gift to subscribing witness is void unless there are two other competent subscribing witnesses (84 O.S. § 143), but such witness may take share to which he would have been entitled in case of intestacy, not exceeding testamentary gift (84 O.S. § 184).

Lapses.

If legatee or devisee dies in lifetime of testator gift to him fails unless will shows intention to substitute another in his place. (84 O.S. § 177). But this is subject to exception that there is devise to child or other relation of testator, who dies in testator's lifetime leaving lineal descendants who survive testator, such descendants take just as devisee would have taken if living. (84 O.S. § 142).

Pretermitted Children.

If testator omits to provide for any of his children (including afterborn of posthumous children) or issue of deceased child, such child or issue will inherit its share of testator's estate as if he had died intestate, unless it appear that such omission was intentional. (84 O.S. § 131-2).

Testamentary Guardian.

See category 14 Family, topic 14.07 Guardian and Ward, subhead Selection of Guardian.

Election.

Spouse cannot bequeath and devise away from surviving spouse so much of estate that surviving spouse receives less in value than undivided one-half interest in property acquired through joint industry of spouses during marriage. Surviving spouse has right of election to take one-half of joint industry property in lieu of gifts for benefit of spouse under will. Spouse makes election by filing writing in court in which decedent's estate is being administered on or before date of hearing of petition for final distribution. Election which fails to substantially comply with statute is void, but spouse can make another election if within allotted time period. Right is personal to surviving spouse and may be exercised only during lifetime of such spouse, but if spouse is judicially determined incompetent, guardian or conservator can make election if authorized by court having jurisdiction over guardian or conservator. Certified copies of guardian's or conservator's letters and order of court authorization must be attached to election. Guardian or conservator may be appointed in any state prior to time permitted for election. Foregoing provisions are subject, however, to contrary provisions in valid antenuptial agreement (see category 14 Family, topic 14.09 Husband and Wife). (84 O.S. § 44).

Foreign Probated Wills.

Every will duly proved and allowed in any of territories, or in any of United States or District of Columbia, or in any foreign country or state, may be allowed and recorded in any county in which testator left any estate, or any estate for which claim is made. (58 O.S. § 51). When copy of will and probate thereof duly authenticated is produced by executor, or by any other person interested in will, same must be filed, and court must appoint time for hearing, notice whereof must be given as provided for on original petition. (58 O.S. § 52). On hearing will must be admitted to probate if it has been proved, allowed, or admitted to probate in such other foreign jurisdiction, and was executed according to law of place in which same was made, or in which testator was domiciled, or in conformity with laws of this state. (58 O.S. § 53).

Alternatively, title to Oklahoma property owned by nonresident may be passed by filing of petition with certified copy of foreign will, order admitting same to probate and order distributing estate from domiciliary probate proceedings, or if decedent died intestate by attaching certified copy of order appointing personal representative and order distributing estate from domiciliary probate proceedings. Petition shall contain jurisdictional facts; statement that personal representative consents to act, renounces his right, or if it is even necessary for personal representative to be appointed; names, ages and residences of heirs, legatees and devisees of deceased, including such persons named in will or determined in order determining heirs in domiciliary estate; description, probable value and character of Oklahoma property; and name and address of person for whom letters are prayed. Upon filing petition, court shall issue order setting for hearing. Not less than 20 days prior to date of hearing, notice shall be published one time and shall be mailed to all devisees, legatees and heirs including those named in will or order determining heirs. If no interested party files written objection, court shall enter order distributing

Oklahoma property in accordance with will, or if deceased died intestate, in accordance with laws of intestate succession of this state. If objection is filed, and is determined to have merit, court may appoint personal representative, and administration shall proceed under regular statutory provisions. (58 O.S. § 677).

Living Wills.

Oklahoma Advance Directive Act (63 O.S. § 3101.1 et seq.) permits person of sound mind and at least 18 years old to execute Advance Directive for Health Care governing withholding or withdrawal of life-sustaining treatment which may include either or both living will and appointment of health care proxy and also may include specific donation of entire body or designated body organs or parts. Directive must be signed by declarant and two witnesses at least 18 years old and not legatees, devisees or heirs at law of declarant. Advance directive must be substantially in form provided by statute. (63 O.S. § 3101.4).

Do-Not-Resuscitate Act (63 O.S. § 3131.1 et seq.) permits person or incapacitated person's representative (including parent or guardian on behalf of minor) to notify attending physician, by execution of do-not-resuscitate (DNR) consent form or by other specified notice of which health care provider has actual knowledge, that such person does not consent to administration of cardiopulmonary resuscitation in event of cardiac or respiratory arrest. DNR consent form, which may be revoked at any time, must be substantially in form provided by statute. (63 O.S. § 3131.5).

Hydration and Nutrition for Incompetent Patients Act (63 O.S. § 3080.1 et seq.) governs types of treatment required in specified circumstances.

Foreign Executed Wills.

Will executed outside this state by person not having his or her domicile within state, and not probated elsewhere, may be admitted to probate in Oklahoma if executed according to law of this state or law of place where will was made or where testator was at time domiciled. (84 O.S. § 71-73).

Uniform Anatomical Gift Act adopted. (63 O.S. § 2201 to 2209).

Simultaneous Death.

See topic 13.05 Death, subhead Survivorship.

Testamentary Trusts.

See topic 13.15 Trusts.

14 FAMILY

14.01 ADOPTION:

Adoption Code (10 O.S. § 7501-1.1 et seq.) based on Uniform Adoption Act, with modifications.

Following persons are eligible to adopt child: (1) Husband and wife jointly if both spouses are at least age 21; (2) either husband or wife if other spouse is parent or relative of child; (3) unmarried person at least age 21; (4) married person at least age 21 who is legally separated from spouse. (10 O.S. § 7503-1.1).

Consent Required.

Minor may be adopted if written consent to adoption or permanent relinquishment for adoption executed by: (1) Both parents of minor; (2) one parent of minor, alone, if other parent is dead, parental rights of other parent have been terminated, or consent of other parent is otherwise not required pursuant to 10 O.S. § 7505-4.2; (3) legal guardian or guardian ad litem of minor, under specified circumstances; (4) executive head of licensed child-placing agency, under specified circumstances; (5) any person having legal custody of minor by court order if parental rights of both parents have been judicially terminated and court that issued custody order for minor has consented to adoption and certified copy of order containing consent is filed before final decree. (10 O.S. § 7503-2.1).

Parent of minor born in wedlock or parent who is age 16 deemed capable of giving consent to adoption of minor. If parent of minor born out of wedlock is under age 16, parent's consent to adoption deemed sufficient when given by such minor parent before district court judge and accompanied by written consent of legal guardian, parent or other person having custody of minor parent. If minor to be adopted is age 12 or older, consent of minor to adoption also is required, unless court finds it is not in best interest of minor to require minor's consent. With certain specified exceptions, consents must be acknowledged before judge of district court issuing decree of adoption. (10 O.S. § 7503-2.1).

Consents must be executed at times specified by statute. (10 O.S. § 7503-2.2). Requirements for form and execution of consent (including extrajudicial consent by putative father age 16 or older of minor born out of wedlock) and personal relinquishment specified. (10 O.S. § 7503-2.3 to 2.6). Except as otherwise provided in 10 O.S. § 7503-2.6 and 2.7, permanent relinquishment or consent to adoption is irrevocable.

Adoption without Consent and Termination of Parental Rights.

If consent to adoption or permanent relinquishment for adoption has not been obtained from both parents of minor to be adopted and rights of nonconsenting parent(s) have not previously been terminated, petitioner for adoption, consenting parent, or legal guardian or legal custodian of minor must file application stating reason that consent or relinquishment of parent(s) is not necessary (see 10 O.S. § 7505-4.2 for cases where consent is not required). In alternative, if nonconsenting parent is putative father of minor born out of wedlock, application to terminate parental rights may be filed. Procedure for notice and hearing on such application and for appeal from order terminating parental rights specified. (10 O.S. § 7505-4.1, 4.3).

Jurisdiction, Venue and Choice of Law.

District court of state has jurisdiction over proceedings to terminate parental rights and for adoption of minor if specified residency or physical presence requirements are met and substantial evidence concerning minor's present or future care is available in state. Court cannot exercise jurisdiction over proceeding for adoption of minor if, at time petition is filed, proceeding concerning custody or adoption of minor is pending in court of another state exercising jurisdiction substantially in conformity with Uniform Child Custody Jurisdiction Act or Oklahoma Adoption Code, unless proceeding is stayed by court of other state. (10 O.S. § 7502-1.1). Proceedings for adoption may be brought in district court in county where petitioner or child to be adopted resides. (10 O.S. § 7502-1.2). Except as otherwise provided, proceedings governed by laws of this state, including Adoption Code and Interstate Compact for Placement of Children. Permanent relinquishment of child for adoption or consent to adoption executed outside of state recognized as valid if executed in accordance with specified requirements. (10 O.S. § 7502-1.3). Specified procedures for adoption of minor born outside U.S. and readoption of minor adopted outside U.S. and supplementary certificate of birth for minor adopted outside U.S. Oklahoma does not recognize adoption by more than one individual of same sex from any other state or foreign jurisdiction. (10 O.S. § 7502-1.4).

Petitions.

Filing fee of $92 (of which $20 is deposited to credit of Voluntary Registry and Confidential Intermediary Program and Mutual Consent Voluntary Registry). (28 O.S. § 152). Petition must be verified by petitioner and include specified information. (10 O.S. § 7505-3.1).

Proceedings.

Any petitions filed pursuant to Adoption Code have priority over all cases pending on court's docket. Any other proceedings concerning adoption of child must be expedited. (10 O.S. § 7505-1.4). Unless otherwise ordered, hearings are confidential and held in closed court without admittance of anyone other than interested parties and their counsel. (10 O.S. § 7505-1.1). Court must appoint attorney for minor in contested proceeding and may appoint attorney for child in uncontested proceeding. Court may appoint separate guardian ad litem for minor. (10 O.S. § 7505-1.2). Separate procedure for appointment of counsel and guardian ad litem and termination of parental rights, if child is alleged to be deprived. (10 O.S. § 7003-3.7; 10 O.S. § 7006-1.1). Procedure for pre-adoption termination of parental rights specified. (10 O.S. § 7505-2.1).

Notice of Plan for Adoption.

Before or after birth of minor born out of wedlock, Department of Human Services (DHS), licensed child-placing agency, or attorney representing prospective adoptive parents may, by in-hand service or certified mail to putative father, notify putative father that mother of child is considering adoptive placement for minor through notice of plan for adoption. Specified information must be included in notice. (10 O.S. § 7503-3.1).

Medical and Social Histories, Home Studies.

Before placing minor for adoption, DHS, child-placing agency or attorney representing adoptive parent must compile written medical and social history report of minor containing specified information and records. (10 O.S. § 7504-1.1). Copy of report must be furnished to prospective adoptive parent, filed with court and supplemented before hearing on petition for adoption. (10 O.S. § 7504-1.2). Pre-placement home study of adoptive parent required unless waived by court or unless parent or guardian places minor directly with relative of minor for purposes of adoption. (10 O.S. § 7505-5.1 to 5.4).

Disclosure of Expenses.

With petition, or prior to final decree, affidavits must be filed disclosing all costs, funds or monies expended or expected to be expended by adoptive family and by attorney, child placing agency or person facilitating direct placement adoption in connection with adoption. Adoption-related costs and expenses deemed proper items specified by statute. Court must disapprove any expenditure it deems unreasonable or in violation of 21 O.S. § 865 to 869 (prohibiting trafficking in children). (10 O.S. § 7505-3.2). Attorneys for petitioner and birth parents must also file disclosure statement of expenses. (10 O.S. § 7503-1.2).

Interlocutory Order and Final Decree.

Upon examination of pre-placement home study, and after hearing, court may issue interlocutory decree giving care and custody of minor to petitioner. (10 O.S. § 7505-6.1). Before final hearing on petition for adoption, following items (or affidavit explaining absence of item) must be filed: (1) Certified copy of birth certificate or other record of date and place of birth of minor; (2) any consent, extrajudicial consent, or permanent relinquishment; (3) certified copy of any court order terminating parental rights of minor's parents or guardian; (4) certified copy of any court order or petition in any pending proceeding concerning custody of or visitation with minor; (5) copy of any home study performed on petitioners; (6) copy of any agreement with public agency to provide subsidy for benefit of minor with special needs (see 10 O.S. § 7510-1.1 to 1.6 re: subsidized adoptions programs); (7) verified document by DHS, or child-placing agency, attorney for adoptive parent or person placing minor for adoption that petitioner has been furnished copy of medical and social history report; (8) name and address, if known, of any person entitled to receive notice of proceeding; (9) affidavit of expenditures; and (10) any other document or information required by court. (10 O.S. § 7505-6.2).

Six months after date of interlocutory decree, petitioner may apply for final decree of adoption. If minor is related by blood to petitioner, or is stepchild of petitioner, or court finds that best interests of child will be furthered, court, after examination of home study reports, may waive entry of interlocutory decree and six-month waiting period. Notice of final hearing must be served on any biological parent whose parental rights have not been terminated, unless parent has executed consent or permanent relinquishment. If applicable, notice also must be served on DHS or child-placing agency that has original custody or performed home study. Petitioners and child must appear at final hearing, unless presence of child is waived by court. (10 O.S. § 7505-6.3).

Court may enter final decree of adoption, if satisfied that adoption is in best interests of child. (10 O.S. § 7505-6.3). Grandparent who is parent of minor's biological parent may be given reasonable rights of visitation. (10 O.S. § 7505-6.5). If court denies petition for adoption, it must issue appropriate order for legal and physical custody of minor. (10 O.S. § 7505-6.4).

Appeals.

Appeal in case concerning adoption of minor or termination of parental rights for adoption purposes must be initiated by filing petition in error in Supreme Court within 30 days of filing of order, judgment or decree appealed from. Adjudication of appeals and other proceedings concerning adoption of minor must be expedited by Supreme Court. (10 O.S. § 7505-7.1).

Except as provided in 10 O.S. § 7503-2.7, when interlocutory or final decree of adoption has been rendered, decree terminating parental rights cannot be challenged more than three months after its rendition. No adoption may be challenged more than one year after entry of final adoption decree. Unless Supreme Court so orders, appeal does not suspend district court's order regarding minor or remove minor from custody of court or of person, institution or agency to whose care minor has been committed. (10 O.S. § 7505-7.2).

Effect of Adoption.

After final decree is entered, relation of parent and child and all rights, duties and other legal consequences of natural relation of child and parent exist between adopted child and adoptive parents and kindred of adoptive parents. From date of final decree, child is entitled to inherit real and personal property from and through adoptive parents and adoptive parents are entitled to inherit from and through child in accordance with statutes of descent and distribution. After final decree, biological parents of adopted child, unless they are adoptive parents or spouse of adoptive parent, are relieved of all parental responsibilities for child and have no rights over adopted child or to property of child by descent and distribution. (10 O.S. § 7505-6.5). Health insurance benefits applicable for any natural child of insured are payable for adopted child from date of placement in custody of insured; coverage includes necessary care and treatment of medical conditions existing prior to date of placement. (36 O.S. § 6059).

Records relating to adoption proceedings are kept as permanent court record, and are confidential and not open to inspection or copying except as authorized by statute or upon order of court for good cause shown. (10 O.S. § 7505-1.1). Court clerk must prepare certificate of decree of adoption or annulment of adoption within 30 days after decree becomes final, and forward certificate to State Registrar by 15th day of following calendar month. If biological parent has filed affidavit of nondisclosure (see 10 O.S. § 7503-2.5), affidavit must be attached to certificate.

State Registrar must prepare supplementary birth certificate in new name of adopted person (or certificate of foreign birth, if adopted person was born in foreign country) and seal and file original certificate of birth, if any, with certificate of decree of adoption and affidavit of nondislosure, if any. For adoptions finalized after Nov. 1, 1997, if specified conditions are met, State Registrar must provide, at adopted person's request, uncertified copy of adopted person's original birth certificate at any time after person's 18th birthday. (10 O.S. § 7505-6.6).

Paternity Registry.

Centralized paternity registry established by DHS to protect parental rights of putative father who wishes to affirmatively assume responsibility for children he may have fathered, and expedite adoptions of children whose biological fathers are unwilling to assume responsibility for their children by registering with registry or otherwise acknowledging their children. (10 O.S. § 7506-1.1, 1.2).

Adult Adoptions.

Adult person may be adopted by any other adult person, with consent of person to be adopted or his guardian, approval of court, and written consent of spouse, if any, of adoptive parent. Petition for adult adoption is filed with district court in county where adoptive parent resides. Decree of adult adoption has same legal consequences as other adoptions. See subhead Effect of Adoption, supra. (10 O.S. § 7507-1.1).

Adult Adoptee Services.

All records of any adoption finalized in state must be maintained for 22 years by child-placing agency, entity, organization or person arranging or facilitating adoption, or transferred to DHS or transferee agency assuming responsibility for preservation of such records. (10 O.S. § 7508-1.1). Specified persons may register with Mutual Consent Voluntary Registry established by DHS. (10 O.S. § 7508-1.2). Under search program established by DHS, services of confidential, certified intermediary may be used by eligible persons to locate adult biological relative with whom contact has been lost through adoption or termination of parental rights proceedings. (10 O.S. § 7508-1.3).

14.02 ALIMONY:

See topic 14.06 Divorce.

14.03 COMMUNITY PROPERTY:

See topic 14.09 Husband and Wife.

14.04 DESERTION:

See topic 14.09 Husband and Wife.

14.05 DISSOLUTION OF MARRIAGE:

See topic 14.06 Divorce.

14.06 DIVORCE:

Grounds for divorce are: (1) Abandonment for one year; (2) adultery; (3) impotency; (4) pregnancy of wife, at time of marriage, by another than husband; (5) extreme cruelty; (6) fraudulent contract; (7) incompatibility; (8) habitual drunkenness; (9) gross neglect of duty; (10) imprisonment under sentence for felony at time petition is filed; (11) procurement of final divorce decree outside state which does not in this state release other party from obligations of marriage; (12) insanity for five years, after having been patient of mental institution for such period, with poor prognosis for recovery. (43 O.S. § 101).

When word "divorce" used in statutes, Legislature intends term to mean "dissolution of marriage". (43 O.S. § 105[E]).

Legal Separation.

Wife or husband may obtain alimony from other for any of causes for which divorce may be granted. (43 O.S. § 129).

Residence Requirements.

Either petitioner or respondent must have been actual resident of state in good faith for six months preceding filing of petition. Action may be brought in county where petitioner has been actual resident for 30 days or in county of respondent's residence. Residence in U.S. military reservation is residence in county for that purpose. (43 O.S. § 102, 103). Venue may be transferred under certain conditions. (43 O.S. § 103).

Married person who meets residence requirements for bringing divorce action in this state may seek divorce in this state, though other spouse resides elsewhere. (43 O.S. § 131).

If divorce is sought on ground of insanity and spouse alleged to be insane is patient in institution of another state, applicant for divorce must have resided in this state for five years preceding commencement of action. (43 O.S. § 101).

Jurisdiction.

District courts have jurisdiction to grant divorces. (43 O.S. § 101). Court may exercise personal jurisdiction over person, whether or not resident of state, who lived in state in marital and/or parental relationship as to all obligations for alimony and child support where other party to relationship continues to reside in state. Service may be made outside state by any method authorized by statutes of this state. (43 O.S. § 104).

Pleading.

Initial pleading titled "Petition". Person filing petition shall be called "Petitioner". Responsive pleading titled "Response". Person filing responsive pleading shall be called "Respondent". Petition must be verified by petitioner. (43 O.S. § 105). Response may allege cause for divorce against petitioner. (43 O.S. § 106). Pleading shall be titled "In re the Marriage of [Petitioner] and [Respondent]". (12 O.S. § 105).

Fees.

See category 6 Courts and Legislature, topic 6.01 Courts, subhead District Courts.

Mediation.

When property, separate maintenance, or custody is at issue, court may refer matters to mediation, unless party asserts or it appears to court that domestic violence or child abuse has occurred. (43 O.S. § 107.3).

Orders Concerning Property, Children, Support and Expenses.

Temporary Orders.

After petition is filed in action for divorce or separate maintenance, either party may file verified application requesting court to issue temporary order: (1) Regarding child custody, support or visitation, spousal maintenance, payment of debt, possession of property, or attorney fees; and (2) providing other injunctive relief proper in circumstances. Temporary order cannot be issued until at least five days notice of hearing is given to other party. (43 O.S. § 110).

Automatic Temporary Injunction.

Upon personal service of petition for divorce, annulment, or legal separation on respondent, automatic temporary injunction goes into effect against both parties, unless waived by both parties pursuant to statutory requirements or, within three days of service, party files objection and requests hearing, in which case injunction remains in place until hearing. Injunction remains in place until dissolution of marriage or other final order. Notice of injunction must be printed and attached to summons and petition. Injunction prohibits actions too numerous to mention here and, therefore, statute should be consulted. (43 O.S. § 110).

Temporary Restraining Order.

Can be issued without notice if court finds on basis of verified application and testimony of witnesses that irreparable harm will result to moving party or child of party, but motion for temporary order must be set within ten days. (43 O.S. § 110).

Expenses.

Upon granting decree of divorce or separate maintenance, court may require either party to pay other's reasonable expenses. Court may make additional orders relative to expenses of subsequent actions brought by parties for enforcement or modification of any interlocutory or final orders in divorce action. (43 O.S. § 110).

Delayed Final Order.

In divorce action involving minor children, final order cannot issue for at least 90 days from date of filing of petition, unless waived by court for good cause shown and without objection by either party. Requirement does not apply to divorces filed for specified causes. (43 O.S. § 107.1).

Decree must recite date when judgment rendered. If appeal is taken, judgment does not become final until appeal is determined. If appeal is taken from any part of judgment except granting of divorce, divorce is final and takes effect from date decree is rendered; however, neither party may marry another person until six months after decree is rendered. (43 O.S. § 127). (See also subhead Remarriage, infra.) Equal wrong no basis for denying decree but decree must be granted both parties. (43 O.S. § 108).

Appeal from judgment granting or denying divorce shall be made in same manner as in any other civil case. (43 O.S. § 123).

Division of Property.

In cases where divorce is granted to both parties, where alimony is granted without divorce or where divorce is refused, court may enter order for control and equitable division and disposition of property of either or both parties. (43 O.S. § 108). Decree must confirm in each spouse property owned prior to marriage and undisposed-of property acquired after marriage in spouse's own right. Subject to valid, written antenuptial contract, court must make division of jointly-acquired property by division in kind, or by setting property apart to one party and requiring payment to other. Court may set apart portion of separate estate of spouse to other spouse for support of children of marriage where custody resides with that spouse. (43 O.S. § 121). Decree must specify that payments pertaining to division of property will continue until completed; such payments are irrevocable and are not subject to subsequent modification. (43 O.S. § 134). Any order pertaining to division of property pursuant to divorce or separate maintenance action, if willfully disobeyed, may be enforced as indirect contempt of court. (43 O.S. § 111).

Alimony.

Either spouse may be allowed alimony from real and/or personal property of other. (43 O.S. § 121). Divorce decree providing for periodic alimony payments must plainly state dollar amount of all or portion of each payment designated as support and dollar amount of all or portion of payment pertaining to division of property. Provisions of decree pertaining to payment of support alimony may be modified prospectively upon proof of changed circumstances. Voluntary cohabitation of former spouse with member of opposite sex is ground to reduce or terminate support alimony. Payments for support terminate upon recipient's death, or upon remarriage unless recipient shows within 90 days of remarriage that support is still needed and not inequitable. Claims for past-due support payments must be made within 90 days of recipient's death. (43 O.S. § 134). Income assignment is available to collect current support alimony payments, provided that child support payments have priority over alimony payments. (12 O.S. § 1171.3).

Absent specific order providing for lien, order for payment of money pursuant to divorce decree is not lien against real property of person ordered to make such payments. Arrearage in payments of support reduced to judgment may be lien against real property of person ordered to make such payments. (43 O.S. § 134). Court-ordered payments of suit moneys draw interest at rate of 10% per year from date they become delinquent. (43 O.S. § 114).

Change of Name.

When divorce is granted, wife may be restored to maiden or former name, if desired. (43 O.S. § 121).

Revocation of Certain Provisions.

Provisions contained in will (84 O.S. § 114), written contract providing death benefits (15 O.S. § 178), or express trust (60 O.S. § 175) in favor of person's former spouse are automatically revoked upon their divorce or annulment.

Custody and Support of Children.

Petition or cross-petition for divorce, legal separation or annulment must state whether parties have minor children of marriage. If so, court must make provision for guardianship, custody, medical care, support and education. (43 O.S. § 112). When custody or visitation of minor child is contested, court may appoint attorney as guardian ad litem. (43 O.S. § 107.3). In all actions for divorce, separate maintenance, guardianship, paternity, custody or visitation involving minor child, including modification or enforcement of prior order, court may require all adult parties to attend educational program. (43 O.S. § 107.1, 107.2). In high-conflict cases court may order appointment of parenting coordinator to hear and decide disputed issues relating to minor children. (43 O.S. § 120.1 et seq.).

Custody.

In awarding custody of minor unmarried child or in appointing general guardian for such child, court must consider best interests of physical, mental and moral welfare of child. In determining custody or visitation, court may order mother, child or father to submit to body fluids test (e.g., blood, saliva, or urine). Neither legal preference nor presumption for or against joint legal custody, joint physical custody, or sole custody in final award of custody; however, if requested by parent, court shall provide substantially equal access to minor children to both parents at temporary order hearing, unless court finds that such shared parenting would be detrimental to child. Court must determine whether any individual seeking custody or who has custody of, guardianship of or visitation with child is or has been subject to registration requirements of state Sex Offenders Registration Act (57 O.S. § 581 et seq.) or similar act in other state or has been convicted of crime listed in Oklahoma Child Abuse Reporting and Prevention Act or in § 582 of Title 57 of Oklahoma Statutes, is alcohol-dependent or drug-dependent person who can be expected to inflict or attempt to inflict serious bodily harm to himself/herself or another person in near future as result of such dependency, or has been convicted of domestic abuse within past five years, or is residing with person falling within categories above. Rebuttable presumption exists that it is not in best interests of child to grant custody or guardianship to such person. Child of sufficient age to form intelligent preference may express and court shall consider preference as to which parent child wishes to have custody; however, court is not bound by child's choice and may take other facts into consideration in awarding custody or limits of or period of visitation. Rebuttable presumption exists that child 12 years of age or older is of sufficient age to form intelligent preference. Neither legal preference nor presumption for or against private or public school or home-schooling in awarding custody or appointing general guardian. (10 O.S. § 21.1; 43 O.S. § 108, 109, 109.1, 110.1, 110.2, 112, 112.2, 113). If custodial parent required to be separated from child due to military service, court may not enter final order modifying custody. (43 O.S. § 112).

Civil action for child stealing against person not party to child custody proceeding who removes or detains child under age 18 with intent to deny another person's right to custody or visitation; remedies include damages and attorneys fees. (43 O.S. § 111.2). Parent or other person who violates court order granting custody with intent to deprive lawful custodian of custody of child is guilty of felony; good cause may be asserted as defense. (21 O.S. § 567A).

Person with right to establish principal residence of child must notify in writing every other person entitled to visitation of proposed relocation of child's principal residence. Parent entitled to notice may object within 30 days after receipt of notice and seek temporary or permanent order prohibiting relocation. Order issued by court to person entitled to custody must require compliance with notification requirements. (43 O.S. § 112, 112.3).

Visitation.

If sole custody awarded to one parent, court may provide for visitation of non-custodial parent, unless not in best interests of minor child. Visitation order must provide specified minimum amount of visitation unless court determines otherwise. By Jan. 1, 2005, Administrative Director of Courts is to have developed standard visitation schedule and advisory guidelines. Violation of visitation order may be enforced by non-custodial parent by indirect civil contempt. Unless custodial parent establishes good cause for noncompliance, non-custodial parent is entitled to recover court costs and attorney fees expended in enforcing order. (43 O.S. § 111.1, 111.1A, 112). Adults entitled to visitation must notify every other person entitled to custody or visitation of intended change in adult's residence. (43 O.S. § 112.3). Child visitation registry program provided under Child Visitation Registry Act. (43 O.S. § 420-425). Court may order parents to participate in program before or after divorce or custody proceedings are final. Entries in registry records rebuttable presumptive proof of compliance or noncompliance with court-ordered visitation.

Grandparent Visitation.

Grandparent may be granted visitation rights if in best interest of child and certain other statutory conditions are met. However, under no circumstances may judge grant right of visitation to any grandparent if child is member of intact nuclear family and both parents object to granting of visitation. Grandparent may file with court motion for enforcement of visitation rights if parent interferes with rights. (10 O.S. § 5).

Paternity Determination.

In action for divorce, legal separation or annulment, court may determine if party is parent of child and, if so, which party should have custody, and may award child support to parent to whom custody is awarded and make appropriate order for payment of costs and attorneys fees. (43 O.S. § 109.2). Failure to comply with order to submit to genetic testing to determine paternity is considered to be noncompliance with order for support and may result in revocation or suspension of license (i.e., driver's license, professional license). (43 O.S. § 139.1, 56 O.S. § 240.15). See topic 14.10 Infants, subhead Paternity and Child Support.

Child Support.

Guidelines for computing child support specified by statute. (43 O.S. §§ 118, 118A-I, 119). Support order summary form must include social security numbers of both parents and child and must be submitted to judge with all paternity and child support orders, and then submitted to Central Case Registry. (43 O.S. § 112, 118, 120). Income assignment is available to collect any amounts due for child support, child care and medical expenses, and remains in effect regardless of change in payor and as long as current support is due or until all arrearages for support are paid, whichever is later. Payment of arrearages does not prevent income assignment from taking effect. (12 O.S. § 1171.3). Court may modify order based on material change of circumstances before or after final judgment; however, amount of periodic child support payment cannot be modified retroactively or payment of past due amount waived. Except in limited circumstances, child is entitled to support until child reaches 18 years of age. Child regularly and continuously attending high school is entitled to support through age 20. Court may require security, bond or other guarantee to ensure payment. (43 O.S. § 112, 116). Court may order either or both parents to provide for support of child for indefinite period after age 18 in case involving physical or mental disability of child. (43 O.S. § 112.1A).

Court-ordered child support is owed until paid in full and is not subject to statute of limitations. (12 O.S. § 95). Child Support Enforcement Division of Department of Human Services (DHS) authorized to initiate enforcement proceedings and receive payments to effectuate income assignment. (56 O.S. § 238 to 240.23). DHS maintains case registry for all Title IV-D cases and all child support orders established or modified after Oct. 1, 1998. (43 O.S. § 112A). Financial institution data match reporting system implemented by DHS uses automated data exchanges to compare account information data held by financial institutions with database of child obligors in noncompliance with order of support. Financial institutions must comply with specified reporting requirements. Upon matching delinquent obligor with financial account, Division issues levy for each match account. (56 O.S. § 240.22).

Payments draw interest at rate of 10% per year from date they become delinquent. Past-due payment or installment is judgment by operation of law, and may be lien against real and personal property of person ordered to make such payments. Child support judgment does not become dormant for any purpose, but ceases to be lien upon real property five years from date judgment filed of record with county clerk in county where property located, unless execution issued and filed with county clerk within five years from date judgment is determined or last execution on judgment is issued as required by law. (43 O.S. § 114, 115, 135, 137). Income or wage assignments for child support authorized. (12 O.S. § 1170 et seq., 56 O.S. § 240). Lien against worker's compensation benefits, as well as personal injury and wrongful death claims authorized. (85 O.S. § 48.1).

Order requiring payment of child support may be enforced by indirect civil contempt proceedings, if willfully disobeyed. (43 O.S. § 137, 21 O.S. § 566.1). Any court where venue is proper for collection of child support through income assignment can enforce child support orders and punish violators by contempt. (21 O.S. § 566). Other enforcement remedies include suspension or revocation of license (e.g., driver's license, professional license). Violator may be placed on probation. (10 O.S. § 139.1, 56 O.S. § 240.15). Willful failure to fulfill child support obligations without lawful excuse is misdemeanor; punishable as felony if delinquent support accrues without payment for one year or exceeds $5,000. (21 O.S. § 852). See also category 8 Debtor and Creditor, topic 8.09 Garnishment, subhead Proceedings to Obtain, catchline Garnishment for Collection of Child Support.

Oklahoma Child Supervised Visitation Program. (43 O.S. § 110.1a).

Uniform Child Custody Jurisdiction Act adopted. (43 O.S. § 501 et seq.).

Uniform Child Custody Jurisdiction and Enforcement Act adopted. (43 O.S. § 551-101 et seq.).

Uniform Interstate Family Support Act adopted. (43 O.S. § 601-101 et seq.).

See topic 14.10 Infants.

Remarriage in state by either party while other party survives, within six months after divorce decree or within 30 days after disposition of any appeal from decree, constitutes bigamy, and cohabitation in state within said time periods with new spouse married outside State constitutes adultery. (43 O.S. § 123).

Separation agreements are not binding upon court, and may be closely scrutinized to determine whether reasonable, just and fair. (167 Okla. 598, 32 P.2d 305).

Annulment of Marriage.

See topic 14.11 Marriage.

Antenuptial Contracts.

See topic 14.09 Husband and Wife.

14.07 [RESERVED]

14.08 GUARDIAN AND WARD:

Oklahoma Guardianship and Conservatorship Act ("Act") (30 O.S. § 1-101 et seq.). Copies of guardian and conservatorship handbook available through offices of district court clerk. (30 O.S. § 1-124).

Guardians are either general, limited or special. (30 O.S. § 1-108). General guardian is guardian of person or of all property of ward, or both. Limited guardian has limited powers granted by court over person of ward (excluding partially incapacitated persons) or property of ward, or both. (30 O.S. § 1-109, 110). Special guardian may be appointed without notice upon filing of petition, upon presentation of evidence of incapacity of subject of proceeding upon showing of imminent threat to person or financial resources of ward, and upon presentation of proposed emergency plan of care. Special guardian is granted only limited powers; court approval is required for any changes in emergency plan of care or specified powers. Power to change place of residence of ward granted upon showing of necessity. (30 O.S. § 1-115). Act applies to minors (under age 18) in state; incapacitated and partially incapacitated persons in state; and property in state of non-domiciliary minors, or incapacitated or partially incapacitated persons, or property coming in control of guardian subject to Act. (30 O.S. § 1-112). Incapacitated person is defined as one who is not minor, is impaired by mental illness or retardation, physical illness or disability, drug or alcohol dependency, or similar cause, lacks capacity to meet essential requirements for health or safety, and is unable to manage financial resources. Incompetency and incapacity under this definition are synonymous. Partially incapacitated person needs assistance of limited guardian to meet essential requirements for health or safety, or to manage financial resources. (30 O.S. § 1-111). Court has power to appoint and remove guardians, issue and revoke letters of guardianship, control conduct of guardians with respect to care of ward and his estate (which includes compelling plans, reports, inventories and accounting; supervising payment of debts, sale and regulation of property; and settling accounts), appoint appraisers of property, appoint temporary guardian for minor during pendency of application for permanent guardianship. (30 O.S. § 1-114). Court may also appoint guardian ad litem for vulnerable adults. (30 O.S. § 3-106.1).

Venue is in district court of county where ward resides or where proposed guardian resides if such person is member of ward’s family, or district court of county to which cause is transferred by another district judge (but for nonresident minor or incapacitated person, venue must be in county where ward has property). If there is more than one place where proceeding could be maintained, court in which proceeding is first commenced has exclusive jurisdiction. If several proceedings are commenced, first court shall determine proper venue. Court has power to transfer proceedings in interest of justice, and to consolidate guardianship and conservatorship cases. Court may appoint separate attorney for subject of proceeding who does not have legal representation and either cannot afford private attorney or cannot retain counsel due to incapacity. (30 O.S. § 1-115). Act does not impair right to appoint guardian ad litem to defend interest of minor at any time upon application of interested persons or upon court’s own motion. (30 O.S. § 1-117).

Selection of Guardian.

Nominations of guardians for minors can be made by will or other written instrument to take effect upon death of nominating parent who has not relinquished parental rights. (30 O.S. § 2-102).

Minor who has attained age 14 can nominate his own guardian subject to court approval. (30 O.S. § 2-103). If minor under age 14, either natural parent has preference to be appointed as guardian if other natural parent endorses same. If both natural parents seek application, court must decide who is most competent. (30 O.S. § 2-106). If neither parent is competent, Court may appoint guardian who shall be in charge of education of minor. (30 O.S. § 2-107).

Any adult of sound mind not under duress, fraud or undue influence can nominate his own guardian of person or property, or both, in event of whole or partial incapacity. Such nomination is binding upon Court subject to disqualification of nominee. (30 O.S. § 3-102).

Form.

Nomination must be in writing and signed by person making nomination in substantially following statutory form:

Nomination of Guardian by an Adult

I, ________, being of sound mind and not acting under any duress, menace, fraud, or other undue influence do hereby nominate (name, current residence, and relationship, if any, of the nominee) to serve as the guardian of my (person, property, both) in the event that after the date of this instrument I become incapacitated.

Executed at ________ (city, state) on this ______ day of ________, 20____.

____

Signature

Alternates can be nominated. Nominations do not affect special powers of attorney (58 O.S. § 1051-1077), durable powers of attorney or express trusts (30 O.S. § 3-102).

Parent of unmarried wholly or partially incapacitated person, or spouse of such incapacitated person if married, or his adult child then serving as guardian or limited guardian may nominate successor in event of death or incapacity of nominator by will or other writing in same manner as provided in 30 O.S. § 3-102. (30 O.S. § 3-103).

Following priorities guide in selection of guardian or limited guardian of wholly or partially incapacitated person: (1) Individual(s) nominated under 30 O.S. § 3-102; (2) current guardian or limited guardian appointed by court where ward resides; (3) person nominated by will or by other writing of deceased parent, spouse, or adult child who was serving as guardian or limited guardian; (4) spouse of such incapacitated person; (5) his adult child; (6) his parent; (7) his sibling; or (8) any individual approved by court with whom such person has been living with for more than six months prior to filing of petition (excluding owner, operator, administrator or employee of facility subject to Nursing Home Care Act, or Group Homes For the Developmentally Disabled or Physically Handicapped Persons Act). (30 O.S. § 3-104).

Eligibility and Competency.

No person who has not been resident in good faith for one year shall be appointed; also, no foreign trust company or institution shall be appointed. This does not prevent nonresident from being appointed guardian of own children, grandchildren, spouse, parent, grandparent, brother, sister, aunt, uncle, niece or nephew. Domestic corporation must be bank or trust company having trust powers (6 O.S. § 1002), and must maintain its usual place of business in county of residence of minor or of wholly or partially incapacitated person, and its principal place of business must be located where proceedings are conducted; provided, domestic corporation or nonresident person may be appointed upon written request in will or otherwise by person eligible to make such nomination. (30 O.S. § 4-104). No natural person can act as guardian of estate if judge of district court having jurisdiction of guardianship is under financial obligation to such person, or, if guardianship is established and judge later becomes pecuniarily liable to guardian or ward, or such person has contributed to judge's election. (30 O.S. § 4-103). Person is ineligible to be guardian if he is minor or wholly or partially incapacitated person. Person may be declared eligible under certain circumstances and in best interests of ward after court hearing even if such person is convicted felon, is insolvent, has declared bankruptcy in prior five years, has financial obligation to ward, or has conflict of interest. (30 O.S. § 4-105).

Appointment of Guardian.

Court can appoint guardians of persons of minors. Appointments are made upon verified petition of relative or other person in behalf of minor. Notice must be given to minor if he is at least age 14; and to his parents and other persons having care of him; or, his grandparents if he has no parents; or, if he has no parents and grandparents, then to adult relative, if any, residing in county where petition is filed; or if none of foregoing, then as court directs. Notice, if required, must be mailed to persons entitled thereto at least ten days prior to petition's hearing date, or shorter period if court deems appropriate. (30 O.S. § 2-101).

Any order appointing guardian of minor who has parent living or other person legally responsible for support of child must provide for payment of child support by parent or other responsible party and contain income assignment provision. (30 O.S. § 2-101, 30 O.S. § 2-108, 43 O.S. § 115).

If value of minor's whole estate is $10,000 or less, court can direct delivery of estate to custodian under Oklahoma Uniform Transfers To Minors Act; or direct delivery to parent, or person having custody, or to minor himself to be disposed of as directed by court. (30 O.S. § 2-116).

Any person interested in welfare of adult person believed to be wholly or partially incapacitated person ("subject person") may petition court for guardian or other assistance. Petition shall be verified and shall specify: Names and addresses of persons entitled to notice (30 O.S. § 3-110) and to attorney of subject person if known; nature and degree of alleged incapacity; relief requested and facts and reasons in support thereof; and estimated value of ward's intangible personal property. Guardianship plan, and copy of any physical, psychological or other evaluation completed within 60 days of filing date of petition may be attached. Prior to making appointment, court may receive investigation and report regarding background and home of prospective guardian. (30 O.S. § 3-101).

Hearing on petition shall be no more than 30 days after filing. (30 O.S. § 3-109). Except for action for temporary guardian, notice must be served personally on subject person at least ten days prior to hearing and sent to all others on whom notice must be served by first class mail at least 15 days prior to hearing. (30 O.S. § 3-110). Notice to subject person must contain additional information prescribed in statutory form at 30 O.S. § 3-110. Court may appoint more than one guardian (30 O.S. § 4-501), but no person may be appointed guardian of more than five minors or wholly or partially incapacitated persons, except superintendents, managers and officers of certain charitable institutions under state control (30 O.S. § 4-101).

When whole estate of minor does not exceed value of $10,000, court may, without appointment of guardian or giving of bond, authorize and direct delivery of property or any portion to one or more custodians pursuant to Transfers to Minors Act or to one or more other custodians designated by court, or payment or delivery of property or any portion to parent of minor, to person having care or custody of minor, or to minor. When whole estate of minor exceeds value of $10,000, court may, without appointment of guardian or giving of bond, authorize and direct delivery of property having value of up to $10,000 to one or more custodians pursuant to Transfers to Minors Act or to one or more other custodians designated by court, or payment or delivery of up to $10,000 of property or any portion to parent of minor, to person having care or custody of minor, or to minor. Person receiving property must pay necessary expenses of minor and hold, manage, and dispose of property in manner directed by court. (30 O.S. § 2-116).

Qualification.

In cases involving appointment of person, but not estate, court may require bond; but court must require bond of guardianship of estate in amount not less than value of intangible personal property as shown in petition or subsequent accountings or otherwise determined by court, except bond can be waived if court finds anticipated annual income to ward for one year plus value of personal property (excluding joint tenancy) of ward is less than $40,000. (30 O.S. § 4-201).

Inventory, Accountings and Reports.

Within two months after appointment, guardian or limited guardian of property of ward shall file inventory. Guardian shall state his opinion of value of ward's estate and shall file same with district court clerk. If requested by ward, judge or interested party, ward's estate must be appraised by appraisers appointed, sworn, and acting in manner provided for regulating settlement of decedents' estates. (30 O.S. § 4-301). Guardian or limited guardian of property must thereafter annually file accounts with court for settlement and allowance. Additional accounts must be presented whenever court requires same. Annual report of accounts must show changes of property listed on inventory (and shall include compensation requests for guardian and attorneys). Unless court orders otherwise, annual plans and reports not required if ward's assets (other than homestead) worth less than $40,000 if bond posted, or less than $10,000 if no bond posted, and if guardian is spouse (or relative within fourth degree) of ward. (30 O.S. § 4-303).

Unless filed with initial petition, within two months after appointment, guardian or limited guardian of property of wholly or partially incapacitated person shall file for approval of court proposed plan for management of financial resources of ward. (30 O.S. § 3-122).

Additional reports required from time to time upon occurrence of certain events, including significant change in capacity of wholly or partially incapacitated person, resignation or removal of guardian, or termination of guardianship. (30 O.S. § 4-303). Guardian or limited guardian of person of wholly or partially incapacitated person must file annual report. (30 O.S. § 4-305). Guardian or limited guardian of property of ward also must file annual report. (30 O.S. §

4-306). Guardian of minor ward not required to file annual reports unless ordered by court. (30 O.S. § 4-303).

Duties.

Guardian of persons charged with custody, support, health and education of ward. Limited guardians of wholly or partially incapacitated persons do not have custody of person of ward and only have powers conferred by court. (30 O.S. § 1-120). Guardian of property must keep property safely, not permit waste, and not sell same without court order; guardian must act diligently in good faith, and as prudent person would in managing own property. (30 O.S. § 1-121). Guardian must settle all accounts of ward, and demand, sue for, and receive all debts due ward, or make, with approval of court, compromise or compound for same and give discharges to debtors upon receiving fair and just settlement. Guardian shall appear for and represent ward in all legal suits and proceedings unless another person is appointed for that purpose as guardian or next friend. (30 O.S. § 4-702). Certain powers are limited or denied: (1) To consent on behalf of ward to withhold or withdraw life-sustaining procedures, except with specific court authorization, or as authorized by advance directive (see category 13 Estates and Trusts, topic 13.16 Wills, subhead Living Wills); (2) to consent on behalf of ward to determination or relinquishment of parental rights; (3) except in emergency to preserve life, to consent on behalf of ward to abortion, psychosurgery, removal of bodily organ, performance of experimental biomedical or behavioral procedure, or participation in biomedical or behavioral experiment, except with court authorization; (4) to prohibit marriage or divorce of ward except with court authorization; and (5) to place ward in facility or institution to which person without guardian would have to be committed pursuant to laws of this state in formal commitment proceedings. (30 O.S. § 3-119). Relative of child within third degree who has care and custody of child has same rights to consent to school-related medical and dental care as legal guardian and may execute affidavit to allow such care to be given. (10 O.S. § 21.6).

With approval of district court, guardian of estate of incapacitated person may renew or extend mortgage upon ward’s real estate, or grant new mortgage (including home equity conversion or rising debt loan) to meet requirements for health and safety of ward, obtain necessary services, or maintain ward in his or her residence. (58 O.S. § 385). Department of Human Services may obtain court order authorizing it to place vulnerable adult into protective services and appoint temporary guardian, freeze assets, and suspend or revoke powers of attorney-in-fact. (43A O.S. § 10-108).

Investments.

Money belonging to estates of minors and wholly or partially incapacitated persons subject to jurisdiction of court can only be invested in one or more of following: (1) Real estate and first mortgages on real property not exceeding 50% of actual value of property, (2) U.S. bonds, or any other type of security certificate, or evidence of indebtedness guaranteed by U.S. government, or any authorized agency thereof, (3) state bonds, (4) bonds of municipal corporations, or (5) accounts in savings and loan associations and credit unions in state, and all types of interest-bearing time deposits and certificates of banks, savings and loan associations, and credit unions in state, not to exceed amount insured by U.S. government. Under certain circumstances investment for ward can be made in home. (30 O.S. § 4-709).

Securities in Name of Nominee.

See category 13 Estates and Trusts, topic 13.15 Trusts, subhead Securities in Name of Nominee.

Gifts to Minors.

See topic 14.10 Infants.

Sales.

Real and personal estate of ward may be sold by guardian when it appears to satisfaction of court that it is for benefit of ward, or real or personal estate of ward, or some part of his estate to obtain order for sale. Guardian must file verified petition with court setting forth condition of ward's estate and facts and circumstances supporting relief requested. All sales must be for cash, or part cash and part deferred payments not to exceed ten years, bearing interest from date of sale which court deems most beneficial to ward. On sale of real property, guardian shall demand and receive note and mortgage on real estate sold, with additional security as court deems necessary. Guardian before sale must give bond to state, but court can order no bond is required if other general bond is sufficient, or court finds that: (1) Anticipated annual income plus value of personal property of ward is less than $40,000, and (2) guardian is either parent, spouse, brother, sister, grandparent, child or grandchild of ward. (30 O.S. § 4-751-770). If ward owns interest in real property in addition to homestead interest, sale or lease must be conducted in specified manner and approved by court, and spouse must join in execution and acknowledgment. When ward owns no interest in real property other than homestead interest, guardian may execute conveyance on behalf of ward for purpose of waiving homestead interest upon court order issued pursuant to application and notice by mail to interested persons at least ten days prior to hearing. (30 O.S. § 3-124).

Leases.

Guardians of minors and wholly or partially incapacitated persons are authorized to make or sell oil, gas or mining leases in same manner as personal representatives of decedents' estates. (30 O.S. § 4-759; 58 O.S. § 924-929.1).

Liabilities of Guardian.

Guardian who willfully violates duties or willfully misuses powers assigned by court thereby causing injury to ward or damages to his financial resources, shall, in addition to criminal penalties, be liable in civil action for actual damages suffered by ward. (30 O.S. § 4-901). Also guardian who has concealed or conveyed away any of his ward's property may be charged with embezzlement. (58 O.S. § 892).

Termination of Guardianship.

Guardianship of wholly or partially incapacitated person or minor may be terminated and guardian discharged whenever, on application of ward or other interested party, it appears to court that there is no longer necessity therefor. (30 O.S. § 4-804). After ward is age 14, he may select his guardian and terminate former guardian's relationship upon approval of court. (30 O.S. § 2-104). Guardianship of incapacitated or partially incapacitated person may be terminated and guardian discharged upon verified petition by guardian, any relative of ward or any friend of ward to have fact of restoration of capacity judicially determined. (30 O.S. § 3-116).

Compensation.

Guardian may be allowed amount of reasonable expenses, and compensation for services as court deems just and reasonable; provided extent that services of guardian or limited guardian of property are for collection of income of ward, compensation shall not exceed 7½% of income so collected. (30 O.S. § 4-884).

Conservator may be appointed by court upon verified petition by any person, relative or friend that person is inhabitant or resident of county, or is not resident of county but has property therein; that ward is unable to manage his property because of physical disability; and ward voluntarily consents to such proceedings. Court must cause notice to be served personally on ward and other persons and in manner court directs, not less than five days before hearing date, and ward, if able, must attend hearing. No person shall be appointed conservator who would be ineligible to act as guardian of ward. Conservator shall have care, custody and management of such estate and shall give bond to state and shall submit plans and reports in same manner as provided for guardians of incapacitated and partially incapacitated persons. Conservator may be discharged upon application of ward or otherwise as court may determine proper when it appears conservatorship is no longer necessary. Upon death, resignation or removal of conservator court may certify that ward is discharged by operation of law if proceedings no longer necessary. Conservator shall be compensated in same manner as provided for guardians. Subsequent appointment of guardian of incapacitated or partially incapacitated person shall be of person only. Upon appointment, ward has no power to enter into contract obligating his estate, except for necessities. (30 O.S. § 3-211-220).

Nonresidents.

If both guardian and ward are nonresidents, property to which ward is entitled may, on application of guardian, be removed to state of ward's residence. (30 O.S. § 4-605-606).

Court Supervised Power of Attorney.

See category 21 Property, topic 21.15 Powers of Attorney, for alternative procedure for guardian or estate or conservatorship.

Uniform Veterans' Guardianship Act has been adopted. (72 O.S. § 126.1-126.23).

Uniform Fiduciaries Act not adopted.

Uniform Simplification of Fiduciary Security Transfers Act not adopted.

14.09 HUSBAND AND WIFE:

Mutual Obligations.

Husband and wife contract towards each other obligations of mutual respect, fidelity and support. (43 O.S. § 201). Neither husband nor wife, as such, is answerable for acts of other. (43 O.S. § 208).

Disabilities of Married Women.

None. Married woman retains same legal existence and legal personality after marriage as before, and is entitled to same protection of rights as husband. (43 O.S. § 214).

Separate property of husband not liable for debts of wife contracted before marriage, but liable for his own debts contracted before or after marriage. Separate property of wife not liable for debts of husband contracted before marriage, but liable for her own debts contracted before or after marriage. (43 O.S. § 208). Except as to right of support (see subhead Support of Spouse, infra), neither husband nor wife has any interest in separate property of other, but neither can be excluded from other's residence. (43 O.S. § 203).

Dower and Curtesy.

Abolished. (43 O.S. § 208). See category 13 Estates and Trusts, topic 13.07 Descent and Distribution.

Antenuptial contracts authorized by statute (84 O.S. § 44), must be executed prior to marriage, be fair (350 P.2d 596), give full disclosure (305 P.2d 1028), and be in writing (15 O.S. § 136). Effect of such contracts can be to waive property claims with respect to: (1) Intestacy—right to inherit under laws of descent; (2) testacy—to elect forced share if will gives less than that prescribed by statute (84 O.S. § 44); (3) homestead (709 P.2d 1044); (4) support to surviving spouse (709 P.2d 1044); and (5) divorce (565 P.2d 365).

Support of Spouse.

Husband must support wife out of community property or out of his separate property or by his labor. Wife must support husband out of community property or out of her separate property when he has no community or separate property, is unable from infirmity to support himself and has not deserted her. (43 O.S. § 202). The husband is liable for necessaries furnished his wife unless she has abandoned him without justification and refused to return. (43 O.S. § 209, 210).

Co-tenancy.

Husband and wife may hold property as joint tenants or tenants in common or as community property (43 O.S. § 207), but see, however, subhead Community Property Law, infra.

Contracts.

Either husband or wife may enter into any agreement or transaction with other or with any other person; but they may not alter their legal relations except as to property and except as provided by written agreement for separation and provision for support. (43 O.S. § 204, 205).

Actions.

Married woman may sue and be sued as though unmarried. (43 O.S. § 214). Either spouse may sue other. (32 O.S. § 15). Criminal penalties for domestic abuse specified. (21 O.S. § 644). Court must order counseling or treatment for domestic abuse or for violation of protective order as condition for suspended sentence or probation. (21 O.S. § 644; 22 O.S. § 60.6). Third violation of protective order is felony. Second violation of protective order with physical injury or impairment is felony. (22 O.S. § 20.6).

Uniform Interstate Enforcement of Domestic Violence Protection Orders Act (22 O.S. § 60.21 et seq.).

Agency.

Either spouse may act as attorney in fact for other, except in conveyance or incumbrance of homestead or lease thereof for more than one year. (16 O.S. § 3, 4, 6, 7).

Conveyances.

Either spouse may, without joinder or consent of other spouse, convey or encumber his or her separate property (16 O.S. § 13; 32 O.S. § 8), except homestead. See category 21 Property, topic Deeds, subhead Execution; also category 8 Debtor and Creditor, topic 8.10 Homesteads.

Abandonment, Desertion and Nonsupport.

Husband abandoned by wife is not liable for her support unless abandonment justified by his misconduct, nor is he liable for her support if separation is by agreement, unless support is stipulated in agreement. (43 O.S. § 210). If husband or wife abandons other and is absent from state for one year, without providing for maintenance and support of family, or is sentenced to imprisonment for one year or more, district court of county where abandoned spouse resides may authorize such spouse to manage, control, sell or encumber property of abandoning spouse for support and maintenance of family or for purpose of paying debts previously contracted. (43 O.S. § 211). Desertion of wife or child under age 15 is punishable as felony. (21 O.S. § 853-4).

Uniform Interstate Family Support Act (43 O.S. § 601-101 et seq.) adopted in 1994.

Parents not subject to prosecution for child abandonment or neglect solely due to relinquishing child seven days or younger to medical services provider or child rescuer. (10 O.S. § 7115.1).

Custody of Children.

See topic 14.10 Infants.

Community Property Law, which became effective July 26, 1945, was repealed effective June 2, 1949. Husband and wife whose property interests were affected by law could, on or before June 2, 1950, record agreement specifying rights acquired by either party thereunder. In event of failure to agree, either party could file action for determination of rights on or before June 2, 1950. No action may be brought after June 2, 1952, to establish or recover interest in property based on such law unless interest is of record. (43 O.S. § 215).

14.10 INFANTS:

Age of majority: 18. (15 O.S. § 13). Except minor is individual under 21 for purposes of sale or handling of beverage of ½ of 1% alcohol by volume. (37 O.S. § 537). Court may emancipate infant. (10 O.S. § 91-4). Infant legally married may dispose of and contract relating to real estate acquired after marriage. (16 O.S. § 1).

Disabilities.

Minor cannot give delegation of power. Subject to right to disaffirm, minor may contract like adult except that minor under 18 cannot contract with relation to real estate or any interest therein or personal property not in his immediate possession or control. (15 O.S. § 17, 18).

Disaffirmance of Contracts.

Minor may not disaffirm contract for necessaries for self or his family (15 O.S. § 20) or obligation entered into by him under express authority or direction of statute (15 O.S. § 21); but a minor, within one year after attaining majority, or his heirs or personal representatives within one year after his death, may disaffirm any other contract. If minor between ages of 16 and 18 has paid for repairing, supplying or equipping any motor vehicle he may disaffirm contract only by restoring consideration. (15 O.S. § 19).

Property and Earnings.

Minor may take and hold title to real estate, and estate of freehold or inheritance may be made to commence in future by express provisions of deed and without at same time creating any intervening estate. (16 O.S. § 32). Parent, as such, has no control over property of child. (10 O.S. § 8). Wages of employed minor may be paid to minor until parent or guardian entitled thereto gives employer notice of claim to such wages. (10 O.S. § 18).

Custody.

Order of preference of custody or guardianship. (10 O.S. § 21.1, 26). Court must determine whether any individual seeking custody or who has custody of, guardianship of or visitation with child is or has previously been subject to registration requirements of state Sex Offenders Registration Act (57 O.S. § 581 et seq.) or similar act in other state or has been convicted of crime listed in Oklahoma Child Abuse Reporting and Prevention Act or in § 582 of Title 57 of Oklahoma Statutes, is alcohol-dependent or drug-dependent person who can be expected to inflict or attempt to inflict serious bodily harm to himself/herself or another person in near future as result of such dependency, or has been convicted of domestic abuse within past five years, or is residing with person falling within categories above; rebuttable presumption that it is not in best interests of child to have custody or guardianship granted to such person. (10 O.S. § 21.1; 43 O.S. § 112.2). Parent entitled to custody must give child support and education suitable to his circumstances. If support and education which parent having custody is able to give are inadequate, other parent must assist to extent of ability. (10 O.S. § 4). In deprived child proceeding, court may determine paternity and order father to pay child support. (10 O.S. § 7003-8.8). Except as otherwise provided by law, mother of unmarried minor child born out of wedlock is entitled to care, custody, services, earnings and control of minor. (10 O.S. § 6). Authority of parent ceases upon appointment of guardian of person, upon marriage of child or upon its attaining majority. (10 O.S. § 10). Either parent may authorize any adult to whom minor is entrusted to consent to medical treatment. (10 O.S. § 170.1).

Uniform Child Custody Jurisdiction Act (43 O.S. § 501 et seq.) and Uniform Child Custody Jurisdiction and Enforcement Act (43 O.S. § 551-101 et seq.) adopted. See topic 14.06 Divorce, subhead Custody and Support of Children, catchline Custody.

Indian Child Welfare Act (10 O.S. § 40.1 et seq.).

Child Care Facilities Licensing Act (10 O.S. § 401 et seq.).

Children's Code (10 O.S. § 7001-1.1 et seq.).

Child Abuse Reporting and Prevention Act (10 O.S. § 7101-7115).

Foster Care and Out-of-Home Placement Act (10 O.S. § 7201 et seq.).

Inpatient Mental Health and Substance Abuse Treatment of Minors Act (43A O.S. § 5-501 et seq.).

Interstate Compact for Juveniles Act (10 O.S. § 7501-1.1 et seq.) adopted.

Juvenile Code (10 O.S. § 7301-1.1 et seq.).

Oklahoma Child Supervised Visitation Program (43 O.S. § 110.1a).

Uniform Transfers to Minors Act adopted in substance. (58 O.S. § 1201 et seq.). Age of majority under Act is 21.

Uniform Securities Ownership by Minors Act not adopted.

Paternity and Child Support.

Action to establish paternity and to enforce support obligations can be brought at any time before child reaches age 18. Action to establish paternity can be brought by child if commenced within one year after child reaches age 18. (12 O.S. § 95). Affidavit acknowledging paternity must be filed with birth certificate for child born to unmarried woman, unless adoption decree has been presented and consent to adoption given as provided by law. (63 O.S. § 1-311.3). Father or putative father of child born out of wedlock may file notice of intent to claim paternity or instrument acknowledging paternity of child. (10 O.S. § 55.1). Failure to comply with order to submit to genetic testing to determine paternity is considered to be noncompliance with order for support and may result in revocation or suspension of license (i.e., driver's license, professional license). (43 O.S. § 139.1, 56 O.S. § 240.15).

Individual who has been legally determined to be father of child is liable for support and education of child to same extent as father of child born in wedlock. (10 O.S. § 83, 89; 56 O.S. § 238.6B). Except for adoptions, termination of parental rights shall not terminate duty of either parent to support his or her minor child. (10 O.S. § 7006-1.3). Grounds for termination of parental rights specified. (10 O.S. § 7006-1.1).

See topic 14.06 Divorce, subhead Custody and Support of Children.

Uniform Parentage Act enacted. (10 O.S. § 7700-101 et seq.).

Uniform Interstate Family Support Act enacted. (43 O.S. § 601-100 et seq.). See topic 14.06 Divorce, subhead Custody and Support of Children, catchline Child Support.

Actions for Sexual Abuse.

Action based on intentional conduct brought by any person for recovery of damages for injury suffered as result of childhood sexual abuse incidents or exploitation (defined in 21 O.S. § 845) or incest can only be brought within latter of following periods: (a) Within two years of act alleged to have caused injury or condition, or (b) within two years of time victim discovered or reasonably should have discovered that injury or condition was caused by such act or that act caused injury for which claim is brought. Provided, however, that time limit for commencement of action is tolled for child until child reaches age of 18 years. Provided further, any action based on intentional conduct must be commenced within 20 years of victim reaching age of 18. No action may be brought against alleged perpetrator or estate after death of alleged perpetrator. Evidentiary requirements specified. (12 O.S. § 95).

Actions.

Minor may be party to legal action or other proceedings. (15 O.S. § 27). He sues by guardian or next friend (12 O.S. § 226) and defends by guardian if any, of his estate, if no guardian, by guardian ad litem. (12 O.S. § 228, 229). He is civilly liable for his torts but not subject to exemplary damages unless when act was done he was capable of knowing it wrongful. (15 O.S. § 25-6). Parent and child are not answerable for each other's acts (10 O.S. § 20), except parent liable for damages up to $1,500 for criminal or delinquent acts of minor residing at home. (23 O.S. § 10). Parent's right to recover damages for injury to child may be assigned to child. (10 O.S. § 17.1, 12 O.S. § 83). Money recovered in court proceeding by next friend or guardian ad litem for or on behalf of person under age 18 in excess of $1,000 over sums sufficient for paying costs and expenses including medical bills and attorney's fees must be deposited, by order of court, in one or more institutions approved by court; court may approve structured settlement with proceeds of settlement invested in annuity to be paid to or for benefit of minor. Until person reaches 18 years of age, withdrawals from such account(s) can be made only pursuant to court order. (12 O.S. § 83).

Adoption.

See topic 14.01 Adoption.

14.11 MARRIAGE:

Unmarried person age 18 or older and not otherwise disqualified is capable of contracting and consenting to marriage with person of opposite sex. (43 O.S. § 2, 3).

Consent Required.

Person under age 18 cannot marry without express consent and authority of parent or guardian; however, upon affidavits of three reputable persons that both parents of minor are deceased or mentally incompetent, or their whereabouts are unknown to minor, and that no guardian for minor has been appointed, judge of district court issuing license may consent to marriage. (43 O.S. § 3). Parent who does not have legal custody cannot consent to marriage of child under age of 18; parent or guardian of child under age of 18 who is in custody of Department of Human Services or Department of Juvenile Justice cannot consent to marriage of such minor child. Persons under age 16 are prohibited from marrying; however, court may authorize marriage of underage persons: (1) In settlement of suits for seduction or paternity, or (2) when unmarried female is pregnant, or has given birth to illegitimate child, whether or not suit for seduction or paternity has been brought. Court cannot authorize marriage of any male under age 16 or any female under age 16 who is pregnant unless at least one parent of minor, or guardian or custodian, is present before court or given notice and opportunity to attend hearing and object to issuance of marriage license. (10 O.S. § 7001-1.3; 43 O.S. § 3).

Application for license must be sworn to in person by both parties upon certain specified proof of residence, full legal name, and age. If either party is under legal age, application must be on file 72 hours prior to issuance of marriage license. License is valid throughout state. (43 O.S. § 5). $25 license fee reduced to $5 if applicants submit certificate that they have completed premarital counseling program meeting specified requirements. (43 O.S. § 5.1).

Premarital blood test for discovery of communicable or infectious disease as required by State Board of Health, by licensed physician within 30 days prior to issuance of license, and filing of such physician's certificate and statement of laboratory test with court clerk are required, unless district judge waives requirement or extends period. (43 O.S. § 31-32).

License is issued by clerk of district court along with marriage certificate. Must contain names, ages and residences of parties, date of issuance, name of court and name of city or town and county where located. (43 O.S. § 4-6). Must be returned within 30 days after issuance (43 O.S. § 6) with certificate of person solemnizing marriage endorsed thereon (43 O.S. § 8).

Ceremony may be performed, in presence of at least two adult witnesses, by judge or retired judge of any court, or ordained or authorized preacher or minister, priest or other ecclesiastical dignitary who has filed copy of order of appointment, credentials or authority from church or synagogue in office of court clerk of county in which he or she resides (or, if nonresident, in county in which ceremony is to be performed), and is at least age 18. (43 O.S. § 7).

Marriage Records.

District judge or clerk keeps records of marriage licenses and certificates (43 O.S. § 9) which are admissible in evidence in all courts (43 O.S. § 11).

Common law marriages are recognized. (67 Okla. 3, 168 Pac. 197). Oklahoma recognizes common law marriages validly consummated in another state. Validity of common law marriage is determined by laws of state in which parties resided at time of such marriage. (201 Okla. 511, 208 P.2d 557).

Indian Marriages.

Marriages according to Indian customs are recognized. (34 Okla. 807, 127 Pac. 436).

Prohibited Marriages.

Following marriages are void, between: Ancestor and descendant of any degree; stepparent and stepchild; uncle and niece or aunt and nephew, unless relationship by marriage only; brother and sister, whole or half blood; first cousins; provided, any marriage of first cousins performed in another state authorizing such marriages, otherwise legal, is hereby recognized as valid in this state as of date of such marriage. (43 O.S. § 2). Polygamous or plural marriages are prohibited. (Const., art. I, p. 2; En. Act 3). Marriage between persons of same gender performed in another state not recognized as valid and binding in this state as of date of marriage. (43 O.S. § 3.1).

Annulment.

Where either party was incapable because of lack of age or understanding, district court may annul marriage in action by incapable party or his or her parent or guardian. Children begotten before annulment are legitimate. (43 O.S. § 128). In annulment suit, court may compel husband to pay reasonable allowance for maintenance and suit money (23 Okla. 490, 100 Pac. 541) and make equitable division of property jointly accumulated by parties living together as husband and wife (79 Okla. 30, 190 Pac. 1088). Statutes set no limitation of time within which action to avoid marriage must be brought.

15 HEALTH

15.00A HEALTH REGULATIONS:

Supervision.

Under Public Health Code (63 O.S. § 1-101 et seq.), Commissioner of Health, appointed by Board of Health, is executive officer of State Department of Health, with general supervision of health of citizens of state, including investigation and enforcement of matters pertaining to public health, sanitation and safety. Fees charged for health services and for license or permit issuance or renewal established by Board, within ranges specified by statute. (63 O.S. § 1-106.1). Local services administered by county, district, cooperative and city-county health departments. (63 O.S. § 1-201 et seq.).

Vital Statistics.

Commissioner maintains statewide records of birth, death, fetal death and related data. (63 O.S. § 1-301 et seq.). See category 10 Documents and Records, topic 10.07 Vital Statistics.

Food.

Annual license required for operation of establishment, stationary or otherwise, where food or drink is offered for sale or sold to public (except nonprofit civic, charitable or religious organization, using nonpaid persons to prepare or serve food on its behalf, for occasional fund-raising events sponsored and conducted by organization). Adulteration, misbranding, and false or misleading advertisement of food prohibited. (63 O.S. § 1-1101 et seq.).

Drugs, Devices and Cosmetics.

Adulteration, misbranding, and false or misleading advertisement of any drug, device or cosmetic prohibited. (63 O.S. § 1-1401 et seq.). Uniform Controlled Dangerous Substances Act adopted; Commissioner of state Bureau of Narcotics and Dangerous Drugs Control has supervision over registration and control of manufacture, distribution, dispensing, prescribing, administering or use for scientific purposes of controlled dangerous substances within state. (63 O.S. § 2-101 et seq.). Anti-Drug Diversion Act (63 O.S. § 2-302) requires registration of out-of-state pharmaceutical suppliers providing controlled dangerous substances to individuals within state, except wholesale distributors that ship to pharmacies or other registered entities. Under Pharmacy Act (59 O.S. § 353.1 et seq.), Board of Pharmacy has authority to regulate practice of pharmacy; sale of drugs, medicines, chemicals and poisons; dispensing of drugs and medicines. Labeling of prescription drugs is also regulated. (59 O.S. § 353.13A). Unused prescription drug from nursing facilities, assisted living centers or pharmaceutical manufacturers may be transferred to county pharmacies or other government pharmacies. (59 O.S. § 367.1 et seq.). Oklahoma Prescription Drug Discount Program Act of 2005 (59 O.S. § 368) created pilot program for discount prescription drugs.

See category 3 Business Regulation and Commerce, topic 3.12 Consumer Protection.

Hazardous Substances.

Delivery or introduction into commerce of misbranded package of hazardous substance prohibited. (63 O.S. § 1-1601 et seq.). Poison Control Act (63 O.S. § 2654.1 et seq.).

See category 12 Environment, topic 12.01 Environmental Regulation.

Smoking Regulation.

Under Smoking in Public Places Act (63 O.S. § 1-1521 through 1527), smoking and nonsmoking areas must be designated by state or local governmental agency or person who owns or operates public place; restaurant or health facility may prohibit all smoking; educational facility for early childhood through grade 12 must prohibit smoking in building and on grounds during school hours. (63 O.S. § 1-1523). Prevention of Youth Access to Tobacco Act (37 O.S. § 600.3 et seq.) prohibits sale or furnishing of tobacco to person under age 18.

Licensing, Regulation of Hospitals.

License required to operate hospital, except hospitals operated by federal government, state mental hospitals and community-based structured crisis centers. (63 O.S. § 1-701 et seq.). License required for ambulatory surgical center. (63 O.S. § 2657 et seq.). Permit required for establishment, operation and maintenance of tissue bank. (63 O.S. § 330.97).

Licensing, Regulation of Health Care Providers.

Licensing requirements, qualifications specified for body piercing and tattoo artists (21 O.S. § 842.1 et seq.), podiatrists (59 O.S. § 136 et seq.), chiropractors (59 O.S. § 161 et seq.), dentists and providers of related services (59 O.S. § 328.1 et seq.), genetic counselors (63 O.S. § 1-561 et seq.), pharmacists (59 O.S. § 353.1 et seq.), physicians and physician’s assistants (59 O.S. § 481 et seq.), nurses (59 O.S. § 567.1 et seq.), optometrists (59 O.S. § 581 et seq.; 59 O.S. § 942), osteopaths (59 O.S. § 620 et seq.), licensed alcohol and drug counselors (59 O.S. § 1870 et seq.), licensed behavioral practitioners (59 O.S. § 1930 et seq.), pedorthists (59 O.S. § 2301 et seq.), physical therapists (59 O.S. § 887.1 et seq.), anesthesiologist assistants (59 O.S. § 3201 et seq.), occupational therapists (59 O.S. § 888.1 et seq.), orthotists and prosthetists (59 O.S. § 3001 et seq.), radiologist assistants (59 O.S. § 541 et seq.), social workers (59 O.S. § 1250 et seq.), and persons other than physicians practicing medical micropigmentation (63 O.S. § 1-1454). Health benefit plans must provide for credentialing of physicians and other health care providers. (36 O.S. § 4405.1). Volunteer licenses available for retired physicians and dentists. (59 O.S. § 328.23a, 493.5, 635.1).

Telemedicine Act (63 O.S. § 6801 et seq.) regulates health care delivery, diagnosis, consultation, treatment, transfer of medical data, or exchange of medical education information by means of audio, video, or communications (other than consultation provided by telephone or facsimile machine).

Oklahoma Health Information Exchange Act (63 O.S. § 7100.1 et seq.) provides for State Board of Health to adopt and distribute standard authorization form for exchange of health information. Exchanges of information pursuant to form are immunized from liability in actions based on state privacy or privilege law.

Nursing Homes and Specialized Care.

Licensing requirements, qualifications specified in Residential Care Act (63 O.S. § 1-819 et seq.), Long-Term Care Certificate of Need Act (63 O.S. § 1-850 et seq.), Hospice Licensing Act (63 O.S. § 1-860.1 et seq.), Adult Day Care Act (63 O.S. § 1-870 et seq.), Alzheimer’s Disease Special Care Disclosure Act (63 O.S. § 1-879.2a-c), Continuum of Care and Assisted Living Act (63 O.S. § 1-890.1 et seq.), Nursing Home Care Act (63 O.S. § 1-1901 et seq.), Long Term Care Security Act (63 O.S. § 1-1944 et seq.), Home Care Act (63 O.S. § 1-1960 et seq.), Long-Term Care Ombudsman Act (63 O.S. § 1-2211 et seq.), Child Care Facilities Licensing Act (10 O.S. § 401 et seq.).

Mental Health Services.

Under Mental Health Law (43A O.S. § 1-101 et seq.), Department of Mental Health and Substance Abuse Service oversees care and treatment of persons mentally ill or requiring treatment for drug or alcohol abuse or who require domestic violence or sexual assault services. Court may order child to be taken to mental health or substance abuse treatment facility in certain juvenile proceedings. (10 O.S. § 7003-2.1). With narrow exceptions, mental health and drug or alcohol abuse treatment information is privileged and confidential. (43A O.S. § 1-109).

Emergency Medical Services.

Emergency medical providers and ambulance services licensed under Emergency Medical Services Act. (63 O.S. § 1-2501 et seq.). Statewide emergency medical services and trauma care system administered by Department under Emergency Medical Services and Care Systems Act. (63 O.S. § 330.90 et seq.).

Abortions.

Can only be performed or induced by licensed physician. Abortion not permitted after unborn child has become viable unless necessary to prevent death of pregnant woman or prevent impairment to her health. (63 O.S. § 1-730 through 63 O.S. § 1-741). Performance of partial-birth abortion is subject to criminal penalty of $10,000 or up to two years imprisonment, unless necessary to save life of mother whose life is endangered by physical disorder, illness or injury. (21 O.S. § 684).

Health Insurance.

Before issuing or delivering policy, application, rider or endorsement form, insurer must file copy of form, classification of risks, and premium rates with Insurance Commissioner. Requirements for individual accident and health insurance policies (36 O.S. § 4401 et seq.) and group policies (36 O.S. § 4501 et seq.) specified. Modification of individual or group accident or health policies prohibited without policyholder consent. (36 O.S. § 1219.5). Long-Term Care Insurance Act (36 O.S. § 4421 et seq.) governs specified types of policies. Health Care Freedom of Choice Act (36 O.S. § 6053 to 6057) gives insured certain rights regarding selection of practitioner to perform services and procedures. Under Breast Cancer Patient Protection Act (36 O.S. § 6060.4 et seq.), health benefit plans providing for treatment of breast cancer and other breast conditions must include coverage for specified care and benefits. Low cost mammography screening coverage required in certain circumstances. (36 O.S. § 6060). Medicaid Program Reform Act (56 O.S. § 1010.1 et seq.) provides coverage or cost-sharing option for coverage under state Medicaid program to low-income persons. Health Insurance High Risk Pool Act (36 O.S. § 6531 et seq.) provides coverage for individuals eligible for credit for health insurance costs under Section 35 of Internal Revenue Code or who are federally defined eligible individuals. Genetic Nondiscrimination in Insurance Act (36 O.S. § 3614.1 et seq.) restricts disclosure and use of genetic tests or information by insurers or employers. Group health insurance and health benefit plans must provide benefits for treatment of severe mental illness and audiological services for children up to 18 years. (36 O.S. § 6060.10, 6060.7). Health benefit plans that provide for medical and surgical benefits must provide coverage for routine annual obstetrical/gynecological examinations. (36 O.S. § 6060.3a). Health Insurance Purchasing Group Act regulates health insurance purchasing groups. (36 O.S. § 4521 et seq.). Multiple Employer Welfare Arrangements are also regulated. (36 O.S. § 633 et seq.). Discount medical plan organizations also regulated. (36 O.S. § 1219.4). Policies providing for reimbursement for mental or behavioral health or alcohol and drug treatment service must entitle providers to reimbursement on equitable basis commensurate with requirements for licensure. (36 O.S. § 6045). No health benefit plan may exclude otherwise allowable claims which occur in conjunction with arrest or pretrial detention of policyholder. (36 O.S. § 6060.4a).

Managed Care.

Health Maintenance Organizations Act (36 O.S. § 6901 et seq.) regulates certificates of authority for HMOs and governs powers and practices of HMOs. Act should be consulted specifically due to its complexity. HMO or insurance carrier may be liable for damages for harm to enrollee if failure to exercise ordinary care resulted in denial or delay and enrollee suffered harm. (36 O.S. § 6593). Managed Care External Review Act (63 O.S. § 2528.1 et seq.) provides right to external review of decisions made by certain health plans to deny coverage or reimbursement; act also requires internal review procedures. Managed care plan must provide for referral to specialist with expertise in treating covered benefits. (63 O.S. § 2550.1 et seq.).

Medical Savings Account Act.

Resident of state or employer allowed to deposit specified maximum allowable contributions to medical savings account to pay eligible medical expenses of account holder and dependents of account holder. (63 O.S. § 2621 et seq.).

Health Services for Minors, Incompetent Patients.

Persons under age 18 may consent to have services provided by health professionals in specified cases; such minors assume financial responsibility for cost of services. Spouse, parents or legal guardian of minor not liable for payment unless they have expressly agreed to pay for such care. (63 O.S. § 2601 et seq.).

Protective Services for Vulnerable Adults Act (43A O.S. § 10-101 et seq.) allows Department of Human Services to oversee health care for vulnerable adults.

Hydration and Nutrition for Incompetent Patients Act (63 O.S. § 3080.1 et seq.) governs types of treatment required in specified circumstances. Certain persons, in specified order of priority, may consent to local-institutional-review-board-approved experimental treatment, test or drug when adult person, because of medical condition, is incapable of giving informed consent. (63 O.S. § 3102A).

Do-Not-Resuscitate Act (63 O.S. § 3131.1 et seq.) permits person or incapacitated person's representative (including parent or guardian of minor child) to notify attending physician, by execution of do-not-resuscitate (DNR) consent form or by other specified notice of which health care provider has actual knowledge, that such person does not consent to administration of cardiopulmonary resuscitation in event of cardiac or respiratory arrest. (63 O.S. § 3131.4). DNR consent form, which may be revoked at any time, must be substantially in form provided by statutes. Health care agencies must maintain written policies and procedures with respect to DNR orders, consent forms and physician certifications, and must provide ongoing education to patients, health care providers and community on issues concerning use of DNR consent forms. Act does not require physician, health care provider or health care agency to begin or continue administration of CPR if, in reasonable medical judgment, it would not prevent imminent death of patient. (63 O.S. § 3131.5).

Assisted Suicide Prevention Act (63 O.S. § 3141.1 et seq.) prohibits person from knowingly providing physical means or participating in physical act by which another person commits or attempts to commit suicide. Licensed health care professional who administers, prescribes or dispenses medications or procedures for purpose of alleviating pain or discomfort, even if their use may increase risk of death, or who withholds or withdraws medically administered life-sustaining procedure does not violate act. (See also 63 O.S. § 2-551.) Violation of assisted-suicide prevention laws is grounds for criminal penalties (21 O.S. § 813-815), civil action (63 O.S. § 3141.5-3141.7) and, if licensed health care professional, revocation or suspension of license or certificate. (63 O.S. § 3141.8).

Uniform Advance Directive Act adopted. (63 O.S. § 3101.1 et seq.). See category 13 Estates and Trusts, topic 13.16 Wills, subhead Living Wills.

Uniform Duties to Disabled Persons Act adopted. (63 O.S. § 2551 et seq.).

Uniform Anatomical Gift Act adopted. (63 O.S. § 2201 et seq.). Certain agreements for transfer of donated organs to out-of-state transplant recipients authorized. (63 O.S. § 2204).

Catastrophic Health Emergency Powers Act (63 O.S. § 6101 et seq.) regulates government authority over health care in event of catastrophic event.

Affordable Access to Health Care Act (63 O.S. § 1-1708.1A et seq.) governs actions involving personal injury or wrongful death brought against health care providers based on professional negligence.

Health Savings Account Act (36 O.S. § 6060.14 et seq.) enables citizens to establish health savings accounts as permitted by I.R.C. § 223.

Oklahoma Medicaid False Claims Act (63 O.S. § 5053 et seq.) provides for civil fines and other remedies for false claims made under state's Medicaid program.

16 INSURANCE

16.01 INSURANCE COMPANIES:

Oklahoma Insurance Code adopted. (36 O.S. § 101 et seq.). Space does not permit complete analysis and code itself should be consulted.

Supervision.

Insurance Department is created consisting of Insurance Commissioner and State Board for Property and Casualty, 204 N.E. 23rd Street, Suite 28, Oklahoma City, Oklahoma 73107. (Const., art. VI, §§ 22-4).

The Insurance Commissioner administers and enforces code except for duties assigned to Board. Commissioner must examine financial affairs of domestic insurers every three years and must examine foreign or alien insurers' financial affairs every five years. Commissioner may accept examinations conducted by accredited states on foreign insurers. (36 O.S. § 309.2). Insurers must file annual statements before last day of February on forms provided by Commissioner. Advisory organizations regulated. (36 O.S. § 1140 et seq.). Insurers must also file annual market conduct statements. (36 O.S. § 311.4).

State Board for Property and Casualty administers and enforces code, in general, as to rates and rating organizations—casualty and property; agents, solicitors and adjusters—property, casualty, life, accident and health; unauthorized insurers; domestic stock and mutual insurers; fraternal benefit societies; and other provisions.

Licenses and Fees.

Examination for license covering laws and one or more lines of insurance not to exceed $100. (36 O.S. § 1435.23). Examination for adjuster's license: (a) For one examination $20; (b) for any combination of two or more examinations $40. (36 O.S. § 6212).

Licenses.

(a) Producer's license, every two years $60; (b) limited lines producer license, every two years $40; (c) temporary license as agent $20; (d) managing general agent's license, every two years $60; (e) surplus lines broker's license, every two years $100; (f) insurance vending machine, each machine, every two years $100; (g) insurance consultant's license, every two years $100; (h) adjuster's license in any single class of business, $30 every two years, in any combination of two or more classes of business, $50 every two years; (i) public adjuster's license, $30 every two years; (j) emergency adjuster, each year $15; (k) insurance producer's provisional license $40. Permit from Insurance Commissioner required for individual or organization offering prearranged or prepaid funeral services or benefits, $50 initial filing fee. (36 O.S. § 1435.23, 6212, 6124).

Tax.

Every insurer doing business in state must annually on or before last day of Feb. report under oath of president or secretary or other chief officer of such company, to Insurance Commissioner, total amount of premiums, membership, application, policy and/or registration fees received during preceding calendar year or since last return, from insurance within state and, at same time, pay to Commissioner annual license fee and annual tax of 4% of all of said premiums, after all returned premiums and dividends to policy holders are deducted, and on all membership, application, policy and/or registration fees collected thereby, except premiums or fees paid by any county, city, town or school district funds or by their duly constituted authorities performing public service. Such fees, taxes, etc. are in lieu of all other state taxes or fees and taxes or fees of any subdivision or municipality of state, except ad valorem taxes. Domestic insurer also must pay 4% tax on premiums unless it has its principal place of business in state, maintains in state personnel knowledgeable of and responsible for company's operations and records, and conducts in state substantially all its underwriting, policy issuing, and serving operations for Oklahoma policyholders. (36 O.S. § 624). Certain graduated credits against such premium taxes are allowed for investments in Oklahoma securities in excess of 2% of company's admitted assets. (36 O.S. § 625). On or before end of month following each calendar quarter, each surplus line broker must remit to State Treasurer through Insurance Commissioner tax on premiums exclusive of sums collected to cover Federal and State taxes and examination fees, on surplus line insurance subject to tax transacted by him during period covered by report. Such tax is at rate of 6% of gross premiums less premiums returned on account of cancellation or reduction of premium, and other exemptions. (36 O.S. § 1115). Insurers are also liable for assessments by insurance guaranty association. (36 O.S. § 2021).

Reports.

Risk-Based Capital for Insurers Act (36 O.S. § 1521-1533) requires domestic insurers to file risk-based capital reports with Insurance Commissioner, requires risk-based capital to be determined by certain formulas. Insurer domiciled in state also must file reports with Insurance Commissioner disclosing material acquisitions and dispositions of assets or material nonrenewals, cancellations or revisions of ceded reinsurance agreements unless such acquisitions and dispositions have been submitted to Commissioner for review, approval or information purposes pursuant to other provisions of Code. (36 O.S. § 310A-1 et seq.). All insurers must have annual audit by independent certified public accountant and file audited financial report. (36 O.S. § 311A.1 et seq.). Certain financial reports must also be filed with National Association of Insurance Commissioners. (36 O.S. § 311). Property and casualty insurers must submit annual statement of actuarial opinion. (36 O.S. § 1125 et seq.).

Process Agent.

Foreign or alien insurer must appoint the Insurance Commissioner as its attorney to receive service of legal process.

Retaliatory Laws.

Provided for in code.

Policies.

Certain standard forms and provisions are set out in the code and all forms must be approved. (36 O.S. § 4002, 36 O.S. § 4405, 36 O.S. § 4803, 36 O.S. § 941.2, 36 O.S. § 1241.1). Certain types of life insurance policies or annuity contracts and selling practices have been prohibited. (36 O.S. § 609, 36 O.S. § 1204, and 36 O.S. § 1214-1217). All policies must comply with Life, Accident and Health Insurance Policy Language Simplification Act after Jan. 1, 1990. (36 O.S. § 3641). See category 15 Health, topic Health Insurance.

Rates.

Provision made for regulation of rates and rating organizations by Board for Property and Casualty Rates (36 O.S. § 331, 36 O.S. § 900.1 et seq., 36 O.S. § 981 et seq.). Unlawful for property or casualty insurers to raise rates, cancel policy, or refuse to issue or renew policy solely on basis of policyholder inquiring about making claim if policyholder does not in fact submit claim. (36 O.S. § 940).

Investments.

Code makes provisions regulating investments by insurers.

Agents and Brokers.

Producer Licensing Act (36 O.S. § 1435.1 et seq.) governs licensure and appointment of persons or entities engaged in sale, solicitation or negotiation of insurance. Writing of controlled business prohibited when commissions from controlled business exceed 25% of aggregate commissions earned by licensee in any 12-month period. Pawnbroker can offer insurance coverage during pawn contract period if licensed as limited insurance representative. (59 O.S. § 1511).

Third-Party Administrators.

Any administrator (as defined) who collects premiums for insurer or trust or who adjusts or settles claims for insurer or trust, in connection with life or health insurance coverage or annuities in state must act pursuant to written agreement with insurer; obtain approval from insurer or trust before publishing any advertising pertaining to business underwritten by insurer or trust; be bonded; provide written notice to insured individuals advising them of policyholder and insurer or trust; hold valid administrator’s license issued by Commissioner; and file annual report prepared by certified public accountant concerning each administered plan. (36 O.S. § 1441, et seq.). Criminal penalties are provided. (36 O.S. § 1450).

Direct Actions Against Insurer.

See category 23 Transportation, topic 23.01 Motor Vehicles, subhead Direct Actions.

Interstate Insurance Product Regulation Compact adopted. (36 O.S. § 7004 et seq.).

Oklahoma Subsidence Insurance Act (36 O.S. § 991.1 et seq.) allows insurers to offer coverage for mine subsidence.

Captive Insurance Company Act (36 O.S. § 6470.1) governs insurance companies formed to write insurance business for parents and affiliates.

Uniform Insurers Liquidation Act.

Adopted in substance. (36 O.S. § 1801, 1803 O.S. § 04, 1814 et seq.).

Viatical Settlement Act of 2008 (36 O.S. § 4055.1 et seq.) provides conditions for licensing and regulation of viatical settlement providers and viatical settlement contracts with persons owning or covered by policy insuring life of person who has catastrophic or life-threatening illness or condition. Requires certain disclosures to be made and prohibits certain acts in connection with viatical settlements and life settlement contracts.

Health Insurance.

See category 15 Health, topic 15.00A Health Regulations, subhead Health Insurance.

Use of Credit Information in Personal Insurance Act (36 O.S. § 950 et seq.) regulates use of credit information with regard to personal insurance.

Service Warranty Insurance Act.

(36 O.S. § 6601 et seq.). Requires licensing of service warranty associations by State Insurance Commissioner.

Vehicle Protection Product Act.

(36 O.S. § 6650 et seq.). Requires vehicle protection product warrantors and related vehicle protection product sellers and warranty administrators to register with Insurance Department and comply with statutory requirements.

Unfair Claim Settlement Practices Act (36 O.S. § 1250.1-1250.16).

16.02 SURETY AND GUARANTY COMPANIES:

May solely guarantee recognizances, stipulations, bonds and undertakings (18 O.S. § 481), and are estopped to deny liability or corporate power to execute instrument or incur liability (18 O.S. § 487).

Are supervised by Commissioner of Insurance. Before commencing business in state must deposit with Commissioner copy of charter and statement of assets and liabilities verified by president and treasurer. Must make such reports quarterly. (18 O.S. § 482, 484).

Foreign surety and bond company must have on deposit with Oklahoma State Treasurer, or proper officer of some other state, $100,000 in specified securities and must have paid up capital of at least $500,000 in cash or invested in securities in which domestic company could lawfully invest and which are satisfactory to Insurance Commissioner. (18 O.S. § 482; 36 O.S. § 101). Corporation of foreign country must, in lieu of capital, deposit $500,000 with Treasurer of Oklahoma or some other state. (36 O.S. § 102).

17 INTELLECTUAL PROPERTY

17.01 TRADEMARKS AND TRADENAMES:

Covered by Okla. Statutes. (78 O.S. § 21 et seq.).

Who May Acquire.

Trademarks may be acquired by any “person” which means any individual, firm, partnership, corporation, association, union or other organization.

What May Be Used.

Trademark means any word, name, symbol, emblem or device adopted and used to identify goods made or sold or services rendered. (78 O.S. § 21). Trademark distinguishing goods or services of applicant from goods of others cannot be registered if it consists of or comprises: (a) Immoral, deceptive or scandalous matter; (b) matter that may disparage or falsely suggest connection with persons living or dead, institutions, beliefs, or national symbols, or bring them into contempt or disrepute; (c) flag or coat of arms or other insignia of U.S., state or municipality, or foreign nation, or any simulation thereof; (d) name, signature or portrait of any living individual, except with individual's written consent; (e) mark that, when applied to goods or services of applicant is merely descriptive or deceptively misdescriptive, or is primarily geographically descriptive or deceptively misdescriptive, or is primarily merely surname; however, nothing in this subsection prevents registration of mark that has become distinctive of applicant's goods and services. Secretary of State may accept as evidence that mark has become distinctive, as applied to applicant's goods or services, proof of continuous use of mark by applicant in state or elsewhere for five years preceding date of filing of application for registration; or (f) trademark that so resembles trademark registered in state, or trademark previously used in state by another and not abandoned, that it is likely when applied to goods or services of applicant to cause confusion or mistake or to deceive. (78 O.S. § 22).

Registration.

Trademark may be registered with Secretary of State by filing application on required form with following information: (1) Name and business address of person applying for registration and, if corporation, state of incorporation; (2) goods or services in connection with which mark is used, mode or manner in which mark is used, and class in which goods or services are categorized; (3) date when trademark was first used anywhere and date when it was first used in state by applicant or his predecessor in business; and (4) statement that applicant is owner of trademark and no other person has right to use trademark in state. Application must be signed by applicant or member of firm or officer of corporation or association applying, and must be accompanied by specimen or facsimile of trademark. Filing fee of $50 for application. (78 O.S. § 23). Single application may include all goods upon which or services with which trademark is used, indicating appropriate class(es) of goods or services. When single application includes goods or services that fall within multiple classes, payment of fee required for each class. (78 O.S. § 29). Certificate of registration issued by Secretary of State must show class of goods or services and description of goods or services on which trademark is used, trademark and its description, registration date and term of registration. (78 O.S. § 24).

Duration and Renewal.

Registration of trademark effective for initial term of ten years from date of registration and, upon application filed within six months prior to expiration of initial term, may be renewed for successive periods of five years. Renewal fee $25. (78 O.S. § 25).

Assignment.

Trademark and registration are assignable with good will of business in which trademark is used, or with part of good will of business connected with use of and symbolized by trademark. Assignment may be recorded with Secretary of State; upon payment of $25 recording fee, new certificate will be issued in name of assignee for remainder of term of registration or of last renewal. Assignment of registration void as against subsequent bona fide purchaser without notice unless recorded with Secretary of State within three months after date of assignment or prior to subsequent purchase. (78 O.S. § 26).

Cancellation.

Registration cancelled by Secretary of State upon voluntary request for cancellation from registrant or assignee of record; if not renewed in accordance with provisions of act; or if court of competent jurisdiction finds that registered trademark has been abandoned, that registrant is not owner of trademark, that registration was granted improperly, that registration was obtained fraudulently, or orders cancellation of registration on any ground. Fee $25 for filing cancellation. (78 O.S. § 28).

Protection Afforded and Infringement.

Any person who infringes trademark of registered owner is liable in civil action. Any court of competent jurisdiction may restrain by injunction manufacture, use, display or sale of any counterfeit or imitation of registered trademark. Court may require payment to owner of all profits and/or all damages suffered and may order destruction of such counterfeit or imitation. (78 O.S. § 31).

Common Law Rights.

Act does not adversely affect enforcement of rights in trademarks acquired in good faith at any time at common law. (78 O.S. § 33).

Invention Development Services Act (15 O.S. § 680-689) governs contracts for invention development or promotion services, specifies financial requirements of invention developer.

Trademark Anti-Counterfeiting Act (21 O.S. § 1990 et seq.) prohibits use, display, advertisement, distribution or possession of item or service that bears or is identified by counterfeit mark.

Uniform Deceptive Trade Practices Act enacted. (78 O.S. § 51 to 55). See category 3 Business Regulation and Commerce, topic 3.20 Monopolies, 3.22 Restraint of Trade and Competition.

Tradenames.

See category 2 Business Organizations, topic 2.03 Corporations, subhead Name.

Oils and Greases.

It is unlawful to store, sell or offer for sale from any container, tank, pump or other device, liquid fuels, lubricating oils, greases or similar products other than those manufactured or distributed by manufacturer or distributor indicated by tradename, symbol, sign or other distinguishing trademark appearing on such container. It is unlawful for anyone to imitate any symbol, sign, emblem, color scheme or trademark of another of liquids, fuels, lubricating oils, greases or other similar products. Mixing, blending or compounding of liquid fuels, lubricating oils, greases or similar products of any manufacturer or distributor with those of another, or adulterating same and exposing them for sale under trademark or tradename of either as unadulterated product of such manufacturer or distributor is prohibited, but any owner may apply his own trademark or name to such mixture. (52 O.S. § 391-6).

Partnership Name.

See category 2 Business Organizations, topic 2.08 Partnerships.

Copyright.

See category 3 Business Regulation and Commerce, topic 3.13 Contracts.

17.02 TRADE SECRETS:

Uniform Trade Secrets Act adopted. (78 O.S. § 85 to 94). Misappropriation of trade secrets, including business records and customer lists, constitutes larceny. (21 O.S. § 1732). Disclosure of trade secret is subject to privilege under Evidence Code. (12 O.S. § 2508). Agreements and information relating to state-owned or controlled technology are exempt from Open Records Act disclosure requirements, but are subject to certain reporting requirements. (51 O.S. § 24A.19).

18 LEGAL PROFESSION

18.01 ATTORNEYS AND COUNSELORS:

Supreme Court has exclusive power and authority to pass on qualifications and fitness of applicants for admission to practice law. (5 O.S. § 12).

Integrated bar has been set up under articles adopted by Supreme Court. (Sup. Ct. Order of Oct. 10, 1939; 185 Okla. 505, 95 P.2d 113).

Eligibility.

To be admitted to practice of law in state, applicant must have good moral character, be at least 18 years of age, meet all applicable conditions and requirements for admission to practice by examination or upon motion without examination, take specified oath and file same with Clerk of Supreme Court, and sign Roll of Attorneys personally or by granting power of attorney to Administrative Director of Board of Bar Examiners. (tit. 5, c. 1, App. 5, Rule 1).

Registration as Law Student.

Applicant for admission by examination must register as law student with Board of Bar Examiners by Jan. 15 of year following year in which applicant first enters law school; nunc pro tunc registration after such date may be permitted by Board. If attorney of another jurisdiction is not eligible for admission upon motion, Board of Bar Examiners may permit such attorney to take examination without requiring registration as law student, if other requirements are met. (tit. 5, c. 1, App. 5, Rule 4). Regular registration fee is $125; nunc pro tunc registration fee is $450.

Educational requirements for admission by bar examination are certificate of graduation with Juris Doctor degree from law school in U.S., its territories or possessions accredited by American Bar Association, and attainment of satisfactory score on Multistate Professional Responsibility Examination. (tit. 5, c. 1, App. 5, Rule 4).

Petition for Admission.

Admission Without Examination.

Persons who may be admitted to practice in state upon recommendation and motion of Board, without examination, if found to meet eligibility requirements: (1) former judges of courts of record of general or appellate jurisdiction with tenure of five years or more; (2) persons lawfully admitted to practice and in good standing in reciprocal state (state which grants Oklahoma judges and lawyers right of admission on motion, without requirement of taking examination), engaged in actual and continuous practice of law for at least five of seven years immediately preceding application and who are graduates of ABA-approved law school. Special temporary permit may be granted to person admitted to practice in another state who teaches full-time in law school accredited by ABA. Applicant must provide report by National Conference of Bar Examiners, and proof of practice and licensing as may be required by Board. (tit. 5, c. 1, App. 5, Rule 2).

Admission by Examination.

Examination is compulsory for persons not meeting requirements for admission upon motion without examination. Two bar examinations are held each year. Application to take examination must be filed at least six months prior to date of examination. Regular application fee for applicant registered as law student and not admitted in any other jurisdiction is $250; regular application fee for practicing attorneys is $400. (tit. 5, c. 1, App. 5, Rules 3 O.S. § 5).

Examination over Oklahoma law covers code of professional responsibility; commercial law, including contracts, U.C.C., consumer law and creditor's rights including bankruptcy; property; procedural law, including pleadings, practice, evidence, and remedies; criminal law; business associations, including agency, partnerships, and corporations; constitutional and administrative law; torts; intestate succession, wills, trusts, and estate planning, including federal estate and gift taxation; conflicts of laws and family law. Applicant must attain average grade of at least 75% on examination; section over code of professional responsibility must be passed with grade of at least 75%. (tit. 5, c. 1, App. 5, Rule 5).

Admission Pro Hac Vice.

Regularly admitted practicing attorney in courts of record of another state, having business in courts of Oklahoma, may, on motion, be permitted to practice for purpose of such business; but it must appear that he has associated with him a resident licensed attorney of Oklahoma unless his state permits Oklahoma attorneys to practice therein without associating local attorneys. (5 O.S. § 17, 17.1, 17.2).

Registration of Out-of-State Attorneys.

Numerous requirements for registration of out-of-state attorneys with Oklahoma Bar Association and obtaining approval for appearance in state forum. (tit. 5, c. 1, App. 1, Art. II, § 5).

Licenses.

Persons licensed to practice law in state are members of State Bar Association. Annual dues for active member are $175.

Disabilities.

Attorney may not become surety on bond in any action in which he is counsel, and bond on which he is surety is void. (5 O.S. § 11).

Compensation.

Attorney may contract for contingent fee up to 50% of net recovery, and adverse party settling or compromising action is liable for fee. (5 O.S. § 7).

Lien.

Attorney has lien on client's cause of action or counterclaim provided he gives notice thereof to adverse party, which may be given at time of filing pleading in court of record by endorsing thereon his name and "lien claimed." (5 O.S. § 6). He has also common law lien on all documents or other property of his client coming into his hands professionally until general balance due him for professional services is paid. (109 Okla. 161, 235 Pac. 502). Order directing indigent defendant to pay costs of representation is lien against all of defendant's real and personal property and may be filed against such property and foreclosed. (19 O.S. § 138.10).

Attorney Ethics.

American Bar Association Model Rules of Professional Conduct adopted. (tit. 5, c. 1, App. 3-A).

Discipline.

Supreme Court has exclusive power to discipline attorneys or revoke permit to practice and to make rules of conduct. (5 O.S. § 13). See Rules Governing Disciplinary Proceedings. (tit. 5, c. 1, App. 1-A).

Mandatory Continuing Legal Education.

With certain exceptions, each attorney must complete 12 hours of approved continuing legal education per year, including one hour of ethics. (Sup. Ct. Order of Jan. 17, 1986, as am'd to Sept. 1990; tit. 5, c. 1, App. 1-B).

Unauthorized Practice.

No person may practice law who is judge of court of record, sheriff, coroner, or deputy sheriff, or clerk of court, in court of which he is clerk (5 O.S. § 1), or person who is not active member of State Bar Association, except when admitted pro hac vice. (tit. 5, c. 1, App. 1, Art. 2, § 5).

Professional Corporations.

See category 2 Business Organizations, topic 2.03 Corporations, subhead Professional Corporations.

19 MINERAL, WATER AND FISHING RIGHTS

19.00A FISH AND GAME:

Supervision.

Dept. of Wildlife Conservation, governed by Wildlife Conservation Commission, has charge of managing state's wildlife under Wildlife Conservation Code. (29 O.S. § 1-101 et seq.).

License and Permit Requirements.

Required licenses and permits include: (1) Aquatic culture license (commercial propagation of water species), (2) commercial fishing license, (3) commercial fisherman's permit to sell out of state, (4) commercial turtle harvester or buyer license, (5) commercial hunting area license (big game or upland game), (6) commercial wildlife breeder's license, (7) falconer's permit, (8) fishing license, (9) fur dealer's license, (10) hunting license, (11) trapping license, (12) noncommercial wildlife breeders license, (13) migratory bird permit, and (14) permits to control nuisance or damage by wildlife. (2 O.S. § 6-311 et seq.; 29 O.S. § 4-101 et seq.). In addition, Wildlife Land Stamp must be purchased and persons must maintain stamp in their possession, when hunting, fishing or taking any wildlife. (29 O.S. § 4-140). Licenses are nontransferable and, unless otherwise provided, terminate Dec. 31 for year issued. (29 O.S. § 4-101). Five year and lifetime fishing, hunting or combination hunting/fishing licenses may be purchased. (29 O.S. §§ 4-113.1, 4-114). Hunting or fishing on occupied land of another absent consent prohibited. (29 O.S. § 5-202, 6 O.S. § 304).

Regulation of Fishing and Fishing Waters.

Code includes regulations concerning aquatic culture (commercial propagation of water species), commercial fishing, sport fishing (including method of taking, length limits and bag limits), minnow dealers, fishing waters, and noxious aquatic plant controls. (29 O.S. § 6-1101 et seq.). Code also regulates dams (29 O.S. § 7-101 to 103), hatcheries (29 O.S. § 7-302), and pollution, including removal and disposition of dead fish (29 O.S. § 7-401 to 403). Use of certain mechanical fishing devices prohibited. (29 O.S. § 1001).

19.01 MINES AND MINERALS:

State Mining Board has exclusive control of granting certificates of competency to district mine inspectors, superintendents, mine foremen, hoisting engineers, fire bosses or shot firers, which certificates entitle holders thereof to discharge duties for which they are thereby qualified at any mine. (45 O.S. § 1 et seq.; 45 O.S. § 902 et seq.).

Chief mine inspector and a deputy mine inspector for each mining district compose corps of mining inspectors. They must examine all surfaces mines at least once a month, and other mines from time to time. They have general power and authority to oversee and direct operations and to shut down mine in emergency, and have power to enforce removal and repair of dangerous conditions. Bond (minimum $2,000) is required of all operators except those exempted by statute. (45 O.S. § 728). Operator failing to perform corrective work or defaulting under bond or other security required by 45 O.S. § 728 will not be issued any permit until such obligations are met. If operator or surety fails to perform corrective work, permit may be revoked or bond forfeited. Mining without permit subjects entity and its agents to fine of up to $10,000. (45 O.S. § 729). District courts have jurisdiction to review orders of mine inspector. (45 O.S. § 1 et seq.).

Operation and safeguards are regulated by statute as to ingress and egress, condition of shafts, underground excavations, ventilation, dust, water lines, sprinkling attachments, investigations and reports of loss of life, age and experience of shaft hoisting engineers, signalling methods and codes, hoisting speed, shaft collars, cribbing, timbering, pipes and air lines, hoisting equipment, explosives, storage, shots, sanitation, maps of mines, travelway and length of working day. (45 O.S. § 1 et seq.).

Surface Mining.

Certified strip pit mine foreman required for every mine with more than three employees. Subjects regulated include ground control; fire prevention; storage, transportation, and use of explosives; drilling for blasting; loading, hauling, and dumping; travelways; electrical wiring; use of equipment; personal protection; augering; and other general procedures. (45 O.S. § 901 et seq.). Permit from State Department of Mines and Mining required for each surface coal mining operation and underground coal mining operation. (45 O.S. § 724). Permit application must include $500 fee for each permit year and adequate reclamation plan. Performance bond of minimum $10,000 required. (45 O.S. § 745.1 et seq.).

Explosives and Blasting Regulation Act.

Under Act (63 O.S. § 122.1 et seq.), Department of Mines has jurisdiction over use of explosives and blasting activities for surface and non-surface mining activities and, except as otherwise provided, use of explosives and blasting activities for non-mining activities not subject to specific statutory authority of another state agency; permit or written exemption notification from Dept. of Mines required to purchase blasting agents or explosives in state.

Oil and Gas.

Corporation Commission has duty of enforcing statutory regulations on oil and gas mining industry (17 O.S. § 51-3; tit. 52), which include extensive conservation laws, administered by conservation division, defining and prohibiting waste of oil and gas and provisions for well spacing and drilling units (tit. 52). See Pipelines Act (52 O.S. § 1.1 et seq.); Production and Transportation Act (52 O.S. § 21 et seq.); Underground Storage of Gas (52 O.S. § 36.1 et seq.); Oil and Gas Conservation Act (52 O.S. § 86.1 et seq.); Unitized Management of Common Sources of Supply (52 O.S. § 287.1 et seq.); Surface Damage Act (52 O.S. § 318.2-318.9); Seismic Exploration Regulation Act (52 O.S. § 318.21 et seq.); Production Revenue Standards Act (52 O.S. § 570.1 et seq.); Natural Gas Market Sharing Act (52 O.S. § 581.1 et seq.); Underground Storage Tank Regulation Act (17 O.S. § 301 et seq.); Petroleum Storage Tank Reform Act (17 O.S. § 321 et seq.). Also see 52 O.S. § 296.1, requiring owner or operator of production crude oil storage tank to take certain actions to secure tanks.

Transfer of energy resource assets, as defined in Energy Resources Conservation Act, 52 O.S. § 601 et seq., or ownership interest in person, other than natural person, owning or controlling such assets is not valid or effective unless exempt or approved by Corporation Commission. Exemptions include transfer in ordinary course of business, granting of mortgage or royalty interest or other right to receive production or proceeds therefrom, transfer where transferee would own less than 10% of transferor, transfer where value of energy resource assets is less than $75,000,000, transfer of domestic public utility and other transfers exempted by Commission. Commission shall approve application of transferee, after hearing, if transfer will not, among other things, adversely impact development of energy resource assets proposed to be transferred, impair contractual obligations affecting such assets and impede conservation of such assets. Commission shall waive such requirements if, based on affidavits filed by transferor and transferee, Commission determines there are no substantial issues requiring application and hearing. Transferee must pay $5,000 fee upon filing application and costs incurred in excess of fee.

Land Reclamation.

See Mining Lands Reclamation Act (45 O.S. § 721 et seq.); Abandoned Mine Reclamation Act (45 O.S. § 740.1 et seq.); Coal Mining Reclamation Acts (45 O.S. § 742 et seq.). See category 12 Environment, topic 12.01 Environmental Regulation, subhead General Supervision.

Liens.

Miner and employee engaged in developing and opening up coal mines, and every mechanic, builder, artisan, laborer or other person who performs any work or labor in and about such mine, has a lien on the buildings, machinery, equipment, inside or outside, income, franchises, leases or subleases, and all other appurtenances and all property of the person, owner, agent, firm or corporation owning, constructing or operating such mine or mines and all property in their possession or under their control or permitted by the owner to be used in the construction or operation thereof, superior, whether prior in time or not, to liens of all persons interested in such mines as managers, lessees or sublessees, operators, mortgagees, trustees and beneficiaries under trust or owners. (42 O.S. § 148).

Any person, corporation, or partnership who, under contract with owner of leasehold for oil and gas purposes or of any gas pipe line or oil pipe line, or with his trustee or agent, performs labor or services, including services of geologist or petroleum engineer, or furnishes material, machinery or supplies used in completing, operating or repairing any oil or gas well, or machinery used for such purposes has a lien thereon. (42 O.S. § 144). Subcontractor may have lien on leasehold for oil and gas purposes or on oil or gas pipe line, to same extent as original contractor. (42 O.S. § 145). Lien pursuant to 42 O.S. § 144 and 42 O.S. § 145 is preserved by filing lien statement in office of county clerk of county where well located within 180 days of date work last performed or material last supplied. (42 O.S. § 146). Lien pursuant to 42 O.S. § 144 and 42 O.S. § 145 extends only to oil and gas leasehold estate. (42 O.S. § 146).

Interest owner in oil and gas may perfect lien on oil or gas severed proceeds of sale of such oil or gas. Verified notice in form substantially similar to statutory form must be filed within 90 days of date payment due, and lien expires within one year of filing of notice unless action commenced to enforce lien. (52 O.S. § 548 et seq.).

State of Oklahoma has lien on abandoned oil and gas well-site equipment, structures and contents, in amount equal to Corporation Commission’s cost of plugging or repairing well and restoring lease site. (17 O.S. § 53.3).

Coal Mining Fee.

Operators of coal mines must pay to Department of Mines fee of 5¢ per ton of coal produced (45 O.S. § 931); failure to pay fee is cause for injunction restraining further mining (45 O.S. § 936). Unpaid fees are first and perpetual lien on all of operator’s property, subject to state tax liens. (45 O.S. § 934).

Taxes.

See category 22 Taxation, topic 22.12C Mines, Minerals and Fisheries Taxes, subhead Severance Taxes.

19.01A WATER LAW:

Supervision.

Oklahoma Water Resources Board regulates stream water use (82 O.S. § 105.1 et seq.) and has authority to allocate ground water resources by issuing permits limiting amount of water taken from ground for nondomestic purposes. (82 O.S. § 1020.1 et seq.). Board is authorized to promulgate rules known as Oklahoma Water Quality Standards, which establish classifications of uses of state's waters. (82 O.S. § 1085.30).

See category 12 Environment, topic 12.01 Environmental Regulation.

Ownership of Water.

Owner of land owns water standing on or flowing over or under its surface but not forming definite stream. Water running in definite stream, formed by nature over or under surface, may be used by owner of land riparian to stream for domestic uses (as defined in 82 O.S. § 105.1). Ownership of land subject to riparian accretion or avulsion determined by statute. (60 O.S. § 335 to 340). Land owner may not prevent natural flow of stream or natural spring from which stream commences definite course, nor pursue or pollute same, because such water is public water subject to appropriation for benefit and welfare of people of state; however, land owner may dam up or otherwise use bed of stream on land for collection or storage of waters in amount not exceeding that which he owns, so long as he provides for continued natural flow of stream. (60 O.S. § 60). Ownership and use of groundwater governed by 82 O.S. § 1020.1 et seq. With certain narrow exceptions, moratorium currently in place until Nov. 1, 2009 on sale or exportation of surface and/or groundwater outside state. (82 O.S. § 1B).

20 MORTGAGES

20.01 CHATTEL MORTGAGES:

Governed by Uniform Commercial Code. (12A O.S. § 9-101 et seq.). See category 3 Business Regulation and Commerce, topic 3.09 Commercial Code.

Execution of Instrument.

Governed by Uniform Commercial Code. (12A O.S. § 9-203).

Motor Vehicles.

See category 23 Transportation, topic Motor Vehicles, subhead Titles, Sales and Liens; category 8 Debtor and Creditor, topic 8.03 Consumer Credit.

Filing.

Proper place to file financing statement is as follows: (a) For consumer goods, farm equipment, livestock, farm products, or accounts or general intangibles relating to sale of farm products by farmer, filing is in county clerk's office of county where debtor resides (or if debtor not resident of state then in county where goods are kept), and in addition when collateral is crops filing must be made in county clerk's office of county where land is located; (b) for timber, minerals, accounts described in § 9-103.1(5), or fixtures, filing is in office where real estate mortgage would be recorded; (c) for transmitting utility, filing is in office of Secretary of State; and

(d) in all other cases filing is in office of county clerk of Oklahoma County. (12A O.S. § 9-401). Uniform filing fee is $10. (12A O.S. § 9-403). In addition, as to farm products, filing must be made in office of Secretary of State. See category 3 Business Regulation and Commerce, topic 3.09 Commercial Code, subhead Farm Products.

Renewal Affidavit.

Governed by Uniform Commercial Code. (12A O.S. § 9-403).

Removal of Property.

Governed by Uniform Commercial Code. (12A O.S. § 9-103, 401).

Assignment of security interest is governed by Uniform Commercial Code. (12A O.S. § 9-405).

Foreclosure of security interest is governed by Uniform Commercial Code. (12A O.S. § 9-501 et seq.).

Redemption.

Governed by Uniform Commercial Code. (12A O.S. § 9-506).

Release of collateral is governed by Uniform Commercial Code. (12A O.S. § 9-406).

Forms.

No official or approved forms for use as a Financing Statement, Security Agreement, Continuation Statement, Partial Release, or Assignment.

Financing Statement should include the following information:

(1) Name and address of Debtor.

(2) Name and address of Secured Party.

(3) A description of the collateral covered by the Security Agreement.

(4) (If collateral is crops, timber, minerals, accounts described in § 9-103(5), or fixtures) describe the real estate on which collateral is located.

(5) State whether or not proceeds or products of collateral are covered by Security Agreement.

(6) The Financing Statement must be signed by the Debtor.

20.02 COLLATERAL SECURITY:

See category 8 Debtor and Creditor, topic 8.15 Pledges.

20.03 MORTGAGES OF PERSONAL PROPERTY:

See topic 20.01 Chattel Mortgages; see also category 3 Business Regulation and Commerce, topic 3.09 Commercial Code.

20.04 MORTGAGES OF REAL PROPERTY:

Every instrument purporting to be an absolute or qualified conveyance of real estate or any interest therein, but intended to be defeasible or as security for payment of money is deemed a mortgage, and must be recorded and foreclosed as such either in action to enforce mortgage or pursuant to power of sale granted therein (see subhead Sales, infra). (46 O.S. § 1).

Every instrument substantially the same as the form prescribed by law (see subhead Forms, infra) is deemed a good and valid mortgage, with all contracts and covenants essential to protect the rights of the holder thereof; but any further lawful contract embodied therein is binding upon the parties thereto. In mortgage transaction not involving consumer loan nor agricultural loan, mortgagor may assign rents and profits from mortgaged property as additional security for debts secured by mortgage without regard to whether such assignment provides for immediate collection or collection upon future default by mortgagor of rents and profits assigned as they become due. (46 O.S. § 4). In mortgage transaction made primarily for agricultural purpose, mortgagor may make contemporaneous mortgage and assignment of rents and profits, as additional security, if assignment provides that mortgagee is to actually collect such rents and profits, and if certain other requirements are met. (46 O.S. § 4.1).

Execution.

Mortgages must be signed, sealed, delivered, acknowledged and recorded as deeds. See category 21 Property, topic 21.06 Deeds.

All rights of a mortgagor in and to the premises, existing at the time or subsequently accruing, accrue to the benefit of the mortgagee and are covered by his mortgage. (16 O.S. § 17). Mortgage of homestead is not valid unless in writing and signed by both husband and wife. (16 O.S. § 4). District court may authorize administrators or executors of estate of deceased persons or guardians of estates of minors or incapacitated persons to execute mortgage, including renewal or new mortgage. (58 O.S. § 385).

Recordation.

The record of a mortgage, duly made, operates as notice to all subsequent purchasers and incumbrancers. (46 O.S. § 7). Mortgages and deeds of trust are recorded as deeds. (See category 21 Property, topic 21.06 Deeds.) Mortgage given for purchase price of real property at time of its conveyance has priority over all other liens created against purchaser subject to operation of recording laws (42 O.S. § 16), except for taxes (68 O.S. § 353) and for labor performed on the property (42 O.S. § 96). Every grant of real property which appears by any other writing to be intended as a mortgage must be recorded as a mortgage, and the grantee can derive no benefit from such record unless the grant and other writing explanatory thereof are recorded together. (46 O.S. § 8, 10).

Fees for filing and recording mortgage are: For first page $8; for each additional page $2. (28 O.S. § 32).

Registration Tax.

Before a mortgage may be filed for record, the mortgagee must pay a registration tax of 10¢ for each $100 or fraction thereof if mortgage is for five years or more; 8¢ if for four years; 6¢ if for three years; 4¢ if for two years, and 2¢ if for less than two years. (68 O.S. § 1901). Payment of registration tax relieves debt from further taxation other than income tax or interest on mortgaged debt. If property is situated in more than one county tax should be paid in county where mortgage is first offered for filing. If property is in different states amount of tax payable in Oklahoma is based upon proportion of property mortgaged situated in state. Value must be established by affidavit. Mortgage cannot be recorded or foreclosed unless tax paid. (68 O.S. § 1901 et seq.). Supplemental instrument or assignment of mortgage not subject to additional tax or fee unless it creates or secures new or further indebtedness or obligation other than principal indebtedness or obligation secured by recorded primary mortgage. (68 O.S. § 1905).

Any scheme, arrangement, agreement, inducement or device which charges to or exacts from the mortgagor the payment of such tax is a misdemeanor. (68 O.S. § 1904).

Assignment.

Any conveyance, other than to a bona fide purchaser, by one holding under an instrument purporting to be an absolute conveyance, but intended as security, shall be deemed and treated as an assignment and transfer of the mortgage rights of and indebtedness to the maker thereof. (46 O.S. § 2). Otherwise common law rules govern.

Payment to Assignor.

Where a mortgage on real property within the state has been on record in the county where the property is situated for six months or more, and an assignment thereof is, or has been, made, and such assignment is not recorded in the county where the real estate is situated, the mortgagor or his heirs, assigns or personal representatives, if without actual notice or knowledge of such assignment, may pay the principal debt or all matured interest to the mortgagee or the last assignee whose assignment is recorded, and such payment extinguishes the mortgage debt, or satisfies the interest, notwithstanding any transfer of any note or other evidence of indebtedness secured by such mortgage. The holder of the unrecorded assignment has, however, a right of action against his assignor receiving such payment, for money had and received to his use. (46 O.S. § 12-13).

Satisfaction.

If upon expiration of 50 days from payment of secured debt, holder of mortgage neglects or refuses to release mortgage for ten days after written request by mortgagor, such holder forfeits and pays to mortgagor 1% of principal debt per diem (not to exceed $100 per day) after expiration of such ten days. Total penalty cannot exceed 100% of total principal debt. For purposes of this provision “mortgagor” includes subsequent purchaser. (46 O.S. § 15). Any agent or attorney duly authorized to collect debt secured thereby has power and authority to release mortgage, and request made of such agent or attorney who has collected debt binds holder to pay like penalty. (46 O.S. § 14).

Release.

Mortgage on real property may be released by written instrument, signed, sealed, delivered, acknowledged and recorded as deeds. See category 21 Property, topic 21.06 Deeds. Act does not apply to real estate mortgages or marginal releases now of record. (46 O.S. § 16).

Foreclosure.

Mortgages on real estate may be foreclosed by equitable action in district court of county in which the land is situated. (12 O.S. § 131, 686). The property must be appraised, unless appraisement waived by mortgage, and may not be sold for less than two-thirds of appraised value unless appraisement waived. Notice of sale must be published for at least 30 days prior to date of sale and order of sale must conform to judgment. (12 O.S. § 760-5). Party for whom judgment is rendered is entitled to recover reasonable attorney’s fee, where fixed by mortgage (42 O.S. § 176), and sale must be confirmed by court (12 O.S. § 765). Sheriff makes deed. (12 O.S. § 766).

No action on, or foreclosure of, any mortgage, contract for deed, or deed of trust may be brought more than seven years after date of last maturing obligation secured by such instrument, unless holder files written notice of extension within seven-year period. No action on, or foreclosure of, such instrument may be brought more than 30 years after date of its recordation, if due date of last maturing obligation secured thereby cannot be ascertained from written terms thereof, unless similar notice of extension was filed before Oct. 1, 1981. (46 O.S. § 301).

When the words “and waive the appraisement” are written or printed in a mortgage, the premises must be sold without appraisement, but in such case no order for sale may issue until six months after judgment. (46 O.S. § 4).

Redemption may be made, prior to foreclosure, by any person having interest in property (42 O.S. § 18) or by junior lienholder, who is then subrogated to rights of superior lienholders (42 O.S. § 19). After valid sale under decree of foreclosure there can be no redemption. Order of confirmation by court relates back to time of sale. (9 Okla. 683, 60 Pac. 235).

Deficiency Judgment.

Personal judgment is rendered for the amount due; but no deficiency judgment may be rendered except on motion and notice filed within 90 days of sale, and deficiency is amount of judgment, costs and disbursements less sale price or market price, whichever is greater. (12 O.S. § 686).

Sales.

Mortgagor may confer power of sale upon mortgagee in mortgage. (46 O.S. § 40, et seq.). Upon default by mortgagor and after exercising power of sale in manner prescribed by statute, property is sold by mortgagee at public auction to highest bidder. (46 O.S. § 44, 45, 46). Sale may be conducted in any county where part of property is situated. (46 O.S. § 45). Mortgagee executes and delivers deed to purchaser which recites that deed is executed by mortgagee exercising its power of sale after breach or default by mortgagor. (46 O.S. § 47).

If mortgaged property is homestead property, mortgagor may elect for judicial foreclosure proceedings or mortgagor may elect against deficiency judgment if mortgagee exercises its power of sale. (46 O.S. § 43). For non-homestead property, mortgagor is liable for any deficiency and mortgagee must commence action for deficiency within 90 days after date of sale. (46 O.S. § 43). After valid conveyance there can be no redemption except right of redemption held by U.S.A. pursuant to 28 U.S.C. 2410. (46 O.S. § 47).

Mortgage in which power of sale is granted must state in bold and underlined language, substantially following (46 O.S. § 43):

“A power of sale has been granted in this mortgage. A power of sale may allow the mortgagee to take the mortgaged property and sell it without going to court in a foreclosure action upon default by the mortgagor under this mortgage.”

Deed of trust on real property, intended as security, shall be subject to all statutory provisions relating to mortgages. (46 O.S. § 1.1). Accordingly, deeds of trust are rarely used in Oklahoma.

Forms.

The following forms may be used:

Forms

Mortgage (46 O.S. § 3): Know all men by these Presents: That, ... and . . . . . . of . . . . . . county, in the . . . . . . of . . . . . . part . . . . . . of the first part, have mortgaged and hereby mortgage to . . . . . . of . . . . . . county, ... of . . . . . . part . . . . . . of the second part, the following described real estate and premises, situated in . . . . . . county, State of Oklahoma, to-wit: . . . . . ., with all the improvements thereon and appurtenances thereunto belonging, and warrant the title to the same . . . . . . This mortgage is given to secure the principal sum of . . . . . . dollars, with interest thereon at the rate of . . . . . . per centum per annum, payable . . . . . . annually from . . . . . . according to the terms of . . . . . . certain promissory note . . . . . . described as follows, to-wit: . . . . . . Dated this . . . . . . day of . . . . . ., 20. . . . . . .

. . . .

(Acknowledgment).

Deed of trust (46 O.S. § 31-9): This deed made this . . . . . . day of . . . . . ., 20. . . . . . ., by and between . . . . . . grantor, party of the first part, and . . . . . . Trustee, party of the second part, and . . . . . . party of the third part, witnesseth:

The said party of the first part does hereby grant unto the said party of the second part, the following described property, situated in . . . . . . county, State of Oklahoma, to-wit: (describe) in trust, however, to secure the balance only of the purchase price of the above described premises, evidenced by the following described obligations (here describe debts, notes, etc., to be secured, name of party for whose benefit same is made and insert any other provisions parties may agree upon). In witness whereof, the party of the first part has hereunto set his (or her or its) hand and seal this the day and year first above written.

. . . .

(Acknowledgment).

This deed of trust accepted this . . . . . . day of . . . . . ., 20. . . . . .

. . . . .Trustee.

21 PROPERTY

21.01 ABSENTEES:

Appointment of Agent for Nonresident Heir.

District court may appoint agent to act for nonresident heir. Agent must give bond to state of Okla., and render account to court appointing him. Personal property remaining unclaimed for one year may be sold and proceeds paid to State Treasurer, to be paid over to person entitled when he establishes his claim. (58 O.S. § 671-6).

Conservator of Estate of Absentee.

Upon notice as provided and good cause shown, district court of county of an “absentee’s” last known legal domicile may appoint conservator to take charge of absentee’s estate under court’s supervision; “absentee” being a person absent from his usual place of residence for at least six months and whose whereabouts are unknown by his family or others who would be expected to know his whereabouts, or a person who in connection with any activity relating to prosecution of any war in which U.S. is engaged has been reported by Department of Defense or other U.S. department for a period of at least three months to be missing, missing in action, or interned in a neutral country, or beleaguered, besieged or captured by an enemy of U.S. (60 O.S. § 361).

Escheat.

Real and personal property escheats to state when any person seized with such property dies without heirs or devise by will or if such owner be absent for seven years and is not known to exist. (84 O.S. § 271). Abandoned mineral interests also subject to escheat. (60 O.S. § 658.1, 84 O.S. § 271.1). Escheat proceedings may be initiated by District Attorney or Attorney General. (84 O.S. § 273).

Uniform Unclaimed Property Act (1981) substantially adopted. (60 O.S. § 651-87).

See also category 13 Estates and Trusts, topic 13.09 Executors and Administrators, subhead Distribution if Abroad.

21.02 ADVERSE POSSESSION:

Possession of realty which is open, visible, continuous, and exclusive, with claim of ownership such as will notify party seeking information on subject that premises are not held in subordination to any title or claim of another, but against all titles and claimants, is adverse possession. (178 Okla. 180, 62 P.2d 997). Occupancy for period of 15 years confers a title by prescription. (60 O.S. § 333; 12 O.S. § 93).

21.03 CONDOMINIUMS:

See topic 21.16 Real Property.

21.04 CONVEYANCES:

See topic 21.06 Deeds.

21.05 CURTESY:

Abolished. (84 O.S. § 214; 43 O.S. § 208).

21.06 DEEDS:

Execution.

Deed must be in writing, contain appropriate legal description, and be subscribed by grantor (16 O.S. § 4) or grantor’s authorized agent (16 O.S. § 3). Witnesses are not necessary to validity (16 O.S. § 2), except that in order for one who cannot write to execute written instrument by mark, one of two persons who saw such mark made must write name of maker and both such persons must write their own names on instrument as witnesses to mark and signature (16 O.S. § 34).

Deed relating to homestead is not valid unless signed by both husband and wife, if both living and not divorced or legally separated. Unless specifically restricted, attorney-in-fact may execute valid deed, mortgage, or contract affecting homestead exempt by law including principal’s personal homestead rights on behalf of husband, wife, or both. Power of attorney authorizing such execution must be recorded with county clerk of county or counties in which affected property is located. (16 O.S. § 4). Power of attorney to convey must be in writing and executed with formality required for deeds, and deed or other conveyance executed by attorney-in-fact may not be received for record until power of attorney is filed for record in same office. (16 O.S. § 20).

See topic 21.15 Powers of Attorney. See also categories 8 Debtor and Creditor, topic Homesteads; Family, topic Husband and wife, subhead Conveyances.

Generally acknowledgment is necessary to recordation, but not to validity between parties. (16 O.S. § 15, 26). Unrecorded deed is good as between parties, but void as to third persons without notice. (16 O.S. § 15). To affect such persons deed must be recorded in office of county clerk of county in which land is located.

Any interest created by deed may be disclaimed by person entitled thereto within six months after effective date of instrument. (60 O.S. § 752-753).

Certain deeds dividing platted lots or conveying tracts of less than five acres must be approved by municipal planning commission. (11 O.S. § 47-116).

Recording Fees.

See category 10 Documents and Records, topic 10.04 Records, subhead Recording Fees.

Taxes.

See category 22 Taxation, topic 22.13 Property Taxes, subhead Real Estate Conveyance Tax.

Corporate deed must be signed in name of corporation by either president, vice-president, chair or vice-chair of board of directors, or attorney in fact and acknowledged. (16 O.S. § 93, 95).

Effect.

Quitclaim deed, made in substantial compliance with statute, conveys all right, title and interest of maker in and to premises described. (16 O.S. § 18).

Warranty deed, made in substantial compliance with statute, conveys to grantee, his heirs or assigns, the whole interest of grantor in premises described, and grantor is deemed to have covenanted: That at time of making deed he was legally seized of an indefeasible estate in fee simple of the premises and had good right and full power to convey same; that the same was clear of all incumbrances and liens, and that he warranted to grantee, his heirs and assigns, quiet and peaceable possession thereof; and that he would defend the title thereto against all persons who might lawfully claim the same; and such covenants and warranty are obligatory and binding upon any such grantor, his heirs and personal representatives, as if written at length in such deed. (16 O.S. § 19). Evidentiary effect of recorded document (16 O.S. § 53), see category 10 Documents and Records, topic 10.04 Records, subhead Effect of Record.

Types of Estates.

See topic 21.16 Real Property.

Forms.

Warranty deed may be substantially in following form (16 O.S. § 40):

Form

Know all men by these presents: That . . . . . . part . . . . . . of the first part, in consideration of the sum of . . . . . . dollars, in hand paid, the receipt of which is hereby acknowledged, do hereby grant, bargain, sell and convey unto . . . . . . the following described real property and premises, situate in . . . . . . County, State of Oklahoma, to-wit: . . . . . . together with all the improvements thereon and the appurtenances thereunto belonging, and warrant the title to the same.

To have and to hold said described premises unto the said part . . . . . . of the second part, ... heirs and assigns forever, free, clear and discharged of and from all former grants, taxes, judgments, mortgages and other liens and encumbrances of whatsoever nature.

Signed and delivered this . . . . . . day of . . . . . . 20 . . . .

(Acknowledgment). Grantor.

Quitclaim deed may be in substantially the same form, inserting “quitclaim” before the word “grant,” so as to read “do hereby quitclaim, grant, bargain, sell and convey,” and omitting words “and warrant the title to the same.” (16 O.S. § 41).

See category 10 Documents and Records, topic 10.01 Acknowledgments.

21.07 DEEDS OF TRUST:

See category 20 Mortgages, topic 20.04 Mortgages of Real Property.

21.08 DOWER:

Abolished. (84 O.S. § 214; 43 O.S. § 208).

21.09 ESCHEAT:

See topic 21.01 Absentees, subhead Escheat; categories 3 Business Regulation and Commerce, topic Banks and Banking; Estates and Trusts, topic Descent and Distribution, subhead Escheat.

21.10 LANDLORD AND TENANT:

Leases and Recording Thereof.

Lease for over one year must be in writing. (16 O.S. § 4). Acknowledgment is not necessary to validate lease between the parties, but lease is not valid against third persons unless acknowledged and recorded in office of county clerk of county in which property is located. (16 O.S. § 15). However, open actual possession of property gives notice to the world of possessor’s interest. (183 Okla. 22, 79 P.2d 585).

No statutory form of lease is prescribed. However, if leased premises fall within provisions of Oklahoma Residential Landlord and Tenant Act certain provisions are required. (41 O.S. § 101 et seq.).

Term.

Person in possession of real property, with assent of owner, is presumed to be a tenant at will unless contrary shown. (41 O.S. § 1). When rent is reserved, payable at intervals of three months or less, the tenant is deemed to hold from one period to another, equal to the intervals between the days of payment, unless there is an express contract to the contrary. (41 O.S. § 3).

Where premises are let for one or more years and, after expiration of term, tenant continues to occupy premises with assent of landlord, there is a tenancy at will. (41 O.S. § 2).

Assignment of Lease.

No tenant for a term not exceeding two years, or at will, or by sufferance, may assign or transfer his term or interest, or any part thereof, to another, without the written assent of the landlord or person holding under him. (41 O.S. § 10).

Security Deposits.

Damage or security deposits under residential leases must be kept in escrow account.

Misappropriation punishable by fine and imprisonment. (41 O.S. § 115).

Rent.

A conveyance by the landlord is valid without the attornment of the tenant; but the payment of rent by the tenant to the grantor, at any time before notice of sale given to said tenant, is good against the grantee. (41 O.S. § 12). Rents from lands granted for life or lives may be recovered as other rents. (41 O.S. § 16). A person entitled to rents dependent on the life of another may recover arrears unpaid at the death of that other. (41 O.S. § 17). The occupant of any land without special contract is liable for the rent to any person entitled thereto. (41 O.S. § 19).

When there is no contract or usage to the contrary, rent of agricultural and wild land is payable yearly at the end of each year. Rents of lodgings are payable monthly at the end of each month. Other rents are payable quarterly at the end of each quarter. Rents for shorter periods are payable at the end of each period. (41 O.S. § 37).

Lien.

Any rent for farming land is lien on crop growing or made on premises (41 O.S. § 23), which may be enforced by action, and by attachment thereon if tenant has removed, or is about to remove, property or crops from premises (41 O.S. § 27-9).

Landlord has a lien on property owned by residential tenant located in rented premises, except for instruments or books of tenant's profession, personal effects, items used by tenant for protection of his health, and items used for care of babies, for proper charges owed by tenant and cost of enforcing lien. (41 O.S. § 133).

Self-Service Storage Facility Lien Act (42 O.S. § 191-200) specifies rights and duties of owner and occupants of self-service storage facilities, including required disclosures in rental agreement and lien created by rental agreement.

Distraint.

Common law right of distraint for rent is not in force. (4 Okla. 138, 44 Pac. 203).

Termination of Tenancy.

Thirty days notice is required to terminate tenancy at will or for three months or less, unless rent payable at shorter intervals. (41 O.S. § 4). Three months notice is required in case of tenancy from year to year. (41 O.S. § 5). In case of nonpayment of rent, ten days notice is required if tenancy is for three months or more, and five days if for less. (41 O.S. § 6-7). No notice required where term expired, waste committed or relation of landlord and tenant does not exist. (41 O.S. § 8). Landlord may reenter and dispossess tenant or undertenant on unauthorized assignment of lease through forcible entry and detainer procedure. (41 O.S. § 11). Procedures for disposal of personal property left at leased premises following termination specified by statute. (41 O.S. § 51, 41 O.S. § 130).

Holding Over.

For failure to give up premises after notice of intention to do so, tenant is liable for double rent. (23 O.S. § 69). For willfully holding over after end of term, and after notice to quit and demand of possession made, measure of damages is double yearly value of property, in addition to compensation for detriment caused thereby. (23 O.S. § 70). For forcibly ejecting or excluding person from possession, measure of damages is three times such sum as would compensate for detriment caused to him. (23 O.S. § 71).

Dispossession.

Action lies for forcible entry and detention, or detention only, of real property. Claims for collection of rent or damages or claims arising under Residential Landlord and Tenant Act (41 O.S. § 101 et seq.) may be included in same action. Summons must be served at least three days before day of trial. Upon issuance of writ of execution, officer, plaintiff or agent of plaintiff may take possession of premises within 48 hours after notice to defendant. Person who wrongfully refuses to surrender possession of premises may be charged with trespass. (12 O.S. § 1148.1-1148.16).

Residential Landlord and Tenant Act adopted. Act contains selected provisions from Uniform Residential Landlord and Tenant Act and in general, requires parties to mitigate damages, imposes obligation of good faith, limits terms of rental agreements, requires escrow of security deposits, and specifies various rights, duties and remedies. (41 O.S. § 101 et seq.). Lessor of residential rental property must explain to lessee or tenant how to test smoke detector to ensure it is in working order. Responsibility for checking smoke detector rests with lessee or tenant. (74 O.S. § 324.11a). Act also applies to site, space or lot leased to owner or resident of manufactured home used as dwelling. (41 O.S. § 102). Disposition of property upon death of tenant regulated. (41 O.S. § 130.1).

Discrimination in Housing Act.

(25 O.S. § 1451 et seq.).

21.11 LEASES:

Uniform Commercial Code Art. 2A adopted. (12A O.S. § 2A-101 et seq.). See topic 21.10 Landlord and Tenant.

21.12 [RESERVED]

21.13 PERPETUITIES:

Perpetuities are forbidden. (Const., art. 2, § 3).

Absolute power of alienation cannot be suspended by any limitation or condition whatever, longer than during lives of persons in being plus 21 years at creation of limitation or condition; except that contingent remainder in fee may be created on prior remainder in fee to take effect in event that persons to whom first remainder is limited die under age of 21, or upon any other contingency by which estate of such persons may be determined before they attain majority. (60 O.S. § 31, 34). Common Law Rule Against Perpetuities is in effect. (435 P.2d 107). Inter vivos instruments and wills violating said Rule shall be reformed or construed in accordance with doctrine of cy pres so as to be valid to extent possible and give effect to general intent of creator of interest. (60 O.S. § 75 et seq.). This does not apply to charitable trusts. (174 Okla. 407, 51 P.2d 303). See also category 13 Estates and Trusts, topic 13.15 Trusts.

Uniform Statutory Rule Against Perpetuities.

Not adopted.

21.14 PERSONAL PROPERTY:

Tenancy by entirety exists in Oklahoma between husband and wife. See topic 21.16 Real Property.

21.15 POWERS OF ATTORNEY:

Attorneys in Fact.

Power of attorney for conveyance of real property or interest therein, or for execution or release of any mortgage therefor, must be recorded in county where real property is situated in same manner as deed or mortgage. (16 O.S. § 20). Power to sell or encumber personalty need not be recorded. See topic 21.06 Deeds, subhead Execution.

Formalities.

Power of attorney for conveyance or encumbrance of real estate must be executed and acknowledged in same manner as deeds or mortgages. Power of attorney is not revoked until an instrument containing a revocation is recorded in county where power of attorney was recorded. (16 O.S. § 20-21).

Uniform Statutory Form Power of Attorney Act.

Adopted. (15 O.S. § 1001 et seq.). Powers set forth in act are incorporated by initialing category listed in (A) through (M) of form. See statute for language of form.

Uniform Durable Power of Attorney Act.

Adopted. (58 O.S. § 1071 et seq.).

Additional provisions: power of attorney must state (1) fact of execution under Uniform Durable Power of Attorney Act; (2) time and conditions under which power effective; (3) extent and scope of powers conferred; and (4) who exercises power, including any successor. Power may be restricted or complete with respect to principal's (1) person, including health and medical care decisions, but excluding execution of Directives to Physicians (see category 13 Estates and Trusts, topic 13.16 Wills, subhead Living Wills); and (2) real and personal property. Principal (or other person at direction and in presence of principal) signs power at its end in presence of two witnesses who sign in presence of each other and principal (or other person). Witnesses must be at least 18 years old; not related to principal by blood or marriage; and not attorney-in-fact or related to attorney-in-fact by blood or marriage.

Form.

Execution of power in substantially following statutory form (58 O.S. § 1072.2):

Signed: ____________________

(Principal's signature)

City, County, and State of Residence

The principal is personally known to me and I believe the principal to be of sound mind. I am eighteen (18) years of age or older. I am not related to the principal by blood or marriage or related to the attorney-in-fact by blood or marriage. The principal has declared to me that this instrument is his power of attorney granting to the named attorney-in-fact the power and authority specified herein, and that he has willingly made and executed it as his free and voluntary act for the purposes herein expressed.

Witness: ____________________

Witness: ____________________

STATE OF OKLAHOMA)

) ss.

COUNTY OF ________________)

BEFORE ME, the undersigned authority, on this day personally appeared ___________ (principal), ___________ (witness) and ____________ (witness), whose names are subscribed to the foregoing instrument in their respective capacities, and all of said persons being by me duly sworn, the principal declared to me and to the said witnesses in my presence that the instrument is his or her power of attorney, and that the principal has willingly and voluntarily made and executed it as the free act and deed of the principal for the purposes therein expressed, and the witnesses declared to me that they were each eighteen (18) years of age, or over, neither of them is related to the principal by blood or marriage, or related to the attorney-in-fact by blood or marriage.

The foregoing instrument was acknowledged before me this ____ day of ________, 20__.

My commission expires:

My commission number is:

____

Notary Public

____

Health Care Proxy.

See category 13 Estates and Trusts, topic 13.16 Wills, subhead Living Wills.

21.16 REAL PROPERTY:

Persons at least 18 years old, if otherwise qualified, persons with rights of majority, and any legal entity may own and transfer real property. Transfer may be made to and title taken in name of legal entity or office, in which case title vests in entity or person from time holding office. Unless otherwise provided by statute, defunct or dissolved entity continues in existence for purpose of transferring real property. (16 O.S. § 1).

Owner of land in fee has right to surface and to everything permanently set beneath or above it. (60 O.S. § 64).

Estates in real property, in respect to duration of their enjoyment, are either: Estates of inheritance, or perpetual estates; estates for life; estates for years; or estates at will. (60 O.S. § 22). Every estate of inheritance is a fee, and every such estate, when not defeasible or conditional, is a fee-simple or an absolute estate. (60 O.S. § 23).

Condominiums.

A unit ownership estate can be created by express declaration of owner or owners. Space does not permit complete analysis and Code itself should be consulted. (60 O.S. § 501 et seq.).

Estates tail are abolished; and every estate which would be at common law adjudged to be a fee tail is a fee simple. (60 O.S. § 24).

Future estate may be limited by the act of the party who comes in possession at a future day, either without the intervention of a precedent estate, or on the termination, by lapse of time or otherwise, of a precedent estate, created at the same time. (60 O.S. § 28).

Tenancy in common is governed by common law rules.

Joint tenancy in real or personal property may be created by a single instrument, will or transfer when expressly declared therein to be a joint tenancy. Joint tenancy may be created by transfer to persons as joint tenants from an owner or a joint owner to himself and one or more persons or from tenants in common to themselves, or by coparceners in voluntary partition, and such an estate may be created by or for persons who have elected to become bound under any community property act now in existence or which may hereafter be enacted. Adjudication of incompetency does not terminate such an estate.

In event of death of a joint tenant, leaving estate subject to probate, a certified copy of letters testamentary or of administration constitutes prima facie proof of death.

If title to real property is held by two or more persons in joint tenancy with right of survivorship (including mortgages owned by two or more persons in joint tenancy with right of survivorship), surviving joint tenant or personal representative or attorney in fact of surviving joint tenant may evidence termination of interest of deceased joint tenant by filing in office of county clerk of county where property is located: (1) Certified copy of certificate of death of deceased joint tenant, (2) affidavit by surviving joint tenant or personal representative or attorney in fact of surviving joint tenant acknowledged by notary public stating that decedent named in such certificate is same person as joint tenant named in previously recorded document, identifying recorded document by book and page where recorded, date of death of deceased joint tenant; and (3) waiver or release of estate tax by Oklahoma Tax Commission or copy of district court order releasing tax liability or affidavit described in (2) above stating that no estate taxes are due. If affidavit is filed by personal representative or attorney in fact, letters of administration, letters testamentary, letters of guardianship or power of attorney must be filed with affidavit. Affidavit filed either before or after effective date of act which was either acknowledged or sworn or both acknowledged and sworn before notary is valid and title to such real property is deemed marketable unless otherwise defective. (58 O.S. § 912).

In all other cases of death of life tenant or joint tenant in any interest in real property (including mortgages owned by two or more persons as joint tenants with right of survivorship), surviving tenant or any other person claiming interest in said property may have death judicially determined by filing petition in county court in county where property or some part thereof is located or of decedent's residence, alleging facts of joint tenancy, alleging joint tenant's death, describing real property, and listing heirs or others known to have interest. Hearing will be held not less than ten days after filing of petition and not less than ten days after notice by publication and by mail to those individuals listed whose addresses are known. (58 O.S. § 911).

Interest of joint tenant in such an estate is subject to execution sale, which sale constitutes a severance. (60 O.S. § 74).

Tenancy by entirety, in real or personal property, can be created only between husband and wife, and may be created by transfer to persons by entirety from an owner, or a joint owner, to himself and one or more persons, or from tenants in common to themselves, or by coparceners in voluntary partition, and such an estate may be created by or for persons who have elected to become bound under any community property act now in existence, or which may hereafter be enacted. An adjudication of incompetency does not terminate such an estate. In event of death of a tenant by entirety leaving estate subject to probate, a certified copy of letters testamentary or of administration constitutes prima facie proof of death. Interest of tenants by entirety of such an estate is subject to execution sale, and such sale constitutes a severance. (60 O.S. § 74).

Rule in Shelley's Case abolished. (60 O.S. § 41).

Foreign conveyances or encumbrances executed and acknowledged in conformity with law of state where executed are valid as to execution and acknowledgment. (16 O.S. § 37b).

Uniform Vendor and Purchaser Risk Act adopted. (16 O.S. § 201-3).

Uniform Conservation Easement Act provides for creation, conveyance, acceptance and duration of conservation easement (nonpossessory interest of holder of real property imposing limitations or affirmative obligations including retaining or protecting natural, scenic or open-space values of real property). (60 O.S. § 49.1).

Uniform Environmental Covenants Act adopted. (60 O.S. § 49.11 et seq.).

Residential Property Condition Disclosure Act adopted. (60 O.S. § 831 et seq.).

Title Examination Standards adopted by Oklahoma Bar Association (tit. 16, c. 1, App.) are not binding upon courts but are deemed persuasive. (Knowles v. Freeman, 649 P.2d 532, 535 [Okla. 1982]).

See also topics 21.06 Deeds and Landlord and Tenant; categories 5 Civil Actions and Procedure, topic Partition; Debtor and Creditor, topic Homesteads; Documents and Records; Family, topic Husband and Wife; Mortgages, topic Mortgages of Real Property.

21.17 TRUST DEEDS:

See category 20 Mortgages, topic 20.04 Mortgages of Real Property.

22 TAXATION

22.01 ADMINISTRATION:

Oklahoma Tax Commission.

Tax Commission, consisting of three members appointed by Governor (68 O.S. § 102), assesses railroad and public service corporation; adjusts and equalizes value of real and personal property in several counties of state and lists all property of several counties; computes and collects all license, franchise, gross revenue, excise, income, collateral and direct inheritance, legacy and succession taxes, graduated income taxes, graduated legacy and succession taxes, registration, production and all specific taxes.

Tax Procedure Code.

Provides uniform and exclusive procedures and remedies with reference to state taxes and controls unless specific tax law otherwise expressly provides. (68 O.S. § 201 et seq.). Tax Commission is authorized to promulgate rules, conduct hearings, examine books and to cancel or refuse issuance of licenses for violations of tax laws, rules and regulations and for nonpayment or delinquency of tax.

Taxes, fees, interest and penalties imposed by any state tax law or by this Act may be collected in same manner as personal debt of taxpayer to state recoverable in any court of competent jurisdiction by action. For any return, claim, statement or other document required to be filed or any payment required to be paid within prescribed period or on or before prescribed date, date of postmark stamped on cover in which document or payment is mailed deemed date of delivery or payment. (68 O.S. § 221.1). From time of delinquency taxes bear interest at 1¼%

per month; if not paid within 60 days after delinquency, penalty of 10% is added (unless taxpayer remits tax within 60 days of proposed assessment or voluntarily pays tax upon filing amended return); if any part of deficiency or jeopardy assessment is due to failure or refusal of taxpayer to file report or return required by this Act or any state tax law within ten days after written demand, penalty of 25% is added; if any part of deficiency is due to fraud with intent to evade tax, 50% penalty is added. Commission may waive interest or penalties if failure to pay tax was due to mistake of fact or law, on satisfactory explanation approved by order of District Court of Oklahoma County.

Tax Commission may compound, settle or compromise controversy, provided that in cases involving more than $5,000 order of District Court of Oklahoma County after full hearing is required. Tax Commission may grant reasonable extension for filing of any return required under state tax law; however, date on which payment of tax is due cannot be extended. Extension of up to seven months allowed for filing corporation income or franchise tax returns, if franchise tax returns are filed at same time as corporate income tax return. Time for filing other returns cannot be extended in aggregate longer than half of period of time for which any such return is filed under applicable state tax law. (68 O.S. § 216).

Confidentiality.

Records and files of Tax Commission concerning administration of Code or any state tax law are considered confidential and privileged, and are not subject to disclosure, examination or inspection except as otherwise provided by law. (68 O.S. § 205). Tax Commission is authorized to release taxpayer information to third parties to facilitate collection of taxes. (68 O.S. § 264). Names of persons owing delinquent taxes, including interest, penalties, fees and costs in excess of $25,000, which are unpaid for more than 90 days after all appeal rights have expired are required to be posted on internet. (68 O.S. § 205.5).

Assessment of Taxes.

No assessment will be made after three years from date return was required to be filed or was filed, whichever period expires later, except where before expiration of period Commission and taxpayer have consented in writing to assessment after such time or extended time, or in case of false or fraudulent return. No assessment required if report or return, signed by taxpayer, was filed and liability evidenced by report or return has not been paid. (68 O.S. § 233).

Notwithstanding filing of return or fact that tax may not be yet due, where Tax Commission believes that liability has accrued in excess of amount of bond filed, or taxpayer intends to leave state, conceal his property, discontinue business or do any other act to prejudice or render ineffectual proceedings to compute, assess or collect tax, Commission must declare tax period terminated and immediately assess tax, notify taxpayer and demand immediate payment and on failure or refusal to pay, tax becomes delinquent and collectible. In such event taxpayer may give security for tax or may appeal.

Protest of Taxes.

If taxpayer fails to make report or return, Commission may determine, from information in its possession or obtainable by it, amount of tax due and notify taxpayer, who may, within 60 days after mailing of notice, file written protest and request oral hearing which must be granted not less than ten days from date of notice by Tax Commission; if no written protest is filed, Commission must immediately assess tax and no appeal to Supreme Court is allowed. Tax Commission may extend protest period 90 days. After hearing, Commission makes appropriate order and assessment; if prior to date of such order, taxpayer has overpaid tax and within 30-day period does not appeal to Supreme Court, Commission must make refund.

Review.

Taxpayer aggrieved by any order, ruling or finding of Commission may appeal directly to Supreme Court. Taxpayer must, within 30 days after date of mailing of such order (1) file petition in error in office of clerk of Supreme Court, and (2) request that Commission prepare record of appeal for filing with Supreme Court within 30 days. Commission may request, within 30 days of filing of petition in error with Supreme Court, that taxpayer be required to pay penalty, interest, or file bond as condition precedent to appeal. If taxpayer is successful on appeal, Commission must refund amounts paid together with interest at rate of 3% per annum. (68 O.S. § 225).

Refund.

Verified claims for refunds may be filed with Tax Commission within three years of payment if due to misinterpretation of law, error of fact or computation. (68 O.S. § 227). No taxpayer entitled to nor allowed any refund of taxes, penalties or interest paid pursuant to state law subsequently determined to be illegal or invalid, unless taxpayer shall have timely sought remedies and procedures provided by 68 O.S. § 207, 221, 226 or 815 or brought action for declaratory judgment. (68 O.S. § 227.1). Interest is paid on refund if refund payment is not made within specified number of days. (68 O.S. § 217).

Lien.

Commission may issue to sheriff of any county tax warrant, commanding levy upon and sale of taxpayer's real or personal property in county for payment of delinquent tax. Tax warrant filed with county clerk and recorded in same manner as judgment is lien paramount and superior to all other liens subsequently attaching. Tax warrant may be executed in same manner prescribed for execution of court judgments.

All taxes, interest and penalties imposed by any state tax law constitute lien in favor of state on all franchises, property and rights of property, whether real or personal, then belonging to or thereafter acquired by person owing tax from date said taxes are due, and said lien is superior to claims of unsecured creditors and to all other liens except those of bona fide mortgagee, pledgee, judgment creditor or purchaser whose rights attached prior to filing and indexing in office of county clerk. Liens are released and extinguished upon payment of tax, penalty, interest and costs, or upon expiration of ten years after date upon which warrant was filed with county clerk; provided, Tax Commission may, prior to release and extinguishment of such lien, refile warrant one time in office of county clerk. Warrant so refiled shall continue lien until payment of tax, penalty, interest and costs, or upon expiration of ten years after date upon which warrant was refiled and indexed by county clerk. (68 O.S. § 234.A).

Fiduciaries and Estates.

No final account of any fiduciary may be allowed by any probate court unless account shows, and judgment finds, that all outstanding taxes imposed by any state law have been paid, and taxes that may become due are secured by bond, deposit or otherwise.

Comity.

Courts of this state must recognize and enforce liability for taxes lawfully imposed by other states which extend like comity to this state.

Penalties.

Any person conducting business without obtaining licenses, or after forfeiture of licenses, required by any state tax law is punishable by fine of not more than $5,000 or imprisonment for not more than one year.

Any taxpayer who, due to intentional disregard of any state tax law, but without intent to defraud, fails or refuses to file any report or return or to furnish supplemental return or other data required by Commission, or aids and abets another, or makes any false entry or fails to make required entry in any book, ledger or account, is subject to fine of not more than $5,000. Any taxpayer who with intent to defraud state or evade payment of any state tax, fee, interest or penalty due under any state tax law, fails or refuses to file any report or return or to furnish supplemental return or any other information required by Commission is subject to penalty of at least $1,000 and not more than $50,000 or imprisonment for not less than two years, or to both penalty and imprisonment. Any taxpayer making, signing or verifying any report, return or statement required to be submitted pursuant to any state tax law who, with intent to defeat or evade payment of tax, makes false or fraudulent report, return or statement, or aids and abets another in such conduct, is subject either to penalty of not less than $1,000 and not more than $50,000, or imprisonment for not less than two years and not more than five, or both. Any person who refuses to testify or produce books or permit their examination, to furnish evidence or to answer proper questions is subject to fine of not more than $5,000 or imprisonment for one year.

Additional penalty in amount equal to 10% of amount of tax, penalty and interest, alleged to be due and delinquent, is imposed upon any person convicted of, entering plea of guilty, or entering plea of nolo contendere to violation of any tax law of state.

Interstate Co-operation.

Neither Uniform Act on Interstate Arbitration of Death Taxes nor Uniform Act on Interstate Compromise of Death Taxes adopted.

22.02 ALCOHOL, BEVERAGES AND TOBACCO TAXES:

Alcoholic beverage excise tax and tax permit requirement is imposed by 37 O.S. § 553, 577.

Beer tax is imposed by 37 O.S. § 163. Annual license taxes also payable by manufacturers, wholesalers, retail dealers. (37 O.S. § 163.3, 163.7).

Gross receipts tax at rate of 12% is imposed on total gross receipts of holder of mixed beverage, caterer or special event license from sale, preparation or service of mixed beverages. (37 O.S. § 576). Admission charges entitling admittee to complimentary mixed beverages or discounted prices for mixed beverages are subject to tax.

Cigarette tax and license fee is imposed by 68 O.S. § 302, 304, 415.

Tobacco tax is levied by 68 O.S. § 402, 402.1, 402.2. Tax is payable by affixing stamps to containers and is in lieu of other taxes on sale or consumption of cigars and tobacco products. (68 O.S. § 403). Tax is now imposed on sales of all tobacco products sold in tribally-owned stores. (68 O.S. § 349, 349.1).

22.03 BUSINESS TAXES:

Franchise tax is imposed by 68 O.S. § 1201 et seq. See category 2 Business Organizations, topic 2.03 Corporations, subhead Franchise Tax.

Cotton manufactories tax levied in lieu of all other taxes. (68 O.S. § 2001 et seq.).

Credit Unions and State and National Banking Associations.

Privilege tax imposed by 68 O.S. § 2370 is in addition to franchise tax.

Insurance Companies.

See category 16 Insurance, topic 16.01 Insurance Companies.

22.03A CONTROLLED DANGEROUS SUBSTANCES TAX:

Marijuana and controlled dangerous substance tax is imposed by 68 O.S. § 450.1. Tax is payable on drugs or other controlled substances, possessed, transferred or sold in violation of state law. Tax is payable by affixing stamps to controlled dangerous substance immediately after receipt of substances.

22.04 [RESERVED]

22.05 EMPLOYMENT TAXES:

Unemployment compensation tax in form of "contributions" imposed by 40 O.S. § 3-101 et seq. Contributions required from every employer who employs one or more individuals for some portion of day in each of 20 different weeks in calendar year or pays employment wages of $1,500 or more. Exceptions include: certain agricultural services; domestic services; services for son, daughter or spouse; services of child under 21 in employ of parent; services in employ of foreign government or its wholly owned instrumentality; services of student nurse; services in hospital by intern who has completed four-year medical course; services of insurance agent or solicitor compensated solely by commissions or fees.

Contributions are based on wages (which generally include all remuneration for services, in any form, not in excess of $10,700 to any individual during calendar year). Rate is 3.1%, except that employer who has had three years compensation experience may receive "experience rating" under which rate may range from 0.1% to 5.5%. No contributions required from employees, nor may employer deduct contributions from employee's wages.

Act is administered by Commission of five members, Board of Review and Advisory Council. Under regulation of Commission, employers must make reports quarterly.

22.06 ENVIRONMENTAL TAXES:

Waste tire recycling fee is imposed by 68 O.S. § 53003.

22.07 ESTATE TAX:

Effective Jan. 1, 2010, estate tax is repealed. Estate tax is imposed by 68 O.S. § 801 et seq., and levied on transfer, whether in trust or otherwise, of property of every decedent, whether real, personal or mixed and whether tangible or intangible, or any interest thereon or income therefrom, by will or intestate laws of state, by order setting apart property or family allowance under probate code, or by deed, grant, bargain, sale or gift made in contemplation of death of grantor, vendor or donor, or intended to take effect at or after such death, excepting gifts for which decedent was not required to file any federal gift tax return. Any transfer with respect to life insurance policy or requiring federal gift tax return made by decedent within three years prior to death, without equivalent in monetary consideration, is deemed in contemplation of death unless contrary is shown.

Valuation date is date of death or, if executor elects, six months after date of death. Exceptions to six month alternate valuation apply to transfers made within six months of date of death (valued at time of transfer) and to interests which are affected by mere lapse of time (valued at date of death with adjustments). No deduction allowed if allowance for item is in effect given by alternate valuation. (§§ 807-816).

Gross estate is determined by including value at time of death of all property of decedent, whether tangible or intangible, within jurisdiction of state, and any interest therein or income therefrom. (68 O.S. § 807). Value of any interest in decedent's estate vesting in surviving spouse is excluded, except for purpose of computing additional tax to absorb federal credit. (68 O.S. § 804). Gross estate may not be diminished by deduction of dower or curtesy passing under laws of this or any other state, territory or country, or by transfer due to claim of creditor unless due during lifetime, or by forgiveness of debt or surrender of right in contract or chose in action. In determining gross estate of decedents there shall be excluded (except for purposes of figuring total tax necessary to bring Oklahoma estate tax up to amount of credit allowed against Federal estate tax) value of property beneficial or otherwise vesting in surviving spouse less value of debts, mortgages, liens, administrative charges or other encumbrances chargeable against such value. Any will of decedent, or trust of trustor dying after Dec. 31, 1981, which contains formula expressly providing that spouse of testator or trustor is to receive maximum amount of property qualifying for marital deduction allowable by Federal law shall be construed (unless contrary intention is expressed) as referring to unlimited marital deduction provided by Economic Recovery Tax Act of 1981; and such provisions apply retrospectively to wills of decedents or trusts of trustors dying after Dec. 31, 1981. In case of property passing to spouse under Q-Tip election allowable by Federal law, marital deduction is limited to actuarial value of spouse's life estate.

If laws of state of nonresident decedent contained reciprocal exemption provisions at time of transfer or did not impose transfer or death tax on personal property of residents of this state, intangible property generally is excluded in determining gross estate of such nonresident.

Net estate is determined by making specified deductions from gross estate. (68 O.S. § 808). Credit computed in same manner as I.R.C. § 2013 is allowed for all or part of estate tax paid with respect to transfer of property to present decedent by or from person who dies within ten years before, or within two years after him.

Exemption.

There is deducted from net estate aggregate exemption according to following effective dates: Jan. 1, 2006 until Dec. 31, 2007: $1,000,000; Jan. 1, 2008: $2,000,000; Jan. 1, 2009: $3,000,000.

If estate consists of property both within and without state, exemption is prorated accordingly.

Rates of tax on excess of net estate over exemption are specified by statute. (68 O.S. § 803). If tax levied on value of property of estate in Oklahoma is less than credit allowed on federal estate tax imposed on value of such property, additional tax sufficient to bring total tax up to full amount of such credit is imposed. (68 O.S. § 804).

Repealer.

Effective Jan. 1, 2010, estate tax is repealed.

Returns.

Executor, administrator, trustee, devisee, heir of transferee must, within nine months after decedent's death, unless time extended, make detailed return to Tax Commission on forms furnished by Commission. If additional tax is assessed, administrator, executor, trustee or interested party may file objection within 60 days. Request to adjust or abate assessment for reasons other than error of omission or inclusion of property on return can be filed within one year from date of mailing of notice upon demonstration, by preponderance of evidence, that assessment or some portion thereof is clearly erroneous. (68 O.S. § 815).

Payment.

Tax accrued at death of decedent, is due and payable nine months thereafter, and bears interest at rate of 1¼% per month from due date. Tax Commission may accept partial payments of tax and provide manner, method and time of such payments. Where determination of full amount of tax cannot be made because of litigation, contingent claims or disagreements between interested parties, and there is finding of district court that such situation exists, interest is charged on tax on that portion of estate which is in controversy at rate of ½ of 1¼% per month only. Executor or administrator may borrow money to pay tax and secure same by mortgage or pledge of assets of estate with approval of judge of district court having jurisdiction to settle estate. Tax is lien on all of property of estate except such part as is used for payment of charges against estate and expenses of administration, until paid, and all persons to whom such property is transferred and executor or administrator who distributes or transfers any of estate without payment of tax are personally liable for such tax to extent of value of such property at time tax became due. Lien is extinguished ten years after death.

Reports of Corporations, etc.; Waivers.

Corporation, association, joint stock company or trust whose ownership is represented by shares and which does business within this state must keep record in this state showing ownership of such stock, shares, indebtedness, bonds or other pecuniary interests in such corporation, etc.; on acquiring knowledge of death of owner it must, before making transfer of any such stock or shares or paying any dividends or any indebtedness on bonds or delivering any property, make report of such amount to Tax Commission and secure waiver from it. If any payment, delivery or transfer is made without getting such waiver corporation, etc., making same is personally liable for tax.

Apportionment Against Inter Vivos Dispositions.

Uniform Estate Tax Apportionment Act repealed. (c. 97, O.S.L. 1969). Doctrine of equitable apportionment adopted which requires that, in absence of express direction in will to contrary, burden of estate taxes falls on property which generates tax and exonerates that which does not. (641 P.2d 1110). Property generating estate taxes can include non-probate assets such as property held in joint tenancy and passing by right of survivorship. (730 P.2d 519).

22.07A GAMBLING AND ENTERTAINMENT TAXES:

Oklahoma Charity Games Act.

(3A O.S. § 421 et seq.).

Oklahoma Education Lottery Act.

(3A O.S. § 713 et seq.).

State-Tribal Gaming Act.

(3A O.S. § 263 et seq.).

Coin operated music and amusement devices tax is imposed by 68 O.S. § 1501 et seq.

Fireworks.

License fees are imposed on manufacturing, distribution, wholesale and retail activities. (68 O.S. § 1625).

Tourism promotion tax imposed at rate of .1% upon gross receipts from sales of certain services and products relating to tourism industry. (68 O.S. § 50010 et seq.).

22.08 GASOLINE AND SPECIAL FUELS TAXES:

Motor Fuel Tax Code.

(68 O.S. § 500.1 et seq.).

Special fuel tax is imposed by 68 O.S. § 701 et seq.

Motor fuel diesel fuel importer for use tax is imposed by 68 O.S. § 601 et seq.

22.08A GENERATION SKIPPING TAX:

As to estate and transfer tax, see topic 22.07 Estate Tax.

22.09 GIFT TAX:

Gift Tax.

None.

22.10 [RESERVED]

22.11 INCOME TAX:

Federal taxable income and adjusted gross income used as base with certain adjustments to arrive at Oklahoma taxable income. (68 O.S. § 2351 et seq.). In case of oil and gas production, 22% of gross income (limited to 50% of net) allowed as deduction for depletion. Federal income taxes paid attributable to income subject to Oklahoma income tax are deductible by individuals. Income tax imposed on individual, corporation, estate, trust or other taxable entity with respect to Oklahoma taxable income from whatsoever source derived.

Capital Gains Deduction.

Deduction from Oklahoma adjusted gross income of any corporation, estate, trust, or individual allowed for qualifying gains receiving capital treatment per Internal Revenue Code, subject to restrictions. (68 O.S. § 2358[D], [F]).

Human Organ Deduction.

Deduction from Oklahoma adjusted gross income of up to $10,000 for unreimbursed expenses incurred by individual and related to organ donation of individual. (68 O.S. § 2358[E]).

Exemptions and Credits.

For each individual and dependent, difference necessary to allow $1,000 exemption (adjusted from Federal exemptions) per person is added or deducted. Additional exemption of $1,000 allowed for each taxpayer or spouse if blind at close of tax year, or if age 65 or older at close of tax year based on filing status and Federal adjusted gross income of taxpayer. Other exemptions and standard deduction specified by statute. (68 O.S. § 2358). Trusts and estates receive same exemption as Federal. Person or organization exempt from tax for Federal income tax purposes is also exempt from tax in Oklahoma. Miscellaneous credits set forth in 68 O.S. § 2357. Interest on local government obligations and obligations of Oklahoma Department of Transportation exempt from income taxation. (68 O.S. § 2358.5).

Individuals.

Rate determined by using tables. (68 O.S. § 2355).

Estates and Trusts.

Rate same as for single individuals. (68 O.S. § 2355).

Nonresident Aliens.

8% of Oklahoma taxable income. (68 O.S. § 2355).

Part-Year Resident Individuals, Nonresident Individuals, Nonresident Trusts, Nonresident Estates.

See 68 O.S. § 2358, 2362. Natural person domiciled or resident in state more than seven months in aggregate of taxable year is presumed to be resident individual. Natural person who resides less than seven months of taxable year within state is presumed to be part-year resident individual. Nonresident individual means individual other than resident individual or part-year resident individual. (68 O.S. § 2353).

Corporations, 6%.

No tax on accumulated taxable income or personal holding company income. Educational, religious, charitable, and social corporations and associations are exempt from tax if they are exempt for Federal income tax purposes.

Returns must be made to Tax Commission by Apr. 15 following close of taxable year. Members of U.S. Armed Forces may file three months and 15 days after (1) their return to U.S., (2) their return to Oklahoma after active duty, or (3) their release from hospital in U.S. after treatment of wounds, injuries, or disease, if extension is granted. Noncorporate fiscal year returns due on or before 15th day of fourth month following close of fiscal year. Corporate returns due on or before 15th day of third month following close of fiscal year. Every corporation must make return. Every resident individual required to file Federal return must make return. Every nonresident individual having Oklahoma adjusted gross income of $1,000 or more must file. Every partnership shall file partnership return except those electing under I.R.C. § 761 not to file. Every estate and trust must make return. Tax is payable to Tax Commission with return. (68 O.S. § 2368). Tax is delinquent if not paid on or before date return is due. If return is filed electronically, tax is due on or before Apr. 15 following close of taxable year regardless of when return is electronically filed. (68 O.S. § 2375). In event due date for electronically filing individual income tax returns is changed by Internal Revenue Code, Oklahoma Tax Commission will accept returns filed by that date. (68 O.S. § 2368, 2375).

Married taxpayers must file joint or separate returns in accordance with filing of Federal returns, except as otherwise provided. If married taxpayers file joint return, Tax Commission may relieve spouse of liability for deficiency in tax (including interest and penalties) for such tax year to extent such deficiency is determined to be liability of other spouse. (68 O.S. § 2361).

Failure to file return to evade payment or filing of return which is false in any material item is felony. (68 O.S. § 2376).

Estimated Tax.

Taxpayer must make declaration of estimated tax for taxable year if: (1) in case of single individual taxpayer, tax liability can reasonably be expected to be $500 or more in excess of taxes to be withheld from wages, (2) in case of married individuals, combined tax liability can reasonably be expected to be $500 or more in excess of taxes to be withheld from wages, or (3) in case of corporation or trust, tax for taxable year can reasonably be expected to be $500 or more. Requirement does not apply to estates or any individual whose gross income from farming for taxable year is at least 662/3% of total estimated gross income from all sources for taxable year. (68 O.S. § 2385.7). Amount of estimated tax must be paid at time declaration is filed; however, if estimated tax is more than $500, it may be paid in four equal installments. (68 O.S. § 2385.9).

Withholding Provision.

Taxes must be withheld from wages of employee by employer in graduated percentages from 4% to 12% of total amount withheld by employer from each employee under I.R.C., provided that Tax Commission may reduce percentage to 4%. If employee not subject to withholding provision of I.R.C., employer to withhold 1% of wages in excess of $200 per month. If total withheld for any quarterly period is less than 25¢, no deduction from wages is required. Depending on amount to be paid over, employer must pay amount withheld to Tax Commission on or before 15th day of month following close of each quarterly period. Commission may require every employer who is delinquent in withholding and omitting of taxes to furnish bond. (68 O.S. § 2385.23). Individual taxpayer and married individuals (combined) whose expected tax liability is $100 or more, in excess of taxes to be withheld, and corporations and trusts whose tax liability can be expected to be $500 or more must file declaration of estimated tax with Commission on or before 15th day of fourth month after taxpayer's taxable year. (68 O.S. § 2385.7-.8). Effective Mar. 1, 2010, every employer required to remit federal withholding under Federal Semimonthly Deposit Schedule must file returns pursuant to Tax Commission's electronic data interchange program and pay over amounts withheld on same dates as required under Federal Semimonthly Deposit Schedule for federal withholding taxes. (68 O.S. § 2385.3). Certain taxpayers must make declaration of estimated tax at specified time for amount taxpayer expects to owe for current year. Estimates at respective dates must be not less than 70% of amount of tax due as indicated by taxpayer's records or information on respective dates. Taxpayers with Oklahoma taxable income of at least $1 million in at least one of preceding three taxable years may compute tax by placing taxable income on annualized basis. (68 O.S. § 2385.13).

Tax Commission shall deduct from income tax refund due to taxpayer amount of delinquent state tax, penalty and interest thereon, which such taxpayer owes pursuant to any state tax law prior to payment of such refund. State agency or district court seeking to collect debt or final judgment of at least $50 from individual filing state income tax return may file claim with Tax Commission requesting that amount owed be deducted from any refund due. (68 O.S. § 205.2).

Any person who distributes revenue relating to oil and gas production in Oklahoma to royalty interest owners must withhold amount equal to 6¾% of such payment. (68 O.S. § 2385.26). Obligation to withhold does not apply to payments made to current or permanent residents of Oklahoma, charitable institutions, federally recognized Indian tribes, or U.S., State of Oklahoma, or any state or federal agency or political subdivision. Amounts withheld shall be paid quarterly to Oklahoma Tax Commission. (68 O.S. § 2385.27).

Pass-through entities are required to withhold income tax at rate of 5% of Oklahoma share of income of entity distributed to each nonresident member. (68 O.S. § 2385.29). Due dates for amounts withheld by pass-through entities vary according to date of corresponding distributions. (68 O.S. § 2385.30).

22.12 INHERITANCE TAX:

None, as to estate and transfer tax, see topic 22.07 Estate Tax.

22.12A INSURANCE TAX:

Annual license and premium tax is imposed on insurance companies. (36 O.S. § 624).

22.12B LODGING TAX:

See topic 22.17 Sales and 22.19 Use Taxes.

22.12C MINES, MINERALS AND FISHERIES TAXES:

Severance Taxes.

Gross Production Tax.

Tax is imposed on gross value of asphalt and ores bearing lead, zinc, jack, gold, silver and copper, at rate of ¾ of 1% (68 O.S. § 1001); on gross value of ores bearing uranium or any fissionable materials at rate of 5% (68 O.S. § 1020); and on gross value of petroleum or other crude oil or other mineral oil, natural gas and/or casing-head gas at rate of 7%; however, effective Jan. 1, 1999, through June 30, 2010, tax rate on production of oil is 1%, 4% or 7% depending upon average price per barrel of Oklahoma oil. Effective July 1, 2002 through June 30, 2010, tax rate on production of gas is 1%, 4% or 7% depending upon average price of gas per thousand cubic feet (mcf). (68 O.S. § 1001). Exemptions from gross production tax for specified period for incremental production resulting from enhanced recovery project or production enhancement project, production of oil and/or gas from horizontally drilled well, reestablished production of oil and/or gas from inactive well, and production of oil and/or gas from well spudded during specified time period and drilled to depth of 15,000 feet or greater and from well qualifying as new discovery, unless weighted average price exceeds specified amount. Application for qualification for exemption must be filed with Tax Commission. (68 O.S. § 1001[d]-[j]). Exemption also provided for production from economically at-risk oil or gas leases. (68 O.S. § 1001.3[a]). Tax becomes due on first day of each calendar month, and if not paid by 25th day of second calendar month following month of production tax becomes delinquent and draws penalty. Where oil, gas or casing-head gas is sold at time of production, tax must be paid by purchaser and deducted from purchase price, but if not sold at such time tax, including tax on royalty oil not sold, must be paid by producer. Tax on asphalt, ore bearing lead, zinc, jack, gold, silver or copper, including royalty interest must be paid by producer for himself. If oil, gas and casing-head gas is sold for price other than cash market price then prevailing in particular field from which it is produced, Tax Commission may require tax to be paid on basis of prevailing market price in that field. Tax is payable to Tax Commission. Payment must be accompanied by monthly reports under oath on forms furnished by Tax Commission, and penalties are assessed for failure to file reports and for delay in filing same. (68 O.S. § 1010). Delinquent gross production taxes constitute first and paramount liens against property of purchaser or producer in favor of state, and Tax Commission may institute appropriate actions to enforce liability for tax. Gross revenue tax is in lieu of all state or municipal taxes on any rights attached to or inherent in right to oil, gas or other minerals, or on mineral rights and privileges belonging or appertaining to land, or on machinery, appliances and equipment in, around and actually used in operation of any mine or well, or on oil or other minerals during tax year in which produced, or on any investment in leases, rights, minerals or property heretofore referred to; but oil in storage or other minerals on hand at date on which other property is assessed for general ad valorem taxes is to be assessed and taxed like other property. (68 O.S. § 1001).

Value of Gas Subject to Regulation.

If authorized price of petroleum or other crude or mineral oil, natural gas, casing-head gas or liquids extracted therefrom sold by producer is increased by any U.S. agency or court adjudicating appeal from agency, gross production tax shall be conditionally paid by producer pending final determination. (68 O.S. § 1022). If authorized price of said petroleum products is decreased by any U.S. agency or court adjudicating appeal from agency, excess tax paid may be recovered if refund claim is filed with Tax Commission within one year following final determination. (68 O.S. § 1023).

Gas Excise Tax.

Tax of .095 of 1% of gross value of all natural gas and/or casing-head gas produced in Oklahoma. Beginning July 1, 2011, tax will be reduced to .085 of 1%. (68 O.S. § 1102). Every person, corporation or other entity responsible for paying or remitting petroleum excise tax shall file with Tax Commission monthly report on each lease at same time and in manner as required for reporting of gross production tax. (68 O.S. § 1104).

Oil Excise Tax.

Tax of .095 of 1% of gross value on each barrel of petroleum oil produced in Oklahoma. Beginning July 1, 2011, tax will be reduced to .085 of 1%. This tax is in addition to gross production tax on oil and must be reported to and collected by Tax Commission at same time and in same manner as gross production tax. (68 O.S. § 1101).

22.12D PENALTIES:

See topic 22.01 Administration, subhead Penalties, and heading for particular taxes.

22.1322.15 [RESERVED]

22.16 PROPERTY TAXES:

Taxable Property.

Under Ad Valorem Tax Code (68 O.S. § 2801 et seq.), all real and personal property in state is subject to ad valorem taxation except that which is expressly exempted and except where specific taxes are imposed in lieu of property taxes.

Limitations on Power to Tax.

Taxes must be uniform upon same class of subjects and all property taxed ad valorem is assessed at fair cash value except real property and tangible personal property shall not be assessed at more than 35% of its fair cash value. (Const. art. X §§ 5, 8). No ad valorem tax may be levied for state purposes. Total ad valorem taxes for all purposes may not exceed 15 mills on dollar, except for additional school levies and other levies by vote. (Const. art. X, § 9).

Tax on Property.

All corporations organized, existing or doing business in state for profit (other than railroads, air carriers and public service corporation assessed by State Board of Equalization and other than national and state banks, trust companies and building and loan associations) are assessed on value of their real property and personal property, as of Jan. 1 of each year, in county, town, district or city where such property is located, and less value of any property relieved by payment of in lieu of taxes on which specific taxes are levied. (68 O.S. § 2837, 2838). Persons age 65 or older or any totally disabled person who is head of household with gross household income not exceeding $12,000 may file claim for property tax relief. (68 O.S. § 2904-2911).

Special provisions apply to taxation of express, transmission, pipeline, gas, heat, light, power, sleeping car, transportation companies, and public trusts.

Exemptions are granted with respect to public property and certain property devoted to scientific, educational and charitable purposes, as well as certain specified property of residents of state. Certain military personnel and honorably discharged veterans are allowed $200 personal property exemption. Exemptions are set forth in detail in 68 O.S. § 2887 including certain manufacturing concerns set forth in 68 O.S. § 2902. Family homestead is exempt from ad valorem taxation to extent of $1,000 of assessed valuation thereof, with additional exemption of $1,000 of assessed valuation if gross household income does not exceed $25,000. (68 O.S. § 2889, 2890). Exemptions also apply to certain new or improved housing construction. (78 O.S. § 2817). Exemption from personal property tax for permanently disabled veterans. (Const. art. X, §

8D). Original application for exemption must first be filed with county assessor. (Const. art. X, § 22A).

Assessment.

All real and personal property having actual or constructive taxable situs in state shall be listed and assessed in county, school districts, and municipal subdivision where actually located on Jan. 1 of each year. Where personal property is brought into state between Jan. 1 and Sept. 1, and acquires actual situs before Sept. 1, it is listed and assessed where situated unless already assessed in another state for current year. (68 O.S. § 2831).

All taxable personal property, except intangible personal property, personal property exempt from ad valorem taxation, or household personal property must be listed and assessed each year at its fair cash value estimated at price it would bring at fair voluntary sale on Jan. 1 of such year, except that unmanufactured farm products must be assessed and valued as of preceding May 31. In case of stocks of goods, wares and merchandise, statement must contain average amount for preceding year ending Dec. 31. Real property is assessed annually as of Jan. 1 at its fair cash value, estimated at price it would bring at fair voluntary sale for highest and best use for preceding year or previous year of classification if not used during preceding year, subject to specified limitations. (68 O.S. § 2817, 2817.1). Real property becoming taxable between periods for assessing must be assessed, improvements put on real property during such period must be assessed, and in case improvements are destroyed or value of land impaired after date of assessment, board of equalization or county assessor shall adjust difference. New single family residences deemed completed for assessment when realty conveyed to bona fide purchaser or improvements occupied, whichever shall first occur before Jan. 1 of initial assessment year, but no later than one calendar year after year construction commenced; if incomplete on Jan. 1, assessed on fair market value of materials used. (68 O.S. § 2817). Taxpayers must make return of their property, except real estate, under oath to assessor. If any personal property not listed by Mar. 15, and if listed and assessed by Apr. 15 penalty of 10% of assessed value, after Apr. 15, 20% of assessed value. (68 O.S. § 2836). All corporations other than railroads, air carriers, public service corporations, national and state banks, trust companies and building and loan associations, must, before Mar. 15, make sworn lists or schedules of their taxable property in each county to county assessor as of Jan. 1. On failure of corporation to make such list, county assessor and county board of equalization must list taxable value of corporation's property and add 10% of value thereof as penalty. (68 O.S. § 2838, 2839). Assessor must deliver assessment roll to county board of equalization by 4th Mon. of Apr. in each year. (68 O.S. § 2842). County board of equalization must hold sessions commencing on Apr. 1, or first working day thereafter and ending not later than May 31 for purpose of equalizing, correcting and adjusting assessments; provided, however, that in counties having assessed valuation in excess of $1,000,000,000, said sessions shall commence on 4th Mon. in Jan. and end not later than May 31. (68 O.S. § 2863). They may raise or lower valuation of property as fixed by assessor, add omitted property and cancel assessments of nontaxable property. Where county assessor or county board of equalization increases valuation of property returned by taxpayer, notice must be given to taxpayer, who has 20 days to file written complaint, and board may take evidence and correct valuation. (68 O.S. § 2876). Taxpayer and county assessor have right to appeal from findings of board to district court within ten days after adjournment of board. (68 O.S. § 2880.1).

Tax Roll Correction.

Tax roll can be corrected by county treasurer on authority of proper certificate issued by board of tax roll corrections or pursuant to court order. (68 O.S. § 2871).

Levy.

Ad valorem taxes are levied by county excise boards, which meet on 1st Mon. of July. Taxpayers have right to protest any alleged illegality of levy, but if no protest is filed within 15 days, plus any extension granted, levy is legal and cannot thereafter be contested. Court of tax review convenes on 1st Mon. in Oct. to hear protests, and judgment thereon may be appealed to Supreme Court.

Payment.

All taxes on ad valorem basis are for fiscal years ending June 30, become due on Nov. 1, and unless one-half is paid by Jan. 1 (all if less than $10), entire tax becomes delinquent on that date, provided such first half shall not become delinquent until 30 days after tax rolls have been filed by county assessor with county treasurer. If one-half of tax is paid by Jan. 1, second half must be paid before Apr. 1 and becomes delinquent on that date if not paid. Mortgage services, as defined in 24 C.F.R., part 3500.17, must pay all accounts they are servicing in one annual payment before Jan. 1 or entire tax levy for such fiscal year will become delinquent on that date. (68 O.S. § 2913). No demand for payment is necessary and all delinquent taxes bear interest at 1½% per month until paid. (68 O.S. § 2913).

Liens.

As between grantor and grantee of land where there is no express agreement as to who shall pay taxes, taxes on real estate become lien on such real estate on Oct. 1 of each year, and if such real estate is conveyed after said date grantor must pay such taxes, and if conveyed by said date, grantee must pay taxes. (68 O.S. § 2912). Taxes on real and personal property are lien for seven years. (68 O.S. § 2941).

Priority of tax lien upon sale of personal property, see 68 O.S. § 2925, 2929, 3102, 3103. Tax Commission is entitled to recover from taxpayer named in warrant any fees or costs charged by county clerk for filing of tax lien or tax warrant. (68 O.S. § 231.3).

Delinquent Taxes.

Within 60 days after taxes on personal property become delinquent, county treasurer must publish list in newspaper in county giving name of taxpayer and amount due, and upon demand of any person or whenever treasurer shall deem it advisable issue warrants to sheriff to collect amount of taxes, interest, cost of advertising, and his fees. Sheriff may levy on any property of taxpayer and sell same in manner of sales under execution. Real estate may be sold for delinquent personal taxes. (68 O.S. § 3102-3105).

Sale and Redemption.

Sales of real estate for delinquent taxes must be made at public sale on 1st Mon. in Oct. of each year and from day to day until completed. Sales are made by county treasurer at his office for preceding year or years. (68 O.S. § 3107). He must give notice of sale by publication in some newspaper in county once a week for two consecutive weeks at any time after Apr. 1, but prior to end of Sept. preceding sale. Notice must contain list of all lands to be sold, name of last owner of record as reflected by records in office of County Treasurer, and amount of taxes due. Notice must also contain following language: Sale hereby advertised is conditional and subject to two-year right of redemption by record owner. County treasurer must also give notice by certified mail to record owner. (68 O.S. § 3106). If no one offers to purchase land, county treasurer must buy same for county. (68 O.S. § 3108). County treasurer must issue certificate of purchase to purchaser and purchaser has lien on land for purchase price and for any other taxes paid by him together with interest at 8%. County treasurer may issue certificate of purchase to purchaser from county and tax sale certificates to individuals are assignable.

Owner of, or person having legal or equitable interest in, real estate sold for taxes, may redeem from sale, before execution of deed by county treasurer, by paying county treasurer: (a) If certificate held by individual, sum paid for certificate and all taxes paid and endorsed thereon, with interest at 8% from date of sale or purchase from county, and interest at 8% on taxes endorsed on certificate from date of endorsement and costs, all for use of owner of certificate; (b) if county is holder, by paying treasurer sum for which property was sold, with penalty at 12% per annum and accrued costs. Infants, idiots and insane persons may redeem from taxes any real property belonging to them within one year after expiration of disability, with interest and penalty of not more than 10% per annum. (68 O.S. § 3113). If property is not redeemed within two years, holder of certificate is entitled to deed after giving 60 days notice to owner. (68 O.S. § 3118). But tax sales certificates are subject to limitation of seven years, on expiration of which holder is not entitled to tax deed. (68 O.S. § 3117). Tax deed does not convey mineral rights unless surface owner owned them. (68 O.S. § 3119).

Last record owner of, or person having legal or equitable interest in, real estate sold at tax resale to county, may redeem same by paying county treasurer, before issuance of deed by county commissioners to purchaser, consolidated amount of all taxes due at time of resale, including penalties, interest and costs to date of redemption, provided said real estate shall be assessed at its fair cash value for year or years it was held in name of county and not subject to taxation, and taxes thereon for said years shall be paid before property may be redeemed.

If land purchased by county remains unredeemed for two years and no person offers to purchase it for tax, penalty and costs, treasurer must sell land at resale, held on 2nd Mon. of June, publishing notice of resale once a week for four consecutive weeks preceding resale in newspaper published in county, or if there be no newspaper published in county, posting notice on court house door. Such notice must contain description of real estate to be sold, name of owner as shown by last tax rolls, time and place of sale and statement of date on which said real estate was sold to county, and year or years for which taxes have been assessed, and that same has not been redeemed for two years, and amount of all delinquent taxes, costs, penalties and interest accrued on same, and that such real estate will be sold to highest bidder for cash. County treasurer must also give notice by certified mail to record owner. (68 O.S. § 3125-3127). Land must be offered for sale by county treasurer at this office between 9 a.m. and 4 p.m., and sale must be continued from day to day until all of said real estate is sold. Land must be sold at public auction to highest bidder for cash, and if no one offers to bid sufficient to pay delinquent taxes, costs and expenses, or two-thirds of current assessed value whichever is less, county treasurer must bid off same in name of county for amount due thereon (68 O.S. § 3129), and all property acquired by county may thereafter be sold by treasurer at such price as may, after notice by publication, be approved by board of county commissioners. (68 O.S. § 3125). For property purchased by bidders, treasurer must make deeds to purchasers on forms prescribed by statute. Such deed vests in purchaser absolutely perfect title in fee simple, subject to all claims which state may have had on said lands for taxes or other liens or encumbrances (68 O.S. § 3131) and after expiration of 12 months from date of filing deed for record, no action may be commenced to void or set aside said deed except as to persons under legal disability. (68 O.S. § 3131).

Exemption applies to single-family residential dwellings located in county with population in excess of 100,000, not used as rental property, not exceeding $125,000 in value, and which serves as residence of person age 65 or older with low income. (68 O.S. § 3105).

Intangible Personal Property Tax.

Repealed. (Okla. Const. Art. 10, § 6A). Intangible personal property shall not be subject to ad valorem tax or any other tax in lieu of ad valorem tax.

Mortgage Registration Tax.

Imposed by 68 O.S. § 1904. See category 20 Mortgages, topic 20.04 Mortgages of Real Property.

Real Estate Conveyance Tax.

Documentary Stamp Tax.

There is imposed, on each deed, instrument, or writing by which any lands, tenements, or other realty sold shall be granted, assigned, transferred, or otherwise conveyed to, or vested in purchaser, or any person, by his direction, when consideration or value of interest conveyed, exclusive of value of any lien or encumbrance remaining at time of sale, exceeds $100, tax at rate of 75¢ for each $500 or fractional part thereof. (68 O.S. § 3201). Exempt from tax are deeds: recorded prior to effective date of act; which secure debts or other obligations; which, without additional consideration, confirm, correct or supplement deed previously recorded; between husband and wife, or parent and child, or any person related within second degree of consanguinity, without actual consideration; between any person and express revocable trust created by such person or such person’s spouse; to which property is transferred from person to partnership, LLC, or corporation of which transferor or transferor’s spouse, parent, child, or other person related within second degree of consanguinity to transferor are only owners of partnership, LLC, or corporation and such ownership remains unchanged for period of at least one year; tax deeds; of release of property which is security for debt or obligation; executed by Indians in district court approval proceedings or by Secretary of Interior; of partition; made pursuant to mergers of corporations, partnerships or LLCs; made by subsidiary corporation to parent corporation for no consideration other than cancellation or surrender of subsidiary stock; to which State of Oklahoma or instrumentality, agency or subdivision thereof is party in any capacity; to which U.S., or agency or department thereof is party in any capacity, provided this shall not exempt transfers to or from national banks or Federal savings and loan associations; in foreclosure actions where grantee is holder of mortgage on property being foreclosed, or any deed executed pursuant to power of sale in which grantee is party exercising such power of sale or any deed executed in favor of holder of mortgage on property in consideration for release of borrower from liability on indebtedness secured by such mortgage except as to cash consideration paid; and to which Oklahoma Space Industry Development Authority or spaceport user is party. (68 O.S. § 3202). Taxes shall be paid by any person who makes, signs, issues, or sells any document and instrument subject to tax, or for whose use or benefit same is made, signed, issued or sold. (68 O.S. § 3203). Tax is paid by purchase of tax stamps from county clerks. (68 O.S. § 3204).

Mortgage registration tax is imposed by 68 O.S. § 1904. See category 20 Mortgages, topic 20.04 Mortgages of Real Property.

22.17 SALES AND USE TAXES:

Sales Tax.

Imposed by Oklahoma Sales Tax Code (68 O.S. § 1350 et seq.) is 4.5% on gross proceeds or gross receipts derived from all sales of specified tangible personal property, goods and services (68 O.S. § 1354).

Exemptions.

Include sales subject to other taxes (68 O.S. § 1355), to or by governmental and nonprofit entities (68 O.S. § 1356), tourism incentives (68 O.S. § 1357.2), drugs and medical devices and equipment (68 O.S. § 1357.6), horses (68 O.S. § 1357.7), certain aircraft engine repairs, modification and replacement parts (68 O.S. § 1357.25), agriculture (68 O.S. § 1358), manufacturers (68 O.S. § 2359), corporations, partnerships and limited liability companies (68 O.S. § 1360), and other specified general exemptions (68 O.S. § 1357).

Sales Tax Relief.

Relief of $40 multiplied by number of personal exemptions, excluding exemptions for blindness or age, is available to individuals with gross household income not exceeding certain specified amounts. (68 O.S. § 5011). Relief shall not be available to felons during calendar year in which such felon is incarcerated. Claims must be received by Tax Commission June 30 of succeeding year.

Collection.

Sales tax is paid by consumer or user to vendor and it is duty of vendor to collect same and remit tax to Tax Commission, unless consumer is exempt from sales tax. Any attempt to absorb tax himself or other intentional acts of noncompliance with this code subjects vendor to prosecution. Person who makes purchases of $1 million or more annually in taxable items for use in state enterprises may apply for direct payment permit. Permit valid for three years; $20 fee. (68 O.S. § 1364.1).

Special Events.

Promoters or organizers of special events are required to obtain special event permit. (68 O.S. § 1364.2).

Lodging Tax.

Counties satisfying population requirement are authorized to levy lodging tax not to exceed 5% upon gross proceeds or gross receipts derived from service of furnishing public lodging. (68 O.S. § 1370.9).

Payment.

Taxes collected during each month are payable to Tax Commission by 20th day of following month, except that certain remitters and taxpayers whose total liability for any one month does not exceed $50 may file and remit semiannually. If report remitting tax is not filed by 15th of such month, interest shall be charged from date report should have been filed until report is actually filed. Taxpayers owing average of $2,500 or more per month must participate in Tax Commission's electronic funds transfer and electronic data interchange programs. (68 O.S. § 1365).

Counties may generally levy additional sales tax not to exceed 2%; additional county sales tax may be levied for certain specified purposes. Tax Commission must give 60 days notice of rate change to all vendors. (68 O.S. § 1370, 1370.2A).

Cities and towns may levy additional sales tax not to exceed amount levied by state except in certain circumstances. (68 O.S. § 2701 et seq.). Hospital authority created by any combination of cities, towns and counties may levy sales tax not to exceed 2% on sales or services in cities, towns and counties comprising authority. (68 O.S. § 1370.8).

Use tax is 4.5% on every person storing, using or consuming any tangible personal property purchased or brought into state, except tangible personal property intended solely for use in other states but which is stored in Oklahoma pending shipment, or which is temporarily retained in Oklahoma for purpose of fabrication, repair, testing alteration, maintenance or other service. Tax does not apply to: Property brought into state by nonresident individual, visiting state, for his personal use; property purchased for resale before use; property sale or use of which has already been subject to equal or greater tax under laws of this state or some other state (if prior tax was less than 2%, use tax is difference between such tax and 2%), however, no credit is given for taxes paid in another state if that state does not grant same credit for taxes paid in Oklahoma; property specifically exempted from taxation under sales or consumers' tax law of this state; property brought into state by individual for his own personal use with intent to become resident of state; property used or to be used by railroads or commercial airlines; livestock bought outside of and brought into state for feeding or breeding purposes, and to be resold; machinery and equipment purchased and used to establish new manufacturing or processing plants in state and machinery and equipment used in operation thereof, if such machinery and equipment is used to manufacture property subject to sales tax. (68 O.S. § 1401 et seq.).

Payment.

Returns for each calendar month must be made, and tax for such month paid, by 15th day of month following. Semi-annual reporting and payment allowed for remitters with tax liability not exceeding $50 per month. Electronic payment and reporting required for taxpayers owing $25,000 or more of use tax per month on average. (68 O.S. § 1405).

Collection.

Every retailer maintaining places of business both within and without Oklahoma making sales of tangible personal property outside Oklahoma for use within shall collect tax from purchaser and shall list with Tax Commission name and address of each agent and location of each place of business in state. Tax Commission may authorize retailers not maintaining places of business in state to collect tax.

Revoking Permits.

Tax Commission may, after notice and hearing, revoke permits to do business in state of retailers not maintaining place of business in state or both within and without state and authorized to collect tax for failure to comply with this law or regulations prescribed thereunder.

Municipal Use Tax.

Municipality levying sales tax may levy municipal use tax (in addition to 4.5% state use tax), at rate not exceeding that municipality's sales tax rate, on storage, use or other consumption of tangible personal property within municipality. Tax is assessed only if property is purchased outside Oklahoma and brought into municipality. Tax is payable at time of importation into, or storage in, municipality. Exempted from tax is property intended for use solely outside municipality, or brought into municipality only for fabrication, repair, or testing. Any municipal sales tax previously paid on such property may be deducted from amount of municipal use tax owed, to extent that tax previously paid does not exceed sales tax that municipality would have charged if it had levied sales tax on property. (68 O.S. § 1411).

Farm equipment tax is imposed in lieu of ad valorem tax on certain items owned for sale or lease by retailers of farm tractors and other equipment. (68 O.S. § 5401).

Lodging tax may be levied in addition to sales tax levied by county not to exceed 5% upon gross proceeds from service of furnishing public lodging. (68 O.S. § 1370.9).

Nine-One-One Wireless Emergency Number Act.

(63 O.S. § 2843 et seq.).

Simplified Sales and Use Tax Administration Act.

Tax Commission is authorized to enter into "Streamlined Sales and Use Tax Agreement" with one or more states. (68 O.S. § 1354.14 et seq.).

22.18 STAMP AND SEAL TAXES:

Stamp Tax.

See topics 22.02 Alcohol, Beverages and Tobacco Taxes, subhead Tobacco Tax, 22.03A Controlled Dangerous Substances Tax, subhead Marijuana and Controlled Dangerous Substance Tax, and 22.13 Property Taxes, subhead Real Estate Conveyance Tax. Also see 68 O.S. § 5301 et seq. for stamp tax in lieu of ad valorem tax on new auto, truck, motorcycle, motor, motorboat, farm equipment inventories held by retailers, and watercraft inventories.

22.18A TAX INCENTIVES AND EXEMPTIONS:

Aerospace

Credits provided to employers for tuition reimbursed, compensation paid or credit provided to qualified employee relating to employment in aerospace sector. (68 O.S. § 2357.301).

Armed Forces.

Exemption provided for retirement benefits received by individual from any component of Armed Forces. (68 O.S. § 2358[D]).

Biodiesel Facility Credit.

Credit provided for certain biodiesel facilities. (68 O.S. § 2357.67).

College Savings Plan Act.

70-3970.1 et seq. Additional income tax deduction is allowed up to $10,000 each taxable year for each taxpayer, allowing $20,000 deduction for taxpayers filing joint returns. Deduction may be taken for contributions and rollovers made during taxable year and up to Apr. 15 of succeeding year, or due date of taxpayer's state income tax return, excluding extensions, whichever is later. (68 O.S. § 2358[D]).

Compete with Canada Film Act.

Provides rebate in amount of 17% of documented expenditures made in Oklahoma directly attributable to production of long-form narrative film or television production in state. (68 O.S. § 3621 et seq.). Rebate provided equal to specified percentage of documented expenditures made in Oklahoma directly attributable to production of film, television production or television commercial and for music created by Oklahoma resident that is recorded in Oklahoma. (68 O.S. § 3624).

Computer Jobs Credit.

Credit provided to employers for net increases in number of full-time equivalent employees earning at least $35,000 per year engaged in computer services jobs. (68 O.S. § 54006).

Energy Efficient Residential Property.

Credit provided for eligible expenses incurred by contractor in construction of energy efficient residential property. (68 O.S. § 2357.46).

Ethanol Facility Credit.

Credit provided for certain ethanol facilities. (68 O.S. § 2357.66).

Fire Protection Credit.

Credit provided for cost of purchase of certain fire control devices. (68 O.S. § 2357.102).

Motor Vehicles.

Credits provided for investments in qualified clean-burning motor fuel property and qualified electric motor vehicle property. (68 O.S. § 2357.22).

Oklahoma Capital Improvement Authority.

Authorized to issue state tax exempt notes, bonds, or other evidence of obligations. (73 O.S. § 307, 308).

Oklahoma Film or Music Project.

Credit provided for reinvestment of profit from existing Oklahoma film or music project with production in company in new Oklahoma film or music project. (68 O.S. § 2357.101).

Oklahoma Quality Investment Act.

Provides incentives to support and retain qualified manufacturing establishments. (68 O.S. § 4201 et seq.).

Oklahoma Quality Jobs Program Act.

68-3601 et seq. Oklahoma Quality Jobs Incentive Leverage Act supplements OQJPA by leveraging incentive payments received under statute, and disallowing certain other tax incentives. (68 O.S. § 3651 et seq.).

Oklahoma Refinery Revitalization Act.

Encourages expansion of refining capacity within Oklahoma by allowing taxpayers to treat 100% of cost of qualified refinery property as expense that is not chargeable to capital account. (68 O.S. § 2357.204).

Oklahoma Tourism Development Act.

Provides for sales tax credit or income tax credit in connection with approved tourism attraction projects, including film, digital media, and music production and development projects. (68 O.S. § 2357.36 et seq.).

Poultry Litter Credit.

Credit provided for purchase and transportation of poultry litter. (68 O.S. § 2357.100).

Qualified Business Enterprise Credit.

Credit provided for entities satisfying certain specified principal business activities and making at least 75% of its sales to out-of-state customers or buyers, subject to additional requirements. (68 O.S. § 2357.201).

Qualified Rehabilitation Expenditures.

Credit provided for qualified rehabilitation expenditures incurred in connection with certified historic hotels, historic newspaper plants and historic buildings. (68 O.S. § 2357.41).

Railroad Modernization Act of 2005.

Provides credit for qualified railroad reconstruction or replacement expenditures. (68 O.S. § 2357.103 et seq.).

Rural Venture Capital Formation Incentive Act.

Credit against tax on qualified investment in qualified rural small business venture by qualified rural small business capital companies. (68 O.S. § 2357.71 et seq.).

Rural Economic Development Loan Act.

Credit against tax on banks and financial institutions allowed in accordance with statutory requirements with respect to income received as result of qualifying loans. (68 O.S. § 2370).

Small Business Capital Formation Incentive Act.

Credit against tax on qualified investment in Oklahoma small business venture by qualified venture capital companies. (68 O.S. § 2357.60 et seq.).

Small Employer Quality Jobs Incentive Act.

Provides incentives to small businesses engaged in certain basic industries. (68 O.S. § 3901 et seq.).

Space Transportation Vehicles.

(68 O.S. § 2357.42 and 68 O.S. § 3621 et seq.).

21st Century Quality Jobs Incentive Act.

Provides incentives to attract growth industries and sectors to Oklahoma. (68 O.S. § 3911 et seq.).

See topics 22.10 Income Tax, subhead Exemptions and Credits; 22.13 Property Taxes, subhead Exemptions; 22.17 Sales and 22.19 Use Taxes, subhead Sales Tax, catchline Exemptions.

22.18B TAX LIENS:

Uniform Federal Lien Registration Act codified at 68 O.S. § 3401 et seq.

See topic 22.01 Administration, subhead Lien. See category 8 Debtor and Creditor, topic 8.13 Liens.

22.18C TRANSPORTATION TAXES:

Aircraft excise tax imposed by 68 O.S. § 6001 et seq.

Freight car tax is imposed by 68 O.S. § 2201 et seq.

Motor Boat Excise Tax.

Oklahoma Vessel and Motor Registration Act imposes certain registration fees and requires that dealers obtain license. See 63 O.S. § 4001 et seq.

Oklahoma Vessel and Motor Excise Tax Act imposes excise tax on transfer of legal ownership of any vessel or motor registered in state. (63 O.S. § 4103).

Motor Vehicles.

Motor vehicle excise tax is imposed by 68 O.S. § 2101 et seq. See category 23 Transportation, topic 23.01 Motor Vehicles.

Recreational vehicle excise tax is imposed by 68 O.S. § 2104.1. See category 23 Transportation, topic 23.01 Motor Vehicles.

Manufactured home excise tax is imposed by 68 O.S. § 2104.3.

Vehicle Importer Tax.

Same or substantially same type or category of tax or fee may be imposed upon out-of-state resident as is imposed upon residents of Oklahoma for same or substantially similar use of vehicle in such other state in amount of any fee or tax including property, motor fuel, excise, sales, use or mileage tax required by laws of such other state to be paid by resident of Oklahoma.

Rental Tax.

6% on gross receipts of all rental car agreements. (68 O.S. § 2110).

22.18D TRAUMA CARE TAX:

Tax disguised as fee is imposed on certain hospitals, specialty hospitals and ambulatory surgery centers. Tax is 30% of annual net revenues less net revenues from Medicare and/or Medicaid, with allowances for uncompensated care. Tax is paid to Commissioner of Health of Oklahoma State Department of Health and is to be deposited in Trauma Care Assistance Revolving Fund. (63 O.S. § 1-702b).

22.19 USE TAXES:

See topic 22.17 Sales and 22.19 Use Taxes.

23 TRANSPORTATION

23.01 MOTOR VEHICLES:

Commissioner of Public Safety, 3600 N. King, Oklahoma City, Oklahoma 73111, has duty of enforcing all laws regulating operation of vehicles or use of highways.

Vehicle license required annually on staggered registration basis. (47 O.S. § 1101, et seq.). Number plates must be displayed in rear. License fees are in lieu of all ad valorem taxes on vehicles. (47 O.S. § 1103). Vehicles owned by members of Armed Forces or their spouses classified specially for vehicle license and registration purposes. (47 O.S. § 1127). Mobile home licenses, see 47 O.S. § 1117-1119. Commercial trucks, truck-tractors, trailers and semi-trailers licenses, see 47 O.S. § 1133. Licensing of used motor vehicle, travel trailer or commercial trailer, see 47 O.S. § 1137.1. Boats, see Vessel and Motor Registration Act (63 O.S. § 4002 to 4043) and Boating Safety Regulation Act (63 O.S. § 4200 et seq.). For recreational vehicles licenses, see subhead Recreational Vehicle License, Excise Tax, infra.

Operator’s license is required; expires four years from last day of month in which license was issued or, if requested by applicant, four years from last birth month of applicant. (47 O.S. § 6-101 et seq.). Motor vehicle license agents required to provide voter registration forms to qualified elector who applies in county of residence for operator’s license or identification card. (26 O.S. § 4-111.1).

Graduated license program between ages 15 and 18, after which unrestricted license may be obtained; restricted license with motorcycle restriction provision age 14 or older; commercial license may not be issued to person under age 18; except that person at least age 17 may be issued restricted commercial license to operate commercial motor vehicle for harvest purposes. No license may be issued to person under age 21 to operate motor vehicle required to be placarded for hazardous materials, except persons age 18 years or older may operate farm vehicle. (47 O.S. § 6-101, 102, 103 O.S. § 105). Applicants for commercial driving licenses with hazardous materials endorsement or renewal thereof must also submit to security threat assessment by Transportation Security Administration. (47 O.S. § 6-106, 110). Licensee incapable of properly controlling motor vehicle or hazard to public safety based on accident or violation record may be re-examined, or required to take physical examination or driver training.

(47 O.S. § 6-119). Department of Public Safety must deny license, restricted license or instruction permit to person under age 18 who does not present documentation of compliance with specified educational requirements or lawful excuse from such requirements; demonstration of satisfactory reading proficiency required. (47 O.S. § 6-107.3, 107.4; 70 O.S. § 1210.515). License may be suspended for default on guaranteed student loans. (70 O.S. § 623.1). Driving privilege will be revoked if person attempts to fraudulently obtain license by use of another person's identity. (47 O.S. § 6-201). Revocation of driving privilege mandatory for conviction of certain offenses. (47 O.S. § 6-205, 205.2). Driving privilege suspended if owner fails to furnish proof of insurance. (47 O.S. § 609). See subhead Insurance.

Nonresidents, Members of Armed Forces.

Nonresident age 16 or older with valid driver license issued by home state or country, and member of U.S. Armed Forces or spouse with valid driver license issued by overseas component of U.S. Armed Forces, may operate motor vehicle in state as authorized by class, restrictions and endorsements specified on license. (6 O.S. § 102). Any person or spouse of person on active duty with U.S. Armed Forces living outside continental limits of U.S. having valid driver's license issued by Oklahoma shall have, without additional charge, valid driver's license for duration of such service and for period of 60 days after return of person or spouse to continental limits of U.S. (47 O.S. § 6-121). Vehicle owned by nonresident member of Armed Forces assigned to duty in Okla., and vehicle owned by spouse residing in Okla. of nonresident service member serving in foreign country, must be registered in Okla. unless vehicle is registered and licensed in State of residence or domicile of such service member or such spouse. Oklahoma resident stationed out of state may authorize parents to register his or her vehicle. (47 O.S. § 22.30J, 47 O.S. § 1127).

Application for driver's license must state full name, date of birth, sex, residence address, county of residence and mailing address if different than residence address of applicant; certain medical information; whether applicant is deaf or hearing impaired; license plate number and state of issuance for up to two vehicles owned by applicant; brief description of applicant; whether applicant has previously been licensed and, if so, when and by what state or country; whether any such license has ever been suspended or revoked or any application refused and, if so, date of and reason for such suspension, revocation or refusal. Application for commercial driver's license must contain applicant's social security number. If applicant owns vehicle not registered in state, applicant must submit affidavit that applicant is not resident of state. Males under 26 must consent to registration with Selective Service. Refusal to so consent requires denial of license. (47 O.S. § 6-106). Finger imaging of applicants required. (47 O.S. § 6-110.2).

Titles, Sales and Liens.

Certificate of title, stating title, liens and encumbrances, must be obtained from Tax Commission or a motor license agent thereof by presenting manufacturer's certificate of origin in case of new car, or remanufactured vehicle, or otherwise by presenting former certificate with proper endorsements sworn to before notary public. (47 O.S. § 1105, 1107). For vehicles not manufactured for sale in the U.S., additional documents showing ownership and compliance with federal law are required. (47 O.S. § 1105). Application for certificate of title for vehicle within last seven model years requires declaration whether vehicle has been damaged by collision or other occurrence and whether vehicle has been recovered from theft and extent of damage. (47 O.S. § 1105). With certain exceptions, on any transfer of ownership, seller shall verify mileage at time of sale on certificate of title. (47 O.S. § 1107, 1107.2). Rights of all persons in vehicles are subject to Uniform Commercial Code. Security interest in vehicle is perfected by delivering lien entry form, existing certificate of title, and lien filing fee of $10 to Oklahoma Tax Commission or motor license agent. If lien entry form delivered within 20 days after executed, security interest perfected from date of execution; otherwise, perfection begins when form is delivered. (47 O.S. § 1110). Vehicle is subject to certain liens for repairs. (42 O.S. § 91 et seq.). Off road all-terrain vehicles and motorcycles purchased or transferred after July 1, 2005 must be titled. (47 O.S. § 1105[B]).

Identification Marks.

Felony to alter or destroy engine number or other distinguishing number, or to give wrong description in any application for registration. (47 O.S. § 4-107, 109).

Operation Prohibited.

By person under influence of intoxicating liquor or other drugs; first offense misdemeanor and other offenses felonies. (47 O.S. § 11-902).

Odometer Alteration.

Odometer Setting Act (47 O.S. § 12-501 et seq.) prohibits sale or installation of any device that causes odometer of any motor vehicle to register any mileage other than true mileage; disconnection, resetting or alteration of odometer with intent to change number of miles indicated also is prohibited (47 O.S. § 12-503).

Size, Weight and Load Limits.

Regulated by 47 O.S. § 14-101-121.

Lights Required.

Regulated by 47 O.S. § 12-201 et seq. Motorcycles must display lighted lamps and illuminating devices at all times. (47 O.S. § 12-601).

Equipment Required.

Regulated by 47 O.S. § 12-201 et seq. Seat belts required for operator and front seat passengers (47 O.S. § 12-416) and restraint system required for children under four (47 O.S. § 11-1112).

Safety glass, of type approved by Commissioner of Public Safety, must be used in doors, windows and windshields of all vehicles sold or registered in state. (47 O.S. § 12-406).

Collisions.

Operator of motor vehicle involved in collision in which any person is killed or injured or where property damage is in excess of $300 must make written report within ten days to Commissioner of Public Safety upon forms available from sheriffs and chiefs of police. Report must be accompanied by estimate of motor vehicle agency or established garage as to cost of repairing reporting operator's vehicle. Commissioner may furnish information to interested party concerning financial responsibility of owner or operator (see infra, subhead Financial Responsibility) but report is otherwise confidential. (47 O.S. § 10-108). Person requesting accident report may be required to state in writing, under penalty of perjury, that report will not be examined, reproduced, or otherwise used for commercial solicitation purposes. Misdemeanor to obtain or use information from accident report for purpose of making commercial solicitation. Copy of accident report must include following notice: "Warning-State Law. Use of contents for commercial solicitation is unlawful." (47 O.S. § 40-102). Driver cited for traffic offense where accident resulted in immediate death or great bodily injury must submit to drug and alcohol testing. (47 O.S. § 10-104).

Liability of owner for acts of others is governed by common law rules; except that owner of motor vehicle who knowingly permits it to be operated by person not qualified under the act is civilly liable as joint tort feasor for unlawful act of operator. (47 O.S. § 6-307).

Guests.

There is no statutory limitation of liability for injury to a guest.

Insurance.

Every owner of motor vehicle within state, other than licensed used car dealers, or owner who signs affidavit that vehicle will not be used on public streets (47 O.S. § 7-607), must maintain security for payment of loss resulting from liability arising out of ownership, maintenance, operation, or use of motor vehicle to extent of $25,000 for injury or death to any one person, $50,000 for injury or death to two or more persons in same accident, and $25,000 for damage to property (47 O.S. § 7-204, 302, 324). Unless otherwise provided, no motor vehicle can be operated in state unless there is in effect security for payment of loss resulting from liability arising out of ownership, maintenance, operation or use of vehicle. Proof of such security must be carried in vehicle at all times and produced for inspection upon request by law enforcement officer or person affected by collision. Provision is applicable to nonresident owners and operators of vehicles only if state in which vehicle is registered requires compulsory liability insurance. (47 O.S. § 7-204, 7 O.S. § 601). See subhead Financial Responsibility, infra. Auto liability insurance for bodily injury must protect from uninsured and hit-and-run drivers, unless insured rejects in writing. (36 O.S. § 3636). Insurance carrier may not cancel, refuse to issue or renew, or charge higher premium for motor vehicle liability or collision insurance policy because insured had lower liability limits with previous insurer without actuarial justification. (36 O.S. § 941).

No-Fault Insurance not adopted.

Financial Responsibility.

Motor Vehicle Safety Responsibility Act (47 O.S. § 7-101 et seq.) adopted. It requires operator of vehicle involved in an accident causing physical injury or property damage to other party in excess of $300 to make report within ten days to Commissioner of Public Safety, who is directed, if such operator does not have liability insurance, to determine amount of security which such operator must deposit with him to cover any judgment for damages. Unless such security is deposited and proof of financial responsibility is filed within 50 days from date of report, Commissioner must suspend, upon ten days notice, operator's license and all of owner's motor vehicle registrations, and if operator or owner is nonresident, privilege of using any vehicle within state. License, registration and nonresident's operating privilege may be renewed upon deposit of required security, or if no action for damages is commenced within one year, or upon evidence of nonliability, or when judgment is satisfied to extent of $25,000 for injury to one person, or $50,000 for injury to two or more persons, or $25,000 for property damage. Penalties are provided for violations of Act. Operator or owner whose license, registration or operating privilege has been suspended by Commissioner may appeal to district court.

Proof of financial responsibility may be given by filing: (1) Certificate by insurance carrier authorized to do business in state (nonresident owner may file certificate by insurance carrier authorized to do business in state where vehicle is registered, provided such carrier authorizes Commissioner to accept service of process in its behalf and agrees that policy is amended to conform to state laws); (2) bond of insurance carrier or two individual sureties owning real estate worth twice amount of bond; (3) depositing with Commissioner of $75,000 in cash or certificate of deposit; or (4) certificate of self-insurance obtained from Commissioner by owner of more than 25 vehicles.

Foreign Vehicles.

Automobile, motorcycle or house trailer properly registered in home state for current year may be registered in Oklahoma, without fee, within 15 days after entering the state, and such registration is good for 60 days from date of entry.

Foreign truck, tractor, trailer or motor bus used for commercial purposes must be registered same as domestic vehicle, except that nonresident owner of such vehicle, if it is properly registered in home state for current year, may without registration make not more than two trips of 72 hours each during any calendar month, but this exception does not apply where vehicle is leased to Class A or Class B motor carrier which operates frequently or regularly on state highways.

However, nonresident need not register his vehicle unless its trip into Oklahoma goes through or past first incorporated city or town after entry, or distance traveled in the state exceeds 60 miles, but this does not exempt a nonresident engaged in an industrial or commercial enterprise whose vehicles frequently travel over state highways in furtherance of such enterprise.

Owner of foreign motor bus, truck, truck-tractor, trailer or semi-trailer, registered in home state and brought into this state for commercial purposes or hire, may obtain temporary license for not exceeding ninety days on application to Tax Commission and payment of proportionate part of annual license fee, if home state grants reciprocal rights to Oklahoma residents. (47 O.S. § 1124).

Nonresident operators may operate without local licenses under following conditions: Nonresident at least 16 years old who has in his possession a valid driver's license of his home state or country, may operate motor vehicle as authorized by class, restrictions and endorsements on license. (47 O.S. § 6-102).

Actions Against Nonresidents.

Nonresident Violator Compact adopted. (47 O.S. § 789 et seq.).

Direct Actions.

Action by injured party directly against insurer of allegedly negligent motorist not allowed, except that insurer can be joined in action against motor carrier for injuries resulting from negligent operation of said carrier. (47 O.S. § 169; 196 Okla. 567, 166 P.2d 434).

Lemon Law.

(15 O.S. § 901).

Aftermarket Crash Parts Regulation Act.

(15 O.S. § 951 to 956).

Mobility-Impaired Driver Refueling Service Act (47 O.S. § 1601 et seq.) allows service stations on voluntary basis to provide refueling service to certain mobility-impaired drivers on request.

Electronic Toll Collection Act (47 O.S. § 11-1401.1 et seq.) provides for imposition of monetary liability on vehicle owner for failure to comply with toll collection regulations of state Turnpike Authority.

Motor Vehicle Carriers.

Corporation Commission has supervision and regulation of motor carriers doing an intercity business or operating between fixed termini or over a regular route, and not operating exclusively within limits of incorporated city. Commission may fix or approve rates, charges, classifications, rules and regulations; regulate and supervise accounts, schedules, service and safety of operations; prescribe uniform system and classification of accounts; and require filing of reports. Carrier cannot operate until it has obtained from Commission certificate of public convenience and necessity and filed with Commission liability insurance bond in sum fixed by Commission. (47 O.S. § 161-2, 166, 169 O.S. § 70). Commission regulates state's participation in single state registration system for motor carriers authorized by Intermodal Surface Transportation Efficiency Act of 1991 (49 U.S.C. § 11506) and applicable rules and regulations of

Interstate Commerce Commission. Commission also regulates interstate motor carriers exempt from ICC regulations. (47 O.S. § 162.1). Motor carriers not required to sign any statement of liability or enter into any contract for indemnification of any person for any acts or omissions not arising from damage or loss from wrongful or negligent act or omission by motor carrier. (47 O.S. § 169.7).

Driver of vehicle containing livestock or domestic fowls, or slaughtered livestock or domestic fowls, or parts of either, must have permit authorizing movement. (4 O.S. § 351).

Department of Public Safety regulates transportation of hazardous material. (47 O.S. § 230.1, et seq.).

Motor Vehicle Carrier Act.

Except as specifically limited, provisions of Act (47 O.S. § 240.1 et seq.) apply to transportation of passengers or property by motor carriers and private carriers, except motor carriers of household goods and used emigrant movables, over public highways of state. Corporation Commission has supervision and regulation of such transportation. Terms of Act apply to interstate commerce and commerce with foreign nations, to extent permitted under federal law.

Recreational Vehicle License, Excise Tax.

Applicable to every vehicle manufactured, constructed, equipped as self-propelled home, housecar or living quarters not including those registered as automobiles, motor buses, house trailers or “campers.” Licensing fee based on manufacturer’s factory delivered price. Value of recreational vehicles for purposes of motor vehicle excise tax is basically same as described for other vehicles in motor vehicle excise tax section except minimum value is $250 or minimum tax of $5. (68 O.S. § 2104.1).

Vehicle excise tax, at rate of 3¼% of value of vehicle is imposed on use of every vehicle registered for first time in state and on every transfer of legal ownership of such vehicle, except as specified. Value of new vehicle manufactured in U.S. is manufacturer’s price at factory plus value of all extra or optional equipment attached unless tax paid under Tit. 26 U.S.C. 4481 in which case value is actual sales price (on new vehicle manufactured outside U.S. is price set by Oklahoma Tax Commission as gross value at point of entry); of used vehicle 65% of new vehicle value as above determined during first and second years and each year thereafter 65% of value in preceding year until minimum of $35 is reached. Tax is in lieu of all other taxes except annual registration and license fee, sales tax on accessories not attached to vehicle, mileage tax, fee for certificate of title and any fee charged under jurisdiction of Corporation Commission. Among exemptions from tax are: Vehicles taxed on ad valorem basis; vehicles of nonresidents occasionally brought into this state; transfer of ownership by inheritance, bequest, reorganization of corporation, liquidation of partnership or foreclosure of lien; certain rental or leased vehicles. (68 O.S. § 2101 et seq.). Excise tax for all-terrain vehicles or off-road motorcycles is 4½% of actual sale price. (68 O.S. § 2103).

Vehicle Rental Tax.

Rental tax of 6% imposed on gross receipts of motor vehicle rental agreements of 90 days or less. (68 O.S. § 2110).

Vehicle Importer Tax.

See category 22 Taxation, topic 22.18C Transportation Taxes, subhead Motor Vehicles, catchline Vehicle Importer Tax.

Gasoline Tax.

See category 22 Taxation, topic 22.08 Gasoline and Special Fuels Taxes.

23.02 RAILROADS:

See category 3 Business Regulation and Commerce, topic 3.08 Carriers.

1

OREGON LAW DIGEST

—Scope —

Revised for 2010 edition by

MILLER NASH LLP of Portland.

(Citations unless otherwise indicated are to Oregon Revised Statutes, a comprehensive statutory revision effective Dec. 31, 1953 and updated to reflect legislative changes through the last legislative session. Session laws are cited by year and chapter, or Bill number. HB indicates a House Bill. SB indicates a Senate Bill. “ORCP” indicates Oregon Rules of Civil Procedure. “UTCR” indicates Oregon Uniform Trial Court Rules. “OAR” indicates Oregon Administrative Rules. Parallel citations to the Pacific Reporter begin with 11 Or.)

Note: Next regular legislative session convenes Jan. 2011. This revision covers all laws enacted through adjournment (June 29, 2009) of 2009 session. Legislative session held biennially in Salem commencing on 2d Mon. in Jan. of odd-numbered year.

1 INTRODUCTION

1.01 GOVERNMENT AND LEGAL SYSTEM:

The State of Oregon is a constituent state of the United States of America. For further discussion of the U.S. federal system, see Introduction to the Federal Government of the United States at the beginning of this volume. A great many laws are promulgated by the federal government of the United States and are not reflected in the topics below. See the Introduction to this volume for references to the federal law topics covered.

Like all but one of the United States, Oregon has a common law legal system, with roots in English common law. For information on the courts and legislature of Oregon, see category 6 Courts and Legislature.

1.02 [RESERVED]

1.03 HOLIDAYS:

Following legal holidays are observed; each Sunday; New Year's Day, Jan. 1; Martin Luther King, Jr.'s Birthday, third Mon. in Jan.; Presidents Day, third Mon. in Feb. (but not for schools [336.010(7)]); Memorial Day, last Mon. in May; Independence Day, July 4; Labor Day, first Mon. in Sept.; Veterans' Day, Nov. 11; Thanksgiving Day, fourth Thurs. in Nov.; Christmas Day, Dec. 25; and days appointed by Governor. (ORS 187.010-.020). Statutory enumeration does not affect collective bargaining agreements. (ORS 187.010[4]).

Holiday Falling on Weekend.

When holiday falls on Sat., preceding Fri. shall be holiday that year. When holiday falls on Sun., succeeding Mon. shall be holiday that year. (ORS 187.010[2]).

Legality of Transactions on Holiday.

Transactions on holidays are valid. Any act to be performed on holiday may be performed on next succeeding business day without liability for delay. (ORS 187.010[3]).

Bank Holidays.

Holidays for banks and savings associations are same as legal holidays, plus Columbus Day, 2d Mon. in Oct. On holidays, banks and savings associations may conduct business that does not require being open to public for carrying on substantially all bank's (or association's) business functions. (ORS 707.430, 722.162).

Public Contracts.

Labor employed by public entities through contractors shall be paid at least time and one-half for work on Sats., Suns., New Year's Day, Memorial Day, Independence Day, Labor Day, Thanksgiving Day, and Christmas Day, except for public improvement work under collective bargaining agreements; certain fire prevention or suppression work; and Sat. and Sun. work under certain personal service contracts. (ORS 279.334[1],[3],[5],[6]).

1.04 OFFICE HOURS AND TIME ZONE:

Oregon is in the Pacific (GMT -08:00) time zone. Office hours are generally from 8 a.m. to 5 p.m.

2 BUSINESS ORGANIZATIONS

2.01 AGENCY:

Common law rules govern, with exceptions noted infra.

Any person having capacity to contract may appoint agent or act as agent.

Declarations of agent made within scope of agency and during its existence are admissible at trial as admission by party-opponent. (ORS 40.450[4][b][D]).

Determination of “agency” in context of labor relations is addressed in 663.100; whether specific acts were actually authorized or subsequently ratified is not controlling.

2.02 ASSOCIATIONS:

Common law rules generally apply. Savings and loan associations regulated by statute. (c. 722).

Formation.

Common law rules apply. Statutes governing formation of savings and loan associations. (c. 722).

Rights and Powers.

Common law rules apply. Statute governing powers of savings and loan associations. (ORS 722.202).

Liabilities.

Member of unincorporated association not obligated on contract entered into by association through its officers unless member expressly or impliedly consents to become so obligated. (233 Or. 302, 378 P.2d 569).

Actions.

Association may sue in any name it has assumed and may be sued in that name or any other by which known. Any member of association may be joined as party in action against association. (ORCP 26B).

Dissolution.

Common law rules apply. Statute governing voluntary dissolution. (ORS 722.074).

Professional Associations.

See topic 2.03 Corporations, subhead Professional Corporations.

See also topic 2.04 Joint Stock Companies.

2.03 CORPORATIONS:

Basis for most Oregon provisions is Revised Model Business Corporation Act (1984) (“Model Act”), included in Uniform and Model Acts section. Material variations in Oregon Business Corporation Act (“Oregon Act”) from Model Act are noted under following subheads. Unless otherwise indicated, section numbers appearing in text refer to Model Act. Section numbers appearing in parentheses refer to sections of Oregon Revised Statutes (“ORS”).

General Supervision.

Secretary of State's office administers provisions of Oregon Act. Address: Secretary of State, State of Oregon, 158 12th Street, N.E., Salem, Oregon 97310.

Purposes.

§ 3.01 substantially adopted. Business subject to regulatory statutes other than Oregon Act may not incorporate under Oregon Act if business is required to be organized under such other statute. (ORS 60.074).

Name.

§ 4.01 not adopted. Corporate name must contain “corporation”, “incorporated”, “company”, “limited”, or abbreviation of one of them. Use of term “cooperative” in corporate name is prohibited. Corporate name may include only letters of Roman alphabet, Arabic and Roman numerals, and incidental punctuation. Corporate name must be distinguishable on records of Secretary of State from any other corporate name, names of certain enumerated types of entities, reserved names, registered corporate names, and assumed business names, except where applicant has adjudicated prior or concurrent right to use name. (ORS 60.094). Informal verification of name availability may be obtained by calling (503) 986-2200. § 4.02, relating to name reservation, substantially adopted with additional requirement that reserved name must conform to corporate name requirements in ORS 60.094. (ORS 60.097). Name reservation fee: $10. (ORS 60.007). § 4.03, relating to registered name, substantially adopted. Application must state that corporation is not doing business in Oregon and name must conform to ORS 60.094. Registration is effective for one year. (ORS 60.101). § 4.03(e) not adopted. Registration fee: $100. (ORS 60.007).

Term of Corporate Existence.

§ 3.02 presumption of perpetual duration adopted. (ORS 60.077[1]).

Incorporators.

§ 2.01 adopted except incorporator may be natural person, age 18 or over, domestic corporation, foreign corporation, partnership, or association. (ORS 60.044). § 2.04, relating to liability for pre-incorporation transactions, adopted except reference to incorporation "under this act" is omitted to clarify that incorporation under prior law or other states' acts may be valid. (ORS 60.054).

Articles of Incorporation.

§ 2.02 adopted with additional provisions requiring: (i) Mailing address of registered office if different from street address and (ii) mailing address to which notices may be sent until address has been designated in annual report. Articles may include provisions eliminating or limiting director's personal liability to corporation or shareholders for conduct as director, with certain restrictions. See subhead Liabilities of Directors, infra. (ORS 60.047). § 6.01, requiring certain information regarding authorized shares to appear in articles, substantially adopted. (ORS 60.131).

Filing of Articles.

§ 2.03 substantially adopted. (ORS 60.051). § 1.20, dealing with filing of documents generally, substantially adopted except: (i) Documents need not be typed or printed, but must be legible, (ii) documents must be executed by incorporator if directors have not been selected or if execution occurs before organizational meeting, (iii) delivery is accomplished only when document is received, and (iv) reproduction of document may be filed without true copy. (ORS 56.016; 60.004). Documents may be filed by facsimile transmission; telephone (503) 378-4381. (ORS 56.016). Document becomes effective only on date accepted for filing, which is generally after date delivered unless delivered in person. (ORS 60.011).

Incorporation Fee.

$50. (ORS 60.007).

Filing Fees.

See subhead for particular document.

License to Do Business.

§ 1.28, relating to certificate of existence, substantially adopted; certificate means, but need not state, that corporate name is registered, that annual report has been filed within last 14 months, and that facts set forth in § 1.28(b)(2), (b)(3), and (b)(5) are true. Additional provision permits request for certificate covering any fact of record. (ORS 60.027). Certificate fee: $10. (ORS 60.007).

Organization.

§ 2.05 adopted. (ORS 60.057). § 8.21, relating to action by directors without meeting, substantially adopted. (ORS 60.341). See also subhead Issuance of Stock, infra.

Paid-in Capital Requirements.

None.

Amendment of Articles.

§ 10.01, granting authority to amend, substantially adopted. (ORS 60.431). § 10.02, allowing amendment by directors, adopted with additional clauses permitting (i) increase or decrease in number of authorized shares of registered open-end investment company and (ii) deletion of mailing address after first annual report filed. (ORS 60.434). § 10.02(4), relating to stock splits, not adopted. Stock splits are permitted without amending articles of incorporation. (ORS 60.154). Amendment by directors without shareholder approval is required in connection with certain share reacquisitions to decrease authorized capital stock. (ORS 60.177). §§ 10.03 and 10.04, relating to amendment by directors and shareholders adopted without requirement for recommendation by directors. (ORS 60.437, 60.441). § 10.05, relating to amendment before shares issued, adopted with additional provisions requiring notice to subscribers and allowing rescission of subscriptions. (ORS 60.444). § 10.06 substantially adopted without reference to undisputed votes. (ORS 60.447). § 10.07, relating to restated articles, substantially adopted with additional provisions permitting incorporators to restate articles before corporation has issued shares and allowing omission(s) of certain statements from restated articles. §§ 10.08 (amendment pursuant to reorganization), and 10.09 (effect) adopted (ORS 60.454, 60.457). Filing fee: $10. (ORS 60.007).

Increase or Decrease of Authorized Capital Stock.

See subhead Amendment of Articles, supra.

Bylaws.

§§ 2.06 and 2.07 adopted. (ORS 60.061, 60.064). §§ 10.20-10.22, relating to amendment, substantially adopted, without § 10.22(c). (ORS 60.461, 60.464, 60.467).

Stock.

§§ 6.01 and 6.02, relating to authorization and terms of shares, substantially adopted. (ORS 60.131, 60.134). § 6.03 substantially adopted. (ORS 60.137). § 6.04 adopted, regarding fractional shares. (ORS 60.141). § 6.24, relating to share options, adopted with additional provision permitting terms of option to restrict exercise by person acquiring specified percentage of shares. (ORS 60.157).

Stock Certificates.

§§ 6.25 and 6.26 adopted. (ORS 60.161, 60.164).

Issuance of Stock.

§ 6.20, regarding subscriptions, substantially adopted; corporation may rescind subscription agreement without reselling shares. (ORS 60.144). §§ 6.21, issuance, and 6.28, expense of issue, substantially adopted. (ORS 60.147, 60.171).

Transfer of Stock.

§ 6.27 adopted. (ORS 60.167).

Uniform Simplification of Fiduciary Security Transfers Act not adopted.

Uniform Commercial Code adopted. (cc. 71-79). See category 3 Business Regulation and Commerce, topic 3.09 Commercial Code.

Stock Transfer Tax.

None.

Shareholders.

§ 6.30 adopted with additional transition provisions. Shareholders of corporations incorporated prior to June 15, 1987, have preemptive rights unless articles of incorporation, or restated articles, expressly deny them. (ORS 60.174).

Repurchase of Stock.

§ 6.31 adopted, with additional provision stating that shares converted into another class or series of corporation are considered acquired by corporation. (ORS 60.177).

Shareholders' Actions.

§ 7.40 adopted. (ORS 60.261).

Shareholders' Liabilities.

§ 6.22 substantially adopted. Articles of incorporation may not impose shareholder liability. (ORS 60.151).

Shareholders' Meetings.

§§ 7.01-7.07 and 7.20-7.28 adopted (ORS 60.201-.251) with following changes: If articles of incorporation or bylaws of registered investment company so provide, company is not required to hold annual meeting in any year in which election of directors is not required under Investment Company Act of 1940. (ORS 60.201). Additional provision allows bylaws or board resolution to provide for participation in shareholder meetings by conference call or similar means. (ORS 60.222). Notice must be given to corporation at least five days prior to hearing on court-ordered meeting; Oregon Act specifies priority of such hearing. (ORS 60.207). Action taken without meeting is effective when last shareholder signs consent, unless consent specifies earlier or later effective date. (ORS 60.211[d]). Default record date is day before notice is mailed or transmitted for delivery. (ORS 60.214). Shareholdings shall be determined at close of business on record date unless another time is specified when record date is fixed. (ORS 60.001[27]). Record date may be same day as director action to fix record date, provided that shareholders of record are determined after directors' action. (ORS 60.221[1]). Shareholder may waive notice at any time even if no notice given. (ORS 60.217). Party initiating proceeding to compel inspection of shareholders' list need not post undertaking pursuant to ORCP 82A. (ORS 60.224). § 7.21 adopted without “special circumstances” exception to provision that prohibits majority-owned subsidiary from voting shares of its parent. (ORS 60.227). Additional provision permits majority of votes represented to adjourn meeting. (ORS 60.219). § 7.25 adopted with modification to clarify that, in accordance with ORS 60.247, quorum requirements can be increased or decreased. (ORS 60.241). § 7.27 modified to provide that quorum requirements may be reduced by articles of incorporation to as few as one-third of votes entitled to be cast on any matter and to require approval of changes in quorum and voting requirements in accordance with quorum and voting requirements in effect before change. (ORS 60.247). § 7.28(d), relating to exercise of right to vote cumulatively, not adopted. (ORS 60.251).

Notice provision of Model Act, § 1.41, modified by: (i) Allowing oral notice to directors only when articles or bylaws so provide, (ii) requiring written notice to shareholders, (iii) allowing director notices to be mailed to director's address shown on corporate records, and (iv) allowing articles of incorporation or bylaws to govern time at which director notices are effective. (ORS 60.034).

Voting Trusts.

§ 7.30 adopted. (ORS 60.254). § 7.31, relating to voting agreements, substantially adopted; Oregon Act refers to “persons”, rather than solely to “shareholders”. (ORS 60.257). Shareholder agreements meeting certain requirements may: (i) restrict discretion of board of directors; (ii) establish directors or officers; (iii) govern exercise or division of voting power; (iv) establish terms for use of corporate property or provision of services; or (v) require dissolution of corporation; even if inconsistent with Oregon Act. (ORS 60.265).

Directors.

§§ 8.01-8.11 adopted (ORS 60.301-.334) with following changes: § 8.01 modified to require that all corporations have board of directors and to permit shareholder agreements to limit board's discretion. (ORS 60.301). § 8.03(a) modified to provide estate of incompetent individual or deceased individual may not be director. (ORS 60.307). Share series as well as classes may be authorized to elect specified directors. (ORS 60.311). Term of director elected to fill vacancy expires at next shareholder meeting electing directors only if director was elected by board. (ORS 60.314). § 8.06 substantially adopted with additional provision that if corporation has cumulative voting, terms of directors may be staggered only if authorized by articles or bylaws and each group of directors contains at least three members. (ORS 60.317). § 8.07 substantially adopted with additional provision that notice of resignation is irrevocable once delivered, unless board permits its revocation; notice of resignation is effective at time specified in § 1.41(e) unless notice states later effective date. (ORS 60.321, 60.034[5]). § 8.31, conflict of interest, modified to allow interested shareholders to participate in approval of transaction and to provide that shareholders vote as single class. (ORS 60.361). § 8.32, loans to directors, adopted. (ORS 60.364).

Directors Meetings.

§§ 8.20-8.25 substantially adopted with modification to § 8.23 allowing waiver of notice at any time even if no notice given. (ORS 60.337-.354). See subhead Shareholders' Meetings, supra, regarding notice.

Powers and Duties of Directors.

See subheads Directors, supra, and Liabilities of Directors, infra. § 8.30 adopted regarding general standards for discharging duties. Additional provision permits directors to consider social, legal, and economic effects on third parties when evaluating tender or exchange offers. (ORS 60.357).

Liabilities of Directors.

§ 8.30 adopted, stating that director is not liable for actions taken if director has performed duties in compliance with certain standards; additional provision permits directors to consider social, legal, and economic effects and long-term interests of corporation and shareholders when evaluating tender offers and similar transactions. (ORS 60.357). § 8.33 regarding liability for unlawful distributions adopted. (ORS 60.367). Articles of incorporation may contain provision eliminating or limiting personal liability of directors to corporation or shareholders for monetary damages for acts occurring after provision becomes effective. Such provision may not limit liability in cases of breach of duty of loyalty, bad faith, intentional misconduct, knowing violation of law, unlawful distributions, or improper personal benefit. (ORS 60.047[2][d]).

Officers.

§ 8.40 adopted with additional provision requiring president and secretary. (ORS 60.371). §§ 8.41 and 8.42, relating to duties and standards of conduct, adopted. (ORS 60.374, 60.377). § 8.43 modified to provide that: (i) notice of resignation is effective at time specified in § 1.41(e) unless notice specifies later effective time; (ii) board of directors, appointing officer, or authorized officer may remove another officer at any time; and (iii) resignation notice is irrevocable once delivered unless revocation is permitted by board of directors. (ORS 60.381, 60.034[5]). § 8.44 modified to provide that neither removal nor resignation affects contract rights of officer or corporation. (ORS 60.384). Officers may be appointed pursuant to shareholder agreements. See subhead Voting Trusts, supra.

Liability of Officers.

§ 8.42 adopted, stating that officer is not liable for actions taken if officer has performed duties in compliance with certain standards. (ORS 60.377).

Indemnification of Directors and Officers.

§ 8.50-8.58 adopted with certain changes. (ORS 60.387-.414). Indemnification authorized by statute is nonexclusive. “Safe harbor” provided for corporations wishing to provide indemnification beyond that authorized by ORS 60.391; different standards are specified for safe harbor indemnification of directors and nondirectors. (ORS 60.414). Indemnification provisions otherwise apply equally to officers and directors. (ORS 60.407). Distinction in § 8.51 between persons acting in “official capacity” and those not so acting is eliminated. (ORS 60.391). No determination that indemnification is permissible must be made prior to advancing expenses. (ORS 60.397). Oregon Act modifies § 8.54(2) by deleting provision limiting court-ordered indemnification to amount of reasonable expenses incurred if director or officer found liable. (ORS 60.401). Provision of Oregon Act corresponding to § 8.55(b)(4) does not disqualify any shareholders from voting to approve indemnification. (ORS 60.404[2][d]).

Principal Office.

Address of principal office must be stated in annual report. (ORS 60.787). Articles of incorporation must specify mailing address to which notices may be mailed until address is designated in first annual report. (ORS 60.047[1][e]).

Registered Agent.

§ 5.01, relating to registered office and registered agent, substantially adopted. (ORS 60.111). § 5.02, relating to change of registered office or agent, adopted except: (i) Statement of change need not include address of current registered office or name of current registered agent; (ii) statement that new agent has consented is required, but written consent need not be included; (iii) provision for filing statement of change if registered agent moves office is made mandatory; and (iv) existing registered office or agent is terminated and new office or agent is established on effective date of filing. (ORS 60.114). Registered agent may resign by sending signed statement to Secretary of State for filing and to corporation at its principal office or mailing address; resignation is effective on 31st day after filing or upon corporation's appointment of successor registered agent, whichever occurs first. (ORS 60.117). § 5.04, relating to service on corporation, not adopted. Parallel provision provides that registered agent is corporation's agent for service of any process, notice, or demand. If corporation has no registered agent or agent cannot with reasonable diligence be found at registered office, Secretary of State shall be agent upon whom process may be served. If service is not on registered agent, person instituting proceedings must: (1) Deliver or mail process to Secretary of State, (2) transmit notice to corporation by certified or registered mail to last registered office or to address most likely to result in actual notice, and (3) file return receipt and appropriate affidavit with appropriate court. (ORS 60.121).

General Powers of Corporations.

§ 3.02, relating to general powers, substantially adopted. (ORS 60.077). § 3.03, relating to emergency powers, and § 3.04, relating to ultra vires acts, adopted. (ORS 60.081, 60.084).

Dividends.

§ 6.40, regarding distributions, and § 6.23, regarding share dividends, substantially adopted. (ORS 60.181, 60.154).

Unclaimed Dividends.

See category 21 Property, topic 21.01 Absentees, subhead Escheat.

Sale or Transfer of Corporate Assets.

§ 12.01 substantially adopted. (ORS 60.531). § 12.02 substantially adopted, without requirement that board of directors make recommendation about proposed transaction. (ORS 60.534).

Books and Records.

§ 16.01 relating to corporate records adopted except: (i) Corporation has alternative of keeping records at its registered office, and (ii) requirement that financial statements sent to shareholders in past three years must be kept not adopted. (ORS 60.771). § 16.02, relating to shareholder inspection of records, substantially adopted; right to inspect accounting records expanded to include tax returns; right to inspection under § 16.02(a) conditioned on compliance with § 16.02(c). (ORS 60.774). § 16.03, relating to scope of inspection right, adopted. (ORS 60.777). § 16.04, relating to court-ordered inspection, adopted except Oregon Act contains more specific requirements for expedited court handling of application which apply to both § 16.04(a) and (b) applications. (ORS 60.781).

Reports.

§ 16.20, relating to provision of financial statements to shareholders, not adopted. § 16.21(a), relating to reports to shareholders of indemnification of directors, adopted. (ORS 60.784). § 16.21(b) relating to notice to shareholders if shares issued for promissory note or future services not adopted. § 16.22, relating to annual reports, adopted except: (i) Report must be filed by anniversary date; (ii) report must set forth street address and mailing address, if different, of principal office; (iii) report need set forth names and addresses of president and secretary only, not of directors or other officers; (iv) report need not state number of authorized shares and outstanding shares; (v) information in report must be current as of 30 days before anniversary date; (vi) non-receipt of annual report form mailed to corporation does not excuse failure to file; (vii) corporation has 45 days to supply required information if annual report is returned because incomplete; and (viii) amendment of report allowed to reflect changes after report filed. (ORS 60.787).

Corporate Bonds or Mortgages.

See subheads General Powers of Corporations and Sale or Transfer of Corporate Assets, supra.

Merger and Consolidation.

§§ 11.01-11.07 substantially adopted. (ORS 60.481-.501). Provision included for merger with nonprofit corporation. (ORS 60.481). § 11.03, relating to action on plan of merger or exchange, amended to permit board of directors to submit plan to shareholders without recommendation and to provide exceptions to requirement for separate approval by voting groups. (ORS 60.487). Reference to undisputed votes in § 11.05(a)(3)(ii) deleted. (ORS 60.494).

Share Exchanges or Acquisitions; Tender Offers.

Subject to contrary provision in subject corporation's articles of incorporation or bylaws, 60.801-.813 (“Control Shares Act”) eliminates voting rights of “control shares” unless voting rights are restored by vote of “voting shares” that are not “interested shares” and by vote of all voting shares. “Interested shares” are those voted by or at direction of officers, directors who are employees, or acquiring persons or group. “Voting shares” are those that are part of voting group that elects majority of board of directors. (ORS 60.801).

“Control shares” are those acquired, or power to vote which is acquired, by person or group in transaction that causes voting power of person or group to exceed one-fifth, one-third, or one-half of total voting power. Voting power is measured with respect to election of directors by voting shares. Shares acquired within 90 days of acquisition in which one of “control” thresholds is crossed are treated as control shares. Shares acquired in certain enumerated types of acquisitions, including merger or plan of share exchange to which corporation is party, will not be considered control shares. (ORS 60.801).

Control Shares Act applies only to shares of Oregon corporation having 100 or more record or beneficial shareholders and having its principal place of business, principal office, or assets with fair market value of not less than $1 million within state. Control Shares Act does not apply to corporation unless 10% of its record shareholders are Oregon residents, 10% of its shares are owned beneficially or of record by Oregon residents, or at least 10,000 of its record or beneficial shareholders reside within state. (ORS 60.801).

Person proposing to make or who has made control share acquisition may give issuing corporation notice including certain prescribed information. After notice is given, corporation is required to present question of voting rights for control shares to shareholders at next shareholders' meeting occurring more than 60 days after control share acquisition. Upon request and at expense of person giving notice, corporation must alternatively present question of voting rights to shareholders at special meeting held at least 30 but not more than 50 days after receipt of notice unless acquiring person agrees in writing to another date. (ORS 60.810).

If control shares are granted voting rights and holder has acquired control shares having majority of voting power of all voting shares, shareholders who did not vote for restoring voting rights of central shares may exercise dissenter's rights unless articles of incorporation or bylaws provided otherwise before acquisition occurred. Fair value to which dissenters are entitled may not be less than highest price per share paid by acquiring person or group in control share acquisition. (ORS 60.813).

Other Tender Offer Provisions.

Requirement of identical rights for all shares of class not violated by rights, options, or warrants issued to all shareholders of any class that become void if held by, or that may not be exercised by, persons owning or offering to acquire specified number or percentage of corporations' outstanding securities. (ORS 60.157[2]). Oregon permits directors to consider social, legal, and economic effects and long-term interests of corporation and shareholders when evaluating tender offers and similar transactions. (ORS 60.357[5]).

Business Combinations with Interested Stockholders.

Corporation may not engage in business combination with interested shareholder for three years following date shareholder became interested shareholder, with certain exceptions. “Interested shareholder” is generally person or entity owning 15% or more of outstanding voting stock of corporation, and certain affiliates and associates. Business combination permitted if: (1) before shareholder became interested shareholder, board approved business combination or transaction in which shareholder became interested shareholder; (2) upon consummation of transaction in which shareholder became interested shareholder, shareholder owned at least 85% of voting stock outstanding at time transaction commenced (excluding shares owned by directors who are officers and by certain employee share plans); or (3) after shareholder became interested shareholder, business combination is approved by board and authorized at shareholder meeting (not by written consent) by at least two-thirds of outstanding voting stock not owned by interested shareholder. Corporation may elect not to be governed by foregoing restrictions under certain circumstances and is generally not subject to restrictions if it does not have class of voting stock listed on national securities exchange, authorized for quotation on interdealer quotation system of registered national securities association, or held of record by more than 2,000 shareholders. Restrictions do not apply if shareholder becomes interested shareholder inadvertently, divests sufficient shares as soon as possible, and would not have been interested stockholder (except for inadvertent acquisition) within three years immediately before business combination between corporation and shareholder. (ORS 60.825-.845).

Dissolution.

§ 14.01, relating to dissolution by incorporators or initial directors, substantially adopted except: (i) Corporation must not have issued shares and must not have commenced business, and (ii) articles of dissolution need not state that net assets of corporation have been distributed to shareholders. (ORS 60.621). Corporation may be dissolved by written consent of all shareholders. (ORS 60.624). § 14.02, relating to dissolution by board of directors and shareholders, adopted. (ORS 60.627). § 14.03, relating to articles of dissolution, adopted without references to undisputed votes. (ORS 60.631). § 14.04, relating to revocation of dissolution, substantially adopted without requirement that copy of articles of dissolution be filed with articles of revocation. (ORS 60.634). § 14.05, relating to effect of dissolution, and § 14.06, relating to known claims against dissolved corporation, adopted. (ORS 60.637, 60.641). § 14.07(a)-(c), relating to unknown claims, adopted. (ORS 60.644). § 14.07(d), relating to enforcement of claims, adopted except that Oregon provision covers known and unknown claims and limit on shareholders' total liability for claims is value of assets distributed to shareholder determined as of date of distribution, reduced by any liability of corporation paid by shareholder after distribution. (ORS 60.645).

§ 14.20 relating to grounds for administrative dissolution, substantially adopted; dissolution proceeding may be commenced immediately rather than after 60-day delay. (ORS 60.647). § 14.21, relating to procedure for and effect of administrative dissolution, substantially adopted except corporation has 45 days after notice to correct or show nonexistence of grounds for dissolution and Secretary of State is not required to notify corporation of dissolution after notice of grounds for dissolution sent. (ORS 60.651). § 14.22, relating to reinstatement, substantially adopted except: (i) Application must be made within five years of dissolution, (ii) application need not contain information regarding corporation's name or status of taxes, and (iii) procedure Secretary of State must follow to reinstate is simplified. (ORS 60.654). Fee for reinstatement application: $15. (ORS 60.007). Parallel provision to § 14.23 allows appeal from denial of reinstatement pursuant to ORS 183.310-.550. (ORS 60.657).

§ 14.30, relating to grounds for judicial dissolution, adopted; circuit courts given jurisdiction. (ORS 60.661). § 14.31, relating to procedure for judicial dissolution, substantially adopted. (ORS 60.664). §§ 14.32 and 14.33, relating to receivership and judgment of dissolution, substantially adopted. (ORS 60.667, 60.671). § 14.40 replaced by provision for deposit of dissolved corporation's assets to which missing or incompetent persons are entitled with Department of State Lands. (ORS 60.674).

Shareholder agreements may require dissolution upon occurrence of certain events or at request of one or more shareholders. See subhead Voting Trusts, supra.

Insolvency and Receivers.

§ 14.32, relating to receivership or custodianship, adopted. (ORS 60.667). § 14.40, relating to disposition of undistributable assets, not adopted. Oregon Act instead provides: (i) Assets that should be distributed to missing or incompetent person are to be liquidated and proceeds deposited with Department of State Lands, (ii) liquidating agent is to prepare and file statement of names and last-known addresses of distributees, and (iii) funds then escheat to state. (ORS 60.674).

Close Corporations.

No special provisions enacted.

Appraisal.

§§ 13.01-13.31 substantially adopted (ORS 60.551-.594) with following exceptions: § 13.02, relating to right to dissent, modified in that: (i) Amendment of articles of incorporation gives rise to dissenters' rights only if amendment affects preemptive rights or involves reverse stock split, which reduces shareholder's interest to fraction of share that will be acquired for cash, and

(ii) dissenters' rights not available if shares listed on national exchange or NASDAQ national market system. (ORS 60.554). § 13.25, relating to payment, modified by deleting requirement that statement of changes in shareholder equity accompany payment. (ORS 60.577).

Foreign Corporations.

Authority to Transact Business.

§ 15.01, requiring authorization and defining activities not considered transacting business, substantially adopted; Oregon Act eliminates certificate of authority. (ORS 60.701). § 15.02, relating to consequences of transacting business without authority, substantially adopted; foreign corporation transacting business without authorization is liable for fees that would have been paid had it been authorized. (ORS 60.704). § 15.03, relating to application for certificate of authority, modified as follows: (i) Language changed to refer to application for authorization (no certificate of authority is issued), (ii) application must state corporation's duration if not perpetual, mailing address of principal office if different from street address, and names and addresses of president and secretary but not of directors, and (iii) certificate of existence submitted with application must be current within 60 days of delivery. (ORS 60.707). Application fee is $440. (ORS 60.007). Certificate of authorization may be obtained for $10 fee. (ORS 60.027, 60.007). Provision similar to § 15.04 requires amendment to application for authority if foreign corporation changes its name or duration; amendment must state name as on Secretary of State's records and new name or new period of duration; new name must comply with ORS 60.717. (ORS 60.711). § 15.05, effect of authority, modified by replacing references to certificate of authority with references to authorization to transact business. (ORS 60.714).

Name.

§ 15.06 not adopted. Statute instead provides that, except as discussed below, foreign corporation's name must comply with requirements for name of domestic corporation contained in ORS 60.094. Compliance with ORS 60.094(1), relating to words denoting limited liability, not necessary if corporate name contains some other word denoting limited liability under law of place of incorporation. If name not distinguishable on records of Secretary of State, applicant must use “(name under which incorporated), a corporation of (place of incorporation)”. If foreign corporation changes name to one not complying with Oregon Act, it is prohibited from transacting business in Oregon under new name until it adopts complying name and complies with ORS 60.711 regarding amendments for changes of name. (ORS 60.717).

Registered Agent.

§ 15.07, relating to registered office and agent, substantially adopted. (ORS 60.721). § 15.08, relating to change of registered office or agent, adopted except: (i) Statement of change need not include address of current registered office or name of current registered agent, (ii) statement that new agent has consented is required, but written consent need not be included, (iii) provision for filing statement of change if resident agent moves office is made mandatory, and (iv) existing registered office or agent is terminated and new office or agent is established on effective date of filing. (ORS 60.724). Registered agent may resign by sending signed statement to Secretary of State for filing and to corporation at its principal office or mailing address; agency is terminated on 31st day after filing unless corporation has previously appointed successor registered agent. (ORS 60.727).

Service of Process.

§ 15.10 not adopted. Registered agent is agent for service. Secretary of State is agent if: (i) Corporation fails to appoint agent or agent cannot be located, (ii) corporation's authority has been withdrawn or revoked, (iii) corporation is transacting business without authority, or (iv) corporation has transacted business without authority, ceased to transact, and has become subject to service on Secretary of State. Service on Secretary of State is in same manner provided in ORS 60.121, except copy of process must be sent to corporation's principal office or place of business if corporation not authorized to transact business in state. After initial service on Secretary of State, no additional documents need be served on Secretary of State to maintain jurisdiction. (ORS 60.731).

Termination of Authority.

§ 15.20, relating to withdrawal, substantially adopted except: (i) § 15.20(a), prohibiting withdrawal until certificate of withdrawal obtained, not adopted, (ii) application for withdrawal must contain commitment to notify Secretary of State for five years of changes in mailing address, (iii) § 15.20(c), regarding service of process, not adopted, and (iv) corporation's authority to transact business in Oregon ceases on filing of application to withdraw. (ORS 60.734). § 15.30, relating to revocation of authority, adopted without 60-day grace period. (ORS 60.737). § 15.31, regarding procedure and effect of revocation, adopted except: (i) References to certificate of authority replaced by references to authorization to transact business, (ii) foreign corporation has 45 days after notice to correct or show nonexistence of each ground, (iii) Secretary of State is not required to notify corporation of revocation after notice of grounds for revocation sent, (iv) last two sentences of § 15.31(d), regarding service of process on Secretary of State, not adopted, and (v) authority of registered agent is terminated upon revocation. (ORS 60.741). § 15.32 replaced with provision allowing foreign corporation to appeal revocation pursuant to ORS 183.310-.550. (ORS 60.744). Additional provision describes procedure for reinstatement of foreign corporation within five years of revocation of authority. (ORS 60.747).

Taxation of Corporate Property.

Rules are same as for taxation of property of individual, except with respect to designated utilities and companies assessed by Department of Revenue. (ORS 308.505—.730). See category 22 Taxation.

Annual Report Filing Fee.

Domestic corporation must pay annual report filing fee of $30, foreign corporation must pay annual report filing fee of $220. (ORS 60.007).

Corporate Income Tax.

Corporations, including those doing wholly interstate business, must pay tax on Oregon taxable income from sources in Oregon, other than income subject to excise tax, at rate of 6.6% (ORS 318.020). Definitions and exemptions are generally same as in subhead Corporate Excise Tax, infra. (ORS 318.031, 318.040).

Corporate Excise Tax.

Business corporations and financial institutions (including banks) doing business in state must pay excise tax on Oregon taxable income at rate of 6.6% on first $250,000 of taxable income and 7.6% on income exceeding $250,000 for tax years beginning Jan. 1, 2011 ending before Jan. 1, 2013. Threshold income increases to $10 million after Jan. 1, 2013. (ORS 317.061, 2009 c. 345). Minimum tax is $10 for taxpayers named in ORS 317.070, minimum amount for corporations filing under ORS 317.010 reflects sales revenues. (ORS 317.090, 2009 cc. 345; 403). Exemptions determined under rules similar (but not identical) to rules under IRC § 501. (ORS 317.080).

Oregon taxable income is based on federal taxable income with certain modifications. (ORS 317.010[7],[10], 317.259).

Oregon has provisions dealing with S corporations. (ORS 314.730-.760).

Corporations (other than financial organizations, utilities, etc.) doing business both within and without state are taxed only on proportion of their incomes apportioned or allocated to Oregon under formula prescribed by Uniform Division of Income for Tax Purposes Act. (ORS 314.615).

One-quarter of estimated tax must be paid on or before 15th day of fourth, sixth, ninth, and 12th months of tax year if aggregate tax liability is expected to exceed $500. (ORS 314.505-.525). Return must be filed on or before 15th day of month following due date of corresponding federal return as prescribed under IRC. (ORS 314.385). Returns are filed with, and tax paid to, Department of Revenue, Salem.

Professional Corporations.

Persons rendering any type of personal service for which license is required may incorporate under Oregon Professional Corporation Act. (c. 58).

Deeds.

See category 21 Property, topic 21.06 Deeds.

Model Nonprofit Corporation Act adopted with significant variations. (c. 61).

Limited Liability Companies.

See topic 2.06 Limited Liability Companies.

2.04 [RESERVED]

2.05 JOINT STOCK COMPANIES:

Joint stock companies are referred to in Const. Art. XI, § 3, which provides limited liability for stockholder and, in Const. Art. XI, § 9, which prohibits counties and municipal corporations (except ports) from owning shares in or lending credit to joint companies. No other statutory references to joint stock companies. “Business trusts” are associations, including real estate investment trusts, engaged in business under written trust agreements with beneficial interests divided into transferable shares. (ORS 128.560).

Purposes.

Business trust may conduct business generally. (ORS 128.565).

Formation.

Filing by business trust with Corporation Division required. (ORS 128.575).

Rights, Powers and Liabilities.

Business trust has applicable rights and powers of domestic or foreign corporation. (ORS 128.580). Trust's compliance with filing requirements is condition precedent to immunity of trustees under 128.585. (99 Or. App. 533, 783 P.2d 39). Secretary of State may inactivate trust for failure to comply with filing and other requirements. (ORS 128.597).

Annual Reports.

Business trusts must file annual reports (ORS 128.595) and submit filing fee of $40, if domiciled in Oregon, and $440 if domiciled outside of Oregon (ORS 128.600).

Actions by and against business trust governed by corporation law. (ORS 128.580).

Dissolution.

No specific statute.

Massachusetts Trusts.

See discussion of business trusts in introductory paragraph.

Professional Corporations.

See topic 2.03 Corporations.

2.06 LIMITED LIABILITY COMPANIES:

Oregon Limited Liability Company Act ("LLC Act") enacted June 24, 1993, and effective Jan. 1, 1994. Where indicated, some provisions of LLC Act are substantially similar to corresponding provisions of Oregon Business Corporation Act ("Oregon Act") discussed in topic Corporations. Unless otherwise indicated, section numbers appearing in parentheses refer to sections of ORS.

General Supervision.

Corporation Division of Oregon Secretary of State administers provisions of LLC Act. Address: Oregon Corporation Division, 158 12th Street N.E., Salem, Oregon 97310.

Purposes.

Limited liability company may be organized under LLC Act to conduct or promote any lawful business or purpose which partnership, business corporation, or professional corporation may conduct or promote, except that business subject to exclusive regulation under another Oregon statute may not be organized under LLC Act if business is required to be organized under other statute. (ORS 63.074).

Name of limited liability company must contain words "limited liability company" or abbreviation "L.L.C." or "LLC". (ORS 63.094). Other restrictions on names similar to those of Oregon Act apply. (ORS 63.094). Name may be reserved for 120-day period. (ORS 63.097). Name reservation fee: $10 (ORS 63.007).

Organizers.

One or more individuals 18 years of age or older or other entities may form limited liability company by executing and delivering articles of organization for filing. Organizers need not be members of limited liability company. (ORS 63.044). All persons purporting to act as or on behalf of limited liability company, knowing limited liability company was not then in existence, are jointly and severally liable for all liabilities created by so acting. (ORS 63.054).

Articles of Organization.

Limited liability company which is formed by filing articles of organization must set forth: (a) name of limited liability company; (b) initial registered agent and street address of registered agent; (c) mailing address to which notices may be mailed; (d) if limited liability company to be manager-managed, statement that limited liability company will be manager-managed or statement that limited liability company to be managed by manager or managers; (e) name and address of each organizer; and (f) latest date on which limited liability company is to dissolve or statement that its existence is perpetual; if limited liability company is to render professional services, as defined in ORS 58.015, professional services to be rendered through limited liability company. (ORS 63.047). Filing fee for articles of organization: $40. (ORS 63.007). Filing requirements substantially similar to those under Oregon Act for filing articles of incorporation. (ORS 63.004).

Filing Fees.

See subhead for particular document.

License to do Business.

LLC Act includes provision for certificate of existence or authorization substantially similar to corresponding provision under Oregon Act. (ORS 63.027).

Paid-In Capital Requirements.

None.

Amendment of Articles of Organization.

Limited liability company may amend its articles of organization at any time to add, change, or delete any provision provided that articles of organization as amended contain only such provisions as are required or permitted in initial articles of organization under LLC Act. (ORS 63.434). Amendments are effected by filing articles of amendment containing: name of limited liability company; text of each amendment adopted; date of each amendment's adoption; and one of following: if amendment was adopted by managers without member action, statement to that effect and statement that member action was not required; or if amendment was adopted by members, statement that member approval required under ORS 63.444, articles of organization, or any operating agreement has been obtained and statement of percentage of each member's approval.

Contributions to Capital.

Contributions of member to limited liability company may consist of cash, property, services rendered, promissory note, or other obligation to contribute cash or property or perform services. (ORS 63.175). Promise by member to contribute to limited liability company is not enforceable unless in writing and signed by member. (ORS 63.180). Unless otherwise provided in limited liability company's articles of organization or operating agreement, obligation of member to make contribution may be compromised only by consent of all members. Notwithstanding compromise, creditor may enforce original obligation if creditor acted in reliance on that obligation before compromise. (ORS 63.180).

Share Certificates.

LLC Act does not provide for certificates evidencing member's interest in limited liability company.

Members.

Limited liability company may be formed under LLC Act with one or more members. (ORS 63.001[17]). (*Note*: federal and state income tax treatment of single-member limited liability company is unclear.)

Management.

In member-managed LLC, unless articles of organization or operating agreement provide otherwise, each member has equal rights in management and conduct of business; matters relating to business of LLC may be decided by majority of members; certain exceptions require consent of all members. In manager-managed LLC, unless articles of organization or operating agreement provide otherwise, each manager has equal rights in management and conduct of business; matters relating to business of LLC may be exclusively decided by manager, or if more than one, by majority; certain exceptions require consent of all members, and other exceptions require consent of majority of members. References in statute to managers apply to managers of manager-managed LLC and members of member-managed LLC. (ORS 63.130). Each member of member-managed LLC and each manager of manager-managed LLC is agent of LLC, and act of member or manager for apparently carrying on in usual course of business of LLC binds LLC unless member or manager so acting lacked authority and person with whom member or manager was dealing knew or had notice that member or manager lacked authority. In manager-managed LLC, member is not agent solely by reason of being member. (ORS 63.140).

Election and Removal of Managers.

Manager must be designated, elected, removed or replaced by vote, approval or consent of majority of members and holds office until successor elected and qualified, unless manager sooner resigns or is removed. (ORS 63.130).

Liability of Members and Managers.

Debts, obligations and liabilities of limited liability company, whether arising in contract, tort, or otherwise, are solely debts, obligations and liabilities of company. Member or manager is not personally liable solely by reason of being or acting as member or manager. Failure of company to observe usual limited liability company formalities or requirements relating to exercise of powers or management of business is not ground for imposing personal liability on members or managers for liabilities of company. (ORS 63.165). Members of limited liability company who are professionals as defined in 58.037(2) have same vicarious personal liability as shareholders of professional corporation pursuant to 58.187. (ORS 63.074[2]).

Duties and Standard of Conduct of Members and Managers.

Only fiduciary duties member owes to member-managed LLC and other members are duty of loyalty and duty of care. Duty of loyalty includes duty to account to company for all property, profit or benefit derived by member in conduct of company's business or from use of company's property. Member shall refrain from dealing with company in any way adverse to company and shall not represent person with interests adverse to company. Duty of care limited to refraining from grossly negligent or reckless conduct, intentional misconduct or knowing violation of law. Duties to be discharged with obligation of good faith and fair dealing. Duties not violated by conduct that furthers member's own interest. In manager-managed LLC, member who is not manager owes no duties to company or other members solely by reason of being member. Manager held to same standard of conduct prescribed for members. Operating agreement may not eliminate duty of loyalty or unreasonably reduce duty of care. (ORS 63.155).

Limitation of Liability and Indemnification.

Articles of organization or operating agreement of limited liability company may eliminate or limit liability of person who is acting or failing to act as member, manager, employee, or agent. However, no such provision shall eliminate or limit liability or provide for indemnification of member of member-managed limited liability company or manager of manager-managed limited liability company for any act or omission occurring prior to date when provision became effective and no such provision shall eliminate or limit liability of member or manager for certain specified acts or omissions. (ORS 63.160).

Principal Office.

Address of principal office must be stated in annual report. (ORS 63.787). Articles of organization must specify mailing address to which notices may be mailed until address is designated in annual report. (ORS 63.047).

Registered Agent.

Provisions are substantially identical to corresponding provisions of Oregon Act discussed above. (ORS 63.111-.121).

General Powers of Limited Liability Companies.

Unless articles of organization provide otherwise and subject to limitations of allowable purposes (see subhead Purposes, supra), each limited liability company may: (a) sue and be sued and complain and defend in all courts in its own name; (b) purchase, take, receive, lease, or otherwise acquire, own, hold, improve, use, and otherwise deal in or with real or personal property or any interest in real or personal property, wherever situated; (c) sell, convey, mortgage, pledge, create security interest in, lease, exchange or transfer, and otherwise dispose of all or any part of its property or assets; (d) purchase, take, receive, subscribe for or otherwise acquire, own, hold, vote, use, employ, sell, mortgage, lend, pledge, otherwise dispose of, and otherwise use or deal in or with other interests in or obligations of any other entity; (e) make contracts or guarantees, incur liabilities, borrow money, issue its notes or other obligations that may be convertible into other securities of limited liability company or include option to purchase other securities of limited liability company, or secure any of its obligations by mortgage or pledge of any of its property, franchises, or income; (f) lend money, invest or reinvest funds, or receive and hold real or personal property as security for repayment of funds so loaned, invested, or reinvested; (g) be promoter, incorporator, general partner, limited partner, member, associate, or manager of any partnership, joint venture, trust, or other entity; (h) conduct its business, locate offices, and exercise powers granted by LLC Act within or without this state; (i) elect or appoint managers, employees, or agents of limited liability company, define their duties, fix their compensation, and lend them money and credit; (j) make and alter operating agreement, not inconsistent with its articles of organization or with laws of this state, for managing its business and regulating its affairs; (k) pay pensions and establish pension plans, profit-sharing plans, and benefit or incentive plans for any or all of its current or former managers, members, employees, and agents; (1) make donations for public welfare or for charitable, scientific, or educational purposes; (m) transact any lawful business that will aid governmental policy; (n) indemnify member or manager or any other person as and to extent not inconsistent with provisions of LLC Act; (o) cease its activities and dissolve; and (p) have and exercise all powers and do every other act not inconsistent with law which is necessary or convenient to promote and effect any or all of purposes for which limited liability company is organized. (ORS 63.077).

Allocation of Profits and Losses.

Profits and losses are allocated among members, and among classes of members, in manner provided in articles of organization or operating agreement. (ORS 63.185). LLC Act provides default allocation provisions if neither articles of organization nor operating agreement provide for allocation. Unless articles of organization or operating agreement provide otherwise, LLC Act regulates allocations of profits or losses where one or more additional members are admitted after formation of limited liability company. (ORS 63.185).

Distributions of cash or other assets may be made before dissolution and winding up as provided in articles of organization or operating agreement. (ORS 63.195). Distributions may be made only if, after giving effect to distribution, in judgment of managers, limited liability company would be able to pay its debts as they become due in ordinary course of business and fair value of total assets of limited liability company would at least equal sum of its total liabilities plus (unless articles of organization permit otherwise) amount that would be required if limited liability company were to be dissolved at time of distribution, to satisfy any preferential rights on dissolution of its members. (ORS 63.229). See subhead Distribution of Assets Upon Dissolution, infra.

Liability for Wrongful Distributions.

Member of member-managed LLC or member or manager of manager-managed LLC who votes for or assents to distribution in violation of LLC Act, articles of organization, or operating agreement is personally liable to limited liability company for amount of wrongful distribution if it is established member or manager did not act in compliance with LLC Act. (ORS 63.235).

Operating Agreement.

Agreement of members as to affairs of limited liability company and conduct of its business. Operating agreement generally need not be written (although some provisions of LLC Act will control unless otherwise provided in writing in operating agreement). See, e.g., 63.209(1)(a), and 63.621(2).

Nature of Membership Interest.

Membership interest in limited liability company is personal property. Member is not co-owner of and has no interest in specific limited liability company property. (ORS 63.239).

Assignment of Membership Interest.

Except as provided in articles of organization or operating agreement, membership interest is assignable in whole or in part and assignment of interest does not dissolve limited liability company or entitle assignee to become or exercise any rights of member, including right to participate in management of limited liability company. (ORS 63.249). Except as otherwise provided in articles of organization or operating agreement, assignee of member's interest may become member only if all other members unanimously consent. (ORS 63.255).

Books and Records.

Requirements for maintaining records of limited liability companies and for inspection of records by members are substantially similar to corresponding provisions for business corporations under Oregon Act discussed above. (ORS 63.771-.781).

Merger.

One or more business entities may merge into limited liability company organized under c. 643 if merger permitted by statutes governing each other business entity party to merger, plan of merger approved by each entity party to merger and articles of merger filed. Limited liability company may be merged into business entity organized under laws of Oregon or under laws of another jurisdiction if: (a) merger permitted by laws of Oregon or by laws of other jurisdiction that govern other business entity; (b) plan of merger approved by each entity party to merger; (c) articles of merger filed in this state; (d) limited liability company complies with requirements imposed under laws of this state, and if applicable, laws of other jurisdiction with respect to merger. Merger plan shall set forth: (a) name and type of each business entity planning to merge; (b) name and type of business entity that will survive; (c) summary of material terms and conditions of merger; (d) manner and basis of converting ownership interests into ownership interests or obligations of surviving business entity, and (e) if any party is business entity other than LLC, any additional information required for merger by statutes governing that business entity. (ORS 63.481). Mergers with foreign LLCs also authorized. (ORS 58.045).

Dissolution.

Limited liability company is dissolved, and its affairs shall be wound up, upon first to occur of: (1) reaching time for dissolution (if any) specified in articles of organization; (2) upon occurrence of events specified in writing in articles of organization or operating agreement; (3) by vote or such other action of members as provided in writing in articles of organization or operating agreement or, if neither so provides in writing, upon written consent of all members; (4) administrative dissolution by Secretary of State; or (5) entry of judicial decree of dissolution. Except as otherwise provided in writing in articles of organization or operating agreement, limited liability company is dissolved and its affairs wind up upon death, incompetency, withdrawal, expulsion, bankruptcy, or dissolution of member, or occurrence of any other event that terminates continued membership of member, unless all remaining members consent to continue within 120 days after event. (ORS 63.621).

Effect of Dissolution; Winding Up.

Dissolved limited liability company that does not continue as described above under subhead Dissolution continues its existence but may not carry on any business other than that which is appropriate to wind up and liquidate its business and affairs. (ORS 63.637). LLC Act includes provisions for known and unknown claims against dissolved limited liability companies and enforcement of such claims substantially similar to corresponding provisions for business corporations under Oregon Act discussed above. (ORS 63.641-.645).

Distribution of Assets Upon Dissolution.

Upon winding up of limited liability company, assets shall be distributed: (1) to extent permitted by law to creditors, including members who are creditors, in satisfaction of liabilities other than liabilities for distributions to members; (2) except as provided in articles of organization or operating agreement, to members and former members in satisfaction of obligations for distributions due and owing; and (3) except as provided in articles of organization or operating agreement, to members first for return of previously unreturned contributions and thereafter in proportions in which members share profits. (ORS 63.625).

Articles of Dissolution.

At any time following dissolution of limited liability company, limited liability company may file articles of dissolution setting forth name of limited liability company and date dissolution occurred. (ORS 63.631). Filing articles of dissolution is necessary precondition to utilization of notice procedure in ORS 63.644 to bar unknown claims against limited liability company.

Foreign Limited Liability Companies.

Provisions for foreign limited liability companies are substantially similar to corresponding provisions for foreign corporations under Oregon Act discussed above. (ORS 63.701-.747).

State Taxation of Limited Liability Companies.

Limited liability company formed under LLC Act or qualified to do business as foreign limited liability company shall be classified as partnership, for Oregon income taxation purposes, unless classified otherwise for federal income tax purposes, in which case limited liability company will be classified in same manner as it is classified for federal purposes. (ORS 63.810). See category 22 Taxation.

Annual Report Filing Fee.

Domestic limited liability companies must pay annual report filing fee of $30; foreign limited liability companies must pay annual report filing fee of $220. (ORS 63.007).

2.07 [RESERVED]

2.08 PARTNERSHIPS:

Uniform Partnership Act repealed Jan. 1, 2003. (c. 68). Oregon Revised Partnership Act (ORPA) effective Jan. 1, 1998. From Jan. 1, 1998 through Dec. 31, 2002, UPA applies to existing partnerships except domestic and foreign limited liability partnerships. From Jan. 1, 1998 through Dec. 31, 2002, ORPA applies to all new partnerships, existing partnerships which elect to be governed by its provisions, and all domestic and foreign limited liability partnerships. After Jan. 1, 2003, ORPA applies to all partnerships. (c. 67).

Registration of Name.

See category 17 Intellectual Property, topic 17.01 Trademarks and Tradenames.

Actions.

See category 5 Civil Actions and Procedure, topic 5.20 Process, subhead Service Upon Particular Defendants.

Limited Partnership.

Revised Uniform Limited Partnership Act (1976) with 1985 Amendments, adopted with minor revisions. (c. 70). $40 fee for filing certificate of limited partnership. $440 registration fee for qualifying foreign limited partnership; $20 annual fee for domestic limited partnership and $220 annual fee for foreign limited partnership. (ORS 70.065).

Registered Limited Liability Partnership.

Registered limited liability partnerships ("LLPs") authorized as of Jan. 1, 1996. (c. 68). Partnership may register as LLP or foreign LLP only if it renders professional services or is affiliated with such LLP or foreign LLP and renders related or complementary services. Professional services and affiliation defined by statute. (ORS 67.500).

Liability of LLP Partner.

Except as noted below, partners of LLP not personally liable, directly or indirectly, for debts, obligations, or liabilities of LLP or any other partner, incurred by LLP while partnership is registered, solely by reason of being partner or participating in conduct of LLP business. Partner of LLP remains personally liable for obligations for which partner was liable before partnership became LLP. (ORS 67.105).

Partners of LLP have personal liability to same extent and manner as provided for professional corporation shareholders. (ORS 67.105).

Registration.

LLP must file application for registration with Secretary of State. (ORS 67.520). Fee of $40 must accompany application. (ORS 67.525). Initial registration effective for one year, renewable annually thereafter. Annual registration fee $20. (ORS 67.525).

LLP Name.

Name of LLP must contain words "registered limited liability partnership" or abbreviation "L.L.P." or "LLP" as last words or letters of name. Other name restrictions similar to those of Oregon Business Corporation Act apply. LLP may not transact business under assumed business name unless it contains words or abbreviations described above. (ORS 67.625).

Foreign LLP may apply for authorization to do business in Oregon. Provisions similar to those for foreign corporations under Oregon Business Corporation Act. See topic 2.03 Corporations. Filing fee for initial authorization application $440; fee for subsequent annual renewals $220. (ORS 67.500, 67.525).

3 BUSINESS REGULATION AND COMMERCE

3.01 BANKS AND BANKING:

Uniform Commercial Code adopted. (ORS 71.1010 et seq.). UCC Art. 2A (leases) and Art. 4A (funds transfers) adopted. See topics 3.02 Bills and Notes and 3.09 Commercial Code.

Regulated By.

Bank Act (cc. 706-716) applies to all corporations formed to receive money on deposit or conduct trust business, except that credit unions are regulated by c. 723. Banking institutions may engage in certain types of insurance agency business. (ORS 707.310). See also Sale of Checks Act (c. 717) and 705.600-.630.

Constitution forbids incorporation of any bank company or institution for purpose of issuing or putting into circulation any bill, check, certificate, promissory note or other paper, or paper of any bank company or person to circulate as money. (Const. Art. XI, § 1).

Supervision.

Department of Consumer and Business Services. (c. 705).

Branches.

May be established at any location within or without state of Oregon, subject to approval by director of Department of Consumer and Business Services.

Customer Bank Communication Terminals.

Provided for and regulated as branch banking, including cooperative CBCT's. (ORS 714.200 et seq.).

Stockholders liable to additional assessment up to par value of shares for benefit of depositors, unless bank has provided equivalent security for depositors by membership in F.D.I.C., other federal instrumentality, or otherwise. (Const., Art. XI, § 3).

Deposits.

Trust company may receive deposits of money, securities, and other personalty in trust. (ORS 709.150). On death of depositor, bank may pay deposit not exceeding $25,000 to specified relatives, or public agency, on affidavit stating relationship, time and place of death, that total deposits of deceased in all banks and trust companies in state do not exceed $25,000, and promising to pay depositor's final expenses and just debts out of deposit if necessary. (ORS 708A.430).

Unclaimed Deposits.

Deposits remaining unclaimed after six months from date of notice of bank's voluntary liquidation become abandoned property and are turned over to State for disposition under Uniform Disposition of Unclaimed Property Act as amended. (ORS 711.225, 98.302-.436). Same disposition is made of unclaimed deposits and dividend accounts remaining two years after final order of bank's involuntary liquidation. (ORS 711.590).

See category 21 Property, topic 21.01 Absentees, subhead Escheat.

Collections.

Uniform Commercial Code adopted as amended. (ORS 71.1010, et seq.).

Abandonment.

Disposition of abandoned deposits controlled by Uniform Disposition of Unclaimed Property Act as amended. (ORS 98.302-.436).

Priority of Depositors.

In case of institutional insolvency or liquidation depositors have priority claim upon assets after beneficiaries of certain pledged assets and expenses of liquidation. (ORS 711.520).

Trust companies including trust departments of banks are subject to statutory regulation (ORS 706.005[36]; c. 709) and rules applicable to other fiduciaries with respect to investments and management of property (Uniform Trustees' Powers Act, 128.003-.100). See subhead Foreign Fiduciaries, infra.

Uniform Common Trust Fund Act, as amended, adopted. (ORS 709.170).

Mutual savings banks are provided for. (c. 716).

Credit unions are provided for. (c. 723).

Private Institutions in noncorporate form are prohibited. (ORS 707.005 et seq.).

Bank Holding Companies.

Approval of director of Department of Consumer and Business Services required to become bank holding company of bank organized under Oregon law. (ORS 715.015). No company other than in-state banking institution or out-of-state banking institution may become bank holding company of Oregon bank. (ORS 715.070).

Foreign Banks.

With certain exceptions, foreign (out-of-state) and extranational institutions doing business in Oregon are subject to provisions of Bank Act and must qualify to do business in Oregon. (c. 713). In general, these requirements do not apply to foreign or extra-national institutions by reason of their engaging in business of lending money on mortgage security; such institutions may obtain certificate authorizing making of mortgage loans upon application to director of Department of Consumer and Business Services. (ORS 713.010, 713.020, 713.070). See also 705.500 et seq. for requirements applicable to foreign and extranational institutions that hold or enforce notes secured by real estate mortgages or trust deeds. Upon application to and approval by director, out-of-state banking institution may acquire Oregon chartered bank that has been engaged in business of banking for not less than three years, or bank holding company of such bank. (ORS 715.050). Out-of-state institution that acquires in-state bank by merger or purchase of assets may thereafter operate branches in-state under its out-of-state charter and may branch de novo in-state; provided such activity is authorized by laws of its home state, is approved by director, and meets certain other requirements (c. 714). Oregon has exercised option under Riegle-Neal Interstate Banking and Branching Efficiency Act of 1994 to permit interstate mergers prior to July 1, 1997. (ORS 711.017).

Foreign Fiduciaries.

Except as expressly authorized by law, foreign or extranational institution may not hold real or personal property in trust in Oregon or act as fiduciary. Permitted exceptions include (i) holding or transferring real or personal property by foreign trust company or national bank acting as trustee to secure indebtedness under terms of mortgage or security agreement filed or recorded in Oregon, (ii) investing collective investment funds consisting solely of pension or certain other tax-exempt assets by foreign trust company or national bank if state of its domicile extends reciprocal privileges to Oregon domiciled banks, (iii) engaging in trust business by corporation organized under laws of, and controlled by bank or bank holding company having principal office in, Alaska, Arizona, California, Hawaii, Idaho, Nevada, Utah, or Washington, provided such corporation obtains certificate of authority and meets certain other requirements. (ORS 713.012). See also 705.500 et seq.

Taxation of Banks.

See category 2 Business Organizations, topic 2.03 Corporations, subhead Corporate

Excise Tax.

Savings and Loan Associations.

See category 2 Business Organizations, topic 2.02 Associations.

See also topic 3.09 Commercial Code.

3.02 BILLS AND NOTES:

Uniform Commercial Code adopted. (ORS 71.1010 et seq.).

1990 Official Amendments to Art. 3 and 4 adopted, with some variations, applying to transactions entered into on or after Nov. 4, 1993. For variations, see topic 3.09 Commercial Code.

Telegraphic Checks, etc.

Checks, due bills, promissory notes, bills of exchange, and all orders or agreements made for the payment or delivery of money, or other thing of value, may be made or drawn by telegraph, and when so made, have the same effect to charge maker, drawer, indorser, or acceptor thereof, and create the same rights in favor of the payee, indorsee, acceptor, holder or bearer thereof. (ORS 165.845).

Sale of Checks.

Banking Supervisor regulates and licenses issuers and sellers of money orders, checks, and drafts. (ORS 717.010 et seq.). Applicants must show financial responsibility (ORS 717.050) and provide bond (ORS 717.070). Telegraph companies, agents of licensees, banks, trust companies, savings and loan and building and loan associations authorized to do business in state exempt from licensing statute. (ORS 717.040).

Judgment notes are not in use.

Consumer Transactions.

Holder of note given for loan made in close connection with sale of goods or motor vehicles not for commercial or business use is subject to all claims and defenses borrower has against seller notwithstanding agreement to contrary, but liability does not exceed amount owing to lender. (ORS 83.670, 83.850-.860). Restrictions on or penalty for repayment of note prior to date specified for payment in connection with loan for personal, family, or household use are enforceable only if required notice is expressly stated in note. (ORS 82.160, 82.170).

Check Drawn by Agent.

Bank, in absence of written notice to contrary, may presume that check drawn in authorized manner, including check drawn for personal order of agent, by agent authorized to draw checks on principal's account, is drawn for purpose authorized and within scope of authority conferred upon agent. (ORS 708A.440).

Check Tendered in Full Payment.

See category 5 Civil Actions and Procedure, topic 5.01 Accord and Satisfaction; see also subhead Check Payable to State, infra.

Tender to Agent of Promisee.

Payment to authorized agent of promisee discharges maker's payment obligation on note. (284 Or. 167, 585 P.2d 691). See generally category Business Organizations, topic Agency.

Check Payable to State.

Acceptance of check bearing notation of “payment in full” or similar language by state or any state agency does not preclude state from recovering full amount owing unless duly authorized officer has agreed in writing to accept check in full payment of obligation. (ORS 293.265[2]).

Dishonored Checks.

Statutory damages of $100 or triple amount of check, draft, or order that has been dishonored for lack of funds, lack of account with drawee, or because maker has stopped payment without good cause, are recoverable if written demand for payment made at least 30 days prior to commencement of action. Damages shall not exceed by more than $500 amount of check, draft, or order. (ORS 30.701).

Attorney fees to prevailing party in an action based on check dishonored for lack of funds or because payment was stopped, if plaintiff makes written demand on defendant for such amount 30 days prior to commencement of action. (ORS 30.701). Cost of collection and/or attorney fee clauses are enforceable when parties stipulate reasonable attorney's fees (269 Or. 389, 525 P.2d 135) but invalid when specific amount or percentage is stipulated (113 Or. 506, 232 P. 631). Attorney fees allowed on appeal. (ORS 30.701). Attorney fee clauses in instruments are reciprocal, so that party who successfully establishes non-liability under instrument is entitled to recover attorney fees. (ORS 20.096). Recoverable cost of collection limited to costs and disbursements specified in statute. (102 Or. App. 336, 794 P.2d 833).

See also topic 3.09 Commercial Code.

3.03 [RESERVED]

3.04 BILLS OF SALE:

See topic 3.23 Sales.

3.05 BLUE SKY LAW:

See topic 3.24 Securities.

3.06 BROKERS:

Uniform Commercial Code adopted. (ORS 71.1010 et seq.).

Real estate brokers, principal real estate brokers and real estate property managers must be licensed by Real Estate Agency, unless exempted. (ORS 696.020,.030). Real Estate Agency under control and supervision of Real Estate Commissioner. Applicant for broker's license must be 18 years of age or older, have high school diploma or General Educational Development (GED) certificate and complete educational courses and examination prescribed by agency rule; applicant for principal broker's license must also complete courses in brokerage administration and sales supervision, and have three years active experience as licensed broker or real estate salesperson. (ORS 696.022, 2009 c. 502). Real Estate Board conducts examination of applicants for licenses. Real Estate Commissioner may revoke or suspend license for stated causes. (ORS 696.301). Examination fee is $75; license fees are $230 for original license or biennial renewal. (ORS 696.270). Real Estate Commissioner may prescribe by rule terms and conditions for license recognition of nonresident broker and for reciprocity agreements with other jurisdictions. (ORS 696.265). See also category 5 Civil Actions and Procedure, topic 5.20 Process. All brokers must maintain records within state. (ORS 696.280).

Contract for real estate agent or broker services for compensation must be in writing. (ORS 41.580).

Motor vehicle (ORS 822.047) and motor carrier (ORS 767.120, 767.440) brokers regulated.

Stock and security brokers are regulated by Blue Sky Law. (See topic 3.24 Securities.) Bucketshop and other fraudulent transactions are criminal. (ORS 59.991).

Produce Brokers.

See topic 3.14 Factors.

3.07 BULK SALES:

Uniform Commercial Code bulk transfer provisions repealed. (1991, c. 83, § 1).

See category 8 Debtor and Creditor, topic 8.08 Fraudulent Sales and Conveyances.

3.08 CARRIERS:

Public Utility Commission of three members appointed by Governor, regulates rates and practices of telecommunications utilities and has power, after hearing and subject to review, to fix intrastate rates, regulate service and schedules, prescribe forms of accounts, etc. (ORS 756.010-.990). Motor carriers and railroads are regulated by State Department of Transportation. (cc. 825, 824).

Uniform Commercial Code adopted. (ORS 71.1010 et seq.). See topic 3.09 Commercial Code.

Rates.

Rates of motor carriers are subject to regulation by State Department of Transportation. (c. 825). Telecommunications utilities are subject to regulation by Public Utility Commission. (c. 759).

Discrimination, including extensive charges and preferences to particular persons or localities, rebates, etc. are prohibited. (ORS 767.410).

Limiting Liability.

Prohibitions on limiting liability of carriers. (ORS 771.010-.020). See topic 3.09 Commercial Code. (ORS 77.3090).

Bills of Lading.

See topic 3.09 Commercial Code.

Liens.

Carrier of goods has lien thereon for its charges and may retain possession until such charges are paid. (ORS 87.152). See topic 3.09 Commercial Code. (ORS 77.3070).

Motor Vehicle Carriers.

See category 23 Transportation, topic 23.01 Motor Vehicles.

3.09 COMMERCIAL CODE:

1958 Official Text of the Uniform Commercial Code was adopted in its entirety effective Sept. 1, 1963. All transactions prior to Sept. 1, 1963 to be governed by prior Oregon law. The section numbers in the 1958 Official Text were changed for integration into the Oregon Revised Statutes by adding a “7” in front of each Official Text reference and a “O” at the end. For example, Sec. 6-102 became 76.1020. Code constitutes§§ 71.1010-79.6280 of Oregon Revised Statutes.

1972 Official Revision adopted, with certain revisions and omissions.

1977 Official Amendments adopted regarding investment securities.

1987 and 1990 Official Amendments (Art. 2A—Leases) adopted with some variations.

1990 Official Amendments to Arts. 3 and 4, and conforming amendments to Art. 1, adopted with some variations, applying to transactions entered into on or after Nov. 4, 1993.

1994 Official Amendments to Art. 8 and conforming amendments to Arts. 1, 4, 5, and 9 adopted with some variations.

Variations from Official Text which are not set out under other topics include:

(Rep. 2009 c. 181).

§ 1-201(27), Delete last two sentences;

§ 1–201(37), Adopts 1987 Conformity Amendments for definition of “Security Interest”.

§ 1-201(43) does not adopt 1990 conforming amendment to Revised Art. 3.

§ 1-201(44) deletes ORS 73.3030.

§ 1-209, Optional section not adopted.

§ 2-103(1)(b), Changed to define “Livestock”. (2009 c. 181 s. 24).

§ 2-104(1) replaces “holds himself out as having knowledge or skills” with “purports to have knowledge or skill.”

§ 2-316(3)(d), Added providing that no implied warranty of freedom from disease exists in sales of livestock between merchants, excluding sale for immediate slaughter.

§ 2-318, Alternative A adopted.

§ 2-401(4), Changed to provide for passage of title to livestock transported by private, common or contract carrier on payment of draft, check, certificate of deposit or note if seller notes on brand inspection certificate. § 2-401(4) redesignated (5).

§ 2-403(2), Changed to provide that buyer of livestock pursuant to 2-401(4) has no power to transfer good title to a good faith purchaser for value if draft, check, certificate of title or note is later dishonored. § 2-403(2) redesignated (3); § 2-403(4) redesignated (5). § 2-403(5) omits reference to bulk transfer.

§ 2A-103(e) modified to retain $25,000 limit.

§ 2A-103(g)(iii)(A) and (B) 1990 amendments not adopted.

§ 2A-103(g)(iii)(C) modified as follows: “The lessor informs the lessee in writing of the identity of the supplier unless the lessee has selected the supplier and directed the lessor to purchase the goods from the supplier.”

§ 2A-103(g)(iii)(D) modified as follows: “The lessor informs the lessee in writing that the lessee may have rights under the contract evidencing the lessor's purchase of the goods and the lessor advises the lessee in writing to contact the supplier for a description of any such rights; or”.

§ 2A-103(g)(iii)(E) modified as follows: “The lease contract discloses all warranties and other rights provided to the lessee by the lessor and supplier in connection with the lease contract and informs the lessee that there are no warranties or other rights provided to the lessee by the lessor and supplier other than those disclosed in the lease contract.”

§ 2A-106(1) added “The lessee or lessor resides”.

§ 2A-108(2) deleted.

§ 2A-108(3) modified to state “(2) When it is claimed or appears to the court that the lease contract or any clause thereof may be unconscionable, the party shall be afforded a reasonable opportunity to present evidence as to its commercial setting, purpose and effect to aid the court in making the determination.”

§ 2A-108(4) deleted.

§ 2A-109(2) deleted.

§ 2A-216 alternative A adopted.

§ 2A-504(1) added “a provision in the lease agreement which states that damages in the event of the lessee's default and the lessor's sale of the goods include, in addition to costs payable to third parties, any past-due amounts plus the sum of the present value of future rentals, the lessor's costs of enforcing the lease, the lessor's reasonably predictable residual at expiration, reasonable compensation for any loss of tax benefits, or an equivalent amount, and any other damages suffered or to be suffered by the lessor because of the lessee's default, less the net proceeds of sale, is reasonable.”

§ 2A-506(1) modified as follows: “the parties may reduce the period of limitation to not less than two years.”

§ 2A-507, 1990 amendment not adopted.

§ 2A-511(2) omits section references.

§ 2A-512(1)(c) renumbered as 2A-512(2) and modified to state: “If the lessee complies with subsection (1) of this section, the lessee has no further obligations with regards to goods rightfully rejected.”

§ 2A-512(2) renumbered to 2A-512(3).

§ 2A-516(3)(b) omits section references.

§ 2A-516(5) omits section references.

§ 2A-524, 1990 amendment not adopted.

§ 2A-529(5), 1990 amendment not adopted.

§ 3-112(3) added to read:

"(3) Nothing in subsection (1)(a) of this section shall affect any right of a holder of a check, draft or order that has been dishonored by nonacceptance or nonpayment:

(a) To collect interest on the debt or obligation for which the check, draft or order was given, pursuant to ORS 82.010; or

(b) To exercise the remedies for dishonor of the check, draft or order provided in ORS 30.700."

§ 3-118(3) modified to read six years instead of three years.

§ 3-118(4) modified to read six years instead of three years.

§ 3-118(5) deletes "and the maker is not required to pay before that date."

§ 3-118(7) modified to read that "an action for any of the following must be commenced within six years after the claim for relief accrues."

§ 3-118(8) added: "The circumstances under which the running of a limitation period may be tolled shall be determined by other law."

§ 3-312, nonuniform provision dealing with testament of lost, destroyed or stolen cashier's check, teller's check or certified check, adopted.

§ 3-403(1) modified to read "or takes it for value or for collection."

§ 3-414(5) deletes "A disclaimer of the liability stated in X in subsection (6) is not effective if the draft is a check."

§ 3-416(4) substitutes "claim for relief" for bracketed material.

§ 3-417(6) substitutes "claim for relief" for bracketed material.

§ 4-101, 1990 Official Amendment not adopted

§ 4-104(c) modified to also read "Banking day" does not include Sat., Sun. or bank holiday listed in 707.430.

§ 4-106, Alternative B adopted.

§ 4-107 substitutes "bank" for "branch."

§ 4-109 substitutes "Uniform Commercial Code" for bracketed material.

§ 4-111 substitutes "claim for relief" for bracketed material.

§ 4-203 modified to include statutory references to Art. 3 and Art. 4.

§ 4-302(a) modified to add "Pursuant to ORS 74.2070(1)."

§ 4-406 changes “one year” to “180 days” and adds following after “any alteration on”: “the face or the back of the item or does not within 18 months from that time discover and report any unauthorized endorsement on the item.”

§ 4A-305(e) modified to read “The court may award reasonable attorney fees to the prevailing party in an action to recover amounts under this section.”

§ 4A-404(b) last sentence is modified to read “The court may award reasonable attorney fees to the prevailing party in an action to recover interest owing by reason of the provisions of this subsection.”

§ 5-104(4), Added to exclude coverage of Article 5 from most letters of credit subject to Uniform Customs and Practice for Commercial Documentary Credits.

§ 5-112(1), Optional language omitted.

§ 5-114(2)(a) substitutes “protected” for “bona fide”.

§ 5-114(4), (5) Optional subsections omitted.

Article 6 (bulk transfers) repealed.

§ 7-204(4), Subsection reads: “This section does not modify or repeal any existing law or rule of law that imposes a higher responsibility upon the warehouse or invalidates a contractual limitation that would be permissible under ORS §§ 77.1010 to 77.6040 [Article 7 of the UCC].”. (2009 c. 181).

§ 7-209(3), Subsection reads: ``(3) A warehouseman's lien for charges and expenses under subsection (1) or a security interest under subsection (2) is also effective against any person that so entrusted the bailor with possession of the goods that pledge of them by the bailor to a good-faith purchaser for value would have been valid. However, the lien or security interest is not effective against a person that before issuance of a document of title had a legal interest or perfected security interest in the goods and that did not: (a) deliver or entrust the goods or any document of title covering the goods to the bailor or the bailor's nominee with; (A) Actual or apparent authority to ship, store or sell; (B) Power to obtain delivery under ORS 77.4030; or (C) Power of disposition under ORS 72.4030, 72A.3040(2), 72A.3050(2), 79.0320 or 79.0321(3) or other statute or rule of law; or (b) Acquiesce in the procurement by the bailor or its nominee of any document''. (2009 c. 181).

§ 7-210(2)(b), Omitted “or certified.”

§ 7-403(1)(b), Optional language adopted.

Art. 9 repealed, Revised Art. 9 adopted effective July 1, 2001. (2001, c. 445). Variations from Official Text include:

§ 9-102(1)(e), agricultural services liens (ORS 87.226), agricultural producer liens (ORS 87.700-.740) and grain producer liens (ORS 87.750-777) excluded from definition of “agricultural lien”;

§ 9-335, priority given to security interest in accession if purchase money security interest and perfected not more than 20 days after debtor received possession;

§ 9-406 substantially rewritten. Ineffectiveness of agreement terms restricting assignment extended to statutes and other laws, but only as to accounts and chattel paper.

Neither restriction applies to workers compensation claims as described in 26 U.S.C. 104(a)(2), claims to benefits under Special Needs Trusts as described in 42 U.S.C. 1396p(d)(4), claims to benefits under annuity policies to extent permitted by 743.049, personal injury claims as described in U.S.C. 104(a)(2) provided that transaction constitutes sale of claim. Statutes and other laws restriction does not apply to claims for Crime Victims Compensation (ORS 147.325), Workers Compensation (ORS 656.234) or Oregon Lottery Prizes (ORS 461.250) to extent those statutes inconsistent. Section prevails over inconsistent present or future statute unless expressly referred to and overridden;

§ 9-506, new section added dealing with possible change in filing office search logic. If new search logic would not disclose statement found with old search logic, statement nevertheless effective except as against purchaser who gives value in reasonable reliance on search using new logic;

§ 9-515, current nonuniform provision requiring Secretary of State to send secured parties renewal notices between three and six months before financing statement or continuation expires continued under Revised Art. 9;

§ 9-516, some rejection provisions apply only to filings with Secretary of State;

§ 9-519, timeliness provision expanded to four business days for filings received by mail. File number and timeliness provisions apply only to filings with Secretary of State;

§ 9-520, time for communication concerning refusal to accept record for filing expanded to four business days for filings received by mail. Timeliness provision applies only to filings with Secretary of State.

§ 9-523, responses to requests for information may indicate state of record up to five days prior to receipt of request. Time for communication expanded to four business days for filings received by mail. Timeliness provision applies only to filings with Secretary of State;

§ 9-525, fees, $10 for filing, $10 for response to request for information for each distinct debtor name to be searched plus $5 for each copy of UCC documents;

§ 9-620(f), secured party who has taken possession of collateral has 180 days to dispose of it;

§ 9-625(c), minimum damages $1,000; attorney's fees may be awarded; only individual actions may be brought.

§ 10-101, Not adopted as part of Oregon Revised Statutes but language included in enacting legislation. (§ 428, c. 726, OL 1961).

§ 10-102, Not adopted as part of Oregon Revised Statutes but specific repealer and transition provisions included in enacting legislation. (§ 427, 1961 c. 726).

§ 10-103, Section omitted.

§ 10-104, Included as ORS 77.604. Optional subsection (2) not adopted.

§§ 11-101 through 11-108 inclusive not adopted.

For additional variations see topics 3.01 Banks and Banking, Bills and Notes, Sales, Securities, Warehousemen; category 8 Debtor and Creditor, topic 8.08 Fraudulent Sales and Conveyances.

Security interests in motor vehicles covered under 481.410,.412.

The following options and alternatives in the 1962 Official Text have been exercised: § 5-112(1), optional clause omitted; § 5-114, optional subsections omitted; § 7-403(1)(b), optional clause adopted: § 10-104, (2), optional subsection omitted.

1977 Official Amendments adopted regarding investment securities.

1987 Official Amendments (Article 2A-Leases) adopted with some variations and became effective Sept. 1, 1991, and applies to transactions on or after effective date.

Filing Fees.

See category 10 Documents and Records, topic 10.04 Records, subhead Filing Under Uniform Commercial Code.

Forms.

Forms in format of 1999 revision to Article 9 may not be refused by filing office. (ORS 79.0521). See Part VI Appendix, Uniform and Model Acts, Commercial Code Amendments, UCC Financing Statement.

See also topics 3.01 Banks and Banking, Bills and Notes, Brokers, Carriers, Factors, Frauds, Statute of, Sales, Securities, Warehousemen; categories 2 Business Organizations, topic Corporations; Civil Actions and Procedure, topic Limitation of Actions; Debtor and Creditor, topics Assignments, Fraudulent Sales and Conveyances, Liens, Pledges; Documents and Records, topics Records, subhead Filing Under Uniform Commercial Code, Seals; Mortgages, topic Chattel Mortgages; Transportation, topic Motor Vehicles.

3.103.11

3.12 CONSUMER PROTECTION:

Retail Installment Contracts.

Printed portion of some contracts for retail installment sale of goods or services must be in at least eight-point type and must contain, inter alia, specific itemization of price and service charge. (ORS 83.020-.030). In these contracts acknowledgment by buyer of receipt of copy of contract must be in at least ten-point bold type, and if acknowledgment is contained in contract it must appear directly above buyer's signature. (ORS 83.070). Seller must notify buyer of service charge and buyer's right to prepay total unpaid balance, and seller must supply buyer with periodic statements of buyer's account. (ORS 83.080). Provisions of retail charge agreement by which buyer agrees not to assert claim or defense arising out of sale against seller or assignee, or which call for wage assignment, are invalid. (ORS 83.150). Buyer cannot waive any provisions of statute or remedies granted by law. (ORS 83.160). If retail installment contract for purchase of motor vehicle meets requirements of 83.510 to 83.680 and contains information required by federal law, it must be accepted for consideration by any lender. (ORS 83.635).

Printed portion of retail installment contract for sale of motor vehicle or mobile home must be in at least eight-point type, with following three exceptions which require ten-point bold type (ORS 83.520): (a) Both at top of contract and directly above buyer's signature words “Retail Installment Contract”; (b) specific statement that liability insurance coverage for bodily injury and property damage caused to others is not included, if that is the case; and (c) this notice:

NOTICE TO THE BUYER

Do not sign this contract before you read it or if it contains any blank space, except that if delivery of the vehicle is to be made to you after this contract is signed, the serial number or other identifying information and the due date of the first installment may be filled in at the time of delivery and name of financing agency may be inserted in contract on or about date that name of financing agency is known, if not known at time of contract execution. (ORS 83.565[2][d]).

You are entitled to a copy of this contract.

You have the right to pay off in advance the full amount due and to obtain a partial refund of the finance charge.

In absence of bona fide error, if seller fails to comply with requirements for retail installment contracts seller is subject to fine and is unable to collect under the contract the finance, service, delinquency, collection or refinancing charges or official fees. (ORS 83.170, 83.990).

Retail contract for sale or lease of motor vehicles on any form of credit or consumer goods or service on credit and evidence of buyer's indebtedness must have words “consumer paper” printed on face. Such papers are not negotiable instruments under UCC. (ORS 83.820[1]). Even absent such wording, assignee of motor vehicle dealer, seller or lessor subject to all claims or defenses of buyer or lessee and agreement to contrary of no force. Such assignee's liability not to exceed amount owing assignee at time claim or defense asserted. These restrictions do not apply to instruments owned, guaranteed or insured by state or federal governmental agency. (ORS 83.820[2]). Assignee of “consumer paper” making good faith enforcement of security interest not liable for punitive damages for wrongful repossession. (ORS 83.820 [3]). No deficiency judgment after repossession (or voluntary surrender) if unpaid time balance or time sale price less than $1,250, but damages may be obtained for wrongful damage to property. (ORS 83.830[1][a]). No repossession following judgment for unpaid balance less than $1,250. (ORS 83.830[1][c]). If repossession (or voluntary surrender) and unpaid time balance or time sale price $1,250 or more, action must be brought to recover deficiency within 180 days of repossession (or voluntary surrender) or 75 days of disposition, whichever is earlier, for goods other than mobile homes, and within one year of repossession (or voluntary surrender) or 75 days of disposition, whichever is earlier, for mobile homes. (ORS 83.830[1][b]).

Notwithstanding contrary agreement, lender (or holder of instrument negotiated by lender) who makes loan in close connection with sale of consumer goods, including motor vehicle, is subject to claims and defenses which borrower, as buyer, has against seller arising out of sale, not exceeding amount owing exclusive of unearned interest. (ORS 83.860). Loan is in close connection with sale if lender and seller are related or under common control, one controls other, lender compensates seller for referring borrower, seller directly and materially assists borrower in obtaining loan, lender supplies loan documents to seller, or seller prepares loan documents. (ORS 83.850[4]). Similar provision for lease of motor vehicle. (ORS 83.850[5]). Extension of credit on credit card issued by lender is not in close connection with such sale unless card is issued contemporaneously with extension of credit. (ORS 83.850[6]).

Warranties.

Disclaimer of manufacturer's implied warranties of merchantability and fitness or of retailer's or distributor's implied warranties of fitness for consumer goods must be conspicuous writing attached to goods and must inform buyer before sale, in simple language, that: (a) Good is sold “as is” or “with all faults”; (b) buyer bears entire risk of quality and performance; and (c) buyer assumes entire cost of any service or repair for defective goods. (ORS 72.8050). Manufacturers who make express warranties must maintain service facilities in Oregon. (ORS 72.8100). If manufacturer does not maintain service facilities in Oregon, consumer may seek replacement, repair or restitution from retailer in accordance with warranty (ORS 72.8110), who then has rights against manufacturer (ORS 72.8130).

Unlawful Trade Practices.

Broadly defined as any unconscionable tactic relating to sale or rental of real estate, goods or services to consumer, failing to deliver all or part of goods as promised, or running unlawful collection agency under ORS 646.639 (ORS 646.607, 2009 c. 60) or any per se violation by virtue of conduct enumerated in 646.608(1). Civil actions in many instances may be commenced to recover actual damages or statutory damages of $200, whichever is greater, punitive damages and equitable relief. (ORS 646.638, 2009 c. 552). State also has investigatory powers (ORS 646.618) and may seek injunction and attorney fees and if assurance of voluntary compliance provides for payment of money and such amount is not paid, assurance of voluntary compliance may be entered as judgment in favor of State (ORS 646.632). Court may award reasonable attorney fees to prevailing party in actions alleging unlawful trade practices. (ORS 646.632,.638). Court may not award reasonable attorney fees to prevailing defendant in unlawful trade practice action if action is maintained as class action pursuant to ORCP 32. (ORS 646.638[4]). Unlawful to organize or attempt to induce membership in pyramid club. (ORS 646.608[1][r];.609).

Lease-Purchase Agreements (“Rent-to-own”).

Applies to certain agreements for use of personal property by individual for personal, family or household purposes with exception of motor vehicle lease. (ORS 646.247[2][d]). Lessor required to make specified disclosures in writing at or before consummation of agreement (ORS 646.249,.251). Limitations on what agreement may contain. Consumer has specified reinstatement rights. (ORS 646.245-.259).

Health Spas.

Required to provide written price lists to prospective buyers (ORS 646.666), and written contracts including information about services, spa rules, duration of contract, cancellation provisions, and following provision: (ORS 646.671,.676).

BUYER'S RIGHT TO CANCEL

If you wish to cancel this contract, without penalty, you may cancel it by delivering or mailing a written notice to the health spa. The notice must say that you do not wish to be bound by the contract and must be delivered or mailed before midnight of the third business day after you sign this contract. The notice must be mailed to ____ (insert name and mailing address of health spa). If you cancel within the three days, the health spa will return to you within 15 days all amounts you have paid. (ORS 646.671,.676).

____

Upon cancellation, buyer entitled to pro rata refund. (ORS 646.671[6]). Waiver of buyer's rights is void. (ORS 646.686).

Home Solicitation Sales.

Telephone or door to door solicitation: seller must identify himself, whom he represents and purpose of call, provide description of goods or services offered and inquire whether person is interested in listening to sales presentation, within first 30 seconds. During course of presentation seller must state total cost of goods or services offered and number, timing and amount of any installment payments. (ORS 646.611). Certain telephonic sellers required to register under business name with Department of Justice. (ORS 646.551-557). Prohibits telephone solicitations where telephone number included on list published by administrator of telephone solicitation program. (ORS 646.569). Provides for discontinuance notice to sender of unsolicited fax material regarding sale of realty, goods, or services. (ORS 646A.360). Provides for written notice of buyer's right to cancel home solicitation sale until midnight of third business day after transaction. (ORS 83.720,.730). Seller must obtain buyer's signature on written agreement or offer to purchase which designates date buyer actually signed and contains in ten-point type or larger. (ORS 83.730):

NOTICE OF BUYER'S RIGHT TO CANCEL

(1) (Date) You, the buyer, may cancel this agreement without any penalty, cancellation fee or other financial obligation by mailing or delivering a notice to the seller within THREE BUSINESS DAYS from the above date.

(2) If you cancel:

(a) Any property you traded in, any payments you made under the sales contract and any checks or notes you signed will be returned within 10 business days following receipt by the seller of your notice of cancellation. Any security interest that arises from the transaction will be cancelled.

(b) You may either make available to the seller at your residence, in substantially as good condition as when received, any goods delivered to you under the sales contract or you may comply with the seller's instructions regarding the return shipment of the goods at the seller's expense and risk.

(c) If you make the goods available to the seller at your residence and the seller does not pick up the goods within 20 days of the date of your notice of cancellation, you may keep or discard the goods without further obligation.

(d) If you do not make the goods available to the seller, or if you agree to return the goods to the seller and you do not return the goods, you must perform all of your obligations under the sales contract.

(3) To cancel this transaction, mail or deliver a signed and dated copy of this notice or other written expression of your intention to cancel, or send a telegram, to (name of seller) at (address of seller's place of business) not later than 12 midnight on (date), the third business day after you signed the written agreement or offer to purchase.

I HEREBY CANCEL THIS TRANSACTION

____________________ __________

(Signature of buyer) (Date)

Until the seller has complied with this section the buyer may cancel the home solicitation sale by notifying the seller in any manner and by any means of intention to cancel.

(ORS 83.730[5]). Sale made by telephone solicitation requires signed, written contract containing statutory provisions to be binding. (ORS 83.715).

Credit Card Solicitations.

Certain disclosures required. (ORS 646A.220-232).

Credit Services Organizations.

Prohibits certain conduct of salespersons, agents, representatives, or independent contractors who sell or attempt to sell services of credit services organization. Requires registration and bonding with Department of Consumer and Business Services. Written disclosure statement required before any agreement is signed or money is paid by consumer. (ORS 646.380-.396).

Lemon Laws.

Consumer remedies to enforce express warranties on new motor vehicles within one year of delivery or 12,000 miles, whichever is earlier. (ORS 646.315-.375).

Odometer Offenses.

Tampering with motor vehicle odometer is illegal (ORS 815.410[1]), and purchaser may bring action against tamperer for $1,500 or treble actual damage caused, whichever is greater. Court may award reasonable attorney fees to prevailing party in action alleging odometer tampering. (ORS 815.410[3]).

Uniform Deceptive Trade Practices Act.

Main provisions adopted (ORS 646.605-.656), with significant variations and omissions. Court may award reasonable attorney fees to prevailing party in action alleging unlawful trade practices or unlawful debt collection practices. (ORS 646.632,.638,.641,.642). Court may not award reasonable attorney fees to prevailing defendant in unlawful trade practice action if action is maintained as class action pursuant to ORCP 32. (ORS 646.638[4]).

Uniform Trade Secrets Act.

Adopted. (ORS 646.461-.475).

Price Comparison.

Unlawful to include price comparison in advertisement unless origin of compared price is identified clearly and conspicuously. (ORS 646.881-.885).

Time-price doctrine codified, and sales in which there is both cash price and time sale price are not loans despite transfer to third parties. (ORS 83.880,.885). However, sellers intending to sell consumer contracts must place statutory notice so informing consumer on contract. (ORS 83.890).

Unlawful Debt Collection Practice.

To use or threaten force, threaten criminal proceeding, threaten any other procedure not in fact available (including penalties, fees, costs, interest), threaten seizure without revealing any required court procedure, use abusive language, act with intent to harass by contacting repeatedly or at inconvenient times, contact employer, make more than necessary and limited contact at place of employment, fail to identify name, affiliation and purpose immediately upon contacting debtor or simulate use of legal documents (ORS 646.639), subjects one to liability for damages or $200 whichever greater, punitive damages and attorney fees (ORS 646.641). Court may award reasonable attorney fees to prevailing party in action alleging unlawful debt collection practices. (ORS 646.641[2]). One year statute of limitations. (ORS 646.641[3]). Debt collector subject to and in compliance with Federal Fair Debt Collection Practices Act deemed in compliance with 646.639. (ORS 646.643).

Plain language statutes apply to forms authorizing disclosure of personal or privileged information about individual in connection with insurance transaction (ORS 746.630) and set standards for readability for life and health insurance policies (ORS 743.100 through 743.109).

Procedures available for review of certain consumer contracts by various governmental departments and agencies at request of seller or lender for certification that contract uses plain language. Fact of certification can be stated in contract, but has no effect on contract's legality and cannot be used in action to enforce or interpret such contract. (ORS 180.540-.555). Prearranged funeral contracts are required to comply with standards of plain language statute. (ORS 128.421[3][a]).

See also topics 3.19 Interest, Sales; categories 20 Mortgages, topic Chattel Mortgages; Transportation, topic Motor Vehicles.

3.13 CONTRACTS:

Uniform Commercial Code adopted, including Article 2A-Leases. (ORS 71.1010 et seq.).

See also topics 3.09 Commercial Code, Consumer Protection, Frauds, Statute of, Sales; categories 10 Documents and Records, topic Seals; Family, topics Husband and Wife, Infants.

3.14 FACTORS:

Uniform Commercial Code adopted. (ORS 71.1010 et seq.).

License Requirements.

Brokers, commission merchants, credit buyers, cash buyers and agents dealing in farm produce, and wholesale and retail farm produce peddlers must be licensed and are subject to regulation by State Department of Agriculture. (ORS 585.010-.220, 585.990).

Liens, Consignment Agreements.

Oregon recognizes common law factor's possessory lien which, within equitable limits, may be transferred. (291 Or. 420, 631 P.2d 1355). There is no statutory factor's lien nor special provision for filing or recording to protect rights of consignor, factor or commission merchant except under Commercial Code.

Real Estate and Security Brokers.

See topic 3.06 Brokers.

See also topics 3.06 Brokers, 3.09 Commercial Code, 3.24 Securities.

3.15 FRANCHISES:

General.

Supervision.

Director of Department of Consumer and Business Services, Salem, Oregon, administers

c. 650, which regulates franchise transactions.

Uniform Act.

Oregon has not adopted Uniform Franchise and Business Opportunities Act.

Disclosure Statement.

Franchisor must provide disclosure statement and all proposed agreements to prospective franchisees at least ten business days before earlier of date prospective franchisee executes any agreements or pays or is required to pay franchisor any consideration. (441-325-020[2]). See 441-325-020(1) for permitted forms of disclosure statement. Offer or sale of franchise exempt from presale disclosure requirements if Federal exemption from disclosure statement delivery available or if offer or sale is renewal, extension, or amendment; is of additional franchise to existing franchisee and certain conditions satisfied; is by court appointed fiduciary or order; or is isolated transaction and franchisor not involved and certain conditions satisfied.

Relation to Securities Law.

If part of franchise offering is security, franchisor must also comply with Oregon Securities Law. (441-325-050). See also topic 3.24 Securities.

Liability for Damages.

Franchisee may obtain rescission damages if seller engaged in fraud or made material misrepresentation or omission, or fails to provide timely disclosure statement and agreement, subject to affirmative defense of franchisee's knowledge. Three-year statute of limitations. Attorney fees to prevailing party except in class actions. (ORS 650.020 [1],[2],[3],[5]; 441-325-020[4]).

Persons Liable.

Partners, officers, directors, and control persons of franchisor and persons who participate or materially aid in sale have joint and several liability with franchisor, except for non-seller without actual or constructive knowledge. (ORS 650.050 [4]).

Rights of Indemnification and Contribution.

Corporation has right of indemnification against executive officers, directors and control persons who are willful violators. Liable persons have right of contribution, except willful violator has no right against negligent violator, and executive officers, directors, and control persons have no right against corporation. (ORS 650.020 [6]).

Records and Filings.

Franchisor must maintain records of Oregon sales and disposition of proceeds. Reports must be filed as required by Director. (ORS 650.010). See 650.015 regarding when offer or sale made in Oregon.

Exemption.

Offer or sale by franchisee (or subfranchisor of entire area franchise) for own account exempt from c. 650 if franchisor not involved. (441-325-040).

Motor Vehicle Dealerships.

Prohibited Conduct.

Subject to limited exceptions, manufacturer, distributor, or importer may not require dealer to accept non-ordered product; coerce dealer to enter agreement or sales promotion program with threat to cancel franchise; refuse or fail to deliver new vehicle products covered by franchise if advertised as available or delivered to another dealer; prevent reasonable changes in dealer capital structure or financing; unreasonably prevent transfer; unreasonably fail to permit dealer's heir or devisee to succeed to dealership; unreasonably refuse to compensate dealer for delivery, preparation, and warranty work required by franchise; or coerce dealer to participate monetarily in advertising program or purchase promotional or display materials at dealer's expense. (ORS 650.130). Franchisor may not require franchisee to waive jury trial; prevent franchisee from bringing action in otherwise available forum; or, prior to dispute, require arbitration or other alternative resolution procedures. (ORS 650.165).

Termination of Franchise.

Manufacturer, distributor, or importer may not terminate or refuse to continue franchise without good cause; must give 60 days' written notice stating specific reasons (30 days if for specified causes). If franchise terminated and another in same market area is retained, manufacturer, distributor or importer must provide specific reasons why dealer's franchise was terminated and other retained. (650.140, 2009 c. 627). Dealer must protest by filing complaint in notice period. (ORS 650.140). If franchise terminated, dealer entitled to fair and reasonable compensation (as defined) for specified inventory and equipment acquired from manufacturer, distributor, or importer. Contractual rights of setoff preserved. Unless dealer terminates, if dealer's established place of business used for sales or service under franchise, dealer entitled to current, fair rental value for lesser of one year or remaining lease period, subject to duty to mitigate. (ORS 650.145).

New and Relocated Dealerships; Replacement Dealers.

Manufacturer, distributor, or importer or successor in interest must give specified dealers or former dealers 60 days' written notice prior to franchising additional, or authorizing relocation of existing, dealership of same line-make in relevant market area, except for relocation within three miles of existing site. Dealer or former dealer may enjoin for good cause (including enjoining franchise of replacement dealer if franchising occurs after one year following end of former franchise) by filing complaint within 60 days of receipt of notice. (ORS 650.150, 2009 c. 627). Replacement dealer is person who buys, sells or exchanges new vehicles under franchise at dealership where former dealer was franchised by same manufacturer, distributor, or importer or predecessor in interest. (ORS 650.120[16] 2009 c. 627).

Predelivery Preparation and Warranty Work.

Manufacturer, distributor, or importer must specify dealer predelivery preparation and warranty work obligations and provide schedule of compensation and time allowances. Hourly rate must be no less than dealer's rate to non-warranty customers. Reimbursement for parts (except for motor home living facilities) is amount dealer charges non-warranty customers if not unreasonable. Claims must be approved or disapproved within 30 days after receipt and paid within 30 days after approval or receipt of claim without specific written disapproval. Written notice of grounds for disapproval required. Manufacturer, distributor, or importer may reserve two-year right to audit and charge back false, fraudulent, unsubstantiated, or improperly submitted claims. (ORS 650.158[1],[2],[4]).

Recalls.

Manufacturer, distributor, or importer must include in written notices of recall expected availability date of parts and equipment and must adequately compensate dealer for recall repair services. (ORS 650.153[3]).

Damage to New Motor Vehicles.

Manufacturer liable for damage to new vehicle before delivery to carrier. If vehicle damaged in transit, dealer must notify manufacturer within prescribed period and request authorization to replace or repair. If timely authorization not given, ownership reverts to manufacturer and dealer released. Manufacturer must give dealer written disclosure at time of delivery of damages and post-manufacturing repairs. If value of repairs exceeds specified amount, manufacturer must repurchase or provide adequate compensation to assist in sale or disposition, unless dealer has not complied with contract regarding damaged vehicles. Repurchase by manufacturer releases dealer. Dealer must give written disclosure of damage and repair to purchaser prior to sale if damage exceeds specified amount. (ORS 652.155).

Dealer's Remedy.

Dealer may enjoin illegal conduct. Courts may award actual damages. Attorney fees to prevailing party except in class actions. Two-year statute of limitations. (ORS 650.170). Violations of 650.140 and.150 may constitute irreparable injury for temporary restraining order. (ORS 650.167).

Motor Fuel Franchises.

Prohibited Conduct.

Franchisors may not require unreasonable minimum sales; alter franchise premises (except with consent or as required by law); interfere with franchisee's right to counsel or to participate in trade associations; set franchisee's sales price; except for initial inventory, require purchases or leases from franchisor or approved sources unless reasonably necessary for lawful purpose and justified on business grounds, and no substantial effect on competition; charge price not set in good faith; require release of liability; refuse to renew franchise without fair compensation for certain items of resalable property purchased from franchisor; or impose unreasonable standard of conduct. (ORS 650.205[1],[2],[3] and[4] and 650.210).

Credit Cards.

650.205 [5] regulates acceptance of franchisor's credit cards and chargebacks.

Transfer of Franchise.

Franchisor may not unreasonably withhold consent to transfer to qualified party, but can require transferee not prior franchisee of franchisor to accept trial franchise. (ORS 650.220). Franchisee may transfer franchise to controlled corporation if franchisee guarantees performance. Franchisor may require corporation to assume franchisee's obligations and franchisee to maintain controlling interest and actively operate marketing premises. (ORS 650.230).

Death of Franchisee.

If marketing premises leased, franchisor must enter into new franchise with decedent's designee on terms extended to other franchisees if designee meets qualifications then required for franchisees and, within ten days of death, designee enters into new franchise on generally extended terms, except no change in rent during part of new lease equal to unexpired part of prior lease. Until designee enters into new franchise, franchisor may possess and operate marketing premises for own account. (ORS 650.225).

Hours of Operation.

Franchisor may not require operation of service station in excess of 16 hours a day as condition of renewal, subject to specified exceptions. (ORS 650.235).

Good Faith.

Franchisee and franchisor subject to principle of good faith. (ORS 650.245).

Relief.

Franchisee may seek damages or injunction. Court may award attorney fees and costs. Four-year statute of limitations. (ORS 650.250).

3.16 FRAUDS, STATUTE OF:

Uniform Commercial Code adopted. (ORS 71.1010 et seq.).

In following cases an agreement is void unless same or some note or memorandum thereof, expressing consideration, be in writing and subscribed by party to be charged, or by his lawfully authorized agent; evidence therefore of agreement may not be received other than the writing, or secondary evidence of its contents, in cases prescribed by law: (1) An agreement that by its terms is not to be performed within one year from making thereof; (2) an agreement to answer for debt, default or miscarriage of another; (3) an agreement by an executor or administrator to pay debts of his testator or intestate out of his own estate; (4) an agreement made upon consideration of marriage other than mutual promise to marry; (5) an agreement for leasing for a longer period than one year, or for sale of real property, or of any interest therein; (6) an agreement concerning real property made by an agent of party sought to be charged, unless authority of agent be in writing; (7) all agreements authorizing or employing an agent or broker to sell or purchase real estate for a compensation or commission; (8) agreement to lend money, extend credit, or forbear payment, to modify terms of such agreement, or to release guarantor or cosigner, if party is financial institution, consumer finance company, or mortgage banker, as defined by statutes. (ORS 41.580, 93.020).

Loan or credit document, or document identifying loan or extension of credit, if made by financial institution, consumer finance company, or mortgage banker, must contain underlined or at least 10-point bold type statement substantially to following effect:

"Under Oregon law, most agreements, promises, and commitments made by us after October 3, 1989, concerning loans and other credit extensions which are not for personal, family or household purposes or secured solely by the borrower's residence must be in writing, express consideration, and be signed by us to be enforceable."

Other requirements pertain if financial institution, consumer finance company, or mortgage banker is to invoke statute of frauds defense. (ORS 41.580).

Grubstaking contracts must be in writing. (ORS 517.110).

Creation of Trust.

See category 13 Estates and Trusts, topic 13.15 Trusts.

Revival of Barred Claims.

See category 5 Civil Actions and Procedure, topic 5.16 Limitation of Actions.

Ratification of Contract by Minor.

See category 14 Family, topic 14.10 Infants.

Part Performance.

Oral contracts may in equity be taken out of statute by part performance. (207 Or. 514, 298 P.2d 177).

See also topic 3.09 Commercial Code.

3.17 [RESERVED]

3.18 INFORMATION TECHNOLOGY, INTERNET AND NEW MEDIA:

Criminal Law.

Computer Crimes.

Person who knowingly accesses, attempts to access or uses, attempts to use, any computer, computer system, computer network or any part thereof for purpose of: (a) devising or executing scheme or artifice to defraud; (b) obtaining money, property or services by means of false pretenses, representations or promises; or (c) committing theft, including, but not limited to, theft of proprietary information commits Class C felony. (ORS 164.377[2]). Person who knowingly and without authorization alters, damages or destroys computer, computer system, computer network, or any computer software, program, documentation or data contained in such computer, system, or network commits Class C felony. (ORS 167.377[3]). Person who knowingly and without authorization uses, accesses or attempts to access any computer, computer system, computer network, or any computer software, program, documentation or data contained in such computer, system, or network commits Class A misdemeanor. (ORS 164.377[4]).

Criminal Harassment.

Person who intentionally subjects another to alarm by conveying electronic threat to inflict serious physical injury on that person, or to commit felony involving that person or property of that person or any member of that person's family commits Class B misdemeanor. (ORS 166.065[1]). Person criminally liable for harassment if person knowingly permits any electronic device under person's control to be used in violation of 166.065(1). (ORS 166.065[2]).

Internet Gambling.

Regulated by 167.109-167.117.

Electronic Commerce General Policy.

Oregon Economic and Community Development Commission shall develop and maintain economic development policy that implements strategy declared in ORS 285A.020. (ORS 285A.045).

Electronic Communications.

See generally Uniform Electronic Transactions Act. (ORS 84.001-84.061).

Property Tax Exemption.

Enterprise zone designated for electronic commerce eligible for property tax exemption under 285C.050,.175. (ORS 285C.180).

Public Body.

Where not prohibited by other law, public body may provide for receipt and acceptance of communications or transactions in accordance with Digital Signature Act (ORS 84.052); public body not authorized to require only electronic delivery or acceptance of communications or transactions prior to Jan. 2, 2006 (ORS 192.850).

Taxation.

Imposition, assessment, collection or attempt to collect tax on Internet access or use of Internet access prohibited if tax not in effect on Oct. 16, 2001. (ORS 305.822).

Y2K-related Civil Actions.

Civil actions based on computer date failure related to processing of dates of calendar year 1999 or subsequent years regulated by 30.655-.665.

3.193.16

3.17 INTEREST:

Rate of interest charged by private and commercial lenders on ordinary loans may not exceed 36% per annum. (ORS 82.010, 725.615, 725.340). Pawnbrokers subject to limitations. (ORS 726.390).

If not otherwise agreed, rate of 9% applies to all moneys after they become due, money received to use of another and held beyond reasonable time without owner's consent, and money due when contract to pay and no specified rate of interest. (ORS 82.010). On installment loans and open-end credit, financial institutions may charge late charge in any amount agreed to by lender and borrower. (708A.255). Financial institutions must refund on all loans upon early payment amount equal to total interest to maturity less greater of: (1) 10% of amount financed or $75, whichever is less, or (2) interest earned to installment due date nearest date of prepayment. (708A.255).

Maximum Rate.

See general discussion, supra and discussion under subhead Small Loans, infra.

Prepayment Penalty.

Lender may not refuse to accept, and may not collect penalty for, payment prior to date provided in loan agreement, unless loan agreement contains statutory notice. (ORS 82.160; 82.170).

Judgments.

Interest on judgments accrues at 9% from date of entry unless some other date is specified therein. Judgments on contracts providing for interest at rate higher than 9% bear same interest as contract as of date of entry. (ORS 82.010). Interest on judgments is simple interest unless by contract. Interest accrues on interest accrued prior to date of entry and accrues on attorney fees and costs. (ORS 82.010).

Open accounts bear interest from date of last item thereof. (ORS 82.010).

Small Loans.

Licensee under Consumer Finance Act (c. 725) may charge interest rate on secured or unsecured loans not to exceed 36% per annum (ORS 725.340). Interest may be precomputed subject to certain limitations when loan is originally scheduled to be repaid in 62 months or less. (ORS 725.340). Interest limits apply to loans of $50,000 or less unless lender or loan is exempt as outlined below or unless lender is Consumer Finance Act licensee. Limits are as follows: On business or agricultural loans of $50,000 or less, annual rate may not exceed greater of 12%, or 5% in excess of discount rate, including any surcharge on discount rate, on 90-day commercial paper in effect at Federal Reserve Bank in Federal Reserve District where person making loan is located, on date loan or initial advance of funds under loan is made; on loan of $50,000 or less, other than business or agricultural loan described above, annual rate may not exceed greater of 12%, or 5% in excess of discount rate on 90-day commercial paper in effect at Federal Reserve Bank in Federal Reserve District where person making loan is located, on date loan or initial advance of funds under loan is made. (ORS 82.010). Commissions, bonuses, fees, premiums, penalties, etc. are included in computation of interest charged. (ORS 82.020). Such limits do not apply to banks, national bank, state or federally chartered mutual savings bank, state or federally chartered savings and loan associations, state or federally chartered credit unions, pawnbrokers licensed under c. 726, lenders approved by Secretary of HUD for participation in mortgage insurance program under National Housing Act, or Consumer Finance Act licensee. (c. 725). Such limits do not apply to: (1) Loans secured by first lien on real property or made to finance acquisition of real property and secured by any lien on that property; (2) loans secured by real property, scheduled under loan agreement to be repaid in substantially equal payments and made by lender who makes, invests in, or arranges real property loans, including loans secured by first liens on residential manufactured homes, aggregating more than $1,000,000 per year. Payments are “substantially equal” if, under terms of loan agreement, no single scheduled payment is more than twice amount of any other scheduled payment; (3) loans wholly or partially secured or covered by guarantees or insurance by FHA, U.S. Department of Veterans' Affairs, Rural Development or Farm Service Agency, any U.S. department, bureau, board, commission or agency, or any corporation wholly owned, directly or indirectly by U.S.; (4) loans permitted under applicable federal law and regulations from tax qualified retirement plan to person then participant under plan; (5) bona fide sales or resales of securities or commercial paper; and (6) interest charged by broker-dealers registered under Securities Exchange Act of 1934 for carrying debit balance in account for customer if debit balance is payable on demand and secured by stocks or bonds. (ORS 82.025).

Usury.

Lender who violates interest limits for loans $50,000 and less (see subhead Small Loans, supra) forfeits interest on loan to borrower, but borrower must repay principal amount. (ORS 82.010).

Pawnbroker charging excessive rate forfeits principal, interest, and any charges to county school fund where loan is made. Pawnbroker must also return pledged item to pledgor without tender of principal and interest. (ORS 726.420).

3.18 [RESERVED]

3.19 LICENSES, BUSINESS AND PROFESSIONAL:

Licenses are required for a large number of businesses and occupations, but there are no laws regulating licensing of commercial travelers. Latter is governed by local ordinance.

Collection Agencies.

Collection agency must register with State Department of Consumer and Business Services. (ORS 697.015). Statutory registration requirements concern provision of information, but additional requirements may be established by rule. (ORS 697.031).

3.20 MONOPOLIES, RESTRAINT OF TRADE AND COMPETITION:

Antitrust.

“Little Sherman Act” (ORS 646.725-.730), but exempts certain activities of persons regulated by Banking, Savings and Loan, and Public Utility Commissioners and Director of

Department of Insurance and Finance as well as certain activities of labor organizations, agricultural and seafood co-ops, telecommunications utilities, metropolitan service districts, and activities conducted pursuant to certificate issued under 15 U.S.C. §§ 4001 to 4021. (ORS 62.845; 646.740). Parens patriae provisions. (ORS 646.775). Immunity for lawful development, publication, and charging of motor carrier rates. (ORS 767.020 [d]).

Federal antitrust decisions are persuasive authority in construing Oregon's antitrust laws. (ORS 646.715[2]).

“Little Robinson-Patman Act” precludes price discrimination in commodities or services of like grade and quality where effect is to lessen competition in line of commerce or create monopoly. (ORS 646.040).

Treble damages, costs and attorneys' fees may be awarded in civil actions. Four year statute of limitations. Statutory rules about effect of actions brought under federal antitrust laws. (ORS 646.780; 646.140). Criminal penalties. (ORS 646.990).

Unlawful Trade Practices.

Statutory unlawful trade practices include price discrimination in commerce and food commerce, and other practices concerning certain commodities and services. Sellers prohibited from including price comparison in advertisement unless certain requirements are met. (ORS 646.010-.691,.850-.935; 698.640; c. 746).

Resale Price Agreements.

“Little Sherman Act” adopted. (ORS 646.725-.730).

Trade Secrets.

Uniform Trade Secrets Act adopted. (ORS 646.461-.475).

3.21 NEGOTIABLE INSTRUMENTS:

See topic 3.02 Bills and Notes.

3.22 RESTRAINT OF TRADE:

See topic 3.20 Monopolies, 3.22 Restraint of Trade and Competition.

3.23 SALES:

Uniform Commercial Code adopted. (ORS 71.1010 et seq.). See topic 3.09 Commercial Code.

Bills of Sale.

No statutory provisions.

Sales of Motor Vehicles.

Comprehensive statute regulates terms and conditions of retail installment contracts for sale or lease of motor vehicles (ORS 83.510-.680) in addition to applicable provisions of Uniform Commercial Code (ORS 71.1010 et seq.). Dealers subject to regulation. (ORS 822.005-.070). See also category 23 Transportation, topic 23.01 Motor Vehicles.

International Sales of Goods.

See Part V this volume, Selected International Conventions.

Bulk Sales.

Uniform Commercial Code bulk transfer provisions repealed. (1991, c. 83, § 1). See also category 8 Debtor and Creditor, topic 8.08 Fraudulent Sales and Conveyances.

Contracts of Sale.

No statutory requirements as to size of print used in contract. See also topics 3.16 Frauds, Statute of, and 3.09 Commercial Code.

Consumer Protection.

See topic 3.10 Consumer Protection.

Uniform Deceptive Trade Practices Act.

Main provisions adopted (ORS 646.605-.652), with significant variations and omissions.

Product Liability.

Privity of contract not required for personal injury action against manufacturer, contractor, etc., for product liability. (235 Or. 145, 382 P.2d 843; 235 Or. 507, 384 P.2d 223). Product liability civil actions governed by statute. (ORS 30.900-.927).

Retail Credit Sales.

See topic 3.10 Consumer Protection.

3.24 SECURITIES:

Supervision.

Oregon Securities Law (c. 59) administered by Director of Department of Consumer and Business Services, 21 Labor and Industries Building, Salem, Oregon 97310.

Regulatory Powers of Supervising Authority.

It is unlawful for any person to offer or sell any security in Oregon unless security is registered and offer or sale is not in violation of any rule, order, condition or restriction, security is exempt, sale is exempt, or security is federal covered security for which notice has been filed and fees paid. (ORS 59.055). Director registers securities unless he finds that registration should be denied on ground that proposed plan of business, characteristics and terms of sale or proposed methods of sale and distribution are unfair, unjust or inequitable, or on another of grounds specified in 59.105. (ORS 59.075).

Securities to Which Act Applicable.

“Security” means note, stock, treasury stock, bond, debenture, evidence of indebtedness, certificate of interest or participation in pension plan or profit-sharing agreement, collateral-trust certificate, preorganization certificate or subscription, transferable share, investment contract, voting-trust certificate, variable annuity, certificate of deposit for security, certificate of interest or participation in oil, gas, or mining title or lease or in payments out of production under such title or lease, obligations secured by interest in real property when sold by broker-dealer, mortgage banker, mortgage broker or financial institution other than to specified persons, or, in general, any interest or participation in, temporary or interim certificate for, receipt for, guarantee of, or warrant or right to subscribe to or purchase any of above. “Security” does not include insurance or endowment policy or annuity contract, other than variable annuity, under which insurance company promises to pay fixed or variable sum of money either in lump sum or periodically for life or some specified period; beneficial interest in voluntary inter vivos trust not created solely for purpose of voting or to evade provisions of 59.005-.370; beneficial interest in testamentary trust (ORS 59.015[19]); or timeshare plan or interest subject to regulation (ORS 94.813).

Exempt Securities.

Following securities are exempt from registration: (1) Securities issued or guaranteed by U.S. or state or political subdivision or agency or instrumentality thereof and any other security offered in connection with or as part of such security if security cannot be severed and sold separately; (2) securities issued or guaranteed by foreign governments with which U.S. maintains diplomatic relations or political subdivisions thereof meeting certain requirements; (3) securities representing interests in or direct obligations of or guaranteed by national banks and certain other federally chartered financial institutions; (4) securities approved for listing by New York Stock Exchange, American Stock Exchange, Midwest Stock Exchange, Pacific Stock Exchange or other exchange recognized by rule of Director, or securities approved for designation on NASDAQ-National Market System; or securities of equal or senior rank to such listed or designated security; (5) securities maintaining rating approved by Director in recognized securities manual; (6) securities representing interests in or direct obligations of and issued by banks, trust companies, savings and loan associations or credit unions supervised by State of Oregon; (7) commercial paper issued or transferred in ordinary course of legitimate business and not subject of public offering; (8) securities whose issuance is supervised by Public Utility Commission of Oregon if Commission is exercising supervision over issuer; (9) stock or certificate issued by agricultural cooperative or irrigation association to evidence membership, but exemption does not apply to cooperative or association engaging in production, processing or marketing of forest products; (10) stock or certificate issued by fishing cooperative to evidence membership; (11) stock or certificate issued by consumer association, which provides groceries to members, to evidence membership; (12) securities issued in conjunction with employer's benefit plan, if qualified under Internal Revenue Code and terms thereof are fair, just and equitable under rules of Director; (13) securities issued by person organized and operated exclusively for religious, educational, benevolent, fraternal, charitable or reformatory purpose and not for pecuniary profit, no part of whose net earnings inure to benefit of any person, private stockholder or individual, and designated by rule of Director; (14) other securities exempted by rule of Director. (ORS 59.025).

Exempt Transactions.

Following transactions are exempt from registration: (1) Transaction by sheriff, marshal, or court-appointed fiduciary; (2) isolated non-issuer transaction in Oregon; (3) transaction by issuer pursuant to pro rata offering to existing security holders, if no commission is paid or given, and issuer has not had effective registration under Oregon Securities Law nor used pro rata offering exemption within one year; (4) offer, sale, transfer or delivery to bank or other specified institutional buyer or to broker-dealer, mortgage broker or mortgage banker; (5) transaction with “accredited investor” as defined in Securities Act of 1933 or rules of Director, if no public advertising or general solicitation; (6) exercise of conversion privilege without additional consideration if security surrendered was convertible and registered or exempt from registration when issued; (7) transaction in vendor's interest in land sale contract or bonds or notes secured by mortgages or trust deeds upon realty so long as entire vendor's interest, mortgage or trust deed, with all bonds or notes secured thereby, is sold to single purchaser in single sale; (8) agency or principal sales by licensed broker-dealers, executed upon customers' orders on any exchange or over-the-counter market (but not solicitation of such orders) where there is no intent to avoid Oregon Securities Law and public offering is not involved; (9) offer or sale by licensed broker-dealer of security acquired in ordinary course of business if certain requirements are met; (10) offer or sale by licensed broker-dealer, acting either as principal or agent, of securities previously issued to public if certain requirements are met; (11) offer, but not sale, of security for which registration statement has been filed under both Oregon Securities Law and Securities Act of 1933 if no stop or refusal order is in effect and no public proceeding or examination looking toward such order is pending or has been filed under Oregon Securities Law and offer is allowed by Director; (12) transactions resulting in not more than ten purchasers in Oregon in 12-month period where no commission is given, no public advertising or general solicitation is used and certain other requirements are met; (13) transaction with existing security holders pursuant to statutory vote on merger, consolidation, liquidation, reclassification of securities or sale or exchange of assets in consideration of issuance of securities of another issuer; (14) capital stock issued by professional corporation organized under (c. 58); (15) other transactions exempted by rule of Director (ORS 59.035).

Registration of Securities.

Director by rule establishes procedures for registering securities and may coordinate registration with any federal securities act or national registration system. (ORS 59.065).

Every registration application must be accompanied by fee of $1 per $1,000 of aggregate price of securities that are to be offered in Oregon on first $100,000 or fraction thereof, 50¢ per $1,000 on next $200,000 or fraction thereof and $25 per $100,000 for each additional $100,000 or fraction thereof, but in no case will fee be less than $25 nor more than $500. Fee is not refundable. (ORS 59.065). Registration and every notice filed under § 6 of 1997 Act expires one year from date of registration or effective date of notice unless Director establishes different expiration date. (ORS 59.075).

If registrant sells securities in Oregon in excess of quantity registered or for price in excess of aggregate price for which fees were initially paid, registrant may obtain retroactive registration of excess by paying additional fee computed at three times difference between initial fee paid and fee required for securities sold. Minimum additional fee is $25. (ORS 59.065).

Registrant must amend registration application for material changes in terms and conditions of registration, including increase in securities offered in Oregon, change in type of securities or change in identity of issuer. (ORS 59.070).

Licensing of Dealers, Brokers, and Others.

Person may not transact business in Oregon as broker-dealer, state investment adviser, investment adviser representative or salesperson (ORS 59.015) unless such person is licensed (ORS 59.165). Director by rule establishes procedures for registration and may coordinate licensing with any national registration or licensing system. Director may require applicant for registration to pass examination on Oregon Securities Law and securities business. Director may require applicant to publish announcement of application. Applicants for licensing as broker-dealer or investment adviser must file corporate surety bond or irrevocable letter of credit running to State of Oregon in amount to be determined by Director but not more than $100,000 (exceptions for licensed broker-dealers subject to § 15 of Securities Exchange Act of 1934, and for licensed state investment adviser with principal place of business in another state), and must have at least one salesperson registered in Oregon. Licensing of broker-dealer or investment adviser requires fee of $100. Renewal is $50 per year. Licensing of salesperson requires fee of $15. Renewal is $15 per year. (ORS 59.175).

Liabilities.

Person offering or selling security is liable to purchaser if sale violates Oregon Securities Law or is made by means of untrue statement of material fact or omission of material fact. Purchaser may recover, upon tender of security, purchase price plus interest or, if purchaser no longer owns security, those damages which would have been awarded upon tender less value of security at date of disposition. Similarly, person offering to purchase or purchasing security is liable to seller, and seller has comparable rights against purchaser, if purchase violates restriction imposed on registration or is made by means of untrue statement of material fact or omission of material fact. Action must be brought within three years of transaction except for action for fraud which may be brought within two years of discovery, if later. (ORS 59.115,.127). Offer to rescind bars proceedings in certain circumstances. (ORS 59.125,.131). Director may bring suit to enjoin acts or practices constituting violations of Oregon Securities Law or rules and orders of Director and for civil penalty of not more than $20,000 for each violation and may include claims for restitution, damages or disgorgement of illegal gains. (ORS 59.255).

Every person who participates or materially aids in sale (purchase) other than escrow agents, custodians, or depositories, or who directly or indirectly controls seller (purchaser), and every partner, limited liability company manager, officer and director of seller (purchaser) is also liable to same extent as seller (purchaser) unless nonseller (nonpurchaser) sustains burden of proof that he/she did not know or in exercise of reasonable care could not have known of facts on which liability is based. Purchaser (seller) must sustain burden of proof that escrow agent, custodian or depositary knew or was grossly negligent in failing to know of facts on which liability is based. (ORS 59.115,.127).

Penalties.

Violation of provisions of Oregon Securities Law or rules of Director may result in criminal and civil penalties. (ORS 59.991,.995).

Appeals.

Persons aggrieved by orders of Director which have been subject of timely application for hearing are entitled to judicial review under Oregon Administrative Procedures Act. (c. 183, 59.305).

Tender Offers.

Control share act adopted. (ORS 60.801-.813). Business combination act adopted. (ORS 60.825-.845). See category 2 Business Organizations, topic 2.03 Corporations.

Mortgage Bankers and Brokers.

Person may not engage in residential mortgage transactions in Oregon as mortgage banker or mortgage broker unless such person is licensed. (ORS 59.845).

3.25 STATUTE OF FRAUDS:

See topic 3.16 Frauds, Statute of.

3.26 TRUST RECEIPT SECURITY:

See category 8 Debtor and Creditor, topic 8.15 Pledges. Uniform Commercial Code adopted. (ORS 71.1010 et seq.).

3.27 WAREHOUSES:

Uniform Commercial Code adopted. (ORS 71.1010 et seq.). Uniform Disposition of Unclaimed Property Act as amended. (ORS 98.302-.436).

Variations from 1972 Official Text of U.C.C. Art. 7 are omissions of reference to notification by certified letter in § 7-210(2)(b) and change in § 7-209(3) to provide that warehouseman's lien or security interest is also effective against ``any person that so entrusted the bailor with possession of the goods that a pledge of them by the bailor to a good-faith purchaser for value would have been valid''. (2009 c. 181). Owners and operators of refrigerated locker plants are not deemed warehousemen. (ORS 628.360). For additional variations see topic 3.09 Commercial Code.

Optional clause for § 7-403(1)(b) adopted. Blank in § 7-204(4) was filled as follows: “or change any existing law or rule of law which imposes a higher responsibility upon the warehouse or invalidates contractual limitations which would be permissible under this chapter." (ORS 77.2040[4], 2009 c. 181).

Regulation.

Warehouses must keep records of property they receive. (ORS 98.110). Public grain warehouses subject to regulation by State Department of Agriculture, and duties as to forwarding and delivering grain in their custody regulated. (c. 586).

Licenses; Bonds.

Grain warehousemen must be licensed by State Department of Agriculture and pay annual license fee (ORS 586.270), and must give bond to State of Oregon. (ORS 586.300).

Lien.

Warehousemen have possessory lien for their reasonable charges. (ORS 87.152). Warehouse also has lien under UCC on goods covered by warehouse receipt or proceeds thereof in warehouseman's possession. (ORS 77.2090-77.2100, 2009 c. 181).

Sale.

Perishable goods not reclaimed within 30 days may be sold by sheriff or constable on ten days notice, and decaying goods may be sold summarily. (ORS 98.230). Other goods may be sold if not reclaimed within one year, upon 60 days notice. (ORS 98.130-.210).

See also topic 3.09 Commercial Code.

4 CITIZENSHIP

4.01 ALIENS:

State income tax covers aliens (ORS 316.022); payment of workers' compensation to nonresident alien subject to restrictions (ORS 656.232); permanent resident aliens or those lawfully present to perform job eligible for unemployment compensation (ORS 657.184), except some admitted to perform agricultural labor (ORS 657.045); certain state and local law enforcement agencies may not enforce immigration laws (ORS 181.850); court to advise alien of effects on immigration and naturalization before accepting plea of guilty or no contest in criminal case (ORS 135.385); foreign exchange student considered resident for hunting, trapping, and fishing licenses (ORS 497.006).

Property.

Alien with declared intent to become U.S. citizen may apply to purchase state lands (ORS 273.255) or locate mining claim on unappropriated public domain (ORS 517.010).

5 CIVIL ACTIONS AND PROCEDURE

5.01 ACCORD AND SATISFACTION:

Compromise.

Oregon Uniform Commercial Code revised in 1993 to provide that good faith tender of instrument as full satisfaction of unliquidated claim or claim subject to bona fide dispute establishes accord and satisfaction if payee or agent with actual authority knew that instrument was tendered in full satisfaction of claim. Alternatively, such tender establishes accord and satisfaction if instrument or accompanying written communication contains conspicuous statement that instrument is tendered in full satisfaction of claim. (ORS 73.0311). Prior to 1993 revision, Oregon Uniform Commercial Code provided that mere negotiation of commercial instrument tendered in full payment does not establish accord and satisfaction unless payee or officer or agent with actual authority agrees in writing to accept amount tendered as full payment of obligation. (ORS 73.1230). Prior case law, which may remain valid in noncommercial context, provides as follows. Acceptance of check tendered in full payment will discharge unliquidated claim disputed in good faith. Creditor's acceptance of payment tendered in full satisfaction of disputed or unliquidated claim constitutes accord and satisfaction even if amount tendered is no greater than amount debtor admits owing. (280 Or. 425, 571 P.2d 503). Debtor must intend such payment to be satisfaction of claim, and must make that intention known to creditor in some unmistakable manner. (285 Or. 247, 590 P.2d 720). Creditor's actual subjective intent in cashing check does not matter. (63 Or. App. 364, 664 P.2d 419). However, check tendered in full payment will not constitute accord and satisfaction if amount of check was fixed by mutual mistake. (276. Or. 737, 556 P.2d 687).

See also category 3 Business Regulation and Commerce, topic 3.02 Bills and Notes, subhead Check Payable to State.

Reservation of Rights.

Under common law, creditor's acceptance of check tendered in full payment of disputed or unliquidated claim constitutes accord and satisfaction even if accepted under protest and with reservation of rights. (63 Or. App. 364, 664 P.2d 419).

Caveat: Insertion of conspicuous statement in instrument or accompanying communication does not establish accord and satisfaction if: (1) payee, prior to tender, sent notice that communications regarding debt are to be sent to designated person or office, and instrument or accompanying communication was not received by that designated person or office, or (2) payee, within 90 days of payment, tenders repayment of amount of instrument. (ORS 73.0311[3]).

Effective Date.

ORS 73.0311 became effective Nov. 4, 1993. ORS 73.1230 governs transactions entered into prior to that date.

Pleading.

Must be specifically pleaded. (ORCP 19 B; 265 Or. 202, 508 P.2d 216).

Where effect of particular compromise is disputed, burden of proof that accord and satisfaction was intended is on party claiming same. (265 Or. 456, 509 P.2d 1179).

See also category 3 Business Regulation and Commerce, topic 3.09 Commercial Code.

5.02 ACTIONS:

Oregon Rules of Civil Procedure (ORCP) became effective Jan. 1, 1980 and substantially revised jurisdiction's procedural statute. Oregon Rules of Civil Procedure can be found in Volume 1 of Oregon Revised Statutes.

Equity.

All procedural distinctions between actions at law and suits in equity are abolished, except for those distinctions specifically provided for by ORCP, statute, or Oregon Constitution. (ORCP 2). See subhead Equity Jurisdiction, infra.

Forms of Action.

Distinction between forms of action abolished; there is one form of action known as civil action. (ORCP 2).

Commencement.

See topics 5.20 Process, 5.17 Pleading.

Conditions Precedent.

In pleading performance or occurrence of conditions precedent, it is sufficient to allege generally that all conditions precedent have been performed or have occurred. (ORCP 20 A).

Tort actions against public body must be preceded by written or actual notice of claim presented within one year in action for wrongful death and 180 days after loss or injury in all other claims. (ORS 30.275).

Availability of attorneys fees in action is sometimes conditioned upon prior written demand upon defendant for payment of claim which is subject of action. (See, e.g., 20.080.) In action on insurance policy attorneys fees are available to plaintiff whose recovery exceeds amount of any tender by insurer if settlement is not made within six months from date on which proof of loss is filed with insurer. (ORS 742.061). Exception for personal injury protection benefits, or uninsured or underinsured motorist benefits, where only amount is in dispute and insurer has consented to binding arbitration. (ORS 742.061).

Parties.

Every action shall be prosecuted in name of real party in interest. (ORCP 26 A).

Executor, administrator, guardian, conservator, bailee, trustee of express trust, party with whom or in whose name contract has been made for benefit of another, or party authorized by statute may sue in that party's own name without joining party for whose benefit action is brought; and when statute so provides, action for use or benefit of another shall be brought in name of state. (ORCP 26 A).

Minors or incapacitated persons appear by guardian, conservator or guardian ad litem. (ORCP 27).

No action shall be dismissed on ground that it is not prosecuted in name of real party in interest until reasonable time has been allowed after objection for ratification of commencement of action by, or joinder or substitution of, real party in interest. (ORCP 26 A).

All persons may join in one action as plaintiffs if they jointly, severally, or alternatively assert any right to relief arising out of same transactions or occurrences, and if common questions of fact or law will arise in action. (ORCP 28 A).

All persons may be joined in one action as defendants if there is jointly, severally, or alternatively asserted against them any right to relief arising out of same transactions or occurrences, and if there are common questions of fact and law. (ORCP 28 A).

Plaintiff or defendant need not be interested in obtaining or defending against all relief demanded in order to be proper party. (ORCP 28 A).

Person who is subject to service of process shall be joined as party in action if: (1) In that person's absence complete relief cannot be accorded among those already parties, or (2) that person claims interest relating to subject of action and his or her absence may (a) impair or impede his or her ability to protect interest, or (b) may leave persons already parties subject to substantial risk of incurring multiple or inconsistent obligations. (ORCP 29 A).

Parties to original action may be made parties to counterclaim or crossclaim. (ORCP 22). Third party practice also permitted. (ORCP 22 C).

Until party's true name is discovered, he or she may be designated by any name. (ORCP 20 H.).

All parties necessary to complete determination of controversy should be brought in; however, if all interested parties cannot be joined, court determines whether action should proceed among parties before it, or whether absent parties are indispensable. (ORCP 29 B).

Intervention.

At any time before trial persons with an interest in litigation may ask leave of court to intervene by joining plaintiff or defendant or by demanding anything adversely to both plaintiff and defendant. Except where statute, ORCP or common law confers unconditional right to intervene, leave to intervene is discretionary with court. Intervention is by motion stating grounds for intervention. Motion to intervene must be accompanied by pleading setting forth claim or defense for which intervention is sought. (ORCP 33).

Interpleader.

Where plaintiff is or may be exposed to double or multiple liability, plaintiff may join as defendants persons having claims against plaintiff. Plaintiff may upon court order, deposit with court, otherwise preserve or secure by bond any property or amount to which plaintiff admits liability. Upon hearing, court may discharge plaintiff from liability as to property deposited or secured before court determines rights of claimants to property. Interpleader also available to defendant. (ORCP 31).

Plaintiff may usually recover attorneys' fees where interpleader allowed. (231 Or. 106, 370 P.2d 726, 372 P.2d 187. See also 287 Or. 285, 292-93, note 5, 598 P.2d 302, 306, note 5 [1979]).

Third Party Practice.

Within 90 days after service of plaintiff's summons and complaint, defendant may, as matter of right, serve complaint on nonparty who is or may be liable to defendant for all or part of plaintiff's claim. After 90 days, defendant, third party plaintiff, must obtain leave of court and agreement of parties. Third party defendant makes defenses by motion or answer, and may counterclaim against third party plaintiff, crossclaim against other third party defendants, and further claim against additional nonparties who are or may be liable to him for all or part of third party plaintiff's claim against him. Third party defendant can assert against original plaintiff third party plaintiff's defenses to plaintiff's claim. Third party defendant and original plaintiff can assert claims against each other arising from subject matter of plaintiff's original claim against defendant; against such claims third party defendant and plaintiff shall defend by motion or answer and may make further counterclaims and crossclaims. Third party claims may be severed or separated for trial. (ORCP 22 C[1]).

Plaintiff may bring in third party on any counterclaim asserted against plaintiff. (ORCP 22 C[2]).

Defendant in action or suit on contract brought by assignee of rights under that contract may join as party maker of that contract, if defendant has claim against maker arising from contract, and any person who may be liable to defendant for attorneys' fees under certain attorneys' fee provisions which can include maker, despite assignment. (ORCP 22 D[2], ORS

20.097).

Joinder of Claims.

Plaintiff may join as many claims, legal or equitable, as plaintiff has against opposing party so long as claims are separately stated and do not require different places of trial. (ORCP 24 A, C).

Class Actions.

One or more members of a class may sue or be sued as representative parties on behalf of all, where statutory conditions and conditions of ORCP satisfied. (ORCP 32).

Splitting Causes of Action.

Party may not split his cause of action. Where clear intent is that contract is divisible, however, separate suits may be maintained. (241 Or. 164, 405 P.2d 359). Successive actions or suits may be maintained on same contract or transaction whenever new cause of action arises after former action or suit. (ORS 30.715).

Consolidation or Severance of Actions.

Upon motion of any party, where common question of law or fact, court may order joint hearing or trial or consolidate all such actions. (ORCP 53 A).

Upon motion of any party, for convenience, expedition, economy or to avoid prejudice, court may order separate trial of any claim, crossclaim, counterclaim, third-party claim or separate issue. (ORCP 53 B, ORCP 22 E).

Stay of Proceedings.

Court has discretionary power to grant or deny motion for continuance or postponement. (273 Or. 398, 541 P.2d 455). Postponement is granted only upon showing of good cause for postponement. (ORCP 52 A). Court may require motion to postpone trial due to absence of evidence, to be accompanied by affidavit or declaration showing evidence which moving party expects to obtain. (ORCP 52 B).

Abatement and Revival.

No action abates by death or disability of party or transfer of any interest therein. In case of death, court shall on motion allow action to be continued by personal representative or successors in interest within one year after death or against personal representative or successors in interest within four months of first publication of notice to interested parties, but not more than one year after death. In case of disability court may within one year thereafter allow action or suit to be continued by or against party's guardian or conservator or successor in interest. In case of transfer of interest court may allow action to be continued by or against original party or successors in interest. (ORCP 34). Cause of action for personal injury or death survives death of wrongdoer and action may be brought or continued against his personal representative. (ORS 30.080, 30.090, 30.100). Cause of action arising out of injuries to person may be maintained after death by his personal representative if decedent might have maintained it had he lived. (ORS 30.020; 30.075). Recovery under 30.075 reduces recovery by personal representative in wrongful death action. (ORS 30.020). Otherwise, there is no limit on recovery in wrongful death action (ORS 30.020), except statutory limitations on noneconomic damages (ORS 31.710). Punitive damages awarded in wrongful death action are subject to review and reduction by court. (ORS 31.730). See also topic 5.16 Limitation of Actions, subheads Three Years, Two Years. All other causes of action or suit by one person against another, survive to personal representatives of former, and against personal representatives of latter. (ORS 115.305).

Limitation of.

See topic 5.16 Limitation of Actions.

Small Claims.

See category 6 Courts and Legislature, topic 6.01 Courts.

Equity Jurisdiction.

All procedural distinctions between actions at law and suits in equity are abolished. (ORCP 2). Procedures set forth in ORCP apply to actions, which include all proceedings formerly, cognizable as actions at law, suits in equity, or proceedings of statutory origin. (ORCP 1 A). Right to jury trial depends upon historical legal or equitable nature of issues pursuant to Oregon constitution. (ORCP 50, 51 C[2]). Distinctions between substantive elements of law and equity remain. Distinctions between legal and equitable remedies, including doctrines limiting availability of equitable remedies such as laches and clean hands, remain. Scope of review in equity is de novo at Court of Appeals but may be limited to questions of law if further appealed to Supreme Court. (ORS 19.125[3],[4]).

Administration.

See category 13 Estates and Trusts, topic 13.09 Executors and Administrators.

Direct Actions Against Insurer.

No statutory provision exists for direct action against insurer by injured person.

5.03 APPEAL AND ERROR:

Jurisdiction Over Appeal.

Appeal may be had from justice (ORS 53.010), municipal (ORS 221.350) or county (ORS 5.120) courts to circuit court (ORS 53.020). Appeals from circuit courts are to Court of Appeals (ORS 46.250, 2.516), and from Court of Appeals, by petition for review, to Supreme Court (ORS 2.520). Circuit court may certify otherwise nonappealable class-action order involving controlling question of law and Court of Appeals may allow appeal from that order. (ORS 19.015). Court of Appeals, but not parties, may certify appeal to Supreme Court which may accept or deny certification within 20 days. (ORS 19.210, ORAP 17.05). Review of land use decisions of local government, special district or state agency may be obtained by filing notice of intent to appeal and petition for review with Land Use Board of Appeals. (ORS 197.825; 197.830). Final orders of that Board may be appealed to Court of Appeals. (ORS 197.850). Court of Appeals also has jurisdiction to review final orders issued by state agencies in contested cases and to determine validity of agency rules. (ORS 183.400; 183.482).

Time Allowed: How Taken.

Appeals to circuit courts and Court of Appeals must be taken within 30 days after entry of judgment or disposition or denial of motion for judgment n.o.v. or new trial. (ORS 53.020, 5.120, 19.255, ORCP 63D, 64F). If appeal has been filed, another party desiring to appeal has ten days in addition to time provided above. (ORS 19.026[3]). Appeals are taken by serving and filing notice of appeal within period. (ORS 19.023). Serving and filing notice are jurisdictional. (ORS 19.033[2]). Appeals in criminal proceedings must be taken within 30 days after judgment or order appealed from was entered in register. (ORS 138.071). In appeal from sentence of death, Supreme Court shall appoint counsel to represent defendant upon request to Supreme Court. Appeals of certified class-action orders involving controlling questions must be made to Court of Appeals within ten days after order. (ORS 19.225). Petitions for review in Supreme Court must be served and filed within 35 days after Court of Appeals decision. (ORS 2.520, ORAP 9.05).

Supreme Court has 20 days within which to grant or deny appeal certified from Court of Appeals. (ORS 19.405). Filing of notice of appeal or petition for review may be accomplished by registered or certified mail. (ORS 19.260, ORAP 1.35[b]). Petitions for review of state agency order in contested case or of validity of agency rule must be filed within 60 days of order. (ORS 183.400; 183.482). Original notice of appeal from Circuit Court and original petition for review of state agency order are filed with State Court Administrator. (ORS 19.240, 183.482[1]).

Amount in Controversy.

No appeal may be taken from circuit court in action for damages or recovery of money unless it appears from pleadings that amount in controversy exceeds $250 (ORS 19.205), nor from justice's court unless such amount is at least $30 (ORS 53.010).

Appeal Bond.

Undertaking for costs must be given within 14 days after filing notice of appeal (ORS 19.300; 53.040) unless dispensed with by stipulation or waived by trial court on good cause (ORS 19.310). Undertaking must be given in minimum amount of $500 unless otherwise fixed by court, and liability of surety is limited to amount specified. (ORS 19.300; 19.305).

Stay of Proceedings.

Appellant may stay execution pending appeal by giving undertaking, with sureties, to pay judgment on appeal or otherwise restore property detained, provided party has actually filed notice of appeal. (ORS 19.335). Undertaking may be waived or reduced in amount by trial court if appellant is fiduciary for another. (ORS 19.340). Even though such bond be given, party who recovered judgment in circuit court contract action may enforce judgment if it gives counter-undertaking within ten days after appeal is perfected or within five days after justice court allows appeal. (ORS 19.345, 53.080).

Extent of Review.

Court reviews entire record on appeal, and affirms, modifies, reverses or remands on basis of its determination of correctness of decision below (Const., Art. VII, § 3), but reverses or modifies only for error substantially affecting rights of party (ORS 19.415). It may not reexamine any fact found by jury unless it affirmatively finds there was no evidence to support verdict. (Const., Art. VII, § 3). Upon appeal in equitable proceeding related to termination of parental rights, cause must be tried anew upon record in Court of Appeals, otherwise Court of Appeals has sole discretion whether to try case anew upon record or make one or more factual findings anew from record, but Supreme Court may limit its review to questions of law. (ORS 19.415, 2009 c. 231).

Character of Hearing.

Case is heard on record in Court of Appeals or de novo in circuit court. (ORS 19.415, 53.090, ORAP 3.72).

Judgment or Order on Appeal.

Appellate judgment effective when copy entered in court's register and mailed by State Court Administrator to court from which appeal taken. (ORS 19.450).

Extraordinary Writs.

See topic 5.05 Certiorari.

5.04 BONDS:

Appellant in civil action must file undertaking to cover costs on appeal, in minimum amount of $500, unless otherwise fixed by trial court. (ORS 19.300). Filing does not stay proceedings unless undertaking provides for payment of judgment. (ORS 19.330; 19.335). Undertaking may be provided by one or more sureties, or in form of irrevocable commercial bank letter of credit. (ORS 19.305). Undertaking may be simplified bond, not requiring seal or signature of appellant. (49 Or. 163, 89 P. 148; 111 Or. 35, 224 P. 831). Adverse party may object to sufficiency of sureties or amount of undertaking. (ORS 19.305). Undertaking may be waived by written stipulation of parties (ORS 19.310), or by trial court for good cause, including indigency (ORS 19.310).

Sureties.

Surety may be licensed surety company, person worth double amount of undertaking, or commercial bank providing irrevocable letter of credit. (ORS 19.305; ORCP 82). Liability of surety limited to amount specified in undertaking on appeal. (ORS 19.305).

Enforcement.

Judgment against appellant also entered against sureties as if parties, to extent of undertaking. (ORS 19.450).

5.05 CERTIORARI:

Writ of certiorari known as writ of review. (ORS 34.010). Except for reviewable land-use decision, any party to proceeding before inferior court, officer or tribunal, including county courts, may have decision reviewed for errors by writ of review. (ORS 34.020; 34.102).

Court of Appeals, but not parties, may certify appeal in any proceeding directly to Supreme Court for review and latter may accept or deny certification within 20 days. (ORS 19.405).

Jurisdiction.

Writ must be allowed by circuit court or where county court has judicial functions, by county court of county where decision to be reviewed made. (ORS 34.030).

Grounds.

Writ allowed whenever inferior officer or tribunal, other than state agency subject to Oregon's Administrative Procedure Act, in judicial or quasi-judicial matter, exceeds its jurisdiction, fails to follow applicable procedure, makes finding or order not supported by substantial evidence or applicable law, misconstrues applicable law, or renders unconstitutional decision, to injury of substantial interest of party seeking relief. (ORS 34.040).

Proceedings.

Writ allowed by court upon verified petition of applicant filed within 60 days of decision to be reviewed and filing of bond for costs. Writ issued by clerk and may be served by any officer qualified to serve summons, with original served on officer whose decision is to be reviewed and copy on adverse party. (ORS 34.010-34.090).

Review.

Court may affirm, modify, reverse, or annul decisions reviewed and order restitution. (ORS 34.100).

5.06 CHARITABLE IMMUNITY:

See topic 5.09 Damages.

5.07 COMMISSIONS TO TAKE TESTIMONY:

See topic 5.11 Depositions and Discovery.

5.08 COSTS:

Court may award prevailing party costs and disbursements. (ORCP 68 B). On appeal, prevailing party may include party which obtains substantial modification of trial court judgment. (ORS 20.077). Oregon Rules no longer expressly limit award of costs and disbursements to judgments exceeding specified amount.

Vicarious Liability.

Guardians and trustees not personally liable for costs and disbursements except for mismanagement or bad faith in conduct of case. (ORS 20.150, 2009 c. 427).

Liability of Public Employees.

Governmental employees are exempt from paying costs when made party to action in their official capacity. (ORS 20.140).

Security for Costs.

Security may be required for out-of-state plaintiff in justice court. (ORS 52.170). Security may be required to obtain release of chattel that is subject to lien. (ORS 87.342). Security not otherwise required. See also subhead Liability of Attorneys, supra.

Class Actions.

When defendant class in class action is entitled to attorneys' fees, costs or disbursements from plaintiff class, only representative parties and those who appeared individually are liable for amounts. When plaintiff is entitled to attorneys' fees, costs, or disbursements from defendant class, court may apportion them out among all members of class. (ORCP 32 M[1][b], 2009 c. 552). Court may order adverse party to pay prevailing class its attorneys' fees and litigation expenses if permitted by law in similar cases not including class. (ORCP 32 M[1][d]2009 c. 552).

Offers to Allow Judgment.

Costs, disbursements, and attorneys' fees are included by court as part of offered judgments unless otherwise agreed upon by parties. (ORCP 54 E, CCP 2008).

If party asserting claim rejects offer of compromise made at least ten days before trial, and subsequently fails to obtain more favorable judgment, it cannot recover costs, disbursements, or attorneys' fees incurred after date of offer. Party against whom claim was asserted can recover its costs and disbursements from time of service of offer, even if it does not prevail in underlying claim. (ORCP 54 E).

Attorneys' Fees.

Oregon Rule uses bill of disbursements method for almost all attorneys' fee claims. With this method, attorneys' fees are dealt with after case is tried. (ORCP 68 C).

Court may award reasonable fee to successful plaintiffs or successful defendants on counterclaims pleaded in amount of $7,500 or less in actions for personal injury or property damage if written demand for payment made on defendant and defendant's insurer preceded filing of action by 30 days. If within plaintiff's possession or reasonably available, written demand must include, in action for personal injury, medical bills and records to reasonably inform person receiving information of scope and nature of claimed injury, and in action for property damage, written indication of extent of property damage. (ORS 20.082, 2009 c. 487).

Prevailing owner of property in inverse condemnation proceeding is entitled to reasonable attorneys' fees. (ORS 20.085).

Court shall allow reasonable attorneys' fees to prevailing party in action on dishonored or NSF check, if written demand preceded filing of action by ten days. (ORS 20.090).

Reasonable attorneys' fees are allowed defendant successfully asserting discharge in bankruptcy as bar. (ORS 20.094).

Reasonable attorneys' fees are awarded prevailing party in any case involving contract that specifically provides for attorneys' fees and costs incurred to enforce provisions of contract, regardless of whether prevailing party is party specified in contract or is party to contract. (ORS 20.096, 2009 c. 285). If such contract is assigned, maker and assignee are severally liable for attorneys' fees. (ORS 20.097).

Court may award attorneys' fees to successful plaintiffs in breach of warranty for consumer goods or service cases pled in amount less than $2,500 with written demands and access to goods at least 30 days prior to filing and when defendant failed before filing to tender amount equal to damages ultimately recovered. Defendants are entitled to similar award if court deems action frivolous. (ORS 20.098).

Prevailing party is entitled to reasonable attorneys' fees in action for interference with chattel subject to nonpossessory chattel lien. (ORS 87.332). Attorneys' fees are awarded to prevailing party in foreclosure actions on nonpossessory chattel liens (ORS 87.336), material or workmen's liens on real property (ORS 87.386), construction liens (ORS 87.060[5]), attorney's liens (ORS 87.485), or liens on agricultural produce (ORS 87.725). Prevailing plaintiff in lien foreclosure action entitled to reasonable attorney fee if written demand was made not less than 20 days prior to commencement of action. Defendant entitled to fees if defendant tendered to plaintiff, prior to commencement of action, amount not less than damages awarded to plaintiff. (ORS 87.076[4][b]).

Prevailing party in action under Residential Landlord and Tenant Act may recover reasonable attorneys' fees at trial and on appeal. (ORS 90.710). Reasonable attorneys' fees may be allowed to prevailing party in employee's action for loss or damage to trade equipment while under employer's control. (ORS 653.285).

Reasonable attorneys' fees are awarded to prevailing personal representative continuing action if his demand does not result in defendant's tender of amount equal to final award within 20 days before trial (tender must occur before action commenced if action originally brought by personal representative). (ORS 30.075[2]). Reasonable attorneys' fees are awarded prevailing claimants' attorneys in appealed or disputed workers' compensation cases, or when there is employer misconduct regarding proceeding. (ORS 656.382, 656.386, 2009 c. 526). Director of Workers' Compensation Department may recover court costs and attorney fees in actions to enjoin employers from employing workers without providing coverage mandated by law or to recover penalties. (ORS 656.052[4]). Person who prevails on appeal of order declaring that person is noncomplying employer or proposing assessment of penalty is entitled to attorney fees from Director. (ORS 656.740[5]).

Reasonable attorneys' fees may be awarded in domestic relations actions (ORS 107.105) and support enforcement proceedings. See category 14 Family, topics 14.05 Divorce, 14.11 Marriage.

5.09 DAMAGES:

Compensatory Damages.

Common law rules prevail generally. Mental anguish in absence of physical injury is compensable only in cases involving “outrageous conduct” or special circumstances of considerable magnitude. (282 Or. 731, 580 P.2d 1019).

Punitive Damages.

Award of punitive damages in civil action requires clear and convincing evidence of malice, or reckless and outrageous indifference to highly unreasonable risk of harm and conscious indifference to health, safety and welfare of others. (ORS 31.730; 187 Or. 89, 210 P.2d 461). Not available in tort claims for abuse of speech. (286 Or. 99, 593 P.2d 777; 121 Or. App. 160, 855 P.2d 159; Const. Art. 1, § 8). May not be recovered against health practitioner (doctor, nurse, therapist, technician, etc.) who is licensed, registered, or certified and acting within proper scope of practice and without malice. (ORS 31.740). Drug manufacturer is not liable for punitive damages if drug manufactured and labeled in accordance with terms of FDA approvals and licenses, unless manufacturer made intentional misrepresentation to FDA or prescribing doctor or intentionally failed to obey recall order. (ORS 30.927). Employer may be liable for punitive damages based on conduct of employee if employee was acting within scope of employment. (271 Or. 430, 532 P.2d 790). Punitive damages are also recoverable on statutory basis in certain actions for civil rights violations (ORS 659A.885); for specified acts against Indian graves (ORS 97.760); unlawful employment practices (ORS 659A.885); unlawful trade practices (ORS 646.638); unlawful debt collection practices (ORS 646.641); weights and measures security seal violations (ORS 618.516); discrimination in public accommodations (ORS 659A.885); intentional theft of or tampering with utility services (ORS 30.184); intimidation (ORS 30.190); product liability actions (ORS 30.925); unlawful interception or disclosure of certain communications (ORS 133.739); racketeering activities (ORS 166.725); wrongful death (ORS 30.020); intentional, improper inspection or release of inmate or patient records of certain state institutions (ORS 179.507); certain misconduct by notary public (ORS 194.200); and intentional injury to mining claim of another (ORS 105.831). No pleading can assert punitive damages claim until court has granted seeking party's motion to plead punitive damages, which in turn must stand on evidence sufficient to support directed verdict. Sixty percent of punitive damage award must be paid to state. (ORS 31.735). Court must review any punitive damage award; such award “shall not be disturbed when it is within the range that a rational juror would be entitled to award in the light of the record as a whole.” (320 Or. 544, 549, 888 P.2d 8; 31.370). Court may reduce amount of punitive damage judgment if defendant has taken reasonable remedial measures to prevent reoccurrence of conduct that gave rise to claim. (ORS 31.730).

Double Damages.

Authorized by statute in certain actions involving dogs which kill or damage livestock (ORS 609.140); unlawful sex discrimination in wage rates (ORS 652.230); damage to property by fire due to willfulness, malice, or negligence (ORS 477.090); loss of money or anything of value in illegal gambling (ORS 30.740); certain violations of landlord-tenant law (ORS 90.300,.375,.425,.900); willful removal of material from state lands (ORS 273.241); false return or fraudulent act of tax collector (ORS 311.015); negligent violation of laws governing removal of material from bed or banks or filling of waters of state (ORS 196.875[1]); and non-willful injury or removal of produce, trees, or shrubs from land of another (ORS 105.815).

Treble Damages.

Authorized by statute in certain actions for racketeering (ORS 166.725); willful injury to produce, trees, or shrubs upon another's land (ORS 105.810); waste (ORS 105.805); antitrust violations (ORS 646.780); trade discrimination (ORS 30.860); unlawful price discrimination (ORS 646.140); willful violation of “fine print” sales law (ORS 359.315); willful failure of certain out-of-state principals to pay commissions owed sales representatives within 14 days after termination (ORS 646A.097); collusive setting of insurance rates (ORS 737.245); intentional violation of laws governing removal of material from bed or banks or filling of waters of state (ORS 196.875[2]); improper use of telegraph messages (ORS 165.505); property damage caused by snowmobile or off-highway vehicle (ORS 821.310); and violation by public utility, railroad, air carrier or motor carrier of certain statutory requirements when gross negligence or willful misconduct established (ORS 756.185).

Sovereign Immunity.

Modified as to tort claims. (ORS 30.260-.300). Damages limited: $100,000 to any single claimant for property damage, and $500,000 for any number of claims arising out of single occurrence; damages limited to $1,500,000 to $2,000,000 for single claimant for personal injury or death depending on when cause of action arose, $3,000,000 to $4,000,000 for multiple claimants depending on when cause of action arose. Punitive damages not recoverable. (ORS 30.260-.300, 2009 c. 67).

Noneconomic Damages Limitation.

In any claim for bodily injury, including emotional injury or distress, death or property damage, amount awarded for noneconomic damages may not exceed $500,000. Noneconomic damages include subjective, nonmonetary losses such as pain, suffering, emotional distress, injury to reputation, and loss of consortium. (ORS 31.710). This limitation has been held unconstitutional by Supreme Court. (329 Ore. 62, 987 P.2d 463).

Liability of Joint Tortfeasors.

In any civil action arising out of bodily injury, death, or property damage, including claims for emotional injury or distress, loss of care, comfort, companionship and society, and loss of consortium, liability of each defendant for damages is several only. Judgment must set forth percentages of fault between defendants and third party defendants, even if claim not asserted against third party defendant. Obligation of each defendant and third party defendant not reduced by amounts paid in settlement of claim or by way of contribution. (ORS 31.610[2]). If court determines within one year that all or part of party's share is uncollectible, it may reallocate uncollectible share among other parties. (ORS 31.610[3]). Party's share of obligation not increased by reallocation if party's percentage of fault is less than either percentage of fault of claimant, or 25%. (ORS 31.610[4][a]-[b]). Joint and several liability retained for violations of Oregon and federal law regarding hazardous wastes and substances, radioactive wastes, and air and water pollution (ORS 31.610[6]).

Comparative negligence does not bar recovery if fault attributable to claimant equal to or less than combined fault of defendant, third party defendants and settled parties, but damages allowed diminish in proportion to percentage of fault attributable to claimant. (ORS 31.600[1]). Trier of fact compares fault of claimant with fault of any party against whom recovery is sought, third party defendants who are liable in tort to claimant, and any person with whom claimant has settled. No comparison of fault with any person immune from liability to claimant, not subject to jurisdiction of court, or not subject to action because of time bar. (ORS 31.600[2]). Defendant who files third party complaint against person alleged to be at fault or who alleges fault of party who has settled with claimant has burden of proving fault and causation of those other parties. (ORS 31.600[3]). Provisions apply to product liability cases. (287 Or. 3, 597 P.2d 351). Uniform Comparative Fault Act not adopted.

Seatbelts.

Evidence of nonuse of safety belt or harness admissible to mitigate injured party's damages. Mitigation may not exceed 5%. (ORS 31.760).

Liquidated Damages.

Clause unenforceable where designed as penalty to secure performance rather than as estimate of anticipated damages. To enforce, party must establish that clause was intended to provide for damages for breach, that actual damages would be difficult to estimate and that there is reasonable relation between agreed damages and foreseeable loss. (277 Or. 343, 560 P.2d 1058).

Charitable Immunity.

Doctrine no longer applicable. (235 Or. 412, 394 P.2d 1009).

Implied Assumption of Risk.

Doctrine abolished. (ORS 31.620).

Uniform Contribution Among Tortfeasors Act (Revised).

Not adopted.

No-Fault Insurance.

See category 23 Transportation, topic 23.01 Motor Vehicles, subhead No-Fault Insurance.

Actions for Death.

See category 13 Estates and Trusts, topic 13.05 Death, subhead Action for Death.

5.10 DECLARATORY JUDGMENTS:

See topic 5.15 Judgments.

5.11 DEPOSITIONS AND DISCOVERY:

Within State for Use Within State.

Depositions of parties and witnesses may be taken after summons served or defendant appears, whichever is sooner. If prior to expiration of period to appear and answer, deposition may be taken upon leave of court, except leave of court is not required if defendant has sought discovery or if special notice procedure is followed for deponent who will be unavailable. (ORCP 39 A). Deposition must be preceded by oath or affirmation administered by officer authorized to administer oaths or by person specially appointed by court. (ORCP 38 A). Depositions may be written or oral. (ORCP 39 and 40).

Outside State for Use Within State.

Depositions may be taken on notice before person authorized to administer oaths in place outside state or before person appointed or commissioned by court or pursuant to letters rogatory. (ORCP 38 B). Commissions or letters rogatory shall be issued on application and notice and on terms that are just and appropriate. (ORCP 38 B).

Within State for Use Elsewhere.

Governed by same rules as for use within state. Uniform Foreign Depositions Act adopted. (ORCP 38 C).

Deposition Upon Oral Examination.

Written notice of time and place, and name and address of deponent must be given to all parties reasonable time before taking deposition. (ORCP 39 C). Request complying with ORCP 43 may accompany notice if production of documents and things is sought at deposition. Notice may provide for recording deposition by other than stenographic means, yet court may require stenographic recording. Notice of deposition of organization should designate matter upon which examination is requested and advise nonparty organization of its duty to designate witness to testify on matters requested. Organization must designate persons to testify on its behalf and set forth matters on which each person will testify. Parties may stipulate to take deposition by telephone, or court may order depositions by telephone upon motion. (ORCP 39 C). Direct and cross-examination may proceed as at trial. All objections must be noted upon transcription or recording and evidence objected to must be taken subject to objections. (ORCP 39 D). Either party or deponent may move court to terminate or limit examination upon showing that examination is being conducted in bad faith or unreasonable manner. (ORCP 39 E, 36 C). If requested by witness or party at time of deposition or with leave of court at any time before trial, witness shall examine transcription or recording and may make changes on transcript or in writing to accompany recording. Statement of reasons must accompany changes. Such changes must be served on all parties. (ORCP 39 F).

Certificate.

Stenographic reporter must certify under oath that witness was sworn and that transcript is true record of testimony. If nonstenographic recording is later transcribed, transcriber shall certify that witness was sworn on recording and that transcript is correct. When recording or nonstenographic deposition or transcription thereof is to be used at any proceeding or is filed, party taking deposition or such party's attorney shall certify that recording is true, complete, and accurate recording of deposition and has not been altered. (ORCP 39 G[1]).

Filing.

Deposition must be filed with court where action is pending, if requested by any party. (ORCP 39 G[2]).

Exhibits.

Party may request that documents and things produced for inspection be marked for identification, annexed to and returned with deposition. Originals may be retained by witness if copies are provided to parties, but originals must be marked and witness must afford parties opportunity to compare copies with originals. Any party may move for order annexing originals pending final determination of case. (ORCP 39 G[3]). If subpoena duces tecum served, designation of materials to be produced must be attached to deposition notice. (ORCP 39 A).

Failure to Appear.

If party giving notice of deposition fails to appear, and another party attends in person or by attorney, court may order party giving notice to pay other party its reasonable expenses, including reasonable attorney's fees. If party giving notice of deposition of witness fails to serve subpoena on witness causing witness to fail to attend and another party or his attorney attends, court may order party giving notice to pay reasonable expenses and attorney's fees incurred by other party attending. (ORCP 39 H).

Written Questions.

Upon stipulation of parties or leave of court, any party may take deposition of any person, including party, by written questions. Questions must be served on every other party with notices stating name, address of person to whom directed, or, if not known, general description sufficient to identify, and name or title and address of officers before whom deposition is to be taken. Written cross questions may be served upon all other parties within 30 days after service of written questions, redirect questions within ten days of cross questions and recross questions within ten days of redirect questions. (ORCP 40 A). Officer designated in notice shall take testimony of witness and prepare, certify and file or mail deposition with attached copy of notice and questions. (ORCP 40 B).

Use.

Deposition of party or witness may be introduced at trial for impeachment. Deposition of party (or of party's officer or director) may be introduced for any purpose by adverse party. If admissible under rules of evidence, deposition of witness may be used against party if party was present or represented at taking of deposition and deponent is dead, beyond subpoena power of court, unavailable or other exceptional circumstances where, in judgment of court, it is interest of justice to allow use. (ORS 45.250). Substitution of parties or dismissal of proceeding followed by new proceeding involving same subject matter and parties does not affect right to use depositions previously taken. (ORS 45.270).

Objections.

All errors and irregularities in notice of deposition are waived unless written objection is promptly served upon party giving notice. (ORCP 41 A). Objections to competency, relevancy and materiality are not waived by failure to object during deposition unless ground for objection would have been alleviated if presented at that time. Objections on oral examination to manner of taking deposition, form of questions or answers, oath or affirmation, conduct of parties or any error which might be prevented if promptly presented are waived unless made at taking of deposition. Objection to form of written questions waived unless served in writing on party propounding within time allowed for serving succeeding questions and within 20 days of last questions authorized. (ORCP 41 C).

Compelling Attendance of Witnesses.

Party may subpoena witnesses for deposition upon proof of service of notice to take deposition. Nonparty state resident may be required to attend examination only in county where such person resides, is employed, transacts business in person, or in such other convenient place fixed by court. Nonresident of state may be required to attend only in county where served with subpoena or other convenient place fixed by court. (ORCP 55 F[2]). Disobedience of subpoena is punishable as contempt. (ORCP 55 G).

De Bene Esse.

See subhead Perpetuating Testimony, infra.

Perpetuating Testimony.

Deposition prior to commencement of action may be taken upon leave of court. Person desiring to perpetuate testimony may file petition in county of such person's residence or residence of any expected adverse party. Petition must be made in name of petitioner and show petitioner expects to be party to action in state and is unable to bring or defend such action without perpetuated testimony, or that petitioner has some interest in some real property in state which would be subject of such action; subject matter of expected action and petitioner's interest therein; facts petitioner desires to establish by perpetuated testimony; names or descriptions of persons petitioner expects to be adverse parties, and their addresses so far as is known; and names and addresses of parties to be examined. Notice of deposition and copy of petition must be served in same manner as summons. (ORCP 37 A). Perpetuation of testimony after commencement of action permitted where witness may be unavailable for trial or suffer undue hardship to appear at trial. Perpetuation of testimony permitted not less than seven days before trial on not less than 14 days notice unless shorter periods ordered by court. Perpetuation deposition notice subject to additional requirements of brief description of subject areas of testimony of witness and manner of recording deposition. All objections to testimony and evidence taken at perpetuation deposition must be made at time of deposition and noted in record. Any objections not made at deposition are waived. (ORCP 39 I).

Form of Deposition.

The following form of deposition may be used:

Form

(Case Caption). BE IT REMEMBERED THAT the deposition of ________ was taken before ________, Court Reporter and Notary Public, on ________, commencing at the hour of _____, in (office location), in the City of ________, County of ________, State of ________

STATE OF ________)

County of ________) ss.

I, ________, a Court Reporter and Notary Public for the State of ________, do hereby certify that ________ personally appeared before me at the time and place mentioned in the caption herein; that the witness was by me first duly sworn on oath, and examined upon oral interrogatories propounded by counsel; that said examination, together with the testimony of said witness, was taken down by me in stenotype and thereafter reduced to typewriting; and that the foregoing transcript, Pages 1 to ____, both inclusive, constitutes a full, true and accurate record of said examination of and testimony by said witness, and of all other oral proceedings had during the taking of said deposition, and of the whole thereof.

Witness my hand as Notary Public at (city), (state), this (date).

____

Notary Public for ____________________

Usual Stipulation.—Usual stipulation in deposition reads:

(At said time and place the following stipulation was entered into between the attorneys in behalf of the respective parties:)

It is hereby stipulated and agreed by and between the parties hereto, through their respective counsel, that the deposition of ________ may be taken before ________, a Notary Public for ________, at this time and place, on oral interrogatories to be propounded to said witness as by law provided.

It is further stipulated that all irregularities as to notice of time and place and manner of taking said deposition are hereby waived, each party reserving the right to objection at the time of trial to any question or answer as to the competency, relevancy or materiality thereof, but that objections as to the form of questions are waived unless made at the time of taking said deposition.

Reading and Signing.—Witness must, at time deposition is taken, request opportunity to examine and change transcript. After conclusion of deposition, changes to transcript may be made by party or witness before trial with leave of court. (ORCP 39 F[1]). Witness must make changes within 30 days after deposition is submitted to witness and provide statement of reasons for making changes. (ORCP 39 F[2]).

Discovery.

FRCP adopted with modifications. (ORCP 36). FRCP 26(b)(4) not adopted. Oregon practice does not require party to disclose witnesses, including expert witnesses, in advance of trial. FRCP 26(e), regarding supplementation of responses, also not adopted.

Interrogatories.

FRCP 33 not adopted. Oregon procedure does not authorize interrogatories but party may submit deposition upon written questions. (ORCP 40). See subhead Written Questions, supra.

Production of Documents, Entry upon Land.

FRCP 34 adopted with minor modifications. (ORCP 43). Thirty-day response period of FRCP 34(b) not adopted. Requesting party specifies reasonable time, place, and manner of making inspection. Defendant not required to produce or allow inspection before expiration of 45 days after service of summons, unless court specifies shorter time. Third party may be compelled to produce documents and things for inspection pursuant to subpoena without having to appear for deposition. (ORCP 43 D). Party must serve nondeposition subpoena for production of documents and things on other parties seven days before serving subpoena on third party. Third party has 14 days to respond to subpoena. (ORCP 55 B). Party must serve copy of subpoena for hospital records on person whose records are sought and on all other parties, not less than 14 days before service upon hospital. (ORCP 55 H). Subpoena duces tecum for medical records must be served on patient, health care recipient, or attorney, before being served on custodian of medical records. (ORCP 55 I).

Physical and Mental Examinations.

FRCP 35 adopted with modifications. (ORCP 44). ORCP 44 C and E authorize party against whom claim in civil action is pending to request copies of claimant's hospital records and physician's or psychologist's reports and office and chart notes.

Demand for Admission of Facts.

FRCP 36 and 37(c) adopted with minor modifications. (ORCP 45 and 46 C). Requests must be separately numbered and provide blank space reasonably calculated to allow response to be inserted. More than one set of requested admissions may be served, but total number shall not exceed 30 without leave of court. (ORCP 45 E, F).

Sanctions and Protective Orders.

FRCP 26(c) and 37 adopted with minor modifications. (ORCP 36 C and 46). Court will deny any motion made pursuant to ORCP 36 through 46 unless moving party, before filing motion, makes good faith effort to confer with other party concerning issues in dispute. (UTCR 5.010[2]). Moving party must file certificate of compliance with UTCR 5.010 with motion. (UTCR 5.010[3]).

5.12 EQUITY:

See topic 5.02 Actions.

5.13 EVIDENCE:

Witnesses.

Oregon Evidence Code in effect. (ORS 40.010-.585).

Any person, having sworn or affirmed to testify truthfully, who can perceive and communicate, may testify as to matters of personal knowledge. (ORS 40.310, 40.315, 40.320). Presiding judge or juror sitting at trial may not testify at that trial. (ORS 40.330, 40.335). Lawyer may not represent litigant at trial if lawyer or another member of lawyer's firm is likely to be called as adverse witness and lawyer or firm member's testimony will or may be prejudicial to lawyer's client. If lawyer is to be called on behalf of client, lawyer (except in narrow circumstances) may not represent litigant at trial although another member of lawyer's firm may. (Oregon Rules of

Professional Conduct, Rule 3.7). Court must appoint interpreter and provide assistive communication devices for disabled witness at no charge to witness. (ORS 45.285).

See also topic 5.11 Depositions and Discovery.

Privileged Communications.

Except in narrowly defined situations (see cited statutes individually), no attorney, psychotherapist, physician, licensed professional nurse, certificated school staff member or counselor, licensed clinical social worker, member of clergy, licensed professional counselor or marriage and family therapist, stenographer, interpreter or spouse may testify as to confidential communications without consent of holder of privilege. Privilege waived by holder's voluntary disclosure or consent to disclosure of any significant part of matter or communication. Holder's offering of witness as to mental, emotional or physical condition waives psychotherapist's or physician's privilege. (ORS 40.225-40.275, 40.280). Comment upon claim of privilege prohibited. (ORS 40.290). Instruction against adverse inference from claim of privilege must be given upon request. (ORS 40.290). Newsmen and others connected with communications media cannot be compelled to disclose source of any published or unpublished information or substance of any unpublished information, except in civil defamation actions where defendant asserts defense based on source or content of allegedly defamatory information. Newsman's privilege extends to papers, effects and work premises, except where newsman commits crime. Newsman's privilege is lost if informant offers himself as witness. (ORS 44.510-.540).

Public officer may not testify as to public records statutorily exempt from disclosure. (ORS 40.270).

Government may refuse to disclose identity of informant as to law violation unless government or informant has disclosed informant's identity or interest to those who would resent informer's communication or if informer appears as government witness. If informant's testimony is necessary to fair determination of case and privilege is claimed, court may dismiss charge or make other orders as justice requires. Court may require in camera disclosure of identity of informer relied upon to obtain search warrant. (ORS 40.275).

Except where required for administration or enforcement of public health laws or rules, local health authority officials may not be compelled to disclose records of reportable diseases without written consent of subject of report. (ORS 433.008).

Husband and Wife.

In civil or criminal action, spouse has privilege to refuse, disclose and prevent other spouse from disclosing any confidential communication made during marriage. In any criminal proceeding, neither spouse may be forced to testify adversely to other spouse regarding any matter occurring during marriage unless testifying spouse consents. There is no privilege in criminal actions where one spouse is charged with bigamy or offense against other or child of either spouse or against third party in course of offense against spouse. No privilege exists as to matters occurring prior to marriage or in civil action where spouses are adverse parties. (ORS 40.255).

Statements of Person Since Deceased or Otherwise Unavailable.

Following statements of persons since deceased or otherwise unavailable are admissible: Former testimony; statements under belief of impending death concerning cause or circumstances of impending death; statements against pecuniary or proprietary interest, inculpatory statements or statements invalidating declarant's claim; statements of declarant's or other's personal or family history; certain statements made in professional capacity; or material statements which are most probative evidence available and interests of justice require their admission. (ORS 40.465).

Self-incrimination.

Witness cannot be compelled to testify against himself in criminal prosecution. (Const., Art. I, § 12).

Rape Cases.

In rape and sexual abuse cases, reputation or opinion evidence of the past sexual behavior of alleged victim is not admissible. With leave of court, other evidence of past sexual behavior may be admissible only to show motive or bias of alleged victim, to rebut or explain scientific or medical evidence, or where constitutionally required. (ORS 40.210).

Compelling Attendance.

See topic 5.11 Depositions and Discovery.

Impeachment.

Witness credibility may be attacked by any party. (ORS 40.345). Credibility may be attacked by opinion or reputation evidence as to character for untruthfulness, and after such attack, may be supported by like evidence. Extrinsic evidence of specific instances of misconduct may not be used to impeach, but conviction of felonies or crimes of false statement may be used within 15 years of conviction or release, if conviction not rendered nugatory. (ORS 40.350, 40.355). Extrinsic evidence of conduct or statements showing bias or interest may be used only if witness fails to fully admit facts relating to bias or interest and witness allowed to explain. Rehabilitation may be made only by evidence showing lack of bias or interest. (ORS 40.360). Credibility may not be impeached by evidence of beliefs or opinions of witness on matters of religion. (ORS 40.365). Extrinsic evidence of prior inconsistent statement (other than party admission [40.450]) admissible only after opportunity given to explain or deny. (ORS 40.380).

Testimony by Affidavit.

Upon written waiver by defendant in trial of traffic infraction, court may admit affidavit of witness in lieu of oral testimony. (ORS 153.575).

5.14 INJUNCTIONS:

Temporary restraining order or preliminary injunction may be allowed by court or judge thereof at any time after commencement of action and before judgment. (ORCP 79 A). Prejudgment restraint of property subject to provisional process limitations. See category 8 Debtor and Creditor, topic 8.02 Attachment.

Jurisdiction.

No special jurisdictional limitations.

Prerequisites.

Preliminary injunction may be allowed after action commenced and undertaking filed with clerk of court. (ORCP 79 A; ORCP 82).

Procedure.

See subhead Notice, infra.

Temporary Restraining Order.

May be obtained without notice if (1) it clearly appears from facts shown by affidavit, declaration, or verified complaint that irreparable injury will occur before hearing; (2) affidavit or declaration sets forth efforts made to notify opposing party; and (3) affidavit or declaration sets forth reasons why notice should not be required. Order expires unless expressly extended within ten days from issuance. (ORCP 79 B). Party opposing order may move for modification or dissolution on two days' notice, unless court orders shorter notice. (ORCP 79 B[4]). Appearance by party for hearing on temporary restraining order does not convert it to preliminary injunction. Different procedures and standards for order in domestic relations case. (ORS 107.700-.730). Certain protective orders may be obtained from police officer or court to protect individuals from stalking (ORS 163.730 et seq.) and to prevent abuse of elderly persons and persons with disabilities (ORS 124.020).

Preliminary Injunction.

Requires at least five days' notice to adverse party prior to hearing. (ORCP 79 C). Injunction may be allowed when it appears to court that party is entitled to relief demanded, if such relief consists in restraining some act which during litigation would injure that party, or when it appears that party to be enjoined is doing or threatens some act in violation of opposing party's rights concerning subject of action, and tending to render judgment ineffectual. (ORCP 79 A).

Bond.

Party is required to give undertaking in amount fixed by court to pay all costs, damages, and attorney fees as may be incurred by party wrongfully enjoined. (ORCP 82). No security required where restraining order or preliminary injunction is sought (a) to protect person from violent or threatening behavior, or (b) to prevent unlawful conduct when effect of injunction is to restrict enjoined party to available judicial remedies. Undertaking generally not required in marital dissolution cases. (ORS 107.095).

Notice.

Preliminary injunction may be granted only upon at least five days notice to opposing party, unless different period fixed by court. (ORCP 79 C). See also subhead Temporary Restraining Order, supra.

5.15 JUDGMENTS:

Judgment is final determination of rights of parties in action or final judgment entered pursuant to Oregon Rules of Civil Procedure (“ORCP”) ORCP 67 B or G. Order is any intermediate determination. (ORCP 67).

Judgments by confession are allowed upon written confession of party, signed and verified under oath by party or person authorized to bind party. Application to confess judgment must be filed in county where at least one of defendants reside or may be found and must authorize entry of judgment for specified sum; state concisely facts out of which it arose and show that sum is presently due; state that confessor understands it authorizes immediate entry of judgment and enforcement; be executed after date when sums are due. It may not be entered in case arising out of sale of goods or services for personal or household use or loan for personal or household use. (ORCP 73).

Judgment notes are not in use.

Form of Judgments.

Judgments in civil or criminal actions that contain money awards must comply with 18.035-.048.

Judgments by Consent.

Consent judgments recognized, but cannot be used to expand court's jurisdiction. (182 Or. 549, 189 P.2d 397; ORCP 67 F).

Judgment on Pleadings.

After pleadings are closed, any party may move for judgment on pleadings. (ORCP 21 B).

Summary Judgment.

Fed. R. Civ. P. 56 substantially adopted. (ORCP 47). ORCP 47 E provides that affidavit or declaration of attorney stating that unnamed, qualified expert has been retained and is willing to testify to facts or opinions creating issue of fact is sufficient to controvert allegations of moving party. (ORCP 47 E).

Declaratory Judgments.

Uniform Declaratory Judgments Act adopted. (ORS 28.010-.160).

Default judgment may be entered by clerk in contract action for money or claim for sum certain. In other cases application to court necessary. Must give ten days written notice if party has appeared or if plaintiff has notice that party is represented by attorney. Nonmilitary affidavit or declaration required except on order of court. If party who has filed appearance fails to appear at scheduled trial, court may proceed without nonappearing party and without further notice to such party. (ORCP 69).

Offer of Judgments.

Offer to allow judgment may be made up to ten days prior to trial. If offer of judgment not accepted by claimant within three days and filed with court it is withdrawn and may not be used as evidence but may be submitted to trial court only after decision on merits and only if claimant does not recover more than offer, then party making offer is entitled to costs and disbursements from time of offer. (ORCP 54 E, CCP 2008).

Registering.

Court administrator shall enter all judgments in register. (ORS 18.075). Judgment creditor can register judgment in any other county so long as judgment remains in force, by recording certified transcript of judgment or lien record abstract in County Clerk Lien Record for any other county. See also subhead Liens, infra.

Vacation or Modification.

Court may set aside judgment within one year taken against a party through his mistake, inadvertence, surprise or excusable delay, if there is newly discovered evidence, or fraud by adverse party. (ORCP 71). Court may set aside judgment within reasonable time if judgment is void, judgment is satisfied or judgment on which it is based is revised or vacated. (ORCP 71). New trial, may be granted for irregularities preventing fair trial, misconduct of jury or prevailing party, accident or surprise, newly discovered evidence, insufficiency of evidence, or error in law properly excepted to. (ORCP 64).

Revival.

Judgments expire unless renewed before expiration of following periods: civil actions—ten years; criminal actions—20 years; child support—35 years. (ORS 18.180, 2009 c. 354). Judgments for child support are not renewable. All other judgments are renewable for one period as follows: civil and criminal—ten years (ORS 18.182[5]); spousal support—15 years (ORS 18.185).

Actions.

Action on judgment must be commenced within ten years. (ORS 12.070).

Voluntary Dismissal.

Action may be dismissed by plaintiff as matter of right on motion of plaintiff filed and served not less than five days before trial if no counterclaim, or if counterclaim does exist, at discretion of court. Dismissal also granted on stipulation of parties. Involuntary dismissal available where plaintiff fails to prosecute or to establish prima facie case. (ORCP 54).

Liens.

Judgment of circuit or county court is lien on judgment debtor's real property, then owned or thereafter acquired, in counties where and when judgment or transcript registered. (ORS 18.150,.152). When judgment is satisfied, it is duty of judgment creditor to file satisfaction and deliver to judgment debtor, executed satisfaction of judgment for every county where certified copy of judgment or lien record abstract has been recorded. (ORS 18.225).

Judgment that includes money award of justice's court is not lien until certified copy of judgment or lien record abstract recorded in County Clerk Lien Record of county where rendered. (ORS 52.635).

Judgment lien continues for following periods after entry of judgment: civil actions—ten years; criminal actions—20 years; spousal and child support—25 years. (ORS 18.180). Thereafter, judgment and lien expire unless circuit court, on motion made prior to expiration, renews judgment. Judgments for child support are not renewable. All other judgments are renewable for one period as follows: civil and criminal—ten years (ORS 18.182[5]); spousal support—15 years (ORS 18.185).

Priorities.

Conveyance of interest in real property void as against judgment liens, unless conveyance recorded at time judgment entered or recorded. (ORS 18.165).

Assignment of judgment may be recorded. (ORS 18.205).

Release.

Bankrupt may, by motion after discharge, have judgment against him released (ORS 18.238).

Execution.

See category 8 Debtor and Creditor, topic 8.05 Executions.

Satisfaction.

Judgment debtor, or person interested in land on which judgment is lien, may pay it to court administrator, who must then satisfy it upon record. (ORS 18.235).

Satisfaction of judgment may be by recording certified copy of original satisfaction document. (ORS 18.225).

Foreign Judgments.

Uniform Enforcement of Foreign Judgments Act adopted. (ORS 24.105-24.175). Foreign judgment in form of restraining order enforceable as Oregon order without necessity of filing. Certain exceptions apply. Order eligible for entry into Law Enforcement Data System. (ORS 24.190). Judgment of admiralty court of foreign country has same effect as if rendered by U.S. Admiralty Court. (ORS 43.200). Uniform Foreign Money-Judgments Recognition Act adopted. (ORS 24.200-24.255). Uniform Foreign-Money Claims Act adopted. (ORS 24.260-24.335).

5.16 LIMITATION OF ACTIONS:

Uniform Commercial Code adopted. (ORS 71.1010 et seq.).

Actions are barred unless brought within the following periods after the respective causes of action accrue:

Ten Years.

To recover real property or possession thereof (ORS 12.050) or to determine any claim of right or interest in real property (ORS 12.040), (see category 21 Property, topic 21.02 Adverse Possession); on sealed instruments entered into before Aug. 13, 1965 (ORS 12.070); on judgment or decree of any American court (ORS 12.070); to cancel land patent (ORS 12.040); any action not otherwise provided for (ORS 12.140).

Six Years.

For waste or trespass upon or for interference with or injury to any interest of another in real property with certain exceptions (ORS 12.080, 273.241); on liability created by statute, other than penalty or forfeiture and except for statutory liquidated damages or penalty for failure to pay overtime as stated below (ORS 12.080); on action for taking, detaining or injuring personal property (ORS 12.080[4]); on contracts or liabilities, expressed or implied (ORS 12.080), except following: contracts under seal entered into before Aug. 13, 1965 (ORS 12.070); action for breach of UCC contract for sale (ORS 72.7250). Action based on child abuse must be commenced before person attains age of 40 if conduct giving rise to action occurred before person was 18, or five years after discovery of causal connection, whichever is later. (ORS 12.117, 2009 c. 879).

Five Years.

On contract for the sale of real property. (ORS 12.060). Action for personal injury arising from any medical-dental malpractice must be commenced within two years from date of discovery of such injury or date upon which injury, in exercise of reasonable care, should have been discovered, with additional limitation that it must be commenced within five years from date of act or omission unless delay is due to fraud, deceit, or misrepresentation, and then within two years of when such is or should have been discovered. (ORS 12.110[4]).

Four Years.

On action for breach of contract for sale under Art. II, Uniform Commercial Code (ORS 72.7250) (but see two-year limit for “product liability civil actions,” which may include UCC Art. II cases [30.900-.915]); action for treble damages for violation of Oregon antitrust law, but if state or federal government antitrust case based in whole or in part on same matter is pending, plaintiff may file within one year after conclusion of government case (or first of them to conclude, if more than one) (ORS 646.800[2]); action for price discrimination (ORS 646.140[2]).

Three Years.

Against sheriff for act in official capacity excluding escapes (ORS 12.100), and action upon statute for penalty or forfeiture where action is given to party aggrieved, or to such party and state, except provision relating to statutory claims for liquidated damages and penalties for failure to pay overtime stated below (ORS 12.100); in personal injury action commenced by injured person's personal representative (ORS 30.075); from discovery of injury in wrongful death actions brought by personal representatives (ORS 30.020); actions by common carriers for recovery of tariff charges (ORS 760.545); action for sale of security in violation of Oregon Securities Law (or within two years of discovery of alleged fraud or misstatement) (ORS 59.115[5]). See also category 17 Intellectual Property, topic 17.01 Trademarks and Tradenames, subhead Franchises.

Two Years.

For recovery of over-or-under charge by for-hire carrier of persons or household goods (ORS 767.410[4]); for assault, battery, false imprisonment, or for any injury to person or rights of another, not arising on contract, and not especially enumerated elsewhere (ORS 12.110[1]); for relief on ground of fraud or deceit commencing from discovery of fraud or deceit (ORS 12.110[1]); for actions to recover overtime or premium pay and statutory liquidated damages therefor; and for medical and dental malpractice (but see subhead Five Years, supra) (ORS 12.110); for damages arising from improvements to real property commencing from date of discovery (ORS 12.135); against mother or father for family expense (ORS 108.040, 2005, c. 109); action by supplier of material or labor to public works on contractor's bond (ORS 279.536); upon statute for forfeiture or penalty to state or county (ORS 12.110[2]); product liability civil action commencing from date of discovery of relationship between injury and product (ORS 30.905[1], 2009 c. 485); automobile dealers' actions for franchise violations (ORS 650.170); actions on fire insurance policies, commencing with inception of loss (ORS 742.240); actions arising from act or omission of public body or officer, except actions for escape of prisoner or for damages from construction, and subject to 90- or 180-day notice requirement (ORS 30.275); actions against ski area operator for skier's injury (ORS 30.980); action arising from nuclear incident involving release of radioactive material (excluding acts of war) that causes loss of or damage to property, or loss of use of property, or bodily injury, sickness, or death (ORS 12.110[5]; 12.137); for death, injury, or damage resulting from certain breast implants (ORS 12.276).

One Year.

Under rental agreement or statutory landlord-tenant law (ORS 12.125); against sheriff or other officer for escape of prisoner arrested or imprisoned on civil process (ORS 12.120); for libel or slander (ORS 12.120); by private person for statutory penalty given in whole or in part to person who will prosecute for same (if private person does not sue within such time, district attorney may sue in behalf of state within two years) (ORS 12.130); for unlawful trade practice commencing from date of discovery (but suspended during pendency of action by prosecuting attorney based on same matter complained of) (ORS 646.638[6]); for challenge to change in governmental boundary (ORS 12.270); for state law antitrust violation if case brought after government antitrust case based in whole or in part on same matter is concluded and more than three years after cause of action accrued (ORS 646.800[2]); for unlawful collection practice (ORS 646.641[3]); for proceedings against garnishee (ORS 12.085); for unlawful employment practice, unless 90-day time limit produced by certain types of notice from Commissioner of Labor applies (ORS 659A.875); liens against boats or vessels (ORS 783.010-.160); unlawful debt collection (ORS 646.641); enforcement of express warranty on new motor vehicle (ORS 646.365).

Six Months.

Actions to foreclose liens for contributions to employee benefit plans. (ORS 87.865).

One Hundred Twenty Days.

Actions to foreclose construction liens. (ORS 87.055).

Ninety Days.

Actions for unlawful employment practices in certain circumstances. (ORS 659A.875).

Seventy-five Days.

Actions to recover deficiency on default of consumer loans in certain circumstances. (ORS 83.840).

Sixty Days.

Actions against municipalities for reduced commercial property value resulting from restrictions on street use. (ORS 105.870).

Forty-five Days.

Actions to foreclose agricultural produce lines; period may be extended to 225 days if notice of lien filed. (ORS 87.730).

Actions Not Specifically Provided For.

Any action not otherwise provided for must be brought within ten years. (ORS 12.140).

Suit in equity must be commenced within the time limit applicable to an action at law. (ORS 12.040).

When Time Commences to Run.

At time injury in wrongful death case is discovered or reasonably should have been discovered (ORS 30.020); time of last payment made on existing contract after same is due (ORS 12.240); on return to state or end of concealment of defendant who was out of state and couldn't be served within, or was concealed within state, when action accrued (ORS 12.150); action for relief on ground of fraud or mistake, on discovery thereof, (ORS 12.110; 12.040[4]); on contract for sale of real property, at contract date for final payment (ORS 12.060); on an account, at date of last charge or payment proved in account, but interest, financing, carrying charges not deemed such charge (ORS 12.090); on contract for sale under Art. II, Uniform Commercial Code, when breach occurs regardless of aggrieved party's lack of knowledge (breach occurs at tender as to present warranties) (ORS 72.7250), unless “product liability civil action” legislation applies, in which case time may commence when death, injury, or damage complained of occurs (ORS 30.905[2]); on practicing engineering or land surveying without license when discovered up to ten years (ORS 672.991[2]); on medical-dental malpractice not involving fraud or deceit when act or omission discovered or should reasonably have been discovered up to five years; otherwise, within two years from date such fraud or deceit is or should have been discovered (ORS 12.110). On unlawful trade practice, at time of discovery of unlawful act (ORS 646.638[6]); on state law antitrust case taking advantage of tolling feature of prior government action, when state or federal government proceeding is concluded (whichever is first concluded) (ORS 646.800[2]). On nuclear incident action, upon discovery of injury and causal connection between incident and injury, or upon substantial change in degree of injury. (ORS 12.110[5]; 12.137).

When Action Commenced.

Action or suit is deemed commenced when complaint has been filed if service of summons occurs before expiration of 60 days thereafter. (ORS 12.020).

When Period Runs.

If statute requires act be done within one or more years, time is computed in calendar years. Special rule for Leap Years. (ORS 174.120).

New Action.

Where action begun within statutory period is involuntarily dismissed without prejudice on any ground not adjudicating merits or with prejudice on ground plaintiff failed to effect service within time allowed, after statutory period has expired, new action may be commenced within 180 days after entry of judgment of dismissal if defendant had notice of original action not later than 60 days after action was filed. New action may be commenced only once for same claim or claims. (ORS 12.220).

Foreign Causes of Action.

Uniform Conflict of Laws-Limitations Act adopted. (ORS 12.410-.480). Oregon limitation period applies unless claim is substantively based on law of another state or states. Court may apply Oregon limitation period in any event upon determination that foreign limitation period differs substantially and is unfair to either plaintiff or defendant.

Disabilities of Plaintiff.

During continuance of following disabilities statutory period does not run against persons, who at time action accrues (ORS 12.170), are: under 18, insane, or imprisoned on sentence less than life, but extension obtained thereby may not have effect of extending time more than five years in all nor more than one year after disability ceases (ORS 12.160), and will extend by maximum of 90 days notice deadline for actions arising from act or omission of public body or officer (ORS 30.275[2]). Tolling by disability is inapplicable to five-year limitation for medical-dental malpractice. (ORS 12.110[4]). Statutory periods are tolled as against alien subject or citizen of country at war with U.S. during period of war. (ORS 12.200).

Absence or Concealment of Defendant.

Statutory period does not run in favor of defendant while he is absent from state residing elsewhere, and service cannot be made within state (including on statutory agent) or he is concealed therein. (ORS 12.150).

Interruption of Statutory Period.

Statute commences anew from last payment made on past due contract. (ORS 12.240). “Acknowledgment” does not toll statute unless written, signed by party to be charged and unqualified direct admission of present debt. (ORS 12.230; 208 Or. 56, 298 P.2d 1000). Statutory period tolled during time of injunction or statutory prohibition precluding commencement. (ORS 12.210). Statutory period suspended for 120 days for clients whose attorney's practice has been taken over by Circuit Court. (ORS 9.745).

Revival of Barred Claims.

A barred debt may be revived, or a new time from which the statutory period will run may be fixed, by a part payment indicating acknowledgment of larger debt due or new promise in writing, signed by party to be charged, but not otherwise. (ORS 12.230-.240).

Contractual limitations in insurance policies are permitted, but life insurance policy may not limit time to sue thereon to less than three years after accrual of cause of action. (ORS 743.225). Parties to U.C.C. sales agreement may reduce period to one year but may not extend. (ORS 72.7250).

How Presented.

Bar of statute of limitation must be raised in responsive pleading and may be raised by motion to dismiss. (ORCP 19 B, 21 A).

Actions by State.

General statutes of limitation do not apply to actions brought in name of and for benefit of state, or any county, or public corporation unless provided specifically. (ORS 12.250).

See also categories 3 Business Regulation and Commerce, topics Commercial Code, Securities; Estates and Trusts, topic Wills, subhead Contest.

Statute of Ultimate Repose.

Notwithstanding other longer statutory provisions as result of tolling or delayed commencement of running of statute of limitations, all actions for negligent injury to person or property must be brought within ten years from date of act or omission complained of. (ORS

12.115[1]). No action arising out of nuclear incident (ORS 12.110[5]) may be commenced more than 30 years from date of incident (ORS 12.137[3]).

``Product liability civil action'' for injury or property damage must be commenced not later than two years after discovery of relationship between injury and product; for death, not later than three years after death or discovery of relationship between death and product, or in any case not later than ten years after product first purchased for use or consumption, or expiration of similar statute of repose in foreign jurisdiction if product manufactured in another state or foreign country (ORS 30.905, 2009 c. 485); in case of asbestos-related disease action must be commenced within two years of date of discovery of injury (ORS 30.905[3]); in case of intrauterine device-related injury action against manufacturer must be commenced within two years of date of discovery or date on which plaintiff in exercise of reasonable care should have discovered such injury (ORS 30.905[5]).

Statutes of ultimate repose not applicable to actions involving certain breast implants. (ORS 12.276[2]).

Action by personal representative of one who died with cause of action on which statute had not run may bring case after statute has run, within one year of death; estate of one who died before statute ran can be sued within one year of death notwithstanding running of statute in interim. (ORS 12.190).

5.16A PARTITION:

105.205-.405 provide for the bringing of suits to partition real property held by tenants in common, or to sell such property if it cannot be divided without great prejudice to owners. Suit may determine interests of all owners, creditors having liens, and tenants, including those persons having estate of inheritance, or for life or years.

Jurisdiction and Venue.

Circuit court in county where property is located has jurisdiction of partition suits. (ORS 14.040).

Partition in Kind or Sale.

Partition in kind is first preference, public sale is second preference, and private sale is third preference. Referees may be appointed by court to sell property if partition cannot be made without great prejudice to owners. Otherwise, court enters judgment requiring partition and appoints referees to partition property. (ORS 105.245).

Mortgage in Lieu of Partition or Sale.

If property can be neither divided nor sold without prejudice, party objecting to partition may in some cases, by borrowing money on property, pay off other parties' interests as judicially determined. (ORS 105.210).

5.17 [RESERVED]

5.18 PLEADING:

Oregon Rules of Civil Procedure (ORCP) in effect.

Pleadings permitted are complaint, answer (which may include affirmative defenses, cross-claims, and counterclaims), reply, and third-party complaint. Third party complaints and cross-claims require answers. Counterclaims require replies. Reply required to assert affirmative matter in avoidance of defenses asserted in answer. (ORCP 13).

Every pleading must contain caption setting forth name of court, title of action, register number of cause, and designation of action. (ORCP 16). Every complaint and any other pleading which asserts claim for relief must contain plain and concise statement of ultimate facts constituting claim for relief, without unnecessary repetition; demand for relief claimed; and, if for recovery of money damages, amount sought. Relief in alternative or of several different types may be demanded. (ORCP 18).

Answer must contain either general or specific denial of each material allegation of complaint controverted by defendant, or denial based on lack of any knowledge or information thereof sufficient to form belief, and statement of any new matter constituting defense or counterclaim. (ORCP 19).

Each defendant may plead as many counterclaims, both legal and equitable, as he may have against plaintiff and may assert cross-claim against other defendants. Cross-claim must arise from same transaction or occurrence set forth in complaint or be related to property which is subject matter of complaint. Cross-claim may assert that another defendant is or may be liable to cross-claimant for all or part of plaintiff's claim. Also, except in cases of contribution among joint tortfeasors, any defendant may file third-party complaint against any person who is not then party but who is or may be liable to third-party plaintiff for all or part of original plaintiff's claim. Third-party claim may be filed as matter of right not later than 90 days after service of summons and complaint. Otherwise, third-party plaintiff must obtain agreement of parties who have appeared and leave of court. Third-party defendant may assert cross-claim, counterclaim or otherwise defend as against any other parties and may himself plead third-party complaint to bring in additional parties. When counterclaim is asserted against plaintiff, he may bring in third parties if under circumstances defendant would be entitled to do so. (ORCP 22).

No compulsory counterclaim rule in state courts.

Demurrer.

Not in use. Pleader may assert by responsive pleading, or by motion to dismiss: Lack of jurisdiction over person or subject matter; another action pending between same parties for same cause; incapacity of plaintiff to sue; insufficiency of summons or process, or service thereof; party asserting claim is not real party in interest; failure to join party needed for just adjudication; failure to state ultimate facts sufficient to constitute claim; action is time-barred. Motion to dismiss should be made before pleading if further pleading is permitted. (ORCP 21 A).

Time.

In circuit court defendant has 30 days from date of service to appear if served other than by publication; and if served by publication of summons he has 30 days from date of first publication. (ORCP 7 C[2]).

Amended or Supplemental Pleadings.

Any pleading may be amended by party once as matter of course at any time before responsive pleading is served or, if pleading is one to which no responsive pleading is permitted, within 20 days after it is served. Otherwise, party may amend by leave of court or written consent of adverse party, and leave is freely given when justice so requires. Amended pleadings need not be served on parties in default unless amended pleading asks for additional relief against such parties. Matters arising after commencement of suit or action are pleaded by supplemental pleading. (ORCP 23).

Frivolous Claims.

Pleadings, motions, and other papers must be signed by party or at least one attorney of record who is member of Oregon State Bar. Pleadings need not be verified or accompanied by affidavit.

Attorney or party who signs, files, or otherwise submits argument in support of pleading, motion, or other paper thereby certifies propriety of purpose and grounding of paper in law and fact. Court may impose sanctions against person or party found to have made false certification or to be responsible for false certification. Sanction must include order requiring payment of reasonable attorney fees and expenses incurred by moving party by reason of false certification.

Service, Filing.

For original summons and complaint, see topic 5.20 Process. Other pleadings may be served by mail or in person upon attorney or party, but if party is represented by attorney service must be made upon attorney. Service upon attorney may be made by delivery, by mail, or by telephone facsimile communication device if attorney maintains such device and device is operating at time service is made. Proof is by written acknowledgment of service, certificate of attorney or affidavit or declaration of other person. Other than notices of deposition and requests for inspection or production, and responses thereto, all papers that are required to be served must be filed with clerk of court within reasonable time after service. (ORCP 9; 205.125).

Proof of Claims.

In forwarding claims for action in Oregon such information should be given as will enable local attorneys to prepare a complaint. If defendant answers, proof of claims must be made by testimony or by deposition if witnesses are unavailable to appear in court.

Small Claims.

See category 6 Courts and Legislature, topic 6.01 Courts.

5.19 PRACTICE:

Oregon Rules of Civil Procedure (ORCP) in effect. Uniform Trial Court Rules (UTCR) apply uniformly to circuit courts throughout state. Supplementary local rules permitted, unless disapproved by Chief Justice of Supreme Court.

Claims (other than class actions and actions providing for statutory attorney fees) not exceeding $750 must be heard without attorney or pleadings before “Small Claims Department” and claims not exceeding $7,500 may be heard without attorney or pleadings, before “Small Claims Department”. (ORS 46.405 and 55.011). If party demands jury trial in proceeding before small claims department, case will be referred to arbitration, without participation of attorneys. (ORS 46.458). If defendant before small claims department requests jury and loses, defendant must pay reasonable attorney fees. (ORS 46.465). See also category 6 Courts and Legislature, topic 6.01 Courts.

Certain claims not exceeding $50,000 in circuit court are subject to mandatory arbitration. (ORS 36.400). Claims less than $10,000 are limited to six-person jury. (ORCP 56 B).

Small Claims.

See category 6 Courts and Legislature, topic 6.01 Courts.

Direct Actions Against Insurer.

See category 23 Transportation, topic 23.01 Motor Vehicles, subhead Direct Actions.

See also topics 5.02 Actions, Appeal and Error, Depositions and Discovery, Injunctions, Judgments, Pleading, Process; category 8 Debtor and Creditor, topics 8.02 Attachment, 8.05 Executions, 8.09 Garnishment.

5.20 PROCESS:

Commencement.

Civil action is commenced by filing complaint with clerk of court. (ORCP 3). For purposes of statute of limitations, action is commenced by filing and service of summons.

Summons.

After commencement of action, one or more summonses may be issued and served. Summons is issued when subscribed by plaintiff or by resident attorney of Oregon. (ORCP 7 B). Summons must under ORCP 7 C: (1) Contain title of action, name of court in which complaint is filed, and parties to action, (2) direct defendant to appear and defend within applicable time limit, (3) assert that if defendant fails to appear, plaintiff will apply to court for relief demanded in complaint, (4) contain subscription by plaintiff or resident Oregon attorney, (5) contain post office address to which paper in action may be served by mail, and (6) contain notification substantially as follows, printed in type size at least equal to eight-point type:

NOTICE TO DEFENDANT:

[READ THESE PAPERS CAREFULLY]

You must “appear” in this case or the other side will win automatically. To “appear” you must file with the court a legal paper called a “motion” or “answer.” The “motion” or “answer” must be given to the court clerk or administrator within 30 days along with the required filing fee. It must be in proper form and have proof of service on the plaintiff's attorney, or if the plaintiff does not have an attorney, proof of service on the plaintiff.

If you have questions, you should see an attorney immediately.

Time For Response.

If summons served by publication, 30 days from date of first publication. In all other cases, 30 days from date of service. (ORCP 7 C).

By Whom Served.

Any competent, disinterested person of at least 18 years of age who resides in Oregon or in state where service is made may serve summons. (ORCP 7 E). Service may not be made by party nor party's attorney.

Service Methods.

True copy of summons and complaint shall be served in manner reasonably calculated to notify defendant of action and to afford reasonable opportunity to appear and defend, and may be served as follows: (1) Personal service—personal delivery to defendant; (2) substituted service—delivery to any person over 14 years of age residing at defendant's dwelling house or usual place of abode; (3) office service—if defendant maintains business office, delivery during normal working hours to person apparently in charge thereof; (4) court ordered service—if service cannot be made by above methods, court upon motion may order service by any method or methods most reasonably calculated under circumstances to apprise defendant of existence and pendency of action, including but not limited to publication of summons, mailing summons and complaint without publication, and posting of summons. (ORCP 7 D).

Completing Service.

Where substituted or office service is used, plaintiff must promptly mail true copy of summons and complaint by certified or registered mail, return receipt requested, to defendant at his usual place of abode, together with statement of date, time and place at which substituted or office service was made. If office service, mailing may be to defendant's place of business instead of place of abode. Substituted or office service is completed upon receipt by defendant, three days after such in-state mailing, or seven days after such outside state mailing, whichever occurs first. (ORCP 7 D[2]).

Service Upon Particular Defendants.

On Individuals 14 Years of Age or Older.

By personal delivery on defendant or on agent authorized by appointment or law to receive service. If defendant cannot be found at his dwelling house or usual place of abode, by substituted service or by office service upon defendant or agent authorized by appointment or law to receive service. (ORCP 7 D).

On Minors Less Than 14 Years of Age.

By service in manner specified for individuals 14 years of age or older, together with service upon minor's father, mother, conservator or guardian, or if there be none, upon any person having care or control of minor, with whom minor resides, in whose service minor is employed, or upon appointed guardian ad litem. (ORCP 7 D).

Upon Incapacitated Person.

By service in manner specified for individuals 14 years of age or older, together with service upon conservator of such person's estate or guardian, or if there be none, upon such person's appointed guardian ad litem. (ORCP 7 D).

On General Partnership.

By personal service on partner or agent authorized by appointment or law to receive service. (ORCP 7 D).

On Limited Partnership.

By personal or office service upon registered agent, general partner, or by personal service upon any clerk on duty in office of registered agent. If none can be found in county where action is filed, by substituted service upon such registered agent or general partner, by personal service on any clerk or agent of limited partnership who may be found in county where action is filed, or by mailing summons and complaint to office of registered agent or to last registered office of limited partnership, to its principal office or place of business, or to any address most likely to give actual notice, or upon Secretary of State. (ORCP 7 D, CCP 2008).

On Association.

Service on cooperatives (ORS 62.155) by serving registered agent or alternatively if none, or unable to be found, by serving Corporation Commissioner pursuant to 60.121. Labor unions are legal entities and may be served by serving officers. (244 Or. 302, 417 P.2d 1009). Unincorporated associations subject to suit under common name may be served by personal service upon officer, managing agent, or agent authorized by appointment or law to receive service. (ORCP 7 D).

On State.

By personal service on Attorney General, or by leaving copy of summons and complaint with deputy, assistant or clerk at Attorney General's office. (ORCP 7 D).

On Public Bodies.

By personal or office service upon officer, director, managing agent, or attorney thereof. (ORCP 7 D).

On Domestic or Foreign Private Corporation.

By personal or office service upon registered agent, officer, or director, or by personal service upon any clerk on duty in office of registered agent. If none can be found in county where action is filed, follow procedures listed under catchline On Limited Partnership, supra. (ORCP 7 D, CCP 2008). If corporation fails to appoint agent, or if agent cannot be found, service may be made on Corporation Commissioner. (ORS 60.121, 60.731).

On Vessel Owners and Charterers.

By personal service upon vessel master employed by owner or charterer or agent of owner or charterer authorized to provide services to vessel calling at Oregon port or Washington port on that portion of Columbia River forming common boundary with Oregon. (ORCP 7 D).

Insurance Support Organizations.

Such organizations, defined in c. 746, which transact business outside state having effect on state resident deemed to have appointed Insurance Commissioner to accept service for them. (ORS 746.675).

On Nonresident Real Estate Licensee.

Such licensees deemed to have appointed Real Estate Commissioner as agent for service of process. Service on Commissioner requires leaving copy of summons and complaint with Commissioner or in Commissioner's office, together with $2 fee, and mailing copy by registered mail or by certified mail with return receipt to defendant's last known address. (ORS 696.255).

Personal service outside state may be made whenever court has subject matter and personal jurisdiction.

Long Arm Statute.

Special standards for jurisdiction set out in ORCP 4. In addition, jurisdiction is authorized to full extent of state and federal constitutions. (ORCP 4).

Service by Mail.

Where service of summons and complaint by mail is allowed or required, mailing must be certified or registered, return receipt requested, and is complete three days after mailing if address is within Oregon and seven days after mailing if address is outside Oregon. Where service by publication is ordered and defendant's address is known or can be ascertained, defendant shall be mailed copy of summons and complaint; otherwise, mailing of summons and complaint to defendant's last known address is sufficient. (ORCP 7 D).

Substituted Service.

See subhead Service Methods, supra; category Transportation, topic Motor Vehicles, subhead Actions Against Nonresidents; category Intellectual Property, topic Trademarks and Tradenames, subhead Tradenames.

Service on Motorists.

In action involving motor vehicle, defendant motorist, except defendant foreign corporation maintaining registered agent in state, who cannot be served in normal manner, may be served by personal service upon State Motor Vehicles Division Administrator with $12.50 fee, together with service of true copy of summons and complaint by mail upon defendant and defendant's insurance carrier if known. (ORCP 7[D]).

Simulated Process.

Issuing or delivering document that in form and substance falsely simulates civil or criminal process with intent to harass, defraud or injure another person is Class B misdemeanor. (ORS 162.355).

Return and Proof.

Summons must be returned promptly to clerk of court where complaint filed with proof of service or mailing, or stating defendant cannot be found. Summons may be returned by mail. Service other than by publication is proved by certificate completed by server indicating time, place and manner of service. Details of service required where defendant not personally served. Service by publication proved by affidavit or declaration in form prescribed by ORCP 7 F.

Disregard of Error.

Court may disregard error relating to form and issuance of summons and person who may serve if defendant received actual notice of substance and pendency of action. (ORCP 7 G).

Official Process.

All process authorized to be issued by court shall run in name of State of Oregon. Summonses and subpoenas are not official process. Such process may be served on legal holidays and Sundays. Telegraphic transmission of papers requiring service is authorized. (ORCP 8).

See also category 23 Transportation, topic 23.01 Motor Vehicles.

5.21 REPLEVIN:

Action to recover possession of personal property, though designated in ORCP 85 as “claim and delivery,” is substantially common law remedy of replevin.

Forum.

Jurisdiction lies in justice court for property worth up to $7,500. (ORS 51.080 [2]). Otherwise, jurisdiction is in circuit court. Venue is in county where property is located. (ORS 14.040[2]).

Proceedings.

After commencing action to recover possession of personal property and prior to judgment (ORCP 85 A), plaintiff may file sworn petition and supplemental affidavits or declarations requesting specific provisional process (ORCP 83 A). If sworn petition and affidavits or declarations meet detailed requirements (ORCP 83 A), court will order defendant and persons in possession of property to appear, three to seven days after service, to show cause why provisional process to take possession or restrain disposition or use of property shall not issue (ORCP 83 G). Court shall issue provisional process if it finds probable cause for sustaining plaintiff's claim. (ORCP 83 I). Order may issue without hearing if court finds defendant made written waiver after service of order for hearing. (ORCP 83 H). Court may issue temporary order restraining injury or removal of property. (ORCP 83 F). If defendant has or is about to harm, remove or similarly threaten property, or defendant would not comply with temporary restraining order, court may issue provisional process. (ORCP 83 E). Before sheriff takes property, plaintiff generally must file surety bond or irrevocable letter of credit issued by commercial bank. (ORCP 82 A[3]). If property is taken by sheriff under these rules, plaintiff generally may not voluntarily dismiss his case until 30 days after taking. (ORCP 85 E). Statute of limitations is six years. (ORS 12.080[4]).

Uniform Commercial Code also provides for replevin. (ORS 72.7020, 72.7160).

Repossession.

Under prior law (ORS 29.860 repealed, 1977), if defendant provided bond comparable to plaintiff within three days of taking, plaintiff was required to return property. Similar rule still applies to attachment (see ORCP 84 F[1]), but Oregon law is now silent on this point with respect to claim and delivery.

Judgment for either party may be for possession of property, or value of property if delivery or return is not possible. Additionally, wronged party may collect damages for other party's detention of property. (ORCP 67 D).

5.22 SEQUESTRATION:

Does not exist in Oregon.

5.23 SERVICE:

See topic 5.20 Process.

5.24 STAY OF EXECUTION:

See topic 5.03 Appeal and Error; category 8 Debtor and Creditor, topic 8.05 Executions.

5.25 [RESERVED]

5.26 VENUE:

Locus of Subject.

Actions for recovery of or for injuries to real property, for recovery of distrained personal property, for partition of real property, for foreclosure of lien or mortgage upon real property, or for determination of adverse claim in real property or for specific performance of agreement in relation thereto shall be commenced and tried in county in which subject of action, or some part thereof, is situated. (ORS 14.040).

Locus of Cause of Action.

Actions against public officer or authorized agent, and actions for recovery of penalty or forfeiture imposed by statute, must be commenced and tried in county where cause, or some part thereof, arose, except that when statutory penalty or forfeiture is imposed for offense committed on lake, river or stream situated in two or more counties, action may be commenced and tried in any county bordering on such body of water and opposite place where offense was committed. (ORS 14.050).

Actions Against State Departments and Officials.

Actions against any state department, official, officer, commissioner, commission or board may be brought in county where cause, or some part thereof, arose, except those described under subhead Locus of Subject, supra. (ORS 14.060).

Adoption.

Petitions to adopt minor child must be commenced in Oregon county with which child has most significant connection or in Oregon county in which licensed adoption agency is located. (ORS 109.309[5]). See category 14 Family, topic 14.01 Adoption.

Domestic Relations.

Suits for annulment, dissolution, or marital separation may be filed only in county in which one of parties resides. (ORS 107.728). Proceedings under Abuse Prevention Act and Elder Abuse Prevention Act shall be commenced in county where petitioner or respondent resides. Contempt proceedings must be conducted by court that issued order or in county where violation of restraining order occurred. If county where violation occurred not where order issued, certified copy of original order must be filed with court. (ORS 124.012).

Torts.

See subhead Other Actions, infra.

Livestock Brand Inspection Violations.

Action for violation of livestock brand inspection requirements may be commenced and tried either in county where livestock movement originated or in county where livestock movement terminated. (ORS 604.992[2]).

Motor Safety Violations.

Action for violation of motor carrier safety rules must be commenced in county of defendant's residence if defendant is Oregon resident or in county where violation was committed if defendant is nonresident of Oregon. (ORS 767.455[2]).

International Commercial Arbitration Agreements.

Actions to compel arbitration under international commercial arbitration agreements must be commenced (1) in county where arbitration agreement is to be performed or was made; or (2) if arbitration agreement does not specify county where agreement is to be performed and if agreement was not made in Oregon, in county where any party to court proceeding resides or has place of business; or (3) in any county if neither (1) nor (2) applies. (ORS 36.464).

Other Actions.

All other actions not described above shall be commenced: (1) In county in which defendants, or one of them, reside at commencement of action, (2) in county where cause arose, or (3) in any county if none of defendants reside in state. Resident of more than one county is deemed resident of each. Oregon corporations, limited partnerships and foreign corporations authorized to do business in Oregon deemed residents of any county in which agent authorized to receive process resides or in which corporation or partnership conducts regular, sustained business activity. Foreign corporations and foreign limited partnerships not authorized to transact business in Oregon may be sued in any county. Unincorporated associations or partnership subject to being sued in own name deemed resident of county where any person resides who is amenable to service on behalf thereof. (ORS 14.080).

Change of Venue.

Upon motion, change of venue may be granted if not sought for purpose of delay and if:

(1) Venue was improperly laid, (2) judge has interest in proceeding, (3) convenience of witnesses and parties would be promoted, or (4) judge or county inhabitants are so prejudiced against moving party that impartial trial cannot be had. (ORS 14.110). Change of venue initiated by motion at any time prior to trial, except that if basis for motion is that venue is improperly laid, motion must be made before answer filed. (ORS 14.120).

Contract Provisions.

Clause in retail installment contract purporting to fix venue in particular county and to waive right to move for change of venue is unenforceable. (255 Or. 395, 467 P.2d 633). But such clause in other contracts may be enforceable if fair and reasonable. (54 Or. App. 652, 635 P.2d 1063).

6 COURTS AND LEGISLATURE

6.01 COURTS:

United States District Court.

Clerk's offices located at 740 Mark O. Hatfield U.S. Courthouse, 1000 SW Third Avenue, Portland, Oregon 97204 and 102 U.S. Courthouse, 211 East Seventh Avenue, Eugene, Oregon 97401.

Oregon constitutes one judicial district.

Court sits at Portland, Eugene, and Medford and from time to time, at Pendleton, Klamath Falls, Coquille or any other place in district as directed by court.

Filing Fee.

Clerk requires parties instituting civil action to pay filing fee of $120.

Supreme Court of Oregon.

Jurisdiction.

Court has jurisdiction to review decisions of Court of Appeals. (ORS 2.520). It has jurisdiction of judicial fitness proceedings (ORS 1.420, 1.430), Bar membership, suspension, reprimand and like proceedings (ORS 9.220, 9.250, 9.527, 9.536, 9.539), proceedings regarding professional corporations organized to provide legal services (ORS 58.365), and proceedings to affirm, modify or set aside orders issuing or denying temporary injunctions in labor disputes (ORS 662.120). It may, in its discretion, take original jurisdiction of mandamus, quo warranto, and habeas corpus proceedings. It consists of seven justices, chosen by electors of state, holding office for term of six years.

Rules of Court for Supreme Court and Court of Appeals obtainable at http://www.ojd.state.or.us/Web/OJDPublications.nsf/Files/ORAP_2005_COMPLETE_VERSION.pdf/$File/ORAP_2005_COMPLETE_VERSION.pdf or from OJD Publications Section, Supreme Court Building, 1163 State Street, Salem, Oregon 97310. Cost $7 without binder, $10 with binder.

Court of Appeals.

Jurisdiction.

Court has exclusive jurisdiction of all appeals except where Supreme Court has original jurisdiction by statute or constitution, but may certify appeal to Supreme Court instead of making its own ruling. (ORS 2.516). Court of Appeals jurisdiction includes review of boundary changes proposed by Oregon Boundary Commission. (ORS 199.461). Parties may petition for Supreme Court review of any Court of Appeals decision within 35 days of decision. (ORS 2.520). Court consists of ten judges, chosen by electors of state, holding office for term of six years. (ORS 2.540). It sits in Salem, but may sit at other places designated by statute. (ORS 2.560). Appeals taken from any circuit court east of Cascade Mountains, except from counties of Lake and Klamath, are heard at Pendleton, unless otherwise stipulated by parties; and appeals taken from all other circuit courts in state are heard at Salem unless otherwise ordered by court. (ORS 19.118).

Tax Court.

Jurisdiction.

This court, established by ORS 305.405-.555, supplants former jurisdiction of circuit courts with regard to appeals and petitions from orders, rulings and actions of Oregon Department of Revenue on tax laws administered by Department, and orders relating to collection, enforcement, administration, distribution of local taxes by political subdivisions of state by agreement with state agency. (ORS 305.620[6]). These include taxes on or measured by income, property taxes and forest severance taxes.

In addition to its regular division which functions much like circuit court, tax court has small claims division of limited jurisdiction (tax amount in controversy does not exceed $5,000, questions of cash value of personal or real property, improvements on land, or land value combined with any improvement does not exceed $250,000) in which rules of evidence relaxed and no appeal. Effective Jan. 1, 2006, magistrate division, whose decisions are appealable to judge of tax court, will replace small claims division. (ORS 305.405-.555).

Court has principal office in Salem but holds trials in county seats throughout state.

Court's jurisdiction is exclusive and its judgments are not subject to collateral attack. Appeals from regular division of court are taken directly to Supreme Court. (ORS 305.445).

Rules of Court obtainable from Oregon Tax Court, 520 Justice Bldg., 1162 Court St. N.E., Salem, Oregon 97310.

Circuit Courts.

All judicial powers not specifically vested in some other court are conferred upon circuit courts. They have appellate jurisdiction and supervisory control over county courts and other inferior courts, officers and tribunals.

Circuit court performs functions of county court in matters other than county business in Baker, Clackamas, Columbia, Coos, Douglas, Jackson, Josephine, Klamath, Lake, Lane, Marion and Tillamook Counties and in any other counties in which charter provision approving transfer of functions is enacted. (ORS 3.130).

Circuit courts have jurisdiction in specified family law matters and all juvenile court proceedings. (ORS 3.250-.280).

There are 23 judicial districts in state. (ORS 3.011).

Place of Sitting.

Baker County: Eighth District; court sits at Baker.

Benton County: Twenty-first District; court sits at Corvallis.

Clackamas County: Fifth District; court sits at Oregon City.

Clatsop County: Nineteenth District; court sits at Astoria.

Columbia County: Nineteenth District; court sits at St. Helens.

Coos County: Fifteenth District; court sits at Coquille.

Crook County: Twenty-second District; court sits at Prineville.

Curry County: Fifteenth District; court sits at Gold Beach.

Deschutes County: Eleventh District; court sits at Bend.

Douglas County: Sixteenth District; court sits at Roseburg.

Gilliam County: Seventh District; court sits at Condon.

Grant County: Eighth District; court sits at Canyon City.

Harney County: Ninth District; court sits at Burns.

Hood River County: Seventh District; court sits at Hood River.

Jackson County: First District; court sits at Medford.

Jefferson County: Twenty-second District; court sits at Madras.

Josephine County: Fourteenth District; court sits at Grants Pass.

Klamath County: Thirteenth District; court sits at Klamath Falls.

Lake County: Thirteenth District; court sits at Lakeview.

Lane County: Second District; court sits at Eugene.

Lincoln County: Seventeenth District; court sits at Newport.

Linn County: Twenty-third District; court sits at Albany.

Malheur County: Ninth District; court sits at Vale.

Marion County: Third District; court sits at Salem.

Morrow County: Sixth District; court sits at Heppner.

Multnomah County: Fourth District; court sits at Portland.

Polk County: Twelfth District; court sits at Dallas.

Sherman County: Seventh District; court sits at Moro.

Tillamook County: Nineteenth District; court sits at Tillamook.

Umatilla County: Sixth District; court sits at Pendleton.

Union County: Tenth District; court sits at LaGrande.

Wallowa County: Tenth District; court sits at Enterprise.

Wasco County: Seventh District; court sits at The Dalles.

Washington County: Twentieth District; court sits at Hillsboro.

Wheeler County: Seventh District; court sits at Fossil.

Yamhill County: Twelfth District; court sits at McMinnville.

County Courts.

County court has no jurisdiction in civil cases except as hereinafter stated.

In some counties, county court has probate court jurisdiction, and jurisdiction over commitment of insane persons. (ORS 3.260, 3.265; 5.020; 111.055).

County judge may grant orders for preliminary injunctions returnable to circuit court, and may hear and determine questions arising upon habeas corpus when such questions do not involve action of court or judge of equal or higher jurisdiction. (ORS 5.030, 34.320).

County Clerk of county in which there is county court serves as Court Clerk and Recorder of Deeds. (ORS 205.110).

Probate and Juvenile Courts.

Probate jurisdiction exercised by either circuit or county courts, depending on assignments made by ORS for each county. Juvenile jurisdiction exercised by circuit courts only. As to probate, see category 13 Estates and Trusts, topic 13.16 Wills, subhead Probate. As to juvenile, see ORS 3.130,.250-.280.

Justices' Courts.

These courts have civil jurisdiction concurrent with certain other courts in cases in which matter in dispute does not exceed value of $7,500, except actions in which title to real property is in question, and actions for false imprisonment, libel, slander, or malicious prosecution. (ORS 51.080,.090). Justice courts also have concurrent jurisdiction with circuit courts of some misdemeanors, at election of defendant, and of crime of theft where punishment extends only to fine or imprisonment in county jail. (ORS 51.040-.070). Justices are committing magistrates.

County Clerks.

County clerks are ex-officio court clerks with authority under direction of court to enter orders and judgments, file pleadings, and keep and maintain court records. (ORS 205.110). In Home Rule Counties of Lane, Hood River, Multnomah and Washington, office of county clerk has been abolished and replaced as follows: Lane, court and recording functions carried out by Director of Records and Elections; Hood River, court and recording functions carried out by Department of Records and Assessment; Multnomah, court functions carried out by Department of Justice Services, Circuit Court, and Civil Process Divisions, and recording functions by Department of Records and Elections, Recording Division; Washington, court and recording functions carried out by Director of Records and Elections.

Small Claims Courts.

Each circuit (ORS 46.405-.560) and justice court (ORS 55.011-.140) has small claims department for recovery of money, damages, specific personal property, or any penalty or forfeiture. If amount claimed does not exceed $750, action must be handled in small claims department. (ORS 46.405). If amount claimed exceeds $750 but does not exceed $7,500 (ORS 55.011), defendant may have action tried in justice court by so advising court at time claim is called for hearing. Defendant may assert counterclaims that are in existence when plaintiff's claim is issued and arise out of same transaction. (ORS 46.461, 55.095). If counterclaim exceeds $7,500, it will be dismissed unless defendant moves to have case transferred to appropriate court at defendant's expense. (ORS 46.461). Small claims actions are commenced by plaintiff appearing in person or by agent or assignee before justice of peace and subscribing, verifying and filing claim on form provided for by statute in justice court (ORS 55.020), and by paying fee (ORS 55.020, 51.310). Claims in justice courts must include affidavit by plaintiff establishing bona fide effort to collect claim prior to filing. (ORS 55.030, 46.425).

Except in action arising under Residential Landlord and Tenant Act (ORS 90.100-90.940), plaintiff must include all amounts claimed from defendant arising out of single transaction. For transaction requiring installment payments, plaintiff need only claim payments due. Provided claim does not exceed $7,500, plaintiff may include amounts claimed from defendant on more than one transaction. If claims are assigned, plaintiff need bring action only on claims assigned as of filing date, and plaintiff may bring separate action for each person assigning claims to plaintiff. (ORS 46.425).

Notice of claim in small claims department is same as in circuit courts or at plaintiff's election through certified mail. (ORS 46.445). Defendant has 14 days after receiving notice to pay claim, demand hearing or jury trial. (ORS 46.455). If claim exceeds $750, defendant has constitutional right to jury which defendant may request accompanied by fees. (ORS 46.455[2][c]). If defendant requests jury trial, and if action is not subject to mandatory arbitration under 36.400 or 36.405, plaintiff given 20 days to file formal complaint. (ORS 46.465). Service of summons and formal complaint may be by mail.

Notice of claim in small claims department of justices' courts is by personal service or by certified mail, at option of plaintiff. (ORS 55.045). Defendant must pay claim, request hearing or request jury trial within 14 days. (ORS 55.065). If hearing requested, court sets time and notifies parties by mail. (ORS 55.075). If jury trial requested, plaintiff must serve complaint and summons on defendant within 20 days after mailing of notice by court. Defendant must respond within ten days. (ORS 55.075).

If defendant fails to appear in small claims department of circuit or justice courts, judgment will be given against defendant for amount claimed plus small claims filing fees, service expenses, and prevailing party fee. When judgment is given without trial of issue of law or fact, defendant may also claim $50 as prevailing fee. (ORS 20.190). Judgment is final, and no appeal may be taken from judgment. (ORS 46.485; 20.190[3]). No formal pleadings are required in small claims. Attorneys cannot represent clients before small claims department without consent of court. (ORS 46.415[4]; 55.090). Parties may offer evidence at hearing by witnesses and judge may informally consult witnesses or otherwise investigate controversy. If judgment given against defendant remains unpaid and no appeal is taken, plaintiff may have same entered on register of justice court; judgment against defendant in circuit court is entered on docket of circuit court. Thereafter execution may be issued as in other cases before those courts. (ORS 46.485; 55.130).

6.02 LEGISLATURE:

Session held biennially in Salem commencing on 2d Mon. in Jan. of each odd-numbered year. (Const. Art. IV § 10; 171.010).

Special or Extraordinary Sessions.

Governor may call extraordinary session by proclamation. When both houses convened Governor sets purpose for session. (Const. Art. V § 12). In emergency, presiding officers of both houses upon request of majority of members of each house may convene legislature. (Const. Art. IV § 10a).

Initiative and Referendum.

Oregon has both initiative and referendum. (Const. Art. IV § 1).

Lobbyists.

Lobbyists are constitutionally permissible. (Const. Art. I, § 26). Oregon requires registration and filing of expense statements. (ORS 171.725-.785). Certain conduct prohibited. (ORS 162.465; 171.756).

6.03 REPORTS:

Decisions of Supreme Court are reported in Oregon Reports, beginning with vol. 1. Decisions since 1883 are also reported in Pacific Reporter. Beginning in 1962 decisions of Oregon Tax Court are reported in Oregon Tax Court Reports. Opinions of Oregon Court of Appeals are published in separate volumes of Oregon Reports and are also reported in Pacific Reporter. Decisions of Oregon Land Use Board of Appeals are reported in "Oregon LUBA Decisions". Formal opinions of Attorney General are collected in bound volumes "Opinions of the Attorney General of the State of Oregon". Informal letters of advice (also known as informal opinions) are published, but not issued in bound volumes.

Digests are New Oregon Digest and Pacific Digest.

6.04 STATUTES:

The 1953 legislature enacted Oregon Revised Statutes ("ORS"), comprehensive statutory revision which became effective on Dec. 31, 1953. ORS is republished in new volumes following each legislative session.

Uniform Acts which have been adopted are: †A.B.A. Bus. Corp., Revised (1987); †Revised Anatomical Gift (2007); Arbitration (2003); Athlete Agents (2005); Certification of Questions of Law (1983); Child Custody Jurisdiction (1973, rep. 1999 c. 649); Child Custody Jurisdiction and Enforcement (1999); †Commercial Code (1961, eff. Sept. 1, 1963; 1975, eff. Jan. 1, 1976); †Common Trust Fund (1951); Conflict of Law-Limitations (1987); †Controlled Substances (1977, 1979); †Criminal Extradition (1935, 1973); †Deceptive Trade Practices, 1966 version (1965, 1979); †Declaratory Judgments (1927, 1961); Determination of Death (1987); Disclaimer of Property Interests (ORS 105.623-.649); Disposition of Community Property Rights at Death (1973); †Disposition of Unclaimed Property, 1954 and 1966 versions (1957, 1983); †Division of Income for Tax Purposes (1965, 1969); Electronic Transactions (ORS 84.001-.070); †Enforcement of Foreign Judgments, 1964 version (1979); Estate Tax Apportionment, 1964 version (1969); †Federal Lien Registration (1981); Foreign Depositions (1959); Foreign Money Claims (1991); Foreign Money-Judgments Recognition (1977); Fraudulent Transfer (1985); Insurers Liquidation (1941); International Wills (1981); Interstate Family Support (1993); Judicial Notice of Foreign Law (1937); †Limited Partnership, 1976 version (1985); Prudent Management of Institutional Funds (2007); †Non-Profit Corp. (1959); Notarial Acts (1983); Partnership (1939); Premarital Agreement (1987); †Principal and Income, 1962 version (1975) repealed 2003; 1997 Revised Principal and Income adopted (2003); Prudent Investor (1995); Residential Landlord and Tenant (1973); †Securities, 1956 version (1967); Simultaneous Death (1947, 1969; rep. 1999 c. 131); Statutory Rule Against Perpetuities (1989); Testamentary Additions to Trusts (1969); To Secure Attendance of Witnesses from Without a State in Criminal Proceedings (1937); Trade

Secrets (1987); Transboundary Pollution Reciprocal Access (1991); Transfers to Minors (1985); Trust Code (2005); Trustees' Powers (1977); †Unclaimed Property, 1981 (1983); Vendor and Purchaser Risk (1955).

†Adopted with significant variations or modifications. See appropriate topics.

For text of Uniform Acts falling within the scope of the Martindale-Hubbell Law Digests see Uniform and Model Acts section.

6.05 UNIFORM LAWS:

For list of Uniform Acts in force in this state see topic 6.04 Statutes. For text of Uniform Acts within scope of Martindale-Hubbell Law Digests see Uniform and Model Acts section.

7 CRIMINAL LAW

7.00A BAIL:

See topic 7.01 Criminal Law.

7.01 CRIMINAL LAW:

Crimes are defined by Oregon Criminal Code of 1971, as am'd. (ORS 161.005-167.870). Criminal procedure is regulated by 131.005-157.070.

Indictment or Information.

Generally, felony charges are only by grand jury indictment. (Const. Am. Art. VII, § 5[3]). For requirements of grand juries and indictments, see 132.010, et seq. District Attorney may charge person on information filed in circuit court of crime punishable as felony if person appears and waives indictment, waives preliminary hearing or probable cause established at preliminary hearing. (Const. Am. Art. VII, § 5[4], [5]).

Bail before conviction is matter or right, except where crime charged is murder or treason and proof is evident or presumption of guilt is strong. (Const. Art. I, § 14). For release on security or recognizance, see 135.230-.295.

Uniform Act for Out-of-State Supervision of Parolees enacted. (ORS 144.610-.620).

Uniform Criminal Extradition Act enacted. (ORS 133.743-.857). Uniform Act on Fresh Pursuit enacted. (ORS 133.410-.440). Uniform Act to Secure Attendance of Witnesses from Without a State in Criminal Proceedings enacted. (ORS 136.623-.637). Western Interstate Corrections Compact. (ORS 421.282-421.294).

8 DEBTOR AND CREDITOR

8.01 ASSIGNMENTS:

Uniform Commercial Code adopted. (ORS 71.1010 et seq.).

Attorneys' Fees.

Original maker of contract providing for recovery of attorneys' fees to party is severally liable with assignee for such fees if defendant is prevailing party in action by assignee of contract rights. (ORS 20.097).

Instrument Transferring Title.

Any assignment of a chose in action by way of sale or pledge made in writing for valuable consideration takes effect at the time of such execution according to its terms; however, if notice of such assignment is not given to debtor and debtor later makes payment or discharges obligation to assignor, such payment or performance also discharges debtor's obligation to assignee. (ORS 80.010).

Filing.

Under Commercial Code, financing statement must be filed to perfect some assignments. (ORS 79.0310). Assignment of permit to appropriate water binds only parties thereto unless filed for record in Water Resources Department. (ORS 537.220, 537.635).

Recording.

Mortgage may be assigned by instrument recorded in mortgage records of county where land is situated. (ORS 86.060). Recordation of judgment affecting lands in county records acts as notice of action. (ORS 93.730).

Notice.

Recording of mortgage assignment is not notice of assignment to mortgagor so as to invalidate payment by him to mortgagee. (ORS 86.080). See also subhead Effect, infra.

Effect.

An assignment is valid regardless of lack of notice to debtor unless such notice is required by statute. However, if notice is not given, a debtor who pays assignor in good faith without notice is discharged. (ORS 80.010).

Assignment of chose in action cannot prejudice any set-off or other defense existing at time of, or before notice of assignment; but this does not apply to negotiable instruments, transferred in good faith for consideration before due. (ORS 80.020).

Municipal corporations cannot be sued by assignees of claim for money illegally exacted, except for claims on taxes, licenses or money due on contract. (ORS 30.380).

Assignment of Wages.

Common law rules generally apply. Assignment of future wages by public officer is void as against public policy although wages presently earned may be assigned. (124 Or. 618, 265 P. 786). Provision for wage assignment in retail installment contract, motor vehicle retail installment contract, or retail charge agreement is unenforceable. (ORS 83.150; 83.670). No licensee under Oregon Consumer Finance Act may take an assignment of earnings as payment of or security for payment of a loan. (ORS 725.355).

Retail Installment Contracts.

Provision in retail installment contract or retail charge agreement that buyer will not assert against assignee claim or defense arising out of sale is invalid (ORS 83.150); assignee of retail credit contract for sale or lease of consumer goods or services is subject to claims or defenses of customer against seller or lessor, arising out of sale or lease (ORS 83.820).

See also category 3 Business Regulation and Commerce, topic 3.09 Commercial Code.

8.02 ATTACHMENT:

Nature.

Attachment is form of provisional process by which unsecured plaintiff obtains judicial lien on defendant's property prior to judgment. (ORCP 81 A[1]). Attachment is obtained by writ, or claim of lien. (ORCP 84 C, D). Provisional process may be obtained only upon specific application to court accompanied by detailed affidavit, declaration, or sworn petition. (ORCP 83 A). Court considers affidavit, declaration, or petition, and other evidence, and upon finding of filed complaint and probable cause for sustaining underlying claim may order prehearing issuance of provisional process. (ORCP 83 C).

Actions in Which Allowed.

Writ of attachment is available in action upon contract, express or implied, for direct payment of money, not secured by mortgage, lien, or pledge unless such security has been rendered nugatory by act of defendant; in action for money damages for breach of contract, other than contract for marriage, against nonresident defendant; and in action against nonresident defendant for money damages for injury to property in this state. (ORCP 84 A[2]). No attachment may issue against consumer good or any property if underlying claim is based on consumer transaction. (ORCP 83 B). Once attachment is authorized, plaintiff establishes attachment lien on real property by filing claim of lien. (ORCP 84 C).

Courts Which May Issue Writ.

Justice court may not issue writ of attachment against realty. (ORS 46.082; 52.250).

In Whose Favor Writ May Issue.

Attachment available to plaintiffs generally (ORCP 84 A[2]), including third party plaintiffs, cross-claimants, and counterclaimants (ORCP 81 A[8]).

Against Whom Writ May Issue.

Attachment issues against property of defendant. (ORCP 84 A[2]).

Claims on Which Writ May Issue.

An attachment may be had on a claim that is not payable within state (153 Or. 248, 56 P.2d 336), but cannot be had upon unliquidated claim (259 Or. 348, 485 P.2d 1208).

Time For Issuance of Writ.

Attachment may be had at time of, or at any time after, issuance of summons. (ORCP 84 A[2]).

Grounds.

See subheads Nature, Actions in Which Allowed, supra, and Proceedings to Obtain, infra.

Proceedings to Obtain.

Upon plaintiff's affidavit or declaration meeting detailed requirements (ORCP 83 A), court issues order for defendant and persons in possession of property to appear, three to seven days after service, to show cause why provisional process to take possession or restrain disposition or use of property should not issue. (ORCP 83 G). Court issues provisional process if affidavit or declaration adequate and after hearing finds probable cause for sustaining plaintiff's claim. (ORCP 83 I). Order may issue without hearing if court finds defendant voluntarily, intelligently and knowingly made written waiver meeting statutory requirements, and no reason to believe waiver invalid. (ORCP 83 H). Upon certain findings where plaintiff meets requirements for injunction, court may, in its discretion and without hearing, issue temporary order restraining injury or removal of property, and requiring defendant to show cause why order should not continue during pendency of proceedings. (ORCP 83 F). If court finds that before hearing defendant has or is about to harm, remove or similarly threaten property, or defendant would not comply with temporary restraining order, it may issue provisional process. (ORCP 83 E).

Recording of Provisional Process Order.

Before writ of attachment may be issued by court clerk, or property may be attached, plaintiff must have order authorizing issuance of provisional process recorded in County Clerk Lien Record. (ORCP 84 A).

Attachment Bond.

Plaintiff must file with clerk surety bond or irrevocable letter of credit issued by commercial bank in amount fixed by court. (ORCP 82 A[3][a]). Surety on attachment bond must be qualified surety company. (ORCP 82 A[5]).

Property That May Be Attached.

Real property in which defendant holds title, tangible personal property, including negotiable instruments and securities under ORS 78.1020, debts and interest of distributee of decedent's estate. (ORCP 84 B). Partner's interest may be attached only for partnership debt. (ORS 68.420[2]).

Levy.

Sheriff levies on personal property not in possession of third person by taking it into his possession. Personal property in possession of third person attached by garnishment procedures. (ORCP 84 D). See topic 8.09 Garnishment. Levy on certificated security or debt evidenced by negotiable instrument (ORS 78.1120) only by actual seizure of security certificate (Id.). Real property is attached by filing claim of lien with clerk of court authorizing claim, and with county clerk of county in which property is located. (ORCP 84 C).

Vessel Arrest.

Procedures of ORCP 84 not applicable to proceeding under c. 783 involving seizure of vessel to enforce lien with respect to labor and materials used in original construction of vessel. (66 Or. App. 625, 676 P.2d 319).

Exemptions.

See topic 8.06 Exemptions.

Notice of Exemption.

Sheriff required to mail notice of exemption described in topic Garnishment, subhead Notice of Exemption, to defendant following service of writ of attachment. Plaintiff must provide defendant's address or statement that plaintiff does not know address. (ORCP 84 D[3]).

Indemnity.

Sheriff who is to hold or sell personal property may require bond of plaintiff when knowing of third party claim to property or in doubt of ownership, encumbrances, or damage to perishable property. (ORCP 84 D[4]).

Priorities.

Attaching creditors, from date of attachment, considered purchasers in good faith as against third persons. Attachment carries priority over subsequently perfected security interests. (32 Or. App. 551, 574 P.2d 696). Attaching creditors share in order of their levy. (30 Or. 43, 46 P.

421).

Release of Property.

Property attached may be returned to defendant upon order of court by filing of surety bond undertaking in amount fixed by court. (ORCP 84 F[1]).

Sale.

Levying officer may sell perishable property or livestock and retain proceeds in its place. (ORCP 84 D[2][a]).

See also topics 8.05 Executions, 8.09 Garnishment.

8.03 [RESERVED]

8.04 CREDITORS' SUITS:

Creditor may use creditor's bill proceeding to subject debtor's nonexempt assets to payment of unsatisfied judgment where legal remedies are unavailable or inadequate to accomplish result. Court's jurisdiction may depend upon presence and extent of debtor's property within state. (293 Or. 341, 647 P.2d 920). Creditor may obtain order charging interest of judgment debtor in general partnership.

See also topics 8.05 Executions, Fraudulent Sales and Conveyances; category 13 Estates and Trusts, topic 13.09 Executors and Administrators.

8.05 EXECUTIONS:

Kinds of Execution.

Executions may be: (1) Against real or personal property of judgment debtor; or (2) for delivery of possession of specific real or personal property, which may be combined with execution against property; or (3) against currency of judgment debtor. (ORS 18.860). Execution upon income of spendthrift trusts prior to distribution to beneficiary not allowed except for beneficiary's obligations for alimony and child support. (254 Or. 44, 456 P.2d 1009). Execution may be by writ of execution (ORS 18.660) or writ of garnishment (ORS 18.605).

Exemptions.

See topic 8.06 Exemptions.

Garnishments.

See topic 8.09 Garnishment.

Support.

See category 14 Family, topic 14.05 Divorce, subhead Enforcement of Support.

Decedents' Estates.

Execution may not issue on judgment against decedent, and judgment to be presented to personal representative as claim. (ORS 18.312).

Time for Issuance.

Execution may be issued at any time after entry of judgment, except that in case of real property, judgment must have been recorded. (ORS 18.252,.255). Execution issued on nonfinal judgment is voidable on direct attack but may not be collaterally attacked. (304 Or. 529, 748 P.2d 67). See category 5 Civil Actions and Procedure, topic 5.15 Judgments, subhead Liens. Writs against real property must be recorded in County Lien Record. (ORS 18.255).

Stay of execution is allowed where appeal is taken and supersedeas bond filed (see category 5 Civil Actions and Procedure, topic 5.03 Appeal and Error), except that execution on real property of soldiers and sailors is suspended during active service in wartime. (ORS 408.440).

Liens.

See topic 8.09 Garnishment; category 5 Civil Actions and Procedure, topic 5.15 Judgments, subhead Liens.

Priorities.

See category 5 Civil Actions and Procedure, topic 5.15 Judgments, subhead Priorities.

Levy is made by sheriff on real property by filing notice with court; on tangible personal property by seizing or securing property, on intangible property to be sold by filing notice with court, on property to be delivered by securing and delivering possession. (ORS 18.878,.880). Executions against property may be issued to sheriff of any county where judgment debtor's property is located. (ORS 18.868).

Return.

In justices' courts, writ is returnable in 30 days (ORS 52.700), and in circuit and county courts in 60 days (ORS 18.872).

Satisfaction.

See category 5 Civil Actions and Procedure, topic 5.15 Judgments, subhead Satisfaction.

Sale.

In sale of personal property notice must be posted in three public places in county of sale or on Internet; in sale of real property notice by publication for four consecutive weeks in newspaper in county where located or on Internet and by posting notice on property. In both instances, copy of notice must also be sent by registered mail or certified mail with return receipt to judgment debtor and judgment debtor's attorney. (ORS 18.920,.924). Officer may require indemnity bond from judgment creditor on various grounds. (ORS 18.886).

Sale of residential property of natural person may be had only with prior order of court on petition of judgment creditor. (ORS 18.901-18.912).

Sale is by auction, between 9 A. M. and 4 P. M. If of tangible personal property it must be within view of those attending sale. (ORS 18.930).

Property must be offered in such parcels as are likely to bring highest price. (ORS 18.930). Sheriff may postpone sale if sheriff is unavailable or for want of purchasers, and at creditor's request may adjourn it for time not exceeding return day of writ. (ORS 18.932).

On sale of real property plaintiff in writ may have order confirming sale unless objections thereto are filed within ten days after return of execution. Upon hearing on objections, court will order property resold if there were substantial irregularities, but otherwise will confirm sale. Purchaser authorized to take possession from date of sale. (ORS 18.946,.948).

Assignment of sheriff's certificate of sale must be executed as other conveyances and recorded. (ORS 93.530).

Redemption.

There may be no redemption from sale of leasehold interest in real property of less than two years unexpired term. (ORS 18.962). All other property may be redeemed within 60 days by any lien creditor unless objection to sale be filed and then within 60 days from date of order confirming sale, and within 180 days by judgment debtor or his successor in interest, time running from date of sale, or one lien creditor may redeem it from another within 60 days after former redemption. (ORS 18.964). Purchaser or redemptioner is entitled to possession but in event of redemption must account for rents and profits. (ORS 18.946, 18.968). Judgment debtor's right of redemption, whether retained or transferred after execution sale, remains subject to prior judgment liens. (309 Or. 476, 789 P.2d 643). Notice of sale and redemption rights on residential property must be posted and mailed to presale owner within 30 days of delivery of certificate of sale. (ORS 18.944).

Supplementary Proceedings.

After judgment, and upon proof of return of service of unsatisfied execution or notice of demand to pay judgment within ten days, court may compel debtor to appear and answer under oath questions concerning any property that he has or claims. (ORS 18.265). Examination may be held in county of debtor's residence or service of order; mileage is payable if more than 100 miles from debtor's residence. Debtor may obtain order changing time or place for good cause. (ORS 18.265). Both parties may subpoena and examine witnesses in their own behalf. If from examination of judgment debtor it appears that he has property subject to execution, court may make order requiring same to be applied in satisfaction of judgment. (ORS 18.268). After judgment, plaintiff may serve debtor with interrogatories about his property and financial affairs which must be answered under oath and returned within 20 days of receipt. (ORS 18.270).

Order for debtor's appearance may restrain him from disposing of any of his property. (ORS 18.265).

8.06 EXEMPTIONS:

Federal exemptions allowed in Bankruptcy Reform Act of 1978 (11 USC § 522[d]) not available to Oregon residents. (ORS 18.305). Certain exemptions and limits on value, if any, apply as follows: (1) Books, pictures and musical instruments, $600; (2) wearing apparel, jewelry and other personal items, $1,800; (3) tools, implements, apparatus, team, harness or library necessary to debtor's trade, occupation or profession, $3,000; (4) vehicle, $3,000; (5) domestic animals and poultry for family use, $1,000, and food to support such animals and poultry for 60 days; (6) household goods, furniture, radios, television set and utensils, if held primarily for debtor's personal, family, or household use, $3,000; (7) fuel and provisions necessary for debtor's family for 60 days; (8) all professionally prescribed health aids for debtor or dependents; (9) spousal or child support or separate maintenance to extent reasonably necessary to support debtor and dependents; (10) award under any crime victim reparation law; (11) payment up to $10,000 for personal bodily injury of debtor or individual of whom debtor is dependent; (12) payment in compensation of loss of future earnings of debtor or individual on whom debtor is dependent to extent reasonably necessary for support of debtor and dependents; (13) debtor's interest in any personal property, $400 (not available to raise any other exemption). (ORS 18.345, 2009 c. 612). Exemptions 1, 2, 3, 4, and 13 above can be claimed by each judgment debtor in household. Exemptions 1, 2, 3, 4, 10, 11, and 13 above may be combined at option of debtors when claimed for same property. (ORS 18.345[4]).

Other exemptions include public or private pensions, except when judgment creditor is enforcing support obligation (ORS 18.358, 237.201, 237.980); funds in individual retirement account or accounts established pursuant to Internal Revenue Code 401(a), 401(c), 401(k), 403, 408 and 457, are exempt to extent contributions were not subject to federal excise tax as excess contribution, but, except for permitted contributions, are subject to 95.200 to 95.310 concerning fraudulent transfers (ORS 18.358); wages protected by limits on garnishment except for bankruptcy court orders, state and federal taxes (ORS 18.385); one rifle or shotgun and one pistol, total value not to exceed $1,000 (ORS 18.362); vocational rehabilitation benefits (ORS 344.580); veterans benefits and loans (ORS 407.595); veterans' bonuses (Or. Const. Art. XI-F[2][7]); public assistance payments (ORS 411.760); medical assistance benefits (ORS 414.095); workers' compensation benefits in hands of insurer except for child or spousal support up to certain limits (ORS 656.234; 292 Or. 780, 643 P.2d 336); unemployment benefits (ORS 657.855); social security, including SSI (42 USC § 407); certain exempt amounts, including wages, social security, public assistance, unemployment benefits, benefits to emergency service workers, disability benefits when placed in checking or savings account (up to $7,500) (ORS 23.166); cash surrender value of life insurance policies not payable to debtor's estate (ORS 743.046,.047); federal annuities; health insurance proceeds and disability proceeds of life insurance policies (ORS 743.050); non-federal annuities (except amounts paid with intent to defraud creditors) to $500 per month, with excess over $500 per month subject to same exemption as wages (ORS 743.049); benefits from fraternal benefit society (ORS 748.207); certain cemetery land and burial plots (ORS 65.855,.870).

Substitution.

Proceeds of sale or exchange and insurance policy proceeds of debtor's exempt property are exempt for reasonable time (not to exceed one year for homesteads, 18.395) while held for investment in other exempt property. (73 Or. 61, 143 P. 1136). Exempt wages, social security, public assistance, unemployment benefits, benefits to emergency service workers, disability benefits including money from fraternal benefit society, when placed in bank remain exempt (up to $7,500) if identifiable. (ORS 18.348). Property is also exempt if traceable to: (1) Award under crime victim reparation law; (2) payment, up to $10,000, on account of personal bodily injury of debtor or dependents; or (3) payment in compensation of loss of future earnings to extent reasonably necessary for support of debtor and dependents. (ORS 18.345).

Debts Against Which Exemptions Not Available.

No article of property, nor proceeds thereof, is exempt from execution under a judgment for its purchase price. (ORS 18.305).

Earnings.

Garnishment of earnings is limited to smallest of: (1) 25% of disposable earnings for week, (2) amount by which disposable earnings exceed (a) $170 for period of one week or less, (b) $340 for any two-week period, (c) $368 for any half-month period, (d) $731 for any one-month period, or (e) for any other period longer than one week, $170 multiplied by fraction produced by dividing number of days for which earnings paid by seven, or (3) amounts in (1) or (2) minus any support payments ordered to be paid under 25.378, 110.303 to 110.452, 419B.408 or 419C.600. Limitations (1) and (2) do not apply to any order of court of bankruptcy or debt due for federal tax; limitation (2) does not apply to debt due for state tax. (ORS 18.385).

Pensions.

All pensions in recognition of service or employment are exempt and individual retirement accounts or 401(a), 401(c), 401(k), 403 or 457 trusts or profit sharing plans are exempt from execution and all other process, except process arising from support obligation, without need for claim by pensioner. (ORS 23.170).

Plans subject to 29 USC 1001-1461 (ERISA) (see also 26 USC 4010) are subject to transfer restrictions under applicable non-bankruptcy law, and thus may be excluded by debtor from property of bankruptcy estate. (504 U.S. 753, 119 L. Ed.2d 519[1992]).

Waiver of Exemption.

Waiver by debtor of limit on earnings subject to garnishment is void. (ORS 18.385).

Necessity of Claiming Exemption.

Exempt property must be selected by the debtor or his agent when levy is made, or thereafter before sale as soon as he knows that levy has been made. Otherwise exemptions are waived. (ORS 18.345). Claim of exemption is heard by court out of which execution issues as long as requirements of 18.255 have been met. (ORS 18.322, 18.610).

Homestead Exemption.

See topic 8.10 Homesteads. See also topic 8.09 Garnishment.

8.07 FORECLOSURE:

See topics 8.13 Liens, Pledges; category 20 Mortgages, topic 20.04 Mortgages of Real Property.

8.08 FRAUDULENT SALES AND CONVEYANCES:

Uniform Commercial Code adopted. (ORS 71.1010 et seq.).

Uniform Fraudulent Conveyance Act not adopted.

Uniform Fraudulent Transfer Act adopted. (ORS 95.200-.310). Applies to transfers made or obligations incurred on or after Jan. 1, 1986.

Remedies.

Legal and equitable remedies available, see 95.260; see also topic 8.03 Creditors' Suits.

Bulk Sales.

Uniform Commercial Code bulk transfer provisions repealed. (1991, c. 83, § 1).

8.09 GARNISHMENT:

Nature.

Writ of garnishment is process of court enabling judgment creditor, in payment of his judgment, to reach indebtedness owed to judgment debtor by, or personal property in possession of, third party. (ORS 18.602). Judgment must be final; writ of garnishment and subsequent sheriff's sale void if issued pursuant to intermediate order. (85 Or. App. 209, 735 P.2d 1249). (See ORCP 67B regarding finality of judgments.) At any time after receiving money judgment, party may have one or more writs of garnishment for its enforcement, as long as judgment remains lien. (ORS 18.605). Under certain circumstances garnishment is available as prejudgment provisional process. (ORS 18.605; ORCP 83 & 84). See topic 8.02 Attachment.

Property Which May Be Reached.

Tangible or intangible personal property of judgment debtor, or debts or other obligations owed to judgment debtor, may be reached. (ORS 18.615).

Jurisdiction.

Garnishment available for other than real property in justice's courts (ORS 52.210, 52.250), and generally in circuit courts.

Proceedings to Obtain.

Court administrator may issue one or more writs upon application by judgment creditor. (ORS 18.635). Attorney who is active member of Oregon State Bar may issue one or more writs on behalf of judgment creditor. (ORS 18.635). Writ valid for 60 days after issuance. (ORS 18.609). After delivery or mailing by certified mail, return receipt requested (ORS 27.165), of original or copy of writ (ORS 18.650) to person in possession or person designated in case of partnership, corporation, political entity, estate, or debtor (ORS 18.655), copy mailed or delivered to defendant with notice of exemptions and claim form (ORS 18.658). See infra, subhead Claim of Exemption. Garnishee must answer within five days (ORS 18.680), and liable to plaintiff for failure to deliver garnished property (ORS 18.775). Prejudgment garnishment requires observance of procedure for provisional process. (ORCP 83, 84). See topic 8.02 Attachment.

Continuing Writ of Garnishment Directed to Employer of Judgment Debtor.

Court administrator or attorney may issue writ of garnishment directed to employer of judgment debtor that is effective to garnish earnings accruing from garnishee to judgment debtor from date of service of writ until 90 days have expired since date of issuance of writ. (ORS 18.625). Statutes specify form of continuing writs of garnishment that may be issued by court administrator or attorney. (ORS 18.635).

Continuing Writ of Garnishment Issued by County or County Agency.

Writ of garnishment issued on behalf of county, or county agency, and directed to employer of judgment debtor remains in effect until debt is paid or garnishment is released by county, or court order. (ORS 18.625). Each time money is payable from garnishee to judgment debtor, and in any event not less than once every 30 days until garnishment no longer is in effect, garnishee must deliver certificate of garnishee and garnished property to county. (ORS 18.735).

Forms.

Writ issued by attorney is substantially in form specified in 18.830.

Claim of Exemption.

Writ of garnishment must be accompanied by notice of exemption in form specified by 18.845.

Adverse Claims.

See topic 8.02 Attachment, subhead Priorities.

Exemptions.

See topic 8.06 Exemptions.

Earnings.

Wages are exempt in part from garnishment. (ORS 18.385). See subhead Claim of Exemption, supra. See topic 8.06 Exemptions, subhead Earnings.

Duty of Garnishee with Respect to Property Removed by Judgment Debtor.

Garnishee has no duty to deliver or hold property of judgment debtor that was removed from garnishee's possession after service of writ and before garnishee, through exercise of reasonable care, could act to prevent removal of property. (ORS 18.670).

Search Fee Payable to Financial Institution.

When writ of garnishment is delivered to garnishee that is financial institution, judgment creditor must pay that financial institution $10 search fee unless defendant is employee of garnishee. (ORS 18.790). If search fee is not paid, writ of garnishment is not effective and financial institution garnishee does not need to respond to garnishment. (ORS 18.790).

Financial Institution's Right of Set Off.

If garnishee is financial institution, garnishee may, following delivery of writ of garnishment, set off sums due from judgment debtor to financial institution at time garnishee received writ of garnishment. (ORS 18.795). Financial institution may not set off portion of debt accelerated after receipt of writ. (Id.). Financial institution garnishee must disclose amount of set off in certificate of garnishee and certify that amount set off was due from judgment debtor to financial institution at time garnishee received writ. (Id.).

Release.

Plaintiff or plaintiff's agent or attorney may release garnishment. (ORS 18.770). Copy of release must be delivered by plaintiff to defendant. (ORS 18.770). Duplicate originals of release must be delivered by plaintiff or defendant to court administrator, garnishee, and sheriff, if sheriff is holding or selling any of defendant's property. Release terminates proceedings for sale upon execution of any property garnished. (ORS 18.770). Garnishee, upon receipt of release, relieved of liability arising under issuance and service of writ or garnishment or garnishee's return. (ORS 18.770).

See also topics 8.02 Attachment, 8.05 Executions.

8.10 HOMESTEADS:

Homesteads are exempt from execution except for construction liens, purchase money liens, mortgages, and land sale contracts (ORS 18.406), and in some instances, judgments for child support (ORS 18.398), but in order for exemption to be available property must be actual abode of owner and occupied by owner, or owner's spouse, parent or child (ORS 18.395). Manufactured dwelling (as defined by ORS 446.003) or floating home (as defined by ORS 830.700) are also exempt as homesteads. (18.395, 2009 c. 612).

Certain Exemptions from Taxation.

See category 22 Taxation, topic 22.13 Property Taxes, subhead Exemptions.

Limitations of Value and Area.

Exemption limited to $40,000 (one debtor) or $50,000 total (two or more debtors in household with interest subject to sale). (18.395). Area may not exceed one city block (in town or city laid off into blocks and lots) or 160 acres elsewhere. (18.402). Fair market value determined by hearing if in dispute. (18.415). If conveyance or bankruptcy intervenes before levy, value determined at time of conveyance or bankruptcy, whichever is first. (18.395). Sale not permitted if judgment of $3,000 or less at time of entry or if no bid received in excess of applicable exemptions plus costs of sale. (18.395).

Debts or Liabilities against Which Exemption Not Available.

Homestead exemption does not affect construction liens for work, labor or material furnished exclusively for improvement of property claimed as homestead, nor purchase money liens and mortgages. (23.260, 23.164[4]). Court authorizing sale of residence may, in its discretion, disallow all or part of claimed homestead exemption if it is sought to collect judgment for child support. (23.240 to 23.300). This shall not apply to any proceeding brought by or on behalf of state. (23.240 to 23.300).

Temporary removal or absence from homestead with intention of reoccupying property as homestead does not impair exemption. (ORS 23.164[2], 23.240[1][a]).

Designation of Homestead.

No statutory provision.

Claim of Exemption.

Exemption effective without claim of debtor. (23.164[1], 23.240[1]). Transferee may raise as defense if first attempt to reach property occurs after transfer. (266 Or. 625, 513 P.2d 1172).

Waiver of Exemption.

No statutory provision.

Alienation or Encumbrance.

Statute expressly preserves exemption to extent of $25,000/$33,000 and despite sale. (23.240[2], 23.164[2], 266 Or. 625; 513 P.2d 1172). Homestead may be mortgaged. (23.260).

There is no specific constitutional or statutory provision requiring spouse of homestead owner to join in instrument.

Proceeds of Sale.

Proceeds up to $23,000/$30,000 ($20,000/$27,000 for mobile home without ownership of real property on which situated) while held with intent to purchase another homestead are exempt for period not to exceed one year. (23.164[2] and[5]; 23.240[2] and [3]). Proceeds must in fact be reinvested in new homestead. (42 Bankr. Rep. 395). See subhead Limitations of Value and Area, supra.

Rights of Surviving Spouse and Family.

See category 13 Estates and Trusts, topic 13.09 Executors and Administrators, subhead Allowances.

Loss of Exemption.

Homestead may be lost by abandonment. Cessation of occupancy raises presumption of abandonment. (233 Or. 578, 379 P.2d 880).

8.11 JUDGMENT NOTES:

Not in use in Oregon.

8.12 LEVY:

See topics 8.02 Attachment, 8.05 Executions.

8.13 LIENS:

Uniform Commercial Code including Article 2A but excluding Article 6 adopted. (ORS 71.1010 et seq.).

Possessory Chattel Liens.

Available to: (1) Person who makes, alters, repairs, transports, stores, pastures, cares for, provides services for, supplies materials for, performs labor on chattel at request of owner or lawful possessor, on that chattel for reasonable or agreed charges (87.152); (2) keeper of inn, hotel, motel, on most chattels brought in by guests or boarders for reasonable or agreed charges (87.156); (3) landlord, including landlords of self-service facilities, on all chattels, except wearing apparel, owned by tenants or occupants legally responsible for rent (87.162); and (4) person who transports, pastures, feeds, or cares for impounded animals (87.159). Lien has priority over all other liens, security interests and encumbrances, except taxes and certain liens held by state or its political subdivisions. As to (3) liens, security interests perfected prior to time chattel bought on premises have priority. (87.146). Chattels may be retained until charges paid. (87.152). Foreclosure sale must be conducted in accordance with 87.186-.206.

Nonpossessory Chattel Liens.

Available to: (1) Person who makes, alters, repairs, transports, stores, provides services for, performs labor on chattel at request of owner, on that chattel for reasonable or agreed charges (87.216); (2) person who performs labor on or assists in obtaining, handling, manufacturing, transporting timbers or wood products at request of owner thereof, on timbers or products, for reasonable or agreed charges, and landowner from whose land timber is cut, on timbers, for reasonable or agreed charges (87.222); (3) person who furnishes land, performs labor, supplies materials, performs services on farmland, range, ranch, orchard, or other place of business to aid growing or harvesting of crops or raising of animals, on crops or animals for reasonable or agreed charges (87.226); (4) person who performs labor operating chattel to catch or transport fish, on fish taken using chattel, for reasonable or agreed charges (87.232). Liens attach to proceeds in certain cases. (87.236). Liens have equal priority and are subordinate to taxes and certain state liens and, as to (1) liens, to prior perfected security interests. (87.146). Notice requirements set forth in 87.242-.252. Suit to foreclose must be within six months after notice of claim or expiration of extended payment period. (87.266).

Real Property Liens.

Available to: (1) Person furnishing labor, materials, or transportation of mine materials or product to mine or improvement on mine (87.352); (2) person who prepares land or furnishes equipment for use in irrigation or cultivation of land, or interest in land of person requesting labor, materials or equipment, for reasonable or agreed charge (87.356); (3) person who furnishes nursery stock of value or price of $25 or more, or interest in land of requesting party, for reasonable or agreed charges (87.358); (4) electric cooperative or utility for electricity supplied for irrigation (87.362). Lien as to (1)-(3) attaches day performance, transportation or furnishing material ceases. (87.364[1]). Liens as to (4) attach day of first delivery of electricity. (87.364[2]). Notice requirements are set forth in 87.366. Suit to foreclose must be within six months after notice of claim or expiration of extended payment period. (87.376).

Employee Benefit Plans.

If employer required to contribute into fund, trustees of plan and each employee has lien on employer's property used in business and on earnings of business. (87.855). Notice must be filed within 60 days after payment becomes due. Suit to foreclose must be commenced within six months after filing lien. (87.865).

Lien on Boats or Vessels.

Any person employed on board a boat or vessel navigating on waters of this state, and every person furnishing such boat with supplies or wharfage or towage, may have lien upon such boat or vessel for what is due him. Actions to enforce must be commenced within one year. (783.010-.170). Every boat or vessel used in navigating waters of this state or constructed in this state is liable and subject to lien for wages for work aboard boat or vessel; for contract obligations of boat or vessel owner or owner's contractors or agents; for repair, fitting, laundering or equipment on boat or vessel; for premiums for insurance place on boat or vessel; for wharfage, anchorage or towage within state; for damages arising from breach of freight or passenger contracts and for damages or injury to persons or property by boat or vessel. (783.010; 783.310-.360).

Agricultural Producers.

Agricultural producer (87.700) that delivers or transfers agricultural produce for consideration to purchaser has lien on all agricultural produce and inventory of purchaser, and proceeds from sale of any agricultural produce to third party. If produce consists of meat animals (603.010) lien also attaches to accounts receivable. Lien attaches on date produce delivered or transferred to purchaser or agent. No notice need be filed to perfect lien. (87.705). Lien expires 45 days after final payment due to producer unless extended; if extended, lien expires 225 days after final payment due. (87.710). Lien has priority over all other classes of liens on inventory, proceeds or accounts receivable of purchaser, without regard to whether those liens attached before or after agricultural producer lien. (87.715). Agricultural producer of grain (87.750) has similar lien on inventory and proceeds of sale of purchaser (87.755). Lien on grain, but not on proceeds or other inventory, discharged upon sale by purchaser to third party. (87.755).

Crops.

Lien exists on crops for irrigation water (545.104) and for maintenance and operation of drainage districts in which crops are grown (547.495-.515). Lien exists on land in favor of electric cooperative or utility that supplies electricity for purposes of irrigation. (87.362).

Hospitals and physicians have liens on personal injury judgments and amounts owing under indemnity or compensation contracts covering costs of hospitalization and treatment recovered by patients. (ORS 87.555-.585). Ambulance service providers have liens on amounts payable to patients under indemnity or compensation contracts for such services. (ORS 87.603-.633).

Waiver, Loss or Extinguishment.

Common law, possessory lien lost when lienholder voluntarily and unconditionally parts with possession or control of property. (193 Or. 24, 236 P.2d 939). Right to mechanics lien may be waived by express or implied agreement. (47 Or. 40, 81 P. 813).

Enforcement.

Liens are foreclosed by suit except where particular statute provides otherwise. (88.010).

Redemption.

No redemption from sale of personal property. As to real property see topic 8.05 Executions.

Mechanics' Liens.

See subhead Construction Liens, infra.

Construction Liens.

Every person performing labor upon, furnishing or transporting any material or renting equipment to be used in construction of any improvement has lien upon same for work or labor done, transportation or labor furnished, or equipment rented at instance of owner of structure or his agent. (87.010). Trustees of employee benefit plan have lien upon improvement for amount of contributions due on labor performed on improvement. (87.010[4]). Architects, landscape architects, land surveyors and registered engineers who prepare plans, drawings or specifications intended for use on or to facilitate construction of improvement, or who supervise such construction, shall have lien on land and structure necessary for use of said plans, drawings or specifications or supervision performed. (87.010[5]). Person who prepares plans, drawings, surveys or specifications used for landscaping or site preparation has lien upon land landscaped or prepared. (87.010[6]). No right to claim lien is created for architects, landscape architects, land surveyors or registered engineers who provide services or equipment for owner occupied residence at request of agent or owner. (ORS 87.021). When material, equipment, services or labor is furnished at request of other than owner, person who has furnished material, equipment, services or labor can only perfect lien if he has notified owner in manner provided in statute within eight days, excluding Sat., Sun., and legal holidays, after delivery. (87.021).

Property Subject to Lien.

Improvement and land or any interest therein upon which any such improvement is constructed, together with convenient space about improvement for use and occupation are subject to lien. (87.010, 87.015).

Priority.

Liens, described in this section, as they affect the building or improvement, are preferred to all prior liens, mortgages or other encumbrances upon land if perfected. Improvements may be sold separately from land; and such liens, as they affect land, are preferred to any subsequent liens, mortgages, or other encumbrances in accordance with this section. No lien for materials or supplies has priority over any recorded mortgage or trust deed, however, unless person furnishing such material or supplies shall within eight days, excluding Sats., Suns. and legal holidays, after date of delivery of material or supplies for which lien may be claimed deliver notice to mortgagee or owner in statutory form. (87.025[3]). After receipt of such notice, mortgagee or owner may demand that list of materials with amount due be furnished. Failure to furnish such list after proper demand constitutes waiver of priority. (87.025[4], 87.027). Upon demand of person making payment, supplier must execute waiver of all lien rights as to materials or supplies for which payment has been made. (87.025[5]).

Time for Filing.

Persons claiming lien for labor, materials, or equipment rental must perfect not later than 75 days after person has ceased to perform labor, furnish materials or rent equipment, or 75 days after completion of construction, whichever is earlier. Every other person claiming lien under 87.010 must perfect lien not later than 75 days after completion of construction. (87.035). Repair work to remedy defect does not extend time for filing. (85 Or. App. 529, 737 P.2d 639).

Lien is perfected by filing statement by lienor with recording officer of county, containing with particularity true statement of demand, after deducting all just credits and offsets; name of owner, or reputed owner; name of person by whom claimant was employed or to whom he furnished material or rental equipment or by whom contributions are owed; description of property sufficient for identification, including address if known; amount of his demand; and verified by him or some other person having knowledge of facts subject to criminal penalties for false swearing. (87.035).

Notices required by Construction Lien Law must be in writing and delivered in person or by registered or certified mail, except “Information Notice to Owner” which may also be delivered by first class mail with certificate of mailing. (87.018).

If materials or labor are furnished on noncommercial improvement, or equipment or services only are furnished on commercial improvement, at request of someone other than owner, person furnishing such labor or material shall give notice of right to lien to owner. This notice may be given at any time during progress of improvement, but only protects right to lien for labor or materials provided after eighth day, excluding Sats., Suns. and legal holidays, before notice is delivered or mailed. Lien will not be enforced unless required notice of right to lien is given. (87.021). Notice of right to lien shall include following information substantially in following form:

Form

NOTICE OF RIGHT TO LIEN

WARNING: READ THIS NOTICE. PROTECT YOURSELF FROM PAYING ANY CONTRACTOR OR SUPPLIER TWICE FOR THE SAME SERVICE.

TO:________________________________ Date of mailing:____________________

Owner

____

Owner's address

____

This is to inform you that. . . . has begun to provide. . . . (description of materials, equipment, labor or services) ordered by. . . . for improvements to property you own. The property is located at. . . . .

A lien may be claimed for all materials, equipment, labor and services furnished after a date that is eight days, not including Saturdays, Sundays and other holidays as defined in ORS 187.010, before this notice was mailed to you.

Even if you or your mortgage lender have made full payment to the contractor who ordered these materials or services, your property may still be subject to a lien unless the supplier providing this notice is paid.

THIS IS NOT A LIEN. It is a notice sent to you for your protection in compliance with the construction lien laws of the State of Oregon.

This notice has been sent to you by:

NAME:___________________________

ADDRESS:________________________

TELEPHONE:_____________________

IF YOU HAVE ANY QUESTIONS

ABOUT THIS NOTICE, FEEL

FREE TO CALL US.

IMPORTANT INFORMATION ON REVERSE SIDE

[Reverse Side]

IMPORTANT INFORMATION FOR YOUR PROTECTION

Under Oregon's laws, those who work on your property or provide labor, equipment, services, or materials and are not paid have a right to enforce their claim for payment against your property. This claim is known as a construction lien.

If your contractor fails to pay subcontractors, material suppliers, rental equipment suppliers, service providers or laborers or neglects to make other legally required payments, the people who are owed money can look to your property for payment, *even if you have paid your contractor in full.*

The law states that all people hired by a contractor to provide you with materials, equipment, labor or services must give you a notice of the right to lien to let you know what they have provided.

WAYS TO PROTECT YOURSELF ARE:

—RECOGNIZE that this notice of right to a lien may result in a lien against your property unless all those supplying a notice of right to a lien have been paid.

—LEARN more about the lien laws and the meaning of this notice by contacting the Builders Board, an attorney or the firm sending this notice.

—ASK for a statement of the labor, equipment, services or materials provided to your property from each party that sends you a notice of the right to a lien.

—WHEN PAYING your contractor for materials, equipment, labor or services, you may make checks payable *jointly* to the contractor and the firm furnishing materials, equipment, labor or services for which you have received a notice of the right to a lien.

—OR use one of the methods suggested by the “Information Notice to Owners.” If you have not received such a notice, contact the Builders Board.

—GET EVIDENCE that all firms from whom you have received a notice of right to a lien have been paid or have *waived* the right to claim a lien against your property.

—CONSULT an attorney, a professional escrow company or your mortgage lender. (ORS 87.023, 87.093).

Owner who receives notice of right to lien may demand list of materials furnished and description of labor or equipment or services supplied, including statement of amount owed. (ORS 87.027). Failure to provide such lists within 15 days causes loss of right to attorneys' fees and costs otherwise allowable in suit to foreclose lien.

Builders Board will adopt by rule form entitled “Information Notice to Owner,” which form shall be provided to owner or first purchaser by original contractor on residential construction or improvement of more than $1,000 at time of signing contract. If initial price is under $1,000, owner should provide notice within five days of when he knows or should reasonably know that contract price will exceed $1,000. If oral contract, contractor shall mail notice to owner within five days of making contract. If this notice is not given on residential construction, contractor may not claim lien for labor, services, equipment, or materials supplied. Builders Board may suspend contractor's registration or impose maximum $5,000 penalty for failure to give notice. (ORS 87.093[5],[6]).

Lien for delivery of materials and supplies will not have priority over recorded mortgage or trust deed on either land or improvement, unless notice is given to mortgagee of record in statutory form not later than eight days, excluding Sats., Suns. and legal holidays, after date of delivery of material or supplies for which lien may be claimed. Mortgagee may demand list of materials and supplies. (ORS 87.025[3] [4]).

Person filing claim for lien must give owner written notice that claim has been filed not later than 20 days after filing or lose right to costs, disbursements and attorneys' fees allowable under Construction Lien Law. (ORS 87.039).

Person intending to commence suit to foreclose lien must deliver to owner and mortgagee written notice of intent to foreclose not later than ten days before commencement of foreclosure suit or lose right to costs, disbursements and attorneys' fees allowable under Construction Lien Law. Compliance with this notice requirement must be pleaded and proved in foreclosure action. (ORS 87.057).

In suit to enforce lien, evidence of actual labor, equipment, services, and material costs creates rebuttable presumption of reasonable value. Reasonable attorney fees allowed to prevailing party at trial and on appeal. (ORS 87.060).

Duration of Lien.

Lien becomes ineffective at expiration of 120 days after filing unless foreclosure suit has been commenced in proper court or if extended payment is provided and terms stated in recorded lien then 120 days after expiration of such extended payment. In no event does lien continue for more than two years after claim, if lien is filed. (87.055).

Public Works.

Contractor for public improvement must give bond for faithful performance of contract, unless excused because of emergency. (279.029).

Attachment Lien.

See topic 8.02 Attachment.

Attorney's Lien.

See category 18 Legal Profession, topic 18.01 Attorneys and Counselors.

Chattel Mortgage Lien.

See category 20 Mortgages, topic 20.01 Chattel Mortgages.

Collateral Security.

See topic 8.15 Pledges.

Execution Lien.

See topic 8.05 Executions.

Factor's Lien.

See category 3 Business Regulation and Commerce, topic 3.14 Factors.

Judgment Lien.

See category 5 Civil Actions and Procedure, topic 5.15 Judgments.

Landlord's Lien.

See category 21 Property, topic 21.10 Landlord and Tenant.

Liens on Exempt Property.

See topic 8.06 Exemptions.

Liens on Homestead.

See topic 8.10 Homesteads.

Merchandise Lien.

Uniform Commercial Code adopted.

Real Estate Mortgage Lien.

See category 20 Mortgages, topic 20.04 Mortgages of Real Property.

Tax Lien.

See category 22 Taxation.

See also category 3 Business Regulation and Commerce, topic 3.09 Commercial Code.

8.14 MECHANICS' LIENS:

See topic 8.13 Liens.

8.15 PLEDGES:

Uniform Commercial Code adopted. (71.1010 et seq.).

Chose in action may be pledged without notice to debtor. (80.010). Life or health insurance policy may be pledged. (743.043).

Remedies of Pledgee.

Pledges may be foreclosed in manner provided in pledge or by suit in equity. (88.010-.100).

See also categories 3 Business Regulation and Commerce, topic Commercial Code; Civil Actions and Procedure, topic Replevin.

8.16 RECEIVERS:

Receiver may be appointed by circuit court, or judge thereof, in following civil actions or upon judgment or order therein:

1. Provisionally, before judgment, on application of either party, when such party's right to property which is subject of action suit or proceeding and which is in possession of adverse party is probable and property or its rents or profits are in danger of being lost or materially injured or impaired;

2. After judgment to carry same into effect;

3. To dispose of the property according to the judgment or decree or to preserve it during the pendency of an appeal or when an execution has been returned unsatisfied and the debtor refuses to apply his property in satisfaction of the judgment;

4. In action brought by creditor to set aside transfer, mortgage or conveyance of property on ground of fraud or to subject property or fund to payment of debt;

5. At instance of attaching creditor when property attached is of perishable nature or is otherwise in danger of waste, impairment or destruction or where debtor has absconded or abandoned property and it is necessary to conserve or protect it or to dispose of it immediately;

6. At instance of judgment creditor either before or after issuance of execution to preserve, protect or prevent transfer of property liable to execution and sale thereunder;

7. In cases provided by statute when corporation or cooperative association has been dissolved or is insolvent or in imminent danger of insolvency or has forfeited its corporate rights;

8. When a corporation or cooperative association has been dissolved or is insolvent or in imminent danger of insolvency and it is necessary to protect its property or to conserve or protect interests of stockholders or creditors. (ORCP 80 B).

Jurisdiction.

Circuit courts, or judges thereof, may appoint receivers. (ORCP 80 A).

Proceedings.

See general discussion in introductory paragraph. It is required that adverse party be given five days notice of hearing. (ORCP 80 C). Order appointing receiver during suit not final order for appeal unless certified as such by court. (19.010; 116 Or. 440, 241 P. 388; ORCP 67 B).

Eligibility and Competency.

No specific statutory requirements.

Powers and duties of receiver are to take charge of property and to manage and dispose of it as court may direct. (ORCP 80).

Compensation not fixed by statute. Court may allow reasonable compensation. (14 Or. 165, 12 P. 234).

Discharge.

Termination requires court order upon motion made with ten days notice to all parties who have appeared in proceeding. Court may order termination and filing of final accounting and report. (ORCP 80 G). If surety of receiver is discharged and receiver fails to file new bond appointment of receiver must be revoked. (33.510).

Qualification.

Receivers must give security in amount fixed by court. (ORCP 82 A[2]).

8.17 REDEMPTION:

See topics 8.05 Executions, Liens; categories 20 Mortgages, topic Mortgages of Real Property; Taxation.

8.18 SUPPLEMENTARY PROCEEDINGS:

See topic 8.05 Executions.

8.19 TRUSTEE PROCESS:

See topic 8.09 Garnishment.

8.20 USURY:

See category 3 Business Regulation and Commerce, topic 3.19 Interest.

9 DISPUTE RESOLUTION

9.01 ALTERNATIVE DISPUTE RESOLUTION:

Mandatory (Alternative) Dispute Resolution.

Mandatory arbitration of civil disputes where claim does not exceed $50,000, exclusive of attorney fees and costs; and in domestic relations suits where only contested issue is division or disposition of property. (36.400[1],[3]; 36.405[1]). After conclusion of arbitration any party may request and receive trial de novo in court. (36.425).

Voluntary (Alternative) Dispute Resolution.

Courts may refer to arbitration certain civil actions not subject to mandatory arbitration, if parties so stipulate. (36.410). Courts may refer most civil actions to mediation if no party objects. (36.185). Certain types of civil cases on appeal may be referred to mediation. (ORAP 15.05).

Alternative Dispute Resolution Jurisdictional Bodies/Commissions.

State Dispute Resolution Commission adopts by rule standards and guidelines for dispute resolution programs, reporting requirements, qualifications and training for dispute resolution personnel, and participants' payment requirements. (36.115,.175). Attorney General, in consultation with Dispute Resolution Commission and Oregon Department of Administrative Services, may develop model rules for alternative dispute resolution. Agency that elects to use alternative dispute resolution must inform and may consult Dispute Resolution Commission, Department of Justice, and Oregon Department of Administrative Services for advice regarding its implementation. (183.502).

See also topic 9.02 Arbitration and Award.

Alternative Dispute Resolution Acts.

None.

9.02 ARBITRATION AND AWARD:

Nonwaivable Provisions.

Several provisions of c. 598 are nonwaivable. (36.610).

Application for Judicial Relief.

Must be made by petition to court and accompanied by filing fee provided by ORS 21.110(1) for plaintiffs, and persons responding to petition must pay filing fee provided by ORS 21.110(1) for defendants. If first petition relating to arbitration seeks confirmation, vacation, modification or correction of award, person filing petition must pay fee of $35 plus surcharge, and person filing appearance in opposition to petition must pay filing fee of $21 plus surcharge. If subsequent petitions filed relating to same agreement to arbitrate or arbitration proceeding, no additional filing fees shall be required of parties. If civil action is pending relating to same dispute, and filing fees were paid for that action under ORS 21.110, filing fees may not be charged. (36.615).

Validity of Agreement to Arbitrate.

Agreement to arbitrate in record, meaning information inscribed on tangible medium or stored in electronic or other medium and retrievable in perceivable form, is valid, enforceable, and irrevocable except on ground that exists at law or equity for revocation of contract. (36.620). Provision is nonwaivable. (36.610).

Petition to Compel or Stay Arbitration.

On petition of person showing agreement to arbitrate and alleging another person's refusal to arbitrate, court shall order parties to arbitrate if refusing party does not appear or does not oppose petition. If refusing party opposes petition, court shall summarily decide issue and order parties to arbitrate unless it finds there is no enforceable agreement to arbitrate. Court may not refuse to order arbitration because claim subject to arbitration lacks merit or grounds for claim have not been established. Court on just terms shall stay any judicial proceeding involving claim alleged to be subject to arbitration unless court renders final decision in arbitration. If claim subject to arbitration is severable, court may limit stay to that claim. Judge shall decide all issues raised under petition filed unless there is constitutional right to jury trial on issue, which shall be tried to jury upon request of any party to proceeding. (36.625). Provision is nonwaivable. (36.610).

Provisional Remedies.

Before arbitrator is appointed and authorized and able to act, court, upon petition of party and for good cause shown, may enter order for provisional remedies. After appointed, arbitrator may issue such orders for provisional remedies, including interim awards; and party may move court for provisional remedy only if matter is urgent and arbitrator not able to act timely or arbitrator cannot provide adequate remedy. (36.630). Provision is nonwaivable. (36.610).

Initiation of Arbitration.

Person initiates arbitration proceeding by giving notice in record to other parties to agreement to arbitrate in agreed manner or, in absence of agreement, by certified mail, return receipt requested and obtained, or by service as authorized for summons under ORCP 7 D. Notice must describe nature of controversy and remedy sought. Unless person objects for lack or insufficiency of notice not later than beginning of arbitration hearing, person by appearing at hearing waives any objection to lack or insufficiency of notice. (36.635).

Consolidation of Separate Arbitration Proceedings.

Upon petition, court may order consolidation of separate arbitration proceedings as to all or some of claims if: (a) separate agreements to arbitrate or separate arbitration proceedings between same persons or one of them is party to separate agreement to arbitrate or separate arbitration proceeding with third person; (b) claims subject to agreements to arbitrate arise in substantial part from same transaction or series of related transactions; (c) existence of common issue of law or fact creates possibility of conflicting decisions in separate arbitration proceedings; (d) prejudice resulting from failure to consolidate is not outweighed by risk of undue delay or prejudice to rights of or hardship to parties opposing consolidation; and (e) agreement to arbitrate does not prohibit consolidation. (36.640).

Appointment of Arbitrator: Service as Neutral Arbitrator.

If parties agree on method for appointing arbitrator, that method must be followed, unless it fails. If no agreement on method or it fails, court, on petition of party, shall appoint arbitrator. Arbitrator so appointed has all powers of arbitrator designated in agreement to arbitrate or appointed pursuant to agreed method. Individual who has known, direct and material interest in outcome of arbitration proceeding or known, existing and substantial relationship with party may not serve as arbitrator required by agreement to be neutral. (36.645).

Disclosure by Arbitrator.

Individual who is requested to serve as arbitrator, after making reasonable inquiry, shall disclose to all parties and to any other arbitrators in arbitration proceeding any known facts reasonable person would consider likely to affect impartiality of arbitrator, including: (a) financial or personal interest in outcome of arbitration; and (b) existing or past relationship with any party to arbitration proceeding, their counsel or representatives, witness or another arbitrator in proceeding. (36.650).

Action by Majority.

If more than one arbitrator, powers of arbitrator must be exercised by majority of arbitrators, but all of them shall conduct hearing. (36.655).

Immunity of Arbitrator.

Arbitrator immune from civil liability to same extent as Oregon judge acting in judicial capacity. (36.660). Provision is nonwaivable. (36.610).

Arbitration Process.

Arbitrator may conduct arbitration in such manner as arbitrator considers appropriate for fair and expeditious disposition of proceeding. Arbitrator may decide request for summary disposition of claim or particular issue: (a) if all interested parties agree; or (b) upon request of one party to arbitration proceeding, if that party gives notice to all other parties to proceeding and other parties have reasonable opportunity to respond. If arbitrator orders hearing, arbitrator shall set time and place and give notice of hearing not less than five days before hearing begins. Party's appearance at hearing waives any objection based on lack or insufficiency of notice unless party makes objection not later than beginning of hearing. Upon request of party and for good cause shown, or upon arbitrator's own initiative, arbitrator may adjourn hearing from time to time as necessary but may not postpone hearing to time later than that fixed by agreement for making award unless parties to arbitration consent to later date. Arbitrator may hear and decide controversy upon evidence produced although party who was duly notified of arbitration proceeding did not appear. Court, on request, may direct arbitrator to conduct hearing promptly and render timely decision. At hearing, party has right to be heard, to present evidence material to controversy and to cross-examine witnesses appearing at hearing. (36.665).

Representation by Lawyer; Representation of Legal Entities.

Party to arbitration proceeding may be represented by lawyer admitted to practice in Oregon or any other state. Corporation, business trust, partnership, limited liability company, association, joint venture or other legal or commercial entity may be represented by lawyer admitted to practice in Oregon or any other state, by officer of entity, or by employee or other agent authorized by entity to represent entity in proceeding. (36.670). Provision is nonwaivable. (36.610).

Powers of Arbitrators/Attorneys.

Arbitrator may administer oaths, hold conferences with parties before hearing, determine admissibility, relevance, materiality and weight of any evidence, permit depositions, and such discovery arbitrator decides is appropriate, including issuance of protective orders. Arbitrator or attorney for any party to arbitration proceeding may issue subpoena for attendance of witness and for production of records and other evidence at any hearing. (36.665,.675).

Judicial Enforcement of Preaward Ruling by Arbitrator.

If arbitrator makes preaward ruling in favor of party to arbitration proceeding, party may request arbitrator to incorporate ruling into award under 36.685. Prevailing party may petition court for expedited order to confirm award under 36.700, in which case court shall summarily decide petition. Court shall issue order to confirm award unless court vacates, modifies, or corrects award under 36.705 or 36.710. (36.680). Provision is nonwaivable. (36.610).

Award.

(1) Arbitrator shall make record of award, which must be signed or otherwise authenticated by any arbitrator who concurs with award. If award requires payment of money, including but not limited to payment of costs or attorney fees, award must be accompanied by separate statement. Arbitrator shall give notice of award, including copy of award, to each party to arbitration. Award must be made within time specified by agreement to arbitrate or, if not specified therein, within time ordered by court. Party waives any objection that award was not timely made unless party gives notice of objection to arbitrator before receiving notice of award. (36.685).

Change of Award by Arbitrator.

Within 20 days after receiving notice of award, party may request arbitrator to modify or correct award because: (a) mathematical error, (b) award is imperfect in form; (c) arbitrator has not made final and definite award upon claim; or (d) to clarify award. (36.690). Provision is nonwaivable. (36.610).

Remedies; Fees and Expenses of Arbitration Proceeding.

Arbitrator may award punitive damages or other exemplary relief if such award is authorized by law and evidence produced justifies award, and must state separately amount. Arbitrator may award reasonable attorney fees and other reasonable expenses of arbitration as may be specified in arbitration agreement if such award is authorized by law or by agreement of parties to arbitration. Arbitrator may order such remedies as arbitrator considers just and appropriate under the circumstances. Arbitrator's expenses and fees, together with other expenses, must be paid as provided in award. (36.695).

Confirmation of Award.

After party to arbitration proceeding receives notice of award, party may petition court for order confirming award. Party filing petition must serve copy of petition on all other parties. Court shall issue confirming order unless within 20 days after petition is served on other parties: (a) party requests arbitrator modify or correct award, in which case, court may stay entry of order on petition until final decision by arbitrator; or (b) party petitions court to vacate, modify, or correct award. (36.700). Provision is nonwaivable. (36.610).

Vacating Award.

Within 20 days of service of petition for confirmation, petition for vacating award must be filed. Upon petition, court shall vacate award if: (a) award was procured by corruption, fraud or other undue means; (b) there was: (A) evident partiality by appointed neutral arbitrator; (B) corruption by arbitrator; or (C) prejudicial misconduct by arbitrator; (c) arbitrator refused to postpone hearing upon showing of sufficient cause for postponement, refused to consider evidence material to controversy or otherwise conducted hearing as to prejudice substantially rights of party; (d) arbitrator exceeded arbitrator's powers; (e) there was no agreement to arbitrate, unless person participated in arbitration without raising objection not later than beginning of hearing; or (f) arbitration was conducted without proper notice of initiation of arbitration so as to prejudice substantially rights of party to arbitration proceeding. (36.705). Provision is nonwaivable. (36.610).

Modification or Correction of Award.

Upon petition filed within 20 days after petitioner is served with petition for confirmation of award, court shall modify or correct award if: (a) evident mathematical miscalculation or evident mistake in description of person, thing or property referred to in award; (b) arbitrator has made award on claim not submitted to arbitrator and award may be corrected without affecting merits of decision upon claims submitted; or (c) award is imperfect in matter of form not affecting merits of decision on claims submitted. If petition granted, court shall modify or correct and confirm award as modified or corrected. Otherwise, unless petition to vacate is pending, court shall confirm award. Party filing petition must serve copy of petition on all other parties to proceedings. (ORS 36.710). Provision is nonwaivable. (ORS 36.610).

Judgment on Award; Attorney Fees and Litigation Expenses.

Upon granting order confirming, vacating without directing rehearing, modifying or correcting award, court shall enter judgment in conformity with order, and is enforceable as any other judgment in civil action. Court may allow reasonable costs of petition and subsequent judicial proceedings. Prevailing party to contested judicial proceeding may petition for and court may add reasonable attorney fees incurred in judicial proceeding after award is made to judgment confirming, vacating without directing rehearing, modifying or correcting award. (36.715). Provision is nonwaivable. (36.610).

Jurisdiction.

Court having jurisdiction over controversy and parties may enforce agreement to arbitrate. Agreement to arbitrate providing for arbitration in Oregon confers exclusive jurisdiction on court to enter judgment on award. (36.720). Provision is nonwaivable. (36.610).

Venue.

Application for judicial relief must be made in court for county in which agreement to arbitrate specifies arbitration hearing is to be held or, if hearing already held, in court for county where held. Otherwise, petition may be made in court for any county in which adverse party resides or has place of business or, if no adverse party has residence or place of business in Oregon, in court of any county in this state. All subsequent petitions must be made in court hearing initial petition unless court otherwise directs. (36.725).

Appeals.

Appeal may be taken from: (a) order denying petition to compel arbitration; (b) order granting petition to stay arbitration; or (c) judgment entered, including but not limited to judgment: (A) confirming or denying confirmation of award; (B) modifying or correcting award; (C) vacating award without directing rehearing. Appeal must be taken as provided in ORS c. 19. (36.730). Provision is nonwaivable. (36.610).

Savings Clause.

Arbitration agreement made before Jan. 1, 2004 continues to be governed by ORS 36.300 to 36.365 as though those sections were not repealed. (36.600).

Mandatory Arbitration.

Circuit courts require arbitration of civil disputes involving: (1) Claim for recovery of money or damages in amount no greater than $50,000; and (2) division of property in dissolution of marriage proceeding (36.405). Presiding judge of court may exempt or remove action from arbitration for good cause. (30.405[2]). If court has established mediation program, action will be assigned to mediation, rather than arbitration, if parties agree. (36.405[3]). Where party's claim exceeds arbitrable limit, court may refer matter to arbitration if no reasonable juror could return verdict exceeding arbitrable limit. (36.415[2]). Once arbitrator's decision filed with court, either party may appeal within 20 days, and, upon payment of $150, have trial de novo. If appealing party does not improve position at trial, party forfeits $150 fee and is precluded from recovering any attorney fees, costs or disbursements. Furthermore, responding party entitled to attorney fees, costs and disbursements. (36.425). In addition to arbitration described above, arbitration compulsory in following proceedings: Rental agreements for manufactured dwelling and floating home spaces (90.610); reclamation of property removed by flood (99.010, 99.020, 99.030); interstate dispute respecting decedent's domicile for death tax purposes (118.865, 118.870); city annexations and division of assets between city and public service district on withdrawal of part of district (222.530, 222.540, 222.560); labor disputes by public employees where no right to strike (e.g., police, fire fighters, guards in correctional institutions or mental hospitals, nurses in health care facilities) (243.742 through 243.762 and sections therein referenced); allocations under Multistate Tax Compact (305.655, Art. IX); boundary changes, division of assets of school districts (330.123); community college district boundary changes (341.573); appeal from decision of reduction of teacher staff due to funding or administrative decision (342.934); joint city museum dispute (ORS 358.405); forest road maintenance costs (376.345); cost of returning stray livestock to owner (607.304, 607.332, 607.338); certain disputed workers' compensation claims between employers, medical service providers and health insurance providers (656.289); certain automobile insurance claims (742.504, 742.520[6], 742.534).

Uniform Arbitration Act Adoption/Deviation.

Uniform Arbitration Act adopted. Statute (36.600-36.740) makes all controversies arbitrable except those respecting terms and conditions of employment under collective contracts between labor unions and employers (see 662.405-662.455 on labor arbitration). Statute does not exclude common law arbitration. (304 Or. 407, 745 P.2d 1221).

Jurisdictional Arbitration Acts.

Oregon International Commercial Arbitration and Conciliation Act (ORS 36.450–36.558) applies to international commercial arbitration and conciliation, subject to any agreement in force between U.S. and any other country (36.454).

9.02A MEDIATION:

Jurisdictional Mediation Acts.

When persons cannot settle dispute directly, they should be encouraged and assisted to resolve dispute with aid of trusted and competent third-party mediator rather than leave dispute unresolved or resort to litigation. (36.100). Dispute Resolution Commission established (36.115) to govern operation and procedures of court mediation, submitting proposed rules for approval of Oregon Supreme Court (36.180). Parties in any civil action may elect to mediate dispute or court may refer them to mediation. (36.185-.190). Parties may also elect private mediation at their own option and expense. (36.200). Court of Appeals shall establish appellate mediation program. (2.560). Director of Agriculture shall establish mediation service for agricultural producers who owe creditors more than $100,000 and wish to mediate their indebtedness related to foreclosure proceedings. (36.245). State Board of Education shall establish rules prescribing mediation for disputes regarding identification, evaluation, education, or placement of child with disability. (343.155).

Credentials of/Qualifications of/Standards for Mediators.

Upon referral or election to mediate, parties shall select mediator or one will be assigned from court's panel of mediators. (36.190). Circuit courts providing mediation referral shall establish mediation panels, whose members shall have qualifications set by Dispute Resolution Commission. No mediator required to have formal education in any particular field. (36.200).

10 DOCUMENTS AND RECORDS

10.01 ACKNOWLEDGMENTS:

Uniform Law on Notarial Acts.

Adopted in 1983. (ORS 194.505-.595).

General.

When Required.

Acknowledgment required of following instruments: (1) Deeds for conveyance of land, or any estate or interest therein (ORS 93.010); (2) assignments of sheriffs' certificates of sale of real property on execution or mortgage foreclosure (ORS 93.530); (3) instruments contracting to convey fee title to any real property, at time more than 12 months from date that instrument is executed and parties are bound (ORS 93.635); (4) satisfaction of mortgage (ORS 86.100).

Who May Take.

Acknowledgment of above instruments may be taken by any judge of Supreme Court, Court of Appeals, Tax Court, or circuit court (ORS 1.260); by any other judicial officer within officer's territorial jurisdiction (ORS 1.270); by county judge, justice of peace, or notary public within state (ORS 93.410); by county clerk (ORS 205.110[3]); or by trial court administrator or clerk (ORS 8.225[3]).

Alternative to Acknowledgment or Proof.

Corporations and Partnerships.

Where document is required by law to be verified before it may be filed with Secretary of State, document shall include or be accompanied by written declaration, prepared under penalties of perjury by person executing document, to effect that person has examined document and to best of his or her knowledge and belief it is true, correct, and complete. Acknowledgment before notary public is not required. (ORS 56.035).

Forms.

See topic 10.03 Notaries Public, subhead Forms.

10.02 AFFIDAVITS:

Affidavit is written declaration under oath, made without notice to adverse party. (ORS 45.020).

General Requirements as to Administration.

Within the State.

An affidavit may be taken within state by any judge (ORS 1.260), justice of peace (ORS 1.270), or notary (ORS 194.505).

Outside of State.

See topic 10.03 Notaries Public, subhead Outside State but within U.S.

General Requirements of Jurat.

See topic 10.03 Notaries Public, subhead General Requirements of Certificates.

Form.

See topic 10.03 Notaries Public, subhead Forms.

Authentication.

Secretary of State may certify official character of notary who has recorded his commission with certifying officer. (ORS 194.040).

Alternative to Affidavit.

When affidavit required by ORCP, declaration under penalty of perjury may be used instead. (ORCP 1 E).

10.03 NOTARIES PUBLIC:

Qualifications.

Notary public must be 18 years of age, able to read and write English language, of good moral character, and reside in Oregon or in adjoining state and be regularly employed in Oregon or carry on business in Oregon, and have satisfactorily completed written examination prescribed by Secretary of State. Must not have had notary commission revoked for official misconduct during five-year period preceding date of application. Must not have been convicted of felony, or lesser offense incompatible with duties of notary public, during ten-year period preceding date of application. Must mail or deliver notice to Secretary of State within 30 days of change of residence or business address. Notice must include new and old address. (ORS 194.022, .047).

Uniform Law On Notarial Acts adopted. (ORS 194.505-.595).

Notarial Acts.

"Notarial act" or "notarization" is any act that notary is authorized to perform, and includes taking acknowledgment, administering oath or affirmation, taking verification upon oath or affirmation, witnessing or attesting signature, certifying or attesting copy and noting protest of negotiable instrument. (ORS 194.505[3]).

Acknowledgments.

"Acknowledgment" is statement by person that person has executed instrument for purposes stated therein and, if instrument is executed in representative capacity, that person signed instrument with proper authority and executed it as act of person or entity represented and identified therein. (ORS 194.505[1]).

General Requirements as to Taking.

In taking acknowledgment, notarial officer must determine, either from personal knowledge or from satisfactory evidence, that person appearing before officer and making acknowledgment is person whose true signature is on instrument. In taking verification upon oath or affirmation, notarial officer must determine, either from personal knowledge or from satisfactory evidence, that person appearing before officer and making verification is person whose true signature is on statement verified. In witnessing or attesting signature, notarial officer must determine either from personal knowledge or from satisfactory evidence, that signature is that of person appearing before officer and named therein. In certifying or attesting copy of document or other item, notarial officer must determine that proffered copy is full, true and accurate transcription or reproduction of that which was copied. In making or noting protest of negotiable instrument, notarial officer must determine matters set forth in 73.5050. Notarial officer has satisfactory evidence that person is person whose true signature is on document if that person is: (a) personally known to notarial officer, (b) identified upon oath or affirmation of credible witness personally known to notarial officer or (c) identified on basis of identification documents. (ORS 194.515).

Performance of Notarial Acts.

Notarial acts may be performed by following persons:

Within State.

Notary public of this state and judge, clerk or deputy of any court of this state. Notarial acts performed within this state under federal authority as provided in this chapter have same effect as if performed by notarial officer of this state. Signature and title of person performing notarial act are prima facie evidence that signature is genuine and that person holds designated title. (ORS 194.525).

Outside State but within U.S.

Notary public authorized in that jurisdiction, judge, clerk or deputy clerk of court of that jurisdiction, or any other person authorized by law of that jurisdiction to perform notarial acts. Notarial acts performed in other jurisdictions of U.S. under federal authority as provided in this chapter have same effect as if performed by notarial officer of this state. Signature and title of officer above indicated are prima facie evidence that signature is genuine and that person holds such title, and conclusively establish authority of holder of that title to perform notarial act. (ORS 194.535).

Outside the U.S.

Notary public or notary, judge, clerk, or deputy clerk of court of record, or any other person authorized by law of jurisdiction to perform notarial acts. “Apostille” in form prescribed by Hague Convention of Oct. 5, 1961, conclusively establishes that signature of notarial officer is genuine and that officer holds designated office. Certificate by foreign service or consular officer of U.S. stationed in nation under jurisdiction of which notarial act was performed, or certificate by foreign service or consular officer of that nation stationed in U.S., conclusively establishes any matter relating to authenticity or validity of notarial act set forth in certificate. Official stamp or seal of officer listed above is prima facie evidence that signature is genuine, that person holds such title, and that person with that title has authority to perform notarial acts. If title of office and indication of authority to perform notarial acts appears either in digest of foreign law or list customarily used as source for that information, it conclusively establishes authority of officer with that title to perform notarial acts. (ORS 194.555).

Notarial Acts Under Federal Authority.

Notarial act is effective if performed anywhere by any of following persons under authority granted by law of U.S.: Judge, clerk or deputy clerk of court; commissioned officer on active duty with military services of U.S.; officer of foreign service or consular officer of U.S. or any other person authorized by federal law to perform notarial acts. Signature and title of person performing notarial act are prima facie evidence that signature is genuine and that person holds designated title. Signature and title of officer listed above conclusively establish authority of holder of that title to perform notarial act. (ORS 194.545).

General Requirements of Certificates.

Notarial act must be evidenced by certificate signed and dated by notarial officer. Certificate must include identification of jurisdiction in which notarial act is performed and title of office notarial officer holds and may include official stamp or seal of office. If officer is notary public, certificate must also indicate date of expiration, if any, of commission or office, but omission of that information may subsequently be corrected. If officer is commissioned officer on active duty with military services of U.S., it must also include officer's rank. (ORS 194.565).

Forms.

Following forms may be used (ORS 194.575):

For an acknowledgment in an individual capacity: State of. . . . ., County of. . . . ., ss. . . . . This instrument was acknowledged before me on (date) by (name(s) of person(s)).

(Signature of notarial officer)

(Seal, if any)

Title (and Rank)

My commission expires:

For an acknowledgment in a representative capacity: State of. . . . ., County of. . . . ., ss. . . . . This instrument was acknowledged before me on (date) by (name(s) of person(s)) as (type of authority, e.g., officer, trustee, etc.) of (name of party on behalf of whom instrument was executed.)

(Signature of notarial officer)

(Seal, if any)

Title (and Rank)

My commission expires:

For a verification upon oath or affirmation: State of. .. . ., County of. . . . ., ss. . . . . Signed and sworn to (or affirmed) before me on (date) by (name(s) of person(s) making statement.)

(Signature of notarial officer)

(Seal, if any)

Title (and Rank)

My commission expires:

For witnessing or attesting a signature: State of. . . .., County of. . . . ., ss. . . . . Signed or attested before me on (date) by (name(s) of person(s)).

(Signature of notarial officer)

(Seal, if any)

Title (and Rank)

My commission expires:

For attestation of a copy of a document: State of. . . . ., County of. . . . ., ss. . . . . I certify that this is a true and correct copy of a document in the possession of. . . . . .

Dated:. . . . .

(Signature of notarial officer)

(Seal, if any)

Title (and Rank)

My commission expires:

Seal.

Official seal of notary public is stamp capable of making legible imprint and legibly reproducing under photographic methods. Secretary of State prescribes size and form of imprint. Attempt to notarize instrument has no effect unless it bears imprint of official seal. Exception for notarization of plat for subdivision, partition or condominium. (ORS 194.031[4]). Upon delivery of official seal, sample of imprint must be filed with Secretary of State. Any notary whose official seal is lost or damaged must immediately give written notice to Secretary of State, who will issue Certificate of Authorization to notary for new seal. Seal embosser may be used. (ORS 194.031).

Powers.

Notary has power to act throughout state and to take acknowledgments of deeds (ORS 93.410), take testimony and administer oath and affirmation (ORS 44.320).

Fees.

For application for appointment as notary public: Fee, not to exceed $40, to be paid in advance to Secretary of State. (194.020, 2009 c. 745).

For services as notary public: Secretary of State determines maximum fees that notary public may charge. Notary may charge additional fee for traveling to perform notarial act if notary explains that additional fee is not required by law and person agrees upon this additional fee in advance. Notaries must display English-language schedule of fees. (ORS 194.164).

Term of office of notary public is four years. (ORS 194.012).

Full faith and credit shall be given to all protestations, attestations, and other instruments of publication of notaries public. (ORS 194.040[2]).

Change of Name.

Notary whose name is changed must mail or deliver notice to Secretary of State within 30 days after change is effective. Notary may continue to use old name until commission expires or notary may apply for amended commission to use new name. (ORS 194.052).

Notarial Journal.

Each notary public must keep chronological journal of notarial acts performed except for administering oath or affirmation or certifying or attesting copy. Secretary of State will prescribe rules regarding form of notarial journal and its retention or disposition. (ORS 194.152). Notary who is employee may enter into agreement with employer pursuant to which notarial journal is retained or disposed of by employer upon termination of employment. (ORS 194.152[3]). Notary journal in possession of notary who is not public official of employee is exempt from disclosure under 192.410 to 192.505. Notarial journal in possession of Secretary of State or notary who is public official or employee is not exempt from disclosure under 192.410 to 192.505 unless Secretary of State or other custodian determines that public interest in disclosure is outweighed by interests of parties in keeping journal record of notarial act confidential. (ORS 194.152[4]). This notarial journal is in addition to record of protests of commercial paper required under 194.090.

Resignation.

Person must resign notarial commission by mailing or delivering letter of resignation indicating effective date of resignation to Secretary of State if (i) person no longer desires to be notary, (ii) person ceases to reside in Oregon, or if person is nonresident notary, ceases to be regularly employed or carry on trade or business within Oregon, or (iii) person becomes unable to read or write. (ORS 194.063).

Disposition of Official Seal and Notarial Journal.

Notary public whose notarial commission is resigned or revoked must deliver official seal to Secretary of State and dispose of notarial journal and records within 30 days after effective date of resignation or revocation, whichever occurs first. Upon normal expiration of notarial commission, notary public must destroy official seal as soon as is reasonably practicable and dispose of notarial journal and records within 30 days after expiration. (ORS 194.154). Former notary who intends to apply for new commission need not dispose of notarial journal and records within 30 days after commission expires but must do so within three months after expiration unless newly commissioned within that period. (ORS 194.154[3]). If notary dies during term of commission, notary's heirs or personal representative, as soon as reasonably practicable after death, must: (i) deliver official seal to Secretary of State, and (ii) notify Secretary of State in writing of date of death and of disposition of notarial journal and records. (ORS 194.156).

Prohibitions.

Notary public may not (i) perform notarial act if notary is signer or named in document that is to be notarized, (ii) endorse or promote any product, service, contest, or other offering if notary's title or seal is used in endorsement or promotional statements (ORS 194.158), (iii) make representations to have powers, qualifications, rights, or privileges that office of notary does not have, or (iv) use term “notario publico” or any equivalent non-English term, in any business card, advertisement, notice, sign or in any other manner that misrepresents authority of notary public. (ORS 194.162). Notary who is not licensed to practice law in Oregon and who advertised notarial services in language other than English must include in advertisement, notice, or sign, in same language and in English (i) statement prominently displayed: “I am not licensed to practice law in the State of Oregon and I am not permitted to give legal advice on immigration or other legal matters or accept fees for legal advice” and (ii) fees for notarial acts. (ORS 194.162[3]).

10.04 RECORDS:

County clerk is custodian of records relating to real property except in Home Rule Counties where recording is handled by following departments: Benton, Records and Licensing; Hood River, Records and Assessments; Lane, Deeds and Records; Multnomah, Recording Department of Assessments and Records; Washington, Mapping and Recording Division, Department of Assessment and Taxation. *For list of Counties and County Seats, see first page for this state in Volume containing Practice Profiles Section.*

Uniform Commercial Code adopted. (ORS 71.1010 et seq.). See category 3 Business Regulation and Commerce, topic 3.09 Commercial Code.

Recordable Instruments.

Conveyances, deeds, land sale contracts, assignment of seller's or purchaser's interest in land sale contract, and other agreements or memoranda thereof affecting title to realty, mortgages, trust deeds, assignments for security purposes, or assignments of proceeds of land sale contract must be recorded to be effective as against subsequent good faith purchaser for value who records first. (ORS 93.640). Any instrument creating license, easement, profit a prendre, or leasehold interest or oil, gas, or other mineral interest or estate in real property or interest in real property created by land sale contract, or memorandum of such instrument or contract (ORS 93.710), or any instrument containing power to convey lands or any executory contract for purchase or sale of land, when acknowledged or proved (ORS 93.670), or certified copy of any judgment or order of confirmation affecting realty (ORS 93.730), or notice of lis pendens (ORS 93.740), may be recorded. Earnest money agreements, options and rights of first refusal may, but are not required to be recorded. (ORS 93.635). Mortgagor may record Master Form instrument and "short form" mortgages or trust deeds incorporating Master Form provisions. (ORS 93.780-93.802). Certain other instruments may be recorded as provided in Uniform Commercial Code. (ORS 71.1010 et seq.).

Requisites for Recording.

Conveyances acknowledged, proved, or certified in manner prescribed by law entitled to recording (ORS 93.480) except no instrument conveying or contracting to convey fee title to realty nor any memorandum thereof may be recorded unless there appears on face of such instrument statement of true and actual consideration paid for such transfer (ORS 93.030). Memorandum of instrument must contain date of instrument, names of parties, legal description of real property, nature of created interest, consideration paid, and signature of party from whom interest passes acknowledged or proved in manner provided for deeds. (ORS 93.640, .710). Copies of documents, orders, and decrees in proceedings in U.S. District Court for District of Oregon certified by clerk of such court which affect title to real property are entitled to recording, as are copies of petitions, orders, and decrees in bankruptcy proceedings certified by clerk of U.S. District Court for District of Oregon. (ORS 93.760, .770).

Recording Fees.

Fees for recording any instrument required or permitted by law to be recorded are $5 per page, minimum fee for recording assignment, release, or satisfaction of recorded instrument, $5. (205.320). Additional fees for most instruments conveying or contracting to convey title to real property. (205.323, 2009 c. 18). Counties authorized to charge additional fee not to exceed $10 per instrument for Public and Corner Preservation Fund. (ORS 203.148).

Recording Taxes.

See category 22 Taxation.

Foreign Instruments.

Conveyance or encumbrance executed and acknowledged in conformity with law of state where executed and acknowledged may be recorded. Uniform Law on Notarial Acts adopted. (ORS 194.505-.595).

Effect of Record.

Unrecorded conveyance, deed, land sale contract, or other agreement or memorandum thereof affecting title to realty void as against subsequent good faith purchaser for value who records first. (ORS 93.640). Record of duly recorded conveyance or certified transcript thereof may be read in evidence with like effect as original conveyance. (ORS 93.650).

Torrens Act repealed. (1971, c. 478).

Transfer of Decedent's Title.

Personal representative must record personal representative's deed in deed records of each county in which real property of estate is located. (ORS 116.223).

Filing Under Uniform Commercial Code.

Proper place to file financing statement to perfect security interest is as follows: (a) When collateral is timber to be cut, minerals (including oil and gas) or accounts thereon, or when financing statement is filed as fixture filing and collateral is goods which are fixtures or will become fixtures, then in office where mortgage on real property would be filed; (b) in all other cases, in office of Secretary of State, Corporation Division—UCC, Public Service Building, 255 Capitol Street, N.E., Suite 151, Salem, Oregon 97310-1327. (503) 986-2200. Filers should include phone numbers, so filing office can correct minor defects without returning document. Standard form is single page. Original will be returned after processing. With debtor consent on standard form, central filing may be made by facsimile transmission to (503) 373-1166, with fee charged to VISA or MasterCard. Filing, indexing, and search fees are prescribed by Secretary of State, and subject to change. Fee for filing and indexing financing statement is $10. Standard form includes up to three debtor names. Farm products EFS filings require social security or tax identification number for each debtor, and filing fee is additional $10. Fee for continuation, assignment, release, and amendment is $10. No charge for termination statement. There is no additional fee for use of nonstandard form. Call for fees for local real property filings. (ORS 79.0501).

Vital Statistics.

Records of births and deaths are kept by county registrar for State Registrar of Center for Health Statistics. (432.105). Certified copy of birth or death certificate will be issued by State Registrar of Vital Statistics, PO Box 116, Portland, Oregon 97207, upon written application by applicant having direct and tangible interest in vital record. (432.121). Fees are fixed by Health Authority rule. (432.146, 2009 c. 595).

Lis Pendens.

Notice of suit involving title to or interest in real property may be recorded in every county in which property lies. Purchasers and encumbrancers have notice only from time of recording. Statutory form of notice to be used. (93.740).

10.05 SEALS:

Seal Defined.

Seal is particular sign made to attest in most formal manner execution of instrument. (ORS 42.110).

Necessity for Seal.

See topic 10.03 Notaries Public.

Effect of Seal.

Presence or absence of seal has no effect upon validity, enforceability or character of any written instrument, except where specifically otherwise provided by statute. Writing under seal may be modified or discharged by writing not under seal or by valid oral agreement. (ORS 42.115).

Effect on Statutes of Limitations.

See category 5 Civil Actions and Procedure, topic 5.16 Limitation of Actions, subheads Ten Years, and Six Years.

Seals Inoperative under Uniform Commercial Code.

Affixing seal to writing evidencing contract for sale or offer to buy or sell goods does not constitute writing sealed instrument and law with respect to sealed instruments does not apply to such contract or offer. (ORS 72.2030).

See also category 3 Business Regulation and Commerce, topic 3.09 Commercial Code.

10.06 TORRENS ACT:

See topic 10.04 Records.

10.07 VITAL STATISTICS:

See topic 10.04 Records.

11 EMPLOYMENT

11.01 EMPLOYER AND EMPLOYEE:

See topic 11.02 Labor Relations.

11.02 LABOR RELATIONS:

Commissioner of Bureau of Labor and Industries ("Bureau") has general jurisdiction over enforcement of wages, hours, child labor, leaves of absence, discrimination and certain other labor laws. (ORS 651.050). Bureau may set maximum hours not to exceed those fixed by statute. (ORS 652.010-652.060). State Conciliation Service is authorized to mediate industrial disputes and to arbitrate if requested. (ORS 662.405-.455). Authority of Bureau to fix minimum wage rates limited to specified persons. (ORS 653.030). Employment Relations Board has jurisdiction over public and private sector labor relations act. (cc. 663, 243).

Hours of Labor.

Commissioner of Bureau may prescribe minimum conditions and maximum hours of employment. (ORS 653.261). Statute excludes specific occupations. (ORS 653.020). Commissioner may not set maximum hours of work less than eight hours a day and 40 hours per week. Overtime rate is one and one half times regular wage. Overtime provisions do not apply to employee engaged in production, harvesting, or processing agricultural crops, livestock, poultry or fish, or if individual employed by state, political subdivision or quasimunicipal corporation if other provisions of law apply or if waived by collective bargaining agreement. (ORS 653.261). Overtime shall be paid after ten hours for employees of canneries, dryers, packing plants, not located on farms and primarily processing products produced on such farms. (ORS 653.265). Hours of labor in mills, factories or manufacturing establishments are limited to ten hours a day, and in sawmills, planing mills, shingle mills, and logging camps (except for certain classifications), limited to eight hours a day, with not over three hours overtime at one and one-half times regular wages, except employers under certain labor contracts (ORS 652.020).

Child under 16 years of age may not be employed for more than ten hours in one day or for more than six days in any week. Except in specified occupations or with special permit child under 16 years of age may not be employed before 7 a.m. or after 7 p.m., but can work until 9 p.m. between June 1 and Labor Day. Child employee under 16 years of age is entitled to not less than 30 minutes for meal time. (653.315, 2009 c. 104). Every employer of children under 16 must post notice of these regulations. (ORS 653.315[4]). Wage and Hour Commission rules governing total hours minors may work cannot be more restrictive than Fair Labor Standards Act unless provided by Oregon law. (ORS 653.307[1]).

On public contracts no one may be employed more than eight hours a day or 40 hours a week except in cases of necessity, emergency, service at county fairs, as required by public policy, or where contractor is party to collective bargaining agreement. (ORS 279.334[1] [3]). If employee works more than allowed, overtime must generally be paid at rate of time and a half for additional hours and for work on weekends and specified holidays. Financial institutions and persons employed to fight fires are excluded. (ORS 279.335, .342).

Wages.

There must be regular paydays, not over 35 days apart. (ORS 652.120). Barring certain exceptions, minimum wage is $7.25 per hour as of 2005 but is adjusted for inflation each year. (ORS 653.025). Commissioner of Bureau of Labor may prescribe lower rates for student-learners or persons with mental or physical disabilities. (ORS 653.030). Personal Service Contractors are excluded from prevailing wage laws. (ORS 279.310-.320). Employers may deduct value of meals, lodging and services from minimum wage, may include commissions but not tips. (ORS 653.035). Covered employers required to maintain certain records and post certain notices from Commissioner. (ORS 653.045, .050). Employers' liability for failure to pay minimum wages may include unpaid wages, civil penalties, attorneys' fees, and criminal liability. Attorneys fees may also be awarded to prevailing employer in action brought by employee. (ORS 653.055, 653.991). Certain overtime requirements apply to mines, mills, factories, and manufacturing establishments. (ORS 652.020; 652.040).

Wages must be paid in cash, or a negotiable instrument which the employer must cash on demand, to employee or, upon agreement, to employee's account in bank or savings institution. (ORS 652.110). When employer discharges employee or where employment is terminated by mutual agreement, wages earned and unpaid must be paid by end of first business day after discharge or termination. (ORS 652.140). Exception for seasonal farm workers. (ORS 652.145). Exception for termination due to sale of business. (ORS 652.140). Where employee not having contract for definite period quits, all wages earned become due and payable immediately provided employee gave not less than 48 hours notice (excluding weekends and holidays) of his intention to quit; but if notice was not given wages become due and payable within five days (excluding weekends and holidays) after termination of employment, or at next regular payday after termination, whichever comes first. Employer required to estimate wages due in certain circumstances. (ORS 652.140). Collective bargaining agreement may vary due date for payment of wages upon termination. Such wages must be forwarded by mail to any address designated by employee, or deposited without discount in account, if so requested. (ORS 652.140). Employer financially able to pay and wilfully withholding wages is liable for unpaid wages, up to 30 days wages as penalty, and, if payment was delayed more than 48 hours, attorney fees. (ORS 652.150, .200). Where employees go on strike wages are not due and payable until regular payday, delay not to exceed 30 days in time. (ORS 652.170). Upon employee's death, wages earned up to $10,000 must be paid to surviving spouse or dependent children or their guardians or conservator of their estate. (ORS 652.190). Commissioner of Bureau of Labor may collect such wage claims upon assignment of claim by employee. (ORS 652.330). Wage claims given priority when business is in receivership. (ORS 652.500-.570). Discrimination for filing wage claim is prohibited. (ORS 652.355). Certain out-of-state companies must pay sales representatives within 14 days of termination. Sales representative has right of action for unpaid commissions, interest, attorney fees, and treble damages. (ORS 646A.097).

Employer must provide employee on each pay day with itemized statement showing amount and purpose of all deductions from pay. Employer may not withhold, deduct or divert any portion of wages unless: Required by law; or authorized in writing by employee and for employee's benefit; or pursuant to authorization voluntarily signed by employee provided that employer is not ultimate recipient of money; or pursuant to collective bargaining agreement; or in repayment of employer loan, if authorized by voluntarily signed agreement made solely for employee's benefit. (ORS 652.610). Employee has private right of action to recover actual or statutory damages for improper payroll deductions. (ORS 652.615). Fraudulent payment of wage less than that called for by law or by contract is misdemeanor. (ORS 652.240, 652.990). Employees working on piece rate in various logging occupations shall receive at least monthly statement of scale or quantity produced. (ORS 652.130).

Employer cannot discharge a person because his wages have been garnisheed. (ORS 23.186).

Apprentice agreements are regulated. (c. 660).

Public Contracts.

See category 1 Introduction, topic 1.02 Holidays, subhead Public Contracts.

Priority of Wage Claims.

Court-appointed receiver for debtor must pay wages of employees and laborers that accrued within six months of appointment from first receipts and earnings of debtor, after paying current operating expenses under receiver's administration. Receiver must pay receiver's employees and laborers out of first receipts and earnings during receiver's administration at least once every 30 days. If receipts are insufficient, employees and laborers may demand certificate of amounts due and interest at 8% annually. (ORS 652.500). When property is seized under attachment or execution or a receiver appointed or assignment made for the benefit of creditors the debts owing to laborers or employees for labor performed within 90 days, not exceeding $2,000 to each, are preferred claims (ORS 652.510[1]) if claim presented within 30 days from seizure or 45 days of receivership or assignment (ORS 652.510[2]). If wage claims are excepted to without probable cause, costs and attorneys' fees are recoverable. (ORS 652.560). Every sale and transfer in payment of preexisting debt, and every mortgage given to secure such debt, is void as against vendor's or mortgagor's employees up to greater of $2,000 or 30 days of wages owing each employee for labor performed within preceding 90 days. (ORS 652.570).

Child Labor.

Children under 14 may not be employed during term of public schools (ORS 653.320[1]) or in any factory, workshop, mercantile establishment, store, business office, restaurant, bakery, hotel or apartment house (ORS 653.320[2]). Bureau of Labor and Industries (“Bureau”) may issue permits for children age 12-14 to do suitable work during school vacations exceeding two weeks. (ORS 653.320[3]). Exemptions of minor or class of minors from these provisions may be granted. (ORS 653.320[4]). Children under 12 but at least nine years of age may pick berries or beans if specified requirements are met. (ORS 653.350). Children under 18 years prohibited from working in enumerated occupations unless employer keeps on file prescribed annual employment certificate and complete list of all such children employed. File must remain accessible to school authorities, police and Bureau. (ORS 653.310). Children under 18 prohibited from employment as engineers or operators of logging engines (ORS 653.330[1]), elevator operators (ORS 653.335), or messengers or delivery boys employed between 10 p.m. and 5 a.m. (ORS 653.340[1]). Children under 16 prohibited from employment in giving signals to engineers in logging operations (ORS 653.330[2]), and from being employed in telegraph, telephone or public messenger service (ORS 653.340[2]). Bureau may issue permit authorizing child under 18 to engage in employment otherwise prohibited (1) if child has completed vocational training for such employment and (2) has graduated from high school or is employed while schools are not in session for period exceeding 30 days. (ORS 653.326[1]). Regulations do not apply to child's parent or custodian. (ORS 653.385). Labor Commissioner may impose upon any person civil penalty of up to $1,000 for violations of child labor standards. (ORS 653.370). Violations are also punishable as misdemeanors. (ORS 653.991).

Farm Labor.

Farm labor contractors, including contractors involved in forestation and reforestation are regulated. (ORS 658.405-.485). Farm labor contractor does not include farmer who recruits only for own operations and receives no remuneration for workers employed by another on incidental basis. (ORS 658.405[1][g]). Contractors must be licensed and bonded. (ORS 658.415).

Contractor must give employees at time of hiring, recruiting, soliciting, or supplying (whichever is earliest) written statement of compensation, terms, and conditions of employment (ORS 658.440[1][f], [g]); bond or letter of credit required, conditioned on compliance with statute and fulfillment of contracts and representations (ORS 658.415).

No farm labor contractor or employer may discharge or otherwise discriminate against employee for filing claim, testifying, investigating employee's rights or causing proceedings to be instituted against employer or for discussing employee's rights under farm labor laws (ORS 658.452), including rights relating to housing owned or controlled by employer where employees reside (ORS 659.285-.295). Employers may impose only certain reasonable restrictions on access by employees' invitees to housing owned or controlled by employer where employees are residing. Employee residents must have access to telephone. (ORS 659.285). Government officials, doctors, education officials, religious organizations, and government-sponsored service organizations have authorized access to employer-controlled housing. (ORS 659.280). Employer housing rules must be posted for three days before enforcement. (ORS 659.290). Farm workers have direct right of action against labor contractor and employer to recover actual damages or $1,000, whichever is greater, under certain circumstances (ORS 658.453); Commissioner may assess penalty up to $2,000 for each violation (ORS 658.453 [1]); Commissioner and others may bring suit to enjoin any unlicensed farm labor contractor or any person from using services of unlicensed farm labor contractor (ORS 658.475). Any person knowingly using contractor's services shall be jointly and severally liable for unpaid wages, penalty wages, court costs and disbursements if contractor has failed to comply with licensing requirements contained in 658.415, 658.465. Commissioner may also levy civil penalties for violation of statute. (ORS 658.453, .475).

Employment agencies regulated (ORS 658.005-245); up to $5,000 bond or letter of credit required (ORS 658.075); action may be brought against bond or letter of credit (ORS 658.245). Exemptions listed. (ORS 658.015, 658.019). No fee may be charged individual until employment obtained and work started. (ORS 658.176). Various unlawful practices defined. (ORS 658.195-.205). Schedule of charges must be published. (ORS 658.145). Employment agencies also subject to certain unlawful employment practice charges. (ORS 659.030[2]).

Leaves of Absence.

For employers of 25 or more, employees who have worked at least 180 days are entitled to leave of absence (1) for birth, adoption, or foster care placement of child under 18, (2) to care for family member with serious health condition, (3) for serious health condition of employee, including pregnancy, and (4) to care for child who requires home care, even if condition is not serious health condition. Total leave is 12 weeks per year, except, under certain circumstances, employees are entitled to additional 12 weeks in a year for newborn care and home care of child. (ORS 659.470-.494). All leaves are unpaid, except that employees may have right to use accrued sick leave or vacation leave. Employees returning from leave of absence have reinstatement rights to former job, and in some cases, equivalent job.

Discrimination.

State civil rights statute prohibits discrimination based on race, religion, color, sex, marital status, expunged juvenile record, national origin, or age, if 18 or older, of person or of person's associates, disability or injured worker status. (ORS 659.030, -.425). Term sex includes pregnancy. (ORS 659.029). Discrimination prohibitions apply to compensation, terms, conditions, privileges of employment. Employment agency may not classify, refer, refuse to refer or otherwise discriminate because of race, religion, color, sex, national origin, marital status, age if 18 or older, or individual's expunged juvenile record. (ORS 659.030). Other unlawful employment practices include retaliation against individual making safety complaints (ORS 654.062[5]), making complaints about health care facilities, testifying in unemployment compensation hearings (ORS 659.035), requiring employees to take breathalyzer test, polygraph examination, psychological stress, genetic screening, or brain wave tests except in identified situations (ORS 659.227), seeking, obtaining or using genetic screening information (ORS 659.036), denying parental leave up to 12 weeks (ORS 659.360), failing to reasonably accommodate pregnant worker's request to transfer to less strenuous work; failing that to grant leave with subsequent reinstatement (ORS 659.389), denying family medical leave up to 12 weeks every two years with subsequent reinstatement (ORS 659.570), retaliation for giving legislative testimony (ORS 659.270), for whistleblowing (ORS 659.505, .550), for performing jury service (ORS 10.090), failing to grant reinstatement to member of state militia called to active service (ORS 399.235), making retaliatory evictions from company housing (ORS 659.295), requiring employees to pay for medical examination as condition of continued employment (ORS 659.330), denying leave up to 40 work hours to donate bone marrow (ORS 659.358), discriminating against individual except in enumerated circumstances because of another family member's past or present employment with employer (ORS 659.340), and retaliation for filing workers' compensation claim (ORS 659.410). Employee has right of reinstatement to former job or, if disabled, to other available and suitable work after recovering from compensable injury. (ORS 659.415; 659.420). No restriction on drug testing, but confirming tests required and must be done in licensed clinical laboratory using approved technology. (ORS 438.435[5]). Other statutes prevent discrimination against employee for making wage claim or instituting or testifying in proceedings in connection with enforcement of wage claims (ORS 652.355), or under Wage and Hour Act (ORS 653.060). No person may blacklist or try to prevent hiring of individual discharged by that person or use force or misrepresentation to prevent person from accepting or continuing employment. (ORS 659.230, .240). Employers must allow members of Legislative Assembly to take leave of absence to attend sessions. (ORS 171.120). Employers may not discriminate in regard to hiring, tenure or other terms or conditions of employment to encourage or discourage membership in labor organization. (ORS 243.672, 663.125). Discrimination barred against individual who files affidavit or petition or complaint or participates in Employment Relations Board proceedings. (ORS 243.672, 663.120[3]). Employer may not discriminate in employment against physically or mentally disabled or person perceived as disabled where person can, with reasonable accommodation, meet demands of position. (ORS 659.437). State agencies must interview severely disabled persons for openings in state service under certain circumstances. Severely disabled persons may be certified by Vocational Rehabilitation Division for 90 day appointment rather than taking competitive examination. (ORS 240.379-394). Pregnancy, childbirth or related matters may not be treated differently from similar disabling conditions for all employment-related purposes, including fringe benefits. (ORS 659.029).

Employees may seek relief from discrimination through Bureau of Labor or private lawsuit. (ORS 659A.820;.885). Private party may seek reinstatement, back pay and attorney fees. (ORS 659A.885). Injured workers and disabled may also have jury trials and seek compensatory and punitive damages. (ORS 659A.885).

Conciliation agreements and orders of Commissioner of Bureau of Labor and Industries may be enforced by mandamus or injunction. (ORS 659A.840). Agreement or order awarding money damages may be filed in accordance with 205.125. (ORS 659A.840). Once filed order becomes lien against defendant's real property. (ORS 205.125).

State agencies or appointive authorities must implement affirmative action program to provide equal employment opportunity in programs, services, appointments to state boards, commissions and advisory boards, and awarding of contracts. (ORS 243.305; 659.025). State Bureau of Labor may eliminate and prevent discrimination because of race, religion, color, sex, national origin, marital status, physical or mental handicap, or age by promoting voluntary affirmative action. (ORS 659.100[1]). Higher education institutions and community colleges engaged in reduction in force must maintain affirmative action policy and must interview at least one qualified minority applicant when hiring head coach or athletic director. (341.541, 352.380, 2009 c. 780).

Unlawful Restrictions.

Contracts not to join or remain member of labor or employer organization are void. (ORS 662.030).

Noncompetition agreements are enforceable only if entered into upon initial employment or advancement. (ORS 653.295).

Labor Unions.

Labor unions recognized and right to engage in collective bargaining protected for both private sector (ORS 661.010-.040, 663.005-.170) and public sector employees (ORS 243.656-.662). Oregon does not have “right to work” law. (ORS 663.125). Labor union may sue and be sued as a legal entity. (244 Or. 302, 417 P.2d 1009).

Labor Disputes.

Private employers not subject to Railway Labor Act or jurisdiction of National Labor Relations Board, and excluding labor organizations and persons involved in building and construction industry are covered by Oregon State Labor Relations Law. (ORS 663.005). Employees have right to organize; bargain collectively; engage in protected concerted activity; and enter into fair share and union security agreements with protection for religious objectors. (ORS 663.110). Unfair labor practices of employer and union defined in 663.100-.170. Employment Relations Board has jurisdiction of allegations of unfair labor practice complaints (ORS 663.175-.195) and provides mediation and arbitration services (ORS 662.425). Employers required by federal law to give notice of plant closing must notify Job Training Partnership Act Section of Department of Economic Development. (ORS 285.185). Limitations on court's ability to issue injunctions in labor disputes. (ORS 662.040). Picketing of agricultural sites is prohibited by nonemployees while crops are being harvested. (ORS 662.815). Use of professional strikebreakers prohibited. (ORS 662.205-225). Employment Relations Board has jurisdiction over public employers of state and any political subdivision therein. (ORS 243.650[18]). Mandatory topics for collective bargaining do not include subjects with insubstantial effect on wages, hours, and other terms and conditions of employment, subjects that have greater impact on management prerogative than on wages, hours, or other terms and conditions of employment, enumerated subjects including staffing level and grooming standards, and certain subjects in school districts, including class size, curriculum, and student discipline. (ORS 243.650[7][f]). Public employees, except for deputy district attorneys, parole and probation officers, police, fire and guards at certain state institutions have right to strike after complying with statutory bargaining, mediation, and notice requirements. (243.726[1], [2]; 243.736, 2009 c. 376). Mediation can be implemented after 150 days of negotiations or by mutual agreement. (ORS 243.172[1]). Employer and union may jointly agree on fact-finding after mediation. (ORS 243.172[2][c]). Status quo must be maintained until conclusion of bargaining process. (ORS 243.172[2][d]). Sit-down, slowdown, rolling, intermittent and on-and-off strikes are prohibited. (ORS 243.762[2][f]). Police, fire, and certain guards are prohibited from striking and are subject to mediation and final offer arbitration on unresolved mandatory topics of bargaining. (ORS 243.742). Arbitrator's decision must be based on certain factors. (ORS 243.746[4]).

Safe Employment Act provides for safety and health regulation of places and methods of employment. Workers' Compensation Department to promulgate and enforce rules, standards and order (ORS 654.025[2]); granted inspection and investigation powers (ORS 654.067). Director may prescribe and enforce orders for installation and use of devices, safeguards, methods and work practices. (ORS 654.035[1], [2]). Director may issue citations (ORS 654.071) and assess civil penalties (ORS 654.086) for violations. Employee may complain to Director of violations and cannot be discharged for such complaint. (ORS 654.062).

Employer's Liability Act requires all owners, contractors, or persons engaged in construction, repair, alteration, removal or painting of buildings, bridges or other structures, operation of machinery, manufacture, transmission and use of electricity, or use of dangerous substances or appliances to comply with safeguards prescribed by Workers' Compensation Department. (ORS 654.310). Generally all owners, contractors or persons having charge of any work involving risk or danger to employees or public are required to use every device and precaution which it is practicable to use for protection and safety of life and limb. (ORS 654.305). Act also virtually abolishes defenses of contributory negligence and negligence of fellow servant. (ORS 654.330, .335).

If death results from violation of Employers' Liability Law, the action may be brought by surviving husband, widow, children or adopted children, and, if none, by other lineal heirs, and, if none, by parents, and damages are not limited in amount. If beneficiaries named are nonresidents, action may be brought for their benefit by personal representative. (ORS 654.325). But see subhead Workers' Compensation Act, infra.

Workers' Compensation Act (c. 656).—Coverage extended to all employees other than those listed in 656.027. Independent contractors defined. (ORS 670.600). Special coverage and exemptions listed. (ORS 656.031-.044). Covered employees temporarily out of state for employment purposes are covered. (ORS 656.126[1]). Employees from other states temporarily in Oregon are exempted from Oregon coverage, provided employer has afforded similar coverage in other state and that state offers reciprocity. (ORS 656.126[2]). Benefits for same injury in Oregon and another state may be offset. (ORS 656.126[6]). Director of Insurance and Finance Department has authority to enter into agreement with other states relating to conflicts of jurisdiction. (ORS 656.126[5]). Certain employers must establish and administer safety committees. (ORS 654.176, 654.182).

Covered Employers.

Coverage as: (1) Carrier-insured employer; (2) self-insured employer by establishing; (a) qualified staff to process claims, and (b) financial ability to make required payments promptly; or (3) self-insured employer group approved by Director of Insurance and Finance Department and meeting standards of self-insured employer. (ORS 656.017, .407, .430). Remedy for covered workers is exclusive for all injuries or diseases that arise out of and in course and scope of employment whether or not compensable. (ORS 656.018[7]). Employer's Liability Law inoperative as to complying employer. (ORS 656.018). Defenses of assumption of risk, negligence of fellow servant and contributory negligence not available to employer who fails to comply. (ORS 656.020). Failure to obtain coverage may result in payment of $1,000 civil penalty and $250 per day fine that violation continues. (ORS 656.735).

Compensable injuries covered include accidental injuries and accidental injuries to prosthetic appliances, if result of accident whether or not due to accidental means, arising out of and in course of employment requiring medical services or resulting in disability or death. (ORS 656.005[7][a]). Injury must be established by medical evidence and supported by objective findings. Objective findings are verifiable indications of injury or disease and include range of motion, atrophy, muscle strength, and palpable muscle spasm, but does not include subjective responses to physical examination that are not measurable, reducible, or observable. (ORS 659.019). Consequential injuries and injuries which combine with other preexisting conditions are not compensable unless original injury is major contributing cause of combined condition. Preexisting condition includes injuries, congenital abnormality, personality disorder that contributes or predisposes worker to injury or disease. (ORS 656.024). Injuries to active participants in assaults, or while performing activities primarily for employee's personal pleasure, excluded. (ORS 656.005[8]). Intentional self-injuries excluded. (ORS 656.156[1]). Also excluded are injuries major contributing cause of which was due to worker's consumption of alcoholic beverages or unlawful controlled substances unless employer permitted, encouraged or had actual knowledge of consumption. (ORS 656.005[7]). Special provisions cover occupational diseases including mental disorders and repetitive trauma. (ORS 656.802-807).

Notice to employer of accident must be given within 90 days. Notice need not be in any particular form, but must be in writing and must state when, where and how injury occurred. Should be given by mail to last-known place of business or by personal delivery to employer, foreman or other supervisor. If not possible to notify employer, notice may be given to Director and referred to insurer or self-insured employer. Forms promulgated by Workers' Compensation Board may be used. Failure to give notice bars claim unless given within one year of date of accident and employer had knowledge or worker died within 180 days after accident. (ORS 656.265[4]). Issue of failure to give notice must be raised at first hearing for compensation. (ORS 656.265[5]). Special time requirements relate to notice of occupational diseases. (ORS 656.807).

Only certain types of physicians can authorize time loss or compensable care, authorize work release or rate impairment. Out-of-state physician or foreign physician can be attending physician. (ORS 656.005[12]). Insurers can contract with managed care organizations to provide exclusive medical care for injured workers. (ORS 656.245[4]). Workers have defined reinstatement rights. (ORS 659.415, .420).

Claim Acceptance or Denial.

Written notice of claim acceptance or denial to be provided to worker within 60 days after notice or knowledge of claim. (ORS 656.262[6][a]). Worker must notify insurer or self-insured employer if condition has been incorrectly omitted from acceptance and insurer or self-insured employer has 60 days to revise notice. (ORS 656.262[6][d]). New or omitted medical condition claims may be made at any time and must clearly request formal acceptance. They are not made by receipt of medical claims billing, requests for authorization, or provision of services. (ORS 656.267). Written acceptance or denial must be provided within 60 days of new medical condition claim. (ORS 656.262[6][a]). After claim acceptance, denials may not be issued unless acceptance based on fraud, misrepresentation, or other illegal action of worker or if insurer or self-insured employer later obtains evidence within two years of claim acceptance that claim is not compensable or that insurer is not responsible. Insurer has burden of proof by preponderance of evidence for backup denials. (ORS 656.262[6][a]). If insurer or self-insured employer accepted combined or consequential condition, it may issue denial at any time when compensable injury ceases to be major contributing cause. (ORS 656.262[6][c]).

Hearing by administrative law judge within 90 days of request for hearing except if postponed in extraordinary circumstances for not more than 120 days (ORS 656.283), with appeal to Workers' Compensation Board; review to be completed by Workers' Compensation Board within 90 days of receipt of appeal except in extraordinary circumstances (ORS 656.295) and further appeals to Court of Appeals, limited to substantial evidence test (ORS 656.298).

Rates of compensation and medical benefits for injury and death governed by statute. (ORS 656.202-.254). Payments exempt from attachment or garnishment or seizure on execution. (ORS 656.234). Insurer or self-insured employer closure of claims and rating of disability allowed in certain circumstances with rights of reconsideration and appeal. (ORS 656.268).

See also subhead Employer's Liability Act, supra.

Unemployment Compensation.

Comprehensive unemployment insurance statute enacted. (c. 657). To qualify for benefits employee will have worked for employer subject to c. 657 in covered employment for 18 or more weeks with wages of $1,000 in base year. Employee must also have earned six times weekly benefit amount for service performed subsequent to beginning of prior benefit year if benefits paid to him that year. (ORS 657.150[2]). Amount of benefits subject to minimums and maximums based on percentage of state average weekly covered wage. (ORS 657.150[4]). To receive benefits, assistant director for employment department must find individual to have: Registered for work and continue reporting to employment office; made claim in accordance with statute; be able, available and actively seeking and unable to find suitable work; been unemployed for waiting period of one week unless waiting period waived by governor due to emergency; met qualifications. (ORS 657.155).

Individual becomes disqualified for benefits under certain circumstances, including discharge for willful misconduct connected with work, voluntary quitting without good cause, and cessation of work through labor dispute. (ORS 657.176, .200, .210, .215). Lockout is not disqualification. (ORS 657.200).

Eligibility requirements to receive extended benefits during periods of high unemployment. (ORS 657.325). Supplemental benefits available to eligible dislocated workers. (ORS 657.335-.345).

Benefits not denied to individuals participating in approved vocational training programs. (ORS 657.340-.350).

11.03 WORKERS' COMPENSATION LAW:

See topic 11.02 Labor Relations.

12 ENVIRONMENT

12.01 ENVIRONMENTAL REGULATION:

Note: citations under this heading beginning “340-” refer to Oregon Administrative Rules compilation.

General Supervision.

Regulatory agency enforcing most pollution statutes is Department of Environmental Quality (DEQ). (ORS 468.030-.050). Environmental Quality Commission (EQC) is appointed by Governor. (ORS 468.010). EQC appoints DEQ director and makes all DEQ administrative rules. (ORS 468.015, 468.020, 468.040). Regional air quality control authority may be formed to perform EQC's and DEQ's air pollution control functions for regions with minimum population of 130,000. (ORS 468A.100-.180). Energy Facility Siting Council (EFSC) (ORS 469.450-.470) members appointed by governor and confirmed by senate (ORS 469.450). EFSC oversees regulation of energy facilities, not including hydroelectric projects. (ORS 469.300-.320, 469.450, .470). EFSC directed to form Electric and Magnetic Field Committee which is to report findings to Energy Policy Review Committee and Legislative Assembly. (ORS 469.480). Office of Energy in Department of Consumer and Business Services coordinates programs of Oil Heat Commission. (ORS 469.230). Goals promulgated and interpreted by Land Conservation and Development Commission (LCDC) (ORS 197.030-.050) govern land use regulations of most other state and local agencies (ORS 197.250), and LCDC coordinates ocean resource management (ORS 196.438). Board of Forestry to adopt rules governing timber operations near streams and inventoried resource sites. (ORS 527.620, 527.630, 527.670). Legislative Assembly, upon LCDC's recommendation, may further restrict use and development of areas of critical state concern. (ORS 197.405-.430). Portland Metropolitan Service District (Metro) controls solid waste and sewage disposal within its boundaries except that EQC and DEQ are responsible for siting landfill in Portland metropolitan area. (ORS 268.317-.318, 459.005-.355). Department of Geology and Mineral Industry regulates mining processing and reclamation. (ORS 517.750-.955). Department of Agriculture administers registration and application of pesticides. (ORS 634.306). Health Division of Department of Human Resources controls hazardous substances and radiation sources. (ORS 453.001). Department of Transportation coordinates development of plan for regulation of transportation of hazardous or radioactive material or waste. (ORS 453.825). EQC regulates disposal of hazardous wastes. (ORS 466.005-.385). Department of Insurance and Finance, Accident Prevention Division, regulates construction involving asbestos. (OAR 437, Div. 3, Subdiv. D [1926.58]).

Prohibited Acts of Pollution.

Ambient Standards.

Statutes prohibit any emission which violates ambient standards for air quality (ORS 468A.025-.045), water quality (ORS 468B.048-.050), or noise levels (ORS 467.020-.040) established by EQC, or emission of radiation which Assistant Director for Health of Department of Human Resources determines endangers human health or safety (ORS 453.750). EQC standards are set forth in OAR c. 340, and include ambient air standards (340-31-015 to -055), and ambient water quality standards which vary among river basins (340-41-202 to -975).

Emission and Disposal Standards.

EQC regulations also limit air pollutant emissions (regardless of ambient air quality) for various industrial processes (340-208-0010 to -0610, 340-238-0010 to -0100), from indirect sources (340-254-0010 to -0080), from motor vehicles (340-256-0010 to - 0470), and from agricultural operations (340-264-0010 to -0078, 340-266-0010 to -0130). Sale of aerosol sprays containing saturated chlorofluorocarbons not containing hydrogen is illegal. (ORS 468A.655). Manufacture, sale, use, and disposal of materials containing more than 100 parts per 1,000,000 of PCB is regulated (ORS 466.250-.355, .505-.530), as is treatment and disposal of hazardous wastes (ORS 466.005-.225). Note that “disposal” is defined broadly. (ORS 466.005[4]). Disposal, storage, and transportation of solid waste is regulated. (ORS 459.005-.405). EQC regulations govern emergency response to spills of oil or hazardous materials. (ORS 466.605-.680). Rules require cleanup to background levels based upon feasibility and protection of public and environment. (340-122-0010 to -0110). Disposal of used oil without permit prohibited. (ORS 459A.580). DEQ must file notices of environment hazards with local governments. (ORS 466.360-.385). Establishment or operation of waste disposal facility for certain types of radioactive wastes prohibited. (ORS 469.525). EQC has adopted regulations governing discharges into state waters of oil from oil spills (ORS 468B.300-.335; 340-141-0001 to -024), and runoff from animal feeding or holding operations (340-051-0005 to -0080). EQC to adopt maximum contaminant levels for groundwater. (ORS 468B.165). DEQ declares groundwater management area where high levels of contaminants are found and appropriate agency implements remedial plan. (ORS 468B.150-.185). With some exceptions and limitations, deposit of waste tires in landfills is prohibited. (ORS 459.710). Permit required to collect or transport waste tires. (ORS 459.712). Deposit of lead-acid batteries in mixed municipal waste is prohibited. (ORS 459.420). Sale of cleaning agents with more than.5% phosphorus prohibited. (ORS 468B.130). Sale or use of tributyltin- or organotin-derivative based marine paints prohibited except for certain uses or circumstances. (ORS 634.505). Littering, generally and especially where litter may wash into public waters, is criminal offense (ORS 164.775-.805); and sale of beverage container which has detachable opener or which lacks label indicating refund value is criminal offense (ORS 459A.700, .720; 459.992[3]). EQC has promulgated noise standards for industrial and commercial sources (340-035-0035), motor vehicles (340-035-0025) and airports (340-035-0045). “Unreasonable” noise from vehicles is prohibited. (ORS 815.232-.233, 809.600). City of Portland has also enacted comprehensive ordinance regulating noise emissions. (Title 18, Code of City of Portland). Gas-fired appliances sold new must have electric ignition rather than pilot light. (ORS 479.770). Public buildings constructed after July 1, 1978 must meet certain mandatory energy conservation standards; public utilities must provide shielded outdoor lighting option, public buildings constructed after Jan. 1, 2010 must install shielded outdoor lighting fixtures to greatest extent possible. (ORS 455.560-.595, 2009 c. 588). New woodstoves must meet emission standards adopted by EQC. (ORS 468A.460-.480). Owners and operators of underground industrial chemical storage and fuel tanks must meet standards and prevent, report, and clean up leaks and spills. (ORS 466.706-.835; 340-122-0205 to -0360; 340-150-0001 et seq.). Employers must provide list of hazardous substances in work environment to state fire marshal. (ORS 453.317). See also subhead Permits, infra. Dept. of Revenue and Employment Div. authorized to provide information relating to community hazardous right-to-know laws.

Recycling.

EQC must afford opportunity to recycle certain materials to all persons in cities of 4,000 or more. (ORS 459A.005-.085). Statewide integrated solid waste management and reduction program requires local governments to meet specified recycling goals. Minimum recycled content for containers made of plastic and glass and for newsprint and phone directories. (ORS 459A.005-.085).

See also subhead Permits, infra.

Enforcement.

DEQ has general enforcement power for any statute, rule, or permit it administers relating to air or water pollution. EQC has authority to bring suit for enforcement of any statute it administers or any rule, standard, permit, or order issued thereunder. (ORS 468.100). DEQ must investigate all written substantiated complaints filed by individuals alleging any violation of any statute, rule, or permit which results in water or air pollution, and commence enforcement proceedings if it confirms violation exists. (ORS 468.090). DEQ must prepare list (ORS 465.215) and inventory of sites with confirmed hazardous substance releases. DEQ's decision to list or inventory site is final and not appealable. Facilities may be removed from list or inventory under certain circumstances. (ORS 465.230). EQC may delegate rule enforcement to State Health Authority or to county, district, or city board of health. (ORS 468.060, 2009 c. 595). Private and governmental rights to prosecute most nuisance actions are preserved (ORS 468.100[4]), but actions for damage arising out of licensed pesticide applications must be preceded by filing damage claim with Department of Agriculture (ORS 634.172).

Penalties.

DEQ or regional air quality control authority may impose civil penalties for violation relating to air or water pollution (ORS 466.880, 468.130, 468.140), for violation of EQC rule or order relating to solid waste disposal (ORS 459.995), and for failure to meet standards for underground storage tanks (340-012-0067). DEQ's civil penalty matrix outlines procedures and criteria used in assessing civil penalties. (340-012-0026 et seq.). DEQ or EFSC can impose civil penalties for violation of statutes governing siting of energy facilities and transportation of radioactive material. (ORS 469.992). EQC and regional air quality control authority may seek judicial relief to restrain violations (ORS 468.100), and Governor may direct DEQ to enter emergency order, enforceable by state and local police, restraining pollution or contamination (ORS 468.115). Strict liability for injury to fish, wildlife, or habitat by act of pollution can be enforced by DEQ, Attorney General, or Fish and Wildlife Commission. (ORS 468B.060). State “superfund” program to identify and clean up hazardous waste disposal sites imposes strict liability on certain owners, operators, and others for remedial costs and includes both civil and criminal penalties. (ORS 465.255). Class B felony (ORS 161.605[2], 161.625) to knowingly dispose, store, treat, transport hazardous waste, knowingly discharge waste into state waters, or knowingly contaminate air, and either recklessly cause substantial harm to human health or environment as result, or knowingly disregard law in committing violation (ORS 468.926, .931, .939, .946). Class B misdemeanor (ORS 161.615[2], 161.635[b]) to knowingly act in manner that violates hazardous waste disposal, storage, treatment or transportation statutes (ORS 468.922, .929) or to violate water pollution statutes with criminal negligence (ORS 468.943). Other felonies include environmental endangerment. (ORS 468.951, .953). Refusal to provide information to DEQ or other agency is Class A misdemeanor. (ORS 468.956). Certain affirmative defenses available. (ORS 468.959). Internal environmental audit reports enjoy statutory privilege. (ORS 468.963). Criminal penalties, enforceable by district attorneys are also available for violating EQC rules relating to noise (ORS 467.990); for violating rule or ordinance relating to solid waste disposal, or operating solid waste disposal site without permit (ORS 459.992); or for committing violation relating to pesticide registration or application (ORS 634.372, 634.992). DEQ may seek judicial relief against violations of statute, rule, order, or term of license relating to disposal of environmentally hazardous wastes, including: defoliants, insecticides, fungicides, rodenticides, dessicants, herbicides, nematocides, and radioactive materials. (ORS 466.210).

Permits.

Site certificate from EFSC is required to construct or expand most energy facilities, or for uranium mining or milling or other radioactive waste disposal; incorporates all other permits. (ORS 469.320, 469.375, 469.400). For all developments other than energy facilities, “one-stop” process administered by Economic Development Department is optional with person proposing development. (ORS 285.253). Order of EQC approving construction is required before constructing or expanding most stationary sources of air pollution (ORS 468A.055), and permit from DEQ is required before emitting air pollutants from such source (ORS 468A.040-.045). Permits are also required for forest slash burning (ORS 477.515) and other open burning (ORS 476.380). Certificate of compliance with EQC standards is required before registering most motor vehicles in Portland and Medford Metropolitan areas. (ORS 468A.390; 340-204-1-0080). DEQ permit is required to discharge wastes into public waters or to operate any type of sewage disposal system, including septic tank or cesspool (ORS 468B.080), or to own or operate underground storage tanks (UST) (ORS 466.760; 340-150-0020). In addition, UST service providers must be licensed by DEQ (340-160-0005 to -0150) and delivery of substances to UST is prohibited without proof of permit (340-150-0150). Installers and testers of certain underground storage tanks must be certified. (ORS 466.750). No permit is required to install compost toilet, but all installations subject to inspection, and installers subject to bond requirement. (ORS 447.115-.124). DEQ permit is required in most cases to construct subsurface sewage disposal system. (ORS 454.655). No subdivision plat may be approved without certification that adequate means of sewage disposal exists for each lot. (ORS 92.090[5]). No permit is required to emit noise, but DEQ may issue written exceptions (340-035-0010, -0025[4], -0035[6]) or variances (340-035-0100) for noise sources exceeding EQC standards. Permit is required to operate solid waste disposal site (ORS 459.205) or waste tire storage site (ORS 459.730), and environmentally hazardous wastes cannot be disposed of except at licensed site (ORS 466.100). Generators and users of hazardous waste are required to prepare toxics use reduction plans by Sept. 1, 1991; DEQ provides technical assistance. (ORS 465.003-.034). Waste disposal facilities may not accept waste from noncomplying generators. (ORS 466.005-.385). Persons who are engaged in nonexempt asbestos abatement projects must satisfy licensing and certification requirements. (340-248-0110; 340-248-0100 to -0180). Permit from State Department of Energy required to transport most radioactive material within state. (ORS 469.605). Proof of financial responsibility required for transport of oil or hazardous materials. (ORS 468B.300-.335). License from Department of Agriculture is required to consult about, to deal in, to operate business for applying, or to apply pesticides (ORS 634.106-.146), and joint Agriculture-State Forester permit is required to apply isopropyl ester of 2,4-D or similar esters (ORS 634.322[10]).

Water Resources.

General Supervision.

Agency administering and enforcing water resources laws is Department of Water Resources (DWR), acting at direction of Water Resources Commission (WRC). (ORS 536.007-.080). WRC appointed by Governor (ORS 536.022), as is director of DWR (ORS 536.032). Strategic Water Management abolished. (1995, c. 690).

Appropriation of Water.

All water within state belongs to public. (ORS 537.110). With certain exceptions, permit is required to appropriate surface or ground water for beneficial use. (ORS 537.130, .141, .615). Application for permit to appropriate water shall be approved unless proposed use conflicts with existing rights. (ORS 537.160). DWR may impose limitations, reject applications, or, for ground water, initiate rulemaking proceeding to declare affected area critical ground water area under 537.730-.740. (ORS 537.190, .620). DWR also reviews applications for uses of groundwater potentially impacting designated scenic waterways. (ORS 390.835). Water right priority established as of date of filing application. (ORS 537.250). Defective application does not lose its priority of filing. (ORS 536.295). Right to use water continues so long as water applied to beneficial use (ORS 537.250), unless owner fails to use water for five years (ORS 540.610) or requests cancellation (ORS 540.621). Certain permits held by public utilities exempt from timelines. (ORS 537.410). WRC can grant additional time to county, municipality, or district for reservoir permits. (ORS 537.248). Certain state agencies may request water right certificates to maintain in-stream flow for fish and wildlife, pollution abatement, or recreation and scenic attraction. (ORS 537.332-.360). Waters of certain streams have been withdrawn from appropriation. (ORS 538.010-.300). Pre-1909 water rights of municipalities are confirmed. Cities of Portland, Medford, Bend, and Pendleton have special rights to certain streams. (ORS 538.410-.450). Appropriator may keep up to 75% of water saved by improving technology or method of diversion, transportation, application, or recovery of water or by implementing other approved conservation measures. (ORS 537.455-.500). WRC to promulgate rules regulating allocation of conserved water. (ORS 537.480). License required for water well contractors to alter or construct wells. (ORS 537.747-.765). Well identification number must be placed on well and recorded on property deed at time of drilling or property transfer. (ORS 537.789). WRC regulates construction, modification, and operation of wells. (ORS 537.772-.796).

Change in Use or Transfer of Water Rights.

Water is generally appurtenant to premises upon which used. (ORS 540.510). Water rights can be assigned with notice to property owner and affected parties. (ORS 537.220, .630-.635). Seller of real estate including surface water right for irrigation must deliver water rights certificate, notice of permit, or transfer approval order to purchaser at closing. (ORS 537.330). DWR can approve change in use, after notice, if no injury to existing rights. (ORS 540.520-.530). DWR can allow transfer of point of diversion from surface to groundwater. (ORS 540.531). DWR can approve use of stored water in exchange for replacement water from another source. (ORS 540.533-.543). Aquifer storage and recovery is beneficial use inherent in all water rights for other uses. (ORS 537.531).

Adjudication of Water Rights.

Application of water to beneficial use by riparian proprietor before Feb. 24, 1909, vested water right to extent of beneficial use. (ORS 539.010). On petition by appropriators or at DWR director's motion, procedures provide for determination of rights of various claimants to use of water of any stream. (ORS 539.021-.240; 690-030-00050–0090). Director may negotiate with any federally recognized Indian tribe (ORS 539.300-.320) to determine scope of tribal water rights (ORS 539.300-.350).

Distribution of Water.

State divided into water districts, each with watermaster charged with regulating distribution of water. (ORS 540.010-.150). Water users of jointly owned ditch, pipeline, or reservoir, except where owned by irrigation district or improvement company, may ask watermaster to divide water from it when users cannot agree; users must pay expenses of watermaster in performing such tasks. (ORS 540.210-.270). Unpaid expenses become lien on property. (ORS 540.240-.270). Owner of ditch, canal, or reservoir must maintain headgate and measuring devices. (ORS 540.310-.400).

Water Districts.

Irrigation districts may be formed to provide for construction, purchase, improvement, operation, or maintenance of irrigation works. (ORS 545.002-.628; 548.005-.955). Drainage districts may be formed to reclaim swampy, wet, overflowed, or irrigated lands and to protect them by drainage or otherwise from effects of water for sanitary or agricultural purposes or for public health, convenience, utility, or benefit. (ORS 547.005-.990; 548.005-.955). Counties may contract with federal agencies for flood control. (ORS 549.010-.990). Diking districts may be formed to dike or dam lands subject to overflow by tide water or freshets. (ORS 551.010-.180). Water improvement districts may be formed for drainage, irrigation, flood control, water supply, recreation, agricultural improvement, pollution abatement, or enhancement of water quality or fish and wildlife resources. (ORS 552.013-.992). Water control districts may be formed to acquire, build, or operate water control works for drainage, irrigation, flood control, or agricultural improvement. (ORS 553.010-.850). Corporations, with names including words "district improvement company", may be formed for irrigation, drainage, water supply for domestic use, or protection of land by flood control. (ORS 554.005-.590). Weather modification districts may be formed to cause, prevent, or attempt to cause or prevent precipitation. (ORS 558.200-.990). Upon application of any person to reclaim desert government lands within states, WRC shall apply for lands and contract with Secretary of Interior for patent to state of such lands. Upon withdrawal of such land by U.S. Department of Interior, WRC shall contract with applicant for reclamation of land. (ORS 555.010-.410).

Hydroelectric Power Projects.

Siting of hydroelectric projects subject to strict standards protective of natural resources, particularly anadromous and wild game fish, and recreational opportunities. (ORS 543.010-.017). WRC may issue licenses to hold water rights and to construct and operate dams and appurtenances. (ORS 543.050). DWR may issue preliminary permit for up to three years for applicant to prepare for project. (ORS 543.210-.257). Person proposing to operate hydroelectric project in Oregon shall apply for state preliminary permit. (ORS 543.210). After notice and hearing, license may be issued for up to 50 years. (ORS 543.260-.320). License may be terminated if licensee fails to comply with time limitations for construction or other conditions. (ORS 543.410-.430). WRC must approve transfer of license. (ORS 543.440). Statutes provide for financing of hydroelectric projects (ORS 543.510-.560) and for acquisition of project by state or municipality (ORS 543.610-.620). Various water districts may enlarge or modify existing water system to generate electricity. (ORS 543.650-.685). Any person claiming right to use of water for power development, other than licensee under 543.010-.620, shall pay annual fee based upon horsepower. (ORS 543.710-.730). WRC sets standards for projects. (690-051-0000 to -0410; 690-053-0000 to -0050). Persons applying for federal hydroelectric permits must also apply to WRC. (ORS 537.140).

Wetlands.

Permit from Department of State Lands (DSL) required for fill or removal of material from waters or from beds or banks of waters. (ORS 196.810). Mitigation required for fill or removal from estuary. (ORS 196.830). Person aggrieved by grant of permit entitled to hearing. (ORS 196.835). Double and treble damages available through court action for destruction of public right of navigation. (ORS 196.875). State and local governments are prohibited from restricting fill or alteration of certain artificially created wetlands. (ORS 196.687). DSL to establish standards for identifying and inventorying wetlands and public and private mitigation banking by July 1, 1996. (ORS 196.825).

Prohibited Acts and Penalties.

Without authorization, no person may use water to which another is entitled or waste water to another's detriment. (ORS 540.720). No person may interfere with headgate or use water denied by watermaster. (ORS 540.710). Violation of above provisions punishable by $10-250 fine, six-month imprisonment, or both. (ORS 540.990). Owner must clear weeds from ditches. (ORS 540.440). Violation punishable by $25-150 fine plus costs or by confinement in county jail one day for each $2 of fine. (ORS 540.990). Upon acceptance of offer to purchase real estate, seller must test wells for nitrates and coliform bacteria and submit results to State Health Authority. (ORS 448.271, 2009 c. 595). Violation of well construction statutes or regulations punishable by revocation of license, or fine of $1,000 for major violation and $250 for minor violation. (ORS 537.787-.792). Unlawful use of surface or ground water punishable by $10-250 fine, six-month imprisonment, or both. (ORS 537.990). Construction of splash dam for floating of logs punishable by $1,000 fine, one-year imprisonment, or both. (ORS 541.990). Violation of prohibition against issuance of stock or assumption of liability regarding construction, operation, or financing of hydroelectric power project without WRC approval punishable by $5,000 fine, one-year imprisonment, or both. (ORS 543.990). Dumping of refuse into drainage conduit west of Cascade Mountains punishable by $25-500 fine, 100-day imprisonment, or both. (ORS 547.990). Tapping or bringing additional water into drainage ditch without compensation punishable by $100 fine and order to restore drainage to previously existing condition. (ORS 549.990). Violation of regulation governing recreational use of water improvement district facilities punishable by $250 fine. (ORS 552.992). Any removal of material from beds or banks of waters or deposit of fill in waters without or not in accordance with permit or in violation of Oregon Wetlands Mitigation Act of 1987 punishable by $10,000 fine per day. (ORS 196.890).

13 ESTATES AND TRUSTS

13.01 ADMINISTRATION:

See topic 13.09 Executors and Administrators.

13.02 ADVANCEMENTS:

See topic 13.07 Descent and Distribution.

13.03 ALLOWANCES:

See topic 13.09 Executors and Administrators.

13.04 CLAIMS:

See topic 13.09 Executors and Administrators; category 5 Civil Actions and Procedure, topic 5.17 Pleading.

13.05 DEATH:

Uniform Determination of Death Act adopted. (ORS 432.300).

Person Presumed Dead.

Person not heard from in seven years presumed dead. (ORS 40.135[1][s]).

Survivorship.

Uniform Simultaneous Death Act requires 120 hour survivorship. (ORS 112.570-.590).

Action for Death.

Wrongful Death.

When death caused by wrongful act or omission, personal representative of deceased may maintain action therefor if deceased might have maintained action had he lived (ORS 30.010-.100). Such action is for benefit of decedent's spouse, children, parents, and other intestate heirs. Action must be commenced within earliest of three years after injury causing death is discovered or reasonably could have been discovered, or period specified in applicable statute of repose. Discovery rule applicable to other causes of action does not apply. (307 Or. 500, 769 P.2d 775). Compensatory damages may be awarded to compensate for actual pecuniary loss to decedent, spouse, children, parents, stepchildren, stepparent, legal guardian of minor child, or estate and for loss of society, companionship and services, and punitive damages may also be awarded. (ORS 30.020).

Survival of Tort Actions.

Cause of action arising out of injuries to a person may be maintained after death by his personal representative if decedent might have maintained it had he lived. If decedent had not commenced action prior to death, representatives must do so within three years of tort. In some cases attorney fees recoverable. (ORS 30.075). If wrongdoer dies, claim for relief as to compensatory damages survives against personal representative of wrongdoer. (ORS 30.080).

For death resulting from violation of Employers' Liability Act, see category 11 Employment, topic 11.02 Labor Relations.

Toy-Related Death.

Physician required to report death determined or suspected to be toy-related. (ORS 677.491).

Death Certificate.

See category 10 Documents and Records, topic 10.04 Records, subhead Vital Statistics.

Uniform Anatomical Gift Act.

See topic 13.16 Wills.

Living Wills.

See topic 13.16 Wills.

13.06 DECEDENTS' ESTATES:

See topics 13.07 Descent and Distribution, Executors and Administrators, Wills; category 8 Debtor and Creditor, topic 8.10 Homesteads.

13.07 DESCENT AND DISTRIBUTION:

Prior to 9-27-87, net estate passes half to surviving spouse, half to issue by representation. Effective 9-27-87 if all surviving issue are also issue of surviving spouse, all to spouse. If all surviving issue are not also issue of spouse, half to spouse, half to issue by representation. If no issue all to spouse, and vice versa. As of Jan. 1, 2008, registered domestic partners have same rights as married couple. (See Oregon Family Fairness Act, Notes following 106.990). If no spouse or issue, estate descends in following order: Surviving parents; brothers and sisters by representation; if no surviving brother or sister issue of brothers and sisters equally if of equal degree of kinship, by representation if not; grandparents by representation; if no surviving grandparent issue of grandparents equally if of equal degree of kinship, by representation if not. (ORS 112.025-.045).

Taking by “representation” accomplished as follows: Estate divided into equal shares for surviving heirs of nearest degree of heirship and deceased persons of same degree with surviving issue, each surviving heir of nearest degree receiving one share and share of deceased person of same degree being divided among such person's issue in same manner. (ORS 112.065).

If married, surviving parents or grandparents take as tenants by entirety (as to real property) or joint tenants with right of survivorship (as to personal property); otherwise as tenants in common. (ORS 112.045).

Community Property.

Uniform Disposition of Community Property Rights at Death Act adopted. (ORS 112.705

et. seq.). See category 14 Family, topic 14.09 Husband and Wife.

Predeceased Persons.

Persons are considered predeceased if they fail to survive deceased by 120 hours. (ORS 112.572).

Posthumous children or other issue inherit as though living at time of parent's death. (ORS 112.075).

Half blood relatives take equally with those of whole blood. (ORS 112.095).

Illegitimates.

For purposes of intestate succession, before relationship of father and child and other relationships dependent upon establishment of paternity shall be given effect: (a) paternity of child must be established under ORS 109.070 during lifetime of child, or (b) father must have acknowledged himself as such in writing during life of child. (ORS 112.105). For all other purposes, illegitimates are treated as legitimates. (ORS 109.060).

Slayers.

For purposes of intestate succession, person who feloniously takes life of decedent generally considered to have predeceased decedent, but slayer may retain life estate in slayer's undivided interest in property held with decedent (and others) as tenants by entirety or joint tenants with right of survivorship. (ORS 112.455-.555).

Aliens.

As to inheritance rights see category 4 Citizenship, topic 4.01 Aliens.

Adopted Children.

As to inheritance rights, see category 14 Family, topic 14.01 Adoption.

Advancements.

Gift during lifetime to heir is advancement if declared in writing by decedent or acknowledged in writing by heir to be advancement. Excess over distributive share need not be refunded. (ORS 112.135-.145). Advancement also taken into account in computing share of issue of deceased advancee. (ORS 112.155).

Election.

None.

Determination of heirship is by declaratory judgment proceeding. (ORS 111.095[2], 28.040).

Administration.

See topic 13.09 Executors and Administrators.

Renunciation.

Uniform Disclaimer of Property Interests Act adopted. (ORS 105.623-.649).

Escheat.

On failure of heirs all property of intestate escheats to state. (ORS 112.055). Within ten years after death of decedent whose estate escheated to state, or within eight years after entry of judgment or order escheating property to state, person not having actual knowledge of escheat may file petition with Director of Department of State Lands claiming property and recover property or its proceeds. (ORS 116.253).

See topic 13.09 Executors and Administrators.

13.08 ELECTION:

See topic 13.16 Wills.

13.08A ESTATES: (in property)

See category 21 Property, topic 21.16 Real Property.

13.09 [RESERVED]

13.10 EXECUTORS AND ADMINISTRATORS:

Jurisdiction over administration of decedents' estates is in county courts of Gilliam, Grant, Harney, Malheur, Sherman and Wheeler Counties and in circuit courts in all other counties. (ORS 111.055). Venue in county of residence or domicile, where property was located at time of death or time proceeding commenced, or in county in which decedent died. (ORS 113.015).

Preferences in Right to Administer.

Court shall appoint qualified person as personal representative, giving preference in following order: (a) Executor named in will; (b) surviving spouse; (c) nearest of kin; (d) Director of Human Services, or attorney approved by director, if decedent received public assistance and such assistance is claim against estate; (e) Director of Oregon Health Authority, or attorney approved by director, if decedent received public assistance and such assistance is claim against estate; (f) Department of Veterans Affairs if decedent was protected person and Department joins in petition; (g) any other person. (113.085, 2009 c. 828).

Eligibility and Competency.

Following persons are not qualified to act as personal representatives: Incompetents, minors, persons suspended for misconduct or disbarred from practice of law, persons who resigned from Oregon State Bar while disbarment or disciplinary proceedings were pending, licensed funeral service practitioner, and persons convicted of felony if court finds facts underlying conviction would constitute grounds for removal of personal representative and court believes person would be unfaithful or neglectful of his trust. (ORS 113.092;.095).

Qualification; Bond.

Personal representative must file bond executed by surety company, or by one or more personal sureties (residents of state) approved by court. Bond must be adequate to protect interested persons, but in no event less than $1,000. In setting amount of bond, court considers (a) Nature, liquidity and apparent value of assets, (b) anticipated income during administration, (c) probable indebtedness and taxes. (ORS 113.105).

Exemption from Bond.

Executor need not file bond if testator provided in will that no bond required unless court in its discretion requires otherwise or if personal representative is sole heir or devisee; or is Director of Department of State Lands; or is Department of State Lands; or is Assistant Director for Adult and Family Services or his designated representative or Department of Veterans' Affairs. (ORS 113.105). No distinction made for foreign personal representatives.

Waiver of Bond.

Court may, in its discretion, waive bond requirement if all devisees and heirs agree in writing that requirement be waived and signed agreement is filed with court at time of filing petition for appointment of personal representative. (ORS 113.105).

Issuance of Letters.

Letters testamentary or letters of administration issued to personal representative upon filing required bond with clerk. (ORS 113.125).

Form

LETTERS TESTAMENTARY

No.__________________________

THIS CERTIFIES that the will of __________________________, deceased, has been proved and __________________________ has (have) been appointed and is (are) at the date hereof the duly appointed, qualified and acting __________________________ (Executor(s) or Administrator(s) with the Will Annexed) of the will and estate of the decedent.

IN WITNESS WHEREOF, I, as Clerk of the Circuit Court of the State of Oregon for the County of __________________________, in which proceedings for administration upon the estate are pending, do hereby subscribe my name and affix the seal of the court this ____ day of _________, 20___.

__________________________ Clerk of the Court

By __________________________ Deputy

(Seal)

LETTERS OFADMINISTRATION

No. __________________________

THIS CERTIFIES that _________ has (have) been appointed and is (are) at the date hereof the duly appointed, qualified and acting administrator(s) of the estate of _________, deceased, and that no will of the decedent has been proved in this court.

IN WITNESS WHEREOF, I, as Clerk of the Circuit Court of the State of Oregon for the County of _________, in which proceedings for administration upon the estate are pending, do hereby subscribe my name and affix the seal of the court this ____ day of _________, 20___.

__________________________ Clerk of the Court

By __________________________ Deputy

(Seal)

Removal.

Personal representative must be removed when he ceases to be qualified or becomes incapable of discharging duties. Personal representative may be removed when he has been neglectful or unfaithful or failed to inform court of felony conviction. Removal proper upon motion of court or any interested person. (ORS 113.195).

Special Kinds of Administration.

If, prior to appointment and qualification of personal representative, it becomes necessary to preserve property of decedent or if disposition of remains of decedent is required, court may appoint special administrator to take charge of property or remains. (ORS 113.005).

Public Administrators.

No statutory provision.

Inventory and Appraisal.

Within 60 days after appointment, unless longer time granted by court, personal representative must file inventory of all estate property that has come into his possession or knowledge. Inventory must show estimates of true cash value as of date of decedent's death. (ORS 113.165). Supplemental inventory required 30 days after receiving knowledge or possession of additional property or property must be included in next accounting. (ORS 113.175).

General Powers and Duties.

Personal representative is a fiduciary under general duty to collect income from estate property and to preserve, settle and distribute estate. (ORS 114.265). Specific powers enumerated by statute. (ORS 114.305-.325).

Notice of Appointment.

Upon appointment personal representative must deliver to devisees, heirs, and certain others required to be named in petition for appointment notice stating: (a) Title of court in which proceeding pending; (b) name of decedent, place and date of death; (c) whether a will has been admitted to probate; (d) name and address of personal representative and his attorney; (e) date of appointment of personal representative; (f) statement advising devisee, heir, or other interested person that his rights may be affected by proceeding and that additional information may be obtained from records of court, personal representative or attorney for personal representative; (g) statement that rights in estate may be barred unless person contests probate or validity of will within prescribed period. Within 30 days after appointment personal representative must file affidavit of delivery or mailing of notice. Affidavit must contain information delivered and names of recipients. (ORS 113.145).

Notice to Creditors.

Upon appointment personal representative must publish notice to interested persons in each of three consecutive weeks in: (a) Newspaper published in county in which estate proceeding is pending; (b) if no newspaper is published in county in which estate proceeding is pending, newspaper designated by court.

Notice must include: (a) Title of court in which proceeding is pending; (b) name of decedent; (c) name of personal representative and address at which claims are to be presented; (d) statement requiring persons with claims to present them within four months after date of first publication of notice; (e) date of first publication of notice; (f) statement advising all persons whose rights may be affected by proceeding that additional information may be obtained from records of court, personal representative or attorney for personal representative.

Personal representative must file proof of publication of notice to interested persons and copy of published notice. (ORS 113.155).

During three months following appointment, unless longer time allowed by court, personal representative must make reasonably diligent efforts to ascertain identity and address of persons with claims against estate. Within 30 days of expiration of such period, personal representative must deliver or mail to each known creditor, with exceptions, notice which includes: (a) Title of court in which proceeding is pending; (b) name of decedent; (c) name of personal representative and address at which claims are to be presented; (d) statement that claims not presented within 30 days of date of notice may be barred; and (e) date of notice, which is date on which delivered or mailed. Within 60 days of expiration of such period, personal representative must file proof of compliance and copy of notice with dates of delivery or mailing and name and address of person to whom delivered or mailed. (ORS 115.003).

Notice to Creditors of Inter Vivos Trusts.

Similar, but separate, procedure exists for giving notice to, and barring claims by, creditors of inter vivos trusts. (130.350-.450).

Presentation of Claims.

Claims must be presented to personal representative. (ORS 115.005).

Claims are barred from payment if not presented within claim's applicable statutes of limitation and before later of: (a) Four months after date of first publication of notice to interested persons; or (b) if claim is one which requires mailed or delivered notice, 30 days after such notice is delivered or mailed. (ORS 115.005[2]). Claims presented after expiration of such period shall be paid if claim: (a) Is presented before expiration of claim's applicable statute of limitations and before personal representative files final account; (b) is presented by person who did not receive notice mailed or delivered more than 30 days prior to date claim is presented; and (c) would be allowable but for time at which claim is presented. (ORS 115.005[3]). Claim may not be paid only after payment of all priority expenses and all previously presented claims. (ORS 115.005[4]). These rules do not affect or prevent proceedings to enforce mortgages, pledges, or liens, to quiet title or reform instrument relating to title or, to limits of insurance protection only, proceedings to establish liability protected by liability insurance. (ORS 115.005[5]).

Claim on debt due for which creditor holds security may be presented as claim on unsecured debt due, or creditor may elect to rely entirely on security without presentation of claim. (ORS 115.065).

Claim on debt not due whether or not creditor holds security may be presented as claim on debt due. (ORS 115.075).

Claim on contingent or unliquidated debt is presented as any other claim. (ORS 115.085).

Proof of Claims.

Each claim presented must: (1) Be in writing, (2) describe nature and amount thereof, if ascertainable, (3) state names and addresses of claimant and, if any, his attorney. (ORS 115.025).

Form

(Title of Court and Cause)

No.____________________

CLAIM

STATE OF OREGON

County of ____________________ } ss.

I, ____, being sworn say:

1. The above-entitled estate is indebted to:

(Name and address of the claimant

and his attorney (if any))

in the amount of: $__________ (if ascertainable)

for: (describe nature of debt)

2. I (am the claimant) (am presenting this claim in behalf of the claimant and have personal knowledge of the facts stated above). The amount of $________ (is justly due the claimant) (is justly owing to the claimant and will become due on ___________, 20 ___); no payments have been made which are not credited; and there is, to my knowledge, no offset or counterclaim thereto except as stated above.

____

Subscribed and sworn to before me this ____ day of _______________________, 20___.

____

Notary Public for Oregon

My Commission expires:

Approval or Rejection of Claims.

Claims presented to personal representative considered allowed as presented unless within 60 days after date of presentment of claim personal representative mails or delivers notice of disallowance of claim in whole or in part to claimant and claimant's attorney, if any. Personal representative must file claim as presented together with copy of notice of disallowance in estate proceeding. (ORS 115.135).

If personal representative disallows a claim in whole or in part claimant, within 30 days after date of mailing or delivery of notice of disallowance, may commence separate action against personal representative on claim or file in estate proceedings a request for summary determination of claim by probate court, with proof of service on personal representative or personal representative's attorney. If claimant fails to request summary determination or to commence separate action, claim, to extent disallowed by personal representative, is barred. (ORS 115.145).

Payment of Claims.

After day on which all known claims are barred under 115.005, personal representative, after making provision for support of spouse and children ordered by court, for expenses of administration and for claims already presented which have not been disallowed or disallowance of which has been appealed, shall pay claims allowed in order of priority in 115.125. After payment of those claims, claims presented and allowed after those with priority under 115.005[3] shall be paid in order in which they are received to extent of remaining assets. (ORS 115.115).

Priorities.

If assets of estate are insufficient to pay all expenses and claims in full, personal representative makes payment in following order: (a) Support of spouse and children; (b) expenses of administration; (c) expenses of plain and decent funeral and disposition of remains of decedent; (d) debts and taxes with preference under Federal law; (e) reasonable and necessary medical and hospital expenses of last illness of decedent; (f) taxes with preference under Oregon law that are due and payable; (g) debts owed employees of decedent for labor performed within 90 days immediately preceding death; (h) child support arrearages; (i) claim of Oregon Health Authority for states's monthly contribution to federal government related to cost of outpatient prescription drug coverage for eligible people; (j) claim of Department of Human Services for net amount of certain public assistance paid to decedent; (k) claim of Department of Human Services or Oregon Health Authority for care and maintenance of decedent at state institution; (l) claim of Department of Corrections for care and maintenance of certain decedents; (m) all other claims against estate.

If assets of estate are insufficient to pay all expenses or claims of any one class in full, each item of that class is paid its proportionate dollar value of remaining assets. (ORS 115.125, 2009 c. 595).

Sales.

Personal representative has power to sell property of estate without notice, hearing or court order. However, notice, hearing and order of court are required if: (a) Sale is in contravention of provisions of will; (b) property is specifically devised and will does not authorize its sale; or (c) sale price of property to be sold exceeds $5,000 and bond of personal representative, unless court directs otherwise. (ORS 114.325).

Actions by Representative.

All causes of action or suit by one person against another, survive to and against respective personal representatives. (ORS 115.305).

Actions against Representative.

Unless personal representative fails to give proper notice to creditor, no action against personal representative may be commenced until claim of plaintiff has been presented to personal representative and disallowed, but action against decedent commenced or pending on date of death may be continued against personal representative without presentation. (ORS 115.315-.325). See subhead Presentation of Claims, supra.

Allowances.

Court by order makes necessary and reasonable provision from estate of decedent for support of spouse and dependent children upon: (a) Petition by spouse or dependent; (b) service of petition and notice of hearing on personal representative; (c) notice to persons whose distributive shares may be diminished by granting of petition; (d) hearing. (ORS 114.015-.085). Temporary support may be allowed pending hearing upon petition for support. (ORS 114.035).

Widow's Quarantine.

Spouse and dependent children of decedent may continue to occupy principal place of abode of decedent until one year after decedent's death. (ORS 114.005).

Intermediate Accountings.

Personal representative must file verified account of administration within 60 days after anniversary date of appointment, or within 30 days after removal, resignation or revocation of letters, or at such other times as court orders. (ORS 116.083).

Final Accounting and Settlement.

Personal representative must file verified account of personal representative's administration and petition for distribution when estate ready for final distribution. (ORS 116.083[1][c]).

Upon filing of petition for final account and petition for distribution, personal representative shall fix time for filing objections thereto. Not less than 20 days before objections are due, personal representative must send notice of date for final objections to interested persons. Proof of mailing notice must be filed with court. (ORS 116.093).

Consent Settlement.

Allowed on approval of court. (ORS 116.113).

Distribution.

If no objections to final account and petition for distribution are filed, or if objections are filed, upon hearing, court enters general judgment of final distribution. Judgment must designate persons in whom title to estate is vested and portion of estate or property to which each is entitled under will, by agreement approved by court, or pursuant to intestate succession. (ORS 116.113). See subhead Foreign Executors or Administrators, infra.

Distribution if Distributee Refuses or Cannot be Found.

If delivery of property cannot be made to distributee entitled thereto, court may direct delivery to Department of State Lands. (ORS 116.203). May be recovered by person entitled thereto in manner provided for escheat funds. See topic 13.07 Descent and Distribution, subhead Escheat.

Liabilities.

Personal representative liable to interested persons for any breach of fiduciary duty to same extent as trustee. (ORS 114.395). Personal representative may be liable for: (a) All of estate of decedent that comes into his possession, including income therefrom; (b) all property not part of estate if: (1) he commingled property with assets of estate, or (2) property received under a duty imposed on him by law in capacity of personal representative; (c) any loss to estate arising from: (1) neglect or unreasonable delay in collecting assets of estate, (2) neglect in paying money or delivering property of estate, (3) failure to pay taxes required by law or to close estate within reasonable time, (4) embezzlement or commingling assets of estate with other property, (5) unauthorized self-dealings, (6) wrongful acts or omissions of co-personal representative that could have been prevented by exercise of ordinary care, (7) any other negligent or wilful act or nonfeasance in administration of estate by which loss to estate arises. (ORS 116.063). Personal representative liable for failure to make reasonably diligent search for creditors and to give proper notice. (ORS 115.003[5]).

Personal representative not liable for debts due decedent or other assets of estate that remain uncollected without his fault or loss by decrease in value or destruction of property of estate if loss is caused without his fault. (ORS 116.073).

Unless personal representative fails to give proper notice to creditor, to extent final account is approved, personal representative and his surety, subject to right of appeal, are relieved from liability. (ORS 116.123, .213). Personal representative is liable to third parties as agent for disclosed principal. (ORS 114.405).

Compensation of Representatives.

Upon application to court personal representative is entitled to receive compensation for services, as follows: (a) Upon property subject to jurisdiction of court, including income and realized gains: (1) 7% of any sum not exceeding $1,000, (2) 4% of all above $1,000 and not exceeding $10,000, (3) 3% of all above $10,000 and not exceeding $50,000, (4) 2% of all above $50,000; (b) 1% of property, exclusive of life insurance proceeds, not subject to jurisdiction of court, but reportable for Oregon inheritance tax or Federal estate tax purposes. In all cases, further compensation as is just and reasonable may be allowed by court. When decedent by his will has made special provision for compensation, personal representative is not entitled to any other compensation for services unless prior to employment he signs and files with clerk of court written renunciation of compensation provided by will. (ORS 116.173).

When Administration Unnecessary.

If it appears after expiration of four months after date of first publication of notice to interested persons that reasonable provisions for support of spouse and dependent children of decedent warrants that whole of estate after payment of claims, taxes and expenses of administration be set apart for such support, court may so order. There are no further proceedings in administration of estate and estate is summarily closed. (ORS 114.085).

If estate is $200,000 or less, not more than $50,000 attributable to personal property, not more than $150,000 attributable to real property, claiming successor (ORS 114.505) or personal representative if testate (ORS 114.515) may file affidavit with clerk of probate court of county where venue proper for appointment of personal representative. Where decedent dies intestate and without heirs, creditor who is claiming successor may not file affidavit without written authorization from estate administrator of Department of State Lands. (ORS 114.520). Affidavit may not be filed until 30 days after death. Contents of affidavit specified in statute. Delivery of affidavit entitles claimant to receipt of personal property of decedent and transfer of corporate securities. Claimant may compel transfer of property in proceeding brought by such person. Claimant must pay creditors of decedent who presented claims within four months after affidavit filed. Summary proceeding provided for disallowed claims. If no personal representative appointed in four months, claiming successor receives all property shown in affidavit. (ORS 114.515-.555).

Small Estates.

See subhead When Administration Unnecessary, supra.

Estates of Absentees.

Special proceedings provided to administer estate of absentee. Must be missed for at least one year. (ORS 117.005-.095).

Foreign Executors or Administrators.

When administration of estate completed and estate is in condition to be distributed, court, upon application by personal representative, may authorize delivery to personal representative of estate of decedent pending in a foreign jurisdiction, property court finds appropriate for payment of debts, taxes or other charges or for distribution to distributees of estate in foreign jurisdiction. (ORS 116.163). Foreign executors and administrators may receive debts and obligations owed estate by residents. (ORS 116.263).

Uniform Fiduciaries Act not adopted.

Uniform Disposition of Community Property Rights at Death Act adopted. (ORS 112.705-.775).

Uniform Principal and Income Act, 1962 version, adopted with significant variations and modifications. Repealed. 1997 Revised Uniform Principal and Income Act adopted. (c. 129). 2003 Uniform Principal and Income Act adopted. (129.200-.450).

Uniform Probate Code not adopted, but Uniform International Wills Act (Part 10 of Art. 2 of Code) adopted. (ORS 112.232).

Uniform Prudent Investor Act adopted. (ORS 128.192-.218).

Uniform Simplification of Fiduciary Security Transfers Act not adopted.

Uniform Revised Anatomical Gift Act adopted. (ORS 97.951-.982). See topic 13.05 Death.

Uniform Disclaimer of Property Interests Act adopted. (ORS 105.623-.649).

Uniform Disclaimer of Transfers by Will, Intestacy or Appointment Act adopted 1975, revised 1981 to authorize fiduciary to disclaim on behalf of decedent, to permit disclaimers of fractional shares or limited interests, or to permit disclaimers within nine months of vesting of interest. (Rep. 2001, c. 245).

13.11 [RESERVED]

13.12 INTESTACY:

See topic 13.07 Descent and Distribution.

13.13 [RESERVED]

13.14 PROOF OF CLAIMS:

See topic 13.09 Executors and Administrators; category 5 Civil Actions and Procedure, topic 5.17 Pleading.

13.15 TRUSTS:

Uniform Trust Code.

Adopted in 2005. (c. 130).

Kinds.

Common law prevails. Express, resulting and constructive trusts are recognized and enforced.

Creation.

No trust of real property can be created, transferred, or declared otherwise than by implication or operation of law, except by instrument in writing subscribed by party creating, transferring or declaring same, or by lawful agent of such party, under written authority, and executed with such formalities as are required by law. (ORS 93.020).

Appointment of Trustee.

Trustee named in will or inter vivos trust takes office without court appointment. Vacancy in office of trustee may be filled as provided by creating instrument or by court of competent jurisdiction according to established rules of equity. (ORS 93.190). Vacancy arising prior to or during probate proceeding may be filled by probate court. (ORS 111.085).

Eligibility and Competency.

National banks operating in fiduciary capacity under federal laws and regulations may engage in trust business if domiciled in Oregon. (ORS 709.300). Trust companies and state banks are chartered by Director of Department of Insurance and Finance to do trust business. (ORS 707.140).

Qualifications.

Bond or oath not required of individual trustee unless trust instrument so requires. Oath not required on behalf of trust company. (ORS 709.240). Trust companies required to deposit cash, interest-bearing securities, surety bond, irrevocable letter of credit, or combination thereof, with Director of Department of Consumer and Business Services, Finance and Corporate Securities Division. (ORS 709.030). Indemnity bond may be required when any single fiduciary account exceeds trust company's capital and surplus. (ORS 709.130). For personal representatives' bonds, see topic 13.09 Executors and Administrators, subhead Qualification; Bond.

Removal of Trustee.

Court may remove trustee for violation of terms of trust. (178 Or. 484; 169 P.2d 131).

General Powers and Duties of Trustees.

Uniform Trustees' Powers Act adopted with modifications. Non-pro rata distributions allowed. (ORS 128.003-.051, .065).

Bequests and Devises to Inter Vivos Trusts.

Uniform Testamentary Additions to Trusts adopted with modifications. (ORS 112.265). See topic 13.16 Wills.

Accounting.

Generally, trustees are accountable according to terms of trust. (ORS 130.650). Trustee must report to qualified beneficiaries annually and at termination of trust, and may report to other beneficiaries if requested, with some exceptions relating to certain irrevocable trusts. (ORS 130.710, 2009 c. 275).

Court Supervision.

Court may intervene in administration of trust to extent requested by interested person or as provided by law; proceeding may relate to any matter involving trust's administration. (ORS 130.050). Declaratory judgments authorized. (ORS 130.050).

Investments.

Statutory “prudent investor” rule applies. (ORS 130.750-.775).

Securities in Name of Nominee.

Fiduciary may deposit securities with clearing corporation which may hold in name of nominee. (ORS 128.100).

Discharge and Resignation.

Trustee can be removed by order of court. (ORS 130.625). Unless prohibited in trust instrument, trustee may delegate performance of function to cotrustee. (ORS 130.605[5]). Trustee may resign upon approval of court of competent jurisdiction or after 30 days notice to qualified beneficiaries, settler if living, and all cotrustees. (ORS 130.620).

Uniform Common Trust Fund Act, as amended, adopted. (ORS 709.170).

Uniform Prudent Investor Act adopted. (ORS 130.750-.775).

Uniform Supervision of Trustees for Charitable Purposes Act not adopted (but see Charitable Trust and Corporation Act, under subhead Charitable Trusts, infra).

Charitable Trusts.

Trusts which are “private foundations” and “split-interest trusts” are prohibited from engaging in acts of “self dealing”, retaining “excess business holdings”, making investments which jeopardize exempt purposes and making “taxable expenditures” as terms are defined in IRC §§ 509, 4941, 4943, 4944, 4945 and 4947. “Private foundations” must distribute income and, when necessary, principal sufficient to avoid tax liability under IRC § 4942. Trustee of trust which is “private foundation” or “split-interest trust” may amend governing instrument to extent necessary to avoid tax liability under IRC §§ 4941 to 4945, or terminate status of trust as “private foundation”, with prior consent of Attorney General and benefited organizations. (ORS 128.085-.095).

Under Charitable Trust and Corporation Act (ORS 128.610-.750), unless excepted, every charitable organization over which Attorney General has enforcement or supervisory powers must file copy of articles of incorporation, trust agreement or other governing instrument with Attorney General and must file periodic reports with Attorney General (ORS 128.660, .670). Attorney General is required to establish and maintain register of charitable organizations subject to Act. Attorney General has power to investigate and to institute appropriate enforcement proceedings. (ORS 128.650, .680, .710).

Under Charitable Solicitations Act (ORS 128.801-.898), professional or commercial fund-raising firms must comply with registration, notice, disclosure, financial reporting, record maintenance and other requirements of Act.

Uniform Management of Institutional Funds Act adopted with modifications. (ORS 128.310-.355).

Accumulations.

No statutory restriction on accumulation of income.

Perpetuities.

See category 21 Property, topic 21.12 Perpetuities.

Pour Over Trusts.

See topic 13.16 Wills, subhead Bequests and Devises to Inter Vivos Trusts.

Termination.

Trustee may terminate trust if trustee concludes that value of trust property insufficient to justify cost of administration, provided trustee gives notice of termination to qualified beneficiaries, but may not terminate trust if trustee is beneficiary of trust or has duty of support for beneficiary of trust. (ORS 130.215).

Renunciation.

Uniform Disclaimer of Property Interests Act adopted. (ORS 105.263-.649).

Special Trusts.

Special rules governing Prearranged Funeral Plans as Trusts (ORS 97.923-.949), Employees' Trusts (ORS 128.510-.520), and Business Trusts (ORS 128.560-.600).

See also category 3 Business Regulation and Commerce, topic 3.20 Monopolies, 3.22 Restraint of Trade and Competition.

Will/Trust Unification.

Many will doctrines, including ademption, advancement, anti-lapse, pretermitted heir and revocation on divorce applied to revocable inter-vivos trusts. (ORS 130.520-.575).

13.16 WILLS:

Any person 18 or more years of age or who has been lawfully married and is of sound mind may make a will. (ORS 112.225).

Testamentary Disposition.

No limitations.

Execution.

Every will must be in writing and executed with following formalities: (a) Testator must, in presence of each witness: (1) sign will, or (2) direct one of witnesses or some other person to sign his name thereon, or (3) acknowledge signature previously made on will by him or at his direction; (b) any person who signs name of testator must sign his own name on will and write on will that he signed name of testator at direction of testator; (c) at least two witnesses must each: (1) see testator sign will, or (2) hear testator acknowledge signature on will, and (3) attest will by signing name to it. Will executed in compliance with Uniform International Wills Act, adopted in 1981, is deemed to have complied with foregoing formalities. (ORS 112.235).

Attestation Clause.

Following may be used:

Form

The foregoing instrument, consisting of. . . . pages besides this page, was on this. . . . day of. . . . . .,. . . ., signed by. . . . . . who declared this to be his (her) last will and testament; we saw the testator sign such instrument and at his (her) request and in his (her) presence and in the presence of each other have signed our names as attesting witnesses. At the time this will was signed, we believe the testator was of sound mind and memory and was acting voluntarily.

. . . . Residing at. . . . . .

. . . . Residing at. . . . . .

Holographic wills are not recognized.

Nuncupative wills are not recognized.

Contract to Make Will or Not Revoke Will.

Contract, executed after Jan. 1, 1974, to make will or devise, or not to revoke will or devise, or to die intestate is established only by contract provisions in will, reference in will to contract proved by extrinsic evidence or writing signed by testator evidencing contract. No presumption of contract by joint or mutual will. (ORS 112.270).

Revocation.

Will may be revoked by publication of another will, or by being burned, torn, cancelled, obliterated or destroyed, with intent and purpose of revoking. Such revocation may be accomplished by testator, or by another person at direction of testator and in presence of testator. Injury or destruction by person other than testator at direction and in presence of testator must be proved by at least two witnesses. (ORS 112.285). Will is revoked by subsequent marriage of testator if testator is survived by his spouse unless: (a) will evidences intent that it not be revoked by subsequent marriage; or (b) testator and his spouse enter into written contract before marriage that either makes provision for spouse or provides that spouse is to have no rights in estate of testator. (ORS 112.305).

Unless will evidences different intent, divorce or annulment of marriage after execution of will revokes all provisions in will in favor of former spouse of testator and any provision therein naming former spouse as personal representative; effect of will is same as though former spouse did not survive testator. (ORS 112.315).

Revival.

If will or part thereof has been revoked or is invalid, it can be revived only by re-execution of will or by execution of another will in which revoked or invalid will or part thereof is incorporated by reference. (ORS 112.295).

Testamentary Gifts to Subscribing Witnesses.

Will is not invalidated if attested by interested witness. (ORS 112.245).

Slayers.

Property that would pass by will or trust to person who feloniously takes life of decedent passes as if slayer predeceased decedent. (ORS 112.455-.555).

Bequests and Devises to Inter Vivos Trusts.

Pour-over trusts valid. Unless testator's will provides otherwise, property devised to a trust is not considered held under testamentary trust but becomes part of trust to which given. Trusts are administered and disposed of in accordance with instrument setting forth terms of trust, including any amendments thereto made before death of testator, regardless whether made before or after execution of testator's will, and, if testator's will provides, including any amendments to trust made after death of testator. Unless testator's will provides otherwise, revocation or termination of trust before death of testator causes devise to lapse. (ORS 112.265). Uniform Testamentary Additions to Trusts Act adopted. (ORS 112.265).

Testamentary Guardians.

See category 14 Family, topic 14.07 Guardian and Ward.

Probate.

Will may be probated in (a) County where decedent had his domicile or where he had place of abode at time of death; (b) county where property of decedent was located at time of death or is located at time proceeding is commenced; (c) county in which decedent died. Filing in county other than one specified is not a jurisdictional defect. (ORS 113.015). Jurisdiction of probate matters is vested in county courts of Gilliam, Grant, Harney, Malheur, Sherman and Wheeler counties and circuit court for all other counties. (ORS 111.075). Any interested person or executor named in will may petition for appointment of a personal representative and for probate of will. (ORS 113.035).

Self-Proved Wills.

Affidavit of attesting witnesses, may be made when will executed or any time thereafter, may be submitted to prove duly executed will or witness may appear personally in court. (ORS 113.055).

Form

AFFIDAVIT OF ATTESTING

WITNESSES TO WILL

State of Oregon)

) ss.

County of ________________________)

We, the undersigned, being sworn, each for myself say:

On the date of the foregoing (or attached) will of __________ ______________ (or, the will of _________________________, of which a photographic or facsimile copy is attached hereto) in our presence, said _________________________ signed the same and declared it to be his/her will, whereupon, at his/her request and in his/her presence, we attested the will by signing our names thereto.

To the best of my knowledge and belief, the testator was, at that time, over the age of 18 years and of sound mind.

____

____

Subscribed and sworn to by each of the affiants above named this ____ day of ____________, 20__.

____

Notary Public for Oregon

My commission expires: _______________

NOTE: This affidavit is usually made a part of the will, in which case no attestation clause is needed, but the witnesses should also sign above the affidavit.

Contest.

When will has been admitted to probate, any interested person may, at any time within four months after filing of affidavit of mailing information to heirs and devisees, or four months after first publication of notice to interested persons, whichever is later, contest probate or validity of will. (ORS 113.075).

Effective Sept. 29, 1991, as to estates of decedents dying thereafter and effective July 1, 1992, as to all estates, any interested person may contest probate or validity of will or assert interest in estate for reason that (a) will is ineffective, (b) there exists will that has not been alleged in petition for admission of will to probate to be will of decedent, or (c) decedent agreed, promised, or represented that decedent would make or revoke will or devise, or not revoke will or devise, or die intestate. Action to contest probate or validity of will or to assert interest in estate must be commenced before four months after date of delivery or mailing of information to interested persons, or if person filing action was not required to be named in petition as interested person, four months after first publication of notice to interested persons, or with respect to (c) above, no later than one year after death of decedent. Action described in (c) above cannot be presented as claim against estate. (ORS 113.075).

Legacies.

Time for payment is not specified by statute. Provisions against ademption of specific devises in certain cases set out in statute. (ORS 112.385).

Unclaimed Legacies.

If report filed by personal representative not less than 30 days after date of entry of judgment of distribution shows that payment or delivery of property cannot be made to distributee entitled thereto, either because distributee refuses to accept property or because he cannot be found, court may direct personal representative to pay or deliver property to Department of State Lands, to be placed in escheat funds of state. (ORS 116.203).

Lapse.

When property is devised or bequeathed to person related by blood or adoption to testator who dies, leaving lineal descendants, before testator, such descendants take property that beneficiary would have taken if he had survived testator by representation, unless otherwise provided in will of testator. (ORS 112.395).

Children.

No person, including issue of testator, is entitled to any portion of estate of testator disposed of in his will other than as provided in will. (ORS 112.415). If testator has one or more children living when he executes will and no provision is made in will for any such living child, pretermitted child does not take share of estate of testator disposed of by will. If testator has one or more children living when he executes will and provisions made in will for one or more such living children, pretermitted heir entitled to share in estate of testator disposed of by will as follows: (a) Pretermitted child may share only in portion of estate devised and bequeathed to living children by will; (b) share of each pretermitted child is total value of portion of estate devised and bequeathed to living children by will divided by number of pretermitted children plus number of living children for whom provision, other than nominal provision, is made in will; (c) to extent feasible, interest of pretermitted child in estate is of same character, whether equitable or legal, as interest given to living children by will. If testator has no children living when he executes his will, pretermitted child takes share of estate as though testator died intestate. (ORS 112.405).

Election.

Surviving spous of domiciled decedent has waivable right to elective share, obtainable by filing motion or petition within stipulated time after decedent's death. (2009 c. 574, §§ 2, 6). Except as otherwise provided, elective share is dollar amount determined by multiplying augmented estate by specified percentage, based on length of marriage. (2009 c. 574, § 3).

Augmented estate consists of all property in decedent's probate and non-probate estates, surviving spouse's estate, and property received by surviving spouse from decedent, less amount of all enforceable claims and encumbrances on property. (2009 c. 574, §§ 8-15). Augmented estate does not include community property under 112.705 to 112.775, or property irrevocably transferred with written consent or joinder of surviving spouse. (2009 c. 574, § 9). Elective share payable according to priority schedule. (2009 c. 574, § 16). Only original recipient of decedent's non-probate estate, or person who received all or part of non-probate estate from original recipient for less than fair consideration and who still retains property or proceeds, may be required to contribute toward satisfaction of elective share. (2009 c. 574, § 17). Protective orders available to surviving spouse. (2009 c. 574, § 18).

As of Jan. 1, 2008, registered domestic partners have same rights as married couple. (See Oregon Family Fairness Act, Notes following 106.990).

Living Wills.

See subhead Advance Directive, infra.

Advance Directive.

Capable adult may designate competent adult as attorney-in-fact for health care and give other health care instructions. (ORS 127.510[1], [2]). Advance Directive must be in form shown at end of this Digest, reflect date of principal's signature and witnessed by two adults. (ORS 127.515[2], [3] and [4]). Power continues in effect until principal's death, until revoked, until attorney and alternate attorney withdraws or, when power of attorney names principal's spouse as attorney-in-fact, petition for dissolution or annulment of marriage is filed and principal does not reaffirm appointment in writing. (ORS 127.510[3], [4]; 127.545).

Foreign Executed Wills.

Will is lawfully executed if it is in writing, signed by or at direction of testator and otherwise executed in accordance with law of: (a) Oregon at time of execution or death of testator; or (b) domicile of testator at time of execution or death; or (c) place of execution at time of execution; or (d) Uniform International Wills Act. (ORS 112.255).

Foreign Probated Wills.

Written will of testator who died domiciled outside this state, which upon probate may operate upon property in this state, may be admitted to probate upon petition therefor, by filing certified copy of will and certified copy of order admitting will to probate or evidencing its establishment in jurisdiction where testator died domiciled. (ORS 113.065)

Simultaneous Death.

See topic 13.05 Death, subhead Survivorship.

Testamentary Trusts.

See topic 13.15 Trusts.

Uniform Revised Anatomical Gift Act adopted (ORS 97.951-.994). Oregon includes provision that person named executor who carries out gift of testator before issuance of letters testamentary or under will not admitted to probate will not be liable to surviving spouse or next of kin for doing so (ORS 97.984); and that transplants of donated parts of human body not subject to implied warranties under UCC (ORS 97.985).

Uniform Disposition of Community Property Rights at Death Act adopted. (ORS 112.705-.775).

Uniform International Wills Act adopted 1981. (ORS 112.232).

14 FAMILY

14.01 ADOPTION:

Any person may petition circuit court for leave to adopt another. (ORS 109.309). If petition is for adoption of minor child, adoption is governed by Uniform Child Custody Jurisdiction Act (ORS 109.700-109.930), except joinder provision (ORS 109.800) does not apply. Compliance with Indian Child Welfare Act required if applicable. (ORS 109.309).

Consent Required.

Parents, or survivor of them, must consent in writing to adoption of child. If child has no living parent, guardian must consent. If no living parent or guardian then next of kin in Oregon. If no living parent, guardian or qualified next of kin, court will appoint next friend to give or withhold consent. (ORS 109.312). Consent of mother's husband not required if judicially determined that husband was not father of child. (ORS 109.326). Consent of father of illegitimate child required only if paternity is acknowledged by joint declaration filed with Vital Statistics or asserted in filiation proceedings. Otherwise mother's consent is sufficient. (ORS 109.092). Child over 14 years must also consent. (ORS 109.328). Written consent of person to be adopted who is legally married or 18 or over may be sufficient without consent of any other person. (ORS 109.329). Compliance with Interstate Compact on Placement of Children may be required if adoptive child is not already in Oregon. (ORS 417.200-.260).

Court may dispense with consent of parent who is mentally ill, mentally retarded, or imprisoned if welfare of child is best promoted by adoption (ORS 109.322) or parent who has willfully neglected or deserted child for one year prior to filing of petition (ORS 109.324). Husband who is judicially determined not father of child need not consent. (ORS 109.326). Consent may be given by State Office for Services to Children and Families (SCF) or public or private organization located outside state under some circumstances. (ORS 109.316; 109.318).

Parent may withdraw consent at any time prior to entry of decree in private placement unless parent has signed valid certificate of irrevocability, or is otherwise estopped. (ORS 109.312[2]; 20 Or. App. 6, 530 P.2d 540). If parent signs certificate of irrevocability, consent may be revoked only if obtained through fraud or duress, once child is placed in physical custody of another for purposes of adoption and other statutory conditions are met. (ORS 109.312[2]; 418.270[4]). Certificate of irrevocability is not applicable to children subject to Indian Child Welfare Act. (ORS 109.312[3]).

Conditions Precedent.

Petitioner must satisfy court that he or she is able to bring up child and furnish suitable nurture and education and that adoption is fit and proper. (ORS 109.350).

Jurisdiction.

Circuit courts have jurisdiction over adoption proceedings. (ORS 3.275, 109.309). With minor child, state has jurisdiction over adoption if, immediately prior to filing petition, minor, one consenting parent or prospective parent resided in state for at least six consecutive months and no other state has state jurisdiction. (ORS 109.309).

Venue.

If petition is for adoption of person 18 years of age or older, petition is filed in county where petitioner, adoptee or person who consents to adoption resides, if any of them reside in

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Oregon. If petition is for adoption of minor child, petition is filed in county where child has most significant connection or in county where licensed adoption agency is located. (ORS 109.309; 315 Or. 386, 848 P.2d 592).

Petition.

If petition is for adoption of minor child, petitioner must file with petition: (1) written statement identifying full names and addresses of (a) petitioners, (b) all persons whose consent to adoption is required (ORS 109.312), if such names and addresses are known or can be readily ascertained by petitioners and (c) Oregon licensed adoption agency, if any, or person who privately placed child for adoption; (2) documents demonstrating required consent (ORS 109.312); and (3) written evidence documenting current home study approved by SCF or Oregon licensed adoption agency (unless waiver of home study available—e.g., stepparent adoptions, in which case waiver request must be filed). Petitioner must also file adoption report information form prescribed by State Registrar. After entry of judgment of adoption, completed form is mailed to State Registrar by court clerk. (ORS 109.400).

Proceedings.

Copy of petition to adopt minor child must be served by registered or certified mail or personally on Assistant Director for SCF within 30 days after petition is filed with court. SCF, or Oregon licensed adoption agency designated by SCF, then has 60 days to submit placement report to court, but SCF can waive 60-day period and placement report requirement. (ORS 109.309). SCF may charge petitioners reasonable fee for investigations, home study and placement reports. Fees are established by SCF rules, which must provide for fee waivers or reductions based on petitioner's ability to pay. Petitioner must report fee charged to court and court must make findings as to necessity and reasonableness of fee. Unless effective waiver certificate obtained, it is unlawful to present child who has been surrendered to agency to court for adoption, unless six months have elapsed after signing of surrender. (ORS 418.270[3]). Parent who does not consent (including divorced parent without custody) must be served personally with petition and order to appear at hearing if found within state. If not so found citation must be both published and sent to last ascertainable address. If not found in state, notice must be published at least four weeks or served personally outside state. (ORS 109.330). Citation served by publication need not contain names of adoptive parents. (ORS 109.330). Notice to putative father of illegitimate required where father has resided with or attempted to support child, or has filed notice of filiation proceedings with Vital Statistics prior to child's being placed by agency in physical custody of another for purpose of adoption. Notice need not disclose name of mother. (ORS 109.096). Hearing and court action required within six months of filing petition. (ORS 109.307). Petitioner may be appointed guardian pending proceedings. (ORS 109.335). See topic 14.07 Guardian and Ward. Petitioner must file written statement itemizing all moneys paid or estimated to be paid related to adoption of minor child. (ORS 109.311).

Grandparent Rights.

Petitions for stepparent adoptions must be served by registered or certified mail or personally on all persons whose consent to adoption is required (ORS 109.312) and on parents of deceased or incapacitated parent, if such names and addresses are known or readily ascertained by petitioners. (ORS 109.309) Grandparents served with petition for stepparent adoption may file motion with court for visitation rights no later than 30 days after service of petition. (ORS 109.332). Visitation rights are awarded only if court finds by clear and convincing evidence that: (1) Visitation rights are in child's best interest; (2) substantial relationship existed between child and grandparent prior to adoption; and (3) visitation rights do not interfere substantially with relationship between child and adoptive family. (ORS 109.332).

Judgment.

If court satisfied as to identity and relations of persons and that petitioner is able properly to bring up child, judgment is entered. Judgment must recite facts and order that, from date of judgment, child is, to all legal intents and purposes, that of petitioner. (ORS 109.350). Medical history of adopted person is to be given to adoptive parent(s) at time judgment is entered except when adoption is by stepparent and upon request to adoptee upon reaching majority. (ORS 109.342).

Name.

If petition prays change of child's name, court, upon entering judgment granting adoption, may also provide for in judgment and grant certificate. (ORS 109.360). Otherwise, public notice of name change required. (ORS 33.420).

Effect of Adoption.

Adopted person bears same relation to adoptive parents and their kindred as if he were natural child of such parents. Adopted person, his issue and kindred take by intestate succession from adoptive parents, their issue and kindred, and adoptive parents, their issue and kindred take by intestate succession from adopted person, his issue and kindred, as though adopted person were natural child of adoptive parents. Adopted child's legal relationship with natural parents is same as if child had not been born to them. When child is adopted by stepparent, relationship to natural parent who is spouse of adopting parent is not changed. (ORS 109.041, .050; 112.175).

Open Adoption Agreements.

Adoptive parents, birth parents and adoptees may enter into court-approved written agreements permitting continued contact between “birth relatives” (birth parents, grandparents, siblings and other members of child's birth family) and adoptee or adoptive parents. Open adoption agreements can be modified by court if court finds: (1) Modification is necessary to serve child's best interests and (2) party seeking modification participated, or attempted participation in good faith, in mediation prior to seeking modification. In addition, court must find that: (1) modification is agreed to by all parties to original agreement or (2) exceptional circumstances after original agreement justify modification. Open adoption agreements are enforceable by civil action provided that party seeking enforcement participated, or attempted participation in good faith, in mediating dispute prior to filing civil action. Failure to comply with open adoption agreement is not grounds for setting aside adoption or revoking written consent to adoption. (ORS 109.305).

Setting Aside Adoption.

Any party to adoption proceeding may appeal adoption judgment. Such judgment is entitled to same presumptions and is conclusive to same extent as if by court of general jurisdiction. Except for right of appeal as provided by 19.010, adoption judgment is binding upon parties. After expiration of one year from entry, judgment is binding on all persons. (ORS 109.381).

Records in adoption cases are not open to inspection except upon order of court. (ORS 7.211). Certificate of adoption will be issued, upon request, to adopted person, adoptive parent(s), attorney of record and agency which consented to adoption. (ORS 109.410). State Office for Services to Children and Families (SCF) maintains adoption registry in which voluntary participants may register willingness to release identifying information and may obtain nonidentifying information as to health history and genetic and social history of adoptees. Fee to registrant $25; fee to person requesting information $45. (109.425-109.500; 413-130-0320, -0330). Upon request by adult adoptee (or adoptive parent of minor or deceased adoptee) who is registered with voluntary adoption registry, SCF will instruct Oregon licensed adoption agency to conduct search for adoptee's birth parents and/or genetic siblings. (ORS 109.502). Upon request by birth parent (or parent or adult sibling of deceased birth parent) or adult genetic sibling of adoptee who is registered with voluntary adoption registry, SCF will instruct Oregon licensed adoption agency to conduct search for adult adoptee relinquished by birth parent for adoption. (ORS 109.502). Person requesting search must pay search request fee. Search request fees are established by SCF rules and include fee paid to search organization and fee paid to SCF for search program administrative costs. (ORS 109.506). If search organization locates person being sought, confidential inquiry of that person is made to determine if contact is desired with person requesting search. If contact is desired, search organization (1) informs person being sought about voluntary adoption registry, including information and forms necessary for registration, (2) notifies person requesting search that person being sought was located and desires contact and has voluntary adoption registry information (but search organization cannot give person requesting search identifying information about person being sought) and (3) notifies voluntary adoption registry that person being sought was located and gives registry identifying information about that person, including person's address and date confidential inquiry was made. If contact is desired and person being sought does not register within 90 days after confidential inquiry, SCF will contact that person to offer registration materials and determine whether registration is still intended. If contact is not desired, search organization only informs person being sought about voluntary adoption registry. In no event can search organization make contact with person being sought after confidential inquiry. (ORS 109.503). If one birth parent is sought and contact is not desired, person requesting search may request search (and pay search request fee) for birth parent not previously contacted. However, search request for genetic sibling cannot be made if, upon previous search for birth parent, contact is not desired. (ORS 109.504).

See also topic 14.10 Infants, subhead Termination of Parental Rights.

14.02 [RESERVED]

14.03 COMMUNITY PROPERTY:

Uniform Disposition of Community Property Rights at Death Act adopted. (ORS 112.705-.775).

See topic 14.09 Husband and Wife.

14.04 DESERTION:

See topics 14.05 Divorce, 14.09 Husband and Wife.

14.05 [RESERVED]

14.06 DIVORCE:

This subject governed by c. 107.

Grounds for Absolute Divorce are: Circumstances justifying annulment (ORS 107.015), or irreconcilable difference between parties which have caused irremediable breakdown of marriage (ORS 107.025). Doctrines of fault and in pari delicto abolished in suits for annulment, dissolution or separation. (ORS 107.036).

Grounds for Legal Separation.

Separation may be rendered when irreconcilable differences cause temporary or unlimited breakdown of marriage; parties make and file agreement not to live together for at least one year; or irreconcilable differences exist and continuation of marriage protects legal, financial, social or religious interests. (ORS 107.025). One party must be resident of and domiciled in state when suit commenced. (ORS 107.075). Court has same powers with regard to property, support and child custody as in dissolution proceedings. (ORS 107.095-.105).

Citizenship Requirements.

No statutory provision.

Residence Requirements.

If married in state and suit is on grounds specified in Oregon statutes, residence or domicile of either party in state at time suit is commenced is sufficient. Otherwise one party must be resident or domiciliary at time suit is commenced and continuously for six months prior. (ORS 107.075).

Jurisdiction.

Circuit court has jurisdiction.

Venue is in county in which either party resides. (ORS 14.070).

Process.

Support Enforcement Division of State must be served with true copy of petition in any suit for dissolution, annulment, or separation where child support rights have been assigned to state. (ORS 107.087).

Pleading.

Petition must contain: Names, birth dates, and social security numbers, if known, of all children born or adopted during marriage; reference to and expected birth date of unborn children conceived during marriage; names, birth dates, and social security numbers, if known, of all children born to parties prior to marriage; whether domestic relation or support suit is pending; and acknowledgment that petitioner is bound by restraining order. At or prior to hearing detailed personal report is required. If real property is involved, petitioner may have notice of pendency of action recorded at time petition is filed. (ORS 107.085). Pleading forms listed. (ORS 107.500). Affirmative defenses abolished, but counterclaims relating to matters other than grounds for annulment, dissolution or separation are allowed. (ORS 107.055).

Practice.

If minor children are involved, court may cause investigation of parties' character, finances, order mental examinations (ORS 107.425), or appoint counsel for children on its own motion, by motion of either party, or if requested to do so by child at either or both parties' expense (ORS 107.425). Court may hold hearing on custody prior to other issues whenever petition is before it. (ORS 107.105). Any county may implement mandatory mediation programs for custody and visitation disputes prior to hearing. (ORS 107.755-107.795). Court may request district attorney to represent interests of state. (ORS 107.046). Court has full equity powers.

Conciliation services are available in some counties (ORS 107.520); invoked by petition of party (ORS 107.550); delays dissolution hearing for 45 days and requires attendance at conciliation proceedings (ORS 107.560, 107.570), unless 45-day period waived on joint stipulation or on order of court based upon affidavits. (ORS 107.560).

Judgment.

Entry of judgment authorizes immediate implementation of its provisions. (ORS 107.115). Judgment revokes provisions for spouse in prior will unless intent to contrary shown. (ORS 112.315).

Summary Procedure.

Available if residency requirement is met and irreconcilable differences (ORS 107.025) exist; no minor child born or adopted prior to or during marriage, or no child over age 18 attending school; wife is not pregnant at time proceeding is commenced; length of marriage ten years or less; no real property; debts $15,000 or less; equity in personal property $30,000 or less; and rights to spousal support or temporary relief waived. If response filed, treated as contested dissolution. (ORS 107.485-107.500).

Alimony.

Term “alimony” no longer used. (ORS 107.105, 30 Or. App. 581, 567 P.2d 599). Support, pendente lite and permanent, may be allowed. Permanent support may be ordered paid in gross or in installments. Trustees may be appointed to administer money allowed to party for maintenance. (ORS 107.105). Power is reserved to modify judgment as to future support upon showing of changes in circumstances. (ORS 107.135).

Support order may include one or more of following categories: (A) transitional, based on duration of marriage, training and employment skills, work experience, financial needs and resources, tax consequences, custodial and child support responsibilities, and other factors court deems just and equitable; or (B) compensatory, when there has been significant financial or other contribution to education, training, vocational skills, career or earning capacity of other party, based on amount, duration and nature of contribution, duration of marriage, relative earning capacity, extent to which marital estate has benefited from contribution, tax consequences, and other factors court deems just and equitable; or (C) maintenance, based on duration of marriage, age of parties, health of parties, standard of living established during marriage, relative income and earning capacity, training and employment skills, work experience, tax consequences, custodial and child support responsibilities, and other factors court deems just and equitable. (ORS 107.105). Compensatory order may be modified only because of involuntary, extraordinary and unanticipated change of circumstances that reduce earning capacity of paying spouse. (ORS 107.135). Spouse entitled to support should enjoy standard of living not unduly disproportionate to that enjoyed during marriage. (68 Or. App. 432; 683 P.2d 110). Hearing authorized after payment of support for ten years, to determine whether supported party under age of 60 has made reasonable efforts to become self-supporting. Support may not be terminated if granted in lieu of property to give other spouse tax benefit. At hearing court considers age of recipient, health, work experience and earning capacity of parties, age, health and dependency of minor children and efforts made to improve opportunities for employment. (ORS 107.407, 107.412). Record shall reflect if spousal support in lieu of property and if obligor dies prior to termination of such support, obligee may receive lump sum payment from obligor's estate. (ORS 107.105).

Allowance for prosecution, defense of suit, or support of party may be ordered pendente lite and for visitation rights of noncustodial parent (ORS 107.095) or in judgment (ORS 107.445) to be paid by husband or wife to his or her spouse upon showing of necessity (ORS 107.095). Court may order fees paid directly to party's attorney. (ORS 107.445).

Allowance for support of children may be ordered against either or both parents (ORS 107.105), including support or maintenance of child attending school, who is over 18 but under 21 (ORS 107.108). Child must carry at least one-half of full time course load to be “child attending school”. Court need not order support for child who is self-supporting, emancipated, or married. (ORS 107.105). In determining amount, court shall use formula established by support enforcement division of Department of Justice pursuant to federal Family Support Act of 1988. In establishing formula, division shall consider following criteria: Earnings resources, earnings history, reasonable necessities, and ability to borrow of each parent; educational, physical, and emotional needs of child; amount of assistance which would be paid to child under full standard of need of state's IV-A plan; preexisting support orders and current dependents; cost of day care if custodial parent works outside home; and other reasonable criteria. Formula must comply with following standards: Child is entitled to benefit from income of both parents to same extent as if family unit remained intact; both parents should share in cost of supporting child in same proportion as each parent's income bears to combined income. (ORS 107.105). Order may be made restraining either husband or wife from molesting minor children or other, or requiring either spouse to move out of home if necessary for best interest of children, or if spouse assaults or threatens to assault other. (ORS 107.095). Judgment may provide for payments by party not given custody either in gross or in installments for their support and welfare or for payment by both parties if joint custody is awarded. Trustees may be appointed to administer funds for their benefit. (ORS 107.105). Court may terminate, alter or modify support order as reasonably necessary under circumstances; compensatory order may be modified only because of involuntary, extraordinary and unanticipated change of circumstances that reduce earning capacity of paying spouse. (ORS 107.135). Party seeking modification has burden to show substantial change in circumstances since original judgment. (293 Or. 772; 652 P.2d 1247).

Support Enforcement Division of state or district attorney may appear in annulment, dissolution or separation proceedings at court's request. (ORS 107.046). Except when child to whom duty of support is owed is within jurisdiction of court of state which has enacted Uniform Child Custody Jurisdiction Act, or Uniform Child Custody Jurisdiction and Enforcement Act, court may at any time modify part of judgment or order requiring payment for support of minor child with whom parenting time is being denied. (ORS 107.431). Service of process on Support Enforcement Division required where such modification proceedings involve child receiving public aid. (ORS 107.431).

Court may terminate duty of support toward child who has become self-supporting, emancipated, or married, and may suspend support of child over 18 who is not “attending school”. Credit may be allowed in judgment, where such custody is with consent of custodial party. (ORS 107.135).

Enforcement of Support.

Court may provide for security, bond or other guarantee to secure support obligation. (ORS 25.230). Statutory mechanism for district attorney or Support Enforcement Division to enforce support decree, after notice and hearing opportunity to obligor, by requiring obligor's employer to withhold arrearages and ongoing support payments from disposable earnings. (ORS 25.310). Original domestic relation decree may include order directing employer or trustee of obligor to withhold support funds. (ORS 25.350). Administrative judgment debtor examination procedure established for Support Enforcement Division when support payments more than one month in arrears. (ORS 25.170).

Receipt of public assistance operates as assignment of support rights to Department of Human Resources and Department of Justice by operation of law. (ORS 418.042). Where support payments are paid to Department of Justice, any full or partial satisfaction of support payment judgment must be delivered to that department. (ORS 18.228). Division of Child Support of Department of Justice may enforce support order or decree when there is collectible unreimbursed assistance. (ORS 25.080).

Administrative procedures for establishing child support obligations when no court order in cases involving public assistance. Payment of public assistance creates debt to state. Division of Child Support will establish scale and formulas for determining minimum support obligations in these cases. (ORS 416.400-416.425).

Uniform Interstate Family Support Act (1992) adopted. (ORS 110.300-.441).

Disposal of property by either party during pendency of suit is restrained by court order after petition for dissolution is filed and served upon respondent. Restraining order restricts changes to insurance policies, including change of beneficiaries; encumbering or disposing of property without written consent of other party, except in usual course of business or necessities of life. Restriction does not include payments for attorney fees in existing action, real estate and income taxes, mental health expenses, or expenses to provide for safety and welfare of minor child. Restraining order must be attached to summons. (ORS 107.093). Interest in retirement or pension plan considered as property. (ORS 107.105).

Division of Property of Spouses.

Marital property system of property distribution prevails. Court must consider spouse's contribution as homemaker as contribution to marital assets. There is rebuttable presumption of equal contribution. Court must require full disclosure of assets. Court must consider tax consequences and other costs of sale of assets reasonably anticipated by parties. Division of property by judgment not taxable sale or exchange. (ORS 107.105). Custodian can be required to account for use of support. (ORS 107.105). Fault in causing dissolution may not be considered. (ORS 107.036). Court may approve voluntary property settlement agreements providing for support of party. (ORS 107.105).

Judgment, order, or court approved settlement may provide for direct payment to party of all or part of benefit payable to other party under Public Employees' Retirement System or Teacher's Retirement System.

Change of spouse's name to premarital form must be provided for in judgment if requested. (ORS 107.105).

Care and Custody of Children.

In custody and parenting time determinations best interests and welfare of child are primary (but not sole) consideration. Court must appoint counsel for children if children so request. (ORS 107.425). Court may consider emotional ties to family members, parties' interest and attitudes toward child, desirability of continuing existing relationships, and preference of child but may not rely on any one factor to exclusion of others. Rebuttable presumption that family home proper place for child to reside. (ORS 107.105). No automatic preference to mother in custody determination. (ORS 107.137). Preference for primary caregiver. (ORS 107.137). Court may consider conduct, marital status, incomes, social environment or lifestyle of parties only if it is shown that these factors are causing or may cause emotional or physical damage to child. (ORS 107.137). When appropriate, court shall recognize value of close contact with both parents and encourage joint custody. (ORS 107.105). Where custody and parenting time granted, court shall require that neither parent move more than 60 miles further distant from other parent without giving reasonable notice to other parent with copy of notice to court (ORS 107.159). Upon petition, court may grant visitation rights to grandparents of minor children in cases of annulment or dissolution of marriage of children's parents, death of parent, or separation. (ORS 109.119). Uniform Child Custody Jurisdiction and Enforcement Act adopted. (ORS 109.701-.834).

Remarriage.

Either party may remarry immediately after court signs judgment of dissolution. (ORS 107.115).

Foreign Divorces.

No statutory provisions.

Annulment of Marriage.

See topic 14.11 Marriage.

Antenuptial Contracts.

See topic 14.09 Husband and Wife.

DOMESTIC PARTNERS:

As of Jan. 1, 2008, registered domestic partners have same rights as married couple. (See Oregon Family Fairness Act, Notes following 106.990)

14.07 [RESERVED]

14.08 GUARDIAN AND WARD:

Provisions similar to Uniform Guardianship and Protective Proceedings Act, but with numerous modifications, adopted. “Fiduciary” means guardian, conservator, or other person appointed by court to assume duties for “protected person”. “Respondent” means person for whom entry of protective order is sought. (ORS 125.005).

Jurisdiction.

Probate courts and commissioners have exclusive jurisdiction over protective proceedings including guardianship, conservatorship, and appointment of fiduciaries. (ORS 125.015).

Selection of Guardian or Conservator.

Court appoints most suitable person as fiduciary after giving consideration to (1) specific circumstances of respondent, (2) any stated desire of respondent, (3) relationship by blood or marriage of person nominated to be fiduciary to respondent, and (4) any preference expressed by parent of respondent. (ORS 125.200).

Eligibility and Competency.

Person is not qualified to serve as fiduciary if person is incapacitated, financially incapable, minor, or is acting as health care provider for protected person. (ORS 125.205).

Appointment of Guardian or Conservator.

Upon petition, court may appoint guardian of minor after notice and opportunity for written objection is given to: (1) Minor if over 14 years of age; (2) person who has had principal care and custody of minor 60 days preceding date of petition; (3) any living parent of minor; and (4) if Children's Services Division proposes to be appointed guardian for purpose of consenting to adoption of minor, minor's brothers, sisters, aunts, uncles and grandparents whose identity and address can be ascertained with reasonable diligence, and (5) any persons named as potential guardians in will filed for probate action executed by parent of minor. (ORS 125.060). If necessary, court may appoint temporary fiduciary who will exercise powers of guardian for up to 60 days. (ORS 125.600). If no qualified and suitable person seeks appointment, Children's Services Division may be appointed guardian. (ORS 125.305). If interests of minor inadequately represented, court may also appoint attorney. (ORS 125.025).

Court may appoint guardian of incapacitated person upon petition of incapacitated person or any person interested in his welfare upon proper notice to incapacitated person, and after hearing objections, if any, to petition. (ORS 125.010). Court may appoint guardian if satisfied by clear and convincing evidence that: (1) Proposed ward is incapacitated in area(s) alleged in petition; (2) appointment is necessary and desirable for providing care and supervision of incapacitated person; (3) no less restrictive alternative is appropriate, and (4) proposed guardian is qualified, suitable and willing to serve. (ORS 125.305). At least 15 days prior to appointment of guardian for incapacitated person, notice of such action must be given to: (1) Person alleged to be incapacitated; (2) that person's spouse, parents and adult children; (3) any person serving as guardian or conservator or who has care and custody of alleged incapacitated person; (4) any person cohabitating with respondent and interested in affairs or welfare of respondent; (5) any attorney representing respondent in any capacity; (6) office of Long Term Care Ombudsman if respondent in, or proposed to be placed in, nursing home or residential facility; (7) system designated in 192.517 if respondent is resident of, or proposed to be placed in, mental health treatment facility; (8) any fiduciary, trustee, health care representative or attorney-in-fact for respondent; (9) representative of Adult and Family Services if respondent receiving benefits from State; (10) representative of Oregon Health Authority if respondent receiving medical assistance from State; (11) representative of U.S. Department of Veterans Affairs if respondent receiving benefits from DVA; (12) Attorney General and representative of facility if respondent incarcerated; (13) consulate for respondent's country if respondent is foreign national; and (14) if no above listed person other than person alleged to be incapacitated can be notified, one of closest adult relatives to alleged incapacitated person if any can be found. (125.060, 2009 c. 595).

Notice must be personally served on alleged incapacitated person, with copy of petition attached. (ORS 125.065). Notice shall set forth purposes and possible consequences of hearing in understandable language and shall list following rights of alleged incapacitated person: (1) Right to request attorney and to be informed of any free or low-cost legal and other relevant services in area; (2) right to request hearing; (3) right to present evidence and cross-examine witnesses; (4) right to request that power of guardian, if any, be limited by court; (5) right to request removal of guardian or modification of guardianship order; and (6) any other matters court deems appropriate. (ORS 125.070). Alleged incompetent person may not waive notice. (ORS 125.060).

Court may appoint conservator of estate of protected person upon petition, after notice and hearing upon objections, if any, for minor or incapacitated person. (ORS 125.400).

Qualification.

Guardian of incapacitated person may be required to give bond (ORS 125.305) and court may require conservator to furnish bond equaling aggregate capital value of property of estate, plus one year's estimated income minus other arrangements for security made by court with conservator and minus value of any land which fiduciary lacks power to sell or convey without court authorization. (ORS 125.410).

Those not qualified to act as guardian or conservator are: (1) Incapacitated persons; (2) minors; (3) financially incapable persons; (4) persons acting as health care providers for protected person. (ORS 125.205).

Powers and Duties.

Guardian of minor has powers and responsibilities of a parent who has not been deprived of custody of his minor and unemancipated child, except not legally obligated to provide from his own funds for ward and not liable to third persons by reason of guardian and ward relationship for acts of ward. (ORS 125.315). Guardian of incapacitated person has essentially same powers, rights and duties respecting ward that parent has respecting unemancipated minor child except not liable to third persons for acts of ward solely by reason of guardian and ward relationship. (ORS 125.235). Conservator of estate of protected person has management and control of estate and power to collect, hold and sell estate assets, including land, without prior court order (ORS 125.445), and may in certain instances distribute principal or income without court authorization or confirmation (ORS 125.425). However, notice to those persons required by 125.060(3) and approval by court is required prior to sale of protected person's principal residence. (ORS 125.430). Conservator has powers conferred by law on trustees. (ORS 125.445). If estate has personal property worth not more than $10,000 over unpaid expenses, conservator, with prior approval of court by order, may pay expenses and claims of estate and deliver all remaining personal property to person designated by court order. Recipient of property must give receipt to conservator which is release and acquittance for property so delivered. (ORS 125.535).

When protected person dies, conservator must give will of protected person to court and give notice to personal representative or devisees named in will. (ORS 125.530).

Investments to be determined by conservator of estate of a protected person, but must take into account any known estate plan of protected person, including will, any revocable trusts of which he is settlor, any transfer, contract or joint ownership arrangement with provisions for payment or transfer of benefits or interests at death. (ORS 125.460). Conservator has powers conferred by law on trustees in state. (ORS 125.445).

Securities in Name of Nominee.

Conservator may hold securities in name of nominee, without disclosure of conservatorship, but is liable for acts of nominee. (ORS 125.445). See category 13 Estates and Trusts, topic 13.15 Trusts, subhead Securities in Name of Nominee.

Liabilities.

Unless otherwise provided by contract, conservator not liable on contract in fiduciary capacity except for failure to reveal representative capacity and identify estate in contract, and is individually liable for obligations arising from ownership or control of property of estate or for torts committed in administration only if personally at fault. (ORS 125.485).

Accounts.

Guardian of incapacitated person must file written report with court within 30 days after each anniversary of appointment. (ORS 125.325). Conservator must file accounting within 60 days of each anniversary of appointment. (ORS 125.475). If protected person recovers from disability or minor attains age of majority, conservator may settle account with protected person without filing report with court. Protected person must give conservator receipt for property delivered who then must file copy of receipt with court. (ORS 125.475).

Inventory.

Guardian of incapacitated person required to list monies received and spent on behalf of ward by way of written report required under 125.325. Conservator must file inventory of all estate property within possession and knowledge by 90 days after appointment and supplemental inventory when other property comes into his possession within 30 days of possession or in next accounting. (ORS 125.470). If estate of protected person includes real property, conservator may have certified copy of inventory recorded in deed record of clerk of county in which real property is situated (ORS 125.470).

Termination of Guardianship or Conservatorship.

Guardianship of minor terminates upon death, resignation approved by court, or removal of guardian, or upon minor's death or majority. (ORS 125.230). Guardianship of incapacitated person terminates upon death of guardian or ward, order determining incapacity of guardian, or removal or resignation subject to court approval. (ORS 125.230). Conservatorship terminates by court order that minority or disability of protected person has ceased. (ORS 125.090).

Insane Persons.

See subhead Appointment of Guardian or Conservator, supra.

Foreign Fiduciary.

Upon accepting appointment, resident or nonresident fiduciary submits personally to jurisdiction of court in proceedings relating to protective proceeding. (ORS 125.215).

Gifts to Minors.

See topic 14.10 Infants.

Uniform Fiduciaries Act not adopted.

Uniform Simplification of Fiduciary Security Transfers Act not adopted.

14.09 HUSBAND AND WIFE:

Disabilities of Married Women.

Married woman has same civil rights and privileges which are enjoyed by her husband including right of action for loss of consortium of husband. (ORS 108.010).

Separate Property.

Neither spouse liable for liabilities of other incurred before marriage or incurred separately during marriage. (ORS 108.020,108.050). Both spouses generally liable for family expenses and education of children. After separation, one spouse is not responsible for debts incurred by other, except for debts to provide for spouses' minor children. (ORS 108.040). Neither spouse has interest in property owned by other spouse, except as to expenditures for family or education of children. (ORS 108.060). Obligation for expenses of minor stepchildren ceases upon entry of judgment of dissolution. (ORS 109.053).

Contracts.

Husband and wife may contract with each other and transact business with each other. (ORS 108.060, 108.080, 108.090).

Neither spouse has any rights in property owned by other which can be subject of contract between them (ORS 108.060), except that property settlement may be incorporated by court in domestic relations judgment (ORS 107.105).

Married woman is liable on her contracts and liable for her torts same as though unmarried. Husband not responsible merely by marital status. (ORS 108.030, 108.060).

Prenuptial Agreements.

Uniform Premarital Agreement Act adopted. (ORS 108.700-.740). Parties to intended marriage may enter into premarital agreement in writing regarding their real and personal property of all kinds. Parties may contract with respect to any matter, including personal rights and obligations not in violation of public policy or law. Parties' agreement may not adversely affect child's right to support. (ORS 108.710). Parties may contract to prohibit spousal support; however, if such agreement results in one party becoming eligible for public assistance, court may require spousal support to extent necessary to avoid eligibility. (ORS 108.725).

Actions.

Married woman may sue or be sued without her husband being joined as party. (ORS 108.010).

No action for alienation of affection or criminal conversation. (ORS 31.980, 31.982).

Spouses may sue each other on contract or for damages to their separate property. (ORS 108.080). Spouses may sue each other for ordinary negligence (306 Or. 347, 759 P.2d 253); may also maintain action for wilful tort (227 Or. 45, 361 P.2d 64).

Action for abuse provides immediate ex parte hearing with mandatory injunctive relief upon showing of immediate and present danger of abuse. (ORS 107.700-.730).

Estates by the Entirety.

See category 21 Property, topic 21.16 Real Property.

Conveyance or Encumbrance of Property.

Any conveyance, transfer or lien executed by either husband or wife to or in favor of the other is valid to same extent as between other persons. (ORS 108.090).

Either spouse may dispose of his or her property, real or personal, without joinder of other. Dower and curtesy abolished. (ORS 112.685-.695). See category 21 Property, topics 21.08 Dower, 21.05 Curtesy.

Agency.

Either spouse may constitute other as attorney in fact to control or dispose of property for their mutual benefit, and such power may be revoked. (ORS 108.100).

Abandonment and Nonsupport.

Spouse or agency providing public assistance may petition court for order of support in county in which spouse resides or may be found. Fee $5. (ORS 108.110-.130). Crime of criminal nonsupport committed if parent or other person lawfully charged with support of child under 18 years of age knowingly fails to support such child without lawful excuse. (ORS 163.555).

Care and Custody of Children.

See topic 14.05 Divorce. Uniform Child Custody Jurisdiction Act adopted. (ORS 109.700-.930).

Uniform Interstate Family Support Act adopted effective July 1, 1994 (ORS 110.300-.441), replacing Revised Uniform Reciprocal Enforcement of Support Act (1968) (repealed).

Community Property Law of 1947 was repealed, effective Apr. 11, 1949. (ORS 108.520, 108.550). Prior rights are not affected. (ORS 108.520). Community property may be converted into property held in common, by the entirety, or separately, by agreement in writing signed by both spouses. (ORS 108.530). On death of either spouse after Apr. 11, 1951, all property which would have been separate but for the 1947 law is subject to disposition by will and to descent and distribution as separate property of such decedent as though the community property law had not been passed. (ORS 108.540). Uniform Disposition of Community Property Rights at Death Act adopted. (ORS 112.705-.775).

Cohabitant Benefits.

Common-law marriage not recognized.

Cohabitant of qualified worker may collect workers' compensation benefits as if married spouse if couple cohabitated in Oregon more than one year prior to date of injury and children living as result of relation. (ORS 656.226). “Common-law spouse” intestacy status not available for deaths after Jan. 1, 2000. (ORS 112.017, rep. 1999, c. 133).

See also topics 14.11 Marriage, Divorce; categories 5 Civil Actions and Procedure, topic Evidence, subhead Witnesses; Debtor and Creditor, topic Homesteads; Property, topics

Curtesy, Dower.

14.10 INFANTS:

Age of majority for both males and females is 18, or, upon marriage according to law (ORS 109.510; 109.520), but under Oregon gift law (ORS 126.805 to 126.886), age of majority is 21 (ORS 126.805[1]).

Emancipation.

Infant may be emancipated by act of parent (35 Or. 268, 57 P. 908) or by decree (ORS 419B.550-.558).

Disabilities of minors include: Marriage if under 17 years of age (ORS 106.010); making of contracts (143 Or. 101, 20 P.2d 409) except contracts for necessaries (46 Or. 47, 79 P. 185), educational loans (ORS 348.105); and contracts for necessities of residential dwelling unit and for utility services to that unit (ORS 109.697); conveyance of realty (ORS 93.010); execution of wills unless lawfully married (ORS 112.225); service as personal representative (ORS 113.095[2]); guardian, or conservator (ORS 126.045[2]); voting (Or. Const. Art. II, § 2); holding of certain public offices (Or. Const. Art. IV, § 8); service as juror (ORS 10.030); service as incorporator (ORS 60.044); service of process (ORCP 7 E).

Contracts.

Infants may be bound to contracts for necessaries (46 Or. 47, 79 P. 185) including contracts for necessities of residential dwelling unit and for utility services to that unit (ORS 109.697). Infants are also bound for educational loans. (ORS 348.105). Other contracts are voidable upon attaining majority (75 Or. 578, 147 P. 558); however, if contract is fair, infant must return value received, undepreciated, to rescind contract (97 Or. 464, 191 P. 660).

Uniform Transfers to Minors Act (ORS 126.805-.886) adopted, effective Jan. 1, 1986, with following variations: (a) Act contains no definition of “person”; (b) transfer to adult member of beneficiary's family or trust company in cases where no custodian nominated or nominated custodian dies is limited to $5,000 (ORS 126.826[3]).

Uniform Securities Ownership by Minors Act not adopted.

Actions.

Minors are represented in suits or actions by guardian or conservator of estate. If there is no guardian or conservator of estate they are represented by guardian ad litem, who may be appointed by court in which action is brought, upon application of infant, if he is at least 14 years old. If infant is less than 14 years old, relative or friend of infant may make application if infant is plaintiff. If infant is defendant and less than 14 years old, relative or friend of infant, or any other party, may make application. (ORCP 27).

Adoption.

See topic 14.01 Adoption.

Alcoholic Beverages.

One must be at least 21 years old to buy alcoholic beverages. (ORS 471.105).

Medical Treatment.

Any infant may consent to treatment of reportable venereal disease without consent of parents but parents who have not consented not liable for payment. (ORS 109.610). Any infant may receive birth control information and services without parental consent, and infants at least 15 years old may obtain medical and dental treatment without consent of parents (ORS 109.640), but parents may be advised of such information and services (ORS 109.650). Person 16 or over may donate blood without parental consent. (ORS 109.670).

Support of Minors.

Expenses of family and education of minor children are chargeable upon property of both husband and wife. (ORS 108.040). Abandonment, neglect and nonsupport are crimes. (ORS 163.535, 163.545, 163.555).

Parental Responsibility.

In addition to any other remedy provided by law, parents entitled to legal custody of unemancipated minor child are liable up to $7,500 per claimant for actual damages to person or property caused by child's intentional torts. (ORS 30.765). Parents entitled to legal custody of unemancipated minor are liable up to $5,000 for costs incurred by forester in suppressing fires on forest land willfully or negligently caused by their minor child. (ORS 477.745). Parents or legal guardians of child under 15 may be prosecuted for failing to supervise child if child violates curfews, fails to go to school, or commits act that brings child within jurisdiction of juvenile court. Parents or legal guardians may be ordered to attend parent training, fined up to $1,000, and shall be ordered to pay restitution up to $2,500. (ORS 163.577). Above statutes do not apply to foster parents. Parents and legal guardians can be required to enter into contract with juvenile department in regard to supervision and implementation of child's probation. If parents or legal guardians breach contract, they may be fined up to $1,000. (ORS 419C.470).

Termination of Parental Rights.

Juvenile court has authority, upon finding that parent or parents are unfit, to terminate rights of parent or parents of child within its jurisdiction. Procedure for termination includes service of summons on parent or parents, right to appointed counsel if indigent, hearing, and right of appeal. Facts on basis of which parental rights are terminated must be established by clear and convincing evidence. After termination, child may be placed in custody of public or private institution or agency authorized to consent to adoption of children. (ORS 419B.500-.530).

Housing.

Discrimination against purchaser with children prohibited in certain state funded low income housing. (ORS 456.725). Minors who are at least 16 years old, parent, or pregnant may contract for necessities of residential dwelling unit and for utility services to that unit. (ORS 109.697).

Juvenile Code.

Set forth at 419A.-.C.

14.11 MARRIAGE:

Minimum age: 17. (ORS 106.010).

Consent Required.

Parent or guardian of party less than 18 years old. If either party has no parent or guardian resident within state and one party has resided within county for six months preceding, consent of nonresident parent or guardian is not necessary for issuance of license. (ORS 106.060).

Medical Examination.

Medical certificate not prerequisite to issuance of marriage license. (ORS 106.041; 106.077).

License Required.

Issued by county clerk after receipt of written application and satisfaction of other legal requirements. (ORS 106.041-.077). Both parties must apply. (ORS 106.041).

Affidavit of nonparty establishing exemption from parental consent requirements must be filed with county clerk. County clerk may accept any reasonable proof of age of party. (ORS 106.050).

Waiting Period.

License becomes effective three days after application signed by applicants. Three day period waived by court order or order of county clerk upon good and sufficient cause. (ORS 106.077).

Fees.

For application for marriage license, $25; for issuance of marriage license and registering its return $25; for taking affidavit for and registering Declaration of Domestic Partnership $25; for solemnizing marriage, $25. (ORS 106.045[1]; 106.120; 205.320[6]). Judicial officer and county clerk may charge fee not to exceed $100 plus actual costs for solemnization of marriage performed at place other than courthouse where judicial officer or county clerk serves and outside of normal working hours. (ORS 106.120).

Ceremonial Marriage.

Marriage may be solemnized by any clergyperson authorized by congregation, judicial officer (circuit, municipal, federal, or magistrate judge or justice of peace) within officer's jurisdiction, or county clerk. (ORS 106.120). No particular form of ceremony required except assent and declaration in presence of solemnizer and two witnesses. (ORS 106.150). Ceremony by one professing appropriate authorization is not affected by want of power if either participant relies. (ORS 106.130).

Record of Marriages.

Persons solemnizing marriage must file certificate within ten days with clerk of county issuing license. (ORS 106.170). Person conducting ceremony required to issue certificate in statutory form to parties. (ORS 106.160).

Common law marriage cannot be created in Oregon (113 Or. 279, 232 P. 658), but if valid in state where entered into, recognized as valid in Oregon (224 Or. 76, 355 P.2d 724).

Proxy Marriages.

Marriages by proxy are not authorized. (ORS 106.010). Parties must express consent in presence of person solemnizing and witnesses. (ORS 106.150).

Marriages by written contract not authorized.

Prohibited Marriages.

Marriage to following persons void if solemnized in Oregon: person having living spouse; between kindred (whole or half blood) who are first cousins or nearer according to civil law except when parties are first cousins by adoption. (ORS 106.020). But children thereof are legitimate. (ORS 106.190). Suit may be brought to declare marriage void ab initio. (ORS 107.005).

Declaration of Validity.

Marriage may be declared valid upon petition of party where other claims it void or voidable under ORS 106.020. (ORS 107.005).

Annulment may be granted where marriage procured by force or fraud or either party lacked legal age or sufficient understanding and has not been subsequently ratified. (ORS 107.015).

Residence requirements for annulment are: (1) Marriage solemnized in Oregon, either party resident or domiciled in Oregon at time suit commenced, and grounds are exclusively those set out in Oregon code; (2) otherwise, at least one party must be resident of or domiciled in Oregon continuously for six months prior to and at time of suit. (ORS 107.075). For separation, one party must be resident of or domiciled in Oregon at commencement of suit. (ORS 107.075[3]).

Antenuptial Contracts.

See topic 14.09 Husband and Wife.

Legitimacy of Children.

Parental and familial legal rights are same for legitimate and illegitimate children. (ORS 109.060). If child's parents marry within six months after prior marriage of one is declared void or ended by decree of divorce, child is legitimate if marriage of parents is in all other respects legal and regular. (ORS 106.190). Paternity may be established by statutory presumption, joint declaration or acknowledgment, or filiation proceedings. (ORS 109.070, 109.090, 190.092, 109.124-.235). Paternity decisions from other states receive full faith and credit. (ORS 432.289). State may apply to court or administrator to require genetic parentage tests for purpose of determining support obligations. (ORS 109.070). Upon establishment of paternity, father has same rights as father who is or was married to mother of child. (ORS 109.094).

Name.

Upon entering marriage, party may retain party's surname prior to marriage, change surname to surname of other party, or to hyphenated combination of surnames of both parties. (ORS 106.220).

Domestic Partnerships.

As of Jan. 1, 2008, same sex domestic partnerships having similar features to marriage are allowed. (See Oregon Family Fairness Act, Notes following 106.990).

See also topics 14.09 Husband and Wife, 14.05 Divorce, 14.01 Adoption.

14.12 MARRIED WOMEN:

See topics 14.09 Husband and Wife, Marriage; categories 5 Civil Actions and Procedure, topic Evidence, subhead Witnesses; Debtor and Creditor, topic Homesteads; Estates and Trusts, topics Executors and Administrators, Wills; Property, topic Dower.

15 HEALTH

15.0115.04

15.05 FOOD, DRUGS, DEVICES AND COSMETICS:

Food and Other Commodities.

Regulated by c. 616.

Pharmacists; Drug Outlets; Drug Sales.

Regulated by c. 689.

15.06 [RESERVED]

15.07 HEALTH INSURANCE BENEFITS:

See also category 16 Insurance.

Health and Life Insurance.

Regulated by c. 743.

Oregon Health Plan.

Establishes program within Oregon Health Authority, in cooperation with other state agencies, to provide medical assistance to individuals in need with family income below federal poverty level and who are eligible for services under c. 414. (2009 c. 595).

15.07A MEDICAL USE OF MARIJUANA:

Oregon Medical Marijuana Act.

Regulated by 475.300-.346. Person who possesses registry identification card issued under 475.309 may engage in, and designated primary caregiver may assist in, medical use of marijuana only as justified to mitigate symptoms or effects of debilitating medical condition. (ORS 475.306[1]). For limits on amount possessed, delivered or produced, see 475.306(1).

15.07B PHYSICIAN-ASSISTED SUICIDE:

Oregon Death with Dignity Act.

Capable adult who is resident of Oregon who has been determined by attending physician and consulting physician to be suffering from terminal disease, who has voluntarily expressed wish to die, may make written request for medication for purpose of ending life in human and dignified manner. (ORS 127.800-.897). No person shall qualify solely because of age or disability. (ORS 127.800[2]).

15.0815.11

15.12 PUBLIC HEALTH:

See generally c. 431.

Licensing of physicians and surgeons regulated by 677.100-.288.

Licensing of nurses and nursing home administrators regulated by c. 678.

15.13 SMOKING REGULATIONS:

Oregon Indoor Clean Air Act.

Regulated by 433.835-.870. As of Jan. 1, 2009, smoking prohibited in public places and places of employment. (ORS 433.840). Smoking prohibited within ten feet of entrances, exits, windows that open or ventilation intakes of public places or places of employment. (ORS 433.845). Exceptions for certain smoke shops and cigar bars and certain hotel rooms. (ORS 433.850).

Tobacco Sales.

Regulated by 431.840-.853.

16 INSURANCE

16.01 INSURANCE COMPANIES:

Defined.

(ORS 731.102).

Regulated by Insurance Code. (cc. 731-35, 737, 742-44, 746, 748, 750-752). Exceptions listed in 731.032-.036.

Supervision by Director, Department of Consumer and Business Services, 440 Labor & Industries Building, Salem, Oregon 97310. (ORS 731.236; 731.076).

Rates regulated by c. 737. Applies to all insurance except reinsurance, aircraft, wet marine, transportation, life, health, and surplus lines. (ORS 737.035). Insurer may file and use, except for title, workers' compensation and commercial liability. (ORS 737.205-.209, 737.320). Rating organizations must be licensed. (ORS 737.350). Life and health rates (except noncredit group life and health) to be filed with Director. (ORS 743.015; 743.018). Rates for individual and small employer health plans subject to certain restrictions. (ORS 743.737, .767).

Organization.

Upon receipt of permit to organize (ORS 732.015), insurance company may be incorporated either with (ORS 732.025) or without capital stock (ORS 732.035) by persons 21 or older or by financially responsible corporations (ORS 732.085). Domestic mutual insurers may become domestic stock insurers upon conversion or reorganization approved by Director. (ORS 732.600 et seq.). Every insurer who is member of insurance holding company system must register with Director; foreign insurers exempt if subject to similar requirements in domicile. (ORS 732.551). Filing fee to organize domestic insurer as Director establishes by rule. (ORS 731.804). Private corporation law (c. 60) governs powers, duties and relationships of domestic insurer, except to extent inconsistent with Insurance Code (ORS 732.005). Insurance Code governs formation of insurers (ORS 732.015 et seq.), general corporate procedures (ORS 732.205 et seq.), directors, officers and employees (ORS 732.305 et seq.), shares, shareholders and members (ORS 732.405 et seq.), acquisition, merger and consolidation (ORS 732.517 et seq.), annual reports (ORS 732.460), fees and taxes (ORS 731.804 et seq.). Domestic insurer may transfer domicile to another state upon approval of Director. (ORS 731.364). Foreign insurers governed by provisions of Insurance Code (ORS 731.362), but not general laws governing foreign corporations (ORS 731.378). See subhead Foreign Insurance Companies, infra.

Annual statements must be filed with Director and with National Association of Insurance Commissioners by Mar. 1 on form adopted by Director, who will consider form recommended by National Association of Insurance Commissioners. (ORS 731.574). Audit by independent certified public accountant required. (ORS 731.488).

Medical malpractice insurers must report claims to state licensing boards within 30 days. (ORS 742.400).

Policies.

Statutes regulating are: Generally (ORS 742.001-.065; 743.010-.055; 743.100-.109); individual life and annuity (ORS 743.150-.295); group life (ORS 743.303-.358); health (ORS 743.700-.816); individual health (ORS 743.402-.498); franchise health (ORS 743.516-.520); group health (ORS 743.522-.562; 743.600-.622; 743.706); health insurance for small employers (ORS 743.730-.745); student health (ORS 743.550); medicare supplement (ORS 743.680-.689); long term care (ORS 743.650-.656); credit life and health (ORS 743.371-.380); fire (ORS 742.200-.254); home protection (ORS 742.280); mortgage (ORS 742.282-.286); surety (ORS 742.350-.376); medical malpractice (ORS 742.400-.405); motor vehicle (ORS 742.449-.572); legal expense plans (ORS 750.505-.715); oral binders (ORS 742.043). Life policies may provide for acceleration of death benefits upon occurrence of specified qualifying events. (ORS 743.154).

Intentional torts cannot be insured against. (278 Or. 409, 564 P.2d 681).

Punitive damages may be insured against. (279 Or. 199, 567 P.2d 1013).

Reasonable expectations doctrine has not been adopted; insurance policies construed as other contracts. (289 Or. 295, 613 P.2d 32).

Insurable interest does not require legally enforceable right. (258 Or. 545, 484 P.2d 310). Interest in insured property must exist at time of loss. (ORS 742.011).

Assignment is permitted or not according to terms of policy. (ORS 743.043).

Termination of Insurance Policies.

Automobile (ORS 742.560-.572); fire (ORS 742.224, .226, .254); group life (ORS 743.333, .336); surety bonds (ORS 742.358-.362, .366); individual health insurance (ORS 743.471-.472); group health insurance (ORS 743.529, .560-.562, .600-.622, .760-763); individual life insurance (ORS 743.204-.222); home protection insurance (ORS 742.280[2]); commercial liability (ORS 742.700-.710); withdrawal from commercial liability lines also restricted (ORS 731.482). Liability or fire coverage of certified day care center may not be terminated or withheld solely because of provider status. (ORS 742.260).

Warranties are deemed to be representations unless fraudulent or material to acceptance of hazard or risk. (ORS 742.013). But see 742.208 for fire policies.

Coverage.

Group health insurance must cover treatment for chemical and alcohol dependence, diabetes self-management education, and certain mental conditions. (ORS 743.556, .704). Health policies must cover pelvic and pap smear examinations and examinations for breast cancer and permit access to women's health care provider. (ORS 743.727-.728, 743.813).

Overlapping Coverage.

Repugnant clauses disregarded and insurers share liability in proportion to policy limits. (219 Or. 110, 341 P.2d 110; 219 Or. 130, 346 P.2d 643).

Incontestability for individual life insurance policies two years from date of issuance during lifetime of insured, except for nonpayment of premiums. (ORS 743.168). Group life insurance incontestable two years from date of issuance except for nonpayment of premiums.

(ORS 743.315).

Trade practices, including unauthorized insurance, premium financing and misuse of insurance information. (ORS 746.005-.991). Use of genetic testing in connection with insurance underwriting restricted. (ORS 746.135).

Unfair claim settlement practices prohibited (ORS 746.230), prohibition not applicable to wet marine and transportation insurance (ORS 746.005).

Rates based on “fictitious groupings” prohibited, subject to specified exceptions. (ORS 737.346). But see 735.325 et seq. relating to purchasing groups, and 737.346, relating to “wrap up” insurance for certain construction projects.

Rebates.

Prohibited unless specified in policy (ORS 746.045); prohibition not applicable to wet marine and transportation insurance (ORS 746.005).

Unfair Discrimination.

Prohibited; prohibition not applicable to wet marine and transportation insurance. (ORS 746.005, .015, .018).

Controlled insurance restricted. (ORS 746.065).

Undefined category of unfair or deceptive trade practices prohibited. (ORS 746.240).

Liens on life insurance policies are allowable assets in determining financial condition of insurer. (ORS 733.010).

Adjusters and insurance producers must be licensed, unless exempt. (ORS 744.053, .056, .505, .515). With certain exceptions, written examination required. (ORS 744.508, .535). Insurance producers and adjusters must be residents of Oregon or state or Canadian province which permits Oregon residents to act as insurance producers and adjusters, or have place for transacting business in Oregon. (ORS 744.059, .063, .528). Insurance producers and adjusters must satisfy requirements established by rule. (ORS 744.001, .525). Insurance producer shall not act as agent of insurer unless insurance producer is appointed agent of that insurer; or insurance producer transact insurance on behalf of another insurance producer who is appointed agent of that insurer. Except as provided in group contract of insurance, any person who solicits or procures application for insurance as agent of insurer shall be regarded as agent of insurer issuing policy and not agent of insured. (ORS 744.078). With certain exceptions, company must give agent 90 days' written notice of termination. (ORS 744.175). Resident agents must maintain separate trust account unless average monthly premium balances exceeded $2,000,000 for last 12 months and certificate of deposit maintained in amount of such balances. (ORS 744.225, .227).

Annual license fees are to be set by Director rule. Authorized insurers assessed to support Department budget based on premiums on Oregon risks. (ORS 731.804).

Dividends to shareholders may be declared and paid only from earned surplus unless Director approves prior to declaration, and may not be paid if insurer would be unable to pay debts or capital and surplus would be less than required capitalization or greater amount specified by Director. (ORS 732.225, .576). Dividends to be reported to Director ten business days prior to payment. (ORS 732.554). Extraordinary dividends and other extraordinary intercompany transactions require approval of Director. (ORS 732.574-.576).

"Insurance consultants" must be licensed unless exempt; examination, errors and omissions insurance, and disclosures to prospective clients required. (ORS 744.605-.665).

Third party administrators of life or health insurance coverage must be licensed unless exempt, maintain errors and omissions insurance. (ORS 744.700-.740). Written agreement with insurer addressing specified subjects, required. (ORS 744.720).

Viatical settlement or life settlement providers and brokers must be licensed unless exempt and are subject to various disclosure, filing, and recordkeeping requirements and regulatory prohibitions. Life settlement contracts must be in writing, include rescission rights and be in form approved by Director. (ORS 744.316, Note, Life Settlement Contracts).

Multiple employer welfare arrangements must obtain certificate from Director. Trust carrying out MEWA generally subject to regulation and taxation like health insurer, with certain exceptions. (ORS 750.301-.341).

Managing general agents must be licensed unless exempt, maintain errors and omissions insurance, have written contract with insurer addressing specified subjects, undergo independent financial examination. (ORS 744.300-.316).

Reinsurance intermediary brokers and managers must be licensed unless exempt, are subject to special regulations, including restrictions on contracts with insurers and reinsurers. (ORS 744.800-.820).

Producer-controlled property and casualty insurers are subject to special regulations, including restrictions on contracts with controlling producer. (ORS 732.810-.814).

Assumption reinsurance agreements require approval by Director. Policyholder notification and opt-out provisions exist. (ORS 742.150-.162).

Service contract obligors must register with Director and provide proof of financial stability. Service contracts backed by registered obligors are not subject to Insurance Code but are subject to certain other requirements. (ORS 646.263-.285). Reimbursement insurance policies backing obligors must meet prescribed standards. (ORS 742.390-.392).

Investments are regulated. (ORS 733.510-780).

Liability Insurance.

Insurer is liable to judgment creditor of insured although insured bankrupt or insolvent, when judgment arose from injuries covered by the policy. (ORS 742.031).

No-Fault Insurance.

See category 23 Transportation, topic 23.01 Motor Vehicles, subhead No-Fault Insurance.

Fraternal benefit societies are regulated (c. 748), subject to specified provisions of Insurance Code (ORS 748.603).

Health care service contractors and health maintenance organizations are regulated (ORS 750.003-.095), subject to specified provisions of Insurance Code (ORS 750.055).

Legal expense organizations are regulated (ORS 750.505-.715), subject to specified provisions of Insurance Code (ORS 750.705).

Insurance for public bodies covered by c. 278.

Medical malpractice insurance covered by 742.400-.405.

Condominiums and Insurance.

(ORS 100.435).

Reciprocal insurers are organizable when bona fide applications for at least 200 risks aggregating $3,000,000 are made; special limitations for wet marine hull insurance. (ORS 731.369). Process may be served upon registered agent or upon Director of Department of Insurance and Finance. (ORS 731.370, .434). Surplus requirements are regulated. (ORS 731.566-.570). Foreign or alien insurers must maintain $50,000 on deposit with state treasurer of their state of domicile, or in escrow with bank or trust company in such state if state treasurer not empowered to accept such deposits (ORS 731.369); domestic reciprocal insurer must deposit $50,000 with Department of Consumer and Business Services unless exempt (ORS 731.362).

Attorney's Fees in Actions on Policies.

Insured may recover attorney fees in suit on insurance policy where settlement was not made within six months after proof of loss and recovery exceeds amount of tender. (ORS 742.061). Attorneys' fees also allowed in actions against unauthorized insurers (ORS 746.350); and for collusive ratings (ORS 737.245).

Supervision, rehabilitation and liquidation of insurers are subject to comprehensive statutory provisions. (ORS 731.014-.440).

Insurance guaranty associations established. (ORS 734.510-.890).

Process Agent.

All authorized insurers must designate agent to receive process; if insurer fails to designate agent, or agent cannot be found, Director of Department of Consumer and Business Services is process agent. (ORS 731.434; 60.111-.121).

Foreign Insurance Companies.

(1) Qualification.

Foreign insurer must obtain certificate of authority from Director. (ORS 731.354). Application must include certified copy of charter or articles of incorporation; statement of financial condition; must satisfy Director that insurer is legally organized to do proposed business and will maintain required capitalization; must make required deposits. (ORS 731.362). Insurer generally must have capital and surplus of $2,500,000, except workers' compensation insurer, $5,000,000; mortgage insurer, $4,000,000; home protection insurer, from $250,000 to $1,000,000 depending on aggregate premiums; title insurer, $2,500,000; reciprocal insurer must have surplus of $2,500,000; reciprocal insurer which exchanges policies of insurance covering workers' compensation insurance, $5,000,000; health care service contractor $2,500,000; and legal expense organization (unless backed by insurance), bond or deposit of $10,000 to $100,000, depending on type of plan offered, amount of fees collected. (ORS 731.554-.566; 750.045,.309,.685). Director authorized to impose greater capital and surplus requirements on insurers if necessary to maintain insurer's solvency. (ORS 731.554). Redomestication as domestic insurer permitted upon approval by Director. (ORS 731.363).

(2) Fees and Taxes.

Fee as set by rule must accompany application for certificate of authority; fee and assessment as set by Director and (prior to 1997) premium tax of 2¼% (subject to certain exceptions) are payable annually; estimated tax payments quarterly. (ORS 731.804-.844). See subhead Taxes, infra.

(3) Deposits.

To protect policyholders, some insurers must deposit securities with Department of Consumer and Business Services or, in some cases in lieu thereof, post surety bond; surety insurer $250,000; title insurer $100,000; workers' compensation insurer, formula in 731.628; home protection insurer, $100,000; mortgage guaranty insurer, $500,000. (ORS 731.624-.628). Worker's compensation reinsurer must make deposit for insurer to take credit for reinsurance. (ORS 731.628).

(4) Annual statement of financial condition as of Dec. 31 must be filed by Mar. 1, supplements to annual statement must be filed by due date, and annual fee and premium tax must be paid by Apr. 1 or certificate of authority expires 60 days after due date. (ORS 731.410, .574, .816-.820).

(5) Unauthorized Insurers.

Unauthorized person transacting insurance in state is subject to Insurance Code and jurisdiction of state courts. (ORS 731.022, 731.354, .356, .434). Service of process may be had on Director of Department of Insurance and Finance. (ORS 746.320). Violators of Insurance Code are subject to civil penalties of $10,000 for each offense as well as profit gained by unauthorized transaction and additional penalties for violations of reporting requirements. (ORS 731.988). Criminal penalties also may be imposed. (ORS 731.992).

Surplus lines licensees are regulated. (ORS 735.400-.495).

Retaliatory Law.

If another state imposes taxes, fees, etc. on Oregon insurer in amounts greater than Oregon would impose, Oregon will impose like charges on insurers from that state. (ORS 731.854).

Taxes.

Domestic companies are not subject to premium tax (except additional tax on fire premiums) unless owned or controlled by foreign insurer. Until 1997, foreign or alien insurers are subject to tax of 2¼% of gross amount of premiums received from business in state, less return premiums, payments for policyholder dividends, and savings paid or credited to accounts of subscribers of reciprocal insurers. (ORS 731.816). Fire insurer is subject to additional tax of 1% of such premiums. (ORS 731.820). Wet marine and transportation insurance premiums are taxed on different basis. (ORS 731.824, .828). Premium tax is in lieu of other taxes measured by premiums or income except corporate excise taxes imposed upon insurers by c. 317; companies subject to premium tax are exempt from corporate excise tax (ORS 317.080); local taxes are prohibited except nondiscriminatory payroll, excise, or income tax on domestic insurers. (ORS 731.840). Effective Jan. 1, 1997, premium tax (other than tax on fire premiums) repealed (except for surplus lines licensees). Foreign and alien insurers are subject to corporate excise taxes on same basis as domestic insurers. From 1997 through 2001, foreign and alien insurers also subject to transition tax to permit gradual reduction in revenue resulting from premium tax repeal. (ORS 731.816).

Direct Actions Against Insurer.

No direct action statute exists.

Slayer's Statute.

(ORS 112.455-.555).

Long-arm jurisdiction where promise to insure (made anywhere) coupled with cause of action arising in Oregon; or person, property or risk in Oregon when promise to insure made or when cause of action arose. (ORCP 4[I]).

Liability risk retention groups and purchasing groups are regulated. (ORS 735.300-.365).

Market assistance plans, joint underwriting associations and professional liability funds may be established by Director in commercial liability area. (ORS 735.200-.265, 752.005-.055).

Plain Language.

Life and health policies. (ORS 743.100-.109). See category 3 Business Regulation and Commerce, topic 3.10 Consumer Protection.

16.02 SURETY AND GUARANTY COMPANIES:

Supervision—Certificate of Authority to Do Business.

Both domestic and foreign companies are under the jurisdiction of Director of Department of Insurance and Finance and must satisfy Director that they have complied with all statutory requirements. This done, Director will issue certificate of qualification and authority to do business. Company must be authorized by its articles to do surety business, and must file copy thereof with Director of Department of Insurance and Finance, together with application to do business. (ORS 732.015—732.055). Fees determined by Director of Department of Insurance and Finance. (ORS 731.804).

Organization.

No special provisions. Domestic companies are organized under Insurance Code. See topic 16.01 Insurance Companies.

Rights and Powers.

Have such powers as are provided in Insurance Code (ORS 732.005) and Business Corporation Act (c. 60). See topic 16.01 Insurance Companies.

A qualified surety company may execute any bond or undertaking. If required to justify, it need only exhibit certificate of authority issued to it by Director of Department of Insurance and Finance. (ORS 742.350-742.376). See category 5 Civil Actions and Procedure, topic 5.04 Bonds.

Foreign Companies.

Regulated as foreign insurer. Must have combined paid-up capital and surplus in U.S. equal to $1,000,000 in order to qualify. (ORS 731.362, .554). Must make special deposit of $250,000 with Department of Consumer and Business Services. (ORS 731.624). See topic 16.01 Insurance Companies, subhead Foreign Insurance Companies.

Taxation.

See topic 16.01 Insurance Companies, subhead Taxes.

17 INTELLECTUAL PROPERTY

17.01 TRADEMARKS AND TRADENAMES:

What May Be Used.

Trademarks ineligible for registration described by statute. (ORS 647.029, .035).

Registration.

Anyone desiring to secure exclusive use of trademark must make application to Corporation Division, Business Registry, of Secretary of State's office, on registration form furnished by Division. (ORS 647.015). If no similar trademark or tradename is on file and application is not for mere descriptive word or surname and mark is not otherwise ineligible, Division issues certificate of registration on payment of $50 fee. (ORS 647.009, .015, 045).

Term of Registration; Renewal.

Term of Registration is five years. (ORS 647.055). Registration may be renewed for successive five-year terms on payment of $50 fee. (ORS 647.009,.055). Renewal application must state that mark is still in use, must include specimen showing actual mark, and must be filed with Business Registry within 90 days prior to expiration of current term. (ORS 647.055, 2009 c. 459).

Assignment.

Registered trademark is assignable with good will of business in which trademark used. Assignment must be in writing, and signed and may be filed with Secretary of State, who may then issue to assignee certificate of registration effective until remainder of term lapses. Assignment void as against subsequent purchaser of trademark without notice unless assignment recorded within 90 days thereof or prior to such subsequent purchase. Registrant or applicant can file to change name for registration or application. Secretary of State may issue certificate of registration to assignee outright or for remainder of term. Secretary may accept other writings where appropriate and must keep public record. (ORS 647.065, 2009 c. 459).

Protection Afforded.

Certificate of registration is competent and sufficient proof of registration of mark in action or proceeding brought in Oregon state court. (ORS 647.045, 2009 c. 459).

Infringement.

Owner of registered mark may proceed in civil action for injunctive relief and may receive all defendant's profits and plaintiff's damages suffered from misuse. (ORS 647.105,.107, 2009 c. 459). Court may order seizure and destruction or other disposition of counterfeit marks or goods bearing counterfeit marks. (ORS 647.105, .111). Trademark counterfeiting is criminal offense. (ORS 647.135-.155). Antidilution statute is applicable to trademarks or tradenames which are either: (1) Inherently distinctive, or (2) become distinctive through secondary meaning notwithstanding absence of competition between parties or absence of confusion as to source of goods or services. (ORS 647.107; 294 Or. 493, 659 P.2d 377). Not applicable to nominative or descriptive fair use. (647.107, 2009 c. 459).

Labor Union Trademarks.

Statute protects labor trademarks and labels of individuals, associations and unions and provides criminal punishment and civil remedies for their unlawful use. (ORS 661.210-.290).

Tradenames.

Assumed business name of individual or entity must be registered with Corporation

Division. (ORS 648.010). Statutory exceptions for certain foreign corporations and certain partnerships and associations. (ORS 648.007[3]). Fee for registration is $10, plus $2 per county; renewal fee is $10, plus $2 per county. (ORS 648.115). Registration must be renewed every two years. (ORS 648.017). Amendments to registration are $10, plus $2 for each county added by amendment. (ORS 648.115). Fee for service of process on Corporation Division under c. 648 is $20. (ORS 648.115).

Corporation Division shall not register assumed business name if it is not distinguishable on record from another current or reserved assumed business name or from name of another person unless applicant provides affidavit in statutory form. (ORS 648.051).

Nonresidents and foreign entities named as persons who carry on, conduct or transact business under assumed business name in applications for registration are deemed to have appointed Secretary of State as agent for process. (ORS 648.061).

Failure to register, amend, or renew registration when necessary is punishable by civil penalty up to $100. (ORS 648.990). Person who fails to register assumed business name lacks standing to maintain cause of action for benefit of business until business name is registered. (ORS 648.135[1]). Registration does not accord private right of action for injunctive relief to protect exclusive use, such relief being available under common law unfair competition. (291 Or. 105, 628 P.2d 733). In any suit arising out of business conducted without proper registration, plaintiff may recover $500 or costs plaintiff incurred in ascertaining defendant's real name, whichever is greater. Court may also award attorney fees to prevailing party. (ORS 648.135).

Individual or entity that conducts business under its real and true name may register name with Corporation Division. Such registration affords same protection and is subject to same requirements as registration of assumed business name. (ORS 648.008).

Franchises.

Franchisor offering or selling franchise in Oregon, or to Oregon domiciliary, or to be operated in Oregon, must make full disclosure of nature and terms of franchise, must maintain complete set of records on sale and disposition of proceeds, and may be required to report sale information to Director of Department of Insurance and Finance. (ORS 650.010). Franchisor cannot use scheme or device to defraud, or make any untrue statement or omit to state material fact. (ORS 650.020). Control persons of franchisor and anyone who participates in sale is liable to same extent as franchisor. (ORS 650.020[4]). Franchisee may recover for any violation amounts to which franchisee would be entitled upon an action for rescission. (ORS 650.020[3]). Court may also award attorney fees to prevailing party other than defendant in action maintained as class action pursuant to ORCP 32. (ORS 650.020[4]). Violations may be enjoined by Division. (ORS 650.065). Securities laws, where applicable, must be separately complied with. See also category 3 Business Regulation and Commerce, topic 3.15 Franchises.

Three-year statute of limitations applies to actions under franchise transactions statute. (ORS 650.020[5]). See also category 5 Civil Actions and Procedure, topic 5.16 Limitation of Actions, subhead Three Years.

17.02 TRADE SECRETS:

Uniform Trade Secrets Act adopted. (ORS 646.461-.475).

18 LEGAL PROFESSION

18.01 ATTORNEYS AND COUNSELORS:

Integrated Bar.

Practice of law is regulated by Oregon State Bar Act, as am'd. (ORS 9.005-9.755, 9.990).

Subject to right of litigant to represent himself in his own cause, no person may practice law in Oregon unless active member of Oregon State Bar. (ORS 9.160). See also Rules Regulating Admission to Practice Law in Oregon (rev. 1989), promulgated by Supreme Court. Some activities of title insurers and escrow agents are exempt from being considered practice of law. (ORS 9.160[4]-[9]).

State Bar is public corporation and an instrumentality of judicial department of state (ORS 9.010) and is governed by board of 18 governors, including four members of public, which formulates and enforces rules of professional conduct (ORS 9.025, 2009 c. 218), investigates complaints against attorneys, and initiates disciplinary proceedings (ORS 9.527-.565). Board of bar examiners, appointed by supreme court, has general charge, subject to supervision by Supreme Court, of admission to bar. (ORS 9.210).

Eligibility.

Any person of good moral character who has requisite learning and ability, is fit to practice law, and is at least 18 years old may be admitted to practice as attorney upon examination. (ORS 9.220). Nonresidents of Oregon must designate resident Bar member as agent for service of process. (Rule of Procedure 1.12).

Registration as Law Student.

No requirement.

Educational Requirements.

Degree from law school approved by American Bar Association Council on Legal Education is required for all applicants. (Admission Rule 3.05). See subhead Admission of Out-of-State Attorneys, infra.

Petition for admission must be filed not later than Oct. 31 preceding Feb. examination or Mar. 31 preceding July examination. Petition may be filed after normal filing date upon payment of late filing fee and showing of good cause. Late filing date is May 31 for July examination and Dec. 31 for Feb. examination. Not later than 15 days before examination evidence of graduation from approved law school must be filed. Fee for application and admission upon student examination is $400, $550 if previously admitted to bar of another state. Additional fee of $100 for applicant granted leave to file late application. (Admission Rules 2.05, 4.05, 5.15). See also subhead Admission of Out-of-State Attorneys, infra.

Examinations for admission are conducted in Feb. and July by Board of Examiners at Portland. Oregon uses Multistate Bar Examination and requires all applicants to pass Multistate Professional Responsibility Examination within 24 months of Bar Examination. Multistate Professional Responsibility Examination may be taken at any location where it is given. However, Oregon does not accept transfer of Multistate Bar Examination scores from other jurisdictions. In addition, examination contains essay questions relating to subjects selected from following list: Civil litigation, including legal and equitable remedies, federal and Oregon procedure, federal and Oregon rules of evidence; commercial transactions, including Uniform Commercial Code (Arts. I, II and IX only), common law contracts, and related aspects of agency; property, including transactions in real property, trusts, decedents' estates; public law, including criminal law and procedure, federal and Oregon administrative law and procedure, constitutional law, and federal income taxation; business organizations, corporations and partnerships; legal ethics; and torts. (Admission Rule 3.05).

Admission of Out-of-State Attorneys.

Attorney of good moral character and 18 years of age or older, who has been admitted to practice and has practiced three out of last five years before highest court of any other state, Federal territory, or District of Columbia, or has been admitted to practice before highest tribunal of foreign country where common law of England exists as basis of its jurisprudence and where requirements for admission are substantially equivalent to those of Oregon, may be admitted upon passing examination. (Admission Rule 2.25).

Petition must be accompanied by certificate of secretary or president of bar of each state having integrated bar in which applicant has been admitted, or certificate of clerk of Supreme Court or admitting court of each state in which applicant has been admitted, stating date of admission, that applicant is in good standing and that there is not pending and has not ever been any complaint, grievance, disciplinary proceeding or disciplinary action against applicant except as fully stated in certificate. Fingerprints and executed releases for access to credit, driving and scholastic records are also required. Application must be filed in duplicate original. (Admission Rule 4.15).

Admission Pro Hac Vice.

Subject to ORS 9.160, Oregon Supreme Court may adopt rules to govern admission pro hac vice. Subject to such rules, one who has not been admitted to practice law in Oregon may appear as counsel for party, if associated with active member of Oregon State Bar or practice law in Oregon on temporary basis, including performing transactional or prelitigation work. (ORS 9.241).

Attorney Ethics.

Portions of American Bar Association Model Rules of Professional Conduct (1983) adopted. (Oregon Code of Professional Responsibility, Oregon State Bar). Much of Code of Professional Responsibility parallels American Bar Association Model Code of Professional Responsibility (1969), with modifications.

Insurance.

All active members of state bar engaged in private practice of law in Oregon must carry professional liability insurance with Professional Liability Fund. (ORS 9.080; Bylaws of Oregon State Bar, Art. 15).

Licenses.

Annual license fee is established by board of governors, subject to modification by vote of house of delegates. No fee is charged if admitted in Oregon for 50 years or more, other than fee for Professional Liability Fund and Client Security Fund. All active members in private practice whose principal offices are in Oregon must also pay fees to Professional Liability Fund and Client Security Fund.

Privileges.

Only active members of Oregon Bar may argue before Supreme Court or Court of Appeals unless court, on motion filed 21 days prior to date set for argument, orders otherwise. (ORAP 6.10, 8.10).

Liabilities.

See category 5 Civil Actions and Procedure, topic 5.08 Costs.

Compensation.

See category 5 Civil Actions and Procedure, topic 5.08 Costs.

Lien.

Attorney has lien for his compensation (whether specially agreed upon or implied for reasonable value of services rendered) upon all papers, personal property and money of his client in his possession, upon actions, suits and proceedings after commencement thereof, and upon judgments, decrees, orders and awards entered in his client's favor (except decrees or orders for payment of support). If lien is claimed upon money judgment or decree, notice of claim of lien must be filed with clerk of court within three years of entry of judgment or decree. If lien is claimed upon judgment or decree for possession, award or transfer of personal property, notice of claim of lien must be filed with county recording office within one year of entry of judgment or decree and disposition of any appeal. If lien is claimed upon judgment or decree for possession, award or conveyance of real property, notice of claim of lien must be filed with county recording office within six months of entry of judgment or decree and disposition of any appeal. Liens upon judgments or decrees for possession, award, conveyance or transfer of real or personal property must be foreclosed within one year after notice of claim of lien is filed unless such period is extended by written agreement. In no case can period exceed two years.

Lien is superior to all other liens except tax liens, prior encumbrances and prior liens of record on real or personal property. No person may satisfy any judgment until attorney's lien is satisfied, but judgment debtor may pay full amount of judgment into court and thereby be released. (ORS 87.430-87.490). For form of satisfaction of attorney's lien, see category 5 Civil Actions and Procedure, topic 5.15 Judgments.

Disbarment or Suspension.

Attorney may be reprimanded, disbarred or suspended by Supreme Court. (ORS 9.527-.565).

Unauthorized Practice.

The practice of law by any person who is not an active member of state bar is punishable by fine of not more than $500 or imprisonment in county jail for period not to exceed six months, or both. (ORS 9.160, 9.990).

Professional Corporation.

See category 2 Business Organizations, topic 2.03 Corporations, subhead Professional Corporations.

19 MINERAL, WATER AND FISHING RIGHTS

19.01 MINES AND MINERALS:

State Department of Geology and Mineral Industries is responsible for preparation of studies of state's mineral resources and regulation of mining. Address: 800 N.E. Oregon Street, Portland 97232.

Mining Claims.

Any citizen of U.S. or person who has declared intention to become such, discovering vein or lode of mineral bearing rock on public domain, may locate claim by posting notice and within 30 days thereafter marking boundaries with four substantial markers. Within 60 days of posting notice, locator must record copy of posted notice with county clerk. (ORS 517.010-.030). Placer claims may be located by similar procedures, except placer claims conforming to legal subdivisions may be located without boundary markers. (ORS 517.042-.052). Millsites five acres in size may be located on nonmineral land in same manner as placer claim, but location notice must be recorded within 30 days. (ORS 517.160). Abandoned claims may be taken up without reference to any work previously done. (ORS 517.040). All mining claims in state are deemed real estate, subject to all provisions as to transfer, mortgage, etc., except that redemption by judgment debtor must be made within 60 days. (ORS 517.080-.090).

Mining Operations.

All surface mining operations must be conducted in accordance with approved state operating permit and reclamation plan. (ORS 517.790). Penalties may be imposed for violations of surface mining and reclamation provisions. (ORS 517.990). Procedure exists for landowner to extinguish dormant mineral encumbrances. (ORS 517.170). Grub stake contracts must be in writing and recorded in county where locations thereunder are made. (ORS 517.110).

Mineral Leasing of State Lands.

Department of State Lands has authority to lease state lands for development of hard minerals, oil and gas, and geothermal resources. (ORS 273.551). County may lease mineral rights for designated county lands. (ORS 275.294).

Hours of labor in underground mines are limited. (ORS 652.040, 652.990).

Safeguarding of Employees.

General employment safety provisions apply. (c. 654). See also category 11 Employment, topic 11.02 Labor Relations.

Oil and Gas.

State permits are required for all drilling. (ORS 520.025). State may establish spacing units for pools and order unitization. (ORS 520.210-.330).

Geothermal Resources.

Ownership of geothermal resources is in surface owner unless otherwise reserved or conveyed. (ORS 522.035). Geothermal wells cannot be drilled without state permit. (ORS 522.055-.115). State may establish spacing and unitization for geothermal reservoirs. (ORS 522.815).

Taxes.

Except for improvements, machinery, and buildings, unpatented mining claims are exempt from property taxes. (ORS 307.080).

20 MORTGAGES

20.01 CHATTEL MORTGAGES:

Uniform Commercial Code adopted. (ORS 71.1010 et seq.). For variations from the Official Text see category 3 Business Regulation and Commerce, topic 3.09 Commercial Code. Security interests in “investment property” governed by Uniform Commercial Code—Investment Securities. (c. 78). Chattel mortgage records searches, discharge of chattel mortgages, and other matters relevant to chattel mortgages taken prior to adoption of U.C.C. (Sept. 1, 1963), governed by separate statutory enactment. (ORS 86.405-.470). Retail installment contracts covered by separate comprehensive statute. (c. 83). See category 3 Business Regulation and Commerce, topic 3.10 Consumer Protection.

Filing.

Except where agricultural liens, timber, minerals, or fixtures involved, all filings made with Secretary of State. (ORS 79.0501).

After-acquired Property.

U.C.C. adopted; security interest may be taken in after-acquired property except for consumer goods or commercial tort claims. (ORS 79.0204).

Future Advances.

U.C.C. adopted; security interest may secure future advances. (ORS 79.0204).

Motor Vehicles.

In addition to applicable U.C.C. provisions, security interests in motor vehicles are governed by provisions concerning title. (c. 803). Security interest must be noted on certificate of title to be perfected, unless vehicle is inventory held for sale by dealer. (ORS 803.097). Retail sales of motor vehicles by dealers pursuant to retail instalment contracts are also governed by comprehensive statute. (ORS 83.510-.680).

Boats.

Security interest must be noted on certificate of title to be perfected unless boat, boathouse, or floating home is inventory held for sale by dealer. (ORS 488.763). Security interests in documented vessels are covered by federal law.

Remedies.

U.C.C. adopted, with 180 days allowed for compulsory disposition of collateral. (ORS 79.0620).

Retail Installment Agreements.

Retail installment agreements require single document unless obligation is evidenced by note secured by chattel mortgage which recites amount and terms of payment and note recites secured by mortgage. (ORS 83.020). Retail sales of consumer goods by dealers pursuant to retail instalment contracts governed by comprehensive statute. (c. 83).

Taxation.

See category 22 Taxation, topic 22.13 Property Taxes.

Form.

Secretary of State has approved standard forms of financing statements. Forms in 1999 revisions of Art. 9 must be accepted. See Part VI Appendix, Uniform and Model Acts, Commercial Code Amendments, UCC Financing Statement.

See also categories 3 Business Regulation and Commerce, topic Commercial Code; Documents and Records, topic Records, subhead Filing Under Uniform Commercial Code.

20.02 [RESERVED]

20.03 MORTGAGES OF PERSONAL PROPERTY:

See topic 20.01 Chattel Mortgages.

20.04 MORTGAGES OF REAL PROPERTY:

A mortgage creates a lien upon the land, but conveys no interest therein. (12 Or. 474, 8 P. 548; 57 Or. App. 491, 645 P.2d 573).

Form and Execution.

Mortgages are customarily drawn in the form of a deed, followed by appropriate clauses containing recitals that the conveyance is intended as a mortgage to secure payment of named sum, description of note or other debt secured, and various covenants and conditions under which mortgage is or is not to be operative. They are executed in the same manner as deeds. (12 Or. 474, 8 P. 548; 93.010; 93.020). No seal of grantor, corporate or otherwise, is required on deed. (ORS 93.010; 93.410). Use of bargain and sale deed, rather than warranty deed, to create mortgage does not put mortgagee on notice of prior unrecorded interests. (285 Or. 313, 590 P.2d 1231). Mortgages must be signed but seal or witnesses are not necessary. Acknowledgment is not necessary to establish validity (ORS 93.450) but is necessary to entitle mortgage to be recorded (ORS 93.480).

Instruments submitted for recording must be on paper of sufficient quality for recording photographically, not larger than 8½ x 14 inches, and must be typed, printed or written in at least 8-point type (does not apply to out-of-state notarial acts or to certified copies of public records). Additional penalty of $20 is collected by county clerk for recording instrument unless instrument satisfies requirements of previous sentence and contains at least following on first page: clear label in sufficient detail to identify transaction, name of grantor and grantee (or other specified parties), and person (and mailing address) to whom instrument will be mailed after recording. (ORS 205.232, .234, .327). Person presenting instrument for recording may satisfy requirements of preceding sentence by submitting cover sheet containing all required information. Cover sheet is recorded as part of instrument, but it need not be signed or acknowledged. (ORS 205.234).

Recording.

In order to be effective against subsequent bona fide purchasers or mortgagees from mortgagor, mortgage must be acknowledged or proved and recorded in office of county clerk (recorder of conveyances in some counties) of county in which mortgaged property is situated. (ORS 93.640).

Recording Fees.

As to recording and appropriate recording office, see category 10 Documents and Records, topic 10.04 Records.

Taxes.

See category 22 Taxation.

Assignment.

Mortgages may be assigned by instrument in writing, executed and acknowledged with same formality as mortgage, and recorded in records of mortgages in proper county. (ORS 86.060).

Satisfaction.

Mortgage may be discharged of record by presenting to recording officer certificate executed by mortgagee, his personal representative or assigns, acknowledged as provided by law, stating that mortgage has been paid or otherwise discharged. (ORS 86.100). No mortgage of real property may be discharged except by person appearing of record to be owner thereof, except that where note is secured by mortgage and is transferred by endorsement, without formal assignment of mortgage, mortgage may be released by delivering note to county clerk or recorded with certificate of payment signed by owner and holder of note. (ORS 86.100-.120; 47

Or. 223, 81 P. 778). If discharge not entered within 30 days after demand by mortgagor, mortgagee, or his personal representative or assign, may be liable for $100 damages and also for all actual damages. (ORS 86.140).

Foreign executors, administrators, conservators and guardians may discharge mortgages by recording in mortgage records certified copy of their letters testamentary or of administration, guardianship or conservatorship with certificate stating that such letters are in effect. (ORS 86.130). Clause in mortgage prohibiting satisfaction of debt prior to given date may not necessarily be invalid as unreasonable restraint on alienation. (283 Or. 297, 583 P.2d 1126).

Prepayment.

When mortgage or trust deed given to secure loan primarily for personal, family, or household use extends for more than three years, note and loan agreement must explicitly state maximum prepayment penalty for each year. Failure to comply renders prepayment penalty void. (ORS 86.150).

Late Charges.

On loans secured by single-family owner-occupied residential real property, no late charges permitted: On payments received within 15 days of periodic installment payment due date; in excess of 5% of delinquent installment or amount stated in note or mortgage, whichever is less; unless note or mortgage provides for charge and lender gives monthly billing, coupon or notice disclosing due date and late charge; or more than once per installment. (ORS 86.165). Does not apply to: Loans insured, guaranteed or purchased by instrumentality of federal government whose regulations establish late charge limitations; or to mortgage banking or servicing companies, except that borrower must be notified of mortgage's noncompliance prior to execution. (ORS 86.180, .185).

Security Protection Provisions.

On loans of $100,000 or less secured by residential real property, lender's security protection provisions (commitment of cash or assets for payment of property taxes, insurance or similar charges) are restricted. (ORS 86.205-.275). Amount of required security deposits may not exceed pro rata of amount accrued at settlement plus 1/12 of estimated annual total, with monthly deposits and adjustment for deficiencies thereafter. (ORS 86.240). Interest required on deposits and service charge prohibited, except on loans prior to Sept. 1, 1975, on loans from certain state or federal lenders or where prohibited by law. (ORS 86.245-.250). Security protection arrangements not required by lender may be mutually adopted. (ORS 86.255). Violation renders provision voidable and lender liable for actual damages or $100, whichever greater, together with costs and attorneys' fees. (ORS 86.265). Does not apply to certain loans by mortgage servicing companies to out-of-state purchasers, provided notice given by lender. (ORS 86.270).

Foreclosure.

Mortgages can only be foreclosed by suit. (ORS 88.010). Right of foreclosure on property of members of Army and Navy is suspended during active service in time of war (ORS 408.440), but Oregon statute superseded by federal Soldiers' and Sailors' Civil Relief Act of 1940 (50 [App.] USC 501 et seq.; 97 Or. 71, 184 P. 494, 191 P. 328). Foreclosure must commence within ten years after maturity. (ORS 88.110). Fact that part of mortgage represents debt owed to one other than mortgagee does not prevent mortgagee from maintaining foreclosure suit for full amount in his own name where mortgagee seeking to recover was party in whose name original agreement had been made for benefit of another. (286 Or. 143, 593 P.2d 130).

Deficiency judgment in mortgage foreclosure is authorized except in case of purchase money mortgage (as defined). (ORS 88.010, 88.070).

Sale on Foreclosure.

Foreclosure judgment will require that property be sold upon notice. Procedure and effect are the same as in sale upon execution. (ORS 88.060, 88.080).

Redemption.

Mortgagor or his successor in interest may redeem property sold at any time within 180 days after sale by paying amount of purchase price with interest at 9% from date of sale and taxes paid by purchaser plus any sums expended to prevent waste subject to set-off for rents and profits accrued while purchaser is in possession of property. Ten-day written notice of accounting required to obtain set-off. Purchaser has lien on crops grown after sale and for sums expended to prevent waste or to cultivate, seed or plow property. (ORS 23.560). Notice of intent to redeem must be given not less than two days nor more than 30 days before application to sheriff. (ORS 23.570). Mortgagor who has transferred his interest may not redeem unless deficiency judgment entered against him, and then only within ten days after 180-day redemption period has expired. (ORS 23.530, 23.560). Lien creditor may redeem property within 60 days of sale by paying amount of purchase price plus interest at 10% from date of sale, taxes paid by purchaser plus any sum mortgagor or successor would be required to pay for redemption with like interest. If purchaser has lien superior to redemptioner, redemptioner must pay lien with interest. (ORS 23.540). Property may be redeemed from redemptioner. (ORS 23.550). Costs incurred in order to redeem property are not deductible from rents and profits due subsequent redemptioner in suit for accounting. (41 Or. App. 127, 597 P.2d 835).

Future Advances.

If provided in instrument, when mortgagor fails to pay when due taxes, assessments, interest on prior mortgages, insurance premiums, or other charges necessary for protection of lien of mortgage, mortgagee may pay same, and such payments are added to mortgage debt. Court has recognized validity of mortgages to cover future advances. (276 Or. 837, 556 P.2d 955). For contracts and loan agreements entered into after Jan. 1, 1996, statutory form of notice of right of secured party to place insurance on property must be given. (ORS 746.201).

Line of credit instruments (mortgages or trust deed securing consumer or commercial credit agreements that permit principal to be advanced up to maximum amount) have priority as of date of recording, regardless of lienholder's knowledge of any intervening lien. Priority of line of credit instruments includes advances of principal and certain protective advances. Advances to complete construction of previously agreed-upon improvements on real property made after date of recording, pursuant to credit agreement not secured by borrower's residence, retain priority, even if they exceed maximum principal amount stated in line of credit instrument if front page of instrument or memorandum thereof so state (ORS 86.155). Debtor may limit amount secured by residential line of credit instrument to outstanding balance by notice to lienholder. (ORS 86.155[4]).

Priorities.

Receiver's lien does not take priority over first mortgage when first mortgagee is not party to receivership proceedings. (38 Or. App. 199, 589 P.2d 1167). Renegotiation or adjustment of interest rate, increase in indebtedness secured resulting from deferment of all or portion of interest payments and addition thereof to balance, or execution of new note reflecting foregoing, extension of term of mortgage, trust deed, or line of credit instrument or modification of payments required under note do not affect priorities. (ORS 86.095, 86.155).

Subordination Agreements.

Mortgagees may agree as to the priority of mortgages. (152 Or. 601, 54 P.2d 838).

Trust Deeds.

Except for special rules applicable to trust deeds (ORS 86.705-.795), trust deeds are deemed to be mortgages; grantor is mortgagor and beneficiary is mortgagee (ORS 86.715). Transfers in trust of interest in real property may be made to trustee to secure obligation. Upon breach of obligation power of sale may be exercised by trustee or, at option of beneficiary, may be foreclosed as mortgage. (ORS 86.710). Trustee may proceed by advertisement and sale if no action to recover on debt has been instituted and may bring action to appoint receiver or to obtain temporary restraining order unless at time action is instituted, trust deed covers single family residence occupied as principal residence of grantor, grantor's spouse, or grantor's child. (ORS 86.735).

Trustee may be active member of Oregon State Bar, bank, trust company or savings and loan association authorized to do business under laws of Oregon or U.S., title insurance company authorized to insure real property in Oregon, U.S. or any agency thereof, or escrow agent licensed in Oregon. (ORS 86.790). Except for U.S. or agency, trustee may not be beneficiary. (ORS 86.705). Trustee has no fiduciary duty to grantor of trust deed. (ORS 86.790).

Advertisement and Sale; Foreclosure.

Following recording of notice of default and at least 120 days before date of trustee's sale, notice either by personal service pursuant to ORCP 7D(2), (3) or by both first class and certified mail, return receipt requested, must be given to grantor (debtor), successor in interest having record or known interest in property, any person with lien or interest subsequent to trust deed of record or known to beneficiary, and persons having recorded request for notice. (ORS 86.740). At least 120 days before sale, occupants must be personally served with notice pursuant to ORCP 7D(2), (3). (ORS 86.750). Notice must also be published for four successive weeks ending more than 20 days prior to sale. On or before date of sale affidavits of mailing, service and publication of notices must be recorded. (ORS 86.750). Notice contents governed by 86.745. Grantor or successor, any person with subordinate lien or encumbrance, or beneficiary under subordinate trust deed may reinstate loan and forestall sale by paying not less than five days before sale, all amounts due other than that which would not be due if no default had occurred plus costs of foreclosure and statutory sum for attorney's fees and trustee's fees. (ORS 86.753). Person entitled to notice who does not receive notice from trustee under 86.740 or actual notice at least 25 days prior to sale has right to redeem within five years of sale and to sue trustee for damages. (ORS 86.742).

Effect of Sale.

Sale pursuant to advertisement and sale terminates interest of all persons given notice or claiming through those given notice. There is no right of redemption. No deficiency judgment may be obtained by advertisement and sale, but deficiency judgment may be obtained on judicial foreclosure of trust deed that is not residential trust deed. (ORS 86.770).

Late Charges: Security Protection.

Restrictions on late charges and security protection provisions apply. (ORS 86.160[3], 86.205[4]).

Residential Trust Deeds.

Trust deed on property with four or fewer residential units, one of which is occupied as principal residence of grantor, grantor's spouse or grantor's minor children at time foreclosure is commenced. (ORS 86.705). Special roles restrict appointment of receiver (ORS 86.735), limit aggregate trustee and attorney fees necessary to cure default to $1,000. (ORS 86.753).

Forms.

Master form instrument may be recorded in county permitting short form mortgage or short form trust deed to be recorded with reference to master form. (ORS 93.780-.790; 93.802).

Common form of mortgage is as follows:

Mortgagor,. . . . . ., whose address is. . . . . . ., for and in consideration of the sum of. . . . . . . Dollars ($. . . .), paid to. . . . . . ., the receipt of which is hereby acknowledged, has granted, bargained, sold and conveyed, and hereby grants, bargains, sells and conveys to. . . . . . ., Mortgagee, whose address is. . . . . . . the following described real property located in. . . . . . . County, State of Oregon: (insert description), together with the tenements, hereditaments and appurtenances belonging or appertaining thereto.

This conveyance is intended as a mortgage to secure the payment of the sum of. . . . . . Dollars ($. . . .) in accordance with the terms of a certain promissory note of which the following is a substantial copy: (insert).

Mortgagor warrants that the proceeds of the loan represented by the above-described note and this mortgage are primarily for Mortgagor's personal, family or household purposes/are for business or commercial purposes (choose one and comply with appropriate lending disclosure requirements.) If the sum of money due upon said note shall be paid according to the terms therein expressed, this conveyance shall be void. However, in the event of default in payment of the principal or interest or any part thereof as provided in said note, then Mortgagee and Mortgagee's legal representatives or assigns may foreclose this mortgage and sell the real property above described or any part thereof, in the manner prescribed by law, and out of the money arising from such sale, retain the said principal, interest and attorney's fees as provided in said note, together with the costs and charges of making such sale.

Date, Signature, Acknowledgment

(For restrictions re maximum prepayment privileges penalties, see 86.150.)

(For restrictions re line of credit mortgage, see 86.155.)

(For restrictions re certain modifications affecting priority, see 86.095.)

Assignment of mortgage:. . . . . . . (“Assignor”) for value received, has granted, bargained, sold, assigned, transferred and set over, and hereby grants, bargains, sells, assigns, transfers and sets over unto. . . . . . . (“Assignee”) that certain mortgage (and the obligation thereby secured) dated. . . . . . ., 20. ., made and executed by. . . . . . . to secure the payment of the sum of $. . . . ., with interest; said mortgage was recorded on. . . . . . ., 20. ., in the office of the county clerk/recorder (indicate which), of the County of. . . . . . ., State of Oregon, in book/reel/volume No. . . . . at page. . . or as document/fee/file/instrument/microfilm No. . . . . (indicate which);

Assignor hereby covenants to and with Assignee that the Assignor is the lawful owner and holder of the said mortgage and the obligation secured thereby and has a good right to sell, transfer and assign the same as aforesaid, and that there is now unpaid upon said obligation and mortgage the sum of $. . . . . . ., with interest from. . . . . . ., 20. . .

In witness whereof, the undersigned Assignor has executed this instrument on. . . . . . ., 20. . .

Date, Signature, Acknowledgment

Satisfaction of mortgage: The undersigned is the owner and holder of the mortgagee's interest in a mortgage between. . . . . . . (mortgagor) and. . . . . . . (mortgagee), dated. . . . . . ., 20. ., and recorded. . . . . . ., in the records of. . . . . . . County, Oregon, in Book. . . . at Page. . . . [or, as appropriate, as file or entry number.. . .] and the debt and other obligations thereby secured.

The undersigned acknowledges that the debt and other obligations and mortgage have been fully paid, satisfied and discharged.

Date, Signature, Acknowledgment

Release of part of mortgaged property: The undersigned is the owner and holder of the mortgagee's interest in the mortgage between. . . . .. . (mortgagor) and. . . . . . . (mortgagee), dated. . . . . . ., 20. ., and recorded. . . . . . ., in the records of. . . . . . . County, Oregon, in Book. . . . at Page. . . . [or, as appropriate, as file or entry number..] and the debt and other obligations thereby secured.

The undersigned, in consideration of the receipt of valuable consideration, releases from the lien of the above-referenced mortgage only the following described property: (insert description).

Date, Signature, Acknowledgment

Chattel Mortgages.

See topic 20.01 Chattel Mortgages.

21 PROPERTY

21.01 ABSENTEES:

Care of Property.

Upon petition of person interested in affairs of person unable to manage financial resources because of disappearance, court may, after hearing if objection is filed, appoint conservator or make other protective orders with or without appointment of conservator. (ORS 125.005[3], .010). Conservator must account annually to court, but may settle account with absentee upon his return without filing report with court. (ORS 125.475).

Administration of estate of absentee is proper. Petition for administration must state, inter alia: (a) Whether absentee, when last heard from, was resident or nonresident; (b) address of last-known domicile; and (c)(i) that, to knowledge of petitioner after diligent search, whereabouts of absentee unknown for period stated of not less than one year and that petitioner has reason to believe and believes absentee is dead, or (ii) that death of absentee is probable under circumstances stated in petition and that fact of death is in doubt solely by reason of failure to find or identify remains. (ORS 117.005, 113.035). After notice and hearing on petition, court may find absentee to be deceased and grant letters of administration of his estate as provided for estates of other decedents. (ORS 117.045-.095). Within five years after distribution of estate, absentee can recover estate or proceeds from distributee but not purchasers. (ORS 117.075).

Person Presumed Dead.

See category 13 Estates and Trusts, topic 13.05 Death.

Process Agent.

Claims and service of process on absentee for whose estate personal representative has been appointed are effective if made on personal representative. (ORS 115.005-.325).

Escheat.

Probate court may issue letters of administration upon estate of absentee to applicant entitled thereto. (ORS 117.035). Property of one dying intestate without heirs escheats to state. (ORS 112.055, 113.045). Belated claims may be made within ten years of decedent's death or eight years of time state acquires property. (ORS 116.253). Uniform Disposition of Unclaimed Property Act adopted with significant nonuniform amendments, and incorporating provisions of Uniform Unclaimed Property Act. (ORS 98.302-.436).

Unclaimed Deposits.

See category 3 Business Regulation and Commerce, topic 3.01 Banks and Banking.

Unclaimed Legacies.

See category 13 Estates and Trusts, topic 13.16 Wills.

Unclaimed Property Compact repealed. (1985, c. 336).

Interruption of Statute of Limitations.

See category 5 Civil Actions and Procedure, topic 5.16 Limitation of Actions.

See also category 13 Estates and Trusts, topic 13.07 Descent and Distribution, subhead Escheat.

21.02 ADVERSE POSSESSION:

Character of Possession.

Claimant must prove, by clear and convincing evidence, actual, open, notorious, exclusive, hostile, and continuous possession. (ORS 105.620[1][a]). For claims vesting and filed after Jan. 1, 1990, claimant must have had honest belief that claimant was actual owner of property and that belief must have (1) continued throughout possession; (2) had objective basis; and (3) been reasonable under circumstances. (ORS 105.620[1][b]). Claimant maintains hostile possession of property if possession is under claim of right or with color of title. (ORS 105.620[2]). Color of title means claimant claims under written conveyance of property or by operation of law from one claiming under written conveyance. (ORS 105.620[2]).

Duration of Possession.

Continuous possession for ten years is required to generate title. (ORS 12.050). Tenant in common must have had exclusive possession and have paid all taxes for 20 consecutive years to acquire title against cotenants. Notice of exclusive possession need not be given to other cotenants by cotenant in possession.(ORS 105.615).

Relation Back.

Once matured, title relates back to beginning of prescriptive period. (47 Or. App. 225, 614 P.2d 1169).

Easements established by adverse use must be adverse to rights of true owner under claim of right, continuous, and uninterrupted for ten years, with knowledge and acquiescence, but not permission, of owner. (206 Or. 140, 289 P.2d 684, on rehearing 291 P.2d 733). Adverse possession will not cut off easement unless adverse use is inconsistent with existence of easement. (280 Or. 405, 571 P.2d 495).

Disabilities.

Disabled persons are those who, at time cause of action accrues, are: (1) Within age of

18 years; (2) insane; (3) imprisoned for term less than person's natural life. (ORS 12.160). Time of disability is not part of time limited for commencement of action but disability does not extend period more than five years. Period extended not more than one year after disability ceases. (ORS 12.160). Disability must exist when cause of action accrues. (ORS 12.170). Limitation does not attach until all coexisting disabilities are removed. (ORS 12.180).

Torrens Act (c. 94) repealed. (1971, c. 478).

Public Rights.

Adverse possession by state for statutory period will give title by prescription (ORS 105.620[3]) but not against county lands (303 Or. 173, 734 P.2d 1348). Rights of cities and towns to lands dedicated to or otherwise acquired for streets, highways, parks or public places, and rights of state and counties in all public lands, cannot be extinguished by adverse possession. (ORS 12.250; 221.750; 275.027).

21.03 [RESERVED]

21.04 CONVEYANCES:

See topic 21.06 Deeds.

21.05 CURTESY:

Abolished for surviving spouse of person who dies after July 1, 1970. (ORS 112.685-.695).

21.06 DEEDS:

Execution.

A deed must be signed by the grantor and delivered and, in order to be recorded, must be acknowledged or proved by a subscribing witness. Seal of grantor, corporate or otherwise, is not required. (ORS 93.010, 93.410, 93.480). Deed executed outside state may be acknowledged according to laws of place of execution or laws of Oregon. Uniform Law on Notarial Acts adopted. (ORS 194.505-.595).

See also categories 8 Debtor and Creditor, topic Homesteads, subhead Alienation or Encumbrance; Family, topic Husband and Wife, subhead Conveyance or Encumbrance of Property.

Requisites.

Since Jan. 1, 1968, true and actual consideration paid for transfer must be stated in terms of dollars on face of any instrument conveying or contracting to convey fee title to any real estate. Consideration includes amount of cash and amount of any encumbrance remaining on property or assumed by grantee. If consideration includes other property or other value, given or promised, neither its monetary value nor its description is required to be stated so long as fact that other property or value formed part of transaction is stated on face of instrument. Either grantor or grantee may make statement. Failure to make statement of consideration does not invalidate conveyance, but does preclude recordation. If statement appears in body of instrument above signature, signature constitutes certification of truth of statement. If statement is separate from body of instrument, it must be signed separately. (ORS 93.030).

All instruments conveying or contracting to convey fee title after Jan. 1, 1974 shall contain statement in substantially following form: “Until a change is requested, all tax statements shall be sent to the following address:. . . . . .” Lack of such statement does not invalidate conveyance and if instrument without such statement is recorded, recording is valid. (ORS 93.260). Grantor may directly convey to himself and others to create concurrent estate. (ORS 93.280).

Recording.

Unless recorded in the office of the county clerk (recorder of conveyances where there is such an officer) of the county in which the property is located, a conveyance deed, land sales contract or assignment of all or any portion of seller's or purchaser's interest in land sales contract, is void against subsequent purchaser or mortgagee in good faith and for valuable consideration, whose conveyance deed, land sales contract or assignment is first recorded. (ORS 93.640). As to recording fees, see category 10 Documents and Records, topic 10.04 Records.

If deed is executed by attorney in fact, power of attorney, acknowledged like deed, may be recorded. (ORS 93.670). Recorded power of attorney cannot be revoked unless revoking instrument is recorded. (ORS 93.670[2]).

Operation and Effect.

No covenant shall be implied except those shown below in subhead Forms. (ORS 93.140, .850-.870). Implied warranty of fitness may attach to sale by deed in any form of new house constructed by vendor. (269 Or. 635, 525 P.2d 1019; 279 Or. 353, 569 P.2d 1037). Deed absolute in form is presumed to be deed unless proved otherwise by clear and convincing evidence. (269 Or. 281, 525 P.2d 140).

Quitclaim deed is sufficient to pass all estate which grantor could lawfully convey by bargain and sale deed. (ORS 93.110).

No instrument conveying or contracting to convey fee title to real property shall contain provisions prohibiting use of solar energy systems on that real property. Any such provision executed after Oct. 3, 1979 is void and unenforceable. (ORS 105.880).

Instrument attempting to convey fee title to real property which restricts use of property by any person or group of persons by reason of color, race, religion, national origin or disability or restricts use of property by any home or facility licensed by Mental Health and Developmental Disability Services Division, Senior and Disabled Services Division or Office of Alcohol and Drug Abuse Program is void and unenforceable. (ORS 93.270).

Taxes.

See category 10 Documents and Records, topic 10.04 Records, subhead Recording Fees. Some counties charge transfer tax. See category 22 Taxation, topic 22.13 Property Taxes, subhead Real Estate Conveyance Tax. All counties charge recording fees.

Zoning.

All instruments transferring or contracting to transfer fee title except for owner's sales agreements and earnest money receipts, must contain statement, “BEFORE SIGNING OR ACCEPTING THIS INSTRUMENT, THE PERSON TRANSFERRING FEE TITLE SHOULD INQUIRE ABOUT THE PERSON'S RIGHTS, IF ANY, UNDER CHAPTER 1, OREGON LAWS 2005 (BALLOT MEASURE 37 (2004)). THIS INSTRUMENT DOES NOT ALLOW USE OF THE PROPERTY DESCRIBED IN THIS INSTRUMENT IN VIOLATION OF APPLICABLE LAND USE LAWS AND REGULATIONS. BEFORE SIGNING OR ACCEPTING THIS INSTRUMENT, THE PERSON ACQUIRING FEE TITLE TO THE PROPERTY SHOULD CHECK WITH THE APPROPRIATE CITY OR COUNTY PLANNING DEPARTMENT TO VERIFY APPROVED USES, TO DETERMINE ANY LIMITS ON LAWSUITS AGAINST FARMING OR FOREST PRACTICES AS DEFINED IN ORS. 30.930 AND TO INQUIRE ABOUT THE RIGHTS OF NEIGHBORING PROPERTY OWNERS, IF ANY, UNDER CHAPTER 1, OREGON LAWS 2005 (BALLOT MEASURE 37 (2004)).” All owner's sales agreements and earnest money receipts must contain statement, “THE PROPERTY DESCRIBED IN THIS INSTRUMENT MAY NOT BE WITHIN A FIRE PROTECTION DISTRICT PROTECTING STRUCTURES. THE PROPERTY IS SUBJECT TO LAND USE LAWS AND REGULATIONS, THAT IN FARM OR FOREST ZONES, MAY NOT AUTHORIZE CONSTRUCTION OR SITING OF A RESIDENCE AND THAT LIMIT LAWSUITS AGAINST FARMING OR FOREST PRACTICES AS DEFINED IN ORS 30.093 IN ALL ZONES. BEFORE SIGNING OR ACCEPTING THIS INSTRUMENT, THE PERSON ACQUIRING FEE TITLE SHOULD INQUIRE ABOUT THE PERSON'S RIGHTS, IF ANY, UNDER CHAPTER 1, OREGON LAWS 2005 (BALLOT MEASURE 37 (2004)). BEFORE SIGNING OR ACCEPTING THIS INSTRUMENT, THE PERSON ACQUIRING FEE TITLE TO THE PROPERTY SHOULD CHECK WITH THE APPROPRIATE CITY OR COUNTY PLANNING DEPARTMENT TO VERIFY APPROVED USES, EXISTENCE OF FIRE PROTECTION FOR STRUCTURES AND THE RIGHTS OF NEIGHBORING PROPERTY OWNERS, IF ANY, UNDER OREGON LAWS 2005 (BALLOT MEASURE 37 (2004)).” (ORS 93.040). Action may not be maintained against person for failure to include above-mentioned statements unless person acquiring or agreeing to acquire fee title would not have executed or accepted instrument but for absence of statement. (ORS 93.040).

Forms.

Following statutory forms may be used (ORS 93.850-.870):

Form

Warranty Deed:. . . . ., Grantor, conveys and warrants to. . . . ., Grantee, the following described real property free of encumbrances except as specifically set forth herein: (Describe the property conveyed and if there are to be exceptions to covenants described below, insert such exceptions.) (Here insert statement required by 93.040.) The true consideration for this conveyance is $. . .. . . . (Here comply with 93.030.)

Dated this. . . . . day of. . . . . ., 20. . . . . .

Operation and Effect.

Deed in this form shall convey entire interest in described property at date of deed which deed purports to convey. Grantor, his heirs, successors, and assigns, shall be forever estopped from asserting that grantor had, at date of deed, an estate or interest in land less than that which deed purported to convey and deed shall pass any and all after-acquired title. It shall include following covenants in favor of grantee: (a) That at the time of the delivery of deed, grantor is seized of estate in property which grantor purports to convey and that he has good right to convey same; (b) that at the time of the delivery of deed, property is free from encumbrances except as specifically set forth on deed; and (c) that grantor warrants and will defend title to property against all persons who may lawfully claim same. To exclude any encumbrances or other interests from scope of covenants, such exclusions must be expressly set forth on deed. (ORS 93.850).

Form

Special Warranty Deed:. . . . . ., Grantor, conveys and specially warrants to. . . . ., Grantee, the following described real property free of encumbrances created or suffered by the grantor except as specifically set forth herein: (Describe the property conveyed and if there are to be exceptions to covenants described below, insert such exceptions.) (Here insert statement required by 93.040.) The true consideration for this conveyance is $. . . . . . .

(Here comply with 93.030.)

Dated this. . . . . day of. . . . . ., 20. . . . . .

Operation and Effect.

Deed in this form shall have same effect as warranty deed, except that covenant of freedom from encumbrances shall be limited to those encumbrances created or suffered by grantor and covenant of warranty shall be limited to those persons who may lawfully claim same by, through or under grantor. To exclude any encumbrances or other interests from scope of covenants, such exclusions must be expressly set forth on deed. (ORS 93.855).

Form

Bargain and Sale Deed:. . . . ., Grantor, conveys to.. . . . . . ., Grantee, the following described real property: (Describe the property conveyed.) (Here insert statement required by 93.040.) The true consideration for this conveyance is $. . . . . .. (Here comply with the requirements of 93.030.)

Dated this. . . . . day of. . . . . ., 20. . . . .

Operation and Effect.

Deed in this form shall convey entire interest in described property at date of deed which deed purports to convey. Grantor, his heirs, successors and assigns, shall be forever estopped from asserting that grantor had, at date of deed, an estate or interest in land less than that which deed purported to convey and deed shall pass any and all after acquired title. A bargain and sale deed shall not operate to provide any covenants of title in grantee and his successors. (ORS 93.860).

Form

Quitclaim Deed:. . . . ., Grantor, releases and quitclaims to. . . . ., Grantee, all right, title and interest in and to the following described real property: (Describe the property conveyed.) (Here insert statement required by 93.040.) The true consideration for this conveyance is $. . . . . . . (Here comply with 93.030.)

Dated this. . . . . day of. . . . . ., 20. . . . . .

Operation and Effect.

Deed in this form shall have effect of conveying whatever title or interest, legal or equitable, grantor may have in described property at date of deed but shall not transfer any title or interest which grantor may thereafter obtain nor shall it operate as an estoppel. Grantee taking title by way of quitclaim deed shall not, merely because of his receipt of title by such deed, be denied status of good faith purchaser for value. (ORS 93.865).

See topic 21.16 Real Property.

21.07 DEEDS OF TRUST:

See category 20 Mortgages, topic 20.04 Mortgages of Real Property.

21.08 DOWER:

Abolished for surviving spouse of person who dies after July 1, 1970. (ORS 112.685-.695).

21.09 ESCHEAT:

See topic 21.01 Absentees, subhead Escheat; categories 3 Business Regulation and Commerce, topic Banks and Banking, subhead Unclaimed Deposits; Estates and Trusts, topics Descent and Distribution, subhead Escheat, Wills, subhead Unclaimed Legacies.

21.10 LANDLORD AND TENANT:

Kinds of Tenancy.

Tenancies expressly recognized are: Tenancy at sufferance, tenancy at will, tenancy for years, tenancy from year to year, tenancy from month to month, tenancy by entirety, and tenancy for life. (ORS 91.020). Week to week tenancy may also exist. (ORS 91.855[1]). One who comes into possession of real estate of another lawfully, but who holds over wrongfully after termination of his term, is considered as tenant at sufferance, (ORS 91.040). One who enters into possession of real estate with consent of owners, under circumstances not showing intention to create freehold interest, is tenant at will. (ORS 91.050). Where no certain term is mentioned but annual rent is reserved, tenancy is from year to year. (ORS 91.060). Tenancy for undetermined period, but with specific monthly rental, creates tenancy from month to month. (ORS 91.070).

Leases must be in writing if for more than one year. (ORS 93.020). Must be acknowledged in order to be recorded. (ORS 93.710).

Recording.

Lease (or memorandum) must be recorded in county where leased premises are situated in order to be effective against bona fide purchasers without actual notice. (ORS 93.710). Possession under unrecorded lease is, however, notice to third persons. (43 Or. 383, 73 P. 1).

Rent.

Unless otherwise provided all rents reserved are due in advance. The tenant must pay or tender payment on or prior to the first day of the rent paying period, and no demand is necessary to render a tenant in default. (ORS 91.210).

Lien.

Landlord has lien on all chattels of tenant brought upon leased premises, except wearing apparel and household goods. (ORS 87.162; 91.835). See subhead Distress, infra.

Termination of Tenancy.

Notice to terminate periodic tenancy other than for default, and notices required in connection with dispossession proceedings, must be in writing and served by delivery to tenant in person or by being posted in conspicuous place on leased premises, or by being left at his residence or place of abode. (ORS 91.110).

Where rent under a tenancy at will is payable at periods less than three months, a notice to terminate tenancy must be not less than time equal to intervals between times of payment of rent. (ORS 91.050). Sixty days written notice prior to expiration of rent paying period is required to terminate tenancy from year to year (ORS 91.060); 30 days prior written notice, given at any time, to terminate tenancy from month to month (ORS 91.070); ten days prior written notice to terminate tenancy from week to week (ORS 91.855). In case leasing is for agricultural purposes, 90 days prior written notice is required. (ORS 105.120). Where date of expiration of tenancy is determined by lease, no notice is required. (ORS 91.080). Failure of tenant to pay rent reserved by terms of his lease for period of ten days (unless different period is stipulated in lease) after same is due, operates to terminate tenancy and no notice to quit or pay rent is required to render tenant's holding thereafter unlawful. However, if landlord accepts rent lease is reinstated. (ORS 91.090).

No notice is necessary to terminate tenancy at sufferance. (ORS 91.040).

Holding Over.

Wrongful holdover after termination or expiration of term creates tenancy at sufferance which is terminable without notice. (ORS 91.040; 91.080).

Dispossession.

Action for forcible entry or unlawful detainer is brought in county where property is situated, in circuit court or before any justice of peace, where tenant is ten days in default in payment of rent, when lease has expired, or tenant is holding contrary to any condition or covenant of it, or when tenant from month to month or year to year remains in possession after notice to quit. (ORS 105.110-.115). Attorneys permitted to appear on behalf of any party, but attorneys fees not awarded if defendant does not contest action. (ORS 105.137).

Distress.

Before landlord lien statute (ORS 87.162) was enacted, common law distraint existed in Oregon. Distraint for rent in residential context is abolished. (ORS 91.835). Common law remedy still exists in commercial context. (220 Or. 188; 348 P.2d 441; 27 BR 532).

Uniform Residential Landlord and Tenant Act adopted, but with numerous variations, omissions, and additions. (ORS 91.700-.895).

General.

Rights, duties, liabilities and remedies of landlords and tenants under written or oral rental agreements for residential dwelling units governed by Residential Landlord and Tenant Act. Tenant may not waive rights and remedies provided by Act. (ORS 91.745). Unconscionable agreements may be held unenforceable. (ORS 91.735). Unless otherwise provided, tenant must pay in advance fair rental value of premises and rent may not be increased without 30 days prior written notice. (ORS 91.740). Landlord must maintain dwelling in habitable condition as defined by Act; this duty not separate from landlord's right to receive rent. (ORS 91.770; 91.750). Landlord required to supply and install smoke detectors in each dwelling unit. (ORS 479.250-.300). Landlord of four or less units must advise tenant prior to execution of rental agreement of any notice of impending trust deed, mortgage, or contract of sale, default or sale, forfeiture or foreclosure. (ORS 91.766). Tenant must use premises for intended purposes, keep premises clean and sanitary, not damage premises and not disturb neighbors. (ORS 91.775). Landlord shall have reasonable access to premises. (ORS 91.785). Security deposits may be held and used by landlord only to remedy tenant's defaults or to repair tenant's damages to premises after written accounting of basis of claim. Security deposit not forfeited if tenant fails to maintain tenancy for specific term. For bad faith failure to return deposit or failure to account for amount withheld tenant may recover twice amount wrongfully withheld. Landlord must disclose name and address of manager and person authorized to receive service of process, notices and demands. (ORS 91.760). Landlord's rules and regulations generally enforceable if fair, explicit, and reasonably designed not to evade landlord's obligation but to promote welfare of tenants, preserve premises or distribute services fairly to tenants generally. Landlord must notify tenant of rules and regulations and, if they work substantial modification of bargain, obtain tenant's consent. (ORS 91.780). Actions under rental agreement or Act must be commenced within one year. (ORS 12.125). Reasonable attorney fees may be awarded to prevailing party together with costs and necessary disbursements in actions under rental agreement or Act, notwithstanding any agreement to contrary. (ORS 91.755).

Tenant's Remedies.

If landlord fails to comply with rental agreement or Act, tenant may terminate rental agreement on 30 days prior written notice if breach not remedied within such 30 day period or, in case of essential services, on seven days prior written notice if breach not remedied within seven days following notice. If same breach occurs within six months, tenant may terminate rental agreement on 14 days notice. However, tenant may not terminate for conditions deliberately or negligently caused by tenant, member of tenant's family, or other person on premises with tenant's consent. Tenant may recover damages and obtain injunctive relief in appropriate cases. Landlord must return security deposit and prepaid rent if tenant terminates rental agreement. (ORS 91.800). If landlord deliberately refuses or is grossly negligent in failing to supply heat, running water, hot water, electricity or other essential service, tenant may procure same, and deduct cost from rent, recover damages, secure substitute housing and refrain from paying rent during landlord's noncompliance and recover cost of such housing not in excess of periodic rent. If landlord is merely negligent in failing to provide such services tenant may cause necessary work to be done and deduct cost up to maximum of $200. (ORS 91.805). Landlord's noncompliance with rental agreement or Act may be defense or counterclaim by tenant to landlord's action for possession or rent, but tenant may be required to pay rent into court. If tenant pays insufficient amount to court prior to commencement of trial, tenant may not collect attorney's fees. If no rent remains due in action for possession, judgment shall be entered for tenant. (ORS 91.810). If landlord excludes tenant from premises, seriously attempts or threatens unlawfully to remove or exclude tenant from premises, willfully diminishes essential services or retaliates against tenant when tenant complains of violations of building code, rental agreement or Act or tenant joins tenant union, tenant may recover possession or terminate rental agreement and may recover greater of up to two months periodic rent or twice actual damages, whether or not tenant has resorted to other aforementioned remedies. (ORS 91.815, .865). If landlord enters into rental agreement for dwelling unit knowing that governmental agency has posted dwelling unit as unlawful to occupy, tenant may recover either two months' periodic rent or up to twice actual damages sustained, whichever is greater, together with any security deposit and prepaid rent. (ORS 91.817). Tenant may terminate rental agreement without liability for future rent on 14 days written notice, with verification, to landlord that tenant or minor member of tenant's household is victim of domestic violence, sexual assault or stalking. (ORS 90.453).

Landlord's Remedies.

If tenant fails to comply with rental agreement or Act, or tenant's use of premises materially affects health and safety, landlord may terminate rental agreement on 30 days prior written notice if breach not remedied in 14 days, or, if same breach occurs within six months, landlord may terminate rental agreement on ten days prior written notice. If rent not paid when due or within seven days thereafter, including first day rent is due, landlord may terminate rental agreement on 72 hours prior written notice if rent remains unpaid. Landlord may terminate on 24 hour prior written notice if tenant, someone in tenant's control or tenant's pet seriously threaten or inflict substantial personal injury or damage or commit extremely outrageous act. (ORS 91.820). Employee of landlord may only be evicted after 24 hours' written notice of termination of employment. (ORS 91.120). Landlord may recover damages and injunctive relief in appropriate cases. (ORS 91.820). Separate ten day notice provisions where tenant keeps unpermitted pet. (ORS 91.822). If rental agreement requires tenant to give notice of absences of more than seven days, landlord may recover actual damages for tenant's wilful failure to give notice. Upon tenant's absence in excess of seven days landlord may enter premises as reasonably necessary. If tenant abandons premises, landlord shall make reasonable efforts to relet and rental agreement terminates as of date of new tenancy. (ORS 91.825). Acceptance of rent with knowledge of tenant's default constitutes waiver unless otherwise agreed after breach, unless eviction proceedings have been commenced, rent accepted does not cover period beyond date of its acceptance and landlord notifies tenant that acceptance will not waive right to evict tenant. (ORS 91.830). Landlord's lien on tenant's household goods not enforceable. (ORS 91.835). If tenant abandons personal property, landlord must make reasonable attempts to notify tenant and specify at least 15 day period for removal of such property, before disposing of it. If landlord seizes and retains tenant's personal property without complying with statutory procedures, tenant will be relieved of liability for damage to premises under certain circumstances and for unpaid rent and may recover up to twice actual damages sustained by tenant. (ORS 91.840). If rental agreement terminated landlord may have claim for possession and separate claim for actual damages. (ORS 91.845). If tenant willfully and not in good faith holds over after termination or expiration of rental agreement landlord may recover greater of two months periodic rent or twice actual damages. (ORS 91.855).

Mobile or Floating Home Spaces.

Additional limitations and restrictions apply to rental agreements involving mobile or floating home spaces. (ORS 91.870 to 91.935).

Form (ORS 105.125)

IN THE. . . . . COURT

FOR THE COUNTY OF. . . . .

(Landlord),

Plaintiff(s), No.

vs. COMPLAINT

(Tenant), (Forcible Entry and

Unlawful Detainer)

Defendant(s).

I

Defendant(s) (is) (are) in possession of the following premises:

.... (city)........... (county)

II

Defendant(s) (entered upon the premises with force) (are/is unlawfully holding the premises with force).

III

Plaintiff(s) (is) (are) entitled to possession of the premises because:

. . . . . . 24-hour notice (personal injury)

. . . . . . 24-hour notice (substantial damage)

. . . . . . 24-hour notice (extremely outrageous act)

. . . . . . 24-hour notice (unlawful occupant)

. . . . . . 24-hour notice (employee termination)

. . . . . . 72-hour notice (nonpayment of rent)

. . . . . . 10-day notice (repeat violation)

. . . . . . 10-day notice (pet violation)

. . . . . . 7-day notice (week-to-week tenancy-cause)

. . . . . . 10-day notice (week-to-week tenancy)

. . . . . . 30-day notice (month-to-month tenancy)

. . . . . . 30-day notice (cause)

. . . . . . Other notice

. . . . . . No notice

ATTACH A COPY OF THE NOTICE RELIED ON TO THE COMPLAINT

Wherefore, plaintiff(s) (prays) (pray) for possession of the premises and costs and disbursements incurred herein.

....

Plaintiff(s)

21.11 LEASES:

See topic 21.10 Landlord and Tenant.

21.12 [RESERVED]

21.13 PERPETUITIES:

Uniform Statutory Rule Against Perpetuities adopted effective Jan. 1, 1990. (ORS 105.950-.975). Statutory rule against perpetuities is generally prospective in application. (ORS 105.970).

Employees' pension and profit-sharing trusts exempt from Rule Against Perpetuities. (ORS 128.520). Cemetery maintenance trusts exempt. (ORS 97.730). Planned community declaration, bylaws and rules exempt. (ORS 94.770). Condominium declaration, bylaws, and rules exempt. (ORS 100.025).

21.14 PERSONAL PROPERTY:

Definition.

Distinction between real and personal property turns on common law rules. When affixed to realty, determination as to whether property is real or personal depends on nature of annexation, adaptation, and parties' objective intent. (232 Or. 170, 373 P.2d 995).

Ownership.

Tenancy by entirety in personal property does not exist in Oregon. Rather, Oregon court conceives of conveyance to husband and wife with right of survivorship as creating concurrent life estates with contingent cross remainders. (228 Or. 123, 363 P.2d 1102). Joint tenancy in personal property may be created by written instrument only, but shall not derogate from rights of creditors. (ORS 105.920).

Subject to Execution.

Personal property, with certain exceptions, is subject to execution. (ORS 18.345).

Found Property.

Finder of property worth more than $100 must notify county clerk, publish notice for two weeks and wait three months before asserting ownership or be subject to prosecution for theft. (ORS 98.005-.025, 164.065).

Abandoned Property.

State has adopted Uniform Disposition of Unclaimed Property Act with significant nonuniform amendments, and incorporating provisions of Unclaimed Property Act. (ORS 98.302-.436).

21.15 POWERS OF ATTORNEY:

Attorneys in Fact.

Real property or any interest therein may be conveyed by agent or attorney in fact under written authority, and acknowledged or proved and recorded. (ORS 93.010; 93.020). See also topic 21.06 Deeds and subhead Advance Directive under category 13 Estates and Trusts, topic 13.16 Wills.

Uniform Durable Power of Attorney Act.

Not adopted.

Power of Attorney for Health Care.

Statutory requirements relating to, and required form for, powers of attorney for health care, including decisions on withholding or withdrawal of artificially administered nutrition or hydration under specified circumstances, are set forth in Oregon Health Care Decisions Act (ORS 127.505 to 127.660) governing “advance directives” by capable adults. Adults of sound mind may also designate attorney-in-fact and make declaration of preferences or instructions regarding mental health treatment pursuant to form set out in 127.735. (ORS 127.700-.737).

Revocation.

Power of attorney is generally revoked by death of principal. (183 Or. 149, 163, 191 P.2d 380). However, death of principal or occurrence of event that would otherwise terminate authority will not revoke written power of attorney until agent has actual knowledge of death or event, if agent acts in good faith. (ORS 127.015, 2009 c. 46). Power of attorney is not revoked by later financial incapability of principal; but see 127.505 et seq. for provisions applicable to powers of attorney for health care. (ORS 127.005, 2009 c. 46). Recorded power of attorney to convey land not deemed revoked by act of executing party unless instrument of revocation is also recorded. (ORS 93.670). ``Springing'' powers expressly permitted. (127.005, 2009 c. 46).

Members of Armed Forces.

No statutory provision.

21.16 REAL PROPERTY:

Joint tenancy is abolished and use of term, without more, creates tenancy in common. Right of survivorship may, however, be created by express agreement of parties. (ORS 93.180). Conveyance "not as tenants in common but with the right of survivorship" has been interpreted as creating concurrent estates for life with contingent remainders which vest in survivor. (216 Or. 23, 337 P.2d 330). In absence of contrary intent, statute governs payment and survivorship rights in promissory notes secured by mortgage or trust deed given by grantee to his grantors evidencing deferred portion of purchase price and in land sale contracts. (ORS 93.240). Use of word "heirs" or other words of inheritance not necessary to create or convey estate in fee simple. (ORS 93.120).

Conveyance to husband and wife, as such, creates tenancy by entirety. (273 Or. 382, 541 P.2d 460).

Joint property rights may be created directly without use of intervening conveyance to "straw man." (ORS 93.280).

Rule in Shelley's Case abolished as to wills (ORS 112.345) and as to gifts or conveyances made after June 30, 1993 (ORS 93.050).

Foreign Conveyances.

Uniform Law on Notarial Acts in force. (ORS 194.505-.595).

Leaseholds.

See topic 21.10 Landlord and Tenant.

Condominium.

"Oregon Condominium Act" regulates creation and sale of condominium units and controls rights, powers and interests of parties in condominiums. (ORS 100.005-.990).

Subdivisions.

Subdivision control law prescribes requirements for subdivisions. (ORS 92.305-.495, 92.990).

Planned Communities.

Rights, powers and interests of parties in planned communities created after July 1, 1982, and sale thereof, governed by 94.550-.785.

Timeshares.

Statute regulates sale and management of timeshare property having more than 12 timeshare estates. (ORS 94.803-.945).

Membership Campgrounds.

Statute regulates sale of membership camping contracts. (ORS 94.953-.989).

Unlawful Trade Practices.

Trade in real estate which is or may be used or bought primarily for personal or family purposes is within scope of Unlawful Trade Practices law. (ORS 646.605-.656).

Purchase and Sale Agreements.

See topic Deeds for notice required by statute to be included in agreements. (ORS 93.040[2]). Uniform Vendor and Purchaser Risk Act adopted. (ORS 93.290-.300).

See also topic 21.06 Deeds; categories 5 Civil Actions and Procedure, topic Partition; Debtor and Creditor, topic Homesteads; Environment, topic Environmental Regulation; Family, topic Husband and Wife; Mortgages, topic Mortgages of Real Property.

Land Use Development and Regulation.

Use and development of real property is regulated under comprehensive network of land use laws and regulations administered concurrently by Oregon Land Conservation and Development Commission (c. 197), by municipal corporations (cc. 92 and 227), and by counties (cc. 92 and 215). No real estate development of any kind may proceed, no building permits or other governmental authorizations may be granted, unless development conforms either to comprehensive land use plan classification or to zoning classification of particular parcel of property for which development is proposed, whichever is more restrictive. (271 Or. 500, 533 P.2d 772). Planned communities in Oregon created after July 1, 1982 governed by comprehensive requirements. (ORS 94.550-.785). Creation of subdivisions (divisions of single parcels of real property into four or more lots) and partitions (divisions of single parcels of real property into two or three lots) are governed by c. 92 and city and county ordinances adopted pursuant thereto. Special use restrictions are placed on former disposal and other sites designated as potential environmental hazard sites by Environmental Quality Commission. (ORS 466.360-.385).

Residential Property Disclosure.

Seller of real property improved by one to four dwelling units, condominium, time-share property or manufactured dwelling must deliver to each buyer who makes written offer seller's property disclosure statement in substantially same form shown at end of this Digest. (ORS 105.465-.490).

See also category 12 Environment, topic 12.01 Environmental Regulation.

21.17 TRUST DEEDS:

See category 20 Mortgages, topic 20.04 Mortgages of Real Property.

22 TAXATION

22.01 ADMINISTRATION:

State Taxes.

Department of Revenue exercises general supervision of system of property taxation (ORS 306.115), and administers and enforces other tax laws (ORS 305.015, 314.805).

Tax Appeals.

Oregon Tax Court has exclusive jurisdiction, subject to review by Supreme Court, for determination of questions of law and fact arising under most tax laws. (ORS 305.410).

Penalties.

General.

Anyone willfully submitting false return is guilty of Class C felony and may be fined

$1,000 or imprisoned for one year, or both. (ORS 305.815, 305.990, 314.991).

Income Tax.

All deficiencies bear interest at statutory rates or as may be adjusted by Department of Revenue from date of return to payment. (ORS 305.220). If taxpayer fails to make timely filing of return or payment of tax, 5% penalty is imposed; if return not filed until after three months after due date, additional 20% penalty imposed; 30 days after notice and demand, additional penalty of 25% may be imposed; 100% penalty for certain intentional false acts or acts done with intent to evade tax. (ORS 314.400).

Inheritance Tax.

Failure to submit records, papers or files relating to estate of decedent when requested by Department of Revenue is misdemeanor. (ORS 118.990). Failure to file timely return results in penalty of 5%; after three months, additional 20%; deficiency caused even partially by fraud results in penalty of 100% of full deficiency. (ORS 118.260). Interest imposed at rate determined by Department of Revenue after nine months. (ORS 118.260, 305.220).

Personal Property Tax.

Property tax return filed late but before June 1 results in penalty of 5%; return filed after June 1 but before Aug. 1 results in penalty of 25%; return filed after Aug. 1 or failure to file return results in penalty of 50%. (ORS 308.296).

Real Property Tax.

See topic 22.13 Property Taxes, subhead Sale and Redemption.

22.02 ALCOHOL, BEVERAGES AND TOBACCO TAXES:

Alcoholic Beverage Tax.

C. 473.

Cigarette Tax.

C. 323.

22.0322.04

22.05 EMPLOYMENT TAXES:

Employer Tax.

Mass transit districts may by ordinance impose tax on employers based on wages and also on earnings from self-employment. (ORS 267.385).

Unemployment Compensation Tax.

Imposed on certain employers employing one or more persons in 18 different weeks during any calendar year, or having total payroll during any calendar quarter of $225 or more. (ORS 657.025, 657.505). Tax is imposed on entire payroll, excluding any remuneration over amount defined by statutory formula. (ORS 657.095). Numerous types of employment are exempted. (ORS 657.045-.094). Definition of employment is in part related to definition in Federal Unemployment Tax Act. (ORS 657.030). Act applies to interstate employment under certain conditions. (ORS 657.035). There is no tax on employees. (c. 657).

Rates are based on experience record of each employer. Rates are established by statute prior to establishment of experience record. (ORS 657.430-.435). Employment Division, Department of Human Resources, administers law. (ORS 657.608).

Payment.

Taxes are payable quarterly on or before last day of month following close of quarter. Delinquent employers may be required to pay monthly, in which case taxes are due on or before last day of month following month for which payable. Interest at 1½% per month accrues on all taxes unpaid after due date, and there is penalty of 10% for failure to pay after demand. (ORS 657.505, 657.515).

22.06 [RESERVED]

22.07 ESTATE TAX:

None. See, however, topic Inheritance Tax.

22.07A EXCISE TAXES:

See category 2 Business Organizations, topic 2.03 Corporations.

22.07B GAMBLING AND ENTERTAINMENT TAXES:

Amusement Device Tax.

C. 320.

22.08 GASOLINE AND SPECIAL FUELS TAXES:

Gasoline Tax.

C. 319.

22.09 GIFT TAX:

No gift tax applies to gifts made after Dec. 31, 1986. (ORS 119.051).

22.10 [RESERVED]

22.11 INCOME TAX:

Law is set forth in Personal Income Tax Act of 1969 as amended (c. 316). Act attempts to make law identical in effect to Federal Internal Revenue Code in effect for tax year of taxpayer, modified as necessary by state's jurisdiction to tax and as provided by legislature. (ORS 316.007, 316.012).

Income Taxed.

Taxable income based on federal taxable income, with numerous modifications. (ORS 316.012).

Rates.

Marginal rates range from 5% to 11% and are adjusted for changes in consumer price index. (ORS 316.037, 2009 c. 746). In case of joint, head of household, or surviving spouse returns, tax imposed is twice tax which would have been imposed at above rates if taxable income had been cut in half. (ORS 316.042).

Standard deduction is sum of "basic standard deduction" ($1,640 to $3,280) plus "additional standard deduction," if applicable ($1,000 to $1,200 for each taxpayer who is either blind, or 65 or older). (ORS 316.695).

Personal exemption credit of $90, multiplied by number of personal exemptions allowed by § 151 of Internal Revenue Code, allowed against taxes otherwise due. (ORS 316.085).

Other Credits.

Federal tax credits allowable only as specified in Oregon law. (ORS 315.054). Oregon specifically provides for number of state tax credits. (c. 315; 316.078-.116; 316.132-.148).

Nonresidents.

Nonresident taxed only on income derived from Oregon. (ORS 316.130).

Income Taxed-Corporations.

See category 2 Business Organizations, topic 2.03 Corporations, subhead Taxation of Corporate Property.

Unemployment Compensation.

Recipients of unemployment compensation subject to income tax and estimated tax program for benefits received after Jan. 1, 1997. (c. 657).

Uniform Division of Income for Tax Purposes Act adopted. (ORS 314.605-.695). Effective Jan. 1, 1986, use of method other than allocation and apportionment under 314.610-.665 permissible only if statutory methods result in constitutional violation (nonuniform provision). (ORS 314.670).

Multistate Tax Compact adopted. (ORS 305.655-.685).

22.12 INHERITANCE TAX:

Tax Imposed.

Inheritance tax limited to maximum state death tax credit available for federal estate tax purposes. If property left in two or more states and total state taxes, excluding any additional or pickup tax, is less than such credit, additional tax is determined under regulations of Department of Revenue. (ORS 118.100[2]). If amount of state tax credit is changed as result of change or correction of federal estate tax liability, executor is required to report change to Department of Revenue, which may issue notice of deficiency within two years after receiving report. (ORS 118.100[4]).

Collection.

Department of Revenue has general supervision over collection of tax, which accrues upon death of decedent and is payable to Department of Revenue at expiration of nine months from death, except as otherwise provided in Act. (ORS 118.220-.250). Tax must be collected by Department of Revenue in same manner as income taxes are collected under c. 314. (ORS 118.230[2]). If extension is granted, interest is charged at rate determined by Department of

Revenue from time tax became payable. (ORS 118.260).

Lien.

Tax is lien upon property inherited until paid, and transferees, personal representatives, and trustees are liable for payment of tax to extent of value of property received. (ORS 118.230).

Transfer of Stock.

Stock of corporation owned by decedent may be transferred with consent of Department of Revenue. (ORS 118.450). No such transfer in Oregon by foreign executor, administrator, or trustee is valid unless tax paid to Department of Revenue. (ORS 118.310).

Valuation Date.

For inheritance tax purposes value of assets determined on date of decedent's death. (ORS 118.150).

Apportionment Against Inter Vivos Dispositions.

In absence of explicit language in will, taxes are apportioned. (ORS 116.113).

Interstate Cooperation.

If other states involved in dispute concerning decedent's domicile have statutes similar to 118.855-880, and if Oregon and at least one other state each claim to have been domicile of decedent, Department of Revenue may enter written agreement with other states and executor to accept sum certain in full payment of death taxes. (ORS 118.860; 118.865). If agreement is not achieved, question of domicile is submitted to board of arbitration. (ORS 118.870). When these provisions apply and are pursued, no other proceeding may be instituted to determine domicile for death tax purposes. (ORS 118.860).

22.12A MINES, MINERALS AND FISHERIES TAXES:

Timber Tax.

Oregon has several special taxes relating to timber. In lieu of general property taxes, are Eastern Oregon Privilege Tax (ORS 321.405-.520), Western Oregon Forestland and Privilege Tax (ORS 321.257-.390), and Western Oregon Small Tract Optional Tax (ORS 321.705-.765). Additional taxes are imposed to provide funds for fire protection: Forest Products Harvest Tax (ORS 321.005-.185), which has general application; and separate taxes applying to protected forest lands (ORS 321.015, 477.880).

22.1322.15

22.16 PROPERTY TAXES:

Real and Personal Property Tax.

All real property in state and all tangible personal property situated within state (unless specifically exempted, see subhead Exemptions, infra), is subject to assessment and taxation in equal and ratable proportion at 100% of its real market value. (ORS 307.030, 308.232). Some vessels with home ports in Oregon are assessed at 40% of real market value, and some ships in intercoastal or foreign trade and some self-propelled, offshore drilling rigs are assessed at 4% of real market value. (ORS 308.256). Where vessel used as plant for reduction or processing (but not canning) of deep-sea fish is docked or moored in Oregon waters on or subsequent to tax day, county assessor must be notified and vessel, machinery and equipment are subject to assessment and taxation at 100% of real market value. (ORS 308.260).

Exemptions.

Extensive and substantial exemptions exist for both real and personal property. (c. 307). Timely application must be made for many exemptions. (For example, see 307.115, 307.162, 307.260, 307.380, 307.460, and 307.495). Relief may be provided when failure to apply was for good cause. (ORS 307.475).

Valuation of Property.

All property assessed at 100% of real market value. (ORS 308.232). Real market value is market value determined in accordance with rules of Department of Revenue. If property has no immediate market value, real market value is amount that would justly compensate for loss. Value adjusted for governmental restrictions on use. (ORS 308.205). If real or personal property is damaged by fire or act of God, reduction in tax allowed. (ORS 308.425). Valuation of certain rehabilitated rental residential property may be frozen for ten years. (ORS 308.450-.481). Special valuation rules for farm land. (ORS 308.345-.406). Special valuation rules for industrial plants. (ORS 308.408-.413).

Property Tax Limitations.

Initiative measure amending Oregon Constitution adopted by voters. Amendment separates all taxes imposed upon any property into two categories: (1) revenues raised specifically to fund public school system and (2) revenues raised to fund all other government operations. Maximum allowable tax for each $1,000 of property's real market value is limited as follows:

Fiscal Year	*School System*	*Government Operations*
1991-92	$15.00	$10.00
1992-93	$12.50	$10.00
1993-94	$10.00	$10.00
1994-95	$ 7.50	$10.00
1995-96 and thereafter	$ 5.00	$10.00

Limits do not apply to government assessments, service charges, and taxes to pay interest and principal of certain government bonds.

Assessment and Levy.

Assessments are made as of July 1, at 1 a.m. (ORS 308.210). Taxes are levied in July. (ORS 310.020).

Review of Assessment.

Board of property tax appeals may review assessments. (ORS 309.100, 309.150). Appeal from board of property tax appeals to magistrate division of Tax Court (ORS 305.501). Appeals from magistrate division to judge of tax court and appeal from Tax Court to Supreme Court. (ORS 305.445).

Payment.

One-third of taxes and other charges due must be paid on or before Nov. 15, one-third on or before Feb. 15, and one-third on or before May 15. (ORS 311.505). Interest on delinquent taxes for tax years 1989-1990 through 1999-2000 is charged at 11/3% per month. (ORS

311.500). Discounts for payment on or before Nov. 15 are: 2% on two-thirds of tax and 3% on full tax. (ORS 311.505). Persons 62 years of age or older having household income of less than $32,000 may defer payment of property taxes. (ORS 311.666-.696).

Collection.

Tax collector is designated for each county by county court or board of commissioners. (ORS 311.055).

Refund.

Claims for refund must be filed with county governing body within six years of assessment date. (ORS 311.806). Appeals, however, must be filed within much shorter time limits. (ORS 305.280).

Personal Liability of Owner of Property.

Taxes on real property, value of which is substantially dissipated or destroyed by owner subsequent to assessment date, are personal debt of such owner. (ORS 311.420). Unlawful to remove timber from land until all taxes which are due and payable have been paid. (ORS 311.425). Taxes on personal property are personal debt of owner. (ORS 311.455).

Prorating Between Buyer and Seller.

Where there is no agreement between parties to sale of real property, current fiscal year's taxes are prorated as of date of sale. (ORS 311.275). Fiscal tax year is from July 1 to June 30. (ORS 308.007).

Liens.

Personal property taxes are lien from July 1 of year of assessment on all personal property of person assessed. Real property taxes are lien on real property assessed from July 1 of year of levy. (ORS 311.405).

Sale and Redemption.

Real property is subject to foreclosure for delinquent taxes three years from earliest date of delinquency. (ORS 312.010). After notice by personal service or by publication and both certified and regular first-class mail, county may bring one general proceeding in rem to foreclose tax liens on all properties on foreclosure list. (ORS 312.040, 312.050). Holder of recorded mortgage lien may file with tax collector request for notice of foreclosure list and will then be given notice by registered mail. (ORS 312.140). In general, prior to judgment, property may be removed from foreclosure proceeding by payments such as would have prevented its inclusion in foreclosure list plus penalty of 5%. (ORS 312.110). After judgment, property is sold directly to county for taxes and interest and may be redeemed within two years by person having interest in such property on payment of full amount of judgment plus penalty of 5% and $50 fee. (ORS 312.120). During redemption period, former owner has right to possession, but is subject to penalty for waste. (ORS 312.180). Not less than one year prior to expiration of period of redemption, tax collector is required to give specific notice to any person or entity entitled to redeem whose interest appears in records of county as of date foreclosure proceeding were instituted. (ORS 312.125). Notice of expiration of redemption period (which is not required to include property descriptions or names of respective owners) is published in two weekly issues just prior to end of such period. (ORS 312.190). Property not redeemed within two-year period is immediately deeded to county and all rights of redemption are terminated. (ORS 312.200). County is thereafter deemed to have constructive possession sufficient to establish adverse possession regardless of defects, jurisdictional or otherwise, in foreclosure proceedings. (ORS 312.218, 312.220). Different procedure is provided for foreclosure of delinquent taxes of irrigation and drainage districts. (ORS 548.610-.675).

Reciprocity with Other States.

Oregon courts must recognize and enforce liability for taxes lawfully imposed by laws of any other state which extends like comity. (ORS 305.610).

Real Estate Conveyance Tax.

Imposed by Washington County Code. Tax equal to $1 per $1,000 or fraction thereof of selling price. (ORS 3.04.070).

22.17 SALES AND USE TAXES:

Sales Tax.

None.

Use Tax.

None.

22.18 STAMP AND SEAL TAXES:

Stamp Tax.

None.

22.18A TAX LIENS:

Uniform Federal Tax Lien Registration Act.

As amended. (ORS 87.806-.831).

23 TRANSPORTATION

23.01 MOTOR VEHICLES:

Department of Transportation administers laws relating to licensing, registration and operations of motor vehicles. (ORS 802.010[1]). Registration, license, and certificate of title requirements apply generally to campers, mobile homes that are vehicles and trailers. (c. 803).

Registration.

Every owner of vehicle operated on state highways must make application for registration with Motor Vehicles Division before operation. (ORS 803.300). Registration is limited to owners domiciled in Oregon with certain exceptions. (ORS 803.360). “Owner” means person in whose name title to vehicle is issued and is entitled to possession and use of vehicle; or if certificate of title, registration, and right to possession and use of vehicle are in different persons, person, other than security interest holder or lessor, entitled to possession under security agreement, or lease. (ORS 801.375). Motor Vehicles Division to remove person's name and address on request from any list sold for direct mail advertising. Except for legitimate government purposes, Motor Vehicles Division may not disclose information and addresses collected or contained in connection with application, licensing or permitting. (ORS 802.222).

Operating vehicle and failing to maintain liability insurance or provide proof of financial responsibility is prohibited. (ORS 806.010).

Automobiles licensed for 24-month periods, expiration dates are staggered throughout calendar year; certain other classes of vehicles licensed for 12-month periods or one or more calendar quarters. Certain new vehicles have four year registration period. (ORS 803.400, .415). Licensed vehicles, except mobile homes and "fixed load vehicles" defined as vehicles neither designed nor used primarily for transportation of persons or property over highways, are not otherwise taxable. (ORS 803.585). License fees are governed by 803.420,.570-.585.

Motor Vehicles Division issues vehicle license plate which must be displayed on vehicle in plain view, and also issues registration card which must be kept in vehicle. (ORS 803.500-.520, .540). Photocopies may be used in commercial vehicles. (ORS 803.505). Limited exemption exists for certain personal vehicles of members of U.S. Armed Forces. (ORS 803.305).

Operator's License.

The Uniform Motor Vehicle Operators' and Chauffeurs' License Act in substance, and an interstate Driver License Compact have been adopted. (c. 807). Person commits offense of vehicle operating without driving privileges if person operates motor vehicle upon highway or premises open to public in state and person does not have license, driver permit, endorsement or statutory grant of driving privileges for particular type of operation, unless person is nonresident (for which see subhead, Nonresident Operators, infra), members of U.S. Armed Forces when operating vehicle in course of duty, servicemen and spouses holding valid out-of state licenses, certain drivers of snowmobiles, off-highway vehicles, and road and farm machinery, and persons driving under valid school or learner's permits. (ORS 807.010-.020, 2009 cc. 395, 482). Classes of licenses and endorsements established by 807.031-.035. Commercial driver license system created. (ORS 807.031). Special endorsement is required for operation of motorcycle. (ORS 807.035).

Age requirements are as follows: (1) Operator's license, 16 years; (2) Chauffeur's license, 18 years; (3) School permit, 14 years; (4) Learner's permit, 15 years. (ORS 807.060, .065, .230, .280).

Only persons who reside or are domiciled in state are eligible for driver's license. Person who is resident of state must obtain license or permit. (ORS 807.062).

Titles.

Every vehicle or trailer licensed must have been registered and a certificate of title issued by Motor Vehicles Division. (ORS 803.025-.030). Proportional registration of heavy vehicles transferred to Public Utility Commission as of Feb. 1, 1990. (c. 803). Motor Vehicles Division must be notified of change of name or address within 30 days of change. . (ORS 803.220). When vehicle is destroyed, certificate must be surrendered for cancellation within 30 days. (ORS 819.010). Snowmobiles and off-highway vehicles must have title issued with limited exceptions. (ORS 821.060-.070).

Sales.

All transfers of title, interest, or ownership, except for leasehold interests in certain fleet vehicles operating in interstate commerce, whether voluntary or by operation of law, must be reported to department and noted on certificate of title. (ORS 803.092). See also category 3 Business Regulation and Commerce, topic 3.10 Consumer Protection. Presumption that if part of vehicle or vehicle itself has been subject to four or more repairs or vehicle has been out of service 30 or more days, manufacturer is unable to conform vehicle to warranty and manufacturer must replace vehicle or reimburse retail buyer of new vehicle. (ORS 646.315-.375).

Liens.

All security interests must be shown on certificate of title. Exclusive means of perfecting security interest (except for dealers) is by application for notation of security interest on title. (ORS 803.097).

Identification Marks.

Class A misdemeanor knowingly to sell, conceal, or possess vehicle or component from which identification number has been altered or removed. (ORS 819.430).

Odometer Alteration.

Class C felony for any person to tamper with odometer. Also subject to civil action by owner or subsequent purchaser of vehicle; damages of $1,500 or treble actual damage caused by violation, whichever is greater. (ORS 815.410, .415).

Operation prohibited by person under age of 16 (except student over age of 14 securing special permit), problem drinkers, drug addicts, or certain physically or mentally incapacitated persons. (ORS 807.060).

Size and weight limits are regulated by 818.010-.120.

Equipment and lights required are set forth in 814.260-.300, 815.110-.430, 816.040-370. Motorcycle and moped drivers and passengers must wear approved headgear. (ORS 814.260-.290; 254 Or. 47, 456 P.2d 996).

Seat Belts.

No vehicle intended for transportation of individuals may be sold unless equipped, for operator and at least one passenger, with approved seat belts, safety harness or child safety systems. (ORS 815.080). Mandatory seat belt wear requirement for operators and passengers of motor vehicles. Violation of wear requirement by operator or by passenger under age 16 is Class D traffic infraction chargeable to operator. Violation by passenger age 16 or older is Class D traffic infraction chargeable to operator. (ORS 811.210). Persons under eight years of age and weighing 40 pounds or less must be properly secured in child safety system. (ORS 811.210). Evidence of failure to use available seat belt is admissible in personal injury action to show comparative fault of injured party. (304 Or. 558, 748 P.2d 77; 18.590).

Motor Vehicle Emission Standards.

Establishment of standards for control of motor vehicle emissions. (ORS 468A.360). Certificate of compliance with emission standards is required to register or reregister motor vehicles in Portland metropolitan area and other designated areas, unless vehicle is more than 20 years old. (ORS 803.350, 815.295-.325).

Traffic Regulations.

Basic rule is that driver must drive at speed which is safe in the circumstances, giving consideration to traffic, surface and width of highway, hazards at intersections, weather and highway conditions. Speeds in excess of posted limits are prima facie in violation of basic rule. Maximum limit if not otherwise posted is 65 MPH for automobiles on rural interstate highways, 55 MPH for trucks. Maximum speed 25 MPH in residential areas where no speed posted. (ORS 811.100-.115).

Rules of road established in c. 811. Criminal Procedure Statute creates four classes of traffic infractions, prescribes maximum fines, abolishes criminal penalties and jury trial for most infractions and enacts trial procedures. (c. 811, 153.505-.635). Fines increase if infractions occur in highway work zones. (ORS 809.410). (Jury trial provision ruled unconstitutional Brown v. Multnomah County Dist. Ct., 280 Or. 95 [1977].) Defines driving under influence to include driving with.08 or greater blood alcohol level (ORS 813.010), except for persons under 21 years of age (any amount of alcohol in blood constitutes being under influence) (ORS 813.300) and except for drivers of commercial vehicles (.04 or greater blood alcohol constitutes being under influence) (ORS 813.410). Bicycles are vehicles for purposes of rules of road. (ORS 814.400).

Disabled person parking statutes at 811.602-.640.

Accidents.

Driver must stop vehicle, remain at scene until he has (1) given name, address and vehicle registration number, and name and address of any other occupants of his vehicle, to occupants of other vehicles or injured pedestrians involved; (2) upon request, given operator's license number; and (3) rendered aid to injured persons. Witness to accident must give name and address to drivers and occupants of vehicles involved and to injured pedestrians. If other vehicle was unoccupied, driver must attempt to locate owner or leave his name and address and name and address of owner of vehicle he was driving conspicuously attached to other vehicle. Driver, except one in need of immediate medical assistance, or except to report accident to authorities, must remain at accident scene until police officer arrives and receives required information. (ORS 811.700, .705, .715). If damages to property of any person, driver, or owner equal $1,500 or more, then accident must be reported by drivers of vehicles and owners of vehicles on approved form to department of transportation within 72 hours. If damage is to property other than vehicle involved in accident or vehicle is towed from scene of accident, each driver involved in accident must file report as specified above. (ORS 811.720-811.730).

Liability of Owner.

Owner liable for negligence of others according to usual rules of agency. Owner of car kept for family use liable for negligence of any member of family. (142 Or. 611, 13 P.2d 600, 20 P.2d 395).

Guests.

1979 Legislature abolished guest passenger status.

Financial Responsibility.

A comprehensive “Motor Vehicle Safety Responsibility Act” has been enacted. (c. 806).

Insurance or proof of financial responsibility required. (ORS 806.060).

No-Fault Insurance.

Without relieving insured of any potential tort liability, each policy of liability insurance covering private passenger motor vehicle, other than motorcycle, shall provide to insured, family members residing in his household, passengers and pedestrians struck by insured vehicle, certain coverage for medical expenses and either loss of wages, if injured person usually engaged in remunerative occupation. If injured person is not usually engaged in remunerative occupation, coverage may be provided for essential services performed for benefit of injured person. Schedule of minimum benefits set out in statute. Minimum benefits include cost of child care for injured parent. (ORS 742.524). Insured or other covered person receiving benefits under such coverage must reimburse insurer to extent of such benefits received out of any settlement or judgment he may obtain from person legally responsible for his injury. If insured is or would be legally liable for injuries to other covered persons to whom required benefits have been paid by motor vehicle liability insurer other than insured's or by health insurer or health care service contractor, insured's motor vehicle liability insurer is to reimburse such other insurers or contractors for benefits so furnished in amount not to exceed damages so recoverable if policy of such other insurers or contractors contemplates such reimbursement. (ORS 742.534, .538).

Foreign Vehicles.

Nonresident owner of motor vehicle licensed in another state or country may operate vehicle over highways of state so long as not gainfully employed in state or taking action to acquire residence in state; residents of adjoining states employed in Oregon may operate vehicles licensed in adjoining state; foreign licensed motor vehicles operated for profit in state must be registered and licensed in state. Law provides for reciprocal exemption agreements with other states and for apportionment agreements with respect to registration of fleets engaged in interstate movement under the ICC. (ORS 803.030, .200, 802.500-.560).

Nonresident operators, if licensed in home jurisdiction, may operate motor vehicles in this state for up to 30 days under foreign license without examination or license here unless operator would be under age for Oregon license. (ORS 807.020).

Actions Against Nonresidents.

An action arising out of accident or collision while operating motor vehicle on road, highway or street of state, whether against a resident or a nonresident of this state, may be commenced by service of process on Administrator of Motor Vehicles Division and mailing copy of summons and complaint to defendant and defendant's insurance carrier, if known. No default shall be entered against any defendant served by mail under this section who has not either received or rejected registered or certified letter containing copy of summons and complaint, unless plaintiff can show by affidavit that defendant cannot be found. In case of foreign corporations maintaining registered agent in state service shall be on such registered agent in lieu of Administrator. Notice of service and copy of summons must be sent by registered or certified mail to defendant. Every motorist must notify Administrator of any change in address which occurs within three years of accident. (ORCP 7D[4]).

Direct Actions.

No statutory provision exists for direct action against insurer by injured person.

Motor vehicle carriers, and also forwarders and brokers, are regulated by the Public Utilities Commissioner. (c. 767). Law imposes a mileage tax, details of which are set forth in 767.815-.880. Any action, suit or proceeding relating to operation of motor vehicles in state may be commenced against nonresident carrier by service of process on Public Utilities Commissioner. (ORS 767.495).

Gasoline Tax.

See category 22 Taxation, topic 22.08 Gasoline and Special Fuels Taxes.

Lemon Law.

See category 3 Business Regulation and Commerce, topic 3.10 Consumer Protection. Also applies to motorcycles. (ORS 646.315).

23.02 RAILROADS:

See category 3 Business Regulation and Commerce, topic 3.08 Carriers.

24 Forms

Property Disclosure Statement and Advance Healthcare Directive Forms

(Click here to view)

—Scope —

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(Citations, unless otherwise indicated, are to titles and sections of Purdon's Pennsylvania Statutes Annotated. Citations to titles and sections with an asterisk between refer to Consolidated Pennsylvania Statutes. P. R. C. P. indicates Pennsylvania Rules of Civil Procedure. R. C. P. D. J. indicates Rules of Civil Procedure for District Justices. P. R. A. P. indicates Pennsylvania Rules of Appellate Procedure. P. R. Crim. P. indicates Pennsylvania Rules of Criminal Procedure. P. R. E. indicates Pennsylvania Rules of Evidence. P. R. J. P. A. indicates Pennsylvania Rules of Judicial Administration. P. B. A. R. indicates Pennsylvania Bar Admission Rules. P. R. D. E. indicates Pennsylvania Rules of Disciplinary Enforcement. Pa. R.C.L.E. indicates Pennsylvania Rules for Continuing Legal Education. R.P.C. indicates Rules of Professional Conduct. P. C. indicates Pennsylvania Code. P. L. indicates official pamphlet laws, cited by year and page. Session Laws are indicated by year and act number. Parallel citations to Atlantic Reporter begin with 110 Pa. and 102 Pa. Super.)

Note: This Revision is current through Dec. 2009 and incorporates 2009 Acts passed by Assembly and approved by Governor through Act 2009-44. Regular session of legislature held in Jan. of each year.

1 INTRODUCTION

1.01 GOVERNMENT AND LEGAL SYSTEM:

The Commonwealth of Pennsylvania is a constituent state of the United States of America. For further discussion of the U.S. federal system, see Introduction to the Federal Government of the United States at the beginning of this volume. A great many laws are promulgated by the federal government of the United States and are not reflected in the topics below. See the Introduction to this volume for references to the federal law topics covered.

Like all but one of the United States, Pennsylvania has a common law legal system, with roots in English common law. For information on the courts and legislature of Pennsylvania, see category 6 Courts and Legislature. Local governments in Pennsylvania are organized under General Local Government Code (53 Pa.C.S. § 901 et seq.) and Municipality Authorities Act (53 Pa.C.S. § 5601 et seq.). Special provision for cities of second class made in Intergovernmental Cooperation Authority Act. (53 P.S. § 28101 et seq.).

1.02 [RESERVED]

1.03 HOLIDAYS:

The following days are holidays: Jan. 1; 3d Mon. in Jan.; 3d Mon. in Feb.; Good Friday; last Mon. in May; June 14; July 4; 1st Mon. in Sept.; 2d Mon. in Oct.; 1st Tues. after 1st Mon. in Nov.; Nov. 11; 4th Thurs. in Nov.; Dec. 25; any day appointed or recommended by President of U.S. or Governor of Commonwealth as day of thanksgiving or fasting and prayer or other religious observance; Suns.; and Sats. from noon to midnight. (44 P.S. § 11).

Holiday Falling on Sunday.

Whenever Jan. 1, Feb. 12, June 14, July 4, Nov. 11, or Dec. 25, fall on Sun., following Mon. is holiday. (44 P.S. § 16).

Holiday Falling on Saturday.

Banks may observe following Mon. as full holiday whenever Jan. 1, July 4 or Dec. 25 fall on Sat.. (7 P.S. § 113).

Legality of Transactions on Holiday.

Pennsylvania has Sunday Trading Laws restricting types of business which may be performed on Suns. (18 Pa.C.S. § 7361, 7363, 7364, 7365); but Pa. Supreme Court has ruled these laws violate state constitution and are unenforceable (481 Pa. 101, 392 A.2d 266). Executory contracts made on Sun. are voidable. Contracts made on Sun. and executed by one party are enforceable against other. Conducting of sport, musical, theatrical and dramatic performances, exhibitions, contests and similar activities (other than motion picture exhibitions) on Sun. after 1 p.m. may be disallowed by referendum in each county. (4 P.S. § 40.2).

Bank Holidays.

Each day specifically appointed by President of U.S. or Governor of Commonwealth as bank holiday is to be treated as public holiday for banking transactions (such as presenting paper for payment or acceptance, protesting and giving notice of dishonor, etc.), but is regarded as business day for all other purposes. Acts which may not be done during bank holiday must be done on next succeeding business day, except that instruments payable at sight or on demand on half holiday Sat. are payable on that day before 12 o'clock noon, though demand for payment shall not be made until next secular business day. (7 P.S. § 113, 44 P.S. § 11).

Banks may, and usually do, observe Sats. as full holidays. (44 P.S. § 15). Banks may elect to do business on Sun. (7 P.S. § 113[a][vii]).

1.04 OFFICE HOURS AND TIME ZONE:

Pennsylvania is in the Eastern Standard (GMT -05:00) time zone. Office hours are generally from 9 a.m. to 5 p.m.

2 BUSINESS ORGANIZATIONS

2.01 AGENCY:

No statutory provisions as to the relation generally. Common law rules govern. Agents of professional athletes subject to regulation and registration. (Uniform Athlete Agents Act, 5 Pa.C.S. § 3101 et seq.). See category 6 Courts and Legislature, topic 6.04 Statutes.

2.02 ASSOCIATIONS:

Unincorporated associations are governed by Associations Code, pt. IV, c. 91. (15 Pa.C.S. § 9101-9103). Their business is conducted by customary usages and principles of parliamentary law and procedure. (15 Pa.C.S. § 9101). Incorporated or unincorporated fraternal benefit societies, orders, or supreme lodges, without capital stock, governed by Fraternal Benefit Societies Code. (40 P.S. § 1142-101 et seq.).

Privileges and duties of members of unincorporated association are defined by contract in association's constitution and bylaws. (400 Pa. 477, 162 A.2d 358).

Rights and Powers.

Transfer of membership or interest in association may be restricted.

Liabilities.

Status of unincorporated association is difficult to determine under decided cases, but in general it may be said that if association is conducted for profit, its members may become liable as partners; otherwise, liability must be worked out by ordinary rules of agency. (97 Pa. 493). Only association, and not individual members, is liable for periodic or funeral benefits or other similar liabilities. (15 Pa.C.S. § 9102).

Actions.

Action by unincorporated association must be prosecuted in name of member or members as trustees ad litem. (P. R. C. P. 2152). In action against association, it is proper to name as defendant association by its name, or any officer as trustee ad litem, and members may be joined as individual defendants (P. R. C. P. 2153) but not as class (493 F. Supp. 97). Members of fraternal benefit societies are exempted from individual liability for obligations of society. (40 P.S. § 6525).

Dissolution.

Constitution or bylaws of unincorporated association govern dissolution; absent such provision, decision to dissolve must be made by majority vote of membership. (380 Pa. 236, 110 A.2d 244).

Professional Associations.

After Oct. 1, 1989, members of occupations traditionally or legally designated “professions” have to be originally organized as partnerships or corporations. (15 Pa.C.S. § 9302). Those non-converting professional associations, organized before that date, are governed by Professional Associations Act of 1988, Associations Code, pt. IV, c. 93. (15 Pa.C.S. § 9301-9319). Under this Act, articles of association must be filed with the clerk of Court of Common Pleas of county in which association has its principal office. Amended articles of association must be filed in Department of State within 30 days of any change in membership or principal office address. Existence may be perpetual or for term of years. Associates hold proportional and transferrable interests in association and elect board of governors to manage affairs thereof. Associates are jointly and severally liable for torts of agents and employees and for misapplied funds. Dissolution takes place upon expiration of term of existence or by vote of associates. Upon dissolution, property of association, after satisfaction of debts, is divided among associates according to their proportional interests.

Decennial Filing.

During year 2001 and every tenth year thereafter, all associations registered under 54 Pa.C.S. § 6.5, including limited partnerships and registered limited liability partnerships except associations that are exempt because they have made filing with Department of State of the Commonwealth during the ten years ending on Dec. 31 of year in which decennial filing would otherwise be required, that qualify under §503(b) or, in connection with 2001 decennial filing, that qualify under §503(c) of Title 54, must file report with Department setting forth association's name and address, statement that association continues to exist and any other information Department specifies by regulation. (54 Pa.C.S. § 503). If nonexempt association fails to file report on or prior to Dec. 31 of year in which decennial filing is required to be made, then it loses exclusive use of its name, and association's name becomes available for any corporation, association or limited partnership registering to do business in Commonwealth of Pennsylvania.

Professional Corporations.

See topic 2.03 Corporations, subhead Professional Corporations.

2.03 CORPORATIONS:

Business corporations are formed under Business Corporation Law of 1988 (“1988 BCL”). (Associations Code, pt. II, subpt. B, 15 Pa.C.S. § 1101 to 4162). Corporations not-for-profit are organized under and governed by Nonprofit Corporation Law of 1988. (15 P.S. § 5101 to 6145). 1988 BCL went into effect Oct. 1, 1989, and applies to: (1) domestic corporations for profit; (2) domestic corporations for profit organized on cooperative principle only to extent provided by Cooperative Corporation Law of 1988 (Associations Code, pt. II, subpt. D, 15 Pa.C.S. § 7101 to 7726); (3) business development credit corporations; and (4) any other domestic corporation for profit incorporated under or subject to statute that provides that corporation's corporate affairs shall be governed by laws applicable to domestic business corporations (15 Pa.C.S. § 1102[a], [d], [e]).

1988 BCL does not apply to: (1) Banking institutions, as defined in Banking Code of 1965 (see category 3 Business Regulation and Commerce, topic 3.01 Banks and Banking); (2) credit unions, as defined in Credit Union Act; (3) domestic insurance corporations incorporated under or subject to Insurance Company Law of 1921 or any statute relating to incorporation or reincorporation of limited life insurance companies (see category 16 Insurance, topic Insurance Companies); and (4) foreign insurance corporations incorporated under any laws other than those of Pennsylvania and that are qualified to do business in Pennsylvania under Insurance Company Law of 1921. (15 Pa.C.S. § 1102[c], 1103).

Filing of Documents.

Department of State, Room 308, North Office Bldg., Harrisburg, Pa. 17120, has function of serving as office of public record for filing and public inspection of articles and other papers relating to corporate affairs. (15 Pa.C.S. § 132). In general, Department must file any document delivered to it for such purpose if it relates to matters authorized or required to be filed, is accompanied by any applicable docketing statement (15 P.S. § 134), and otherwise complies with all filing requirements, and if all fees, taxes and certificates or statements relating thereto have been tendered (15 Pa.C.S. § 135, 136, 139).

Fees.

All fees charged by Corporation Bureau of Department of State for its services under various laws are listed at 15 Pa.C.S. § 153.

Purposes.

Business corporation may be incorporated for any lawful purpose or purposes. (15 Pa.C.S. § 1301).

Name.

May be in any language but must be expressed in Roman letters or characters or Arabic or Roman numerals and must contain word “corporation”, “company”, “incorporated”, or “limited” or abbreviation thereof; word “association”, “fund” or “syndicate”; or words or abbreviations of like import in languages other than English. (15 Pa.C.S. § 1303[a]). Name must be distinguishable from name (existing or reserved) of any other domestic corporation for profit or not-for-profit, any foreign corporation for profit or not-for-profit which is either authorized to do business in Pennsylvania, or for which application for certificate of authority has been filed but has not yet become effective or any association registered under 54*c.5, subject to certain exceptions with respect to such other association changing its name, ceasing to do business, terminating its existence, abandoning its name, terminating registration of its name, or giving consent to use of its name. (15 Pa.C.S. § 1303[b]). Name also must not imply that corporation is insurance company nor contain word “annuity”, “assurance”, “beneficial”, “bond”, “casualty”, “endowment”, “fidelity”, “fraternal”, “guaranty”, “indemnity”, “insurance”, “insurer”, “reassurance”, “reinsurance”, "surety" or "title" when used in such way as to imply corporation is engaged in business of writing insurance or reinsurance as principal or any words of like purport unless it is duly licensed as insurance company by jurisdiction of incorporation or Insurance Department certifies it has no objection to use of designation. Name of domestic insurance corporation shall contain word "mutual" only if it is mutual insurance company and clearly designates object and purpose of corporation. (15 Pa.C.S. § 1303[c]). Name must not imply that corporation is governmental agency, bank as defined in Banking Code of 1965 (unless Pennsylvania bank holding company), insurance company, or public utility corporation furnishing gas or electric service to public, unless corporation has as express corporate purpose of furnishing service subject to jurisdiction of Pennsylvania Public Utility Commission or Federal Energy Regulatory Commission, or credit union. Name must not contain word "college", "university", or "seminary", subject to certain exceptions, any blasphemy, words implying practice of engineering or surveying unless approved by State Registration Board for Professional Engineers, words implying practice of architecture unless approved by Architects Licensure Board, or word "cooperative" or abbreviation thereof unless corporation is cooperative corporation. (15 Pa.C.S. § 1303[c]). Corporate name may be reserved for period of 120 days upon application to Department of State, accompanied by docketing statement. (15 Pa.C.S. § 134, 1305[a]; 71 P.S. § 803.3[13]). See subhead Fees, supra. Reservation may be transferred. (15 Pa.C.S. § 1305[b]). No provision for renewal of reservation but, upon expiration of 120 day period, name becomes available for reservation by anyone, including original reserver.

Decennial Filing.

During year 2001 and every tenth year thereafter, all domestic and foreign for profit and nonprofit corporations, except corporations that are exempt because they have made filings with Department of State of the Commonwealth during the ten years ending on Dec. 31 of year in which decennial filing would otherwise be required that qualifies under §503(b) of Title 54, or, in connection with 2001 decennial filing, filing that qualifies under §503(c) of Title 54, must file report in Department setting forth corporation's name and address, statement that corporation continues to exist and any other information Department specifies by regulation. (54 Pa.C.S. § 503). If nonexempt corporation fails to file report on or prior to Dec. 31 of year in which decennial filing is required to be made, then it loses exclusive use of its name, and corporation's name becomes available for any corporation, association or limited partnership registering to do business in Commonwealth of Pennsylvania. (54 Pa.C.S. § 504).

Term of Corporate Existence.

This term may be perpetual. (15 Pa.C.S. § 1306[a] [6]).

Incorporators.

Business corporation may be formed by one or more corporations for profit or not-for-profit or natural persons of full age. (15 Pa.C.S. § 1302).

Articles of Incorporation.

Articles must be signed by each incorporator and must set forth in English: (1) corporate name which, if foreign, must be set forth in Roman letters or Roman or Arabic numerals; (2) address, including street and number if any, of initial registered office in Pennsylvania which may be c/o "commercial registered office provider" (15 Pa.C.S. § 109); (3) statement that corporation is incorporated under 1988 BCL; (4) whether corporation is organized on stock or non-stock basis and, if on stock basis, aggregate number of shares that corporation is authorized to issue (*Note:* major change from prior law; par value no longer required); statement of voting rights, designations, preferences, limitations and special rights with respect to any class of shares, to extent they have been determined, and statement of any authority vested in board of directors to divide authorized but unissued shares into classes or series or to determine any voting rights, designations, preferences, limitations and special rights; (5) name and address, including street and number if any, of each incorporator; (6) term of existence, if not perpetual; and (7) if articles are to be effective on date other than filing date, hour if any, and month, day and year of effective date. Articles may also include any provision authorized or required by 1988 BCL to be set forth in articles or bylaws, such as provisions granting shareholders preemptive rights or denying cumulative voting rights, and any other provisions, whether or not authorized by 1988 BCL, relating to management of business or affairs of corporation. Naming of directors in articles constitutes affirmation that they have consented in writing to serve. (15 Pa.C.S. § 1306). Original articles or shareholder-approved articles may vary provisions of 1988 BCL unless provision expressly states it may not be relaxed, although shareholders may always be given greater rights regardless of BCL language. (15 Pa.C.S. § 1306[b]). This flexibility does not apply to corporations registered under c. 25.

Advertisement.

Notice of intention to file or of filing of articles of incorporation must be published once in each of two newspapers of general circulation meeting statutory requisites before or after filing of articles and setting forth name of corporation and statement that it is to be, or has been, incorporated under 1988 BCL. (15 Pa.C.S. § 1103, 1307).

Filing of Articles.

Articles of incorporation and docketing statement are filed with Department of State, which issues certificate of incorporation. Docketing statement must comply with statutory requisites, be in form published in Pennsylvania Code and set forth, with respect to new corporations, statute under which it was incorporated, date of incorporation, names and residence addresses of chief executive officer, secretary and treasurer, address of its principal place of business and amount, if any, of its authorized and issued capital stock. Corporate existence begins upon later of filing of articles or effective date specified in articles. (15 Pa.C.S. § 133[e], 134, 1308, 1309). For filing fee for articles of incorporation, see subhead Fees, supra.

Organization.

After corporate existence begins, organizational meeting of initial directors named in articles, or of incorporators if no directors named, must be held upon at least five days' written notice. Incorporators may act in person, by written consent or by proxy. Bylaw adopted at organizational meeting shall be deemed bylaw adopted by shareholders for purposes of 1988 BCL. (15 Pa.C.S. § 1310).

Amendment of Articles.

Articles of incorporation may be amended to: adopt new name; change term of existence; change, add to, or diminish corporate purposes; cancel or otherwise affect right of shareholders to receive dividends accrued but not declared or otherwise effect reclassification of or affect substantial rights of shareholders; provide special treatment of shares; restate articles; or in any other respects desired if articles as amended would qualify as original articles. (15 Pa.C.S. § 1911). Amendments are proposed by resolution of board of directors, or by petition of shareholders entitled to cast at least 10% of all votes entitled to be cast thereon (but shareholders of registered corporation have no statutory right to propose amendment articles; see subhead Registered Corporations, infra) and must be stated in form prescribed by statute. (15 Pa.C.S. § 1912). Written notice of meeting that will act on amendment must be given at least ten days in advance to each shareholder entitled to vote thereon. (15 Pa.C.S. § 1704[b][1], 1913). Unless articles or specific provisions of 1988 BCL require greater vote, amendment must be adopted by affirmative vote of majority of votes cast and, if any class or series of shares is entitled to vote thereon as class, affirmative vote of majority of votes cast in each such class vote. If proposed amendment would affect relative rights of class or series of shares, then holders of outstanding shares of such class or series shall be entitled to vote as class with respect to amendment regardless of any limitations in articles or bylaws, but subject to certain statutory provisions permitting board of directors to act without shareholder approval. Except with respect to amendments proposed by 10% of outstanding shares (15 Pa.C.S. § 1912[a][2]), proposed amendment is not deemed adopted by corporation unless it has also been approved by board of directors (15 Pa.C.S. § 1914[a], [b]). Unless otherwise restricted in articles, board of directors can adopt amendment without shareholder approval (1) if no shares have been issued; (2) to change corporate name, provide for perpetual existence or reflect automatic reduction in authorized shares by virtue of corporation's acquisition of own shares or deletion of reference to class or series of shares no longer outstanding; (3) if corporation has only one class of shares outstanding, to effect stock dividend or split; or (4) to restate operative provisions of articles. (15 Pa.C.S. § 1914[c]). See also other provisions of 1988 BCL permitting board of directors to effect amendments without shareholder approval to change registered office or determine terms of new stock issuances. (15 Pa.C.S. § 1507, 1522). Resolution or petition may provide that amendment may be terminated prior to its effective date. Unless otherwise provided in articles, provision in articles requiring specific number or percentage of votes cannot be amended by lesser number or percentage. (15 Pa.C.S. § 1914[e]). On adoption of amendment, articles of amendment are executed by corporation (15 Pa.C.S. § 1108), setting forth: name of corporation and address, including street and number, if any, of registered office; state under which incorporated and date of incorporation; effective date if other than date of filing; manner in which amendment was adopted; amendment set forth in full; and if amendment effects restatement of articles, statement that restated articles supersede original articles and all amendments thereto. (15 Pa.C.S. § 1915, 1916[b]). Articles of amendment are filed with Department of State, together with requisite docketing statement (see subhead Filing of Articles, supra), whereupon amendment becomes effective unless later effective date specified therein. Amendments do not affect any existing cause of action in favor of or against corporation, any pending action or proceeding to which corporation is party, or existing rights of persons other than shareholders. (15 Pa.C.S. § 1916). For filing fee for articles of amendment, see subhead Fees, supra.

Note: Major change from prior law; dissenters rights with respect to elimination of accumulated dividend arrearages and elimination of cumulative voting rights have been removed.

Increase or Decrease of Authorized Capital Stock.

See subhead Amendment of Articles, supra.

Bylaws may contain any provisions for managing business and regulating affairs of corporation not inconsistent with law or articles. Except as otherwise provided in 1988 BCL, shareholders have power to adopt, amend and repeal bylaws. Authority to adopt, amend and repeal bylaws may be vested by bylaws in board of directors, subject to power of shareholders to change such action, and subject to enumerated sections of 1988 BCL that commit certain matters expressly to bylaw adopted by shareholders. (15 Pa.C.S. § 1504). See subhead Organization, supra, re bylaws adopted at organizational meeting.

Stock.

Corporation may create and issue number of shares stated in its articles, which may consist of one class or be divided into two or more classes and one or more series within any class, having full, limited, multiple, or fractional or no voting rights, and such designations, preferences, limitations and special rights as may be stated in original articles of incorporation or any amendment thereof, which amendment may be made solely by action of board of directors if articles authorize board to make such divisions and determinations. (15 Pa.C.S. § 1521[a], 1522). When so authorized in its articles, corporation may issue classes or series of shares having terms specifically authorized by statute with respect to redemption features, dividend rights, preferences and conversion features. Articles may expressly confer on shareholders specifically enforceable right to dividends, redemption or other distributions, provided that such provision to be valid, must expressly refer to §1521 of 1988 BCL or expressly refer to specific enforceability of distribution. (15 Pa.C.S. § 1521[b]). Unless articles provide otherwise, equitable methods such as pro rata or by lot must be used to redeem shares, subject to redemption under articles. Before issuing shares of any class or series with respect to which board made divisions and determinations of voting rights, preferences, limitations and special rights, corporation must file with Department of State statement with respect to shares setting forth: name of corporation; resolution of board setting forth its actions; aggregate shares of such class or series established and designated by resolution, by all prior statements and by any other provision of articles; date of adoption of resolution; and effective date if other than date of filing. Statement must be accompanied by requisite docketing statement (see subhead Filing of Articles, supra), whereupon resolution becomes effective unless later effective date is specified therein, and operates as amendment of articles. Resolution may provide that amendment to be effected thereby may be terminated prior to its effective date. (15 Pa.C.S. § 134, 1522[c]-[f]).

Share Certificates; Uncertificated Shares.

Every shareholder is entitled to share certificate representing shares owned unless articles provide for uncertificated shares. (*Note:* Major change from prior law.) Share certificate must state that corporation is incorporated under laws of Pennsylvania; name of person to whom issued; number and class of shares and designation of series, if any, that certificate represents; and full or summary statement of designations, voting rights, preferences and limitations and special rights of each class or series so far as fixed and determined, and authority of board of directors to fix and determine same, or statement that corporation will furnish such statement to any shareholder upon request. Information required to be stated on share certificate must be provided registered owners of uncertificated shares. (15 Pa.C.S. § 1528).

Issuance of Shares.

Except as otherwise provided in bylaws, shares may be issued for amount and form of consideration fixed by, or in manner authorized by, board of directors, including services already performed, future services or note or obligation of shareholder. *(Note:* Major change from prior law.) 1988 BCL permits issuance of par value stock for less than par, and all issued shares are deemed fully paid, regardless of failure to pay in full agreed consideration, and nonassessable, but this provision has no effect on personal obligation of subscriber to pay agreed consideration. Subscription agreement may provide for denial or limitation of rights to vote or receive dividends, or any other rights of shareholder, prior to payment in full of agreed consideration, but such denial or limitation shall be ineffective, except against person with actual knowledge, unless noted conspicuously on face or back of share certificate or in notice provided to owners of uncertificated shares. Shares may be issued for no consideration to effect stock dividends or splits. (15 Pa.C.S. § 1523, 1524, 1526).

Transfer of securities is governed by Uniform Commercial Code. See category 3 Business Regulation and Commerce, topic 3.09 Commercial Code. Transfer of corporation's securities may be regulated by any provision of bylaws not inconsistent with Div. 8 of Code which deals with investment securities, and other provisions of law. Certain restrictions on transfer are expressly authorized by 1988 BCL, including rights of first refusal in corporation or other holders of corporation's securities, mandatory purchases pursuant to “buy-sell” agreements, mandatory consents to transfer by corporation or other holders, prohibitions on transfer that are not manifestly unreasonable and restrictions on transfer necessary to maintain corporation's “Subchapter S” status for federal tax, or comparable state law, purposes. Any such restriction on transfer shall be ineffective, except against person with actual knowledge, unless noted conspicuously on face or back of share certificate or in notice provided owners of uncertificated shares. (15 Pa.C.S. § 1529).

Uniform Simplification of Fiduciary Security Transfers Act has not been adopted.

Uniform Securities Ownership by Minors Act adopted. (70 P.S. § 101).

Stock transfer tax was repealed as of July 10, 1957.

Stock Rights and Options.

Except as otherwise provided in its articles prior to creation and issuance thereof, corporation may create and issue option rights or securities having conversion or option rights entitling holders thereof to purchase shares, option rights, securities having option or conversion rights or obligations or assets of corporation, or to purchase from corporation shares, option rights, securities having option or conversion rights or obligations owned by corporation and issued by any other person, terms of which may be fixed by board of directors. Pricing of and payment for rights and options are subject to same provisions as are applicable to pricing of and payment for shares, except that rights and options may be issued to representatives of corporation or its affiliates as incentive to service or continued service or for such other purpose as directors deem advantageous to corporation. (15 Pa.C.S. § 1525).

Shareholders, upon written verified demand stating purpose, may examine corporate records for any proper purpose. (15 Pa.C.S. § 1508[b]). Except as otherwise provided in articles, shareholders of corporation (other than statutory close corporations, see subhead Close Corporations, infra) subject to 1988 BCL have no preemptive rights. (15 Pa.C.S. § 1530).

Tender Offers.

See category 3 Business Regulation and Commerce, topic 3.24 Securities, subhead Takeover Disclosure Law.

Shareholder actions may be brought by person who was either shareholder or owner of beneficial interest in shares at time transaction in question occurred, or whose shares or beneficial interest in shares devolved upon him or her by operation of law from person who was shareholder or owner of beneficial interest in shares at that time. In certain circumstances, corporation may require plaintiff to give security for reasonable expenses, including attorneys' fees. (15 Pa.C.S. § 1782). Pennsylvania adheres to business judgment rule and has adopted sections of American Law Institute's 1994 Principles of Corporate Governance governing decisions by corporate directors to terminate shareholder derivative actions. (547 Pa. 600, 692 A.2d 1042, adopting §§7.02-7.10, 7.13). See category 5 Civil Actions and Procedure, topic 5.08 Costs, subhead Security for Costs.

Shareholder Liabilities.

Shareholder not personally liable to corporation or creditors thereof (15 Pa.C.S. § 1526[a]), except shareholder of business corporation providing professional services has no greater immunity than that available to officers, shareholders, employees or agents of business corporation that is professional corporation (15 Pa.C.S. § 1526[b]). Disciplinary jurisdiction of entities regulating profession unaffected. (15 Pa.C.S. § 1526[c]). Shareholder who accepts or receives distribution knowing it to have been made in violation of 1988 BCL may be required to make contribution to any director held liable for such unlawful distribution. (15 Pa.C.S. § 1553[b]).

Shareholders' meetings may be held at such geographic location within or outside of Commonwealth as provided in, or fixed pursuant to, bylaws. Unless bylaws provide otherwise, all shareholders' meetings must be held at executive office of corporation wherever situated. (15 Pa.C.S. § 1704[a]). Bylaws may provide for number and time of meetings, but at least one meeting must be held in each calendar year for election of directors unless articles provide otherwise. (15 Pa.C.S. § 1755[a]). If annual or other regular meeting is not called and held within six months after designated time, any shareholder may call meeting at any time thereafter. Special meetings may be called at any time by board of directors; unless otherwise provided in articles, by shareholders entitled to cast at least 20% of votes that all shareholders are entitled to cast at particular meeting (but shareholders of registered corporation have no statutory right to call special meeting of shareholders; see subhead Registered Corporations, infra); or by such officers or other persons as bylaws provide. (15 Pa.C.S. § 1755). Written notice of every meeting must be given to each shareholder of record entitled to vote at meeting at least ten days prior to meeting that will consider fundamental change under c. 19 of 1988 BCL or five days prior to meeting in any other case. (15 Pa.C.S. § 1704[b]). Notices may be waived in writing or by attendance at meeting except where attendance is for express purpose of objecting that meeting was not lawfully called or convened. (15 Pa.C.S. § 1705). Unless restricted in bylaws, meetings may be held by conference telephone or other electronic means. (15 Pa.C.S. § 1708). Unless otherwise provided in bylaws adopted by shareholders, quorum consists of presence in person or by proxy of holders of majority of outstanding shares entitled to vote. (15 Pa.C.S. § 1756).

If shares are voted on any issue other than procedural motion, shares will be deemed to be present for entire meeting; therefore, shares voted by broker on any issue will be considered present for each matter to be voted upon even if shares are not voted on each matter. (15 Pa.C.S. § 1756; *Note:* change in prior law.) There shall be presiding officer at every shareholders' meeting. Presiding officer shall be appointed in manner provided in bylaws or, in absence of such provision, by board of directors. If bylaws are silent on appointment of presiding officer and board fails to designate presiding officer, president shall be presiding officer. Except as otherwise provided in bylaws, presiding officer is given authority to determine order of business and to establish rules for conduct of meeting. (15 Pa.C.S. § 709).

Voting may be in person or by proxy. Unless coupled with interest, proxies are revocable at will, notwithstanding any agreements to contrary, but revocation is ineffective until notice thereof is given to secretary of corporation or its designated agent in writing or by electronic transmission. No proxy is valid after three years from date of its execution, authentication or transmission unless longer time is expressly provided therein. (15 Pa.C.S. § 1759). Except as otherwise provided in 1988 BCL or in bylaw adopted by shareholders, any corporate action to be taken by vote of shareholders shall be authorized by majority of votes cast by all shareholders entitled to vote thereon. (15 Pa.C.S. § 1757). Unless articles of incorporation provide otherwise, shareholders have cumulative voting rights, except that shareholders of corporation not incorporated under 1988 BCL or Business Corporation Law of 1933 who were not entitled to cumulative voting rights when corporation became subject to 1988 BCL, shall be entitled to cumulate their votes only if articles so provide. (15 Pa.C.S. § 1758[c]). Unless otherwise restricted in bylaws, board of directors may fix time not more than 90 days prior to date of meeting (except in case of adjourned meeting) as record date for determination of shareholders entitled to notice of, or to vote at, meeting. If bylaws so provide, board of directors may adopt procedure for certification of beneficial owner by registered holders for various purposes, thus facilitating direct communication between corporation and beneficial owner. (15 Pa.C.S. § 1763). Unless otherwise restricted in bylaws, shareholders may act by unanimous consent in lieu of meeting or, if permitted by bylaws (or, in case of registered corporation, articles; see subhead Registered Corporations, infra), by partial consent of shareholders who would have been entitled to cast minimum number of votes that would be necessary to authorize action at meeting. (15 Pa.C.S. § 1766). Court can appoint custodian to resolve deadlock or for other cause. (15 Pa.C.S. § 1767).

Voting trusts and other forms of shareholder agreements are subject only to general law of contracts and rule against perpetuities. Statutory restrictions of prior law are eliminated. (15 Pa.C.S. § 1768).

Directors must be natural persons of full age who, unless otherwise restricted in bylaws, need not be residents of Commonwealth or shareholders of corporation. (15 Pa.C.S. § 1722). Number of directors shall be one or more, regardless of number of shareholders (*Note:* major change from prior law), as fixed by, or in manner provided in, bylaws. If not so fixed, number shall be as stated in articles, or three if no number stated. (15 Pa.C.S. § 1723). Term of office is as provided in bylaws, which shall be one year unless board is classified in respect of time for which directors shall severally hold office. (15 Pa.C.S. § 1724). Except as otherwise provided in bylaws, vacancies, including vacancies resulting from increase in number of directors, are filled by majority vote of remaining directors and each person so selected serves for balance of unexpired term unless otherwise restricted in bylaws. (15 Pa.C.S. § 1725[b]). Unless otherwise provided in bylaw adopted by shareholders, directors may be removed without cause by vote of shareholders, except that, unless otherwise provided in articles by specific and unambiguous statement that directors may be removed without assigning cause, directors of classified board may be removed by vote of shareholders only for cause, if such classification was effected by bylaw adopted by shareholders. (15 Pa.C.S. § 1726[a]). Articles of incorporation may not prohibit removal of directors for cause. (15 Pa.C.S. § 1726[a][5]). No transaction between corporation and director is void or voidable solely for that reason if statutory standards of disclosure and authorization by board or approval by shareholders, or fairness, are met. (15 Pa.C.S. § 1728).

Directors' meetings may be held at such place within or outside of Commonwealth as board may from time to time appoint or as may be designated in notice of meeting. Meetings may be held upon such notice, if any, as bylaws prescribe. Unless bylaws provide otherwise, written notice must be given at least five days prior to every special meeting. (15 Pa.C.S. § 1703). Notice may be waived in writing or by attendance at meeting, except where attendance is for purpose of objecting that meeting was not lawfully called or convened. (15 Pa.C.S. § 1705). Unless restricted in bylaws, meetings may be held by conference telephone or other electronic means. (15 Pa.C.S. § 1708). Unless otherwise provided in bylaws, quorum consists of majority of directors in office, and acts of majority of those present and voting at meeting at which quorum is present are acts of board. Unless otherwise restricted in bylaws, directors may act by unanimous consent in lieu of meeting. (15 Pa.C.S. § 1727).

Powers and duties of directors are conferred or imposed by 1988 BCL unless bylaws adopted by shareholders or statute provides for other persons to exercise or perform such powers and duties. (15 Pa.C.S. § 1721). Directors have right to inspect and copy corporate records to extent reasonably related to their duties. (15 Pa.C.S. § 1512).

Liabilities of Directors.

Standards of care and personal liability of directors of business corporation are codified at 15 Pa.C.S. § 1712, 1713. Such directors stand in fiduciary relation to corporation. Liability imposed for failure to perform duties in good faith, in manner director reasonably believes to be in best interests of corporation, and with such care, including reasonable inquiry, skill and diligence, as ordinarily prudent person would use under similar circumstances. Acts of directors presumed to be in best interests of corporation absent breach of fiduciary duty, lack of good faith or self-dealing. (15 Pa.C.S. § 1715[d]). Directors may rely in good faith on information, opinions, reports and statements of officers, employees, experts and committees reasonably believed to be reliable and competent. They may consider effects of actions on: shareholders, employees, suppliers, customers and creditors of corporation; communities where located; short- and long-term interests of corporation; resources, intent and conduct of any person seeking control of corporation; and all other pertinent factors. Directors' duties may be enforced directly by corporation or indirectly by shareholder through action in right of corporation. (15 Pa.C.S. § 1717). If majority of disinterested directors assent to takeover, any act of director with respect thereto is presumed lawful absent showing by clear and convincing evidence that such assent was not made in good faith after reasonable investigation. (15 Pa.C.S. § 1715[d]). Directors also liable for unlawful distributions. (15 Pa.C.S. § 1553). Bylaw adopted by shareholders can eliminate directors' personal liability for money damages unless director breached or failed to perform statutory duties and breach or failure to perform constituted self-dealing, willful misconduct or recklessness, or unless liability is criminal or for payment of local, state or federal taxes. (15 Pa.C.S. § 1713). 1988 BCL provides for permissive and mandatory indemnification by corporation of representatives and advancement of expenses. (15 Pa.C.S. § 1741 to 1745). Directors have right to dissent from actions of board and its committees. (15 Pa.C.S. § 1714). See also subhead Close Corporations, catchline Management of Corporation, infra.

Officers.

Corporation must have president, secretary and treasurer, or persons who act as such, regardless of title. President and secretary must be natural persons of full age. Treasurer may be corporation but if natural person must be of full age. Any number of offices may be held by same person. Officers are elected or appointed in manner provided by bylaws. (15 Pa.C.S. § 1732).

Registered Office.

Every corporation must have registered office, which need not be its place of business, and location of which may be changed by board. Before change becomes effective, corporation must either amend its articles of incorporation to reflect change or file statement of change of registered office with Department of State, together with requisite docketing statement (see subhead Filing of Articles, supra). (15 Pa.C.S. § 1507). For filing fee for statement of change of registered office, see subhead Fees, supra. (71 P.S. § 803.3[1]). Corporation may satisfy requirement of maintaining registered office by filing statement naming commercial registered office provider. (15 Pa.C.S. § 109, 1507[c]).

Registered Agent.

None required.

General Powers of Corporations.

Corporations have power to: have perpetual succession; sue or be sued; have corporate seal; acquire, hold, convey or mortgage property; guarantee or become surety; borrow money; invest its funds; make contributions; use abbreviations, logos or symbols; be promoter, partner or member of any partnership, enterprise or venture; transact lawful business in aid of governmental policy; continue salaries of its employees while serving in armed forces; pay pensions and establish pension plans; compensate its employees and directors, lend them money and pay bonuses; enter into contracts with its shareholders; and accept, reject or take no action in respect of proposed acquisitions, tender offers or takeovers. (15 Pa.C.S. § 1502). Corporations also have power to indemnify their representatives (15 Pa.C.S. § 1741, 1742), excluding willful misconduct or recklessness (15 Pa.C.S. § 1746[b]), purchase and maintain insurance on behalf of their representatives (15 Pa.C.S. § 1747) and dissolve and wind-up (15 Pa.C.S. § 1972). Ultra vires may be asserted as defense only in: (1) action by shareholder against corporation to enjoin doing of unauthorized acts; (2) action by or in right of corporation against officer or director for unauthorized acts; (3) proceeding by Commonwealth to enjoin unlawful business or revoke corporate franchise. Defense of ultra vires may not be raised in connection with conveyance or transfer of real or personal property when any representative of corporation acted within scope of actual or apparent authority. (15 Pa.C.S. § 1503). Corporation may not raise defense of ultra vires if it benefited from performance and other party contracted in good faith. (372 Pa. 338, 93 A.2d 440).

Dividends and other distributions, including stock redemptions and all other similar payments in respect of corporation's shares (except its own shares) may be authorized by board unless, after giving effect thereto: (1) corporation would be unable to pay its debts as they become due in usual course of its business, or (2) corporation's total assets would be less than sum of its total liabilities plus (unless otherwise provided in articles) amount needed, if corporation were to be dissolved at time of distribution, to satisfy preferential rights upon dissolution of shareholders whose preferential rights are superior to those receiving distribution. (15 Pa.C.S. § 1103, 1551; *Note:* major change in prior law.) Provisions in articles setting forth par values do not restrict corporation's ability to make distributions. (15 Pa.C.S. § 1551[a]).

Unclaimed Dividends.

See categories 13 Estates and Trusts, topic Descent and Distribution, subhead Escheat;

Property, topic Absentees.

Sale or Transfer of Corporate Assets.

Sale, lease, exchange or other disposition of all or substantially all of corporation's assets may be made only pursuant to plan of asset transfer approved by board and majority of votes cast by all shareholders entitled to vote thereon (*Note:* major change in prior law) at meeting held upon at least ten days' written notice, unless sale is made in usual and regular course of business, to relocate all or substantially all of business, to subsidiary corporation if transaction does not alter voting rights, preferences, limitations or relative rights of shares of any class of parent corporation, in connection with dissolution or liquidation of corporation or in connection with sale/leaseback. (15 Pa.C.S. § 1704[b][1], 1924[a], 1932). “Substantially all” means at least 75% of assets, and 75% of either pre-tax income from continuing operations or revenues from continuing operations. (15 Pa.C.S. § 1932[g]). Consideration received may be transferred in whole or part to shareholders. (15 Pa.C.S. § 1932[b][3]; *Note:* major change in prior law.) Shareholders who object to plan of asset transfer and comply with subchapter D of c. 15 of 1988 BCL (15 Pa.C.S. § 1571 to 1580) are entitled to rights and remedies of dissenting shareholders. See subhead Merger and Consolidation, catchline Dissenting Shareholder, infra. See also categories 3 Business Regulation and Commerce, topic Bulk Sales; Debtor and Creditor, topic Fraudulent Sales and Conveyances, subhead Bulk Sales.

Books and Records.

Corporation must keep books and records of account, minutes of proceedings of incorporators, shareholders and directors, and share register. Share register must be kept at either registered office, principal place of business, actual business office, or office of registrar or transfer agent. (15 Pa.C.S. § 1508[a]). Books and records may be in written form capable of being converted into legible written form within reasonable time. (15 Pa.C.S. § 107). See subhead Shareholders, supra.

Reports.

Unless otherwise agreed between corporation and shareholder, corporation (other than registered corporation; see subhead Registered Corporations, infra) must, within 120 days after close of each fiscal year, mail to shareholders annual financial statements, including at least balance sheet as of close of fiscal year and statement of income and expenses for fiscal year, prepared on basis of generally accepted accounting principles if corporation prepares financial statements for fiscal year on that basis for any purpose. Statements that are audited or reviewed by public accountant shall be accompanied by report of such accountant; in other cases, each copy shall be accompanied by statement of person in charge of corporation's financial records containing certain information about manner in which statements were prepared. In lieu of mailing statements, corporation may send them by facsimile, email or other electronic transmission to any shareholder who has supplied corporation with facsimile number or address for electronic transmissions for purpose of receiving financial statements from corporation. (15 Pa.C.S. § 1554).

Corporate Bonds or Mortgages.

Corporation may borrow money, issue or incur its obligations and secure any of its obligations by mortgage on or pledge of or security interest in any of its property, franchises or income. (15 Pa.C.S. § 1502[a][7]).

Merger and Consolidation.

Two or more domestic business corporations, two or more foreign business corporations or one or more domestic business corporations and one or more foreign business corporations may be merged into one of such domestic corporations, or consolidated into new corporation to be formed under 1988 BCL. Any one or more domestic business corporations and any one or more foreign business corporations may be merged into one of such foreign business corporations, or consolidated into new corporation to be incorporated under laws of foreign state. In any such case, foreign corporation must be authorized by law of its domicile to enter into such merger or consolidation. Provisions of 1988 BCL applicable to domestic and foreign business corporations are also applicable to merger or consolidation with or into domestic or foreign partnership, business trust or other association. (15 Pa.C.S. § 1921).

Proceedings.

Boards of directors of each domestic corporation must approve plan of merger or consolidation by resolution and direct that plan be submitted to vote of shareholders at regular or special meeting. (15 Pa.C.S. § 1922). Approval by shareholders is unnecessary if: (1) Plan, whether or not corporation is surviving corporation, does not alter status of corporation as domestic business corporation or alter in any respect provisions of its articles, except changes under §1914(c) (15 Pa.C.S. § 1914[c]); (see subhead Amendment of Articles, supra) do not require shareholder action and each share of corporation outstanding immediately prior to effective date of merger or consolidation is to continue as, or be converted into, except as may otherwise be agreed to by holder thereof, identical share of surviving or new corporation after such effective date; (2) immediately prior to adoption of plan and at all times thereafter prior to its effective date, another corporation that is party to plan owns directly or indirectly 80% or more of outstanding shares of corporation; or (3) no shares of corporation have been issued prior to adoption of plan by board. (15 Pa.C.S. § 1924[b]). Approval by shareholders unnecessary if plan of merger or consolidation provides for creation of single indirect wholly owned subsidiary under specified conditions. (15 Pa.C.S. § 1924[b][4]). Not less than ten days' written notice of meeting must be given to each shareholder, whether or not entitled to vote. (15 Pa.C.S. § 1704[b][1]). Notice must include copy or summary of plan and, if subchapter D of c. 15 of 1988 BCL (15 Pa.C.S. § 1571 to 1580, relating to dissenters rights) is applicable, copy of that subchapter and of §1930 (15 Pa.C.S. § 1930, relating to dissenters rights) to holders of shares of any class or series (unless corporation is registered corporation; see subhead Registered Corporations, infra). (15 Pa.C.S. § 1923). Plan shall be adopted upon receiving approval by board of directors and majority of votes cast by all shareholders entitled to vote thereon (*Note:* major change from prior law) of each domestic corporation that is party to plan and majority of holders of each class of stock entitled to vote as class. (15 Pa.C.S. § 1924[a]). Plan may contain provisions for termination of plan prior to time merger or consolidation becomes effective. If articles of merger or consolidation have been filed in Department of State prior to such termination, statement of termination must be filed in Department. (15 Pa.C.S. § 1902, 1924[c]). On adoption of plan, articles of merger or consolidation must, except in case of merger or consolidation of subsidiary corporation with parent corporation not requiring shareholder approval, be executed by each corporation setting forth: name and location of registered office (see subhead Registered Office, supra, re commercial registered office provider) of domestic surviving or new corporation, or name and jurisdiction of incorporation of foreign surviving or new corporation and certain information regarding its address, depending on whether it is qualified or nonqualified foreign corporation; name and address of registered office of each other domestic corporation and qualified foreign corporation that is party to plan; exact effective date, if any, including hour; manner in which plan was adopted by each domestic corporation and, in case of foreign corporation, that plan was authorized, adopted or approved in accordance with law of state of domicile; and plan of merger or consolidation. (15 Pa.C.S. § 1926). Articles of merger or consolidation and requisite tax clearance certificates must be filed with Department of State, together with requisite docketing statement (see subhead Filing of Articles, supra). (15 Pa.C.S. § 139, 1927). See also subhead Fees, supra.

Dissenting shareholder of domestic corporation that is party to plan of merger or consolidation who objects to plan and complies with provisions of subchapter D of c. 15 (15 Pa.C.S. § 1571 to 1580, relating to dissenters rights) is entitled to rights and remedies of dissenting shareholders, subject to certain exceptions for plan adopted by directors only (15 Pa.C.S. § 1924[b][1][i]; 1930[b]) and so-called “statutory market” exception for listed or widely-held shares (15 Pa.C.S. § 1571[b], 1930). Shareholder wishing to exercise dissenters rights and obtain payment of fair value of shares must file with corporation written notice of intention to demand payment of fair value for shares if plan is effectuated, effect no change in beneficial ownership of shares from date of such filing continuously through effective date of plan, and refrain from voting shares in approval of such plan. (15 Pa.C.S. § 1574). If plan is approved by required vote of shareholders, corporation must mail further notice to all dissenters who gave due notice of intention to dissent and who refrained from voting in favor of plan. If plan is to be adopted without shareholder approval, corporation must send notice to all shareholders who are entitled to dissent and demand payment of fair value. Such notices must describe procedures for making demand for payment and depositing share certificates or restricting transfer of uncertificated shares and be accompanied by copy of statutory provisions for dissenters rights. (15 Pa.C.S. § 1575). Corporation must either remit to dissenters who have made demand amount corporation estimates to be fair value of shares or give written notice that no remittance will be made. (15 Pa.C.S. § 1577). Shareholder who disagrees with corporation's estimate may send corporation own estimate of fair value. (15 Pa.C.S. § 1578). If any demands for payment remain unsettled within 60 days after latest of effectuation of plan, timely receipt of demand for payment, or timely receipts of any estimates by dissenters of fair value of shares, corporation may institute valuation proceedings for fair value of shares to be determined by court. (15 Pa.C.S. § 1579).

De facto transaction doctrine, regarding mergers, consolidations and other fundamental transactions, is statutorily abolished. (15 Pa.C.S. § 1904).

Share Exchanges.

All outstanding shares of one or more classes or series of domestic business corporation may be acquired by any person through exchange of shares pursuant to plan of exchange. Other shares may be converted into shares, other securities or obligations of any person, or into cash, property or rights. This provision permits triangular merger transactions to be effected without need to utilize third corporation. Statutory procedures for proposal, adoption and termination of plan of exchange, availability of dissenters rights and execution and filing of articles of exchange are similar to those provided for mergers (see relevant catchlines, supra and infra). (15 Pa.C.S. § 1931).

Transactions Creating New Control Group.

Any shareholder of registered corporation (see subhead Registered Corporations, infra) that becomes subject of control transaction who objects to transaction is entitled to certain rights unless corporation adopts articles or follows certain other procedures that specifically provide that no such rights are granted its shareholders. Control transaction occurs when person or group of persons acting in concert acquire or possess voting power to cast at least 20% of votes to be cast in election of directors. Upon occurrence of control transaction, members of control group shall give notice to all shareholders of record that they are entitled to demand that they be paid fair value (stated dollar amount) for their shares (not less than highest price paid per share by controlling person within 90 days prior to control transaction plus any incremental value not reflected in that price) and if shareholder believes fair value of his shares is higher, that he is entitled to appraisal rights. Control person must also notify Court of Common Pleas. After receiving notice, shareholder may make, within reasonable time, demand on controlling person for payment of amount equal to fair value for his shares. If shareholder and control person are unable to agree on fair value of shares, shareholder may proceed with specified appraisal right procedure in Court of Common Pleas. (15 Pa.C.S. § 2541 to 2548).

Regulation of Certain Business Combinations.

Registered corporation (see subhead Registered Corporations, infra), unless it adopts articles or follows certain other procedures providing that it is not subject to these provisions, is prohibited from entering into certain business combinations with any shareholder who owns at least 20% of votes entitled to be cast in election of directors or who directly or indirectly controls, is controlled by, or is under common control with corporation or is officer, director or partner of corporation unless business combination is one of enumerated excepted transactions provided by statute. (15 Pa.C.S. § 2551 to 2556).

Investment Trusts.

c. 27 of 1988 BCL (15 Pa.C.S. § 2701 to 2722; *Note:* no predecessor provisions in prior law) provides for formation of, or existing business corporation (other than closely-held corporation or professional corporation) to become, management corporation. Unless provided otherwise in bylaws, directors of management corporation are selected and may be removed by board of directors. (15 Pa.C.S. § 2711[a]). Shareholder meetings, including annual meeting, need not be held. (15 Pa.C.S. § 2712).

Division.

Any domestic business corporation may be divided into two or more domestic business corporations, into one or more domestic business corporations and one or more foreign business corporations or into two or more foreign business corporations. Any foreign business corporation may be divided into one or more domestic business corporations and one or more foreign business corporations or into two or more domestic business corporations. In any such case, law of foreign corporation's domicile must authorize division. (15 Pa.C.S. § 1951). Statutory procedures for proposal, adoption and termination of plan of division, availability of dissenters rights and execution and filing of articles of division are similar to those provided for mergers (see subhead Merger and Consolidation, supra). (15 Pa.C.S. § 1951 to 1957).

Conversion.

Any business corporation may be converted into nonprofit corporation, but no conversion may involve beneficial, benevolent, fraternal or fraternal benefit societies having lodge system and representative form of government, or transacting any type of insurance whatsoever or any corporation subject to supervision of Department of Banking, Insurance Department, or Pennsylvania Public Utility Commission, unless such agency expressly approves such transaction in writing. (15 Pa.C.S. § 1961). Statutory procedures for proposal, adoption and termination of plan of conversion, availability of dissenters rights and execution and filing of articles of conversion are similar to those provided for mergers (see subhead Merger and Consolidation, supra). (15 Pa.C.S. § 1961 to 1966).

Dissolution.

Voluntary dissolution may take place pursuant to resolution adopted by board of directors and approved by majority of votes cast by all shareholders entitled to vote thereon (*Note:* major change from prior law) at regular or special meeting held upon at least ten days' written notice. (15 Pa.C.S. § 1704[b][1], 1972 to 1974). (*Note:* Provisions of prior law requiring filing of certificate of election to dissolve are eliminated.) Board of directors has full power to wind up and settle affairs of corporation and must mail by certified or registered mail notice of winding up proceedings to each known creditor and each municipality in which it has place of business, and publish such notice. (15 Pa.C.S. § 1975). When all liabilities of corporation have been discharged or provided for and all remaining assets distributed to shareholders according to their respective rights and preferences, or if assets are insufficient to discharge all liabilities, when all assets have been fairly and equitably applied to payment of liabilities, articles of dissolution and requisite tax clearance certificates must be filed with Department of State, together with requisite docketing statement (see subhead Filing of Articles, supra), whereupon corporation's existence ceases. (15 Pa.C.S. § 139, 1977; *Note:* provision of prior law requiring filing of proofs of publication is eliminated.) Corporation, its directors, officers and shareholders are liable to suit on account of any right or claim existing, or liability incurred, prior to dissolution, for two years after date of dissolution or other time period provided by law, whichever is less. (15 Pa.C.S. § 1979). Dissolution may also occur by expiration of corporation's period of duration or by domestication of corporation under laws of another jurisdiction if domestication is authorized by same vote as is required for voluntary dissolution and corporation surrenders its charter. (15 Pa.C.S. § 1978, 1980).

Involuntary proceedings for dissolution may be commenced by application of shareholder or director (except director of registered corporation; see subhead Registered Corporations, infra) if acts of directors or those in control of corporation are illegal, oppressive or fraudulent, corporate assets are being misapplied or wasted or directors are deadlocked and shareholders are unable to break deadlock. (15 Pa.C.S. § 1981). Application may also be filed by judgment creditor whose execution has been returned unsatisfied or creditor whose claim is admitted, if corporation is unable to discharge its liabilities in regular course of business. (15 Pa.C.S. § 1982). Upon filing of application, Court of Common Pleas of county where registered office is located may appoint receiver pendente lite to preserve corporation's assets and carry on its business until hearing can be held. (15 Pa.C.S. § 1984). After hearing, court may appoint liquidating receiver, which shall be natural person of full age or corporation authorized to act as receiver, and may fix date, not less than 120 days from date of order, by which all claims must be filed. (15 Pa.C.S. § 1985 to 1987). After application of assets to payment of costs and expenses of proceedings and liabilities of corporation and distribution of any excess to shareholders, court enters order of dissolution and clerk of court prepares and transmits articles of dissolution, together with certified copy of order, to Department of State, whereupon corporation's existence ceases. (15 Pa.C.S. § 1989).

Post-dissolution Claims.

Subchapter H of c. 19 (15 Pa.C.S. § 1991 to 1998; *Note:* new provisions with no counterparts in prior law) contains detailed procedures governing disposition of corporation's assets after its dissolution, if corporation has elected to proceed under subchapter H and has so stated in its articles of dissolution. (15 Pa.C.S. § 1977[a][6][ii]). Procedures include collecting sums due and converting all assets into cash, giving notice to claimants, acceptance or rejection of matured claims, offering security for contingent, conditional or unmatured claims, application to court for determination of amount and form of security sufficient to provide compensation to claimants whose matured claims are known but whose identities are unknown or claimants who have rejected offer for security for unmatured claims and payment of claims, posting of security and provision for all other liabilities.

Insolvency and Receivers.

When corporation is insolvent or in financial difficulty, board of directors, without consent of shareholders, may authorize officers to execute deed of assignment for benefit of creditors, file voluntary petition in bankruptcy or file answer in receivership or bankruptcy proceedings. Corporation is expressly authorized to participate in proceedings under Bankruptcy Code (11 U.S.C. 101 et seq.). (15 Pa.C.S. § 1903).

Close Corporations.

1988 BCL is generally applicable to all statutory close corporations. C. 23 of 1988 BCL (15 Pa.C.S. § 2301 to 2337) is applicable to business corporation, other than management corporation (see subhead Investment Trusts, supra) that had elected to become close corporation under Business Corporation Law of 1933 and had not terminated that election or elects to become statutory close corporation under c. 23 of 1988 BCL. (15 Pa.C.S. § 2301). Statutory requirements for “minimum vote” mean that holders of shares of every class are entitled to vote regardless of any limitations in articles or bylaws and action must be approved by vote of shareholders of each class entitled to cast at least two-thirds of votes that all shareholders of such class are entitled to cast thereon. Bylaw adopted by shareholders may require for any corporate action subject to minimum vote requirement vote greater than two-thirds or vote of all shares of any class, and any such bylaw may not be amended, repealed or modified by any vote less than that required to effect such action. (15 Pa.C.S. § 2302). Statutory close corporation may be formed in same manner as domestic business corporation, except that articles must contain heading stating name of corporation and that it is statutory close corporation, and provide that neither corporation nor any shareholder shall make public offering (within meaning of Securities Act of 1933) of any of its shares. Articles may set forth maximum number of persons who are entitled to be record holders or beneficial owners of its shares and qualifications of shareholders. (*Note:* Provision of prior law limiting number of shareholders to 30 is eliminated.) (15 Pa.C.S. § 2303, 2304). Existing business corporation may elect to become statutory close corporation by amending its articles by affirmative vote of all shareholders whether or not otherwise entitled to vote thereon. (15 Pa.C.S. § 2305). Status as statutory close corporation continues until: (1) corporation voluntarily terminates its status by amendment of its articles adopted by at least minimum vote of shareholders, or (2) provisions required or permitted to be stated in articles to qualify as statutory close corporation are in fact breached and neither corporation nor shareholders take steps to prevent loss of status or remedy such breach by filing with Department of State, within 30 days after occurrence of event or after event has been discovered, whichever is later, certificate executed by corporation stating that breach has occurred, concurrently taking steps necessary to correct situation that threatens its status, and filing statement with Department of State stating that no breach exists. (15 Pa.C.S. § 2306, 2307, 2309).

Preemptive Rights.

Unless otherwise provided in bylaw adopted by shareholders, holders of any class of voting shares have preemptive rights to subscribe for or purchase any voting shares, or option rights or securities having conversion or option rights with respect to voting shares, unless such shares, option rights or securities are issued pursuant to plan to which subchapter D of c. 15 (15 Pa.C.S. § 1571 to 1580, relating to dissenters' rights) is applicable. (15 Pa.C.S. § 2321[b]).

Share Certificates.

Uncertificated shares may not be issued. Each share certificate issued must contain legend containing statutory language noting statutory close corporation status. (15 Pa.C.S. § 2321[a], [c]).

Restrictions on Transfer.

Unless otherwise provided in bylaw adopted by shareholders, no interest in shares may be transferred, by operation of law or otherwise, whether voluntary or involuntary, except as permitted by enumerated exceptions, including transfer to corporation; intrashareholder and intrafamily transfers; transfers approved by all of holders of most junior shares having voting rights; transfers to executor, administrator, trustee or receiver as result of death, bankruptcy, insolvency or dissolution of shareholder; transfer pursuant to merger, consolidation or share exchange; transfer by pledge when no voting rights are given to pledgee; and transfers made after termination of statutory close corporation status. Any transfer in nonexempt transaction may be made only to third party who meets statutory qualifications and makes cash offer, subject to right of first refusal in corporation or its shareholders. (15 Pa.C.S. § 2322). Corporation has option to acquire shares where attempted transfer was in violation of transfer restriction or restriction on transfer is held invalid. (15 Pa.C.S. § 2323, 2324). If shares are issued or transferred to any person not entitled under articles to be holder of record or to person whose holding would breach restriction on number of shareholders, and such qualifications or restrictions are conspicuously noted on share certificate, corporation may, at its option, refuse to register transfer of shares in name of transferee, unless transfer has been consented to by all shareholders. (15 Pa.C.S. § 2308).

Management of Corporation.

Written agreement among shareholders entitled to cast majority of votes for election of directors that restricts or interferes with discretion or powers of board of directors is not invalid as such; effect of such agreement is to relieve such directors, and impose on shareholders party to agreement, liability for acts or omissions imposed by law on directors. (15 Pa.C.S. § 2331). Bylaw adopted by shareholders may provide that business and affairs of corporation shall be managed by shareholders rather than by board, so that (1) no meeting of shareholders need be called to elect directors, (2) shareholders shall be deemed directors for purposes of 1988 BCL, and (3) shareholders shall be subject to all liabilities imposed by law on directors. (15 Pa.C.S. § 2332). Court may appoint custodian, receiver or provisional director, as appropriate in circumstances, to resolve dissension and deadlock situations. (15 Pa.C.S. § 2333, 2334). No written agreement among shareholders, or any provision of articles or bylaws, that relates to any phase of affairs of corporation shall be invalid on ground that it is attempt to treat corporation as if it were partnership. (15 Pa.C.S. § 2335).

Fundamental changes under c. 19 of 1988 BCL (15 Pa.C.S. § 1901 to 1998) that require shareholder approval must be adopted by at least minimum vote (15 Pa.C.S. § 2336).

Shareholder Option to Dissolve Corporation.

Bylaw adopted by shareholders may grant to any shareholder or holders of specified number or percentage of shares option to have corporation dissolved at will or upon occurrence of any specified event or contingency. (15 Pa.C.S. § 2337).

Registered Corporations.

C. 25 of 1988 BCL (15 Pa.C.S. § 2501 to 2556; *Note:* new provisions) contains provisions applicable only to “registered corporations”, defined as domestic business corporation that: (1) Has class or series of shares entitled to vote generally in election of directors registered under Securities Exchange Act of 1934 (“34 Act”); (2) is subject to reporting requirements of 1934 Act by having filed registration statement under Securities Act of 1933 relating to shares of class or series of its equity securities; (3) has all of its shares owned, directly or indirectly, by one or more registered corporations or foreign corporations that, if domestic corporations, would be registered corporations; or (4) is registered as management company under Investment Company Act of 1940. (15 Pa.C.S. § 2501[a], 2502). Registered corporations are subject generally to 1988 BCL. Specific provisions of c. 25 control over general provisions of 1988 BCL. (15 Pa.C.S. § 2501[b]). Registered corporation can opt out of some or all of provisions of c. 25 by following statutory procedures. (15 Pa.C.S. § 2501[c], 2541[a], 2551[b]). Opt out of certain provisions of c. 25 must be done in original articles, before corporation becomes registered corporation or within 90 days thereafter. (15 Pa.C.S. § 2561[b], 15 Pa.C.S. § 2571[b]). Certain fundamental transactions require affirmative vote of shareholders holding majority of votes, excluding interested shareholders. (15 Pa.C.S. § 2538). Provisions of 1988 BCL generally not applicable to registered corporations include: (1) Requirements of §1554 (15 Pa.C.S. § 1554, relating to financial reports to shareholders) (15 Pa.C.S. § 2511); (2) requirement to supply copy of subchapter D of c. 15 (15 Pa.C.S. § 1571 to 1580, relating to dissenters rights) to shareholders entitled to dissenters' rights in connection with proposed corporate action from whom corporation solicits proxy relating to approval of, or to whom it sends information statement relating to, such proposed action (15 Pa.C.S. § 2512); (3) right of shareholders to call special meeting of shareholders (15 Pa.C.S. § 2521); (4) right of shareholders to propose amendment to articles (15 Pa.C.S. § 2535); (5) right of director to file application seeking involuntary winding up and dissolution of corporation (15 Pa.C.S. § 2536); and (6) right of shareholders of corporation that adopts plan of asset transfer to dissenters' rights except as provided by §1906(c) (15 Pa.C.S. § 1906[c]) or unless board of directors or bylaws so provide under §1571(c) (15 Pa.C.S. § 1571[c]; 15 Pa.C.S. § 2537). *Note:* Applicability of some exceptions depends on which part(s) of “registered corporation” definition pertain(s) to particular corporation in question. Provision permitting disparate treatment of certain persons validates use of “poison pills”. (15 Pa.C.S. § 2513). 1990 amendments, Act No. 1990-36, added detailed provisions regulating control-share acquisitions (15 Pa.C.S. § 2561 to 2567), protecting certain registered corporations and interested parties from manipulative and coercive actions such as “greenmail” (15 Pa.C.S. § 2571 to 2575), providing severance compensation for employees terminated following certain control-share acquisitions (15 Pa.C.S. § 2581 to 2583), and protecting labor contract rights from adverse effects of business combination transactions (15

Pa.C.S. § 2585 to 2588). See also subhead Merger and Consolidation, catchlines Transactions Creating New Control Group and Regulation of Certain Business Combinations, supra.

Foreign Corporations.

Foreign business corporations are regulated by c. 41 of 1988 BCL (15 Pa.C.S. § 4101 to 4162), and foreign nonprofit corporations are governed by c. 61 of Nonprofit Corporation Law of 1988 (15 Pa.C.S. § 6101 to 6145).

Right to Do Business in State.

Before doing business in state, foreign business corporation must file application for certificate of authority with Department of State. (15 Pa.C.S. § 4124). Upon filing, foreign business corporation deemed to hold certificates of authority. (15 Pa.C.S. § 4125). See subhead Fees, supra. (71 P.S. § 803.3[3]). Without excluding other activities which may not constitute doing business, foreign corporation is not considered to be doing business for purposes of qualifying or holding real estate, but not necessarily for purposes of taxation or service of process, by reason of carrying on any one or more of following activities in Pennsylvania: (1) maintaining or defending any suit; (2) holding corporate meetings; (3) maintaining bank accounts; (4) maintaining offices or agency for transfer, exchange and registration of its securities; (5) effecting sales through independent contractors; (6) soliciting and procuring orders by any means and maintaining offices therefor where such orders require acceptance outside Pennsylvania; (7) creating as borrower or lender evidence of debt secured or unsecured; (8) collecting debts and enforcing security; (9) transacting business in interstate or foreign commerce; (10) conducting isolated transactions completed within period of 30 days; and (11) inspecting, appraising and acquiring real estate and mortgages thereon and personal property and security interests therein and holding, leasing away and transferring same, as fiduciary or otherwise. (15 Pa.C.S. § 4122). This authority will not be granted if corporation has name unavailable for use by domestic corporation. (15 Pa.C.S. § 4123). See subhead Name, supra.

Penalty for Doing Business Without Authority.

Any foreign corporation which does business within state without certificate of authority may not maintain actions in any court until it obtains certificate. Neither may any action be maintained by successor or assignee of such corporation on any claim arising out of unauthorized transaction of business in Pennsylvania. Failure to secure certificate of authority does not affect validity of any contract with corporation and does not prevent corporation from defending any action. (15 Pa.C.S. § 4141).

Registered Office.

Foreign corporation must maintain registered office in Pennsylvania which need not be same as its place of business. (15 Pa.C.S. § 4144). See subhead Registered Office, supra, for alternative procedure of naming commercial registered office provider.

Amendment of Certificate of Authority.

Foreign corporation may change name under which it is authorized to do business in Pennsylvania or correct information in certificate by filing with Department of State application for amended certificate. (15 Pa.C.S. § 4126). See subhead Fees, supra. If foreign corporation is party to merger or consolidation and it is surviving corporation, it must file statement thereof on form prescribed by Department of State. (15 Pa.C.S. § 4127).

Powers and Duties.

Qualified foreign business corporation, so long as its certificate of authority is not revoked, enjoys same rights and privileges as domestic business corporation and, except as otherwise provided in 1988 BCL, is subject to same liabilities, restrictions, duties and penalties imposed on domestic corporations. (15 Pa.C.S. § 4142). Foreign insurance companies subject to Pennsylvania laws regulating business of insurance. (15 Pa.C.S. § 4142[c]). Nonqualified business corporation may acquire, hold, mortgage, lease and transfer real and personal property in Pennsylvania in same manner and subject to same limitations as qualified foreign business corporation, and is subject to same liabilities, restrictions, duties and penalties imposed on qualified foreign business corporation. (15 Pa.C.S. § 4143).

Domestication of foreign corporations is provided for. (15 Pa.C.S. § 4161, 4162).

Termination of Authority.

Qualified foreign business corporation may withdraw from doing business and surrender its certificate of authority by filing application with Department of State, together with requisite tax clearance certificates and docketing statement (see subheads Filing of Articles and Fees, supra). Before filing application, corporation must officially publish and mail to its creditors notice of its intention to withdraw from Pennsylvania. Upon filing application, corporation's authority to do business in Pennsylvania ceases, but termination of authority does not affect any action or proceeding pending at time thereof or any right of action arising with respect to corporation before such filing. (15 Pa.C.S. § 139, 4129).

Foreign Domiciliary Corporations.

Foreign corporation is foreign domiciliary corporation if it has as record holders of its shares persons having Pennsylvania addresses whose aggregate holdings (1) represent 60% or more in interest of its outstanding shares, whether or not entitled to vote; or (2) are entitled to cast at least 60% of votes that all holders of outstanding shares are entitled to cast in election of directors. Excluded from definition are (1) foreign business corporation that, if domestic business corporation, would be registered corporation (see subhead Registered Corporation, supra); and (2) foreign business corporation all shares of which are owned, directly or indirectly, by one or more registered corporations or corporations described in clause (1). (15 Pa.C.S. § 4102; *Note:* new provision). Statute effectively overrides internal affairs doctrine by providing that Pennsylvania courts shall not dismiss or stay any claim or proceeding by shareholder or representative of foreign domiciliary corporation against such corporation on ground that it is foreign corporation or that cause of action relates to internal affairs thereof, but every such action shall proceed as if such corporation were domestic corporation. Reserved for future use are subsections that would apply specific provisions of 1988 BCL to foreign domiciliary corporations. (15 Pa.C.S. § 4145).

Foreign Corporations Franchise Tax.

Foreign entities from which reports required are subject to and must pay franchise tax annually. Amount of tax is computed by multiplying each dollar of capital stock value by appropriate rate of tax set forth in 72 P.S. § 7602[h]. Any foreign corporation, joint-stock association, limited partnership or company subject to tax may elect to compute and pay its tax under 72 P.S. § 7602[a]. (72 P.S. § 7602[b]). Capital stock value is computed as product of one-half times sum of average net income capitalized at 9.5% plus 75% of net worth, from which product $160,000 must be subtracted. (72 P.S. § 7601). See subheads Corporate Net Income Tax and Capital Stock Tax, infra, for discussion of apportionment formulas. Holding companies may elect to apply tax rate to only 10% of its capital stock value in lieu of any other apportionment or allocation to which company would otherwise be entitled. (72 P.S. § 7602[e]). Special provisions are applicable to regulated investment companies (72 P.S. § 7602[f]), automobile clubs (72 P.S. § 10003.13), and to real estate investment trusts organized as business trusts.

Manufacturing exemption, whereunder property, and payroll attributable to manufacturing, processing, research or development both within and outside Pennsylvania are eliminated from numerators of property and payroll factors, except companies which enjoy and exercise right of eminent domain, effective for tax years beginning on or after Jan. 1, 1999. (72

P.S. § 7602). Pollution control devices are exempt. (72 P.S. § 7602.1).

Investment credits, as of July 1, 1999, are available for developers of new facilities for production of qualified fuels against Pennsylvania foreign franchise tax on property purchased after 1999 and before 2013 for any such facility. Credit may not exceed 15% of capital cost of any such facility. (72 P.S. § 8803-A). Aggregate tax credits authorized by Department of Revenue may not exceed $18 million in any one year. Unused portion of authorized credit may be carried forward to future tax years until full amount of credit has been used. Credits may be purchased or assigned. (72 P.S. § 8801-A).

Tentative and final reports must be filed with Department of Revenue on forms furnished by that Department. Basis of tentative report, due dates of reports and tax, and penalties for failure to file reports or pay tax are as set forth under subhead Capital Stock Tax, infra.

Advance Payment of Corporate Taxes.

Advance payment of certain taxes, including the following, may be made at a discount of 4% per annum from date of payment to date when taxes become due: capital stock tax; corporate loan tax; corporate net income tax; and foreign corporation franchise tax. (72 P.S. § 3325, 3331).

Taxation of Corporate Property.

The rules are the same as for taxation of property of individuals.

Corporate Net Income Tax.

Corporate Net Income Tax (C.N.I.) is payable with respect to net income from business transacted in Pennsylvania, and is imposed generally upon every corporation (and, for taxable years beginning after Jan. 1, 1998, every business trust that elects to be taxed as corporation for federal income tax purposes) organized under laws of Pennsylvania, U.S., or any other state, territory, dependency or foreign country, and which, in its own name or through any person, association, business trust, corporation, joint venture, limited partnership, partnership or other entity: (1) does business in Pennsylvania; (2) carries on activities in Pennsylvania; (3) has capital or property employed or used in Pennsylvania; or (4) owns property in Pennsylvania. Tax is imposed at rate of 9.99% of taxable income. (72 P.S. § 7402).

Corporations exempt from corporate net income tax are entities taxable as bank and trust companies (72 P.S. § 7701 et seq.), title insurance company (72 P.S. § 7801 et seq.), insurance company (72 P.S. § 7901 et seq.), mutual thrift institution (72 P.S. § 8501 et seq.), federally qualified real estate investment trusts, federally regulated investment companies, regulated financial institutions (72 P.S. § 7701 et seq., 8501 et seq.), federally tax-exempt organizations, and state not-for-profit entities which would qualify for federal tax exemption, Pennsylvania S corporations, and (effective for taxable years beginning after Jan. 1, 1998) limited liability companies that are not taxable federally as corporations. (72 P.S. § 7401).

Taxable income is defined as taxable income as returned to and ascertained by Federal government, with specified adjustments. Certain dividends from non-U.S. corporations are deductible to extent reported in taxable income to Federal government. However, no net income taxes are allowed as deduction. Certain federal tax preference items are added to taxable income. Interest income from U.S. government securities are generally deductible from income. (72 P.S. § 7401). Foreign taxes taken as credit, rather than deduction, on federal return are not deductible in computing taxable income for CNI purposes. (478 Pa. 164, 386 A.2d 491).

Deduction allowed for years beginning on or after Jan. 1, 1977 for amount equal to federal new jobs credit disallowed as deduction from federal taxable income. (72 P.S. § 7401).

No deduction is allowed for amount of §172 net operating loss. However, for taxable years beginning in 1995 and thereafter net loss deduction is available, subject to $2,000,000 limitation, pursuant to specified carryover schedule. (72 P.S. § 7401).

Allocation and apportionment permitted in case of corporation transacting a portion of its business outside Pennsylvania according to following rules: nonbusiness income subject to direct allocation generally in accordance with factors of property situs, place of utilization of property or taxpayer's commercial domicile. Business income apportioned by three factor formula equal to average of property, payroll and sales fractions. Numerator of property fraction is average value of real and tangible personal property owned and rented in Pennsylvania and denominator is average value of real and tangible personal property owned and rented everywhere. Payroll fraction numerator is total compensation paid in state; denominator is total compensation paid everywhere. Sales fraction (numerator: total sales in state; denominator: total sales everywhere) assigns sales of tangible personal property on destination basis and other business receipts according to where greater portion of income-producing activity is performed. (72 P.S. § 7401). Dividends received and interest on U.S., state or political subdivision obligations are excluded from sales fraction for CNI purposes, effective for taxable years beginning after Jan. 1, 1984 (for taxable years beginning after Jan. 1, 1983 for corporate franchise and capital stock taxes). Rule allowing Secretary of Revenue to “throw out” of sales fraction sales involving delivery to foreign jurisdictions in which taxpayer is not taxable has been held unconstitutional. (505 Pa. 15, 476 A.2d 890).

Special apportionment provisions are applicable to regulated investment companies and certain classes of public utilities, i.e., transportation companies, pipeline companies, natural gas companies and water companies. (72 P.S. § 7401).

Credit is available for payment of additional amounts of Federal Unemployment Compensation Tax by certain for profit business enterprises when expanding employment in Commonwealth. (72 P.S. § 8803).

Credit is available under Neighborhood Assistance program to extent of 50% of investment in approved program (70% credit for special priority programs), but not more than $250,000. Act also provides that total amount of tax credits allowed to be claimed by all taxpayers in aggregate during year may not exceed $12,750,000. Credit does not apply to C.I.T. (62 P.S. § 2085).

Economic Revitalization Tax Credit available against CNI for qualifying taxpayers. (72 P.S. § 8701 et seq.).

Credit is available for creating new jobs over specified levels. (72 P.S. § 8801-B et seq.).

Reports.

For taxable years commencing in 1992, corporations must report and pay estimated tax for CNI on or before Mar. 15 for calendar year taxpayers, or 15th day of third month of fiscal year for fiscal year taxpayers. Tentative tax no longer payable for CNI. (72 P.S. § 7403, 1991, No. 22).

Penalty is incurred on failure to file report of 10% on first $1,000 of tax, 5% on next $4,000 and 1% on balance. (72 P.S. § 7403). Effective Jan. 1, 1982, interest at Federal rate, subject to change annually, is incurred on failure to pay tax when due. (72 P.S. § 806). Criminal penalties are incurred for fraudulent reporting and, under certain circumstances, for failure to retain and permit examination of records, to file reports and to pay tax. (72 P.S. § 7410).

Tax credits available for qualified research and development expenses (72 P.S. § 8701-B et seq.), employment incentives for hiring welfare recipients, disabled, and persons undergoing rehabilitation (72 P.S. § 8702-A et seq.), and certain community projects (72 P.S. § 8904-A et seq.).

Corporate Loans Tax.

A tax of four mills per dollar of nominal value is imposed upon resident holders of scrip, bonds, certificates and evidence of indebtedness, issued or assumed, or on which interest shall be paid, by private corporations incorporated in or doing business in Pennsylvania and having a resident treasurer therein. (72 P.S. § 3250-10).

Tax is deducted at source from interest payments and paid direct to state unless the borrower's contract obligates it to pay interest without deduction, in which case full interest is paid to holder in addition to the tax to the state. (72 P.S. § 3250-10).

Corporations exempt from paying tax are nonprofit corporations, building and loan associations, savings institutions having no capital stock, fire companies, firemen's relief associations, life insurance companies, casualty or fire insurance corporations having no capital stock, secret beneficial societies, labor unions and labor union relief associations (72 P.S. § 3250-10) and beneficial societies paying sick and/or death benefits from funds received from voluntary contributions or assessments upon members (72 P.S. § 3250-10).

Foreign corporations cannot be compelled to withhold tax unless treasurer is a resident of state or performs major portion of his duties in state. (72 P.S. § 3250-10).

Exemptions.

There is no tax payable when scrip, bonds, etc., are owned in their own right by corporations subject to tax on their capital stock, including state banks, savings banks, trust companies and also savings banks without capital stock, unless obligations held by savings banks without capital stock were issued tax free, but if scrip, bonds, etc., are held by corporations as fiduciary or in any other manner, they are taxed, as in case of individuals, except when held as executor or administrator of estate of nonresident decedent or as trustee for resident or nonresident religious, charitable or educational organization, no part of net earnings of which inures to benefit of any private stockholder or individual. (72 P.S. § 3250-10).

Act does not apply to bank notes, or notes discounted or negotiated by any bank or banking institution, savings institution or trust company, to interest bearing accounts in savings institution, bank, or employee's thrift association, to scrip, bonds etc. held in trust for benefit of employees under federally tax exempt stock, bonus, pension or profit sharing plan, or to personal property held under federally tax exempt plan for individual's retirement, or to property held by trust created by nonresident for benefit of nonresident. (72 P.S. § 3250-10).

Reports must be filed with, and tax paid to, Department of Revenue on or before Apr. 15 or within 105 days of close of fiscal year. (72 P.S. § 702, 708).

Penalty.

Penalty is incurred on failure to file report of 10% on first $1,000 of tax due, 5% on next $4,000, and 1% on balance. (72 P.S. § 1702). Interest at Federal rate, subject to change annually, is incurred on failure to pay tax when due. (72 P.S. § 806). Criminal penalties are incurred for fraudulent reporting (72 P.S. § 1704A) and for failure to file report under certain circumstances (72 P.S. § 1704).

Capital Stock Tax.

Domestic corporations having capital stock, joint stock associations, every business trust to which 15*c.95 applies, every common law business trust and every limited liability company other than restricted professional corporation subject to 15*c.89, and certain limited partnerships are generally subject to tax at rate of 7.24 mills on each dollar of capital stock value for years beginning in 2002 and in declining amounts in years thereafter. (72 P.S. § 7602[h]). Capital stock value computed as product of one-half times sum of average net income capitalized at 9.5% plus 75% of net worth, from which product $160,000 must be subtracted. (72 P.S. § 7601). Special provisions are applicable to regulated investment companies. (72 P.S. § 7602[e]).

Corporations exempt from tax are nonprofit corporations and cooperative agricultural associations not having capital stock and not conducted for profit, entities taxable as bank and trust companies (72 P.S. § 7701 et seq.), title insurance company (72 P.S. § 7801 et seq.), insurance company (72 P.S. § 7901 et seq.) or mutual thrift institution (72 P.S. § 8501 et seq.). Family farm corporations are exempt if 75% of assets devoted to business of agriculture and 75% of stock owned by members of same family. (72 P.S. § 7602.2).

Investment credits, as of July 1, 1999, are available for developers of new facilities for production of qualified fuels against Pennsylvania capital stock tax on property purchased after 1999 and before 2013 for any such facility. Credit may not exceed 15% of capital cost of facility. (72 P.S. § 8803-A). Aggregate tax credits authorized by Department of Revenue may not exceed $18 million in any one year. Unused credit may be carried forward to future tax years until full amount of credit has been used. Credits may be purchased or assigned. (72 P.S. § 8801-A).

Apportionment is effected by use of a single asset fraction with exempt assets eliminated from numerator. Exempt assets include assets used in manufacturing, processing, research or development (except for companies which enjoy and exercise right of eminent domain), tangible assets situated outside Pennsylvania, certain government obligations, stock of Pennsylvania corporations on which capital stock tax has been paid, stock of foreign subsidiaries to extent representing assets situated outside Pennsylvania, and pollution control devices. Total assets are included in denominator. (72 P.S. § 1894, 1896, 7602, 7602.1; 489 Pa. 69, 413 A.2d 1017). Alternatively, three factor formula by which foreign corporations compute and pay franchise tax can be elected, but only if corporation transacts business in and is subject to tax in another state. (72 P.S. § 7602; 469 Pa. 444, 366 A.2d 569). Numerator of single-factor apportionment formula or, if three factor formula is elected, numerators of property, payroll and sales factors, may be adjusted to exclude values related to manufacturing, processing, research and development in Pennsylvania. (72 P.S. § 7602[a], 72 P.S. § 7602[b]). See subhead Corporate Net Income Tax, supra, for discussion of three factor apportionment formula.

Holding companies may elect to apply tax rate provided in 72 P.S. § 7602[h] to 10% capital stock tax value in lieu of any other apportionment or allocation to which company would otherwise be entitled. (72 P.S. § 7602[e]).

Reports must be filed with, and tax paid to, Department of Revenue on or before Mar. 15 (or 15th day of third month after end of fiscal year) on form prescribed by Department. For taxable years beginning during 1988 and thereafter, tentative tax is computed by applying current tax rates to 90% of previous year's tax base. Tentative tax is due with tentative report on Mar. 15 (or 15th day of third month after end of fiscal year). Balance of tax is paid when annual report is filed. Taxpayers may elect to pay tax in quarterly installments based on 90% of previous year's tax base or on estimate of current year's basis. Each installment payment is computed by multiplying tax base by statutory percentage for that installment. (72 P.S. § 10003).

Penalty is incurred on failure to file timely annual report of 10% on first $1,000 of tax due, 5% on next $4,000 and 1% on balance. (72 P.S. § 7603, 7403). Effective Jan. 1, 1982, interest at Federal rate, subject to change annually, is incurred on failure to pay tax when due. (72 P.S. § 806). If tentative tax is underpaid (understated by more than 5% for taxable years beginning prior to Jan. 1, 1979), there will be added to tax due additional 10% of underpaid amount and such amount will bear interest from date tentative tax was due. (72 P.S. § 10003).

Criminal penalties are incurred for fraudulent reporting, for failure to file report under certain circumstances, and for willful failure to pay tax due. (72 P.S. § 7603, 7410).

S Corporations.

Corporations which have elected to be taxed under Subchapter S of Internal Revenue Code may elect to receive S treatment under Pennsylvania law. Requirements are similar to federal. Separate state election must be made. Treatment at corporate and shareholder level is essentially same as under federal law. Effective for tax years beginning in 1999 and thereafter, corporations that elect Subchapter S status for federal income tax purposes are not required to meet separate Pennsylvania passive investment income limitation to retain their partnership status. In tax years prior to 1999, Subchapter S election was terminated for Pennsylvania tax purposes if corporation exceeded passive investment income, without regard to accumulated earnings and profits (defined more broadly than under federal law) in any taxable year. Corporations disqualified from Subchapter S status on account of exceeding passive investment income limitations prior to 1999 may elect Subchapter S status for tax years after 1998 if election was filed before Sept. 16, 1999. If Pennsylvania S election is made, corporation generally is relieved from payment of corporate net income tax, but not capital stock/franchise tax. (72 P.S. § 7307 et seq.). Commencing with 1997 tax year, any S corporation subject to federal income tax is also subject to corporate net income tax. Pennsylvania S corporation information return must be filed by 30 days after due date of corporation's federal return. (72 P.S. § 7330.1[b]). Pennsylvania S Corporations must withhold individual income tax from Pennsylvania source income allocable to nonresident shareholders. (72 P.S. § 7324, 1991, No. 22).

Professional corporations are governed by c. 29 of 1988 BCL. (15 Pa.C.S. § 2901 to 2925). With certain exceptions, corporations (other than management corporation; see subhead Investment Trusts, supra) may be organized under this chapter only for purpose of rendering professional service, which term is defined to mean type of personal service to public which requires license or other legal authorization. (15 Pa.C.S. § 102). Only persons so licensed may be shareholders in such corporation, although certain services may be performed by nonprofessional employees or agents of corporation. (15 Pa.C.S. § 2923, 2924). 1988 BCL shall not affect laws of Pennsylvania applicable to legal rights, duties and liabilities between person furnishing professional services and person receiving such services. (15 Pa.C.S. § 2925). See also topic 2.02 Associations, subhead Professional Associations.

Deeds.

See category 21 Property, topic 21.06 Deeds.

Model Non-Profit Corporation Act has not been adopted. See Pennsylvania Corporation Not-for-Profit Code. (15 Pa.C.S. § 7101 to 8145). See subhead Filing of Articles, supra. See Nonprofit Corporation Law of 1988. (Associations Code, pt. II, subpt. C, 15 Pa.C.S. § 5101 to 6162).

Limited Liability Companies.

See topic 2.06 Limited Liability Companies.

2.04 [RESERVED]

2.05 JOINT STOCK COMPANIES:

There is no statute in Pennsylvania which provides for the formation of the type of associations known in common law as “Joint Stock Companies.” Act of 1874, P. L. 271 (59 P.S. § 341), which permitted creation of “partnership associations”, has been repealed and such associations are now governed by Business Corporation Law or Professional Corporation Law.

See topic 2.03 Corporations.

Massachusetts Trusts.

There are no statutes in Pennsylvania regulating the conduct of business by so-called Massachusetts trusts. Business trusts are recognized and the rights of the members are governed by common law principles.

Professional Associations.

See topic 2.02 Associations, subhead Professional Associations.

Professional Corporations.

See topic 2.03 Corporations, subhead Professional Corporations.

2.06 LIMITED LIABILITY COMPANIES:

Limited liability companies are authorized by 15 Pa.C.S. § 8901 et seq., Limited Liability Company Law of 1994. Intent is to afford recognition and full faith and credit to such companies outside Pennsylvania. (15 Pa.C.S. § 8902).

Purposes.

May be organized for any lawful purpose except banking and insurance. (15 Pa.C.S. § 8911[a]). May be utilized by banks to market and sell title insurance. (15 Pa.C.S. § 8911[a][1]). Insurance agency nevertheless may be organized as limited liability company. (15 Pa.C.S. § 8911[a][2]). Limitations upon business, purposes or powers of company, expressed or implied in certificate of organization or operating agreement or implied by law, may be asserted in actions by members against company or company against members but not as defense in actions brought by third parties. (15 Pa.C.S. § 8911[b]). Conveyance or acquisition of property in name of company by company representative with actual or apparent authority is valid even if in excess of purpose or powers of company. (15 Pa.C.S. § 8911[c]).

Name.

See topic 2.03 Corporations, subhead Name.

Registered Office.

Company must maintain in Pennsylvania registered office which may be same as place of business. Commercial registered office permitted. (15 Pa.C.S. § 8906).

Organization.

Organizers may be one or more persons who need not be company members at time of organization or thereafter. (15 Pa.C.S. § 8912).

Certificate of Organization.

Must be signed by each organizer and set forth: (1) Company name; (2) address of initial registered office; (3) names and addresses of organizers; (4) certificates of membership interest, if any; (5) whether company management vested in manager; (6) effective date and time of certificate; (7) whether company restricted professional company and description of services; and (8) provisions concerning internal affairs members which elect to set out in certificate. (15 Pa.C.S. § 8913).

Filing.

Certificate of organization filed in Department of State. Company organized upon filing or later effective date specified in certificate. (15 Pa.C.S. § 8914).

Powers and Capacity.

Limited liability company has legal capacity of natural persons. Has power to carry out business of partnership without limited partners. (15 Pa.C.S. § 8921).

Management.

Vested in members or, to extent provided in certificate of organization, in one or more managers selected as prescribed in operating agreement. (15 Pa.C.S. § 8941).

Contributions to Capital and Distributions.

Interests in company may be issued in exchange for cash, tangible or intangible property, services rendered, promissory note or obligations to contribute. (15 Pa.C.S. § 8931[a]). Promise by member to contribute unenforceable unless in writing signed by member. (15 Pa.C.S. § 8931[b]). Profits and losses may be distributed as stipulated in operating agreement or, if not, per capita. (15 Pa.C.S. § 8932).

Liability of Members and Managers.

Unless provided otherwise in certificate of authority, no personal liability for debt, obligation or liability of company of any kind by virtue of being member or manager. (15 Pa.C.S. § 8922).

Actions.

Suit may be brought by or against company in its own name. Members are not proper parties. (15 Pa.C.S. § 8991). Suit on behalf of company may be brought by member authorized by vote of members or manager authorized by vote of managers. (15 Pa.C.S. § 8992).

Voting.

Decisions made by affirmative vote or consent of majority of members or managers entitled to vote. (15 Pa.C.S. § 8942[a]). Except as provided in operating agreement, unanimous vote needed to amend certificate of organization or operating agreement, or to authorize act that contravenes certificate or agreement. (15 Pa.C.S. § 8942[b]).

Duties of Managers and Members.

For companies without managers, members accountable to company for benefits and profits derived from company transactions. (15 Pa.C.S. § 8943[a]). Managers have duties of officers, directors, and shareholders of domestic corporations. (15 Pa.C.S. § 8943[b]).

Classes of Members.

Operating agreement may provide for classes of members having varying rights, powers, and duties. (15 Pa.C.S. § 8944[b]). Right to vote may be granted in operating agreement to all, or certain identified members, or to specified class or group of members. (15 Pa.C.S. § 8944[c]).

Property.

Transferred to or otherwise acquired by company is company property with no interest in members. Estates and titles vest in company. (15 Pa.C.S. § 8923).

Transfer of Interests.

Interests of members constitute personal estate and may be transferred or assigned as provided in operating agreement. Unless otherwise provided in agreement, unanimous vote or written consent (which approval may be unreasonably withheld) of members needed for transferee to participate in company management or to become member. (15 Pa.C.S. § 8924[a]). Member's interest may be evidenced by certificate. (15 Pa.C.S. § 8924[b]).

Taxation.

For purposes of Pennsylvania taxation or license fees, domestic or foreign limited liability company not restricted professional company deemed to be domestic corporation and members deemed to be shareholders, except that for years beginning after 1997 limited liability companies that are not taxable federally as corporations and restricted professional companies are exempt from Corporate Net Income Tax (see topic 2.03 Corporations, subhead Corporate Net Income Tax, catchline Corporations Exempt). (15 Pa.C.S. § 8925).

Indemnification.

Subject to standards and restrictions which may be contained in operating agreement, company may indemnify and hold harmless any member, manager or other person from any claim and demand. (15 Pa.C.S. § 8945[a]). Indemnification may not be made when conduct giving rise to claim was willful misconduct or recklessness. (15 Pa.C.S. § 8945[b]). Indemnification may include expenses incurred in defense of action or proceeding. (15 Pa.C.S. § 8945[d]).

Merger and Consolidation.

Domestic and foreign limited liability companies may merge or consolidate, upon adoption of plan of merger or consolidation by majority vote of members and managers. (15 Pa.C.S. § 8956-8959).

Division.

Domestic and foreign limited liability companies may divide into two or more such companies upon proposal and adoption by majority vote of members and managers. (15 Pa.C.S. § 8961-8965).

Dissolution.

Occurs upon first of: (1) As specified in certificate of organization; (2) as specified in operating agreement; (3) by unanimous written agreement or consent of members; (4) termination of member, unless remaining members consent to continue business of company; or (5) entry of order of judicial dissolution. (15 Pa.C.S. § 8971). Upon application by or for member, court may order dissolution whenever it is not reasonably practicable to carry on business. (15 Pa.C.S. § 8973). Liabilities of company are settled in following order of preference: (1) Creditors in order of legal priority; (2) liability for declared distribution to members; (3) members in respect of capital contributions; (4) members on share of profits and income on contributions. (15 Pa.C.S. § 8974). Existence of company ceases upon filing certificate of dissolution. (15 Pa.C.S. § 8976).

Election of Professional Associations.

Associations subject to 15*c.93 may elect to operate as limited liability company by filing certificate of election in Department of State. (15 Pa.C.S. § 8908). See topic 2.02 Associations, subhead Professional Associations.

Foreign Limited Liability Companies.

Are subject to treatment as foreign limited partnerships under 15*c.85, subchapter K. Qualified foreign restricted professional company shall so state in application and briefly describe professional services to be rendered. Qualified foreign limited liability company enjoys same rights and privileges as domestic one and is subject to same liabilities, restrictions, duties, and penalties. (15 Pa.C.S. § 8981). Qualified foreign limited liability company may become domestic by filing certificate of domestication in Department of State. (15 Pa.C.S. § 8982). See topic 2.07 Partnerships, subheads Limited Partnership and Out-of-State Partnerships.

Restricted Professional Companies.

Company specifically organized to provide professional service may organize as limited liability company. (15 Pa.C.S. § 8995-8998). It may only provide described professional services and only through licensed persons. (15 Pa.C.S. § 8996). It must register annually. (15 Pa.C.S. § 8998). For purposes of Pennsylvania taxation and license fees, restricted professional companies deemed to be limited partnerships under 15*c.85 and members deemed to be limited partners. (15 Pa.C.S. § 8997). See topic 2.07 Partnerships, subhead Limited Partnership.

Interchangeability.

Any business that may be conducted in corporate form may also be conducted as partnership or limited liability company. (15 Pa.C.S. § 8102).

2.07 [RESERVED]

2.08 PARTNERSHIPS:

Uniform Partnership Act adopted. (15 Pa.C.S. § 8301-8365).

Names.

Fictitious names must be filed under certain circumstances. See category 17 Intellectual Property, topic 17.01 Trademarks and Tradenames, subhead Tradenames.

Decennial Filing.

See topic 2.02 Associations, subhead Decennial Filing.

Limited Partnership.

Uniform Limited Partnership Act adopted. (15 Pa.C.S. § 8501-8594). Following should be noted:

Place of filing certificate is with Department of State. (15 Pa.C.S. § 8511).

Modifications of Uniform Act include: proper name need not contain words “limited partnership” and may contain name of limited or general partner (15 Pa.C.S. § 8505); limited partner data need not be filed in public record (15 Pa.C.S. § 8511); option of keeping records at principal place of business instead of registered office (15 Pa.C.S. § 8507); partnership may indemnify partners from liability except for willful misconduct or recklessness (15 Pa.C.S. § 8510); organization automatically constitutes consent to service of process in Pennsylvania on partnership matters (42 P.S. § 5301[a][3]); court of common pleas of county of registered office may execute certificate of cancellation and other required certificates (15 Pa.C.S. § 8515); liability for damages of certificate signers and general partners for materially inaccurate statements or omissions in limited partnership certificate or later changes in circumstances making statements inaccurate (15 Pa.C.S. § 8516); valuations of partner property or service contributions need not be fixed (15 Pa.C.S. § 8542); and partnership sharing of profits and losses is per capita in absence of contrary written agreement (15 Pa.C.S. § 8543, 8544).

Interchangeability.—Any business may be conducted either as partnership or corporation with equivalent powers. (15 Pa.C.S. § 8102[a]).

Out-of-State Partnerships.

Foreign limited partnerships required to register before transacting business in Pennsylvania (15 Pa.C.S. § 8582). State has jurisdiction by reason of qualification as foreign entity. (42 Pa.C.S. § 5301[a][3][i]).

Foreign limited partnership name can be any name that could be used by domestic limited partnership. (15 Pa.C.S. § 8584). Registered foreign limited partnerships need not file fictitious name. (54 Pa.C.S. § 303[b]). Foreign limited partnership doing business in Pennsylvania may not sue in Pennsylvania court until it has registered. (15 Pa.C.S. § 8587).

Qualified foreign limited partnerships may become domestic limited partnerships by filing certificate of domestication in Department of State. (15 Pa.C.S. § 8590).

Registered Limited Liability Partnerships.

Limited liability partnerships may be created and registered as domestic or foreign. (15 Pa.C.S. § 8201-8221). Partners not individually liable for partnership debts and obligations arising from negligent or wrongful acts or misconduct, whether sounding in contract, tort, or otherwise, committed by another partner. (15 Pa.C.S. § 8204[a]). Other liabilities of partners determined by general partnership law (15*c.83) and limited partnership law (15*c.85). (15 Pa.C.S. § 8207[b]).

Foreign Registered Limited Liability Partnerships.

Partners in foreign registered limited liability partnership are not entitled to greater protection from liability than is available to partners in domestic registered limited liability partnership. (15 Pa.C.S. § 8211[c]).

3 BUSINESS REGULATION AND COMMERCE

3.01 BANKS AND BANKING:

Banks are governed by Banking Code of 1965. (7 P.S. § 101 et seq.). Uniform Commercial Code has been adopted. (13 Pa.C.S. § 1101). See topic 3.09 Commercial Code.

Regulated by.

Under Department of Banking Code (71 P.S. § 733) and Banking Code of 1965, supervisory control is vested in Department of Banking (10 Pa. Code 1.1 et seq.), and extends to: all corporations and persons authorized to receive money on deposit or for safe-keeping or to engage in banking business and all corporations authorized to act as fiduciary, including banks, bank and trust companies, trust companies, private banks (except as exempted, see infra, subhead Private Banks and Bankers), savings banks, mutual savings banks and building and loan associations, and national banks acting as fiduciaries (to extent supervision by state authorities permitted by federal law).

Credit unions governed by Credit Union Code. (17 P.S. § 101 to 1504).

General Powers and Liabilities.

A bank or bank and trust company has usual powers of such institutions (7 P.S. § 301, 401), subject to certain restrictions.

Bank and trust company may act as fiduciary, investment advisor, custodian, agent, attorney in fact, registrar, transfer agent, fiscal agent, or treasurer of certain public bodies or nonprofit corporations and may insure titles to real estate if grandfather provision applies and if power to issue title insurance is exercised at least once in any 12 months. (7 P.S. § 402, 406).

Deposits and collections are governed by Uniform Commercial Code, Div. 4. (13 Pa.C.S. § 4101). See topic 3.09 Commercial Code. Deposits may be made in name of minor, individually, jointly or in trust. (7 P.S. § 603). If either joint depositor may withdraw, upon death or incompetency of one, other may withdraw, unless incompetency adjudicated by court and notice of appointment of guardian given to bank, and deposit arrangement does not provide for payment despite such notice. (7 P.S. § 604). Tentative trusts are permitted. Upon death of person making deposit in trust for another, beneficiary may withdraw. (7 P.S. § 605).

Unclaimed Deposits.

Deposits and other claims which have not increased or decreased, or concerning which holder has received no correspondence or other writing indicating interest in account or deposit for period of five years (15 years in case of travelers checks) are subject to custody and control of Commonwealth for eventual sale or distribution. (72 P.S. § 1301.1 to 1301.29). See also category 21 Property, topic 21.01 Absentees, subhead Abandoned and Unclaimed Property.

Stockholders' Liability.

Shareholders of incorporated institutions are not liable to depositors or other creditors. (7 P.S. § 1207; 15 Pa.C.S. § 1526).

Insolvency.

On insolvency, Secretary of Banking takes possession of business and property of institution as receiver or conservator (71 P.S. § 733[504]) (subject to designation by Secretary or appointment by court of federal agency which insures deposits as receiver with all rights, powers and duties of Secretary). (71 P.S. § 733[16]). However, power to take possession without hearing repealed as to nonfederally insured savings associations. (7 P.S. § 6020-252). Secretary of Banking has all powers of equity receiver or conservator and title or right to possession of all property to which institution has title or right of possession. (71 P.S. § 733[701]). He may conduct or suspend business and within six months must determine whether or not to liquidate. (71 P.S. § 733[704, 705]). If liquidating, Secretary gives notice to all depositors and creditors, stating amount that books of institution show to be due and that unless proof of different amount is made within specified time amount shown by books will be conclusively presumed correct. (71 P.S. § 733[1001]). Proof of claims differing from amount shown on books must be made by presenting deposit or pass book or other evidence of indebtedness to Secretary of Banking. If evidence of indebtedness has been lost or is believed incorrect, Secretary may prescribe method of proving claim. (71 P.S. § 733[1002]). Creditors other than depositors or persons for whom institution holds funds in fiduciary capacity must present sworn statements of claim. (71 P.S. § 733[1003]). After time for proving claims expires, Secretary of Banking files, with prothonotary of court of common pleas, account setting forth, inter alia, claims allowed and claims disputed, together with priority in distribution granted to or claimed by any claimant. Notice of filing of account is given to all depositors and creditors. (71 P.S. § 733[1007]). Any claimant may file exceptions within 30 days after filing of account; exceptions are adjudicated by court. (71 P.S. § 733[1008, 1009]). Claims rank as follows: (1) costs and expenses of administration; (2) claims given priority by applicable statutes in order provided thereby or in absence of contrary provisions, pro rata; (3) all other claims exclusive of claims on subordinated securities of savings bank or capital securities of other institutions; and (4) subordinated securities or capital securities, as defined in Banking Code. (7 P.S. § 1809).

Trust companies authorized to act as such under Banking Code of 1933 (repealed) or organized after Jan. 2, 1966, are subject to provisions of Banking Code of 1965. They have usual powers of such institutions, but are not authorized to engage in business of receiving deposits. (7 P.S. § 102[dd], 401, 402).

Foreign Trust Companies.

Corporate fiduciary organized under laws of state other than Pennsylvania or national bank located in another state (to extent supervision is permitted by federal law) can act as fiduciary in Pennsylvania only if: (a) (1) it is appointed fiduciary by will, codicil or trust instrument or by any Pennsylvania court or register of wills or designated by beneficiary or other fiduciary of estate pursuant to terms of trust, or (2) it is successor by merger or consolidation to corporation lawfully acting as fiduciary in Pennsylvania, and (b) laws of such other state confer like powers on Pennsylvania corporate fiduciaries. (7 P.S. § 106).

Common trust funds provided for. (7 P.S. § 404, 10 Pa. Code 15.1 et seq.). Uniform Common Trust Fund Act not in effect.

Foreign Banks.

Organization engaged in banking business under laws of foreign nation where domiciled may engage in business of receiving money for deposit or transmission and establish office in Pennsylvania by written permission of Department of Banking. (7 P.S. § 105).

Fiduciary Powers of Merged Institutions.

If party to merger or consolidation was authorized to act in fiduciary capacity and if resulting institution or national bank is similarly authorized, it is automatically substituted as fiduciary of all accounts held in that capacity by party to merger or consolidation; likewise, fiduciary appointment of party to merger does not lapse by reason of consummation thereof. (7 P.S. § 1608).

Within 60 days after merger or consolidation, any person with interest in account held in fiduciary capacity by participant may apply to appropriate court for appointment of new fiduciary on ground that merger will adversely affect fiduciary administration. (7 P.S. § 1608).

Merger, Generally.

See 7 P.S. § 1601 to 1610.

Savings banks authorized to act as such under Banking Code of 1933 (repealed) or to be incorporated after Jan. 2, 1966 are subject to provisions of Banking Code of 1965. They are corporations authorized to engage in business of receiving savings and certain demand deposits. (7 P.S. § 102[x], 501, 503). They have usual investment and lending powers of such institutions as well as limited fiduciary powers with respect to establishment of collective investment funds. (7.501 to 7.514).

Savings and loan associations and building and loan associations are subject to provisions of Savings Association Code of 1967. (7 P.S. § 6020 et seq.).

Consumer discount companies making small loans and offering revolving loan accounts subject to licensing by Department of Banking. (7 P.S. § 6203).

Private Banks and Bankers.

Any individual or partnership lawfully engaged in business of private bank on Jan. 2, 1966, and any unincorporated association so engaged in business of employees' mutual banking association may continue to do so subject to requirements and conditions imposed by Banking Code of 1965; but no new private bank or employees' mutual banking association may be established. Individual private banker may, on approval of Department of Banking, form partnership; existing partnership may admit new partners, subject to securing similar authorization, and death or withdrawal of member of any partnership does not force any private bank to liquidate if any remaining member elects to continue, except new certificate of authorization from Department of Banking may have to be obtained. On death of individual private banker, his business must be liquidated. (7 P.S. § 1902). Loan and investment powers and restrictions are similar to those applying to incorporated banks. (7 P.S. § 1908). Consumer deposits must be either insured or secured by pledge of assets. (7 P.S. § 1908).

Interstate Banking.

Banks, bank holding companies, savings banks, savings associations, and building and loan associations in Pennsylvania may acquire or be acquired by bank holding companies located in other states on regional, reciprocal basis for certain period of time and on reciprocal basis without regional requirement thereafter. (7 P.S. § 116). Statute preempted by federal law to extent restricts ownership of national banks or national bank holding companies by non-Pennsylvania national bank holding companies. (7 P.S. § 115; 644 F.Supp. 290).

Taxation.

Inclusion of U.S. obligations in former bank shares tax base ruled unconstitutional. (502 Pa. 170, 465 A.2d 965). Single excise tax enacted 1983 but declared unconstitutional in 1989. (520 Pa. 244, 553 A.2d 937). New bank shares tax imposed at rate of 1.25% for calendar year 1990 and each year thereafter upon each dollar of taxable amount of bank shares. (72 P.S. § 7701). Value of shares for each year determined by adding together book value of capital stock paid in, book value of surplus and book value of undivided profits, less amount equal to percentage of total that book value of U.S. obligations bears to book value of total assets. Divide by six sum of value for current year and preceding five years. Result, divided by number of bank shares, equals taxable amount of each share. (72 P.S. § 7701, 72 P.S. § 7701.1). If tax is collected from shareholders, shares and so much of capital and profits not invested in real estate are exempt from local taxation, and bank not required to make reports to local assessors or county commissioners on its personal property. (72 P.S. § 7701). Shares held by charitable, religious or educational institutions, and shares of bank and trust or trust company, all of whose capital stock is held by parent liable for shares tax, are exempt. (48 D.&C. 399, 72 P.S. § 7801). Effective as of Jan. 1, 1992, 100% of tax due for current year must be paid by time of filing report for year. Reports must be made to Department of Revenue on or before Mar. 15. (72 P.S. § 7701).

Mutual thrift institutions ("M.T.I."), defined as Pennsylvania savings banks without capital stock, Pennsylvania savings and loan associations, federal savings and loan associations located in Pennsylvania, federal and Pennsylvania savings institutions having capital stock and located in Pennsylvania, and every building and loan association, are taxable at rate of 11½% of net income. (72 P.S. § 8501, 8502). Net income of mutual thrift institutions is taxable at rate of 20%, at rate of 12½% for years 1991 and fiscal years beginning in 1991, at rate of 11½% for years 1992 and thereafter. (72 P.S. § 8502[a]). Net income or net loss shall exclude income or loss from US obligations exempt from local and state taxation and should exclude Pennsylvania obligations exempt from Pennsylvania taxation. (72 P.S. § 8502[c(5)]). Interest on loan to County Development Authority included in net income. (29 Pa. C.C. 222, 370 A.2d 409). Interest on tax-exempt Commonwealth obligations held for investment exempt from taxation. (515 Pa. 369, 528 A.2d 942). Deductions allowable from net income include amounts credited or paid as dividends or interest to shareholders, holders of accounts or depositors. (72 P.S. § 8502[c(4)]). M.T.I.s exempt from all other corporate taxes and all local taxation, except tax on real estate and transfers thereof. (72 P.S. § 8502[e]). Tentative tax for current year is current rates applied to 90% of tax base of year preceding immediate prior year. Tentative tax is due with tentative report on Apr. 15 (or 15th day of fourth month after end of previous fiscal year). Balance due with annual report following Apr. 15 (or 15th day of fourth month after end of fiscal year). For taxable years commencing on or after Jan. 2, 1992, M.T.I.s shall report and pay estimated tax on or before Mar. 15 (or 15th day of third month after end of fiscal year). (72 P.S. § 8502, 10003). M.T.I.s shall apportion net income or loss by fraction, numerator of which is payroll factor, receipts factor and deposits factor and denominator of which is three. (72 P.S. § 8502.1). M.T.I.s may take credit for income-based taxes paid to other states. (72 P.S. § 8502.2). Provisions regarding apportionment, credits and additional filing requirements (72 P.S. § 8502.01, 8502.2, 8502.3) shall not apply for years 1992 and thereafter. (72 P.S. § 8502.5).

Private bankers are taxed 1% on gross receipts. (72 P.S. § 2221). Tentative tax for current year is current rates applied to 90% of tax base of year preceding immediate prior year. Tentative tax is due on Mar. 15 (or 15th day of third month after end of fiscal year) (72 P.S. § 2221, 10003). (72 P.S. § 10003). Reports must be made and tax paid to Department of Revenue on or before Feb. 15. (72 P.S. § 2221).

Penalty is incurred on failure to file report and for certain other omissions of 10% of first $1,000 of tax, 5% on next $4,000 and 1% on balance. (72 P.S. § 1702, 1705, 7403[d]). M.T.I.s failing to file report are liable for $5,000 penalty. (72 P.S. § 8502[f]). Private bankers may incur additional penalty of $1,000 for failure to file reports. (72 P.S. § 1707). Interest at rate equal to federal deficiency interest rate is incurred on failure to pay tax when due. (72 P.S. § 806). If tentative tax is underpaid (understated by more than 5% for taxable years beginning prior to Jan. 1, 1979), there will be added to tax due additional 10% of underpaid amount, and such additional amount will bear interest from date tentative tax was due. (72 P.S. § 10003). Criminal penalties are also incurred for fraudulent reporting (72 P.S. § 1704A), for failure to file report under certain circumstances (72 P.S. § 1704), and (in case of banks, bank and trust companies, trust companies, and savings institutions having capital stock) for willful failure to pay tax due (72 P.S. § 7410[c]). M.T.I.s failing to file report are prohibited from initiating any action in Pennsylvania Court. (72 P.S. § 8502.4).

Mortgage Banker or Broker.

Mortgage bankers and brokers regulated by 7 Pa.C.S. c. 61. Chapter does not apply to regulated banks or credit unions federally or state chartered. (7 Pa.C.S. §6101). Dept. of Banking issues licenses upon application. Licensing provided for mortgage brokers, mortgage lenders, and mortgage loan correspondent. (7 Pa.C.S. §6131). Mortgage lenders must meet approval criteria of national mortgage regulator (FNMA, FHLMC, or FHA), maintain lines of credit not less than $1,000,000, establish tangible net worth no less than $250,000, and have fidelity bond coverage approved by national mortgage regulator (FNMA or FHLMC). (7 Pa.C.S. §6131[c]). Mortgage loan correspondents must be bonded in amount of $100,000 and have tangible net worth no less than $100,000. (7 Pa.C.S. §6131[d]). Mortgage brokers must have $100,000 bond unless they do not accept advance fees. (7 Pa.C.S. §6131[e]). Mortgage originators, brokers, lenders, or loan correspondents must meet education requirements. (7 Pa.C.S. §6131[g]). Non-residents may obtain licenses if authorized to do business in Pennsylvania, if they maintain office for mortgage business there, and if they consent to receive service of process. (7 Pa.C.S. §6131[i]).

Subject to several requirements (7 Pa.C.S. §6121) and prohibitions (7 Pa.C.S. §6123), licensed mortgage lenders may make first and secondary mortgage loans and collect application fees thereon, collect fees for title examination, abstracts and insurance, and provide access to credit insurance (7 Pa.C.S. §6122). Subject to restrictions, mortgage lenders may make open-ended loans. (7 Pa.C.S. §6126).

Operating without required license is felony of third degree. (7 Pa.C.S. §7331).

3.02 BILLS AND NOTES:

Uniform Commercial Code has been adopted. (13 Pa.C.S. § 1101). Division 3 of Code replaces Uniform Negotiable Instruments Law. (13 Pa.C.S. § 3101). See topic 3.09 Commercial Code.

Judgment notes may be recognized. See category 5 Civil Actions and Procedure, topic 5.15 Judgments, subhead Judgments by Confession.

Attorney fee clauses are enforceable. (314 Pa. 343, 171 A. 589). See also 13 Pa.C.S. § 3106.

3.03 [RESERVED]

3.04 BILLS OF SALE:

See topic 3.23 Sales.

3.05 BLUE SKY LAW:

See topic 3.24 Securities.

3.06 BROKERS:

Uniform Commercial Code has been adopted. Division 8 of Code deals with investment securities. (13 Pa.C.S. § 8101). See topic 3.09 Commercial Code.

Brokers Dealing in Securities.

See topic 3.24 Securities.

Insurance Brokers.

See category 16 Insurance, topic 16.01 Insurance Companies.

Loan Brokers.

Attorney General has promulgated regulations under Unfair Trade Practices and Consumer Protection Law (73 P.S. § 201-1 et seq.) prohibiting specified practices and requiring escrow of fees (37 P.C. §305.1 et seq.).

Mortgage Broker.

See topic 3.01 Banks and Banking, subhead Mortgage Banker or Broker.

Real estate brokers and salespersons must be licensed by State Real Estate Commission pursuant to Real Estate Licensing and Registration Act, 63 P.S. § 455.101 et seq., which establishes qualifications for licensing and prohibits specified practices by licensees. Commission issued comprehensive regulations, pursuant to former Act, with respect to qualification and licensing of salespersons and brokers (49 P. C. §35.1 et seq.) which regulations remain in effect. Reciprocal licenses may be issued to nonresidents licensed in another state. (63 P.S. § 455.602). Applicant for broker's license must be at least 21 years of age, high school graduate or equivalent, have completed prescribed course of study, worked as licensed salesperson for three years or possess equivalent experience and receive passing grade on examination. (63 P.S. § 455.511). Real estate appraisers are able to be certified by State Board of Certified Real Estate Appraisers. (63 P.S. § 457.1 et seq.).

Law provides broker lien on commercial real estate in amount of compensation due for services. (68 P.S. § 1051 et seq.).

Vehicle Brokers.

Vehicle manufacturers, dealers and salespersons must be licensed pursuant to Board of Vehicles Act (63 P.S. § 818.1 et seq.), which establishes qualifications for licensing and prohibits specified acts by licensees. License holders are required to renew their licenses biennially with

State Board of Vehicle Manufacturers, Dealers and Salespersons. (63 P.S. § 818.6).

3.07 BULK SALES:

Bulk sales provisions (Division 6) of Pennsylvania's Uniform Commercial Code were repealed, effective July 9, 1993, Uniform Commercial Code Modernization Act (Act No. 1992-97). See topic 3.09 Commercial Code. For laws which remain applicable to sales in bulk, see category 8 Debtor and Creditor, topic 8.08 Fraudulent Sales and Conveyances, subheads Uniform Fraudulent Conveyance Act and Bulk Sales.

3.08 CARRIERS:

Public Utility Commission has general regulatory power over common and contract carriers as to intrastate commerce. (66 Pa.C.S. § 501, 2501).

Commission has jurisdiction over interchange and grade crossings, their construction, relocation, alteration, elimination, reactivation, suspension, maintenance and operation. (66 Pa.C.S. § 2702). Commission may require common carriers to construct and maintain certain switch or other connections with or between lines of another common carrier. (66 Pa.C.S. § 2303). Motor Carrier Advisory Council created to assist in regulation of common and contract carriers. (52 P.C. 93 et seq.).

Uniform Commercial Code has been adopted. (13 Pa.C.S. § 1101 et seq.). See topic 3.09 Commercial Code.

Rates.

Commission has regulatory power over service (66 Pa.C.S. § 1501 et seq.) and rates (66 Pa.C.S. § 1301 et seq.), and latter (with all rules and regulations) must be embodied in published and filed tariffs (66 Pa.C.S. § 1302; 52 P.C. 23.11 et seq.) and must be demanded and collected, and it is unlawful to demand or collect any different rate (66 Pa.C.S. § 1303). Tariff rates cannot be changed except by filing new or supplemental tariffs at least 60 days prior to effective date of change. On complaint filed within 60-day period or on its own motion, upon reasonable notice, Commission may suspend operation of new rates for period not longer than six months from time such rate would otherwise become effective, and additional period of not more than three months pending such decision, or, if increase is general rate increase, for period not to exceed seven months from time such general rate increase would otherwise become effective. (66 Pa.C.S. § 1308). In such case, Commission may order continuance of old rates or may fix temporary rates to yield not less than 5% return on original cost, less depreciation, of physical property used and useful in public service. (66 Pa.C.S. § 1308, 1310). Commission may, after notice and hearing, upon own motion or upon complaint, find existing rate unjust or unreasonable and may set rates to be thereafter observed. (66 Pa.C.S. § 1309, 2507). Commission has power to regulate rates of contract carriers. (66 Pa.C.S. § 2502). Contracts of contract carriers and rate schedules must be filed with Commission. (66 Pa.C.S. § 2506).

Discontinuance of Service.

Except when required to prevent or alleviate emergency, certain public utilities may not discontinue service, except upon request of customer, for nonpayment of charges or other reason, unless “personal contact” (which is defined to include contact with customer's designee, community interest group or local police department) has been made with customer at least three days prior to such discontinuation, in addition to written notice, at any other time. (66 Pa.C.S. § 1503).

Discrimination.

No carrier may make any unreasonable discrimination in rates or services. (66 Pa.C.S. § 1304, 1502).

Limiting Liability.

Liability may be limited in accordance with statutory provisions. (66 Pa.C.S. § 2304).

Certificate of Public Convenience.

No carrier or other utility corporation can be formed or registered to do business in Pennsylvania and no utility, whether corporate or natural person, can commence business or extend its system or service without first securing certificate of public convenience from Commission. (66 Pa.C.S. § 1101). Such certificate is also necessary prerequisite to certain acquisitions of tangible or intangible property used or useful in public service and to abandoning or surrendering, in whole or in part, any service. (66 Pa.C.S. § 1102[a]). No certificate of public convenience from Commission is required prior to issue of stocks, bonds and/or other securities of utility, but utility, under such regulations as Commission may prescribe, must, prior to such issue, file securities certificate on form prescribed by Commission, setting forth information with reference thereto, and within 30 days Commission must register certificate, extend consideration period or reject it. If Commission fails to act within 30 days, certificate is deemed registered. (66 Pa.C.S. § 1901 et seq.).

Permits.

No person or corporation can render service as contract carrier by motor vehicle without permit issued by Commission. (66 Pa.C.S. § 2503). No person or corporation may simultaneously hold certificate of public convenience as common carrier and permit as contract carrier by motor vehicle without approval of Commission for good cause. (66 Pa.C.S. § 2504). Common carrier and motor carrier cannot interchange, receive or deliver with, from or to common carrier without permit to transport property intrastate. (66 Pa.C.S. § 2303).

Bills of Lading.

Uniform Commercial Code became effective July 1, 1954. Div. 7 of Code replaces Uniform Bills of Lading Act. (13 Pa.C.S. § 7101 et seq.). See topic 3.09 Commercial Code.

Liens.

Carrier's lien for charges and related expenses as conferred by Uniform Commercial Code has been adopted. (13 Pa.C.S. § 7307). Carrier has right to sell property upon proper notice. (13 Pa.C.S. § 7308). See topic 3.09 Commercial Code.

Mass Transportation.

Department of Transportation created and authorized to make project grants in Commonwealth, and to promote betterment of urban and rural mass transportation, including common carrier mass transportation. (55 P.S. § 600.201 et seq., 55 P.S. § 651 et seq.). Department authorized to promulgate rules and regulations to assure compliance in carrying out purposes for which such grants are made. (55 P.S. § 600.206, 55 P.S. § 660). Similar authority extended to metropolitan transportation authorities. (55 P.S. § 600.301 et seq.).

3.09 COMMERCIAL CODE:

Uniform Commercial Code, jointly sponsored by American Law Institute and National Conference of Commissioners on Uniform State Laws, became effective July 1, 1954; revised and re-enacted effective Jan. 1, 1960, in line with revisions reflected in 1958 Official Text; amended effective Oct. 1, 1963, in line with 1962 Official Text; transferred to Tit. 13 of Pennsylvania Consolidated Statutes without substantive change effective Jan. 1, 1980 (13 Pa.C.S. § 1101); amended effective May 25, 1983, in line with 1972 Official Text. Uniform Commercial Code Modernization Act (Act No. 1992-97) adopted Official Amendments effective July 9, 1993, concerning new technologies in payment systems (Divs. 3, 4), personal property leasing (new Div. 2A), funds transfers (new Div. 4A), and transfer of uncertificated securities (Div. 8), and repealed Div. 6 (bulk sales). See infra. Uniform Commercial Code Modernization Act of 2001 (Act No. 2001-18) adopted Official Amendments effective July 1, 2001, concerning rewriting of letters of credit (Div. 5) and secured transactions (Div. 9) and some amendments to other Divisions. Pennsylvania Comments on Modernization Act of 2001 have status of legislative history under 1 Pa.C.S. § 1939. Code displaced, among other laws, Uniform Bills of Lading Act, Uniform Conditional Sales Act, Uniform Negotiable Instruments Law, Uniform Sales Act, Uniform Stock Transfer Act, Uniform Trust Receipts Act, Uniform Warehouse Receipts Act, Bank Collection Code, Bulk Sales Act, and laws relating to chattel mortgages, factors' liens and assignments of accounts receivable.

Variations from and additions to 1972 Official Text appear in following sections: §1-108, omitted; §2-702, “or lien creditor” deleted in subsection (3) following “or other good faith purchaser”; §3-501 conforms to 1966 Amendment to Official Text; §4-208(3)(a), inserts “relating to attachment and enforceability of security interest proceeds, formal requisites” (all subsections in Pennsylvania are lettered, not numbered; no hyphenation); following references to §9-203; §7-204(4), omitted; §7-209(3)(b) conforms to 1966 Amendment to Official Text; §8-102(3), conforms to 1973 Amendment to Official Text; §9-104(e), repealed; §9-105(1) and 9 P.S. § 106 introductions read: “The following words and phrases when used in this division shall have, unless the context clearly indicates otherwise, the meanings given to them in this [sub]section”; §9-301(2), changes ten day filing grace period to 20 day period; §9-312(4), changes ten day filing grace period to 20 day period; §9-313(4)(c), omits “factory or”; §9-403, subsection (5), omitted; §9-404(3), omitted; §9-405(2), penultimate sentence omitted; §9-406, last sentence omitted; §9-409, provides for microfilm records; §9-410 concerns duty of filing officers; §9-503 adds subsection (2) “If a secured party elects to proceed by process of law he may proceed by writ of replevin or otherwise.”

Code contains provisions as respects effectiveness and lapsing of financing statements filed prior to May 25, 1983. (1982, No. 201; see note following 13 Pa.C.S. § 9102).

1972 Official Text optional provisions have been adopted (substantially or identically) or omitted, alternative provisions have been selected, and requested insertions have been supplied as follows: §2-318, alternative A adopted; §3-121, alternative A adopted; §4-106, optional language omitted; §4-202(1)(b), optional language adopted; §4-212, optional subsection (2) adopted; §5-112(1), optional language omitted; §5-114, optional subsections (4) and (5) omitted; §6-104(1) (c), following language inserted in blank: “the office of the prothonotary in the county in which the property was located at the time of transfer”; optional §6-106 adopted with minor changes, optional subsection (4) adopted and phrase “court of common pleas” inserted; §6-107, optional subsection (2)(e) adopted; §6-108, optional subsection (3)(c) adopted; §6-109, optional subsection (2) omitted; §7-403(1)(b), optional language adopted; §9-203(4), language inserted in blank makes reference to Motor Vehicle Sales Finance Act (69 P.S. § 601), Consumer Discount Company Act (7 P.S. § 6201), Home Improvement Finance Act (73 P.S. § 500-101) and Goods and Services Installment Sales Act (69 P.S. § 1101); §9-302(3), language inserted refers to Vehicle Code (75 P.S. § 101) and Mobile Home Titling Act (68 P.S. § 1001); §9-401(1), third alternative adopted and word “prothonotary” inserted in blanks throughout; §9-401(3), alternative adopted; “on which the crops are growing” added; §9-402(3), omits asterisk and material pertaining thereto and omits “[for record]”; §9-402(5), alternative language not adopted; optional §9-407 adopted. Specific filing fees set forth under subhead Filing Fees, infra.

Filing Fees.

Following filing fees are applicable to any filing with Secretary of State under Uniform Commercial Code (15 Pa.C.S. § 153):

Financing Statement, Amendment or Statement of Correction $84; each ancillary transaction $12; search—per debtor named $12; additional fee for each financing statement found and for each statement of assignment reported therein $1; financing statement or ancillary transaction not filed on standard form $28; supplementary page identical in size to standard form approved by Secretary of the Commonwealth no charge; and supplementary page of nonstandard size no charge.

Financing Statement, Amendment or Statement of Correction	$ 84
Each Ancillary transaction	12
Search—per debtor named	12
Additional fee for each financing statement found and for each statement of assignment reported therein	1
Financing statement or ancillary transaction not filed on standard form	28
Supplementary page identical in size to standard form approved by Secretary of the Commonwealth	No Charge
Supplementary page of nonstandard size	No Charge

Filing fees vary from county to county depending on size of county and within county between recorder of deeds and prothonotary. (42 Pa.C.S. § 21001; 42 Pa.C.S. § 21042; 42 Pa.C.S. § 21051).

Permanent Editorial Board's Recommendations for Optional Amendments.

1966 Official Amendments adopted in part effective Jan. 1, 1980. (1979, No. 86). Sections amended include 2 P.S. § 702, 3 P.S. § 501, 7 P.S. § 209.

1972 Official Amendments adopted effective May 25, 1983. (1982, No. 201).

1973 Official Amendment adopted effective May 25, 1983. (1982, No. 201).

1977 Official Amendments (uncertificated securities) adopted effective July 9, 1993.

1986 Official Amendments not adopted.

1989 Official Amendments (funds transfers) adopted effective July 9, 1993.

1987 and 1990 Official Amendments (personal property leasing) adopted effective July 9, 1993.

1990 Official Amendments (Divs. 3, 4) adopted effective July 9, 1993.

1994 Official Amendments (revised Div. 8) and **1994, 1995 Conforming Amendments** adopted effective May 22, 1996.

2001 Official Amendments (rewrote Divs. 5, 9) adopted effective July 1, 2001.

See also: topics Banks and Banking, 2008 Official Amendments (rewrote Divs. 1, 7, and made some amendments to other Divisions) adopted effective June 15, 2008. (Act No. 2008-13).

Bills and Notes, Brokers, Carriers, Contracts, Factors, Frauds, Statute of, Sales, Securities, Warehousemen; categories Business Organizations, topic Corporations; Civil Actions and Procedure, topic Limitation of Actions; Debtor and Creditor, topics Assignments, Fraudulent Sales and Conveyances, Liens, Pledges; Documents and Records, topics Records, Seals; Mortgages, topic Chattel Mortgages.

3.10 CONDITIONAL SALES:

See topic 3.23 Sales.

3.11 CONSIGNMENTS:

See topic 3.14 Factors.

3.12 CONSUMER PROTECTION:

Bureau of Consumer Protection in Department of Justice has power to investigate sales and financing of goods and services to consumers. (71 P.S. § 307-1 to 307-6).

Office of Consumer Advocate in Department of Justice represents interests of consumers before Public Utility Commission. (71 P.S. § 309-1 to 309-7).

Breach of Personal Information Notification Act.

Entities which maintain, store or manage computerized data that include personal information must notify Pa. resident of breach of security of system by unauthorized person who accessed and acquired resident's personal information. (73 P.S. § 2301 et seq.).

Retail Credit Sales.

Goods and Services Installment Sales Act (69 P.S. § 1101 to 2303) covers retail installment contracts, retail installment accounts and revolving accounts. There are limitations on interest and charges and disclosure requirements which protect retail buyer. Buyer's waiver of provisions of act is deemed contrary to public policy and void. (69 P.S. § 1102). See topic 3.17 Interest. Special restrictions in case of installment sales of motor vehicles (69 P.S. § 601 et seq.) and goods furnished under home improvement contract (73 P.S. § 500[101] to 500[602]). Creditors are limited in ability to communicate with third persons when attempting to collect debt. (69 P.S. § 1604).

Construction Code Act.

Provides process supervised by Department of Labor and Industry which will result in statewide administration and enforcement of uniform construction code for buildings and other structures. (35 P.S. § 7210.101 et seq.).

Consumer Protection.

Pennsylvania Unfair Trade Practices and Consumer Protection Law (73 P.S. § 201[1] to 201[9]) prohibits unfair or deceptive practices and methods of competition, provides enforcement procedures, and allows for private actions for treble damages to be awarded at court's discretion (73 P.S. § 201[9.2]) and allows consumer to avoid certain sales or contracts for sale made at his residence. Fair Credit Extension Uniformity Act (73 P.S. § 2270.1 et seq.) itemizes and penalizes unfair or deceptive debt collection acts and practices. See also topic 3.20 Monopolies, Restraint of Trade and Competition.

Automobile Lemon Law (73 P.S. § 1951 to 1963) enables purchaser or lessee of new vehicle to require manufacturer, under certain circumstances, to correct defects or refund purchase price. Cash Consumer Protection Act (73 P.S. § 204[l] et seq.) makes it unlawful to refuse to rent or sell property or services to individual for reason that individual does not possess credit card but does not require any particular form of payment and permits cash security requirement. Activities of credit services organizations regulated by Credit Services Act (73 P.S. § 2181 to 2192) with consumer damage action (73 P.S. § 2191). Rental-Purchase Agreement Act governs rental agreements for personal property for personal, family or household use which permit lessee to acquire ownership. (42 Pa.C.S. § 6901 et seq.). Act includes mandatory disclosures (42 Pa.C.S. § 6903), prohibits certain provisions like confession of judgment (42 Pa.C.S. § 6904), controls rental costs (42 Pa.C.S. § 6905), and gives lessee reinstatement rights after termination (42 Pa.C.S. § 6906).

Mortgage Loan Industry and Consumer Protection. See topic 3.01 Mortgage Banker or Broker.

Credit Reporting Agency Law (73 P.S. § 2501 et seq.) enables consumers to freeze release of credit reports to third parties (with enumerated exceptions) to protect from identity theft.

Food Act (31 P.S. § 20.1 to 31 P.S. § 20.18) authorizes Secretary of Agriculture to regulate, consistent with federal law, manufacture and distribution of food and food additives to prevent adulterated, misbranded, and deleterious food.

Social Security Number Privacy Act limits use of social security numbers on Commonwealth agency forms. (71 P.S. § 2601 et seq.). Prohibits health insurers from placing such numbers on identification cards. (71 P.S. § 2605).

Telephone Subscriber Directory Express Consent Act.

Express written consent needed for commercial mobile service provider to list name and telephone number of customer in directory. (73 P.S. § 2401 et seq.).

Privacy of social security numbers protected and enforced by criminal penalties. (74 P.S. § 201 et seq.).

Telemarketer Registration Act establishes "do-not-call" list to protect consumers from unwanted residential or wireless telephone solicitation calls. (73 P.S. § 2245.1, 2245.2).

Unsolicited Telecommunication Advertisement Act prohibits unsolicited emails or faxes which use third party's domain name without permission, use false return address, contain false or misleading information in subject line, or fail to provide return email address or toll-free number for blocking further messages. (73 P.S. § 2250.1 et seq.). See topic 3.16 Information Technology, Internet and New Media.

Unsolicited goods statute enacted. (73 P.S. § 2001).

Uniform Deceptive Trade Practices Act not adopted.

Utility consumer protection provided (66 Pa.C.S. § 1401 et seq.), including complaint system (66 Pa.C.S. § 308.1).

Plain Language.

Plain Language Consumer Contract Act (Act 1993-29) enacted. (73 P.S. § 2201 et seq.). Consumer contracts must be written, organized, and designed so that they are easy to read and understand. (73 P.S. § 2205[a]). Act provides language guidelines for courts. (73 P.S. § 2205[b]). Consumers given damage action and equitable relief. (73 P.S. § 2207). Form contracts may be submitted to Attorney General for pre-approval. (73 P.S. § 2209).

3.13 CONTRACTS:

Uniform Commercial Code has been adopted. (13 Pa.C.S. § 1101).

Uniform Written Obligations Act adopted. (33 P.S. § 6 to 8).

Legal age for entering into binding and enforceable contracts is 18. (23 Pa.C.S. § 5101).

See topics: Commercial Code, Sales; categories Documents and Records, topic Seals; Family, topic Infants.

3.14 FACTORS:

Uniform Commercial Code has been adopted. (13 Pa.C.S. § 1101). See topic 3.09 Commercial Code. Code repeals all inconsistent acts and parts of acts, and should be consulted in evaluating older statutes dealing with factors, liens, etc., some of which are not specifically repealed by Code.

Liens.

Factor has common law lien upon goods resulting from costs or expenses of carriage, storage or labor relating to goods. If owner or consignee fails to pay charges on goods within 30 days of personal demand, factor may sell goods at public auction provided notice of sale with name of consignee has been published for two successive weeks in county newspapers and by six handbills posted in conspicuous places in vicinity. When address of owner or consignee is unknown, goods are perishable or notice is impracticable, judge (or district justice in case of perishable goods) upon application may order sale without notice. Excess moneys arising from sale after deducting amount of lien and costs to be held subject to order of owner. (6 P.S. § 15 to 17).

If a factor, or other person entrusted with merchandise with authority to sell or consign, ships, pledges, or transmits same to third person without notice before receiving or making advances thereon that factor is not owner, third person has lien for advances to or for use of factor, and for money or securities received for use by factor. This lien is subject to factor's lien for expenses. Owner of goods is entitled to recover them before they have been deposited or pledged, or from assignees of factor in case of insolvency. (6 P.S. § 18 to 20, 201 to 202).

Factors' Lien Act of 1947, dealing with loans on security of merchandise, repealed by Uniform Commercial Code. See topic 3.09 Commercial Code. Factors' liens are among security devices governed by Division 9 of Code, dealing with secured transactions. (13 Pa.C.S. § 9102).

3.15 FRAUDS, STATUTE OF:

Interest in land only created by writing signed by grantor or agent acting under written authority except unwritten lease not exceeding three years duration is binding. (33 P.S. § 1). See category 21 Property, topic 21.10 Landlord and Tenant. Statute of Frauds provision of Uniform Commercial Code adopted. (13 Pa.C.S. § 2201). See topic 3.09 Commercial Code.

Contracts of Sale.

For sale of $500 or more in goods, contract only enforceable if set forth in writing. Written confirmation sufficient if contract between merchants. (13 Pa.C.S. § 2201). See topic 3.09 Commercial Code. For sale of real estate, contract only enforceable if writing signed by grantor. (33 P.S. § 1).

For sale or purchase of securities, contract only enforceable if set forth in signed writing, delivery of security accepted or payment made, written confirmation sent to party against whom enforcement of contract is sought, or party against whom enforcement is sought admits contract in pleadings. (13 Pa.C.S. § 8319).

Security interest not enforceable against debtor or third parties where secured party not in possession of collateral, unless debtor has signed security agreement which contains description of collateral. (13 Pa.C.S. § 9203).

Except in contracts for sale of goods, securities, or security agreements, contract for sale of personal property beyond $5,000 must be in writing. (13 Pa.C.S. § 1206).

Part Performance.

Decree of specific performance against vendor under oral contract for sale of land available where continuous and exclusive possession taken under contract and improvements made by vendee not readily compensated in money, or other equitable considerations require decree of specific performance. (356 Pa. 184, 51 A.2d 708). Goods contract enforceable: (1) if seller has substantially commenced manufacture of special items not suitable for sale to others or has made procurement commitments for them, or (2) if goods paid for or accepted. (13 Pa.C.S. § 2201[c]).

Assignment.

Declaration of trust, confidence of land, grant or assignment void if not in writing. (33 P.S. § 2).

Surety.

Promise to pay debt of another only enforceable if in writing. (33 P.S. § 3).

Acceptances.

No person may be charged as acceptor of bill of exchange, draft or order exceeding $20 unless acceptance in writing signed by him or his lawful agent. (33 P.S. § 5).

3.16 INFORMATION TECHNOLOGY, INTERNET AND NEW MEDIA:

E-Commerce.

Electronic Transactions Act validating electronic signatures, records and writings applicable to non-electronic consumer contract only by consumer's separate and express acknowledgment. (73 P.S. § 2260.901). Commonwealth agencies may utilize electronic services provided by U.S. Postal Service or any similar service to send and receive electronic records and signatures. (73 P.S. § 2260.502[d]).

Electronic Meetings.

Business Corporation Law permits shareholders' and directors' meetings to be conducted by electronic means. See category 2 Business Organizations, topic 2.03 Corporations, subheads Shareholders' Meetings, Directors' Meetings.

Unsolicited Telecommunication Advertisement Act.

See topic 3.12 Consumer Protection.

Telephone Subscriber Directory Express Consent Act.

See topic 3.12 Consumer Protection.

3.17 INTEREST:

Six percent is legal rate of interest and maximum lawful rate of interest for loan or use of money in amount of $50,000 or less where no express contract made for lower rate. (41 P.S. §201[2]). Following classes of loans exempted from maximum interest limitation: (1) Loans in original bona fide principal amount of more than $50,000; (2) unsecured, noncollateralized loans in excess of $35,000; and (3) business loans of any principal amount. (41 P.S. §201[b]). Maximum interest rate on residential mortgages tied to U.S. bond yields. (41 P.S. §301). Loans insured or guaranteed in whole or in part by Federal Housing Administration, Veterans

Administration, or other federal agencies or departments, provided that any such loan is subject to maximum rate of interest established by law or by such department or agency. (41 P.S. § 301, 302).

Licensed consumer discount companies making loans of $15,000 or less may charge 9½% interest for first 48 months and 6% interest thereafter or charge 2% per month on unpaid principal balance which charge may not be paid in advance nor compounded. (7 P.S. § 6213, 6217.1).

On collateral demand loans of $5,000 or more and secured by negotiable instruments any compensation agreed upon by parties in writing may be charged. (41 P.S. § 1).

Commission merchants may contract for 7% interest. (41 P.S. § 5).

Loans Secured by Savings Accounts and Certificates.

Rate of interest shall be at least 1% higher than rate of earnings paid by savings association on account or certificate securing loan. (7 P.S. § 6020[160]).

Judgments carry interest at lawful rate. (42 Pa.C.S. § 8101).

For residential mortgage interest rates, see category 20 Mortgages, topic 20.04 Mortgages of Real Property.

In retail contracts covered by Goods and Services Installment Sales Act, service charge is that agreed upon by seller and buyer, except for bailor or lessor of goods charge. In no case can it exceed 15% simple interest per annum on unpaid balance in case of credit card issuer primarily engaged as seller or distributor of gasoline. Minimum charge of 50¢ per month will be allowed. (69 P.S. § 1501). Maximum monthly service charge on outstanding balance in retail installment account is that agreed upon by seller and buyer, with minimum 50¢ per month allowed and with 18% simple interest per annum maximum for bailments and leases of goods. (69 P.S. § 1904). See topic 3.23 Sales.

In retail installment sales of motor vehicles by seller licensed under Motor Vehicle Sales Finance Act, finance charges may not exceed: (1) 18% simple interest per annum on unpaid balance, for new vehicles except if cost $10,000 or more and used primarily for commercial purposes and new trucks weighing 15,000 pounds or more; (2) 18% simple interest per annum on unpaid balance, for used vehicles with model year not more than two years old; (3) 21% simple interest per annum on unpaid balance for other used vehicles; (4) 7½% per annum for new vehicles costing $10,000 or more and used primarily for commercial purposes except new trucks weighing more than 15,000 pounds; (5) maximum finance charge for mobile homes by regulation of Federal Housing Administration for new mobile homes; and (6) 10% per annum for new trucks weighing more than 15,000 pounds. (69 P.S. § 619).

Open accounts do not carry interest (29 Pa. 360), until they have been liquidated or settled.

Contracts for Payment of Money.

If contract bears interest at rate higher or lower than legal rate but does not specify rate applicable after debt becomes due, then interest will be at legal rate after such due date. (326 Pa. Super. 14, 473 A.2d 584).

Pawnbrokers may charge 6% per annum, plus service charges of not more than 2½% per month on that part of unpaid balance of loan not in excess of $150 and 1½% per month on any remainder of the unpaid balance. (63 P.S. § 281[12]).

Usury.

No domestic or foreign business corporation may plead usury as defense to enforcement against it of any debt obligations. (15 P.S. § 1313). When borrower other than business corporation contracts for usurious interest, borrower not required to pay excess over maximum rate permitted by law, and it is lawful for borrower to deduct excess from amount of debt. (41 P.S. § 501). When paid, borrower may recover triple amount of excess if suit is brought within four years of time of payment. Recovery is limited to four years of contract period. (41 P.S. § 502). Attorney's fees may be awarded. (41 P.S. § 503). Knowing and intentional violation is misdemeanor of third degree. (41 P.S. § 505).

Criminal Usury.

Where not otherwise authorized by law, collection of money or property in satisfaction of loan bearing interest rate of greater than 25% per annum is racketeering activity. (18 Pa.C.S. § 911[h][l][iv]). It is first degree felony to use income derived from two instances of racketeering activity (18 Pa.C.S. § 911[h][4]) in any commercial enterprise (18 Pa.C.S. § 911[b] and [c]). Attorney General has investigative authority for criminal and civil proceedings. (18 Pa.C.S. § 911[e]). Under former criminal usury statute (18 P.S. § 4806.1[h], superseded), apparently repealed (but effectiveness of repeal subject to doubt), interest rate greater than 36% per annum, unless otherwise authorized by law, was felony (18 P.S. § 4806.3, superseded).

3.18 [RESERVED]

3.19 LICENSES, BUSINESS AND PROFESSIONAL:

Transient vendors are required to obtain certificate of registration from Department of Revenue each year. (72 P.S. § 7248).

Collection agency may not represent creditor in any legal proceedings, take assignment of claim for purpose of collection, furnish or offer to furnish legal services, represent debtor in proposed adjustment of his affairs, solicit employment for or receive fee from attorney or threaten legal proceedings against debtor. Established custom of sharing commissions with attorney upon collection is not prohibited. It may inform debtor that if claim is not paid it will be referred to attorney for such action as he may deem necessary. (18 Pa.C.S. § 7311). Regulations have been adopted pursuant to unfair trade statutes (73 Pa.C.S. § 201-3.1), regulating conduct of debt collection activities (37 P.C. 303.1 et seq.).

See also topics 3.01 Banks and Banking, subhead Mortgage Banker or Broker, and 3.06 Brokers, subhead Real Estate Brokers and Salespersons.

3.20 MONOPOLIES, RESTRAINT OF TRADE AND COMPETITION:

Agreements creating monopolies, maintaining resale prices or in restraint of trade are illegal at common law and will not be enforced.

Unfair Trade Practices.

Unfair Sales Act declares to be unfair competition and prohibits advertisement, offer for sale or sale of merchandise by retailers or wholesalers at less than cost with intent of injuring competitor or with result of lessening competition or deceiving purchaser except in: (a) clearance sales; (b) sales of perishable merchandise to forestall loss; (c) sales of imperfect, damaged or discontinued goods; (d) final liquidation of business; (e) sales for charitable purposes or to relief agencies; (f) sales on contract to government departments or institutions; (g) when price of goods is set in good faith to meet competition; (h) sales by any officer under court order; (i) sales to employees of tools, equipment or materials, or appliances or products, used in trade or business.

(73 P.S. § 213, 216).

Unfair Trade Practices and Consumer Protection Law declares unfair methods of competition and unfair or deceptive acts or practices (as defined in Act or in regulations promulgated by Attorney General) in conduct of any trade or commerce to be unlawful. (73 P.S. § 201-1, 201-2, 201-3, 201-3.1). Attorney General or District Attorney may bring action in name of Commonwealth in equity for injunction, and for civil penalty for wilful violations of Act. (73 P.S. § 201-4, 201-8). Act creates private right of action for any person who purchases or leases goods or services primarily for personal, family or household services and thereby suffers any ascertainable loss of money or property as result of unfair act or practice, and entitles successful plaintiff to recover costs, attorney fees and actual damages or $100, whichever is greater. (73 P.S. § 201-9.2[a]). Court may, in its discretion, award up to three times actual damages sustained, but not less than $100 and may provide such additional relief as it deems necessary or proper. Any permanent injunction, judgment or order of court made by court in action brought by Commonwealth for injunction shall be prima facie evidence of unfair acts or practices in private action. (73 P.S. § 201-9.2).

Unfair Trade Practices and Consumer Protection Law creates three day right of rescission in buyer for residential or telephonic sales of goods or services having price of $25 or more. Seller must notify buyer of this right in conspicuous manner in sales contract and in attached notice of cancellation form substantially as provided in Act. (73 P.S. § 201-7).

Cash Consumer Protection Act prohibits refusal to rent or sell property or services to any person because person does not possess credit card. (73 P.S. § 204-3).

Feature Motion Picture Fair Business Practices Law (73 P.S. § 203) was held constitutional in 614 F. Supp. 1100, aff'd, 800 F.2d 369. Statute promotes fair and effective competition by prohibiting: (a) Blind bidding (73 P.S. § 203-4); (b) distributors from receiving minimum guaranteed payment from exhibitors (73 P.S. § 203-5); (c) distributors from receiving advances from exhibitors prior to exhibition of picture (73 P.S. § 203-6); and (d) exclusive first run or exclusive multiple first run license agreements for more than 42 days (73 P.S. § 203-7). Statute also prescribes bidding procedures. (73 P.S. § 203-8). Exhibitors may bring actions for damages and injunctive relief for willful and intentional violations of statute by distributors or exhibitors. Successful exhibitors are entitled to costs including reasonable attorneys' fees. (73 P.S. § 203-10).

Gasoline, Petroleum Products and Motor Vehicle Accessories Act regulates leases or other agreements between suppliers and distributors of gasoline and petroleum products and dealers in order to avoid undue control of dealers by suppliers and to promote competition and public safety. (73 P.S. § 202-1). Suppliers may cancel, terminate or fail to renew lease or contract with dealers only upon giving of 90 days' written notice by certified mail and only for reasons set out in statute. (73 P.S. § 202-3). Suppliers may not require dealers to assent at time of entering agreement to relief from liability under Act, or accept leases for premises of term of less than one year, may not prohibit lessee dealers from associating for any lawful purpose, may not prohibit transfer by will of gasoline station business and right of lessee dealer under agreement to spouse or children, and may not provide any term in lease or other agreement which violates Act. (73 P.S. § 202-4). Dealers may bring actions against their suppliers for damages and for injunctive relief for violations of Act and are entitled to recover costs, including reasonable attorney's fees, if violations found willful and intentional. (73 P.S. § 202-6).

Resale Price Agreements.

See category 17 Intellectual Property, topic 17.01 Trademarks and Tradenames.

3.21 NEGOTIABLE INSTRUMENTS:

See topics 3.02 Bills and Notes, 3.09 Commercial Code.

3.22 RESTRAINT OF TRADE:

See topic 3.20 Monopolies, Restraint of Trade and Competition.

3.23 SALES:

Uniform Commercial Code has been adopted and Div. 2 of Code replaces Uniform Sales Act. (13 Pa.C.S. § 2101). See topic 3.09 Commercial Code.

Contracts of Sale.

Uniform Commercial Code governs. See topic 3.15 Frauds, Statute of.

It is misdemeanor for any person engaged in business of financing purchase of real or personal property or lending money on security thereof to require, as condition precedent to making loan or mortgage or renewal thereof, that borrower negotiate any insurance or renewal of insurance through particular insurance company, agent or broker. This does not prevent lender from approving or disapproving insurance company selected to underwrite such insurance. (18 Pa.C.S. § 7309).

Out-of-state sellers who use commissioned sales representatives must execute written contracts or for willful failure be subject to exemplary damages and attorney fees in suit to collect commissions. (43 P.S. § 1471 et seq.). Payment of owed commissions due within 14 days of termination. (43 P.S. § 1473).

Bills of Sale.

No statutory form is prescribed.

Conditions or Warranties.

Uniform Commercial Code governs. (13 Pa.C.S. § 2312, 2318).

Products liability law has developed largely by judicial decision. Action for personal injuries to ultimate consumer lies against manufacturer and suppliers for negligence. (424 Pa. 365, 227 A.2d 897; 352 Pa. 51, 41 A.2d 850). Manufacturer liable where plaintiff demonstrates that injuries were proximately caused by product defect. (498 Pa. 594, 450 A.2d 615). Restatement 2d, Torts §328D adopted. (457 Pa. 602, 327 A.2d 94). Privity is not required when action is on breach of either express or implied warranty. (457 Pa. 24, 319 A.2d 903; 432 Pa. 217, 246 A.2d 848). Restatement 2d, Torts §402A, strict liability on sellers of defective products, adopted. (422 Pa. 424, 220 A.2d 853). Two year tort statute of limitations applies. (625 F.2d 1095).

Transfer of Title.

Uniform Commercial Code governs. (13 Pa.C.S. § 2403).

Remedies of Seller.

Uniform Commercial Code governs. (13 Pa.C.S. § 2703).

Remedies of Buyer.

Uniform Commercial Code governs. (13 Pa.C.S. § 2711).

Conditional sales are among security devices governed by Uniform Commercial Code, Div. 9, dealing with secured transactions. (13 Pa.C.S. § 9102). Code repealed Uniform

Conditional Sales Act. (See topic 3.09 Commercial Code.)

Bulk Sales.

See categories 8 Debtor and Creditor, topic Fraudulent Sales and Conveyances; Business Regulation and Commerce, topic Bulk Sales.

Sales of Motor Vehicles.

See category 23 Transportation, topic 23.01 Motor Vehicles.

Retail Credit Sales.

See topic 3.12 Consumer Protection.

International Sales of Goods.

See Part V of this volume, Selected International Conventions.

Government Procurement.

Commonwealth Procurement Code governs expenditure of funds, other than investments, by Commonwealth agencies under contract. (62 Pa.C.S. § 101 et seq.).

3.24 SECURITIES:

Uniform Securities Act (see Uniform and Model Acts section) has been adopted under title “Pennsylvania Securities Act of 1972” (70 P.S. § 1), effective Jan. 1, 1973, with material additions, omissions and changes by statute and regulations, as follows:

§101: Market manipulation by any person for purpose of creating a false or misleading appearance of active trading in a security or with respect to market for a security is prohibited. (402). Manipulative, deceptive or fraudulent practices by broker/dealer or agent are prohibited. (403). Certain use of inside information is prohibited. (406). Issuer is prohibited from employing agent who has been agent for another issuer within previous twelve months. (306[b]).

§102: Self-dealing by investment advisors without disclosure to customers is prohibited. (404[c]).

§102(b)(1): Act does not prohibit an investment advisory contract which provides for compensation based on total value of fund computed in any manner permitted by Investment Advisors Act of 1940 or any contract for investment advisory services to an institutional investor. (405).

§201: Following persons exempted from registration: out-of-state broker/dealers and their agents registered under Securities Exchange Act of 1934 or Investment Advisors Act of 1940, if specified limited contacts with Pennsylvania residents (302[a], [b] and [d]); bank executing orders for account of purchaser or seller (302[c]); officer, director, partner or employee of issuer, if such person receives no compensation for services on behalf of issuer except in connection with exempted security or transaction (302[e]); auctioneers (302[f]; 64 P.C. 302.061); and credit unions (302[f]; 64 P.C. 302.061).

§201(b): Except in certain instances permitted by Commission (302[f]; 64 P.C. 302.060), no agent shall at any time represent more than one broker/dealer or issuer, except affiliated organizations registered as broker/dealers. (301[b]).

§201(d): Registration expires on Dec. 31 of each year unless renewed. (301[e]).

§202(a): Last sentence omitted.

§202(b): Filing Fees.—Applicant for initial or renewal registration: Broker/Dealer, $250, plus (until June 30, 2001) compliance assessment of $100 ($150 after June 30, 2001); Agent, $50 plus (until June 30, 2001) compliance assessment of $30 ($32 after June 30, 2001, and until June 30, 2004; $35 thereafter); Investment Advisor, $200, plus (until June 30, 2001) compliance assessment of $50 ($75 after June 30, 2001); Associated person, $50; Agent or associated person changing employers, $50. When application is denied, withdrawn or when registration is revoked, filing fee is retained. (602[d]).

§202(d): Commission has established limitations on aggregate indebtedness of broker/dealers in relation to net capital. (303[d], 64 P.C. 303.041).

§202(e): Commission requires surety bond of $10,000 to be posted by issuer who employs agents in connection with any nonexempt security or transaction. (303[e], 64 P.C. 303.051[a]).

§203: Commission has prohibited unreasonable charges or other compensation and has prescribed rules appropriate in public interest regulating broker/dealers and investment advisors who are not members of national securities associations registered under Securities Exchange Act of 1934. (304[e], [f]; 64 P.C. 304.051, 304.052).

§302: Registration by notification omitted.

§303(b)(1): Two copies of preliminary prospectus or offering circular are required. (205[b][i]).

§304(c): If registration statement has been on file for 30 days and all information required by Commission has been furnished and a written request that Commission take action within ten days is filed and Commission takes no action, registration becomes effective at end of ten day period. (206[c]).

§305: Purchaser of securities registered by qualification directly from issuer or affiliate may rescind purchase within two business days after receiving prospectus not materially different from final prospectus. (207[m]). Issuer registering securities for sale in this State or who has sold securities in this State pursuant to an exemption contained in 202(e), 203(d), (p) or (r) shall keep and maintain complete set of books and records of such sales and use of proceeds for a period of three years following last sale or one year after disposition of all proceeds, whichever is longer. (209[a]). Every open-end or closed-end investment company, face amount certificate company or unit investment trust filing under §§203(i), 205 or 206, and every issuer registering securities for sale in this State under §206, must file annual report with Commission, no earlier than 365 days and no later than 420 days from effective date of registration, exemption or exemption renewal, setting forth total amount of securities sold in this State during applicable effective period. (209[b]). Commission may require that debt securities registered by qualification be issued under a trust indenture. (207[h]).

§305(b): Filing fees for sales of securities: Exemption filings for securities registered under §5 of Securities Act of 1933 or exempted from registration under §3(b) of that Act, except in case of offering of securities by open-end or closed-end investment company, face amount certificate company or unit investment trust, $250(602[b][i]); registration statement filings by coordination, except in case of offering of securities by open-end or closed-end investment company, face amount certificate company or unit investment trust, for less than $10,000,000, fee is $500, for $10,000,000 or more, fee is $750 (602[b][ii]); registration filings by qualification, except in case of offering of securities by open-end or closed-end investment company, face amount certificate company or unit investment trust, $350 plus 1/20 of 1% of maximum aggregate

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offering price (maximum fee, $2,150) (602[b][iii]); filing for offering of securities by open-end or closed-end investment company, face amount certificate company or unit trust, based upon maximum aggregate offering price, fee for: (a) $4,000,000 or less is 1/20 of 1% with minimum fee of $350, (b) more than $4,000,000 but less than $100,000,000 fee is $3,000, (c) $100,000,000 or more fee is $3,500 subject to certain exceptions (602[b][iv]), (d) indefinite offerings (no defined amount need be specified), $3,500, plus $500 assessment fee; filing under exemption for certain reorganizations if party to transaction files required materials, $250 (602[b][v]). If registration statement is withdrawn before effective date or pre-effective date, stop order is entered, $300 will be retained from filing fee for registration by coordination and $175 will be retained from filing fee for registration by qualification. (602[b][vi]). Filing for exemption from registration for investment contract issued in connection with certain employee benefit plans and for certain transactions pursuant to offer of securities to existing security holders of issuer or of corporation owning substantially all voting stock of issuer or of corporation which organized issuer for purpose of offer, $500 (602[b][vii], [ix]); filing for exemption from registration for sales to not more than 25 persons in Pennsylvania during 12 month period that meet certain requirements, $150 if maximum aggregate offering price is less than $1,000,000, $400 if maximum aggregate offering price is greater than $1,000,000 (602[b][viii]); filing for exemption from registration for offer or sale of debt of issuer organized for educational, charitable or religious purposes or as trade or professional association, if certain requirements are met, $100 (602[b][x]).

§305(c): Registration statement shall also specify names of all underwriters and broker/dealers selling or offering securities in this state. (207[b]).

§401: Definitions of “advertisement” (102[a]), “affiliate” (102[b]), “bank” (102[d]), “commission” (102[f]), “control” (102[g]), “institutional investor” (102[k]), “promoter” (102[o]), “publish” (102[p]), “reporting company” (102[q]) and “underwriter” (102[v]) added and “administrator” deleted.

§401(b): “Agent” defined not to include individual who has no place of business in this state if he effects transactions in this state exclusively with broker/dealers. (102[c]).

§401(c): Broker/dealer defined not to include executor, administrator, guardian, conservator or pledgee (102[e][iv]), and licensed real estate broker or agent whose transactions in securities are isolated and incidental to real estate business (102[e][vi]).

§401(c)(4)(B): Omitted. (But see 302[a].)

§401(j): (j)(6)(B), (C) and (D) omitted. (But see 203[o].) Definition of “sale” or “sell” includes issuance of securities pursuant to merger, consolidation, sale of assets or other corporate reorganization involving exchange of securities in whole or part for securities of another person. (102[r][i]). Also includes dividend or distribution by any person to all or any class of its security holders of securities of any other person, whether or not such dividend or distribution is for value. (102[r][viii]). Offer of rescission involves offer and sale. (102[r][vi]).

§401(l): Interest in condominium not security. (68 Pa.C.S. § 3405).

§402(a)(7): Offer, sale, issuance or guarantee of security must be subject to regulation by Interstate Commerce Commission or to registration under Public Utility Holding Company Act of 1935 or Pennsylvania Public Utility Law. (202[b]).

§402(a)(8): Securities quoted on any national quotation service designated by regulation, and securities which satisfy margin requirements under Regulation T are exempted. (202[f]).

§402(a)(9): Limited to equity securities. (202[e]).

§402(a)(10): Commercial paper proposed to be sold or offered to public in units of less than $5,000 to any single person is not exempted. (202[c]).

§402(a)(11): Any security of a registered broker/dealer issued to its officers, partners or employees is exempted subject to regulations. (202[h]).

§402(b): (b) (1), (2), (3), (8), (9), (10) omitted and following exempted transactions added: any non-issuer transaction except where directly or indirectly for benefit of an affiliate of issuer (203[a]); any non-issuer transaction for benefit of an affiliate of issuer which is exempted from §5 of Securities Act of 1933 except transactions exempted under §§3(a)(11) or 3(b) of that Act (203[b]); any offer or sale to an institutional investor (as defined in 102[k]) or to a broker/dealer (203[c]); sales by an issuer to not more than 25 persons in this State during a period of 12 consecutive months if purchaser agrees not to sell for 12 months, which agreement, under certain circumstances, may subsequently be waived (64 P.C. 204.011), and there is no media advertisement or mass mailing and no compensation to any promoter in connection therewith, unless such compensation is given or paid in connection with sale made by broker-dealer registered under §301 and person receiving such compensation either is such broker-dealer or agent registered pursuant to §301 of such broker-dealer, and filing fee specified in §602(b)(viii) is paid, subject to filing (203[d]); any offer to not more than 50 persons during 12 month period if only certain limited sales result (203[e]); however, if registered broker-dealer is used, sales may be made to 35 persons plus unlimited number of experienced private placement investors, or, alternatively, unlimited number of accredited investors and offers may be made to 90 persons plus number of additional persons equal to those experienced private placement investors who actually purchase securities or unlimited number if all sales are to accredited investors, subject to filing (204[a], 64 P.C. 204.010); offer or sale of preorganization subscriptions or securities of newly formed company, corporation, or entity to not more than five persons (203[f]); sale of security registered under §5 of Securities Act of 1933 or exempted under §3(b) of that Act if issuer is reporting company (as defined in 102[q]), and if no stop order or refusal is in effect, and if no public proceeding or investigation regarding such order is pending under Securities Act of 1933 or this Act, as subject to filings and fee (203[i]); transaction exempted from registration under Sections 3(a) (9) or 3(a) (10) of Securities Act of 1933, subject to notice in certain cases (203[1]); transactions incident to vote by security holders on merger, consolidation or sale of assets involving issuance or exchange of securities if, in cases where more than 25% of security holders are Pennsylvania residents, specified proxy or other materials submitted to security holders (203[o]); offer or sale of evidence of indebtedness of charitable or nonprofit issuer subject to filing and other limitations (203[p]); distribution in partial or total liquidation of company or entity subject to conditions and limitations (203[q]); certain sales by issuers that have not sold securities to more than ten persons from date of initial capitalization where offers have not been made to more than 90 persons in consecutive 12-month period (64 P. C. 203.187).

§402(c): Commission may, for particular security or transaction, deny or revoke any exemption specified in §§202, 203 of this Act within specified notice and procedural framework. (204[b]).

§406: Describes permitted relationships between Commissioners or Commission employees and licensed persons or qualified organizations. (605).

§407: Commission may take possession of books, records and accounts for a reasonable time not exceeding 30 days. (510[a][ii]).

§408: Commission, represented by Attorney General (71 P.S. § 732-204[c]), permitted to bring class action on behalf of persons injured by violations of this Act (509[b]). Injunction procedure is set forth. (509[a]).

§410: Structure of civil liability section is significantly different but, in substance, same remedies are provided. (501, 502, 503). Provides liabilities and rescission for unlawful conduct by investment advisors. (501[d]). Burden is upon investment advisor to show lack of knowledge of true facts or advisor could not have known true facts in exercise of reasonable care. (501[g]). Corporation has right of indemnification against an affiliate under specified conditions. (503[b]). No person shall be deemed to violate §§401 or 406 or to make misleading statement in connection with any sale, offer or purchase of securities made in accordance with 17 C.F.R. 240.1065-1(c) (relating to trading "on the basis of" material nonpublic information in insider trading cases).

§410(c): Action to enforce civil liability created under 501 must be brought within four years after transaction or one year from receipt of actual or constructive notice of violation, whichever shall first expire. (504[a]).

§412: Commission may, by regulation, require certain issuers which are not reporting companies (as defined in 102[q]), to distribute financial information to its shareholders at least annually. (606[a]). Commission has promulgated rules concerning certain advertisements of securities. (606[c]; 64 P.C. 606.031, 606.034). Commission may make regulations with respect to record retention. (610). Within 30 days after any order has become effective without a hearing, any interested party may apply to Commission for a hearing. (607[a]).

§414(e): Delete exception for any publication which is published in this State with more than two-thirds of its circulation outside this State. (702[d]).

§414(g): Designation of Commissioner as agent for service of process in connection with registration statements not required. (42 Pa.C.S. § 5301, 5322).

§419: Effective date of Act is Jan. 1, 1973.

§510(e): Upon request, Pennsylvania Securities Commission may assist securities regulatory authority and its jurisdiction. Decision to provide assistance shall be based on whether requesting authority will provide reciprocal assistance and whether assistance would prejudice public interest.

§514(a): Pennsylvania Securities Commission may issue order to require person to reduce compensation received from securities transactions where there has been willful violation of §301(a).

§601(c.1): Except for privileges expressly created in Act, no provision of Act creates or derogates from any privilege existing at common law, or otherwise, when evidence is sought under subpoena directed to Commission or its officers or employees.

§602.1(c)(iv)(A) and (B): Commission may impose administrative assessment up to $50,000 for single violation or $250,000 for multiple violations of §301 on any person who is not registered under §301, not registered broker or dealer, and not member of national securities association. Commission's assessment may be up to $50,000 for single violation and $300,000 for multiple violations of §301 on any person (not individual) who is not registered under §301, but is registered broker, dealer or member of national securities association.

§612(a) and (b): Any person claiming status as federally-covered security or adviser or exemption from definition has (a) burden of proof in civil or administrative proceeding and (b) burden of going forward with evidence in criminal proceeding.

Supervision.

Pennsylvania Securities Commission, 333 Market Street, Fourteenth Floor, Harrisburg, Pennsylvania 17101.

Uniform Commercial Code has been adopted. (13 Pa.C.S. § 1101). See topic 3.09 Commercial Code.

Uniform Simplification of Fiduciary Security Transfers Act has not been adopted.

Uniform Securities Ownership by Minors Act adopted. (70 P.S. § 101).

Transfer on Death Security Registration.

Owners of securities may register them in beneficiary form. (20 Pa.C.S. § 6401 et seq.). Transfer on death is effective by contract and is not testamentary. (20 Pa.C.S. § 6409).

Form

(“TOD” means “transfer on death”; “POD” means “pay on death”)

Sole owner-sole beneficiary: “John S. Brown TOD (or POD) John S. Brown, Jr., or John S. Brown TOD to Sally Smith, trustee under my trust (under will or deed) dated . . . . .”

Form

(“TOD” means “transfer on death”; “POD” means “pay on death”)

Multiple owners-sole beneficiary: “John S. Brown Mary B. Brown JT TEN TOD John S. Brown, Jr.”

Form

(“TOD” means “transfer on death”; “POD” means “pay on death”)

Multiple owners-primary and secondary (substituted) beneficiaries: “John S. Brown Mary B. Brown JT TEN TOD John S. Brown, Jr. SUB BEN Peter Q. Brown or, John S. Brown Mary B. Brown JT TEN TOD John S. Brown, Jr., LDPS (lineal descendents per stirpes).”

Takeover Disclosure Law has been adopted effective Mar. 3, 1976, which makes it unlawful, unless securities or offer are exempt, to make takeover offer or acquire equity securities of Pennsylvania corporation or corporation with principal place of business and substantial assets in Pennsylvania pursuant to such offer unless registration statement containing information required by §5 of Act is filed with Pennsylvania Securities Commission 20 days prior thereto, copy of such registration statement is sent to target company and employees' collective bargaining representative, if any, and offering price is publicly disclosed (70 P.S. § 73, 74). All other solicitation material must be filed with Commission. Takeover offer does not include offer: (1) to target company with no more than 100 equity security holders of record or no more than $1,000,000 of assets, (2) which is effected by registered broker-dealer on national exchange or over-the-counter market without solicitation of sell orders where broker-dealer performs only customary broker's function and receives customary broker's commission, (3) by issuer to acquire own securities, (4) made by dealer for his own account in ordinary course of business, or (5) which will not result in acquisition of 2% of securities of any class or acquisition of equity securities from more than 25 persons within preceding 12-month period. (70 P.S. § 73). Act does not apply if target company recommends offer to shareholders and offeror files with Commission information specified by §13(d) of Securities Exchange Act of 1934 and undertakes to notify security holders of target company that notice has been filed and is available for inspection or if Commission finds security or offer exempt. (70 P.S. § 78).

Securities deposited pursuant to tender offer may be withdrawn within seven days from effective date of offer or after 60 days from effective date of offer if not then taken up by offeror. (70 P.S. § 77).

Violations of Act are subject to injunctive relief and criminal and civil penalties. (70 P.S. § 81 to 70 P.S. § 83). Act does not apply when offeror or target company is public utility or public utility holding company, bank or bank holding company, savings and loan holding company and takeover is subject to appropriate federal agency, Act or authority. (70 P.S. § 84).

Waiting period provisions of statute found unconstitutional in Crane Co. v. Lam, 509 F. Supp. 782 (E.D. Pa. 1981).

Transaction Creating New Control Group.

Shareholders have right to receive payment for their shares following “control transaction”. See category 2 Business Organizations, topic 2.03 Corporations, subhead Merger and Consolidation.

3.25 STATUTE OF FRAUDS:

See topic 3.15 Frauds, Statute of.

3.26 TRUST RECEIPT SECURITY:

See category 8 Debtor and Creditor, topic 8.15 Pledges.

3.27 WAREHOUSEMEN:

Cold storage business is subject to statutory regulation. It is responsibility of Department of Agriculture to inspect cold storage warehouses to ascertain sanitary conditions, wholesomeness of food, and time period during which foods have been stored, and to make rules and regulations governing same. (71 P.S. § 445). Self-service storage facilities are subject to statutory regulation. (73 P.S. § 1901 et seq.).

Warehouse receipts and other documents of title and rights, duties and liabilities of warehousemen are governed by Uniform Commercial Code. (13 Pa.C.S. § 7101 et seq.). See topic 3.09 Commercial Code.

4 CITIZENSHIP

4.01 ALIENS:

Aliens may take, hold, and dispose of realty and of personalty by will or descent. (20 Pa.C.S. § 2104[8], 2518).

Property.

Aliens, whose sovereign is not at war with the United States, may purchase and hold real estate not exceeding 5,000 acres, nor $20,000 in net annual income. (68 P.S. § 28 to 32). Nonresident aliens and foreign governments prohibited from holding agricultural land in excess of 100 acres except that received by devise or bequest or held as security for indebtedness or as permitted by treaty. (68 P.S. § 41 to 47). Where alien has acquired real estate in excess of limit prescribed by law and has conveyed to any person authorized to hold same, title thereto is indefeasible. (68 P.S. § 51 to 57). Regarding nonprofit corporations, see 15 Pa.C.S. § 8101; regarding corporations for profit, see 15 P.S. § 2001.

Registration.

Statute requiring registration of aliens, with certain exceptions, with Department of Labor and Industry (35 P.S. § 1801) held unenforceable due to enactment of Federal Alien Registration Act of 1940 (312 U.S. 52).

5 CIVIL ACTIONS AND PROCEDURE

5.01 ACCORD AND SATISFACTION:

Common law rules generally prevail.

General Requirements.

For accord and satisfaction to bar claim, there must be consideration and execution of act. (151 Pa. 415, 25 A. 52). When claim disputed or unliquidated, and settlement check is tendered giving creditor notice that it must be rejected or accepted in full satisfaction of claim, retention and use by creditor constitutes accord and satisfaction. (189 Pa. Super. 316).

Pleading.

Accord and satisfaction is affirmative defense that must be specifically pleaded. (P. R. C. P. 1030).

Uniform Commercial Code adopted. (13 Pa.C.S. § 2209). See category 3 Business Regulation and Commerce, topic 3.09 Commercial Code.

5.02 ACTIONS:

Legislature has authorized Supreme Court to prescribe general rules of procedure and practice. (42 Pa.C.S. § 1722). Court has promulgated Pennsylvania Rules of Civil Procedure which generally govern and supersede both Practice Act of 1915 and former Supreme Court Equity Rules. See also topic 5.19 Practice.

Equity.

Action in equity is abolished as of July 1, 2004. One form of action known as “civil action.” Pa. Order 03 P.S. § 50. (Sup. Ct. Dec. 16, 2003; P. R. C. P. 1001).

Forms of Actions.

Effective July 1, 1984, actions of assumpsit and trespass were consolidated into single form of action entitled Civil Action. (P. R. C. P. 1001-1041.2). Actions at law provided for by Rules of Civil Procedure include ejectment (P. R. C. P. 1051-1058), to quiet title (P. R. C. P. 1061-1068), replevin (P. R. C. P. 1071-1088), mandamus (P. R. C. P. 1091-1100), quo warranto (P. R. C. P. 1111-1114), mortgage foreclosure (P. R. C. P. 1141-1150), ground rent (P. R. C. P. 1161-1164), protection from abuse (P. R. C. P. 1901-1905), support (P. R. C. P. 1910.1-1910.50), custody (P. R. C. P. 1915.1-1915.25), and divorce or annulment of marriage (P. R. C. P. 1920.1-1920.92). Actions for declaratory judgment are also permitted. (See Declaratory Judgment Act, 42 Pa.C.S. § 7531-7541 [P. R. C. P. 1601-1604].) Specific action provided for damages caused by acts of terrorism (42 Pa.C.S. § 8318) and ecoterrorism (42 Pa.C.S. § 8319).

Commencement.

Civil action or action in ejectment is commenced by filing with Prothonotary praecipe for writ of summons or complaint. (P. R. C. P. 1007). Other forms of actions at law permit one or more of above alternatives. (P. R. C. P. 1063, 1073, 1093, 1113, 1143, 1161, 1162, 1653, 1901.3, 1910.4, 1915.3, 1920.3). See also topics 5.20 Process, 5.17 Pleading.

Parties.

Actions are brought by real parties in interest, with certain exceptions. (P. R. C. P. 2002). Special rules are applicable to certain classes of persons as parties, such as minors (P. R. C. P. 2026-2050), incompetents (P. R. C. P. 2051-2075), individual defendants who are nonresidents or conceal their whereabouts (P. R. C. P. 2076-2100), Commonwealth and political subdivisions (P. R. C. P. 2101-2125), partnerships (P. R. C. P. 2126-2150), unincorporated associations (P. R. C. P. 2151-2175), and corporations and similar entities (P. R. C. P. 2176-2200).

Access to Justice Act provides funds to nonprofit legal service offices to provide free legal services to poor and disadvantaged in civil actions. (42 Pa.C.S. § 4901 et seq.).

Joinder of parties, compulsory or voluntary, and effect of joinder, are set forth in P. R. C. P. 2226-2250. Persons having only joint interest in subject matter of action must be joined on same side as plaintiffs or defendants, and if person who must be joined as plaintiff refuses to join, he shall, in proper case, be made defendant or involuntary plaintiff when substantive law permits such involuntary joinder. (P. R. C. P. 2227). Permissive joinder is covered by P. R. C. P. 2229. Joinder of additional defendants is covered by P. R. C. P. 2251-2275.

Class Actions.

Class actions are permitted under appropriate circumstances. (P. R. C. P. 1701-1716).

Stockholder's derivative action permitted in form specified by rule. (P. R. C. P. 1506). See category 2 Business Organizations, topic 2.03 Corporations, subhead Shareholder Actions.

Intervention.

At any time during pendency of action, person not party thereto may intervene if: (1) Entry of judgment in such action or satisfaction of such judgment would impose any liability upon such person to indemnify in whole or in part party against whom judgment might be entered, or (2) such person is so situated as to be adversely affected by distribution or other disposition of property in custody of court or any officer thereof, or (3) such person could have joined as original party in action or could have been joined therein, or (4) determination of such action might affect any legally enforceable interest of such person whether or not he may be bound by judgment in action. (P. R. C. P. 2327). Local government agency may intervene in action against its employee for damage claims arising out of employment. (42 Pa.C.S. § 20043).

Interpleader.

At any time during pendency of action, court of its own motion or upon petition of defendant, may interplead plaintiff and one or more claimants not parties of record. More than one claimant may be interpleaded. (P. R. C. P. 2302). Right of interpleader, under Rules of Civil Procedure, is exclusive in actions at law and is in addition to right to institute equity interpleader actions. (P. R. C. P. 2318). Interpleader compact to adjudicate claims to property in hands of stakeholder where one or more claimants are in different jurisdictions has been adopted. (42 Pa.C.S. § 7521-24).

Interpreters.

If sufficient funds appropriated in civil and criminal proceedings, court interpreters provided for persons with limited English proficiency or who are deaf. (42 Pa.C.S. § 4401 to 4438).

Joinder of Causes of Action.

In civil action, plaintiff may state in complaint more than one cause of action cognizable in civil action against same defendant heretofore asserted in assumpsit or trespass. (P. R. C. P. 1020[a]). Causes of action and defenses may be pleaded in alternative. (P. R. C. P. 1020[c]). Where same transactions or occurrences give rise to causes of action, against same person, including causes of action in alternative, they shall be joined in separate counts in action against any such person, and failure to join cause of action operates as waiver of cause of action against all parties to action. (P. R. C. P. 1020[d]).

Joinder of causes of action is required in case of certain related plaintiffs where causes of action accrue for injury not resulting in death. (P. R. C. P. 2228 [a] [husband and wife], [b] [minor and parent]).

Splitting Causes of Action.

Although splitting of actions is not favored, it is permissible when parties and court agree on method. (468 Pa. 85, 360 A.2d 191).

Consolidation and Severance of Actions.

Trial court has discretion in determining what actions should be consolidated or severed for trial. (P. R. C. P. 213). Issues in action can be split by agreement of parties, when some issues can be resolved by settlement, while others must be resolved through litigation. (468 Pa. 85, 360 A.2d 191).

Stay of Proceedings.

Continuances may be granted by court for cause. (P. R. C. P. 216).

Abatement and Revival.

Traditionally, grounds for abatement of action included death of party and pendency of another action as well as transfer of interest (other than by death) of one of parties and defects as to parties.

Pennsylvania has abandoned common law rule that death abates personal actions entirely. Statute provides that all causes of action of proceedings, real or personal, survive death of any party. (42 Pa.C.S. § 8302). Action may be brought by personal representative of decedent if no spouse, parent or child survive. (42 Pa.C.S. § 8301). See also category 13 Estates and Trusts, topic 13.05 Death, subhead Action for Death.

Pendency of another action is ground for abatement only where prior action is within state, is before court with jurisdiction over case, is between substantially same parties, and involves essentially same cause of action and relief.

Transfer of interest (other than by death) of one of parties may result in continuation of action under name of original plaintiff, under name of transferee, or both. (P. R. C. P. 2004).

Substitution of anyone who has succeeded by operation of law, election or appointment to interest or office of party to civil action or proceeding at law or in equity is ordinarily accomplished under P. R. C. P. 2351-2375. Rules for substitution in actions to enforce municipal liens and claims and mechanics' liens are set forth in 49 Pa.C.S. § 1504 and 53 Pa.C.S. § 7181.

Limitation of Actions.

See topic 5.16 Limitation of Actions.

Small Claims.

See category 6 Courts and Legislature, topic 6.01 Courts.

Termination of Actions.

Plaintiff may terminate any civil proceedings at law or in equity by discontinuance before trial or by voluntary nonsuit during trial with leave of court for good cause shown. (P. R. C. P. 229, 230). Discontinuance may not be entered as to less than all defendants without written consent of all parties or without leave of court after notice to all parties and may, on petition, be stricken to prevent unreasonable inconvenience, vexation, prejudice, etc. (P. R. C. P. 229). After plaintiff has rested his case he may suffer compulsory nonsuit in case with only one defendant upon oral motion of party if he has failed to establish right to relief. (P. R. C. P. 230.1). While entry of compulsory nonsuit bars second action, discontinuance or voluntary termination do not do so if plaintiff pays costs of terminated action. (P. R. C. P. 231). Plaintiff's discontinuance or nonsuit does not affect defendant's previously filed counterclaim, but defendant may terminate his counterclaim by discontinuance or voluntary nonsuit. (P. R. C. P. 232).

Prohibited Actions.

Actions for alienation of affections, except under very limited circumstances, have been abolished (23 Pa.C.S. § 1901), as have actions for breach of promise to marry (23 Pa.C.S. § 1902). No cause of action or award of damages for wrongful birth or wrongful life. (42 Pa.C.S. § 8305).

Administration.

See category 13 Estates and Trusts, topic 13.08 Executors and Administrators.

Direct Actions Against Insurer.

See category 23 Transportation, topic Motor Vehicles, subhead Direct Actions Against Insurer; see also category 16 Insurance, topic 16.01 Insurance Companies, subhead Bad Faith Actions Against Insurer.

Confession of Judgments.

Confession judgments are governed by P. R. C. P. 2950-2976. Certain classes of defendants may be entitled to special due process rights. (Swarb v. Lennox, 405 U.S. 191). Confession judgments not permitted in consumer credit transactions. (P. R. C. P. 2950).

Sovereign Immunity.

See topic 5.09 Damages.

Medical Malpractice.

Medical negligence lawsuits subject to special rules. (40 P.S. § 1301.801-A et seq.). Included are: limits on punitive damages (40 P.S. § 1301.812-A), special attorney certifications on documents (40 P.S. § 1301.813-A, 40 P.S. § 1301.821-A), discovery limits (40 P.S. § 1301.822-A), and mandatory conciliation conferences (40 P.S. § 1301.825-A).

Professional Liability Actions.

Supplemental rules provided in civil actions in which professional liability claim is asserted. (P.R.C.P. 1042.1 et seq.). Licensed professionals subject to rules include: health care provider; accountant; architect; chiropractor; dentist; engineer; land surveyor; nurse; optometrist; pharmacist; physical therapist; psychologist; veterinarian; and attorney.

5.03 APPEAL AND ERROR:

Legislature has authorized Supreme Court to prescribe by general rule practice and procedure governing appeals (42 Pa.C.S. § 1701), and Supreme Court adopted Pennsylvania Rules of Appellate Procedure (P. R. A. P.), effective July 1, 1976.

From Courts of Common Pleas.

Supreme Court has exclusive jurisdiction of appeals from final orders in matters such as right to public office, right to practice law, right of Commonwealth or subdivision to create indebtedness, review of death sentence, and where court has held law or treaty unconstitutional. (42 Pa.C.S. § 722). Commonwealth Court has jurisdiction of appeals from final orders in civil actions in which Commonwealth or officer thereof are parties or which relate to nonprofit corporations, eminent domain, or local government matters. (42 Pa.C.S. § 762). Superior Court has jurisdiction of all other appeals from final orders. (42 Pa.C.S. § 742).

How Taken.

Appeals from judgments or orders must be taken by filing notice of appeal and proof of service with lower court and serving copies on all parties, lower court judge, court reporter and district court administrator. (P. R. A. P. 901-907).

Time.

Appeals must be filed within 30 days after entry of order or judgment. (P. R. A. P. 903[a]). Cross appeals must be filed within 14 days of filing date of first notice of appeal or within time otherwise prescribed by this rule whichever occurs later. (P. R. A. P. 903[b]). Appeals from order changing criminal venue or venire, order in any matter under Pennsylvania Election Code, or order in any matter under Local Government Unit Debt Act or similar statute must be taken within ten days after entry of such order. (P. R. A. P. 903[c]).

From Commonwealth and Superior Courts.

Appeals are taken to Supreme Court. (P. R. A. P. 1101, 1112, 42 Pa.C.S. § 723, 724). Except as provided in 42 Pa.C.S. § 723, there is no right of appeal from Superior Court or Commonwealth Court to Supreme Court. (42 Pa.C.S. § 5105[b]).

How Taken.

Appeals from orders in actions originally commenced in Commonwealth Court or in appeals from Board of Finance and Revenue are taken in same manner as appeals from courts of common pleas. (P. R. A. P. 1101). All other appeals from final orders of either court must be taken by filing petition for allowance of appeal and proof of service with prothonotary of Supreme Court. (P. R. A. P. 1112).

Time.

Petitions for allowance of appeal must be filed within 30 days after entry of order. If petition for reargument filed, time to file petition for allowance of appeal runs from entry of order denying reargument or from entry of decision on reargument. (P. R. A. P. 1113[a]). Opposing party may file brief in opposition or cross appeal within 14 days. (P. R. A. P. 1113[b], 1116). Petitions for allowance of appeal from order arising under Pennsylvania Election Code or Local Government Unit Debt Act or similar statute must be filed within ten days after entry of such order. (P. R. A. P. 1113[c]).

Interlocutory Appeals.

Where authorized by law, appeals from interlocutory orders may be taken to appellate court having jurisdiction of final orders in such matter. In addition, if lower court believes any interlocutory order involves controlling question of law and immediate appeal may materially advance ultimate resolution of matter, court must so state in its order. (42 Pa.C.S. § 702). Party may apply to lower court to include such statement in order within 30 days of entry. (42 Pa.C.S. § 5574). Appellate court then has discretion to permit appeal. (42 Pa.C.S. § 702[b]). Interlocutory appeals may be taken as of right from orders affecting judgments, affecting attachments, changing criminal venue or venire, affecting injunctions, awarding new trial, directing partition, changing venue, or sustaining venue, personal jurisdiction or in rem jurisdiction, and from orders determining validity of will or trust. (42 Pa.C.S. § 5105[c], P. R. A. P. 311). Appeals lie of right from collateral orders of agencies or lower courts. (P.R.A.P. 312).

How Taken.

Petition for permission to appeal and proof of service must be filed with prothonotary of appellate court. (P. R. A. P. 1311[b]).

Time.

Petition must be filed within 30 days after entry of order or entry of order amended to include prescribed statement. (42 Pa.C.S. § 5571[d]; P. R. A. P. 1311[b]). Opposing party may file brief in opposition within 14 days. (P. R. A. P. 1314).

Fees.

Fee for filing appeal from Court of Common Pleas to appellate court is $30. (42 Pa.C.S. § 21071, 42 Pa.C.S. § 21161). Where petition so filed is granted, no fee is payable in lower court and no additional fee is payable on docketing appeal in appellate court. (P. R. A. P. 2701[b]). Fee in connection with writ of certiorari from Supreme Court is $15. (204 P.C. §155.1).

Stay of Proceedings and Supersedeas.

Taking of appeal or filing petition for allowance of appeal generally prevents lower court from proceeding further with matter. (See P. R. A. P. 1701.) Petition for permission to appeal interlocutory order does not stay proceedings in lower court unless lower court, appellate court or judge thereof so orders. (42 Pa.C.S. § 702[c], P. R. A. P. 1313, P. R. A. P. 311[e]).

Appeal from order involving solely payment of money operates as supersedeas upon filing with clerk of lower court of security in amount of 120% of amount found due by lower court. (P. R. A. P. 1731). Appeal from order not involving solely payment of money operates as supersedeas only with filing with clerk of lower court of appropriate security as may be imposed. (P. R. A. P. 1733).

Application for stay, suspension of injunction or modification of terms of supersedeas during pendency of appeal must ordinarily be made first in lower court. (P. R. A. P. 1732[a]).

Appeal Bond.

Absent need for supersedeas, no appeal bond need be filed.

Extent of review depends upon nature of judgment, order or decree and nature of proceedings in lower court.

Character of Hearing.

Review.

Judgment or Order on Appeal.

Appellate courts are given broad powers with respect to disposal of cases before them. (42 Pa.C.S. § 502; 42 Pa.C.S. § 542; 42 Pa.C.S. § 562).

5.04 BONDS:

Bonds in civil cases are specified by statutes and rules of civil procedure dealing with each particular form of action. In general, they are made payable to parties interested or to

Commonwealth for use of parties. Bonds must be approved by court in which action is pending and rules of each court should be consulted.

Sureties.

Although statute may provide for one or more sufficient sureties, bond executed by corporate surety authorized to do business in Commonwealth is sufficient bond. (40 P.S. § 835).

Statute or rule requiring bond with sureties to be given by individual are construed to allow instead bond given by indemnity or surety company authorized to do business in Commonwealth and approved by proper authority. (1 Pa.C.S. § 1906; P. R. C. P. 105).

Whenever bank and trust company or trust company acts in fiduciary capacity, its own bonds are sufficient. (7 P.S. § 403).

Enforcement.

Right to sue on replevin bond is governed by P. R. C. P. 1075.3. Suit must be brought on such bond within one year. (42 Pa.C.S. § 5523[2]).

As to bonds in criminal cases, see 42 Pa.C.S. § 5701 et seq.

5.05 CERTIORARI:

In general, any appeal now extends to entire record, and scope of review of order on appeal is not limited as on broad or narrow certiorari. (42 Pa.C.S. § 5105[d]). However, decisions of community courts, district justices, Philadelphia's municipal and traffic courts, and Pittsburgh's magistrate's court are reviewable by writ of certiorari. (42 Pa.C.S. § 934).

Jurisdiction.

Court of common pleas for judicial district where minor court located has jurisdiction to issue writ. (42 Pa.C.S. § 934).

Grounds.

If petitioner was plaintiff in district justice action, praecipe for writ of certiorari filed with court of common pleas must claim such gross irregularity of procedure as to make judgment void. If petitioner was defendant, he may file praecipe for writ of certiorari claiming judgment should be set aside because of lack of personal or subject matter jurisdiction in district justice action, improper venue, or gross irregularity of procedure. (R.C.P.D.J. 1009).

Proceedings.

Upon receipt of praecipe, prothonotary shall issue writ. (R.C.P.D.J. 1011). Service requirements governed by R.C.P.D.J. 1011.

Bond/Supersedeas.

No bond required for issuance of writ of certiorari. (R.C.P.D.J. 1010). Except where writ involves judgment for possession of real property, receipt of writ by district justice operates as supersedeas. (R.C.P.D.J. 1013).

Effect of Writ.

If common pleas court finds in favor of party who obtained writ, judgment of district justice set aside without prejudice (R.C.P.D.J. 1014[a]); if court finds against party who obtained writ, writ shall be dismissed (R.C.P.D.J. 1014[b]).

Certiorari and Appeal Not Permitted.

Judgment may not be subject of both certiorari (limited review not on merits) and appeal (trial de novo on merits). (R.C.P.D.J. 1015). Writ may be stricken by prothonotary upon proof of service of notice of appeal. If appeal stricken or voluntarily terminated, writ may be reinstated. (R.C.P.D.J. 1015).

5.06 CHARITABLE IMMUNITY:

See topic 5.09 Damages.

5.07 COMMISSIONS TO TAKE TESTIMONY:

See topic 5.11 Depositions and Discovery.

5.08 COSTS:

Supreme Court empowered to establish by rule standards governing imposition and taxation of costs, guided by following considerations: (1) Attorney's fees taxable only to extent authorized by 42 Pa.C.S. § 2503; (2) prevailing party should generally recover taxable costs; (3) imposition of costs or multiple thereof may be used as penalty for violation of rules. (42 Pa.C.S. § 1726). In other cases, taxable costs awarded to prevailing party. (239 Pa. Super. 66, 362 A.2d 1098). “Damages for delay” awarded in civil actions seeking monetary relief for bodily injury, death or property damages. (P.R.C.P. 238). Emotional distress, anguish and humiliation do not constitute bodily injury. (383 Pa. Super. 633, 557 A.2d 730). Only two defenses to plaintiff motion: (1) Written offer of settlement, in specified sum with prompt cash payment or structured settlement, maintained for 90 days or until commencement of trial, with final award not exceeding 125% of offer; (2) plaintiff-caused occurrences which delayed trial. Lack of fault is no defense. (381 Pa. Super. 236, 553 A.2d 443). Damages start one year after original process served. Amount is percentage of award measured as prime rate plus 1%, per annum, uncompounded.

Liability of Attorney, Trustees Ad Litem.

Vexatious attorney personally liable for opposing counsel fees. (80 Pa. Commw. Ct. 354, 471 A.2d 909). Trustees ad litem for plaintiff or counterclaiming associations liable for costs taxed against such associations. (P.R.C.P. 2155).

Items Allowed.

Taxable costs include filing fees, service fees, witness fees, and fees of court-appointed masters, auditors, accountants or experts. Additional items taxable as costs at court's discretion in partition of real property. (P. R. C. P. 1574). On appeal, costs of notes of testimony and printing brief taxable, as are filing fees except fees in transferor court in matters transferred for erroneous filing and fees for transfer of mistaken filing of appeal. (P. R. A. P. 2742, 2743). Costs may be taxed for delay, and costs, including attorneys' fees, may be taxed for bad faith use of summary judgment motions or appeals. (P. R. C. P. 217, 1035[f]; P. R. A. P. 2744). Taxation of attorneys' fees as costs permitted in particular instances. (42 Pa.C.S. § 1726, 2503). Factors governing award of counsel fees in class actions set forth in P. R. C. P. 1716.

5.09 DAMAGES:

Common law generally prevails as to compensatory damages. Delay damages are available in personal injury, death or property damage cases. See topic 5.08 Costs. Damages for conversion of stocks, bonds or other like property of fluctuating value are limited to difference between proceeds of conversion, or portion thereof paid or credited to owner, and highest value property may have reached within reasonable time after he had notice of conversion. (42 Pa.C.S. § 8335).

Charitable Immunity.

Doctrine has been abolished. (417 Pa. 486, 208 A.2d 193).

Sovereign Immunity.

Doctrine has been reinstated by statute. (1 Pa.C.S. § 2310). As to Commonwealth, there are nine exceptions: (1) Vehicle liability; (2) medical-professional liability; (3) care, custody and control of personal property; (4) Commonwealth real estate, highways and sidewalks; (5) potholes and other dangerous conditions; (6) care, custody and control of animals; (7) liquor store sales; (8) national guard activities; and (9) toxoids and vaccines. (42 Pa.C.S. § 8522). Maximum damages in these excepted areas are limited to $250,000 per plaintiff and $1,000,000 in aggregate. (42 Pa.C.S. § 8528). Local agencies may be liable for negligence with damages limited to $500,000 in aggregate. (42 Pa.C.S. § 8542, 8553).

Uniform Contribution Among Tortfeasors Act (Revised) has been adopted. (42 Pa.C.S. § 8321 et seq.).

Comparative Negligence Rule adopted by statute in all actions brought to recover damages for negligence resulting in death or injury to person or property. (42 Pa.C.S. § 7102). Liability is joint and several for intentional torts or where defendant liable for 60% or more of total liability apportioned to all parties, with right of contribution. (42 Pa.C.S. § 7102[b.1]). Otherwise, responsibility apportioned among defendant, settling nonparties, and other nonparties. (42 Pa.C.S. § 7102[b.2]).

Punitive Damages.

In claim for punitive damages, wealth of defendant discoverable only by court order. (P.R.C.P. 4003.7).

Noneconomic Loss.

In actions for bodily injury or death, jury instructions for noneconomic loss provided. (P. R. C. P. 223.3).

5.10 DECLARATORY JUDGMENTS:

See topic 5.15 Judgments.

5.11 DEPOSITIONS AND DISCOVERY:

Methods of taking depositions are oral examination and written interrogatories. Deposition procedures here described are available in civil actions or proceedings in courts subject to rules of civil procedure, including eminent domain proceedings and municipal claims. (P. R. C. P. 4001-4025). See also topic 5.19 Practice, subhead Discovery.

For Use Within the State.

Parties may by agreement provide that depositions may be taken before any person, at any time or place, upon any notice, or in any manner, and may modify procedures for methods of discovery. (P. R. C. P. 4002). Leave of court is required only if deponent is in prison, or if plaintiff's notice schedules taking of deposition prior to expiration of 30 days after service of original process and defendant has not sought discovery, unless person to be examined is aged, infirm or about to leave for place outside Commonwealth or more than 100 miles from courthouse. (P. R. C. P. 4007.2).

Oral Examination.

Deposition by oral examination may be recorded stenographically or by videotape. (P. R.

C. P. 4017, 4017.1).

Reasonable written notice of oral deposition shall be given to every other party, except defendants served by publication who have not appeared in action. Party noticed for oral deposition shall be required to appear without subpoena. Notice shall state time and place of taking deposition and name and address of each person to be examined if known or general description sufficient to identify him or particular class to which he belongs. (P. R. C. P. 4007.1). If deposition is to be recorded by videotape, notice must so indicate and must state name and address of officer before whom deposition taken, name and address of videotape operator and his employer, and whether deposition will be simultaneously recorded by stenographic means. (P. R. C. P. 4017.1). Purpose of deposition must be stated in notice only if action has been commenced by writ of summons and plaintiff desires to take deposition for purpose of preparing complaint. Party may in his notice name organization as deponent and describe with particularity matters to be inquired into. In that event organization shall designate one or more persons to testify. (P. R. C. P. 4007.1).

Parties served with notice of deposition may, in lieu of participating in oral examination, transmit written interrogatories to person taking deposition, who must propound them to witness. (P. R. C. P. 4017).

Written interrogatories must be served on each party or his attorney of record. Party so served has 30 days within which to serve cross interrogatories. Subsequent interrogatories must be served within ten days. Objections to form of interrogatories are waived unless served within time allowed for serving succeeding or other interrogatories or within ten days after service of last interrogatories. Other objections may be made at trial, but certain objections are waived if not made at once. Copy of all interrogatories is transmitted to person designated to take deposition for completion, certification and return to prothonotary by registered mail. (P. R. C. P. 4004).

Interrogatories shall contain notice stating name and address of officer before whom deposition is to be taken, time and place of taking deposition and name and address of each person to be examined or general description sufficient to identify him. Deposition upon written interrogatories may be taken of organization. (P. R. C. P. 4004, 4007.1[e]).

Use of Deposition.

Deposition stenographically recorded may be used, at trial, against any party who was present or represented at taking thereof or who had notice thereof if notice was necessary. Subject to rules of evidence, such use may be as follows: (1) Any party may use any deposition to contradict or impeach deponent's testimony as witness, or as permitted by rules of evidence; (2) deposition of party may be used by adverse party for any purpose; (3) deposition of witness, whether or not party, may be used by any party for any purpose if witness is dead, if witness is more than 100 miles from place of trial or is outside Pennsylvania, if witness is aged, sick, infirm or imprisoned, or if interest of justice requires; and (4) if party offers only part of deposition in evidence, adverse party may require introduction of so much of rest as is relevant to that part. (P. R. C. P. 4020). In addition to uses permitted for stenographically recorded depositions, videotape deposition of medical or expert witness, other than party, may be used at trial for any purpose, whether or not witness is available to testify. (P. R. C. P. 4017.1). Oral deposition of medical witness is admissible in civil matters, whether or not witness is available to testify. (42 Pa.C.S. § 5936).

For Use Outside State.

Courts may order persons in state to give testimony, statement or produce documents or things for use in matters pending outside state. Application for such order may be made by any interested party or in response to letters rogatory. (42 Pa.C.S. § 5326).

Depositions Taken Outside of State for Use Within State.

Deposition to obtain testimony or documents in matter pending in Commonwealth may be taken outside Commonwealth on reasonable written notice to all parties before person commissioned by court of Commonwealth, pursuant to letter rogatory or by stipulation. (42 Pa.C.S. § 5325; P.R.C.P. 4015).

Deposition pursuant to notice may be taken before person authorized to administer oaths by law of place of deposition or laws of Commonwealth or of U.S. (42 Pa.C.S. § 5325; P.R.C.P. 4015).

Commission or letter rogatory must be issued after notice and application to court and evidence obtained thereby is not inadmissible due to any departure from requirements for depositions taken within Commonwealth. (42 Pa.C.S. § 5325; P.R.C.P. 4015).

Perpetuating Testimony.

Any party may take deposition of any person for purposes of trial, hearing, discovery or preparation of pleadings, subject to discovery rules. (P. R. C. P. 4001[c]).

Request that testimony be perpetuated by deposition for use in future actions may be made by filing complaint setting forth names and addresses of prospective parties to contemplated action, if known; nature of contemplated action; interest of party seeking perpetuation; need for perpetuating such testimony; and name and address of person whose testimony is sought. If court grants request, deposition will be taken to extent practicable, in conformity to rules on depositions and discovery. (P. R. C. P. 1532).

Pre-Complaint Discovery.

To obtain information material and necessary to filing complaint without unreasonable burden to another, plaintiff may conduct pre-complaint discovery. Upon objection, court weighs importance of discovery against burdens on discovered person or party. (P.R.C.P. 4003.8).

Before Whom Taken.

In U.S. or territory or insular possession subject to its dominion, depositions for use in Pennsylvania can be taken before any officer authorized to administer oaths by laws of U.S. or Pennsylvania or of place where examination is held or any person appointed by court in which action is pending. Elsewhere, such depositions can be taken before: (1) Secretary of embassy or legation, consul general, consul, vice-consul, or consular agent of U.S., or other person authorized to administer oaths by laws of U.S. or law of that place; or (2) by person or officer appointed under commission or letters rogatory, such appointment being made only where necessary or convenient. Deposition may not be taken before person who is relative, employee or attorney of any of parties, or who is relative or employee of such attorney, or who is financially interested in action. (P. R. C. P. 4015).

Compelling Attendance of Witnesses.

General subpoena rules, P.R.C.P. 234.1-234.9, are used to compel deponent's attendance and document production at deposition. (P.R.C.P. 234.1). Appropriate sanctions may be assessed for noncompliance with subpoena or notice to attend, including contempt for wilful failure. (P.R.C.P. 234.5). If party fails to answer written interrogatories or fails to appear before official taking deposition, court may punish him for contempt, stay further proceedings until order is obeyed, enter order establishing facts to which questions related or restrict disobedient party's power to assert claims or introduce evidence. (P. R. C. P. 4019).

If deponent fails to be sworn or to answer questions, deposition may be completed on other matters or adjourned as proponent may prefer. Thereafter, after reasonable notice, proponent may apply to court where deposition is being taken or where action is pending for order compelling witness to do so. (P. R. C. P. 4019).

Examination of Witnesses.

Official taking deposition must put witness on oath or affirmation and must be present to direct recording of testimony. Objections to correctness of transcribed testimony are waived unless filed promptly in writing with court. Witness must read and sign completed deposition within 30 days of its submission to him, unless he is ill or absent, in which cases fact of illness or absence must be noted on record by person before whom deposition is taken, and he must sign it. Reading and signing are unnecessary if waived by witness and by all parties who attended taking of deposition, or if witness is ill, cannot be found or refuses to sign. (P. R. C. P. 4017).

Return.

Official before whom stenographically recorded deposition was taken must certify that witness was duly sworn by him and that deposition is true record of witness' testimony. Attorney for party taking deposition recorded by videotape must take custody of videotape and make inspection and copies thereof available upon request and at cost of party. (P. R. C. P. 4017, 4017.1).

Form.

The following may be used:

Form

In the Court of Common Pleas of . . . . County

John Doe,

Plaintiff } . . . . . Term, (year) . .

v.

Richard Roe,

Defendant, } No. . . . .

Deposition of . . . .

Deposition taken before . . . . at . . . . in . . . ., on the . . . . day of . . . ., (year) . ., by virtue of . . . .

(Here identify Court order, if any. If none, state that deposition is taken per attached notice.)

. . . ., a deponent produced by the plaintiff being duly sworn (or affirmed), deposes as follows:

(Here insert a transcript on a question and answer basis if an oral deposition, or the numbered questions and answers if by written interrogatories.)

. . . .

Signature of deponent

STATE OF . . . .

COUNTY OF . . . .   }   ss.

The foregoing is a true and correct record of the examination held at . . . ., at . . . . o'clock on the . . . . day of . . . ., (year) . ., of the deponent, ..., who was duly sworn (or affirmed) by me and after I caused the testimony to be transcribed and then to be read by the said deponent, he subscribed the deposition in my presence on this . . . . day of . . . ., (year) . ..

(SEAL)

. . . .

Signature and title of notary public or other officer taking deposition.

(If there is a waiver of signing by the witness and all parties who attended the taking of the deposition, the certificate of the examiner should so state.)

5.11A DNA DATA AND TESTING:

Data base and data bank created. (44 Pa.C.S. § 2301 et seq.).

Samples.

Persons convicted of listed serious offenses required to submit to drawing of DNA sample. (44 Pa.C.S. § 2316).

5.12 EQUITY:

See topic 5.02 Actions.

5.13 EVIDENCE:

Rules.

Pennsylvania Rules of Evidence adopted as of Oct. 1, 1998. (Sup. Ct. Order 98 P.S. § 16).

Witnesses.

All witnesses are prima facie competent to testify in judicial proceedings, criminal or civil. (42 Pa.C.S. § 5911, 5921; P. R. E. 60[a]). Witness' opinion on matters of religion are not grounds for disqualification. (42 Pa.C.S. § 5902). Intimidation of witnesses in criminal proceeding is felony. (18 Pa.C.S. § 4952).

Conviction of perjury or subornation of perjury renders witness incompetent in civil case unless judgment has been set aside or reversed or unless proceeding is one to punish or prevent injury or violence threatened to person or property of witness. 42 Pa.C.S. § 5922). Perjury conviction may be shown to affect credibility but does not make person incompetent to testify in criminal trial. (42 Pa.C.S. § 5912). Those who may make victim impact statements during sentencing not excludable from trial on that ground. (42 Pa.C.S. § 9738).

Interest in outcome of civil proceeding does not render witness incompetent. (42 Pa.C.S. § 5921).

Privileged Communications.

Attorney is not competent or permitted to testify in civil or criminal proceedings to confidential communications made to him by client unless client waives privilege. (42 Pa.C.S. § 5928, 42 Pa.C.S. § 5916). In civil matter, physician is not permitted to disclose information tending to blacken character of patient which was acquired in attending patient, without patient's consent, except in civil actions brought by patient for damages for personal injuries. (42 Pa.C.S. § 5929). Confidential communications to clergymen, licensed psychologists and psychiatrists, sexual assault counselors, and specified school personnel (guidance counselor, nurse, psychologist, home and school visitor) in course of their duties may not be disclosed by such person without consent of person (or parent, if student is under age of 18) who made such communication. (42 Pa.C.S. § 5943-5945.1). News reporters may not be required to disclose sources of information in any legal proceeding trial, or investigation before governmental unit unless radio or television stations fail to maintain and make available for inspection exact recording or transcript of broadcast for at least one year. (42 Pa.C.S. § 5942). In civil non-bankruptcy matter, certified public accountants may not disclose information learned in professional engagement, except in connection with audit when engaged to make or disclose audit results. (63 Pa.C.S. § 9.11a).

Husband and Wife.

Spouse has waivable privilege not to testify in criminal proceeding against then lawful spouse except in specified proceedings or to rebut attack against character or conduct. (42 Pa.C.S. § 5913-5915). In civil proceeding spouses not competent or permitted to testify against each other except in specified actions or to rebut attack against character or conduct. (42 Pa.C.S. § 5924-5926).

Communications or Transactions with Persons Since Deceased or Incompetent.

Where party to contract or thing has died or has been adjudged as lunatic and his right thereto has passed to party on record who represents his interest in subject, no other party to such contract or thing nor any other person with interest adverse to deceased or lunatic party is competent to testify as to any matter occurring prior to death or adjudication of lunacy, except where proceeding is by or against surviving partners, or joint promisors or promisees, or where proceeding is possessory action against several defendants and one or more disclaims of record any title, or where issue is devisavit vel non and controversy is between parties claiming such property by devolution of death of owner. (42 Pa.C.S. § 5930).

Surviving party with adverse interest with respect to matter involving deceased or lunatic party which occurred prior to death or adjudication of lunacy, is competent to testify as to any relevant matter if such matter occurred between him and another person living at time of trial who testifies against surviving party or if matter occurred in presence of another living person. (42 Pa.C.S. § 5933).

Self-Incrimination.

Person accused of crime cannot be compelled to give evidence against himself (Const., art. I, §9), nor as to other matters (42 Pa.C.S. § 5918). Court may issue immunity order to force witness to testify over claim of privilege against self-incrimination. (42 Pa.C.S. § 5947).

Compelling Attendance.

Except defendants on trial in criminal proceeding, any competent witness may be compelled to testify in civil or criminal matter, except as to matters which, in opinion of trial judge, would tend to incriminate him. (42 Pa.C.S. § 5941). Uniform Act to Secure Attendance of Witnesses from Without State in Criminal Proceedings has been adopted. (42 Pa.C.S. § 5961 et seq.). Uniform Rendition of Prisoners as Witnesses in Criminal Proceedings Act has been adopted. (42 Pa.C.S. § 5971 et seq.).

Child Victims and Witnesses.

Children under 16 years receive additional rights and protections during involvement with criminal justice system, including testimony by videotape or closed-circuit television to prevent serious emotional distress. (42 Pa.C.S. § 5981 et seq.).

Wills.

See category 13 Estates and Trusts, topic 13.16 Wills.

5.14 INJUNCTIONS:

Jurisdiction to issue injunctions is vested in courts of original jurisdiction. (42 Pa.C.S. § 931). Such authority exists only in cases where there is no adequate remedy at law. (50 Pa. Commw. Ct. 199, 412 A.2d 672).

Procedure.

Claim to prevent waste is civil action for equitable relief. (Note to rescinded P. R. C. P. 1576). Specific injunctive procedures apply in proceedings in aid of execution. (P. R. C. P. 3118).

Bond.

Ordinarily, no bond is required as prerequisite to permanent injunction; but bonds are required in connection with preliminary or special injunctions. (P. R. C. P. 1531[b]).

Preliminary injunctions or special injunctions may be issued only after written notice and hearing unless it appears to court that immediate and irreparable injury will be sustained before notice can be given or hearing held, in which case court may issue preliminary or special injunction without hearing or without notice. Injunction granted without notice to defendant is deemed dissolved unless hearing on continuance of injunction is held within five days or within such other time as parties may agree or court upon cause may direct. (P. R. C. P. 1531[a], [d]). When any preliminary or special injunction is issued involving freedom of expression, hearing must be held within three days after defendant's demand and final order must be filed within 24 hours after such final hearing. Otherwise, injunction shall be deemed dissolved. (P. R. C. P. 1531[f]).

Except when plaintiff is Commonwealth of Pennsylvania or subdivision, instrumentality or officer thereof, preliminary or special injunction may be granted only if: (1) Plaintiff files bond, in amount fixed and with security approved by court, conditioned that if injunction is dissolved because improperly granted or for failure to hold hearing, plaintiff must pay any injured person all damages and costs sustained by reason of granting injunction; or (2) plaintiff deposits with prothonotary legal tender of U.S. in amount fixed by court, to be held on same condition. (P. R. C. P. 1531[b]).

Court may grant or deny preliminary or special injunction on basis of pleadings or petition and, in doing so, may consider affidavits of parties or third persons or any other proof it may require. (P. R. C. P. 1531[a]).

Prerequisites for obtaining preliminary and permanent injunctions are governed by common law. (449 Pa. 432, 296 A.2d 748; 52 Pa. Super. 647). Mandatory preliminary injunctions will be granted in only extraordinary circumstances. (13 Pa. Commw. Ct. 464, 320 A.2d 141, *aff'd*, 462 Pa. 464, 341 A.2d 475).

Violations may be punished by civil or indirect criminal contempt, depending upon purpose of proceeding. (184 Pa. Super. 47, 132 A.2d 922; 42 Pa.C.S. § 4131 et seq.).

Interlocutory Appeal may be taken as of right from order granting, continuing, modifying, refusing or dissolving injunction, or refusing to dissolve or modify injunction. (P. R. A. P. 311 [a][4]).

Injunctions in Labor Cases.

See category 11 Employment, topic 11.02 Labor Relations, subhead Labor Disputes.

5.15 JUDGMENTS:

Judgments may be interlocutory or final.

Judgments by Confession.

Prothonotary authorized to enter judgment in favor of holder for face amount of any note or bond which contains confession of Judgment or authorization of confession by attorney upon filing. (P. R. C. P. 2951). Prothonotary must immediately give written notice by mail to defendant when judgment by confession is entered. (P. R. C. P. 236). Negotiability of instrument not affected by term authorizing confession of judgment on instrument if not paid when due. (13 Pa.C.S. § 3112).

Judgment by confession abolished with respect to consumer credit transactions. (P.R.C.P. 2950).

Declaratory Judgments.

Uniform Declaratory Judgments Act adopted with modifications. (42 Pa.C.S. § 7531 to 7541).

§6 of Uniform Act modified so that existence of alternative remedy does not bar proceeding under Declaratory Judgments Act. (42 Pa.C.S. § 7537). §8 of Uniform Act modified to incorporate Pennsylvania limitations of time. (42 Pa.C.S. § 7538). §9 of Uniform Act modified to permit relief even if purpose or effect of proceeding to resolve or determine question of fact. (42 Pa.C.S. § 7539[a]). §11 of Uniform Act modified to require service of proceedings on appropriate taxing authority when tax in issue. (42 Pa.C.S. § 7540). §12 of Uniform Act modified to deny relief when: (1) Divorce or annulment sought; (2) matter within exclusive jurisdiction of tribunal other than court; (3) appeal from order of tribunal. (42 Pa.C.S. § 7541). §§7, 10, 13 P.S. § 16 of Uniform Act omitted from Declaratory Judgments Act.

Default Judgments.

In most actions at law, default judgment may be entered against defendant for failure to answer complaint endorsed with notice to plead or when defendant admits relief is due. (P. R. C. P. 1037). Such judgments entered by Prothonotary on praecipe of plaintiff. At any time court may enter appropriate judgment in event of default or admission. (P. R. C. P. 1037). When equitable relief sought, court may enter appropriate order and may take testimony. (P. R. C. P. 1037[d]).

Default cannot be entered unless praecipe of plaintiff includes certification that written notice of intention to file praecipe was mailed to defendant after default occurred and at least ten days prior to filing of praecipe, calculated forward from date of mailing or delivery. (P. R. C. P. 237.1). Judgment of “non pros” requires same certification from appellee when defendant appeals judgment of district justice court. (P.R.C.P. 237.1, 1037[a]). Forms of notice of praecipe provided in rules. (P.R.C.P. 237.4, 237.5).

Deficiency Judgments.

Judgment creditors who buy real property in execution proceedings may petition court of county where execution sale held to fix fair market value so as to determine judgment deficiency;

judgment debtors may petition to have judgment marked satisfied. (42 Pa.C.S. § 8103; P.R.C.P. 3276-3291).

Upon showing of meritorious cause of action and legitimate excuse, judgment of “non pros” may be lifted by timely petition. (P.R.C.P. 237.3, 3051).

Liens.

Every judgment or other order of common pleas court is lien upon all real property located within said judicial district. Any other order of common pleas court is lien upon real and personal property located within said judicial district. Any order which is lien in any county may be made lien in any other county. (42 Pa.C.S. § 4303). Lien continues for five years and may be continued for successive periods of five years by praecipe for writ of revival before expiration of any five year period. (42 Pa.C.S. § 1722, 4303, 5526[1], 20003; 20 D.&C. 3d 769). Judgment liens governed by P. R. C. P. 3020-3023.

Judgments not liens upon after-acquired real estate unless revived after it acquired or execution issued and levy on after-acquired real estate indexed in judgment index. (12 P.S. § 883, 42 Pa.C.S. § 1722[b], 4303).

Judgments of federal courts located in state are liens on property in same manner and extent as state court judgments. (42 Pa.C.S. § 4305).

Judgments of community courts and district justices are not liens on real property until transcript of record with final judgment filed in common pleas court of district where property located. (42 Pa.C.S. § 1106, 1516). Judgment of Philadelphia Municipal Court is lien to extent judgment of Philadelphia common pleas court is. (42 Pa.C.S. § 1124).

Priority.

Liens on real property have priority as follows: Purchase money mortgages if recorded within ten days; other mortgages from time left for record; verdicts for sum certain from time recorded; adverse judgments from time rendered; amicable judgments from time instruments on which entered left for entry. (42 Pa.C.S. § 1722[b], 8141, 20003). To become prior lien judgment must be docketed and indexed with prothonotary. (42 Pa.C.S. § 1722[b], 4303, 20003).

Revival.

Judgments on real property must be revived within five years after lien has expired. (42 Pa.C.S. § 5526). Other judgments must be revived within 20 years. (396 Pa. 500, 152 A.2d 763). After 20 years, presumption of payment must be rebutted and revival re-establishes lien only as to date of revival. Intervening purchasers, mortgagees, or judgment creditors whose rights attach between expiration of lien and revival of judgment, who have no actual knowledge of judgment, have superior position to that of revived judgment. (236 Pa. Super. 258, 345 A.2d 921).

Satisfaction.

Prothonotary marks judgment satisfied upon plaintiff's order. Proper form is:

Form

(CAPTION)

TO PROTHONOTARY, C.P.:

Kindly mark the judgment in the above case satisfied upon payment of your costs only.

(Signature)

(Date)

Upon satisfaction of judgment, judgment creditor obligated to enter satisfaction on written request and tender of fees for entry. Failure to do so subjects him to liquidated damages. (42 Pa.C.S. § 8104).

Support Orders.

Support obligation becomes judgment when due. Past due support obligations do not operate as lien until judgment or order entered in Court of Common Pleas in county where property of obligor is located. Obligation for payment terminates when all amounts paid. (23 Pa.C.S. § 4302).

Revised Uniform Enforcement of Foreign Judgments Act adopted with minor modifications. §§5 and 7 of Uniform Act omitted. (42 Pa.C.S. § 4306). Uniform Foreign Money-Judgments Recognition Act enacted. (42 Pa.C.S. § 2201 et seq.).

5.16 LIMITATION OF ACTIONS:

Unless particular statute provides otherwise, actions or proceedings must be brought within following periods after respective causes of action accrue:

Thirty Days.

Proceedings for summary offenses involving vehicles. (42 Pa.C.S. § 5553[b]).

Six Months.

Actions against government officer for official acts; petition to establish deficiency judgment; action to set aside judicial sale of property; action by employee to recover wages and benefits withheld by employer in violation of 42 Pa.C.S. § 4563(c). (42 Pa.C.S. § 5522). Bulk transfer actions: Uniform Commercial Code has been adopted. (13 Pa.C.S. § 6111). See category 3 Business Regulation and Commerce, topic 3.09 Commercial Code.

Government Defendants.

Notice must be given to government unit within six months of accrual of claim. (42 Pa.C.S. § 5522).

One Year.

Libel, slander, privacy invasion; actions on payment or performance bond, or bond given as security except bond given by condemnor in eminent domain proceeding. (42 Pa.C.S. § 5523).

Sixteen Months.

Petitions under Pennsylvania Occupational Disease Act. (77 Pa.C.S. § 1415).

Two Years.

Assault, battery, false imprisonment, false arrest, malicious prosecution, malicious abuse of process, actions to recover damages for personal injuries or death caused by wrongful act, neglect, unlawful violence or negligence; actions for taking, detaining, or injuring personal property; real property damages for waste or trespass; statutory claims for civil penalty or forfeiture; action against government officer for nonpayment or nondelivery of items collected upon execution or otherwise in his possession; any other action for damages for injury to person or property founded on negligent, intentional or otherwise tortious conduct, including any other trespass action including deceit or fraud (42 Pa.C.S. § 5524); prosecution for criminal offense not otherwise provided for (42 Pa.C.S. § 5552[a]); two years after person knows or should know of asbestos injury (42 Pa.C.S. § 5524.1[a]).

Three Years.

Petitions under Pennsylvania Workmen's Compensation Act. (77 Pa.C.S. § 602).

Four Years.

Claims on contract to sell, construct or furnish tangible personal property; oral express contract claims; contracts implied in law; actions upon judgment or decree of court; action on any official bond of public official, officer or employee; action on bond, note or other written instrument; actions on written contract. (42 Pa.C.S. § 5525). Contracts for sale of goods: Uniform Commercial Code has been adopted. (13 Pa.C.S. § 2725). See category 3 Business Regulation and Commerce, topic 3.09 Commercial Code.

Five Years.

Revival of judgment lien on real property; real property specific performance claims or noncompliance with contract of sale; enforcing equity of redemption or implied or resulting trusts for real property; prosecution for major offenses (42 Pa.C.S. § 5552[b]).

Six Years.

Petition for appointment of viewers for assessment of damages after condemnor has filed declaration of taking. (42 Pa.C.S. § 5527[a]). Any civil action or proceeding neither subject to another limitation nor excluded from application of limitation. (42 Pa.C.S. § 5527).

Twelve Years.

Action for childhood sexual abuse after attaining 18 years of age. (42 Pa.C.S. § 5533[b][2]). Prosecution for major sexual offenses. (42 Pa.C.S. § 5552[b.1]). Damages resulting from deficient land survey. (42 Pa.C.S. § 5537).

Fifteen Years.

Escheat or payment into State Treasury without escheat. (42 Pa.C.S. § 5528).

Twenty Years.

Execution against personal property; actions on instruments in writing under seal which state they are under seal and are enforceable under 42 Pa.C.S. § 5529(b) for 20 years. (42 Pa.C.S. § 5529; 73 P.S. § 2205[d][3]).

Twenty-one Years.

Action for possession or payment of any charges relating to real property. (42 Pa.C.S. § 5530).

No Limitation.

Action by client against attorney to enforce implied or resulting trust for real property; action by state, county or institution district against real or personal property to recover cost of maintenance and support for public charges. (42 Pa.C.S. § 5531). Prosecution for murder, voluntary manslaughter, conspiracy or solicitation to commit murder, any felony alleged to have been perpetrated in connection with murder, “hit-and-run” accidents causing injury or death, vehicular homicide, and aggravated assault on person known to be law enforcement officer. (42 Pa.C.S. § 5551).

Construction Projects.

Civil suits against those involved in construction must be commenced within 12 years of construction completion to recover damages for deficiency in construction; property damages, personal injuries, and wrongful death arising from such deficiency; and contribution or indemnity relating to such damages. Wrongful death claims occurring more than ten and within 12 years after construction completion may be commenced not later than 14 years after construction completion. (42 Pa.C.S. § 5536).

Actions Not Specifically Provided For.

All actions for which no limitation period is prescribed must be commenced within six years. (42 Pa.C.S. § 5527).

New Actions.

Except in actions to recover for personal injuries or wrongful death, when proceedings timely commenced and terminated other than on merits, or by voluntary nonsuit, discontinuance, or dismissal for failure to prosecute, party may commence new action upon same cause within one year after termination regardless of usual limitation period. (42 Pa.C.S. § 5535).

Foreign Causes of Action.

For claims accruing outside state, limitation period is shorter of periods prescribed by foreign state and this state. (42 Pa.C.S. § 5521).

Disabilities of Plaintiff.

Time to commence proceedings is not extended by insanity or imprisonment, unless statute otherwise provides; time for unemancipated minor to bring civil action extended by period of minority. (42 Pa.C.S. § 5533).

Interruption of Statutory Period.

Specific acknowledgment, promise to pay, or part payment tolls running of limitation period. Thereafter, limitation period begins to run anew. (128 Pa. 183, 18 A. 341; 341 Pa. 142, 19 A.2d 61).

Revival of Barred Claims.

Debt barred by limitation revived by partial payment or acknowledgment. (162 Pa. Super. 405, 57 A.2d 915).

Contractual Limitations.

Shorter limitation period prescribed by written agreement which is not manifestly unreasonable governs limitation period for civil action or proceeding. (42 Pa.C.S. § 5501).

Pleading.

Limitation must be specifically pleaded as affirmative defense. (P. R. C. P. 1030).

Absence or Concealment of Defendant.

Time within which proceeding must be commenced only runs from time defendant comes into or returns to this state if he was without state when cause of action accrued. Time defendant remains continuously absent from state for four months or more or resides within state under false name is not part of limitation period although defendant was within state at time action accrued. No deductions from limitation period, however, if personal jurisdiction over defendant possible without personal delivery of process within state, if foreign corporation has officers or agents within state upon whom process may be served, or if service on substituted agent within state possible. In cases involving express or implied trusts, limitation period does not begin to run until discovery of fraud. (42 Pa.C.S. § 5532).

Effect of War.

When action accrues in, or any party is alien citizen or subject of, foreign country or territory that is either at war with U.S. or is subsequently occupied by government at war with U.S., time of such war or occupation is not part of limitation period. Nor does limitation period include time during which plaintiff is resident of or travels to foreign country or territory at war with U.S. or occupied by government at war with U.S. (42 Pa.C.S. § 5534).

5.16A PARTITION:

Partition may be had where co-tenancy exists.

Real Estate.

Jurisdiction and Venue.

Action for partition of real estate may be brought by one or more co-tenants in Court of Common Pleas only in county where all or any part of property is located.

Proceedings.

All other co-tenants must be joined. (P. R. C. P. 1553). Rules for civil actions govern. (P. R. C. P. 1551). Plaintiff's complaint must include description of property and extent of each party's interest. (P. R. C. P. 1554). Court because of default or admission or after hearing or trial may enter order of partition, after which conference is held to determine method of partition. Court may appoint master to hear matter, to conduct sale or to act upon specified issues. (P. R. C. P. 1557, 1558).

Partition in Kind or Sale.

Property capable of division is awarded to parties according to their respective interests. (P. R. C. P. 1560, 1561). Property not capable of division without prejudice is sold at private sale among parties, but if amount bid does not equal or exceed value of property as determined by court, property is sold at private or public sale as court directs. However, if parties defendant own majority in value of property and they object to sale, entire property is awarded to them subject to payment to parties desiring partition and sale of amounts of their respective interests which then becomes lien on property. (P. R. C. P. 1563, 1567, 1568). Upon divorce, division of property jointly owned by former spouses is governed by 68 P.S. § 501, although equitable partition pursuant to P. R. C. P. 1551-1574 remains available. (503 Pa. 329, 469 A.2d 578).

Under Divorce Code, upon request of either party in divorce or annulment proceedings, court must equitably divide all marital property. See category 14 Family, topic 14.05 Divorce.

Decedent's Estate.

Court, for cause shown, may order estate to be distributed in kind to parties in interest, including fiduciaries. When there are two or more distributees, distribution may be made of undivided interests in real or personal estate, or personal representative or a distributee may request court to divide, partition and allot property or to direct sale of property. If such request is made, court after notice must partition property among distributees in proportion to their respective interests or court may direct personal representative to sell at a sale confined to distributees, or at a private or public sale any property which cannot be partitioned. (20 Pa.C.S. § 3534).

Personal Property.

When personal property is owned jointly by persons who are not partners or husband and wife, and one of such persons desires to dispose of his or her interest and cannot come to an agreement with other owners, he may petition Court of Common Pleas wherein property is situated. (68 P.S. § 111). Upon divorce, division of property jointly owned by former spouses is governed by 68 P.S. § 501, although equitable partition pursuant to P.R.C.P. 1551-1574 remains available. (503 Pa. 329, 469 A.2d 578).

Under Divorce Code, upon request of either party in divorce or annulment proceedings, court must equitably divide all marital property. See category 14 Family, topic 14.05 Divorce.

5.17 [RESERVED]

5.18 PLEADING:

Pleading in general follows common law system and is largely governed by Rules of Civil Procedure. System of pleading established by Rules for civil actions applies generally to other actions including actions in equity (see topic 5.02 Actions), but there are many special rules for each form of action, such as actions of divorce or confession of judgment.

Pleadings Permitted.

In civil actions, authorized pleadings are complaint, answer, reply if answer contains new matter, counterclaim or cross-claim, counterreply if reply to counterclaim contains new matter, preliminary objection, and response thereto. (P. R. C. P. 1017). Additional pleadings are authorized in actions of divorce, interpleader, intervention, confession of judgment, and under Eminent Domain Code. (P. R. C. P. 1920.11, 2302, 2328, 2959, 26 P.S. § 1-502).

Frivolous Claims and Documents.

Parties and attorneys sanctionable for submitting frivolous claims, defenses, motions, oppositions and other signed documents. Sanctions extend to document submitted for improper purpose, like harassment or delay. Party or attorney given 28 days to amend or withdraw offending document after receiving written notice. (P. R. C. P. 1023.1 et seq.). Rules substantially same as Federal Rule of Civil Procedure 11.

Complaint.

Requirements for complaint in civil action (P. R. C. P. 1019) generally apply in other forms of action. Additional requirements, however, are imposed for each type of action; applicable rules specify these requirements.

In civil action, plaintiff may state in complaint more than one cause of action against same defendant heretofore asserted in assumpsit or trespass. (P. R. C. P. 1020[a]). Causes of action and defenses may be pleaded in alternative. (P. R. C. P. 1020[c]). Relief in alternative or of several different types may be demanded. (P. R. C. P. 1021[a]). Where same transactions or occurrences give rise to causes of action, including causes of action in alternative, they shall be joined in separate counts in action against any such person, and failure to join cause of action operates as waiver of cause of action against all parties to action. (P. R. C. P. 1020[d]).

Any pleading demanding relief for unliquidated damages shall not claim any specific sum. (P. R. C. P. 1021[b]). In counties having rules governing compulsory arbitration, plaintiff shall also state whether amount claimed does or does not exceed jurisdictional amount requiring arbitration. (P. R. C. P. 1021[c]). Every complaint must be accompanied by notice to defend. (P. R. C. P. 1018.1).

Preliminary objections may be filed by any party to any pleading. They are limited to following grounds: lack of jurisdiction, improper venue, or improper form or service of writ of summons or complaint; failure of pleading to conform to law or rule of court, etc.; insufficient specificity; legal insufficiency (demurrer); lack of capacity to sue, nonjoinder of necessary party, or misjoinder of claims; and pendency of prior action or agreement for alternative dispute resolution. (P.R.C.P. 1028[a]). In equity, preliminary objections also include objections of failure to exercise or exhaust statutory remedy and existence of adequate nonstatutory remedy at law. (P. R. C. P. 1028[a][7], [8]). In eminent domain proceedings, preliminary objections are limited to challenges to: (1) Power or right of condemnor to appropriate condemned property; (2) sufficiency of security; (3) procedure followed by condemnor; or (4) declaration of taking. (26 P.S. § 1-406).

Preliminary objections must state specifically grounds relied upon. They must all be raised at one time, may be inconsistent with each other, and may be raised in one pleading. Party may file amended pleading as of course within 20 days after service of copy of preliminary objections. If preliminary objections are overruled, objecting party shall have right to plead over within 20 days, after notice of order, or such other time fixed by court. Amendment or new pleading if allowed or required shall be filed within 20 days after notice of order or such other time fixed by court. Objections to amended pleadings are raised by new preliminary objections. (P. R. C. P. 1028).

Answer.

For civil actions general rule as to averments and answer is set forth in P. R. C. P. 1019. Additional requirements apply in other actions according to specific rules. Responsive pleading must admit or deny averments of fact in preceding pleading or part thereof to which it is responsive, and averments in pleading to which responsive pleading is required are admitted when not denied specifically or by necessary implication by averment of contrary facts. (P. R. C. P. 1029). Certain averments must be specifically denied in actions seeking monetary relief for bodily injury, death or property damage. (P. R. C. P. 1029[e]).

In most actions, party waives defenses and objections not presented either by preliminary objection, answer or reply except affirmative defenses of contributory negligence, comparative negligence, and assumption of risk, defense of failure to state claim upon which relief can be granted, defense of failure to join indispensable party, objection of failure to state legal defense to claim, or determination by court that it lacks jurisdiction over subject matter and any other non-waivable defense or objection. (P. R. C. P. 1032). In divorce proceedings averments are deemed denied except averments of affidavit under §201(d) of divorce code. (P.R.C.P. 1920.14).

Affirmative defenses must be pleaded in responsive pleading under heading “New Matter,” e.g., accord and satisfaction, arbitration and award, assumption of risk, consent, contributory negligence, discharge in bankruptcy, duress, estoppel, failure of consideration, fair comment, fraud, illegality, immunity from suit, impossibility of performance, justification, laches, license, payment, privilege, release, res judicata, statute of frauds, statute of limitations, truth and waiver. (P. R. C. P. 1030). Assumption of risk, comparative negligence, and contributory negligence need not be pleaded. (P. R. C. P. 1030[b]).

Counterclaim or Set-Off.

In actions at law, defendant may set forth in answer under heading “Counterclaim” any cause of action cognizable in civil action which he has against plaintiff at time of filing answer. (P. R. C. P. 1031). No counterclaim is allowed in replevin actions (unless it is claim secured by lien on property), mandamus actions, or mechanics lien actions. (P. R. C. P. 1082, 1096, 1658).

In actions of mortgage foreclosure and ejectment, counterclaims are limited to matters which arise from transaction or occurrence from which plaintiff's cause of action arose. (P. R. C. P. 1056, 1148). In partition proceedings, defendant may counterclaim for partition of all or any property which plaintiff could have included in complaint. (P. R. C. P. 1556).

Divorce defendants may plead their own grounds for divorce as counterclaim, and any other matter permitted by divorce statutes. (P. R. C. P. 1920.15).

Discontinuance or nonsuit of complaint does not bar proceedings on counterclaim. (P. R. C. P. 232).

Cross-Claim.

In answer or reply claim that another party is solely liable or liable to or with cross-claimant. (P. R. C. P. 1031.1).

Reply.

Requirements for reply in civil actions generally apply to other actions. (P. R. C. P. 1017, 1019). Consequences for failing to file reply depend upon type of action. (P. R. C. P. 1032).

Demurrers are presented by preliminary objection. (P. R. C. P. 1028[a]).

Amended or Supplemental Pleadings.

In civil actions, either by filed consent of adverse party, or by leave of court, party may at any time change form of action, correct name of party, or amend his pleading; amended pleading may aver transactions which have happened before or after filing of original pleading, even though they give rise to new cause of action or defense. Amendment may be made to conform pleading to evidence offered or admitted. (P. R. C. P. 1033). Substitution of successor for party is governed by P. R. C. P. 2351 et seq.

Bills of Particulars.

In actions at law or in equity, motion for more specific pleading is authorized. (P. R. C. P. 1028). Prothonotary, upon praecipe, shall enter rule as of course upon party seeking divorce or annulment to file bill of particulars as to such cause of action. (P. R. C. P. 1920.21).

Verification.

Every pleading containing averments of facts not appearing of record in action or containing denials must be verified. (P. R. C. P. 76, 1024).

Service.

See topic Process for rules governing service of complaints and writs. Copies of all legal papers other than original process must be served on all parties to action by handing or mailing copy or leaving copy at address of each party's attorney of record or at another agreed address or by facsimile transmission. If there is no attorney of record, service is effected by handing copy to party or by mailing copy to or leaving copy at party's address endorsed on appearance or prior pleading or party's residence or place of business, and if none by leaving copy at or mailing copy to last known address of party to be served, or by facsimile transmission. (P. R. C. P. 440). Party requesting service notified of return by sheriff. (P. R. C. P. 440[c]).

Filing.

Actions are commenced by filing complaint or, where permitted, writ of summons or agreement for amicable action, with prothonotary. (P. R. C. P. 1007, 1063, 1073, 1093, 1113, 1143, 1920.3). Filing is not considered substitute for service on adverse counsel.

Time.

When any period of time is referred to in any rule, except concerning publication for successive weeks (P. R. C. P. 107) or computation of months (P. R. C. P. 108), such period shall be computed so as to exclude first and include last day of such period (P. R. C. P. 106). In actions at law or in equity writ or complaint must be served within 30 days after issuance or filing. (P. R. C. P. 401[a]). Every pleading subsequent to complaint must be filed within 20 days after service of preceding pleading, but no pleading need be filed unless preceding pleading contains notice to defend or endorsement with notice to plead. (P. R. C. P. 1026). However, defendants served outside of U.S. have 60 days to respond to complaint. (P. R. C. P. 1026[b]).

Proof of Claims.

Uniform Enforcement of Foreign Judgments Act has been adopted. Judgment filed with clerk of court of common pleas pursuant to Act creates lien as of filing date. (42 Pa.C.S. § 4306).

Claims forwarded for collection by suit should be accompanied by all of material facts on which claim is based, together with copies of notes, contracts, book entries and other documents which are basic to claim.

Small Claims.

See category 6 Courts and Legislature, topic 6.01 Courts.

5.19 PRACTICE:

Practice in state's entire unified court system governed by rules promulgated by Supreme Court. Common law practice and statutory provisions inconsistent with rules suspended and superseded. (Const. art. 5, §10[c]; 42 Pa.C.S. § 1722). Federal Rules do not provide basis for majority of state practice. Rules include P. R. A. P., P. R. J. A., P. R. D. E., P. B. A. R., P. R. C. P., P. R. Crim. P., P. R. C. P. J. P. In addition, local courts are empowered to enact supplementary procedural rules. Code of Professional Responsibility repealed and Rules of Professional Conduct effective Apr. 1, 1988.

Certification of Pleadings and Papers.

Pennsylvania requires pleadings, motions and other papers to be signed, such signature certifying that document is well founded in fact and law. (P. R. C. P. 1023.1 et seq.). See topic 5.17 Pleading, subhead Frivolous Claims and Documents. Certificate of merit must be filed within 60 days after complaint in any action alleging professional malpractice (P. R. C. P. 1072.3) and should resemble form shown in P. R. C. P. 1042.8.

Discovery.

Scope and proceedings of discovery generally follow Federal Rules of Civil Procedure. Parties have right to depose other parties and witnesses (P. R. C. P. 4001-4004, 4007.1-.3, 4008), propound written interrogatories and requests for admission to adverse parties (P. R. C. P. 4005, 4014), inspect tangible items of party (P. R. C. P. 4009.1 et seq.), and, upon order of court for good cause, have physical and mental examination of persons performed (P. R. C. P. 4010).

Motions.

Subject to listed exceptions, applications to court for orders governed by general motion rules. (P. R. C. P. 208.1 et seq.).

Preliminary Objections.

Objections to jurisdiction, venue, form or service of writ of summons; claims of lack of capacity to sue, pendency of prior action, non-joinder or misjoinder; motion to strike or motion for more specific pleadings; legal insufficiency (Demurrer) (except bars of statute of limitations, statute of frauds, collateral estoppel and res judicata which must be pleaded as new matter); and agreement for alternative dispute resolution are raised by preliminary objection. (P. R. C. P. 1028[a]).

New Matter.

See topic 5.17 Pleading, subhead Answer.

Certification of Readiness for Trial.

Local rules vary as to when and how civil actions must be certified as ready for trial.

Direct Actions Against Insurer.

See category 23 Transportation, topic 23.01 Motor Vehicles, subhead Direct Actions Against Insurer.

Small Claims.

See category 6 Courts and Legislature, topic 6.01 Courts.

See topics 5.02 Actions, Appeal and Error, Depositions and Discovery, Injunctions, Judgments, Pleading, Process; category 8 Debtor and Creditor, topics 8.02 Attachment, 8.05 Executions, 8.09 Garnishment.

5.20 PROCESS:

Most actions are commenced by filing of praecipe for writ of summons or complaint. (P. R. C. P. 1007). However, praecipe may not be used to commence actions in replevin, to quiet title, mandamus, quo warranto, divorce, mortgage foreclosure, mechanics liens, or confession of judgment. Agreements may not be used to commence actions in replevin, quo warranto, divorce or mortgage foreclosure. Foreign attachments and fraudulent debtor's attachments were abolished effective Oct. 1, 1989.

General Requisites.

Service requirements vary according to cause of action. (P.R.C.P. 400-03, 422-24, 1075.4, 3108, 3182). Copies of writ or complaint to be served in civil action must be attested by prothonotary or certified by plaintiff to be true and must include notice to defend. (P.R.C.P. 401[c], 1018.1). Service within state must be made within 30 days of filing of complaint or issuance of writ; service outside of state must be made within 90 days thereafter, service only valid if complaint reinstated or writ reissued. (P.R.C.P. 401, 404, 424). Process served or executed on Sun. valid. (42 Pa.C.S. § 5107).

By Whom Issued.

A writ of summons is issued by the prothonotary.

Who May Serve.

Writ or complaint in civil action must be served by sheriff in most cases or by coroner if sheriff is party. (P.R.C.P. 400). In Philadelphia County, temporary provisions permit competent nonparty adult to serve original process in certain situations. (P. R. C. P. 400.1). Defendant or his authorized agent may accept service by filing document in following form (P.R.C.P. 450):

Form of Acceptance of Service

(CAPTION)

Acceptance of Service

I accept service of the ____________________ (on behalf of ____________________ and certify that I am authorized to do so).

(Date)

____

(Defendant or Authorized Agent)

(Mailing Address)

In equity, declaratory judgment action seeking only declaratory relief, equity, partition, prevent waste, custody, support, divorce or annulment proceedings, service may also be made by competent adult not party. (P. R. C. P. 400). Out of state service may be made by those permitted to serve under state law or law of place where served. (42 Pa.C.S. § 5323[c]; P. R. C. P. 404).

Personal Service on Individual.

When defendant in civil action is adult individual and not under some type of legal disability, writ of summons, or complaint may be served by handing true and attested copy: (a) To defendant personally, (b) to adult member of family where he resides but if no adult member found, then to adult person in charge of such residence, (c) to clerk or manager of hotel, inn, apartment house, boarding house or other place of lodging where he resides, or (d) to his agent or person for time being in charge of his office or usual place of business. (P. R. C. P. 402).

Personal Service on Infant.

The original process is served on a minor in the same manner prescribed for service of like process upon adult defendant or by handling copy to minor's guardian. In addition, any pleadings or other papers may be served upon minor's guardian or his attorney of record, and if no guardian has been appointed, then upon minor. (P. R. C. P. 420).

Personal Service on Incapacitated Person.

The original process may be served on incapacitated in same manner prescribed for service of like process on competent defendant, or may be served on his guardian, appointed by Pennsylvania court; any pleading or other paper may be served on incompetent's guardian or guardian ad litem or his attorney of record. (P. R. C. P. 421).

Personal Service on Partnership.

Service of process upon partner, officer or registered agent authorized by partnership in writing to receive service of process for it or upon manager, clerk or other person in charge of any regular place of business of partnership shall be deemed service upon partnership and upon each partner individually named in action, provided person served is not plaintiff in action. (P. R. C. P. 423).

Personal service of original process on corporation or similar entity made by serving executive officer, partner or trustee of corporation, managing clerk or other person for time being in charge of any regular place of business or activity, or agent authorized in writing to receive service of process, provided person served in not named in action. (P. R. C. P. 424).

Personal Service on Association.

Rules for service are same as those applicable to partnerships. (P. R. C. P. 423).

Personal Service on Foreign Corporation.

Rules for service are same as those for domestic corporations. Service effected outside of state by personal delivery, in manner provided by law of place where served, by mail, by direction of foreign authority pursuant to letter rogatory, by treaty or as directed by court. (42 Pa.C.S. § 5322-5323[a]; P. R. C. P. 404).

Personal Service on Commonwealth.

Process in actions against Commonwealth must be served at principal or local office of agency being sued and at office of Attorney General. (42 Pa.C.S. § 8523[b]; P. R. C. P. 422).

Personal Service Outside State.

Service of process rules for nonresidents are same as those for foreign corporations.

Service by Mail.

Service by mail for residents or domiciliaries allowed only where authorized by specific rule of civil procedure. (P. R. C. P. 403). Mail service is permissible for nonresidents and foreign corporations. (P. R. C. P. 404). See subhead Personal Service on Foreign Corporation, supra.

Service by Publication.

If service cannot be made under applicable rule, plaintiff may move for special order directing method of service, stating in affidavit why service cannot be made and nature and extent of investigation made to locate defendant. (P. R. C. P. 430[a]). If publication authorized, it must contain notice to defend as set forth in P.R.C.P. 430(b).

Long Arm Statute.

(42 Pa.C.S. § 5321-5329). Long arm jurisdiction specifically established in actions to determine paternity and provide support. (23 Pa.C.S. § 4342[c], [d]). Long Arm Statute reach is as broad as permissible under due process clause of the Fourteenth Amendment to U.S. Constitution. See subhead Personal Service On Foreign Corporation, supra.

Proof of Service.

The sheriff makes a return of service. (P. R. C. P. 405). Proof of service, if made by person other than sheriff, must be by affidavit. (P. R. C. P. 405[d]). Party requesting service notified of return by sheriff. (P. R. C. P. 405[g]).

Proof of service outside state by affidavit, by manner prescribed by court order or by law of place where served. When service by mail, proof by receipt signed by addressee or other evidence of personal delivery. (42 Pa.C.S. § 5323[b]; P. R. C. P. 405).

See also topics 5.02 Actions, and 5.19 Practice.

Nonresident Motorist.

See category 23 Transportation, topic 23.01 Motor Vehicles.

Subpoenas.

General rules and forms for attendance and production subpoenas are found at P.R.C.P. 234.1 to 234.9. See topic 5.11 Depositions and Discovery.

5.21 REPLEVIN:

Party with right to possession may recover property by complaint of replevin from one who wrongfully took or detains property. (216 Pa. Super. 258, 263 A.2d 914).

Proceedings.

Except as otherwise governed by procedure rules specifically governing replevin, replevin proceedings governed by rules applicable to civil actions. (P. R. C. P. 1071). Replevin commenced by verified complaint. (P. R. C. P. 1073, 1073.1). Property may be seized by sheriff before judgment pursuant to writ of seizure. (P. R. C. P. 1075). After complaint is filed, plaintiff may move for issuance of writ of seizure, followed by hearing on motion for writ. (P. R. C. P. 1075.1). If writ is issued by court, bond is required in double value of property described in complaint. (P. R. C. P. 1075.1, 1075.2, 1075.3). In certain circumstances writ may be issued ex parte. (P. R. C. P. 1075.2). Venue is in county in which civil action could be brought or where property is found. (P. R. C. P. 1072). Objections to bond or security can be made by petition. (P. R. C. P. 1080).

Repossession.

Counterbond may be filed with prothonotary by defendant or intervenor claiming right to possession of property, other than party claiming only lien thereon, within 72 hours after service or after property has been seized; counterbond must be in the same amount as original bond. (P. R. C. P. 1076). Upon filing of counterbond, plaintiff may petition for impounding of property by sheriff. If no such petition filed, sheriff delivers possession to one filing counterbond. Otherwise, delivery by sheriff withheld pending court's determination. (P. R. C. P. 1077, 1079). Property may be impounded in custody of sheriff. (P. R. C. P. 1079).

Claims of Third Persons.

A person not a party to the action who claims the right to possession of the property may intervene in the action as a defendant, and after the allowance of intervention, the intervenor has the same status as an original party. (P. R. C. P. 1076, 2327, 2330).

Judgment or Order.

If any party is found to have lien upon property, court may enter conditional verdict in order to enforce rights of all parties. (P. R. C. P. 1082[b]). If property has been seized, judgment in rem may be entered against defendant, who has not been served and has not appeared, after complaint filed and after 45 days from seizure. (P. R. C. P. 1083). If defendant is served or appears and judgment is entered for party in possession, judgment shall determine his right to retain possession of property and his right to recover special damages; if for party not in possession, judgment shall determine his right to recover possession, money value of property and his right to special damages. (P. R. C. P. 1084, 1085). Judgment enforced as provided in P.R.C.P. 3170-3173. (P.R.C.P. 1086). Execution may be stayed or set aside as provided under P. R. C. P. 3172.

Retail Theft.

Civil penalty of $150 plus value of merchandise, costs and attorney fees assessable in civil action based on retail theft. (42 P.S. § 8308).

5.22 SEQUESTRATION:

Enforcement proceedings governed by P. R. C. P. 3101-3260.

Upon execution against any interest in real property or mortgage or lien court may order sheriff or sequestrator appointed by court to collect rent, interest, principal or other sum becoming due to defendant. Court may require sequestrator's bond upon such terms as it deems proper. (P. R. C. P. 3114).

Municipal lien may be enforced after expiration of 20 days from recovery of judgment, upon petition, by appointment of a sequestrator of rents and profits bound by judgment. (53 P.S. § 7275).

In Orphans' Court Division, orders or decrees in administration of estates or trusts may be enforced by writs of sequestration of real or personal property of estate or trust or of respondent. Such writs are directed to and executed by sheriff of county where court or property to be sequestered is located. To extent not provided for by Orphans' Court division rule or special order, practice conforms to practice in division of court having jurisdiction over action at law. (20 Pa.C.S. § 783).

See category 8 Debtor and Creditor, topics 8.02 Attachment, 8.05 Executions, 8.09 Garnishment, 8.16 Receivers.

5.23 SERVICE:

See topic 5.20 Process.

5.24 STAY OF EXECUTION:

See topic 5.03 Appeal and Error; category 8 Debtor and Creditor, topic 8.05 Executions.

5.25 SUBMISSION OF CONTROVERSY:

No legislation.

5.26 VENUE:

Power to change venue is vested in courts. (Const. art. 3, §23; 42 Pa.C.S. § 5106; P.R.C.P. 1006).

Civil action against individual may be brought only in court in which individual may be served, or in which cause of action arose, or where transaction or occurrence took place out of which cause of action arose, or in any other county authorized by law (P. R. C. P. 1006[a][1]), except that actions against certain classes of defendants may be brought in counties designated by particular rules hereinafter referred to. If equitable relief sought, where property or part thereof located when property subject of action. (P. R. C. P. 1006[a][2]).

Action of ejectment or action to quiet title may be brought only in county in which land or part of land is located. (P. R. C. P. 1052, 1062).

Action of replevin may be brought in county in which civil action may be brought or in county in which property to be replevied is found. (P. R. C. P. 1072).

Mandamus and Quo Warranto.

Actions by private parties must be brought in county where action arose if state officer or instrumentality is defendant, in county of defendant political subdivision, or in county of registered office or principal place of business of corporate defendant. (P. R. C. P. 1092, 1112).

Action of divorce, or annulment of marriage, except claim for custody, may be brought only in county in which plaintiff or defendant resides. (P. R. C. P. 1920.2). Venue in action for custody is governed by Uniform Child Custody Jurisdiction Act. (42 P.S. § 5341 et seq.).

Medical professional liability actions may be brought against health care provider only in county where cause of action arose. (42 Pa.C.S. § 5101.1).

Action of mortgage foreclosure may be brought only in county in which land or part of land is located. (P. R. C. P. 1142).

Individual Defendants Who Are Nonresidents or Conceal Their Whereabouts.

Actions other than those involving real or personal property, divorce, or annulment of marriage, may be brought only in county where defendant may be personally served, where cause of action arose or where transaction or occurrence took place out of which cause of action arose, or in any other county authorized by law. (P. R. C. P. 1006).

Long Arm Jurisdiction.

In paternity and support cases utilizing long arm jurisdiction, venue in county where plaintiff resides. (P.R.C.P. 1910.2[b]).

Political Subdivisions.

Action brought in court of common pleas by Commonwealth may be brought in any county permitted by rule of Supreme Court. (P. R. C. P. 2103). Actions against Commonwealth agency or employee thereof may be brought in county where principal or local office of Commonwealth party is located, where cause of action arose or where transaction or occurrence took place out of which cause of action arose. (42 P.S. § 8523). Except when Commonwealth is plaintiff, actions against political subdivisions may be brought in county where political subdivision is located. (P. R. C. P. 2103).

Partnerships.

Actions against partnerships are brought in county where their business is regularly conducted, where cause of action arose or where transaction or occurrence took place out of which cause of action arose. (P. R. C. P. 2130). Venue is similar in actions against unincorporated associations. (P. R. C. P. 2156).

Corporations.

Personal action against corporation may be brought in county where its registered office or principal place of business is located, where it regularly conducts business, where cause of action arose, or where transaction took place out of which cause of action arose. (P. R. C. P. 2179). In addition, action upon policy of insurance against insurance company incorporated or doing business in Pennsylvania may be brought in county where insured property is located or where plaintiff resides in actions upon life, accident, health, disability and livestock insurance or fraternal benefit certificates. (P. R. C. P. 2179).

Confession of Judgment.

Actions required as prerequisite to issuance of execution upon certain judgments under Loan Interest and Protection Law entered by confession (41 P.S. § 407) shall be commenced only in county in which confessed judgment, whether entered originally or by transfer, constitutes lien upon residential real estate of defendant. (P. R. C. P. 2982[a]). Action required as prerequisite to issuance of execution upon certain judgments entered by confession under Goods and Services Installment Sales Act (69 Pa.C.S. § 1101, et seq.) shall be commenced in county in which buyer signed contract, resided at time contract entered into or resides at commencement of action, or in county where goods have been affixed to real property (P. R. C. P. 2982[b]).

Multiple Defendants.

Action to enforce joint, or joint and several liability, against two or more defendants may be brought in any county where venue may be laid against any of defendants, except action in which Commonwealth is defendant. (P. R. C. P. 1006[c]).

Multiple Causes of Action.

Actions stating more than one cause of action against same defendant may be brought in any county in which any of causes of action might have been brought. (P. R. C. P. 1006[f]).

Change of venue may be had: (a) For convenience of parties and witnesses (change of venue is limited under this provision to court where action originally could have been brought); (b) where court finds that fair and impartial trial cannot be held in county for reasons stated of record (order changing venue must be certified to Supreme Court, which shall designate county to which case is to be transferred). (P. R. C. P. 1006[d][2]).

6 COURTS AND LEGISLATURE

6.01 COURTS:

United States District Courts.

Eastern District.

Clerk's office at Room 2609, 601 Market Street, Philadelphia 19106.

Counties.

Berks, Bucks, Chester, Delaware, Lancaster, Lehigh, Montgomery, Northampton, Philadelphia and Schuylkill.

Court sits at Philadelphia, Allentown, Easton and Reading.

Middle District.

Clerk's office at Federal Building, Scranton 18501.

Counties.

Adams, Bradford, Cameron, Carbon, Centre, Clinton, Columbia, Cumberland, Dauphin, Franklin, Fulton, Huntingdon, Juniata, Lackawanna, Lebanon, Luzerne, Lycoming, Mifflin, Monroe, Montour, Northumberland, Perry, Pike, Potter, Snyder, Sullivan, Susquehanna, Tioga, Union, Wayne, Wyoming and York.

Court sits at Scranton, Harrisburg, Lewisburg, Wilkes-Barre and Williamsport.

Western District.

Clerk's office at 819 U.S. Post Office and Courthouse, Pittsburgh 15219.

Counties.

Allegheny, Armstrong, Beaver, Bedford, Blair, Butler, Cambria, Clarion, Clearfield, Crawford, Elk, Erie, Fayette, Forest, Greene, Indiana, Jefferson, Lawrence, McKean, Mercer, Somerset, Venango, Warren, Washington and Westmoreland.

Court sits at Pittsburgh, Johnstown and Erie. (28 U.S.C. 118).

Fees.

Filing fee for civil actions in U.S. District Courts is $150; filing fee on application for writ of habeas corpus is $5. (28 U.S.C. 1914[a].

State Courts.

Statewide unified court system established as set forth in 42 Pa.C.S. § 301; Const. art. 5, §1. Fees for court costs listed at 42 Pa.C.S. § 1725(c)-(d), 42 Pa.C.S. § 1725.1.

Supreme Court.

Supreme Court composed of Chief Justice and six associate justices. (42 Pa.C.S. § 501). Majority of court constitutes quorum for transaction of any business. (42 Pa.C.S. § 326; P. R. A. P. 3102 [a]).

Supreme Court has exclusive jurisdiction of appeals from final orders of courts of common pleas involving: Matters prescribed by general rules; right to public office; matters where qualifications, tenure or right to serve, or manner of service, of any member of judiciary is drawn into question; imposition of death sentence for felonious homicide; and other matters tried with capital offenses; matters relating to petitions for review of special prosecutions or investigations, including supersession of district attorney, by Attorney General or by Court; appointment, supervision, administration or operation of special prosecutor; convening, supervision, administration, operation, or discharge of investigating grand juries or matters otherwise affecting existence of such grand juries or directly affecting such grand juries or their investigations, and enforcement of subpoenas issued by or otherwise affecting existence or operation of any investigating committee of General Assembly or Pennsylvania Crime Commission; matters where right or power of Commonwealth or any political subdivision to create or issue indebtedness is drawn into direct question; matters where court of common pleas has held invalid as repugnant to Constitution, treaties or laws of U.S., or to Constitution of Commonwealth, and treaty or law of U.S. or any provision of Constitution of, or any statute of, Commonwealth, or any provision of any home rule charter; matters where right to practice law is drawn in direct question. (42 Pa.C.S. § 722).

Supreme Court also has exclusive appellate jurisdiction of final orders of Commonwealth Court on matters originally commenced there, except in matters which constitute appeals from another court, district justice or other governmental unit, and of any final order of Commonwealth Court entered in any appeal from decision of Board of Finance and Revenue. (42 Pa.C.S. § 723).

It has original but not exclusive jurisdiction of habeas corpus, mandamus or prohibition to inferior courts, and quo warranto as to any officer with statewide jurisdiction. (42 Pa.C.S. § 721).

All other final orders of Superior and Commonwealth Courts reviewable on allowance of appeal by any two justices upon petition of any party. (42 Pa.C.S. § 724).

It has exclusive jurisdiction on appeals from final orders of Legislative Reapportionment Commission, Court of Judicial Discipline, except special tribunals reviewing orders against justices, and those agencies with power to administer training of minor judiciary, admit persons to bar, and to discipline attorneys. (42 Pa.C.S. § 725).

It has plenary jurisdiction in matters of immediate public importance. (42 Pa.C.S. § 726).

Court exercises general supervisory and administrative authority over unified judicial system. (42 Pa.C.S. § 1701).

Prothonotary maintains offices in Philadelphia, Harrisburg and Pittsburgh. All matters within court's jurisdiction may be initially filed in any such office. (P. R. A. P. 3301).

Superior Court.

Superior Court has no original jurisdiction except in cases of habeas corpus, mandamus and prohibition to inferior courts where ancillary to matters within its jurisdiction. (42 Pa.C.S. § 741).

It has exclusive appellate jurisdiction of final orders of Courts of Common Pleas, except matters within exclusive jurisdiction of Supreme and Commonwealth Courts. (42 Pa.C.S. § 742).

Effective Sept. 1, 1978, all appeals before Superior Court will be held before three judges, except by special order of Superior Court.

Court en banc consists of up to nine active members of Court. (42 Pa.C.S. § 326; P. R. A. P. 3103 [a][1]).

En banc opinions are binding on any subsequent panel of Court. (P. R. A. P. 3103 [b]).

Prothonotary's office is located in Harrisburg, Philadelphia and Pittsburgh. (P. R. A. P. 3502).

Commonwealth Court.

Commonwealth Court has original jurisdiction of all civil actions or proceedings against Commonwealth or its officers acting in official capacities (except habeas corpus or post-conviction relief not ancillary to its appellate jurisdiction, eminent domain, actions under Board of Claims Act, certain actions or proceedings relating to matters affecting government units and certain actions on claims in which sovereign immunity has been waived); all civil actions or proceedings by Commonwealth or any officer acting in official capacity, except eminent domain; and as otherwise specified by statute. Its original jurisdiction is exclusive, except in civil actions or proceedings brought by Commonwealth or its officers, which is concurrent with Common Pleas, or cases which fall under original jurisdiction of Supreme Court. Commonwealth Court has ancillary jurisdiction over any claim or other matter related to claim otherwise within its exclusive original jurisdiction and has original jurisdiction in cases of mandamus and prohibition to inferior courts and government units where such relief is ancillary to matters within its appellate jurisdiction and has power to issue writs under like conditions. (42 Pa.C.S. § 761). Commonwealth Court has exclusive original jurisdiction of certain election disputes. (42 Pa.C.S. § 764). Government unit may petition Commonwealth Court to enforce order it has issued. (P. R. A. P. 3761).

Except for direct appeals from Courts of Common Pleas within exclusive jurisdiction of Supreme Court, Commonwealth Court has exclusive appellate jurisdiction from final orders of Courts of Common Pleas in civil actions or proceedings against Commonwealth or its officers (except habeas corpus or post-conviction relief not ancillary to its appellate jurisdiction); criminal actions or proceedings for violation of rules, regulations or orders of, or statutes administered by, state administrative agencies; actions or proceedings under municipality, institution district, public school, political subdivision, planning and zoning codes, or involving application, interpretation or enforcement of laws governing political subdivisions, municipalities, local authorities, elections, campaign financing, home rule charters, local ordinances, and resolutions; appeals from local administrative agencies; not-for-profit corporations; eminent domain; and immunity waiver in actions against local parties. (42 Pa.C.S. § 762).

Except those cases within Supreme Court's exclusive jurisdiction, it has exclusive appellate jurisdiction from courts of common pleas in civil actions or proceedings by

Commonwealth or its officers; actions or proceedings against Commonwealth or its officers relating to eminent domain, matters affecting governmental units, actions under Board of Claims Act, certain actions on claims in which sovereign immunity has been waived and actions for habeas corpus or post-conviction relief ancillary to proceedings within its appellate jurisdiction; criminal actions or proceedings for violation of rules, regulations or orders of, or statutes administered by, Commonwealth agencies; actions or proceedings under political subdivision, planning and zoning codes, laws governing political subdivisions, municipalities, local authorities, elections, home rule charters, local ordinances, and resolutions; appeals from local administrative agencies; and actions or proceedings relating to not-for-profit corporations. (42 Pa.C.S. § 762).

Except those appeals from agencies within exclusive jurisdiction of Supreme Court or common pleas courts, it has exclusive appellate jurisdiction from government agencies under Administrative Agency Law, including Environmental Hearing Board, Public Utility Commission, Unemployment Compensation Board, and any agencies having statewide jurisdiction, and as provided by statute. (42 Pa.C.S. § 763). It has exclusive jurisdiction of appeals from arbitrator's decisions on disputes between state and public employees. (42 Pa.C.S. § 763). Principal office of prothonotary is in Harrisburg. (P. R. A. P. 3702).

Common Pleas Courts.

Except as otherwise provided, Court of Common Pleas has unlimited original jurisdiction. (42 Pa.C.S. § 931). State divided into 60 judicial districts with Common Pleas Court in each district, and branch in each county of multicounty districts. (42 Pa.C.S. § 901, 911). In Philadelphia County, court has three divisions: Trial, Orphans' and Family. In Allegheny County, court has four divisions: Civil, Criminal, Orphans' and Family. Numerous other districts have separate Orphans' Court divisions. (42 Pa.C.S. § 951). Common Pleas Courts must promulgate local rules describing pre-trial procedures. (P. R. C. P. 239 et seq.). Such rules must be consistent with Supreme Court and legislated rules. (P. R. C. P. 239[b][1]).

Community Court.

In any judicial district, majority of electors voting may approve establishment or discontinuance of community court. Except as otherwise provided, court has jurisdiction equal to that of Municipal Court, Traffic Court, and District Justice. (42 Pa.C.S. § 1101-1106).

Philadelphia Municipal Court.

Except as otherwise provided, has jurisdiction concurrent with Philadelphia County Court of Common Pleas over criminal matters not involving juveniles which are punishable by no more than five-year term; all summary offenses except those within Philadelphia Traffic Court's jurisdiction; landlord-tenant matters without limitation on damages awardable; civil actions, except by or against Commonwealth agency or employee within scope of office or employment, involving less than $10,000 in assumpsit, trespass, and for fines and penalties by government agency; civil actions involving less than $15,000 concerning real estate and school taxes levied by cities of first class; and actions to enjoin public nuisances. Court can also preside at arraignments, fix and accept bail, issue warrants, perform duties of similar nature, and appoint six bail commissioners for four year terms to administer oaths, preside at preliminary arraignments, assign counsel, issue criminal complaints, fix bail and issue arrest and search and seizure warrants. (42 Pa.C.S. § 1123).

Pittsburgh Magistrates Court.

Except as otherwise provided, has jurisdiction over certain criminal complaints, arrests for specified crimes, civil claims by Pittsburgh or county agencies, and traffic court matters. (42 Pa.C.S. § 1141-1143).

Traffic Court.

Except as otherwise provided, has jurisdiction of all summary offenses under motor vehicle laws. (42 Pa.C.S. § 1301-1342).

Magisterial District Judges.

In any judicial district other than Philadelphia County, where Community Court not established, there is one Magisterial District Judge in each magisterial district with general jurisdiction in civil cases of assumpsit, trespass, and government agency suits, except actions by or against Commonwealth agency or employee, where claim does not exceed $8,000 and does not involve real estate title. Magisterial District Judges also have jurisdiction over summary offenses (except those within jurisdiction of established and open traffic court), landlord tenant matters, and certain crimes, and can preside at arraignments, fix and accept bail (except in cases involving murder or voluntary manslaughter), issue warrants, issue subpoenas and perform duties of similar nature. (42 Pa.C.S. § 1501-1516; R.C.P.D.-J. 201-382).

Small Claims Courts.

See subheads Philadelphia Municipal Court and District Justices, supra.

6.02 LEGISLATURE:

Regular sessions held in January of each year. (Const., art. II, §4).

Special or Extraordinary Sessions.

Governor may call special sessions. (Const., art. II, §4).

Initiative and Referendum.

No initiative or referendum as to statutes.

6.03 REPORTS:

Judicial reports of Supreme Court of Pennsylvania are contained in reports of Dallas, 4 vols.; Addison, 1 vol.; Yeates, 4 vols.; Binney, 6 vols.; Sergeant & Rawle, 17 vols.; Rawle, 5 vols.; Penrose & Watts, 3 vols.; Watts, 10 vols.; Wharton, 6 vols.; Watts & Sergeant, 9 vols.; from 1754 to 1844; and the Pennsylvania State Reports, from 1845 to date.

Pennsylvania Superior Court Reports contain decisions of Superior Court from its inception, 1895, to date.

Pennsylvania Commonwealth Court Reports contain decisions of Commonwealth Court from its inception, 1970, to date.

Prior to 1889, Pennsylvania State Reports did not contain all of decisions of Supreme Court. Previously unreported cases have been collected in following reports: Grant, 3 vols. (1852-1863); Pennypacker, 4 vols. (1881-1884); Monaghan, 2 vols. (1888-1889); Walker, 4 vols. (1877-1885); Sadler, 10 vols. (1885-1889).

Decisions of Public Service Commission and Public Utility Commission have been published in series of official reports beginning in 1913. Decisions of Environmental Hearing Board have been published in series of official reports beginning in 1973. There are no official reports of decisions of lower courts. These decisions are contained in numerous unofficial reports, among most important of which are Pennsylvania District Reports in 30 vols. covering period from 1892 to 1921; Pennsylvania County Court Reports in 50 vols. covering period from 1885 to 1921; District & County Reports into which two foregoing have been combined since 1921.

Opinions of Supreme Court, Superior Court and Commonwealth Court are also reported in Atlantic Reporter.

Digests.

Vale Pennsylvania Digest and Pennsylvania Digest 2d, both published by West Publishing Co., cover Pennsylvania Supreme, Superior and Commonwealth Court reports and reported cases of all other Pennsylvania courts of record, together with Pennsylvania cases decided in Supreme Court of U.S., Courts of Appeal, Circuit Court of Appeals, and Federal Circuit and District Courts from 1682 to date.

6.04 STATUTES:

Official pamphlet laws contain acts of each session of Legislature. Pennsylvania Consolidated Statutes are official codification and compilation of laws of Commonwealth of Pennsylvania. Most recent unofficial compilation is Purdon's Pennsylvania Statutes Annotated, published jointly by George T. Bisel Co., and West Publishing Company. Purdon is also reprinting new, official codification under title Pennsylvania Consolidated Statutes Annotated, which is currently bound with Pennsylvania Statutes Annotated. These publications should not be confused with Pennsylvania Code (P.C.), which is code of regulations, not of legislation. Dates in parentheses refer to date of adoption or most recent recodification.

Uniform Acts adopted and still in effect are: Acknowledgment (1941); Anatomical Gift (1972, rewritten 1995); Arbitration (1980); Athlete Agents (2002); Blood Tests to Determine Paternity (1976); Business Records as Evidence (1976); Child Custody Jurisdiction and Enforcement (2004); Commercial Code (1953, reenacted 1959, recodified 1979, revised 1982, 1996); Condominium (1980); Contribution Among Tortfeasors (1976); Controlled Substances (1994 with amendments, am'd 1996, 1999); Criminal Extradition (1976); Declaratory Judgments (1976); Determination of Death (1982); Disclaimer of Property Interests (1976, am'd 1984, 1986); Durable Power of Attorney (1982); Electronic Transactions (1999 with amendments); Enforcement of Foreign Judgments (1976); Facsimile Signature of Public Officials (1961, am'd 1974); Federal Lien Registration (1989); Fiduciaries (1923, recodified 1974); Firearms (1972, am'd 1984, 1986); Flag (1972); Foreign Money-Judgments Recognition (1990); Fraudulent Transfer (1993); Interparty Agreement (1927); Interstate and International Procedure (1976); *Interstate Arbitration of Death Taxes (reenacted 1991); *Interstate Compromise of Death Taxes (reenacted 1991); Interstate Family Support (1996); **Juvenile Court Act (1976, am'd 1986); Limited Partnership (1975, am'd 1981); Military Justice (1975); Partnership (1975, am'd 1978); Photographic Copies of Business and Public Records as Evidence (1951, recodified 1976); Principal and Income (1972, am'd 1976, 1978); Real Estate Cooperative Act (1992); Rendition of Prisoners as Witnesses in Criminal Proceedings (1976, am'd 1982); Securities (1972, am'd 1998); Securities Ownership by Minors (1961); Simultaneous Death (1941, recodified 1972); Single Publication (1976); To Secure Attendance of Witnesses From Without a State in Criminal Proceedings (1976); Statute of Limitations on Foreign Claims (1976); Testamentary Additions to Trusts (1972); Trade Secrets (2004); Transfers to Minors (1992); Trust Code (2006, substantially modified); Victims of Crime (1992, substantially modified); Written Obligations (1927).

As to Uniform Commercial Code, see category 3 Business Regulation and Commerce, topic 3.09 Commercial Code. As to Uniform Securities Act, see category 3 Business Regulation and Commerce, topic 3.24 Securities. As to Uniform Trust Code, see category 13 Estates and Trusts, topic 13.15 Trusts.

* Adopted as single Act, entitled Interstate Compromise and Arbitration of Inheritance Taxes.

**Designated Juvenile Act at adoption.

For text of Uniform Acts falling within scope of Martindale-Hubbell Law Digests, see Uniform and Model Acts section.

6.05 UNIFORM LAWS:

For list of Uniform Acts in force in this state see topic 6.04 Statutes. For text of Uniform Acts within the scope of the Martindale-Hubbell Law Digests see Uniform and Model Acts section.

7 CRIMINAL LAW

7.00A BAIL:

See topic 7.01 Criminal Law.

7.01 CRIMINAL LAW:

Model Penal Code adopted under title Crimes Code. (18 Pa.C.S. § 101 et seq.).

Offenses set forth at 18 Pa.C.S. § 101 et seq. Criminal procedure governed by 42 Pa.C.S. § 8701 et seq. and P. R. Crim. P. Sentencing provisions set forth at 42 Pa.C.S. § 9701 et seq. and P. R. Crim. P. 700-708. Limitations governed by 42 Pa.C.S. § 5551-5554.

Special rules govern cases in which death sentence authorized. (P. R. Crim. P. 801-811; 42 Pa.C.S. § 9711).

Indictment or Information.

Prosecutions may be instituted by indictment only, except that courts of common pleas may, with approval of Supreme Court, provide for initiation of criminal proceedings by information filed in manner provided by law. (Const., art. 1, §10; 42 Pa.C.S. § 8931; P. R. Crim. P. 560-569).

Bail.

All prisoners bailable by sufficient sureties except for capital offenses when proof evident. (Const. art. 1, §14; P. R. Crim. P. 520-529).

Interstate Agreement on Detainers adopted. (42 Pa.C.S. § 9101 et seq.).

Uniform Act to Secure the Attendance of Witnesses From Without a State in Criminal Proceedings adopted. Act known in Pennsylvania as “Uniform Act to Secure the Attendance of Witnesses from Within or Without a State in Criminal Proceedings.” (42 Pa.C.S. § 5961 et seq.).

Uniform Rendition of Prisoners as Witnesses in Criminal Proceedings Act adopted. (42 Pa.C.S. § 5971 et seq.).

Criminal History Record Information Act adopted. (18 Pa.C.S. § 9101 et seq.).

Uniform Criminal Extradition Act adopted. (42 Pa.C.S. § 9121 et seq.).

Uniform Firearms Act adopted under title “Pennsylvania Uniform Firearms Act”. (18 Pa.C.S. § 6101 et seq.).

Uniform Business Records as Evidence Act adopted. (42 Pa.C.S. § 6108 et seq.).

Uniform Photographic Copies of Business and Public Records as Evidence Act adopted. (42 Pa.C.S. § 6109).

Uniform Act on Blood Tests to Determine Paternity adopted. (42 Pa.C.S. § 6131 et seq.).

Uniform Juvenile Court Act adopted. (42 Pa.C.S. § 6301 et seq.).

8 DEBTOR AND CREDITOR

8.01 ASSIGNMENTS:

Generally, rights, debts and choses in action are assignable subject to common law rules. Claims and payments under Workmen's Compensation Act are not assignable. (77 P.S. § 621). Transfers of claims against state residents for purpose of evading exemptions from attachment or execution or exemptions from application of personal earnings to debts are unlawful. (42 Pa.C.S. § 8128). There are numerous statutes regulating assignment of specific choses in action, such as life insurance, retail installment sales contracts and mortgages. Many assignments are governed by Uniform Commercial Code. (13 Pa.C.S. § 1101 et seq.). See category 3 Business Regulation and Commerce, topic 3.09 Commercial Code.

Filing.

With certain exceptions, assignments of accounts, contract rights or chattel paper and assignments intended to create security interest in personal property or fixtures, including goods, documents, instruments, accounts, contract rights, chattel paper and general intangibles, should be perfected by filing pursuant to Uniform Commercial Code, Div. 9. (13 Pa.C.S. § 1101 et seq.). See categories 3 Business Regulation and Commerce, topic Commercial Code; Documents and Records, topic Records.

Recording.

Assignments of any right, title or interest relating to real property may be recorded in office of recorder of deeds in county where real estate is located. Instruments must be acknowledged to be recorded. (21 P.S. § 356, 381). See categories 10 Documents and Records, topic Records; Mortgages, topic Mortgages of Real Property.

Assignees may sue in own name. (417 Pa. 475, 207 A.2d 817).

8.02 ATTACHMENT:

Caveat.

Jonnet v. Dollar Savings Bank, 530 F.2d 1123 (3d Cir. 1976), holds that Pennsylvania's procedures for foreign attachment provide insubstantial protection to prospective defendants against wrongful attachment and are unconstitutional. Accordingly, foreign attachment is not presently available. (Schreiber v. Republic Inter-Corp., 473 Pa. 614, 375 A.2d 1285 (1977). Pennsylvania's rules governing foreign attachment (P.R.C.P. 1251-1279, 1411, 1461) and fraudulent debtor's attachment (P.R.C.P. 1285-1292, 1412, 1462) were rescinded effective Oct. 1, 1989.

8.03 [RESERVED]

8.04 CREDITORS' SUITS:

There are no statutory provisions for enforcement of judgments or other claims against property not subject to execution. Actions in equity may be maintained for this purpose.

8.05 EXECUTIONS:

Execution process to enforce judgments is governed by P. R. C. P. 3101-49, 3160-65, 3170-73, 3180-83, 3190, 3251-60, 3301-04. Every judgment for recovery of money is enforceable by writ of execution. (P. R. C. P. 3102). Writ of execution in money judgment must include notice to defendant, summary of major exemptions and claim for exemption. (P. R. C. P. 3252). Revival of judgment liens governed by P. R. C. P. 3025 et seq.

Forms.

See P. R. C. P. 3252 for new notice, execution and exemption forms. See P. R. C. P. 3311-13 for attachment of wages, salary and commission forms and exemption claim forms.

Kinds of Execution.

Writ may issue against any tangible or intangible personal property or real estate, including that in possession of third parties. Upon levy or attachment, sheriff shall mail copy of writ to execution defendant. (P. R. C. P. 3108). Special rule governs safe deposit boxes. (P. R. C. P. 3110).

Exemptions.

See topic 8.06 Exemptions.

Time for Issuance.

Praecipe for writ of execution may be filed with prothonotary of any county in which judgment has been entered. (P. R. C. P. 3103). Writ may be reissued at any time. (P. R. C. P. 3106[b]). Successive writs may be issued at same or different times without prior return of outstanding writ. (P. R. C. P. 3103[d]). Execution against personal property must be issued within 20 years after entry of judgment upon which execution is to be issued. (42 Pa.C.S. § 5529).

Stay.

Execution stayed upon written direction of plaintiff to sheriff; upon entry of bond as security; pending disposition of property claim of third party; upon showing of exemption or immunity of property from execution; or upon showing of statutory right to stay. Execution may be stayed upon application showing defect in writ, levy or service or other legal or equitable ground. (P. R. C. P. 3121, 3162, 3172, 3183). Order staying execution may impose terms and conditions or limit stay as appropriate. (P. R. C. P. 3121[c]).

Lien.

No execution of lien upon personal property prior to levy. (P. R. C. P. 3108, 3109). Judgment liens governed by P. R. C. P. 3020-3023. See category 5 Civil Actions and Procedure, topic 5.15 Judgments.

Return.

Sheriff must make return upon completion or abandonment of execution proceedings and upon expiration of 90 day period allowed for service or levy. (P. R. C. P. 3106[d], 3139, 3164, 3173).

Priorities.

Priority of distribution between competing plaintiffs as to different levies or executions determined by time of delivery of writs to sheriff. (P. R. C. P. 3137).

Claims of Third Persons.

Third persons with claims to tangible personal property may void levy by sheriff. (P. R. C. P. 3201-16). Third party must file written claim with sheriff prior to execution sale. (P. R. C. P. 3202, 3258). Sheriff determines whether claimant is owner in whole or in part. (P. R. C. P. 3204). If determination in favor of claimant and no objection filed with prothonotary, levy on property deemed abandoned and property returned to person from whom taken. (P. R. C. P. 3206). If sheriff's determination against claimant, objection must be filed or claim deemed abandoned. (P. R. C. P. 3207). Upon filing of objection, interpleader is at issue and court must make determination. (P. R. C. P. 3206, 3207).

Satisfaction.

See category 5 Civil Actions and Procedure, topic 5.15 Judgments.

Sale.

Real or personal property may be sold after levy. (P. R. C. P. 3124-3131). Plaintiff must file with sheriff affidavit setting forth names and addresses of owner and every other person with interest in property. Written notice of sale of real property must be given 30 days prior to sale to defendant, owner and every person with interest in property, and must be posted in handbills and published. (P. R. C. P. 3129). Notice of sale of personal property must be given six days prior to sale by posting of handbills. (P. R. C. P. 3128).

Redemption.

No right of redemption from execution sales. Upon petition before delivery of personal property or deed to real property, court may set aside sale. (P. R. C. P. 3132).

Supplementary Proceedings.

Any time after judgment, plaintiff may use discovery proceedings to discover assets of defendant. Expenses taxed as costs against defendant if discovery establishes he has property liable to execution. (P. R. C. P. 3117). Upon petition and after notice and hearing, court may award plaintiff other relief in aid of execution. (P. R. C. P. 3118).

Body Execution.

Except in action for fines and penalties or as contempt punishment, defendant may not be arrested for judgment. (42 Pa.C.S. § 5108[b]).

8.06 EXEMPTIONS:

Individual judgment debtor is entitled to exemption from execution of personal property to value of $300, plus all wearing apparel, bibles and school books, sewing machines belonging to seamstresses or used and owned by private families, certain uniforms and accoutrements, certain retirement funds and accounts and certain insurance proceeds. (42 Pa.C.S. § 8123-8124).

Tangible personal property exhibited at international exhibitions held under auspices of federal government is exempt from attachment, distress, levy, sale or other seizure. (42 Pa.C.S. § 8125).

Under specified circumstances, common carriers are not liable in attachment as garnishee. (42 Pa.C.S. § 8126).

Debtor must be notified that he may have exemptions and claim for exemption form must accompany each writ of execution. (P. R. C. P. 3252).

Substitution.

Statute does not authorize debtor who does not possess articles specifically exempted to hold money or other property exempt in lieu thereof. But see P. R. C. P. 3123.

Debts Against Which Exemptions Not Allowed.

Exemptions do not apply to judgment for any of following: support, $100 or less obtained for wages for manual labor, board for four weeks or less, debts of nonindividual, or mortgage foreclosure on real property. (42 Pa.C.S. § 8123[b]).

Waiver of Exemption.

Debtor may not waive exemptions by express or implied contract. (42 Pa.C.S. § 8122).

Necessity of Claiming Exemption.

Debtor entitled to exemption may claim it in kind or in cash at any time before date of sale by notifying sheriff of claim and, if exemption is claimed in kind, by designating property which he elects to retain as exempt. Failure of debtor to claim exemption does not of itself constitute waiver. In event of such failure, sheriff shall choose, appraise and set aside property equal to amount of exemption. (P. R. C. P. 3123, 3123.1).

Earnings.

Wages, salaries and commissions of individuals in hands of employer are exempt from attachment, execution or other process, except in action for support, for board for four weeks or less, for amounts awarded to judgment creditor-landlord arising out of residential lease or for student loan obligations. (42 Pa.C.S. § 8127, 24 P.S. § 5104[11]).

Pensions.

Specified retirement funds and accounts and rights thereto are exempted from attachment or execution. (42 Pa.C.S. § 8124[b]).

Insurance Proceeds.

Specified insurance proceeds and rights thereto are exempted from attachment or execution. (42 Pa.C.S. § 8124[c]).

Federal Exemptions.

Payments under Social Security Act and other Federal Retirement and workers' compensation benefits are probably included under provisions of P. R. C. P. 3123. (658 F.2d 93).

Exemption from Wage Attachment.

Defendant may claim exemption from attachment based on federal poverty income guidelines. (P. R. C. P. 3303).

8.07 FORECLOSURE:

See topic 8.13 Liens; category 20 Mortgages, topics 20.01 Chattel Mortgages, 20.04 Mortgages of Real Property.

8.08 FRAUDULENT SALES AND CONVEYANCES:

Uniform Commercial Code has been adopted. (13 Pa.C.S. § 1101 to 9507). See category 3 Business Regulation and Commerce, topic 3.09 Commercial Code.

Uniform Fraudulent Transfer Act has been adopted. (12 Pa.C.S. § 5101 to 5110).

Remedies.

Creditors whose claims have matured may, except as to purchaser for fair consideration without knowledge of fraud, or one who has derived title from such purchaser, set aside or disregard conveyance and levy execution upon property. Creditors whose claims have not matured may petition court of competent jurisdiction to restrain defendant from disposing of property, to appoint receiver, to set aside conveyance, or to grant other appropriate relief. (39 P.S. § 359, 360).

Bulk Sales.

Business association selling or transferring in bulk 51% or more of its stock of goods, wares or merchandise of any kind, fixtures, machinery, equipment, buildings or real estate must give Department of Revenue ten days notice of sale or transfer prior to completion and must pay all taxes and unemployment compensation contributions to date. Seller must present to purchaser certificate from Department of Revenue showing tax reports have been filed and taxes and contributions paid. Failure of purchaser to require such certificate renders him liable for unpaid taxes. (69 P.S. § 529; 72 P.S. § 1403). See category 3 Business Regulation and Commerce, topic 3.07 Bulk Sales.

8.09 GARNISHMENT:

Garnishment to satisfy money judgments governed by P. R. C. P. 3101-3149.

Property Which May Be Reached.

Plaintiff may execute against judgment debtor's real and personal property. (P. R. C. P. 3107). See topic 8.06 Exemptions.

Jurisdiction.

Writ of execution may be issued by prothonotary of county in which judgment was entered originally and may be directed to sheriff of any county within Commonwealth. (P. R. C. P. 3103[b]). When judgment transferred to another county, writ issued by prothonotary of transferee county may be directed only to sheriff of transferee county. (P. R. C. P. 3103[c]).

Proceedings to Obtain.

Writ of execution obtained by filing praecipe with prothonotary of county in which judgment has been entered. (P. R. C. P. 3103[a]).

Answer of Garnishee.

Garnishee, upon being served, must forward copy of writ to defendant, and upon filing answers to interrogatories, must forward copy thereof to defendant. (P. R. C. P. 3140). Garnishee has no further duty to defend. (P. R. C. P. 3141).

Practice.

Prothonotary transmits writ to sheriff, who may levy upon defendant's real or personal property in any order or simultaneously, as plaintiff directs. (P. R. C. P. 3103[b], 3107, 3109). Sheriff is responsible for service upon garnishee. (P. R. C. P. 3108, 3111-13). Discovery in aid of execution available any time after judgment. (P. R. C. P. 3117[a]). Defendant must be afforded prompt post-seizure hearing on claims of exemption. (P. R. C. P. 3123.1). Sheriff must give six days' notice before sale of personal property (P. R. C. P. 3128[a]), and 30 days' notice before sale of real property (P. R. C. P. 3129[b]). Notice before sale of real property must be given to owner, defendant on judgment and all persons with record interest in or lien on property. (P. R. C. P. 3129[b]). Personal property transfer effected by sheriff's bill of sale. (P. R. C. P. 3134). Real property transferred by sheriff's deed. (P. R. C. P. 3135). Sheriff's return required. (P. R. C. P.

3139).

Adverse Claims.

Priority between competing writs determined by time of delivery to sheriff. (P. R. C. P. 3137).

Judgment.

Judgment governed by P. R. C. P. 3123.1 (c), 3146, 3147.

Earnings.

Wages generally exempt from garnishment. Exceptions for actions for support, board, judgments for damages to leased residences, or repayment of certain educational loans. (42 Pa.C.S. § 8127). See topic 8.06 Exemptions.

See topics 8.02 Attachment, 8.05 Executions.

8.10 HOMESTEADS:

No homestead law.

8.11 JUDGMENT NOTES:

See category 5 Civil Actions and Procedure, topic 5.15 Judgments, subhead Judgments by Confession.

8.12 LEVY:

See topic 8.05 Executions.

8.13 LIENS:

Hotel proprietors have lien not to exceed sum of $200 upon baggage and other property of guests for indebtedness contracted for boarding or lodging. After due notice, proprietor may sell such property at public auction. (37 P.S. § 71 et seq.).

Building and loan associations have lien on savings accounts of any member subject to lien in default of repayment or satisfaction of any loan or advance of money except real estate loan, unless specifically pledged as security therefor. Association may by written instrument waive its lien. (7 P.S. § 6020[125]).

Pilotage fees are lien upon vessel. (55 P.S. § 192).

Spinners, throwsters and dyers have a lien for amounts that may be due them upon goods that come into their hands to be manufactured. (6 P.S. § 21).

Lien of a partner is governed by Uniform Partnership Act. (59 Pa.C.S. § 361).

Lien of a seller of goods is provided by Uniform Commercial Code, Division 2. (13 Pa.C.S. § 2505; 9113). See category 3 Business Regulation and Commerce, topic 3.09 Commercial Code.

Lien of a warehouseman is provided by Uniform Commercial Code, Division 7. (13 Pa.C.S. § 7209). See category 3 Business Regulation and Commerce, topic 3.09 Commercial Code.

Lien of federal taxes and other federal liens are governed by Uniform Federal Lien Registration Act. (74 P.S. § 157-1 et seq.).

Waiver, Loss or Extinguishment.

Statutory liens are generally extinguished upon payment of underlying indebtedness.

Mechanics' Liens.

Governed by Mechanics' Lien Law of 1963. (49 P.S. § 1101 et seq.).

Who May Acquire.

Contractors and subcontractors, as defined in Act (49 P.S. § 1201), may file liens for debts arising from erection, construction, alteration or repair of improvement on real property provided such claims shall exceed $500. (49 P.S. § 1301). Erection and construction are defined to include substantial addition to existing improvement. (49 P.S. § 1201).

Property subject to mechanics' liens includes every improvement and estate or title of owner in property improved. (49 P.S. § 1301). However, no lien is allowed in following cases: (a) for labor or materials furnished for public purpose; (b) where property is conveyed for valuable consideration prior to filing of claim for alterations or repairs; (c) certain improvements of leasehold premises; and (d) where claimant holds security interest under Uniform Commercial Code for materials furnished, or where he has reserved title or right to acquire title. (49 P.S. § 1303).

Perfecting Liens.

To perfect lien for any improvement, contractor must file claim within six months after completing work. Within one month after filing claim, he must serve upon owner notice that claim has been filed, specifying court, term and number; within 20 days after service, affidavit of service of such notice must be filed. (49 P.S. § 1502).

Subcontractor must, in addition to complying with above requirements, serve upon owner formal written notice of intention to file claim for lien at least 30 days prior to filing except that no such notice is required where claim is filed pursuant to rule to do so entered by owner or contractor. (49 P.S. § 1501, 1506). If lien is claimed for alterations or repairs, subcontractor must serve, on or before date of completion of his work, in addition to notice, written preliminary notice of intention to file claim if amounts due or to become due are not paid. (49 P.S. § 1501).

Lien of alterations or repairs dates from filing of claim. Lien for erection or construction dates from date of visible commencement of work upon ground. (49 P.S. § 1508).

Claim is filed in office of prothonotary of court of common pleas in county where improvement is located and must set forth: (a) Name of claimant and whether he files as contractor or subcontractor, (b) name and address of owner or reputed owner, (c) date of completion of claimant's work, (d) if filed by subcontractor, name of person with whom he contracted and dates on which he gave preliminary notice, if required, and formal notice of intention to file, (e) if filed by contractor under contract for agreed sum, identification of contract and brief statement of kind and character of labor or materials furnished, (f) in all other cases except that set forth in clause (e), detailed statement of kind and character of labor or materials furnished and prices charged for each, (g) amount claimed to be due and (h) such description as will reasonably identify improvement and property against which claim for lien is filed. (49 P.S. § 1502, 1503).

Subordination.

Mechanics' liens subordinated to purchase money and open-end mortgages. (49 P.S. §

1508[b]).

Waiver.

For work on residential buildings, contractor or subcontractor may waive right to file claim by written instrument signed by him or by any conduct raising equitable estoppel. (49 P.S. § 1401[a]). For work on nonresidential buildings, waiver by contractor or subcontractor of lien rights is void as against public policy unless given in consideration of payment actually received. (49 P.S. § 1401[b]). Waiver operating against subcontractor may also be by written contract between owner and contractor or separate written instrument signed by contractor providing that no claim shall be filed by anyone; however, there must be proof that subcontractor had actual notice thereof before he furnished any labor or materials or proof that such contract or written instrument was filed in office of prothonotary prior to commencement of work upon ground, or within ten days after execution of principal contract, or not less than ten days prior to contract with claimant subcontractor. (49 P.S. § 1402).

Enforcement of Lien.

No executions shall issue against property subject to claim except after judgment is obtained and within five years from date of such judgment or revival thereof. (49 P.S. § 1706). Action to obtain judgment shall be commenced within two years from date of filing of claim and verdict must be recovered or judgment entered within five years from date of filing of claim. Claim shall be lost if not prosecuted to verdict or judgment within that period. (49 P.S. § 1701). Time consumed in presentation and disposition of all motions and petitions of defendants and in appeals shall be excluded in computation of five-year period. (49 P.S. § 1701). Procedure for reducing claim to judgment is governed by P. R. C. P. 1651-61. Practice and procedure for execution is governed by Pennsylvania Rules of Civil Procedure. (49 P.S. § 1706). See topic 8.05 Executions. Judgment upon any claim shall be revived within each recurring five-year period according to practice and procedure set forth in Judgment Lien Law of 1947. (49 P.S. § 1705). See category 5 Civil Actions and Procedure, topic 5.15 Judgments.

Removal of improvements subject to lien of filed claim may be enjoined by court upon petition. No improvement subject to lien of filed claim shall be removed except pursuant to title obtained at judicial sale. If improvement is unlawfully removed, it remains liable to claim filed except in hands of purchaser for value. (49 P.S. § 1307).

Public Works.

General contractor must give bond to secure payment for labor and material furnished in prosecution of work. Bond covers labor or material furnished to either general contractor or any subcontractor and any person furnishing labor or material has right of action on bond. “Labor and materials” is defined to include public utility services and rentals of equipment for use at site. (8 P.S. § 193, 194).

Attachment Lien.

See topic 8.02 Attachment.

Attorney's Lien.

See category 18 Legal Profession, topic 18.01 Attorneys and Counselors.

Carrier's Lien.

See category 3 Business Regulation and Commerce, topic 3.08 Carriers.

Execution Lien.

See topic 8.05 Executions.

Judgment Lien.

See category 5 Civil Actions and Procedure, topic 5.15 Judgments.

Landlord's Lien.

See category 21 Property, topic 21.10 Landlord and Tenant.

Liens on Exempt Property.

See topic 8.06 Exemptions.

Liens on Homestead.

Pennsylvania has no Homestead Law.

Real Estate Mortgage Lien.

See category 20 Mortgages, topic 20.04 Mortgages of Real Property.

Tax Liens.

See category 22 Taxation, topic 22.17A Tax Liens.

Motor Vehicles.

See category 23 Transportation, topic 23.01 Motor Vehicles.

For other liens discussed in various topics in this digest, see categories 3 Business Regulation and Commerce, topics Carriers, Factors; and Employment, topic Labor Relations.

8.14 MECHANICS' LIENS:

See topic 8.13 Liens.

8.15 PLEDGES:

Pledges are among the security devices governed by Uniform Commercial Code, Division 9. dealing with secured transactions. (13 Pa.C.S. § 9101). See category 3 Business Regulation and Commerce, topic 3.09 Commercial Code.

Attachment of things pledged (subject to the rights of the pledgee) is a recognized means of enforcing judgments of third parties. (P. R. C. P. 3101[b][2]).

Accounts Receivable.

For priority between successive pledgees of the same accounts receivable, see Uniform Commercial Code, Div. 9. (13 Pa.C.S. § 9101).

Trust receipts are among security devices governed by Uniform Commercial Code, Div. 9. (13 Pa.C.S. § 9101). Code repealed Uniform Trust Receipts Act. See category 3 Business Regulation and Commerce, topic 3.09 Commercial Code.

8.16 RECEIVERS:

Receivers may be appointed where necessary to save property from injury or threatened loss or dissipation, but will not be appointed where receivership is sole relief asked or where another safe, expedient, adequate and less drastic remedy is available. (475 Pa. 57, 379

A.2d 870). Receivers of insolvents may be appointed on petition of creditors. (39 P.S. § 31, 33).

Jurisdiction to appoint receivers in general (42 Pa.C.S. § 931) and receivers of insolvents (39 P.S. § 31, 33, 35) is conferred upon courts of common pleas. Court may appoint no one except Secretary of Banking or, in some cases, party recommended by secretary as receiver of banking institution. (71 P.S. § 733[606]).

Proceedings.

In an action, court may appoint receiver for property or may permit person in possession to retain it if he gives such security as court may direct. Temporary receiver may be appointed without notice if required by exigencies of case, but only if plaintiff puts up bond or legal tender in amount fixed by court to indemnify any injured person against damages and costs in event that appointment is vacated because improperly made. In such cases, hearing is held promptly after appointment and receiver must notify all persons interested, including creditors and stockholders, if any, whose addresses are known or can be ascertained. On appointing permanent receiver, court must also appoint two appraisers to inventory and appraise all assets of defendant. (P. R. C. P. 1533).

Eligibility and Competency.

No officer of corporation or member of partnership may be appointed as sole temporary receiver of corporate or partnership property; but, after hearing, such officer or member may be appointed sole permanent receiver. (P. R. C. P. 1533).

Qualification.

Before a receiver in equity may act, he must give such security for the faithful performance of his duty as the court may direct. (P. R. C. P. 1533). Receivers appointed under 39 P.S. § 35 must file oath or affirmation (39 P.S. § 41) and bond (39 P.S. § 42) with court.

Powers and Duties.

The order appointing receiver fixes time within which he must file report of property of debtor, interests in and claims against it, its income-producing capacity and recommendations as to best method of realizing its value for those entitled. (P. R. C. P. 1533). When receiver files his account, he must give notice of intention to apply for confirmation thereof on date fixed by court or local rule. Notice must state that account may be confirmed and distribution ordered unless exceptions are filed with prothonotary before that date. Court may order partial distribution and may require filing of refunding bonds by claimants. (P. R. C. P. 1534).

Receiver must report to Secretary of Revenue of Commonwealth any unclaimed or abandoned property. (72 P.S. § 1301.11). Receiver may not sell property of any person without first filing report with Department of Revenue at least 20 days prior to sale. (42 Pa.C.S. § 8151).

Discharge.

Any creditor may move court to discharge any receiver of insolvent for dereliction of duty or other reason or receiver may voluntarily petition his own discharge. (39 P.S. § 131).

8.17 REDEMPTION:

See topic 8.05 Executions; categories 20 Mortgages, topic Mortgages of Real Property; Taxation, topic Property (Ad Valorem) Taxes, subhead Redemption.

8.18 SUPPLEMENTARY PROCEEDINGS:

See topic 8.05 Executions.

8.19 TRUSTEE PROCESS:

See topics 8.02 Attachment, 8.05 Executions.

8.20 USURY:

See category 3 Business Regulation and Commerce, topic 3.19 Interest.

9 DISPUTE RESOLUTION

9.01 ALTERNATIVE DISPUTE RESOLUTION:

Mandatory (Alternative) Dispute Resolution.

Courts of common pleas authorized by statute, 42 Pa.C.S. § 7361, to establish by rule compulsory arbitration in cases involving $50,000 or less in larger counties and $25,000 or less in smaller counties. Actions involving title to real property excluded. Judgments entered on arbitrators' award enforced as any other judgment of court. Right to trial de novo granted, upon payment of fees and costs. Pennsylvania Rules of Civil Procedure governing compulsory arbitration are P.R.C.P. 1301 et seq. Attorneys must consult local court of common pleas rules for details of any compulsory arbitration program.

Court of Common Pleas of Philadelphia County provides for compulsory arbitration before panels of three lawyers under civil rules 1301-05, 1308. Arbitration has jurisdiction up to $50,000 except equity actions, cases involving title to real estate, and appeals from municipal court. Procedures are similar to judge-tried cases, including right to discovery and damages for delay, but expert witness reports, specific damages, and other items listed in local rule may be proved by documents alone. Trial de novo permitted by appeal within 30 days after entry of arbitration award on docket. Appellant must reimburse prothonotary cost of arbitrators' compensation. Cases heard at Arbitration Center, 1601 Market Street, 2nd Floor.

United States District Court, Eastern District of Pennsylvania provides, under local rule 53.2, for compulsory arbitration before panels of three lawyers of civil cases seeking money damages only not in excess of $100,000. Excluded are social security cases, cases in which prisoner is party, constitutional claims, and civil rights claims with jurisdiction based on 28 U.S.C. §1343. Federal Rules of Evidence used as guides to admissibility of evidence. Subpoenas available for attendance of witnesses and production of documentary evidence at hearing. Upon payment of arbitrators' fees, party may demand trial de novo at which court or jury may not consider arbitrators' award.

Eastern District of Pennsylvania also requires, under experimental local rule 53.2.1, mediation for purposes of early settlement in all odd-numbered civil cases except social security and other specifically exempted matters. Within 60 days after first appearance of defendant, conference is held with mediator from roster of mediators certified by chief judge.

United States District Court, Middle District of Pennsylvania provides, under local rules, for referral of any civil action to mediation in judge's discretion. Mediation is conducted before mediators certified by chief judge and serving pro bono. Judges also have discretion to refer cases to magistrate judges or neutral evaluators for conduct of settlement conferences.

United States District Court, Western District of Pennsylvania establishes, under local rule 16.3, mediation/neutral evaluation conducted by adjunct settlement judges certified by chief judge. Judge to whom case assigned has discretion to order any action for mediation/neutral evaluation.

Voluntary (Alternative) Dispute Resolution.

Mediation is available at discretion of parties subject to compulsory arbitration in Court of Common Pleas of Philadelphia County. Voluntary arbitration available to parties to civil actions in Western District of Pennsylvania. Local rule 16.2 sets up system of arbitration for all civil actions involving only money damages but permits parties to withdraw any case from arbitration by notice.

Pennsylvania, and especially Philadelphia, is site for many private organizations offering alternative dispute resolution services to litigants and the Bar. See listings in Martindale-Hubbell Dispute Resolution Directory.

Offers of Compromise.

Compromise offers inadmissible to prove or disprove liability. Evidence of conduct or statements made in compromise negotiations inadmissible (P. R. E. 408).

Settlement Funds Delivery.

Failure to deliver settlement funds within 20 days of delivery of executed release subjects defendant to interest sanction. (P. R. C. P. 229.1).

Structured Settlement Protection Act requires court approval for transfer of payment rights under structured settlements. (40 P.S. § 4001 et seq.; P. R. C. P. 229.2).

See topic 9.02 Arbitration and Award.

9.02 ARBITRATION AND AWARD:

Parties by agreement may submit controversies to common law arbitration, statutory arbitration, or if rule so provides, judicial arbitration. (398 Pa. 457, 159 A.2d 708; 42 Pa.C.S. § 7362).

Form and Requisites of Submission.

Agreement for submission to arbitration only binding if arbitrators specified and other contract formalities met. (33 F. Supp. 362; 207 Pa. 539, 56 A. 1079). Agreement may be oral or written, but statutory arbitration only available if specified in writing. (158 Pa. Super. 170, 44 A.2d 321; 476 Pa. 456, 383 A.2d 189).

Contracts to Arbitrate Future Disputes.

Arbitration at common law unless otherwise specified. (476 Pa. 456, 383 A.2d 189).

Judgment on Award.

On application in statutory arbitrations, court will enter order confirming award and entering judgment. (42 Pa.C.S. § 7313). On application made more than 30 days after award in common law arbitrations, court will enter order confirming award and entering judgment. (42 Pa.C.S. § 7342[b]).

Enforcement.

Unless otherwise agreed, common law award only enforceable in action at law. (305 F.2d 811). Common law arbitration award only modified by court when party denied hearing or fraud, misconduct, or irregularity caused rendition of unjust, inequitable or unconscionable award. (42 Pa.C.S. § 7341; 476 Pa. 456, 383 A.2d 189).

Mandatory Arbitration.

When local rules of court provide, arbitration mandatory in first instance for civil claims unrelated to real estate title which amount to less than $50,000. (42 Pa.C.S. § 7361; 75 Pa.C.S. § 1794; P. R. C. P. 1301 et seq.). Absolute right of appeal de novo. (42 Pa.C.S. § 7361; P. R. C. P. 1311). Applicable time period for such appeal is 30 days. (310 Pa. Super. 140, 456 A.2d 222). Arbitration also required for controversies involving withdrawal of bid submitted to public bodies (73 P.S. § 1604) and construction of capital improvements for state (71 P.S. § 638[12]). Special boards have exclusive mandatory arbitration jurisdiction over health care malpractice claims (40 P.S. § 1301.101 et seq.) and contract claims against state (72 P.S. § 4651-1 et seq.). See topic 9.01 Alternative Dispute Resolution, subhead Mandatory (Alternative) Dispute Resolution.

Powers of Arbitrators.

Arbitrators can compel attendance of witnesses and require production of documents. (42 Pa.C.S. § 7309; 42 Pa.C.S. § 7342; 42 Pa.C.S. § 7361; 42 Pa.C.S. § 7362).

Rescission.

Parties to contract with arbitration clause may mutually rescind that remedy by proceeding to litigate without objection. (309 Pa. 314, 163 A. 668; P. R. C. P. 1304-1305).

Uniform Arbitration Act.

Adopted. (42 Pa.C.S. § 7301 et seq.). Common law arbitration (42 Pa.C.S. § 7341) and judicial arbitration (42 Pa.C.S. § 7361) also available. Subsection 42 Pa.C.S. § 7361(b)(2)(i) repealed insofar as inconsistent with Motor Vehicle Financial Responsibility Law. (75 Pa.C.S. § 1701 et seq.).

Jurisdictional Arbitration Acts.

See topic 9.01 Alternative Dispute Resolution, subhead Mandatory (Alternative) Dispute Resolution.

Credentials of/Qualifications of/Standards for Arbitrators.

No general statutory provision. When mandatory arbitration by local court rule, arbitrators must be actively engaged in practice of law in that district, chair of panel must be admitted to practice of law for three years, and not more than one from same firm on same panel. (P. R. C. P. 1302).

Consumer Credit Arbitrations.

Procedures established to compel arbitration of and to confirm awards in consumer credit disputes. (P. R. C. P. 1326-31).

9.02A MEDIATION:

Jurisdictional Mediation Acts.

Courts of common pleas authorized to establish mediation programs for divorce and custody matters. (23 Pa.C.S. § 3901-3904). Court-established custody mediation programs and court-ordered individual custody mediations governed by Supreme Court rules. (P. R. C. P. 1940.1 et seq.). Attorneys must consult local court of common pleas rules for details of mediation program.

Credentials of/Qualifications of/Standards for Mediators.

Custody mediators in Courts of Common Pleas subject to several qualification standards. (P. R. C. P. 1940.4).

Mediation Privilege.

Subject to listed exceptions, mediation communications and documents are privileged from compelled disclosure and are inadmissible in evidence. (42 Pa.C.S. § 5949). They are also nondiscoverable. (P. R. C. P. 4011[d]).

10 DOCUMENTS AND RECORDS

10.01 ACKNOWLEDGMENTS:

Uniform Acknowledgment Act has been adopted. (21 P.S. § 291.1 to 291.13).

As Uniform Act permits acknowledgments to be taken as previously provided, it should be noted that other statutes authorize acknowledgments to be taken by officers as listed hereafter.

Within State.

Supreme court justices, judges, district justices and appointive judicial officers (42 Pa.C.S. § 327, 1513), certain mayors (21 P.S. § 144, 146, 149), notaries public (57 P.S. § 162), recorders of deeds (21 P.S. § 151, 152), deputies appointed by recorders of deeds (21 P.S. § 291.2[3]). Notary's authorized fee for acknowledgments as fixed by Secretary of Commonwealth is $2 for first signature and $1 for each additional signature. (4 P. C. 161.1).

Outside State but within United States.

Clerk or deputy clerk of federal court, clerk, prothonotary or deputy prothonotary or deputy clerk of court of record of other state, notaries public, recorders of deeds (21 P.S. § 291.3); commissioners of deeds appointed by Governor of Pa. (21 P.S. § 971); mayor or chief magistrate of place where acknowledgment is taken (21 P.S. § 41); any officer of state or territory who is locally authorized to take acknowledgment (21 P.S. § 185, 381).

Outside United States.

United States ambassadors, ministers plenipotentiary, chargés d'affaires, or other persons appointed by United States to exercise public ministerial functions (21 P.S. § 222); consuls, vice or deputy consuls, commercial agents, vice or deputy commercial agents, notary public or judge or clerk of court of record of country where acknowledgment is made (21 P.S. § 223, 291.4); commissioners in chancery in any foreign country (21 P.S. § 224).

Persons in or with U.S. Armed Forces.

Acknowledgment of any member of U. S. Armed Forces or of dependent of such member may be taken by any commissioned officer in active service with rank of second lieutenant or higher in Army, Air Force or Marine Corps, ensign or higher in Navy or Coast Guard, or with equivalent rank in any other component part of such forces. (21 P.S. § 291.10a, 57 P.S. § 54d).

General Requirements as to Taking.

Official must know or have satisfactory evidence that acknowledger is person described in and who executed instrument. (21 P.S. § 291.5).

General Requirements of Certificate.

It should contain date, venue, name of acknowledger, and signature of officer taking acknowledgment, his official position, his seal, if notary, date of expiration of his commission and location of his office. (21 P.S. § 291.7, 291.8; 57 P.S. § 160). Lack of embossed impression may be disregarded by recorder of deeds. (21 P.S. § 291.8). See topic 10.03 Notaries Public, subhead Powers and Duties.

Married Women.

Same form as though unmarried. (21 P.S. § 82, 291.6).

Testators.

Acknowledgments necessary to self-proved wills are governed by statute. (20 Pa.C.S. § 3132.1).

Attorneys in Fact.

Acknowledgments should be as act of their principal as well as their own act. (21 P.S. § 291.7[3]).

Corporations.

Acknowledgments made by officer authorized to do so. (21 P.S. § 291.7[2]). May also be made by attorney duly authorized. (21 P.S. § 111).

Foreign Acknowledgments.

Uniform Acknowledgment Act has been adopted. (21 P.S. § 291.1 to 291.13).

Effect of Acknowledgment.

Certificate of acknowledgment to written instrument is prima facie evidence of due execution of written instrument (21 P.S. § 46), but is subject to rebuttal where fraud is alleged.

Unacknowledged deeds cannot be recorded. (21 P.S. § 42).

Proof by Witnesses.

Unacknowledged instrument may be proved by two eye witnesses (need not be subscribing witnesses) before any officer authorized to take acknowledgments. (21 P.S. § 42). Handwriting may be proved by two persons if eye witnesses not available. (21 P.S. § 44, 45).

Authentication.

Acknowledgments taken within this state for use within this state are sufficiently proved prima facie by certificate of acknowledgment of proper officer under seal. (21 P.S. § 46, 291.9).

Acknowledgment taken outside of this state but in U. S., territory or District of Columbia need not be authenticated if official before whom it is taken affixes his official seal; acknowledgment taken outside of U. S. must be authenticated by certificate as to official character of officer taking it. (21 P.S. § 291.9).

Forms are prescribed by Uniform Acknowledgment Act (21 P.S. § 291.7; see reprint in Part III of this volume). While other forms sometimes may be used, it is best to use statutory forms provided by Uniform Act.

Act 1981-71 adds additional form of certificate:

(5) By an attorney at Law-

State of . . . .

County of . . . .

On this, the . . . . day of . . . ., (year) . . . . . ., before me . . . ., the undersigned officer, personally appeared . . . ., known to me (or satisfactorily proven) to be a member of the bar of the highest court of said state and a subscribing witness to the within instrument, and certified that he was personally present when . . . . whose name . . . . subscribed to the within instrument executed the same, and that said person . . . . acknowledged that . . . . he . . . . executed the same for the purposes therein contained.

In witness hereof, I hereunto set my hand and official seal.

. . . .

. . . .

Title of Officer

Alternative to Acknowledgment or Proof.

No statutory provision.

Validating Acts.

Various validating acts have been passed most recent applying to acknowledgments prior to 2005. (21 P.S. § 281.1).

10.02 AFFIDAVITS:

Within state affidavits may be taken by notaries (57 P.S. § 162), judicial officers, clerks of court and others designated by general rules (42 Pa.C.S. § 327) and, where affidavit required by statute, by any officer or individual designated by law as one before whom it may be taken (1 Pa.C.S. § 1991). Any oath which statute requires to be administered by notary may be administered by magistrate, alderman or district justice. (57 Pa.C.S. § 55). Certain affidavits may be taken by members of veterans' organizations (51 Pa.C.S. § 9102) and by state administrative officials (71 Pa.C.S. § 197). Notary fee for affidavit limited to $2. (4 P. C. 161.1). Notary may waive fee in whole or in part in any particular case. (57 P.S. § 167[c]).

Outside state but within United States affidavit may be taken by commissioners of deeds appointed by governor. (21 Pa.C.S. § 971, 972).

Outside United States ambassadors, ministers plenipotentiary, charges d'affaires, or other U.S. officials exercising public ministerial functions may administer oaths and affirmations for instruments under seal executed in form prescribed by Pennsylvania law. (21 Pa.C.S. § 222).

Persons in Armed Forces.

Affidavit of member of U.S. Armed Forces and spouse may be taken by certain officers in U.S. Armed Forces (57 Pa.C.S. § 54d), or by any person having general notarial powers under Uniform Code of Military Justice, 10 U.S.C.A. 936 (57 Pa.C.S. § 54b).

General Requirements as to Administration.

There is no statutory requirement concerning knowledge of identity of affiant. However, affiant must appear before notary. (24 Pa. Cmnwlth. 613, 357 A.2d 703; 59 D.&C.2d 796).

General Requirements of Jurat.

Notarial seal, statement of expiration date of notary's commission and location of his office required. (57 P.S. § 160). See topic 10.03 Notaries Public. Clerk employed by bank, banking institution or trust company who is also notary is forbidden from protesting checks, notes, drafts, bills of exchange or other commercial paper for such institution. All fees of any such notary belong to notary, not to corporation of which he or she is director or clerk. (57 P.S. § 167[d]). No district justice, magistrate or alderman, holding office of notary, shall have jurisdiction in cases arising on papers containing his or her acts as notary. Notary public forbidden from acting in transactions in which he or she has direct or pecuniary interest. (57 P.S. § 165).

Use of Affidavit.

Ex parte affidavit inadmissible to establish independent fact. (267 Pa. 233, 109 A. 922; 160 Pa. Super. 480, 52 A.2d 373).

Form.

General form of affidavit is as follows:

Form

COMMONWEALTH OF PENNSYLVANIA, COUNTY OF : SS.,. . . . . . being duly sworn according to law deposes and says . . . .

. . . .

(Signature of Affiant).

Sworn to and Subscribed before me this . . . . . . day of . . . ., 20. . .

(Officer Administering Oath), (Seal),

(Official Character).

Alternative to Sworn Affidavit.

Affidavit includes statement in writing of fact or facts, signed by person making it, that is unsworn but contains statement that it is made subject to penalties of 18 Pa.C.S. §4904 relating to unsworn falsification to authorities. (P.R.C.P. 76).

10.03 NOTARIES PUBLIC:

Appointment and conduct of notaries is regulated by Notary Public Law. (57 P.S. § 147 et seq.).

Qualification.

Notary must take oath of office and shall give surety bond in amount of $10,000. (57 P.S. § 154). Within 45 days after appointment or reappointment, and within 30 days after transferring office to another county, notary must register signature in office of prothonotary for county where notary's office is maintained and in counties of second class, also with clerk of court. (57 P.S. § 155).

Authentication.

Notarized domestic documents authenticated by notary seal; foreign documents authenticated by final certification of official. (42 Pa.C.S. § 5328). See topic 10.01 Acknowledgments.

Eligibility.

Any citizen of Pennsylvania 18 years of age or older who is of good character and ability and resides or is employed in Pennsylvania. (57 P.S. § 149).

Seal.

Notary must authenticate all acts by notarial seal which shall show clearly in following order: Words “NOTARIAL SEAL”; name and surname of notary and words “Notary Public”; name of municipality and county in which notary maintains office; and date notary's commission expires. Electronic seals not required for electronic records and signatures. (57 P.S. § 158).

Powers and Duties.

Notary has power to administer oaths, take acknowledgments of all writings, including commercial paper, and take depositions and affidavits. (57 P.S. § 162). Notaries may not perform official acts for transactions in which they have financial interest. (57 P.S. § 165).

Certified copies of any notary's official act may be received and read in evidence as proof of facts stated therein. (42 Pa.C.S. § 6105).

Territorial Extent of Powers.

Jurisdiction of each notary is statewide. (57 P.S. § 148).

Expiration of Commission.

Every notarial act must bear statement below notary's signature giving date when his commission expires and location of his office. (57 P.S. § 159). Should renewal application be rejected or commission revoked, notary shall deliver seal to Department of State within ten days after notice of rejection or revocation. Criminal penalties attach for violation of this requirement. (57 P.S. § 168.1).

Fees for notarial acts are fixed by Secretary of Commonwealth. (57 P.S. § 167).

Certificate of Authority.

See topic 10.01 Acknowledgments, subhead Authentication.

Commissioners of deeds have power to take acknowledgments and to administer oaths. (21 P.S. § 972).

Officers of U.S. Armed Forces have power to take acknowledgments. (57 P.S. § 54b, 54d). See topic 10.01 Acknowledgments.

10.04 RECORDS:

Each county has recorder of deeds who has charge of records relating to property. (16 P.S. § 9701).

For list of Counties and County Seats see first page for this state in Volume containing Practice Profiles Section.

Uniform Commercial Code has been adopted. (13 Pa.C.S. § 1101 et seq.). See category 3 Business Regulation and Commerce, topic 3.09 Commercial Code.

Recordable Instruments.

Any instrument affecting any right, title or interest in real estate should be recorded in office for recording of deeds in county where real estate is located and so recorded is constructive notice to world of its contents. Deeds executed within state must be recorded within 90 days; those executed out of state and all mortgages must be recorded within six months. (21 P.S. § 356, 357, 444, 445, 621). Deeds are indexed under names of both grantor and grantee and mortgages are indexed under names of both mortgagor and mortgagee. (16 P.S. § 9851).

Deeds and other instruments affecting real property which are not recorded in proper county are regarded as fraudulent and void as to subsequent bona fide purchasers or mortgagees without actual or constructive notice whose deeds or mortgages are first recorded. Judgment creditor is within protection of Act. (21 P.S. § 351). However, actual possession is constructive notice of interest of possessor in premises. (299 Pa. Super. 260, 445 A.2d 744).

All deeds, mortgages or transfers of interest in real estate must have exact addresses of all grantees or mortgagees certified prior to recording. (16 P.S. § 9781, 9782; 21 P.S. § 625).

Place of Recording.

Any instrument affecting real estate should be recorded in office for recording deeds in county where real estate is located (21 P.S. § 444); probated wills should be recorded by register of county where decedent had last family or principal residence (20 Pa.C.S. § 921, 3131); copies of wills may be filed with register in counties where decedent owned real estate (20 P.S. § 924); commercial code filings should be with Secretary of State, prothonotary or recorder of deeds of county depending upon nature of instrument (13 Pa.C.S. § 9401).

Requisites for Recording.

Before instrument can be recorded, it must be properly acknowledged by person executing it or proved by two witnesses or, in specified cases, by proof of handwriting. (21 P.S. § 42 to -45, 325.1).

Recording Fees.

Ranges of fees are controlled by statute and vary according to size of county. Specific fee charged is established by each county and thus varies from county to county. (42 Pa.C.S. § 1725; 42 Pa.C.S. § 21051).

Foreign Conveyances or Encumbrances.

Conveyance or encumbrance executed and proved out of state by witness before proper officer of jurisdiction where instrument is executed may be recorded. (21 P.S. § 381).

Uniform Acknowledgment Act has been adopted. (21 P.S. § 291.1 et seq.). Thus, acknowledgment in conformity with law of state, territory, or insular possession where executed, is effective acknowledgment. (21 P.S. § 291.10).

Effect of Recording.

Recording charges all persons interested with constructive notice of contents of instrument. (21 P.S. § 357).

Torrens Act.

Torrens system of land registration has not been adopted.

Transfer of Decedent's Title.

Where resident testator has devised real estate in county other than that in which he resided, copy of will and probate thereof (certified by register of wills of county where probated) may be filed in office of register of wills of any county in which real estate is located. (20 Pa.C.S.

§ 924).

In case of nonresident testator, duly authenticated copy of will proved according to law where probated may be filed with register of wills where real estate is located and letters testamentary or of administration may be issued. If, in addition to such copy, duly authenticated copy of probate proceedings is filed, letters will be issued without further proof of will unless will was probated outside U.S. and it is proved that essential requirement of Pennsylvania law has not been met. (20 Pa.C.S. § 3136).

Exemplified copies of wills probated outside of Pennsylvania must be recorded by recorder of deeds in grantor index under name of testator and in grantee index under name of devisee of Pennsylvania real estate. Each will so recorded and indexed constitutes notice to all persons of existence thereof. (21 P.S. § 403).

There are no statutory provisions relating to record evidence of transfer of title by intestacy.

Filing Under Commercial Code.

Where local law of Pennsylvania governs perfection of security interest or agricultural lien, proper office in which to file financing statement to perfect security interest or agricultural lien is either (a) office designated for filing or recording of record of mortgage on related real property if (i) collateral is as-extracted collateral or timber to be cut, or (ii) financing statement is filed as fixture filing and collateral is goods which are or are to become fixtures, or (b) office of Secretary of Commonwealth in all other cases, including case in which collateral is goods which are or are to become fixtures and financing statement is not filed as fixture filing. (13 Pa.C.S. § 9501[a]). To perfect security interest in collateral, including fixtures, of transmitting utility, however, office in which to file financing statement is office of Secretary of Commonwealth. (13 Pa.C.S. § 9501[b]). Financing statement also constitutes fixture filing as to collateral indicated in financing statement which is or is to become fixtures. Except as specified at 13 Pa.C.S. § 9516(b), communication of record to filing office and tender of filing fee (specified under 13 Pa.C.S. § 9525) or acceptance of record by filing office constitutes filing. (13 Pa.C.S. § 9516[a]). Record communicated as required to constitute filing, but which filing office refuses to accept for reason not set forth as exception under 13 Pa.C.S. § 9516(b), is effective as filed record except as against purchaser of collateral that gives value in reasonable reliance upon absence of record from files. (13 Pa.C.S. § 9516[d]).

Vital Statistics.

This subject is governed by Vital Statistics Law of 1953. (35 P.S. § 450.101 et seq.). Certified copies of certain records may be obtained as follows: Birth certificate or death certificate from Division of Vital Records, P.O. Box 1528, New Castle, Pa. 16103; fees $4 for birth certificate and $3 for death certificate (28 P.C. 1.46); marriage certificate from clerk of orphans' court in county where license issued or from Division of Vital Records if issued since Jan., 1941 (fees vary [48-1-19]); divorce and annulment decrees from prothonotary in court where entered or from Division of Vital Records if entered since Jan., 1945.

Delayed registration of any vital statistics is subject to regulations prescribed by Pennsylvania Advisory Health Board, Harrisburg. (35 P.S. § 450.702).

Person born in state prior to Jan. 1, 1906, of whose birth no complete or correct record exists in orphans' court of county in which person was born may petition court for delayed special registration, or correction or completion, of record of birth; forms may be obtained from clerk of court. Hearing may be held and if court is satisfied as to facts, it orders record of birth filed and recorded upon payment of filing fee of $2.50, which includes one certified copy of record. Fee for additional certified copies is $1 each. (35 P.S. § 491, 492, 495).

Public Records.

Right-to-Know Law adopted. (65 P.S. §67.101 et seq.). All Commonwealth, local, judicial, and administrative agencies designate open-records officer to receive record request, furnish or deny record, and maintain file on matter. (65 P.S. §502). If not exempt (65 P.S. §708) or privileged, records presumed to be available to public (65 P.S. §305), and must be accessible for inspection and duplication in accordance with this Law (65 P.S. §305).

10.05 SEALS:

Use of seals has not been abolished, but written instrument need not have seal to provide consideration if it contains express statement in any form that signer intends to be legally bound. (33 P.S. § 6).

Word "seal" or "L. S.," written or printed, or any marks or lines intended as seal, has been held to constitute good and sufficient seal (144 Pa. S. 440, 19 A.2d 617), and, with printed statement that parties have "set their hands and seal" to document, evidences contract under seal unless adequately rebutted (21 Pa. Comm. 630, 347 A.2d 524).

Uniform Commercial Code adopted. (13 Pa.C.S. § 1101 to 9507). See category 3 Business Regulation and Commerce, topic 3.09 Commercial Code.

Corporate Seals.

Corporations have power to have and use seal and alter it at pleasure (15 P.S. § 1302[3]), but seal is not necessary for valid execution by corporation of any written instrument unless specifically required by law (15 P.S. § 1305).

Effect of Seal.

Seal imports consideration. (388 Pa. 206, 130 A.2d 453). Affixing of seal to writing evidencing contract for sale or offer to buy or sell goods does not constitute writing sealed instrument and law with respect to sealed instruments does not apply to such contract or offer under Uniform Commercial Code. (13 Pa.C.S. § 2203).

10.06 TORRENS ACT:

Not adopted.

10.07 VITAL STATISTICS:

See topic 10.04 Records.

11 EMPLOYMENT

11.01 EMPLOYER AND EMPLOYEE:

See topic 11.02 Labor Relations.

11.01A JOB CREATION:

Tax incentives provided for businesses established in areas designated as "strategic development areas" by Governor. (72 P.S. § 9901-C et seq.).

11.02 LABOR RELATIONS:

Department of Labor and Industry, headed by Commissioner of Labor and Industry, and its Industrial Board have broad powers over working conditions and practices. (71 P.S. § 561 to 574, 1442 to 1444).

Labor regulations promote health and safety of workers in manufacturing plants. Special provisions govern bakeries, lead manufacturing establishments, mines, railroads and industrial homework, etc. Elaborate regulations protect women in industry. The Pennsylvania Human Relations Act prohibits discrimination. (43 P.S. § 951 to 955). Many cities and counties have local ordinances and agencies which prohibit discrimination.

Pennsylvania Labor Relations Board exercises jurisdiction in labor disputes. (43 P.S. § 211.4; 211.8-211.10).

Hours of Labor of Women or Children.

No female 18 years or older may be employed or permitted to work in or in connection with any establishment for more than six days or more than 48 hours in any week or more than ten hours in any day. If this schedule of hours imposes unnecessary hardship and violates intent of Act, Secretary of Labor and Industry, with approval of Industrial Board, may issue general rules and regulations prescribing variations from schedule. (43 P.S. § 103). Women over 18 may be employed in manufacturing establishments during any hours, night or day, provided provisions of Act as to hours of labor, etc., and regulations of Industrial Board are complied with. (43 P.S. § 104). No female may be permitted to work for more than five hours continuously without meal or rest period of at least 30 minutes. (43 P.S. § 107). Every employer must post abstract of Act in conspicuous place, and keep accurate record of hours. (43 P.S. § 113).

Act does not apply to female agricultural field workers or female domestic servants in private homes nor does regulation of hours apply to registered nurses in hospitals, or females over 18 in executive, administrative or professional positions, or as confidential secretary or outside saleswoman. (43 P.S. § 103).

Numerous forms of employment are prohibited for minors under 16 and 18. (43 P.S. § 44). Minors between the ages of 16 and 18 can perform certain functions for volunteer fire companies (43 P.S. § 48.3) and under certain conditions work in establishments serving alcoholic beverages (43 P.S. § 44). Minors 14 and 15 years of age may work at ski resorts, golf courses, and amusement parks when not exposed to alcoholic beverages. (43 P.S. § 44). No minor under 18 may work more than six consecutive days or more than 44 hours in one week or more than eight hours in one day. No minor under 16 may work before 7 A. M. or after 7 P. M., with certain exceptions. (43 P.S. § 46). Specified occupations, and occupations declared dangerous by Industrial Board are prohibited to minors under 18. (43 P.S. § 44). Statute contains detailed requirements with respect to employment certificates, school records, certificates of physical fitness, proofs of age, etc. (43 P.S. § 49 through -56).

All provisions relating to hours of labor of women or children may be invalid under Federal Civil Rights legislation and Pennsylvania Human Relations Act. (325 F. Supp. 467, aff'd, 480 F.2d 240 [3d Cir. 1973]).

Wages.

Minimum wage rate is $6.25 beginning Jan. 1, 2007, $7.15 beginning July 1, 2007, and $7.25 effective July 24, 2009. (43 P.S. § 333.104[a]) subject to substitution of any federal minimum over these minimums (43 P.S. § 333.104[a.1]). Federal minimum wage is now $5.85 per hour. Overtime shall be at time and one-half. (43 P.S. § 333.104[c]). There are number of exceptions to minimum and overtime rates. (43 P.S. § 333.105). Secretary of Department of Labor and Industry has broad powers to investigate wages paid. (43 P.S. § 333.107). It is duty of every employer to keep true and accurate record of hours of each employee and wages paid to each, for three years and shall furnish to secretary upon demand sworn statement of same. (43 P.S. § 333.108). Unless otherwise stipulated by contract (and excepting railroad employees who must be paid weekly) wages must be paid at least semi-monthly, one of payments to be between 1st and 15th of month and other between 15th and end of month, but employers who desire to do so may pay at more frequent intervals. (43 P.S. § 251, 253, 255.1). Payment of wages on regular paydays and civil and criminal penalties for violations are governed by Wage Payments and Collection Act. (43 P.S. § 260.1 et seq.).

Discrimination in rate of pay because of sex is prohibited. (43 P.S. § 336.3).

Employer may pay wages, salary or any employee benefits not exceeding $5,000 due deceased employee, to his wife, children, father or mother, sister or brother (preference being given in the order named) without requiring letters of administration to be issued. Such payment fully discharges employer from any further claim for such wages. (20 Pa.C.S. § 3101[a]).

Wage liens are preferred to liens created by other instruments except mortgages or judgments entered prior to performance of labor. (43 P.S. § 224).

Wage claims for period not exceeding six months prior to sale or transfer of real or personal property by execution or otherwise on account of death or insolvency of employer are lien on property to extent of employer's interest and are preferred and first paid out of proceeds of sale. Lien, however, cannot be for more than $200. Claim must be filed in prothonotary's office within three months after it becomes due in same manner as mechanics' liens. (43 P.S. § 221).

In all cases of execution upon employer's property, wage claimant at any time prior to sale of employer's property can give written notice of his claim to officer executing writ and latter is authorized to pay claimant out of sale proceeds to amount not exceeding $200. (43 P.S. § 222).

Wages of employee may not be attached to satisfy debt or judgment, except in action for support or for board for four weeks or less or in proceeding pursuant to Higher Education Assistance Act. (42 Pa.C.S. § 8127; 24 P.S. § 5104[11]).

Labor Unions.

Employees have right to join union and to strike. (43 P.S. § 211.5). Collective bargaining (43 P.S. § 211.5, 211.7) is regulated by Pennsylvania Labor Relations Act (1937, P. L. 1168) which creates Pennsylvania Labor Relations Board. (43 P.S. § 211.4). Act applies to all employers except U.S., Commonwealth and any political subdivision thereof, any person subject to Federal Railway Act and any labor organization other than when acting as employer. (43 P.S. § 211.3). Pennsylvania does not have right to work law.

Public Employee Relations Act (43 P.S. § 1101.101 et seq.) extends right to organize and bargain collectively to employees of Commonwealth, its political subdivisions and any instrumentalities, and any nonprofit or charitable, religious, scientific, literary, recreational, health, educational or welfare institution receiving grants or appropriations from local, State or Federal Governments. (43 P.S. § 1101.301).

Labor Disputes.

Arbitration of labor disputes is generally provided for by Pennsylvania Labor Mediation Act. (43 P.S. § 211.31 et seq.). In case of labor disputes involving utility companies furnishing electric, gas, water and steam heat, when collective bargaining fails, compulsory arbitration may be resorted to. (43 P.S. § 213.1 to 213.8).

In event of bargaining impasse with public employees, parties may voluntarily submit to mediation. If no agreement reached within 21 days and mediation has not been utilized, both parties must call in Pennsylvania Bureau of Mediation. (43 P.S. § 1101.801). Arbitration is mandatory in public employee disputes involving interpretation of collective bargaining agreement. (43 P.S. § 1101.903).

Unfair labor practices are defined and prohibited by Pennsylvania Labor Relations Act (43 P.S. § 211.6) and are subject to control of Pennsylvania Labor Relations Board (43 P.S. § 211.8).

Following are unfair labor practices for employer: (a) To interfere with, restrain or coerce employees in exercise of rights under Act; (b) to dominate or interfere with formation or administration of any union or to contribute financial or other support to it; (c) by discrimination in regard to hiring or any term or condition of employment, to encourage or discourage membership in any union, but employers may enter into closed shop agreement with union which is representative of employees in appropriate collective bargaining unit covered by such closed shop agreement; (d) to discharge or otherwise discriminate against employee because he has filed charges or given testimony under Act; (e) to refuse to bargain collectively; (f) to deduct from wages any dues payable to union unless authorized by majority vote of all employees and by particular employee in writing. (43 P.S. § 211.6).

Following are unfair labor practices for union or employees: (a) To coerce employee to join union or to intimidate from joining any union; (b) to join sit-down strike; (c) to coerce employer to accede to demands by threats of violence; (d) to engage in secondary boycott; (e) to strike, boycott or picket any place of business on account of any jurisdictional controversy. (43 P.S. § 211.6).

Board has exclusive power to prevent any unfair labor practice. If unfair labor practice is charged, board must serve complaint on party charged and give notice of hearing thereon. Person so complained of may file answer and give testimony. In discretion of board any other person may be allowed to intervene. Rules of evidence in law or equity are not controlling. If board determines that person so charged has engaged in, or is engaging in, unfair labor practice, it must state its findings and order such person to cease such practice and to take such affirmative action, such as reinstatement of employees, as will effectuate policies of this Act. It may require such person to make reports from time to time showing extent to which order has been complied with. (43 P.S. § 211.8).

Strikes by public employees who are guards at prisons or mental hospitals, or persons necessary to functioning of courts are prohibited. (43 P.S. § 1101.1001). Strikes by other public employees are permitted after bargaining and mediation fail if such strike does not present a threat to health, safety or welfare of public. (43 P.S. § 1101.1003). Likewise prohibited are strikes by employees of utility companies furnishing electric, gas, water and steam heat service during compulsory settlement of labor disputes. (43 P.S. § 213.14). Collective bargaining by policemen and firemen employed by state or political subdivision of state are governed by 43 P.S. § 217.1 et seq. Additional provisions governing labor disputes involving public employees holding positions by appointment or employment in state government, including any agencies, boards, commissions etc. or in government of any political subdivision or in public school system are found in 43 P.S. § 215.1 et seq.

Injunctions.

Governed by Labor Anti-Injunction Act (43 P.S. § 206a et seq.) except in cases involving (a) labor dispute violating agreement arrived at through provisions of Pennsylvania or National Labor Relations Acts, (b) coercion of employer by union to require his employees to become members of union, (c) coercion of employer by employees or union to violate Pennsylvania or National Labor Relations Acts or (d) labor dispute wherein employees or union seize plant and equipment of employer to coerce collective bargaining. (43 P.S. § 206d).

No court may issue injunction against: (a) Refusing to work, (b) becoming or remaining member of union, (c) paying or withholding any strike or unemployment benefits or unemployment insurance, (d) aiding by lawful means any person involved in labor dispute before any court, (e) publicizing any labor dispute, (f) organizing in unions for collective bargaining, (g) persuading persons to boycott another, (h) refusing to work with any person or group of persons, (i) refusing to work on any goods, (j) assembling peaceably to promote interests in labor dispute, (k) advising any person of intent to do or not to do any of foregoing acts, (l) agreeing with other persons to do or not to do any of foregoing acts, (m) causing, without fraud or violence, others to do or not to do any of foregoing acts, or (n) doing in concert with others any of foregoing acts. (43 P.S. § 206f).

No injunction may be issued in any labor dispute except after hearing testimony of witnesses for both sides in open court and except after findings of fact by court to effect that: (a) Unlawful acts have been threatened or performed and will be performed or continued unless restrained, (b) substantial and irreparable injury to complainant's property will follow, (c) as to each item of relief granted greater injury will be inflicted on complainant by denial than on defendant by granting relief, (d) no item of relief granted is prohibited by this act, (e) complainant has no adequate remedy at law, and (f) public officers charged with duty to protect complainant's property are unable to furnish adequate protection. (43 P.S. § 206i).

No temporary injunction may issue until complainant files bond with adequate security to protect those enjoined from any loss, expense or damage, including costs and attorney's fee. (43 P.S. § 206j).

No relief may be granted to any complainant who has failed to comply with any obligation imposed by law involved in labor dispute or who has failed to make every reasonable effort to settle dispute. (43 P.S. § 206k).

No injunction may issue where employees are defendants or if employer has hired others to take their place, unless employer discharges latter and assigns defendants to their old positions. (43 P.S. § 206m).

Every injunction must contain provision that “complainant and/or employer be enjoined from acts or threats of violence, intimidation, coercion, molestation, libel or slander against organizations engaged in labor dispute.” (43 P.S. § 206n).

Every temporary injunction expires within such time as court may fix, not to exceed ten days, unless complainant is by that time ready to proceed to trial and pays necessary calendar and trial fees. Every permanent injunction expires at end of 180 days, unless extended for another 180 days after further hearing. (43 P.S. § 206p).

Procedure for settlement of labor disputes involving public utility companies furnishing electric, gas, water and steam heat services is established by 1947, P. L. 1161. (43 P.S. § 213.1 to 213.16).

Open Work Force Law.

Political subdivisions may not require percentage of workers or hours worked to be made up of or performed by residents of specific municipality if federal or Commonwealth funds utilized. (43 P.S. § 159.1 et seq.).

Prohibition of Illegal Alien Labor on Assisted Projects Act.

Knowing employment of illegal alien prohibited in projects using labor services financed in whole or part by Commonwealth grants or loans. (43 P.S. § 166.3). Penalty is full repayment of grant, penalty interest on loan, and repayment of loan if directed by agency. (43 P.S. § 166.4).

Workers' Compensation Act.

Act of 1915, P. L. 736, and its amendments cover field of industrial accidents.

"Employer" is synonymous with "master" and includes natural persons, partnerships, joint stock companies, corporations for profit, corporations not for profit, municipal corporations, Commonwealth and all governmental agencies created by it. (77 P.S. § 21). "Employer" includes compensation carrier and grants carrier immunity to common law liability. (439 Pa. 180, 268 A.2d 924). Employer who permits subcontractor or employee to engage another in services furthering employer's business is liable to such employee to same extent as to his own employees. (77 P.S. § 52).

"Employee" is synonymous with "servant," including all persons who perform services for consideration, excluding domestic servants (77 P.S. § 676) and other persons whose employment is casual and not in employer's regular course of business (77 P.S. § 22). Executive officers of corporations elected or appointed pursuant to charter or by-laws are employees of corporation, except elected officers of Commonwealth, but executive officers who do not receive remuneration for their services may choose not to be such. (77 P.S. § 22).

Minor may be entitled to compensation although he was employed in violation of law relating to employment of minors or obtained employment by misrepresenting his age. (77 P.S. § 421).

Accidents covered include only those which have occurred in course of employment. (77 P.S. § 411). Act applies to all accidents occurring within Commonwealth irrespective of place of hiring. (77 P.S. § 1). Under certain circumstances it applies to accidents occurring outside of state. (77 P.S. § 411.2).

In any action at law to recover damages for personal injury the defenses of negligence of fellow servant, assumed risk, contributory negligence (except intoxication or reckless indifference) are abolished. (77 P.S. § 41). If disability or death is compensable, fellow servant may not be held liable for his negligence. (77 P.S. § 72).

Acceptance of Act.

Compensation schedules are provided whereby amount of compensation recoverable for every type of injury is set forth. (77 P.S. § 511 to 513). Every employer is liable for compensation for personal injuries or death caused by injury to employee in course of employment. Compensation must be paid by employer, without regard to negligence, according to compensation schedules. No employee, however, is entitled to compensation where injury was self-inflicted, caused by violation of law, including illegal use of drugs, or when employee's intoxication caused injury or death. (77 P.S. § 431).

Insurance.

Every employer must insure his liability in State Workmen's Insurance fund or an authorized insurance company unless he has been exempted by Department of Labor and Industry. Provision is made whereby employers who insure in fund can escape personal liability for compensation. Employer may be exempted from insurance upon satisfying Department of Labor and Industry of his financial responsibility. (77 P.S. § 501).

Claims for compensation must be preceded by notice in specified form (77 P.S. § 632) to employer within 120 days of accident (77 P.S. § 631); must be filed with Workmen's Compensation Board within three years (77 P.S. § 602); and, if contested, are heard by Board or by referee appointed by Board. Employees seeking or receiving compensation are obliged to report to insurer details of any subsequent employment or self-employment (77 P.S. § 631.1), which may lead to suspension or reduction of payments (77 P.S. § 774.2, 774.3). Subject to mandatory provisions of Act and approval of workers' compensation judge, parties may settle disputed claims. (77 P.S. § 1000.5).

Rates of compensation for death, minimum and maximum base pay, and persons entitled to payment are specified. (77 P.S. § 541 to 563).

Awards and agreements for compensation are treated as judgments upon which execution may issue. Where disability is total and permanent and employer has defaulted on payments, judgment will be for $30,000 less amount employer paid in. (77 P.S. § 921). Compensation claims have same priority (without limit of amount) as have claims for unpaid wages for labor. (77 P.S. § 621). See supra, subhead Wages.

Uninsured Employers Guaranty Fund pays death and injury claims when employer uninsured. (77 P.S. § 2701 et seq.).

Occupational Diseases.

Compensation for occupational diseases is governed by 1939, P. L. 566, as am'd. (77 P.S. § 1201 to 2626). Pennsylvania Workers' Compensation Act was amended by adding section defining occupational diseases for purposes of that Act. Terms “injury,” “personal injury,” and “injury arising in the course of his employment,” shall include occupational diseases as defined. (77 P.S. § 27.1, 411).

The Pennsylvania Occupational Disease Act (77 P.S. § 1201 et seq.).—No person may receive compensation under Workers' Compensation Act and Occupational Disease Act during same period. Any person may pursue, in alternative, claim under each Act. (77 P.S. § 1000).

Act creates Pa. Workers' Compensation Advisory Council which shall consider and advise Department of Labor and Industry upon all matters related to administration of Pa. Workers' Compensation Act and Pa. Occupational Disease Act. (77 P.S. § 1000.3).

Unemployment Compensation.

Pennsylvania Unemployment Compensation Law (43 P.S. § 751 et seq.) is administered by Department of Labor and Industry (43 P.S. § 761). Each employer, whether or not liable for contributions under Act, must keep employment records. Such records must be retained by employer for four years after contributions relating to such records have been paid. (43 P.S. § 766).

Special provisions governing educational employees, athletes, aliens and corporate officers are found in 43 P.S. § 802.1 to 802.4. Special provisions relating to Commonwealth employees are found in 43 P.S. § 891. Special provisions relating to employees of non-profit organizations are found in 43 P.S. § 901 to 910. Special provisions relating to employees of political subdivisions are found in 43 P.S. § 911 to 914.

Contributions.

Provisions govern rates for employer and employee contributions to Pennsylvania Unemployment Compensation Fund. (43 P.S. § 781 to 782). Provision is made for transfer of experience record and reserve account balance to employer's successor. (43 P.S. § 781[d]). Interest fund tax requiring additional contribution by employers reduced under 1985 amendment (43 P.S. § 781.6) and surcharge imposed by 1988 amendment (43 P.S. § 781.5, .7).

Benefits.

Except with respect to weeks ending in benefit years which begin prior to Jan. 1, 1989, employee's weekly benefit rate shall be computed as greater of either: (1) Amount computed on basis of his highest quarterly wage, or (2) 50% of his full time weekly wage. Rate so computed is payable only if minimum qualifying wages have been earned in base year. Insufficient base year wages result in redetermination at lower rate. (43 P.S. § 804). “Base year” means first four of last five completed calendar quarters immediately prior to first day of individual's benefit year. (43 P.S. § 753). Benefits are reduced by entitlement to certain pension or annuity payments, vacation pay, severance allowance, etc. (43 P.S. § 804), but not for social security or railroad retirement pensions to which employee has contributed in any amount (43 P.S. § 804[4]) or for certain military pay (51 Pa.C.S. § 7318).

Eligibility requirements, in addition to one week waiting period, include payment of not less than 20% of total base year wages in one or more quarters, other than highest quarter of base year, activity in seeking suitable work and availability for work. (43 P.S. § 801). Further eligibility provisions found at 43 P.S. § 802 to 802.6. 1985 amendment governing eligibility of seasonal workers in fruit and food processing industry provides benefits to certain workers. (43 P.S. § 802.5). Extended Benefits Program covered by 43 P.S. § 811 et seq.

Definition of employment includes service wherever performed in U.S., Virgin Islands or Canada if such service is not otherwise covered by unemployment compensation law and control of such service is exercised from Pennsylvania. (43 P.S. § 753).

Workers who are unemployed as result of lockout are eligible for compensation, but not workers unemployed as result of strike. (476 Pa. 589, 383 A.2d 519, app. dismissed, 440 U.S. 977 (1979), reh'g denied, 441 U.S. 968 (1979)).

Procedure.

Department of Labor and Industry shall examine each claim for compensation and on basis of facts found by it determine whether or not claim is valid. (43 P.S. § 821[a]). If claim is invalid, notice must be given to claimant. Notice need not be given to employer unless employer has filed information in writing which raises question as to claim. (43 P.S. § 821[c]).

Unless claimant or last employer or base-year employer of claimant files appeal with Unemployment Compensation Board within 15 calendar days after notice was delivered to him personally, determination with respect to facts set forth in such notice shall be final and compensation shall be paid or denied in accordance therewith. (43 P.S. § 821[e]). Where appeal is taken, referee shall, after affording parties and Department reasonable opportunity for fair hearing, affirm, modify or reverse such finding of fact and determination, as case may be. Parties and Department of Labor and Industry shall be duly notified of decision and reasons therefor, which shall be deemed final decision of Board, unless within 15 days after date of such decision Board acts on its own motion or, upon application, permits any of parties or Department to file further appeal before Board. (43 P.S. § 822, 824).

Any decision by Department or any referee of Board shall not be subject to collateral attack unless appealed from. (43 P.S. § 829).

Employer Disclosure of Information.

Presumption of good faith when employer, upon request of prospective employer or current or former employee, discloses information to prospective employer. Employer is immune from civil liability in any case brought by current or former employee, unless bad faith shown with clear and convincing evidence as specified. (42 Pa.C.S. § 8340.1).

11.03 WORKERS' COMPENSATION LAW:

See topic 11.02 Labor Relations.

12 ENVIRONMENT

12.01 ENVIRONMENTAL REGULATION:

General Supervision.

Department of Environmental Protection is vested with powers and duties relating to matters of environmental concern formerly vested in other departments and commissions, including supervision and regulation of forests, waters, parks, mines and mineral industries, atomic energy, housing and environmental nuisances, such as air and water pollution, flood control, dams, wetlands, solid waste treatment, storage and disposal, and oil and gas conservation. (71 P.S. § 510-1 et seq.). Environmental Hearing Board has power to hold hearings and issue adjudications on any order, permit, license, or decision of Department of Environmental Protection. (35 P.S. § 7511 et seq.). Environmental Quality Board has power to formulate, adopt, and promulgate rules and regulations of Department of Environmental Protection. (71 P.S. § 510-20). Political subdivisions may create Environmental Advisory Council to advise other local agencies and to identify local environmental problems. (53 Pa.C.S. § 2321 et seq.). Two or more municipalities may, by authority of referendum of electors, form Environmental Improvement Compact (53 Pa.C.S. § 2501 et seq.). Where municipalities are properly proceeding under county or multi-municipal land use plan, state agencies shall consider and may rely upon such plans and conforming zoning ordinances in reviewing applications for funding or permitting of infrastructure or facilities. (53 P.S. § 11105[a]).

Central offices of Department are located in Rachel Carson State Office Building, 400 Market Street, Harrisburg, Pennsylvania, 17101.

Agricultural Area Security Law (3 P.S. § 901 et seq.) provides means to protect and enhance agricultural land as economic and environmental resource. Provides for establishment by local governments of Agricultural Security Area Advisory Committees which may authorize creation of local agricultural areas, within which operation of legislative powers and condemnation powers may be restricted in manner consistent with promotion and conservation of agricultural users. Also creates State Agricultural Land Preservation Board to purchase 25 year or longer agricultural conservation easements and authorizes county boards to make such purchases. Easements prevent development or improvement of land other than for agricultural production. Gives Secretary of Department of Agriculture power to promulgate rules and regulations.

Air Pollution Control Act (35 P.S. § 4001 et seq.) is administered by Department of Environmental Protection (71 P.S. § 510-1). Department's powers and duties include authority to make inspections, approve plans concerning air pollution control equipment, issue orders and permits, receive and originate complaints and institute legal proceedings. (35 P.S. § 4004).

Unlawful Conduct.

Unlawful to fail to comply or to cause or assist in violation of Act's requirements, to cause public nuisance, or to cause air pollution or soil or water pollution resulting from air pollution. Causation of air pollution defined to include presence in outdoor atmosphere of any form of contaminant or other matter in such place, manner or concentration inimical to public health, safety or welfare, injurious to human, plant or animal life, or which unreasonably interferes with enjoyment of life or property. (35 P.S. § 4003).

Enforcement.

Department may issue enforcement orders (35 P.S. § 4004[a]) and may initiate enforcement action to compel compliance with Act's requirements (35 P.S. § 4004[10]). Any District Attorney or solicitor of municipality may bring action in law or equity to restrain violation of Act or to abate public nuisance. (35 P.S. § 4013.6). Upon 60 days notice to Department and to alleged violator, any person may commence civil action to compel compliance with Act's requirements and access civil penalties, unless Department has commenced and is diligently prosecuting enforcement action in court or before Environmental Hearing Board. (35 P.S. § 4013.6).

Act preserves all existing rights and remedies in law or equity to abate air pollution in Commonwealth. (35 P.S. § 4012.1a).

Penalties.

Violation of provision of Act or of rule or regulation thereunder constitutes summary offense, subject to fine not less than $100 nor more than $2,500, and, in default thereof, imprisonment for period up to 90 days for each separate offense. Violation of provisions of Act or rule or regulation of board, or order of department may result in assessment of civil penalties per day for each violation. (35 P.S. § 4009.1). Willful or negligent violation of Act, rule, regulation, order or permit condition punishable by fine from $1,000 to $50,000 or imprisonment up to two years, or both, for each separate offense. (35 P.S. § 4009 [b][1]). Other specific violations are punishable by separately-specified fines and sentences.

Permits.

Except for routine maintenance, any source, equipment or device used solely for supplying heat or hot water to family dwellings and other exceptions authorized by regulation, persons who install, modify or reactivate stationary air contamination source, or install air pollution control equipment thereon must receive Department's written approval. (35 P.S. § 4006.1). Further, no person shall operate any stationary air contamination source without permit to operate from Department unless otherwise authorized by regulation. (35 P.S. § 4006.1[b]).

Bluff Recession and Setback Act (32 P.S. § 5201 et seq.) authorizes comprehensive program to regulate planning and development in bluff areas, to protect people and property in bluff areas from damage caused by bluff erosion, to regulate development activities in bluff recession hazard areas, to preserve and restore natural ecological systems and to prevent continuing destruction of private property and structures. Empowers Department of Environmental Protection to identify areas subject to bluff recession hazards. Department may compel municipalities to implement and enforce setback ordinances. Establishes civil and criminal penalties for private persons who violate Act or any setback ordinance.

Uniform Interstate Air Pollution Agreements Act (35 P.S. § 4101 et seq.) authorizes Department of Environmental Protection to make agreements with authorities in other states to control air pollution.

Motor Vehicle Emissions Testing.

See category 23 Transportation, topic 23.01 Motor Vehicles.

Radon Certification Act (63 P.S. § 2001 et seq.), provides for certification of persons who perform radon testing and radon remediation, confidentiality of certain data and imposes penalties on violators.

Clean Streams Law (35 P.S. § 691.1 et seq.) is administered by Department of Environmental Protection (71 P.S. § 510-1). Department's powers and duties include authority to make inspections, issue orders and permits, and receive and act upon complaints. (35 P.S. § 691.5).

Prohibited Acts of Pollution.

Unauthorized discharge of sewage (35 P.S. § 691.202), industrial wastes (35 P.S. § 691.307) and other pollutants (35 P.S. § 691.401), and unauthorized discharge from mines (35 P.S. § 691.315) into waters of Commonwealth are declared public nuisances and constitute unlawful conduct (35 P.S. § 691.611).

Enforcement.

Department may issue enforcement orders (35 P.S. § 691.610), and Attorney General, any district attorney or solicitor of municipality may institute action at law or in equity in name of Commonwealth to abate acts declared nuisances to restrain or prevent violations of Act or to preliminarily enjoin activities that endanger public health (35 P.S. § 691.601). Department may institute summary proceedings before magistrate, alderman or district justice in county where offense occurred or public is affected. (35 P.S. § 691.603). Others may bring action at law or in equity to abate acts declared public nuisances, and persons adversely affected may commence civil action to compel compliance with Act's requirements. (35 P.S. § 691.601).

Penalties.

Violation by person, municipality or corporation of any provision of law or of any rule, regulation, order or permit condition of Department constitutes summary offense subject to fine not less than $100 nor more than $10,000, and in default thereof, imprisonment for period of 90 days. Intentional or knowing violation is felony of third degree subject to fine not less than $5,000 nor more than $50,000 or imprisonment up to seven years, or both. Negligent violation constitutes misdemeanor of second degree subject to fine not less than $2,500 nor more than $25,000 or imprisonment for period not more than two years, or both. Negligent violation within two years of misdemeanor conviction for violation constitutes misdemeanor of first degree subject to fine not less than $5,000 nor more than $50,000 or imprisonment for period not more than five years, or both. Each day of continued violation shall constitute separate offense. (35 P.S. § 691.602). In addition, after hearing, department may impose civil penalties up to $10,000 per day per violation. (35 P.S. § 691.605).

Permits.

Permits are required for discharge of sewage (35 P.S. § 691.202) and industrial waste (35 P.S. § 691.307) and for discharge from mines (35 P.S. § 691.315), into waters of Commonwealth, for construction or extension of sewer system (35 P.S. § 691.207), and for other activities creating danger of potential pollution (35 P.S. § 691.402).

Conservation District Law (3 P.S. § 849 et seq.) reenacts and amends Soil Conservation Law relating to conservation of soil, water and related resources, and land use practices contributing to soil wastage and erosion, provides for organization of county conservation districts and creates State Conservation Commission in Department of Environmental Protection.

Safe Drinking Water Act (35 P.S. § 721.1 et seq.) administered by Department of Environmental Protection (35 P.S. § 721.5). Department's powers and duties include adopting and implementing public water supply program, enforcing drinking water standards, and inspecting, testing and sampling public water systems. (35 P.S. § 721.5).

Enforcement.

Department may issue enforcement orders (35 P.S. § 721.5), institute contempt action in Commonwealth Court for enforcement of orders (35 P.S. § 721.13[a]), and institute summary proceedings (35 P.S. § 721.13[c]). Other persons having adversely affected interest may commence civil action to compel compliance with Act. (35 P.S. § 721.13[b]).

Penalties.

Violation of Act or rule, regulation, order or permit condition of Department constitutes summary offense subject to fine between $50 and $5,000, and in default thereof, imprisonment between 30 days and 90 days. Willful or negligent violation is misdemeanor of third degree subject to fine between $1,250 and $12,500 or imprisonment for up to one year, or both. Willful or negligent violation within two years of prior misdemeanor violation is misdemeanor of second degree subject to fine between $1,250 and $25,000, or imprisonment for up to two years or both. Any person endangering health of persons by knowingly introducing contaminant into public water system or tampering with public water system subject to fine up to $50,000, or imprisonment up to five years, or both. Department may assess civil penalties up to $5,000 per day for each violation of Act.

Permits required for construction and operation of public water systems. (35 P.S. § 721.7).

Sewage Facilities Act (35 P.S. § 750.1 et seq.) provides for planning and regulation of community sewage systems and individual sewage systems, requires municipalities to submit plans for systems to Department of Environmental Protection, authorizes grants and reimbursements to assist in preparation and revision of plans for systems, requires permits for persons installing systems, authorizes Environmental Quality Board to adopt and administer rules, regulations, standards and procedures for construction, installation, alteration, maintenance and operation of systems, authorizes Department of Environmental Protection to order municipalities to submit, revise and implement official plans, and provides for fines and civil penalties for violating permit requirements or rules, regulations and standards promulgated by Department of Environmental Protection, or in default thereof, imprisonment for period of not more than 90 days.

Storage Tank and Spill Prevention Act (35 P.S. § 6021 et seq.) provides for protection of public health and safety from release of hazardous materials from aboveground and underground storage tanks. Establishes regulatory scheme for storage of regulated substances in new and existing storage tanks, for cleanup and removal of released regulated substances, and liability for damages sustained from such releases. Authorizes Department of Environmental Protection to register or issue permits for such storage tanks and issue orders to enforce Act's requirements. Provides for fines and civil penalties for violating Act's requirements. Authorizes actions by district attorneys or municipal solicitors to abate nuisance or violation under Act, or by persons adversely affected to compel compliance with Act.

Solid Waste-Resource Recovery Development Act (35 P.S. § 755.1 et seq.) establishes program of grants and loans by Department of Environmental Protection for solid waste or resource recovery development agencies for demonstration and development projects.

Solid Waste Management Act (35 P.S. § 6018.101 et seq.) administered by Department of Environmental Protection (71 P.S. § 510.1). Department's powers and duties include authority to regulate storage, collection, transportation, processing, treatment and disposal of solid waste (35 P.S. § 6018.104[6]), to require municipalities to submit plans for solid waste management systems (35 P.S. § 6018.201), to issue orders and permits (35 P.S. § 6018.104[7]), and to institute legal proceedings (35 P.S. § 6018.104[10]).

Unlawful Conduct.

Without permit or license, operating solid waste facility, burning solid waste, transporting solid waste to unpermitted facility, and transporting hazardous waste are unlawful under Act, as is transporting solid waste to unpermitted facility. (35 P.S. § 6018.610).

Enforcement.

Department may issue enforcement orders (35 P.S. § 6018.602), and institute contempt action in Commonwealth Court for enforcement of orders (35 P.S. § 6018.603). Warrantless inspections under Act do not violate Fourth Amendment. (. . . Pa. . . . ., 566 A.2d 845). Department and any district attorney or solicitor of municipality may institute action in equity to restrain violation of Act or maintenance or threat of public nuisance. (35 P.S. § 6018.604).

Penalties.

Violation of Act or rule, regulation, order or permit condition of Department is summary offense subject to fine between $100 and $1,000, and in default thereof, imprisonment up to 30 days. Violation of provision of Act, or rule, regulation, order or permit condition of Department is misdemeanor of third degree subject to fine between $1,000 and $25,000 per day for each violation, or imprisonment up to one year, or both. Violation within two years of prior misdemeanor violation is misdemeanor of second degree subject to fine between $2,500 and $50,000 for each violation, or imprisonment up to two years, or both. Knowingly transporting hazardous waste to unpermitted facility, or making false statements in documents used for purposes of compliance with Act is misdemeanor of third degree subject to fine between $1,000 and $25,000 per day for each violation. Similar violation within two years of prior misdemeanor violation is misdemeanor of second degree subject to fine between $2,500 and $50,000 for each violation, or imprisonment between two years and 20 years, or both. Storage, transportation, treatment, or disposal of hazardous waste without permit or in violation of order of Department is felony of second degree subject to fine between $2,500 and $100,000 per day for each violation, or imprisonment between two years and ten years, or both. Intentionally or recklessly storing, transporting, treating or disposing of hazardous waste in violation of Act causing pollution, public nuisance, or bodily injury is felony of first degree subject to fine between $10,000 and $500,000 per day for each violation, or imprisonment between two years and 20 years, or both. (35 P.S. § 6018.606). Department may assess civil penalties up to $25,000 per day for each violation. (35 P.S. § 6018.605).

Permits required for construction and operation of municipal waste processing and disposal facilities, residual waste processing and disposal facilities (35 P.S. § 6018.301), and hazardous waste treatment, storage and disposal facilities (35 P.S. § 6018.401).

Infectious and Chemotherapeutic Waste Disposal Act (35 P.S. § 6019.1 et seq.) provides for development of statewide plan and regulations with regard to incineration and disposal of infectious and chemotherapeutic wastes. Permits issued must comply with plan.

Hazardous Sites Cleanup Act (35 P.S. § 6020.101 et seq.) administered by Department of Environmental Protection, with regulations issued by Environmental Quality Board (35 P.S. § 6020.303). Generators, possessors, and transporters which have arranged for disposal of hazardous substances, as well as owners or operators of sites where such is located, liable for Act's procedures, costs, and penalties when releases have no valid state or federal permit. (35 P.S. § 6020.701). Strict liability for response costs and damages to natural resources. (35 P.S. § 6020.702, .1101).

Program Elements. Municipalities “hosting” hazardous waste sites receive technical and financial aid from Department in permitting and supervisory functions (35 P.S. § 6020.304); owners of property within 2,500 feet of site have right to quarterly laboratory analysis of private water supplies (35 P.S. § 6020.304[c]); teams of experts review permit applications (35 P.S. § 6020.309); Department publishes list of hazardous waste sites ranked according to degree of risk (35 P.S. § 6020.502) and investigates and makes appropriate response to releases or threatened releases of contaminants and hazardous substances (35 P.S. § 6020.501, .505); Department has right to enter and inspect sites where hazardous releases are or may be occurring and to issue orders to that effect (35 P.S. § 6020.503).

Fees.

Hazardous waste treatment or disposal facilities pay tonnage fee to host municipality. (35 P.S. § 6020.306-.308).

Penalties and Costs.

Those responsible for release of hazardous substance pay response costs and damage to natural resources, plus punitive damages of one to three times such costs when willful failure to obey response order. (35 P.S. § 6020.507). Additional civil penalties assessable by Department up to $25,000 per offense without regard to willfulness or negligence. (35 P.S. § 6020.1104).

Procedures.

Response actions developed on basis of written findings and analysis after public hearing duly notified to affected persons. (35 P.S. § 6020.506). Review on administrative record in Board and court when Department files action to enforce order, collect penalty, or recover response costs. (35 P.S. § 6020.508). Protection available to whistleblowers. (35 P.S. § 6020.1112). Persons experiencing or about to experience personal injury or property damage caused by release of hazardous substance have civil action in Court of Common Pleas, after 60 days notice to Department, host municipality, and alleged violator to abate or prevent violation of Act's requirements. (35 P.S. § 6020.1115).

Land Recycling and Environmental Remediation Standards Act (35 P.S. § 6026.101 et seq.) promotes use and reuse of existing commercial and industrial land needing environmental cleanup. Compliance with remediation standards provides persons responding to environmental site hazards with cleanup liability protection. Funds created to finance industrial land recycling and industrial sites cleanup.

Coal Refuse Disposal Control Act (52 P.S. § 30.51 et seq.) provides for inspection, licensing by permit and bonding of coal refuse disposal areas and issuance of orders by Department of Environmental Protection to require operators to comply with established rules, regulations or quality standards adopted to avoid air or water pollution, provides for civil and criminal penalties for operators who refuse to comply with cessation orders and for citizen's suits to compel compliance with Act.

Pesticide Control Act of 1973 (3 P.S. § 111.21 et seq. as am'd by 1986, Act No. 167) relates to labeling, distribution, storage, transportation, use, application and disposal of pesticides and devices, requires registration with Secretary of Agriculture for pesticides distributed within Commonwealth, authorizes secretary to adopt rules and regulations limiting or prohibiting distribution or use of pesticides which are injurious to environment and to adopt stop sale, use or removal orders, provides for licensing of pesticide dealers, authorizes Attorney General to institute equity action to restrain violations of Act, and imposes criminal and civil penalties on violators.

Radiation Protection Act (35 P.S. § 7110.101 et seq.) combines radiation safety provisions of The Atomic Energy Development and Radiation Control Act and Environmental Radiation Protection Act (which are repealed); empowers Department of Environmental Protection to implement comprehensive statewide radiation protection program; further provides for power of Environmental Quality Board to adopt rules and regulations; expands authority of Department to regulate other radiation sources; provides for radiation emergency responses; establishes requirements for transport of spent reactor fuel; and provides penalties.

Dam Safety and Encroachments Act (32 P.S. § 693.1 et seq.) gives Environmental Quality Board power and duty to adopt regulations and standards for design, construction, operation, monitoring, maintenance, modification, repair and removal of dams and reservoirs, water restrictions and encroachments; provides for permits to be issued by Department of Environmental Protection for construction and operation of these facilities; imposes monitoring and inspection duties on owners of such facilities; provides for departmental orders for repairing, altering, maintaining or removing such facilities; and prescribes civil remedies, and civil and criminal penalties, and enforcement orders for violations of Act.

Weather Modification Act (3 P.S. § 1101 et seq.) provides for regulation and licensing of rainmaking activities, creates Weather Modification Board within Department of Agriculture and defines its powers and duties, imposes administrative duties on Department of Agriculture, and provides penalties for violations of Act.

Protection of Agricultural Operations from Nuisance Suits and Ordinances (3 P.S. § 951 et seq.) limits circumstances under which agricultural operations may be subject to public nuisance suits and requires municipalities that define or prohibit public nuisances to exclude from definition of such nuisances normal farming operations.

Water Facilities Restoration Act (32 P.S. § 7501 et seq. as am'd by 1988, Act No. 16) creates Water Facilities Loan Board within Department of Environmental Protection, and allows for financing of water facility projects through issuance of bonds. Most of Act was repealed by Pennsylvania Infrastructure Investment Authority Act.

Land and Water Conservation and Reclamation Act (32 P.S. § 5101 et seq.) authorizes Commonwealth to issue notes and bonds to finance programs to prevent, control, and eliminate stream pollution from mine drainage and air pollution from burning coal refuse banks, restore abandoned strip mine areas, and develop lands for recreation, conservation, and historical uses.

Open Space Lands Act (32 P.S. § 5001 et seq.) authorizes Commonwealth of Pennsylvania and counties thereof to acquire or hold land for certain open space uses including protection of water resources, forests, parks, and other natural and scenic resources. (32 P.S. § 5005).

Pennsylvania Climate Change Act (71 P.S. §361.1 et seq.) establishes Climate Change Advisory Committee in Dept. of Environmental Protection and requires annual reports on potential impact of climate change in Commonwealth, and designation of voluntary greenhouse gas registry, and submission to Governor of climate change action plan and greenhouse gas inventory.

Pennsylvania Scenic Rivers Act (32 P.S. § 820.21 et seq.) authorizes establishment of Pennsylvania Scenic Rivers System by Department of Environmental Protection, imposes administrative duties on Department of Environmental Protection and authorizes designation of scenic rivers.

Flood Plain Management Act (32 P.S. § 679.101 et seq.) provides for regulation of land and water use for flood control purposes, requires subject municipalities to participate in National Flood Insurance Program, authorizes Department of Community and Economic Development, in consultation with Department of Environmental Protection to adopt regulations to coordinate and enforce municipal flood plain management regulations under National Flood Insurance Program and to designate and regulate obstructions in flood plains, authorizes Department of Community and Economic Development to administer grants to municipalities and counties to assist them in implementing legal requirements, and provides for withholding of funds from municipalities for failure to comply with Act, punitive and legal relief for violations of Act and appeal procedure.

Storm Water Management Act (32 P.S. § 680.1 et seq.) provides for regulation of land and water use for flood control and storm water management purposes, provides for county adoption of watershed storm water management plans, directs Department of Environmental Protection and Department of Community and Economic Development to review and approve such plans, directs landowners and developers to implement measures consistent with such plans, provides for grants to municipalities and counties to assist in implementing legal requirements, and provides for withholding funds from municipalities for failure to comply with Act and punitive and legal relief for violations of Act.

Surface Mining Conservation and Reclamation Act (52 P.S. § 1396.1 et seq.) provides for conservation and improvement of lands affected by surface mining; requires licenses and permits for surface mining from Department of Environmental Protection; provides for civil and criminal penalties for violations of Act or rules, regulations and orders promulgated thereunder; requires special authorization for remining of previously mined areas; requires submission of map and reclamation plans and posting of bond with permit application; provides for expenditures from Surface Mining Conservation and Reclamation Fund and Emergency Bond Fund for Anthracite Deep Mine Operators for reclaiming and planting affected lands; provides for inspection procedures and authorizes injunctive remedy for Attorney General and citizens' suits.

Noncoal Surface Mining Conservation and Reclamation Act (52 P.S. § 3301 et seq.) provides for conservation and improvement of land affected by surface mining of noncoal minerals; creates Noncoal Surface Mining Conservation and Reclamation Fund for use in revegetation and reclaiming of affected land and restoration and replacement of affected water supplies; requires annual license for surface mining and permit for operation of or discharge from surface mine from Department of Environmental Protection; requires submission of map or plan, reclamation plan, and posting of bond or payment with permit application; provides for civil and criminal penalties for violations of Act or rules, regulations and orders promulgated thereunder; provides for inspection procedures; and authorizes injunctive remedy for Attorney General and citizens' suits.

Bituminous Mine Subsidence and Land Conservation Act (52 P.S. § 1406.1 et seq.) requires permits from Department of Environmental Protection for opening, reopening or continuation of bituminous coal mine operation, requires filing of map or plan, authorizes bonding requirement, provides for mine inspection procedure, authorizes injunctive remedy for Department and others and civil and criminal penalties for violations of Act or rules, regulations and orders promulgated thereunder.

Environmental Laboratory Accreditation Act (27 Pa.C.S. § 4101 et seq.) requires (1) Department of Environmental Protection to establish program for accrediting environmental laboratories; (2) environmental laboratory to be accredited and in compliance with Act to generate data or analyses to be used with environmental studies; and (3) all testing and analysis required under environmental statute to be performed by accredited laboratory operating in compliance with applicable testing and analysis requirements. Pending adoption of regulations implementing requirement, all environmental laboratories must register with Department of Environmental Protection, and must apply for accreditation within six months after Environmental Quality Board establishes accreditation requirement by regulation in order to continue operations until Department of Environmental Protection acts on application.

Environmental Stewardship and Watershed Protection Act creates special fund for protection and improvement of water-quality-impaired watersheds, continues with certain restrictions on sewage construction payments to municipalities, and provides environmental infrastructure grants to water and wastewater treatment facilities. (27 Pa.C.S. § 6101 et seq.).

Environmental Good Samaritan Act grants civil liability immunity to person who voluntarily provides free equipment, materials or services for reclamation or water pollution abatement project. (27 Pa.C.S. § 8101 et seq.). People who seek to enforce environmental laws by filing lawsuits or by communicating with government are immune from civil liability for their non-malicious actions. (27 Pa.C.S. § 8301-8303). Winning defendants may collect reasonable attorney fees and costs of litigation from them. (27 Pa.C.S. § 7707).

Prescribed Burning Practices Act allows use of prescribed burns as a land management tool. Prescribed burns are defined as planned and controlled application of fire to existing vegetative fuels under specified conditions and following certain measures to accomplish land management objectives. Prescribed burns conducted in accordance with regulations set forth in act are deemed to be in public interest and do not constitute public or private interest. (32 P.S. § 425.1 et seq.).

Uniform Environmental Covenants Act regulates and prescribes enforceability of real property servitudes arising under environmental remediation project imposing activity and use limitations. (27 Pa.C.S. §6501 et seq.).

Wild Resource Conservation Act (32 P.S. § 5301 et seq.) establishes Wild Resource Conservation Board, empowered to design projects necessary to preserve and enhance wild resources of Commonwealth. Empowers Department of Environmental Protection to study and classify plants to determine management measures needed for continued survival, and authorizes Environmental Quality Board to issue regulations based on Department's study and classification and to set limitations relating to taking, possession, transportation, exportation, processing or selling of wild plants, as may be deemed necessary. (32 P.S. § 5307). Department shall also promote and establish criteria for and promote Statewide system of private wild plant sanctuaries, and may designate private lands as such upon appropriate application. (32 P.S. § 5307). Department authorized to issue wild plant management permits, which allow holders to transplant wild plants into public and private sanctuaries for various purposes relating to propagating species (32 P.S. § 5308).

Prohibited Acts.

No person (except private landowner) may willfully adversely alter or destroy local ecosystem of private wild plant sanctuary (32 P.S. § 5308). Act also prohibits any person (except private landowner) from disturbing, picking, taking or possessing vulnerable, threatened or endangered wild plants; from transporting with intent to sell, selling or exporting threatened or endangered wild plants; and from disturbing, picking or taking wild plants from State parks and forests (32 P.S. § 5311).

Penalties.

Violations of permit provisions punishable by fine of not more than $200, or revocation of license, or both. Violations of wild plant protection provisions punishable by fines up to $100 for each plant taken or destroyed. Violations of other provisions punishable by fines of not more than $100 for each violation (32 P.S. § 5311).

Noxious Weed Control Law (3 P.S. § 255.1 et seq.) creates Noxious Weed Control Committee within Department of Agriculture, empowered to establish list of weeds determined to be injurious to public health, crops, livestock, agricultural land or other property.

Prohibited Acts.

Sale, transportation, planting or propagation of noxious weeds, e.g., cannabis sativa; chicory; Canadian thistle; multiflora rose; Johnson grass.

Penalties.

Failure to comply with Secretary's order is summary offense punishable by fines not exceeding $300 or imprisonment for up to 90 days or both. Any person who interferes with agents of Secretary discharging duties under Act may be convicted of third degree misdemeanor and punished by fines not exceeding $2,500 or one year's imprisonment. (3 P.S. § 255.10).

Plant Pest Act (3 P.S. § 258.1 et seq.) empowers Department of Agriculture to detect and control plant pests by quarantines and other measures.

Low-Level Radioactive Waste Disposal Act (35 P.S. § 7130.101 et seq.) provides for low-level radioactive waste disposal and for siting regional low-level radioactive waste disposal facility; authorizes Department of Environmental Protection to develop and implement comprehensive program to regulate generation, storage, handling, transportation, processing, minimization, separation, management and disposal of low-level radioactive waste; authorizes Environmental Quality Board to adopt regulations developed by Department to implement Act; provides for permitting of generators, brokers and carriers for access to regional facility; authorizes Department to enter contract with operator-licensee designate to screen State for potentially suitable sites, study those sites, and submit license application for regional facility; and establishes Low-Level Waste Advisory Committee. Department empowered to impose civil and criminal penalties. Department authorized to bring action to restrain violations of Act. Citizens affected by violations may intervene in Department injunction action or institute separate civil action.

Appalachian States Low-Level Radioactive Waste Compact (35 P.S. § 7125.1 et seq.) relates to Pennsylvania's agreement with West Virginia and other eligible states (Delaware and Maryland) to enter into interstate compact for regional management and disposal of low-level radioactive waste.

Worker and Community Right-to-Know Act (35 P.S. § 7301 et seq.) requires employers and chemical manufacturers to make available identity of chemicals used in workplace and information regarding health hazards posed by use or exposure to hazardous substances.

Radon Gas Demonstration Project and Home Improvement Loan Act (35 P.S. § 7501 et seq.) authorizes Department of Environmental Protection to develop and implement methods of remedial action to reduce unsafe levels of radon gas in residential buildings; authorizes establishment of low-interest loan programs to assist persons with residences infiltrated by dangerous levels of radon gas.

Pennsylvania Infrastructure Investment Authority Act (35 P.S. § 751.1 et seq.) establishes Pennsylvania Infrastructure Investment Authority to provide assistance in financing water and sewage projects, empowers Authority to issue bonds, and transfers all unencumbered funds, rights, powers, duties, obligations, liabilities, records and equipment of Water Facilities Loan Board (32 P.S. § 7504) to Authority.

Pennsylvania Municipal Waste Planning and Recycling and Waste Reduction Act (1988, Act No. 101) administered by Department of Environmental Protection. Requires counties to submit to Department and implement municipal waste management plans; requires municipalities to implement recycling programs; authorizes grants to counties and municipalities for planning, resource recovery and recycling; establishes recycling fee and host municipality benefit fee; and empowers Environmental Quality Board to promulgate rules and regulations for implementation of Act.

Enforcement.

Department may issue enforcement orders, and Department and district attorney or solicitor of affected county or municipality may institute actions in equity to restrain violation of Act, regulation or order, or term or condition of approved municipal waste management plan, or maintenance or threat of public nuisance. Citizens' suits permitted against violators of Act.

Penalties.

Violation of Act or regulation, order, or condition of approved municipal waste management plan is summary offense subject to fine between $100 and $1,000, and in default thereof, imprisonment up to 30 days. Violation of Act or any regulation, order, or condition of approved municipal waste management plan is misdemeanor of third degree subject to fine between $1,000 and $10,000 per day for each violation or imprisonment up to one year or both. Violation within two years of prior misdemeanor violation is misdemeanor of second degree subject to fine between $2,500 and $25,000 for each violation or imprisonment up to two years, or both. Department may assess civil penalties up to $10,000 per day for each violation.

Safe Packaging Act (35 P.S. § 6024.101 et seq.) regulates use of toxic materials in packaging. No package or component thereof may contain inks, dyes, pigments, adhesives, stabilizers or any other additive containing any lead, cadmium, mercury or hexavalent chromium intentionally inserted as opposed to incidentally present. (35 P.S. § 6024.301).

Waste Tire Recycling Act (35 P.S. § 6029.101 et seq.) authorizes Department of Environmental Protection to regulate disposal of whole waste tires, including hauling of waste tires, and establishes funding mechanisms to support waste tire collection and environmental remediation of waste tire sites.

Water Resources Planning Law (27 P.S. § 3101 et seq.) establishes process and mechanisms for developing regional and statewide water resource management plans by compiling resource inventories, identifying resource uses and needs and considering alternative management strategies.

Great Lakes-St. Lawrence River Basin Water Resources Compact. Governor authorized to enter into compact with other states to protect, conserve, restore, improve, and manage waters and water-dependent natural resources of basin. (32 P.S. §817.21 et seq.).

Industrial Sites Environmental Assessment Act (35 P.S. § 6028.1 et seq.) establishes fund to provide grants for environmental assessment of industrial sites, and authorizes loans from separate Industrial Sites Cleanup Fund.

Waste Transportation Safety Act (27 P.S. § 6201 et seq.) regulates transportation of municipal and residual waste to processing and disposal facilities, requires transporters to obtain authorization from Department of Environmental Protection to operate waste transportation vehicle, and prohibits municipal or residual waste processing or disposal facilities from accepting such waste unless delivering vehicle bears current authorization sticker from Department.

Alternative Energy Portfolio Standards Act (73 P.S. § 1648.1 et seq.) establishes requirements for electric energy sold by electric distribution company or generation supplier to Pennsylvania retail electric customers. Electric energy sold must be comprised of specified minimum percentages of electricity generated from alternative energy sources. Specified alternative energy sources include number of categories of renewable energy sources, as well as other designated categories of sources. These requirements may be met by selling electricity generated by alternative energy sources, and/or by obtaining alternative energy credits attributable to electricity generated from alternative energy sources by any party designated as eligible.

13 ESTATES AND TRUSTS

13.01 ADMINISTRATION:

See topic 13.08 Executors and Administrators.

13.02 ADVANCEMENTS:

See topic 13.07 Descent and Distribution.

13.03 ALLOWANCES:

See topic 13.08 Executors and Administrators.

13.04 CLAIMS:

See topic 13.08 Executors and Administrators; category 5 Civil Actions and Procedure, topic 5.17 Pleading.

13.05 DEATH:

Presumption of Death from Absence.

When a person domiciled in Pennsylvania disappears and is absent without being heard of after diligent inquiry, orphans' court of county where he last resided may, upon petition of any party in interest, enter decree that he is dead. (20 Pa.C.S. § 5701[a]). Unexplained absence for seven years and exposure to specific peril are respectively sufficient grounds for finding that absentee died seven years, or less than seven years, after he was last heard of. (20 Pa.C.S. § 5701[b], [c]). Hearing and decree must be preceded by publication of notice and two weeks waiting period after last publication. (20 Pa.C.S. § 5704).

After decree has been entered, missing person's real and personal property is administered by his personal representative as in case of other decedents (see topic 13.08 Executors and Administrators), provided that distribution by will or by intestacy may be accomplished only under decree of court. If distributee does not execute refunding bond on terms approved by court, court must appoint trustee to receive and hold his share until further order. (20 Pa.C.S. § 5703).

Court may, on its own motion or upon motion of party in interest, order search for absentee to be conducted at expense of absentee's estate. (20 Pa.C.S. § 5705).

Written finding of missing in action or presumed death made by Secretary of Defense or officer authorized under Federal Missing Persons Act, or certified copy thereof, is prima facie evidence of death, date, circumstances and place of disappearance. (51 Pa.C.S. § 9401).

Survivorship.

Uniform Simultaneous Death Act has been adopted. (20 Pa.C.S. § 8501 et seq.). See also category 5 Civil Actions and Procedure, topic Descent and Distribution.

Action for Death.

Whenever death results from unlawful violence or negligence, persons entitled to maintain action for such death are surviving spouse, children or parents of decedent, and no other relatives. Duplicate recovery prohibited if injured individual brought damage action during lifetime. Such persons may recover whether or not they are residents of Pennsylvania and amount recovered must be distributed among them in proportions in which they would take decedent's personal estate in case of intestacy, without liability to creditors. (42 Pa.C.S. § 8301). Action must be commenced within two years after death. (42 Pa.C.S. § 5524[2], 5502).

Within six months of death only personal representative may bring action. Thereafter, either personal representative or any person entitled to damages may do so. (P. R. C. P. 2202). While pending action bars all others, any person entitled to damages may petition court to be substituted as plaintiff in pending action. (P. R. C. P. 2203). There are various other procedural requirements. (P. R. C. P. 2204-2206).

Plaintiff may recover, in addition to damages, reasonable hospital, nursing, medical, funeral and administration expenses. (42 Pa.C.S. § 8301[c]). If none of aforementioned relatives survives decedent, personal representative may recover for hospital, nursing, medical, funeral and administration expenses. (42 Pa.C.S. § 8301[d]).

There is no statutory limitation of amount which may be recovered.

In addition to action for death described above, there is also survival action wherein personal representative of deceased may recover for pain and suffering of deceased until time of death and for present worth of his likely earnings during period of his life expectancy (20 Pa.C.S. § 3373). Survival action must be brought within two years after cause of action accrues. (42 Pa.C.S. § 5524[2], 5502). Both actions should be enforced in one proceeding. (P. R. C. P. 213). See also category 5 Civil Actions and Procedure, topic 5.02 Actions, subhead Abatement and Revival.

Certificates.

Pursuant to Vital Statistics Law of 1953 (35 P.S. § 450.101 et seq.), certified copies of death certificates may be obtained from Bureau of Vital Statistics, P.O. Box 1528, New Castle, Pa. 16103. For fee see category 10 Documents and Records, topic 10.04 Records, subhead Vital Statistics.

Certificate of each death or fetal death which occurs in Pennsylvania must be filed with any local registrar or state registrar within 96 hours after death or fetal death or within 96 hours after finding of dead body or fetal remains by person in charge of interment or removal. (35 P.S. § 450.501).

Where it is not necessary to have letters granted to administer decedent's estate but it is desired to have public record of his death, certificate of death may be filed with Register of Wills. (20 Pa.C.S. § 925).

Uniform Anatomical Gift Act (1968) has been adopted with substantial modifications. (20 Pa.C.S. § 8601 et seq.).

Living Wills.

See topic 13.16 Wills, subhead Living Wills.

13.06 DECEDENTS' ESTATES:

See topics 13.07 Descent and Distribution, 13.08 Executors and Administrators, 13.16 Wills.

13.07 DESCENT AND DISTRIBUTION:

Real and personal property in excess of share of surviving spouse, or all such property if no surviving spouse, passes as follows, each class of which member is living taking to exclusion of subsequent classes (20 Pa.C.S. § 2103).

(1) Issue of decedent. See also category 14 Family, topic 14.01 Adoption.

(2) Parents (including adopting parents).

(3) Brothers and sisters, or their issue.

(4) Grandparents as follows: if at least one grandparent survives, then one-half to paternal grandparents or grandparent, or if both dead, to children of each and children of deceased children of each and one-half to maternal grandparents or grandparent, or if both are dead, to children of each and children of deceased children of each. If both paternal or both

maternal grandparents are dead leaving no child or grandchild surviving decedent, then half passing to them is added to half passing to other grandparents.

(5) Uncles, aunts and children and grandchildren of deceased uncles and aunts.

(6) In default of all such persons, then to the Commonwealth.

Shares passing to any such persons are divided into as many equal shares as there shall be persons in nearest degree of consanguinity to decedent living and taking shares therein and persons in that degree who have died and left issue who take shares therein. One share passes to each such living person and one share per stirpes to such issue, except that grandchildren of aunts and uncles do not share if there are any relatives as close as living children of aunts and uncles. Where all persons entitled are in same degree of consanguinity, they take equally. Rights of inheritance are conditioned on survivorship by five days. (20 Pa.C.S. § 2104).

Surviving spouse takes as follows: $30,000 plus one-half balance if decedent is survived by issue, all of whom are issue of surviving spouse, or parent; one-half if decedent is survived by issue, not all of whom are issue of surviving spouse; all if decedent is not survived by issue or parent. (20 Pa.C.S. § 2102). No spouse who has willfully refused to support other spouse for one year or more prior to other's death, or who has willfully and maliciously deserted spouse for like period, can claim any right to decedent's estate. (20 Pa.C.S. § 2106).

No parent who, for a year or more prior to minor or dependent child's death, has willfully neglected or failed to perform duty of support to, or willfully deserted, such child, or committed crimes concerning such child, can claim any interest in child's estate. (20 Pa.C.S. § 2106).

As to election between testamentary provision and distributive share, see topic 13.16 Wills. As to family exemption, see topic 13.08 Executors and Administrators.

Right of Election.

Unless spouse domiciled in Pennsylvania dies during divorce proceeding in which grounds proved, surviving spouse has right to elective share of one-third of various properties of decedent. (20 Pa.C.S. § 2203).

Half-blood and whole blood share equally in both real and personal estate regardless of how it came to decedent. Rule excluding those not of the blood of person from whom real estate came to decedent abolished. (20 Pa.C.S. § 2104).

Descendants and relatives begotten before intestate's death but born thereafter inherit as though born prior to death of intestate. (20 Pa.C.S. § 2104).

Illegitimates.

Pennsylvania no longer recognizes status of illegitimacy. (48 P.S. § 167). For purposes of inheritance, person born out of wedlock is considered child of both his mother and father. (20 Pa.C.S. § 2107).

Adopted Children.

See category 14 Family, topic 14.01 Adoption.

Advancements.

Advancement is charged against intestate share only if declared in writing by decedent or acknowledged in writing by heir to be advancement. (20 Pa.C.S. § 2109.1).

Effect of Disclaimer.

Disclaimant is treated as having predeceased decedent, but disclaimant's actual survival is recognized to determine whether other persons take shares equally or by representation. Disclaimer is not to diminish interest of any person other than disclaimant in disclaimed property which such person acquired in his or her own right. (20 Pa.C.S. § 6205).

Modification by Decedent's Will.

Decedent by will may expressly exclude or limit intestate succession rights. Share is treated as if disclaimed. (20 Pa.C.S. § 2101[b]).

Intestacy Following Prior Estate.

Identity of intestate heirs entitled to take at termination of prior estate to be determined as though death of testator, settler or grantor occurred at time of prior estate's termination. (20 Pa.C.S. § 2104).

Escheat.

In default of any persons entitled to inherit, the estate escheats to the Commonwealth. (20 Pa.C.S. § 2103[6]).

See also topic 13.08 Executors and Administrators.

13.07A ESTATES: (in property)

See category 21 Property, topic 21.16 Real Property.

13.0813.09

13.10 EXECUTORS AND ADMINISTRATORS:

Letters testamentary or of administration are issued by register of wills of county of decedent's family or principal residence at time of death; if decedent was not domiciled in Pennsylvania, letters are granted by register of wills of any county where any property of estate within Pennsylvania is located or, if there is no such property and service of process is to be made in Pennsylvania upon personal representative as authorized by law, then by register of any county. (20 Pa.C.S. § 3151).

Preferences in Right to Administer.

Executor named by will is entitled to letters testamentary. Letters of administration are issued in following order of preference: those entitled to residuary estate under will; surviving spouse; next of kin entitled to share in estate; creditors of decedent at time of death; other fit persons; nominees of above, in discretion of register of wills; guardianship support agency; redevelopment authority. (20 Pa.C.S. § 3155, 3158).

Eligibility.

Nonresidents may, in discretion of register of wills, be granted letters of administration. (20 Pa.C.S. § 3157). As to foreign corporations, see category 3 Business Regulation and Commerce, topic 3.01 Banks and Banking. Married woman may act as executrix or administratrix. Person under 18 may not qualify as executor or administrator. (20 Pa.C.S. § 3156).

Provisions of statutes with respect to effect of merger of trust company or banking company which is authorized to act, and is acting, in fiduciary capacity with another trust company or banking company (see category 3 Business Regulation and Commerce, topic 3.01 Banks and Banking, subhead Fiduciary Powers of Merged Institutions) apply to merger of such company which is acting as executor or administrator.

Qualifying Oath.

Before letters are issued executor or administrator must take oath or affirmation that he will well and truly administer estate according to law. (20 Pa.C.S. § 3161). Oath, as well as affidavit to petition for grant of letters, may be administered by any Pennsylvania register of wills or by public officer of another jurisdiction who has similar duties and has been authorized to do so by register of county where application for letters is to be made. Oath of subscribing witness relative to probate of will may be taken before officer authorized to administer oaths in Pennsylvania or another state. (20 Pa.C.S. § 3154).

Bond.

No bond required of domestic corporate fiduciary or foreign corporate fiduciary if laws of state of foreign corporation provide similar exemption for Pennsylvania corporations. Unless required by court or will, no bond required of individual personal representative named in will who is resident of Commonwealth, is excused from filing bond in will, or is not resident of Commonwealth but will serve with resident co-personal representative of whom no bond is required if assets remain in custody of resident co-personal representative. No bond required of individual personal representative not named in will who is resident of Commonwealth and is sole residuary legatee or next of kin or is nominee of all residuary legatees or next of kin. (20 Pa.C.S. § 3171, 3174; 7 P.S. § 106).

Removal of Representative.

An executor or administrator may be removed for causes specified. (20 Pa.C.S. § 3182).

Revocation of Letters on Probate of Will or Later Will.

When there is no will, register of wills may revoke letters of administration granted by him if it appears that person to whom they were granted is not entitled thereto. If there is a will, register may amend or revoke letters testamentary or of administration granted by him not in conformity with provisions of probated will. (20 Pa.C.S. § 3181).

Special Kinds of Administration.

Administrators c.t.a. have powers, duties and liabilities of executors. (20 Pa.C.S. § 3325). Administrators d.b.n. or d.b.n.c.t.a. have power to recover from their predecessors in administration, or their legal representatives, all assets of estate and must stand in their predecessor's stead for all purposes, except that they are not liable for predecessor's acts. (20 Pa.C.S. § 3326).

Register of wills may grant letters of administration durante minoritate, durante absentia or pendente lite, security being entered as in other cases of administration. (20 Pa.C.S. § 3160).

Inventory and Appraisement.

Real and personal property of estate must be appraised by personal representative and verified inventory filed at earlier of filing of account or inheritance tax return including any extension. If party in interest requests earlier date, filing must be made within three months after appointment of personal representative or within 30 days after request, whichever is later. Court may also direct filing at any time. In case of ancillary letters, inventory and appraisement is of property within Pennsylvania only. (20 Pa.C.S. § 3301). After-discovered property must be included within supplemental inventory which must be filed within 30 days from its discovery. (20 Pa.C.S. § 3303).

Payment of Wages Due Decedent.

See category 11 Employment, topic 11.02 Labor Relations, subhead Wages.

General Powers and Duties.

Personal representative must take possession of, maintain and administer all real and personal property except real estate occupied by an heir at time of death or devisee with consent of decedent. (20 Pa.C.S. § 3311[a]). Redevelopment authority granted letters of administration, upon payment of fair market value of real property in current state to estate, may take, clear, combine or transfer title as necessary to return property to productive use. (20 Pa.C.S. § 3311[b]). Subject to provisions of will, he may lease any real or personal property, which he is entitled to possess, for a term expiring not more than one year after decedent's death, unless lease is terminable at any later time upon 30 days notice, or unless a longer term is approved by court. (20 Pa.C.S. § 3352). Upon order of court he may pledge or mortgage any real or personal property. (20 Pa.C.S. § 3353).

Specific performance of decedent's contract for purchase or sale of realty or personalty may be had. (20 Pa.C.S. § 3390).

Notice of Appointment.

Executor or administrator must, immediately after grant of letters, publish, once a week for three weeks in one newspaper of general circulation and in local legal periodical, notice of grant of letters requesting presentation of claims against estate and payment of debts owed decedent. (20 Pa.C.S. § 3162).

Notice to Beneficiaries and Intestate Heirs.

Within three months of grant of letters executor or administrator must send copy of decedent's will to beneficiaries thereunder and written notice to intestate heirs stating their interests in estate, place of grant of letters and information about personal representative and counsel to estate. (Sup. Ct. O. C. Rule 5.6). Certification of such notice must be filed with register of wills within ten days.

Presentation of Claims.

Person having claim against estate must give written notice of claim to executor or administrator promptly. There is no special form of such notice. If given to personal representative before claim is barred, or within one year of decedent's death, whichever occurs later, it will toll statute of limitations. (20 Pa.C.S. § 3383 to 3385). Claims may become unenforceable after one year from decedent's death against bona fide grantee of real property. (20 Pa.C.S. § 3385). All claims must be presented in court at audit of account of personal representative; failure to do so will bar claimant. (20 Pa.C.S. § 3386). Claims contingent or unmatured should also be presented. (20 Pa.C.S. § 3387, 3388).

Proof of Claims.

It is not necessary that claim be verified, but it must be presented in orphans' court at audit of account and proved.

Payment of Claims.

Claims admitted by executor or administrator are paid without proof, unless objected to by party in interest in estate.

If claim has been admitted in account and account has been confirmed or if, after proof of claim at audit, it is allowed by court, executor or administrator will be ordered to pay it. If claim is not allowed or if judgment has not been obtained in suit against executor or administrator, claimant has no remedy except by appeal from disallowance.

If claim is not yet due, court may provide for payment by awarding present value of claim as agreed to by claimant and personal representative or by ordering personal representative to retain or pay into court sufficient assets to pay claim. (20 Pa.C.S. § 3387, 3388).

State treasurer may distribute unclaimed or abandoned property of $11,000 or less in value to immediate relatives of deceased owner upon certain proofs. (20 Pa.C.S. § 3101[e]).

Priorities.

If estate is insufficient to pay all charges and claims in full, personal representative, subject to any preference given by law to claims due U.S., shall pay them in following order without priority between claims of same class: (1) Costs of administration; (2) family exemption; (3) funeral and burial expenses, medical or nursing services, medicine, hospital services including maintenance, costs of medicine furnished to decedent within six months of death, expenses for medical, nursing and hospital (including maintenance) services provided to decedent within six months of death, cost of services provided under medical assistance program within six months of decedent's death, and cost of services performed for decedent by employees within six months of death, and services by employees within six months of death; (4) cost of grave marker; (5) rents for occupancy of decedent's residence for six months prior to death; (6) claims by Commonwealth and its political subdivisions; and (7) all other claims. (20 Pa.C.S. § 3392).

Sales.

Except as otherwise provided in will, personal representative may sell any personal property, whether specially bequeathed or not, and any real property not specifically devised. (20 Pa.C.S. § 3351). Upon order of court, or with joinder of devisee, real estate, specifically devised, may be sold. (20 Pa.C.S. § 3353, 3351). Upon own motion or upon motion of any party in interest, court may restrain any sale not authorized by will. (20 Pa.C.S. § 3355).

Actions.

All causes of action survive death of party to action as provided by 42 Pa.C.S. § 8302. (20 Pa.C.S. § 3371). Personal representative of deceased party to action may be substituted for him. (20 Pa.C.S. § 3372). Action or proceeding to enforce right or liability which survived decedent may be brought by or against personal representative. (20 Pa.C.S. § 3373).

Distribution.

Personal representative, at own risk and without filing account, may distribute real and personal property, and such distribution is without liability to any claimant who has not given notice of claim within one year after first complete advertisement of grant of letters or thereafter but prior to distribution. (20 Pa.C.S. § 3532). Personal representative is relieved of liability with respect to all real and personal estate distributed in conformity with decree of court or in accordance with rule of court after confirmation of account. (20 Pa.C.S. § 3533). Personal representative has no liability for continued distribution of real or personal property in accordance with pattern of distribution that conformed to law in effect when distribution began, notwithstanding change in law that would require different distribution, unless he is actually aware of information relevant to change in rights of interested parties or otherwise fails to act reasonably in ascertaining such rights. This does not affect any cause of action which parties in interest may have among themselves. (20 Pa.C.S. § 3539). Where gross real and personal estate does not exceed $25,000 short form of procedure for accounting and distribution is provided. (20 Pa.C.S. § 3531).

Distribution if Abroad.

Provision for disposition of funds payable to distributee who is not resident of U.S. or its territories and would not have actual use, enjoyment or control of money or other property distributable to him (§737 of Fiduciaries Act of 1949) declared unconstitutional (444 Pa. 212, 282 A.2d 700).

Allowances.

Surviving spouse entitled to exemption of $3,500 out of personal or real estate, with preference for payment out of property not specifically devised. When there is no such spouse, or he or she has forfeited his or her right, children, or, if no children, parents, forming part of decedent's household take same exemption. (20 Pa.C.S. § 3121).

Accounts.

Executor or administrator may file account at expiration of four months from first complete advertisement of original grant of letters. He may be directed by orphans' court to file account of his administration at any time. Accounting can be compelled by citation if not made at end of six months. (20 Pa.C.S. § 3501.1). Accountant must give written notice of filing of account, and of scheduled audit, to all claimants who have notified him of their claims, and to any other person known to him to have interest in estate as beneficiary, heir, or next of kin. (20 Pa.C.S. § 3503). Time period for giving notice prior to scheduled audit varies by county. Fact that account has been filed and will be called for audit in orphans' court is also advertised by clerk of that court. (20 Pa.C.S. § 745). Account will not be confirmed unless required notice has been given.

If executor or administrator has received property from trustee, guardian or agent following decedent's death, he may annex copy of account of administration of trust, guardianship or agency to his own account covering administration of estate. If notice of annexation is given to persons required to be notified of filing of estate account, confirmation of estate account also relieves trustee, guardian or agent of liability to such persons. (20 Pa.C.S. § 3501.2).

Account of personal representative is audited by orphans' court. In special cases, auditor may be appointed. (20 Pa.C.S. § 3511, 3512). Audit is followed by adjudication which includes award. (20 Pa.C.S. § 3514). Review may be had (within five years) if error is alleged in account, adjudication or auditor's report; however, personal representative is not liable as to any property distributed pursuant to court decree before filing of petition for review. (20 Pa.C.S. § 3521).

As to payment of legacies, see topic 13.16 Wills, subhead Legacies and Devises.

Status Reports.

For decedents dying after July 1, 1992, if estate administration completed within two years of death, executor or administrator shall file report with Register of Wills in form prescribed in Pa. Supreme Court Orphans' Court Rules containing information about conclusion of administration and distribution to beneficiaries. If administration not completed in two years, executor or administrator must file status reports annually, stating estimated time of completion. For decedents dying prior to July 1, 1992, annual reports are required.

Liabilities.

Unless he specifically contracts otherwise in writing, personal representative is not personally liable on any contract made within his authority and disclosing capacity in which he is acting. (20 Pa.C.S. § 3331). If he commits breach of duty with respect to assets held, he is, in discretion of court, liable for interest thereon not exceeding legal rate. (20 Pa.C.S. § 3544).

Discharge of Representative.

An executor or administrator whose account has been settled and confirmed and who has paid and transferred property in his hands to those entitled may be discharged by orphans' court division, on petition, from future liability. (20 Pa.C.S. § 3184).

Compensation.

Court allows such compensation as is reasonable and just and may calculate such compensation on graduated percentage. (20 Pa.C.S. § 3537).

When Administration Unnecessary.

Estates of personal property not exceeding $25,000 in gross value regardless of real estate may be settled on petition of any party in interest, whether or not letters have issued. Court may revoke decree within one year if it finds that improper distribution has been ordered. (20 Pa.C.S. § 3102). See categories 3 Business Regulation and Commerce, topic Banks and Banking, subhead Deposits and Collections; Employment, topic Labor Relations, subhead Wages.

Small Estates.

See subhead When Administration Unnecessary, supra.

Foreign Executors and Administrators.

A foreign fiduciary may institute proceedings in Commonwealth and may exercise all other powers of similar local fiduciary, except that he shall have no such power when there is administration in this Commonwealth. Except in case of powers with respect to securities and bank accounts, maintenance of proceeding or exercise of other power is conditioned upon such fiduciary filing exemplified copy of his appointment and of instrument pursuant to which he was appointed, and affidavit that after diligent search estate is not, so far as he has been able to discover, indebted to any person in Commonwealth, and that he will not exercise power which he would not be permitted to exercise in jurisdiction of his appointment. When foreign fiduciary is personal representative or trustee under will of nonresident decedent, he may not exercise powers within Commonwealth for one month after decedent's death. (20 Pa.C.S. § 4101). If unable to make such affidavit, he should apply for letters of administration, which may be granted to him in discretion of register of wills. (20 Pa.C.S. § 3157). When there is no administration in Pennsylvania foreign fiduciary has, upon submission of certificate of appointment, all powers of similar local fiduciary with respect to stock, bonds and other securities of Pennsylvania corporation or of federal corporation located in Pennsylvania. (20 Pa.C.S. § 4102[a]). Where no administration in Pennsylvania, foreign fiduciary has, upon submission of certificate of appointment and affidavit that no debts are due to Pennsylvania resident and all taxes owed Commonwealth or subdivision have been paid or provided, all powers of similar local fiduciary with respect to bank deposits. (20 Pa.C.S. § 4102[b]). Foreign fiduciary under will of decedent who died before Apr. 1, 1956 or whose will was probated outside U.S., who wishes to exercise power with respect to Pennsylvania real estate must have exemplified copy of will admitted to probate and all taxes due Commonwealth or any subdivision thereof must be paid or provided for. (20 Pa.C.S. § 4101). See also topic 13.16 Wills, subhead Foreign Wills.

Uniform Fiduciaries Act adopted. (7 P.S. § 6351 et seq.).

Uniform Principal and Income Act adopted, with significant modifications. (20 Pa.C.S. § 8101 et seq.). Official comments may be used to determine legislative intent. (1 Pa.C.S. § 1939; 365 Pa. 280, 74 A.2d 120).

Uniform Anatomical Gift Act (1968) adopted, with substantial modification. (20 Pa.C.S. § 8601 et seq.).

Uniform Simplification of Fiduciary Security Transfers Act not adopted. Covered by Art. 8 of Uniform Commercial Code. (13 Pa.C.S. § 8101).

13.11 [RESERVED]

13.12 INTESTACY:

See topic 13.07 Descent and Distribution.

13.13 [RESERVED]

13.14 PROOF OF CLAIMS:

See topic 13.08 Executors and Administrators; category 5 Civil Actions and Procedure, topic 5.17 Pleading.

13.15 TRUSTS:

Uniform Trust Act has been adopted with significant modifications. (20 Pa.C.S. § 7701 et seq.). Pennsylvania modifications to Uniform Trust Act are explained in comments by Pennsylvania Joint State Government Commission in annotations to statute. Uniform Fiduciaries Act has been adopted. (7 P.S. § 6351 et seq.). Principal and Income Act which differs materially in some sections from Uniform Act has been adopted. (20 Pa.C.S. § 8101 et seq.). Uniform Act, effective May 3, 1945, and Principal and Income Act, effective July 3, 1947, are applicable to receipts after Acts' effective dates by trusts created before Acts' effective dates. (405 Pa. 61, 173 A.2d 86).

Kinds.

Common law prevails. Express, resulting and constructive trusts recognized and enforced. Business trusts are permitted and governed by 15 Pa.C.S. § 9501 to 9507.

Appointment of Trustee.

Where fiduciary is in military service, in other government service, in position of conflicting interest, or in any other situation where his functioning as fiduciary for temporary period may not be in best interests of estate, court having jurisdiction of his accounts may appoint substituted fiduciary pro tem. or may allow remaining fiduciaries to act. (20 Pa.C.S. § 4301).

Creation.

There are no express requirements; trusts may be created by will or deed. Express trusts of real estate must be manifested by writing signed by creator of trust pursuant to 1856, P. L. 532. (33 P.S. § 2).

Eligibility and Competency.

Trustee may be individual or bank or trust company. (20 Pa.C.S. § 102; 7 Pa.C.S. § 106). As to competency of foreign corporations, see category 3 Business Regulation and Commerce, topic 3.01 Banks and Banking, subhead Foreign Trust Companies.

General Powers and Duties of Trustees.

Trustee may not, with limited exceptions, make discretionary distributions to or for benefit of trustee, or trustee's estate, or creditors of either, except for trustee's health, education, support or maintenance to extent otherwise permitted by terms of trust. (20 Pa.C.S. § 7504). Limits do not apply to trustee with unlimited right to withdraw entire principal or with testamentary power of appointment of entire principal. (20 Pa.C.S. § 7504[c]).

Investments.

Unless otherwise provided for in governing instrument, guardians and trustees subject to jurisdiction of orphans' court shall invest and manage property held in trust as prudent investor would, by considering purposes, terms and other circumstances of trust and by pursuing overall investment strategy reasonably suited to trust. (20 Pa.C.S. § 7201, 20 Pa.C.S. § 7203). C. 73 of the Pennsylvania Estates and Fiduciaries Code governs municipalities, investments and applies to administrators of municipal pension or retirement plans and any other person whose fiduciary duties are, by statute, governed by principles of c. 73. (20 Pa.C.S. § 7301).

Securities in Name of Nominee.

Corporate fiduciary may keep investments in nominee registration, provided consent of any co-fiduciaries obtained. Individual trustee may employ bank to act as his agent under power of attorney and hold trust assets in name of bank's nominee. (20 Pa.C.S. § 3321,7133).

Common trust funds provided for. (7 P.S. § 404, 10 Pa. Code 15.1 et seq.).

Gifts to Minors.

See category 14 Family, topic 14.10 Infants.

Discharge.

After confirmation of final account and distribution to those entitled, trustee and surety may be discharged by court from future liability. (20 Pa.C.S. § 3184, 7121).

Powers of appointment or consumption may be released or disclaimed pursuant to 20 Pa.C.S. § 6103.

Accumulations.

See category 21 Property, topic 21.12 Perpetuities, subhead Accumulations.

Perpetuities.

See category 21 Property, topic 21.12 Perpetuities.

Pour Over Trusts.

See topic 13.16 Wills, subhead Bequests and Devises to Inter Vivos Trusts.

Uniform Principal and Income Act adopted, with significant modifications. (20 Pa.C.S. § 8101 et seq.). Trustee of charitable trust may, absent contrary provision in trust instrument, elect to be governed by 20 Pa.C.S. § 8113. Trustee elects annual investment policy earning between 2% and 7% of value of trust. (20 Pa.C.S. § 8113).

Uniform Fiduciaries Act adopted. (7 P.S. § 6351 et seq.).

Uniform Simplification of Fiduciary Security Transfers Act not adopted. Covered by Art. 8 of Uniform Commercial Code. (13 Pa.C.S. § 8101 et seq.).

Uniform Disclaimer of Property Interests Act adopted with significant modifications. (20 Pa.C.S. § 6201).

Uniform Testamentary Additions to Trusts Act adopted. (20 Pa.C.S. § 2515).

13.16 WILLS:

Any person of sound mind 18 years of age or older may make a will. (20 Pa.C.S. § 2501).

Testamentary Disposition.

Testator may dispose of his entire property. There is no limit to amount which may be given to religious, charitable, etc., institutions. Statute declaring void devises to religious or charitable institutions within 30 days of death to extent of interest of one (other than state) who would benefit and who objects in writing (except for carry-over from a superseded will executed more than 30 days before death) held unconstitutional. (459 Pa. 411, 329 A.2d 503). Prior audit under now unconstitutional statute is not res judicata; remaining money must be distributed to designated charities. (474 A.2d 411).

Execution.

Will must be in writing, and must be signed at end by testator or by someone in his presence and by his express direction.

If testator is unable to sign his name, for any reason, will to which his name is subscribed is valid, provided he makes his mark in presence of two witnesses who must sign their names to will in his presence. If testator is unable to sign his name or make his mark for any reason, will to which his name is subscribed in his presence and by his express direction is valid provided testator declares instrument to be his will in presence of two witnesses, who must sign their names to will in his presence. (20 Pa.C.S. § 2502).

Except in wills signed by mark or by person other than testator, it is not necessary that there be any attesting witnesses or even any subscribing witnesses, but it is usual to have at least two attesting witnesses.

Attestation clause may be as follows:

Form

Signed, sealed, published and declared by the testator, John Doe, as and for his last will and testament, in the presence of us, who, at his request, in his presence and in the presence of each other, have hereunto subscribed our names as witnesses.

Self-proved wills provided for. (20 Pa.C.S. § 3132.1). Acknowledgment and affidavits must in form and content be substantially as set forth in Uniform Probate Code or as follows:

Form

Acknowledgment

Commonwealth of Pennsylvania (or state of)

County of

I, ..., testat. . . . whose name is signed to the attached or foregoing instrument, having been duly qualified according to law, do hereby acknowledge that I signed and executed the instrument as my Last Will; that I signed it willingly; and that I signed it as my free and voluntary act for the purposes therein expressed.

Form

Affidavit

Commonwealth of Pennsylvania (or state of)

County of

We (or I), ... and . . . ., the witness(es) whose name(s) are (is) signed to the attached or foregoing instrument, being duly qualified according to law, do depose and say that we were (I was) present and saw the testator sign and execute the instrument as his Last Will; that the testator signed willingly and executed it as his free and voluntary act for the purposes therein expressed; that each subscribing witness in the hearing and sight of the testator signed the will as a witness; and that to the best of our (my) knowledge the testator was at that time 18 or more years of age, of sound mind and under no constraint or undue influence.

Acknowledgment and affidavit may be made before attorney who certifies same to notary. (20 Pa.C.S. § 3132.1[c]). Certification must be substantially as follows:

Form

Attorney's Certification

Commonwealth of Pennsylvania (or state of)

County

On this, the . . . . day of . . . ., (year) . . . . ., before me . . . ., the undersigned officer, personally appeared . . . ., known to me or satisfactorily proven to be a member of the bar of the highest court of (Pennsylvania or the state in which execution of the will took place), and certified that he was personally present when the foregoing acknowledgment and affidavit were signed by the testator and witnesses.

Living Wills.

Provided by Living Will Act, 20 Pa.C.S. § 5441 et seq. Living will governing initiation, continuation, withholding or withdrawal of life-sustaining treatment may be made by individual of sound mind who is 18 or older, has married, has graduated from high school, or is emancipated minor. (20 Pa.C.S. § 5442[a]). Living will may but need not be in form included as Part I of form in subhead Combined Living Wills and Health Care Powers of Attorney.

HEALTH CARE TREATMENT INSTRUCTIONS INTHE EVENT OF END-STAGE MEDICAL CONDITIONOR PERMANENT UNCONSCIOUSNESS(LIVING WILL)

The following health care treatment instructions exercise my right to make my own health care decisions. These instructions are intended to provide clear and convincing evidence of my wishes to be followed when I lack the capacity to understand, make or communicate my treatment decisions:

IF I HAVE AN END-STAGE MEDICAL CONDITION (WHICH WILL RESULT IN MY DEATH, DESPITE THE INTRODUCTION OR CONTINUATION OF MEDICAL TREATMENT) OR AM PERMANENTLY UNCONSCIOUS SUCH AS AN IRREVERSIBLE COMA OR AN IRREVERSIBLE VEGETATIVE STATE AND THERE IS NO REALISTIC HOPE OF SIGNIFICANT RECOVERY, ALL OF THE FOLLOWING APPLY (CROSS OUT ANY TREATMENT INSTRUCTIONS WITH WHICH YOU DO NOT AGREE):

1. I direct that I be given health care treatment to relieve pain or provide comfort even if such treatment might shorten my life, suppress my appetite or my breathing, or be habit forming.

2. I direct that all life prolonging procedures be withheld or withdrawn.

3. I specifically do not want any of the following as life prolonging procedures: (If you wish to receive any of these treatments, write “I do want” after the treatment)

heart-lung resuscitation (CPR) . . . .

mechanical ventilator (breathing machine) . . . .

dialysis (kidney machine) . . . .

surgery . . . .

chemotherapy . . . .

radiation treatment . . . .

antibiotics . . . .

Please indicate whether you want nutrition (food) or hydration (water) medically supplied by a tube into your nose, stomach, intestine, arteries, or veins if you have an end-stage medical condition or are permanently unconscious and there is no realistic hope of significant recovery. (Initial only one statement.)

TUBE FEEDINGS

. . . . . . I want tube feedings to be given.

OR

NO TUBE FEEDINGS

. . . . . . I do not want tube feedings to be given.

HEALTH CARE AGENT'S USE OF INSTRUCTIONS (INITIAL ONE OPTION ONLY).

. . . . . . My health care agent must follow these instructions.

OR

. . . . . . These instructions are only guidance. My health care agent shall have final say and may override any of my instructions. (Indicate any exceptions) . . . .

If I did not appoint a health care agent, these instructions shall be followed.

LEGAL PROTECTION

Pennsylvania law protects my health care agent and health care providers from any legal liability for their good faith actions in following my wishes as expressed in this form or in complying with my health care agent's direction. On behalf of myself, my executors and heirs, I further hold my health care agent and my health care providers harmless and indemnify them against any claim for their good faith actions in recognizing my health care agent's authority or in following my treatment instructions.

ORGAN DONATION (INITIAL ONE OPTION ONLY)

. . . . . . I consent to donate my organs and tissues at the time of my death for the purpose of transplant, medical study or education. (Insert any limitations you desire on donation of specific organs or tissues or uses for donation of organs and tissues.)

. . . .

OR

. . . . . . I do not consent to donate my organs or tissues at the time of my death.

SIGNATURE

Having carefully read this document, I have signed it this . . . . . . day of . . . ., 20. . . ., revoking all previous health care powers of attorney and health care treatment instructions.

. . . .

(SIGN FULL NAME HERE FOR HEALTH CARE POWER OF ATTORNEY AND HEALTH CARE TREATMENT INSTRUCTIONS)

WITNESS: . . . .

WITNESS: . . . .

Two witnesses at least 18 years of age are required by Pennsylvania law and should witness your signature in each other's presence. A person who signs this document on behalf of and at the direction of a principal may not be a witness. (It is preferable if the witnesses are not your heirs, nor your creditors, nor employed by any of your health care providers.)

NOTARIZATION (OPTIONAL)

(Notarization of document is not required by Pennsylvania law, but if the document is both witnessed and notarized, it is more likely to be honored by the laws of some other states.)

On this . . . . . . day of . . . ., 20. . . ., before me personally appeared the aforesaid declarant and principal, to me known to be the person described in and who executed the foregoing instrument and acknowledged that he/she executed the same as his/her free act and deed.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal in the County of . . . ., State of . . . . the day and year first above written.

. . . .

Notary Public

. . . .

My commission expires

Health Care Powers of Attorney.

Health care power of attorney may be made by individual of sound mind who is 18 or older, has married, has graduated from high school or is emancipated minor (20 Pa.C.S. § 5452[a]) pursuant to Health Care Agents and Representatives Act (20 Pa.C.S. § 5451 to 5465). Health care power of attorney may but need not be in form in subhead Combined Living Wills and Healthcare.

DURABLE HEALTH CARE POWER OF ATTORNEY

I, ..., of . . . . County, Pennsylvania, appoint the person named below to be my health care agent to make health and personal care decisions for me.

Effective immediately and continuously until my death or revocation by a writing signed by me or someone authorized to make health care treatment decisions for me, I authorize all health care providers or other covered entities to disclose to my health care agent, upon my agent's request, any information, oral or written, regarding my physical or mental health, including, but not limited to, medical and hospital records and what is otherwise private, privileged, protected or personal health information, such as health information as defined and described in the Health Insurance Portability and Accountability Act of 1996 (Public Law 104-191, 110 Stat. 1936), the regulations promulgated thereunder and any other State or local laws and rules. Information disclosed by a health care provider or other covered entity may be redisclosed and may no longer be subject to the privacy rules provided by 45 C.F.R. Pt. 164.

The remainder of this document will take effect when and only when I lack the ability to understand, make or communicate a choice regarding a health or personal care decision as verified by my attending physician. My health care agent may not delegate the authority to make decisions.

MY HEALTH CARE AGENT HAS ALL OF THE FOLLOWING POWERS SUBJECT TO THE HEALTH CARE TREATMENT INSTRUCTIONS THAT FOLLOW IN PART III (CROSS OUT ANY POWERS YOU DO NOT WANT TO GIVE YOUR HEALTH CARE AGENT):

1. To authorize, withhold or withdraw medical care and surgical procedures.

2. To authorize, withhold or withdraw nutrition (food) or hydration (water) medically supplied by tube through my nose, stomach, intestines, arteries or veins.

3. To authorize my admission to or discharge from a medical, nursing, residential or similar facility and to make agreements for my care and health insurance for my care, including hospice and/or palliative care.

4. To hire and fire medical, social service and other support personnel responsible for my care.

5. To take any legal action necessary to do what I have directed.

6. To request that a physician responsible for my care issue a do-not-resuscitate (DNR) order, including an out-of-hospital DNR order, and sign any required documents and consents.

APPOINTMENT OF HEALTH CARE AGENT

I appoint the following health care agent:

Health care agent: . . . . (Name and relationship)

Address: . . . .

. . . .

Telephone Number: Home . . . . Work . . . .

E-mail: . . . .

IF YOU DO NOT NAME A HEALTH CARE AGENT, HEALTH CARE PROVIDERS WILL ASK YOUR FAMILY OR AN ADULT WHO KNOWS YOUR PREFERENCES AND VALUES FOR HELP IN DETERMINING YOUR WISHES FOR TREATMENT. NOTE THAT YOU MAY NOT APPOINT YOUR DOCTOR OR OTHER HEALTH CARE PROVIDER AS YOUR HEALTH CARE AGENT UNLESS RELATED TO YOU BY BLOOD, MARRIAGE OR ADOPTION.

If my health care agent is not readily available or if my health care agent is my spouse and an action for divorce is filed by either of us after the date of this document, I appoint the person or persons named below in the order named. (It is helpful, but not required, to name alternative health care agents.)

First Alternative Health Care Agent: . . . . (Name and relationship)

Address: . . . .

. . . .

Telephone Number: Home . . . . Work . . . .

E-mail: . . . .

Second Alternative Health Care Agent: . . . . (Name and relationship)

Address: . . . .

. . . .

Telephone Number: Home . . . . Work . . . .

E-mail: . . . .

GUIDANCE FOR HEALTH CARE AGENT (OPTIONAL)

GOALS

If I have an end-stage medical condition or other extreme irreversible medical condition, my goals in making medical decisions are as follows (insert your personal priorities such as comfort, care, preservation of mental function, etc.): . . . .

SEVERE BRAIN DAMAGE OR BRAIN DISEASE

If I should suffer from severe and irreversible brain damage or brain disease with no realistic hope of significant recovery, I would consider such a condition intolerable and the application of aggressive medical care to be burdensome. I therefore request that my health care agent respond to any intervening (other and separate) life-threatening conditions in the same manner as directed for an end-stage medical condition or state of permanent unconsciousness as

I have indicated below.

Initials . . . . . . I agree

Initials . . . . . . I disagree

Combined Living Wills and Health Care Powers of Attorney.

Living will and health care power of attorney may be combined in one document, although separate forms may also be used. Combined living will and health care power of attorney may but need not be in following form:

DURABLE HEALTH CARE POWER OF ATTORNEY ANDHEALTH CARE TREATMENT INSTRUCTIONS(LIVING WILL)PART IINTRODUCTORY REMARKS ONHEALTH CARE DECISION MAKING

You have the right to decide the type of health care you want.

Should you become unable to understand, make or communicate decisions about medical care, your wishes for medical treatment are most likely to be followed if you express those wishes in advance by:

(1) naming a health care agent to decide treatment for you; and

(2) giving health care treatment instructions to your health care agent or health care provider.

An advance health care directive is a written set of instructions expressing your wishes for medical treatment. It may contain a health care power of attorney, where you name a person called a “health care agent” to decide treatment for you, and a living will, where you tell your health care agent and health care providers your choices regarding the initiation, continuation, withholding or withdrawal of life-sustaining treatment and other specific directions.

You may limit your health care agent's involvement in deciding your medical treatment so that your health care agent will speak for you only when you are unable to speak for yourself or you may give your health care agent the power to speak for you immediately. This combined form gives your health care agent the power to speak for you only when you are unable to speak for yourself. A living will cannot be followed unless your attending physician determines that you lack the ability to understand, make or communicate health care decisions for yourself and you are either permanently unconscious or you have an end-stage medical condition, which is a condition that will result in death despite the introduction or continuation of medical treatment. You, and not your health care agent, remain responsible for the cost of your medical care.

If you do not write down your wishes about your health care in advance, and if later you become unable to understand, make or communicate these decisions, those wishes may not be honored because they may remain unknown to others.

A health care provider who refuses to honor your wishes about health care must tell you of its refusal and help to transfer you to a health care provider who will honor your wishes.

You should give a copy of your advance health care directive (a living will, health care power of attorney or a document containing both) to your health care agent, your physicians, family members and others whom you expect would likely attend to your needs if you become unable to understand, make or communicate decisions about medical care. If your health care wishes change, tell your physician and write a new advance health care directive to replace your old one. It is important in selecting a health care agent that you choose a person you trust who is likely to be available in a medical situation where you cannot make decisions for yourself. You should inform that person that you have appointed him or her as your health care agent and discuss your beliefs and values with him or her so that your health care agent will understand your health care objectives.

You may wish to consult with knowledgeable, trusted individuals such as family members, your physician or clergy when considering an expression of your values and health care wishes. You are free to create your own advance health care directive to convey your wishes regarding medical treatment. The following form is an example of an advance health care directive that combines a health care power of attorney with a living will.

NOTES ABOUT THE USE OF THIS FORM

If you decide to use this form or create your own advance health care directive, you should consult with your physician and your attorney to make sure that your wishes are clearly expressed and comply with the law.

If you decide to use this form but disagree with any of its statements, you may cross out those statements.

You may add comments to this form or use your own form to help your physician or health care agent decide your medical care.

This form is designed to give your health care agent broad powers to make health care decisions for you whenever you cannot make them for yourself. It is also designed to express a desire to limit or authorize care if you have an end-stage medical condition or are permanently unconscious. If you do not desire to give your health care agent broad powers, or you do not wish to limit your care if you have an end-stage medical condition or are permanently unconscious, you may wish to use a different form or create your own. YOU SHOULD ALSO USE A DIFFERENT FORM IF YOU WISH TO EXPRESS YOUR PREFERENCES IN MORE DETAIL THAN THIS FORM ALLOWS OR IF YOU WISH FOR YOUR HEALTH CARE AGENT TO BE ABLE TO SPEAK FOR YOU IMMEDIATELY. In these situations, it is particularly important that you consult with your attorney and physician to make sure that your wishes are clearly expressed.

This form allows you to tell your health care agent your goals if you have an end-stage medical condition or other extreme and irreversible medical condition, such as advanced Alzheimer's disease. Do you want medical care applied aggressively in these situations or would you consider such aggressive medical care burdensome and undesirable?

You may choose whether you want your health care agent to be bound by your instructions or whether you want your health care agent to be able to decide at the time what course of treatment the health care agent thinks most fully reflects your wishes and values.

If you are a woman and diagnosed as being pregnant at the time a health care decision would otherwise be made pursuant to this form, the laws of this Commonwealth prohibit implementation of that decision if it directs that life-sustaining treatment, including nutrition and hydration, be withheld or withdrawn from you, unless your attending physician and an obstetrician who have examined you certify in your medical record that the life-sustaining treatment:

(1) will not maintain you in such a way as to permit the continuing development and live birth of the unborn child;

(2) will be physically harmful to you; or

(3) will cause pain to you that cannot be alleviated by medication.

A physician is not required to perform a pregnancy test on you unless the physician has reason to believe that you may be pregnant.

Pennsylvania law protects your health care agent and health care providers from any legal liability for following in good faith your wishes as expressed in the form or by your health care agent's direction. It does not otherwise change professional standards or excuse negligence in the way your wishes are carried out. If you have any questions about the law, consult an attorney for guidance.

This form and explanation is not intended to take the place of specific legal or medical advice for which you should rely upon your own attorney and physician.

PART II

DURABLE HEALTH CARE POWER OF ATTORNEY

I, ..., of . . . . County, Pennsylvania, appoint the person named below to be my health care agent to make health and personal care decisions for me.

Effective immediately and continuously until my death or revocation by a writing signed by me or someone authorized to make health care treatment decisions for me, I authorize all health care providers or other covered entities to disclose to my health care agent, upon my agent's request, any information, oral or written, regarding my physical or mental health, including, but not limited to, medical and hospital records and what is otherwise private, privileged, protected or personal health information, such as health information as defined and described in the Health Insurance Portability and Accountability Act of 1996 (Public Law 104-191, 110 Stat. 1936), the regulations promulgated thereunder and any other State or local laws and rules. Information disclosed by a health care provider or other covered entity may be redisclosed and may no longer be subject to the privacy rules provided by 45 C.F.R. Pt. 164.

The remainder of this document will take effect when and only when I lack the ability to understand, make or communicate a choice regarding a health or personal care decision as verified by my attending physician. My health care agent may not delegate the authority to make decisions.

MY HEALTH CARE AGENT HAS ALL OF THE FOLLOWING POWERS SUBJECT TO THE HEALTH CARE TREATMENT INSTRUCTIONS THAT FOLLOW IN PART III (CROSS OUT ANY POWERS YOU DO NOT WANT TO GIVE YOUR HEALTH CARE AGENT):

1. To authorize, withhold or withdraw medical care and surgical procedures.

2. To authorize, withhold or withdraw nutrition (food) or hydration (water) medically supplied by tube through my nose, stomach, intestines, arteries or veins.

3. To authorize my admission to or discharge from a medical, nursing, residential or similar facility and to make agreements for my care and health insurance for my care, including hospice and/or palliative care.

4. To hire and fire medical, social service and other support personnel responsible for my care.

5. To take any legal action necessary to do what I have directed.

6. To request that a physician responsible for my care issue a do-not-resuscitate (DNR) order, including an out-of-hospital DNR order, and sign any required documents and consents.

APPOINTMENT OF HEALTH CARE AGENT

I appoint the following health care agent:

Health care agent: . . . .

(Name and relationship)

Address: . . . .

. . . .

Telephone Number: Home . . . . Work . . . .

E-mail: . . . .

IF YOU DO NOT NAME A HEALTH CARE AGENT, HEALTH CARE PROVIDERS WILL ASK YOUR FAMILY OR AN ADULT WHO KNOWS YOUR PREFERENCES AND VALUES FOR HELP IN DETERMINING YOUR WISHES FOR TREATMENT. NOTE THAT YOU MAY NOT APPOINT YOUR DOCTOR OR OTHER HEALTH CARE PROVIDER AS YOUR HEALTH CARE AGENT UNLESS RELATED TO YOU BY BLOOD, MARRIAGE OR ADOPTION.

If my health care agent is not readily available or if my health care agent is my spouse and an action for divorce is filed by either of us after the date of this document, I appoint the person or persons named below in the order named. (It is helpful, but not required, to name alternative health care agents.)

First Alternative Health Care Agent: . . . .

(Name and relationship)

Address: . . . .

. . . .

Telephone Number: Home . . . . Work . . . .

E-mail: . . . .

Second Alternative Health Care Agent: . . . .

(Name and relationship)

Address: . . . .

. . . .

Telephone Number: Home . . . . Work . . . .

E-mail: . . . .

GUIDANCE FOR HEALTH CARE AGENT (OPTIONAL) GOALS

If I have an end-stage medical condition or other extreme irreversible medical condition, my goals in making medical decisions are as follows (insert your personal priorities such as comfort, care, preservation of mental function, etc.): . . . .

. . . .

. . . .

. . . .

SEVERE BRAIN DAMAGE OR BRAIN DISEASE

If I should suffer from severe and irreversible brain damage or brain disease with no realistic hope of significant recovery, I would consider such a condition intolerable and the application of aggressive medical care to be burdensome. I therefore request that my health care agent respond to any intervening (other and separate) life-threatening conditions in the same manner as directed for an end-stage medical condition or state of permanent unconsciousness as I have indicated below.

Initials . . . . . . I agree

Initials . . . . . . I disagree

PART III

HEALTH CARE TREATMENT INSTRUCTIONS IN THE EVENT

OF END-STAGE MEDICAL CONDITION

OR PERMANENT UNCONSCIOUSNESS

(LIVING WILL)

The following health care treatment instructions exercise my right to make my own health care decisions. These instructions are intended to provide clear and convincing evidence of my wishes to be followed when I lack the capacity to understand, make or communicate my treatment decisions:

IF I HAVE AN END-STAGE MEDICAL CONDITION (WHICH WILL RESULT IN MY DEATH, DESPITE THE INTRODUCTION OR CONTINUATION OF MEDICAL TREATMENT) OR AM PERMANENTLY UNCONSCIOUS SUCH AS AN IRREVERSIBLE COMA OR AN IRREVERSIBLE VEGETATIVE STATE AND THERE IS NO REALISTIC HOPE OF SIGNIFICANT RECOVERY, ALL OF THE FOLLOWING APPLY (CROSS OUT ANY TREATMENT INSTRUCTIONS WITH WHICH YOU DO NOT AGREE):

1. I direct that I be given health care treatment to relieve pain or provide comfort even if such treatment might shorten my life, suppress my appetite or my breathing, or be habit forming.

2. I direct that all life prolonging procedures be withheld or withdrawn.

3. I specifically do not want any of the following as life prolonging procedures: (If you wish to receive any of these treatments, write “I do want” after the treatment)

heart-lung resuscitation (CPR) . . . .

---

mechanical ventilator (breathing machine) . . . .

dialysis (kidney machine) . . . .

surgery . . . .

chemotherapy . . . .

radiation treatment . . . .

antibiotics . . . .

Please indicate whether you want nutrition (food) or hydration (water) medically supplied by a tube into your nose, stomach, intestine, arteries, or veins if you have an end-stage medical condition or are permanently unconscious and there is no realistic hope of significant recovery.

(Initial only one statement.)

TUBE FEEDINGS

. . . . . . I want tube feedings to be given.

OR

NO TUBE FEEDINGS

. . . . . . I do not want tube feedings to be given.

HEALTH CARE AGENT'S USE OF INSTRUCTIONS(INITIAL ONE OPTION ONLY)

. . . . . . My health care agent must follow these instructions.

OR

. . . . . . These instructions are only guidance.

My health care agent shall have final say and may override any of my instructions. (Indicate any exceptions) . . . .

If I did not appoint a health care agent, these instructions shall be followed.

LEGAL PROTECTION

Pennsylvania law protects my health care agent and health care providers from any legal liability for their good faith actions in following my wishes as expressed in this form or in complying with my health care agent's direction. On behalf of myself, my executors and heirs, I further hold my health care agent and my health care providers harmless and indemnify them against any claim for their good faith actions in recognizing my health care agent's authority or in following my treatment instructions.

ORGAN DONATION (INITIAL ONE OPTION ONLY)

. . . . . . I consent to donate my organs and tissues at the time of my death for the purpose of transplant, medical study or education. (Insert any limitations you desire on donation of specific organs or tissues or uses for donation of organs and tissues.) . . . .

OR

. . . . . . I do not consent to donate my organs or tissues at the time of my death.

SIGNATURE

Having carefully read this document, I have signed it this . . . . . . day of . . . ., 20. . . ., revoking all previous health care powers of attorney and health care treatment instructions.

. . . .

(SIGN FULL NAME HERE FOR HEALTH CARE POWER OF ATTORNEY AND HEALTH CARE TREATMENT INSTRUCTIONS)

WITNESS: . . . .

WITNESS: . . . .

Two witnesses at least 18 years of age are required by Pennsylvania law and should witness your signature in each other's presence. A person who signs this document on behalf of and at the direction of a principal may not be a witness. (It is preferable if the witnesses are not your heirs, nor your creditors, nor employed by any of your health care providers.)

NOTARIZATION (OPTIONAL)

(Notarization of document is not required by Pennsylvania law, but if the document is both witnessed and notarized, it is more likely to be honored by the laws of some other states.)

On this . . . . . . day of . . . ., 20. . . ., before me personally appeared the aforesaid declarant and principal, to me known to be the person described in and who executed the foregoing instrument and acknowledged that he/she executed the same as his/her free act and deed.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal in the County of . . . ., State of . . . . the day and year first above written.

. . . .

Notary Public   My commission expires

(20 Pa.C.S. § 5471).

Foreign Execution.

Will of a person domiciled outside of Pennsylvania at time of execution is validly executed if executed in accordance with above requirements or in compliance with law of jurisdiction where testator was domiciled at time of execution or at time of death. (20 Pa.C.S. § 2504.1).

Holographic wills are recognized.

Revocation.

A will may be revoked by act of testator: (1) By burning, cancellation, or obliteration by testator himself or by another in his presence and at his direction; (2) by new will or codicil, properly executed or proved, or other writing, duly executed and proved in same manner as will. (20 Pa.C.S. § 2505).

Where testator or testatrix marries after execution of will, surviving spouse takes such share of estate as he or she would have taken in case of intestacy, unless will gives greater share or it appears from will that will was made in contemplation of marriage to surviving spouse. In case of divorce after execution of will, all provisions for spouse so divorced are thereby revoked. If testator fails to provide in will for child born or adopted after its execution, unless such failure is expressly intentional in will, such child takes from portion of estate not passing to surviving spouse such share of estate as he would have received if testator had died unmarried and intestate owning only said portion of estate. (20 Pa.C.S. § 2507).

Revival.

Where later revoking will is revoked, prior will is revived if revocation is in writing and declares intention of testator to revive prior will or if prior will is re-executed after such revocation. (20 Pa.C.S. § 2506).

Testamentary Gifts to Subscribing Witnesses.

Legatee is not incompetent as witness and there are no restrictions on testamentary gifts to subscribing witnesses.

Bequests and Devises to Inter Vivos Trusts.

Valid bequest or devise may be made to trustee of inter vivos trust, including an unfunded life insurance trust, whether or not trust is in existence at time will is executed, and gift is not invalidated by subsequent amendment of trust instrument. (20 Pa.C.S. § 2515).

Probate.

Wills of decedents domiciled in Pennsylvania at time of death are probated only before register of wills of county where decedent had last family or principal residence. Wills of decedents not domiciled in Pennsylvania may be probated before register of any county where property is located. (20 Pa.C.S. § 3131).

All wills must be proved by two competent witnesses and in case of will signed by testator, register will prefer proof by subscribing witnesses only if they are available and will prefer proof of testator's signature to proof of signature of subscribing witness. (20 Pa.C.S. § 3132[1]). Will signed by mark or by person other than testator must be proved by subscribing witnesses if such proof can be adduced by exercise of reasonable diligence or, if not, by other means including proof of subscribers' signatures, which are then prima facie proof of facts recited in attestation clause. (20 Pa.C.S. § 3132[2]). When testator's inability to sign his name is not known by subscribing witnesses, it may be proved by testimony of other, nonsubscribing, witnesses. (472 A.2d 205). Oath of subscribing witness relative to probate of will may be taken before officer authorized to administer oaths under laws of Pennsylvania or another state, unless there is will contest or will is signed by mark or by another. (20 Pa.C.S. § 3154[B]).

Will in foreign language must be accompanied by sworn English translation. (20 Pa.C.S. § 3135).

Probate of will is conclusive as to all property devised or bequeathed thereby unless appeal to orphans' court is taken within one year (20 Pa.C.S. § 908) or unless probate record is amended by register on submission of later will or codicil within three months of death (20 Pa.C.S. § 3138). Will may be offered for probate at any time. If not offered within one year after death will is void against bona fide conveyance or mortgage of real estate which is recorded before will is offered for probate. (20 Pa.C.S. § 3133). On request of party in interest, register can compel production of will by any person in possession or control thereof. (20 Pa.C.S. § 3137).

Contest.

By caveat filed with register of wills prior to probate (20 Pa.C.S. § 906) or by appeal to orphans' court after probate (20 Pa.C.S. § 908). Register may require caveator to file bond to cover any costs which may be charged to him. When caveat is filed, register of wills may not delay probate more than ten days after filing of probate petition or after filing of caveat, whichever is later, unless caveator files any necessary bond. Appeals from probate must be filed within one year of probate, otherwise probate is conclusive as to all property devised or bequeathed.

Penalty clause in will for contest unenforceable when probable cause exists for instituting proceedings. (20 Pa.C.S. § 2521).

Legacies and Devises.

Personal representative may distribute personal or real property without liability to any claimant who has not given notice of his claim one year after first complete advertisement of grant of letters (20 Pa.C.S. § 3532) and should make distribution following confirmation of his account (20 Pa.C.S. § 3533).

Unless will provides otherwise, pecuniary legacy bequeathed in trust shall be entitled to income at 5% from death of decedent until payment of legacy and when not in trust from one year after death of decedent. Until payment of legacy, specific legatee or devisee is entitled to net income from property given him. Demonstrative legacy shall be entitled to income from death of decedent until payment at rate earned by property out of which it is primarily paid and, to extent it is not paid from that source, at 5% from one year after death of decedent. Legacy payable at future date, unless earlier set aside in separate trust, does not begin to bear income until three months after date fixed for payment. (20 Pa.C.S. § 3543).

Unless will directs otherwise, devisee or beneficiary of real or personal property which is subject to security interest takes subject thereto and is not entitled to exoneration out of other estate. This is true whether mortgage created by testator or previous owner and even though testator made general direction that his debts be paid. (20 Pa.C.S. § 2514[12.1]).

Whenever any person is entitled to income from proceeds of conversion of realty or increase, profits or dividends of personalty for life or term of years or for any other limited period or upon condition or contingency, such person may receive property on furnishing such security as will sufficiently secure remainderman's interest. (20 Pa.C.S. § 6113). Portion of estate may be discharged from annuities or legacies payable in future and realty may be discharged from lien of legacies by appropriate procedure in orphans' court. (20 Pa.C.S. § 3552, 3553).

Order of abatement among distributees is set forth in 20 Pa.C.S. § 3541.

Remedy for collection of legacies of all kinds, and whether charged on land or not, is exclusively in orphans' court. (20 Pa.C.S. § 3551).

Unclaimed Legacies.

If neither payment of nor claim for dower, recognizance, legacy, annuity installment or other charge created by will, agreement, inter vivos trust or court decree upon real property has been made for period of 20 years, release or extinguishment is presumed. (20 Pa.C.S. § 3554). Property held in fiduciary capacity for benefit of another person is presumed abandoned and unclaimed unless owner within seven years after property has or shall become payable or distributable has increased or decreased principal, accepted payment of principal or income, corresponded in writing concerning property, or indicated interest as evidenced by writing in fiduciary's file. (72 Pa.C.S. § 1301.8).

Unless court finds absentee's death has disqualified him as beneficiary or distributee of estate or unless trustee has been appointed for absentee, court, at audit of personal representative's account, must direct property distributable to absentee be converted into money and paid into State Treasury where it must be held in custodial capacity subject to refund. Orphans' court retains jurisdiction over claims to such money. (20 Pa.C.S. § 3540[a]).

If existence of additional distributees would affect distribution of estate or trust but there is no proof of existence of such additional distributees and court is satisfied that all steps have been taken to establish their existence, court may award distribution of estate or trust to those entitled as if no additional distributees existed with or without refunding bond. If such distribution is made to Commonwealth as intestate heir, in lieu of bond, payment shall be as provided in 20 Pa.C.S. § 3540(a) above. Otherwise, bond must be without security, in such form and amount as court directs, and executed by each distributee and filed with clerk of orphans' court division. Bond must provide that, if within seven years or shorter period fixed by court, existence of additional distributees is established, distributee will return all or portion of property received by him or, if disposed of, make such restitution as court deems equitable. (20 Pa.C.S. § 3540[b]).

See also topic 13.08 Executors and Administrators, subhead Distribution if Abroad.

Lapse.

No legacy to descendant lapses by death if legatee leaves issue surviving testator; issue take legacy. Where testator leaves no descendant or spouse who would receive benefit of lapsed legacy, legacy to brother or sister or their children will not lapse if legatee leaves issue surviving testator, in which case issue take legacy. (20 Pa.C.S. § 2514).

Children living when will disposing of parent's entire estate is executed and not provided for therein have no rights in estate, although not expressly disinherited. See also subhead Revocation, supra.

As to right of election of surviving spouse who was married before execution of will see infra, subhead Election to Take Against Will.

Testamentary Guardian.

See category 14 Family, topic 14.07 Guardian and Ward, subhead Eligibility and Competency.

Election to Take Against Will.

Surviving spouse may elect to take against will of deceased spouse, and in such case is entitled to one-third of probate estate. (20 Pa.C.S. § 2203[a]). Right to elect is personal to spouse and may be exercised in whole or in part during his lifetime by him or his agent in accordance with 20 Pa.C.S. § 5603(d) (relating to powers of attorney). (20 Pa.C.S. § 2206). If spouse is minor, right to elect may be exercised only by guardian. If spouse is incapacitated, guardian or agent may exercise right. (20 Pa.C.S. § 2206, 5603[d], 5604). In latter two cases, election can be exercised only pursuant to court order. Election also applies to property in excess of $3,000 conveyed to any one donee within one year of death, and property conveyed without adequate consideration by decedent where he retained income or use, power of revocation or invasion, joint ownership with power to sever or convey, or annuity. Assets not subject to election include property conveyed with consent of spouse, life insurance on decedent's life, and employee benefits. Offsets against spouse's elective share include property passing to surviving spouse by decedent's exercise or non-exercise of power of appointment; employee benefits; joint, entireties, or community property to extent of decedent's contribution; and life insurance on decedent's life if premiums paid by decedent, his employer, partner or creditor.

Such election must be in writing and delivered to clerk of orphans' court of county where decedent died domiciled within six months from issuance of letters, except that six months period may be extended on application to court within six months after probate. Failure so to do is deemed waiver of right of election. Costs incurred in making election are reimbursed from estate as administration expense. (20 Pa.C.S. § 2210).

Foreign Wills.

Wills of persons domiciled out of state at time of death are valid if executed as required by law of their domicile. (20 Pa.C.S. § 2504.1).

Copies of foreign wills duly proved and authenticated may be registered in Pennsylvania, and letters granted thereon; but copy of record of probate of original will and letters, duly attested, must be produced and filed. (20 Pa.C.S. § 3136).

If no letters issued in Pennsylvania are in effect, heir or devisee may, after one year from decedent's death, transfer decedent's real property to bona fide grantees or encumbrancers free of general creditors' claims. By doing so, however, he becomes liable to subsequently appointed personal representatives for value of property transferred. (20 Pa.C.S. § 3385). If no letters have been granted in Pennsylvania and year has elapsed, claimant to such real property as or through heir or devisee may establish title in orphans' court of proper county without ancillary letters. If no exceptions to decree nisi are filed within three months it is confirmed absolutely, free of all decedent's debts not then liens of record and regardless of any testamentary writing of decedent thereafter probated. (20 Pa.C.S. § 3546). See also topic 13.08 Executors and Administrators, subhead Foreign Executors and Administrators.

Simultaneous Death.

See topic 13.05 Death, subhead Survivorship.

Testamentary Trusts.

See topic 13.15 Trusts.

Uniform Anatomical Gift Act (1968) adopted, with substantial modification. (20 Pa.C.S. § 8601 et seq.).

Uniform Disclaimer of Property Interests Act adopted with significant modifications. (20 Pa.C.S. § 6201).

Uniform Durable Power of Attorney Act adopted. (20 Pa.C.S. § 5604 et seq.).

Uniform Simultaneous Death Act adopted. (20 Pa.C.S. § 8501 et seq.).

Uniform Testamentary Additions to Trusts Act adopted. (20 Pa.C.S. § 2515).

14 FAMILY

14.01 ADOPTION:

New Adoption Act enacted, effective Jan. 1, 1981, am'd Aug. 8, 1982 and Dec. 12, 1984. (23 Pa.C.S. § 2101 to 2910). Department of Public Welfare authorized to enter into interstate adoption compacts. (62 P.S. § 6000.1 et seq.).

Any individual may adopt any other individual. (23 Pa.C.S. § 2311, 2312). Activities of child placement intermediaries regulated by statute.

Consent Required.

Adoptee if over 12; adopter's spouse (unless adoption is joint); adoptee's surviving natural parents, except as noted below; adoptee's legal guardians or custodians, if any; man married to natural mother within one year prior to adoptee's birth, absent proof he is not natural father. Consents must be executed more than 72 hours before or after birth of adoptee and are revocable by birth or putative father within 30 days of later of birth or consent and by birth mother within 30 days of consent, but putative father may execute consent at any time after notice of expected or actual birth of child. (23 Pa.C.S. § 2711).

Consent of natural parents not required if prior to adoption hearing parental rights voluntarily terminated by relinquishment or involuntarily terminated because of abandonment, neglect, abuse or parental incapacity, because presumptive father is not natural father, because child is foundling, or because conditions leading to removal of child from parents or placement with agency by parents will not be remedied. Upon termination court names agency or proposed adoptive parents as custodian. (23 Pa.C.S. § 2714, 2501 to 2513, 2521; 468 Pa. 165, 360 A.2d 603; 469 Pa. 141, 364 A.2d 1307). Court may dispense with consents other than that of adoptee when: (a) Adoptee is over 18, or (b) adoptee is under 18 and has no parent living whose consent is required. (23 Pa.C.S. § 2713).

Form of Consent.

Provided. (23 Pa.C.S. § 2711[d]).

Conditions Precedent.

Adoption decree may be entered at any time if adoptee is at least 18 or adopter and adoptee are related by blood or marriage; otherwise, unless good cause is demonstrated, adoption decree may not be entered until after termination of parental rights, filing of intermediary's report and completion of investigation report. (23 Pa.C.S. § 2901).

Jurisdiction of adoption, voluntary relinquishment, and involuntary termination proceedings vested in appropriate division of courts of common pleas, usually orphans' court division except in Philadelphia where it is family court division. (23 Pa.C.S. § 2301; 20 Pa.C.S. § 711, 713).

Venue.

Proceedings may be brought in court of county where petitioner, natural parent or adoptee resides, where office of agency having custody of child or which placed child is located, or, with court approval, where adoptee formerly resided. (23 Pa.C.S. § 2302).

Petition must set forth adopter's name, residence, marital status, age, occupation, religion, racial background and relationship, if any, to adoptee; that report of home study and preplacement, report of intention to adopt and intermediary's report have been filed, if required; name and address of intermediary, if any; name of adoptee and length of residence with adopter; if report of intention to adopt and intermediary's report not filed or if adoptee over 18 (see subhead Proceedings, infra), all information required therein; new name if change requested; that all necessary consents are attached or why they are not; that adopter desires to adopt adoptee; if adoptee's birth certificate cannot be obtained, statement of efforts to procure it and request that court establish date and place of adoptee's birth at adoption hearing. Printed form used in many counties. (23 Pa.C.S. § 2701).

Proceedings.

Within 30 days of receiving child under 18, adopters must file with court report of intention to adopt. Report must set forth circumstances surrounding receipt of child, child's name, sex, racial background, age, date and place of birth, and religion; name and address of intermediary and any fee paid thereto; whether natural parents received counseling with respect to termination of their rights, including dates of counseling and name and address of counselor; name, address and signature of adopter; and acknowledgment set forth in statute. If child received from agency, only agency's name and address and circumstances of receipt required. No report required if adoptee related within certain degree by blood or marriage. (23 Pa.C.S. § 2531, 2532).

Intermediary must file report within six months of filing of report of intention to adopt setting forth under oath facts required in report of intention to adopt; date of placement of child; natural parents' names, residence, racial background, age, marital status as of child's birth and one year prior thereto, and religion; whether parental rights terminated; amount of fees paid, and description and value of property of child; statement that no provision of statute regulating interstate placement of children has been violated; and statement that medical history information obtained or, if not obtained, statement of reasons why not. (23 Pa.C.S. § 2533). All necessary consents, adoptee's birth certificate, and certified copy of decree of termination must be attached. (23 Pa.C.S. § 2534). Court then causes investigation to be made. (23 Pa.C.S. § 2535, 2724). Hearing held in open court or chambers; adopter, adoptee and, if required by court, intermediary must appear. (23 Pa.C.S. § 2722, 2723).

Decree.

Formal decree signed certifying adoption. (23 Pa.C.S. § 2902). All proceedings impounded. (23 Pa.C.S. § 2905).

Foreign Adoption Decree.

Registration of foreign adoption decrees provided and issuance of certificates of domestic adoption. (23 Pa.C.S. § 2908).

State subsidies to adopting family covering maintenance cost, medical, surgical, and/or psychological expenses, and other costs incident to adoption may be available where minor to be adopted is physically and/or mentally handicapped, emotionally disturbed, or hard to place by virtue of age, sibling relationship or ethnicity. (62 Pa.C.S. § 771 to 774).

Names.

Adoptee may assume adopter's name if desired and any given first or middle names. (23 Pa.C.S. § 2904). Subsequent change of name by adopter automatically changes name of minor adoptee. (54 Pa.C.S. § 703).

Effect of Adoption.

Upon adoption, adoptee has all rights of child and heir of adopter and is subject to duties of such child. (23 Pa.C.S. § 2902).

Effect on Inheritance.

In case of intestacy, adoptee is considered issue of adopter and not issue of natural parents, except in distributing estate of natural kin, other than natural parent, who has maintained family relationship with adoptee. If natural parent marries adopter, adoptee for purposes of inheritance is also considered issue of such natural parent. (20 Pa.C.S. § 2108).

In construing will or inter vivos conveyance, making gift to person described by relationship to testator, conveyor, or another, adoptee shall be considered child of adopter and not of natural parents except in construing will of natural kin, other than natural parent, who has maintained family relationship with adoptee. In construing will of testator who is not adopter, adoptee will be considered child of adopter only if adoption occurred during adoptee's minority or reflected earlier parent-child relationship. (20 Pa.C.S. § 2514, 6114).

Paternity.

Father of child born to unmarried woman may, with consent of mother, file acknowledgment of paternity with Department of Health or, where mother does not join in acknowledgment of paternity, file claim of paternity entitling him to notice of proceeding to terminate parental rights. (23 Pa.C.S. § 5103).

Natural Parents.

Adoptee 18 or over, and adopter or guardian of adoptee under 18, may through court procedure obtain from impounded adoption records information not endangering anonymity of natural parents. Upon consent or after death of natural parent (who has not withdrawn consent by form filed with court and Department of Health), identity and, where applicable, present residence of that natural parent may be obtained through court or agency that placed adoptee. When consent of both natural parents is on file with court and Department of Health, information from original birth certificate and other information may be obtained from court or Department of Health. (23 Pa.C.S. § 2905). Unauthorized disclosure of confidential adoption information is misdemeanor. (23 Pa.C.S. § 2910).

Termination of Parental Rights.

See topic 14.10 Infants.

14.02 ALIMONY:

See topic 14.05 Divorce.

14.03 COMMUNITY PROPERTY:

See topic 14.09 Husband and Wife.

14.04 DESERTION:

See topics 14.05 Divorce, 14.09 Husband and Wife.

14.05 [RESERVED]

14.06 DIVORCE:

This subject is governed by Divorce Code, 23 Pa.C.S. § 3101 to 3707, and P. R. C. P. 400 et seq. and 1920 et seq.

Grounds.

Court to grant divorce upon any of following grounds: (1) Willful and malicious desertion or absence without reasonable cause for one or more years; (2) adultery; (3) cruel and barbarous treatment; (4) bigamy; (5) conviction of serious crime; (6) indignities rendering condition intolerable and life burdensome; (7) 18 months confinement in mental institution without reasonable prospect of discharge during next 18 months; (8) irretrievably broken marriage, either 90 days after filing complaint with mutual consent or upon two-year separation without mutual consent. (23 Pa.C.S. § 3301).

Collusion.

Collusion is defense to all causes of action for divorce except ground of irretrievably broken marriage. (23 Pa.C.S. § 3307[a]). Collusion exists only where conspiracy to fabricate grounds, perjury or fraud on court. Discussion and negotiation of settlement agreement is not collusion. Entry of general appearance is not collusion. (23 Pa.C.S. § 3309).

Grounds for Legal Separation.

Legal separation does not exist.

Citizenship Requirements.

None.

Residence Requirements.

Action may be brought for divorce if either party has been bona fide resident of Commonwealth for at least six months immediately preceding filing of complaint. (23 Pa.C.S. § 3104[b]).

Jurisdiction.

Exclusively in Court of Common Pleas. Court shall determine in conjunction with any decree concerning divorce or annulment matters raised in pleadings, including property rights, custody and visitation rights, child support, settlement agreements and any other matter pertaining to divorce or annulment. Court may retain continuing jurisdiction. If marriage is dissolved or annulled in foreign forum, court has jurisdiction to determine such matters not decided to fullest extent allowed under Constitution of U.S. (23 Pa.C.S. § 3104).

Venue.

Any action, except custody claim, may be brought in county where plaintiff or defendant resides or upon which parties have agreed in writing or by participation. (23 Pa.C.S. § 3104[e]; P.R.C.P. 1920.2). Venue of custody claims is governed by 42 Pa.C.S. § 5364.

Process.

Service may be made by Sheriff or competent adult upon defendant personally, by mail or by such other manner as court may direct. Defendant may accept service without collusion. (P.R.C.P. 1920.4, 1930.4). In addition to general process rules for nonresidents, nonresident plaintiff may obtain order by filing motion and affidavit of investigation made to determine defendant's whereabouts. (P.R.C.P. 430).

Pleading.

One or more alternative grounds for divorce may be stated in complaint, and cause of action for annulment may be joined in alternative. Defendant may counterclaim for divorce or annulment. Court may order decree of divorce or annulment where grounds proven even though economic and other rights and obligations remain pending based either on consent of parties or upon certain demonstrations by moving party. (23 Pa.C.S. § 3323[c.1]). Averment of irretrievably broken marriage upon two-year separation deemed admitted unless denied; all other averments deemed denied unless admitted by answer. (P.R.C.P. 1920.11-1920.15 and 1017).

Practice.

All hearings are held before court or master appointed by court unless jury trial granted. (23 Pa.C.S. § 3321 to 3323). Issues of custody and paternity may not be heard by master. (23 Pa.C.S. § 3321). Discovery requires special court order, except for interrogatories relevant to alimony and property division. (P.R.C.P. 1920.22). Injunctive or other special relief available against party removing himself or property from jurisdiction or disposing of property to defeat property or support awards. (23 Pa.C.S. § 3323)[f]; P. R. C. P. 1920.43 and 1920.44).

Counselling.

Court may require counselling sessions in divorces on grounds of indignities or irretrievably broken marriage upon request of either party or in ex parte proceeding upon two year separation on ground of irretrievably broken marriage, where there is at least one child under 16 years, on court's own initiative. (23 Pa.C.S. § 3302).

Judgment or Decree.

Decree granting or denying divorce or annulment is final when entered subject to right of appeal. No judgment may be entered by default or on pleadings. (P.R.C.P. 1920.41). Motion to open decree procured by intrinsic fraud or where there is new evidence must be made within 30 days after entry of decree. Motion to vacate decree or strike judgment void because of extrinsic fraud, lack of jurisdiction over subject matter or fatal defect apparent on face of record must be made within five years. (23 Pa.C.S. § 3331 to 3333).

Temporary Alimony and Spousal Support.

Alimony pendente lite, spousal support and reasonable counsel fees and expenses may be allowed upon petition upon consideration of all relevant factors. Court may direct that adequate health insurance coverage be maintained for dependent spouse pendente lite. (23 Pa.C.S. § 3323[c], 3702; P. R. C. P. 1920.13).

Allowance for Prosecution of Suit.

Counsel fees and expenses may be allowed upon petition. (23 Pa.C.S. § 3323[c], [e], 3702; P.R.C.P. 1920.13).

Permanent Alimony.

Court may award alimony to either party for finite or indefinite period as it deems necessary upon consideration of all relevant factors. (23 Pa.C.S. § 3701). Award is subject to revision upon changed circumstances of either party of substantial and continuing nature. Remarriage terminates alimony award. (23 Pa.C.S. § 3701[e]). Cohabitation with person of opposite sex who is not member of immediate family is bar to alimony award. (23 Pa.C.S. § 3706).

Division of Property of Spouses.

Marital property distribution prevails. Upon request of either party in divorce or annulment proceedings, court must equitably divide all marital property without regard to marital misconduct as it deems just. Marital property is subject to division regardless of how title is held. (23 Pa.C.S. § 3501 to 3508).

Change of Name.

Either party after divorce or during proceeding may resume use of prior name upon filing of written notice with prothonotary. (54 Pa.C.S. § 704).

Custody of Children.

Provision for care, custody and visitation rights as to children may be made in proceedings for divorce or annulment or at any time thereafter. (23 Pa.C.S. § 3104[a]; R. C. P. 1915.1 et seq.). Custody and visitation policies established by statute. (23 Pa.C.S. § 5301 et seq.). Award of shared custody possible upon application of one or both parents, agreement or court discretion when in best interest of child. (23 Pa.C.S. § 5304). Information about criminal charges against other parent available to parties to custody proceeding or order. (42 Pa.C.S. § 1904). Grandparents may petition for physical and legal custody. (23 Pa.C.S. § 5313).

Uniform Child Custody Jurisdiction and Enforcement Act.

Effective Aug. 15, 2004. (23 Pa.C.S. § 5401 et seq.).

Allowance for Support of Children.

Parents are liable for support of unemancipated children under 18 and may be liable for those 18 and older. (23 Pa.C.S. § 4321). Genetic testing for paternity authorized. (23 Pa.C.S. § 4343[c]). Support guidelines based upon reasonable needs of child and ability of parents considering net income, earning capacity, assets and other factors. (23 Pa.C.S. § 4322). Guidelines developed and applied by courts of common pleas. (P.R.C.P. 1910.16-1 et seq.). Formula calculation of amount presumed correct but rebuttable. (23 Pa.C.S. § 4322[b]; P.R.C.P. 1910.16-1[d]). Support actions not based on contract are governed by P.R.C.P. 1910.1-1910.31. Lien imposed by operation of law on monetary awards from court proceeding, workers' compensation or occupational disease proceeding in cases of overdue support. (23 Pa.C.S. § 4308.1). See category 5 Civil Actions and Procedure, topic 5.02 Actions, subhead Forms of Actions.

Revised Uniform Reciprocal Enforcement of Support Act.

Adopted. (23 Pa.C.S. § 4501 et seq.).

Remarriage.

No restrictions.

Foreign Divorces.

Full faith and credit given to decree of divorce or annulment by any court of competent jurisdiction. (23 Pa.C.S. § 3333).

Enforcement of Foreign Decrees.

Foreign decrees for distribution of marital property, alimony, temporary alimony or alimony pendente lite or affecting property found within Pennsylvania may be enforced upon petition. (23 Pa.C.S. § 3705).

Separation Agreements.

Private agreements are valid if free from fraud or coercion and not directly conducive to procurement of divorce. Court may incorporate agreement into decree of divorce or annulment. (23 Pa.C.S. § 3104[a][1]). Agreements, whether or not incorporated into decree, are enforceable under statute to same extent as court order. Except for provisions regarding child support, visitation or custody, private agreements are not subject to court modification in absence of any provision to contrary. (23 Pa.C.S. § 3105).

Termination of Parental Rights.

See topic 14.10 Infants.

Premarital Agreement.

Burden on party challenging agreement to prove unenforceable by clear and convincing evidence as to specified elements. (23 Pa.C.S. § 3106).

14.07 [RESERVED]

14.08 GUARDIAN AND WARD:

Appointment, control, removal and discharge of guardians of minors, and settlement of their accounts, are within jurisdiction of orphans' court division of court of common pleas of county where minor resides. (20 Pa.C.S. § 711, 721, 5111).

Where value of minors' estate is $25,000 or less, court may direct payment thereof to parent or person by whom minor maintained, or to minor without appointing guardian. (20 Pa.C.S. § 5101). Any amount in cash of a resident or nonresident minor may be ordered by court to be deposited in one or more savings accounts in name of minor in banks, building and loan associations or savings and loan associations insured by Federal governmental agency, provided that amount deposited in any one institution does not exceed amount thus insured. No withdrawal can be made until minor attains majority except by court order. (20 Pa.C.S. § 5103).

Selection of Guardian.

Minor, if over age of 14 years, may nominate guardian, otherwise court chooses guardian. (20 Pa.C.S. § 5113). Preference is given to guardian nominated by minor over age 14.

Eligibility and Competency.

Persons of same religious persuasion as parents of minor are preferred as guardians of person. (20 Pa.C.S. § 5113). No person under 18 years of age may be appointed. Parent may not be appointed sole guardian of estate, but may be co-guardian. (20 Pa.C.S. § 5112). These prohibitions do not extend to testamentary guardians. Nonresident may be testamentary guardian. As to competency of foreign corporation, see category 3 Business Regulation and Commerce, topic 3.01 Banks and Banking.

Appointment.

Orphans' court division appoints guardian of minor resident of county and may appoint guardians of estates of minors residing out of state if they have estates within jurisdiction of court. (20 Pa.C.S. § 5111).

Any person may by will appoint testamentary guardian for estate he or she shall leave to any minor child; only sole surviving parent or adopting parent of such child may appoint testamentary guardian of person of such child. (20 Pa.C.S. § 2519).

Any person may, in deed or gift inter vivos, or in exercise of right under insurance or annuity policy to designate beneficiary, appoint guardian of interest or estate of any minor or incapacitated beneficiary. (20 Pa.C.S. § 5115).

Qualification.

Every guardian must give bond, with sufficient surety, in such amount as court considers necessary, except that no bond may be required of guardian appointed in will or other instrument, or corporate guardian having principal place of business in Commonwealth, except for cause shown. Court may dispense with bond in other cases. (20 Pa.C.S. § 5121, 5122).

Inventory.

Within three months after any property of his ward comes into his hands, guardian must file inventory and appraisement of personal estate, statement of real estate, and statement of any property which he expects to acquire thereafter. (20 Pa.C.S. § 5142).

Powers, duties and liabilities of guardian are same as those of personal representative of decedent's estate. (20 Pa.C.S. § 5144).

Investments.

See category 13 Estates and Trusts, topic 13.15 Trusts.

Securities in Name of Nominee.

See category 13 Estates and Trusts, topic 13.15 Trusts, subhead Securities in Name of Nominee.

Gifts to Minors.

See topic 14.10 Infants.

Real Estate.

Guardian may lease real property of minor for term not extending beyond date minor becomes of age, but not for more than five years, unless longer term is approved by court. (20 Pa.C.S. § 5152). Upon order of court, guardian may sell or mortgage such real estate, or grant option for sale or lease of such real estate. (20 Pa.C.S. § 5155).

Liabilities of Guardian.

Unless he specifically contracts otherwise in writing, guardian of estate is not personally liable on any written contract made within his authority and disclosing his capacity. (20 Pa.C.S. § 3331, 5144).

Accounts.

Final accounts must be filed when directed by court and may be filed upon termination of guardianship or at any other time authorized by court. (20 Pa.C.S. § 5161).

Termination of Guardianship.

Guardianship terminates when minor becomes of age, or upon death of minor prior to that time.

Standby Guardians.

Terminally ill or periodically incapable or debilitated parent, legal custodian, or legal guardian may petition for judicial appointment of standby guardian without terminating or limiting parental rights. (23 Pa.C.S. § 5601 et seq.).

Incapacitated Persons.

After June 16, 1992, when adult resident of Pennsylvania or nonresident having property in Pennsylvania whose ability to receive and evaluate information effectively and communicate decisions in any way is impaired to such extent that he is partially or totally unable to manage his financial resources or to meet essential requirements for his physical health and safety, Orphans' Court Division may appoint guardian of his estate and, if resident, plenary guardian of his person. Upon finding of total incapacity, court may appoint plenary guardian of estate; otherwise limited guardian of estate is preferred. When incapacitated person is nonresident of Pennsylvania for whom guardian appointed in another jurisdiction, foreign guardian ordinarily will be preferred for appointment in Pennsylvania. Emergency guardian of person and estate authorized to serve for up to 20 days. (20 Pa.C.S. § 5513).

Powers and duties of guardians of incapacitated persons are prescribed by c. 55 of Probate, Estates and Fiduciaries Code. (20 Pa.C.S. § 5501 to 5537). Guardianship support agencies also authorized. (20 Pa.C.S. § 5551-5555). Court upon petition may substitute its judgment for that of incapacitated with respect to estate and affairs of incapacitated. (20 Pa.C.S. § 5536).

Foreign guardians have same powers as other foreign fiduciaries. See category 13 Estates and Trusts, topic 13.08 Executors and Administrators, subhead Foreign Executors and Administrators.

Removal.

Grounds for removal of guardian are: waste and mismanagement, likelihood of insolvency, failure to perform duty imposed by law, incapacity to perform duty because of continuing physical or mental inability which is likely to jeopardize estate, removal from Commonwealth without furnishing security, any other reason which jeopardizes estate, adjudication of capacity of incapacitated person. Any person interested may petition for removal of guardian; or court, in case of emergency, may summarily remove guardian. (20 Pa.C.S. § 3182, 3183, 5131, 5515).

Uniform Fiduciaries Act adopted. (7 P.S. § 6351 et seq.).

Uniform Simplification of Fiduciary Security Transfers Act has not been adopted.

14.09 HUSBAND AND WIFE:

Act of 1985, P. L. 264, No. 66 (23 Pa.C.S. § 4301 et seq.), repealed many statutory provisions granting basic rights and powers to married women. Act explicitly preserves right to enforce repealed statutes as necessary. Married women have same right and power as married men to acquire, own, possess, control, use, convey, lease or mortgage any property, either in possession or in expectancy. (48 P.S. § 32.1).

Change of Name.

Surviving spouse may resume any prior surname by filing written notice and death certificate with specified prothonotary or equivalent office. (54 Pa.C.S. § 704.1).

Contracts.

Married woman may contract generally and may become accommodation maker, endorser, guarantor or surety for another person. (See 60 D. & C. 658.)

Married woman may contract with her husband. She may be incorporator or director and officer of corporation. (15 P.S. § 1201, 1401, 1406). She may pledge her separate personal property without consent or joinder of her husband.

Conveyance or Encumbrance of Property.

Either husband or wife may convey to both as tenants by entireties; both, as such tenants, may convey to either alone and either, as tenant by entireties, may convey alone to other. (69 P.S. § 541).

Minor spouse, 17 or over, may validly join his or her adult spouse in conveyance, mortgage or execution of bond. (21 P.S. § 57).

Either spouse, after divorce, may convey his interest in property held by entireties to other, without joinder of other. (23 Pa.C.S. § 3508).

Mortgage of married man, in absence of fraud, is valid without joinder of his wife (6 S. & R. 531) and sale under such mortgage conveys free of wife's inchoate intestate interest. Married woman shall have same power as married man to lease or mortgage real property. (48 P.S. § 32.1).

For purpose of determining property subject to elective share of surviving spouse, married person can convey title to individually owned real property without necessity of joining spouse in deed, to extent adequate consideration received. (20 Pa.C.S. § 2201, 2203, 2205). For purpose of determining marital property in divorce or annulment proceeding, real property conveyed or disposed of in good faith, and for adequate consideration prior to commencement of divorce proceedings is excluded. (23 P.S. § 401, 403).

Liability for Debts of Spouse.

No liability for debts of spouse contracted before marriage. (23 Pa.C.S. § 4101). Spousal property responds to debts for necessities. (23 Pa.C.S. § 4102).

Separate earnings of married person belong to him or her. (23 Pa.C.S. § 4104).

Antenuptial contracts are evaluated under same criteria as other types of contracts. Full and fair disclosure of spouse's worth is required for validity and will be presumed if contract provides it has been made. Reasonableness of prenuptial bargain is not proper subject for judicial review. (525 Pa. 392).

Rights as to Children.

Parents may sue to recover damages for injury to children. (P. R. C. P. 2228[b]).

Actions.

Where personal injuries, not resulting in death, inflicted on both spouses, enforcement will be through one action. (P. R. C. P. 2228[a]). Separate property interpreted to include claim for liquidated tort damages and defense of interspousal immunity as bar to suits abolished. (495 Pa. 300, 433 A.2d 859). Abuse of adults by household members is prohibited under Protection from Abuse Act. (35 P.S. § 10181 et seq.). Police officer may arrest domestic violence suspect without warrant and seize weapons upon observing corroborative evidence of violent act. (18 Pa.C.S. § 2711). Special provisions govern issuance and enforcement of judicial orders protecting victims of abuse. (42 Pa.C.S. § 6701 et seq.).

Agency.

Either spouse may act as attorney in fact for other.

Desertion and Nonsupport.

Matters of support generally governed by Act of 1985, P.L. 264, No. 66. (23 Pa.C.S. § 4301 et seq.). Compliance with federal child support program by “Title IV-D” agency. (23 Pa.C.S. § 4371 et seq.). Married persons liable for support of each other according to respective abilities. Parents liable for support of unemancipated children under 18 and may be liable for support of children 18 or older. (23 Pa.C.S. § 4321). For purposes of child support, marital status of parents immaterial. (23 Pa.C.S. § 4323). Spousal support may include payment of percentage of health care expenses. Health care coverage for spouse required by court where available at reasonable or no cost as employment benefit. (23 Pa.C.S. § 4324). Health care coverage (now called “medical support”) for children owed support is mandatory. (23 Pa.C.S. § 4326).

Domestic relations section of court of common pleas generally responsible for investigation, administration, and enforcement in support cases. Support guidelines available from domestic relations section. (23 Pa.C.S. § 4305). Counties authorized to publish names of delinquent support obligors in arrears 30 days or more. (23 Pa.C.S. § 4309).

Person owed support, or parent, custodian, or Commonwealth on such person's behalf, or person caring for child, may bring action in court of common pleas without advance filing fee. (23 Pa.C.S. § 4341; P. R. C. P. 1910.3, 1910.4). County Title IV-D attorney or other Commonwealth official represents persons outside defendant's county or Commonwealth in local support proceedings. (23 Pa.C.S. § 4306).

In compliance with 42 U.S.C. §666, procedures established with respect to determination of paternity, including genetic testing (23 Pa.C.S. § 4343); availability of expedited procedure and long-arm jurisdiction for paternity and support matters (23 Pa.C.S. § 4342); enforcement of support orders through attachment of income or property (23 Pa.C.S. § 4348; P. R. C. P. 1910.1 et seq., 3101 et seq.); interception of state income tax refunds (23 Pa.C.S. § 4307); requirement to post bond or give security (23 Pa.C.S. § 4347); availability of information on arrearages to consumer reporting agency (23 Pa.C.S. § 4303); and mandatory employer reporting of new hires (23 Pa.C.S. § 4391 et seq.). Support orders also enforced through contempt. (23 Pa.C.S. § 4345).

Right of wife to support is not affected by foreign divorce where husband was not bona fide domiciliary of state granting divorce.

Uniform Interstate Family Support Act adopted. (23 Pa.C.S. § 7101 et seq.).

Community Property.

State Supreme Court held community property law (48 P.S. § 201 et seq.) invalid under state constitution (357 Pa. 581, 55 A.2d 521).

14.10 INFANTS:

Under Pennsylvania Statutory Construction Act, minor is defined as any person under age 21. (1 Pa.C.S. § 1991). However, as used in Probate, Estates and Fiduciaries Code “minor” is any person under age 18 except as used in Uniform Transfers to Minors Act. (20 Pa.C.S. § 102, 5301).

Disabilities and Privileges.

In general contracts of infants are voidable, except contracts for necessaries. Infants of 18 or more years of age may enter into binding and legally enforceable contracts. (23 Pa.C.S. § 5101).

Infants may make bank deposits (7 P.S. § 603), and take shares in co-operative associations (15 P.S. § 12007) or credit unions (15 P.S. § 12317) and give valid receipts for payments in connection therewith. Savings association may open savings accounts in name of minor as sole and absolute owner of such accounts, and receive payments and pay withdrawals, accept pledges to association and act in any other manner with respect to such accounts as if minor were of full age and legal capacity. (7 P.S. § 6020[117]).

Minors who have attained age 18, graduated from high school, been married or been pregnant may make contracts for medical service without parental consent. (35 P.S. § 10101). Fraternal benefit societies may insure children of any age on application of adult. (40 Pa.C.S. § 6528). Any minor may make contracts for medical services relating to treatment of pregnancy or venereal disease without consent. (35 P.S. § 10103). Special procedures may apply in cases of nonemergency abortions for unemancipated infants under age 18. (18 Pa.C.S. § 3206).

Minor of 17 or over may enter into a loan guaranteed by United States or any agency under Servicemen's Readjustment Act of 1944 but may not avoid the contract of such loan because of his age, or interpose defense of infancy. The minor spouse of any person who is eligible for a guaranteed loan under the Act may join in loan contract but likewise may not avoid it or set up defense of infancy. (51 Pa.C.S. § 7310).

Deed of conveyance of his or her real estate executed and acknowledged by an adult married person in conjunction with his or her minor spouse, if 17 years old or over, is valid. (21

P.S. § 51).

Any person of sound mind 18 years of age or older may make will. (20 Pa.C.S. § 2501).

Any person 18 years of age or older may serve as executor or administrator and as guardian for a minor. (20 Pa.C.S. § 3156, 5112).

Emancipation is question of fact to be determined by circumstances presented in each case. (382 Pa. Super. 468, 555 A.2d 1294). Marriage results in emancipation to extent of parental rights and obligations but does not remove other disabilities.

Involuntary Termination of Parental Rights.

Parental rights may be terminated, after at least ten days notice to parent or parents and hearing (23 Pa.C.S. § 2513) on petition filed by parent, agency, or individual having custody or standing in loco parentis to child (23 Pa.C.S. § 2512). Rights may be terminated on any one of number of enumerated grounds, and court gives primary consideration to needs and welfare of child. (23 Pa.C.S. § 2511). Decree may terminate all rights, or all rights and duties, of parent, including power or right of parent to object to or receive notice of adoption proceedings. (23 Pa.C.S. § 2521).

Liability of Parents for Tortious Acts.

Parents of child under age 18 are liable for damages caused by wilful, tortious act of child resulting in injury to a person or theft, destruction or loss of property. (23 Pa.C.S. § 5502). Suit may be brought directly against parents. (23 Pa.C.S. § 5504[d]). Limits of liability are $1,000 for loss suffered by one person and $2,500 for loss suffered by all persons as result of one act. (23 Pa.C.S. § 5505).

Medical Consent.

Provides mechanism for parents, temporarily unable to care for children's medical needs, to consent to care by another. (11 P.S. § 2511 et seq.; 11 P.S. § 2513[c][2] [authorization form]).

Ratification of infant's contracts may be implied from failure to disaffirm within a reasonable time after coming of age.

Disaffirmance of Infant's Contracts.

Generally speaking, infants' disaffirmance must have the same degree of solemnity as that required in the formation of a contract.

Actions.

Unless otherwise provided by law, a person 18 years of age or older is deemed an adult and may sue and be sued. (23 Pa.C.S. § 5101). Infant must be represented by guardian who may be guardian appointed by court generally or ad litem, or person in nature of next friend selected by minor plaintiff. (R. C. P. 2026, 2027, 2031). Limitation period for civil action that unemancipated minor could bring does not begin to run until minor reaches age 18. (42 P.S. § 5533). Abuse of children by household members is prohibited under Protection from Abuse Act. (35 P.S. § 10181 et seq.). Special provisions govern issuance and enforcement of judicial orders protecting victims of abuse. (42 Pa.C.S. § 6701 et seq.).

Support.

Uniform Interstate Family Support Act adopted. (23 Pa.C.S. § 7101 et seq.).

Uniform Transfers to Minors Act adopted, Dec. 16, 1992. (20 Pa.C.S. § 5301 to

5310). Age of majority under Act is 21. Certain custodianships may continue until not later than time minor attains age 25, where transfer is made pursuant to provision in will, trust, or nomination. (20 Pa.C.S. § 5321).

Uniform Securities Ownership by Minors Act adopted. (70 P.S. § 101 to 106).

Uniform Child Custody Jurisdiction and Enforcement Act.

Effective Aug. 15, 2004. (23 Pa.C.S. § 5401 et seq.).

Adoption.

See topic 14.01 Adoption.

14.11 MARRIAGE:

This subject is governed by The Marriage Law. (23 Pa.C.S. § 1101 to 1905). “Marriage” defined as “civil contract by which one man and one woman take each other for husband and wife”. (23 Pa.C.S. § 1102).

Nonage.

Under 16, except by order of orphans' court division. (23 Pa.C.S. § 1304[b][1]).

Consent Required.

Person under age 18 may not be licensed to marry unless consent of custodial parent or guardian is first obtained; and such consent must be personally given before officer issuing marriage license, or must be certified under hand of custodial parent or guardian, attested by two adult witnesses, and signature acknowledged before officer competent to take acknowledgments. If person has no guardian, judge or, in judge's absence, clerk of orphans' court division of court of common pleas can appoint guardian, pro hac vice. (23 Pa.C.S. § 1304[b]). If person is under age 16, approval of orphans' court division must also be obtained. (23 Pa.C.S. § 1304[b][1]). Court may annul marriage of person under 16 for failure to obtain judicial approval. (20 D.&C. 441). No statute of limitations for annulment proceedings. (339 Pa. Super. 493, 489 A.2d 748).

License.

A license is required. (23 Pa.C.S. § 1301[a]). In some cases, however, valid marriage may be contracted without such license or pursuant to defective or improperly obtained license. (215 Pa. Super. 255, 257 A.2d 290). Marriage licenses are issued by clerk of orphans' court division of any county and license, when issued, authorizes marriage in any county. (23 Pa.C.S. § 1301[b]).

Waiting Period.

Except on authorization by court in case of emergency, extraordinary circumstances, or reservist called to active duty, marriage license will not be issued prior to third day following date of application therefor. (23 Pa.C.S. § 1303). Marriage license is not valid for more than 60 days. (23 Pa.C.S. § 1310). Fee for marriage license is $3. (23 Pa.C.S. § 1105).

Both parties must appear in person and be examined under oath or affirmation about legality of marriage, prior marriages, age and other restrictions and application information. (23 Pa.C.S. § 1306). Refusal to issue license is judicially reviewable. (23 Pa.C.S. § 1308).

Ceremonial Marriage.

No statute makes a ceremonial marriage essential. Ceremonial marriages may be performed by a large number of officials, including mayors, judges, ministers, priests, rabbis, district justices, magistrates and aldermen. (23 Pa.C.S. § 1503).

Reports of Marriages.

Official or minister solemnizing marriage gives parties an original marriage certificate bearing his signature, and sends signed duplicate to clerk of orphans' court division who issued license. (23 Pa.C.S. § 1504[a]). Duplicate is recorded by clerk, and transcript of record is furnished to State Department of Health. (23 Pa.C.S. § 1106[a]).

Record.

See category 10 Documents and Records, topic 10.04 Records, subhead Vital Statistics.

Common law marriages contracted after Jan. 1, 2005, invalid. (23 Pa.C.S. § 1103).

Proxy Marriages.

There is no statutory authorization for such a marriage.

Marriages by Written Contract.

There is no statutory authorization for such a marriage.

Prohibited Marriages.

No license will be issued if either applicant is weakminded, insane, of unsound mind, or under guardianship as person of unsound mind unless judge of orphans' court division authorizes issuance; nor will license be issued if, when application is made, either party is under influence of intoxicating liquor or narcotics. (23 Pa.C.S. § 1304[c], [d]).

Marriage within following degrees of consanguinity is prohibited: Between man and his mother, aunt, sister, daughter, granddaughter, first cousin, or between woman and her father, uncle, brother, son, grandson, first cousin. (23 Pa.C.S. § 1304[e]).

Same sex marriages void in Pennsylvania even if valid in state or country where entered into. (23 Pa.C.S. § 1704).

Recognition of foreign marriages is governed by 42 Pa.C.S. § 5328, patterned after §§5.01 to 5.04 of Uniform Interstate and International Procedure Act.

Annulment of Marriage.

Marriages which are void or voidable for any reason may be annulled at suit of either party. (23 Pa.C.S. § 3303 to 3305). In case of purported common law marriage where party was under 18, parent or guardian of minor may bring declaratory judgment proceeding during party's minority to have marriage declared void. (23 Pa.C.S. § 3303[b]). Jurisdiction and requirements as to residence are governed by Divorce Code. (23 Pa.C.S. § 3101 et seq. and P. R. C. P. 1920.1 et seq.). Pennsylvania no longer recognizes status of illegitimacy. (23 Pa.C.S. § 5102).

Antenuptial Contracts.

See topic 14.09 Husband and Wife.

14.12 MARRIED WOMEN:

See topics 14.09 Husband and Wife, Marriage; categories 5 Civil Actions and Procedure, topic Evidence, subhead Witnesses; Documents and Records, topic Acknowledgments; Estates and Trusts, topics Executors and Administrators, Wills; Property, topic Dower.

15 HEALTH

—Scope —

Secretary of Health supervises and regulates matters related to health and health care providers. Health matters regulated generally by tit. 35.

15.01 DO-NOT-RESUSCITATE:

Out-of-Hospital Non-Resuscitation Law enacted. (20 Pa.C.S. § 5481 to 5488).

15.02 EMERGENCY MANAGEMENT SERVICES:

Emergency Management Services Code protects safety, health and welfare of Commonwealth citizens, provides multiple emergency services, including medical and health, in response to emergencies of any kind caused by man-made or natural disasters affecting safety, health and welfare of substantial number of citizens. (35 Pa.C.S. § 7101 et seq.).

15.03 EMERGENCY MEDICAL SERVICES:

Minimum standards for ambulance services and education and certification of emergency medical services personnel provided. (35 Pa.C.S. § 8101 et seq.).

15.04 FOOD, DRUGS, DEVICES AND COSMETICS:

Uniform Controlled Substances Act (1994) substantially adopted. (35 P.S. § 780-101 et seq.). Schedules of controlled substances found at 35 P.S. § 780-104. Prohibited acts and penalties found at 35 P.S. § 780-113. See also category 6 Courts and Legislature, topic 6.04 Statutes, subhead Uniform Acts.

Adulteration and misbranding of food controlled by Food Act. (31 P.S. § 20.1 to 20.18). Specific food products controlled by various chapters of tit. 31.

15.05 HEALTH CARE COST CONTAINMENT:

Health Care Cost Containment Act (35 P.S. § 449.1 et seq.) requires Health Cost Containment Council to gather data concerning health provider quality and service effectiveness (35 P.S. § 449.5, 35 P.S. § 449.6) and to make its data available to general public (35 P.S. § 449.7).

15.06 HEALTH CARE FACILITIES:

Certificate of need program expired by virtue of sunset provision. (35 P.S. § 448.904a). Department of Health issues licenses for health care facilities. (35 P.S. § 448.802a et seq.).

15.07 HEALTH INSURANCE BENEFITS:

Health and Accident Insurance.

See category 16 Insurance, topic 16.01 Insurance Companies, subhead Health and Accident Insurance.

Medicare.

Health Care Practitioners Medicare Fee Control Act prohibits charging or collecting from Medicare patients amounts in excess of those paid by Medicare Program. (35 P.S. § 449.31 et seq.).

15.08 MEDICAL PROFESSIONAL LIABILITY:

Medical Care Availability and Reduction of Error (MCARE) Act, 40 P.S. § 1303, 101 et seq., seeks to assure availability in Pennsylvania of medical care through comprehensive and high-quality health care system. Reform of medical professional liability rules includes definitions of informed consent (40 P.S. § 1303.504), controls on punitive damages (40 P.S. § 1303.505), modification of collateral source doctrines (40 P.S. § 1303.508), controls on damage payments (40 P.S. § 1303.510), and required qualifications of experts offering medical opinions (40 P.S. § 1303.512). MCARE establishes Patient Safety Authority to reduce medical errors (40 P.S. § 1303.301 et seq.) and regulates medical professional liability insurance (40 P.S. § 1303.701 et seq.). Pre-trial procedures in medical professional liability actions governed by P. R. C. P. 1042.21 et seq. Parties may request judge or jury to make separate findings for medical and other related expenses, loss of earnings and/or earning capacity, and non-economic loss. (P. R. C. P. 1042.71). Post-trial relief available from awards for non-economic loss which deviate substantially from reasonable compensation. (P. R. C. P. 1042.72). See also category 16 Insurance, topic 16.01 Insurance Companies, subhead Medical Professional Liability Insurance.

15.09 MENTAL HEALTH:

Mental health advance declarations and powers of attorney provided. (20 Pa.C.S. § 5801 et seq.).

15.10 SMOKING REGULATIONS:

Clean Indoor Air Act (35 P.S. §637.1 et seq.) prohibits smoking in public places, defined as enclosed areas serving workplace, commercial establishment or area where public is invited or permitted, and at public meetings (35 P.S. §637.2, 637.5[2]). Exceptions include private homes and vehicles, cigar bars, tobacco shops, and drinking establishments. (35 P.S. §637.5[b]). Criminal liability imposed for violations. (35 P.S. §637.9[e]).

Tobacco Settlement Agreement Act (35 P.S. § 5673 et seq.) requires non-settling tobacco product manufacturers to place funds into escrow account to pay future judgments or settlements.

16 INSURANCE

16.01 INSURANCE COMPANIES:

General act relating to Insurance Department is 1921, P. L. 789, as amended. (40 P.S. § 1). Art. VI of this act rewritten by Act No. 2002-147. General act relating to insurance companies is 1921, P. L. 682, as amended. (40 P.S. § 341). Corporate form of mutual insurance company is regulated by Associations Code, c. 21. (15 Pa.C.S. § 2101 to 2126). Corporate form of other domestic insurance corporations governed by Associations Code, c. 31. (15 Pa.C.S. § 3101 to 3138). Fraternal benefit societies organized under 40 P.S. § 991.2401 et seq.

Interstate Insurance Product Regulation Compact.

Pennsylvania has joined. (40 P.S. § 4101 et seq.). Insurance Commissioner represents Commonwealth in interstate commission. (40 P.S. § 4102).

General Supervision.

Insurance Department enforces state's insurance laws. (40 P.S. § 41). Insurance Commissioner, Pa. Insurance Department, Harrisburg, Pa. 17120, heads department. (40 P.S. § 42).

Rate and form filings on property and casualty insurance governed by 40 P.S. § 710-1 et seq. Rate and form filings on title insurance governed by 40 P.S. § 910(37) et seq. Risk-based capital reporting requirements set at 40 P.S. § 221.1 et seq.

Annual statements must be filed with Insurance Commissioner and with National Association of Insurance Commissioners. (40 P.S. § 443).

Policies.

All policies covering life, health, accident, personal liability, fire, marine, title, and all forms of casualty insurance, all contracts pertaining to endowments or annuities, or use applications or riders or endorsements in connection therewith must be submitted to and formally approved by Insurance Commissioner and copies filed in Insurance Department, except riders and endorsements relating to manner and distribution of benefits and reservation of rights and benefits under such policy and used at request of policy holder and except any forms which in opinion of Insurance Commissioner do not require his approval. Approval of any form may be revoked by Commissioner. (40 P.S. § 477b).

Upon express permission of Insurance Commissioner, joint policies of two or more insurance companies authorized to transact same kinds of insurance business may be issued. (40 P.S. § 440.1).

Life Insurance.

For required provisions in policies, see 40 P.S. § 510, 510a, 510c, 576.

No policy may be delivered in Pennsylvania if it contains the following: (a) Provision for forfeiture on failure to pay loan on policy or interest thereon while total indebtedness is less than the cash value; (b) limitation of action to less than two years; (c) provision by which policy purports to be issued or to take effect more than six months before the original application for insurance was made; (d) provision for mode of settlement at maturity of less value than the amount insured on face of policy plus dividends, if any, and less indebtedness to company and any premiums due. (40 P.S. § 511). Death benefits not paid within 30 days of proof of death bear interest. (40 P.S. § 511b).

Contract exists when insurer accepts application and first premium payment. (479 Pa. 579, 388 A.2d 1346). Individual life, individual endowment, individual annuity, industrial life and industrial endowment policies may be rescinded by policy holder within ten days of delivery, replacement policies with same insurer within 45 days, and replacement policies with new insurer within 20 days. (40 P.S. § 510c, 510d, 576).

Life policies (except those issued by limited companies) must comply with Standard Non-Forfeiture Law. Act exempts reinsurance, group, pure endowment, annuity contracts, term policies of uniform amount or renewals thereof of 20 years or less expiring before age 71 with uniform premium during term, or certain term policies of decreasing amount, and certain policies having cash surrender value or paid-up nonforfeiture benefit not exceeding 2.5% of amount of insurance and does not apply to any policies delivered outside state through agent or other representative of issuer. (40 P.S. § 510.1).

Policy may be issued only on application of person to be insured, or person liable for support of child to be insured, except that trustees, corporations and partnerships may insure lives of officers or members provided insured gives prior written consent. Any person may insure his life for benefit of any other person or corporation, but no person shall cause to be insured life of another unless named beneficiary has insurable interest in life of insured. (40 P.S. § 512). Unless policy provides otherwise, insured under any group life policy may assign any incidents of ownership. (40 P.S. § 532.7a).

Misrepresentation by agents of stock or mutual life insurance companies is a misdemeanor. (40 P.S. § 518).

No stock life insurance company may declare dividends except from profits of its business. In estimating profit there must be first charged as a liability: (a) Capital stock; (b) required paid in surplus; (c) unpaid losses; (d) liabilities for reserve; (e) sums due on mortgages, bonds, stocks and book accounts of which no principal and interest has been paid for a calendar year or foreclosure suit commenced, or on which judgment has remained unsatisfied for two years; (f) interest unpaid; (g) other debts. (40 P.S. § 591).

Subscribers of any mutual life insurance company may be assessed pro rata to amount of their subscriptions. (40 P.S. § 611). Subscribers are entitled to interest up to 6%. (40 P.S. § 612). Such companies may maintain surplus or safety fund. (40 P.S. § 614).

At the request of a policy-holder his policy may be exchanged, altered or converted into any other form of policy allowed by law. (40 P.S. § 571).

No new policy may be issued after notice of impairment of reserve liability from Insurance Commissioner. (40 P.S. § 508).

Pa. mutual life insurance companies may reorganize into domestic stock life insurance company. (40 P.S. § 1010.21 et seq.).

Life and Health Insurance Guaranty Association created to protect insureds from impairment of insolvency of member insurer. (40 P.S. § 991.1701 to 40 P.S. § 991.1718).

Fire and Marine Insurance.

Every stock or mutual fire insurance company doing business in the state must make reports of fires to the bureau of fire protection. (40 P.S. § 635).

The statutes require a standard form of fire insurance policy. (40 P.S. § 636).

All fire and marine insurance companies doing business in state must file schedules (except as to inland marine risks) of rates with Insurance Commissioner or be members of licensed rating organization. (40 P.S. § 1224).

Health and Accident Insurance.

Policies delivered or issued for delivery to any person in Pennsylvania must: (a) Express consideration; (b) state effective date and termination date; (c) purport to insure only one person except in certain cases where policy may insure two or more members of a family; (d) be printed in not less than ten-point type and be arranged so that no portion of the text is given undue prominence over any other part; (e) refer in specified manner to any exceptions and reductions of indemnity; (f) be identified by form number; (g) not incorporate by reference any portion of charter, constitution, rules or by-laws, except reference to rates or classification of risks or short-rate table on file with Commissioner; (h) if entitled “non-cancellable” be automatically renewable until age 60 upon payment of required premiums. (40 P.S. § 752).

Policies issued in Pa. must also meet certain minimum standards set forth in regulations of Insurance Commissioner. (40 P.S. § 776.1 to 776.7). Health insurance policies must provide coverage for serious mental illnesses. (40 P.S. § 764g).

False statement in application does not bar recovery unless it was made with actual intent to deceive or materially affected acceptance of risk or hazard. (40 P.S. § 757). No alterations may be made in application without written consent of applicant. (40 P.S. § 758).

Acknowledgment of notice or acceptance of proof of loss does not operate as a waiver of rights of the insurer in defense of any claim under policy. (40 P.S. § 759). Policies unlawfully issued are deemed to contain standard provisions. (40 P.S. § 760).

Medical Professional Liability Insurance.

Regulated by Medical Care Availability and Reduction of Error (MCARE) Act. (40 P.S. § 1303.101 et seq.). Sets coverage limits for insurance required of health care providers. (40 P.S. § 1303.711). Fund established to pay awards in excess of basic coverage. (40 P.S. § 1303.712). See category 15 Health, topic 15.07A Medical Professional Liability.

Group, including blanket and franchise, accident and health insurance is regulated. (40 P.S. § 756.2 to 756.5).

Health care insurance has been made portable and eligibility widened in compliance with federal law. (40 P.S. § 1302.1 et seq.; 40 P.S. § 981-1 et seq.).

Health Care Provider Retention Program offers assessment abatements for certain health care providers who commit to providing medical services in Pa. for one year following receipt of abatement. (40 P.S. § 1303.1101 et seq.).

Workmen's Compensation Insurance.

Policies of insurance against liability under the Workmen's Compensation Act are enforceable directly by the injured employee. (40 P.S. § 811).

Form of such policies must be approved by Insurance Commissioner, and may not contain limitation of liability to amount less than liability under Workmen's Compensation Act. Policies may not be cancelled or terminated during term of policy except for nonpayment of premium. (40 P.S. § 813).

Mutual Companies Other Than Life.

Policy must state maximum premium, and may contain any provisions which are not inconsistent with laws of this state. (40 P.S. § 914, 916). Period during which policy holders may be assessed is limited. Insurance Commissioner may fix basis of reserves. (40 P.S. § 918). Companies may be converted into stock insurance companies. (40 P.S. § 911-A et seq.).

Title insurance companies are subject to supervision of Insurance Department and their business regulated by statute. (40 P.S. § 59; 40 P.S. § 910[1] to 910[54]).

Lloyds Associations.

Lloyds associations of underwriters may write any kind of insurance not prohibited by law except life insurance. Such insurance must be by express license of the Insurance Commissioner unless within the classes of insurance mentioned in the act. (40 P.S. § 932).

Before business may be transacted the underwriters must file with the Insurance Commissioner a declaration setting forth: (a) Name; (b) location of principal office; (c) form of power of attorney and agreement between the underwriters; (d) form of policy; (e) names and addresses of underwriters; (f) kind of insurance to be written; (g) that fund for protection of policy holders is in possession of attorney in the United States, such fund being $100,000 or $200,000 depending upon the kind of insurance to be written; (h) that underwriters are not less than 25 in number and that each is worth $20,000 net; (i) statement of cash and invested assets. (40 P.S. § 933). The Insurance Commissioner being satisfied issues a license to do business which must be renewed annually. (40 P.S. § 934).

Alien underwriters must deposit with Insurance Commissioner $5,000, unless nine-tenths of members are citizens, or unless association has established trust deposit of $100,000 in favor of its policy holders. (40 P.S. § 936).

No association may expose itself to a loss on any one risk to an amount in excess of one-fifth of its cash and invested assets, unless the excess is promptly reinsured. (40 P.S. § 940).

Group life insurance is regulated by 40 P.S. § 532.1 to 40 P.S. § 542. Policies must contain standard provisions. (40 P.S. § 532.6). Group (including blanket and franchise) accident and health insurance is regulated by 40 P.S. § 756.2 to 40 P.S. § 756.5.

Insurance premium finance companies are required to obtain licenses. Insurance premium finance agreements into which they enter are subject to regulation. (40 P.S. § 3301 to 3314).

Credit Life Insurance and credit health and accident insurance are regulated by 40 P.S. § 310.75.

Insurance holding company members must register with Insurance Commissioner and approval of Insurance Commissioner is required for certain transactions between holding company and affiliated insurance companies. (40 P.S. § 459.7).

Rebates are prohibited. (40 P.S. § 310.45).

Designated Insurance.

Financial institution may not condition loans or deposits on purchase of its own or designated insurance. (40 P.S. § 310.76).

Agents and Brokers.

Certificates of qualification are issued by Insurance Department upon application and successful completion of examination. (40 P.S. § 310.4). Under specified conditions, exemptions from examination available. (40 P.S. § 310.4[d]). Licenses may issue to individuals or business entities. (40 P.S. § 310.5). Financial institutions may only underwrite title insurance. (40 P.S. § 910-1 et seq.). Nonresidents may obtain certificates of qualification upon conditions of reciprocity stated in law. (40 P.S. § 310.11). Annual fees are set by category in 71 P.S. § 240.12A. (31 P.C. 33.15, 71 P.S. § 240.12A).

Insurance brokers are licensed for two year periods by Insurance Department upon application and successful completion of examination. (40 P.S. § 310.8). Under specified conditions, exemptions from examination available. (40 P.S. § 310.4[c]). Annual fees are set by category in 71 P.S. § 240.12A. (31 P.C. 33.15, 71 P.S. § 240.12A).

Managers and exclusive general agents must be licensed and their names certified to Insurance Commissioner. (40 P.S. § 310.31 et seq.). Annual fees are set by category in 17 P.S. § 240D.12A. Licenses are valid for one year. (40 P.S. § 310.32[d], 71 P.S. § 240.12A).

Surplus lines agents are regulated. (40 P.S. § 1006.4 to 1006.18).

Broker for state agencies is Secretary of Property and Supplies. (71 P.S. § 634.1).

Funds received or collected by a broker or agent are held in a fiduciary capacity and may not be mingled with funds held by the broker or agent in any other capacity without express consent of his principal. (40 P.S. § 310.96). Insurance fraud controlled by Insurance Fraud

Prevention Authority and Trust Fund. (40 P.S. § 325.1 et seq.).

Investments are regulated for companies writing fire and marine (40 P.S. § 653b to 654), casualty (40 P.S. § 722.1 to 724.1) and title (40 P.S. § 910[32] to [36]) insurance, for mutual companies other than mutual life companies (40 P.S. § 912.1 to 913.1), for stock and mutual life insurance companies (40 P.S. § 504.1, 504.2, 505.2 to 506.1) and for reciprocal and interinsurance exchanges (40 P.S. § 968.1 to 968.2).

Broker controlled property and casualty insurers subject to special regulation. (40 P.S. § 991.1301 et seq.).

Foreign insurance companies doing business in Pennsylvania are regulated by Insurance Commissioner. (40 P.S. § 46, 71, 421, 495.1 to 495.5, 755, 911). Many of provisions of that act as to domestic companies, especially provisions relating to forms of policies, reports, etc., are equally applicable to foreign companies. Certain acquisitions by insurance companies are regulated pursuant to 40 P.S. § 459.6 and require approval of Insurance Commissioner. (40 P.S. § 459.6).

Right to Do Business in State.

Any foreign insurance company fully and legally organized which has actually engaged in insurance business may do business within state upon filing with Insurance Commissioner certified copy of charter, financial statement and forms of all policies it proposes to issue, satisfying him that its capital stock is fully paid and unimpaired. (40 P.S. § 421).

Similar Names Prohibited.

The Insurance Commissioner may prohibit the use by any insurance company or association of a name too closely resembling that of another insurance company. This act does not apply to those companies or associations authorized to do business in the Commonwealth prior to Dec. 30, 1959. (40 P.S. § 421.1).

Government-Owned Companies.

Under strict controls and conditions Insurance Commissioner may issue certificate of authority to government-owned insurance company. (40 P.S. § 420).

Insurance holding companies subject to special regulations. (40 P.S. § 991.1401 et seq.).

Capital Requirements.

Foreign stock or mutual life insurance companies generally must have a paid up capital equivalent to that required by similar domestic companies. (40 P.S. § 501). Foreign stock fire, marine or fire and marine insurance company must have a paid up capital of not less than $200,000 or $400,000, depending upon the type of business to be done. (40 P.S. § 651). Foreign mutual fire and/or marine insurance company must, in order to be licensed, have a specified surplus over liability, amount of which varies with type of business to be done and period for which subject company has been licensed. (40 P.S. § 671). Foreign stock casualty insurance companies must have paid up capital of at least amount required of domestic companies. (40 P.S. § 721). Similar provisions exist as to foreign mutual casualty insurance companies. (40 P.S. § 871).

Surplus lines insurance may be placed with non-admitted insurers, subject to special regulations. (40 P.S. § 991.1601 et seq.).

Reports.

All foreign insurance companies must file with the Insurance Commissioner the annual reports required of domestic companies (40 P.S. § 443) and must also file with the Department of Revenue, on or before Mar. 15, a report showing gross premiums from business in Pennsylvania (40 P.S. § 444). Foreign stock and mutual fire insurance companies must also report all insurance on property in Pennsylvania. (40 P.S. § 633).

Business to Be Done Through Resident Agents.

No foreign stock fire insurance company, authorized to transact business in Pennsylvania, may write any policy on property in Pennsylvania unless the risk has been approved in writing by an agent who is a resident of or whose principal place of business is in this state, regularly licensed to transact insurance business herein, who must countersign all policies so issued and receive commission thereon when premium is paid. (See 326 Pa. 404, 190 Atl. 924.) Such foreign company may, however, issue policies at its principal or department offices if such policies are issued on applications procured and submitted to such company by Pennsylvania agents who receive commission thereon when paid.

Power to Hold Real Estate.

Foreign insurance companies may erect and maintain buildings, and take, hold, mortgage, lease and convey real estate in same manner and subject to same limitations as domestic insurance companies. (40 P.S. § 462 and 40 P.S. § 463).

Retaliatory Laws.

If by laws of any other state or foreign government any taxes, fines, penalties, license fees or other obligations or prohibitions, additional to or in excess of those imposed by Pennsylvania laws on insurance companies, associations and exchanges of other states, are imposed on insurance companies, associations and exchanges of Pennsylvania doing business in such state, like obligations and prohibitions are imposed on insurance companies, associations and exchanges of such state doing business in Pennsylvania. (40 P.S. § 50).

Gross Premiums Tax.

All insurance companies except title insurance companies and certain mutual benefit associations, and certain nonprofit health service corporations are subject to a tax of 2% on gross premiums and annuity considerations received from business done in Pennsylvania. (72 P.S. § 7901, 7902, 1991, No. 22). Credit allowed over five years for part of assessment by Pennsylvania Life and Health Insurance Guaranty Association equal to total assessment multiplied by fraction numerator of which is certain life, health, and accident premiums and denominator of which is total premiums collected in year immediately preceding year in which assessment is paid. (40 P.S. § 1812). Gross premiums do not include premiums for reinsurance, premiums returned upon cancellation, or certain other receipts. Annuity considerations do not include amounts paid to fund pensions that are qualified or exempt for federal income tax purposes. (72 P.S. § 7901, 7902).

Tentative tax for current year is current rates applied to 90% of tax base of immediate prior year or amount estimated by taxpayer but not less than 90% of tax as finally reported. Tentative tax for tax years beginning in calendar year 1987 with respect to capital stock and franchise tax is current rate applied to 80% of tax base from year preceding immediate prior year. For tax years beginning during 1988 and thereafter tax is current rate applied to 90% of tax base for immediately preceding year. Tentative tax is due Mar. 15 (or 15th day of third month after end of fiscal year). Balance of tax due with annual report due following Mar. 15 (for fiscal year taxpayers on or before 30 days after return to Federal Government due). (72 P.S. § 7903, 10003).

Penalty.

Effective Jan. 1, 1982, delinquent taxes bear interest from due date at Federal rate, effective on Jan. 1 of calendar year. Rates are adjusted annually. (72 P.S. § 806). Failure, or refusal to file, or knowingly filing false report subject to penalty of 10% on first $1,000, 5% on next $4,000, and 1% of remainder of tax due. (72 P.S. § 7904, 7403). If tentative tax is underpaid (understated by more than 5% for taxable years beginning prior to Jan. 1, 1979), there will be added to tax due additional 10% of underpaid amount and such amount will bear interest from date tentative tax was due. (72 P.S. § 10003). Criminal penalties for fraudulent reporting and for willful failure to make report or to pay tax. (72 P.S. § 7904, 7410).

Pennsylvania Fair Plan Act.

All companies which write basic property insurance in Pennsylvania must participate in Pennsylvania Industrial Placement Facility under which insurance is provided to properties in urban areas and under which an assessment is levied in amount of 2% of aggregate gross premiums for policies of basic property insurance written in Commonwealth. (40 P.S. § 1600.201, 1600.401).

Mortgage Property Insurance Coverage Act.

Mortgage lenders may not require borrowers to obtain property insurance coverage exceeding replacement values of buildings and structures on land used to secure loan nor require them to insure value of such land. (Act No. 2008-51).

Pennsylvania Insurance Guaranty Act.

All companies writing property and casualty insurance in Pennsylvania must participate in Pennsylvania Insurance Guaranty Association under which costs assessed to member companies are used to assume obligations for claims against insolvent companies. (40 P.S. § 1701.201).

Life and Health Insurance Guaranty Association Act.

All companies writing certain life, health and accident insurance or annuity contracts in Pennsylvania must participate in Pennsylvania Life and Health Insurance Guaranty Association under which costs assessed to member companies are used to assume obligations for claims against insolvent companies. (40 P.S. § 1801 to 1824).

Property and Casualty Insurance Guaranty Association.

Association created to provide means to pay covered claims under property and casualty insurance policies, to avoid excessive delay in such payment, and to avoid financial loss to claimants or policyholders as result of insurer insolvency. Participation by and assessment of Pennsylvania insurers is mandatory. (40 P.S. § 991.1801 to .1820).

Marine Insurance Profits Tax.

Insurers writing certain marine insurance policies in Pennsylvania (inland marine and land transportation risks which begin and end in U.S. exempted) must pay 5% tax on averaged net underwriting profits allocable to this state. (72 P.S. § 2281 to 2283). Reports must be filed with Department of Revenue on or before June 1, on which date tax as computed shall be paid. (72 P.S. § 2283, 715).

Penalty.

Penalty is incurred on failure to timely file bonus or tax report and pay amount due. (72 P.S. § 1702). Effective Jan. 1, 1982, interest at Federal rate, subject to change annually, is incurred on failure to pay tax when due. (72 P.S. § 806). Criminal penalties are incurred for fraudulent reporting (72 P.S. § 1704A) and for failure to file report under certain circumstances (72 P.S. § 1704).

Surplus Lines Tax.

3% tax on premiums for insurance placed with unlicensed insurers. Tax is on insured; agents or brokers must not pay any portion. If portion of subject matter insured is located outside of state, tax is on portion of premium allocable to risk within state. (40 P.S. § 1006.11). Tax does not apply to life insurance, annuities, reinsurance, railroad or air line property involved in interstate or foreign commerce, risks commonly insured by wet marine policies, title insurance, and insurance on subjects located, resident, or to be performed wholly outside of state (40 P.S. § 1006.5). Reports must be filed by surplus line agent by Jan. 31 of each year with respect to transactions during prior calendar year. (40 P.S. § 1006.11).

Penalty.

In addition to penalties as described under subhead Marine Insurance Profits Tax, violation of Act is misdemeanor subject to fine of up to $1,000 and may result in suspension, revocation or nonrenewal of guilty surplus lines agent's license. (40 P.S. § 1006.10, 1006.11, 1006.16).

Shares Tax.

See category 3 Business Regulation and Commerce, topic 3.01 Banks and Banking, subhead Taxation, for discussion of shares tax imposed under 72 P.S. § 7801 et seq. Rates and treatment of title insurance companies identical to banks. Book value determined by generally accepted accounting principles as of end of each calendar quarter in preceding calendar year.

Penalty.

Penalty is incurred on failure to file report, on filing false information or on refusing to permit examination of records of 10% of first $1,000 of tax due, 5% on next $4,000 and 1% on balance. Failure to post settlement for shareholder information may result in company being held responsible for amount of tax assessed against shareholders of such company. (72 P.S. § 1705). Effective Jan. 1, 1982, interest at Federal rate, subject to change annually, is incurred on failure to pay tax when due. (72 P.S. § 806). If tentative tax is underpaid (understated by more than 5% for taxable years beginning prior to Jan. 1, 1979), there will be added to tax due additional 10% of underpaid amount and such amount will bear interest from date tentative tax was due. (72 P.S. § 10003). Criminal penalties for fraudulent reporting and for willful failure to make report or to pay tax. (72 P.S. § 7802, 7410).

Unauthorized Companies.

Any person, corporation, partnership, or association entering a life insurance or annuity contract with an unauthorized company (one not registered or entitled to do business in state) is liable for a 2% tax on gross premium and annuity considerations for such insurance. Tax due at time of making contract or paying premium. (72 P.S. § 2265, 1991, No. 22). Failure to comply is misdemeanor subject to fine of up to $500. (72 P.S. § 2266). Effective Jan. 1, 1982, delinquent taxes bear interest at Federal rate, subject to change annually. (72 P.S. § 806).

Surety and Guaranty Companies.

See topic 16.02 Surety and Guaranty Companies.

Direct Actions Against Insurer.

See category 23 Transportation, topic 23.01 Motor Vehicles, subhead Direct Actions Against Insurer.

Bad Faith Actions Against Insurer.

In action under insurance policy, if court finds insurer acted in bad faith toward insured, insurer may be liable for court costs and attorney fees, punitive damages, and interest on award from date of claim in amount equal to prime interest rate plus 3%. (42 Pa.C.S. § 8371).

16.02 SURETY AND GUARANTY COMPANIES:

These companies are generally regulated and supervised in the manner provided for in the case of insurance companies. See topic 16.01 Insurance Companies.

Organization.

Surety and guaranty companies are organized as casualty insurance companies. (40 P.S. § 382[c]). Usual rules for formation of such companies apply. (40 P.S. § 383).

Deposits.

Every surety company, domestic or foreign, must have a fund of at least $100,000 invested in securities of the United States or of any state or country in which it is incorporated or in other safe securities, the value of which must be at or above par. These securities must be deposited with the Insurance Commissioner or corresponding officer of the state or country in which it is authorized to transact business. (40 P.S. § 832).

Capital Requirement.

Liabilities of surety company must not exceed its available assets. For this purpose liabilities are taken to include capital stock, outstanding debts and premium reserve equal to 50% of annual premium on all outstanding risks. (40 P.S. § 832). Paid up capital stock must be at least $750,000. (40 P.S. § 386). Company must file with Insurance Commissioner certified copy of its charter, written application for authority to do business, and statement of its paid-up cash capital, each item of investment, amount of premium on existing bonds upon which company is surety, amount of liability for unearned portion thereof, and amount of its outstanding debts of all kinds. (40 P.S. § 832). Company must file, annually, similar statement, and certificate from officer with whom deposit of securities was made that securities are fully worth $100,000. (40 P.S. § 832, 834).

Rights and Powers.

Any surety company authorized to do business may execute any bond, recognizance or other obligation which is required by law or by charter or ordinances of any municipal corporation to be given with a surety or sureties. Execution of such bond is a complete compliance with every requirement of law that bond shall be executed by one or more sureties who shall be residents, householders, etc. (40 P.S. § 835).

No company may expose itself to any loss or hazard on any one risk in amount exceeding 10% of its capital and surplus unless excess is protected by (a) reinsurance, (b) co-suretyship of another surety company, (c) deposit with it of property in trust, (d) conveyance or mortgage for its protection or (e) in case of suretyship for fiduciary, deposit of property with it so that no alienation may be made without its consent (40 P.S. § 832).

No surety company which has signed a bond may deny its corporate power to execute such instruments when sued upon the obligation. (40 P.S. § 836). Compensated surety companies do not benefit from strict construction of their obligations. (152 Pa. Super. 217, 31 A.2d 453).

Any insurance company authorized to transact surety business may, in any year, become surety in amount not exceeding $200 with respect to each guaranteed arrest bond certificate issued by an automobile club or an insurance company authorized to write automobile liability insurance provided required form is filed with Insurance Commissioner. (40 P.S. § 837).

Foreign companies must have actually engaged in insurance business, and comply with general requirements of law as to foreign insurance corporations (40 P.S. § 421, 421.1) and with deposit and capital requirements applicable to domestic companies (40 P.S. § 721, 832). They can do business only through resident agents. (40 P.S. § 730).

Taxation.

Gross premiums tax, see topic 16.01 Insurance Companies.

17 INTELLECTUAL PROPERTY

17.00A RIGHT OF PUBLICITY:

Right of publicity established for unconsented use for commercial or advertising purposes of name or likeness with commercial value. (42 Pa.C.S. § 8316).

17.01 TRADEMARKS AND TRADENAMES:

Any individual, firm, partnership, association, corporation, union or other organization may apply for Pennsylvania registration of trademark or service mark which is used by registrant to identify goods produced, manufactured or sold by him, provided it is placed in any manner on goods or their containers or on tags or labels affixed thereto, and goods are sold or otherwise distributed in Pennsylvania. (54 Pa.C.S. § 1102, 1111).

What May Be Used.

Any word, name, symbol or device or combination thereof may be adopted and used and then registered as trademark (54 Pa.C.S. § 1102) if it meets foregoing requirements and if it does not consist of or comprise: (a) Immoral, deceptive, or scandalous matter; (b) matter which may disparage or falsely suggest connection with persons, living or dead, institutions, beliefs, or national symbols, or bring them into contempt or disrepute; (c) flag or coat of arms or other insignia of U.S., or of any state, municipality or foreign nation or any simulation thereof; (d) name, signature or portrait identifying particular living individual except by individual's written consent; (e) any trademark which, when used on or in connection with applicant's goods is merely descriptive or deceptively misdescriptive of them, or, when used on or in connection with applicant's goods is primarily geographically descriptive or deceptively misdescriptive of them or is primarily surname; or (f) trademark which so resembles any trademark already registered in Pennsylvania and not abandoned as to be likely to cause confusion or mistake or to deceive public concerning origin or manufacture of applicant's goods, unless person last applying for registration is entitled thereto by right of prior adoption and use in Pennsylvania. (54 Pa.C.S. § 1111).

Registration.

Trademarks are registered by filing application with Department of State. (54 Pa.C.S. § 1112). General classes of goods and services established by U.S. Patent and Trademark Office pursuant to International Classification System are to be used. Application may relate only to one class. This does not prevent filing several applications for one trademark. (54 Pa.C.S. § 1103). Application must be accompanied by facsimile of trademark. (54 Pa.C.S. § 1112). Department of State then registers trademark. (54 Pa.C.S. § 1113). Registration is effective for five years and may be renewed for successive five year periods on application filed within six months prior to expiration. (54 Pa.C.S. § 1114). Renewal application must state trademark is still in use in Pennsylvania and include specimen showing actual use. (54 Pa.C.S. § 1114). Department of State must cancel all registrations which are not renewed. (54 Pa.C.S. § 1116).

Application for registration for “mark”—word, name, symbol, picture, design or device, or any combination thereof (54 Pa.C.S. § 1501) produced upon reusable articles and receptacles loaned, rented, sold or otherwise circulated within Pennsylvania (54 Pa.C.S. § 1501) may be filed with Department of State (54 Pa.C.S. § 1511). Application must be accompanied by facsimile of mark. (54 Pa.C.S. § 1511). Filing fee is $50. (Act 47 of 2003, §618-A). Registration of mark is prima facie evidence of ownership of articles and supplies upon which mark is produced. (54 Pa.C.S. § 1511). Registration may be amended (54 Pa.C.S. § 1512), and report concerning use of mark must be filed during year 2001 and every tenth year thereafter, unless filing made within preceding ten years to avoid deregistration (54 Pa.C.S. § 1515). Marks registered under prior enumerated statutes deemed registered under present statute. (54 Pa.C.S. § 1502).

Assignment.

Trademarks and their registration are assignable with good will of related business. (54 Pa.C.S. § 1115). Marks on articles and supplies, and their registration are assignable with sale of articles and supplies. (54 Pa.C.S. § 1513). Assignments shall be in writing, duly executed and may be recorded with Department of State. (54 Pa.C.S. § 1115, 1513). Fee is $50. (Act 47 of 2003, §618-A).

Crimes.

Any person who knowingly manufactures, uses, displays, advertises, distributes, offers for sale, sells or possesses with intent to sell or distribute any items or services bearing or identified by counterfeit mark shall be guilty of Pennsylvania crime of trademark counterfeiting. (18 Pa.C.S. § 4119).

Protection Afforded.

Registrant, in addition to exercising common law remedies, may seek to enjoin manufacture, use, display, or sale of imitations of his trademark and, in same suit, court may require defendant to pay over profits and damages and to surrender imitations in his possession for destruction. Treble damages and/or attorney fees may be available in certain bad faith circumstances. (54 Pa.C.S. § 1125, 1126).

Infringement is prohibited and person aggrieved thereby may bring civil action for remedies provided in 54 Pa.C.S. § 1125; however, in order to recover profits or damages acts of copying and applying mark for distribution or sale must have been committed with intent that confusion, mistake or deception would occur. (54 Pa.C.S. § 1123).

Dilution of mark that is famous in Pennsylvania is ground for injunctive relief even if parties are not in competition or there is no confusion as to source of goods. (54 Pa.C.S. § 1124).

Insignia.

Pennsylvania State Police or any society, organization or association not repugnant to constitution and laws of U.S. or Pennsylvania, including labor unions, lodges and orders may apply for registration of its insignia, including union label. (54 Pa.C.S. § 1301, 1311). Application must be accompanied by facsimile of insignia. (54 Pa.C.S. § 1311). Filing fee is $50. (Act 47 of 2003, §618-A). Report concerning use of insignia must be filed in 2001 and every tenth year thereafter to avoid deregistration. (54 Pa.C.S. § 1314). Insignia registered under prior enumerated statutes deemed registered hereunder. (54 Pa.C.S. § 1302). Labor union may dictate and specify conditions and limitations under which label may be used by any person employing union members, manufacturing articles upon which label may be affixed or using labor symbolized by such label. (54 Pa.C.S. § 1321).

Tradenames.

Any entity, including individual, corporation, association, partnership, joint-stock company, business trust, syndicate, joint adventureship or other group of persons conducting business under fictitious name must register it. (54 Pa.C.S. § 302, 303). Application filed with

Department of State must be duly executed and must set forth fictitious name, brief statement of character or nature of business, location of business, name and address of each individual interested in business, name, form of organization, state, date of incorporation and location of principal place of business and registered office in Pennsylvania of any entity interest in such business, and include statement that applicant understands filing creates no exclusive right in fictitious name. (54 Pa.C.S. § 311). Mandatory registration does not apply to any nonprofit or professional activities, activities prohibited from being carried on under fictitious name, certain limited partnerships and unincorporated associations. (54 Pa.C.S. § 302, 303). Registration fee for fictitious name is $70. (Act 47 of 2003, H.B. 172, §618-A[2][V]). Entity, including individual party, must advertise notice of intention to file application once in legal newspaper and once in general newspaper in county where principal office or business is located. (54 Pa.C.S. § 311).

Fictitious name must not: (a) Include corporate designator such as “corporation”, “incorporated”, or “limited” unless one entity in application is corporation, but may include “company”; (b) be deceptively similar to name of corporation authorized to do business in Pennsylvania, nonprofit unincorporated association, limited partnership, Pennsylvania agency, or name statutorily reserved; (c) contain words “college”, “university” or “seminary”; “engineer”, “engineering”, “surveyor” or “surveying”; “bank”, “banking”, “banker” or “trust”; or “cooperative,” unless certificate of approval obtained from Department of Education, State Registration Board for Professional Engineers, or Department of Banking respectively, or unless name complies with statute on co-operatives. (54 Pa.C.S. § 311).

Registration application may designate party authorized to execute amendments, withdrawals or cancellation. (54 Pa.C.S. § 311[c]). Fictitious names registered under prior enumerated statutes deemed registered hereunder. (54 Pa.C.S. § 304).

Failure to register fictitious name will preclude entity, successors and assigns, from bringing suit on any contract until application filed and $500 penalty paid to Department of State; however, these provisions are inapplicable if substantial compliance in good faith with this or prior law. (54 Pa.C.S. § 331).

Corporations and other associations with registered names must file report in Department of State in 2001 and every tenth year thereafter, with listed exceptions, to avoid deregistration. (54 Pa.C.S. § 503).

17.02 TRADE SECRETS:

Uniform Trade Secrets Act adopted. See category 6 Courts and Legislature, topic 6.05 Uniform Laws. It is crime to wrongfully take trade secret, defined as valuable scientific or technical information, design, process, procedure, formula, improvement or customer sales information or any other privileged or confidential information which is of value and specifically identified as confidential by owner and not published or otherwise matter of public knowledge. (18 Pa.C.S. § 3930). Worker and Community Right-to-Know Act and other regulatory statutes requiring manufacturers and suppliers of toxic and hazardous substances to report them to government agencies make criminal disclosure by government officers, employees and agents when trade secret claimed by regulated party. (E.g., 35 P.S. § 7311.) Courts may protect trade secrets from pretrial discovery. (P.R.C.P. 4012[a][9]).

18 LEGAL PROFESSION

18.01 ATTORNEYS AND COUNSELORS:

Jurisdiction over Admission.

Admission of attorneys is now governed by Pennsylvania Bar Admission Rules 101 through 402. (Pa. B.A.R. 103).

Eligibility and Educational Requirements.

General requirements for admission to bar are: (1) Receipt of undergraduate degree from accredited college or university or receipt of equivalent education; (2) receipt of Bachelor of Law or Juris Doctor degree from accredited law school; (3) absence of incompatible prior conduct; and (4) satisfactory completion of Pennsylvania bar examination. (Pa. B.A.R. 203).

Examination.

Pennsylvania uses Multi-State Bar Examination. Additional local subjects tested are civil procedure, commercial paper, conflict of laws, constitutional law, contracts, corporation law, criminal law, decedents' estates, evidence, family law, federal personal income tax, professional responsibility, real property, sales, secured transactions, and torts. Multi-State Bar Examination scores from other jurisdictions not accepted.

Admission Without Examination.

Attorney of another state may apply for admission to Bar of this Commonwealth. Requirements for admission are: (a) (1) through (3) under subhead Eligibility and Educational Requirements, supra; (b) admission to bar of reciprocal state; (c) certificate of good standing at bar of such state; and (d) five of past seven years immediately preceding application date: (i) practice in another state, (ii) engaged full-time in teaching law at accredited law school. Time under (d)(i) and (ii) may be aggregated. No applicant will be admitted who has taken and failed Pennsylvania bar examination and has not subsequently passed examination. (Pa. B.A.R. 204).

Attorney who is qualified to practice in courts of another state and who is enrolled in graduate criminal law or poverty law and litigation program in accredited law school in this Commonwealth or after having completed study of law in accredited law school is employed by or associated with organized legal services program for indigents in civil matters in this Commonwealth, may practice before courts of this Commonwealth in all matters in which attorney is associated with organized defender association or organized legal services program. (Pa. B.A.R. 311).

Foreign legal consultants may consult on law of foreign country where admitted subject to specified restrictions. (Pa. B.A.R. 342). License requirements are: (1) Member in good standing of foreign bar; (2) active for five of seven years preceding application; (3) good moral character and general fitness; (4) 26 or older; (5) intends to maintain office and practice in Commonwealth; and (6) has passed Multistate Professional Responsibility Exam. (Pa. B.A.R. 341).

Effect of Admission to Practice.

Members of Pennsylvania bar entitled to practice law before every court and district justice of Commonwealth upon presentation of certificate issued by Court Administrator of Pennsylvania. (Pa. B.A.R. 232[a]).

Admission Pro Hac Vice.

Foreign and out of state attorneys may be specially admitted, by motion, to this Bar for purposes limited to particular matter unless good cause for denial of such motion appears. Such attorneys may not act as attorney of record. (Pa. B.A.R. 301). Motion and requirements governed by P.R.C.P. 1012.1.

Disability as Surety.

This is governed by rules of the local courts, many of which prohibit an attorney from acting as surety.

Liens.

A statutory attorney's lien was held unconstitutional. (265 Pa. 304, 108 Atl. 612). At common law, however, there is a retaining lien upon documents or money in the attorney's possession until he has been paid for his services, and a charging lien upon a fund in court primarily produced by his services.

Attorney Ethics.

Pennsylvania Rules of Professional Conduct, based largely on A.B.A. Model Rules, revised and republished effective Jan. 1, 2005. (Order 04 P.S. § 35, Pa. Supreme Court, Aug. 23, 2004). Attorneys may advertise specialty if certified by approved certifying organization. (R.P.C. 7.4). Private law firms may organize themselves using any form of association desired, as long as all beneficial owners are lawyers. (R.P.C. 5.4[d]).

Discipline.

Rules of Disciplinary Enforcement define and state procedures for discipline and disbarment. (Pa. R. D. E. 101-602).

Unauthorized Practice.

Individuals admitted to Pennsylvania bar or corporations complying with Professional Corporation Law may practice law or hold themselves out as entitled to practice law. (42 Pa.C.S. § 2524, 2521). Associations may provide legal services but only through officers, employees or agents duly admitted to practice law. Associations may employ persons not so admitted but such may not render legal services. Associations may charge for legal services of lawyers, may collect such charges, and may compensate those who render professional services. (42 Pa.C.S. § 2524[b]). Special rules govern legal services provided on temporary basis by lawyers admitted to practice outside Pennsylvania. (R.P.C. 5.5[c], [d]).

Mandatory Continuing Legal Education.

Pa. Rules for Continuing Legal Education (“Pa.R.C.L.E.”) administered by Continuing Legal Education Board. (Pa.R.C.L.E. 103, 104). Every active lawyer must complete yearly minimum of 12 hours of study on professional responsibility, practice and procedure or substantive law offered by certified provider or activity approved by Board. (Pa.R.C.L.E. 105). Newly admitted attorneys must attend Bridge the Gap program of at least four hours.

Professional Associations.

See category 2 Business Organizations, topic 2.02 Associations, subhead Professional Associations.

Professional Corporations.

See category 2 Business Organizations, topic 2.03 Corporations, subhead Professional Corporations.

19 MINERAL, WATER AND FISHING RIGHTS

19.01 MINES AND MINERALS:

Department of Environmental Resources, of which Secretary of Environmental Resources is head (71 P.S. § 66) has duty of seeing that mining laws are enforced (71 P.S. § 510[1, 15]). That Department has adopted comprehensive regulations. (25 P.C. 86 [surface and underground coal mining: general], 87 [surface mining of coal], 88 [anthracite coal], 89 [underground mining of coal and coal preparation facilities], and 90 [coal refuse disposal]).

Operation of Mines.

Operation of bituminous mines is governed by Pennsylvania Bituminous Coal Mine Safety Act. (52 P.S. §690-101 et seq.). Operation of anthracite mines is governed by Pennsylvania Anthracite Coal Mine Act. (52 P.S. § 70[101] et seq.). Both Acts repealed to extent inconsistent with equal employment rights of sexes. (Act of Oct. 4, 1978 [1978, No. 173]; 1 Pa.C.S. § 2301[d]).

Foremen, assistant foremen and mine examiners in anthracite mines are required to be examined and qualified by examining boards before they may be employed. (52 P.S. § 70[201 to 205]). Examination and qualification are also required for certification of miners in anthracite mines as prerequisite to employment. (52 P.S. § 70[207, 215, 216]). Certification of miners in bituminous mines also governed by statute. (52 P.S. §690-204 to 207). There are similar provisions in Bituminous Coal Mine Act for certification of mine foremen, assistant mine foremen, mine electricians and mine examiners (52 P.S. §690-208, 209, 217) and for use of noncertified persons under certain temporary or emergency conditions (52 P.S. §690-203).

Persons in charge of anthracite (52 P.S. § 661) and bituminous (52 P.S. § 1406.1 et seq.; 1407) mines must take certain precautions against causing collapse of surface structures, and are deemed guilty of misdemeanor if they fail to comply with statute (52 P.S. § 667, 1396.23, 1406.17a, 1410a). Similarly, persons in charge of noncoal surface mining operations are deemed guilty of misdemeanor if they fail to comply with statute. (52 P.S. § 3322).

Third class cities (53 P.S. § 37201) and other municipal corporations (53 P.S. § 5201) in anthracite and bituminous regions may establish bureaus of mine inspection and surface support to regulate surface support. State Mining Commission has power to control maintenance of surface support of lands owned by state. (52 P.S. § 1501).

Anthracite Strip Mining and Conservation Act (52 P.S. § 681.1 et seq.), Surface Mining Conservation and Reclamation Act (52 P.S. § 1396.1 et seq.), Bituminous Mine Subsidence and Land Conservation Act (52 P.S. § 1406.1 et seq.) and Noncoal Surface Mining Conservation and Reclamation Act (52 P.S. § 3301 et seq.) require operators to be licensed and to secure permits conditioned on filing bond or alternative type of security specified in those Acts, insuring performance by them of various conservation and safety measures. Reclamation plan required to be submitted with application for permit to operate surface mine. (52 P.S. § 1396.4, 3307). See category 12 Environment, topic 12.01 Environmental Regulation, subheads Surface Mining Conservation and Reclamation Act, Noncoal Surface Mining Conservation and Reclamation Act and Bituminous Mine Subsidence and Land Conservation Act. Anthracite Strip Mining and Conservation Act repealed by Surface Mining Conservation and Reclamation Act insofar as provisions inconsistent therewith. (Act of Nov. 30, 1971 [P.L. 554, No. 147], 52 P.S. § 1396.1). Except as provided in 52 P.S. § 3304, Surface Mining Conservation and Reclamation Act repealed to extent that it applies to surface mining of minerals other than bituminous and anthracite coal by Noncoal Surface Mining Conservation and Reclamation Act. (52 P.S. § 3301 et seq.).

Commonwealth of Pennsylvania is signatory to Interstate Mining Compact, object of which is to assure sound mining practices. (52 P.S. § 3251, 3252).

Under Coal Mine Sealing Act of 1947 (52 P.S. § 28.1 et seq.) abandoned mines must be sealed to minimize or stop pollution of waters of Commonwealth and to prevent access by persons or animals.

Drilling of gas wells in workable coal seams in Commonwealth is regulated by Coal and Gas Resource Coordination Act. (58 P.S. § 501 et seq.).

Noncoal surface mining is regulated by Noncoal Surface Mining Conservation and

Reclamation Act. (52 P.S. § 3301 et seq.).

Acquisition and Disposal by Commonwealth of Certain Mines.

Secretary of Environmental Resources is authorized to acquire with available Federal and/or State funds, either amicably or by condemnation, land which has been affected by past mining practices and which is hazardous to health and safety of citizens or land which is necessary to abate adverse effects of past mining practices on land and water resources in Pennsylvania, upon terms and conditions set forth in 52 P.S. § 30.101.

Safeguarding of Employees.

There are elaborate safety regulations with regard to both anthracite (52 P.S. § 70[101 et seq.]) and bituminous (52 P.S. §690-101 et seq.) mines. See also regulations at 25 P.C. 207.1 et seq.; 209.1 et seq.

Mine Families First Act.

Mine Families First Program assists families of those trapped, injured, or awaiting rescue during underground mine emergency. (52 P.S. §1430.1 to 1430.5).

Inspection.

Mines are inspected by mine inspectors under supervision of Secretary of Environmental Resources. (52 P.S. § 70[103-130], 690-216, 506, 1406.9, 71 P.S. § 510[15, 16]). All anthracite mines and collieries must be examined at least once every two months. (52 P.S. § 70[117]). Electrical inspections of anthracite mines and collieries must be conducted at least twice a year. (52 P.S. § 70[106]). There are similar provisions for bituminous mines (52 P.S. § 701[104-124]) but inspection is limited to at least once every three months for mine's liberating explosive gas, and at least once every four months for nongassy mines (52 P.S. § 690-118, 317, 344). Inspection of surface mining operations governed by 52 P.S. § 1396.4c. Inspection of noncoal surface mining operations governed by 52 P.S. § 3314.

Coal Refuse Disposal Control Act.

Disposal of coal refuse is regulated by Coal Refuse Disposal Control Act. (52 P.S. § 30.51 et seq., 25 P.C. §90.1 et seq.).

Oil and Gas.

Drilling, operating and abandoning oil and gas wells is regulated by statute. (58 P.S. § 1 et seq.; 58 P.S. § 501 et seq.; 58 P.S. § 601 [101 et seq.]). Bonding requirements for oil and gas operations also provided. (58 P.S. § 601.215[a]).

Sealing of Abandoned Wells.

Department of Environmental Resources is required to plug certain abandoned oil and gas wells. (71 P.S. § 510[15]).

20 MORTGAGES

20.01 CHATTEL MORTGAGES:

Uniform Commercial Code, Art. 9 (1972 Official Text) adopted effective July 1, 2001. (13 Pa.C.S. § 9101 et seq.). Code repealed Chattel Mortgage Act of 1945. See category 3 Business Regulation and Commerce, topic 3.09 Commercial Code. Method of assigning, releasing, satisfying or extending chattel mortgages filed in accordance with Chattel Mortgage Act of 1945 and prior to July 1, 1954, is set forth in 21 P.S. § 941.1 to 941.13.

Filing.

Governed by Uniform Commercial Code. (13 Pa.C.S. § 9501 et seq.). Filing in office of Secretary of Commonwealth fee is $84 (19 P. C. 3.30[a]), except $12 for goods as collateral. (13 Pa.C.S. § 9525).

Forms.

Financing Statements and Statements of Continuation, Partial Release, Assignment and Termination under Uniform Commercial Code must be filed on forms developed for central filing; sources for these will be furnished by Secretary of Commonwealth, Corporation Bureau, Harrisburg, on request. (19 P. C. 55.1 to 55.101).

Exclude.

See category 8 Debtor and Creditor, topics 8.15 Pledges; 8.08 Fraudulent Sales and Conveyances.

20.02 COLLATERAL SECURITY:

See category 8 Debtor and Creditor, topic 8.15 Pledges.

20.03 MORTGAGES OF PERSONAL PROPERTY:

See topic 20.01 Chattel Mortgages; category 3 Business Regulation and Commerce, topic 3.09 Commercial Code.

20.04 MORTGAGES OF REAL PROPERTY:

Execution.

All mortgages must be in writing and signed by the mortgagor. (33 P.S. § 1). No defeasance can reduce a deed absolute on its face to a mortgage unless it is in writing, signed and delivered by the grantee. (21 P.S. § 951). A seal is unnecessary if mortgagor is natural person (21 P.S. § 10), but corporate mortgagor should affix seal. Acknowledgment is not necessary to pass title but is necessary for recording. (21 P.S. § 621, 951).

A mortgage is a conveyance in form but is treated as security for payment of debt. (101 Pa. Super. 168; 299 Pa. Super. 260, 445 A.2d 744).

Recording is not necessary to validity between the parties but constitutes notice to third persons. (21 P.S. § 351). Defeasances in separate instruments must be recorded if they are to be valid against subsequent grantees or mortgagees. (21 P.S. § 951). Mortgages are recorded in county where land lies. (21 P.S. § 351, 621). Certificate of residence of mortgagee is required before mortgage or assignment may be recorded. (21 P.S. § 625). See category 10 Documents and Records, topic 10.04 Records.

Short Form Mortgage.

A party contemplating the recording, as mortgagee, of several mortgages in the same county containing the same general covenants, conditions and obligations may file an unacknowledged “Stipulation of General Mortgage Provisions,” in the form provided by statute, containing such general covenants, etc. Thereafter, he may record “short form mortgage”, which incorporates general covenants only by reference to recorded Stipulation and which has same effect as any other mortgage. Copy of Stipulation must be set forth after acknowledgment, but this is not recorded. (21 P.S. § 629 to 633). Recording of mortgage may be subject to Uniform Parcel Identifier Act, Act No. 1 of 1988.

Recording fees depend upon the class of the county where a mortgage is recorded. (16 P.S. § 7629, 11411).

Power of Attorney.

Corporations, real estate, mortgage, title insurance, guaranty, surety and indemnity companies and co-partnerships must, except in certain commercial circumstances, designate by power of attorney filed in office of recorder of deeds names of persons authorized to enter acknowledgments, assignments, extensions, postponements, releases or satisfactions, or to do any other thing affecting lien of any recorded mortgage.

Taxes.

State taxes recording of mortgage at 50¢, which is collected by recorder. (72 P.S. § 3173).

Future advances may be covered by mortgage under common law principles and are covered by open-end mortgage. (42 Pa.C.S. § 8143).

Second Mortgages.

Secondary Mortgage Loan Act, 7 P.S. § 6601 et seq., regulates and requires license for business of making certain secondary mortgage loans as defined therein.

Financing Terms.

Flexible maximum interest rate for residential mortgages (Defined at 41 P.S. § 101) equal to Monthly Index of Long Term U.S. Government Bond Yields plus 2½% per annum. (41 P.S. § 301). This flexible maximum interest rate does not apply to obligations to pay original bona fide principal amount of more than $50,000 and certain other obligations. (41 P.S. § 301[f]). There are protective provisions for borrowers. (41 P.S. § 401 et seq.).

Mortgage on manufacturing plant covers many articles of personal property necessary to operation of plant even though not physically attached to the land. (See 371 Pa. 463, 91 A.2d 277; 316 Pa. 300, 175 Atl. 697; 312 Pa. 402, 167 Atl. 278.) These cases should be re-examined in light of Uniform Commercial Code. (13 Pa.C.S. § 9101 et seq.). Art. 9 of Code deals with secured transactions affecting personal property, including in some cases personalty affixed to real estate. (13 Pa.C.S. § 9334).

Priorities.

Priority of mortgages are measured from time they are left for record except purchase money mortgages, which take priority from time of delivery if they are recorded within ten days after date or otherwise, from time they are left for record. (42 Pa.C.S. § 8141). Open-end mortgages secure future money advances made after date of recording relating back to date of mortgage. (42 Pa.C.S. § 8143).

Insurance.

It is a misdemeanor for any person engaged in the business of financing, the purchase of real or personal property or lending money on the security thereof to require, as a condition precedent to the making of a loan or mortgage or the renewal thereof, that the borrower negotiate any insurance or renewal of insurance, except certain group creditor policies, through a particular insurance company, agent or broker. This does not prevent the lender from approving or disapproving the insurance company selected to underwrite such insurance. (18 Pa.C.S. § 7309).

Subordination Agreements.

A mortgage may be subordinated to a subsequent mortgage by agreement provided the agreement is recorded. (21 P.S. § 654).

Assignment.

Assignments of mortgages must be in writing, acknowledged and recorded. (21 P.S. § 623-1, 624). Certificate stating assignee's residence is needed for recording. (21 P.S. § 625).

Holders of mortgages, judgments, recognizances and other securities, where the same are due, are required upon tender of the amount due, together with all interest and other charges by the owner of the encumbered property, his agent, attorney, or terre tenant, to assign and transfer same to such person or persons as the owner of encumbered property may name. (21 P.S. § 733).

Release.

The mortgagee may release any part of the mortgaged premises and foreclose on the remaining part. (21 P.S. § 761).

Satisfaction.

Governed by Mortgage Satisfaction Act. (21 P.S. § 721-1 et seq.). After payment of mortgage obligation and satisfaction and recording costs, mortgagor sends notice to satisfy to mortgagee using form below. (21 P.S. § 721-6).

Form of Notice to Satisfy

NOTICE TO RECORD MORTGAGE SATISFACTION PIECETO AVOID PENALTY

Date of notice:

To the mortgagee named below:

The party issuing this notice believes that the mortgagee of the mortgage described below has received full satisfaction and payment of all amounts secured by the mortgage, including any applicable satisfaction fee, and that, where applicable, the mortgagee has been instructed in writing, effective as of the date and time of receipt of the mortgage payoff figure, to close and decline any further advances on any open line of credit which was secured by the affected mortgage. The party issuing this notice hereby requests that the mortgagee issue and present for recording a satisfaction piece concerning the mortgage or provide a satisfactory reason why the mortgage should not be satisfied to the party issuing this notice. If you do not comply with this notice, you may be liable for penalties and costs in accordance with the Act of December 9, 2002 (P.L. 1530, No. 197), known as the Mortgage Satisfaction Act, or the party issuing this notice may be able to satisfy the mortgage without your consent.

Name of mortgagor:

Name of mortgagee:

Name of last assignee:

Date of mortgage:

Amount of mortgage: $

Recorded in County, Pennsylvania, in Book, Page/instrument number.

Brief description of premises covered by mortgage:

Mortgagee loan number (if known):

Name of party presenting this notice:

Address of party presenting this notice:

Telephone number of party presenting this notice:

Mortgage records satisfaction using satisfaction in form below. (21 P.S. § 721-5).

Form of Satisfaction Piece

SATISFACTION PIECE

Made this day of ,

Name of Mortgagor:

Name of Mortgagee:

Name of Last Assignee:

Date of Mortgage:

Original Mortgage Debt:

Mortgage Recorded on ,

in the Office of the Recorder of Deeds of

County, Pennsylvania,

in Book, Page/instrument

number.

Brief Description or Statement of Location of Mortgaged Premises:

The undersigned hereby certifies that the debt secured by the above-mentioned mortgage has been fully paid or otherwise discharged and that upon the recording hereof said mortgage shall be and is hereby fully and forever satisfied and discharged.

The undersigned hereby authorizes and empowers the recorder of said county to enter this satisfaction piece and to cause said mortgage to be satisfied of record.

Witness the due execution hereof with the intent to be legally bound. (signature(s) of individual mortgagee(s) or representative(s) of legal entity)

(acknowledgment)

If mortgagee of residential mortgage fails to record satisfaction, settlement officer may record satisfaction in form below. (21 P.S. § 721-7).

Form for Settlement Officer Satisfaction

SETTLEMENT OFFICER SATISFACTION

Name of mortgagor

Date of mortgage

Name of mortgagee

Principal amount

Name of last assignee

Recorded on premises

In

County, Pennsylvania, in Book

Page/as instrument

Brief description or Statement of Location of

Mortgaged Premises.

COMMONWEALTH OF PENNSYLVANIA:

COUNTY OF ss:

Before me, the subscriber, a notary public in and for the Commonwealth of Pennsylvania, personally appeared, who, being duly sworn according to law, deposes and says:

(1) The settlement officer is licensed by the Insurance Department as a Title Insurance Agent with license no. . . . ., or is an employee of a Title Insurance Company authorized to do business in Pennsylvania or is an attorney licensed to practice law in this Commonwealth.

(2) The settlement officer business address is:

(3) The settlement officer has conducted or supervised a settlement in which the above-captioned mortgage was paid in full in accordance with the payoff statement provided by the mortgagee.

(4) The above settlement was held on . . . . at . . . . in which the mortgagor sold the property, refinanced the mortgage, other

(5) The settlement officer has ascertained, if the mortgage secures an open-end line of credit account, that the mortgagee has been instructed in writing, effective no later than the date and time of the receipt of the mortgage payoff figure, to close and decline any further advances on the home equity or other open-end line of credit which was secured by the affected mortgage.

(6) The settlement officer has ascertained that the mortgagee has received payment of the loan secured by the mortgage in accordance with the payoff statement, as evidenced by a

bank check, certified check, escrow account check from the settlement officer or an attorney trust account check that has been negotiated by the mortgagee, or any documentary evidence of the receipt of payment by the mortgagee.

(7) A satisfaction piece has not been recorded concerning the mortgage, nor has the settlement officer received a satisfaction piece.

(8) The settlement officer has delivered to the mortgagee notice of intent to present for recording a settlement officer satisfaction using the format and procedures described in the Act of December 9, 2002 (P.L. 1530, No. 197), known as the Mortgage Satisfaction Act. Attached hereto is a copy of the written request, notice of intent and a copy of the return receipt which indicates the written request and notice of intent were received by the mortgagee.

(9) The settlement officer has no actual knowledge of any objection by the mortgagee to the recording of a settlement officer satisfaction, nor has an objection been recorded in accordance with the Act.

(10) Attached hereto is a copy of the canceled check, wire confirmation or other evidence of payment, which paid the mortgage in full in accordance with the payoff statement.

(signature of settlement officer)

In witness whereof, I have hereunto set my hand and official seal, this day of ,.

Notary Public.

Foreclosure.

Mortgagee may proceed either by action on bond (which is normally accompanied by warrant to confess judgment) or by action of mortgage foreclosure. (316 Pa. Super. 367, 463 A.2d 4). See category 5 Civil Actions and Procedure, topic Judgments for discussion on enforceability of warrants to confess judgment. Court determines whether debtor knowingly and willingly waives right to notice and hearing prior to entry of judgment. (P. R. C. P. 2973.3).

If action is brought on the bond, execution is in the manner provided for enforcement of other money judgments, i.e. by writ of execution in the form provided in P. R. C. P. 3252. See category 8 Debtor and Creditor, topic 8.05 Executions.

The action of mortgage foreclosure is established by P. R. C. P. 1141-1150, 3180, 3257. Plaintiff must name as defendants mortgagor or his personal representative, heir or devisee and real owner of property or, if such owner is unknown, grantee in last recorded deed. Except where mortgagor is named as real owner, he need not be joined as defendant if plaintiff states in his complaint that he releases him from liability for debt. (P. R. C. P. 1144). Complaint may state two or more grounds of foreclosure but no more than one cause of action. (P. R. C. P. 1146). Thus, mortgagee may not join contractual claim on mortgage note or bond to mortgage foreclosure claim. (257 Pa. Super. 101, 390 A.2d 266). Procedure follows that for rules relating to civil action of assumpsit (P. R. C. P. 1141[b]), except that there are special rules for matters such as venue, service and contents of complaints and scope of counterclaims (P. R. C. P. 1142-1144, 1146-1148). (*Note:* 1145 has been rescinded.) Execution is by writ of execution in form provided by P. R. C. P. 3257.

Deficiency Judgments.

If proceeds of sale are insufficient to satisfy debt, deficiency judgment may be entered against mortgagor on bond. Mortgagee who buys in mortgaged premises in foreclosure sale must credit mortgagor with fair value thereof. (42 Pa.C.S. § 8103). Procedures to fix fair market value of property sold on execution and to mark judgment as satisfied are found in P.R.C.P. 3276-3291.

Redemption.

There can be no redemption after foreclosure sale. (41 P.S. § 404).

Form of Mortgage

This indenture, made the . . . . day of . . . ., in the year of our Lord (year) . ., between . . . . (hereinafter called the mortgagor. .) of the one part, and . . . . (hereinafter called the mortgagee. .) of the other part.

Whereas, the said mortgagor. ., in and by . . . . obligation. . or writing. ., obligatory under . . . . hand. . and seal. . duly executed, bearing even date herewith, stand. . bound unto the said mortgagee. . in the sum of . . . . lawful money of the United States of America, conditioned for the payment of the just sum of . . . . lawful money as aforesaid . . . ., together with interest thereon, ..., payable . . . . at the rate of . .% per annum, without any fraud or further delay; and for the production to the mortgagee. ., ... executors, administrators . . . . or assigns, on or before the first day of . . . . of each and every year, of receipts for all . . . . taxes and water rents of the current year assessed upon the mortgaged premises, and also, from time to time, and at all times, until payment of said principal sum, for the keeping of the building . . . . herein mentioned insured against loss or damage by fire for the benefit of the mortgagee. . in the sum of . . . ..

Provided, however, and it is thereby expressly agreed, that if at any time default shall be made in the payment of interest as aforesaid, for the space of . . . . days after any . . . . payment thereof shall fall due, ... or in such production to the mortgagee. ., ... executors, administrators . . . . or assigns, on or before the first day of . . . . of each and every year, of such receipts for . . . . taxes and water rates of the current year upon the mortgaged premises, or in the maintenance of such insurance, then, and in such case the whole principal debt aforesaid . . . . shall, at the option of the said mortgagee. ., ... executors, administrators . . . . or assigns, become due and payable immediately; and payment of said principal debt, ... and all interest thereon, may be enforced and recovered at once, anything therein contained to the contrary notwithstanding.

And provided further however, and it is thereby expressly agreed, that if at any time hereafter, by reason of any default in payment, either of said principal sum . . . . at maturity, or of said interest, or in production of said receipts for . . . . taxes and water rents within the time specified, or the maintenance of such insurance, a writ of execution is properly issued upon the judgment obtained upon said obligation, or by virtue of said warrant of attorney, or an action of mortgage foreclosure is brought upon this indenture of mortgage, an attorney's commission for collection, viz.: . .%, shall be payable, and shall be recovered in addition to all principal and interest then due, besides costs of suit, and all expenses of effecting such insurance, and thereby waiving the right of inquisition on any real estate that may be levied upon under a judgment obtained by virtue hereof and voluntarily condemning the same, and authorize the entry of such condemnation upon said writ of execution and agreeing that the said real estate may be sold under the same; and also waiving and relinquishing all benefit of any and every law now or hereafter in force to exempt from levy and sale on execution the said mortgaged premises or any other property whatsoever, or any part of the proceeds arising from any sale thereof; as in and by the said recited obligation. . and the condition. . thereof, relation being thereunto had, may more fully and at large appear.

Now this indenture witnesseth, that the said mortgagor. ., as well for and in consideration of the aforesaid debt or principal sum of . . . . and for the better securing the payment of the same, with interest unto the said mortgagee. ., ... executors, administrators . . . . and assigns, in discharge of the said recited obligation. ., as for and in consideration of the further sum of $1, unto . . . . in hand well and truly paid by the said mortgagee . . . . at and before the sealing and delivery hereof, the receipt whereof is hereby acknowledged, ... granted, bargained, sold, aliened, enfeoffed, released and confirmed, and by those presents . . . . grant, bargain, sell, alien, enfeoff, release and confirm unto the said mortgagee. ., ... and assigns. ..

Together with all and singular the . . . . ways, waters, water-courses, rights, liberties, privileges, improvements, hereditaments and appurtenances whatsoever thereunto belonging, or in any wise appertaining, and the reversions and remainders, rents, issues and profits thereof.

To have and to hold the said . . . . hereditaments and premises hereby granted, or mentioned and intended so to be, with the appurtenances, ... unto the said mortgagee. ., ... and assigns, to and for the only proper use and behoof of the said mortgagee. ., ... and assigns forever. . . . . And the said mortgagor. . for . . . . heirs, executors and administrators, do. . hereby covenant, promise and agree, to and with the said mortgagee. ., ... executors, administrators . . . . and assigns, that if the said mortgagor. ., ... heirs, executors or administrators, shall neglect or refuse to keep up the aforesaid insurance, it shall be lawful for the said mortgagee. ., ... executors, administrators . . . . or assigns, to insure the said building . . . . in a sum sufficient to secure payment of said principal debt in case of fire, and all costs and expenses of effecting such insurance shall be treated as part of the principal debt in a suit upon this mortgage.

Provided always, nevertheless, that if the said mortgagor. ., ... heirs, executors, administrators or assigns, do and shall well and truly pay, or cause to be paid, unto the said mortgagee. ., ... executors, administrators . . . . or assigns, the aforesaid debt or principal sum of . . . . on the . . . . day . . . . and time . . . . hereinbefore mentioned and appointed for payment of the same, together with interest as aforesaid, and shall produce to the said mortgagee. ., ... executors, administrators . . . . or assigns, on or before the first day of . . . . of each and every year, receipts for all . . . . taxes and water rents of the current year assessed upon the mortgaged premises, without any deduction, defalcation, or abatement to be made of anything, herein mentioned to be paid or done, and shall keep the building . . . . herein mentioned insured as aforesaid, then, and from thenceforth, as well this present indenture, and the estate hereby granted, as the said recited obligation. . shall cease, determine and become void, anything hereinbefore contained to the contrary thereof in any wise notwithstanding.

And provided, also, that it shall and may be lawful for the said mortgagee. ., ... executors, administrators . . . . or assigns, when and as soon as the principal debt or sum hereby secured . . . . shall become due and payable as aforesaid, or in case default shall be made for the space of . . . . days in the payment of interest on the said principal sum . . . . after any . . . . payment thereof shall fall due, ... or in case there shall be default in the production to the said mortgagee. ., ... executors, administrators . . . . or assigns, on or before the first day of . . . . of each and every year, of such receipts for . . . . taxes and water rents the current year assessed upon the mortgaged premises, or in the maintenance of the insurance as aforesaid, to bring an action of mortgage foreclosure upon this indenture of mortgage, and to proceed thereon to judgment and execution for the recovery of the whole of said principal debt, ... and all interest due thereon, together with an attorney's commission for collection, viz.: . .% besides cost of suit, and all expenses of effecting such insurance without further stay, any law usage, or custom to the contrary notwithstanding.

In witness whereof, the said mortgagor. . to these presents . . . . hereunto set . . . . hand. . and seal. .. Dated the day and year first above written.

. . . . (Seal)

. . . . (Seal)

Sealed and delivered in the presence of us:

. . . .

. . . .

It is hereby certified that the address of the mortgagee within named is . . . ..

(Acknowledgment).

Recorded in the office for recording of deeds in and for . . . . in mortgage book . . . ., No. . . . ., page . . . ., etc.

Witness my hand and seal of office this . . . . day of . . . ., Anno Domini (year) . ..

Form of Bond and Warrant

Know all men by these presents that . . . . (hereinafter called the obligor. .) . . . . held and firmly bound unto . . . . (hereinafter called the obligee. .) in the sum of . . . . lawful money of the United States of America, to be paid to the said obligee . . . . certain attorney, executors, administrators . . . . or assigns: to which payment well and truly be made, ... do bind and oblige . . . . heirs, executors and administrators, ... firmly by these presents. Sealed with . . . . seal. .. Dated the . . . . day of . . . . in the year of our Lord (year) . ..

The condition of this obligation is such, that if the above bounden obligor. ., ... heirs, executors or administrators, or any of them, shall and do well and truly pay, or cause to be paid unto the above-named obligee. ., ... certain attorney, executors, administrators . . . . or assigns, the just sum of . . . . lawful money as aforesaid, ..., together with interest thereon . . . . payable . . . . at the rate of . .% per annum, ... without any fraud or further delay; and shall produce to the said obligee. ., ... executors, administrators . . . . or assigns, or on before the first day of . . . . of each and every year, receipts for all . . . . taxes and water rents of the current year assessed upon the premises described in the accompanying indenture of mortgage; and also from time to time and at all times until payment of the said principal sum, keep the building . . . . therein mentioned insured against loss or damage by fire for the benefit of the mortgagee. . in the sum of . . . . then the above obligation to be void, or else to be and remain in full force and virtue.

Provided, however, and it is hereby expressly agreed, that if at any time default shall be made in payment of interest as aforesaid, ... for the space of . . . . days after any . . . . payment thereof shall fall due, ... or in such production to the obligee. ., ... executors, administrators . . . . or assigns, on or before the first day of . . . . of each and every year, of such receipts for the . . . . taxes and water rents of the current year assessed upon the mortgaged premises, or in the maintenance of such insurance, then and in such case the whole principal debt aforesaid, ... shall, at the option of the said obligee. ., ... executors, administrators . . . . or assigns, become due and payable immediately, and payment of said principal debt . . . . and all interest thereon, may be enforced and recovered at once, anything herein contained to the contrary notwithstanding.

And provided further, however, and it is hereby expressly agreed, that if at any time hereafter, by reason of any default in payment, either of said principal sum . . . . at maturity, or of said interest, or in production of said receipts for . . . . taxes and water rents, within the time specified, or in the maintenance of such insurance, a writ of execution is properly issued upon the judgment obtained upon this obligation, or by virtue of the warrant of attorney, hereto attached or an action of mortgage foreclosure is brought upon the accompanying indenture of mortgage, an attorney's commission for collection, viz.: . .%, shall be payable, and shall be recovered in addition to all principal and interest then due, besides costs of suit and all expenses of effecting such insurance. And the said obligor. ., for . . . . heirs, executors, administrators and assigns, hereby expressly waive. . the right of inquisition on any real estate that may be levied upon under a judgment obtained by virtue hereof and voluntarily condemn. . the same and authorize. . the entry of such condemnation upon said writ of execution and agree. . that the said real estate may be sold under the same; and also expressly waive. . and relinquish. . unto the said obligee. ., ... executors, administrators . . . . or assigns, all benefit that may accrue to . . . . them by virtue of any and every law now or hereafter in force to exempt from levy and sale on execution the premises described in the aforesaid indenture of mortgage, or any other property whatsoever, or any part of the proceeds arising from any sale thereof.

. . . . (Seal)

. . . . (Seal)

Sealed and delivered in the presence of us:

. . . .

. . . .

To . . . ., attorney of the court of common pleas, at . . . ., in the County of . . . ., in the State of . . . ., or to any other attorney of the said court, or any other court there or elsewhere.

Whereas, ..., in and by a certain obligation bearing even date herewith, do. . stand bound unto . . . . in the sum of . . . . lawful money of the United States of America, ... conditioned for the payment of the just sum of . . . . lawful money as aforesaid . . . . together with interest thereon, ... payable . . . . at the rate of . .% per annum, ... and for the production to the obligee. ., ... executors, administrators . . . . or assigns, on or before the first day of . . . . of each and every year, of receipts for all . . . . taxes and water rents of the current year assessed upon the premises described in the indenture of mortgage accompanying said obligation; and also from time to time and at all times until payment of said principal sum, to keep the building . . . . therein mentioned insured against loss or damage. . by fire for the benefit of the mortgagee. . in the sum of . . . ..

Provided, however, and it is thereby expressly agreed, that if at any time default shall be made in payment of interest as aforesaid, ... for the space of . . . . days after any . . . . payment thereof shall fall due, ... or in such production to the obligee. ., ... executors, administrators . . . . or assigns, on or before the first day of . . . . of each and every year, of such receipts for the . . . . taxes and water rents of the current year assessed upon the mortgaged premises, or in the maintenance of such insurance, then and in such case the whole principal debt aforesaid, ... shall, at the option of said obligee. ., ... executors, administrators . . . . or assigns, become due and payable immediately, and payment of said principal debt, ... and all interest thereon, may be enforced and recovered at once, anything therein contained to the contrary notwithstanding.

And provided further, however, and it is thereby expressly agreed, that if at any time thereafter, by reason of any default in payment, either of said principal sum . . . . at maturity, or of said interest, or in production of said receipts for . . . . taxes and water rents within the time specified, or in the maintenance of such insurance, a writ of execution is properly issued upon the judgment obtained upon said obligation, or by virtue of this warrant, or an action of mortgage foreclosure is begun upon the accompanying indenture of mortgage, an attorney's commission for collection, viz.: . .% shall be payable, and shall be recovered in addition to all principal and interest then due, besides costs of suit and all expenses of effecting such insurance, and the said obligor. . for . . . . heirs, executors, administrators and assigns, thereby expressly waive. . the right of inquisition on any real estate that may be levied upon under a judgment obtained by virtue hereof and voluntarily condemn. . the same and authorize. . the entry of such condemnation upon said writ of execution and agree. . that the said real estate may be sold under the same; and also expressly waive. . and relinquish. . unto the said obligee. ., ... executors, administrators . . . . or assigns, all benefit that may accrue to . . . . them by virtue of any and every law now or hereafter in force to exempt from levy and sale on execution the premises described in the aforesaid indenture of mortgage, or any other property whatsoever, or any part of the proceeds arising from any sale thereof.

These are to desire and authorize you, or any of you, to appear for . . . . heirs, executors or administrators, in the said court or elsewhere, in any appropriate action there or elsewhere brought or to be brought against . . . . heirs, executors or administrators, at the suit of the said obligee. ., ... executors, administrators . . . . or assigns, on the said obligation, as of any term or time past, present, or any other subsequent term or time there or elsewhere to be held, and confess judgment thereupon against . . . . heirs, executors or administrators, for the sum of . . . . lawful money of the United States of America, debt, besides cost of suit and all expenses of insurance as aforesaid, and an attorney's commission of . .% in case payment has to be enforced by process of law as aforesaid, by non sum informatus nihil dicit or otherwise, as to you shall seem meet: And for your or any of your so doing, this shall be your sufficient warrant. And the said obligor. ., for . . . . heirs, executors, administrators and assigns, do. . hereby remise, release, and forever quit claim unto the said obligee. ., ... certain attorney, executors, administrators . . . . and assigns, all and all manner of error or errors, misprisions, misenteries, defects and imperfections whatever, in the entering of the said judgment, or any process or proceeding thereon or thereto, or anywise touching or concerning the same.

In witness whereof, ... have hereunto set . . . . hand. . and seal. . the . . . . day of . . . . in the year of our Lord (year) . ..

. . . . (Seal)

. . . . (Seal)

Sealed and delivered in the presence of us:

. . . .

. . . .

Form of Assignment of Bond and Mortgage

Know all men by these presents, that . . . . the mortgagee. . named in the . . . . indenture. . of mortgage hereinafter mentioned, for and in consideration of the sum of . . . . lawful money unto . . . . paid by . . . . at the time of the execution hereof, the receipt whereof is hereby acknowledged, do hereby grant, bargain, sell, assign, transfer and set over unto the said . . . . and assigns, all . . . . indenture of mortgage given and executed . . . ..

Also the bond. . or obligation . . in the said . . . . indenture. . of mortgage recited, and all moneys, principal and interest, due and to grow due thereon, ... with the warrant. . of attorney to the said obligation. . annexed, together with all rights, remedies and incidents thereunto belonging, and all . . . . right, title, interest, property, claim and demand, in and to the same:

To have, hold, receive and take, all and singular the hereditaments and premises hereby granted and assigned, or mentioned and intended so to be, with the appurtenances unto . . . . and assigns, to and for . . . . only proper use, benefit and behoof forever; subject, nevertheless, to the equity of redemption of said . . . . mortgagor. . in the said indenture. . of mortgage named, and . . . . and assigns therein.

In witness whereof, etc.

. . . .

. . . .

Sealed and delivered in the presence of us:

. . . .

. . . .

It is hereby certified that the address of the assignee within named is . . . .

(Acknowledgment of proof by witnesses).

. . . .

Form of Release of Mortgage

To all to whom these presents shall come, ... send greeting:

Whereas, ..., by indenture of mortgage bearing date the . . . . day of . . . ., Anno Domini (year) . ., and recorded in the office for recording of deeds in and for the . . . . in mortgage book . . . ., No. . . . ., page . . . ., etc., granted and conveyed unto . . . . and assigns, the premises therein particularly described, to secure the payment of a certain debt or principal sum of . . . . lawful money, etc., with interest, as therein mentioned, ...

And whereas, the said . . . . requested the said . . . . to release the premises hereinafter described, being part of said mortgaged premises, from the lien and operation of the said mortgage:

Now therefore know ye, that . . . . the said . . . ., as well in consideration of the premises, as of the sum of . . . . lawful money, to . . . . in hand paid by the said . . . . at the time of the execution hereof, the receipt whereof is hereby acknowledged . . remised, released, quitclaimed, exonerated and discharged, and by these presents, ... do. . remise, release, quit-claim, exonerate and discharge unto the said . . . . and assigns, all that . . . ..

To hold the same, with the appurtenances, unto the said . . . . and assigns, forever freed, exonerated and discharged of and from the lien of said mortgage, and every part thereof.

Provided, always, nevertheless, that nothing herein contained shall in anywise affect, alter or diminish the lien or incumbrance of the aforesaid mortgage on the remaining part of said mortgaged premises, or the remedies at law for recovering thereout or against the said . . . . or assigns, the . . . . principal sum, with interest, secured by said mortgage.

In witness whereof, etc.

. . . .

(Acknowledgment or proof by witnesses).

. . . .

Recorded in the office for recording of deeds in and for the . . . . in release of mortgage book . . . ., No. . . . ., page . . . ., etc.

Witness my hand and seal of office this . . . . day of . . . ., Anno Domini (year) . ..

. . . .

Forms of Satisfaction Piece for Use in

Philadelphia.

(a) Form of Individual Satisfaction Piece; Complete Satisfaction (21 P.S. § 717[a]).

KNOW ALL MEN BY THESE PRESENTS That . . . . . . do . . . hereby certify that a certain Indenture of Mortgage bearing date the . . . day of . . . (year). . ., made and executed by . . . . . . to . . . . . . to secure payment of the principal sum of . . . . . . dollars and duly recorded in the Department of Records of the City of Philadelphia, Mortgage Book No. . . . page . . . on the . . . day of . . . (year) . ., and secured upon (describe real estate) . . . . has been paid and that upon the recording of this instrument the said mortgage shall be and is hereby forever discharged. The mortgage has not been assigned, except as follows . . . .

WITNESS . . . . hand and seal this . . . . day of . . . . A.D. (year) . . . Signed, sealed and delivered in the presence of

. . . . (SEAL)

. . . . (SEAL)

. . . .

(b) Form of Corporation Satisfaction Piece; Complete Satisfaction (21 P.S. § 717[b]).

KNOW ALL MEN BY THESE PRESENTS That . . . . . . do . . . hereby certify that a certain Indenture of Mortgage bearing date the . . . day of . . . . (year) . . ., made and executed by . . . . to . . . . . . to secure payment of the principal sum of . . . . . . Dollars and duly recorded in the Department of Records of the City of Philadelphia, Mortgage Book No. . . . . page . . . . on the . . . day of . . . . . . (year) . ., and secured upon (describe real estate) . . . . has been paid and that upon the recording of this indenture the said mortgage shall be and is hereby forever discharged. The mortgage has not been assigned, except as follows . . . .

IN WITNESS WHEREOF the said Corporation has caused its common or corporate seal to be hereunto affixed the . . . . day of . . . . . (year) . . . .

. . . .

President

Attest

. . . .

Secretary

Forms of Satisfaction Piece for Use in All

Other Counties.

(a) Form of Satisfaction Piece for Use by Natural Persons. (21 P.S. § 720[4][a]).

Satisfaction Piece

Made this . . . . . day of . . . . . . (year) . . . . .

Name of Mortgagor:

Name of Mortgagee:

Name of Last Assignee:

Date of Mortgage:

Original Mortgage Debt: $

Mortgage recorded on . . . . . ., (year) . . . ., in the office of the Recorder of Deeds of . . . . . . County, Pennsylvania, in Mortgage Book . . . . . ., page . . . . (Unless the word "None" is inserted after the "Name of Last Assignee" above, include the following): Last assignment recorded on . . . . . ., (year) . . . . . in the Office of the Recorder of Deeds of . . . . County, Pennsylvania, in Mortgage Book . . . . . ., page . . . . . .

Brief Description or Statement of Location of Mortgaged Premises:

The undersigned hereby certifies that the debt secured by the above-mentioned Mortgage has been fully paid or otherwise discharged and that upon the recording hereof said Mortgage shall be and is hereby fully and forever satisfied and discharged.

Witness the due execution hereof.

Witnessed by:

. . . .

. . . .

(Affix Acknowledgment)

(b) Form of Satisfaction Piece for Use by Other than Natural Persons. (21 P.S. § 720[4][b]).

Satisfaction Piece

Made this . . . . day of . . . . . ., (year) . . . . .

Name of Mortgagor:

Name of Mortgagee:

Name of Last Assignee:

Date of Mortgage:

Original Mortgage Debt: $

Mortgage Recorded on . . . . . ., (year) . . . ., in the Office of the Recorder of Deeds of . . . . . . County, Pennsylvania, in Mortgage Book . . . . ., page . . . . . . (Unless the word "None" is inserted after the "Name of Last Assignee" above, include the following): Last assignment recorded on . . . ., (year) . . . . in the Office of the Recorder of Deeds of . . . . County, Pennsylvania, in Mortgage Book . . . . . ., page . . . . . .

Brief Description or Statement of Location of Mortgaged Premises:

The undersigned hereby certifies that the debt secured by the above-mentioned Mortgage has been fully paid or otherwise discharged and that upon the recording hereof said Mortgage shall be and is hereby fully and forever satisfied and discharged.

Witness the due execution hereof.

Attested or witnessed by:

. . . .

. . . .

By . . . .

(Affix Acknowledgment)

Chattel Mortgages.

See topic 20.01 Chattel Mortgages.

21 PROPERTY

21.01 ABSENTEES:

Care of Property.

If person domiciled or having property in Pennsylvania disappears and is absent from his last known residence for one year without being heard of after diligent inquiry, orphans' court division of court of common pleas of county where he last resided or where any of his property is located may, after due notice and upon good cause being shown, appoint trustee to take charge of his estate. Court has discretion to shorten one year period. Petition for appointment of trustee may be filed by any person who would be party in interest were absentee deceased or by any insurer or creditor of absentee. Absentee must be made party and any other person who would have interest in his property, were he deceased, may be made one upon direction of court. (20 Pa.C.S. § 5702[a]). See also category 13 Estates and Trusts, topic 13.05 Death.

Court may appoint temporary trustee on filing of petition. (20 Pa.C.S. § 5702[c]). Rules applicable to permanent trustee's bond, removal, discharge and powers, duties and liabilities in administration of absentee's real and personal property are same as those for guardian in administration of minor's estate. (20 Pa.C.S. § 5702[b]). See category 14 Family, topic 14.07 Guardian and Ward. Trustee may pay premiums on policies insuring absentee's life and may, with court approval, use so much of absentee's property or income therefrom as may be necessary for support of anyone whom absentee, if living, would be legally obliged to support or for education of his minor children. Sale or disposition of assets and execution of leases require prior court approval. (20 Pa.C.S. § 5702[b]).

See subhead Abandoned and Unclaimed Property, infra.

Abandoned and Unclaimed Property.

Every person holding property which became subject to custody and control of Commonwealth under Article XIII.1 of Title 72 during preceding year must report to State Treasurer on or before April 15 of year following year in which property first became subject to Commonwealth's custody and control. (72 P.S. § 1301.11). Definition of “abandoned and unclaimed property” varies depending upon nature of property and nature of institution or organization holding such property. (72 P.S. § 1301.3 thru 1301.10). After delivery of property to State Treasurer (72 P.S. § 1301.13), Treasurer may sell, donate or use it for benefit of Commonwealth or any of its political subdivisions (72 P.S. § 1301.17). For special rules concerning abandoned and unclaimed property held by financial institutions, see category 3 Business Regulation and Commerce, topic 3.01 Banks and Banking, subhead Unclaimed Deposits.

See categories 3 Business Regulation and Commerce, topic Banks and Banking, subhead Unclaimed Deposits; Estates and Trusts, topics Descent and Distribution, subhead Escheat, and Wills, subhead Unclaimed Legacies.

Appointment of Agent for Service of Process.

With exception of foreign corporations registered to do business in Pennsylvania, no statute requires nonresident to appoint agent for service of process.

21.02 ADVERSE POSSESSION:

Adverse possession of real estate for a period of 21 years ripens into title. (42 Pa.C.S. § 5530; 362 Pa. 302, 66 A.2d 267).

Character of Possession.

The possession must be actual, continuous, visible, notorious, distinct and hostile against one who has failed to assert his legal rights. (362 Pa. 302, 66 A.2d 267).

Duration of Possession.

Use for 21 years which is adverse and continuous creates a prescriptive right.

Mining Rights.

Where there has been a severance in title of the surface from the underlying stratum, the continued possession of the surface will not give title to the underlying minerals by adverse possession, unless there is actual entry taken. (353 Pa. 53, 44 A.2d 244).

Easements may be acquired by adverse possession. (438 Pa. 439, 265 A.2d 800).

Disabilities.

Imprisonment or insanity does not extend time period. (42 Pa.C.S. § 5533[a]). If person is minor at time cause of action accrues, time period commences to run upon attaining majority. (42

Pa.C.S. § 5533[b]).

Recording Claim of Title.

A person claiming title to land by adverse possession must file and have recorded in the office for recording deeds of the county where the land is situated a statement of his claim. Such statement has the effect of a deed or conveyance from the former owner. If the claimant fails to record such claim and is out of possession, his title by adverse possession does not avail him as against a purchaser or mortgagee from the owner for value without notice or a judgment creditor of the owner. Claim of title by adverse possession cannot be asserted against Commonwealth. (68 P.S. § 81 to 88).

21.03 [RESERVED]

21.04 CONVEYANCES:

See topic 21.06 Deeds.

21.05 CURTESY:

Share of deceased wife's estate which is allotted to surviving husband by rules of intestate succession (20 Pa.C.S. § 2102) (see category 13 Estates and Trusts, topic 13.07 Descent and Distribution) or by election against will (20 Pa.C.S. § 2203) (see category Estates and 13.15 Trusts, topic 13.16 Wills) is in lieu and full satisfaction of his curtesy at common law (20 Pa.C.S. § 2105[b]).

21.06 DEEDS:

See topic Real Property for types of estates.

Execution.

Deeds must be in writing and must be delivered. Natural person's deed need not be sealed (21 P.S. § 10), but if grantor is corporation, seal should be affixed. Witnesses are desirable but not necessary. (1 S. & R. 72; 271 Pa. 80, 113 A. 836). Acknowledgment is not necessary to pass title but is necessary for recording. (21 P.S. § 42).

Recording.

All deeds to be recorded in recorder of deed's office in county where land lies; recorder shall attend to registering deed in any other office in said county if necessary. (21 P.S. § 325.1). Deeds are not accepted for record without certificate of residence of grantee and his complete postoffice address. (16 P.S. § 9781). Upon production before recorder of deeds of original or certified copy of judgment of any Pennsylvania court affecting deed there recorded, recorder notes court, date, term and number in margin of deed thus constituting notice. (21 P.S. § 402). Recorder must keep indexes of all grantors and grantees. (16 P.S. § 9851, 9852). Entries in indexes are notice. (16 P.S. § 9853). Unrecorded deeds are deemed fraudulent and void as to subsequent bona fide purchasers, mortgagees or judgment creditors without notice unless recorded before deed of subsequent purchaser is recorded, lien arises or judgment is entered. (21 P.S. § 351). See also category 10 Documents and Records, topic 10.04 Records.

Failure to record certificate of grantee residence does not invalidate deed or transfer of interest in real estate. (21 P.S. § 287).

Counties, upon recommendation of their recorders, may adopt uniform parcel identification system. (21 P.S. § 333). Under system, each parcel of land is assigned identifier number, which corresponds to county tax maps. (21 P.S. § 334). All conveyances may be made by reference to identifier number. First conveyance after adoption of uniform system must contain identifier number. (21 P.S. § 10.1). Recorder, where system adopted, may refuse to record deed without identification number. (16 P.S. § 9781.1). Recorder must also maintain additional index by identifier number. (16 P.S. § 9854.1). After four years (or such longer period as county may provide), identifier index will be deemed to provide constructive notice. (16 P.S. § 9854.2).

Recording Fees.

Recorder's fees vary in proportion to number of words or pages to be copied (16 P.S. § 7629, 11411, 42 P.S. § 21051) and number of additional registrations necessary (16 P.S. § 7629).

Operation and Effect.

In absence of exception or reservation, deed passes grantor's entire interest. (21 P.S. § 3).

The words “grant and convey,” or either are deemed to pass the title in fee simple (21 P.S. § 2), and to imply covenants against incumbrances and for quiet enjoyment against grantor, his heirs and assigns, unless expressly limited. Words “to warrant generally” are deemed to mean general warranty. Words “to warrant specially” are deemed to mean special warranty. (21 P.S. § 4 to 6).

Rule in Shelley's case is not applied, so grant directly or in trust expressing intent to create life estate with remainder to heirs of life tenant may not be construed to give life tenant estate in fee. (20 Pa.C.S. § 2517, 6117).

Doctrine of worthier title not applied. Language describing beneficiaries as transferor's heirs, heirs at law, next of kin, distributees, relatives, family or language of similar import does not create reversionary interest in transferor. (20 Pa.C.S. § 2517[b]).

Builder-vendor who constructs and sells residential property impliedly warrants that such building has been constructed in reasonably workmanlike manner and that it is habitable. (447 Pa. 118, 288 A.2d 771).

Penalty clause for contest unenforceable in trust instrument when probable cause exists. (20 Pa.C.S. § 2521).

Evidence.

Certified copies of record are legal evidence of deeds. (21 P.S. § 471). Records of court proceeding to prove contents of lost deed are legal evidence of facts decreed therein. (42 Pa.C.S. § 6104[b]). Anyone having personal knowledge of facts which may affect title to real estate, and who is competent to testify, may make and record affidavit stating such facts which shall be admissible evidence of facts stated. (21 P.S. § 451).

Fiduciaries.

Except as otherwise provided by will or trust instrument, personal representatives or trustees may sell most property without court approval. (20 Pa.C.S. § 3351). See topics Executors and Administrators, Trusts. Failure of administrator to file petition to fix or waive security under §3351 before selling estate is not grounds for setting aside sale. (5 D.&C. 3d 561). Power to sell, unless expressly restricted, includes power to sell at public or private sale, but not power to grant option. Fiduciary may convey by attorney or agent under power of attorney provided that he may not delegate any discretionary power unless will or trust instrument authorized him to do so. (20 Pa.C.S. § 3319). Foreign fiduciary may, after one month following decedent's death, exercise power of sale with respect to local land provided that there is no local administration and provided that: (1) He files with proper register of wills exemplified copy of his appointment in foreign jurisdiction and exemplified copy of instrument pursuant to which he acts diligently; (2) he files affidavit that, after reasonable search, he has found no local creditors, and that he will not exercise any power not permitted to him in jurisdiction of appointment; and (3) he pays such local taxes as are due. (20 Pa.C.S. § 4101). See category 13 Estates and Trusts, topic 13.08 Executors and Administrators, subhead Foreign Executors and Administrators; see also category 14 Family, topic Guardian and Ward.

Powers of attorney should be in writing and acknowledged. Conveyance under duly executed power of attorney which is either certified as proved or proved by one or more witnesses is valid (21 P.S. § 302), and may be signed in name and behalf of grantor or in attorney's own name, but conveyance should cite attorney's authority (21 P.S. § 303). Powers valid until attorney shall have due notice of revocation. (21 P.S. § 304). Powers may be recorded in office of recorder of deeds. (21 P.S. § 381, 384).

Corporations.

A deed by a corporation must be executed in the name of the corporation, under the corporate seal, and usually is signed by the president and attested by the secretary.

Authorized deed by any officer is not invalidated by informality of execution or acknowledgment if no defect in substance. (21 P.S. § 116).

Coal Notices.

Every deed, agreement of sale, title insurance policy and other instrument with respect to sale or conveyance of surface land, excepting mortgages or quitclaim conveyances, must include a statutory coal notice in each case involving a prior or contemporaneous severance of title to coal or right of surface support under any part of such surface land. (52 P.S. § 1551).

Every deed of conveyance of surface land in counties where bituminous coal has been found and is separately assessed for taxation must contain either (1) certification by grantor that such land is entitled to support from underlying coal or (2) statement printed in deed in contrasting color and signed by grantee to effect that grantee is aware that he may not be obtaining right of protection against surface subsidence resulting from coal mining operations. (52 P.S. § 1406.14).

Hazardous Waste Disposal Notice.

After Sept. 4, 1980, grantor in every deed for conveyance of property on which hazardous waste is presently disposed or has been disposed by grantor or with grantor's actual knowledge shall include acknowledgment of such hazardous waste disposal. (35 P.S. § 6018.405).

Taxes.

There is a real estate transfer tax imposed by Commonwealth of Pennsylvania and similar taxes are imposed by many municipalities. See category 22 Taxation, topic 22.14 Property Taxes, subhead Realty Transfer Tax.

Form

This Deed, made the . . . . day of . . . . ., in the year 20. . ., between . . . ., (here insert name or names and residence of grantor or grantors), and . . . . (here insert name or names and residence of grantee or grantees); Witnesseth, that in consideration of . . . . Dollars, in hand paid, the receipt whereof is hereby acknowledged, the said grantor does hereby grant and convey (or release and quit-claim) to said grantee, all . . . . (here give location and description of property conveyed or released, with recital of title if desired) . . . . (If reservations, exceptions or special conditions, insert same here) . . . . (If covenants of general or special warranty, insert same here). (21 P.S. § 1).

In witness whereof, said grantor has hereunto set . . . . hand and seal, the date and year first above written.

. . . . (Seal)

. . . . (Seal)

Sealed and delivered

in the presence of:

. . . .

. . . .

21.07 DEEDS OF TRUST:

See categories 13 Estates and Trusts, topic Trusts; Mortgages, topic Mortgages of Real Property.

21.08 DOWER:

Share of deceased husband's estate which is allotted to surviving wife by rules of intestate succession (20 Pa.C.S. § 2102) (see category 13 Estates and Trusts, topic 13.07 Descent and Distribution) or by election against will (20 Pa.C.S. § 2203) (see category Estates and 13.15 Trusts, topic 13.16 Wills) is in lieu and full satisfaction of her dower at common law (20 Pa.C.S. § 2105[a]).

21.09 ESCHEAT:

See topic 21.01 Absentees, subhead Abandoned and Unclaimed Property; categories 3 Business Regulation and Commerce, topic Banks and Banking, subhead Unclaimed Deposits; Estates and Trusts, topics Descent and Distribution, subhead Escheat, Wills, subhead Unclaimed Legacies.

21.10 LANDLORD AND TENANT:

Since lease is a contract, landlord, upon default, has usual remedies for breach of contract and also special right of distress. Landlord's statutory remedies are contained in Landlord and Tenant Act of 1951. (68 P.S. § 250.101 et seq.). It has been held that implied warranty of habitability applies to all residential leases. (253 Pa. Super. 76, 384 A.2d 1234, aff'd as modified 486 Pa. 272, 405 A.2d 897). Attempted waiver of such warranty in residential leases is ineffective as being violative of public policy. (257 Pa. Super. Ct. 50, 390 A.2d 240). Tenant must prove notice to landlord of defective condition, reasonable opportunity of landlord to cure, and failure to cure. Where breach of such warranty is shown, tenant may recover: (1) Amount of rent owed multiplied by percentage by which use of premises has been decreased by breach of warranty, (2) amounts paid by tenant on reasonable reparation and replacement in making dwelling habitable and (3) those portions of any excessive utility bills attributable to uninhabitable condition of premises. Tenant may allege and prove that landlord, by breaching such warranty, intentionally inflicted emotional distress upon tenant. (256 Pa. Super. Ct. 208, 389 A.2d 1087). Common law rule that tenant's covenant to pay rent is independent of landlord's covenants, abolished where landlord's covenant is significant inducement to tenant's signing lease. (490 Pa.

58, 415 A.2d 31; 283 Pa. Super. 443, 424 A.2d 891). Leasing of residential property has been held "offering for sale" under Pennsylvania Consumer Protection Law prohibiting unfair practices in conduct of commerce. (459 Pa. 450, 329 A.2d 812). Retention of control by landlord of common areas of tenement or multiple dwelling places duty of reasonable care for safety in use upon landlord. (68 P.S. § 250.502A). Regarding other rights and duties of landlord and tenant, see 68 P.S. § 250.501A to 505A.

Tenant is entitled to peaceful and uninterrupted possession of property. Lessee impliedly convenants: (1) Not to deny lessor's title; (2) to keep premises in repair, ordinary wear and tear excepted; (3) to refrain from waste; (4) to use premises in a proper manner; and (5) to pay rent. A tenant in possession is liable for taxes but he may recover over from landlord. (72 P.S. § 5511.18). On rental of residential property, amount to be deposited in escrow for payment of damages limited to two months' rent during first year of lease, one month's rent thereafter. (68 P.S. § 250.511a). At termination of lease, landlord must either return or account to tenant for sums in escrow, including interest, within 30 days. Failure to refund escrow (minus damages) subjects landlord to damages equal to double sums in escrow, including interest, less any actual damages to leasehold premises; failure to deliver list subjects landlord to forfeit all rights to withhold any portion of escrow or to bring suit for damages. (68 P.S. § 250.512).

Mobile Home Park Rights Act (68 P.S. § 398.1 et seq.) sets forth certain rights and duties of mobile home operators and residents. Utility Service Tenants Rights Act (68 P.S. § 399.1 et seq.), sets forth certain rights and duties of utilities and tenants of residential apartment buildings or mobile homes where landlord provides utility service and landlord is ratepayer to whom utility services are billed by utility.

Common law rule that lessee who had not entered into possession of leasehold could not bring action of ejectment to gain possession has been abolished. (487 Pa. 255, 409 A.2d 337).

Kinds of Tenancy.

Tenancy for years, tenancy from year to year or month to month, tenancy at will and tenancy at sufferance.

Leases for more than three years must be in writing and signed by the parties or by their agents duly authorized in writing; otherwise, such a lease is a lease at will unless the tenancy has continued for more than one year and landlord and tenant have recognized the tenancy by claiming and admitting liability for rent, in which case tenancy is from year to year. (68 P.S. § 250.202). Leases for not more than three years may be oral or written. (68 P.S. § 250.201). If lease is for more than three years, assignment, grant or surrender (unless by operation of law) must be in writing signed by party assigning, granting or surrendering, or by his agent. (68 P.S. § 250.203). It is not necessary that a lease be acknowledged or attested to give it validity. Acknowledgment, however, is a prerequisite to recording.

Recording.

There is no necessity to record lease not exceeding 21 years if tenant is in possession. (16 P.S. § 9751). If tenant, not in possession, desires to protect his interest as against all subsequent parties, he should record his lease. Recording and indexing of acknowledged lease, sublease or agreement pertaining thereto is authorized. (21 P.S. § 404). In lieu of recording lease, etc., memorandum containing certain information, as set forth in Act, may be recorded, which gives constructive notice of provisions of lease. (21 P.S. § 405). Recording of lease for more than 21 years vests estate for years in lessee and not simply *interesse termini*, even though lessee does not enter into possession. (221 Pa. 349, 70 Atl. 838). See also category 10 Documents and Records, topic 10.04 Records.

Rent is payable in a sum certain, in royalties, in kind or in services. It is payable at the end of the term and on the premises unless the lease provides otherwise.

Dwelling Unit Unfit for Habitation.

Duty of tenant to pay and right of landlord to collect rent is suspended whenever one of three departments certifies dwelling as unfit for human habitation. Tenant to pay rent into escrow and may not be evicted so long as making escrow deposits. (35 P.S. § 1700-1). Common law implied warranty of habitability for all residential leases has also been adopted in Pennsylvania. (253 Pa. Super. 76, 384 A.2d 1234, aff'd as modified 486 Pa. 272, 405 A.2d 897).

Lien.

Landlord has no lien on the tenant's property until judgment is secured. See subhead Distress, infra.

Termination of Tenancy.

The relation may be terminated by expiration of the term, forfeiture for breach of covenant, judicial sale of the premises on lien ante-dating the lease, surrender of estate to landlord, expiration by notice to quit, and merger when the reversion and leasehold vest in the same person.

Holding Over.

If tenant holds over after the term, the landlord may either consider him a trespasser or hold him liable as a tenant from year to year or month to month on the terms of the old lease.

Actions for rent may be brought as may ordinary suits in assumpsit. (68 P.S. § 250.301). The usual lease contains confession of judgment for damages in ejectment.

Distress.

It has been held (356 Pa. Super. 269, 514 A.2d 606) that statutory landlord's right to distrain on any personal property on premises, including that of stranger, unless such property is exempt (68 P.S. § 250.302 et seq.) is violative of procedural due process.

It has been held (314 F. Supp. 1091, aff'd 405 U.S. 191) that no judgment by confession may be entered by creditor on lease given in consumer transaction against individual Pennsylvania residents whose income is less than $10,000 a year where documents provide that prothonotary or any attorney may confess judgment for amount due plus attorney's fees. However, entry of judgment pursuant to confession of judgment in commercial lease which contained waiver of notice or hearing has been upheld where there was no evidence of overreaching due to unequal bargaining power such as would suggest that such waiver was not made voluntarily, intelligently and knowingly. (481 F. Supp. 459).

Tenant is entitled to a $300 exemption from distraint and also to exemption for certain kinds of property such as wearing apparel. Certain property belonging to strangers to lease, notably property held by tenant in course of trade or as consignee, is also exempt from distraint. Certain classes of goods possessed by tenant under lease transaction in which purchase money security interest is taken or retained, are exempt from distraint so long as title or security interest remains in lessor or secured party, provided notice in specified form is given landlord or his agent when property is placed on premises or within ten days thereafter. Such classes of goods include, among other things, pianos, soda water apparatus, office equipment, household furniture, household goods and vending machines. On request, owner of goods must advise landlord as to status of account. Interest of tenant in any such goods may be distrained upon and sold, subject to rights of lessor or secured party. (68 P.S. § 250.401 to 404).

Landlord has preference for one year's rent where distrainable goods are taken by virtue of execution. (68 P.S. § 321, 322).

Dispossession.

Landlord may also notify tenant to remove from premises for forfeiture of lease for breach of conditions or upon failure of tenant, upon demand, to satisfy any rent reserved and due. Statute requires notice of repossession from 15 days to 30 days depending upon circumstances but states that notice may be for lesser time or may be waived by tenant if lease so provides. (68 P.S. § 250.501). If tenant does not remove in compliance with notice, landlord may file complaint in county where premises are located. See P.R.C.P. 1051 et seq., 3160 et seq. Local ordinances may impose certain requirements before these rights may be exercised. See R.C.P.D.J. 501 et seq. With respect to establishing taxable costs in connection with such proceedings see 42 Pa.C.S. § 1726.

Uniform Residential Landlord and Tenant Act not adopted.

Mitigation.

Commercial landlord is under no duty to mitigate damages following tenant breach absent express lease provision. (552 Pa. 412, 715 A.2d 1082).

21.11 LEASES:

See topic 21.10 Landlord and Tenant.

21.12 [RESERVED]

21.13 PERPETUITIES:

For all interests created after Dec. 31, 2006, no interest void as perpetuity and no direction or authorization to accumulate income void as perpetuity. (20 Pa.C.S. § 6107.1[b]). For interests created before Jan. 1, 2007, following traditional rules apply. (20 Pa.C.S. § 6107.1[a]). Common law principles, as measured by actual rather than possible events, govern as to restrictions on alienation and creation of estates vesting in future. (20 Pa.C.S. § 6104, 6105).

Accumulations.

Upon expiration of period allowed by common law rule against perpetuities as measured by actual rather than possible events, any direction or authorization to accumulate income shall be void except: (1) for any charitable purpose; (2) for business employee benefit plans. (20 Pa.C.S. § 6106). Income subject to void direction must be distributed to person or proportionately to persons in whom right to such income has vested by terms of instrument or by operation of law. (20 Pa.C.S. § 6107).

21.14 PERSONAL PROPERTY:

Pennsylvania recognizes tenancy by entireties in personal property. (188 Pa. 33, 41 A. 448).

21.15 POWERS OF ATTORNEY:

Attorneys in fact have power to sell or convey real property of principal. (21 P.S. § 301 et seq.). Letter of attorney authorizing act relating to instruments or judgments may be filed in office of clerk of common pleas of any county. Such filing is deemed to be recording for purpose of certified exemplification of record. (42 Pa.C.S. § 2504[a]).

Formalities.

Power of attorney must be signed and dated by principal by signature or mark or by another on behalf of and at direction of principal. Mark or signature by another requires two adult witnesses. (20 Pa.C.S. § 5601[b]). Power of attorney must carry specified notice. (20 Pa.C.S. § 5601[c][form]). Agent must execute and affix to power acknowledgment. (20 Pa.C.S. § 5601[d][form]). Uniform Acknowledgment Act has been adopted. (21 P.S. § 291.1 et seq.). Acknowledgment by attorney in fact is required in case of deed. (21 P.S. § 291.7[form]).

Uniform Durable Power of Attorney Act has been adopted. (20 P.S. § 5601 et seq.). Letter of attorney remains in effect until written revocation by principal is filed in office where letter of attorney is filed or unless agency evidenced thereby is sooner terminated by operation of law. (42 Pa.C.S. § 2504[b]). Durable power of attorney must be in writing. Unless specifically otherwise provided, power of attorney is presumed durable. (20 Pa.C.S. § 5601.1). However, court appointed guardian will have same power to revoke or amend power of attorney that principal would have had if he were not incapacitated. (20 Pa.C.S. § 5604[c]). Other written powers of attorney are not revoked by incapacity or disability of principal until attorney or other person acting in good faith reliance upon power acquires actual knowledge. (20 Pa.C.S. § 5605[b]). Written powers of attorney (durable or otherwise) are not revoked by death of principal, and written non-durable powers of attorney are not revoked by incompetence or disability of principal, until attorney or other person acting in good faith reliance upon power acquires actual knowledge of such fact. (20 Pa.C.S. § 5605[a]). Affidavit executed by agent stating he had no knowledge of termination of power of attorney (durable or otherwise) by revocation or principal's death or disability at time of exercise of power is conclusive proof of nontermination at that time. (20 Pa.C.S. § 5606).

21.16 REAL PROPERTY:

Survivorship is not to be inferred as an incident of what at common law would be a joint tenancy; such tenancy in the absence of clear intention to the contrary, has the incidents of tenancy in common. (68 P.S. § 110). A joint tenancy with right of survivorship may, however, be created if such intention is expressed or clearly to be inferred from express directions. (205 Pa. 24, 54 A. 487).

Real estate held in the name of a husband and wife creates, unless a contrary intention be clear, a tenancy by entireties. (105 Pa. Super. 293, 161 A. 898).

Estates in fee tail have been abolished. Attempt to create this estate creates fee simple. (20 Pa.C.S. § 2516, 6116).

Rule in Shelley's Case is not applied. (20 Pa.C.S. § 2517, 6117[a]).

Doctrine of worthier title is not applied. See topic 21.06 Deeds, subhead Operation and Effect.

Escrow of Deposits.

Deposits may be held in escrow by licensed real estate broker, licensed attorney, financial institution or licensed title insurance company. Escrow may be in account or in form of certificate of deposit, corporate surety bond or irrevocable letter of credit by financial institution. (68 Pa.C.S. § 5408).

Foreign Conveyances or Encumbrances.

An instrument affecting real property in Pennsylvania, executed in a foreign jurisdiction, is not valid unless executed as required by Pennsylvania law. (21 P.S. § 381). Uniform Acknowledgment Act has been adopted. See category 10 Documents and Records, topic 10.01

Acknowledgments.

Condominiums.

Unit Property Act (68 P.S. § 700.101 et seq.) repealed as to condominiums created after Oct. 29, 1980. Uniform Condominium Act adopted and governs creation of condominiums after Oct. 29, 1980. (68 Pa.C.S. § 3101 et seq.). Certain provisions of Act relating to, e.g., public offering statements, purchaser's right to cancel and notice of conversion are effective July 2, 1980 to extent applicable to conversion condominiums established after that date. (Act of July 2, 1980 [1980, No. 82, §3]). Section numbers below are those of Official Text. Material variations from and additions to Official Text of Uniform Act appear in following sections: §1-103, definition of installment sales contract has been added as follows: “An executory contract for the purchase and sale of a unit or interest in a unit whereby the purchaser is obligated to make six or more installment payments to the seller after the execution of the contract and before the time appointed for the conveyance of title to the unit or interest in the unit”; §1-106 (applicability of local zoning ordinances, regulations and building codes) contains following additional language: “Without limiting the other provisions of this section, the creation of a condominium pursuant to section [2-101] (relating to creation of condominium) out of an entire lot, parcel or tract of real estate shall not, in and of itself, constitute a subdivision or land development, for the purpose of these laws, ordinances and regulations”; §1-107, subsection (d) omitted; §1-111 (severability), omitted; §2-101 contains additional language to effect that where lessor under such lease is Commonwealth or agency thereof or municipal government, such lessor need not execute declaration where it has previously given written consent to its filing and agreed to be bound by Act, in which event lessee then in possession shall execute declaration. Declaration to be recorded in same records where deed would be recorded and indexed against each declarant as grantor and against name of condominium as grantee; §2-101 contains additional subsection (d) as follows: “Nothing contained in this section shall prevent the offering for sale of a unit or interest in a unit or the execution of any agreement to sell and purchase a unit or any interest in a unit (as opposed to actual conveyance) prior to completion of the unit”; §2-104 includes following additional language: “Deeds, leases and mortgages of units shall be recorded in the same records as are maintained by the recorder for the recording of like instruments and shall be indexed by the recorder in the same manner as like instruments are indexed”; §2-119(c) contains additional language to effect that amendment must be recorded in records maintained for recording of deeds and must be indexed in name of condominium in both grantor and grantee index; §2-120(b), termination agreement must be recorded in manner described in additional language contained in §2-119(c) above; §3-103(c), limitations on declarant control period are seven years for flexible condominium containing convertible real estate or to which additional real estate may be added or five years for any other condominium, and in any event not more than 180 days after conveyance of 75% of units to unit owners other than declarant; §3-104, instrument transferring special declarant rights must be recorded in manner described in additional language contained in §2-119(c) above; §3-111(a) contains additional clause as follows: “A unit owner shall not be subject to suit or, except as otherwise provided by subsection (b), be otherwise directly or indirectly held accountable for the acts of the association or its agents or employees on behalf of the association”; §3-111(b) provides that money judgment against association will constitute lien against each unit for pro rata share thereof, including interest (based on common expense liability allocated to that unit) when entered of record against name of association in office of clerk of court of common pleas in county or counties in which condominium is located; §3-114, maximum interest on past due assessment is 15% per year. In §3-115(b), second and third sentences omitted and replaced with limited nondivestiture provision to effect that association's lien for common expenses assessments that come due during six months immediately preceding institution of action to enforce collection by judicial sale is divested by such sale only to extent that such six months unpaid assessments are paid from proceeds of sale. Lien as to unpaid assessments beyond such six month period will be divested in full whether or not such proceeds of sale are adequate to pay them but if proceeds sufficient to pay some or all of such additional assessments, after satisfaction in full of costs of sale and liens and encumbrances described in subsections (b)(1) through b(3), remaining proceeds shall be so applied before payment to any other claimant, including prior owner of unit; §4-101(a) refers to Pennsylvania Act's warranty against structural defects provision (68 Pa.C.S. § 3411) rather than §4-113 of Official Text (relating to exclusion or modification of implied warranties of quality); §4-102(12), after “statement” following is inserted: “in at least ten point bold face type, appearing on the first page of the public offering statement”; §4-102(12)(ii) damages recoverable are those described in §4-106 below and must be described in offering statement; §4-102(20) is additional provision which sets forth information which must be included in offering statement for leasehold condominium; §4-102(21) is additional provision which requires statement describing any provision made in budget for capital expenditures or, if none, statement to that effect; §4-102(22) is additional provision which requires declaration as to present condition of all structural components and major utility installations in property including dates of construction, installation and major repairs if known or ascertainable, expected useful life of each item and estimated cost of replacing same; §4-102(b), references to paragraphs (10), (11), (16), (17) and (19) deleted; §4-103(b)(8) (relating to timeshare estates) is additional provision which requires statement in at least ten point boldface type setting forth purchaser's right to cancel purchase contract within seven days after receipt of public offering statement and description of damages recoverable for failure of declarant to provide offering statement prior to conveyance; §4-104(a)(l) specifically includes roofs, plumbing, heating, air conditioning, elevators and pest control conditions; §4-106(a), seven day cancellation provision for time-share estates added; under §4-106(c) damages recoverable equal 5% of sales price, to maximum of $2,000, or actual damages whichever is greater. Minor omission or error in public offering statement or amendment thereto that is not willful entitles purchaser only to actual damages; §4-108(1), after “closing” following is added: “, or in the case of the sale of a unit pursuant to an installment sales contract, upon the expiration of 30 days from the date of occupancy of the unit”; §4-109(a), “as provided for liens on real estate in”, etc. deleted and replaced with “adequate in nature and amount.”; §4-110(a), declarant cannot require tenant or subtenant to vacate prior to one year following written notice of conversion (two years in case of person, referred to in Pennsylvania Act as “eligible tenant or subtenant”, who is 62 years of age or older or is blind or is disabled and has occupied unit for at least two years and provides declarant with proof of such status [68 Pa.C.S. § 3410(f)]) and terms of tenancy may not be altered during that period (except rental for eligible tenant or subtenant may be increased to reflect increases in real estate taxes and utility charges not separately paid by eligible tenant or subtenant for period between declarant's notice of conversion and date on which such tenant or subtenant's lease would otherwise terminate); §4-110(b), for first six months following delivery of notice described in §4-110(a) tenant has prior right to purchase unit tenant is leasing. Subsection (b) does not apply to rental unit which immediately prior to conversion was restricted to exclusively nonresidential use. Last sentence of subsection (b) in Official Text deleted; §4-110(e)(2) is additional provision which permits tenant to terminate lease without liability following receipt of notice of conversion upon 90 days prior written notice without regard to notice period required by lease; §4-110(e)(3) is additional provision which prohibits owner of proposed conversion condominium from engaging in any activity of any nature which would coerce tenant into terminating any lease, including harassment or withholding normal services or repairs; §4-110(f) is additional provision which permits up to two years post conversion notice occupancy for “eligible tenants or subtenants” as defined above and prohibits change in terms of tenancy except as described above; §4-110(g) is additional provision which requires declarant to hold tenants meeting open to public at least 30 days before notice of conversion is given; §4-110(h) is additional provision which prohibits conversion for ten years after rehabilitation of multifamily rental housing for residential rental use financed under Tit. I of Community Development Act of 1974; §§4-111 through 4 P.S. § 114 deleted. Under 68 Pa.C.S. § 3411 of Pennsylvania Act, declarant warrants against structural defects as defined in Act in each unit and in common elements for two year period described in Act. Declarant's warranties transfer to purchase during two-year period. Declarant of conversion condominium warrants against such defects only as to components installed and work done or improvements made by declarant and that unit and common elements have been inspected for structural and mechanical defects and that any such defects found have been repaired; otherwise such declarant may offer units or common elements or both in “as is” condition. Warranty against structural defects cannot be modified, excluded or disclaimed as to unit for residential use.

Official Text optional provisions have been adopted or omitted, alternative provisions have been selected as follows: §1-103(10)(ii), clause A has been selected and optional clause (iii) has been adopted; §1-103(23), optional language omitted; §1-108, optional language adopted; §2-107(a) and (a)(1), optional language omitted; §2-116, Alternative A adopted; §3-101, optional language adopted; §3-102, optional language adopted; §3-103(f), first optional language adopted; §3-104(e)(3), optional language following "thereof" omitted; §4-105, first optional language omitted and second optional language adopted; §4-108, alternative language not adopted.

Cooperatives.

Model Real Estate Cooperative Act adopted without material variation. (68 Pa.C.S. § 4101 to 68 Pa.C.S. § 4418).

Conservation Easements.

Conservation and Preservation Easements Act provides for creation, transfer and duration of easements for purpose of protecting natural, scenic or open space values of real property. (32 P.S. § 5051 et seq.).

Uniform Environmental Covenants.

See Category 21 Property, topic 21.16 Real Property.

Eminent Domain.

The Eminent Domain Code (26 Pa.C.S. § 101 et seq.) is intended to cover all condemnations for public purposes and assessment of damages in Commonwealth (26 Pa.C.S. § 102[a]), with exceptions for Public Utility Commission and statutory powers given to condemnors (26 Pa.C.S. § 102[b]). Under Code, condemnation is effected by filing in Court of Common Pleas declaration of taking (26 Pa.C.S. § 302; 42 Pa.C.S. § 931) with such security as may be required under 26 Pa.C.S. § 303 and title passes to condemnor at time of such filing. After expiration of time for filing by condemnee of preliminary objections (30 days [subject to extension by court for cause (26 Pa.C.S. § 306)] after service of notice of condemnation by condemnor on condemnee [26 Pa.C.S. § 305]), condemnor is entitled to possession or right of entry upon payment of, or written offer to pay amount of, just condemnation as estimated by condemnor (26 Pa.C.S. § 307[a][1][i-ii]); if condemnee refuses possession or right of entry after payment or tender of such estimate, condemnor can secure writ of possession by paying such estimated just compensation into court. (26 Pa.C.S. § 307[a][1][iii-iv]). Payment of such estimated just compensation is without prejudice to either party's right to final determination of just compensation pursuant to subsequent agreement between parties or proceedings before board of viewers under 26 Pa.C.S. § 501-514. Appeal to Court of Common Pleas lies from decision of viewers. (26 Pa.C.S. § 516-522). Condemnor and condemnee may by written agreement filed with and approved by court waive proceedings before viewers and proceed directly to court on agreed issues of law or fact. (26 Pa.C.S. § 520). If condemnor is unable to determine proper distribution of damages it may petition court to distribute damages, furnishing court with schedule of proposed distribution. Notice of filing of such petition and schedule must be given to all condemnees, mortgagees, judgment creditors and other lienholders, as indicated in proposed schedule. (26 Pa.C.S. § 521[b]).

Just compensation is determined in accordance with 26 Pa.C.S. § 701 et seq. Moving and related expenses of displaced businesses and individuals displaced from dwellings are determined under 26 Pa.C.S. § 901 et seq.

Prior approval of Agricultural Lands Condemnation Approval Board required for condemnation of agricultural property under specified authorities. (26 Pa.C.S. § 207).

Property Rights Protection Act.

Subject to listed exceptions (26 Pa.C.S. § 203[b][1] et seq.; 26 Pa.C.S. § 204[b][1] et seq.), condemnation of private property to use for private enterprise prohibited. (26 Pa.C.S. § 204[a]).

Land Trusts.

Local governments may appropriate money to land trust for acquiring, conserving or preserving interests in real property to achieve open space benefits. (32 P.S. § 5011.1).

Land Use.

Pennsylvania Municipalities Planning Code, 53 P.S. § 10101 et seq., governs zoning and subdivision by all cities, towns, boroughs and counties in Commonwealth except cities of Philadelphia and Pittsburgh and Allegheny County. Code reenacted with substantial amendments by P.L. 1988-170 and Acts 67 and 68 of 2000. Art. I of Code contains general provisions including important definitional section. (53 P.S. § 10107). Art. II deals with creation, operation and powers of planning agencies. Municipality may have planning commission or planning department or both. Art. III concerns preparation and adoption of municipality's, multi-municipality's, or county's comprehensive plan, which must contain following basic elements: (1) Statement of objectives of municipality concerning its future development; (2) plan for land use; (3) plan to meet housing needs of present and anticipated residents; (4) plan for movement of people and goods; (5) plan for community facilities and utilities; (6) statement indicating relationship of municipality and its proposed development to adjacent municipalities and areas; (7) plan for protection of natural and historic resources; and (8) plan for reliable supply of water. (53 P.S. § 10301). Art. XI authorizes intergovernmental cooperative implementation agreements to enable participating municipalities to adopt and implement multi-municipal comprehensive plans. Art. IV concerns preparation and adoption of official map for municipality and amendments thereto.

Art. V authorizes municipalities to enact subdivision and land development ordinances. Where such ordinance is enacted by county, it will govern all land located in that county which is not subject to local ordinance, and even where such local ordinance is in effect, applications for subdivision and land development must be submitted to county planning agency for review and report (report is advisory only where local ordinance is in effect). Municipality other than county may adopt by reference subdivision and land development ordinance of county in which it is located and may by separate ordinance designate county planning agency as its official administrative agency for review and approval of plats. (53 P.S. § 10502). Contents of subdivision and land development ordinances are governed by 53 P.S. § 10503 and 53 P.S. § 10503.1. Procedure for approval of “plat”, i.e. map or plan of proposed subdivision or land development, is set forth at 53 P.S. § 10508. Requirements for completion of improvements and financial security are set forth at 53 P.S. § 10509 through 53 P.S. § 10511. Plat must be recorded in office of recorder of deeds of county in which municipality is located within 90 days of approval of final plat, and thereupon becomes part of official map of municipality. (53 P.S. § 10513, 10514).

Art. V-A authorizes municipalities other than counties to assess impact fees by ordinance as condition precedent to final plat approval in order to finance offsite public transportation capital improvements. (53 P.S. § 10501A to 10507A).

Art. VI authorizes governing bodies of municipalities to enact, amend and repeal zoning ordinances in accordance with conditions and procedures prescribed therein. (53 P.S. § 10608 to 10610). Code sets forth permissible subjects of (53 P.S. § 10603) and purposes to be served by (53 P.S. § 10604) zoning ordinance. Municipalities are authorized to initiate enforcement proceedings. Joint municipal planning commissions and county and multi-municipal plans authorized. (53 P.S. § 11102 et seq.).

Planned residential development is governed by Art. VII of Code, which authorizes governing bodies of municipalities to enact, amend and repeal provisions within zoning ordinance fixing standards and conditions for planned residential development. Any such ordinance must be based on and interpreted in relation to statement of community development objectives in zoning ordinance in accordance with Comprehensive Plan. Jurisdiction of county planning agency where local ordinance in effect is similar to subdivision context described above. (53 P.S. § 10704). Standards, conditions and regulations set forth in planned residential development ordinance must be consistent with those set forth in 53 P.S. § 10705, including statement of permitted land uses and standards of density or intensity of land use.

Procedure for approval of planned residential development proposal commences with filing by developer of application for tentative approval of development (53 P.S. § 10707), followed within 60 days by public hearing pursuant to public notice on application (53 P.S. § 10708). Governing body must within 60 days following such hearing either: (1) Grant tentative approval of development plan as submitted, (2) grant tentative approval subject to specified conditions not included in plan submitted or (3) deny tentative approval of plan. (53 P.S. § 10709). Application for final approval is governed by 53 P.S. § 10711.

Art. VIII-A authorizes and provides procedures for joint municipal ordinances by two or more municipalities.

Art. IX requires any municipality which has enacted zoning ordinance to create Zoning Hearing Board and establishes requirements for make-up, operation, jurisdiction, and procedure governing hearings before such Board. (53 P.S. § 10901 et seq.). Hearings must be held within 60 days of application pursuant to public notice, and written decision must be rendered within 45 days of last hearing. (53 P.S. § 10908). Code sets forth respective jurisdictions of Zoning Hearing Board and governing body in 53 P.S. § 10909.1. Criteria for grant of variances are set forth in 53 P.S. § 10910.2 and for special exceptions in 53 P.S. § 10912.1. Code sets forth procedures for conditional uses in 53 P.S. § 10913.2.

Substantive validity challenge to zoning ordinances are governed by 53 P.S. § 10916.1. Depending on circumstances, challenges are submitted to Zoning Hearing Board or governing body. Decision must be rendered within 45 days of last hearing (53 P.S. § 10916.1[c][6]), or challenge will be deemed denied. Municipalities participating in multi-municipal comprehensive plans can raise “reasonable geographic area” defense to substantive validity challenge. (53 P.S. § 10916.1[h]).

Municipalities are authorized to: sue in law or equity to prevent, restrain, correct, and abate violations, to recover damages, and to prevent occupancy of violating buildings; refuse to issue improvement or development permits or approvals, or require correction of violating conditions, to owners, vendees, or lessees of violating properties whether or not they knew of violation; and sue in district court to collect $500 per day civil fines against those violating ordinances. (53 P.S. § 10515.1, § 10616.1, § 10712.2). Zoning appeals are governed by Art. X-A of Code. (53 P.S. § 11001-A et seq.). Appeal within 30 days of notice to Court of Common Pleas for district where land located. (53 P.S. § 11002-A). For appeals based on procedural defects in land use decisions, 30 day appeal period may be waived upon showing of lack of sufficient notice of decision. (53 P.S. §11002.1-A).

See also topics 21.02 Adverse Possession, Curtesy, Deeds, Dower, Landlord and Tenant; categories 5 Civil Actions and Procedure, topic Partition; Family, topic Husband and Wife; Mortgages, topic Mortgages of Real Property.

21.17 TRUST DEEDS:

See categories 13 Estates and Trusts, topic Trusts; Mortgages, topic Mortgages of Real Property.

22 TAXATION

22.01 ADMINISTRATION:

The Secretary of Revenue has general supervision of the administration of tax laws. Equitable and uniform procedures for Department of Revenue's dealings with taxpayers provided by Taxpayers' Bill of Rights. (72 P.S. § 3310-101 et seq.). Local taxpayers have comparable Bill of Rights. (53 P.S. § 8421 et seq.).

Forms relating to taxes collected by state are generally furnished by Department of Revenue, Harrisburg, Pennsylvania, available at www.revenue.state.pa.us.

Interstate Co-operation.

Liabilities for taxes imposed by other states and political subdivisions may be enforced in Pennsylvania courts on the basis of reciprocity. (42 Pa.C.S. § 7551).

Penalties.

See subheads detailing particular taxes, infra. See also categories 2 Business Organizations, topic Corporations; Business Regulation and Commerce, topic Banks and Banking; Insurance, topic Insurance Companies.

22.02 ALCOHOL, BEVERAGES AND TOBACCO TAXES:

Alcoholic Beverage Taxes.

Persons engaged in handling liquor, wine and beer must be licensed, for which there are fees. (71 P.S. § 240.14A). Liquor sales are state monopoly subject to sales tax at rate of 18% of net price. (47 P.S. § 795). Emergency malt beverage tax credit for manufacturers of brewed or malt beverages with qualifying capital expenditures and with annual production under 1,500,000 barrels extended until Dec. 31, 2008. (72 P.S. § 9010).

Cigarette Taxes.

Excise tax of 6.75¢ per cigarette, evidenced by stamps, on sale or possession. Some sales exempt. Stamping agencies generally get 0.98% of total value of cigarette stamps purchased by agent. Cigarette stamping agencies, dealers, wholesalers, and retailers must be licensed; fees for licenses. Licenses may be suspended or revoked. Cigarette Tax Board hears complaints by license applicants. Procedure for refunds exists. Civil and criminal penalties for sale without license, sale or possession of unstamped cigarettes, and counterfeiting stamps. Certain vending machines can be confiscated. (72 P.S. § 8201 et seq.).

22.03 [RESERVED]

22.04 CORPORATE TAXES:

Corporate Loans Tax.

Tax upon resident holders of certain corporate obligations is usually deducted at source from interest and paid directly to state. See category 2 Business Organizations, topic 2.03 Corporations, subhead Corporate Loans Tax.

Corporate Stock Tax.

See category 2 Business Organizations, topic 2.03 Corporations, subheads Corporate Net Income Tax, Corporate Loans Tax, Capital Stock Tax, and Foreign Corporations Franchise Tax.

Corporation License Taxes.

See category 2 Business Organizations, topic 2.03 Corporations, subheads Corporate Net Income Tax, Corporate Loans Tax, Capital Stock Tax, and Foreign Corporations Franchise Tax.

Taxes on Corporations.

See categories 2 Business Organizations, topic Corporations; Business Regulation and Commerce, topic Banks and Banking; Insurance, topic Insurance Companies.

22.05 EMPLOYMENT TAXES:

Unemployment compensation tax applies to all employers (including state and its political subdivisions) of one or more employees in nonexempt employments. Exempt employment is defined to comply with Federal Unemployment Tax Act requirements for state law coverage. (43 P.S. § 753). Contributions are payable quarterly to Pennsylvania Unemployment Compensation Fund in accordance with experience rating system with standard rate of 6.1888% and maximum base rate of 9.2% for years 1986 and thereafter. (43 P.S. § 781 and 782). Certain charitable organizations to which coverage extends as of Jan. 1, 1972, may elect to reimburse Fund rather than pay quarterly contributions. (43 P.S. § 904). Tax is applicable only to first $8,000 of employee's wages. (43 P.S. § 753).

Effective Jan. 1, 1989, all workers except federal government employees must pay unemployment wage tax at rate determined in accordance with statutory trigger provision. (43 P.S. § 781.4, 781.7, 1988, No. 109).

Penalty.

Unpaid tax incurs interest at federal rate, subject to change annually. (72 P.S. § 806). Criminal penalties and restitution provided for false statements made by employees (43 P.S. § 871) and employers (43 P.S. § 872) and for other violations of statute (43 P.S. § 873).

22.06 [RESERVED]

22.07 ESTATE TAX:

See Inheritance Tax, infra.

22.08 GASOLINE AND SPECIAL FUELS TAXES:

Gasoline Taxes.

Tax of 12¢ per gallon or fractional part thereof is imposed with certain limited exceptions on all liquid fuels used or sold and delivered by distributors within State. (75 Pa.C.S. § 9004). This tax is collected by distributors from consumer at time liquid fuels are used or sold and delivered and is remitted to State. Distributor incurs penalty of 10% of tax due and risks suspension or revocation of permit on failure to file report or remit tax due. (75 Pa.C.S. § 9006). Tax discount to distributors for timely payment of tax of 2% on taxes up to $50,000; 1½% on amounts between $50,000 and $75,000; 1% on amounts between $75,000 and $100,000, and ½% on taxes exceeding $100,000. (75 Pa.C.S. § 9006[b][1]).

In lieu of 12¢ per gallon tax, tax of 1.5¢ per gallon, plus tax under 74 Pa.C.S. § 6121(a) of 3.8¢ in 2007 (rate announced annually) on all fuels used or sold and delivered by distributors as fuel in propeller-driven piston aircraft or aircraft engines. Tax of 1.5¢ per gallon plus 2.0% in 2007 (rate announced annually) on all jet fuels used or sold and delivered by distributors. (75 Pa.C.S. § 9004, 74 Pa.C.S. § 6131).

On or before 20th day of each month, every distributor must file with Department of Revenue report of fuels used by him or delivered within state during preceding month. If distributor fails to make report and pay tax, he shall be liable for penalty of 10% of tax due and may lose his permit. (75 Pa.C.S. § 9006).

In addition to foregoing taxes, road tax is imposed on motor carriers with two axles gross weight in excess of 26,000 pounds, or motor carriers with three or more axles regardless of weight and used in combination with gross or registered weight in excess of 26,000 pounds. Tax is equivalent to rate per gallon of current liquid fuels tax with credit allowed for liquid fuels tax paid to state on motor fuels purchased within state for use within and without state. (75 Pa.C.S. § 2101.1, 75 Pa.C.S. § 9602 to 9604). Each failure to file prescribed reports by motor carrier at time due will result in penalty equal to greater of 10% of tax owed and $50 plus interest of 1% per month. (75 Pa.C.S. § 9613, 9614). Assessment of 5% of tax is added if not paid within 15 days of notice and demand.

Tax of 60 mills upon each dollar is imposed on petroleum revenues derived by oil companies and wholesale fuel distributors from liquid fuels used or sold and delivered within State. (75 Pa.C.S. § 9502). Failure by oil company to report and pay tax when due or filing of false report results in 15% penalty being imposed. (75 Pa.C.S. § 9503). Criminal penalties are also provided for making of false and fraudulent returns and willful failure to report and pay tax due and failing to maintain records for three years. (75 Pa.C.S. § 9510).

22.09 GIFT TAX:

None; but inheritance tax applies to gifts made within one year of death of transferor to extent transfer or transfers to or for benefit of transferee, in aggregate, exceed $3,000 during any calendar year. (72 P.S. § 9107[c][3]).

22.10 HOTEL AND RESTAURANT TAXES:

Hotel Occupancy Taxes.

There is 6% excise tax on room rent. (72 P.S. § 7210). Generally, with exception of certain sixth class counties, provided in 16 P.S. § 1770.7, counties may impose local use and hotel occupancy tax of up to 3% on rental of hotel room to public. (16 P.S. § 1770.6).

22.11 INCOME TAX:

State personal income tax with flat rate of 3.07% imposed on eight classes of income presently in effect. Tax imposed on subject income of residents regardless of source, and on Pennsylvania source income of nonresidents. Taxpayers include individuals, estates and trusts. In case of corporations, see category 2 Business Organizations, topic 2.03 Corporations, subhead Corporate Net Income Tax. (72 P.S. § 7302).

Classes of taxable income include: (1) Compensation as defined (72 P.S. § 7301[d]); (2) net profits from businesses or professions; (3) net gains from sale, exchange or other disposition of property; (4) net gains or income from rents, royalties, patents and copyrights; (5) dividends; (6) interest; (7) gambling and lottery winnings other than prizes of Pa. State Lottery; and (8) net gains or income derived through estates or trusts. (72 P.S. § 7303). Losses in class of income can only be used to offset income in same class. (61 P.C. 121.13). Losses may not be carried forward or backward. (61 P.C. 103.1, 103.13). Stock dividend not taxable if not income for federal income tax purposes. (72 P.S. § 7301[f]). Interest on and gain from disposition of obligations of U.S. and of Pennsylvania and its subdivisions and authorities not taxed. (72 P.S. § 7303). For net gain from sales, taxpayer may elect installment sales method. (72 P.S. § 7301). Compensation treated as received if so considered for federal income tax purposes. (72 P.S. § 7303[a][1][ii]). Employer contributions to employee trust, pooled funds or custodial accounts received when contribution made. (72 P.S. § 7303[a][1][ii][B-D]).

Income computed under accounting method regularly used by taxpayer. (72 P.S. § 7303[a.1]). Reasonable depreciation allowed on business property and property held for production of income. (72 P.S. § 7303[a.2]).

Term "sale, exchange or other disposition" does not include exchange of stock or securities pursuant to a federally tax-free reorganization or receipt of stock or securities pursuant to a tax-free incorporation. (72 P.S. § 7303).

Exemptions.

No tax if total "poverty income" is $6,500 or less, or $13,000 for jointly filing spouses, plus $9,500 for each dependent. (72 P.S. § 7304[d][1]). Taxpayers whose personal income exceeds base limitations for full refund of all tax paid or due are entitled to partial refund or forgiveness according to specified formula. (72 P.S. § 7304[d][2]).

Income which is generally not subject to tax includes: (1) pensions and annuities; (2) government payments made to veterans and their families; (3) benefits paid by public retirement systems; (4) interest on certain Pennsylvania and federal obligations if statorily free from taxation; (5) lodging and food supplied by taxpayer's employer for his/her convenience; (6) U.S. military pay owing to active duty outside Commonwealth; (7) life insurance proceeds; (8) worker's compensation payments; (9) unemployment compensation payments; (10) public assistance payments; (11) child support payments; (12) scholarships; (13) medical care savings accounts; and (14) certain dividends paid in form of stock by distributing corporation.

Gain from sale, exchange or other disposition of personal residence is not subject to tax. (72 P.S. § 7303).

Active duty income while member of U.S. armed forces outside state excluded, and income from U.S. or Pennsylvania governments for active state duty for emergency within or outside of Pennsylvania. (72 P.S. § 7303[1]). Full or partial tax exemption (or refund) if within poverty levels of income, as defined. (72 P.S. § 7304).

Income earned from health savings accounts are excluded from taxation. (72 P.S. § 3402b.1 et seq.).

Resident Individual.

Pennsylvania domiciliary (with exceptions); also non-domiciliary maintaining permanent place of abode in state and spending more than 183 days of taxable year in state. Resident estate is estate of decedent who at death was resident individual. Resident trust is a trust under will of a resident individual or one created by or consisting in whole or in part of property of a resident, but shall not include income, charitable trusts and pension or profit sharing trusts. (72 P.S. § 7301).

Pennsylvania source income for nonresident individual, estate or trust if: (1) from real or tangible property in state; (2) from a trade, profession or occupation in state; (3) distributive share of income of partnership or Pennsylvania S Corporation allocable to state; or (4) from intangible property employed in business in state. (72 P.S. § 7301).

Estate or trust beneficiary is taxable on income which is required to be distributed currently or in fact paid or credited to him. Estate or trust is taxable on income or gains not distributed or credited to beneficiary. Nonresident estates, trusts or beneficiaries are taxed only to extent that income or gains are from Pennsylvania sources. (72 P.S. § 7301, 7305).

Credit is allowed for income taxes imposed on a resident taxpayer by another state or foreign country. Credit is limited to pro rata amount of Pennsylvania tax on income taxed by other jurisdiction. (72 P.S. § 7314).

Credits allowed for qualified film production expenses (72 P.S. § 8701-D et seq.), best management practices on agricultural operations (72 P.S. § 8701-E et seq.), and businesses providing neighborhood assistance (72 P.S. § 8904-A et seq.).

Withholding is required at rate prescribed under personal income tax, presently 3.07% of gross weights. Withholding not required on compensation paid to residents for services in other states which require withholding. (72 P.S. § 7316, 61 Pa. Code 113.3). Withholding not required if employee can certify that he incurred no personal income tax liability for preceding tax year and that he anticipates no liability for personal income tax for current taxable year. (72 P.S. § 7323). Pennsylvania employers are not required to withhold tax from employees who work in Pennsylvania and are taxed in their home states, pursuant to reciprocal agreements with Ohio, Maryland, West Virginia, Indiana, Virginia and New Jersey. (72 P.S. § 7356[b]). Partnerships, associations or Pennsylvania S corporations must withhold on Pennsylvania source income allocable to nonresident partners, shareholders or members. Withholding and reporting of nonfiling corporate partners' net shares of income and deductions required. (72 P.S. § 7403.2).

Declaration of estimated tax is required of every individual, trust or estate with more than $8,000 of anticipated taxable income not subject to withholding. Declarations are due on 15th of Apr., June, or Sept. of taxable year or Jan. 15 of next year depending on when taxpayer determines declaration required. Taxpayers who derive minimum of two-thirds of their income from farming may file and pay all estimated tax by Jan. 15 of succeeding taxable year or file annual income tax return and pay total tax due by Mar. 1 of succeeding tax year. (72 P.S. § 7325). Amount of estimated tax payable in number of equal installments determined by date of declaration. (72 P.S. § 7325, 7326).

Return is due on or before due date of taxpayer's Federal income tax return and should be accompanied by any balance of tax due. Spouses may file joint returns (with exceptions). (72 P.S. § 7331). However, one spouse's losses may not be used to offset losses of other spouse. (61 P.C. 121.15[d]). Partnerships having Pennsylvania resident partner or Pennsylvania source income must file information returns on or before due date of Federal partnership return. (72 P.S. § 7330, 7335[c]). If, after filing tax return, facts are discovered or events transpire which would increase taxpayer's taxable income or tax or both, taxpayer must file amended return within 30 days from date of determination of such increase. (61 Pa. Code 117.9a).

Relief.

Petition for reassessment and review by Board of Finance and Revenue. (72 P.S. § 9701 to 9706 after Dec. 31, 2007; 72 P.S. § 7340, 7341, and 7342 before Jan. 1, 2008).

Tax Credits.

Tax credits available for investments in alternative energy production. (73 P.S. 1649 c. 7).

22.12 INHERITANCE TAX:

Inheritance tax is imposed and regulated by Inheritance and Estate Tax Act of 1991, effective for estates of decedents dying (and inter vivos transfers made by decedents dying) on or after Oct. 3, 1991. (72 P.S. § 9101 et seq.). Act of 1982, P.L. 1086 as am'd (72 Pa.C.S. § 1701 et seq.) remains effective for estates of decedents dying before that date and on or after Dec. 13, 1982; Act of 1961, P.L. 373 as am'd (72 P.S. § 2485-101 et seq.) remains effective for estates of decedents dying before Dec. 13, 1982 and on or after Jan. 1, 1962; Act of 1919, P.L. 521 as am'd (72–2301 et seq.) remains effective for estates and decedents dying before Jan. 1, 1962.

Transfers Subject to Tax.

Tax is imposed on transfer of any property by will or by intestacy by resident or nonresident. However, there is exemption for inter-spousal transfers. It is also imposed on certain specified inter vivos transfers. (72 P.S. § 9107). “Property” or “estate” includes: (a) real property and tangible personal property of resident decedent or transferor having its situs in Pennsylvania; (b) intangible personal property of resident decedent or transferor; (c) real property and tangible personal property of resident decedent having its situs outside Pennsylvania which decedent had contracted to sell provided jurisdiction in which property has its situs does not subject it to death tax; (d) real property and tangible personal property of nonresident decedent or transferor having its situs in Pennsylvania, including such property held in trust; (e) liquor license issued by Commonwealth. (72 P.S. § 9102).

Following transfers, if made by resident or nonresident during his lifetime, are taxable at time of his death to extent that they are made without valuable and adequate consideration in money or money's worth at time of transfer: (a) transfer made within one year of death of transferor to extent transfer or transfers to or for benefit of transferee, in aggregate, exceeds $3,000 during any calendar year; (b) transfer which takes effect in possession or enjoyment at or after death and under which transferor has retained reversionary interest, value of which exceeds 5% of value of property transferred immediately before transferor's death; (c) transfer under which transferor expressly or impliedly reserves for his life or any period which does not in fact end before his death possession or enjoyment of, or right to income from, property transferred, or right, either alone or in conjunction with any person not having adverse interest, to designate persons who shall possess or enjoy property or income therefrom; (d) transfer under which transferee promises to make payments to, or for benefit of, transferor or to care for transferor during remainder of transferor's life; (e) transfer under which transferor has at his death, either alone or in conjunction with another person not having adverse interest, power to alter, amend or revoke interest of beneficiary or relinquishment of such power within one year of death. (72 P.S. § 9107[c]).

Property held in joint tenancy with right of survivorship is taxable to extent of fraction of property, which fraction is determined by dividing value of whole property by number of joint tenants in existence immediately prior to death of decedent. This section does not apply to property held by husband and wife with right of survivorship. (72 P.S. § 9108).

Transfers Not Subject to Tax.

(a) Transfers to U.S., Commonwealth or political subdivision thereof; (b) transfers outright to or in trust for religious, charitable, scientific, literary or educational institutions, whether incorporated or unincorporated, or to prevent cruelty to children or animals, and to certain veterans' organizations; (c) proceeds of insurance on life of decedent, including refunds of unearned premiums for current policy period and post mortem dividends, and also including life insurance proceeds paid under pension, stock bonus, profit-sharing, H.R. 10 or other retirement plan; (d) proceeds of Federal War Risk Insurance, National Service Life Insurance or similar government insurance, including refunds of unearned premiums for current policy period and post mortem dividends; (e) payments due servicemen from U.S. for service in Vietnam Conflict after Aug. 5, 1964 for period between date it declared him missing in action and date it determined him dead; (f) inter vivos transfers to exempt governmental or charitable donee; (g) transfers by nonresident decedent of intangible personal property; (h) advancements of or on account of intestate share, or in satisfaction or partial satisfaction of gift by will, but not transfers made within one year of death of transferor to extent transfer or transfers to or for benefit of transferee, in aggregate, exceed $3,000 during any calendar year; (i) adjusted service certificates and service bonds issued under Acts of Congress of May 19, 1924 and Jan. 27, 1936 respectively; (j) property subject to power of appointment, whether or not such power is exercised; (k) property awarded to Commonwealth as statutory heir, by escheat or without escheat, except property awarded to Commonwealth as custodian for known distributee; (l) property owned by husband and wife with right of survivorship unless co-ownership was created within one year of death of co-tenant (whereby section relating to transfers within one year of death of transferor applies); (m) property held by decedent who had no beneficial interest therein; (n) obligations owing to decedent that are worthless at death; (o) lump sum Social Security or veterans' death benefit; (p) lump sum Railroad Retirement burial benefit; (q) payments under pension, stock bonus, profit sharing and other retirement plans (e.g., H.R. 10 plans and IRA's) to extent that decedent before death did not have right to possess (including proprietary rights at termination of employment), enjoy, assign or anticipate payments, or to extent that such payments are or would be exempt from Federal Estate Tax regardless of form of payment. (72 P.S. § 9111). Inter-spousal transfers for estates of decedents dying on or after Jan. 1, 1995, are taxed at rate of 0%. (72 P.S. § 9116).

Rates.

Property passing to or for use of husband or wife not subject to inheritance tax for estates of decedents dying on or after Jan. 1, 1995. Transfer of property from child 21 years of age or younger to or for use of natural parent, adoptive parent, or stepparent taxed at rate of 0%. Property, passing to or for use of grandmother, grandfather, father, mother, lineal descendant (including stepchildren and descendants of stepchildren), and wife or widow and husband or widower of child is subject to tax at 4.5% of value of property in excess of allowable deductions. Transfer of property passing to or for use of sibling, defined as individual with at least one parent in common with decedent by blood or adoption, taxable at 12% of value of property in excess of allowable deductions. Property passing to or for use of all other beneficiaries is taxable at 15% of value of property in excess of allowable deductions. Filers may elect to have tax computed on Pa. share of entire estate as if nonresident decedent was resident. (72 P.S. § 9116).

Valuation of Property.

Except as otherwise provided, valuation date is date of transferor's death. Value of life and future interests and interests for term certain shall be determined in accordance with rules and regulations to be promulgated by Department of Revenue and, until they are promulgated, rules and regulations in effect for Federal Estate Tax purposes shall apply. (72 P.S. § 9121). When it is uncertain what rate of tax will be applicable to future interests, value of interest of each class of possible beneficiaries is determined by compromise with Department of Revenue. (72 P.S. § 9116[e]). See instructions to Schedule M of Inheritance Tax Return. Special use valuation available for agricultural and forest land. (72 P.S. § 9122).

Deductions.

The allowable deductions are set forth in the Act and are deductible regardless of whether or not assets of estate are employed in payment or discharge of deductible items. When tax is imposed upon inter vivos transfer or transfer by right of survivorship deduction is allowed to transferee to extent that transferee has actually paid deductible items and either transferee was legally obligated to pay items or testamentary or intestate estate was insufficient to pay items. (72 P.S. § 9126).

The following expenses are deductible: (a) Reasonable expenses of administration of estate and of assets includable in taxable estate; (b) bequest to executor, trustee or attorney in lieu of compensation to extent it is reasonable for such services; (c) family exemption of $3,500; (d) reasonable and customary funeral expenses, including cost of burial lot; (e) reasonable and customary expenses for tombstone and grave marker; (f) payments or bequests in trust for perpetual care of grave; (g) bequests in reasonable amounts for performance of religious services; (h) property taxes accrued prior to decedent's death; (i) state and foreign death taxes. (72 P.S. § 9127, 9128).

Decedent's liabilities are in general deductible. Following liabilities of decedent are deductible with qualifications described: (a) Indebtedness founded on promise or agreement to extent it was contracted bona fide and for adequate consideration in money or money's worth; (b) indebtedness on secured loan, whether or not security is part of gross taxable estate, except that indebtedness secured by real property or tangible personal property with situs outside Pennsylvania is deductible only to extent that indebtedness exceeds value of such property; (c) decedent's liability (net of all collectible contribution) on joint obligation, whether or not payment is secured by property held jointly with right of survivorship except that indebtedness secured by real property or tangible personal property with situs outside Pennsylvania is deductible only to extent that indebtedness exceeds value of such property; (d) indebtedness arising from contract for support of decedent; (e) decedent's obligation, whether or not discharged by testamentary gift; (f) decedent's debt which is unenforceable because of statute of limitations if paid by estate; (g) decedent's pledge to exempt charity whether or not enforceable if paid by estate; (h) decedent's liability for tort or as accommodation party except to extent it can reasonably be anticipated that estate will be exonerated or reimbursed by others; (i) decedent's medical expenses only to extent that not reimbursed by insurer or other source. Foregoing items are deductible in deceased person's estate regardless of fact that surviving spouse is solvent and would be legally liable for such debts or expenses. (72 P.S. § 9129, 9130).

Litigation expenses of beneficiaries, claims under marital or support agreement with former or surviving spouse, insofar as they arise in consideration of relinquishment or promised relinquishment of marital or support rights, and indebtedness secured by real property on tangible personal property outside state except to extent indebtedness exceeds value of property are not deductible. (72 P.S. § 9130).

Assessment of Tax.

Personal representative of decedent's estate and transferee of property which is includible are required to file return within nine months of decedent's death. Department of Revenue has discretion to grant extension of time for filing for additional period of six months. Return for resident decedent is filed with Register of Wills of County having jurisdiction to grant letters testamentary or of administration. Return for nonresident decedent is filed with Register who issued letters, if any, in Commonwealth, otherwise with Department of Revenue. (72 P.S. § 9136).

Within six months after filing of return, Department of Revenue shall cause appraisement to be made of such property and official with whom return is required to be filed shall determine allowance or disallowance of all deductions claimed. (72 P.S. § 9137, 9138). Within one month thereafter official shall assess tax. (72 P.S. § 9139). Any party in interest, including Commonwealth and personal representative, not satisfied with appraisement allowance or disallowance of deductions or assessment of tax within 60 days after notice of action complained of may either file written protest with Department of Revenue, and send copy to Attorney General, or notify Register of Wills in writing that he elects to have correctness of action complained of determined at audit of personal representative's account, or appeal to court to have matter determined at said audit or such other time as court may fix. No bond is required to be filed. (72 P.S. § 9186, 9187).

Liability for Tax.

In absence of contrary intent appearing in will, inheritance tax on property which passes absolutely and in fee by will and is not part of residuary estate shall be paid out of residuary estate. Tax on transfer for limited period shall be paid out of principal of property which supports such estate. As to any other transfers ultimate liability is upon transferee of such property. (72

P.S. § 9144). Personal representative must retain or collect tax from transferee before delivery of property is made. Property subject to tax may be sold to collect tax due on behalf of transferee under direction of court. (72 P.S. § 9146).

Tax is lien upon real property included in transfer on which tax is imposed. (72 P.S. § 9167). Unless suit for collection of taxes is instituted within 20 years after tax becomes delinquent, lien shall cease as to any purchaser, mortgagee or lessee of, devisee or heir of, or beneficiary under deed of trust of, such real property; at any time within said 20 year period Department of Revenue may file certificate of nonpayment with clerk of Orphans' Court where real property is situated to continue lien for further period of five years, which period may be extended for additional periods of five years by filing further certificate. (72 P.S. § 9169).

Payment.

Tax is due at date of decedent's death and becomes delinquent nine months thereafter. It is paid to Register of Wills who granted letters testamentary or of administration. In case of nonresident, if no letters have issued, payment is made to Department of Revenue. (72 P.S. § 9136[f], 9142).

Payment of tax on “small business transfers” may, under designated circumstances, be paid in quarterly installments over 20 consecutive quarters. To qualify, business entity's principal purpose may not be management of investments or income producing assets and entity must have employed average of less than 50 full time employees during 12 months immediately preceding date of death and meet other enumerated criteria. (72 P.S. § 9154).

Discount of 5% is allowed if tax is paid within three months after death of decedent. (72 P.S. § 9142). If tax is not paid when due and payable, interest is charged on unpaid tax at rate established by §806 of Fiscal Code, unless payment is not made because of litigation or other unavoidable cause of delay and property in hands of fiduciary has not produced statutory rate of interest, in which case interest is calculated at rate of net income produced by such property. (72 P.S. § 9143).

Estate Tax.

Additional tax is imposed on estates of resident decedents and on locally situated estates of decedents who resided outside Commonwealth in order to absorb full credit allowed on Federal estate tax. Such tax may be credited against any inheritance tax later imposed. (72 P.S. § 9117, 9145).

Interstate Co-operation.

When decedent's domicile is in dispute, Attorney General may agree to arbitration of issue or may compromise tax, including interest thereon. (72 P.S. § 9157, 9158). Uniform Act on Interstate Compromise and Arbitration of Inheritance Taxes has been adopted. (72 P.S. § 9156 et seq.).

Apportionment Against Inter Vivos Dispositions.

Equitable apportionment of Federal estate tax against inter vivos dispositions authorized. (20 Pa.C.S. § 3702).

22.13 LOCAL AND MUNICIPAL TAXES:

Imposed in Philadelphia by authority of Sterling Act. Local Tax Enabling Act (53 P.S. §6924.101 et seq.) authorizes cities of second class and lower governments, including school districts, to impose taxes on persons, transactions, occupations, privileges, subjects, and personal property within limits of such political subdivisions, and on transfers of or interests in real estate within such limits (53 P.S. §6924.301.1). Commonwealth taxes automatically vacate ordinances or resolutions on same subject and authorized by this Act. (53 P.S. §6924.305).

Gross Receipts Tax.

Business Privilege Tax is imposed on persons engaged in business in Philadelphia. (53 P.S. § 16181 to 93). Excluded from tax are nonprofit organizations, public utilities subject to regulation by Pa. Public Utilities Commission or ICC (only with respect to regulated activities), foreign insurance companies and employment for wage or salary. Tax is imposed on taxable receipts at 2.10 mills and net income at 6.5% for 2004; 1.90 mills on taxable receipts and 6.5% on income for 2005; at 1.65 mills and 6.5% for 2006; at 1.54 mills and 6.5% for 2007; and at 1.415 mills and 6.5% for 2008 and thereafter. (19 P.S. § 2604, Phila. Code).

Special tax rates for receipts tax apply to wholesalers, retailers and manufacturers. Banks, title insurance companies, insurance companies, mutual thrift institutions and public utilities subject to Public Utilities Commission jurisdiction pay only lower of tax on receipts or tax on net income. Brokers, dealers and investment advisors registered under Pennsylvania Securities Act of 1972 pay tax based on special calculation. (53 P.S. § 16184).

Excluded from taxable receipts are receipts from affiliated corporations, sales delivered to regular customer location outside Philadelphia, services performed outside Philadelphia and dividends, interest and royalties from corporation where taxpayer directly owns at least 20% of all classes of stock. (53 P.S. § 16182). Further limitations apply to financial businesses. Net income equals either net gain from operation of business after all expenses (other than taxes based on income) or federal taxable income before dividends received deduction and net operating loss deduction, with adjustments. Taxpayer must choose one or other net income determination, which is irrevocable after it has been chosen. (53 P.S. § 16182, 19 P.S. § 2600 Phila. Code). Qualified persons are exempt, as is income earned within Keystone Opportunity Zone by business located within Zone.

Pittsburgh Business Privilege Tax is imposed by ordinance on persons operating or conducting business within Pittsburgh, unless subject to Institution and Service Privilege Tax. First $20,000 of gross receipts is exempt. Rate is two mills for tax year 2005 and 2006 and, subject to certain exceptions, one mill in 2007, 2008 and 2009. Business Privilege Tax will be repealed in 2010. (243.01 et seq. Pitts. Code). Qualified persons or businesses in Keystone Opportunity Zones are exempt.

Pittsburgh Institution and Service Privilege Tax is imposed by ordinance on nonprofit entities engaged in service transactions, including hospitals and schools, if not subject to Pittsburgh Mercantile License Tax. Rate is 6 mills on previous year's gross receipts. Tax is due with a return on Apr. 15 of tax year. (247.01 et seq. Pitts. Code).

Income Taxes.

Philadelphia School District Investment Net Income Tax is imposed by statute on individuals residing in Philadelphia. (53 P.S. § 16101). Tax is levied annually pursuant to ordinance. Tax is imposed on and income received or credited at rate of 4.4625% for 2004 tax year; at rate of 4.3310% for 2005 tax year; at rate of 4.3010% for 2006 tax year; at rate of 4.2600% for 2007 tax year; 4.2190% for tax year 2008; and 4.1690% for tax year 2009. Income subject to tax includes, in general, dividends, rent, and trust income paid to beneficiary. Specific exemptions are provided for interest on state and federal obligations, interest on savings deposits, long-term capital gains, and income from carrying on any trade or business which is subject to Philadelphia Net Profits Tax or Wage Tax. (See infra, subhead Earnings and Profits Taxes.) Also exempt are old age, retirement and pension payments, sick pay and disability benefits, workmen's compensation act and unemployment compensation act benefits, active military service pay and bonuses, death benefits, insurance proceeds, gifts and bequests, and compensatory damages arising from any claim or cause of action. Tax is due with return on Apr.

15 following tax year. (19 P.S. § 1804 Phila. Code).

Municipal and School District Occupational Taxes.

Eliminated. (53 P.S. § 6927.1 et seq.).

Earnings and Profits Taxes.

Philadelphia Wage and Net Profits Tax is imposed on salaries, wages, and commissions (effective on or after July 1, 2003), as well as on net profits (effective on or after Jan. 1, 2003) at rate of 4.4625% for 2004 tax year; 4.3310% for 2005 tax year; 4.3010% for 2006 tax year; and 4.2600% for 2007 tax year; 4.2190% for 2008 tax year; and 4.1690% for 2009 tax year for Philadelphia residents and 3.8801% for the 2004 tax year; 3.8197% for 2005 tax year; 3.7716% for 2006 tax year; and 3.7557% for 2007 tax year; 3.7242% for 2008 tax year; and 3.6850% for 2009 tax year for nonresident activity conducted in Philadelphia. (19 P.S. § 1502 Phila. Code, 19 P.S. § 2803 Phila. Code). Credit is allowed against net profits tax for 60% of business privilege tax imposed on net income. Unused credits may not be carried forward. Constitutionality of differential between resident and nonresident rates has been upheld. (507 Pa. 317, 489 A.2d 1349). Pittsburgh Net Profits Tax and Earned Income Tax are imposed on residents and those nonresidents who are not subject to income tax in their home municipalities at rate of 1%. (245.02 Pitts. Code, 205 Pitts. Reg.). Pittsburgh Home Rule Tax is imposed on net profits of any business, profession or enterprise conducted within Pittsburgh at rate of 5/8 of one percent. Pittsburgh School District Net Profits Tax and Earned Income Tax is imposed on residents at total rate of two percent by state enabling Act and board resolution passed under authority of special provisions included in State's Public School Code of 1949.

School districts authorized to impose earned income and net profit taxes up to 1.5% on individuals residing in school districts. (53 P.S. § 8711 et seq.). Public referendum required to increase maximum rate of earned income tax. (53 P.S. § 6927.6, 53 P.S. § 6927.7).

Corporations are not subject to these earnings and profits taxes.

Philadelphia Net Profits Tax is due with a return on Apr. 15 following tax year. If return is made for fiscal year, or for period other than calendar year, return is due within 105 days after end of period. Four quarterly installments must be filed similar to federal estimated tax. Pittsburgh Net Profits Tax and School District Net Profits Tax are due in installments on an estimated basis generally similar to federal estimated tax, with a final return and payment due on Apr. 15 following tax year. Withholding of Philadelphia Wage Tax and Pittsburgh Earned Income Tax and School District Earned Income Tax is required for employers.

Various taxes imposed for school revenues may not be imposed on businesses and persons in Keystone Opportunity Zones. (73 P.S. § 820.703[b]).

Personal Property Taxes.

Note: Pennsylvania Supreme Court ruled that constitutionally invalid provisions of personal property tax is severable, rendering remaining portion of tax constitutional. (757 A.2d 338).

In 2008, Local Tax Enabling Act authorized cities of second class and lower governmental units including specified classes of townships and school districts to taxes on persons, transactions, occupations, privileges, subjects, and personal property within their respective political subdivision limits, and to impose personal property taxes on such property within their geographical limits as specified. (53 P.S. §6924.301.1).

Real Estate Use and Occupancy Tax.

Effective July 1, 2001, tax at rate not to exceed $4.62 per $100 of assessed value of real property is imposed annually by Philadelphia School District on use or occupancy by owner or lessee of such property for business or commercial purposes pursuant to ordinance. Landlords must collect tax monthly and file returns monthly, quarterly or semiannually, as established by Regulation of School Revenue Commissioner. (19 P.S. § 1806 Phila. Code). Tax is constitutional. (441 Pa. 567; 274 A.2d 524).

Taxes for Transit Systems.

Counties of second class (except second class A) may tax vehicle rentals and retail sales of liquor and malt and brewed beverages to finance transit systems. (53 Pa.C.S. § 8602).

Real Estate Non-Utilization Tax.

Imposed by City of Philadelphia at rate of 5% on most recently assessed value of property for real estate tax purposes, effective 1/1/01 on “privilege of utilizing property as vacant and abandoned property” payable Apr. 15 of year following privilege year. (19 P.S. § 2500 Phila. Code).

Condominium conversion privilege tax has been repealed.

Parking Taxes.

Philadelphia imposes tax on every person parking or storing motor vehicle in or on any parking facility in City. Rate is 15% of gross receipts from parking or storage of motor vehicles. Tax is supposed to be collected by operator from person parking car and paid over to City by 25th of each month. (19 P.S. § 1202 Phila. Code).

Philadelphia Airport Passenger Tax.

Held unconstitutional. (453 Pa. 81, 309 A.2d 157).

Philadelphia Hotel Room Rental Tax.

7% tax is imposed on consideration received by each operator of hotel within Philadelphia from each transaction of renting room or rooms to accommodate transients. (19 P.S. § 2402-2402.1 Phila. Code). Returns are due on or before 15th day of each month. (19 P.S. § 2405 Phila. Code).

Philadelphia vending machine tax has been repealed. (19 P.S. § 2800 Phila. Code).

Philadelphia Sales Tax.

Effective Oct. 1, 1991, sales and use tax of 1% imposed on all sales located in Philadelphia. (Phila. Code 19 P.S. § 2701).

Keystone Opportunity Zones.

Defined areas within political subdivisions designated as keystone opportunity zone (see 73 P.S. § 820.101 et seq.). Must exempt, deduct, abate or credit local taxes (73 P.S. § 820.701), and exempt businesses and residents within zone from other taxes (73 P.S. § 820.703[a]).

Economic Development Districts.

Relief from several taxes offered for businesses located in economic development districts in first class cities. (53 P.S. § 18200.101 et seq.).

See category 2 Business Organizations, topic 2.03 Corporations, subheads Corporate Net Income Tax, Corporate Loans Tax, Capital Stock Tax, and Foreign Corporations Franchise

Tax.

22.1422.15

22.16 PROPERTY TAXES:

Real property is subject to tax by counties, municipalities, school districts and other subdivisions of state, but not by state (except for taxation of public utility realty by state, see subhead Public Utilities, infra). (72 P.S. § 5020-101 et seq., 5341.1a et seq., 5342 et seq., 5452.1a et seq., 5453.101 et seq., 53 P.S. § 37501 et seq.). Leaseholds are not real property. (16 Pa. Commw. 361, 328 A.2d 567). Rules relating to time for payment, discount privileges and penalties for late payment, etc., vary among classes of political subdivisions. Real estate assessors determine actual value of property. In arriving at actual value, county may utilize either current market value or base year market value. Board of County Commissioners or Board of Revision of Taxes must establish predetermined ratio of assessed value to market value which may not exceed 100%. Property assessed at value based on predetermined ratio not exceeding 100% of actual value. (72 P.S. § 5020-402, 5341.13, 5348, 5452.4, 5453.602, 53 P.S. § 37504). Taxes on revised assessment or valuation may not exceed 110% of previous year's taxes in case of school district and 105% in case of other taxing districts. (72 P.S. § 5453.602[b][2]). Appeal may be taken from assessment to Board of Revision of Taxes or county commissioners. Further appeal lies with Court of Common Pleas and higher courts thereafter. On appeal, real estate tax assessment must be computed by multiplying market value of property, as of date such appeal was filed, by established predetermined ratio. (72 P.S. § 5350). If such ratio varies by more than 15% from common level ratio published by State Tax Equalization Board on or before July 1 of year preceding tax year on appeal, assessment must be computed by multiplying market value by common level ratio. Base year valuation may be appealed without reference to ratio. Right of appeal granted to persons who suffered catastrophic loss. (72 P.S. § 5020-511, 5341.14, 5349, 5350, 5452.10, 5453.702, 53 P.S. § 37521). Rate of tax is fixed annually by each political subdivision of state. (72 P.S. § 5020-201).

Real property assessment laws were changed to provide that, except in Philadelphia, taxes may not be levied on county-wide revised assessment until revision has been completed for entire county. (72 P.S. § 5020-402).

Suits to enforce personal liability of owner for taxes assessed against his real property by any political subdivision must be brought within five years after such taxes become due. (72 P.S. § 5512). Actions brought under provisions of §21(c) of “Local Tax Collection Law” (72 P.S. § 5511.21) may be commenced within one year of discovery of conveyance giving rise to action without regard to date of conveyance (72 P.S. § 5512).

Machinery and equipment contained in any mill, mine, manufactory or industrial establishment is excluded from determining value thereof. Silos for processing or storage of animal feed incidental to operation of farm on which silos are located are excluded from determining value of real estate used predominantly as farm. (72 P.S. § 5020-201). For fiscal years starting on or after Jan. 1, 2005, signs and sign structures are excluded from real property for purposes of real estate taxes. (16 P.S. § 1770.9).

Property tax or rent rebate limited to $500 available to senior citizens, widows, widowers and permanently disabled persons with income of $15,000 or less. (72 P.S. § 4751-3, 4751-4). Local taxing unit may exempt improvements to industrial, commercial and other business property (72 P.S. § 4723) and to deteriorated dwellings from tax; maximum exempt amount per dwelling, determined annually by U.S. Bureau of Census New One-Family Houses Price Index (72 P.S. § 4711-202, 4711-203). Local taxing authorities may abate real estate tax, for period not to exceed two years, upon assessed valuation of improvements to unimproved residential property. (72 P.S. § 4754-1 et seq.). Local taxing authorities may exempt new construction within designated deteriorated areas of economically depressed communities, for period not to exceed ten years. (72 P.S. § 4722 et seq.). Local taxing authorities may defer payment of real property tax increases for low-income households. (53 P.S. § 8571 et seq.). Local taxing authorities may exclude from taxation part of assessed value of homesteads and farmsteads. (53 P.S. § 8581 et seq.). First and second class counties have power to defer or exempt payment of increases in real property taxes by long-time owner-occupants. (72 P.S. § 4749.1-.6). First class cities authorized to forgive real property taxes attributable to rate increases or increases in assessed homestead value of certain low-income senior citizens. (72 P.S. § 4751-21 et seq.).

Preferential assessments are available for agricultural land and forest land, generally consisting of not less than ten contiguous acres, by applying to any County Board of Assessment Appeals on or before June 1st immediately preceding tax year, subject to roll-back taxes imposed on nonqualifying transfers of land or changes of land use. Fee for recording breach of preferential assessment required. (72 P.S. § 5490.3, 5490.4). In addition, owners of farm land, forest land, water supply land and open space land may enter covenants with counties of first, second, second A, third or fourth classes which have adopted procedures for reduced assessments. Rollback taxes will be imposed upon breach of covenants. (16 P.S. § 11943, 11946).

100% of real property tax must be abated on assessed valuation of deteriorated property within keystone opportunity zone (see 73 P.S. § 820.101 et seq.). (73 P.S. § 820.702).

Public Utilities.

Annual state tax at rate calculated by department on each dollar of taxable value of “utility reality”, defined at 72 P.S. § 8101-A(3). Impact limits established for years through 2001. (72 P.S. § 8110-A). For tax years beginning in 2000, and each year thereafter, entire estimated tax must be paid on or before May 1. Late payments bear interest at rate set forth at 72 P.S. § 806 from due date and penalty of 5% of amount due. (72 P.S. § 8102-A). Items excluded from utility realty include (1) machinery/equipment and (2) certain land/improvements to generation of electricity used in production/delivery of public utility service. (72 P.S. § 8101-A[3]). Certain additional items are also exempt. (72 P.S. § 8101-A[3]). Due to numerous exclusions/exemptions, much real property owned by public utilities taxed at local rather than state level.

Penalty.

Penalty interest rates for unpaid tax vary by taxing jurisdiction. 72 P.S. § 806 applies to tax due Commonwealth. For example, interest accrues at rate of 12% per year for unpaid Second Class County taxes. (72 P.S. § 5648). In addition, real property may be sold for nonpayment of tax. See subhead Sale, infra.

Sale.

Improved or occupied “seated lands” may be sold for nonpayment of taxes on or after the first Monday in May in second year after year of assessment and levy. (72 P.S. § 5971a). Sale is preceded by advertisement and ten days notice by registered or certified mail to owner or, if owner's whereabouts are unknown to terre-tenant. (72 P.S. § 5971g).

Unseated lands may be sold for taxes after the owners have refused to pay them for two years if there is not personal property thereon sufficient to pay the tax. (72 P.S. § 5984). Notice must be given by publication once a week for three consecutive weeks in two newspapers. (72 P.S. § 6002).

Real Estate Tax Sale Law of 1947 (72 P.S. § 5860.101) has replaced above procedures in all counties except Philadelphia and Allegheny. Under this Act both seated and unseated lands may be sold for nonpayment of taxes no earlier than second Mon. in Sept. and no later than Sept. 30 (excluding adjournments) in second year after taxes become due and payable. (72 P.S. § 5860.601). Sale is preceded by advertisement and 30 days notice by certified mail to owner of property if owner is known and by posting on property ten days prior to sale. (72 P.S. § 5860.602).

Cities of second class-A such as Scranton are governed by special acts under which occupied and unoccupied lands may be sold for nonpayment of taxes after claim has become delinquent. Sale in these cities is preceded by advertisement and posting of notice upon land advertised for sale at least ten days prior to date of sale. (53 P.S. § 30901, 30902).

Goods and chattels are subject to distraint sale. Taxpayer must be given hearing. (72 P.S. § 5511.17, 5641).

Redemption.

The owner of seated or unseated lands sold for taxes may redeem at any time within two years from time of sale by payment to county treasurer of taxes and costs plus a penalty of 15% and by refunding subsequent taxes paid by purchaser (72 P.S. § 6071, 6091), except that in Philadelphia County, after decree of court, property may be sold at sheriff sale, free of liens and of right of redemption (53 P.S. § 7282), and with further exception that unoccupied residential property sold to City of Philadelphia must be redeemed within nine months after date of acknowledgment of sheriff's deed (53 P.S. § 7293). In Allegheny County, owner of property sold under tax claim may redeem it within nine months after date of acknowledgment of sheriff's deed. (53 P.S. § 7293). When lands of orphans or insane persons are sold, land may be recovered by suit brought within two years after removal of disability. (72 P.S. § 6093). Notwithstanding any other provision of law to contrary, in any city, township, borough or incorporated town, redemption not available for property that has not been occupied continuously by same individual as residence for at least 90 days prior to date of sale and continues to be occupied upon acknowledgment of sheriff's deed. (53 P.S. § 7293).

Real Estate Tax Sale Law of 1947 (72 P.S. § 5860.101) has replaced above procedures in the counties listed under catchline Sale, supra. Under this Act neither seated nor unseated lands may be redeemed at any time after sale thereof. (72 P.S. § 5860.501[c]). In first year after tax becomes due and payable, taxpayer receives notice that he has one year in which to redeem property. (72 P.S. § 5860.501). County commissioners may by legislation extend period to discharge tax claim for real estate taxes for 12-month period if taxpayer is seriously ill or injured, or unemployed. (72 P.S. § 5860.503a). There is no provision in this Act with respect to sale of lands of minors or insane persons.

In cities of Pittsburgh and Scranton, governed by special acts, owner of lands sold for taxes may redeem at any time within one year from time of sale by payment to City Treasurer of taxes and costs plus penalty of 10% and by refunding subsequent taxes paid by purchaser. (53 P.S. § 26103, 30903).

With exception of counties governed by Real Estate Tax Sale Law of 1947 and the two cities governed by special acts, noted above, any political subdivision which has purchased real estate at tax sale may, after expiration of redemption period and subject to approval of Court of Common Pleas, agree with former owner to accept in compromise less than whole amount of taxes, interest, penalties and cost which may be due. (72 P.S. § 5878a).

Exemptions.

Churches and other places of worship, burial grounds not used for profit, hospitals, educational, charitable and benevolent institutions maintained by public or private charity, parks when held by trustees for public use and all property used for public purposes are exempt. (72 P.S. § 5020-204). Social halls and grounds of fire and rescue stations maintained by public or private charity are exempt if receipts from activities conducted on property are used solely for charitable purposes of such stations. (72 P.S. § 5020-204). Exemptions from real estate tax or personal residence are available to certain disabled veterans. (51 Pa.C.S. § 8901-06). In Philadelphia, member of Reserve Unit or National Guard on active duty may qualify for credit against certain real estate taxes equal to portion of tax due. (19 P.S. § 1309 Phil. Code). Local taxing authorities may grant three to ten year exemption, depending on option chosen by authority, to new dwelling units in deteriorating areas (72 P.S. § 4711-303), and up to ten years of sliding scale exemption to improvements to business and residential property located in deteriorating areas (72 P.S. § 4711-203; 72 P.S. § 4725).

Realty Transfer Tax.

Stamp tax at rate of 1% of actual consideration, or computed value where there is no consideration, must be paid to Commonwealth by any person who executes, delivers, accepts, or presents for recording, any deed, instrument or writing whereby any lands, tenements or hereditaments within Pennsylvania are sold or conveyed within 30 days of acceptance of such document. (72 P.S. § 8102-C, 1986, No. 77). Transfers of certain long-term leases and life estates are also subject to tax as well as transfer within any three year period of 90% or more of ownership interest in “real estate company” (corporation, partnership, limited liability company or other entity 90% owned by 35 or fewer persons which either derives 60% or more of its gross receipts from ownership or disposition of real estate or holds real estate value of which equals 90% or more of value of its tangible assets excluding tangible assets which are readily tradeable or freely transferable on established market). Tax does not apply to wills, mortgages, transfers between corporations operating housing projects pursuant to Housing and Redevelopment Assistance Law and shareholders thereof, transfers to or between nonprofit industrial development agencies and industrial corporations purchasing from them, transfers between husband and wife, certain transfers between ex-spouses if within three months of final divorce decree or decree of equitable distribution of marital property whichever is later, transfers between parent and child or spouse of such child, transfers between siblings or between parent and trustee for benefit of child or spouse of such child, transfers between grandparent and grandchild or spouse of grandchild, transfers between principal and straw party for purpose of placing mortgage or ground rent, correctional deeds without consideration, transfers to U.S., state or their instrumentalities or subdivisions by gift or dedication, or in connection with condemnation, reconveyance by condemning body to owner at time of condemnation, leases for production or extraction of coal, oil, natural gas or minerals, conveyance to trustee under recorded trust agreement as security for debt contracted at time of conveyance, transfer by owner of occupied residence to builder of new residence when former residence is traded as part of consideration for latter, transfer from purchase money mortgagor to vendor holding purchase money mortgage, transfers to certain political subdivisions buying in tax delinquent properties, transfers to nature conservancy or other preservation group, exempt from tax under §501(c)(3) of Internal Revenue Code, or certain transfers between religious organizations or in sheriff sale instituted by original mortgagee in which purchaser is mortgagee who instituted said sale. (72 P.S. § 8102-C.3, 1986, No. 77). Distribution in liquidation from corporation to trust for benefit of shareholders in proportion to their stock interests is exempt. (487 Pa. 233, 409 A.2d 326).

Penalty.

Until stamps have been duly affixed, document subject to tax may not be recorded, received in evidence or be basis of legal action. (72 P.S. § 8108-C). Effective, Jan. 1, 1982, interest at Federal rate, subject to change annually, is incurred on unpaid tax. (72 P.S. § 806). Criminal penalties are provided for certain specified acts. (72 P.S. § 8110-C).

Philadelphia and many other municipalities have realty transfer taxes which are frequently payable in addition to tax imposed by Commonwealth and may apply to broader classes of documents. Philadelphia rate on transfer of real property including certain leases is 3% of value of property transferred July 1, 1994 and thereafter. (§19-1403 of Philadelphia Code as am'd by ordinance of June 1, 1989). Certain parties are exempt (§19-1404). Certain transactions are excluded. (§19-1405).

22.17 SALES AND USE TAXES:

Tax on sales at retail by seller maintaining place of business in Pennsylvania or on use within Pennsylvania of tangible personal property and certain services is imposed at rate of 6% of purchase price. (72 P.S. § 7201; 72 P.S. § 7202).

Taxable Transactions.

Sale at retail is any transfer for a consideration of ownership, custody or possession of tangible personal property, including grant of license to use or consume, when such transfer is made for purpose of consumption or use, whether such transfer be absolute or conditional and by whatsoever means same shall be effected including sales from vending machines. (72 P.S. § 7201). Term is also defined to include rendition for consideration of number of services including servicing of motor vehicles, repairing of personal property other than wearing apparel and shoes, secretarial services, telephone communications, mobile telecommunications services, and certain cable television services. (72 P.S. § 7201[k]). Vehicle dealer who purchases for resale and uses vehicle prior to resale may elect to pay tax equal to 6% of fair rental value for period of use. (72 P.S. § 7205). Commercial aircraft operator who purchases aircraft for resale or lease or under another valid exemption may elect to pay tax on subsequent taxable use at rate of 6% of fair rental value of aircraft during such use. (72 P.S. § 7205[b]). Use is exercise of any right or power incidental to ownership, custody or possession of tangible personal property and includes but is not limited to transportation, storage or consumption. Use also includes obtaining by purchaser of services of type listed above with respect to sales at retail. (72 P.S. § 7201[o]).

Exemptions.

Sale at retail does not include any transfer of property or rendition of services for purpose of resale or transfer of tangible personal property, including but not limited to machinery and equipment, parts therefor and supplies, to be used by a person directly in any of operations of (1) Manufacture of personal property, (2) farming, dairying, agriculture, horticulture or floriculture, (3) producing, delivering and rendering of a public utility service, and (4) processing of personal property (including processing of fruit for wholesale distribution). (72 P.S. § 7201[k], No. 8). Use does not include consumption of tangible personal property, including but not limited to machinery and equipment, parts therefor and supplies, and certain services, directly by person in any of operations of (1) Manufacture of personal property, (2) farming, dairying, agriculture, horticulture or floriculture, (3) producing, delivering or rendering of public utility service, and (4) processing of certain personal property prior to retail sale (including processing of fruit for wholesale distribution). (72 P.S. § 7201[o]). Sale or use of certain tangible personal property and services is excluded from tax. (72 P.S. § 7204). Cigarettes, various consumer items and ready-to-eat food and beverages now subject to tax. (1983, No. 29; 1991, No. 22).

Credits.

Effective after July 1, 1999, developers of new facilities for production of qualified fuels are entitled to investment tax credit against sales and use taxes on property purchased after 1999 and before 2013. (72 P.S. § 8801-A et seq.). Credit may not exceed 15% of capital cost of qualified facility.

Computation.

Tax is computed as follows, where purchase price is: 11¢ to 17¢, tax is 1¢; 18¢ to 34¢, tax is 2¢; 35¢ to 50¢, tax is 3¢; 51 to 67¢, tax is 4¢; 68¢ to 84¢, tax is 5¢; 85¢ to $1, tax is 6¢; over $1, tax is 6¢ for each dollar plus above bracket charges upon any fractional part of dollar in excess of even dollars. (72 P.S. § 7203).

Collection.

Tax is imposed on the buyer but is collected by the seller, where seller maintains place of business in Pennsylvania. Seller who fails to collect tax is liable for tax which should have been collected. Sellers are required to procure license from Department of Revenue. (72 P.S. § 7237, 7208).

Returns and Payment.

Returns must be filed monthly by licensees, except that if total tax due for the third calendar quarter of the preceding year is less than $600 quarterly returns only shall be filed. In the case of licensees collecting $75 or less per calendar quarter, reporting on a less frequent basis may be allowed. Annual return due only if required by Department of Revenue. Payment must accompany return. Any nonlicensee liable to pay tax must file a return by 20th day of month succeeding month in which liability occurs. (72 P.S. § 7217, 7221).

Penalty.

Effective Jan. 1, 1982, interest at Federal rate, subject to change annually, is incurred on unpaid tax. (72 P.S. § 806). Failure to file return and understatement of amount due by more than 50% incurs penalty of 5% per month, to 25% maximum. If assessment for delinquency is necessary, 5% of amount understated is added to assessment. (72 P.S. § 7266).

Refunds.

Refund available equal to one-third of sales tax paid to Department of Revenue on sales attributable to bad debts deducted on federal income tax returns required to be filed after Jan. 1, 1990. Vendors are required to remit sales and use tax on credit sales, whether or not payment was made by purchaser or vendor.

Transient Vendors and Promoters.

Licensing provisions and penalties for omissions and failure to collect sales tax provided. (72 P.S. § 7248, 7248.5, 7248.6).

Horse Racing Tax.

Corporations holding horse races, other than state, county, or agricultural associations, must impose tax on admission price. (4 P.S. § 325.208).

Optional Local Sales and Use Tax.

First class cities authorized to tax sales at retail and services, and use thereof, at .5% or 1%. (53 P.S. § 12720.503). First class counties authorized to impose local sales and use tax of up to 2% on vehicle rentals where renter takes possession of vehicle within authorized taxing jurisdiction. (16 P.S. § 2398). Philadelphia imposes 2% vehicle rental tax. (19 P.S. § 3301 Phila. Code).

22.17A TAX LIENS:

Municipal tax liens extend to all property against which tax levied, and all property benefited by improvements. (53 P.S. § 7102).

Municipal taxes are a first lien on real property (subordinate to lien of state taxes) and date from the day the rate is fixed except where tax is imposed and assessed prior to start of fiscal year in which case lien dates from first day of fiscal year. (53 P.S. § 7102).

All federal liens, including tax liens, covered by Uniform Federal Lien Registration Act. (74 P.S. § 157-1 to 157-8).

22.17B UNIFORM FEDERAL LIEN REGISTRATION ACT AMENDED:

See topic 22.17A Tax Liens.

22.1822.19

22.20 UTILITIES TAX:

Tax is imposed upon gross receipts of transportation (except taxi cabs, motor buses, and motor omnibuses), communications, energy (except gas companies), and other public utilities from business done in state. Exceptions include, but are not limited to gross receipts derived from sales to any municipality owned or operated public utility and gross receipts derived from business done inside limits of municipality owning or operating public utility or furnishing public utility service. In case of electric companies, tax also is imposed upon apportioned gross receipts derived from sales in other states of electricity generated in Pennsylvania effective Jan. 1, 1977 (after 1979 tax applies only to sales in states that have taken and not rescinded retaliatory action). Rate increased to 50 mills effective July 1, 1991. (72 P.S. § 8101). Additional tax of 7.6 mills imposed upon each dollar of state taxable value of utility realty. (72 P.S. § 8112-A). Rate reduction must benefit consumer in form of reduction of state tax surcharge. Public utility which fails to pass benefit through to consumer will be subject to civil penalty of at least $1,000, but not more than $5,000, and any such additional relief as court may deem appropriate. (72 P.S. § 8101). Annual report must be made on or before Apr. 15 to Department of Revenue. Tentative tax for current year is current rates applied to 90% of tax base of immediate prior year. Tentative tax is due with tentative report on Mar. 15 (or 15th day of third month after end of fiscal year). (72 P.S. § 10003, 8101).

Penalty is incurred on failure to file report of 5% of tax due for each month or fraction thereof, to 25%, and thereafter at rate of 1% per month. (72 P.S. § 8102, 7403). Effective Jan. 1, 1982, interest at Federal rate, subject to change annually, is incurred on unpaid tax, but not on penalty for failure to report. (72 P.S. § 806, 8102). Criminal penalties are incurred for fraudulent reporting, for failure to report under certain circumstances and for failure to retain records for three years. (72 P.S. § 8102, 7410).

23 TRANSPORTATION

23.01 MOTOR VEHICLES:

Supervising authority is Bureau of Motor Vehicles, Dept. of Transportation, Harrisburg, Pa. 17122.

Vehicle Code (75 Pa.C.S. § 101 et seq.), cited in this title as “VC-,” followed by applicable section number, governs.

Vehicle License.

Vehicle must be registered annually in connection with annual inspection (VC-1307) and must display legible registration plate at all times (VC-1332). Seasonal registration also permitted. (VC-1307[a.1]). Special plates issued for licensed dealers and manufacturers (VC-1335) and special groups (VC-1338 et seq.).

Registration Card.

Upon registration of a vehicle, Department shall issue a registration card to owner. (VC-1308). Operator of registered vehicle must have registration in his possession while operating vehicle (VC-1311); however, no violation if valid registration produced at office of issuing authority or office of arresting officer within five days (VC-1311-c).

Driver's License Compact.

Pennsylvania has joined driver's license interstate compact. (75 Pa.C.S. § 1581).

Operator's License.

Operator must secure license and renew it at intervals of not more than four years, as determined by Department of Transportation (VC-1501, 1514), and have same in possession when operating vehicle and shall exhibit license upon demand by police officer (VC-1511); however no violation if valid license produced at office of issuing authority or office of demanding officer within 15 days of filing of citation or demand, respectively. (VC-1511). Employees of Federal Government operating official vehicles, members of armed services with valid military driver's licenses, nonresidents who are at least 16 years of age with valid out of state license, and operators of implements of husbandry who are least 16 years of age or 14 years of age if driving on highway abutting operator's residence are exempt. (VC-1502). Licenses will not be granted to persons under 18 years of age (VC-1503[a][7]) except that Department may issue junior driver's license to person 16 or 17 years of age under rules and regulations adopted by Department (VC-1503[c]); regular license may be issued to 17 year old who has completed approved driver training course (VC-1503[b]); persons under 18 may not operate school buses (VC-1509[a][3]). Licenses will not be issued to nonresidents, users of alcohol or controlled substances who are incapable of safely driving motor vehicle, persons adjudged mentally or physically disabled, or persons whose operating privileges have been suspended or revoked in Pennsylvania or any other state. (VC-1503). No person possessing junior operator's license may operate vehicle upon public highway between 11 p.m. and 5 a.m. unless accompanied by spouse 18 years of age or older or parent, or is himself member of volunteer fire company, engaged in public or charitable service or employed, and is operating vehicle and carrying affidavit to that effect. (VC-1503-c). Operators of commercial motor vehicles and their employers are subject to special licensing requirements and controls. (VC-1601 et seq.).

Titles.

All owners of vehicles in Commonwealth must obtain certificate of title from Department of Transportation, Bureau of Motor Vehicles. (VC-1101). Exemptions from this requirement: Vehicles owned by U.S. unless registered in Pennsylvania; golf carts, motorcycles, go-carts or other similar vehicles unless registered in Pennsylvania; new vehicles owned by manufacturer or registered dealer before and until sale; vehicles owned by nonresidents and not required by law to be registered in Pennsylvania; vehicles owned by resident required to be registered in another state and used principally outside of Pennsylvania; vehicles regularly engaged in interstate transportation on which certificates of title have been issued in another state; vehicles moved solely by human or animal power; implement of husbandry unless required to be registered, special mobile equipment unless required to be registered, multipurpose agricultural vehicles. (VC-1102). Application for certificate is made on form furnished by Department. (VC-1103.1). Usual fee is $15. (VC-1952). Application for certificate must be accompanied by sales tax or evidence to show tax has been collected. (VC-1103-b). See category 22 Taxation, topic 22.17 Sales and Use Taxes.

Sales.

Title to motor vehicle is transferred by assignment of certificate of title. Assignment contains warranty of title and must be sworn to before officer empowered to administer oaths. Within ten days of assignment, purchaser presents assignment and certificate to Department of Transportation, together with sales tax or evidence of exemption unless purchased from dealer, and makes application for new certificate of title. While certificate of title need not be obtained by purchaser who is manufacturer or registered dealer holding vehicle for resale, these transferees shall give notice of acquisition within seven days to Department of Transportation upon form furnished by it. (VC-1111-1113, 1116). Upon reselling vehicle to one other than another manufacturer or dealer, manufacturer or dealer shall execute assignment and warranty of title to transferee who completes application for certificate of title in his own name. (VC-1113), and shall forward certificate of title to department within ten days of transfer. Upon reselling vehicle, manufacturer, jobber or dealer executes assignment on form furnished by Department of Transportation and buyer applies for new certificate of title. (VC-1113). Transfers may be made to surviving spouse without letters of administration upon filing affidavit that debts have been paid. (VC-1114-b).

The Automobile Lemon Law (73 P.S. § 1951 to 1963) authorizes purchaser or lessee of new motor vehicle to require manufacturer, under certain circumstances, to correct defects which appear in motor vehicle (73 P.S. § 1954) or to refund purchase price to purchaser (73 P.S. § 1955). Purchaser of motor vehicle may enforce provisions of this Act by bringing civil action against noncomplying provider. (73 P.S. § 1958). Lemon Law vehicle repurchased by manufacturer may not be resold or leased without express notice of vehicle's history. (73 P.S. § 1960). See category 3 Business Regulation and Commerce, topic 3.12 Consumer Protection, subhead Consumer Protection.

Messenger Service.

Persons or organizations which, for a fee, furnish messenger service to members of public for purpose of obtaining for such persons certificates of title, motor vehicle registrations, operators' licenses, inspection stickers or other such documents must register with Bureau of Motor Vehicles, pay a fee of $50 and file a bond of $50,000. Annual fee for registration of additional place of business or branch office shall be $25. Fee for changing location of place of business or branch office during period of registration is $5. (VC-1959, 7501 et seq.).

Liens and encumbrances on vehicles perfected when application for certificate of title is received or date stamped by Department. Certificate is delivered to senior lienor who retains it until his lien is paid off. Outstanding certificate showing lien is notice of lien to Commonwealth, creditors, subsequent mortgagees, lienors, and encumbrancers and purchasers. (VC-1131-1138).

Transactions creating security interests in personal property, including motor vehicles, are governed by Uniform Commercial Code, Article 9. (13 Pa.C.S. § 9101). Filing provisions of Uniform Commercial Code do not apply to motor vehicle which is not inventory held for sale for which certificate of title is required if notation of such security interest can be indicated by public official on certificate or duplicate thereof. (13 Pa.C.S. § 9302[c][2]).

Identification Marks.

All vehicles required to have vehicle identification number affixed permanently on vehicle. (VC-7101).

Size and Weight Limits.

Regulated by VC-4901-4982.

Hazardous Materials Transportation.

Regulated by VC-8301-8308.

Equipment Required.

Regulated by VC-4101-4108, 4501-4502, 4521-4536, 4551-4553, 4571-4573.

Lights Required.

Regulated by VC-4301-4307.

Inspection.

Vehicles must be inspected annually, except certain vehicles. (VC-4701-4731).

Motorcycle Safety.

Special motorcycle safety education program established. (VC-7901-7911).

Accidents.

Driver of any vehicle involved in an accident resulting in death, personal injuries or property damage, must stop immediately and give his name, address, registration number of vehicle, information relating to financial responsibility, and upon request, exhibit operator's license to police officer at scene or investigating accident, and to person injured or occupants of vehicle collided with, and must render assistance to persons injured, including transportation of injured person to physician for treatment, if such treatment is necessary or is requested. (VC-3742-3744). Operator of any vehicle involved in any accident resulting in personal injuries, death or property damage must immediately report accident to police department, and if accident is not investigated by police officer, operator must within five days, forward report of accident to Department of Transportation upon furnished forms. (VC-3746-3747). If driver is physically unable to give information or assistance required and there are other occupants of vehicle who are physically able to do so, each such other occupant must reveal identity of himself and driver and owner of vehicle of which they were occupants, to person struck or to driver or occupants of any vehicle involved or to owner or custodian of any property involved and must render aforementioned assistance to injured persons. (VC-3744-c). If vehicle or property damaged is unattended, driver must stop and either locate and notify operator or owner of such vehicle or property or leave in conspicuous place on such vehicle or property written notice giving name and address of driver, information relating to financial responsibility and registration number of vehicle being driven, and must notify nearest police department without delay. (VC-3745). Driver of vehicle in accident not resulting in serious injury or death must remove vehicle from roadway to safe place. (VC-3745.1).

Driver Education and Control.

Secretary administers system for driver education and maintains a record of convictions under motor vehicle laws. Number of points for each conviction in accordance with statutory schedule is assigned to each person, and when 11 points have been accumulated, person's operator's license or learner's permit will be suspended. Three points are removed from year to year in absence of succeeding convictions. As points are accumulated, attendance at driver improvement school or at clinic may be required in addition to special examination. (VC-1531-1552). Reaccumulation of points may lead to short suspension. (VC-1586). Conviction of certain driving related offenses or controlled substances laws or conviction or adjudication of delinquency for school-related terroristic threats will result in suspension. (VC-1532). Any person denied driver's license, whose driver's license has been cancelled, or whose operating privilege has been recalled, suspended, or revoked has right to appeal. (VC-1550).

Intoxication Tests.

Operation of a motor vehicle in Commonwealth constitutes implied consent to chemical tests for intoxication and refusal to submit to such tests constitutes grounds for suspension of an operator's license. (VC-1547).

Liability.

Owner or controller of vehicle permitting any unauthorized or unlicensed person to operate vehicle upon any highway is guilty of summary offense and is jointly and severally liable with driver for any damages caused by negligent operation of vehicle. (VC-1574). Negligence of driver not imputed to injured owner-passenger unless master-servant, principal-agent, or bailorbailee relationship established. (440 Pa. 409, 269 A.2d 476).

Guests.

There is no statute restricting liability for injury to a gratuitous guest.

Proof of Financial Responsibility.

New Pennsylvania Financial Responsibility Law (VC-1701 et seq.) repeals old No-Fault Insurance Law (40 P.S. § 1009.101 et seq.) and establishes hybrid system between mandatory and voluntary insurance system. Following are statute's key components:

"Financial responsibility" is defined as ability to respond in damages for liability on account of accidents arising out of maintenance or use of motor vehicle in amount of $15,000 because of injury to one person in any one accident, in amount of $30,000 because of injuries to two or more persons in any one accident, and in amount of $5,000 because of damage to property of others in any one accident. (VC-1702).

All applications for motor vehicle registration or renewal of motor vehicle registration must be accompanied by certification of financial responsibility. (VC-1786, 1305, 1309). Proof of financial responsibility will also be required before restoring motor vehicle operator's privileges or motor vehicle registration after suspension (VC-1783), after conviction or guilty plea for moving violation (VC-1784), and after motor vehicle accident in which there is either injury or at least one of motor vehicles is so damaged that it must be towed from scene (VC-1785, 3746).

Financial responsibility can be demonstrated by filing with Department of Motor Vehicles evidence that vehicle is covered by insurance policy that contains at least minimum limits of liability, by filing with Department of Transportation evidence of self-insurance as provided by Motor Vehicle Code (VC-1787), or by showing other reliable financial arrangements, deposits, resources, or commitments acceptable to Department of Transportation (VC-1782).

Sanction for failing to meet financial responsibility requirements is loss of motor vehicle operating privileges, suspension of motor vehicle registration, or both. (VC-1781-1785). If person fails to pay judgment arising out of motor vehicle accident within 60 days, judgment creditor may inform Department of Transportation which shall suspend motor vehicle operating privileges of judgment debtor unless he can demonstrate financial responsibility or makes arrangements for payment. Person's motor vehicle operating privileges remain suspended until financial responsibility is shown. (VC-1771-1773).

Statute also contains detailed insurance regulatory provisions regarding first party benefits (VC-1711-1723), prohibition of exclusion of coverage of intoxicated drivers (VC-1724), uninsured and underinsured motorist coverage (VC-1731-1736), assigned risk plan (VC-1741-1744), assigned claims plan (VC-1751-1757). See category 16 Insurance, topic 16.01 Insurance Companies.

Person insured by private passenger motor vehicle policy has right to select "limited tort" option at reduced premium. Under this option persons covered by policy waive right to seek nonmonetary damages, such as pain and suffering, except in case involving serious injury, defined as death, serious impairment of body function or permanent serious disfigurement. (VC-1705). Insured persons may also expressly reject uninsured or underinsured motorist protection. (VC-1731).

Foreign Vehicles.

Nonresident owner may operate his vehicle in Pennsylvania without registering vehicle or paying any fees, provided vehicle is duly registered in owner's state of residence. Foreign vehicles operated within Pennsylvania for transportation of persons for profit or for carrying on other business must register unless exempted under terms of reciprocity agreement. (VC-1303).

Nonresident operator who is at least 16 years of age and is in possession of valid driver's license issued by his home state or Canada is exempt from licensing in Pennsylvania. Nonresidents licensed in countries other than U.S. or Canada are exempt only upon showing satisfactory understanding of official traffic-control devices. Nonresident may only operate class of vehicles for which he is licensed to operate, subject to all restrictions contained on license. (VC-1502.3).

Actions Against Nonresidents.

Jurisdiction over nonresident causing injury in Pennsylvania or violating any Pennsylvania statute is acquired pursuant to 42 Pa.C.S. § 5322. Process may be served by personal delivery, in manner prescribed by law of place in which service is being made, by any form of mail requiring signed receipt, as directed by foreign authority in response to letter rogatory, or as directed by court. (42 Pa.C.S. § 5323).

Direct Actions Against Insurer.

Absent statutory or applicable policy provision authorizing direct actions against insurer, injured person has no right of action against tortfeasor's insurer. (16 D. & C. 3rd 67).

Motor vehicle carriers are regulated by the Public Utility Commission (see category 3 Business Regulation and Commerce, topic 3.08 Carriers).

Bus Taxation Proration Agreement has been adopted whereby contracting states may permit owners of fleets of buses operating in two or more states to prorate registration of buses in such fleets in each state in which fleets operate on basis of proportion of miles operated within such state to total fleet miles, as defined. (VC-8101-8105).

Tractors.

Tractors and operators are registered and licensed by the Department of Transportation.

Diesel-powered vehicles are required to comply with smoke control standards promulgated by Secretary. (VC-4532).

Snowmobiles are regulated. They must be registered. It is unlawful to operate snowmobile on any street or highway not designated for such use by governmental agency. Accidents resulting in injury to or death of any person or property damage exceeding $100 must be reported to Department of Environmental Resources. They may not be used to pursue wildlife. (VC-7701-7706, 7711-7716, 7721-7729, 7741-7743, 7751-7753).

Gasoline Tax.

See category 22 Taxation, topic 22.08 Gasoline and Special Fuels Taxes.

Passenger Protection.

Drivers and front seat passengers of vehicles manufactured after 1966 must wear seat belts, except rural letter carriers, those with written medical excuses from physician, and delivery persons traveling between stops at less than 15 mph. Parent or legal guardian of child under four years of age who is transporting child in motor vehicle registered in Pennsylvania is required to fasten child securely in child passenger restraint system, children four to eight must also have child booster seat, and drivers under 18 may not operate vehicle with more passengers than seat belts. (VC-4581a). Penalty for violation is $25 fine. (VC-4581b).

Impoundment of Vehicles.

Vehicles not duly registered in Pennsylvania may be impounded upon nonpayment of fine in excess of $250 imposed pursuant to designated sections of Act. (VC-6309-6310).

23.02 RAILROADS:

See category 3 Business Regulation and Commerce, topic 3.08 Carriers.

1
PUERTO RICO LAW DIGEST

—Scope —

Revised for 2010 edition by

McCONNELL VALDÉS LLC of San Juan.

(Citations are to Laws of Puerto Rico Annotated (LPRA), e.g., 31 LPRA 131 means Title 31 LPRA section 131 or to statute if not codified, e.g. 2005, Act 20 means Act No. 20 of year 2005; United States Code Annotated (USCA), e.g., 48 USCA 731; and United States Internal Revenue Code (1986 IRC). See also category 6 Courts and Legislature, topic 6.03 Reports.) Laws of Puerto Rico are available in English and Spanish versions, with same title and section numbers: Due to delays in translation to English, English version may not be available. In this case, refer to Spanish version.

Note: This revision covers legislation adopted and approved by Governor through Act No. 49 of Aug. 3, 2009, except as otherwise noted. Legislature meets in semiannual sessions, commencing 2d Mon. of Jan. and 3d Mon. of Aug. and ending June 30 and Tues. before 3d Thurs. of Nov. (Aug.-Nov. session not held election years.)

1 INTRODUCTION

1.01 GOVERNMENT AND LEGAL SYSTEM:

Status of Puerto Rico.

Puerto Rico occupies unique status in U.S. political system based upon Puerto Rico Federal Relations Act approved by Congress on July 3, 1950. Act was “adopted in the nature of a compact so that the people of Puerto Rico may organize a government pursuant to a constitution of their own adoption.” Constitution was adopted, approved by Congress, and proclaimed on July 25, 1952. Upon proclamation of constitution, repeal of substantial portions of prior Organic Act became effective (see 48 USCA 731d). Among provisions retained is one stating that “statutory laws of the United States not locally inapplicable, except as hereinbefore or hereinafter otherwise provided, shall have the same force and effect in Puerto Rico as in the United States, except the internal revenue laws other than those contained in the Philippine Trade Act of 1946 or the Philippine Trade Agreement Revision Act of 1955.” This section also provides that “all taxes collected under the internal revenue laws of the United States on articles produced in Puerto Rico and transported to the United States, or consumed in the island shall be covered into the Treasury of Puerto Rico.” (See 48 USC 734.) Also retained from Organic Act was provision (48 USC 863) creating U.S. District Court for District of Puerto Rico and requiring (48 USC 864) that proceedings in such court be conducted in English language and that “laws of the United States relating to appeals, certiorari, removal of causes, and other matters or proceedings as between the courts of the United States and the courts of the several States shall govern in such matters and proceedings as between the United States District Court for the District of Puerto Rico and the Courts of Puerto Rico." Also retained were mass naturalization provisions of Organic Act (see 8 USC 1402). Result of this is that Commonwealth of Puerto Rico is populated substantially by U.S. citizens, uses U.S. currency, U.S. mail, has U.S. Customs, and in general has appearance of State of the Union, with Governor and legislature elected by popular suffrage, system of Commonwealth courts and other systems similar to those of respective States. However, Puerto Rico is not a State and its inhabitants cannot vote in national elections and are not represented in Congress, except by Resident Commissioner with voice in House of Representatives but no vote. Puerto Rico is subject to customs laws of U.S., but proceeds of customs duties collected on goods imported into Puerto Rico are paid into Commonwealth Treasury. Bona fide residents of Puerto Rico for entire taxable year are exempted from U.S. income tax for such year on income derived from sources within Puerto Rico, but are not otherwise exempted from U.S. income tax. For U.S. Estate and Gift Tax, citizens of U.S. who are such solely by virtue of birth or residence in Puerto Rico are treated (with certain exceptions) as nonresident aliens, while citizens of U.S. resident in Puerto Rico who are otherwise citizens of U.S. are treated on same basis as any other citizen of U.S. There is no agreement among courts as to what particular form of words is to be used to describe relationship between Puerto Rico and U.S. For discussion of conflicting views, see Americana of Puerto Rico, Inc. v. Kaplus. (368 F.2d 431 [1966]). Most that can be safely said at present moment is that relationship between Puerto Rico and U.S. is sui generis, and generalizations based upon it are to be approached with caution.

For information on the courts and legislature of Puerto Rico, see category 6 Courts and Legislature.

For further discussion of the U.S. federal system, see Introduction to the Federal Government of the United States at the beginning of this volume. A great many laws are promulgated by the federal government of the United States and are not reflected in the topics below. See the Introduction to this volume for references to the federal law topics covered.

Language.

Both English and Spanish are official languages in departments of Commonwealth and in all courts and public offices, and no public or private document written in either language shall be held void on account of language in which expressed. (1 LPRA 59 to 59[f]). In practice, Spanish is predominant.

1.02 [RESERVED]

1.03 HOLIDAYS:

(1 LPRA 71; 29 LPRA 301).

Full legal holidays are Jan. 1, Jan. 6, Good Friday, Easter Sun., 2d Sun. in May, 3d Sun. in June, General Election Day, Thanksgiving Day and Dec. 25. These holidays are mandatory only in certain retail establishments. These establishments may open on Sun. from 11:00 a.m. to 5:00 p.m., unless Sun. is holiday. Commonwealth government closes all day on all above holidays, plus 2d Mon. in Jan., 3d Mon. in Jan., 3d Mon. in Feb., Feb. 18, Mar. 22, 3d Mon. in Apr., last Mon. in May, July 4, 3d Mon. in July, July 25, July 27, 1st Mon. in Sept. (Labor Day), Oct. 12, Nov. 11 and Nov. 19. Any legal or contractual obligation due date or act falling on holiday may be performed on next business day.

Legality of Transactions on Holiday.

In criminal cases, orders of arrest may be made and served; proceedings to recover possession of personal property may be had; and suits for obtaining any such writs and proceedings may be instituted, on any day.

1.04 OFFICE HOURS AND TIME ZONE:

Puerto Rico is in the Atlantic Standard (GMT -04:00) time zone and does not observe Daylight Savings time. Office hours are generally from 9 a.m. to 5 p.m. Government offices generally open at 8 a.m. and may close before 5 p.m. Certain government agencies including those dealing with internal revenue, drivers' licenses, motor vehicles, good conduct certificates, corporations, child support, vital statistics and regulations and permits for real property are open Tues. through Fri. until 7 p.m. and Sat. from 9 a.m. to 1 p.m.

2 BUSINESS ORGANIZATIONS

2.01 AGENCY:

(10 LPRA 1521; 31 LPRA 4421, 5101).

General principles of agency law in Puerto Rico are derived from Spanish Civil Code. See category 21 Property, topic 21.15 Powers of Attorney.

An agent is required to adhere to the instructions of the principal, and, if there are none, to proceed in a prudent manner. He must account for everything he receives for the principal. He may delegate his powers if not expressly prohibited from doing so, but is liable for the acts of the substitute if there was no authority to make the delegation or if his appointee is notoriously incompetent. Unless expressly agreed otherwise agency is presumed gratis, except where the agent's usual business is to do the kind of work entrusted to him.

The principal must reimburse the agent for his expenses and indemnify him for losses suffered by reason of the agency. The agent may retain goods of the principal as a guarantee for such payments.

Persons presuming to act for others without authority are personally liable to the person for whom they presume to act; if such person ratifies or takes advantage of what they have done, the relation becomes that of principal and agent.

Dealers' Act (10 LPRA 278 et seq.) precludes termination, impairment or refusal to renew a dealer's contract (established relationship) except for just cause. Retroactive application of Act to contracts prior to effective date of Act, June 24, 1964, held unconstitutional. (Warner Lambert Co. v. Superior Court of Puerto Rico, San Juan Section, 101 DPR 378). Just cause is nonperformance of any of essential obligations of contract, or any act or omission on dealer's part that adversely affects interest of principal in promoting, marketing or distributing merchandise or service. Termination or impairment or refusal to renew constitutes tortious act which subjects principal to jurisdiction of Commonwealth courts under long-arm statute. In absence of just cause, principal must indemnify dealer on basis of following factors; actual value of amount expended by dealer in acquisition of premises, equipment installations to extent these are not useful to other activity in which dealer is engaged; cost of goods, parts, accessories and utensils that dealer has in stock; goodwill of business; amount of profit obtained in distribution of merchandise or in rendition of services during last five years, or if less than five years, five times average annual profit obtained during last years. Provisions of Act are of public interest and rights under it cannot be waived. Every action accruing under Act prescribes in three years from date of definite termination or performance of detrimental acts. Distribution contracts to which Act applies shall be interpreted in accordance with, and shall be governed by, laws of Puerto Rico, any stipulation to contrary being null. Clauses forcing distributor to arbitrate or litigate outside Puerto Rico any controversy arising with respect to distribution contract are likewise null and against public policy. (Walborg Corp. v. Superior Court, 104 DPR 184). Prior to enforcement of dealer contract arbitration clause, court with jurisdiction in Puerto Rico must determine that clause was entered into freely and voluntarily by parties. Rebuttable presumption exists that clause was included by principal and that clause is contract of adhesion to be interpreted as such. In event parties have not appointed arbitrator or have not or cannot agree on arbitrator, appointment will be made by court with jurisdiction in Puerto Rico. (10 LPRA 278b-3). However, if interstate or foreign commerce covered by U.S. treaty is involved, then Federal Arbitration Act and applicable treaty will prevail and arbitration clause will be enforced. (Mitsubishi Motors v. Soler Chrysler-Plymouth, Inc., 723 F.2d 155 (1st Cir. 1985); Ledee v. Ceramiche Ragno, 684 F.2d 184 [1st Cir. 1982]).

As to contracts entered into as of July 13, 1988 or thereafter, violation by distributor of any provision contained in distribution contract which prohibits or restricts changes in (i) capital structure of distributor, (ii) management of distributor, (iii) means of financing operations of distributor, or (iv) sale, transfer or encumbrance of any interest in distributor, will not constitute just cause for termination unless principal shows that such violation adversely and materially affects development of market for its products or distribution of principal's products. Amendment also establishes rebuttable presumption that principal has impaired relationship with its distributor when any of following events occurs: (i) principal establishes facilities in Puerto Rico for direct distribution of products for which distributor was previously responsible, (ii) principal establishes relationship with one or more additional distributors for distribution of products in Puerto Rico, contrary to terms of existing distribution contract, (iii) principal refuses to file without justification distributor's purchase orders for principal's products, in reasonable quantities and within reasonable period of time, and (iv) principal unilaterally and unreasonably changes, to detriment of distributor, method of delivery or manner, terms or conditions of payment for products. As to such contracts, violation by distributor of sales quotas or other standards which are unrealistic in view of market conditions at time of violation, shall not be deemed to constitute just cause for termination. Burden of proof for demonstrating reasonableness of sales quotas or other standards is on principal. Action of privatizing program, service, or enterprise of central government or public corporation, is just cause to end relationship existing between said program, service or enterprise and any distributor. Such action will not entitle distributor to receive damages under Act. (10 LPRA 278a).

Provisional remedies, such as injunctive relief, are available, at court's discretion to maintain status quo between principal and dealer while case is pending final judgment.

Sales Representatives.

(10 LPRA 279). Protection similar to that afforded to dealers under Dealers' Act is given to exclusive sales representatives who do not have same obligations as dealer (e.g. do not maintain inventory, deliver goods sold, do not establish terms of sale, do not assume credit risk, do not close sales contracts, etc.). Same basic prohibitions as to termination and impairment, definition of just cause, and remedies apply. Important difference is that sales representative has option of requesting damages based on criteria similar to those provided in Dealers' Act or, in alternative, requesting damages equal to 5% of total sales made by representative during term of relationship. Does not apply to contracts entered into before Dec. 5, 1990 (unless contract is renewed after that date or novation of contract occurs).

2.02 ASSOCIATIONS:

There is no general law authorizing formation of unincorporated associations without shares of stock. There are special statutes authorizing formation of special corporations designated as associations, such as hospital service associations, credit unions, and like, but concept of association is, for most purposes, foreign to Puerto Rico law. See topics 2.03 Corporations, 2.07 Partnerships.

2.03 CORPORATIONS:

Incorporation is under general law, except for insurance or banking corporations. General corporation law is modeled after General Corporation Law of Delaware, and provides for incorporation of any lawful business except those prohibited by law. (14 LPRA 2601 et seq.).

General Supervision.

Secretary of State, Corporation Division (http://www.estado.gobierno.pr/), exercises general supervision over corporations. Division of Corporations and Marks, Department of State of the Commonwealth of Puerto Rico, PO Box 3271, San Juan, PR 00902-3271.

Purposes.

Private corporations can be organized for any purpose not proscribed by law. (14 LPRA 2601[b]).

General Powers of Corporations.

Corporate powers (14 LPRA 2651, 2652), should be carried out in interests of stockholders (14 LPRA 2653). No act of corporation is invalid because corporation did not have capacity or power to carry out act. (14 LPRA 2655). Banking powers are denied. (14 LPRA 2654).

Name.

No name may be used that conflicts with name of corporation already registered in Department of State. Name must contain words “Corporation”, “Corp.” or “Inc.” or words of like import. Reservation of name provided for. If Department of State approves name, reservation period is 120 days. Reserved name may be assigned to any other person or corporation. (14 LPRA 2602[a][1]).

Term of Corporate Existence.

Corporate entity exists as of time that certificate of incorporation is filed (14 LPRA 2603[d], 2606[a]), and exists in perpetuity or as stated in articles of incorporation (14 LPRA 2602[b][4]).

Incorporators.

Any person, partnership, association, trust, corporation or any other type of organization, profit or nonprofit, regardless of residence, domicile or state of organization may be incorporator. (14 LPRA 2601[c]). Incorporators act as directors of corporation unless otherwise provided for in certificate of incorporation. (14 LPRA 2607).

Articles of Incorporation.

Must contain: (1) Name (14 LPRA 2602[a][1]), (2) street address (including municipality) (14 LPRA 2602[a][2]), (3) nature, object or purpose of business, (statement is sufficient if it declares that corporation will dedicate itself “to any legitimate matter for which a corporation may be created under the General Law of Corporations of the Commonwealth of Puerto Rico,”) (14 LPRA 2602[a][3]), (4) classes of stock or statement that there will be only one class of stock; total number of each class of stock; par value of each class of stock, or declaration that stock will have no par value; and statement of powers, preferences and rights of each class of stock (14 LPRA 2602[a][4]), (5) name and address (including municipality) of each incorporator (14 LPRA 2602[a][5]), and name and address (including municipality) of any person acting as director as of date of incorporation (14 LPRA 2602[a][6]) if rights and powers of incorporators end with filing of articles of incorporation. May contain: (1) Provision that any corporate action will require vote of larger number of stock or any class or series of such stock having voting power or of larger number of directors than that required by statute (14 LPRA 2602[b][1]), (2) any provision for administration of business or conduct of corporate affairs to create, limit, or define powers within corporation so long as they are not contrary to laws of Commonwealth (14 LPRA 2602[b][2]), (3) grant of preemptive rights to stockholders to subscribe to additional issues of stock (otherwise no such power will exist) (14 LPRA 2602[b][3]), (4) provision limiting organization's corporate existence to specified date (otherwise corporation's existence is perpetual) (14 LPRA 2602[b][4]), (5) provision imposing personal liability on stockholders for debts of corporation to specified extent or under specified conditions (otherwise stockholders are not personally liable for such debts) (14 LPRA 2602[b][5]).

Filing Articles of Incorporation.

Articles of incorporation must be filed with Secretary of State and, if directors designated in Articles, signed by directors, and if not designated, signed by incorporator or incorporators. If none of these available, by majority of stockholders. (14 LPRA 2603).

Incorporation Tax or Fee.

Secretary of State collects filing fees based on authorized capital stock. Minimum fee is $100. (14 LPRA 3361). Upon making and filing certificate of incorporation and paying fees required, corporation is in existence. (14 LPRA 2603[d], 2606[a]).

Organization meeting must be held by incorporator or incorporators or by board of directors if initial directors named in certificate of incorporation to adopt by-laws, elect directors (if meeting is of incorporators), elect officers (if meeting is of directors), do any other acts to perfect organization, and transact any business coming before meeting. Any action permitted at meeting may be taken without meeting if incorporators or directors sign instrument stating action taken. Two day written notice of meeting necessary. Notice need not be given anyone attending meeting or signing waiver. Meeting may be held anywhere. (14 LPRA 2607, 2608).

Paid-In Capital Requirements.

None.

Amendment of Certificate.

Certificate may be amended to change corporate name; change, enlarge or diminish nature of business or corporate powers and purpose(s); increase, decrease or reclassify authorized capital stock; cancel or change right of holders of any class of stock to receive dividends which have accrued but have not been declared; create new classes of stock with rights and preferences prior and superior or subordinate and inferior to authorized stock; change period of duration; make any change provided that amended provisions are lawful and proper to insert in original certificate as of time of filing of amendment. If certificate requires greater vote by directors, or holders of any class or series of stock or securities with voting power than is required by any section of statute, such provision can be altered only by such greater vote. (14 LPRA 2952).

Amendment is effectuated by resolution of directors, followed by vote of majority of outstanding voting stock at meeting called by board of directors for purpose of voting on proposed amendment or at annual meeting. In addition, class vote provided where any proposed amendment would adversely alter or change preferences, special rights or powers of one or more classes of stock or series of stock. Certificate setting forth amendment and its adoption must be filed with Secretary of State. In case of corporations without capital stock, certificate may require approval of specified percentage of members; otherwise procedure differs but slightly. (14 LPRA 2952).

Increase or Decrease of Authorized Capital Stock.

Directors may issue capital stock at any time within amount authorized in certificate. Authorized capital stock may be increased by amendment of certificate. (14 LPRA 2952[a][3]). Authorized capital may be reduced, by resolution of board of directors, if assets remaining after such reduction are sufficient to pay any debts for which payment has not been otherwise provided. (14 LPRA 2954).

By-laws.

Original or other by-laws may be adopted, amended, or repealed by incorporators, by initial directors if named in certificate, or, before corporation has received any payment for any of its stock, by board of directors. After corporation has received any payment for any of its stock, power to adopt, amend or repeal should be in stockholders entitled to vote or in directors if authorized by certificate (latter does not divest stockholders of power to adopt, amend or repeal by-laws). They may contain any provision, not inconsistent with law or certificate, relating to business of corporation, conduct of its affairs, its rights or powers, or rights or powers of stockholders, directors, officers or employees. In non-stock corporation, power to adopt, amend, or repeal by-laws resides in members entitled to vote or in governing body if charter permits. (14 LPRA 2609).

Stock.

Shares of stock are personal property. (14 LPRA 2772).

Stock: common, preferred or special, may be with or without par value. No-par value stock may be issued for such consideration as may be fixed by directors or by stockholders (if provided by certificate). (14 LPRA 2761).

Stock: common, preferred or special, with or without par value, may be issued in classes or in series within classes, each class or series having such voting powers, preferences, rights, qualifications, limitations, or restrictions as stated in certificate of incorporation, amendment thereof or in resolution of directors providing for issue pursuant to authority expressly stated in certificate. (14 LPRA 2761). If issued under resolution of directors, “certificate of designations” fully stating rights and privileges must be filed with Secretary of State and copy recorded in same manner as certificate of incorporation. (14 LPRA 2761[g]).

Stock of any class or series may be made redeemable at option of corporation or stockholder provided corporation shall have outstanding shares of at least one class or series with full voting powers not subject to redemption. Any redeemable stock may be redeemed at such times and prices as are stated in certificate of incorporation or resolution of directors providing for issue. Such stock may be redeemed for cash, property or rights, including securities of same or another corporation. (14 LPRA 2761[b]). Redeemable stock is not considered outstanding for voting purposes. (14 LPRA 2774[d]).

Stock may be purchased or otherwise acquired by corporation unless capital is or will become impaired. Stock redeemable at option of corporation may not be purchased for price greater than redemption price. Corporation may exchange debt security for its stock as long as capital is not impaired. (14 LPRA 2774[a]).

Corporation may retire any of its capital stock that is issued but not outstanding. Retired stock resumes status of authorized and unissued stock unless certificate of incorporation provides otherwise. If certificate of incorporation prohibits reissuance of retired stock, certificate so stating must be filed. (14 LPRA 2953). No reduction of capital may be made unless assets remaining are enough to pay debts. (14 LPRA 2954).

Any stock of any class is convertible into or exchangeable for any other class or series of stock as stated in certificate or resolution of directors providing for issue. (14 LPRA 2761[e]).

Uncertificated Stock.

Any stock of any class or series may, by resolution of board of directors, be represented by uncertified shares. However, every stockholder upon request is entitled to stock certificate, notwithstanding such resolution. (14 LPRA 2771).

Stock certificates must be signed by chairman or vice-chairman of board or president or vice-president and treasurer or assistant treasurer or secretary or assistant secretary of such corporation. Any or all of signatures may be facsimiles. (14 LPRA 2771).

Issuance of Stock.

Stock may be issued only for cash, labor done, personal property, real property or leases thereof. Stock so issued is deemed fully paid and nonassessable if: (1) Par or stated value allocated to capital is paid in full by type of consideration named above; or (2) balance or “surplus” consideration is supported by binding obligation. (14 LPRA 2762). Board of directors may issue stock as partly paid share. (14 LPRA 2767).

Directors may require payment on 30 days notice, and may sue for payment, or sell, or forfeit stock if payment is not made. (14 LPRA 2769-2770).

Transfer of Stock.

Governed by Art. 8, Uniform Commercial Code. (c. VI). Record date for determination of stockholders of record may not be more than 60 nor less than ten days before meeting. If no record date fixed, date shall be at close of business on day next preceding day on which notice is given, or, if notice waived, at close of business on day next preceding day on which meeting is held. (14 LPRA 2903[a]).

For purposes other than meetings, record date shall not precede date upon which resolution fixing record date is adopted and which date shall not be more than ten days after resolution date. If no record date, date shall be when first written consent is received by corporation or if prior action taken by board, date shall be at close of business on day board adopts resolution taking such prior action. (14 LPRA 2903[b]).

Restrictions.

Written restriction on transfer of security is enforceable if noted conspicuously on security or in notice sent to holders of uncertificated stock and against any person with actual knowledge. Restriction may be imposed by certificate, by-laws, or agreement among security holders or among such holders and corporation. Restriction may obligate holder to offer security to corporation, other holders or any other person; may obligate corporation, any holder, or any person to purchase security; may require corporation's or holders' consent to transfer; or may prohibit transfer to designated persons. Other lawful restrictions on transfer or registration of transfer of securities may be allowed. (14 LPRA 2852).

Uniform Securities Ownership by Minors Act not adopted.

Uniform Simplification of Fiduciary Security Transfers Act not adopted.

Stock Transfer Tax.

None.

Stockholders' Actions.

Stockholder may recover from corporation amount paid by stockholder for any debt of corporation for which corporation is liable. (14 LPRA 3130). In derivative action, stockholder must aver that he was stockholder at time of transaction of which he complains or that stock thereafter devolved upon him by operation of law. (14 LPRA 3131).

Stockholders' Liabilities.

Personal liability for debts of corporation may be imposed to extent and upon conditions specified in certificate; otherwise not liable except as may be by reason of own conduct or acts. (14 LPRA 2602[b][5]). If stock not fully paid, stockholder liable up to sum necessary to complete amount of unpaid balance of consideration for which shares issued. (14 LPRA 2768). No person holding unpaid stock as collateral security shall be personally liable but person pledging stock shall be liable. (14 LPRA 2768[d]). No reduction of capital shall release any liability of any stockholder whose stock has not been fully paid. (14 LPRA 2954[b]).

Stockholders' meetings may be held at such times and such places, either within or without Puerto Rico, as by-laws provide. (14 LPRA 2901[a]).

Annual meeting is required by statute. Failure to hold meeting will not affect otherwise valid corporate acts or work forfeiture or dissolution of corporation. Court may order holding of overdue meeting upon application of any stockholder or director. (14 LPRA 2901[c]).

For record date, see subhead Transfer of Stock, supra.

Written notice required of any meeting at which stockholders required or permitted to take action. Notice must state place, date and hour of meeting and purpose(s) of special meeting. Notice must be given at least ten and not more than 60 days before meeting. (See also, however, subheads Sale or Transfer of Corporate Assets, and Merger and Consolidation, infra.) No notice necessary for adjourned meeting unless adjournment for more than 30 days, new record date fixed, or time and place of adjourned meeting not announced at meeting where adjournment taken. (14 LPRA 2912). Any notice required by statute, certificate of incorporation or by-laws may be waived in writing either before or after meeting. Attendance at meeting is waiver of notice except attendance to object at beginning of meeting that it is not lawfully called or convened. Neither business to be transacted nor purpose of any regular or special meeting need be specified in any written waiver unless required by certificate of incorporation or by-laws. (14 LPRA 2918).

Meeting of stockholders or members of non-stock corporation, and vote on any particular action required or permitted to be taken, may be dispensed with if that number necessary to approve particular action at meeting consent thereto in writing. (14 LPRA 2917). No notice need be given to any person with whom communication is unlawful, or to any stockholder or member of non-stock corporation to whom notice has been mailed and returned undelivered of: (a) two consecutive annual meetings and all notices of meetings and actions by written consent between such annual meetings, or (b) all and at least two dividend or interest payments during 12 month period. (14 LPRA 2919).

Stock ledger is only evidence of who are stockholders entitled to vote or to examine stock ledger. List of stockholders must be open for inspection by any stockholder, for any purpose germane to meeting, during business hours, in city where meeting to be held, at least ten days before meeting and during meeting. (14 LPRA 2909).

One vote allowed for each share of stock unless otherwise provided. Voting may be by proxy granted by stockholder in writing or by some form of electronic transmission to persons acting as proxy. Irrevocable proxies recognized. (14 LPRA 2902). Certificate of incorporation may authorize cumulative voting for all elections of directors or for elections held under specified circumstances. (14 LPRA 2904).

Voting Trusts.

Stockholders may, by agreement in writing, create voting trust for any period. Copy of agreement and any amendments must be filed in registered office of corporation in Puerto Rico, open to inspection of any stockholder or beneficiary of agreement. Certificates of stock or uncertificated stock deposited under said agreement shall be cancelled and new certificates or uncertificated stock issued to voting trustees, in which certificates, if any, and on stock ledger, it must appear that they are issued under agreement. Voting trustees may vote in person or by proxy, but incur no liability as stockholder, trustee, or otherwise, except for individual malfeasance. Majority of voting trustees determine manner of voting, unless otherwise provided in agreement; if equally divided, vote shall be divided equally among trustees. (14 LPRA 2908).

Voting Agreements.

Signed and written agreement between stockholders may provide for stock to be voted as provided in agreement or as parties agree. (14 LPRA 2908).

Directors.

Number of directors (one or more) and any qualifications for position of director (unless otherwise provided, director need not be shareholder), shall be fixed in by-laws or Certificate of Incorporation (one or more). (14 LPRA 2721[b]). Directors may be classified into three groups with different term lengths. (14 LPRA 2721[d]). Any director may be removed by majority of stockholders with right to vote; such removal must be with cause if corporation is one in which directors are classified under (14 LPRA 2721[d]) (unless otherwise provided for in certificate of incorporation) or, under certain circumstances, where corporation has cumulative voting. (14 LPRA 2721[k]).

Director's Meetings.

May take place within or without Commonwealth of Puerto Rico. (14 LPRA 2721[f]). Director may participate in meeting by means other than physical presence. (14 LPRA 2721[h]). Meeting is not necessary for board to take action, as long as such action is ratified. (14 LPRA 2721[e]). Unless otherwise provided for by law, certificate of incorporation or by-laws, majority of directors shall constitute quorum, and majority vote at meeting in which quorum is present shall be sufficient to approve decisions of board of directors. (14 LPRA 2721[j]).

Powers and Duties of Directors.

Corporation's regular business and matters are overseen by board of directors. (14 LPRA 2721[a]). Board may create committees to carry out some of functions of board; however, committees are explicitly prohibited from carrying out some functions of board. (14 LPRA 2721[c]). Unless otherwise provided for in certificate of incorporation or by-laws, board may fix remuneration of directors. (14 LPRA 2721[g]). Must carry out duties in good faith (14 LPRA 2723), and with due loyalty to corporation (14 LPRA 2724), and is responsible for veracity of statements made about corporation (14 LPRA 2727). Where director is interested party, corporation's contracts are not necessarily void or voidable. (14 LPRA 2725). Loans to directors or officers are not prohibited. (14 LPRA 2726). Corporation may indemnify. (14 LPRA 2728).

Liabilities of Directors.

Directors and members of committees are protected in relying in good faith upon books and reports of corporation and representations by its officers and employees. (14 LPRA 2721[i]).

Officers shall be provided for in by-laws or by resolution of board. (14 LPRA 2722[a]). Officers shall continue in office until their successors are duly appointed, or they resign or are removed. (14 LPRA 2722[b]). Failure to elect officers annually will not cause dissolution of corporation. (14 LPRA 2722[c]). One officer shall keep record of all meetings of board of directors and shareholders. Any number of offices may be held by same person. (14 LPRA 2722[a]).

Liabilities of Officers.

No statutory provision.

Indemnification of Directors and Officers.

Corporation may indemnify directors, officials, employees or agents involved in any litigation or proceeding involving corporation, including expenses if he or she acted reasonably and in good faith. (14 LPRA 2728[a]). Indemnity may extend to derivative actions (14 LPRA 2728[b]), and suits or proceedings in which director, officer, employee or agent has succeeded on merits (14 LPRA 2728[c]). If possible, determination of whether to indemnify and extent to which director, officer, employee or agent acted reasonably and in good faith is made by directors who are not parties to proceeding. (14 LPRA 2728[d]). Such indemnity may be made before such determination is made by directors. (14 LPRA 2728[e]). Corporations may purchase indemnity insurance. (14 LPRA 2728[g]).

Principal Office.

Corporation must maintain designated office in Puerto Rico which need not be same as location of corporation's business operations. (14 LPRA 2681). Location of this office may be changed by resolution of board of directors. (14 LPRA 2683).

Registered Agent.

Corporation must have agent, either corporation or individual, that is domiciled in Commonwealth of Puerto Rico and whose office is same as designated office of corporation. (14 LPRA 2682). Corporation may change its agent (14 LPRA 2683), and/or his address (14 LPRA 2684). Where corporation's agent resigns, such resignation must be filed with Secretary of State and be accompanied by sworn declaration. (14 LPRA 2685, 2686). Service of process may be made on registered agent. (14 LPRA 3126).

Dividends.

Subject to any restrictions in certificate of incorporation, directors may declare dividends out of surplus or, if no surplus is available, out of net profits for fiscal year in which dividend is declared and/or preceding fiscal year. No dividends may be declared while capital is impaired to extent that it amounts to less than aggregate amount of capital represented by issued and outstanding stock of all classes having preference on distribution of assets. (14 LPRA 2778[a]). Dividends may be paid in cash, in property, or in corporation's capital stock. If dividend is paid in theretofore unissued capital stock, amount not less than aggregate par value of par value stock being declared as dividend (or amount determined by board of directors for stock without par value) must be transferred from surplus to capital account by resolution of board of directors. (14 LPRA 2781).

Sale or Transfer of Corporate Assets.

Board of directors or governing body as authorized by affirmative vote of majority of voting stock at stockholders' meeting called upon at least 20 days notice or by written consent of majority of voting stock or by majority of members of non-stock corporation having right to vote for election of members of governing body may sell, lease or exchange all or substantially all of corporate assets. Consideration may include money or other property, including stock or securities of any other corporation. Notwithstanding stockholder authorization or consent to proposed sale, lease or exchange of corporation's property and assets, board of directors may abandon such proposed sale, lease or exchange without further action by stockholders or members, subject to rights, if any, of third parties under any contract relating thereto. (14 LPRA 3001).

Books and Records.

Any records maintained in regular course of business, including stock ledger, books of account, and minute books, may be kept by any information storage device if readily convertible into legible form. (14 LPRA 2914). Stockholder of record, in person or by attorney or agent, may, upon written demand under oath stating purpose, inspect for any proper purpose stock ledger, list of stockholders and other books and records and make copies and extracts. Proper purpose means purpose reasonably related to such person's interest as stockholder. If corporation refuses inspection, stockholder may apply to court to compel it. (14 LPRA 2910). Certificate of incorporation may confer upon bond and debenture holders same right of inspection. (14 LPRA 2911). Director may examine stock ledger, list of stockholders and other books and records for purpose reasonably related to his position as director. (14 LPRA 2910[d]).

Reports.

On or before 15th day of Apr., Puerto Rico corporation must make annual report to and on form designated by Secretary of State. Report must be signed by corporation's president and treasurer. (14 LPRA 3271).

Corporate Bonds or Mortgages.

Corporation may issue bonds, and may secure any obligation by mortgage. (14 LPRA 2652[l]). Bondholders may be granted same rights as stockholders have to vote and to inspect corporate books, accounts and records. Certificate of incorporation may provide that holders of debt securities shall be deemed to be stockholders for any voting purposes and it may place exclusive power to vote in hands of bondholders. (14 LPRA 2911). Usury may not be pleaded in defense to any action on bond, note or other evidence of indebtedness. (14 LPRA 3134). Except to extent certificate of incorporation provides otherwise, authorization or consent of stockholders not necessary to mortgage or pledge corporate property or assets. (14 LPRA 3002).

Merger and Consolidation.

Any two or more Puerto Rico corporations may merge pursuant to resolution of board of directors (14 LPRA 3051) approved by vote of majority of total number of outstanding shares of capital stock of each corporation. Stockholder vote may be at annual or special meeting. (14 LPRA 3051[c]). Notice must be mailed to each stockholder at least 20 days prior to meeting. Certified agreement must be filed with Secretary of State. In lieu of filing full agreement, surviving or resulting corporation may file certificate of merger or consolidation. (14 LPRA 3051[c]). Agreement may contain provision permitting termination or certain modifications agreement any time prior to filing with Secretary of State by board of any corporation notwithstanding approval of stockholders. (14 LPRA 3051[d]). Except to extent certificate of incorporation provides otherwise, no vote of stockholders of surviving corporation necessary: (1) If agreement does not amend certificate of incorporation of surviving corporation, (2) if each share of stock of surviving corporation outstanding prior to merger is to be identical or treasury share of stock of surviving corporation after merger, and (3) either no shares of common stock of surviving corporation and no shares, securities or obligations convertible into such stock are to be issued or delivered under plan of merger, or authorized unissued shares or treasury shares of common stock of surviving corporation to be issued or delivered under plan of merger plus those initially issuable upon conversion of any other shares, securities or obligations to be issued or delivered under plan do not exceed 20% of common stock of constituent corporations outstanding prior to merger. No vote of stockholders is necessary if no stock of such corporation has yet been issued. (14 LPRA 3051[f]).

Surviving or resulting corporation possesses all rights, privileges, powers and franchises and is subject to all restrictions, disabilities and duties of each constituent corporation. All property and debts of each corporation are vested in surviving or resulting corporation. All rights of creditors and liens upon property survive. (14 LPRA 3059). Merger does not abate actions against any constituent corporation. (14 LPRA 3061). Surviving or resulting corporation may issue bonds to cover payments or obligations in effecting merger and may mortgage its franchise, rights, privileges and property to secure bonds. (14 LPRA 3060).

Puerto Rico corporation may merge or consolidate with one or more U.S. corporations if law of state of incorporation of U.S. corporation permits. (14 LPRA 3052[a]). If surviving or resulting corporation is to be governed by laws of another state, it must consent to be served with process in Puerto Rico in any proceeding for enforcement of any obligation of any constituent Puerto Rico corporation or of any obligation of surviving or resulting corporation arising from merger, including suit for appraisal rights. Process may be served on Secretary of State. (14 LPRA 3052[d]). Puerto Rico corporation may merge or consolidate with non-U.S. corporation if law of other jurisdiction permits it. (14 LPRA 3052[a]).

Parent company may merge with or into 90% or more owned subsidiary on filing certificate setting forth resolution of board of directors (14 LPRA 3053), but, if Puerto Rico corporation party to merger is not wholly owned by parent, stockholders have appraisal rights under law. (14 LPRA 3053[d]). (See subhead Appraisal, infra.) And, if parent corporation is not surviving corporation, approval of majority of outstanding stock of parent is necessary. (14 LPRA 3053[a]).

Dissolution.

If corporation has not issued stock or commenced business, majority of incorporators or directors, if they have been named or elected, may surrender corporation's rights and franchises by filing with Secretary of State certificate that no stock has been issued or business has not been begun; that no part of capital has been paid or, if some has been paid, that amount less disbursements for necessary expenses has been returned; that if corporation has begun business but has not issued stock, all debts have been paid; that if corporation has not begun business but has issued certificates that all issued stock certificates have been surrendered and cancelled; and that all rights and franchises of corporation are surrendered. Upon filing certificate, corporation is dissolved. (14 LPRA 2603, 3004).

Dissolution of any corporation may be effected by resolution of directors followed by approval of majority of outstanding voting stock at stockholder meeting for which notice has been mailed to each stockholder having voting power. Dissolution may also be effected by unanimous written consent of stockholders having voting power. Certificate of dissolution must be filed with Secretary of State. (14 LPRA 2603, 3005).

Corporate existence continues for three years, or longer period as court directs, after dissolution for prosecuting and defending suits, settling business, disposing of property, discharging liabilities and distributing assets to stockholders. (14 LPRA 3008). Court may appoint one or more directors as trustees or may appoint receivers to wind up business. (14 LPRA 3009). Suits begun by or against corporation prior to or within three years after dissolution shall proceed until fully disposed of. (14 LPRA 3008).

Joint Venture Having Two Stockholders.

If stockholders each own 50% of stock and are unable to agree on desirability of discontinuing venture, either stockholder may file with court petition and proposed plan for discontinuance along with certificate that petition and plan have been transmitted in writing to other stockholder. If within three months stockholders do not file certificate that plan agreed to and within one year certificate that distribution of assets completed, court may dissolve corporation and appoint trustees or receivers to wind up affairs. Either or both periods may be extended by agreement of stockholders with certificate filed in court prior to expiration of period. (14 LPRA 3003).

Revocation.

At any time within three years, or such longer period as court may have directed, following voluntary dissolution, revocation thereof may be effected by resolution of directors, and majority vote at noticed special meeting of outstanding stockholders entitled to vote before dissolution. Certificate stating name of corporation, names and addresses of officers and directors, and affirmative vote of majority of stockholders or in lieu of vote written consent of stockholders must be acknowledged and filed with Secretary of State. Secretary of State's certificate that corporation has revoked dissolution will be recorded in Department of State. (14 LPRA 3101).

Forfeiture of Charter.

Charter may be forfeited in court for abuse, misuse or nonuse of its powers, privileges or franchise on motion of Secretary of Justice. No proceeding for nonuse will be brought during first two years of incorporation. (14 LPRA 3013).

Renewal or Revival of Certificate of Incorporation.

Any corporation may, at any time before expiration of time limited for its existence, and any corporation whose certificate of incorporation has become inoperative for nonpayment of taxes, has expired for failure to renew same or has been renewed invalidly, has expired due to non-appointment of successor registered agent within 60 days after resignation by registered agent, may at any time procure renewal or revival of its certificate of incorporation by filing with Secretary of State certificate stating: name of corporation and date of filing of its original certificate of incorporation, name and office address of registered agent; whether renewal is to be perpetual, and, if not, length of its existence; in case of renewal before expiration of time limited for its existence, date when such renewal is to commence, which must be prior to date of expiration of old certificate of incorporation; that corporation was duly organized in Puerto Rico; date when certificate would expire or other facts showing certificate has been forfeited or become void; that certificate is filed by authority of those on board at time certificate expired or those elected to replace such directors. Renewal or revival validates all lawful acts done before or during period when certificate of incorporation was inoperative or void. All taxes, penalties and interest due at time certificate of incorporation became void or expired must be paid, but in case of corporation which has been inoperative for more than five years, it shall instead pay sum equal to two times amount of annual fee that would be due and payable by such corporation for year in which renewal or revival is effected, computed at then current rates. (14 LPRA 3102).

Close Corporations.

If certificate of incorporation states in heading that it is close corporation (14 LPRA 3204[a]) and provides that all issued stock is not to be held by more than 35 persons, that all issued stock is subject to one or more restrictions on transfer permitted by 14 LPRA 2852, and that corporation may not offer any stock at “public offering” within meaning of Securities Act of 1933, as amended, then corporation may be organized as close corporation (14 LPRA 3204[b]). Existing corporation may become close corporation by amending certificate of incorporation to comply with 14 LPRA 3201 et seq. Heading of amendment must state it is close corporation. Amendment must be approved by vote of two-thirds of outstanding shares of each class of stock. (14 LPRA 3205). Corporation may terminate status as close corporation by amending certificate of incorporation to delete pertinent provisions. Amendment must be approved by two-thirds of outstanding shares of each class of stock unless certificate requires greater than two-thirds vote to terminate. (14 LPRA 3214). If any of required provisions are breached, corporation's status as close corporation is terminated unless within 30 days of breach or within 30 days of its discovery, whichever is later, corporation files certificate stating breached provision has ceased to be applicable, furnishes copy of this certificate to each stockholder, and takes steps necessary to correct situation threatening its status as close corporation, including refusal to register wrongfully transferred stock. Upon suit by corporation or stockholder, court may enjoin or set aside any act inconsistent with required provisions. (14 LPRA 3219).

If stock certificate conspicuously notes qualifications or number of persons entitled to be holders of record and stock is issued or transferred in breach of qualifying conditions, person taking is presumed to have notice of ineligibility. Corporation may then refuse to register transfer unless all stockholders consent to transfer or corporation amends certificate of incorporation. (14

LPRA 3206). If restriction on transfer shall be found not authorized by 14 LPRA 2852, corporation has option for 30 days after judgment is final to acquire restricted security at price agreed on by parties or at fair value as determined by court. (14 LPRA 3207).

Written agreement among majority of stockholders is not invalid on grounds of restricting discretion or powers of directors. Agreement places liability for managerial acts or omissions on stockholders, who are parties to agreement, rather than directors as long as agreement in effect. (14 LPRA 3209). Certificate of incorporation may provide business of close corporation to be managed by stockholders. Meeting of stockholders need not be called to elect directors. Unless context requires otherwise, stockholders are deemed directors for applying provisions of corporate law, and are subject to all liabilities of directors. (14 LPRA 3208).

No written agreement among stockholders or provision of certificate of incorporation or by-laws is invalid on ground it is attempt to treat corporation as partnership. (14 LPRA 3210).

Certificate of incorporation may grant to any stockholder or holders of any specified number or percentage of stock option to have corporation dissolved. Stockholder must give written notice of exercise of option to all other stockholders and 30 days thereafter dissolution shall commence. (14 LPRA 3211[a]).

Certificate may be amended to include such provision by affirmative vote of holders of all outstanding stock with or without voting power unless certificate authorizes such amendment by at least two-thirds vote. If such provision is in effect, it must be noted conspicuously on each stock certificate. (14 LPRA 3211[b], [c]).

Court may appoint custodian upon application of any stockholder if stockholders are deadlocked or if petitioning stockholder has right of dissolution under 14 LPRA 3211, 3215[a]. In lieu of custodian, court may appoint provisional director. (14 LPRA 3215[b]). Provisional director must be impartial and cannot be stockholder or creditor of corporation or affiliate. Provisional director has same rights and powers as elected director until removed by court, by majority vote of stockholders, or by two-thirds vote of class of stockholders which filed application for his appointment. (14 LPRA 3216).

Appraisal.

If proposed merger for which appraisal rights are provided is submitted at stockholder meeting, corporation must give at least 20 days notice to each stockholder of record on date of meeting who is entitled to appraisal, and must include copy of 14 LPRA 3062. Each stockholder electing appraisal must make written demand prior to vote on merger. Demand sufficient if it reasonably informs corporation of stockholder's identity and his intent to demand appraisal. Notice must be given to stockholders of effective date of merger. (14 LPRA 3062[d][1]). Similar procedure for action where there is no meeting, or for shares of subsidiary Puerto Rico corporation where parent merges with or into 90% to 100% owned subsidiary. Appropriate notice of appraisal rights must be given within ten days after merger. (14 LPRA 3062[d][2]). Any stockholder who has complied with foregoing may, within 120 days after merger, petition court demanding valuation of stock of such stockholder, but stockholder may withdraw demand and accept offered terms within 60 days after merger. (14 LPRA 3062[e]). Upon application of stockholder for appraisal proceeding, court may order expenses, including attorney's fees and expenses of experts, to be charged pro rata against value of shares entitled to appraisal. (14 LPRA 3062[j]). Appraisal not available to holders of stock of any class which is registered on national securities exchange or designated as national market system security on interdealer quotation system by National Association of Securities Dealers, Inc. or held of record by more than 2,000 stockholders (14 LPRA 3062[b][1]) or to stockholders of corporation surviving merger if merger did not require vote of stockholders of surviving corporation. (See subhead Merger and Consolidation, supra.) Above restrictions on appraisal not applicable to holders of class or series of stock of constituent corporation if under terms of merger or consolidation pursuant to 14 LPRA

3051, 3052, 3054, 3057, and 3058, such holders are required to accept for such stock anything except: (a) Stock of corporation surviving or resulting from merger or consolidation, (b) stock of any other corporation which at record date were either registered on national securities exchange or designated as national market system security on interdealer quotation system by National Association of Securities Dealers, Inc. or held of record by more than 2,000 stockholders, (c) cash in lieu of fractional shares of stock corporation described in (a) and (b), or (d) combination of stock and cash in lieu of fractional shares as set forth in (a), (b), and (c). (14 LPRA 3062[b][2]). Corporation in charter may provide for appraisal in transactions other than mergers. (14 LPRA 3062[c]).

Foreign Corporations.

No foreign corporation may do business in Puerto Rico until it files with Secretary of State certificate evidencing its corporate existence and stating name and address of its registered agent, its assets and liabilities and business it proposes to do in Commonwealth, and pays fee of $100. Certificate of Secretary of State is prima facie evidence of company's right to do business in Commonwealth. (14 LPRA 3162, 3165).

Certificate containing all charter amendments and all articles of merger or consolidation must be filed with Secretary of State within 30 days of amendment, or merger. (14 LPRA 3167).

Foreign corporation is not deemed to be doing business in Puerto Rico and need not comply with 14 LPRA 3162 if it is mail order business accepting orders outside Puerto Rico; if it employs salesmen in Puerto Rico but approves orders outside Puerto Rico, with all goods shipped from outside Puerto Rico; if it creates, as borrower or lender, or acquires evidences of debt, mortgages or liens on real or personal property; if it secures or collects debt or enforces any rights in property by securing same. (14 LPRA 3164).

Annual report must be filed on or before Apr. 15 each year with Secretary of State. Report must be signed by president or vice-president and treasurer or assistant treasurer. (14 LPRA 3271). Failure to file report within any two year period may result in termination of right to do business in Puerto Rico. (14 LPRA 3169).

Service of process upon qualified corporation may be made on registered agent or, if there is no such agent, on any officer, director or other agent of corporation then in Puerto Rico. If such service is impossible, service may be made upon Secretary of State. (14 LPRA 3172). Service of process upon non-qualifying corporation transacting business in Puerto Rico may be made on Secretary of State. (14 LPRA 3174). Provisions of 14 LPRA 3164 shall not apply in determining whether any foreign corporation is transacting business in Puerto Rico for purpose of service of process. (14 LPRA 3164[b]).

Unqualified foreign corporation, not excepted by 14 LPRA 3164, may not maintain any action or special proceeding in Puerto Rico until it has become authorized to do business in Puerto Rico. Failure to qualify will not prevent foreign corporation from defending any action or special proceeding in state or impair validity of any contract or act. (14 LPRA 3163).

Withdrawal.

Foreign corporation qualified to do business in Puerto Rico may withdraw by filing with Secretary of State address to which process against corporation may be mailed and (1) certificate under corporate seal, signed by president or vice-president, attested by secretary or assistant secretary, surrendering authority to do business; or (2) certified copy of certificate of dissolution; or (3) certified copy of order or decree of dissolution. (14 LPRA 3173).

Penalties.

Court may enjoin any foreign corporation from doing business in Puerto Rico if corporation not qualified or if certificate of authority secured by false or misleading representations. (14 LPRA 3163[e]). Foreign corporation doing business of any kind in Puerto Rico without complying with provisions for foreign corporations subject to fine. (14 LPRA 3175).

Taxation of Corporate Property.

No special rules. See category 22 Taxation, topic Real and Personal Property Taxes.

Income Tax.

See category 22 Taxation, topic 22.11 Income Tax.

Professional Corporations.

May be formed by person performing personal services to public which require obtaining of license or other legal authorization and which formerly by reason of law could not be performed by corporation. (14 LPRA 3401 et seq.). Other than rendering professional services, professional corporations may not conduct any business. (14 LPRA 3407).

Deeds.

See category 21 Property, topic 21.06 Deeds.

Nonprofit Corporations.

(14 LPRA 3421 et seq.).

Organization.

Defined as corporation not authorized to issue stock whose income may not be distributed among its members, directors and officers, except upon liquidation of mutual benefit nonprofit corporations, such as labor unions, chambers of commerce and professional associations. This limitation does not prohibit reasonable compensation for services rendered by directors, officers or members to corporation. Organized under general corporation law and, in addition to general purpose clause, certificate of incorporation must state general nature of services or purposes for which organized, as well as disclose services to be rendered selecting from following activities: social services, legal defense, education, research and investigation, health services, art and culture, recreation and sports, housing services, environmental services, economic, social and community services, grant making, international activities, religious services, institutional services, or other services. Certificate of incorporation also must indicate type of organization selecting from following: professional organization, social club, civic organization, religious organization, foundation, community-based organization, philanthropic organization, or institutional services.

Members.

Certificate of incorporation to provide if corporation is to have members in addition to board of directors and officers.

Administration and Quorum.

Corporation administered as general purpose corporation and quorum for transaction of business and decisions shall be not less than one third of members of governing body.

Derivative Litigation.

Commonwealth Secretary of Justice has standing to file derivative actions against directors and members of corporation.

Model Nonprofit Corporation Act not adopted.

2.04 FOREIGN CORPORATIONS:

See topic 2.03 Corporations.

2.05 JOINT STOCK COMPANIES:

No statutory provision.

Massachusetts Trusts.

Permissible under Trust Act. (31 LPRA 2541-2581).

2.06 LIMITED LIABILITY COMPANIES:

Puerto Rico Limited Liability Company Act (“Act”) (14 LPRA 3426 et seq.) permits formation of limited liability company (“LLC”). Corporations engaged in specified activities can also qualify as special partnerships whose shareholders enjoy limited liability. See category 22 Taxation, topic 22.11 Income Tax, subhead Rates, catchline Special Partnerships.

General Supervision.

Secretary of State, Corporate Division, (http://www.estado.gobierno.pr/).

Certificate of Formation Requirements.

One or more persons may form LLC. To form, one or more authorized persons must execute certificate of formation (“Certificate”), which must be filed with Secretary of State (“Secretary”). Certificate must state LLC's: (a) Name, (b) address of registered office and name and address of registered agent for service of process, and (c) other desired provisions. (14 LPRA 3426k).

Name.

LLC's name must include words “Limited Liability Company” “Compañía de Responsabilidad Limitada” or abbreviation, “L.L.C.”, “C.R.L.” or designation “LLC” or “CRL”. LLC's name must be distinguishable from name filed by any other entity reserved, registered, formed or organized under Puerto Rico law or qualified to do business or registered as foreign corporation or foreign LLC in Puerto Rico, unless written consent of other entity is obtained and filed with Secretary. (14 LPRA 3426a). Name may be reserved by filing executed application and filing fee of $75 with Secretary. (14 LPRA 3426b; 14 LPRA 3443[a][1]).

Purpose.

LLC may carry on any lawful business purpose unless proscribed by Constitution and laws of Puerto Rico. (14 LPRA 3426e).

Registered Office and Registered Agent.

LLC must maintain registered office in Puerto Rico. LLC must maintain resident agent in Puerto Rico to accept service of process. Change of address of LLC's registered office or of identity of LLC's registered agent must be filed with Secretary along with fee of $50. (14 LPRA 3426c; 14 LPRA 3443[a][2]).

Amending Certificate.

Amendment of Certificate must state: (a) Name of LLC and (b) amendment to Certificate. Certificate of amendment is filed with Secretary and is effective on filing date, unless later time is specified. Corporation Law governs. (14 LPRA 2952; 14 LPRA 3426k).

Powers.

LLC may carry on any lawful business, purpose or activity. LLC may exercise all powers and privileges granted by Act or any other law or by its limited liability company agreement (“Agreement”), with any powers incidental thereto. (14 LPRA 3426e).

Limited Liability Company Agreement.

Any action to interpret, apply, or enforce Agreement, duties of LLC to managers and members, duties or managers and members to LLC, duties among managers and members, or rights and restrictions of LLC may be brought in Court of First Instance. (14 LPRA 3426j).

Limited Liability Company Interest.

LLC interest (“Interest”) is member's share of profits and losses of LLC and member's right to receive distributions of LLC's assets. (14 LPRA 3426i).

Limited Liability.

Unless Agreement provides otherwise, no member or manager of LLC is personally liable for LLC's obligations solely by reason of being member or manager. (14 LPRA 3427b).

Management.

Unless otherwise provided in Agreement, LLC shall be managed by its members in proportion to their then current percentage or other interest in LLC's profits owned by all of members, with decision of those owning more than 50% of such percentage or interest controlling. Agreement may provide for management, in whole or in part, by manager, chosen by members as provided in Agreement. Unless Agreement provides otherwise, each member and manager has authority to bind LLC. LLC may have more than one manager. (14 LPRA 3428a). Manager who is also member has rights and powers, and is subject to restrictions and liabilities, of manager and, except as provided in Agreement, is subject to restrictions and liabilities of members to extent of his participation in LLC as member. (14 LPRA 3428b). Agreement may provide for classes or groups of managers and specify their relative rights, powers and duties including rights to vote. Agreement may provide for taking of action, including amendment of Agreement, without vote or approval of any manager or class or group of managers. Unless prohibited by Agreement, managers may take action by written consent to act by proxy and such proxy may be granted in writing, by means of electronic transmission or as otherwise permitted by applicable law. (14 LPRA 3428c).

Manager and member are protected by good faith reliance on LLC's records, and upon other information presented to LLC by any of its managers, members, officers, committees or employees, or by any other person, as to matters manager reasonably believes are with such other person's professional or expert competence and, who has been selected with reasonable care by or on behalf of LLC. (14 LPRA 3428e). Agreement may specify penalties or consequences for failure of manager to comply with terms of Agreement or upon happening of specified events. (14 LPRA 3428d).

Upon application of member or manager, Court of First Instance may determine validity of admission, election, appointment, removal or resignation of manager, right of persons to serve as managers, and result of any vote of members or managers. (14 LPRA 3426i). Unless Agreement provides otherwise, members and managers may delegate rights and powers to manage and control. Such delegation shall not alter manager's or member's power to control LLC. (14 LPRA 3428f).

Members.

Person may become member of LLC and receive interest therein without making contribution or being obligated to make contribution to LLC. Unless Agreement provides otherwise, person may become member without acquiring interest in LLC. Unless Agreement provides otherwise, member shall have no preemptive right to subscribe to any additional issue of interest or other interests in LLC. (14 LPRA 3427d). Contribution of member to LLC may be in cash, property, services or promissory note or other obligation to contribute cash, property or services. (14 LPRA 3429a[a]). Member failing to contribute agreed property or services for any reason must, at option of LLC, contribute cash equal to agreed value (as stated in LLC's records) of contribution not made. Unless Agreement provides otherwise, member's obligation to make contribution or return money or other property paid or distributed in violation of this chapter may be compromised only by consent of all other members. Creditors may under certain circumstances enforce member's obligation to make contribution or return money or other property to LLC regardless of consented compromise. Member's LLC interest may be reduced, eliminated, or subordinated to nondefaulting members, or subject to other penalties or consequences, for failure to pay contribution obligation if Agreement so provides. (14 LPRA 3429a[c]).

Profits and losses of LLC shall be allocated among members, and among classes or groups of members, as provided in Agreement. In absence of Agreement, profits and losses shall be allocated on basis of agreed value (as stated in LLC's records) of contributions made by each member to extent received by LLC and not returned. (14 LPRA 3429b).

Unless Agreement provides otherwise, distributions shall be made to members, and among classes or group of members on basis of agreed value (as stated in LLC's records) of contributions made by each member to extent received by LLC and not returned. (14 LPRA 3429c). No obligation of member or manager to LLC shall be subject to defense of usury. (14 LPRA 3429d).

Distribution (not including amounts constituting reasonable compensation for present or past services, retirement plan, or benefit program) not allowed if, after distribution, all liabilities of LLC, other than liabilities to members on account of their interests and liabilities for which recourse of creditors is limited to specified property of LLC, exceed fair value of its assets, except that fair value of property subject to liability for which recourse of creditors is limited must be included in assets of LLC only to extent that fair value of that property exceeds that liability. If member knowingly receives improper distribution, LLC may recover amount for up to three years. After three years such member shall not be subject to liability under this chapter unless action to recover sum was commenced before expiration of three-year period and such member was found liable as result of that action. (14 LPRA 3430f).

Member's interest is personal property and member has no interest in specific property of LLC. (14 LPRA 3431). Member's interest is assignable in whole or in part except as provided in Agreement. Unless provided in Agreement, assignment of interest does not entitle assignee to become or exercise any rights or powers of member; however assignment entitles assignee to share in such profits, losses, distributions, allocation of income, gain, loss, deduction, or credit or similar item to which assignor was entitled, to extent assigned. Member ceases to be member and to have power to exercise any rights or powers of member upon assignment of all his interest. Unless Agreement provides otherwise, pledge of, or granting of security interest, lien or other encumbrance in or against any or all interest of member shall not cause member to lose membership or power to exercise any rights or powers thereof. Unless provided in Agreement, member's interest in LLC may be evidenced by certificate of membership issued by LLC. Agreement may provide for assignment or transfer of any LLC interest represented by such certificate and make other provisions with respect to such certificate. Unless Agreement provides otherwise, assignee is not liable as member solely because of assignment. Unless Agreement provides otherwise, LLC may acquire any interest of member or manager, after which interest will be deemed cancelled. (14 LPRA 3431a). Assignee of member may become member as provided in Agreement and upon: (a) approval of all members of LLC other than assignor, or (b) compliance with any procedure specified in Agreement. Assignee who becomes member has rights and powers to extent assigned and is subject to restrictions and liabilities as provided in Agreement. Assignee-member is subject to assignor's liability to make contribution under § 14-3429a, but not under § 14-2851-2868 of Act. Assignee not subject to liabilities including that of assignor to make contribution under § 14-3429a if assignee did not know about obligations at time he became member and such obligations could not be ascertained from Agreement. (14 LPRA 3431c[b]).

Service of Process, Manager or Member.

Member or liquidating trustee may be served with process in all civil actions or proceedings brought in Puerto Rico even if he is not manager or liquidating partner at time suit is commenced. Serving as manager or liquidating trustee is consent to appointment of LLC's registered agent, or, if none, Secretary being such person's agent upon whom service of process may be made. Serving as manager or liquidating trustee shall also constitute consent that service of process in compliance with this section is valid and of legal force as if served upon such manager or liquidating trustee. (14 LPRA 3426h, 3126-3134).

Records.

Member may, subject to reasonable standards as set forth in Agreement or otherwise established by manager or, if no manager, then by members, obtain from LLC upon reasonable demand for any purpose reasonably related to member's interest as member of LLC: (a) Information regarding status of LLC's business and financial condition, (b) LLC's federal, state and local income tax return for each year, (c) current list of name and last known business, residence or mailing address of each member and manager, (d) copy of any written Agreement and Certificate and amendments thereto, as well as copies of any written powers of attorney by which such documents have been executed, (e) information regarding amount of cash and description and statement of agreed value of any other property or service contributed by each member and which each member has agreed to contribute in future, and date on which each became member, and (f) any other information that is reasonable. (14 LPRA 3427c[a]). Manager may also examine any of foregoing for purpose reasonably related to his position as manager. (14 LPRA 3427c[b]).

Manager may keep confidential from members for reasonable period of time any information which manager reasonably believes to be in nature of trade secrets or other information disclosure of which manager in good faith believes is not in best interest of LLC or could damage LLC or its business or which LLC is required by law or agreement with third party to keep confidential. (14 LPRA 3427c[c]).

Any action to enforce any right under § 14-3427c shall be brought in Court of First Instance which is vested with exclusive jurisdiction to determine whether person seeking information under § 3427c is entitled to such information. Court may order LLC to permit member access to information of subsection (a)(3) on condition that member first pay cost of obtaining information. Court may impose other conditions, limitations and restrictions it finds appropriate. (14 LPRA 3427c[f]).

Rights of member or manager to obtain information may be restricted in original Agreement or in any subsequent amendment approved or adopted by all members and in compliance with Agreement. (14 LPRA 3427c[g]).

Derivative Actions.

Member or assignee of LLC interest may bring action in Court of First Instance on behalf of LLC to recover judgment in its favor if: (a) Managers or members with authority to do so have refused to bring action; or (b) if effort to cause those members or managers to bring action is not likely to succeed (14 LPRA 3433); and (c) plaintiff is member or assignee at time of transaction of which he complains or plaintiff's status as member or assignee of LLC interest devolved upon him by operation of laws or by terms of Agreement from person who was member at time of transaction. (14 LPRA 3433a). Complaint shall state with particularity effort, if any, of plaintiff to secure initiation of action by manager or reasons for not making such effort. (14 LPRA 3433b). If derivative action is successful, in whole or in part, by judgment, compromise or settlement, court may award plaintiff reasonable expenses, including attorney's fees, from any recovery in such action or from LLC. (14 LPRA 3433c).

Resignation.

Member may resign from LLC only at time and in manner specified in Agreement. Notwithstanding anything to contrary under applicable law, unless provided for in Agreement, member may not resign prior to dissolution and winding up of LLC. (14 LPRA 3430b). Upon resignation from LLC, member is entitled to receive such distribution as is provided in Agreement and except as otherwise provided, member shall receive within reasonable time after resignation, fair value of member's interest as of date of resignation based upon his right to share in distributions from LLC. (14 LPRA 3430c).

Voting.

Agreement may provide for classes or groups of members and their relative rights, powers and duties. Agreement may grant to all or certain identified members or specified class or group of members right to vote separately or with all or any class or group of members or managers, on any matter. Voting by members may be on per capita, number, financial interest, class, group or any other basis. Agreement may provide for taking of action, including amendment to Agreement, without vote or approval of any member or class or group of members. Unless otherwise provided, members may vote by proxy or in person and such proxy may be granted in writing, by means of electronic transmission or as otherwise permitted by applicable law. (14 LPRA 3426p). Upon application of member or manager, Court of First Instance may determine results of any vote pursuant to Agreement. Court may also determine validity of admission, election, appointment, removal or resignation of LLC manager. (14 LPRA 3426i).

Merger and Consolidation.

LLC may merge with or into one or more domestic LLC or “other business entities” formed or organized under laws of Puerto Rico or any other state or foreign country or other foreign jurisdiction following procedures for corporations under c. 10 of General Corporation Law. (14 LPRA 3426l; 14 LPRA 3051 et seq.).

Domestication.

Non-U.S. entity may become domesticated LLC upon approval of jurisdiction governing internal affairs of entity and upon filing with Secretary certificate of domestication which states: (i) Date on which and jurisdiction where entity came into being; (ii) name of entity immediately prior to filing of certificate of domestication; (iii) name of limited liability company set forth in certificate of formation that complies with c. I and has been executed by one or more authorized persons in accordance with § 14-3426k; (iv) future effective date of domestication as LLC if not to be effective upon filing of certificate of domestication; and (v) jurisdiction that constituted seat, siege social, or principal place of business or central administration of non-U.S. entity immediately prior to filing of certification of domestication. Obligations and liabilities of domesticating non-U.S. entity become attached to and may be enforced against domestic LLC. (14 LPRA 3426m).

Rights or securities of, or interests in, non-U.S. entity to be domesticated may be exchanged for or converted into cash, property, rights or securities of, or interests in, domestic LLC or other entity. (14 LPRA 3426m[j]).

Transfer.

Domestic LLC may transfer to any jurisdiction, other than any state, that permits transfer to, domestication or continuance in such jurisdiction of LLC, and, in connection therewith, may elect to continue as domestic LLC, which must be approved in writing by all of managers and members of LLC unless otherwise provided in Agreement, and which shall occur upon filing of certificate of transfer or certificate of transfer and continuance with Secretary which shall state: (i) Name of LLC; (ii) date of filing of original certificate of formation; (iii) jurisdiction to which LLC shall transfer or be domesticated; (iv) future effective date or time of transfer or domestication, if not upon filing of certificate; (v) approval of transfer or continuance in accordance with § 14-3426n; (vi) agreement to service of process in Puerto Rico and appointment of Secretary as agent to accept service of process; (vii) address to which service of process shall be sent by Secretary; and (viii) in case of continuance as domestic LLC, statement of continuance. Transfer or domestication out of Puerto Rico does not affect liabilities incurred prior to transfer. Rights or securities of, or interests in, LLC may be exchanged for or converted into cash, property, rights or securities of, or interests in, business form in which LLC will exist in such other jurisdiction as consequence of transfer or another business form. (14 LPRA 3426n).

Conversion.

Any other entity may convert to domestic LLC upon: (i) Approval of conversion to LLC in manner provided for by document governing internal affairs of entity; (ii) filing of certificate of conversion to LLC that has been executed by one or more authorized persons in accordance with § 14-3426o; and (iii) filing of certificate of formation that complies with § 14-3426o and has been executed by one or more authorized persons in accordance with § 14-3426o.

Series of Members.

Agreement may establish or provide for establishment of designated series of members, managers of LLC interests having separate rights, powers and duties with respect to specified property or obligations or profits and losses of LLC. (14 LPRA 3426p).

Dissolution and Winding Up.

LLC is dissolved and its affairs wound up following procedures in c. IX of General Corporation Law. (14 LPRA 3432; 14 LPRA 3001-3015). Upon petition of any member or administrator, Court of First Instance may order dissolution and winding up upon determination that it is not reasonably possible to continue affairs of LLC in accordance with Agreement. (14 LPRA 3432a).

Foreign LLC Qualifications.

Foreign LLC's internal affairs and liability of its members and managers governed by law of state, territory, possession, or other jurisdiction or country of organization. Foreign LLC will not be denied registration in Puerto Rico based on any difference between laws of LLC's place of organization and Puerto Rico law. Foreign LLC may carry on any lawful business, purpose or activity, except where prohibited by laws of Puerto Rico and shall possess same powers and privileges, together with any powers incidental thereto, as Act grants to domestic LLCs. (14 LPRA 3438). Before doing business in Puerto Rico, foreign LLC must register with Secretary. To register, foreign LLC must pay requisite fee and application for registration signed by authorized person setting forth same information required of foreign corporations provided in c. 13.10 of General Corporation Law. (14 LPRA 3161 et seq.).

2.06A LIMITED LIABILITY PARTNERSHIPS:

Limited Liability Partnerships Act. (10 LPRA 1861 et seq.).

General Supervision.

Secretary of State, Corporate Division, (http://www.estado.gobierno.pr/). (10 LPRA 1862).

Formation.

Two or more natural persons must execute and file copy of partnership's deed of constitution with Secretary of State. (10 LPRA 1861[b]; 1862[a]). Public deed required for domestic partnership. See category 21 Property, topic 21.06 Deeds.

Purposes.

May be organized for any lawful business, including professional services. (10 LPRA 1861[b]; 1866).

Name.

Must contain “limited liability partnership” (“sociedad de responsabilidad limitada”), or “LLP” or “L.L.P.” (“SRL” or “S.R.L.”). (10 LPRA 1863).

Articles of Organization.

Must include name of partnership, address of principal place of business, name and address of managing partner, names and addresses of partners and brief description of business for which it is organized. (10 LPRA 1862[a]).

Registered Agent.

Must name person in Puerto Rico authorized to receive service of process. (10 LPRA 1862[c]).

Liability.

Partner will not be liable for obligations of partnership nor for those that may arise as result of negligent or unlawful acts committed by another partner or employee who is not under his supervision or direct control, provided such partner did not have prior notice or knowledge of act. (10 LPRA 1867).

Foreign Limited Liability Partnerships.

Are recognized and must qualify with Secretary of State to do business in Puerto Rico. (10 LPRA 1861[c]; 1862[b]).

Filing Fees.

$110 for filing of Articles of Organization.

2.07 [RESERVED]

2.08 PARTNERSHIPS:

(10 LPRA 1036, 1341; 31 LPRA 4284).

General.

Term “partnership” is misleading translation of Spanish word “sociedad.” Civil Law “sociedad” is juridical entity separate from partners forming same. Assumption that common law partnership is same as civil law “sociedad” misleading.

For requirements as to limited liability partnerships see topic 2.06A Limited Liability

Partnerships.

Formation.

No special formalities, except for Special Partnerships and when agreement is to be recorded or partnership owns or will own immovable property, formation must be by public deed. See category 21 Property, topic 21.06 Deeds. Registration not required, but mercantile partnerships and limited partners, do not, as to third persons, enjoy protection of partnership contract unless same recorded in Mercantile Registry. Recording fee of $1 per $1,000 of capital to $10,000, and 50¢ per $1,000 above $10,000, applies. (10 LPRA 1033, 1046).

Name.

No requirement as to filing of certificate as to name. (10 LPRA 1362; 10 LPRA 1392).

Rights and Liabilities of Partners Inter Sese.

(31 LPRA 4341, et seq.). Every partner is debtor for his contribution to partnership, and failure to effect same justifies interests and damages. Partners have unlimited and joint liability for losses, damages, disbursements and obligations. If management of business is not placed in hands of one or more partners, all have voice in administration. (31 LPRA 4357). Without express agreement no partner can on his own personal account engage in same kind of business as partnership.

Rights and Liabilities of Partners as to Third Persons.

(31 LPRA 4371, et seq.). Partnership is liable to third person for acts of partner if latter acted for partnership's account, had powers to bind partnership and acted within apparent scope of his authority. Partners may limit liability for unauthorized acts, if partnership contract is registered; otherwise, each is liable for debts of partnership, but creditors of partnership must exhaust remedies against partnership assets before proceeding against partners individually.

Dissolution.

(10 LPRA 1454, et seq.; 31 LPRA 4391 et seq.). Partnership may be dissolved upon: (1) expiration of stipulated term; (2) entire loss of capital; (3) failure of partnership; (4) death of general partner, unless articles provide succession by heirs or that partnership shall be continued by surviving partners; (5) incapacity of managing partner; (6) bankruptcy of general partner; and (7) with certain limitations, by voluntary action of general partner. There are certain cases where conduct of partner may authorize partial rescission of contract, excluding him from partnership.

Limited Partnership.

Limited partnerships (Sociedades en Comandita) are partnerships in which one or more of the partners are subject to unlimited and joint liability for the partnership obligations and one or more of the partners are not responsible for debts and losses except up to the amount of the capital they have subscribed. The name of the partnership must include the name of one or more of the unlimited partners; if the names of all the unlimited partners do not appear the words “and Company” (“y Cia.”) must be added. Name of special silent partners must not appear in firm name. Firm name must always conclude with words “Limited Partnership” (“Sociedad en Comandita,” generally abbreviated to “S. en C.”). Special silent partners have no voice in management of company and are entitled to examine into conduct of business only in accordance with provisions of partnership agreement or when annual balance is submitted. Capital belonging to special silent partners may be represented by shares. Many of provisions relating to unlimited or general partnerships are applicable to limited partnerships.

Foreign partnerships may engage in business in Puerto Rico without formal registration, but persons dealing therewith are not bound by limitations in partnership contract

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unless same is filed in Mercantile Registry.

Special Partnerships.

(31 LPRA 4372). See category 22 Taxation, topic 22.11 Income Tax, subhead Rates, catchline Special Partnerships. Partners of partnerships electing special partnership status under Income Tax Act entitled to limited liability so long as partnership qualifies for this status.

3 BUSINESS REGULATION AND COMMERCE

3.01 BANKS AND BANKING:

(7 LPRA 1 et seq.).

Regulated by Commissioner of Financial Institutions. ("Commissioner"). (http://www.ocif.gobierno.pr). Banking Act: 7 LPRA 1 et seq.; foreign banks: 7 LPRA 181 et seq.; international banking entities: 7 LPRA 232 et seq.; mortgage lenders: 7 LPRA 1051 et seq.; financial intermediaries: 7 LPRA 1071 et seq. Insurance activities regulated by Commissioner of Insurance (http://www.ocs.gobierno.pr): (7 LPRA 3[b][3], 111[k], [n]; 26 LPRA 304-1[6][7][8], 916[1], 1111[5], 1208, 2713a, 2915[1][d], 2920[6], 2921[4]).

Uniform Commercial Code adopted in part with variations. See topic 3.09 Commercial Code. (19 LPRA 401 et seq.).

Stockholders.

Not liable to assessment, except as to stock not fully paid. Acquisition of 5% or more of voting stock of local bank requires prior approval of Commissioner. (7 LPRA 39).

Deposits.

(19 LPRA 801 et seq.). In general, all types of deposits are permitted, but deposits contrary to substantive law either not accepted or ineffective; e.g., a deposit intended to make a transfer effective on death. Stop payment orders expressly authorized by statute, provided timely notice is given to bank. Orders are effective for 14 days if given verbally, and for up to six months if in writing. (19 LPRA 953). No obligation to pay checks after six months from date of issue. (19 LPRA 954). Forged and altered instruments governed by Commercial Transactions Act. (See topic 3.09 Commercial Code.) Banking practice usually observed if generally established. Deposits partially frozen on death of depositor. See category 22 Taxation, topic 22.07 Estate Tax.

Unclaimed Deposits.

Banks are required, after notice to Commissioner and publication, to pay over annually to Commissioner amounts held on deposit, unclaimed for five years. After delivery of funds to Commissioner, action against bank barred. Depositor is allowed ten years in which to claim such funds with interest from Commissioner, after which action is barred. (7 LPRA 158, 2104, 2105). See category 21 Property, topic 21.01 Absentees, subhead Escheat.

Collections.

Uniform Commercial Code adopted with variations. See topic 3.09 Commercial Code. (19 LPRA 801 et seq.).

Trust Companies.

(7 LPRA 301 et seq.). Not authorized to conduct banking business unless organized prior to June 26, 1980 and comply with all requirements of Banking Act. (7 LPRA 501).

Uniform Common Trust Fund Act not adopted. No comparable statute.

Foreign Banks.

Upon qualification and license by Commissioner, foreign banks (including non-U.S. banks) authorized to engage in full banking business in competition with Commonwealth banks. (7 LPRA 181). National banks under authority of § 25 of Federal Reserve Act (12 USCA 601 et seq.) may open branches in Commonwealth and, subject to federal control, engage in full banking business, including exercise of trust powers. See category 13 Estates and Trusts, topic 13.09 Executors and Administrators, subhead Foreign Executors or Administrators.

International Banking Entities.

Certain business and tax advantages available to banking entities licensed by Commissioner to provide services primarily to offshore clients. (7 LPRA 232 et seq.). See also category 22 Taxation, topic 22.18A Tax Incentives and Exemptions, subhead International Banking Center Act.

3.02 BILLS AND NOTES:

(19 LPRA 501-755).

Uniform Commercial Code adopted with variations. See topic 3.09 Commercial Code. (19 LPRA 401 et seq.).

Special Requirements.

Notes evidencing consumer debt not negotiable. See topic 3.23 Sales, subhead Retail Credit Sales.

Judgment Notes.

Not in common use; validity doubtful. Judgment by confession requires sworn statement by defendant: (1) authorizing entry of judgment for specific sum; and (2) if as security for contingent liability, statement of facts and showing that sum confessed does not exceed liability. (32-App III R35.4).

Attorney fee clauses and cost of collection are generally enforceable. See topic 3.13 Contracts, subhead Requirements and Enforceability.

Special Defenses.

See topic 3.23 Sales, subhead Retail Credit Sales.

3.03 BILLS OF LADING:

See topic 3.08 Carriers.

3.04 BILLS OF SALE:

See topic 3.23 Sales.

3.05 BLUE SKY LAW:

See topic 3.24 Securities.

3.06 BROKERS:

Mediating Commercial Agents.

(10 LPRA 1181 et seq.). Statutory provisions are rarely, if ever, used and/or applied.

Real Estate Brokers.

(20 LPRA 3025 et seq.). No person may act as real estate broker in Puerto Rico of real estate located within or without Puerto Rico unless licensed by Examining Board for Real Estate Brokers. Licenses are granted only to individuals, partnerships (if all partners are individually licensed as real estate brokers or salespersons) and corporations (if all shareholders are individually licensed as real estate brokers and all directors and officers who carry out duties as brokers or salespersons are licensed as such). Only property owners dealing in their own property, attorneys-in-fact named in accordance with applicable Puerto Rico laws acting for property owners, lawyers (in attorney/client capacity), persons acting pursuant to wills and those acting pursuant to court or federal or local agency authorization are excluded from licensing requirements. Employment of non-licensed person as broker is also prohibited. Maximum criminal penalty for practicing as broker without license is $500 and/or six months in jail. (20 LPRA 3057). Maximum administrative fine for violation of law is $10,000. (20 LPRA 3058).

Broker must be at least 18, meet educational requirements, present criminal background checks, pay $200 Internal Revenue voucher, present certificate from banking institution where escrow account is established and pass written examination offered by Examining Board. Brokers must post $10,000 bond, enterprises $20,000 bond. (20 LPRA 3033, 3036). License must be renewed every four years. (20 LPRA 3040).

Residence in Puerto Rico is not required. Examining Board is authorized to establish reciprocity with States or foreign countries that extend similar privilege to brokers licensed in Puerto Rico. (20 LPRA 3043).

Persons transacting real estate sales in Puerto Rico of real estate located outside Puerto Rico must register with Department of Consumer Affairs (DACO) (http://www.daco.gobierno.pr). (20 LPRA 3047). Owners of real estate outside Puerto Rico and offered for sale in Puerto Rico must upon signing of option or contract of sale for such property post $1,000,000 bond or 6% of sale price thereof, all as required by DACO, and file reports twice yearly with DACO. Violations of these statutes by these sellers are felonies subject to one-year prison term and/or maximum fine of $25,000. (20 LPRA 3050, 3057[b]).

License may be denied, suspended or revoked on various grounds. (20 LPRA 3032[b], 3042).

Commissions are not regulated.

Financial Intermediaries.

(7 LPRA 1071 et seq.). Defined to include persons or entities in business of loan broker, lender, financial planner, consultant or adviser. License issued by Commissioner of Financial Institutions (http://www.ocif.gobierno.pr) required except for banks, broker-dealers, investment advisers, trust companies, mortgage institutions, federal or Commonwealth government agencies, credit and loan associations, small personal loan companies, government retirement systems, federal savings and loan associations, investment companies, insurance companies, individuals in lending business with annual volume not exceeding $10,000 and persons acting on behalf of such entities or other entities licensed to engage in lending business and lawyers, accountants, economists, engineers or teachers who offer these services incidentally in exercise of their professions.

License Fees.

Application fee is $500. Annual fee is $1,000 if business volume is under $5,000,000, otherwise $1,875. (7 LPRA 1074-1076).

Capital; Bond.

Minimum paid-in capital is $10,000; $10,000 bond required and up to maximum of $200,000 in Commissioner's discretion. (7 LPRA 1077).

Fiduciary duty exists to clients. (7 LPRA 1079).

Penalties.

Administrative fines not exceeding $5,000 per violation may be imposed. Violation is either misdemeanor or felony depending on circumstances. Court may order restitution in addition to other penalties provided by law. (7 LPRA 1087).

Insurance Brokers.

See category 16 Insurance, topic 16.01 Insurance Companies.

Investment Brokers.

See topic 3.24 Securities.

Uniform Commercial Code adopted with variations. See topic 3.09 Commercial Code. (19 LPRA 401 et seq.).

3.07 BULK SALES:

Art. 2 of Uniform Commercial Code not adopted. See category 8 Debtor and Creditor, topic 8.08 Fraudulent Sales and Conveyances.

3.08 CARRIERS:

(27 LPRA 1001 et seq.).

The Public Service Commission of Puerto Rico has general supervision. (27 LPRA 1101 et seq.).

Uniform Commercial Code adopted with variations. See topic 3.09 Commercial Code. (19 LPRA 401 et seq.).

Licenses.

Required for public carriers, and requires prior finding of convenience and necessity. (27 LPRA 1110-11).

Rates.

Tariffs, rates, charges, timetables and safety norms are regulated and approved by Commission. (27 LPRA 1103-06).

Discrimination.

Carrier cannot favor one customer over another but preferences may be given for shipment of perishable goods. (27 LPRA 1201[k]).

Bills of Lading.

Uniform Commercial Code applies. (19 LPRA 1401 et seq.). See topic Commercial Code for variations. The Federal Bills of Lading Act applies as to transportation covered thereby.

Lien.

Uniform Commercial Code applies. (19 LPRA 1507, 1508). See topic Commercial Code for variations.

3.09 COMMERCIAL CODE:

(19 LPRA 401 to 2207).

Uniform Commercial Code ("Code") has not been adopted as such. However, Arts. 1, 3, 4, 4a, 5, 7, 8 and 9 of Code (including revisions and amendments through 1995) adopted as Commercial Transactions Act ("CTA") effective Jan. 1, 1998 (except Arts. 1, 3, 4, 4a and 5 which became effective prior to 1997). 2000 Revised Article 9 not adopted. Articles of Code are referred to as Chapters; cc. 1, 2, 3, 4, 5, 7, 8 and 9 of CTA are equivalent to Arts. 1, 3, 4, 4a, 5, 7, 8 and 9 of Code, respectively. Parts of Code are referred to as subchapter and section numbers remain same. References to "State" in Code have been changed to "Commonwealth". English version of CTA governs, however, translation from Spanish is not always adequate or complete and reference to Spanish version may be helpful. See topics 3.07 Bulk Sales and Sales for equivalent material in omitted Arts. 2 and 6 of Code. See Uniform and Model Acts section of Digest for text of Code. For forms for use under Code see topic Forms at end of this Digest.

Material Variations from Official Text, Omissions, and Action on Optional Provisions.

Listed below by Code section number are material variations made in Puerto Rico from official text, sections omitted, and action taken with respect to optional provisions in Puerto Rico:

Amendments Adopted.

a. Article 1: Adopted as revised prior to "1995 Official Text of Revised Article 5 (with conforming and miscellaneous amendments to articles 1, 2, and 9)".

b. Article 3: Adopted as revised conforming with "1994 Official Text of Revised article 8 (with conforming and miscellaneous amendments to articles 1, 3, 4, 5, 9 and 10)".

c. Article 4: Adopted as revised conforming with "1994 Official Text of Revised article 8 (with conforming and miscellaneous amendments to articles 1, 3, 4, 5, 9 and 10)".

d. Article 4a: Adopted as revised in "1995 Official Text - Article 4A - Funds Transfers".

e. Article 5: Adopted as revised in "1995 Official Text of Revised Article 5 (with conforming and miscellaneous amendments to articles 1, 2, and 9)".

f. Article 7: Adopted as revised conforming with "Permanent Editorial Board's 1966 Official Recommendations for amendment of the Uniform Commercial Code".

g. Article 8: Adopted as revised in "1994 Official Text of Revised article 8 (with conforming and miscellaneous amendments to articles 1, 3, 4, 5, 9 and 10)".

h. Article 9: Adopted as revised conforming with "1995 Official Text of Revised Article 5 (with conforming and miscellaneous amendments to articles 1, 2, and 9)".

Amendments Not Adopted.

a. 2003 Revised Article 7.

b. 2001 Revised Article 1.

c. 1998 Revised Article 9.

Code Article 1. (19 LPRA 401 et seq.).

§ 1-101: Short title changed to read: “Commercial Transactions Act.”

§ 1-102(3): Amended to read: “The effect of the provisions of this Act may be varied by agreement, except as otherwise provided in this Act.”

§ 1-102(4): Deleted “presence” and substituted “absence”; deleted phrase “the effect of other” and substituted “such.”

§ 1-103: Amended to read: “Unless displaced by the particular provisions of this Act, the general principles of law of our jurisdiction shall supplement its provisions.”

§ 1-104: Amended to read: “None of the parts of this Act shall be implicitly repealed by subsequent legislation if such construction can reasonably be avoided.”

§ 1-105(1): Amended to read: “The parties may agree as to the law that shall govern their rights and duties, be it the law of Puerto Rico or of any state or nation.”

§ 1-105(2): Amended to limit provisions that will govern certain transactions notwithstanding contrary agreement as follows: “Where one of the following provisions of this Act specifies the applicable law, that provision governs and a contrary agreement is effective only to the extent permitted by law (including rules of international private law on conflicts law) so specified:” “Applicability of the Chapter on Bank Deposits and Collection. Section 3 LPRA 102 (19 LPRA 802).”; “Governing law in the Chapter on Funds Transfers. Section 4 LPRA 507 (19 LPRA 1167)”. “Applicability of the chapter on Investment Securities. Section 8 LPRA 110”; and “Perfection provisions of the chapter on Secured Transactions. Sections 9 LPRA 103 and 9 LPRA 304.”

§ 1-106(1): Deleted phrase “but neither consequential or special nor penal damages may be had except as specifically provided in this Act or by other rule of law.”

§ 1-107: Amended to read: “Any claim or right for breach of an obligation arising under this Act can be waived by a waiver or renunciation in writing signed and delivered by the aggrieved party, or its representative, except if the waiver or renunciation are contrary to the law, public interest or public order.”

§ 1-108: Amended to add at end “and independent.”

§ 1-201: Changes made in definitions as follows:

“Action”: Deleted “suits in equity” and references to §§ 2-208 and 2A-207.

“Bank”: Amended to include “savings bank, a savings and loan association, a savings and loan union or cooperative or a trust company.”

“Bearer”: Amended to require that securities are to be “certified.”

“Buyer in ordinary course of business”: Deleted sentence referring to sellers of minerals.

“Delivery”: Amended to require that securities are to be “certified”.

“Organization”: Amended to include “political subdivision” and “governmental instrumentality.”

“Security interest”: Deleted phrase “an interest in personal property or fixtures” and substituted “a right in rem in personal property or real property by destination”; deleted “Article 9” and substituted “this Act” in third sentence; deleted reference and sentence with respect to § 2-401 and cross references to § 2-326 in parenthetical.

Subsection (27) on notice: Deleted phrase “knowledge or a notice.”

“Value”: Amended cross-references to read: “Sections 2 LPRA 303, 3 LPRA 208 and 3 LPRA 209.”

“Written”: Added at end “by any other means.”

§ 1-204(3): Deleted “no time” and substituted “no specific time.”

§ 1-205(2): Deleted sentence “The existence and scope of such a usage are to be proved as facts.”

§ 1-206: Amended to read: “Property located in Puerto Rico and subject to its laws. As used in this chapter the following terms have the following meaning when they refer to property that is located in the Commonwealth of Puerto Rico and is subject to its law:

(a) ‘Intangible’ and ‘tangible,’ when referring to property, mean incorporeal and corporeal, respectively.

(b) ‘Interest in property’ means a real right in movable or immovable property.

(c) ‘Personal Property’ means movable property.

(d) ‘Real estate’ means immovable property and real rights therein, and leases of immovables which have been recorded in the Registry of Property.

(e) ‘Statutory lien’ means a preference or priority created by the Civil Code or the Commerce Code of Puerto Rico, or other statutory authority.”

§ 1-207(1): Last sentence amended to add at end phrase “to reserve its rights”.

§ 1-209: Omitted.

Code Article 3. (19 LPRA 501 et seq.).

§ 2-101: Short title changed to read: “This chapter may be cited as Chapter 2–Negotiable Instruments.”

§ 2-102(a): Amended to read: “This chapter applies to negotiable instruments. It does not apply to money, to payment orders governed by Chapter 4, or to securities governed by Chapter 8. (b) If there is a conflict between this Chapter and Chapters 3 or 9, Chapters 3 and 9 govern.”

§ 2-103(c): References to “Certificated Security,” “Security,” and “Uncertificated Security” added.

§ 2-110(b): Inserted words “or signing” before word “machine.”

§ 2-110(c): Inserted phrase “producing reasonable certainty” after word “way” in introductory language.

§ 2-116(b): Added at end phrase “in this jurisdiction.”

§ 2-118: (a), (b), (e) and (f): Amended to set all six and ten year periods at three and five years, respectively.

§ 2-118(c): Deleted “three” and substituted “five”.

§ 2-118(h) and (i) added: “(h) Notwithstanding anything to the contrary herein, an action to enforce obligation of a party to pay a note secured by a real estate mortgage should be commenced within the period of time provided by Article 1864 of the Civil Code of Puerto Rico (31 LPRA 5294) for the exercise of a mortgage action.

(i) The statute of limitations shall be interrupted by suit or any judicial proceeding brought against the debtor, by the acknowledgment of the obligations, or by the renewal of the instrument on which the right of the creditor is based. The statute of limitations shall be considered uninterrupted by a judicial proceeding if the plaintiff should withdraw it, or the case should go by default or the complaint be dismissed. The period of the statute of limitations shall begin to be counted again, in case of the acknowledgment of the obligations, from the day this is done; in case of their renewal, from the date of the new instrument, and if the period for meeting the obligation should have been extended, from the date this extension expires. This provision shall not be applicable to a promissory note secured by a real estate mortgage.”

§ 2-202(a): Deleted “infant” and substituted “minor.”

§ 2-202(b): Deleted “by other law” and substituted “by the law in Puerto Rico.”

§ 2-207: Phrase “by striking” inserted following word “cancel(ed)” in second and fourth sentences.

§ 2-302(d): Phrase “issuing or transferring of” inserted after “the consideration for.”

§ 2-303(a): Amended to add phrase “It shall be understood that” before article “an” in introductory language. Subsection (1) amended by deleting words “the instrument” and inserting pronoun “it” in lieu thereof. Subsection (3) amended to read: “the instrument is issued or transferred as evidence, payment, or as security for an existing obligation of any person, whether or not the obligation is due.” The word “other” used instead of word “a” in subsection (4). Term “person” used instead of term “party” in subsection (5).

§ 2-305(a)(1) and (d): Deleted “infancy” and substituted “minority.”

§ 2-308(a): Amended first two sentences to read: “Except when the authenticity of, and authority to make, a signature on the instrument is denied in the pleadings, in a judicial action with respect to the instrument, the authenticity and the signature will be construed as admitted. If the validity of a signature is denied, the burden of establishing validity is on the person claiming it, but the signature is presumed to be authentic if the action is not to enforce the liability of a purported signer who is dead or incompetent when evidence of validity of the signature is required.”

§ 2-309: Amended to read. “(a) A person entitled to enforce an instrument, but who is not in possession of the instrument, retains the right of enforcement if the loss of possession is not the result of a voluntary transfer or a legitimate taking and such person may not reasonably reacquire the instrument because the same has been destroyed, lost or stolen.

(b) A person seeking enforcement of an instrument under subsection (a) must prove the terms of the instrument and the person's right to enforce the instrument. If that proof is made, Section 2 LPRA 308 applies as if the instrument had been produced. Judgment in favor of the person seeking enforcement must be based on a finding that the person required to pay the instrument is adequately protected against loss that might occur by reason of a claim by another person to enforce the instrument.”

§ 2-310(a): First sentence amended to read: “When a certified check, cashier's check, or teller's check is taken for an obligation, the obligation is discharged for the amount of the instrument, unless otherwise agreed.”

§ 2-310(b): Introductory clause amended to read: “Except as provided in subsection (a) or unless otherwise agreed, if a note or uncertified check is taken for an obligation, the obligation is suspended for the amount of the instrument pursuant to the following rules:”.

§ 2-406(b): Amended to read: “Under subsection (a), if the person asserting the preclusion substantially contributes to the loss by failing to exercise ordinary care, such person will be responsible for the loss to the extent to which the failure of each to exercise ordinary care contributed to the loss.”

§ 2-410(b): Inserted “Puerto Rico or the U.S. Virgin Islands” after “United States.”

§ 2-415(e): Reference to subsection (e) omitted.

§ 2-419(a): Deleted phrase “to the instrument.”

§ 2-419(b): Eliminated the reference to statute of frauds.

§ 2-419(c): Second sentence amended to read: “Except as provided in Section 2 LPRA 605, the obligation of an accommodation party to pay the instrument is enforceable regardless of whether the person enforcing the obligation had notice when taking the instrument that the same was signed for accommodation.”

Subchapter 5: Title changed to “Dishonor of the Instrument.”

§ 2-501(b)(1): Added “Puerto Rico and the U.S. Virgin Islands” after “United States.”

§ 2-502: Title changed to “Dishonor of the Instrument: Administrative Expenses.” Subsection (g) added to read: “Every payee, or its assignee or successor, of a check which has been dishonored due to insufficient funds, to the closure of the account or for not having express authorization to draw on credit, may charge the payor a ten (10) dollar fee for administrative expenses, in addition to the unpaid amount of the check and accrued interest, at the prevailing legal rate, from the date in which the check was first dishonored. The dishonor of the check shall constitute prima facie evidence of the drawer's or indorser's knowledge of the insufficiency of funds.”

§ 2-503: Title changed to “Notice of Dishonor of the Instrument.”

§ 2-504: Title changed to “Excused Presentment and Notice of Dishonor of the Instrument.”

§ 2-505: Title changed to “Evidence of Dishonor of the Instrument.”

§ 2-603(c): Deleted phrase “is able and ready to pay on the due date at every place of payment” in second sentence and substituted “is ready to pay on the due date at the place of payment.”

Code Article 4. (19 LPRA 801 et seq.).

§ 3-101: Short title changed to read: “This chapter may be cited as Chapter 3–Bank Deposits and Collections.”

§ 3-105(1): Deleted phrase “credit union” and substituted “savings and loan union or cooperative.”

§ 3-106(b): Alternative A adopted.

§ 3-111: Amended to read: “An action to enforce an obligation, duty, or right arising under this chapter must be commenced within three years after the cause of action accrues. The statute of limitations shall be interrupted by suit or any judicial proceeding brought against the debtor, by the acknowledgment of the obligations, or by the renewal of the instrument on which the right of the creditor is based. The statute of limitations shall be considered uninterrupted by a judicial proceeding if the plaintiff should withdraw it, or the case should go by default or the complaint dismissed. The period of the statute of limitations shall begin to be counted again, in case of acknowledgment of the obligations, from the day this is done; in case of their renewal, from the date of the new instrument, and if the period for meeting the obligation should have been extended, from the date this extension expires.”

Subsection 3 LPRA 210(c): Deleted phrase “and is subject to Article 9.”

§ 3-214(c): Inserted word “bank” after word “payor.”

§ 3-215(e): Phrase “for an item” deleted from introductory sentence.

§ 3-405(a): Word “existing” deleted from first sentence.

§ 3-503: Deleted phrase “and except as provided in Article 5” and substituted phrase “and unless otherwise indicated by the law pertaining to documentary drafts.”

§ 3-504b: Amended to read: “For its reasonable expenses incurred by action under subsection (a) the presenting bank has a lien upon the goods or their proceeds. No filing is required to perfect such a lien, which may be foreclosed in the same manner as an unpaid seller's lien.”

Code Article 4a. (19 LPRA 1021 et seq.).

§ 4-101: Short title changed to read: “This chapter may be cited as Chapter 4–Funds Transfers.”

§ 4-105(a)(2): Deleted term “credit union” and substituted “savings and loan union or cooperative.”

§ 4-208(b)(3): In second sentence deleted phrase “need not determine” and substituted “does not have the obligation to determine.”

§ 4-210(a)(2): Deleted phrase “resulted from the use of the noncomplying means.”

§ 4-211(f): Deleted phrase “without the bank's agreement.”

§ 4-304: In first sentence deleted phrase “from the bank.”

§ 4-405(c): Deleted phrase “of the beneficiary” after phrase “to payment or agreement.”

Code Article 5. (19 LPRA 1221 et seq.).

§ 5-101: Short title changed to read: “This chapter may be cited as Chapter 5–Letters of Credit.”

Code Art. 6 not adopted.

Code Article 7. (19 LPRA 1401 et seq.).

§ 7-101: Short title changed to read: “This chapter may be cited as Chapter 7–Documents of Title.”

§ 7-102(3): Cross reference to definition of “Contract of Sale” changed to “Section 9 LPRA 105(1)[e].”

§ 7-204: Optional Subsection (4) not adopted.

§ 7-402: First sentence amended to read: “Neither a duplicate nor any other document of the same issuer confers any right in the goods, except as provided in the case of bills in a set, overissue of documents for fungible goods and substitutes for lost, stolen or destroyed documents.”

§ 7-403(1)(b): Bracketed language omitted.

§ 7-403(1)(d): Deleted reference to “Article on Sales (Section 2 LPRA 705)” and substituted reference to “applicable law.”

§ 7-503(1)(a): Deleted reference to Section 2 LPRA 403 and substituted Section 9 LPRA 307 (19 LPRA 2107).

§ 7-504(2)(a): Deleted reference to Section 2 LPRA 402 and substituted reference to “applicable law.”

§ 7-504(4): Deleted reference to Section 2 LPRA 705 and substituted references to new subsections (5), (6) and (7):

§ 7-504(5), (6) and (7) added:

“(5) The seller may stop delivery of goods in the possession of a carrier or other bailee when he discovers the buyer to be insolvent and may stop delivery of carload, truckload, planeload or larger shipments of express or freight when the buyer repudiates or fails to make a payment due before delivery or if for any other reason the seller has a right to withhold or reclaim the goods. (6) As against such buyer the seller may stop delivery until (a) receipt of the goods by the buyer; or (b) acknowledgment to the buyer by any bailee of the goods except a carrier that the bailee holds the goods for the buyer; or (c) such acknowledgment to the buyer by a carrier by reshipment or as warehouseman; or (d) negotiation to the buyer of any negotiable document of title covering the goods. (7)(a) To stop delivery the seller must so notify as to enable the bailee by reasonable diligence to prevent delivery of the goods. (b) After such notification the bailee must hold and deliver the goods according to the directions of the seller, but the seller is liable to the bailee for any ensuing charges or damages. (c) If a negotiable document of title has been issued for goods the bailee is not obliged to obey a notification to stop until surrender of the document. (d) A carrier who has issued a non-negotiable bill of lading is not obliged to obey a notification to stop received from a person other than the consignor.”

§ 7-509: Amended to read: “The question whether a document is adequate to fulfill the obligations of a contract for sale is governed by the applicable provisions of the Commerce Code of Puerto Rico and the Civil Code of Puerto Rico and the question whether a document is adequate to fulfill the conditions of a credit is governed by the chapter on Letters of Credit

(Chapter 5).”

Code Article 8. (19 LPRA 1701 et seq.).

§ 8-101: Short title changed to read: “This chapter may be cited as Uniform Commercial Code—Investment Securities.”

§ 8-103(b): Inserted “or Puerto Rico” immediately prior to term “investment company laws.”

§ 8-107(a)(4): Amended to read: “if the person designated in paragraph (1), (2), or (3) is deceased, the decedent's heir or executor subject to having capacity to act and the approvals required by law; or.”

§ 8-107(c)(1): Delete phrase “the law of the state” and substituted “the law of the nation, state or territory.”

Part 6 of Code Article 8 omitted.

2000 Revised Article 9 of Code not adopted.

Code Article 9. (19 LPRA 2001 et seq.).

Chapter 9: Heading changed to read: “Secured Transactions; Sales of Accounts and Chattel Paper; Consignments.”

§ 9-101: Short title changed to read: “This chapter may be cited as Chapter 9–Secured Transactions.”

§ 9-102: Subsection (1) amended to add subsection (1)(c), which states that Chapter shall also apply to “consignments.” “Chattel trusts, trust deeds and equipment trusts” deleted from subsection (2) list of security interests to which Chapter applies. Subsection (4) added, which reads: “The provisions of the Civil Code of Puerto Rico with respect to pledges and with respect to transmission of credits shall not apply to transactions governed by this Law.”

§ 9-103: Subsection (1)(a) amended to delete references to minerals. Boats and yachts added to list of mobile goods in subsection (3)(a) and reference to minerals deleted. Subsection (5), on minerals, omitted. Subsection (6), on investment property, renumbered Subsection (5). New sentence added to subsection (5)(f) “The rules in paragraphs (c), (d), and (e) of subsection (3) apply to security interests to which this paragraph applies.”

§ 9-104(e): Deleted term “governmental subdivision” and substituted “political subdivision or governmental instrumentality,” and added at end phrase “to the extent such a transfer is governed by special statute.”

§ 9-104(g): Amended to read “to any loan made by an insurance company, bank or finance company pursuant to the provisions of a policy or contract issued by it or another person and upon the sole security of the policy or contract or with respect to unearned insurance premium as provided in Section 9 LPRA 302(1)(i) and 9 LPRA 312(4); or”.

§ 9-104(m): New section: “to a transaction covered by 27 LPRA 2051-2063, as amended, with respect to medallions for taxis and other vehicles.”

§ 9-104(m) renumbered as 104(n).

§ 9-105(1) definitions amended as follows:

"Collateral": amended to add "when the context so requires" after phrase "a security interest and," and to add at end "and goods delivered on consignment."

"Debtor": amended to include phrase "and when the context so requires" after phrase "in the collateral."

"Document": amended to delete reference to general definitions of Article (Chapter) 1.

"Goods": amended to include "commodity contracts" and delete parenthetical phrase.

"Mortgage": amended to read: "means the real right created by a mortgage contract under the Civil Code of Puerto Rico and the Mortgage and Property Registry Act."

"Pursuant to commitment" amended to read: "with respect to an advance, means that the secured party has bound himself to make it, whether or not a subsequent event of default or other event not within his control has relieved or may relieve him from his obligation."

"Security agreement": omitted.

"Secured party" amended to read: "means a lender, seller or other person in whose favor there is a security interest, including, where the context so requires, a person to whom accounts or chattel paper have been sold and a consignor. When the holders of obligations issued under an indenture of trust, equipment trust agreement or the like are represented by a trustee or other person, the representative is the secured party."

§ 9-105(1) new definitions added:

(d) "Commonwealth" means Commonwealth of Puerto Rico.

(e) "Contract for sale" means present sale of goods and contract to sell goods at future time.

(l) "Lease" means a transfer of the right to possession and use of goods for a term in return for consideration; but sale, including sale on approval or a sale or return, or retention or creation of security interest is not a lease. Unless context clearly indicates otherwise, the term includes a sublease.

(o) "Sale" means a passing of title from the seller to the buyer for a price.

§ 9-105(2): amended to add reference to "Consignment-§ 9-114."

§ 9-105(3): amended to delete references to "Contract for Sale" and "Sale."

§ 9-109(2): Deleted term "governmental subdivision" and substituted "political subdivision or a governmental instrumentality."

§ 9-109(3): Amended to read: " 'farm products' if they are any type of crops, whether growing or to be grown, and whether harvested or unharvested, or any species of livestock, or any type of agricultural commodity or product raised or cultivated of every type and description, including but not limited to hogs, sheep, horses, bees, rabbits, goats, or poultry, and oysters, crabs, lobsters, prawns, shrimp, and fish raised, produced, cultivated, harvested or gathered on any beds of bodies of water, whether owned, leased, or licensed by the debtor, grains, beans, rice, vegetables, grasses, legumes, fruits, tobacco, plantains, coffee, sugar cane, flowers, plants, shrubberies, nuts and berries, and other similar products whether of trees or other sources, or if they are a product of such crop or livestock in its unmanufactured state, such as seed, molasses, honey, meat, milk, eggs, and cut or harvested timber, but not standing timber, or supplies used or produced in farming operations, and if they are in the possession, including civil possession as defined in 31 LPRA 1421, as amended, of a debtor engaged in planting, producing, raising, cultivating, harvesting, gathering, fattening, grazing, or other farming, marine, or aquacultural operations. If goods are farm products they are neither equipment nor inventory."

§ 9-110: Amended to add at end "provided in the case of real estate the description shall include the Registry of Property inscription data for the property."

§ 9-111: Amended to state that creation of security interest is not bulk transfer under "10-61, 62 and 10 LPRA 1720."

§ 9-113: Omitted.

§ 9-114: Amended to read: "(1) A consignment is a transaction in which a person (the 'consignor') delivers goods to another person (the 'consignee') primarily for sale by the consignee and the consignee has the right to return any commercial unit of the goods in lieu of payment. Such goods may be seized by creditors of the consignee even though the consignor has retained title to them unless it is established that the consignee is generally known by his creditors to be substantially engaged in selling the goods of others, or the consignor complies with the filing provision of this chapter. (2) If the parties denominate a transaction as one of consignment but intend to create a security interest in the goods, the transaction is not a consignment but a secured transaction. (3) A consignor who delivers goods under a consignment and who would be required to file under this chapter has priority over a secured party who is or becomes a creditor of the consignee and who would have a perfected security interest in the goods if they were the property of the consignee, and also has priority with respect to identifiable cash proceeds received on or before delivery of the goods to a buyer, if (a) the consignor complies with the filing provision of this chapter before the consignee receives possession of the goods; and (b) the consignor gives notification in writing to the holder of the security interest if the holder has filed a financing statement covering the same types of goods before the date of the filing made by the consignor; and (c) the holder of the security interest receives the notification within five (5) years before the consignee receives possession of the goods; and (d) the notification states that the consignor expects to deliver goods on consignment to the consignee, describing the goods by item or type. (4) In the case of a consignment which is not a secured transaction and in which the requirements of the preceding subsection have not been met, a person who delivers goods to a consignee is subordinate to a person who would have a perfected security interest in the goods if they were property of the debtor."

§ 9-203(1): Deleted phrase "Section 9 LPRA 113 and security interest arising under the Article Sales on and Leases" and substituted "the provisions of the Commerce Code or the Civil Code of Puerto Rico on a security interest arising from a sale."

§ 9-203(4): Blank filled in with: "10-941 et seq., known as the Small Personal Loan Act; 10 LPRA 731 et seq., known as the Retail Installment Sales and Financing Companies Act; and any similar consumer legislation."

§ 9-206(2): Deleted "Article on Sales" and substituted "the Commerce Code or the Civil Code of Puerto Rico or other special legislation, as applicable."

§ 9-301(2): Deleted "ten" and substituted "thirty."

§ 9-302(1)(f): Deleted reference to Articles on Sales and Leases and substituted "the Commerce Code or Civil Code of Puerto Rico."

§ 9-302(1)(i): Added: “A security interest in or claim in or under any policy of insurance including unearned premiums. Such interest shall be perfected when notice thereof is given in writing to the insurer.”

§ 9-302(3)(b): Deleted.

§ 9-302(3)(c): Renumbered as (3)(b).

§ 9-304(4), (5) and (6): Deleted “twenty-one” and substituted “ten.”

§ 9-307(1): Deleted reference to Section 1 LPRA 201 and clause: “other than a person buying farm products from a person engaged in farming operations.”

§ 9-312(3)(b): Deleted “twenty one” and substituted “twenty.”

§ 9-312(4): Deleted “ten” and substituted “thirty.”

§ 9-313(1)(a): Amended to read: “(a) goods are ‘fixtures’ when they become so related to particular real estate that they are immovables pursuant to the provisions of 31 LPRA 1403.”

§ 9-313(1)(b): Amended to read: “a ‘fixture filing’ is the filing in the section of the Registry of Property where a mortgage on the real estate would be recorded in accordance with the provisions of the Mortgage Law, of a financing statement covering goods which are or are to become fixtures and conforming to the requirement of Subsection (5) of Section 9 LPRA 402.”

§ 9-313(1)(c): Deleted “including the acquisition cost of the land, if the recording of the writing so indicates,” and substituted “and may include the acquisition cost of the land.”

§ 9-313(4)(a): Deleted “ten” and substituted “twenty.”

§ 9-313(4)(d): Reference to equitable proceedings deleted.

§ 9-319 added: “Preference and Priority. For the purposes of classification of credits and their priority under the Civil Code of Puerto Rico, the security interest shall have the same preference attributed to the pledge in 31 LPRA 5192 and the same priority attributed to credits secured by pledge in 31 LPRA 5211.”

§ 9-401(1)(a) and (b): Amended to read: “(a) when the collateral is crops growing or to be grown or timber to be cut or when the financing statement is filed as a fixture filing (Section 9 LPRA 313) and the collateral is goods which are or are to become fixtures, then in the section and in the books of the Registry of Property where a mortgage on the real estate would be filed or recorded; in which books the financing statement shall be recorded in the entries of the corresponding property subject to compliance with the requirements of this law, and the memorandum referred to in 30 LPRA 2156, shall not be required to accompany the same.

(b): In all other cases, subject to the provisions of Section 9 LPRA 410, in the office of the Secretary of State.”

§ 9-401(3): First alternative adopted.

§ 9-401(6): Omitted.

§ 9-402(1): Amended to read: “A financing statement is sufficient if it gives the names of the debtor and the secured party, is signed by the debtor, gives an address of the secured party from which information concerning the security interest may be obtained, gives a mailing address of the debtor and contains a statement indicating the types, or describing the items, of collateral. The parties to the financing statement shall have the option, but not the obligation, of authenticating their signatures before a notary public. A financing statement may be filed before a security agreement is made or a security interest otherwise attached. When the financing statement covers crops growing or to be grown, timber to be cut or when the financing statement is filed as a fixture filing (Section 9 LPRA 313) and the collateral is goods which are or are to become fixtures, the statement must also comply with Subsection (5). A copy of the security agreement is sufficient as a financing statement if it contains the above information and is signed by the debtor. The parties to the security agreement shall have the option, but not the obligation of authenticating their signatures before a notary public. A carbon, photographic or other reproduction of a security agreement or a financing statement is sufficient, as a financing statement if the security agreement so provides or if the original has been filed in this Commonwealth."

§ 9-402(3): Amended to delete item 2 of form and to have item 3, on goods, become item 2 and to add in this item 2 clause "including recording data" to line requesting Real Estate description and clause "who hereby consents to the filing of this financing statement" at end; and to provide in item 4 (renumbered item 3) optional space providing for "Signature of Record Owner."

§ 9-402(5): Amended to read: "A financing statement covering crops growing or to be grown or timber to be cut or a financing statement filed as a fixture filing (Section 9 LPRA 313) where the debtor is not a transmitting utility, must show that it covers this type of collateral, must recite that it is to be filed for record in the Registry of Property, and the financing statement must contain the legal description of the real estate (including recording data) sufficient if it were contained in a mortgage of the real estate to record the mortgage under the law of this Commonwealth. If the debtor does not have recorded ownership, title of the real estate, the financing statement must show the name of the record owner in accordance with the Registry of Property and contain or be accompanied by his duly authenticated consent to the filing."

§ 9-402(6)(c): Amended to add after "in this section" phrase "other than a recital that it is to be filed in the Registry of Property."

§ 9-403(2) and (3): Amended to change references from 5 years to 10 years.

§ 9-403(5): Fees set at $5, $10, $3, $1 and $1, respectively. New sentence added at end: "All of the foregoing fees are subject to the provisions of Section 9 LPRA 409."

§ 9-403(7): Adds "crops growing or to be grown or" before word "timber," and deletes references to "minerals or the like" and to "accounts subject to Subsection (j) of Section 9 LPRA 103."

§ 9-404(1): Amended to add in last sentence after "one hundred dollars" the phrase: "or such other amount as the Secretary of State may from time to time provide by regulation."

§ 9-404(3): Fees set at $2, $5 and $1, respectively.

§ 9-405(1): Amended to make filing fees subject to provisions of Section 9 LPRA 409 and to set fees at $5, $10 and $1, respectively.

§ 9-405(2): Amended to set fees at $3, $6 and $1, respectively.

§ 9-406: Amended to permit optional notarization, to make filing fees subject to provisions of Section 9 LPRA 409 and to set fees at $3, $6 and $1, respectively.

§ 9-407(1): Optional provision adopted.

§ 9-407(2): Amended to subject fees to provisions of Section 9 LPRA 409; fees set at $5, $10 and $2, respectively.

§ 9-409 added to permit Secretary of State to adjust foregoing fees from time to time by regulation.

§ 9-410, 9 LPRA 411 and 9 LPRA 412 added: “To exempt the United States government (9 LPRA 410) (including its agencies, instrumentalities and farm credit banks), the Commonwealth (9 LPRA 411) (including its agencies, instrumentalities, organizations, dependencies and political subdivisions, as well as the authorities, public corporations, all retirement systems established by said entities, and the Fondo de Ahorro y Préstamo de Empleados del Gobierno Estatal), cooperative associations (9 LPRA 412), from the payment of all fees mandated by Article 9, but only when according to the law or practice in private commercial transactions payment of said fees corresponds to said entities.”

§ 9-413 added: “Security interests in motor vehicles. When a security interest is created in a motor vehicle, as defined in Section 1 LPRA 161 of the Motor Vehicle and Traffic Law of Puerto Rico, the security interest shall be perfected when filed in the Registry of Motor Vehicles and Trailers of the Department of Transportation established by Section 2 LPRA 102 in the manner provided in said act. The transfer will also be inscribed in said Register prescribed in the act, provided, however, that in the case of a motor vehicle without a certificate of title or corresponding license issued by the Commonwealth or another jurisdiction, the security interest shall be perfected only when the financing statement is filed solely in the office of the Secretary of State, pursuant to the provisions set forth in Section 9 LPRA 401 of this Chapter. The transfer of a motor vehicle shall be recorded in the Registry of Motor Vehicles and Trailers of the Department of Transportation and Public Works prescribed in the Motor Vehicle and Traffic Law of Puerto Rico.”

§ 9-503: Added: **Secured Party's Right to Possession After Default.** “Unless otherwise agreed a secured party has on default the right to take possession of the collateral; provided, however, that in a consumer secured transaction prior to the taking of possession the secured party shall be required to give the debtor at least two (2) days written notice, to the last known address of the debtor, of the intent to take possession of the collateral. In taking possession a secured party may proceed without judicial process if this can be done without breach of the peace or may proceed by action. If the security agreement so provides the secured party may require the debtor to assemble the collateral and make it available to the secured party at a place to be designated by the secured party which is reasonably convenient to both parties. Without removal a secured party may render equipment unusable, and may dispose of collateral on the debtor's premises under Section 9 LPRA 504.”

The voluntary return of the collateral with the consent of the secured party shall have the same effect as a repossession and any agreement in conflict therewith shall be deemed void. After repossession the debtor shall execute any and all documents necessary to transfer title to the collateral to the secured party.

In a consumer secured transaction, the following rules apply: (1) Upon taking possession of the collateral, the secured party shall retain the same for a period of thirty (30) days from the time of repossession, and during such period, the debtor, or his successor in interest, may comply with the terms of the security agreement and thereupon receive said property. After the expiration of such period, if such terms are not complied with, the secured party, or his successor in interest, may proceed to dispose of the collateral in accordance with the provisions of Section 9 LPRA 504.

(2) The security agreement shall bear the following notice in the space immediately preceding the signature of the debtor: NOTICE TO DEBTOR, YOU ARE HEREBY NOTIFIED THAT THE SECURED PARTY MAY AFTER AN EVENT OF DEFAULT TAKE POSSESSION OF THE COLLATERAL WITHOUT JUDICIAL PROCESS.

(3) Notification of repossession must contain the following information: (a) a description of the default committed by the debtor; (b) the amount that must be paid to the secured party to redeem the obligation secured by the collateral; (c) the amount that must be paid to the secured party to reinstate the obligation secured by the collateral; (d) a telephone number or mailing address from which additional information concerning the obligation secured is available.

(4) A particular phrasing of the notification is not required. A notification substantially complying with the requirements of this subsection is sufficient, even if it contains minor errors that are not seriously misleading. The notice sent the debtor shall be made through certified mail with return receipt requested or any other mechanism that may certify that the secured party sent such notice.

(5) The following form of notification, when completed contains sufficient information:

Notice of secured party's plan to repossess the collateral

To: [Name of debtor, as stated on the security agreement]

Address: [Address of debtor, as stated on the security agreement]

Pay us our costs of retaking the collateral, all regular payments, including interest, that are overdue, and all late charges. The amount is now about [$], but that amount may change. To learn the exact amount, call us at [telephone number] or write us at [address]. You will have to make this payment on or before [date]. If you make the payment, [You-name of debtor] will have to keep on making the rest of the regular [monthly] payments.

(6) Notification after Self Help Repossession—Within twenty four (24) hours from the repossession of the collateral in any consumer secured transaction, the secured party must send written notice to the debtor, to the last known address of the debtor, to inform the debtor of the repossession of the collateral. The notice sent the debtor shall be made through certified mail with return receipt requested or any other mechanism that may certify that the secured party sent such notice. Said notice must include the following information: (a) Name of debtor; (b) Address of debtor; (c) Name of secured party; (d) Address of secured party; (e) Description of collateral; (f) Place of repossession; (g) Date of repossession; (h) Copy of the security agreement.

A particular phrasing of the notification is not required. Any notification substantially complying with the requirements listed in this Section shall be sufficient, even if it contains minor errors that are not seriously misleading.

For purposes of this section “consumer secured transactions” means a transaction in which an obligation is incurred primarily for personal, family or household purposes, a security interest secures the obligation, and the collateral consists of consumer goods.

§ 9-504: Amended to delete sentence that refers to Article on Sales.

§ 9-505(1): Deleted “ninety” and substituted “one hundred twenty”.

Forms.

For statutory forms of financing statements, equivalent to UCC-1, UCC-3 and UCC-11, see topic Forms at end of this Digest. 2002 Revised Article 9 not adopted. Revised National

Article 9 forms not accepted.

3.10 CONDITIONAL SALES:

See topic 3.09 Commercial Code.

3.11 CONSIGNMENTS:

See topic 3.09 Commercial Code.

3.12 CONSUMER PROTECTION:

Department of Consumer Affairs (DACO) (23 LPRA 1001 et seq.) (http://www.daco.gobierno.pr) created to protect, represent, advise, educate and orient consuming public. Powers include power to regulate, fix, control, freeze and review consumer product and service prices, profit margins and rate of return of capital on articles, products and services; regulate and monitor advertisements and deceptive practices in commerce; offer legal and technical advice to consumers; investigation and adjudication of complaints and corrective action by court or otherwise. Secretary of Consumer Affairs authorized to represent consumer public before any private entity or public agency. Secretary authorized to impose administrative fines up to $10,000 for violation of rules, regulations, orders of DACO. DACO granted subpoena power and Court of First Instance authorized to enforce same.

False Advertising.

False representation as to product constitutes misdemeanor punishable by fine of not more than $500 or imprisonment for not more than six months, or both, in discretion of court. (3 LPRA 341 et seq.). All commercial businesses required to post sign in Spanish in form approved by Secretary. English translation follows: “False advertising is illegal. Such conduct carries a maximum fine of $10,000. The consumer may submit complaint to DACO. Act No. 5 of April 23, 1973, as amended.” (3 LPRA 341r).

Telemarketing Fraud.

Use of telephone for marketing regulated. (10 LPRA 4031 et seq.). Certain practices prohibited including threats and intimidation. Contracts resulting from prohibited behavior are void and company or solicitor of contract subject to fine (maximum $5,000) or imprisonment (maximum of six months) as determined by court.

Warranty on Consumer Goods.

Sale of household goods and appliances prohibited where warranty not valid in Commonwealth. Violation is misdemeanor with $500 fine and/or confinement not to exceed six months. (10 LPRA 112), et seq.). Sellers required to furnish receipts to buyers using durable ink and paper designed to last longer of one year or length of warranty. Fine per violation of $100-$10,000 enforced by DACO (2006, Act 95).

Service contracts on household goods and appliances must be executed in documents separate from sale contract. Service contract commences only upon expiration of warranty of seller or manufacturer, whichever is later (except as to items not covered by manufacturer warranty), and must cover labor, defects and damages if such items covered by manufacturer warranty. Violation is misdemeanor with fine $100 minimum $500 maximum and/or confinement not to exceed six months. (10 LPRA 113).

Consumer leases of personal property governed by special conditions. See category 21 Property, topic 21.10 Landlord and Tenant, subhead Lease of Personal Property, catchlines Consumer Leases and Consumer Leases with Purchase Option.

Lemon Law.

New motor vehicles sold in Puerto Rico must be covered by factory warranty which cannot be inferior in any way to that granted by manufacturer for benefit of any consumer in U.S. Manufacturer, distributor or seller must file with DACO copy of warranty contract to be granted to consumer, together with Spanish translation thereof, at no additional charge to consumers. This requirement is not subject to provisions of Act No. 1 of Jan. 28, 1993. (1 LPRA 59; 10 LPRA 2051-2065).

Manufacturer must make arrangements to adequately service its vehicles in Commonwealth wherever purchased and file information about servicing with DACO. (10 LPRA 2057). Manufacturer is liable for damages caused by manufacturing or design defects. (10 LPRA 2060). Authorized dealers or those persons who sell any new vehicle must provide effective factory warranty service. (10 LPRA 2061).

Credit Reports.

Credit reporting agencies subject to regulation by Secretary and by Commissioner of Financial Institutions. Financial institutions required to inform all credit reporting agencies of payment of debt subject to negative report within 15 days of payment and to inform clients of filing of negative credit information with credit reporting agencies within 30 days of filing. Federal Fair Credit Reporting Act of 1970, as amended (15 USCA §§ 1681-1681u [1996]), adopted, except that exemptions of USCA 1681c(b) do not apply. (7 LPRA 2031-39).

Ombudsman functions as representative for investigation of complaints by individuals and private juridical entities against government agencies. Complaints may be investigated if act complained of is contrary to law or regulation, unreasonable, unfair or discriminatory, based on error, unexplained, or erroneously or inefficiently performed. There is no charge for ombudsman's services. (2 LPRA 701 et seq.).

Repossession of Consumer Goods.

Local version of UCC grants certain protections to consumer upon repossession including 30-day period after repossession for consumer to pay debt and reclaim property. Notice to debtor of repossession is required. (19 LPRA 2203 et seq.).

See also topic 3.23 Sales, subhead Retail Credit Sales.

Uniform Deceptive Trade Practices Act not adopted.

Plain Language.

No “Plain Language” statute. However, many documents such as insurance policies, retail sales contracts must be available for signature in Spanish. See topic 3.23 Sales, subhead Retail Credit Sales.

3.13 CONTRACTS:

(31 LPRA 3371 et seq.).

Civil Law rather than Common Law controls.

Requirements and Enforceability.

Contract valid if parties have consented, object of contract appears certain and determinable and there exists cause (consideration). (31 LPRA 3391). See subheads Consent and Consideration, infra. Contract provisions enforceable between parties except clauses contrary to law, morals or public order. (31 LPRA 3372). Attorneys fee clauses enforceable but considered “penalty clauses” and subject to court modification if excessive or unreasonable. (31 LPRA 3133).

Consent induced by error, violence, intimidation or deceit is void. (31 LPRA 3404). Error invalidates consent only if it refers to substance of object of contract, or to conditions principally giving rise to its execution. Error with regard to person does not invalidate consent unless going to essence of contract. Violence requires irresistible force; intimidation requires reasonable and well-grounded fear by one party of suffering imminent danger and serious injury to his person or property, or to person or property of spouse, descendants or ascendants, taking into consideration age, sex and status of party. Fear of displeasing persons to whom obedience and respect are due is not intimidation. Violence or intimidation may proceed from a third person. Deceit (dolo) exists when one party by words or insidious machinations induces other to execute a contract which he would not otherwise have executed; it may not proceed from a third person, although deceit of a third person may result in error.

Consideration.

Concept of “consideration” is covered by concept of “cause” (causa). English translations appearing in 31 LPRA 3431 et seq. are confusing in translating cause as “consideration.” In onerous contracts, cause means giving or promise to give a valuable thing; in remuneratory contracts, services or benefits for which remuneration is paid; and in contract of pure generosity, mere liberality of benefactor. Cause is presumed to exist even if not expressed.

Revocation.

When contract of purchase and sale is accompanied by earnest money, identified as such in contract, either party may rescind; vendee on forfeiture of earnest money, and vendor on payment to vendee of double amount of earnest money. (31 LPRA 3750; 73 DPR 666).

Offers may be withdrawn at any time before acceptance. Acceptance by letter is not binding on offeror until it comes to his knowledge. (31 LPRA 3401).

Government Contracts.

All contracts with Commonwealth, its agencies, instrumentalities and municipalities (with certain minor exceptions) must be filed with Comptroller of Puerto Rico within 15 days of signing (30 days if signed outside Commonwealth). Obligation to file on Government. If Comptroller notifies any objection to contract, government entity must correct within 30 days. (2 LPRA 97). Act prohibits disbursements under contracts until filed with Comptroller. (2 LPRA 97[d], [e]). See topic 3.18 Licenses, Business and Professional, subhead Government Contractors and Applicants for Government Incentives; category 8 Debtor and Creditor, topic 8.01 Assignments, subhead Assignment of PR Government Contracts. All government agencies and instrumentalities required to publish on Internet all public documents related to bids, jobs (obras), contracting, management, reports on status of public projects. (2006, Act 113).

Uniform Commercial Code adopted with variations. See topic 3.09 Commercial Code. (19 LPRA 401).

Infants.

See category 14 Family, topic 14.10 Infants.

Interpretation of Contracts.

If terms clear and consistent with parties' intentions literal interpretation prevails. If terms contrary to intention, intention prevails. Intention is determined based on contemporary and previous acts of parties. (31 LPRA 3471-79).

3.14 FACTORS:

(10 LPRA 1571 et seq.).

Administrative manager of business of another is called factor. Acts of factor representing mercantile house bind principal, though effected in violation of instructions, if they relate to matters comprised in usual business of house or if expressly or tacitly approved. (10 LPRA 1576).

Commission merchants may contract in their own name or in that of their principal. In the former case the commission merchant alone is liable to and may proceed against third parties. A commission merchant must follow instructions. He cannot, without express authority, sell on time or installment. He has lien for his commission and expenses on articles received by him. (10 LPRA 1577).

Uniform Commercial Code adopted with variations. See topic 3.09 Commercial Code. (19 LPRA 401).

3.15 FRANCHISES:

No special legislation. See category 2 Business Organizations, topic 2.01 Agency, subhead Dealers' Act.

3.16 FRAUDS, STATUTE OF:

Concept of Statute of Frauds unknown to Puerto Rico law. Similar provisions exist in Civil Code which require that certain agreements must appear in public deed: (1) Rights and extinction of rights as to real property, including agreement submitting property to condominium regime; (2) leases for six years or more; (3) prenuptial agreements; (4) assignment, denial or renunciation of hereditary rights; (5) powers of attorney granting power to sue, manage property, perform act that must be formalized in public deed or that prejudices third parties; (6) assignments of rights granted by public deed. (31 LPRA 3453). Except in above cases, however, contracts are valid between parties whatever their form. (31 LPRA 3451).

3.17 INTEREST:

Legal rate in absence of agreement is 6%. (31 LPRA 4591).

Maximum rates for personal, mortgage, commercial and agricultural loans are fixed from time to time by Financing Board of Office of Commissioner of Financial Institutions. (http://www.ocif.gobierno.pr). (7 LPRA 2008). Maximum rate for nonregulated loans not exceeding $3,000 is 9% and above $3,000 is 8%. (10 LPRA 998). No requirement for written agreement.

Corporations are not permitted to plead usury as defense. (14 LPRA 3134).

Small Loans.

Under Small Personal Loan Act, cash loans of $5,000 or less, payable in substantially equal monthly installments, including amortization of principal and amount of annual charge, made by licensed small lenders subject to charges and interest fixed from time to time by Financing Board of Office of Commissioner of Financial Institutions. (7 LPRA 2008, 10 LPRA 941 et seq.).

Retail Credit Sales.

Under Retail Installment Sales Act, Financing Board of Office of Commissioner of Financial Institutions (7 LPRA 2008) is authorized to fix maximum credit service charges for retail installment sales, without regard to usury laws. Interest rates established from time to time for credit cards, revolving charge plans, motor vehicles (new and used), household appliances, commercial electrical fixtures, household furniture, and industrial, agricultural and construction machinery. (10 LPRA 774 et seq.).

Judgments bear interest established from time to time by Financing Board. (7 LPRA 2008; 32 App III R44.3).

Open Accounts.

Lacking agreement, interest at legal rate of 6% runs from demand, which may be extrajudicial. (31 LPRA 4591).

Usury.

Penalty is loss of interest and forfeiture of 25% of principal to Commonwealth. (31 LPRA 4594).

3.18 INFORMATION TECHNOLOGY, INTERNET AND NEW MEDIA:

E-Commerce.

Regulation of e-commerce is limited. Uniform Electronic Transactions Act adopted to facilitate commercial electronic transactions: (1) With states of U.S. and other U.S. jurisdictions which have adopted Act, (2) internationally, (3) within Puerto Rico and with government agencies, (4) to promote consistency in electronic transactions, (5) grant legal standing to electronic documents, contracts and signatures. (3 LPRA 991-998). Providing e-commerce services, as rule, does not require public license or approval. Federal laws apply unless Puerto Rico excluded specifically.

Advertising.

No specific laws on Internet advertising. See category 3 Business Regulation and Commerce, topic 3.12 Consumer Protection, subhead False Advertising. General tort law applies to damages resulting from false or misleading advertising. (31 LPRA 5141).

Digital Signatures.

Use authorized and regulated by Puerto Rico Electronic Signatures Act (3 LPRA 8701 et seq.) enacted pursuant to and in accordance with U.S. Electronic Signatures in Global and National Commerce Act (E-SIGN, 15 USCA 7001 et seq.). Regulation for Concession of Licenses, Certificate Issuers and Registration effective on Sept. 20, 2009 (Reg. 7560 of Aug. 21, 2008).

Identity Theft.

Identity theft and impersonating someone with intent to deceive are crimes. (33 LPRA 4843 et seq.).

Computer Crime.

Federal laws apply. Penal Code (33 LPRA 4275c) imposes penalties for unlawful access and other types of damages to computers, related programs and databases.

Government Agencies.

Transactions involving Commonwealth government and public, including periodic filings required of businesses by Commonwealth law, tax returns and applications to bid for business with municipalities may be effected electronically. (3 LPRA 991-998). Uniform Administrative Procedure Act (3 LPRA 2121) requires that any regulation that is proposed to be adopted, amended or repealed and summary of proposed action and its basis be available through Internet in Spanish and English for comment by general public. Government Internet address is http://www.gobierno.pr. (See specific categories and topics for various agency Internet addresses.)

Telecommunications.

Regulated by Puerto Rico Telecommunications Act of 1996. (27 LPRA 265 et seq.). Objectives of statute, to promote competition among private service providers, are enforced by Telecommunications Board (http://www.jrtpr.gobierno.pr). Certified telecommunications providers have right to locate their antenna equipment on government land and towers already used by government for its own antenna equipment, subject to meeting certain requirements. (27 LPRA 269g).

Telemedicine services to patients in Commonwealth may only be provided (i) by Commonwealth licensed physicians and (ii) with consent of patient. Physicians licensed outside of Puerto Rico may practice telemedicine in Commonwealth in emergency. (20 LPRA 6001 et seq.).

3.19 LICENSES, BUSINESS AND PROFESSIONAL:

(Title 20).

All recognized professions and numerous other pursuits are licensed. Any written advertising by licensed professional or business must include license or permit number. Violation is misdemeanor subject to maximum $500 fine. If ten or more professionals in firm, need include only license number of managing professional. (3 LPRA 341r). Commercial travelers not licensed. See category 22 Taxation, topic 22.13 Local and Municipal Taxes.

Collection Agencies.

(10 LPRA 981 et seq.). License requirement not applicable to banks, lawyers, real estate brokers, public officers or persons acting under judicial authorization, construction and finance companies, savings and loan associations, loan and finance companies or insurance companies. License required from Department of Consumer Affairs, yearly license and renewal $300. Bond of $5,000 required for each license. Various acts prohibited, including violence or threat of violence, publication or threat to publish list of debtors, intimidation by use of simulated legal documents, collection actions at place of work without employer consent. Violations punishable by administrative fine of not less than $50 nor more than $500 imposed by Department of Consumer Affairs. Violation also misdemeanor punishable by fine of not more than $1,000 or confinement for not more than two years, or both, in discretion of court.

Compulsory Business Registry.

(10 LPRA 2521-2527). All individuals and juristic persons operating business or having principal place of business in Commonwealth must register in Compulsory Business Registry no later than July 15 each year, submitting statistical information required by Puerto Rico Trade and Export Company, including type of business, gross sales for preceding year and NAIC classification. Registration can be through Internet at http://www.comercioyexportacion.com and receipt of application will be confirmed through Internet. Information in Registry is available on Internet to public. Registration fees, access fees and fines for failure to register up to $5,000 are fixed by Puerto Rico Trade and Export Company. Fees may be paid by credit card.

Government Contractors and Applicants for Government Incentives.

General Service Administration Administrator required to maintain list of contractors qualified to bid on contracts for government and its agencies. Only those on list qualify for government contracts. Qualification requires moral and financial solvency and no prior record of corruption involving government. List is public and available on Internet (http://www.asgpr.com). (3 LPRA 931 et seq.). Government contractors, suppliers, and any person requesting economic incentives from government subject to code of ethics and sanctions for any violations of code, including triple damages and ten-year ban on contracting with government. (3 LPRA 1755 et seq.). See category 22 Taxation, topic 22.18A Tax Incentives and Exemptions.

3.20 MONOPOLIES, RESTRAINT OF TRADE AND COMPETITION:

(10 LPRA 257 et seq.).

Local law closely follows Federal antitrust laws, with some exceptions based on local market conditions. Local courts are guided, but not bound, by federal antitrust case law when interpreting local statute "according to local economic conditions." (153 DPR 861). Private action broader in some aspects and more restricted in others; pleading and antitrust standing requirements more liberal. Motorfuel producers and wholesalers cannot institute zone pricing programs. (23 LPRA 1104). Insurance Code has specific provisions concerning monopolies and unfair trade practices. (26 LPRA 2703-2736).

See also category 5 Civil Actions and Procedure, topic 5.20 Process, subhead Long-arm Statute.

3.21 NEGOTIABLE INSTRUMENTS:

See topic 3.02 Bills and Notes.

3.22 RESTRAINT OF TRADE:

See topic 3.20 Monopolies, 3.22 Restraint of Trade and Competition.

3.23 SALES:

(10 LPRA 1701; 31 LPRA 3741 et seq.). Arts. 2 and 6 of Uniform Commercial Code not adopted. Remaining articles of UCC adopted with variations. See topic 3.09 Commercial Code. (19 LPRA 401).

Contracts of sale, whether of real or personal property, are subject to general provisions of law relating to contracts and public instruments, and to special rules provided in Civil and Commercial (not UCC) Codes. See topic 3.13 Contracts.

Contracts of Sale.

By a contract of purchase and sale one party agrees to deliver a specified thing and the other to pay a specified price in money or otherwise. (31 LPRA 3741). Sale is perfected and binding on vendor and vendee if they have agreed upon things sold and upon price thereof, though neither has been delivered, however title not conveyed until buyer given possession. (31 LPRA 3746; 143 DPR 243). Determination of price cannot be left to judgment of one of parties. (31 LPRA 3745). If sale is made by notarial instrument, expense of execution of instrument is for account of vendor, and cost of first copy and other expenses subsequent to sale are chargeable to vendee, unless agreed otherwise. (31 LPRA 3751). Sales of real property must be recorded for validity against third parties. See category 21 Property, topic 21.06 Deeds, subheads Recording and Forms. See subhead Retail Credit Sales, infra and topic Frauds, Statute of.

Bills of Sale.

There are no special statutory requirements.

Husband and wife cannot sell property to each other unless separation of property has been agreed upon by antenuptial agreement or there is court decreed separation. (31 LPRA 3772). See category 14 Family, topic 14.09 Husband and Wife.

The cost of the delivery of the thing sold is borne by the vendor and that of its removal by the vendee. (31 LPRA 3814).

If the same thing is sold to different vendees, it belongs to the person who first takes possession in good faith, if it is personal property, and to the person who first records it in the registry, if it is real property. (31 LPRA 3822).

Warranty.

Unless there is stipulation to contrary, vendor warrants to vendee: (a) legal and peaceful possession of thing sold, provided that vendee notifies him promptly of institution of suit against vendee, and (b) that there are no hidden defects therein. (31 LPRA 3831). See topic 3.12 Consumer Protection, subhead Lemon Law.

Product Liability.

No special statutory provisions except for motor vehicles. See topic 3.12 Consumer Protection, subhead Lemon Law.

Disability to Purchase.

A guardian cannot purchase the property of his ward, or agents that of their principals, or lawyers the property or rights which may be the objects of litigation in which they take part. (31 LPRA 3773).

Delivery.

The vendor is not bound to deliver the thing sold if the vendee has not paid the price, or a period for the payment has not been fixed in the contract, nor need he deliver it when after the sale it is discovered that vendee is insolvent. (31 LPRA 3815).

Retail Credit Sales.

(10 LPRA 731 et seq.). Retail Installment Sales Act covers retail installment sales made to individuals. Maximum finance charge fixed by Financing Board of Office of Commissioner of Financial Institutions. See topic 3.19 Interest, subhead Retail Credit Sales. Words “Retail Installment Contract” in 10-point type must appear at beginning of document and above buyer's signature. Following must appear in 10-point type (12-point type for chattel mortgages and conditional sales): “Notice to buyer. Do not sign this contract before you have read it or if it contains blank spaces. You are entitled to a copy of this contract. Under the present law you have the right to pay off in advance the balance due on the contract. In such cases the principal due on the date of payment and any balance to cover charges or interest accrued to such date will be canceled.” In addition to disclosures required in law, each contract must contain disclosures required by and comply with Federal Truth in Lending Act and Regulation Z issued thereunder. Buyer entitled to copy of contract and to notice of assignment. Assignment does not cut off buyer's defenses and buyer may assert against assignee all defenses available against seller, provided buyer gives notice to assignee within 20 days of learning of existence of defense. Contract must contain notice to assignee to this effect. All notes issued in connection with contract must state that they are subject to terms of contract. Right to accelerate is limited. Revolving charge plans and credit cards are also regulated by law and must comply with federal law. Retail sellers, credit card issuers and revolving plan sellers must file contract forms with Office of Commissioner of Financial Institutions and obtain approval prior to use of contract in Puerto Rico. Any retail installment contract must be offered to client in English or Spanish, as chosen by client. Companies (other than banks, trust companies, investment companies or credit

cooperatives) in business of acquiring retail installment contracts, financing insurance policies, or that finance their own sales and have portfolio of at least $1,000,000, must be licensed by Commissioner of Financial Institutions. See topic 3.19 Interest, subhead Retail Credit Sales.

Consumer Protection.

See topic 3.12 Consumer Protection.

Remedies of Seller.

Remedies vary according to whether sale is of civil or commercial nature. With regard to personal property rescission of sale takes place for benefit of vendor when vendee does not appear to receive property at time fixed, or does not offer price at such time if due. (31 LPRA 3876). In commercial sales, if purchaser refuses without just cause to receive goods bought vendor may demand fulfillment or rescission of contract but in former case he must deposit merchandise to order of court. (10 LPRA 1708). Losses suffered by merchandise after same is at disposal of purchaser, fall upon purchaser except in cases of negligence of vendor. (10 LPRA 1709). Purchaser who at time of receiving merchandise carefully examines same has no right of action against vendor for defects in quantity or quality of merchandise. (10 LPRA 1712).

Remedies of Buyer.

In commercial sales if vendor does not deliver goods at time stipulated purchaser may demand full compliance or rescission of contract, with damages in either case. (10 LPRA 1705). He is not obliged to receive part of merchandise purchased but if he accepts partial delivery sale is consummated with regard to goods received. (10 LPRA 1706). Loss or impairment of goods before delivery without fault of vendor entitles purchaser to rescind contract unless title has already passed. (10 LPRA 1707).

Buyer has right of action for defects of merchandise received in bales or packages but must bring his action within four days following receipt of packages. In such cases he may choose between rescission of contract or its fulfillment, with damages in either case. (10 LPRA 1712).

Bulk Sales.

See category 8 Debtor and Creditor, topic 8.08 Fraudulent Sales and Conveyances.

Sales of Motor Vehicles.

See topic 3.12 Consumer Protection, subhead Lemon Law and category 23 Transportation, topic 23.01 Motor Vehicles.

3.24 SECURITIES:

(10 LPRA 851 et seq.).

Uniform Securities Act, 1956 version, with 1958 amendments, adopted. See Part VI, Uniform and Model Acts for text of Uniform Securities Act. Sections of Laws of Puerto Rico Annotated (Puerto Rico Uniform Securities Act) correspond to Uniform Securities Act (“Act”) as follows: §§ 851-853 correspond to §§ 101-103; §§ 861-864 correspond to §§ 201-204; §§ 871-876 correspond to §§ 301-306; §§ 881-895 correspond to §§ 401-415; §§ 416-419 of Act were omitted in their entirety in Puerto Rico law; § 853 and §§ 896-898 of Puerto Rico law are new.

Material Variations from Official Text, Omissions, and Action on Optional Provisions.

Listed below by Act section number are material variations made in Puerto Rico from official text, sections omitted, and action taken with respect to optional provisions in Puerto Rico:

§ 101(4) and (5) added: "(4) It is unlawful for any person, in connection with the offer, sale, or purchase of any security to, directly or indirectly, issue, circulate or publish any material through printed or electronic means, which contains false representations regarding material facts, or omits information regarding a necessary material fact in such a way that the information that is issued, circulated or published, in light of the circumstances in which it was issued, circulated or published, is misleading.

(5) It is unlawful for any person, relative to offer, sale or purchase of any securities, directly or indirectly, to issue, circulate or publish any material, or make any written representation unless the name of the person who issues, circulates or publishes the information, and the fact that it is that person who issues, publishes or makes the representation, are clearly indicated on that same document."

§ 201(c): Amended to include representative of investment advisor; to increase categories of eligible clients; to limit to five number of clients for 12-month period; to prohibit place of business in Commonwealth.

§ 201(d), (e) and (f) added; § 201(d) redesignated as 201(g). § 201(d): Covers federally-covered investment advisers, requires registration, no place of business in Commonwealth; limits type and number of clients. § 201(e): (1) Investment advisor cannot lawfully employ unregistered investment advisor representative; (2) federally-covered investment advisor cannot employ, supervise or associate with unregistered investment advisor. Notice of termination of relationship required in either case. § 201(f): Unlawful for federally-covered investment advisor doing business in Commonwealth to employ, supervise or associate with investment advisor representative with place of business in Commonwealth unless: (1) he has filed notice of registration statement; (2) he is registered as broker-dealer not subject to § 204(b)(5); or (3) he has no place of business in Commonwealth, and (a) his clients are limited to specific types, or (b) limited to five in number except those specified in (a).

§ 202(a): Amended to include "investment advisor representative"; omits last sentence: "Registration of a broker-dealer automatically constitutes registration of any agent who is a partner, officer, or director, or a person occupying a similar status or performing similar functions."

§ 202(b): Added to cover federally-covered investment advisor. Requires submitting copies of SEC filings to Commissioner of Financial Institutions (see subhead Supervision, infra) and designating Commissioner as agent for service of process. Not applicable if only clients in Commonwealth qualify under § 201(c)(3).

§ 202(b) redesignated as § 202(c) and restated as three clauses covering (1) broker-dealers and broker-dealer agents; (2) investment advisors and investment advisor representatives and (3) federally-covered investment advisors. All pay registration and renewal fees of $500 except $150 for broker-dealer agent.

§ 202(c)-(g) redesignated as (d)-(h) and amended: clause (e) (formerly [d]) made subject to limitations of § 15 of Securities Exchange Act of 1934 as to minimum capital and debt to net capital ratio requirements for broker-dealers, and to § 222 of Investment Advisors Act of 1940 as to minimum financial requirements for investment advisors; clause (f) (formerly [e]) made subject to same respective limitations.

§ 202(f): Amended amount of surety bond to be posted to $50,000. Amended third sentence to read: "No bond may be required of any registrant whose net capital, which may be defined by regulation, exceeds $100,000 or who offers any other guarantee that may be accepted by the Commissioner."

§ 202(f) and (g) added and now redesignated as (g) and (h): "(g) It is required that broker-dealers who wish to register in Puerto Rico be members of the National Association of Securities Dealers, Inc. ('NASD'), or its successor.

(h) The Commissioner has the power to use the services of the Central Registration Depository or any system which succeeds it or is similar to it, operated by NASD or its affiliates, to accept registration applications, the filing of documents and the collection of fees on behalf of the Commissioner."

§ 203(d): Inserted, after "protection of investors": "In the case of periodic inspections, the broker-dealer and investment adviser whose records are inspected, shall pay the Commissioner an examination fee of $100 for each day or fraction thereof for each inspector participating in each inspection, in addition to the expenses incurred on account of per diems and mileage according to the regulations established for officials and employees of the Commonwealth of Puerto Rico, by certified check or postal money order drawn to the account of the Secretary of the Treasury. In no case shall there be a charge exceeding $6,000 for periodic inspections in one year." Deleted "Securities Exchange Act of 1934" and substituted "Securities Exchange Act."

§ 204(a): Deleted at end "thirty days" and substituted "ninety days."

§ 301 (3): Added to include federally-covered security as exclusion.

§ 303(a): Added at end: "This registration may be achieved through the use of the electronic system known as Securities Registration Depository (SRD), or any successor or similar system approved by the Commissioner by regulation. The Commissioner, through regulations, shall adopt norms to implement this mechanism."

§ 303(b)(1): Deleted "three copies" and substituted "one copy."

§ 303(c): Deleted word "telegram" after second sentence and substituted "or any means of electronic transmission."

§ 305(b): Added after first sentence: "When a registration is by qualification, the person shall pay a registration fee equal to 1/5 of 1 percent, but in no case less than $1,000 up to a maximum of $2,500. In the case of registration by qualification, the Commissioner may reduce the established amounts through regulations and charge 1/10 of 1 percent but never less than $400 in the case of enterprises engaged in activities of great public interest, which during each taxable year derive at least 70 percent of their gross income from Puerto Rican sources and at least 70 percent of such income comes from the development of one of the following activities: (1) a business engaged in substantial renovation of buildings or structures; (2) a manufacturing business which generates substantial jobs, it being understood that the criteria to be used shall be the unemployment rate and personal income with regard to the work force available in the municipality where the activity is to be undertaken; (3) a tourism business; (4) an agricultural business; (5) a business for the export of products or services to foreign countries; or (6) an enterprise engaged in investment in high risk projects or businesses, which operates as a Capital Investment Fund under Act No. 3 of October 6, 1987, as amended, known as the Capital Investment Funds Act of Puerto Rico."

§ 305(k): Deleted "Investment Company Act of 1940" and substituted "Investment Companies Act of Puerto Rico."

§ 306(a): Deleted at end "thirty days" and substituted "ninety days."

§ 307: Added to cover sale in Commonwealth of federally-covered securities.

§ 401(b): Changes made in definitions as follows:

“Agent”: Amended to exclude individual “effecting transactions as an employee of and for the account of the Commonwealth of Puerto Rico or any political subdivision, agency, corporate, or other instrumentality thereof.” Amended to exclude person engaging in transactions with respect to federally covered securities and broker-dealer engaging in transactions limited to those described in § 15(h)(2) of Securities Exchange Act of 1934.

“Broker-dealer”: Amended to exclude “a governmental instrumentality.” Amended to qualify exclusion for banks, savings institutions and trust companies to limit excluded business to that permitted under § 3(a) (4) (B) (i) to (B) (xi) and 3(a) (5) (C) (ii) and (iii) of Securities Exchange Act of 1934 and to offer and sale of individual retirement accounts and educational contribution accounts, as such terms are defined in Puerto Rico Internal Revenue Code of 1994. Amended exclusion for person with no place of business in Commonwealth, 401(c) (5) (A) (iii), to limit excluded business with banks, investment companies, pension or security participation trusts and other financial institutions to those acting in their own name.

“Fraud”, “deceit”, and “defraud”: Deleted “not limited to common-law deceit” and substituted “not limited to ‘dolo’ within the meaning of the Civil Code.” (See 31 LPRA 3408; category Business Regulation and Commerce, topic Contracts, subhead Consent.)

“Investment adviser”: Amended to exclude governmental instrumentality, investment adviser representative, federally covered adviser and person excluded from definition of term “investment adviser” under § 202(a)(11) of federal Investment Advisers Act of 1940; and to eliminate exclusion for banks, savings institutions and trust companies.

“Security”: Amended to include “hybrid instrument.”

New definitions added for following: “Accredited Investors,” “Representative of investment adviser,” “Federally covered adviser,” “Federally covered security” and “SEC”; “Person associated with a broker-dealer or associated person of a broker-dealer”; “Hybrid instrument”; “Identified banking product or instrument”; “Swap agreement”; and “Qualified investor”.

§ 402(a)(5): Phrase “insurance companies not authorized to do business in Puerto Rico and not registered in the Securities and Exchange Commission under the Investment Company Act of 1940” inserted after “similar security.”

§ 402(a)(6): Deleted “Federal Credit Union or any other credit union” and substituted “federal savings and credit cooperative, any savings and credit cooperative union, or similar association organized and supervised under the laws of Puerto Rico.”

§ 402(a)(8): Added after “Midwest Stock Exchange” “the National Association of Securities Dealers Automated Quotations-National Market System (NASDAQ-NMS), Chicago Options Exchange and the Pacific Stock Exchange and any other securities exchange that solicits an exemption if the Commissioner, in his discretion, determines that it is necessary and convenient to add to the ones already mentioned.”

§ 402(a)(11): Added phrase “or any interest share in a noncollective trust fund” after “investment contract.” Deleted “if the Administrator is notified in writing thirty days before the inception of the plan, or with respect to plans which are in effect on the effective date of this Act within sixty days thereafter” and substituted “that complies with the qualification requirements of sections 1165 or 1023(n)(1)(B) of the Internal Revenue Code of Puerto Rico of 1994.”

§ 402(a)(13) added: “A security issued by an issuer registered as an open-end management investment company or unit investment trust under Section 8 of the Investment Company Act of 1940 (15 USC 80a-8) if following requirements are met:

(i) the issuer is advised by an investment adviser that is a depository institution exempt from registration under the Investment Advisers Act of 1940 (15 U.S.C. 80b-1 et seq.) or that is currently registered as an investment adviser, and has been registered, or is affiliated with an adviser that has been registered as an investment adviser under the Investment Advisers Act of 1940 (15 U.S.C. 80b-3) for at least the three years preceding an offer or sale of a security claimed to be exempt under this paragraph; and the issuer has acted, or is affiliated with an investment adviser that has acted as investment adviser to one or more registered investment companies or unit investment trusts for at least three years preceding an offer or sale of a security claimed to be exempt under this paragraph; or

(ii) the issuer has a promoter that has, at all times, throughout the three years before an offer or sale of a security claimed to be exempt under this paragraph, promoted one or more registered investment companies or unit investment trusts the aggregate total assets of which have exceeded $100,000,000; and

(iii) in addition to the aforementioned, the Commissioner has received, before any sale exempt under this subsection; (a) a notification of intent of a sale, prepared and signed by the issuer of the security, which must include the issuer's name and address and the type and quantity of the securities to be offered in Puerto Rico; and (b) the payment of the fees stipulated by Article 305(b) of this Act.

(iv) In the event that an offer or sale of securities of an open-end management investment company or of a unit investment trust is to be realized, the filing of a new notice and the payment of the fees corresponding thereto shall be required twelve months after the Commissioner has received the notice and payment of fees established in Section 402(a)(13)(iii).

(v) An exemption under this section does not constitute or grant an exemption from the requirement of registration to agents who offer or sell the securities referred to in this section.

(vi) For the purposes of this section, an investment adviser shall be understood to be affiliated with another investment adviser if the investment adviser controls or is under common control with such other investment adviser.”

§ 402(b)(10)(C): Deleted “no payment is made by any subscriber” and substituted “not more than $1,000 in the aggregate is paid by all subscribers.”

§ 402(b)(13) added: “Any offer (but not the sale) of a security for which a registration statement has been filed under this Act, under the standards adopted by the Commissioner, through a regulation to such effect, to authorize the use of the prospectus or preliminary offering memorandum.”

§ 402(b)(14) added to incorporate Model Accredited Investor Exemption proposed by North American Securities Administrators Association in 1997.

§ 402(e) added: “Every person who files an application for exemption must accompany the same with a filing fee of $100.”

§ 407(a): Omitted “(3) may publish information concerning any violation of this Act or any rule or order hereunder.”

§ 407(e) added: “The Commissioner may issue subpoenas and request that they be enforced in Puerto Rico at the request of an agency or administrator that regulates the securities industry in another state if the activity constituting the alleged violation for which the subpoena is sought would constitute a violation of this Act, had it occurred in Puerto Rico."

§ 408: Amended to create subsections (a), (b), (c), (d), (e) and (f).

"(a) When in the judgment of the Commissioner any person has engaged or is about to engage in any act or practice constituting a violation of any provision of this Act, or any regulation or order promulgated pursuant to the provisions of the same, he/she may, at his/her discretion, initiate a process in the Court of First Instance, Superior Part, to enjoin such acts or practices, and to enforce compliance with the provisions of this Act or any regulation or order promulgated pursuant to its provisions. Upon presentation of proof to the satisfaction of the Court, a permanent or temporary injunction, restraining order, or writ of mandamus shall be granted, and a receiver or curator may be appointed for the defendant or for the defendant's assets. The Commissioner shall not be required to post bond.

(b) If the Commissioner reasonably believes, whether or not based upon an investigation conducted by him/her, that a person has violated or, in the case of subsection (b)(1) of this section, is about to violate this Act or a rule or order issued by the Commissioner under this Act, the Commissioner may, in addition to any other power granted to him/her under this Act and upon prior notice and hearing to such effects, unless such right to notice and hearing is waived by the person against whom the sanction is imposed, take one or more of the following measures:

(1) Issue an order to cease and desist;

(2) Censor the person, if the person has a broker-dealer, agent or investment adviser license; or

(3) Suspend or prevent the person from associating with a licensed broker-dealer, agent or investment adviser in Puerto Rico for a term not to exceed one year; term during which the Commissioner may conduct any further investigations and take other actions allowed by law that may be necessary to protect the public interest.

(c) For purposes of determining what sanctions, if any, may be imposed under subsections (b)(1) to (b)(3) of this section, the Commissioner shall consider, among other factors, the frequency and persistence of the conduct which constitutes a violation of any provision of this Act or any regulation or order promulgated pursuant to its provisions, the number of persons affected adversely by the conduct to be sanctioned, and the scope of the damage caused or about to be caused, should it be easily determined.

(d) The notice required in accordance with subsection (b) of this section shall indicate the legal or statutory provisions that, according to the Commissioner have been violated or, in the case of subsection (b)(1) of this section, are about to be violated, and shall also indicate the right of the affected party to an opportunity for hearing.

(e) Notwithstanding the requirement of previous notice and hearing under subsection (b) of this section, the Commissioner may impose the sanctions provided under subsection (b)(1) of this section by means of an immediate action adjudicatory procedure in those cases allowed under Section 3.17 of Act No. 170 of August 12, 1988, as amended, known as the Uniform Administrative Procedure Act.

(f) Nothing herein provided shall in any way limit the powers conferred to the Commissioner under the Financial Institutions Commissioner's Office Act, Act No. 4 of October 11, 1985, as amended."

§ 409(a): Deleted “not more than $5,000 or imprisoned not less than three years, or both” and substituted “not less than $500 nor more than $10,000 or imprisonment for a term of not less than six months nor more than five years, or both.” Optional bracketed information adopted. Inserted at end “Original jurisdiction to hear these cases is vested in the Court of First Instance.”

§ 409(c): Deleted “by statute or at common law” and substituted “under the Penal Code.”

§ 409(d) added: “The Commissioner may, in addition to the other remedies established in this Act, or in substitution thereof, impose upon any person who violates any provision of this Act, any rule or order under this Act, an administrative fine of not less than $500 nor more than $5,000 for each violation. The Commissioner may impose an additional fine equal to the total amount of the price paid for any of the securities offered or sold in contravention to the provisions of this Act, and/or order the refund of such price to purchasers who agree to it, plus interest at the rate applicable to judicial awards as established by the Financing Board created by Law No. 4 of October 11, 1985, as amended. If the person upon whom an administrative fine is imposed is not in agreement with it, he/she may request a hearing, in writing, within ten days following the date of notice. If the person agrees, he/she shall pay the fine no later than the expiration of said ten days, at the Office of the Commissioner, through a certified check or money order payable to the Secretary of the Treasury. The injured party shall have the remedy provided by section 411 of this title, against the Commissioner's decision to impose an administrative fine.”

§ 410(a)(2): Deleted “together with interest at six percent per year” and substituted “together with interest at the rate applicable to judicial awards as provided by the regulations approved to such effect by the Financing Board created by section 2001 et seq. of Title 7,”.

§ 410(e)(1): Deleted “together with interest at six percent per year” and substituted “together with interest at the rate applicable to judicial awards, as provided by the regulations approved to such effect by the Financing Board created by section 2001 et seq. of Title 7,”.

§ 410(e)(2): Deleted “and at a time when he did not own the security” and substituted “and when he was no longer the owner of the security.”

§ 411: Amended to read: “Any person aggrieved by a final order of the Commissioner may obtain its review before the Court of Appeals according to Act No. 248 of December 25, 1995.”

§§ 416, 417, 418 and 419 omitted.

New sections of Puerto Rico Uniform Securities Act added as follows:

§ 853 added: “Section 103. Market Manipulation. It shall be unlawful for any person, directly or indirectly:

(a) with the purpose of creating a false or deceptive appearance of the existence of an active market for a security, or a false or deceptive impression regarding the existence of a market for a specific security:

(1) to carry out any transaction with respect to the security which does not involve a change in the owner of the security; or

(2) to enter any order or orders for the purchase or sale of a security with the knowledge that the order or orders are substantially of the same size, or to be performed

substantially at the same time and substantially for the same sale or purchase price for the security, and that these have been made or will be made by or for the same person or for any other person affiliated with such person;

(b) to carry out, alone, or with one or more persons, a series of transactions in any security, creating an active market, whether actual or apparent, in such security to increase or decrease its price, for the purpose of inducing the purchase or sale of such security by others."

§ 896 (§ 416) added: Authorizes Commissioner to cooperate with securities regulating agencies in other countries.

§ 897 (§ 417) added: Creates special fund to educate investors.

§ 898 (§ 418) added: Authorizes Commissioner to adopt policies and initiatives adopted by NASAA.

Tender Offers.

No provision.

Supervision.

Administered by the Commissioner of Financial Institutions, Ponce de León Ave., Centro Europa Bldg., Suite 600, San Juan, Puerto Rico 00907; Internet: http://www.ocif.gobierno.pr.

Uniform Simplification of Fiduciary Security Transfers Act not adopted.

Uniform Securities Ownership by Minors Act not adopted.

Commercial Code.

Art. 8 of Uniform Commercial Code, 1995 version applies. (See topic Commercial Code for variations.) (19 LPRA 1701 et seq.).

3.25 STATUTE OF FRAUDS:

See topic 3.16 Frauds, Statute of.

3.26 TRUST RECEIPT SECURITY:

See category 8 Debtor and Creditor, topic 8.15 Pledges.

3.27 WAREHOUSEMEN:

(10 LPRA 341; 19 LPRA 1401).

The Secretary of Agriculture (http://www.agricultura.gobierno.pr) has general supervision over warehouses. (10 LPRA 343).

Bonds.

Warehousemen applying for license to conduct warehouse must offer bond in form, amount and with conditions prescribed by the Secretary. (10 LPRA 347).

Licenses.

A license is required to conduct warehouse business, issuable for a period of one year. (10 LPRA 345-6).

Commercial Code.

Uniform Commercial Code adopted. (See topic 3.09 Commercial Code.)

4 CITIZENSHIP

4.01 ALIENS:

Constitutional safeguards of due process and equal protection of laws are generally enjoyed by aliens. Aliens may engage in commerce and own personal property. There are some restrictions on alien ownership of real property. Only aliens that legally enter U.S. and who possess valid work authorization from U.S. Citizenship and Immigration Services or who are lawful permanent residents may be employed; provided “I-9” employment eligibility and record keeping requirements are met. See category 11 Employment, topic 11.02 Labor Relations, subhead Employment of Aliens.

For taxation of nonresident aliens see category 22 Taxation, topic 22.11 Income Tax, subhead Rates, catchline Nonresident Alien Individuals.

5 CIVIL ACTIONS AND PROCEDURE

5.01 ACCORD AND SATISFACTION:

(31 LPRA 4821 et seq.).

Known under local law as compromise or a contract to give, promise, or retain something. (31 LPRA 4821). It avoids provocation of, or terminates, suits; and has effect of res judicata. (31 LPRA 4827). Case law recognizes common law accord and satisfaction, where creditor accepts payment from debtor of undisputed amount or sum certain. (DPR 114:236; 101:830; 62:238).

Guardian cannot compromise rights of ward, except with judicial approval. Parents cannot compromise property and rights of child under their authority without judicial approval unless amount involved does not exceed $500. (31 LPRA 4822; 31 LPRA 616; 31 LPRA 786[12]; 31 LPRA 788).

No compromise can be made with regard to civil status of persons, nor matrimonial questions, nor future support obligations (31 LPRA 4825).

Rescission.

Ignorance of final judgment deciding suit is ground for rescission of compromise, but ignorance of reversible judgment is not. (31 LPRA 4830). In absence of bad faith, discovery of new documents does not justify rescission of compromise. (31 LPRA 4829).

Pleading.

As defense, compromise must be affirmatively pleaded. (32 App III R6.3).

Alternative to Acknowledgment or Proof.

No alternative exists.

5.02 ACTIONS:

(Title 4 Appendix).

Rules with respect to commencement, parties, third party practice, intervention, interpleader, joinder, splitting, consolidation and severance of actions, abatement and revival and termination of actions follow, in general, the Federal Rules of Civil Procedure, excluding 1993 amendments. See topic 5.19 Practice.

Class Actions.

Class action may be brought by any consumer of goods or services and/or by Commonwealth as parens patria for damages or seeking injunctive relief. Likewise, merchants, consumers of goods and services and Commonwealth Government may bring class action for violations of Puerto Rico Antitrust Law. In such actions, members of class are notified personally by court of action, if possible; otherwise, by most practical means. Judgment will include all members that did not request exclusion from action. In addition to awarding damages court must grant attorneys fees in amount not less than 25% of damages awarded, plus interest from date damage was caused, and costs of proceedings (32 LPRA 3341 to 3344; 2006 TSPR 187; [2006, Act 269]). Uniform Class Actions Act not adopted. Local rule similar to Federal Rule of Civil Procedure 23 has been adopted. (32 App. Ill R.20).

Equity.

When no statute applicable to case at issue, court decides according to natural justice as embodied in general principles of jurisprudence and established usages and customs. (31 LPRA 7).

Claims Against Commonwealth.

In personal or property damage claims against Commonwealth caused by its negligence, written notice of claim is required to be presented to Secretary of Justice within 90 days following date when claimant became aware of damages claimed. (32 LPRA 3077a). See topic 5.09 Damages, subhead Sovereign Immunity.

Prohibited Actions.

Action known in equity as “taxpayer's suit” is prohibited. (32 LPRA 3074).

Small Claims.

See category 6 Courts and Legislature, topic 6.01 Courts.

Direct action against insurer is permitted. (26 LPRA 2003). See category 23 Transportation, topic 23.01 Motor Vehicles, subhead Direct Actions.

Limitation of.

See topics 5.16 Limitation of Actions and 5.19 Practice.

5.03 APPEAL AND ERROR:

(4 LPRA 24 et seq. and Rules of Civil Procedure; 32 App III; see topics 5.02 Actions and Practice as to adoption of Federal Rules of Civil Procedure).

From Administrative Agencies to Court of Appeals.

By appeal, Court of Appeals will review final decisions, regulations, orders and resolutions of administrative agencies. (4 LPRA 24y[c]).

From Court of First Instance to Court of Appeals.

Appeals may be taken from final judgments. (4 LPRA 24y[a]). By discretionary certiorari, Court of Appeals may review any interlocutory order entered by Court of First Instance. (4 LPRA 24y[b]).

From Court of Appeals to Supreme Court.

In addition to entertaining traditional writs of habeas corpus, mandamus, quo warranto, prohibition, and others, Supreme Court will review by appeal final judgments of Court of Appeals in cases concerning laws, regulations or ordinances declared unconstitutional and cases raising issues of conflict of opinions among panels of Court of Appeals. By discretionary certiorari, Supreme Court may review any other order or judgment entered by Court of Appeals. By discretionary certification, cases pending before Court of First Instance or Court of Appeals concerning constitutionality of laws, regulations or ordinances are also reviewable before Supreme Court. Appeals, petitions for certiorari or certification must be generally filed within 30 days after date of notification of entry of judgment or order. (4 LPRA 24s; 32 App III R53.1).

From Supreme Court of P.R. to U.S. Supreme Court.

Decisions of Supreme Court of Puerto Rico can be reviewed by petition for certiorari to Supreme Court of U.S. as in case of any state. (See 28 U.S.C. § 1258.)

Stay of Proceedings.

(A) By writ of appeal—stay follows once writ of appeal filed before Supreme Court as to proceedings before lower courts with regard to judgment appealed from. Filing of writ of appeal before Court of Appeals stays proceedings before Court of First Instance, but Court of Appeals may order to contrary and Court of First Instance may proceed upon issues not included in appeal. (B) By certiorari—its filing before Supreme Court or Court of Appeals does not stay proceedings before Court of First Instance, unless order to contrary issued, but issuance of writ of certiorari stays proceedings, unless order to contrary issued. (C) Petition for certification does not stay proceedings before Court of Appeals or Court of First Instance, but Court of Appeals may not render judgment unless Supreme Court denies petition for certification. (32 App III R53.9 4 App. XX1-A R. 17 and 20; 4 App. XX11-AR. 18 and 35).

Extent of Review.

Local Rule 43.2 of Civil Procedure regarding scope of judicial review is substantially similar to Federal Rule of Civil Procedure 52(a). For judicial review of administrative decisions, local Uniform Administrative Procedure Act (3 LPRA 2175) is substantially similar to Federal Administrative Procedure Act, 5 U.S.C. 706.

See category 6 Courts and Legislature, topic 6.01 Courts.

5.04 BONDS:

(32 App III R69.1, 69.2, 69.3 and 69.4).

May be either (a) cash bond of amount designated or (b) mortgage bond secured by real property worth one-third more than amount of bond as shown by tax assessment certificate, except that if property's market value is shown to be higher than tax value, mortgage bond may be in amount equal to two-thirds of market value of property, or (c) personal bond given by resident of Puerto Rico who owns real property to be given as security, and whose assets, exclusive of property exempt from execution, and net of his debts, are worth double amount specified in bond, or (d) bond issued by recognized surety company authorized to do business in Commonwealth. Bonds shall not be required of private parties in actions concerning divorce, family relations, community property, or support claims, or from indigent nonresident party who can show probability of success on merits, or from government or public corporations. (32 App III R69.6). See topic 5.08 Costs, subhead Security for Costs.

5.05 CERTIORARI:

See topic 5.03 Appeal and Error.

5.06 CHARITABLE IMMUNITY:

See topic 5.09 Damages.

5.07 COMMISSIONS TO TAKE TESTIMONY:

See topic 5.11 Depositions and Discovery.

5.08 COSTS:

(32 App III R44). Costs are allowed as of right to prevailing party. Costs of appeal are also allowed as of right to party for whom judgment is rendered on appeal by Court of Appeals and Supreme Court. Granting of attorney's fees is discretionary with court, where latter finds there was obstinacy on part of defeated litigant in bringing or defending action. Costs can be taxed against defendant who did not enter appearance in action.

Security for Costs.

(32 App III R69.5). When plaintiff resides outside Puerto Rico or is foreign corporation, bond is required to secure costs, expenses, and attorney's fees which may be awarded. All proceedings are stayed until bond is posted, which must be not less than $1,000. Additional bond may be required upon showing that original bond is not sufficient security. If bond or additional bond is not filed within 90 days, action will be dismissed. See topic 5.04 Bonds.

5.09 DAMAGES:

Civil code governs, not common law. (31 LPRA 5141 et seq.). Person who through willful or negligent act or omission causes damage subject to liability.

Parents and guardians liable for damages caused by minor children residing with them, unless parent or guardian acted in prudent manner to prevent damages. (31 LPRA 5142).

Comparative Negligence Rule in effect. (31 LPRA 5141). Uniform Comparative Fault Act not adopted.

Doctrine of Charitable Immunity does not apply. (67 P.R.R. 574, 581).

Sovereign immunity (32 LPRA 3077 et seq.) waived for: (a) Damages against person or property up to $75,000 for acts or omissions of any officer, agent or employee of Commonwealth including medical malpractice claims against doctors and other medical personnel due to obstetric, orthopedic, general surgery or trauma treatment rendered within Commonwealth or government agency health facilities whether or not government operated. Limit increased to $150,000 when damages are caused to more than one person or when several causes of action accrue to plaintiff; (b) action to recover personal and real property or rights thereto, with or without claims for damages, rents or profits; and (c) civil action where amount does not exceed $75,000 of principal and is based on Constitution, law or any regulation of Commonwealth or on contract with Commonwealth. See topic 5.02 Actions, subhead Claims Against Commonwealth.

Medical Malpractice.

Court may appoint attorney and two physicians to prepare report on prima facie malpractice, which must be preceded by parties' own expert reports. Court reviews final report and may accept or reject its conclusions. (32 App III R41.6).

No-Fault Insurance.

See category 23 Transportation, topic 23.01 Motor Vehicles, subhead No-Fault Insurance.

Uniform Contribution Among Tortfeasors Act (Revised) not adopted.

See also category 13 Estates and Trusts, topic 13.05 Death, subhead Actions for Death.

5.10 DECLARATORY JUDGMENTS:

See topic 5.15 Judgments.

5.11 DEPOSITIONS AND DISCOVERY:

See topic 5.19 Practice.

32 App III R27.

Electronic discovery in effect. (32 App III R23.1[a]).

Rules of Civil Procedure modeled on Federal Rules. Uniform Foreign Depositions Act not adopted. Deponent and stenographer must have their oaths taken by notary public, whose presence at deposition is not required once deponent has been sworn in. (32 App III 25.1).

Party not interested in transcript of deposition shall so state to court by motion waiving its use at trial. If granted, deposition shall remain under custody of court and shall not be transcribed. (R27.6).

Commissions to take testimony are issued by court for taking depositions in foreign countries. (32 App III R25.2 similar to Federal Rule of Civil Procedure 28[b]).

5.12 EQUITY:

See topic 5.02 Actions.

5.13 EVIDENCE:

Witnesses.

(31 LPRA 3332).

Local rules similar to Federal Rules of Evid. 601-615 have been adopted. (32 App. IV R36-50; [2009, Act 46]).

All persons may be witnesses except those who are unintelligible or cannot understand duty to tell truth. (32 App. IV R37; [2009, Act 46]).

Expert Witnesses.

Local rules similar to Federal Rules of Evid. 701-706 have been adopted, except for those federal amendments enacted in 1993. (32 App. IV R 51-59; [2009, Act 46]).

Privileged Communications.

Self-incrimination, attorney-client, doctor-patient, husband-wife, accountant-client, priest-penitent, counselor-crime victim, trade and state secrets, informers' identity and voting privileges are recognized. (32 App. IV R 23-30; [2009, Act 46]).

Uniform Act to Secure Attendance of Witnesses in Criminal Cases has been adopted. (34 LPRA 1471). 1936 amendments not adopted.

5.14 INJUNCTIONS:

(29 LPRA 101; 32 LPRA 3521 - 3533, 3561 - 3566; 32 App III R57; Rule 65 of Federal Rules of Civil Procedure has formed, partially, basis for local Rule 57.)

An injunction may be granted (a) when it appears by complaint that plaintiff is entitled to relief demanded, and such relief consists in restraining commission of act complained of temporarily or permanently, (b) when it appears that commission of some act during litigation would produce great or irreparable injury to party, (c) when it appears that party to action is doing or about to do some act tending to render judgment ineffectual, (d) where money damages would not afford adequate relief, (e) where it would be extremely difficult to ascertain adequate amount of compensation, (f) where it is necessary to prevent multiplicity of judicial proceedings, (g) where obligation arises from trust, (h) to retain or recover real property when applicant was in actual possession during year before action was brought. (32 LPRA 3523, 3561 - 3562).

Injunctions cannot be granted to: (a) enjoin pending judicial proceedings unless such restraint is necessary to prevent multiplicity of proceedings; (b) enjoin proceedings in court of U.S.; (c) restrain execution of public statute by officers of law, civil rights actions excepted; (d) restrain breach of contract, performance of which would not be specifically enforced; (e) restrain exercise of office in lawful manner by person in possession; (f) restrain legislative act by municipal corporation; (g) prevent levying or collection of tax levied by laws of U.S. or Puerto Rico; (h) against labor organizations or their officers in connection with any labor controversy except in cases specified by law. (32 LPRA 3524).

Jurisdiction.

The Supreme Court or any judge thereof may issue injunctions to enforce the jurisdiction of said court and the judges of Court of First Instance may issue injunctions in all other cases. During pendency of appeal, both trial and appellate courts may suspend, modify, restore or grant injunction. (32 App III R.57.6).

Procedure.

A temporary restraining order may be granted without notice to adverse party if it appears from facts shown by affidavit or verified complaint that immediate and irreparable injury, loss or damage will result before notice can be served and hearing had thereon and if efforts to give prior notice are certified to court and reasons why no prior notice should be given. It expires by its terms within such time after entry, not to exceed ten days, unless extended another ten days for good cause. Motion for preliminary injunction must be heard at earliest possible time and takes precedence over all matters. When motion comes on for hearing, party who obtained temporary restraining order must proceed with application for preliminary injunction; if he does not, court will vacate temporary restraining order. Court may order consolidation of preliminary injunction hearing with trial of action on merits. With or without such consolidation, any evidence received in preliminary hearing and admissible upon trial on merits will become part of record of case and need not be repeated. (32 App III R57.1[b], 57.2).

Bond.

A bond must be required except when the injunction is granted upon application of Commonwealth of Puerto Rico or municipality or any officer or agency thereof. (32 App III 57.3).

See topics 5.04 Bonds, and 5.08 Costs, subhead Security for Costs.

5.15 JUDGMENTS:

(32 App III R35.4, 43 LPRA 46; 32 LPRA 1793, 1798, 1801; and Title 4).

Judgments constitute final resolution of case, and are appealable as matter of right; while orders are interlocutory resolution of particular issue in case, and are only reviewable by discretionary writ of certiorari. However, similar to federal case law, some collateral orders are considered sufficiently final to be deemed judgments which are immediately appealable.

Judgment by confession for money due or to become due, or to secure any person against contingent liability, may be entered without any action or trial upon filing verified statement signed by defendant authorizing entry of judgment for specified sum, stating concisely circumstances out of which debt arose, and showing that sum confessed is or will become justly due, or that sum confessed does not exceed contingent liability. This is entered by clerk of court and it thereupon becomes judgment which may be enforced in ordinary manner.

Judgment on Pleadings.

Available under Rule 10.3 of Civil Procedure similar to Federal Rule of Civil Procedure 12(c).

Summary Judgments.

Provided for in Rule 36 of Civil Procedure similar to Federal Rule of Civil Procedure 56.

Declaratory Judgments.

32 App III R59. Substantially similar to Uniform Act. Court of First Instance has authority to declare rights, status and other legal relations.

Default judgment may be had if defendant fails to appear or answer as follows: (1) In action arising upon contract for recovery of money only and not against infant or incompetent person, clerk upon verified application of plaintiff must enter default and immediately thereafter enter judgment for amount specified in supporting affidavit, and costs; (2) in other actions clerk must enter default and thereafter plaintiff may apply for relief demanded in complaint, necessary evidence being heard by court or master. (32 App III R45).

Offer of Judgment.

Party defending against claim may serve upon adverse party offer to allow judgment to be taken against him for money or property or to effect specified in offer, with costs then accrued. Offer not accepted shall be deemed withdrawn and shall not be admissible in evidence except to determine costs, expenses and attorney's fees. If judgment finally obtained by offeree is not more favorable than offer, offeree must pay costs, expenses, and attorney's fees incurred after making of offer. (32 App III R35.1). However, this is not matter of course and case law has substantially eroded these fees and costs—shifting rule.

Docketing.

After final trial of case judge files brief statement setting out facts as found by him and giving reasons for his decision, and judgment is entered accordingly. Similar to Federal Rule of Civil Procedure 52. (32 App III R43).

Vacation or Modification.

Available under Rules 47 to 49 of Civil Procedure, similar to Federal Rules of Civil Procedure 59 and 60.

Recording of Judgment.

Upon application clerk delivers certified abstract of judgment to person in whose favor it was rendered, and same may be recorded in judgment record kept in registries of property. (30 LPRA 1801-1813).

Lien.

Upon recording judgment operates as lien on real property of person against whom it was rendered, situated in district where abstract is recorded and not exempt from execution, and upon such real property as said person may thereafter acquire in district. Such lien continues for five years from date of entry in registry. (30 LPRA 1806, 1808).

Revival.

Dormant judgments may be enforced after five years by leave of court, upon motion with notice to all parties. (32 App III R51.1).

Satisfaction.

Rule 49.2(5) of Civil Procedure is substantially similar to Rule 60(b)(5) of Federal Rules of Civil Procedure.

Foreign Judgments.

(32 LPRA 1793 et seq.).

Effect of judicial record of State of Union is same in Puerto Rico as in state where it was made, except that it can be enforced only by action or special proceeding and except also that authority of guardian, committee, executor or administrator does not exceed jurisdiction conferred by laws under which said authority was granted.

Any judicial record may be impeached by evidence of want of jurisdiction or collusion or fraud of party offering record in respect to proceedings.

Effect of judgment or final order in action or special proceeding before court or judge of U.S., having jurisdiction to pronounce judgment or order, is as follows: (1) In case of judgment or order against specific thing, or in respect to probate of will, or administration of estate of decedent, or in respect to personal, political, or legal condition or relation of particular person, judgment or order is conclusive upon title to thing, will, or administration, or condition or relation of person; and (2) in other cases judgment or order is, in respect to matter directly adjudged, conclusive between parties and their successors in interest by title subsequent to commencement of action or special proceeding, litigating for same thing under same title and in same capacity, provided they have notice, actual or constructive, of pendency of action or proceeding.

Full faith and credit clause and 28 U.S.C. 1738 enforceable in Commonwealth courts.

Non-U.S. judgments can be domesticated by independent action. Case law (DPR 112:389; 114:743; 119:254; 128:243) has established showing that must be made to have foreign judgment recognized as well as form of action to be prosecuted and its procedural requirements. Only available defenses against such recognition appear to be: absence of original subject matter or personal jurisdiction, fraud, due process, and public policy considerations.

Revised Uniform Enforcement of Foreign Judgments Act not adopted.

5.16 LIMITATION OF ACTIONS:

(31 LPRA 5291 et seq.).

Uniform Commercial Code adopted with variations. See category 3 Business Regulation and Commerce, topic 3.09 Commercial Code. See 19 LPRA 518 for variations from prescriptive periods of UCC as to negotiable instruments.

Prescriptive periods in which right to enforce an obligation is lost vary according to nature of action. Most important periods are:

Thirty Years.

Actions relating to real property. (31 LPRA 5280, 5293). See category 21 Property, topic 21.02 Adverse Possession.

Twenty Years.

Actions to enforce mortgages and mortgage notes. (31 LPRA 5294).

Fifteen Years.

Ordinary personal actions for which no other period is specified, including actions in debt and contractual actions and debt and contract actions arising under Code of Commerce transactions entered into prior to Nov. 9, 1998. (31 LPRA 5294, 10 LPRA 1902).

Ten Years.

Claims for construction defects. (31 LPRA 4124).

Six Years.

Actions to recover personal property. (31 LPRA 5292).

Five Years.

Actions for support or to recover pensions, rents and payments to be made annually or at shorter intervals. (31 LPRA 5296). Commercial actions without specific limitation in Code of Commerce arising out of debts or contracts entered into on Nov. 9, 1998 and thereafter. (10 LPRA 1902). Notes payable on demand when no principal or interest paid for five years and bills of exchange. (19 LPRA 518).

Four Years.

Actions for rescission or nullity of contracts. (31 LPRA 3500).

Three Years.

Actions for payment of judges, lawyers, registrars, notaries public, experts, agents and clerks; apothecaries; doctors, professors and teachers; mechanics, servants and laborers; innkeepers. (31 LPRA 5297). Actions by dealers or commission agents against principals under Dealers' Act or Sales Representatives' Act. See category 2 Business Organizations, topic 2.01 Agency. Time for counting prescriptive period for apothecaries, mechanics, servants, laborers and innkeepers is counted from date on which respective services cease to be rendered. Laborers may, within prescriptive period, assert claims for unpaid wages for three years, counting backward from date on which employment ceased. Actions arising out of negotiable instruments, except demand notes when interest not paid and bills of exchange. (19 LPRA 518). See category 3 Business Regulation and Commerce, topic 3.09 Commercial Code. Actions to recover possession of personal property possessed by another in good faith. (31 LPRA 5276).

One Year.

Actions to recover or retain possession, or arising out of repairs to vessels, delivery of freight and various other maritime contracts and all tort actions, including actions for personal injury. (31 LPRA 5141, 5298; 10 LPRA 1910).

Six Months.

Actions relating to collection of freight charges, contribution of general average, etc.; actions relating to modification of sales contracts by reason of mistake in area; implied warranty actions arising from sale of chattels to recover price paid or reduction thereof. (10 LPRA 1909; 31 LPRA 3818-3821; 31 LPRA 3847).

Death of Party.

If a person entitled to bring an action dies before the expiration of the applicable prescriptive period, and cause of action survives, action may be commenced by his representatives within one year from his death. If person against whom action may be brought dies before expiration of applicable prescriptive period, action may be commenced against his representatives within one year after issuing of letters testamentary or of administration with respect to decedent. (32 LPRA 255).

Interruption of Statutory Period.

The prescription of actions is interrupted by suit, by actual receipt of extrajudicial demand from creditor and by any act of recognition of debt by debtor. (31 LPRA 5303).

Contractual Limitations.

The right to prescription in the future cannot be waived, but prescription acquired may be waived. (31 LPRA 5246).

Foreign Causes of Action.

Actions that arise outside of Puerto Rico and are barred by a statutory period where they arose, cannot be maintained locally except in favor of one who has been a citizen of Puerto Rico and who has held the cause of action from the time it accrued. (32 LPRA 263).

Disabilities of Plaintiff.

In personal action, while plaintiff is: (1) minor; (2) insane; or (3) married woman whose husband must necessarily join her in commencement of action, period of such disability is not part of applicable prescriptive period (32 LPRA 254); imprisonment (32 LPRA 254[3]) is not considered disability (966 F.2d 1; 995 F.2d 325; DPR 132:670).

Absence of Defendant.

When cause of action accrues against person who is out of Commonwealth, prescriptive period commences to run after his return. If he departs from Commonwealth after cause of action accrues, prescriptive period is interrupted for period of absence. (32 LPRA 253).

Pleading.

Prescription must be pleaded in order to take advantage thereof. (32 App III R6.3).

5.16A PARTITION:

(31 LPRA 1279; 31 LPRA 2871 et seq.; 32 LPRA 2621 et seq.).

Rules applicable to property acquired by descent and distribution and property held in common are essentially same. No one is obliged to remain as owner in common and contracts stipulating for maintenance of co-ownership are valid for not longer than ten years, without prejudice to right to extend same for like period. Statutes contemplate, where possible, division by mutual agreement without judicial intervention, except so far as necessary to protect interest of minors or pursuant to special provisions of law relating to liquidation of property passing by descent and distribution. See category 13 Estates and Trusts, topic 13.09 Executors and Administrators, subhead Distribution.

Jurisdiction is in Court of First Instance.

Proceedings.

If there is no designation of commissioner of partition in decedent's will and heirs are unable to agree on division of estate, court will designate commissioner, who acts somewhat as special master, making division subject to court approval. If property held in common essentially indivisible and parties are unable to agree, then any interested party may compel that same be sold and proceeds distributed.

5.17 [RESERVED]

5.18 PLEADING:

(32 App III Rules of Civil Procedure).

Rules are substantially similar to Federal Rules of Civil Procedure. See topic 5.19 Practice.

Proof of Claims.

Concept unknown in local law.

Small Claims.

See category 6 Courts and Legislature, topic 6.01 Courts, subhead Small Claims Court.

Frivolous Claims.

Rule 9 is fashioned after former Fed. Rule 11. Frivolous claims made during pretrial discovery or summary judgment proceedings are treated in manner similar to that provided in analogous federal civil procedure rules. Where party has been obstinate, court in its final judgment shall award attorneys' fees and may tax prejudgment interest, at rate periodically fixed by regulation, against obstinate party. Interlocutory costs and economic sanctions may be imposed against party for delay, inaction, abandonment, obstruction or lack of diligence in prejudice of fair administration of justice. (32 App III R44).

5.19 PRACTICE:

Federal Rules of Civil Procedure have formed, partially, the basis for local Rules of Civil Procedure.

The code system is in force. Civil actions are largely governed by the Civil Code, Code of Civil Procedure, Code of Commerce, Rules of Civil Procedure and various supplementary statutes. Codified in Laws of Puerto Rico Annotated, Titles 4, 10, 31 and 32.

Direct Actions Against Insurer.

See category 23 Transportation, topic 23.01 Motor Vehicles, subhead Direct Actions.

Small Claims.

See category 6 Courts and Legislature, topic 6.01 Courts, subhead Small Claims Court.

See also topics 5.02 Actions, Appeal and Error, Depositions and Discovery, Injunctions, Judgments, Pleadings, Process; category 8 Debtor and Creditor, topics 8.02 Attachment, 8.05 Executions, 8.09 Garnishment.

5.19A PRESCRIPTION:

See topic 5.16 Limitation of Actions.

5.20 PROCESS:

(32 App III R4).

All judicial process runs in the name of "United States of America, S.S., the President of the United States" and all criminal prosecutions are conducted in name and by authority of "The People of Puerto Rico." (P.R. const. § 10).

Federal Rules of Civil Procedure have formed, partially, basis for local Rules of Civil Procedure. (32 App III). See topic 5.19 Practice.

General Requisites.

See Rule 4.2 substantially similar to Federal Rule of Civil Procedure 4(a).

By Whom Issued.

Clerk of court.

Who May Serve.

A marshal, deputy marshal or any person over 18 who can read and write, excluding attorney of party or persons interested in suit. (Rule 4.3[a]).

Personal Service on Individual.

Service is made by delivering copy of the summons and complaint to the individual or an agent designated by him to receive service of process. (Rule 4.4[a]).

Personal Service on Infant.

Service is made by delivery to minor's father, mother, or guardian, and also to minor if 14 years of age or older. If there be none of these in Puerto Rico, it may be made upon person taking care of infant. (Rule 4.4[b]).

Personal service on incompetent person is made by delivery to such person and also his guardian. If in institution, also to its director. (Rule 4.4[c]).

Personal service on partnerships, foreign and domestic corporations, joint stock companies and associations is made by delivery to an officer, managing or general agent, registered agent or any other agent authorized by appointment or by law to receive service of process. (Rule 4.4[e]). General Corporation Law permits other methods of service of process on domestic and foreign corporations. (14 LPRA 3126, 3172, and 3174). See category 2 Business Organizations, topic 2.03 Corporations, subheads Registered Agent and 2.04 Foreign Corporations.

Service by Publication.

When the defendant resides out of the island, or has departed therefrom, or cannot be found within it, or conceals himself in order to avoid service, or has no known place of residence, or is foreign corporation without resident agent, service can be made by order of court by publication, which must be in newspaper of daily general circulation in Puerto Rico, and if residence is known, copy of summons and complaint must also be deposited in post-office directed to person to be served at his place of residence by certified mail, return receipt requested. Absent defendant may be personally served outside Puerto Rico by marshal or qualified attorney where absentee may be found, or by specially appointed person. (Rules 4.3[a] and 4.5).

Long-arm Statute.

Long-arm statute enacted allowing personal service on nonresident for actions or claims arising where defendant or his agent: (1) Carries out business transactions in Puerto Rico; (2) executes tortious act in Puerto Rico; (3) meets with accident while personally or through agent driving motor vehicle in Puerto Rico; (4) meets with accident in Puerto Rico in operation of passenger or freight transportation business in Puerto Rico or between Puerto Rico and foreign country, or if accident occurs outside Puerto Rico in operation of such business, when contract has been executed in Puerto Rico; (5) uses or owns real property in Puerto Rico. Process is effected by publication and certified mail, return receipt requested. (Rule 4.5). Service on nonresident for actions or claims of violation of anti-trust law where substantial income is derived from goods consumed and/or services performed within Puerto Rico and/or where substantial income is derived from economy of Puerto Rico from specific local market can be effected under Rule 4.7. (10 LPRA 269b).

Proof of Service.

Return is made within time during which person served must answer or appear. If service is made by private person, he must make affidavit thereof. (Rule 4.8).

Time to Serve.

Process must be served within six months of commencement of action but this term may be extended for good cause. (Rule 4.3[b]).

Waiver of Service.

Rule 4.3.1 substantially similar to Federal Rule of Civil Procedure 4(d).

Nonresident Motorist.

See category 23 Transportation, topic 23.01 Motor Vehicles.

5.21 REPLEVIN:

(32 App III R21.5–21.7).

No special statutory provision. Recovery of personal property effected through ordinary civil action. Rule 21 of Rules of Civil Procedure allows intervention by third party to reclaim possession of attached property. Recovery of attached property conditioned on posting of bond by third party claimant. See category 8 Debtor and Creditor, topic 8.02 Attachment.

5.22 SEQUESTRATION:

See category 8 Debtor and Creditor, topic 8.02 Attachment.

5.23 SERVICE:

See topic 5.20 Process.

5.24 STAY OF EXECUTION:

See topic 5.03 Appeal and Error; category 8 Debtor and Creditor, topic 8.05 Executions.

5.25 SUBMISSION OF CONTROVERSY:

(32 App III R5.2).

Rule of Civil Procedure 5.2 permits submission of controversy to Court of First Instance upon stipulation of facts and verified application.

5.26 VENUE:

(32 App III R3).

Rule 3 of Rules of Civil Procedure prohibits dismissal of any cause on ground of improper venue, and directs that such cause may be heard before any part of Court of First Instance, if parties agree and judge consents, or be transferred to appropriate division or part. Real actions are tried in part of Court of First Instance in which subject of action or some part thereof is situated and insurance actions and tort actions, as well as actions against government, are tried in part of Court of First Instance where cause or any part thereof arose. Other actions are tried in part of Court of First Instance where defendants or some of them reside except wage and child support claims which are tried at plaintiff's place of residence. Corporate defendants are deemed to reside where they have their headquarters, main office or registered agent, or where they have incurred obligations.

Change of Venue.

Except for a case filed in wrong division or part of Court of First Instance, change of venue appears to rest in sound discretion of trial court, for convenience of parties and witnesses and in interest of justice. (Rule 3.5).

Contract provisions fixing venue apparently enforceable, subject to consent of presiding judge. (Rule 3.1).

5.27 WITNESSES:

See topic 5.13 Evidence, subhead Witnesses.

6 COURTS AND LEGISLATURE

6.01 COURTS:

United States District Court for District of Puerto Rico and U.S. Bankruptcy Court for District of Puerto Rico.

Clerk's office: Federico Degetau Federal Building, Carlos Chardón St. 150, Hato Rey, PR 00918. Senior Judges and Bankruptcy Court sit in U.S. Courthouse and Post Office Building, 300 Recinto Sur St., Suite 109, San Juan, PR 00901.

Court sits in San Juan.

Jurisdiction same as any Art. III U.S. District Court.

Language.

English required.

Filing Fees.

Those established by Judicial Code of U.S.

Electronic Case Management and Filing System in Effect.

All pleadings and motions must be filed at http://ecf.prd.uscourts.gov; there are limited exceptions such as pro se filings and cases and documents under seal. Attorneys notified by email of filings, deadlines and other events.

General Court of Justice.

Judicial power of Commonwealth is vested in General Court of Justice, as unified judicial system in jurisdiction and administration, which is comprised of Supreme Court, Court of Appeals and Court of First Instance. (4 LPRA 24b). Justices and judges are appointed by Governor with advice and consent of Senate. (4 LPRA 24v; 4 LPRA 25b). Case dockets in all courts can be examined at judicial branch website: http://www.tribunalespr.org.

Supreme Court consists of Chief Justice and six Associate Justices, and has essentially final appellate jurisdiction, reviews decisions of Registrars of Property and may entertain other matters usually extraordinary. (4 LPRA 24r and s). See category 5 Civil Actions and Procedure, topic 5.03 Appeal and Error.

Court of Appeals.

This court is intermediate appellate court between Court of First Instance and Supreme Court; also reviews administrative decisions and regulations. Consists of 39 judges appointed for 16-year terms, who operate in panels of not less than three nor more than seven. Court has headquarters in San Juan and sessions in 13 panels, 11 of which are assigned to judicial regions (San Juan, Bayamón, Arecibo-Aguadilla-Utuado, Mayagüez-Aibonito, Ponce-Fajardo, Caguas-Guayama and Carolina-Humacao) and two panels to complex litigation. (4 LPRA 24t, u, v and z). See category 5 Civil Actions and Procedure, topic 5.26 Venue.

Court of First Instance is court of general, original jurisdiction. Consists of maximum of 253 superior judges and 85 municipal judges appointed for 12-year and eight-year terms, respectively. Court of First Instance is divided into 13 judicial regions: Aguadilla, Aibonito, Arecibo, Bayamón, Caguas, Carolina, Fajardo, Guayama, Humacao, Mayagüez, Ponce, San Juan and Utuado, including specific municipalities within those judicial regions. Court of First Instance entertains, on civil side: all civil matters; tax cases; eminent domain cases; trust and estate and divorce cases; enforcement of administrative agency orders and review or enforcement of arbitration awards; special or extraordinary proceedings; and on criminal side: all felony cases and misdemeanor cases, and juvenile matters. (4 LPRA 25a, b, c, d and e).

Venue.

See category 5 Civil Actions and Procedure, topic 5.26 Venue.

Prosecuting Attorneys.

Prosecuting Attorneys are part of Executive Branch (Department of Justice) rather than Judicial Branch and as such are under control of, and represent, Secretary of Justice in all suits and proceedings, civil and criminal, in which Commonwealth of Puerto Rico may be involved. (3 LPRA 294q-295n).

Small Claims Court.

No express provision, but Rule 60 of Rules of Civil Procedure provides summary procedure for collection actions where debt, exclusive of interest, does not exceed $5,000. (32 App III R60).

6.02 LEGISLATURE:

Legislative Assembly.

Consists of House of Representatives and Senate. (1-Const. III-1).

Regular Sessions.

Semiannual, commencing second Mon. of Jan. and third Mon. of Aug. and ending June 30 and Tues. before third Thurs. of Nov. respectively. In years corresponding to holding of general elections Legislative Assembly does not convene for second session. No limitation as to subjects. (1-Const. 111-8; 2 LPRA 1a).

Special Sessions.

Called by Governor. Business limited to matters stated in call, or special message. (2 LPRA 1).

Initiative and Referendum.

No initiative or referendum as to statutes. Referendums are available only for constitutional amendments and consolidation or elimination of municipalities. Referendums must be requested by Legislative Assembly by joint resolution approved by no less than two-thirds of each house. No initiative or referendum as to statutes. (1-Const. VI-1; VII-1).

Lobbyists.

No statute specifically governs lobbyists. However, both House and Senate have adopted rules requiring that lobbyists register and adhere to certain rules. Also, Puerto Rico Commonwealth Executive Agencies' Contractors, Suppliers, and Economic Incentives Applicants' Code of Ethics (3 LPRA 1755-1761) and Ethics in Government Act (3 LPRA 1801 et seq.) both contain broad definitions of gifts which could impact negatively on lobbying activities.

6.03 REPORTS:

Decisions of Supreme Court of Puerto Rico since 1899 are published in Spanish in Decisiones de Puerto Rico, cited DPR. Also, decisions were published in English in Puerto Rico Reports, cited PRR. However, publication of reports in English ceased Apr. 18, 1975, but official translations of decisions of Supreme Court until 1988 exist and are available from Court. Translations of decisions after 1988 can be requested for fee from Supreme Court of Puerto Rico, Translation Bureau, PO Box 9022392, San Juan, PR 00902-2392 or by telephone at 787-723-6033.

Selected decisions of U.S. District Court for District of Puerto Rico and U.S. Bankruptcy Court for District of Puerto Rico are published in Federal Supplement and Bankruptcy Reporter.

Unofficial Reports.

Supreme Court and selected Court of Appeals decisions are published in Spanish in advance sheet form by local bar association (2009…) and by private publisher (2009 JTS …).

Digests.

Digest of decisions of Supreme Court of Puerto Rico has been compiled and published in

Spanish, under title “Digesto de P.R.”.

Citation System.

Blue Book is generally followed.

6.04 STATUTES:

The laws of Puerto Rico are largely codified. Session Laws of Legislature are regularly published in both languages. Copies can be obtained by application to Secretary of State of Puerto Rico (http://www.estado.gobierno.pr). All laws are codified and annotated in LPRA subdivided into 34 main headings. Codification of previous year's laws may be delayed until mid-year.

The local legislation is derived from Spanish and U.S. sources. Provisions relating to personal rights, family relations, property rights, inheritance, contracts and land registration have been little changed since days of Spanish colony, and treatises of Spanish commentators are used in their interpretation, while corporation laws, laws of procedure and evidence, penal code and commercial code are taken from U.S. sources, and U.S. decisions may be used as illustrations in tort cases.

Uniform Acts which have been adopted are: Attendance of Witnesses from Without a State in Criminal Proceedings, Act to Secure (1934) (34 LPRA 1471-1475) 1936 revision not adopted; Controlled Substances (1971) (24 LPRA 2101-2608); Insurers Liquidation (1991) (26 LPRA 4001-4054); Interstate Family Support (1997) (8 LPRA 541-848c); †Securities (1963); †UCC Arts. 1, 3, 4, 4A and 5 (1995), Arts. 7, 8, and 9 (1997); Veterans' Guardianship (1936) (31 LPRA 861-879). (See category Criminal Law for additional uniform acts adopted.)

Above acts adopted without significant variations, except Securities and UCC. See category 3 Business Regulation and Commerce, topics 3.24 Securities and 3.09 Commercial Code.

For text of Uniform Acts falling within the scope of the Martindale-Hubbell Law Digests see Uniform and Model Acts section.

Other Uniform Laws.

Uniform Electronic Transactions (2006) (10 LPRA 4081-4096); Interstate Compact on the Placement of Children (2000) (8 LPRA 549-549g); Interstate Compact for the Supervision of Adult Offenders (2004). English version prevails. (4 LPRA 1433 et seq.). Uniform Anatomical Gift Act adopted with variations. (24 LPRA 3620-3620y).

6.05 UNIFORM LAWS:

See topic 6.04 Statutes.

7 CRIMINAL LAW

7.01 CRIMINAL LAW:

New Penal Code adopted (33 LPRA 4629 et seq.) effective May 2005. There is code of criminal procedure (title 34) and set of rules of criminal procedure (34-App. I-II).

Indictment or Information.

Felonies are prosecuted on information by the district attorney, misdemeanors on a complaint under oath.

Bail prior to conviction is a matter of right. (34-R218). Pending appeal from conviction of offense not punishable by life imprisonment, court will admit bail as matter of right when appeal is taken from judgment imposing fine only or imprisonment in jail in misdemeanors; in all other cases, in discretion of court. (34-R198).

Uniform Attendance of Witnesses From Without a State in Criminal Proceedings, Act to Secure adopted 1934; 1936 amendments not adopted. (34 LPRA 1471 et seq.).

Interstate Compact for Supervision of Parolees and Probationers.

(Adopted 2004, English version prevails). (4 LPRA 1433 et seq.).

Uniform Criminal Extradition Act.

(Adopted 1960). (34 LPRA 1881 et seq.).

Spyware: Act No. 165 of Aug. 6, 2008, enacted to regulate and eliminate unauthorized access to computers through programs called “Computer Spyware” used to gain unauthorized access to economic, credit, educational, medical and personal and other information stored on computers. This act is modeled on acts adopted by various U.S. states, including Arizona, Arkansas, Iowa, Georgia, Utah, Virginia and Washington.

Penalties: Any person who, intending to defraud or cause economic or other damage violates this act is guilty of fourth degree felony. Unintentional or careless violator is guilty of misdemeanor. (See Category Taxation, topic Penalties and subheads thereunder, for details on administrative and criminal penalties imposed for failure to file or pay various types of taxes.)

8 DEBTOR AND CREDITOR

8.01 ASSIGNMENTS:

(31 LPRA 3941 et seq.).

Credits, rights and actions may be assigned, and assignment carries with it all accessory rights such as security, mortgage, pledge, and the like. Implied warranty by assignor about existence and validity of rights or credits assigned. Uniform Commercial Code adopted with variations. See category 3 Business Regulation and Commerce, topic 3.09 Commercial Code.

Instrument Transferring Title.

To bind debtor no special form of instrument is required; but third persons are not bound by assignment, except from date on which assignment becomes certain, either by public instrument, affidavit, or entry in public registry. (31 LPRA 3941). Assignments of credits evidenced by negotiable instruments are governed by Commercial Transactions Act, which is derived from Uniform Commercial Code. (19 LPRA 401 et seq.). See category 3 Business Regulation and Commerce, topic 3.09 Commercial Code. As to latter, requirements for date certain do not apply unless transfer is as security. Further exception to general rule is that credits secured by mortgage on immovable property, not evidenced by instrument transferable by delivery or by endorsement and delivery, must be by public instrument. See categories 20 Mortgages, topic Mortgages of Immovable Property, subhead Assignment; and Property, topics Deeds and Real Property.

See subhead Assignment of PR Government Contracts, infra.

Filing and Recording.

No filing or recording of assignment of rights, actions, or credits is required except as required by Art. 9 of UCC and in case of assignment of mortgage credit not evidenced by instrument transferable by delivery or by endorsement and delivery. See categories 3 Business Regulation and Commerce, topic Commercial Code; and Mortgages, topic Mortgages of Immovable Property, subhead Assignment.

Notice of assignment is not required to be given to debtor, but if not given, debtor, paying former creditor without notice of assignment, is discharged. (31 LPRA 3942).

Assignments of wages are in general prohibited by requirement that employer pay all wages in lawful money without deduction, except for payments to hospital service association; payment for purchase of savings bonds of U.S. or Puerto Rico; purchase of stock of employer or stock of or discharge of obligations to credit union; to cover checkoff required by collective bargaining agreement; payment of insurance premiums; payment of tax debt; contributions to Individual Retirement Account or government Retirement Systems; and other matters specified by law. (29 LPRA 175).

Assignment of PR Government Contracts.

Statute prohibits assignments except of government funds due under contract (unless contract prohibits assignment) when assignment made to financial institution, and requires notice to contracting officer, or agency or department head, to any bonding company guaranteeing contract and to Secretary of Treasury or official paying agent if designated in contract. No partial assignment permitted. Debts, including tax debts, due by assignor to government agencies have priority over assignee as to amounts not yet disbursed to assignee. Assignment also permitted by contractor in default, with consent of department head, to bonding company which agrees to complete job. (3 LPRA 901, 902).

See category 3 Business Regulation and Commerce, topic 3.13 Contracts, subhead Government Contracts.

8.02 ATTACHMENT:

(32-App III R56).

Actions in Which Allowed; Grounds.

In every action, before or after entering judgment, on motion of the claimant, the court may make such temporary order as may be necessary to secure the effectiveness of the judgment. Court may order attachment, garnishment, prohibition to alienate, lis pendens (30 LPRA 2401, 2402, R56.7), claim and delivery of personal property, receivership, order to do or desist from doing any specific act, or it may adopt any other measure which it may deem advisable, according to circumstances of case. In every case in which temporary remedy is sought, court shall consider interests of all parties and shall provide as substantial justice may require. Notice to adverse party and hearing are required before provisional remedy granted. Puerto Rico Supreme Court has found Puerto Rico Rule of Civil Procedure 56.4 unconstitutional under due process clause, insofar as it may permit issuance of ex parte attachment orders, or prohibit alienation of defendant's property. However, Court noted three exceptions to its finding of invalidity: where plaintiff is enforcing property interest on thing to be attached, such as prior lien; where plaintiff has shown extraordinary circumstances; or where plaintiff has shown probability of success on merits by authentic documents which in turn show that defendant's debt to plaintiff is due and owing.

Court Which May Issue Writ.

That with jurisdiction over original suit motivating attachment to secure effectiveness of the judgment.

In Whose Favor Writ May Issue.

Any qualified plaintiff, including nonresidents, aliens and foreign corporations.

Proceedings, Bond, Sale.

Petition may be made when action is instituted or at any stage of proceedings before or after judgment. Bond must be furnished unless: obligation of defendant appears from authentic document, that is, from public instrument or private document acknowledged before judge or notary; judgment has been rendered for plaintiff; or in certain proceedings in forma pauperis. (R56.3). Foreign corporations desiring to obtain attachment should make arrangements with home office of surety companies doing business in Puerto Rico, so that local agents of such surety companies can issue attachment bond without loss of time and expenses.

Attachment of personal property is effected by depositing same with court or person designated by court under plaintiff's responsibility, but property may be deposited with defendant if he gives bond for its value. Perishable property may be sold at auction and proceeds are deposited as court may direct. Attachment of real estate must be recorded in registry of property and buyer, on notice of said recordation, acquires property subject to attachment. (R56.4).

Contingent counterclaims for wrongful attachment may be filed in principal action, or in independent action; likewise, third parties' claims to property attached.

Release of Property, Vacation.

The order to secure the effectiveness of judgment is vacated if suit or hearing is terminated adversely against party who obtained order, or if defendant posts bond to substitute attachment.

Wages.

See topic 8.06 Exemptions, subhead Earnings.

8.03 [RESERVED]

8.04 CREDITORS' SUITS:

Under Rules of Civil Procedure, such action is simply civil action in which demand is made for equitable relief to enforce payment of debt out of property or other interest of debtor which cannot be reached by ordinary legal process.

8.05 EXECUTIONS:

(32-App III R51). Parts 51.2 and 51.3 of this Rule 51 correspond to Rule 69(a) and 70 of Federal Rules of Civil Procedure.

See category 5 Civil Actions and Procedure, topic 5.19 Practice.

There is one standard form for execution to enforce judgments or orders.

Writs of executions against property of judgment debtor may be issued to marshal of any judicial region in Commonwealth and at same time to different judicial regions. (R51.5).

Time for Issuance.

Execution may issue after 30 days from date of notice of judgment, if no appeal is taken, and may be had at any time within five years after entry of final judgment. After five years, court order is required. (R51.1).

Levy on personal property is made by taking possession thereof. To make levy on immovable property it is sufficient to endorse such levy on writ and send copy of writ, with endorsement, to registrar of property of district where property is situated, to be noted in registry. (R56.4).

Return.

The execution is returnable as soon as possible.

Claims of Third Persons.

If personal property seized is claimed by third person, proceeding may be stayed by filing of bond by claimant, whereupon marshal reports to court and issue is adjudicated in writing and tried as in other cases. If real property seized is claimed by another, sale may be stayed by injunction and claim is tried as in other civil cases. (R56.7).

Exemptions.

See topic 8.06 Exemptions.

Sale; Redemptions.

Sale of property levied on is at public auction with no right of redemption. Sale may be suspended by injunction at request of a third person claiming property. (R51.8).

Supplementary Proceedings.

Postjudgment asset discovery is available. (R51.4).

8.06 EXEMPTIONS:

A debtor is entitled to exemption of enumerated articles of personal property, in some instances limited as to value. (32 LPRA 1130).

Benefits from life insurance are exempt where annual premium does not exceed $50. (32 LPRA 1130[9]).

Earnings.

Three-fourths of earnings of judgment debtor for personal services rendered within 30 days before levy are exempt when necessary for use of family in Puerto Rico. (32 LPRA 1130[7]).

8.07 FORECLOSURE:

See topic 8.13 Liens; category 20 Mortgages, topic 20.02A Mortgages of Immovable Property.

8.08 FRAUDULENT SALES AND CONVEYANCES:

Contracts executed by guardians, or on behalf of absentees, without sufficient authorization may be rescinded within four years if persons represented by guardian, or absentee, have suffered damages of more than one-fourth of value of things which were object of contract; likewise, contracts executed in fraud of creditors when latter cannot otherwise recover amount of their debt and contracts by defendant relating to things in litigation, if executed without approval of parties in litigation or competent judicial authority. (31 LPRA 3492, 3500). Alienations of property not made for valuable consideration are presumed to be in fraud of creditors; and alienations for valuable consideration made by persons against whom judgment has been issued are likewise presumed fraudulent. (31 LPRA 3498).

Remedies.

No rescission of above contracts can take place when object of contract cannot be returned by person claiming it, or it is legally in possession of third persons who have not acted in bad faith, and, in such case, damages may be claimed from responsible person. (31 LPRA 3496). Whoever acquires in bad faith things alienated in fraud of creditors is liable for damages should it be impossible to return the thing. (31 LPRA 3499).

Bulk Sales.

The alienation of a commercial establishment or of the whole or greater part of its stock, sold in a lump to one or several persons on same day or within one month, is presumed fraudulent if alienation is made gratuitously or for half or less than half of market price, or to creditor or creditors in payment of debts, to prejudice of or in preference to other creditors having same or better claim. In all such cases, creditors have right to have alienation rescinded and to have proper value of establishment or stock sold deposited at disposal of proper court to be divided among creditors in accordance with law. Commercial sales are not considered fraudulent or subject to rescission: (a) when made with consent of creditors or of majority of them representing at least 80% of liabilities; (b) when deposit is made at time of sale or within 24 hours after its consummation, in court of proper jurisdiction, of amount of all claims against seller; (c) when notice is given to all creditors by registered mail one month in advance of intention to make sale and price thereof, accompanied by inventory and list of creditors, correctness of both being certified under oath, such inventory, list of creditors, and evidence of notice to be filed in commercial registry. (10 LPRA 1720).

The sale, by lots or in bulk, of the whole or a part of a stock of merchandise, not made in regular course of business and in usual and customary course of business of seller, is considered fraudulent and void as against creditors of seller unless, at least 12 days prior to sale, seller and buyer make complete and detailed inventory showing amount thereof, and, as far as reasonably possible, cost to seller of every article to be included in sale; and unless buyer demands and obtains from seller written report of names and addresses of seller's creditors and amount owed to each of them, with sworn statement from seller to effect that, according to his best information and belief, it is complete and exact list of his creditors and debts; and unless buyer, at least 12 days before taking possession of merchandise, or paying price thereof, notifies, either personally or by registered mail, each and every one of creditors whose names and addresses appear on list, of the fact of proposed sale and of price, terms and conditions thereof. Above provisions do not apply to sales made by executors, administrators, trustees, or grantees by virtue of voluntary assignment effected for benefit of creditors, receivers in bankruptcy, or by any public official executing judicial order. Purchaser who complies with statute is under no duty to apply purchase price to claims of seller's creditors. There is no special statutory limitation of time within which creditor may attack sale as violating bulk sale act (10 LPRA 61).

Uniform Fraudulent Conveyance Act not adopted.

Uniform Commercial Code Arts. 2 and 6 not adopted. See category 3 Business Regulation and Commerce, topic 3.09 Commercial Code.

8.09 GARNISHMENT:

Handled under Rule 56 of Civil Procedure as another means to secure effectiveness of judgment. See topics 8.02 Attachment and 8.06 Exemptions, supra.

8.10 HOMESTEADS:

(31 LPRA 1851 et seq.).

Every person who is head of family is entitled to right.

Limitation of Value.

$15,000.

Limitation of Area.

None.

Debts and Liabilities Against Which Exemption not Available.

Purchase price or liability for improvements. (31 LPRA 1852).

Designation of Homestead.

Set forth in deed of acquisition, and in case property is already registered in applicant's name he can state so in affidavit filed with registrar of property. The fact that property is not registered as a homestead in registry of property does not affect the right of homestead. (31 LPRA 1854).

Claim of Exemption.

Made by means of affidavit, setting forth good faith thereof, delivered to officer in charge of sale. Claim is still available within one year after sale.

Waiver or Loss of Exemption.

Homestead rights cannot be waived or renounced, except in mortgage to or guaranteed by Federal Housing Administrator, Veterans Administration, Federal Land Bank of Baltimore, Puerto Rico Production Credit Association, National Farm Loan Association of San Juan, Puerto Rico, Small Business Administration; in loans and mortgages guaranteed or granted by Puerto Rico Housing Finance Authority and Farmers Home Administration; and in case of conventional mortgage loans. (31 LPRA 1851).

Alienation or Encumbrance.

Alienation as in case of other real estate; encumbrance not permitted.

Proceeds of Sale.

If property is sold to satisfy debt for more than $15,000 and homestead is claimed, excess is paid to creditor and exempt amount is deposited in court for decision as to legitimacy of claim. (31 LPRA 1855).

Rights of Surviving Spouse and Family.

Exemption continues after death of head of family for benefit of surviving spouse who occupies homestead, and after death of both spouses, for children until youngest reaches majority. In case of unmarried persons who qualify as head of family, benefits pass on to ascendants or descendants up to fourth degree until youngest of such persons reaches majority. (31 LPRA 1853).

8.11 JUDGMENT NOTES:

See category 3 Business Regulation and Commerce, topic 3.02 Bills and Notes.

8.12 LEVY:

See topics 8.02 Attachment, 8.05 Executions.

8.13 LIENS:

Uniform Commercial Code adopted. (19 LPRA 401 et seq.). See category 3 Business Regulation and Commerce, topic Commercial Code for variations.

Mechanics' Liens.

Whenever worker or employee works on construction, extension, maintenance or repair of any improvement, house or building, total amount of wages constitutes lien on said property, both when work is done under immediate direction of owner and when contractors, subcontractors, jobbers, or builders intervene. With exceptions provided by law, lien has preference as to payment over all other debts of owner. (29 LPRA 186). No action or claim may be established against owner or grantee of any work one year after work for which payment is claimed has been finished. (29 LPRA 189).

Public Works.

Contractors must post bond to guarantee payment of wages and materials. (22 LPRA 47).

Chattels.

Person who works on chattel has right to keep it in pledge until paid. (31 LPRA 4133).

Foreclosure.

Usual procedure for foreclosure is by petition filed with Court of First Instance asking for foreclosure by sale of property involved, culminating in decree of foreclosure and sale. Foreclosure under Commercial Code covered in 19 LPRA 2201 et seq.

Redemption.

There is no right of redemption of property sold in enforcement of liens thereon, except in case of tax sales. See category 22 Taxation, topic Real and Personal Property Taxes.

Attachment Lien.

See topic 8.02 Attachment.

Attorney's Lien.

See category 18 Legal Profession, topic 18.01 Attorneys and Counselors.

Government Right of Set Off.

With certain exceptions, government agencies, including public corporations and municipalities forbidden to make payment of any amount due to any natural or juridical person who is indebted to any government agency, corporation or municipality. Amounts withheld are to be applied to debt owing government. (3 LPRA 283h[j]).

Collateral Security.

See topic 8.15 Pledges.

Execution Lien.

See topic 8.05 Executions.

Judgment Lien.

See category 5 Civil Actions and Procedure, topic 5.15 Judgments.

Real Estate Mortgage Lien.

See category 20 Mortgages, topic Mortgages of Real Property.

Tax Lien.

See subhead Government Right of Set Off, supra; category Taxation, topics Estate Tax, Gift Tax, Property Taxes.

8.14 MECHANICS' LIENS:

See topic 8.13 Liens.

8.15 PLEDGES:

(31 LPRA 5001 et seq.).

Pledge contracts are not effective unless object pledged is delivered to creditor or to a third person agreed upon by debtor and creditor. (31 LPRA 5021). To be effective against third parties, pledges must have date certain; i.e., appear in authentic document which term includes public instrument (see category 21 Property, topic 21.06 Deeds), private document authenticated before notary, public registry. (31 LPRA 5023).

A later debt contracted by pledgor to pledgee extends pledge to cover both debts, even though not so stipulated. (31 LPRA 5024). Creditor is bound to use due care, and may recover expenses incurred for preservation. (31 LPRA 5025). Interest received on any pledge is credited first to interest on debt and balance to principal. (31 LPRA 5026). While pledgor remains owner, creditor can exercise any of actions to reclaim or defend pledge against third parties which owner could. (31 LPRA 5027). Pledgee has no right to make use of pledge without authorization of owner. (31 LPRA 5028).

Remedies of Pledgee.

Upon maturity of debt secured by pledge, creditor may proceed with intervention of notary to sell pledge at public auction upon notice to debtor and to owner of pledge. If no sale is made at first auction second one may be held, and, if there is still no purchaser, creditor may take over pledge giving full discharge of debt. (31 LPRA 5030). There is no right of redemption. Statutory remedy does not preclude foreclosure by action, or preclude private sale where pledged property is listed on recognized exchange (e. g., share on New York Stock Exchange).

Commercial Code.

Uniform Commercial Code adopted with variations. See category 3 Business Regulation and Commerce, topic 3.09 Commercial Code. (19 LPRA 401 et seq.). Security agreements covered by UCC are not subject to Civil Code pledge provisions set forth above.

8.16 RECEIVERS:

(32-App III R56.6).

Receiver may be appointed where necessary to secure effectiveness of judgment entered or which may be entered; and elsewhere where authorized by law.

Jurisdiction and Proceedings.

Appointment is made by Court of First Instance upon petition of party and hearing.

Eligibility and Competency.

No party, attorney, or person interested in action can be appointed receiver therein without written consent by affected parties.

Qualifications.

Receiver must post bond for amount fixed by court.

Compensation and discharge are fixed by court.

8.17 REDEMPTION:

See topics 8.05 Executions, Liens; categories 20 Mortgages, topic Mortgages of Immovable Property; Taxation, topic Real and Personal Property Taxes.

8.18 SUPPLEMENTARY PROCEEDINGS:

See topic 8.05 Executions.

8.19 TRUSTEE PROCESS:

No statute.

8.20 USURY:

See category 3 Business Regulation and Commerce, topic 3.19 Interest.

9 DISPUTE RESOLUTION

9.01 ALTERNATIVE DISPUTE RESOLUTION:

Mandatory (Alternative) Dispute Resolution.

Puerto Rico Supreme Court Regulation on Alternative Methods of Dispute Resolution created Bureau to train and certify neutrals and to manage all state court connected centers and programs. ADR conducted under Regulation is referred to below as “court-annexed ADR”. Regulation grants discretion to state courts to refer pending cases and matters to: (1) mediation; (2) binding or nonbinding arbitration; and (3) early neutral evaluation. Specific rules apply for each procedure. Bureau contact is Box 190887, San Juan, PR 00919-0887; tel. (787) 641-6357, 641-6358.

Mediation.

No jurisdictional mediation acts. For state court discretionary referrals of cases to mediation refer to regulation issued by Bureau created by Regulation on Alternative Methods of Dispute Resolution. See subheads Mandatory (Alternative) Dispute Resolution, supra, Municipal Center for Conflict Resolution, infra. Federal court in Puerto Rico may select case for mediation at its discretion, on motion by party, or by stipulation or all parties. (L.Cv.R. 83.10). Party may object for good cause to court ordered mediation. (L.Cv.R. 83.10[d]).

Credentials of/Qualifications of/Standards for Mediators.

Mediators for court-annexed ADR must be certified by Bureau. Refer to regulation issued by Bureau created by Regulation on Alternative Methods of Dispute Resolution. See subheads Mandatory (Alternative) Dispute Resolution, supra, Municipal Center for Conflict Resolution, infra.

Qualifications of mediators for federal cases, see (L.Cv.R. 83.10[c][1]).

Voluntary (Alternative) Dispute Resolution.

Centers for mediation of mostly personal and domestic disputes are available to general public. There are centers in San Juan, Ponce, Carolina, Caguas, Fajardo, Humacao and Bayamón. (4 LPRA 532-532e).

Municipal Center for Conflict Resolution.

Legislation creating Municipal Center for the Resolution of Conflicts to be located in Municipality of San Juan was approved in 2000, to be effective Jan. 1, 2001. Enabling ordinance by municipal assembly of San Juan not approved as of this writing. Statute calls for designation by mayor of San Juan of arbitrators (lawyers only), mediators (certified mediators only) and “friendly problem-solvers” (nonlawyers). Referrals may be by Court of First Instance, as provided by Civil Order or special laws or directly by parties to controversy. Medical malpractice not covered. Decisions of “friendly problem-solvers” cannot cover matters of law. Person challenging decision has burden of proof. Appeal from decisions of friendly problem-solvers is to Court of First Instance and from arbitrators' or mediators' decisions through discretionary certiorari to Court of Appeals. (21 LPRA 1021 et seq.).

9.02 ARBITRATION AND AWARD:

Written agreement to submit any controversy to arbitration is valid and specifically enforceable. (32 LPRA 3201-3229). No provision or decision on enforcement of arbitration clause in consumer contract. Arbitration clauses in insurance contracts held not enforceable. (102 DPR 224). Issues deemed not arbitrable in court/annexed ADR: criminal cases, extraordinary writs, civil rights actions, cases pursuant to Minors Act, and case where one of parties is in confinement.

Forms and Requisites of Submission.

Unless otherwise agreed, arbitration is initiated by written request made personally or by certified mail. Party receiving notice has 20 days to object to arbitration by filing petition with Court of First Instance in district where party resides. Court in summary procedure is authorized to resolve issues on existence of arbitration agreement, to stay legal proceedings, subject to results of arbitration and to enforce agreement to arbitrate controversies. (32 LPRA 3211).

Contracts to arbitrate future disputes enforceable.

Rescission.

No statutory provisions for rescission of contract to submit or of actual submission. See category 3 Business Regulation and Commerce, topic 3.13 Contracts, subheads Consideration and Consent.

Powers of Arbitrators.

Arbitrators have powers granted in arbitration agreement.

Award and Enforcement Thereof.

Award shall be made in writing, signed by all arbitrators or majority of them and copy delivered to each party. (32 LPRA 3220).

Within one year following award any party may request Court of First Instance to confirm award, which court shall do unless award is reversed, modified, or corrected.

Award of arbitrator may be reversed only: (1) when obtained by fraud or other improper act, (2) upon showing that arbitrator was prejudiced or corrupt, (3) if arbitrator refused to postpone hearing upon showing of just cause, or refused to hear relevant and material evidence, or committed any other prejudicial error, (4) when arbitrator exceeded his authority or when award failed to resolve dispute in definite manner, or (5) if there was no valid agreement to arbitrate or proceeding was not initiated in proper manner. Court may modify or correct award due to mathematical error, error in description of any person, thing or property; when decision of arbitrator goes beyond subject matter of arbitration; or when award contains errors of form. (32 LPRA 3222).

Judgment on Award.

When order is issued confirming, modifying, correcting, or reversing award, clerk of court shall file documents constituting judgment record: (1) Agreement, appointment of arbitrator(s), and extension(s) granted to make award, (2) award, (3) any document upon which petition for confirming, modifying or correcting award is based and copy of each court order in connection with petition, and (4) copy of judgment.

Judgment rendered shall have same force and effect and shall be subject to same provisions of law as judgments in civil actions. Orders and judgments of lower court can be appealed to Supreme Court by certiorari. (32 LPRA 3228).

Mandatory Arbitration.

No statutory provisions for mandatory arbitration.

Uniform Arbitration Act Adoption/Deviation.

Uniform Arbitration Act not adopted. However, Federal Arbitration Act held to preempt local law.

Jurisdictional Arbitration Acts.

None.

Credentials of/Qualifications of/Standards for Arbitrators.

Law only requires that arbitrators be of legal age, and know how to read and write. (However, 21 LPRA 1021 et seq. requires arbitrators to be lawyers. See topic 9.01 Alternative Dispute Resolution, subhead Municipal Center for Conflict Resolution). Otherwise, credentials and qualifications of arbitrators are left to discretion of parties. According to Puerto Rico law, arbitrators must state under oath that they will comply with their obligations, will hear without prejudice positions of parties and will enter fair awards according to their best knowledge. Arbitrators may be challenged for cause. Arbitrators for court-annexed ADR must be certified by Bureau. See topic 9.01 Alternative Dispute Resolution, subhead Mandatory (Alternative) Dispute Resolution. (32 LPRA 3205-3210).

Dealers' Agreements.

See category 2 Business Organizations, topic 2.01 Agency, subhead Dealers' Act, as to enforceability of arbitration clauses in dealers' agreements.

10 DOCUMENTS AND RECORDS

10.01 ACKNOWLEDGMENTS:

(4 LPRA 2001 et seq.; 4 LPRA 881 to 899).

Substantially all documents which ordinarily require certificate of acknowledgment in U.S. are executed in Puerto Rico before notary public, who certifies in instrument itself to facts which, in U.S., are usually expressed in acknowledgment. See topic 10.02 Affidavits; category 21 Property, topic 21.06 Deeds. Uniform Acts on Notaries and Acknowledgments not adopted.

Authentication.

Documents executed in Puerto Rico before notary public need not be authenticated before any official. (4 LPRA 882). Certificate of acknowledgment taken in state of U.S. before notary public for use within Puerto Rico must be authenticated by state official attesting to notary's authority to take acknowledgment or verification. Certificate of acknowledgment taken in foreign country must be executed before any notary public, any minister, commissioner, or chargé d'affaires of U.S. resident in, or accredited to, country where acknowledgment is taken; any consul general, vice consul general, consul, vice consul, commercial agent, vice commercial agent, deputy consul or consular agent of U.S. in such country. Those before foreign notaries public must in turn be authenticated in manner provided for in country and also by U.S. consul or vice consul. (4 LPRA 884). If foreign country in question has adhered to Convention Abolishing the Requirement of Legalization for Foreign Public Documents, authentication must be effected by apostille issued by that country's designated officer. (4 LPRA 884).

10.02 AFFIDAVITS:

(4 LPRA 881 et seq.; 4 LPRA 2091-95).

Within Puerto Rico.

Affidavits may be made before any judge of General Court of Justice, before any clerk of such Court and before any notary public. See topic 10.03 Notaries Public. (4 LPRA 884).

Outside Puerto Rico but within United States.

Before clerk of court of record having seal, or any notary public. Affidavits to be filed in any official registry or with any governmental office, if not before clerk of court, should be attested by clerk of court or state officer having jurisdiction over appointment of notaries. (4 LPRA 884).

Outside United States.

See topic 10.01 Acknowledgments, subhead Authentication.

Armed Forces.

No special provisions.

General Requirements as to Administration.

Person administering affidavit must state that signatory personally known to him or identified by witness personally known to him, or identify signatory through Commonwealth or U.S. federal or state government issued identification with photo and signature or by passport issued by foreign country. If identified by witness, administering person responsible for witness identity and witness responsible for signatory identity. (4 LPRA 2033, 2035, 2092).

Form

Typical form of affidavit is as follows: “Sworn to and subscribed before me, by (name, age, civil status, trade or occupation, and residence), of legal age, personally known to me (or whom I have identified by means of. . .) in (city, state) this. . . day of. . ., 20. . .” In case of recognition of a signature not made under oath, same form shall be used, except that words “sworn to” shall be omitted.

Alternative to Affidavit.

No alternative exists.

10.03 NOTARIES PUBLIC:

(4 LPRA 2001 et seq.).

Notaries are public officials whose responsibilities and duties are much more onerous than those of notaries in other parts of U.S. (4 LPRA 2002). Notary acting as notary bound by Canons of Professional Ethics applied to lawyers. (151 DPR 568).

Appointment.

Notaries are appointed by Supreme Court of Puerto Rico and authorized to act in all territory of Commonwealth. (4 LPRA 2003, 2011).

Term.

For life.

Eligibility.

To be admitted to practice as a notary it is necessary to be a lawyer admitted to practice profession of law in Puerto Rico and to pass special Notary Public Admission Examination. Notaries must post bond for $15,000. (4 LPRA 2011). See category 18 Legal Profession.

Seal.

Affidavits and deeds must bear notary's seal. Notary's signature, seal, sign and flourish must be registered with Secretary of State of Commonwealth and Supreme Court of Puerto Rico. (4 LPRA 2012). Deeds must also bear signature, sign, seal and flourish. (4 LPRA 2031). See category 21 Property, topic 21.06 Deeds.

Powers and Duties.

Notary empowered to take affidavits, certify acts and extrajudicial actions taken before him and to prepare and execute deeds. Affidavit may include legitimation of signature; sworn statement; certification of copy of document against original; certification of translations; and identification of thing or object. Notary must not authorize affidavit if aware any information included is incorrect. (4 LPRA 2002). Act (acta) is instrument required to be in form of deed, but which does not transmit rights. It attests to event or circumstances witnessed or personally known to notary, e.g., clarifying deed, certificate as to contents of safe deposit box, etc. (4 LPRA 2048, 2049). Notaries are responsible to parties for damages resulting from negligence in preparation of wills, deeds, acts, and other public instruments. Notaries are responsible personally to Commonwealth for collection of documentary stamp tax required on public instruments and on affidavits, and for performance of other governmental functions. See category 21 Property, topic 21.06 Deeds, subhead Taxes. Notary before whom power of attorney is executed or protocolized must, on his own responsibility, file same in Registry of Powers within statutory period of 72 hours (4 LPRA 922); if last will and testament is executed or protocolized before notary, he must also on his own responsibility file notice thereof in Registry of Wills on day after signing of will (4 LPRA 2123). Notary may be estopped from acting as lawyer when litigation is related to document he has notarized. Noncontested Matters before Notary Act allows notaries to act in specified noncontested matters including declarations of heirship, executor's acceptance of position and issuance of letters testamentary, protocolization of holographic wills, certification of simple absence, and correction of entries in Demographic Registry, such as name changes. (4 LPRA 2155). Implementation pending approval of regulations by Supreme Court and Secretary of Justice. See categories 13 Estates and Trusts, topics Descent and Distribution, Executors and

Administrators, Wills; Property, topic Absentees.

Records of a notary are semi-public. (See category 21 Property, topic 21.06 Deeds.) Original documents executed before a notary are property of Commonwealth, but remain under custody of notary and constitute his protocol which is bound in volumes annually. (4 LPRA 2072). At least once a year official inspection must be made of notarial office to ascertain whether protocols are kept according to law. (4 LPRA 2102). Records of persons ceasing to be notaries and records over 60 years old are kept in general office of notarial archives in capital of each of 13 judicial districts, which office is generally in charge of senior notary. (4 LPRA 2111).

Territorial Extent of Powers.

Throughout Puerto Rico. (4 LPRA 2003).

Officers of U. S. Armed Forces.

No special provisions.

10.03A PUBLIC INSTRUMENTS:

See category 21 Property, topic 21.06 Deeds.

10.04 RECORDS:

Mortgage Law and Regulations. (30 LPRA 2001 et seq.).

Registry of Property is part of Department of Justice. Secretary of Justice names Administrative Director and issues regulations. (30 LPRA 2001 et seq.).

Uniform Commercial Code Art. 9 adopted. (19 LPRA 2001). See category 3 Business Regulation and Commerce, topic 3.09 Commercial Code.

Registry of Property.

One Central Registry composed of 29 sections, each section covering territorial demarcation. Records related to realty are recorded in Registry of Property. (30 LPRA 2051). Only essential details of documents are transcribed into Registry records. (30 LPRA 2155, 2308). Each immovable property is individually identified with number. Unrecorded immovable property may be recorded by special proceedings. (30 LPRA 2762).

Recordable Instruments.

Those which: (1) Constitute, convey, declare or extinguish rights over immovable property or with effect over immovable property, including those which modify rights of domain or inherent to rights over immovable property; (2) adjudicate rights over immovable property; (3) create leases and subleases with term of six years or longer or, if for shorter term, where parties expressly agree to recordation; (4) grant option to purchase immovable property, for period not exceeding five years, except in leases with option to purchase where option is recordable for term of lease; (5) grant right to repurchase realty or right of first refusal for period not to exceed ten years; (6) involve hereditary rights; (7) involve judgments declaring legal incapacity or other conditions affecting legal capacity with regard to disposition or administration of immovable property; (8) involve matters subject of notarial acts issued under provisions of Noncontested Matters before Notary Act, (see topic 10.03 Notaries Public, subhead Powers and Duties); and judgments and court orders with respect to filing of judicial action affecting immovable property or rights over immovable property. (30 LPRA 2201).

Place for Recording.

In Registry Section corresponding to place where property located. (30 LPRA 2051).

Requisites for Recording.

Most documents required to be in deed form for access to registry and accompanied by evidence of representative authority of parties, if appropriate. See category 21 Property, topic 21.06 Deeds. Upon filing, Registry officials review documents for legal form, legality of acts and contracts contained therein, statutory requirements and legal capacity of parties. (30 LPRA 2267). Registrar's objections to record are notified to notary. (30 LPRA 2272). 20-day period is allowed to request reconsideration. (30 LPRA 2273). Administrative appeal lies to Supreme Court. (30 LPRA 2279-80). If no appeal is taken, 60-day period is allowed to cure defects. If defects not timely cured, registration will be denied, priority lost and up to $50 in registry fees cancelled. Only owner of record may consent to recordation affecting immovable property. (30 LPRA 2272).

Registrars.

Appointed by Governor with consent of Senate. Must be attorney and notary with seven years experience. Administrative Director appointed by Secretary of Justice. (30 LPRA 2052-53).

Recording Fees.

(30 LPRA 1767a, 1767b). For documents in Registry of Property, including conveyances and constitution and cancellation of mortgages, are based on amount of transaction as follows: for $1,000 or less, charge is $2; for $1,001 up to $25,000, $2 for each $1,000 or fraction thereof; in excess of $25,000, $50 for first $25,000 and $4 for each additional $1,000 or fraction thereof. Value for leases is fixed at stipulated rent for first 12 years of lease, or total rent to be paid, whichever is less. Where no value is stated in deed, fees will be based upon value assessed for property tax purposes or last value of property as it appears from Registry. There is also standard filing fee of $10.50 for any document filed in Registry. See also category 21 Property, topic 21.06 Deeds, subhead Taxes, as to stamp taxes on public deeds.

Foreign Conveyances or Encumbrances.

See category 21 Property, topic 21.06 Deeds.

Effect of Record.

Documents filed in Registry constitute notice to third parties from date of filing. (30 LPRA 2256).

Torrens Act.

Not in effect.

Transfer of Decedent's Title.

The partition and division of decedent's estate is made according to will and/or the laws of succession. Heirs established in will or heirship declaration may effect transfer of decedent's recorded title to immovable property to themselves without court intervention. (30 LPRA 2316). See category 13 Estates and Trusts, topic 13.07 Descent and Distribution.

Filing Under Commercial Code.

Liens on personal property (except motor vehicles) perfected by filing with Secretary of State at: Commercial Transactions Registry, Puerto Rico Department of State, Diputación Provincial Building, 2d. floor, corner of San Francisco and San José Streets, Old San Juan, PR 00902 or by mail to PO Box 9023271, San Juan, PR 00902-3271.

Liens on motor vehicles perfected by filing with Department of Transportation and Public Works, PO Box 41243 Minillas Station, San Juan, PR 00940-1243, to attention of División Administrativa, Servicio Colectivo.

Vital Statistics.

Demographic Registry, under Department of Health, 171 Quisqueya Street, Hato Rey, Puerto Rico 00917, is in charge of registration of births, marriages and deaths. There is local registry in every municipality. Certified copies of such registrations may be obtained upon payment of $5 fee in Internal Revenue Stamps. Persons over 60 or receiving social security exempt from fee. Request may be addressed to Department of Health, Demographic Registry, P.O. Box 11854, San Juan, Puerto Rico 00910. Internet address is http://www.salud.gov.pr/Regdem/.

Lis Pendens.

See category 8 Debtor and Creditor, topic 8.02 Attachment.

10.05 SEALS:

Common law use of seals is unknown to Puerto Rico law, and a seal (other than notarial seal) on private instrument is meaningless.

10.06 TORRENS ACT:

Not in effect.

10.07 VITAL STATISTICS:

See topic 10.04 Records.

11 EMPLOYMENT

11.01 EMPLOYER AND EMPLOYEE:

See topic 11.02 Labor Relations.

11.02 LABOR RELATIONS:

(Title 29-61 et seq.).

Under Department of Labor and Human Resources (http://www.dtrh.gobierno.pr), there is Conciliation and Arbitration Bureau that is available for resolution of grievances and disputes between employers and unions. There is also Mediation and Adjudication Office, Chauffeurs Social Security Bureau, Unemployment and Disability Insurance Bureau, Solicitor for the Disabled, Occupational Safety and Health Bureau, Employment Standards Bureau and Anti-Discrimination Unit. Puerto Rico has, as well, Industrial Commission, State Insurance Fund for workers' compensation and Insular Labor Relations Board.

Hours of Labor.

(29 LPRA 271). Legal working hours are defined as eight per day and 40 per week. As far as employers covered by U.S. Fair Labor Standards Act overtime is paid at rate of time and one half unless minimum wage mandatory decree or collective bargaining agreement requires more. For purposes of overtime, workweek is fixed but day is not. Employee who works more than eight hours in any 24-hour period is entitled to daily overtime. Employee and employer may agree to flexible work schedule to avoid overtime caused by irregular shifts not exceeding eight

hours provided certain conditions are met. (29 LPRA 272a). All employers must provide employees one hour meal period which should begin not before termination of third hour and before commencement of sixth consecutive hour of work. (29 LPRA 283). With approval of Secretary of Labor, meal period during workday may be scheduled to take place between second and third consecutive hour of work. Employee may be entitled to second meal period upon completing five consecutive hours of work, but no penalty will accrue if employee does not work more than two hours after completing his regular work shift, and waives right to second meal period by written agreement with his employer of one hour in case of overtime. Employer who employs or permits employee to work during time fixed to take meals must pay penalty to employee for said hour or fraction thereof, based on two times his regular salary rate, which penalty stands separately from any overtime payment employee is entitled to receive for hours in excess of eight worked that day. One hour meal period may be reduced to not less than 30 minutes (except security guards, croupiers and nurses whose meal periods may be reduced to not less than 20 minutes) by mutual agreement between employer and employee. If employees are unionized, meal period may be reduced through collective bargaining or written agreement between employer and union.

Employees are entitled to seventh day of rest but work performed by employees on seventh consecutive day of work must be paid at twice employee's regular rate of pay. (29 LPRA 295). Moreover, under Closing Law, certain commercial establishments must close at specified hours on Sun. and certain holidays. Establishments that may open on Sun. and holidays and are covered by Closing Law must compensate their employees at twice regular rate of pay and must adhere to provisions of law. There are no mandatory holidays for manufacturing operations in Puerto Rico. (29 LPRA 301).

Special restrictions apply to employment of minors between ages of 14 and 18. (See also subhead Child Labor, infra.)

Wages of hourly employees must be paid in lawful money or by check. With employee's consent, employer may pay by electronic transfer or direct deposit. Deductions from employee's pay are prohibited, except under certain circumstances. (29 LPRA 175).

Wages of hourly employees must be paid at intervals not to exceed 15 days; and at termination of employee's work or by following day of pay. (29 LPRA 171).

An expedited method of disposing of wage claims in courts is provided, and Department of Labor maintains bureau to assist employees in this. (32 LPRA 3118).

Secretary of Labor may establish minimum vacation and sick leave requirements for industries where minimum accrual is under one day per month for sick leave or 1.25 days per month for vacation. Secretary has been commissioned to raise accrual levels in these industries to levels mentioned above. Accrual levels may be higher in other industries. Fair Labor Standards Act minimum applies in Puerto Rico. (29 LPRA 250 et seq.). Employers not covered by Federal Fair Labor Standards Act must pay minimum wages equal to 70% of prevailing minimum wage. (29 LPRA 250a).

See also category 8 Debtor and Creditor, topic Assignments, subhead Assignment of Wages and, as to prescriptive period applicable to wage claims, category 5 Civil Actions and Procedure, topic 5.16 Limitation of Actions, subhead Three Years.

Severance Pay; Probation Period.

Employees hired to work for indefinite period of time who are discharged without just cause must be paid two month's severance pay plus one week for every completed year of service for company. If employee worked five years or more but not more than 15 years, three month's pay plus two weeks pay for each year of service. If employee worked 15 years or more, six month's pay plus three weeks pay for each year of service. (29 LPRA 185a-185b). Although term “just cause” is not specifically defined in law, statute lists six examples of dismissals that would constitute just cause and also sets forth several examples of dismissals that would not constitute just cause. (29 LPRA 185b). Seniority by job classification must be generally observed unless there exist objective criteria clearly demonstrating significantly greater efficiency and ability of less senior employee. Employees hired for probationary period are not covered by severance pay provisions, unless they become regular employees, although they may be covered by other statutes such as for discrimination and protection of pregnant workers. Any contract providing for probationary period must be in writing and may not exceed 90 days except with approval of Secretary of Labor or by agreement between employer and union and in no event exceed six months. Probationary employment contracts for longer duration are not forbidden for purposes other than severance pay. Any stipulation in employment contract for specified time period or particular job pursuant to which employer is authorized to terminate contract without just cause at any time prior to completion or under which employee waives any benefit, right or additional compensation he might be entitled to by reason of dismissal is null and void. (29 LPRA 185a).

Temporary Employees.

Employer may hire temporary employees provided that written contract specifying duration of employment is signed. However, if employee is given any reason to expect continuation in employment for indefinite period of time upon conclusion of contract, employee will not be bona fide temporary employee and will be protected by severance pay statute. Hiring of temporary employees through employment agency is regulated by local statute. (29 LPRA 185a, 575).

Mandatory Bonus.

Every employer, whether or not engaged in business for profit, employing 15 or less employees during 12-month period commencing on Oct. 1 of each calendar year is obligated to pay to those employees who have worked 700 hours or more within such period bonus equal to 2.5%, 2.75% and 3%, respectively, for years 2006, 2007 and 2008, of total wages (up to $10,000) earned by each such employee within such period, as compensation in addition to any other wages or benefits of any other kind to which employee may be entitled. For employers with more than 15 employees, minimum amount of annual bonus payable to employees is 3% for 2006, 4.5% for 2007 and 6% for 2008 of their annual compensation (up to $10,000). Payment is required to be made not before Dec. 1 nor after Dec. 15 of each year, unless otherwise mutually agreed by employer and his employees, in which case employer must notify Department of Labor of such agreements not later than Nov. 30 of each year. If timely payment not made, employer must pay additional sum equal to one-half of bonus if payment is made within six months from default; if later than six months from default, penalty is doubled. Total of sums paid as bonus shall not exceed 15% of net annual profit of employer. In case employer intends to pay no bonus or only part of bonus established by law because of insufficient profits, it must send notice of its intent along with balance sheet up to date as of Sept. 30 and certified profit and loss statement to Puerto Rico Department of Labor not later than Nov. 30, or it must pay bonus in full as if it had adequate profits. Twelve-month profit and loss statement will cover Oct. 1 of previous year through Sept. 30 of year for which bonus is to be paid. Certified public accountant who attests statement must be authorized to practice in Puerto Rico. Bonus not mandatory where collective bargaining agreement contains annual bonus provision unless stipulated bonus less than statutory minimum, in which case employer must make up difference. Credit may also be taken for voluntary bonus. Statute not applicable to employees engaged in domestic service or in family residence, or in charitable institutions. Public employees and employees engaged in agricultural activities not covered, but are covered by similar companion statutes. Minimum requirements for longshoremen are 100 hours. (29 LPRA 501-507).

Child Labor.

Except under certain circumstances, employment of minors is prohibited. Minors of 16 years of age or under cannot be employed in business enterprise, except that minors from 14 to 16 may be employed outside of school hours and during vacations. Employment certificate authorizing employment of child labor is required. No minor under 16 can be employed in certain occupations declared injurious to health and life (mirror silvering, power machinery, diamond polishing, pearl, perfumery and medicine factories, garages, restaurants and store clerks). There are other occupations similarly prohibited to minors under 18 (handling acids, poison, toxic powders and gases, benzol, explosives and inflammable substances, machinery, cardboard cutting devices; working in bakeries, laundries, foundries, quarries, boilers, rough construction works, scaffolds, elevators repairs, excavations, tobacco warehouses and factories, tanneries, sawmills, distilleries, gambling places, piers, ships; as electricians, jockeys, cinema operators, pistol or spray gun painters and welders; in match, rug or button factories; promotion of tobacco and alcoholic beverages). Under certain circumstances minors 16 to 18 may be employed in construction industry. (29 LPRA 479 et seq.). See also subhead Hours of Labor, supra. (29 LPRA 431; 446; 475).

Female Labor.

See subhead Maternity Leave, infra.

Discrimination in employment on account of age, race, color, religion, sex, national origin, social origin or condition, marriage, veteran status, disability and political beliefs or for being perceived as victim of domestic violence is prohibited. Under local statute, prevailing employee is entitled to double damages including compensatory damages. (29 LPRA 146, 1321).

Sexual Harassment.

Under Puerto Rico law, employer may be liable for sexual harassment by fellow employees or nonemployees if employer or its agents or supervisors knew or should have known of conduct, unless employer can prove that immediate and appropriate action was taken to remedy situation. As to agents and supervisors, statute seems to establish, and Department of Labor takes position, that employer may be held strictly liable for sexual harassment. Statute also enumerates affirmative measures employer must take to prevent and discourage sexual harassment. (29 LPRA 155 et seq.). Prescriptive period is one year. (29 LPRA 155m).

Maternity Leave.

Women who are employed are entitled to maternity leave of four weeks before and four weeks after childbirth, or may opt with medical approval to take one week prenatal leave and seven weeks postnatal, or reduce postnatal leave to two weeks, and employers must pay them full salaries in advance for such period. Woman who adopts child is generally entitled to eight-week maternity leave. Four-week post delivery leave may be extended if delivery is delayed. In certain cases reinstatement rights without pay extend up to 12 additional weeks. Female employee may be entitled to disability benefits under Non-Occupational Disability Act. For maternity leave purposes, therapeutic or spontaneous abortions may be treated in some cases as if normal childbirth had occurred. (29 LPRA 467). Upon return to work, woman is entitled to one 30-minute, two 15-minute, or three 20-minute lactation period(s) per day for 12 months. (29 LPRA 478).

See also supra, subhead Hours of Labor.

Service on Jury.

Employee called to jury duty cannot be fired and must be reinstated, provided reinstatement is requested within 48 hours following termination of jury duty. Employee is entitled to full salary during jury duty leave up to 15 days, and has option to credit additional time for jury service to vacation leave. (29 LPRA 152, 34 LPRA 1735e).

Witness Leave.

Employees who are summoned as witnesses in criminal cases are entitled to receive salaries from their employers for time actually spent in court. (29 LPRA 193).

Federal Fair Labor Standards Act of 1938 applies to Commonwealth.

Labor Relations Act, (29 LPRA 61 et seq.), modeled closely on National Labor Relations (Wagner) Act, was adopted in 1945. Jurisdiction of local Insular Board is as follows: (1) When employer commits unfair labor practice or other conduct not listed in Federal Act but included in local act, i.e., breach of agreement to accept arbitration award; (2) where employer is expressly exempt under Federal Act but is subject to local act, i.e., agriculture and government corporations; (3) if National Board (under § 10[a]) cedes jurisdiction to Insular Board; (4) when employer is engaged wholly in intra-island commerce. Labor unions and disputes in all other situations are handled by National Labor Relations Board under Taft-Hartley Act. There is anti-injunction statute even more restrictive than Norris-La Guardia Act. (29 LPRA 101).

Strikes.

A special law which applies only to employees of governmental corporate entities provides for issuance of anti-strike injunctions whenever public health, public security or furnishing of essential public services would need protection. (29 LPRA 91).

Labor Unions.

Unions are recognized under National (Wagner) or Puerto Rico Labor Relations Acts. No “right to work” law. See topic 11.02 Labor Relations Act, supra.

Labor Disputes.

See subheads Labor Relations Act and Strikes, supra.

Workers' Accident Compensation Act (11 LPRA 1 et seq.) is applicable to all employers and insurance in monopolistic state fund is compulsory for all employers. Casual employees need not be insured. State Insurance Fund (http://www.cfse.gobierno.pr) covers work-related accidents or conditions, including occupational diseases.

Industrial Commission appointed by Governor of Puerto Rico with approval of Senate, reviews decisions of State Fund Administrator.

State Fund Administrator is chief executive of Fund and has wide powers to examine payrolls, settle claims, etc. Industrial Commission is limited to quasi-judicial functions. When employer insures as provided in Act, there is no right of action against employer for employment-related accidents. (Co-workers acting according to duties and responsibilities of their position are generally also immune.) Nor does insured employer have standing to question compensability awards. Uninsured employer and/or responsible third parties are liable in cases or work-related accidents, disease or death of employee. All employers must file annual payroll report and their payroll records are subject to inspection by State Fund Administrator. Disabled employee's right to reinstatement is protected for 12 months from accident. (11 LPRA 1).

Occupational Diseases.

Covered by Workers' Compensation. See subhead Workers' Accident Compensation Act, supra.

Compensation for Non-Occupational Disability.

(11 LPRA 201). State Insurance Plan provides insurance for all employees (with minor

exceptions) for loss of compensation by reason of absence from work due to illness or accident not employment-related. State Plan is compulsory, except that employer may establish private plan if authorized by Secretary of Labor. Plan is financed by contributions from employers and employees. Normally coverage commences on eighth day of incapacity except when employee is hospitalized, in which case coverage may commence on first day of disability, and continues thereafter, but not for more than 26 weeks in any period of disability or in any period of 52 consecutive weeks. Disabled employee's right to reinstatement is protected for one year from accident.

Employer's Liability Act.

See subhead Workers' Accident Compensation Act, supra.

Drug Testing.

(29 LPRA 161 et seq.). Statute authorizes and promotes establishment of drug testing programs. Employees, job applicants and candidates for re-employment may be tested at any time if employed or seeking employment in following businesses: gunsmith, controls or drives railroad train, passenger transport vehicle, vehicle used to haul cargo on public roads, or vehicle used to transport passengers or cargo by air or water. Employers may test individual employees based on reasonable suspicion of drug use or if employee is involved in work related accident or as follow up for rehabilitation program. Statute also authorizes testing of employment applicants and random testing. To implement drug testing program, employer must adopt written policy and regulations and comply with statute's procedural and substantive requirements.

Unemployment Compensation.

(29 LPRA 701). Act provides for unemployment insurance, is similar to Federal Act, and is included in Federal system. See category 22 Taxation, topic 22.04 Employment Taxes, subhead Unemployment Compensation Tax.

Employment of Aliens.

Federal immigration laws are fully applicable in Puerto Rico. Employment of aliens who have not been duly authorized to hold employment by U.S. Citizenship and Immigration Services is prohibited and punishable under Immigration Reform and Control Act (IRCA) of 1986 and subsequent legislation, as well as under local statute. (29 LPRA 153). Employers must strictly comply with all employment eligibility verifications requirements under IRCA.

Consolidated Omnibus Budget Reconciliation Act (“COBRA”).

Applicable in Puerto Rico.

Health Insurance Portability and Accountability Act (“HIPAA”).

Applicable in Puerto Rico.

Worker Adjustment and Retraining Notification Act (“WARN”).

Applicable in Puerto Rico.

Safety and Health.

The Occupational Safety and Health Act (“OSHA”) is equally applicable in Puerto Rico as it is to states. In 1975, Secretary of Labor submitted and received approval from federal government for proposed plan to substitute OSHA. As result, Secretary of Labor has issued rules and regulations in area of occupational safety and health. (29 LPRA 361).

Disability.

Americans with Disabilities Act is applicable in Puerto Rico. Local statute also protects disabled persons from discrimination, requires reasonable accommodation, and provides for filing of claims with Office of the Solicitor for Disabled Persons or civil actions under general antidiscrimination statute. Morbid obesity is disability. (1 LPRA 501 et seq.).

Family Leave.

Family and Medical Leave Act is applicable in Puerto Rico.

11.03 WORKERS' COMPENSATION LAW:

See topic 11.02 Labor Relations, subhead Workers' Accident Compensation Act.

12 ENVIRONMENT

12.01 ENVIRONMENTAL REGULATION:

(12 LPRA 8001 et seq., 3 LPRA 151 et seq., 28 LPRA 110 et seq., 12 LPRA 25 et seq.).

General Supervision.

Puerto Rico Constitution provides for protection of environment and natural resources. (1-Constitution Art. VI-19). Environmental Public Policy Act (Act) (12 LPRA 8001 et seq.) creates Environmental Quality Board (EQB) (http://www.jca.gobierno.pr), attached to Office of the Governor, which has plenary power to develop, enforce and regulate environmental public policy of Commonwealth of Puerto Rico (12 LPRA 8002a). Operational phase is implemented by Department of Natural and Environmental Resources (DNER). (3 LPRA 153; 3-App. IV, Art. II). (http://www.drna.gobierno.pr). DNER has supervision of coastal and mineral resources, water resources and flood control, natural resources, wildlife, forests, fishing, hunting, energy resources and solid waste. (3 LPRA 155-158, 3-App. IV, Art. III). Public policy as to solid waste, including hazardous solid waste reduction is also implemented by DNER through Solid Waste Authority (SWA) (http://www.ads.gobierno.pr), public corporation whose powers are exercised through Secretary of DNER. (3-App. IV, Art. V; 12 LPRA 1301 et seq.). Penal Code codifies three new environmental crimes as part of Code. (33 LPRA 4869-71).

Federal environmental statutes apply in Puerto Rico. U.S. Environmental Protection Agency (EPA) has enforcement responsibility for all its programs in Puerto Rico. EPA and EQB entered into Air Enforcement Agreement under which most of Clean Air Act programs have been delegated to EQB. EPA and EQB entered into Water Enforcement Agreement under which EQB has primary enforcement responsibility for violations of water regulations. However, EPA retains jurisdiction for enforcement of compliance schedule violations, effluent limitations, and other National Pollutant Discharge Elimination System (NPDES) permit conditions. EPA and EQB have entered into enforcement agreement pertaining to hazardous waste control compliance and enforcement strategies, but EPA retains primary jurisdiction in most areas of hazardous waste control. EPA has authorized Puerto Rico to administer local Solid Waste Regulation in lieu of federal Resource Conservation and Recovery Act (RCRA) non-hazardous waste regulations. EPA delegated implementation of Underground Injection Control (UIC) program to EQB. EPA has not delegated Underground Storage Tank (UST) program to EQB. However, EPA and EQB entered into Memorandum of Agreement designating EQB as agency in charge of implementing UST program.

Prohibited Acts of Pollution.

Under EQB, DNER and other applicable regulations following acts prohibited: causing any damage which may be considered irreparable and contrary to public interest, causing or contributing to harmful condition to environment and natural resources or any action causing imminent danger to health and public safety (12 LPRA 8002c[b][1][l]), disposal of hazardous wastes (12 LPRA 8002c[b][4]) except as permitted by Act and regulations; causing or permitting noise pollution (12 LPRA 8002c[b][6]) or air or water pollution or emission of any air or water pollutant in violation of applicable law and regulations (12 LPRA 8002c[b][5], [7], 1320k); causing or permitting land pollution or treatment, storage, collection, transportation, processing or disposal of hazardous or nonhazardous solid waste in violation of applicable law and regulations (12 LPRA 1301 et seq., 8002c[b][9]); causing or permitting real or potential damage to human health or environment or contamination through biomedical waste or generation, storage, transportation, and disposal of biomedical waste in violation of applicable law and regulations. Penal Code prohibits following acts: endangering life or health by polluting water sources for human use (33 LPRA 4869); endangering people's health or polluting environment (33 LPRA 4870); and if foregoing is caused by juridical person without permits or in clandestine manner, or when juridical person does not comply with requirements of environmental authority to correct or suspend any act which violates law, submits false information to obtain permit, or impedes inspection by competent authority (33 LPRA 4871).

Enforcement.

EQB is authorized to inspect public and private premises and documents relating to environmental conditions and to issue orders regarding environmental practices. (12 LPRA 8002c[a][1]-[12]). EQB has authority to conduct hearings motu proprio or upon request (12 LPRA 8002f[a]) and notify interested parties who may appear in person or represented by attorney (12 LPRA 8002f[a][2]). EQB must issue order or resolution within 60 days of hearing. (12 LPRA 8002f[a][3]). Petitioner may seek judicial review of order or resolution with Court of Appeals within 30 days after notification. (3 LPRA 2172, 12 LPRA 8002f[a][4]-[6]; 142 DPR 75). Petitioner may first seek reconsideration with EQB within 20 days of notification of order or resolution. (3 LPRA 2165). EQB must entertain motion for reconsideration within 15 days. (3 LPRA 2165). If EQB rejects motion or does not act within 15 days, 30 day period to seek judicial review starts anew upon expiry of 15 days or notification of rejection. (3 LPRA 2165). If EQB issues determination on reconsideration petition, 30 day period starts upon notice thereof. Filing of petition for review does not suspend order or resolution of EQB. (3 LPRA 2172).

Penalties.

(1) Violation of Act or regulations is misdemeanor punishable with fine not less than $200 or more than $500 and additional discretionary fine of $500 per day for number of days violation exists. (12 LPRA 8002j[a]). (2) EQB represented by Secretary of Justice or its attorneys is authorized to file suit in any court of competent jurisdiction to recover total value of damages caused to environment and/or natural resources of Commonwealth. (12 LPRA 8002c[a][11]). (3) For violation of Act or regulations EQB may impose sanctions and administrative fine of up to $25,000 per violation. Each day of continuing violation is separate violation. (12 LPRA 8002j[a]-[c]). (4) Additional administrative fine of up to $50,000 may be imposed for recurrent violation or in cases of contumacy. (12 LPRA 8002j[d]). (5) Knowingly making false representation or statement under Act or altering any facility or monitoring method required by EQB is misdemeanor punishable by fine of $100-$500. If this violation is related to hazardous waste, water or underground injection control programs, it will be felony punishable by fine of $10,000-$25,000 per day for each violation and jail for term of six to 12 months. (12 LPRA 8002j[e]). (6) Violation related to Hazardous Waste Program; Water Quality, Underground Injection Control, and Permits and Certification for Removal of Lead-Based Paints regulations is felony punishable by fine of $10,000-$25,000 per day for each violation and jail for term of six to 12 months. (12 LPRA 8002j-[a], [e]). (7) Violation of Operating Air Permit Program under Title V of Federal Clean Air Act (which is implemented by EQB) is punishable by administrative fine and/or civil penalty of up to $25,000 per day, for each violation. (12 LPRA 8002j[h]). Knowing violation of Operating Air Permit Program under Title V, knowing false representation or certification under this program or knowingly rendering inoperable any monitoring equipment or method under this program, is felony punishable by fine of $1,000-$25,000 per day for each violation and jail for fixed term of six

to 18 months. (8002j[i]). (8) Any person may bring damage suit in court against private citizens or corporations based on damages suffered by violations of Act. Civil action is independent and different from any administrative process which may be followed by EQB. (12 LPRA 8002m). (9) Any person in violation of Act or regulations may be subject to additional penalty of attending courses and workshops, adopted, promulgated or adopted by EQB, with purpose of creating consciousness of environmental harm and promoting health and welfare of human beings in harmony with Puerto Rico's natural resources. (12 LPRA 8002j[1]).

Violation of DNER's Organic Act or regulations is misdemeanor punishable with fine of not less than $50, nor more than $500, or with imprisonment for term of not less than five days nor more than 90 days, or both penalties, at discretion of court. After conducting hearing, Secretary of DNER may impose administrative fines for damages caused to wildlife, animal and plant species or for violation of DNER's Organic Act or regulations. Secretary of DNER may fix through regulation fines for each violation of Act or regulations not to exceed $5,000. (3 LPRA 158). Subsequent violation of DNER's Organic Act or regulations is subject to fines not to exceed $10,000. (3 LPRA 158[c]). Any violation of DNER's Organic Act or regulation may be subject to additional penalty of attending courses and workshops approved by Secretary of DNER to promote use and conservation of Puerto Rico's natural resources. (See 3 LPRA 156 subhead "HISTORY" topic "Special Provisions", Section 2[6].)

Violation of environmental crimes of Penal Code are felonies punishable by imprisonment. (33 LPRA 4869-71). Restitution penalty and suspension of permits can be imposed by court. (33 LPRA 4871).

Permits.

EQB issues Act-required permits upon applicant's proof of compliance with Act and regulations and oversees Environmental Impact Statement process. (12 LPRA 8002c[b][3][E], 8002g, 8006f). Permits are required under Air Regulation (12 LPRA 8002c[b][13]), Hazardous and Non-Hazardous Solid Waste Management Regulations, Underground Injection Control Regulation (12 LPRA 8002c[b][8][A][i]), and Underground Storage Tank Regulation (12 LPRA 8002c[b][9][A][i]). DNER issues permits required for water wells, surface water intake construction, excavation, extraction and dredging activities and use of maritime terrestrial zone. (3 LPRA 155[g], 12 LPRA 1115d, 1115h). Regulation for Erosion and Sedimentation Control also requires permit from EQB when extracting or removing top soil close to body of water.

Hazardous Materials.

Puerto Rico Public Service Commission (PSC) regulates transport of hazardous material in intrastate commerce on public highways. Local regulations are express adoption of specific 1997 provisions of Federal Department of Transportation's (DOT) Hazardous Materials Regulation. PSC and DOT both have jurisdiction over transport by public highways. Transport by vessel, rail car and aircraft are not within PSC regulatory authority. (27 LPRA 1101, 2001; 12 LPRA 8002c[b][9]).

Land use planning is under jurisdiction of Planning Board (PRPB) (23 LPRA 62 et seq.) (http://www.jp.gobierno.pr), Regulations and Permits Administration (ARPE) (23 LPRA 71 et seq.) (http://www.arpe.org) and/or local autonomous municipalities (21 LPRA 4001 et seq.). PRPB was created to guide integrated development of Puerto Rico and promote best use of land and other natural resources. (23 LPRA 62c). PRPB's powers and duties include preparation and adoption of Integrated Development Plan (23 LPRA 621), Land Use Plans (23 LPRA 62m), Four-Year Investment Program (23 LPRA 62n) and zoning maps and regulations (23 LPRA 62o); ruling on land use and location consultation proposals (23 LPRA 62j[14]); delegation of duties to ARPE that do not require public policy determination (23 LPRA 62j[19]). PRPB's implementation of public policy is subject to EQB's environmental review process under Act. PRPB has adopted Zoning Regulations, which create various types of zoning districts, such as residential, commercial, industrial, agricultural and public, among others. PRPB may evaluate and authorize through location approval uses which are not ordinarily permitted by applicable regulations but which may be considered under other provisions. PRPB may also rezone districts; grant variances for uses not permitted by regulations under extraordinary circumstances where literal application of regulatory requirement would result in unreasonable restriction to property right; grant exceptions for uses not expressly authorized within district, but are compatible with district's established purposes.

ARPE is instrumentality of PRPB (23 LPRA 71a) in charge of implementing PRPB's programs and delegations of public policy. ARPE's relevant powers and duties include enforcement of PRPB regulations regarding zoning, development, subdivision, segregation and use of land, construction and use of buildings and erection of billboards. (23 LPRA 71d, 71e). ARPE also has authority to issue construction and use permits in zoned areas and in non-zoned areas where no public policy determination is required.

Autonomous Municipalities Act delegates greater authority to municipalities over land use regulation. (21 LPRA 4001 et seq.). Municipalities may request PRPB to delegate power to adopt their own municipal and/or regional land use plans, maps and regulations in substitution of those adopted by PRPB. Municipal/Regional plans must not conflict with PRPB regulations of general application, including those relating to flood zones, historic sites and building codes. PRPB has issued regulations to implement such provisions of Autonomous Municipalities Act. PRPB and ARPE retain control over regional impact projects and use variances, among other matters.

Recycling is implemented by SWA through Solid Waste Reduction and Recycling Act. (12 LPRA 1320 et seq.). SWA's powers and duties include: implementation of Program for Reduction and Recycling of Solid Wastes in coordination with municipalities; development or oversight of development of necessary infrastructure for collection, processing and marketing of recyclable materials; construction, reconstruction or making improvements to management, recovery and recycling facilities; development of guidelines and standards establishing requirements regarding separation, classification, purchase and use of recyclable materials for application to industry, business or public or private entities that use or produce recyclable materials. (12 LPRA 1320[b]). Recyclable materials include paper products, corrugated cardboard, ferrous and nonferrous metals, glass, plastic and any other material which can be recovered and sold for recycling at net cost equal to or less than cost of collection, deposit and processing at disposal facility. (12 LPRA 1320e). Each municipality must designate recycling coordinators to prepare, revise and coordinate implementation of municipal Recycling Plan. (12 LPRA 1320b[b]). Recycling programs shall be developed with assistance and approval of SWA and in accordance with requirements of Recycling Act. Recycling Act prohibits construction, operation, modification, expansion or closure of installation for waste recovery and recycling without corresponding permit issued by EQB. (12 LPRA 1320[h]).

EQB regulates solid waste management facilities in general. (12 LPRA 1320b[c], 1320h). EQB may inspect facilities (12 LPRA 1320i) and impose fines for violations of permits (12 LPRA 1320b[c][3]).

Remediation.

Under Act, EQB possesses broad powers to compel any person to carry out remediation at contaminated property regardless of origin of contamination.

Title IV of Act provides general legal framework authorizing EQB to take required response actions to remediate contaminated property (12 LPRA 8004a-o). Title IV creates emergency fund to respond to emergencies caused by hazardous substances or waste, to have necessary funds to match federal assistance under Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) and to provide for removal and remedial action for contaminated sites. (12 LPRA 8004f). Act creates Environmental Emergency Response Planning Commission attached to EQB (12 LPRA 8004b) which addresses initial environmental emergencies and implements Emergency Response Planning and Communities Right to Know Act. (42 USCA-11001 et seq.; 12 LPRA 8004c) in its response to environmental emergencies.

EQB may also compel remediation of contaminated property pursuant to specified regulations issued under Act, including omnibus cleanup provision of EQB's Regulation for the Control of Hazardous Solid Wastes. This omnibus provision is similar to provision codified in § 7003 of RCRA.

Solid Waste Management.

Management of solid waste in Puerto Rico is implemented by SWA. (12 LPRA 1301 et seq.). SWA's powers include planning, financing and operating all services for transfer, processing, recovery and final disposal of solid waste for use of municipalities, public agencies and private persons (12 LPRA 1305[d]); provide and operate sites and facilities for processing, recovery, final disposal or storage of hazardous solid waste (12 LPRA 1305[h]); enter into contracts with private entities or municipalities for operation of solid waste facilities and to receive and collect solid wastes from municipalities or private entities (12 LPRA 1305[l]); regulate management of solid waste facilities (12 LPRA 1305[v]); establish regulatory controls over public and private operations consisting of collection, transfer, processing, recovery and final disposal of solid waste (including hazardous solid waste) consistent with EQB and EPA standards, rules and requirements (12 LPRA 1305[v]); establish permit and licensing mechanism to control such solid waste operational activities consistent with EQB and EPA standards, rules and regulations (12 LPRA 1305[z]); preparation and development of projects and programs for disposal of solid waste (12 LPRA 1305[aa]); impose rates and other terms and conditions for service of public or private solid waste facilities (12 LPRA 1305[n]). SWA also in charge of directing delivery of solid waste in accordance with Solid Waste Management Regional Plan. SWA also provides certain economic incentives for establishment of waste management and disposal facilities, and 50% tax credit for investments in facilities. (12 LPRA 1318a). See category 22 Taxation, topic 22.18A Tax Incentives and Exemptions. SWA may inspect facilities and impose administrative sanctions and fines. (12 LPRA 1305[t], [jj]).

Biomedical Waste Management.

EQB regulates management of regulated biomedical waste, including segregation, handling, packaging, labeling, storage, transport, and treatment, by way of Act No. 180 of Aug. 6, 2008 and Non-Hazardous Solid Waste Management Regulations (EQB Regulation No. 5717, Nov. 14, 1997). Biomedical Waste Management Act applies to all facilities that generate, transport, store, or treat biomedical waste to ensure that waste is properly handled to protect public health. Act lists minimum permitting standards for biomedical waste generators, storage facilities and treatment facilities, and for registration of biomedical waste transporters. It follows “cradle to grave” approach in management of biomedical waste. As result, it requires “manifest” that will accompany waste material throughout its life. This manifest is form used for identifying quantity, composition, volume, size, origin, routing, and destination of biomedical waste during its transportation from point of generation to point of off-site treatment, or disposal.

Underground Storage Tanks.

EQB regulates underground storage tanks (UST) and is in charge of overseeing compliance with requirements established in Act and Underground Storage Tank Regulation (UST Regulation) issued thereunder. (EQB Regulation No. 4362, Dec. 14, 1990). UST Regulation requires that EQB be notified of all existing USTs and establishes design, construction and operation requirements for UST owners and operators including recordkeeping, leak detection, notification, reporting, investigation and control of leaks, corrective actions, closure actions, financial responsibility and yearly registration charges.

12.01A WATER:

See category 19 Mineral, Water and Fishing Rights, topic 19.01A Water Rights.

12.02 [RESERVED]

12.03 WILDLIFE AND ENDANGERED SPECIES:

Wildlife and endangered species are protected under Puerto Rico Commonwealth Wildlife Act (Wildlife Act). (12 LPRA 107-107t, 2004, Act 294, Act 295). (Wildlife Act), Act promotes conservation and management of wildlife fauna which includes all native and adapted species in wild state that breed naturally and all migratory species that settle in Puerto Rico. Wildlife Act defines illegal acts detrimental to wildlife and sets penalties for violations. (12 LPRA 107d). DNER has issued Regulation for Conservation and Management of Wildlife, Exotic Species and Hunting in Puerto Rico (Regulation 6765) and Regulation for Threatened and Endangered Species in Puerto Rico (Regulation 6766). Regulation 6765 promotes protection, conservation and management of wildlife species, establishes mechanisms for mitigation of natural habitat modification, regulates introduction of exotic species into Puerto Rico and establishes hunting permit requirements. Regulation 6766 identifies and preserves threatened and endangered species and encourages their survival; identifies and promotes conservation of critical natural habitats and essential critical natural habitats; regulates import and export of threatened and endangered species and adopt designation criteria for species with populating tendency that could reach critically dangerous limit or reach extinction in short period of time.

13 ESTATES AND TRUSTS

13.01 ADMINISTRATION:

See topic 13.10 Executors and Administrators.

13.02 ADVANCEMENTS:

See topic 13.07 Descent and Distribution.

13.03 ALLOWANCES:

See topic 13.10 Executors and Administrators.

13.04 CLAIMS:

See topic 13.10 Executors and Administrators.

13.05 DEATH:

Presumption of Death.

See category 21 Property, topic 21.01 Absentees. (31 LPRA 164, 165).

Survivorship.

There is rebuttable presumption that when two persons perish in same calamity survivorship occurs according to following rules: (1) If both were under 15, older is presumed to have survived; (2) if both were over 60, younger; (3) if one was under 15 and other over 60, former; (4) if both were over 15 and under 60 and sexes are different, male is presumed to have survived; if sexes are same, then older; (5) if one was under 15 or over 60 and other between those ages, latter is presumed to have survived. (32 App III R16[39]).

Actions for Death.

When death of person is caused by wrongful act or neglect of another, his heirs or personal representatives may maintain action for damages suffered by deceased against person causing death or against his employer if responsible for employee's conduct. (31 LPRA 2621). If person deceased is minor, action may be brought by his legitimate or legitimized natural father who has not abandoned family and his legitimate or natural mother, individually or jointly, or by his guardian. (31 LPRA 2652). In addition, in certain cases person (including, but not limited to heir) who suffers damages as result of such death may claim such damages against person causing such death or, if applicable, his employer. Action must be brought within one year. (31 LPRA 5298). There is no statutory limitation on amount recoverable. Heirs are also entitled to continue any action originated by deceased. (31 LPRA 5141).

Death Certificate.

See category 10 Documents and Records, topic 10.04 Records, subhead Vital Statistics.

Uniform Anatomical Gift Act.

See topic 13.16 Wills.

Living Wills.

See topic 13.16 Wills.

13.06 DECEDENTS' ESTATES:

See topics 13.07 Descent and Distribution, 13.10 Executors and Administrators, 13.16 Wills; category 8 Debtor and Creditor, topic 8.10 Homesteads.

13.07 DESCENT AND DISTRIBUTION:

(31 LPRA 2081 et seq.; 31 LPRA 2251 et seq.; 31 LPRA 2591 et seq.).

Contrary to common law, heirs succeed automatically, unless heir elects to reject or accept with benefit of inventory. (31 LPRA 2771 et seq.). Court of First Instance has jurisdiction to determine identity of persons prima facie entitled to succeed. In intestate succession, court determines identity of heirs in ex parte proceeding known as “Declaration of Heirship”. In testate matters, court in ex parte proceeding determines prima facie validity and authenticity of will, and if will names executor (“albacea”) issues letters testamentary to named executor. See topic 13.10 Executors and Administrators. Controversies arising between heirs so identified and legatees and others claiming to be heirs are usually settled in plenary suits between claimants and heirs. (32 LPRA 2301, 2302 et seq.).

Order of Succession.

In default of testamentary provisions the estate passes to the following in the order named: (1) direct descendants; (2) ascendants; (3) brothers and sisters or their children; (4) surviving spouse; (5) collaterals up to 6th degree; (6) University of Puerto Rico. (31 LPRA 2641 et seq.; 2671 et seq.; 2691-2693).

Surviving spouse is forced heir with regard to life usufruct assigned by law. (See topic 13.16 Wills.) Right to inherit barred by abandonment of children, prostitution of daughters, conviction for attempting against life of deceased, failure to report latter's death, etc. (31 LPRA 2261; 31 LPRA 2458).

Half blood.

Receive half share of those of whole blood. (31 LPRA 2674).

Posthumous Children.

Their rights are protected upon widow's notification of pregnancy to interested parties, unless husband has acknowledged such condition. Division of inheritance is suspended until birth or miscarriage. (31 LPRA 2711-2719).

Illegitimates.

Since 1942, all children have with respect to their parents and to estate left by latter same rights that correspond to legitimate children. (31 LPRA 441; 501; 88 PRR 658, 88 DPR 676]).

Adopted Children.

See category 14 Family, topic 14.01 Adoption.

Determination of Heirship.

Intestate proceedings are held before Court of First Instance. (32 LPRA 2301).

Renunciation.

Must be by public deed, notarized instrument or petition to court. Cannot be partial or conditional. Creditors of heir may accept inheritance of repudiating heir up to credit amount. (31 LPRA 2771-2791; 2825). See topic 13.10 Executors and Administrators, subhead Presentation of Claims.

Acceptance of Inheritance.

In order to be entitled to an inheritance the heir must accept the same. The acceptance may be unconditional or subject to the making of an inventory. The heirs accept the estate individually, and acceptance of one does not affect rights of others. Unconditional acceptance may be made in writing or may be implied from any act which indicates that heir has accepted inheritance. In case of unconditional acceptance, heir is liable for all debts of decedent, payable not only out of estate which he accepts but also out of his own property. Acceptance with benefit of inventory may be made before notary or before proper judge and is preceded or followed by formal inventory of estate's assets and if requested by heir may be preceded by 30 day period within which to decide whether to accept after completion of inventory (right to deliberate). In case of such qualified acceptance heir is responsible for debts of decedent only out of estate which he inherits and his own property is not affected. (31 LPRA 2771-2825).

Advancements.

Taken into account in distributing the estate as to legal portions due to forced heirs unless expressly declared by donor not to be subject to collation. See topic 13.16 Wills, subhead Forced Heirs. (31 LPRA 2841-2842).

Escheat.

The estate of a decedent who leaves no heirs escheats to the government. (31 LPRA 2691-2693).

See topic 13.10 Executors and Administrators.

13.08 ELECTION:

See topic 13.16 Wills.

13.08A ESTATES: (in property)

See category 21 Property, topic 21.16 Real Property.

13.09 [RESERVED]

13.10 EXECUTORS AND ADMINISTRATORS:

(31 LPRA 2511 et seq.; 32 LPRA 2361 et seq.).

Basic concepts differ widely from common law. See discussion under subhead General Powers and Duties; Notice to Creditors; Presentation of Claims; Proofs of Claim; Approval or Rejection of Claims, as to notice to creditors; presentations of claims; proofs of claim; approval or rejection of claims, infra.

Administration is not equivalent to common law probate, and is required only where one or more heirs, through absence or infancy, are not protected by usual proceeding. Administration (roughly equivalent to equity receivership) may also be had where necessary to protect estate, as where estate consists of an operating business and the like.

Term “executor” is a misleading translation of Spanish “albacea,” who is essentially an attorney-in-fact for decedent.

All proceedings are held before Court of First Instance. (32 LPRA 2361).

Administrator Required; Preferences in Right to Administer.

Administrator not required when executor accepts charge, unless heir absent from Commonwealth and has no legitimate representation, is incapacitated or minor without representation of parent or guardian. In latter cases executor must petition court to appoint administrator. Preference as administrator first to surviving spouse, then person with greatest interest in estate, or if parties have equal interest, or valid objection made, to third party of recognized integrity. (32 LPRA 2369). Executor can administer if sufficient powers granted in will, but, unless testator has forbidden judicial administration, interested parties may nevertheless petition for administrator. Court not required to name executor as administrator. (31 LPRA 2811; 32 LPRA 2331-2332; 2361 et seq.).

Eligibility and Competency.

Minors and persons legally incapacitated may not be executors or administrators. (31 LPRA 2512). Nonresident person named in will of Puerto Rico resident may act as executor. Foreign corporation may act if approved by court.

Qualifications.

Administrators are appointed by court upon petition of interested party. (32 LPRA 2301). Executor deemed to have accepted charge unless rejected within six days of death or knowledge of death. Acceptance may be tacit. (31 LPRA 2517).

Exemption from Bond.

Executor bond not required unless heir or interested party petitions court. Will may exempt executor from bond. Court will require bond from administrator unless all interested parties consent to exemption. Bond amount can be prorated if some parties do not or cannot consent to exemption. (32 LPRA 2370).

Issuance of Letters.

Court will issue letters testamentary to executor upon presentation of death certificate, will, certificate of registry of wills and written acceptance of charge. Letters of administration are issued to administrator upon filing bond and oath of office. (32 LPRA 2571).

Term of Appointment.

Term of executor is one year or until completion of any litigation as to will unless will otherwise provides or heirs consent to extension. Term of administrator determined by court. (31 LPRA 2523-2525).

Removal.

Executor or administrator may be removed for cause upon petition of interested party. (31 LPRA 2529, 32 LPRA 2512).

Special Kinds of Administration.

Temporary administrator authorized to take charge of property of estate. (32 LPRA 2368). Commissioner for partition or division of estate shall be appointed by will or court unless all heirs consent to partition and division. (32 LPRA 2621 et seq.). See category 5 Civil Actions and Procedure, topic 5.16A Partition.

Inventory and Appraisal.

Inventory by executor or administrator required to commence within ten days after appointment. Notice to heirs required. (32 LPRA 2401). Appraisal method not specified except, when value disputed, court must designate two appraisers to determine value. (32 LPRA 2403). Heir can condition acceptance of inheritance upon inventory. See topic 13.07 Descent and Distribution, subhead Acceptance of Inheritance.

Sales.

Executor may sell property if will grants this power without court order. (31 LPRA 2520; 36 PRR 714, 36 DPR 795]). Letters of administration or court order may grant administrator power to sell. Court approval required if any party not of age or incapacitated.

Allowances.

Subject to tax restrictions executor may with consent of heirs advance funds to heirs without court approval. After distribution to any surviving spouse of his or her share of community property, administrator can make advances to heirs if authorized by court. Amount limited to income generated by estate, and subject to recapture if distributive share exceeded. (32 LPRA 2443, 153 DPR 427. See category 22 Taxation, topic 22.07 Estate Tax.

General Powers and Duties; Notice to Creditors; Presentation of Claims; Proofs of Claim; Approval or Rejection of Claims.

Will may specify broad powers for albacea (executor); in default thereof, powers conferred by Civil Code are limited to payment of funeral expenses, payment of legacies with consent of heirs, carrying out of will provisions, and precautions for preservation and custody of property. (31 LPRA 2521).

Executor or administrator obliged to pay legitimate claims of decedent within reasonable term, with intervention of heirs, or in default, of Court of First Instance; also required to publish in newspaper designated by Court of First Instance notice to creditors to present claims, duly verified, at place designated by notice. There are no statutory forms for claims. Executor or administrator must reject doubtful claims and claimant may then sue. If claims not filed within six months, executor or administrator not liable for assets distributed to heirs or legatees before action begun. Failure of creditor to present claim does not prejudice his right to proceed against heir accepting his share in succession or debar heirs from exercise of right to deliberate or to accept estate with benefit of inventory. (32 LPRA 2541 et seq.). See topic 13.07 Descent and Distribution, subhead Acceptance of Inheritance.

To understand this, bear in mind that succession means transmission of rights and obligations of decedent to heirs, as well as all property, rights and charges of decedent, even though property exceeds charges or charges exceed property, or whether decedent leaves only charges and no property. (31 LPRA 2081; 2082). Rights to succession are transmitted from moment of decedent's death (31 LPRA 2085; 2092) and heir continues juridical personality of decedent (75 PRR 198, 75 DPR 209) and inheritance includes all property, rights and obligations of person not extinguished by his death (31 LPRA 2090).

Distribution.

If decedent has not appointed anyone to partition estate, partition may be made by heirs without judicial action when all heirs are in possession of their full civil rights and when any minors are represented by their father or mother with “patria potestas”. (31 LPRA 2877-2879). Creditor with recognized claim can delay any distribution until claims paid or bonded. (31 LPRA 2931). See categories Civil Action and Procedure, topic Partition; Family, topic Infants, subheads Patria Potestas, Property and Actions.

No distribution or encumbrances of estate assets allowed until executor or other administrator or agent of estate obtains negative certificate of debt from Administrator of Child Support Administration. (8 LPRA 528a-1).

Accounting.

Executor must submit final account to heirs, but, in cases where executor required to invest property, accounts must be rendered to court. (31 LPRA 2526). Quarterly accounts required to be submitted to court as well as final account upon liquidation of estate. (32 LPRA 2511 et seq.).

Liabilities.

No statutory provision. Governed by Civil Code provisions on damages caused by fault or negligence. (31 LPRA 5141).

Compensation.

Unless will provides otherwise, executors and administrators entitled to percent of income of estate: 5% of first $1,000, 2.5% of amount up to $10,000 and 1% of excess over $10,000, plus expenses. Statutory compensation not based on estate value. (32 LPRA 2491).

Foreign Executors or Administrators.

Have standing to act on behalf of heirs through petition to court if authorized by will or court. Otherwise heirs must act directly or through attorneys-in-fact designated in power of attorney executed or duly protocolized in Puerto Rico. See categories 10 Documents and Records, topics Acknowledgments and Notaries Public, subhead Powers and Duties; Property, topic Powers of Attorney.

Uniform Fiduciaries Act.

Not adopted.

Revised Uniform Principal and Income Act.

Not adopted.

Uniform Simplification of Fiduciary Security Transfers Act.

Not adopted.

Uniform Anatomical Gift Act.

See topic 13.16 Wills.

13.11 FIDUCIARIES:

See topics 13.10 Executors and Administrators, and Trusts; also category 14 Family, topic 14.08 Guardian and Ward.

13.12 INTESTACY:

See topic 13.07 Descent and Distribution.

13.13 LIVING WILLS:

See topic 13.16 Wills.

13.14 PROOF OF CLAIMS:

See topic 13.10 Executors and Administrators; also category 5 Civil Actions and Procedure, topic 5.17 Pleading.

13.15 TRUSTS:

(31 LPRA 2541 et seq.).

Kinds.

A trust may be constituted by will or public instrument (31 LPRA 2542; 2543); it may be singular or universal, pure or conditional, for certain day or term or life of settlor; and for any purpose not contravening law or public morals (31 LPRA 2546-2547; 2555). Charitable trusts may be made for indefinite period of time and for benefit of undetermined persons, whether in being or to be born. (31 LPRA 2546). Trusts paying income stream to persons or granting usufruct over property may not exist for more than 30 years. This limitation does not apply to charitable trusts. (31 LPRA 2548; 2555).

Creation.

Testamentary trusts take effect after death of constituent. Trust upon real property must be recorded in Registry of Property. (31 LPRA 2545). Secret trusts are prohibited. (31 LPRA 2551). Legal existence of trust begins upon acceptance of mandate by trustee. Acceptance may be express or implied. (31 LPRA 2556). Stamp fees are payable on trust deed. See category 21 Property, topic 21.06 Deeds, subhead Taxes.

Appointment of trustee appears in the mandate. (31 LPRA 2557; 2562).

Eligibility and Competency.

Trustee can be natural or juridical person. (31 LPRA 2566). Individuals must have same capacity as guardian (tutor) and be resident of Puerto Rico. (31 LPRA 741). See category 14 Family, topic 14.08 Guardian and Ward, subhead Eligibility and Competency. There is no residency requirement for juridical person.

Qualification.

No formal requirements. Bond optional unless ordered by court upon petition of interested party or district attorney. (31 LPRA 2571).

General Powers and Duties of Trustee.

Trustee has full powers to execute mandate of trust, under which Trustee may be authorized to make sales or investments and/or may be required to render accounting. Trustees may sue in their representative capacity. (31 LPRA 2572).

Sales.

Permitted if authorized by trust mandate. (31 LPRA 2572).

Investments.

No legislation except for employer sponsored Individual Retirement Accounts. (13 LPRA 8569).

Securities in Name of Nominee.

No statutory provisions.

Bequests and Devises to Inter Vivos Trusts.

See topic 13.16 Wills.

Accounting.

No statutory provisions.

Liability of Trustee.

A trustee is liable only for voluntary carelessness or gross negligence. (31 LPRA 2569).

Compensation presumed to exist. In absence of agreement, trustee receives same compensation as guardian (tutor) as set by court, but not less than 4% nor more than 10% of net income or other liquid profits from property administered. (31 LPRA 790; 2558).

Removal of Trustee.

Trustee may be discharged by court for (1) conflict of interest, (2) fraud or negligence or (3) incapacity or inhibition. (31 LPRA 2574).

Discharge.

Trustee may resign with court approval. (31 LPRA 2568).

Trusts are extinguished by: (1) fulfillment of purpose; (2) impossibility of fulfillment; (3) absence of condition to be executed or nonperformance of condition within required time; (4) resignation or death of trustee when no successor appointed or provided for; (5) destruction of corpus; (6) cancellation of settlor's right to corpus; (7) merger of title of sole trustee with settlor's; (8) agreement of parties. (31 LPRA 2559).

Revised Uniform Principal and Income Act not adopted.

Uniform Fiduciaries Act not adopted.

Uniform Simplification of Fiduciary Security Transfers Act not adopted.

Accumulations.

No statutory provisions.

Perpetuities.

See category 21 Property, topic 21.13 Perpetuities.

13.16 WILLS:

(31 LPRA 2111 et seq., 32 LPRA 2241 et seq.).

Wills may be made by all persons except minors less than 14 years old and persons mentally incapacitated. See subhead Holographic Wills, infra. Making of will is personal act and cannot be delegated. Naming of heirs and legatees cannot be left to third person, nor can designation of amounts to be given to heirs and legatees who are personally identified be delegated. Testator may, however, give third person authority to determine distribution of amounts which he leaves to definite class, such as relatives, poor, charitable establishments, etc., and also selection of persons or establishments to whom amounts shall be given. (31 LPRA 2111-2125).

Testamentary Dispositions.

Legacies may be charged with conditions, but no provision of transfer to another person can extend beyond second degree of lives in being at testator's death. (31 LPRA 2331-2346). Testamentary provisions are void if made in favor of priest attending testator during his last illness, or of priest's relatives to fourth degree, or his church, or if made by ward in favor of guardian before accounts of guardianship are approved, except in cases of close relationship, or if made in favor of notary before whom will is signed, or of wife or relatives to fourth degree of notary. (31 LPRA 2257-2259). See subhead Forced Heirs, infra.

Forced Heirs.

Only part of the decedent's estate may be disposed of freely by will; a certain portion goes to the heirs by operation of law (forced heirs—“herederos forzosos”), the amount of such portion depending upon the degree of relationship between the decedent and the heirs. The portions pertaining to such forced heirs are called “legal portions” (legítimas). (31 LPRA 2361 et seq.).

Forced heirs are children and descendants, including natural children and illegitimate children (88 DPR 676; [88-PRR 658]), or, if there are none, parents and ascendants, also surviving spouse. Legal portion pertaining to children is two-thirds of estate; in one of these thirds they have equal shares, other may be distributed among them as testator desires. Third of estate not pertaining to children may be disposed of freely by testator. If there are no children legal portion of surviving parents is one-half of estate. (31 LPRA 2361, et seq.). Surviving spouse has, in addition to half of all marriage partnership property (see category 14 Family, topic 14.09 Husband and Wife, subhead Community or Conjugal Property), life interest in portion of estate which varies according to whether there are one or more children or no children. In case there is more than one child life estate comprises portion equivalent to smallest portion which any of children could inherit. If there are neither descendants nor ascendants, surviving spouse entitled (in addition to half of marriage partnership property) to one-half of estate in usufruct. (31 LPRA 2411, et seq.).

Execution.

With respect to form, wills are either (a) common, or (b) special. The common wills are (1) holographic, (2) open wills, and (3) closed wills. The special wills are (1) military wills, (2) maritime wills and (3) foreign wills. The following cannot be witnesses: minors; persons not domiciled in Puerto Rico; blind and entirely deaf or dumb persons; persons who do not understand testator's language; mentally incapacitated persons; persons convicted of forgery or perjury; employees or relatives to fourth degree of consanguinity or second of affinity of officiating notary. In general, in order to make will in Puerto Rican form in any language other than English or Spanish, two interpreters must be present and translate testator's instructions into English or Spanish, will being written in language of testator and either in English or Spanish. Notary and at least two of witnesses must personally know testator or he must be identified by witnesses personally known to notary and witnesses to will. (31 LPRA 2141-2152).

Form of Attestation (open will only).

Form

All the formalities required by law have been complied with and have taken place in a single act without interruption. I, the notary, and all of the instrumental witnesses have at all times during the execution of this instrument been in the presence of and have seen, heard and understood the testator and each of us has witnessed the testator signing this instrument and initialing each and every page thereof.

Holographic wills may be executed at any place, within or without Puerto Rico, and foreigners may execute such wills in their own language. Testator must be 18 years of age, must write entire will and include year, day and month of execution. Will must be protocolized before Court of First Instance of testator's domicile or place of decease, within five years after his death. (31 LPRA 2143; 2161-2167).

Proof.

Court summons surviving spouse and ascendants and descendants or brothers and sisters, opens will, hears testimony of witnesses and decides on admission of will. If identity of will is considered proven, a certified copy of same and of proceedings is issued to interested parties and constitutes a sufficient title for recording of real property of inheritance in Registry of Property. (32 LPRA 2280a).

Open wills are executed in one uninterrupted act before notary empowered to act at place of execution and three witnesses who see and understand testator, two of whom must know testator. Testator declares his wishes, notary reads will to parties assembled and all sign, date and hour being expressed. If testator is in imminent peril of death he may make will before five witnesses without presence of notary. In case of epidemics he may make his will orally before three witnesses more than 16 years of age. In such cases will becomes void upon expiration of two months after peril or epidemic ceases, or of three months after decease, if matter is not brought before proper court to have will made public instrument. (31 LPRA 2144, 2181-2192).

Every notary before whom open will is executed must, on day after execution, forward certification as to execution to Director of the Office of Notarial Inspection, who must enter name of testator and other information in record book kept for that purpose. (4 LPRA 2123).

Closed Wills.

A closed will may be written by the testator or another person, setting forth the place and date. If written by the testator he puts his scroll (initials) on every page and signs at end; if written by another person testator signs every page and at end. If testator cannot sign, another may sign setting forth reason. Will is placed in closed and sealed envelope; testator appears with it before notary and five witnesses, and declares that envelope contains his will, describing manner in which it is written; on envelope notary makes statement which is signed by all present, setting forth hour, place and date, and certifying that in notary's opinion testator was qualified to make such will. Blind and illiterate persons cannot make closed wills. Deaf and dumb persons must write such wills themselves. In case of lack of formalities will is void as closed will but may nevertheless be valid as holographic will. (31 LPRA 2145, 2201-2210).

Proof.

Upon death of testator person having custody of closed will must file it in Court of First Instance of district where testator resided at time of his death, whereupon court summons notary and witnesses whose names appear on envelope and examines them as to genuineness of their signatures, and whether envelope has been opened. Signature of absent or deceased witnesses may be proved by any of other witnesses or by two persons acquainted with their signature and that of testator. When legal formalities have been complied with, judge opens and reads will and orders it protocoled in a notary's protocol. (32 LPRA 2271 et seq.).

Renunciation.

See topic 13.07 Descent and Distribution.

Revocation.

Testamentary provisions are essentially revocable, whatever the testator may say to the contrary. Closed wills may be revoked by mutilation or destruction, others are revoked with the same solemnities as required for their execution or by making a subsequent will. The acknowledgment of an illegitimate child in a will is effective although the will is revoked. (31 LPRA 2231-2237).

Revival.

Prior will recovers its force if testator revokes subsequent one and expressly declares that former be valid. (31 LPRA 2233).

Testamentary gifts to subscribing witnesses are not authorized in cases of open wills executed with or without notary. Heirs and legatees named in an open will, or relatives of same within fourth degree of consanguinity or second of affinity cannot serve as witnesses. (31 LPRA 2147).

Probate.

Concept of probate does not exist. If there is open will, upon receipt of certified copy, proof of filing and priority, executor's acceptance and death certificate, court will appoint executor (albacea) by issuing letters testamentary. (32 LPRA 2571). Court does not intervene further unless petitioned by interested party. Holographic and closed wills are “proved” as stated above.

Contest may be brought in Court of First Instance. Testator cannot prohibit contest of his will in cases in which there exists nullity specified by law above explained for each type. Any will executed under duress, deceit or fraud is void. (31 LPRA 2127; 32 LPRA 2591-2592).

Legacies.

The order of payment is: (1) cash; (2) specific items; (3) items to be preferred; (4) for support; (5) for education; (6) all others pro rata, if necessary. (31 LPRA 2498).

Unclaimed Legacies.

When a legacy is not accepted, or not claimed by legatee, it shall be merged into whole of estate. (31 LPRA 2499).

Lapse.

If legatee dies before accepting legacy, leaving several heirs, one of them may accept and another repudiate their respective shares. (31 LPRA 2500). Testator may substitute one or more persons in place of heir or legatee designated in case latter dies before testator or cannot accept inheritance. Parents and other ascendants may appoint substitutes for their descendants under 14 years of age in case descendants die before reaching said age, or for incompetent descendants over 14 years of age, but legal rights of forced heirs of such descendants cannot be prejudiced. (31 LPRA 2301-2304).

Disinheritance (31 LPRA 2261, 2451-2459).—Forced heir may be disinherited by testator by express provision of will stating legal grounds for disinheriting. (31 LPRA 2452). Law states grounds for disinheritance of children and descendants (31 LPRA 2456), parents and ascendants (31 LPRA 2457) and spouses (31 LPRA 2458). In addition those guilty of unworthy conduct (indignidad) (31 LPRA 2261) may also be disinherited. See subhead Forced Heirs, supra.

Testamentary Guardian.

See category 14 Family, topic 14.08 Guardian and Ward.

Election and Contribution.

The surviving spouse has no right to take against the will except as to portions allotted by law as forced heir. See subhead Forced Heirs, supra.

Foreign wills executed with formalities required by country of execution are valid, except those made jointly by two or more persons in the same instrument. (31 LPRA 2221-2222). However, forced heirship laws will apply to real property located in Puerto Rico regardless of testator's domicile. See subhead Forced Heirs, supra.

Simultaneous Death.

See topic 13.05 Death, subhead Survivorship.

Living Wills.

Persons over 21 can give written instructions by sworn statement before notary or before doctor and two witnesses prohibiting life-sustaining medical procedures in case of terminal (within six months) illness or vegetative state. Can name attorney-in-fact to make decisions. Cannot refuse medication to relieve pain, nourishment or hydration unless death is imminent or cannot absorb food or liquid. Statement must be included in patient's medical record. Not effective when patient is pregnant. (24 LPRA 3651 et seq.).

Testamentary Trusts.

See topic 13.15 Trusts.

Uniform Anatomical Gift Act.

Repealed, but similar provisions adopted. (24 LPRA 3620-3620y).

14 FAMILY

14.01 ADOPTION:

(31 LPRA 531 et seq.; 32 LPRA 2699 et seq.).

Adoptees must be under legal age, 21, and never have married when adoption decree issued. Person may be adopted after becoming of age if adoptee has resided with adopter prior to age 18 and up to date petition filed. (31 LPRA 533).

Consent Required.

Following persons must consent to adoption in court: (a) adopter(s), (b) any adoptee over ten years old, (c) parents of adoptee having patria potestas over adoptee, or parent who does not have patria potestas pursuant to divorce decree except in cases when minor is emancipated or parents are disabled or absent, (d) parent who has acknowledged minor child being adopted, (e) Secretary of Department of the Family when unemancipated minor is under his custody and parents have been deprived of patria potestas, (f) guardian or judicial defender appointed to consent to adoption, (g) minor parents over 18 years of age who were married to each other at time adoption request was presented, (h) biological grandparents when biological parents are unemancipated minors or in their absence, court appointed defender representing biological parents. (31 LPRA 536).

Conditions Precedent.

Adopters must fulfill following requirements: (1) have resided in Puerto Rico for at least six consecutive months prior to adoption request, (2) be of legal age, except in case of married couple, in which case it will suffice if one is of age and other at least 18, (3) have legal capacity to act, and (4) be at least 14 years older than adoptee. If one spouse wishes to adopt child of other, adopter must have been married at least two years to parent of adoptee, or be at least 14 years older than adoptee. Persons declared incompetent by judicial decree may not be adopters, nor may persons sentenced to prison be adopters while imprisoned. No one may be adopted by more than one person except by those who are married to each other who adopt jointly. Generally, spouses must adopt jointly. Descendants may not adopt ascendants by consanguinity or affinity. Guardian may not be adopted by ward, or ward by guardian, until final guardianship accounts are rendered and approved. (31 LPRA 531-534).

Interstate Compact on the Placement of Children adopted. (8 LPRA 549 et seq.).

Jurisdiction; Proceedings.

Adoptions must be processed within 120 days following presentation of request. Adopter must present petition for adoption, under oath, at Court of First Instance corresponding to place of residence of adoptee. Biological parents must be notified and may be heard. If report of investigation by Department of the Family and evidence at hearing on application are favorable, court may authorize adoption. New status is registered in Vital Statistics Registry. (32 LPRA 2699a et seq.).

Petition.

Must contain (1) names, addresses and telephone numbers of adopter and biological parents; (2) allegation as to convenience of adoption; (3) name of adoptee and proposed name change; (4) personal circumstances, social security number, residential and mailing address, name and address of employer, source of income and information on moral and economic solvency of adopter; (5) information on legal custody of adoptee, if minor; and (6) pertinent information of prior blood, custodial, economic and other ties between adopter and adoptee. Petition is to be accompanied by: (1) birth certificates of adoptee and adopter; (2) certificates as to marital status of adopter and adoptee; (3) certificate as to criminal record of adopter; (4) consent of biological parents, if available; (5) study by social expert as to proposed adoption, if available; (6) proposed motion on scheduling and proposed adoption order if proceeding not contentious; (7) draft of new birth certificate; and (8) evidence of having furnished copy of petition to advocate for Family Relations and to corresponding office of Family Department. (32 LPRA 2699b).

Decree.

Adoption decree is granted if court determines that adoption is in best interest of adoptee. It should contain all necessary information to establish new relationship formed between adoptee and adopter. (32 LPRA 2699j).

Name.

Adoptee will acquire surname of adopter, unless court determines to contrary. (31 LPRA 539).

Effect of Adoption.

Adoption extinguishes any juridical link between adoptee and biological family or prior adoptive family. Adoptee will retain all rights to patrimonial properties acquired while member of former family prior to adoption. (31 LPRA534; 117 DPR 464). Juridical links of adoptee with prior family will subsist when adoptee is child of adopter's spouse or adoptee was recognized by only one parent and is adopted by person of opposite sex from recognizing parent. (31 LPRA 539).

Setting Aside Adoption.

Adoption irrevocable. (32 LPRA 2699p). Decree can be annulled for fraud or procedural errors within one year. (32 LPRA 2699q & r).

14.02 ALIMONY:

See topic 14.06 Divorce.

14.03 COMMUNITY PROPERTY:

See topics 14.06 Divorce, 14.09 Husband and Wife.

14.04 DESERTION:

See topics 14.06 Divorce, 14.09 Husband and Wife.

14.05 DISSOLUTION OF MARRIAGE:

See topic 14.06 Divorce.

14.06 DIVORCE:

This subject is governed by Civil Code. (31 LPRA 321-385a).

Grounds for Absolute Divorce.

(1) Adultery, (2) conviction of felony which involves jail sentence, unless spouse is entitled to and accepts benefits of suspended sentence, (3) habitual drunkenness or continued and excessive use of opium, morphine or any other narcotic, (4) cruel treatment or grave injury, (5) abandonment for over a year, (6) absolute, perpetual and incurable impotency occurred after marriage, (7) attempt of husband or wife to corrupt their sons or prostitute their daughters and connivance in such corruption or prostitution, (8) proposal of husband to prostitute his wife, (9) separation of spouses for uninterrupted period of more than two years (in which case neither spouse is held culpable), (10) incurable insanity lasting more than seven years, supervening after marriage if it seriously prevents spouses living together spiritually. (31 LPRA 321). Divorce by mutual consent although not provided for by statute, has been recognized by case law. (107 DPR 250).

Grounds for Legal Separation.

No statutory provision.

Citizenship Requirements.

None.

Residence Requirements.

Plaintiff must have resided in Puerto Rico for one full year next preceding the action, unless ground for divorce arose in Puerto Rico or while one of the spouses resided there. (31 LPRA 331).

Jurisdiction and Practice.

Divorces are granted in actions filed in Court of First Instance in ordinary manner, however divorce by mutual consent is granted in ex parte proceeding instituted in Court of First Instance. Where action is based on cause (4) or cause (5) in subhead Grounds for Absolute Divorce, supra, and there are minor children and parties reside in Puerto Rico, judge must attempt conciliation before case is tried. (31 LPRA 331).

Venue.

See category 5 Civil Actions and Procedure, topic 5.26 Venue.

Process.

No special provisions.

Pleading.

No special provisions.

Decree is entered on determination that ground for divorce exists; no interlocutory decree.

Temporary Alimony.

If either spouse has left or declares intention to leave conjugal domicile, court designates house where spouse shall reside during suit. (31 LPRA 342). If one of spouses does not have sufficient means, court must order other to pay for spouse's maintenance in proportion to payor's means using conjugal property or private property, if necessary. Court can order joint administration of conjugal property. Each spouse entitled to one half of income from conjugal property without charge to spouse's share of such property. (31 LPRA 343).

Allowance for Prosecution of Suit.

Litis expensas granted as part of temporary alimony. (31 LPRA 343; 99DPR 705).

Permanent Alimony.

If either spouse lacks sufficient means for subsistence once divorce is decreed, court may assign alimony from income or property of other spouse. Alimony may be revoked if it becomes unnecessary or when recipient spouse remarries or lives in public concubinage. Amount of alimony is based on spousal agreement, age and health, employment, dedication to family, extent of recipient's collaboration in business of payor, duration of marriage or cohabitation, economic means and needs and any other relevant factor. Once granted, court can revise amount due to changed circumstances. (31 LPRA 385).

Division of Property of Spouses.

Community property regime prevails. Where marriage subject to community property regime (see topic 14.09 Husband and Wife, subhead Community or Conjugal Property), dissolution of marriage requires dissolution of conjugal partnership and distribution of assets to spouses. (31 LPRA 381). Upon filing of divorce action, neither spouse may contract debts nor effect any settlements payable from community property without court approval. (31 LPRA 344).

Change of Wife's Name.

No statutory provision for change of name after divorce.

Custody of Children.

If both spouses claim provisional custody pending divorce action, court determines custody. (31 LPRA 341). In judgment for custody after divorce, care and patria potestas of minor children is granted to party who in sound discretion of court best serves interest and well-being of children, but other spouse has right to continue family relations with children in such manner and to such extent as court may determine. Subject to approval by court, custody and patria potestas may also be shared by both parents if so requested. Spouse deprived of patria potestas has right to recover same by accrediting in competent court death of other spouse, or that it will serve best interest and well-being of children. (31 LPRA 383). Grandparents may not be denied visiting rights without just cause. (31 LPRA 591a).

Allowance for Support of Children.

No statutory provisions with respect to divorce. Obligation for support arises from Civil Code provisions requiring parent to support children. See topic 14.10 Infants, subhead Support of Minor.

Remarriage.

Remarriage of divorced man or woman not prohibited. Divorced woman must present medical certificate with reference to whether she is pregnant or not if remarriage within 301 days after divorce. (31 LPRA 232a).

Foreign Divorces.

Decree of state, territory, or possession entitled to full faith and credit (28 USC 1738) if based on jurisdiction. Other foreign decrees, if based on proper jurisdiction, probably recognized by comity.

Separation Agreements.

No statutory provisions for recognition and enforcement.

Antenuptial Contract.

See topic 14.09 Husband and Wife.

Reconciliation.

Divorce actions are terminated by reconciliation of the parties. (31 LPRA 361, 362).

14.07 DOMESTIC PARTNERS:

Domestic partnership not recognized.

14.08 GUARDIAN AND WARD:

(31 LPRA 661 et seq.; 32 LPRA 2661 et seq.).

Jurisdiction lies with Court of First Instance. See category Civil Actions and Procedures, topic Venue as to venue.

Guardianship is conferred either by will, by law, or by a competent court. (31 LPRA 666).

Guardians, also called "tutors," may be appointed for the custody of the person and property, or the property only, of persons not subject to "patria potestas" (see topic 14.10 Infants) who are: (1) Minors not lawfully emancipated, (2) insane, demented or deaf-mutes who cannot understand or communicate by any means, (3) spendthrifts or habitual drunkards declared such by court order, (4) those court finds are addicted to drugs. (31 LPRA 662).

There is a special law for the guardianship of incompetent veterans and their dependents. (31 LPRA 861 et seq.).

Selection of Guardian.

If no testamentary guardian appointed, guardianship of minor (in absence of patria potestas) pertains to either grandparents or any sibling, as court determines having regard to best interest and well-being of minor. Law also provides who shall be appointed guardian in case of incapacity. (31 LPRA 701, et seq.).

Eligibility and Competency.

Persons who are nonresidents or of bad conduct, insolvent, or subject to certain other specified disabilities may not be guardians. Court may remove guardian after notice and hearing. (31 LPRA 741-743).

Appointment of Guardian.

Father or mother may by will appoint guardian for minor not subject to patria potestas of another (see topic 14.10 Infants, subhead Parental Authority), or incapacitated adult person. (31 LPRA 681). Any testator may also designate guardian to administer property left to minor or incapacitated person. (31 LPRA 682). Appointment of guardian for incapacitated persons must be by petition to court by spouse or relatives who may be forced heirs (see category 13 Estates and Trusts, topic 13.07 Descent and Distribution), or in their absence or incapacity by district attorney. (31 LPRA 704, 705). Court upon hearing may issue declaration of incapacity and set guardianship limits. (31 LPRA 706, 707, 717). Guardian selected by court from spouses, parents, children, grandparents, siblings. (31 LPRA 709, 722).

Qualification.

Guardian must post bond (except parents, grandparents, or testamentary guardian relieved from this obligation) prior to assumption of duties and appointment must be recorded in registry of guardianships. (31 LPRA 761-767).

Inventory.

Prepared relative to all real and personal property and presented to Court of First Instance for approval. (31 LPRA 783[3]). Court may seek disinterested party to appraise property. (31 LPRA 784a). Newly discovered property or accessions through inheritance or otherwise must be added to inventory. (31 LPRA 784b).

Powers and Duties, Investment and Real Estate.

Guardian must support and educate ward. (31 LPRA 783). Court approval required for physical discipline, trips outside of Puerto Rico, sales, investments, borrowing and other property dealings, judicial actions and other acts. (31 LPRA 786). Guardian must accompany minor ward being disciplined judicially. (34 LPRA 2237g).

Investments.

Court approval required. (31 LPRA 786).

Securities in Name of Nominee.

No statutory provision.

Liabilities of Guardian.

Guardian has duty to look after interests of ward as head of household would and is liable for failure to discharge duty. If ward's capital is negligently left uninvested, guardian's liability is limited to legal rate of interest. (31 LPRA 783a, 787).

Accounts.

Rendered annually and on termination of the guardianship. Accounts are audited by the court. (31 LPRA 801-809).

Termination of Guardianship.

When minor becomes of age, is emancipated or adopted; in case of incapacitated person upon removal of causes thereof. (31 LPRA 791).

Uniform Fiduciaries Act not adopted.

Uniform Simplification of Fiduciary Security Transfers Act not adopted.

14.09 HUSBAND AND WIFE:

(31 LPRA 561-570).

Husband and wife are obligated to live together, mutually help each other and support each other. Husband and wife must satisfy each other's needs in proportion to their assets and both will decide where to reside. (31 LPRA 281).

Disabilities of Married Women.

Removed.

Separate property of spouses is: (1) That brought into marriage as his or her own, (2) that acquired during marriage by gift, devise or inheritance, (3) that acquired by right of redemption or by exchange for other separate property, (4) that bought with money belonging exclusively to husband or wife. Each spouse has right to manage and freely dispose of his or her separate estate, but gifts between spouses, except moderate gifts on festive days, are void. (31 LPRA 285, 3588, 3631).

Contracts between spouses not valid although sale by conjugal society to related corporation held valid. (31 LPRA 3772; 23-DPR-289). No limitations on rights to contract with third parties except both must consent to sale or mortgage of real estate owned by conjugal society. (31 LPRA 284, 3588).

Antenuptial Contracts.

Future spouses may enter into antenuptial contract prior to marriage setting forth agreement as to ownership of present and future assets. Terms of antenuptial contract may not be contrary to law, to nature and purpose of marriage, to rights and liberties of individual or to morals and good manners. Contract must be in form of public instrument executed before notary public, and may not be amended after marriage occurs. Antenuptial contract is void and of no effect if marriage does not take place. (31 LPRA 3551 et seq.).

Actions.

Married women may contract and appear in court in all cases.

Agency.

Either spouse may act as attorney in fact for the other. See subhead Community or Conjugal Property, infra.

Conveyance or Encumbrance of Property.

Written consent by both parties is necessary for validity of any deed or mortgage. Personal property destined for family or personal use may be purchased by either spouse. (31 LPRA 284). Noncommunity property may be conveyed by owning spouse alone. (31 LPRA 285).

Desertion and Non-support.

Willful omission to perform duties imposed by law or court to furnish support to children or spouse is punishable by maximum imprisonment of 90 days or fine up to $5,000. (33 LPRA 4759, 4766, 4694). Desertion of minors with intent to abandon is punishable by minimum imprisonment of six months and maximum of three years. When life, health, bodily integrity or sexual indemnity of children is placed at risk, minimum imprisonment of three years and maximum of eight years may be imposed. (33 LPRA 4760, 4694).

Revised Uniform Reciprocal Enforcement of Support Act not in effect.

Community or Conjugal Property.

Unless otherwise provided in an antenuptial agreement, marriage is considered as copartnership in which property brought into marriage is treated differently from that acquired during marriage, latter belonging in equal parts to both spouses. Property of marriage partnership comprises: (1) Property obtained by labor, industry or wages of each spouse, (2) property purchased with money of marriage partnership and (3) fruits, income, rents and interest obtained during marriage from separate property of each spouse. Conjugal property does not include capital gains arising from sale of private property of either spouse. (31 LPRA 3641).

Property is presumed to belong to marriage community unless proved to be separate property. (31 LPRA 3647). Unless agreed to contrary, both spouses are administrators of conjugal partnership, but neither spouse may alienate or encumber partnership property without written consent of other spouse. Exception to joint alienation requirement where property is spent or sold for family or personal use that is in accordance with socio-economic position of family, or where spouse dedicated to commerce, industry or profession is using conjugal property to those ends. Every sale or agreement made in violation of this provision is void. (31 LPRA 284, 3672).

Whether and to what extent community property system applies to property of marriages performed outside Puerto Rico is in doubt. Real property in Puerto Rico is covered, irrespective of place of marriage; personal property is not covered for purposes of descent and distribution when decedent is domiciliary of non-community property state.(See topics 21.14, “Personal Property,” and 21.1, “Real Property” as to use of these two terms in Commonwealth.)

Person whose spouse has been declared legally absent or who has committed act of divorce, entitled to separation of conjugal property. (31 LPRA 3712).

Marriage partnership is dissolved by death or divorce or annulment of marriage, and in such case property covered by it is divided equally between spouses. (31 LPRA 301). Each spouse may by will dispose of one-half of community property subject to laws of descent and distribution. See category 13 Estates and Trusts, topic 13.07 Descent and Distribution.

Marriage partnership property is liable for debts contracted during marriage by husband and by wife, except if it can be shown that debt not incurred for benefit of partnership. It is also liable for minor repairs to separate property of each spouse and for support of family and education of children. Debts contracted by husband or wife before marriage are not chargeable to community property unless other charges on property have been met and debtor spouse has insufficient capital. Upon filing of divorce action, neither spouse may contract debts nor effect any settlements payable from community property without court approval. (31 LPRA 3661 et seq.).

14.10 INFANTS:

(31 LPRA 591 et seq.).

Age of majority is 21 years. (31 LPRA 971). Age of majority was reduced to 18 years on Sept. 1, 2000. (1 LPRA 422 nt). On July 18, 2001 age of majority was again raised to 21 years. (1 LPRA 422 nt). However, all voluntary emancipations and judicial acts performed by those age 18 to 21 between Sept. 1, 2000 - July 18, 2001 remain valid. All persons under 21 who by virtue of Act 289 attained age of majority could remain as adults if sworn statement confirming desire to continue as adult was filed with Demographic Registry within 90 days after July 18, 2001. See subhead Emancipation, infra, and category Documents and Records, topic Records, subhead Vital Statistics.

Patria Potestas.

Parental authority over infant children is called “patria potestas.” Legitimate and legitimized minor children are under patria potestas of both parents, except that in cases of emergency or when parent is dead, absent or legally impeded, or when divorce decree has been entered and parent has voluntarily abandoned his children for period longer than six months, other parent may exercise this function. Illegitimate and adopted minors are under patria potestas of parent acknowledging or adopting them. Patria potestas terminated by death of parents or child, emancipation or adoption. (31 LPRA 591, 631, 632). Also, Court of First Instance may terminate, restrict or suspend patria potestas when certain enumerated causes occur including endangering child's physical or mental health, abandoning child or exploiting child. When patria potestas is terminated or suspended, court will also deprive parent of right to administer and enjoy child's property and will appoint guardian if necessary. (31 LPRA 634; 634a-634c). See also subhead Emancipation, infra.

Support of Minor.

Parents must support minor children, educating them in accordance with their means and representing them in actions which may benefit them. (31 LPRA 562, 601).

Emancipation.

Minors may be emancipated by marriage, which can be contracted by males starting at the age of 18, and females at the age of 16 if they obtain consent from their parents. Minors over 18 may be also emancipated by declaration of their parents before notary public and two witnesses and with minor's consent, or by judicial order. Minor emancipated by marriage who is younger than 18 has rights of person of age, except that in order to alienate or mortgage real property and to contract loans consent of father, or in default of father, that of mother or of guardian, is required. Minors emancipated by declaration of parent having patria potestas may govern their property and person as though they were of age. Minor emancipated by court action is considered as of age for all legal effects. Minor cannot be executor even with authorization of his parent or guardian. (31 LPRA 232, 901 et seq., 2512).

Minors between ages of 18 and 21 who are engaged in commerce or industry may perform all acts necessary to administer their business enterprise without need for parent or guardian consent. (31 LPRA 3402). These minors must register in Mercantile Registry. (10 LPRA 1004, 1031, 1032).

See subhead Age of Majority, supra, as to certain persons under age 21 considered as adults.

Property.

Administration of children's property belongs to both parents or to parent exercising patria potestas, but alienation or encumbrance of any real estate or of personal property worth more than $2,000 is prohibited, without authorization from court, except that no such authorization is needed for sale of crops. Authorization of court is required for leases of over six years, but no leases can be made extending beyond minor's coming of age. When interests of parents conflict with those of child, court appoints as latter's representative person on whom guardianship would devolve or, in absence thereof, person that court deems appropriate. Property acquired by unemancipated child by labor or industry or for valuable consideration belongs to child, but usufruct thereof belongs to parents while he or she lives in their company and can only be renounced by parents in favor of child. Usufruct of children's property cannot be transferred or assigned by parents to third party. (31 LPRA 611 et seq.). See subhead Emancipation, supra.

Actions.

When an infant is a party to an action he must appear either by his father or mother vested with “patria potestas”, his general guardian or by a guardian ad litem appointed by the court in which the action is pending. (32 App III R15.2). See subhead Emancipation, supra; category Civil Actions and Procedure, topic Accord and Satisfaction.

Parental Responsibility.

Statute imposes parental liability for torts of child. Parent having patria potestas, even though shared with ex-spouse, and physical custody, either permanent or temporary, of minor child at time of act may be solely responsible for tortious acts of child, absent showing that parent duly fulfilled duties of proper supervision of child. (31 LPRA 5142; 156 DPR 503; 157 DPR 636). Parents must accompany minor being disciplined judicially. (34 LPRA 2237g).

Adoption.

See topic 14.01 Adoption.

Uniform Interstate Family Support Act in effect. (8 LPRA 541 et seq.). Amended to conform to Public Law 104-193 of 1996. English text prevails.

Uniform Transfers to Minors Act not adopted.

14.11 MARRIAGE:

(31 LPRA 221 et seq.).

Males under 18 and females under 16 technically incapable of marriage, but if marriage occurs same is valid if validity not attacked prior to one day after incapacitated party reaches legal age of puberty (18 for males and 16 for females) and marriage partners were living together, or if woman conceives before reaching such age or before commencing suit for nullity. Seduced female over 14 and under 16 may contract marriage with consent of parents or tutor or in default thereof with consent of Court of First Instance. Male over 16 under 18 under accusation of having seduced female over 14 under 16 may contract marriage under same conditions. (31 LPRA 232). Same sex marriages and civil unions not recognized. (31 LPRA 221).

Consent Required.

Persons under 21 require consent of person exercising patria potestas and, in default thereof, of Court of First Instance. No statutory formalities prescribed for consent of person holding patria potestas. Consent not required if over 18 and woman has been seduced or is pregnant. (31 LPRA 242). See topic 14.10 Infants, subhead Age of Majority as to certain persons under age 21 considered as adults.

Medical certificate is required as to mental illness, idiocy and venereal disease. (31 LPRA 235, 236).

License.

Required license issued by keeper of Vital Statistics Registry in district where either party resides. If neither party is Puerto Rico resident by keeper of Vital Statistics Registry in district where ceremony is to take place. (24 LPRA 1162). No statutory requirement as to who must appear but application must be accompanied by medical certificates and information as to parental consent for minors, prior marriages, children of applicants and divorces. (31 LPRA 236, 24 LPRA 1165). License fee is $20.

Waiting Period.

None.

Ceremonial Marriage.

Regularly licensed or ordained priests or other ministers of Gospel, Jewish rabbis, judges of General Court of Justice and of U. S. District Court for District of Puerto Rico may celebrate marriages between legally authorized persons. Celebrant must examine applicants under oath as to their legal capacity; reduce such sworn declarations to writing; state full name, age, civil status, profession or occupation, nature and domicile of each contracting party and of their respective parents, relation of consanguinity or affinity, if any; if either has been previously married, declaration shall so state as well as manner of dissolution, with full name of former spouse and date of termination, as well as names, ages and addresses of children of former marriage, if any. Sworn statement must be subscribed by applicants under oath administered by celebrant. Celebrant is forbidden to perform ceremony unless satisfied that parties have legal capacity to marry; and if consent of parents is required then celebrant must obtain same in writing. (31 LPRA 243-245).

Report of Marriage.

Each celebrant must deliver, within ten days, to Demographic Registry of district in which ceremony took place, marriage license and affidavit of contracting parties, together with marriage certificate stating date and place where marriage was performed and containing signature of officiating person, contracting parties and witnesses and reference to existing children of parties. (24 LPRA 1163, 1165).

Record.

See category Document and Records, topic Records, subhead Vital Statistics.

Common Law Marriages.

Not recognized. Whether Puerto Rico will or will not recognize common law marriages between nondomiciliaries of Puerto Rico does not appear to have been decided.

Proxy marriages between a person present in Puerto Rico and one absent are permitted. In addition to medical certificate, must provide power of attorney to third party indicating name; color or race; age; birth date; civil status; residence; occupation; place of birth; names and birth places of father and mother; if widowed name and date of death of spouse and names of surviving children; if divorced, name of divorced spouse, identity of court issuing divorce decree, date of decree and indication of whether it is final, reason for divorce, and whether children survive; name, address and personal circumstances of attorney in fact and proposed spouse. Power of attorney to be notarized and acknowledged. See category 10 Documents and Records, topic 10.01 Acknowledgments. (31 LPRA 253-259).

Marriages by written contract are unknown to Puerto Rico law.

Prohibited Marriages.

Marriage is prohibited as to following persons: (1) Ascendants or descendants by consanguinity or affinity; (2) collaterals by consanguinity within fourth degree; (3) adoptive father or mother and adoptee, adoptee with surviving spouse of adopter, and adopter with surviving spouse of adoptee; (4) legitimate descendants of adopter with adoptee while adoption exists; (5) parties to adultery who have been convicted by final judgment during five years after such judgment; (6) those convicted as responsible for death of one of spouses; (7) persons suffering from syphilis and any sexually transmitted disease, while such diseases subsist. (31 LPRA 233, 235).

Following persons are incapacitated from contracting marriage: (1) One legally married; (2) one not of sound mind; (3) minors (see introductory paragraph); (4) minor without consent required; (5) one suffering from physical impotency for purposes of procreation; (6) tutor and his descendants, with ward, until accounts have been finally approved and guardianship terminated; (7) mentally challenged persons not able to consent. (31 LPRA 232).

Foreign marriages are recognized if valid in place where contracted, except that foreign marriages by domiciliaries of Puerto Rico not recognized if parties could not have been legally married in Puerto Rico. (31 LPRA 265).

Annulment of marriage is similar to grounds and procedure for annulment of any other contract, and there are no special provisions specifying grounds, jurisdiction, venue, residence requirements, or proceedings. Case law distinguishes between void and voidable marriages, and trend is to refuse annulment of voidable marriages except upon timely application of aggrieved person; e. g., marriage of female under 16 is voidable and may be attacked only by affected minor or her representative.

Antenuptial Contracts.

See topic 14.09 Husband and Wife.

14.12 MARRIED WOMEN:

Disabilities, see topic 14.09 Husband and Wife.

15 HEALTH

15.01 ABORTIONS:

Physicians or health care facilities manager or supervisor acquiring knowledge of abortion required to notify Department of Health. Reports are confidential. Penalties include jail term and loss of license. No notice need to be given to parents of minor. (24 LPRA 231 et seq.).

15.02 ADMINISTRATION:

Health laws administered and enforced by Secretary of Health of Puerto Rico. (3 LPRA 171 et seq.). (http://www.salud.gobierno.pr).

15.03 DISEASES:

Contagious Diseases.

Physicians, surgeons, dental surgeons and osteopaths and if none of these involved, practitioners, nurses and midwives required to notify local health officer where patient resides of suspicion or existence of various contagious diseases. (24 LPRA 352). Confidential reports also required for cancer and related diseases including Hodgkin's, leukemia and others (24 LPRA 381 et seq.), sexually transmitted diseases (including positive and negative lab reports) (24 LPRA 571 et seq.), autism (24 LPRA 3544) and Alzheimer's (24 LPRA 12013).

Occupational Diseases.

See category 11 Employment, topic 11.02 Labor Relations, subhead Workers' Accident Compensation Act.

Hereditary Diseases.

Testing and consent to testing requirements are regulated by 24 LPRA 3151 et seq.

15.04 [RESERVED]

15.05 FOOD, DRUGS, DEVICES AND COSMETICS:

Regulated by Food, Drugs, and Cosmetics Act (24 LPRA 711 et seq.); and Controlled Substances Act (24 LPRA 2101 et seq.), ``Electronic Signatures'' and ``electronically transmitted prescriptions'' definitions were added to Controlled Substances Act, among other related amendments, to comply with Medicare Prescription Drug, Improvement and Modernization Act. (2009, Act 64).

15.06 FRAUD AND ABUSE:

Regulated by 20 LPRA 411e and code of ethics of medical profession, Department of State Regulation No. 7044.

15.07 HEALTH INSURANCE BENEFITS:

Health maintenance organizations regulated by Insurance Code. (26 LPRA 1901 et seq.).

Health insurance benefits to medically-indigent persons regulated by Health Insurance Administration Act. (24 LPRA 7001 et seq.).

Medicaid funds received by Commonwealth are used primarily by Department of Health to finance benefits to medically-indigent persons, to support health facilities owned by Commonwealth and also by Health Insurance Administration to finance health care services to Health Reform program beneficiaries.

15.08 LICENSING AND CERTIFICATION:

Health care facilities must comply with licensing requirements of Health Facilities Act. (24 LPRA 331 et seq.). Certificates of Need Act (24 LPRA 334 et seq.) requires health facilities to obtain certificate of need prior to acquisition of medical facility, commencement or relocation of operations or making capital investments in or acquiring high tech medical equipment for medical facility. (24 LPRA 334a).

Physicians must comply with registration and licensing requirements of Board of Medical Licensing and Discipline and its enabling act. (20 LPRA 131 et seq.). Other healthcare professionals must comply with registration and licensing requirements of their examining boards. (20 LPRA 81 et seq.).

15.09 LIVING WILLS:

See category 13 Estates and Trusts, topic 13.16 Wills, subhead Living Wills.

15.10 ORGAN DONATIONS:

Provisions similar to Uniform Anatomical Gift Act adopted. (24 LPRA 3620-3620y).

15.10A PATIENT'S RIGHTS AND OBLIGATIONS:

Patient's rights and obligations regulated by Patient's Bill of Rights and Responsibilities Act. (24 LPRA 3041 et seq.), which is enforced by Advocate for Patients Beneficiaries of the Health Reform (http://www.gobierno.pr/GPRPortal/Ciudadanos/Familia/OPP.htm) (3 LPRA 1981 et seq.), whose jurisdiction extends to all patients in Commonwealth. Patient grievance procedures regulated by 3 LPRA 1985 et seq. and 24 LPRA 3055.

Uniform Health-Care Information Act not adopted.

15.11 [RESERVED]

15.12 PUBLIC HEALTH:

See topic 15.07 Health Insurance Benefits.

Private establishments engaged in rendering of services must have at least one automated defibrillator available for use by its visitors, clients or employees. “Private Establishments” are defined according to capacity of place for flow or accommodation of persons, including but not limited to: (a) private schools, (b) stadiums and private sports centers with capacity of more than 500 persons, (c) private show and entertainment establishments with capacity of more than 500 persons, (e) private universities and conference, seminar or exhibition halls of private nature with capacity of more than 500 persons, (f) industries, factories, shopping malls, hotels, inns and any other private enterprise with capacity to shelter, receive or serve more than 250 persons. Health Department will train individuals in each establishment on how to administer defibrillator. Regulation to enforce and establish penalties has yet to be approved but Act is effective immediately. (2008, Act 141).

15.13 SMOKING REGULATIONS:

Smoking in public and private places regulated by 24 LPRA 891-899. Violation is subject to fines up to $250 for violation, $500 for repeat violation, provided that smoking in gasoline retail sales service station is misdemeanor with sanction being imprisonment for ten to 30 days or fine of not less than $250 nor more than $500, or both penalties at discretion of court.

24 LPRA 894 provides for designation by owner or person in charge of establishment to which this regulation applies, to designate and prepare separate areas for smoking.

16 INSURANCE

16.01 INSURANCE COMPANIES:

(Title 26).

Regulated by Insurance Code. (26 LPRA 101 et seq.).

General Supervision by Office of Commissioner of Insurance of the Commonwealth of Puerto Rico, B5 Calle Tabonuco, Suite 216, PMB 356, Guaynabo, PR 00968-3029.

http://www.ocs.gobierno.pr.

Rates.

(26 LPRA 1201 et seq.).

Annual Statements.

Annual Statements must be filed by each authorized insurer with Commissioner, within first three months of every calendar year, at above address. (26 LPRA 331). Rating organization may not do business in Commonwealth unless licensed by Commissioner as rating organization. (26 LPRA 1221 et seq.).

Risk Based Capital Reports.

Annual ``Risk Based Capital'' reports are required to be filed by domestic insurers and health service organizations. Foreign insurers will need to comply with filing requirement only if specifically requested, in writing, by Commissioner of Insurance. (26 L.P.R.A 4501 et seq.; 2008, Act 32).

Policies.

Insurance coverages are classified as: (1) life (26 LPRA 402, 1301 et seq.); (2) disability (26 LPRA 403, 1601 et seq.); (3) property (26 LPRA 404, 26 LPRA 408[12]); (4) marine and transportation (26 LPRA 405); (5) agricultural (26 LPRA 406); (6) casualty (26 LPRA 408, 2001 et seq.); (7) surety (26 LPRA 409, 2201 et seq.); (8) title (26 LPRA 410, 2401 et seq.); (9) vehicle (26 LPRA 407); and (10) mortgage loan (26 LPRA 2301 et seq.). Contracts must be executed in Spanish and in English if requested by insured. Commissioner may waive said requirement by regulation if technical nature of policy so justifies. (26 LPRA 1114[2]).

Discrimination.

No rate shall discriminate unfairly between risks involving essentially same hazards and expense elements, except life and disability insurance where no rate or benefit shall discriminate among persons in same class. (26 LPRA 1204, 2708). Rating organizations must furnish rating services without discrimination to all members and subscribers. (26 LPRA 1225).

Rebates of premiums and other illegal inducements are prohibited. (26 LPRA 2710; 2711).

Liens.

Policy loans not exceeding redeemable cash value according to policy terms secured by lien on policy proceeds. (26 LPRA 661).

Agents and Brokers.

(26 LPRA 949-953). Brokers and agents are now known as producers. Producers may be appointed as authorized representatives of one or more insurers. (26 LPRA 949b-949l). Producers must be licensed by Commissioner. (26 LPRA 949i). Producer's licenses issued to bonafide Puerto Rico residents (26 LPRA 950i) who undergo written examination (26 LPRA 950a). In case of partnership, examination is required of every partner. In case of corporation, examination is required of at least one director and every person who will act on behalf of corporation. (26 LPRA 950g). Nonresident producers may qualify for license at discretion of Commissioner. (26 LPRA 950m). Act provides that scope of producer permitted activities is limited (26 LPRA 951n); however, similar provision in prior law declared unconstitutional by federal court (363 F. Supp.2d 47, 443 F.3d 103). Following fees apply: examination fee $150; annual fees for individual producer acting as authorized representative $157; corporate producer

acting as authorized representative $315; individual producer $525; corporate producer with premium volume under $1 million $1,051, over $1 million $2,103; nonresident producers $841; manager with two or less insurers $1,051, more than two $5,257. (26 LPRA 701 et seq.). Note: Some of LPRA sections referred to under topic Agents and Brokers may only be located in Spanish version of LPRA.

Process Agent.

Each authorized foreign insurer, domestic reciprocal insurer or domestic Lloyd's insurer shall appoint Commissioner as its attorney-in-fact to receive service of legal process against it in Commonwealth. Service of process upon insurer may also be made upon resident agent of insurer designated for that purpose. (26 LPRA 317, 327).

Investments.

(26 LPRA 316; 648-662).

Authorization to Conduct Insurance Business.

To do business in Commonwealth, insurer must be organized as stock, mutual, reciprocal, cooperative, or Lloyd's insurer. (26 LPRA 304). Insurer must comply with paid-in capital or surplus requirements (26 LPRA 309), deposit of assets requirement (26 LPRA 313, 314, 315a), and investment in Commonwealth securities requirement (26 LPRA 316). Insurer must file application for certificate of authority with Commissioner, stating its name, location of home office, location of principal office in U.S., if any, type of insurer, organization date, and, if reciprocal or Lloyd's insurer, name of its attorney-in-fact and address of principal office in Commonwealth. (26 LPRA 317). Application must be accompanied by: (a) copy of resolution of board of directors or other governing body authorizing conduct of insurance business in Commonwealth; (b) certified copy of charter; (c) copy of bylaws, if any, certified by its president or secretary; (d) copy of its annual statement as of Dec. 31 last preceding; (e) evidence of deposit of assets; (f) designation of insurer's manager or general agent to be resident in and have charge of its affairs in Commonwealth. (26 LPRA 317).

Insurers must pay $350 fee for filing of application for authorization. (26 LPRA 701[2][j]). Insurers must pay annual fee based on premium volume by June 30 of each year. (26 LPRA 701 et seq.). For taxes payable see subhead Premium Tax, infra.

Foreign Insurance Companies.

Must register. Foreign insurers are those organized under laws of any state or country other than Commonwealth. (26 LPRA 301). In addition to requirements for authorization of domestic insurance companies (see subhead Authorization to Conduct Insurance Business, supra), foreign insurers must be organized and continuously active for term not less than five years immediately preceding date of application. (26 LPRA 304[5]). Foreign insurers must include with application for certificate of authority: (a) copy of report of last examination made of insurer by insurance supervisory official of its domicile; (b) certificate from insurance supervisory official of its domicile, or state of entry into U.S., stating kinds of insurance it is authorized to transact in such state or country, and amount of its paid-in capital (if stock insurer) and surplus; (c) certificate from insurance supervisory official of state or country of its domicile certifying that there are no provisions of insurer's charter or of laws of its domicile which would prevent insurer from extending its insurance operations to Commonwealth; (d) certificate whereby insurer consents to be sued in courts of Commonwealth for any cause of action arising against it in Commonwealth, stating that legal process may be served on Commissioner or on insurer's agent residing in Commonwealth. (26 LPRA 317). At discretion of Commissioner, foreign insurer may provide certificate acknowledging deposit of assets in state of domicile in lieu of evidence of deposit of assets in Commonwealth if domicile in state having reciprocity with Commonwealth. (26 LPRA 313[3]). Commissioner may deny registration to foreign insurers organized under inadequate laws with respect to capitalization or regulatory supervision. (26 LPRA 304a).

Foreign insurers must pay $350 fee for filing of application for authorization. (26 LPRA 701[2][j]). Foreign insurers must pay $6,309 annual fee by June 30 of each year, except $2,103 for foreign insurers exclusively engaged in reinsuring. (26 LPRA 701 et seq.). For taxes payable see subhead Premium Tax, infra.

No restriction on right to hold real property in state other than those applicable to corporations. See category 2 Business Organizations, topic 2.03 Corporations, subhead Foreign Corporations.

No statutory provisions as to withdrawal other than those applicable to corporations. See category 2 Business Organizations, topic 2.03 Corporations, subhead Foreign Corporations. In practice, withdrawal must be coordinated with Commissioner.

For penalties for conduct of unauthorized insurance business, see subhead Penalties for Conduct of Unauthorized Business, infra.

Annual statements required. See subhead Annual Statements, supra.

Offshore Insurance Center.

Insurers and reinsurers authorized to provide insurance and consulting services to international markets and to captive entities. Reinsurers also may provide such services in Puerto Rico. These international insurers may be organized as Puerto Rico entities under Puerto Rico International Insurers and Reinsurers Act (26 LPRA 4301 et seq.), or may qualify to operate as branch office of foreign entity. (26 LPRA 4318). Tax incentives for these insurers include income, municipal, and property tax exemptions, as well as tax exempt distributions to shareholders or partners. (26 LPRA 4324). Temporary tax has been imposed on these insurers. (2009, Act 7). See category 22 Taxation, topic 22.18A Tax Incentives and Exemptions, subhead International Insurers and Reinsurers Act.

Compulsory Participation in Joint Underwriting Associations, Insurance Guaranty Associations and Insurer's Syndicate.

Insurers authorized to transact insurance in Puerto Rico are required to be members of joint underwriting associations, insurance guaranty associations, and insurers' syndicates created by law as condition for continued authorization to write any insurance business. Currently these exist: Joint Underwriting Association for Fire and Allied Lines (26 LPRA 3701, et seq.), Miscellaneous Insurance Guaranty Association (26 LPRA 3801, et seq.), Life and Disability Insurance Guaranty Association (26 LPRA 3901, et seq.), Medical Malpractice Syndicate (26 LPRA 4101, et seq.) and Motor Vehicle Compulsory Liability Insurance Joint Underwriting Association (26 LPRA 8051, et seq.).

Penalties for Conduct of Unauthorized Insurance Business.

Any insurance company that has general or soliciting agent in Commonwealth or issues single policy or certificate of guaranty insuring resident of or property located in Commonwealth is considered as engaged in insurance business in Commonwealth. 370 F.Supp. 345; 575 F.2d 980). Penalties for conduct of unauthorized insurance business are: (1) Administrative fine maximum of $5,000, with cumulative maximum of $50,000 (26 LPRA 321a); (2) misdemeanor (26 LPRA 1001); (3) insurer denied access to local courts to maintain action as to coverage (but not to defend action) (26 LPRA 1002); (4) contracts issued are voidable by insured (26 LPRA 1003); (5) penalty tax of 15% of premium applies to be withheld and paid by insured (does not apply to medical malpractice insurance) (26 LPRA 1020); (6) additional fines of up to $10,000 per violation may apply (26 LPRA 2726).

Retaliatory Laws.

If state or county imposes taxes, fees, fines, obligations, restrictions or penalties on Commonwealth insurers or agents in excess of those imposed on insurers of such foreign jurisdiction doing business in Commonwealth, Commissioner may impose like legal requirements, penalties or taxes on insurers of such foreign jurisdiction. (26 LPRA 335).

Premium Tax.

Insurance transactions are subject to tax of 46% on their aggregate premiums except in case of annuity contracts where tax is 3% of net consideration received (26 LPRA 702[1]) and “surplus line” premiums which are taxed at 9% of premium (excludes medical malpractice) (26 LPRA 1013). Tax is not applicable to local insurers maintaining principal office (as defined in law) in Commonwealth. (26 LPRA 702a). Capital stock, obligations and securities issued by foregoing corporations owned by domestic insurer with main office in Commonwealth also exempt from personal property tax. (26 LPRA 702a). This tax must be paid as long as premiums are collected in Commonwealth although insurer may have withdrawn from writing new business. (26 LPRA 702[2]).

Uniform Insurers Liquidation Act.

(26 LPRA 4001 et seq.). Adopted in Dec. 14, 2007 as Act 206.

No-Fault Insurance.

See category 23 Transportation, topic 23.01 Motor Vehicles, subhead No-Fault Insurance.

Plain Language.

No “Plain Language” statute. See subhead Policies, supra.

Direct Actions Against Insurer.

Insurance Code provides for direct action against liability insurer by injured third party. (26 LPRA 2003). See category 23 Transportation, topic 23.01 Motor Vehicles, subheads Direct Actions, No-Fault Insurance.

Financial Institutions.

Insurance companies may have economic interests in bank holding companies and banks in accordance with Gramm-Leach-Bliley Act. (Pub. L. No. 106-102 [1999]; 26 LPRA 304-1, 307, 320, 916[1], 2713a). If insurer has relationship with financial institution other than those defined or with depository institution or financial holding company that does not comply with requirements of Gramm-Leach Bliley Act, Commissioner can revoke, suspend or not renew insurer's authorization. (26 LPRA 304-1[4], 320). Banks may also conduct insurance business through subsidiary. See category 3 Business Regulation and Commerce, topic 3.01 Banks and Banking.

16.02 SURETY AND GUARANTY COMPANIES:

(Title 26).

Surety and guaranty companies governed by Insurance Code, and subject to supervision of Commissioner. (26 LPRA 2201 et seq.). Foreign corporation authorized to operate on same conditions as any other foreign insurer. See topic 16.01 Insurance Companies.

17 INTELLECTUAL PROPERTY

17.00A MORAL RIGHTS OF AUTHORS OF LITERARY, SCIENTIFIC, ARTISTIC OR MUSICAL WORKS:

Under Commonwealth law, author of literary, scientific, artistic or musical work has right to benefit from it and exclusive prerogatives to attribute to himself (or retract) its authorship, dispose of work, authorize its publication and protect its integrity. (31 LPRA 1401). Protection of these moral rights is independent from protection of proprietary rights. (31 LPRA 1401b). Moral rights extend for 50 years after author's death and protection passes to successors or heirs. (31 LPRA 1401c). Violation of moral rights entitles author or successor to request injunctive relief and damages. (31 LPRA 1401f). Actions for violation of moral rights must be brought within one year of violation. (413 F.Supp.2d 84 Copyright Cases or Patent Cases). Creator of work of art is entitled to 5% of increase in value upon resale of work. (31 LPRA 1401h). Actions seeking payment with respect to resale must be brought within three years of knowledge of violation. (31 LPRA 1401g).

17.01 TRADEMARKS AND TRADENAMES:

(10 LPRA 171, 10 LPRA 225).

Trademarks.

(10 LPRA 171 et seq.).

What May Be Used.

No mark shall be registered which consists of: (1) matters that are contrary to law; (2) flag or coat of arms or other insignia of Puerto Rico or of U.S., or any other state, municipality or foreign nation, or imitation thereof; (3) complete name, one or two surnames, portrait, nickname, signature or combination thereof of person, unless consent obtained, but applicant may register its own name or part of it, provided that such mark is otherwise registrable; (4) words descriptive of products or services on which mark is used; (5) words that indicate type, species, nature, quality or shape of products or services on which mark is used; (6) geographic names or terms that indicate source or origin of products or services on which they are used; (7) mark that is identical to registered or known mark of another and used on same type of products or services, or mark that is so similar to mark of another that its use is likely to cause confusion or error in public mind or to deceive purchasers; (8) mark that is identical or similar to commercial name already registered or pending registration at Department of State, that is likely to cause confusion or error in public's mind; provided that marks identified in clauses 4, 5 and 6 are registrable if they have acquired distinctive character for products or services for which registration is requested as result of use to which they have been given.

Registration.

Owner of mark may register it by filing application with Secretary of State, accompanied by sworn statement to effect that applicant is entitled to use mark in Puerto Rico. Registration fee is $150. Applicants also are required to provide facsimiles of mark as used, or proposed to be used, in commerce. (10 LPRA 171b et seq.). Five years after presentation for registry of trademark without prior use, if trademark not yet recorded, registry will not proceed.(165 DPR [2005]).

Term and Renewal.

Mark is valid for ten years after registration. May be renewed for successive ten year periods by filing petition within last year of current ten-year period. Renewal fee is $150. (10 LPRA 171p). Registration of mark filed without use expires if registrant fails to use mark in commerce and file statement of use within five years of registration. (165 DPR 781).

U.S. Registration.

Registration in U.S. Patent and Trademark Office protects marks used in interstate commerce in Puerto Rico but not in some situations where infringement is strictly intrastate. U.S. marks may be registered in Puerto Rico if not in conflict with mark already registered. Federally registered trademarks used in interstate commerce and in Puerto Rico have priority over subsequent Puerto Rico registrations. (165 DPR 598).

Assignment.

Registered mark may be assigned by means of duly sworn written document filed with Secretary of State. Fee is $10 per mark. (10 LPRA 171h).

Protection Afforded.

Registration is prima facie evidence of ownership. Infringers are subject to injunction, action for damages and/or seizure order. (10 LPRA 171w).

Tradenames.

(10 LPRA 225 et seq.). Registration of tradename at Department of State may be obtained by submitting: (a) Application specifying business activity covered by name; (b) sworn statement to effect that no other person entitled to use name in Puerto Rico, and that description and facsimiles submitted truly represent name; (c) facsimiles of name as used or to be used in commerce; (d) evidence that applicant has applied for or obtained municipal or other licenses or permits required by law to engage in such business; and (e) filing fee of $150. Similar or confusing names may not be registered. Registration is optional and grants to registered owner exclusive right to use name in commerce. Registration is prima facie evidence of ownership. Infringers are subject to injunction, action for damages and/or seizure order.

17.02 TRADE SECRETS:

There is no specific statutory provision, but Puerto Rico's general tort and property law statutes (31 LPRA 5141, 31 LPRA 1021, et seq.) as well as unfair competition statute and regulations (10 LPRA 259, Unfair Competition Regulation VII) may be used to protect trade secrets. Also, Rule 23.2(g) of Puerto Rico Rules of Civil Procedure allows protective orders to prevent disclosure of trade secrets, and Rule 30 of Puerto Rico Rules of Evidence recognizes qualified privilege against disclosure of trade secrets.

18 LEGAL PROFESSION

18.01 ATTORNEYS AND COUNSELORS:

(4 LPRA 721 et seq.; 4-App IX, XVII-B, XXI-A Part II).

The Commonwealth bar is integrated.

Jurisdiction over admissions lies with Supreme Court which issues regulations and appoints Examining Board members. (4 LPRA 721).

Eligibility.

Persons of legal age, of good moral character and domiciled in Puerto Rico, or resident in Puerto Rico for 12 months prior to date of filing application for admission, may be admitted to bar. (4 LPRA 721).

Registration as law student not required.

Educational Requirements.

Applicant must (1) have bachelor degree from university in Puerto Rico or U.S. or possess equivalent degree which meets requirements established by Council for Higher Education or is approved by Supreme Court and (2) be graduate of law school approved by American Bar Association or by Supreme Court. When applicant has graduated from foreign law school, must validate studies and obtain corresponding degree from law school approved by ABA and Supreme Court. Applicants who have practiced law in other jurisdictions must submit certificate of good standing and include report of any disciplinary proceedings. (4-App XVII-B R4, R6; XXI-A R12).

Petition for Admission.

Petition must be sworn before notary and filed with Examining Board for Candidates for Practice of Law, accompanied by two photos, good conduct certificate, academic transcript, law school diploma, and other documents required by Board.

Examinations.

All applicants must be of legal age and pass written examination. All candidates having passed bar examination must procure certificate of good character from Committee on Character of Applicants for Admission to Bar appointed by Supreme Court. Multi-State Bar Examinations not utilized and score transfers from other jurisdictions not authorized. Examination given twice a year and covers legal topics and notarial topics in separate examinations. (See category 10 Documents and Records, topic 10.03 Notaries Public.) Examination given in Spanish but may be answered in Spanish or English. Fee is $50 for legal and $25 for notarial examinations. (4 LPRA 721; 4 App XXI-A R12, 13). See subhead Federal Practice, infra.

Clerkship.

No requirements for such service before admission.

Admission Pro Hac Vice.

Member of U.S. state bar may be admitted for purposes of particular case. (4 App XXI-A R12).

Licenses.

Only members in good standing of Puerto Rico Bar Association can practice. Annual membership fee is $200. (4 LPRA 774; 780; 781).

Disabilities.

Attorney may not acquire any instrument or thing subject to controversy for purpose of bringing suit on it; however, attorney can acquire such property rights in payment for property sold or in exchange for services or antecedent debt. (4 LPRA 742).

Disbarment or Suspension.

Promoted upon complaint filed with the Supreme Court. (4 LPRA 735).

Compensation.

Guidelines in Puerto Rico Canons of Professional Ethics list factors for fixing amount of fees. (4 LPRA 2131, 4 App IX Can. 24). Contingent fees in tort claims limited to 33% of recovery, except 25% if client is minor or incapacitated. (4 LPRA 742). See category 10 Documents and Records, topic 10.03 Notaries Public, subhead Fees.

Lien.

Attorney's lien not recognized.

Mandatory continuing legal education requirement approved by Supreme Court in 2005. (2005 TSPR 44). Effective date Oct. 2006.

Professional Corporations.

See category 2 Business Organizations, topic 2.03 Corporations, subhead Professional Corporations.

Unauthorized Practice.

Only individual admitted to bar and in good standing may practice. (4 LPRA 735; 740; 782).

Attorney Ethics, (4 App IX).—Puerto Rico Canons of Professional Ethics.

Federal Practice.

U.S. District Court for District of Puerto Rico has similar educational requirements for applicants and separate examination for admission. ABA Model Rules of Ethics apply.

19 MINERAL, WATER AND FISHING RIGHTS

19.00A FISHING RIGHTS:

All aquatic and semiaquatic organisms found in bodies of water, which are not private property, are of public domain and use subject to limitations imposed by chapter on “Protection of Game and Fish” and regulations thereunder. (12 LPRA 17 et seq.). Any person fishing in jurisdictional waters of Commonwealth must hold licenses and permits issued by Department of Natural and Environmental Resources (DNER) (http://www.drna.gobierno.pr), except for those exceptions provided by regulation. (12 LPRA 25d). Commercial fishing is prohibited in lakes and reservoirs. (12 LPRA 24). Sport fishermen must observe ten fish per person per day limit. (12 LPRA 24). Commonwealth jurisdiction extends for 12 miles from limit of low-tide line or from baselines established under international law principles. (12 LPRA 25b). See category 12 Environment, topic 12.01 Environmental Regulation, subhead General Supervision.

19.01 MINES AND MINERALS:

Under Mining Act, ownership of commercial minerals found in soil and subsoil of Commonwealth, its adjacent islands and in surrounding waters and submerged lands, extending not less than three marine leagues, belong to Commonwealth, which through third parties or directly may exploit them. (28 LPRA 111). Secretary of DNER has power to adopt, amend and repeal rules and regulations with respect to exploitation, development and utilization of commercial minerals. (28 LPRA 115a).

Department of Natural and Environmental Resources (DNER) has supervision over mines and mining and requires permits for all activities of extraction, removal, and dredging of components from earth's crust. (28 LPRA 207). Environmental Quality Board (“EQB”) requires Erosion and Sedimentation Control Permit. (EQB Regulation for the Control of Erosion and Prevention of Sedimentation, Regulation No. 5754, Feb. 1998).

Operation of Mines.

Mining Act authorizes Secretary of DNER to issue prospecting permits. Right to extract commercial minerals is granted only through leases issued by Secretary with approval of Governor. (28 LPRA 116-17). Open pit and strip mining are prohibited. (28 LPRA 110, 116[a] [3]).

Safeguarding of Employees.

Local miners are protected under federal law. Employers are subject to regulations of Federal Mine Safety and Health Act. (30 USCA 801, et seq.).

Inspection of Mines.

Secretary may inspect works involved in prospecting for and exploiting commercial minerals, as well as books and files of persons and entities carrying out such works. (28 LPRA 115a[l]). Visual inspection is required before renewal of permit for excavation, removal or dredging of components of earth's crust. (28 LPRA 211).

Oil and Gas.

Regulations adopted by DNER pursuant to 28 LPRA 115a establish system of permits for prospecting, leasing and production of oil and gas.

Taxes.

There are no special taxes on mining.

See category 12 Environment, topic 12.01 Environmental Regulation.

19.01A WATER RIGHTS:

(12 LPRA 1115-1115v).

Water and water bodies are property of Commonwealth. (12 LPRA 1115c). Department of Natural and Environmental Resources ("DNER") is authorized to issue and enforce regulations governing use and development of water and water bodies. (12 LPRA 1115d). Permit from DNER is required for drilling wells. (12 LPRA 1115g). Franchise from DNER is also required for extraction of water from any water body, which is granted only for beneficial and reasonable uses of water. (12 LPRA 1115h). Any legal, beneficial and reasonable use of water existing by June 3, 1976, constitutes vested right for which franchise is not required. (12 LPRA 1115o). Franchisees are required to pay tax of.02¢ per gallon of water extracted (except for water used for agricultural, agro-industrial and/or animal husbandry purposes). (12 LPRA 1115k; Art. 8.13, Department of Natural Resources Regulation No. 6213, Oct. 2000).

See category 12 Environment, topic 12.01 Environmental Regulation.

20 MORTGAGES

20.01 CHATTEL MORTGAGES:

Uniform Commercial Code adopted with variations. See category 3 Business Regulation and Commerce, topic 3.09 Commercial Code. (19 LPRA 401 et seq., 2001 et seq.).

Forms.

See end of this Digest.

20.02 COLLATERAL SECURITY:

See categories 3 Business Regulation and Commerce, topic Commercial Code; Code Article 9.

20.02A MORTGAGES OF IMMOVABLE PROPERTY:

See category 21 Property, topic 21.16 Real Property, for discussion of "immovable" vs.

"real" property.

Mortgage Law and Regulations. (30 LPRA 2001 et seq.).

Mortgage on immovable property is lien thereon. (30 LPRA 2551). Mortgage with no recourse to mortgagor available. (30 LPRA 2603). May be constituted to secure direct obligation or mortgage note payable to mortgagee or to bearer. (30 LPRA 2614). If constituted to secure direct obligation or mortgage note payable to mortgagee, formal acceptance of lien by mortgagee (normally in mortgage deed) and recordation of acceptance is essential. Title to mortgaged property remains with mortgagor.

Sales Deemed Mortgages.

Following sales of real estate with provision of reversion are deemed mortgages: (1) when vendee fails to take possession of property sold, (2) when vendor pays vendee interest on selling price, though such interest be called rental, (3) when grossly inadequate sum appears as price of sale. (31 LPRA 3915).

Execution.

By deed. See category 21 Property, topic 21.06 Deeds.

Recording.

Essential. (30 LPRA 2551, 2607).

Recording Fees.

See category 10 Documents and Records, topic 10.04 Records, subhead Recording Fees.

Trust Deeds.

Not judicially tested.

Future Advances.

Allowed, if so provided in mortgage, up to amount of lien. 30 LPRA 2562, 2563, 2609). Open-end mortgages provided for. (30 LPRA 2604).

Priorities.

Determined by hour and date of filing, subject to party claiming priority being third party. Third party defined as acting in good faith, for value, and without notice. (30 LPRA 2256).

Subordination Agreements.

Allowed and enforceable. Recordation essential. (30 LPRA 2606, 2608).

Assignment.

Mortgage securing instrument transferable by endorsement or payable to bearer deemed transferred by mere endorsement and delivery, or delivery if bearer instrument, with no need to record. Record will not show identity of mortgagee, but holder of instrument duly transferred entitled to all rights of transferor. (30 LPRA 2614). Mortgage directly securing obligation other than negotiable instrument, including nonnegotiable instrument, requires transfer by public deed and recording. (30 LPRA 2612, 2613). See categories 21 Property, topic Deeds; Debtor and Creditor, topic Assignments, subhead Instrument Transferring Title.

Release.

Where lien is over one single property, partial release only by subdivision and with consent of mortgagee. (30 LPRA 2570). Where lien is over two or more properties, lien responsibility for each property must be stated in mortgage and mortgagor is entitled to release of one or more properties when amount equal to lien responsibility has been satisfied. (30 LPRA 2566).

Satisfaction.

Upon satisfaction, deed of cancellation required. See category 21 Property, topic 21.06 Deeds. If lien constituted to secure mortgage note, holder discharges duty by endorsement and delivery of mortgage note to mortgagor. If constituted to secure direct obligations, mortgagee must execute deed of cancellation. (30 LPRA 2462).

Foreclosure.

Summary proceedings available, essentially ex parte. Court decisions under prior law declaring summary proceedings void for minor errors and defects have resulted in abandonment of summary proceedings. Foreclosure generally made by ordinary proceedings, similar to foreclosure in equity. (30 LPRA 2701 et seq.).

Sales.

Foreclosure sales by public auction, with statutory and judicial notice requirements. Mortgagee may bid in foreclosure sales. (30 LPRA 2701 et seq.).

Deficiency judgments are allowed, usual and enforceable for balance of principal and interest, except for non-recourse mortgage. (31 LPRA 5171).

Moratorium.

No Commonwealth law. U.S. Bankruptcy Law applicable.

Redemption.

No statutory right.

Forms.

No statutory forms. See category 21 Property, topic 21.06 Deeds, subhead Forms, for example of typical form of deed.

20.03 MORTGAGES OF PERSONAL PROPERTY:

See categories 21 Property, topic Personal Property; Business Regulation and Commerce, topic Commercial Code.

21 PROPERTY

21.01 ABSENTEES:

(31 LPRA 131 to 201).

When any person is absent from or resides outside of Puerto Rico, without leaving attorney-in-fact or administrator for his property, court may appoint administrator to represent him and to administer his property, preferring spouse or presumed heirs. (31 LPRA 131, 132).

Care of Property.

Immovable property so held by court appointed administrator may only be administered and may not be sold or encumbered. (31 LPRA 135). If spouse does not insist on continuance of conjugal partnership, presumed heirs may obtain provisional possession of such property upon expiration of five years from disappearance if absentee named no representative, and upon expiration of seven years if representative was named. (31 LPRA 151, 152, 158). These terms may be shortened if evidence offered from which presumption can be drawn that absentee is deceased. (31 LPRA 154). Presumed heirs with such provisional possession may not sell or encumber such property, but court may, for cause, authorize sale of movable property or undivided interests in immovable property. (31 LPRA 160, 163). Absence for 15 years from commencement of provisional possession, or 90 years from birthdate of absentee is sufficient to support declaration of presumed death. (31 LPRA 164).

Escheat.

Upon showing of absence for ten years and nonexistence of heirs in Puerto Rico, court may order sale of absentee's property and delivery of proceeds to Secretary of Treasury of Commonwealth. (31 LPRA 138). See category 3 Business Regulation and Commerce, topic 3.01 Banks and Banking, subhead Unclaimed Deposits.

Actions.

If action is brought against absentee having no local representative, court will appoint an administrator ad hoc to defend. (31 LPRA 141). See category 5 Civil Actions and Procedure, topic 5.20 Process, subhead Service by Publication.

21.02 ADVERSE POSSESSION:

(31 LPRA 1421 et seq. and 31 LPRA 5261 et seq.).

Character of Possession.

Title to immovable property may be acquired through public, peaceful, and uninterrupted possession in capacity of owner. (31 LPRA 5261-5263).

Duration of Possession.

Prescriptive period as to persons present is ten years and as to absent persons 20 years, with good faith and proper title, and 30 years without title or good faith and without distinction between present and absent persons. (31 LPRA 5278, 5280).

Easements may not be acquired by lapse of time except easements which are both continuous and apparent for 20 years. (31 LPRA 1651). Continuous easements are those in which use is or may be uninterrupted, without intervention of human act, and apparent easements are those continually indicated by external signs revealing use and benefit thereof. (31 LPRA 1634).

21.03 CONDOMINIUMS:

See topic 21.16 Real Property.

21.04 CONVEYANCES:

See topic 21.06 Deeds.

21.05 CURTESY:

Unknown to Puerto Rico law. See categories 14 Family, topic Husband and Wife; Estates and Trusts, topic Descent and Distribution.

21.06 DEEDS:

(4 LPRA 2001 et seq.; 30 LPRA 2201, 2251).

Puerto Rico practice as to deeds differs sharply from common law practice. Notarial system used in Puerto Rico is similar to that in other Latin American jurisdictions.

Deeds are prepared by authorizing notary who identifies himself and parties, and capacity in which they appear. Notary sets forth statements and covenants of parties in third person. Notary must certify that deed has been prepared in accordance with wishes of parties; that he has advised parties of legal effect of instrument; that he has read instrument to parties or that they have read it, or waived reading. (4 LPRA 2033). Notary must attest to everything set forth in deed, including fact that notary personally knows appearing parties in deed or that notary has assured himself of identity of parties pursuant to means provided in Notarial Act. See category 10 Documents and Records, topic 10.02 Affidavits, subhead General Requirements as to Administration. (4 LPRA 2035, 2036, 2044). Special notarial paper is required as specified by statute. (4 LPRA 2055).

Execution.

Deed is executed by parties in presence of notary, by signature at foot, and by initials of parties on each page. (4 LPRA 2046). Notary then authorizes deed, affixing his signature, mark, and seal immediately below parties' and witnesses' (if any) signatures. Notary also places his flourish and seal on each page of deed. (4 LPRA 2034). Only one original deed is executed, which becomes public instrument but remains in possession of notary, and is annually bound in volume (protocol) with other deeds of notary, all numbered consecutively, by year, in his protocol for calendar year, thus forming part of public records of Commonwealth. Upon notary's death or retirement as notary, his protocols are delivered into custody of General Archivist of District. Deed is sufficiently identified if referred to as “Deed Number. . . . of. . . . . . (date) before Notary. . . . .”

Certified Copies.

For registry and other purposes, notary, his substitute, or General Archivist, in proper case issues to interested parties one or more certified copies of deeds or, if requested, portions thereof. Such copies bear notary's attestation over his signature, mark and seal. (4 LPRA 2061). Like original, each page of copy bears notary's flourish and seal and internal revenue stamps must be affixed to each certified copy. See subhead Taxes, infra. Such copies are admissible to Registry of Property, in courts, and for every purpose for which original might be required in common law jurisdiction, with advantage that proof of authenticity is not required.

Recording.

Recording is necessary only to bind third persons except for validity of mortgage lien, validity of restrictive covenants upon real property and constitution of condominium regimes. (30 LPRA 2256, 2304, 2607; 31 LPRA 1291). No special time is fixed for recording. Recording is made in office of Registry of Property which covers immovable affected; and, if covered by more than one office, in all offices covering immovable. Place of residence of parties does not affect place of recording.

Recording Fees.

See category 10 Documents and Records, topic 10.04 Records, subhead Recording Fees.

Operation and Effect.

No deed will be admitted to Registry which is not accompanied by proper receipt showing payment of recording fees, or which, in opinion of Registrar, either does not, or cannot, effect intended transfer or conveyance by reason of incurable defect. Affected parties may request reconsideration of negative decision by Registrar. (30 LPRA 2273, 2274). Registrar's final decision may be challenged by appeal (recurso gubernativo) to Supreme Court of Puerto Rico. (30 LPRA 2279). In practice, effort is usually made to satisfy Registrar, by modification, amendment, or clarification of deed.

Taxes.

(4 LPRA 851). Internal revenue stamps are affixed and cancelled on each original public deed and on certified copies thereof. For value not exceeding $250, 50¢ for original and 20¢ for each copy; in excess of $250, but not greater than $500, $1 for original and 50¢ for each copy; in excess of $500, but not greater than $1,000, $2 for original and $1 for each copy; in excess of $1,000, but not greater than $5,000, $2 for first $1,000 and 50¢ additional for each $1,000 or fraction thereof for original, and $1 for first $1,000 and 20¢ additional for each $1,000 or fraction thereof for each copy; in excess of $5,000, $2 for first $1,000 and $1 additional for each $1,000 or fraction thereof for original, and $1 for first $1,000 and 50¢ additional for each $1,000 or fraction thereof for each copy. Value for leases is fixed at stipulated rent for full term of lease and renewals. Bar Association of Puerto Rico $1 stamp affixed to and cancelled on each original deed and on each certified copy; Legal Aid Society $3 stamp affixed to each notarial affidavit. (4 LPRA 851, 896). Legal Aid Society stamps affixed and cancelled on deeds: deed value between $25,000 and $50,000, $5 on original and $2.50 on certified copy and if deed value over $50,000, increasing by $5 increments on original and $2.50 increments on certified copy for each additional $50,000 or fraction thereof.

Forms.

No statutory forms. There follows a typical form of deed used for sales of real property. It is not recommended that deeds be prepared outside of Puerto Rico without advice of Puerto Rico counsel.

Form

NUMBER

DEED OF SALE

In the municipality of. . . . . . ., Commonwealth of Puerto Rico, this (insert date of execution).

BEFORE ME

. . . . (insert name of authorizing notary), Attorney-at-Law and Notary Public in and for the Commonwealth of Puerto Rico, with residence in the municipality of. . . . . and an office in the municipality of. . . . ., Puerto Rico.

APPEAR

OF THE FIRST PART: (insert name, personal circumstances, and social security number of appearing party) (hereinafter referred to as “Sellers”).

OF THE SECOND PART: (insert name, personal circumstances, and social security number of appearing party) (hereinafter referred to as the “Purchasers”).

I, the Notary, attest that I am personally acquainted with the appearing parties [or that I have assured myself of the identity of the appearing parties by means of. . .,] who assure me that they have, and in my judgment they do have, the legal capacity to execute this deed, whereupon freely and of their own will and accord they

STATE

FIRST: The Sellers are the owners in fee simple (*pleno dominio*) of certain immovable property which is hereinafter referred to as the “Property” and is described in the Spanish language as follows: (insert property description). . . . .

TITLE AND ENCUMBRANCES

(insert title and recording information including liens and encumbrances as they appear of record)

SECOND: The appearing parties have agreed on the sale of the Property with all its uses and improvements thereto, all in accordance with the following provisions:

One: The Sellers sell to the Purchasers, and the Purchasers hereby purchase from the Sellers the Property, together with all its rights, easements, servitudes and appurtenances. This Deed shall entitle the Purchasers to enter into possession of the Property upon the mere execution of this deed.

The purchase price for the sale of the Property is (insert amount) which is paid by the Purchasers to the Sellers as follows:

(a) The amount of (insert amount) which Purchasers have delivered to Sellers prior to this act;

(b) The amount of (insert amount) which Purchasers deliver to Sellers in this act;

(c) The amount of (insert amount) which the Purchasers reserve to satisfy the mortgage note referred to in paragraph FIRST above.

The Purchasers expressly assume the obligation to pay said mortgage note and the obligations set forth in the mortgage securing said note.

THIRD: The Sellers hereby warrant to the Purchasers that they have title in fee simple (*pleno dominio*) to the Property, that they have all necessary powers to sell the same and to make this deed, and that the Property is subject to no leases, liens or encumbrances except as stated in paragraph FIRST hereof. The Sellers likewise assume the obligations provided by the Civil Code of Puerto Rico in the event of eviction.

FOURTH: All expenses of the preparation of this deed and of internal revenue stamps on the original thereof shall be for the account of the Sellers and all expenses of internal revenue stamps on the first certified copy thereof and of registration thereof in the Registry of Property shall be for the account of the Purchasers.

FIFTH: Property taxes due on the Property for the fiscal years prior to the fiscal year two thousand. . . . . . (20. . . . . .) and for the fiscal year two thousand. . . . . . (20. . . . . .) corresponding to the period up to the date of this deed shall be for the account of the Sellers and thereafter for the account of the Purchasers.

ACCEPTANCE

The appearing parties to this Deed accept the same as drafted because it has been drawn up in accordance with their stipulations, terms and conditions. I, the Notary, made to the appearing parties the necessary legal warnings concerning the execution of this deed and they were fully advised by me thereon.

The appearing parties waived the right which I advised them they had to have witnesses to the execution of this deed; but, upon my advice, made use of their right to read the same, and finding it drafted to their entire satisfaction, having been advised by me, the Notary, of the pertinent legal warnings and reservations, proceed to sign it before me and to affix their initials on each folio of the same. To all of which, as well as to everything contained or related in this deed, I the Notary, certify.

Executed Outside of Puerto Rico.

Deeds of conveyance may generally be executed outside of Puerto Rico so long as requirements of form and content of place of origin of document or those of Puerto Rico (30 LPRA 2209) are complied with and such deeds are protocolized by notary in Puerto Rico. See category 10 Documents and Records, topic 10.03 Notaries Public. (31 LPRA 11; 4 LPRA 2056). Notary must cancel same stamps on protocolized deed as would have been required if originally executed in Commonwealth. See subhead Taxes, supra.

Foreign Deeds.

Foreign deed which is in form conforming substantially to Puerto Rican notarial law, must, in order to be recognized in Puerto Rico, be authenticated by governmental authority having jurisdiction over notaries in place of execution, which authentication must in turn be authenticated by embassy or consular officer of U.S. in such place or if country has adhered to Convention Abolishing the Requirement of Legalisation for Foreign Public Documents, by certificate or apostille issued by that country's designated officer, and must also be protocolized in Puerto Rico. (4 LPRA 2056, 3111). See subhead Executed Outside of Puerto Rico, supra as to protocolization and taxes due.

21.07 DEEDS OF TRUST:

See category 20 Mortgages, topic 20.02A Mortgages of Immovable Property.

21.08 DOWER:

Unknown to Puerto Rico law. See categories 14 Family, topic Husband and Wife; Estates and Trusts, topic Descent and Distribution.

21.09 ESCHEAT:

See topic 21.01 Absentees, subhead Escheat; categories 3 Business Regulation and Commerce, topic Banks and Banking, subhead Unclaimed Deposits; Estates and Trusts, topic Descent and Distribution, subhead Escheat.

21.10 LANDLORD AND TENANT:

Lease contracts, other than personal property leases, are governed by Civil Code (31 LPRA 4011 et seq.) and can cover property or services. In lease of property lessor grants to lessee use of property for fixed term and stipulated price. (31 LPRA 4012). In lease of services, one party agrees to complete work or perform services for stipulated price. (31 LPRA 4013). See subhead Lease of Personal Property, infra.

Uniform Commercial Code Art. 2A not adopted.

Kinds of Tenancy.

No provision on kinds of tenancy. Common law concepts not applicable. See topic 21.16 Real Property.

Leases may be in any form, written or verbal, and are binding between parties. (31 LPRA 3451). Unless otherwise agreed in purchase agreement, purchaser with knowledge of unrecorded lease is expressly authorized to terminate same. However, lessee will be entitled to recover damages from seller. (31 LPRA 4068).

Recording.

No lease is recordable unless in public instrument. Leases for less than six years not recordable unless parties agree (see topic 21.06 Deeds). (30 LPRA 2201).

Rent.

Unless specially agreed otherwise, lessee of rural property has right to reduction of rent in case of loss of more than half of pending fruits through extraordinary and unforeseen fortuitous events (fire, war, flood, pestilence, locusts, earthquake, and other similar infrequent and unforeseen events). Lessee has no right to rent reduction because of sterility of land leased or loss of crop through ordinary fortuitous event unless there is agreement to contrary. (31 LPRA 4081).

Termination of Tenancy.

Leases without fixed term, if of farm land, are deemed to be for time required to harvest crop (31 LPRA 4083); if of urban property, on basis on which rent is fixed. (31 LPRA 4092).

Holding Over.

In tenancy for which no contrary contractual provision exists, lease is automatically renewed if tenant holds over for 15 days with acquiescence of landlord. If lease is of urban property and rent paid on yearly basis, renewal is for one year; if monthly, one month; if daily, one day. (31 LPRA 4063). If lease is of rural property, renewal is for one harvesting period. (31 LPRA 4083).

Dispossession.

The lessor may judicially dispossess the lessee (1) upon the expiration of the lease, (2) upon default in payment, (3) for violation of terms of the lease and (4) for improper use of the thing leased. (31 LPRA 4066).

Distress.

Unlawful Detainer Act (32 LPRA 2821) provides for summary dispossession proceeding. In such proceeding when complaint is founded upon nonpayment of rental defendant can exhibit no proof except receipt or other document showing that payment has been made, and cannot appeal unless he deposits in court amount due up to date of judgment and furnishes bond to pay costs and all damages occasioned to plaintiff. (32 LPRA 2829; 32 LPRA 2832).

Uniform Residential Landlord and Tenant Act not adopted.

Lease of Personal Property.

Governed by Act to Regulate Leasing of Personal Property (10 LPRA 996 et seq.) which establishes licensing requirements for lessors, Personal Property Leasing Institutions Act (10 LPRA 2401 et seq.) which regulates lease forms and rights of parties, and Act to Regulate Lease Agreements with Option to Purchase (10 LPRA 2451 et seq.) which regulates consumer leases with purchase options.

License.

Lessors of personal property must be licensed by Commissioner of Financial Institutions (http://www.ocif.gobierno.pr) unless lessor's assets in leasing business have value of less than $10,000 or leases are for less than one year. (10 LPRA 996b). Application for license requires fee of $500 and payment of annual license fee of $500. (10 LPRA 996c). Separate license is required for each office. Transfer of business, including voting control of corporation, requires Commissioner approval. (10 LPRA 996e). Reports to Commissioner due as required by regulation. (10 LPRA 996h).

Type of Lease.

"Finance Lease" and "Operating Lease" are defined terms. Operating Lease includes every personal property lease except Finance Lease. Any lease meeting one of following conditions is Finance Lease: (a) Lease transfers title upon termination; (b) lease contains purchase option for value substantially under market value; (c) lease term is equal to or greater than 75% of useful life of property; or (d) present value of lease payments equals or is greater than 90% of fair market value of property. (10 LPRA 2401).

Lease Form.

(10 LPRA 2403, 2404). Detailed disclosure similar to that for retail installment sales is required. (See category 3 Business Regulation and Commerce, topic 3.23 Sales, subhead Retail Credit Sales.) Operating Leases need not disclose residual value, finance charges, or annual percentage rate. Following notice is required:

"This is not a retail installment sale. There are penalties for cancellation of this contract. Do not sign this contract unless you have read it or if it contains blank spaces. You have a right to a copy of this contract."

Consumer Leases.

Leases to natural persons for personal or family purposes where value of property does not exceed $60,000 are "Consumer Leases". Consumer Lease maximum value may be adjusted by Commissioner every three years based on rate of inflation. (10 LPRA 2401). All Consumer Leases require full disclosure and are subject to further regulation by Commissioner. (10 LPRA 2403). Lessor has obligation to use diligence to determine if lease is Consumer Lease. (10 LPRA 2406). Lessee may repay Consumer Lease at any time based on present value if no default. (10 LPRA 2425). Lessee may also return property and require its sale or lease by lessor, but remains liable for deficiency. (10 LPRA 2422).

Lease Terms.

Lessor is owner of leased property. Selection of property is left to lessee. Lease not binding until property delivered and accepted by lessee. Lessor need not pay seller of property until property accepted by lessee. Seller must deliver any warranties directly to lessee. Lessee has direct right of action against seller. All Finance Leases must contain option to purchase and if there is residual value, option price cannot be greater than residual value. Lessor must approve any assignment by lessee. Assignments by lessor must be notified to lessee. In case of Finance Lease with residual value, lessee may, at expiration of term, (a) acquire title to property paying residual value, (b) redeliver property, or (c) continue to lease property at rental not less than residual value. If property is returned, lessor must sell or lease it and lessee is responsible for deficiency based on residual value or present value of new lease. If property cannot be sold or leased, lessee must pay residual value and will obtain title. (10 LPRA 2407-2418).

Repossession.

There is summary repossession procedure established. (10 LPRA 2423).

Consumer Leases with Purchase Option.

Motor vehicle leases not covered. Disclosures and warnings similar to Retail Installment Sales Act required. See category 3 Business Regulation and Commerce, topic 3.23 Sales, subhead Retail Credit Sales. Security interest perfected by UCC filing. See category 3 Business Regulation and Commerce, topic 3.09 Commercial Code. Regulated by Department of Consumer Affairs which is authorized to adopt mandatory model agreement. See category 3 Business Regulation and Commerce, topic 3.12 Consumer Protection. (10 LPRA 2451 et seq.).

Commercial Code.

Perfection of security interest in finance lease covered by provisions of Commercial Transactions Act (19 LPRA 2001). (See category 3 Business Regulation and Commerce, topic 3.09 Commercial Code.)

21.11 LEASES:

See topic 21.10 Landlord and Tenant.

21.12 PARTITION:

See category 5 Civil Actions and Procedure, topic 5.16A Partition.

21.13 PERPETUITIES:

Testator may direct that heir who is descendant maintain inherited property and devise it on his death to specific person, provided such person is related to original testator within second degree or is living when testator dies. (31 LPRA 2308).

Property may be devised or bequeathed for charitable purposes under conditions of perpetual payments, but heir may at any time capitalize encumbrance. (31 LPRA 2315).

Owner may subject property to annuity known as “censo”. Censo is by nature perpetual, but person obligated to make payments may redeem obligation by making sufficient provision for payment of annuity. (31 LPRA 4175).

Trusts cannot be created to extend beyond the lives of two persons in being. (31 LPRA 2553). Trusts which provide usufruct or income in favor of legal entities, except nonprofit entities, become extinct after 30 years. (31 LPRA 2555).

21.14 PERSONAL PROPERTY:

Term unknown in Puerto Rico law except as inaccurate translation of Spanish “mueble” (movable). See category 3 Business Regulation and Commerce, topic 3.09 Commercial Code, comment to UCC Art. 1 LPRA 206. (19 LPRA 456; 31 LPRA 1061-1068).

Concept of “tenancy by the entirety” unknown.

21.15 POWERS OF ATTORNEY:

(31 LPRA 4421 et seq.).

Attorneys in Fact.

For most purposes, powers of attorney should appear in public instruments executed before a notary, filed with Registry of Powers of Attorney and should be detailed and explicit regarding powers conferred. Authority of person granting power must clearly appear. (4 LPRA 921, 922).

Agency may be either explicit or implicit, written or verbal, general or special. (31 LPRA

4422, 4424). It must be effected by appearing in public instrument when granted for purposes of administration or litigation (except to attorney at law) or to be used in court or in connection with public instrument, or rights in immovable property. (31 LPRA 3453). Powers of attorney may be general or special, express or tacit. (31 LPRA 4422, 4424). General power of attorney merely covers acts of administration. In order to incur obligations, agree to arbitration, alienate, mortgage or execute other acts of ownership, power to do so must be specifically granted. (31 LPRA 4425). Agency is not perfected until accepted, but acceptance may be express or tacit. (31 LPRA 4422).

Revocation.

Powers of attorney are terminated by (1) revocation by principal, (2) resignation of agent, (3) death, bankruptcy or insolvency of principal or agent. (31 LPRA 4481). In case of resignation, agent must continue acting until principal can take necessary steps to replace agent. (31 LPRA 4486). Acts of agent realized in ignorance of circumstance causing termination of agency are valid. (31 LPRA 4487).

Members of Armed Forces.

No local laws have been approved in connection with granting, continuance and revocation of powers of attorney given by members of Armed Forces.

Uniform Durable Power of Attorney Act not adopted.

Disability of Grantor.

Law not clear as to whether incapacity of grantor terminates agency. If grantor wishes agency to continue until his death, this should be specified in written instrument, preferably public instrument.

21.16 REAL PROPERTY:

(31 LPRA 1041 et seq.).

Term “real property” unknown in Puerto Rico law except as inaccurate translation of Spanish “immueble” (immovable). (31 LPRA 1041-1044). Dominion title (dominio) roughly equivalent to fee simple. Terms “joint tenancy” and “tenancy by entirety” unknown. Co-ownership is provided for in 31 LPRA 1271 et seq., and relationship may be defined by contract; if not so defined, rules set out in 31 LPRA 1271 et seq. govern. No concept analogous to joint tenants with right of survivorship.

Area of Real Property.

If sale of real property is made with statement of its area at certain price per unit of measure, vendor must deliver entire area sold; if area is found to be less than that stipulated vendee may demand proportional reduction in price, and, if difference exceeds 10%, he may rescind contract. (31 LPRA 3818). If greater area is found vendee must pay for excess unless difference exceeds 5% in which case he may choose between paying greater value or withdrawing from contract. (31 LPRA 3819). If sale is made for fixed price, and not at rate of specified sum for unit of measure or number, it is not affected by greater or less area which may be found within boundaries expressed in conveyance. (31 LPRA 3820).

Conditional sales of real property are valid when expressed in public instrument and recorded, but may under certain conditions be construed to be mortgages. (31 LPRA 3915). See subhead Sales Deemed Mortgages, infra.

Delay in Payment.

In sale of real property, though it was stipulated that failure to pay price within certain time will produce rescission of contract, vendee may pay even after expiration of period, unless he has been summoned judicially or by notarial act. (31 LPRA 3875).

Redemption.

When co-owner of thing held in common sells his share to third party, other co-owners have right to redeem within nine days. (31 LPRA 3922, 3924). When rural estate of not exceeding one hectare is sold, owners of adjacent lands have similar right of redemption. Co-owner has priority over adjacent land owners. (31 LPRA 3923, 3924).

Sales Deemed Mortgages.

See category 20 Mortgages, topic 20.02A Mortgages of Immovable Property, subhead Sales Deemed Mortgages.

Rule in Shelley's Case.

Not applicable.

Foreign Conveyance or Encumbrance.

Real property is subject to laws of country where situated. (31 LPRA 10). See topic 21.06 Deeds.

Condominiums permitted and regulated by special statute. (31 LPRA 1291 et seq.).

Timeshare and vacation clubs permitted and regulated by special statute. (31 LPRA 1251 et seq.).

21.17 TRUST DEEDS:

See category 20 Mortgages, topic 20.02A Mortgages of Immovable Property.

22 TAXATION

—Scope —

(Titles 13 and 21).

With certain exceptions, internal revenue laws of U.S. have no territorial application in Puerto Rico, but citizens of U.S. residing in Puerto Rico are personally subject to internal revenue laws of U.S., unless exempted by applicable U.S. statute. Puerto Rico is thus markedly different from State of the Union, and interplay between U.S. and Puerto Rico taxes in fields of income taxes and succession taxes offers complex problems. As used below “PRIRC” refers to Puerto Rico Internal Revenue Code of 1994 and “ 1986 IRC” refers to U.S. Internal Revenue Code of 1986.

22.01 ADMINISTRATION:

Department of Treasury, under Secretary of Treasury (http://www.hacienda.gobierno.pr), has general supervision and administration of Puerto Rico tax laws except property taxes which are administered by Municipal Revenue Collection Center (http://www.crimpr.net) and municipal license taxes and tax on new construction which are administered by Office of Commissioner of Municipal Affairs (http://www.ocam.gobierno.pr).

Collection.

Taxes are collected by Department of Treasury, Municipal Revenue Collection Center and Municipalities, as applicable. See topics for each type of tax.

Payment.

See topics for each type of tax.

State Taxes.

Income tax is equivalent in most ways, including rates, to federal income tax. Gift and estate taxes are also similar to federal. Sales tax is similar to state sales taxes in U.S. Excise tax substitutes for sales tax in some cases and is collected upon manufacture or introduction of certain articles to Puerto Rico. There are no separate county or school taxes. Municipal taxes are limited to property tax, business license tax, municipal sales tax and tax on new construction. There are stamp taxes on notarial documents and construction plans and recording fees for real property transactions.

Assessment of Taxes.

See topic Real and Personal Property Taxes.

Tax Appeals.

After appropriate administrative review, appeal is to Court of First Instance. See topics for each type of tax.

Exemptions.

All Puerto Rico commonwealth and municipal government and federal government property, income and purchases are exempt. For additional exemptions see topic for each type of tax.

Penalties.

Real Property Tax.

(21 LPRA 5086; 5091). Additions to tax: 5% if payment made after 30 but within 60 days from due date or 10% if payment is made after 60 days. 10% interest charged on delinquent taxes. Criminal penalties: (1) fraudulent return or other filing: felony, $3,000 and/or three years maximum; (2) intentional failure to provide sworn statement or return: misdemeanor, $350 and/or three months maximum.

Personal Property Tax.

(21 LPRA 5221). For delay in payment of 30 days or less, no penalty; for delay of more than 30 days but less than 60 days, 5% penalty; for delay of more than 60 days but less than 90 days, 10% penalty; and for delay in excess of 90 days, 15% penalty. For delay in filing personal property tax return, unless such failure is due to reasonable cause, 5% if delay is not more than 30 days, and additional 5% for each additional 30 days, but not to exceed 25% in aggregate. In case of deficiency, 10% of deficiency if any part of it was due to negligence or intentional disregard of rules or regulations, and 100% of deficiency if it was due to fraud. 10% interest charged on delinquent taxes. Criminal penalties: same as in catchline Real Property Tax, supra.

Income Tax.

(13 LPRA 8045 et seq.). Additions to tax: for failure to file return: 5% for first 30-day period, 10% for each 30-day period not to exceed 25%; for failure to file declaration of, or pay, estimated tax by individual: 10% of each due and unpaid installment plus 2% per month not to

exceed 20%; for failure to pay on time: 5% if payment made after 30 but within 60 days from due date or 10% if payment made after 60 days; for failure to pay estimated tax by corporation: addition of 20% of deficiency; for substantial underestimate of estimated tax: 12% per annum. Criminal penalties: willful failure to pay tax, keep records, or supply information or file return or declaration is misdemeanor punishable by imprisonment of not more than 90 days and/or maximum fine of $5,000; preparation or presentation of false or fraudulent return is felony in third degree punishable by imprisonment for term ranging from three years and one day to eight years and/or maximum fine of $20,000. 10% interest charged on delinquent taxes.

Estate and Gift Tax.

(13 LPRA 8045 et seq.; 13 LPRA 8110 et seq.). Additions to tax: willful neglect to file return: 5% for first 30-day period, 10% for each additional 30-day period not to exceed 25%; failure to pay on time: 5% if payment made after 30 but within 60 days from due date or 10% if payment made after 60 days. Criminal penalties: willful failure to file return or pay tax is felony in third degree punishable by imprisonment for term ranging from three years and one day to eight years and/or maximum fine of $20,000; willful preparation or presentation of false or fraudulent return is felony in third degree punishable by imprisonment for term ranging from three years and one day to eight years and/or maximum fine of $20,000. 10% interest charged on delinquent taxes.

Excise Tax.

(13 LPRA 8045 et seq.; 13 LPRA 8080 et seq.). Administrative penalties: failure to pay on time: 5% surcharge if payment made after 30 but before 60 days from due date or 10% if payment made after 60 days. 10% interest charged on delinquent taxes. Criminal penalties: in cases of misdemeanors for which no other penalty has been specifically provided, fine not greater than $5,000 and/or imprisonment for term not to exceed 90 days; in cases of felony in third degree, fine not greater than $20,000 and/or imprisonment for term ranging from three years and one day to eight years; in cases of felony in fourth degree, fine not greater than $10,000 and/or imprisonment for term ranging from six months and one day to three years. Fine not to exceed $20,000 may also be imposed.

Municipal License Tax.

(21 LPRA 651u, 651x and 652t). Additions to tax: willful neglect to file: 5% for each 30-day period not to exceed 25%; failure to pay on time: 5% if payment made after 30 but before 60 days or 10% if made after 60 days. Criminal penalties: preparation or presentation of false or fraudulent return is misdemeanor punishable with imprisonment of up to six months and/or maximum fine of $500 or both. 10% interest charged on delinquent taxes assessed by municipality; 12% interest if taxpayer pays less than tax determined in return.

Municipal Construction Tax.

(21 LPRA 4057). Failure to pay: penalty not to exceed 200%. Criminal penalties: $500 and/or six months.

Sales and Use Tax.

(13 LPRA 8104 et seq.). Following penalties, among others, are applicable: failure to register with Merchant Registry: $10,000; falsification, or possession, of false Merchant Registry Certificate: $10,000 for each Certificate; providing false information: $5,000; posting false Merchant Registry Certificate: $5,000 for each occurrence; transfer of Merchant Registry Certificate: $5,000; failure to update information: $500; failure to deposit sales and use tax: 25% to 50% of deficiency for first occurrence (100% for additional occurrences); failure to post Merchant Registry Certificate in visible place: $1,000; false advertising: $1,000 to $20,000; failure to reflect tax separately in sales receipt: $100 for each occurrence; falsification of Certificate of Exemption or posting false Certificate of Exemption: $10,000 for each Certificate; failure to obtain

valid Certificate of Exemption from exempt buyer: 50% of applicable sales and use tax in addition to tax due; collection of tax in excess: $100 for each occurrence.

Taxpayer Bill of Rights.

(13 LPRA 8014-8016). Following rules apply to administration of taxes under jurisdiction of Department of Treasury: (a) Receive dignified, appropriate and impartial treatment by officials and employees of Department during investigation, processing and disposition of case being prosecuted; (b) claim that confidentiality of information submitted to Department by taxpayer or authorized representative be maintained; (c) require that every interview be at reasonable time and place, in coordination with official or employee of Department; (d) assurance that interview or investigation not be utilized to harass or intimidate interviewed person in any way; (e) at beginning of investigation, receive explanation of procedure and taxpayer's rights; (f) be assisted by attorney, accountant, certified public accountant, or any person authorized to represent registered taxpayers before Department, or authorized by law; (g) be informed prior to interview of intent to record same and to be provided with exact copy of recording, subject to payment of cost; (h) be notified of nature of taxpayer's tax responsibility; (i) be advised of right not to self-incriminate through own testimony, to remain silent and not to have silence taken into account nor have it taken against taxpayer if exposed to criminal action; (j) consult at any time during interview with attorney, public accountant or agent authorized to represent taxpayer before Department, or to end interview even if it has commenced; (k) be notified in writing of adjustments made by Department as result of tax investigation if adding interest, penalties and surcharges, and exact amount of adjustment and grounds for changes; (l) waive rights described above if waiver is voluntarily and knowingly; (m) grant written power of attorney authorizing any person to represent taxpayer during interview or tax proceeding, which person shall receive treatment equal to that of taxpayer for purposes of interview; (n) not to be discriminated against by reason of race, color, sex, birth, origin or social condition, nor for political or religious ideas or association with any taxpayer or person that represents taxpayer, and not to have records maintained containing tax information for these purposes.

Interstate Cooperation.

No specific procedure available for compromise of death taxes where decedent's domicile is disputed. However, general settlement agreement and compromise provisions are applicable to estate taxes. (13 LPRA 8126-8127). No provision covering “citizens” as defined in § 2208 of 1986 IRC. See topic 22.07 Estate Tax.

22.02 ALCOHOL, BEVERAGES AND TOBACCO TAXES:

Alcoholic Beverage Tax.

(13 LPRA 9501, 9521 et seq.). Tax imposed on certain alcoholic beverages stored or that have been or may subsequently be distilled, rectified, produced, manufactured, imported or introduced into Puerto Rico.

Tobacco Tax.

(13 LPRA 9008). Cigarettes: $11.15 for each hundred or fraction thereof. (2009, Act 7). Other products, topic 22.17 Sales and Use Taxes.

22.03 BUSINESS TAXES:

Franchise Tax.

None.

Construction Tax.

See topic 22.13 Local and Municipal Taxes, subhead Construction Tax.

Municipal License Tax.

See topic 22.13 Local and Municipal Taxes, subhead Municipal License Tax.

22.04 [RESERVED]

22.05 EMPLOYMENT TAXES:

Unemployment Compensation Tax.

(29 LPRA 701 et seq.). Each employer must pay tax on first $7,000 of annual wages paid, based on experience rating system, plus special tax of 1% of taxable wages. Special tax, together with experience-based tax, may not exceed 5.4%. Tax not deductible from employee wages.

Local Employment Tax.

None.

Exemptions and Credits.

None.

22.06 ENVIRONMENTAL TAXES:

Exemptions.

None.

Hazardous Waste Tax.

None.

Mines, Minerals and Fisheries Taxes.

None.

Severance Taxes.

None.

Recycling Tax.

Oil.

(12 LPRA 1335 et seq.). Each quart of oil subject to $1.00 deposit payable by importer, manufacturer or refiner before distribution or retail of product. (12 LPRA 1335f). This charge is passed on to distributor and/or ultimate user. Subject to certain requirements, deposit is reimbursed if used oil recycled. Also, importer, manufacturer and refiner selling oil wholesale subject to 25¢ per quart or 60¢ per gallon charge, not refundable to be passed on to buyer. Buyer who resells in smaller containers must pay difference in tax rate to Department of Treasury. (12 LPRA 1335i).

Tires.

(12 LPRA 1331d, 1331e). Imported and locally manufactured vehicle tires, including used tires, subject to tax ranging from $1.65 to $25 per tire, depending on size.

22.07 ESTATE TAX:

(13 LPRA 9101 et seq.). Subtitle C of PRIRC patterned broadly on 1986 IRC. PRIRC meets anomaly created by §§ 2208 and 2209 of 1986 IRC dividing U.S. citizens residing in Puerto Rico into "citizens" (those who did not acquire U.S. citizenship solely by reason of being citizen of Puerto Rico or birth in Puerto Rico) and "nonresident noncitizens" (those who acquired U.S. citizenship solely by reason of being citizen of Puerto Rico or birth in Puerto Rico) for U.S. estate tax purposes by imposing tax on part of gross estate located in Puerto Rico of said "citizens" equal to maximum credit available under § 2014(b)(2) of 1986 IRC.

Rates.

PRIRC imposes unified tax upon transfers by gift or inheritance. In cases of U.S. "citizens" resident in Puerto Rico, whose gross estate is taxable under 1986 IRC, tax imposed on part of gross estate located in Puerto Rico shall be equal to credit granted under § 2014(b)(2) of 1986 IRC. For other cases, including "nonresident noncitizens" for U.S. estate tax purposes, see topic 22.09 Gift Tax, subhead Rates.

Returns.

(13 LPRA 9251). Executor must file return within 270 days of decedent's death. If complete information regarding any portion of gross estate was not available to executor, persons having beneficial interest in such property shall file corresponding final return within 30 days of notice from Secretary.

Time of Payment.

(13 LPRA 9258). Payment of tax is required within 270 day term to file return.

Liability.

(13 LPRA 9103, 9251). Liability for tax is on executor, but upon release of executor from duties by Secretary, on heirs, recipients or beneficiaries.

Lien.

(13 LPRA 9331 et seq.). All property of estate subject to preferential lien in favor of Commonwealth. Unless authorized by Secretary, courts may not approve any disbursement or distribution unless tax attributable to funds or property distributed is deducted and deposited in court; notaries may not authorize any document resulting in disbursement or distribution of estate property (except with respect to documents signed prior to decedent's death); and registrars shall not record any notarial document, judgment or judicial order pertaining to any such disbursement or distribution. Bank withdrawals limited to greater of $15,000 or 25% of amount on deposit. Payment of insurance policy proceeds limited to greater of $5,000 or 40% of total proceeds. Any payments made by bank or insurer must be reported to Secretary. In addition, banks and other depositories must maintain detailed records of safe deposit box contracts, including each event of access to box and after death of lessee access permitted only in presence of Treasury representative. Lien is cancelled by payment of estate tax. Partial cancellation permitted with consent of Secretary.

Exemptions, Deductions and Credits.

(13 LPRA 9152 et seq.).

Fixed Exemption.

(13 LPRA 9158). $400,000 fixed exemption from estate taxes, reduced by deduction allowed for property located in Puerto Rico.

Additional Deductions.

(13 LPRA 9152 et seq.). In computing taxable estate, deductions are available for: value of property located in Puerto Rico at time of death as defined in PRIRC; decedent's personal debts; all kinds of taxes collectible by Commonwealth of Puerto Rico; total amount of debts secured by mortgages or debts with respect to property, up to value of property; funeral expenses up to $4,000; casualty losses not compensated by insurance; fees paid to lawyers, accountants, appraisers, surveyors, partitioners and executors up to higher of 1½% of gross estate or $20,000; property passing to surviving spouse, subject to Civil Code limitations; 50% of value of eligible investments in qualified enterprise as defined by PRIRC; whole amount of various legacies or bequests made for charitable or religious purposes; subject to certain limitations, 100% of value of property used for agricultural, poultry and animal husbandry enterprises.

Credits.

(13 LPRA 9172 et seq.). Credits are available for: taxes paid in prior years or transfers of property made by decedent or to decedent; estate or inheritance taxes paid to U.S., states, possessions of U.S., or to foreign countries in connection with property located therein, which was included in decedent's gross estate.

Apportionment Against Inter Vivos Dispositions.

No special statute. See topic 22.09 Gift Tax.

Interstate Cooperation.

No provision.

22.07A EXCISE TAXES:

(13 LPRA 9001 et seq.). Imported plastic products, cigarettes, cement, petroleum products and motor vehicles subject to excise taxes. All manufacturers are required to obtain identification number and place bond in favor of Secretary of Treasury. All dealers, importers and manufacturers must submit sworn import declaration. Bonded taxpayers must pay tax and request refund on imported articles that subsequently become entitled to exemption.

Rates.

Plastic Products: 6.6% of taxable price in Puerto Rico on imported plastic products that do not meet certain requirements.

Cement: Dealers and local manufacturers taxed at 6¢ for each hundred weight or fraction thereof.

Cigarettes: See topic 22.02 Alcoholic Beverages and Tobacco Taxes, Subhead Tobacco Taxes.

Sugar: 14¢ for each pound or fraction thereof.

Fuels: See topic 22.08 Gasoline and Special Fuels Taxes.

Vehicles used for transportation of students and tourists can be fully exempt from excise taxes. Tax on new and used automobiles, multipurpose vehicles, motorcycles, scooters and all terrain vehicles (2009, Act 7) based on their suggested retail sales price is:

Taxable Price Tax Up to $6,170 - $750; $6,170 to $10,690 - $750 plus 12% of excess over $6,170; $10,690 to $21,380 - $1,292 plus 23% of excess over $10,690; $21,380 to $31,780 - $3,571 plus 27% of excess over $21,380; $31,780 to $44,890 - $6,559 plus 32% of excess over $31,780; over $44,890 - $10,886 plus 40% of excess over $44,890

Refund procedure with respect to taxable articles sold to exempt persons must be submitted to Department of Treasury within 180 days after payment of tax. (13 LPRA 8036). In other cases, statute of limitation is four years from date of payment. If refund denied, taxpayer may seek judicial review in Court of First Instance within 30 days of date of denial by Department of Treasury. (13 LPRA 8040). Taxpayer may contest excise taxes without having first to pay tax at issue.

22.08 GASOLINE AND SPECIAL FUELS TAXES:

(13 LPRA 9009, 9010). Fuels: Excise tax on each gallon or fraction of gasoline (16¢), aviation fuel (3¢) and gas oil or diesel oil (8¢). Crude oil, unfinished oils and end products derived from oil and any other hydrocarbon mixture shall pay excise tax on each Barrel, from $3 to $6 pending on index price per Barrel.

22.09 GIFT TAX:

(13 LPRA 9201 et seq.). Imposed on all gifts of property wherever situated if donor is resident of Puerto Rico; if nonresident, on all gifts of property situated in Puerto Rico. Property situated in Puerto Rico means all property in fact situated in Puerto Rico, all shares issued by Puerto Rico corporations and partnerships and by foreign corporations or partnerships when at least 80% of their gross income for three years ending with close of taxable year preceding gift was derived from Puerto Rico sources and any intangible physically situated in Puerto Rico. Bonds, promissory notes or other obligations of Commonwealth, its municipalities, or its public authorities or corporations, irrespective of physical location of such instruments, are deemed situated in Puerto Rico.

Rates.

(13 LPRA 9103; 13 LPRA 9201). Unified tax imposed upon transfers by gift or inheritance is graduated from 18% on transfers up to $10,000 to 50% on transfers in excess of $2,500,000.

Returns.

(13 LPRA 9252 to 9254). Returns are required to be filed annually with Secretary of Treasury on or before Apr. 15 of each year for gifts made during prior calendar year in excess of $10,000 exclusion, except in case of gifts of real properties which require filing of return regardless of gift amount. Information returns are required on same date from each donor in case of gifts in excess of $10,000 exclusion. Each notary must, within 30 days, notify Secretary of any instrument of gift executed before him. All domestic corporations and all foreign corporations doing business in Puerto Rico (except those whose shares are registered or sold on recognized exchanges) must, within 30 days following transfer, inform Secretary of transfer of shares between persons within second degree of consanguinity or affinity. Partnerships are required to report any changes in partnership shares. Insurance companies are required annually on or before Apr. 15 to report endorsements of life, endowment, or annuity policies of $1,000 or more, by which change of ownership of such policies is effected, and likewise to report policies terminated by death of assured. Similar requirements are imposed upon all mutual funds or investment funds.

Payment.

(13 LPRA 9258). Payment of tax is required to be made with return, on each Apr. 15.

Liability.

(13 LPRA 9202). Liability for tax is on donor, but if donor does not pay, then on donee.

Lien.

(13 LPRA 9331 et seq.). Lien of tax arises at date of transfer and affects all property object of gift. Lien preferred over all debts, credits or obligations of any kind arising after transfer, but negotiable instruments, if acquired by bona fide purchaser for value, are liberated and lien then falls on property of transferor. Additionally, if tax not paid on notice and demand from Secretary, tax constitutes lien on all property, real or personal, of delinquent taxpayer.

Exemptions.

Annual Exemption.

(13 LPRA 9203). Annual exemption of $10,000 per donee.

Property Located in Puerto Rico.

(13 LPRA 9207). In case of native-born Puerto Rico resident, deduction is allowed for value of real and personal property which at date of gift is located in Puerto Rico.

Additional Exemptions.

Additional exemptions are allowed of $1,000 annually for gifts to each incapacitated child (13 LPRA 9218) and without limit for gifts for educational or medical purposes (13 LPRA 9219).

Charitable or Religious Purposes.

(13 LPRA 9220). Gifts for public, charitable or religious purposes are excluded in computing annual donation, both for residents and nonresidents.

22.10 HOTEL AND RESTAURANT TAXES:

Rates.

(13 LPRA 2271, 2271o). Room occupancy tax of 9% imposed on occupancy rental of rooms in hotels (11% tax for hotels authorized to operate gaming rooms). Different rates may apply to other types of lodging.

22.11 INCOME TAX:

(13 LPRA 8401 et seq.). Subtitle A of PRIRC is adapted from U.S. Internal Revenue Code of 1939, as amended up to 1952, and incorporates many significant changes adopted by U.S. thereafter.

Liability.

(13 LPRA 8411 et seq.; 13 LPRA 8615 et seq.). All persons, natural or juridical, are liable on all income from Puerto Rico sources, unless expressly exempted. Resident individuals (those domiciled in Puerto Rico; it is presumed that individual is resident if physically present and living in Puerto Rico for at least 183 days during year) are liable for tax on all income from whatever source derived. Nonresidents liable only on Puerto Rico source and effectively connected income. Puerto Rico corporation liable on all income from whatever source. Resident foreign corporations (i.e., not organized in Puerto Rico but engaged in trade or business in Puerto Rico) are liable for all of their income that is effectively connected with conduct of trade or business in Puerto Rico (herein “ECI”). ECI rules apply to resident foreign corporations and all Puerto Rico source income is treated as ECI. As general rule, all non-Puerto Rico source income is not ECI. Exception to this general rule if corporation has office or fixed place of business in Puerto Rico

(i.e., branch office), and income attributable to Puerto Rico office consists of: royalties on intangibles derived from Puerto Rico business, dividends, interest or gain or loss from sale of securities in banking or financing businesses or income received by corporation trading securities for its own account, and income received from sale of goods outside Puerto Rico through Puerto Rico office (but if goods are sold for use or consumption or disposition outside Puerto Rico, exception does not apply and income will not be ECI). Nonresident foreign corporations (i.e., not organized in Puerto Rico and not engaged in trade or business in Puerto Rico) are liable only on Puerto Rico source income at flat rates applicable to various classes of income (i.e., interest, dividends, rents, etc.). ECI provisions are not applicable to nonresident foreign corporations, except for special elective provision applicable to income from real property located in Puerto Rico.

Rates.

Individuals (Trusts and Estates).

(13 LPRA 8411 et seq.). Tax brackets for taxable year 2008 start with minimum 7% rate on taxable income not over $17,000 with maximum rate of 33% on taxable income in excess of $50,000. 5% add-on tax is imposed on taxable income exceeding $75,000 or $37,500 if married taxpayer computes tax separately. This tax is limited to amount that will result in flat tax, at maximum rate in effect, on taxpayer's entire taxable income increased by his personal and dependent exemptions. Individual tax liability will be higher of regular tax or alternative base tax (“ABT”). ABT only applies to individuals whose adjusted gross income (“AGI”) (determined with certain adjustments such as deducting taxpayer's share in loss of special partnership and deductible expenses related to services rendered as employee, and adding back certain excluded income [2009, Act 7]) exceeds $75,000. ABT rates are 10% on income starting with $75,000 but not over $125,000; 15% on income starting with $125,000 but not over $175,000; and 20% on excess of $125,000 if income is greater than $175,000. (2009, Act 37). From 2009 through 2011, deduction of expenses for services rendered outside of Puerto Rico is not available unless services provider's income is subject to taxation under the Code. (2009, Act 37). Levels of AGI are reduced by 50% if married taxpayer computes tax separately. Married individuals living together and both working may opt to determine tax liability on separate spouse basis or as single taxpayers. Net long-term capital gains subject to 10% special tax rate. However, individual may elect to include such gain as gross income for purposes of computing regular tax, if such election would result in lower tax. Certain amounts received as compensation for mental anguish or emotional damages are subject to income tax. From 2009 through 2011, surtax of 5% of taxpayer's liability under Code, imposed to estates, trusts and individuals with adjusted gross income in excess of $100,000 ($150,000 individuals married filing jointly). (2009, Act 7).

Alternative Special Tax.

(13 LPRA 8413). Alternative 10% special tax on dividend distributions and profit distributions of domestic corporations and partnerships and foreign corporations and partnerships (that are not of cooperative type) whose gross income from sources within Puerto Rico or connected or treated as effectively connected with conduct of trade or business in Puerto Rico is at least 80% of gross income of such foreign corporation or partnership for prior three taxable year period; alternative tax of 10% on total amount of nonexempt interest paid or credited on deposits in accounts that bear interest (or that are registered with brokerage house as nominee) in cooperatives, savings and loans association or any other organization of banking nature located in Puerto Rico or to that part of any amount paid or distributed from individual retirement amount. Individual may opt to include said interest as part of his gross income and subject to normal tax rates if more beneficial. In order to qualify, taxpayer must authorize financial institutions to withhold tax on or before Apr. 15 of each taxable year or date account that bears interest is opened. Alternative tax of 10% on total amount of non-exempt eligible interest paid or credited on bonds, notes or other obligations issued by domestic corporation or partnership, or by foreign corporation or partnership when no less than 80% of its gross income for prior three

taxable year period, is effectively connected with conduct of trade or business in Puerto Rico. Alternative tax of 10% also applies on total amount of non-exempt eligible interest paid or credited upon certain mortgages on Puerto Rico residential property. In order to qualify, taxpayer must authorize payor to withhold tax.

Nonresident U.S. Citizens.

(13 LPRA 8605 et seq.). U.S. citizens not residents of Puerto Rico are taxable at same rates as residents of Puerto Rico, but only on their Puerto Rico source income. Certain items of Puerto Rico source income are subject to 20% withholding tax, provided that rate is 10% for sales or exchanges of shares of stock and real estate. Also see topic 22.18A Tax Incentives and Exemptions, subhead International Banking Center Act.

Nonresident Alien Individuals.

(13 LPRA 8605 et seq.). Nonresident aliens not engaged in business are taxable at flat 29% tax on Puerto Rico source fixed or determinable annual or periodic income and on net Puerto Rico source capital gains. Exempt is interest on Puerto Rico bank deposits, real property mortgages constituted before July 1, 1995, and interest received from unrelated persons. May elect to treat real property income and capital gains as ECI and pay lesser rates applicable to residents. Eligible for 10% tax rate on dividends from certain corporations. Withholding at source at 29% applies to all payors of such income, except that in case of sales of real estate or shares of stock by nonresident alien, buyer withholds.25% of sales price (net of original cost). Nonresident aliens engaged in business are taxable at same rates and in same manner as Puerto Rico resident individuals on all ECI, which can include non-Puerto Rico source income attributable to Puerto Rico office. Deductions are allowed only to extent they are connected with ECI, except that certain charitable contributions or gifts or losses whether or not connected with conduct of trade or business in Puerto Rico are always deductible. No personal exemptions or credits for dependents allowed against net income. Credits for taxes paid to U.S., foreign countries, and possessions of U.S. with respect to ECI from source without Puerto Rico are allowed.

Corporations and Partnerships.

(13 LPRA 8415 et seq.). Unlike rule under U.S. law, partnerships, as general rule, are taxable as corporations, and partners are not taxable on undistributed partnership profits. Tax treatment of special partnerships follows U.S. rules. See catchline Special Partnerships, infra. Corporations are subject to normal tax of 20% of net income and to surtax on surtax net income. In case of foreign corporations engaged in trade or business in Puerto Rico net income subject to normal tax means net ECI (13 LPRA 8615[b]). Surtax net income equals normal tax net income less $25,000. Only one $25,000 surtax exemption is allowed to any controlled group of corporations. Rates are graduated from minimum rate of 20% to maximum rate of 39%. Additional tax of 5% imposed on net income in excess of $500,000 until benefit of graduated rates is recaptured. All corporations or partnerships other than foreign corporations and partnerships not engaged in trade or business within Puerto Rico; special partnerships; corporations or partnerships operating under Puerto Rico Tax Incentives Act, or any prior or subsequent analogous act; and registered investment companies and real estate investment trusts declared exempt are subject to Alternative Minimum Tax (“AMT”). Corporate income tax liability is greater of AMT or regular tax liability. Any excess of AMT over regular tax liability for given year may be credited against regular tax of any subsequent year for which regular tax exceeds AMT. AMT is 22% of Alternative Minimum Taxable Income (“AMTI”), reduced by exemption amount of up to $50,000. Various adjustments, which generally have effect of accelerating recognition of income, must be made to taxable income in order to arrive at AMTI. Before applying 22% AMT rate, AMTI is reduced by $50,000 exemption amount, which is, however, reduced by 25% of amount by which AMTI exceeds $500,000, so that no exemption amount is available if AMTI totals $700,000 or more. Net long-term capital gains subject to 15% tax rate. Alternative tax of 10% on total amount of non-exempt eligible interest paid or credited on

bonds, notes or other obligations issued by domestic corporation or partnership, or by foreign corporation or partnership when no less than 80% of its gross income for prior three taxable year period is effectively connected with conduct of trade or business in Puerto Rico. Alternative tax of 10% also applies on total amount of non-exempt eligible interest paid or credited upon certain mortgages on residential property located in Puerto Rico. In order to qualify, taxpayer must authorize payor to withhold tax. From 2009 through 2011, surtax of 5% of taxpayer's liability under Code, imposed to corporations, partnerships, with adjusted gross income in excess of $100,000. It will also be imposed to: cooperatives, credit unions, affiliates and subsidiaries, their operations, assets, capital, and reserves whose income is greater than $250,000; insurance cooperatives organized under Puerto Rico Insurance Code, Cooperative Bank of Puerto Rico, affiliates and subsidiaries, when income is greater than $250,000, international insurance companies, international holding companies, and international banking entities. In case of excess net income earned by taxable international banking entity, 5% will only apply to portion of income not otherwise subject to taxation under Code. (2009, Act 7). Domestic corporations and partnerships with volume of business in excess of $3,000,000 must submit financial statements certified by C.P.A. licensed in Puerto Rico with income tax return. For foreign corporations and partnerships, threshold is volume of business in excess of $1,000,000. (2008, Act 147).

Foreign corporations and partnerships (i. e., not organized under Puerto Rico law). (13 LPRA 8615-8622).

Engaged in trade or business in Puerto Rico are taxable on their net income that is ECI. Taxed at same rates and in same manner as domestic corporations. Deductions are allowed up to extent that they are connected with income that is ECI. Additional branch profit tax equal to 10% of amount equivalent to dividend or profit distribution for taxable year is imposed on all foreign corporations engaged in trade or business within Puerto Rico. Dividend or profit distribution equivalent amount means effectively connected earnings and profits attributable to income that is effectively connected with its Puerto Rico business, increased or decreased by year's net reduction or increase in its cash and net assets effectively connected with that business. Branch profits tax does not apply to foreign corporations if 80% of gross income for three-year period ending with taxable year is derived from Puerto Rico sources or is effectively connected with Puerto Rico trade or business. In addition, industrial development income and tourism development income (see topic 22.18A Tax Incentives and Exemptions, subhead Tourism Development Incentives) is not subject to branch profits tax, so that this provision will not apply to grantees of tax exemption nor to dividends received by foreign corporations from exempt corporations.

Not engaged in trade or business in Puerto Rico (13 LPRA 8615) are generally taxed on fixed or determinable gross income at 29% to extent amounts so received are considered to be from sources within Puerto Rico. Exceptions are dividends and partnership profit distributions which are taxed at 10% rate. Certain royalties for use of industrial intangibles are also taxed at 2% or 12% rate. (See topic 22.18A Tax Incentives and Exemptions, subhead Tax Incentives Act.) 29% tax is imposed on amount of gains derived from sources within Puerto Rico from sales or exchanges of capital assets which exceed losses allocable to sources within Puerto Rico from such sales or exchanges. Interest on Puerto Rico bank deposits, real property mortgages constituted before July 1, 1995, and interest received from unrelated persons is exempt. May elect to treat rental income from real property in Puerto Rico and gains from sale of real property held for production of income as ECI. After election, net rental income taxed at regular corporate income tax rates and net capital gains at 25%. Foreign tax credits against Puerto Rico tax are allowed for foreign taxes paid on non-Puerto Rico source ECI. Deductions and credits attributable to Puerto Rico income allowed only upon filing Puerto Rico income tax return reflecting income received from all sources. Credit allowed for taxes withheld at source. (13 LPRA 8432, 8550).

Special Partnerships.

(13 LPRA 8630 et seq.). Special partnerships are taxed following pattern similar to U.S.

partnership tax and, contrary to other partnerships, its partners enjoy limited liability. Partners taxed on distributive shares in net income of partnership. Businesses eligible for special partnership status must derive at least 70% of gross income from Puerto Rico sources, except when engaged in production of feature films. In addition, special partnerships must derive at least 70% of their income from one of following activities: tourism, agriculture, construction, land development, rehabilitation of buildings and structures, sale or rental of buildings or structures, film production, manufacturing which generates substantial employment and exporting of goods or services to foreign countries. Special partnership can also enjoy tourism tax incentives. Corporations are also eligible for special partnership treatment. See topic 22.18A Tax Incentives and Exemptions, subhead Tourism Development Incentives.

Subchapter N Corporations.

(13 LPRA 8680 et seq.). PRIRC has provisions similar to those applicable to S Corporations under 1986 IRC. Generally, Subchapter N corporations are treated as pass-through entities; shareholders taxed on distributive share in net income of corporation. Eligibility requirements for Subchapter N status similar to those applicable to S Corporations under 1986 IRC, except that corporation must be organized in Puerto Rico or, if organized in any state of U.S. or in District of Columbia, must be engaged exclusively in trade or business in Puerto Rico. Generally, partnerships are eligible for Subchapter N status. Certain corporations, including tax exempt corporations and capital investment funds, are ineligible for Subchapter N status. Special rules apply to existing corporations that elect Subchapter N status.

Exemptions.

Individuals.

(13 LPRA 8425). Individual residents and all U.S. citizens are entitled to personal exemptions of $3,000 if married and computing tax jointly; $3,000 head of household; $1,300 single or married not living with spouse; $1,500 married and living with spouse, but computing tax separately or filing separate return. Exemptions for dependents are $2,500 for children, handicapped, blind, over 65, and students in universities and other technical and professional education institutions (one-half if married taxpayer computes tax separately).

Corporations.

(13 LPRA 8501). Following organizations are, generally, exempt from taxation: labor, agricultural, or horticultural organizations; cemeteries; religious or charitable corporations; nonprofit business leagues; nonprofit civil leagues or organizations; nonprofit clubs; cooperative associations; savings and credit unions; certain holding companies; employees' voluntary and beneficent associations; entities exempted from taxation under Tax Incentives Acts (see topic 22.18A Tax Incentives and Exemptions); limited dividend corporations providing homes for rent to low or moderate income families; insurance cooperatives; real estate investment trusts; and certain other entities.

Qualified Deferred Compensation Plans.

(13 LPRA 8565). Puerto Rico requirements are similar but not identical to provisions of 1986 IRC. Major differences: contributions to cash or deferred arrangement limited to $8,000 ($9,000 in 2009 and 2010; $10,000 in 2011 and 2012; and $12,000 in 2013); catch-up contributions limited to $1,000; 20% special tax to be withheld by payor on lump-sum distributions on account of separation from service; (10% for distributions from trusts organized in Puerto Rico or U.S. having Puerto Rico resident as trustee/payment agent, if in compliance with certain investment requirement); $11,000/$15,000 annual exclusion from gross income on annuities or periodic distributions; no top-heavy provisions; no compensation limits; no 20% withholding on annuities or periodic distributions; no 1986 IRC 401(m) limitations. Puerto Rico plans are subject to provisions of Title I of Employee Retirement Income Security Act of 1974 (“ERISA”) and related

trusts are generally exempt from U.S. tax under 1986 IRC § 501(a). (ERISA-1022[i]).

Cafeteria Plans.

(13 LPRA 8422[l]). Puerto Rico requirements similar but not identical to provisions of 1986 IRC. Major differences: Cafeteria plans in Puerto Rico provide fewer qualified benefits, no pre-tax contributions, and must be submitted for qualification with Commonwealth Department of Treasury.

Deductions.

(13 LPRA 8423). Individual may choose between standard deduction or itemizing deductions, whichever is higher. Standard deduction is allowed in amount of $3,150 for taxpayer married, living with spouse and computing tax jointly; $1,575 for taxpayer married, living with spouse and computing tax separately or filing separate return; $2,730 for taxpayer head of household; and $2,100 for taxpayer single or married not living with spouse. Individual taxpayer, in lieu of standard deduction, may deduct following itemized deductions: child care expenses up to $1,500 for one dependent or 3,000 for two or more; if married living with spouse and filing separate return, amounts $750 and $1,500, respectively; expenses incurred in care of senior citizens up to $600 for one senior and $1,200 for two or more (13 LPRA 8423[aa][2][S]); interest paid or accrued on mortgages covering taxpayer's principal residence as well as second home; property tax on property used as residence by its owner; motor vehicle license on automobile or automobiles used by taxpayer for personal use; loss of principal residence by fire, hurricane and other unforeseen causes not compensated by insurance (50% of loss per taxpayer, if married filing separate return); 10% of rent paid by lessee on property used as his residence up to $500 ($250 if married filing separate return); loss up to maximum of $5,000 in certain personal property as result of specifically delineated casualties ($2,500 if married filing separate return); 30% of expenses incurred in purchase and installation of solar equipment to be used in principal residence not to exceed $1,500; 50% of expenses incurred in acquisition and installation of windmills for production of electric energy up to maximum of $3,000; expenses incurred in acquisition of any orthopedic equipment for use by handicapped person up to $1,000; expenses incurred for education of dependents: (i) At elementary level $750 and (ii) at secondary level $1,000, per dependent, up to $1,500 for one dependent and $3,000 for two or more dependents; contributions and interest paid to housing cooperative associations; 33% of charitable and other contributions; special unlimited deductions for certain charitable and other contributions; interest paid on college level student loans; certain medical expenses; up to $500 of cost of personal computer for use of taxpayer's dependents. Married taxpayer living with spouse but computing tax separately may claim 50% of applicable itemized deductions. Following deductions are allowed in addition to either standard or itemized deduction: contributions to qualified pension or retirement plans; contributions to Individual Retirement Accounts (IRA's) up to $5,000 or up to maximum of $10,000 if married, filing joint return; contributions to Educational Contribution Accounts up to $500 per beneficiary; contributions to Educational Foundation established under 18 LPRA 913 in excess of $250 for individuals and $500 for corporations (13 LPRA 8440A); ordinary and necessary expenses incurred in connection with exercise of profession or as employee; veterans deduction of $500; interest expense on auto loans; special $3,000 deduction when both spouses receive earned income and compute tax jointly. Other interest deductible as business expense or incurred in transaction entered into for profit, is deductible but subject to separate basket limitation, that is, individuals are restricted on extent to which expenses incurred in certain activities may be used to offset income from other activities. Deduction of ordinary and necessary business expenses by employees are restricted. Reimbursed business expenses by employer are fully deductible by employee but only if such amounts are included in information return submitted by employer. Unreimbursed business expenses related to exercise of trade or profession as employee are deductible only up to lesser of $1,500 or 4% of AGI from wages. If married and filing separate returns, maximum deduction is $750 or 4% of AGI from wages. Interest deduction for car loan is limited to $1,200 maximum ($600 if married and computes tax separately). Interest deduction for student loans allowed. No deduction is allowed for other

consumer interest paid. Depreciation of automobile used in trade or business limited to adjusted basis up to $25,000 divided by five years. Leased automobile equivalent to sale subject to same limitation as if purchased. For operating leases, depreciation is equal to total rent paid, limited to maximum depreciation ($5,000) otherwise allowable if automobile purchased. Special deduction of 100% of contributions to Ponce Museum of Art during taxable years 2008 and 2009, not to exceed 15% of taxpayers AGI.

Credits.

Contributions to Educational Foundation established under 18 LPRA 913 up to $250 for individuals and $500 for corporations (13 LPRA 8440A); individual taxpayers with adjusted gross income of $10,000 or less receive tax credit for total income tax liability. (13 LPRA 8440B). Single taxpayers, head of household, or married, living with spouse and computing tax jointly, with earned income up to $20,000, will receive, subject to certain restrictions, tax credit from up to $300. (13 LPRA 8440G). Tax credit is available for businesses that acquire products manufactured in Puerto Rico for exportation or sale for local consumption. (13 LPRA 8440D, 8440E). See also topic 22.18A Tax Incentives and Exemptions. Tax credit, subject to certain limitations, is provided for donations (during five year period) to Santa Catalina Palace Patronage. (13 LPRA 8440H). Tax credit, subject to certain limitations, is available for establishment of eligible conservation easements or donation of eligible land, equal to 50% of value of easement or land. (12 LPRA 785 et seq.). Tax credit available for acquisition, production and installation of solar electric systems; up to $5 million per year for eligible individuals, $15 million per year for eligible entities. From 2009 through 2011, tax credits for purchases of articles manufactured in Puerto Rico for local sale and consumption, solid waste, venture capital, urban centers revitalization, theatre district, conservation easements, social interest housing and housing infrastructure are unavailable due to moratorium. Any unused credit as of Jan. 1, 2009 may be not claimed until taxable year 2012. Credits acquired before Mar. 4, 2009 are not subject to moratorium. Credits on hand as of June 30, 2009 must be reported on informative return to Registry of Tax Credits, in order to be claimed without approval of Secretary. (2009, Act 7). Other credits not subject to moratorium such as purchase of articles manufactured in Puerto Rico for export, for incremental purchases of agricultural products, for purchase of automobiles propelled by alternative or mixed power, program for purchase of newly constructed housing, program for purchase of existing housing, tourism development, film industry and industrial tax, must be included and filed in Registry. For urban centers revitalization credits, municipalities may evaluate and issue certificates of compliance for projects with certificates of eligibility. In all cases, grants of credits must be limited to $40 million in each moratorium year, provided no credit exceeding $15 million is granted to any single project. (2009, Act 37).

Health Savings Accounts.

Puerto Rico requirements similar but not identical to provisions of 1986 IRC. Major differences: limitation on pre-tax and catch-up contributions.

Withholding Tax.

(13 LPRA 8547). Withholding taxes basically follow U.S. pattern, including withholding on wages and salaries, on fixed or determinable annual or periodical gains, profits, or income of nonresident individuals, and corporations. Withholding rates on wages and salaries are designed to approximate actual taxes that employee will pay. Unlike U.S., withholding also required on distributable net income of pass-through entities, and on certain payments for services rendered or for indemnification pursuant to judicial/extrajudicial claims. Certain reductions and exemptions from such withholding may apply. General trend to cover all payments to nonresidents, whether individuals or corporations, and liability and rates should be currently checked. Shareholders of foreign corporation are taxed by presuming that retained earnings of corporation are paid as dividends when corporation files its certificate of withdrawal from business in Puerto Rico. Buyers of land or shares of stock from foreign persons not engaged in trade or business in Puerto Rico must withhold.25% of sales price (net of original cost), which is subject to readjustment when and

if vendor files return and establishes right to lower tax.

22.12 INHERITANCE TAX:

See topic 22.07 Estate Tax.

22.13 LOCAL AND MUNICIPAL TAXES:

(21 LPRA 651 et seq.; 4052, 4057).

Real and Personal Property Tax.

(21 LPRA 5001 et seq.).

Taxable Situs.

(21 LPRA 5001). All property (real, personal and intangible) located within territorial limits of municipality and not expressly exempted is subject to annual ad valorem tax imposed by municipality where located.

Exemptions.

(21 LPRA 5061 and 21 LPRA 5151 et seq.). Exempted are credits in checking accounts, savings accounts, time deposits, promissory notes, or other personal credits. Other exemptions cover property of individual not used in trade or business; first $50,000 of assessed value of taxable personal property of small businesses selling taxable articles at retail when sales for immediately preceding fiscal year (July 1-June 30) do not exceed $150,000; property of U.S. and property exempt from taxation by laws of U.S.; property of Commonwealth of Puerto Rico or of any municipal district thereof; property of Conservation Trust of Puerto Rico; indebtedness owed by any taxable person, association or corporation; shares of capital stock in and obligations of corporations organized under laws of Puerto Rico or in foreign corporations if held by individuals or by corporations, partnerships, registered investment companies or insurance companies organized in Puerto Rico; personal property brought into Puerto Rico for processing or assembling and reexporting from Puerto Rico; intangible property in nature of goodwill, licenses, trademarks, concessions, franchises, contract rights, interests in time shares/vacation clubs, inventions, formulas, processes, know-how, client lists and similar property; machinery and equipment used for conversion of coal into energy; machinery and equipment or other personal property used in control, reduction or prevention of environmental pollution; churches, parish houses, lodges, buildings for charitable, educational, scientific, literary, recreational, social institutions and associations not for pecuniary purposes, together with limited extension of land; cemeteries, tombs and rites of burial; fish in possession of fishermen by whom caught and ships constituting working tools of fisherman and fishing boats exclusively devoted to fishing as part of industrial unit, or of entity devoted to fishing and to exclusive transportation of fish for industrial processing in Puerto Rico; growing crops and products of land owned by and still in hands of producer; bovine cattle and silos used in cattle ranches; foundries and equipment and structure specifically constructed therefor; professional tools and working tools of mechanics or artisans moved or worked exclusively by hand; household furniture, wearing apparel and provisions; educational and professional books and private libraries; family pictures; non-interest bearing mortgage bonds, and other obligations used exclusively as guaranty or security of proper performance of official duties; motor vehicles subject to payment of license fees (see category 23 Transportation, topic 23.01 Motor Vehicles), except those held in stock by dealers; real or personal property possessed as owner by government of foreign country for total use and utilization thereof for official purposes of its consulate in Puerto Rico; raw sugar and molasses produced from sugar cane in Puerto Rico while in possession of producer; refined sugar in possession of refiner; machinery and equipment used in Puerto Rico for investigation of and/or prospecting for minerals or petroleum with approval of Mining Commission; aircraft and replacement parts used by public carriers; certain rental housing under federal rental assistance programs; property of any hospital, clinic or polyclinic belonging to religious institution; property of

nonprofit associations selling medical and hospital service plans; television and radio stations operating under Federal Communication Commission license or franchise; solar power material, equipment or accessories that use solar power for their operation; property belonging to international banking entities; vessels not used in trade or business in Puerto Rico, and inventory of cooperatives and commercial entities under special voluntary group purchase programs. (21 LPRA 5151). Additionally, each homeowner is entitled to exemption of first $15,000 ($150,000 for taxable years 2009-2010 through 2012-2013 [2009 Act 7]) of assessed value of house used as his residence and exemptions are available for land devoted to agricultural use; for raw material held for production of finished products; for products stored for aging; for property affected by slum clearance and urbanization renewal; and for residential property; and certain property subject to restrictions of Planning Board. Three-year exemption is provided for buildings under construction and equipment, materials and machinery while being installed. Five to 20-year exemption provided for multilevel structures dedicated to parking business. Industrial development programs offering limited tax exemption are also available. See topic 22.18A Tax Incentives and Exemptions. General authority for administration and enforcement of property taxes is vested in Municipal Revenue Collection Center ("Collection Center").

Rates.

(21 LPRA 5001). Property is taxed both by Commonwealth and by municipality in which property is located. Municipality rates vary and, as result, total combined rate ranges from $5.08 to $8.23 per $100 of reported value of personal property and from $7.80 to $10.23 of assessed value on real property. For taxable years 2009-2010 through 2012-2013, special tax assessment is used to impose real property tax. Appraisal value for real property is current value times ten. Tax rate applied is current rate divided by ten. (2009, Act 7).

(21 LPRA 5093). Discounts are available for early payment: In case of personal property taxes, if tax is paid in full on or before May 15, taxpayer is entitled to 5% discount; in case of real property taxes, 10% of semiannual amount if paid within 30 days following date on which receipts are in possession of collector; and 5% of semiannual amount if paid after 30 but not more than 60 days from date on which receipts are in possession of collector; plans for deferred payment without surcharge other than interest are available. Personal property taxes become delinquent if not paid before May 15 of each year; real property taxes become delinquent if not paid within 90 days from due date.

Assessment.

(21 LPRA 5201 et seq.). Assessment of real and personal property is made as of its status and condition on Jan. 1 of each year. Tax on personal property is self-assessed by taxpayer on return which must be filed by May 15 of each year. Corporations with volume of business in excess of $3,000,000 must submit financial statements certified by C.P.A. licensed in Puerto Rico with personal property tax return, also certified by C.P.A. licensed in Puerto Rico. (2008, Act 147). Tax on real property is assessed by appropriate assessment and collection district. Assessment is based on real property value as of fiscal year 1957/58, year of last general assessment of property. Assessment, once made, remains in effect until revised by committee of Administrative Review.

Review of Assessment.

(21 LPRA 5098a). Administrative review of assessment must be filed with Collection Center within 30 days of mailing of assessment notice. Payment of total tax or tax agreed to plus 40% of tax disputed is precondition to filing for review. Within 30 days of mailing of assessment notice, taxpayer may appeal decision of Collection Center to Court of First Instance.

Payment.

(21 LPRA 5091; 21 LPRA 5205). Taxes on real property are due semiannually, in

advance, on July 1 and Jan. 1 of each year. Payment is made, in person or by mail, to Collection Center of district in which property is located. Taxes on personal property must be included with return or paid on or before May 15 of each year.

Collection.

(21 LPRA 5101). Collection is effected by Collection Center or its agents by written notice of attachment for total amount of taxpayer's debts and attachment of property.

Lien.

(21 LPRA 5080). Liens for property taxes may be upon real or personal property. Unrecorded real property liens are valid as to third parties only for current and previous five annual assessments on such property. Additional annual assessments could be valid as to third parties if debt sold under Sale of Tax Liens Act. See subhead of Sale of Tax Liens Act, infra.

Sale.

(21 LPRA 5101 et seq.). Notice of attachment is served on debtor either personally, on any member of his family, or on any person of age employed by him in charge of property. If no person can be found to accept service, there is provision for substitute service by mail and publication, and property can be sold upon completion of term of 30 days counted from date of notice. Sale requires published notice three times a week for period of one week in two newspapers of general circulation in Puerto Rico plainly stating time and place and conditions for auction.

Redemption.

(21 LPRA 5114). Owner, his heirs or assigns, or any person having any right or interest on date of sale of real property sold for taxes may redeem within one year from date of issuance of certificate of purchase by paying to Collection Center or its agents, or to purchaser, full amount of purchase price, cost of improvements and related expenses, and costs and taxes accrued up to date of redemption, plus 20% of all of above. Redemption is not allowed if Collection Center notifies taxpayer within 30 days from sale of results thereof and amount of surplus resulting, if any, and likewise as to whether purchaser was third person or Commonwealth, and taxpayer elects to receive surplus.

Sale of Tax Liens Act.

(21 LPRA 5921 et seq.). Past due and outstanding real and personal property tax debts for taxable years 1974-75 and later can be sold to eligible third parties. Sold debts accrue interest at 15%. Property of certain minors, elders, handicapped or terminally ill individuals is exempted from provisions of Act. Purchaser of tax debt acquires same collection and sale rights as Collection Center, including certain liens on property.

Puerto Rico Special Real Property Tax.

For taxable years 2009-10 through 2011-12, additional real property tax for certain residential and commercial use property equal to 0.591% of special assessed value. Special tax is payable every semester on Mar. 1 and Sept. 1, and is assessed and collected by Department of Treasury. Taxpayers may avail themselves of 10% or 5% discount for early payments if paid within 30 days or 60 days from due date. (2009, Act 7). Homeowners whose household income is less than $20,000 derived solely from annuities and pensions and owners subject to employment termination per 2009, Act 7, until re-employed are exempt from special tax. (2009, Act 37).

Real Estate Conveyance Tax.

No provision. See topic 22.18 Stamp and Seal Taxes, subhead Stamp Tax and

Recording Fees.

Municipal License Tax.

(21 LPRA 651 et seq.). Municipalities are authorized to impose municipal license taxes on gross receipts of any business conducted therein. Maximum tax is 1.5%, in case of financial businesses, and 0.5%, in case of nonfinancial businesses. Minimum tax to be paid is set at $25. However, businesses with volume not in excess of $5,000 are exempt from paying tax. Various other statutory exemptions are provided. Municipalities are authorized to provide for lower tax rates and grant tax exemptions, as long as treatment is uniform for all businesses of same nature within each industry or commercial sector. Foreign tax credit is provided in case of financial businesses for taxes of same nature paid on non-Puerto Rico source income subject to municipal license tax in Puerto Rico. (21 LPRA 651f). Taxes are self-assessed and payable in semiannual installments. Filing date of return is five business days after Apr. 15. Municipal license tax due semiannually, in advance, on July 15 and Jan. 15. Tax is computed on basis of volume of business during accounting year ending within calendar year preceding filing of return. Corporations with volume of business in excess of $3,000,000 must submit financial statements certified by C.P.A. licensed in Puerto Rico with return. (2008, Act 147). If volume of business is under $3,000,000 copy of attachment reflecting breakdown of gross income and operating expenses as reported for income tax purposes must accompany return, certified by taxpayer. If tax is paid at time of filing of return (Apr. 15), 5% discount is allowed. Certain businesses and entities exempt from payment of tax, including those located in foreign trade zones.

Construction Tax.

(21 LPRA 4052, 4057). New construction and demolition are subject to excise tax. Amount of tax fixed by ordinance in each municipality based on cost of work. Owner of project must file declaration describing work and costs and pay tax prior to commencing work. Tax applies to change orders. Maximum of 50% of tax may be reimbursed if work is not completed. No reimbursement if requested after six months of tax payment. Judicial review is by Court of First Instance. Private contractor is liable for tax if project is for exempt government entity.

22.14 MOTOR VEHICLE TAXES:

See topic 22.07A Excise Taxes. See also category 23 Transportation, topic 23.01 Motor Vehicles.

Automobile Rental Surcharge.

No provision.

Road Tax.

No provision.

22.14A PREMIUM:

See Category 16 Insurance, topic 16.01 Insurance Companies, subhead Premium Tax.

22.1522.16

22.17 SALES AND USE TAXES:

Sales Tax.

(13 LPRA 9091 et seq.). 5.5% on sales at retail and leases of tangible personal property;

leases of real property, excluding tax imposed by Tourism Company on hotel and lodging occupancy (13 LPRA 9091[f][5]); amusement and sports events admissions; cable or satellite television services; telecommunication services; sale of computer software; and taxable services, all with certain exemptions and limitations.

Sales.

(13 LPRA 9092). Include installment or conditional sales, mail or Internet sales to person in Puerto Rico and financial leases that constitute sale as per Generally Accepted Accounting Principles (some financial leases excluded). Sales exclude exempt exchanges and sale or exchange of all or substantially all assets of business outside normal course of business.

Sales at Retail.

(13 LPRA 9092f). Do not include sales for reselling purposes or subleases. Registration needed for resellers and specific rules apply to merchants doing business with resellers and to obtain certificate of exemption. (2009, Act 37).

Telecommunication Services.

(13 LPRA 9091[mm]). Tax imposed on voice, video, audio or other type of information or signal transfer; free calling services, calls to 900 numbers or other similar services, fixed wireless services, beepers or paging services, prepaid calling services, prepaid wireless calling services, private communication services, coin operated telephone services, wireless mobile transmission services, and others. Exemptions include installation and maintenance services at client facilities, charges for use of tangible personal property, publicity services, Internet access, service charges required by local or federal laws, service to other telecommunication companies, among others.

Taxable Services.

(13 LPRA 9091[pp]). Any service rendered to any person including storage of tangible personal property (excluding motor vehicles and any type of food), leases, computer programming, installation of tangible personal property, maintenance of tangible personal property, among others, with certain exemptions and limitations.

Exemptions.

Following are examples only: Stocks, notes, mortgages and insurance; automobiles, omnibuses, trucks (see topic 22.14 Motor Vehicle Taxes); Intangibles. Certain promotional materials; purchases of staple commodities during state of emergencies; child care centers; taxable items acquired by higher learning institutions; certain breads and crackers; certain technological assistance equipment used by persons with disabilities; and certain articles normally bought during back to school period, named “Back to School Tax Holiday”.

Fuels.

Gasoline, aviation fuel, gas oil, diesel oil. See topic Gasoline and Special Fuel Taxes.

Electricity and Water.

Electricity generated by Puerto Rico Electric Power Authority (or other companies), water supplied by Puerto Rico Water and Sewers Authority.

Products for Exportation.

(13 LPRA 9093b). Generally, any taxable item sold for use or consumption outside Puerto Rico, if such sales are exported within 60 days after date of sale, and sale or transfer of cigarettes or tobacco to foreign and U.S. ships, foreign war ships and foreign ships while visiting Puerto Rico.

Raw Materials.

(13 LPRA 9093e). Purchase of raw material by manufacturing companies including hydraulic cement.

Machinery and Equipment.

(13 LPRA 9093e). Purchase of machinery and equipment used exclusively in manufacturing process (including production of electrical energy) or in repair or construction of boats inside or outside manufacturing plant. Exemption certificate required.

Tax Exempt Companies.

Purchases of certain products by manufacturing companies which are exempt from excise tax payment under Economic Incentives for Development of Puerto Rico Act or any other similar provision or substitute law. Exemption certificate required.

Airport Terminal and Port.

(13 LPRA 9093f). Sale of taxable items in stores established in air or maritime terminals to persons who travel outside Puerto Rico. License required.

Government.

(13 LPRA 9093g). Purchases by agencies or instrumentalities of U.S. Government and Commonwealth Government of Puerto Rico for official use.

Personal Belongings.

Certain personal belongings of any nonresident individual of Puerto Rico or active in service with U.S. Armed Forces moved officially to service in Puerto Rico who establish or re-establish residency in Puerto Rico.

Foods and ingredients for foods for human consumption excluding dietary supplements, alcoholic beverages, tobacco and its derivatives, candies, confectionery products, except certain breads and crackers, carbonated beverages and prepared foods. Foods prepared and served for patients or residents of any hospital or other facility designed for care for sick, elderly, feeble, physically or mentally disabled persons, or those who require special care or attention, if such foods constitute part of transaction including sale of health or medical-hospital services. Foods prepared and served to students in school dining rooms and those that constitute part of transaction including sale of educational services. Foods prepared and served as part of transactions subject to room occupancy tax.

Medical.

(13 LPRA 9093k). Drugs for human consumption that may only be acquired by medical prescription and, only if prescribed by physicians authorized to practice in Puerto Rico and filled by pharmacists with license to practice in Puerto Rico, excluding cosmetics or cleaning articles. Drugs sold to physicians, surgeons, dentists or podiatrists for patient treatment or provided by health facility for patient treatment per physician's order. Dietary supplements or alcoholic beverages not included. Hypodermic needles, hypodermic syringes, chemical components for medical treatment of human beings; prostheses, insulin and oxygen, certain medical equipment, supplies and technology used when rendering health services.

Excluded Services.

(13 LPRA 9091[nn], [pp]). Services rendered to businesses, designated professional services (legal, architects, certified public accountants, engineers, geologists, among others), services provided by Commonwealth of Puerto Rico, educational services (including enrollment

costs), service charges by financial institutions, services and commission insurance charges and health and hospital services, services rendered by persons with annual gross income not exceeding $50,000, funeral services up to $4,000, among others.

Commercial Leases.

(13 LPRA 9093l). Leases of real property for commercial purposes, including office or sales spaces, warehouses and parking facilities.

Use Tax.

(13 LPRA 9092a). 5.5% on use, storage or consumption of taxable item in Puerto Rico including use, storage, or consumption of any tangible advertising material (e.g., pamphlets, catalogues, price lists) imported into Puerto Rico.

Sales tax exemptions apply also to use tax.

Additional exemptions include items for sale in regular course of business in Puerto Rico, use of tourist or visitor's equipment and normal travel clothes; use of taxable items with aggregate value not exceeding $500 introduced by residents of Puerto Rico; items related to film production, construction, trade shows, conventions and seminars introduced into Puerto Rico temporarily and re-exported by same person who imported items (exemption must be requested from Secretary of Treasury). (13 LPRA 9091[vv]).

Collections.

(13 LPRA 9094a-9094b). Sales and use taxes remitted to Secretary of Treasury with Monthly Taxable Sales and Use Tax Return on or before 20th day of month following month of sale or transaction. Sales tax must be shown separately by municipality. Annual Sales and Use Tax Returns must be filed not later than 15th day of third month after close of tax collector's accounting year.

Electronic Returns and Payments.

(13 LPRA 9094c-9094f). Treasury Department may require taxpayer to file returns and remit payments by electronic means if annual volume of business informed in Merchant Registry Application or in Annual Sales and Use Tax Return is $500,000 or more. If payment is required to be remitted by electronic means, then Monthly Sales and Use Tax Return must be filed by electronic means.

Registration.

(13 LPRA 9096-9096b). Merchant Registry Application required for each store, office or location and must be filed with Treasury before commencement of operations. Certificate must be posted in visible place. Penalties apply for failure to obtain certificate.

Municipal Sales and Use Tax.

(13 LPRA 8189). 1.5% municipal sales and use tax imposed throughout all municipalities on same basis and with same exceptions and limitations as Puerto Rico sales and use tax. Municipal sales and use tax may include, if approved by ordinance, 1% municipal sales and use tax on food and ingredients for food.

22.18 STAMP AND SEAL TAXES:

Stamp Tax and Recording Fees.

Construction Plans.

(20 LPRA 741). College of Engineers is authorized to collect tax on plans, documents or certificates required to be submitted to any governmental office in amount of 50¢ where value does not exceed $500; in excess of $500 rate is $1 for each $1,000 or fraction thereof.

Stamp Tax.

See category 21 Property, topic 21.06 Deeds, subhead Taxes.

Recording Fees.

See category 10 Documents and Records, topic 10.04 Records, subhead Recording Fees.

22.18A TAX INCENTIVES AND EXEMPTIONS:

Agriculture Tax Incentives Act.

(13 LPRA 10401-10412). Income derived from qualifying agricultural activity qualifies for 90% exemption from income taxes, 100% exemption from municipal and Commonwealth taxes on personal and real property and 100% exemption from municipal license and excise taxes. Investor in agricultural business may request investment matching incentive of 50% of eligible investment up to $250,000 per participant per year ($1,500,000 per year for "production nucleus"). Agricultural business includes cultivation of products for human or animal consumption; breeding of certain animals; commercial fishing; cultivation of ornamental plants or flowers; agro-industrial cattle and livestock corporation including production and processing of milk products.

Capital Investment Funds.

(7 LPRA 3021-3047). Puerto Rico income tax credit available to fund up to 25% of cash received for private proprietary interests. Investment credit can be carried forward to following five taxable years. Gain on sale of private proprietary interest taxed at 10% rate. Fund operations may include manufacturing and service ventures, tourism, agriculture, fishing industries and research and development. Eligible proprietary investment limited to $50 million per calendar year.

Economic Incentives for Development of Puerto Rico Act.

Flat income tax rates of 3.5% or 4% (7.5% or 8% if alternative tax method), depending on location, on industrial development income of exempted businesses. 0% to 1% income tax rate on industrial development income from pioneer activities, not available under alternative tax method or to existing businesses. 100% exemption on any dividend or profit distribution. Withholdings on royalty payments of 12% (2% if alternative tax method). Partial exemptions from income tax and local tax available to eligible businesses for fixed term of 15 years. Total exemption to certain income from eligible investments. Exemption from property tax of 90%, up to 100% for certain operations. Exemption from municipal license tax of 60%, up to 75% for small businesses, 90% for operations in Vieques and Culebra, and 100% exemption for headquarter activities (during five years beginning on date exemption commences). Special Deduction for Investment in Buildings, Structures, Machinery and Equipment. Credits available for following eligible activities: purchase of products manufactured in Puerto Rico; job creation; investment in research and development, including clinical trials, toxicology tests, infrastructure, and renewable energy; electric energy cost reduction; transfer of intellectual property; investment in strategic projects; and acquisition of troubled exempt businesses. Special deduction and credits subject to certain limitations on eligible activities, transferability, and usage.

Feature Film Industry Development Act.

(23 LPRA 571-577a). Income derived by licensed filming entity from conduct of eligible

filming or infrastructure projects subject to fixed 7% income tax. Dividends or benefits distributed from projects are exempt. Exemption and fixed rate effective for ten years. 90% exemption from business license, construction and other municipal taxes; 100% exemptions from excise taxes on certain articles. Investor entitled to income tax credit equal to 40% of payments made to residents of Puerto Rico for filming projects up to 50% (25% in certain projects for television) of cash contributed to entity for stock or participation in initial issuance of securities. Investor in infrastructure project entitled to credit equal to lesser of 40% of cash contribution to entity or 20% of budget. Credits generally available in two installments.

Incentives for Development of Puerto Rico Small Businesses Act.

Entities with gross income of no more than $5 million - 30% flat income tax rate (25% in certain cases); no graduated surtax; entities with gross income of no more than $5 million allowed current deduction for cost of computers used in business; accelerated depreciation for certain motor vehicles and environmental conservation equipment; deduction from gross income of 50% of self-employment tax; deduction for health insurance premiums for self-employed and families. Effective for taxable years commenced after Dec. 31, 2008.

International Banking Center Act.

(7 LPRA 232 et seq.). Income derived by qualified International Banking Entities, as well as dividends or profits distributed by qualified exempt banking entities to nonresident shareholders or partners and liquidating distributions, may qualify for 100% exemption from income taxes, except for certain International Banking Entities that are units of Puerto Rico banking institutions which may be subject to Puerto Rico income taxes. Exempt banking entities qualify for additional 100% tax exemption on personal and real property taxes and municipal license taxes. (7 LPRA 232v-282w).

International Insurers and Reinsurers Act.

(26 LPRA 4301-4327). Income derived by International Insurers and certain qualified holding companies of International Insurers, as well as dividends or profits distributed by qualified exempt insurers to shareholders or partners and liquidating distributions, qualify for 100% exemption from income taxes. Exempt insurers qualify for additional 100% tax exemption on personal and real property taxes and municipal license taxes. (26 LPRA 4324).

Solid Waste Disposal Facility Investment Credit.

(12 LPRA 1318a et seq.). Puerto Rico income tax credit for investment in solid waste disposal and/or treatment facilities or eligible capital fund allowed for 50% of eligible cash investment. Credit to be taken in no less than two yearly installments. Excess credit may be carried forward. Loss on sale by investor or participant, except project developer, can be credited in year of sale and excess carried forward for four years. Loss credit per year may not exceed 1/3 of total loss for taxable year.

Tourism Development Incentives.

(23 LPRA 6001 et seq.). Tourism development income, as well as all dividends or profits distributed by qualified exempt business to shareholders or partners and liquidating distributions, qualify during ten-year period for 90% exemption from income taxes if tourism activities are established in Puerto Rico, except that if established in Municipalities of Vieques or Culebra, 100% exemption will apply. Exempt businesses qualify for additional tax exemptions, among them: 90% exemption on municipal and commonwealth taxes on personal and real property; 90% exemption from municipal license taxes, excise and other municipal taxes levied by any ordinance to existing business and 100% exemption for new business; and 100% exemption from municipal excise taxes on construction, subject to certain exclusions and requirements to condohotels devoted to integrated leasing programs. Investor is entitled to tourism investment credit equal to 50% of its eligible investment to be credited in two installments; first in year when

exempt business obtained necessary financing for project, and second in following year. Sum of these credits cannot exceed lesser of 10% of total cost of project or 50% of cash contributed by investors and participants to exempt business in exchange for shares of exempted business. Equipments used to generate power from alternative sources considered property dedicated to tourism activities; eligible investment includes acquisition and installation of such equipments; tourism investment credit equal to 60%. Credits can be assigned only if investor is not developer. Credits against income tax also available to investors who realize loss on sale or disposition.

22.19 USE TAXES:

See topic 22.17 Sales and Use Taxes, subhead Use Tax.

22.20 UTILITIES TAX:

See topic 22.17 Sales and Use Taxes, subhead Electricity and Water.

23 TRANSPORTATION

23.01 MOTOR VEHICLES:

(9 LPRA 5001 et seq.).

Department of Transportation and Public Works (http://www.dtop.gov.pr) has general supervision, PO Box 41243, Minillas Station, San Juan, PR 00940-1234. Road 887 km 8.4 intersection Road 848, Bo. San Antón, Old Baxter Laboratories, Carolina, PR. No Uniform Acts adopted.

Vehicle License.

License issued by Secretary of Transportation and Public Works is required. (9 LPRA 5002). License plate and current renewal sticker must be displayed. Renewals in month of original vehicle registration for one year period. (9 LPRA 5012).Vehicles belonging to members of Armed Forces not exempt. Veterans have option to request special license plate exempt from payment. (9 LPRA 5032a). Vehicles are registered upon entry for three months in special registry with Secretary of Transportation and Public Works, after which vehicular license must be obtained. (9 LPRA 5009).

Operator's License issued by Secretary of Transportation and Public Works is required. (9 LPRA 5051). Applicants undergo written theoretical and physical examination and obtain two year apprentice permit. One month after having received apprentice permit, and no later than two years from its date of issuance, apprentice undergoes practical examination, and if approved, license is granted, valid for period of six years, at end of which it may be renewed after another physical examination. License expiration date same as date of birth. (9 LPRA 5056, 5058, 5064). See subhead Operation Prohibited, infra, as to operators under age 18. Special requirements apply to obtain license to drive motorcycles. (9 LPRA 5056a). Special license issued to operators of trucks transporting toxic materials and dangerous substances. (9 LPRA 5067). Evidence of foreign license is enough for automatic issuance of local license where reciprocity with Puerto Rico exists. (9 LPRA 5055).

Members of Armed Forces are exempted from license requirement while operating vehicle belonging to U.S. or National Guard of P.R. and they and their families are exempt while on active duty in Puerto Rico, if not domiciled in Puerto Rico, while holding valid foreign license issued by jurisdiction with reciprocity arrangements with Commonwealth. (9 LPRA 5055).

Dealer's License.

License issued by Secretary of Transportation and Public Works is required to engage in business of selling motor vehicles and trailers. Special licenses required to deal in cars repossessed or damaged in accidents. (9 LPRA 5015-16).

Negotiator's License.

License issued by Secretary of Transportation and Public Works is required to engage in business of obtaining for another person, with that person's authorization, any type of license or renewal thereof in connection with motor vehicles. Must take exam and post bond. License valid two years. (9 LPRA 5068).

Titles.

Certificate of title required and is issued upon sale of new vehicle. Certificate of title includes name, address and social security number of owner and names of lien holders. Evidence of ownership required for licensing vehicle introduced to Puerto Rico by other than dealer. No certificate of title or license issued until excise tax paid. (9 LPRA 5003-04). See category 22 Taxation, topic 22.07A Excise Taxes.

Sales.

Require signature of seller and buyer on certificate of title and license and notarization. Must be filed in Department of Transportation and Public Works by buyer within ten days. (9 LPRA 5035-36). No new license plate or sticker required.

Liens.

Liens for traffic fines have preference over all other liens and no transfer of vehicle or vehicle's or driver's license renewal permitted until fine paid or eliminated. (9 LPRA 5685[e]). When vehicle involved in traffic accident, damaged party may obtain one year lien upon presentation to Secretary of Transportation and Public Works of sworn statement, within which time no transfer of title will be effected by Secretary. (9 LPRA 5110). See subhead Traffic Regulations, infra. Security interests must be recorded in Department of Transportation and Public Works. (9 LPRA 5006, 19 LPRA 2163). See categories 3 Business Regulation and Commerce, topic Commercial Code; Documents and Records, topic Records, subhead Filing under Commercial Code.

Identification Marks.

Alteration of license plate or serial number is punishable by imprisonment and/or fine. (9 LPRA 5044).

Operation Prohibited.

Operators must (a) have mental and physical capacity, (b) read and write English or Spanish, and (c) be 18 years old, or (d) be 16 years old, if parent with patria potestas or guardian consents and assumes responsibility for fines and damages, operation is limited to private use of vehicle, and other special requirements are met. (9 LPRA 5056, 5063a). Special licenses may be issued to applicants with partial physical handicaps. (9 LPRA 5062).

Size and Weight Limits.

Regulated by 9 LPRA 5451 et seq.

Equipment Required.

Regulated by 9 LPRA 5401 et seq.

Lights Required.

Regulated by 9 LPRA 5404-13.

Seat Belts and Car Seats.

Required for all motor vehicles with seat belts that are available and in usable condition. Drivers and passengers must buckle up. Violations subject driver to administrative fine of $50 per person not wearing seat belt. Driver may be liable for damages if passenger fails to buckle up. Failure to buckle up raises presumption of negligence in case of accident. (107 DPR 757). Car seats required for children under four years old and children under 12 required to use rear seats; violations subject to $100 administrative fine. (9 LPRA 5381-84).

Inspections.

Vehicle inspection at least annually but not more than every six months established by regulation. Used vehicles imported to Commonwealth must be inspected prior to licensing. Inspection is requirement for license renewal. Inspection stations are operated by Commonwealth or are licensed by Secretary and can issue inspection certificates and renewal stickers. (9 LPRA 5351-59). See subhead Vehicle License, supra.

Traffic Regulations.

In addition to speed, includes reckless driving, passing, right of way, high beams, one way traffic, traffic lights, emergency vehicles, backing up, turning, stopping and parking. (9 LPRA 5151-78).

Accidents must be reported to police authorities, traffic division or highway patrols. Driver involved in accident has duty to stop, assist injured party if possible, and give name, address, license plate number and compulsory insurance information to other party. Driver or owner involved in accident causing personal injury or property damage must report accident to Police within four hours of accident. (9 LPRA 5103, 5106). See subhead Liens, supra.

Liability of Owner.

Owner of motor vehicle is responsible for all damages caused by negligent operation thereof by third person expressly or implicitly authorized to operate vehicle. There is presumption that person operating vehicle was authorized to do so. Negligent operator shall be bound to indemnify owner of motor vehicle. Damage liability not applicable to owners of rental vehicles when vehicle driven by lessee. (9 LPRA 5621).

Compulsory Public Liability Insurance.

Motor vehicles must be insured for $3,000 per accident. Renewal of license requires proof of current annual coverage. Annual coverage available through Department of Transportation and Public Works for $99 for private vehicle and $148 for commercial vehicle or from insurance company. (26 LPRA 8052-8061).

Guests.

There is no statute restricting liability for injury to a gratuitous guest.

Contributory negligence is not a defense but only serves to mitigate damages. (31 LPRA 5141).

Proof of Financial Responsibility.

Not required. See subhead No-Fault Insurance, infra.

Insurance.

See subheads No-Fault Insurance, infra, and Compulsory Public Liability Insurance, supra.

No-Fault Insurance.

Limited compulsory administrative insurance system in effect. Motor vehicles licensed within Commonwealth must pay premium with annual vehicle registration. Container trailers used in maritime transport of cargo from without Puerto Rico pay special premium if trailer is to remain in Puerto Rico for brief period of time. Law authorizes administrative claims for bodily injury resulting in death, incapacity, dismemberment or loss of sight, arising in connection with maintenance or use of motor vehicle, excluding injuries arising within area reserved for maintenance or repair services, or arising while repairs made at home. Death benefits payable to defined beneficiaries in accordance with schedule if death occurs as result of accident within one year of accident. Dismemberment and loss of sight benefits payable within 52 weeks of accident. Incapacity benefits payable to victim who held remunerative job for at least six of twelve months preceding accident, provided incapacity manifested within 20 days of accident, in amount equal to 50% of salary during first year ($100/wk maximum) and 50% during second year ($50/wk maximum). Law further authorizes necessary medical and hospitalization services through practitioners and hospitals under contract or specially authorized. Statutory benefits reduced in amount equal to monies received from other sources, excepting social security benefits, gifts, life insurance, inheritance, compulsory family support payments and payment of accumulated vacation pay. Administrative claims to be filed with Automobile Accident Compensation Administration within 15 days of accident, except that claims for death benefits may be submitted within 120 days following death. In all cases claimants have 15 days to notify Administration of accident.

No relief under Act for injuries which are intentionally self-inflicted, arise from accident occurring while driving without legal authorization, engaged in or as spectator at automobile races, engaged in criminal act other than violation of traffic laws, or under influence of alcohol or narcotics. Such disqualification is no bar to claim of statutory beneficiaries of decedent.

Statutory benefits exclusive only if damages do not exceed $1,000 for mental anguish, humiliation, etc., and $2,000 for other damages. Where damages exceed this maximum, civil judgment will be reduced in amount equal to administrative remedy received or limits set forth above, whichever greater. Judgment in favor of beneficiaries reduced in amount equal to administrative relief. (9 LPRA 2051 et seq.).

Judicial review of decisions of agency available in Court of Appeals. (See category 5 Civil Actions and Procedure, topic 5.03 Appeal and Error.)

Foreign Vehicles.

Must be licensed in Puerto Rico. Secretary can grant permission to operate noncommercial vehicle without license for up to 120 days. Commercial trailers may operate in Puerto Rico without license for not more than 30 days. (9 LPRA 5038-40).

Nonresident Operators.

Holder of valid U.S. or foreign license may drive legally in Puerto Rico for up to 120 days. (9 LPRA 5055).

Actions Against Nonresidents.

See category 5 Civil Actions and Procedure, topic 5.20 Process, subhead Long-arm Statute.

Direct Actions.

Direct action against insurer in Puerto Rico permitted. Insurer liable only up to policy limit and can raise any defense available to its insured other than those which are personal to insured. (26 LPRA 2003[1]; 574 F.2d 44). Injured party may sue insurer in separate action after suing insured. (26 LPRA 2003[2]).

Motor Vehicle Carriers.

Supervised and regulated by Public Service Commission. See category 3 Business Regulation and Commerce, topic 3.08 Carriers.

Motor Vehicle Taxes.

Annual license fees apply. (9 LPRA 5681, 5682). Also see category 22 Taxation, topic 22.07A Excise Taxes, subhead Rates, catchline Vehicles.

Gasoline Tax.

See category 22 Taxation, topic 22.08 Gasoline and Special Fuels Taxes.

Lemon Law.

See category 3 Business Regulation and Commerce, topic 3.12 Consumer Protection, subhead Lemon Law.

23.02 RAILROADS:

See category 3 Business Regulation and Commerce, topic 3.08 Carriers.

23.02A FORMS:

COMMERCIAL CODE FORMS

See also categories 3 Business Regulation and Commerce, topic Commercial Code; Mortgages, topic Chattel Mortgages.

[UCC Forms revised in 2006. Copies of revised forms attached.]

24 Forms

Commercial Code Forms

(Click here to view)

1
RHODE ISLAND LAW DIGEST

—Scope —

Revised for 2010 edition by

EDWARDS ANGELL PALMER & DODGE LLP, of Providence.

(Citations, unless otherwise indicated, refer to General Laws of Rhode Island of 1956, as reenacted and as am’d.; R. C. P. indicates Rules of Civil Procedure; D. C. R. indicates District Court Rules. Parallel citations to the Atlantic Reporter begin with

15 R. I.; Rhode Island Reports, official reporter, published from 1828-1980.)

This revision incorporates legislation through Sept. 15, 2009. General Assembly meets annually commencing in Jan.

Note: Rev. Arts. 3, 4, 5, 8, and 9 of Uniform Commercial Code adopted, effective July 1, 2001 and Rev. Art. 7 of Uniform Commercial Code adopted, effective July 1, 2006. Rev. Art. 1 of Uniform Commercial Code adopted, effective May 27, 2007 (RIGL 6A-1-101 et seq.; Pub. L. No. 00-182, 00-238, 00-420, 00-421, 06-112, 06-135, 07-019). See category 3 Business Regulation and Commerce, topics 3.02 Bills and Notes, 3.09 Commercial Code, 3.24 Securities.

1 INTRODUCTION

1.01 GOVERNMENT AND LEGAL SYSTEM:

The State of Rhode Island is a constituent state of the United States of America. For further discussion of the U.S. federal system, see Introduction to the Federal Government of the United States at the beginning of this volume. A great many laws are promulgated by the federal government of the United States and are not reflected in the topics below. See the Introduction to this volume for references to the federal law topics covered.

Like all but one of the United States, Rhode Island has a common law legal system, with roots in English common law. For information on the courts and legislature of Rhode Island, see category 6 Courts and Legislature.

1.02 [RESERVED]

1.03 HOLIDAYS:

Legal holidays are Jan. 1, 3d Mon. of Jan. (Dr. Martin Luther King’s birthday), 3d Mon. of Feb. (Washington’s birthday), May 4 (R.I. Independence Day), last Mon. of May (Memorial Day), July 4 (Independence Day), 2d Mon. of Aug. (Victory Day), 1st Mon. in Sept. (Labor Day), 2d Mon. of Oct. (Columbus Day), Nov. 11 (Veterans’ Day), Dec. 25 (Christmas Day), Tues. after 1st Mon. in Nov. in year of general election of state officers (Election Day) (RIGL 25-1-1), and Thanksgiving Day (by Proclamation). (RIGL 25-1-2). Banks may make Saturdays legal holidays for certain purposes. (RIGL 25-1-3, 4).

Holiday falling on Sunday is celebrated on following Monday. (RIGL 25-1-1).

1.04 OFFICE HOURS AND TIME ZONE:

Rhode Island is in Eastern time zone. Office hours are generally from 9 a.m. to 5 p.m.

2 BUSINESS ORGANIZATIONS

2.01 AGENCY:

Common law rules govern generally.

2.02 ASSOCIATIONS:

Formation and Dissolution.

No statutory provisions regarding the formation or dissolution of unincorporated associations other than co-partnerships.

Liabilities.

Officers or members are not subject to arrest in such actions and are not personally liable to execution after final judgment against association unless execution against it is returned unsatisfied. (RIGL 9-2-14, 15).

Actions.

Any officer or authorized member of unincorporated association may bring an action as trustee for association. (RIGL 9-2-11). Unincorporated association may be sued in action brought against its president and secretary or similar officers or if there are no officers then against a member. Death or incapacity of an officer or member suing or being sued does not affect such action. (RIGL 9-2-11 through 13).

Fraternal and Beneficial.

Associations having a system of lodges and providing insurance by assessment plan are regulated by statute. (RIGL 27-25-1 et seq. through RIGL 27-28-1 et seq.). Certain not-for-profit charitable, educational and religious organizations are exempt from sales and use taxes. (RIGL 44-18-30).

Hospitals.

Rules and limitations governing acquisition of not-for-profit hospital by for-profit entity. (RIGL 23-17.14-1 et seq.).

Professional Associations.

Following may form professional service corporations: physicians, surgeons, dentists, attorneys, osteopaths, professional engineers, architects, certified public accountants and licensed public accountants, veterinarians, chiropractors, chiropodists (including podiatrists), registered nurses, optometrists, physical therapists, and landscape architects. (RIGL 7-5.1-1 through 12). See topic 2.03 Corporations.

Public Charitable Institutions.

Directors or trustees who are unpaid are relieved of liability for damages occasioned solely by reason of membership on or participation in activities of board. (RIGL 7-6-9).

2.03 CORPORATIONS:

Note: The Model Business Corporation Act, prepared by the Committee on Corporate Laws (Section of Corporation, Banking and Business Law of the American Bar Association), has been adopted, effective Jan. 2, 1970, and is known as the “Rhode Island Business Corporation Act.” (RIGL 7-1.2-101 through RIGL 7-1.2-1804). For text of Model Act, see Uniform and Model Acts section. Law as digested below relates primarily to variances of Rhode Island Business Corporation Act from Aug. 1977 version of Model Act contained in Uniform and Model Acts section. Certain later amendments have been adopted.

No right accrued or any liability or penalty incurred under repealed statutes are affected by Rhode Island Business Corporation Act.

General Supervision.

Secretary of State.

Purposes.

With certain exceptions, business corporations may be organized for any lawful purpose. (RIGL 7-1.2-301).

Literary, educational, scientific, charitable and other nonbusiness corporations including libraries, certain industrial or recreational development corporations and corporations for municipal projects, and corporations to provide housing for elderly persons, may be organized under "Rhode Island Non-Profit Corporations Act" (RIGL 7-6-1 through RIGL 7-6-108). Reference should be made to Non-Profit Corporation Act for specific statutory provisions.

Corporations which cannot be organized under Business Corporation Act must be incorporated by special act of general assembly or under special statutory provisions.

Name.

Generally same as Model Act. No formal procedure for determining availability of name. Usual practice is to telephone or write to Secretary of State. Name may be same as name of corporation whose certificate of incorporation has been revoked by Secretary of State, provided such revocation has not been withdrawn within one year. (RIGL 7-1.2-401). Available name may be reserved by eligible parties for 120 days by filing application and fee of $50 with Secretary of State. Corporation may register its name for $50. Corporations may use fictitious name after filing fictitious business name statement and fee of $50. (RIGL 7-1.2-401 through 404).

Term of corporate existence must be as set forth in articles of incorporation, and may be perpetual. (RIGL 7-1.2-202).

Incorporators.

One or more persons may act as incorporators. (RIGL 7-1.2-201).

Articles of Incorporation.

Generally same as Model Act. Must include specifics as to issuable share number, total number of shares in each class, and their associated rights. May include provisions which, except under certain circumstances, limit or eliminate personal liability of directors to corporation or its stockholders for monetary damages for breach of such directors' duties as directors. (RIGL 7-1.2-202). Beginning of corporate existence may be postponed, but must be noted in articles of incorporation. (RIGL 7-1.2-202).

Filing of Articles of Incorporation.

File with Secretary of State, Corporations Division, 100 North Main Street, Providence, RI 02903. Filings considered original and valid if they bear either original signatures, facsimile or electronic signatures and include but not be limited to any electronically transmitted documents or similar communications transmitted through medium provided and authorized by Secretary of State. (RIGL 7-1-7.1). Filing may be accomplished by delivery to Secretary of State in either paper format or electronic transmission through medium provided and authorized by Secretary of State. (RIGL 7-1.2-106[7]).

Incorporation fee, payable to Secretary of State, $230 if total number of new shares authorized is fewer than 75,000,000 (Secretary of State Form 100); if total number of new shares authorized is 75,000,000 or more, contact Secretary of State for fee.

Same rates apply to increase in number of authorized shares. Fee is payable only as to increased number of shares and number of previously authorized shares are taken into account in determining applicable rate. (RIGL 7-1.2-1602).

Fees for corporation organized by special act of general assembly, except those for religious, charitable, or literary purposes, or military or fire company, are same as above. (RIGL 7-1.2-1804).

Filing Fees.

In addition to incorporation fee, there is fee of $70 for filing articles of incorporation. (RIGL 7-1.2-1602). Filing fee for nonprofit corporations is $35. (RIGL 7-6-92). All other filing fees are set forth in RIGL 7-1.2-1602.

License to Do Business.

See subhead Filing of Articles of Incorporation, supra.

Revocation of certificate of incorporation by Secretary of State if it is established that corporation abused authority, procured its articles of incorporation fraudulently or failed to comply with other statutory requirements after notice and opportunity to cure. (RIGL 7-1.2-1310). Corporation's authority to transact business ceases upon issuance of certificate of revocation. (RIGL 7-1.2-1311). Certificate of revocation may be withdrawn within ten years upon curing of certain failures in compliance and payment of penalty. Reinstatement is conditioned on designation of new name if former name has been adopted by another corporation as permitted by provisions of 7-1.2. Upon reinstatement, title or interest in real estate held at time of revocation is revested in corporation. (RIGL 7-1.2-1312).

Organization.

Generally same as Model Act. (RIGL 7-1.2-201).

Paid in Capital Requirements.

There are no statutory requirements as to amount of capital stock to be paid in at time of organization.

Amendment of Articles.

Generally same as Model Act. (RIGL 7-1.2-901 through 907). If proposed amendment would affect only shares of one series of class, only shares of series so affected will be considered separate class for class voting on amendments. (RIGL 7-1.2-904). Corporation created by legislative act may amend its charter in same manner as articles of incorporation may be amended. (RIGL 7-1.2-902). Fee for filing articles of amendment is $50. (RIGL 7-1.2-1602).

Increase or decrease of authorized capital stock may be effected by amendment of articles of incorporation. (RIGL 7-1.2-901). As to fees payable on increase of capital stock, see supra, subhead Incorporation Fee.

By-laws.

Generally same as Model Act. By-laws adopted by incorporators or board of directors at its organization meeting and may contain any provisions for regulation and management of affairs of corporation not inconsistent with law or articles of incorporation. May be amended by incorporator or incorporators prior to issuance of stock or assumption of duties by directors, by shareholders or, unless otherwise provided in articles of incorporation or by-laws, by board of directors, but any amendment by board of directors may be changed by shareholders. Section 27A (optional) of Model Act adopted. (RIGL 7-1.2-203).

Stock.

There may be one or more classes of stock, any or all of which may consist of shares with par value or shares without par value, with such designations, preferences, limitations and relative rights as are stated in articles of incorporation. If articles of incorporation so provide, shares of any preferred or special class may be divided into and issued in series, with such variations in relative rights and preferences, including variations in voting rights, if any, and designations, preferences, and relative, participating, optional or other special rights and qualifications, limitations and restrictions thereof, as may be desired. If authority is expressly vested in board of directors by articles of incorporation, board of directors may divide classes into series and fix and determine, within limitations set forth in articles of incorporation, relative rights and preferences of shares of any such series. (RIGL 7-1.2-602).

Stock Certificates.

Generally same as Model Act, except that certificates must be signed by officer or officers designated for such purpose by by-laws, or in absence of such designation, by either chairman or vice-chairman of board of directors or president or vice president and by treasurer, assistant treasurer, secretary or assistant secretary. Any or all of signatures may be facsimile. Shares of corporation may, but need not, be represented by certificates. (RIGL 7-1.2-608).

Issuance of Stock.

Generally same as Model Act. (RIGL 7-1.2-604).

Transfer of Stock.

Uniform Commercial Code in effect. (RIGL 6A-1-101 et seq.). See category 3 Business Regulation and Commerce, topic 3.09 Commercial Code.

Uniform Securities Ownership by Minors Act not adopted.

Uniform Simplification of Fiduciary Security Transfers Act adopted. (RIGL 18-11-1 through 11). In event of any conflict between this Act and Uniform Commercial Code (RIGL 6A-8-101 through 406), this Act controls (RIGL 6A-8-107).

Stock Transfer Tax.

No state transfer tax.

Restrictions on transfer may be imposed by certificate of incorporation, by-laws or by agreement among any number of holders of shares or among such holders and corporation, and must be noted conspicuously on certificates to be valid against person who becomes holder without actual knowledge of restriction. Written restriction on transfer or registration of transfer of shares or securities having conversion or option rights, is enforceable against holder, his successor or transferee, including any fiduciary entrusted with responsibility for person or property of holder. No restriction will be binding with respect to shares issued prior to adoption of restriction unless holders voted for adoption of restriction or are parties to agreement imposing it. (RIGL 7-1.2-609).

Stockholders.

Preemptive rights generally same as Alternate Section 26A of Model Act. (RIGL 7-1.2-613).

Stockholders actions cannot be brought unless plaintiff was holder of record of shares or voting trust certificates at time of transaction of which he complains, or his shares or voting trust certificates devolved upon him by operation of law from person who was holder of record at that time. Upon final judgment and finding that action was brought without reasonable cause, court having jurisdiction may impose costs.

Stockholders’ Liabilities.

Generally same as Model Act. Shareholder’s or subscriber’s obligation to corporation or its creditors with respect to shares held or subscribed may not be less than amount of consideration for which such shares could be lawfully issued. (RIGL 7-1.2-612). Unlawful to invest any income derived from racketeering activity or collection of unlawful debt in legitimate enterprise. Penalties include fines, imprisonment and forfeiture to State of any interest or property acquired through violation of Act. “Racketeering activity” means any act or threat involving murder, kidnapping, gambling, arson, robbery, bribery, extortion, larceny or prostitution, or any dealing in narcotic or dangerous drugs punishable by imprisonment for more than one year. Purchase of securities on open market as investment without intention of controlling or participating in control of issuer, or of assisting another to do so, not unlawful if securities of issuer held by purchaser, members of his immediate family, and his or their accomplices in racketeering activity or collection of unlawful debt after such purchases do not amount in aggregate to 1% of outstanding securities of any one class, and do not, either in law or in fact, confer power to elect one or more directors of issuer. (RIGL 7-15-1 through 11).

Stockholders’ Meetings.

Generally same as Model Act. Failure to hold annual meeting at designated time does not cause forfeiture or dissolution of corporation. If no such meeting is held in 13 month period, Superior Court may, upon application of any shareholder, order meeting to be held. Special meetings may be called by board of directors or by those authorized by articles of incorporation or by-laws. Upon application of shareholder, director or person aggrieved, Superior Court for county where corporation’s principal office is located will determine validity of elections, appointment of any director or officer, right of any person to hold office, and if office is claimed by more than one person, person entitled thereto; will determine voting and other rights of persons claiming same in respect of such election or appointment; and will confirm election or appointment, order new election or direct other relief. (RIGL 7-1.2-701).

Notice.

Written notice must be given not less than ten nor more than 60 days prior to meeting. (RIGL 7-1.2-701). Attendance of person at meeting constitutes waiver of notice of such meeting except where attendance is for express purpose of objecting to transactions of any business because meeting not lawfully called or convened. Neither business to be transacted at nor purpose of any meeting of shareholders or members of committee of corporation need be specified in any written waiver of notice unless required by by-laws. (RIGL 7-1.2-701).

Closing of Transfer Books and Fixing Record Date.

Generally same as Model Act, except that if closed, stock transfer books must be closed for stated period, not less than that specified in any applicable by-law and not more than 60 days. (RIGL 7-1.2-703).

Voting List.

After fixing record date for meeting, list of shareholders must be made available for inspection by any shareholder, his agent or attorney. (RIGL 7-1.2-704). Persons listed to vote may vote. If right to vote is challenged, inspector or presiding person relies on list to determine right to vote.

Quorum.

Generally same as in Model Act. (RIGL 7-1.2-705).

Greater Voting Requirements.

Whenever articles of incorporation require vote of holders of greater proportion of shares, or of any class or series thereof than required by statute, articles of incorporation control. (RIGL 7-1.2-706).

Action without meeting may be taken (1) if all shareholders entitled to vote consent thereto in writing, and (2) except for shareholder action in connection with mergers, consolidations, certain acquisitions and sale or transfer of assets not in ordinary course, upon written consent of less than all shareholders entitled to vote if (a) consenting shareholders would be entitled to cast at least minimum number of votes which would be required to take such action at meeting at which all shareholders entitled to vote thereon are present, and (b) action pursuant to above provision is authorized by articles of incorporation. Prompt notice of such action must be sent to all shareholders who would have been entitled to vote at such meeting. All written consents of shareholders are to be filed with minutes of proceedings of shareholders. (RIGL 7-1.2-707). Nonbusiness corporations may also act by unanimous written agreement of membership in place of actual meeting. (RIGL 7-1.2-612).

Proxies.

Generally same as Model Act, except that proxy may be irrevocable if coupled with interest. (RIGL 7-1.2-708). Shareholder may vote by proxy using Internet and/or telephone. (RIGL 7-1.2-708).

Voting.

Generally same as Model Act. Shares jointly owned or held in tenancy in common may be voted by one of owners or tenants, unless another joint tenant or tenant in common seeks to vote any of such shares in person or by proxy. (RIGL 7-1.2-708). Cumulative voting is permitted if allowed in articles of incorporation. (RIGL 7-1.2-708). Articles of incorporation may confer on holders of bonds or debenture holders rights to vote in election of directors and on any matters on which shareholders may vote and rights to inspect books and records of corporation. (RIGL 7-1.2-710).

Voting Trusts and Shareholder Agreements.

Generally same as Model Act, but shareholders’ agreements are valid and enforceable for period not to exceed ten years and provisions in statute governing voting trusts and shareholders’ agreements are permissive and are not to be interpreted so as to invalidate otherwise legal voting trusts, agreements and irrevocable proxies. Voting trusts and shareholders’ agreements may be extended for additional period not exceeding ten years. (RIGL 7-1.2-709).

Directors.

Generally same as Model Act, except that directors are not required in close corporations. See subhead Close Corporations, infra. Directors manage business and affairs of corporation. (RIGL 7-1.2-801). Directors required to act in good faith with care of ordinarily prudent person in like position under similar circumstances and in manner reasonably believed to be in best interest of corporation. (RIGL 7-1.2-801). Board consists of one or more directors. (RIGL 7-1.2-802).

Directors’ Meetings.

Generally same as Model Act. (RIGL 7-1.2-809). Procedures for committee meetings adopted. (RIGL 7-1.2-808).

Powers and Duties of Directors.

Business and affairs of corporation must be managed by board of directors. Board of directors has authority to fix compensation of directors unless otherwise provided in articles of incorporation. (RIGL 7-1.2-801).

Liability of Directors.

Generally same as Model Act, except director is not liable under RIGL 7-1.2-811 for unlawful dividends, distributions, or redemptions if he acted with due care and good faith or if he relied in good faith on financial statements certified by certain officers of corporation or independent accountants. Articles of incorporation may include provisions which, except under certain circumstances, limit or eliminate personal liability of directors to corporation or its stockholders for monetary damages for breach of duties. (RIGL 7-1.2-202). Unpaid director of nonprofit corporation not individually liable for conduct in office unless malicious, willful or wanton misconduct. (RIGL 7-6-9). Unlawful for any person employed by or associated with any enterprise to conduct or participate in conduct of affairs of enterprise through racketeering activity or collection of unlawful debt. (RIGL 7-15-2[c]).

Officers.

Generally same as Model Act. Officers elected by directors or shareholders. Failure to elect officers does not dissolve or otherwise affect corporation. (RIGL 7-1.2-812).

Liabilities of Officers.

Corporate officer stands in fiduciary relationship toward stockholders; his position is analogous to that of trustee and cestui que trust; relationship is one of trust and confidence and imposes duty on fiduciary to act with utmost good faith. (98 R.I. 49, 199 A.2d 592). Unpaid officer of nonprofit corporation not individually liable for conduct in office unless malicious, willful or wanton misconduct. (RIGL 7-6-9).

Indemnification of Directors, Officers, Employees and Agents.

Generally same as 1980 amendment to Model Act § 5 except that indemnification provided by statute is not exclusive of other rights existing under by-laws, by agreement, by vote of stockholders or disinterested directors, or otherwise. (RIGL 7-1.2-814).

Directors’ etc. Conflicts of Interest.

Generally same as Model Act. (RIGL 7-1.2-807).

Registered Agent and Registered Office.

Generally same as Model Act except that where registered agent of corporation is attorney his business address need not be identical with registered office. Any incorporator, officer, agent or servant of corporation who designates registered agent for that corporation without registered agent’s authority, will be guilty of misdemeanor punishable by fine of not more than $1,000 or by imprisonment of not more than one year, or both. (RIGL 7-1.2-501). See subhead Foreign Corporations, infra.

General Powers of Corporations.

Generally same as Model Act, with additional power to purchase insurance for its benefit on life of directors, officers or employees, or on life of any shareholder for purpose of acquiring, at his death, shares of its stock owned by such shareholder. (RIGL 7-1.2-302).

Dividends.

Generally same as Model Act.

Unclaimed Dividends.

See category 21 Property, topic 21.01 Absentees, subhead Escheat.

Sale or Transfer of Corporate Assets.

Generally same as Model Act. In sale of assets other than in regular course of business, notice to shareholders must enclose or include statement of shareholder's right to dissent and copy or summary of statutory provision governing rights of dissenters. (RIGL 7-1.2-1102). Shareholders' consent not required when sale is (1) to one or more subsidiaries in which transferor corporation owns shares possessing at least two-thirds of total combined voting power of all classes entitled to vote for directors, or (2) for cash with or without assumption of transferor's liabilities. If substantially all assets of parent corporation are shares possessing at least two-thirds of total combined voting power of all classes entitled to vote for directors in subsidiary or subsidiaries, sale of assets by such subsidiary or subsidiaries will be treated as sale of assets of such parent corporation. (RIGL 7-1.2-1101, 02).

Right to Dissent and Rights of Dissenting Stockholders.

Generally same as Model Act. Shareholder may not dissent as to less than all of shares registered in his name which are owned beneficially by him. Nominee or fiduciary may not dissent on behalf of any beneficial owner as to less than all shares of such owner registered in name of such nominee or fiduciary. Unless otherwise provided in articles of incorporation, no right to dissent for holders of shares which, as of date fixed to determine shareholders entitled to notice of proposed transaction, were (1) registered on national securities exchange (2) held of record by not less than 2,000 shareholders, or (3) in opinion of court or any appraiser appointed thereby, regularly traded in full, free, fair and active market. (RIGL 7-1.2-1201, 02).

Books and Records.

Generally same as Model Act. (RIGL 7-1.2-1502).

Reports.

Generally same as Model Act. Business corporation's annual report need not include name and address of its registered agent. (RIGL 7-1.2-1501). Annual report filing fee, $50. (RIGL 7-1.2-1602). Nonbusiness corporations must file report in June of each even year: Filing fee, $20. (RIGL 7-6-92). Penalty for failing to file annual report is $25. (RIGL 7-6-94 also RIGL 7-1.2-1501). See subhead Dissolution, infra.

Merger or Consolidation.

Generally same as Model Act. Every class of shares of any merged or consolidated corporation is entitled to vote as class, whether or not such class is otherwise entitled to vote. Unless required by articles of incorporation, approval by, and notice to shareholders of surviving corporation are not required if: (1) Plan of merger does not amend articles of incorporation of such corporation, and (2) plan of merger does not involve issuance or transfer by such corporation (directly or through options or warrants for, or shares or debt instruments convertible within one year into such shares) of shares possessing more than 20% of total combined voting power of all classes entitled to vote for directors which will be outstanding immediately after such merger. (RIGL 7-1.2-1002). Merger becomes effective upon issuance of certificate of merger by Secretary of State or on later date as stated in plan. (RIGL 7-1.2-1005).

Stockholder Approval of Certain Acquisitions.

Before any domestic corporation acquires, directly or through a subsidiary, either (1) all or substantially all assets of one or more corporations, or (2) shares of one or more corporations possessing two-thirds or more of total combined voting power of all classes of such acquired corporation or corporations entitled to vote for directors, for consideration which includes (either directly or through medium of options or warrants for, or shares or debt instruments convertible within one year into, such shares) shares of acquiring corporation possessing more than one-third of total combined voting power of all classes of acquiring corporation entitled to vote for directors which will be outstanding immediately after such acquisition, such acquisition must be approved by shareholders of acquiring corporation. (RIGL 7-1.2-1002).

Business Combination Act.

Corporation, (i) organized under R.I. law, (ii) having at least 5% of voting stock owned beneficially by R.I. residents, and (iii) either has principal executive offices and significant business operations in R.I. or employs in R.I. at least 250 people or 25% of its total workforce, including its subsidiaries, may not engage in “business combination” with shareholder owning 10% or greater of corporation’s voting stock for five years after date such shareholder attains 10% ownership, unless corporation’s board of directors approves business combination. “Business combination” is prohibited after expiration of five year period, unless (i) approved by majority of corporation’s disinterested shareholders, or (ii) fair price test is satisfied. “Business combination” is defined broadly. (RIGL 7-5.2-1 through 8).

Conversion of Other Entity to Domestic Corporation.

Other business entity may convert to domestic corporation by filing certificate of conversion and articles of incorporation with Secretary of State in accordance with RIGL 7-1.2-105 after conversion is approved in manner provided for in entity’s own governing documents. (RIGL 7-1.2-1007).

Conversion of Domestic Corporation to Other Entity.

Domestic corporation may convert to another type of business entity upon authorization of conversion and filing with Secretary of State of certificate of conversion—both in accordance with RIGL 7-1.2-1008. (RIGL 7-1.2-1008).

Limited Liability Companies.

See topic 2.06 Limited Liability Companies.

Dissolution.

Generally same as Model Act. Requires affirmative vote of holders of majority of shares entitled to vote on resolution unless any class of shares is entitled to vote as class, in which event approval also requires affirmative vote of holders of majority of shares of each class entitled to vote as class and of total shares entitled to vote on resolution, among other things. (RIGL 7-1.2-1303). Upon issuance of certificate of dissolution by Secretary of State, existence of corporation ceases. (RIGL 7-1.2-1301). If corporation is dissolved prior to effective date stated in articles of incorporation, no franchise taxes are due. (RIGL 7-1.2-1301).

Insolvency and Receivers.

Generally same as Model Act. Additional grounds for court to liquidate assets and business of corporation are that two or more shareholder factions are divided, internal dissension is threatening serious harm (RIGL 7-1.2-1301), and that holders of one-half or more of outstanding capital stock have voted for dissolution (RIGL 7-1.2-1314). Judicial liquidation of assets may be ordered in action by creditor when corporation is insolvent or assets misapplied or in danger of being wasted or lost. When claim of creditor has been reduced to judgment and execution thereon returned unsatisfied or corporation has admitted claim is due and owing, prima facie evidence of insolvency. (RIGL 7-1.2-1314 through 1324).

Avoidance of dissolution sought by one or more shareholders may be accomplished by corporation or one or more of its shareholders filing with court election to purchase shares of shareholder or shareholders seeking dissolution at price equal to their fair value. (RIGL 7-1.2-

1315). Receiver may be appointed if liquidation would not be appropriate. (RIGL 7-1.2-1323).

Close Corporations.

Model Act does not contain following provisions. If approved by all shareholders and if corporation's articles of incorporation contain heading immediately after corporation's name stating it is close corporation pursuant to RIGL 7-1.2-1701, articles of incorporation, by-laws or agreement may restrict, or assign to one or more shareholders, powers normally vested in board of directors or provide that there shall be no board of directors; grant right to one or more shareholders to dissolve corporation at will or on occurrence of specified contingency; or impose restraints on transfer of corporation's shares. RIGL 7-1.2-709, limiting duration of voting trust or shareholders' agreement, not applicable to close corporation. Status is terminated by filing amendment to articles of incorporation if: (1) all shareholders, or such lesser number if so provided, approve termination, (2) there are more than 30 shareholders and one shareholder demands termination, or (3) any person who acquires record shares of corporation without notice or knowledge of such status demands termination, provided notice is conclusively presumed if corporation's stock certificates state on face under name of corporation that it is close corporation pursuant to RIGL 7-1.2-1701. Court may order filing of such amendment. (RIGL 7-1.2-1701).

Appraisal.

Right exists for sale of corporate assets, merger, consolidation and acquisitions requiring shareholder approval. (RIGL 7-1.2-1201, 02). See subheads Sale or Transfer of Corporate Assets; and Right to Dissent and Rights of Dissenting Stockholders, supra.

Foreign Corporations.

Generally same as Model Act. (RIGL 7-1.2-1401 through 1418). Foreign corporations holding mortgages on real estate without maintaining records in State must authorize registered agent to accept payment and provide for discharge of such mortgages. (RIGL 7-1.2-1408). Name may be same as name of corporation whose certificate of incorporation has been revoked by Secretary of State, provided such revocation has not been withdrawn within one year. (RIGL 7-1.2-1403). See also subheads Registered Agent and Registered Office, supra; Franchise Tax, and Business Corporation Tax, infra.

Socially Responsible Corporations.

Qualifying corporations granted public recognition. (RIGL 42-63.2-1 et seq., effective Jan. 1, 1992).

Taxation of Corporate Property.

Real estate and tangible personal property of corporations is taxed by cities and towns in like manner as though owned by individual. See category 22 Taxation, topic 22.13 Property Taxes, subhead Real and Personal Property Taxable.

Franchise Tax.

Domestic corporations and corporations qualified to do business in state (except public utilities, insurance or surety companies, religious, charitable, literary and other nonbusiness corporations) are liable for franchise tax at rate of $2.50 for each $10,000 or fractional part thereof of authorized capital, no-par shares being taken at $100 per share (minimum fee of $100). Franchise tax is reduced by amount of business corporation taxes paid. If corporation shows, by supplemental affidavit attached to its return, that it has not at any time during its next preceding taxable year been engaged within this state in any business activities tax is at following rates only: $500 where stock does not exceed $1,000,000; and further sum of $12.50 for each additional $1,000,000 or fraction thereof. (RIGL 44-12-1 through 12).

Franchise tax return, as of the last day of its next preceding taxable year, must be filed with Tax Administrator on or before Mar. 15, if fiscal year is calendar year, and if not, then on or before 15th day of third month following close of fiscal year. Tax is payable to same officer within 15 days after its assessment and bears interest at annual rate provided in RIGL 44-1-7 from that time if not paid when due. Treasurer or other corporate agent who neglects or refuses to make return is subject to fine up to $500. Such tax is lien on corporation's real estate. Failure to pay franchise tax for period of two years after such tax is due and payable is ground for forfeiture of charter or articles of association. (RIGL 44-12-1 through 12).

Business Corporation Tax.

Imposed by RIGL 44-11-1 et seq. Each corporation to pay annually to Rhode Island tax equal to 9% of net income, as defined in RIGL 44-11-11, qualified in RIGL 44-11-12, and apportioned as provided in RIGL 44-11-13 through RIGL 44-11-15. (RIGL 44-11-2). Pass-through entity (e.g. an S corporation, LLC, or limited partnership) is required to withhold income tax at highest Rhode Island withholding rate provided for individuals or 9% for corporations on member's share of income from entity that is derived or attributable to sources in Rhode Island distributed to each non-resident member. (RIGL 44-11-2.2).

Amount of tax is (1) 9% of its net income, as defined in RIGL 44-11-11, 12 and apportioned to this state as provided in RIGL 44-11-13 through 15 for taxable year; or (2) 10¢ for each $100 of gross income as defined in this section, as of last day of taxable year but in no event less than $100 if corporation is personal holding company, regulated investment company, or real estate investment trust. (RIGL 44-11-2).

Investment Companies.

A corporation deriving 90% or more of its gross receipts from buying, selling, dealing in or holding securities on its own behalf and not as broker, underwriter or distributor is exempt from tax computed on net worth, but instead pays tax on net income set forth above, after deducting from net income 50% of excess of capital gains over capital losses. (RIGL 44-11-2).

"Personal holding company" registered under federal Investment Company Act of 1940, "regulated investment company" or "real estate investment trust," as defined in applicable federal income tax law, does not pay tax computed on either net worth or net income but instead pays tax of 10¢ for each $100 of gross income, or $100, whichever is greater. Gross income means gross income as defined in applicable federal income tax law, plus (i) any interest not included in such federal gross income minus (ii) interest on obligations of U.S. or its possessions, and other interest exempt from taxation by State of Rhode Island, and minus (iii) 50% of excess of capital gains over capital losses. (RIGL 44-11-2).

Subchapter S Corporations are not subject to Rhode Island income tax except to extent of income subject to federal tax under subchapter S. Shareholders include proportionate share of corporation's federal taxable income in personal returns. Enforcement procedures are set forth in statute with regard to nonresident shareholders. (RIGL 44-11-2[d]).

Domestic international sales corporations are treated under federal law as it existed on Dec. 31, 1984 and are not subject to tax on net income or net worth. (RIGL 44-11-11).

Foreign sales corporations which have valid election in effect for entire taxable year are not subject to tax on net income or net worth, and income is treated under federal law as it existed on Jan. 1, 1985.

Net income under Act means gross income as defined in federal corporation income tax law applicable to taxable year with certain specified additions, and with deductions which, with certain exceptions, are those allowed by such federal law. (RIGL 44-11-11).

Apportionment of net income to this state, where taxpayer derives income from sources or engages in any activities for profit both within and without this state, is made by means of allocation fraction computed under provisions of act. (RIGL 44-11-14, 15). Apportionment method may be elected by any taxpayer providing administrative services to pension or retirement plans and by banking institutions engaged only in credit card business. (RIGL 44-11-14.3).

Net worth is aggregate of values disclosed on corporation's books for its outstanding stock, paid in surplus, retained earnings and undivided profits, various surplus reserves and indebtedness owing directly or indirectly to certain shareholders other than qualified intercompany indebtedness owing to shareholder holding 80% or more of corporation's stock as determined in accordance with RIGL 44-11-16. If corporation owns 80% or more of each class of outstanding stock in subsidiary, its net worth, after adjustment, is reduced by 50% of its investment in subsidiary, as disclosed by its own books. Subsidiary can be either domestic corporation or entity organized under laws of foreign country provided, in latter instance, entity is considered corporation under federal tax law. If, in opinion of Tax Administrator, corporation's books do not disclose fair valuations, he may make reasonable determination of corporation's net worth which reflects fair value of corporate assets, exclusive of investment in subsidiary corporations. He is also authorized to prescribe regulations that would determine whether interest in corporation is to be treated as stock or indebtedness. Net worth of corporation having regular place of business outside state must be apportioned to this state by means of allocation fraction. (RIGL 44-11-1 through 16). (Business Corp. Tax Return, Form T-70A.)

Investment tax credit is governed by RIGL 44-31-1 et seq.

Tuition tax credit is governed by RIGL 44-62-1 et seq.

Disabled access credit is governed by RIGL 44-54-1.

Deduction for new research and development facilities is governed by RIGL 44-32-1.

Incentives for innovation and growth is governed by RIGL 44-63-1 et seq.

Deductions for initial qualifying investments in certified venture capital partnerships or initial investments in qualifying business entities which meet certain criteria are covered by RIGL 44-43-2. Wage credits and exclusions from capital gains in connection with such investments are also permitted under certain circumstances. (RIGL 44-43-3; 5).

Final returns in such form and containing such information as Tax Administrator may prescribe must be filed, (1) in case taxable year of taxpayer is calendar year, on or before Mar. 15 in year following close of such taxable year, and (2) in case taxable year of taxpayer is a fiscal year, on or before 15th day of the third month following its close. Under RIGL 44-11-4 Tax Administrator has promulgated regulations whereby affiliated group of corporations may file consolidated returns provided all such corporations consent to such filing, have same fiscal period, are subject to business corporation tax and, unless waived by Tax Administrator, also file separate returns. Tax Administrator may grant a reasonable extension of time for filing returns.

Corporations are required to file declarations of estimated tax and must pay entire amount of its estimated tax during current taxable year. Declarations required by Title 44, c. 26, must be filed whenever corporation's estimated tax for taxable year can be expected to exceed $500 as follows: if requirements of RIGL 44-26-2 are first met before 15th day of 3d month of taxable year, declaration must be filed no later than last day of 3d month of tax year; where said requirements are met after 15th day of 3d month and before 1st day of 6th month of tax year, declaration must be filed no later than 15th day of 6th month of tax year; where said requirements are met after last day of 5th month and before 1st day of 12th month of tax year, declaration must be filed no later than 15th day of 12th month of tax year. Amount of advance payment must be paid either (a) in three installments (40%-40%-20%), if declaration filed on or before last day of 3d month of taxable year, one installment at time of filing, another on 15th day of 6th month of taxable year, and last installment on 15th day of 12th month of taxable year; or (b) if declaration is filed after last day of 3d month of taxable year, and is not required by RIGL 44-26-3 to be filed on last day of 3d month of taxable year, but is required to be filed by 15th day of 6th month, payment must be paid in two installments (80%-20%), one installment by 15th day of sixth month, other by 15th day of 12th month; or (c) if declaration is not required to be filed by 15th day of 6th month of taxable year, but is required to be filed by 15th day of 12th month of taxable year, full payment must be paid at time of filing; or (d) if declaration is filed after time prescribed, including cases where an extension has been granted, there must be paid at time of such filing all installments which would have been payable had declaration been filed on time. (RIGL 44-26-4). All such advance payments are allowed as credit on final tax due. (RIGL 44-26-5). Interest at rate of 2% in excess of “prime rate” determined pursuant to RIGL 44-1-7(b) must be charged on amount of any underpayment for period of underpayment. (RIGL 44-26-6).

Return forms may be obtained from Dept. of Revenue, Division of Taxation, One Capital Hill, Providence, R.I. 02908.

Supplemental returns must be made disclosing any items of income or asset or any other information required by the act or regulations omitted in its return. Any taxpayer whose U.S. income tax return, or whose net income so returned, shall be changed or corrected by any U.S. official in any respect affecting tax imposed by this chapter, must, within 60 days after receipt of notification of final adjustment and determination of such change or correction, make supplemental return. Any deficiency must be paid within 15 days of notification (RIGL 44-11-19), together with interest at annual rate provided by RIGL 44-1-7.

Determination and Payment of Tax.

At time taxpayer files return it must pay to Tax Administrator amount of tax computed on basis of its net income under RIGL 44-11-2, less a credit for amount of taxes paid in advance. Thereafter, Tax Administrator determines correct tax and if tax so determined exceeds amount taxpayer has paid at time of filing its return, Tax Administrator mails taxpayer a notice of additional tax due, indicating basis on which tax is determined. If taxpayer within ten days following mailing of such notice gives Tax Administrator notice of its dissatisfaction, Tax Administrator may redetermine amount of such tax after hearing. Additional tax is due and payable within 30 days after mailing of such notice. (RIGL 44-11-6). Any tax not paid when due bears interest at rate of 2% in excess of “prime rate” as determined by statute. (RIGL 44-11-7).

Claim for refund may be filed with Tax Administrator at any time within three years after the tax has been paid, or, in case of a change or correction of its taxable income by any official of the United States government, within three years after receiving notice of such change or correction. Period is extended in certain cases when claim relates to net operating loss carryback or capital loss carryback. (RIGL 44-11-20).

Lien.

Any tax, penalty and interest imposed upon any corporation under this chapter constitutes a lien, prior to all others, upon such corporation’s real estate located in this state. (RIGL 44-11-8).

Notice of Sale.

Sale or transfer of a major part of assets of a domestic or foreign corporation subject to the tax, other than in ordinary course of business, or in any event by a real estate corporation, is fraudulent as against state unless corporation notifies Tax Administrator of terms of sale or transfer five days in advance thereof. Upon such transfer, tax owing to date becomes due and payable. (RIGL 44-11-29).

Appeals.

Any taxpayer aggrieved by Tax Administrator’s determination of tax due and payable may, within four months after such tax is payable, provided it has paid said tax, petition sixth division of district court setting forth reasons why such determination is alleged to be erroneous and praying for relief therefrom. Any taxpayer, aggrieved by failure of Tax Administrator to allow and pay claim for refund of any tax paid under this chapter within four months after same has been filed, may, within four months from expiration of such four month period, petition sixth division of district court. Party aggrieved by final order of court may seek review thereof in supreme court. (RIGL 44-11-35). These statutory provisions may be subject to Administrative Procedure Act (RIGL 42-35-1 through 18) providing mode of review of administrative action. (103 R.I. 688, 240 A.2d 727).

Taxation of Public Utilities.

Public utilities are subject to a tax on gross earnings (RIGL 44-13-1 through 34) and must file return on or before Mar. 1 each year (RIGL 44-13-6).

Professional Corporations.

Professional corporation may be organized according to laws governing such corporations (RIGL 7-5.1-1 through 12) to render professional services by following: physicians and surgeons, dentists, attorneys-at-law, osteopaths, professional engineers, architects, certified public accountants and licensed public accountants, veterinarians, chiropractors, podiatrists, registered nurses, optometrists, physical therapists, landscape architects or land surveyors. Only one such profession may be practiced by corporation and every officer, director and shareholder must be authorized to practice that profession, except that following groups may combine: (1) Physicians, surgeons, dentists, optometrists, registered nurses and podiatrists; (2) landscape architects, professional engineers, architects; and land surveyors; (3) certified public accountants and licensed public accountants. No person may be officer, director, shareholder or employee of more than one professional corporation without prior written approval of appropriate regulatory agency. (RIGL 7-5.1-1 through 12).

One or more attorneys admitted to practice in this state may incorporate under professional service corporation statute, provided that prior to commencing practice as corporation, such corporation applies for and receives from Supreme Court, or from any committee or board appointed by it, license to practice, and provided, further, that such corporation complies with all rules, regulations and orders issued by Supreme Court regulating practice of law. (106 R.I. 752, 263 A.2d 692). Other professions enumerated in statute require application for or approval of license prior to conducting business as professional service corporation.

Insurance must be maintained in amounts as set by statute. (RIGL 7-5.1-8).

Names of professional corporations must end with words “Corporation” or “Incorporated” or “Limited” or abbreviation “Corp.” or “Inc.” or “Ltd.” (RIGL 7-5.1-7).

Deeds.

See category 21 Property, topic 21.06 Deeds.

Rhode Island Non-Profit Corporation Act.

Rhode Island Non-Profit Corporation Act was substantially revised in 1984. Reference should be made to RIGL 7-6-1 through RIGL 7-6-108 for specific provisions. Health Insurance Conversion Act (RIGL 27-64-1 through RIGL 27-64-27) regulates all not-for-profit corporation conversions. Attorney General must review and approve. See also subheads Purposes and Liability of Directors, supra.

Uniform Prudent Management of Institutional Funds Act.

Uniform Prudent Management of Institutional Funds Act adopted (RIGL 18-12.1-1 through 10) including presumption of imprudence in RIGL 18-12.1-4(d).

See also category 22 Taxation, topic 22.03 Business Taxes.

2.04 [RESERVED]

2.05 JOINT STOCK COMPANIES:

No statutory provisions.

Professional Corporations.

See topics 2.02 Associations, 2.03 Corporations.

2.06 LIMITED LIABILITY COMPANIES:

Limited Liability Company Act.

Two or more persons may form limited liability company by delivering or causing to be delivered in duplicate executed Articles of Organization for filing with secretary of state. (RIGL 7-16-5). Certain entities may convert to limited liability companies by filing with Secretary of State executed Articles of Organization and Certificate of Conversion (RIGL 7-16-5.1) after conversion is approved pursuant to entities' controlling documents (RIGL 7-16-5.2). Every limited liability company organized under this Act has purpose of engaging in any business which limited partnership may carry on, except provision of professional services, as defined in § 7-5.1-2, unless more limited purpose is set forth in Articles of Organization. (RIGL 7-16-1 through 75). Filing fees: $150 for original articles of organization; $50 for amending, restating, or amending and restating articles of organization. (RIGL 7-16-65).

2.07 LIMITED PARTNERSHIP:

See topic 2.08 Partnerships.

2.08 PARTNERSHIPS:

Uniform Act adopted (RIGL 7-12-12 through 59) with following modification:

7-12-39. Subd. (1) reads: "On due application to the superior court by any judgment creditor of a partner, the court may charge the interest of the debtor partner with payment of the unsatisfied amount of such judgment debt with interest thereon" (continuing as in Uniform Act).

See also sections providing that specified provisions in partnership agreements shall not be deemed to be testamentary in character (RIGL 7-12-1), that surviving partner must deliver a detailed statement, verified by oath, of assets and liabilities of co-partners as of date of death of a partner to administrator or executor of deceased partner within ten days after written demand for same (RIGL 7-12-2), that such executor or administrator may enter upon premises and examine books of such co-partnership and take inventory (RIGL 7-12-3) and that, upon dissolution of a co-partnership, any partner may make a separate composition with creditors of such co-partnership (RIGL 7-12-4 through 10).

Limited liability partnership recognized. (RIGL 7-12-12 through 59).

Limited Partnership.

Revised Uniform Act adopted, effective Jan. 1, 1986 (RIGL 7-13-1 through 65), with following modifications:

7-13-1 expands upon definition and implications of written partnership agreement.

7-13-2 allows use of letters and punctuation “l.p.” in name in place of words “limited partnership” but prohibits use of any name similar to any other corporation or limited partnership organized or registered in state.

7-13-6 reads: “A limited partnership may carry on any business that a partnership without limited partners may carry on.”

7-13-8 provides requirements for filing certificate of limited partnership with Secretary of State.

7-13-8.1 and 8.2 provides for conversion of certain entities to limited partnership including filing of executed certificate of limited partnership and certificate of conversion with Secretary of State. (RIGL 7-13-13).

7-13-9 provides that certificate of amendment will be effective at time of its filing with Secretary of State.

7-13-13 provides that any signature on any certificate authorized to be filed with Secretary of State under any provision of this chapter may be facsimile.

7-13-19 defines liability of limited partners to third parties.

7-13-22 permits additional general partners to be admitted in accordance with partnership agreement or upon unanimous written consent of all parties.

7-13-33 provides that partnership agreement may provide that limited partner may not withdraw from limited partnership or assign partnership interest in limited partnership prior to dissolution and winding up of limited partnership.

7-13-37 sets forth limitations on distributions.

7-13-45. Superior Court is designated as to procedure for amendment, cancellation or dissolution.

7-13-54 outlines certain activities which do not constitute transacting business in state including maintaining or defending legal actions, conducting meetings, maintaining offices for securities, transfers or bank accounts, effecting sales to independent contractor, soliciting orders requiring acceptance outside of state, creating evidences of debt or liens on real or personal property, securing or collecting debts or transacting any business in interstate commerce.

Rhode Island has no statutory provision regarding liability upon return of contribution.

Fees for filing with Secretary of State, State House, Providence, 02903, specified in RIGL 7-13-54.1; certificate of limited partnership is $100. (RIGL 7-13-54.1).

Out-of-State Partnerships.

Partnerships composed of nonresidents must file with Secretary of State written appointment of agent for service of process. (RIGL 9-5-29). No other special registration requirements for foreign partnerships.

3 BUSINESS REGULATION AND COMMERCE

3.01 BANKS AND BANKING:

Uniform Commercial Code adopted. (RIGL 6A-1-101 et seq.). Rev. Art. 4: Bank Deposits and Collections adopted. Effective July 1, 2001. (RIGL 6A-4-101 through 4-505; Pub. L. No. 00-238, 00-421).

Regulated as Follows.

Basic statute is Tit. 19 which covers all financial institutions. Savings banks, banks, trust companies, loan and investment banks and savings and loan associations are supervised by Director of Business Regulation.

Bank Examiners must notify Department of Business Regulation in writing within five days if they apply for, accept, or are granted loan from bank they examined. (RIGL 6.1-42-14).

Deposits.

Minors not under guardianship may withdraw deposits made by them. (RIGL 19-9-11). Deposits may be made by one person in trust for another and if no other notice of existence and terms of trust are given to the bank, the deposit may be paid to person for whom deposit was made upon death of trustee. (RIGL 19-9-12). Deposits in names of two persons, payable to either or survivor, may be paid to either or to personal representative of survivor. (RIGL 19-5-5). Ownership of multiple-party account determined by RIGL 19-9-14.1. Mere form of deposit is not conclusive evidence of right to distribution and intention of depositor may be determined. (57 R.I. 411, 190 Atl. 440). “State Linked Deposit Policy” links deposit of state funds with bank performance based on federal rating system. (RIGL 35-4-4.1 through 4.6). Maximum unimpaired liability at bank to any one person not to exceed 15%; exceptions. (RIGL 19-3-3).

Unclaimed Deposits.

Bank deposits inactive for three years, sums payable on checks on which bank is directly liable which have been outstanding for more than five years from date payable, and property removed from safe deposit box or other safekeeping repository on which lease or rental period has expired that has been unclaimed by owner for more than five years escheat to state. (RIGL 33-21.1-6; RIGL 33-21.1-5; RIGL 33-21.1-16). Time period for abandonment begins again upon date of court-ordered sale, transfer or conveyance of any type of property referred to in RIGL 33-12.1-6. (RIGL 33-21.1-6[e]). After payment or delivery of funds or property to General Treasurer of State, person claiming interest in funds or property may make claim thereto to General Treasurer who, if he shall determine claim is valid, shall pay over funds or property to such person with income accruing on funds after they have been paid to General Treasurer. (RIGL 33-21.1-24; RIGL 33-21.1-21). Person aggrieved by decision or inaction of General Treasurer may appeal to Superior Court. (RIGL 33-21.1-26). See also category 21 Property, topic 21.01 Absentees, subhead Escheat.

Commercial Transactions.

Laundering of monetary instruments prohibited; civil and criminal penalties consistent with federal provisions. (RIGL 11-9.1-15).

Trust companies may carry on savings and commercial banking, rental of safe deposit vaults, and act as trustee, executor, administrator, custodian, conservator, guardian of any estate, assignee or receiver. (RIGL 19-31-2, RIGL 19-31-3). On change of bank or trust company into

national bank or of national bank into state bank or trust company by conversion, merger or consolidation, successor bank succeeds to fiduciary appointments and powers. (RIGL 19-7-5). Financial institutions may merge or consolidate. (RIGL 19-2-13).

Credit Unions.

Credit Union Conversion Act regulates conversion of credit unions into other types of financial institutions. (RIGL 19-5.1-1 et seq.). Credit unions are subject to reserve requirements under Federal Reserve Act, 12 U.S.C. 221 et seq. (RIGL 19-5-6).

Common trust funds permitted if not expressly prohibited in instrument creating fiduciary relationship. (RIGL 18-5-1 through 4).

Trustee under Keogh and IRA Plans.

Savings banks and credit unions may act as trustee or custodian under self-employed retirement plan (Keogh Plan) or individual retirement account plan (IRA Plan). (RIGL 19-5-4[f]; RIGL 19-21-8).

Electronic Devices and Machines.

Any financial institution or credit union may use customer-bank-communications terminals subject to approval by Director of Department of Business Regulation. Any request to establish customer-bank automated teller machine must be sent to director by certified mail, return receipt requested. If director fails to respond to such request within five business days of receipt of request it will be deemed approved. (RIGL 19-3-13). Other than federally-regulated institutions, no person within this state shall engage in business of providing electronic money transfers without license from Director. (RIGL 19-14-2). Banks prohibited from sending customers ATM cards except upon request of customer. (RIGL 19-3-13.1).

Incorporation of Banks and Trust Companies.

Board of Bank Incorporation is composed of Director of Business Regulation, General Treasurer, Attorney General, one member of House of Representatives and one member of Senate. Board charges filing fee for applications submitted for approval. (RIGL 19-1-2). Mutual savings bank may reorganize into mutual holding company. (RIGL 19-2-14.1).

Foreign Banks or Trust Companies.

A trust company incorporated in another state or a national banking association located in another state may act as trustee under any instrument in which it is named as trustee, or may be appointed as trustee of any trust by any court of competent jurisdiction of this state, or may be appointed by any probate court of this state as administrator, guardian of estate or conservator, or as executor of any will in which it is named as executor as long as home state grants Rhode Island institutions same privilege. Must file in office of Department of Business Regulation written instrument appointing Director of Business Regulation in his name of office its attorney, on whom all process may be served in any legal proceeding relating to conduct or affecting any property held under said trusts or said will or said appointment. (RIGL 19-3.1-6).

Out-of-state bank or bank holding company which conducts banking operations principally in one or more of New England states may acquire ownership or control in excess of 5% of outstanding voting stock of Rhode Island banks or bank holding companies; provided that laws of State in which such out-of-state bank or bank holding company is located or in which its operations are principally conducted expressly provide no less restrictive rights to Rhode Island bank or bank holding company, as determined by Rhode Island board of bank incorporation. Acquisition of bank or bank holding company voting stock requires shareholder and Director of

Department of Business Regulation approval. (RIGL 19-7-2). Interstate mergers and purchases of assets and assumptions of liabilities are permitted, provided that there is reciprocity with law of state where out-of-state institution has its principal office. (RIGL 19-7-2 through RIGL 19-7-4).

Conversion of Financial Institutions.

Any solvent financial institution with capital stock chartered under laws of Rhode Island may, upon notice and subject to approval, convert to and become general business corporation organized under Rhode Island Business Corporation Act, or another financial services entity chartered under U.S. law. (RIGL 19-10.1-1 et seq.).

Resident Agent.

All banks and bank holding companies doing business in Rhode Island must maintain resident agent within state. (RIGL 27-5-3.3).

Taxes.

See category 22 Taxation, topic 22.03 Business Taxes, subhead Taxation of Financial Institutions.

3.02 BILLS AND NOTES:

Uniform Commercial Code in effect. (RIGL 6A-1-101 et seq.). Rev. Art. 3: Negotiable Instruments adopted. Effective July 1, 2001. (RIGL 6A-3-101 through 3-606; Pub. L. No. 00-238, 00-421).

See topic 3.09 Commercial Code.

Special Requirements.

For special requirements as to consumer notes see topic 3.23 Sales, subhead Retail Credit Sales.

Judgment notes are probably unenforceable. (350 F. Supp. 1013). They may not be taken by a licensed small loan company. Violation by a small loan company is a misdemeanor and voids any right to collect principal, interest or other charges. (RIGL 19-25-24, 36).

Attorney fee clauses enforceable. (51 R.I. 24, 150 Atl. 610).

Special Defenses.

Consumer note taken in connection with retail sale of consumer goods and services must prominently display words “nonnegotiable consumer note.” Assignee of consumer note takes subject to defenses permitted under § 6A-3-306 even if assignee qualifies as holder in due course. (RIGL 6-27-5). No finance, delinquency, collection, repossession or refinancing charges may be recovered on any contract violating this section.

3.03 BILLS OF LADING:

See topic 3.08 Carriers.

3.04 BILLS OF SALE:

See topic 3.23 Sales.

3.05 BLUE SKY LAW:

See topic 3.24 Securities.

3.06 BROKERS:

Uniform Commercial Code in effect. (RIGL 6A-1-101 et seq.). See topic 3.09 Commercial Code.

No general statutory provisions.

Real Estate Brokers.

Brokers (including corporations, partnerships and other entities), and salesperson for brokers required to be licensed by Director of Business Regulation (RIGL 5-20.5-17), except lawyers and others as provided in RIGL 5-20.5-2; applicants required to pass examination and meet certain requirements (RIGL 5-20.5-3, 4); special provisions for nonresidents on reciprocal basis (RIGL 5-20.5-10); each broker and salesperson applicant required to file $1,000 bond with surety (RIGL 5-20.5-5); broker's or salesperson's license must be renewed by Jan. 1 in each year (RIGL 5-20.5-11); revocation or suspension of license following director's determination of facts of case based on verified complaint may be made with or without hearing (RIGL 5-20.5-14); director may refuse license if obtained by false representation, or fraudulent act or conduct (RIGL 5-20.5-14); damages of up to three times commission for violations payable to aggrieved person (Id.); hearings provided prior to revocation or suspension of license (RIGL 5-20.5-15); appeal provisions (RIGL 5-20.5-16); fines, imprisonment or both imposed for violations of chapter or for certain enumerated acts (RIGL 5-20.5-17). Fees payable: $10 for each application; examination fee based upon testing service contract with director; $50 for each broker's license and renewal; $30 for each salesperson's license and renewal; $5 for change of salesperson from one broker to another; $2 for duplicate of lost or destroyed license or pocket card. Errors and omissions insurance required for brokers. (RIGL 5-20.5-24). Real estate appraisers board—constitution and duties. (RIGL 5-20.7-4 et seq.). Unless licensed, person may not maintain action for recovery of commission for acting as broker. (RIGL 5-20.5-21). Persons aggrieved through fraud, misrepresentation or deceit of duly licensed real estate broker or real estate salesperson may recover from Real Estate Recovery Fund maintained by Department of Business Regulation. (RIGL 5-20.5-5).

Insurance Brokers.

See category 16 Insurance, topic 16.01 Insurance Companies.

Investment Brokers.

See topic 3.24 Securities.

Pawnbrokers.

See topic 3.14 Factors.

3.07 BULK SALES:

See category 8 Debtor and Creditor, topic 8.08 Fraudulent Sales and Conveyances.

3.08 CARRIERS:

Uniform Commercial Code in effect. (RIGL 6A-1-101 et seq.). See topic 3.09 Commercial Code.

Public Utilities Commission has general supervision over various types of carriers. (Title 39). Enumerated duties of utilities and carrier. (39-2 et seq.). Various types of "common carriers" defined by statute. (RIGL 39-1-2; RIGL 39-11-1; RIGL 39-12-2; RIGL 39-13-2; RIGL 39-14-1).

Rates.

Regulated by Public Utilities Commission in varying degrees depending on type of carrier. **Broadband Deployment and Investment Act** prohibits departments, agencies, commissions, or political subdivisions of state from regulating entry, rates, terms, or conditions of VoIP Service or IP-enabled service. (RIGL 39-28-1 et seq.).

Price discrimination and unreasonable preferences prohibited and penalties provided. (RIGL 39-2-2; RIGL 39-2-3).

Limiting Liability.

Carrier may by stipulation limit its common-law liability upon certain conditions. (RIGL 6A-7.1-309; 17 R.I. 441, 22 Atl. 1113).

Bills of Lading.

Uniform Commercial Code in effect. (See RIGL 6A-7.1-101 et seq.).

Liens and enforcement thereof provided. Uniform Commercial Code in effect. (RIGL 6A-7.1-307, 308). Lien of railroad for care and feeding of livestock. (RIGL 4-1-17).

Motor Vehicle Carriers.

See category 23 Transportation, topic 23.01 Motor Vehicles.

3.09 COMMERCIAL CODE:

Uniform Commercial Code in effect. (RIGL 6A-1-101 et seq.). 1962 Official Text adopted, and its 1972, 1973 and 1977 Official Amendments enacted. 1960, c. 147, §§ 2-5 roughly correspond to Art. 10 of 1962 Official Text. 6A-4.1 entitled “Funds Transfers” regulates wholesale wire transfers of funds, primarily between businesses or financial institutions, and not consumer electronic transfers. (RIGL 6A-4.1-1 et seq.).

Revised Art. 1 adopted (effective May 23, 2007) with technical and conforming amendments made to other articles. (Pub. L. No. 07-019).

Revised Arts. 3, 4, 5, 8 and 9 adopted (effective July 1, 2001), with technical and conforming amendments made to other articles. (Pub. L. No. 00-182, 00-238, 00-420, 00-421).

Revised Art. 7 adopted (effective July 1, 2006) with technical and conforming amendments (Alternative A) made to other articles. (Pub. L. No. 06-112 and 06-135).

Article 6 repealed effective July 13, 2001 by Pub. L. No. 01-210.

Intentional variations, options and alternatives from adopted UCC provisions not covered elsewhere are as follows:

§ 1-201(20)—amended to read “ ‘Good faith’ means honesty in fact in the conduct or transaction concerned.”

§ 1-209—1966 Official Optional Amendment not enacted.

§ 2-202(b)—word “writing” substituted for “record.”

§ 2-315—adds second sentence: “As to foodstuffs or drinks sold for human consumption in sealed containers, there is an implied warranty that the goods shall be reasonably fit for such purpose, and such warranty shall extend from the seller and the manufacturer or packer of such goods to the person or persons described in § 6A-2-318 of this chapter.” (1961, c.

144).

§ 2-318—amended to read: "A seller's or a manufacturer's or a packer's warranty whether express or implied including but not limited to a warranty of merchantability provided for in § 6A-2-314, extends to any person who may reasonably be expected to use, consume or be affected by the goods and who is injured by breach of the warranty. A seller or a manufacturer or a packer may not exclude or limit the operation of this section." (1969, c. 202). Alternatives in 1966 Official Optional Amendment not enacted.

§ 2-329 entitled "Servicing of Warranties"—added 1977, provides special rules relating to express and implied warranties in case of consumer sales (as defined), and includes several requirements relating to servicing of warranties by manufacturers and their representatives.

§ 2-401(b)—words "of title" omitted.

§ 2-505(b)(2)—words "of title" omitted.

§ 2-509(2)(a)—words "possession or control of" omitted.

§ 2-702—1966 Official Amendment not enacted.

§ 2-705(2)(c)—word "warehouseperson" substituted for "warehouse."

§ 2-725(4)—words "January 2, 1962" substituted for words "this Act becomes effective."

§ 2-725—added subsection (5): "Notwithstanding any other provision of this section, any action for breach of warranty arising out of an alleged design inspection, testing or manufacturing defect, or any other alleged defect of whatsoever kind or nature in a product, must be commenced within ten (10) years after the date the product was first purchased for use or consumption."

§ 2A-103(1)(c)—words "a single article, as a machine, or a set of chapters" substituted for "a single article, as a machine, or a set of articles."

§ 2A-103(1)(e)—optional clause omitted.

§ 2A-103(1)(s)—words "a single chapter" substituted for "a single article."

§ 2A-106(1)—words "within 30 days thereafter in which the goods are to be used, or in which the lease is executed by the lessee" substituted for "within 30 days thereafter or in which the goods are to be used."

§ 2A-216—Alternative C adopted.

§ 2A-222—"Effect of tax increase on lease payments," provides that a residential real estate lease shall not contain any provision obligating lessee to make payments to lessor on account of increased real estate tax levied during lease term, unless certain statutorily mandated language is set forth in such lease.

§ 3-606—entitled "Official Comments," provides: "It is the intention of the general assembly that the official comments of this chapter represent the express legislative intent of the general assembly and shall be used as a guide for interpretation of this chapter."

§ 4-106(b)—Alternative A adopted.

§ 4-505—identical to § 3-606.

§ 5-115—words “cause of action” substituted for “claim for relief.”

§ 5-118(a)—words “and any identifiable proceeds of the collateral” inserted after “letter of credit.”

§ 5-118(b)—words “Subject to subsection (c), as long as” substituted for “So long as.”

§ 5-119—entitled “Transition,” provides this section applies only to letters of credit issued on or after the effective date of this chapter (July 1, 2001).

§ 5-120—identical to § 3-606.

§ 7-204—option to refer to local statutes not exercised and optional subsection (4) omitted.

§ 7-701—“July 1, 2006” inserted.

§ 7-702—not enacted.

§ 7-705—identical to § 3-606.

§ 8-602—identical to § 3-606.

§ 9-102(a)(34)(i)(B)—words “including sea weeds” inserted after “aquatic goods.”

§ 9-102(a)(34)(ii)—words “Fish, shellfish or other” inserted before “aquatic goods.”

§ 9-109(d)(1)—does not apply to “a claim or right to receive compensation for injuries or sickness”; also does not apply to “a claim or right to receive benefits under a special needs trust.”

§ 9-201(b)—optional clauses (i) and (ii) included.

§ 9-311(a)(2)—words “A statute of this State, which provides for a security interest to be indicated on the certificate as a condition or result of perfection, including chapter 3.1 of Title 31 and chapter 22.1 of Title 46; of” inserted.

§ 9-334—optional section (j) omitted.

§ 9-406(j)—words “statutes, rules, and regulations inconsistent with this provision” substituted for “inconsistent provisions of the following statutes, rules, and regulations:”.

§ 9-408(e)—words “statutes, rules, and regulations inconsistent with this provision” substituted for “inconsistent provisions of the following statutes, rules, and regulations:”.

§ 9-501(a)(2)—adds “secretary of state”.

§ 9-502(b)(2)—optional words omitted.

§ 9-502(b)(3)—optional words omitted.

§ 9-502(c)(4)—optional words included.

§ 9-512(a)—Alternative B adopted; adds book and page reference as additional requirement.

§ 9-516(b)(iv)—optional words included.

§ 9-518(b)—Alternative B adopted; adds book and page references as additional requirement.

§ 9-519(b)—words “Except as otherwise provided in subsection (i)” inserted at beginning of subsection (b); “January 1, 2006” inserted.

§ 9-519(d)—optional words included.

§ 9-519(f)—Alternative B adopted; adds book and page reference as additional requirement.

§ 9-519(h)—words “Except as otherwise provided in subsection (i)” inserted at beginning of subsection (h).

§ 9-519(i)—optional language included.

§ 9-520(b)—optional language omitted.

§ 9-522(a)—Alternative B adopted; adds book and page references as additional requirement.

§ 9-523(c)(1)(i)—optional language omitted.

§ 9-523(d)—words “its written certificate” inserted.

§ 9-523(f)—“secretary of state” inserted.

§ 9-525—amended to reflect Rhode Island fees.

§ 9-525(c)—Alternative A adopted.

§ 9-526(a)—words “secretary of state” inserted.

§ 9-526(a)(2)—optional language included.

§ 9-526(b)—words “secretary of state” inserted.

§ 9-609(b)(2)—words “; provided however, in the case of repossession of any motor vehicle without knowledge of the retail buyer, the local police department shall be notified of such repossession within one hour after obtaining such possession. In the absence of a local police department or if the local police department cannot be reached for notification, the state police shall be promptly notified of such repossession” inserted at the end of subsection (b)(2).

§ 9-615.1—“Security interests—cross collateral,” provides special rules for cross-collateralization of consumer goods purchased on credit.

§ 9-710—identical to § 606.

Financing statement, although signed by both debtor and secured party and filed in accordance with provisions of Code, which does not contain grant of security interest, does not qualify as security agreement under § 6A-9-203(b). (97 R.I. 59, 196 A.2d 150).

For offices for filing and fees under Article 9, see categories 10 Documents and Records, topic Records; and Mortgages, topic Chattel Mortgages.

Forms.

See end of this Digest.

See also topics 3.01 Banks and Banking, Bills and Notes, Brokers, Carriers, Contracts, Factors, Frauds, Statute of, Sales, Securities, Warehousemen; categories 2 Business Organizations, topic Corporations; Civil Actions and Procedure, topic Limitation of Actions; Debtor and Creditor, topics Assignments, Fraudulent Sales and Conveyances, Liens; Documents and Records, topics Records, Seals; Mortgages, topic Chattel Mortgages.

3.10 CONDITIONAL SALES:

See topic 3.23 Sales.

3.11 CONSIGNMENTS:

See topic 3.14 Factors.

3.12 CONSUMER PROTECTION:

Door-to-Door Sales.

Buyer may cancel sale or lease of merchandise solicited in home by written notice to seller mailed within three days of signing sales contract or lease. (RIGL 6-28-3). Sales agreement must disclose certain listed items and seller must give notice to buyer of all buyer's rights under chapter 6-28. Seller's failure to return deposit within 30 days of rightful cancellation by buyer shall enable buyer to recover double damages. (RIGL 6-28-4). No seller may offer buyer commission or rebate in return for names of prospective purchasers unless seller gives buyer chart showing number of people who participated in plan during past three years and amounts of money paid to them and unless there is separate written agreement signed and dated by both buyer and seller containing statements listed in RIGL 6-29-1. Consumer Note.—Promissory note executed by retail buyer in connection with sale of consumer goods and services must contain words "non-negotiable consumer note" placed prominently thereon. Assignee takes subject to defenses permitted under RIGL 6A-3-306 even if assignee qualifies as holder in due course. (RIGL 6-27-5).

Credit Cards.

No person granting or extending credit by use of credit cards may mail any such card to any individual unless such individual shall have previously made written request therefor. (RIGL 6-30-1). Provisions do not apply to issuance of card to person already having credit account with issuer; to issuance of credit card to individual whose credit account was transferred to issuer by another person engaged in business of extending credit by use of credit cards; or to renewal of previously issued cards. (RIGL 6-30-3). Any person, firm or corporation violating provisions of 6-30 is guilty of misdemeanor and is prohibited from recovering debt created through use of credit cards. (RIGL 6-30-4). No seller or service provider shall print or otherwise produce or reproduce, or permit printing or other production or reproduction of either: any part of credit card account number, other than last five digits or other characters on any receipt provided or made available to cardholder; or credit card expiration date on any receipt provided or made available to cardholder. Any cardholder whose credit card has been subject of violation of this section may bring civil action in superior court against provider.

Mail Order Sales.

Every person conducting mail order or catalog sales business within state who uses post office box or telephone answering service must disclose legal name of business and complete street address from which business is conducted in all advertising. (RIGL 6-40-1 through 3).

Electronic Mail Fraud.

Electronic Mail Fraud Regulatory Act grants consumers right to bring action for damages or injunction against any person who represents himself using Internet to be business or individual without authority of such business or individual. (RIGL 6-48.1-1 et seq.).

Truth-in-Lending.

No exemption granted from Federal Truth-in-Lending requirements.

Fair Debt Collection Practices Act.

(RIGL 19-14.9-1 et seq.).

Unit Pricing.

Every person, firm, corporation or other business entity of more than seven full time employees that sells at retail listed products or other consumer commodity designated by Director of Business Regulation must disclose to consumer “unit price” of commodity. (RIGL 6-31-2, RIGL 6-31-5).

Price Disclosure.

Every person who sells at retail any consumer commodity must disclose total price thereof in manner standard within each place of business and must clearly set off dollars from cents. (RIGL 6-31-2). Every person who advertises sale at percentage of regular price must post regular price at point of purchase. (RIGL 6-13-11).

Lay-Away Sales.

Buyer may cancel lay-away sale, except of special order merchandise, by written notice to seller within ten days of signing agreement, after which time seller may retain maximum of 10% of payments made. (RIGL 6-32-3). Seller is prohibited from committing certain unlawful acts with respect to sale. (RIGL 6-32-2). Seller must give notice to buyer of buyer’s rights under chapter 6-32. (RIGL 6-32-4). Any person violating any provision is guilty of misdemeanor. (RIGL 6-32-6).

Closing Out Sales.

Governed by c. 6-14.

Mortgages.

Lenders must disclose brokerage fees, loan fees, points, finders fees, origination fees or similar charges on all secured mortgage loans on real estate containing not more than four dwelling units. Specific reference must be made to fact that in event of prepayment, such charges are not refundable. (RIGL 34-23-6).

Trade Practices.

Rhode Island Unfair Trade Practice and Consumer Protection Act prohibits use of unfair methods of competition and unfair or deceptive acts or practices (RIGL 6-13.1-1 through 12), compels distributors of gas and/or electric appliances to provide parts and manuals to businesses engaged in servicing such appliances, and prohibits price discrimination in sale of appliance parts (RIGL 6-13.1-12 through 14). Service contractors must disclose to potential customers fees charged for service call. (RIGL 6-13.1-16). Bill of sale for electrical appliance sold for more than

$50 must note model year designated by manufacturer of appliance. (RIGL 6-13-9).

False Claims.

State False Claims Act (RIGL 9-1.1-1 et seq.) prohibits, among other things, knowingly presenting or causing to be presented to officer or employee of state or member of Rhode Island National Guard false or fraudulent claim for payment or approval (RIGL 9-1.1-3). Attorney General or private person may bring civil enforcement action and, in action by private person, person may receive at least 15% but not more than 25% of proceeds of action or settlement of claim. (RIGL 9-1.1-4).

Persons engaged in business of servicing or repairing electric or gas appliances for consumers shall inform consumer of intention to use rebuilt or used parts. (RIGL 6-13.1-12.1).

Unsolicited Merchandise.

Receipt of unsolicited goods through mail or otherwise must be considered unconditional gift to recipient. (RIGL 6-13-10; RIGL 6-33-1).

Food and Drug Laws.

Rhode Island Food, Drug and Cosmetic Act prohibits, among other things, manufacture and sale of any food, drug, device or cosmetic that is adulterated or misbranded. (RIGL 21-31-1 through 23). Pharmacists must label prescription drugs. (RIGL 5-19-36.1). Laws regulate handling and labeling of dairy, fish, poultry and other food products. (RIGL cc. 21-1 through 21-26 and 21-33). Food establishment sanitation regulated. (RIGL 21-27-1 et seq.). Physicians may prescribe either specific drug or provide for substitutions but must clearly indicate such to dispensing pharmacists. Consumer receives savings on substituted drugs. (RIGL 5-37-18, RIGL 5-19-38).

Used Cars.

Car dealers are prohibited from selling motor vehicles to consumers without providing consumer written warranty protecting against certain specified defects, which warranty period shall vary in accordance with mileage of vehicle. (31.5.4-1 through 5).

Automobile repossession governed by RIGL 6-51-1 et seq.

Miscellaneous.

Special laws govern labeling of spermaceti oil (RIGL 6-9-1 through 4), thread (RIGL 6-10-1 through 7), gold and silver (RIGL 6-11-1 through 8), and plastic bottles and containers (RIGL 23-18.13-1). Special laws govern control of hazardous substances (RIGL 23-38.1-1 through 15), bakery products (21-24.1 through 8), frozen dairy products (RIGL 21-9-1 through 13), packaging of poisonous household substances (RIGL 23-38.2-1 through 8), solicitation of goods and services through use of prizes and gifts (RIGL 42-61.1-1 through 9), control of flammable fabrics (RIGL 23-38.3-1 through 12), sales of gift certificates (RIGL 6-13-12), warranties for assistive technology devices (RIGL 6-45-1), gasoline (RIGL 31-37-11), insulation contracts (RIGL 6-38-1 through 6), itinerant vendor goods (RIGL 5-15-17), and children’s products (RIGL 23-74-1 through 8). Sales below cost prohibited. (RIGL 6-13-1 through 8). No agreement regarding sale of consumer goods may contain provision giving seller power to sell or attach real estate prior to obtaining judgment. (6.-13.1-17). Businesses that accept personal checks from Rhode Island customers are prohibited from refusing checks based solely on geographic area in which customer lives. (RIGL 6-13-18). Closing out sales are regulated by RIGL 6-14-1 through 16 which require seller to obtain license. Retail customers entitled to cash refund for unused items returned within five business days of date of purchase unless clearly informed otherwise by posted signs. (RIGL 6-27-9). Packaged bakery products required to have pull date. (RIGL 21-33-1 through 6). Contracts entered into for repair of motor vehicle after accident rescindable within 48 hours of such accident by presentation of written notice to repairer. (RIGL 6-35-1). Certificate/license required for electrical contractors, oil burner contractors, fire alarm contractors. (RIGL 5-6-2; RIGL 5-6-8). Financial institutions must display notice of all charges. (RIGL 18-9-21.1). Alcohol servers must complete appropriate training program. (RIGL 36-7-6.1). Public Radio Conversions Act governs conversions of public radio stations to commercial radio stations. (RIGL 18-4.1-1 et seq.). Home heating oil solicitation, advertising, and contracts must meet certain requirements. (RIGL 5-82-1).

Uniform Deceptive Trade Practices Act not adopted. (RIGL 6-13.1-1 through 12).

Plain Language Law.

No "plain language" law has been adopted.

See also topic 3.23 Sales.

3.13 CONTRACTS:

Generally common law rules apply. (RIGL 6-1-1 through RIGL 6-35-3). Unless otherwise provided for in contract, personal representative of deceased joint contractor may be charged but plaintiff must first exhaust partnership estate if joint contract is partnership contract. (RIGL 9-2-6). See topic 3.12 Consumer Protection; categories 10 Documents and Records, topic Seals; Family, topics Infants, Husband and Wife.

Uniform Commercial Code is in effect. (RIGL 6A-1-101 et seq.). See topic 3.09 Commercial Code.

3.13A DEALERSHIPS:

Rhode Island Fair Dealership Act adopted. (RIGL 6-50-1 et seq.).

3.14 FACTORS:

Uniform Commercial Code in effect. (RIGL 6A-1-101 et seq.). For changes in Code covering secured transactions, see category 20 Mortgages, topic 20.01 Chattel Mortgages.

See also topic 3.09 Commercial Code.

Consignment Agreements.

Security interest of consignor in goods that are subject of consignment is purchase money security interest in inventory. (RIGL 6A-9-103).

License Requirements.

There are no license requirements for factors or commission merchants. However, there are licensing requirements for persons engaged in business of making loans of money, credit, goods, or things in action of $5,000 or less which may be applicable. (RIGL 19-14-1 et seq.).

Liens.

Covered by Uniform Commercial Code.

3.15 FRANCHISES:

No person shall offer to sell or sell franchise unless offer is registered as provided in "Rhode Island Franchise Investment Act" or is exempt therefrom. (RIGL 19-28.1-1 through 34). Scope and applicability defined in RIGL 19-28.1-4. Exemptions from registration set forth in RIGL 19-28.1-6.

Uniform Franchise and Business Opportunities Act not in effect.

3.16 FRAUDS, STATUTE OF:

No action shall be brought: (1) on contract for sale of lands, tenements or hereditaments, or lease thereof for more than one year; (2) on agreement made upon consideration of marriage; (3) to charge any trustee under any express trust, or any executor or administrator, on his special promise to answer any debt or damage out of his own estate; (4) on special promise to answer for debt, default, or miscarriage of another person; (5) on any agreement not to be performed within space of one year from making thereof; or (6) on agreement or promise to pay commission on sale of any interest in real estate, which includes leasing real estate (107 R. I. 92, 265 A.2d 328); unless promise or agreement, or some note or memorandum thereof, is in writing, and signed by party to be charged therewith, or by some other person by him thereunto lawfully authorized (RIGL 9-1-4; 589 A.2d 1196). Party's in-court admission of all of terms essential to validity of contract otherwise subject to statute eliminates need for any writing. (119 R.I. 862, 383 A.2d 1042).

Uniform Commercial Code in effect. (RIGL 6A-1-101 et seq.). See topic 3.09 Commercial Code.

Contracts of Sale.

Uniform Commercial Code applies. See RIGL 6A-2-201 (sale of goods); RIGL 6A-8-113 (statute of frauds is inapplicable to sale of securities); and RIGL 6A-1-206 (sale of personal property not otherwise covered).

Part Performance.

In equity, part performance may avoid operation of statute, if the part performance relied upon is exclusively referable to the oral agreement sued upon (495 A.2d 238; 487 A.2d 129; 79 R. I. 183, 86 A.2d 376; 75 R. I. 243, 65 A.2d 697; 51 R. I. 296, 154 A. 214) and is substantial (104 R. I. 665, 248 A.2d 69; 43 R. I. 367, 112 A. 781). Payment of purchase price for real estate is not sufficient part performance to avoid statute even in equity (54 R. I. 136, 170 A. 492; 49 R. I. 78, 139 A. 791), although it may be sufficient if combined with detrimental reliance (89 R. I. 223, 152 A.2d 219 [life estate]; 77 R. I. 1, 72 A.2d 671; 48 R. I. 213, 136 A. 767; 48 R. I. 33, 134 A. 849; but see 77 R. I. 142, 73 A.2d 815). Part performance is not sufficient to avoid statute in action to recover commission for sale of real estate. (105 R. I. 1, 249 A.2d 56).

3.17 [RESERVED]

3.18 INFORMATION TECHNOLOGY, INTERNET AND NEW MEDIA:

Unsolicited Electronic Mail.

Any unsolicited commercial email must include notice of toll free phone number or return email address by which recipient can terminate further correspondence. (RIGL 6-47-2). Use of third party's Internet domain name without permission is prohibited, as is misrepresentation of point of origin of unsolicited commercial email. (RIGL 6-47-2).

Identity Theft Protection Act.

Businesses that own or license personal information about Rhode Island residents are required to provide reasonable security for that information. (RIGL 11-49.2-1 through 7).

Computer Crime.

It is unlawful to access computer for fraudulent purposes (RIGL 11-52-2), or to intentionally, without authorization, and for fraudulent or other illegal purposes, alter, damage or destroy computer systems, networks, software or data contained in computer. (RIGL 11-52-3). Computer theft and trespass are unlawful. (RIGL 11-52-4, RIGL 11-52-5). Transmission of electronic communications for sole purpose of harassment is unlawful.(RIGL 11-52-4.2).

Uniform Electronic Transactions Act adopted with modifications. (RIGL 42-127.1-1 et seq.). Applies to any electronic record or electronic signature created, generated, sent, communicated, received or stored on or after July 13, 2000. (RIGL 42-127.1-4).

3.193.16 [RESERVED]

3.17 INTEREST:

Legal rate in absence of special agreement is 12%. (RIGL 6-26-1). Supreme Court has stated that legal rate may be insufficient under certain circumstances. (107 R. I. 202, 266 A.2d 56).

Maximum Rate.

Subject to provisions of RIGL 19-14.2-1, except for duly licensed pawnbrokers and small loan business, no person, partnership, association or corporation loaning money to or negotiating loan of money for another may directly or indirectly reserve, charge or take interest, before or after maturity at such rate which shall exceed greater of 21% per annum or “alternate rate” of unpaid principal balance of net proceeds of such loan, not compounded nor taken in advance or added onto amount of loan. Maximum rate not applicable to credit card transactions. Rate to be agreed upon between lender and debtor. Certain credit card fees construed as interest. (RIGL 6-26-2).

“Alternative rate” shall mean rate per annum equal to nine percentage points (9%) plus index which is domestic Prime Rate as published in money rate section of Wall Street Journal on last business day of each month preceding later of date of debtor’s agreement or date on which rate is redetermined in accordance with debtor’s agreement. If Wall Street Journal ceases publication of Prime Rate, Director of Business Regulations shall designate substantially equivalent rate. (RIGL 6-26-2).

Interest shall not be construed to include following (1) charges pursuant to cc. 30 and 31 of tit. 27, (2) premiums for insurance in amount not exceeding reasonable value of property offered as security for loan against any substantial risk of loss, liability, damage or destruction in conformity with insurance laws of this state, (3) premiums for insurance providing loss of income or involuntary unemployment coverage if such coverage is not factor in approval by lender of extension of credit and debtor gives specific written indication that cost of this coverage has been conspicuously disclosed to debtor, that debtor realizes that such coverage is not condition for extension of credit, and that debtor voluntarily desires such coverage, (4) commercial loan commitment or availability fees to assure availability of specified amount of credit for specified period of time or, at borrower’s option, compensating balances in lieu of such fees, (5) reasonable attorney’s fees customarily charged for preparation of loan, security or mortgage documents and for collection of defaulted loans, fees for title examination or title insurance, other customary and reasonable costs incident to closing, supervision and collection of loans in this state or (6) any excess of fair market value over cost of any security, as defined by federal Investment Company Act of 1940, of borrower acquired in connection with, or as incident to, extension of credit by any person, partnership, association or corporation engaged primarily in business of investing, owning, holding, or trading in securities, except any excess of any consideration received from redemption, sale, transfer or other disposition of any security of borrower over cost thereof, whether or not security was so acquired. Any of foregoing charges, if paid or advanced by lender, may be considered part of net proceeds of loan and, if paid by debtor, shall not be deducted from net proceeds of loan. (RIGL 6-26-2).

For loans made pursuant to a revolving or open-end credit plan, maximum finance charge is 18% per year. (RIGL 6-27-4[b]). Finance charge for retail sale of consumer goods shall not exceed 1½% per month. (RIGL 6-27-4[b]). See topic 3.23 Sales, subhead Retail Credit Sales.

No limitation on rate of interest where loan is for commercial purposes, amount exceeds $1,000,000, is capable of being repaid and is not secured by mortgage against principal residence of borrower. (RIGL 6-26-2).

Judgments.

Interest runs at 12% from date of accrual of any civil action, except in contractual actions where interest specified in contract. (RIGL 9-21-10). Post-judgment interest is calculated at 12% per annum and accrues on both principal of judgment and prejudgment interest. (RIGL 9-21-10). Every judgment for money draws interest at 12% per annum until time of discharge. In civil action where defendant is covered by liability insurance, if plaintiff makes written offer to settle for maximum amount of policy coverage or less and defendant's insurer refuses offer, defendant's insurer is liable for all interest due on judgment. (RIGL 27-7-2.2).

Open Accounts.

Except for banks, pawnbrokers and certain other lenders, on revolving or open-end credit plan no finance charge may be imposed until 30 days after purchase or 21 days after disclosures required in RIGL 6-27-4(b) are made, whichever is later.

Pawnbrokers.

Maximum rates are: on loans up to $50 not exceeding three months, 5% per month for periods exceeding three months or on loans exceeding $50, 2½% per month (RIGL 19-26-18), provided that when interest allowed by this section would amount to less than 50¢ minimum charge of 50¢ per month (RIGL 19-26-18). No person may charge interest on loans of $2,500 or less at rate greater than otherwise specified by law. Licensed small loan businesses may take no charges except to cover recording fees and cost of reasonable credit life, credit accident and health or property loss insurance.

Small Loans.

Licensed persons may lend any sum of money not to exceed $5,000 and may charge interest on unpaid principal balance on such loans at rate not exceeding: on loans up to and including $300 per month, 3% per month; on loans exceeding $300 but not exceeding $800, 2.5% per month; and on loans exceeding $800, but not exceeding $5,000, 2% per month. (RIGL 19-4.2-8).

Interest on loans shall not be paid, deducted, or received in advance, or compounded and shall be computed and paid only on unpaid principal balances and on basis of number of days actually elapsed, for purpose of which computations a month shall be any period of 30 consecutive days.

If part or all of consideration for contract of loan is unpaid balance of prior loan with same licensee then principal of new contract of loan shall not include any unpaid interest on such prior loan, except interest which has accrued within 60 days before making of such new contract of loan; however, unpaid interest on such prior loan need not be included in principal of new loan more than once in any period of 12 months.

Usury.

Every contract made in violation of any of provisions of RIGL 6-26-2, and every mortgage, pledge, deposit, or assignment made or given as security for performance of such contract, shall be usurious and void; but shall not affect rights of indorsee or transferee of negotiable instrument, who purchases same before maturity, for value, and without notice of its usurious character; however, nothing contained in RIGL 6-26-2 shall affect rights, duties or liabilities of any persons acting under provisions of c. 25 of tit. 19, and if borrower shall, either before or after suit, make any payment on such contract, either of principal or interest, or of any part of either, whether to lender or to any assignee, indorsee or transferee of such contract, said borrower shall be entitled to recover from lender amount so paid. Receipts shall be given whenever payments are made of either principal or interest. Provisions of RIGL 6-26-2 shall not apply to any bank and its subsidiaries, bank holding company and its subsidiaries, trust company, savings bank, loan and investment company, credit union, or building and loan association organized under laws of State of Rhode Island, any other entity regulated by Department of Business Regulation, national bank and its subsidiaries, federal savings and loan association or federal credit union. In event such regulated financial institution knowingly contracts or charges usurious rate of interest in violation of any of provisions of RIGL 6-26-2, it shall forfeit entire interest on debt. In case usurious rate of interest has been paid, person by whom it has been paid or his legal representative may recover from such regulated financial institution in action on debt, twice amount of interest so paid, provided that such action is commenced within two years from time usurious transaction occurred. (RIGL 6-26-4).

Any person who, on his own behalf or on behalf of any other person, partnership, corporation or association, shall willfully and knowingly violate any of provisions of RIGL 6-26-2 shall be guilty of criminal usury and shall be imprisoned for not more than five years. (RIGL 6-26-3).

Possession of records of usurious transactions is punishable by not more than one year in prison or fine of $500 or both. (RIGL 6-26-9, 10).

Civil and criminal penalties for violation of c. 6-27 (“The Rhode Island truth in lending and retail selling act”) are set forth under topic Sales, subhead Retail Credit Sales.

See topics 3.12 Consumer Protection, Sales, subhead Retail Credit Sales; also category 20 Mortgages, topic 20.04 Mortgages of Real Property, subhead Prepayment.

3.18 [RESERVED]

3.19 LICENSES, BUSINESS AND PROFESSIONAL:

Persons engaged in a number of professions or occupations must obtain licenses.

Expedited permit process for projects of critical economic concern. (RIGL 42-116-1 through 8).

Acupuncturists licensed under 5-37.2 et seq.

Alcoholic beverages (sale of) licensed under RIGL 3-7-1 et seq.

Architects registered under RIGL 5-1-1 et seq.

Assisted living facilities licensed under RIGL 23-17.4-2 et seq.

Athlete agents registered under RIGL 5-74.1-1 et seq.

Athletic trainers licensed under RIGL 5-60-1 et seq.

Auctioneers licensed under RIGL 5-58-1 et seq.

Automobile body repair shops licensed under RIGL 5-38-1 et seq.

Barbers, hairdressers, cosmeticians, manicurists, and estheticians licensed under RIGL 5-10-1 et seq.

Burglar and hold-up alarm businesses licensed under RIGL 5-57-1 et seq.

Business fast start office (one-stop system) allows persons to obtain certificates, permits, and other evidence of right to engage in business activity. Does not include occupational licenses that must be issued by licensing agency. (RIGL 42-132-1 et seq.).

Buyers and sellers of precious metals licensed under RIGL 6-11.1-1 et seq.

Caterers licensed under RIGL 3-7-14.2.

Chemical dependency professionals licensed under RIGL 5-69-1 et seq.

Chiropractors licensed under RIGL 5-30-1 et seq.

Collection agencies may not act as representative of or on behalf of another person to commence, settle, compromise, adjust or dispose of any civil or criminal case or cause of action unless licensed as attorney. (RIGL 11-27-2; RIGL 11-27-14). Any nonprofit sharing credit corporation or association or its officers or agents, licensed under former 1931, c. 1782, may collect or adjust, as incidental to its main purposes, contract claims of its own members; claim must be turned back to creditor-member for reference to his own attorney at law if pursued in court. (RIGL 11-27-16).

Contractors registered and licensed under RIGL 5-65-1 et seq.

Dentists and dental hygienists licensed under RIGL 5-31.1-1 et seq.

Designers of individual sewage disposal systems licensed under RIGL 5-56.1-1 et seq.

Dieticians and nutritionists licensed under RIGL 5-64-1 et seq.

Electricians licensed under RIGL 5-6-1 et seq.

Electrologists licensed under RIGL 5-32-1 et seq.

Employment agencies licensed under RIGL 5-8-1 et seq.

Engineers registered under RIGL 5-7-1 et seq.

Funeral directors/embalmer funeral service establishments licensed under RIGL 5-33.2-1 et seq.

Hawkers and peddlers licensed under RIGL 5-11-1 et seq.

Hearing aid dealers and fitters licensed under RIGL 5-49-1 et seq.

Health care facilities licensed under RIGL 23-17-1 et seq.

Hoisting Engineers licensed under RIGL 28-26-1 et seq.

Home inspectors licensed under RIGL 5-65.1-1 et seq.

Horse riding schools licensed under RIGL 5-13-1 et seq.

Installers of individual sewage disposal systems licensed under RIGL 5-56-1 et seq.

Interpreters for deaf licensed under RIGL 5-71-1 et seq.

Land surveyors registered under RIGL 5-8.1-1 et seq.

Landscape architects licensed RIGL 5-51-1 et seq.

Mechanical trades licensed under RIGL 28-27-1 et seq.

Mental health counselors and marriage and family therapists licensed under RIGL 5-63.2-1 et seq.

Mortgage loan originators licensed under RIGL 19-14.10-1 et seq.

Nurses licensed under RIGL 5-34-1 et seq.; (Nurse Licensure Compact adopted under RIGL 5-34.3-1 et seq.).

Nurse anesthetists licensed under RIGL 5-34.2-1 et seq.

Nursing home administrators licensed under RIGL 5-45-1 et seq.

Occupational therapists licensed under RIGL 5-40.1-1 et seq.

Optometrists licensed under RIGL 5-35.1-1 et seq.

Orthotists and prosthetists licensed under RIGL 5-59.1-1 et seq.

Osteopaths licensed under RIGL 5-37-1 et seq.

Pharmacists licensed under RIGL 5-19.1-1 et seq.

Physical therapists licensed under RIGL 5-40-1 et seq.

Physician assistants licensed under RIGL 5-54-1 et seq.

Physicians licensed under RIGL 5-37-1 et seq.

Plumbers and irrigators licensed under RIGL 5-20-1 et seq.

Podiatrists licensed under RIGL 5-29-1 et seq.

Precious metals purchase and sale licensed under RIGL 6-11.1-1 et seq.

Psychologists licensed under RIGL 5-44-1 et seq.

Public accountants (permit) under RIGL 5-3.1-1 et seq.

Private security guards licensed under RIGL 5-5.1-1 et seq.

Radiography, nuclear medicine technology, or radiation therapy practitioners licensed under RIGL 5-68-1 et seq.

Radon control services providers licensed under RIGL 23-61-5.

Real estate brokers and salespersons licensed under RIGL 5-20.5-1 et seq.

Real estate appraiser licensed under RIGL 5-20.7-1 et seq.

Social Workers licensed under RIGL 5-39.1-1 et seq.

Speech language pathologists and audiologists licensed under RIGL 5-48-1 et seq.

Telecommunications contractors, technicians, and installers licensed under RIGL 5-70-1 et seq.

Tobacco sellers must be trained in sale of tobacco products under RIGL 11-9-13.13.

Veterinary practice licensed under RIGL 5-25-1 et seq.

3.20 MONOPOLIES, RESTRAINT OF TRADE AND COMPETITION:

Contracts, Combinations and Conspiracies in Restraint of Trade.

Antitrust statute prohibits all concerted action in restraint of trade, monopolization, attempts to monopolize, tying arrangements, and requirement and/or output contracts. Violation exposes violator to criminal and civil liability as well as treble damage actions by injured parties. Statute gives attorney general power to issue civil investigative demands and to bring actions as parens patriae. (RIGL 6-36-1 through RIGL 6-36-26). Party who is not direct purchaser from wrongdoer lacks standing to recover in suit under antitrust statute. Standing rests with direct purchaser or Attorney General on behalf of indirect purchaser. Consumer warranty is not sufficient to vest plaintiff with standing to sue as direct purchaser. (796 A.2d 461).

Unfair Trade Practices—Deceptive Trade Practices.

All unfair methods of competition and unfair or deceptive acts or practices prohibited. Enforcement provisions include private and class actions, civil penalties and forfeiture of corporate franchise. (RIGL 6-13.1-5.2; RIGL 6-13.1-7 through RIGL 6-13.1-9).

Unfair Sales Practices.

Prohibits below-cost sales with intent to injure competition. (RIGL 6-13-1 through RIGL 6-13-4). Includes provisions on unsolicited goods, gift certificates and discount price advertising. (RIGL 6-13-12).

See also topic 3.15 Franchises.

3.21 NEGOTIABLE INSTRUMENTS:

See topic 3.02 Bills and Notes.

3.22 RESTRAINT OF TRADE:

No general statute.

See category 16 Insurance, topic 16.01 Insurance Companies, subhead Unfair Competition and Practices.

3.23 SALES:

Uniform Commercial Code in effect. (RIGL 6A-1-101 et seq.). See topic 3.09 Commercial Code.

Bills of Sale.

There are no statutory requisites for a bill of sale or for recording a bill of sale.

Contracts of Sale.

See topic 3.16 Frauds, Statute of. No requirement as to type size in printed contracts.

Conditional Sales.

Uniform Commercial Code in effect covering secured transactions. See category 20 Mortgages, topic Chattel Mortgages for modifications.

Product Liability.

There is implied warranty that food or drink for human consumption be reasonably fit for such purpose, extending from seller and manufacturer or packer to persons who may be reasonably expected to use, consume, or be affected by goods. (RIGL 6A-2-315; 109 R. I. 458, 287 A.2d 345). Privity no longer required in cases resulting from injuries sustained by user or consumer of a product negligently produced or distributed. (112 R. I. 234, 308 A.2d 508). Manufacturer or seller of product not liable for product liability damages where subsequent alteration or modification of product was substantial cause of injury. (RIGL 9-1-32). Market share doctrine may not be used to establish liability in products liability action against drug manufacturer. (599 A.2d 1364).

Retail Credit Sales.

Regulated by RIGL 6-27-1 through 9 (“The Rhode Island Truth in Lending and Retail Selling Act”). Maximum permissible finance charge for any revolving or open-end credit plan is 18% per annum, except that minimum charge of no more than 50¢ per month may be made for any period during which there is balance due creditor. (RIGL 6-27-4[b]). Maximum permissible finance charge for all other extensions of credit is 21% per annum; except no limit, where finance charge does not exceed $10. Buyer may prepay unpaid balance at any time despite contrary provisions of retail contract. (RIGL 6-27-4[a]). Under revolving or open-end credit plan, late fee not to exceed $12 may be assessed on each minimum payment not paid in full within 40 days of billing date. (RIGL 6-27-4[e]). Provisions do not apply to any person doing business under any general or special law of Rhode Island or of U.S. relating to banks, savings banks or credit unions, trust companies or building and loan associations, nor to any transaction covered by c. 19-25 (“Small loan business”), c. 19-25.2 (“Secondary mortgage loans”), c. 19-26 (“Pawnbrokers”), c. 19-20 (“Loan and investment companies”), and RIGL 6-26-2. (RIGL 6-27-4[c]).

If any extension of credit in connection with a sale of consumer goods and services by a retail seller to a retail buyer involves execution of a promissory note, words “non-negotiable consumer note” must be placed prominently thereon, and assignee takes such note subject to claims and defenses permitted under RIGL 6A-3-306 irrespective of whether he qualifies as a “holder in due course” as defined in RIGL 6A-3-302. (RIGL 6-27-5). This section does not apply to financing insured under FHA regulations.

Any creditor who willfully imposes a finance charge in violation of RIGL 6-27-4 is liable to borrower in amount of $100 or an amount equal to twice finance charge, whichever is greater, but not in excess of $2,000 on any credit transaction; any person who willfully violates RIGL 6-27-4 shall be fined not more than $500 or imprisoned not more than one year, or both. (RIGL 6-27-7). Any customer who pays cash for item (except food, perishable items, custom-made merchandise, items for internal consumption, items sold “as is”) is entitled to cash or check refund within five days of sale, unless customer has been clearly informed by poster at place of display, store entrances or register. (RIGL 6-27-9). Any person, corporation or entity refusing to grant refund shall be guilty of misdemeanor and subject to fine of not less than $500 nor more than $1,000. (RIGL 6-27-9[c]).

See also topic 3.19 Interest.

Consumer Protection.

See topic 3.12 Consumer Protection.

Bulk Sales.

See topic 3.09 Commercial Code; category 8 Debtor and Creditor, topic 8.08 Fraudulent Sales and Conveyances.

Sales of Motor Vehicles.

See category 23 Transportation, topic 23.01 Motor Vehicles.

3.24 SECURITIES:

The sale and the offering for sale of securities to the public is regulated by RIGL 7-11-1 through 806.

Uniform Commercial Code is in effect. (RIGL 6A-1-101 et seq.). Rev. Art. 8 adopted. See topic 3.09 Commercial Code.

Supervision of sale of securities under Act is exercised by Department of Business Regulation, Securities Division, 100 North Main Street, Providence, RI, 02903.

Regulatory Powers of Supervising Authority.

Director has power to conduct investigations by subpoenaing witnesses and compelling production of documents. (RIGL 7-11-601). Without prior notice, Director may issue cease and desist orders; with prior notice, director may also censure licensees, bar persons from associations with licensed broker-dealers or investment advisors in state, or impose fines of up to $10,000 for single violation and $100,000 for multiple related violations. (RIGL 7-11-602). Director may apply to district court for enforcement against violators and would be violators of Securities Act or rule or order thereunder. (RIGL 7-11-601).

Act applies to securities as broadly defined in statute so as to include foreign currency, bonds, stocks, notes, debentures, certificates of interest in profit sharing agreements and oil, gas, and mineral leases, evidence of indebtedness, transferable certificates of interest or participation, etc. Terms “person” and “sale” are also broadly defined in statute. (RIGL 7-11-101).

Prerequisites to Sales or Offerings.

All securities, unless specifically exempt or sold in exempt transaction, must be registered with Director before being sold or offered for sale. (RIGL 7-11-301).

Exempt Securities.

Uniform Act § 401 adopted, subject to following modifications: (1) Uniform Act 401(1) amended to exclude security payable solely from revenues to be received from nongovernmental industrial or commercial payments. (RIGL 7-11-401[1]). (2) Uniform Act 401(10) amended to require issue in denominations of at least $50,000 and rating in one of three highest rating categories from nationally recognized statistical rating organization. (RIGL 7-11-401[11]). (3) Rhode Island Act provides following additional exemptions: (a) security issued by and representing or guaranteeing depository institution if institution's deposits are insured by Federal Deposit Insurance Corporation, Federal Savings and Loan Insurance Corporation, National Credit Union Share Insurance Fund, or successor to applicable agency (RIGL 7-11-401[3]); (b) equipment trust certificates for equipment leased or sold to person whose securities are exempt (RIGL 7-11-401[6]); (c) security designated as national market system security by National Association of Securities Dealers, Inc. (RIGL 7-11-401[8]); (d) option by agency registered under Securities Exchange Act of 1934 if underlying security or option is registered, exempt or not required to be registered under c. 7 (RIGL 7-11-401[9]); (e) issue of security of registered open-end management investment company or unit investment trust within 12 months of notice and payment of $1,000 to Director if issuer is advised by qualifying investment advisor, and has qualifying sponsor. (RIGL 7-11-401[14]).

Exempt Transactions.

Uniform Act 402 adopted subject to following modifications: (1) Uniform Act 402(2) amended to impose additional conditions on nonissuer transactions in security by registered broker-dealer (RIGL 7-11-402); (2) Uniform Act 402(5) amended to exclude chattel mortgages (RIGL 7-11-402); (3) Uniform Act 402(5) amended to require no more than 25 purchasers in this state and to impose additional conditions (RIGL 7-11-402); (4) Rhode Island act provides following additional exemptions: (a) offer to sell or sale of preorganization certificate or subscription agreement issued with organization of depository institution if organization is supervised by official or agency of any state or of U.S., (b) transaction involving offer to sell, but not sale, of security exempt from registration under Securities Act of 1933 if registration statement filed under this chapter is ineffective and offeror is not aware of any stop order that may have entered, (c) transaction with distribution of securities of issuer to securityholders of another if merger, consolidation, exchange of securities, sale of assets, or other reorganization to which issuer and others are parties, (d) offer to sell or sale of promissory note secured by first lien on real estate or originated by depository institution with additional conditions, (e) any offer or sale made in reliance on exemptions in Rule 505 or 506 or Regulation D under Securities Act of 1933 provided no commission given, and not later than ten days prior to first sale of securities, Uniform Consent to Service of Process, notice of original filing on Form D and $300 fee are filed with Director. (RIGL 7-11-402).

Registration by Filing.

Uniform Act 302 adopted, subject to additional conditions and following modifications: (1) Uniform Act 302(a) amended to require additional conditions (RIGL 7-11-302); (2) Uniform Act 302(C) amended to require information to be on file with Director for at least five business days (RIGL 7-11-302).

Registration by Coordination.

Uniform Act 303 adopted, subject to following modifications: (1) Uniform Act 303(b)(1) amended to require filing of two copies of latest form of prospectus. (RIGL 7-11-303). Director may waive or modify application of requirement of this section. (RIGL 7-11-303).

Registration by Qualification.

Uniform Act 304 adopted, subject to following modifications: (1) Uniform Act 304(b)(2) amended to also require compensation paid within last 12 months and estimated to be paid in next 12 months by issuer, predecessor, parents, subsidiaries and affiliates to those persons covered in paragraph 2. (RIGL 7-11-304). Rhode Island Act provides following requirements: (a) Description of pending litigation or proceeding which materially affect issuer's business or assets (RIGL 7-11-304); (b) registration becomes effective if no stop order and director or registrant has not ordered delay (RIGL 7-11-304).

Fees for Registration.

.1% of maximum aggregate offering price of securities offered for sale in state, but not less than $300 or more than $1,000; fees not refundable in event of withdrawal or stop order. (RIGL 7-11-305).

Other provisions generally applicable to registration are codified as set out in Uniform Act 305(c)-(g), subject to following modifications: (1) Uniform Act 305(g) amended to apply to issuer with no public market for its shares or no significant earnings from continuing operations during last five years; securities must be deposited in escrow for not more than three years. (RIGL 7-11-305[g]). (2) securities offered and sold pursuant to § 4(5) of Securities Act of 1933 and mortgage related securities under § 3(a)(41) of Securities Exchange Act of 1934 must comply with Act's registration requirements. (RIGL 7-11-305[K]).

Licensing of Broker-Dealers, Sales Representatives, Investment Advisors, and Investment Advisor Representatives.

Broker-dealers and sales representatives must be licensed (RIGL 7-11-201) or exempt from licensing (RIGL 7-11-202). Investment advisors and investment advisor representatives must be licensed (RIGL 7-11-203) or exempt from licensing (RIGL 7-11-204). Such license may be denied, suspended or revoked by Director upon notice and hearing if it appears that any such person is violating any provision of this Act, is conducting his business in fraudulent manner or is violating any regulations of Director. (RIGL 7-11-212; 214). Every person applying for license must pay fee (RIGL 7-11-206), may have to pass oral or written examination and must file consent to service. Director may waive examination. (RIGL 7-11-708). Annual licensing fees are $250 for broker or investment advisor, $100 for each branch office, and $50 for salesman or investment advisor representative. (RIGL 7-11-206). No person may act at any one time as salesman for broker and as investment advisor agent for investment advisor unless broker's investment advisor services are solely incidental and receive no special compensation. (RIGL 7-11-101). Director may require broker-dealer who is not registered under Securities Exchange Act of 1934 to maintain minimum capital net worth and certain ratio between net capital and aggregate indebtedness. (RIGL 7-11-209).

Advertisements.

Director, by rule or order, may require filing of any prospectus, pamphlet, circular, form, letter, advertisement, or other sales literature addressed or intended for distribution to prospective investors. (RIGL 7-11-404).

Liabilities and Remedies.

Director may impose civil penalties (of up to $10,000 for single violation), issue cease and desist order, censure individual if that person is licensed broker-dealer, sales representative, investment advisor, or investment advisor representative, or bar or suspend person from association with licensed broker-dealer or investment advisor in Rhode Island. (RIGL 7-11-602). Court may assess civil penalties (of up to $10,000 for single violation or $100,000 for multiple violations in single or related proceedings), order declaratory or injunctive relief, restitution, and appointment of receiver or conservator for defendant or defendant's assets. (RIGL 7-11-603). Willful violation of this Act or known false or misleading statement is felony. (RIGL 7-11-604). Willful violation of stop or cease and desist order is misdemeanor. (RIGL 7-11-604).

Person who offers or sells securities in violation of Rhode Island Act is liable to purchaser unless violation is of § 7-11-501 or § 7-11-503 and purchaser knew of false statement or seller reasonably did not know. (RIGL 7-11-605). Upon tender of security, purchaser shall recover purchase price, interest, costs and attorney's fees less income received on security. If purchaser no longer owns security, he may recover amount that would have been recoverable upon tender, less value of security when purchaser disposed of it, interest from date of disposition, costs, and attorney's fees. Person who purchases security in violation of specified sections of this Act is liable to purchaser or seller of security where price was affected by market manipulation and damages are amount that would be recoverable upon tender less value of security when purchaser disposed of it, interest, costs, and attorney's fees. Liabilities described above may be shared jointly and severally with control persons, partners, officers and directors, agents, employees, and broker-dealer or sales representatives, under certain circumstances. (RIGL 7-11-605). Plaintiff must sue within three years of violation or within one year of discovery. (RIGL 7-11-606). Violator may avoid civil action if offer of complete rescission before suit is filed. (RIGL 7-11-607). Rights and remedies described above are in addition to any others that may exist at law or equity. (RIGL 7-11-608). Contract in violation of Rhode Island Uniform Securities Act or of rule or order thereunder or purporting to waive compliance with act, is unenforceable. (RIGL 7-11-802).

Hearings and Appeals.

Director may issue written notice of intent or summary order without prior notice of opportunity for hearing. Upon receiving notice of such action, party has 15 days to request hearing; hearing is then set for 20 to 60 days after request. (RIGL 7-11-710). Party may be represented by counsel. (RIGL 7-11-710). Judicial review of determinations of Directors may be obtained in accordance with Administrative Procedure Act. (RIGL 7-11-711).

Model Land Sales Practice Act.

Not adopted.

Uniform Simplification of Fiduciary Security Transfers Act.

Adopted. (RIGL 18-11-1 through 11). In event of any conflict between this Act and Uniform Commercial Code (RIGL 6A-8-101 through 602), this Act controls (RIGL 6A-8-107).

Uniform Transfer on Death Security Registration Act.

Adopted. (7-11.1–7-11.12).

3.25 STATUTE OF FRAUDS:

See topic 3.16 Frauds, Statute of.

3.26 TRUST RECEIPT SECURITY:

Uniform Commercial Code in effect. (RIGL 6A-1-101 et seq.). See topic 3.09 Commercial Code.

3.27 WAREHOUSEMEN:

Uniform Commercial Code in effect. (RIGL 6A-1-101 et seq.). Following should be noted:

§ 7-204 (RIGL 6A-7.1-204), optional subsection (4), omitted.

See topic 3.09 Commercial Code.

Bonds.

No statutory requirements.

Licenses.

No statutory requirements.

Liens.

Covered by Commercial Code. (RIGL 6A-7.1-209, 210).

Lien arises in favor of person storing personal property for officer who has removed same under writ of possession. (RIGL 9-25-9, 10).

4 CITIZENSHIP

4.01 ALIENS:

Property.

Aliens may take, hold, transmit and convey real estate and may sue for and recover possession of same, as if they were citizens of U.S. (RIGL 34-2-1). See also category 13 Estates and Trusts, topic 13.09 Executors and Administrators, subhead Distribution if Abroad.

5 CIVIL ACTIONS AND PROCEDURE

5.01 ACCORD AND SATISFACTION:

Generally, common law principles apply, e.g., accord and satisfaction is based on contract (55 R.I. 262, 180 A. 339); may be based on sum less than that due (113 R.I. 45, 317 A.2d 433), so long as consideration is present (92 R.I. 12, 165 A.2d 728); operates as discharge of all rights and obligations of prior agreement (103 R.I. 74, 234 A.2d 667); and may be based on compromise of judgment (112 R.I. 599, 313 A.2d 642; RIGL 9-21-2).

Uniform Commercial Code in effect. See category 3 Business Regulation and Commerce, topic 3.09 Commercial Code.

Compromise of disputed claim is sufficient consideration for accord and satisfaction. (35 R.I. 451, 87 A. 186; 57 R.I. 441, 190 A. 457).

Pleading.

Accord and satisfaction must be pleaded as an affirmative defense. (R.C.P. and D.C.R. 8[c]).

5.02 ACTIONS:

Rules of civil procedure substantially similar to federal rules of civil procedure in effect in Superior Court and District Court, cited R.C.P. and D.C.R. See topic 5.19 Practice.

Forms of Action.

One form of action called “Civil Action.” (R.C.P. and D.C.R. 2).

Commencement.

See topic 5.19 Practice.

Parties.

In general, see R.C.P. and D.C.R. 17-21. No action is defeated by misjoinder of parties. (R.C.P. 21). Permissive joinder is same as federal rule. (R.C.P. and D.C.R. 20).

Class Actions.

R.C.P. 23. Uniform Class Actions Act not adopted.

Contribution and Indemnification.

Right of contribution exists among joint tortfeasors, but does not impair any right of indemnity under existing law. (RIGL 10-6-1 through RIGL 10-6-11).

Forum Non Conveniens.

Doctrine of forum non conveniens recognized for all causes of action begun in Rhode Island courts. (946 A.2d 1171).

Intervention.

R.C.P. and D.C.R. 24 divide intervention into two classes, intervention as of right and permissive intervention. Intervention is permitted by statute in actions against estates (RIGL 33-18-18), actions on contractors' bonds (RIGL 37-12-3), and by stockholders in corporate action against directors (RIGL 7-4-12). Where constitutionality of act of legislature is in question, Attorney General must be notified. (R.C.P. 24 [d]).

Interpleader.

R.C.P. 22.

Third Party Practice.

R.C.P. and D.C.R. 14, same as federal rule.

Joinder of Causes of Action.

R.C.P. and D.C.R. 18, same as federal rule, except for special provisions governing direct actions against insurers. (R.C.P. and D.C.R. 18[b]; RIGL 27-7-1 through RIGL 27-7-3).

Splitting Causes of Action.

Claims may be severed for trial. (R.C.P. and D.C.R. 42[b]).

Consolidation of Actions.

R.C.P. and D.C.R. 42, substantially same as federal rule.

Stay of Proceedings.

No special statute, rule or practice. Courts have authority to order stays.

Acceleration of Actions.

Any civil action in which plaintiff or defendant has attained age of 65 years, and is not corporation, partnership, association or other such entity, shall be accelerated to trial at request of such party. (RIGL 9-2-18). Any civil action filed for personal injury, property damage or wrongful death in which parties agree that damages, if liability is proven, are likely to be in sum of $100,000 or more, or if court upon motion of either party finds that damages, if liability is proven, are likely to be in sum of $100,000 or more, shall be given priority for expedited hearing. (RIGL 9-2-20). Cause of action for nonpayment of settled claim for 30 days given priority on trial calendar. (RIGL 9-1-50).

Abatement and Revival.

In addition to actions which survive death of plaintiff at common law: actions of waste, replevin, for conversion, for damages to person or to real and personal estate (RIGL 9-1-6), wrongful death (RIGL 10-7-1 through 4), and actions for recovery of possession of land (RIGL 9-1-9) survive plaintiff by statute. Actions which survive may be prosecuted or defended by executor or administrator of decedent. (RIGL 9-1-7). On death of party, court may order substitution of proper parties and action does not abate. (R.C.P. and D.C.R. 25[a]). If one of several parties dies, action may be prosecuted by or against surviving plaintiff or defendant as case may be. (R.C.P. and D.C.R. 25[a]). See also category 13 Estates and Trusts, topic 13.09 Executors and Administrators.

Limitation of.

See topic 5.16 Limitation of Actions.

Small Claims.

See category 6 Courts and Legislature, topic 6.01 Courts.

Termination of Actions.

Actions may be terminated by judgment, voluntary and involuntary dismissal (with or without prejudice), stipulation, default, by court or defendant’s motion for lack of prosecution for five years. (R.C.P. and D.C.R. 41).

Prohibited Actions.

No special statutory provisions.

Administration.

See category 13 Estates and Trusts, topic 13.09 Executors and Administrators.

Direct Action Against Insurer.

See category 23 Transportation, topic 23.01 Motor Vehicles, subhead Actions for Injury.

5.03 APPEAL AND ERROR:

Rules of civil procedure substantially similar to Federal Rules of Civil Procedure in effect in Superior Court and District Court. See topic 5.19 Practice.

From District Court.

In civil actions a claim of appeal must be made in writing and costs paid within two days after judgment. (RIGL 9-12-10). In actions for possession of tenements let bond with surety for payment of rent must be filed in addition to costs required by RIGL 9-12-10. (RIGL 9-12-12). Appeal to Superior Court for trial de novo, but jury trial is waived if not claimed in Superior Court. (RIGL 9-11-7). Plaintiff in small claims procedure waives right of appeal. (RIGL 10-16-14). In case of any appealable decision, decree, order or judgment, if aggrieved party fails to claim appeal through accident, mistake, unforseen cause or excusable neglect, Superior Court may allow appeal upon petition within 90 days of entry of decision. (RIGL 9-21-6). No appeal is available to defendant manufacturer or seller of consumer product in product liability action, following entry of default judgment.

From Superior Court.

In civil actions, appeals to Supreme Court must be taken within 20 days from entry of judgment by filing notice of appeal. (R.A.P. 3, 4; RIGL 9-24-1). Upon showing of excusable neglect trial court may extend time to appeal up to 30 days from expiration of original 20 day period. (723 A.2d 1118).

Appeals from an interlocutory order or judgment ordering sale of property, granting an injunction, ordering or denying a new trial after trial by jury, or appointing a receiver may be taken in like manner as from a final judgment. (RIGL 9-24-7).

Writ of Error.

Appeals may be taken directly from District Court and from Superior Court to Supreme Court by writ of error for error of law appearing on record. (RIGL 8-1-2; 28 R.I. 584, 68 Atl. 471; 29 R.I. 478, 72 Atl. 561).

Appeal Bond.

In civil cases on appeal from District Court to Superior Court, appellant must deposit $50 for opponent’s attorney fees and $25 minimum costs. (RIGL 9-12-10). On appeal from Superior Court to Supreme Court there is no appeal bond, except as ordered in case of injunction (R.C.P. 62[c]).

Stay of Proceedings.

In civil action, execution of judgment is stayed automatically on appeal; no superseded bond required. (R.C.P. and D.C.R. 62[d]). Interlocutory or permanent injunction or judgment in receivership not automatically stayed by appeal. (R.C.P. 62[a]).

From Family Court.

Appeals generally follow procedure in civil actions; except appeals in bastardy cases follow procedure for appeal by way of bill of exceptions. Review of decisions relating to modification of alimony or child support by petition for writ of certiorari. Appeals taken to Supreme Court. In divorce/custody action, trial court may grant interim relief by allowing parent granted permission to relocate children out of state permission to relocate with children while appeal pending. (962 A.2d 47). Pendency of appeal does not suspend order or decree of court, nor discharge child from custody of court or of person, institution or agency to whose care such child has been committed. (RIGL 14-1-52, 53).

From Probate Courts.

Appeals may be taken from any probate court to Superior Court by claiming an appeal filed within 20 days next after decree of probate court is entered, and by filing in Superior Court within 30 days after entry of said decree reasons of appeal, together with a certified copy of claim of appeal and of probate proceedings appealed. (RIGL 33-23-1). Failure to claim appeal from probate court or town council action within time allowed may be excused upon petition to Superior Court within 90 days. (RIGL 9-21-6). Preceding statutes not applicable to petition to vacate order approving will. (588 A.2d 1359). Jury trial may be had if claimed by either party. (RIGL 33-23-1, 10). See also category 13 Estates and Trusts, topic 13.09 Executors and Administrators, subhead Time for Filing Claims.

Extent of Review.

Appeals from Superior Court and Family Court are limited to questions of law. Appeals from District Court and Probate Courts extend to questions of law and fact.

5.04 BONDS:

Requirements for bonds and sureties thereon vary in accordance with type of bond, nature of action, court rules and citizenship of parties.

Sureties.

Company organized under laws of any state with paid-up capital of at least $250,000, authorized by charter to transact business as surety, may, having complied with requirements regulating admission to transact business in state, be accepted as sole surety upon bond of any person or corporation. (RIGL 7-9-1 through 4).

Enforcement.

Varies with type of bond. In actions for breach of condition on bond or to recover penalty, if it is found that condition is broken or penalty forfeited, judgment entered for penal sum, but execution awarded for amount of damage as ascertained by court. (RIGL 9-27-1 through 5).

5.05 CERTIORARI:

Rules of civil procedure substantially similar to federal rules of civil procedure in effect in Superior Court and District Court. See topic 5.19 Practice.

Writ may be issued by Supreme Court. (RIGL 8-1-2; Supreme Court Rule No. 13). Grounds and extent of review are as at common law or as provided by statute in specified cases.

5.06 CHARITABLE IMMUNITY:

See topic 5.09 Damages.

5.07 COMMISSIONS TO TAKE TESTIMONY:

See topic 5.11 Depositions and Discovery.

5.08 COSTS:

In civil action, prevailing party may recover costs at court's discretion. (RIGL 9-22-5). Court may award costs to either party on motions, petitions and appeals in any pending proceeding. (RIGL 9-22-9). Plaintiff cannot recover costs in excess of amount of his claim, nor can he, when property other than real estate is attached, recover costs of such attachment when final judgment is for less than $50, unless obligation sued on is for necessaries furnished to defendant. (RIGL 9-22-8). See R.C.P. and D.C.R. 54. Legal Aid Society of Rhode Island and Rhode Island Legal Services, Inc. are exempt from fees. (RIGL 9-29-14).

Security for Costs.

Nonresident plaintiff, upon motion of defendant and for cause shown must give qualified person within state, or surety company authorized to do business therein, surety for costs. If such surety is not furnished, case is subject to dismissal. (RIGL 9-22-1, 3).

5.09 DAMAGES:

Common law generally prevails as to compensatory damages. Tort liability subject to monetary limitation. (RIGL 9-31-1). Pure economic loss may be awarded in negligence action against third party builder involving land purchase by plaintiff consumer. (727 A.2d 190).

Fraud and bad faith in action for breach of contract to purchase real property allows "loss of bargain" damages. (873 A.2d 95). Punitive damages may be awarded in torts involving malice, wantonness or willfulness, such as criminal conversion (47 R. I. 186, 131 Atl. 643), false imprisonment (28 R. I. 248, 66 Atl. 570), assault (47 R. I. 144, 131 Atl., 385), libel and slander (86 R. I. 229, 134 A.2d 180).

Comparative Negligence Rule.

Adopted. (RIGL 9-20-4). Set-off prohibited. (RIGL 9-20-4.1). Comparative negligence principles not applicable in negligent misrepresentation actions involving consumers. (602 A.2d 510).

Charitable Immunity.

Charitable institutions not immune from suit. (12 R. I. 411, 34 Am. Rep. 675; 35 R. I. 22, 85 Atl. 120). Charitable hospital corporations are liable for negligence. Prior statutory immunity repealed. (RIGL 9-1-26). Doctors and nurses protected by Good Samaritan Statutes. (RIGL 5-37-14; RIGL 5-34-38). Qualified persons gratuitously rendering emergency assistance in nature of cardiopulmonary resuscitation or automated external defibrillation are immune from suit for ordinary negligence. (RIGL 9-1-34). Persons providing approved training in cardiopulmonary resuscitation or automated external defibrillation are also immune from suit. (RIGL 9-1-34).

Sovereign immunity abrogated by statute with $100,000 limit with limitation of damages subject to certain statutory exceptions (RIGL 9-31-1 through RIGL 9-31-12); abrogation of sovereign immunity limited by legislative enactments granting immunity in certain instances or by R.I. Supreme Court pursuant to public-duty doctrine. (895 A.2d 721).

Uniform Commercial Code covers damages relating to bank collections (RIGL 6A-4-103) and sale of goods (RIGL 6A-2-701 through 725).

See also category 13 Estates and Trusts, topic 13.05 Death, subhead Actions for Death.

5.10 DECLARATORY JUDGMENTS:

See topic 5.15 Judgments.

5.11 DEPOSITIONS AND DISCOVERY:

Rules of civil procedure similar to Federal Rules of Civil Procedure in effect in Superior Court and in District Court. See topic 5.19 Practice. Any court may on motion issue commission to take depositions in any pending matter. (RIGL 9-18-9).

Uniform Foreign Depositions Act not adopted.

Notice.

Party taking a deposition upon oral examination for use in Superior or District Court must give reasonable notice in writing to every other non-defaulted party. (R.C.P. and D.C.R. 30[a]). In other Courts, official taking deposition must cause adverse party or his attorney of record, to be notified in writing a reasonable time, not less than 24 hours, before deposition. (RIGL 9-18-2, 3).

Within State for Use Within State.

In Superior Court and District Court any party may take testimony of any person by deposition for purpose of discovery or use as evidence except that, within 20 days of service, plaintiff must obtain leave of court. (R.C.P. and D.C.R. 26[a]). In other courts, depositions may be taken by order on such terms as court directs when necessary to prevent failure or delay of justice. (RIGL 9-18-9).

Within State for Use Elsewhere.

Such a deposition may be taken before any person residing in this state to whom a commission shall be directed by an out of state tribunal with all formalities prescribed therein or, if there are none prescribed, then according to laws of jurisdiction whence such commission issues. (RIGL 9-18-11).

Outside of State for Use Within State.

Deposition for use in Superior or District Court may be taken on notice before a person authorized to administer oaths, or commissioned by court, or pursuant to a letter rogatory. (R.C.P. and D.C.R. 28[b]). For other courts, deposition may be taken in manner required by this State or by state where taken or before person commissioned by governor or court or, if outside of U.S., by resident official of U.S. upon proper notice. (RIGL 9-18-5).

De Bene Esse.

See subhead Perpetuating Testimony, infra.

Perpetuating Testimony.

Any person may present petition to a justice of Supreme, Superior, Family or District Court praying that deposition of witness be taken in any matter which is or may be subject of litigation and court may thereupon designate notary public or standing master in chancery to take deposition. (RIGL 9-18-12). Deposition so taken may be used in evidence against any person who had notice of taking if deponent dies, becomes of unsound mind, is absent from state or unable to attend. (RIGL 9-18-15). See also R.C.P. and D.C.R. 27(a).

Before Whom Taken.

Deposition upon oral examination may be taken for use in Superior or District Court before officer authorized to administer oaths or persons appointed by court. (R.C.P. and D.C.R. 28[a]). For other courts, deposition may be taken by any disinterested justice of Supreme or Superior Court, Family Court, justice of peace or notary public in any pending action in which he is not serving as counsel to either party. (RIGL 9-18-1).

Compelling Attendance of Witnesses.

For use in Superior or District Court, attendance may be compelled by use of subpoena for witnesses (R.C.P. and D.C.R. 45) and by penalties for parties. (R.C.P. and D.C.R. 37[d]). In other courts, any person may be compelled to appear and depose within this state in same manner as to appear and testify in court. (RIGL 9-18-7). See topic 5.13 Evidence, subhead Witnesses.

Examination of Witnesses.

May examine on insurance policy limits of liability and property damage in negligence actions. Deponent need not produce his attorney’s work product. (R.C.P. and D.C.R. 26[b]).

Return.

Witness has right to examine and correct transcript but can waive. Officer may file even if witness does not waive and will not sign. Rules state procedure for officer to follow. (R.C.P. and D.C.R. 30[e], [f]).

Forms.

No statutory form. Federal forms may be used.

5.12 EQUITY:

See topic 5.02 Actions.

5.13 EVIDENCE:

Witnesses.

Competency.

No person is disqualified from testifying by reason of his being interested in or being a party to any proceeding. (RIGL 9-17-12).

Conviction of a crime does not affect competency of a witness but may detract from credibility. (RIGL 9-17-15).

Privileged Communications.

Common law rule applies to attorney and client communications. (See 48 R. I. 296, 137 Atl. 776.) There is no privilege with respect to physician-patient communications. (See 37 R. I. 393, 93 Atl. 33; 26 R.I. 454, 59 Atl. 313.) There is limited privilege as to communications to and information obtained by health care providers. (RIGL 5-37.3-4, RIGL 9-17-24).

No clergyman or priest is competent to testify concerning confession made to him without consent of confessor. No minister, priest or rabbi may testify to confidential communication, entrusted to him in his professional capacity and necessary and proper to enable him to discharge functions of his office in the usual course, without consent of communicant. (RIGL 9-17-23). Qualified privilege to newsman for nondisclosure of confidential information. (RIGL 9-19.1-1 through 3).

Husband and Wife.

In all civil actions, husband or wife of either party is a competent witness and, if both are parties, both are competent witnesses, except that neither is allowed to give testimony tending to incriminate other or to disclose communications made by one to other during their marriage, except on trials of petitions for divorce, on trials between them involving their respective property rights and in criminal prosecutions for pandering. (RIGL 11-34-3; RIGL 9-17-13).

Children.

Child who is victim of sexual assault may testify against defendant through videotaped proceedings provided certain procedural safeguards are satisfied. (RIGL 11-37-13.1). In family court proceedings, hearsay evidence is permitted concerning act of abuse, neglect or misconduct by parent or guardian if spontaneous statement made by child to someone child would normally turn to for sympathy, protection or advice. (RIGL 14-1-68, 69).

Attorneys.

Attorney may not act as advocate at trial in which attorney is likely to be necessary witness. (922 A.2d 110).

Communications or Transactions With Persons Since Deceased or Incompetent.

There is no statute prohibiting an interested person from testifying to declarations, communications or transactions with persons since deceased but there are limitations. (See RIGL 9-19-9 through 11.) Deceased person’s statements made in good faith and upon personal knowledge before action commenced are not inadmissible as hearsay. (R. Evid. 804[c]). If physician, dentist or professional engineer has died prior to trial, his relevant records and reports are admissible in workers’ compensation cases and in actions for personal injuries or death.

(RIGL 9-19-29).

Self Incrimination.

Guarantee against by art. 1. § 13 of State Constitution. Attorney General may request that presiding justice exercise discretion to order witness to testify or to produce evidence. Witness cannot thereafter be prosecuted on account of such evidence except for perjury. (RIGL 12-17-15).

Expert evidence is needed to establish standard of care in medical malpractice action. (795 A.2d 1119). Expert medical opinion must rise to level of reasonable medical certainty, i.e. some degree of positiveness or probability and not possibility. (900 A.2d. 1087).

Compelling Attendance.

See topic 5.11 Depositions and Discovery.

Uniform Act to Secure the Attendance of Witnesses From Without the State in Criminal Cases is in effect. (RIGL 12-16-1 through 13).

Uniform Rendition of Prisoners as Witnesses in Criminal Proceedings Act in effect. (RIGL 12-16.1-1 through RIGL 12-16.1-8).

5.14 INJUNCTIONS:

Rules of civil procedure substantially similar to Federal Rules of Civil Procedure in effect in Superior Court and District Court. See topic 5.19 Practice.

Superior Court's grant of preliminary or permanent injunctions is governed by usual equitable principles as modified by R.C.P. 65. See topic 5.19 Practice.

Preliminary injunctions may be issued after notice to adverse party and hearing on evidence or affidavit. Hearing may be consolidated with trial on merits. Temporary restraining orders shall not be granted without notice to adverse party except in certain circumstances. Temporary restraining order issued without notice is effective for maximum of ten days but court may extend for additional period after hearing. Court may require security for damage to any party due to issuance of restraining order or preliminary injunction. As to labor disputes, see category 11 Employment, topic 11.02 Labor Relations, subhead Injunctions.

5.15 JUDGMENTS:

Rules of civil procedure substantially similar to Federal Rules of Civil Procedure in effect in Superior Court and District Court. See topic 5.19 Practice.

Judgments by Confession and Judgments by Consent.

Clerk may enter judgment for sum certain or denying relief upon agreement or written petition by parties or attorneys. (R.C.P. and D.C.R. 58[b]).

Judgments on Pleadings.

(R.C.P. and D.C.R. 12[c]).

Judgment upon Multiple Claims or Involving Multiple Parties.

(R.C.P. 54[b]). As general rule only final judgment is entered when all claims and counterclaims adjudicated. (811 A.2d 1154).

Summary Judgments.

(R.C.P. and D.C.R. 56). Denial of summary judgment motion not appealable. (603 A.2d 337). Grant of summary judgment reviewed on de novo basis. (945 A.2d 297).

Declaratory Judgments.

(R.C.P. 57). Uniform Declaratory Judgments Act adopted. (RIGL 9-30-1 through 16).

Default Judgments.

(R.C.P. and D.C.R. 55).

Offer of Judgment.

(R.C.P. and D.C.R. 68).

Docketing.

(R.C.P. and D.C.R. 58).

Vacation or Modification.

Motion to alter or amend must be served within ten days after entry of judgment. (R.C.P. 59[e]). Motion for new trial must be served within ten days after entry of judgment. (R.C.P. 59[b]). See also R.C.P. and D.C.R. 60, 62. Motion to vacate arbitration award must be served within 60 days after award is filed or delivered, and before award is confirmed. (RIGL 10-3-15). On appeal, trial court's decision on Rule 60(b) motion to vacate will be reviewed using abuse of discretion standard. (945 A.2d 289).

Lien.

Judgment is not a lien on property until execution is levied.

Revival.

See subhead Action on Judgment, infra.

Assignment.

Judgment may be assigned the same as any chose in action.

Satisfaction.

Upon satisfaction of a judgment, entry should be filed with clerk of court in which judgment was obtained.

Action on judgment may be brought at any time within 20 years from its rendition. (RIGL 9-1-17).

Foreign judgments may be enforced by civil action thereon and proved by duly authenticated copy of record. (RIGL 9-32-6).

Uniform Enforcement of Foreign Judgments Act adopted in 1985. (RIGL 9-32-1 through 8).

Homestead Estate Exemption.

Homestead estate generally exempt from attachment, levy, or execution and sale for payment of debts or legacies. (RIGL 9-26-4.1).

5.16 LIMITATION OF ACTIONS:

Rules of civil procedure substantially similar to federal rules of civil procedure in effect in Superior Court and District Court. See topic 5.19 Practice.

Uniform Commercial Code in effect. (RIGL 6A-1-101 et seq.). See category 3 Business Regulation and Commerce, topic 3.09 Commercial Code.

Actions are barred unless commenced within the following periods after the respective causes of action accrued:

Twenty years: Actions on contracts or liabilities under seal; on judgment or decree of any U.S. or state court of record. (RIGL 9-1-17).

Ten years: Except as otherwise specially provided, all civil actions; breach of warranty in sale of goods. Actions against contractors, engineers, or architects based on design. (RIGL 9-1-29). Actions for medical assistance fraud. (RIGL 40-8.2-4).

Seven years: Except as otherwise specifically provided, for violation of refuse disposal provisions. (23-18.9). Violation of solid waste provisions. (23-19). For violation of hazardous waste provisions. (23-19.1). For water pollution. (46-12). For violation of public drinking water provisions. (46-13). (RIGL 12-12-17). For claims based on intentional conduct brought by any person for recovery of damages for injury suffered as result of childhood sexual abuse. (RIGL 9-1-51).

Four years: Breach of contract for sale of personalty; other breach of warranty claims (contract-based). (RIGL 6A-2-725; 619 A.2d 429). Enforcement of antitrust act. (RIGL 6-36-23). To determine paternity. (RIGL 15-8-6). For actions to enforce regulation of business practices among motor vehicle manufacturers, distributors and dealers. (RIGL 31-5.1-15).

Three years: For personal injury claims under strict liability, implied warranty or negligence theory. (RIGL 9-1-14; 619 A.2d 429). For wrongful death. (RIGL 10-7-2; RIGL 10-7-7). Discovery rule applies in wrongful death action. (874 A.2d 179). For medical, legal, veterinarian, accounting, insurance or real estate agent or broker malpractice unless injuries or damages not discoverable with exercise of reasonable diligence. (RIGL 9-1-14.1). For exposure to “Agent Orange”. (RIGL 9-1-14.2). For suits against state, political subdivision, city or town. (RIGL 9-1-25). For claims against insurers on accident and sickness insurance policies. (RIGL 27-18-3). For claims of legal malpractice. (RIGL 9-1-14.3). Workers’ Compensation claims. (RIGL 28-35-57). For actions alleging forcible entry and detainer of land. (RIGL 34-19-10). For actions against public utilities for violations of duties under Title 39, cc. 1 to 5. (RIGL 39-2-7). Against towns for injury or damage arising out of maintenance of highways, causeways, or bridges, with 60 days’ notice after incident. (RIGL 45-15-9). For legal malpractice unless injuries not discoverable with exercise of reasonable diligence. (RIGL 9-1-14.3). For criminal injuries compensation. (RIGL 12-25-6). For any other criminal offense unless longer statute of limitations is otherwise provided. For civil actions seeking damages resulting from sexual abuse of minor asserted against non-perpetrator defendant in absence of applicable tolling theory. (941 A.2d 174). For personal injury claims where injured party is entitled to proceed against insurer pursuant to RIGL 27-7-2, where action otherwise properly filed against insurer within proper time limitations and process against insured is returned “non est inventus”, statutory limitation for filing action directly against insurer is extended additional 120 days. (RIGL 9-1-14).

Two years: By owners or holders of receipts or bills of lading against interstate common carriers. (RIGL 39-12-28). For action against contractor’s bond, unless longer period is provided in bond. (RIGL 37-12-5). For filing complaint by Human Rights Commission to eliminate unlawful employment practice. (RIGL 28-5-18).

One year: For slander. (RIGL 9-1-14). For enforcement of penalty provisions of Truth-in-lending and retail selling act. (RIGL 6-27-7). One year from payment to enforce hospital liens. (RIGL 9-3-6). Against insurer to enforce repairer's lien of motor vehicle lessor's lien, accrues at time of payment to insured. (RIGL 9-3-11, RIGL 9-3-14). For libel of deceased person, one year after death if libel occurred within three months of death. (RIGL 10-7.1-2). Claims against insurers on fire insurance policies. (RIGL 27-5-3). For action for breach of bond given for liberty of jail yard in civil action. (RIGL 10-12-10). For assessment of damages in state condemnation proceedings. (RIGL 37-6-18, RIGL 45-29-7, RIGL 45-32-34, RIGL 46-5-6). Against state on highway and public works contracts, or to confirm arbitrator's award in public works arbitration. (RIGL 37-13.1-1, RIGL 37-16-17).

Six months: For assessment of damages in department of environmental management proceedings; with notice. (RIGL 46-5-6).

New Actions.

If an action is timely commenced and terminated other than by voluntary discontinuance, dismissal for neglect to prosecute, or judgment on merits, a new action may be commenced within one year after termination (RIGL 9-1-22); in sale of goods, period is six months. (RIGL 6A-2-725).

Foreign Causes of Action.

No action shall be brought by any person upon a cause of action accruing without this state which was barred by limitation or otherwise in jurisdiction in which such cause of action arose while he resided therein. (RIGL 9-1-18).

Disabilities of Plaintiff.

If person is under 18, of unsound mind, imprisoned, or outside United States at time cause of action accrues, he may bring suit within period of limitation after impediment removed. (RIGL 9-1-19). In determining whether statute of limitations period should be tolled on basis of unsound mind, inability to manage one's day-to-day activities is proper standard for determining whether plaintiff's mental state constitutes unsound mind. (794 A.2d 476). This statute does not apply to actions for wrongful death. (118 R.I. 441, 374 A.2d 787). In actions for medical malpractice, suit must be brought within three years of removal of disability. (RIGL 9-1-14.1). In actions for legal malpractice, suit must be brought within three years of removal of disability. (RIGL 9-1-14.3).

Absence or Concealment of Defendant.

If any person, against whom a Rhode Island resident has a cause of action, (a) is outside state when cause of action accrues or leaves state during the period of limitation, and (b) does not leave property within state that can be attached, then action may be commenced within period of limitation after his return, if he returns in such manner that an action may, with reasonable diligence, be commenced against him. (RIGL 9-1-18). Fraudulent concealment by actual misrepresentation of a cause of action tolls running of period of limitation and such cause of action is deemed to accrue at time its existence is first discovered. (RIGL 9-1-20).

Interruption of Statutory Period.

Action may be commenced either by or against executor or administrator of decedent within one year after death of party if death occurred within 60 days of limitation period and action survives. (RIGL 9-1-21).

Revival of Barred Claims.

A debt may be revived, and statutory period started anew, by part payment or oral or written acknowledgment. (49 R. I. 151, 141 A. 307). Part payment of judgment does not revive judgment. (42 R. I. 78, 105 A. 516).

Pleading.

Limitation is an affirmative defense (R.C.P. 8[c]; D.C.R. 8[c]) and must be asserted by either motion or answer or it is waived (R.C.P. and D.C.R. 9[f], 12[a], [b], [h]). Criminal law application. (585 A.2d 645).

Claims Against State.

Claimant given right to sue state by special act or in cases involving tort claims against state or any political subdivision thereof, must do so within two years of date of special act or within two years of accrual of any claim of tort. (RIGL 9-1-25).

Action for contribution by joint tortfeasor must be commenced within one year of first payment made by a joint tortfeasor which has discharged common liability or which is more than his pro rata share thereof. (RIGL 10-6-4).

Actions on Claims Against Decedents' Estates.

See category 13 Estates and Trusts, topic 13.09 Executors and Administrators.

5.16A PARTITION:

All joint tenants, coparceners and tenants in common, seized or possessed of any estate of inheritance in any lands, tenements or heriditaments, may be compelled to make partition between them of such lands by civil action. (RIGL 34-15-1). All joint tenants, coparceners and tenants in common, seized or possessed of any estate for life or years, or of any estate for life or years with others who have estates of inheritance in possession, may be compelled to make partition between them, to continue until estate of some of parties shall determine, by civil action. (RIGL 34-15-2, 3). Partition may be made between persons who hold fee of any shares of land and persons who are entitled to any shares thereof for life or in reversion or remainder, whether such remainder is vested or contingent and whether it be to persons not in being or not yet ascertained. (RIGL 34-15-20).

Jurisdiction and Venue.

Partition proceedings are brought in Superior Court for county in which any of real estate is situated. (RIGL 8-2-13, 14; RIGL 9-4-2; RIGL 34-15-6).

Proceedings.

Where any interested person, not a plaintiff, is a nonresident, or where any interested person has left state and it is not known where he is, or whether alive, or survived by children, or where some person unknown to plaintiff is interested in cause, court provides notice to such person by publication or mail and after such notice may proceed as if person were actually notified or had appeared. (RIGL 34-15-7). Service of process may be made on defendant who is inhabitant but temporarily absent from state by leaving copy thereof with tenant in possession of estate involved, and if such defendant does not answer, cause will be continued three months or until his return within such period, at which time, if he does not answer, court will appoint agent for him to defend action. (RIGL 34-15-8, 9). If interested party is omitted from action, he shall be summoned 20 days before trial and if he does not appear, his name may be inserted in process and judgment may be rendered against him. (RIGL 34-15-10). Court will appoint guardian for defendant who is infant, of unsound mind, or otherwise incapacitated. (RIGL 34-15-11). No action is abated by decease of parties plaintiff or defendant, but court will notify heirs or devisees of same and may render judgment as if such heirs or devisees had been original parties. (RIGL 34-15-12). In action against several defendants, they may answer severally or jointly. (RIGL 34-15-14).

Partition in Kind or Sale.

Court may order share of any party to be set off, dividing remainder or leaving it undivided. (RIGL 34-15-15). Court may order whole or part of premises to be sold at public auction or by private contract by commissioners appointed to divide or sell same; but no interested persons, not parties to action, are bound by such sale unless court makes them parties. (RIGL 34-15-16, 17). If property cannot be partitioned by metes and bounds court has discretion to order sale. (76 R. I. 30, 68 A.2d 59). Court must use sound discretion and consider all facts before allowing sale. (117 R. I. 349, 367 A.2d 701).

5.17 [RESERVED]

5.18 PLEADING:

Rules of civil procedure: Superior Court rules conform generally to Federal Rules of Civil Procedure. Simplified rules of procedure in District Court. See topic 5.19 Practice.

Pleadings Permitted.

Complaint and Answer; Reply to Counterclaim; Answer to Cross Claim; Third Party Complaint and Third Party Answer. Reply to Answer or Third Party Answer by court order only. (R.C.P. and D.C.R. 7).

Counterclaim or Set-off.

Rule with respect to compulsory counterclaim in Superior Court similar to Federal Rule 13(a) except that counterclaim need not be stated if opposing party's claim is for damages arising out of motor vehicle ownership, operation, use, or control, or was already subject of pending action. (R.C.P. 13[a]). Pleading may state as counterclaim any claim against opposing party. (R.C.P. 13[b]). All counterclaims in district courts are permissive. (D.C.R. 13[a]).

Demurrer.

Not used. (R.C.P. and D.C.R. 7).

Amended or Supplemental Pleadings.

Similar to Federal Rule 15. (R.C.P. and D.C.R. 15).

Affidavits to support and resist motion for summary judgment same as Federal Rule 56. (R.C.P. 56 and D.C.R. 56).

Supporting affidavits, depositions, answers to interrogatories and admissions on file may be used to support motion for summary judgment. (R.C.P. 56 and D.C.R. 56).

Bills of Particulars.

Not used.

Verification.

Same as Federal Rule 11 prior to 8/1/83. (R.C.P. and D.C.R. 11).

Service.

Service must be made upon attorney who represents a party unless service upon party is ordered by court. (R.C.P. 5[b]; D.C.R. 5[b]).

Filing.

Filing of all pleadings and other papers is required with clerk of court. (R.C.P. 5 [d] and [e]; D.C.R. 5[d] and [e]).

Time.

In Superior Court, complaint, if delivered to officer for service, must be filed with clerk within ten days after completion of service and if attachment is made, within 30 days after first attachment. (R.C.P. 3). Answer must be served within 20 days after service of summons and complaint unless otherwise ordered. Answer to cross claim or reply to counterclaim must be served within 20 days after service. Service of motion permitted by rules alters these periods by requiring responsive pleadings within ten days after denial or postponement of motion or grant of motion for more definite statement. Provisions are similar to Federal Rule 12. (R.C.P. 12). Foregoing periods of time are same in District Court. (D.C.R. 12).

Small Claims.

See category 6 Courts and Legislature, topic 6.01 Courts.

See also topic 5.02 Actions.

5.19 PRACTICE:

Pursuant to statutory rule-making authority (as supplemented by 1965, c. 55 and 1966, c. 1 which amend statutory practices and procedures to conform with rules) practice in Superior Court is governed by Rhode Island Rules of Civil Procedure (R.C.P.) and in District Court by Rhode Island District Court Rules of Civil Procedure (D.C.R.). R.C.P. and D.C.R. in general conform to Federal Rules of Civil Procedure, with some modifications; numbering of R.C.P. and D.C.R. generally parallels numbering of Federal Rules.

Discovery.

(R.C.P. and D.C.R. 26 through 37). Party may be required to produce an income tax return, W-2 Statement or copies thereof by judicial order. (459 A.2d 941). Surveilling party may be required to produce surveillance materials upon showing of undue hardship by party or witness surveilled. (556 A.2d 47). Disclosure of insurance policy limits may be required in negligence actions. (R.C.P. and D.C.R. 26[b][2]). Public body may not deny person access to public records and court may impose fine of up to $1,000 for any violation of this chapter. (RIGL 38-2-9). Justices of peace and notaries public may issue subpoenas to witnesses and subpoena duces tecum in any case pending before any probate court. (RIGL 8-9-17.1). See also topic 5.11 Depositions and Discovery. Following material variations from Federal Rules should be noted:

Deposition Scope Limitations.

R.C.P. and D.C.R. 26(b)(2).

Order of Taking Depositions.

Subject to Court’s discretion. (R.C.P. and D.C.R. 30[a]).

Orders for Protection of Parties and Deponents.

Court may require party taking deposition outside state to pay traveling expenses of opposing party and his attorney. (R.C.P. and D.C.R. 30[b]).

Access to Deposition.

Deposition need not be sealed and shall be open to inspection upon filing, unless otherwise ordered by Court. (R.C.P. and D.C.R. 30[f]).

Interrogatories to Parties.

Plaintiff must have leave of court to serve interrogatories within 60 days of service of complaint. (R.C.P. and D.C.R. 33[a]). Interrogatories are limited in number to 30 questions. (R.C.P. and D.C.R. 33[b]). Party interrogated must object or answer interrogatories within 40 days. (R.C.P. and D.C.R. 33[a]). If objections cannot be resolved by parties, interrogating party may move for order to answer. (R.C.P. and D.C.R. 33[a]). Continuing duty to supplement answers. (R.C.P. and D.C.R. 33[c]).

Production of Documents and Things and Entry upon Land for Inspection.

Any party may, without leave of Court, serve on any other party a request to produce and permit copying of designated documents and things or to enter upon land. Party upon whom request is served must comply with request, unless within 20 days after service thereof (or such other time as court may allow), he serves objection on requesting party. Requesting party may move for order with respect to any objection or failure to permit inspection as requested. (R.C.P. and D.C.R. 34). Any federal or state agency, public utility, or national bank served with subpoena for production of documentary evidence may provide photostatic copies of all requested documents to be used as evidence. (RIGL 9-17-5.1).

Demand for Admission of Facts.

(R.C.P. and D.C.R. 36 through 37).

Direct Actions Against Insurer.

For statute providing direct liability of insurer to person injured in certain cases, see category 23 Transportation, topic 23.01 Motor Vehicles, subhead Actions for Injury.

Juries.

Six person juries required in civil cases. (RIGL 9-10-11.1). Jurors are qualified under RIGL 9-9-1 and RIGL 9-9-1.1. Presiding justice of superior court, or justice assigned by him, may order entire panel of petit jurors to be divided into sub-panels to expedite jury selection. (RIGL 9-10-11.1). Juries permitted in Family Court. (RIGL 14-1-47).

Small Claims.

See category 6 Courts and Legislature, topic 6.01 Courts.

See also topics 5.02 Actions, Appeal and Error, Depositions and Discovery, Injunctions, Judgments, Pleading, Process; category 8 Debtor and Creditor, topics 8.02 Attachment, 8.05 Executions, 8.09 Garnishment.

5.20 PROCESS:

Rules of civil procedure substantially similar to Federal Rules of Civil Procedure in effect in Superior Court and District Court. See topic 5.19 Practice. Most civil actions commenced by summons and complaint. (R.C.P. and D.C.R. 3).

General Requisites.

Similar to Federal Rule 4(b). (R.C.P. and D.C.R. 4[a]).

By Whom Issued.

Issued by plaintiff’s attorney on blank form procured from clerk. (R.C.P. and D.C.R. 4[b]).

Who May Serve.

Sheriff, deputy sheriff, town sergeant, or constable, except as otherwise provided by statute or by court. (RIGL 9-5-6, 8, 10; RIGL 42-9-8.1; RIGL 45-16-4; RIGL 45-16-4.3; RIGL 45-16-4.4; R.C.P. and D.C.R. 4[c]). Subpoenas served in manner similar to that prescribed in Federal Rule 45. (R.C.P. and D.C.R. 45).

Personal Service on Individual.

By leaving a copy of summons and complaint with him or at his dwelling house or usual place of abode with some person of suitable age and discretion then residing therein or with authorized agent. (R.C.P. and D.C.R. 4[d]). See infra, subhead Personal Service Outside the State.

Service at Work.

Employer may not obstruct service on employee. (RIGL 9-5-35).

Personal Service on Infant.

Permitted, but guardian ad litem must be appointed after service of process before proceeding with litigation. (50 R.I. 321, 147 Atl. 617).

Personal Service on Incompetent Person.

By service on guardian or conservator and upon incompetent person. (R.C.P. and D.C.R. 4[d]).

Personal Service on Partnership.

All partners should be served with process. See infra, subhead Personal Service Outside the State. (19 R. I. 70, 31 Atl. 690).

Personal Service on Domestic Corporation.

Similar to Federal Rule 4(d) except that service may be made by leaving copy of summons and complaint at office of corporation with person employed therein. (R.C.P. and D.C.R. 4[d]). See category 2 Business Organizations, topic 2.03 Corporations, subhead Resident Agent and Registered Office.

Personal Service on Association.

Serve president and secretary or officers or members exercising substantially those functions; or, in absence of such officers, serve any two officers, or if there is only one officer, serve their officer. If no officer is known to plaintiff, then serve any member of association. (RIGL 9-2-12). Class action against all members may be alternative form of suit. (269 F.2d 311).

Personal Service on Foreign Corporation.

Same as for domestic corporation. In addition, every foreign corporation that manufactures products sold or used in state must file designation of person to accept service of process. If no written power appointing attorney for service is filed, secretary of state may be served. See category 2 Business Organizations, topic 2.03 Corporations.

Personal Service Outside the State.

Every foreign corporation, nonresident individual, nonresident partnership and nonresident association having the necessary minimum contacts with state is subject to service and suit in manner provided in statute. (RIGL 9-5-33; see R.C.P. and D.C.R. 4[e] and [f]).

Service by Mail or Publication.

Any justice of Superior Court may order special service of process by personal notice or notice by mail or publication for purpose of dealing with any property, relation or person within the state and subject to jurisdiction of court. (RIGL 8-2-33). Use registered or certified mail, return receipt requested. See R.C.P. and D.C.R. 4(e) and (g) for other permissible forms of service by mail.

Service of Prehearing Notice of Summary Judgment.

Defect in service of prehearing notice of summary judgment motion is subject to “raise or waive” rule. (870 A.2d 1022).

Long Arm Statute.

See subhead Personal Service Outside the State, supra.

Proof of Service.

If served by sheriff, sheriff annexes statement of service directly to writ. If made by person other than sheriff or his deputy, affidavit must be made. See R.C.P. and D.C.R. 4(h).

Nonresident Motorist.

See category 23 Transportation, topic 23.01 Motor Vehicles.

5.21 REPLEVIN:

Personal property may be replevied by owner or person claiming present right to possession thereof, except by defendant in suit in which said property has been attached. (RIGL 34-21-1, 2; R.C.P. 64, D.C.R. 64). Action must be brought in District Court if value of property is $5,000 or less and in Superior Court if value exceeds $5,000. (RIGL 34-21-1, 2).

Proceedings.

Plaintiff seeking to replevy personal property shall proceed by complaint and summons and shall make a motion for issuance of a writ of replevin which shall be served with complaint and summons. Motion shall be granted only upon a showing that there is a probability that plaintiff will prevail and that there is a substantial need for transfer of possession of personal property to plaintiff prior to adjudication of claim. In lieu of ordering issuance of writ, court may order defendant to give security. If court orders issuance of writ, statutory requirements for security are operative. (R.C.P. and D.C.R. 64, RIGL 34-21-4 through -6).

Bond.

If court orders issuance of writ, plaintiff must give bond with sufficient sureties (RIGL 34-21-4).

Delivery to Plaintiff.

Officer serving writ may not deliver the goods to plaintiff until the court has approved, after notice and summary hearing, the amount of the plaintiff’s bond and sufficiency of surety. (RIGL 34-21-5).

Repossession.

Further bond or further surety may be ordered by court upon defendant’s motion therefor and for cause shown at any time pending writ and, if plaintiff fails to comply with order, action is dismissed and judgment rendered for defendant for return and restoration of property replevied with damages and costs. (RIGL 34-21-6).

On failure by plaintiff to comply with court's order as to bond within three days after entry thereof court directs officer having possession of goods to return them to defendant with judgment for damages and costs. (RIGL 34-21-5).

Claims of Third Persons.

If action brought against officer who has attached property at suit of a creditor, such creditor may assume defense of suit after indemnifying officer against damages and costs. (RIGL 34-21-13).

Judgment.

If plaintiff, upon trial, obtains a judgment for possession of goods, he recovers his reasonable damages for taking and detention and his costs; no costs shall be taxed against defendant bailee where he surrenders upon demand property to officer serving writ and makes no defense to action, if he shall, before service of writ, have offered to surrender property upon receipt of good and sufficient bond of indemnity. (RIGL 34-21-10).

For Defendant.

If plaintiff neglects to enter and prosecute the suit, defendant may, upon complaint, have judgment for a return and restoration of the property replevied, reasonable damages for the taking and reasonable costs. (RIGL 34-21-7). Upon trial, if judgment is rendered for return and restoration, defendant may recover reasonable damages with costs of suit. (RIGL 34-21-8).

5.22 SEQUESTRATION:

Clerk of Superior Court, on application of party entitled to performance, may issue writ of attachment or sequestration against property of disobedient party to compel compliance with judgment order. Such property may include money, deeds and other documents. (R.C.P. 70). Governed generally by equitable principles and R.C.P. 70.

See also topic 5.19 Practice; category 8 Debtor and Creditor, topics 8.02 Attachment, 8.05 Executions, 8.09 Garnishment and 8.16 Receivers.

5.23 SERVICE:

See topic 5.20 Process.

5.24 STAY OF EXECUTION:

See topics 5.02 Actions, Appeal and Error; category 8 Debtor and Creditor, topic 8.05 Executions.

5.25 SUBMISSION OF CONTROVERSY:

See topic 5.15 Judgments, subhead Declaratory Judgments.

5.26 VENUE:

Rules of civil procedure substantially similar to federal rules of civil procedure in effect in Superior Court and District Court. See topic 5.19 Practice.

All actions involving title to land, interest therein or possession thereof must be brought in county or division where land or some portion thereof is located. Other actions must be brought in county or division where one of plaintiffs or defendants dwells, or where one defendant is found, or, if all parties are nonresidents, in any county or division. Actions involving corporations shall be brought in county or division where other party dwells, or where defendant is found or where corporation is located by its charter or where it actually holds or is required to hold its annual meetings. (RIGL 9-4-2 through 5). Actions brought contrary to these venue provisions may be dismissed or transferred to proper county or division. (RIGL 9-4-6). In multiparty claims litigation, for convenience or to avoid prejudice, court may order separate trial in same or different county as to any claims or issues. (R.C.P. and D.C.R. 42).

Small claims actions have same venue as other civil actions. When plaintiff is corporation, action must be brought in division where defendant resides. (RIGL 10-16-3).

Petitions for divorce are filed in county in which petitioner resides unless petition is based on residence of respondent. (RIGL 15-5-13).

Change of Venue.

Venue may be changed by petition pursuant to RIGL 8-2-30 or by consent of parties with approval of court, and any civil cause may be referred to another county by presiding justice of Superior Court to obtain a more speedy trial. (RIGL 8-2-27).

6 COURTS AND LEGISLATURE

6.01 COURTS:

United States District Court.

Clerk's office: John O. Pastore Federal Building, Two Exchange Terrace, Providence 02903.

Court sits at Providence.

Deposit of $150 to cover fees is required on commencement of any action, except Chapter XI bankruptcy petition in bankruptcy for which fee is $800.

Supreme Court.

Jurisdiction.

Supreme Court has general supervision of all courts of inferior jurisdiction to correct and prevent errors and abuses therein when no other remedy is expressly provided; it may issue writs of habeas corpus, or error, certiorari, mandamus, prohibition, quo warranto, and all other extraordinary and prerogative writs and processes necessary for furtherance of justice and due administration of law; it may entertain informations in nature of quo warranto and petitions in equity to determine title to any office; it has jurisdiction of petitions for trials and new trials as provided by law, bills of exceptions, appeals and certifications to Supreme Court.

Court sits at Providence.

Superior Court.

Jurisdiction.

Superior Court has original jurisdiction of suits and proceedings of an equitable character and of statutory proceedings following course of equity; of all actions where title to real estate or some right or interest therein is in issue, except actions for possession of tenements let or held at will or by sufferance; and exclusive original jurisdiction of all other civil actions in which amount in controversy shall exceed sum of $10,000; and concurrent original jurisdiction with District Court in all other action at law in which amount in controversy exceeds sum of $5,000 and does not exceed $10,000; and jurisdiction concurrently with Supreme Court of writs of habeas corpus, mandamus, quo warranto, and informations in nature of quo warranto; also original jurisdiction in all criminal matters brought by indictment and jurisdiction of all criminal and civil appeals from district courts and of all appeals from probate courts.

Court sits at Newport for Newport County, at Warwick for Kent County, at South Kingstown and Westerly for Washington County, at Providence and Bristol for Bristol County and at Providence and Woonsocket for Providence County.

Family Court.

Jurisdiction.

Petitions for divorce from bond of marriage and from bed and board, allowance, alimony, support and custody of children, allowance of counsel and witness fees, other matters affecting parties and children wherein jurisdiction is acquired by filing of such petitions for divorce, and other matters arising out of petitions and motions relative to real and personal property in aid thereof; separate maintenance; antenuptial agreements, property settlement agreements and all other contracts between persons who were husband and wife or who planned to become husband and wife at time such contract was entered into; complaints for support of parents and children; matters relating to delinquent, wayward, dependent, neglected or mentally defective or mentally disordered children, or children who, by reason of handicap, suffer from learning disability which requires special education or treatment and other related services; adoption of children under 18 years of age; change of names of children under age of 18 years; power to enter orders designed to bring about family reunification; paternity of children born out of wedlock and provision for support and disposition of such children or their mothers; child marriages; matters involving criminal or quasi-criminal charges against persons under 18 years of age (juvenile may be referred to adult court only after waiver of jurisdiction by Family Court [951 A2d 481]), except for persons charged with certain offenses to be tried as adults (RIGL 14-1-3); matters relating to adults involved with paternity of children born out of wedlock; responsibility for or contributing to delinquency, waywardness or neglect of children under 16 years of age; desertion, abandonment or failure to provide subsistence for any children dependent upon such adults for support; neglect to send any child to school as required by law; bastardy proceedings; and custody of children in proceedings, whether or not supported by petitions for divorce or separate maintenance or for relief without commencement of divorce proceedings. Exclusive initial jurisdiction of all appeals from any administrative agency or board affecting or concerning children under age of 18 years. (RIGL 8-10-3; 577 A.2d 248). Jurisdiction in instances of witness intimidation limited to prosecution of juveniles accused of witness intimidation in Family Court. (783 A.2d 917). This Court has authority to appoint guardian for child who has previously been in custody of Department for Children. (RIGL 40-11-12). Family Court without jurisdiction to entertain divorce petition involving same sex couple married in another state. (935 A.2d 956).

District Court.

State-wide District Court with six divisions. Original jurisdiction of all civil actions, except in equity, where amount in controversy does not exceed $5,000, of all actions for possession of tenements or estates let, or held by will or sufferance, of actions of replevin where value of goods and chattels are $5,000 or less in value, and of housing violations. Concurrent original jurisdiction with Superior Court of all civil actions at law where amount in controversy exceeds $5,000 and does not exceed $10,000, although any defendant is entitled to remove such action to Superior Court. District Court has authority to issue ex parte restraining order when family court is not in session. (RIGL 15-15-4[B][1]).

District Court has jurisdiction of all crimes and misdemeanors wherein punishment provided by law does not exceed fine of $500 or imprisonment for more than one year; and authority to examine and bind over to Superior Court all crimes beyond jurisdiction of District Court. Sixth Division has jurisdiction over involuntary civil commitment under mental health, drug abuse and alcoholism laws, review of decisions of registrar of motor vehicles and traffic violation hearing board, review of decisions by tax administrator, liquor control board, and unemployment security board. (1976, c. 140). All trials in District Court are without jury. Such courts meet at some regular place, date, and hour fixed by chief judge as specified in process.

Appeal to Superior Court from judgment of District Court must be filed within two days, exclusive of Sats., Suns. and legal holidays, after judgment is entered. (RIGL 9-12-10).

District Court has exclusive original jurisdiction of all violations of minimum housing standards. (RIGL 8-8-3). Party aggrieved by final judgment, decree or order relating to such matter may petition supreme court within 20 days after entry of judgment for writ of certiorari. (RIGL 8-8-3.2).

Housing Court.

Decisions of local housing boards of review may be appealed by filing complaint with district court encompassing area wherein real estate is located, within 30 days from mailing of board’s decision. Such suits are entitled to priority in calendaring. This court is empowered to enter temporary restraining orders, preliminary and permanent injunctions, assess fines of up to $500 for willful violations of housing code. (RIGL 45-24.2-6).

Small Claims.

Claims of $2,500 or less in action for money damages to recover amount of any tax, action to recover damages from retail sale or services, and action based upon negotiable instrument, exclusive of interest and costs, may be brought in District Court by filing of written statement of claim containing names, residences and post office addresses or business address of parties, amount and nature of claim, written waiver of right to appeal and sum of $30 plus prevailing postal rate. Service is made by registered or certified mail. If defendant fails to appear at time of hearing, he is defaulted and judgment entered for plaintiff for amount of his claim found by court to be due and owing. If plaintiff does not appear at time of hearing, court may dismiss claim or enter judgment for defendant for costs, but if court finds that claim has already been adjudicated or is brought to oppress or harass defendant, it may deny claimant availability of this procedure. Defendant may file counterclaim against plaintiff. Defendant has same right of appeal as in ordinary civil actions in district courts. (RIGL 10-16-1 through 16).

Traffic Tribunal.

Decisions of Appeals Panel of Traffic Tribunal may be appealed to District Court if appeal is filed within ten days after notice of decision is given. (RIGL 31-41.1-9).

Divisions.

First Division: Bristol County.

Second Division: Newport County.

Third Division: Kent County, City of Cranston, Towns of Johnston, Scituate and Foster.

Fourth Division: Washington County.

Fifth Division: Cities of Woonsocket, Pawtucket and Central Falls, and Towns of Lincoln, Cumberland, Burrillville, Glocester, Smithfield, North Providence and North Smithfield.

Sixth Division: Cities of Providence and East Providence.

Small Claims Courts.

See subhead District Court, supra.

Workers' Compensation Court.

This Court has such jurisdiction as may be necessary to carry out its duties under Workers' Compensation Act (cc. 29-38 inclusive), except those provisions relating to crime (RIGL 28-30-1).

Probate Courts.

Each city or town has own probate court with licensed attorney as probate judge, except Town of New Shoreham where Town Council is court of probate. Petition for change of name granted or denied without regard to spousal consent. (RIGL 35-22-28). Probate court has jurisdiction to appoint guardians for minors and adults. See category 14 Family, topic 14.07 Guardian and Ward.

City Court.

Providence Municipal Court.

This court has jurisdiction over minor traffic violations and enforces minimum housing standards ordinance and miscellaneous ordinances. Court meets at place, date, and hour fixed by court, which is specified in process. Other cities have municipal courts of similar jurisdiction.

Justices of Peace.

Justices of peace have no authority to act as judges, but may be authorized by Chief Judge of District Court to set and take bail in all complaints bailable before District Court (except offenses punishable by life imprisonment) and to commit to adult correctional institutions in default of bail, and to issue warrants (except search warrants) and complaints for any offense for which judge of District Court may issue same. Powers may only be exercised within division of District Court to which justice of peace is attached, but such justices of peace as are authorized by chief judge of District Court to set and take bail and to commit as aforementioned and to issue warrants (except search warrants) in any division may do so where defendant is being held by state police.

Municipal Courts.

Compact between state courts, agencies and local municipal courts sets forth jurisdiction with respect to law enforcement powers. (RIGL 8-18-1 et seq.).

6.02 LEGISLATURE:

General Assembly meets annually commencing in Jan. (Amend. XI, § 1, R. I. Const.).

Special Sessions may be called by Governor. (Art. 7, § 7, R. I. Const.).

Initiative or Referendum.

No provision for initiative. Procedure for referendum contained in c. 17-5.

Lobbyists are regulated by c. 22-10.

Composition of Senate and Districts governed by RIGL 22-1-1 and 2.

Composition of House of Representatives and Districts governed by RIGL 22-2-1 and 2.

6.03 REPORTS:

Decisions of Supreme Court were historically (from 1828-1980) reported in Rhode Island Reports and currently are reported in Atlantic Reporter. Certain *per curiam* opinions were for a time reported only in Atlantic Reporter.

Digest.

All Rhode Island cases are covered in Rhode Island and Atlantic Digests.

6.04 STATUTES:

Latest compilation of statutes is General Laws of 1956. Subsequent legislation is in annual Public Laws, and is incorporated in pocket supplements to General Laws.

Uniform Acts promulgated by the National Conference of Commissioners on Uniform State Laws which have been adopted are: †Aeronautical Regulatory (1940; 1966); †Alcoholism and Intoxication Treatment (1972); †Business Corporation (1969; 1976); †Business Records as Evidence (1928); †Certification of Questions of Law (1974); Child Custody Jurisdiction and Enforcement (2003); †Close Pursuit (1936); Code of Military Justice (1962, 1965); †Commercial Code (1960, 1966); Contribution Among Tortfeasors (1940, 1965); Controlled Substances (1974); Criminal Extradition, as revised (1947); Custodial Trust (1988); Declaratory Judgments (1959); Determination of Death (1982); Divorce Recognition (1949); Electronic Transactions (2000); Enforcement of Foreign Judgments (1985); Escheat of Postal Savings System Accounts (1971); Estate Tax Apportionment (1971); Facsimile Signature of Public Officials (1967); †Fiduciaries (1960); †Flag (1902, 1946); Fraudulent Transfer Act (1986); Interstate Enforcement of Domestic Violence Protection Orders (2000, 2002); Interstate Family Support (1996); Judicial Notice of Foreign Law (1940); Landlord and Tenant Act (1986); †Revised Limited Partnership (1985); †Management of Institutional Funds (1972); Mandatory Disposition of Detainers (1974); †Motor Vehicle Certificate of Title and Anti-Theft (1971); †Partnership (1947); †Paternity (1979); †Post-Conviction Procedure (1974); Premarital Agreement (1987); Prudent Investor (1996); †Reciprocal Enforcement of Support (1951, 1970); Rendition of Prisoners as Witnesses in Criminal Proceedings (1970); Simplification of Fiduciary Security Transfers (1959); Simultaneous Death (1947); State Administrative Procedure (1961 Model Act) (1962); †To Secure Attendance of Witnesses from Without a State in Criminal Proceedings (1936); Trade Secrets Act (1986); Transfers to Minors (1985); †Unauthorized Insurers (1973); Unclaimed Property Act (1987); Veterans' Guardianship, as revised (1946, 1959).

Other Uniform Acts adopted are: Commercial Drivers' License (1990).

For text of Uniform Acts falling within the scope of Martindale-Hubbell Law Digests, see Uniform and Model Acts section.

†Adopted with significant variations or modifications. See appropriate topics.

6.05 UNIFORM LAWS:

For list of Uniform Acts in force in this state see topic 6.04 Statutes. For text of Uniform Acts within the scope of the Martindale-Hubbell Law Digests see Uniform and Model Acts section.

7 CRIMINAL LAW

7.01 CRIMINAL LAW:

Crimes and criminal procedure are governed by Titles 11 and 12.

Bail. All offenses are bailable before conviction, except where punishable by death or life imprisonment and proof evident or presumption great. If defendant gives personal recognizance to appear before court, it is within discretion of court to accept 10% of amount of bail which defendant is ordered to furnish and to not require giving of surety or sureties. (RIGL 12-13-10). Court may examine source and sufficiency of security offered for bail and disapprove bail if person posting funds is unreliable, security is insufficient, or arrangement contravenes public policy. (RIGL 12-13-1 through 24).

Battered Women's Syndrome recognized as affirmative defense. (612 A.2d 725). Must be proven by preponderance of evidence. (899 A.2d 1281).

Elderly Violence Prevention Act creates right to speedy trial for victims 65 or older (RIGL 12-29.1-6) and offense of exploitation of elders (11-68-1 et seq.).

Indictment or Information. (12-12-1 through 22).

Internet Misrepresentation of Business Affiliation. (11-52.1-1 et seq.).

Interstate Agreement on Detainers Act. (RIGL 13-13-1 et seq.).

Interstate Compact for Supervision of Parolees and Probationers. (RIGL 13-9-1 et seq.).

Jessica Lunsford Child Predator Act. (RIGL 11-37-8.2.1).

Newly discovered evidence warrants new trial when: (1) Evidence discovered since trial; (2) defendants were diligent in trying to get evidence before trial; (3) evidence not merely cumulative or impeaching but is material to issue; and (4) evidence likely to change verdict at new trial. (865 A.2d 1064).

Protection and Supervision of Criminal Witnesses. (12-30-1 through RIGL 12-30-12).

Sexual Offender Registration and Community Notification Act. (RIGL 11-37.1-1 et seq.). Offenders appealing risk level classifications entitled to meaningful opportunity to be heard before Superior Court. (971 A.2d 555).

Software Fraud. (11-52.1-1 et seq.).

Trafficking of Persons and Involuntary Servitude made criminal offense. (RIGL 11-67-1 et seq.).

Uniform Criminal Extradition Act. (RIGL 12-9-1 et seq.).

Uniform Rendition of Prisoners as Witnesses in Criminal Proceedings Act. (RIGL 12-16.1-1 et seq.).

Uniform Controlled Substances Acts. (RIGL 21-28-1.01 et seq.); but medical use of marijuana protected (RIGL 12-28.6-1 et seq.).

Victim's Bill of Rights. (RIGL 12-28-1 et seq.).

8 DEBTOR AND CREDITOR

8.01 ASSIGNMENTS:

Following are not assignable: personal injury claim (101 R.I. 708, 227 A.2d 105), executory contract for personal services (26 R.I. 436, 59 A. 111), partner's right in specific partnership property (RIGL 7-12-36), interest in employees' trust as defined in RIGL 28-17-1 (RIGL 28-17-4), interest in policemen's or firemen's fund (RIGL 9-26-5), public assistance (RIGL 40-6-14).

Uniform Commercial Code in effect. (RIGL 6A-1-101 et seq.). See category 3 Business Regulation and Commerce, topic 3.09 Commercial Code.

Instrument Transferring Title.

Statutory form for assignment of mortgage is as follows: . . . . . holder of a mortgage by . . . . . to . . . . dated . . . . . recorded in the Records of Deeds in . . . . . in . . . . . book No. . . . . . at page . . . . ., for consideration paid, assigns said mortgage and the note and claim secured thereby to. . . . . . Witness . . . hand . . . . . this . . . . . day of . . . . .

(Acknowledgment)

(See RIGL 34-11-12. See also category 3 Business Regulation and Commerce, topic 3.09 Commercial Code.)

Filing.

See category 3 Business Regulation and Commerce, topic 3.09 Commercial Code.

Notice.

See category 3 Business Regulation and Commerce, topic 3.09 Commercial Code.

Effect.

Assignee of nonnegotiable chose in action which has been assigned in writing may maintain action thereon in his own name, subject to all defenses and rights of counterclaim, recoupment or set-off to which defendant would have been entitled had action been brought in name of assignor. (RIGL 9-2-8). See also category 3 Business Regulation and Commerce, topic 3.09 Commercial Code.

Assignment of Wages.

Wages for not more than one year may be assigned to secure an existing debt if assignment made in writing in statutory form and signed by assignor. Assignment must state date of execution, money or money value of goods furnished by assignee and rate of interest and copy must be delivered to assignor at date of execution of assignment. (RIGL 28-15-2 through 4). See also category 3 Business Regulation and Commerce, topic 3.09 Commercial Code.

Recording.

Such assignment of future earnings is not valid, except between the parties, unless recorded within five days in office of recorder of deeds of city or town where assignor resides. Copy of assignment must also be given to employer. (RIGL 28-15-5, 6). See also category 3 Business Regulation and Commerce, topic 3.09 Commercial Code.

Deductions.

Where collective bargaining agreement is in effect, wage deductions for defraying legal fees, contributions to prepaid legal plan, union dues, subscriptions for health service, contributions for certain charitable purposes, payments for obligations of U.S. or stock under employee stock purchase plan, contributions to employee pension plan or insurance plan, amounts to be credited to a share, deposit, or loan account in any credit union or contributions, subscriptions or payments of similar nature not connected with past or present indebtedness may be made by employer and are excepted from c. 28-15. (RIGL 28-15-9). See also category 3 Business Regulation and Commerce, topic 3.09 Commercial Code.

Standard form of assignment of wages is as follows:

Form

Know all men by these presents That I, ..., of . . . . . . in the County of . . . . . ., for a valuable consideration, to me paid by . . . . . . of . . . . . . the receipt whereof I do hereby acknowledge, do hereby assign and transfer to said . . . . . . all claims and demands (which I now have, and all) which within a period of . . . . . . from the date hereof I may and shall have against my present employer, ..., and against any person whose employ I shall hereafter enter (for all sums of money due and) for all sums of money and demands which, at any time within said period, may and shall become due to me for services as . . . . . .

To have and to hold the same to the said . . . . . ., his executors, administrators and assigns, to secure a debt (1) of $. . . . (with interest thereon from . . . . . . at the rate of . . . . per cent per annum) for money (or goods) actually furnished by the assignee amounting to $. . . . (2) contracted prior to the execution of this assignment (or contracted simultaneously with the execution of this assignment).

In Witness Whereof I have set my hand this . . . . day of . . . . . .

Signed and delivered

in presence of:

. . . .

(See RIGL 28-15-3. See also category 3 Business Regulation and Commerce, topic 3.09 Commercial Code.)

Assignment to Secure Small Loans.

Assignment of compensation for services, earned or to be earned, to secure loan made by licensee under so-called “Small Loans Act” is not valid unless: (1) Amount of loan is paid to borrower simultaneously with execution of assignment; and (2) assignment must be in writing, and signed by borrower himself, and, if borrower is married, assignment is signed by both husband and wife except that if borrower and spouse have lived apart for at least five months before assignment, written assent of borrower’s spouse is not required. Under such assignment, sum not exceeding 10% of borrower’s compensation is collectible by lender from borrower’s employer at time of each payment of compensation after lender has served on such employer copy of assignment verified by lender or his agent, similarly verified statement of amount unpaid on loan and printed copy of §§ 33 and 34 of Act. (RIGL 19-25-33, 34). See also category 3 Business Regulation and Commerce, topic 3.09 Commercial Code.

8.02 ATTACHMENT:

Actions in Which Allowed.

Generally only allowed in action based upon a contract under which damages can be determined. (24 R.I. 23, 51 Atl. 1044). Allowed in tort actions where defendant nonresident with property within state. (RIGL 10-5-6). See subhead Courts Which May Issue Writ, infra.

Courts Which May Issue Writ.

Superior Court and District Court. In civil action of equitable character, Superior Court may allow attachment by special order. (RIGL 10-5-5). Family Court may allow attachment for failure to make child support payments. (RIGL 15-13-3.1).

In Whose Favor Writ May Issue.

Attachment may issue in favor of a nonresident or a foreign corporation.

Exemptions.

See topic 8.06 Exemptions.

Claims on Which Writ May Issue.

Attachment may issue on a debt that is due and on unmatured debt absolutely payable at a certain date. (19 R.I. 220).

Proceedings to Obtain.

At time of commencement of action or at any time thereafter prior to judgment, plaintiff must file a motion for authority to attach defendant's assets, including real and personal property. Notice of motion must be served on defendant at least five days prior to hearing date. Motion will be granted only upon plaintiff's showing that he will probably prevail and that there is a need for furnishing plaintiff security in amount sought for satisfaction of judgment, plus interest and costs. (RIGL 10-5-2; R.C.P. and D.C.R. 4[j]).

In actions where plaintiff's claim has been reduced to judgment, defendant's assets may be attached and may be subject to trustee process. (RIGL 10-5-2). This provision, along with RIGL 9-28-1, has been held unconstitutional insofar as it allows post-judgment attachment without notice and opportunity to be heard on any claim of exemption. (757 F.2d 1344).

District Court requires notice and hearing before wage garnishment and notice and hearing not less than five nor more than nine days after other garnishment of personal property. (D.C.R. 69).

Attachment Bond may be required. (R.C.P. and D.C.R. 4[j]).

Levy.

Real estate is attachable by sheriff by filing copy of writ containing description of real estate to be attached, and name of partnership, if any, holding title to such real estate, with recorder of deeds or town clerk in city or town where real estate is located. (RIGL 10-5-9). Personal property is attachable to value commanded in writ and is kept by officer making attachment in his custody as security until he sells property or it is withdrawn from his custody. (RIGL 10-5-10, 12).

Indemnity.

Levying officer has no right to require.

Priorities.

Rights of attaching creditors are determined by time when sheriff actually serves trustee or takes possession of personal property or in case of realty, when copy of writ is filed in records of land evidence. (RIGL 9-26-30).

Release of Property.

Personal property attached may be released within 48 hours after such attachment, exclusive of Sundays and legal holidays, by the defendant or some one in his behalf giving bond to sheriff with satisfactory surety or sureties to pay judgment. (RIGL 10-5-13). If no bond is given, attached goods are appraised and attachment may be released before final judgment by defendant or some one in his behalf giving like bond to return goods or paying double their appraised value or judgment. (RIGL 10-5-16).

Real estate may be released by defendant giving surety company bond in amount of damages in writ or depositing such amount in cash with registry of court. (RIGL 10-5-17).

Dissolution of Attachments.

Attachment dissolved if complaint in action is not filed within 30 days after such attachment. (RIGL 10-5-45). Real estate attachment lien dissolved whenever the cause remains without action for a period of six years as shown by court docket. (RIGL 10-5-44). See topic 8.05 Executions.

Sale.

Animals, perishable goods and goods which cannot be kept without great and disproportionate expense may be sold after reasonable notice by order of court and proceeds paid into registry of court to be held as security to satisfy judgment or decree. (RIGL 10-5-35, 36).

Third Party Claims.

Interested persons may intervene and contest validity of attachment. (RIGL 10-17-19).

Modification.

Defendant may move to reduce demand for judgment and amount of property attached or to release property from attachment. (RIGL 10-5-18).

Wages.

Wage attachments permitted. (RIGL 10-5-8). See subhead Proceedings to Obtain, supra. See also Consumer Credit Protection Act, Tit. III (15 USCA §§ 1671 et seq.). Failure to make child support payments. (RIGL 15-13-3.1).

8.03 [RESERVED]

8.04 CREDITORS' SUITS:

Any judgment creditor, after his execution has been returned wholly or in part unsatisfied may, by civil action in nature of creditor's bill, reach and apply and subject to payment and satisfaction of his judgment any equitable estate, any equitable assets or any choses in action of judgment debtor, except those exempt from attachment by virtue of statutory provision. (RIGL 9-28-1). Above statutory remedy does not supersede availability of creditors' suits under usual equitable principles.

8.05 EXECUTIONS:

Rules of civil procedure in Superior and District Courts substantially similar to federal rules of civil procedure. See topic Practice.

Kinds of Execution.

Generally by writ of execution. (R.C.P. and D.C.R. 69; Tit. 9, cc. 25 and 26 of Gen. Laws).

Exemptions.

See topic 8.06 Exemptions.

Time for Issuance.

Unless stayed or otherwise ordered, execution issues after 24 hours immediately following entry of judgment. (RIGL 9-25-2). But see infra, subhead Stay of Execution. Execution may be issued at any time within six years from rendition of judgment or from return day of last execution. (RIGL 9-25-3).

Stay of Execution.

No execution shall issue in Superior Court upon a judgment until expiration of 20 days after its entry or until time for appeal has expired. (R.C.P. 62[a]). Foregoing period two days in District Court. (D.C.R. 62[a]). Upon motion, for cause, any justice of Supreme, Superior or District Court may stay execution upon any judgment or decree until further order. (RIGL 9-25-4). See R.C.P. and D.C.R. 62(b). Statute does not require any security on such stay.

Time for Levy in Attachment Suit.

If final judgment is rendered for plaintiff in any action in which writ was served by attachment, execution issued thereon must be levied on property attached within six months if issued from Supreme, Superior or Family Court, and within three months if issued from District Court, from day of entry of such judgment or decree and in absence of stay, or attached property will be discharged of attachment. (RIGL 9-25-23).

Levy on Real Estate.

When execution is to be levied on real estate or any interest therein, officer charged with service of such execution files with recorder of deeds, if any, or with town or city clerk of town or city in which such real estate lies, copy of execution together with description of such real estate or interest therein, and filing fee. Recorder of deeds or clerk notes upon copy of execution and in official book time of filing, names of parties to execution, including name of partnership where real estate levied upon is held in partnership name, amount of judgment, and name of court and time when such execution is returnable. Such filing constitutes good and sufficient levy on real estate or interest described in copy of execution. (RIGL 9-26-14, 15). Such levy is discharged of record after expiration of 20 years from date of judgment, unless levy is against only one spouse in real estate held as tenants by entirety. (RIGL 9-26-33).

Sale of Real Estate.

If real estate or interest therein is not redeemed within three months after levy is made, officer gives public notice of levy and of intended sale thereunder by causing advertisement to be published once a week for three weeks next before time of sale in newspaper published in county where such real estate lies, and sells same, or so much thereof as may be sufficient to satisfy judgment and costs and charges at public auction. (RIGL 9-26-16).

Adjournment of Sale.

Officer may, for good cause, adjourn sale from time to time, giving one week's notice thereof by publication as provided above. (RIGL 9-26-17).

Purchaser's Title.

Deed given by officer vests in purchaser all estate, right and interest which debtor had therein at time estate was attached or in case there was no attachment, all estate, right and interest which debtor had at time levy was made. (RIGL 9-26-16).

Levy on and Sale of Personal Property.

Where goods and chattels are levied on, officer takes possession of same and must advertise same at least ten days before sale. Expedited sale for perishables is possible by court order. (RIGL 9-26-12).

Mortgaged personal estate in possession of mortgagor, while redeemable at law or in equity, may be levied upon and sold in same manner as unencumbered personal estate. Proceeds of sale are first applied to payment of mortgage, balance to satisfaction of judgment. In case of such levy plaintiff in execution may redeem mortgaged property in same manner as mortgagor might have done and acquire mortgagee's lien. If property is not redeemed or sold before time of redemption expires, attachment becomes void. (RIGL 9-26-7 through 11). See Uniform Commercial Code. (RIGL 6A-1-101).

Return.

Execution is returnable in District Court in three months and in Supreme, Superior and Family court six months from date of such execution. (RIGL 9-25-20, 21).

Priorities.

Person who first procures an attachment, or, if there is no attachment, person who first levies execution is entitled to have his claim satisfied before others. (RIGL 9-26-31).

Supplementary Proceedings.

If execution is returned wholly or in part unsatisified, any judgment creditor may, by a civil action in nature of a creditors bill, reach and apply equitable estate, equitable assets, or any chose in action of debtor not exempt from attachment. (RIGL 9-28-1). See R.C.P. and D.C.R. 69. See topic 8.06 Exemptions. This provision along with RIGL 10-5-2, has been held unconstitutional insofar as it allows post-judgment attachment without notice and opportunity to be heard on any claim of exemption. (757 F.2d 1344). Debtor may be examined regarding his assets. (RIGL 9-28-4). Installment payments may be ordered. (RIGL 9-28-3, 5). Failure by debtor to comply is punishable by contempt. (RIGL 9-28-6).

Body Execution.

Execution may issue against body of defendant, not exempt from arrest in action upon penal statute or in any tort action or whenever defendant is arrested and held to bail upon original writ of arrest or writ of mesne process therein or whenever it shall be made to appear to court which rendered judgment in such action or to any justice thereof that such defendant is about to leave state without leaving therein sufficient real or personal estate to satisfy such judgment or that such defendant has been guilty of fraud in fact involving moral turpitude or intentional wrong either in contracting a debt for recovery of which judgment was rendered or in concealment, detention or disposition of his property; such body execution shall not issue unless ordered by justice upon written ex parte motion. (RIGL 9-25-15). Where judgment creditor establishes one of statutory grounds for execution, trial justice has no discretion to deny motion for body execution. However, if it is established that judgment debtor has delivered up his property for benefit of creditor, he is protected from continued incarceration. (110 R.I. 368, 292 A.2d 884).

8.06 EXEMPTIONS:

Debtor is entitled to hold exempt from attachment or levy certain specified articles of personal property, in some instances limited as to value, and also such other property, real, personal or mixed, as is exempt from attachment by general or special acts, charters of incorporation or policy of law. (RIGL 9-26-4).

Substitution.

There is no provision entitling a debtor who does not own articles specifically exempted to hold other property or money exempt in lieu thereof.

Debts against Which Exemptions Not Allowed.

No provision.

Waiver of Exemption.

No provision.

Necessity of Claiming Exemption.

Privilege is personal to defendant debtor and must be claimed by him. (17 R.I. 195, 21 A. 103).

See also topics 8.02 Attachment, 8.09 Garnishment.

Earnings.

Salary or wages of any debtor up to $50 salary, and wages of debtor's wife and minor children, and wages of seaman are exempt. (RIGL 9-26-4). See also Consumer Credit Protection Act, Title III. (15 U.S.C.A. § 1671 et seq.).

Relief Payments.

Exemption includes: (1) entire amount payable to debtor from any public charitable fund or relief of poor or in aid of unemployment, where debtor is object of such relief or aid; and (2) entire wages or salary due from any employer for period of one year after debtor ceases to be object of state, federal or municipal relief. (RIGL 9-26-4).

Retirement Benefits.

Exemption includes: (1) individual retirement account or individual retirement annuity and payment, or distribution therefrom; and (2) right or interest of person in annuity, pension, profit sharing, or other retirement plan protected by Employee Retirement Income Security Act of 1974. Neither exemption applies with respect to order of court pursuant to judgment of divorce, separate maintenance, or child support. (RIGL 9-26-4).

Other exemptions include necessary wearing apparel of debtor or family, debtor's working tools in usual occupation not exceeding value of $1,200 and professional library of professional man in actual practice; household furniture and family stores of a housekeeper not exceeding value of $8,600; debts secured by bills of exchange or negotiable promissory notes; other specified articles (RIGL 9-26-4); proceeds of policies of accident and sickness insurance (RIGL 27-18-24); proceeds of life insurance policies on life of debtor (RIGL 27-4-11).

8.07 FORECLOSURE:

See topic 8.13 Liens; category 20 Mortgages, topic 20.04 Mortgages of Real Property.

8.08 FRAUDULENT SALES AND CONVEYANCES:

Every gift, grant or conveyance of lands, tenements, hereditaments, goods or chattels, or of any rent, interest or profit out of the same, by writing or otherwise, and every note, bill, bond, contract, suit, judgment or execution, fraudulently intended to defraud creditors of their just demands, is void: Provided, however, that this does not apply as against a bona fide purchaser, mortgagee, lessee, or other taker for value without notice. (RIGL 6-16-1). Uniform Commercial Code adopted. (RIGL 6A-1-101 et seq.). See category 3 Business Regulation and Commerce, topic 3.09 Commercial Code.

Uniform Fraudulent Transfer Act adopted. (RIGL 6-16-1 through 12).

Remedies.

Creditors may institute civil action to set aside fraudulent conveyance. (27 R. I. 239, 61 A. 642). In case of real estate, action for ejectment is also proper. (28 R. I. 16, 65 A. 274).

Money judgment against transferee is available when return of property is impossible or its value has been diminished. (122 R.I. 518, 410 A.2d 113).

Bulk Sales.

Transferee who has, in good faith, complied with statutory requirements is under no liability to creditors of transferor (40 R. I. 297, 100 A. 913) and under no duty to see to application of purchase price to payment of their claims (51 R. I. 247, 153 A. 870).

Under business corporation tax law (RIGL 44-11-29) and sales and use tax law (RIGL 44-19-22), five days notice of bulk sale or transfer must be given to State Tax Administrator.

See category 3 Business Regulation and Commerce, topic 3.09 Commercial Code.

8.09 GARNISHMENT:

Right exists and is treated by statute and custom as attachment. See topic 8.02 Attachment.

Property Which May be Reached.

Any personal estate not exempted by law and not evidenced by negotiable instrument in hands of third person is liable to attachment on trustee process. (RIGL 10-5-7; RIGL 6A-7.1-602; RIGL 6A-9-311). Various kinds of income and benefit payments may be garnished to satisfy child support obligations. (RIGL 15-5-24).

Jurisdiction.

Superior Court and District Court. (RIGL 10-5-2). Family Court. (RIGL 15-5-24).

Proceedings to Obtain.

At time of commencement of action, or at any time thereafter prior to judgment, plaintiff must file a motion for authority to attach defendant’s personal estate. Notice of motion must be served on defendant at least five days prior to hearing date. Motion will be granted only upon plaintiff’s showing that he will probably prevail and that there is a need for furnishing plaintiff security in amount sought for satisfaction of judgment plus interest and costs. Bond may be required. (RIGL 10-5-2; R.C.P. and D.C.R. 4[j]).

In actions where plaintiff’s claim against defendant has been reduced to judgment, defendant’s personal estate may be attached and may be subject to trustee process. (RIGL 10-5-2). This provision, along with RIGL 9-28-1, has been held unconstitutional insofar as it allows post-judgment attachment without notice and opportunity to be heard on any claim of exemption. (757 F.2d 1344).

District Court requires notice and hearing before wage garnishment and notice and hearing not less than five nor more than nine days after other garnishment of personal property. (D.C.R. 69).

Answer of Garnishee.

Garnishee (trustee) required by statute to file affidavit (account) as to property of named defendant in his hands and possession. Negative affidavit required if such is fact. (RIGL 10-17-2). Copies of all affidavits must be sent to each plaintiff's attorney with name endorsed on writ. (RIGL 10-17-3).

Failure to Answer.

If garnishee makes no account, he is liable for whole amount of any judgment obtained, except as he may be relieved therefrom in case of accident or mistake. (RIGL 10-17-15; RIGL 9-25-24).

Garnishee must file account in affidavit form in District Courts within ten days after service of writ, and in Superior Court within 20 days after service of writ. (RIGL 10-17-4).

Tangible personal property attached in hands of garnishee may be surrendered by him to officer making attachment and officer makes due return thereof upon writ. (RIGL 10-17-5).

Garnishee in doubt being a party defendant may appear in proceedings for purpose of having his liability determined. (RIGL 10-17-13).

Examination of Garnishee.

Person signing garnishee's affidavit may be summoned by either party at any time before final judgment and subjected to examination and cross-examination upon all matters relating to or connected with the facts set forth therein and evidence may be introduced to contradict his testimony. (RIGL 10-17-6).

Attachment dissolved if complaint not filed in court within 30 days after attachment made. (RIGL 10-5-45).

Release of attachment is effected and garnishee discharged if plaintiff or officer serving writ accepts bond given in accordance with statute. (RIGL 10-5-22 through 24).

If defendant is not served but judgment is rendered, garnishee is charged to amount of res in hands of garnishee (75 R. I. 465, 67 A.2d 404) or, if garnishee fails to render account, to amount of just claim which plaintiff shows against defendant to satisfaction of court (RIGL 10-17-15).

Adverse Claims.

Claimant may, on his own motion, become a party to action so far as respects title to personal estate attached. (RIGL 10-17-19). In such case, garnishee may also set forth adverse claim in his affidavit and request court to determine his liability as garnishee. (RIGL 10-17-13).

Judgment.

Garnishee is charged with amount disclosed in his affidavit, if less than judgment, otherwise to amount of judgment. (RIGL 10-17-7).

Action against Garnishees.

Garnishee must be charged or motion made therefor within 30 days after date on which execution may issue. (RIGL 10-17-7; RIGL 9-25-2). If several persons are charged as garnishees, plaintiff may sue each separately and recover amount in each garnishee's hands until he recovers payment of judgment against original defendant in full with interest and costs. (RIGL 10-17-8).

Satisfaction of Judgment.

After final judgment against the defendant, garnishee may satisfy to amount of estate before suit and such payment serves as discharge against both plaintiff and defendant. (RIGL 10-17-9). If tangible personal property is attached, garnishee may, after entry of final judgment against defendant, surrender it to officer charged with execution issued on such judgment in order that same may be taken on execution. (RIGL 10-17-10). If garnishee's affidavit discloses that defendant's personal estate in his hands consisted of money, he may at any time before final judgment deliver it to clerk of court. (RIGL 10-17-11). Such surrender or delivery is good discharge to garnishee for such articles or money as to both plaintiff and defendant in action. (RIGL 10-17-12).

Relief from judgment may be obtained by a garnishee who has been charged as such by reason of his failure to file an account, by his making an affidavit pursuant to RIGL 9-25-24.

Earnings, salary or wages due defendant at time of service of writ or to become due defendant in future in excess of $50 may be attached. (RIGL 9-26-4 § 12[c]). See topic 8.06 Exemptions. See also Consumer Credit Protection Act, Title III (15 USCA §§ 1671 et seq.).

8.10 HOMESTEADS:

There is no homestead exemption in this state.

8.11 JUDGMENT NOTES:

See category 3 Business Regulation and Commerce, topic 3.02 Bills and Notes.

8.12 LEVY:

See topics 8.02 Attachment, 8.05 Executions.

8.13 LIENS:

Provisions of common law are in effect.

Uniform Commercial Code in effect. (RIGL 6A-1-101 et seq.). See category 3 Business Regulation and Commerce, topic 3.09 Commercial Code.

Waiver, Loss or Extinguishment.

Common law principles apply. Any real estate lien dissolves after expiration of 20-year period from date of recording of attachment. (RIGL 10-5-46).

Enforcement.

Persons entitled to liens at common law or by contract for work, labor, money expended on or storage of personal property, if not paid within 30 days after written demand, may enforce lien by complaint in Superior Court for county where one plaintiff resides. Court may order sale of property in satisfaction of debt. (34-35).

Mechanics' Liens.

(RIGL 34-28-1 through 37). Law constitutional and non-violative of due process because homeowners provided with hearing on validity of lien. (867 A.2d 796). Real estate (including interest of lessee or owner of less than freehold) on which improvement has been constructed, altered or repaired under contract or at request of owner, lessee or owner of less than freehold, or husband of owner with consent of wife, is subject to lien for work done and for materials used in such construction, alteration and repair. (RIGL 34-28-1 through 3). Waiver of lien prior to commencement of work by covenant, promise or agreement pursuant to contract or agreement relative to work done is precluded. Waiver of lien upon or after payment for work done is not prohibited. (RIGL 34-28-1). Notice of intention to claim lien must be given before or within 200 days after doing of such work or furnishing of such materials by registered or certified mail, return receipt requested, addressed to owner or lessee in form provided by statute. Within 200 days of work or furnishing of materials, copy of such notice of intention must be filed in records of land evidence. In event that notice is returned, within 30 days of return of notice, and no more than 200 days after mailing, it must be filed under same circumstances provided above. (RIGL 34-28-4). Notice of lien recorded in land evidence records pursuant to RIGL 34-28-4 effective for 200 days prior to date of filing. Notice of lien effective as to retainage earned but not paid for work furnished pursuant to RIGL 34-28-1 et seq.; notice of lien effective from commencement of work (RIGL 34-28-9). Lien of architect or engineer for work done in connection with construction, etc., valid if notice of intention provided in RIGL 34-28-4 mailed and filed in land evidence records before later of 200 days of performance of work or ten days after actual and visible commencement of such construction. (RIGL 34-28-7). Lien enforced by filing complaint in Superior Court for county where land located and by filing notice of lis pendens in records of land evidence in city or town where land located in form provided by statute, both within 40 days of recording notice of intention. Complaint to be filed on same day as notice of lis pendens or within seven days thereafter. (RIGL 34-28-10 through 13). These time periods are strictly enforced. (764 A.2d 174). Persons claiming lien must file account and demand in Superior Court. (RIGL 34-28-16). Actions for enforcement of mechanics' lien or action on bond or cash escrow provided pursuant to RIGL 34-28-17 may be accelerated upon motion of any party. (RIGL 9-2-18.1). After notice, court may order sale of property and payment of claims, with prior equities preserved. (RIGL 34-28-21 through 25). Owner or lessee may obtain discharge of lien by paying into registry of court total amount of all claimed liens or surety bond in such amount. (RIGL 34-28-17). Provision is made for notice of subcontractors' claim to mortgagee under construction mortgage loan of less than $500,000, with result that undisbursed fund may be withheld from owner or paid to claimant. (RIGL 34-27.1-1). As matter of law, party does not waive its right to arbitrate contractual dispute by filing notice of intent to claim mechanic's lien. (874 A.2d 1286).

Hospital furnishing medical or other services to patient injured by accident not covered by Workmen's Compensation Act has a lien (subject to the lien of an attorney) for its reasonable and necessary charges up to date of payment of damages, on patient's share of amount recovered or collected by patient or his personal representative from another for damages on account of such injuries, provided it gives the notices required by statute prior to payment. Lien is enforceable against person making payment for one year after payment. (RIGL 9-3-4 through 6).

Department of Social and Rehabilitative Services has lien upon estate of recipient of medical assistance if recipient was at least 65 years of age when such assistance was received. Lien does not attach if recipient is survived by spouse, child under age of 21, or permanently disabled child. (RIGL 40-8-15).

Personal Property.

There are statutory liens on personal property as follows:

In favor of motor vehicle repairer for material and labor furnished in repairing motor vehicle involved in an accident, if owner of motor vehicle has collision insurance. Lien is on any payment due owner by insurance carrier and is subject to lien of an attorney. Notice must be given in accordance with statute. (RIGL 9-3-9 through 11).

Motor vehicle lessor licensed under RIGL 31-5-33 who rents substitute vehicle for one owned by lessee, and insured against transportation expense, has lien upon payment due owner of said vehicle for transportation expenses and on account of such insurance for rental payments; lien is subject to attorney's lien. (RIGL 9-3-12 through 14).

In favor of processor of textiles, leather goods, or furs for indebtedness of persons, partnership or corporation for whose account labor was performed or materials furnished in treating or processing, or shipping, trucking and storage of property. Lien is paramount to interest of owner of property unless processor notified by registered or certified mail of such interest prior to time labor performed or materials furnished. (RIGL 34-29-1 et seq.).

In favor of jeweler, watchmaker or silversmith for alteration, repairing or other work done on personal property. (RIGL 34-30-1 et seq.).

In favor of launderer or cleanser for laundering, cleansing or storage of apparel or other personal property. (RIGL 34-31-1, 2).

In favor of hotel or innkeeper on guest's baggage and property brought on its or his premises, for accommodations or lodging and extras furnished, moneys advanced or credit extended. (RIGL 34-33-1, 2).

In favor of pilot upon hull and appurtenances of any vessel. (RIGL 46-9-17).

In favor of railroad upon animals for food, care and custody furnished. (RIGL 4-1-17). See category 3 Business Regulation and Commerce, topic 3.08 Carriers.

In favor of issuer upon its securities if its right to such lien is noted conspicuously thereon. (RIGL 6A-8-209).

For expenses of disinfecting imported goods, wares and merchandise. (RIGL 23-9-19).

Employee and dependents have first lien upon insurance proceeds due to employer for workers' compensation benefits. (RIGL 78-36-6).

Wage earners have priority claim against assets of employer for wages or workers' compensation payments having priority same as that afforded to wages under Federal Bankruptcy Act. (RIGL 28-14-6.1 and RIGL 28-33-28).

In favor of licensed towing contractor upon motor vehicles for towing and storage charges. (RIGL 31-22-15).

In favor of sellers of mobile and manufactured homes to be located at mobile or manufactured home parks in state. (RIGL 31-44-4).

In favor of self-service storage facility owners for rent, labor, insurance, or other valid charges related to personal property stored. (34-42).

In favor of operator of dry dock facility upon vessels for storage fees. (RIGL 34-46-1).

In favor of manufacturer's for all dies, molds, forms or patterns in their possession.

Real Estate Liens.

In favor of complainant for fence viewer fees and construction of partition fences. (RIGL 34-10-16). In favor of condominium association for unpaid common expenses. (RIGL 34-36-20).

Public Buildings and Works.

No lien attaches to a public building or other public works constructed by or for state, city, town or subdivision or agency thereof or to land owned by state, city, town or subdivision thereof (RIGL 34-28-31); but contractors performing work on state roads, bridges, public buildings and public works must give bond to state providing for prompt payment of labor performed and materials furnished (37-12).

Merchandise Liens.

Uniform Commercial Code applies. (RIGL 6A-1-101 et seq.).

Water Charges.

Water charges are lien on real estate and, if not paid, are collected in same manner as taxes assessed on real estate. (RIGL 39-15-12).

Redemption.

Owners of property sold in accordance with statutes to enforce any of foregoing liens have no right to redeem.

Boats.

Rhode Island has adopted Uniform Boat Title Act. (RIGL 46-22.1-1 et seq.).

Attachment Lien.

See topic 8.02 Attachment.

Attorney’s Lien.

See category 18 Legal Profession, topic 18.01 Attorneys and Counselors.

Collateral Security.

See category 3 Business Regulation and Commerce, topic 3.09 Commercial Code.

Execution Lien.

See topic 8.05 Executions.

Judgment Lien.

See category 5 Civil Actions and Procedure, topic 5.15 Judgments.

Liens on Exempt Property.

See topic 8.06 Exemptions.

Motor Vehicle Liens.

See category 23 Transportation, topic 23.01 Motor Vehicles.

Real Estate Mortgage Lien.

See category 20 Mortgages, topic 20.04 Mortgages of Real Property.

Tax Lien.

See category 22 Taxation, topic 22.13 Property Taxes, subhead Real and Personal Property Taxable, catchline Lien.

See also categories 3 Business Regulation and Commerce, topic Carriers; Mortgages, topic Chattel Mortgages.

8.14 MECHANICS' LIENS:

See topic 8.13 Liens.

8.15 PLEDGES:

Uniform Commercial Code in effect. (RIGL 6A-1-101 et seq.). See category 3 Business Regulation and Commerce, topic 3.09 Commercial Code.

Remedies of Pledgee.

Uniform Commercial Code in effect. (RIGL 6A-1-101 et seq.).

8.16 RECEIVERS:

Jurisdiction.

On application of creditor, claimant, debtor, or other interested person, Superior Court has discretionary power to appoint receiver to assume control of debtor's property and may impose such terms as are reasonable in particular case.

Proceedings.

Receivership is governed by equitable principles and rules of practice of Superior Court. (R.C.P. 66).

Eligibility and Competency.

No special qualifications are required for appointment, except that receiver must be resident of Rhode Island.

Qualifications.

Bond, while customary, need not be filed unless provided in decree of court.

Powers and Duties.

Duties of receiver are governed by such decree of court.

Compensation.

Expenses of receivership, including counsel fees, are given priority. Amount of compensation is in discretion of court.

Other types of receivers available: Receiver of state banks and trust companies and corporations whose deposits are insured by F.D.I.C. or other U.S. agency (RIGL 19-15-1 et seq.); alternative receivership for specified corporations (19-15.1 et seq.); receiver of loan and investment companies (RIGL 19-20-6); receiver of insurance companies (RIGL 27-1-14 et seq.; see also Uniform Insurers Liquidation Act, RIGL 27-14-1 et seq.); receiver of redevelopment project for benefit of obligees of redevelopment bonds (RIGL 45-33-13); receiver as remedy for deceptive trade practices (RIGL 6-13.1-5); receiver to collect business corporation tax (RIGL 44-11-38), public service corporation tax (RIGL 44-13-33), bank tax (RIGL 44-14-37), tax on bank deposits (RIGL 44-15-16), personal income tax (RIGL 44-30-92); receiver of limited partnership (RIGL 7-13-23) or partnership (45 R. I. 86, 119 A. 753); receiver for wage earner (RIGL 10-18-1 et seq.); receiver to manage estate of joint tenants or tenants in common (RIGL 10-15-1 through 4); receiver appointed by probate court to manage absentee's estate (RIGL 33-20-1); receiver for building-loan associations (RIGL 19-23.1-22); receiver for liquidation of corporation (RIGL 7-1.2-1316 et seq.); receiver for insurance company holding system (RIGL 27-35-10).

See categories 2 Business Organizations, topic Corporations; Property, topic Absentees.

8.17 REDEMPTION:

See topics 8.05 Executions, Liens; categories 20 Mortgages, topic Mortgages of Real Property; Taxation, topic Property Taxes, subhead Real and Personal Property Taxable.

8.18 SUPPLEMENTARY PROCEEDINGS:

See topic 8.05 Executions.

8.19 TRUSTEE PROCESS:

See topic 8.09 Garnishment.

8.20 USURY:

See category 3 Business Regulation and Commerce, topic 3.19 Interest.

9 DISPUTE RESOLUTION

9.01 ALTERNATIVE DISPUTE RESOLUTION:

See topic 9.02 Arbitration and Award.

9.02 ARBITRATION AND AWARD:

Uniform Arbitration Act not adopted.

Court-Annexed Arbitration.

Presiding judge of Superior Court may promulgate regulations for compulsory and/or non-compulsory nonbinding arbitration of civil actions. Costs of arbitration will be borne by court system and reasonable cost not to exceed $300 may be assessed to each of parties. Any party dissatisfied with arbitration decision may demand trial, and may be required to post $200 filing fee to be deposited into “the court improvement project fund” (RIGL 9-20.1-1), which will be reimbursed if party rejecting arbitrator’s decision receives more favorable decision at trial (RIGL 8-6-5).

Contracts to Arbitrate Future Disputes.

Valid and enforceable to settle by arbitration controversy arising out of contract or out of refusal to perform contract, or agreement to submit to arbitration any controversy existing between parties at time of agreement. (RIGL 10-3-2).

Rescission.

Contract irrevocable except on such grounds as exist at law or in equity for revocation of any contract. (RIGL 10-3-2; RIGL 28-9-1).

Assignability.

Right to settle disputes by arbitration is not assignable right. (795 A.2d 1127).

Powers of Arbitration.

Majority of arbitrators in non-labor controversies have power to summon witnesses and in proper case to compel witnesses to bring in books, records, etc. (RIGL 10-3-8). As to labor controversies, see RIGL 28-9-11.

Award and Enforcement Thereof.

In labor and non-labor controversies award must be in writing and signed by majority of arbitrators (RIGL 10-3-10) and at any time within one year after award is made, any party to arbitration may apply to court for order confirming (RIGL 10-3-11).

Judgment on Award.

On grounds specified in statute, court may either vacate award or modify or correct award. (RIGL 10-3-12 through 14; RIGL 28-9-18 through 20). When award vacated, court may order rehearing by arbitrators if time period within which arbitration agreement required award to be made not expired. (RIGL 10-3-13). Justice remanding case for rehearing by arbitrator should set reasonable time within which parties must seek rehearing. (812 A.2d 799).

Attorney’s Fees.

Arbitrator may award attorney’s fees if authorized by contract between parties. (788 A.2d 1112).

Arbitration.

Trustees may enter into rule of court, like other parties, to submit matters in dispute, in relation to estates represented by them, to arbitration and award. (RIGL 18-4-3).

Fire Losses.

Standard form of fire insurance policies must provide that in case of disagreement as to losses under insurance policies, the loss shall be ascertained by two competent and disinterested appraisers, one selected by insured and one by company. Two chosen select disinterested umpire and, if appraisers fail to agree, dispute is submitted to umpire and award of any two determines amount. (RIGL 27-5-3).

Public Works Contracts.

Contracts involving public building, sewer, water treatment or disposal projects, highways or bridges must contain statutory provision for arbitration of disputes arising therefrom, only highway/bridge claims up to $100,000 included. Claims are treated as individual items, not in aggregate. Statute requiring arbitration of disputes applies to all written contracts executed on or after Jan. 1, 1986. Generally, contract provision for arbitration procedure supersedes method provided in statute. (RIGL 37-16-2).

Construction Contracts.

Surety on bond furnished by contractor principal to guarantee performance or payment on construction contract is subject to any provision for arbitration of disputes contained in written contract entered into by contractor principal and claimant where dispute involves question of claimant’s right of recovery against surety. Arbitration shall be in accordance with arbitration statute (RIGL 10-3-1, et seq.). (RIGL 10-3-21).

Labor Arbitration.

Arbitration statute (28-9) covers provisions in written labor contracts including controversies relating to execution of contract renewal (RIGL 28-9-3). Special statutes for fire fighters (RIGL 28-9.1-1 et seq.), policemen (RIGL 28-9.2-1 et seq.), certified public school teachers (RIGL 28-9.3-1 et seq.), municipal employees (RIGL 28-9.4-1 et seq.), some employees of Public Transit Authority (RIGL 39-18-17), and health care provider employees (RIGL 28-7-45). Compulsory mediation or arbitration for school committees (RIGL 28-9.3-9) and school boards (RIGL 28-9.4-10).

10 DOCUMENTS AND RECORDS

10.01 ACKNOWLEDGMENTS:

Uniform Act not adopted. See RIGL 34-12-1 through 9.

May be taken by following officers:

Within state: state senator, state representative, judge, justice of peace, clerk or assistant clerk of Superior Court, mayor, notary public, town clerk or recorder of deeds. (RIGL 34-12-2). Fee 50¢. (RIGL 36-2-4).

Outside state but within United States or dependency thereof: judge or justice of any court, justice of peace, mayor, notary public, commissioner for R. I., or officer authorized by law to act in place of acknowledgment. (RIGL 34-12-2; RIGL 42-31-3).

Outside the United States.

Ambassador, envoy, minister, chargé d'affaires, secretary of legation, consul-general, consul, vice-consul, consular agent, vice consular agent, or any other diplomatic or consular agent or representative of U.S. appointed to and residing in country where acknowledgment taken; judge or other presiding officer of any court having a seal or clerk or other certifying officer thereof; mayor or chief civil officer of any city or other political subdivision; notary public; person specifically authorized for that purpose by a commission issued under seal of superior court; any person authorized by laws of country where acknowledgment made to take acknowledgments of conveyances of real estate. (RIGL 34-12-2).

Persons in or with U.S. Armed Forces.

Any commissioned officer in active service with rank of second lieutenant or higher in Army, Air Force or Marine Corps, and ensign or higher in Navy or Coast Guard, or equivalent rank in any other component part of U.S. Armed Forces. (RIGL 34-12-5). See also topic 10.03 Notaries Public, subhead Officers of U.S. Armed Forces.

Unauthorized Officers.

Acknowledgment made in good faith before unauthorized officer is valid, although such officer may be liable for fine of $50. (RIGL 34-12-3).

General Requirements as to Taking.

Acknowledgment of deed: certificate must express that grantors were known and acted freely. (RIGL 34-12-1).

General Requirements of Certificate.

No set form. Neither seal of officer nor statement of date of expiration of commission required.

Married women acknowledge same as other persons. (RIGL 34-12-1).

Foreign Acknowledgments.

Such acknowledgment by duly commissioned foreign notary public valid when certified by designated foreign officers or members of armed services of U.S. (RIGL 34-12-9).

Effect of Acknowledgment Before Armed Services Officer.

Has same legal effect as if made before state official; is admissible to evidence and eligible to record. (RIGL 34-12-6).

Proof by subscribing witnesses not authorized.

Authentication of certificate of officer taking acknowledgment not required. Clerk of Superior Court, Supreme Court, Family Court, and District Court authenticate for use outside state; fee $1. (RIGL 42-30-9). Secretary of State will also issue certificates of appointment for fee of $2. Secretary of State will authenticate signature of notary public for $5. (RIGL 42-30-15).

Forms.

No set form. Following may be used:

Individual Form

State of Rhode Island, County of . . . .

In . . . . in said County on the . . day of . . . ., 20 . ., before me personally appeared . . . each and all to me known, and known by me to be the party(ies) executing the foregoing instrument, and . . acknowledged said instrument, by . . . . executed to be . . . . free act and deed.

Corporate Form

State of Rhode Island, County of . . . .

In . . . . in said County on the . . . . day of . . . ., 20. ., before me personally appeared . . . ., ... of . . . ., to me known and known by me to be the party executing the foregoing instrument on behalf of said corporation and he acknowledged said instrument by him executed to be his free act and deed and the free act and deed of said corporation.

Alternative to Acknowledgment or Proof.

No statutory provision.

Validating Act.

Acknowledgments taken by duly authorized foreign notary before Apr. 27, 1928, good if attested. (RIGL 34-12-9).

Defective acknowledgments on instruments of conveyance cured if instrument on record for ten years, unless court proceeding commenced challenging acknowledgment. (RIGL 34-11-36).

10.02 AFFIDAVITS:

The following persons may administer oaths:

Anywhere within the state: Governor, Lieutenant-Governor, Secretary of State, Attorney General, Assistant Attorneys General, General Treasurer, active and retired Justices of Supreme, Superior, Family, and District Courts, each member of General Assembly after he has filed his signature with Secretary of State, commissioners appointed by other states to take acknowledgments of deeds and depositions within this state and notaries public. (RIGL 36-2-1). Also certain officials in relation to all matters connected with or in administering duties of their respective offices. (RIGL 36-2-3).

Within the respective counties and towns for which they may be elected or appointed to office: Clerks of Courts, Justices of the Peace, Mayors of Cities, Judges of Probate, Presidents of Town Councils or persons acting as such, Town Clerks and Town Wardens. (RIGL 36-2-2).

Anywhere outside of state by commissioner appointed by Governor and duly qualified. (RIGL 42-31-3). Oath, affidavits and depositions taken by such commissioners are as effective as if certified by judge, justice of peace or notary public within this state. (RIGL 42-31-4).

In addition to acknowledgment of instruments and performance of other notarial acts in manner and form and as otherwise authorized by law, instruments may be acknowledged, documents attested, oaths and affirmations administered, depositions and affidavits executed, and other notarial acts performed, before or by any commissioned officer in active service of armed forces of U.S. with rank of second lieutenant or higher in army, air force, or marine corps, or with rank of ensign or higher in navy or coast guard, or with equivalent rank in any other component part of armed forces of U.S., by any person without limits of U.S., and to any person who is member of armed forces who is within or without limits of U.S. and their lawful dependents. (RIGL 34-12-5).

Affidavits taken without the state by a magistrate empowered to do so are received by the courts without proof of the official character of the officer before whom they are taken, unless notice is given that such proof is required.

Authentication of signature of officer is not required for use in this state. Supreme and Superior Court clerks authenticate for use outside of the state; fee $1.

Form.

No particular form is prescribed by law except in case of affidavits used to substantiate claims of damage to real or personal property. (RIGL 9-19-28). Where affidavit is used to present opinion of physician or dentist as to proximate cause of condition, affidavit must state with some degree of certainty that given state of affairs is result of given cause. (518 A.2d 354, RIGL 9-19-27).

Alternative to Affidavit.

No statutory provision.

10.03 NOTARIES PUBLIC:

Qualification.

Any qualified elector or member of state bar may be appointed by Governor. Each applicant, other than members of state bar, must demonstrate that he has: (1) Ability to speak, read and write English language, and (2) sufficient knowledge of powers and duties of notary public. No bond is required. Every state senator, state representative, member of city or town council, chief, deputy, or assistant clerk of any state court, clerks of board of canvassers or worker’s compensation court, municipal clerk, board of canvassers registrar, and two police officers from each state and local police department, shall, upon completion of certificate of engagement, have power to act as notary public. (RIGL 42-30-14).

Authentication.

See topic 10.01 Acknowledgments, subhead Authentication.

Seal.

No requirement that notaries shall use seal.

Powers and Duties.

Within Rhode Island, notaries may administer oaths, transact, do and finish all matters relating to protests and protesting bills of exchange and promissory notes and may take depositions as prescribed by law and acknowledgments of deeds and other instruments. (RIGL 36-2-1; RIGL 42-30-7, 8).

Territorial Extent of Powers.

Notary's authority extends over entire state. (RIGL 42-30-8; RIGL 36-2-1).

Expiration of Commission.

Notary public need not indicate commission expiration date.

Fees.

For marine protest $1; for drawing, extending and recording marine protest $1.50; for taking affidavits 25¢; for travel, per mile, 10¢; for taking acknowledgment and affixing seal $1; for protest of bill of exchange, order or draft, for nonacceptance or nonpayment, or of promissory note or check for nonpayment, if the amount is $500 or more, $1, and if less than $500, 50¢ for recording; for noting the nonacceptance or nonpayment of bill, order, draft, check or note 75¢; for each notice of such to a party 25¢; provided whole cost of protest including notices and record shall not exceed $2 and whole cost of noting including notices shall not exceed $1.25. (RIGL 42-30-13). Certification of notary public's signature by Secretary of State $5. (RIGL 42-30-15).

Commissioners of Deeds.

All oaths administered, affidavits and depositions taken, and acknowledgments certified by commissioners are as effectual in law as if certified by notary public within this state. (RIGL 42-31-4).

Officers of U.S. Armed Forces.

See topic 10.01 Acknowledgments, subhead Persons in or with U.S. Armed Forces. Officers are given general notarial powers. Acts performed before statute are validated. Instrument or document is not invalidated by failure to state place of execution or acknowledgment. If signature, rank and branch of service or subdivision thereof of officer appears on instrument or document or certificate no further proof of officer's authority is necessary. (RIGL 34-12-5 through 8).

10.04 RECORDS:

Uniform Commercial Code in effect. (Title 6A). See category 3 Business Regulation and Commerce, topic 3.09 Commercial Code.

Town and city clerks are recording officers and are custodians of the records, except in the city of Providence, which has a recorder of deeds, and except that financing statements or security agreements dealing with personal property, other than fixtures or farm equipment, under the Uniform Commercial Code are filed with office of Secretary of State, U.C.C. Division, 100 North Main Street, Providence, R.I. 02903.

If any instrument has been recorded or filed by a town clerk, city clerk or recorder of deeds in manner prescribed by law, a duly certified copy may be recorded or filed in office of any other town clerk, city clerk or recorder of deeds wherein original might properly have been recorded or filed, and when so recorded or filed has same effect as recording or filing of original instrument. (RIGL 34-13-6).

No proceeding in court, and no final order, decree or judgment concerning title to any real estate, or to any interest or easement therein, can affect (except as to parties thereto, their heirs and devisees and those having actual notice thereof) any rights acquired before notice of filing or entry of same is recorded in records of land evidence in town or city where such real estate is situated. Notice must briefly state names of all parties, court wherein filed, date of filing, substance of the bill, petition, declaration or other complaint, rule, order, decree or judgment, and description of real estate thereby affected so far as necessary to warn any person subsequently dealing with title to land. (RIGL 9-4-9).

Recordable Instruments.

Conveyances of lands or interests in lands for longer than one year are void unless signed, acknowledged, delivered and recorded; except, if delivered, as between parties thereto and their heirs and as against those taking by gift or devise, or those having notice thereof, same need not be acknowledged or recorded. (RIGL 34-11-1). Validity of signature does not turn on form of mark; any mark will suffice as long as mark adopted as one's own. (944 A.2d 161). Following instruments must be recorded on request of any person and on payment of lawful fees: letters of attorney, contracts for sale of land, bonds for title or covenants or powers concerning lands, notice of lis pendens, decrees in equity and judgments at law affecting title to land, deeds, mortgages and transfers and discharges thereof, leases and transfers and cancellations thereof, instruments of defeasance, instruments (excepting wills) creating trusts, certain affidavits, instruments or notices affecting title to land, certificates as to change of corporate name, approved maps and plats and those not requiring approval, declarations of restrictions, and covenants, conditions and powers of sale incorporated in mortgages by reference. (RIGL 34-13-1). Also, under Uniform Commercial Code, financing statements, security agreements, termination statements and similar documents. (RIGL 6A-9-501-527). Also, certificate of taxes and other assessments, constituting liens on parcel of real estate, as furnished by city or town collector of taxes. (RIGL 44-7-11).

Requisites for Recording.

Conveyance of lands or interest in lands must be acknowledged, if within state, before any state senator, state representative, judge, justice of peace, clerk or assistant clerk of Superior Court, mayor, notary public, town clerk or recorder of deeds and shall be made by all grantors even though releasing dower only. (RIGL 34-12-1, 2). For acknowledgment made without state see topic 10.01 Acknowledgments. Every deed presented for recording due to sale of property which results in transfer of ownership of property must contain total dollar amount of actual sale which shall be recorded as part of deed. (RIGL 34-11-1.4).

Recording Fees.

Minimum fees are: bill of sale, $45; foreclosure deed under power of sale, $80; warranty deed, quitclaim deed, deed of executor, administrator, trustee, conservator, receiver or commissioner, $80; mortgage, lease, $60; general assignment, partial release of mortgage, assignment of mortgage, discharge of mortgage, $45; federal tax lien, discharge of federal tax lien, $7.25; discharge of attachment or execution, $45; any other instrument not otherwise expressly provided for by statute, $45; maps, plats, surveys, drawings (not attached to or part of another recordable instrument), $45; power of attorney, $45; lis pendens, $80. Recording officers may charge rate of $1 for each additional page or fraction over. (RIGL 34-13-7). Writ of attachment or execution affecting title to real estate, account under mechanics' lien law, $10. (RIGL 34-13-8). Certificate of taxes and other assessments, $8. (RIGL 44-7-11).

Effect of Record.

Record or filing is constructive notice to all persons of contents of such instruments. (RIGL 34-13-2). When duly signed and acknowledged instrument recorded on or after May 8, 1969, purporting to affect title to real estate has been on record for period of six years, and as to instruments recorded prior to May 8, 1969, for period of six years, including two years after May 8, 1969, it is conclusive evidence in favor of purchasers and encumbrancers for value without notice claiming thereunder that such instrument was in fact duly delivered. (RIGL 34-11-35).

Expiration of Recorded Instruments Affecting Real Estate.

Recorded option to purchase or lease which has expired ceases to be notice after one year from expiration. One year period shall not be extended for any cause. (RIGL 34-4-22). Recorded contract or other instrument (other than option) to purchase or sell real estate ceases to be notice unless, within 90 days after date provided for delivery of deed, or if there is no such date within 90 days after date provided for payment of final payment or installment of purchase price, or if there is no such delivery date or payment date, then within 90 days after date of recording, action shall have been commenced to enforce contract or other instrument and notice of pendency of action is recorded. Ninety day period shall not be extended for any cause except as may be agreed by all parties to contract or other instrument at time of execution of contract or other instrument. (RIGL 34-4-23). Restriction or covenant created after May 11, 1953, if unlimited in time, expires 30 years after execution of instrument creating it except restriction or covenant created by Commerce Oil Refining Corporation with respect to land in town of Jamestown. (RIGL 34-4-21).

Torrens system of registering title to land has not been adopted.

Transfer of decedent’s title to his devisees or heirs, so far as concerns real estate in the town or city where the will was probated or administration proceedings had, is sufficiently evidenced by the probate records. With respect to other real estate, certified copies of the will should be recorded in the records of land evidence of the town or city where such real estate is located.

There is no provision for making of any record other than probate record to evidence transfer of title to real estate of an intestate.

In case of nonresident testator, authenticated copy of will should be recorded in probate court in town or city where real estate is located (see category 13 Estates and Trusts, topic 13.16 Wills, subhead Foreign Probated Wills) and certified copy of such record should be recorded in records of land evidence of town or city where any other real estate is located. (RIGL 33-6-31).

In case of nonresident intestate, ancillary administration should be had and same course followed as in case of resident.

Filing Under Commercial Code.

Except when collateral is fixtures or farm equipment or farm products or accounts, contract rights or general intangibles relating to sale of farm products by a farmer, with Secretary of State, U.C.C. Division, 100 North Main Street, Providence, R. I. 02903. Fixtures and farm equipment and other collateral excepted above, with city or town clerks (recorder of deeds). (RIGL 6A-9-501). Fee for financing statement or termination statement, $16; $32 with exhibits two pages or more. (RIGL 6A-9-525).

Vital Statistics.

23-3-1 through 35 includes in state department of health division of vital statistics to operate state-wide system of vital statistics.

Local registrars are town clerk or any person whom city or town council may appoint. (RIGL 23-3-6). Reports of births, deaths and marriages must be filed in local registrar's office, and local registrar transmits these to state registrar and, in case of deaths, to local board of canvassers. (RIGL 23-3-7). Court reports of adoptions and divorces are made to state registrar of vital statistics. (RIGL 23-3-14; RIGL 23-3-20). Both state and local registrar charge basic fees: for certified copies and searches covering two consecutive calendar years, $20; each duplicate copy, $15; for each additional calendar year search if applied for at same time or within three months of original request, $2; for expedited service, $7 additional; for processing adoptions, legitimations, or paternity determinations under RIGL 23-3-14 and 15, $15; for making authorized corrections, alterations, and additions (except no fee for making corrections, etc. on records filed before one year of date on which event recorded has occurred), $15; for examination of documentary proof and filing of delayed record, $20; and $20 for issuance of certified copy of delayed record. (RIGL 23-3-25). Fee for filing or removal of birth out-of-wedlock at local town clerk's office $5. Fee for birth, marriage or death certificate $15. Certificates are obtainable from local registrars or from Division of Vital Statistics, Department of Health, Rm. 101, 3 Capitol Hill, Providence, R. I. 02908.

Correction and Amendment of Vital Records.

Certificates or records may be amended only as directed by Director of Health to protect integrity of records. (RIGL 23-3-21).

Disclosure of Records.

It is unlawful for any person to disclose or permit inspection of information contained in vital statistics records except as authorized by regulation. (RIGL 23-3-23).

See also category 3 Business Regulation and Commerce, topic 3.09 Commercial Code.

10.05 SEALS:

Whenever a seal is required to be affixed to any paper, word "seal" includes an impression of such seal with or without use of wax or wafer. (RIGL 43-3-15). Neither ink scrolls nor word "seal" are sufficient to make sealed instrument. (24 R. I. 175, 52 Atl. 804).

Uniform Commercial Code is in effect. (RIGL 6A-1-101 et seq.). See category 3 Business Regulation and Commerce, topic 3.09 Commercial Code.

Conveyances.

No seal is required on instruments conveying land or an interest therein, nor on releases or mortgage discharges. Word "covenant" used in any instrument conveying land has same effect as if seal had been affixed. (RIGL 34-11-2, 5).

Statute has not abolished seals as to instruments not conveying land. (44 R. I. 327, 117 A. 225).

10.06 TORRENS ACT:

Not adopted.

10.07 VITAL STATISTICS:

See topic 10.04 Records.

11 EMPLOYMENT

11.01 EMPLOYER AND EMPLOYEE:

See topic 11.02 Labor Relations.

11.02 LABOR RELATIONS:

Director of Labor supervises enforcement of most laws concerning labor (Title 28) except for labor-management relations matters under jurisdiction of State Labor Relations Board (28-7). Fair Employment Practices Act (28-5) is administered by Rhode Island Commission For Human Rights (RIGL 28-5-8, 13). Workers' Compensation Department has initial jurisdiction over all workers' compensation matters (except for petitions for commutation which remain with Workers' Compensation Court). (RIGL 42-89-2).

Hours of Labor.

Limitations on hours of labor for women have been repealed. (RIGL 28-3-11). For children under 18 and over 16, limits are 48 hours per week and nine hours per day except when 48 hours are worked in five days, and then limit is 9 3/5 hours per day. During school vacations, children between ages of 16 and 18 may work for unlimited number of hours in given week or calendar day. (RIGL 28-3-11). Children under 18 may not work in any factory, manufacturing or mechanical establishment before 6 A.M. or after 11 P.M. (RIGL 28-3-11). Children between 14 and 16 working under permit may not work over 40 hours per week or eight hours per day (RIGL 28-3-11), and may be employed only between 6 A.M. and 7 P.M. (RIGL 28-3-1). Under school supervised and administered work experience and career exploration program, students 14 years of age could work at certain jobs otherwise normally prohibited. (RIGL 28-3-3.1). All employees entitled to 20 minute uncompensated mealtime within six hour work shift and 30 minute uncompensated mealtime within eight hour work shift. (RIGL 28-3-14). Provisions of above section not applicable to employers of licensed health care facilities or employers of fewer than three employees on any shift. (RIGL 28-3-14). Employees who report for shift must be given three hours work or pay. (RIGL 28-12-3.2). Employees working on Sundays and holidays must be paid 1.5 times normal rate provided that refusing to work on Sunday or holidays is not grounds for discharge or other penalty; manufacturers that operate seven continuous days per week or chauffeur driven limousine or taxi companies that operate seven continuous days per week, 24 hours per day, are exempt from such provision. (RIGL 25-3-3).

Wages.

Every employer shall establish regular pay day on which wages shall be paid, and each scheduled pay day shall fall within nine days of end of payroll period for which wages are computed. Employee who is absent from his place of labor on pay day is entitled to payment thereafter on demand. In case of discharge of employee, unpaid wages must be paid on next regular pay day; holiday and vacation pay and insurance benefits due employee are also considered unpaid wages for employees employed for one year or more. Unpaid wages are payable within 24 hours after dismissal due to employer's closing his business establishment as result of merger, liquidation or moving business out of state; in case of suspension of work as result of industrial dispute, unpaid wages due at time of suspension must be paid in full on next regular pay day. (RIGL 28-14-2, 4, 5). Every employer must keep records of hours worked and wages paid to each employee. Records must be preserved for at least three years after their entry and are subject to inspection by Director of Labor. (RIGL 28-14-12). Director may investigate violations, take assignments of wages claims, institute or cause to be instituted civil actions for collection of such wages with or without consent of employee and institute criminal actions for violations of act. (RIGL 28-14-19 through 23). Criminal penalty for each separate violation is fine of $50 to $100 or ten to 90 days imprisonment or both. (RIGL 28-14-17). Specified deductions from wages are permissible where collective bargaining agreement is in effect. (RIGL 28-14-10 and RIGL 28-15-9).

Minimum wage of $7.40 per hour commencing Jan. 1, 2007. (RIGL 28-12-3).

Overtime pay is required for hours over 40 per week (RIGL 28-12-4.1) with certain exemptions (RIGL 28-12-4.1 proviso; and RIGL 28-12-4.3).

Wages due deceased employee, if not in excess of $150, may be paid by his employer, at any time after 30 days from his death, to surviving spouse or other persons specified by statute. Payment of such wages is full discharge and release to employer from any claim therefor by employee's estate or any other person. (RIGL 28-14-6).

Wage differentials based on sex are prohibited with certain reservation. (RIGL 28-6-18).

Assignments of Wages.

See category 8 Debtor and Creditor, topic 8.01 Assignments.

Severance Agreements.

State agencies, boards and quasi-governmental bodies, etc., prohibited from entering into non-collectively bargained agreements that provide for benefits in excess of specified limits upon termination of services as employee. (Laws 1985, Sen. Bill 1018).

Child Labor.

No child under 16 may work in any factory, mechanical or manufacturing establishment or in certain hazardous occupations. Part-time and vacation employment in certain businesses is allowed only by permit from local school committees for minors 14 to 16 years old. (RIGL 28-3-1 through 3).

Labor Unions.

Labor Relations Act gives employees right to form or join unions, to bargain collectively and engage in concerted activities. Discrimination against members or representatives of labor unions is prohibited. (RIGL 28-6.6-1). Prohibits certain specified unfair labor practices by employers. (RIGL 28-7-13). Labor Relations Board has power to prevent unfair labor practices and supervises method and procedure for selection of exclusive employee representative for purposes of collective bargaining. Board may petition Superior Court for enforcement of its orders. (RIGL 28-7-26). Labor organizations may sue as legal entity for violation of collective bargaining agreements by employers. (RIGL 28-8-1, 2). For suits against unincorporated associations, see RIGL 9-2-12. No "right to work" law.

Labor Disputes.

Director of Labor offers services for voluntary mediation and conciliation of labor disputes. (RIGL 28-10-1).

Advertisements or solicitations for employees during strike or other labor disputes are regulated by statute. (RIGL 28-10-9). Use of professional strikebreakers is unlawful. Criminal penalties for violations. (RIGL 28-10-11). Unemployment compensation unavailable to strikers during labor disputes except in certain lockout situations. (RIGL 28-44-16).

Injunctions in labor disputes are strictly regulated by statute and may be issued only after testimony in open court and after certain specific findings by court. (RIGL 28-10-2 through 4).

Arbitration agreements between employers and unions are enforceable and statutory provisions govern stay of judicial proceedings, enforcement, vacation and modification of award. (28-9-1 et seq.). Unless otherwise agreed to in writing, arbitrators may modify penalties relating to disciplining employees. (RIGL 28-9-1 et seq.).

Under Privatization of State Services Act, before any award is final, state employees or their bargaining representatives have right to protest award decision within 30 days to Director of Revenue. (RIGL 42-148-6).

Equal Opportunity and Affirmative Action.

Applies in all areas where state dollar is spent in employment, public service, grants, financial assistance, licensing and regulation. (RIGL 28-5.1-1 through 16). Yearly report on status of programs issued from Governor's office. (RIGL 28-5-40).

Apprenticeship Requirement for State Public Works Contracts.

All general contractors and subcontractors who perform work on any public works contract awarded by State valued at $1,000,000 or more must employ apprentices in apprentice to journeyman ratio approved by Apprenticeship Council of the Dept. of Labor and Training. (RIGL 37-13-3.1).

Unfair Employment Practices.

It is an unlawful employment practice to refuse to hire, to discharge or to discriminate against a person because of race or color, religion, sex, sexual orientation, gender identity or expression, disability, age, or country of ancestral origin, or to refuse to reasonably accommodate employee's or prospective employee's disability in absence of showing of hardship, or for any labor organization to deny him full and equal membership rights therein, or expel him therefrom or discriminate against him because of such reasons, or for any employment agency to discriminate against him for such reasons, or for any employment agency, labor organization, placement service, or other employer referring service to comply with employer's request if it indicates that such employer will not afford complete employment opportunities to individuals regardless of their race, color, religion, sex, sexual orientation, physical handicap, age or country of ancestral origin (RIGL 28-5-7). It is unlawful employment practice to discriminate against individuals who have applied for, received or continue to receive public assistance on basis of physical or mental impairment. (RIGL 42-87-1). Employers must adopt policy against sexual harassment in workplace. (RIGL 28-51-2). Employers shall be required to maintain copies of their written policies on sexual harassment at their business premises, and copies of such policies shall be made available to all employees and any state or federal employment discrimination enforcement agency upon request. (RIGL 28-51-2). Employment discrimination against reservists is also unlawful. (RIGL 30-11-6). Unlawful employment practices may be established by proof of disparate impact. (RIGL 28-5-7.2). Injunctive remedies and compensatory damages may be available. (RIGL 28-5-24). Punitive damages may be available against non-state employers. (RIGL 28-5-29.1). Mandatory lie detector tests are prohibited. (RIGL 28-6.1-1). Employer may require job applicant to submit testing of blood, urine and other bodily tissue or fluid under certain conditions. Use of urine and drug tests as condition of continued employment is prohibited except under limited conditions and circumstances where reasonable belief of drug use and appropriate safeguards of employees privacy. (RIGL 28-6.5-1). Employers regulated by federal agencies which either require or authorize drug testing programs are exempted from this prohibition. (RIGL 28-6.5-1). Employers prohibited from requiring employees or prospective employees to refrain from smoking outside course of their employment. (23-20.7.1-1). Employers may be fined up to $200 for charging fee for filing of employment application. (RIGL 28-6.3-2). Employees are entitled to inspect personnel files three times annually. (RIGL 28-6.4-1). Employee who is victim of crime must be allowed to leave work to attend court proceedings related to crime, although employer is not required to pay employee for this absent time. (RIGL 12-28-13). Cities and towns may not require residence as qualification for police or firefighter employment. (RIGL 45-2-15.1; RIGL 45-2-15.2). No employer may cause to be made audio or video recording of employee in certain workplace areas, i.e. restroom. (RIGL 28-6.12-1).

Industrial home work is regulated by statute. (RIGL 28-18-1 et seq.).

Reports.

Every person, firm or corporation employing five or more persons must, during April and October of each year, report to Chief of Division of Industrial Inspection in Department of Labor (who furnishes forms) number of employees, classifying them by sex and as adults or minors under 16 years of age. (RIGL 28-20-5).

Whistleblower's Protection Act prohibits employer from discharging, threatening, or otherwise discriminating against employee who reports or plans to report to public body, employer, or employee's supervisor violation or prospective violation of law or regulation. (RIGL 28-50-3). Act provides that employee may bring action for injunctive relief or actual damages. (RIGL 28-50-4). Act applies to all public and private employees, including at-will employees, contract employees and independent contractors. (RIGL 28-50-2).

Workplace Violence Protection Act.

If employer, employee, or employer's invitee suffers unlawful violence, receives threat of unlawful violence, or is stalked or harassed while at workplace, victim may seek temporary restraining order and/or injunctive relief against violator. (RIGL 28-52-2).

Workers' Compensation Act provides compensation for personal injuries arising out of and in course of employment and for death resulting from injuries so sustained. Certain occupational diseases are also compensable. Act applies to all employers employing four or more employees in same business or in and about same establishment. Employers within state must make written disclosure to prospective employees as to whether they are subject to or exempt from Act. (RIGL 28-29-6.2). Effective Jan. 1, 2004, Act applies to all employees who are injured or hired in Rhode Island. (RIGL 28-29-1.3). General contractor is considered employer unless written documentation that subcontractors maintain workers' compensation insurance for employees. (RIGL 28-29-6.1). Domestics, farmers, farm labor and employers of less than four employees are exempt. (RIGL 28-29-7). Upon filing of written statement, exempt employers may voluntarily elect to become subject to Act. (RIGL 28-29-8). Employees of employers subject to or who have elected to be subject to Act are held to have waived their rights of action at common law unless they give notice in writing to their employer at time of hiring claiming such rights and file copy with Director of Department of Labor within ten days after hiring. Workers' Compensation Act's exclusivity provision does not bar independent statutory claims created by Rhode Island Fair Employment Practices Act (RIGL 28-5-1 et seq.), Rhode Island Civil Rights Act (RIGL 42-112-1 et seq.), Rhode Island Constitution, Rhode Island Civil Rights of People with Disabilities Statute (RIGL 42-87-1 et seq.; 723 A.2d 287), or work-related defamation claims (790 A.2d 368). Employers subject to Act must provide for liability for personal injuries to employees by insurance or certification to pay directly to injured employees or may use combination of insurance and self-insurance. (28-29). Within monetary limits established by director, certain groups of employers within industry are permitted to adopt plan of group self-insurance under which group assumes liability for members. Such groups are not subject to provisions of Title 27. (RIGL 28-47-1 et seq.). Application fees and expense payments are required from such employers. (RIGL 28-36-1). Procedure for setting workers' compensation insurance rates. (27-7.1). Insurance fund is not state agency. (RIGL 27-7.2-16). Penalties assessed against employees, employers and insurers who are in willful noncompliance with Act. (27-7; RIGL 28-36-15).

Basic total disability compensation is 75% of average weekly spendable base wages, with maximum of 115% of state average weekly wage plus $15 for each dependent not to exceed 80% of employee's average weekly spendable base wage. (RIGL 28-33-17). Employee incapacitated for more than 52 weeks, even though non-consecutive, entitled to cost-of-living adjustment (COLA) under RIGL 28-33-17(f)(1). (896 A.2d 710). Employees who refuse alternate work deemed suitable by Workers' Compensation Court receive 662/3% of difference between average weekly wages and earning capacity after injury. (RIGL 28-33-18.2). Death benefits to dependents wholly dependent on employee for support equal to rate that would have been payable for total disability except for increase to $20 for each dependent child and no 80% cap. (RIGL 28-33-12). $15,000 burial expenses payable if injury results in death. (RIGL 28-33-16). Employees afflicted by occupational diseases recover from most recent employer in whose employ he or she engaged in activity causing disease. Employer may petition Workers' Compensation Court for apportionment among other employers for whom benefit recipient worked since contracting disease. (RIGL 28-34-8). No compensation payable for any period during which employee is employed at weekly rate equal to or greater than that earned at time of injury. (RIGL 28-33-17.1, 1978, c. 232; see also RIGL 28-33-18.1, 1978, c. 232). Employee's average weekly wage is ascertained by dividing gross wages, including holiday pay, by number of weeks employee worked. (731 A.2d 724). Partially disabled employees injured on or after Sept. 1, 1990 who have not attempted in good faith to obtain suitable employment will receive 70% of compensation rate with compensation not to be reduced until employee is given reasonable length of time to seek suitable employment. Period for partial compensation payments shall not exceed 312 weeks. Partial disability compensation is 75% of average weekly spendable base wages, inclusive of overtime pay, before injury. (RIGL 28-33-18). Total disability compensation applies if partially incapacitated employee is unable to find suitable work. (RIGL 28-33-18). Payments for medical and hospital charges are provided. (RIGL 28-33-5). Employee may select physician, hospital, or dentist but health care provider must give employer written notice of employee's selection, and must present employer itemized bill at least once every two months thereafter, or provider forfeits right to payment. Provider may add interest if payment is not received within 21 days of date of request. Additional compensation is provided for specific injuries. (RIGL 28-33-19 [n]). Medical treatment costs compensable if treatment is reasonable based on treatment's acceptance at national level. (605 A.2d 1321). Claims are barred unless filed within three years from fourth day of time loss due to injury. Employees who willfully provide false information of or intentionally fail to disclose their workers' compensation history on employment application requesting information could have their claims barred for two years. (RIGL 28-35-57.1). Employees receiving workers compensation benefits who fail to report earnings may be subject to civil or criminal liability and may be required to forfeit payments received. Employees who fraudulently obtain or attempt to obtain benefits may forfeit right to any future benefits and are guilty of larceny. (RIGL 28-33-17.2). Workers' Compensation Court may impose penalties or sanctions for such actions. (RIGL 28-33-17.3). Special Fund comprised of forfeiture and penalty payments is used to reimburse employers who make second injury payments to employees previously disabled from work related injury. (RIGL 28-37-4). Prison inmates cannot collect compensation. (RIGL 28-33-17.1).

Employers making payments must file memorandum with Director of Department of Labor (with copy to employee) specifying nature of injury and compensation rate within ten days of initial payment. (RIGL 28-35-1). Employees paid direct weekly benefits must file copy of initial medical treatment report (within ten days of receipt of report) with employer. If employer continues to make payments after ten days of receipt of report, employer must file memorandum of agreement and such payments constitute conclusive admission of liability as to injuries set forth therein and that employee is entitled to compensation. (RIGL 28-35-9). If employer or insurer pays weekly benefits to employee without filing memorandum of agreement with Department, such payment constitutes conclusive admission of liability and of employee's ongoing incapacity and entitlement to benefit payments. (RIGL 28-35-9). Employer and/or insurer must file statement of total compensation, medical expenses, and other expenses with Department of Workers' Compensation within 60 days discontinuing or suspending payments. (RIGL 28-35-46.1).

Early pay procedure and employee assistants are provided within Department to assist and advise injured employees in order to expedite handling of claims. For new injuries occurring after Mar. 1, 1986, employers have 14 days from date of notice of incapacity or death to file notice of controversy or commence payments. Informal procedure includes informal hearings and mandatory pre-trial conferences before Department judges. (RIGL 28-35-19, 20). Parties may appeal hearing officer's prelimination to Workers' Compensation Court within five days. (RIGL 28-

35-28). Decrees of Appellate Division of Workers' Compensation Court acting within its powers, in absence of fraud, are final, unless, upon review on certiorari to Supreme Court, decree is reversed because Court acted without or in excess of its authority, or order, decree or award was procured by fraud, or Court erred on question of law or equity or mistake of fact. Any person aggrieved by final decree of Appellate Division of Workers' Compensation Court may petition Supreme Court for writ of certiorari for review on any of foregoing grounds by procedure set forth in Act. (28-29 through 38).

Employers are liable for property damage sustained by employee arising out of and in course of his employment. (RIGL 28-33-43). Injuries sustained during voluntary participation in employer-sponsored social or nonprofessional athletic activities, or carpool or rideshare program, are not compensable under Act, although employees may still recover for possible tortious misconduct. (RIGL 28-33-2.1, RIGL 28-29-2). Employers may be obligated to continue providing health insurance benefits to employees receiving workers' compensation for up to one year. (RIGL 28-33-44).

Labor Contract Protections in Wake of Business Combination.

Labor contract cannot be terminated or impaired by "business combination" transaction. Definition of "business combination" relates to both mergers and corporate transactions which would probably result in sale of substantially all of corporation's assets. Department of Labor has broad power to enforce above-stated rule. (RIGL 28-7-19.1, 1990, c. 138).

Severance Obligations in Wake of Business Combination.

Employee of target company with more than 50 full-time employees is entitled to one-time lump sum payment from acquiring company equal to employee's years of service multiplied by twice his weekly compensation upon following events: (i) Employee's employment is terminated within 24 months after acquiring company obtains 50% or greater interest in target company; or (ii) employee's employment is terminated within shorter period of 12 months prior to acquiring company obtaining 50% or greater interest in target company or period which acquiring company obtained 5% interest in target company to date on which it obtained 50% or greater interest in target company. Rule does not apply if: (i) Terminated employee has express contract providing for more benefits, (ii) business combination is between members of same family or is pursuant to bona fide pledge to creditors. Upon acquiring company assuming control of target company, acquiring company must provide written notice to each employee of target company and collective bargaining representative(s) of rights of employees under this rule. Department of Labor has broad authority to enforce rule. Terminated employee has right of private cause of action. (RIGL 28-7-19.2).

Disaster Service Volunteers.

Any state employee who is certified disaster volunteer of American Red Cross may be granted leave from work with pay for not more than ten working days each calendar year to participate in specialized disaster relief service. (RIGL 28-49-2).

Temporary Disability Insurance.

Cash benefits are provided for disabilities resulting from nonoccupational injury and sickness. Governed generally by 28-39, employee contributions by 28-40, and benefits by 28-41. Minors of 14 and 15 years of age are exempt. (RIGL 28-40-2.1).

Health Insurance Premiums.

Employer who receives health insurance premium payments from employee and fails to pay premiums on policy can be sued for double damages. (RIGL 9-1-40).

Health Insurance Benefits.

Employee's domestic partner is covered dependent. (RIGL 36-12-1).

Employee holding position in municipal service who enters US armed forces and who has at time of entrance into armed services family medical benefits, continues to be eligible to receive family medical benefits for designated family members excluding employee. (RIGL 30-6-6).

Health Insurance Tax Incentive.

On or before July 1, 2009, employers with annual average employment of more than 25 employees for six consecutive months must adopt and maintain for employees cafeteria plan that satisfies Internal Revenue Code 26 U.S.C. 125 and rules and regulations adopted by health insurance commissioner through which employees and dependents may purchase health insurance. (RIGL 27-70-1 et seq.).

Occupational Safety and Health.

Governed by 28-20 and by RIGL 23-1-1. Occupational safety and health review board established pursuant to RIGL 28-20-19. Plan not as yet approved under federal OSHA. Employer who uses, transports, stores or otherwise exposes employees to toxic or hazardous substances must make list available in each workplace of substances to which employees are or may be exposed. (RIGL 28-21-1 through RIGL 28-21-21). Employer is personally liable to employees injured as result of knowing and intentional misrepresentations. (RIGL 28-21-7). Fines ($5,000), and one year imprisonment for willful violations. (RIGL 28-21-17).

Occupational Diseases.

Similar coverage as to that under "Workers Compensation-Occupational Diseases". (RIGL 28-34-1 through -12).

Unemployment Compensation.

Generally entitlement and basic rates covered by RIGL 28-42-11, RIGL 28-43-1 et seq., and RIGL 28-44-1 through -68 of Employment Security Act. Recipients may also receive tuition benefits. (RIGL 28-42-81). Employers and corporate officers who have failed to register with Division of Employment Security subject to $5,000 fine and/or one year imprisonment. (RIGL 28-42-65.1). Department of Employment Security may recover certain mistaken benefit payments provided that there shall be no recovery where Director of Employment Security has determined that individual receiving benefits was not at fault or that recovery would defect purposes of Employment Security Act. (RIGL 28-42-68). Entrepreneurial Training Assistance Program for qualified, unemployed persons governed by RIGL 28-44-70.

Worksharing Benefits.

Eligible employers may initiate work-sharing plans as alternative to layoffs, subject to approval of Director of Department of Labor. (RIGL 28-44-69).

Parental and Family Leave.

Employers with 50 or more employees must provide employees who have been employed by same employer for 12 consecutive months 13 weeks leave within two year period following birth or adoption of child or by reason of serious illness of parent, spouse, child, mother-in-law, father-in-law, or employee him/herself, and, with respect to employees of state, domestic partners. Employees must give 30 day notice; employer must reinstate employee to same or equivalent position. Employer required to maintain insurance benefits. Applies to both male and female employees. (RIGL 28-48-1 et seq.).

11.03 WORKERS' COMPENSATION LAW:

See topic 11.02 Labor Relations.

12 ENVIRONMENT

12.01 ENVIRONMENTAL REGULATION:

Enforcement.

Division of Enforcement within Branch of Environmental Management shall enforce laws and regulations of Department. In connection with such enforcement, Commissioners for Environmental Management and Environmental Protection shall have powers and duties as set forth in RIGL 20-1-4 and RIGL 20-1-5, as well as RIGL 20-1-6, RIGL 20-1-7, and RIGL 20-1-8 pertaining to appointment, and conservation powers, of conservation officers and deputy wardens. (RIGL 42-17.1-3[c]). Additional powers and duties of Director of Environmental Management are set forth in RIGL 42-17.1-2. Rhode Island Resource Recovery Corporation shall have powers and liabilities as set forth in RIGL 23-19-6. Division of enforcement shall cooperate with enforcement personnel of Coastal Resources Management Council and other state and municipal enforcement agencies. (RIGL 42-17.1-3[c]). Biosecurity Board of Coastal Resource Management Council recommends inspections to ensure compliance with public health, and reviews federal regulations that pertain to aquatic diseases. (RIGL 20-10-1). Commissioner of Environmental Protection shall enforce policies and regulations regarding quality of air, water, solid and hazardous waste, freshwater wetlands, groundwater, and design, construction and operation of all sewage disposal systems. (RIGL 2-17.1-11). Director of Health may order removal of polluting matter from premises. (RIGL 46-14-2). Director of Department of Environmental Management is authorized to designate any departmental staff to enforce litter control and recycling efforts. (RIGL 37-15-5). Director of Environmental Management is authorized to approve location, design and operation of new underground sewage tanks. (RIGL 46-12-3).

Specific enforcement powers are granted to state boating law administrator. (RIGL 42-17.1-3[g][2]). Rhode Island Rivers Council shall have powers and duties relating to waters and navigation as set forth in RIGL 46-28-6, 7. Water resources board to promulgate rules and regulations for review of water supply system management plan. (RIGL 46-15.3-7.3 et seq.). Divisions within Branch of Environmental Protection have enforcement authority, including: Division of air pollution control, solid and hazardous waste, groundwater and individual sewage systems, freshwater wetlands, water pollution control, solid and hazardous waste, groundwater and individual sewage systems, freshwater wetlands, water pollution control. (RIGL 42-17.1-4[a]-[e]). Coastal Resources Management Council and Department of Environmental Management share jurisdiction of water quality issues relating to dredging, disposal of dredge materials and transportation thereof. (RIGL 42-17.1-1; RIGL 46-23-1 et seq.). Division of Public Utilities and Carriers shall have power to regulate storage, transportation and distribution of gas as set forth in RIGL 39-3-39. Division of criminal investigation shall coordinate all criminal enforcement proceedings for Department. (42-17.104[f]). Rhode Island Bays, Rivers, and Watersheds Coordination Team has duties as set forth in RIGL 46-31-1 et seq. Rhode Island Environmental Monitoring Collaborative has powers and duties set forth in RIGL 46-23.2-6.

Municipalities have general enforcement powers with respect to environmental quality violations. (RIGL 10-20-3). Other authorities with enforcement powers include: Health Director has enforcement powers with respect to asbestos abatement (RIGL 23-24.5-12); authorities in control of public places (ejection of smokers, RIGL 23-20.6-2[b]); local authorities (e.g., with respect to threat to water supply, RIGL 46-14-5; air pollution emergencies, RIGL 23-25.1-8; filth removal, RIGL 23-19-4; noxious trades, RIGL 23-24-1); and Attorney General (e.g., with respect to air, RIGL 23-23.1-10, or water, RIGL 46-12-17, pollution).

Municipalities retain general police powers and express statutory authority in certain specific areas (e.g., refuse disposal within their borders, RIGL 23-18.9-1; filth removal, RIGL 23-19.2-2; hazardous waste facilities within their borders, RIGL 23-19.7-5; regulate right of passage along ocean’s shores, RIGL 45-6-1; implementation of wastewater pretreatment programs [45-6-2.3]; establishment of Waste Water Management Districts [45-24.5-1]).

Prohibited Acts of Pollution.

Failure to adopt anti-air or water pollution system as ordered by Environmental Director (RIGL 23-23-8; RIGL 46-12-8); causing air pollution contrary to Governor’s order after air pollution emergency proclaimed (RIGL 23-23.1-5); open fire burning at public or semi-public refuse disposal facility or in connection with salvage, industrial, commercial, or institutional operation in contravention of regulations of Environmental Director, and other open fire burning in contravention of laws of any city or town (RIGL 23-23-18); smoking tobacco in any form in certain public places (RIGL 23-20.6-2); causing water pollution or causing sewage to be placed in location where it is likely to cause such pollution (RIGL 46-12-4[a]); without approval of Environmental Director, discharging sewage into state waters (excepting existing discharge of sewage and any addition to existing discharge from system approved by Environmental Director which does not exceed capacity of system as approved), constructing or modifying any anti-pollution system, or undertaking any development which may result in discharge of sewage into state waters (RIGL 46-12-4[b], [c], [d]); failure to submit reports with regard to solid waste disposal area located within 200 feet of any water course (RIGL 46-12-34); contaminating a source of water supply used for drinking purposes by any city, town, district, institution or company, except that enriching without human excrement or polluting effects of land used for agricultural purposes and bathing at camp or resort licensed by Department of Health prior to June 20, 1968 are not prohibited (RIGL 46-14-1); transporting or dumping waste or dredge material within state waters without permit (RIGL 46-17.1-1); disposal of human or animal pathological waste in any waste disposal facility; using coastal wetland contrary to order of Environmental Director (RIGL 2-1-15); altering fresh water wetland without approval of Environmental Director and city or town council (RIGL 2-1-21); selling, transporting, or using any endangered species of plant or animal (RIGL 20-37-3); violation of coastal resources management program or of regulations or decisions of Coastal Council (RIGL 46-23-7); transporting hazardous waste or providing disposal facility for it without permit or in violation of Environmental Director’s regulations (RIGL 23-19.1-7 to RIGL 23-19.1-10); cesspool cleaning without license (RIGL 23-19.4-1); designing, installing or repairing sewage disposal systems without license (RIGL 5-56.1-2); distribution, sale or use of cleaning agents containing excessive levels of phosphorous (RIGL 46-29-1); permitting exposure to asbestos materials (RIGL 23-24.5-5); undertaking asbestos abatement project or disposing of friable asbestos materials without license (RIGL 23-24.5-12); disposing of solid waste at other than solid waste management facility licensed by Environmental Director (RIGL 23-18.9-5); amount of toxics in packaging must be reduced within two years (RIGL 23-18.13-4, 1990, c. 145); disposing of used rubber tires within Rhode Island without license, storing in excess of 400 tires without license, and burning of used tires within Rhode Island or exporting of used tires for burning outside Rhode Island within 30 miles of any Rhode Island reservoir watershed (RIGL 23-63-2); discharge of oil into or upon waters or land, except by regulation or by permit (RIGL 46-12.3-3, 1990, c. 324); discharge of contaminated ballast water from vessel into water (RIGL 46-12.3-4, 1990, c. 324); contamination of drinking water sources (RIGL 46-14-1); discharge of sewage by boat into state waters unless boat is equipped with approved type of marine toilet (RIGL 46-12-39); failure of petroleum tank vessel operators to possess valid certificate of financial responsibility, issued by U.S. Coast Guard (46.12.4-1); uprooting or cutting in whole or in part any certain coniferous and other protected trees and plants (RIGL 2-15-12); unauthorized use of distinctive recycling logo (RIGL 23-18.8-3[c]); disposal of telephone directories prohibited except through established systems of recycling (RIGL 23-18.8-5); disposing of out-of-state solid waste at state central landfill (RIGL 23-19-13.1). Gasoline imported for sale or sold in Rhode Island must contain less than 0.5% MTBE or other oxygenates. (RIGL 31-37-7.1). Diesel emissions regulated by RIGL 31-47.3-1 et seq.

Statutory powers of entry and/or inspection are provided for in cases: of non-dwellings in air pollution emergency (RIGL 23-23.1-8); at reasonable times where pollution to state waters likely (RIGL 46-12-31); and of danger to drinking water (RIGL 46-14-6).

Penalties.

Violation of an order issued by Environmental Director to adopt anti-pollution system for air (RIGL 23-23-14[a]) or water (RIGL 46-12-14) carries fine of not more than $500 or imprisonment of not more than 30 days, or both, each day constituting separate offense. Violation of prohibitions against water pollution carries maximum civil penalty of $25,000 and maximum criminal fine of $25,000 or imprisonment of five years, or both, for each day in violation. (RIGL 46-12-14). Violation of contamination of drinking water provisions carries maximum civil penalty of $5,000 and maximum criminal fine of $5,000 or 30 days imprisonment, or both, for each day in violation. (RIGL 46-14-8). Interference with performance of Environmental Director’s duty to control air or water pollution carries maximum fine of $500. (RIGL 23-23-14[c]; RIGL 46-12-31). Falsification of any document filed pertaining to water pollution results in, upon conviction, fine of not more than $5,000 for each violation or imprisonment of not more than 30 days, or both. (RIGL 46-12-14). No penalty is specified for illegal open fire burning, unless prohibited by Environmental Director’s order. (RIGL 23-23-14, RIGL 23-23-18). After air pollution emergency is proclaimed, violation of Governor’s order or interference with its enforcement carries maximum fine of $500, or 90 days imprisonment, or both, each day constituting separate offense. (RIGL 23-23.1-9). Pollution of drinking water carries maximum fine of $400, or one year imprisonment, or both (RIGL 46-14-1); refusal to remove refuse from near drinking water as ordered carries per diem fine of $20 (RIGL 46-14-2). Failure to file reports as to solid waste disposal areas carries $400 per day fine. (RIGL 46-12-35). Falsification of reports carries $400 fine or one year imprisonment or both. (RIGL 46-12-36). Transporting or dumping waste or dredge within state waters without permit carries maximum fine of $5,000, or one year imprisonment, or both. (RIGL 46-17.1-1). Use of coastal wetlands contrary to Environmental Director’s order may be enjoined. (RIGL 2-1-15). Environmental Director may order violator to cease and/or to restore wetland and upon his refusal have restoration effected at violator’s expense. Maximum fine of $500, or 30 days imprisonment, or both, each day constituting separate offense, for violation of Environmental Director’s order. Environmental Director may also seek injunction or relief by prerogative writ. (RIGL 2-1-24). Failure by owners of seagoing vessels transporting petroleum products to file performance bond or liability insurance must be fined not more than $100,000 or twice amount required to rectify any damage caused, whichever is greater. (RIGL 46-12.4-1). Coastal Council may order violator to cease and desist. Maximum fine of $500 or three months imprisonment or both, each day constituting separate offense, for violation of Coastal Council’s order. Coastal Council may also seek injunction or relief by prerogative writ. (RIGL 46-23-7.3). Violator of hazardous waste provisions is subject to fine of not more than $25,000 for each day (RIGL 23-19.1-17) and violator of cessation order is guilty of felony and is subject to imprisonment for not more than five years or fine up to $25,000 or both (RIGL 23-19.1-18). Coastal Council may record order or notice and subsequent transferee shall be responsible for complying therewith. (RIGL 46-23-7). Environmental Director may assess extraordinary cost in investigation against violator. Violator of asbestos provisions is subject to fine of not more than $25,000, each day constituting separate offense. (RIGL 23-24.5-26). Violators of vehicle tire storage and recycling provisions are subject to fine of not more than $1,000 per occurrence. (RIGL 23-63-5). Violators of pesticide control provisions are subject to fine of up to $10,000 for each offense. Undertaking asbestos abatement project or disposing of friable asbestos materials without license or violating any rules or regulations of Health Director promulgated pursuant to c. 23-24.5 entitled “Asbestos Abatement” will subject violator to fine of up to $25,000 for each offense. (RIGL 23-24.5-12). Disposal of solid waste at other than licensed solid waste facility will subject violator to criminal penalties including fine up to $5,000 for each day during which such violation shall be repeated or continued and all costs incurred in removal of solid waste or by imprisonment for not more than five years or both. In addition, violators will be subject to civil penalty of not more than $25,000. (RIGL 23-18.9-10). Illegal disposal of infectious and pathological waste will subject violator to fine not less than $2,500 nor more than $5,000. (RIGL 23-19-13.2). Violators of oil pollution control provision must reimburse Department for expenses incurred in connection with cleanup. (RIGL 46-12.3-8; 46-

12.5.1-7). Violation of oil pollution prohibitions carry maximum civil penalty of $25,000 (RIGL 46-12.3-6, 1990, c. 324) and maximum criminal penalty of $25,000 or imprisonment for five years, or both, for each day in violation (RIGL 46-12.3-10, 1990, c. 324). Director may order replacement of any shrub or tree taken without permission from public land (RIGL 2-15-11); city or town, by local ordinance, may impose fines up to $250 per day for failure to submit soil erosion plan (RIGL 45-46-5). Violation of out-of-state waste disposal provision punishable by fine of not more than $5,000 and/or imprisonment for up to three years. (RIGL 23-19-13.1). Violation of radon control licensing and certification punishable by forfeiture of fees derived from activity and fine of $500 for first offense and $1,000 for second and subsequent offenses. (RIGL 23-61-5). Violation of ban on importation and possession of non-native (exotic) freshwater invasive aquatic plants punishable by fine of not more than $500 or imprisonment for up to 90 days or both. (RIGL 20-1-26).

Dam Management Districts.

Cities and towns may create dam management districts to inspect, maintain, repair, or reconstruct dams. Districts may apply and contract for appropriate funds. (RIGL 45-62-1 et seq.).

Underground Storage Tank Financial Responsibility Program.

Owners of underground storage tanks must have $1,000,000 of liability insurance per incident and $2,000,000 of liability insurance in aggregate. State of Rhode Island established state fund to facilitate clean-up of leaking underground storage tanks. Underground Storage Tank Review Board created to oversee administration and implementation of fund. (RIGL 46-12.9-8). Governor appoints eight of ten total board members. (RIGL 46-12.9-8[b]). Board must create and submit annual report to governor. (RIGL 46-12.9-8[e][3]).

Permits/Licenses.

Commissioner of branch with jurisdiction over permit, license or enforcement proceeding shall review all decisions rendered by administrative adjudication branch as pertain to permitting, licensing, or enforcement proceeding. (RIGL 42-17.1-17). Permit for Department of Environmental Management required to cut or remove any shrub or tree from public land. (RIGL 2-15-8). Specific plants protected. (RIGL 2-15-12). Licensure of well water purification companies required (RIGL 23-1-5.7); license and certification required for radon control services (RIGL 23-61-5).

Programs.

Lead Poisoning Prevention Act includes screening, facility inspection, administrative fines and notification. (RIGL 23-24.6-1 et seq.). Industrial Property Remediation and Reuse Act to clean up contaminated properties to levels protective of human health and environment. (RIGL 23-19.14-1 et seq.). Notice of hazardous waste violation sent to chief executive officer of city or town or town council and filed in land records until problem resolved. (RIGL 2.3-19.1-33). Soil Erosion and Sediment Control Plans as delivered by cities and towns shall include model ordinance provisions. (RIGL 45-46-4, 5). R.I. publications required to use recycled paper. (RIGL 23-18.16-1 et seq.). Water supply management plan required by all parties involved in distribution of water. (RIGL 46-15.4-1). Sewage sludge incineration facility assessment requirements. (RIGL 23-65-1 et seq.). Public Water Supply Systems Act governs combinations and/or annexations of small public water supply systems to adjacent water supplies. (RIGL 46-29-17). Underground Storage Tank Financial Responsibility Act facilitates clean-up of releases from leaking underground storage tanks by reimbursing responsible parties for certain remediation costs. (RIGL 46-12.9-1 et seq.). Mercury Reduction and Education Act encourages establishment of effective waste reduction, recycling, management and education programs and applies to motor vehicles at end-of-life. (RIGL 23-24.8-1 et seq.). Wildlife Damage Act to combat wildlife damage to crops. (RIGL 20-1-24 et seq.). Energy and Consumer Savings Act of 2005 sets minimum efficiency standards for certain products sold or installed in State. (RIGL 39-27-1 et seq.). Implementation of Regional Greenhouse Gas Initiative authorized. (RIGL 23-82-1 et seq.).

Segregated leaf and yard debris accepted by RI Resource Recovery Corporation as part of municipal leaf and yard waste diversion program. (RIGL 23-18-3[17]). Recycling program established for computers, computer monitors, televisions, and other covered electronic products. (RIGL 23-24.10-1 et seq.).

Uniform Septage Disposal Fee.

Uniform Septage Disposal Fee imposed on disposal of septage (RIGL 46-12.11-3); fees deposited in Bays, Rivers and Watersheds Fund (RIGL 46-12.11-4; RIGL 46-31-12.1).

Marketing.

Rhode Island has adopted FTC uniform standards for environmental marketing claims. (RIGL 6-13-3.1). Attorney General may bring suit for injunctive relief against any use of deceptive environmental claims. (RIGL 6-13.3-2.3).

Energy.

Renewable Energy Standard provided for. (RIGL 39-26-1 through 10).

Long-Term Contracting Standard for Renewable Energy provided for. (RIGL 39-26.1-1 through 8).

State Energy Conservation (Building) Code provided for. (RIGL 23-27.3-100.1.5.4).

13 ESTATES AND TRUSTS

13.01 ADMINISTRATION:

See topic 13.09 Executors and Administrators.

13.02 ADVANCEMENTS:

See topic 13.07 Descent and Distribution.

13.03 ALLOWANCES:

See topic 13.09 Executors and Administrators.

13.04 CLAIMS:

See topic 13.09 Executors and Administrators; category 5 Civil Actions and Procedure, topic 5.17 Pleading.

13.05 DEATH:

Defined.

Uniform Determination of Death Act adopted. (RIGL 23-4-16): Irreversible cessation of circulatory and respiratory systems, or “brain dead”.

Death presumed after four years absence unheard from. (RIGL 8-9-23).

Death presumed in sea disaster six months after U.S. Navy, U.S. Coast Guard or similar agency’s (in foreign country) investigation and finding that person was so lost if eyewitness. U.S. Navy, U.S. Coast Guard or similar agency’s (in foreign country) finding sufficient without eyewitness if more than one person lost. (RIGL 8-9-22).

Official Findings, Reports or Records.

A written finding of presumed death, or a duly certified copy thereof, made pursuant to Federal Missing Persons Act, or official written report or record, or duly certified copy thereof, that person is missing, missing in action, interned in a foreign country, or beleaguered, besieged or captured by enemy, or is dead or alive, made pursuant to Federal Missing Persons Act or by any other law of U.S., must be received in any court, office or other place in this state as prima facie evidence thereof. Such written finding of presumed death is also prima facie evidence of date, circumstances and place of disappearance. (RIGL 9-19-19, 20).

Survivorship.

Uniform Simultaneous Death Act has been adopted. (RIGL 33-2-1 through 9).

Actions for Death.

An action for death by wrongful act, neglect or default, survives for sole benefit of spouse and children of deceased, or if there be neither spouse nor children, for sole benefit of next of kin. (RIGL 10-7-2). Statute not applicable to nonviable fetus. (587 A.2d 67). Any damages recoverable are not to be considered as damages to, or assets of, decedent's estate. Nor are they liable to claims against that estate. (RIGL 10-7-10). Action must be commenced within three years of death and must be brought by and in name of executor or administrator of deceased, whether appointed or qualified within or without state but, if there be no executor or administrator or if, there being one, no action is brought in his name within six months after death, one action may be brought in names of all beneficiaries, either by all or by part stating that they sue for benefit of all; if all do not bring suit, only those suing are responsible for costs although judgment is for benefit of all. Cause of action survives death of any person liable, and may be originally brought against his executor or administrator, or if brought against such person in his lifetime, may in event of his death be defended by his executor or administrator. Any person or corporation found liable under §§ 10-7-1 through 4 will be liable in sum not less than $250,000. (RIGL 10-7-1 through 13). Wrongful death damages not recoverable by sole surviving relative whose negligence was proximate cause of decedent's death. (585 A.2d 640). No person who is adjudged to be in willful contempt of court for being more than six months in arrears of order to pay child support to deceased may recover. (RIGL 10-7-2). Pecuniary damages are measured by determining gross amount of decedent's prospective income over remainder of his life expectancy, deducting therefrom decedent's prospective personal expenses, exclusive of those of his dependents, and reducing remainder to its present value, subject to adjustment based on increased cost of living. (RIGL 10-7-1.1). No person who voluntarily and gratuitously renders emergency assistance to person in need may be liable for civil damages resulting from ordinary negligence. (RIGL 19-1-27.1).

Expenses Incurred Prior to Death.

A separate cause of action for damages for death by wrongful act survives to decedent's executor or administrator alone, whether appointed within or without this state, for sole benefit of decedent's estate, to recover for decedent's hospital, medical and other expenses, including diminution of his earning power up to time of his death. Recovery for pain and suffering may be had. Action must be commenced within two years after decedent's death. Cause of action survives death of person liable for death of another and may be brought against his executor or administrator, or if brought against him in his lifetime may, in event of his death, be defended by his executor or administrator. (RIGL 10-7-5 through 8).

Certificate obtainable from town or city clerk where death occurred or from state division of vital statistics. See category 10 Documents and Records, topic 10.04 Records, subhead Vital Statistics.

13.06 DECEDENTS' ESTATES:

See topics 13.07 Descent and Distribution, 13.09 Executors and Administrators, 13.16 Wills.

13.07 DESCENT AND DISTRIBUTION:

Subject to rights of the surviving spouse, if any (see subhead Surviving Spouse, infra), real and personal estate not disposed of by will descends and is distributed as follows, each class taking to exclusion of subsequent classes: (1) children and/or descendants of deceased children; (2) parents equally or all to surviving parent; (3) brothers and sisters and/or descendants of deceased brothers or sisters; (4) in equal moieties to more remote paternal and maternal kindred, each in the following course: (a) grandparents equally or all to surviving grandparent; (b) uncles and aunts and/or descendants of deceased uncles or aunts; (c) great-grandparents equally or all to surviving great-grandparent; (d) great-uncles and great-aunts and/or descendants of deceased great-uncles or great-aunts. (RIGL 33-1-1, 2, 10). If there be no maternal or paternal kindred on the one part, the whole goes to the other part, and if none on either part, the whole goes to the husband or wife of the intestate, and if the husband or wife be dead, it goes to his or her kindred in like course as if such husband or wife had survived the intestate and then died entitled to the estate. (RIGL 33-1-3; 99 R. I. 368, 208 A.2d 119).

Descendants of persons who would have inherited if living take always per stirpes. (RIGL 33-1-7).

Person who is adjudged to be in willful contempt of being more than six months in arrears of court order to pay child support for deceased shall be deemed to have predeceased child. (RIGL 10-7-2).

Surviving spouse takes life estate in all realty. (RIGL 33-1-5; RIGL 33-25-2). (See category 21 Property, topics 21.08 Dower, 21.05 Curtesy.) If any estate, real or personal, is devised or bequeathed to surviving spouse, such devise or bequest shall bar life estate unless surviving spouse, within six months after date of first publication of qualifications of fiduciary spouse, files in probate court written statement waiving devise and bequest and claiming his or her life estate in real estate of decedent. (RIGL 33-25-4). If intestate left no issue, probate court, on application within six months from date of first publication of notice of qualification of administrator, may also allow or set off in fee to surviving spouse real estate not exceeding $75,000 in value. (RIGL 33-1-6). Surviving spouse takes one half of personalty not bequeathed if decedent left issue, otherwise first $50,000 in value and one half of remainder. (RIGL 33-1-10).

Felonious slayer may not inherit from his victim. (RIGL 33-1.1-2).

Half Blood.

Statutes make no distinction between relatives of full and of half blood with regard to inheritance from each other. (24 R. I. 314, 53 Atl. 43; 16 R. I. 579, 18 Atl. 186).

Posthumous Children or Other Issue.

No right in inheritance accrues to any persons other than to children of intestate unless such persons are alive and legally capable to take as heirs at time of intestate's death. (RIGL 33-1-4).

Illegitimates inherit from and through mother and father. Marriage of parents and acknowledgment of child legitimizes child. (RIGL 33-1-8).

Child support obligations not extinguished by death of parent. (RIGL 33-11-51).

Adopted Children.

See category 14 Family, topic 14.01 Adoption.

Determination of Heirship.

Preferable method is petition for, and order of, distribution.

Advancements.

If real estate is conveyed by deed of gift, or personal estate is delivered to child or grandchild, and charged as advancement or written memorandum thereof made by intestate or by his order, or is delivered expressly for purpose of advancement in presence of two witnesses who are requested to take notice thereof, such property is deemed advancement and such child or grandchild takes it as part of estate. (RIGL 33-1-11). In any division of real estate, advancement must be taken into consideration and probate court must ascertain amount thereof before appointing commissioners to divide such real estate. (RIGL 33-3-4).

Election.

Right of spouse to distributive share of estate apparently does not bar life estate in realty which replaced dower and curtesy. (RIGL 33-1-9, RIGL 33-25-2).

Aliens.

See category 4 Citizenship, topic 4.01 Aliens.

Disclaimer.

Provision is made for disclaimer or renunciation of all or any portion of or any interest in inheritance of real or personal property or devise of real property or legacy of personal property. (RIGL 34-5-1 through 12).

Escheat.

If a person dies without leaving any heir or legal representative, town council of town within which his or her real estate is located may direct town treasurer to take possession of same for use of town until claimed by heir or other legal representative and said town must account to claimant for property but not income therefrom. (RIGL 33-21-1, 3 through 6). See topic 13.09 Executors and Administrators.

Recordation.

Prior to acceptance by probate court of final account or affidavit of complete administration, fiduciary must submit to probate court affidavit of no real property or duly recorded certificate of descent, signed by fiduciary, containing name and residence of each person to whom real property therein is distributed or descends or particular description of estate distributed or descending to each person. (RIGL 33-3-14). When real property of deceased person is devised or distributed, decedent's executor or administrator shall cause certificate of descent to be recorded in land evidence records of every city or town in which affected property is located. (RIGL 33-9-29).

Revised Uniform Disposition of Unclaimed Property Act adopted with significant variations. §§ 33-21-11 through RIGL 33-21-43 have been repealed. However, RIGL 33-21-1, 3, 4, 5, 6 and 10 are in effect. (RIGL 33-21-1, 3-6 and 10). Unclaimed Intangible and Tangible Property Act adopted. (RIGL 33-21.1-1 through 41).

Minor or Incompetent Distributee or Heir.

See topic 13.16 Wills, subhead Legacies.

Bona fide purchasers for value of real and personal property from heirs, devisees or legatees protected after one year from decree adjudicating intestacy or allowing will. (RIGL 33-9-22).

See also topic 13.09 Executors and Administrators.

13.08 ELECTION:

See topic 13.16 Wills.

13.08A ESTATES: (in property)

See category 21 Property, topic 21.16 Real Property.

13.09 [RESERVED]

13.10 EXECUTORS AND ADMINISTRATORS:

Administration proceedings should be held in probate court of town or city in which decedent resided at time of his death, or in case of nonresident decedent in any town or city where he left rights, credits or estate, real or personal. (RIGL 8-9-11).

Petition for appointment and notice thereon: see topic 13.16 Wills, subhead Probate.

Preferences in Right to Administer.

In testate estate, person named as executor in will, if otherwise competent, has right to appointment if he gives bond. (RIGL 33-8-1). In intestacy, surviving spouse or one or more of next of kin, or surviving spouse with one or more of next of kin, they being suitable persons and competent, have prior right to administration of estate, but if they neglect to apply for letters of revenue within 30 days after death of decedent, or are unsuitable or renounce administration, court may, on petition of some party in interest, grant administration to any suitable person. (RIGL 33-8-8).

Eligibility and Competency.

Nonresident individual is competent to act as executor or administrator, but must appoint resident agent on whom process may be served. (RIGL 33-18-9). Nonresident may not be appointed administrator by reason of any right to trust unless other circumstances render it proper. (RIGL 33-8-7).

Married woman may act as executrix or administratrix. (RIGL 15-4-10; RIGL 33-8-11).

Rhode Island trust company may act as executor or administrator (RIGL 19-5-6), and upon deposit of securities with State Treasurer, is exempt from giving surety on its bond (RIGL 19-5-7; RIGL 19-8-2). Where trust company changes into national bank, or vice versa, by conversion, merger or consolidation, successor bank automatically succeeds to fiduciary appointment and powers. (RIGL 19-5-20). As to foreign trust company or national bank, see category 3 Business Regulation and Commerce, topic 3.01 Banks and Banking, subhead Foreign Banks or Trust Companies.

Qualification.

Executor or administrator qualifies, after appointment, upon filing bond in amount ordered by probate court with sufficient surety. Bond is upon condition that he faithfully perform his duties. (RIGL 33-17-1, 2).

Exemption from Bond.

Order or request in will that executor be exempt from giving bond or surety only exempts executor from giving surety. (RIGL 33-17-4). If administrator is surviving spouse, or sole heir of decedent, exempt from giving surety. (RIGL 33-17-1.2). Probate court may require bond with surety at any time. (RIGL 33-17-4). No distinction between resident and nonresident with respect to exemption from surety.

Removal.

Grounds for removal include incapacity, neglect of duty, or waste (RIGL 33-18-2), mismanagement (RIGL 33-17-13) and failure of nonresident fiduciary to appoint and maintain a resident agent (RIGL 33-18-13). Notice of proceeding required by publication (RIGL 33-22-7, 11) and by citation to fiduciary (RIGL 33-18-3).

Special Kinds of Administration.

Custodian (i.e., temporary) (RIGL 8-9-10); administrator c.t.a. (RIGL 33-8-4, 5); administrator d.b.n., c.t.a. or d.b.n. (RIGL 33-8-10); administrator pendente lite or administrator ad colligendum (RIGL 33-23-3; 101 R.I. 667, 226 A.2d 423).

Public Administrators.

Office established only for City of Providence. Applicable to those who die in Providence intestate without known next of kin, and with no prior pending proceedings for administration. (. . . R.I. . . ., 428 A.2d 300).

Inventory must be filed by executor or administrator within 90 days after appointment or such further time as probate court allows, unless he has given bond to pay funeral charges, debts and legacies. (RIGL 33-9-1; RIGL 33-17-3). Executor or administrator is appraiser except that on petition of interested party, probate court may appoint one or more disinterested appraisers. (RIGL 33-9-4).

Powers.

Probate court may authorize executors, administrators, guardians and conservators to submit to arbitration, to abandon or to adjust by compromise any controversy or thing whatever relating to estates to enter into agreements. (RIGL 33-18-16).

Borrowing, Pledging and Investing.

An executor or administrator may be authorized by the Superior Court to borrow on, mortgage or pledge personal estate for purposes approved by court. Said Court may also authorize investment of estate's funds, voting of corporation stock, loaning of money to corporations in which estate is interested, purchase of stock in, or obligation of, such corporations, guaranteeing of obligations of such corporations subject to restrictions in will. (RIGL 33-9-14 through 21).

Continuation of Business.

Probate court may authorize continuation of decedent's business so far as may be expedient for prudent winding up. (RIGL 33-9-7).

Leasing and Renting.

Where personal property is insufficient to pay debts and charges, probate court may authorize executor or administrator to receive rents and to lease real estate, but such authority will probably not interfere with spouse's statutory life estate and will not be granted with respect to real estate specifically devised unless other real estate is insufficient. (RIGL 33-12-9, 10; RIGL

33-25-1 through 6).

Nominee.

Corporate fiduciary may register stock, etc., in name of nominee. (RIGL 18-10-1 through 5).

See also infra, subheads Sale or Mortgage of Real Estate and Sale of Personal Property.

Delegation of powers by fiduciary who is engaged in war service or is outside U.S. is authorized. (RIGL 18-3-3 through 7).

Notice to creditors is published by probate clerk, on qualification of executor or administrator, as often as court directs. (RIGL 33-18-1).

Filing of Claims.

All claims, including pending suits, preferred claims, and claims of executor or administrator against estate of deceased person must be filed in office of clerk of probate court in form setting forth nature and approximate amount (if known) of claim and name and address of claimant and attorney, if any, for claimant. Each statement of claims, other than that filed by executor or administrator, must contain affidavit that copy of statement was transmitted by hand delivery or forwarded to executor or administrator or his attorney of record by registered or certified mail, return receipt requested. (RIGL 33-11-4).

Unmatured claims must be filed. (RIGL 33-11-3). Secured claim need not be filed to protect security, but must be filed in order to participate in general assets as to any excess over value of or amount realized on security. (RIGL 33-11-32).

With his claim creditor must also file his post office address. Clerk should further be notified of any change in creditor’s address during administration. (RIGL 33-11-6).

Time for Filing Claims.

Claims against estates of decedents must be filed within six months of the first publication of notice by the clerk of the qualification of an executor or administrator. Claims not filed within said six months period are barred except that a creditor who, by reason of accident, mistake, or any other cause, has failed to file his claim may, at any time before distribution of the estate, petition the probate court for leave to file his claim. Court, after notice to executor or administrator and hearing on said petition, may grant leave to file claim on such terms as court shall prescribe, and claim, if allowed, must be paid out of assets remaining in hands of executor or administrator at time of receipt by him of notice of petition. (RIGL 33-11-5).

Appeal from decree denying leave to file untimely claim may be taken by petitioner to Superior Court where it is heard de novo without jury. Rulings, order or decree of Superior Court are not reviewable by appeal or exception. No appeal from decree or order of probate court granting leave to file claim. (RIGL 33-11-5).

Proof of Claims.

No form for proof of claim is prescribed by statute but claimant must, if requested by executor or administrator, file with clerk affidavit in support of his claim. Affidavit states that, to best of his knowledge and belief, he has given credit to estate for all payments and off-sets to which it is entitled and that balance claimed is justly due and disclose any security held for his claim, and if claim is not upon negotiable instrument, that no such instrument has been given. (RIGL 33-11-7).

Allowance of Claims.

Failure to act on claim within time in which it might be disallowed amounts to allowance thereof. (28 R.I. 555, 68 Atl. 431). See RIGL 33-11-15, infra.

Disallowance of Claims.

Any claim filed within six months from said first publication may be disallowed within six months and 30 days from said first publication by executor or administrator, or by any person interested, by filing statement disallowing such claim in the probate clerk's office and giving notice in writing either personally or by registered or certified mail to the claimant whose claim is so disallowed; any claim filed after six months from said first publication may be so disallowed within 30 days after notice of filing. (RIGL 33-11-14).

Executor or administrator, or any person interested, who has failed to disallow any claim within time prescribed by statute may at any time before distribution of estate, if claim has not previously been paid, petition probate court for leave to disallow. If such leave is granted, claim may be disallowed as aforesaid within such time as is fixed by court, as if same had been disallowed within time prescribed by statute. (RIGL 33-11-15).

Examination of Disallowed Claims.

If estate is solvent, personal representative, claimant, or interested party may request that probate court determine disallowed claim by petition filed within 20 days of disallowance. If no such request is timely made or if probate court in its sole discretion finds pleading, discovery, and trial of issues presented would be more efficiently presented in district or superior court depending upon amount in controversy, disallowance will be affirmed by probate court and claimant will bring civil action on disallowed claim pursuant to RIGL 33-11-48 within 30 days of entry thereof or claim shall be forever barred (RIGL 33-11-16).

Bar of Claims by Lack of Administration.

Any creditor of deceased person who has died intestate being seized at time of death of real estate within this state and upon whose estate no letters of administration have been taken, is forever barred from collecting such claim unless such creditor within period of six years after death of such person petitions for letters of administration upon such estate. This law, however, does not affect right of any creditor to satisfy his claim from any security held by him. (RIGL 33-13-4).

Payment of Unmatured Claims.

Unmatured claims are paid with other claims, deducting discount to maturity. (RIGL 33-11-3).

Contingent Claims.

Persons holding contingent claims may file within time allowed for filing claims or wait until action accrues and sue heirs, devisees, legatees or next of kin. If claim is filed, assets deposited in registry of court or bond produced. Suit must be brought within one year after claim becomes payable. (RIGL 33-11-9 through 13; RIGL 33-13-15).

Insolvent Estates.

If estate appears insolvent, executor or administrator may so represent it to probate court at any time during administration of estate. If probate court finds estate probably insolvent, and there are claims which have been disallowed, it will schedule hearing on claims. (RIGL 33-11-24 through 31).

Priorities.

If the estate of decedent is insufficient to pay debts, after deducting charges of administration and property as is set off and allowed to widow and family, remainder of estate must be applied to payment of debts and charges in following order: (1) Necessary funeral charges of deceased; (2) necessary expenses of his/her last sickness; (3) debts due to U.S.; (4) debts due to Rhode Island and all state and town taxes; (5) wages of labor performed within six months next prior to death of deceased person, not exceeding $1,000 to any one person; (6) proceeds due Rhode Island state lottery pursuant to RIGL 42-61-6.2; (7) other debts filed within six months of first notice; (8) all other debts. If there is not sufficient property to pay all debts of any class, creditors of that class must be paid ratably upon their respective claims and no payment will be made to creditors of any class until all those of preceding class or classes have been paid in full. (RIGL 33-12-11). Assets of insolvent decedent are held to satisfy creditors in state before being released to creditors without state. (RIGL 33-12-15).

Secured Claims.

In case a secured claim against an insolvent estate exceeds the value of security or amount realized thereon, creditor prorates with other creditors of same class as to excess. (RIGL 33-11-32).

Liability of Real Estate for Debts.

The real estate of a deceased person is liable for his debts for two years and six months next after first publication of notice of qualification of first executor or administrator, and within that time cannot be encumbered or alienated by devisees or heirs to affect sale by executor or administrator. (RIGL 33-13-3).

Sale or Mortgage of Real Estate.

If the personal property of a deceased person is insufficient to pay his debts, funeral expenses, charges of administration, expenses of supporting his family, as prescribed by law, and such legacies as are expressly or impliedly charged upon real estate, his executor or administrator shall sell or mortgage, in manner provided by statutes, so much of his real estate or of any interest therein as may be subject to and required for purpose of such payments. (RIGL 33-12-4).

Action by legatee to impress charge against real estate based upon will must be brought within six years from proof of will and notice of suit filed in land records within ten days of commencement of suit. (RIGL 33-13-9).

An executor or administrator may sell decedent’s real estate not specifically devised. May also sell specifically devised real estate provided specific devisee consents in writing, despite sufficiency of personal property to pay debts, funeral charges, charges of administration, expenses of supporting his family and legacies, whenever in discretion of probate court such action seems desirable in effecting prompt and efficient settlement of estate. (RIGL 33-12-6).

Sale of personal property may be made by executor or administrator at public auction after reasonable notice of such sale or at private sale under advice and direction of probate court, provided that such advice and direction shall not be required in case of sale at private sale by executor or administrator c.t.a. in exercise of power to sell at private sale conferred on him by will. Private sale unless authorized by probate court or by will or sale by auction improperly made is deemed maladministration. (RIGL 33-12-8).

Actions.

Presentation of claim is condition precedent to action thereon. Right to sue on claims against estate (except in certain cases for which special provision is made) is suspended for six months from date of first publication of notice of qualification of executor or administrator (RIGL 33-11-49) and until disallowance of claim. Suit on claim disallowed prior to expiration of six months from said first publication may be brought no later than 30 days after expiration of six months from said first publication. Suit on claim disallowed after expiration of six months from said first publication may be brought within 30 days after notice is given to claimant that such claim is disallowed. (RIGL 33-11-48). Except as is otherwise provided, no such action may be commenced after two years from date of first publication of notice of qualification of executor or administrator or after order of distribution has been made (RIGL 33-11-50).

In case where commissioners are appointed, no action may be brought on claim against estate. Only remedy, in case of disallowance, is appeal to Superior Court. (RIGL 33-11-42).

An action pending against decedent at time of his death may be continued against representative if cause of action survives. (RIGL 33-9-24; RIGL 33-11-44). Actions by decedent pending at death may be continued by representative if cause of action survives. (RIGL 33-9-24). See category 5 Civil Actions and Procedure, topic 5.02 Actions.

Cause of action accruing for or against decedent who dies before time limit for bringing such action or within 60 days after expiration of said time may be commenced by or against executor or administrator at any time not more than one year after appointment of such executor or administrator but not more than three years after death of decedent if such cause of action survives death. (RIGL 9-1-21). See category 5 Civil Actions and Procedure, topic 5.02 Actions.

After settlement of the estate, and after expiration of six months from the date of first publication of notice of the qualification of an executor or administrator, the heirs, next of kin, devisees and legatees are liable for all debts for which action could not have been brought against the executor or administrator and certain other claims specially provided for. (RIGL 33-13-14 through 20).

Allowances.

Wearing apparel of widow or widower and minor children of decedent belongs to them, respectively. Widow or widower is also entitled, for herself or himself and for family under her or his care, to such household effects, supplies, and, in addition thereto, such other personal property of husband or wife, exempt from attachment by law, as probate court shall deem necessary, having regard to all circumstances of case; or, if there is no widow or widower, minor children shall be entitled to same or use thereof in such manner as court shall direct. (RIGL 33-10-1).

Probate court shall make reasonable allowance out of estate of deceased for support of his or her family, until same can otherwise be provided for, for not exceeding six months from date of decease. Such allowance may be fixed at any time on application of executor or administrator or of any party in interest, filed within six months after first publication of notice of qualification of executor or administrator. Court may also, provided a final account has not been allowed, make allowance for support of such family for second period not exceeding six months, such allowance to be fixed at any time after first six month period has passed and within one year after said first publication of notice, on application of executor or administrator or of any party in interest. After exhausting personal property, real estate may be sold to provide amount of allowance decreed, in same manner as for payment of debts. Appeal from decree granting letters testamentary or of administration does not prevent allowance or payment thereof, nor does appeal from decree making such allowance if bond with surety be filed. (RIGL 33-10-3).

If no issue of decedent survive, probate court must set off to widow or widower portion of real estate of deceased spouse, not needed to pay debts, for support in addition to, and subject to same conditions as, statutory life estate. (RIGL 33-10-4).

Accounting and Settlement.

Executor or administrator must account within two years after qualification and thereafter at least once a year, except that executor or administrator who is sole beneficiary or who files a release from each beneficiary may file, in lieu of an account, affidavit of completed administration. (RIGL 33-14-1). Probate court gives notice by publication to all persons known to be interested prior to hearing on account. (RIGL 33-22-7, 11).

Consent Settlement.

Executor or administrator may be authorized by probate court to compromise or settle any controversy, including one involving construction of provisions of will. (RIGL 33-18-16).

Distribution.

Orders of distribution provided for. (RIGL 33-13-11, 12).

Distribution if Abroad.

Probate court may order paid into registry of court money or property due a legatee or distributee residing outside U.S. or territories who would not have benefit or control of same. (RIGL 33-13-13).

Compensation or commission allowed executor or administrator rests with discretion of court. (RIGL 33-14-8).

Donation of Conservation Easement.

Donation of Conservation Easement provided for. (RIGL 33-9-30).

Small Estates.

If resident of Rhode Island dies having estate consisting entirely of personal property total value of which does not exceed $15,000 (excluding motor vehicles), certain close relatives of deceased that are residents of Rhode Island may, provided no petition for letters testamentary or letters of administration have been filed with applicable probate court, after 30 days of decedent’s death, file with probate court statement, verified by oath or affirmation, containing (1) name and address of affiant, (2) name, residence and date of death of deceased, (3) relationship of affiant to deceased, (4) schedule of assets of deceased including estimated value of such assets, (5) statement that affiant has undertaken to act as voluntary administrator of estate, (6) names and addresses of joint owners of property with deceased and (7) names and address of persons who would take under Rhode Island general law § 33-1-10 in case of intestacy. Voluntary administrator generally: may sell any property for cash, is required to discharge expenses and debts of deceased in accordance with Rhode Island general laws § 33-12-11 and distribute balance to surviving spouse or, if there is no surviving spouse, to persons prescribed by Rhode Island general laws § 33-1-10. (RIGL 33-24-1). If Rhode Island resident dies leaving small estate and will that names executor, similar procedure is followed however, affiant must include in his or her statement to court names of those persons who would take under provisions of will. (RIGL 33-24-2).

Foreign executor or administrator of a nonresident decedent may assign and transfer any mortgage debt and the mortgage securing same belonging to such decedent, upon real or personal property located in this state, provided a duly authenticated copy of the certificate of his appointment and evidence that it has not been revoked are annexed to such assignment and transfer. (RIGL 33-18-24). Local administrator or executor of nonresident decedent may be authorized by the probate court to transmit local assets to administrator or executor in state, territory, district or country where decedent was domiciled instead of disposing of same according to will or applicable intestate laws. (RIGL 33-12-13, 14). See also topic 13.16 Wills, subhead Foreign Probated Wills.

Uniform Estate Tax Apportionment Act adopted. (RIGL 44-23.1-1 through 44.23.1-12).

Uniform Fiduciaries Act adopted. (RIGL 18-4-15 through RIGL 18-4-22; §§ 3, 8 and 10-16 omitted).

Revised Uniform Principal and Income Act.

Few provisions adopted with slight variations. (See RIGL 18-4-28, 29.)

Uniform Principal and Income Act not adopted.

Uniform Simplification of Fiduciary Security Transfers Act adopted. (RIGL 18-11-1 through 11). In event of any conflict between Uniform Simplification of Fiduciary Security Transfers Act and Uniform Commercial Code (RIGL 6A-8-101 through 406), former controls (RIGL 6A-8-107).

13.11 FIDUCIARIES:

See topics 13.09 Executors and Administrators, Trusts; category 14 Family, topic 14.07 Guardian and Ward.

13.12 INTESTACY:

See topic 13.07 Descent and Distribution.

13.13 [RESERVED]

13.14 PROOF OF CLAIMS:

See topic 13.09 Executors and Administrators; category 5 Civil Actions and Procedure, topic 5.17 Pleading.

13.15 TRUSTS:

Kinds.

Common law rules generally apply. Trusts may be express or arise by operation of law. (47 R.I. 263, 132 A. 527). Express trusts of lands must be in writing, signed and delivered. (RIGL 34-11-1). Oral proof of an express trust of personalty is not permissible. (RIGL 9-1-4; 108 R.I. 100, 110, 272 A.2d 683, 689). Employees' trusts are exempted from operation of rule against perpetuities (abolished by statute in Rhode Island under RIGL 34-11-38) and other restraints on alienation. (RIGL 28-17-2).

Appointment of Trustee.

Trustee named in will or inter vivos trust takes office without necessity of court appointment. Superior Court has jurisdiction to fill vacancies. (RIGL 18-2-1 through 9). In case of change of bank or trust company into national bank or of national bank into state bank or trust company by conversion, merger or consolidation, successor bank succeeds automatically to fiduciary appointments and powers. (RIGL 19-5-20). State bank or trust company resulting from merger of two banks or trust companies succeeds automatically to fiduciary appointments and powers of merged entities. (RIGL 19-1-14).

Eligibility and Competency.

No statutory provisions. For eligibility of foreign corporate trustees see category 3 Business Regulation and Commerce, topic 3.01 Banks and Banking, subhead Foreign Banks or Trust Companies.

General Powers and Duties of Trustees.

Trustee conduct regulated by Uniform Prudent Investor Act. (RIGL 18-15-1). Trust instruments, whenever effective, wherein no provision is made to contrary, deemed to give trustee, in addition to other powers trustee may lawfully have, discretionary authorization to invest in real or personal property, foreign or domestic, including savings accounts and stock or other securities of corporations, building-loan associations, investment trusts and investment companies; to vary from time to time the investments; to sell, lease, partition and exchange; to sell at public or private sale for cash or credit together or in parcels; to give or receive moneys for equality of partition or exchange; to appoint proxies; to participate in, assent to or disapprove corporate reorganizations or adjustments; and upon termination of trust, to divide in kind, partition and sell. Superior Court may authorize trustee to exercise foregoing powers even if trust instrument is inconsistent with such exercise if court finds that authority to exercise any of such powers is desirable to enable trustee to perform duties and accomplish purposes of trust. (RIGL 18-4-2 and RIGL 18-4-4). Superior Court may authorize sale or lease of property, borrowing, platting of land, and dedication of streets. (RIGL 18-4-10). Superior Court may authorize compromise, arbitration or abandonment of debts or claims. (RIGL 18-4-8).

Consolidation or Division of Trusts.

Upon petition and for good cause court may order division or consolidation of trust or trusts upon certain terms and conditions enumerated. (RIGL 18-4-24).

Delegation of powers by fiduciary who is engaged in war service or is outside of United States and prevented by war or national emergency from returning is authorized. (RIGL 18-3-3 through 7).

Vesting of Title.

Where trustee or trustees are appointed, under any instrument creating trust, by order or decree of any court of competent jurisdiction, either within or without state, order or decree vests in trustee, either solely or jointly with then surviving or other trustee or trustees, title to all trust estate and property, as though they had been named as original trustee or trustees in instrument creating trust. (RIGL 18-2-4). Conveyance of real estate to named trust vests title in trustees of trusts, even if trustees are not so named. (RIGL 34-4-28).

Infant trustee of real or personal estate shall, when circumstances of trust require, or trust is to be terminated, by direction of Superior Court, convey and transfer said estate to such person and in such manner, either personally or by master, as court may direct. (RIGL 18-4-6).

Dealing with Trustee.

Trustee’s written receipt for any personal property payable, transferable or deliverable to said trustee, under any trust or power, expressly including purchase moneys and loans, is a sufficient discharge and effectually exonerates person paying, transferring or delivering property from answering for loss or misapplication. (RIGL 18-4-5).

Spendthrift Trusts.

Spendthrift trusts are valid. (RIGL 18-9.1-1). See also RIGL 27-4-12, permitting effective restraint against alienation of insurance or annuity contract.

Investments by Fiduciaries.

Investments by fiduciaries, except guardians (see category 14 Family, topic 14.07 Guardian and Ward), are not regulated by statute. See subhead General Powers and Duties of Trustees, supra.

Securities in Name of Nominee.

Any trust company or national banking association may cause securities to be held in name of nominee. (RIGL 18-10-1 through 5).

Bequests and Devises to Inter Vivos Trust.

See topic 13.16 Wills.

Accounting by Trustee.

Periodic accounts not required but may be presented to Superior Court for allowance. See RIGL 18-6-3 through 7.

Compensation.

Trustee entitled to expenses and to reasonable compensation; expenses and compensation may be equitably apportioned between principal and income in such manner as trustee shall determine. (RIGL 18-6-1).

Discharge.

Superior Court, upon petition, may allow accounts and authorize payment of funds due to one incapable of giving proper receipt or discharge therefor into registry of court, discharging trustee. (RIGL 18-6-2 through 6).

Uniform Common Trust Fund Act not adopted. Common trust funds are provided for. (RIGL 18-5-1 through -7).

Revised Uniform Principal and Income Act.

Few provisions adopted with slight variations. (See RIGL 18-4-28, 29.)

Gifts to Minors.

See category 14 Family, topic 14.10 Infants.

Animal Trusts.

Animal trusts allowed for animals surviving settlor. (RIGL 4-23-1).

Uniform Fiduciaries Act.

Uniform Fiduciaries Act adopted. (RIGL 18-4-15 through 21). Sections 3, 8 and 10-16 omitted.

Uniform Simplification of Fiduciary Security Transfers Act.

Uniform Simplification of Fiduciary Security Transfers Act adopted. (RIGL 18-11-1 through 11). In event of any conflict between this Act and Uniform Commercial Code (RIGL 6A-8-101 through 406), this Act controls (RIGL 6A-8-107).

Termination of Small Trusts.

Any corporate trustee may terminate trust in whole or in part, if current market value is less than $200,000. (RIGL 18-4-24).

Charitable Trusts.

Charitable trusts are subject to supervision by an administrator in the attorney general's department whose duty it is to see to the due application of funds given or appropriated for such purposes within state. (RIGL 18-9-1, 2, 6, 9). Attorney General must be notified of all judicial proceedings affecting or in any manner dealing with charitable trust or trustee who holds in trust within state property for such purposes and is interested party in all such judicial proceedings. (RIGL 18-9-5). Fiduciary holding property for charitable purposes must annually on or before July 1, unless otherwise directed by Attorney General, make to him or her written report for last preceding fiscal year of such trust, showing property held and administered, receipts and expenditures, names and addresses of beneficiaries and any other information he or she may require. Refusal for two years to file such report constitutes breach of trust and Attorney General is required to take action to compel compliance. (RIGL 18-9-13). No trustee under inter vivos charitable trust, regardless of any language therein, is exonerated from liability for failure to exercise reasonable care, diligence and prudence. (18 9-14). Trustees of private foundation, charitable trust or split interest trust are prohibited from self-dealing, retaining excess business holdings and certain other acts prohibited by Tax Reform Act of 1969. (RIGL 18-4-22). Superior Court, upon petition, may qualify trust as "charitable remainder trust" under proposed Treasury Regulations governing such trusts. (RIGL 18-4-23). Charitable trust with assets of less than $200,000 may be terminated with consent of Attorney General and beneficiaries by delivery of assets to beneficiaries, who shall apply trust estate for uses and purposes set forth in trust instrument. (RIGL 18-9-16).

Uniform Prudent Management of Institutional Funds Act.

Uniform Prudent Management of Institutional Funds Act adopted (RIGL 18-12.1-1 through 10) including presumption of imprudence in RIGL 18-12.1-4(d).

Uniform Custodial Trust Act.

Uniform Custodial Trust Act adopted. (RIGL 18-13-1 et seq.).

Accumulations.

No statutory provisions in effect. Common law rule presumably applies. (56 R. I. 283, 293, 185 Atl. 239, 244; 77 R. I. 296, 300, 75 A.2d 210, 212).

Perpetuities.

Rule against perpetuities abolished by statute. (RIGL 34-11-28).

Pour Over Trusts.

See topic 13.16 Wills, subhead Bequests and Devises to Inter Vivos Trusts.

Renunciation or Disclaimer.

(By beneficiary). Any beneficiary (or guardian, conservator or legal representative of estate of any beneficiary) may disclaim any interest in any trust by instrument complying with statutory requirements. (RIGL 34-5-1 through RIGL 34-5-11).

13.16 WILLS:

Who May Make Will.

Every person of sane mind and 18 years of age or upwards may by will dispose of all real and personal estate to which he was entitled at law or in equity at time of his death, not including estate tail. (RIGL 33-5-2, 3; RIGL 15-12-1; 112 R. I. 159, 308 A.2d 518). Married woman, otherwise qualified, may make will. (RIGL 15-4-7). No person sentenced to imprisonment in adult correctional institutions shall have power during imprisonment to make any will except by permission of Superior Court granted on petition therefor. (RIGL 13-6-3).

Testamentary Disposition.

There is no restriction as to amount that a testator may give to charity, subject to statutory life estate of spouse in all real estate owned by decedent in fee simple at death. (RIGL 33-25-2). Earlier common law rule that "illusory transfers" will not defeat spouse's statutory survival share and "illusory transfer test" (690 A.2d 345) is supplanted by statute (RIGL 33-25-2; 894 A.2d 891).

Testamentary Capacity.

Person making will need not have "full knowledge" of will's content. (880 A.2d 843).

Execution.

All wills and bequests of any lands, tenements, and hereditaments and of personal estate, within or without the state, must be in writing (which includes "printing," engraving, lithographing, and photo-lithographing, and all other representations of words in letters of usual form), and signed by the testator or by some person in his presence and by his express direction. Such signature must be made or acknowledged by the testator in the presence of two or more witnesses present at the same time who must attest and subscribe the will in the presence of the testator and of each other. Otherwise, the will is utterly void and of no effect. No other publication is necessary. No seal is necessary. (RIGL 33-5-5). While no form of attestation clause is necessary, following is commonly used:

Form

". . . . . declared this instrument to be . . . . will and signed it in our presence and we have at . . . . request signed our names as witnesses in . . . . presence and in the presence of each other."

Holographic and Nuncupative wills are not recognized, except that any soldier or airman in actual military service, or any mariner or seaman being at sea, may dispose of his personal estate as he might have done under common law rule. (RIGL 33-5-6).

Revocation.

Will may be revoked by another will or codicil properly executed, by writing declaring intention to revoke same executed with formalities of will, or by burning, tearing or otherwise destroying by testator or by some person in his presence and by his direction with intention of revoking same. (RIGL 33-5-10).

Marriage of person acts as revocation of will made by him or her previous to such marriage, unless it appears from will that it was made in contemplation of that particular marriage; but if will exercises a power of appointment and appointed property would not in default of appointment pass to persons who would have been entitled to it had it been property of testator making such appointment and had he died intestate, so much of will as makes such appointment is not revoked by such marriage. (RIGL 33-5-9; 108 R.I. 127, 273 A.2d 307).

Final judgment of divorce revokes provisions for benefit of former spouse in will made prior to divorce unless it appears from will that it was made in contemplation of such divorce. (RIGL 33-5-9.1).

No will shall be revoked by any presumption of intention on ground of alteration of circumstances. (RIGL 33-5-11).

Revival.

No statutory provision is made for revival of will which has been revoked, but court has held that failure of later will revived earlier will which had been properly executed. (28 R.I. 523, 68 Atl. 622).

Testamentary Gifts to Subscribing Witnesses.

Devise, legacy, estate, interest, gift or appointment made to attesting witness (excepting charges and directions for payment of debts) is void so far as concerns such attesting witness or any person claiming under him, but such person is not incompetent as witness. (RIGL 33-6-1 through 3). Executor of or trustee under will is not thereby rendered incompetent as witness to will. (RIGL 33-6-4).

Bequests and Devises to Inter Vivos Trusts.

Devise, bequest or appointment may be made to trust in writing, in existence when will executed and identified in will, including unfunded life insurance trust. Property added to trust is administered and disposed of according to terms of trust, including amendments, as it appears at testator’s death. (RIGL 33-6-33).

Testamentary Guardians.

See category 14 Family, topic 14.07 Guardian and Ward, subhead Selection of Guardian.

Probate.

Wills are probated before and admitted to record by the probate court of the town or city of the testator’s residence; in case of nonresident in any town or city where he left property. (RIGL 8-9-11). No form of proof is provided. If uncontested, one subscribing witness is sufficient to prove will. (RIGL 33-7-26[a]). Evidence of absent witness, if required, may be taken by deposition. (RIGL 33-7-10, 11; RIGL 33-7-24; RIGL 8-9-17).

In case subscribing witnesses are serving in or with U.S. Armed Forces or as merchant seamen or are incapable of testifying or otherwise unavailable in course of such service, will may be admitted to probate on proof that signature thereto is in handwriting of purported testator. (RIGL 33-7-10, 11).

Petition for probate of will, or first grant of original or ancillary administration, must set forth under oath: (a) Title of proceeding, name and address of petitioner; (b) decedent’s domicile and any other jurisdictional facts; (c) so far as known to petitioner (1) names and post-office addresses of the surviving spouse and heirs at law, provided, however, if no heirs at law are listed, petitioner must set forth what efforts petitioner has made to locate heirs at law (RIGL 33-22-2), (2) age and post-office address of any minor, and names and post-office addresses of his parents, or such of them as may be living, and of his guardian, if any, (3) name and post-office address of guardian of any person adjudged incompetent, and name and post-office address of person or institution having care or custody of such incompetent, and (4) if petition is for allowance of will, names and post office addresses of named beneficiaries entitled to take under will if different from heirs at law. (RIGL 33-22-2). Notice of petition for probate is to be sent by probate clerk to any executor who is not a party to petition. (RIGL 33-7-9). Notice of petition for probate must be published in newspaper by probate clerk. (RIGL 33-22-7, 11).

Notice of filing and nature of petition for probate and time and place set for hearing thereon (or, in lieu thereof, a copy of the newspaper notice published pursuant to RIGL 33-22-11, 13) must be sent by petitioner or by his attorney, postage prepaid, at least ten days before the date set for hearing, to each person whose name and address is required by RIGL 33-22-2 above, to be set forth in the petition. In case post-office address of a person entitled to notice is without continental limits of United States, three weeks notice must be given to him. Petitioner, or his attorney, must file affidavit at or prior to hearing that said notice was given. (RIGL 33-22-3). No notice need be sent to any interested sui juris person waiving notice and if all interested persons waive notice and assent to action by court at any time, court may proceed to hear cause without publication or further notice. (RIGL 33-22-5). Failure to comply with RIGL 33-22-3 does not defeat court's jurisdiction or affect adversely regularity of any proceeding, but upon discovery thereof court may make such further orders as circumstances may require. (RIGL 33-22-6).

Self-proved Wills.

If no interested person objects, court may grant probate of will or codicil without testimony if self-proved by affidavit of one or more subscribing witnesses executed before or after death of testator before officer authorized to administer oaths in or out of state. (RIGL 33-7-26[b]). Affidavit substantially in following form meets requirements of statute:

Form

"STATE OF . . . . . .

COUNTY OF . . . . . .

In . . . . . on this . . . . day of . . . . . ., 20. ., before me personally appeared the undersigned, who, being duly sworn, depose and say that: they witnessed the execution of the will (codicil) of . . . .; that the signature to the will (codicil) is in the handwriting of the testator or was made by some other person for the testator, in the testator's presence and by the testator's express direction; that said testator so subscribed said will (codicil) and declared the same to be his last will (a codicil to his last will) in their presence; that they thereafter subscribed the same as witnesses in the presence of said testator and in the presence of each other; that at the time of the execution of said will (codicil) the testator appeared to be of sound mind and 18 years of age or over; and that the signatures of the witnesses on said will are genuine.

. . . .

. . . .

Subscribed and sworn to before me on the day and date first above written,

. . . .

Notary Public"

Contest.

The validity of a will may be attacked in the probate court and an appeal from its allowance or disallowance may be taken to the Superior Court. See category 5 Civil Actions and Procedure, topic 5.03 Appeal and Error, subhead From Probate Courts.

Notice of, to Legatees and Devisees.

Whenever in any pending proceeding for probate of will, it appears that probate of will or appointment of executor or administrator with will annexed is to be contested in probate court,

court must forthwith order petitioner to file with clerk same information relative to legatees and devisees, if any, named in will, or their representatives, as is required relative to surviving spouse and heirs at law (see supra, subhead Probate, catchline Petition) and notice must be given by petitioner, or his attorney, to such legatees and devisees in same manner and under same conditions as is provided for notice to surviving spouse and heirs at law. (RIGL 33-22-4). See supra, subhead Probate, catchline Notice.

Legacies bear interest from and after one year from testator's death unless will provides otherwise. (RIGL 33-6-15). If legacy is not paid, legatee may recover legacy in civil action, provided executor has filed statement of legacies to be paid under RIGL 33-13-6 (requiring such filing for cause shown) or failed to comply with said statute. (RIGL 33-13-9).

Legacy to Minor or Incompetent.

If executor's or administrator's final account shows that estate of a minor or incompetent in his hands is not in excess of $5,000, the same may be applied or disposed of in such manner as the court shall deem for the advantage of such minor or incompetent. (RIGL 33-14-10).

Legacy to Alien.

See topic 13.09 Executors and Administrators, subhead Distribution if Abroad.

Disclaimer.

See topic 13.07 Descent and Distribution, subhead Disclaimer.

Part of Body.

Gift may be made by will. (RIGL 23-18.5-4[a]).

Pecuniary Bequest.

If satisfiable in kind, assets used must be valued at date of distribution. (RIGL 33-13-8.1).

Ademption.

Substantial change in nature or character of subject matter of specific bequest operates as ademption regardless of actual intention of testator. (413 A.2d 72).

Unclaimed Legacies.

See topics 13.07 Descent and Distribution, subhead Escheat; 13.09 Executors and Administrators, subhead Distribution if Abroad.

Lapse.

If legatee or devisee predeceases testator leaving issue who survive testator, such legacy or devise does not lapse but passes to such issue, unless contrary intention appears by will. (RIGL 33-6-19). Unless contrary intention appears by will, such real estate or interest therein as is comprised or intended to be comprised in any devise which fails by reason of death of devisee in lifetime of testator leaving no issue who survive testator, or by reason of such devise being contrary to law or otherwise incapable of taking effect, is included in residuary devise (RIGL 33-6-20); same rule also applies to personalty (34 R.I. 316, 83 Atl. 433); and if residuary devisee or legatee die before testator without leaving issue living at testator's death, other residuary devisees or legatees named in same clause, if any, whether class or not, take share of residuary devisee or legatee so dying in same proportion as their other shares (RIGL 33-6-20).

Children.

Children may be disinherited, but if testator omits to provide in will for child born after execution of will, either during lifetime or after death, or for any issue of deceased child of dying after execution of will or for any issue born after execution of will of deceased child of dying before such execution, such child or issue takes as in case of intestacy, unless it appears that omission was intentional. Where such omitted posthumous child, child or issue of deceased child takes portion of estate of testator, such portion is taken equally from all devisees and legatees in proportion to value of what they respectively receive under will, unless in consequence of specific devise or legacy or of some other provision of will, different apportionment is found necessary in order to give effect to testator’s intention regarding that part of estate which passes by will. In such cases, recipients are bound to contribute with devisees and legatees and entitled to claim contribution from them for payment of testator’s debts if such be necessary. (RIGL 33-6-23 through 27; 82 R.I. 27, 105 A.2d 667).

The statute does not cover case of pretermitted child living at time of execution of will or pretermitted issue then living of a child then deceased.

Construction and Effect.

Bequests and devises by will include contingent, executory and other future interests in real or personal estate, also rights of entry for conditions broken, and other rights of entry in any real and personal estate to which the testator may be entitled at time of his death, notwithstanding that he became entitled thereto subsequent to execution of will, but not estate tail. (RIGL 33-5-2). Every will must be construed, with reference to the real and personal estate comprised in it, to speak and take effect as if executed immediately before death unless contrary intention expressly appears by will. (RIGL 33-6-6). General devise or legacy of property, real or personal, described in general manner, is construed to include any real or personal estate to which such description might extend over which testator had general power of appointment, and operates as execution of such power, unless contrary intention appears. (RIGL 33-6-17; 98 R.I. 79, 200 A.2d 1). Devise without words of limitation passes fee simple or other whole estate or interest which testator had power to dispose of by will unless contrary intention appear. (RIGL 33-6-7).

Title to real or personal estate passes by will when will is finally proved, except that Rhode Island real estate situated in town or city other than that where will is proved does not pass until copy of will has been recorded in land records of such town or city. Upon such proving and recording title relates back to death of testator. (RIGL 33-6-31).

General power of appointment permits appointment to estate of donee unless contrary intent shown. (RIGL 34-22-11 through 14).

Title to motor vehicle passes to surviving spouse upon death of owner unless otherwise provided by will. (RIGL 31-3.1-37).

Bona fide purchaser for value of property from devisees or legatees. See topic 13.07 Descent and Distribution, subhead Bona Fide Purchasers for Value.

Election.

Where will fails to indicate intention that provision therein for surviving spouse is in lieu of statutory life estate in real estate, dower or curtesy, surviving spouse takes statutory life estate in all real estate owned by decedent in fee simple at death in addition to such provision. (RIGL 33-25-3).

In case of provision for surviving spouse in lieu of statutory life estate, dower or curtesy, such surviving spouse must signify nonacceptance of same in writing to probate court within six months from probate of will in order to be entitled to statutory life estate. (RIGL 33-25-4). Statute in effect prior to 1978 Act, but not specifically repealed, sets forth similar procedure with respect to widow's nonacceptance of will containing provision in lieu of dower. (RIGL 33-6-22). Statute in effect prior to 1978 Act, but not specifically repealed, states that if widow accepts provision in lieu of dower, and apportionment of decedent's debts among legatees is required, all other legacies abate proportionately prior to that of widow. (RIGL 33-6-25). Prior to 1978 Act, in case of provision for husband in lieu of curtesy, husband must have done some affirmative act to stop him from claiming his curtesy. (63 R.I. 164, 7 A.2d 678). 1978 Act states that it applies retroactively to dower and curtesy rights existing prior to effective date of Act (RIGL 33-25-6), but validity of this provision has not been adjudicated.

A surviving spouse has no right of election with respect to personal property.

Foreign Executed Wills.

Any last will executed without this state in mode prescribed by law, either of place where executed, or of testator's domicile, shall be deemed legally executed in mode prescribed by laws of this state, if in writing and subscribed by testator. (RIGL 33-5-7).

Foreign Probated Wills.

Executor or any other person interested in will which has been finally proved and allowed in probate court outside of Rhode Island may produce copy of such will and of probate thereof duly authenticated according to act of Congress, to probate court in any town or city in Rhode Island where testator had estate, real or personal, on which will may operate, with request that will be filed and recorded. Notice is then given of date for hearing, at which, if no sufficient cause is shown to contrary, court orders said copy to be placed on file and recorded. Probate court may also issue letters testamentary or of administration with will annexed if so desired. (RIGL 33-7-18 through 22). If this is not done, possible liability left outstanding for debts of testator. Will of non-domiciliary which is executed in same manner as is prescribed for Rhode Island residents may be admitted to original probate. Will previously admitted to probate in testator's domicile will not be admitted to original probate in Rhode Island unless: (a) Showing is made that ancillary probate would be unduly expensive, inconvenient or impossible; (b) that testator has directed in his will that original probate be had in Rhode Island; or (c) that law of testator's domicile discriminates against domiciliaries of this state either as beneficiaries or as fiduciaries. Will denied probate in testator's domicile shall not be allowed original probate in Rhode Island unless denial of probate in domicile was for reason which would not be ground for rejection of will if testator had been domiciled in this state. (RIGL 33-7-25).

Delivery of Assets to Foreign Representative.

Any person or corporation before having actual notice of the pendency of application for letters testamentary, of administration or guardianship in Rhode Island, may permit such representative or guardian of the estate of a nonresident duly appointed and authorized by any state, territory or district in the United States to transfer stocks and bonds or receive dividends and interest, or may pay money over or deliver personal property to such representative or guardian. If permission is refused by corporation, probate court may authorize upon compliance with certain statutory formalities. (RIGL 33-18-24 through 26). See topic 13.09 Executors and Administrators, subhead Foreign Executor or Administrator.

Simultaneous Death.

See topic 13.05 Death, subhead Survivorship.

Testamentary Trusts.

See topic 13.15 Trusts.

Living Wills.

No specific legislation. Durable power of attorney for health care. (RIGL 23-4.9-1 and 2). Mandatory form provided in statute. Statute permits designation of person as agent to make health care decisions. Form includes statement of desires concerning life prolonging care, treatment, services and procedures.

14 FAMILY

14.01 ADOPTION:

Any person residing in state may petition to adopt any person younger than himself. Spouse of petitioner, if any, must join petition; provided, however, that upon good cause shown and showing that granting of petition for adoption would be in best interests of minor child, prayer of such petition may be granted although spouse of petitioner is not party to petition. (RIGL 15-7-4[a]). If adoptee is under 18, petition is to Family Court (RIGL 15-7-4[a]); if over 18, petition is to Probate Court of city or town where petitioners live (RIGL 15-7-4[d]), Family Court retains jurisdiction if petitioners become nonresidents during pendency of action (RIGL 15-7-4[b]). Nonresident may so petition, if child at time of filing of petition is in care of governmental or state licensed child-placing agency. (RIGL 15-7-4[c]).

Other than parent, no person, firm, corporation, association or agency can offer to place or assist in placing child for adoption unless licensed by Department for Children and their Families or governmental child-placing agency. Foregoing inapplicable where offer of assistance is through Department for Children and their Families, licensed child-placement agency, or where child is placed with enumerated relatives. (RIGL 15-7-1). Agency shall provide written pre-adoption report to prospective parents. (RIGL 15-7-2.1).

Whenever parent(s) shall place child with person(s) other than enumerated relatives for adoption, person(s) with whom child has been placed for adoption shall notify Department for Children and their Families within 15 days. Department shall then conduct investigation and report to Family Court for hearing within 60 days. At hearing, Court will determine whether placement is in child's best interest and if it finds that placement is not for best interest of child it shall order child returned to parents, placed with department or licensed agency or placed with whomever Court deems in child's best interest. (RIGL 15-7-2).

Consent Required.

Where adoptee is a minor, natural parents if living, otherwise guardian, next of kin or court-appointed next friend must consent. Child 14 years or over must also consent to own adoption. (RIGL 15-7-5). Where adoptee is 18 years or older, no notice to or consent of parents is necessary. (RIGL 15-7-5, RIGL 15-12-1). Where petitioners are one of natural parents of child under 18 years and his or her spouse or one of child's grandparents and child is residing with petitioners, and if noncustodial parent refuses to consent to adoption, then Court shall determine whether noncustodial parent's rights shall be terminated involuntarily. (RIGL 15-7-5). Natural parents of child under 18 years may, under certain conditions, authorize duly licensed child-placement agency in Rhode Island, or governmental child-placement agency, to petition Family Court for termination of their rights to consent. Granting of petition makes agency guardian for all purposes. (RIGL 15-7-6).

If natural father has not consented to petition for termination of rights or adoption, court inquires of natural mother and if she identifies natural father he is given notice of hearing in such manner as Court directs. Proof of notice must be filed before either petition may be granted. If, after notice, natural father fails to appear or claim rights to child, court terminates his rights with reference to child; if he claims rights, court determines them. If natural father identifiable but whereabouts unknown, or if natural father unidentifiable, Court may decide whether or not notice by publication would lead to his identity and if so, order publication. (RIGL 15-7-26).

Any child committed to Department for Children and their Families by Family Court and placed in foster care per 40-12 who remains in such care for two years and whose natural parents have not exercised reasonable visitation rights within that time may, in Court's discretion, be adopted by foster parents with or without consent of natural parents, provided Department made efforts to involve parents in planning and determines adoption in child's best interest (RIGL 40-12-15).

Termination of Parental Rights.

Where petition filed, notice given to parent of child and hearing held. (RIGL 15-7-7[a]). Family Court terminates all legal rights of parent including right to notice of subsequent adoption proceedings if court, by clear and convincing evidence, finds as fact that, notwithstanding reasonable efforts by agency to encourage and strengthen parental relationship (In re Alvia, 909 A.2d 498): (1) Parent willfully neglected to provide proper care and maintenance for at least one year, where financially able to do so, disregarding infrequent and insubstantial contribution; or (2) parent unfit by reason of conduct or conditions seriously detrimental to child, including but not limited to: (i) Institutionalization or imprisonment of parent such that improbable for parent to care for child for extended period of time (In re Alvia, 909 A.2d 498), (ii) cruel or abusive conduct toward child, (iii) child has been in legal custody or care of Department for Children, Youth and Families ("DCYF"), parent has chronic substance abuse problem (parent's inability to care for child for 12 months due to substance abuse is prima facie evidence), and parent's prognosis indicates that child will not be able to return to custody of parent within reasonable period of time (considering child's age and need for permanent home), (iv) child has been placed with DCYF, court has previously involuntarily terminated parental rights to another child of parent and parent continues to lack ability or willingness to respond to rehabilitative services, and court finds it improbable that additional period of services would result in reunification within reasonable period of time (considering child's age and need for permanent home), (v) parent has subjected child to abandonment, torture, chronic abuse or sexual abuse and (vi) parent has committed murder or voluntary manslaughter or has committed on another of his or her children felony assault resulting in serious bodily injury on another of his or her children or conspired to murder same; or child has been in legal custody or care of DCYF for 12 months, parent was offered or received services to correct situation, and no substantial probability exists that child will be able to return to parent's care within reasonable period of time (considering child's age and need for permanent home); or (vii) parent exhibited behavior or conduct seriously detrimental to child for extended period, parent has abandoned or deserted child (lack of communication or contact with child prima facie evidence of desertion DCYF must file petition and family court must expedite hearings). (RIGL 15-7-7[a]). Parent's past violent conduct, unwillingness or inability to acknowledge responsibility, and failure to address issues of anger in any meaningful way sufficient to warrant termination of parental rights regarding later-born child. (914 A.2d 978). At time adoption decree is entered, Court entering decree may grant natural parent post-adoptive visitation and privileges if parental rights were involuntarily terminated, appeal is pending, and child was not in pre-adoptive home prior to termination of parental rights. (RIGL 15-7-14.1). Where petition is filed pursuant to § 15-7-7(a), (b)(1) or (b)(3), Court must find that parental conduct occurred notwithstanding efforts by agency prior to filing of petition to encourage and strengthen parental relationship. Where petition is filed pursuant to § 15-7-7(c), Court must review original conduct or condition leading to child's placement in care and determine if parent's circumstances have changed. In making such determination, Court must consider lack of good faith effort of parent for six continuous months after placement to adjust his circumstances, conduct or conditions to make return of child possible, or failure of parent to effect lasting adjustment after reasonable efforts by available social agencies for such extended period of time that it appears reasonable no lasting adjustment can be effected. Where petition is filed pursuant to RIGL 15-7-7(c), Court does not need to find that case planning has gone on for 12 month period with one or both parents before terminating parental rights, particularly where parent is responsible for some of delay. (798 A.2d 892). Where petition is filed pursuant to § 15-7-7(d), lack of communication or contact with child for at least six months is prima facie abandonment or desertion. Under c. 15-7, Court must give primary consideration to physical, psychological, mental and intellectual needs of child insofar as such consideration not inconsistent with other provisions of chapter. If child has been placed in foster family care, then such consideration shall include extent of child's integration with foster family and foster family's ability and willingness to permanently integrate child into foster family. (RIGL 15-7-7).

Where petitioners are one of natural parents of child under 18 years and his or her spouse or one of child's grandparents and child is residing with petitioners, and if noncustodial parent refuses to consent to adoption, then Court may terminate involuntarily noncustodial parent's rights and grant petition without noncustodial parent's consent if petitioners prove by clear and convincing evidence any of grounds set forth in § 15-7-7(a), (b), or (d). Petitioners need not demonstrate efforts to encourage and strengthen child's relationship with noncustodial parent prior to terminating his or her parental rights. Individual who is not licensed or governmental child placement agency may not bring petition to terminate parental rights without pending adoption petition. (605 A.2d 486).

If Court finds rights should be terminated it must enter decree appointing some suitable person to give or withhold consent in any subsequent adoption proceeding. When petition was filed by licensed or governmental placing agency, Court must appoint agency sole party to give or withhold consent to adoption and make agency guardian of child for all purposes. Notwithstanding provisions of "Confidentiality of Health Care Information Act", RIGL 5-37.3-1 through 10, no privilege of confidentiality may be involved with respect to any illness, trauma, incompetency, addiction to drugs or alcoholism of any parent. Record of testimony of parties adduced in termination of parental rights proceedings has same rights of confidentiality accorded record in adoption proceedings (see RIGL 14-1-5; RIGL 8-10-21) and is inadmissible in any civil, criminal or other proceeding in any court against person named defendant or respondent for any purpose whatsoever, except in subsequent proceedings involving same child or same respondent under c. 15. Statutory exception to hearsay rule applies at custody and/or termination of parental rights proceedings for certain statements of child under age of 13. (RIGL 14-1-69). If any child, parental rights to whom have been finally terminated, has not been placed by agency in adoptive home within 30 days from date of final termination decree, Family Court must review status of child and agency must file report explaining plan to permanently place child. (RIGL 15-7-7). Court must make findings of fact and conclude all hearings on termination petitions within 180 days after notice to natural parents effectuated; if unable to conclude hearing within such time, court must enter order setting forth facts necessitating extension of time period. (RIGL 15-7-7.1).

Minor Parents.

For purpose of this statute (15-7), "minor" means under 18. (RIGL 15-7-10[a]). No minor parent may give a binding consent to any termination of rights or to any adoption petition except with consent of one of parents, guardian or guardian ad litem of such minor parent, provided, however, if whereabouts of both of parents of such minor parent are unknown, as shown on sworn petition, after due notice and proper finding court may grant petition. (RIGL 15-7-10[b]).

Out-of-State Child.

Anyone bringing or causing to be brought a child, not related to him, into Rhode Island for purpose of adoption, must within 15 days of entry of child into state report to Department for Children and their Families Said Department will thereupon investigate and report to Family Court, which, after due notice and hearing will determine merits of proposed placement. (RIGL 15-7-3).

Condition Precedent.

No petition may be granted until child shall have lived for six months in proposed home, provided, that this period of residence may be waived upon showing of good cause. (RIGL 15-7-12).

Jurisdiction.

If adoptee be under 18, petition is to Family Court (RIGL 15-7-4[a]; RIGL 8-10-3); if he be over 18, petition is to Probate Court (RIGL 15-7-4[d]).

Proceedings.

After petition for adoption filed, court notifies Department for Children and their Families which investigates and submits written report and recommendation to court. However, if petition concerns child who has been placed for adoption by duly licensed child-placement agency, court may accept case summary of such agency in lieu of investigation and recommendation. Prospective adoptive parent must also apply to local or state police for nationwide criminal records check. These provisions may be waived where child is natural child of and resides with petitioner. (RIGL 15-7-11).

Parents' Whereabouts Unknown.

When petition for adoption or termination of parental rights states whereabouts of parent or parents of child are unknown, said fact must be sworn to by petitioners by affidavit setting forth last contacts with absent parent and any other pertinent information on whereabouts. If, after review of affidavit by Court, it is determined that personal service cannot be effectuated, Court must enter order directing notice to be given by publication, which notice must be published once in such newspaper as Court directs. (RIGL 15-7-8). Parent who has not had notice of hearing may at any time within one year after last publication of notice apply to Family Court to reverse decree. (RIGL 15-7-21).

Change of Name.

Adopted child's name may be changed, where such change requested in petition. (RIGL 15-7-15).

Religious Faith.

For purposes of placement of children in adoptive homes, child shall be placed in home of such religious faith or persuasion as may be designated by natural parent(s) so far as practicable. If natural parent(s) waive right to designate religion of his child, such right becomes vested in governmental or duly licensed child-placing agency, to be exercised in best interests of child. (RIGL 15-7-13).

Effect of Adoption.

Adopted children inherit from parents by adoption and from lineal and collateral kindred of such parents; parents by adoption and such kindred of such parents inherit from adopted child and his descendants. Adopted child and his descendants included within limitation to "lawful heirs, issue, children, descendants" of parents by adoption unless contrary intention appears in instrument or unless particular estate so limited shall have vested in persons entitled thereto by Apr. 20, 1962, except as to child over 18 at time of adoption and adopted after death of maker of instrument. When adopted child is related by blood to parent or parents by adoption, he and his descendants inherit from and through such parent or parents only as adopted child or descendants of adopted child and not by virtue of such blood relationship. (RIGL 15-7-16). Person adopted as adult has same rights to inherit from parents by adoption as minor. (799 A.2d 235). Similar section held merely rule of construction concerned with burden of proof rather than substantive law. (93 R.I. 149, 172 A.2d 743). When construing writing, "lawful heirs, issue, children, [or] descendants" does not include those persons who were over age of 18 at time of adoption. (RIGL 15-7-16[a]. 944 A.2d 846). Pursuant to RI intestacy law, however, adopted adult qualifies as "heir, issue, child, or descendant" of his or her adoptive parent. (944 A.2d 846).

Adopted children, under certain conditions, inherit from natural parents. (RIGL 15-7-17).

Challenging Adoption Decree.

Challenge of decree of adoption or termination of parent's right to give or withhold consent for adoption must be made within 180 days after decree entered. Decree overturned only upon clear and convincing evidence that decree not in best interest of adoptee. (RIGL 15-7-21.1). Any child made subject of such petition may, by next friend, appeal in like manner, but no bond may be required of, or court costs awarded against such child or next friend. (RIGL 15-7-19). During pendence of appeal, and until final determination of appeal, family court retains jurisdiction over custody of child. (RIGL 15-7-20).

Where Adoption Denied.

When family court denies adoption petition, it may order return of child to persons or licensed agency legally entitled to his custody, and failure of persons having physical control of child to return him constitutes contempt punishable by imprisonment. (RIGL 15-7-18).

14.02 ALIMONY:

See topic 14.06 Divorce.

14.03 COMMUNITY PROPERTY:

System does not obtain in Rhode Island.

14.03A DEPENDENT AND NEGLECTED CHILDREN/FOSTER CARE:

No license issued by Department of Children, Youth and Families to individual seeking license as foster parent without national and statewide criminal background check. (RIGL 14-1-34).

14.04 DESERTION:

See topics 14.06 Divorce, 14.09 Husband and Wife.

14.05 DISSOLUTION OF MARRIAGE:

See topic 14.06 Divorce.

14.06 DIVORCE:

This subject is governed by RIGL 15-5-1 through 28.

Grounds for Divorce.

Absolute divorce from bond of marriage may be granted when marriage was originally void or voidable by law; or in case either party is for crime deemed to be or treated as if civilly dead; also for impotency, adultery, extreme cruelty, willful desertion for five years of either of parties, or for such desertion for shorter period of time in discretion of court, for continued drunkenness, for habitual, excessive, and intemperate use of opium, morphine, or chloral, and for neglect and refusal, for period of at least one year before filing of petition, on part of husband to provide necessaries for subsistence of his wife, husband being of sufficient ability; for any other gross misbehavior and wickedness, in either of parties, repugnant to and in violation of marriage covenant; when parties have lived separate and apart for space of at least three years, whether voluntary or involuntary; or if parties have irreconcilable differences which have caused irremediable breakdown of marriage. (RIGL 15-5-3.1).

Divorce from bed, board, and future cohabitation until parties be reconciled, may be granted for any of causes for which by law divorce from bond of marriage may be decreed, and for such other causes as may seem to require same. (RIGL 15-5-9). See subhead Alimony, catchline Support Without Divorce, infra.

Residence.

No complaint for divorce from bond of marriage may be granted unless: (1) Petitioner has been domiciled inhabitant of this state, and has resided therein for period of one year immediately preceding petition; or defendant has been domiciled inhabitant of this state and has resided therein for one year immediately preceding complaint and is served with process. (RIGL 15-5-12).

Residence and domicile of person, immediately prior to entering active service in U.S. Armed Forces or merchant marine, or to leaving state to engage in services in connection with military operations, continues during time of such service and 30 days thereafter for purpose of bringing divorce action. (RIGL 15-5-12).

In case of divorce from bed, board and future cohabitation, plaintiff must be domiciled inhabitant in this state and must have resided in this state for such length of time as court deems sufficient to warrant granting of such divorce. (RIGL 15-5-9).

Jurisdiction over divorce actions is in Family Court (RIGL 8-10-3) but Family Court without jurisdiction to entertain divorce petition involving same sex couple married in another state. (935 A.2d 956).

Venue.

All petitions for divorce must be filed, heard and tried in county in which plaintiff resides unless complaint is based upon respondent's residence, in which case such complaint must be filed, heard and tried in Providence County or in county in which defendant resides, provided that for convenience court may, with consent of chief judge or any associate justice designated by him or her and parties, order action transferred to another county. (RIGL 15-5-13).

Process.

Rules of Procedure have been modified to comply, in part, with Rule 4, Superior Court Rules of Procedure.

Pleading.

Defendant may file counterclaim for divorce.

Practice.

All suits for divorce are commenced by complaint signed and sworn to by plaintiff, if of sound mind and of legal age to consent to marriage; otherwise, upon application to court and after notice to party in whose name complaint shall be filed, court may allow such complaint to be signed and sworn to by resident guardian or next friend. (RIGL 15-5-11).

No divorce from bond of marriage may be granted solely upon default, nor solely upon admission by pleadings, nor where court is satisfied that there has been any collusion or corrupt conduct by either party, nor where acts constituting grounds were done or contrived with intent to procure divorce. Must have trial before court in open session. (RIGL 15-5-4; RIGL 15-5-22).

Testimony in all cases of divorce, separation and annulment must be given viva-voce in open court except that court may permit taking of depositions where witnesses are aged, infirm or too ill to appear or for any other special cause. (RIGL 9-19-26). Whenever acts giving rise to divorce are such that in nature of things plaintiff could not ordinarily produce corroborating testimony, court may grant divorce on plaintiff's testimony. (RIGL 15-5-5).

Final decree may be entered ex parte in chambers on suggestion of prevailing party at any time within 30 days after expiration of three months from date of decision. Thereafter, final decree may be entered only in open court and on motion, notice of which must be duly given, except where original complaint was not answered. Decree shall be final without waiting period 20 days after entry of decree finding that parties have lived separate and apart for three years. (RIGL 15-5-23). Court order required to dismiss divorce action when commissioner has been appointed by Court. (586 A.2d 1092).

Allowance for Prosecution of Suit.

In granting any complaint for divorce, divorce from bed and board, or relief without commencement of divorce proceedings, Family Court may order either party to pay counsel fees to other. (RIGL 15-5-16; 491 A.2d 990; 494 A.2d 80; 503 A.2d 125).

Alimony.

Court may order either party to pay alimony to other in granting complaint for divorce. Decrees of alimony may be altered, amended or annulled for cause after notice. Court lacks authority to modify alimony obligations contained in separation agreement not merged into final divorce judgment. (585 A.2d 627). Decree of alimony entered after Sept. 1, 1958, is automatically terminated by remarriage unless decree provides otherwise. (RIGL 15-5-16).

In case of divorce from bed, board and future cohabitation, court may assign to plaintiff separate maintenance out of estate or property of husband or wife, as case may be. (RIGL 15-5-9).

Support without divorce may be had when either party is insane, or whenever cause is in existence which is, or if continued will be, cause for divorce, by either party petitioning Family Court. Court may restrain either party from interfering with personal liberty of other, and may restrain either party from maliciously causing or attempting to cause bodily harm to other, with or without dangerous weapon, and may restrain either party from placing, by physical menace or threat of physical menace, other in fear of imminent bodily injury. Upon finding by court that any party has been so harmed, menaced or threatened, court may prescribe treatment including but not limited to outpatient counseling, may regulate custody of children, provide for their education and support, and order one of parties to pay alimony and/or counsel fees to other which allowance is judgment for debt upon which suit may be brought or execution may issue to run against goods and chattels of husband or wife and for want thereof against body. (RIGL 15-5-19). Restraining orders may be obtained also upon filing of complaint for divorce and are enforceable by civil and criminal contempt proceedings. (RIGL 15-5-19).

On each judgment containing support provisions, court may order husband or wife to assign such salary currently due or to be due from husband or wife’s employer in such amount as will meet support payments imposed by court. (RIGL 15-5-24). All alimony and support obligations in arrears may be subject to imposition of interest at 12% per annum unless responsible party shall, for good cause shown, be relieved of interest. (RIGL 15-5-16.5). Administrative process exists to withhold current and delinquent child or spousal support obligations from wages or other income of delinquent payor, whether support orders are issued in this state or another jurisdiction. (RIGL 15-16-1). Effective Jan. 1, 1994, immediate income withholding permitted for certain child and spousal support issued or modified on or after that date. (RIGL 15-16-5.1).

Division of Property of Spouses.

In addition to or in lieu of alimony, court may assign to husband or wife portion of estate of other. Property not assignable if held by party prior to marriage, but income derived therefrom may be assigned. Property which has been transferred to one of parties by gift from third party before, during, or after term of marriage may not be assigned. (RIGL 15-5-16.1; 577 A.2d 976). Division of property does not need to be equal to be equitable. (567 A.2d 1131).

After filing of complaint for divorce from bed, board and future cohabitation and until a decree of reconciliation, court may permit either party seized in own right of real estate to sell, mortgage or otherwise dispose of same free of dower or curtesy. (RIGL 15-5-10). Trial judge may allow delay in sale of marital residence and grant temporary exclusive use of home to custodial parent to minimize adverse effect of divorce on children. (973 A.2d 499).

Change of Wife's Name.

Decree of divorce may authorize wife to change her name. (RIGL 15-5-17).

Children.

Court may regulate custody and provide for education, maintenance and support of children (RIGL 15-5-16 and 16.2), and may require security, bond or guarantee to secure payment of overdue support (RIGL 15-5-16.6). Court may modify child support order retroactively only to date that notice of petition to modify was given to adverse party if circumstances have changed. (RIGL 15-5-16.2). Child support order continues in full force and effect, by wage withholding, after youngest child emancipated and will be applied to arrearage due and owing as indicated in child support computer system. (RIGL 15-5-16.2).Termination of parental rights does not ipso facto extinguish child support obligations. (801 A.2d 679). Medical support of children governed by RIGL 15-29-1 through 10. Court must consider evidence of past or present domestic violence or sexual abuse when making child custody and visitation decisions. (RIGL 15-5-16). Court must consider perpetrator's history of causing physical harm, bodily injury or assault to another person. (RIGL 15-5-16). Judicial determination that child has been physically or sexually abused by parent sufficient to deny visitation provided case is annually reviewed to determine parent's possible rehabilitation. (RIGL 15-5-16). Refusal of parent to engage in counseling following such denial is sufficient to continue to deny visitation. (RIGL 15-5-16). In petition to modify order for custody or visitation, finding that domestic or family violence has occurred since last custody determination constitutes prima facie finding of change of circumstances. (RIGL 15-5-16). Fact that parent is absent or relocates because of act of domestic or family violence shall not weigh against that parent in determining custody and visitation. (RIGL 15-5-16). Parent's incarceration insufficient basis for denial of visitation rights. (603 A.2d 337). Court may direct parties to participate in mediation to resolve their differences in respect to issues of custody and visitation. (RIGL 15-5-29). Sibling and grandparents visitation rights recognized. (RIGL 15-5-24.2; RIGL 15-5-24.3). See subhead Alimony, supra for administrative wage withholding process for delinquent child or spousal support obligations. Uniform Child Custody Jurisdiction Act in effect. (RIGL 15-14-1 through 26).

Remarriage.

After entry of final decree, there is no restriction on remarriage of either party. (RIGL 15-5-23).

Foreign Divorces.

Uniform Divorce Recognition Act in effect. (RIGL 15-6-1 through 4).

Separation Agreements.

Agreements in settlement of property rights and alimony are not in their nature void as being contrary to public policy if they are fair and not designed to influence improperly conduct of parties in divorce proceedings or to mislead court. (88 R. I. 426, 149 A.2d 722).

Uniform Interstate Family Support Act in effect. (RIGL 15-23-1 through 53).

14.07 [RESERVED]

14.08 GUARDIAN AND WARD:

Jurisdiction in guardianship matters is in probate court of city or town where ward resides or if ward resides without state where ward has property (RIGL 33-15-3) with appeal to Superior (RIGL 33-23-1) and Supreme Courts (RIGL 9-24-1; 583 A.2d 877).

Limited guardianship and guardianship of adults regulated by RIGL 33-15-1 et seq. including all forms which must be used for purposes of this chapter.

Guardianship of minors regulated by RIGL 33-15.1-1 et seq.

Guardian ad litem regulated by RIGL 33-15-7.

Person of full age who is unable to manage his or her estate and is unable to provide for his or her personal health and safety as result of mental and/or physical disability may have guardian appointed of his or her person and/or estate upon petition of relative or friend or director of public welfare and after notice and hearing; oral or written evidence under oath from qualified physician required. Court may create limited guardianship when ward requires assistance in some but not all matters. (RIGL 33-15-8). Court may appoint temporary guardian for purpose of authorizing, directing or ratifying any transaction necessary for admission to nursing home or enrollment in government benefits program. (RIGL 33-15-8.1).

Conservator of property of person unable to care for his or her property because of disability, or upon his or her own election after notice to such person and hearing, may be appointed by probate court. Such conservator has same powers and duties as guardian of estate only. No person convicted of certain felonies or any offense involving fraud or theft shall be qualified for appointment as conservator. (RIGL 33-15-44, 45).

Notice of application and hearing must be given by regular mail, postage prepaid, to spouse and children or heirs at law of prospective ward. Petitioner or attorney must file affidavit of notice prior to hearing. (RIGL 33-15-17.1). Special provisions for notice to person confined in medical facility. (RIGL 33-15-9).

Natural guardians of minor children are their parents, jointly, who are equally charged with their care, nurture, welfare and education and may be sued, either jointly or separately, for their support. (RIGL 33-15-1).

Nonresident having property in this state, who, if resident, would be liable to be put under guardianship, may have guardian appointed of his or her property located in this state. (RIGL 33-15.1-8).

Selection of guardian of minor under 14 is made by probate court but minor over 14 may nominate his or her guardian, subject to probate court's approval, which, in case of nonapproval, appoints as in other cases. (RIGL 33-15.1-5, 6).

Nonresident cannot be appointed guardian (except testamentary) of resident minor. (RIGL 33-15-7).

Testamentary guardian of minor may be appointed by parent, subject to approval of court and to rights of surviving parent. (RIGL 33-15.1-7). Guardian of retarded person may nominate successor by will. (RIGL 33-5-4).

Temporary guardian, pending determination of application for appointment or appeal, may be appointed by probate court to have custody of the person and/or estate of the ward, from which appointment there is no appeal. (RIGL 33-15-10, 11).

Family court has power to appoint guardian for child who has been placed in care, custody and control of Department of Children, Youth and Families. (RIGL 40-11-12).

Bond.

Guardian or conservator, before entering upon execution of his or her trust, must give bond to probate court in such sum and with such surety or sureties as it shall require, conditioned upon faithful performance of his or her trust according to law. (RIGL 33-17-1; RIGL 33-15-45). Probate Court has discretion to dispense with surety requirement if guardian is spouse, parent, child or brother or sister of ward. (RIGL 33-17-1.3).

Inventory of ward's property must be filed within 30 days after appointment or such longer time as may be allowed by court. (RIGL 33-15-19; RIGL 33-15.1-17).

Powers and Duties.

General guardian has custody of person and estate of his or her ward and must provide support and maintenance of such ward and of his or her household or family; and guardians of minors shall take special charge of their educations. Guardians of persons who are of full age shall take charge of education of children of their wards unless guardians shall be appointed for such children. (RIGL 33-15-28, 29; RIGL 33-15.1-28 through 30).

Guardianship for Education.

See topic 14.10 Infants. Educational advocates for handicapped children under care and custody of state. (RIGL 33-15.1-2).

Estate Planning.

Superior Court may, upon notice, authorize guardian or conservator (other than minor) to take action or apply funds, in keeping with ward's wishes as far as possible, to minimize taxes and to provide for gifts to charities, relatives and friends. Gifts may be made to prospective legatees, devisees or heirs or to individuals or charities in which ward is believed to have interest or if ward's intentions cannot be ascertained, he or she will be presumed to favor reduction in taxes and partial distribution of his or her estate. (RIGL 33-15-37.1).

Investments.

Guardian must obtain permission of court to sell ward's personal property and should obtain court's permission to make or change investments, which permission may be granted without notice. (RIGL 33-15-33, 35; RIGL 33-15.1-24, 27).

Statements of Claims Against Estate.

Creditors of ward shall file statements of their claims in office of probate clerk. Such claims filed within six months shall be preferred in payment over all claims subsequently filed. (RIGL 33-15.1-18 through 22).

Securities in Name of Nominee.

See category 13 Estates and Trusts, topic 13.15 Trusts, subhead Securities in Name of Nominee.

Real Estate.

Sale or mortgage of ward's real estate to pay ward's debts, expenses of supporting ward's family and sale for better investment or for any proper purpose may be authorized by probate court (RIGL 33-15-32), after notice to spouse and next of kin (RIGL 33-22-8). Sale may be by private contract and guardian may be purchaser if court approves price. (RIGL 33-19-9).

Bond with satisfactory sureties must be given before sale (RIGL 33-19-8) and, if at public auction, notice of time, place and conditions of sale must be published for four weeks in some public newspaper designated by the court (RIGL 33-19-10). Within ten days after sale at public auction, affidavit must be filed with probate clerk stating times and places of giving notice (RIGL 33-19-12). Conveyance by guardian makes as good title to purchaser as ward, if competent, could have made. (RIGL 33-19-15; RIGL 33-15.1-23).

Release of Parents.

See topic 14.10 Infants.

Parents as Joint Natural Guardians.

Releases. (RIGL 33-15.1-1).

Accounts are required every year but may be excused in any year upon application. (RIGL 33-15-26).

Compensation.

Guardian may be allowed in his or her account reasonable compensation for his or her services. (RIGL 33-15-27).

Termination.

Distribution to persons entitled and final account under oath supported by vouchers and allowed by court is final discharge and forever exonerates guardian and his or her sureties from all liability under such decree unless his or her account is impeached for fraud or manifest errors. (RIGL 33-18-27, 28; RIGL 33-15.1-37).

Removal of Guardian—Resignation.

Court may remove any guardian or guardian may resign upon final account with court. (RIGL 33-15.1-37).

Uniform Veterans' Guardianship Act adopted. (RIGL 33-16-1 through 35).

Foreign Guardians.

Where both ward and guardian are nonresident, latter may demand, sue for, recover and remove property of ward in this state upon production of authenticated certificate satisfactory to the probate court that he or she has given bond and security in state of residence in double value of ward's property, and finding that removal will not prejudice interest of any other person in said property. (RIGL 33-15-42). When nonresident guardian produces exemplified copy of court record relative to appointment and giving bond, probate court may discharge resident guardian and authorize delivery of property but 30 days notice must be given to resident guardian of intended application for order of removal, and court may refuse such order if refusal is for best interest of ward or any other person having interest in said property. (RIGL 33-15-43).

Foreign guardian of nonresident ward has same powers as foreign executor or administrator as to assigning and transferring mortgage debt and mortgage securing same belonging to his ward. (RIGL 33-18-24). See category 13 Estates and Trusts, topic 13.09 Executors and Administrators.

Gifts to Minors.

See topic 14.10 Infants.

Uniform Fiduciaries Act adopted, with modifications. (RIGL 18-4-15 through 21). See category 13 Estates and Trusts, topic 13.15 Trusts.

Uniform Simplification of Fiduciary Security Transfers Act adopted. (RIGL 18-11-1 through 11). In event of any conflict between this Act and Uniform Commercial Code (RIGL 6A-8-101 through 406), this Act controls (RIGL 6A-8-107).

14.09 HUSBAND AND WIFE:

Disabilities of Married Women.

Married woman has same rights, powers and remedies and is subject to same liabilities as to her property, contracts and torts as if she were unmarried. (RIGL 15-4-1 through 16). If married woman chooses to have abortion, husband must be notified and his written consent must be obtained in advance. (RIGL 23-4.8-1 through 5).

Separate property acquired by married woman either before or after marriage remains and is her sole and separate property free from control of her husband. (RIGL 15-4-1).

Contracts of any kind whatsoever may be made by married woman, same as if she were single and with same rights and liabilities. (RIGL 15-4-3). Neither spouse is liable on contract made by other. (RIGL 15-4-12). Either spouse may act as surety for the other. (RIGL 15-4-3). Husband is not liable for wife's debts contracted prior to marriage. (RIGL 15-4-12).

Antenuptial Contracts.

R.I. has adopted Uniform Premarital Agreement Act. (RIGL 15-17-1).

Actions.

Married woman may sue or be sued without joinder of her husband. (RIGL 15-4-14). In general, either spouse may sue other in contract actions. Doctrine of interspousal immunity abrogated, at least as to claims arising out of motor vehicle collisions. (120 R.I. 299, 388 A.2d 1).

Agency.

Either spouse may act as agent or attorney for other. (RIGL 15-4-11).

Trade or business of any kind may be carried on by married woman as if she were unmarried, including trading or other type of partnership with her husband. (RIGL 15-4-9).

Conveyance or Encumbrance of Property.

Married woman may convey to and take title from any person, including her husband, except in fraud of creditors. (RIGL 15-4-4; RIGL 34-11-3). Deed of married woman conveying her separate interest in any lands may be acknowledged by her in same manner as if unmarried. (RIGL 15-4-5). Neither spouse need join in conveyance or mortgage of other's real estate, except to bar dower or curtesy right which may remain after enactment of RIGL 33-25-1 through 6, abolishing common law and statutory dower and curtesy. (RIGL 15-4-4, 6).

Desertion and Non-Support.

Husband who abandons his wife or children, leaving them in danger of becoming public charges, or who neglects to provide according to his means for their support, may be proceeded against in district court and is subject to imprisonment. (RIGL 11-2-1). If he leaves state he is subject to fine up to $1,000 or imprisonment up to five years, or both. (RIGL 11-2-2). Parent's lack of communication with child for period of six months establishes prima facie desertion. (RIGL 15-

7-7[a][4]).

Husband Absent or Imprisoned.

If a husband has abandoned his wife and has been absent from the state for at least one year or if he has been condemned to imprisonment for one year or more, the wife may on petition to the Superior Court, or Family Court setting forth the facts, have a trustee appointed to collect rents and income of husband's property and to apply it to support of wife and their minor children until further order of court. If property is less than $300 in value, whole or any part of it may be set off to wife absolutely. (RIGL 15-4-16).

Torts.

Husband is not liable for wife's torts committed before marriage nor is he liable for her torts committed after marriage, unless he participates therein or coerces her thereto. Nor is wife liable for husband's torts. (RIGL 15-4-12).

Assault Between Husband and Wife.

Simple assault (RIGL 11-5-3) between husband and wife deemed domestic assault punishable in district court by imprisonment up to one year, fine of up to $1,000, or both. Arrest must be made within 24 hours of crime. (RIGL 11-5-9). Person may be convicted of first degree assault against his spouse if there has been: (1) Separation for 90 days; (2) complaint for divorce filed; and (3) report to law enforcement authorities within 24 hours. (RIGL 11-37-2.1). In context of domestic assault, any protective order issued by another jurisdiction shall be given full faith and credit in Rhode Island. (RIGL 12-29-1.1). Form of complaint under Domestic Abuse Prevention. (RIGL 15-15-6).

Revised Uniform Reciprocal Enforcement of Support Act adopted. (RIGL 15-11-1 through -42).

Uniform Interstate Enforcement of Domestic Violence Protection Orders Act adopted. (RIGL 15-15.1-1 through -10).

Community property system does not obtain.

14.10 INFANTS:

Age of majority is 18 for both sexes. (RIGL 15-12-1). Person must be 21 or older in order to purchase or consume alcoholic beverages (RIGL 3-8-1 to 11.4) and 18 or older to purchase tobacco products (RIGL 11-9-13). Once Family Court has obtained jurisdiction over child prior to that child's 18th birthday, court will continue to have jurisdiction over that child until he or she reaches age of 19 unless discharged prior to turning 19. (RIGL 14-1-6).

Emancipation governed by common law. Parent's approval of employment contract emancipates minor as to wages earned under contract. (19 R.I. 461, 34 Atl. 737).

Disabilities.

Contracts of infants, except for necessaries, are voidable. (46 R.I. 230, 125 Atl. 286).

Actions.

Infant may bring action by next friend. Rights of infant litigant are subject to supervision of court. When infant is defendant, court must appoint guardian ad litem to conduct defense. (50 R.I. 321, 147 Atl. 617). Infant can recover sums due him under contract. (38 R.I. 307, 95 Atl. 569).

Support of Minor.

Parents are joint natural guardians of their minor children and, as such, are responsible for their care, nurture, welfare and education. (RIGL 33-15-1; RIGL 15-9-1 through 8).

Parental Responsibility.

Parents of unemancipated minor liable, up to $1,500, for willful or malicious injury to property or person caused by minor. (RIGL 9-1-3).

Release.

Where amount does not exceed $5,000 release of both parents or such parent or guardian as has legal custody of minor or guardian or husband of minor wife is binding. (RIGL 33-15-1[a]).

Adoption.

See topic 14.01 Adoption.

Grandparents and siblings visitation rights granted upon petition to family court. (RIGL 15-5-24.3). Grandparents' visitation order survives subsequent adoption. (Puleo v. Forgue, ... A.2d ...).

Uniform Transfers to Minors Act adopted. (RIGL 18-7-1 through 26). Minor for purposes of Act, is defined as one who has not attained 21.

Uniform Securities Ownership by Minors Act not adopted.

Department for Children and Their Families established within executive branch of state government. (RIGL 42-72-1 through -29). Office of child advocate established. (RIGL 42-73-1 through -10). Division of Juvenile Prosecution established. (RIGL 42-9-2). Family and children trust fund established. (RIGL 42-72-30).

Termination of Parental Rights.

Court may terminate all rights of parent to child, including right to notice of any subsequent adoption, if parent: willfully neglects or abandons child; had child in care of government child placement agency for six months; or is deemed unfit parent, i.e. mental illness, abusive conduct, excessive use of drugs/alcohol. (RIGL 15-7-7).

Delinquent and Dependent Children.

Governor authorized to execute Interstate Compact for Juveniles. (RIGL 14-6.2-1).

14.11 MARRIAGE:

Legal age of consent is 14 years for males and 12 years for females as at common law. (21 R. I. 101, 41 A. 1005); but compare subhead Consent Required, infra, and carnal knowledge statute. (RIGL 11-37-2).

Consent Required.

No minor or person under control of parent or guardian may give or subscribe to information required in marriage license or receive marriage license, unless consent in writing of parent or guardian, given in presence of town or city clerk or any clerk employed in that office, has been first obtained; provided, however, that: (a) Proof shall be submitted that such minor has attained the age of 16 if a female or 18 if a male; (b) information may be given and subscribed to and license may be issued to any resident of the state who is 18 years of age and has no parent or guardian in this state competent to act or any nonresident over 18 years of age who has no parent or guardian in the United States competent to act; (c) information may be given and subscribed to by resident minor who has attained age of 16 if female or 18 if male, on consent in writing of director of public welfare of town or city in which such minor resides given in presence of town or city clerk or any clerk employed in that office. No license may be issued to female under age of 16 or to male under age of 18, until Family Court, after investigation by Department of Social Welfare and report to said court, directs town or city clerk to issue such license. (RIGL 15-2-11).

License.

Persons intending to marry must personally obtain license to marry from clerk of town or city in which female party to proposed marriage resides; if she is nonresident, then in city or town where male party resides; if both parties are nonresident, then in city or town where marriage to be performed. (RIGL 15-2-1). Such declaration must be subscribed and sworn to before clerk and, when certified by clerk, becomes marriage license of declarants. Forms of certificates, reports, and other returns shall include as minimum, items recommended by federal agency responsible for national vital statistics subject to approval of and modification by state director of health. (RIGL 15-2-7). No license may be issued prior to receipt by clerk of medical statements required under subhead Medical Examination, supra. Justice of Supreme, Superior, Family or District Court or Providence Police Court, after hearing in chambers, may render written decision that public policy or physical condition of one of parties requires intended marriage to be celebrated without delay, in which case license may be issued forthwith. (RIGL 15-2-10; RIGL 8-10-43).

If either party has been married and divorced, authenticated copy of divorce decree must be presented to town or city clerk before license is issued. (RIGL 15-2-1).

Waiting Period.

There is no waiting period.

Marriage ceremony may be performed, anywhere in state, by any ordained clergy or elder in good standing, any justice or judge or former justice, judge, or administrator of Supreme, Superior, District, Family or Workers' Compensation Court or traffic tribunal, clerk of Supreme Court and any clerk or general chief clerk of Superior, District, or Family Court or traffic tribunal, magistrates, special or general magistrates of Superior Court, Family Court, traffic tribunal or District Court, administrative clerks of District Court, and any administrators of Workers' Compensation Court, and any former chief clerk of District Court and any former clerk or general chief clerk of Superior Court, secretary of Senate, elected clerks of General Assembly, any former secretary of Senate or any former elected clerk of General Assembly who retires after July 1, 2007, judges of U.S. appointed pursuant to Art. III of U.S. Constitution, bankruptcy judges appointed pursuant to Art. I of U.S. Constitution, U.S. Magistrate Judges appointed pursuant to federal law, any justice or any former justice of Municipal Courts of cities and towns of R.I. and of Police Court of Town of Johnston and every probate judge and every former probate judge. Wardens of Town of New Shoreham may join persons in marriage within New Shoreham. (RIGL 15-3-5). Marriage among Quakers or persons professing Jewish religion or connected with Baha'i faith according to their rites and ceremonies is good and valid. (RIGL 15-3-6).

Records of marriages are kept by town and city clerks. (RIGL 15-2-12). Clerks cannot be compelled to record common law marriages. (121 R. I. 88, 395 A.2d 1060). See category 10 Documents and Records, topic 10.04 Records, subhead Vital Statistics.

Common law marriages are recognized. (47 R. I. 337, 133 Atl. 243). No case or statute law as to recognition of out-of-state common law marriages.

Proxy marriages are not authorized. (RIGL 15-3-5; RIGL 15-3-15).

Marriages by written contract are within statute of frauds. (RIGL 9-1-4).

Prohibited Marriages.

Marriages between following persons are prohibited and void: parent and child; grandparent and grandchild; stepparent and stepchild; parent of stepparent and stepchild; parent-in-law and son- or daughter-in-law; parent of parent-in-law and son- or daughter-in-law; brother and sister; uncle and niece; aunt and nephew. (RIGL 15-1-1, 2). Marriages between Jews within degrees of consanguinity permitted by their religion are valid. (RIGL 15-1-4). Marriage by idiot or lunatic is absolutely void and issue are illegitimate. (RIGL 15-1-5). Issue of marriage null in law are legitimate. (RIGL 15-8-21).

Foreign marriages are recognized. (26 R. I. 351, 58 Atl. 978).

Annulment.

Courts have no jurisdiction to annul marriages in proceedings for that purpose. Remedy is by divorce which may be granted in case of any marriage originally void or voidable by law. (RIGL 15-5-1; 26 R. I. 441, 59 Atl. 311; 34 R. I. 261, 83 Atl. 83). See topic 14.06 Divorce. There is no statutory provision limiting time within which petition for divorce must be brought to annul marriage on ground of non-age, nor any decision on subject.

14.12 MARRIED WOMEN:

See topics 14.09 Husband and Wife, Marriage; categories 5 Civil Actions and Procedure, topic Evidence, subhead Witnesses; Documents and Records, topic Acknowledgments; Estates and Trusts, topic Wills; Property, topic Dower.

15 HEALTH

15.0115.04 [RESERVED]

15.05 FOOD, DRUGS, DEVICES AND COSMETICS:

Regulated generally by Rhode Island Food, Drug, and Cosmetic Act. (RIGL 21-31-1 et seq.). Controlled substance use, possession and manufacture governed by Uniform Controlled Substances Act (RIGL 21-28-1.01 et seq.) but medical marijuana use protected for qualifying patients (RIGL 21-28.6-1h et seq.). Persons who are at least 65 or at least 55 years of age and receiving social security disability benefits may be eligible for pharmaceutical assistance under Pharmaceutical Assistance to the Elderly Act. (RIGL 42-66.2-5). Sale and promotion of performance-enhancing dietary supplements is regulated for teachers, athletic directors, sports coaches and other school officials. (RIGL 16-21.4-1 et seq.).

15.06 [RESERVED]

15.07 HEALTH INSURANCE BENEFITS:

Health Maintenance Organization Act regulates establishment and operation of Health Maintenance Organizations. (RIGL 27-41-1 et seq.).

Health Care Accessibility and Quality Assurance Act of 1996 regulates administration of health plans by insurance companies and health care entities in Rhode Island via review and certification procedures directed by Department of Health. (RIGL 23-17.13-1 et

seq.).

15.0815.11 [RESERVED]

15.12 PUBLIC HEALTH:

Confidentiality of Health Care Communications and Information Act establishes safeguard for maintaining integrity of patient's confidential health care information. (RIGL 5-37.3-1 et seq.).

Firefighter Cancer Wellness Act promotes firefighter wellness and reduction of incidence and effects of cancer among firefighters. (RIGL 23-12.8-1 et seq.).

Health Care Facility Licensing Act of Rhode Island regulates licensure, quality assurance, and discipline of health care facilities. (RIGL 23-17-1 et seq.).

Health Care Power of Attorney provided for under RIGL 23-4.10-1 et seq. Adults have right to make written health care durable power of attorney which may instruct physicians to withhold life sustaining procedures in event of terminal condition. Duties and responsibilities of agents and health care providers, penalties, immunities, and statutory form for durable health care power of attorney. (RIGL 23-4.10-1 et seq.).

Health Information Exchange Act establishes safeguards and confidentiality protections for Health Information Exchange, technical system operated by Regional Health Information Organization (RHIO) under state authority allowing for statewide mobilization of confidential health care information. (RIGL 5-37.7-1 et seq.).

Hospital Conversion Act regulates certain significant transfers of ownership or membership interest or authority in hospital that involve for profit or not-for-profit corporations. (RIGL 23-17.14-1 et seq.).

Human cloning prohibited under RIGL 23-16.4-1 et seq. until July 7, 2010. Creation of human being through cloning prohibited. This ban does not prohibit cloning of cells, genes, tissues, or organs that would not result in creation of entire human being, nor does it prohibit in vitro fertilization, administration of fertility enhancing drugs, or other medical procedures used to assist woman in becoming or remaining pregnant. (RIGL 23-16.4-2).

Licensing of Nursing Service Agencies provided for under RIGL 23-17.7.1-1 et seq.

Long-Term Care Reform Act regulates nursing home complaints, nursing home inspection, and monitoring of quality and financial condition. (RIGL 23-17-12 et seq.). Notification guidelines to residents and family members and other quality improvement guidelines also regulate nursing homes. (RIGL 5-24-3 et seq.).

Nursing Facilities Receivership Act regulates nursing facilities and potential receivership. (RIGL 23-17.11-1 et seq.). Permits Director of Dept. of Health to regulate nursing facilities and provides appropriate legal remedies for violations. (RIGL 23-17.11-2 et seq.)

Patient Protection Act prohibits financial arrangements in Rhode Island for kickbacks, bribes, and rebates in exchange for patient referrals or for purchase of health care goods or services, as similarly prohibited by Federal Social Security Act. (RIGL 5-48.1-1 et seq.).

Patient Safety Act of 2008 proposes creation of patient safety organization. (RIGL 23-17.21-1 et seq.).

Physicians are governed by Board of Medical Licensure and Discipline. (RIGL 5-37-5.1 et seq.).

Program for all-inclusive care for elderly provides elderly with optional Medicaid benefit that is alternative to nursing home care. It allows for pre-paid, capitated program of managed care services delivery for qualified beneficiaries. (RIGL 40-8.8-1 et seq.).

Rhode Island Autism Spectrum Disorder Evaluation and Treatment Act reinforces screening for children who are uninsured and/or underinsured through Department of Health. (RIGL 23-79-1 et seq.).

Stroke Prevention and Treatment Act of 2009 directs director of Department of Health to establish process to recognize primary stroke centers in state, requires all acute care hospitals in state to maintain readiness to treat stroke patients, and otherwise provides for improvement in quality of care for individuals with stroke. (RIGL 23-78.1-1 et seq.).

Umbilical Cord Blood Donation Notification Act requires obstetrical professionals or facilities to inform pregnant women of options relating to stem cells contained in umbilical cord blood. (RIGL 23-83-1 et seq.).

Utilization of Unused Prescription Drugs Act allows nursing facilities, assisted living residences, residential care facilities or community health organizations to transfer unused prescription drugs (other than controlled substances as defined in RIGL 21-28-1.02) to charitable clinics for re-dispensing to medically indigent Rhode Island residents. (RIGL 23-25.4-1 et seq.).

15.13 SMOKING REGULATIONS:

Public Health and Workplace Safety Act prohibits smoking in all enclosed public places and all enclosed facilities within places of employment. Employers can provide outdoor smoking space for employees which is separated from enclosed workplace. This act takes effect March 1, 2005. (23-20.10-1 et seq.). Town can ban smoking or require separate enclosed smoking area in licensed bars and restaurants. (789 A.2d 899). Certain areas are exempt from smoking regulation. (RIGL 23-20.10-6).

Smoking Restrictions in Schools Act prohibits smoking at all school facilities. (RIGL 23-20-9 et seq.).

Tobacco Settlement Financing Corporation Act creates corporation to oversee state's tobacco receipts. (RIGL 42-133-1 et seq.).

15.14 PUBLIC SAFETY:

All new and existing places of assembly (with certain specified exceptions) must be completely protected by approved system of automatic sprinklers installed and maintained in accordance with N.F.P.A. Standard 13, 2002 Edition pursuant to specified schedule. (RIGL 23-28.6-21).

16 INSURANCE

16.01 INSURANCE COMPANIES:

Regulated by Titles 27 and 42. Accident and Sickness insurance is regulated under c. 27-18.

Supervision by Director of Business Regulation who is also by statute Insurance Commissioner, 233 Richmond Street, Providence, R. I. 02903 (RIGL 42-14-5); examinations of activities, operations, financial conditions, and affairs of all persons transacting business of insurance in Rhode Island under RIGL 27-13.1-1 et seq.

Unfair Competition and Practices.

Regulated by statute (RIGL 27-29-1 et seq.); Unfair Claims Settlement Practices Act (27-9.1).

Rates (except life insurance) are regulated (fire and marine: 27-6; casualty: 27-9); regulation (health insurance) upon merger or consolidation (RIGL 27-19-30.1, RIGL 27-20-25.2, RIGL 27-41-27.2); effective Jan. 1, 2003, use of insurance scoring for rating and underwriting of homeowners' insurance governed by RIGL 27-6-53.

Annual statements must be filed with Insurance Commissioner. (RIGL 27-12-1).

Statement of Actuarial Opinion must be filed annually by property and casualty insurance companies doing business in state. (RIGL 27-12.3-1 et seq.).

Policies.

Life Insurance (RIGL 27-4-0.1 et seq.); life insurance policy forms must be filed with Insurance Commissioner (RIGL 27-4-24); fire insurance—form of standard policy (RIGL 27-5-3); accident and sickness insurance—form of policy (RIGL 27-18-2 et seq.).

Discrimination forbidden; life insurance (RIGL 27-4-1; penalty RIGL 27-4-4); accident and sickness insurance (RIGL 27-18-25); health benefits (RIGL 42-62-14); also generally discrimination in rates prohibited (RIGL 27-1-39); Unfair Discrimination Against Subjects of Abuse in Health Benefits Plan Act (RIGL 27-60-1 et seq.); and Unfair Discrimination Against Subjects of Abuse in Life Insurance Act (RIGL 27-61-1 et seq.).

Misrepresentation as to terms of life insurance policy forbidden; revocation of license as penalty. (RIGL 27-4-5).

Right to examine and return life insurance policy within 20 days with refund of premium paid. (RIGL 27-4-6.1).

Rebates forbidden: life insurance (RIGL 27-4-1, 6); other insurance (RIGL 27-8-7).

Liens.

No statutory provision for lien of insurance company on policies.

Agents and Brokers.

Person may not sell, solicit, or negotiate insurance in state for any class of insurance unless licensed for that line of authority in accordance with RIGL 27-2.4-1 et seq. Insurance Commissioner may issue surplus line broker's license to person, firm, or corporation licensed as insurance agent in state. (RIGL 27-3-38).Mandatory pre-licensing education required for property and casualty insurance producers (RIGL 27-3.3-1, 10); initial insurance producer license fee: $55; annual renewal fee: $55 ; annual contracted producer report: $30 (per producer)(RIGL 27-2.4-4); surplus line broker's fee: $50 (RIGL 27-3-42). Surplus line brokers required to purchase and continuously maintain bond in amount of $25,000. (RIGL 27-3-39).

Financial Institutions may conduct insurance transactions if they are Rhode Island licensed insurance producer representing Rhode Island authorized insurer or Rhode Island eligible surplus lines insurer. Transaction restrictions and disclosure requirements apply. (RIGL 27-58-1 et seq.). Business transacted with producer controlled property/casualty insurer must be disclosed to prospective insured prior to effective date of any policy of insurance. (RIGL 27-48-1 et seq.).

Captive insurance companies may be created to insure limited class of risks. (RIGL 27-43-2). Minimum capital of $100,000 to $400,000 required depending on type of company. (RIGL 27-43-4).

Claims Adjuster.

Required to be licensed (except for adjusters of life, accident, or health claims) by Insurance Commissioner; those adjusters with less than one year's experience are "trainees"; no insurance company may have more than 25% trainees (if company employs more than ten adjusters); application and yearly license fee. (RIGL 27-10-3). Emergency licenses may be issued to adjusters for work on homeowner losses in event of emergency. (RIGL 27-10-8). Commissioner may permit experienced adjuster to act as adjuster in this state on homeowner's losses without Rhode Island license. (RIGL 27-10-8).

Process Agents.

Insurance Commissioner must be appointed as agent upon whom all process against foreign insurance company may be served. Service is also permitted in accordance with procedures in R.C.P. 4. (RIGL 27-2-13).

Investments by domestic insurance companies are regulated. (27-11.1).

Foreign Insurance Companies.

Must apply for admission to transact business in state; must file charter and pay fee of $30, pay $100 for each annual statement and, after admission, $100 annual license fee, and may be required to make special deposits for protection of Rhode Island policyholders and claimants. (RIGL 27-2-7, 16, 6.1). Stock company must have paid-in capital stock of $1,000,000 and $2,000,000 surplus, and mutual company $3,000,000 net assets over all liabilities, if incorporated in foreign country stock company must have paid-in capital of $2,000,000 and $4,000,000, surplus, and mutual company $6,000,000 net assets over all liabilities, and have made deposit with proper officers of state in U.S. or with R.I. Insurance Commissioner of $2,000,000 in trust for benefit of policyholders in U.S. (RIGL 27-2-5, 6). Detailed statement of investments, premiums in force, liabilities, etc., to be filed with Insurance Commissioner. (RIGL 27-2-8, 9). No restriction on right to hold real property in state. License suspension or revocation. (RIGL 27-2-24 through 27). Insurance by unqualified company binding but every person acting on behalf of company in state in effecting such insurance subject to fine of not less than $300 nor more than $1,000. (RIGL 27-2-20). Transaction of business by unqualified insurer constitutes appointment of Commissioner as attorney for service; bond must be posted or company must qualify as condition of defending action. (RIGL 27-2-13; RIGL 27-16-5, 10; RIGL 27-2-17). All policies must be placed through licensed agent except life policies where reciprocal provision in state of agent's residence. (RIGL 27-2-3). Foreign insurer which wants to become domestic insurer must comply with organization and licensing requirements for domestic insurer of same type, and must file with insurance commissioner its charter or other organizational documents. (RIGL 27-2.2-1). Filing fee of $1,000 required. (RIGL 27-2.2-3). Domestic insurer may transfer its documents to another jurisdiction. (RIGL 27-2.2-4).

Plain Language.

See category 3 Business Regulation and Commerce, topic 3.12 Consumer Protection.

Retaliatory Laws.

Whenever laws of any other state impose obligations on insurance companies incorporated in state, including requirement of countersignature as pre-condition to issuance or delivery of insurance contracts, like obligations imposed on insurance companies of other state doing business here. (RIGL 27-2-17). Whistleblower protection for physicians' reporting health insurance agents' violation of service agreement or law. (RIGL 27-18-45).

Taxation.

Every domestic, foreign or alien insurance company operating in state (except ocean marine insurers and fraternal benefit societies) must file tax return by Mar. 1 each year. (RIGL 44-17-1).

Premium Tax.

2% of gross premiums on insurance covering property in state written during preceding calendar year except ocean marine insurance, or in case of foreign insurer, not less than tax imposed by state under which insurer is organized upon foreign insurer except as provided in RIGL 27-2-17(d) (no tax where foreign jurisdiction does not impose retaliatory tax) (RIGL 44-17-1); dividends deductible in case of insurance on mutual plan (RIGL 44-17-2). Insurance companies shall be assessed annually for payment of attorney general's expenditures in insurance rate hearings involving insurance regulation. (RIGL 27-36-2). Tax on captive insurance companies 2/10 of 1% (0.2%) on first $20 million and 15/100 of 1% (0.15%) on next $20 million, 1/10 of 1% (0.1%) on next $20 million and 37.5/1000 of 1% (0.0375%) on each dollar thereafter on direct premiums on insurance policies written in preceding calendar year. (RIGL 27-43-9).

Insurers' Insolvency Fund.

Any insurance company licensed or chartered to write property or casualty insurance policies in Rhode Island is subject to assessment. Each member insurer must provide fund with irrevocable line of credit. (RIGL 27-34-8). Purpose of fund is to provide payment of covered claims without delay and without financial loss in event of insolvency of insurer. (RIGL 27-34-1 et seq.).

Life and Health Insurance Guaranty Association.

Any insurance company licensed or chartered to write health or life insurance policies and annuity contracts in Rhode Island is subject to assessment. Purpose of fund is to guaranty payments of benefits and continuance of coverage upon insolvency of insurer. (RIGL 27-34.1-1 et seq. and RIGL 27-34.3-1 et seq.).

Insurance Holding Company Systems.

Prior to acquisition of control of or merger with domestic insurer, acquiring party shall file statement with Commissioner; public hearing to be held within 60 days of filing at discretion of Commissioner or upon request of acquiring party, insurer, or any other interested party. (RIGL 27-35-2). Every insurer authorized to do business in state and which is member of insurance holding company system shall file registration statement with Commissioner. (RIGL 27-35-3). Insurers to maintain adequacy of surplus with regard to policyholders and may make no extraordinary dividend or distribution without notice to Commissioner. (RIGL 27-35-4). Transactions within holding company system are also subject to regulations. (RIGL 27-35-4). Violations of chapter may be enjoined and criminal proceedings and civil penalties may be initiated. (RIGL 27-35-8, 9). License may be revoked for violation. (RIGL 27-35-11).

Administrative Supervision.

Insurer may be subject to administrative supervision by commissioner if it's condition is hazardous to public, it has exceeded its powers, it has violated insurance code or it has conducted its business fraudulently. (RIGL 27-14.1-1 et seq.).

Risk Retention.

Risk retention and purchasing groups regulated. (RIGL 27-46-1 et seq.).

Criminal Sanctions for Failure to Report Impairment.

Any person, irrespective of title, designated by board of directors or trustees of insurer as person charged with administering and implementing insurer's policies and procedures must notify commissioner in writing, no later than 15 days after having knowledge, if insurance company's assets are less than sum of insurer's minimum required capital, minimum required surplus and all liabilities. Failure to comply can result in criminal penalties. (RIGL 27-47-1 et seq.).

Reinsurance.

Rules and regulations and accounting standards established for reinsurance. (RIGL 27-1.1-1 et seq.).

Reinsurance intermediaries (RIGL 27-52-1 et seq.), assumption reinsurance (RIGL 27-53.1-1 et seq.), and life and health reinsurance agreements (RIGL 27-4.2-1 et seq.) regulated.

Structured Settlement Protection Act.

(RIGL 27-9.3-1 et seq.). Party acquiring structured settlement rights through transfer must provide transferor with separate disclosure statement setting forth amounts and due dates of structured settlement payments in question and stating that payee can cancel agreement without penalty within three business days after agreement is signed by payee. This statement must be provided not less than three days prior to date payee signs. (RIGL 27-9.3-3). Transfer shall not be effective unless it has been approved by final order of superior court of county in which payee resides. (RIGL 27-9.3-4).

Voluntary restructuring of Solvent Insurers.

For commercial run-off insurers. (RIGL 27-14.5-1 et seq.).

Risk-Based Capital for Insurers Act.

Act requires each domestic insurer to report on and maintain its capital and surplus at minimum amount and limits amount of risk insurance company can accept. Failure to comply prompts regulatory action. Foreign insurers must furnish Risk-Based Capital Report upon written request of Insurance Commissioner. (RIGL 27-4.6-1 et seq.).

Uniform Insurers Liquidation Act.

(RIGL 27-14.4-1 et seq.). National Association of Insurance Commissioners' Insurers Rehabilitation and Liquidation Model Act is in effect. (RIGL 27-14.3-1 et seq.).

Model Act for Regulation of Credit Life Insurance is in effect (RIGL 27-30-1 et seq.), as is Model Act for Regulation of Credit Accident and Health Insurance (RIGL 27-31-1 et seq.), as is Model Act on Credit Reinsurance (RIGL 27-1.1-1 et seq.), of National Association of Insurance Commissioners (NAIC) Insurance Regulatory Information Act (RIGL 27-12.1-1 et seq.), and Model Administrative Supervision Act (RIGL 27-12.2-1 et seq.).

National Association of Insurance Commissioners (NAIL) Model Insurance Guaranty Association Act adopted with minor revisions. (RIGL 27-34.3-1 et seq.).

Health Maintenance Organizations Act.

(RIGL 27-41-1 et seq.).

Small Employer Health Insurance Availability Act.

(RIGL 27-50-1 et seq.).

Direct Actions Against Insurer.

Direct actions against tortfeasor's insurance company must be made before conclusion of tortfeasor's bankruptcy case. (866 A.2d 1222). See category 23 Transportation, topic 23.01 Motor Vehicles, subhead Actions for Injury.

No-Fault Insurance.

See category 23 Transportation, topic 23.01 Motor Vehicles, subhead No-Fault Insurance.

Underinsured Motorists.

See category 23 Transportation, topic 23.01 Motor Vehicles, subhead Insurance.

Protected Cell Companies Act.

Act allows domestic and captive insurance companies to segregate assets and liabilities for purpose of, inter alia, securitizing identified portions of portfolio of risk. (RIGL 27-64-1 et seq.).

16.02 SURETY AND GUARANTY COMPANIES:

Organization.

To do business in Rhode Island, domestic surety company must have paid-up capital of $250,000. (RIGL 7-9-1).

Rights and Powers.

Registration of sureties required in felony cases. (RIGL 12-13-21). Otherwise, no restrictions on power to bond or guaranty. (RIGL 7-9-2).

Foreign Companies.

Insurance companies not incorporated in Rhode Island must have capital stock of at least $1,000,000 and gross paid in and contributed surplus of at least $2,000,000, among other minimum financial requirements. (RIGL 27-2-5).

Taxation.

No statutory provision.

Rights and Powers.

No restrictions on power to bond or guaranty. (RIGL 7-9-2).

17 INTELLECTUAL PROPERTY

17.01 TRADEMARKS AND TRADENAMES:

Model Act on Trademarks and Names adopted. (RIGL 6-2-1 through 15). Any registration under prior law expires ten years from date of registration or Oct. 1, 1976, whichever is later. (RIGL 6-2-16).

Registration.

Person who adopts and uses trademark in Rhode Island may file application for registration of said mark with office of secretary of state accompanied by facsimile of mark in triplicate and $50 filing fee. (RIGL 6-2-2). Secretary will then issue certificate of registration, which is admissible in evidence in any action or judicial proceeding. (RIGL 6-2-4). Registration is effective for ten years and can be renewed for successive periods of ten years by filing renewal application six months before date of expiration, accompanied by $50 renewal fee. (RIGL 6-2-5).

Assignments.

Mark and its registration are assignable with good will of business symbolized. Assignment must be by written instrument, which may be recorded with Secretary of State upon payment of $20 fee. Assignment of registration is void as against subsequent purchaser for value without notice unless recorded with Secretary of State within three months of date of said assignment or prior to subsequent purchase. (RIGL 6-2-6).

Protection Afforded.

Registration of mark is constructive notice of registrant’s claim of ownership thereof and prima facie evidence of registrant’s exclusive right to use said mark in connection with goods or services specified in application for registration. (RIGL 6-2-4). However, registration of mark will not adversely affect rights in common law which another party may have acquired in said mark by good faith use thereof. (RIGL 6-2-14).

Infringement.

Any person who, without consent of registrant, uses copy or colorable imitation of registered mark in conjunction with sale or other distribution of goods or services within Rhode Island may be found liable to registrant in civil action. (RIGL 6-2-11). In addition to damages, registrant can seek injunctive relief in Superior Court to restrain unauthorized use of mark. (RIGL 6-2-13). Likelihood of injury to business reputation or dilution of distinctive quality of mark is ground for injunctive relief notwithstanding absence of competition between parties or of confusion as to source of goods or services. (RIGL 6-2-12).

Resale Price Agreement.

Fair Trade Act (6-12) repealed.

Tradenames.

No person or persons may conduct any business under any designation other than real name or names of individuals conducting such business without first filing in office of clerk of town or city in which business is to be conducted certificate setting forth name under which such business is to be conducted, and true or real full name or names, both Christian and surnames, of person or persons conducting same, with their post office addresses. This certificate must be executed and sworn to by such person before some person authorized to administer oaths. (RIGL 6-1-1). All certificates are indexed and filed in office of town or city clerk. Filing fee is $10. (RIGL 6-1-2).

Statute does not apply to corporations duly organized under the laws of this state, or any corporation organized under the laws of another state and lawfully doing business in this state, nor does it prevent partnership name, provided such partnership name includes real surname of at least one person transacting such business. (RIGL 6-1-3).

Failure to comply subjects offender to fine or imprisonment. (RIGL 6-1-4).

Criminal penalties provided for imitation, etc., of tradename relating to fuels and lubricants. (RIGL 11-18-14 through 18).

See also categories 3 Business Regulation and Commerce, topic Monopolies, Restraint of Trade and Competition; Transportation, topic Motor Vehicles, subhead Manufacturers, Dealers, Wreckers, Rental Trademark Licensors, and Lessors of Motor Vehicles.

17.02 TRADE SECRETS:

No Legislation.

18 LEGAL PROFESSION

18.01 ATTORNEYS AND COUNSELORS:

State Bar is integrated.

Jurisdiction over Admissions.

Supreme Court by general or special rules (cited S.C.R.) regulates admission of attorneys to practice in all courts of state. (RIGL 8-1-2).

Eligibility.

An applicant for admission to bar of Rhode Island must satisfy Board of Bar Examiners: (1) That he is a citizen of the U.S., of good character; (2) that he is over 21 years of age; (3) that he intends, if admitted, to practice law in this state; and (4) that he has satisfied or will satisfy educational and training requirements hereinafter stated. (S.C.R. II, 1).

Registration as Law Student.

No such requirement.

Educational Requirements.

Applicant for admission must satisfy Board of Bar Examiners that he has graduated from law school accredited and approved by American Bar Association and approved by Board of Bar Examiners. (Id.).

Petition for Admission.

Upon petition, for good cause shown, Board of Bar Examiners may in its discretion waive compliance with any of admission requirements if it feels such waiver will not be detrimental to public interest. (S.C.R. II, 6).

Examination.

Examinations are generally held on last Wed. and Thurs. in Feb. and July. All applications must be filed 60 days prior to examination, together with fee of $300, $150 for retakers. No person may take more than five examinations. (S.C.R. II, 1). Rhode Island uses Multi-State Bar Examination and also tests on following subjects: Agency, Partnership, Corporations, Civil Practice, Probate, Wills, Trusts, Conflict of Laws, Creditors Rights, UCC, Domestic Relations and Equity.

Training.

Applicant for admission must satisfy Board of Bar Examiners that he has (or will have prior to date of admission) satisfactorily completed training course sponsored by Rhode Island Bar Association approved by Board either before examination for admission to bar or within one year thereafter. Evidence of said completion shall be filed by applicant in form approved by Rhode Island Bar Association and Board signed by course director. (S.C.R. II, 1).

Attorneys' Admission.

Member of bar of another state who has been engaged in active practice or teaching of law for at least five years out of ten years immediately preceding application shall only be required to take essay portion of Rhode Island Bar Examination. (S.C.R. II, 2). Applicant for attorneys' admission shall pay fee of $500 and fee of $200 to National Conference of Bar Examiners. (S.C.R. II, 4).

Nonresident Attorneys.

Attorneys of other states are permitted on petition to Supreme Court to conduct and argue cases on trial in any court or administrative tribunal (provided that member of R.I. bar must sign all pleadings, briefs and other papers filed with court and assume full responsibility for them and conduct of cause and of attorney to whom such privilege is accorded), but they may not act as attorneys of record for endorsing writs. (S.C.R. II, 9 and RIGL 11-27-13). Senior law students of accredited law schools who have completed or are enrolled in evidence or trial practice course can appear without compensation on behalf of State and indigent defendants in district court criminal proceedings and in family court delinquency matters. (S.C.R. II, 9). Law clerks participating in court-appointed law clerk program immunized from financial liability for certain claims arising out of participation in program. (S.C.R. II, 9 and RIGL 9-1-27.3).

Registration.

All attorneys must register with Supreme Court Clerk within three months after admission to bar or by July 1 of each year and pay $150 registration fee. (S.C.R. IV, 1).

Disabilities.

Attorney of record cannot execute valid appeal bond for his clients. (15 R.I. 297, 3 Atl. 662).

Liens.

By statute, attorney giving notice of his relationship as attorney to person against whom claim is made has lien on any settlement or judgment, and if settlement has been made, may sue both parties to original cause, jointly or severally, for "the full value of his lien in accordance with his implied or express agreement." Such lien may also be enforced by civil action. (RIGL 9-3-1 through 3).

Disbarment or Suspension.

Supreme Court may disbar or suspend attorneys for violation of code of professional responsibility. Written complaints may be filed with counsel for disciplinary board, who investigates complaint and recommends disposition to board. Board reports to Supreme Court. (S.C.R. III, 1 through 23). Conviction of felony, in Rhode Island or any other jurisdiction, will result in disbarment of attorney except in rarest of cases. (No. 2000-526MP). Conversion of client funds warrants public censure and monitoring. (865 A.2d 1071). Public censure is warranted for attorney's lack of diligence relating to client matters and/or misrepresentation concerning diligence. (868 A.2d 656). When sister jurisdiction imposes discipline upon member of RI Bar, Supreme Court will impose identical discipline subject to certain exceptions. (958 A.2d 142).

Unauthorized Practice.

No individual not admitted to Bar of Rhode Island shall practice law. (RIGL 11-27-5). No corporation may practice law unless organized under professional service corporation statute (RIGL 7-5.1-1 through 12) and licensed to do so. See topic Corporations, subhead Professional Corporations. Enforcement by attorney-general and by unauthorized practice of law committee appointed by Supreme Court. (RIGL 11-27-19).

Mandatory Continuing Legal Education.

Attorneys admitted to practice in Rhode Island must complete ten hours of continuing legal education each year. Attorneys who are: (a) Inactive; (b) do not practice law; (c) serve on judiciary; (d) are admitted to practice in Rhode Island for limited time; or (e) attorneys who are 70 years of age or over are exempt from mandatory continuing legal education. (S.C.R. IV, 3).

Specialty Certification Requirements.

None.

Professional Associations.

Attorneys may form professional service corporations and limited liability entities. (S.C.R. III, 10). See category 2 Business Organizations, topic 2.03 Corporations.

19 MINERAL, WATER AND FISHING RIGHTS

19.01 MINES AND MINERALS:

No statutory provisions.

20 MORTGAGES

20.01 CHATTEL MORTGAGES:

Uniform Commercial Code in effect. (RIGL 6A-1-101 et seq.). Revised Art. 9 adopted effective July 1, 2001. Following should be noted:

§ 9-615.1 (RIGL 6A-9-615.1): section added providing cross collateralization rights; not in 1962 or 1972 Official Text.

Filing.

In all cases except farm items, timber, minerals and fixtures, security interests are filed in office of Secretary of State (U.C.C. Div., Secretary of State, 270 Westminster Mall, Providence, R.I. 02903). For farm items, timber, minerals and fixtures, file with recorder of deeds of city or town where real estate is located. (RIGL 6A-9-501).

§ 9-513 (RIGL 6A-9-513): Whenever there is no outstanding secured obligation and no commitment to make advance, incur obligation or otherwise give value, upon 20 days of receipt of authenticated demand by debtor, secured party must file termination statement.

Filing fee not required with respect to record of mortgage which is effective as financing statement filed as fixture filing or as financing statement covering as-extracted collateral or timber to be cut under § 6A-9-502(c). However, other applicable fees apply. (RIGL 6A-9-525).

Forms

Financing Statement.

Where debtor and owner of collateral are not same person, financing statement is defective unless both are listed as debtor. (120 R.I. 197, 386 A.2d 1096).

Security Agreement.

No particular form in use; however, following short form may be used.

See category 3 Business Regulation and Commerce, topic 3.09 Commercial Code.

SHORT FORM

SECURITY AGREEMENT

. . . .

(date)

. . . .

Name No. and Street City County State

(hereinafter called “DEBTOR”), hereby grants to . . . .

. . . .

Name No. and Street City County State

(hereinafter called “SECURED PARTY”) a security interest in the following property* (hereinafter called the “Collateral”) . . . .

. . . .

. . . .

. . . .

to secure payment and performance of obligations identified or set out as follows (hereinafter called the “Obligations”) . . . .

. . . .

. . . .

. . . .

Default in payment or performance of any of the Obligations or default under any agreement evidencing any of the Obligations is a default under this agreement. Upon such default SECURED PARTY may declare all Obligations immediately due and payable and shall have the remedies of a secured party under the Uniform Commercial Code.

Signed in (duplicate) triplicate.

. . . .

DEBTOR

By . . . .

. . . .

SECURED PARTY

By . . . .

* If the Collateral is crops or oil, gas or minerals to be extracted or timber to be cut, or if it is or is to become a fixture, describe the real estate and give the name of the record owner thereof. Description of collateral may include "proceeds" where appropriate.

By . . . . (Signature of Secured Party or Assignee of Record—Not valid until signed)

A financing statement, although signed by both debtor and secured party and filed in accordance with provisions of Code, which does not contain a grant of a security interest, does not qualify as a security agreement under § 6A-9-203(b). (97 R.I. 59, 196 A.2d 150).

For other U.C.C. forms, see end of Digest.

20.02 COLLATERAL SECURITY:

See category 8 Debtor and Creditor, topic 8.15 Pledges.

20.03 MORTGAGES OF PERSONAL PROPERTY:

See topic 20.01 Chattel Mortgages.

20.04 MORTGAGES OF REAL PROPERTY:

Governed by 34-23. Investment aspects of real estate mortgages are governed by RIGL 19-9-8.

In this state, mortgage conveys legal title. (7 R. I. 427; 70 R. I. 421, 40 A.2d 438).

Execution.

Same as deed. Seal not required. (RIGL 34-11-2). See category 21 Property, topic 21.06 Deeds.

Recording.

In order to be valid against third persons without notice, mortgages must be acknowledged and recorded in same manner as absolute deeds. (RIGL 34-23-1; RIGL 34-11-1). (See category 21 Property, topic 21.06 Deeds.) Mortgages, if signed and delivered, though not acknowledged or recorded, are valid as between parties and their heirs and as against those taking by gift or devise or those having notice thereof. (RIGL 34-11-1).

Recording Fees.

Minimum: mortgage, $60; partial release, $45; assignment, $45; discharge, $45. Maximum rate of $1 for each additional page. (RIGL 34-13-7). Extra $2 may be charged if mortgagee's address does not appear on mortgage. (RIGL 34-11-1.3).

Disclosure Reports.

The Rhode Island Housing and Mortgage Finance Corporation must deliver to Governor, General Assembly and Treasurer report containing number and total dollar amount of loans Corporation made or participated in during last calendar year for each census tract of State. Names of mortgage lenders and total dollar amount of loans made must be included. Copies of report are available to public. (RIGL 42-55-22.1).

Taxes.

No conveyance tax on mortgages.

Trust deeds are not ordinarily used to secure debt, statutory power of sale mortgage being much more common. There are no statutory provisions relating to trust deeds. Payment of outstanding taxes on foreclosed property governed by RIGL 34-27-6.

Prepayment.

Mortgage of dwelling house property of not more than four dwelling units must provide in mortgage note that full payment of same may be made at any time after one year from making of loan without penalty and maximum prepayment penalty within first year is 2% of amount prepaid, unless terms, conditions, and amount of prepayment penalty are prominently and conspicuously disclosed and borrower consents. (RIGL 34-23-5).

Escrow Deposits.

Commencing July 1, 1979, mortgagee of owner-occupied residential property holding funds of mortgagor in escrow for payment of taxes or insurance premiums must pay or credit interest at rate equal to rate paid to mortgagee on its regular savings account, if offered, and otherwise at rate not less than prevailing market rate of interest for regular savings accounts offered by local financial institutions. (RIGL 19-9-2). Mortgagor is not allowed to waive interest payment from mortgagee on escrow accounts. Mortgagor cannot charge tax service fee or other fee for ascertaining whether real estate taxes have been paid. Mortgages guaranteed or insured by Farmers' Home Loan Administration, Federal Housing Administration, Veterans' Administration or private mortgage insurer licensed to do business in state of Rhode Island are exempt. (RIGL 19-9-2).

Future Advances.

Whenever a mortgage deed in statutory or other form is entitled at beginning thereof "Mortgage to Secure Present and Future Loans under RIGL 34-25-1 to RIGL 34-25-5, inclusive, of the General Laws," and contains a provision that it is intended thereby to secure present and future loans to a stated maximum amount, mortgage is security from time of recording for all loans up to maximum stated amount, whether or not made after reduction of principal of any loan made on security thereof; and is also security above stated maximum amount for interest, taxes, insurance premiums and other obligations undertaken in note or notes or mortgage deed. Maximum amount must not exceed by more than $3,000, total principal amount of loans, which, at time of or before recording, mortgagee has made or agreed to make to mortgagor. Any excess of principal outstanding at any one time over stated maximum amount is not secured by such mortgage while total amount outstanding is in excess of maximum amount. Mortgage has priority over all mortgages, liens and encumbrances recorded subsequent thereto, except that, if after recording, any writ of attachment of or execution on, or any notice of lis pendens affecting, real estate mortgaged, is recorded, loans made thereafter do not have priority over attachment, execution, or notice of lis pendens. Except that loans which mortgagee at or before recording of mortgage made or agreed to make and additional loans made on such security prior to recording of attachment, execution, or lis pendens, together with interest thereon, taxes, insurance premiums and obligations of mortgagor as mortgagee has agreed, or which mortgagor has given mortgagee right to pay in connection with mortgage, continue to have priority over attachment, execution or lis pendens. (RIGL 34-25-1 through 5; RIGL 34-11-23).

Whenever mortgage deed in statutory form or other form mortgaging real property is clearly entitled at beginning thereof “Open-end mortgage to secure present and future loans under chapter 25 of title 34 of the General Laws and in all other respects complies with requirements of RIGL 34-25-9, deed shall be security from time of its recording for all mortgage debt secured at time of recording and for all future advances secured in aggregate principal amount outstanding at any time not to exceed stated amount of mortgage deed, whether or not future advances are agreed to be made at time of recording mortgage deed or mortgage readvances principal sums repaid. Mortgage is security for interest, taxes, insurance premiums and other obligations undertaken by mortgagor in mortgage deed or in note or notes or agreement secured thereby, notwithstanding that interest, taxes, insurance premiums and other obligations when added to total principal amount of loans outstanding at any time may cause amount secured by mortgage deed to exceed stated maximum amount. (RIGL 34-25-8 through RIGL 34-25-14).

Mortgage securing future advances which are obligatory on part of mortgagee is superior to subsequent encumbrance. (RIGL 34-25-10; 106 R. I. 225, 258 A.2d 82). RIGL 19-9-8 contains specific provisions relating to wraparound mortgages.

Whenever mortgage deed in statutory form or other form mortgaging real property is clearly entitled at beginning thereof “Reverse Mortgage to Secure Present and Future Loans Under Chapter 25 of Title 34 of the General Laws” and in all other respects complies with requirements of RIGL 34-25.1-2, mortgage deed is security from time of its recording for all mortgage debt secured thereby in aggregate principal amount outstanding at any time not to exceed stated amount of mortgage deed, whether or not future advances are agreed to be made at time of recording of such mortgage deed and mortgage readvances principal sums repaid. Mortgage shall also be security for interest, taxes, insurance premiums and other obligations undertaken by mortgagor in mortgage deed, or in note or notes or agreement secured thereby, notwithstanding that such interest, taxes, insurance premiums and other obligations when added to total principal amount of such loans outstanding at any time may cause amount secured by such mortgage deed to exceed stated amount. (RIGL 34-25.1-1 through RIGL 34-25.1-8). Mortgage securing advances which are obligatory on part of mortgagee is superior to subsequent encumbrance. (RIGL 34-25.1-3[b]). After notice is received by mortgagee as provided in statute, subsequent encumbrance is superior to mortgage securing future advances which are not obligatory on part of mortgagee. (RIGL 34-25.1-3[b]). Mortgagees authorized to take reverse mortgages are specified in RIGL 34-25.1-8 and loan requirements of reverse mortgages in RIGL 34-25.1-7.

Priorities.

Any person having existing mechanic’s lien subject to prior recorded mortgage may pay off prior mortgage and be subrogated to rights of holder of prior mortgage. (RIGL 34-28-25).

Subordination Agreements.

May be recorded in same manner as absolute deeds, and are enforceable against executing party from time of execution and delivery, and also against all creditors of party and all persons claiming under or through party. (RIGL 34-24-8).

Assignment.

Where mortgagee is not and has not been in possession and where mortgagor is entitled to redeem, mortgagor, or any encumbrancer, can require mortgagee, instead of discharging or reconveying, and on terms on which he would be bound to discharge or reconvey, to assign mortgage-debt and convey mortgaged property to such third person as mortgagor, or encumbrancer, directs upon assumption of expenses of so doing and agreeing to record same forthwith. As between encumbrancers, prior encumbrancer prevails over requisition of subsequent encumbrancer and encumbrancer over mortgagor. (RIGL 34-26-4).

Mortgagee may assign his interest (RIGL 34-11-24), and use of word “assign” is sufficient (RIGL 34-11-25). Assignment may be recorded. (RIGL 34-13-1).

Release.

Upon full satisfaction of mortgage, mortgagee is required to discharge mortgage within 30 days receipt of payment (RIGL 34-26-8), and mortgagor can compel discharge or release by mortgagee (RIGL 34-26-2, RIGL 19-10-12), and mortgagee shall be liable for treble damages and reasonable attorneys fees incurred by mortgagor should he fail to so discharge or release within ten days after request (RIGL 34-26-5). For partial release, see statutory form. (RIGL 34-11-12).

Foreclosure.

Mortgages usually contain a power of sale for breach of condition, and may be foreclosed under such power of sale (referred to as “Statutory Power of Sale”) (RIGL 34-11-22). Mortgage foreclosure and sale governed by RIGL 34-27-1 et seq. Mortgagee may bid at any sale (RIGL 34-27-2). Payment of outstanding taxes governed by 34-27-6. Mortgages may also be foreclosed by court proceedings (RIGL 34-27-1) by action for ejectment (RIGL 34-20-4) or by peaceable and open entry in presence of two witnesses who give a certificate of that fact. Person delivering possession acknowledges it to be done voluntarily before justice of peace, or notary public, of town, which certificate and acknowledgment must be recorded in clerk’s office. (RIGL 34-23-3, 4). Last two methods are uncommon.

Notice of Sale.

If foreclosure sale is to be made under statutory power of sale, notice of time and place of sale must be published in some public newspaper at least once a week for three successive weeks before sale, with first publication at least 21 days before date of sale and third publication no fewer than seven days and no more than 14 days before original date of sale listed in advertisement. (RIGL 34-27-4). Advertisement may describe real estate by metes and bounds description, street address, or by recitation of Taxing Authority’s Assessor’s Plat and Lot designation. (RIGL 34-27-5). For place of publication and statutory power of sale, see RIGL 34-11-22.

Deficiency Judgments.

No anti-deficiency legislation.

Redemption.

After foreclosure by process of law or by peaceable and open entry, there is right of redemption within three years after mortgagee has taken actual possession and continued same during said term. (RIGL 34-23-3).

Ancient Mortgages.

Commencing Jan. 1, 1989, no power of sale in any mortgage of real estate, then or thereafter of record, shall be exercised and no proceeding for foreclosure begun until after expiration of period of 50 years from date of recording of such mortgage, unless extension of mortgage, or acknowledgment by affidavit that mortgage is not satisfied is recorded within last ten years of such period. Where such extension or acknowledgment is recorded, period shall continue until ten years have elapsed during which no further extension or acknowledgment is recorded. Period is not extended by reason of longer duration of debt, or obligation secured as stated in mortgage or in any extension, or by nonresidence or disability of any person interested in mortgage or real estate, or by any partial payment or document not meeting above requirements. (RIGL 34-26-7). (For procedure to effect discharge, see RIGL 34-26-7.)

Statutory forms now generally used, are as follows (RIGL 34-11-12):

Forms

Mortgage Deed: . . . . . . of . . . . . . for consideration paid, grant to . . . . . . of . . . . . . with mortgage covenants, to secure the payment of . . . . . . Dollars in . . . . . . years with interest at . . . . . . per centum, per annum, payable semi-annually . . . . . . as provided in a certain negotiable promissory note of even date herewith (description, and encumbrances, if any).

This mortgage is made upon the statutory condition and with the statutory power of sale. . . . . . . husband (wife) of the mortgagor, release to the mortgagee all right of curtesy (dower) and all other interest in the aforedescribed premises.

Witness . . . . . . hand . . . . this . . . . . . day of . . . . . ., 20. .

. . . .

. . . .

(Acknowledgment)

Foreclosure Deed under Power of Sale in Mortgage: . . . . . . holder of a mortgage by . . . . . . to . . . . . . dated . . . . . . recorded in the records of . . . . . needs in . . . . . . in book No. . . . . . . at page . . . . . . , by the power conferred by said mortgage and by every other power me thereunto enabling, for . . . . . . Dollars paid, grant to . . . . . . the premises conveyed by said mortgage.

Witness . . . . . . hand this . . . . . . day of . . . . . . , 20. .

. . . .

. . . .

(Acknowledgment)

Affidavit of Sale under Power of Sale in Mortgage (annexed to or made part of foreclosure deed): . . . . . . named in the foregoing deed, make oath and say that the principal, ... interest . . . . obligation . . . . mentioned in the mortgage above referred to was not paid or tendered or performed when due or prior to the sale, and that I published on the . . . . . . days of . . . . . . , 19. . , in the . . . . . . a public newspaper published in . . . . . . , in accordance with the provisions of said mortgage a notice of which the following is a true copy: (Insert advertisement).

Pursuant to said notice, at the time and place therein appointed, ... I sold the mortgaged premises at public auction by . . . . . . , an auctioneer, to . . . . . . above named, for . . . . . . Dollars bid by . . . . . . being the highest bid made for said premises at said auction.

. . . .

. . . .

Sworn to by said . . . . . . on this . . . . . . day of . . . . . . , 20. . , before me

Affidavit that owners not in military service (if such be the fact) must be attached to foreclosure deed.

Partial Release of Mortgage: . . . . . . the holder of a mortgage by . . . . . . to . . . . . . dated . . . . . . recorded in the Records of Deeds in . . . . . . County of . . . . . . , State of Rhode Island in . . . . . . Book No. . . . . . . at page . . . . . , for consideration paid, release to . . . . . . all interest acquired under said mortgage in the following described portion of the mortgaged premises:

Witness . . . . . . hand this . . . . . . day of . . . . . . , 20. .

. . . .

. . . .

(Acknowledgment)

Assignment of Mortgage: . . . . . . holder of a mortgage by . . . . . . to . . . . . . dated . . . . . . recorded in the Records of Deeds in . . . . . . in . . . . . . Book No. . . . . . the page . . . . . . , for consideration paid, assign said mortgage and the note and claim secured thereby to

Witness . . . . . . hand this . . . . . . day of . . . . . . , 20. .

. . . .

. . . .

(Acknowledgment)

Discharge of Mortgage:

The undersigned, having received full payment and satisfaction of the within mortgage recorded in the . . . . . . of . . . . . . in the state of Rhode Island, in . . . . . . in book No. . . . . . . page . . . . . . , hereby cancel and discharge the same. And covenant . . . . . . to and with the payer that . . . . . . the present owner of said mortgage.

Witness, this . . . . . . day of . . . . . . , 20. .

Chattel Mortgages.

See topic 20.01 Chattel Mortgages.

21 PROPERTY

21.01 ABSENTEES:

Care of Property.

Probate court may appoint receiver of estate of person absent for more than one year upon petition of spouse or next of kin or of one or more of his creditors and make orders for custody, care, leasing, investing, and reinvesting of such estate including orders for applying same for support of his family and for payment of his debts, and for sale of real estate of absentee to petitioner upon notice. (RIGL 33-20-1, 2, 4 through 7). If no such petition is filed within five years, personal property is subject to escheat. (RIGL 33-20-1). See category 13

Estates and Trusts, topic 13.07 Descent and Distribution.

Provision is also made for appointment of conservator of property of any person serving in or with the U.S. Armed Forces or as a merchant seaman, who has been reported or listed as missing, interned in a neutral country or beleaguered, besieged or captured by an enemy. (RIGL 33-20-8). Conservatorship terminates upon petition of absentee or his attorney in fact or if absentee has died and executor or administrator has been appointed for his estate. (RIGL 33-20-10).

Presumption of Death.

See category 13 Estates and Trusts, topic 13.05 Death.

Process Agent.

Individual nonresidents and partnerships composed of nonresidents, having a usual place of business in this state, in construction, erection, alteration or repair of building, bridge, railroad, railway or structure of any kind in this state must file with Secretary of State, written power appointing some competent person resident in this state as attorney, with authority to accept service of process before beginning work. If resident attorney dies, resigns or moves from state, such individual or partnership must file written power appointing some other competent attorney. Power of attorney cannot be revoked until new appointment is filed with Secretary of State. If individual or partnership ceases to do business in this state appointment may be revoked by written instrument of revocation filed in office of Secretary of State, but no such revocation is effective as to any liability arising out of any act or omission occurring prior to time when such individual or partnership ceases to do business in this state or to have usual place of business here. Fine of $10 per day for failure to file after notice. Fee for filing power of attorney or revocation, $5. (RIGL 9-5-29 through 32). Forms may be procured from Secretary of State’s office, 148 West River Street, Providence, RI 02904. For manner of service of summons outside state, see R.C.P. and D.C.R. 4(e), (f). For service by publication see R.C.P. and D.C.R. 4(g).

Escheat.

Uniform Unclaimed Property Act adopted in 1986. (RIGL 33-21.1-1 through -41). For escheat of postal savings system accounts, RIGL 33-21A-1 et seq. For conditional escheat of unclaimed funds in Court Registries, see RIGL 8-12-1 through RIGL 8-12-3. See also categories 3 Business Regulation and Commerce, topic Banks and Banking, subhead Unclaimed Deposits; Estates and Trusts, topics Descent and Distribution, subhead Escheat, Executors and Administrators, subhead Distribution if Abroad.

See also category 8 Debtor and Creditor, topic 8.16 Receivers.

21.02 ADVERSE POSSESSION:

Character of Possession.

Possession must be uninterrupted, quiet, peaceful and with actual seisin. (RIGL 34-7-1). Courts commonly paraphrase this standard as actual, open, notorious, hostile and continuous use under claim of right for ten years.

Duration of possession must be at least ten years. (RIGL 34-7-1). No adverse possession permitted by railroad corporation or against its property. (RIGL 39-6-9, 10). Private individual cannot adversely possess public property. (RIGL 34-7-8).

Disabilities.

Not effective against persons under age, or unsound mind, imprisoned or outside U.S., if they assert title within ten years after such an impediment is removed, nor as against reversionary, remainder, expectant or depending interests if holders thereof assert title within ten years after right accrues. (RIGL 34-7-2). Not effective against property interest of utility. (RIGL 39-1-30.2). Not effective against land preserved by non-profit corporation or association for conservation or open space. (RIGL 34-7-9).

Easements.

No easement of light or air is acquired by prescription. (RIGL 34-7-3). No right of footway, except in connection with right to pass with carriages, is acquired by prescription or adverse use (RIGL 34-7-4), unless acquired prior to 1872 (22 R.I. 471, 48 Atl. 795). No utility right of way can be acquired by continued enjoyment of privilege of maintaining apparatus in, upon or over lands or buildings. (RIGL 34-7-5). However, easement for subterranean waterline may be acquired by prescription. (724 A.2d 1014). No statute has reduced common law period of prescription but by analogy to statutory period for adverse possession, period of prescription is ten years. (96 R.I. 334, 191 A.2d 282; RIGL 34-7-1). Expanded use of right-of-way does not warrant extinguishment of right-of-way. (724 A.2d 1014).

Interruption of adverse possession or prescriptive use may be accomplished by service of written notice disputing claim, signed by owner of land, or his guardian or agent, on adverse claimant, or his agent or guardian if within state or on tenant or occupant, and by recording same in land records within three months thereafter. (RIGL 34-7-6).

Quieting Title.

Any person claiming title to real estate, or any interest or estate therein, legal or equitable, based on a deed, grant, devise or inheritance, may bring a civil action to quiet title against all persons claiming or appearing to have of record any adverse interest in such real estate. (RIGL 34-16-1, 4). Open, adverse, exclusive and uninterrupted possession and enjoyment by plaintiff or his predecessors in title for at least ten years raises rebuttable presumption of lost grant, effective to cure defects in plaintiff’s title as set forth in complaint and/or to remove cloud thereon as it concerns any party named or referred to in such cause. (RIGL 34-16-7). Action will not lie to quiet title based solely on adverse possession without color of title. (51 R.I. 213, 153 Atl. 312). Adverse possession may foreclose rights of redemption from sale of land for nonpayment of taxes. (508 A.2d 652).

Acquiescence.

Person may gain title to property when both parties have recognized boundary for ten years. (819 A.2d 1261).

21.03 [RESERVED]

21.04 CONVEYANCES:

See topic 21.06 Deeds; categories 10 Documents and Records, topic Records; Mortgages, topic Mortgages of Real Property.

21.05 CURTESY:

Common law and statutory dower and curtesy abolished. (RIGL 33-25-1). Surviving spouse obtains life estate in realty owned by deceased at death, subject to encumbrances and any liability of deceased to discharge same. (RIGL 33-25-2). Life estate takes precedence over any will provision or creditor’s claim (except those secured by lien) (RIGL 33-25-3), unless surviving spouse fails to elect same by filing waiver of devise or bequest within six months of probate of will (RIGL 33-25-4). Act applies retroactively to dower and curtesy rights existing prior to effective date of Act (RIGL 33-25-6), but validity of provision has not been adjudicated.

Election between life estate and testamentary provision, see category 13 Estates and Trusts, topic 13.16 Wills.

21.06 DEEDS:

Execution.

Deed of real estate must be in writing, signed and acknowledged by grantors, delivered and recorded in records of land evidence in town or city where real estate is situated; but deed, as between parties and their heirs, as against those taking by gift or devise, or having notice, is valid although not acknowledged or recorded. (RIGL 34-11-1). Names of signatories and notaries must be printed or typed below signatures. (RIGL 34-11-1.1). Seal is not required and word "covenant" in unsealed instrument has effect as though seal had been affixed. (RIGL 34-11-2). Any form of conveyance, duly signed and delivered, operates to convey to grantee all possession, estate, title and interest of grantor, absolutely in and to land conveyed, unless otherwise expressly limited. (RIGL 34-11-4). See also topics 21.08 Dower, Curtesy; category 14 Family, topic 14.09 Husband and Wife, subhead Conveyance or Encumbrance of Property.

Acknowledgment by all grantors is necessary for recording. See category 10 Documents and Records, topic 10.01 Acknowledgments.

Failure to Disclose Encumbrances.

Grantor who covenants that real estate is free from all encumbrances is liable to grantee for damages and expenses in removing encumbrances of record. (RIGL 34-11-33).

Release of Dower and Curtesy.

See topics 21.05 Curtesy, Dower; category 14 Family, topic 14.09 Husband and Wife.

Recording.

Deed must be recorded in records of land evidence in town or city where real estate is situated; but validity of unrecorded deed is not affected as between parties and their heirs, as against those taking by gift or devise, or having notice of deed. (RIGL 34-11-1; RIGL 34-13-1). Residence or post office address required for recording. (RIGL 34-11-1.2). If deed has been on record for six years (or if recorded prior to May 8, 1969 for six years including two years after May 8, 1969) it shall be conclusive evidence of delivery. (RIGL 34-11-35). Every deed presented for recording due to sale of property which results in transfer of ownership of property must contain total dollar amount of actual sale as part of deed. (RIGL 34-11-1.4). See category 10 Documents and Records, topic 10.04 Records.

Recording fees (minimum) are: Warranty deed, quitclaim deed, deed of fiduciary, $80 (plus $1 for each additional page). (RIGL 34-13-7). See category 10 Documents and Records, topic 10.04 Records.

Taxes.

Tax at rate of $2 for each $500 or fractional part of consideration on conveyance of realty sold payable by grantor in absence of agreement to contrary. (RIGL 44-25-1).

Forms.

Statutory short forms are in general use (RIGL 34-11-11, 12), and include following:

Form

Warranty Deed: . . . . of . . . . for consideration paid, grant to . . . . of . . . ., with warranty covenants (description, and encumbrances, if any). . . . . wife (husband) of the grantor, release to the grantee all my right of dower (curtesy) in the aforedescribed premises.

Witness . . . . hand(s) this . . . . day of . . . ., 20 . . .

. . . .

. . . .

(Acknowledgments)

Quitclaim Deed: Same form as above except that “with quitclaim covenants” is substituted for “with warranty covenant.”

See topic Real Property for types of estates.

21.07 DEEDS OF TRUST:

See category 20 Mortgages, topic 20.04 Mortgages of Real Property.

21.08 DOWER:

Common law and/or statutory dower and curtesy abolished. (RIGL 33-25-1). Act applies retroactively to dower and curtesy rights existing prior to effective date of Act (RIGL 33-25-6), but validity of provision has not been adjudicated. Surviving spouse entitled to life estate in all real estate owned by deceased husband or wife at death, subject to encumbrances and any liability of decedent to discharge same. (RIGL 33-25-2). Life estate takes precedence over unsecured claims of creditors. (RIGL 33-25-3) In any case where real estate in which surviving spouse has life interest is ordered sold by court or is taken under authority of law, surviving spouse shall be paid present value of such life estate upon petition. (RIGL 33-25-5).

Election between life estate and testamentary provision, see category 13 Estates and Trusts, topics 13.07 Descent and Distribution, 13.16 Wills.

21.09 ESCHEAT:

See topic 21.01 Absentees, subhead Escheat; categories 3 Business Regulation and Commerce, topic Banks and Banking, subhead Unclaimed Deposits; Estates and Trusts, topics Descent and Distribution, subhead Escheat, Wills, subhead Unclaimed Legacies, also Executors and Administrators, subhead Distribution if Abroad.

21.09A EMINENT DOMAIN:

Eminent domain governed by Rhode Island Home and Business Protection Act of 2008. (RIGL 42-64.12-1 et seq.).

21.10 LANDLORD AND TENANT:

Lease for more than one year is void unless it is in writing, signed, acknowledged, delivered and recorded in records of land evidence in town or city where the land is situated; except that, if delivered, it is binding as between the parties and their heirs and as against those taking by gift or devise or those having notice thereof although not acknowledged or recorded. Parol lease for one year or less is valid. (RIGL 34-11-1). Landlord or authorized agent must provide residential tenants and lessees name, address, and telephone number of manager of property and legal owner of property or of person authorized to act on behalf of owner for service of process and receipt of notices and demands. (RIGL 34-18-20). Landlord who is not resident of state must designate agent for service of process. (RIGL 34-18-22.3).

Rent.

If leased building is destroyed, tenant may quit premises and cause termination of rental agreement. Rent paid in advance is returned. (RIGL 34-18-33). Security deposits are permitted. (RIGL 34-18-19). Surrender by tenant and acceptance by landlord does not release tenant from liability for rent accrued at time of surrender. (46 R. I. 242, 126 A. 559). When rent in arrearage for 15 days, landlord may after five days' written notice institute eviction action in District Court or appropriate housing court and obtain judgment for possession and actual damages. Under certain circumstances, attorney's fee may be recovered. (RIGL 34-18-35). Right of landlord to reenter and repossess premises abrogated by statute. (RIGL 34-18-44 and RIGL 34-18.1-15). Moving costs to be paid by residential tenant when evicted by court order. (RIGL 34-18-50). If enforcing officer of any city or town that has adopted minimum housing standards has ordered repair, alteration or improvement of dwelling or has disclosed same to be serious hazard or imminent peril to health, safety and welfare of occupants, tenants may pay rent into escrow account established by enforcing officer to defray cost of correcting conditions. If rent is so paid, no action may be maintained against tenant for rent or possession. (RIGL 45-24.2-11). Residential rental agreement may not include confession of judgment, waiver of statutory rights and remedies, provision for payment of landlord's attorney's fees unless statutorily authorized, or agreement limiting liability of landlord or indemnifying against landlord's liability. (RIGL 34-18-17). 30 days notice of increases in rent, 60 days if tenant is over age 62. (RIGL 34-18-16.1).

Security Deposits.

Maximum of one months' rent; payable within 20 days of termination; waiver ineffective. No retention for ordinary wear and tear is permitted. (RIGL 34-18-19).

Residential Termination of Periodic Tenancy.

Year-to-year tenancy may be terminated on at least three months written notice prior to expiration of occupation year. Tenancy for shorter period may be terminated on at least 30 days' written notice, except that week-to-week tenancy may be terminated on at least ten days' written notice. (RIGL 34-18-37). Notice also required for termination of commercial parol tenancy. (RIGL 34-18.1-4 through 6).

Abandonment.

Upon abandonment by residential tenant, landlord to re-rent premises unless tenant responds otherwise to notice by landlord. If premises re-rented for term beginning before expiration of original term, abandoned tenancy terminates as of date of new tenancy. If landlord does not use reasonable efforts to re-rent or accepts abandonment as surrender, tenancy terminated as of date landlord has notice of abandonment. (RIGL 34-18-40).

Holding Over.

Tenancy at sufferance arises when lessee holds over after termination of lease. (46 R. I. 204, 125 A. 363). If tenant continues in possession after expiration of lease for year or for term of years, landlord may treat tenant as tenant at sufferance or at will, or as tenant from month to month or from year to year. (61 R. I. 282, 200 A. 765). After mortgage foreclosure, tenant becomes mortgagee's tenant by sufferance. (52 R. I. 33, 156 A. 515). If residential tenant unlawfully holds over, landlord may institute eviction action and obtain judgment for possession. Under circumstances of bad faith and willfulness, landlord may recover triple damages. (RIGL 34-18-38). Commercial tenants at will or by sufferance must quit upon notice in writing at day named therein. (RIGL 34-18.1-2).

Dispossession may be accomplished by court action. (RIGL 34-18-35 through 53 and

RIGL 34-18.1-9). Whenever, in action for recovery of nonresidential real property, issuance of execution is stayed by order of court or appeal is pending, tenant shall continue to pay rent due. (RIGL 34-18.1-16 to RIGL 34-18.1-19). Plaintiff does not waive his rights to obtain possession of premises by accepting such payment. (Id.). Every defendant claiming appeal shall also give bond to plaintiff. (RIGL 9-12-12).

Distraint is abolished by statute. Landlord may not enforce lien or security interest in residential tenant's household goods if perfected after 1986. (RIGL 34-18-42).

Distress.

Remedy of distress abolished by repeal of landlord self-help statute. (108 R.I. 168, 273 A. 2d 486).

Discrimination.

Inquiry may not be made of prospective residential tenant as to race, color, religion, sex, sexual orientation, gender identity or expression, marital status, country of ancestral origin, disability, age, or familial status, nor may rental be denied or terms discriminate on basis of any such factor, nor may advertisement indicate preference or limitation relating to any such factor; gender-based distinction is permissible in advertisement for, or selection of, person with whom owner, lessee, or sublessee will share rental premises. Owner may inquire as to whether prospective tenant is over age of 18. (RIGL 34-37-4). Owner of housing accommodation may refuse to rent to person based on his or her sexual orientation if housing accommodation is three units or less, one of which is occupied by owner. (RIGL 34-37-4.4). Owner may not refuse to rent to person or terminate lease solely because that person is victim of domestic violence. (RIGL 34-37-2.4).

Owner must allow handicapped person to make reasonable modifications necessary for full enjoyment of premises at handicapped person's expense. Owner may condition modification on restoration of premises conditions. Housing accommodation of four or more units constructed for first occupancy after Mar. 31, 1991 must be handicapped accessible. (RIGL 34-37-4).

Civil penalties for housing discrimination range from $10,000-$50,000. (RIGL 34-37-5).

Owners of residential structures situated on leased land have right of first refusal before owner may sell land or lease it for any purpose that would result in discontinuance. (RIGL 34-18.2-1 to RIGL 34-18.2-3).

Uniform Residential Landlord and Tenant Act.

Not adopted.

21.11 LEASES:

See topic 21.10 Landlord and Tenant.

21.12 [RESERVED]

21.13 PERPETUITIES:

Rule against perpetuities abolished by statute. (RIGL 34-11-38).

Accumulations.

See category 13 Estates and Trusts, topic 13.15 Trusts, subhead Accumulations.

21.14 PERSONAL PROPERTY:

Uniform Unclaimed Property Act adopted, effective July 1, 1987. (RIGL 33-21.1-1).

21.15 POWERS OF ATTORNEY:

Durable Power of Attorney Act adopted. (RIGL 34-22-6.1).

Statutory Form of Durable Power of Attorney for Health Care adopted. (RIGL 23-4.9-1).

Attorneys in Fact.

Conveyance or mortgage of real estate may be executed by attorney in fact acting under adequate power which has been executed, acknowledged and recorded with like formalities as for deeds. (RIGL 34-11-34). Powers concerning personal estate only need not be recorded.

Formalities.

None required for execution of power except as above.

Revocation.

No statutory provision.

Members of Armed Forces.

If over 17 may give power of attorney to be exercised during active military service during any war, declared or undeclared, in which U.S. is involved; if donor is a minor, donee is not empowered to mortgage or dispose of serviceman’s real or personal property. Actual notice of revocation required to void transaction under revoked power; MIA report is not actual notice of death absent court order. (RIGL 34-22-8 through 10).

21.16 REAL PROPERTY:

Common law estates in land are recognized, subject to certain modifications by statute.

Joint Tenants and Tenants in Common.

All gifts, conveyances or devises to two or more persons create tenancy in common and not joint tenancy, unless joint tenancy is declared, or tenancy is to such persons and the survivors or survivor of them, or to them as trustees or executors, or intention of joint tenancy manifestly appears. (RIGL 34-3-1; 82 R. I. 132, 106 A.2d 262). Joint heirs are deemed tenants in common. (RIGL 34-3-2).

Tenancies by entirety recognized. (67 R. I. 452, 25 A.2d 354). Common law rules govern validity of tenancy by entirety; husband’s creditors may attach husband’s interest but not sell it. (122 R.I. 249, 406 A.2d 1241).

Rule in Shelley’s Case has been modified so that conveyance or devise to a person for life and after his death to his heirs in fee vests an estate for life only in such first taker and a remainder in fee simple in his heirs. (RIGL 34-4-2).

No expectant estate or contingent remainder is defeated or barred by alienation or by destruction of precedent estate, except as otherwise provided for barring estates tail or in creation of estate. (RIGL 34-4-4, 5).

Real estate subject to contingent remainder, executory devise, or power of appointment may be sold or mortgaged by trustees appointed by Superior Court, upon petition of any person having estate in possession in such real estate. (RIGL 34-4-7). Contingent, executory and future interest, possibility coupled with interest, and right of entry, whether immediate or future, vested or contingent, may be conveyed or devised, except for certain qualifications applicable to estates tail. (RIGL 34-4-11).

Estates Tail.

All lands held in fee tail in possession are liable for debts of tenant in tail in his lifetime like estates in fee simple. (RIGL 34-4-14). Person legally seized and possessed of lands as tenant in tail may convey such lands in fee simple, provided intention be expressed of barring the entail and the specific land be definitely described; and life tenant may join with person having vested legal remainder in tail to convey such lands in fee simple, subject to same proviso. (RIGL 34-4-15, 16). Equitable estates tail in possession or remainder and all remainders and reversions expectant thereon, may be barred in same manner as legal estates tail. (RIGL 34-4-17). Devise in fee tail is limited to first taker whose issue receive the estate in fee simple. (RIGL 33-6-10).

Possibility of reverter or right of entry for condition broken in land reserved in deed executed after May 11, 1953, or in will of testator dying after said date, becomes void if such possibility of reverter does not become possessory interest or such right of entry is not exercised within 20 years from date of deed or death of such testator, but statute does not apply to: (1) Lease for term of years, or (2) grant, gift or devise to state, or (3) for public, charitable or religious purposes, or (4) in deed to railroad or public utility corporation. (RIGL 34-4-19, 20). No right of reverter or reentry reserved in deed executed before May 11, 1953, may be enforced by court proceeding after Dec. 31, 1987, unless reentry or reversion occurs on or before Dec. 31, 1987, or unless statement containing certain information is recorded on or before such date. (RIGL 34-4-24).

Conveyance of Real Property.

Seller of real estate required to deliver written statement disclosing condition of real estate to buyer and any agents involved with sale. (RIGL 5-20.8-1 through RIGL 5-20.8-10).

Foreign Conveyances or Encumbrances.

If deed is acknowledged or proved in manner prescribed by law of state, territory or dependency where executed, it is deemed to be legally executed and will have same effect as if legally executed. (RIGL 34-12-1).

Covenants or restrictions concerning use of land created by instrument taking effect after May 11, 1953, if unlimited in time, cease to be valid and operative 30 years after execution of such instrument. (RIGL 34-4-21). This law does not apply to conservations, easements and development rights purchased by state which are preserved in perpetuity. (RIGL 34-39-3). Any covenant or restriction directly or indirectly restricting licensed community residences for eight or fewer mentally retarded or disabled individuals are unenforceable as to such residences. (RIGL 34-4-25). Restrictive covenants which prevent establishment of low and moderate income housing as defined in c. 34-39.1 are also unenforceable. (RIGL 34-39.1-6). Restrictive covenants may not be reimposed by mere recital in conveyance instrument. (RIGL 34-11-40).

Condominium.

Condominiums created before July 1, 1982 are governed by Condominium Ownership Act (RIGL 34-36-1 et seq.) but may voluntarily accept provisions of Rhode Island Condominium Act (RIGL 34-36.1-1 et seq.) (“1982 Act”). Condominiums created on or after July 1, 1982 governed by 1982 Act. Ownership of single units in two-unit project permitted under 1982 Act. Owner of unit is entitled to undivided interest in common areas and facilities of property and is subject to assessment for proportionate share of common expenses. Prior to conveyance of any unit there must be recorded in Land Records survey map and declaration containing among other things description of land, description of building, unit number of each unit and any covenants, conditions and restrictions. Management of project is in accordance with statute and bylaws. Each unit and its percentage of undivided interest in common areas and facilities subject to separate assessment and taxation by city or town. Public offering statement required for residential units in condominiums created under 1982 Act. Public offering statement not required if units owned more than two years, condominium is composed of not more than 12 units, and owner/developer does not reserve right to include condominium as part of other real estate. (RIGL 34-36.1-4.03). Purchaser who has reasonably relied on any material misleading information may under certain circumstances and within certain time period rescind purchase agreement. Court may award punitive damages and attorney's fees. Conversions require four months notice to all tenants and one year to persons 62 or over or those who have resided in project for ten years or more. Reasonable moving costs within 50 mile radius must be paid to disabled or handicapped tenants or those 62 or over. Tenants may break leases. All tenants have right of first refusal. Owner must honor leases. (RIGL 34-36.1-4.01 through RIGL 34-36.1-4.20). Condominium association lien for unpaid assessments. (RIGL 34-36.1-3.16). Condominium associations may foreclose upon default in payment of assessment or any other charge that is lien in favor of association. (34.36.1-3.21). Land only units allowed. (defined, RIGL 34-16.1-03[29]; procedure for creation, RIGL 34-36.1-2.01[a][c]).

Marketable Record Title.

Created when any real estate has unbroken chain of title for period of 40 years, making any prior interests void and unenforceable. (RIGL 34-13.1-11).

Time-share Property.

Time share license or estate (extending over five years or more) is real property. (RIGL 34-41-1.04). More than 12 time share licenses may be created in single property only by time share instrument meeting statutory requirements (RIGL 34-41-2.01 et seq.), and creation of managing entity with statutory powers and liabilities (RIGL 34-41-3.01 et seq.). Time share law including general provisions, creation, termination, requirements for public offering statements and other protection of time share purchaser contained in c. 41. (34-41 et seq.).

Smoke Detectors.

At time of sale of residential real estate of less than eight units (including single family house), property must be equipped with smoke detector system and seller must provide buyer with inspection certificate dated within 60 days prior to sale. Failure to comply does not affect validity of transfer of title. Effective date Jan. 1, 1986. (RIGL 23-28.35-1 et seq.).

See also topics 21.05 Curtesy, Deeds, Dower, Landlord and Tenant; categories 5 Civil Actions and Procedure, topic Partition; Documents and Records, topic Records; Family, topic Husband and Wife; Mortgages, topic Mortgages of Real Property.

21.17 TRUST DEEDS:

See category 20 Mortgages, topic 20.04 Mortgages of Real Property.

22 TAXATION

22.01 ADMINISTRATION:

Administration of property taxes rests in towns and cities and their assessors. (RIGL 44-5-1).

Interstate Cooperation.

In case this state and one or more other states, having substantially similar Acts, each claims that it was decedent's domicile, tax administrator may enter into written agreement with taxing officials of such other state or states and with decedent's executor or administrator, fixing amounts to be paid each such state in full payment of all death taxes of any kind. If no agreement can be reached, act provides for arbitration proceedings. Decedent's executor or administrator may invoke act. (RIGL 44-23-27 through 32).

Reciprocal Enforcement of Tax Liabilities.

Tax liabilities due state or any subdivision may be enforced in courts of other states and other states may bring similar suits in R. I. courts to enforce tax liabilities. (RIGL 44-1-26).

Penalties.

Civil Penalties.

Penalties and interest imposed as follows:

Real and Personal Property Taxes.—See topic 22.13 Property Taxes, subhead Real and Personal Property Taxable, catchlines Taxpayer's Account, Annual Reports by Manufacturers as to Machinery and Equipment, Payment, Sale of Real Estate, and Sale of Personal Property.

Income Tax.—See topic 22.10 Income Tax, subhead Penalties.

Inheritance and Estate Tax.—See topic 22.12 Inheritance Tax.

Gift Tax.—See topic 22.09 Gift Tax.

Taxation of Financial Institutions.—See topic 22.03 Business Taxes, subhead Taxation of Financial Institutions, catchline Tax on Bank Deposits.

Sales and Use Tax.—See topic 22.17 Sales and Use Taxes, subhead Sales Tax, catchline Penalties and Interest.

Gasoline Tax.—Any distributor failing to timely pay tax shall be liable for interest at annual rate provided for in RIGL 44-1-7. Every distributor shall, on or before 20th day of each month, render report of amount of fuels purchased, sold, or used by distributor. (RIGL 31-36-7). If any person fails to file report, tax administrator shall make estimate as to amount of fuels purchased, sold or used which is subject to tax. Upon basis of this estimate, tax administrator shall determine amount required to be paid, plus penalty equal to 10%. (RIGL 31-36-9).

Cigarette Tax.—Any person who shall fail to submit reports required or who makes incomplete, false or fraudulent report shall be fined not more than $5,000 for first offense.

Payroll Taxes.—See topic 22.04 Employment Taxes, subhead Payroll Taxes, catchline Civil Penalties.

Criminal Penalties.

Every return, report, or statement made to tax administrator pursuant to law may be required to be made under oath or affirmation. (RIGL 44-1-12). In addition, following statutory penalties exist:

Income Tax.—Willful failure to file return or pay tax or willful attempt to evade tax punishable by $10,000 fine and/or imprisonment for one year except in case of income derived from violations of Rhode Island Controlled Substance Act, in which case person shall be guilty of felony, fined up to $25,000 and/or imprisoned for up to 20 years. (RIGL 44-30-94).

Inheritance and Estate Tax.—Fiduciaries subject to contempt proceedings brought by tax administrator for neglect or refusal to file returns and in certain other circumstances. (RIGL 44-23-24).

Taxation of Financial Institutions.—Various fines may be imposed upon financial institutions, individuals involved, and officers for failure to file returns, filing false statements, tax evasion and under other circumstances. (RIGL 44-14-32 through 34; RIGL 44-15-5).

Sales and Use Tax.—Person who engages in business as retailer without permit shall be guilty of misdemeanor and fined up to $5,000. (RIGL 44-19-6). Fine of up to $10,000 or imprisonment for one year, or both, for failure to file returns, filing of false statements, or tax evasion. (RIGL 44-19-31).

Cigarette Tax.—Various criminal penalties imposed by 44-20.

Gasoline Tax.—Fine of up to $10,000 or imprisonment for failure to file returns, refusal to permit examination of records, filing of false statements, or tax evasion. (RIGL 31-36-19).

Payroll Taxes.—Various criminal penalties imposed. (28-42; 28-39).

22.02 ALCOHOL, BEVERAGES AND TOBACCO TAXES:

Beverage Tax.

Imposed by RIGL 3-10-1 et seq.

Cigarette Tax.

Imposed by RIGL 44-20-1 et seq.

Little Cigar Tax.

Imposed by RIGL 44-20.2-1 et seq.

22.03 BUSINESS TAXES:

Unincorporated Business Tax.

See topic 22.10 Income Tax.

Taxation of Financial Institutions.

Tax on Bank Deposits.

Every national bank, state bank, trust company, savings bank, building and loan association, and savings and loan association (State or Federal), and loan and investment company organized under laws of this state, or having its principal place of business in this state, shall pay annual tax at rate of 6.95¢ or 6.25¢ (depending on amount of total deposits) on each $100 of deposits as defined in statute, subject to certain specified exclusions. (44-15). Credit unions shall pay annual tax at rate of 6.25¢ or 6.95¢ (depending on amount of total deposits) on each $100 of deposits, as defined in statute. (RIGL 44-15-1.2). Interest at rate determined annually by tax administrator at 2 percentage points above “prime rate” (as defined) imposed on late payments. (RIGL 44-1-7). Additional penalties ranging from 5% up to 50% imposed in event of failure to file required return or in event of filing of false or fraudulent return. (RIGL 44-15-5 through 8).

Franchise Tax.

See category 2 Business Organizations, topic 2.03 Corporations, subhead Franchise Tax.

Corporations.

See category 2 Business Organizations, topic 2.03 Corporations, subheads Business Corporation Tax and Franchise Tax.

22.03A CONTROLLED DANGEROUS SUBSTANCES TAX:

Marijuana and Controlled Substances Tax.

Imposed by RIGL 44-49-1 through 15.

22.04 [RESERVED]

22.05 EMPLOYMENT TAXES:

Federal Old Age and Survivor's Insurance Tax.

Imposed in form of "contributions" by 36-7.

Applies to cities, towns and state agencies which subscribe to federal state agreement on old-age and survivor's insurance under Federal Social Security Act.

Each city, town or agency subscribing to federal-state agreement must pay contributions equal to sum of taxes which would be imposed by 3101 and 3111 of federal insurance contribution Act. (RIGL 36-7-25).

Interest at rate of 12% per year on delinquent payments. (RIGL 36-7-25).

Payroll Taxes.

Employment Security Tax.

Imposed in form of "contributions" by 28-42 through 44.

Tax applies to every employer who, for some portion of a day (but not necessarily simultaneously) within a calendar year, has or had in his or its employ one or more individuals (irrespective of whether same individuals are or were employed in each such day).

Following are not employees within Act: Agricultural laborers; domestic servants; persons employed by son, daughter or spouse; minors employed by parents; persons employed by U.S., or any other state or by any instrumentality or political subdivision of any of these; provided, however, political subdivisions may elect to have all services of specific classes of people in their employ subject to tax and may elect to make required contributions; persons employed by any church or educational institution not institution of higher learning; persons employed in work retraining or rehabilitation programs; patients in hospitals; persons employed by charitable associations if paid less than $50 per calendar quarter; persons to whom unemployment compensation is payable under unemployment compensation system established by act of Congress; employed persons attending school or college. (RIGL 28-42-8 through 10).

Employer must pay contributions at varying rates, depending on employer's account reserve percentage and reserve ratio of employment security fund computed as of Sept. 30 (RIGL 28-42-3[17]; RIGL 28-43-1 through 8.2) of amount equal to taxable wage base (RIGL 28-43-7) (and on any excess up to amount limited in Federal Unemployment Tax Act) paid to each employee as wages within any year.

Returns for each calendar quarter must be made, and the tax shown thereby paid, to the Department of Employment Security, at Providence, not later than the last day of month following close of the quarter.

No contributions are required from employees. Lien upon employer's property in case of nonpayment of contribution. (RIGL 28-43-21).

Temporary Disability Insurance Tax.

Imposed on every employee whose employer is subject to Employment Security Act. (RIGL 28-40-1). No tax is imposed on employer, but employer must deduct tax from employee's wages, failing in which he alone is liable therefor, and transmit such tax to Department of Employment Security. (RIGL 28-40-1, 4). Lien upon employer's property in case of nonpayment of wage deduction. (RIGL 28-40-15).

Civil Penalties.

Interest at rate of 1½% per month imposed on delinquent payments for foregoing payroll taxes. (RIGL 28-43-15; RIGL 28-40-9). Penalty of $10 for each failure or refusal to file reports and 10% of amount due or $10, whichever is greater, for failure or refusal to pay contributions due. (RIGL 28-42-65 and RIGL 28-39-26).

22.06 ENVIRONMENTAL TAXES:

Taxation of Beverage Containers, Hard-to-Dispose Material and Litter Control Participation Permittee.

Imposed by RIGL 44-44-1 et seq.

Residential Renewable Energy System Tax Credit.

(RIGL 44-57-1 et seq.).

22.07 ESTATE TAX:

For decedents whose death occurs on or after Jan. 1, 2002, tax is imposed upon transfer of net estate of every resident and nonresident decedent equal to maximum credit for state death taxes allowed by 26 U.S.C. 2011. If decedent's estate contains property having tax situs outside state, tax is reduced to amount determined by multiplying tax by fraction whose numerator is gross estate excluding all property having tax situs outside state at decedent's death, and whose denominator is decedent's gross estate. (RIGL 44-22-1.1). Property has tax situs in Rhode Island if it is real estate or tangible personal property and has its actual situs in Rhode Island or is intangible property and decedent was resident.

Rates.

Tax is imposed on net estate equal to maximum credit for state death taxes allowed by 26 U.S.C. 2011 in effect as of Jan. 1, 2001. (RIGL 44-22-1.1).

Finality of Assessment.

Amount of taxes assessed by Tax Administrator is final unless appeal is taken therefrom, by written notice to Tax Administrator, by any person aggrieved within 30 days from date of mailing of notice of final assessment by Tax Administrator. (RIGL 44-23-13, 9.1).

Lien.

All property subject to estate tax is chargeable with lien for tax and interest (RIGL 44-23-13) terminating with respect to real estate, ten years after death of person whose act, failure to act, or death, gave rise to lien (RIGL 44-23-38).

Returns and Payment.

Estate tax return is due and estate taxes are payable to Dept. of Revenue, Division of Taxation, One Capital Hill, Providence, Rhode Island 02908, nine months after death of decedent; and if not paid at that time, interest shall be charged at annual rate provided in RIGL 44-1-7 from time tax is due. In addition, if taxes are not paid when due, there shall be added to amount of tax due .5% per month to maximum of 25% unless failure to pay is due to reasonable cause. (RIGL 44-23-16).

Inventory.

To be filed with tax administrator within nine months of death of decedent. (RIGL 44-23-1).

Waivers on transfers of stock in domestic corporations owned by resident decedents must be obtained from Tax Administrator.

Forms may be obtained from Dept. of Revenue, Division of Taxation, One Capital Hill, Providence, 02908.

Valuation Date.

For estate tax, same as for federal estate tax. (RIGL 44-22-1.1[d]).

Apportionment Against Inter Vivos Dispositions.

Uniform Estate Tax Apportionment Act in effect. (44-23.1).

22.08 GASOLINE AND SPECIAL FUELS TAXES:

Gasoline Tax.

Imposed by RIGL 31-36-1 through 23.

22.08A GENERATION SKIPPING TAX:

Generation Skipping Transfer Tax.

(RIGL 44-40-1 through 16). Tax is imposed on every generation skipping transfer in amount equal to amount allowable as credit for state legacy taxes under § 2602 of Internal Revenue Code. Generation skipping transfer is any transfer subject to tax imposed under 26 U.S.C. § 2601 et seq. where original transferor is resident of Rhode Island at date of original transfer, and deemed transferor is resident of Rhode Island at time of his or her death and property transferred is real or personal property in Rhode Island. For real property in any other state or personal property having taxable situs in another state, tax is reduced by amount which bears same ratio to total state tax credit allowable for federal generation skipping transfer tax purposes as value of such property taxable in another state bears to value of gross generation skipping transfer for federal generation skipping transfer tax purposes. Persons required to file federal generation skipping transfer tax return must also file return with Tax Administrator on or before last day prescribed for filing federal return. Tax is due upon taxable distribution or taxable termination as determined under applicable provisions of federal generation skipping transfer tax.

22.09 GIFT TAX:

Rhode Island gift tax has been repealed, effective for gifts made on or after July 1, 1985.

22.10 [RESERVED]

22.11 INCOME TAX:

Personal income tax on individuals, estates, and trusts imposed. (Generally RIGL 44-30-2 et seq.). Effective Jan. 1, 2002 and thereafter, Rhode Island personal income tax is imposed upon taxable income of residents and nonresidents at rate of 25% of federal tax rates. (RIGL 44-30-2). Rhode Island income of resident individual is equal to his or her adjusted gross income for federal income tax purposes as modified by RIGL 44-30-12. For period Jan. 1, 2007, through Dec. 31, 2007, and thereafter, Rhode Island taxable income is determined by deducting from federal adjusted gross income as modified by RIGL 44-30-12 Rhode Island itemized deduction amount and Rhode Island exemption amount (RIGL 44-30-2.6[c][2]). Rhode Island income of nonresident individual is determined according to provisions contained in RIGL 44-30-32. For tax years beginning on or after Jan. 1, 2006, taxpayer may elect to use alternative flat tax rate to calculate his or her personal income tax liability. Alternative flat tax rate defined. (RIGL 44-30-2.10). “Resident” and “nonresident” defined. (RIGL 44-30-5). For tax years beginning on or after Jan. 1, 2001, if taxpayer has alternative minimum tax for federal tax purposes, taxpayer must determine if he/she has Rhode Island alternative minimum tax. (RIGL 44-30-2.6[c]). Capital gains rates for assets held more than five years. (RIGL 44-30-2.7). Exemption from state income tax for writers, composers and artists residing within defined economic development zones in Providence, Pawtucket, Woonsocket, Warwick, etc. (RIGL 44-30-1.1). Credit against tax is allowed residents for income taxes paid to other states. (RIGL 44-30-18). Homeowner or renter may claim credit against Rhode Island personal income tax equal to amount by which property taxes (or 20% of gross rent) exceeds percentage of total income received by all persons of claimant’s household for taxable year, which percentage is based upon income level and household size. If allowable amount of claim exceeds income taxes due, amount of claim not used shall be treated as overpayment and be refunded. (RIGL 44-33-5). Taxpayer who files state income tax return and owns historic residence may claim income tax credit of up to 20% of certified maintenance or rehabilitation costs, which credit shall not exceed $2,000 for any single year. (RIGL 44-33.1-3). Qualifying stock options not considered “income” for Rhode Island income tax. (RIGL 44-39.3-1). Credit of 10% of rehabilitation and reconstruction costs of certified building. (RIGL 44-31-2). Nonrefundable credit to any hydroelectric developer of 10% of first $500,000 expended to install hydroelectric power generation equipment at site of any existing dam. Taxpayer who is employer shall be allowed credit equal to 50% of costs incurred solely and directly for non-worksite or worksite based basic education or vocational training programs; maximum credit of $300 per employee. (RIGL 44-46-1). Credit up to 50% of wages paid or $4,800, whichever is less, to employer of certain machine and metal trade apprenticeships for each eligible apprentice. (RIGL 44-11-41). Credit of 50% of certain job training and retraining expenses incurred to employer of certain qualifying employees. (RIGL 42-64.6-1 through 8). Credit against tax for adoption for those entitled to federal adoption credit for taxable years after Jan. 1, 2006. (RIGL 44-30-2.6).

Tax applies to nonresident individuals, estates and trusts to extent that they have income from ownership or disposition of real or tangible personal property in Rhode Island or from business or occupation carried on in Rhode Island or from gambling winnings from state lottery and from pari-mutuel betting events conducted or operated by license in Rhode Island. (RIGL 44-30-32). Federal tax liability of nonresident is apportioned. (RIGL 44-30-33).

Returns are due on 15th day of fourth month following close of taxable year. Individuals, trusts and estates required to file federal tax returns or having Rhode Island taxable income must file Rhode Island returns. Nonresident individuals, trusts and estates having Rhode Island income must file returns. (RIGL 44-30-51). If individual, trust or estate's Rhode Island income tax is expected to exceed his or its withholding and other credits by more than $250, he or it must file declaration of estimated tax. (RIGL 44-30-55). Payments of estimated tax for calendar year taxpayers are due on 15th day of Apr., June, Sept. and Jan. (RIGL 44-30-56). Employers are required to withhold tax from wages paid to resident and nonresident individuals. (RIGL 44-30-71). Returns and payments to be made to Dept. of Revenue, Division of Taxation, One Capital Hill, Providence, Rhode Island 02908. Beginning Jan. 1, 2009, tax administrator authorized to require that paid tax return preparers that prepare more than 100 RI tax returns in prior year file returns for their clients electronically. (RIGL 44-1-31.1).

Refunds may be subject to setoff under reciprocal agreements with other states and District of Columbia to facilitate interstate filing of certified debt claims and transfer of debt payment funds or to satisfy past due support obligations or obligations owed on certain education loans, advances, or over awards.

Interest.

Whenever full amount of any state tax or any portion or deficiency thereof has not been paid on date when it is due, there shall be added interest at rate of two percentage points above prime rate. Interest rate shall not exceed 21% or be less than 18%. (RIGL 44-1-7).

Penalties are provided for failure to file return, to pay tax as shown on return or to pay any amount in respect of any tax required to be shown on return which is not so shown, unless taxpayer shows that such failure is due to reasonable cause and not due to willful neglect. (RIGL 44-30-85).

Investment tax credit, employer tax incentives, and motion picture production tax credit established under RIGL 44-31-1 et seq., RIGL 44-55-2 et seq., and RIGL 44-31.2-1 et seq.

See category 2 Business Organizations, topic 2.03 Corporations, subhead Business Corporation Tax.

22.12 INHERITANCE TAX:

Rhode Island has no inheritance tax. Inheritance tax imposed under prior law was eliminated effective with estates of decedents dying on or after Oct. 1, 1980.

22.1322.15 [RESERVED]

22.16 PROPERTY TAXES:

Real and Personal Property Taxable.

Taxes upon real estate not exempt from taxation, including such property of corporations, are payable to city or town where such property is actually located. Intangible personal property is exempt from taxation by local cities and towns. (RIGL 44-3-2.1). Tangible personal property is taxable in each town or city where located for larger portion of the 12 months ending with date of assessment. If property is not situated in any one town or city for larger portion of 12 months, property is taxable where it is stored, garaged or permanently situated at time of assessment. If taxes remain in arrears at time of application or renewal, clerks may refuse to grant/renew any license created under city/town ordinances. (RIGL 44-4-24). Cities or towns may exempt retailer's inventory from taxation except upon relocation within Rhode Island. (RIGL 44-3-40). If owner of tangible personal property is unknown to assessors, but agent, assignee, or other representative is in possession, it is taxed to such representative, who shall be personally liable for tax on property in his possession and who shall have lien on property of person unknown to assessors for tax paid on unknown person's property. (RIGL 44-4-10). With specified exceptions, tax increment must be included in calculation of maximum tax city or town may levy pursuant to RIGL 44-5-2 (RIGL 45-33.2-21). Leased equipment is taxable as personal property. (726 A.2d 452). Houseboats used as principal place of residence are taxable as personal property. Individual apartments in condominium buildings are separately valued, subject to conditions prescribed by statute. (RIGL 34-36-27). See category 21 Property, topic 21.16 Real Property, subhead Condominium.

Exemptions.

See generally, RIGL 44-3-3: persons over age of 65 (RIGL 44-3-13); State and Federal land; most U.S. and Rhode Island bonds or securities (see authorizing statute in each case); real estate used for military purposes; certain items of office equipment used for manufacturing or commercial purposes subject to approval of local government (RIGL 44-3-3.1); dwelling houses actually used by officiating clergy (RIGL 44-3-3[6]); intangible personal property of any religious or charitable organization if principal or income is used for religious or charitable purposes (RIGL 44-3-3[7]); buildings and personal estate owned by any corporation and land upon which said buildings stand (up to one acre) when used exclusively for education purposes and where no part of profits therefrom is divided among owners or shareholders (RIGL 44-3-3[8]); estates, persons, and families of president and professors of Brown University for not more than $10,000 for each officer, officer's estate, person, and family included (RIGL 44-3-3[9]); burial grounds; real and personal property held for library purposes; real and personal estate belonging to or held in trust for benefit of incorporated organizations of veterans of any war to extent of $400,000; property real and personal held for or by fraternal association, entire net income of which property is used exclusively to build, furnish or maintain homes or schools for free education of members of such fraternity and their families (RIGL 44-3-3[8]); property of volunteer fire engine company in active service; property of persons unable to pay tax through infirmity or poverty; household furniture and stores of housekeeper in whole (RIGL 44-3-3[17]); manufacturer's inventory; approved air and water pollution control facilities placed in effect after Apr. 13, 1970 (RIGL 44-3-3[22]); lines, equipment, and other tangible personal property of telegraph, cable, telephone, and express corporations, but not CATV systems (RIGL 44-13-13); manufacturing machinery and equipment purchased after Dec. 31, 1974 (RIGL 44-3-3), certain land planted to forest trees (RIGL 44-3-8); manufacturers' inventories exempt from personal property tax (RIGL 44-3-3[21]); property of blind persons to extent of $6,000, subject to mandatory increase by local ordinance or automatic formula (RIGL 44-3-12); property owned by nonresidents and brought into this state temporarily to be finished and returned to owner (RIGL 44-4-10); tangible personal property owned by residents located and taxed in any other state (RIGL 44-4-10); nuclear radiation fall-out shelter to amount of $1,500 (RIGL 44-3-3[18]), aircraft for which fee has been paid to Tax Administrator under Uniform Aeronautical Regulatory Act (RIGL 44-3-3[19]); precious metal bullion (RIGL 44-3-3[23]); certain hydroelectric power generation equipment purchased after July 1, 1979 (RIGL 44-3-3[24]); and farm machinery (RIGL 44-5-42). Property of veterans and their unmarried widows in general is exempt to extent of $1,000 to $39,000, depending upon town of residence, degree of disability and status of property as domicile. Homesteads of disabled veterans exempt from taxation. (RIGL 44-3-4). Cities or towns may by ordinance provide additional exemption up to $15,000 for any veteran classified as prisoner-of-war. Proof of veterans' status need only be made once. (RIGL 30-18-2). "Gold Star Parents" (parents whose sons or daughters lost their lives as result of service in armed forces) are entitled to one exemption of $3,000. (RIGL 44-3-5). Town and city councils may provide by ordinance for adjustment of tax exemption for all persons entitled thereto in any year that town or city has real property revaluation. (Laws 1985, House Bill 5154). Towns and cities, when authorized by electors, and after notice and public hearing, may grant, within certain limitations, exemption or stabilization of amount of taxes on real estate and/or personal property used for manufacturing, commercial or residential purposes to attract out-of-state industrial or commercial enterprises. (RIGL 44-3-9; see RIGL 44-5-38[e]). Towns and cities may, by ordinance, exempt from taxation, up to $5,000, any parcel of real property located on historic stone wall(s). (RIGL 44-3-43). Towns and cities may tax farm buildings at rate that reflects actual costs incurred by town in services to those buildings. (RIGL 44-5-42). Taxpayer who owns historic home is entitled to income tax credit for certified maintenance or rehabilitation costs. (RIGL 44-33.1-2). Taxpayer who incurs qualified rehabilitation expenditures on other certified historic structure is entitled to income tax credit amount of which depends upon when structure placed in service. (RIGL 44-33.2-3). Towns and cities may, by ordinance, exempt from taxation, in whole or in part, real property situated in such city or town which is occupied by persons or families of low or moderate income. (RIGL 44-3-13.4). Towns and cities may, by ordinance, exempt from taxation, any real property classified as farmland, forest land or open space. (RIGL 44-3-32.2). Certain towns and cities authorized by special acts to grant limited exemptions to persons over 65 years of age. (RIGL 44-3-13). Certain towns and cities authorized to grant homestead exemptions for set percentages of assessed values of certain classes of real estate. (RIGL 44-5-60.1, RIGL 44-5-75, Pub. L. No. 00-029). No special exemptions for members of armed forces. Any transferor of real estate enjoying tax exemption must notify tax assessor within 90 days. (RIGL 44-3-14).

Rate of taxation upon real estate and tangible personal property other than manufacturers machinery and equipment is fixed by each city and town and varies considerably. (RIGL 44-5-1, 3). State director of revenue may, upon petition by city or town council, authorize city or town to incur indebtedness in excess of limit of 3% of taxable property of town whenever director shall determine that funds available are insufficient to pay necessary expenses. (RIGL 45-12-11). In case of manufacturers machinery and equipment limitations on rate each city or town may fix are set forth in RIGL 44-5-38.

Assessment.

Date of assessment is midnight on Dec. 31. (RIGL 44-5-1). Valuations are fixed annually as of midnight on that date (RIGL 44-5-1) at full and fair cash value or at uniform percentage thereof (not exceeding 100%) determined by assessors in each town or city (RIGL 44-5-12). Town or city may provide appeal procedure for taxpayers and abate tax in whole or part when appropriate. Town or city may provide for freezing of tax rate and valuation of taxes on real or personal property of any head of household who is 100% disabled and unable to work as of date of disability. (RIGL 44-3-15). Towns and cities required to provide for full public disclosure of effect of rate and base changes on property tax revenues and to follow certain procedures for public hearings on proposed budgets. (RIGL 44-35-1 et seq.). Assessors required to revalue all taxable real estate every tenth year after its first revaluation. (RIGL 44-5-11). Upon completion of such revaluation, city or town may adopt tax classification plan subject to specified limits. (RIGL 44-5-11.8). In case of manufacturer’s machinery and equipment, beginning with assessment of Dec. 31, 1968, valuation generally may not exceed 50% of value with certain variations. (RIGL 44-5-38). Assessment of inventory is based on average value over 12 month period ending Dec. 31. (RIGL 44-5-13). Any person aggrieved by assessment of taxes against him may file appeal with local assessor and, within 30 days after final decision by local assessor, may file petition in superior court for county in which property is located. (RIGL 44-5-26, 27). Taxpayer may challenge illegal or void tax assessment without first filing appeal with local assessor. (RIGL 44-5-27).

Notice must be given by assessors by posting printed notices of time and place of their meeting in four public places in town for three weeks next preceding time of such meeting, and advertising in newspaper with statewide circulation jointly, at least once per week for same space of time. Such notices must require every person and body corporate liable to taxation to bring in to assessors, at such time as may be prescribed, true and exact account of all ratable estate owned or possessed by him or it, describing and specifying value of every parcel of real estate as of Dec. 31 in year of last update or revaluation and personal estate as of Dec. 31 of tax year, together with such additional information as may be prescribed by assessors relative to such ratable estate as may be contained in any corporation or inheritance tax return filed with state by such person within year preceding date of assessment next prior to bringing in of such account. (RIGL 44-5-15). If any person or body corporate liable to taxation files with assessors, on or before Jan. 31 next following date of assessment, written notice of its intention to bring account, person or body may bring in to assessors account at any time between Mar. 1 and Mar. 15 next following date of assessment. (RIGL 44-5-15). In case any person or body corporate fails to file any intention, that person or body is deemed to have waived its right to file account. (RIGL 44-5-15).

Every person bringing must make oath before notary public or other person authorized to administer oaths that account contains, to best of his knowledge and belief, true and full account and valuation of all ratable estate owned or possessed by him; and whoever neglects or refuses to bring in account, if overtaxed, has no remedy therefor (RIGL 44-5-16; for contents required in account, see 93 R. I. 372, 176 A.2d 69; 95 R. I. 471, 188 A.2d 91), except that if his real estate has been assessed at value in excess of value at which it was assessed on last preceding assessment day, whether then owned by him or not, and has been assessed at value in excess of its full and fair cash value, or if tax assessed is illegal in whole or in part, aggrieved person, whether or not he has filed account, may within three months after last day appointed for payment without penalty of such tax, or first installment thereof, file petition in Superior Court for relief from such assessment (RIGL 44-5-26 through 31). Taxpayer filing return has right to court review, and shall not be denied review of valuation of one class of property (real estate or personalty) by reason of inadequacy or inaccuracy of listing of other class, or if inadequacy or omission from listing is inadvertent or not substantial. (RIGL 44-5-16).

Annual Reports by Manufacturers as to Machinery and Equipment.

Manufacturers must file on or before Oct. 1 of each year with town or city tax assessor, report (on prescribed form) containing value of all machinery and equipment, its net book value and accumulated reserve for depreciation. Substantial civil penalties for failure to file. (RIGL 44-5-38[7]).

Cancellation of erroneous, illegal or uncollectible taxes may be made by town or city body authorized by this section where: (1) There is mistake in assessment and tax assessors have certified fact in writing to that body, or (2) when person dies leaving no estate, or removes from state and owns no interest in property within state, and tax collector certifies facts in writing to that body, or (3) when such body is advised by town solicitor by written opinion that tax is illegal, and such opinion is concurred in by chief of division of state taxation. (RIGL 44-7-14).

Payment.

The time for payment of taxes on real estate and tangible personal property is fixed by the city or town ordinance ordering the assessment, which also fixes the penalty, not exceeding 12% per annum, for not paying at appointed time. (RIGL 44-5-5, RIGL 44-5-9).

Collection.

Made by towns and cities.

Lien.

Taxes assessed against any person in any town, for either personal or real estate, constitute lien on real estate therein for three years. Lien terminates at expiration of three years if estate has in meantime been alienated and instrument alienating same has been recorded; otherwise, it continues until recorded alienation thereof. Lien is superior to all other liens or interests except easements and restrictions. (RIGL 44-9-1). Liens may be assigned either individually or in bulk for consideration. (RIGL 44-5-61). Certificate of tax liens on real estate procurable from collectors. (RIGL 44-7-11).

Fire, water, sewer, road and lighting district taxes assessed against person on either real or personal estate pursuant to act incorporating such fire district, constitutes lien upon real estate therein for three years after assessment, and if real estate is not aliened, until same are collected. (RIGL 44-9-3).

Marshalling.

If any person is taxed for several parcels of real estate, no parcel is liable for any tax assessed against any other parcel. If person is taxed for both real and personal estate in same tax, whole tax may be collected out of either real or personal estate. If any person is taxed for several parcels of real estate and for personal estate in same tax, tax on personal estate may be collected out of real estate, and each of parcels shall be liable for payment of tax assessed against it, together with portion of tax on personal estate as assessed value of parcel bears to aggregate values of all parcels. (RIGL 44-9-2). In case of life estate, interest of tenant for life shall first be liable for tax, and remainderman, if assessed, shall be secondarily liable. (RIGL 44-7-19).

Sale of Real Estate.

If taxes are not paid, collector sells at public auction smallest undivided part of land (but not less than 1%) which will bring amount necessary to pay tax, interest, costs and other charges, or whole thereof if no person offers to take undivided interest, after notice has been given of time and place of sale. Notice shall be given by posting, at least three weeks before time of sale, in two or more public places in town, and by publishing once, at least three weeks before date of advertised sale, in newspaper published in town, or in county, statement concerning time and place of sale, real estate liable for taxes, name of person against whom real estate was assessed, list and adequate description of parcel or parcels to be offered for sale, and thereafter by giving weekly formal legal notice, and if sale is postponed, by providing, at least one week prior, formal legal notice giving new date of sale. Any notice of sale shall inform any party entitled to notice of its right of redemption, explain how to exercise right of redemption, and forfeiture that might result from failure to exercise right of redemption. (RIGL 44-9-8 through 9). Collector must also notify person or general partnership taxed, whether or not resident of state, of time and place of sale by first class mail not less than 90 days before date of sale or adjournment of sale, and again by certified mail not less than 40 days before date of sale or adjournment of sale. Copies of such notices shall also be sent simultaneously to Rhode Island Housing and Mortgage Finance Corporation. Failure to so notify Rhode Island Housing and Mortgage Finance Corporation will nullify any tax sale of property. (RIGL 44-9-10, 11). Notice must inform recipient of its right of redemption and explain manner in which right shall be exercised and any penalties or forfeiture that may occur upon failure to exercise right of redemption. (RIGL 44-9-9). Only person or entity failing to receive notice pursuant to RIGL 44-9-9 through 11 shall be entitled to raise issue of lack of notice or defective notice to void tax sale. (RIGL 44-9-11). Property owner can bring separate action to challenge tax sale based on inadequate notice of tax sale itself within one year of decree of foreclosing owner’s right of redemption. (870 A.2d 424).

If at time and place fixed for sale, no one bids amount equal to tax, interest, costs and expenses owing, collector then and there makes public declaration of such fact and if no bid is forthcoming, he then and there gives public notice that he purchases for town or city property for amount sufficient to cover tax, charges, and expenses of levy and sale. (RIGL 44-9-14). Collector may take land for municipal purposes if tax not paid within 14 days after demand upon 14 days notice. (RIGL 44-9-8.1). City or town holding tax title may foreclose right of redemption upon finding of constructive abandonment. (RIGL 44-9-25.2).

Taxes Subsequent to Sale.

After sale to town or city and until time of redemption or foreclosure of right, taxes continue to be assessed; and taxes remain lien on property and bear interest as do other taxes. All taxes and charges levied subsequent to sale to town or city are added to amounts required to be paid when real estate is redeemed or purchased. (RIGL 44-9-17).

Sale of Personal Property.

Collector may distrain personal property, except such as is exempt from attachment or distress by state or federal law, and may sell same in manner provided by statute. (RIGL 44-8-1).

Notice.

Collector must give notice of time and place of sale to be left at last and usual place of abode in state. Collector shall also advertise sale once a week for three successive weeks in newspaper published in town or county and post notices in three public places in town at least 20 days prior to appointed time of sale. (RIGL 44-8-2).

Motor Vehicles.

See category 23 Transportation, topic 23.01 Motor Vehicles, subhead Motor Vehicle Taxes.

Persons out of State.

If any person legally taxed departs state, leaving no property liable for tax, collector may summon attorney, agent, factor, trustee or debtor of such person before district court to declare on oath how much of property, if any, is in his possession; and if sufficient, he or she shall pay tax and charges, or deliver to collector sufficient property therefor. (RIGL 44-8-7).

If any person summoned neglects to appear, or refuses to make oath, or having made oath refuses to pay such tax and charges, or to deliver sufficient property therefor, if such he has, District Court shall grant to collector warrant of distress against proper goods and chattels of person summoned and collector may distrain and sell same wherever found. (44-8.8).

Corporations.

If any corporation shall neglect for 30 days to pay tax imposed upon it, general treasurer shall issue his warrant of distress against corporation (RIGL 44-8-10) directed to sheriff and commanding him to collect from corporation amount of tax. Officer charged with service of warrant shall levy and collect the sum therein named, by attachment and seizure of real and personal estate of such corporation and shall sell same at public auction, giving 30 days previous notice of time and place of sale by posting two notices in town in which corporation is located. (RIGL 44-8-11).

Collection by Suit.

Collector of any tax may recover amount thereof in action against person taxed. (RIGL 44-7-12). Attorney’s fees awarded to prevailing party in municipal tax levy action if court finds no justiciable issues. (RIGL 44-7-12). If judgment rendered for collector, execution shall issue against real and personal estate of defendant, and levy of execution upon any real estate upon which lien for tax is created by this chapter, shall be deemed to relate back and take effect from time of commencement of such lien. (RIGL 44-7-13).

Resale by Town.

Treasurer of any town holding tax title, upon payment of sum not less nor more than amount necessary for redemption, may assign and transfer tax title to any person. Notice of intended assignment must be given by treasurer to owner of record at his last known address by registered mail at least ten days prior to assignment, but failure to receive notice does not affect validity of assignment. Assignment must be recorded within 60 days from its date to be prima facie evidence of all facts essential to its validity. Treasurer may transfer and assign tax titles held by city or town to redevelopment agency of such city or town for no consideration. (RIGL 44-9-18.2).

Sale by Town Treasurer without Foreclosure.

After one year from purchase by town of any parcels for nonpayment of taxes, if treasurer is of opinion parcels are of insufficient value to meet taxes, treasurer may sell all parcels at public auction to highest bidder, first giving notice of time and place of sale in some public newspaper at least once a week for three successive weeks before such sale. Treasurer's deed is not valid unless recorded within 60 days after sale. If so recorded, title taken under this section is absolute. (RIGL 44-9-36). If amount received is more than tax, interest, and charges and subsequent taxes and assessments, together with expenses of sale, balance is deposited with town treasurer to be paid to person entitled thereto if demanded within five years; otherwise, it inures to town. (RIGL 44-9-37). If there are no bids or no bid is deemed adequate, or if purchaser fails to pay bid within ten days, town is deemed purchaser of land and title is absolute if treasurer's deed is recorded within 60 days after sale. (RIGL 44-9-38).

Holder of title may file petition to establish title acquired under RIGL 44-9-36 or RIGL 44-9-38 in Superior Court. (RIGL 44-9-40).

Tax deed of collector conveys title to property subject to right of redemption. Conveyed title shall, until redemption or until right to redeem is foreclosed, be held as security for repayment of purchase price, and all intervening costs and charges, with interest. (113 R. I. 598, 324 A.2d 617). Such deed is not valid unless recorded within 60 days after sale, and if recorded, is prima facie evidence of all facts essential to title thereby conveyed. No sale shall give to purchaser any right to either possession or rents until expiration of one year after sale. (RIGL 44-9-12). Upon expiration of one year after sale of tax title, holder jointly and severally liable for property and responsible for compliance with law. (RIGL 44-9-12).

Tax title conveyed by tax collector's deed, after foreclosure of right of redemption by decree of Superior Court, is absolute. Action to vacate decree must be brought within one year. (RIGL 44-9-24). Action to vacate only instituted for inadequacy of notice of petition amounting to denial of due process or because taxes had been paid or were not due because property was exempt from taxes.

Redemption Prior to Foreclosure Proceedings.

May redeem from town at any time prior to filing of petition for foreclosure under RIGL 44-9-25 if land purchased by town and not assigned, by tendering to treasurer sum for which it was purchased, plus penalty of 10% of purchase price if redeemed within six months of sale, and additional 1% for each succeeding month, together with all charges lawfully added for taxes and expenses. (RIGL 44-9-19). Any person may redeem by tendering to purchaser other than town, at any time prior to filing of petition for foreclosure, original sum and any intervening taxes which have been paid plus interest at rate of 1% per month and costs paid by him, plus penalty as provided in RIGL 44-9-19. May also redeem by tendering to treasurer sum which he would be required to pay to purchaser or to assignee of tax title, in which case town treasurer is constituted agent of purchaser or assignee. (RIGL 44-9-21).

Foreclosure of Right of Redemption.

After one year from sale of land, whoever then holds title may bring petition in Superior Court for foreclosure of all rights of redemption. (RIGL 44-9-25). Purchaser of land sold for taxes may bring immediate petition for foreclosure of right of redemption upon finding by Superior Court of abandonment. (RIGL 44-9-25.1).

Examination of Title.

Upon filing of petition, petitioner shall, at his own cost, select, with approval of court, title company or attorney familiar with examination of land titles to make examination of title sufficient only to determine persons who may be interested in title. Petitioner shall give notice of pendency of petition to all persons appearing interested, notice to be sent by certified or registered mail, return receipt requested. Court may order other and further notice by publication or otherwise. (RIGL 44-9-27).

Default Order.

After return day is fixed, at least 20 days after issuance of notice, court shall, on motion of petitioner, enter order defaulting all persons failing to appear and decreeing that petition as to them is confessed. (RIGL 44-9-28).

Redemption by leave of court may be had by any person claiming an interest and desiring to redeem by filing an answer on or before return day or within such further time as may be allowed by court, setting forth his right in land and an offer to redeem upon such terms as may be fixed by court. After hearing court shall allow party to redeem upon showing of financial capacity to redeem, followed by payment to petitioner of sum fixed by court. (RIGL 44-9-29).

Decree barring redemption forever is entered if default is entered under RIGL 44-9-28 or if redemption is not made within time and upon terms fixed by court under RIGL 44-9-29, or if at time of hearing, person claiming right to redeem does not appear to urge claim, or if upon hearing court determines facts shown do not raise entitlement to redemption. (RIGL 44-9-30).

Validity of tax title may be questioned by any person claiming interest by filing answer in proceeding on or before return day or else be forever barred from contesting or raising question in any other proceeding. (RIGL 44-9-31).

Real Estate Conveyance Tax.

Tax imposed at rate of $2 per $500 of consideration paid. Payment of tax evidenced by affixing of documentary stamps to every original instrument by person recording instruments. (RIGL 44-25-1 - 8).

22.17 SALES AND USE TAXES:

Sales tax

Imposed upon sales at retail at rate of 7% of gross receipts of retailer from sales, which tax must be added by retailer to sale price. Hotel tax of 5% is imposed upon consideration charged for occupancy of any space furnished in any hotel in Rhode Island. Hotel tax is in addition to any sales tax imposed. (RIGL 44-18-36.1). If sole use of property is rental, purchaser or lessor may elect to pay tax as measured by cost of property to him; upon subsequent sale, seller shall include full amount of selling price in his gross receipts and shall pay tax thereon. (RIGL 44-18-8, RIGL 44-18-27). Taxes collected constitute trust fund for state in hands of retailer. (RIGL 44-19-35 through 37). Regulations and Rules re Sales and Use Tax issued by Tax Administrator.

Exemptions from Sales Tax.

Sales to U.S., its agencies and instrumentalities (RIGL 44-18-31) and to common carrier, shipped by seller via purchasing carrier to point outside state (RIGL 44-18-33). Sales of certain renewable energy products. (RIGL 44-18-30[57]). Gross receipts from sales of energy produced, transmitted or sold by Rhode Island Port Authority and Economic Development Corporation. (RIGL 44-18-40.1). Sales by writers, composers and artists in statutorily defined economic development zones. (RIGL 44-18-30B).

General Exemptions Applicable to Sales and Use Taxes.

Sale and storage, use or other consumption (A) which this state is prohibited from taxing under U.S. or state constitution; (B) of any newspaper; (C) of meals served by educational institutions or entities under contract to educational institutions, to students or teachers; (D) (1) of nonreturnable containers sold without contents to persons who place contents in container and sell contents with containers, (2) of containers with contents if sale price of contents is not required to be included in measure of taxes imposed by this act, (3) of returnable containers when sold with contents or when resold for refilling; (E) of tangible personal property by nonprofit hospitals, nonprofit educational institutions, religious organizations, orphanages, charitable organizations, interest-free loan associations not operated for profit, and following vocational student organizations: Distributive Education Clubs of America (DECA), Future Business Leaders of America/Phi Beta Lambda (FBLA/PBL), Future Farmers of America (FFA), Future Homemakers of America/Home Economics Related Occupations (FHA/HERO), Vocational Industrial Clubs of America (VICA), and Parent-Teachers Associations; (F) of gasoline and other products taxed under 31-36; (G) of computer software, tangible personal property, electricity, gas, steam, refrigeration and water when purchased for manufacture into finished product for resale and becomes ingredient, compound or integral part of product or if property or service is consumed in process of manufacturing for resale; (H) to or by state or any political subdivision thereof; (I) of food products for human consumption, except meals consumed on premises and “to go” meals; (J) of medicines sold on prescription and proprietary medicines; (K) of crutches, artificial limbs, dentures, spectacles and eyeglasses, artificial eyes and hearing devices and other prostheses or orthopedic appliances designed to be worn on person; (L) of coffins, caskets, shrouds, or other burial garments which are ordinarily sold by funeral director; (M) of motor vehicles to nonresidents for registration outside of state or to paraplegics; (N) in public buildings of products or wares by blind people; (O) of property bought for air and water pollution control; (P,Q,R) rentals charged by certain charitable, religious and educational organizations and by nursing homes and hospitals; (S) motor vehicle and adaptive equipment for persons with disabilities; (T) of heating fuels for domestic purposes; (U) of electricity, gas and other fuels used for domestic purposes; (V) of tools, dies and molds, and machinery and equipment (except replacement parts), used directly and exclusively in manufacturing (exemption is effective in 20% increments over four-year period beginning July 1, 1974); (W) of trade-in allowance on purchase of new or used automobile, or of proceeds from insurance claim on stolen or damaged motor vehicle, or of proceeds received from manufacturer of automobile for repurchase of said automobile; (X) of precious metal bullion; (Y, Z) sales of certain vessels primarily engaged in interstate or foreign commerce and certain vessels used exclusively for commercial fishing or vessels with Rhode Island party and charter boat license and sales of provisions, supplies, and materials for maintenance and/or repair of such vessels; (AA) articles of clothing and footwear; (BB) of water furnished for domestic use by occupants of residential premises; (CC) of any canonized scripture of any tax exempt nonprofit religious organization; (DD) of boats or vessels sold to nonresidents, provided that nonresidents transport boat within 30 days after delivery by seller outside state for use thereafter solely outside state; (EE) of items not more than $20 by nonprofit organizations for purposes of youth activities, which organization is formed to sponsor and support; and by accredited elementary and secondary schools for purposes of schools or of organized activities of students enrolled therein; (FF) machinery or equipment used directly for commercial farming and agricultural production; (GG) of compressed air; (HH) of flags; (II) of motor vehicles and adaptive equipment to certain veterans; (JJ) of textbooks; (KK) of tangible personal property and supplies used in on-site hazardous waste recycling, reuse or treatment; (LL) of promotional and product literature of boat manufacturers shipped to points outside Rhode Island which: (i) Accompany product when sold; (ii) are shipped in bulk to out-of-state dealers for use in sale of product; or (iii) are mailed to customers at no charge; (MM) of food items paid for with U.S. government food stamps; (NN) of certain transportation charges; (OO) of trade-in value of boats; (PP) of equipment used for research and development; (QQ) of coins; (RR) of farm construction materials; (SS) of telecommunications carrier access service when purchased by telecommunications company from another telecommunications company to facilitate provision of telecommunications services; (TT) of boats or vessels brought into state for winter storage; (UU) tangible personal property used to display any jewelry product; (VV) of boat and vessels if federal luxury tax on boats is reduced prior to Oct. 1, 1993; (WW) of toll-free calls terminating in state made to, or for benefit of, regulated investment companies by eligible companies employing no less than 500 people in state; (XX) of mobile and/or manufactured homes; (YY) of manufacturing business construction material; (ZZ) of tangible personal property and supplies used in process or preparation of floral products and floral arrangements; (AAA) of horse food products; (BBB) of non-motorized recreational vehicles sold to nonresidents; (CCC) of sprinkler and fire alarm systems in existing buildings; (DDD) of aircraft; (EEE) of renewable energy products; (FFF) of returned property; (GGG) of dietary supplements; and (HHH) of agricultural products for human consumption. (RIGL 44-18-30).

Permit.

Every person making sales at retail within state must file application with Tax Administrator for permit for each place of business. Fee $10. (RIGL 44-19-1). Temporary permits may be granted to persons desiring to engage in business for limited period or to persons without permanent or fixed place of business within state. (RIGL 44-19-3). Upon written notice Tax Administrator may cancel permits which have been inactive for 12 consecutive months. (RIGL 44-19-4). Engaging in retail business in state without proper permit is punishable by fine or imprisonment or both (RIGL 44-19-6); state superior court may enjoin any person from engaging in retail business without permit (RIGL 44-19-5.1). Prima facie evidence of engaging in retail business without permit is continuing business with revoked sales permit. (RIGL 44-19-5.1).

Resale Certificates.

Presumed that all gross receipts are subject to sales tax, use of all tangible personal property subject to use tax, and all tangible personal property sold in state is sold for use or consumption in state, until contrary established. Burden of proving contrary is upon person who makes sale and purchaser, unless person who makes sale takes from purchaser certificate to effect that purchase was for resale. (RIGL 44-18-25).

Payments of sales and use taxes must be made monthly to Tax Administrator on or before 20th day of month next succeeding month for which return is required to be made. Where liability for six consecutive months averages under $200 per month, quarterly returns, when specially authorized by Administrator. (RIGL 44-19-10). Limited exclusion of certain small sales by retailer when 60% of sales are less than minimum amount on which retailer can collect tax. (RIGL 44-19-39). Every promoter must file monthly report for each show at which he operates. (RIGL 44-19-10).

Penalties and Interest.

Interest on deficiency computed at rate of two percentage points above prime rate for prior calendar year. (RIGL 44-1-7). Sales and use tax deficiency due to negligence or intentional disregard of law, penalty of 10% of deficiency; if due to fraud or intent to evade, penalty of 50%. (RIGL 44-19-12). Concurrent application of interest provisions is limited. (RIGL 44-19-10). Interest on any taxes for periods covered under amnesty provisions of c. 44-6.1 computed at rate of 11½ %. (RIGL 44-6.1-4). Penalty for misappropriation by retailer or any agent responsible for collection of sales or use tax is fine of not more than $10,000 or imprisonment not exceeding one year or both. (RIGL 44-19-37).

Provision for Review.

Any person aggrieved by determination of Tax Administrator may request hearing. (RIGL 44-19-17 through 19). Provision for appeal of Tax Administrator's decision to Sixth Division District Court is made by RIGL 44-20-48.

Until collected, sales and use taxes constitute lien on real estate, valid against bona fide purchaser, lessee or mortgagee, if recorded. (RIGL 44-19-21). Sale or transfer by any taxpayer of major part of value of assets of taxpayer other than in ordinary course is fraudulent and void as against state, unless taxpayer, at least five business days before sale or transfer, notifies Tax Administrator of proposed sale or transfer and price, terms, and conditions thereof. (RIGL 44-19-22). Director of department of business regulation is agent for service of process on nonresident sellers engaging in business in state in sales and use tax enforcement cases. (RIGL 44-19-34).

Use tax is imposed on storage, use or other consumption in state of tangible personal property purchased from any retailer, delivered in state or subject of business transaction in state at rate of 7% of sale price of property. (RIGL 44-18-20). Hotel tax of 5% of total charged for occupancy is imposed, which is in addition to any sales tax imposed. (RIGL 44-18-36.1). Resident doing business with nonresident contractor must withhold 3% of contract price until 30 days after contractor has completed contract and has requested Tax Administrator to audit records for particular project. (RIGL 44-1-6).

Storage and use do not include keeping tangible personal property shipped or brought into state for purpose of subsequent transporting property outside state for purposes of processing, fabricating or manufacturing into other property for use outside state. (RIGL 44-18-11).

Purchaser of motor vehicle must pay sales or use tax as prerequisite to registration. (RIGL 31-3-4). In cases involving theft, total loss, or destruction of motor vehicle occurring 120 days from date of purchase, use tax previously paid may be credited against amount of use tax due on replacement vehicle; or, if no replacement vehicle is purchased, purchaser will be entitled to refund.

Exemptions from Use Tax.

No tax is payable in any casual sale when: (1) transferee or purchaser is member of seller’s immediate family; (2) transfer or sale is made in connection with organization, reorganization or dissolution or partial liquidation of business entity; (3) sale or transfer is of trailer, other than camping trailer, of type ordinarily used for residential purposes and commonly known as mobile home; (4) transferee or purchaser is otherwise exempt under RIGL 44-18-30; RIGL 44-18-20.

Registration.

Every retailer selling tangible personal property for storage, use or other consumption in this state must register with Tax Administrator. (RIGL 44-19-7).

Streamlined Sales and Use Tax Agreement as created on Nov. 12, 2002 and as amended by Member States of Streamlined Tax Project adopted with exception of Arts. III, IV, and VI which are adopted as modified. (RIGL 44-18.1-1 et seq.).

22.18 STAMP AND SEAL TAXES:

Stamp Tax.

No stock transfer tax. As to tax on conveyances, see topic 22.13 Property Taxes, subhead Real Estate Conveyance Tax.

22.18A TAX LIENS:

Revised Federal Tax Lien Registration Act.

Not adopted. Local filing in office of recorder of deeds in city or town where property located. (RIGL 34-34-1).

23 TRANSPORTATION

23.00A BICYCLE FACILITIES:

Types of Roads.

Types of roadways designated for use by bicyclists defined. (RIGL 31-1-23).

23.01 MOTOR VEHICLES:

Licensing of operators and registration and operation of all motor and other vehicles upon highways of this state are governed by Title 31-1 through 46. Cc. 1 through 27 cited as “The Motor Vehicle Code Act.” Copies of act may be obtained from office of Department of Revenue, Division of Motor Vehicles, 286 Main Street, Pawtucket, RI 02860.

Vehicle license required for motor vehicles, motorcycles, motorized bicycles and tricycles (31-3.2 et seq.), trailers and other mobile equipment owned by resident when operated within state for period of 30 days (RIGL 31-3-2). Resident is any person who owns, rents or leases real estate within state as his residence and either engages in trade, business or profession in state or enrolls his children in school in state for period exceeding 90 days, or any person who is registered or is eligible to register to vote. (RIGL 31-1-18). Two number, fully reflective plates required, one on front and one on rear, except rear plate only required on motorcycle, trailer, semitrailer and certain other vehicles. (RIGL 31-3-10, 18). Courtesy plates are available subject to restrictions of RIGL 31-3-17.1. Veteran’s plates available subject to RIGL 31-3-46, RIGL 31-3-48 and RIGL 31-3-53. Distinguished service plates are available for recipients. (RIGL 31-3-48.1). Alternative design plates available. (RIGL 31-3-59). National Guard member’s plates available. (RIGL 31-3-62). Volunteer fire company plates available. (RIGL 31-3-17). Amateur radio operator plates available. (RIGL 31-3-39). Combination plates for vehicles to be driven for both commercial and pleasure purposes, are available subject to RIGL 31-3-62. Police plates available. (RIGL 31-3-45.1). Plates honoring Dr. Martin Luther King available. (RIGL 31-3-82). WaterFire Providence plates available. (RIGL 31-8-82). License required annually. New plates for current year may be displayed only after expiration of old registration. (RIGL 31-3-33). Division must be notified of all changes of name and address. (RIGL 31-3-34, 35). Plates are issued by Division of Motor Vehicles, State Office Building, Providence. Person registering motor vehicle must furnish evidence that any tax due in connection with sale, storage, use or other consumption of motor vehicle, has been paid in accordance with Tax Administration’s regulations; failure to pay any such tax due is ground for suspension of registration. (RIGL 31-3-4). Liability insurance or proof of financial security required for registration of motor vehicle. (RIGL 31-47-1 - 19). Division of Motor Vehicles will not register or renew registration of vehicle unless certificate of title has been issued by Division to owner. (RIGL 31-3.1-1). Registration stickers required on plates. (RIGL 31-3-33). All registry of motor vehicle offices will process all applications for and issuance of commercial license plates. (RIGL 31-3-10). Registration fees prescribed. (RIGL 31-3-33). City and town police vehicles exempt from registration fees. (RIGL 31-6-10). Temporary registration plates. (RIGL 31-3-17.3). Permanent and temporary handicapped plates may be issued upon proof of disability to registry of motor vehicles. (RIGL 31-28-7, 8). Disabled veteran plates may be issued after certification of eligibility from Veterans’ Administration or presentation of other satisfactory documentation of eligibility. (RIGL 31-28-7). No person against whom has been assessed personal property tax or fire district tax on motor vehicle, which tax remains unpaid per list furnished by city or town tax collectors to Division of Motor Vehicles, may register any such motor vehicle. (RIGL 31-3-6). No exemption from license requirements for members of

Armed Forces. Registration fees are prescribed. (RIGL 31-6-1, 11, 12). Registration may be refused if there has been surrender of registration and subsequent application to evade local taxes. (RIGL 31-3-5.1). Operation with auto body repair shop plates. (RIGL 31-3-20.1).

Operator's or Chauffeur's License.

License must be obtained from Division by all persons operating on highways of this state (RIGL 31-10-1 et seq.) (for motorcycles and scooters RIGL 31-10.1-1.1 et seq.), except qualified nonresident (see subhead Nonresident Operator, infra), U.S. Government employee operating government vehicle on official business or person operating farm or construction equipment. (RIGL 31-10-1, 2). Persons in armed service may obtain special license, at no fee, for duration of their term of service. (RIGL 31-10-8). First license to operate motor vehicle is temporary license expiring on birthday of licensee in second year folllowing issuance of temporary license. Every operator's and chauffeur's license issued after expiration of temporary license expires on birthday of licensee in fifth year following issuance of license, with exception of any person 75 years of age or older whose license expires on birthday of licensee in second year following isuance of license. Licenses are renewable on or before expiration upon application and payment of fee (RIGL 31-10-30, 31). Any person 16 or older may obtain operator's license subject to graduated licensing requirements (RIGL 31-10-6), and, 18 or older, chauffeur's license (RIGL 31-10-3). All residents, as defined under RIGL 31-1-18, must obtain Rhode Island operator's or chauffeur's license within 30 days of establishing residency. (RIGL 31-10-1). Persons exempt from licensing. (RIGL 31-10.3-16). All U.S. citizens or immigrants between ages of 18 and 26 must be registered in compliance with requirements of § 3 of "Military Selective Service Act", 50 U.S.C.App. 451 et seq., when applying for driver's license or renewal or identification card or renewal. (RIGL 31-10-47). Operators and passengers must wear safety belts. (RIGL 31-22-22). Children under age eight, less than 57 inches in height, and less than 80 pounds must be in back seat in US Department of Transportation approved (standard 213) child passenger restraint system. Children under eight but at least 57 inches in height, or at least 80 pounds must be in back seat and properly wear safety belt and/or shoulder harness approved by DOT (Federal Standard 208). (RIGL 31-22-22). Special license needed to operate motorcycle; minimum age is 16. (RIGL 31-10.1-1). Learners must obtain instruction permit. (RIGL 31-10-6). Permittees must wear safety belt. (RIGL 31-10-6). Persons applying for first time receive one-year "First License". (RIGL 31-10-26). Driver education course provided for and required for original licensee under 18. (RIGL 31-10-19, 20). Motorcycle driver education course required for applicants for first motorcycle operator's license. (RIGL 31-10.1-1.1). License may be cancelled, suspended or revoked by Division for certain enumerated causes. (RIGL 31-11-1 through 15, RIGL 31-11-25). Licenses may be voluntarily surrendered. (RIGL 31-10.2-1). Licensees must have license in immediate possession when operating motor vehicle and must display license on demand of police officer or inspector of registry. (RIGL 31-10-27).

Minor under 18 must have license or instruction permit application signed and sworn to by father, mother, guardian, adult husband or wife, or foster parent, who is resident of Rhode Island and qualified to be supervising driver or in event there is none, then by other responsible person. (RIGL 31-10-14). Minor seeking provisional license must first complete 50 hours of driving experience (ten of those hours at night) while driving with supervising driver. (RIGL 31-10-6). Any negligence or willful misconduct of minor under 18 is imputed to person who signed his application, and such person is jointly and severally liable with minor for any damages caused by such negligence or willful misconduct. Except that, while proof of minor's financial responsibility with respect to operation of motor vehicle owned by him or by owner is maintained with Division, liability limited to command amounts prescribed (see subhead Proof of Financial Responsibility, infra), person not subject to liability under act. (RIGL 31-10-15, 16).

License of minor under 18 may be cancelled by any person who signed minor's application by filing with Division verified written request therefor and upon cancellation such signor is relieved of liability for minor's subsequent negligence or misconduct. (RIGL 31-10-17). Upon death of person signing application, Division must cancel license. Provision does not apply after age 18. (RIGL 31-10-18).

Use of cell phones by minors while operating motor vehicles prohibited. (RIGL 31-22-11.9).

Uniform Commercial Drivers' License Act in effect. (RIGL 31-10.3-1 through 36).

Manufacture or distribution of fraudulent identification card (as defined in RIGL 11-18-20.1 and 3-8-6) or fraudulent license to operate motor vehicle illegal (RIGL 3-8-6.3).

Titles.

Certificate of title, issued by Division, is required. (RIGL 31-3.1-1). Title to motor vehicle passes to surviving spouse upon death of owner unless otherwise provided by will. (RIGL 31-3.1-37). Suspension or revocation of registration or title done pursuant to RIGL 31-8-4. Reregistration fee of $50. (RIGL 31-8-4).

Sales.

Seller must assign certificate of title to buyer and deliver it, along with registration card, to buyer. Buyer delivers to Division and applies for new certificate and registration. (RIGL 31-3.1-12). It is unlawful to transfer ownership of motor vehicle unless statutory form evidencing mileage that vehicle has been operated is attached to instrument evidencing transfer and sales agreement. (RIGL 31-23.2-6). Other transfer requirements are set forth in RIGL 31-4-1 to 11. **Global Warming Index Act** requires sellers and lessors of model year 2010 and subsequent model year vehicles to affix in clearly visible location label with information concerning emission of global warming gasses. (31-5.5-1 et seq.).

Liens.

Uniform Commercial Code in effect. (RIGL 6A-1-101 et seq.). Motor vehicle repairer has lien on any insurance payment due owner provided notice is sent to insurance carrier, and carrier is liable to repairer for period of one year after payment to owner. (RIGL 9-3-9 through 11). Lien for repairs may be for no greater amount than that contained in authorization for repairs signed by vehicle owner. (RIGL 34-32-1). Motor vehicle lessor has lien on insurance payments due lessee for transportation expenses covering other vehicle owned by lessee provided notice is sent to insurance carrier, and carrier is liable to lessor for one year after payment to such owner. (RIGL 9-3-12 through 14). Towing and storage charges create lien on vehicle. (RIGL 31-22-15). If towing and storage charges are not discharged within 60 days, wrecker may sell vehicle. (RIGL 31-22-16). Owner-created security interests may be perfected by application for new certificate of title (with 20 day grace period). (RIGL 31-3.1-19).

Rhode Island Automobile Repossession Act declares rights of defaulting consumers and regulated repossession of vehicles. (6-51-1 et seq.).

Abandoned Vehicles.

Any person abandoning motor vehicle on private property is guilty of misdemeanor punishable by up to $500 fine and is responsible for all costs incurred in removing vehicle. (RIGL 31-42-11).

Theft.

Maximum penalty for theft of motor vehicle is $5,000 or imprisonment for five years, or both. (RIGL 31-9-1). "Chop shop" offenses and penalties. (RIGL 31-47-1 through 3). Theft; insurance fraud reporting. (RIGL 27-49-3.1, 1997).

Motor Vehicle Theft Prevention Program.

Decals issued to identify motor vehicles not normally operating between 1 a.m. and 5 a.m. Police officers are authorized to request driver to produce valid driver's license and registration. Inability to produce documents creates presumption that operator is not authorized operator. (RIGL 31-2.1-1).

Identification Marks.

Penalty for altering manufacturer's serial or engine number or other identification marks is a fine of not more than $5,000 or imprisonment for not less than one year or more than five years, or both. (RIGL 31-9-5; RIGL 31-27-14, RIGL 31-46-6). Tow trucks must display name, address and telephone number of registered owner on both sides of vehicle. (RIGL 31-22-23).

Odometer Alteration.

Regulated by RIGL 31-23.2-1 through 13.

Operation Prohibited.

By person under 16 whether or not a resident (RIGL 31-10-3); by unlicensed operator (RIGL 31-10-1); by resident whose license has been refused, suspended, revoked, cancelled, expired, or never applied for (RIGL 31-11-18); by resident or nonresident under foreign license while right is suspended or revoked in this state (RIGL 31-11-12); by habitual offenders per RIGL 31-40-1 to 13; by any person convicted of driving under influence of liquor or drugs, resulting in death (RIGL 31-27-2.2) with increased sanctions if passenger is child under 13 (RIGL 31-27-2[d][4]); by any person under influence of intoxicating liquor or of drugs (RIGL 31-27-2); by any person who operates motor vehicle so that public is endangered, or participates in drag racing on public or private property or operates vehicle in attempt to elude traffic officer or police vehicle (RIGL 31-27-4). Penalties for driving after denial, suspension or revocation of license are enumerated in RIGL 31-11-18, RIGL 31-11-18.1 and RIGL 31-27-2. By operation of motor vehicle on state highways, operator impliedly consents to chemical test of his breath, blood or urine for determination of alcoholic content thereof or presence of controlled substances, provided there is probable cause to believe driver has been operating under influence (819 A.2d. 1256). Refusal to submit to test results in suspension of license, fine, and performance of community service. (RIGL 31-27-2.1). Evidence other than by chemical analysis allowed for conviction of driving under influence. (RIGL 31-27-2). Scientific evidence of blood alcohol level exceeding .08% is required for misdemeanor charge. (RIGL 31-27-2). Definition of alcohol and alcoholic beverages in effect. (RIGL 31-10.3-3). Other persons ineligible for licenses are enumerated in RIGL 31-10-3. No person under 21 may drive school bus or any motor vehicle transporting persons or property for pay without being licensed as chauffeur and meeting other requirements. (RIGL 31-10-5). Any person who permits minor to operate motorcycle when minor is unlicensed or where motorcycle is unregistered may be fined up to $500. (RIGL 31-27-17). Operation of motor vehicle without financial security regulated by RIGL 31-47-1 through 19.

Size and Weight Limits with Load.

Regulated by RIGL 31-25-1 through 29.

Noise Limits.

Regulated by RIGL 31-45-1 et seq.

Equipment Required.

Regulated by RIGL 31-10.1-4 through 6, RIGL 31-22-22 and -23 and RIGL 31-23-1 through 50. All new and used automobiles must be equipped with spare tire and jack. (RIGL 31-4-11).

Lights Required.

Regulated by RIGL 31-24-1 through 53. If law enforcement or police officer stops vehicle between one-half hour after sunset and one-half hour before sunrise, driver must operate interior lights until officer allows vehicle to continue operation. (RIGL 31-22-24).

Inspection.

Required of all motor vehicles and mobile equipment at least annually. Standards as to qualification as inspection stations and as to acceptable condition of motor vehicles are set forth in RIGL 31-38-1 through 20; RIGL 31-10.1-7. Emission inspection station will collect fee of $39 per vehicle. (RIGL 31-47.1-11). Vehicles containing heavy-duty diesel engines subject to enumerated inspection procedures. (31-47.2). Any motor vehicle bearing fire apparatus plates will be subject to yearly inspection. (RIGL 31-22-29). Used motor vehicles unless clearly identified as being sold “for parts only” must bear valid inspection certificate at time of sale. (RIGL 31-38-1). Motor vehicle dealers must inspect used vehicles sold at retail at time of sale. (RIGL 31-38-1). Commercial motor vehicles must meet all state and federal standards as amended or adopted by U.S. Department of Transportation. (RIGL 31-23-1).

Traffic Regulations.

Regulated by 31-12 through 31-13 and 31-15 through 31-22. RIGL 31-41-1 through 6 provides for administrative payment of certain traffic violations without personal appearance. Administrative procedures are provided for noncriminal, moving traffic violations. (RIGL 31-43-1 through 5.1). Fines for traffic offenses. (RIGL 31-41.1-4). Provision for automated traffic violation monitoring systems. (RIGL 31-41.2-1 et seq.).

Accidents.

Driver of vehicle knowingly involved in accident resulting in injury to, or death of, any person including driver of motor vehicle knowingly involved in accident with person riding bicycle, must immediately stop, return to place of accident (RIGL 31-26-1), and remain there until, if requested, he has given his name, address, and registration number, and exhibited his operator’s license to person struck, or to driver or occupant or person attending vehicle collided with and has rendered reasonable assistance to any person injured or struck. He must then immediately give notice of accident to nearby officer of local or state police (RIGL 31-26-3) and, if accident causes personal injury or death or damage to property of any one person, including himself, in excess of $1,000, within 21 days after accident forward written report to Division of Motor Vehicles on forms provided by Division (RIGL 31-26-6; RIGL 31-33-1). If driver is physically incapable of making report and is not owner of vehicle, and damage is in excess of $500, owner must make report within 21 days. (RIGL 31-33-1). If vehicle struck is unattended, driver must stop and either locate operator or owner and notify him of his name and address and that of owner, or leave, in conspicuous place, note giving such information and also statement of circumstances thereof, and then notify nearest office of local or state police. (RIGL 31-26-4). Similar requirement for accident involving domesticated animal. (RIGL 31-26-3.1). Driver of vehicle knowingly involved in accident resulting in injury to or death of any person must immediately stop vehicle at scene of accident and must remain at scene until he/she has fulfilled requirements of RIGL 31-26-3. Person failing to stop or comply with requirements under circumstances which result in injury to any person will, upon conviction, be punished by mandatory loss of license for at least one year and not more than five years and imprisonment for not more than five years and/or fine of up to $5,000; more severe penalties exist for second offense and in case of serious bodily injury or death. (RIGL 31-26-1).

Liability of Owner.

When motor vehicle is operated on public highway with express or implied consent of owner, lessee or bailee thereof, express or implied, operator, in case of accident, is deemed agent of such owner, lessee or bailee unless operator has furnished proof of financial responsibility (see subhead Proof of Financial Responsibility, infra) prior to accident. Evidence that motor vehicle was registered in name of defendant is prima facie evidence that it was operated with his consent, and absence thereof is affirmative defense to be set up in answer and proved by defendant. (RIGL 31-33-6, 7). Owner's limiting instructions about operator's use of vehicle, after consent, do not free owner of liability under RIGL 31-33-6. (934 A.2d 216).

Guests.

There is no statute restricting liability for injury to a gratuitous guest. There are no degrees of negligence under R. I. Law. (48 R. I. 101, 135 Atl. 853).

Insurance.

No motor vehicle will be registered and no registration renewed without statement signed by applicant stating that applicant will not operate, or allow to be operated, registered motor vehicle unless vehicle is covered by financial security (RIGL 31-47-3.1) with financial security bond defined as bond executed by owner or surety company authorized to transact business in Rhode Island and financial security deposit defined as, for each motor vehicle, deposit with assistant director of $75,000 in cash or securities (RIGL 31-47-2). All automobile liability policies written must include uninsured motorist coverage, which includes underinsured motorists, unless insured specifically rejects such coverage. (RIGL 27-7-2.1). Agreements to arbitrate uninsured motorist contracts governed by RIGL 10-3-2. Uninsured motorist statute not applicable to self-insured public carrier. (586 A.2d 1055). Minimum coverage of $2,500 per person and $5,000 aggregate required for liability policies unless specifically rejected by insured. (RIGL 27-7-2.5). All state-licensed insurers are subject to assessment for R.I. Insurers' Insolvency Fund. (RIGL 27-34-9). Car rental agencies must include collision damage waiver disclosure form in their rental agreements to inform lessees that their own policies may provide coverage. (RIGL 31-34-7). Motor vehicle insurance policies must have arbitration provisions that may be utilized at election of injured party whenever claim is for $25,000 or less. (RIGL 27-10.3-1). Insurers may use insurance scoring for rating and underwriting policies of personal motor vehicle insurance under certain conditions. (RIGL 27-9-56).

Proof of Financial Responsibility.

(RIGL 31-31-4 et seq.). Where accident involves personal injury or death or property damage in excess of $500 and no insurance coverage exists, Division determines amount of security required. (RIGL 31-31-5). Proof required under certain circumstances involving revocation or suspension of license and registration. (RIGL 31-32-4). Security may consist of insurance policy, bond, cash, savings bank deposit or marketable securities. (RIGL 31-31-8). License and registration suspended if no security deposited. (RIGL 31-31-9). Owners of rental vehicles are required to demonstrate same proof of financial responsibility. (RIGL 31-34-1). Proof may be given by insurance (RIGL 31-32-21), or deposit of money or securities (RIGL 31-32-30). Financial responsibility statute valid exercise of police power. (101 R. I. 350, 223 A.2d 447). Unlawful for owner of motor vehicle or truck engaged in business of renting motor vehicles or trucks to rent motor vehicles or trucks without proof of financial responsibility. (RIGL 31-34-1).

No-Fault Insurance.

Not adopted.

Foreign vehicle registered in home state or country and displaying license plates required by laws of home state may operate without license or registration indefinitely, provided home state grants reciprocity. (RIGL 31-7-1, 4). Not applicable to nonresident carrying on business in state nor to a vehicle transporting persons or property for compensation either regularly on schedule or for consecutive period exceeding 30 days. (RIGL 31-7-2, 3). Any foreign vehicle owned and/or operated by resident of Rhode Island which is parked overnight for total of 30 days in any one year must be registered in Rhode Island. (RIGL 31-7-1).

Nonresident operator over 16 licensed in home state may operate indefinitely, as an operator only, and, if 18 and has chauffeur's license in home state, may operate either as operator or chauffeur, but before accepting employment as chauffeur from a resident must be licensed in this state (RIGL 31-10-2). If home state or country does not require operator's license, person 18 or over may operate as operator only, not more than 90 days in any year, if vehicle is registered in home state. (RIGL 31-10-2). Division of Motor Vehicles may revoke or suspend privileges of nonresident for causes enumerated for revocation or suspension of resident's license and report any convictions to licensing state. (RIGL 31-11-2). Financial responsibility laws apply to nonresidents. (RIGL 31-31-16; RIGL 31-32-7).

Action against nonresident for accident in state may be commenced by service of writ on Registrar of Registry of Motor Vehicles, payment of $5 fee to Registrar and notice by registered or certified mail to nonresident defendant. Operation of vehicle in state is appointment of Registrar as agent for service of process. (RIGL 31-7-6, 7). Nonresident operator charged with violation of traffic regulations of 31-14 through 16 may be required to post $25 bond. (RIGL 31-7-9).

Actions for injury may be brought directly against insurer if process against insured is returned "non est inventus" or when an insured dies before suit has been brought against him and probate proceedings have not been initiated, or when insured dies with suit pending against him prior to judgment, or where nonresident has been involved in automobile accident in Rhode Island as operator or owner and died before suit has been brought, or where insured has filed for bankruptcy. Insurer cannot be joined with insured as defendant. Separate action may be brought against insurer on judgment obtained against insured. (RIGL 27-7-1 through 3). Registered owner and operator may be joined in same action (RIGL 9-2-17).

Direct Actions.

See subhead Actions for Injury, supra.

Manufacturers, Dealers, Wreckers, Rental Trademark Licensors, and Lessors of Motor Vehicles.

Manufacturers, dealers and wreckers licensed. (RIGL 31-5-1 through 39). Regulation of business practices among manufacturers, distributors and dealers. (31-5.1 through 20). Any person desiring to be licensed as manufacturer, factory representative or distributor must apply to Rhode Island Motor Vehicle Dealers' Commission. (RIGL 31-5-22). Any person, firm or corporation granting franchise or license to use his or its name, trademark or tradename in business of renting motor vehicles and any person renting or leasing motor vehicles must obtain license. (RIGL 31-5-33 through 39). Commercial drivers' schools and instructors licensed. (RIGL 31-10-35 through 43). Lessor of motor vehicle or truck jointly and severally liable with lessee for damages caused by lessee. (RIGL 31-34-4). Long-term lessors of motor vehicles subject to vicarious liability for negligence of drivers who operate leased vehicle with lessor's permission. (794 A.2d 453). Automobile body shops regulated by Department of Business Regulation. (RIGL 5-38-1 through 24). Short-term rental agencies, long-term leasing companies and motor-vehicle financing corporations are subject to vicarious liability under RIGL 31-33-6 and RIGL 31-34-4 as owners of motor vehicles. (794 A.2d 453).

Lessor liability for short-term truck or motor vehicle rental is limited to $250,000 for death or bodily injury of one person in any one accident and limited to $500,000 for death or bodily injury of two or more persons in any one accident. (RIGL 31-33-6). Lessee of truck or motor vehicle may also be considered owner, relieving lessor of liability for any accident. (RIGL 31-33-6).

Lemon Law.

Manufacturers and dealers must accept return of vehicle or leased vehicle from customer upon nonconformity of express or implied warranty, and replace full contract price of vehicle or replace vehicle with comparable new vehicle. (RIGL 31-5.2-1 through 3).

Boats.

Regulation of boats. (46-22 et seq.). Operating boat so as to cause injury or death punishable by fine and imprisonment. (RIGL 46-22-9.3 through 9.5). Life saving device required on all boats. (RIGL 46-22-5). Persons on water-skis, surfboard, tube, or similar device towed behind vessel on any state waters must wear life jacket approved by U.S. Coast Guard. (RIGL 46-22-12). Personal Watercraft ("Jet Skis") Safety Act. (RIGL 46-27-1 through 4). Alcohol Boating Safety Act prohibiting operation of boats while under influence of alcohol or drugs. (RIGL 46-22.2-1 through 2-8).

Beach Vehicle.

Registration permits issued by Coastal Resources Management Council. (RIGL 46-23-25).

Electric Personal Assistive Mobility Devices ("EPAMDs").

Rights and regulations of driver of any other vehicle apply. (RIGL 31-19-3). Use on sidewalks and crosswalks governed by RIGL 31-19-11 and 12.

Diesel emissions are regulated by RIGL 31-47.3-1 et seq.

Motor vehicle carriers of passengers are regulated by Public Utility Administrator, from whom certificate must be obtained, specifying route, number of passengers and service to be furnished. (RIGL 39-13-1 through 17). No person may operate taxicab or limited public motor vehicle without first obtaining certificate of public convenience and necessity. (RIGL 39-14-1 through 26). Owner of taxicab or limited public motor vehicle, before operating or continuing to operate in state, must furnish Division of Public Utilities and Carriers certificate of insurance issued by insurance company authorized to transact business in state showing liability insurance for personal injury and damage to property of not less than $300,000 combined single limit or $250,000 per person, $500,000 per accident bodily injury and $100,000 property damage split limit. (RIGL 39-14-18).

Pupil Transportation Vehicles are regulated by RIGL 31-22.1-1 et seq.

Motor vehicle carriers of animals are regulated by RIGL 31-22-28.

Motor vehicle carriers of property are regulated by RIGL 39-12-1 et seq.

Supervised by Public Utilities Administrator. (RIGL 39-12-4).

Certificate or Permit.—Every intrastate carrier must file with Public Utilities Administrator, in form prescribed and provided, application for certificate or permit, together with fee of $250. (RIGL 39-12-6, 9). Such carriers may not transport property for hire on highways of this state until they obtain from Administrator certificate in case of common carriers (RIGL 39-12-6, 7) or permit in case of contract carriers (RIGL 39-12-9, 10). Any such certificate or permit may be assigned or transferred with approval and consent of Administrator. (RIGL 39-12-20). Such certificate or permit granted only after public hearing and showing of public convenience and necessity, financial responsibility and ability to perform service for which authority is requested with efficiency.

Distinguishing plates, which must be displayed at all times on each intra-state motor carrier, are furnished annually by Administrator at charge of $7 each. Such plates may not be transferred from one vehicle to another without authority from and consent of Administrator.

(RIGL 39-12-26).

Rate schedules which must be just, reasonable and reasonably compensatory and consistent with administrator’s orders, rules and regulations, and which are subject to review and rejection, must be published and filed with the Administrator and kept open for public inspection. Any change in such rates becomes effective not less than 30 days after filing, but Administrator for good cause shown may allow such change to become effective within lesser period. (2-12 through 14, 16).

Filing of Contracts.

A copy of every contract for the transportation of property, showing the period of time it is to be in force, the charges for transportation and accessorial service, and the duties and obligations of all parties thereto, must be filed with the Administrator but is not open to public inspection. (RIGL 39-12-15).

Charges of contract carriers shall in general be no less than those of common carriers for substantially same or similar services. (RIGL 39-12-16).

Suspension, Revocation or Modification of Certificate or Permit.

The Administrator may, after notice and hearing or after failure to appear after due notice, suspend, modify or revoke, a certificate or permit for willful or continued failure to comply with the Administrator’s orders, rules and regulations, or with the terms and conditions of any certificate or permit. (RIGL 39-12-18, 19; RIGL 39-12-35).

Financial Responsibility.

Carrier must either: (1) File certificate of qualified insurance company showing liability insurance for personal injuries of $25,000 and $100,000 and property damage of $10,000; or (2) file surety company bond for $100,000; or (3) be deemed to be qualified as self-insurer by Administrator. (RIGL 39-12-27).

Discrimination in rates and evasion of regulations directly or indirectly are prohibited and are deemed misdemeanors punishable by fine or imprisonment or both. (RIGL 39-12-37).

Interstate carrier engaging in transportation of property by motor vehicles for hire must obtain permit, which gives no right to engage in intrastate business and which is granted upon applicant’s showing that he has authorization from I. C. C. (RIGL 39-12-22). Fee for such permit is $25. Such carrier must also secure and display identifying interstate carrier plate. Fee $20. (RIGL 39-12-26).

Appeals lie from adverse decision by Administrator, either to Superior Court or to Supreme Court. (RIGL 39-5-1).

Bill of lading requirements are prescribed for common carriers. (RIGL 39-12-28).

Motor Vehicle Taxes.

Cities and towns authorized to levy excise tax on motor vehicles and trailers in lieu of property tax. (RIGL 44-34-1 through 13). Motor vehicle and trailer excise tax may be phased out by fiscal year 2008, and city, towns and fire districts given means to recover lost revenue. (RIGL 44-34.1-1 through 2). Reimbursement for lost revenue based on difference between maximum taxable value less personal exemptions and net assessed value. (RIGL 44-34.1-1). Tax levied on basis of uniform values set by vehicle value commission. (RIGL 44-34-2). Payment of tax is prerequisite to transfer of ownership of vehicle or registration of any vehicle owned by taxpayer. (RIGL 31-3-6). Lessors of vehicles that pay excise tax shall provide lessees with estimate of annual taxes payable at time lease agreement entered into. (RIGL 44-34.1-1).

Rate of Tax.

Same as that applied to all property except manufacturer's machinery and equipment. (RIGL 44-34-3).

Exemptions.

Vehicles owned by U.S. or by any organization personal property of which is exempt under RIGL 44-3-3, subparagraphs 1 through 15. Farm vehicles to extent prescribed in RIGL 44-5-42. Veterans, gold star parents and blind persons qualifying for property tax exemption under RIGL 30-22-1 through 4 and RIGL 44-3-4, 5 and 12, but only to extent they do not have sufficient other property to exhaust their exemption. (RIGL 44-34-5). Exemption for certain adaptive motor vehicle equipment for persons with disabilities.

Situs.

Normally, tax situs is individual's town or city of permanent abode at end of tax year or business' principal place of business. Vehicle or trailer customarily kept in some other town or city has situs in that locality. Vehicles rented or leased for six months or more are taxed where kept by renter or lessee. Tax on fleets of vehicles engaged in interstate commerce apportioned: (i) if fleet owner has parking terminal in state, on basis of average percentage of fleet vehicles parked at terminal; or (ii) if fleet owner has only pickup and drop-off station in state, on basis of percentage of total miles traveled by fleet which are traveled within Rhode Island. Situs of such fleet is town or city where terminal or station is located. If one fleet has multiple pickup and drop-off stations in state, communities where stations are located share equally tax levied against fleet owner. (RIGL 44-34-4).

Penalty.

Failure to supply to tax assessor information necessary to determine situs or value of vehicle or trailer forecloses all remedies for overtaxation. (RIGL 44-34-4).

Gasoline Tax.

See category 22 Taxation, topic 22.08 Gasoline and Special Fuels Taxes.

23.02 RAILROADS:

See category 3 Business Regulation and Commerce, topic 3.08 Carriers.

24 FORMS

Commercial Code Forms

Both State and National (statutory) forms accepted. Fee schedule available at http://www.sec.state.ri.us.

1

SOUTH CAROLINA LAW DIGEST

—Scope —

Prepared for 2010 edition by **LexisNexis**.(R)

(Citations refer to Code of Laws of South Carolina, 1976, and cumulative supplements, by titles and sections, unless otherwise noted. Session laws are cited by year and Act number or page. Parallel citations to the South Eastern Reporter begin with 26 S.C. S.C. Rules of Civil Procedure (SCRCP), S.C. Appellate Court Rules (SCACR), and S.C. Rules of Evidence (SCRE) are cited by Rule number.)

Uniform Probate Code (but not 1975 or 1977 amendments) adopted, effective July 1987. (S.C. Code Ann. Title 62). See category 13 Estates and Trusts, topic 13.16 Wills.

Note: This revision is current through October 2009. One may access statutes and regulations referenced herein through http://www.scstatehouse.net/code/statmast.htm. Legislature: General Assembly annual session convenes on second Tues. in Jan.

1 INTRODUCTION

1.01 [RESERVED]

1.02 COMMON LAW:

Common law of England continues in full force and effect insofar as not altered by state code, constitution, or laws. (S.C. Code Ann. § 14-1-50). Various common law crimes codified and superseded. (S.C. Code Ann. § 16-9-380). Common law offense of robbery classified as felony. (S.C. Code Ann. § 16-11-325). Authority possessed by constables under common law not affected. (S.C. Code Ann. § 22-9-210). Code of Military Justice incorporates all common law offenses. (S.C. Code Ann. § 25-1-3075). Common law rule against perpetuities superseded. (S.C. Code Ann. § 27-6-80). Common law rights that attach to phonographic records and electrical transcriptions, sole value of which is their use, abolished. (S.C. Code Ann. § 39-3-510). Common law principles applicable to duties of real estate brokerage companies to clients superseded insofar as inconsistent with statute, but common law may be used to interpret or clarify statutory duties. (S.C. Code Ann. § 40-57-137[Q]). Common law remedies against manufacturer, distributor or ultimate vendor of defective product not removed. (S.C. Code Ann. § 56-5-4940). Common law of trusts supplements Trust Code insofar as not modified by statute. (S.C. Code Ann. § 62-7-106).

1.031.00

1.01 GOVERNMENT AND LEGAL SYSTEM:

The State of South Carolina is a constituent state of the United States of America. For further discussion of the U.S. federal system, see Introduction to the Federal Government of the United States at the beginning of this volume. A great many laws are promulgated by the federal government of the United States and are not reflected in the topics below. See the Introduction to this volume for references to the federal law topics covered.

Like all but one of the United States, South Carolina has a common law legal system, with roots in English common law. For information on the courts and legislature of South Carolina, see category 6 Courts and Legislature.

1.02 [RESERVED]

1.03 HOLIDAYS:

Legal holidays are New Year's Day (Jan. 1), Martin Luther King, Jr. Day (3d Mon. in Jan.), George Washington's Birthday/President's Day (3d Mon. in Feb.), Confederate Memorial Day (May 10), National Memorial Day (last Mon. of May), Independence Day (July 4), Labor Day (1st Mon. in Sept.), Veterans Day (Nov. 11), National Thanksgiving Day (4th Thurs. in Nov.) and day after, and Dec. 24, 25, and 26. (S.C. Code Ann. § 53-5-10). Holidays for banks and savings and loan institutions same as observed by Federal Reserve Bank. In addition to holidays provided for in this section, Governor may declare any other day or days of year legal holidays for institutions affected by this section whenever Governor finds such additional holiday or holidays to be necessary or appropriate. (S.C. Code Ann. § 53-5-55). When any legal holiday falls on Sun., following Mon. is deemed holiday; when any legal holiday falls on Sat., preceding Fri. is deemed holiday. (S.C. Code Ann. § 53-5-30).

All first Mons. in month are business days for purposes of judicial or sheriff's sales or transaction of legal business. (S.C. Code Ann. § 53-5-60). Business done by banks on any day of year other than Sun. is legal. (S.C. Code Ann. § 53-5-70). Any bank, building and loan association, savings and loan association or cash depository, may, in addition to Sun. and other legal holidays as prescribed by statute, close one day of each week and such constitutes legal holiday. (S.C. Code Ann. §§ 53-5-90 to -100).

Legality of Transactions on Sat., Sun. or Holiday.

Paper payable on Sun. or legal holiday is payable on the next succeeding business day. (S.C. Code Ann. § 53-5-80).

Unlawful for persons to engage in worldly work, labor, business of ordinary callings, or retail or wholesale sales to consumers on Sun. (S.C. Code Ann. § 53-1-40). Exceptions to prohibition on Sun. work. (S.C. Code Ann. § 53-1-50). Sale of many items on Sun. prohibited. (S.C. Code Ann. § 53-1-60). Prohibitions of work or sales on Sun. do not affect businesses or services that were legal on Apr. 7, 1962. (S.C. Code Ann. § 53-1-90). Machine shops and rubber molding and plastic injection molding facilities (S.C. Code Ann. § 53-1-100), manufacture and finishing of textile products (S.C. Code Ann. § 53-1-110), manufacturing plants requiring continuous operation (S.C. Code Ann. § 53-1-130), and certain counties (S.C. Code Ann. § 53-1-150) exempt from provisions that prohibit work or sales on Sun.

Civil Proceedings.

See category 5 Civil Actions and Procedure, topic 5.17 Pleading, subheading Time.

1.04 OFFICE HOURS AND TIME ZONE:

South Carolina is in the Eastern (GMT -05:00) time zone. Office hours are generally from 9 a.m. to 5 p.m.

2 BUSINESS ORGANIZATIONS

2.01 AGENCY:

Common law rules govern generally.

If properly constituted agent does any act for his principal which would be lawful if such principal were living, act is valid and binding on estate of principal, although he may have died before such act was done, providing party treating with such agent dealt bona fide, not knowing at time that principal was dead. Notes made before death of principal, and passed away by agent afterwards, are binding on principal's estate, provided receiver of such note receives same bona fide, without knowledge of death of principal and that act of agent would have been binding on principal if it had been done before his death, and provided such act is done within nine months after death of principal. (S.C. Code Ann. §§ 32-11-10 to -40). Power of Agent to make any gift must be expressly granted in agency instrument. (285 S.C. 260, 329 S.E.2d 430).

Conveyance by Attorney.

See category 21 Property, topic 21.06 Deeds.

Agent Liable for Taxes on Personal Property Held in Trust.

Agent is personally liable for taxes on personal property of principal that is (1) required to be listed on return for taxation and (2) in agent's possession at time of return thereof for taxation. (S.C. Code Ann. § 12-37-730).

2.02 ASSOCIATIONS:

Statutory recognition is given only to cooperative associations (S.C. Code Ann. §§ 33-45-10 to -200) and marketing cooperative associations (S.C. Code Ann. §§ 33-47-10 to -120). No corporation or association doing business for profit may use term “cooperative” in its corporate or business name unless it has complied with c. 45 of Title 33 or unless it is a telephone cooperative incorporated under c. 46 or an electric cooperative under c. 49 of Title 33, or a credit union under c. 27 of Title 34.

Cooperative associations may be formed by five or more persons, residents of South Carolina, who associate themselves for purposes of conducting within South Carolina any agricultural, dairy, mercantile, mining, mechanical, or manufacturing business. (S.C. Code Ann. § 33-45-30).

Telephone cooperative associations may be formed by five or more natural persons or two or more telephone cooperatives for purposes of rendering communications and information services. (S.C. Code Ann. §§ 33-46-10 to -830). Marketing cooperative associations may be formed by five or more persons engaged in production of agricultural products with or without capital stock. (S.C. Code Ann. §§ 33-47-10 to -1150). Electric cooperatives may be organized for purpose of supplying electric energy. (S.C. Code Ann. §§ 33-49-10 to -1330).

Unincorporated associations may be sued and proceeded against under name and style by which it is known without naming individual members. (S.C. Code Ann. § 15-5-160). Process may be served on any agent of association. (S.C. Code Ann. § 15-9-330). Property of association and of individual partner or member is liable for satisfaction of judgment against association. (S.C. Code Ann. § 15-35-170). Unincorporated association subject to crime of barratry. (S.C. Code Ann. §§ 16-17-10 to -50).

Unincorporated association, regardless of its underlying purpose, is amenable to suit by its members for tortious acts committed by fellow members. (305 S.C. 406, 409 S.E.2d 368).

Professional Associations.

See topic 2.03 Corporations, subhead Professional Corporations.

2.03 CORPORATIONS:

Note: Model Business Corporation Act, as revised through 7/1/84, prepared by the Committee on Corporate Laws (Section of Corporation, Banking and Business Law) of American Bar Association, has been adopted, with variances, in South Carolina and is known as the “South Carolina Business Corporation Act of 1988”. For text of Model Business Corporation Act (hereinafter referred to as “Model Act”), see Uniform and Model Acts section. Act became effective Jan. 1, 1989. Law as digested below relates only to variances of S.C. Business Corp. Act from Model Act (as revised through 1984) contained in Part VI of this Volume.

General Supervision.

Secretary of State has power reasonably necessary to perform duties required by c. 1-20 of Tit. 33. (S.C. Code Ann. § 33-1-300). Office located at Capitol Complex, Edgar Brown Building, 1205 Pendleton St., Suite 525, Columbia, S.C. 29201. http://www.scsos.com.

Purposes.

Corporation for profit may be formed and do business for any lawful business purpose. (S.C. Code Ann. § 33-3-101).

Corporate name of every domestic corporation, except banks, building and loan associations, savings and loan associations, insurance companies, public utilities, railroads, professional corporations, nonprofit corporations and corporations organized before Jan. 1, 1964, must include “corporation”, “company”, “incorporated” or “limited” or abbreviation thereof. (S.C. Code Ann. § 33-4-101). Name reserved through application to Secretary of State who advises as to availability. Fee $10. (S.C. Code Ann. § 33-1-220). Reserved name may be transferred to another by notifying Secretary of State of transfer. (S.C. Code Ann. § 33-4-102[b]). Except as authorized by statute, corporate name must be distinguishable upon records of Secretary of State. (S.C. Code Ann. § 33-4-101[b]). In mergers and purchase of assets corporation may acquire right to use another corporation's name. (S.C. Code Ann. § 33-4-101[d]). Exclusive and transferable right to name for period of 120 days may be procured on application to Secretary of State. (S.C. Code Ann. § 33-4-102[a]) Secretary of State's office will inform as to availability of name on telephone, but such is informal and nonbinding.

Incorporator may be any person who delivers articles of incorporation to Secretary of State for filing. (S.C. Code Ann. § 33-2-101).

Articles of incorporation have same general requirements as contained in Model Act; in addition thereto, they must be signed by each incorporator and be accompanied by certificate, signed by attorney licensed to practice in this state, that all requirements of §33-2-102 have been complied with. (S.C. Code Ann. § 33-2-102).

Filing of Articles of Incorporation.

Original and conformed copy must be delivered to Secretary of State with required filing fee (see subhead Incorporation and Other Filing Fees and Taxes, infra) who will file articles in his office and certify and return conformed copy, bearing endorsement of date of filing. Articles will not be accepted for filing unless accompanied by initial annual report, filing fee and filing tax and license fee. (S.C. Code Ann. § 33-2-102). (See subhead Incorporation and Other Filing Fees and Taxes, infra.)

Corporate existence begins as of filing date of articles of incorporation with Secretary of State, unless articles provide for some later date; fact that articles have been so filed is conclusive evidence that all conditions precedent to incorporation have been satisfied, that corporation has been incorporated and its corporate existence begun, except in action by state to cancel or revoke articles of incorporation, or to compel dissolution of corporation. (S.C. Code Ann. § 33-2-103).

Execution of Corporate Documents.

Whenever any document relating to a corporation must be executed and filed with Secretary of State, unless otherwise specifically stated: (1) There must be an original executed document and one exact or conformed copy; (2) original document, if required to be executed by corporation, must be signed manually in ink in case of articles of incorporation by all incorporators, in all other cases by chairman of board of directors, or president or such other officer as bylaws may designate; (3) any person signing must state, beneath or opposite his signature, his name and capacity in which he signs; (4) mandatory forms prescribed by Secretary of State must be used or followed (S.C. Code Ann. § 33-1-210); (5) original document, together with exact or conformed copy, must be delivered to Secretary of State who, upon finding that it conforms to law and that proper fees and taxes have been tendered, endorses upon original date and time of filing in his office and returns conformed copy with same filing endorsement and certificate that such conformed copy is true copy of document filed. (S.C. Code Ann. § 33-1-200).

Requirement Before Commencing Business.

Corporation must not transact any business or incur any indebtedness except as incidental to its organization or obtaining subscriptions or payment for its shares until articles of incorporation have been filed with Secretary of State. All persons purporting to act on behalf of corporation are jointly and severally personally liable for all liability incurred prior to incorporation, unless they act under good faith belief that articles have been filed. (S.C. Code Ann. § 33-2-104).

Incorporation and Other Filing Fees and Taxes.

Articles of incorporation for domestic corporations and applications for certificates of authority by foreign corporations $135; articles of merger or share exchange, articles of organization for LLCs, application for certificate of authority for foreign LLC, and articles of merger $110; application to become S.C. LLP and certificate of authority for foreign LLP $100; articles of incorporation for nonprofit corporations $25; and application for certificate of authority for foreign nonprofit corporation, certificate of domestic LP, and registration of foreign LP $10. Other fees charged by the Secretary of State are listed in §33-1-220 and on Secretary of State's website at http://www.scsos.com; which should be consulted for most current fee information.

Paid-in Capital Requirements.

None.

Amendment of Articles.

In addition to provisions relating to amendment of articles contained in Model Act, and requirement of a two-thirds affirmative vote of shareholders for approval, following special provisions have been added in South Carolina:

Prior to organizational meeting of directors and before corporation has issued or received any payment for its shares, articles may be amended by unanimous vote of incorporators. If amendment effects material change in articles, non-assenting subscribers may rescind their subscriptions without liability. (S.C. Code Ann. § 33-10-105). Articles of amendment must show information required by S.C. Code Ann. § 33-10-106. Holders of 10% of voting shares of any class of stock may propose amendments which directors must submit at next shareholders' meeting, if the corporation is not a public corporation. (S.C. Code Ann. § 33-10-103[d]).

Articles may be amended by consent of shareholders entitled to vote on such amendment after recommendation by board of directors; 2/3 vote of shareholders required, unless there is class voting, and in that event 2/3 vote of all shareholders plus 2/3 of each voting class. (S.C. Code Ann. § 33-10-103[f]).

Holders of outstanding shares of class are entitled to vote as separate voting group on proposed amendment if amendment would alter or change power, preferences or special rights of that class adversely. (S.C. Code Ann. § 33-10-104).

Articles of incorporation may contain provision prescribing vote greater or less than vote required by statute but at least majority of votes. Provision may require unanimous or less than unanimous vote for all amendments, or particular amendment, or for specified category of amendments, by all shares or any class of shares. (S.C. Code Ann. § 33-10-103[g]). This provision cannot be altered, modified or removed except by same vote required in such provision for amending articles. (S.C. Code Ann. § 33-10-103).

To accomplish any amendment, document entitled “Articles of Amendment” must be executed and filed with Secretary of State, and state name of corporation, amendment adopted, date of adoption, and number and vote of directors, number of shares outstanding entitled to vote, number entitled to vote as class and whether such votes are cast for or against such amendment. (S.C. Code Ann. § 33-10-106).

Corporate Finance.

South Carolina closely follows Model Act in its treatment of corporate finance with the following exceptions or additions thereto:

Subscriptions for shares must be in writing and signed by subscriber. Corporation can collect from defaulting subscribers as it would any other debt. (S.C. Code Ann. § 33-6-200[d]). Shares issued for future services must be pursuant to written contract for services. Shares issued for notes or for future services or benefits must be escrowed. (S.C. Code Ann. § 33-6-210). Corporations subject to registration requirements of §12 of Securities Exchange Act of 1934 may issue shares for contract for future services without having to place shares and share dividends and distributions in respect of shares in escrow and without having to credit distributions against their purchase price if shares are issued or authorized pursuant to plan that has been approved by shareholders of corporation. (S.C. Code Ann. § 33-6-210[f]).

Subscription for shares entered into before incorporation is irrevocable for six months unless subscription agreement provides longer or shorter period or all subscribers agree to revocation. (S.C. Code Ann. § 33-6-200[a]).

Fractional Shares and Scrip.

Corporation may issue fractional or scrip shares and require that scrip shares be aggregated and exchanged for full shares or such shares become void. (S.C. Code Ann. § 33-6-104[d]).

Dividends and Other Distributions.

No distribution may be made by board if, after giving it effect, corporation would not be able to pay its debts as they become due in usual course of business or corporation's total assets would be less than sum of its total liabilities plus (unless articles of incorporation permit otherwise) amount that would be needed, if corporation were to be dissolved at time of distribution, to satisfy preferential rights upon dissolution of shareholders whose rights are superior to those receiving distribution. (S.C. Code Ann. § 33-6-400[c]).

Transfer of Stock.

Art. 8 of Uniform Commercial Code governs. Shareholders may provide for share transfer restrictions in agreement, articles or by-laws under §33-6-270. See category 3 Business Regulation and Commerce, topic 3.09 Commercial Code.

Stock Transfer Tax.

There is no stock transfer tax imposed in State of South Carolina.

Shareholders.

Preemptive rights apply unless corporation opts-out. Except to extent articles of incorporation provide otherwise, shareholders have right to acquire proportional amounts of corporation's unissued shares when issued. Preemptive right may be waived. Holders of common stock without voting power, preferred shares or shares of any special class have no preemptive rights to shares of common stock with voting power, unless otherwise provided by articles. Except as otherwise provided in articles, there is no preemptive right with respect to shares: (1) Issued as share dividend; (2) issued for consideration other than cash; (3) issued to effect merger, consolidation or purchase of assets; (4) issued to satisfy conversion or option rights previously granted by corporation; (5) issued or optioned to directors, officers or employees under stock option plan; (6) released by waiver from their preemptive right. (S.C. Code Ann. § 33-6-300).

Shareholders may dissent to specified corporate actions, including, in addition to Model Act actions, amendments of articles that materially and adversely affect shareholder's rights. Shareholder must dissent as to all shares beneficially owned by him. S.C. law contains detailed provisions regarding appraisal and procedures in event of dissent. (S.C. Code Ann. §§ 33-13-101 to -310).

Derivative Actions.

Right to bring derivative actions exists at common law and under statute which provides merely that derivative actions may be maintained pursuant to federal and state rules of civil procedure. South Carolina has adopted FRCP 23.1. (SCRCP 23[b][1]; S.C. Code Ann. § 33-7-400).

Shareholders' Meetings.

As provided in Model Act, except:

Failure to hold annual meeting does not affect otherwise valid corporate acts or work forfeiture or dissolution of corporation. If no annual meeting has been held for earlier of nine months after end of previous fiscal year or 18 months after last annual meeting, annual meeting may be called by court order on request of any person entitled to call special meeting of shareholders, or any shareholder may apply to courts to order substitute annual meeting and to fix time and place of such meeting, record date for shareholders, and form of notice of such meeting. (S.C. Code Ann. §§ 33-7-101 to -103).

Unless bylaws otherwise require, if meeting adjourned, notice of adjourned meeting need not be given if time and place of same is announced at meeting at which adjournment is taken. (S.C. Code Ann. § 33-7-105[e]).

Notice of meeting may be waived by written and signed waiver of notice or attendance of any shareholder at meeting, except that attendance solely to object at beginning of meeting that such meeting is not lawfully called or convened does not constitute a waiver. (S.C. Code Ann. § 33-7-106).

Statutory quorum is majority of shares entitled to vote, but articles may provide for quorum of different number. (S.C. Code Ann. § 33-7-250[a]). Corporation cannot vote shares held by domestic or foreign corporation that is itself majority-owned subsidiary of corporation issuing shares. (S.C. Code Ann. § 33-7-210[b]). Shares held by executors, administrators, guardians and other court appointed fiduciaries may be voted, upon proof of their appointment, and shares held by any other fiduciaries may be voted, upon proof satisfactory to corporation of their authority to vote, without transfer of such shares. (S.C. Code Ann. §§ 33-7-230 to -240).

Unless articles of incorporation specify otherwise, directors are elected by plurality of votes cast by shareholders entitled to vote. (S.C. Code Ann. § 33-7-280). Other corporate action subject to shareholder approval requires majority vote of shares present at meeting and voting, except for certain fundamental transactions, voting requirements for which are discussed in S.C. Code Ann. §§33-10-103, 33-11-103 and 33-12-102. (S.C. Code Ann. § 33-7-250). Shareholders have right to cumulate their votes for directors unless articles of incorporation otherwise provide. To exercise his cumulative voting rights, shareholder must: (1) Give written notice to officer of corporation not less than 48 hours before time fixed for meeting, or (2) announce his intention in such meeting before voting for directors commences, at which time person presiding may or, at request of any shareholder, must recess meeting not to exceed two hours. If proper notice given by one shareholder, all shareholders are entitled to cumulate their votes. (S.C. Code Ann. § 33-7-280).

Solicitation of proxies on basis of false and misleading statements or omissions with respect to any material fact is forbidden. Sale of proxy is forbidden. Each shareholder entitled to vote may appoint one or more agents to vote on his behalf. Proxy must be in writing signed by shareholder or his attorney-in-fact. Proxy must be dated or it is effective on date received by appointee. Proxy is valid only for 11 months and is revocable at pleasure of shareholder unless appointment form conspicuously states that it is irrevocable and appointee falls within one of categories identified in statute. (S.C. Code Ann. § 33-7-220). Even in above cases, proxy becomes revocable after pledge is redeemed, debt is paid, or period of employment contracted for has terminated. (S.C. Code Ann. § 33-7-220[f]).

Voting Trusts.

Same general provisions as Model Business Corporation Act except trustees and corporation are required to keep current list of holders of voting trust certificates. In either case, corporation must enter in its records fact that shares are subject to such agreement; copies of agreement to be filed at corporation's office. Except to extent voting trust agreement provides otherwise, certificate holders maintain all shareholder rights, including dissenter's rights and inspection rights not conferred upon trustee. (S.C. Code Ann. § 33-7-300).

Two or more shareholders may enter into written agreements concerning voting of their shares. Such agreements are not subject to provision of §33-7-300. (S.C. Code Ann. § 33-7-310).

Directors.

Same general provisions as Model Act. Number of directors can be increased or decreased only by: (1) Amendment of articles; (2) bylaw adopted by shareholders; or (3) action of board only if corporation is not a public corporation and if specifically provided in articles or bylaws. (S.C. Code Ann. § 33-8-103). Only shareholders can authorize more than 30% increase or decrease in number of directors. (S.C. Code Ann. § 33-8-103[b]). Action of board of directors taken without meeting by majority of directors or without such larger vote as required by articles or bylaws, is permissible if all directors give written consent to action. Such consents may be evidenced by one or more writings signed by each director. (S.C. Code Ann. § 33-8-210).

Directors may be elected by shareholders of given class, then shareholders of that class fill vacancy in seat of director elected by that class; otherwise unless articles or bylaws are contrary, directorship filled by majority of remaining directors. Director elected to fill vacancy holds office only until next shareholder's meeting, unless terms are staggered. (S.C. Code Ann. §§ 33-8-104 to -106; S.C. Code Ann. § 33-8-110).

In addition to suits allowed by provisions of Model Act, suit may be brought against director and corporation by holders of 5% of outstanding shares to remove such director. (S.C. Code Ann. § 33-8-109).

When shareholders vote to approve transaction between corporation and interested director, votes of shares owned or controlled by such director cannot be counted. (S.C. Code Ann. § 33-8-310[d]).

Director's Meetings.

Same general provisions as Model Act. Regular meetings may be held without notice if time and place are set by bylaws or directors. If bylaws do not provide notice to be given for special directors' meeting, notice of such meeting must be sent by any usual means of communication not less than two days prior to meeting. (S.C. Code Ann. § 33-8-220).

Liabilities of Directors and Officers.

Same general provisions as Model Act, except that differing prohibitions against corporation making loans to directors and different liabilities for unlawful distributions. (S.C. Code Ann. §§ 33-8-320, 33-8-330, 33-6-400).

Indemnification of Directors, Officers and Employees.

Act contains detailed provisions about procedure to obtain indemnity. (S.C. Code Ann. §§ 33-8-500 to -580). Corporation may provide and maintain insurance on its officers, directors and employees. (S.C. Code Ann. § 33-8-570).

Officers.

Articles of incorporation may provide that officers be elected by shareholders; otherwise, board of directors elects or appoints such officers. No statutory prerequisites for office. The same individual may hold more than one office in a corporation simultaneously. (S.C. Code Ann. § 33-8-400).

Officers elected by shareholders may be removed only by vote of shareholders, unless shareholders have authorized directors to remove such officers. Any vacancy occurring in any office may be filled by board, unless articles specify otherwise. (S.C. Code Ann. § 33-8-430).

General Powers.

Powers granted are in general subject to any limitation contained in any provision of S.C. Business Corporation Act of 1988 or in any other law. Powers are generally same as those in Model Act. (S.C. Code Ann. § 33-3-102).

See subhead Indemnification of Directors, Officers and Employees, supra, as to restrictions on power of latter.

Dividends.

See subhead Corporate Finance, supra.

Sale of Assets.

Model Act provisions on sale of assets outside ordinary course of business require two-thirds affirmative vote of shareholders required for approval. Board of directors must recommend sale. In addition, sale of assets may be deemed to be in regular course of business if: (1) Corporation was incorporated for purpose of liquidating such assets or property or (2) sale is transaction or one of series of transactions made in furtherance of business of corporation and not to terminate or dispose of its business. (S.C. Code Ann. §§ 33-12-101 to -102).

Prohibited Transfers.

See subhead Liabilities of Directors and Officers, supra.

Books and Records.

Same general provisions as Model Act. In addition, corporation must keep at its principal office copies of federal and state income tax returns for preceding ten years or for such shorter period as corporation may have been in existence, current copy of its bylaws and conformed copy of all documents filed by corporation with secretary of state. (S.C. Code Ann. § 33-16-101). Shareholder may inspect, on five days' written demand under oath, corporation's books and records of account, minutes of shareholder meetings and record of shareholders, and may copy and make extracts therefrom. Demand must state purpose of inspection, and contain reasonable assurance information will not be misused. Proper purpose defined as purpose reasonably related to person's interest as shareholder. If corporation refuses to permit inspection by shareholder, shareholder may apply for court order directing such inspection and application may be denied or granted in discretion of court. (S.C. Code Ann. §§ 33-16-102 to -104).

Merger and Consolidation.

Model Act is closely followed on mergers and consolidations, differences being chiefly minor linguistic matters and two-thirds affirmative vote of shareholders, but, if class voting applies, affirmative vote of two-thirds of each class and two-thirds of total outstanding shares, unless otherwise provided in articles, is required for approval. Notice to shareholders must contain copy or summary of plan of merger; information on financial condition of each participating corporation for last two fiscal years; income statements for last three years; and setting forth clear and concise statement of rights of dissenting shareholders. Shareholder approval is not required in some limited instances. (S.C. Code Ann. §§ 33-11-103).

Merger or share exchange with foreign corporation governed by S.C. Code Ann. § 33-11-107. Parent corporation owning at least 90% of outstanding shares of each class of subsidiary may merge subsidiary into parent without approval of shareholders of parent or subsidiary. (S.C. Code Ann. § 33-11-104). Parent corporation owning at least 90% of outstanding shares of each class of subsidiary corporation may merge itself into subsidiary without approval of shareholders of subsidiary if plan of merger is submitted to and approved by shareholders of parent in accordance with §33-11-103. (S.C. Code Ann. § 33-11-108).

Dissolution.

Model Act provisions followed generally. Corporation's board of directors may propose dissolution for submission to shareholders. If holders of at least 10% of any class of voting shares of corporation propose dissolution, board of directors must submit proposal to shareholders at next possible special or annual meeting. (S.C. Code Ann. § 33-14-102). In certain circumstances, court may dissolve corporation in proceeding by attorney general, by shareholders, by creditors, or by corporation itself. (S.C. Code Ann. §§ 33-14-300, -310).

Close Corporations.

South Carolina has adopted South Carolina Statutory Close Corporation Supplement which closely follows Model Act. (S.C. Code Ann. §§ 33-18-101 to -500). Requirement that corporation have 50 or fewer shareholders was deleted. (S.C. Code Ann. § 33-18-103). Shareholders failing to vote in favor of close corporation status are given dissenters' rights. (S.C. Code Ann. § 33-18-103). Similarly, failure to vote in favor of other actions will lead to dissenters' rights. (S.C. Code Ann. § 33-13-102).

Appraisal.

Shareholders are entitled to payment of fair value of their shares in case of certain amendments of articles affecting classes of shares, mergers, consolidations and sale of assets transactions. (S.C. Code Ann. § 33-13-102). Shareholders do not have appraisal rights when: (1) They are shareholders of parent corporations in short form merger; (2) surviving corporation in merger owns all shares of all other corporations participating in merger; (3) they are shareholders of acquiring corporation in exchange; (4) they are shareholders of corporation whose shares are listed on national securities exchange, unless articles provide otherwise; (5) sale of assets in regular course of business; (6) corporation is liquidated. (S.C. Code Ann. § 33-13-102). Procedure which must be followed to perfect and preserve appraisal rights is very similar to

Model Act provision with variations in time limitations and other details. (S.C. Code Ann. §§ 33-13-200 to -280).

Professional Corporations.

South Carolina has adopted South Carolina Professional Corporation Supplement which closely follows Model Act. (S.C. Code Ann. §§ 33-19-101 to -700).

Foreign Corporations.

Provision as to foreign corporations similar to Model Act. In application for authority to transact business in this state, foreign corporation must set forth information listed in §33-15-103. Foreign corporation may register its own corporate name only if that name is available in this state which may be renewed each year by filing with Secretary of State's office. (S.C. Code Ann. § 33-4-103).

Upon termination of foreign corporation's existence in jurisdiction of its incorporation for whatever reason, corporation, its successor, or trustee, must file with Secretary of State copy of official action taken and its authority to do business in this state terminates. (S.C. Code Ann. § 33-15-200).

Secretary of State is agent for service of process on foreign corporations not authorized to do business in this state, including any business for which authority need not be obtained under the act, in action arising out of or in connection with doing business in this state. (S.C. Code Ann. §§ 15-9-240, 33-15-200).

Solicitation of Charitable Funds.

See category 3 Business Regulation and Commerce, topic 3.12 Consumer Protection, subhead Solicitation of Charitable Funds Act.

License Tax.

Every domestic corporation, every foreign corporation organized to do business under laws of any other state, territory or country and qualified to do business in South Carolina, any other corporation required to file an income tax return, and cooperative, marketing, telephone, and rural electrical corporations must file with Tax Commission on or before 15th day of third month after end of corporation's fiscal year, report verified on oath of one of its duly authorized officers, containing such facts and information as Tax Commission may require. Provision does not apply to eleemosynary corporation organized for religious purposes. (S.C. Code Ann. § 12-20-20, 12-20-110). At same time report is filed, corporation must pay an annual license fee of $15 plus one dollar for each thousand dollars paid to capital stock and paid in surplus of corporation as shown by its books and records on first day of income year next preceding date of filing report; but in no event less than $25. (S.C. Code Ann. §§ 12-20-50, 12-20-60). Where corporation does business partly within and partly without state, or uses part of capital within and part without or operates one or more establishments or plants within and without state, license tax is measured by proportion of dollars paid to capital stock and paid in as surplus in accordance with statutory rules for allocating taxable income. Minimum tax is $25.

Transportation and utility companies and electric cooperatives on or before 15th day of third month next after preceding income year must file annual report with department and pay license fee of: (1) One dollar for each thousand dollars, or fraction thereof, of fair market value of property owned and used within State in conduct of business as determined by department for property tax purposes for preceding taxable year; and (2)(a) three dollars for each thousand dollars, or fraction thereof, of gross receipts derived from regulated business. Only utilities and distribution electric cooperatives are subject to gross receipts license fee. Minimum fee is $25. (S.C. Code Ann. §§ 12-20-20, 12-20-100).

All taxes and penalties are debts payable to state and a first lien on property of party charged. (S.C. Code Ann. § 12-21-3010).

None of the taxes apply to building and loan associations, or credit unions, or to insurance, fraternal, beneficiary or mutual protective corporations or associations. (S.C. Code Ann. § 12-20-110).

Every domestic corporation upon dissolution or retirement from business must file with Secretary of State certificate of dissolution or retirement from business and every foreign corporation on ceasing to do business within the state must file with Secretary of State a certificate to that effect signed by duly authorized officers. (S.C. Code Ann. §§ 33-14-101 to -107 and S.C. Code Ann. § 33-15-200).

Limited Liability Companies.

See topic 2.06 Limited Liability Companies.

Barratry.

Corporations subject to crime of barratry. (S.C. Code Ann. § 16-17-30).

Income Tax on Corporations.

See category 22 Taxation, topic 22.10 Income Tax.

Nonprofit Corporations.

Note: Revised Model Nonprofit Corporations Act, as adopted in 1987 by Subcommittee on the Model Nonprofit Corporation Law of the Business Law Section of the American Bar Association, has been adopted, with variances, in South Carolina and is known as "South Carolina Nonprofit Corporation Act of 1994" ("Nonprofit Act"). For text of Revised Model Act, see Uniform and Model Acts section. Nonprofit Act became effective May 10, 1994. Law as digested below relates only to variances of S.C. Nonprofit Corporation Act from Model Act.

General Provisions.

(S.C. Code Ann. §§ 33-31-101 to -180).

Existing Corporations.

Existing nonprofit corporations organized under State law, and foreign nonprofit corporations are governed by Nonprofit Act and required to file "Notification of Existing Corporation" with Secretary of State. Certain other nonprofit corporations, including legislatively chartered corporations, may elect to be governed by Nonprofit Act. Existing corporations may make designation as public benefit, mutual benefit or religious in type. (S.C. Code Ann. §§ 33-31-1701 to -1708).

Standardization of Forms.

Secretary of State may require use of standardized forms for filing documents. (S.C. Code Ann. § 33-31-121).

Filing Requirements.

Filing service and copying fees. (S.C. Code Ann. § 33-31-122). Filing duty of Secretary of State. (S.C. Code Ann. § 33-31-125).

Certificates of Existence.

Person may apply to Secretary of State to furnish Certificate of Existence for domestic corporation or Certificate of Authorization for foreign corporation. (S.C. Code Ann. § 33-31-128).

Definitions for following terms are different from Model Act definitions: “approved by the members”, “board”, “directors”, “distribution”, “employee”, “member”, “mutual benefit corporation”, “principal office”, “record date”, “voting power”. Additional definition: “conspicuous”. (S.C. Code Ann. § 33-31-140).

Attorney General Investigation.

Attorney General is authorized to investigate organization, conduct and management of nonprofit corporation operating in South Carolina to determine whether it is or has been engaged in acts or conduct in violation of its charter rights and privileges or in violation of any State law. (S.C. Code Ann. § 33-31-171). Must make written request to inspect and examine corporate documents. (S.C. Code Ann. § 33-31-172). Use of information collected is restricted to proceedings to which State is party. (S.C. Code Ann. § 33-31-173). Failure to cooperate results in forfeiture of right to operate, works forfeiture or cancellation of nonprofit corporation's articles or certificate of authority. (S.C. Code Ann. § 33-31-174).

Incorporation.

(S.C. Code Ann. §§ 33-31-201 to -207).

Liability for Pre-incorporation Transactions.

Incorporators given extra protection in that persons who knew or should have known there was no preincorporation entity may not recover against nonprofit corporation for preincorporation transactions. (S.C. Code Ann. § 33-31-204).

Emergency Bylaws and Powers.

In case of management during emergency, directors, officers, employees and agents are immune from liability for deviations from normal procedures where their conduct was authorized by properly adopted emergency bylaws. (S.C. Code Ann. § 33-31-207).

Purposes.

(S.C. Code Ann. §§ 33-31-301 to -305).

Acceptance of Gifts, Devises and Bequests.

Nonprofit Act contains specific power of nonprofit corporation to accept gifts, devises and bequests so long as conditions or limitations thereof are not contrary to Nonprofit Act or to nonprofit corporation's purposes. (S.C. Code Ann. § 33-31-302[14]).

Names.

(S.C. Code Ann. §§ 33-31-401 to -404).

Name Change Filing Requirement.

Any nonprofit corporation owning real property must file notice of name change in office of register of deeds (or if none, clerk of court) of county in which real property is situate. Filing must be by affidavit, by filing certified copy of amended article or articles of merger, or by recording deed of conveyance to newly named surviving, acquiring or reorganized corporation. (S.C. Code Ann. § 33-31-404).

Office and Agents.

(S.C. Code Ann. §§ 33-31-501 to -505).

Notice of Change of Principal Office.

Nonprofit corporations are not required to file annual report with S.C. Tax Commission. Therefore, any changes in entity's principal office must be noted by filing within 30 days “Notice of Change of Principal Office” with Secretary of State setting forth (a) name of nonprofit corporation; and (b) current street address with zip code of current and former principal offices. (S.C. Code Ann. § 33-31-505).

Members and Memberships.

(S.C. Code Ann. §§ 33-31-601 to -640).

Members' Rights and Obligations.

§§6.13 and 6.14 of Model Act pertaining to liability of members not adopted.

Derivative Suits.

See SCRCP 23(b)(1) and §33-31-630.

Members Meetings and Voting.

(S.C. Code Ann. §§ 33-31-701 to -730).

Meetings and Actions without Meetings.

Nonprofit corporations may specify in articles or bylaws matters which may be taken up at regular meetings without prior notice. (S.C. Code Ann. § 33-31-701). New record date must be set if meeting is adjourned for more than 120 days; consistent with S.C. Business Corporation Act. (S.C. Code Ann. § 33-31-707).

Voting.

Members must be listed by classification of membership, if any; list must be made available at member's cost on day after notice is given; court authorized to require payment of member's costs when inspection refused. (S.C. Code Ann. § 33-31-720). Amendments to increase or decrease quorum requirements for member action must be approved by members. Amendments to increase, decrease or delete quorum must be adopted under quorum then in effect or proposed to be adopted, whichever is greater. Not adopted is Model Act provision that unless 1/3 of voting power is present at meeting no action can be taken which is not described in meeting notice. (S.C. Code Ann. § 33-31-722). Amendments to add, change or delete requirements for greater vote or voting by membership class must be adopted by vote and classes of members require to take action under requirements then in effect or proposed to be adopted, whichever is greater. (S.C. Code Ann. § 33-31-723).

Directors and Officers.

(S.C. Code Ann. §§ 33-31-801 to -858).

Board of Directors.

Director elected by members or directors may be removed by Board for any reason set forth in articles or bylaws if such reason existed at beginning of director's term. (S.C. Code Ann. § 33-31-808[i]). Members holding 5% of voting power of any class to elect directors may commence judicial action to remove director. (S.C. Code Ann. § 33-31-810[a]).

Meetings and Action of Board.

Director present at board meeting or meeting of board committee when action is taken is deemed to assent to action unless (a) objection is made to holding meeting or transacting business at meeting; (b) director votes against action; (c) director properly dissents or abstains from voting. (S.C. Code Ann. § 33-31-824[c]).

Standards of Conduct.

Business judgment rule has been applied to nonprofit corporations. See 291 S.C. 214, 352 S.E.2d 714, aff'd 294 S.C. 86, 362 S.E.2d 874. Actions against directors for failure to comply with standards of conduct must be brought sooner of (a) three years after act; or (b) two years after harm complained of is, or reasonably should have been, discovered. Exception for fraudulent concealment. (S.C. Code Ann. § 33-31-830[f]). Board may retrospectively ratify transactions in which directors of public interest or religious corporations have conflict of interest. (S.C. Code Ann. § 33-31-831[b][1]). Loans to officers and directors prohibited except under certain circumstances where mutual benefit corporation's articles or bylaws permit. (S.C. Code Ann. § 33-31-832[b]). Personal liability of directors extends to distributions made in violation of nonprofit corporation's articles as well as in violation of Nonprofit Act. (S.C. Code Ann. § 33-31-833).

Indemnification.

Provisions for indemnification of directors, officers and employees, coextensive with those found in S.C. Business Corporations Act (S.C. Code Ann. §§ 33-8-500 to -580), are contained in Nonprofit Act (S.C. Code Ann. §§ 33-31-850 to -858).

Amendment of Articles.

(S.C. Code Ann. §§ 33-31-1001 to -1031).

Authority to Amend.

Public benefit or religious corporations which wish to amend articles to become designated mutual benefit corporation must deliver notice and copy of proposed amendment to Attorney General at least 20 days before consummation of amendment. (S.C. Code Ann. § 33-31-1001[b]).

Amendment by Directors.

Directors of nonprofit corporation existing prior to effective date of Nonprofit Act may amend articles to specify type of nonprofit corporation. Directors may also amend where there are no members, or where there are no members entitled to vote on amendment. (S.C. Code Ann. § 33-31-1002).

Amendment by Directors and Members.

Any increase in vote required to amend articles or any requirement that voting be by class must be specified in articles or bylaws. (S.C. Code Ann. § 33-31-1003).

Restated Articles.

Nonprofit Act specifies content of Restated Articles. (S.C. Code Ann. § 33-31-1006).

Judicial Amendment.

Attorney General may bring proceeding to correct nonprofit corporation's designation. (S.C. Code Ann. § 33-31-1007[b]).

Amendment of Bylaws.

(S.C. Code Ann. § 33-31-1021).

Amendment by Directors and Members.

Replaces Model Act §10.21 with provisions consistent with S.C. Business Corporation Act §33-10-200. (S.C. Code Ann. § 33-31-1021).

Increase of Quorum or Voting Requirements for Members or Directors.

No similar Model Act provisions, Nonprofit Act's requirements are consistent with S.C. Business Corporation Act S.C. Code Ann. §§ 33-10-210 and 33-10-220. (S.C. Code Ann. §§ 33-31-1023, 33-31-1024).

Merger.

Technical additions are made to clarify that if religious corporation merges with business or mutual benefit corporation its assets must be distributed pursuant to its articles or to another charity. Distributions to members by public benefit or religious corporations are not permitted. Legislatively chartered corporations may merge into new public benefit or religious corporations. (S.C. Code Ann. § 33-31-1102). All requirements for increased voting or voting by class must be contained in articles or bylaws. Mergers which eliminate class of members must comply with certain notice requirements and be approved by 2/3 of each class. (S.C. Code Ann. § 33-31-1103).

Sale and Distribution of Assets Other than in Ordinary Course of Business.

Directors have sole power to sell assets if nonprofit corporation does not have members, or no members are entitled to vote on transaction. All requirements for increased voting or voting by class must be contained in articles or bylaws. (S.C. Code Ann. § 33-31-1202).

Prohibited Distributions.

Nonprofit Act contains non-Model Act definition of “distribution” in §33-31-140(11).

Dissolution.

(S.C. Code Ann. §§ 33-31-1401 to -1440).

Dissolution by Directors.

Directors may dissolve nonprofit corporation themselves where corporation has no members or no members who are entitled to vote on dissolution. All requirements for increased voting or voting by class must be contained in articles or bylaws. (S.C. Code Ann. § 33-31-1402).

Known and Unknown Claims.

Dissolved corporation must, in notification of rejected claims, state that proceeding to enforce claim must be commenced within 90 days. (S.C. Code Ann. § 33-31-1407[c][2]). Proceedings on unknown claims must be commenced within two years of publication of notice. (S.C. Code Ann. § 33-31-1408[b][3]).

Administrative Dissolution.

There are no grace periods for dissolution by administrative proceedings; nonprofit corporations which have been adjudicated bankrupt (under c. 7) may be administratively dissolved. (S.C. Code Ann. § 33-31-1420). Nonprofit corporation may appeal denial of reinstatement within 30 days after service of notice of denial. (S.C. Code Ann. § 33-31-1423).

Judicial Dissolution.

Nonprofit Act contains clarifications of prohibited activities and other events which could form basis for judicial dissolution such as improper or fraudulent solicitation of funds or abandonment of business without proper winding up. (S.C. Code Ann. § 33-31-1430).

Foreign Corporations.

(S.C. Code Ann. §§ 33-31-1501 to -1532).

Transaction of Business in State.

Foreign nonprofit corporations granted authority to transact business in State may enforce any rights which they have in property situated in State. Solicitation of funds or holding of alumni meetings by out-of-state nonprofit educational institutions does not constitute transaction of business in State. (S.C. Code Ann. § 33-31-1501).

Certificate of Authority to Transact Business.

Application must list business addresses only of officers and directors. Certificate of existence from state of incorporation must be dated no later than 60 days prior to application. No requirement that South Carolina attorney certify application. (S.C. Code Ann. § 33-31-1503).

Change of Principal Office.

Must give Secretary of State notice of change of principal office. (S.C. Code Ann. § 33-31-1515). Withdrawing corporation must keep Secretary of State informed of any change in address for six years after it withdraws. (S.C. Code Ann. § 33-31-1520).

Deeds.

See category 21 Property, topic 21.06 Deeds.

2.04 [RESERVED]

2.05 JOINT STOCK COMPANIES:

Service in actions against joint stock companies may be by service on officer of company which is service on all shareholders of record and no change or transfer of shares pending action causes any abatement thereof. (S.C. Code Ann. § 15-9-320).

Massachusetts or Business Trusts.

Instrument creating business trust must be filed with register of deeds or clerk of court in county where trust has its principal place of business, and verified copy filed with Secretary of State. Real estate may be acquired, conveyed and mortgaged by trustees. Rule against perpetuities does not apply. Business trust may sue and be sued in its name without naming shareholders. Instrument creating trust may provide that individual shareholders or trustees have no personal liability and operates to limit liability to obligations of trust itself. (S.C. Code Ann. §§ 33-53-10 to -50).

Professional Associations.

See topic 2.02 Associations.

2.06 LIMITED LIABILITY COMPANIES:

Limited Liability Companies.

Note: In 1996, South Carolina adopted Uniform Limited Liability Company Act (“1996 LLC Act”) as recommended by National Conference of Commissioners on Uniform State Laws. (S.C. Code Ann. §§ 33-44-101 to -1207). As of June 1, 1996 every new LLC must be created under 1996 LLC Act. 1994 LLC Act was derived in part from Nov. 19, 1992 draft version of “prototype” Limited Liability Company Act of American Bar Association's Business Law Section, and July 30, 1993 draft Limited Liability Company Act considered by National Conference of Commissioners On Uniform State Laws. South Carolina made no changes to Uniform Act when it was adopted in 1996. For Uniform Limited Liability Company Act see Uniform and Model Acts in Appendix.

General Provisions.

Name.

LLC's name must include words “limited liability company”, “limited company”, or abbreviations “L.L.C.”, “L.C.”, “LLC”, or “LC”. “Limited” may be abbreviated “Ltd” and company “Co”. Name may not be same or deceptively similar to any other entity existing or authorized to transact business in State, or to any name reserved or registered in State unless written consent of other entity is obtained and filed with Secretary of State. (S.C. Code Ann. § 33-44-105). Name may be reserved or registered by filing application with Secretary of State. Reserved names are held for 120 days. (S.C. Code Ann. § 33-44-106[a]). Registered names of foreign LLC's must be renewed annually between Oct. 1 and Dec. 31. (S.C. Code Ann. § 33-44-107[c]).

Designated Office and Registered Agent.

LLC must maintain designated office in South Carolina, as well as registered agent to accept service of process. Registered agent must be resident of State, domestic corporation, another limited liability company, or foreign corporation or foreign company authorized to do business in this state. (S.C. Code Ann. § 33-44-108).

Formation.

Articles of Organization.

One or more persons may form LLC by filing Articles of Organization with Secretary of State. (S.C. Code Ann. § 33-44-202). Articles of Organization must state (a) name of company, (b) street address of initial designated office, (c) name and address of initial agent, (d) name and address of each organizer, (e) whether company is term company and if so, term specified, (f) whether company is to be manager-managed and if so, name and address of each initial manager, and (g) whether one or more members are to be liable for company's debts and obligations under S.C. Code Ann. § 33-44-303(c). (S.C. Code Ann. § 33-44-203).

Amendment of Articles.

Articles of Organization must be amended upon changes in information or discovery of errors in original Articles. Articles may be restated at any time. Articles of Amendment must be filed with Secretary of State. (S.C. Code Ann. § 33-44-204).

Relation of Members and Managers to Persons Dealing with LLC.

Agency Powers of Members and Managers.

Unless Articles of Organization vest management in manager(s), every member of LLC is agent of LLC for conducting its business with power to bind LLC under apparent agency principals. Acts which are outside usual course of LLC's business must be authorized by other members. (S.C. Code Ann. § 33-44-301).

Unless Articles limit their authority, any member of member-managed company or manager of manager-managed company may sign and deliver any instrument transferring or affecting company's interest in real property. Instrument is conclusive in favor of person who gives value without knowledge of lack of authority of person signing and delivering instrument. (S.C. Code Ann. § 33-44-301[c]).

Liability to Third Parties.

Unless otherwise specified in Articles of Organization and separate writing, members and managers each enjoy limited liability as to acts or omissions of any other member, manager, agent or employee of LLC. (S.C. Code Ann. § 33-44-303). Licensed professionals liable for own negligence, but not that of other members, managers, agents or employees unless at fault in appointing, supervising or cooperating with them. LLC has respondeat superior liability for acts of professional negligence of its members, managers, agents or employees. LLC liable to same extent as member or manager for their wrongful acts or omissions or other actionable conduct either authorized by LLC or performed in ordinary course of LLC's business. (S.C. Code Ann. § 33-44-302).

Rights and Duties of Members and Managers.

Management.

Managers, if appointed in Articles of Organization, have exclusive power to manage LLC except to extent otherwise provided in operating agreement. Managers are chosen by majority vote of members. (S.C. Code Ann. § 33-44-404).

Fiduciary Duties.

Duties of loyalty and care apply to members, or in manager-managed LLC to managers and not members unless manager is also member. (S.C. Code Ann. § 33-44-409). Operating agreement may not eliminate duty of loyalty or unreasonably reduce duty of care. (S.C. Code Ann. § 33-44-103).

Supermajority Voting.

Unanimous approval of members required for, among other things, amendment of operating agreement or Articles of Organization, admission of new member, or dissolution of company. (S.C. Code Ann. § 33-44-404).

Recordkeeping.

Although LLC is not required to maintain any records, LLC must provide members and their agents and attorneys access to its records, if any, at its principal place of business, or other reasonable location, and must allow inspection and copying during ordinary business hours. LLC must give member written description of membership rights upon request. (S.C. Code Ann. § 33-44-408). Failure to maintain records is not grounds for imposing liability on LLC members or managers. (S.C. Code Ann. § 33-44-303).

Transferability of Member's Interests.

LLC distributional interest is considered personal property. (S.C. Code Ann. § 33-44-501). Transfer of distributional interest does not entitle transferee to become or exercise any rights of member. (S.C. Code Ann. § 33-44-502). Unanimous consent of members is required to admit new member. (S.C. Code Ann. § 33-44-404[c][7]). Transferee who has become new member has rights and powers, and is subject to restrictions and limitations, of member under operating agreement and Act. Transferee who does not become member is not entitled to participate in management or conduct of LLC's business and is only entitled to distributions transferor would be entitled to. (S.C. Code Ann. § 33-44-503).

Rights of Third Parties in Member's Interests.

Unless prohibited by operating agreement, member may pledge, grant security interest in, or subject membership interest to lien or other encumbrance without being deemed assignment. (S.C. Code Ann. §§ 33-44-501 to -504). Member's interest may be charged with payment of creditor's unsatisfied judgment. (S.C. Code Ann. § 33-44-504).

Finance.

Contributions to Capital.

LLC interest may be issued in exchange for anything of value. (S.C. Code Ann. § 33-44-401). Obligation to make capital contributions need not be in writing to be enforceable. Such obligation may be compromised only upon unanimous written consent of members. Compromises are not binding upon creditors who extended credit in reliance on obligation as to capital contributions without notice of any compromise. (S.C. Code Ann. § 33-44-402).

Allocation of Profits and Losses.

Made among members in accordance with terms of operating agreement. Act does not contain default rule for allocating profits and losses.

Distributions.

Interim Distributions.

Shared among members and among classes of members in manner provided in operating agreement, or in absence of agreement, on per capita basis. (S.C. Code Ann. § 33-44-405). Distributions authorized in accordance with terms of operating agreement, or in absence of agreement, by vote of members or managers (see topic 2.03 Corporations, subhead Voting Trusts, supra). (S.C. Code Ann. § 33-44-405).

Distributions Upon Dissociation.

Upon member's dissociation from at-will company, company must purchase member's distributional interest for its fair value determined as of date of dissociation if member's dissociation does not result in dissolution and winding up of company's business. Upon member's dissociation from term company, company need not purchase member's distributional interest until expiration of specified term, at which time company must purchase distributional interest for its fair value determined as of date of expiration of specified term. (S.C. Code Ann. §§ 33-44-603 and 33-44-701).

Ownership and Transfer of Property.

Title.

LLC may hold title to real and personal property. (S.C. Code Ann. § 33-44-112[b][2]).

Transfer of LLC Property.

Unless articles limit their authority, any member of member-managed company or manager of manager-managed company may sign and deliver any instrument transferring or affecting company's interest in real property. Instrument is conclusive in favor of person who gives value without knowledge of lack of authority of person signing and delivering instrument.

(S.C. Code Ann. § 33-44-301[c]).

Admission and Dissociation of Members.

(S.C. Code Ann. §§ 33-44-401 -601).

Admission.

New members may be admitted in compliance with operating agreement or, if agreement does not so provide, upon written consent of all current members. (S.C. Code Ann. § 33-44-404). See also subhead Rights and Duties of Members and Managers, catchline Transferability of Member's Interests, supra.

Dissociation.

Person ceases to be member by variety of events including: (a) Voluntary withdrawal; (b) certain transfers of distributional interests; (c) removal pursuant to operating agreement; (d) affirmative vote of members pursuant to operating agreement; (e) any event of insolvency or bankruptcy; (f) death; (g) adjudication of incapacity to make or communicate responsible decisions concerning his person or property; (h) if member is trust, distributions of trust's entire rights to receive distributions from company, but not merely by reason of substitution of successor trustee; (i) in case of LLC member, dissolution and commencement of winding up; (j) in case of corporate member, filing of articles of dissolution or failure to reinstate within 90 days of administrative dissolution; or (k) expulsion by judicial decree. (S.C. Code Ann. § 33-44-601). If operating agreement has not eliminated member's power to dissociate, dissociation is wrongful only if (a) it is in breach of operating agreement, or (b) before expiration of specified term of term company, (i) member withdraws voluntarily, (ii) member is expelled by judicial determination, (iii) member is dissociated by becoming debtor in bankruptcy, or (iv) in case of member who is not individual, trust, other than business trust, or estate, member is expelled or otherwise dissociated because it willfully dissolved or terminated. Wrongfully dissociating member is liable to LLC and to other members for damages caused by dissociation, including reasonable costs of obtaining replacement of services withdrawn member was obligated to perform. Distributions of wrongfully dissociating member are subject to offset for these damages. (S.C. Code Ann. § 33-44-602).

Dissolution.

Events of Dissolution.

LLC is dissolved upon: (a) Occurrence of events specified in Articles of Organization or in operating agreement; (b) if not otherwise specified in operating agreement, written consent of all members; (c) event that makes it unlawful to carry on business, unless company cures illegality within 90 days after notice to company of event; (d) entry of decree of judicial dissolution; or (e) administrative dissolution by Secretary of State. (S.C. Code Ann. §§ 33-44-801,–809, –810).

Winding Up.

Member who has not wrongfully dissociated may wind up LLC's affairs following dissolution. Judicial supervision may be sought if such member, member's legal representative, or transferee applies to circuit court and shows good cause. (S.C. Code Ann. § 33-44-803).

Distribution of assets in following order of priority: (a) To creditors, including members who are creditors; and (b) unless operating agreement otherwise provides to members all remaining cash and other assets must be distributed to members in accordance with their positive capital account balances, determined after taking into account all capital account adjustments for taxable year of company during which distribution occurs, including adjustments for distributions made pursuant to this section. (S.C. Code Ann. § 33-44-806). Known creditors must be notified in writing of dissolution and how to submit claims and that claims received past deadline for receipt of claims will be barred. Claimants whose claims are rejected must commence suit within 90 days after date of rejection notice. (S.C. Code Ann. § 33-44-807). LLC must also publish newspaper notice describing process for submitting claims and that claims received more than five years following notice will be barred. (S.C. Code Ann. § 33-44-808).

Articles of Termination may be filed with Secretary of State. (S.C. Code Ann. § 33-44-805).

Foreign LLC's must register with Secretary of State by filing application for certificate of authority to transact business in this State in order to transact business in State. (S.C. Code Ann. § 33-44-1002). Certificate of existence from foreign LLC's state of organization must accompany application. (S.C. Code Ann. § 33-44-1002). Name must comply with LLC Act requirements for domestic LLC's. (S.C. Code Ann. § 33-44-1002). Registration may be cancelled by filing certificate of cancellation with Secretary of State. (S.C. Code Ann. § 33-44-1007). Failure to register does not impair contracts or foreign LLC's right to defend in any State court. (S.C. Code Ann. § 33-44-1008).

2.07 [RESERVED]

2.08 PARTNERSHIPS:

Uniform Partnership Act (“UPA”) is in effect. (S.C. Code Ann. §§ 33-41-10 to -1090). For standard Uniform Partnership Act see Part VI of this volume.

Revised Uniform Limited Partnership Act of 1976 with 1985 Amendments (“RULPA”), effective date, with certain exceptions, Sept. 1, 1986. (S.C. Code Ann. §§ 33-42-10 to -2040).

Variations from UPA appear in following sections:

§2 adds definition of “Registered limited liability partnership” as formed pursuant to agreement governed by laws of South Carolina, registered under §33-41-1110 and complying with §§33-41-1120 and -1130. (S.C. Code Ann. § 33-41-20[6]).

§4(4) substitutes “substantially identical legislation” for “it”. (S.C. Code Ann. § 33-41-40[4]).

§6 includes in definition of “partnership” registered limited liability partnerships. (S.C. Code Ann. § 33-41-210).

§15 amended to provide that all partners are jointly and severally liable for everything chargeable to partnership except with regard to registered limited liability partnerships, whose partners are not directly or indirectly liable for debts, obligations, liabilities of partnership arising from negligence, wrongful acts, or misconduct committed by another partner, employee, agent, or representative of limited liability partnership. Registered limited liability partnership partners are liable for their own negligence, wrongful acts, or misconduct, as well as that of person under their direct supervision and control. Individual liability for professional services on behalf of registered limited liability partnership in which partner personally participates is to same extent as if services rendered as sole practitioner. No liability in registered limited liability partnership for negligence, wrongful acts, misconduct, or omissions of other partners, agents, or employees unless partner is at fault in appointing, supervising, or cooperating with them (S.C. Code Ann. § 33-41-370). Registered LLP partners receive protection from tort liability only. Unlike limited partners in an LP, they remain jointly and severally liable for the LLP's contractual liabilities.

§18(a) adds “Except as provided in Section S.C. Code Ann. § 33-41-370(B)” and substitutes “shall” for “must” when describing each partners' mandatory contributions toward losses according to profit share. (S.C. Code Ann. § 33-41-510[1]).

§32 inserts “the court shall decree a dissolution” before subsections (a) and (b). (S.C. Code Ann. § 33-41-940[2]).

§33-41-940(2)(a) adds “or” at end of subsection.

§34 amended to preclude partner liability upon dissolution for that which registered limited liability partner would not otherwise be liable. (S.C. Code Ann. § 33-41-960[3]).

§35 divided into four sections, but otherwise no substantive variation. (S.C. Code Ann. §§ 33-41-970 to -1000).

§35(1)(a) inserts “or” at end of subsection. (S.C. Code Ann. § 33-41-970[1]).

§36(4) substitutes “must” for “shall” and “those” for “all.” Inserts “and for which he was liable under Section S.C. Code Ann. § 33-41-370” between “partner” and “but.” (S.C. Code Ann. § 33-41-1010[4]).

§38 divided into two sections, but otherwise not substantive variation. (S.C. Code Ann. §§ 33-41-1030 to -1040).

§38(2)(b) inserts “and” at end of subsection. (S.C. Code Ann. § 33-41-1040[2]).

§38(2)(c)(I) inserts “and” at end of item. (S.C. Code Ann. § 33-41-1040[3][a]).

§40 substitutes “must” for “shall.” (S.C. Code Ann. § 33-41-1060).

§40(a)(I) inserts “and” at end of item. (S.C. Code Ann. § 33-41-1060[1][a]).

§40(a)(II) deletes “necessary for the payment of all liabilities” and “of this section” and substitutes “(4)” for “(2).” (S.C. Code Ann. § 33-41-1060[1]).

§40(c) substitutes “must” for “shall” and deletes “of this section.” (S.C. Code Ann. § 33-41-1060).

§40(d) substitutes “and if” for “but if” and is divided into two sections. (S.C. Code Ann. § 33-41-1060[4]).

§40(g) substitutes “must” for “shall.” (S.C. Code Ann. § 33-41-1060[7]).

§40(h) substitutes “provided by law” for “heretofore.” (S.C. Code Ann. § 33-41-1060[8]).

§40(i) substitutes “must” for “shall”. (S.C. Code Ann. § 33-41-1060[9]).

§40(h) inserts “and” at end of subsection. (S.C. Code Ann. § 33-41-1060[8]).

§§44 and 45 of UPA were not adopted.

After §43, new statutory sections describe requirements of becoming and continuing as registered limited liability partnership (S.C. Code Ann. §§ 33-41-1110 to -1130); South Carolina limited liability partnerships operating in other states or foreign countries (S.C. Code Ann. § 33-41-1140); and foreign limited liability partnerships transacting business in South Carolina (S.C. Code Ann. §§ 33-41-1150 to -1210).

General Assembly has power to provide regulations under this chapter and title and to amend or repeal all or any part of it; all domestic and foreign limited liability partnerships subject to this chapter are governed by such amendment or repeal. (S.C. Code Ann. § 33-41-1220).

Variations from ULPA of 1976 appear in following sections:

§102(1) inserts "or the abbreviation 'LP', or 'L.P.' ". (S.C. Code Ann. § 33-42-30[1]).

§102(4) prohibits use of word "limited" or any abbreviation except as allowed by §102(1). (S.C. Code Ann. § 33-42-30[4]).

Between §§103 and 104 there is assumed name section that requires filing with Secretary of State assumed name certificate which is effective for five full calendar years and may be renewed for like period. (S.C. Code Ann. § 33-42-45).

§105 adds subsection (c) which gives non-partners inspection rights upon five business days written demand. (S.C. Code Ann. § 33-42-60[c]).

Section added which makes it lawful for any manufacturer, brewer, or importer of beer or its affiliate to hold interest in limited partnership providing financial assistance to general partner wholesaler. (S.C. Code Ann. § 33-42-75).

§201(5) deletes "general" before "partners". (S.C. Code Ann. § 33-42-210[a][5]).

§202 adds subsection (g) which is transition provision that applies to limited partnerships formed before 1984 in order to give them time to amend certificates of limited partnerships. (S.C. Code Ann. § 33-42-220[g]).

§204(a)(2) inserts "or substitute" between "new" and "general". (S.C. Code Ann. § 33-42-240[a][2]).

§209 inserts "or restated certificate or any judicial decree of any of the above, as the case may be", between "cancellation" and "to". (S.C. Code Ann. § 33-42-290).

After §209 three additional sections are added. (S.C. Code Ann. §§ 33-42-300 to -310). §33-42-300 requires filing of affidavit indicating general partner's authority as prerequisite to transferring real property owned by partnership. Affidavit must be executed by partnership and filed in county where index to deeds for property is located, and must contain: (i) Name of partnership; (ii) place or places where certificate filed; (iii) name or names of persons authorized to sign documents on behalf of partnership. §33-42-310 eliminates dual filing requirements of certificates of limited partnership and of amendments.

§301(a) adds "on the later of" after "partner". (S.C. Code Ann. § 33-42-410[a]).

§303(a) substitutes "takes part" for "participates". (S.C. Code Ann. § 33-42-430[a]). Second sentence of §303 beginning with, "However" is 1976 version, not amended (1985) version. (S.C. Code Ann. § 33-42-430[a]).

§303(b)(6)(IX) not adopted.

§401 inserts "or substitute" between "additional" and "general". (S.C. Code Ann. § 33-42-610).

§801(4) deletes "but the limited partnership is not dissolved and is not required to be wound up by reason of any event of withdrawal, if", and inserts "or"; inserts "pursuant to §33-42-610" (or §401) between "partnership and" and "to"; substitutes "appointment" for "admission"; and inserts "or substitute" between "additional" and "general". (S.C. Code Ann. § 33-42-1410).

§§802 and 803 designate "the circuit court of the county in which the limited partnership's office designated pursuant to §33-42-50(1) [§104] is located". (S.C. Code Ann. § 33-42-1420).

§901—added part (b) which reads, "A foreign limited partnership may transact any business in this State that a limited partnership formed in this State may carry on". (S.C. Code Ann. § 33-42-1610[b]).

§904—added part (b) which requires foreign limited partnerships transacting business under assumed names to comply with §33-42-45. (S.C. Code Ann. § 33-42-1640[b]).

§908 designates Attorney General as person who may bring action to restrain foreign limited partnership from transacting business in this state in violation of this chapter. (S.C. Code Ann. § 33-42-1680).

§1104 was not adopted.

§1106 was not adopted.

Foreign Limited Partnerships.

Unless in conflict with South Carolina Constitution, foreign limited partnerships are governed by laws of state of organization. (S.C. Code Ann. § 33-42-1610). Before transacting business in South Carolina, foreign limited partnerships must register with Secretary of State. §33-42-1620 describes contents of application for registration. §33-42-1620 provides that by registering, foreign partnership agrees to be subject to jurisdiction of Department of Revenue and courts of this State to determine its South Carolina tax liability. Must comply with assumed name filing requirements. (S.C. Code Ann. §§ 33-42-45 and -1640). Effects of transacting business without registration are described in §33-42-1670. See §907 of RULPA. §33-42-1690 describes nonexclusive list of activities of foreign limited partnership which will not result in determination that foreign limited partnership is transacting business in South Carolina, solely by reason of one or more of these prescribed activities.

Filing Fees.

§33-42-2040 sets following fees: $10 for filing document which includes one copy to person requesting filing. All other copies are: $1 for first page and $.50 for each additional; and $2 for certificate under seal.

Party in Action.

Partnership has capacity with or without joinder of one or more partners to sue and be sued in courts of this state. (S.C. Code Ann. § 15-5-45).

3 BUSINESS REGULATION AND COMMERCE

3.01 BANKS AND BANKING:

Supervision.

Banks, building and loan associations, saving and loan associations and savings banks are under supervision of State Board of Financial Institutions (http://banking.sc.gov/), which is composed of ten members, one of whom is State Treasurer (http://www.treasurer.sc.gov/) and chairman, which appoints Commissioner of Banking and supervises examinations, reports, etc. (S.C. Code Ann. §§ 34-1-20, -60, -80). Board must approve bank's charter. (S.C. Code Ann. § 34-1-70). Board may provide regulations and instructions for direction, control and protection of such institutions. (S.C. Code Ann. § 34-1-60). Board may appoint conservator. (S.C. Code Ann. § 34-5-20).

Stockholders.

Stockholders of insolvent banks are liable to creditors, other than depositors, to the extent of the amount remaining due to the corporation upon the stock owned by them. (186 S.C. 17, 194 S.E. 649).

Deposits and collections are governed by Art. 4 of Uniform Commercial Code.

Subject to provisions of §§62-6-101 to -201, when deposit has been made in names of two or more persons payable to any depositors, or payable to any depositor or survivor or survivors, deposit or any part thereof may be paid to any of such persons, whether other or others be living or not. (S.C. Code Ann. § 34-11-10[a]). All or part of deposit account may be pledged to bank, banking institution or other depository. (S.C. Code Ann. § 34-11-10[b]). Financial institutions may pay multiple party account, sums in joint account, sums in P.O.D. account or sums in trust account to one or more of parties, on request, unless contrary intent is manifested by terms of account or deposit agreement. (S.C. Code Ann. §§ 62-6-108 to -111). Statute (S.C. Code Ann. § 34-11-10) creates rebuttable presumption that persons intended that such deposit should be paid to survivor as owner. (257 S.C. 374, 186 S.E. 2d 258). When wife entrusts husband with her passbook and checks endorsed by her for deposit, entirely reasonable for bank to conclude husband authorized to withdraw from her account. (289 S.C. 63, 344 S.E.2d 624).

Banks must recognize adverse claim to bank deposit if claimant procures restraining order or injunction against bank from a court and depositor is made party thereto; or claimant executes and delivers to bank an appropriate indemnity bond. Above does not apply where depositor stands in a fiduciary relationship to adverse claimant and facts in affidavit form show that fiduciary is about to misappropriate deposit. (S.C. Code Ann. § 34-11-110).

Unclaimed Deposits.

Uniform Unclaimed Property Act (1981) adopted. (S.C. Code Ann. §§ 27-18-10 to -400). §27-18-70 specifically addresses abandoned demand, savings, or matured time deposit with banking institutions. See category 21 Property, topic 21.01 Absentees.

Deposits of Minors.

Bank may accept deposit of and pay out deposits upon check or other order of minor and act in any other matter with respect to deposits with same effect as if dealing with person of full legal capacity. (S.C. Code Ann. § 34-11-20). Same applies to savings and loan associations, savings banks or building and loan associations. (S.C. Code Ann. § 34-28-610).

Records, Photographing of.

State Board of Bank Control regulations classify all records kept by banks and prescribe period for which records of each class must be retained. (R. 15-14). Reproduction by microphotographic process has same force and effect as original thereof. (S.C. Code Ann. § 34-3-540). Such copies admissible in evidence in like manner as original. (S.C. Code Ann. §§ 34-3-540 and 19-5-40).

Investments.

With certain exceptions, bank may not loan equivalent of more than 10% of its capital stock, notes, and debentures actually paid in and surplus to any person. (S.C. Code Ann. § 34-13-50). Bank may purchase and hold such real estate as may be convenient for transaction of its business. (S.C. Code Ann. § 34-3-210[3]). Bank may invest in Federal savings and loan association or building and loan association shares if they are insured by Federal Savings and Loan Insurance Corporation. Bank may invest in bonds or debentures issued by Federal home loan bank or in consolidated bonds or debentures issued by Federal Home Loan Bank Board. (S.C. Code Ann. § 34-13-150). Banks may invest up to 10% of bank's capital and surplus in bank service corporation (corporation whose purpose is to perform for more than one bank services like check and deposit sorting and posting). (S.C. Code Ann. § 34-13-170). Up to 15% of capital accounts of bank may be invested in capital stock of banker's bank (bank insured by FDIC where stock is owned exclusively by other banks and which is engaged exclusively in providing services for other depository institutions), except no purchase of stock may result in acquisition of more than 5% of any class of voting securities of banker's bank. (S.C. Code Ann. § 34-33-60).

Bank, when acting in fiduciary capacity may register and hold stocks, bonds or other securities in name of a nominee. (S.C. Code Ann. §§ 35-5-10 to -40).

Bank Holding Company.

Bank holding companies may be formed upon compliance with and are subject to South Carolina Banking and Branching Efficiency Act of 1996. (S.C. Code Ann. §§ 34-25-10 to -310).

Savings Banks.

S.C. Savings Association Act (S.C. Code Ann. §§ 34-28-10 to 900) generally provides for regulation, activities, organization and authority of mutual or stock-owned savings associations, savings and loan associations, building and loan associations, savings banks, savings and loan holding companies and for limited interstate mergers and acquisitions. To extent not in direct conflict with or superseded by specific provisions of this Act, provisions of South Carolina Business Corporation Act apply.

Trust Companies.

Subject to provisions of S.C. Code Ann. §§ 62-3-203 and 62-7-207, any banking corporation or trust company incorporated in this state with at least $250,000 bona fide capital may be appointed executor, administrator, receiver, assignee, guardian, trustee, etc., subject to same control by courts as legally qualified person. Such corporation is not required to act without its assent. (S.C. Code Ann. § 34-15-10). Capital stock of such corporation is held as security for faithful performance of its duties and no surety is required. (S.C. Code Ann. § 34-15-30).

No corporation, partnership or person may conduct a trust business without written approval from State Board of Bank Control. (S.C. Code Ann. § 34-21-10).

All state charted banks, building and loan associations, savings associations, savings and loan associations, savings banks, trust companies and fiduciary corporations doing trust business are subject to examination by State Board of Financial Institutions and to rules and regulations thereof. (S.C. Code Ann. § 34-21-20).

Uniform Commercial Code adopted. See topic 3.09 Commercial Code.

Common trust funds provided for. (S.C. Code Ann. §§ 34-21-210 to -430).

Private Banks.

There are no statutory provisions. Only legalized incorporated banking institution or savings association may use words “bank” or “banking” in connection with business. (S.C. Code Ann. § 34-3-10).

Small loan companies engaged in business of lending in amounts of $7,500 or less are licensed and supervised by State Board of Bank Control. (S.C. Code Ann. §§ 34-29-10 to -260). See topics 3.18 Licenses, Business and Professional and 3.17 Interest.

License tax, applicable to banks, see category 2 Business Organizations, topic 2.03 Corporations.

Foreign Banks.

Any incorporated bank organized under laws of any state of U.S. or any national banking corporation organized under laws of U.S. maintaining established and active trust department which agrees to perform functions imposed upon it by law of S.C. may act as corporate trustee; but, unless such bank or national bank maintains offices in S.C., it must have unimpaired capital and surplus of not less than twenty-five million dollars. (S.C. Code Ann. § 11-21-10).

3.02 BILLS AND NOTES:

Uniform Commercial Code adopted. See topic 3.09 Commercial Code.

Judgment notes are not recognized in South Carolina.

Attorney's Fees.

Clauses providing for collection of attorney's fees are enforceable, subject to determination of court to fix fee at reasonable sum. (120 S.C. 385, 113 S.E. 313). Claims for collection are actions at law. (327 S.C. 263, 491 S.E.2d 240). Court looks to following factors: (1) nature, extent and difficulty of services rendered; (2) time and labor necessarily devoted to case; (3) professional standing of counsel; (4) contingency of compensation; (5) fees customarily charged in locality for similar services; and (6) beneficial results accomplished. (297 S.C. 382, 377 S.E.2d 296).

Consumer Transactions.

South Carolina Consumer Protection Code provides that no negotiable instrument may be taken in consumer credit sale or consumer lease, other than check dated not later than ten days after its issuance. (S.C. Code Ann. § 37-2-403). Any assignee of rights of seller is made subject to all claims and defenses of consumer buyer against seller. (S.C. Code Ann. § 37-2-404). Code also places restrictions on notes taken for consumer loans, including disallowance of confession of judgment provisions, and assignments of earnings, restricting attorney's fees provision, making lender subject to certain defenses of buyer against related or unrelated seller. (S.C. Code Ann. §§ 37-2-410 to -415 and § 37-3-410). Many consumer transactions are also subject to unconscionability defense.

Fraud.

Not defense where consumer has opportunity to read contents of documents before signing. Right to rely balanced against duty to exercise reasonable diligence. (287 S.C. 382, 339 S.E.2d 112).

3.03 BILLS OF LADING:

See topic 3.09 Commercial Code.

3.04 [RESERVED]

3.05 BLUE SKY LAW:

See topic 3.24 Securities.

3.06 BROKERS:

Real Estate Brokers.

South Carolina Real Estate Commission created to regulate real estate industry. (S.C. Code Ann. § 40-57-10). Real estate broker, salesman or property manager must be licensed by Department of Labor, Licensing and Regulation. (http://www.llr.state.sc.us/). (S.C. Code Ann. § 40-57-20). Qualifications for licensure found at §§40-57-80, and -100. Reciprocating agreements: (S.C. Code Ann. § 40-57-120). Duties of broker or manager in charge found at §40-57-135. Real estate broker's duties to client outlined in §40-57-137. Civil action may be brought for violation of this chapter. (S.C. Code Ann. § 40-57-230).

Mortgage Loan Brokers.

Pertains to brokering of residential mortgage loans. Must be licensed with Administrator of Department of Consumer Affairs (http://www.scconsumer.gov) to act as mortgage loan broker. (S.C. Code Ann. §§ 40-58-10 to -110). C. 58 does not apply to exempt persons or organizations in S.C. Code Ann. § 40-58-20(16). Provides that mortgagee or assignee is responsible for recording satisfaction under certain circumstances and provides for penalties for failure to timely record. (S.C. Code Ann. § 29-3-320).

Loan brokers regulated by S.C. Code Ann. §§ 34-36-10 to -90; prohibited behavior outlined in S.C. Code Ann. § 34-36-20. Penalties for violation at S.C. Code Ann. § 34-36-70. Violation constitutes unfair trade practice. (S.C. Code Ann. § 34-36-80).

Insurance Brokers.

See category 16 Insurance, topic 16.01 Insurance Companies.

Investment Brokers.

See topic 3.24 Securities.

Uniform Commercial Code adopted. See topic 3.09 Commercial Code.

3.07 BULK SALES:

See topic 3.09 Commercial Code.

3.08 CARRIERS:

Public Service Commission regulates all carriers, including motor vehicle carriers. (S.C. Code Ann. § 58-23-20). Decision of Commission may be reviewed by action to vacate its order or for injunction against Commission, which must be brought in circuit court in Richland County. (S.C. Code Ann. § 58-5-340).

Incorporation.

Railroad, steamboat, street railway and canal corporations may be incorporated through the Secretary of State under provisions of special act. Railroad corporations may organize when not less than $500 per mile is subscribed by bona fide subscribers. Canal, steamboat and street railway companies may organize when not less than 50% of the capital stock is subscribed by bona fide subscribers. They elect not less than three nor more than 15 directors, all of whom must be stockholders but none need be residents of this state. (S.C. Code Ann. § 58-15-60).

Employee Liability.

Railroad employees may sue employer for injuries caused by railroad's negligence. (S.C. Code Ann. § 58-17-3720). Contributory negligence abolished but damages reduced in proportion to employee's negligence. (S.C. Code Ann. § 58-17-3730).

Bills of lading governed by Art. 7 of Uniform Commercial Code.

Uniform Commercial Code adopted. See topic 3.09 Commercial Code.

Discrimination.

Unjust discrimination and rebates are prohibited. (S.C. Code Ann. §§ 58-17-1960, -1970).

Liens.

Carrier's lien conferred by Art. 7 of Uniform Commercial Code.

Rates.

Carriers are required to settle freight charges according to rate in bill of lading. As to shipments outside state, rates must conform to classifications and rates filed with Interstate Commerce Commission, and in case of shipments wholly within state, to classifications and rates of Public Service Commission. (S.C. Code Ann. §§ 58-13-420, -430).

Public Service Commission is authorized to fix all rates or divisions thereof between or among common carriers, in case carriers fail to agree. (S.C. Code Ann. § 58-3-170).

Schedule of rates as prepared for railroads by Public Service Commission, must be posted at each station. Penalty for violation $100 per day. (S.C. Code Ann. §§ 58-17-1850, -1860).

Safety.

Public Service Commission authorized to promulgate safety regulations.

Motor Vehicle Carriers.

See category 23 Transportation, topic 23.01 Motor Vehicles.

Public Transportation Passenger Rights Act.

Unlawful for passengers in public transportation vehicle to commit certain acts including littering, playing loud music, carrying weapons or other dangerous articles, interfering with operation of vehicle, boarding bus through rear exit door, or using profane language. (S.C. Code Ann. § 58-23-1830[a]). Driver of such vehicle may refuse to transport any person who violates above provisions. (S.C. Code Ann. § 58-23-1830[c]). Intoxicated persons may be excluded from riding public transportation vehicle by vehicle's driver/operator. (S.C. Code Ann. § 58-23-1830[b]).

Vehicle Size.

§56-5-4010 to -4230 prescribes permissible size, weight, and loads for vehicles. Two and three unit combinations permitted on interstate and other designated roads. (S.C. Code Ann. § 56-5-4070).

3.09 COMMERCIAL CODE:

Uniform Commercial Code adopted effective Jan. 1, 1968 and is codified in Title 36 of S.C. Code.

In South Carolina statutes, Commercial Code is referred to as “this title” rather than "this act", and term "Chapter" is substituted for "Article". Provisions of Official Text are codified into General Statutes of South Carolina at Title 36 and are cited as S.C. Code Ann. § 36-1-101, etc. Noted below are South Carolina provisions (other than title designation) that deviate from 1962 Official Text. South Carolina has adopted 1987 Official Text of Article 2A (as amended by 1990 Amendments), 1989 Official Text of Article 4A, 1995 Official Text of Revised Article 5, 2000 Revision of Article 8, and 2000 Revision of Article 9. 1989 Official Text of Article 4A and 2000 Revision of Article 8 were adopted without variations. Official Conforming Amendments arising from Articles 2A, 5, 8 and 9 were also adopted. Article 6 has been repealed. S.C. Code §§35-7-10 to -120 have also been repealed. For Official Texts and amendments and revisions, see Uniform and Model Acts section.

Variations (a) from 1962 Official Text for Articles 1-4, 7 and 10 (other than variations adopted resulting from Official Conforming Amendments arising from Articles 2A, 5, 8 and 9), (b) from 1987 Official Text for Article 2A (as amended by 1990 Amendments), (c) from 1995 Official Text for Revised Article 5, and (d) from 2000 Revision for Article 9 (as distinguished from additions), appear in following sections:

§1-105(1)—substitutes failing "an" agreement for failing "such" agreement.

§1-105(2)—inserts "seller's" to precede "creditors against sold goods."; substitutes "Perfection provisions" for "Policy and scope".

§1-107—omits "a written" and "signed and delivered by the aggrieved party."

§1-109—"but the comments are not parts of the act" inserted at end of section.

§1-201(5)—inserts "certificated" to precede "security payable".

§1-201(9)—inserts "All persons who sell minerals or the like (including oil and gas) at wellhead or minehead are considered to be persons in the business of selling goods of that kind." preceding last sentence.

§1-201(14)—inserts "certificated" to precede "securities".

§1-201(20)—inserts "certificated" to precede "investment".

§1-201(37)—omits comma and inserts "or" preceding "chattel paper"; omits "or contract rights"; substitutes "under a lease or consignment" for "thereunder".

§1-206(2)—inserts "Subsection (1) of this section does not apply to contract [sic] for the sale of goods (Section S.C. Code Ann. § 36-1-201) nor of securities (Section S.C. Code Ann. § 36-8-113) nor to security agreements (Section S.C. Code Ann. § 36-9-203)".

§2-107(1)—omits "timber,"; inserts "(including oil and gas)" preceding "or a structure. . ."

§2-107(2)—inserts "or of timber to be cut" preceding "is a contract for the sale . . ."

§2-313(1)(a)—"including those on containers or labels" inserted preceding "made by the seller" and "whether directly or indirectly" inserted preceding "which relates to the goods."

§2-314(2)(f)—omitted.

§2-316(1)—reads as follows: "If the agreement creates an express warranty, words disclaiming it are inoperative."

§2-316(2)—last sentence reads as follows: “Language to exclude the implied warranty of merchantability or of fitness for a particular purpose must be specific, and if the inclusion of such language creates an ambiguity in the contract as a whole it shall be resolved against the seller.”

§2-316(a)—words “expressions like ‘as is’, ‘with all faults’ or other” are deleted and word “specific” is inserted before “language.”

§2-316(c)—“, as between merchants,” is inserted before “by usage of trade.”

§2-318—first sentence reads as follows: “A seller's warranty whether express or implied extends to any natural person who may be expected to use, consume, or be affected by the goods and whose person or property is damaged by breach of warranty.”

See also subhead Following Sections are Entirely New and Represent Additions to 1962 Official Text, infra.

§2-606(1)(a)—“in writing” inserted preceding “to the seller.”

§2-606(2)—substitutes “shall not be” for “is” and “the” for “that.”

§2-607(3)(a)—inserts at end of subsection: “however, no notice of injury to the person in the case of consumer goods shall be required.”

§2-722(b)—inserts at end of subsection: “but such plaintiff shall promptly notify the party of the institution of such action and the other party shall have the right to intervene in such action; provided, however, that neither party shall have the right to settle the claim or right of action without the consent in writing of the other party.”

§2-725(1)—“six years” substituted for “four years”; omits last sentence.

§2-725(2)—reads as follows: “A cause of action accrues for breach of warranty when the breach is or should have been discovered.”

§2A-214(1) reads as follows: “If the agreement creates an express warranty words disclaiming it are inoperative.”

§2A-214(3)(a) omits “as is” and “with all faults.”

§2A-216 adopts Alternative C of Official Text.

§4-105(c)—omits “in course of collection except the depositary or payor bank” and substitutes “for collection even though it is also the payor bank.”

§4-107(1)—substitutes “one p.m.” for “two p.m.”

§5-118 “Security Interest of issuer or nominated person.” This section does not appear in 1995 Official Text of Article 5.

§9-111—“UCC Lien Satisfaction.” New section relating to filing by attorney of UCC lien satisfaction affidavit.

§9-523(c) and (e)—words “filing office” were replaced with “Secretary of State's office.”

§9-527—omitted.

§10-101—effective date of act is “12:01 a.m., January 1, 1968”; effective date of revisions to act is “12:01 a.m., January 1, 1989.”

§10-104—omitted.

Options exercised in 1962 Official Text are as follows:

§3-121—Alternative B adopted.

§4-106—bracketed optional language adopted.

§4-202(1)(b)—bracketed optional language adopted.

§4-212(2)—optional subsection adopted.

§7-204—subsection (4) omitted.

§7-403(1)(b)—bracketed optional language omitted.

Following sections are entirely new and represent additions to 1962 Official Text:

§§2-801 to 809, deal with personal jurisdiction of persons and corporations by courts of this state and manner of effecting service of process. See category 5 Civil Actions and Procedure, topic 5.20 Process.

§§2A-101 to 2A-532—“Leases”. New Chapter dealing with leasing of personal property.

§§4A-101—4A-507, Uniform Commercial Code—Funds Transfers. New section dealing with “Payment Order” and “Funds Transfer” as brought about by developing technological changes.

§9-111—“UCC Lien Satisfaction.” New section relating to filing by attorney of UCC lien satisfaction affidavit.

§44-43-10 provides that implied warranties of merchantability or fitness do not apply to transactions involving human tissue, plasma, blood or blood products or derivatives.

Filing Fees.

(See S.C. Code Ann. § 36-9-525.)

UCC-1 or UCC-3 Filing	$ 8.00
UCC-1 or UCC-3 consisting of more than two Pages	10.00
Each Additional Debtor more than two debtors	2.00
UCC-11 Search Fee	5.00
Public Finance Transaction	20.00
Manufactured Home Transaction	20.00
Copies (First Page)	2.00

Copies (Additional Page)	1.00
Certification (Per Copy)	2.00
Fax Fee: Incoming (Per Search)	5.00
Fax Fee: Outgoing (Per Search)	10.00
Additional Fax Fee: Outgoing (Per Page)	1.00

See http://www.scsos.com.

Forms.

See end of this Digest and SC Secretary of State web page http://www.scsos.com/Library_of_Forms_and_Fees.

See also topics 3.01 Banks and Banking, Bills and Notes, Brokers, Carriers, Contracts, Factors, Frauds, Statute of, Sales, Securities, Warehousemen; categories 2 Business Organizations, topic Corporations; Civil Actions and Procedure, topics Limitation of Actions, Process; Debtor and Creditor, topics Assignments, Fraudulent Sales and Conveyances, Liens, Pledges; Documents and Records, topics Records, Seals; Mortgages, topic Chattel Mortgages.

3.10 CONDITIONAL SALES:

See topic 3.22 Sales.

3.11 CONSIGNMENTS:

See topic 3.14 Factors.

3.12 CONSUMER PROTECTION:

Uniform Deceptive Trade Practices Act not adopted. South Carolina Unfair Trade Practices Act (S.C. Code Ann. §§ 39-5-10 to -560) prohibits unfair methods of competition and unfair or deceptive acts or practices in conduct of any trade or commerce. Constitutionality of statute upheld. (294 S.C. 240, 363 S.E.2d 691). Does not apply to negligent or incompetent acts. (761 F.2d 189). Treble damages can be awarded under S.C. Code Ann. § 39-5-140. (283 S.C. 210, 321 S.E.2d 179). Not necessary to prove common law fraud to be awarded recovery under Act. (298 S.C. 439, 381 S.E.2d 212). Cannot sue home builder, seller and developer under South Carolina Unfair Trade Practices Act (SCUTPA) if homeowner did not purchase residence from builder but from original homeowner more than three years after initial sale. (340 S.C. 331, 531 S.E.2d 917).

South Carolina Consumer Protection Code adopted. (S.C. Code Ann. §§ 37-1-101 to 37-23-85). Act regulates consumer credit broadly, including, inter alia, consumer credit sales, consumer loans, consumer leases, consumer rental-purchase agreements, home solicitation sales, continuing care retirement communities, revolving charge accounts, consumer credit insurance, and some aspects of credit cards. Act regulates maximum charges and places limitations on agreements and credit practices. Creditors' and debtors' remedies are defined. Civil and criminal penalties are provided for violation of Act.

Act does not apply to extension of credit to government, its agencies or instrumentalities; sale of insurance by insurer except as otherwise provided in Act; transactions under public or municipal utilities or common carrier tariffs if S.C. or U.S. regulates charges; rates, charges and disclosures of licensed pawnbroker established under statute or ordinance, licensing or examining restricted lenders (see subhead Consumer Finance Companies, infra); rates and charges for advancing insurance premiums by agents or companies authorized to advance premiums under S.C. law; rates and charges on restricted loans; sales or leases made primarily for agricultural purposes; loans to students under government programs; federally chartered credit unions; transactions in securities or commodities accounts with registered broker-dealers. (S.C. Code Ann. § 37-1-202).

Act creates Department of Consumer Affairs consisting of 9 member Commission and office of Administrator. Administrator is given broad investigatory and enforcement powers. (S.C. Code Ann. §§ 37-6-501 to -512).

Consumer Credit Sales.

Includes sales of goods and services where amount financed does not exceed $25,000 and interests in land in some circumstances. Act prescribes maximum charges, and places limitations on agreements, including, inter alia: (1) No negotiable instrument may be taken in consumer credit sale other than check; (2) assignee of seller's rights in consumer credit sale is subject to all defenses buyer has against seller; (3) buyer has right to refinance balloon payment at end of term; (4) Act limits security interests which may be taken; (5) Act limits attorney's fee (maximum of 15%) and default charges which may be added to debt upon default; (6) authorization to confess judgment is prohibited; and (7) unearned credit service charge must be rebated upon prepayment. (S.C. Code Ann. §§ 37-2-101, to -210).

Consumer Loans.

Defined as loan to individual for personal, family or household purposes, which is: (1) First mortgage real estate loan considered non-consumer loan for interest rate purposes (S.C. Code Ann. §§ 37-3-105, 37-2-104, 37-3-104); or (2) is of amount not greater than $50,000. Does not include first purchase money security interest in land. Act regulates maximum charges, and places limitations on agreements, including, inter alia: (3), (5), (6) and (7) listed above under catchline Consumer Credit Sales. Lender is also subject to defenses consumer has against seller in some instances. Lender must be licensed by State Board of Bank Control to make “supervised loans”, defined as consumer loans providing for finance charge exceeding 12% per year. Additional restrictions are applicable to such loans. Defined as agreement for use of personal property primarily for personal, family, or household purposes, for initial period of four months or less that is automatically renewable with each payment and permits consumer to become owner of property. Governed primarily by S.C. Code Ann. §§ 37-2-701 to -714.

Finance Charges.

Maximum finance charge on consumer credit sale is 18% or rate filed and posted pursuant to §37-2-305, (S.C. Code Ann. § 37-2-201) and on consumer loan is 12% or any rate filed by lender with Department of Consumer Affairs and posted in creditor's place of business. (S.C. Code Ann. § 37-3-201). Act also regulates other charges, including delinquency charges and deferral charges, specifies rebates upon prepayment, and other allowable charges. Act also specifies charges on revolving charge accounts. Maximum interest rate on non-written contract 6%. (S.C. Code Ann. § 37-10-106). Dollar amounts used as cutoff points in interest rate statutes subject to adjustment for inflation. New dollar amounts determined and issued by Bureau of Labor Statistics. (S.C. Code Ann. § 37-1-109). Procurement fee, included in total cash price and disclosed to consumer, is not unconscionable or prohibited “additional fee” under §37-2-202. (322 S.C. 399, 472 S.E.2d 242); “Liability damage waiver fee” paid by consumer prior to default, giving consumer opportunity to avoid default, held not to be prohibited charge under §37-2-701(6). (345 S.C. 251, 547 S.E.2d 881).

Credit Insurance.

Act allows creditor to require credit insurance, but regulates maximum charges and other aspects of credit insurance. (S.C. Code Ann. § 37-4-203). Consumer credit insurance not required to obtain credit. (S.C. Code Ann. § 37-2-202).

Home solicitation sales are regulated. Generally, may be revoked by buyer until midnight of third business day after signing of agreement to buy. (S.C. Code Ann. § 37-2-502).

Other Loans.

Act also regulates certain loans, principally residential real estate mortgage loans. (c. 3). Act contains provisions concerning choice of closing attorneys (S.C. Code Ann. § 37-10-102), allowable assumption fees (S.C. Code Ann. § 37-2-202), prepayment and variable rate mortgages (S.C. Code Ann. §§ 37-23-20 and 37-1-301).

Plain Language.

Personal insurance policies, including specifically homeowner's, dwelling fire, automobile, accident and health and life, must comply with regulations issued by Chief Insurance Commissioner regarding readability, type size, general organization, and other aspects of policy layout and appearance. (S.C. Code Ann. § 38-61-30).

Remedies and Penalties.

Limitations on remedies of creditors as well as penalties for violations by creditors and remedies of debtors are set forth in §§37-5-101 to -303. Arbitration clauses in retail installment contracts upheld. (330 S.C. 388, 498 S.E.2d 898). Arbitration clause requiring retail installment contract to be arbitrated under Federal Arbitration Act ("FAA") upheld. FAA preempted South Carolina Uniform Arbitration Act, and Consumer Protection Code cannot be used to invalidate arbitration clause. (343 S.C. 531, 542 S.E.2d 360); Statute of Limitations for violations of c. 10 of Title 37 (Miscellaneous Loan Provisions) held to be three years. Limitations period begins to run from date each payment is made on credit sale; remedies found in §37-5-202 are not exclusive for violation of attorney preference provisions—remedies set forth in §37-10-105 available as well. (333 S.C. 33, 508 S.E.2d 16).

Consumer finance companies, defined as persons conducting business of making advances of cash in amounts of $7,500 or less, regulated by S.C. Consumer Finance Law. (S.C. Code Ann. §§ 34-29-10 to -260). License required from State Board of Bank Control. Excepted from license requirement are variety of institutions regulated under other law, such as banks, savings and loans, insurance companies, and credit unions. Law regulates advertising and insurance regarding loans, prescribes maximum charges, and requires disclosures of contract terms. Confession of judgment prohibited in such loans. When there is no provision for rebate, acceleration provisions do not have to be disclosed. (447 F. Supp. 1121). "Restricted lenders" (as defined by Consumer Finance Act) are "creditors" within meaning of Consumer Protection Code section requiring filing of annual maximum rate schedules with Department of Consumer Affairs. (297 S.C. 111, 374 S.E.2d 918).

Consumer Finance Law.

Section 34-29-140 amended to allow imposition of minimum delinquency charge of $5 on installment not paid after ten days, and to add maintenance fee of $2 per month to gross amount of note if maintenance fee is refunded pro rata upon note prepayment.

Products Liability.

Seller's liability arising from sale of defective product, see §15-73-10 to -40.

Repossession.

After giving notice of default and opportunity to cure, creditor may repossess collateral after second default without sending second cure letter. (S.C. Code Ann. § 37-5-111). No cause of action exists under Consumer Protection Code when, at time of repossession, co-debtor has no right to possession of or title to collateral. (313 S.C. 70, 437 S.E.2d 50).

Solicitation of Charitable Funds Act adopted. Act requires registration of individual, and organizations and professional solicitors with Secretary of State; requires annual reporting; sets fees for registration. Certain organizations excepted from filing. (S.C. Code Ann. §§ 33-56-10 to -200).

See also topic 3.22 Sales; category 16 Insurance, topic 16.01 Insurance Companies, subhead Policies, catchline Mobile Home Hazard Insurance.

South Carolina Hazardous Substances Act regulates introduction, delivery for introduction, delivery or proffered delivery for pay or otherwise, into commerce of any misbranded hazardous substance or banned hazardous substance. (S.C. Code Ann. §§ 23-39-10 to -120).

Uniform Weights and Measures Law regulates weights and measures. (S.C. Code Ann. §§ 39-9-10 to -240).

South Carolina Paint Law repealed, effective June 5, 1987. (S.C. Code Ann. §§ 39-45-10 to -130).

South Carolina Food and Cosmetic Act prohibits manufacture, sale, delivery, holding or offering for sale of any food or cosmetic that is adulterated or misbranded. (S.C. Code Ann. §§ 39-25-10 to-200).

S.C. Uniform Standards Code for Manufactured Housing Act.

(S.C. Code Ann. §§ 40-29-10 to -270). C. 29, Title 40 amended to conform organizational framework of Manufactured Housing Board to boards under administration of Labor and Licensing, and to provide for licensure and regulation of South Carolina Manufactured Housing Board, which regulates manufactured home manufacturers, manufactured homes, manufactured home retail dealers, sales persons, contractors, installers, and repairers, and deals with consumer complaints related to this industry.

Long term care ombudsman authorized to investigate complaint regarding boarding or nursing home. (S.C. Code Ann. §§ 43-38-10 to -60).

South Carolina Drug Act regulates labeling and adulteration of drugs. (S.C. Code Ann. §§ 39-23-10 to -130).

Unsolicited merchandise, except stolen merchandise, received by mail deemed property of recipient. (S.C. Code Ann. § 39-1-50).

Lemon Law.

New chapter added to Title 56 “Enforcement of Motor Vehicle Express Warranties” setting out rights of consumer. (S.C. Code Ann. §§ 56-28-10 to -110).

Lease Contracts.

S.C. UCC amended to add Article 2A to add provisions regarding leases, and providing for drafting, construction, effect, performance, and defaults of lease contracts. Also amended to revised Article 9 of UCC setting forth revised provisions and new consumer protections involving secured transactions. See topic 3.09 Commercial Code.

Car Rentals.

§§56-31-10 to -50 amended so as to provide that chapter applies to rental of both private passenger vehicles and rental vehicles, and defining “rental vehicles.”

3.13 CONTRACTS:

Uniform Commercial Code adopted. See topic 3.09 Commercial Code.

3.14 FACTORS:

Property in the hands of factors must be returned by them for taxation. (S.C. Code Ann. § 12-37-900). Factor must retain sufficient amount of property or proceeds thereof to pay taxes or he becomes personally liable therefor. (S.C. Code Ann. § 12-37-730). Factor failing or refusing to pay for produce, and disposing of same before payment therefor (S.C. Code Ann. § 46-1-60), or failing to account for same (S.C. Code Ann. § 46-1-70), is guilty of felony punishable by fine and/or imprisonment for up to ten years if value of commodities is $5,000 or more; by fine and/or imprisonment for up to five years if value of commodities is more than $1,000 but less than $5,000; and is guilty of misdemeanor and may be fined and/or imprisoned up to maximum amount permitted by law without presentment to grand jury if value of commodities is less than $1,000.

Lien.

Governed by Art. 9 of Uniform Commercial Code.

Uniform Commercial Code adopted. See topic 3.09 Commercial Code.

3.15 FRANCHISES:

Sales of “business opportunity” as defined in act regulated by Business Opportunity Sales Act. (S.C. Code Ann. § 39-57-10 et seq.). Coverage broad, but unclear. Act provides for disclosures and limitations on agreements.

3.16 FRAUDS, STATUTE OF:

Uniform Commercial Code adopted. See topic 3.09 Commercial Code.

Every interest created in real property is deemed an estate at will, unless the grantor, or his agent thereunto in writing lawfully authorized, has created the same by writing duly signed by him, except a lease for a term not over one year. (S.C. Code Ann. § 27-23-60). Agreements for use or occupation of real property for more than one year are void unless in writing. (S.C. Code Ann. § 27-35-20).

No lease, estate, or interest in real property may be assigned, surrendered, or granted, except by deed or note, signed by the party assigning, surrendering, or granting, or his agent thereunto lawfully authorized by writing, or by act and operation of law. (S.C. Code Ann. § 27-23-50).

No action may be brought whereby: to charge any executor or administrator upon any special promise to answer damages out of his own estate; or to charge the defendant upon any special promise to answer for the debt, default or miscarriage of another person; or to charge any person upon any agreement made upon consideration of marriage; or upon any contract of sale of lands, tenements, or hereditaments, or any interest in or concerning them; or upon any agreement that is not to be performed within the space of one year from the making thereof; unless such agreement, or some memorandum or note thereof, is in writing, and signed by party to be charged or some person thereunto by him lawfully authorized. (S.C. Code Ann. § 32-3-10).

Contracts of Sale.

Governed by Art. 2 of Uniform Commercial Code.

No action may be maintained to charge any person on any promise made after full age to pay any debt contracted during infancy, or on any ratification after full age of any promise made during infancy, excepting upon contracts for necessaries, unless the promise or ratification is in writing, signed by the party to be charged. (S.C. Code Ann. § 20-7-250).

No action may be brought to charge any person by reason of any representation or assurance made or given relating to the character, conduct, credit, ability, trade, or dealings of any person, with the intent that such other person may obtain credit, money, or goods thereon, unless such representation or assurance is in writing, signed by party to be charged, or some person by him legally authorized. (S.C. Code Ann. § 32-3-20).

Part performance held to take case out of statute of frauds in some instances. (208 S.C. 406, 38 S.E.2d 147).

3.17 INTEREST:

Usury laws in South Carolina were simplified in July, 1982. On commercial loans, there is no statutory limit on interest rate agreed to in writing. On consumer loans, interest rates are limited based on filing and posting requirements, as well as by statutory provisions prohibiting unconscionable terms.

Maximum finance charges on consumer loans and consumer credit sales regulated by S.C. Consumer Protection Code. (S.C. Code Ann. §§ 37-1-101 to -109). Maximum finance charges on credit services governed by S.C. Code Ann. §§ 37-2-201 to -210.

Statutes specifying maximum interest rates in particular situations are still found. Examples include licensed pawnbrokers.

Licensed small loan companies (companies lending $7,500 or less) may charge in lieu of interest following: (1) On cash advance (amount of cash borrower actually receives) of $150 or less, $2.50 per month with four weeks constituting month; (2) on cash advance of $151 to $2,000, $25 per hundred on that portion of $600 or less, $18 per hundred on that portion from $601 to $1,000, $12 per hundred on that portion from $1,001 to $2,000 when loan is made payable over one year or shorter period of time; in addition to finance charges authorized in (1) and (2), if loan is of $2,000 or less, initial one-time charge of $56 or 7%, whichever is less, may be charged; (3) on cash advance of $2,001 to $7,500, $9 per hundred if loan payable over one year period and proportionately at such rates over longer or shorter period of time plus initial charge of 5% or $200, whichever is less. Maximum loan terms are also set forth. (S.C. Code Ann. § 34-29-140).

For limitation of charges for consumer credit sales see topic 3.12 Consumer Protection.

With respect to actions on accounts, prejudgment legal rate of interest is 8¾% per annum. (S.C. Code Ann. § 34-31-20[a]). Judgments and decrees draw interest equal to prime rate as listed in first edition of Wall Street Journal for each year damages are awarded plus four percentage points compounded annually. (S.C. Code Ann. § 34-31-20[b]).

3.18 [RESERVED]

3.19 LICENSES, BUSINESS AND PROFESSIONAL:

License is required for many professions, occupations and businesses. Most licenses are issued by Department of Labor, Licensing and Regulation, 110 Centerview Drive, Kingstree Building, P.O. Box 11329, Columbia, S.C. 29211. http://www.llr.state.sc.us/. Statutory provisions are found generally in Title 40 of S.C. Code.

As to corporate license tax, see category 2 Business Organizations, topic 2.03 Corporations.

As to various other taxes in nature of license fees, see category 22 Taxation, topic 22.03 Business Taxes.

See also topics 3.06 Brokers, subhead Real Estate Brokers, Securities; categories 16 Insurance, topic Insurance Companies, subhead Insurance Brokers; Legal Profession, topic Attorneys and Counselors.

As to licensing for asbestos abatement, see §§44-87-10 to -50.

As to sales tax licensing, see §12-36-510.

Collection Agencies.

No legislation.

3.20 MONOPOLIES, RESTRAINT OF TRADE AND COMPETITION:

Arrangements, contracts, agreements, trusts or combinations made with view to, or which tend to monopolize trade, restrict competition or control production or prices are against public policy, unlawful and void. (S.C. Code Ann. § 39-3-10; see also 41 ALR 4th 675). Sales at less than cost of manufacture for purpose of injuring competitors prohibited. (S.C. Code Ann. § 39-3-150; see also 41 ALR 4th 612).

Penalties.

$200 to $5,000 for each offense. Each day illegal practice continued is separate offense. Action in name of state by Attorney General or solicitor. (S.C. Code Ann. § 39-3-180). Charter of guilty corporation may be revoked. (S.C. Code Ann. §§ 39-3-160, 39-3-180). Proceeding for discovery in aid of action provided for. (S.C. Code Ann. §§ 39-3-310 to -360). Civil action may be brought to enjoin unfair method of trade and triple damages awarded if violation is willful. (S.C. Code Ann. §§ 39-5-110, 39-5-140).

Damages.

Any person injured may sue and recover from operator of trust or combination full consideration or sum paid for goods, sale of which is controlled by combination or trust. (S.C. Code Ann. § 39-3-30).

Unfair Trade Practices.

Unfair methods of competition and unfair or deceptive acts in conduct of trade or commerce are unlawful. Courts are to be guided by interpretations by Federal Trade Commission and Federal Courts of Federal Trade Commission Act in construing South Carolina Unfair Trade Practices Act. (S.C. Code Ann. § 39-5-20). This Act does not apply to insurance unfair trade practices covered and regulated by §§38-55-10 to -480. Act has also been interpreted to apply only where unfair trade practice affects public interest by potential for repetition. (290 S.C. 475, 351 S.E.2d 347).

Contract between individual and pyramid club or similar organization providing for increase in membership through chain process is unfair trade practice. (S.C. Code Ann. § 39-5-30).

Fair Trade Act.

See category 17 Intellectual Property, topic 17.01 Trademarks and Tradenames.

3.21 NEGOTIABLE INSTRUMENTS:

See topic 3.02 Bills and Notes.

3.22 [RESERVED]

3.23 SALES:

Uniform Commercial Code, Art. 2, governs. (S.C. Code Ann. §§ 36-2-101 to 107). See topic 3.09 Commercial Code.

Conditions or Warranties.

Uniform Commercial Code as enacted in this state contains substantial variations from Model Act as it relates to warranties. See topic 3.09 Commercial Code, subhead Variations, §§36-2-313(1)(a), -314(2), -316(1), -316(2), -316(3)(c), -318, -606(1)(a), -606(2), -607(3)(a), -722(b), -725(1), and -725(2).

Contracts of Sale.

No statutory requirements as to type size. See topic 3.16 Frauds, Statute of.

Bills of Sale.

No special requirements. (128 S.C. 339, 122 S.E. 496).

Product Liability.

Strict liability provided for seller of defective and unreasonably dangerous product causing harm to user, consumer or his property. (S.C. Code Ann. §§ 15-73-10 to -30). Lack of privity of contract is not defense. (247 S.C. 267, 146 S.E.2d 875). See also topic 3.09 Commercial Code, subhead Following Sections are Entirely New and Represent Additions to 1962 Official Text.

Motor Vehicles.

For special provisions, i.e., required form and assignability of contract, service and insurance charge limitation, covering conditional sale of motor vehicle where purchase price is to be paid in installments, see South Carolina Consumer Protection Code (S.C. Code Ann. §§ 37-1-101 to 37-17-10).

Business practices between motor vehicle manufacturers, distributors and dealers regulated by S.C. Code Ann. §§ 56-15-10 to -350.

See topic 3.12 Consumer Protection, subhead Lemon Law.

Retail Credit Sales.

See topic 3.12 Consumer Protection, subhead South Carolina Consumer Protection Code. (S.C. Code Ann. §§ 37-1-101 to -303; §§ 37-2-101 to -605; §§ 37-3-101 to -605; §§ 37-4-101 to -304; §§ 37-5-101 to -303; §§ 37-6-101 to -609; and § 37-9-101). Code incorporates Federal Truth in Lending Act. See also topic 3.17 Interest.

Dram Shop Law.

Unlawful to sell alcoholic beverages to intoxicated persons and persons under 21. (S.C.

Code Ann. §§ 61-4-580, 61-6-2220). No “first party” cause of action against commercial host by intoxicated adult based on alleged violation of alcohol control statutes. (332 S.C. 90, 504 S.E.2d 318; 323 S.C. 345, 474 S.E.2d 450). However, commercial vendor liable to underage first party purchaser. (306 S.C. 51; 410 S.E.2d 251). Commercial host liable to adult third party. (303 S.C. 81, 399 S.E.2d 13). Social host not liable to adult third party. (326 S.C. 212, 486 S.E.2d 3). Social host liable to both first party and third party if intoxicated guest was under 21. (372 S.C. 452, 643 S.E.2d 85).

Consumer Protection.

See topic 3.12 Consumer Protection.

Bulk Sales.

See topic 3.09 Commercial Code.

3.24 SECURITIES:

Uniform Securities Act (1956) has been adopted with certain changes and became effective June 13, 1961. (S.C. Code Ann. §§ 35-1-101 to -703). (For text of Uniform Securities Act see Uniform and Model Acts section.) Act is administered by Attorney General, Columbia 29211, who is ex officio Securities Commissioner.

Variations from the Uniform Act are as follows, references being to sections and subsections of the Uniform Act:

§102(a). Also prohibited for investment advisors who are not federal covered investment advisors are: (1) Advisors acting as principals for own account without disclosure and consent unless broker-dealer not acting as investment advisor or unless otherwise authorized by exemptions promulgated by Securities Commissioner; and (2) dishonest and unethical practices as defined in rules promulgated by Securities Commissioner.

§102(b). Securities Commissioner may promulgate exemptions.

§201(c). “Investment adviser representative” was added following “investment adviser”. Adds “or exempt” after “unless he is registered”. Exemptions are set forth in S.C. Code Ann. § 35-1-404.

§201(d). Registrations expire at end of calendar year unless renewed.

§202(a). Registration becomes effective when the Securities Commissioner so orders.

§202(b). Filing fees for initial or renewal application are $300 for broker-dealer, $100 for agent, $210 for investment advisor and federally-covered advisor, and $55 for investment adviser representative. If application is denied or withdrawn, none of filing fee is refunded.

§202(d). Minimum capital for broker-dealers and investment advisers not to exceed limitations of §15 of Securities Exchange Act of 1934 may be required.

§202(e). Bonds covering original registration and any renewal thereof to be posted by broker-dealers and investment advisers in amount determined by Securities Commissioner, subject to limitations of §15 of Securities Exchange Act of 1934 and §222 of Investment Advisers Act of 1940. Statute of limitations is three years for claims under bond.

§204(a). References to investment adviser representatives are also included.

§301. Added exclusion of federal covered securities.

§302(b)(5). Information and documents specified in clause (9) of Sec. 304 (b) are added.

§302(b). Added as sub-section (7) is a provision which requires additional information as Securities Commissioner may order.

§302(c). Registration statement becomes effective when Securities Commissioner so orders.

§303(b)(1). Two copies of prospectus required.

§304(b)(12). Two copies of documents required.

§304(d). Omitted.

§305. Filing fee for registration statement is $500. No registration statement may be renewed or reregistered unless filing fee of $500 is paid. If withdrawn before effective date or pre-effective stop order is entered, entire fee is retained.

§305. Added as §35-1-990 is provision similar to §304 (d) applying to registration generally.

§305. Added is provision that securities registered pursuant to §§302, 303 and 304, become eligible for trading in secondary market at current market prices upon completion of original offer when such securities are outstanding and in hands of public.

§306(a)(2)(A). Deleted reference to amendment under §305(k).

§306. References to “investment adviser representative” are added after “investment adviser”.

§401. Added definitions of “federal covered advisor”, “federal covered security” and “investment adviser representative”.

§401(b)(3). Employees, partners or directors of any subsidiary of issuer are included in subsection.

§401(c). Deleted second sentence but added exemptions from registration covering many of same persons.

§401(f). “Investment advisor” also includes financial planners and others providing investment advisory services as integral component of other financially related services.

§402(a)(5). Omitted.

§402(a)(8). Also includes NASDAQ/National Market System and such other securities exchange as Securities Commissioner by regulation may designate.

§402(a)(12). Includes any security issued by a cooperative association organized under laws of State of S.C.

§402(b)(9). Exemption for limited offerings is pursuant to offer directed to no more than twenty-five (25) persons.

§406(c). Fees not set by statute are set by Securities Commissioner.

§407(c). Failure to obey subpoena may result in fine of up to $3,000, and/or court may award Securities Commissioner's fees and costs for appearing.

§409(a). Felony offense, fined not more than $50,000 or imprisoned up to ten years, or both, if investor loss is $20,000 or more; Felony offense, fined at court's discretion or imprisoned up to five years, or both, if investor loss more than $1,000 but less than $20,000; Misdemeanor offense, fined up to $30,000 or imprisoned up to three years, or both, if investor loss less than $1,000 or no loss is proven.

§410. Securities Commissioner may also impose and collect administrative fines in amounts not to exceed $5,000 per violation.

§411(a). Review of final order of Securities Commissioner is by Court of Common Pleas for Richland County or County where aggrieved person resides; petition must be filed within 30 days after entry of order.

§415. Omitted.

Tender Offers.

See category 2 Business Organizations, topic 2.03 Corporations.

Franchising.

See topic 3.15 Franchises.

Uniform Commercial Code has been adopted. See topic 3.09 Commercial Code.

Gifts to Minors.

See category 14 Family, topic 14.10 Infants.

Uniform Securities Ownership by Minors Act has not been adopted.

Insider Trading in Securities of Domestic Stock Insurance Companies.

S.C. Code Ann. §§35-9-10 to 35-9-90 was repealed effective Jan. 1, 1988.

3.25 STATUTE OF FRAUDS:

See topic 3.16 Frauds, Statute of.

3.26 [RESERVED]

3.27 WAREHOUSEMEN:

Governed generally by §§39-19-10 to -510. Any person or domestic corporation engaged in business of warehouseman may become public warehouseman upon giving bonds required by statute. (S.C. Code Ann. § 39-19-20).

Bonds.

Public warehouseman must give bond in surety company in amount equal to 10% of estimated value of goods for which storage will be provided. Bond is given to Secretary of State and is conditioned for faithful performance of his duties. Copy of bond must be filed with clerk of court in each county where he proposes to maintain warehouse. (S.C. Code Ann. § 39-19-20).

Insurance.

Public warehouseman must when requested in writing insure goods stored. (S.C. Code Ann. § 39-19-40).

Receipts.

Governed by Art. 7 of Uniform Commercial Code. See topic 3.09 Commercial Code.

State Warehouse System.

State Warehouse System is operated by Department of Agriculture. http://www.scda.state.sc.us/. System provides method of storing, issuing receipts, insuring, grading, tagging, etc. of cotton, storage and receipts for liquor, purchase, storage and sale of fertilizer, farm seed and calcium arsenic. (S.C. Code Ann. §§ 39-22-10 to -200).

Uniform Commercial Code adopted. See topic 3.09 Commercial Code.

Tobacco Warehousemen.

Rates for selling leaf tobacco on a floor of a tobacco warehouse are regulated by statute. (S.C. Code Ann. § 39-19-220). §§39-19-240 to -280, requiring tobacco warehousemen to report weekly amount of tobacco sold, repealed Apr. 3, 1986. Warehousing space is not considered used by manufacturer in conduct of his business for tax purposes. (S.C. Code Ann. § 12-43-220).

4 CITIZENSHIP

4.01 ALIENS:

Property.

Aliens may take, acquire, hold and dispose of real and personal property in same manner as citizens (S.C. Code Ann. § 27-13-10), provided, that no alien nor any corporation controlled by alien may own more than 500,000 acres of land in state, unless such land is purchased at foreclosure in which case land may be held for no more than five years except upon showing of material detriment in which case it may be held for five years longer (S.C. Code Ann. §§ 27-13-30 and -40).

Taxation.

Effective July 1, 1991, estate of resident in state is subject to tax on all real property and tangible personal property situate in state and all intangible personal property owned by resident, wherever situate (S.C. Code Ann. § 12-16-510); estate of resident of U.S., but not of state is subject to tax on all real property and tangible personal property situate in state (S.C. Code Ann. § 12-16-520); and estate of nonresident alien is subject to tax on transfer of real property and on all tangible and intangible personal property situate in state (S.C. Code Ann. § 12-16-530).

For probate purposes, persons are qualified to take as heir regardless of fact they, or person through whom they claim, are or have been aliens. (S.C. Code Ann. § 62-2-112).

Agricultural real property held by corporations which have shareholder who is nonresident alien is assessed at 6% of its fair market value. (S.C. Code Ann. § 12-43-220).

Employment.

Aliens are eligible for unemployment benefits if, at time their services are performed, they are (i) lawfully admitted for permanent residence; (ii) lawfully present for purposes of performing such services; or (iii) permanently residing in U.S. under color of law at time services were performed. (S.C. Code Ann. § 41-35-67).

Worker's compensation benefits are available to aliens (S.C. Code Ann. § 42-1-130), except that benefits payable at death to alien's dependents residing in foreign country are limited by statute (S.C. Code Ann. § 42-9-290).

Miscellaneous.

Nonresident of at least 16 years who is licensed in his or her home state or country is exempt from driver's license requirements, subject to some limitations. (S.C. Code Ann. § 56-1-30[2]). Nonresident of at least 18 years whose home state or country does not require licensing of operators and motor vehicle is registered in home state or country, is exempt for 90 days. (S.C. Code Ann. § 56-1-30[3]). Citizen of foreign jurisdiction whose licensing procedure is at least as strict as South Carolina's, as determined by department, who is at least 18 years of age, who is employed in South Carolina, and who has valid driver's license issued by that jurisdiction may drive in this State for five years if foreign jurisdiction provides reciprocal arrangement for South Carolina residents. (S.C. Code Ann. § 56-1-30[6]). Provisions of this item also apply to dependents of foreign nationals who qualify under this section. See also categories 2 Business Organizations, topic Corporations, subhead Foreign Corporations; Civil Actions and Procedure, topic Limitation of Actions.

5 CIVIL ACTIONS AND PROCEDURE

5.01 ACCORD AND SATISFACTION:

Agreement based on meeting of minds to settle dispute plus consideration. (330 S.C. 287, 498 S.E. 2d 674). Debtor must intend and make clear that payment tendered fully satisfies creditor's demand. Creditor must also accept payment with intention of it operating as satisfaction. Without agreement to discharge obligation there can be no accord; without accord there can be no satisfaction. (310 S.C. 180, 425 S.E.2d 792).

Payment of Less Than Debt.

Payment of a sum smaller than a liquidated debt in pursuance of an agreement not under seal to accept such sum in satisfaction is not satisfaction of the whole but is taken pro tanto, but if creditor accepts as payment in full something which might be more beneficial to him than his debt the debt is satisfied. (83 S.C. 78, 64 S.E. 513).

Compromise.

A creditor may compromise with and release a joint debtor without impairing liabilities of co-debtors. (S.C. Code Ann. § 32-9-10). Debtor who has not compounded may require compounding joint debtor to contribute his ratable portion of joint debt as if compounding debtor had not been discharged. Amount compounded may be set up by way of discount by debtor who has not compounded. (S.C. Code Ann. § 32-9-30).

Offer to Settle Action.

Repealed by 1985 Act No. 100, §2.

Pleading.

Accord and satisfaction must be pleaded as affirmative defense. (SCRCP 8[c]).

Uniform Commercial Code adopted. See category 3 Business Regulation and Commerce, topic 3.09 Commercial Code.

5.02 ACTIONS:

Federal Rules of Civil Procedure are basis of state rules of civil procedure. (304 S.C. 328, 404 S.E.2d 200). See topic 5.19 Practice.

Forms of Action.

One form of action for protection of rights and redress of wrongs designated civil action. (SCRCP 2).

Conditions Precedent.

Performance or occurrence of conditions precedent among special matters to be pled, but sufficient to aver generally that all conditions precedent performed or occurred. (SCRCP 9).

Commencement.

See topic 5.20 Process.

Parties.

All actions must be brought in name of real party in interest. (SCRCP 17[a]).

Permissive joinder where right to relief asserted jointly, severally or in alternative by or against persons based upon same transaction or occurrence and if common questions of law or fact will arise. (SCRCP 20[a]). Compulsory joinder of parties needed for just adjudication. (SCRCP 19[a]). Court may dismiss action if indispensable parties cannot be joined. (SCRCP 19[b]). Misjoinder is not ground for dismissal. (SCRCP 21).

Class Actions.

Uniform Class Actions Act not adopted. Permitted when class so numerous that joinder of all members impracticable, questions of law or fact common to class; representative parties' claims or defenses typical of those of class; representative parties will fairly and adequately protect interests of class; and, in cases in which relief primarily sought not injunctive or declaratory with respect to class as whole, amount in controversy more than $100 for each member, one or more may sue or defend for benefit of all. (SCRCP 23[a]). Actions for personal remedies, including antitrust actions, may not generally be brought as class actions. (276 S.C. 55, 275 S.E.2d 579). Specific requirements for shareholder derivative actions. (SCRCP 23[b]).

Intervention.

Intervention of right under statute or where disposition of matter will practically impair one's ability to protect interest relating to property or transaction in controversy. (SCRCP 24[a]). Permissive intervention where statute confers conditional right to intervene or where applicant's claim or defense and main action have question of law or fact in common. Court must consider whether intervention will unduly delay or prejudice adjudication of original parties' rights. (SCRCP 24[b]).

Interpleader.

SCRCP 22(a) is identical to Fed. R. Civ. P. 22(a).

Third Party Practice.

Defending party as third party plaintiff may serve person, not party to action, who is or may be liable to him for plaintiff's claim; leave of court not needed if third-party complaint filed not later than ten days after service of defending party's original answer. (SCRCP 14[a]). Plaintiff against whom counterclaim asserted may bring in third party. (SCRCP 14[b]). Court may order that third-party defendant be joined as plaintiff or defendant when ends of justice and efficiency in proceedings would be served. (SCRCP 14[c]).

Joinder of Causes of Action.

Party may join all his claims against opposing party in one action. (SCRCP 18[a]). SCRCP 13 provides for compulsory counterclaims when causes of action arise from same transaction and permissive counterclaims when they do not. (SCRCP 13[b]).

Severance and Consolidation of Actions.

Similar to Fed. R. Civ. P. 42. (SCRCP 42). Consolidation within trial court's discretion; court may order separate trial of permissive counterclaim. (315 S.C. 339, 433 S.E.2d 902). If complaint equitable and counterclaim legal and compulsory, court may order separate trials or, as long as joint trial will not deprive party of right to jury trial, order claims tried in single proceeding. (292 S.C. 51, 354 S.E.2d 895).

Stay of Proceedings.

Party may strike its complaint, counterclaim, cross-claim or third party claim from docket one time as matter of right with written agreement from all other adverse parties. (SCRCP 40[j]).

Service members entitled to stay pursuant to Service Members Civil Relief Act may choose to proceed while member reasonably unavailable to appear in geographical location in which litigation is pursued and may seek relief and provide evidence through video-conferencing, Internet camera, email, or other reasonable electronic means. (S.C. Code Ann. § 15–1–340).

Abatement.

When Death or Other Disability Does Not Abate Action.

SCRCP 25 governs abatement and substitution of parties. If party dies and claim is not thereby extinguished, court may order substitution of proper parties. If motion for substitution is not made within reasonable time, action may be dismissed as to deceased party. (SCRCP 25[a][1]). After judgment has been rendered in any action for any wrong, such action does not abate by death of any party. (SCRCP 25[a][3]). If party becomes incompetent, court upon motion may allow action to be continued by or against his representative. (SCRCP 25[b]). In case of any transfer of interest, action may be continued by or against original party, unless court upon motion directs transferee be substituted or withdrawn. (SCRCP 25[d][1]). Substitution under this rule may be made by trial court either before or after judgment, or pending appeal, by Appellate Court. (SCRCP 25[e]).

Small Claims.

See category 6 Courts and Legislature, topic 6.01 Courts.

Administration.

See category 13 Estates and Trusts, topic 13.08 Executors and Administrators.

Direct Actions Against Insurers.

See category 23 Transportation, topic 23.01 Motor Vehicles, subhead Direct Actions.

5.03 APPEAL AND ERROR:

How Appeal Taken.

See S.C. Appellate Court Rules (SCACR) and S.C. Rules of Civil Procedure, SCRCP 72-75.

Character of Hearing.

Appellate hearings reviews and not trials de novo except appeal from arbitration of automobile insurance claims for property damages arising out of motor vehicle accidents. (S.C. Code Ann. § 38-77-770).

Time Allowed for Taking Appeal.

See particular courts.

Judgment or Order on Appeal.

Appellate courts may reverse, affirm or modify the judgment, decree or order appealed from in whole or in part and as to any or all of the parties (S.C. Code Ann. §§ 18-1-140 and 18-9-270) and may if necessary or proper, order new trial. When judgment is reversed or modified appellate court may make complete restitution of all property and rights lost by erroneous judgment (S.C. Code Ann. § 18-1-140).

Two-issue Rule.

Under “two-issue” rule, when jury returns general verdict involving two or more issues and its verdict is supported as to at least one issue, verdict will not be reversed on appeal. (287 S.C. 190, 336 S.E.2d 472).

Supreme Court.

Appeal to Supreme Court from final circuit court judgments that include sentence of death, set public utility rates, concern authorization or issuance of indebtedness pursuant to Const. Ann. art. X, or pertain to elections and election procedure; final judgments that principally involve challenge on state or federal grounds to constitutionality of state law or county or municipal ordinance; orders that limit state grand jury investigations under §14-7-1630; and family court orders relating to abortions by minor under §44-41-33. (SCACR 203[d][1]). Supreme Court may also certify cases for review by it before Court of Appeals has made determination. (S.C. Code Ann. § 14-8-210[b]; SCACR 204[b]).

Court of Appeals.

Initially, most appeals from circuit and family courts made to Court of Appeals. (SCACR 203[d][1]).

From Common Pleas.

See SCACR 203 and SCRCP 72-76. Notice of Appeal must be served on opposing party within 30 days after receipt of written notice of order or judgment or within ten days after receipt of notice regarding judgment notwithstanding verdict, motion to alter or amend, or motion for new trial. (SCACR 203[b][1]).

Notice of Appeal.

Within ten days after service, notice of appeal must be filed with clerk of Court of Appeals and with trial court. (SCACR 203[d][2]). Appeal must be dismissed if notice not timely filed or $100 filing fee not paid. (SCACR 203[d][3]). Supreme Court sets filing fee by order. (SCACR 203[d][2][C]). Notice of appeal must contain (1) name of court, judge, and county from which appeal taken; (2) docket number of case in lower court; (3) date of lower court's order, judgment, or sentence, or for cross-appeal, when notice of appeal was received; (4) name of appealing party; and (5) names, mailing addresses, and telephone numbers of all attorneys of record and names of party or parties whom each represents. (SCACR 203[e]).

Forms

Notice of Appeal, Civil Case.

THE STATE OF SOUTH CAROLINAIn The Court of Appeals[In The Supreme Court]

. . . .

APPEAL FROM GREENVILLE COUNTYCourt of Common PleasGeorge E. Brown, Circuit Court Judge

. . . .

Case No. 2000-CP-00-0000

. . . .

Stephen L. Doe, as Personal Representative of the Estate ofJohn B. Doe, Respondent,v.Jane C. Roe, Appellant.

. . . .

NOTICE OF APPEAL

. . . .

Jane C. Roe appeals the order [judgment] of the Honorable George E. Brown dated September 1, 2000. Appellant received written notice of entry of this order [judgment] on September 3, 2000.

September 15, 2000   /s/ John E. Smith

John E. Smith

Post Office Box 123

Greenville, South Carolina 29000

(864) 000-0000

Attorney for Appellant

Other Counsel of Record:

Mary P. Jones

Post Office Box 456

Greenville, South Carolina 29000

Attorney for Respondent

(864) 000-0000

Notice of Appeal for Cross-Appeal.

THE STATE OF SOUTH CAROLINAIn The Court of Appeals[In The Supreme Court]

. . . .

APPEAL FROM ORANGEBURG COUNTYFamily CourtRebecca T. Green, Family Court Judge

. . . .

Case No. 2000-DR-00-0000

. . . .

John E. Jones, Respondent-Appellant,v.Frances T. Jones, Appellant-Respondent.

. . . .

NOTICE OF APPEAL

. . . .

John E. Jones appeals the order [judgment] of the Honorable Rebecca T. Green dated September 10, 2000. Respondent-Appellant received a notice of appeal from Appellant-Respondent on September 20, 2000.

September 25, 2000   /s/ Thomas A. Doe

Thomas A. Doe

Post Office Box 456

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Attorney for Respondent-Appellant

Other Counsel of Record:

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(803) 000-0000

Attorney for Appellant-Respondent

Appealable Orders.

§14-3-330 governs what lower court orders appellate court may review. These are: (1) Any intermediate judgment, order or decree in law case involving merits in actions commenced in court of common pleas and general sessions, brought there by original process or removed there from any inferior court or jurisdiction, and final judgments in such actions; provided, that if no appeal be taken until final judgment is entered court may upon appeal from such final judgment review any intermediate order or decree necessarily affecting judgment not before appealed from; (2) order affecting substantial right made in action when such order (a) in effect determines action and prevents judgment from which appeal might be taken or discontinues action, (b) grants or refuses new trial or (c) strikes out answer or any part thereof or any pleading in any action; (3) final order affecting substantial right made in any special proceeding or upon summary application in any action after judgment; and (4) interlocutory order or decree in court of common pleas granting, continuing, modifying, or refusing injunction or granting, continuing, modifying, or refusing appointment of receiver.

Order which determines question of subject matter jurisdiction is not immediately appealable. (319 S.C. 240, 460 S.E.2d 392). Order compelling arbitration nor any order relating to arbitration not mentioned in S.C. Code Ann. § 15-48-200(a) is not immediately appealable. (355 S.C. 605, 586 S.E.2d 581). Order denying motion for summary judgment is not immediately appealable. (313 S.C. 476, 443 S.E.2d 379).

Family Court and Domestic Relations Action.

Procedures for notice and filing of appeal are same as for appeals from Court of Common Pleas. For appeal in juvenile action, notice and filing accomplished in same manner as appeal from Court of General Sessions. (SCACR 203).

Probate Courts.

S.C. Probate Code, S.C. Code Title 62 generally governs. Circuit court has appellate jurisdiction in matters originally within jurisdiction of probate court. (S.C. Code Ann. § 62-1-308). Supreme Court and Court of Appeals have jurisdiction of questions of law arising in circuit courts in probate matters. (S.C. Code Ann. § 18-9-30). Grounds of appeal must be filed with probate court and served on all parties within 45 days after notice of decision. (S.C. Code Ann. § 62-1-308). Notice of intention to appeal must be filed with circuit and probate courts, and copy of notice served on all parties within ten days of receipt of written order from Probate Court. Appeal stays further proceedings. (S.C. Code Ann. § 62-1-308).

General Sessions.

In appeals from court of general sessions, after plea or trial resulting in conviction or revocation of probation, notice of appeal must be served within ten days after sentence is imposed. In all other cases, notice of appeal must be served within ten days after receipt of written notice of entry of judgment or order. (SCACR 203[b][2]).

Inferior Courts.

Appeals from magistrates' courts, county commissioners, or from other inferior courts or jurisdictions (excluding probate courts and city courts), lie to circuit court of county where judgment was rendered unless matter was heard by Master or special referee with finality and then matter may be appealed directly to Supreme Court. (S.C. Code Ann. § 18-7-10; SCACR 203). In counties where county courts are established, appeals from inferior courts, except probate courts, also lie to county court. Appeal acts as supersedeas, if appellant gives bond to pay amount of judgment and costs of appeal if it is not sustained. (S.C. Code Ann. § 18-7-10).

Notice of appeal, stating grounds, must be served within 30 days. Time runs after written notice of judgment, unless judgment is announced at the trial, in the presence of appellant or his attorney, in which event no written notice is necessary. (S.C. Code Ann. § 18-7-20).

See also SCRCP Rules 72 to 76.

Administrative Agencies.

After exhausting all administrative remedies available, appeal lies to Circuit Court within 30 days after final decision of agency. Appeal from final decision of professional or occupational licensing board proceeds first to administrative law judge division then to circuit court. Only agency or reviewing court may grant stay. (S.C. Code Ann. § 1-23-380).

Bonds.

Appeal bond not required. Supersedeas bond necessary in certain cases to stay proceedings. (See subhead Stays, infra.) Bonds or undertakings on appeal must be with two or more sureties accompanied by their affidavits that they are worth double amount specified therein. Respondent may except to sufficiency of sureties within ten days after notice of appeal and unless they, or other sureties, justify before judge or clerk of court within ten days thereafter, appeal will be regarded as if no undertaking had been given. Justification must be upon notice of not less than five days, and action of clerk in approving or disapproving sureties may be reviewed on motion after notice before circuit judge. At any time in action, respondent may require sureties to be justified anew, on affidavit that sureties are insufficient. (S.C. Code Ann. § 18-9-210).

Stays.

Notice of appeal stays proceedings in court below (S.C. Code Ann. § 18-9-220), except in following cases:

(a) Where judgment directs sale of perishable property, court below may order property sold and proceeds deposited or invested in bonds of state or of U. S., pending appeal. (S.C. Code Ann. § 18-9-220).

(b) Notice of appeal from judgment directing payment of money does not stay execution unless judge before whom judgment was obtained grants stay, but plaintiff, after notice of appeal, may not enforce execution without giving bond to defendant in double value of property levied on or double amount of judgment to pay damages sustained by defendant in case judgment is reversed, nor can he proceed after giving such bond if defendant give bond to pay plaintiff the debt, costs and damages if judgment is sustained. (S.C. Code Ann. § 18-9-130).

(c) If judgment directs assignment or delivery of documents or personal property, execution is not stayed unless things required to be assigned or delivered be deposited with court, or unless defendant gives bond in amount fixed by trial judge. (S.C. Code Ann. § 18-9-150).

(d) If judgment directs execution of conveyance or other instrument, execution of judgment is not stayed until instrument is executed and deposited with court. (S.C. Code Ann. § 18-9-160).

(e) If judgment directs sale or delivery of possession of real property, execution of judgment is not stayed unless bond is given by appellant that he will not commit waste and, in case judgment is confirmed, that he will pay value of use and occupation of property. When judgment directs sale of land to satisfy mortgage or other lien, bond must provide also for rents; if for unimproved lands, for taxes and interest. (S.C. Code Ann. § 18-9-170).

See also SCACR 225.

5.04 BONDS:

No statutory provisions as to bonds in civil actions generally. Two or more sureties are usually required and in all cases the bond must be acceptable to and considered sufficient by the officer with whom it is filed.

Justification.

Sureties usually must justify by affidavit that each is worth double the amount of bond. (S.C. Code Ann. § 18-9-210). If sureties become insolvent, court may require new bonds. (S.C. Code Ann. § 18-9-140).

Surety Companies.

Bond executed by surety company is acceptable, provided company has been duly authorized to do business in this state. (S.C. Code Ann. § 38-15-60).

Public Construction Contracts.

Bid security is required for all competitive sealed bidding for construction contracts in excess of $50,000 and such other contracts as may be prescribed by state engineer's office. Bid security is bond provided by surety company meeting criteria established by regulations of board or otherwise supplied in form which may be established by regulation of board. (S.C. Code Ann. § 11-35-3030). Bid security must be in amount equal to at least 5% of amount of bid at minimum. (S.C. Code Ann. § 11-35-3030[1][b]). Every suit instituted upon payment bond must be brought in court of competent jurisdiction for county or circuit in which construction contract was to be performed and must be commenced within one year after day on which last of labor was performed or material was supplied by person bringing suit. (S.C. Code Ann. § 11-35-3030[2][d]).

Attorneys.

Rule 604(a), SCACR, provides attorney or other officer of any state court cannot: (1) be surety upon any recognizance or undertaking in any state court of this State; (2) be involved in surety business or in business with any person or persons becoming surety upon any recognizance or undertaking in any court in this State; or (3) refer person to any surety or bondsman who is immediate family member of attorney or court officer. (SCACR 604[a]).

5.05 CERTIORARI:

Appeals initially to Court of Appeals. Supreme Court has discretion to grant writs of certiorari to review opinions and final decisions of Court of Appeals. (SCACR 226[a]). Under limited circumstances may hear direct appeals for Circuit Court on novel issues of important public interest. Writs of certiorari may be granted by Supreme Court (S.C. Code Ann. § 14-3-310) or by justice of Supreme Court (S.C. Code Ann. § 14-3-350). If granted by justice, appeal lies to Supreme Court. (S.C. Code Ann. § 14-3-350). Writs of mandamus and prohibition may also be used as means of review. Grounds and extent of inquiry are as at common law. Writs may also be issued by Court of Appeals and judges (S.C. Code Ann. § 14-8-220), and petitions for writs of certiorari may specifically be considered by Court of Appeals in post-conviction relief matters to extent provided in Supreme Court rules (S.C. Code Ann. § 14-8-200[a]). Judges of Court of Appeals have same power to administer writs at chambers as when in open court. (S.C. Code Ann. § 14-8-290).

Proceedings.

On motion, Supreme Court, or any two justices thereof, may issue writ of certiorari to review final judgment of Court of Appeals. (SCACR 226[a]). Notice of intent to petition for writ of certiorari to be served on opposing counsel and filed with clerks of Court of Appeals and Supreme Court within 30 days after petition for rehearing acted on by Court of Appeals. (SCACR

226[c]). Form included in appendix. (SCACR Part II, Appx. C, Form 17).

Forms

Petition for Certiorari to Court of Appeals.

THE STATE OF SOUTH CAROLINA In The Supreme Court

. . . .

APPEAL FROM GREENVILLE COUNTY Court of Common Pleas George E. Brown, Circuit Court Judge

. . . .

Opinion No. 0000 (S.C. Ct. App. filed Feb. 10, 2002)

. . . .

Stephen L. Doe, as Personal Representative of the Estate of John B. Doe, Respondent, v. Jane C. Roe, Petitioner.

. . . .

PETITION FOR WRIT OF CERTIORARI

. . . .

John E. Smith

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Other Counsel of Record:

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CERTIFICATE OF COUNSEL

Counsel for petitioner certifies that the Petition for Rehearing was made and finally ruled on by the Court of Appeals on March 2, 2002.

QUESTIONS PRESENTED

1.

judicata?

2.

the burden of proof?

STATEMENT OF THE CASE

On February 1, 2000, John B. Doe brought this action . . .

(i.e. R.p. 37, lines 7-8).]

The Court of Appeals affirmed the judgment of the circuit court. Stephen L. Doe, as Personal Representative of the Estate of John B. Doe v. Jane C. Roe, Op. No. 0000 (S.C. Ct. App. filed Feb. 10, 2002). Petitioner seeks a writ of certiorari to review that decision.

ARGUMENT

1.

JUDICATA.

authority.]

2.

BURDEN OF PROOF.

authority.]

CONCLUSION

For the reasons stated, petitioner asks the Court to grant the petition for a writ of certiorari.

Respectfully submitted,

March 27, 2002 /s/ John E. Smith

John E. Smith

Post Office Box 123

Greenville, South Carolina 29000

(864) 000-0000

Attorney for Petitioner

5.06 CHARITABLE IMMUNITY:

See topic 5.09 Damages.

5.06A CLAIM AND DELIVERY:

See topic 5.21 Replevin.

5.07 COMMISSIONS TO TAKE TESTIMONY:

See topic 5.11 Depositions and Discovery.

5.08 COSTS:

Costs at law are recovered by the prevailing party against the adverse party. (S.C. Code Ann. § 15-37-20). In cases in chancery same rule prevails unless otherwise ordered by court. (S.C. Code Ann. § 15-37-10). Costs taxed by clerk on affidavit of prevailing party after five days notice to opposing attorney or two days notice if attorneys reside in same city. (S.C. Code Ann. § 15-37-40).

If guardian ad litem is represented by attorney, court in its discretion may assess reasonable attorneys fees and costs. (Fam. Ct. Rule 12).

Appeals to Circuit and County Courts.

No costs allowed to either party if appeal dismissed for want of prosecution. (S.C. Code Ann. § 18-7-280). Award of costs to appellant to include costs that were incurred below and could have been recovered if judgment had been rendered in his or her favor. (S.C. Code Ann. § 18-7-290).

There is limitation on costs when tort judgment is less than $100. (S.C. Code Ann. § 15-37-50). Other provisions or limitations on costs cover small partition and foreclosure cases (S.C. Code Ann. § 15-37-60); postponement of trial (S.C. Code Ann. § 15-37-80); motions (S.C. Code Ann. § 15-37-90); review by circuit court of decision of inferior court in special proceeding (S.C. Code Ann. § 15-37-100); cost adjustments interlocutory and special proceedings (S.C. Code Ann. § 15-37-110); mileage (S.C. Code Ann. § 15-37-120); references (S.C. Code Ann. § 15-37-130); masters, special masters or referees (S.C. Code Ann. § 15-37-140); uncontested claims (S.C. Code Ann. § 15-37-160); infant plaintiffs (S.C. Code Ann. § 15-37-170); fiduciaries (S.C. Code Ann. § 15-37-180); assignees (S.C. Code Ann. § 15-37-190); and actions prosecuted in name of state (S.C. Code Ann. §§ 15-37-200, -210).

Frivolous Civil Proceedings Sanctions Act provides for liability of attorneys fees and costs of frivolous suits. (S.C. Code Ann. § 15-36-10).

5.09 DAMAGES:

Common law generally prevails. Husband or wife, however, can recover for loss of consortium resulting from negligent injury to spouse. (S.C. Code Ann. § 15-75-20).

Action for alienation or affection, or “heart balm” cases, abolished by Supreme Court. (310 S.C. 200, 422 S.E.2d 750). Civil action for tort of criminal conversation abolished by statute. (S.C. Code Ann. § 15-3-150).

Special damages must be pleaded and cannot be recovered as general damages. (SCRCP 9).

Person, in good faith, rendering emergency care at scene of accident or emergency not liable for civil damages as a result of any act or omission unless such amounts to gross negligence or willful or wanton misconduct. (S.C. Code Ann. § 15-1-310).

Payment by motor vehicle liability insurer of a property damage claim against its insured cannot be delayed because of any other claim arising from same accident or event. (S.C. Code Ann. § 38-77-330).

Charitable Immunity.

Doctrine of charitable immunity was abolished. (277 S.C. 1, 282 S.E.2d 230). Limit of recovery against charitable hospital to $100,000 of actual damages under §44-7-50 violates equal protection. (308 S.C. 1, 416 S.E.2d 623). One may recover actual damages not exceeding limits of S.C. Tort Claims Act. (S.C. Code Ann. § 33-56-180). Injured person may recover up to limits of uninsured or underinsured coverage if actual damages from injury or death arose from use or operation of motor vehicle and exceed $250,000. (S.C. Code Ann. § 33-56-180[B]).

Sovereign Immunity.

Tit. 15, 1976 Code amended by adding c. 78—South Carolina Tort Claims Act. State, agency, political subdivision and governmental entity liable for torts same as private individual, subject to limitations upon, exemptions from, liability and damages contained in chapter. (S.C. Code Ann. §§ 15-78-10 to -220). Whether there is limitation on damages and amount available depend on when cause of action accrued. (355 S.C. 420, 586 S.E.2d 115). Statutory limitations of liability apply to claims for damages under Act. (S.C. Code Ann. § 15-78-120[a]). No punitive or exemplary damages or interest prior to judgment may be recovered. (S.C. Code Ann. § 15-78-120[b]).

No Damages for Delay Clauses.

No-damages-for-delay provisions are generally valid and enforceable as long as they meet ordinary rules governing validity of contracts, with following exceptions: (a) delay caused by fraud, misrepresentation, or other bad faith; (b) delay caused by active interference; (c) delay which amounts to abandonment of contract; (d) uncontemplated delay; and (e) delay caused by gross negligence. (325 S.C. 129, 480 S.E.2d 447).

Comparative Negligence Rule.

Modified comparative negligence adopted by Supreme Court with rule applicable to causes of action arising on or after July 1, 1991. If plaintiff's negligence is 50% or less, plaintiff's recovery reduced by amount of plaintiff's negligence. If plaintiff is 51% or more negligent, plaintiff is barred from any recovery. (303 S.C. 243, 399 S.E.2d 783). Comparative negligence part of determination of liability of defendant whose conduct was less than 50% of total fault for indivisible damages. (S.C. Code Ann. § 15-38-15). Limitation of comparative negligence to motor vehicle accidents under §15-1-300 held unconstitutional. (271 S.C. 122, 245 S.E.2d 604).

See also category 13 Estates and Trusts, topic 13.05 Death, subheads Limitation of Amount Recoverable and Action for Death.

No-Fault Insurance.

See category 23 Transportation, topic 23.01 Motor Vehicles, subhead No-Fault Insurance.

Uniform Contribution Among Joint Tortfeasors Act adopted. (S.C. Code Ann. § 15-38-10 et seq.).

5.10 DECLARATORY JUDGMENTS:

See topic 5.15 Judgments.

5.11 DEPOSITIONS AND DISCOVERY:

Uniform Foreign Deposition Act not adopted.

S.C. Rules of Civil Procedure similar to Federal Rules of Civil Procedure, effective July. 1, 1985 for state rules and May 1, 1986 for 1986 amendments.

Depositions upon written questions available. (SCRCP 31). Cross questions may be served within 30 days after service of notice of deposition and written questions. Parties may serve redirect questions upon all other parties within ten days after service of cross questions, and recross questions may be served within ten days after service of redirect questions. (SCRCP 31[a]).

Depositions Taken by Person Authorized to Administer Oaths.

S.C. has substantially adopted FRCP 28(a)-(c).

Testimony by Videotape.

Videotaped depositions available if prayer in complaint is $100,000 or more or by court order. (SCRCP 30[h]). There is no comparable detailed language in Federal Rule.

Use of Depositions in Court Proceedings.

Depositions may be used at trial as indicated in SCRCP 32. Rule substantially follows FRCP 32. Under SCRCP 30(i), depositions of any licensed physician, psychologist, chiropractor, osteopathic physician, or dentist who provided treatment to party may be received in evidence notwithstanding provisions of SCRCP 32(a)(3) regarding use of depositions in trial.

To Perpetuate Testimony.

Person who desires to perpetuate his own testimony or another's regarding any matter cognizable before any court in S.C. may file verified petition to do so prior to commencement of action. Pending appeal, motion may be filed to perpetuate testimony. (SCRCP 27). S.C. follows FRCP 27, with minor modifications.

Within State for Use Within State.

See SCRCP 26 and 30 Rules substantially similar to Federal Rules, with some modifications.

Within State for Use Elsewhere.

Attorney, licensed to practice law in this state, or Clerk of Court, may issue subpoena, including subpoena duces tecum, compelling attendance of such witness at that deposition, or production of documents or other things pursuant to this rule. (SCRCP 28[d]).

Compelling Attendance of Witnesses.

Subpoena commanding attendance at trial or hearing issues from court for county in which hearing or trial is to be held. For attendance at deposition, subpoena issues from county where deposition will be taken, provided that subpoena to person who is not party commanding attendance at deposition must issue from court for county in which nonparty resides or is employed or regularly transacts business in person. (SCRCP 45).

Examination.

Examination and cross-examination may proceed as permitted at trial under provisions of S.C. Rules of Evidence except SCRE 103, 615. (SCRCP 30[c]).

Return and Form.

Officer transcribing deposition must certify on deposition that witness was duly sworn and that deposition is true record of testimony. Original is sealed and sent to party taking deposition who is custodian of original. (SCRCP 30[f]).

5.12 EQUITY:

See topic 5.02 Actions.

5.13 EVIDENCE:

See topic 5.11 Depositions and Discovery.

South Carolina Rules of Evidence, similar to Federal Rules, effective Sept. 3, 1995.

Witnesses.

All persons competent to be witness except as otherwise provided by statute or S.C. Rules of Evidence. (SCRE 601[a]). Person is disqualified to be witness if court determines that: (1) Proposed witness is incapable of expressing himself concerning matter so as to be understood by judge and jury either directly or through interpretation by one who can understand him, or (2) proposed witness is incapable of understanding duty of witness to tell truth. (SCRE 601).

Conviction of crime does not disqualify but may affect credibility. (SCRE 609). For purpose of attacking credibility of witness: (1) Evidence that witness other than accused has been convicted of crime is admissible, subject to SCRE 403, if crime was punishable by death or imprisonment in excess of one year under law under which witness was convicted, and evidence that accused has been convicted of such crime is admissible if court determines that probative value of admitting evidence outweighs prejudicial effect to accused; and (2) evidence that any witness has been convicted of crime is admissible if it involved dishonesty or false statement, regardless of punishment.

For purposes of this rule, conviction includes conviction resulting from trial or any type of plea, including plea of nolo contendere or plea pursuant to North Carolina v. Alford, 400 U.S. 25, 91 S.Ct. 160, 27 L.Ed.2d 162 (1970).

Evidence of conviction under this rule not admissible if period of more than ten years has elapsed since date of conviction or of release of witness from confinement imposed for that conviction, whichever is later date, unless court determines, in interests of justice, that probative value of conviction supported by specific facts and circumstances substantially outweighs prejudicial effect. However, evidence of conviction more than ten years old as calculated herein, not admissible unless proponent gives to adverse party sufficient advance written notice of intent to use evidence to provide adverse party with fair opportunity to contest use of evidence. (SCRE 609[b]).

Evidence of conviction not admissible under this rule if: (1) conviction has been subject of pardon, annulment, certificate of rehabilitation, or other equivalent procedure based on finding of rehabilitation of person convicted, and that person has not been convicted of subsequent crime which was punishable by death or imprisonment in excess of one year, or (2) conviction has been subject of pardon, annulment, or other equivalent procedure based on finding of innocence. (SCRE 609[c]).

Dead Man's Statute.

South Carolina Dead Man's Statute, §19-11-20, essentially prohibits any interested person from testifying concerning conversations or transactions with decedent if testimony could affect his or her interest. South Carolina courts have recognized number of exceptions to Dead Man's Statute. (326 S.C. 140, 485 S.E.2d 903).

Juvenile Adjudications.

Evidence of juvenile adjudication is admissible under this rule if conviction of crime would be admissible to attack credibility of adult. (SCRE 609[d]).

Pendency of Appeal.

Pendency of appeal does not render evidence of conviction inadmissible. Evidence of pendency of appeal is admissible. (SCRE 609[e]).

Privileged Communications.

Privilege of witness, person or government governed by common law principles except as required by state and federal constitutions or state statute. (SCRE 501). Attorney cannot be forced to testify as to confidential disclosure of client (243 S.C. 453, 134 S.E.2d 392), but South Carolina follows common law rule that communications between physician and patient are not privileged (232 S.C. 274, 101 S.E.2d 821). However, South Carolina does recognize an action against a physician for the disclosure of confidential information, unless the disclosure is compelled by law or consented to by the patient. (665 S.E.2d 222; 328 S.C. 627, 494 S.E.2d 431). Priest-penitent privilege (S.C. Code Ann. § 19-11-90) and mental or emotional patient-provider privilege (S.C. Code Ann. § 19-11-95) provided by statute.

Husband and wife are not competent witnesses against each other as to confidential communications during marriage and in criminal proceeding as to any communication made during their marriage. However, husband or wife is required to disclose any communication, confidential or otherwise, made by one to other during their marriage where suit, action, or proceeding concerns or is based on child abuse or neglect, death of child, criminal sexual conduct involving minor or commission or attempting to commit lewd act upon minor. (S.C. Code Ann. § 19-11-30).

Self-Incrimination.

No person required to answer any question that would tend to incriminate himself or herself. (S.C. Code Ann. § 19-11-80).

News Media.

Persons, companies, or entities engaged in gathering and dissemination of news for public have qualified privilege in any proceeding where compelled disclosure sought and where one asserting privilege is not party in interest. (S.C. Code Ann. § 19-11-100[A]). Disclosure of information or documents or production of items may be compelled if clear and convincing evidence establishes privilege knowingly waived or that testimony or production material and relevant to controversy, cannot be reasonably obtained by alternative means, and necessary to case. (S.C. Code Ann. § 19-11-100[B]).

Business Records.

Uniform Business Records as Evidence Act (S.C. Code Ann. § 19-5-510), and Uniform Photographic Copies of Business and Public Records as Evidence Act adopted (S.C. Code Ann. § 19-5-610).

Statements of Children.

Depositions of children may be videotaped and may be admissible in court subject to certain requirements including unavailability for trial and availability to cross-examination. (S.C. Code Ann. § 19-1-180). In abuse and neglect cases, out of court statements of children, which are otherwise inadmissible, are admissible if made under certain conditions. (S.C. Code Ann. § 19-1-180). To be admissible, court must find (1) child is unavailable for one of the five reasons set forth in statute and (2) out-of-court statement possesses particularized guarantees of trustworthiness. (323 S.C. 299, 474 S.E.2d 156).

Statements Used for Impeachment.

No statement taken from and signed by witness or litigant after July 1, 1966, can be used in any civil pretrial proceeding for impeachment unless such party was furnished copy of said statement at time of its signing. (S.C. Code Ann. § 19-1-100).

5.14 INJUNCTIONS:

Similar to FRCP 65 except additions concerning mandamus, habeas corpus and other remedial writs. (SCRCP 65[f]).

5.15 JUDGMENTS:

Judgment.

Any decree or order which dismisses action as to any party or finally determines rights of any party. Judgment need not contain recital of pleadings, report of master, or record of prior proceedings. (SCRCP, Rule 54[a]). Rules 54(b) (c) are substantially Federal Rules. Form of civil judgment included in rules. (SCRCP Appendix, Form 4). See topic 5.08 Costs.

Form

Judgment in Civil Case.

STATE OF SOUTH CAROLINA JUDGMENT IN A CIVIL CASE

COUNTY OF . . . .

IN THE COURT OF COMMON

PLEAS CASE NO. . . . .

. . . .

. . . .

. . . .

. . . .

PLAINTIFF(S) DEFENDANT(S)

CHECK ONE

[ ]

jury. The issues have been tried and a verdict rendered.

[ ]

decision rendered.

[ ]

(Settled); [ ] Other- . . . .

[ ]

Bankruptcy; [ ] Other- . . . .

IT IS ORDERED AND ADJUDGED:

[ ] See attached order; [ ] Statement of Judgment by the Court:

Dated at . . . . , South Carolina, this . . . . day of . . . . , 20 . . .

. . . .

PRESIDING JUDGE

This judgment was entered on the . . . . day of . . . . , 20 . . . , and a copy mailed first class this . . . . day of . . . . , 20 . . . to attorneys of record or to parties (when appearing pro se) as follows:

. . . .

. . . .

. . . .

. . . .

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

. . . .

CLERK OF COURT

Confession of Judgment.

A judgment by confession without action may be entered where the defendant files with the clerk of court or magistrate (if in magistrate's court), a signed statement, verified under oath, showing the amount for which judgment may be entered, authorizing the entry, and if for money due or to become due, the facts out of which it arose and that the sum confesses is justly due or to become due; and if it is to secure plaintiff against a contingent liability, the statement must show the facts constituting the liability and that the sum confessed does not exceed the liability. Judgment is endorsed on the statement by the clerk of court or magistrate. Execution may issue on a confessed judgment. (S.C. Code Ann. §§ 15-35-350 to -380).

Confession void if equivalent to assignment by insolvent debtor to preferred creditors (32 S.C. 492, 11 S.E. 337) and in certain consumer transactions. (S.C. Code Ann. §§ 34-29-170, 36-3-112, and 37-2-712). See also category 3 Business Regulation and Commerce, topic 3.12 Consumer Protection.

Consent to confession of judgment is equivalent to voluntary appearance as to question of jurisdiction over person. (270 S.C. 386, 242 S.E.2d 430).

Default Judgments.

Similar to Federal Rule except SCRCP 55(a) requires that court enter all judgments by default, and SCRCP Rule 55(b) permits clerk to enter judgments by default for sum certain if there has been no appearance and if defendant is not minor or incompetent person. All parties against whom judgment by default is sought must receive three days notice of application. (SCRCP 55[b]).

Rules 55(c) and (d) are identical to Federal Rules. Under SCRCP 55(c), standard for relief from entry of default is “good cause”. Trial court has sole discretion as to whether to grant relief from default. (293 S.C. 372, 360 S.E.2d 535). Rule 55(d) extends rule's provisions to plaintiffs, counter claimants and cross claimants. Rule 55(e), which was modified, prohibits default against state, minors, incompetents or parties to suit for divorce or annulment against whom service was obtained by publication.

No judgment by default in actions for recovery of money, where summons served by publication and defendant is nonresident of South Carolina unless plaintiff shows by affidavit that attachment was issued and levied on dependent's property and describes property. (SCRCP 55[b][4]).

Fraud.

Res judicata and collateral estoppel do not bar collateral attack of judgment based on fraud. (285 S.C. 296, 328 S.E.2d 924).

Summary Judgment.

Party seeking to recover may file motion 30 days after commencement of action or after service of motion by adverse party. (SCRCP 56[a]). SCRCP 56 otherwise contains language of FRCP 56.

Magistrate's Judgment.

Upon request, a magistrate furnishes a transcript of the judgment and this may be filed and docketed in the office of the clerk of the circuit court of the county where the judgment was rendered. The time of receipt of the transcript is noted thereon, and entered in the abstract of judgments, and from that time the judgment becomes a judgment of the circuit court. (S.C. Code Ann. § 22-3-300).

Docketing.

Upon final decision or verdict clerk prepares, enters and signs judgment. (SCRCP 58). Judgments are entered in book kept by clerk of court known as abstract of judgments. Entry is made so as to show: number of judgment roll; names of parties; cause of action; attorneys; date and amount of judgment; time of bearing interest; how judgment was obtained; costs; kind of execution; date of issuing; sheriff's return; when renewed; and, satisfaction. Clerk must also keep index to judgments. (S.C. Code Ann. § 15-35-520; see also SCRCP 78[b]).

The judgment roll, consisting of the pleadings, judgments, etc., is also filed by the clerk in clerk's office. (S.C. Code Ann. § 15-35-530; SCRCP 58).

A transcript of a judgment may be docketed in the office of the clerk of court in any other county and then has the effect of a judgment of that court. (S.C. Code Ann. § 15-35-540).

Out-of-state U.S. District Court judgments properly registered with U.S. District Courts in South Carolina, may be docketed with county clerks of court in South Carolina pursuant to S.C. Code Ann. § 15-35-540. (295 S.C. 143, 367 S.E.2d 441).

Offer of Judgment.

No later than 20 days before trial, any party to civil action, other than domestic relations case, may file and serve written offer to allow judgment to be taken for or against offeror for stated sum or to specified effect. Offer automatically terminated if not accepted 20 days after notification or ten days before trial. (SCRCP 68[a]; S.C. Code Ann. § 15-35-400).

Liens.

Judgment is lien for ten years on all real estate, not exempt by law, of judgment debtor in county where judgment is entered, from date of judgment. (S.C. Code Ann. § 15-35-810). No lien on personal property results from execution; only actual attachment or levy binds personal property. (S.C. Code Ann. § 15-39-100).

Revival.

Execution may be issued within ten years after entry of final judgment or decree and have active energy during period, without any renewal or renewals. (S.C. Code Ann. § 15-39-30). Execution only process for enforcement of judgment; judgment utterly extinguished ten years after entry. (328 S.C. 293, 493 S.E.2d 100).

Declaratory Judgments.

SCRCP 57 same as FRCP 57, except for substitution of State Code references.

Uniform Enforcement of Foreign Judgments Act has been adopted. (S.C. Code Ann. § 15-35-900 to 960).

Assignment.

Judgment may be assigned by endorsement thereon. (45 S. C. L. 373, 11 Rich. 373). Forms similar to those for satisfaction. (q.v.).

Satisfaction.

Satisfaction is made by endorsement on the judgment by the owner thereof or his attorney, and such satisfaction must be entered in the abstract of judgments.

A bankrupt, after one year from date of discharge, may apply to the court in which a judgment is entered against him and if it appears that he has been discharged from the judgment or the debt on which it was recovered, the court will order the judgment satisfied. Notice of application must be given to judgment creditor. (S.C. Code Ann. §§ 15-35-630 to -640).

Form of Satisfaction

Fully satisfied this . . . . day of . . . . .

(Signed) A. B. or

C. D. Attorney for A. B.

Above may be written on original order for judgment or following may be used on separate paper and filed in record:

Form

State of South Carolina

County of ____________________

John Doe, Plaintiff

vs.

Richard Roe, Defendant }

In the Court of

____

Judgment Roll No. . . . .

Judgment dated . . . .

Entered . . . .

Amount $ . . . .

I, ..., the sole owner and holder of the above entitled judgment, do hereby declare same to be fully satisfied. Witness my hand and seal this . . . . . . day of . . . . In the presence of: Two witnesses and probate as in case of deed.

5.16 LIMITATION OF ACTIONS:

Note: Following applies to causes of action arising after Apr. 5, 1988 except as otherwise indicated. Check specific statute for limitation periods on actions arising prior to that date.

Uniform Commercial Code adopted with variations as to limitation of actions. See category 3 Business Regulation and Commerce, topic 3.09 Commercial Code.

Except in special classes of actions, prescribed by statute, civil actions must be brought within the periods below mentioned after the cause of action accrues. (S.C. Code Ann. § 15-3-20).

For Recovery of Real Estate.

No action against the person in possession on a claim of title by virtue of a written instrument may be brought unless the claimant, his ancestor, or grantor, was actually in possession of the premises, or a part thereof, within 40 years from the commencement of the action. (S.C. Code Ann. § 15-3-380).

The state or its grantee may not sue unless the right or title accrued within 20 years or unless the state, or its grantee, received rents or profits of some part of the property within 20 years. (S.C. Code Ann. §§ 15-3-310, -320).

Where a grant by the state has been declared void by the court, the state, or a subsequent grantee, may bring action within ten years after such determination by the court. (S.C. Code Ann. § 15-3-330).

Action by Individual for Recovery of Real Property.

No action for recovery of possession of real property may be maintained unless it appears that plaintiff, his ancestor, predecessor, or grantor, was seized or possessed of premises in question within ten years before commencement of action. (S.C. Code Ann. § 15-3-340).

Action must be brought within one year after entry and within ten years after accrual or descent of the right of entry. (S.C. Code Ann. § 15-3-360).

Persons under Disability.

If person entitled to commence any action for recovery of real property, or make entry or defense founded on title to real property or to rents or services out of same under disability is, at time such title first descends or accrues, either: (1) within age of 18 years; or (2) insane, time during which disability continues is not any portion of time in this article limited for commencement of such action or making of such entry or defense, but such action may be commenced or entry or defense made after period of ten years and within ten years after disability ceases or after death of person entitled who dies under such disability. But such action may not be commenced or entry or defense made after that period. (S.C. Code Ann. § 15-3-370).

Other Actions.

Within 20 years: (a) Action upon bond or other contract in writing secured by mortgage of real property; (b) action upon sealed instrument, other than sealed note and personal bond for payment of money only whereon period of limitation is same as prescribed in §15-3-530, except that sealed contract for sale or offer to buy or sell goods whereon period of limitation is same as prescribed in §36-2-725. (S.C. Code Ann. § 15-3-520).

Within Ten Years.

Catch-all statute of limitations; action commenced within ten years after accrual of action. (S.C. Code Ann. § 15-3-600). Enactment of Uniform Enforcement of Judgments Act did not abrogate common law rule that ten-year catch-all statute of limitations applies to actions to enforce foreign judgments. (335 S.C. 477, 517 S.E.2d 235).

Within Eight Years.

Effective July 1, 2005, action to recover damages for defective or unsafe condition of improvement to real property not brought more than eight years after substantial completion;

former statute of repose 13 years. (S.C. Code Ann. § 15-3-640). Limitation does not extend limitations period (S.C. Code Ann. § 15-3-660) and not defense in some circumstances (S.C. Code Ann. § 15-3-670).

Within Six Years.—Applies to claims for breach of warranty in contract for sale under UCC. (S.C. Code Ann. § 36-2-725). Action to recover personal injury damages for sexual abuse or incest commenced within six years after person turns 21 or three years from discovery by person of injury and causal relationship. (S.C. Code Ann. § 15-3-555). For certain causes of action accruing prior to Apr. 5, 1988, limitations period reduced to three years. See catchline Within Three Years.

Within Three Years.—(1) Action upon contract, obligation, or liability, express or implied, excepting those provided for in §15-3-520; (2) action upon liability created by statute other than penalty or forfeiture; (3) action for trespass upon or damage to real property; (4) action for taking, detaining, or injuring any goods or chattels including action for specific recovery of personal property; (5) action for any injury to person or rights of another, not arising on contract and not enumerated by law, and those provided for in §15-3-545 (see catchline Actions for Medical Malpractice, infra); (6) action under §§15-51-10 to -60 for death by wrongful act, period to begin to run upon death of person on account of whose death action is brought; (7) any action for relief on ground of fraud in cases which prior to adoption of Code of Civil Procedure in 1870 were solely cognizable by court of chancery, cause of action in case not considered to have accrued until discovery by aggrieved party of facts constituting fraud; (8) action on any policy of insurance, either fire or life, whereby any person or property, resident or situate in this State, may be or may have been insured, or for or on account of any loss arising under policy, any clause, condition, or limitation contained in policy to contrary notwithstanding; and (9) action against directors or stockholders of monied corporation or banking association to recover penalty or forfeiture imposed or to enforce liability, created by law, cause of action in case not considered to have accrued until discovery by aggrieved party of facts upon which penalty or forfeiture attached or liability was created, unless otherwise provided in law under which corporation is organized. (S.C. Code Ann. § 15-3-530).

Except as to actions initiated under §15-3-545 (see catchline Actions for Medical Malpractice, infra), all actions initiated under §15-3-530(5) must be commenced within three years after person knew or by exercise of reasonable diligence should have known of cause of action. (S.C. Code Ann. § 15-3-535).

Actions for Medical Malpractice.

Any action to recover damages for injury to person arising out of any medical, surgical or dental treatment, omission or operation by any licensed health care provider as defined in Art. 5 of c. 79 of Title 38 must be commenced within three years from date of treatment, omission or operation giving rise to cause of action or three years from date of discovery or when it reasonably ought to have been discovered, not to exceed six years from date of occurrence. When action is for damages arising out of placement and inadvertent, accidental or unintentional leaving of foreign object in body or person of anyone or negligent placement of any appliance or apparatus in or upon any such person by any licensed health care provider by reason of any medical, surgical or dental treatment or operation, such action must be commenced within two years from date of discovery or when it reasonably ought to have been discovered; provided, however, that provisions of §15-3-545 apply only to causes of action which arise after June 10, 1977, and, as to causes of action which arise prior to June 10, 1977, statute of limitations existing prior to June 10, 1977, applies. (S.C. Code Ann. § 15-3-545).

Notwithstanding provisions of §15-3-40, if person entitled to bring action against licensed health care provider acting within scope of his profession is under age of majority at date of treatment, omission, or operation giving rise to cause of action, time period or periods limiting filing of action are not tolled for period of more than seven years on account of minority, and in any case more than one year after disability ceases. Such time limitation is tolled for minors for any period during which parent or guardian and defendant's insurer or health care provider have committed fraud or collusion in failure to bring action on behalf of injured minor. (S.C. Code Ann. § 15-3-545).

Within two years: Actions for libel, slander, or false imprisonment; action upon statute for forfeiture or penalty to state. (S.C. Code Ann. § 15-3-550). Actions by motor carriers for recovery of their charges, and actions against motor carriers for recovery of overcharges, with extension in latter actions, if written claim presented within two-year period, of six months from time written notice of disallowance of claim is given to claimant. (S.C. Code Ann. §§ 15-3-580 to -590). Actions under South Carolina Tort Claims Act within two years after date on which loss was or should have been discovered, but time extended to three years if claim filed pursuant to Act. (S.C. Code Ann. § 15-78-110).

Within One Year.

Actions relating to wages claimed under a Federal statute or regulation; actions against a sheriff or other officer for the escape of a prisoner arrested or imprisoned on civil process; actions against any county in this state having population in excess of 85,000 brought by former, present or future officer, employee or agent thereof on account of claim for salary, wages, fees, costs, etc., alleged to be due him for services rendered, or brought by assignee or personal representative of such person (S.C. Code Ann. § 15-3-560); action upon statute for penalty or forfeiture given to any person prosecuting same (S.C. Code Ann. § 15-3-570); action against any railroad company doing business in state for inflicting wrong or injury on any person (S.C. Code Ann. § 58-17-3950).

These limitations apply to actions brought in the name or for the benefit of the state. (S.C. Code Ann. § 15-3-620). They apply also to causes of action arising outside of state. (84 S.C. 224, 66 S.E. 186).

New Actions.

If an action is brought within the time and judgment is reversed on appeal, plaintiff, or if he die and cause survives, his heirs or representatives, may commence new action within one year after the reversal. (S.C. Code Ann. § 15-3-90).

Disabilities.

If a person entitled to bring a personal action, except for a penalty or forfeiture, or against a sheriff or other officer for escape was, when the cause of action accrued, within the age of 18 years, or insane, time of such disability is not part of time limited for commencement of action except that period within which action must be brought cannot be extended for more than five years by any such disability, except infancy, nor can it be extended in any case longer than one year after disability ceases. (S.C. Code Ann. §§ 15-3-40 to -50). If two or more disabilities co-exist when right of action accrues, limitation does not attach until all are removed. (S.C. Code Ann. § 15-3-60). As to actions to recover real estate, see supra, subhead For Recovery of Real Estate. Does not apply to action for penalty or forfeiture or against sheriff or other officer for escape.

Absent Defendants.

Limitations tolled if action accrues against person out of state or during continuance absence for at least one year after accrual. (S.C. Code Ann. § 15-3-30). Long-arm statute prevents tolling statute of limitations for actions against person out of state unless name and location of defendant not known to plaintiff. (330 S.C. 175, 498 S.E.2d 635).

Death.

Running of any statute of limitations on cause of action belonging to decedent which had not been barred as of date of his death is suspended during eight months following decedent's death but resumes thereafter unless otherwise tolled. (S.C. Code Ann. § 62-3-109).

Claims Against Decedent's Estate.

See category 13 Estates and Trusts, topic 13.08 Executors and Administrators, subhead Limitation on Presentation of Claims.

Aliens.

In case of alien enemy, duration of war is excluded from time limited for commencement of action. (S.C. Code Ann. § 15-3-80).

New Promise.

No acknowledgment or promise deemed sufficient evidence of new or continuing contract, so as to revive or continue a contract otherwise subject to the above limitations, unless in writing signed by party to be charged thereby. (S.C. Code Ann. § 15-3-120).

Part payment of principal or interest equivalent to promise in writing. (S.C. Code Ann. § 15-3-120).

Stay of Action.

If commencement of action stayed by injunction or statutory prohibition, time of continuance of injunction or prohibition not part of time limited for commencement of action. (S.C. Code Ann. § 15-3-100).

Pleading.

Limitations must be specially pleaded.

Contractual limitations void if less than time prescribed by statute. (S.C. Code Ann. § 15-3-140).

5.16A PARTITION:

Partition action in equity heard by judge alone. (299 S.C. 110, 382 S.E.2d 897).

Joint tenants and tenants in common are entitled to partition of land held jointly by them. (S.C. Code Ann. §§ 15-61-10 to -20). Partition in kind is favored when it can be fairly made without injury to parties; party seeking partition by sale carries burden of proving partition in kind is not practical or expedient. (299 S.C. 110, 382 S.E.2d 897). Court may decree partial partition in kind, partial partition by sale. (237 S.C. 64, 115 S.E.2d 659).

Jurisdiction.

Court of common pleas has jurisdiction of partition. (S.C. Code Ann. § 15-61-50).

Proceedings.

Division is in kind or the court may order sale and division of proceeds. Legal representatives and all heirs at law or devisees must be made parties. (SCRCP Rules 71[d], [e] and 17[f]).

5.17 [RESERVED]

5.18 PLEADING:

Pleadings are governed by SCRCP. S.C. employs “fact” pleading and rejects Federal “notice” pleading. Must plead ultimate facts and relief demanded. (SCRCP 8). Form of pleadings is governed by SCRCP 7(a) and identical to Federal Rule. For format of pleadings. SCRCP 7(c) abolishes demurrers. SCRCP 7(b) adopts Federal Rules for motion practice. SCRCP 11 requires that parties unrepresented by member of bar sign pleadings. Pleadings may be amended. (SCRCP 15).

Plaintiff may plead breach of contract and quantum meruit without electing theory until close of evidence. (282 S.C. 189, 318 S.E.2d 371).

Pleading Special Matters.

Fraud, mistake, condition of mind, conditions precedent, official document or act, judgment, time and place, special damages, libel or slander, verification of account, and some issues concerning capacity must be specially pleaded. (SCRCP 9).

Claims.

Items of account must be set forth in pleading or be attached thereto. Such statements of account must be verified if pleading is verified. (SCRCP 9[i]).

Joinder.

Plaintiff may unite several laws of action in same complaint whether they are legal or equitable or both. S.C. has adopted Federal Rules for counterclaims, cross-claims, and third party practice. (SCRCP 13 and 14).

Small Claims.

See category 6 Courts and Legislature, topic 6.01 Courts.

Frivolous Civil Proceedings Sanctions Act provides for liability of attorneys fees and costs of frivolous suits in addition to reasonable fine or nonmonetary measures. (S.C. Code Ann. § 15-36-10[G]).

5.19 PRACTICE:

Effective 7/1/85, South Carolina's practice of law is regulated by SCRCP which track Federal Rules with differences noted in Reporter's note following each rule.

Discovery.

SCRCP 26 to 36. SCRCP 26 outlines scope of discovery. SCRCP 27, 28, 30, 31 and 32 govern depositions. SCRCP 29 addresses stipulations regarding discovery procedure. SCRCP 33 pertains to interrogatories with limits as follows: (1) cases less than $25,000—only seven standard interrogatories may be asked; (2) cases over $25,000 and actions for declaratory or injunctive relief—50 interrogatories may be propounded. SCRCP 34 governs production of documents. SCRCP 35 governs physical and mental examinations. SCRCP 36 governs request to admit.

Direct Actions Against Insurer.

See category 23 Transportation, topic 23.01 Motor Vehicles, subhead Direct Actions.

Small Claims.

See category 6 Courts and Legislature, topic 6.01 Courts.

See also topics 5.02 Actions, Appeal and Error, Depositions and Discovery, Injunctions, Judgments, Pleading, Process; category 8 Debtor and Creditor, topics 8.02 Attachment, 8.05 Executions, 8.09 Garnishment.

5.20 PROCESS:

Summons and complaint must be served together. Voluntary appearance of defendant amounts to personal service. (SCRCP 4[d]). SCRCP 3 and 4 essentially track Federal Rule.

Who May Serve.

Summons may be served by sheriff, his deputy, or person over 18 years of age, not attorney or party. (SCRCP 4[c]). All other process by sheriff or his deputy or by any person designated by court who is not less than 18 years of age, except subpoena may be served as provided by SCRCP 45.

Personal Service on Partnerships.

Each partner need not be personally served with process. Service by delivering copy of summons and complaint to officer, managing or general agent, or to any other agent authorized by appointment or law to receive service of process. (SCRCP 4[d][3]).

Personal Service on Unincorporated Associations.

(SCRCP 4[d][3]).

Personal Service on Joint Stock Companies.

(SCRCP 4[d][3]).

Service on Domestic and Foreign Corporations.

Personal service upon corporation, partnership, or other unincorporated association which is subject to suit under common name, is made by delivering copy of summons and complaint to officer, managing or general agent, or to any other authorized agent. (SCRCP 4[d][3]).

Personal Service on Individual.

Individual, other than minor under age of 14 or incompetent person, may be served by delivering copy of summons and complaint to him personally or by leaving copies at his usual place of abode with person of suitable age and discretion residing therein, or by delivering copy to duly appointed agent. (SCRCP 4[d][1]).

Service by Certified Mail.

Service on individuals, minors, and corporations and partnerships may be made by registered or certified mail, return receipt requested and delivery restricted to addressee. Service is effective upon date of delivery as shown upon return receipt. (SCRCP 4[d][8]).

Service on Insurance Companies.

By delivering two copies to director of Department of Insurance with $10 fee. (S.C. Code Ann. § 15-9-270).

Service on Nonresident Individual Fiduciaries.

May be on agent appointed for purpose by fiduciary, or in event of removal, resignation, death, absence or any other reason, then upon probate judge or clerk of court of county wherein appointed. (S.C. Code Ann. § 15-9-450).

Service on Nonresident Operators of Aircraft.

Action may be commenced against nonresident operator of aircraft landed in state, except incorporated air carrier holding certificate of public convenience and necessity from Division of Aeronautics of Department of Commerce, by service on Secretary of Commerce, with fee of $4, sent by certified mail by plaintiff or Secretary of Commerce to defendant and defendant's return receipt and plaintiff's affidavit of compliance are appended and filed with summons and complaint. (S.C. Code Ann. §§ 15-9-390 to -410). If nonresident aircraft operator defendant does not accept and receipt for certified mail containing notice of service and copy of process is returned, sending by open mail and filing of affidavit of mailing with sufficient postage has same effect as personal service. (S.C. Code Ann. § 15-9-400).

Service on Trustees of Inter Vivos Trust.

Service on one resident trustee constitutes service on all other trustees, resident or nonresident. (S.C. Code Ann. § 15-9-440[1]). When no resident trustee, nonresident trustee deemed to have consented to service when process served on Secretary of State when trust created under laws of this state or part of trust property in this state. (S.C. Code Ann. § 15-9-440[3]). Penalty of misdemeanor conviction for failure of trustee served to notify other trustees. (S.C. Code Ann. § 15-9-440).

Service on foreign personal representative may be made by registered or certified mail, addressed to his last reasonably ascertainable address, requesting return receipt signed by addressee only. Notice of ordinary first class mail is sufficient if registered or certified mail service to addressee is unavailable. Service may be made upon foreign personal representative in manner in which service could have been made under other laws of state on either foreign personal representative or his decedent immediately prior to death. If service is made upon foreign personal representative, he is allowed 30 days within which to appear or respond. (S.C. Code Ann. § 62-4-303).

Personal Service Outside of State.

Personal service of summons may be made upon any individual, his executor, administrator or other personal representative, or a corporation, partnership, association or other legal or commercial entity, whether or not a citizen or domiciliary of this state and whether or not organized under laws of this state. (SCRCP 4). If upon a person or legal entity domiciled in, organized under laws of, doing business, or maintaining his or its principal place of business in this state, it has force and effect of personal service of summons within this state (S.C. Code Ann. § 36-2-802); otherwise, it has force and effect of publication (S.C. Code Ann. § 15-9-750). Service, when reasonably calculated to give actual notice, may be made: (1) by personal delivery in manner prescribed for service within state; (2) in manner prescribed by place in which service to be made; (3) by registered or certified mail addressed only to person and requiring signed receipt; (4) as directed by court. (S.C. Code Ann. § 36-2-806). Either individual qualified to make service in this state or individual qualified to make service in place where service to be made is eligible to effect service. (S.C. Code Ann. § 36-2-807). Above in no way limits or affects any other procedure for service under laws of this state. (S.C. Code Ann. § 36-2-809).

Acts Submitting to Jurisdiction, Process.

Any person whether or not a citizen or domiciliary of this state and any legal entity whether or not organized under laws of this state who, in person or through an agent does any of acts hereinafter enumerated, thereby submits himself or itself, and, if an individual, his personal representative, to jurisdiction of courts of this state as to any cause of action arising from doing any such acts: (1) transacting any business in this state; (2) contracting to supply services or things in this state; (3) commission of tortious act in whole or in part in this state; (4) causing tortious injury or death in this state by act or omission outside this state if he or it regularly does or solicits business, engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered in this state; (5) having interest in, using or possessing real property in this state; (6) contracting to insure any person, property or risk located within this state at time of contracting; (7) entry into a contract to be performed in whole or in part by either party in this state; (8) production, manufacture or distribution of goods with reasonable expectation that such goods are to be used or consumed in this state and are so used and consumed. (S.C. Code Ann. § 36-2-802 to -803). Any person subject to jurisdiction of courts of this state, as above provided, may be personally served in same manner as prescribed in subhead Personal Service Outside of State. When jurisdiction is based solely on one of above, provisions of S.C. Code Ann. § 15-7-100(3) permitting change of venue for convenience of witness and ends of justice does not apply. (S.C. Code Ann. § 36-2-803[B]). Other bases of jurisdiction remain unaffected by these provisions. (S.C. Code Ann. § 36-2-809).

Publication of Summons.

Where a person, on whom service of summons is to be made, cannot after due diligence be found within the state, and (a) that fact appears by affidavit to satisfaction of court or judge thereof, clerk of court of common pleas, master or probate judge of county where case is pending and (b) it in like manner appears that cause of action exists against defendant in respect to whom service is to be made or that he is proper party to action relating to real property in this state, court, judge, clerk, master or judge of probate may grant order that service be made by publication of summons in any one or more of following cases: (1) When the defendant is foreign corporation and has property within state, or cause of action arose therein; (2) when defendant, being resident of this state, has departed therefrom, with intent to defraud creditors, or to avoid service of summons, or keeps himself concealed therein with like intent; (3) when defendant is resident of this state and after diligent search cannot be found; (4) when defendant is not resident of the state, but has property therein, and court has jurisdiction of the subject of action; (5) when subject of action is real or personal property in this state, and defendant has or claims an interest or lien, actual or contingent, therein or relief demanded consists wholly or partly in excluding defendant from any interest or lien therein; (6) when defendant is party to adoption proceeding and is either nonresident or service cannot be had in state after due diligence; (7) when defendant is party to proceeding for determination of parental rights and is either nonresident or after due diligence cannot be served within state; (8) when defendant is party to annulment proceeding or where subject matter involves custody, support of minor children or wife, separate maintenance or legal separation. (S.C. Code Ann. § 15-9-710).

In all cases of publication, summons and complaint must be first filed, and summons as published must state time and place of filing. For service on nonresident minor or person non compos mentis: publication of notice giving name and address of guardian ad litem, date when appointment becomes final, and office in which order filed, must accompany publication of summons. (S.C. Code Ann. § 15-9-740).

In actions affecting title to real property, or for partition of real estate or for foreclosure of mortgages on real estate, all unknown parties may be served by publication by publishing notice once a week for three weeks in newspaper in county where premises are located. (S.C. Code Ann. § 15-9-720).

Proof of Service.

Must be shown by certificate of sheriff or deputy or affidavit of other person. (SCRCP 4[g]). Proof of service outside of state may be by affidavit, but before whom depends upon whether affidavit made within or without U.S. (SCRCP 4[h]). For service by publication, proof may be made by S.C. notarized affidavit. (S.C. Code Ann. § 15-9-15).

Long Arm Statute.

See subhead Acts Submitting to Jurisdiction, Process, supra.

Nonresident Motorist.

See category 23 Transportation, topic 23.01 Motor Vehicles.

5.21 REPLEVIN:

Replevin has been superseded in South Carolina by claim and delivery, a statutory remedy which is a combination of replevin and trover. (S.C. Code Ann. §§ 15-69-10 to -210).

Claim and Delivery.

Possession of personal property may not be recovered unless five days notice and an opportunity to be heard have been afforded party in possession, provided right of preseizure hearing may be waived. (S.C. Code Ann. § 15-69-50). When immediate delivery of personal property is claimed, plaintiff or someone in his behalf must make an affidavit showing: (1) That plaintiff is owner of property claimed (particularly describing it), or is lawfully entitled to possession thereof by virtue of special property therein, facts in respect to which must be set forth; (2) that property is wrongfully detained by defendant; (3) alleged cause of detention according to his best information, knowledge and belief; (4) that same has not been detained for tax assessment or fine pursuant to statute, or seized under execution or attachment against property of plaintiff, or if so seized, that it is by statute exempt from such seizure; (5) actual value thereof. (S.C. Code Ann. § 15-69-30).

Notice must be attached to affidavit notifying defendant that within five days from service thereof he may demand in writing from clerk of court a preseizure hearing. (S.C. Code Ann. § 15-69-40). Upon receipt of affidavit and notice with written undertaking by one or more sufficient sureties for bond in double value of property claimed, sheriff must serve same upon defendant. If defendant fails to make timely demand for preseizure hearing, or after such hearing, judge finds for immediate possession, or preseizure hearing has been waived in writing, or probability that property is in immediate danger of destruction or concealment by possessor has been found, clerk of court or judge must endorse upon affidavit a direction to sheriff requiring him to take property. (S.C. Code Ann. § 15-69-50).

At any time before the delivery of the property to the plaintiff, the defendant may require the return thereof, by giving to the sheriff a written undertaking executed by two or more sufficient sureties in double value of property as stated in affidavit of plaintiff. (S.C. Code Ann. § 15-69-140). If property taken is claimed by any other person than defendant, or his agent, and such person makes affidavit of his title and right to possess, stating grounds of such right and title and serves this upon sheriff, sheriff is not bound to keep property, or deliver it to plaintiff, unless plaintiff, on demand, indemnifies sheriff against such claim by bond with two sufficient sureties. (S.C. Code Ann. § 15-69-200). Sheriff must file notice and affidavit, with his proceedings thereon, with clerk of court in which action is pending, within 20 days after taking property. (S.C. Code Ann. § 15-69-120). Magistrate's court has concurrent jurisdiction up to $7,500. (S.C. Code Ann. § 22-3-10).

5.22 SEQUESTRATION:

Not used.

5.23 SERVICE:

See topic 5.20 Process.

5.24 STAY OF EXECUTION:

See topic 5.03 Appeal and Error; category 8 Debtor and Creditor, topic 8.05 Executions.

5.25 SUBMISSION OF CONTROVERSY:

§§15-27-10 and S.C. Code Ann. § 15-35-150 providing for submission of controversy were repealed when new S.C. Rules of Civil Procedure were adopted. New Rules made no provision for submission of controversy.

5.26 VENUE:

Following actions must be tried in county in which subject of action or some part thereof is situated: for recovery of real property, or for injuries to real property; for partition of real property; for foreclosure of mortgage of real property; for recovery of personal property distrained for any cause; and all matters between landlord and tenant. (S.C. Code Ann. § 15-7-10).

Following actions must be tried where cause of action arose: for recovery of penalty or forfeiture imposed by statute; against a public officer or person appointed to execute his duties for an act done by him in virtue of his office. (S.C. Code Ann. § 15-7-20).

In all other cases, actions are tried in the county where defendant resides at time of commencement of action, and in case of more than one defendant, in the county where one of them resides. If none of the parties reside in the state, in any county which plaintiff designates. (S.C. Code Ann. § 15-7-30 [amended 2005]). Administrator may be sued in county where administration was granted and executor in county where will is admitted to probate, and guardian in county where letters of guardianship are issued. (S.C. Code Ann. § 15-7-40). Venue may be changed by consent. (S.C. Code Ann. §§ 15-7-30 to -50). Actions against insurance companies may be brought in county where loss occurs. (S.C. Code Ann. § 15-7-70). For venue provisions in adoptions, see category 14 Family, topic 14.01 Adoption, subhead Venue.

Court must grant change of venue when complaint designates improper county. (S.C. Code Ann. § 15-7-100[1]). Where there is reason to believe impartial trial may not be had or for convenience of witnesses and parties, transfer under §15-7-100 is discretionary.

Improper venue must either be raised in defendant's answer or in motion filed with court prior to defendant answering complaint. (SCRCP 12[b][3]). Otherwise, objection to venue is waived.

When action is brought in wrong county or in wrong court, the court does not dismiss action but transfers it to any proper county or Court in which it could have been brought. (SCRCP 82[b]).

Determinations of residence for causes of action prior to July 1, 2005, are made at time action was commenced. For causes of action arising after July 1, 2005: all defendants may be sued where “most substantial part of the alleged act or omission giving rise to the cause of action occurred at the time the cause of action occurred.” Individual defendants also may be sued in county of their residence. Domestic corporations, domestic limited liability partnerships, domestic limited liability company and domestic limited liability partnerships, and foreign corporations, foreign limited liability partnerships, foreign limited liability companies, and foreign limited liability partnerships with certificate of authority under §33-15-101, may be sued at their principal place of business at time cause of action occurred. Principal place of business is defined as corporation's home office within state from which officers direct, control or coordinate its activities, or location of corporation's manufacturing, sales or purchasing facility within state (if it does not have home office) or location of majority of corporate activity (if it does not have home office, or manufacturing, sales or purchasing facility within state), determined by considering number of employees, authority of employees or tangible assets, in any one county. Owning property and transacting business in county, is in itself, insufficient to establish principal place of business. Nonresident individuals, and foreign corporations, foreign limited liability partnerships, foreign limited liability companies, and foreign limited liability partnerships without certificate of authority under §33-15-101, may be sued at plaintiff's residence if individual, or plaintiff's principle place of business for business organizations listed in statute. Defendants sued under long arm statute (§36-2-803) may now move for change of venue under §15-7-100. Actions against multiple defendants may be set in any county where action may be set for any individual defendant. (2005 S.C. Acts 32, May 6, 2005).

6 COURTS AND LEGISLATURE

6.01 COURTS:

United States District Court.

Clerk's office: 1845 Assembly St., Columbia 29201. http://www.scd.uscourts.gov/.

Aiken Division.

Counties: Aiken, Allendale, and Barnwell.

Anderson Division.

Counties: Anderson, Oconee and Pickens.

Beaufort Division.

Counties: Beaufort, Hampton, and Jasper.

Charleston Division.

Counties: Berkeley, Charleston, Clarendon, Colleton, Dorchester, and Georgetown.

Columbia Division.

Counties: Kershaw, Lee, Lexington, Richland and Sumter.

Florence Division.

Counties: Darlington, Dillon, Florence, Horry, Marion, Marlboro, Williamsburg and Chesterfield.

Greenville Division.

Counties: Greenville and Laurens.

Greenwood Division.

Counties: Abbeville, Edgefield, Greenwood, McCormick, Newberry and Saluda.

Orangeburg Division.

Counties: Bamberg, Calhoun and Orangeburg.

Rock Hill Division.

Counties: Chester, Fairfield, Lancaster and York.

Spartanburg Division.

Counties: Cherokee, Spartanburg and Union.

Fees.

Flat filing fee bill in effect. Clerk's fees are $350 to plaintiff or libellant in all civil cases. (28 USCS § 1914). Identical fee to moving party on removal. No deposit is required from defendants. Filing fee of $245 for bankruptcy under c. 7; filing fee of $1000 under c. 11; and filing fee of $235 under c. 13. (28 USCS § 1930.)

Standard Court Interrogatories.

Both plaintiff and defendant must answer standard court interrogatories. (Local Rules 26.01 and 26.02).

Supreme Court.

Supreme Court meets in Columbia, S.C., in the Supreme Court Building. (http://www.judicial.state.sc.us/)

Jurisdiction.

Supreme Court has original jurisdiction to issue writs or orders of injunction, mandamus, quo warranto, prohibition, certiorari, habeas corpus and other remedial and original writs. (S.C. Code Ann. § 14-3-310). Justices of Supreme Court have these powers at chambers. (S.C. Code Ann. § 14-3-350). Supreme Court has appellate jurisdiction and is court of last resort in cases of law and chancery. (S.C. Code Ann. § 14-3-320). Jurisdiction of Supreme Court further enlarged under Uniform Declaratory Judgments Act. (S.C. Code Ann. § 15-53-20). Supreme Court may answer questions of state law certified by federal courts or appellate courts of other states.

Court of Appeals meets in Columbia, S.C.

Jurisdiction.

Court of Appeals is intermediate appellate court having jurisdiction over Circuit Court and Family Court decisions with exception of certain classes of cases dealing with constitutional questions, rate settings, indebtedness of political subdivisions, elections and sentences for homicide, which have direct appeal to Supreme Court. Rules for court administration set up by Supreme Court. (S.C. Code Ann. §§ 14-8-10 to -400). Rules of Practice and Procedure of Supreme Court adopted as Rules of Practice and Procedure of Court of Appeals. Supreme Court has discretion to grant writs of certiorari to review opinions of Court of Appeals.

Circuit Courts.

Jurisdiction.

State of South Carolina has sixteen circuits, each presided over by at least one judge, elected by General Assembly for six-year term. (S.C. Code Ann. § 14-5-610). Circuit Courts, when dealing with civil matters, are known as Courts of Common Pleas. When dealing with criminal matters, they are known as Courts of General Sessions. Courts of Common Pleas have original jurisdiction, subject to appeal to Supreme Court, of all civil cases, and have power to issue writs or orders of injunction, mandamus, habeas corpus, etc. They have appellate jurisdiction in all cases within jurisdiction of inferior courts, except where it is specifically provided that appeals from inferior courts must be directed to Supreme Court.

Circuits.

Circuits include following counties:

First Circuit: Calhoun, Dorchester, Orangeburg.

Second Circuit: Aiken, Bamberg, Barnwell.

Third Circuit: Clarendon, Lee, Sumter, Williamsburg.

Fourth Circuit: Chesterfield, Darlington, Dillon, Marlboro.

Fifth Circuit: Kershaw, Richland.

Sixth Circuit: Chester, Fairfield, Lancaster.

Seventh Circuit: Cherokee, Spartanburg.

Eighth Circuit: Abbeville, Greenwood, Laurens, Newberry.

Ninth Circuit: Berkeley, Charleston.

Tenth Circuit: Anderson, Oconee.

Eleventh Circuit: Edgefield, Lexington, McCormick, Saluda.

Twelfth Circuit: Florence, Marion.

Thirteenth Circuit: Greenville, Pickens.

Fourteenth Circuit: Allendale, Beaufort, Colleton, Hampton, Jasper.

Fifteenth Circuit: Georgetown, Horry.

Sixteenth Circuit: Union, York.

Place of Sitting.

Abbeville County: 8th Circuit; court sits at Abbeville.

Aiken County: 2d Circuit; court sits at Aiken.

Allendale County: 14th Circuit; court sits at Allendale.

Anderson County: 10th Circuit; court sits at Anderson.

Bamberg County: 2d Circuit; court sits at Bamberg.

Barnwell County: 2d Circuit; court sits at Barnwell.

Beaufort County: 14th Circuit; court sits at Beaufort.

Berkeley County: 9th Circuit; court sits at Moncks Corner.

Calhoun County: 1st Circuit; court sits at St. Matthews.

Charleston County: 9th Circuit; court sits at North Charleston.

Cherokee County: 7th Circuit; court sits at Gaffney.

Chester County: 6th Circuit; court sits at Chester.

Chesterfield County: 4th Circuit; court sits at Chesterfield.

Clarendon County: 3rd Circuit; court sits at Manning.

Colleton County: 14th Circuit; court sits at Walterboro.

Darlington County: 4th Circuit; court sits at Darlington.

Dillon County: 4th Circuit; court sits at Dillon.

Dorchester County: 1st Circuit; court sits at St. George.

Edgefield County: 11th Circuit; court sits at Edgefield.

Fairfield County: 6th Circuit; court sits at Winnsboro.

Florence County: 12th Circuit; court sits at Florence.

Georgetown County: 15th Circuit; court sits at Georgetown.

Greenville County: 13th Circuit; court sits at Greenville.

Greenwood County: 8th Circuit; court sits at Greenwood.

Hampton County: 14th Circuit; court sits at Hampton.

Horry County: 15th Circuit; court sits at Conway.

Jasper County: 14th Circuit; court sits at Ridgeland.

Kershaw County: 5th Circuit; court sits at Camden.

Lancaster County: 6th Circuit; court sits at Lancaster.

Laurens County: 8th Circuit; court sits at Laurens.

Lee County: 3d Circuit; court sits at Bishopville.

Lexington County: 11th Circuit; court sits at Lexington.

McCormick County: 11th Circuit; court sits at McCormick.

Marion County: 12th Circuit; court sits at Marion.

Marlboro County: 4th Circuit; court sits at Bennettsville.

Newberry County: 8th Circuit; court sits at Newberry.

Oconee County: 10th Circuit; court sits at Walhalla.

Orangeburg County: 1st Circuit; court sits at Orangeburg.

Pickens County: 13th Circuit; court sits at Pickens.

Richland County: 5th Circuit; court sits at Columbia.

Saluda County: 11th Circuit; court sits at Saluda.

Spartanburg County: 7th Circuit; court sits at Spartanburg.

Sumter County: 3rd Circuit; court sits at Sumter.

Union County: 16th Circuit; court sits at Union.

Williamsburg County: 3rd Circuit; court sits at Kingstree.

York County: 16th Circuit; court sits at York.

There is clerk of court for each county, whose office is located in city where court sits. Clerk holds that office for all courts of record sitting in that county. (S.C. Code Ann. §§ 14-5-610 to -820).

Probate Courts.

There is probate court in each county, with judges elected for four-year term (S.C. Code Ann. §§ 14-23-30, § 14-23-1020 and 62-1-309), having jurisdiction in all matters testamentary and of administration, appointment, supervision and removal of guardians of minors and committees of persons mentally incompetent, involuntary commitment of lunatics and others; and issuance of marriage licenses. See generally S.C. Code Ann. §§ 62-1-100 to 62-7-602.

Family Court.

Family court in each judicial circuit (see subhead Circuit Courts, supra) there exists family court, having exclusive jurisdiction of many matters involving children (S.C. Code Ann. § 20-7-400) and domestic matters (S.C. Code Ann. § 20-7-420) with exception of traffic, wildlife offenses (S.C. Code Ann. § 20-7-410) wherein jurisdiction is concurrent with magistrate and municipal courts and exclusive jurisdiction of domestic matters in general (S.C. Code Ann. § 20-7-420). May transfer to General Session to be treated as adult under certain circumstances. (S.C. Code Ann. § 20-7-7605).

Municipal Courts.

Municipal courts may be organized for limited criminal jurisdiction. (S.C. Code Ann. § 14-25-5).

Master-in-Equity.

Each county may have master-in-equity, appointed by Governor for six-year term, with power to hear cases referred to him by other courts. Reference may be made by consent of parties or compulsorily ordered in certain cases, including actions for accountings, equitable actions, and actions at law involving equitable issues. Master may enter final order by consent of parties; otherwise final order is entered by circuit court after report by master. (S.C. Code Ann. §§ 14-11-10 to -310 and SCRCP Rule 53).

Magistrate's Courts, with limited civil and criminal jurisdiction, exist statewide. Magistrates appointed by Governor for four-year term. Court has jurisdiction of civil matters in which amount involved or value of property involved does not exceed $7,500 (S.C. Code Ann. § 22-3-10), and of criminal matters in which maximum sentence does not exceed 30 days or $500 fine (S.C. Code Ann. § 22-3-550). Administrative and Procedural Rules for magistrate's court adopted by S.C. Supreme Court effective Apr. 2, 1984 by order dated Mar. 6, 1984.

Matters which may be heard by magistrates include actions for contract damages, injury to real or personal property, actions on penalty and surety bonds, claim and delivery, and actions between landlord and tenant for ejection and distress for rent. (S.C. Code Ann. § 22-3-10). Action commenced by service of summons on defendant who is required to answer within 30 days after service, or if amount less than $25 answer required on fifth day after service. (SCRMC 10). Service may be by mail and in such cases time for responding is doubled. (SCRMC 6). Circuit court procedure generally applies in magistrate's courts. Pleadings may be orally presented to magistrate but must thereafter be reduced to writing. (S.C. Code Ann. § 22-3-190). Jury trial must be requested five days before trial date. Appeal is to circuit court which can review factual and legal findings. Notice of appeal must be served within 30 days after notice of judgment by magistrate. (S.C. Code Ann. § 22-3-1000). Appeal heard on record of trial before magistrate.

6.02 LEGISLATURE:

General Assembly annual session convenes on second Tues. in Jan. (Const., art. 3, §9) and adjourns sine die no later than 5:00 p.m. on first Thurs. in June. (S.C. Code Ann. § 2-1-180). Governor may convene extra session on extraordinary occasions. (Const., art. 4, §19). General Assembly composed of Senate and House of Representatives. Counties entitled to representatives in each house on basis of population. (Const., art. 3, §§2-4, 6).

Initiative and Referendum.

No provision.

Lobbyists.

Registration and annual report of contributions and expenditures required. Amended by S.C. Code Ann. §§ 2-17-5 through 2-17-150 regulating lobbyists and lobbying.

Ethics, Government Accountability and Campaign Reform.

Amended by S.C. Code Ann. §§ 8-13-100 through 8-13-1520.

Felony Offenses.

Bribery of public officials added to list of crimes classified as felonies in §16-1-10. (S.C. Code Ann. § 8-13-705).

Nepotism.

§8-13-750 provides no public official, public member, or public employee may employ, appoint, promote, transfer, or advance family member to state or local office or position in which public official, public member, or public employee supervises or manages.

Delegation of Legislative Authority.

State legislature may not delegate authority to levy taxes to appointed recreation commission. (328 S.C. 83, 492 S.E.2d 79).

6.03 REPORTS:

The South Carolina Equity reports are: De Saussure, 4 vol., 1-4 S.C.Eq.; Harper, 1 vol., 5 S.C.Eq.; McCord, 2 vol., 6-7 S.C.Eq.; Bailey, 1 vol., 8 S.C.Eq.; Richardson's cases, 1 vol., 9 S.C.Eq.; Hill, 2 vols., 10-11 S.C.Eq.; Riley, 1 vol., 12 S.C.Eq.; Dudley, 1 vol., 13 S.C.Eq.; Rice, 1 vol., 14 S.C.Eq.; Cheves, 1 vol., 15 S.C.Eq.; McMullan, 1 vol., 16 S.C.Eq.; Speers, 1 vol., 17 S.C.Eq.; Richardson, 2 vol., 18-19 S.C.Eq.; Strobhart, 4 vol., 20-23 S.C.Eq.; Richardson, 12 vol., 24-35 S.C.Eq.

The South Carolina Law Reports are: Bay, 2 vol., 1-2 S.C.L.; Brevard, 3 vol., 3-5 S.C.L.; Treadway, 2 vol., 6-7 S.C.L.; Mill (Constitutional), 2 vol., 8-9 S.C.L.; Nott & McCord, 2 vol., 10-11 S.C.L.; McCord, 4 vol., 12-15 S.C.L.; Harper, 1 vol., 16 S.C.L.; Bailey, 2 vol., 17-18 S.C.L.; Hill, 3 vol., 19-21 S.C.L.; Riley, 1 vol., 22 S.C.L.; Dudley, 1 vol., 23 S.C.L.; Rice, 1 vol., 24 S.C.L.; Cheves, 1 vol., 25 S.C.L.; McMullan, 2 vol., 26-27 S.C.L.; Spears, 2 vol., 28-29 S.C.L.; Richardson, 2 vol., 30-31 S.C.L.; Strobhart, 5 vol., 32-36 S.C.L.; Richardson, 13 vol., 37-49 S.C.L.

Subsequent decisions are reported in South Carolina Reports, including both law and equity, beginning with vol. 1 and continuing to date.

South Carolina decisions are also reported in Southeastern Reporter.

Digests which have been published are: Simonton & Conner, Equity, 1783-1856; Johnson's Equity, 1856-1868; Chisolm & Hyde, I, II, Law & Equity, 1783-1882; Rice, I, II, 1783-1839; Conners, 1835-1854; Magrath, 1854-1868; Thomas, 1877-1885; Ramage, 4 Vol., Vols. 25 to 100 S.C.; Ravenel & Hughes, 1877-1889; West Publishing Company Digest, Vol. 1-20 S.C.; Southeastern Digest.

6.04 STATUTES:

Code of Laws for South Carolina for 1976 was declared to be only general statutory law of state on Jan. 1, 1976. Subsequent acts are in yearly supplements.

Uniform Acts adopted are: State Aeronautics Regulatory Law (1929); Aircraft Financial Responsibility (1978); Airports (1937); Anatomical Gift (1969); Arbitration (1978); Attendance of Witnesses from Without the State in Criminal Proceedings (1948); Business Records as Evidence (1978); Child Custody Jurisdiction (1981); †Commercial Code (1966); Conservation Easement Act (1991); Contribution Among Joint Tortfeasors (1988); Controlled Substances (1962); Declaratory Judgments (1948); Determination of Death (1984); Divorce Recognition (1950); Enforcement of Foreign Judgments (1993); Federal Tax Lien Registration (1928); Gifts to Minors (1981); Interstate Compromise of Death Taxes (1987); Interstate Compact for Adult Offender Supervision (2002); Interstate Family Support (1994); Judicial Notice of Foreign Law (1948); Land Sales Practices (1968); Limited Liability Company (1996); Limited Partnership (1976); Management of Institutional Funds (1990); Model Business Corporations Act (1988); Partnership (1950); Photographic Copies of Business and Public Records as Evidence (1978); Post-Conviction Procedure (1962); Principal and Income, as Revised (1986); Probate Code (1986); Reciprocal Enforcement of Support, as Revised (1981); Recognition of Acknowledgments (1962); Regulating Traffic on Highways (1949); Residential Landlord and Tenant (1986); †Securities, as amended (1961); †Simultaneous Death (1948); Statutory Rule Against Perpetuities (1987); †Testamentary Additions to Trusts (1961); TOD Security Registration (1997); Trade Secrets (1992); Trustees' Powers (1990); Unauthorized Insurance (1943); †Unclaimed Property (1988); Veterans' Guardianship (1986).

†Adopted with significant variations or modifications. See appropriate topics.

Uniform Commercial Code adopted effective Jan. 1, 1968. See category 3 Business Regulation and Commerce, topic 3.09 Commercial Code.

South Carolina Uniform Act on Interstate Compromise and Arbitration of Death Taxes (effective May 6, 1987) is based on Uniform Interstate Compromise Act and Uniform Interstate Arbitration of Death Taxes Act, at Art. 3 of c. 16. (S.C. Code Ann. §§ 12-16-210 to -320).

For text of Uniform Acts falling within the scope of the Martindale-Hubbell Law Digests see Uniform and Model Acts section.

6.05 UNIFORM LAWS:

For list of Uniform Acts in force in this state see topic 6.04 Statutes. For text of Uniform Acts within the scope of the Martindale-Hubbell Law Digests see Uniform and Model Acts section.

7 CRIMINAL LAW

7.00A BAIL:

See topic 7.01 Criminal Law.

7.01 CRIMINAL LAW:

Crimes are governed by Crimes and Offenses, Tit. 16, Code 1976, and criminal procedure by Criminal Procedures, Tit. 17, Code 1976, subject to later legislation beginning with Acts of 1976 and the South Carolina Rules of Criminal Procedure found in the South Carolina Rules of Court. Other statutes containing criminal penalties are scattered throughout Code, 1976. In June of 1997, South Carolina enacted the Crime Classification Bill. This legislation classifies crimes into various felonies and misdemeanors while exempting some crimes from classification. (S.C. Code Ann. § 16-1-10). Those crimes exempted include murder and most drug offenses. Penalties for exempted crimes are those provided in specific statute for those crimes. Remainder of crimes are classified into A through F felonies or A through C misdemeanors. Any offenses carrying less than one year in prison are misdemeanors and are exempt from classification as well. §16-1-20 of S.C. Code provides sentences for each classification: Class A felonies not more than 30 years, Class B felonies not more than 25 years, Class C felonies not more than 20 years, Class D felonies not more than 15 years, Class E felonies not more than ten years, Class F felonies not more than five years, Class A misdemeanors not more than three years, Class B misdemeanors not more than two years, Class C misdemeanors not more than one year. Fines and community service are still imposed by specific statute. (S.C. Code Ann. § 16-1-20). Person who aids in commission of felony or is accessory before fact in commission of felony by counseling, hiring, or otherwise procuring felony to be committed is guilty of felony and upon conviction, must be punished in manner prescribed for punishment of principal felon except for Class A, B, or C felonies or murder. If for one of these four sentence is as Class D felony. (S.C. Code Ann. §§ 16-1-40 to -55). §16-1-90 lists crimes classified as Class A, Class B, Class C, Class D, Class E, and Class F felonies. §16-1-100 lists crimes classified as Class A, Class B, and Class C misdemeanors. Felony or misdemeanor by statute or common law which is not classified under new statutes must be punished as provided before enactment of classification system. (S.C. Code Ann. § 16-1-110). §16-1-120 provides increased penalties for repeat offenders. Statute provides additional sentences to be imposed on current sentence for those who commit offense shortly after being released from prison. No such additional sentence may be suspended or reduced by any early release program. (S.C. Code Ann. §§ 16-1-120[3], 16-1-40, and 16-1-55). Person convicted of offense for which term of imprisonment is contingent upon value of property involved must, upon conviction for third or subsequent offense, be punished as prescribed for Class E felony. (S.C. Code Ann. § 16-1-57). Violent crimes are defined by §16-1-60. Attempts are punished as if defendant committed principal offense. (S.C. Code Ann. § 16-1-80). Prosecution may also be instituted for common law offenses. (S.C. Code Ann. § 16-1-110).

Child Abuse.

When person is convicted or pleads guilty to sexual or physical abuse of child, court orders that person's name and other information, including nature of plea or conviction, to be placed in Central Registry of Child Abuse and Neglect. (S.C. Code Ann. § 17-25-135). Homicide by child abuse (S.C. Code Ann. § 16-3-85) was amended in May and June of 2000. Penalty for committing child abuse or neglect evidencing extreme indifference to human life is 20 years to life in prison. Aiding and abetting carries up to 20 years in prison. §16-3-95 makes it unlawful to inflict great bodily injury upon child. This is felony punishable by up to 20 years in prison. This section also makes it unlawful for parent or guardian, person with whom child's parent or guardian is cohabitating, or any other person responsible for child's welfare knowingly to allow another person to inflict great bodily injury upon child. Sentence is not more than five years for this conduct. “Great Bodily Injury” is defined as injury which creates substantial risk of death or which causes serious or permanent disfigurement, or protracted loss of impairment of function of any bodily member or organ. This section may not be construed to prohibit corporal punishment or physical discipline which is administered by parent or person in loco parentis in manner which does not cause great bodily injury. This section does not apply to traffic accidents unless accident was caused by driver's reckless disregard for safety of others. (Effective May 1, 2000.)

S.C. recognizes spousal sexual battery. (S.C. Code Ann. § 16-3-615). South Carolina also makes criminal use of date rape drug to commit sexual battery. (S.C. Code Ann. § 16-3-652).

Criminal Procedure.

Criminal waives his right to jury instruction of self defense by not asking for it at trial. Lack of formal request at trial is deemed waiver and may not be appealed. (285 S.C. 386, 330 S.E. 2d 286).

Indictment and Information.

Prosecution is upon indictment by grand jury except when prosecution by information is authorized by statute, or in proceedings before police court, magistrate or court martial. (S.C. Code Ann. § 17-19-10). All criminal proceedings before magistrate are commenced on information. (S.C. Code Ann. § 22-3-710). Indictments are prepared by solicitors. (S.C. Code Ann. § 14-9-210).

Bail.

All persons before conviction are bailable except for capital offenses or offenses punishable by life imprisonment, or with violent offenses defined by General Assembly, given due weight to evidence and to nature and circumstances of event. (S.C. Const. Art. I, §15).

Computer Crime Act of 1984 adopted. (S.C. Code Ann. §§ 16-16-10 to -40).

Crime Victims.

Compensation is now provided for crime victims. (S.C. Code Ann. §§ 16-3-1110 to -1350). Compensation allowed to victims of all crimes, including acts of terrorism, from Victims Compensation Fund. (S.C. Code Ann. §§ 16-3-1110[3] and 16-3-1290). Excludes injuries or deaths not intentionally or recklessly caused by boats or motor vehicles. (S.C. Code Ann. § 16-3-1110[6]). Crime victims and witnesses to crimes are entitled to certain rights, protections and services to include, but not limited to, receipt of incident report; notification of bond hearings, release or escape; notification of post-conviction relief hearings; and protection, including transportation to and from court and physical protection in courthouse. (S.C. Code Ann. §§ 16-3-1505 to -1565).

Food and Drug.

It is felony to tamper with food or drugs. (S.C. Code Ann. § 16-3-75).

Uniform Post-Conviction Procedure Act adopted. (S.C. Code Ann. §§ 17-27-10 to -160).

Interstate Corrections Compact adopted. (S.C. Code Ann. §§ 24-11-10 to -30).

Uniform Expungement of Criminal Records Actadopted. (S.C. Code Ann. §§ 17-22-

910 to -950).

Homicide.

South Carolina recognizes crime of feticide. As long as State can establish beyond reasonable doubt that fetus was viable, then deceased fetus is “person” for purposes of §16-3-10. Therefore, defendant may be charged with homicide for killing of fetus in course of attacking mother. (282 S.C. 444, 319 S.E.2d 703).

Miscellaneous Crimes and Procedures.

STD Testing.

South Carolina grants statutory authority to test certain convicted offenders for Hepatitis B, sexually transmitted diseases, and HIV. (S.C. Code Ann. § 16-3-740). Test will be done on request of victim; probable cause not required. (375 S.C. 106, 651 S.E.2d 314).

Felony Carjacking.

South Carolina recognizes Felony Carjacking. (S.C. Code Ann. § 16-3-1075).

Assisted Suicide.

South Carolina recognizes crime of Assisted Suicide. (S.C. Code Ann. § 16-3-1090).

Victims' Rights.

South Carolina has enacted legislation recognizing victims' rights and creating victims' compensation fund along with office of Crime Victim's Ombudsman within Governor's Office. (S.C. Code Ann. §§ 16-3-1110 to -1670). Legislation deals with compensation of victims from compensation fund and rights of victims' to notification of hearings involving their cases and other information.

Harassment, Stalking.

South Carolina recognizes crimes of harassment, stalking, and aggravated stalking. (S.C. Code Ann. §§ 16-3-1700 to -1840). Magistrates may make it condition of bail that arrestee undergo mental health evaluation. (S.C. Code Ann. § 16-3-1840). These sections provide provisions for victim to obtain restraining order. (S.C. Code Ann. §§ 16-3-1750 to -1760). Before sentencing convicted stalker, court may require offender to undergo mental health evaluation. If court determines from results of evaluation that person needs mental health treatment or counseling, court requires him to undergo mental health treatment. (S.C. Code Ann. § 16-3-1740). Sentences for harassment, stalking and aggravated stalking increase based on harm caused to victim and whether there was prior restraining order in place at time of crime. (S.C. Code Ann. §§ 16-3-1720 and 16-3-1730). Law enforcement officers primary duty when responding to harassment or stalking incident is to enforce law and protect complainant. Officer must notify complainant of right to initiate criminal proceedings and to seek restraining order. (S.C. Code Ann. § 16-3-1810).

Financial Identity Fraud.

South Carolina recognizes crime of “Financial Identity Fraud”. (S.C. Code Ann. § 16-13-510).

Defrauding Drug and Alcohol Screening Tests.

South Carolina recognizes crime of defrauding drug and alcohol screening tests. (S.C. Code Ann. § 16-13-470). (But see 345 S.C. 557, 549 S.E.2d 591, holding part of this statute unconstitutional because it shifted burden of proof of innocence to criminal defendant.)

Sexual Offenses Against Children.

South Carolina recognizes crimes of disseminating obscene material harmful to minors, child exploitation and child prostitution. (S.C. Code Ann. §§ 16-15-305 to -445).

Computer Crimes.

South Carolina recognizes computer crimes. (S.C. Code Ann. §§ 16-16-10 and 16-16-20).

Telemarketing.

South Carolina regulates unsolicited consumer telephone calls. (S.C. Code Ann. § 16-17-445). South Carolina also regulates automatically dialed announcing devices which deliver recorded message. (S.C. Code Ann. § 16-17-446).

"Peeping Tom" statute was amended in 2000 to include use of video or audio equipment as illegal under statute. (S.C. Code Ann. § 16-17-470).

Cigarettes.

South Carolina makes it illegal to sell or distribute cigarette packages that violate certain federal laws. (S.C. Code Ann. § 16-17-505).

Gambling is illegal in State of South Carolina, except for legislation allowing for State approved lottery. (S.C. Code Ann. §§ 16-19-10 to -150).

Explosives, Etc.

South Carolina recognizes crimes involving bombs, bacteriological weapons, and destructive devices. (S.C. Code Ann. §§ 16-23-710 to -780).

Driving Under Influence of Drugs or Alcohol.

South Carolina enacted legislation that imposes same penalty for driving vehicle and registering .08 on breathalyser as is imposed for driving under influence of drugs and/or alcohol. Prosecution is required to prove that there was probable cause for stop of defendant and that breathalyser was in proper working order. (S.C. Code Ann. § 56-5-2933). Traditional D.U.I. law remains in effect.

8 DEBTOR AND CREDITOR

8.01 ASSIGNMENTS:

Choses in action are assignable and assignee may sue thereon, subject (except in case of holder in due course of negotiable instrument) to defenses against assignor existing at time of or before notice of assignment. Assignee of chose in action may take no higher rights than his assignor has at time of assignment.

Ownership interests in automobiles may be assigned by execution of assignment and warranty of titles (S.C. Code Ann. § 56-19-360), as may security interests in automobiles (S.C. Code Ann. § 56-19-670).

Rights in certain insurance benefits may be assigned. (S.C. Code Ann. § 38-65-30). Underinsurance benefits may not be assigned. (S.C. Code Ann. § 38-77-160).

Recording.

Assignments of interests in and liens against realty must be recorded to affect rights of subsequent creditors or purchasers for value without notice. (S.C. Code Ann. § 30-7-10). Assignment may be recorded by having witness prove signature of assignor. Recording fee varies in different counties.

Instrument Transferring Title.

Assignment of fund may be made orally. (160 F.2d 490). No statutory forms exist, except those approved under Uniform Commercial Code for assignments of security interest in personalty.

Assignment may be in blank by assignor signing in presence of two witnesses who also sign. Following form may be used:

Form

For valuable consideration I hereby transfer, set over and assign the within (description) unto . . . . In the presence of:

. . . .

Personal Financial Security Act.

Provides for offense of financial identity fraud and penalties for violation. (S.C. Code Ann. §§ 16-13-500 to 530).

Uniform Commercial Code adopted. (Tit. 36). 1998 Official Text of Uniform Commercial Code, referred to as 1998 UCC Amendments, 2001 Act No. A67, eff. July 1, 2001. See category 3 Business Regulation and Commerce, topic 3.09 Commercial Code.

8.02 ATTACHMENT:

Actions in Which Allowed.

Attachment will lie in any action for the recovery of money, whether on contract or in tort, but numerous exemptions exist as to real and personal property and sources of funds. (S.C. Code Ann. §§ 15-41-30, 16-3-1300 and 43-5-190).

Courts Which May Issue Warrant.

Warrant of attachment must be obtained from the judge, clerk of court, or magistrate in which or before whom the action is brought or from the circuit judge. (S.C. Code Ann. § 15-19-40). Magistrate has jurisdiction up to $7,500. (S.C. Code Ann. § 22-3-10). Magistrate's constable may conduct sale of property for actions initiated in magistrate's court, but may not conduct sale to enforce mechanic's lien. (1979 S.C. AG LEXIS 441).

In Whose Favor Warrant May Issue.

Attachment may be obtained by any plaintiff, including a nonresident or foreign corporation. (S.C. Code Ann. § 15-19-10).

Against Whom Warrant May Issue.

Attachment may issue against any defendant as to whom the necessary grounds (see subhead Grounds, infra) may be shown, whether or not a resident of the state.

Claims on Which Warrant May Issue.

It is not necessary that the claim sued on should be due when the warrant is issued. (S.C. Code Ann. § 15-19-30).

When Warrant May Issue.

Property of defendant may be attached at time of issuing summons or at any time thereafter during pendency of the action. (S.C. Code Ann. § 15-19-10).

Grounds for attachment are that the defendant is a foreign corporation, or not a resident of the state, or that defendant has departed from the state with intent to defraud his or its creditors, or to avoid service of a summons, or keeps himself concealed within the state with like intent, or that defendant has removed or is about to remove property from this state with intent to defraud his creditors, or has assigned, disposed of or secreted, or is about to assign, dispose of or secrete property with like intent. (S.C. Code Ann. § 15-19-10).

Where debt is not due attachment will lie when it appears by affidavit that the debtor has departed from the state with intent to defraud creditors or to avoid service of summons, or keeps himself concealed in the state with like intent, or has removed or is about to remove property from the state with intent to defraud creditors, or has assigned, disposed of, or secreted, or is about to assign, dispose of or secrete property with like intent. Judgment cannot be had until maturity of the debt and plaintiff must pay costs if the debt is paid on or before maturity. (S.C. Code Ann. § 15-19-30). See also SCRCP 64.

Purchase Money Claims.

Real or personal property may be attached in an action for unpaid purchase money thereof, even though none of the general grounds for attachment exist. (S.C. Code Ann. § 15-19-510).

Proceedings to Obtain.

Creditor must obtain warrant of attachment from circuit judge or court before which action is brought. Application for warrant must be supported by affidavit showing that claim exists against defendant, specifying amount, and that ground of attachment exists. (S.C. Code Ann. §§ 15-19-40 and 15-19-50). Warrant directs sheriff to seize sufficient property belonging to defendant to satisfy creditor's claim. (S.C. Code Ann. § 15-19-100). See also SCRCP 64.

Attachment Bond.

Before warrant of attachment issues, plaintiff must give bond for all damages defendant may suffer by reason of attachment, plus defendant's costs, but not less than $250, except in magistrate's court, not less than $25. (S.C. Code Ann. § 15-19-80). Bond must be signed by plaintiff or duly authorized agent before warrant is issued. (31 S.C. 360, 9 S.E. 1028; 55 S.C. 547, 33 S.E. 581).

Warrant of attachment is addressed to any sheriff or constable of any county where property of defendant may be and requires him to attach and keep property of defendant in his county sufficient to satisfy plaintiff's demand and costs. Several warrants may be issued at the same time to sheriffs or constables of different counties. (S.C. Code Ann. § 15-19-100).

Service of Summons in Action.

Personal service of summons must be made or publication thereof commenced within 30 days after attachment. (S.C. Code Ann. § 15-19-10).

Levy and Lien.

Attaching officer must attach real and personal property, unless exempt, including money, and takes into custody books of account, vouchers and papers relating to property. Attested copy of attachment of real estate must be served on owner and lodged in office of Clerk of Court of county in which property situated. If service is impossible, copy and officer's return must be lodged in office of Clerk of Court. Record of attachments is kept by clerk. Lien attaches when warrant is lodged and attachments lodged the same day rank equally. Attachment lien is subject to all prior liens. (S.C. Code Ann. §§ 15-19-230 and 15-19-240).

Indemnity.

There is no statutory authority for the officer demanding an indemnity bond before levy.

Appraisal.

All property attached must be appraised. (S.C. Code Ann. § 15-19-270).

Release of Property.

Defendant or any person establishing a right to property may have the property released from attachment by giving bond in double the amount claimed by plaintiff. (S.C. Code Ann. §§ 15-19-300 to -340).

Third Party Claims.

If property be claimed by a party other than defendant, or by defendant or the person in possession, in the right of some third person, an issue is made up by the judge and trial had. If the party in possession or third person resides in a different county from the plaintiff the issue is tried in the county where the party in possession resides. (S.C. Code Ann. § 15-19-290).

Vacating.

An attachment may be vacated for irregularities or for failure to strictly follow the statute. (31 S.C. 360, 9 S.E. 1028).

Uniform Commercial Code governs attachment of goods covered by negotiable documents, bulk transfers of goods and investment securities.

8.03 [RESERVED]

8.04 CREDITORS' SUITS:

After return of judgment nulla bona, court in supplemental proceeding may order any property of judgment debtor not exempt from execution, and not personal earnings, in hands of judgment debtor or third parties, or owed to judgment debtor, to be applied toward satisfaction of judgment. (S.C. Code Ann. § 15-39-410). See also topic 8.05 Executions and category 5 Civil Actions and Procedure, topic 5.15 Judgments.

8.05 EXECUTIONS:

Kinds of Execution.

Executions are of three kinds, against the property of the judgment debtor, against his person, or for the delivery of possession of real or personal property or delivery with damages for withholding. (S.C. Code Ann. § 15-39-10).

Exemptions.

See topic 8.06 Exemptions.

Time for Issuance.

Execution may issue on final judgment or decree at any time within ten years from the date of entry of such judgment or decree. (S.C. Code Ann. § 15-39-20). Execution may issue on judgment in magistrate's court within three years. (S.C. Code Ann. § 22-3-310).

Stay of Execution.

None provided for. Appeal does not stay ten year “statute of limitations” on execution. (299 S.C. 19, 382 S.E.2d 14).

Form and Contents of Writ.

The execution must be directed to the sheriff or to the coroner where the sheriff is a party in interest, attested by the clerk, subscribed by the party issuing it, or his attorney, and must intelligibly refer to judgment stating court, county in which judgment is filed, names of parties, amount of judgment, amount due, and time of docketing in county to which execution is issued. (S.C. Code Ann. § 15-39-80). See also SCRCP 58 and 69.

If writ is for delivery of possession of real or personal property, it must require officer to deliver possession of same, particularly describing it, to party entitled thereto and may also require officer to satisfy costs or damages out of personal property of party against whom it is rendered or value of property if delivery cannot be had. (S.C. Code Ann. § 15-39-80). See also SCRCP 58 and 69.

See also infra, subhead Execution Against the Person.

Lien.

An execution is not a lien on personal property until levy thereon is made and then only for four months from the date of the levy. (S.C. Code Ann. § 15-39-100). See also SCRCP 58 and 69.

Levy.

The sheriff or other officer may seize property of the judgment debtor or property held in trust for him in order to satisfy the judgment. (S.C. Code Ann. §§ 15-39-610, -620). Personal property must first be exhausted before real estate is levied on. (S.C. Code Ann. § 15-39-80).

Redemption.

Redemption by payment of the judgment and costs must be made within five days from the date of levy or property will be sold to satisfy judgment. (S.C. Code Ann. § 15-39-610).

Property Out of Which Satisfied.

Where execution issues against property it must be satisfied out of the personal property of the debtor if sufficient and, if not, out of the real estate. (S.C. Code Ann. § 15-39-80).

Return.

Execution from court of record must be returned on first day of term at which active energy of process ceases if not returned (S.C. Code Ann. § 15-39-130); execution from magistrate's court is returnable 60 days after its date (S.C. Code Ann. § 22-3-310).

The sheriff, or other officer with whom the execution is lodged, must at each regular term of the court make a return to the office of the clerk of the court of common pleas of his actions on the execution. (S.C. Code Ann. § 15-39-130).

Sale.

Property not redeemed within five days is sold by sheriff at auction to satisfy judgment. (S.C. Code Ann. § 15-39-610). Property to be sold must be sold in county in which it lies. Probate sales must be done by probate judge. If master exists, all sales ordered by court in granting equitable relief, must be done by master. (S.C. Code Ann. § 15-39-630). In counties which do not have master-in-equity, judicial sales may be performed by referee appointed by presiding judge of Court of Common Pleas. (S.C. Code Ann. § 15-39-635). Real property must be advertised by sheriff for three weeks before sale; personal property for 15 days. (S.C. Code Ann. § 15-39-650). Advertisement must set out property to be sold, time and place of sale, name of owner and name of party at whose suit sale is to be made. Advertisement must be posted in three public places in county, including court house door, and published in newspaper if such exists in county. (S.C. Code Ann. § 15-39-660). Sales day is first Mon. in each month, except if Mon. is legal holiday, then sales should routinely be conducted on Tues. next succeeding holiday; but may be conducted at another time when ordered by court or directed by order or reference. (S.C. Code Ann. § 15-39-680). Notwithstanding, sheriff may sell personal property on any day after 15 days advertisement at any convenient place in his county to be designated in advertisement. (S.C. Code Ann. § 15-39-680). Sales are for cash and if purchaser fails to comply sheriff may resell at risk of defaulting purchaser. (S.C. Code Ann. § 15-39-710; see also S.C. Code Ann. §§ 15-39-610 to -900).

Supplementary Proceedings.

When the execution is returned unsatisfied, on the affidavit of the judgment creditor that the judgment debtor has property which he unjustly refuses to apply to the satisfaction of the judgment, the judgment creditor may obtain an order from the judge of a circuit court requiring the judgment debtor to appear and answer concerning his property at the time and place specified in the order within the county where the execution was issued. If property not otherwise exempt is thereby discovered it may be taken and applied to the satisfaction of the judgment.

If it appears by the affidavit that there is danger of the debtor leaving the state, or concealing himself, and if there is reason to believe that he has property which he unjustly refuses to apply to the satisfaction of the judgment, the court may issue a warrant requiring the sheriff of any county where the debtor may be to arrest him and bring him before such judge. He may then be examined and if it appears that there is danger of his leaving the state and that he has property as above mentioned, he may be required to enter into an undertaking with one or more sureties that he will, from time to time, appear before the judge as directed, and that he will not, during the pendency of the proceedings, dispose of any portion of his property not exempt from execution, and on default of such undertaking he may be committed to prison as for contempt. (S.C. Code Ann. §§ 15-39-310 to -340).

Debtors of the judgment debtor may be required to appear and answer as to indebtedness. (S.C. Code Ann. § 15-39-350). Witnesses may be required to appear and testify. (S.C. Code Ann. § 15-39-370). Judge may order any property of judgment debtor, not exempt from execution, in hands of himself or any other person, or due judgment debtor, to be applied to satisfaction of judgment. (S.C. Code Ann. § 15-39-410). In supplementary proceedings judge may appoint receiver and prohibit transfer of any property of judgment debtor. (S.C. Code Ann. §§ 15-39-430, -440).

Execution against the person may be had under certain circumstances, and same may be issued to any county within jurisdiction of court after return of an execution unsatisfied in whole or in part, in any case in which an order of arrest has been served or if complaint shows grounds for arrest. (S.C. Code Ann. § 15-39-50).

Such execution must require the officer to arrest the judgment debtor and commit him to jail until he pays the judgment or is discharged according to law. (S.C. Code Ann. § 15-39-80).

See also SCRCP 69.

8.06 EXEMPTIONS:

Benefits.

Social Security, veterans', disability, illness, unemployment, alimony, support, separate maintenance, and some stock bonus and pension plans are exempt. Also awards under victim reparation laws, payments on account of bodily injury to debtor or person of whom debtor was dependent and payments under life insurance on person of whom debtor was dependent at time of death, to extent reasonably necessary for support of debtor. (S.C. Code Ann. § 15-41-30).

Substitutions.

When personal property is insufficient, balance of exemption may be had in money.

Waiver of Exemption.

No statutory provisions or cases.

Earnings.

Wages of debtor are exempt from satisfaction of judgment. (S.C. Code Ann. § 15-39-410).

Homestead Exemption.

See topic 8.10 Homesteads.

Other Exemptions.

Debtor may be entitled to exemptions in varying amounts in different types of property not covered by Homestead Exemption. (S.C. Code Ann. § 15-41-30).

Uniform Exemptions Act not adopted.

8.07 FORECLOSURE:

See topic 8.13 Liens; category 20 Mortgages, topic 20.04 Mortgages of Real Property.

8.08 FRAUDULENT SALES AND CONVEYANCES:

Any transfer of an interest in property, or a legal proceeding or written instrument made to delay, hinder or defraud creditors and others (S.C. Code Ann. § 27-23-10), or to deceive purchasers (S.C. Code Ann. § 27-23-20), is void as to such persons and those claiming under them. Conveyance made with condition of revocation or determination or alteration at will of grantor is void if afterwards property is sold for good consideration. (S.C. Code Ann. § 27-23-90). No bona fide mortgage made upon good consideration may be impeached or impaired by above statutes. (S.C. Code Ann. § 27-23-90).

In property transaction, person receiving fraudulent misrepresentation is justified in relying on its truth even if falsity might have been discovered through investigation. However, there is duty of reasonable diligence depending on the circumstances involved, includeing positions and relations of parties. (313 S.C. 309, 437 S.E.2d 182).

Fraudulent intent need not be proven where transfer is not made for valuable consideration. Creditor may set aside transfer on showing of (1) debt owed at time of transfer; (2) transfer was made without consideration; and (3) transferor failed to retain sufficient property to pay creditor in full—not merely at time of transfer but in final analysis when creditor seeks to collect his debt. (295 S.C. 1, 366 S.E.2d 256). “Grossly inadequate” consideration is “strong badge of fraud”, but is not same as “without consideration.” (337 S.C. 592, 524 S.E.2d 621).

Parol gifts of chattel are invalid against subsequent creditors, purchasers or mortgagees except where donee lives apart from donor and actual possession is delivered and is continuous in donee. (S.C. Code Ann. § 27-23-70).

Remedies.

Common law action to set aside fraudulent conveyance. In some instances remedy would be claim and delivery or attachment. Criminal provision imposing fine of one year's value of fraudulent conveyance and imprisonment for six months. (S.C. Code Ann. § 27-23-30).

Bulk Sales.

Bulk Sales Act as codified in Art. 6 of Uniform Commercial Code in Title 36 of S.C. Code was repealed effective July 1, 2001 by 1998 UCC Amendments, 2001 Act No. A67. See category 3 Business Regulation and Commerce, topic 3.09 Commercial Code.

Uniform Commercial Code adopted. See category 3 Business Regulation and Commerce, topic 3.09 Commercial Code.

Uniform Fraudulent Conveyance Act not adopted.

8.09 GARNISHMENT:

Judge may order any property of judgment debtor, not exempt from execution, to be applied to satisfaction of judgment, except earnings for personal services. (S.C. Code Ann. § 15-39-410). Under certain conditions, earnings may be attached for medical care, exclusive of doctor's fees, when care was paid for by county. (S.C. Code Ann. §§ 43-7-210 to -280). With limited exception, Victims Compensation Fund awards are not subject to garnishment. (S.C. Code Ann. § 16-3-1300). Public assistance payments are not subject to garnishment. (S.C. Code Ann. § 43-5-190).

§§20-7-1315 to -1329 provide procedures for initiating garnishment of income for child and spousal support payments. §§20-7-1200 to -1270 provide procedures for garnishing income for premiums for court ordered health coverage for children.

Employers are prohibited from withholding wages of employee on basis of foreign garnishment proceedings unless creditor first obtains judgment against employee in courts of this state. Provision does not apply to debt incurred outside this state. There can be no garnishment of earnings for personal services regardless of where debt incurred. (S.C. Code Ann. § 15-39-420).

See topic 8.02 Attachment.

8.10 HOMESTEADS:

Homestead exemption of up to $50,000 is available for debtor's real property or personal property used either by debtor or dependents as residence. (S.C. Code Ann. § 15-41-30).

Municipalities may also provide homestead exemptions from municipal taxes. (S.C.

Code Ann. § 12-37-285).

Limitation of Area.

None.

The exemption cannot be allowed as against a mortgagee of the property claimed to be exempt. (28 S.C. 74, 5 S.E. 215).

No individual may exempt from property of estate, in any bankruptcy proceeding, property specified in §522(d) of Bankruptcy Reform Act (Public Law 95-598) except as expressly permitted (S.C. Code Ann. §§ 15-41-10 to -33), by provisions of South Carolina law (S.C. Code Ann. § 15-41-35).

Designation of Homestead.

Sheriff, when selling property in which debtor has exemption pursuant to S.C. Code Ann. § 15-41-30, must state in advertisement for sale, minimum bid for property in amount not less than debtor's exemption. (S.C. Code Ann. § 15-41-10). Sheriff must not accept any bid less than amount of exemption. (S.C. Code Ann. § 15-41-10).

Sheriff or other officer must deposit any exempted funds with clerk of court of county where funds were collected. (S.C. Code Ann. § 15-41-20). Any person claiming entitlement to such funds must petition Court of Common Pleas for disbursement. (S.C. Code Ann. § 15-41-20).

8.11 JUDGMENT NOTES:

Not used in South Carolina.

8.12 LEVY:

See topics 8.02 Attachment, 8.05 Executions.

8.13 LIENS:

Uniform Commercial Code adopted. See category 3 Business Regulation and Commerce, topic 3.09 Commercial Code.

Miscellaneous Liens.

Keepers of inns, hotels, or boardinghouses have lien on baggage of guests. Baggage may be sold ten days after date of departure of persons incurring debt, such sale to be advertised by written or printed notice at three public places in vicinity for ten days before sale. (S.C. Code Ann. §§ 45-1-20, -30). Proprietor or owner or operator of repair shop or storage garage, who makes repairs on any article left at his shop, or furnishes any material for such repairs, may sell same at public auction after 30 days from written notice to owner of property and to any lienholder with perfected security interest in property that repairs have been completed or storage charges are due. Sale must be made by magistrate after he has advertised for 15 days by posting notice in three public places in township. Storage charges accruing before day on which written notice was mailed to lienholder may constitute lien against vehicle or property to be sold. (S.C. Code Ann. § 29-15-10).

Tort claimant may have lien on defendant's motor vehicle or water craft where vehicle was operated negligently causing injury except where securely locked vehicle is stolen. (S.C. Code Ann. §§ 29-15-20,. § 29-15-40).

Any person owed debt for labor or materials supplied to railroad may have lien against railroad as provided under S.C. Code Ann. § 29-15-30.

Stable or kennel keepers have a lien upon horse or dog for upkeep, rest and training when left with him. Can sell animal after ten days notice given owner. (S.C. Code Ann. § 29-15-60).

Live Stock.

Trespassing live stock may be seized and owner liable for just damages for injuries sustained and for maintenance and care while held. (S.C. Code Ann. §§ 47-7-140 and 47-7-150).

Ships.

Any person to whom money is due for labor performed, or materials used or furnished in the construction, launching, or repair of a ship or vessel, or in the construction of launching-ways, or for provisions, stores or other articles furnished for or on account of any ship or vessel, has a lien upon such ship, to secure the payment of said debt. This lien is preferred to all others except mariners' wages. (S.C. Code Ann. § 29-9-10). Statement of lien must be recorded within 90 days after labor or materials furnished in office of Register of Deeds or Clerk of Court of county within which ship or vessel was located at time debt was contracted. Statement must contain name of person with whom contract made, name of owner of ship, if known, and name of ship or description thereof. (S.C. Code Ann. § 29-9-20).

Lien is enforced by petition in court of common pleas. (S.C. Code Ann. § 29-9-50). Any number of claimants may join in same petition. (S.C. Code Ann. § 29-9-70).

Stock Animals.

The owner of certain stock animals has lien on their issue. Action must be instituted to enforce claim within 12 months from time claim accrued. (S.C. Code Ann. § 29-15-50).

Lien for labor on materials furnished in processing textiles can arise for debt due by owner against any textiles of that owner whereof lienor's possession has terminated. Such goods may be sold 60 days after compliance with statutory notice provision. (S.C. Code Ann. § 29-15-80).

Laundry, dry cleaning establishment, or retail store has lien on any item left over six months where service charge remains unpaid after compliance with statutory notice. (S.C. Code Ann. § 29-15-90).

Agricultural Liens.

Landlords have a paramount lien for rent to the extent of all crops raised on the leased premises, whether the crop is raised by the tenant or another. Laborers who assist in raising the crop have a lien, next in priority to the lien for rent, to the extent of the amount due for labor; there is no preference between the claims of laborers. Landlords also have a lien for advances (subject to liens for rent and labor), which must be indexed in the office of Clerk of Court or of Register of Deeds of county in which land is located in order to affect rights of subsequent purchasers or creditors. Suppliers have lien upon supplies furnished prior to all other liens until the supplies are consumed by use. Holders of liens may prevent improper disposal of crops subject to lien. (S.C. Code Ann. § 29-13-10 to -130). Effective July 1, 2001, agricultural liens must also be perfected by filing in Office of Secretary of State. See S.C. Reporter's Comment 3 to S.C. Code Ann. § 36-9-501 as contained in 1998 UCC Amendments, 2001 Act No. A67.

Liens are enforced by a magistrate, if the amount involved is not more than $100, otherwise in court of common pleas. (S.C. Code Ann. § 29-13-80).

A person whose crop is seized under the lien may replevy. (S.C. Code Ann. § 29-13-

130).

Mechanics' Liens.

Any person to whom a debt is due for labor performed or furnished, or for materials purchased and actually used in erection, alteration or repair of building or for boring or equipping well, or surveying performed by agreement with, or consent of owner or his agent, has lien on such building and upon interest of owner in land on which it is situated. Labor performed or furnished in erection, alteration or repair of any building or any structure upon any real estate includes preparation of plans, specifications and design drawings or making real estate suitable as site for building or structure. Work is considered to include, but not be limited to, grading, bulldozing, leveling, excavating and filling of land, grading and paving of curbs and sidewalks and all asphalt paving, construction of ditches and other drainage facilities and laying of pipes and conduits for water, gas, electric, sewage and drainage purposes. Any private security guard services provided at site during construction is considered labor performed or furnished within mechanic's lien statute. (S.C. Code Ann. §§ 29-5-10, -20). To file a lien, contractor must provide county clerk of court or register of deeds proof that he is licensed or registered if he is required by law to be licensed or registered by recording contractor license number or registration number on lien document when it is filed. (S.C. Code Ann. § 29-5-15). Where work is done or material furnished at expense of contractor or someone other than owner, written notice must be given to owner. (S.C. Code Ann. § 29-5-40).

Perfected holders of mechanic's liens share pro rata in fund remaining on contract price. (S.C. Code Ann. § 29-5-60). Laborers have first lien on money received by contractor for erection, alteration or repair of building, to amount of their respective claims. (S.C. Code Ann. § 29-7-10).

Contractor or subcontractor who for purposes other than paying money loaned upon such contract, transfers, invests or expends and fails to pay to laborer, subcontractor, or materialman out of money received pursuant to §29-7-10 is guilty of misdemeanor and subject to $500 to $1,000 fine or three to six month prison term. (S.C. Code Ann. § 29-7-20[1]).

Any person who willfully and intentionally certifies to any owner or lending institution that all persons, firms, or corporations, including subcontractors and materialmen, have been paid in full, when such persons have not been paid in full, unless all lien rights have been waived in writing, is guilty of misdemeanor and subject to fine up to $5,000 or up to 60 days imprisonment or both. Agreement to waive right to file or claim lien for labor and materials is against public policy and is unenforceable unless payments substantially equal to amount waived are actually made (S.C. Code Ann. § 29-7-20[2]).

Unless otherwise provided in agreement between parties, subcontractor or contractor may set off any debt claimed to be owed by such labor or subcontractor materialman based upon good faith claim that services rendered or materials supplied for which payment is claimed were defective. In order to make such set off, declaration and accounting must be included and certificate submitted with application for payment, and copy or separate notarized original of declaration must be sent by certified mail to affected laborer, subcontractor or materialmen at time certificate is submitted for payment. (S.C. Code Ann. § 29-7-20[3]).

Except as provided in §29-3-50, lien claimed by mechanic or materialman is not enforceable against any mortgage recorded before filing of Notice of Mechanic's Lien. (S.C. Code Ann. § 29-5-70). Lien is dissolved 90 days after work is done or materials furnished unless Notice of Mechanics' Lien, sworn statement of account and description of property is recorded in office of Register of Deeds or Clerk of Court in county where property is situated and served on owner of property, and unless suit to enforce lien is begun and notice of pendency of action is filed within six months after work is done or materials furnished. (S.C. Code Ann. §§ 29-5-90, -120). Ninety days for filing notice of lien under S.C. Code Ann. § 29-5-90 and six months for filing suit under

S.C. Code Ann. § 29-5-120 both begin to run as of date contractor ceases to furnish labor or materials.. (295 S.C. 268, 368 S.E.2d 78, aff'd. 301 S.C. 1, 389 S.E.2d 853).

Aggregate amount of any liens filed by sub-subcontractor or supplier cannot exceed amount due by contractor to subcontractor to whom sub-subcontractor or supplier has supplied labor, materials, or services unless sub-subcontractor or supplier has provided notice of intent to lien by certified or registered mail to contractor. (S.C. Code Ann. § 29-5-20[B]). Notice of intent to lien must meet requirements of S.C. Code Ann. § 29-5-20(B).

In event amount due subcontractor by contractor is insufficient to pay all mechanics' lien holders, all just liens must be prorated by contractor among sub-subcontractors and suppliers to that subcontractor. (S.C. Code Ann. § 29-5-60[B]).

Any person entering into different agreement with, or with consent of owner for improvement of real property may file with Clerk of Court or Register of Deeds in county or counties wherein real property is situated, Notice of Project Commencement containing: (a) Name and address of person filing notice; (b) name and address of owner or developer; (c) general description of improvement; and (d) location of project. Notice must be filed within 15 days of commencement of work. Name and address of contractor must be posted at job site containing following statement “The contractor on the project has filed a Notice of Project Commencement at the County Courthouse. Sub-subcontractors and suppliers to subcontractors shall comply with Section S.C. Code Ann. § 29-5-20 when filing liens in connection with this Project.” Failure to file such notice renders provisions of S.C. Code Ann. §§ 29-5-20(B) and 29-5-60(B) inapplicable. (S.C. Code Ann. § 29-5-23).

Lien may be discharged by filing of bond 11/3 times amount claimed secured by securities of U.S. or State of South Carolina, by cash, or by surety company licensed to do business in state; bond may be filed at any time after service and filing of statement and must be filed in same office in which statement is filed. (S.C. Code Ann. § 29-5-110).

The lien is enforced by petition in the court of common pleas for county, in which building or structure is situated. (S.C. Code Ann. § 29-5-140). If claim does not exceed $100 lien may be enforced in magistrate's court. (S.C. Code Ann. § 29-5-130). Notice of filing petition must be given to owner and other creditors. (S.C. Code Ann. § 29-5-190). Absent parties are notified by publication. (S.C. Code Ann. § 29-5-200). If lien is established, court orders sale of property after notice as in foreclosure of mortgage. (S.C. Code Ann. §§ 29-5-70 to -280). Costs and reasonable attorneys fees for prosecution of lien may be awarded to prevailing party, subject to court's discretion concerning amount. (S.C. Code Ann. §§ 29-5-10, -20, -410). Offer of settlement in compliance with statute may determine award of costs and fees. (S.C. Code Ann. §§ 29-5-10, -20).

Aircraft.

Persons engaged in servicing, furnishing supplies or accessories for, or providing contracts of indemnity for aircraft have lien on aircraft. (S.C. Code Ann. § 29-15-100). Within 90 days after service, furnishing supplies or contract of indemnity, lienor must file verified statement of account identifying aircraft concerned in office of Register of Deeds in county where aircraft was located at time of service, etc. Lien must be enforced in manner provided for liens on ships. (S.C. Code Ann. § 29-15-100).

Child Support.

Delinquency in support payments, as defined in S.C. Code Ann. § 20-7-1315, may have effect of judgment. (S.C. Code Ann. § 20-7-1316).

Redemption.

After sale in the enforcement of a lien there is no right of redemption. (184 S.C. 76, 191 S.E.2d 830).

For other liens discussed in various topics of this digest, see topics 8.02 Attachment, Executions, Exemptions, Homesteads; categories 3 Business Regulation and Commerce, topic Commercial Code; Civil Actions and Procedure, topic Judgments; Legal Profession, topic Attorneys and Counselors; Mortgages, topic Mortgages of Real Property; Property, topic Landlord and Tenant; Taxation, topics Property Taxes, subhead Liens, Uniform Acts, subhead Revised Uniform Federal Tax Lien Registration Act; Transportation, topic Motor Vehicles. As to other liens: Child Support, see S.C. Code Ann. §§ 20-7-1315 to -1329; Employees, see §§ 29-7-10 and 29-11-10; Self Storage Facilities, see §§ 39-20-10 to -50.

8.14 MECHANICS' LIENS:

See topic 8.13 Liens.

8.15 PLEDGES:

Uniform Commercial Code has been adopted. (Title 36). See category 3 Business Regulation and Commerce, topic 3.09 Commercial Code.

8.16 RECEIVERS:

This subject is governed in general by S.C. Code Ann. §§15-65-10 to -130.

A receiver may be appointed: (1) Before judgment, on application of either party, to obtain possession of property, which is subject of action, which is in possession of adverse party, when such property or its rents and profits are in danger of being lost or materially injured, except in cases where judgment upon failure to answer may be had without application to court; (2) after judgment, to carry judgment into effect; (3) after judgment to dispose of property according to judgment or to preserve it during appeal; or when execution has been returned unsatisfied and judgment debtor refuses to apply his property to satisfaction of judgment; (4) when corporation has been dissolved or is insolvent or is in danger of insolvency, or has forfeited its corporate rights; or (5) in such other cases as may be provided by law, or may be in accordance with existing practice. (S.C. Code Ann. § 15-65-10).

Jurisdiction to appoint lies with judge of circuit court either in or out of court and is a matter of equity, but a receiver may be appointed before judgment only when there is the strongest reason to believe that the plaintiff is entitled to the relief demanded in his complaint and there is danger that the property will be materially injured before the case can be determined. (27 S.C. 408, 3 S.E. 781).

Proceedings for appointment are on application under conditions above stated. Four days notice to other party is required except when delay threatens injustice. (S.C. Code Ann. § 15-65-20). When owner of property cannot be found, then said notice of application may be given to any person in possession of property, and where property is abandoned, appointment may be made without notice. If appointment is made without notice, notice of appointment must be given by publication or personal service, as in case of publication of summons. (S.C. Code Ann. § 15-65-30). Issuance of temporary injunction to aid in compliance with this section is to be issued pursuant to SCRCP 65.

Eligibility and Competency.

Receivers must be impartial, capable and not connected in interest with any party to case. (140 S.C. 471, 139 S.E. 135).

Powers and Duties.

Receiver, as agent for court, has those powers and duties given to him by order of appointment. (244 S.C. 572, 137 S.E.2d 764).

Receiver operating railroad is subject to duties, liabilities and restrictions and other provisions respecting maintenance and operation attached to the corporation. (S.C. Code Ann. § 58-17-4130).

Unless otherwise restricted by court, every receiver has power to sue for and collect debts, demands and rents and to compromise and settle doubtful claims. He may also sue and defend in name of debtor where it is necessary or proper for him to do so. (SCRCP 66[b]).

Compensation for receiver is left up to sound discretion of trial judge to set. (125 S.C. 109, 118 S.E. 30). See also §15-65-100.

Discharge.

Receiver is discharged by court after purpose of appointment has been realized and accounts approved.

8.17 REDEMPTION:

See topics 8.05 Executions, Liens; categories 20 Mortgages, topic Mortgages of Real Property; Taxation, topic Property Taxes, subheads, Liens, Redemption.

8.18 SUPPLEMENTARY PROCEEDINGS:

See topic 8.05 Executions.

8.19 [RESERVED]

8.20 USURY:

See category 3 Business Regulation and Commerce, topic 3.17 Interest.

9 DISPUTE RESOLUTION

9.01 ALTERNATIVE DISPUTE RESOLUTION:

Mandatory Dispute Resolution.

Uniform Arbitration Act adopted. (S.C. Code Ann. §§ 15-48-10 to -240). See topic 9.02 Arbitration and Award.

Claims against persons licensed to sell vacation time sharing plans are subject to arbitration by South Carolina Real Estate Commission. (S.C. Code Ann. §§ 27-32-210 and -230).

Courts appoints attorneys to arbitrate property damage liability claims. Decision entered as judgment but may be appealed. (S.C. Code Ann. §§ 38-77-710 to -770).

Arbitration to be used if governing body for area objects to site selected for community residential care facility. (S.C. Code Ann. § 44-7-350).

Complaints by farmers against seed dealers are to be referred to arbitration committee. (S.C. Code Ann. §§ 46-21-260 and -270).

Consumers with complaints under motor vehicle express warranties must first use alternative dispute resolution procedures established by manufacturer or industry. State arbitration board may be established. (S.C. Code Ann. §§ 56-28-60 and -90).

Voluntary Dispute Resolution.

State agencies may request mediation of employee grievances. (S.C. Code Ann. § 8-17-310).

Interstate compromise and arbitration of death taxes allowed. (S.C. Code Ann. §§ 12-16-210 through -320).

Except criminal cases and civil cases in which State or political subdivision is party, parties may agree to arbitration of appeal in lieu of having case decided by appellate court. Arbitrators' decision is not subject to review. (SCACR 223).

Circuit judges designate attorneys to constitute panel of arbitrators for automobile reparation actions. (SCRCP 76).

9.02 ARBITRATION AND AWARD:

Uniform Arbitration Act adopted. (S.C. Code Ann. §§ 15-48-10 to -240).

Written agreement to submit any existing controversy to arbitration or any controversy thereafter arising through arbitration is valid, enforceable and irrevocable, except upon such grounds as exist at law or equity for revocation of any contract.

Notice that contracts subject to arbitration must be typed in underlined capital letters, or rubber-stamped prominently, on first page of contract. Unless such notice is displayed contract is not subject to arbitration. (S.C. Code Ann. § 15-48-10).

However, if Federal Arbitration Act (9 U.S.C. §§ 1 to 307) is applicable, it supersedes state law and case is subject to arbitration clause. (323 S.C. 454, 476 S.E.2d 149). See also 330 S.C. 388, 498 S.E.2d 898 (term “involving commerce” found in 9 U.S.C. §2 is functional equivalent of “affecting commerce”) (citing 513 U.S. 265).

Mere fact that arbitration clause is included in contract of adhesion does not make clause unenforceable as being unconscionable. (330 S.C. 388, 498 S.E.2d 898).

Contracts to Arbitrate Future Disputes.

Enforceable. (S.C. Code Ann. § 15-48-10).

Powers of Arbitrators.

Powers exercised by majority unless otherwise provided by agreement or statute. (S.C. Code Ann. § 15-48-40). Arbitrators may issue subpoenas for attendance of witnesses and for production of documents and may permit deposition to be taken where witness cannot be subpoenaed or is unable to attend hearing. (S.C. Code Ann. § 15-48-80).

Award and Enforcement Thereof.

Upon application of party, courts will confirm award (S.C. Code Ann. § 15-48-120), unless timely motion to vacate, modify or correct award pursuant to S.C. Code Ann. §§ 15-48-130 and 15-48-140. Application to vacate, modify or correct within 90 days of delivery of copy of award. Arbitrators may modify or correct award if application made within 20 days after delivery of award. (S.C. Code Ann. § 15-48-100).

Judgment on Award.

Upon granting order confirming, modifying or correcting award, judgment entered and enforced as any other judgment or decree. (S.C. Code Ann. § 15-48-150).

Exclusions.

Statute excludes arbitration between employers and employees unless agreement provides that Act applies. Statutes specifically provide that employers and employees may not agree that workers' compensation claims, unemployment compensation claims and collective bargaining disputes are governed by this statute. Further excludes pre-agreement entered into when relationship is that of lawyer-client or doctor-patient. Further excludes any claim arising out of personal injury, based on contract or tort, or to any insured or beneficiary under insurance policy or annuity contract. (S.C. Code Ann. § 15-48-10).

10 DOCUMENTS AND RECORDS

10.01 ACKNOWLEDGMENTS:

Uniform Recognition of Acknowledgments Act adopted. (S.C. Code Ann. §§ 26-3-10 to 90). Act provides additional method of proving notarial acts.

The usual form of proof of instruments is by oath of a subscribing witness, commonly called probate, or by acknowledgment by signer or maker of instrument in presence of two witnesses.

Probate (or acknowledgment by signer or maker) may be made before officers and as specified in Uniform Recognition of Acknowledgments Act (S.C. Code Ann. § 30-5-30).

Within State.

Judge; magistrate; clerk of court; notary public. (S.C. Code Ann. § 26-3-20). Customary fee is 50¢ for acknowledgment and $1 for renunciation of dower or inheritance. (S.C. Code Ann. § 8-21-140).

Without State but Within United States.

Clerk of court of record; commissioner for South Carolina; commissioner appointed by dedimus issued by clerk of Common Pleas court of county in which instrument is to be recorded; notary public; justice of the peace.

Without United States.

Ambassador, minister, consul general, consul, vice-consul or consular agent of U. S.; commissioner for South Carolina.

Armed Forces.

Any commissioned officer of Armed Forces of U.S., either within or without limits of South Carolina, may act in same capacity as notary public. Officer administering oath must sign his name, rank, branch, serial number and organization. No official seal is necessary. (S.C. Code Ann. §§ 26-3-20, 30-5-30[A][1][g]).

Foreign Acknowledgments.

Uniform Recognition of Acknowledgments Act adopted. (S.C. Code Ann. § 26-3-30).

General Requirements as to Taking.

Person acknowledging or witness making proof must be personally known to the officer. (S.C. Code Ann. § 26-3-40).

An officer, stockholder, director or employee of a corporation cannot act as notary if individually a party to the instrument, but is otherwise qualified. (S.C. Code Ann. § 26-1-120). In theory, however, that person beneficially interested is disqualified, South Carolina Supreme Court, without reference to statute, has held that stockholder may not act as Notary Public on instrument executed to or by corporation. (184 S.C. 195, 192 S.E. 153).

An attorney may act even though interested as counsel. (S.C. Code Ann. § 26-1-110).

Except as stated above, an individual interested in, or party to, the instrument is disqualified as notary.

General Requirements of Certificate.

Seal of notary should be affixed but absence of seal does not render acts invalid. Notary is required to state date of expiration of commission, but failure to do so does not invalidate. (S.C. Code Ann. § 26-1-60; see also S.C. Code Ann. § 30-5-60.)

Proof by Subscribing Witness.

No acknowledgments are required for any instruments, but they are admitted to record on proof by subscribing witness. No acknowledgment necessary for filing instruments under Uniform Commercial Code.

Proof of Handwriting.

In case proof by subscribing witness cannot be obtained, on account of death, insanity or absence from state of such witness, on proof of such fact and of handwriting of grantor and of both subscribing witnesses, instrument may be admitted to record, in which case all of required proof must be recorded with instrument. (S.C. Code Ann. § 30-5-70). Two witnesses still required when acknowledgments are used instead of affidavits. (1974-75 Op. Atty. Gen., No. 3990, Pg. 64).

Acknowledgment of signature of transferor by notary public has nothing to do with statutory requirement of two subscribing witnesses to deed. S.C. Code Ann. §§ 26-3-20 to -90 and 30-5-30 do recognize and permit recording of deed or other instrument properly subscribed by required number of witnesses if execution is proved by affidavit of subscribing witness under terms of Uniform Recognition of Acknowledgments Act or acknowledgment of person executing instrument under conditions prescribed therein. (294 S.C. 204, 363 S.E.2d 410).

Authentication.

Certificates of proof made outside of the state require no authentication when made under the official seal of the officer taking. A clerk of court should certify that the court is a court of record. (S.C. Code Ann. § 30-5-30).

Must comply with Uniform Recognition of Acknowledgments Act, S.C. Code Ann. §§26-3-10 to -90.

Clerk of court certifies under seal of court to official character of officer taking acknowledgment in this state for use elsewhere. Usual fee, $5. (S.C. Code Ann. § 8-21-310[15]).

The following forms may be used in addition to forms set forth in Uniform Recognition of Acknowledgments Act:

Forms

Proof by subscribing witness:

State of . . . . . .: county of . . . . . .: Personally appeared before me A. B., who, being duly sworn, says that he saw the within named C. D. sign, seal, and as his act and deed, deliver the foregoing (here insert type of instrument), and that he, with E. F., witnessed the execution thereof.

(Signed) A. B.

Sworn to before me this . . . . . . day of . . . . . ., 20. . . . .

. . . . . ., Notary Public for . . . . . ., My Commission Expires . . . . . .

Proof of Instrument Made by Corporation:

State of . . . . . .: county of . . . . . .: Personally appeared before me A. B., who, being duly sworn, says that he saw the corporate seal of the . . . . . . affixed to the foregoing instrument and that he also saw . . . . . ., president, and . . . . . ., secretary of said . . . . . ., sign and attest the same, and that he with C. D. witnessed the execution and delivery thereof as the act and deed of the said . . . .

(Signed) A. B.

Sworn to before me this . . . . . . day of . . . . . ., 20. . . . .

. . . ., Notary Public for . . . . . ., My Commission Expires . . . . . .

Alternative to Acknowledgment or Proof.

No statutory provision.

10.02 AFFIDAVITS:

Within the State.

An affidavit may be made within state before judge (S.C. Code Ann. § 14-5-330), magistrate (S.C. Code Ann. § 22-1-50), master (S.C. Code Ann. § 14-11-100), clerk of court (S.C. Code Ann. § 14-17-250) or notary public (S.C. Code Ann. § 26-1-90). Fee of notary for administering oath for affidavit is 25¢. (S.C. Code Ann. § 8-21-140).

Without the State but Within United States.

Notary public; judge, clerk, deputy clerk; foreign service officer; active commissioned officer in Armed Forces if act performed for merchant seaman of U.S. or member of Armed Forces. (S.C. Code Ann. §§ 26-3-20, 26-3-30).

In Foreign Countries.

An affidavit may be made without the United States before a United States minister, ambassador, consul general, consul, vice consul or consular agent, commissioner for South Carolina, clerk of court, or notary public who affixes his State's official seal. (S.C. Code Ann. § 30-5-30[A]).

Affirmation.

Any person may make solemn affirmation with same effect as if such person had taken oath. See SCRCP 43(d).

Effect.

Affidavits may be recorded if desired. They are not admissible as evidence.

Use.

Affidavits may be used (with pleadings) to obtain temporary injunction, restraining order, attachment, claim and delivery and in similar proceedings.

Form.

No form is prescribed by statute. Usual form is:

Form

State of South Carolina: County of . . . . . .: Personally appeared before me A. B. who being duly sworn says:

(Signed) A. B.

Sworn to before me this . . . . . . day of . . . . . ., 20. . . . .

(Seal) C. D. Notary Public for S.C.

My Commission Expires . . . . . .

Alternative to Affidavit.

No statutory provision.

10.03 NOTARIES PUBLIC:

Uniform Recognition of Acknowledgments Act adopted. (S.C. Code Ann. §§ 26-3-10 to 26-3-90).

Seal.

A notary public has a seal of office, but the absence of a seal does not render his acts invalid provided his official title is affixed. (S.C. Code Ann. § 26-1-60).

Powers.

Notary public has power to administer oaths, take depositions and affidavits, protests for nonpayment of bonds, notes, etc., take acknowledgments and proof of deeds and other instruments required by law to be acknowledged and perform other acts provided for by law. (S.C. Code Ann. § 26-1-90).

He is disqualified from acting where he is individually a party to the instrument, and he may be otherwise disqualified for interest in particular situations. See topic 10.01 Acknowledgments. But interest as counsel or attorney is not disqualifying (S.C. Code Ann. §§ 26-1-110, -120), except as to depositions (SCRCP 28[c]).

Notary public is not officer of state, and therefore not excused from jury service. (S.C. Code Ann. § 14-7-840).

Territorial Extent of Powers.

Jurisdiction of notary extends throughout state. (S.C. Code Ann. § 26-1-80).

Expiration of Commission.

Commissions issued prior to July 1, 1967 continued indefinitely during pleasure of Governor. All commissions issued or renewed after July 1, 1967 are for ten year terms. All commissions issued prior to July 1, 1967, unless renewed, expire Jan. 1, 1970, for any notary whose last name begins with A through K and all others expire Jan. 1, 1971. Notary required to indicate, below signature, date of expiration of commission, but absence of such date does not render acts invalid provided official title is affixed. (S.C. Code Ann. §§ 26-1-10. -60).

Certificate of Authority.

See topic 10.01 Acknowledgments, subhead Authentication.

Fees are prescribed by statute. (S.C. Code Ann. § 8-21-140).

Members of Armed Forces.

Any commissioned officer of Armed Forces of U. S. or any officer of U. S. Merchant Marine, serving within or without limits of U. S., is authorized to act in same capacity as notary public. When acting as such, officer signs his name, rank, serial number and organization. (S.C. Code Ann. §§ 26-3-20, -30).

10.04 RECORDS:

Register of deeds or, if none, clerk of court, is officer in charge of local property records and Secretary of State is in charge of financing statements which are centrally filed.

Uniform Commercial Code adopted. See category 3 Business Regulation and Commerce, topic 3.09 Commercial Code.

Deeds, mortgages, leases for more than one year, and other instruments relating to real property, liens on ships and vessels must be recorded in county wherein affected realty is situated and take effect as to subsequent creditors and bona fide purchasers from time of filing same for record. (S.C. Code Ann. § 30-7-10). *For list of Counties and County Seats see first page for this state in Volume containing Practice Profiles Section.* Recording officer must immediately enter instrument on proper indexes in his office. Index entries are sufficient to constitute notice, but recordation without indexing is not notice as to real estate transfers. (S.C. Code Ann. § 30-9-40). See also topic 10.01 Acknowledgments; categories 2 Business Organizations, topics Corporations, Joint Stock Companies, subhead Massachusetts or Business Trusts; Business Regulation and Commerce, topic Commercial Code.

Actual notice of unrecorded instrument, in order to affect third persons, must be actual notice of the instrument itself or of its nature and purport. (S.C. Code Ann. § 30-7-90).

Requisites for Recording.

No deed, mortgage, or similar instrument relating to real property may be recorded unless proved by affidavit of person executing document or of a subscribing witness taken before a person qualified to administer oaths (in case of persons in U.S. Army, Air Force, Navy, Marine Corps or Coast Guard on active duty outside state, any commissioned officer of said services may administer oaths provided rank, branch and organization are stated, or person executing document must submit affidavit to notary authorized by this section or by Uniform Recognition of Acknowledgments Act that signature was his and instrument was executed for purposes on face thereof). (S.C. Code Ann. § 30-5-30).

Deeds and mortgages must also contain derivation clause and mailing address of grantee or mortgagee. (S.C. Code Ann. § 30-5-35).

Recording Fees.

See categories 20 Mortgages, topic Mortgages of Real Property; Property, topic Deeds.

Foreign Conveyances or Encumbrances.

Uniform Recognition of Acknowledgments Act adopted. (S.C. Code Ann. §§ 26-3-10 to -90).

Filing under Commercial Code; Place; Fees.

Proper place of filing in order to perfect security interest under Art. 9 of Commercial Code is as follows: (a) When collateral is timber to be cut, minerals (including oil and gas) or goods, which at time security interest attaches are or are to become fixtures, then in county where mortgage on real estate concerned would be filed or recorded; and (b) in all other cases, in office of Secretary of State. (S.C. Code Ann. § 36-9-501).

For fees, see category 3 Business Regulation and Commerce, topic 3.09 Commercial Code, subhead Filing Fees.

Transfer of Decedent's Title.

Deeds of Distribution are used to confirm transfer of decedent's title to real estate free of personal representative's right of possession and control. In case of nonresident decedent, exemplified copies of probate records of home state are admitted on verified petition to probate judge and, when filed, constitute the record.

Vital Statistics.

Reports of births, deaths, and fetal deaths must be filed, if required by law, with county registrar appointed by State Director of Health and Environmental Control. (S.C. Code Ann. § 44-63-30, 44-63-40). Fee to be determined by Department of Health and Environmental Control, certified record or search for information relating thereto, but certified copies for purposes called for by certain military and Veterans Administration purposes are exempt from this fee. (S.C. Code Ann. § 44-63-110). Current fee is $12, and $3 for each additional copy per request. For latest fee schedule, see http://www.scdhec.net/vr/fees.htm. Probate judges must keep records of marriages. (S.C. Code Ann. § 20-1-340).

Establishing Birth Records.

Any citizen of South Carolina, or any person born in this state prior to 1915, who has no official birth certificate on record may register statistical birth certificate with county health department for county in which he was born. (S.C. Code Ann. § 44-63-180). This may not be done on behalf of person already deceased. (S.C. Code Ann. § 44-63-180).

For adopted children, see category 14 Family, topic 14.01 Adoption.

10.05 SEALS:

When it appears from the attestation clause, or from other parts of an instrument in writing, that it was the intention of the party or parties that such instrument should be a sealed instrument, it has the effect of a sealed instrument although no seal is actually attached. (S.C. Code Ann. §§ 27-7-30; 19-1-160). Ink scroll, or (L.S.) may be used. (94 S.C. 252, 77 S.E. 923).

Domestic judgments certified by judge of court of record and authenticated by seal of court, or certified by public officer in district where record kept and authenticated by seal of office.

(SCRCP 44[a]).

Uniform Commercial Code adopted. See category 3 Business Regulation and Commerce, topic 3.09 Commercial Code.

10.06 TORRENS ACT:

Not adopted.

10.07 VITAL STATISTICS:

See topic 10.04 Records.

11 EMPLOYMENT

11.01 EMPLOYER AND EMPLOYEE:

See topic 11.02 Labor Relations.

11.02 LABOR RELATIONS:

Labor Regulations.

Children may not work in mercantile or manufacturing establishments on Sun. (S.C. Code Ann. § 53-1-120). Unlawful for any person to work or labor or for any person to employ others to work or labor on Sun. (S.C. Code Ann. § 53-1-40). Certain occupations and businesses exempted. (S.C. Code Ann. §§ 53-1-50, –90, –100, –110, –120 and –130). Provisions do not apply after 1:30 p.m. on Sun. (S.C. Code Ann. § 53-1-5). Employer who dismisses employee because of conscientious objection to Sun. work is subject to civil penalty of treble damages plus court costs and attorney's fees. (S.C. Code Ann. § 53-1-5). Director of Department of Labor, Licensing, and Regulation or designee issues regulations requiring employers to monitor and measure employee's exposure to toxic materials or harmful physical agents. (S.C. Code Ann. § 41-15-100). Employers must furnish employment and environment free from recognized hazards and must comply with occupational safety and health standards. (S.C. Code Ann. § 41-15-80). Employers may not discriminate against employees for filing complaints, or instituting or participating in proceeding regarding occupational safety and health. (S.C. Code Ann. § 41-15-510).

Children.

Employers in South Carolina may not engage in oppressive child labor practices. (S.C. Code Ann. § 41-13-20). Director of Department of Labor, Licensing, and Regulation is given authority to promulgate regulations to prohibit oppressive child labor practices, provided that such regulations are not more burdensome than applicable federal regulations. (Id.). Penalties for violating §41-13-20 found at §41-13-25.

Children may not be required or permitted to work in mercantile or manufacturing establishments on Sunday. (S.C. Code Ann. § 53-1-120).

Employment Discrimination.

Employers may not refuse to hire, fire or otherwise discriminate against persons because of their race, religion, color, sex, age, national origin, or disability. (S.C. Code Ann. § 1-13-80). Complaints about discrimination must be made to S.C. Human Affairs Commission (SHAC) within 180 days of alleged discriminatory act. (S.C. Code Ann. § 1-13-90). If any complaint against employer, which is not governmental entity, has been dismissed by Commission, or if within 180 days from filing of complaint Commission has not filed action, complainant may bring action in equity in circuit court against employer. (S.C. Code Ann. § 1-13-90). Any employer who dismisses or demotes employee because employee complies with valid subpoena to testify in court or administrative proceeding is subject to action for damages. (S.C. Code Ann. § 41-1-70). Employers may not retaliate for employee's institution of or participation in workers' compensation actions. (S.C. Code Ann. § 41-1-80).

Handicap Discrimination.

Discrimination prohibited in employment, accommodations, public services and housing. Private lawsuit authorized to recover damages. (S.C. Code Ann. §§ 43-33-510 to -1285).

Labor Unions.

(Right to Work Act). Union membership or payment of dues to union may not be made a condition of employment or continuation of employment by any employer nor may an employer require any person as a condition of employment or continuation of employment, to abstain or refrain from membership in any labor organization. (S.C. Code Ann. §§ 41-7-10 to -100).

It is unlawful for any carrier or shipper of property to pay to a labor organization any charge by reason of the movement by rail of a motor vehicle, trailer or container which is capable of being moved on the highways. (S.C. Code Ann. § 41-1-60).

Workers' Compensation Act (S.C. Code Ann. §§ 42-1-10 to 42-19-50) provides for payment of compensation, hospital and medical expenses, according to scale set out in Act, for injury or for death resulting from injury by accident arising out of and in course of employment. Stress arising out of and in course of employment unaccompanied by physical injury and resulting in mental injury is compensable if claimant can establish that stress resulted from unusual and extraordinary conditions of employment. (S.C. Code Ann. § 42-1-160). Stress is not compensable if it results from events incidental to normal employer/employee relations including, but not limited to, personnel actions of employer such as disciplinary actions, work evaluations, transfers, promotions, demotions, salary reviews, or terminations, unless such actions are taken in unusual or extraordinary manner. (S.C. Code Ann. § 42-1-160). No payment for disease except where it results from accident or is occupational. No compensation payable if injury or death caused by intoxication of employee, or by his willful intention to kill or injure himself or another. (S.C. Code Ann. § 42-9-60).

Maximum weekly compensation two-thirds of average weekly wage for this State for preceding calendar year as determined by S.C. Employment Security Commission. Minimum compensation is $75. No compensation first seven days unless disability exceeds 14 days. No dollar limit on total compensation, but employee may not recover benefits for more than 500 weeks, except life time benefits available to employee determined to be totally and permanently disabled, and who is also paraplegic, or quadriplegic or had suffered physical brain damage. (S.C. Code Ann. § 42-9-10). Medical treatment must be provided for life in cases of permanent and total disability. (S.C. Code Ann. § 42-15-60).

Act applies to employment of four or more regular employees, except railroad employees, casual employees, farm laborers, Textile Hall Corporation employees, and employees of railway express companies, state and county fair associations, licensed real estate sales persons and employer who had total annual payroll for previous calendar year of less than $3,000. (S.C. Code Ann. §§ 42-1-350; 42-1-360; 42-1-375). Those employers excepted may come under Act by filing with S.C. Employment Security Commission written notice of desire to do so. (S.C. Code Ann. § 42-1-380).

Compensation claims are non-assignable and payments are exempt from all claims of creditors and from taxes. (S.C. Code Ann. § 42-9-360). Claims for compensation must be made within two years after accident or two years after resulting death. (S.C. Code Ann. § 42-15-40).

For death or injury to member of South Carolina National Guard, claim must be filed within two years after accident or one year after federal claim is finalized, whichever is later. (S.C. Code Ann. § 42-15-40).

Act is administered by S.C. Workers' Compensation Commission composed of six Commissioners and chairman appointed by Governor, with advice and consent of Senate. Worker's Compensation Study and Review Committee established. (S.C. Code Ann. §§ 42-3-10 to -20). Award of Commission is conclusive on question of fact. Appeal lies to Court of Common Pleas on 30 days written notice for errors of law. Notice of appeal must state grounds of appeal. (S.C. Code Ann. § 42-17-60). Certified copy of memorandum of agreement, approved by Commission, or of order, decision or award of Commission unappealed from, may be filed in court of common pleas, which will enter judgment on same. (S.C. Code Ann. § 42-17-70). Fees of doctors and attorneys and hospital charges are subject to approval by Commission. (S.C. Code Ann. § 42-15-90).

Employer must insure his liability or satisfy Commission of financial ability to pay compensation claims. Self insurers pay tax of 2½% of actual cost of operating under South Carolina Worker's Compensation Act. (S.C. Code Ann. § 42-5-190).

Occupational Diseases.

Occupational diseases are treated as injuries by accident under workmen's compensation law. (S.C. Code Ann. § 42-11-40). Occupational disease is defined under Act as disease arising out of and in course of employment which is due to hazard in excess of those normally incident to employment and peculiar to occupation in which employee is engaged. (S.C. Code Ann. § 42-11-10).

Employee Handbooks.

Statements in employee handbook can create contract between employer and employee. (292 S.C. 481, 357 S.E.2d 452).

Employers' Liability Act.

None except as to railroad employees. See category 3 Business Regulation and Commerce, topic 3.08 Carriers.

Railroad Employees.

Railroads and railroad employees are not subject to provisions of South Carolina Workers' Compensation Act. (S.C. Code Ann. § 42-1-350). Railroad employee injured or killed through negligence of superior agent or officer or person having right to control or direct his services, or of fellow servant employed in another department or on another train of cars, has same rights and remedies as though he were not employee. (S.C. Code Ann. § 58-17-3720). Assumption of risk is not defense to action by employee for injury except in case of conductor or engineer voluntarily operating unsafe engine or car in his charge. (S.C. Code Ann. § 58-17-3740). Contract of employee to waive benefit of these provisions is void. (See Const., Art. 9, §1-Case Notes under former Art. 9, §15.) Action for death of railroad employee must be brought within two years after death. (S.C. Code Ann. § 58-17-3770).

Unemployment Compensation Act (S.C. Code Ann. §§ 41-27-10 to 41-41-50) provides employer is subject to act if four or more individuals are employed in each of 20 weeks within current or preceding calendar year after Dec. 31, 1971 (S.C. Code Ann. § 41-27-210). Benefits are payable if employee has been paid wages in first four of last five calendar quarters equal to or exceeding one and one-half times total of his wages paid in quarter of such period in which his wages were highest. (S.C. Code Ann. § 41-27-310).

Agricultural labor, domestic service, casual labor, government service, seafood industry, and educational and charitable institution service are exempted employments under certain circumstances. (S.C. Code Ann. § 41-27-260).

Employee must be able and available for work and is disqualified if he left work voluntarily, discharged for misconduct, fails to accept work, voluntarily retires or if, under certain conditions, engages in a labor dispute. (S.C. Code Ann. § 41-35-120).

Payment of Wages.

Employers are required to notify employees in writing at time of hiring of their rate of pay, day, time and place of payment of wages, and deductions which will be made from wages, including payments to insurance programs. (S.C. Code Ann. § 41-10-30).

Any changes in these terms must be made in writing at least seven calendar days before they become effective. (Id.).

Employer cannot withhold or divert any portion of employee's wages unless employer is required or permitted to do so by state or federal law or employer has given written notification as required by §41-10-30(A). (S.C. Code Ann. § 41-10-40).

Employer must pay any separated employee wages due to employee within 48 hours of time of separation or next regular payday not to exceed 30 days. (S.C. Code Ann. § 41-10-50).

Any civil action for recovery of wages must be commenced within three years. Civil penalties may be assessed by Department of Labor, Licensing and Regulation. Employees may recover actual damages in civil action, treble damages, costs and attorney's fees. (S.C. Code Ann. § 41-10-80).

11.03 WORKERS' COMPENSATION LAW:

See topic 11.02 Labor Relations.

12 ENVIRONMENT

12.01 ENVIRONMENTAL REGULATION:

General Supervision.

Department of Health and Environmental Control has jurisdiction over quality of air and waters with authority to abate, control, and prevent pollution under Pollution Control Act. (S.C. Code Ann. §§ 48-1-10 to -350). Act gives department authority to set standards for air and water quality, and makes it unlawful to discharge organic or inorganic matter into air or water, without permit from department. Evidence of violation of air pollution regulations is sufficient to submit question of punitive damages to jury. (289 S.C. 325, 345 S.E.2d 495).

Highways subject to advertising and junkyard control by Department of Transportation. (S.C. Code Ann. §§ 57-25-110 to -710;57-27-10 to -100). http://www.dot.state.sc.us/doing/odas.shtml.

Enforcement.

Department is empowered to hold hearings, compel attendance of witnesses, make findings of fact, issue orders and assess penalties. It may institute legal proceedings to compel compliance with Pollution Control Act or determinations and orders of department. (S.C. Code Ann. § 48-1-50).

State in its own name or in name of department, or any appropriate state agency or subdivision may bring action for damage to animal life, plant life, or property due to discharge of organic or inorganic matter into waters of this state. (S.C. Code Ann. § 48-1-90).

State Attorney General is designated legal advisor to department and upon request of department institutes court action. (S.C. Code Ann. § 48-1-210).

Appeals may be taken from any order of department within 30 days after its filing to court of common pleas of county in which pollution occurs. Department must certify to court, record in hearing. Appeal from judgment in such court may be taken as in any other civil action. (S.C. Code Ann. § 48-1-200).

Penalties.

Any person willfully or with gross negligence or recklessness violating provisions of this Act or rules, regulations, determinations or orders of department is guilty of misdemeanor and subject to fine of $500 to $25,000 for each day's violation or imprisonment for up to two years or both. (S.C. Code Ann. § 48-1-320). Any person so violating is subject further to civil penalties not to exceed $10,000 per day for each violation. (S.C. Code Ann. § 48-1-330).

Permits must be secured from department to make any new outlet or source, or to increase quantity of discharge from existing outlets or sources, for discharge of wastes or air contaminants into waters or ambient air. (S.C. Code Ann. § 48-1-100). Permits also required for construction or extension of disposal systems or sources. (S.C. Code Ann. § 48-1-110).

Hazardous Waste Management.

Permit must be obtained from Department of Health and Environmental Control for storage or transportation of hazardous waste and operation of hazardous waste treatment and disposal facilities. Department is given authority to set standards as to whether waste is hazardous, and is given enforcement authority. (S.C. Code Ann. §§ 44-56-10 to -140).

Radioactive Waste.

Permit required for transportation and disposal of radioactive waste under Radioactive Waste Transportation and Disposal Act. (S.C. Code Ann. §§ 13-7-110 to -200).

Tidelands.

Permit must be obtained from Department's Coastal Division to utilize critical area, defined as coastal waters, tidelands, beaches and beach dune system, for other than traditional use. (S.C. Code Ann. §§ 48-39-10 and -130). Coastal council cannot issue permit allowing grantee to block navigable waterway. Test under S.C. law is whether waterway can carry valuable floatage. Valuable floatage is not necessarily commercial floatage. (289 S.C. 445, 346 S.E.2d 716).

Mining.

South Carolina Mining Act adopted. (S.C. Code Ann. §§ 48-20-10 to -310). See category 19 Mineral, Water and Fishing Rights, topic 19.01 Mines and Minerals.

Pesticides, type, use, devices regulated. Sales, applicators licensed. Administered by State Crop Pest Commission. (S.C. Code Ann. §§ 46-13-10 to -240).

Tax Exemptions.

See category 22 Taxation, topic 22.01 Administration, subhead Exemptions.

13 ESTATES AND TRUSTS

13.01 ADMINISTRATION:

See topic 13.08 Executors and Administrators.

13.02 ADVANCEMENTS:

See topic 13.07 Descent and Distribution.

13.03 ALLOWANCES:

See topic 13.08 Executors and Administrators.

13.04 CLAIMS:

See topic 13.08 Executors and Administrators; category 5 Civil Actions and Procedure, topic 5.17 Pleading.

13.05 DEATH:

A person absent for seven years without being heard from will be presumed dead. (216 S.C. 334, 58 S.E.2d 83). See topic 13.07 Descent and Distribution. There is no method prescribed by which the rights of a person erroneously presumed to be dead may be barred, except as to marital relationship. See category 14 Family, topic 14.11 Marriage.

Uniform Determination of Death Act adopted Apr. 20, 1984. (S.C. Code Ann. §§ 44-43-450; 44-43-460).

Death with Dignity Act revised, adopted effective May 29, 1988. (S.C. Code Ann. §§ 44-77-10 to -160).

Survivorship.

The Uniform Simultaneous Death Act is in effect. (S.C. Code Ann. §§ 62-1-501 to -508). Uniform Survival and Death Act not adopted.

Finding of Death by U. S. Authorities.

Written finding of presumed death made by Secretary of War, Navy or other officer or employee of U. S. authorized to make such finding pursuant to Federal Missing Persons Act (5 U.S.C. §§ 5561 to 5570), as now or hereafter amended or duly certified copy of such finding must be received in any court, office or other place in South Carolina as prima facie evidence of death of person therein found to be dead and of date, circumstances and place of his disappearance and as prima facie evidence that copy was legally executed and certified. (S.C. Code Ann. §§ 19-5-310 to -330).

Action for death must be brought in the name of the executor or administrator of deceased for the benefit of the wife or husband, and child or children of deceased, and if no such wife or husband or child or children, then for benefit of parent or parents. If there be none such then for benefit of heirs of deceased. (S.C. Code Ann. § 15-51-20). If decedent could not maintain personal injury action at time of death, then decedent's representative cannot bring action later. (270 S.C. 477, 242 S.E.2d 683, overruled on other grounds by 353 S.C. 553, 579 S.E.2d 325). Executor or administrator may also bring action for pain and suffering endured between time of injury and death. This is for benefit of estate of deceased. (S.C. Code Ann. § 15-5-90). Action for wrongful death survives against personal representatives of deceased tortfeasor. (S.C. Code Ann. § 15-51-10). Action for pain and suffering survives against personal or real representative. (S.C. Code Ann. § 15-5-90). Reasonable funeral expenses may be recovered as damages in either wrongful death action or survival action but not both. (S.C. Code Ann. § 15-5-100).

Limitation of Actions.

Action must generally be brought within three years from death of decedent. (S.C. Code Ann. § 15-3-530[6]). Limitation against railroad in case of death or injury of employee is two years. (S.C. Code Ann. § 58-17-3770). S.C. Tort Claims Act partially waives sovereign immunity to extent set forth in Act. Under §15-78-80, verified claim against governmental entity may be made within one year after loss was or should have been discovered. After claim is filed, Budget and Control Board has 180 days to respond. If claim is filed, summons and complaint may be filed after either expiration of 180 day period or disallowance of claim or rejection of settlement offer. (S.C. Code Ann. § 15-78-90). Complaint, however, must be filed within three years after injury. (S.C. Code Ann. § 15-78-110). If verified claim is not filed, complaint may still be brought, but it must be within two years after injury was or should have been discovered. (S.C. Code Ann. § 15-78-110).

Limitation of Amount Recoverable.

S.C. Tort Claims Act (S.C. Code Ann. §§ 15-78-10 to -200) partially waives sovereign immunity to extent set forth in Act. Under §15-78-170 one can sue for wrongful death if action could have been brought for bodily injury had death not ensued. Recovery per person for single occurrence is $300,000 with total recovery not exceeding $600,000. However, in case of tort caused by licensed physician or dentist who is employed by governmental entity and acting within scope of his profession, cap on liability is $1,200,000. No punitive damages are available. (S.C. Code Ann. § 15-78-120). (But see 348 S.C. 549, 560 S.E.2d 894, finding statutory caps impliedly repealed by adoption of Uniform Contribution Act and 355 S.C. 581, 586 S.E.2d 569, finding legislature's attempt to reinstate caps “to claims or actions pending” to be retroactive and violation of doctrine of separation of powers). Tort claims against charity are limited in like fashion. (S.C. Code Ann. § 33-56-180). If motor vehicle is involved, this section does not operate to prevent recovery of damages not to exceed coverage limits pursuant to §38-77-160. Further, employee of charity is immune from suit unless his conduct was willful or reckless. “Good Samaritan” clause prohibits suit against licensed health care professional rendering services gratuitously except in case of gross negligence or willful misconduct. Agreement to provide voluntary non-compensated service must be made before rendering of service by licensed health care provider. (S.C. Code Ann. § 38-79-30).

Death Certificate.

See category 10 Documents and Records, topic 10.04 Records, subhead Vital Statistics.

Uniform Anatomical Gift Act.

Revised uniform anatomical gift act adopted. (S.C. Code Ann. §§ 44-43-310 to -420). Driver's license must show driver is donor pursuant to Act. (S.C. Code Ann. § 44-43-40).

Uniform Probate Code (but not 1975 or 1977 amendments) passed with substantial modifications, took effect July 1987. (Title 62).

13.06 DECEDENTS' ESTATES:

See topics 13.07 Descent and Distribution, Executors and Administrators, Wills; category 8 Debtor and Creditor, topic 8.10 Homesteads.

13.07 DESCENT AND DISTRIBUTION:

Uniform Probate Code (but not 1975 or 1977 amendments) adopted (S.C. Code Ann. §§ 62-1-101 to -508) with significant modifications.

Surviving spouse takes as follows: (1) Entire intestate estate if no surviving issue of decedent; (2) one-half of intestate estate if there are surviving issue. (S.C. Code Ann. § 62-2-102).

Heirs Other Than Surviving Spouse.

Part of intestate estate not passing to surviving spouse, descends and is distributed as follows, each class taking to exclusion of subsequent classes: (1) To issue of decedent: if they are all of same degree of kinship to decedent they take equally but if of unequal degree, then those of more remote degree take by representation; (2) if there is no surviving issue, to his or her parent or parents equally; (3) issue of decedent's parents or either of them by representation; (4) grandparents or issue of grandparents, half estate passes to paternal grandparents if both survive, or to surviving paternal grandparent, or to issue of paternal grandparents if both are deceased, issue take equally if they are of same degree of kinship, but if not, more remote take by representation; and other half passes to maternal relatives in same manner; but if there is no surviving grandparent or issue of grandparent on either paternal or maternal side, entire estate passes to relatives on other side in same manner as half; (5) great-grandparents or their issue, half estate passes to surviving paternal great-grandparents in equal shares, or to surviving paternal great-grandparent if only one survives, or to issue of paternal great-grandparents if none of great-grandparents survive, issue taking equally if of same degree of kinship, if not, those of more remote degree take by representation; and other half passes to maternal relatives in same manner; but if no surviving great-grandparents or their issue exist on one side, entire estate passes to relatives on other side in same manner as half; (6) stepchildren or issue of deceased stepchildren take equally if of same degree of step-kinship to decedent, but if not, more remote take by representation. (S.C. Code Ann. § 62-2-103). Parents of deceased, who failed to provide child support to deceased, may be limited by probate court from inheriting. (S.C. Code Ann. § 62-2-114).

Adopted Children.

See subhead Meaning of Child and Related Terms, infra.

Advancements.

Only if declared in contemporaneous writing signed by decedent or acknowledged in writing signed by heir to be advancement. (S.C. Code Ann. § 62-2-110).

Afterborn Heirs.

Issue of decedent (but no other persons) conceived before his death but born within ten months thereafter inherit as if they had been born in lifetime of decedent. (S.C. Code Ann. § 62-2-108).

Meaning of Child and Related Terms.

If relationship of parent and child must be established to determine succession by, through, or from person: (1) From date final decree of adoption is entered and except as otherwise provided in §20-7-1825, adopted child is deemed child of adopting parent and not of natural parents except that adoption of child by spouse of natural parent has no effect on relationship between child and that natural parent; (2) in cases not covered by (1), person born out of wedlock is child of mother, and child of father if (i) natural parents participated in marriage ceremony before or after birth of child, even if attempted marriage is void, or (ii) paternity is established by adjudication commenced before or within later of eight months after death of father or six months after initial appointment of personal representative of his estate and, if after his death, by clear and convincing proof, except that paternity established under (ii) is ineffective to qualify father or his kindred to inherit from or through child unless father has openly treated child as his and has not refused to support child; (3) person is not child of parent whose parental rights have been terminated under § 20-7-1574 of 1976 Code, except that termination is ineffective to disqualify child or its kindred to inherit from or through parent. (S.C. Code Ann. § 62-2-109).

Half Blood.

Relatives of half blood inherit same share they would inherit if they were of whole blood. (S.C. Code Ann. § 62-2-107).

Escheat.

Uniform Unclaimed Property Act (1981) adopted as S.C. Code Ann. §§ 27-18-10 to -400 (Uniform Disposition of Unclaimed Property Act repealed). Variations from Uniform Unclaimed Property Act appear in following sections:

§1 "Administrator" defined as The South Carolina Department of Revenue, its agents or representatives. (S.C. Code Ann. § 27-18-20[1]).

Added to §1 are "lawful charge" and "patronage allocations". Lawful charge means charge for which there is valid and enforceable written contract between issuer and owner of instrument pursuant to which issuer may impose charge and issuer regularly imposes charge and does not regularly reverse or otherwise cancel charge. (S.C. Code Ann. § 27-18-20[12]). "Patronage allocations" means any patronage capital accounts, patronage dividends, capital accounts, capital credits, capital reserves, or any distribution of excess revenue to members. (S.C. Code Ann. § 27-18-20[14]).

§2 Subsection (c) added provides that, unless provided otherwise, all patronage allocations less charges held by entities organized under c. 49 of Title 33 are presumed abandoned after more than seven years. (S.C. Code Ann. § 27-18-30[c]).

§6 (c) Inserts "in excess of one dollar a month" between "charge" and "due". (S.C. Code Ann. § 27-18-70[c]).

§6 (c) (2) and (3) not adopted.

§6 (d) Sentence added before last sentence, providing that in absence of such consent or memo mentioned previously, one automatic renewal is allowed. (S.C. Code Ann. § 27-18-70[d]).

§8 Added (b) providing any sum which utility has been ordered to refund and was received for utility services with interest, less charges, is presumed abandoned after more than five years after becoming payable. (S.C. Code Ann. § 27-18-90[b]).

§24 (c) Inserted "provided in Section S.C. Code Ann. § 12-54-20" in place of "[ ] percent a year." (S.C. Code Ann. § 27-18-250[c]).

§26 Inserted as court, Court of Common Pleas of Richland County. Last sentence providing for award of costs and attorneys' fees not adopted. (S.C. Code Ann. § 27-18-270).

§30 (d) Substantially modified to provide that administrator must give notice to holder stating amount due plus interest and penalties in demand for payment. Payment or written formal protest due 60 days from receipt of notice or holder subject to penalties under §27-18-350(B) or criminal prosecution under §27-18-350(D). (S.C. Code Ann. § 27-18-310[D]).

§34 (a) "may be required to" adopted rather than "shall"; "at the rate provided in Section S.C. Code Ann. § 12-54-25" inserted in place of "at the annual rate of" and bracketed "selections". (S.C. Code Ann. § 27-18-350[A]).

(d) insert “misdemeanor” in first bracket; after “conviction” reads: “must be punished by a fine of not more than $10,000 or imprisonment for not more than one year, or both”. (S.C. Code Ann. § 27-18-350[D]).

§35 Added: “It is unlawful for any person to seek or receive from any person or contract with any person for any fee or compensation for locating or purporting to locate any property which he knows has been reported or paid or delivered to the administrator pursuant to this chapter, in excess of fifteen percent of the value thereof returned to the owner. Any person violating this section is guilty of a misdemeanor and, upon conviction, must be fined not less than the amount of the fee or charge he has sought or received or contracted for, nor more than ten times the amount, or imprisoned for not more than thirty days, or both.” (S.C. Code Ann. § 27-18-360).

§39 Not adopted. Act revised 1996.

Executors and Administrators.

See topic 13.08 Executors and Administrators.

Uniform Simultaneous Death Act adopted (U.S.D.A.). Variations from U.S.D.A. appear in following sections:

§2 Revised to read: “When 2 or more beneficiaries are designated.” (S.C. Code Ann. § 62-1-503).

§3 Second paragraph defining “joint tenants” deleted. (S.C. Code Ann. § 62-1-504).

§4 Not adopted.

§5 Bracketed ([ ]) portion referring to community property not adopted. (S.C. Code Ann. § 62-1-505).

§6 Deletes “or any other situation” between “any” and “where”; deletes “or where provision made for a presumption as to survivorship which results in a distribution of property different from that here provided.” (S.C. Code Ann. § 62-1-507).

§7 Substitutes “substantially identical laws” for “it”. (S.C. Code Ann. § 62-1-508).

§9 Not specifically adopted; unless displaced by particular provisions of S.C. Probate Code, principles of law and equity supplement it. (S.C. Code Ann. § 62-1-103).

§10 Not specifically adopted; but substantially same provision adopted for entire S.C. Probate Code. (S.C. Code Ann. § 62-1-104).

§62-1-506 provides U.S.D.A. not applicable to distribution of property of person who died before Apr. 3, 1948.

13.07A ESTATES: (in property)

See category 21 Property, topic 21.16 Real Property.

13.0813.09

13.10 EXECUTORS AND ADMINISTRATORS:

Uniform Probate Code has been adopted (but not 1975 or 1977 amendments) with substantial modifications. (S.C. Code Ann. §§ 62-1-101 to -508).

Probate jurisdiction is in probate court of each county. (S.C. Code Ann. § 14-23-1150). Appeal lies to circuit court unless parties not in default consent in writing or on record at probate court hearing, in which case appeal may be directly to either Court of Appeals or Supreme Court as governed by S.C. Appellate Court Rules. (S.C. Code Ann. § 62-1-308).

Preferences in Right to Administer; Eligibility and Competency.

Whether proceedings are formal or informal, persons who are not disqualified have priority for appointment in following order: (1) Person with priority as determined by probated will including person nominated by power conferred in will; (2) surviving spouse of decedent who is devisee of decedent; (3) other devisees of decedent; (4) surviving spouse of decedent; (5) other heirs of decedent regardless of whether decedent died intestate and determined as if decedent died intestate (for purposes of determining priority under this item, any heirs who could have qualified under [1]-[4] above are treated as having predeceased decedent); (6) 45 days after death of decedent, any creditor; (7) four months after death of decedent, upon application by S.C. Department of Revenue, any person suitable to court. Unless contrary intent is expressed in decedent's will, any person with priority may nominate another, who then has same priority as person making nomination except that person nominated by testator to serve has higher priority than person nominated pursuant to this item. (S.C. Code Ann. § 62-3-203[a]).

Objection to appointment can be made only in formal proceedings. In case of objection priorities stated in (a) apply except that: (1) If estate appears to be more than adequate to meet exemptions and costs of administration, but inadequate to discharge anticipated unsecured claims, court, on petition of creditors, may appoint any qualified person; (2) in case of objection by heir or devisee appearing to have substantial interest in estate, to appointment of person other than one whose priority is determined by will, court may appoint person who is acceptable to heirs and devisees whose interests in estate appear to be worth in total more than half of probable distributable value or, in default of this accord, any suitable person. (S.C. Code Ann. § 62-3-203[b]).

Conservators of estates of protected persons or, if there is no conservator, any guardian except guardian ad litem of minor or incapacitated person, may exercise same right to be appointed as personal representative, to object to another's appointment, or to participate in determining preference of majority in interest of heirs and devisees that protected person or ward would have if qualified for appointment. (S.C. Code Ann. § 62-3-203[c]).

Appointment of one who does not have priority, including priority resulting from renunciation or waiver, may be made only in formal proceedings. Before appointing one without priority, court must determine that those having priority, although given notice of proceedings, have failed to request appointment or to nominate another for appointment, and that administration is necessary. (S.C. Code Ann. § 62-3-203[d]).

No person is qualified to serve as personal representative who is: (1) Under age of 18; (2) person whom court finds unsuitable in formal proceedings; (3) with respect to estate of any person domiciled in this State at time of his death, corporation created by another state of U.S. or by any foreign state, kingdom or government, or corporation created under laws of U.S. and not having business in this State, or officer, employee, or agent of such foreign corporation, whether officer, employee, or agent is resident or nonresident of this State, if such officer, employee, or agent is acting as personal representative on behalf of such corporation; or (4) probate judge for estate of any person within his jurisdiction (exception for small estates). (S.C. Code Ann. § 62-3-203[e]).

Personal representative appointed by court of decedent's domicile has priority over all other persons except where decedent's will nominates different persons to be personal representatives in this State and in state of domicile. Domiciliary personal representative may nominate another, who then has same priority as domiciliary personal representative. (S.C. Code Ann. § 62-3-203[f]).

This section governs priority for appointment of successor personal representative but does not apply to selection of special administrator. (S.C. Code Ann. § 62-3-203[g]).

If it comes to knowledge of probate judge that any person within his jurisdiction has died leaving estate upon which no application has been made for appointment or no personal representative appointed or no will offered for probate or appointment granted, he must, immediately after lapse of four months from death of such person, notify S.C. Department of Revenue thereof together with his opinion as to whether or not any part of estate is likely to be taxable. (S.C. Code Ann. § 62-3-203[h]).

Bank or trust company incorporated in this state with at least $250,000 total unimpaired capital may act (S.C. Code Ann. § 34-15-10) and need not post bond unless bond not expressly waived in will (S.C. Code Ann. § 62-3-603).

Bond.

With certain exceptions, personal representative is not required to file bond if: (1) all heirs and devisees agree to waive bond requirement; (2) personal representative is sole heir or devisee; (3) personal representative is state agency, bank, or trust company, unless will expressly requires bond; or (4) personal representative is named in will, unless will expressly requires bond. If court appoints as personal representative nominee of personal representative named in will, court may in its discretion decide not to require bond. (S.C. Code Ann. § 62-3-603).

Where bond is required of personal representative or administrator of estate by law or by will, it may be waived under following conditions: (1) Personal representative or administrator by affidavit at time of applying for appointment as such certifies to court that gross value of estate will be less than $20,000, that assets of probate estate are sufficient to pay all claims against estate, and that personal representative or administrator agrees to be personally liable to any beneficiary or other person having interest in estate for any negligence or intentional misconduct in performance of his duties as personal representative or administrator; and (2) all known beneficiaries and other persons having interest in estate execute written statement on form prescribed by court that they agree to bond being waived. This form must be filed with court simultaneously with affidavit required by item (1) above. Creditor for purposes of this item (2) is not considered person having interest in estate. (S.C. Code Ann. § 62-3-603).

Any person having interest of more than $1,000 may make written demand that personal representative give bond. Court determines bond sufficient to protect person's interest. (S.C. Code Ann. § 62-3-605). If bond is required and provisions of will or order do not specify amount, amount required is equal to estimated value of personal estate and amount of income expected from personal estate during next year. Bond must be duly executed by corporate surety, or one or more individual sureties whose performance is secured by pledge of personal property, mortgage on real property, or other adequate security. Court may reduce amount of bond by value of assets of estate deposited with domestic financial institution in manner that prevents their unauthorized disposition. (S.C. Code Ann. § 62-3-604). See §62-3-606 for terms and conditions of bonds.

Investments by fiduciaries are regulated by S.C. Code Ann. §§ 31-19-20 -40; §§ 34-21-210 to -430; § 62-3-715; § 62-5-424; § 62-7-302; § 62-7-418; § 62-7-601; § 62-7-602; § 62-7-604; see also Uniform Trustees' Act, S.C. Code Ann. §§ 62-7-701 to -709.

Inventory.

Personal representative must, within 90 days after his appointment (unless extension granted), file original of inventory listing fair market value of estate's property with court. (S.C. Code Ann. § 62-3-706). Court, upon application, may extend time.

Appraisal.

Personal representative may employ appraiser but is not required to do so unless ordered by court upon motion of interested party. (S.C. Code Ann. § 62-3-707). Compensation must be reasonable in light of value of estate and time involved, and includes mileage at rate paid to members of state boards and commissions. (S.C. Code Ann. § 62-3-721).

Compromises.

Subject to certain limitations and restrictions, personal representative may generally compromise and settle claims and conduct business on behalf of estate. (S.C. Code Ann. § 62-3-715).

Notice to Creditors.

(a) Immediately after his appointment, personal representative must publish notice once a week for three successive weeks in newspaper of general circulation in county announcing his appointment and address and notifying creditors to present their claims within eight months after date of first publication of notice or be barred forever; (b) personal representative may give written notice by mail or other delivery to any creditor notifying creditor to present his claim within time specified in (a), or within 60 days from mailing or other delivery of notice, whichever is later, or be forever barred; (c) personal representative is not liable to any creditor or successor of decedent for failing to give notice. (S.C. Code Ann. §§ 62-3-704, -801).

Limitation on Presentation of Claims.

All claims against decedent's estate which arose before decedent's death, including claims of State, whether due or to become due, absolute or contingent, liquidated or unliquidated, if not barred earlier by other statutes of limitations, are barred against estate, personal representative, and heirs and devisees of decedent, unless presented within earlier of following: (a) one year after decedent's death; or (b) within times provided in paragraph above (see S.C. Code Ann. § 62-3-801) for creditors who are given actual notice and for creditors barred by publication; provided claims barred by non-claim statute at decedent's domicile before giving of notice to creditors barred in this State are also barred in this State. (S.C. Code Ann. § 62-3-803).

Claims arising at or after decedent's death barred unless presented as follows: (1) If claim based on contract with personal representative, within eight months after performance by personal representative is due; (2) any other claim, within eight months after it arises or one year after decedent's death. Nothing within this section affects or prevents any proceeding to enforce any mortgage, pledge, lien, or other security interest upon property of estate; or to limits of insurance protections only, any proceeding to establish liability of decedent or personal representative for which he is protected by liability insurance; or collection of compensation for services rendered and reimbursement for expenses advanced by personal representative or by attorney or accountant for personal representative of estate. (S.C. Code Ann. § 62-3-803).

Presentation of Claims.

Claims against decedent's estate may be presented as follows: (1) Claimant may deliver or mail to personal representative written statement of claim indicating its basis, name and address of claimant, and amount claimed, and must file written statement of claim, in form prescribed by rule, with clerk of probate court. Claim is deemed presented on first to occur of receipt of written statement of claim by personal representative or filing of claim with court. If claim is not yet due, date when it will become due must be stated. If claim is contingent or unliquidated, nature of uncertainty must be stated. If claim is secured, security must be described.

Failure to describe correctly security, nature of any uncertainty, and due date of claim not yet due does not invalidate presentation made, (2) claimant may commence proceeding against personal representative in any court where personal representative may be subjected to jurisdiction, to obtain payment of claim against estate, but commencement of proceeding must occur within time limited for presenting claim, and claimant must file written statement of claim as in (1) above, with clerk of probate court. No presentation of claim is required in regard to matters claimed in proceedings against decedent which were pending at time of his death, (3) if claim is presented under subsection (1), no proceeding thereon may be commenced more than 30 days after personal representative has mailed notice of disallowance with warning of impending bar; but, in case of claim which is not presently due or which is contingent or unliquidated, personal representative may consent to extension of 30-day period, or to avoid injustice, court, on petition presented to court prior to expiration of such 30-day period, may order extension of 30-day period, but in no event may extension run beyond applicable statute of limitations. (S.C. Code Ann. § 62-3-804).

Priorities.

Claims are paid in the following order: (1) Costs and expenses of administration, attorneys fees and reasonable funeral expenses; (2) reasonable and necessary medical and hospital expenses of last illness and medical assistance paid under State Plan; (3) debts and taxes with preference under federal law; (4) debts and taxes with preference under other laws of this state, in order of their priority; and (5) all other claims. No preference is given to claims of same class and claim due and payable is not entitled to preference over one not due. (S.C. Code Ann. § 62-3-805).

Assets Liable for Debts.

Assets and effects of a nonresident within the state are liable for all debts of decedent wherever they lie. Local creditors are not preferred over creditors in decedent's domicile. (S.C. Code Ann. § 62-3-815). With certain exceptions estate of nonresident decedent being administered in this state is, upon conclusion of local administration, paid over to domiciliary personal representative. (S.C. Code Ann. § 62-3-816).

Liabilities of Heirs and Devisees.

Unless previously adjudicated, settled by personal representative, or otherwise barred, claim of any claimant or creditor of estate may pursue assets distributed against one or more distributees of estate, but distributee's liability is limited to amounts received as distributions that exceed exempt property and limited to value of property received valued as of time of distribution. Each distributee timely notified of claim bears cost of satisfaction of unbarred claims as if claim had been settled during administration. (S.C. Code Ann. § 62-3-104; 62-3-1004). Statute of limitations for claimant pursuing distributee, unless previously adjudicated, settled by personal representative, or otherwise barred, is later of (a) if claim by creditor of decedent, one year after decedent's death, and (b) any other claimant and any heir or devisee, later of three years after decedent's death or one year after time of distribution. These limitations do not apply to actions to recover property received as result of fraud. (S.C. Code Ann. § 62-3-1006).

Sales.

Unless authorized by will, personal representative may only sell personal property without court order if aggregate value is less than $5,000. (S.C. Code Ann. § 62-3-711). Personal representative may sell real estate where sale is authorized or directed by will or real property is devised to personal representative. (S.C. Code Ann. § 62-3-711).

If the personal property or assets set apart by the will are insufficient to pay the debts of deceased, the judge of probate may sell all or so much of the real estate as will pay outstanding debts and pay over to personal representative the net proceeds of such sale. (S.C. Code Ann. §§

62-3-1301 to -1312).

Actions by a Personal Representative.

Personal representative may sue as such (except as to proceedings which do not survive decedent). (S.C. Code Ann. § 62-3-703[c]).

Actions against a personal representative for debt of decedent may be commenced against personal representative in any court where personal representative may be subject to jurisdiction in lieu of presenting claim, but proceeding must be commenced within time limit for presenting claim, and claimant must file written statement of claim with clerk of probate court. (S.C. Code Ann. § 62-3-804).

Effective July 13, 1988, personal representatives must notify claimant of disallowance. Claimant has 30 days after mailing of disallowance to commence proceeding against personal representative. Failure of personal representative to notify claimant of impending bar in said notice preserves claim beyond eight month period. (S.C. Code Ann. § 62-3-806). Unless provided otherwise, or unless interest is based upon contract, allowed claims bear interest at legal rate commencing 30 days after expiration of period for original presentation of claims. (S.C. Code Ann. § 62-3-806[d]).

Personal representative may pay any just claim which has not been barred with or without formal presentation but is personally liable to any other claimant whose claim is allowed and who is injured by such payment if payment is made before expiration of eight months from date of first publication of notice to creditors and personal representative either does not require payee to give adequate security for refund of any payments or payment is negligent or willful fault of personal representative. (S.C. Code Ann. § 62-3-807).

Allowances.

No provisions for support of wife and family pending administration.

Widow's Quarantine.

No provision for widow's quarantine. Surviving spouse has right to take elective share of 1/3 of decedent's probate estate. (S.C. Code Ann. § 62-2-201). See topic 13.16 Wills, subhead Elective Shares.

Accounts.

Personal representative must circulate to interested distributees and creditors and file formal accounting on later of: (1) One year after first publication of notice to creditors, and (2) 90 days after receipt of estate tax closing letter. (S.C. Code Ann. § 62-3-1001). Proposal for distribution and petition for settlement of estate must also be filed.

Adjudication of Accounts.

Personal representative must file petition for settlement of estate on later of: (1) One year after first publication of notice to creditors or (2) 90 days after receipt of estate tax closing letter. Petition may request court to consider final account or approve accounting and distribution. Any interested person may petition for order compelling personal representative to perform his duties. (S.C. Code Ann. § 62-3-1001).

Settlement and Distribution.

Settlement includes full process of administration, distribution and closing. (S.C. Code Ann. § 62-1-201[37]). Personal representative is under duty to settle and distribute estate of decedent in accordance with terms of any probated and effective will and Probate Code, and as expeditiously and efficiently as is consistent with best interests of estate. (S.C. Code Ann. § 62-3-703). Personal representative must proceed expeditiously with settlement and distribution of decedent's estate under supervision of court, as follows: (a) Immediately after appointment publish notice to creditors required by §62-3-801, (b) within 90 days after appointment file with court inventory and appraisement required by §62-3-706, (c) upon expiration of relevant period, as set forth in §62-3-807, pay claims allowed against estate, as provided in §62-3-807, (d) upon expiration of relevant period, as set forth in §62-3-1001, file account, proposal for distribution, petition for settlement of estate, proofs required by §62-3-1001, and proof of publication of notice to creditors, (e) time periods stated herein for completing above requirements are not intended to supplant any other time periods stated elsewhere in Probate Code and may be extended by court order. (S.C. Code Ann. § 62-3-704).

No final account of fiduciary will be allowed by probate court unless account shows, and judge of such court finds, that all taxes imposed by provisions of c. 7 of Title 12 upon such fiduciary, which have become payable, have been paid, and that all taxes which may become due or secured by bond, deposit, or otherwise. (S.C. Code Ann. § 62-3-1002).

See subheads, Distribution and Abatement, infra.

Liabilities.

Personal representative is fiduciary who must observe standards of care applicable to trustees as described by §62-7-933. (S.C. Code Ann. § 62-3-703). If personal representative breaches fiduciary duty, he is liable to interested persons for damage or loss resulting from breach to same extent as trustee of express trust. (S.C. Code Ann. § 62-3-712). Any sale or encumbrance to personal representative, spouse, agent or attorney, or any corporation of trust in which he has substantial beneficial interest or any transaction which is effected by substantial conflict of interest on his part, is voidable by any person interested in estate, except one who has consented after fair disclosure, unless will or contract entered into by decedent expressly authorized transaction or transaction is approved by court after notice to interested persons. (S.C. Code Ann. § 62-3-713). Person who deals with personal representative in good faith for value is protected as if personal representative properly exercised his power. (S.C. Code Ann. § 62-3-714).

Distribution.

Personal representative must file proposal to distribute estate assets prior to distribution and mail it to unpaid creditors and estate beneficiaries who may object within 30 days. (S.C. Code Ann. § 62-3-906[b]). Real property devolves to devisees or heirs at death of owner. Personal property devolves at expiration of three years after decedent's death if not yet distributed by personal representative. (S.C. Code Ann. § 62-3-101). Personal representative executes deed of distribution for all property, real and personal. Deed of distribution is evidence of title. (S.C. Code Ann. § 62-3-907). As to real property it constitutes release of personal representative's power over title to real property. Recipients of deed of distribution and their purchasers or encumbrancers are afforded protections found in §§62-3-908 and -910. As to personal property deed of distribution constitutes transfer of title and release of personal representative's power over title to property.

Abatement.

Unless otherwise provided or expressed in will, assets abate without regard to character as real or personal as follows: (1) Intestate property; (2) residuary devises; (3) general devises; (4) specific devises. (S.C. Code Ann. § 62-3-902).

Tax Liabilities.

Early distributions can impose liability upon personal representative if early distribution injures interested party, which includes creditor and claimants. (S.C. Code Ann. § 62-3-807[b]). If penalties and interest caused by negligence of personal representative, he may be charged with interest or penalties. (S.C. Code Ann. § 62-3-916[c][3]). If personal representative distributes property prior to final apportionment of tax, distributee must provide bond or other security for apportionate liability. (S.C. Code Ann. § 62-3-916[d][2]). Personal representative has duty to institute action to recover from distributor apportioned tax. (S.C. Code Ann. § 62-3-916[g]).

Compensation of Representatives.

Unless will or contract provides otherwise or court authorities move for extraordinary services, not to exceed 5% of value of personal property plus sales proceeds of real property on sales directed or authorized by will or court order, plus 5% of income of estate and minimum commission is $50. (S.C. Code Ann. § 62-3-719). If personal representative defends or prosecutes suit in good faith, he is entitled to receive necessary expenses including reasonable attorneys' fees. (S.C. Code Ann. § 62-3-720). Reasonableness of compensation of personal representative may be reviewed by court. (S.C. Code Ann. § 62-3-721).

Small Estates.

Two small estate methods for estates not exceeding $10,000. First provides for simplified handling of estate by small estate affidavit. Affiant must state that value does not exceed $10,000, 30 days have elapsed since decedent's death; no one applied or been appointed personal representative; state that claiming successor is entitled to payment or delivery of property; be approved and countersigned by probate judge and only upon judge's satisfaction that successor is so entitled; and be filed in probate court. This method is ineffective as to real estate, and cannot be utilized by creditors. (S.C. Code Ann. § 62-3-1201). Second small estate method applies where personal representative is appointed, and allows personal representative, with or without notifying creditors, to immediately disburse estate to persons entitled and file closing statement. (S.C. Code Ann. §§ 62-3-1203 to -1204).

Discharge.

Within one year after date of first publication of notice to creditor (or if state or federal estate tax return was filed, within 90 days after receipt of state or federal estate tax closing letter, whichever is later), personal representative must file with court following: (a) full account in writing of his administration; (b) proposal for distribution of assets not yet distributed; (c) petition for settlement of estate; and (d) proof that notice of right to demand hearing and copies of (a), (b), and (c), have been sent to all interested persons including creditors of whom personal representative is aware whose claims are neither paid nor barred. If personal representative does not timely perform these duties, any interested person may petition for order compelling his performance of these duties. After 30 days from filing by personal representative of proof that notice of right to demand hearing has been sent to those entitled, court may order discharge and such other orders necessary. If interested person files with court written demand within 30-day period, court may enter its order or orders only after notice to all interested persons and hearing. If one or more heirs or devisees were omitted as parties in, or were not given notice of, previous formal testacy proceeding, court, on proper petition and after notice to omitted or unnotified persons may determine testacy as it affects omitted persons and confirm or alter previous order as appropriate. (S.C. Code Ann. § 62-3-1001).

Ancillary Administrators.

If nonresident decedent, administration proper in probate court of county in which property of decedent was located at time of death and if more than one probate court is proper, then action should be maintained in court in which action first commenced, unless that court determines it should be located in another court. (S.C. Code Ann. §§ 62-1-301 to -303, S.C. Code Ann. § 62-3-201).

Foreign Executor or Administrator.

Domiciliary foreign personal representative may collect estate assets in South Carolina without local appointment. (S.C. Code Ann. § 62-4-201). Payment or delivery made in good faith releases debtor or person with possession of property to same extent as if made to local personal representative. (S.C. Code Ann. § 62-4-202).

Payment or delivery under §62-4-201 may not be made if resident creditor of nonresident decedent gives written notice to debtor of nonresident decedent or one in possession of personal property otherwise. (S.C. Code Ann. § 62-4-203). If no local administration has been instituted, domiciliary foreign personal representative may file with court in this state in county in which property of decedent is located, authenticated copies of his appointment and obtain all powers of local personal representative. (S.C. Code Ann. §§ 62-4-204 to -207). Foreign personal representative submits personally to jurisdiction of South Carolina courts in estate related proceedings by filing authenticated copies of his appointment, will (if any), and bond pursuant to §62-4-204; by receiving payments under §62-4-201 (jurisdiction limited to money or value collected); or any act which, as individual, would have given South Carolina jurisdiction. (S.C. Code Ann. § 62-4-301).

Absent application of §62-4-301, S.C. courts have jurisdiction over foreign personal representative to same extent decedent was subject immediately prior to death. (S.C. Code Ann. § 62-4-302). Service of process upon foreign personal representative by registered or certified mail to last reasonably ascertainable address, with return receipt; first class mail acceptable if registered or certified unavailable; or service in manner S.C. law permits on foreign personal representative or decedent prior to death. Once service made, 30 days allowed for response or appearance. (S.C. Code Ann. § 62-4-303).

Uniform Fiduciaries Act not adopted.

Uniform Trustees' Powers Act adopted. (S.C. Code Ann. §§ 62-7-701 to -709).

Revised Uniform Principal and Income Act adopted. (S.C. Code Ann. §§ 62-7-401 to -432). See topic 13.11 Trusts.

Revised Uniform Anatomical Gift Act adopted. (S.C. Code Ann. §§ 44-43-310 to -420). Driver's license must show driver is donor pursuant to Act. (S.C. Code Ann. § 44-43-40).

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13.15 TRUSTS:

The English Statute of Uses is in force. (S.C. Code Ann. § 62-7-107).

Uniform Probate Code adopted (but not 1975 or 1977 amendments) with substantial modifications. (S.C. Code Ann. §§ 62-7-101 to 62-7-1106).

Uniform Trust Code adopted with modifications by 2005 S.C. Act 66, May 23, 2005. (S.C. Code Ann. §§ 62-7-101 to -1106).

Kinds.

South Carolina trust code applies to express trusts but not to constructive trusts, resulting trusts, or business trusts. (S.C. Code Ann. §§ 33-53-10 to -50). (S.C. Code Ann. § 62-7-101). As to latter, see category 2 Business Organizations, topic 2.04 Joint Stock Companies, subhead Massachusetts or Business Trusts. As to business trusts, see South Carolina Business

Corporation Act of 1988 under category Business Organizations, topic Corporations.

Creation (S.C. Code Ann. § 62-7-101) of trust must be in writing signed by declarant, or by will, except for trusts of personal property with trustee other than settlor, which can be oral. This does not apply to trust arising, transferred or extinguished by implication of law. (S.C. Code Ann. § 62-7-103). Trusts for religious, educational or charitable purposes may be created by will or by grant giving to trustee discretionary power in selection of objects or beneficiaries of such trust. (S.C. Code Ann. §§ 62-7-405, -408, -409).

All trustees of any trusts governed by laws of this state are required to act or refrain from acting so as not to subject such trusts to taxes imposed by Internal Revenue Code on self-dealing, failure to distribute income, excess business holdings, investments which jeopardize carrying out exempt purposes, and taxable expenditures, unless trust instrument expressly provides otherwise. (S.C. Code Ann. § 62-7-405).

Who May Act as Trustee.

No specific restrictions in state version of Uniform Trust Code. As to limitation on foreign bank or trust company, see category 3 Business Regulation and Commerce, topic 3.01 Banks and Banking.

Powers and Duties of Trustees.

Uniform Trust Code provisions adopted. (S.C. Code Ann. §§ 62-7-801 to -1106).

Investments by fiduciaries are regulated by S.C. Code Ann. §§ 62-5-411, -412; §§ 62-7-801 to -933; §§ 31-19-20, -40; §§ 34-21-210 to -430; § 11-1-70.

Securities in Name of Nominee.

Bank or trust company may register and hold securities in the name of a nominee. (S.C. Code Ann. §§ 35-5-10 to -40).

Common Trust Fund Act adopted (S.C. Code Ann. §§ 34-21-210 to -430) allowing use of common trust funds by trust institutions. Uniform Common Trust Fund Act not adopted.

Uniform Fiduciaries Act has not been adopted.

Uniform Principal and Income Act (1997).—State version adopted in 2001 and recodified as part of state version of Uniform Trust Code in 2005. (S.C. Code Ann. §§ 62-7-901 to -932).

§19 effective date of South Carolina Probate Code applicable: generally July 1, 1987 (S.C. Code Ann. § 62-1-100); for variation see generally S.C. Code Ann. § 62-1-100(b):

"(b) Except as provided elsewhere in this Code, on the effective date of this Code:

(1) the Code applies to any wills of decedents dying thereafter;

(2) the Code applies to any proceedings in court then pending or thereafter commenced regardless of the time of the death of decedent except to the extent that in the opinion of the court the former procedure should be made applicable in a particular case in the interest of justice or because of infeasibility of application of the procedure of this Code;

(3) every personal representative, including a person administering an estate of a minor or incompetent holding an appointment on that date, continues to hold the appointment but has only the powers conferred by this Code and is subject to the duties imposed with respect to

any act occurring or done thereafter;

(4) an act done before the effective date in any proceeding or any accrued right is not impaired by this Code. If a right is acquired, extinguished, or barred upon the expiration of a prescribed period of time which has commenced to run by the provisions of any statute before the effective date, the provisions remain in force with respect to that right;

(5) any rule of construction or presumption provided in this Code applies to instruments executed and multiple-party accounts opened before the effective date unless there is a clear indication of a contrary intent."

Sales.

Estates held in trust may be sold under execution issued against the beneficiary of the trust, in the same manner as if such property was held in the beneficiary's own name. (S.C. Code Ann. § 15-39-620).

Trustee—Beneficiary—Fiduciaries prohibited from making or participating in fiduciary decisions to benefit themselves by prohibiting exercise of general powers of appointment in favor of selves when there are other beneficiaries. (S.C. Code Ann. § 62-7-814).

Merger of legal and equitable titles of trust property may not occur unless sole fiduciary and sole beneficiary are identical. (S.C. Code Ann. § 62-7-402).

Uniform Statutory Rule Against Perpetuities adopted (S.C. Code Ann. §§ 27-6-10 to -80); supersedes common law rule.

Gifts to Minors.

See category 14 Family, topic 14.10 Infants.

Perpetuities.

See category 21 Property, topic 21.12 Perpetuities.

Pour-Over Trusts.

See topic 13.16 Wills.

13.16 WILLS:

Uniform Probate Code (but not 1975 or 1977 amendments) adopted (S.C. Code Ann. §§ 62-1-101 to -508) with following modifications:

Who May Make Will.

Any person married, emancipated, or not minor as defined in §62-1-201(24) and who is of sound mind may make will. (S.C. Code Ann. § 62-2-501).

Execution.

Every will must be in writing signed by testator or in testator's name by some other person in testator's presence and by his direction, and must be signed by at least two persons each of whom witnessed either signing or testator's acknowledgment of signature or of will. (S.C. Code Ann. § 62-2-502).

Holographic wills are impliedly forbidden by statute, unless specifically determined valid by out of state execution or out of state probate. (S.C. Code Ann. §§ 62-2-502, 62-2-505, 62-3-303[c] and [d], and 62-3-408).

Revocation.

Will or any part thereof is revoked: (1) By subsequent will which revokes prior will or part expressly or by inconsistency; (2) by being burned, torn, cancelled, obliterated, or destroyed, with intent and for purpose of revoking it by testator or by another acting at his direction and in his presence. (S.C. Code Ann. § 62-2-506). In case of subsequent annulment, divorce, or order purporting to terminate all marital property rights or confirming equitable distribution between spouses, divorce, annulment, or order revokes any disposition or appointment of property including beneficial interests made by will to spouse, any provision conferring general or special power of appointment on spouse, and any nomination of spouse as executor, trustee, conservator, or guardian, unless will expressly provides otherwise. Property prevented from passing to spouse because of revocation by divorce, or annulment or order passes as if spouse failed to survive decedent, and other provisions conferring some power or office on spouse are interpreted as if spouse failed to survive decedent. If provisions are revoked solely by this section, they are revived by testator's remarriage to former spouse. Decree of separate maintenance which does not terminate status of husband and wife is not divorce for purposes of this section. No other change of marital or parental circumstances other than those described in this section revokes will. (S.C. Code Ann. § 62-2-507).

Revival.

(a) Revocation by acts resulting in physical destruction of will made subsequent to former will, where subsequent will would have revoked former will if subsequent will had remained effective at death of testator, does not revive or make effective any former will unless it appears by clear, cogent, and convincing evidence that testator intended to revive or make effective former will; (b) revocation by third will of will made subsequent to former will, where subsequent will would have revoked former will if subsequent will had remained effective at death of testator, does not revive or make effective any former will except to extent it appears from terms of third will that testator intended former will to take effect. (S.C. Code Ann. § 62-2-508).

Self-proved Wills.

Any will may be simultaneously executed, attested, and made self-proved. Self-proof is effective upon acknowledgment by testator and affidavit of at least one witness, acknowledgment made before officer authorized to administer oaths under laws of state where execution occurs and evidenced by officer's certificate, under official seal, in following form or in similar form showing same intent:

"I ________, the testator, sign my name to this instrument this __ day of __, 20_, and being first duly sworn, do hereby declare to the undersigned authority that I sign and execute this instrument as my last will and that I sign it willingly (or willingly direct another to sign for me), that I execute it as my free and voluntary act for the purposes therein expressed, and that I am eighteen years of age or older, of sound mind, and under no constraint or undue influence.

____

Testator

We, _____________, and _____________,

the witnesses, sign our names to this instrument, and at least one of us, being first duly sworn, does hereby declare, generally and to the undersigned authority that the testator signs and executes this instrument as his last will and that he signs it willingly (or willingly directs another to sign for him), and that each of us, in the presence and hearing of the testator, hereby signs this will as witness to the testator's signing, and that to the best of our knowledge the testator is eighteen years of age or older, of sound mind, and under no constraint or undue influence.

____

Witness

____

Witness

“The State of ____________________

County of ______________________

Subscribed, sworn to and acknowledged before me by __________________, the testator, and subscribed and sworn to before me by _____________________, witness, this _____ day of _____, 20___.

____________________(SEAL)

(Signed)

____

____

(Official capacity of officer)”

Attested will may at any time subsequent to its execution be made self-proved by acknowledgment thereof by testator and affidavit of at least one witness, before an officer authorized to administer oaths under laws of state where acknowledgment occurs and evidenced by officer's certificate, under official seal, attached, or annexed to will in following form or in similar form showing same intent:

“The State of ____________________

County of ______________________

We, _______________, and _______________, the testator and at least one of the witnesses, respectively, whose names are signed to the attached or foregoing instrument, being first duly sworn, do hereby declare to the undersigned authority that the testator signed and executed the instrument as his last will and that he had signed willingly (or willingly directed another to sign for him), and that he executed it as his free and voluntary act for the purposes therein expressed, and that each of the witnesses, in the presence and hearing of the testator, signed the will as witness and to the best of his knowledge the testator was at that time eighteen years of age or older, of sound mind, and under no constraint or undue influence.

____

Testator

____

Witness

Subscribed, sworn to, and acknowledged before me by __________________, the testator, and subscribed and sworn to before me by _____________________, witness, this _____ day of _____, 20___.

____________________(SEAL)

(Signed)

____

____

(Official capacity of officer)”

(S.C. Code Ann. § 62-2-503).

Filing.

Within 30 days after notice or knowledge of death of testator, person having custody or control of will must deliver it to judge of probate court. (S.C. Code Ann. § 62-2-901). Any person who intentionally or fraudulently destroys, suppresses, conceals, or fails to file will in his possession shall, upon conviction, be punished by fine of not more than $500, or by imprisonment for not more than one year, or both. (S.C. Code Ann. § 62-2-901).

Unclaimed Legacies.

See topic 13.08 Executors and Administrators, subhead Settlement and Distribution.

Anti-lapse.

Unless will provides otherwise, if devisee, who is great-grandparent or lineal descendant of great-grandparent of testator is dead at time of execution of will, fails to survive testator, or is treated as if he predeceased testator, issue of deceased devisee who survive testator take in place of deceased devisee and if they are all of equal degree of kinship to devisee they take equally, if not, more remote take by representation. (S.C. Code Ann. §§ 62-2-603 and 62-2-601).

Elective Shares.

If married person domiciled in S.C. dies, surviving spouse has right of election to take elective share of one-third decedent's probate estate. (S.C. Code Ann. § 62-2-201). Right of election may include one-third of assets in revocable inter vivos trust established by decedent. (S.C. Code Ann. § 62-7-112). Spouse must elect within latter of eight months after death or six months after probate of will by filing petition with probate court and mailing same to personal representative. In determining share, spouse is charged with property of probate estate passing or having passed to spouse either outright or in form qualifying for federal estate tax marital deduction. (S.C. Code Ann. § 62-2-201 to -207). If married person not domiciled in S.C. dies, right, if any, of spouse to take elective share in S.C. property governed by law of decedent's domicile at death.

Pretermitted Children.

Intestate share is set aside for any surviving child who either was unprovided for because he was thought to be dead at execution of will or is born to or adopted by testator after execution of will which omits provision for child; but in case of child born to or adopted by testator after execution of will, he does not take set aside share if omission was intentional, if he was otherwise provided for outside of and intentionally in lieu of will's provisions, or if while other child or children were then living testator devised substantially all of testator's estate to his spouse. Election must be made within latter of eight months after death or six months after probate of will by filing petition with probate court and mailing same to personal representative. (S.C. Code Ann. § 62-2-302).

Advancements.

The doctrine of advancements applies only to cases of intestacy (or where directed by will), where indicated in will or in testator's contemporaneous writing or where acknowledged by devisee. (S.C. Code Ann. §§ 62-2-110 and 62-2-610).

Testamentary Guardian.

See category 14 Family, topic 14.07 Guardian and Ward.

Foreign Executed Wills.

Written will is valid if executed in compliance with §62-2-502 either at time of execution or at time of death of testator, or if it complies with law at time of execution of: (1) Place where will is executed, or (2) place where testator is domiciled at time of execution or death. (S.C. Code Ann. § 62-2-505).

Foreign Probated Wills.

Final order of court of another state determining testacy, or validity of will made in proceeding involving notice to and opportunity for contest by all interested persons, must be accepted as determinative by courts of this State, if it includes or is based upon, finding that decedent was domiciled at his death in state where order was made. (S.C. Code Ann. § 62-3-408).

Renunciation.

If person disclaims property interest, in manner provided in §2518 of Internal Revenue Code, interest will be considered as never having been transferred to that person. (S.C. Code Ann. §§ 62-2-801 and 12-16-1910).

Living Wills.

Known as Death With Dignity Act. (S.C. Code Ann. §§ 44-77-10 to -160). Adult may make written directive instructing his physician to withhold or withdraw life sustaining procedures in event of terminal condition. In addition, S.C. Statutory Form Health Care Durable Power of Attorney was created by §62-5-504, which document also contains living will provisions. Death With Dignity Act provides that written declaration must be substantially in following form (or former form used by South Carolina).

STATE OF SOUTH CAROLINA

DECLARATION OF A DESIRE FOR A NATURAL DEATH

COUNTY OF____________________

I, _________________, Declarant, being at least eighteen years of age and a resident of and domiciled in the City of __________, County of ______________, State of South Carolina, make this Declaration this ______ day of ________, 20_____.

I willfully and voluntarily make known my desire that no life-sustaining procedures be used to prolong my dying if my condition is terminal or if I am in a state of permanent unconsciousness, and I declare:

If at any time I have a condition certified to be a terminal condition by two physicians who have personally examined me, one of whom is my attending physician, and the physicians have determined that my death could occur within a reasonably short period of time without the use of life-sustaining procedures or if the physicians certify that I am in a state of permanent unconsciousness and where the application of life-sustaining procedures would serve only to prolong the dying process, I direct that the procedures be withheld or withdrawn, and that I be permitted to die naturally with only the administration of medication or the performance of any medical procedure necessary to provide me with comfort care.

INSTRUCTIONS CONCERNING ARTIFICIAL NUTRITION AND HYDRATION

INITIAL ONE OF THE FOLLOWING STATEMENTS

If my condition is terminal and could result in death within a reasonably short time,

____ I direct that nutrition and hydration BE PROVIDED through any medically indicated means, including medically or surgically implanted tubes.

____ I direct that nutrition and hydration NOT BE PROVIDED through any medically indicated means, including medically or surgically implanted tubes.

INITIAL ONE OF THE FOLLOWING STATEMENTS

If I am in a persistent vegetative state or other condition of permanent unconsciousness,

____ I direct that nutrition and hydration BE PROVIDED through any medically indicated means, including medically or surgically implanted tubes.

____ I direct that nutrition and hydration NOT BE PROVIDED through any medically indicated means, including medically or surgically implanted tubes.

In the absence of my ability to give directions regarding the use of such life-sustaining procedures, it is my intention that this Declaration be honored by my family and physicians and any health facility in which I may be a patient as the final expression of my legal right to refuse medical or surgical treatment and I accept the consequences from the refusal.

I am aware that this Declaration authorizes a physician to withhold or withdraw life-sustaining procedures. I am emotionally and mentally competent to make this Declaration.

APPOINTMENT OF AN AGENT (OPTIONAL)

1. You may give another person authority to revoke this declaration on your behalf. If you wish to do so, please enter that person's name in the space below.

Name of Agent with Power to Revoke: ____________________

Address: ____________________

Telephone Number: ____________________

2. You may give another person authority to enforce this declaration on your behalf. If you wish to do so, please enter that person's name in the space below.

Name of Agent with Power to Enforce: ____________________

Address: ____________________

Telephone Number: ____________________

REVOCATION PROCEDURES

THIS DECLARATION MAY BE REVOKED BY ANY ONE OF THE FOLLOWING METHODS. HOWEVER, A REVOCATION IS NOT EFFECTIVE UNTIL IT IS COMMUNICATED TO THE ATTENDING PHYSICIAN.

(1) BY BEING DEFACED, TORN, OBLITERATED, OR OTHERWISE DESTROYED, IN EXPRESSION OF YOUR INTENT TO REVOKE, BY YOU OR BY SOME PERSON IN YOUR PRESENCE AND BY YOUR DIRECTION. REVOCATION BY DESTRUCTION OF ONE OR MORE OF MULTIPLE ORIGINAL DECLARATIONS REVOKES ALL OF THE ORIGINAL DECLARATIONS;

(2) BY A WRITTEN REVOCATION SIGNED AND DATED BY YOU EXPRESSING YOUR INTENT TO REVOKE.

(3) BY YOUR ORAL EXPRESSION OF YOUR INTENT TO REVOKE THE DECLARATION. AN ORAL REVOCATION COMMUNICATED TO THE ATTENDING PHYSICIAN BY A PERSON OTHER THAN YOU IS EFFECTIVE ONLY IF:

(A) THE PERSON WAS PRESENT WHEN THE ORAL REVOCATION WAS MADE;

(B) THE REVOCATION WAS COMMUNICATED TO THE PHYSICIAN WITHIN A REASONABLE TIME;

(C) YOUR PHYSICAL OR MENTAL CONDITION MAKES IT IMPOSSIBLE FOR THE PHYSICIAN TO CONFIRM THROUGH SUBSEQUENT CONVERSATION WITH YOU THAT THE REVOCATION HAS OCCURRED.

TO BE EFFECTIVE AS A REVOCATION, THE ORAL EXPRESSION CLEARLY MUST INDICATE YOUR DESIRE THAT THE DECLARATION NOT BE GIVEN EFFECT OR THAT LIFE-SUSTAINING PROCEDURES BE ADMINISTERED;

(4) IF YOU, IN THE SPACE ABOVE, HAVE AUTHORIZED AN AGENT TO REVOKE THE DECLARATION, THE AGENT MAY REVOKE ORALLY OR BY A WRITTEN, SIGNED, AND DATED INSTRUMENT. AN AGENT MAY REVOKE ONLY IF YOU ARE INCOMPETENT TO DO SO. AN AGENT MAY REVOKE THE DECLARATION PERMANENTLY OR TEMPORARILY.

(5) BY YOUR EXECUTING ANOTHER DECLARATION AT A LATER TIME.

____

SIGNATURE OF DECLARANT

STATE OF _____________ AFFIDAVIT

COUNTY OF _____________

We, _______________, and _______________, the undersigned witnesses to the foregoing Declaration, dated the _____ day of, ___________, 20______, at least one of us being first duly sworn, declare to the undersigned authority on the basis of our best information and belief, that the Declaration was on that date signed by the declarant as and for his DECLARATION OF A DESIRE FOR A NATURAL DEATH in our presence and we, at his request and in his presence, and in the presence of each other, subscribe our names as witnesses on that date. The declarant is personally known to us and we believe him to be of sound mind. Each of us affirms that he is qualified as a witness to this Declaration under the provisions of the South Carolina Death With Dignity Act in that he is not related to the declarant by blood, marriage, or adoption, either as a spouse, lineal ancestor, descendant of the parents of the declarant, or spouse of any of them; nor directly financially responsible for the declarant's medical care; nor entitled to any portion of the declarant's estate upon his decease, whether under any will or as an heir by intestate succession; nor the beneficiary of a life insurance policy of the declarant; nor the declarant's attending physician; nor an employee of such attending physician; nor a person who has a claim against the declarant's decedent's estate as of this time. No more than one of us is an employee of a health facility in which the declarant is a patient. If the declarant is a resident in a hospital or nursing care facility at the date of execution of this Declaration, at least one of us is an ombudsman designated by the State Ombudsman, Office of the Governor.

____

Witness

____

Witness

Subscribed before me by ______________, the declarant, and subscribed and sworn to before me by _______________, the witness, this _____ day of ____________, 20_____.

____

Notary Public for

My commission expires:____________________

SEAL (S.C. Code Ann. § 44-77-50).

Revised Uniform Anatomical Gift Act adopted. (S.C. Code Ann. §§ 44-43-310 to -420). Driver's license must show driver is donor pursuant to Act. (S.C. Code Ann. § 44-43-40).

Simultaneous Death.

See topic 13.05 Death, subhead Survivorship.

See also category 12 Environment, topic 12.01 Environmental Regulation.

14 FAMILY

14.01 ADOPTION:

South Carolina Adoption Act.

(Children, S.C. Code Ann. §§ 20-7-1646 to -1897; adult, S.C. Code Ann. § 20-7-1825). Any child present within this state at time petition for adoption is filed, irrespective of place of birth or residence, may be adopted. (S.C. Code Ann. § 20-7-1660). Any South Carolina resident may petition court to adopt child. Under special circumstances placement of adopted child may be to nonresident of South Carolina. (S.C. Code Ann. § 20-7-1670). See also §20-7-1760 as to findings required in order granting adoption to nonresident.

Adoption exists by virtue of statutory authority only. Court finding of “de facto” or “equitable” adoption reversed. (298 S.C. 218, 379 S.E.2d 294).

Adult person may be adopted by any other adult person with appropriate consent. §20-7-1825; §§20-7-1650 to -1770 and §62-2-109 of S.C. Probate Code do not apply to adoption of adult person (S.C. Code Ann. § 20-7-1825). No person or child placing agency may receive anything of value as consideration for relinquishing custody of child for adoption. However, costs may be assessed and payment made, subject to court approval, for: Reimbursement for necessary, actual medical, and reasonable living expenses incurred by mother and child for reasonable period of time; guardian ad litem fee; reasonable attorneys fees; reasonable fees to child placement agencies; reasonable fees to sending agency; fees for obtaining investigations and reports per §20-7-1740; fees of individuals required to take consent/relinquishment per §20-7-1705(A). Court may approve adoption while not approving unreasonable costs. (S.C. Code Ann. § 20-7-1690[F]). Violation of this section or of §16-3-1060 is felony punishable by fine of not more than $10,000 or imprisonment for not more than ten years, or both.

Consent or relinquishment in writing is required: (1) From adoptee if over 14 years of age; and either (2) parents or surviving parent of child conceived or born during marriage of parents; or (3) mother of child born to mother who was not married; and either (4) father of child born when father was not married to child's mother, if child was placed with prospective adoptive parents more than six months after child's birth, but only if father has maintained substantial and continuous or repeated contact with child as demonstrated by: (a) payment by father toward support of child of fair and reasonable sum, based on father's financial ability; and either (b) visits by father to child at least monthly when father is physically and financially able to do so, and when father is not prevented from visiting child by person or agency having lawful custody of child; or (c) regular communication by father with child or with person or agency having lawful custody of child, when father is physically and financially unable to visit child, or when father is prevented from doing so by person or agency having lawful custody of child. (Father of child born when father was not married to child's mother, who openly lived with child for period of six months within one year period immediately preceding placement of child for adoption, and who during six month period openly held himself out to be father of child is considered to have maintained substantial and continuous or repeated contact with child for purpose of this item [4] of subsection [A] of this section); or (5) father of child born when father was not married to child's mother, if child was placed with prospective adoptive parents six months or less after child's birth, but only if: (a) father openly lived with child or child's mother for continuous period of six months immediately preceding placement of child for adoption, and father openly held himself out to be father of child during six month period; or (b) father paid fair and reasonable sum, based on his financial ability for support of child or for expenses incurred in connection with mother's pregnancy or with birth of child, including, but not limited to, medical, hospital, and nursing expenses. (S.C. Code Ann. § 20-7-1690[A]). See S.C. Code Ann. § 20-7-1690(B) and (C) for other consent requirements. Literal requirements of §20-7-1690 need not be met if birth father takes prompt and good faith efforts to assume parental responsibility and comply with statute. (313 S.C. 27, 437 S.E.2d 25). Consent is not required from one whose parental rights have been judicially terminated, from parent found to be mentally incapable of giving consent or relinquishment for purpose of adoption or found to be unlikely to provide minimally acceptable care by family court. (S.C. Code Ann. § 20-7-1695). Adult may be adopted by adult with consent of person to be adopted or his guardian, and with consent of spouse, if any, of sole adoptive parent. (S.C. Code Ann. § 20-7-1825).

Withdrawal of any consent of adoption is not permitted except by order of court after notice and hearing. Entry of final decree of adoption renders consent irrevocable. (S.C. Code Ann. § 20-7-1720). Consent must be filed at time petition is filed or after filing, upon good cause shown. (S.C. Code Ann. § 20-7-1730).

Consent of mother required for natural father to adopt illegitimate child of parties. (288 S.C. 468, 343 S.E.2d 613).

Consent by parent who is child is not subject to revocation by reason of parent's minority. (S.C. Code Ann. § 20-7-1690[E]).

Consent or relinquishment must be made by sworn document and signed by person or head of agency giving consent or relinquishment after birth of adoptee. (S.C. Code Ann. § 20-7-1700[A]). For consent obtained in South Carolina, such document must be signed before two witnesses, one of whom must be either family court judge, S.C. attorney not representing petitioners, person certified by Department of Social Services to obtain consents or relinquishments. If consent is obtained outside State, court must determine consent complies with laws of that state and relinquishing party is domiciled in that state or consent is in substantial compliance with §20-7-1700(A). (S.C. Code Ann. § 20-7-1705[A]).

Jurisdiction.

Exclusive jurisdiction of adoption proceedings is in Family Court. (S.C. Code Ann. §§ 20-7-1680 and 20-7-420[3]).

Venue.

Petition may be filed in county: (1) Where petitioner resides, or is in military service; (2) where child resides or is born; (3) in case of nonresident petitioner, petition must be brought in county where child resides, is born, or where agency having custody of child is located. (S.C. Code Ann. § 20-7-1680).

Petition for adoption must be filed within 60 days of date adoptee is placed for purposes of adoption in home of petitioner. (S.C. Code Ann. § 20-7-1730[B]). Must file following at time adoption petition is filed or after filing, on good cause shown: (1) Consent or relinquishment required by §20-7-1690; (2) preplacement investigation report; (3) background investigation report; (4) statement of all payments of money or anything of value made within past five years or agreed to be made in future by or on behalf of petitioner that is not disbursement made and reported pursuant to §20-7-1775. (S.C. Code Ann. § 20-7-1730[C]). Petition must specify: (1) Names, ages and residence of petitioners, and, if married, place and date of marriage; (2) date custody of child is or will be acquired and from what person or agency; (3) date and place of birth of child, if known; (4) name used for child in proceeding, and new name if one desired; (5) desire that relationship of parent and child be established between petitioners and child and that petitioner is fit; (6) full description and statement of value of all property of child; (7) facts, if any, which excuse consent on part of parent to adoption; (8) facts, if any, which may permit placement with or adoption by nonresidents of this State, pursuant to S.C. Code Ann. § 20-7-1670; (9) existence and nature of any prior court orders known to petitioner which affect custody, support, or visitation of child; (10) relationship, if any, of each petitioner to child; and (11) name and address of child placing agency or person facilitating placement of child for adoption, if any. (S.C. Code Ann. § 20-7-1730[A]).

Appointment of Guardian Ad Litem for Child.

Guardian ad litem must be appointed for adoptee. (S.C. Code Ann. § 20-7-1732).

Notice of proceeding must be given to: (1) adjudicated father, (2) any person from whom consent or relinquishment is required (S.C. Code Ann. § 20-7-1690) but cannot be obtained, (3) father of child whose consent or relinquishment is not required (S.C. Code Ann. § 20-7-1690), (4) person recorded as father on child's birth certificate, (5) person living with child or child's mother at time of adoption and holding self out to be child's father, (6) person identified as child's father by sworn, written statement of mother, (7) persons noted at S.C. Code Ann. § 20-7-

1695 (A)(2). (S.C. Code Ann. § 20-7-1734[B]). Responsible Father Registry has as its purpose to provide notice to unmarried biological fathers who affirmatively assume responsibility for children they may have fathered. (S.C. Code Ann. §§ 63-9-810, 63-9-820).

Proceedings.

Prior to final hearing, investigations and reports must be completed. Prior to placement of child with prospective adoptive parents, there must be pre-placement investigation, background investigation and complete reports on each. Pre-placement investigation concerns suitability of petitioners as adoptive parents and best interests of adoptee. Background investigation concerns medical history of adoptee's biological family and adoptee, but may not disclose identity of biological parents. Postplacement investigation report must be filed with court at final hearing, to verify allegations of petition and attachments, to evaluate progress of placement of adoptee, and to determine whether adoption by petitioner is in best interest of adoptee. (S.C. Code Ann. § 20-7-1740).

Final Hearing and Decree.

Final hearing on adoption petition must not be held prior to 90 days and no later than six months after filing of adoption petition. In case of special needs of child, hearing must be held no sooner than 90 days and no later than 12 months. Court may extend this time upon good cause shown. Court will issue order granting adoption if it finds: (1) Adoptee has been in actual custody of petitioner for period of 90 days; (2) all necessary consents or relinquishments for purpose of adoption have been obtained; (3) notice of adoption proceeding has been given to all persons entitled to receive notice under §§20-7-1690 and S.C. Code Ann. § 20-7-1734, and any hearing resulting from notice has been held and handled according to satisfaction of court; (4) disbursements made and accounted for pursuant to §20-7-1775 are reasonable costs and expenses incurred or for fees for services rendered; (5) petitioner is fit and able to care for child; and (6) best interests of child are served by adoption. (S.C. Code Ann. § 20-7-1760). Court enters findings in written decree which orders what effect adoption has on legal rights of adoptee biological parents, that adoptee is child of petitioner, and that adoptee is accorded status provided for in §20-7-1770. (S.C. Code Ann. § 20-7-1760[C]).

Name.

For each adoption handled through child placing agency, attorney for petitioner must, within 15 days of filing of Final Decree, transmit to appropriate agency certified copy of Adoption Decree and Certificate of Adoption with part II completed and verified by adoptive parent and part III certified by Clerk of Court. Agency must complete part I of Certificate of Adoption and transmit form to State Registrar of Vital Statistics within 30 days of filing of Final Decree. For other adoptions, attorney for petitioner completes parts I and II of Certificate of Adoption form provided by State Registrar of Vital Statistics and file with Clerk of Court at time of filing of Final Decree. Clerk of Court certifies part III of Certificate of Adoption and transmits form to state registrar within 30 days of filing of Final Decree. (S.C. Code Ann. § 20-7-1790). State registrar, upon receipt of Certified Certificate of Adoption, amends or supplements birth certificate, as provided by §44-63-140. (S.C. Code Ann. § 20-7-1790[E]).

Effect of Adoption.

After final decree of adoption is entered, biological parents of adopted child, unless they are adoptive parents, are relieved of all parental responsibilities for child and have no rights over such adopted child providing parental responsibilities and rights are expressly affected by final decree. Pre-adoption agreements to contrary are without effect. Relationship of parent and child with all duties, rights and legal consequences of natural relationship exists between adoptee, adoptive parents, and kindred of adoptive parents. (S.C. Code Ann. § 20-7-1770).

Adoptive child in same position as natural child for purposes of inheritance. However,

§20-7-1770 does not apply to remainder interest passed by devise. (285 S.C. 331, 329 S.E.2d 771).

Setting Aside Adoption.

Party to adoption proceeding may appeal final order, judgment, or decree of adoption in manner provided for appeals from court in other family court matters. In addition, this section may not be construed to preclude court's inherent authority to grant collateral relief from judgment on ground of extrinsic fraud. For purposes of this subsection, “extrinsic fraud” is fraud that induces person not to present case or deprives person of opportunity to be heard. However, court is under no obligation to grant person relief from judgment based upon extrinsic fraud if person might have prevented judgment by exercise of proper diligence. (S.C. Code Ann. § 20-7-1800[B]). Except as above in (B), after final order, judgment, or decree of adoption is entered, no party to adoption proceeding, and no one claiming under party, may question validity of adoption because of any defect or irregularity, jurisdictional or otherwise, in proceeding, and party and anyone claiming under party, is fully bound by order. No adoption may be attacked either directly or collaterally because of any procedural or other defect by anyone who was not party to adoption. Failure on part of court or agency to perform duties or acts within time required by this chapter does not affect validity of any adoption proceeding. (S.C. Code Ann. § 20-7-1800[A]). See category 5 Civil Actions and Procedure, topic 5.03 Appeal and Error.

Removal hearing held when adoptive parents have received adoptee but no adoption petition has been filed pursuant to §20-7-1730, unless adoptee is removed pursuant to §20-7-610. (S.C. Code Ann. § 20-7-1738).

Releasing identifying information about adoptee is misdemeanor offense. (S.C. Code Ann. § 20-7-1780).

14.02 ALIMONY:

See topic 14.06 Divorce.

14.03 COMMUNITY PROPERTY:

System does not obtain in South Carolina.

14.04 DESERTION:

See topic 14.09 Husband and Wife.

14.05 DISSOLUTION OF MARRIAGE:

See topic 14.06 Divorce.

14.06 DIVORCE:

Divorce from bonds of matrimony was not allowed prior to 1949. This subject is now governed by S.C. Code Ann. §§ 20-3-10 to -235.

1979 Act provides that each spouse is responsible for support of other spouse and children, and makes provisions of divorce statute equally applicable to each spouse.

Uniform Marriage and Divorce Act not adopted.

Grounds for absolute divorce are adultery, desertion for a period of a year, physical cruelty, continuous separation for a period of one year, and habitual drunkenness, term “habitual drunkenness” to be construed to include habitual drunkenness caused by use of any narcotic drug. (S.C. Code Ann. § 20-3-10).

Bodily injury is not required in order to find physical cruelty. Single, life-threatening act, or act with life-threatening intent, may constitute physical cruelty. (283 S.C. 318, 322 S.E.2d 680).

Residence Requirements.

Plaintiff must be resident in state for at least one year prior to commencement of action, or if plaintiff is nonresident, defendant must have resided in this state one year immediately preceding action. If both parties are residents when action commenced, plaintiff must have been resident for only three months prior to commencement of action. Terms “residents” or “resided” as used in this section as it applies to plaintiff or defendant stationed in this state or active military service means continuous presence in this state for required period regardless of intent to permanently remain in South Carolina. (S.C. Code Ann. § 20-3-30).

Venue.

Action tried in county: (1) in which defendant resides at time of commencement of action, (2) where plaintiff resides if defendant is nonresident or cannot be found after due diligence, or (3) where parties last resided as husband and wife unless plaintiff is nonresident, then it must be brought in county of defendant's residence. (S.C. Code Ann. § 20-3-60).

Process.

Service may be made by publication if it appears, to satisfaction of court, that defendant cannot be found within state. (S.C. Code Ann. § 20-3-70). Court order must be obtained. Manner of publication set forth in §15-9-710 to -740. Personal service on nonresident is sufficient. (S.C. Code Ann. § 20-3-70).

Third party real property interests affected only after Notice of Pendency of Action has been filed. (S.C. Code Ann. § 20-7-477).

Practice.

Family Court Judge must attempt reconciliation and so report. When either party is member of Armed Forces serving without U.S. continental limits, affidavit by such party that reconciliation is impossible will be accepted in lieu of certificate of unsuccessful attempt to reconcile. (S.C. Code Ann. § 20-3-90, -100).

Judgment or decree cannot be entered until three months after filing of complaint, except where plaintiff seeks divorce on grounds of desertion or separation for one year. (S.C. Code Ann. § 20-3-80).

Temporary alimony may be allowed. (S.C. Code Ann. § 20-3-120).

Allowance for prosecution of suit to either husband or wife is authorized. (S.C. Code Ann. § 20-3-120).

Alimony and separate maintenance and support awards may be granted pendente lite and permanently in such amounts and for periods of time subject to conditions as court considers just including, but not limited to: (1) Periodic alimony to be paid but terminating on remarriage or continued cohabitation of supported spouse or upon death of either spouse; (2) lump sum alimony in finite sum terminable upon death of supported spouse; (3) rehabilitative alimony in finite sum, terminable upon remarriage or continued cohabitation of supported spouse, death of either, or occurrence of specific event in future such as job training completion; (4) reimbursement alimony to be paid in finite sum terminable upon remarriage, continued cohabitation or death of either spouse; (5) separate maintenance and support to be paid periodically, but terminating upon divorce of parties, continued cohabitation, or upon death of either spouse; (6) such other form of spousal support, under terms and conditions as court may consider just. (S.C. Code Ann. § 20-3-130[B]). No award of alimony may be awarded to spouse who commits adultery before earliest of these two events: (1) formal signing of written property or marital settlement agreement or (2) entry of permanent order of separate maintenance and support. (S.C. Code Ann. § 20-3-130).

In making award of alimony or separate maintenance and support, court must consider and give weight in such proportion as it finds appropriate to all of following factors: (1) Duration of marriage and age of parties; (2) physical and emotional condition; (3) educational background; (4) employment history and earning potential; (5) standard of living established during marriage; (6) reasonably anticipated earnings; (7) reasonably anticipated expenses; (8) marital and nonmarital properties of parties; (9) custody of children; (10) marital misconduct or fault; (11) tax consequences; (12) support obligation from prior marriage; (13) such other factors court considers relevant. (S.C. Code Ann. § 20-3-130[C]).

Family Law.

Family Court does not have jurisdiction to award money damages. (284 S.C. 591, 327 S.E.2d 375).

Divorce A Mensa Et Thoro.

Does not exist under statute and may not be granted. (268 S.C. 503, 234 S.E.2d 884). Actions for separate support and maintenance allowed at common law. (194 S.C. 115, 8 S.E.2d 351; 213 S.C. 247, 49 S.E.2d 9).

Permanent alimony allowable in suit by nonadulterous husband or wife either in lump sum or periodic payments. Most types of alimony can be modified based on changed circumstances. (S.C. Code Ann. § 20-3-130). Settlement agreement overrides statutory bar to alimony to adulterer. (375 S.C. 182; 650 S.E.2d 680). Alimony is substitute for support incident to marriage. It is not intended to penalize one spouse while rewarding other. (299 S.C. 353, 384 S.E.2d 741). Rehabilitative alimony is available. (S.C. Code Ann. § 20-3-130). Awarded only in special circumstances, preference for permanent periodic support. Purpose is to encourage dependent spouse to become self-supporting. (361 S.C. 521, 605 S.E.2d 572).

Court should segregate alimony and child support awards, unless good cause not to is shown. (S.C. Code Ann. § 20-3-150). Alimony ceases upon remarriage or continued cohabitation of supported spouse. (S.C. Code Ann. § 20-3-150).

Court has power to modify or terminate alimony award. Courts of S.C. may modify foreign alimony decree, if it is modifiable, pursuant to foreign jurisdiction law upon finding of changed circumstances. (292 S.C. 87, 354 S.E.2d 915).

Division of Property of Spouses.

Family Court has exclusive jurisdiction to settle all legal and equitable rights of parties to real and personal property of marriage in actions for divorce, support and maintenance, legal separation, or other marital litigation. (S.C. Code Ann. § 20-7-420[2]). Equitable distribution of marital property governed by §§20-7-471 to -479. Marital property includes all property acquired by parties during marriage regardless of how legal title is held, with exceptions for inherited property, etc. (S.C. Code Ann. § 20-7-473). It further provides factors court is to consider in equitable distribution of property. (S.C. Code Ann. § 20-7-472; 284 S.C. 71, 325 S.E.2d 66). There are 15 different factors set forth in §20-7-472 as follows: (1) Duration of marriage together with ages of parties at time of marriage and at time of divorce or separate maintenance or other marital action; (2) marital misconduct or fault of either or both parties, whether or not used as basis for divorce as such, if misconduct affects or has affected economic circumstances of parties, or contributed to breakup of marriage; provided, that no evidence of personal conduct which would otherwise be relevant and material for purposes of this subsection may be considered with regard to this subsection if such conduct took place subsequent to happening of earlier of (a) entry of pendente lite order in divorce or separate maintenance action, (b) formal signing of written property or marital settlement agreement, or (c) entry of permanent order of separate maintenance agreement between parties; (3) value of marital property, whether property be within or without State. Contribution of each spouse to acquisition, preservation, depreciation, or appreciation in value of marital property, including contribution of spouse as homemaker; provided, that court considers quality of contribution as well as its factual existence; (4) income of each spouse, earning potential of each spouse, and opportunity for future acquisition of capital assets; (5) health, both physical and emotional, of each spouse; (6) need of each spouse or either spouse for additional training or education in order to achieve that spouse's income potential; (7) nonmarital property of each spouse; (8) existence or nonexistence of vested retirement benefits for each or either spouse; (9) whether separate maintenance or alimony has been awarded; (10) desirability of awarding family home as part of equitable distribution or right to live therein for reasonable periods to spouse having custody of children; (11) tax consequences to each or either party as result of any particular form of equitable apportionment; (12) existence and extent of any support obligations, from prior marriage or for any other reason or reasons, of either party; (13) liens and any other encumbrances upon marital property, which themselves must be equitably divided, or upon separate property of either of parties, and any other existing debts incurred by parties or either of these during course of marriage; (14) child custody arrangements and obligations at time of entry of order; and (15) such other relevant factors as trial court expressly enumerates in its order. Court's order as it affects distribution of marital property is final order not subject to modification except by appeal or remand following proper appeal. Family Court may award exclusive possession of marital residence to one parent upon specific finding of special circumstance or compelling reason. (283 S.C. 205, 320 S.E.2d 730). However, where non-occupying spouse files partition suit with regard to marital residence, Family Court lacks jurisdiction to award “full title” to either spouse. (283 S.C. 221, 321 S.E.2d 622). If last family residence was state of S. C. and place where husband's conduct created cause of action for divorce was this state, court has jurisdiction over spouse who has left state. (289 S.C. 330, 345 S.E.2d 498). Recent case law allows wife to claim contributions as homemaker as basis of special equity. (278 S.C. 60, 292 S.E.2d 182). Equitable distribution of marital property on divorce can take into account debts of both parties. (285 S.C. 178, 328 S.E.2d 649). Professional or other degree or license not to be classified as marital property, but professional practices may be. (299 S.C. 353, 384 S.E.2d 741). Improvements made to inherited property during marriage are subject to equitable distribution (282 S.C. 162, 318 S.E.2d 566) although inherited property itself is not marital property, subject to equitable distribution, unless certain circumstances exist which cause inherited property to lose its nonmarital character (280 S.C. 418, 312 S.E.2d 267). All vested and non-vested benefits and rights that accrue during marriage in any retirement, pension, profit sharing, annuity, deferred compensation plans are considered marital property. (309 S.C. 539, 424 S.E.2d 552).

Change of Wife's Name.

Wife may resume maiden name, or name of any former husband, or retain married name upon granting of final judgment of divorce or order of separate maintenance. (S.C. Code Ann. § 20-3-180).

Custody of Children.

Court has power with regard to care and custody of children both before and after final judgment. (S.C. Code Ann. § 20-3-160). Mother and father have equal power, rights and duties, equal access and same right to participate. (S.C. Code Ann. § 20-7-100). Custody of child under age of 21 may be controlled by deed of last will and testament made and probated according to law. (S.C. Code Ann. § 21-21-25).

Military Parent Equal Protection Act deals with effect of military parent's military service on issues of child custody, support and visitation. (S.C. Code Ann. §§ 63-5-900 to -950).

Allowance for support of children to be allocated separately from allowance for wife except for good cause shown. (S.C. Code Ann. § 20-3-150). Factors weighed in determining child support amount. (289 S.C. 499, 347 S.E.2d 108). Changing means of calculating child support, despite a different method having been privately negotiated in divorce settlement, is within family court's discretion. (375 S.C. 246, 652 S.E.2d 83).

Remarriage is not restricted in any way, but terminates alimony. (S.C. Code Ann. § 20-3-150).

Collusion.

No divorce may be granted when collusion of parties appears. (S.C. Code Ann. § 20-3-20).

Dower Barred.

See category 21 Property, topic 21.08 Dower.

Annulment of Marriage.

See topic 14.11 Marriage.

Uniform Divorce Recognition Act adopted. (S.C. Code Ann. §§ 20-3-410 to -440).

Uniform Child Custody Jurisdiction Act adopted. (S.C. Code Ann. §§ 20-7-782 to -830).

14.07 [RESERVED]

14.08 GUARDIAN AND WARD:

Uniform Probate Code adopted (but not 1975 or 1977 amendments) with substantial modifications. S.C. Probate Code effective July 1, 1987. (S.C. Code Ann. Title 62).

Selection of Guardian.

Surviving parent may dispose of custody of child by deed or will. If both parents living, both must sign deed. But court of competent jurisdiction may at any time transfer and assign custody of child for its best interest. (S.C. Code Ann. § 21-21-25). Mother and father have equal rights as joint natural guardians. (S.C. Code Ann. § 20-7-100). Parental rights may be terminated with abused, neglected or abandoned children. (S.C. Code Ann. §§ 20-7-1560 to -1582). Americans with Disabilities Act does not prevent TPR when it is in child's best interest. (375 S.C. 276, 651 S.E.2d 622).

Appointment of Guardian.

In actions by or against infants, guardian (who must appear for infant) may be appointed by the court in which the action is brought, or a judge of probate, clerk of court or master. (SCRCP 17[C]). Special provisions as to making application for appointment. (S.C. Code Ann. § 62-5-303). South Carolina Guardian ad Litem Program for abused or neglected children. (S.C. Code Ann. §§ 20-7-121 to 127, and § 20-7-129).

Qualification (Who May Be Guardians).

(S.C. Code Ann. § 62-5-311).

Duties.

(S.C. Code Ann. § 62-5-312).

Inventory.

Conservator must make inventory of all personal and real property within 30 days of appointment. (S.C. Code Ann. § 62-5-418).

Investments by fiduciaries are regulated by §§62-7-302; S.C. Code Ann. §§ 31-19-20 to -40; and. §§ 34-21-210 to -435.

For special provisions regarding conservators for incapacitated persons or minors see S.C. Code Ann. §§ 62-5-401 to -432.

Liability of conservator is same as that of trustee or other fiduciary. (S.C. Code Ann. § 62-5-417).

Accounts annually to probate court; on failure to do so, forfeits commission. (S.C. Code Ann. § 62-5-419).

Termination of Guardianship for Incapacitated Person.

Guardianship terminates upon death of guardian or ward or incapacity of guardian. (S.C. Code Ann. § 62-5-306). Removal or resignation of guardian. (S.C. Code Ann. § 62-3-307).

Temporary Guardians.

(S.C. Code Ann. § 62-5-310).

Incapacitated persons afforded protection in commitment, confinement, appointment of committees and guardians. Provisions for notice, hearings and readjudication. (S.C. Code Ann. §§ 62-5-101 to 435).

Committees have same general powers as guardians of minors. (S.C. Code Ann. § 62-5-602).

Estates of such persons are settled in same manner as other estates. See category 13 Estates and Trusts, topic 13.08 Executors and Administrators.

Mentally Retarded.

Guardian of person and/or property provided for by S.C. Code Ann. §§ 62-5-101 to -435.

Commissions.

Visitor, lawyer, physician, conservator or special conservator is entitled to reasonable compensation from estate, as determined by Court. (S.C. Code Ann. § 62-5-414).

Gifts to Minors.

See topic 14.10 Infants.

Uniform Fiduciaries Act has not been adopted. (S.C. Code Ann. § 36-3-304).

Uniform Child Custody Jurisdiction Act adopted. (S.C. Code Ann. §§ 20-7-782 to -830).

Uniform Interstate Family Support Act adopted. (S.C. Code Ann. §§ 20-7-960 to -1166).

14.09 HUSBAND AND WIFE:

Separate Property.

Real and personal property of a married woman, held by her at the time of her marriage, or thereafter acquired, is her separate property and not subject to her husband's debts. (S.C. Code Ann. § 20-5-30). Married woman has all rights incident to her separate property as if she were unmarried or a man. (Const., art. 17, §9; S.C. Code Ann. § 20-5-20). Spouse acquires vested interest in marital property subject to apportionment on marital litigation. (S.C. Code Ann. § 20-7-471). Family court does not have jurisdiction or authority to apportion nonmarital property. (S.C. Code Ann. § 20-7-473). Married woman has power to bequeath, devise or convey her separate property as though unmarried. (S.C. Code Ann. § 20-5-20).

Contracts.

A married woman may contract as though unmarried. (S.C. Code Ann. § 20-5-10).

Actions.

A married woman may sue and be sued as though unmarried. (S.C. Code Ann. § 15-5-170).

Husband and wife may sue one another. (S.C. Code Ann. § 15-5-170).

Agency.

Relationship of agency between husband and wife is governed by same rules applied to other agencies, but no presumption arises from mere fact of marital relationship that husband is acting as agent for wife. (283 S.C. 408, 323 S.E.2d 523).

Liability for Spouse's Debts.

Under South Carolina common law, either spouse is responsible to third party who provides necessaries for other spouse. (282 S.C. 159, 318 S.E.2d 12).

In absence of fraudulent intent, spouses may make outright gifts to others during marriage. (301 S.C. 100, 390 S.E.2d 376).

Custody of Children.

The father of unmarried child under 21 years of age, if mother be dead, or mother if father be dead, may, by deed or will, dispose of custody of such children, during minority. If father and mother are both living, deed must be signed by both. This does not abrogate power of court to transfer or assign custody of children for their best interest. (S.C. Code Ann. § 21-21-25).

Uniform Child Custody Jurisdiction Act adopted. (S.C. Code Ann. §§ 20-7-782 to -830).

Uniform Reciprocal Enforcement of Support Act adopted. See subhead Uniform Interstate Family Support Act, infra.

Uniform Interstate Family Support Act adopted. (S.C. Code Ann. §§ 20-7-960 to -1329). Revised. List of courts having jurisdiction under Act available from S.C. Dept. of Social Services, 1535 Confederate Avenue Ext., Columbia, SC 29201. http://www.state.sc.us/dss/.

Community property system inapplicable.

See also topics 14.06 Divorce, 14.11 Marriage.

14.10 INFANTS:

Offenses, Prohibition and Enforcement.

Any properly registered South Carolina citizen 18 or older may vote as provided by law. (Const., art. II, §4).

Support of Minor.

Able-bodied father or mother has obligation to support child, breach of which constitutes misdemeanor, punishable by imprisonment for up to one year or fine not less than $300 nor more than $1,500, or both. (S.C. Code Ann. § 20-7-90). Responsibility for minor includes parent, guardian, foster parent, operator, employee, or caregiver at public or private facility. (S.C. Code Ann. § 20-7-490[3]).

Unlawful for person who has charge or custody of child, or who is parent or guardian of child, or who is responsible for care and support of child to place child at unreasonable risk of harm, to endanger life or health of child, or willfully abandon child. Violation felony punishable by fine or not more than ten years imprisonment, or both. (S.C. Code Ann. § 20-7-50).

Ratification of Contracts.

No action can be maintained on promise made under age 18 to pay debt contracted during infancy or on ratification after full age of any promise, except upon contracts for necessaries, made during infancy, unless such promise or ratification is in writing signed by party charged therewith. (S.C. Code Ann. § 20-7-250). Exception is made regarding contracts to borrow money to defray expenses of attending any institution of higher learning. (S.C. Code Ann. § 20-7-260).

Liability of Parents.

Parents may be reimbursed for uninsured damage done by foster child in foster home up to $500. (S.C. Code Ann. § 20-7-1645).

Infant veterans may execute binding contracts, and litigate or settle controversies arising therefrom, in connection with loans under “Servicemen's Readjustment Act of 1944” and Acts amendatory thereto. (S.C. Code Ann. § 25-15-10).

Adoption.

See topic 14.01 Adoption.

Uniform Gifts to Minors Act in effect. (S.C. Code Ann. §§ 20-7-140 to -240). Age of majority under Act is 21. (S.C. Code Ann. § 20-7-150). Act specifically includes gifts of life insurance, realty and tangible personal property, and gifts placed in trust. (S.C. Code Ann. § 20-7-160).

Uniform Securities Ownership by Minors Act has not been adopted.

Uniform Child Custody Jurisdiction Act adopted. (S.C. Code Ann. §§ 20-7-782 to -830).

14.11 MARRIAGE:

Persons who may contract marriage. (S.C. Code Ann. § 20-1-10).

Persons under the age of 16 cannot enter into valid marriage nor can they be married at common law. (S.C. Code Ann. § 20-1-100).

Consent Required.

See subhead License, infra.

License is required. (S.C. Code Ann. § 20-1-210). Applicant must be at least 16. Applicant between 16 and 18 residing with parent, other relative, or guardian, must provide sworn affidavit from such parent, other relative, or guardian consenting to marriage. (S.C. Code Ann. § 20-1-250). All applicants under 18 must furnish birth certificate or hospital or baptismal certificate issued or dated within one year after birth (may furnish military service "ID" card, selective service card, passports and visas in lieu of birth certificate) or affidavit of parent or guardian as to age; all applicants between 18 and 25 must furnish documentary evidence satisfactory to probate judge (S.C. Code Ann. §§ 20-1-260 to -270). Where unmarried female is pregnant or has borne child, age irrelevant as to marriage of mother and putative father provided that parent guardian or someone authorized by statute consents for female. (S.C. Code Ann. § 20-1-300). No parental consent required for putative father, regardless of age. (Id.). Written application for license must be filed with probate judge at least 24 hours prior to issuance of license. (S.C. Code Ann. § 20-1-220). License issued on statement, upon oath or affirmation, showing capacity, names, ages, and residences of both parties. (S.C. Code Ann. §§ 20-1-220 and 20-1-230). License must be delivered to person performing ceremony. (S.C. Code Ann. § 20-1-210). However, it is expressly provided that marriage without license is not illegal. (S.C. Code Ann. § 20-1-360).

Waiting Period.

Written application for license must be filed with probate judge at least 24 hours prior to issuance of license. (S.C. Code Ann. § 20-1-220).

Ceremony may be performed by a minister of the Gospel, an accepted Jewish rabbi or any officer authorized to administer oaths. (S.C. Code Ann. § 20-1-20).

Records of marriages must be kept by probate judge or clerk of court. (S.C. Code Ann. § 20-1-340). See also category 10 Documents and Records, topic 10.04 Records, subhead Vital Statistics.

Common law marriage is recognized. (185 S.C. 131, 193 S.E. 633). Valid common law marriage requires following: (1) intention evidencing actual and mutual agreement to live together as husband and wife, not as concubinage (235 S.C. 102, 110 S.E.2d 1); (2) cohabitation (307 S.C. 471, 415 S.E.2d 812); (3) holding themselves out to public as husband and wife (307 S.C. 322, 414 S.E.2d 811); and (4) no impediments to marriage. Must be at least 16 to establish valid common-law marriage. (S.C. Code Ann. § 20-1-100).

Illegitimate Children.

Marriage of parents of illegitimate child legitimizes such child. (S.C. Code Ann. § 20-1-60).

Prohibited Marriages.

Mentally incompetent persons may not contract marriage. Same sex marriages and marriages between: parent and child, grandparent and grandchild; step-parent and step-child; parent-in-law and child-in-law; grandparent-in-law and grandchild-in-law; brother and sister; uncle and niece; aunt and nephew are also prohibited. (S.C. Code Ann. § 20-1-10). Marriage of first cousins not prohibited. Bigamous marriages void unless former husband or wife absent and unheard from for five years. (S.C. Code Ann. § 20-1-80). If one of parties to bigamous marriage enters contract in good faith and in ignorance of incapacity of other party, children born of marriage are deemed legitimate. (S.C. Code Ann. § 20-1-90).

Adjudication as to validity may be obtained by suit in court of common pleas and decree therein is conclusive on all persons concerned. (S.C. Code Ann. §§ 20-1-510 and -520).

Annulment.

Court of common pleas, on suit brought, may decree marriage void for lack of consent or other cause showing that no real contract of marriage entered into, provided there has been no cohabitation. Provision made for service on nonresidents. (S.C. Code Ann. § 20-1-510, 20-1-530, 20-1-550). However, family court has jurisdiction to determine validity of marriages and to determine actions for annulment of marriage. (S.C. Code Ann. § 20-7-420).

Abandonment.

In so far as marriage relationship is concerned, a spouse abandoned for seven years may, by special statutory proceeding, obtain a judgment under which absent spouse is conclusively presumed dead. (S.C. Code Ann. § 20-1-540).

“No civil action may be brought in this State for the tort of criminal conversation.” (S.C. Code Ann. § 15-3-150). Tort of alienation of affection has been judicially abolished. (310 S.C. 200, 422 S.E.2d 750).

14.12 MARRIED WOMEN:

See topics 14.09 Husband and Wife, Marriage; categories 5 Civil Actions and Procedure, topic Evidence, subhead Witnesses; Debtor and Creditor, topics Exemptions, Homesteads; Documents and Records, topic Acknowledgments; Estates and Trusts, topics Executors and Administrators, Wills; Property, topic Dower.

15 HEALTH

15.01 ABORTIONS:

Abortions are legal in limited circumstances. (S.C. Code Ann. § 44-41-20).

Consent requirements are codified at §§44-41-30 to -37 and at S.C. Code Ann. § 44-41-330 (Women's Right to Know Act).

Abortions must be reported to Department of Health and Environmental Control within seven days of procedure. (S.C. Code Ann. § 44-41-60).

Licensing of abortion facilities is governed by Department of Health and Environmental Control. (S.C. Code Ann. § 44-41-75).

Partial-birth abortion is felony offense. (S.C. Code Ann. § 44-41-85).

No state funds or Medicaid funds to perform abortions, except abortions authorized by federal law under Medicaid program. (S.C. Code Ann. § 1-1-1035).

15.01A CONTAGIOUS AND INFECTIOUS DISEASES:

Department of Health and Environmental Control (http://www.scdhec.net/) makes and distributes list declaring what diseases are regarded as dangerous, contagious, or infectious on annual Department of Health and Environmental Control List of Reportable Diseases. (S.C. Code Ann. § 44-29-20).

Transporters of human remains must be advised of presence of certain designated contagious or infectious diseases. (S.C. Code Ann. § 44-29-20).

Unlawful to knowingly expose another person to infection with sexually transmitted disease. (S.C. Code Ann. §§ 44-29-60 and 44-29-145).

Physicians, laboratories or others who diagnose or treat cases of sexually transmitted diseases are required to report to Department of Health and Environmental Control; sexual contacts and intravenous drug use contacts must be identified. (S.C. Code Ann. §§ 44-29-70, 44-29-80, and § 44-29-90). Anonymous testing is permitted. (S.C. Code Ann. § 44-29-250).

Sexually transmitted disease records held by Department of Health and Environmental Control are confidential. (S.C. Code Ann. §§ 44-29-135 and 44-29-136).

School children and day care center children must be immunized. (S.C. Code Ann. § 44-29-180).

Mandatory testing of source where health care workers are exposed to blood borne disease. (S.C. Code Ann. § 44-29-230).

Licensing Boards for all health care professionals are required to adopt CDC “Recommendations for Preventing Transmission of Human Immunodeficiency Virus and Hepatitis B Virus to Patients During Exposure-Prone Invasive Procedures”. (S.C. Code Ann. §§ 44-30-10 to -90).

15.01B CONTROLLED SUBSTANCES:

Manufacture, distribution, administration, and dispensing of controlled substances is regulated by State Department of Health and Environmental Control. (S.C. Code Ann. §§ 44-53-110 to -1550). Registration is required by certain licensed professionals. (S.C. Code Ann. § 44-53-280; S.C. Code Regs. 61-1, 61-4).

15.01C HEALTH PLANNING:

Department of Health and Environmental Control is responsible for health planning and franchising (Certificate of Need). (S.C. Code Ann. § 44-7-150).

Certain health care facilities and providers are required to obtain Certificate of Need prior to construction, change in service, change in ownership, acquisition of major medical equipment or issuance of license. (S.C. Code Ann. § 44-7-160; S.C. Code Regs. 61-15).

State Health Plan addressing health planning and franchising needs is issued annually by Department of Health and Environmental Control. (S.C. Code Ann. §§ 44-7-160, -240, -250).

Certain health care facilities are subject to licensure by Department of Health and Environmental Control. (S.C. Code Ann. § 44-7-260).

Uniform Health Care Information Act and Uniform Health Care Decisions Act not adopted.

15.01D MENTAL HEALTH:

Department of Mental Health and its governing body, S.C. Mental Health Commission, has jurisdiction over all of State's mental hospitals, clinics and centers, joint State and community sponsored mental health clinics and centers and facilities for treatment and care of alcohol and drug addicts. (S.C. Code Ann. §§ 44-9-10 to -160). http://www.state.sc.us/dmh/.

Care and commitment (including voluntary and involuntary admission) of mentally ill persons is regulated by S.C. Department of Mental Health. (S.C. Code Ann. §§ 44-17-310 to -900). Procedures for judicial commitment are set forth at S.C. Code Ann. §§ 44-17-510 to -660.

South Carolina Mental Retardation, Related Disabilities, Head Injuries and Spinal Cord Injuries Act governs creation of local county disabilities and special needs boards and S.C. Commission on Disabilities and Special Needs (S.C. Code Ann. §§ 44-20-10 to -1170) for treatment and training of patients with these conditions.

Rights of mental health patients, including right to consent to major medical procedures and electro-convulsive therapy are codified at S.C. Code Ann. §§ 44-22-10 to -220.

Procedures for determining mental fitness to stand trial are codified at S.C. Code Ann. §§ 44-23-10 to -1150.

Procedures for commitment of minors in need of mental health treatment are codified at S.C. Code Ann. §§ 44-24-10 to -280.

Rights of mental retardation clients, including right to consent to major medical procedures and decision making for minor clients are codified at S.C. Code Ann. §§ 44-26-10 to -220.

15.01E ORGAN DONATION:

Revised Uniform Anatomical Gift Act is codified at S.C. Code Ann. §§ 44-43-310 to -420.

Hospitals establish policies on organ and tissue donation and related continuing education. (S.C. Code Ann. § 44-43-920).

15.0215.11

15.12 PUBLIC HEALTH:

South Carolina Medically Indigent Assistance Act. (S.C. Code Ann. § 44-6-135 et seq.).

Bill of Rights for Residents of Long-Term Care Facilities. (S.C. Code Ann. § 44-81-10 et seq.).

16 INSURANCE

16.01 INSURANCE COMPANIES:

See Tit. 38, 1976 Code of Laws, as amended, for general insurance statutes.

General Supervision.

Insurance laws administered by Department of Insurance, P.O. Box 100105, Columbia, SC 29202-3105. http://www.doi.sc.gov/. Governor appoints director as its chief officer. (S.C. Code Ann. §§ 38-3-10 to -240).

License and Incorporation.

Insurance companies doing business in state must obtain license from director or his designee. (S.C. Code Ann. § 38-5-10).

Charters are issued by Secretary of State under laws governing general business corporations, but written approval of director or his designee must be obtained before charter is issued or amended or foreign company is authorized to do business within state. (S.C. Code Ann. § 38-5-110). §§38-5-50 to -110 set forth certain requirements which must be met before approval of director or his designee can be obtained. Minimum capital and surplus requirements set forth in §§38-9-10 to -40.

Mergers.

Provisions made for mergers of mutual insurance companies. (S.C. Code Ann. § 38-19-825). Also includes provisions for liquidation, rehabilitation, reorganization and conservation of insurance companies. Powers generally rest with director or his designee. (S.C. Code Ann. §§ 38-27-10 to -1000).

Premium Service Companies.

Provisions made for licensing and regulation of insurance premium service companies. (S.C. Code Ann. §§ 38-39-10 to -110).

Insolvency.

South Carolina Property and Casualty Insurance Guaranty Association created to provide for payment of certain claims in event of insolvency of insurer. (S.C. Code Ann. §§ 38-31-10 to -170).

Insider Trading Statute provides for regulation and disclosure of transactions in equity securities by principal stockholders, directors and officers of domestic stock insurance companies adopted. (S.C. Code Ann. §§ 38-23-10 to -100).

Policies.

Kinds of insurance for which insurer may be licensed. (S.C. Code Ann. §§ 38-5-30 to -50). Property, casualty, surety, marine and title insurers cannot be licensed to write life insurance.

Property.

Fire policies on real property must contain agreed upon value of property insured, except that on request of owner of property used principally for manufacturing purposes, policy may be issued without itemized value fixed in policy. No insurer may issue policy in excess of value of property insured. If two policies insure property in amount in excess of property's value, each insurer is responsible for pro rata share. (S.C. Code Ann. §§ 38-75-20 and 38-75-30). Any clause purporting to limit or invalidate force and effect of policy because real property insured is encumbered by mortgage is null and void. (S.C. Code Ann. § 38-75-50).

Since acts of one spouse are not imputed to other spouse, innocent spouse may collect proceeds under fire insurance policy on property held jointly even though other spouse guilty of arson. (284 S.C. 66, 325 S.E.2d 62).

Life insurance policies upon life of any person for benefit of insured's spouse, children or children of spouse, inures to benefit of persons for whose use policies are taken out, free from claims of representatives of creditors, or anyone claiming by, through or under them subject to certain exceptions. (S.C. Code Ann. §§ 38-63-40 and 38-65-90). Copy of application must be delivered with each policy of life, health or accident insurance, in default of which no defense is allowed to such policy on account of anything contained in or omitted from such application. If policy is issued upon oral examination, no defense is allowed to policy on account of anything contained in or omitted from such oral application. (S.C. Code Ann. §§ 38-63-210, 38-69-110, 38-71-30). Should life policy contain, in addition to life insurance, benefits for disability or other coverage, two year waiver provision is applicable to these benefits also. Life insurance company may sue to vacate policy for falsity of representations on application provided suit commenced within two years of the date of the policy. (S.C. Code Ann. § 38-63-220[d]).

Companies issuing life policies are, after two years from date of policy, deemed to have waived any right to dispute truth of application or that insured made false representations and said application and representations are deemed and taken to be true. (S.C. Code Ann. §§ 38-63-220[d], 38-69-120[4]).

Health and accident policies must be issued in accordance with standards set by director and on forms filed with and approved by director. Failure to do so will preclude any defense based on anything contained in or omitted from application. For detailed specifications as to forms that may be used, and provisions which may be inserted see §38-71-330. Copies of application must accompany accident and health policies. (S.C. Code Ann. § 38-71-30). Provision excluding coverage for death occurring more than 90 days after original injury is not violative of public policy. (289 S.C. 262, 346 S.E.2d 22).

Medical malpractice liability insurance may be made available through joint underwriting association upon finding of emergency situation by Department of Insurance until General Assembly determines no longer needed. (S.C. Code Ann. §§ 38-83-10 to -190). Day care liability insurance may be available through joint underwriting association upon finding of emergency situation by Insurance Commission until General Assembly determines no longer needed. (S.C. Code Ann. §§ 38-89-10 to -190).

Mobile home hazard insurance policies may not exceed three year policy period and may not exceed value of property insured. Information as to coverage period, amount, unearned premiums on cancellation to be included on any contract to purchase mobile home. (S.C. Code Ann. §§ 38-75-210 to -230).

Rates.

Casualty and surety rates (S.C. Code Ann. §§ 38-73-410 to -545), and fire, marine and inland marine rates (S.C. Code Ann. §§ 38-73-310 to -340) are regulated. Life companies may quote lower rates to female applicants. (S.C. Code Ann. § 38-63-30).

Discrimination and Rebates.

Prohibited (S.C. Code Ann. §§ 38-57-120 to -130), but following are not considered rebates: Paying of bonuses or abating premiums out of surplus accumulated from nonparticipating insurance to life and annuity policyholders, provided the bonuses or abatement of premiums are fair and equitable to policyholders; making an abatement which fairly represents the saving of collection expenses to a policyholder on life policies issued on industrial debit plan, who have for a specified period made payments directly to the office of insurer; readjustment of the rate of premium for a group insurance policy based on the loss or expense experience thereunder; issuing life or disability policies on payroll deduction or similar plan at a reduced rate related to savings made by use of such plan. (S.C. Code Ann. § 38-57-140).

Records of Losses and Claims.

Every insurance company doing business in this state must maintain a record of losses paid under its policies and notices which may normally result in claim or loss. (S.C. Code Ann. § 38-13-130).

Investments.

Transactions within insurance holding company system are regulated by S.C. Code Ann. § 38-21-250.

Policy Loans Interest Rates.

Life insurers have option of issuing life policies (if policy has face amount greater than $5,000), providing for policy loan interest rates of not more than 8% or if written disclosure is made, adjustable maximum interest rate not to exceed rate used to compute cash surrender values under policy or Published Monthly Average which is based upon Moody's Corporate Bond Yield Average - Monthly Average Corporate. (S.C. Code Ann. §§ 38-63-240 to -280).

Nonresident Agents, Brokers and Adjusters.

Director or his designee may enter into reciprocal agreements with commissioners of other states in regard to licensing of nonresident agents, brokers and adjusters. (S.C. Code Ann. §§ 38-45-40, 38-47-20, 38-43-70).

Insurance brokers must be licensed by director or his designee, pass broker licensing examination, pay biennial license fee of $200, file bond approved by Attorney General in sum of $10,000 conditioned to pay any person insured or seeking insurance who sustains loss as result of broker's violation of or failure to comply with any state insurance law or regulation, broker's failure to properly transmit to insurer or insured any payment received by him, or any act of fraud committed by broker in connection with any insurance transaction, and pay broker's premium tax of 4% on premiums for policies of insurers not licensed in South Carolina. (S.C. Code Ann. § 38-45-20). Municipalities may impose additional license fees. (S.C. Code Ann. § 38-45-70). Licenses will be issued only to residents of state, who have been licensed insurance agents of state for at least two years. Insurance brokers must procure certificates as to safety and solvency of insurer, and on request, must furnish insured with financial statement of insurer. Must keep records of all business done for minimum of five years, and make available to director or designee for inspection on demand. (S.C. Code Ann. § 38-45-80).

Under certain conditions director or his designee may license nonresident as broker. Nonresident may be licensed as broker if he files affidavit stating he is licensed broker in another state and meets other conditions. (S.C. Code Ann. § 38-45-30).

Producers.

All business done must be transacted through authorized resident producers licensed in state of South Carolina except for direct insurance covering rolling stock of railroad companies or property in transit while in possession and custody of railroad corporations or other common carriers, and bid bonds on any public or private contract. (S.C. Code Ann. §§ 38-43-60 to -70).

Producer or broker issuing policy in unlicensed company personally liable for limits of coverage if producer or broker does not comply with provisions of Tit. 38 relating to policies issued by unlicensed companies. (S.C. Code Ann. §§ 38-43-180, 38-45-120).

Initial producer license fee $25; biennial producer license renewal fee $25; local appointment initial and biennal fee $40; special appointment initial and biennial fee $100; general appointment initial and biennial fee $100; agency initial and biennial license fee $40. Producer of common carrier selling only transportation ticket policies on accident and health insurance or baggage insurance $20. All fees payable in advance. Fees may be paid by credit card. (S.C. Code Ann. § 38-43-80).

Nonresidents receive nonresident producer license if: currently licensed as resident and in good standing in home state; proper request for licensure submitted and fees paid; certified copy of application for licensure submitted in home state submitted to director or original uniform application submitted; and home state awards nonresident producer licenses to residents of this state on same basis. (S.C. Code Ann. § 38-43-70).

Corporation, partnership or association may be licensed as agent, provided business is transacted by licensed individual. (S.C. Code Ann. § 38-43-30).

Adjusters pay annual license fee of $80. (S.C. Code Ann. § 38-47-30).

Producer may divide commissions on life insurance or accident and health insurance with other licensed agents but not other types of insurance without limitations. (S.C. Code Ann. § 38-43-200).

Process Agent.

Every insurer, before being licensed, must appoint, in writing, director, and his successors in office, as its attorney upon whom all legal process may be served, and issuance and delivery of policy of insurance to any person, firm or corporation in South Carolina, or collection of premiums therein by any insurer not licensed in this state will be deemed to appoint director, and his successors in office, attorney of insurer upon whom process may be served. (S.C. Code Ann. § 38-5-70).

Unlicensed Companies.

Uniform Unauthorized Insurance Act adopted. (S.C. Code Ann. §§ 38-25-110 to -570). Following insurance may be placed with companies not licensed to do business in state, to-wit: Re-insurance, contracts of insurance covering risks of transportation and navigation, contracts of insurance made through authorized surplus line agents or authorized surplus line brokers and contracts written through duly licensed broker, but no duly licensed broker may place any insurance with any insurer not licensed in this state without written approval of director or his designee, and he must have stamped upon face of each policy words “This Company not licensed to do business in this State.” Insurance companies not licensed in S.C. may investigate, adjust losses and so forth in this state if risks were located in another state at time of issuance of contract, and company obtains written authority from director or his designee. For convenience of policyholders, holding policies in companies unlicensed to do business in state, and upon satisfactory assurance that no new business will be done, director or his designee may license person to receive and transmit premiums and to adjust policies under such license upon payment of 2% upon net premiums collected in state.

Insurance companies not authorized to do business in state regulated and subject to suit by Department of Insurance. (S.C. Code Ann. §§ 38-25-10 to -570).

Reciprocal insurance is authorized and regulated and every corporation organized under the laws of this state is authorized to exchange insurance contracts of the kind and character known as reciprocal insurance. (S.C. Code Ann. §§ 38-17-10 to -170).

Special Kinds of Insurance.

Fraternal Benefit Societies (S.C. Code Ann. §§ 38-38-10 to -740), domestic mutual insurers (S.C. Code Ann. §§ 38-19-10 to -1240), mutual benevolent aid associations (S.C. Code Ann. §§ 38-35-10 to -60), nonprofit hospital service plan insurance and medical service corporations, which upon application on or before Jan. 1, 1969, are to be licensed as mutual companies (S.C. Code Ann. § 38-71-10) are regulated.

Foreign Insurance Companies.

In order to do business in South Carolina, must pay all taxes and perform all duties now or hereafter prescribed by law. (S.C. Code Ann. § 38-5-80). Foreign companies not deemed to be doing business in state solely by reason of maintaining bank accounts, creating or acquiring evidences of debt, mortgages or liens on property or owning or controlling a subsidiary corporation doing business in state. (S.C. Code Ann. § 38-5-10). Requirements are similar to those of domestic corporations but special treatment given to domestic mutual insurers. Captive Insurance Companies must apply to director for license, maintain principal place of business in state, and meet other requirements established by statute and as determined by director. (S.C. Code Ann. §§ 38-90-10 to -240). See also subhead Unlicensed Companies, supra.

Annual Statement.

Every insurance company is required to file sworn statement with Department of Insurance on or before Mar. 1 of every year on form furnished by department showing financial condition of company on preceding Dec. 31. (S.C. Code Ann. § 38-13-80).

Retaliatory Laws.

If deposits, license fees and other charges made by a foreign state upon an insurance company organized under laws of this state but doing business in foreign state, exceed amount otherwise required by this state of foreign companies doing business in this state, then deposits and fees of all companies doing business in this state organized under laws of that foreign state are increased to equal deposits and fees which insurance companies of this state doing business in that foreign state are required to pay, or if such foreign state imposes greater restrictions, obligations, conditions, or penalties than does this state for privilege of doing business herein, then all insurers of such foreign state doing business in this state are subject to such greater requirements as imposed in that state. Application of section is based upon comparison of aggregate requirement imposed by S.C. with aggregate requirements imposed by other state. Taxes, fees and other obligations are considered. (S.C. Code Ann. § 38-7-90).

Bond.

All insurance companies required to deposit a bond or securities in an amount not less than $10,000 nor more than $200,000 as determined pursuant to standards promulgated by director or his designee, or, alternatively, required to furnish certificate showing securities in amount not less than $1,000,000 on deposit with officer or official body of another state or states for protection of all its policyholders, or all its policyholders and creditors. (S.C. Code Ann. §§ 38-9-80 to -140).

For bonding requirements for insurance companies engaged in surety insurance see topic 16.02 Surety and Guaranty Companies.

Premium Taxes.

For life insurance, tax levied is ¾ of 1% of total premiums collected. For all other types of insurance, tax levied is 1¼% of total premiums collected. Reporting requirements and due dates found at §38-7-20.

On all fire insurers there is premium tax, in addition to all other taxes, of 1% of gross premiums collected on business insured in state (less premiums returned on canceled policies), for use in defraying expense of investigating causes of fires, inspection of buildings, etc. (S.C. Code Ann. §§ 38-7-30 and 38-7-40). On all foreign fire companies there is additional premium tax of 1% for support of organized fire departments and members thereof. (S.C. Code Ann. §§ 38-7-40 to -80 and §§ 23-9-410 to -470).

License Fees.

Each insurance company of any class, except benevolent aid and fraternal institutions, must pay biennial license fee of $800. In addition, biennial fee of $400 to be collected for each kind of insurance for which the insurer is licensed as defined in §38-5-30(a) through (g). Mutual company with property business in no more than three counties must pay fixed fee of $100, or $40 if doing business in only single county. Fees and taxes are set forth in §§38-7-10 to -190. (S.C. Code Ann. § 38-7-10).

Life Expectancy Table.

Life expectancy table adopted for use when necessary in any civil action or other litigation to establish life expectancy as evidence. (S.C. Code Ann. § 19-1-150).

Insurers Rehabilitation and Liquidation Act adopted as amended. (S.C. Code Ann. §§ 38-27-10 to -1000).

Direct Actions Against Insurer.

South Carolina now recognizes cause of action for bad faith refusal to pay first party insurance benefits permitting recovery of actual and punitive damages. (See 279 S.C. 336, 306 S.E.2d 616; but see 310 S.C. 465, 427 S.E.2d 657, finding that ERISA preempts state common law tort and bad-faith actions when asserted against employee benefit plan.) §38-59-40 permits assessment of attorneys' fees up to 1/3 of amount of judgment for insurance company's bad faith refusal to pay. See category 23 Transportation, topic 23.01 Motor Vehicles, subhead Direct Actions.

No-Fault Insurance.

See category 23 Transportation, topic 23.01 Motor Vehicles, subhead No-Fault Insurance.

16.02 SURETY AND GUARANTY COMPANIES:

See generally §§38-15-10 to -100. Both domestic and foreign companies must obtain certificate of authority from Insurance Commissioner before doing business in State. Must give bond or deposit Certificates of Deposit which have current market value of not less than $10,000 nor more than $200,000 with Commissioner, except domestic insurance companies who voluntarily pay bond required by §38-9-110, or which have complied with §38-9-100, need not give this additional bond. (S.C. Code Ann. § 38-9-80). Must have capital or surplus of $250,000 before being acceptable as surety on official bonds of city, county and state officers. (S.C. Code Ann. § 8-3-90). When surety on bond of officer or employee of state, county, municipality, or other subdivision of state, or of officer or employee of any bank or fiduciary corporation, must use forms prescribed by law or approved by Governor, Commissioner, and Attorney General, or any two of them. (See generally S.C. Code Ann. §§ 38-15-10 to -70.)

17 INTELLECTUAL PROPERTY

17.01 TRADEMARKS AND TRADENAMES:

Trademarks and Service Marks are governed by §§39-15-1105 to 1190. Former Art. 3 (S.C. Code Ann. §§ 39-15-110 to -240) was repealed in 1994 and replaced with preceding statute effective three months after July 13, 1994.

Intent of act is to provide system of state trademark registration and protection substantially consistent with federal system under Trademark Act of 1946, as amended. (S.C. Code Ann. §§ 39-15-1105 to -1190).

Assignment.

Trademark with its registration is assignable with good will of a business in which it is used, assignment to be by written instrument which should be recorded with Secretary of State, with recording fee, upon which occasion he records assignment and issues to assignee new certificate for remainder of term of registration or renewal. Such assignment is void as against a subsequent purchaser for valuable consideration without notice unless so recorded within three months after date thereof, or prior to such subsequent purchase. (S.C. Code Ann. § 39-15-1135). Name changes, licenses, security interests and other instruments may be recorded. Acknowledgment is prima facie evidence of execution. (S.C. Code Ann. § 39-15-1135).

Registration.

Any person, etc., who adopts and uses a trademark in this state may file application for registration with (on a form furnished by) the Secretary of State. See generally http://www.scsos.com/Trademarks. Application must be signed and verified by applicant, member of firm, or officer of corporation or association applying, and must be accompanied by drawing of mark (if other than word mark) and three specimens showing trademark as actually used, and by application fee of $15 per class, payable to Secretary of State. (S.C. Code Ann. §§ 39-15-1115, 39-15-1185). Registration is effective for five years and may be indefinitely renewed for successive periods of five years. Renewal fee of $5 must be paid and renewal application must be filed within six months prior to expiration on form furnished by Secretary of State. (S.C. Code Ann. §§ 39-15-1130, 39-15-1185). Action to require cancellation of registered mark or appeal from refusal of secretary to register mark must be brought in circuit court. (S.C. Code Ann. § 39-15-1175).

Evidence of Registration.

Certificate of registration (or copy certified by Secretary) is competent evidence in courts of state, and is proof of registration in any judicial proceeding. (S.C. Code Ann. § 39-15-1125[b]).

Protection Afforded and Infringement.

Injunction may lie where another uses, without registrant's consent, any reproduction, copy, colorable imitation, or counterfeit of trademark legally registered, whether such wrongful use be in sale, distribution, offer of sale, or advertising, if such use is likely to deceive or to cause confusion or mistake as to source or origin of such goods or services. Statute includes language that purports to limit recovery of profits and damages in certain cases unless acts are committed with intent to cause confusion or mistake or to deceive. (S.C. Code Ann. § 39-15-1160). Statute also provides for injunctive relief for dilution of mark famous in state. (S.C. Code Ann. § 39-15-1165).

Court may order injunctive relief and treble damages and award attorney's fees under limited circumstances for certain counterfeit or imitation use of registered mark. Such remedies are in addition to rights under penal statutes. (S.C. Code Ann. § 39-15-1170).

Common Law Marks.

Nothing in Article may adversely affect rights or enforcement of rights acquired in good faith at common law. (S.C. Code Ann. § 39-15-1180).

Resale Price Agreements.

Fair Trade Act.

South Carolina has Fair Trade Act (S.C. Code Ann. §§ 39-7-10 to -50) that addresses permissible provisions in contract for sale of commodity bearing trademark. However, that article unconstitutional insofar as it applies to nonsigners of minimum price contract, and act violates S.C. Constitution and therefore ineffective. (231 S.C. 636, 99 S.E.2d 665). Federal law issues may also affect application of this statute. (See, e.g., 15 U.S.C. §45.)

Tradenames.

1988 amendments to corporate statute replaced provisions permitting corporation to register its “assumed name” with Secretary of State. (S.C. Code Ann. § 33-4-101[g]). Foreign corporation whose official name is not available in South Carolina can adopt fictitious name for use in South Carolina. (S.C. Code Ann. § 33-15-106[a][2]). When corporation which owns real property in this State changes its name, it must file notice of that name change in office of register of deeds where real property is situated. (S.C. Code Ann. § 33-4-104). Limited partnership must file certificate including its name in office of Secretary of State. (S.C. Code Ann. § 33-42-210). Under §33-42-45, limited partnerships that plan to conduct business in state under name other than one in certificate of limited partnership must file with Secretary of State assumed name certificate which is effective until Dec. 31st of fifth full calendar year following year of filing and renewable for five year periods. Limited partnerships that own real property must also file in office of register of deeds pursuant to §33-42-300. See also category 2 Business Organizations, topic 2.07 Partnerships, subhead Variations from ULPA of 1976.

17.02 TRADE SECRETS:

South Carolina Trade Secrets Act (S.C. Code Ann. §§ 39-8-10 to 130) was adopted in 1997 (previous Act, S.C. Code Ann. §§ 39-8-1 to -8; S.C. Code Ann. § 39-8-11, repealed by 1997 Act No. 38, §1, eff. May 21, 1997). “Trade secret” is defined in S.C. Code Ann. § 39-8-20(5), which definition is important in any evaluation. Trade secret endures and is protectable and enforceable until it is disclosed by proper means. (S.C. Code Ann. § 39-8-30). Under §39-8-20(5)(b), among other things, collective effect of items and procedures must be considered in any analysis of whether trade secret exists and not general knowledge of each individual or procedure.

Employees who know or should know from circumstances of employer's trade secret have duty independently of any agreement to refrain from using or disclosing trade secrets without employer's permission. (S.C. Code Ann. § 39-8-30). Person aggrieved by misappropriation, wrongful disclosure, or wrongful use of his trade secrets may bring civil action to recover damages incurred as result of wrongful acts or to enjoin offensive conduct. (S.C. Code Ann. § 39-8-30[c]). Contractual duty not to disclose trade secret must not be considered void for lack of durational or geographic limitation. (S.C. Code Ann. § 39-8-30[D]). Complainant is generally entitled to actual damages for misappropriation. Exemplary damages not exceeding twice actual damages may be awarded where there is willful, wanton or reckless disregard of plaintiff's rights. (S.C. Code Ann. § 39-8-40). Actual or threatened misappropriation may be enjoined. (S.C. Code Ann. § 39-8-50). Statute includes provisions for protective orders and preservation of secrecy during discovery in civil actions and in criminal proceedings. (S.C. Code Ann. §§ 39-8-60 and 39-8-100). Chapter does not apply to misappropriation occurring before July 1, 1997 or continuing misappropriation beginning before July 1, 1997. (S.C. Code Ann. § 39-8-130). Action for misappropriation must be brought within three years of time misappropriation was discovered or should have been discovered. (S.C. Code Ann. § 39-8-70). Criminal penalties may be available. (S.C. Code Ann. § 39-8-90). Attorney's fees may be awarded if claim of misappropriation is brought in bad faith, motion to terminate injunction is made or resisted in bad faith, or willful misappropriation exists. (S.C. Code Ann. § 39-8-80). Except as expressly provided, chapter displaces conflicting tort, restitution and other law providing civil remedies for misappropriation of trade secret. (S.C. Code Ann. § 39-8-110).

18 LEGAL PROFESSION

18.01 ATTORNEYS AND COUNSELORS:

State Bar is integrated.

South Carolina Supreme Court has exclusive authority to prescribe rules defining and regulating practice of law and governing admission, conduct, disbarment, suspension and reinstatement of attorneys. (S.C. Code Ann. §§ 40-5-10 to -520; 237 S.C. 316, 117 S.E.2d 300).

South Carolina Supreme Court has adopted Model Rules of Professional Conduct, effective Sept. 1, 1990, which are based on Model Rules of Professional Responsibility. Prior to that date, Code of Professional Responsibility regulates attorney conduct. (SCACR 407).

Complete listing of rules of South Carolina Supreme Court may be obtained from Clerk, S.C. Supreme Court, P.O. Box 11330, Columbia, S.C. 29211. Rules may also be found at http://www.judicial.state.sc.us/courtReg/index.cfm.

Qualifications for Admission.

No person may be admitted to practice of law in South Carolina unless person: (1) Is at least 21 years of age; (2) is person of good moral character; (3) has received JD or LLB degree from law school approved by Council of Legal Education of American Bar Association; (4) has been certified as qualified by Committee on Character and Fitness; (5) has passed examination given by Board of Law Examiners; (6) has received South Carolina passing scaled score on Multistate Professional Responsibility Examination administered by National Conference of Bar Examiners; (7) is not disbarred, suspended from practice of law, or subject of any pending disciplinary proceeding in another jurisdiction; (8) has successfully completed Bridge the Gap Program sponsored by South Carolina Bar; and (9) has paid fees and taken oath prescribed by this Rule. (SCACR 402).

Educational Requirements.

Applicants must graduate from law school approved by Council of Legal Education of American Bar Association at time degree was conferred. (SCACR 402[c][3]).

Examination.

Applicants for bar examination must submit applications to Clerk of South Carolina Supreme Court, Post Office Box 11330, Columbia, S.C. 29211, in duplicate, on forms prescribed by Committee on Character and Fitness not sooner than Dec. 1st, nor later than Jan. 31st for July examination, and not sooner than Aug. 1st, nor later than Sept. 30th for Feb. examination. Nonrefundable application fee: $400 for applications filed from Dec. 1 to Dec. 31 or Aug. 1 to Aug. 31; $750 for applications filed during remainder of application periods. Applicants admitted to practice in another state for more than one year must file additional copy of application and additional fee for Character Report from National Conference of Bar Examiners. Applicants may file provisional application any time after being accepted to approved law school if there is important question regarding character; such applications must be accompanied by filing fee of $100. (SCACR 402[d] & [f]).

Board of Law Examiners, appointed by South Carolina Supreme Court, conducts bar examinations. Clerk of South Carolina Supreme Court is Secretary to Board. Bar examination administered twice yearly in Columbia, South Carolina. Bar examination consists of seven sections. Six sections are composed of essay questions prepared by board of law examiners. Chair of Board assigns member of Board to prepare and grade or supervise preparation and grading of each essay section. Multistate Bar Examination is seventh section. To pass Multistate portion, applicant must attain score of at least 125. To pass essay portion, applicant must attain score of 70. Applicant must pass six of the seven sections to pass Bar Examination; provided that applicant who receives scaled score of 110 or less on Multistate Bar Examination fails Bar Examination without grading of essay questions. (SCACR 402).

Applicants who fail Bar Examination may apply to be reexamined. If applicant fails three times, each application thereafter must include verification that applicant has, (1) In year preceding application, attended 12 semester hours of classes at approved law school, or (2) in past six months has studied 20 hours or more per week under direction of practicing attorney who has been member of State Bar for at least five years. (SCACR 402[j]).

Trial Experience Requirements.

Attorney, although admitted to practice, may not appear alone in trial of case until filing with Clerk of South Carolina Supreme Court certificate that he has had at least ten “trial experiences”, defined as either (1) actual participation in trial under supervision of member of State Bar, or (2) observation of entire testimonial type hearing in state tribunal. If hearing concludes prior to decision by trier of fact, it is sufficient if one party has completed presentation of its case. Required trial experiences must include: (1) Three civil jury trials in Court of Common Pleas, or two in Court of Common Pleas and one in U.S. District Court; (2) three criminal trials in General Sessions Court, or two in General Sessions Court and one in U.S. District Court; (3) one trial in equity; (4) two trials in Family Court; and (5) one trial before administrative officer, in proceeding governed by S.C. Administrative Procedures Act. Trial experiences may be had at any time after completion of ½ credit hours required for law school graduation. Attorney who has practiced law for three years in another state may, upon admission to State Bar, submit proof of equivalent experience in another state. (SCACR 403).

Law Students.

Clerkships are not required. Law students may apply to South Carolina Supreme Court for admission to student practice in any inferior court or before any administrative tribunal on behalf of any consenting indigent person, or on behalf of State or its agencies with written approval of Attorney General. (SCACR 401).

Oath of Office.

Upon admission and payment of additional $50 fee, applicant must make oath that he is qualified under Constitution, will discharge his duties to best of his ability, and will defend Constitution of State and of U.S. (Const. of 1895, art. 3, §26; SCACR 402[k]).

Limited Certificate of Admission.

Eligible attorney licensed to practice law in another state who is employed by or under supervision of legal department of and rendering advice to business employer which is either South Carolina corporation or qualified to do business in state may obtain limited certificate of admission to appear as attorney of record in matter pending in state so long as he associates as co-counsel member of State Bar who is present at all proceedings. (SCACR 405).

Admission Pro Hac Vice.

Attorney licensed to practice before court of last resort in another state may participate in trial or argument of case in this state in discretion of court of record and associated with member in good standing of State Bar. (SCACR 404).

Disabilities.

An attorney may not be surety on a bond in a civil action or sign bail bond in criminal matters. (S.C. Code Ann. § 15-1-240; SCRCP 11[d]).

Advertising.

Attorney advertising is regulated by Appellate Court Rules. (SCACR 407, Rules of Professional Conduct 7.1-7.5).

Compensation.

No statutory provisions.

Liens.

Attorneys have no lien for fees with the exception of an attorney's lien on client's papers in attorney's possession. (207 S.C. 97, 34 S.E.2d 482). While South Carolina recognizes an attorney's lien created by the common law, the lien protects only costs and disbursements; it does not cover an attorney's fee. A lien for the payment of an attorney's fee out of the proceeds of a judgment obtained as a result of an attorney's efforts, however, may be created by an express agreement between an attorney and his client. (281 S.C. 344, 315 S.E.2d 174).

Soliciting Legal Business Unlawful.

Unlawful for person or his agent, employee, or anyone acting on his behalf to: (1) solicit or procure through solicitation, either directly or indirectly, legal business; or (2) solicit or procure through solicitation retainer, written or oral, or agreement authorizing attorney to perform or render legal services.

Person who violates provision of this section is guilty of misdemeanor and, upon conviction, must be fined in discretion of court or imprisoned not more than three years, or both. (S.C. Code Ann. § 40-5-350).

Splitting Fees With Lay Persons Unlawful.

Unlawful for person, partnership, corporation, or association to divide with or receive from, or to agree to divide with or receive from, attorney or group of attorneys, whether practicing in this State or elsewhere, any portion of fee or compensation charged or received by attorney or any valuable consideration or reward as inducement for placing or in consideration of having placed in hands of attorney, or in hands of another person claim or demand of any kind for purpose of collecting claim or bringing action on claim or of representing claimant in pursuit of any civil remedy for recovery of claim. This section does not apply to agreement between attorneys to divide between themselves compensation to be received. (S.C. Code Ann. § 40-5-360).

Person who violates provisions of this section is guilty of misdemeanor and, upon conviction, must be fined in discretion of court or imprisoned not more than three years, or both. (S.C. Code Ann. § 40-5-360).

Unauthorized Practice of Law.

Corporations and voluntary associations are prohibited from practicing law. A person who practices law without being enrolled as a member of South Carolina bar or who is not otherwise authorized to perform prescribed legal activities by action of Supreme Court of South Carolina is guilty of a felony. (S.C. Code Ann. §§ 40-5-310 and -320). See category 2 Business Organizations, topic 2.03 Corporations, subhead Professional Corporations.

Continuing Legal Education Requirements.

All persons admitted to South Carolina Bar are required to attend at least 14 hours of approved continuing legal education (CLE) courses annually. At least two of 14 hours required annually must be devoted to legal ethics/professional responsibility. Following members of South Carolina Bar are exempt from these requirements: (1) specialists certified pursuant to this Rule who satisfy continuing legal education (CLE) requirements of their specialty; (2) lawyers who have been admitted to practice law for 30 or more years, and apply to Commission on Continuing Legal Education and Specialization for exemption; (3) lawyers, including members of judiciary, who are not enrolled as “active members” of Bar. (SCACR 408).

Specialty Certification Requirements.

Standards for specialty certification set forth in SCACR 408(e), (j). Currently, recognized specialty fields are: Estate Planning and Probate Law, Taxation Law, and Employment and Labor

Law. (Lawyer Competency Rule 2-12).

Pro Bono.

Attorneys are encouraged to perform pro bono work. Attorneys employed by state are authorized to perform pro bono work under program organized, sponsored or endorsed by State Bar. (S.C. Code Ann. § 40-5-380).

Client's Security Fund.

Committee of State Bar established for purpose of reimbursing losses caused by dishonest conduct of State Bar members. (SCACR 411).

Interest on Lawyer Trust Accounts.

Members who receive client funds in trust must maintain them in specially designated interest-bearing trust account in FDIC or FSLIC insured federal or State bank or savings and loan. Depository institution submits quarterly reports to State Bar Foundation, and all dividends or interest is paid directly to State Bar Foundation, Inc. Nominal or short-term funds need not be placed in such accounts. (SCACR 412).

Disciplinary Procedure.

Board of Commissioners on Grievances and Discipline appointed by Supreme Court from State Bar membership. Term of office is four years. Two members appointed from public with two year terms. Board hears and investigates all alleged grounds for discipline or incapacity, adopts rules and investigates matters dealing with attorney trust accounts. Board recommends action to State Supreme Court which has exclusive disciplinary jurisdiction. (SCACR 413).

19 MINERAL, WATER AND FISHING RIGHTS

19.01 MINES AND MINERALS:

The S.C. Department of Health and Environmental Control (http://www.scdhec.net/) has ultimate authority, subject to appeal provisions, over all mining activities, including regulation and control of all such activities. (S.C. Code Ann. § 48-20-30).

Mining.

South Carolina Mining Act (S.C. Code Ann. §§ 48-20-10 to -310) requires permit from DHEC for mining operations on specified land (S.C. Code Ann. § 48-20-60). Issuance of permit is conditioned on: (1) Approval of plan for reclamation of affected land, (2) no unduly adverse effects on parkland, wildlife and fisheries, (3) finding that operation will not cause violation of air or water quality standards or pose substantial physical hazard to neighboring land owners, (4) applicant has no existing violations under operating permit or certificate of exploration, and (5) bond conditioned on faithful compliance with Mining Act and permit conditions. (S.C. Code Ann. §§ 48-20-10 through 48-20-70).

Act likewise provides for notice and hearing when DHEC believes violation of Act, accompanying regulations, or permit has taken place. If, following hearing, department determines that there has been violation, or operator does not appear at hearing, department may suspend operating permit or revoke permit if violation appears to be willful. (S.C. Code Ann. § 48-20-160).

Applicant for or party aggrieved by action taken by department regarding certificate of exploration, operating permit or reclamation plan may appeal to Mining Council in Office of the Governor. Further appeal may be taken to Court of Common Pleas. (S.C. Code Ann. §§ 48-20-

190, 48-20-200).

Where operator or explorer engages in activity without obtaining correct certificate or permit, DHEC may issue cease and desist order, impose fine, and seek restraining order or injunction. (S.C. Code Ann. § 48-20-220). Anyone willfully violating Act may be guilty of misdemeanor. (S.C. Code Ann. § 48-20-230). Department of Health and Environmental Control has promulgated regulations to implement Act. (See S.C. Code Regs. 89-10 to 89-350.)

Taxes.

Taxation and assessment of mining property. (S.C. Code Ann. § 12-4-540). Valuation of mining property. (S.C. Code Ann. § 12-37-930).

Public Lands.

State Budget and Control Board may issue license granting right to mine phosphate rock and deposits from navigable and non-navigable waters of state. Such licenses may be for such terms as may be determined by Board. (S.C. Code Ann. § 10-9-130).

Interstate Mining Compact adopted. (S.C. Code Ann. §§ 48-21-10, -20). South Carolina Geological Survey Unit is established under Department of Natural Resources and is headed by State Geologist. (S.C. Code Ann. §§ 48-22-10, -30). http://www.dnr.sc.gov/.

20 MORTGAGES

—Scope —

See S.C. Code Ann. §§ 29-1-10 to -50.

20.01 [RESERVED]

20.02 COLLATERAL SECURITY:

See category 8 Debtor and Creditor, topic 8.15 Pledges.

20.03 MORTGAGES OF PERSONAL PROPERTY:

See categories 3 Business Regulation and Commerce, topic Commercial Code; Transportation, topic Motor Vehicles.

20.04 MORTGAGES OF REAL PROPERTY:

Mortgages are usually given to secure bonds or promissory notes. The lien theory obtains. Mortgages, deeds of trust, and instruments in the nature of mortgages are governed by the same rules as deeds, as to witnesses, probate, recording, etc. (S.C. Code Ann. § 30-7-10). See categories 10 Documents and Records, topic Acknowledgments; Property, topic Deeds.

Mortgages of leaseholds or other interests in real estate (including mortgages of structures thereon) are deemed to be mortgages of real estate. (S.C. Code Ann. § 30-5-130).

Recording Fees.

Fee for recording real estate mortgage is $10, with additional charge of $1 per page for fifth and subsequent pages. (S.C. Code Ann. § 8-21-310).

No stamp tax on mortgages. (S.C. Code Ann. § 48-3-120).

Mortgagee may not maintain possessory action for real estate mortgaged when time for payment has elapsed. Mortgagor is still deemed owner of land and mortgagee must proceed by foreclosure and sale. Equity of redemption may be released. (S.C. Code Ann. § 29-3-10). Appraisal rights may be waived in nonconsumer transactions if borrowers and/or guarantors are notified in writing before transaction that waiver of appraisal rights will be required and provided following language appears on signature page of mortgage or other document relating to transaction: “The laws of South Carolina provide that in any real estate foreclosure proceeding a defendant against whom a personal judgment is taken or asked may within thirty days after the sale of the mortgaged property apply to the Court for an order of appraisal. The statutory appraisal value as approved by the Court would be substituted for the high bid and may decrease the amount of any deficiency owing in connection with the transaction. ‘THE UNDERSIGNED HEREBY WAIVES AND RELINQUISHES THE STATUTORY APPRAISAL RIGHTS WHICH MEANS THE HIGH BID AT THE JUDICIAL FORECLOSURE SALE WILL BE APPLIED TO THE DEBT REGARDLESS OF ANY APPRAISED VALUE OF THE MORTGAGED PROPERTY.’ ” This language must be underlined, in capital letters, or disclosed in another prominent manner. (S.C. Code Ann. § 29-3-680). Lien of mortgage is for 20 years from maturity, and if no maturity is stated, for 20 years from date of mortgage. Part payment or written acknowledgment of debt by mortgagor, if recorded on record of mortgage, extends lien for 20 years more. (S.C. Code Ann. § 29-1-10).

Insurance.

Mortgagee doing business in South Carolina may not require that mortgagor purchase casualty insurance on mortgaged property in amount in excess of replacement cost of buildings or appurtenances on mortgaged premises. (S.C. Code Ann. § 29-3-70).

Legal Representation of Borrower Determined by Borrower.

Lender may not require use of certain attorney for loan. (S.C. Code Ann. §§ 37-10-102, 37-3-404).

Assignment.

To be good against subsequent creditors or subsequent purchasers for value without notice or against the owner of the mortgaged property without notice, an assignment must be recorded either on the record of the mortgage, or elsewhere, and in the latter case, notation of the book and page where the assignment is recorded must be made on the margin of the record of the mortgage. An assignment must be witnessed as a mortgage, but need not be acknowledged if it is on or attached to original mortgage. If on separate paper and not attached to original mortgage, it must be acknowledged. (S.C. Code Ann. §§ 30-7-30 to -50).

Satisfaction.

Mortgage, deed of trust, etc., may be cancelled, discharged and released by mortgagee or record owner or holder, or legal representative or attorney in fact (by recorded instrument) of holder, as follows: (1) By exhibiting the instrument to the officer having charge of recording it or his deputy and in the presence of such officer or deputy writing across the face of the record “the debt secured is paid in full and the lien of this instrument is satisfied” or words of like effect, with date and signature, witnessed by officer or deputy; (2) by writing on or attaching to original instrument satisfaction executed in presence of one or more witnesses, in which event satisfaction is recorded across face of record; (3) in case instrument is lost or destroyed, by separate instrument executed in presence of two witnesses and probated, together with affidavit of person executing satisfaction as to ownership of obligation (S.C. Code Ann. § 29-3-330); (4) under certain circumstances by affidavit of attorney stating that mortgage was paid in full pursuant to written payoff statement with proof that payment was made (S.C. Code Ann. § 29-3-

330). When original instrument produced on satisfaction, recording officer or deputy must enter thereon certificate that satisfaction entered of record with date. (S.C. Code Ann. § 29-3-340).

If the debt is paid, or the mortgage released or extinguished, and mortgage is not satisfied of record, mortgagor may obtain rule to show cause on petition and court may order satisfaction entered. (S.C. Code Ann. § 29-3-320).

After full payment on mortgage has been made, mortgagor may request mortgagee to have mortgage marked satisfied in proper office. If mortgagee fails to do so within three months of such request, mortgagee may be liable for sum not to exceed one half of amount secured by mortgage or $25,000, whichever is less, plus actual damages, costs and attorney's fees. (S.C. Code Ann. §§ 29-3-310 to -320).

Release from Lien.

Person who might execute satisfaction may release portion of mortgaged premises from lien thereof by any written instrument executed in the presence of one or more witnesses, which must also be probated unless written on or attached to original mortgage. (S.C. Code Ann. § 29-3-470).

Tax Sale.

See also category 22 Taxation, topic 22.13 Property Taxes, subheads Sales, Redemption.

Foreclosure.

Mortgages may be foreclosed by an ordinary suit of summons and complaint in the county where the property or part of it is located. (S.C. Code Ann. § 15-7-10). Notice of lis pendens must be filed 20 days before judgment. (S.C. Code Ann. § 15-11-10). Notice of lis pendens may be cancelled by one filing notice without need for court order. (S.C. Code Ann. § 15-11-40). Court may render judgment and order sale at same time, and judgment is credited with amount paid plaintiff from proceeds of sale. (S.C. Code Ann. § 29-3-650). Where no deficiency judgment is demanded it is not necessary that mortgagor who has conveyed property, or personal representative of deceased mortgagor, be made party. (S.C. Code Ann. §§ 29-3-610, -620).

Foreclosure Sale.

Sale under foreclosure is at public auction. If deficiency judgment is requested, bidding remains open until 30th day after sale, during which period any person other than highest bidder at sale, or any representative thereof in foreclosure suits may raise bid. Thereafter during such period any person other than such highest bidder at sale or representative, may raise bid and successful purchaser is one who submits last highest bid during period and makes necessary deposits. (S.C. Code Ann. § 15-39-720). Bidding is final at first sale date if no personal or deficiency judgment is demanded and right thereto is expressly waived. (S.C. Code Ann. § 15-39-760). Action to foreclose mortgage is in equity; election to accelerate under “due on sale” clause must be made within reasonable time or equitable defenses of laches, waiver and estoppel may be raised. (285 S.C. 358, 329 S.E.2d 437).

Deficiency.

Defendant against whom personal judgment is taken may, within 30 days after sale, apply by verified petition to clerk of court for order of appraisal. Defendant appoints one appraiser, judgment creditor one and clerk of court third. Appraisers make return giving true value of property. If value returned, after deducting amount for which property sold, equals or exceeds deficiency remaining on judgment after crediting net proceeds of sale, judgment is extinguished. If less, judgment is reduced pro tanto. Appeal may be taken to court having jurisdiction of action.

(S.C. Code Ann. §§ 29-3-680 to -750).

Redemption.

No right of redemption after foreclosure sale. (S.C. Code Ann. § 29-3-10).

Form.

The following form of mortgage may be used:

Form

Mailing address of Mortgagee

The State of South Carolina: To all whom these presents may concern: . . . . . . In the state aforesaid, send greeting: Whereas, ... the said . . . . . ., in and by . . . . . . certain bond or obligation bearing even date herewith, stand firmly held and bound unto . . . . . ., in the penal sum of . . . . . . dollars, conditioned for the payment in lawful money of the United States of the full and just sum of . . . . . . dollars as in and by the said bond and conditions thereof, reference being thereunto had, will more fully appear; Now know all men, that . . . . . . the said . . . . . ., in consideration of the said debt, and for the better securing the payment thereof, according to the conditions of the said bond, and also in consideration of $3, to . . . . . . in hand well and truly paid by the said . . . . . ., at and before the sealing and delivery of these presents, the receipt whereof it is hereby acknowledged, have granted, bargained, sold and released, and by these presents, do grant, bargain, sell and release unto the said . . . . . .: (describe property including derivation clause of mortgagor's title). Together, with all and singular the rights, members, hereditaments and appurtenances to the said premises belonging or in anywise incident or appertaining. To have and to hold, all and singular the said premises unto the said . . . . . ., ... heirs and assigns forever. And . . . . . . do hereby bind . . . .self. . and . . . . . . heirs, executors and administrators, to procure or execute any further necessary assurances of title to the said premises, and also to warrant and forever defend all and singular the said premises unto the said . . . . . ., ... heirs and assigns, from and against . . . . . . and . . . . . . heirs, executors and administrators; and all other persons lawfully claiming or to claim the same or any part thereof. And it is agreed, by and between the parties hereto, that the said mortgagor, ... heirs, executors or administrators, shall keep the buildings erected, or to be erected on said premises, insured against loss and damage by fire, with loss made payable to the said mortgagee, for an amount not less than . . . . . . dollars in such company as shall be approved by the said mortgagee, ... executors, administrators or assigns, and shall deliver the policy to the said mortgagee, and in default thereof, the said mortgagee, ... executors, administrators or assigns may effect such insurance and reimburse themselves under this mortgage for the expense thereof, with interest thereon from the date of its payment. And it is further agreed, in the event of other insurance and contribution between the insurers, that said mortgagee, ... executors, administrators or assigns, shall be entitled to receive from the aggregate of the insurance moneys to be paid, a sum equal to the amount of the debt secured by this mortgage. And it is agreed, by and between the said parties, that if the said mortgagor, ... heirs, executors or administrators shall fail to pay all and any taxes and assessments upon the said premises when the same shall first become payable, then the said mortgagee, ... heirs, executors, administrators or assigns, may cause the same to be paid together with all penalties and costs incurred thereon, and reimburse themselves under this mortgage for the sum so paid, with interest thereon from the date of such payment. And it is agreed, by and between the said parties, that upon default being made in the payment of principal or interest or any part or installment thereof as stipulated in the said bond, or in the payment of the insurance premiums, or of the taxes, or of the assessments hereinabove mentioned, when the same shall severally become payable and, as to the last three items, upon such default continuing for the space of ten days after notice from the mortgagee, ... executors, administrators or assigns, or (in case of payment by the mortgagee as herein allowed) upon the mortgagor's failing for a like period to make good such default by repayment—then the entire amount of the debt secured or intended to be secured hereby shall become due at the option of the said mortgagee, ... executors, administrators or assigns, although the period for the payment thereof may not then have expired. And it is agreed, by and between the said parties, that should legal proceedings be instituted for the collection of the debt secured hereby, then and in that event the said mortgagee, ... executors, administrators or assigns, shall have the right to have a receiver appointed of the rents and profits of the above described premises, who, after deducting all charges and expenses attending such proceedings and the execution of the said trust as receiver, shall apply the residue of the said rents and profits towards the payment of the debt secured hereby. And it is further agreed, by and between the said parties, that should legal proceedings be instituted for the foreclosure of this mortgage or for any purpose involving this mortgage, or should the debt hereby secured be placed in the hands of an attorney at law for collection by suit or otherwise, that all costs and expenses incurred by the mortgagee, ... heirs, executors, administrators or assigns, including a reasonable counsel fee (of not less than . . . .% of the amount involved), shall thereupon become due and payable as a part of the debt secured hereby, and may be recovered and collected hereunder. Provided always, and it is the true intent and meaning of the parties to these presents, that if the said . . . . . ., ... heirs, executors or administrators shall pay or cause to be paid unto the said . . . . . ., ... executors, administrators or assigns, the said debt with the interest thereon, if any shall be due, and also all sums of money paid by the said mortgagee, ... executors, administrators or assigns, according to the conditions and agreements of the said bond and of this mortgage, then this deed of bargain and sale shall cease, determine and be void, otherwise it shall remain in full force and virtue. And it is lastly agreed, by and between the said parties, that the said mortgagor . . . . . . to hold and enjoy said promises until default of payment shall be made. Witness . . . . . . hand. . . . and seal. . . . this . . . . . . day of . . . . . ., in the year of our Lord 20. . . .

. . . . (L.S.)

. . . . (L.S.)

Signed, sealed and delivered in the presence of:

. . . .

. . . .

Nichols Cyc. Legal Forms §6.1098

(In order to entitle mortgage to be recorded, add acknowledgment. For form, see category 10 Documents and Records, topic 10.01 Acknowledgments.)

Forms

Following form of assignment may be used: For valuable consideration I, ..., the sole owner and holder of the within mortgage, do hereby transfer, assign and set over the same with the bond (or note) which it was given to secure unto . . . . . . his heirs and assigns. Two witnesses and an acknowledgment are required. If the assignment is not to be written on the mortgage, a description of the mortgage as to date, amount and place of record should be added.

Nichols Cyc. Legal Forms §6.1469

Following form of satisfaction may be used: State of South Carolina: county of . . . . . .: John Doe to Richard Roe. Mortgage dated . . . . . ., recorded . . . . . ., amount . . . . . . I, ..., sole owner and holder of the above described mortgage hereby declare same to be fully satisfied and the lien thereof forever discharged. Witness my hand and seal this . . . . . . day of . . . . . . Two witnesses and acknowledgment.

Nichols Cyc. Legal Forms §6.1976

Following form of release of lien may be used: State of South Carolina: county of . . . . . .: John Doe to Richard Roe. Mortgage dated . . . . . ., recorded . . . . . . For valuable consideration I, ..., the sole owner and holder of the above described mortgage, do hereby release and forever discharge from the lien of said mortgage the following described property, to wit, (description of property to be released), said mortgage to remain in full force and effect as to the remaining portion of the property therein described. Witness my hand and seal this . . . . . . day of . . . . . . Two witnesses and acknowledgment.

Nichols Cyc. Legal Forms §6.1976

Reverse Mortgages.

See South Carolina Reverse Mortgage Act. (S.C. Code Ann. §§ 29-4-10 to -60).

Reverse mortgage provides cash advances to borrower based on equity principal residence. (S.C. Code Ann. § 29-4-20).

20.04A SECURITY INTEREST IN PERSONAL PROPERTY:

See topic Commercial Code.

21 PROPERTY

—Scope —

Generally §§27-1-10 to -60.

21.01 ABSENTEES:

Care of Property.

No statutory provisions.

Process Agent.

No statutory provisions except as to executors and administrators. See category 13 Estates and Trusts, topic 13.08 Executors and Administrators.

Claims Against Property.

Absentee having or claiming interest in real or personal property or unknown party in action affecting title to real property may be made party to action and served by publication. See category 5 Civil Actions and Procedure, topic 5.20 Process.

Escheat.

Uniform Unclaimed Property Act of 1981. (S.C. Code Ann. §§ 27-18-10 to -400).

21.02 ADVERSE POSSESSION:

See generally, S.C. Code Ann. §§15-67-210 to 15-67-260.

Character of Possession.

Person may acquire fee simple title to real estate by continuous, hostile, open, actual, notorious, and exclusive possession for a period of ten years, but not against the state or political subdivision thereof. (289 S.C. 176, 345 S.E.2d 724). Possession of land under mistaken belief of ownership is insufficient to establish hostility. (287 S.C. 328, 338 S.E.2d 338). Person claiming title by presumptive grant must show that he and those under whom he claims have been in actual possession of tract of land for 20 years. (162 S.C. 177, 160 S.E. 436). Adverse possession relates to real property only. (S.C. Code Ann. § 15-3-310). No adverse possession against any co-tenant unless claim adverse to all co-tenants. (290 S.C. 315, 350 S.E.2d 201).

Landlord and Tenant.

Possession of tenant deemed possession of landlord until expiration of ten years from the termination of the tenancy; or where there has been no written lease, until the expiration of ten years from the time of refusal to pay rent, notwithstanding that such tenant may have acquired another title, or may have claimed to hold adversely to his landlord. (S.C. Code Ann. § 15-67-260).

Easements.

Right of way by prescription implies adverse use of way for 20 years; and party using way must use it as though he were exercising right of property in himself, uncontrollable by owner of soil over which it runs. (363 S.C. 47, 610 S.E.2d 479).

Evidence.

Adverse possession for the period of limitation (see category 5 Civil Actions and Procedure, topic 5.16 Limitation of Actions) must have been evidenced, if claim is under written instrument, by proof that land has been usually cultivated or improved or has been protected by a substantial enclosure or though not enclosed has been used for the supply of fuel or fencing timber or for the purpose of husbandry or for the ordinary use of the occupant. If a known farm or single lot has been partly improved the unimproved portion will be deemed occupied. (S.C. Code Ann. § 15-67-230). Where claim is not under written instrument it must be shown that land has been protected by substantial enclosure or has been usually cultivated or improved. (S.C. Code Ann. § 15-67-250).

Disabilities.

Time begins to run only after removal of disabilities. Person considered under disability if within any one of following categories: (1) Within age of 18 years; or (2) insane. (S.C. Code Ann. § 15-3-370).

Pleading.

Adverse possession is affirmative defense and must be pleaded. (162 S.C. 177, 160 S.E. 436).

Tacking.

Person claiming title must show ten years possession in himself, or by inheritance. He may not tack his possession to that of his grantor in making up his ten year period. Courts will allow tacking by successive adverse occupants of land to make out title by adverse possession when change in possession occurs by operation of law. (S.C. Code Ann. § 15-67-210).

21.03 [RESERVED]

21.04 CONVEYANCES:

See topic 21.06 Deeds.

21.05 CURTESY:

Abolished. (S.C. Const. Arts. 17, 59 [1895]; see S.C. Code Ann. § 62-2-201).

21.06 DEEDS:

See topic Real Property for types of estates.

Conveyance.

Common Law Rule requiring words “and his heirs” is no longer applicable in conveying property in fee simple absolute. It is presumed that entire interest passes to grantee. (S.C. Code Ann. § 27-5-130).

Execution.

An instrument in writing subscribed by the grantor in the presence of and subscribed by two or more credible witnesses is necessary to convey inter vivos an estate or interest in or relating to real property except for a lease for not more than one year. A deed is usually sealed by placing the word “seal” or the letters L. S. after the signature of the grantor though this is not necessary if the attestation clause implies a seal. (S.C. Code Ann. §§ 27-7-10 to -30).

Operation and Effect.

Deed takes effect between parties from date of delivery.

Where there is conflict in description of deed between distances and boundaries, boundary will control. (284 S.C. 256, 325 S.E.2d 569).

Recording in county where realty is located is necessary to affect the rights of subsequent creditors (lien or simple contract) or purchasers for valuable consideration without notice. Deed is effective against creditors or purchasers from day and hour of filing in office of clerk of court or Register of Deeds of county in which property situated and priorities between parties are determined by time of filing for record. (S.C. Code Ann. § 30-7-10). (See also category 10 Documents and Records, topic 10.04 Records.) Deed must be acknowledged or probated before it can be recorded. See infra, subhead Forms.

True Owner.

One requirement of law is that property be listed, assessed, levied upon, advertised, and sold in name of true owner. (298 S.C. 75, 378 S.E.2d 261).

Recording Fees.

Fee for recording deed is $10 with additional charge of $1 per page if deed is over four pages. (S.C. Code Ann. § 8-21-310).

Conveyance by Attorney.

Deed may be executed by an attorney in fact, whose appointment must be recorded. (S.C. Code Ann. § 62-5-501)

Forms.

§27-7-10 prescribes permissible form for deed as follows:

Form

Mailing Address of Grantee

The State of South Carolina:

Know all men by these presents that I, A. B. of . . . . . . in the state aforesaid, in consideration of the sum of . . . . . . dollars to me in hand paid by C. D., of . . . . . . County, State of . . . . . ., the receipt of which is hereby acknowledged, have granted, bargained, sold and released and by these presents do grant, bargain, sell and release unto the said C. D. all that (here describe the premises including derivation clause), together with all and singular the rights, members hereditaments and appurtenances to the said premises belonging or in any wise incident or appertaining: to have and to hold all and singular the premises before mentioned, unto said C. D., his heirs and assigns, forever. And I do hereby bind myself, my heirs, executors and administrators, to warrant and forever defend all and singular the said premises unto said C. D., his heirs and assigns, against myself and my heirs, and against every person whomsoever lawfully claiming or to claim the same, or any part thereof.

Witness my hand and seal, this . . . . . . day of . . . . . . in the year of our Lord . . . . . . and in the . . . . . . year of the independence of the United States of America.

. . . . (L.S.)

In the presence of:

. . . .

. . . .

(Proof by Witness)

Derivation may be omitted on quitclaim or non-warranty deed.

Warranty clause may be omitted or made only against grantor.

Quitclaim deed same as above except covenants omitted and words “all my right, title and interest in and to,” inserted before “all that.”

Corporate form not prescribed by statute. To modify statutory form for corporate use pronouns are changed, references to heirs, executors and administrators are changed to successors and assigns, and attestation clause modified.

21.07 DEEDS OF TRUST:

See category 20 Mortgages, topic 20.04 Mortgages of Real Property.

21.08 DOWER:

Dower and jointure abolished. (281 S.C. 516, 316 S.E.2d 401).

21.09 ESCHEAT:

See category 13 Estates and Trusts, topic 13.07 Descent and Distribution, subhead Escheat. See also category 13 Estates and Trusts, topic 13.08 Executors and Administrators, subhead Settlement and Distribution.

21.10 LANDLORD AND TENANT:

Relations between residential landlord/tenant are governed by Uniform Residential Landlord and Tenant Act. (S.C. Code Ann. §§ 27-40-10 to -940).

Warranty of Habitability.

Warranty of habitability in dwellings covered by Act. Landlord under duty to comply with housing code and maintain in habitable condition. (S.C. Code Ann. § 27-40-440). No duty on landlord exists to provide protection to tenants from criminal activity by third parties. (741 F. Supp. 1205).

Kinds of Tenancy.

Two general kinds of tenancies, at will and for term. In addition, there are special tenancies applicable to domestic servant working for landlord, farm laborer or share cropper working for landlord, and agricultural renters. Agricultural renter may, however, become tenant for term. Tenancy at will is created when one other than owner, excepting domestic servant or farm laborer for owner, uses or occupies real property without oral or written agreement. Tenancy for term is one created by either oral or written agreement and, where term exceeds one year, it becomes tenancy for years. Tenancy for term of not exceeding one year may be created by parol, but all agreements for longer term are void unless in writing. Seal unnecessary but customarily used. Proof by witness necessary to entitle to record. (S.C. Code Ann. §§ 27-35-10 to -180).

Recording.

Lease for more than one year is not valid against rights of third persons without actual notice unless recorded. (S.C. Code Ann. § 27-33-30). Leases for period of less than one year need not be recorded in order to bind subsequent purchaser, because such leases need not be in writing.

Rent is payable as stipulated and if time of payment is not named is payable monthly at the end of each calendar month, excepting rent for farm lands. If tenant fails to give possession after giving notice of intention to quit, he becomes liable for double rent. (S.C. Code Ann. §§ 27-35-10 to -160; S.C. Code Ann. § 27-35-180).

Lien.

Landlord has lien on unexempt personal property on the premises, whether owned by tenant or another, while it remains thereon, which lien follows property of tenant, but not that of third person if removed, if distrained within ten days of removal. If property is worth less than $500 landlord may sell. If worth more may only sell pursuant to §§27-37-10 to -160. Lien is junior to lien for taxes and to lien of security interest perfected before rent contract entered into or perfected before property was brought upon premises. Following articles are exempt; personal clothing, food within dwelling, bedsteads, bedding and cooking utensils. Rents due on agricultural land may be collected by seizure or attachment of crops growing or gathered as well as by distress. (S.C. Code Ann. §§ 27-37-10 to -160; S.C. Code Ann. §§ 27-39-210 to -360).

Termination of Tenancy.

All tenancies for term terminate upon last day of agreed term. Tenancy at will and tenancy of domestic servant are terminated upon 20 days written notice. All other tenancies deemed month-to-month. Landlord or tenant may terminate week-to-week tenancy by written notice at least seven days before termination date specified in notice. Landlord/tenant may terminate month-to-month tenancy by written notice at least 30 days before termination date specified in notice. (S.C. Code Ann. §§ 27-35-10 to -180; S.C. Code Ann. § 27-40-770).

If tenant fails to comply with rental agreement (other than by nonpayment or violation of §27-40-540 for failure to maintain health and safety of dwelling), landlord may terminate lease within 14 days by giving written notice of noncompliance. (S.C. Code Ann. § 27-40-710). If noncompliance is corrected by tenant prior to date specified for termination tenant may not be evicted. (S.C. Code Ann. § 27-40-710).

Holding Over.

Tenant may be ejected. If rent accepted by landlord from tenant, new tenancy created, except that after commencement of ejectment proceedings rent continues to accrue at same rate as prevailed before such proceedings were instituted, and acceptance of rent by landlord does not constitute waiver of his right to insist on ejectment. Collection of such rent may be enforced by distress. Landlord may distrain for rent within six months of termination of lease. (S.C. Code Ann. § 27-37-10, 27-37-150, 27-39-210, 27-40-770).

Eviction.

When tenant fails or refuses to pay rent when due or when demanded, or when term of tenancy has ended, or terms or conditions of lease are violated, tenant may be ejected upon application to magistrate, who issues written rule to vacate or show cause why tenant should not be evicted within ten days of service of rule. (S.C. Code Ann. §§ 27-37-10; -20). Service same as service of summons in Court of Common Pleas, or by posting if premises vacated. (S.C. Code Ann. § 27-37-30). Either party may demand jury trial and may appeal. (S.C. Code Ann. § 27-37-80). Appeal by tenant does not stay ejectment unless appeal bond posted within five days of notice of appeal. (S.C. Code Ann. § 27-37-130). Judges of circuit and county courts have concurrent jurisdiction with and may exercise all of powers and duties conferred upon magistrates in landlord and tenant matters. (S.C. Code Ann. § 27-33-40). See also S.C. Code Ann. §§ 27-40-710 to -800.

Abandonment.

Tenant's absence from rental premises for 15 days after default in payment of rent construed as abandonment. (S.C. Code Ann. § 27-35-150). Where tenant has left personal property in rental premises worth less than $500, personal property may be immediately set out after 15 days have elapsed. Where tenant's belongings are valued in excess of $500 formal eviction proceedings must be commenced in accordance with §§27-40-710 to -800. (S.C. Code Ann. § 27-40-730).

Distress.

Governed by S.C. Code Ann. § 27-40-740. Contractual lien or contractual security interest on behalf of landlord in tenant's household goods not enforceable unless perfected before effective date of Act (July 8, 1986). Landlord may enforce collection of rent by distress only pursuant to §27-39-210 to -360; however, tenant may raise defenses to issuance of distress warrant pursuant to provisions of Act or rental agreement and may take advantage of property exemptions found in §15-41-30. (S.C. Code Ann. § 27-40-740).

Seizure of Third Party's Property.

§27-39-250 allows landlord to collect past due rent by seizing property on premises, selling it and applying proceeds to overdue rent. §27-39-250 applies to all property on leased premises, including that of third persons, but requires notice to third party owners. (But see 589 F. Supp. 242, holding §27-39-250 unconstitutional.)

Form of Lease.

A lease may be made in the following form or to like effect:

Form

State of South Carolina, County of. . . . . Indenture made this . . . . . . day of . . . . . ., 20. . . ., between . . . . . . of . . . . . . and hereinafter called the lessor, which expression shall include his heirs and assigns where the context so requires or admits, of the one part; and . . . . . . of . . . . . . hereinafter called the lessee, which expression shall include his executors, administrators and assigns, where the context so requires or admits, on the other part. Said lessor doth hereby lease and demise unto the said lessee: (Description of property). To hold the premises hereby demised unto the lessee, his executors, administrators and assigns from the . . . . . . day of . . . . . ., 20. . . ., to the . . . . . . day of . . . . . ., 20. . . . . . Yielding and paying therefor during the said term, rent as follows: (With provisos, covenants, conditions for terminating lease, etc.). In witness whereof, parties hereto have hereunto set their hands and seals in duplicate on the day and year first above written.

In the presence of:

. . . . (L. S.)

. . . .

. . . .

21.11 LEASES:

See topic 21.10 Landlord and Tenant.

Manufactured Home Park Tenancy Act §27-47-10 to -620 provides for rights and obligations of manufactured homeowners and manufactured home park owners in situations where manufactured home park consists of five or more lots offered for rent or lease.

21.12 [RESERVED]

21.13 PERPETUITIES:

South Carolina Uniform Statutory Rule Against Perpetuities adopted (S.C. Code Ann. §§ 27-6-10 to -80); supersedes common law rule (S.C. Code Ann. § 27-6-80).

Unless estate vests or terminates no later than 21 years after death of individual then alive or within 90 years after its creation, then it comes within rule against perpetuities and is void. (S.C. Code Ann. § 27-6-20). This does not apply to gift, bequest, or devise, in trust or otherwise for religious, educational, charitable or benevolent uses, or for care or maintenance of tombs, monuments, cemeteries, etc. (S.C. Code Ann. §§ 27-5-70, 27-6-50, 62-7-105, -106, -201, -305). Pension and profit sharing plans specifically exempt from rule against perpetuities. (S.C. Code Ann. §§ 27-5-80, 27-6-50[6]). Business trusts specifically exempt from rule against perpetuities. (S.C. Code Ann. § 27-6-50[7]; S.C. Code Ann. §§ 33-53-10 to -50). As to business trusts, see South Carolina Business Corporation Act of 1988 under category Business Organizations, topic Corporations.

Accumulations.

No statute restricting accumulation of income. Presumably, common law rules prevail.

See also category 13 Estates and Trusts, topic 13.11 Trusts.

21.14 PERSONAL PROPERTY:

Tenancy by entirety nonexistent. (223 S.C. 182, 75 S.E.2d 46).

Joint tenancy with right of survivorship as to stocks and other securities has been repealed as of Jan. 1, 1989.

Personal property acquired during marriage is part of marital estate. (S.C. Code Ann. § 20-7-473).

Malicious injury to personal property is either felony or misdemeanor offense depending on value of property injured or destroyed. (S.C. Code Ann. § 16-11-510).

Under Home Rule municipalities may tax and assess personal property. (S.C. Code Ann. § 5-7-30).

Gifts of.

See category 6 Courts and Legislature, topic 6.05 Uniform Laws.

21.15 POWERS OF ATTORNEY:

Attorneys in Fact.

If power is to convey real estate or mortgage real property, then power must be witnessed and probated, or acknowledged, as in case of deed or mortgage, before it can be recorded. Power must be recorded when it covers conveyances of real estate or mortgaging of real estate. (S.C. Code Ann. § 62-5-501). See topic 21.06 Deeds.

21.16 REAL PROPERTY:

Estates recognized: fee simple, tenancy in common, joint tenancy (without right of survivorship unless instrument creating joint tenancy expressly provides survivorship), life estate with remainder over.

Vacation time sharing plans comprehensively regulated. (S.C. Code Ann. §§ 27-32-10 to -250).

Rule in Shelley's Case.

Abolished in certain respects. (S.C. Code Ann. § 27-5-20).

Condominiums.

South Carolina Horizontal Property Act adopted. (S.C. Code Ann. §§ 27-31-10 to -440). Provides for condominium ownership of property. Converting apartments into condominiums does not violate conditions and restrictions that prohibit "subdivision" of the property, because condominiums divide an ownership interest but not the land itself. (375 S.C. 267, 651 S.E.2d 617).

Uniform Land Sales Practice Act adopted. (S.C. Code Ann. §§ 27-29-10 to -210).

Foreign Conveyances or Encumbrances.

See category 10 Documents and Records, topic 10.04 Records.

Habitability.

Only parties to contract for purchase and sale of residence convey implied warranty of habitability. Those not in privity are not accountable for warranty of habitability. (283 S.C. 247, 321 S.E.2d 192). Whether house is speculation or custom built not determinative of whether there is implied warranty of habitability. What is determinative is whether or not house is new. If used, warranty does not exist. (289 S.C. 161, 345 S.E.2d 715).

See also topics 21.05 Curtesy, Deeds, Dower, Landlord and Tenant, Perpetuities; categories 5 Civil Actions and Procedure, topic Partition; Debtor and Creditor, topic Homesteads; Environment, topic Environmental Regulation; Estates and Trusts, topic Wills; Family, topic Husband and Wife; Mortgages, topic Mortgages of Real Property; Taxation, topic Property Taxes.

22 TAXATION

22.01 ADMINISTRATION:

General Supervision.

S.C. Department of Revenue, 301 Gervais Street, P.O. Box 125, Columbia, S.C. 29214 (Phone: 803-898-5000; Fax: 803-898-5822), is governed by director appointed by Governor with advice and consent of Senate. (S.C. Code Ann. § 12-4-30[c]). See http://www.sctax.org/default.htm. All contested cases, as defined in S.C. Code Ann. § 1-23-310, are heard by administrative law judge pursuant to c. 23 of Title 1. Assessment is subject to classification of property under uniform assessments and statewide property equalization. (S.C. Code Ann. §§ 12-43-210 to -350). Whenever market value estimate of property fixed by assessor is greater by $1,000 or more than amount returned by owner or agent, or whenever any property is valued and assessed for taxation which has not been returned or assessed previously, assessor, on or before July 1st, or as soon thereafter as may be practicable, gives written notice thereof to owner of property or agent. In reassessment years, written reassessment notice to owners or agents must be given by Oct. 1. Notice must include pertinent ownership and legal description data required by Department of Revenue. Notice to be served upon owner or his agent personally or by mailing it to such persons at last known address. In years where there is notice of property tax assessment, if owner or agent objects to valuation and assessment, he must serve written notice of such objection upon assessor within 90 days of date of mailing of notice. In years where there is no notice of property tax assessment, owner or agent has until Mar. 1 to serve written notice of objection upon assessor or owner's right to appeal for that tax year is waived. (S.C. Code Ann. § 12-60-2510). Upon application, Department of Revenue may determine in advance tax effects of transactions and tax liability of taxpayers, upon facts furnished to it. (S.C. Code Ann. § 12-4-320[2]).

Exemptions.

Following property is exempt from ad valorem taxation: All property of state and local governments if property is used exclusively for public purposes; all property of all schools, colleges, and other institutions of learning and all charitable institutions in nature of hospitals and institutions caring for infirm, handicapped, aged, children and indigent, except where profits thereof are applied to private use; all property of public libraries, churches, parsonages, and burying grounds; all property of all charitable trusts and foundations used exclusively for public purposes; all household goods and furniture used in home of owner of such goods or furniture, except where such owner is hotel, rooming house, apartment or other place of business; all inventories of manufacturers, except manufactured articles which have been offered for sale or retail; all new manufacturing establishments located in any counties of this state after July 1, 1977, for five years from time of establishment and all additions to existing manufacturing establishments located in any of counties of this state for five years from time such addition is made if cost of such addition is $50,000 or more; all facilities or equipment of industrial plants which are designed for elimination, mitigation, prevention, treatment, abatement, or control of water, air, or noise pollution; homestead exemption for persons 65 years of age or over, for persons permanently or totally disabled and for blind persons; intangible personal property; all property of public benefit corporations established by a county or municipality used exclusively for economic development purposes which serve a governmental purpose. Numerous other classes of property are also exempt from ad valorem taxation subject to the provisions of S.C. Code Ann.

§ 12–4–720 (S.C. Code Ann. § 12-37-220; see also S.C. Const. Art. X, §3). Vehicles owned by members of armed forces that are licensed and taxed in other jurisdictions are exempt. Owner must file application for exemption of property from taxation and is not required to file again until there is change in status of property; provided, however, that owners of property who are required to file property tax return with department must claim any exemption on return each year property is exempt. (S.C. Code Ann. §§ 12-4-710 to -770).

Application for property tax exemption must be filed within three years of time of timely filed return, including extensions, was filed, or two years from date of payment, whichever is later. If no return was filed, claim for refund must be filed within two years from date of payment. (S.C. Code Ann. §§ 12-4-720[A], 12-54-85[F]). Owners of pollution control property must file before first penalty date for payment of property taxes. Exemption applications are not required for properties owned by U.S. government and for certain other exempt properties. (S.C. Code Ann. § 12-4-720[A][2] to [A][3]).

Returns.

Every taxpayer required to make return to department of property for assessment for property taxation must do so not less than once each calendar year. (S.C. Code Ann. § 12-37-970). Amended returns may be filed with Department of Revenue within allowed time or pursuant to any extension granted by department; however, Department of Revenue may accept or reject within their discretion. (S.C. Code Ann. § 12-37-975). Property is required to be returned at its true value. (S.C. Code Ann. § 12-37-930). President or designated agent of any railroad company with track or roadbed in South Carolina must file return to Department of Revenue annually, on or before 15th day of fourth month following close of company's accounting period. (S.C. Code Ann. § 12-37-1610).

Appeals.

When Department of Revenue raises assessment, appeal may be made in writing within 90 days. (S.C. Code Ann. § 12-60-450). Property taxpayer who disagrees with department's determination may request hearing before Administrative Law Judge if files action within 30 days of department's determination. (S.C. Code Ann. § 12-60-2130).

Interstate Co-operation.

Uniform Act on Interstate Compromise of Death Taxes has been adopted and became effective Jan. 1, 1962. (S.C. Code Ann. §§ 12-16-210 to -320).

Penalties.

Property Tax.

Penalty for failure to file is 10% of assessed value of nonreturned property. Penalty for filing false return is 25% assessed value of property. (S.C. Code Ann. §§ 12-37-800 to -810). Penalties for delinquency are: 3% if not paid by Jan. 16; 10% if not paid by Feb. 2; 15% if not paid by Mar. 17. (S.C. Code Ann. § 12-45-180).

Income Tax.

Penalties are assessed in accordance with Internal Revenue Code except for certain penalties related to certain retirement plan distributions. (S.C. Code Ann. § 12-6-50[5]).

Estate Tax.

For estates of decedents dying after June 30, 1991, S.C. Code Ann. §§ 12-16-1110 to -1200 will determine when returns are due and penalties for failure to timely file and pay tax.

Gift Tax.

No S.C. gift tax for gifts made after Dec. 31, 1991.

Sales and Use Tax.

25% maximum penalty and ½% interest per month on tax and penalty for failure to file return or pay tax timely. (S.C. Code Ann. § 12-54-43). Variety of criminal and civil penalties listed in §12-54-43.

Documentary Stamp Taxes.

Misdemeanor carrying maximum $5,000 fine and/or two year imprisonment for fraudulent or willful reuse of stamps or purchase, sale or use of counterfeit stamps. (S.C. Code Ann. § 12-21-3070).

Gasoline Tax.

Same as federal law. (S.C. Code Ann. § 12-28-1710).

Power Tax.

$100 per day penalty for failure to keep proper records. (S.C. Code Ann. § 12-23-50).

Liquor, Wine and Beer Taxes.

Purchase from other than licensed dealer or possession or storage of unstamped liquor bottle or package, knowingly employing person under age 21 in retail, wholesale, or manufacture of liquor, or drinking alcoholic liquors on premises is misdemeanor carrying for first offense $100 fine or 30 day imprisonment; for second offense $200 fine or 60 day imprisonment; for subsequent offense $300 fine or 90 day imprisonment. Possession or storage of liquor in place of business other than licensed liquor store, unlawful advertisement, is misdemeanor carrying for first offense $200 fine or 60 day imprisonment; for second offense $1,000 fine or one year imprisonment; for subsequent offense $2,000 fine or two year imprisonment. Manufacture, sale, transportation or possession of unstamped liquor or stamped liquor in an illegal manner is misdemeanor carrying for first offense up to $600 fine or six month imprisonment; for second offense $1,500 fine or one year imprisonment; for subsequent offense $3,000 fine or two year imprisonment. (S.C. Code Ann. §§ 61-6-4010 to -4550).

Unlawful for person licensed to sell alcoholic liquors to knowingly and willfully refill, partially refill, or reuse bottle of lawfully purchased alcoholic liquor, or otherwise tamper with contents of bottle. Possession by person licensed to sell alcoholic liquor of any alcoholic beverages in refilled or reused bottles, or other violation subject to maximum $500 fine and license suspension for up to 180 days. Second violation is misdemeanor carrying maximum $1,000 fine or imprisonment up to six months, or both, and subject to possible permanent revocation of license for retail sale of alcoholic beverages. (S.C. Code Ann. § 61-6-1500). Any violation involving avoidance of taxes subject to $1,000 fine and permanent revocation of license. (S.C. Code Ann. §§ 61-6-2600, 61-6-2610).

Misdemeanor carrying maximum $100 fine or maximum 30 day imprisonment for sale of unstamped beer or wine, or failure to secure beer or wine permit, to return permit upon revocation or suspension or continuation of operation after revocation or suspension. Each day without permit constitutes separate offense. (S.C. Code Ann. §§ 61-4-20, -560, -600, -610). Misdemeanor carrying maximum $100 fine or 30 day imprisonment for failure to post sign that possession of beer, ale, porter, or wine by anyone under age 21 is criminal offense. (S.C. Code Ann. § 61-4-70, 61-6-1530). Misdemeanor carrying maximum $200 fine and/or maximum 12 month imprisonment for beer and wine licensee failure to keep proper records or for filing false return. (S.C. Code Ann. § 12-21-2830).

Conviction, guilty plea or forfeiture of bond automatically revokes liquor, beer or wine license for one year on first offense; two years on subsequent one. In alternative, Department of Revenue may impose monetary penalty of $250 for first offense, $500 for subsequent one. (S.C. Code Ann. § 61-6-4260). For violation of statute or of Department of Revenue regulation, Department of Revenue may suspend or revoke license or impose monetary penalty: Retail beer and wine licensees subject to maximum $1,000 penalty; wholesale beer and wine and retail liquor licensees subject to maximum $1,500 penalty; wholesale liquor licensees subject to maximum $5,000 penalty. (S.C. Code Ann. § 61-4-250, 61-6-4270). Licenses of liquor producer and producer's representative and warehouse license for storage by producer subject to suspension or revocation for violation. (S.C. Code Ann. § 61-6-2950).

Maximum $1,000 penalty for failure by wholesaler, importer or other person first offering wine for sale in South Carolina to file report or pay additional wine excise tax. (S.C. Code Ann. § 12-21-1320). Misdemeanor carrying maximum $5,000 fine and/or two year imprisonment for fraudulent or willful reuse of stamps or use of counterfeit stamps. (S.C. Code Ann. § 12-21-3070). $20 per container penalty for holding, transporting, or distributing in violation of Beverage Control Act or with design to avoid payment of license taxes. (S.C. Code Ann. § 61-6-2610).

Taxes on Cigarettes and Playing Cards.

Misdemeanor carrying maximum $200 fine and/or maximum 12 month imprisonment for failure to keep proper records or for filing false return. (S.C. Code Ann. § 12-21-2830). Unstamped goods and vehicle, other than common carrier, transporting same subject to confiscation by Department of Revenue. (S.C. Code Ann. §§ 12-21-2870 to -2890). Misdemeanor carrying maximum $5,000 fine and/or two year imprisonment for fraudulent or willful reuse of stamps or purchase, sale or use of counterfeit stamps. (S.C. Code Ann. § 12-21-3070).

Taxes on Tobacco other than Cigarettes.

Misdemeanor carrying minimum $50, maximum $200 fine and/or minimum 30 day, maximum 12 month imprisonment for failure to keep proper records or for filing false return. (S.C. Code Ann. § 12-21-2830).

Admissions.

Misdemeanor carrying minimum $20, maximum $100 fine or minimum ten day, maximum 30 day imprisonment for operation of a place of amusement without license. (S.C. Code Ann. § 12-21-2470). Misdemeanor carrying maximum $1,000 fine and/or maximum two year imprisonment for fraudulent or willful reuse of tickets or purchase, sale or use of counterfeit or altered tickets. (S.C. Code Ann. § 12-21-2540). Failure to make true return or to file can result in Department of Revenue making return upon information it can obtain and penalties may apply. (S.C. Code Ann. § 12-21-2550, 12-54-43). Misdemeanor carrying minimum $50, maximum $200 fine and/or minimum 30 day, maximum 12 month imprisonment for failure to keep proper records or for filing false return. (S.C. Code Ann. § 12-21-2830).

Coin Operated Devices, Skating Rinks, Bowling Alleys, and Billiard Rooms.

$50 penalty for each failure to secure license or attach same to any machine, apparatus, billiard or pocket billiard table as required; $2,500 penalty for certain machines. (S.C. Code Ann. § 12-21-2738). Any machine, apparatus, billiard or pocket billiard table not having attached thereto required license subject to confiscation by Department of Revenue. (S.C. Code Ann. § 12-21-2742).

Unemployment Compensation.

1% interest per month for good faith understatement of contribution; 10% penalty and 1% interest per month for negligent understatement; 100% penalty and 1% interest per month for fraudulent understatement. (S.C. Code Ann. § 41-31-330). Failure to file report within 15 days after requested to do so by Department of Revenue is penalized at 10% of contributions due, not less than $25 nor more than $1,000. (S.C. Code Ann. § 41-31-350). Misdemeanor carrying minimum $20, maximum $100 fine or maximum 30 day imprisonment for each offense of making false statement or representation or knowingly failing to disclose material fact to obtain or to increase any benefits or to prevent or reduce payment of benefits to any individual, or to avoid or reduce any contribution. (S.C. Code Ann. §§ 41-41-10 to -20). Claimant knowingly making false statement of failure to disclose material fact ineligible to receive up to 52 consecutive weeks benefits. (S.C. Code Ann. § 41-41-20). Any employing unit or person willfully violating any provision of law or any order, rule or regulation thereunder, is liable to $1,000 penalty recoverable in civil action and is subject to conviction of misdemeanor carrying minimum $20, maximum $100 fine or maximum 30 day imprisonment, and each day violation continues is separate offense. (S.C. Code Ann. § 41-41-50).

22.02 ALCOHOL, BEVERAGES AND TOBACCO TAXES:

Liquor, Wine and Beer.

Annual license to sell must be obtained. License for new establishment within limits of municipality will not be issued if such is within 300 feet of church, school or playground or if outside limits of municipality within 500 feet thereof. (S.C. Code Ann. § 61-6-120). License will not be granted for retail stores to sell alcohol without regard to container size between 7:00 p.m. and 9:00 a.m. (or to allow consumption on premises; or to sell to persons under age 21, intoxicated, insane, or mentally incompetent; or to sell on credit except by electronic funds transfer [61-6-1500]); provided, license may be issued for sale of alcoholic liquors sold by drink by business engaged primarily in preparation and serving of meals or furnishing of lodging, or by certain nonprofit organizations. (Const., art. VIII-A, §1). License may be granted for establishments offering meals to public to purchase and possess alcoholic beverages for use solely in cooking and preparing foods. (S.C. Code Ann. § 61-6-700).

Additional license tax upon theatrical shows, circuses and carnivals imposed by S.C. Code Ann. §§ 12-33-410 to -500.

Biennial license to ship into state must be obtained by producers of liquor from Tax Commission (S.C. Code Ann. § 61-6-2840); biennial license for producer's representative and warehouse license for storage by producer required. (S.C. Code Ann. § 61-6-2870).

Individual may bring into state alcoholic beverages not exceeding $20 in value purchased outside continental U.S. without imposition of tax. (S.C. Code Ann. § 12-33-60).

Beverages with alcohol content of less than ½% by weight or volume excluded from alcoholic beverage law. Such beverages are covered under soft drink license tax.

Brew pubs now permitted in S.C. (S.C. Code Ann. §§ 61-4-1700 to -1770).

Cigarette tax imposed by S.C. Code Ann. §§ 12-21-610 to -810.

Tobacco tax imposed by S.C. Code Ann. §§ 12-21-610 to -810.

22.03 BUSINESS TAXES:

Power license tax imposed by §12-23-10.

Hospital tax imposed by S.C. Code Ann. §§ 12-23-810 to -840. Every hospital licensed by S.C. Department of Health and Environmental Control and every hospital doing business in South Carolina is subject to this tax.

Soft Drinks.

Soft drink taxes imposed by Art. 13, c. 21 of Title 12 are repealed effective July 1, 2001.

Coin Operated Devices.

Any person operating coin operated machines must secure annual license and pay tax imposed by §§12-21-2720 to -2750. Person required to obtain license must keep records showing manufacturers' serial number, model, or type of machine (S.C. Code Ann. § 12-21-2718); state license must be attached to machine before its operation commenced (S.C. Code Ann. §§ 12-21-2726, 12-21-2732). Persons operating such devices at recognized state or county fairs receive preferred rates.

Contractors.

License tax imposed by c. 11 of Title 40.

License Tax on Corporations.

See category 2 Business Organizations, topic 2.03 Corporations.

License Tax on Insurance Companies.

See category 16 Insurance, topic 16.01 Insurance Companies.

Chain Stores.

Retailers must obtain retail license for each permanent branch, establishment, or agency and pay license tax of $50 for each retail license at time of application. (S.C. Code Ann. § 12-36-510). See topic 22.17 Sales and Use Taxes, subhead Sales Tax, catchline Vendor Must Secure License.

22.03A CONTROLLED DANGEROUS SUBSTANCES TAX:

Marijuana and Controlled Substances Tax.

Marijuana tax imposed on marijuana and controlled substances based on weight, eff. July 11, 1993. (S.C. Code Ann. §§ 12-21-5010 to -6050).

22.04 CORPORATE TAXES:

Tax on Issuance of Corporate Stock.

See category 2 Business Organizations, topic 2.03 Corporations.

Stock Transfer Tax.

None.

22.05 EMPLOYMENT TAXES:

Unemployment Compensation Tax.

Tax on payrolls of employers employing one or more persons is levied to cover unemployment compensation benefits. Normal rate of tax is 5.4% of payroll, but rate charged any particular employer may, according to benefits charged against his fund, be normal rate of to 5.4% or be decreased according to a graduated scale ranging as low as 19/100 of 1%. Tax is payable quarterly to Unemployment Compensation Commission. No tax is imposed on employees. (S.C. Code Ann. §§ 41-31-10 to -150).

After default, contributions, interest and costs deemed taxes owed to state and are lien against all property of person owing such after warrant of execution issued and filed with clerk of court. (S.C. Code Ann. § 41-31-380).

22.06 [RESERVED]

22.07 ESTATE TAX:

Estate tax, imposed and regulated by §§12-16-10 to -1950, generally in amount of Federal credit. Because the state tax credit was repealed for decedents dying after December 31, 2004, and replaced with a deduction, since January 1, 2005, the South Carolina estate tax has been inoperative. Unless Congress reinstates the state tax credit, or the South Carolina legislature amends S.C. Code Ann. § 12-16-510, no estate taxes will be due to the State of South Carolina at least through 2010. Credit is given for taxes paid to other states. Property of resident includes real property in South Carolina, tangible personal property having actual situs in South Carolina and intangible personal property regardless of location. (S.C. Code Ann. § 12-16-510).

Effective for decedents dying after June 30, 1991, tax equal to maximum amount of federal credit allowed under §2011 of Internal Revenue Code of 1986 is imposed on transfers of residents' taxable estates. (S.C. Code Ann. § 12-16-510). For real and tangible personal property of resident located outside of South Carolina and subject to another state's death taxes, amount of tax must be credited with lesser of amount paid other state or amount computed by multiplying federal credit by fraction, numerator of which is part of gross estate of which other state has jurisdiction and denominator is entire gross estate. (S.C. Code Ann. § 12-16-510[B]). Arbitration procedures have been adopted for situations where S.C. Tax Commission and taxing authority of another state both make claims that decedent was domiciled in their respective states at time of death. (S.C. Code Ann. §§ 12-16-210 to -320). Tax is imposed on transfer of every nonresident's taxable estate located in this state. (S.C. Code Ann. § 12-16-520). That tax is computed by multiplying federal credit by fraction, numerator of which is value of gross estate over which South Carolina has jurisdiction, and denominator of which is value of entire gross estate. Property of nonresident subject to South Carolina taxation includes real property and real property interests located in this state which includes mineral interests, royalties, production payments, leasehold interests, or working interests in oil, gas, coal, or any other minerals, and tangible personal property having actual situs in South Carolina. (S.C. Code Ann. § 12-16-520). Special tax treatment for resident aliens is also provided. (S.C. Code Ann. § 12-16-530). Generation-skipping transfers are taxed up to maximum amount allowable under §2604 of Internal Revenue Code of 1986. (S.C. Code Ann. §§ 12-16-710 to -740). If gross estate of decedent at date of death warrants filing federal estate tax return and estate includes properties qualifying for valuation under §2032A of Internal Revenue Code of 1986, and within ten years after decedent's death and before death of qualified heir, qualified heir disposes of interest in property, other than to family member, or ceases to use property for qualified use, there is additional S.C. estate tax to be paid. (S.C. Code Ann. §§ 12-16-910 to -930). Ten-year lien arises automatically upon all of decedent's property upon failure to pay estate taxes. (S.C. Code Ann. § 12-16-1510).

Valuation Date.

Value of assets for estate tax purposes is determined as of same date or dates as provided under Federal Estate Tax. (S.C. Code Ann. § 12-16-20[16]).

22.07A GAMBLING AND ENTERTAINMENT TAXES:

Admissions tax imposed by §§12-21-2420, with certain exemptions.

Billiard Tables.

Tax imposed by S.C. Code Ann. §§ 12-21-2730 to -2750.

22.08 GASOLINE AND SPECIAL FUELS TAXES:

Gasoline tax imposed by c. 27 of Title 12 and tax on motor fuels imposed by c. 28 of Title 12.

Gasoline sold or dispensed for use in aircraft is subject to retail sales and use tax. (S.C. Code Ann. § 12-36-2120[15]).

22.09 GIFT TAX:

C. 17 of Title 12 is repealed, repealing S.C. gift tax, effective for gifts made after Dec. 31, 1991.

22.10 [RESERVED]

22.11 INCOME TAX:

Income tax is imposed on taxable income of individuals in excess of exemption, at the following rates: 2.5% on first $2,220, 3% on next $2,220, 4% on next $2,220, 5% on next $2,220, 6% on next $2,220, and 7% on excess over $11,100. (S.C. Code Ann. § 12-6-510). Imposed on net taxable income of corporations in excess of applicable credits or exemptions at rate of 5%. (S.C. Code Ann. § 12-6-530). Net taxable income is corporation's taxable income as determined under Internal Revenue Code with certain modifications. (S.C. Code Ann. § 12-6-580). Following Internal Revenue Code sections specifically not adopted: §§1(a) through (e), 3, 11, and 1201, relating to federal tax rates; §§22 through 54, 515, 853, 901 through 908, and 960, relating to tax credits; §§55 through 59, relating to minimum taxes; §§78, 86, 87, 168(k), 168(l), 168(m), 168(n), 196, and 280C; 72(m)(5)(B), 72(f), 72(o), 72(q), 72(t) relating to penalty taxes on certain retirement plan distributions; §172(b)(1), relating to net operating loss carrybacks; §199 relating to deduction attributable to domestic production activities; §§531 through 564, relating to certain special taxes on corporations; §§581, 582 and 585 through 596 relating to banking institutions; §§665 through 668 relating to certain accumulation distributions from trust; §§801 through 845 relating to insurance companies; §§861 through 908, 912, 931 through 940 and 944 through 989 relating to foreign income; §§1352 through 1359 relating to alternative tax on qualifying shipping entities; §§1400 through 1494; §§1501 through 1505, relating to consolidated tax returns; §§2001 through 7655, 7801 through 7871, and 8001 through 9602 except for §§6015 and 6701, and §§6654 and 6655 which are adopted as provided in S.C. Code Ann. § 12-6-3910 and S.C. Code Ann. § 12-54–55. (S.C. Code Ann. § 12-6-50). No exclusion for S.C. income tax purposes as permitted by §1031 for sale or exchange of real estate located in S.C. unless real estate received is located in S.C. Taxpayer may defer, with some exceptions, payment of state income tax on taxable income attributable to increase in gross income from foreign trading receipts. Corporate income tax credit is allowed for infrastructure construction or improvement in some circumstances.

Nonresident individual pays on income derived from sources in this state. (S.C. Code Ann. § 12-6-1720). Nonresident, or taxpayer residing part of year in state, may report and compute as nonresident (S.C. Code Ann. § 12-6-1720) except that taxable income would include all requirements under §12-6-560 (S.C. Code Ann. § 12-6-1710). Alternatively, if taxpayer is resident of South Carolina for part of year, he may elect to compute tax as if South Carolina resident for entire year and be credited on South Carolina return for amount of income tax payable in another state. (S.C. Code Ann. § 12-6-1710; S.C. Code Ann. § 12-6-3400).

Business Development Corporations are exempt from any taxes based on or measured by income and from any corporate license tax or fee. (S.C. Code Ann. § 33-37-70).

Homeowners' Associations.

Residential homeowners' associations are taxable as corporations on taxable income within meaning of IRC §528(d), but are otherwise considered as organizations exempt from income taxes. (S.C. Code Ann. § 12-6-4910).

Building and Loan Associations.

Taxed 6% of net income in lieu of all other taxes except taxes on real property and use taxes; exempt first three years of operation. (S.C. Code Ann. §§ 12-13-10 to -100). Chapter inapplicable to employees' credit unions.

Allocation and Apportionment of Income for Tax Purposes.

Allocation formulas apply to any taxpayer (except public service corporations) doing business partly within and partly without state. After apportionment of interest, dividends, royalties, rents and sales not in regular course of business, income is computed on average of three ratios: (a) Value, without depreciation, of real and tangible personal property within state to all such property used by taxpayer; (b) payrolls within state to total payrolls (salaries of general executive officers excluded); (c) sales within state to total sales. (S.C. Code Ann. §§ 12-6-2210 to -2320). Following items of income to be directly allocated as provided herein and not included in any factor of apportionment formula: Interest received from intangible property not connected with business of taxpayer and interest from intangible property of domestic insurance companies less all expenses allocated to state of principal place of business or place of domicile; dividends from stocks owned, less related expenses, allocated to state of principal place of business or domicile; rents received from leases, royalties of tangible personal property, where property not used in trade or business of taxpayer, less all related expenses, allocated to state in which property located at time income was derived; gains and losses from sale of real property located in South Carolina allocated thereto, gains from sales of property located outside of South Carolina allocated to such other state; gains and losses from sales of intangible personal property not connected with trade or business other than intangible personal property held for sale to customers in regular course of business, less all related expenses, allocated to principal place of business or domicile; income from personal services received by resident individual allocated to South Carolina. (S.C. Code Ann. § 12-6-2220). Taxpayer may consolidate returns showing net income, but return must contain such other information necessary to compute net income of each taxpayer properly attributable to South Carolina so that South Carolina can impose tax on taxpayers concerned. Corporations filing consolidated return are not to be considered single entity. (287 S.C. 394, 339 S.E.2d 118).

Returns and Payment.

Income tax returns must be made, and tax paid in full, to Department of Revenue on or before 15th day of fourth month following end of tax year, except returns and annual reports required by Department of Revenue of corporations which must be made on or before 15th day of third month following end of tax year. Foreign corporations that do not maintain office or place of business in U.S. must be made on or before 15th day of sixth month following taxable year. (S.C. Code Ann. § 12-6-4970). Organization exempt from tax under Federal Internal Revenue Code §501 reporting unrelated business income pursuant to §12-6-4910(8), must file on or before 15th day of fifth month following end of tax year. (S.C. Code Ann. § 12-6-4970).

Refunds due to decedent constitute sole and absolute property of decedent's surviving spouse. (S.C. Code Ann. § 12-6-5550).

Estimated Tax Payments.

Made in accordance with IRC §§6654 and 6655 with some adjustments. (S.C. Code Ann. § 12-6-3910). Payments are considered payments on account. If excess payments are made, taxpayer may claim refund, credit for estimated tax for succeeding year, or credit against corporate license fee. (S.C. Code Ann. § 12-6-3910).

Withholding.

Amount to be deducted and withheld by every person, corporation, etc., subject to jurisdiction of state is as follows: (1) Estimated income tax according to tables and rules of Department of Revenue on wages of $1,000 or more per year (S.C. Code Ann. § 12-8-520); (2) 7% of each payment to nonresident of rents and royalties at rate of $1,200 or more per year for use of or privilege of using property in this state and of payments of prizes and winnings to nonresidents of $500 or more (S.C. Code Ann. §§ 12-8-530, 540); (3) 2% of each payment made to nonresident (except motion picture companies or entities performing services for motion picture companies, after certification by Secretary of State) conducting business of temporary nature within this state, under contract reasonably expected to exceed $10,000 (S.C. Code Ann. § 12-8-550). This item does not apply to nonresidents who register with proper authorities under S.C. Code Ann. § 12-8-550; (4) 7% of any distribution of South Carolina taxable income to nonresident beneficiary of any estate or trust except trusts exempt from taxation under IRC §501 (S.C. Code Ann. § 12-8-570). Wages defined at S.C. Code Ann. § 12-8-520(D), which excludes following: (A) Agricultural labor; (B) services performed by minister in exercise of ministry or by religious order which are duties required by order; (C) services by individual on boat engaged in fishing or other similar services if payment is percentage of catch or proceeds from catch, and size of crew normally less than ten persons; (D) domestic services performed in private residence; (E) payments described in S.C. Code Ann. § 12-7-20(11) (contributions by self-employed persons or partnerships on behalf of partner to Keogh plan or to IRA); (F) premiums on group-term life insurance on life of employee, payments to or on behalf of employee for moving expenses, and payments to or under employee benefit plan, as long as item is not included in South Carolina taxable income pursuant to Art. IV, c. 7, of Title 12; (G) reimbursements for deductible employee business expenses; (H) employee moving expenses; (I) personal services performed on sporadic visits to S.C. by nonresident employees other than in construction, installation, engineering, or similar services; and (J) services performed by certain qualified disabled persons.

22.12 INHERITANCE TAX:

None, but see topic 22.06 Estate Tax.

22.1322.15

22.16 PROPERTY TAXES:

Real and Personal Property Taxable.

All property real and personal in state, and personal property of residents temporarily out of state, or sent out of state for sale and not yet sold, moneys, credits, bonds and stocks of residents are subject to tax (S.C. Code Ann. § 12-37-210), though by administrative practice and established custom tax is assessed only upon real estate, vehicles, fixed assets of businesses in nature of machinery and equipment, merchants' floor stocks and livestock; moneys, credits, stocks, bonds and other intangibles are not subjected to tax. Personal property in transit through state in interstate commerce acquires no situs for property taxation. (S.C. Code Ann. §§ 12-37-1110 to -1140).

Liens.

Taxes and penalties are a first lien on property on which assessed. The lien attaches at the beginning of the fiscal year (Jan. 1) during which the tax was levied. Taxes must be first paid from the estate of deceased persons. (S.C. Code Ann. § 12-49-10).

Collection.

Property taxes are collected by county treasurers and are payable between Sept. 30 and Jan. 15. (S.C. Code Ann. § 12-45-70). Chattel tax may be recovered by distress or attachment. (S.C. Code Ann. § 12-49-50). Execution for delinquent taxes issued Mar. 17 unless it falls on Sat., Sun., or legal holiday. (S.C. Code Ann. § 12-45-180). Execution is directed to officer authorized to collect delinquent taxes, assessments, penalties, and costs. (S.C. Code Ann. § 12-51-40). Delegation of collection authority to banks is valid. (S.C. Code Ann. § 12-45-70).

Refund.

Any taxpayer, or any owner or mortgagee of taxable property may pay any tax under protest and schedule meeting with assessor. If matter is not resolved at conference, taxpayer may file protest. (S.C. Code Ann. § 12-60-2520). Contested cases may be appealed to Administrative Law Judge Division. (S.C. Code Ann. § 12-60-2540).

Sales.

After due notice and advertisement, person officially charged with collection of delinquent taxes sells property at public auction for cash on legal sale date, during regular hours, and gives purchaser receipt for purchase money. (S.C. Code Ann. §§ 12-51-40, -50, -60). If successful bidder fails to remit in legal tender within time specified, that sale will be cancelled and property duly readvertised for sale on subsequent delinquent tax sale date. (S.C. Code Ann. § 12-51-70). If there is no redemption within one year, person officially charged with collection of delinquent taxes makes title to purchaser, and puts him in possession. (S.C. Code Ann. §§ 12-51-90, -130). In all cases of tax sale, deed of conveyance is prima facie evidence of good title and action for recovery of possession must be brought within two years from date of sale. (S.C. Code Ann. § 12-51-160). Official in charge of tax sale may void tax sale if he discovers failure of any required action, prior to passing of tax title. (S.C. Code Ann. § 12-51-150). As to notice to mortgagee, see category 20 Mortgages, topic 20.04 Mortgages of Real Property.

Redemption.

Owner, grantee, or mortgage creditor may, within one year from date of sale, redeem property by paying to person officially charged with collection of delinquent taxes, assessments, penalties, costs, together with interest as provided in subsection B of this section. (S.C. Code Ann. § 12-51-90). Person officially charged with collection of delinquent taxes must give between 20-45 days notice, by certified mail, to owner of record immediately preceding end of redemption period of approaching end of redemption period. (S.C. Code Ann. § 12-51-120). If no redemption, tax title made to purchaser or his assignee and delivery of tax title to clerk of court or Register of Deeds in such county considered “putting the purchaser (or assignee) in possession”. Any overage produced in tax sale, if unclaimed or not assigned by defaulting taxpayer within five years from date of tax sale, escheats to general fund of governing body. (S.C. Code Ann. §§ 12-51-40, -130). Personalty not subject to redemption. (S.C. Code Ann. § 12-51-110).

Alternate Collection, Sales and Redemption Procedure.

Any county or other political subdivision is authorized to adopt an alternate procedure for collection, handling and distribution of delinquent property taxes, penalties and costs. Execution for delinquent taxes issued Apr. 1. After notice, possession taken and after advertisement property sold. No redemption as to personal property. Defaulting taxpayer, any grantee from owner, or any mortgage or judgment creditor may redeem within 12 months from date of sale. If no redemption, tax title made to purchaser or his assignee and delivery of tax title to clerk of court in such county considered “putting the purchaser (or assignee) in possession.” Any overage produced in tax sale, if unclaimed or not assigned by defaulting taxpayer within five years from date of tax sale, escheats to general fund of governing body. (S.C. Code Ann. §§ 12-51-40 to -170).

Real Estate Conveyance Tax.

See category 21 Property, topic 21.06 Deeds.

22.17 SALES AND USE TAXES:

Sales Tax.

“S.C. Sales Tax,” is imposed and regulated by S.C. Code Ann. §§ 12-36-5 to -2680.

Imposition and Rate of Sales Tax.

Sales tax is imposed on any person or company selling at retail tangible personal property, laundry services, electricity, communication services and manufacturer-consumed goods as defined in Act. (S.C. Code Ann. § 12-36-910). Tax is at rate of 5% on gross proceeds of sales. Section 12-36-2110 is added to provide that, effective July 1, 1984, maximum tax that may be levied on sale of any aircraft, motor vehicle, motorcycle, boat, trailer (including house trailer), or semi-trailer pulled by truck tractor (S.C. Code Ann. § 56-3-20), excluding house trailers or campers (S.C. Code Ann. § 56-3-710); recreational vehicles; and self-propelled light construction equipment with compatible attachments limited to 160 net horsepower; is $300 (S.C. Code Ann. § 12-36-2110). Section 12-36-2110 provides that maximum sales tax to be levied with respect to each sale of mobile home is $300, plus 2% of sales price in excess of $6,000 subject to some exceptions. Similar limits with regard to musical instruments or office equipment purchased by religious organization, and with regard to research and development machinery. Person upon whom tax is imposed is required to keep records of gross sales and gross receipts and invoices, bearing name and address of vendor, of goods purchased for resale. (S.C. Code Ann. § 12-36-2540).

Local Sales Tax.

County, upon referendum approval, may levy additional sales and use tax of 1% on gross proceeds of sales within county area. (S.C. Code Ann. §§ 4-10-10 to -100).

Gross proceeds are defined as the value received without deduction on account of cost of property sold, materials used, labor, or service cost, interest paid or any other expenses or losses, but less cash discounts, price refunds, value of secondhand goods received on a trade-in, and amount of any United States taxes imposed on retail sales (except any manufacturer's or importer's excise tax). (S.C. Code Ann. § 12-36-90; see, e.g., 285 S.C. 303, 328 S.E.2d 920).

Tangible personal property is defined as that which may be seen, weighed, measured, felt or touched, or which is in any manner perceptible to the senses. It does not include notes, bonds, mortgages or other evidences of indebtedness or stocks. Tangible personal property includes certain services, accommodations and communications as set forth in statutes. (S.C. Code Ann. § 12-36-60).

Vendor Must Secure License.

Every person who, on or after Jan. 1, 1985, engages in business as retailer must pay one-time retail license tax in amount of $50 for each branch, establishment, or agency located in South Carolina. License tax must be paid at time application for retail license is made. Retailers selling at festivals, however, do not need retail license. Instead, retailers must file special event sales tax return within five days after festival. Festival must be listed in Department of Parks, Recreation and Tourism calendar of events. (S.C. Code Ann. § 12-36-510). License will remain valid as long as person to whom it is issued continues in same business at same location. (S.C.

Code Ann. § 12-36-550).

Exemptions.

Tax does not apply to sale of: property subject to constitutional exemptions; textbooks; livestock (which term is construed to include baby chicks and poults); poultry or livestock feeds; insecticides, chemicals, fertilizers or seeds used by farms, dairies and gardens; boxes, crates and like articles used in connection with agricultural, dairy, grove, or garden products; newsprint paper, newspapers, and religious publications; coal or other fuel sold to manufacturers, electric power companies, and transportation companies for use in the production of by-products for the generation of heat or power used in manufacturing tangible personal property for sale or resale, or for the generation of motor power for transportation; lunches to school children when sales are within school buildings and not for profit; toll charges for transmission of voice or messages over telephone and telegraph and carrier and customer access charges established by F.C.C. or S.C. Public Service Commission; transportation; water, rates and charges for which when sold by public utilities are fixed by S.C. Public Service Commission, or water sold by certain nonprofit organizations; fuel, lubricants and supplies for use or consumption on ships doing intercoastal trade between South Carolina ports and other ports; wrapping paper, twine, paper bags and containers for use incident to delivery of tangible personal property; gasoline or other motor vehicle fuels taxed at same rate as gasoline (except fuel used in aircraft)—see topic Gasoline and Special Fuels Tax, subhead Gasoline Tax, but fuels purchased for non-highway use and for which fuel tax refund has been issued is subject to sales tax; agricultural implements and machinery (which term is construed to include machines used in production of poultry and poultry products, bulk coolers or farm dairy tanks); fuel used in curing agricultural products; electricity for use in manufacturing tangible personal property for sale or for irrigating crops; railroad cars, locomotives and parts thereof, monorail cars, engines or motors therefor and parts thereof; vessels and barges of more than 50 tons burden; farm, grove, and garden products when sold in original state of production and sold by producer or members of his immediate family; proceeds from sale of supplies used by laundries in performing their primary functions; materials necessary to assemble missiles to be used by U.S. Armed Forces; automobiles or motor bikes to nonresident who is in state under orders of U.S. Armed Forces (statement by superior officer required to secure exemption); supplies, technical, equipment and machinery used by radio and television stations in producing and broadcasting programs; medicines sold by prescription; goods sold to nonprofit hospitals which primarily treat children at no cost to patient; prosthetic devices sold by prescription; hypodermic needles, insulin, alcohol swabs and blood sugar testing strips sold to diabetics; resales of supplies by State Budget and Control Board to agencies of state government; sales of time sharing lease plans; farm machinery; manufacturing, processing or mining machinery used in manufacturing tangible personal property for sale, and replacement parts (except autos or trucks); sale of natural and liquified petroleum gas used exclusively in production of poultry; combustible heating material or electricity used for residential purposes; 50% of gross proceeds of sale of modular home; sale or rental of motion picture film to or by theaters; sales of tangible personal property outside of South Carolina; sales of paving asphalt products purchased in South Carolina and consumed outside of South Carolina; sales of hearing aids; sales of depreciable assets used in operation of business, pursuant to sale of business; proceeds of sales or purchases for resale by certain tax-exempt organizations; proceeds of sale of water by certain nonprofit corporations; sales of books to certain libraries; sales of plants and animals sold to publicly supported zoological park or garden; gross proceeds of sales of tangible personal property to U.S. Government; gross proceeds of concession sales at festival recognized by S.C. Dept. of Parks, Recreation and Tourism by organizations devoted exclusively to public or charitable purposes provided proceeds are used for those purposes; sales of war memorials honoring units or contingencies of U.S. Armed Forces or National Guard including U.S. military vessels which are affixed to public property; supplies, equipment, machinery, and electricity sold to motion picture companies for use in producing motion pictures; materials and equipment that become part of enclosure or structure used for commercial housing of poultry or livestock; gross proceeds of sales occurring after July 1, 1982 of containers and chassis to international shipping lines which have contractual relationship with S.C. State Ports Authority; sales of electricity used to irrigate crops; sales of solid waste disposal collection bags where county plan requires such purchase; postage purchased by person engaged in business of selling advertising services consisting of mailing advertising material through U.S. mail; sales of certain recycling properties; sales of material handling systems and equipment (if prior approval is obtained from Department of Revenue); sales of parts and supplies used by persons repairing or reconditioning aircraft and which became part of aircraft; sales of motor vehicle extended service on warranty contracts; tangible personal property delivered to purchasers in states outside South Carolina; certain computer equipment; charges for copies of government documents; medicines and medical supplies sold to free health care clinics; locally created sweetgrass baskets; 70% of gross proceeds of rental or lease of portable toilets; electricity used by certain technology intensive facilities; and sales of lottery tickets. (S.C. Code Ann. § 12-36-2120). Data processing charges, including electronic transfer of information, are not subject to sales or use tax. (S.C. Code Ann. § 12-36-910[c]).

Taxes and Reports.

Tax is due and payable in monthly installments on or before 20th day of month following month in which tax accrues and report is due at same time. (S.C. Code Ann. § 12-36-2570). Tax is payable to Department of Revenue at Columbia, with whom report is filed. Report forms are furnished by Department of Revenue. For reports due after Jan. 1, 1984, sales must be reported by location rather than by consolidated return. Discounts applicable for certain payments. (S.C. Code Ann. § 12-36-2610).

Tax May Be Added to Purchase Price.

Upon each sale of 11¢ or more, licensed vendor may add to sales price, and collect from vendee, specified amounts approximating 5% sales tax, but such addition is not mandatory. (S.C. Code Ann. § 12-36-940).

Use Tax.

"S.C. Sales Tax" statute mentioned under subhead Sales Tax, supra, also provides for a use tax, thus tying in such tax with sales tax and making most of general provisions of act apply to both taxes. Credit is allowed for sales or use tax paid to another state. More important provisions relating specifically to use tax are summarized below. In general effect, use tax is designed to reach sales not covered by sales tax.

Imposition and Rate of Tax.

The use tax is imposed on the sale price of tangible personal property purchased at retail for storage, use, or other consumption in the state, at the rate of 5% of such sale price, regardless of whether the retailer is or is not engaged in business in the state. (S.C. Code Ann. §§ 12-36-1310, -1320). Total use tax imposed on gross proceeds of sale of any single article is subject to same maximum amounts as above specified for sales tax on single articles. Use tax imposed at 5% of fair market value of tangible personal property manufactured within state or imported therein by manufacturer thereof for storage, use or consumption within state by such manufacturer. However, if such property rented or leased by manufacturer, tax imposed at 5% of gross proceeds or gross receipts from such rental or lease. If accommodations are furnished to transients for consideration, gross proceeds derived from such rentals are subject to 5% use tax.

Local Use Tax.

County, upon referendum approval, may levy additional sales and use tax of 1% on sales price for use or other consumption of tangible personal property within county area. (S.C. Code Ann. §§ 4-10-10 to -100).

Exemptions.

Use tax does not apply: (a) To sale of property which is subject to sales tax and on which such tax has been paid by seller or retailer thereof; and (b) retain tangible property and exhibition rentals purchased or leased from sources outside South Carolina relating to museums. (S.C. Code Ann. § 12-36-2130).

Returns (to be filed by seller) are due, and tax payable to Department of Revenue, monthly on or before 20th day of month next succeeding month in which tax accrued. (S.C. Code Ann. § 12-36-2570).

22.18 STAMP AND SEAL TAXES:

Stamp Tax.

Provision made to sell business license stamps to any wholesale or retail merchant or manufacturer, for tobacco, ammunition, and playing cards acquired without state for use or sale within state. (S.C. Code Ann. §§ 12-21-610 to -810).

22.18A UNIFORM ACTS:

South Carolina Uniform Act on Interstate Compromise and Arbitration of Death Taxes (effective May 6, 1987) is based on Uniform Interstate Compromise Act and Uniform Interstate Arbitration of Death Taxes Act, at Art. 3 of c. 16. (S.C. Code Ann. §§ 12-16-210 to -320).

Revised Uniform Federal Tax Lien Registration Act.

Not adopted. Old Uniform Act adopted at S.C. Code Ann. §§ 12-57-10 to -70.

23 TRANSPORTATION

23.01 MOTOR VEHICLES:

Uniform Act Regulating Traffic on Highways adopted. (S.C. Code Ann. §§ 56-5-10 to -6550). Uniform Motor Vehicle Registration Act is closely followed. (S.C. Code Ann. §§ 56-19-10 to -490; S.C. Code Ann. §§ 56-19-610 to -850; S.C. Code Ann. §§ 16-21-10 to -150). S.C. Department of Public Safety, Division of Motor Vehicles, 10311 Wilson Boulevard - Building C, Blythewood, SC 29016, has general supervision of motor vehicles. http://www.scdps.org/.

Vehicle license required biennially. (S.C. Code Ann. § 56-3-610). Retroreflective state number plate must be displayed on rear of car. (S.C. Code Ann. §§ 56-3-1230 and -1240). No exemptions for members of Armed Forces. Plates for house trailer being moved by common carrier provided for. (S.C. Code Ann. §§ 56-3-2110 to -2140). Cannot be licensed unless all county and municipal taxes paid on vehicle and unless applicant is not delinquent in payment of any motor vehicle taxes, and, for vehicle purchased outside this state, unless satisfactory evidence of payment of state use tax is presented. (S.C. Code Ann. §§ 56-3-250 to -255; -350 to -360; -376 to -378; -385 to -440). Statute requiring inspection of vehicles repealed. (See former S.C. Code Ann. § 56-5-5350.) Special licenses and fees for antique vehicles. (S.C. Code Ann. §§ 56-3-2210 to -2230). Boat trailers less than 2,500 pounds, farm and utility trailers privately owned and not for hire need not be licensed or registered. (S.C. Code Ann. § 56-3-130). Camper trailer must be registered and license fee paid. (S.C. Code Ann. § 56-3-720). Dealers may issue temporary license plates and registration for vehicles sold to nonresidents for licensing and registration in another state. (S.C. Code Ann. § 56-3-2600).

Department of Transportation may issue open end permits for moving oversized mobile homes and modular home units under certain conditions. (S.C. Code Ann. §§ 57-3-130 to -190).

Operator's License.

All persons operating motor vehicle required to have driver's license from Department of Motor Vehicles (DMV). Nonresident with valid home state license exempt for five years if certain conditions are met. (S.C. Code Ann. § 56-1-30[6]). No exemptions for members of Armed Forces. License must be in immediate possession of operator. Special beginner's permits may be issued. (S.C. Code Ann. §§ 56-1-10 to -540). Six-month provisional license may be issued for person whose license suspended for driving under influence where applicant attends alcohol traffic safety school and provides proof of financial responsibility. (S.C. Code Ann. §§ 56-1-1310 to -1390).

Point system for traffic violations established and DMV authorized to suspend driver's license based on point system. Out-of-state driving convictions are considered. (S.C. Code Ann. §§ 56-1-710 to -850; S.C. Code Ann. § 56-1-320).

Titles, Sales and Liens.

Title to, lien on, or interest in vehicle must be registered with the DMV and certificate of title obtained except for vehicles owned by United States, owned by manufacturers or dealers and held for sale, owned by nonresident and not required by law to be registered, regularly engaged in interstate transportation and certain husbandry implements. (S.C. Code Ann. §§ 56-19-610 to -710).

Owner, dealer or manufacturer transferring interest in vehicle must, at time of delivery, execute assignment and warranty of title to transferee on certificate, and transferee must execute application for new certificate. Dealer buying and holding a vehicle for resale need not file certificate with department until transferring vehicle to another person. Odometer disclosure statement must be submitted with application for new title, and odometer reading will be noted on new title. (S.C. Code Ann. §§ 56-19-210 to -490).

Security interest in vehicle is not valid against creditors of owner or subsequent transferees unless such is registered with the department. (S.C. Code Ann. §§ 56-19-620 to 630).

Upon involuntary transfer or repossession by lienholder, transferee must mail to department last certificate of title (or court order), application for new certificate and affidavit that vehicle was repossessed, security interest terminated pursuant to terms of security agreement or that statutory lien was foreclosed. (S.C. Code Ann. § 56-19-390).

Criminal provisions provided for violation of title certificate act. (S.C. Code Ann. §§ 56-19-10 to -490; S.C. Code Ann. §§ 56-19-610 to -850; S.C. Code Ann. §§ 16-21-10 to -150).

Motor vehicle dealers are required to keep records of purchases and sales for four years. (S.C. Code Ann. § 56-15-340).

See also category 3 Business Regulation and Commerce, topics 3.22 Sales, subhead Motor Vehicles, and 3.12 Consumer Protection.

Identification Marks.

Misdemeanor to alter or remove identification number of vehicle or engine. (S.C. Code Ann. § 16-21-40).

Operation Prohibited.

Habitual drunkards, habitual offenders, mental incompetents, minors under 16, except those over 15 with beginners permits, and those unable to pass examination for license or who had license suspended. (S.C. Code Ann. § 56-1-40). Provisional license may be granted. See subhead Operator's License, supra.

Size, Weight and Load Limits.

Regulated by S.C. Code Ann. §§ 56-5-4010 to -4230.

Equipment Required.

Regulated by S.C. Code Ann. §§ 56-5-4410 to -5310.

Lights Required.

Regulated by S.C. Code Ann. §§ 56-5-4450 to -4840.

Inspection.

No longer required. Formerly regulated by S.C. Code Ann. §§ 56-5-5310 to -5440.

Traffic Regulations.

S.C. Code Ann. §§ 56-5-10 to -6470.

Seatbelts.

All adult occupants of vehicle must wear safety belts, except not required in back seat unless equipped with shoulder belts. (S.C. Code Ann. §§ 56-5-6520, 6530). Children under age of six are required to be restrained pursuant to §§56-5-6410 to -6440. Violation of these statutes not negligence per se and not admissible in civil action. (S.C. Code Ann. §§ 56-5-6460, 56-5-6540). Violation of these statutes not primary offense and must not be included in DMV or SLED records. (S.C. Code Ann. § 56-5-6540).

Accidents.

Person injured or damaged or personal representative or beneficiaries of person killed by unlawful or negligent operation has lien on vehicle enforceable by attachment and prior to all other liens except taxes. (S.C. Code Ann. § 29-15-20).

Liability of owner for acts of others is as at common law.

Guest Statute.

South Carolina guest statute banning claims by guests without showing of intent, heedlessness or recklessness ruled unconstitutional. (273 S.C. 680, 258 S.E.2d 883).

Financial Responsibility.

Owner of any motor vehicle for which registration is required must maintain security in form of valid policy of insurance or such other form of security as may be approved by Chief Highway Commissioner. Such policy must provide liability coverage with minimum limits of $25,000 for injury or death of one person, $50,000 for injury or death of two or more persons, $25,000 for injury to or destruction of property. (S.C. Code Ann. § 38-77-140). Penalties for noncompliance include fine or imprisonment and revocation of driving license and all registrations in offender's name. (S.C. Code Ann. §§ 56-9-80, 56-9-340).

Further penalties are provided for presenting false evidence of insurance to department or for failing to surrender license plates and registration as required upon cancellation or nonrenewal of policy. (S.C. Code Ann. § 56-9-340).

All policies of insurance issued must contain limits necessary to comply with Act and term damages includes both actual and punitive. (S.C. Code Ann. §§ 56-10-10 to -670). All policies must provide uninsured motorist provision within above-noted limits set forth in S.C. Code

Ann. § 38-77-140. In addition, provision must provide for no less than $10,000 in coverage for injury to or destruction of property of insured. (S.C. Code Ann. § 38-77-150). Further, carrier must offer optional underinsured motorist coverage. (S.C. Code Ann. § 38-77-160; 291 S.C. 518, 354 S.E.2d 555).

Automobile liability insurance may not be cancelled except for nonpayment of premium or revocation or suspension of license of named insured or customary operator. (S.C. Code Ann. § 38-77-123[B]). Appropriate notice of right of cancellation must be given. (S.C. Code Ann. § 38-77-121).

Insurance.

Motor vehicle liability coverage is mandatory with minimum limits of $25,000/$50,000/$25,000. (S.C. Code Ann. § 38-77-140). There is no longer any personal injury protection (PIP) coverage mandated under insurance laws of South Carolina. (S.C. Code Ann. § 38-77-144).

Right of an injured party to claim and sue for damages resulting from motor vehicle accident is retained.

Property damage claims may be arbitrated by panel under control of courts. (S.C. Code Ann. § 38-77-710).

Unemancipated minor may sue or be sued by parent for injuries or damages in motor vehicle accident. (S.C. Code Ann. § 15-5-210). But see 275 S.C. 132, 268 S.E.2d 109, holding statute unconstitutional and abolishing parental immunity.

No-Fault Insurance.

South Carolina is not no-fault state. However, no-fault benefits may be offered. (S.C. Code Ann. § 38-77-144).

Foreign vehicle registered in home state or country and displaying license plates required by laws of home state, may operate for 150 days without license. (S.C. Code Ann. § 56-3-150).

Nonresident operator at least 16 years of age, licensed in home state or country is exempt from securing license. Nonresident operator whose home state or country does not require a license, if at least 18 years of age, may operate not more than 90 days a year without license. (S.C. Code Ann. § 56-1-30).

Action against nonresident operator, nonresident regulated motor carrier, nonregulated motor carrier engaged in transporting persons or hauling perishable products or lumber or a resident operator who subsequently becomes a nonresident may be commenced by service on Director of Department of Public Safety, in which case defendant's return receipt showing his receipt by certified mail of copy of summons and complaint must be filed with summons and court may order such continuance as is necessary to give defendant reasonable time to defend. If certified letter refused, second mailing constitutes service on filing of affidavit showing fact of refusal. Provision made for appointment of administrator of deceased nonresident tortfeasor for accomplishment of service. (S.C. Code Ann. §§ 15-9-370 and -380).

Direct actions by injured persons against insurers not generally allowed except against insurers of motor vehicle carriers and taxis or against insurer for breach of no-fault contract. See category 16 Insurance, topic 16.01 Insurance Companies, subhead Direct Actions Against Insurer.

Motor Vehicle Carriers.

Under control of State Public Service Commission, which may fix rates and rules. Licenses, drivers' permits and routes must be obtained from Commission and license fees paid to it. (S.C. Code Ann. §§ 58-23-510 to -630). Liability insurance or surety bond must be filed with Commission. (S.C. Code Ann. § 58-23-910). Foreign vehicle must have state license and permit. (S.C. Code Ann. § 58-23-510).

Motor carriers subject to special road tax computed on basis of total fuel used as it bears to number of miles traveled in state. (S.C. Code Ann. § 56-11-410). Motor carriers operating entirely within boundaries of South Carolina are exempt. (S.C. Code Ann. § 56-11-415).

See also category 3 Business Regulation and Commerce, topic 3.08 Carriers.

Gasoline Tax.

See category 22 Taxation, topic 22.08 Gasoline and Special Fuels Taxes, subhead Gasoline Tax.

23.02 RAILROADS:

See category 3 Business Regulation and Commerce, topic 3.08 Carriers.

24 FORMS

Commercial Code Forms

(Click here to view)

1

SOUTH DAKOTA LAW DIGEST

—Scope —

Revised for 2010 edition by

DAVENPORT, EVANS, HURWITZ & SMITH, L.L.P. of Sioux Falls.

(Citations, unless otherwise indicated, are to South Dakota Codified Laws, numbered in three parts, set off by hyphens: first part indicates title, second part chapter number, and third part section within chapter. Session Laws are cited by year and chapter number. Parallel citations to North Western Reporter begin with 1 S.D.)

Note: This Revision incorporates all laws enacted and in effect as of July 1, 2009 passed by the Legislature and approved by the Governor. Legislature meets annually beginning second Tue. in Jan.

1 INTRODUCTION

1.01 GOVERNMENT AND LEGAL SYSTEM:

The State of South Dakota is a constituent state of the United States of America. For further discussion of the U.S. federal system, see Introduction to the Federal Government of the United States at the beginning of this volume. A great many laws are promulgated by the federal government of the United States and are not reflected in the topics below. See the Introduction to this volume for references to the federal law topics covered.

Like all but one of the United States, South Dakota has a common law legal system, with roots in English common law. For information on the courts and legislature of South Dakota, see category 6 Courts and Legislature.

1.02 [RESERVED]

1.03 HOLIDAYS:

Holidays are every Sun., Jan. 1, 3d Mon. in Jan., 3d Mon. in Feb., last Mon. in May, 4th day of July, 1st Mon. in Sept., 2d Mon. in Oct., 11th day in Nov., 4th Thurs. in Nov., 25th day of Dec., and every day appointed by President or Governor as legal holiday. If 4th day of July, 1st day of Jan., 11th day of Nov., or 25th day of Dec. falls on Sun., Mon. following is legal holiday and if such day falls on Sat., preceding Fri. is holiday. (SDCL 1-5-1).

Service of process may be made on any holiday except Sunday, and may be made on Sunday if, for good cause shown, a judge in whose court an action has been, or is about to be brought, endorses on the process permission for service on Sunday. (SDCL 1-5-2).

1.04 OFFICE HOURS AND TIME ZONE:

South Dakota is in two time zones. Roughly eastern half of state is in Central (GMT -06:00) time zone and roughly western half of state is in Mountain (GMT -07:00) time zone. Office hours are generally from 8 a.m. to 5 p.m.

2 BUSINESS ORGANIZATIONS

2.01 AGENCY:

See category 21 Property, topic 21.15 Powers of Attorney. See generally 59-1, 5.

2.02 ASSOCIATIONS:

Organization of unincorporated associations not regulated by statute. Provision made for incorporation of lodges, fraternal societies, and fraternal benefit associations.

Unincorporated religious, benevolent, fraternal, charitable or education association may convey or mortgage real estate owned by it when authorized by resolution adopted after two weeks publication of notice of meeting. (SDCL 43-25-22).

Actions.

Associations may be sued under association name. See SDCL 15-6-17(b).

Professional Corporations.

See topic 2.03 Corporations, subhead Professional Corporations.

2.03 CORPORATIONS:

Note: In 2005, South Dakota adopted with variances Revised Model Business Corporation Act. It is known as South Dakota Business Corporation Act. (SDCL 47-1A-101).

There is no franchise tax in S.D.; accordingly all references to such tax in 1984 Act are *inapplicable.*

General Supervision.

Secretary of State, State Capitol, Pierre, S. D. 57501, has general supervision of incorporation of private corporations. (SDCL 47-1A-120).

Purposes.

Corporations may be organized under Act for any lawful purpose; and where law requires compliance with other laws there shall be compliance therewith. (SDCL 47-1A-301). No corporation shall engage in any business other than authorized in charter, nor shall it hold any real estate except such as may be necessary and proper for its legitimate business. (Const. Art. XVII, § 7).

Name.

Unless authorized by SDCL 47-1A-401.2 and SDCL 47-1A-401.3, name must be distinguishable upon records of Secretary of State from name of any other corporation, whether for profit or not for profit, any limited partnership, or any limited liability company. (SDCL 47-1A-401.1). Repealed 2005. Corporate names already in use, with generic, proper, geographical or descriptive terms which have acquired secondary meaning, are protected. (SDCL 47-22-8.1). Corporate name must contain term, corporation, incorporated, company, or limited or abbreviated versions of same. Name may not contain language implying it is organized for purpose other than permitted by SDCL 47-1A-301 and its articles of incorporation. (SDCL 47-1A-401). Corporate name need not be in English if written in English letters or in English letters in combination with Arabic or Roman numerals. (SDCL 47-1A-120). Foreign corporation may adopt fictitious name. (SDCL 47-1A-401.1). No certificate of authority issued to foreign corporation unless its name conforms to requirements of S.D. Act. (SDCL 47-1A-1503). No procedure for determining availability of name. Reservation of name procedure is set forth in SDCL 47-1A-402 and exclusive use may be transferred. (SDCL 47-1A-402). Corporate name may be registered at registration fee of $25 for initial application, and thereafter year to year at fee of $10. (SDCL 47-1A-122).

Issuance of Stock and Bonds.

No corporation shall issue stock or bonds except for money, labor done, or money or property actually received. (Const. Art. XVII, § 8).

Service of Process on Corporation.

If entity that previously filed registered agent filing with secretary of state no longer has registered agent, or if its registered agent cannot with reasonable diligence be served, entity may be served by registered or certified mail, return receipt requested, addressed to governors of entity by name at its principal office in accordance with any applicable judicial rules and procedures. Names of governors and address of principal office may be as shown in most recent annual report filed with secretary of state. (SDCL 59-11-16). If process, notice, or demand cannot be served on entity pursuant to SDCL 59-11-16, service of process may be made by handing copy to manager, clerk, or other person in charge of any regular place of business or activity of entity if person served is not plaintiff in action. (SDCL 59-11-17).

Shareholders' Preemptive Rights.

Shareholders have preemptive right to acquire unissued or treasury shares, or obligations of corporation convertible into such shares, except to extent such right is limited or denied by articles. (SDCL 47-1A-630).

Voting of Shares.

Cumulative voting in election of directors permitted under S.D. Act and State Constitution. (Const. Art. XVII, § 5; SDCL 47-1A-728). Absent special circumstances, shares of corporation are not entitled to vote if they are owned, directly or indirectly, by second corporation, domestic or foreign, and first corporation owns, directly or indirectly, majority of shares entitled to vote for directors of second corporation. This section does not limit power of corporation to vote any shares, including its own shares, held by it in fiduciary capacity. (SDCL 47-1A-721.1).

Uniform Securities Ownership by Minors Act not adopted, but Uniform Transfers to Minors Act adopted. (SDCL 55-10A).

Uniform Simplification of Fiduciary Security Transfers Act adopted. (SDCL 55-8).

Uniform Commercial Code adopted. (Tit. 57A). See category 3 Business Regulation and Commerce, topic 3.09 Commercial Code.

Executive Committee and Other Committees.

Authorized by statute, articles or by-laws; and specifies that committee may be designated of one or more directors. (SDCL 47-1A-825).

Acquisition and Disposal of Its Shares.

Corporation may acquire its own shares, and shares so acquired constitute authorized but unissued shares. If articles of incorporation prohibit reissue of acquired shares, number of authorized shares is reduced by number of shares acquired. (SDCL 47-1A-631).

Distributions from Capital Surplus.

Corporations may not pay out dividends if corporation is insolvent or payment renders corporation insolvent. (SDCL 47-1A-640.1).

Sale or Transfer of Corporate Assets.

Disposition of assets does not require shareholder approval if within regular course of business, to repay debt, to transfer to another entity wholly owned by corporation, or pay shares unless disposition would leave corporation without significant business activity. (SDCL 47-1A-1202).

Unclaimed Dividends.

See category 21 Property, topic 21.01 Absentees, subhead Escheat.

Removal of Officers.

May be removed at any time, with or without cause, by Board of Directors; officer who appointed such officer, unless by-laws or Board of Directors provide otherwise; and any officer authorized by by-laws or Board of Directors. (SDCL 47-1A-843).

Incorporators.

One or more natural persons may act as incorporator or incorporators by delivering articles of incorporation to Secretary of State. (SDCL 47-1A-201).

Directors.

Names and addresses of initial directors may be included in articles. (SDCL 47-1A-202.1). Number of directors must be fixed in articles or by-laws. (SDCL 47-1A-803). Number may be increased or decreased by amendment to articles or by-laws.

Directors Meetings.

Regular meetings may be held without notice, but special meetings require two days notice of date, time and place unless articles or by-laws make time shorter or longer. (SDCL 47-1A-822).

Liabilities of Directors.

Director is not liable unless articles do not preclude liability and action was not done in good faith or it was decision which director did not believe to be within corporation's best interest or other exceptions set forth in SDCL 47-1A-831. Officers and directors authorizing loans to company in which they are substantial shareholders constitutes making loans to themselves. (State v. Flake, 165 N.W.2d 55, 56 [S.D. 1969]).

Officers.

Indemnification of officer is not mandatory but may be authorized by corporation. (SDCL 47-1A-856).

Powers.

Unless its articles provide otherwise, corporation has perpetual duration and succession in its corporate name and has same powers as individual to do all things necessary or convenient to carry out its business and affairs. (SDCL 47-1A-302).

Merger, Consolidation or Share Exchange.

Merger is generally allowed subject to provisions in SDCL 47-1A-1101 through SDCL 47-1A-1108. If articles do not contain merger procedures, plan of merger may be adopted. (SDCL 47-1A-1102.2). Effective date is time specified in document or at time of filing. (SDCL 47-1A-123).

Certificate or Articles of Incorporation.

Articles must contain following: Corporate name; number of shares corporation is authorized to issue; street address of principal office; name of represented entity's commercial registered agent; or if no agent, name and address of entity's noncommercial registered agent; or title of office or other position with entity if service of process is to be sent to person holding that office or position; and, address of business office of that person; and, name and address of each incorporator. (SDCL 47-1A-202; 59-11-6).

Annual Reports.

Each filing entity or qualified foreign entity must deliver to Office of Secretary of State for filing annual report that contains following: Name of corporation and jurisdiction under whose law it is formed; address of its principal office; name of represented entity's commercial registered agent; or, if no agent, name and address of entity's noncommercial registered agent; or title of office or other position with entity if service of process is to be sent to person holding that office or position; and, address of business office of that person; and, names and business addresses of its governors unless board of directors has been eliminated or limited liability company is member-managed. (SDCL 59-11-24; 59-11-6). Subsequent annual reports shall be delivered by same date each subsequent year. (SDCL 59-11-25). Failure to file annual report within 60 days after it is due allows Secretary of State to commence administrative dissolution. (SDCL 47-1A-1420).

Dissolution.

Act permits dissolution by incorporators (SDCL 47-1A-1401) or pursuant to Board of Directors' proposal (SDCL 47-1A-1402). Articles of dissolution are required. (SDCL 47-1A-1403).

Admission of Foreign Corporation.

SDCL 47-1A-1501 sets forth list of activities not constituting transaction of business in state such as owning of real and personal property. (SDCL 47-1A-1501). Application must contain same requirements as domestic corporation. (SDCL 47-1A-202). Forms are provided by Secretary of State at http://www.sdsos.gov.

Change of Registered Agent of Foreign Corporation.

Generally same as for domestic corporation. (SDCL 59-11-11). Foreign Corporation must obtain amended certificate of authority upon changing registered agent. (SDCL 47-1A-1504).

Service of Process on Foreign Corporation.

Generally same as per domestic corporation. (SDCL 59-11-16).

Filing Fees.

Filing articles of incorporation and issuing certificate of incorporation, $150. Filing application of foreign corporation for certificate of authority to transact business in this state and issuing such certificate, $750. (SDCL 47-1A-122).

Fees for filing other documents and issuing certificates are charged and collected by Secretary of State. (SDCL 47-1A-122).

Certified copies are $1 per page and $10 for certificate. (SDCL 47-1A-122.1).

Domestic or foreign corporation which fails or refuses to file its annual report within 60 days of time prescribed allows Secretary of State to commence administrative dissolution. (SDCL 47-1A-1420).

Appeal from Secretary of State.

Allows appeal generally, but must appeal within 30 days after return of document. (SDCL 47-1A-126). Secretary of State has five days to return document after delivery. (SDCL 47-1A-125). Appeal is to circuit court.

Application of Act.

Applies to all domestic and foreign corporations in existence on its effective date that were incorporated under any general statute providing for incorporation for profit. (SDCL 47-1A-1701 and SDCL 47-1A-1702).

Insolvency and Receivers.

Liquidating receiver may be appointed by court. (SDCL 47-1A-1431.2). Assets of insolvent corporation are trust fund for benefit of creditors. (Walton v. Commercial Credit Co., 9 N.W.2d 266, 267-68 [S.D. 1943]).

Close Corporations.

No special statutory provisions. See subhead Farm Corporations, infra.

Taxation of Corporate Property.

Same as taxation of property of individual (see category 22 Taxation, topic Property Taxes), except as to certain specified corporations, particularly insurance companies (see category 16 Insurance, topic 16.01 Insurance Companies).

Stock Transfer Tax.

None.

Franchise Tax.

There is no franchise tax on corporations, except for financial institutions and public utilities.

Income Tax.

Corporations are not subject to any income tax.

Professional Corporations.

Medical Practice Act permits licensed physicians and osteopaths to form corporation under law pertaining to private corporations. (SDCL 47-11-1). Chiropractic corporations are permitted. (SDCL 47-11A-1). Dental Practice Act authorizes formation of dental corporations. (SDCL 47-12-1). Veterinary Corporation Act authorizes formation of veterinary corporations. (SDCL 47-13-1). Professional Service Corporation Act permits licensed attorneys to form corporation under specified conditions. (SDCL 47-13A). Public accountants may form professional service corporation. (SDCL 47-13B-1). Optometrists may form professional service corporation. (SDCL 47-11B-1). Podiatry service corporations are authorized. (SDCL 47-11C-1). Physician assistants may form professional corporation. (SDCL 47-11D-1). Registered nurses, licensed practical nurses, certified registered nurse anesthetists, nurse practitioners and nurse midwives may form professional corporation. (SDCL 47-11E-1). Definition of professional corporation includes limited liability company and limited liability partnership with respect to persons authorized to form pc under 47-11, 47-11A—11E. Grantor trust may be shareholder of professional corporation for so long as grantor is living and eligible to be shareholder. Term “corporation” is defined to include limited liability company.

Farm Corporations.

(Note: Initiated Constitutional amendment adopted in Nov. 1998 was formerly basis of regulation of farm corporations. Constitutionality of amendment challenged and amendment was determined to be unconstitutional under dormant Commerce clause. SD Farm Bureau, Inc. v. Hazeltine, 340 F.3d 583 (8th Cir. 2003). Prior laws governing farm corporations have not been repealed.)

Limited Liability Companies.

See topic 2.06 Limited Liability Companies.

Professional Associations.

No statutory authorization. See subhead Professional Corporations, supra.

Deeds.

See category 21 Property, topic 21.06 Deeds.

Long-Arm Statute.

See category 5 Civil Actions and Procedure, topic 5.20 Process, subhead Long-Arm Statute, for provision whereby foreign corporation is amenable to service of process outside state in action arising from numerous specified activities within or having relation to South Dakota.

Model Non-Profit Corporation Act adopted with variations. (SDCL 47-22 through 47-28).

2.04 [RESERVED]

2.05 JOINT STOCK COMPANIES:

No statutory provisions. Treated as corporations. (Const. Art. XVII, § 19). See also topic 2.02 Associations.

Professional Corporations.

See topic 2.03 Corporations, subhead Professional Corporations.

2.06 LIMITED LIABILITY COMPANIES:

South Dakota adopted South Dakota Limited Liability Company Act in 1998, based upon and substantially similar to Uniform Limited Liability Company Act. (SDCL 47-34A-101 to 1207).

South Dakota Limited Liability Company Act (effective July 1, 1998).

Purposes.

May be formed for any lawful purpose, subject to certain statutory restrictions. (SDCL 47-34A-112).

Name.

Must contain limited liability company, or limited company, or abbreviation, L.L.C., LLC, L.C., or LC. Limited may be abbreviated as Ltd. and company may be abbreviated as Co. Name must be distinguishable upon records of secretary of state from name of any other legal entity registered or reserved with Secretary of State, unless use of name is authorized by present user, registrant or owner of name. (SDCL 47-34A-105).

Term.

Company's existence may be perpetual or for stated term of years from date of filing of its articles of organization with Secretary of State. (SDCL 47-34A-203).

Formation of company may be by one or more persons, consisting of one or more members. (SDCL 47-34A-202.1). "Person" means individual, corporation, business trust, cooperative corporation, estate, trust, partnership, limited liability company, association, joint venture, government, governmental subdivision, agency, or instrumentality, or any other legal or commercial entity. (SDCL 47-34A-101[13]).

Rights and Powers.

Unless its articles of organization provide otherwise, limited liability company has same powers as individual to do all things necessary or convenient to carry on its business or affairs. Such rights are enumerated in SDCL 47-34A-112.

Content of Articles of Organization.

Articles of organization must set forth: (1) Name of company; (2) address of initial designated office; (3) information required by SDCL 59-11-6; (4) name and address of each organizer; (5) duration of company if other than perpetual; (6) whether company is to be manager-managed, and, if so, name and address of each initial manager; and (7) whether one or more of members of company are to be liable for its debts and obligations. (SDCL 47-34A-203).

Registered office and registered agent must be maintained in this state and may be changed in accordance with SDCL 59-11.

Filing of articles of organization is made with Secretary of State. Original and one exact or conforming copy of articles must be delivered to Secretary of State along with applicable fee. If found to conform to law, Secretary of State shall issue certificate of organization. (SDCL 47-34A-202.1).

Articles of organization may be amended at any time by delivering articles of amendment to Secretary of State for filing. Articles of amendment must set forth: (1) Name of limited liability company; (2) date of filing of articles of organization; and (3) amendment to articles. (SDCL 47-34A-204). Articles of amendment are filed with Secretary of State in same manner as original articles, and Secretary of State issues amended certificate of organization.

Annual report shall be delivered by company to Secretary of State for filing and shall set forth: (1) Name of company and state or country under whose law it is organized; (2) information required by SDCL 59-11-6; (3) address of its principal office; (4) names and business addresses of any governors. (SDCL 47-34A-211; SDCL 59-11-25). Annual reports shall be delivered to Secretary of State by same date each subsequent year. (SDCL 47-34A-211; SDCL 59-11-25).

Filing fees on filing articles of organization in case of domestic limited liability company will be $150. Filing fee for articles of organization in case of foreign limited liability company is $750. Other fees: amending or restating articles of organization of domestic limited liability company, $60; amending registration in case of foreign limited liability company, $750; filing articles of termination and statement of dissociation, $10; filing articles of merger, $60; filing application to reserve name, $25; issuing certificate of existence, $20; reporting fee of $50 due and payable with filing of annual reports. (SDCL 47-34A-212 and SDCL 47-34A-1206). Other filing fees also listed in SDCL 47-34A-1206.

Contributions to capital of member may consist of tangible or intangible property or other benefit to company, including money, promissory notes, services performed, or other agreements to contribute cash or property, or contracts for services to be performed. (SDCL 47-34A-401).

Management of limited liability company may be vested in its members or one or more managers. In member-managed company, each member has equal rights in management and conduct of company’s business. In manager-managed company, each manager has equal rights in management and conduct of company’s business; and manager must be designated, appointed, elected, removed, or replaced by vote, approval, or consent of majority of members. (SDCL 47-34A-404.1). Matters of member- or manager-managed company’s business requiring consent of all of members are enumerated in SDCL 47-34A-404.1(c). Articles of organization may establish classes or groups of one or more members having certain expressed relative rights, powers, or duties, including voting rights. (SDCL 47-34A-404.2).

Division and distribution of profits made by company before its dissolution and winding up must be in equal shares. (SDCL 47-34A-405). Distribution may not be made if company would not be able to pay its debts as they become due, or company’s total assets would be less than sum of its total liabilities. (SDCL 47-34A-406).

Limited liability is prescribed for members and managers of limited liability company under Act. Limited liability company is liable for loss or injury caused to person, or for penalty incurred, as result of wrongful act or omission, or other actual conduct, of member or manager acting in ordinary course of business of company or with authority of company. (SDCL 47-34A-302). Unless otherwise provided in articles of organization or member’s consent, debts, obligations, and liabilities of limited liability company are solely debts, obligations, and liabilities of company. Member or manager is not personally liable for debt, obligation, or liability of company solely by reason of being or acting as member or manager. (SDCL 47-34A-303[a]).

Conversion and Mergers.

Partnership or limited partnership may be converted to limited liability company pursuant to provisions set forth in SDCL 47-34A-902. Limited liability company may be merged with or into one or more limited liability companies, foreign limited liability companies, corporations, foreign corporations, partnerships, foreign partnerships, limited partnerships, foreign limited partnerships, or other domestic or foreign entities. (SDCL 47-34A-904).

Member may disassociate from limited liability company, unless otherwise provided in operating agreement, at any time, rightfully or wrongfully, pursuant to SDCL 47-34A-601 and SDCL 47-34A-602. Member who wrongfully disassociates from limited liability company is liable to company and to other members for damages caused by disassociation. (SDCL 47-34A-602).

Dissolution occurs upon: (1) event specified in operating agreement; (2) consent of number or percentage of members specified in operating agreement; (3) event that makes it unlawful for business of company to be continued, but any cure of illegality within 90 days after notice to company of event is effective retroactively to date of event; or (4) on application by member or dissociated member upon entry of judicial decree. (SDCL 47-34A-801). Unless members unanimously waive right to have company's business wound up and company terminated, limited liability company continues after dissolution only for purpose of winding up its business. (SDCL 47-34A-802). After dissolution, member who has not wrongfully dissociated may participate in winding up limited liability company's business, but on application of any member, member's legal representative, or transferee, circuit court, for good cause shown, may order judicial supervision of winding up. (SDCL 47-34A-803). At any time after dissolution and winding up, limited liability company may terminate its existence by filing with secretary of state articles of termination stating: (1) name of company; (2) date of dissolution; and (3) that company's business has been wound up and legal existence of company has been terminated. (SDCL 47-34A-805). Distribution of assets in winding up limited liability company's business and disposition of claims against company shall be made pursuant to SDCL 47-34A-806 through SDCL 47-34A-808. If company goes through administrative dissolution, company may apply to Secretary of State for reinstatement after effective date of dissolution. Applicant must submit application with appropriate filing fee. Filing fee is based on any delinquent annual reports and fees. Application must: (1) List company's name and dissolution date; (2) state grounds for dissolution did not exist or have been corrected; (3) state company's name complies with SDCL SDCL 47-34A-105; and (4) contain certificate showing all taxes have been paid. (SDCL SDCL 47-34A-811).

Foreign limited liability companies are governed by laws of state or other jurisdiction under which foreign company is organized. (SDCL 47-34A-1001). Foreign company may apply for certificate of authority to transact business in state by delivering application to secretary of state for filing. (SDCL 47-34A-1002). If found to be in order and upon payment of all filing fees, secretary of state shall file application and issue certificate of authority to foreign limited liability company. (SDCL 47-34A-1004). If name of foreign company does not satisfy requirements of SDCL 47-34A-105, company must use fictitious name to transact business in this state if its real name is unavailable. (SDCL 47-34A-1005).

2.07 [RESERVED]

2.08 PARTNERSHIPS:

Uniform Partnership Act (1997) adopted. (48-7A).

Name.

It is unlawful for any person to engage in business for profit under name which does not show surname of each person interested in such business, unless statement verified by all such persons, showing name, post office address, and residence address of each person interested and address where main office of business is to be maintained, is filed electronically with Secretary of State or in paper form in office of register of deeds in each county where such business is maintained. Such filing must be renewed every fifth year thereafter. Fee for new filing and for each renewal $10. (SDCL 37-11-1). Like statement must be similarly filed from time to time upon change of 25% or more in ownership in business. Fee for such filing is $10. (SDCL 37-11-2). No action may be maintained until such statement is filed. (SDCL 37-11-5). All persons interested at any time are liable for obligations incurred while they were interested and also liable for obligations incurred prior to filing of verified statement showing that they are no longer interested. (SDCL 37-11-4). Those failing to file guilty of Class 2 misdemeanor. (SDCL 37-11-1).

Limited Partnership.

Uniform Act of 1976 with 1985 amendments adopted. (48-7). There are no exceptions in statute to businesses which may be carried on. Constitutional amendment prohibiting limited partnerships from farming new land or buying, leasing, or contracting for new interest in farm lands, farming or livestock production invalidated. (Const., art. XVII, § 22, 340 F.3d 583).

Out-of-State Partnerships.

There are no mandatory registration requirements applicable to partnerships formed out of state. Foreign limited partnerships and limited liability partnerships must register with Secretary of State before transacting business in state. (SDCL 48-7-902, SDCL 48-7A-1102).

3 BUSINESS REGULATION AND COMMERCE

3.01 BANKS AND BANKING:

Uniform Commercial Code adopted. (Tit. 57A). See topic 3.09 Commercial Code.

Regulated By.

Division of Banking of Dept. of Revenue and Regulation. (SDCL 1-35-4; SDCL 51A-2-2). Mortgage bankers also regulated and licensed by Division of Banking. (51A-12; 54-14).

Powers.

In addition to normal banking powers, South Dakota state chartered banks are permitted by state law to engage in all facets of insurance business, directly or through subsidiaries. (SDCL 51A-4-4). Investments in bank subsidiaries are regulated. (SDCL 51A-4-27, 28). Bank may merge with or acquire assets and assume deposit liabilities of savings and loan association. (SDCL 51A-14-1, 2). State and federal savings and loan associations may reorganize as state banks. (SDCL 51A-14-4). State director of banking may authorize state chartered banks to exercise any power granted to federally chartered bank. (SDCL 51A-2-14.1). Banks may be organized as either corporations or limited liability companies. (SDCL 51A-1-2[1]).

Stockholders.

Dividends paid to stockholders, which in any way impair or diminish capital, may be recovered from stockholder unless capital impairment be subsequently made good. (SDCL 51A-3-20). Bank, except Federal Reserve System bank (86 S.D. 127, 192 N.W.2d 130), has lien upon stock of any stockholder who is indebted to it, and in addition to stock duly recorded bank may reserve its lien against stock owned by debtor but not recorded on transfer books. (SDCL 51A-3-26). Stockholders have dissenting rights as provided by general state corporation law. (SDCL

51A-14-7). Certain stock transfers must be reported. (SDCL 51A-3-24). However, in certain circumstances, stock transfers resulting in change of control do not require prior written approval. (SDCL 51A-3-25).

Deposits.

As to deposit by minor, bank may operate its deposit with minor with same effect upon its liability as if minor was of full age. (SDCL 51A-10-2). As to deposit in names of two or more persons, payable to any of them or survivor, bank is discharged by payment to any one or more of depositors, whether or not other depositors are living. (SDCL 51A-10-3). Contrary disposition by will may destroy survivorship feature of joint deposits. (77 S.D. 106, 86 N.W.2d 526, overruled in part, 83 S.D. 565, 163 N.W.2d 339). Certificate of deposit payable at death to depositor or another constitutes invalid attempt to transfer property without conformity to statute of wills. (80 S.D. 528; 127 N.W.2d 714). Uniform Commercial Code governs stop payment orders, forged or altered instruments, delay in presentment, and withdrawals.

Unclaimed deposits distributed pursuant to Uniform Unclaimed Property Act. (SDCL 43-41B-6).

Collections.

Uniform Commercial Code adopted. (Tit. 57A). See topic 3.09 Commercial Code.

Trust Companies.

Bank organized and qualified for trust company business has powers generally granted to South Dakota trust companies. Domestic trust companies seeking to exercise trust powers but not banking powers may be incorporated under c. 51A-6A. Foreign banks have reciprocal privileges. (SDCL 51A-5-8). Separate trust companies affiliated with bank are permitted. (51A-6). In-state trust service offices permitted. (SDCL 51A-5-29 to 32). Out-of-state trust service offices are also permitted. (SDCL 51A-6A-58). Foreign trust companies are given reciprocal privileges. (SDCL 51A-5-7 to 10).

Uniform Common Trust Fund Act adopted. See category 13 Estates and Trusts, topic 13.11 Trusts, subhead Uniform Common Trust Fund Act.

Foreign Banks.

Certificates of authority for banking business issued only to South Dakota banking corporations. (51A-3). Reciprocal interstate banking authorized in South Dakota. (SDCL 51A-2-38 to 42). As to right of foreign bank to act as executor, administrator, or guardian, see categories 13 Estates and Trusts, topic Executors and Administrators; Family, topic Guardian and Ward.

Interstate Banking.

Subject to approval of director, South Dakota state chartered banks may establish branch banks located outside of South Dakota. To extent another state imposes restriction on ability of South Dakota bank to establish, acquire, or retain branch in that state, other state's restriction must apply to establishment, acquisition, or retention of branch in South Dakota by bank from that state. (SDCL 51A-7-14 to 16).

Financial Institution Franchise Tax.

6% of net income of banks, trust companies and other financial institutions, with decreasing rates on net income exceeding $400 million; federal income taxes paid are deducted from net income. (SDCL 10-43-4).

3.02 BILLS AND NOTES:

Uniform Commercial Code adopted. (Tit. 57A). See topic 3.09 Commercial Code.

Collection Costs.

Nonstandard provision authorizes collection of reasonable costs and expenses of collection up to $40 for certain returned checks if notice given on merchant's premises or on merchant's customer statements. (SDCL 21-1-14 and SDCL 57A-3-421). If drawer of check fails to pay fees and costs and amount of check within 30 days of notice of dishonor, owes additional civil penalty up to twice amount of check and state's attorney may prosecute dishonor. (SDCL 22-30A-33).

Special Requirements.

Note given wholly or in part for a gambling debt "absolutely void." (SDCL 53-9-2). Such note may still be enforced by holder in due course. (49 S.D. 554, 207 N.W. 662). Statute does not apply to "authorized gaming and lotteries". (SDCL 42-7B-55).

Judgment notes are not recognized as basis for a judgment, according to the provisions thereof, the rule being that judgment by confession may be had only by strict compliance with detailed statutory provisions. (SDCL 21-26-1; SDCL 21-26-5 to 7; 1 S. D. 150, 46 N.W. 180).

Collection or attorney fee clauses are not generally enforceable, except in mortgage foreclosure proceedings. (SDCL 15-17-38; SDCL 15-17-39; SDCL 21-48-15; SDCL 21-49-23) and by "regulated lenders". (SDCL 54-3-13; SDCL 54-3-14).

Special Defenses.

See topic 3.10 Consumer Protection.

3.033.05 [RESERVED]

3.06 BROKERS:

Statutes relating to brokers include those regulating dealers in securities (47-31B and 57A-8-102), insurance brokers (58-30), real estate or mortgage brokers (36-21A), persons registered to sell time-share estates (43-15B), persons selling condominiums (43-15A), aircraft brokers (50-12), and meat and meat products brokers (SDCL 39-5-33). These areas are also subject to extensive regulation under Administrative Rules of South Dakota.

Real Estate Brokers.

Licenses.

Real estate broker and salesperson defined. (SDCL 36-21A-6, and 12). Broker associate defined. (SDCL 36-21A-1). Residential rental agent defined. (SDCL 36-21A-12.1). Property manager defined. (SDCL 36-21A-10). Certain persons and entities exempt from licensing requirement. (SDCL 36-21A-29). Acting as licensee without license misdemeanor. (SDCL 36-21A-28). License required for real estate firm. (SDCL 36-21A-37). Agency agreements and obligations and duties of licensees and brokers extensively regulated. (SDCL 36-21A-130 to 151). Brokers licensed and regulated by state real estate commission. Experience and education requirements for responsible broker's license prescribed. (SDCL 36-21A-31). Specified number of classroom hours of education approved by commission and two years of experience required for salesperson license. (SDCL 36-21A-34.1). Reputation, age, competence and citizenship required. (SDCL 36-21A-30). Examination for broker's license or salesperson's license required. (SDCL 36-

21A-36 and 41). Licensed nonresident broker of another state which offers same privileges to licensed brokers of this state not required to maintain place of business in this state. (SDCL 36-21A-54). License issued to broker of another state qualifies him for license in this state. (SDCL 36-21A-54). Biennial registration required, together with proof of 24 hours approved continuing education every two years. (SDCL 36-21A-61 and 62). Application and registration fees required; amount of fees set by regulations (SDCL 36-21A-38, 41, 49, 54, 60, 61 and 66); independent contractor status defined (SDCL 36-21A-124). Education requirement for broker associate license prescribed. (SDCL 36-21A-30.1). Education for salesperson's license prescribed. (SDCL 36-21A-34.1). Broker, or real estate salesperson or broker associate employed by or associated with broker, may form corporation or limited liability company under certain conditions. (SDCL 36-21A-46.1).

Duties.

Statutes substantially define and regulate agency contract, information confidentiality and disclosure, duties of broker, licensee, and buyer representative. (SDCL 36-21A-125 to 151).

Unprofessional conduct defined. (SDCL 36-21A-71). Restrictions on licensee advertising imposed (SDCL 36-21A-72).

Bond.

No bond requirement per se. However, errors and omissions insurance required. (SDCL 36-21A-119). Real estate recovery fund established to provide for recovery of unsatisfied judgments against brokers and salesmen, and brokers and salesmen required to pay separate fee to restore minimum balance in fund if necessary. (SDCL 36-21A-101, 102). Broker's license suspended when payment from fund authorized and repayment to fund required for reinstatement (SDCL 36-21A-114); handling of money received by broker regulated (SDCL 36-21A-80); trust funds regulated where transaction does not close (SDCL 36-21A-81).

Regulation.

Unprofessional conduct by broker defined (SDCL 36-21A-71); grounds for revocation of license defined (SDCL 36-21A-68); sanctions include revocation of license and criminal prosecution (SDCL 36-21A-68 and 87); unlicensed person prohibited from instituting motion for compensation (SDCL 36-21A-88).

Uniform Commercial Code adopted. (Tit. 57A). See topic 3.09 Commercial Code.

3.07 [RESERVED]

3.08 CARRIERS:

Uniform Commercial Code adopted. (Tit. 57A). See topic 3.09 Commercial Code.

Common Carriers Defined.

Public utility or common carrier statutes of state apply to transportation of freight by rail (SDCL 49-16A), and by motor carrier (SDCL 49-28), transportation of hazardous materials (SDCL Ch. 49-28A), telecommunications services (SDCL 49-31), gas, water and electric utilities (SDCL 49-34 and 49-34A), pipelines (SDCL 49-34B), public warehouses (SDCL 49-42A), and grain dealers and inspectors (SDCL 49-45). Certain vehicles excepted from motor carrier and commercial vehicle designation. (SDCL 32-9-3). Wind collector system must notify certain telecommunications systems of proposed construction and location of site. (SDCL 49-32-3.1, 3.2).

Supervision.

Department of Revenue and Regulation, has general supervision of all common carriers (SDCL 49-28-33), and Public Utilities Commission has general supervision of all telecommunications companies (SDCL 49-31-3). Specific requirements must be met to change telecommunications service of any subscriber or to list products or services on subscriber's bill, or civil penalties may be imposed. (SDCL 49-31-89 to 97). Sales or transfers of any telecommunication exchange subject to Commission approval. (SDCL 49-31-59). Certificate of authority from Commission necessary to provide local telecommunications exchange service. (SDCL 49-31-69 to 86). Commission may fine offenders of public utility statutes. (SDCL 49-31-38). Provision of false information to Commission is misdemeanor. (SDCL 49-1-9.1). Changes in ownership or control of telecommunications companies are subject to reporting requirements. (SDCL 49-31-20). State Transportation Commission supervises abandonment, consolidation, merger or inclusion of railroad (SDCL 49-16A-46), and S.D. Railroad Authority may acquire, construct and maintain railroads (SDCL 49-16B-13). Railroad may exercise right of eminent domain, upon authority from Governor or State Transportation Commission for public use consistent with public necessity. (SDCL 49-16A-75 to 75.3). Federal regulations regarding hazardous material transportation safety adopted, with certain modifications. (SDCL 49-28A). Federal safety standards for pipelines adopted. (SDCL 49-34B-3). One-call notification system for excavation activities. (SDCL 49-7A).

Rates.

Railroad freight charges must be just and reasonable. (SDCL 49-16A-5). Department fixes rules and regulations regarding motor carriers (SDCL 49-28-33, and SDCL 49-28-36 through SDCL 49-28-36.5) and telecommunications companies (SDCL 49-31-4). Telecommunication companies may recover cost of mandated services through cost recovery method (SDCL 49-31-98).

Discrimination by railroad (SDCL 49-16A-7), motor carrier (SDCL 49-28-64), telecommunications company (SDCL 49-31-11) and gas and electric utilities companies (SDCL 49-34A-3) prohibited.

Liability.

Obligation of common carrier cannot be limited by general notice, but may be limited by special contract. (SDCL 49-2-7). Carrier cannot be exonerated by agreement in advance from liability for willful or wanton misconduct, fraud or willful wrong. (SDCL 49-2-9). "Do not call" registry adopted for unsolicited telephone calls, with violators subject to civil penalty. (SDCL 49-31-99 through SDCL 49-31-108).

Bills of Lading.

Uniform Commercial Code adopted. (Tit. 57A). See topic 3.09 Commercial Code.

Lien.

Uniform Commercial Code adopted. (Tit. 57A). See topic 3.09 Commercial Code.

Motor Vehicle Carriers.

Registration required or compliance with Federal Highway Administration regulations. (SDCL 49-28-36 and SDCL 49-28A-3). See category 23 Transportation, topic 23.01 Motor Vehicles.

3.09 COMMERCIAL CODE:

Uniform Commercial Code became effective July 1, 1967 (Tit. 57A), but with certain provisions noted under this topic effective July 1, 1966. Uniform Commercial Code—Leases became effective July 1, 1989. (57A-2A). Uniform Commercial Code—Funds, Transfers became effective July 1, 1991. (57A-4A). Uniform Commercial Code—Letters of Credit became effective July 1, 1999. Uniform Commercial Code—Secured Transactions (Revised) became effective July 1, 2001. (57A-9).

Material Variations.

As used under this topic, UCC followed by Arabic numerals, will denote such Code as reproduced in Uniform and Model Acts section; and SD followed by Arabic numerals will denote sections of such "(Title 57A)" whereby there was South Dakota adoption of such Code. Material variations are here summarized.

In 2008, South Dakota adopted certain changes, as recommended by NCCUSL. Those changes deal with clarifying scope of Art. I, applicability of supplemental principles of law, concept of good faith, relevance of course of performance between parties, and existence of independent statute of frauds. South Dakota determined not to adopt NCCUSL's proposed changes to choice of law provisions, leaving existing South Dakota law alone in that regard.

Implied warranty under UCC 2-315 does not apply to contract for sale of human blood, blood plasma, or other human tissue or organs with respect to diseases not detectable by standard testing (SD 2-315.1), nor is there any implied warranty that cattle, hogs or sheep are free from disease (SD 2-316.1).

As to a material change in UCC 2-318, see topic 3.23 Sales, subhead Seller's Warranties.

Collection fee of up to $40 authorized for merchant who receives check which is dishonored. (SD 3-421).

Art. 6, Bulk Transfers, repealed effective July 1, 1993. Rights and obligations arising before July 1, 1993 remain valid. (1993, c. 356).

UCC 9-103(h) (not adopted).

SD 9-103(e) removes exclusion for consumer-goods transactions indicating that payment rules apply in all transactions. Similarly, SD 9-103(f) provides that continuing status of purchase money security interest applies to all transactions, and SD 9-103(g) puts burden on establishing extent to which security interest is purchase money security interest upon secured party claiming purchase money security interest. SD 9-109(d)(15) provides exclusion for pledging or segregating of collateral for public deposits. SD 9-109(d)(16) provides exclusions for assignments of claims to receive compensation for injuries under 26 U.S.C. § 104(a)(1) or (2). SD 9-109(d)(17) provides exclusion for assignments of claims under 42 U.S.C. § 1396p(d)(4). SD 9-204.1 adds curative provisions regarding transactions entered into after June 30, 1978, and prior to July 1, 1979.

SD 9-303(d) adds curative provision with respect to security interests in snowmobiles granted prior to July 1, 1991, allowing perfection either through notation upon Certificate of Title or in accordance with other provisions of Article 9.

SD 9-308(e) adds sentence which provides that any statute conflicting with lien securing right to payment is subject to this provision.

SD 9-310(b)(11) adds exclusions to necessity of filing finance statement for transactions involving public utility filings.

UCC 9-309(14) (not adopted).

SD 9-311(a)(2) adds general exclusion from financing statement requirements for all Certificate of Title statutes allowing indication of security interest upon title.

SD 9-501.1 adds curative provision regarding continuation, release, assignment, amendment, or termination of financing statements filed subsequent to Dec. 31, 1979, and prior to July 1, 1980.

SD 9-501.2 instructs Secretary of State to maintain program allowing secured parties access to state's computer system to record liens on real property in connection with SD 9-501.

SD 9-502(a) requires, in addition to name of debtor, either social security number or taxpayer identification number of debtor.

SD 9-502(b)(3) adds additional requirements for fixture filings and exclusion from real estate description and record owner identification for fixture filings where debtor is transmitting utility.

SD 9-512(a)(1) adds requirement that amendment to financing statement include either social security number or taxpayer identification number of debtor.

SD 9-515(a) adds curative provisions for financing statements filed before July 1, 1997. SD 9-515(b) deletes public-finance transactions from provisions allowing financing statement to be effective for 30 years. SD 9-515(d) and (e) add curative provisions regarding financing statements filed before July 1, 1997.

SD 9-519 deletes subsection b regarding file number assigned to financing statements. (SL 2002, c. 227, § 1).

SD 9-521 South Dakota accepts National Article 9 Forms.

SD 9-523(c) requiring filing officer to redact social security number or employer identification number of debtor from financing statements in most cases.

SD 9-523(d) provides for use of computer printouts from Secretary of State's centralized computer system for establishing security interest in farm collateral and requires Secretary of State to respond by telephone to request for financing statements describing farm collateral.

UCC 9-523(f) not adopted.

SD 9-525.1 adopts curative provisions with respect to filings made under former SD 9-401 in county office of Register of Deeds prior to July 1, 1986.

SD 9-525.2 and SD 9-525.3 provide for Secretary of State to promulgate regulations to implement central filing system and rules concerning operation of central agricultural security interest computer filing system. SD 9-525.4 sets annual fee for effective financing statement master list.

SD 9-530 permits secured party to file standard form combined effective financing statement and uniform commercial code financing statement when covering certain agricultural products or accounts or general intangibles related thereto.

UCC 9-527, concerning periodic reporting by government official or agency, not

adopted.

SD 9-609.1 provides for 24-month statute of limitations for claim against innocent third-party purchaser of farm products and requires creditor to offer it to file against debtor criminal complaint under SD SDCL 23A-2-1.

SD 9-609.2 indicates that sale of farm products without advising of security interest is class 1 misdemeanor.

SD 9-625 eliminates UCC 9-625(e) and (f) setting out statutory damages for non-compliance.

SD 9-626 adopts rebuttable presumption rule for both commercial and consumer transactions.

There is not included mention of various Acts recommended in UCC 10-102(1) for specific repeal. Repealer in SD 10-102(1) is of approximately 25 designated statutory provisions, apparently on theory they are inconsistent with provisions of adopted Code.

UCC 10-103 (general repeal of inconsistent Acts) and 10-104 (identification of Acts not repealed) are omitted from South Dakota Act as adopted.

Options and Alternatives.

In SD 4-106 there is enacted Alternative A.

SD 7-204(4) states SD 49-42 to SD 49-45, inclusive, are statutes not impaired or repealed.

SD 7-403(1)(b) omits clause in brackets appearing in like UCC section concerning burden of establishing negligence.

SD 9-512 enacts Alternative B.

SD 9-518 enacts Alternative B.

SD 9-519(f) enacts Alternative B.

SD 9-522 enacts Alternative B.

SD 9-525(c) enacts Alternative B.

1966 Official Amendments.

§ 2-702, § 3-501, § 7-209, 1966 Official Amendments not enacted. § 1-209, § 2-318, § 9-105, § 9-106, 1966 Official Optional Amendments not enacted. See, as to § 2-318, topic Sales, subhead Seller's Warranties.

1972 Official Amendments.

Enacted with July 1, 1983 effective date.

1973 Official Amendments.

Not adopted.

1977 Official Amendments.

Adopted.

1987 Official Amendments.

Article 2A, Leases, adopted as SD 2A, effective July 1, 1990.

1989 Official Amendments.

Article 4A, Funds Transfers, adopted as SD 4A, effective July 1, 1991.

1990 Revision of Articles adopted as SD 3.

1990 Amendments to Art. 4 adopted.

1994 Revised Art. 8 adopted effective July 1, 1999.

1995 Revised Art. 5 adopted effective July 1, 1999.

1999 Revised Art. 9 adopted effective July 1, 2001.

2003 Revised Art. 7 adopted effective July 1, 2009.

Place of Filing.

See category 10 Documents and Records, topic 10.04 Records, subhead Filing Under Commercial Code.

Filing Fees.

See category 10 Documents and Records, topic 10.04 Records, subhead Filing Under Commercial Code.

See also topics: Banks and Banking, Bills and Notes, Brokers, Carriers, Consumer Protection, Contracts, Factors, Frauds, Statute of, Sales, Securities, Warehousemen; categories Business Organizations, topic Corporations; Civil Actions and Procedure, topic Limitation of Actions; Debtor and Creditor, topics Assignments, Fraudulent Sales and Conveyances, Liens, Pledges; Documents and Records, topics Records, Seals; Mortgages, topic Chattel Mortgages.

3.103.11 [RESERVED]

3.12 CONSUMER PROTECTION:

Uniform Deceptive Trade Practices Act not adopted; however, act similar in scope but somewhat broader adopted in South Dakota Deceptive Trade Practices and Consumer Protection Law. (37-24). State Attorney General charged with coordination and enforcement. (37-23, 24).

Door-to-door sales, as defined, are regulated, including requirement that seller give buyer written notice of right to cancel within three days. (SDCL 37-24-5.3).

Unordered Merchandise.

Except in case of misdelivery or substitution of merchandise solicited, recipient may refuse same and not obligated to return same to sender. (SDCL 37-24-2). Same rule extended to unordered consumer services. (SDCL 37-24-1[14]).

Advertising.

Various advertising and sales practices defined as deceptive and unlawful including restrictions on sending unsolicited email messages. (SDCL 37-24-6[13], SDCL 37-24-42). Hotel and lodging practices regulated. (SDCL 37-24-6[8]). False advertising punishable criminally. (SDCL 37-24-6).

Assistive Devices.

Various rules and restrictions concerning manufacture, sale, lease and repair of devices used by consumers in performing “major life activity”. (37-31).

Multi-Level Distribution.

“Endless chains” whereby participant pays consideration for chance to receive compensation for introducing one or more additional participants proscribed. (SDCL 37-24-6[5]). “Pyramid promotional scheme” defined with operation of scheme felony and participation misdemeanor; civil remedies provided. (37-33).

Business Opportunities.

Sale of business opportunities whereby seller provides products to commence new business and promises to assist purchaser in same regulated. (37-25A). Certain transactions excluded or exempted. (SDCL 37-25A-2, 3). Registration of disclosure documents with Director of Division of Securities required. (SDCL 37-25A-8).

Buying Clubs.

“Buying club” defined (SDCL 37-26-1) and bond required to protect any member who suffers loss of any prepayment to buying club. (SDCL 37-26-3). Attorney General empowered to seek injunctive relief and civil penalty up to $25,000 for violation of chapter. (SDCL 37-26-11).

Electronic Mail Messages.

Unsolicited commercial e-mail advertisements restricted. (SDCL 37-24-42). Prohibited commercial e-mail advertisements. (SDCL 37-24-47).

Consumer Goods.

Promissory note or other evidence of indebtedness arising from contract for sale or lease of consumer goods or services must be designated “consumer paper” and holder of such instrument not deemed holder in due course unless assignee thereof gives notification to retail buyer that he has 60 days to notify holder of any complaint or defense. (57A-3A).

Consumer Installment Sales Contracts.

Regulated. (54-3A). Fees and charges for delinquency and returned checks restricted. (SDCL 54-3A-12, 12.1).

Debt Adjusters.

Defined. (SDCL 37-34-1). Engaging in debt adjusting, budget counseling or debt management business is Class 2 misdemeanor (SDCL 37-34-2) except as provided in SDCL 37-34-3.

Plain Language.

Life or health insurance policy forms filed with Division of Insurance and must meet specified reading ease test, subject to discretion of Director of Division of Insurance. No such policy form may be delivered or issued for delivery in state unless approved by Director. (58-11A).

Franchises.

Laws regulating franchises for brand name goods and services repealed. (SDCL 37-5A). Dealerships in vehicles, implements and equipment separately regulated. (37-5).

Credit Cards.

Defined. (SDCL 54-11-1). Left substantially to agreement of parties. (54-11). Maximum service charge is rate agreed by parties. (SDCL 54-11-6.3). Card issuer may reserve right in credit card agreement to change any terms, subject to certain requirements. (SDCL 54-11-10).

Lemon Law.

Purchaser of new personal or family automobile has right to refund or replacement of automobile not conforming to warranty after reasonable attempts by dealer and manufacturer to make it conform. Lemon law rights period is two years after original delivery or first 24,000 miles. (SDCL 32-6D-5).

Consumer Loans.

Laws regulating small installment loans and consumer finance repealed. (54-6). Nonbanks must obtain money lending license (SDCL 54-4-37, 40) and failure to do so is misdemeanor. (SDCL 54-4-52). Licenses are regulated by rules adopted by state banking commission. (SDCL 54-4-38). Licenses are subject to annual tax as provided in SDCL 10-43 unless exempted as quasi-government organization. (SDCL 54-4-54).

Interest.

See topic 3.19 Interest.

Lease-Purchase Agreements.

Article 2A of Uniform Commercial Code governing leases adopted. (57A-2A). Consumer transactions involving lease of personal property with option to purchase regulated. (54-6A). Certain information required to be disclosed in agreement. (SDCL 54-6A-4, 5). Certain contract provisions prohibited. (SDCL 54-6A-6). Reinstatement rights provided and repossession limited. (SDCL 54-6A-7). Advertising restricted. (SDCL 54-6A-10).

Sales.

See topic 3.21 Sales.

Securities.

See topic 3.24 Securities.

Sweepstakes.

Solicitor may not require or accept payment as condition of giving prize. (SDCL 37-32-2). Written prize notice required including statement of retail value, odds and fees. (SDCL 37-32-3 to 8). Penalties for violation. (SDCL 37-32-11 to 14, and 17).

Telemarketing, consumer goods or services regulated. (37-30A). Required disclosures in unsolicited consumer telephone call. (SDCL 37-30A-2). Written confirmation required of verbal agreement. (SDCL 37-30A-4 to 6). Right of cancellation provided consumer. (SDCL 37-30A-7 and 11). Unreasonable solicitor practices defined. (SDCL 37-30A-3). Certain transactions excluded. (SDCL 37-30A-8 and 10). Return and refund period of ten days required. (SDCL 37-30A-11). Penalties for violation of act and civil cause of action provided. (SDCL 37-30A-13, 14 and 16).

Telephone Sales.

Telephone solicitation of sale of items associated with charitable organization regulated. (37-30). Solicitation associated with charitable organization regulated. (SDCL 37-30-2). Activities of paid solicitors regulated; registration and bond required. (SDCL 37-30-3- 5). Unauthorized solicitations and prohibited practices punishable criminally. (SDCL 37-30-17). Telephone solicitations for non-charitable purposes regulated. (SDCL 37-30-24). Registration required for automatic telephone dialing system; hours of use and contents of message regulated (SDCL 37-30-25, 26, 28).

3.13 CONTRACTS:

Common law principles codified and controlling. (Tit. 53). Penalties for nonperformance void. (SDCL 53-9-4). Provisions fixing compensation for breach are void except where impracticable to fix actual damage. (SDCL 53-9-5; 355 N.W.2d 352). Provisions in restraint of legal proceedings void (SDCL 53-9-6) except agreements to arbitrate under Uniform Act (21-25A). Provisions in unreasonable restraint of lawful profession, trade, or business are void. (SDCL 53-9-8; 73 S. D. 84, 39 N.W.2d 483). Contract in restraint of marriage of person other than minor is void. (SDCL 53-9-7). Indemnity provisions in certain construction contracts are void. (SDCL 56-3-18). Noncompete clause in employment contract or insurance producer contract with captive agent enforceable for up to two years after termination of employment in specified area. (SDCL 53-9-11 and 12; 489 N.W. 2d 890). Noncompete clause in contract for sale of good will of business enforceable within specified area. (SDCL 53-9-9). Contracts entered into via electronic records and electronic signatures authorized. (53-12).

Every contract contains implied covenant of good faith and fair dealing but separate tort for breach of good faith does not exist independent from contract. (459 N.W.2d 833).

See topics 3.09 Commercial Code, Monopolies, Restraint of Trade and Competition; categories 10 Documents and Records, topic Seals; Family, topic Infants.

Uniform Commercial Code adopted. (Tit. 57A). See topic 3.09 Commercial Code.

3.14 FACTORS:

Uniform Commercial Code adopted. (Tit. 57A). See topic 3.09 Commercial Code.

Authority.

A factor has ostensible authority to deal with the property of his principal as his own, in transactions with persons not having notice of the actual ownership. (SDCL 59-9-8).

In addition to the authority of agents in general, a factor has actual authority from his principal, unless specially restricted: (1) To sell, on credit, anything entrusted to him for sale, except such things as it is contrary to usage to sell on credit; but not to pledge, mortgage, or barter same; (2) to insure property consigned to him uninsured; and, (3) to delegate his authority to his partner or servant but not to any person in independent employment. (SDCL 59-9-5 to 7).

Extension of Credit.

A factor may sell property consigned to him on such credit as is usual, but, having once agreed with the purchaser upon the terms of credit, may not extend it. (SDCL 59-9-5).

Liabilities.

A factor who receives property for sale under a general agreement or usage to guarantee sales, or remittance of proceeds, cannot relieve himself from responsibility therefor without consent of his principal. (SDCL 59-9-4).

A factor who charges his principal with a guaranty commission upon a sale, thereby assumes absolutely to pay the price when it falls due, as if it were a debt of his own, and not as a mere guarantor for the purchaser; but he does not thereby assume any additional responsibility for the safety of his remittance of the proceeds. (SDCL 59-9-3).

Lien.

A factor has a general lien, dependent on possession, for all that is due to him as such, upon all articles of commercial value that are entrusted to him by same principal. (SDCL 44-11-10). No filing or recording required to protect lien.

Consignment Agreements.

There are no specific statutes as to consignment agreements, or as to filing or recording thereof.

3.15 FRANCHISES:

Uniform Franchise and Business Opportunities Act not adopted. Franchise investments regulated. (SDCL 37-5B). Notice filing with Division of Securities and application fee generally required. (SDCL 37-5B-4 to 5). Civil and criminal liability for violation of Act (SDCL 37-5B-24 to 26, 39 to 48) including liability to franchisee or subfranchisee for potential treble damages and attorney's fees (SDCL 37-5B-49). Effective registration and administrative orders imposed on registrations prior to July 1, 2008; and offers and sales made within one year of July 1, 2008 are exclusively governed by prior franchise statute (SDCL 37-5A). (SDCL 35-5B-52, 53).

Franchises of dealers in: (1) Automobiles, trucks, motorcycles, motor homes or travel trailers of type and kind required to be titled and registered pursuant to cc. 32-3 and 32-5, and accessories; (2) farm tractors, farm implements, farm machinery, and attachments; (3) boats and personal watercraft; (4) industrial and construction equipment and attachments; (5) snowmobiles and all-terrain vehicles; (6) office furniture, equipment supplies, and attachments; (7) outdoor power equipment and attachments; (8) temperature control unit; and (9) auxiliary idle reduction and temperature management system or auxiliary power unit. (SDCL 37-5). Coercion of dealer to force unwanted purchases or to control sales misdemeanor. (SDCL 37-5-1 and 2). Unfair cancellation of dealer franchise misdemeanor. (SDCL 37-5-3). Cancellation of contract restricted (SDCL 37-5-5) and private right of action granted dealer to enforce rights under Act (SDCL 37-5-8). Repurchase of computer hardware and software and signage required on termination of franchise. (SDCL 37-5-5.5). Repurchase of inventory and parts required on cancellation of contract. (SDCL 37-5-6, 7, 7.1 and 8). Repurchase requirement on death of dealer. (SDCL 37-5-9). Certain terms and termination of dealership contracts for farm and off-road vehicles regulated. (SDCL 37-5-13 to 15).

Offering of "business opportunity" regulated. (37-25A). Written disclosure statement, including statutory language, required to be given to prospective purchasers. (SDCL 37-25A-14, 15). Certain offerings excluded or exempt. (SDCL 37-25A-2, 3). Registration with Division of Securities and filing fee generally required. (SDCL 37-25A-8, 10). Certain contract provisions required. (SDCL 37-25A-17). Civil and criminal liability for violation of Act (SDCL 37-25A-43 to 48) including liability to purchaser for actual damages, interest, attorney's fees and court costs (SDCL 37-25A-49).

3.16 FRAUDS, STATUTE OF:

By statute presently in force following contracts are not enforceable unless same, or some memorandum thereof, be in writing and subscribed by party to be charged, or by his agent thereunto authorized in writing: (1) agreement that, by its terms, is not to be performed within year from making thereof; (2) agreement made upon consideration of marriage, other than mutual promise to marry; (3) agreement for sale of real estate or interest therein or lease thereof for longer than year, but this does not abridge power of court to compel specific performance of agreement for sale of real estate in case of part performance thereof; (4) agreement for loan of money or extension of credit enforceable by beneficiary for whom agreement is made, including vendors of agricultural goods, services, or products. Revolving loan accounts by banks and credit card or revolving charge accounts are exempt. (SDCL 53-8-2).

Contracts of Sale.

Uniform Commercial Code adopted. See topic 3.09 Commercial Code.

Part Performance.

Apart from relevant provisions summarized in clause (3) of introductory paragraph, equitable estoppel may preclude application of statute of frauds where party asserting rights relied on agreement by acts referable thereto and thereby changed his position so enforcement of statute would subject him to unconscionable hardship and loss. (68 S. D. 538, 5 N.W.2d 314).

Public Auction Sales.

Where sale of either real or personal property is at public auction, entry at time of sale by auctioneer, or actual clerk of sale, in sale book of kind of property sold with description thereof sufficient for identification, terms of sale, price, names of purchasers, and person on whose account sale was made, is sufficient memorandum to satisfy requirements of statute. (SDCL 53-8-4).

Uniform Commercial Code adopted. (Tit. 57A). See topic 3.09 Commercial Code.

3.17 [RESERVED]

3.18 INFORMATION TECHNOLOGY, INTERNET AND NEW MEDIA:

Electronic Signatures.

Uniform Electronic Transactions Act adopted with minor changes from model act. (53-12). Act applies to any electronic record or electronic signature created, generated, sent, communicated, received, or stored on or after July 1, 2000. (SDCL 53-12-6).

Computer programs, hardware, data and systems protected from unlawful use, alteration, destruction, or access without or exceeding consent of owner. (SDCL 43-43B-1). Punishment for violation ranges from Class 1 misdemeanor, with up to one year in jail or up to $1,000 fine, or both, to Class 2 felony, with up to 25 years in penitentiary or up to $25,000 fine or both. (SDCL 43-43B-3, SDCL 22-6-1).

Telecommunications companies offering common carrier services subject to general supervision and control of Public Utilities Commission. (SDCL 49-31-3). See topic Business Regulation and Commerce.

Internet gambling prohibited. (22-25A). Violation occurs if it originates or terminates, or both, in state and each individual bet or wager constitutes separate violation. (SDCL 22-25A-9). First offense punishable as Class 6 felony (SDCL 22-25A-10), with up to two years in penitentiary or up to $2,000 fine or both (SDCL 22-6-1). Second offense punishable as Class 5 felony (SDCL 22-25A-10), with up to five years in penitentiary or up to $5,000 fine or both (SDCL 22-6-1).

Electronic auctions of livestock to public allowed, subject to licensing and regulation by Animal Industry Board. (SDCL 40-15-31.1).

Spam Regulation.

Any unsolicited commercial electronic mail message must include "ADV:" as first four characters in subject line. If message contains information consisting of explicit sexual material that may only be viewed, purchased, rented, leased, or possessed by individual 18 or older, first eight characters of subject line must be "ADV:ADLT". Each violation punishable as Class 2 misdemeanor, with up to 30 days in jail or up to $200 fine or both. Any subsequent conviction within two years is Class 1 misdemeanor, with up to one year in jail or up to $1,000 fine or both. Subsequent conviction within two years of conviction of Class 1 misdemeanor is Class 6 felony, with up to two years in penitentiary or up to $2,000 fine or both. (SDCL 37-24-6[13]). Unsolicited commercial electronic mail message does not include message sent to person with whom sender has existing personal or business relationship or message sent at request or express consent of recipient.

Commercial electronic mail messages may not be sent from computer located in South Dakota or to email address sender knows or has reason to know is held by South Dakota resident if it misrepresents or obscures any information in identifying point of origin of message or contains false or misleading information in subject line. (SDCL 37-24-37). Recipient or Internet access service provider may bring action for injunctive relief and/or to recover damages equal to greater of actual monetary loss or $500 for each violation, not to exceed total of $10,000. (SDCL 37-24-40). All of foregoing are considered deceptive trade practice for which action may be brought for actual damages or liquidated damages of $1,000 for each unsolicited e-mail and attorney fees. (SDCL 37-24-41 to 48).

3.193.16 [RESERVED]

3.17 INTEREST:

Categories of interest rates established for use with various statutes by SDCL 54-3-16.

In absence of written agreement fixing rate, legal rate is 12% per year. (SDCL 54-3-4). Interest is payable on all money at 15% after it is due, unless otherwise agreed to by express written contract, or interest rate clearly appears on bill, statement, or invoice, which may not exceed 18%, this applying to any settlement of accounts, from day on which balance is ascertained. (SDCL 54-3-5).

Maximum Rate.

54-3-7, which formerly established general usury limit, was repealed effective July 1, 1981. (SL 1981, c. 350, § 1).

Judgments.

Interest on most judgments and statutory liens excluding real estate mortgages and UCC security agreements and support debts is 10% per year. Interest on judgments arising from inverse condemnation action is 4½% per year. (SDCL 54-3-5.1).

Regulated Lenders.

Certain regulated lenders, including South Dakota state chartered banks and trust companies and federally chartered banks and savings and loan associations, are exempt from all state usury Acts (SDCL 54-3-13 and SDCL 54-3-14).

Small Installment Loans and Consumer Finance Act.

SDCL 54-6-2 which formerly established interest and service charges on small installment loans was repealed effective July 1, 1982. (1982, c. 344, § 1).

Money Lenders Licenses.

Unregulated lenders must obtain money lending license. (SDCL 54-4-36 to SDCL 54-4-72).

Revolving Charge Accounts.

An arrangement prescribing terms of transactions which may be made pursuant to which a retail seller gives purchaser privilege of using a credit card or other means of credit confirmation for purpose of purchasing consumer goods or services is termed revolving charge account. (SDCL 54-11-5). Maximum service charge is rate agreed upon by parties. (SDCL 54-11-6.3). Interest may be compounded. (SDCL 54-11-6.2). Use of card creates binding contract. Issuer may modify agreement, if right has been reserved, upon 25 days' notice. Use after notice constitutes acceptance of new terms. (SDCL 54-11-9; 10). Issuer may require card holders to provide written notice reflecting proposed changes not less than five days prior to effective date of change if issuer sent notice of change not less than 30 days prior to change. (SDCL 54-11-11).

Consumer Installment Sales Contracts.

An arrangement other than a revolving charge account evidencing any consumer transaction in which consumer purchases goods or services, under which arrangement a finance charge may be imposed and consumer agrees to pay in one or more installments, is classified as an installment sales contract. (SDCL 54-3A-1[6]). Finance charge is at rate agreed upon by creditor and consumer by written agreement. (SDCL 54-3A-3). Upon prepayment in full of unpaid balance, consumer entitled to rebate of remaining unearned finance charge. (SDCL 54-3A-9). Creditor may receive additional charges such as for credit life insurance, optional debt cancellation and debt suspension contracts of depository institution authorized to provide such coverage, for example, if disclosed to consumer. (SDCL 54-3A-5). If contract provides, penalties for delinquency of payments may be imposed, but limited to greater of $5 or 5% of delinquency at least ten days late. (SDCL 54-3A-12). Notice of penalty required. (SDCL 54-3A-11). Creditor and buyer may agree to refinance unpaid balance. (SDCL 54-3A-17).

Usury.

Penalties for usury repealed effective July 1, 1982. (formerly SDCL 54-3-9, 12; SDCL 54-6-41; SDCL 54-11-7).

Retail Installment Sales of Motor Vehicles.

Regulation repealed. (formerly SDCL 54-7).

3.18 [RESERVED]

3.19 LICENSES, BUSINESS AND PROFESSIONAL:

Licenses necessary in case of certain occupations and professions, for instance, insurance agents (SDCL 58-6A-19.5), teachers (SDCL 13-42-1), pharmacists (SDCL 36-11-16), barbers (SDCL 36-14-11), dental hygienists (SDCL 36-6A-48), practical nurses (SDCL 36-9-37), beauty parlor operators (SDCL 36-15-51), morticians (SDCL 36-19-21), restaurants (SDCL 34-18-9), tourist camps (SDCL 34-18-9), liquor dealers (SDCL 35-4-2), all stores (SDCL 9-34-7), all retailers (SDCL 7-8-20), hearing aids (SDCL 36-24-16), nursing home administrators (SDCL 36-28-6), polygraph examiners (SDCL 36-30-2), taxidermists (SDCL 41-6-33), tobacco products distributors, wholesalers and manufacturers (SDCL 10-50-9 & 10-50B-7), real estate brokers and salespersons (36-21A), time-share salespersons (SDCL 43-15B-7), mortgage lending (54-14), etc. Licenses are required for hunting and fishing and are obtainable from county treasurer, or Director of Game and Fish, Chief Game Warden, or any other game warden, depending on type of license. (SDCL 41-6-1 to 81). Licenses generally required to use state parks. (SDCL 41-17-13). Municipal corporations have power to require licenses in some cases. (9-34).

Municipalities and counties may regulate door-to-door sales, peddlers and solicitors except for telecommunications services. (SDCL 9-34-8, 18).

Collection Agencies.

No specific statutory provisions; 4% tax on gross receipts of "bill collection services". (SDCL 10-45-5).

3.20 MONOPOLIES, RESTRAINT OF TRADE AND COMPETITION:

Contract, combination, or conspiracy between two or more persons in restraint of trade or commerce any part of which is within this state, or monopolization or attempt to monopolize any trade or commerce within this state, is class 6 felony, punishable by $4,000 fine or two years in penitentiary or both. (SDCL 37-1-3.1to 3.3; SDCL 22-6-1). In addition, state, political subdivision or private person injured in his business or property by violation of state anti-trust laws may bring action for injunctive or other equitable relief, money damages and attorney's fees. Trier of fact shall treble amount of damages awarded. (SDCL 37-1-14.3).

Petroleum Products.

Price discrimination prohibited subject to specific statutory exceptions. (SDCL 37-2-1, 2). Signage of petroleum products regulated and standards established and enforced in conformity to ASTM and NIST standards. (SDCL 37-2-6 through 38).

Contracts in Restraint of Trade, Business or Profession.

Contracts in restraint of exercise of lawful profession, trade or business are void to that extent, except: (1) one who sells good will of business may agree with buyer to refrain from engaging in similar business within specified area, so long as buyer or his assignee carries on like business; (2) partners may agree upon dissolution that none will carry on similar business within same community or specified part thereof; (3) employer and employee may agree that employee will not engage in same business or profession as that of employer for period up to two years from date of termination of agreement and not to solicit existing customers of employer within specified area for period up to two years from date of termination of agreement if employer continues to carry on like business therein. (SDCL 53-9-8 to 11). Noncompetition agreement enforceable if within statute and employee voluntarily quits or is fired for cause; if fired for no cause court will apply balancing test. (553 N.W.2d 513).

Trade Secrets.

Uniform Trade Secrets Act adopted effective July 1, 1988. (37-29).

Unfair Trade Practices.

It is class 6 felony for either seller or buyer of any commodity in general use to discriminate between different localities in state by selling at lower rate or paying higher price in one locality than in another, after equalizing distance and transportation charges, with intent and purpose of destroying competition; except that buyer in more than one locality may raise prices in given locality to, but not above, prices paid by other buyers in such locality, this to meet actual legitimate competition. (SDCL 37-1-4 to 7). Penalty is $4,000 fine or two years in penitentiary or both. (SDCL 22-6-1). It is class 6 felony to make or publish any false statement, spread false rumor, or employ false or fraudulent means, willfully and with intent to affect market price of any kind of property. (SDCL 37-1-8).

There is also private cause of action for described unfair trade practices including award of actual damages trebled, and attorney's fees. (SDCL 37-1-14.3).

Resale Price Agreements.

See category 17 Intellectual Property, topic 17.01 Trademarks and Tradenames. *Caveat:* See, however, P.L. 94-175, repealing exemption of state fair trade laws from Federal anti-trust law.

Franchises.

See topic 3.15 Franchises.

3.213.22 [RESERVED]

3.23 SALES:

Uniform Commercial Code adopted. (Tit. 57A). See topic 3.09 Commercial Code.

Seller's Warranties.

§ 2-318 of Uniform Commercial Code, as adopted, provides that seller's warranty, express or implied, extends to person who may reasonably be expected to use, consume or be affected by goods and who is injured by breach of warranty. (SDCL 57A-2-318).

Contracts of Sale.

For contracts which must be in writing, see topic 3.16 Frauds, Statute of. No statutory limitation exists as to type size in printed contracts.

Bills of sale are not required, and when given need not be witnessed, acknowledged, or filed in order to be valid. Every transfer of personal property not evidenced by bill of sale filed in office of register of deeds of county wherein situated, however, if made by person having possession or control thereof and not accompanied by immediate delivery and followed by actual and continued change of possession, is while seller remains in possession, void against creditors and purchasers and incumbrancers in good faith subsequent to the transfer. (SDCL 54-8-2). Bills of sale may be filed in office of register of deeds. (SDCL 7-9-1). Fee for filing and indexing bill of sale is $10. (SDCL 7-9-15).

Retail Credit Sales.

Generally there are no special restrictions as to retail credit sales. As to special limitations on interest rates see topic 3.17 Interest; and category 23 Transportation, topic 23.01 Motor Vehicles, subhead Retail Installment Sales.

Consumer Protection.

See topic 3.12 Consumer Protection.

Bulk Sales.

See category 8 Debtor and Creditor, topic 8.08 Fraudulent Sales and Conveyances.

Sales of Motor Vehicles.

See category 23 Transportation, topic 23.01 Motor Vehicles.

3.24 SECURITIES:

Uniform Securities Act (2002 version) adopted effective July 1, 2004. (SDCL 47-31B). For text see Uniform and Model Acts section. Act is administered by Director of Division of Securities, 445 East Capitol Avenue, Pierre, S.D. 57501. See also Division of Securities regulations found at Art. 20:08 for additional registration requirements and exemptions.

Material Variations.

Article 1. Broader exception provided for banks in definition of "broker-dealer" in § 102(4). Variable insurance not included in exception for insurance contracts from definition of "security" in § 102(28).

Article 2. Broader exemption from registration requirements provided in § 201(8) for securities issued by cooperatives but limited to cooperatives organized under South Dakota law. South Dakota enactment deletes "by or on behalf" following "securities" in introductory clause of § 202(14).

Article 3. South Dakota enactment does not include § 302(a)(3) of Uniform Act. South Dakota enactment does not include § 305(f) of Uniform Act, and subsequent subsections re-lettered. South Dakota enactment does not include §§ 306(a)(7) or 306(b) of Uniform Act concerning merit review.

Article 4. South Dakota enactment does not include § 410(g) of Uniform Act which eliminates duplicate registration fee for person registered both as broker-dealer and investment advisor.

Article 5. References to felony classifications established under South Dakota law added to § 508.

Article 6. South Dakota enactment did not include § 601(e) of Uniform Act concerning establishment of securities investor education and training fund. New provisions concerning administration of securities statutes added in subsections (a) through (h) of § 601, and subsections (b) through (d) of Uniform Act re-lettered as subsections (i) through (k).

Filing Fees.

Filings required by rules adopted pursuant to SDCL 47-31B-203, $200 unless fee is otherwise identified by statute. (SDCL 47-31B-203).

Notice filings with respect to federal covered securities as defined in § 18(b)(2) of federal Securities Act of 1933, $500 for open-end management companies with total assets of $50 million or less, $1,000 for open-end management companies with total net assets of more than $50 million but less than $250 million, $2,000 for open-end management companies with total net assets equal to or greater than $250 million, $250 for closed-end management companies, and $150 for unit investment trusts; similar fee required for annual renewal filing. (SDCL 47-31B-302[a][1]).

Amendments to notice filings under SDCL 47-31B-302(a)(1), $50 for each name change of each portfolio, series, class, or other designation. (SDCL 47-31B-302[a][2]).

Notice filings for federal covered securities under § 18(b)(4)(D) of federal Securities Act of 1933, $250 if filed on time and $275 for late filings. (SDCL 47-31B-302[c]).

Securities registration statement, sum of $1 per $1,000 for first $500,000 of total proposed sale price of securities; $1 per $1,000 for first $500,000 of total proposed sale price of securities plus 75¢ per $1,000 of excess over $500,000, with minimum fee of $100 and maximum fee of $2,000. (SDCL 47-31B-305[b]).

Extension of registration statement, $100. (SDCL 47-31B-305[g]).

Annual reports to update registration statement, $25. (SDCL 47-31B-305[h]).

Post-effective amendments to increase amount of securities offered, $25 plus filing fee for additional amount calculated under formula in SDCL 47-31B-305(b). (SDCL 47-31B-305[i]).

Initial or renewal broker-dealer registration, $150. (SDCL 47-31B-410[a]).

Initial or renewal agent representation or change of registration as agent, $125. (SDCL 47-31B-410[b]).

Initial or renewal investment adviser registration, $100. (SDCL 47-31B-410[c]).

Initial or renewal investment adviser representative registration, $50. (SDCL 47-31B-410[d]).

Initial and annual notice fee for federal covered investment adviser, $200. (SDCL 47-31B-410[e]).

Requests for interpretive opinions or no action letters, $50. (SDCL 47-31B-605[d]).

Tender Offers.

Takeovers of domestic publicly held corporations subject to regulation. (47-33). Directors may consider various specified factors when responding to takeover. (SDCL 47-33-4). Corporation may establish shareholder rights plans. (SDCL 47-33-5). Control share acquisitions are defined (SDCL 47-33-3[1][l]) and subject to restrictions (SDCL 47-33-8 et seq.). Voting rights of shares acquired in control share acquisition subject to limitations. (SDCL 47-33-12). Other shareholders may demand payment of fair value for their shares under certain circumstances after control share acquisition. (SDCL 47-33-14). Business combinations between corporation and interested shareholders (defined SDCL 47-33-3[1][q]) generally prohibited for four years after interested shareholder’s share acquisition date, subject to exceptions based upon prior approval by other shareholders or directors. After four years, business combination may occur only if approved by majority of all shareholders and disinterested shareholders are paid fair price for their shares, or if approved by majority of all shareholders other than interested shareholder. (SDCL 47-33-17).

Subdivision Offerings.

Regulated by statute relating to real estate brokers and salesmen. (SDCL 36-21A-92 through 100).

Franchising and Pyramid Sales.

Offer and sale of franchises regulated. (SDCL 37-5 and SDCL 37-5A). Offer and sale of “business opportunities” regulated. (SDCL 37-25A). See topic 3.15 Franchises.

Uniform Act for Simplification of Fiduciary Security Transfers adopted. (SDCL 55-8).

Uniform Securities Ownership by Minors Act not adopted, but Uniform Transfers to Minors Act (SDCL 55-10A) in effect. See category 14 Family, topic 14.10 Infants.

Uniform Commercial Code adopted. (Tit. 57A). See topic 3.09 Commercial Code.

3.253.26 [RESERVED]

3.27 WAREHOUSEMEN:

Uniform Commercial Code adopted. (Tit. 57A). See topic 3.09 Commercial Code.

Unless other insurance is agreed to in writing by depositor, public storage warehouse must keep all personal property of depositors fully insured against loss by fire, windstorm, and extended coverage risks. Failure to keep such insurance in place is misdemeanor. (SDCL 49-42A-8).

Warehouse Receipts.

Uniform Commercial Code adopted. See topic 3.09 Commercial Code.

Liens.

Uniform Commercial Code adopted. See topic 3.09 Commercial Code.

4 CITIZENSHIP

4.01 ALIENS:

No distinction shall ever be made by law between resident aliens and citizens, in reference to possession, enjoyment, and descent of property. (Const., Art. VI, § 14). However, no alien, not resident of state or territory of U.S., or foreign government, may acquire agricultural lands, or interest therein exceeding 160 acres, except as acquired by devise or inheritance, or held as security for indebtedness. Provisions do not apply to foreign governments or their subjects whose right to hold property are secured by treaty. Lands acquired by descent or devise or in collection of debts must be disposed of within three years after acquiring title. Nonresident alien who becomes bona fide resident of any state may acquire lands, but upon termination of residency must alienate lands in excess of 160 acres. Lands held in violation of law must be forfeited to State. Restrictions do not apply to agricultural land owned by corporation for immediate or potential use in non-farming purposes but land cannot be used for farming pending development unless certain conditions met. (43-2A).

Superintendent of Education may grant teacher’s certificate to legal alien who has not declared intention to become citizen, and such legal alien may be employed by school district without filing oath of allegiance. (SDCL 13-42-6).

Alien entitled to unemployment benefits under certain circumstances. (SDCL 61-6-1.5).

5 CIVIL ACTIONS AND PROCEDURE

5.01 ACCORD AND SATISFACTION:

Uniform Commercial Code adopted. (Tit. 57A). See category 3 Business Regulation and Commerce, topic 3.09 Commercial Code.

Compromise.

In case of an accord obligation not extinguished until accord executed. Obligation extinguished and satisfied by acceptance by creditor of consideration of accord. (535 N.W.2d 839). Controlling principles differ from those in many jurisdictions in that new consideration not required when part performance expressly accepted by creditor in writing as satisfaction, or when part performance is rendered pursuant to agreement in writing. (SDCL 20-7-4). Illustratively, if debtor tenders as full settlement check for lesser amount than is admittedly owing and due and creditor endorses and cashes check, obligation is extinguished. (908 F.2d 380; 45 S. D. 216, 186 N.W. 830; 54 S. D. 65, 222 N.W. 603). However, if creditor scratches out "settlement in full" endorsement and adds own endorsement reading "restriction of payment in full refused" and "the balance remains due and owing," there is no accord and satisfaction. (247 N.W.2d 490). Somewhat corollary to foregoing, consideration is not essential to validity of release, if it is in writing given by creditor to debtor. (SDCL 20-7-10; 72 S. D. 130, 31 N.W.2d 239). Written contract may be altered by second written contract without new consideration. (SDCL 53-8-7).

Pleading.

Accord and satisfaction must be affirmatively pleaded. (SDCL 15-6-8[c]).

5.02 ACTIONS:

Insofar as was deemed practicable, South Dakota Rules of Civil Procedure (SDCL 15-6-1 to 86) conform to Federal Rules (F.R.).

Equity.

While distinctions between actions at law and suits in equity are abolished (SDCL 15-6-2), this applies only to form, and inherent differences continue. Circuit courts have jurisdiction both at law and in equity. Fact questions in equity are determined by court, without a jury, except that a jury may be impanelled to render a verdict which is solely advisory. (8 S. D. 64, 65 N.W. 435; 36 S. D. 36, 153 N.W. 918; 65 S. D. 145, 272 N.W. 288). If on motion or on its own initiative, court finds that as to some or all issues there is no right of trial by jury, court may dispense with jury trial thereof (SDCL 15-6-39[a]) and may direct separate trials of any number of issues (SDCL 15-6-42[b]). Also court may try any issue with advisory jury or with consent of both parties, order trial with jury whose verdict has same effect as if jury trial had been a matter of right. (SDCL 15-6-39[c]).

Forms of Action.

All cases are in two classifications, actions and special proceedings. An action is an ordinary judicial proceeding for enforcement, determination or protection of a right, redress or prevention of a wrong, or punishment of public offense. Every other remedy is a special proceeding. (SDCL 15-1-1[1]).

Conditions Precedent.

Ordinarily, no preliminary notice of claim or injury is required. Common law rules control as to cases in which a demand must precede suit. Suit for personal injury, property damage, error or omission or death may not be prosecuted against any public entity or its employees unless written notice of time, place and cause of injury is given to public entity within 180 days after injury. (SDCL 3-21-2). Notice must be given in case of suit against state to Attorney General and Commissioner of Administration (SDCL 3-21-3[1]); against county, to county auditor (SDCL 3-21-3[2]); municipality, to mayor or city finance officer (SDCL 3-21-3[3]); school district, to superintendent of schools (SDCL 3-21-3[4]); other public entities, to chief executive officer or secretary of governing board (SDCL 3-21-3[5]). In case of minor or one mentally or physically incapacitated, court may allow service of notice within reasonable time after expiration of disability, upon application within two years after event upon which claim based. (SDCL 3-21-4).

Commencement.

See topics 5.20 Process, 5.17 Pleading.

Parties.

In all original actions and proceedings, the parties are denominated “Plaintiff” and “Defendant”. (SDCL 15-6-17). With specified exceptions, an action must be prosecuted in the name of real party in interest. (SDCL 15-6-17[a], same as F.R. 17[a]).

Married person as party is governed by same rules as if single. (SDCL 25-2-15).

Action by an infant must be by his guardian, conservator or guardian ad litem. (SDCL 15-6-17[c]).

Associates.

When two or more persons are associated in business, under a common name, they may be sued in such common name with the summons served on any one of them, and the judgment binds the joint property of the associates, and the individual property of the party or parties served with process. (SDCL 15-6-17[b]).

Class Actions.

F.R. 23, 23.1 and 23.2 followed. (SDCL 15-6-23, 23.1 and 23.2). Additional prerequisite of SDCL 15-6-23(a) is that suit is not against state for refund of tax on ore, energy materials severance, inheritance, income of banks and financial corporations, insurance company premiums and annuities, retail sales and service, use, realty improvement by contractors, or municipal non-ad valorem tax. Uniform Class Actions Act not adopted.

Joinder of Persons Needed for Just Adjudication.

F.R. 19 followed. (SDCL 15-6-19).

Permissive Joinder of Parties.

F.R. 20 followed. (SDCL 15-6-20).

Intervention.

F.R. 24 followed, except that state statute substituted for statute of U.S. referred to in F.R. 24(a)(1). (SDCL 15-6-24).

Interpleader.

F.R. 22 followed. (SDCL 15-6-22).

Joinder of Causes of Action.

F.R. 18 followed. (SDCL 15-6-18).

Splitting causes of action authorized. (SDCL 15-6-21).

Consolidation of Actions.

F.R. 42(a) followed. (SDCL 15-6-42[a]).

Severance of Actions.

F.R. 42(b) followed. (SDCL 15-6-42[b]).

Stay of Proceedings.

Apart from general power to stay proceedings in instances where required in administration of justice, court empowered to order stay in specified contingencies, such as to enforce obedience of court orders. (SDCL 15-6-37[b][2][c]).

Abatement and Survival.

All causes of action survive notwithstanding death of claimant or person liable. (SDCL 15-4-1). Upon death of party to action, court may order proper substitution, and unless motion for substitution is made not later than 90 days after death is suggested on record by service of statement thereof, as provided for service of motion, action must be dismissed as to deceased party. (SDCL 15-6-25[a]). See also category 13 Estates and Trusts, topic 13.08 Executors and Administrators.

Small Claims.

See category 6 Courts and Legislature, topic 6.01 Courts.

Limitation of.

See topic 5.16 Limitation of Actions.

Prohibited Actions.

Except for injury caused by willful acts or by want of ordinary care or skill, actions for “wrongful life” are prohibited. (21-55).

Direct Actions against Insurer.

See category 23 Transportation, topic 23.01 Motor Vehicles, subhead Direct Actions.

5.03 APPEAL AND ERROR:

Except as noted under later subheadings, all appeals are to Supreme Court. (SDCL 15-26A-3). Unless contrary appears, material under this title relates to appeals from circuit court to Supreme Court. Federal Rules of Appellate Procedure form basis for South Dakota Rules, with numerous differences.

What is Appealable.

As a matter of right, an appeal may be taken from a judgment; an order affecting a substantial right, and in effect determining the action and preventing a judgment from which an appeal may be taken; an order granting a new trial; an order affecting a substantial right made in special proceedings or upon summary application in an action after judgment; an order granting, refusing, continuing, dissolving, or modifying any of the remedies of arrest and bail, claim and delivery, injunction, attachment, garnishment, receivership or deposit in court; and sanctions imposed pursuant to SDCL 15-6-11. (SDCL 15-26A-3). Also, and as matter of discretion, Supreme Court may allow appeal from any other intermediate order made before trial, this on procedure somewhat, but not entirely, analogous to petitions for certiorari to U.S. Supreme Court. (SDCL 15-26A-3[6]). Detailed provisions set forth. (SDCL 15-26A-13 to 21). Appellee may seek review of adverse judgment or order in same action. (SDCL 15-26A-22).

Time for Taking.

Appeal to Supreme Court from judgment or order must be taken within 30 days after written notice of order appealed from is given to appealing party; except for adoption and abuse and neglect proceedings appeal from judgment must be taken within 30 days after judgment is signed, attested, filed and notice of entry thereof is given to adverse party. Running of time is terminated by timely filing of motion for new trial or for judgment as matter of law, and full time for appeal commences to run after written notice of entry of order pursuant to such motion or from date on which time for action by circuit court expires. (SDCL 15-26A-6). If circuit court has not ruled within 20 days after making motion for new trial or for judgment n.o.v., or fails to enter order extending time for taking action on such motion, motion is deemed denied. (SDCL 15-6-59[b]); SDCL 15-6-50[b]). Appellee’s notice of review must be filed within 20 days after service of notice of appeal. (SDCL 15-26A-22).

How Taken.

Appeal is taken by serving on each other party and filing with clerk of trial court notice of appeal designating judgment, order, or part thereof appealed from and serving and filing docketing statement, form for which appears in Appendix of Forms following 15-26A. With appeal, appellant must deposit with clerk $50 as fee of clerk of Supreme Court (SDCL 16-2-29.1), and $50 as fee of clerk of trial court (SDCL 16-2-29[2]), or file affidavit of indigency (SDCL 15-26A-5). Appellee's notice of review must be filed with clerk of Supreme Court, together with section B of docketing statement. (SDCL 15-26A-22).

Cost Bond.

Unless appellant is exempted by law, he must file with clerk of circuit court within time for taking appeal $500 bond, or cash; or equivalent security for costs on appeal. No security required from appellant not subject to costs. Bond may be waived by written consent of each appellee or upon filing of affidavit of indigency. (SDCL 15-26A-23 and 24).

Relief as to Omissions.

Failure of appellant to take any step other than timely service and filing of notice of appeal does not affect validity of appeal, but is ground for such action as Supreme Court deems appropriate, including dismissal of appeal. (SDCL 15-26A-4). Amended notice of appeal may be filed to correct clerical errors or omissions in original notice of appeal but cannot be used to appeal order or judgment entered subsequent to original notice of appeal unless subsequent order or judgment amends order or judgment from which appeal initially taken. (SDCL 15-26A-4.1).

Enlargement of Time.

For good cause shown Supreme Court may enlarge or extend time for doing any act during process of appeal, but may not enlarge time for filing notice of appeal. (SDCL 15-26A-92).

Stay of Proceedings.

Except in injunction and receivership cases, or upon default judgments, and unless otherwise ordered, proceedings on judgment are automatically stayed until 30 days after entry thereof. (SDCL 15-6-62[a]). On motion for new trial or relief from judgment trial court has discretion to stay proceedings, this on such conditions as deemed proper for security of adverse party. (SDCL 15-6-62[b]).

Supersedeas Bond.

Appeal does not stay enforcement of judgment or order unless appellant executes supersedeas bond. (SDCL 15-26A-25). As to money judgment, condition of bond shall be payment of judgment or that part of judgment which is affirmed with interest, from date of judgment. (SDCL 15-26A-26). For other types of judgments (e.g., injunction and receivership cases, abatement of nuisance, possession of property, etc.) applicable rules authorize supersedeas on specified undertakings or as prescribed by court, general purport of provisions being to require adequate security to appellee that judgment will be complied with if affirmed, with recompense for any loss resulting from delay during stay. (SDCL 15-26A-27 to 31).

Requirements as to Sureties.

Undertaking may be with corporate surety authorized to do business in South Dakota (SDCL 2-14-2[5]); or with two individual sureties, in which latter case undertaking must be accompanied by affidavit of sureties, in which each swears he is worth a specified sum (double amount of undertaking) in property in South Dakota, not by law exempt from execution. Detailed provision is made for justification of sureties, if this is demanded or for further undertaking, if sureties should become insufficient (SDCL 15-26A-35). In lieu of undertaking, appellant may deposit with clerk of trial court sum equal to required undertaking. (SDCL 15-26A-41).

Composition of Record.

Within five days after filing of notice of appeal, clerk of trial court must assemble, consecutively number, and certify all pleadings, documents, papers and exhibits filed, except parties may stipulate as to contents of record. This certified record, together with transcript, if any, constitutes record on appeal. Trial briefs constitute part of record only when directed by Supreme Court to provide copies. (SDCL 15-26A-47 and 53). In lieu of foregoing, parties may prepare agreed statement of case which, if approved, constitutes record on appeal. (SDCL 15-26A-55).

Appellant must order transcript or necessary parts thereof within ten days after filing notice of appeal on form prescribed by Supreme Court which appears in Appendix of Forms following 15-26A. (SDCL 15-26A-48). Reporter or administrative agency must deliver transcript within 45 days of receipt of order or prepayment, if requested, unless time is extended by clerk of Supreme Court, or order is received by reporter from appellee for additional parts of transcript in which case 45 day delivery time starts anew. (SDCL 15-26A-51).

Briefs.

Detailed provisions are made as to form and contents of briefs, and these should be closely followed. (SDCL 15-26A-60 to 81).

Disposition on Briefs and Record.

After all briefs have been filed, Supreme Court may, on its own motion and by unanimous action, affirm or reverse order or judgment. Sole grounds are that issues are clearly controlled by state or federal law, are factual, are ones of judicial discretion or, in case of summary judgment, genuine issue of material fact exists. (SDCL 15-26A-87.1).

Oral Argument.

By agreement of parties, case may be submitted on briefs but Supreme Court may direct that case be argued. (SDCL 15-26A-87). Otherwise, oral argument is expected, although Supreme Court may consider case on briefs alone. (SDCL 15-26A-82).

A petition for rehearing may be served and filed within 20 days after filing of Supreme Court's opinion or order of summary disposition, adverse party may serve and file answer thereto within ten days after service of petition. In each instance, original and five copies must be filed. (SDCL 15-30-4).

Extent of Review.

Upon proper record, Supreme Court reviews any order, ruling, or determination of trial court, including order denying new trial, whether any such order, ruling, or determination is made before or after judgment. (SDCL 15-26A-7). Where jury verdict is attacked, question is whether, after resolving all disputed evidence in favor of prevailing party, evidence is such as to sustain verdict. (67 S. D. 484, 294 N.W. 175). Where fact finding of trial court is attacked, question is whether such findings are clearly erroneous. (SDCL 15-6-52[a]).

Appeals from Administrative Agencies.

In nearly all cases where public boards, commissions, or officials act in a quasi-judicial capacity, provision is made for judicial review in Code under title or chapter relating to board, commission, or official rendering decision in question. There is no uniformity in procedure provided under such individual titles or chapters, extent of review, etc.; and instances are so numerous as to render abstract thereof not feasible. See SDCL 1-26-30 to 37 and 21-33 for general procedure in appeals from administrative agencies.

Practice.

See topic 5.19 Practice.

5.04 BONDS:

Where bonds required by statute, resort must be had to such statute for determination of form and requirements as to sureties. In many instances, forms and surety requirements are indicated in this Digest under topic relative to the subject.

Sureties.

Where sureties required by statute, surety company authorized to do business in South Dakota is sufficient, without any other surety. (SDCL 58-21-1). If seal of such company appears on instrument, such seal is, for purposes of obtaining approval, prima facie evidence of authority of such company, and of person who executed instrument in behalf of such company. (58-21). If individual sureties are required, usual, but not uniform, requirement is that there be two, that each be a resident and freeholder of South Dakota and that each is worth at least sum specified in bond, in excess of all his liabilities, and exclusive of property exempt by law from execution.

Form.

Except where specifically authorized by statute, obligee should be those for whose benefit bond is intended, and not the State, although in latter instance bond will still be enforced if from context the purpose is clear. (61 S. D. 460, 249 N.W. 813).

Enforcement.

Except when the action in name of the State is expressly authorized (SDCL 15-6-17[a]), this in behalf of those beneficially interested, action should be prosecuted by those for whose protection bond was given (61 S. D. 460, 249 N.W. 813).

5.05 CERTIORARI:

Jurisdiction and Grounds.

A writ of certiorari may be granted by Supreme and circuit courts when inferior courts, officers, boards, or tribunals have exceeded their jurisdiction and there is no writ of error or appeal, nor any other plain, speedy, and adequate remedy. (SDCL 21-31-1).

Proceedings.

Writ issued on affidavit by party beneficially interested. (SDCL 21-31-2). Writ may be directed to inferior court, tribunal, board or officer, or other person having custody of records or proceedings to be certified. (SDCL 21-31-3). Unless otherwise expressly directed by court, writ served in same manner as summons in civil action. (SDCL 21-31-6).

Extent of review is to determine whether the inferior court, officer, board, or tribunal has regularly pursued the authority thereof. (SDCL 21-31-8).

Judgment.

When a full return has been made the court must hear the parties and may thereupon give judgment either affirming or annulling, or modifying proceedings below. A copy of the judgment must be transmitted to inferior officer, board, or tribunal. (SDCL 21-31-7, 10).

5.06 CHARITABLE IMMUNITY:

Under SDCL SDCL 47-23-2.1, no director, trustee, committee member, or officer of tax exempt organization may be liable from damages resulting from exercise of judgment or discretion in connection with his or her duties, unless act or omission involved willful or wanton misconduct. See topic 5.09 Damages.

5.07 [RESERVED]

5.08 COSTS:

Concept of costs as indemnity to be recovered by prevailing party abolished. (SDCL 15-17-36). Prevailing party may recover disbursements, i.e., expenditures necessarily incurred in procuring evidence or bringing matter to trial. (SDCL 15-17-37). Attorneys' fees may be taxed as disbursements if agreed by parties, if allowed by statute, or in cases of divorce, annulment of marriage, determination of paternity, custody, visitation, separate maintenance, support, alimony, trusts, probate and guardianship proceedings, and mortgage foreclosures. (SDCL 15-17-38). Court may limit taxation of disbursements in interests of justice. (SDCL 15-17-52). Court may impose against one or all parties expenses of requiring jury to report, where case is settled after deadline. (SDCL 15-17-50). Inmate who abuses court system may be ordered to pay costs and attorney's fees. (SDCL 15-17-51.1, 51.2, SDCL 24-2-29.1).

Security for Costs.

Nonresident plaintiff must give security for costs, not exceeding $250, if demanded by defendant. (SDCL 15-9-1 to 4). This may be by endorsement of summons or complaint, signed by resident surety, to effect he is surety for costs, or by surety bond, or by deposit of cash. (SDCL 15-9-1 to 4). This requirement applies in actions in U.S. District Court in South Dakota. (180 F.2d 152).

Liability of Attorney.

There are no statutory provisions making an attorney liable for costs, except in disciplinary proceedings or pursuant to Rule 11. (SDCL 16-19-70.4, SDCL 15-6-11).

5.09 DAMAGES:

Except as hereinafter noted, common law rules apply.

Fixed Damages.

Contract provisions fixing damages for breach void. (SDCL 53-9-5). However, and where it would be impracticable or extremely difficult to fix actual damage, parties may agree on amount presumed to be damage for breach. (SDCL 53-9-5). Penalties imposed by contract for nonperformance void. (SDCL 53-9-4).

Future Damages.

By statute prospective damages are limited to those "certain to result in the future." (SDCL 21-1-10). This has been construed as meaning reasonable certainty (72 S. D. 542, 37 N.W.2d 410), or reasonable probability (283 N.W.2d 254), as distinguished from absolute certainty.

Punitive or Exemplary Damages.

In action not arising on contract, where defendant has been guilty of oppression, fraud, or malice, actual or presumed, or for wrongful injury to animals, committed intentionally or by willful and wanton misconduct, in disregard of humanity, in addition to actual damages jury may award damages for sake of example and as punishment. (SDCL 21-3-2). In claim alleging punitive damages, before discovery may be commenced and before submitted to factfinder, court must hold hearing and find, by clear and convincing evidence, reasonable basis that there has been willful, wanton or malicious conduct. (SDCL 21-1-4.1).

Total general damages in medical malpractice actions limited to $500,000. (SDCL 21-3-11). Previous cap declared unconstitutional. (544 N.W.2d 183), but amended statute has not been tested.

Comparative Negligence Rule.

Where plaintiff’s contributory negligence is slight in comparison with negligence of defendant, plaintiff may recover damages reduced in proportion to amount of his contributory negligence. (SDCL 20-9-2). Determination of whether plaintiff’s contributory negligence is slight is made without determination of percentage of fault by special interrogatory.

See also category 13 Estates and Trusts, topic 13.02 Death, subhead Action for Death.

Charitable Immunity.

No statute or Supreme Court ruling decisive, but see 61 S.D. 323, 248 N.W. 762. Liability insurer of charitable institution estopped from asserting charitable immunity defense. (SDCL 58-23-3).

Sovereign Immunity.

Subject to certain statutory exceptions, state and counties, cities, townships and school districts are not liable for damages for neglectful performance of their governmental duties. (66 S.D. 1, 278 N.W. 6; 76 S.D. 1, 71 N.W.2d 571; 82 S.D. 317, 145 N.W.2d 524; 88 S.D. 564, 225 N.W.2d 593; 295 N.W.2d 736; 297 N.W.2d 454). Employee, officer or agent of state or public entity, acting within scope of employment or agency also immune from liability. (SDCL 21-32-17; SDCL 21-32A-2). Immunity not available for state employees performing ministerial functions. (535 N.W.2d 896). To extent, however, of liability insurance covering state, or other public entity, and its officers, agents and employees, sovereign immunity is deemed waived. (SDCL 21-32-15, 16; SDCL 21-32A-1). Immunity also waived to extent public entity participates in risk sharing pool. (SDCL 21-32A-1). For such waiver to be effective in action against state official, employee or agent, notice must be given by certified mail to attorney general. (SDCL 21-32-18).

Liability Coverage Pool.

Public entity pool for liability claims established effective Mar. 1, 1987 for payment of valid tort claims against public entities and officers and employees for liability for negligence in operation of motor vehicles, negligence in performing acts within scope of employment and liability for federal claims. (SDCL 3-22-1). Exclusions delineated. Not to be construed as waiver of sovereign immunity. (SDCL 3-22-1; 379 N.W.2d 822). Except as limited by agreement between Board of Control and sub-pool or state, pool pays valid claims, except claims for punitive damages. (SDCL 3-22-7). Payment based upon final judgment in circuit court on agreed upon settlement. (SDCL 3-22-7). Pool pays valid claims for public entities’ employee’s acts or omissions within scope of employment. (SDCL 3-22-8). Payment of claim to be based upon structured settlement with no more than 2% of fund paid out in any one year for any one claim. (SDCL 3-22-10). Maximum payout on single claim in single coverage year is $200,000. (SDCL 3-22-10). SDCL 3-22-10 defines scope of sovereign immunity. (SDCL 3-22-17).

See topic 5.20 Process, subhead Service by Mail.

No-Fault Insurance.

See category 23 Transportation, topic 23.01 Motor Vehicles.

Landowner Immunity.

Landowner immune from liability to trespassers on flooded lands unless landowner grossly negligent. (SDCL 20-9-11). Landowner owes no duty of care to keep land safe for use by others for outdoor recreational purposes. (SDCL 20-9-13). Liability still exists for landowner's gross negligence and duty of care exists where landowner charges fee for use of land. (SDCL 20-9-16). Doctrine of attractive nuisance remains unaffected. (SDCL 20-9-18). Similar immunity exists for land owned, leased or managed by state or any of its political subdivisions. (SDCL 20-9-19 to SDCL 20-9-28).

Uniform Contribution Among Tortfeasors Act (Revised) not adopted. Original 1939 version in force. (SDCL 15-8-11 through 22). Any party allocated less than 50% of total fault allocated to all parties may not be jointly liable for more than twice percentage of fault allocated to that party. (SDCL 15-8-15.1). Trier of fact may treat two or more persons as single party if inequitable to distinguish between them. (SDCL 15-8-15.2).

Death.

See category 13 Estates and Trusts, topic 13.02 Death, subhead Action for Death.

Year 2000 Litigation.

(SDCL 21-59-1 to 3 Repealed). There are no South Dakota statutes addressing year 2000 litigation.

5.10 [RESERVED]

5.11 DEPOSITIONS AND DISCOVERY:

Federal Rules of Civil Procedure (F.R.) form basis for South Dakota Rules of Civil Procedure (SDCL 15-6-1 to 86). See topic 5.19 Practice.

Within State for Use Within State.

Unless otherwise indicated, rules under this heading apply.

Uniform Foreign Depositions Act in effect (SDCL 19-5-4).

Within State for Use Elsewhere.

See Uniform Foreign Depositions Act. (SDCL 19-5-4).

Outside of State for Use Within State.

See subhead Before Whom Taken, infra. Unless otherwise indicated, rules under that subhead apply.

De Bene Esse.

Permissible as within scope of rule. (SDCL 15-6-30[a]).

Perpetuating testimony may be taken as to any matter cognizable in any South Dakota court, under rule substantially same as F.R. 27. (SDCL 15-6-27[c]).

Before Whom Taken.

Within jurisdiction of U.S. depositions may be taken before any officer authorized to administer oaths, this by laws of South Dakota, the U.S., or place where examination is to be taken, or by person appointed by court in which action is pending or designated by parties, who is thereby empowered to administer oaths and take testimony. (SDCL 15-6-28[a]). Depositions may be taken and recorded by sound, sound and visual, or stenographic means. (SDCL 15-6-30[b][4]).

In foreign country, depositions may be taken pursuant to any applicable treaty or convention, pursuant to letter of request (whether or not captioned letter rogatory), on notice before person authorized to administer oaths where examination is to be held or by law of U.S., or before person commissioned by court and thereby empowered to administer oath and take testimony, or when taken pursuant to interrogatory. (SDCL 15-6-28[b]).

Compelling Attendance of Witnesses.

Subpoenas may be issued by clerks of courts, judges, specified public officers in matters pending before them, and any attorney of record in any action, proceeding or hearing to compel attendance of witnesses and production of records. Form and contents prescribed in detail. (SDCL 15-6-45[a]). Serving officer must tender witness his fee for attendance for one day and his travel pay. (SDCL 15-6-45[c]). Except in cases of nontender of witness fee and travel pay, if witness fails to attend, he is subject to punishment for contempt, with detailed procedure provided, and is liable for all damages resulting from such failure to attend. (SDCL 19-5-8, 10; SDCL 19-5-11 to 14). Witness fees are $20 for each day's attendance plus mileage at rate specified in SDCL 3-9-1. (SDCL 19-5-1).

Examination of Witnesses.

15-6-30 is substantially same as F.R. 30.

Return.

15-6-30(f)(1) is substantially same as first paragraph of present F.R. 30(f)(1). SDCL 15-6-30(f)(2) is same as present F.R. 30(f)(2). Depositions and other discovery materials are not to be filed with clerk of court. (SDCL 15-6-5[g]).

Use of Depositions.

As against any party present or represented at taking of deposition or who had due notice thereof, all or any part of deposition, so far as admissible under rules of evidence, may be used at trial or upon hearing of any motion, this in accordance with the following: (1) To contradict or impeach testimony of deponent as witness, or for any other purpose permitted by South Dakota Rules of Evidence. (2) Deposition testimony of party or of officer, director, managing agent, or partner of public or private corporation, limited liability company, partnership, or association which is party, may be used by any adverse party for any purpose. (3) Such deposition testimony may be used by any party for any purpose if witness is dead, or out of the county, or unable to testify because of age, sickness, infirmity, or imprisonment, or if offering party is unable to procure attendance of witness by subpoena, or if, on application and notice, court finds exceptional circumstances which make it desirable in the interests of justice to allow the deposition to be used. (SDCL 15-6-32[a]). SDCL 15-6-32(a)(4) is same as F.R. 32(a)(4). Party is not deemed to make person his own witness for any purpose by taking his deposition. Introduction in evidence of deposition or any part thereof, unless for impeachment, usually makes deponent witness of party introducing deposition. Any party may rebut any relevant evidence in deposition whether or not introduced by him. (SDCL 15-6-32[c]).

Form

Following venue and title, begin with this caption: Deposition of . . . . . (names of witnesses) taken before me (name of officer), (title of officer) within and for the county of . . . . . ., state of . . . . . ., pursuant to the annexed (notice or stipulation) and at the time and place mentioned therein, in an action pending in the above entitled court between the above named parties.

Appearances should be noted as follows: The plaintiff . . . . appeared (in person) (and) by . . . . . ., ...h. . . . attorney . . . . . The defendant. . . . appeared (in person) (and) by . . . . . ., ...h. . . . attorney . . . . .

Before the testimony of each witness state: (name of witness), of lawful age, being by me first duly sworn as hereinafter certified, deposed and said as follows:

State by whom the examination is conducted, as “Direct Examination by Mr. . . . .”

Set out each question in order, followed by the answer verbatim given by the witness, indicating questions by “Q” and answers by “A”.

Note any adjournment at time thereof with reasons therefor.

Provide a place for signature of the witness at the end of his testimony.

Certificate of officer to be annexed to deposition: “I (name of officer), a (name of office) in and for the county of . . . . . ., state of . . . . . ., hereby certify that (names of witnesses) w. . . . . by me first (severally) duly sworn (affirmed) to testify the truth, the whole truth, and nothing but the truth; that the testimony of said witness. . . . w. . . . . recorded (by me personally) (by . . . . . ., acting under my direction and in my presence); that the deposition. . . . of such witness. . . . w. . . . . reduced to writing by . . . . . ., a proper person; that the examination of such witness. . . . was conducted and the deposition. . . . w. . . . . (respectively) signed by the witness. . . . in my presence (or, if not so signed, state reasons); that such deposition. . . . w. . . . . taken on the . . . . . . day of . . . . . ., 20. . . ., at . . . . . .; (if adjournments were made, state when deposition was commenced and to when adjournments made, with reasons therefor); that the deposition. . . . taken (is) (are) a true record of the testimony given by the witness. . . . and of the questions asked and of the proceedings had in connection therewith; and that I am not (nor is the person who reduced the deposition. . . . to writing) a relative or employee or attorney or counsel of any of the parties to said action or financially interested in the event of the action. I further certify that my charges as the certifying officer hereto, which have been paid by . . . . . ., are as follows: for administering oath, $. . . .; for certificate and seal, $. . . .; for taking deposition . . . ., ... words at . . . .¢ for every 10 words, $. . . .; total $. . . . .” (Signature, title and seal).

Notice, with proof of service thereof, should be attached to and enclosed with deposition.

5.12 [RESERVED]

5.13 EVIDENCE:

Witnesses.

General rules as to competency are same as Art. VI, Federal Rules of Evidence. (SDCL 19-14-1 to 29).

Privileged Communications.

Uniform Rules of Evidence adopted as to privileged communications between lawyer and client (Rule 502; SDCL 19-13-2 to 5); physician or psychotherapist and patient (Rule 503; SDCL 19-13-6 to 11) (see SDCL 19-2-3 for scope of waiver of privilege in litigated cases); and person and his clergyman (Rule 505; SDCL 19-13-16 to 18). Communications between student and school counselor are privileged (SDCL 19-13-21.1), as are communications during mediation (SDCL 19-13-32).

Husband and Wife.

Uniform Rules of Evidence adopted as to privileged communication between husband and wife. (Rule 504; SDCL 19-13-12 to 15).

Communications or Transactions with Persons Since Deceased.

In suits by or against representatives of deceased persons, including proceedings for probate of wills, any statement of the deceased, oral or written, is not excluded as hearsay, if the trial judge first finds as a fact that such statement was made, that it was in good faith, and on decedent's personal knowledge. (Rule 804[b][5]; SDCL 19-16-34). This has been held inapplicable to action for wrongful death. (74 S.D. 635, 57 N.W.2d 750).

Self-Incrimination.

Provision of State Constitution (Art. VI, Sec. 9) held to extend to all manner of proceedings in which testimony is taken. (72 S. D. 100, 30 N.W.2d 455, and decisions therein cited). It is court's duty, of its own motion and without waiting for objection, to advise witness of right to refuse answer to any question requiring or tending to require incriminating testimony. (SDCL 19-2-8).

Compelling Attendance.

See topic 5.10 Depositions and Discovery.

5.14 INJUNCTIONS:

Procedure is substantially same as F.R. 65. (SDCL 15-6-65).

Jurisdiction.

Supreme Court has jurisdiction to issue injunctions (Const., Art. V, § 5), but original jurisdiction is accepted only when there are strong reasons for it. (1 S. D. 365, 47 N.W. 296; 36 S. D. 350, 154 N.W. 806). As practical matter, injunction cases are almost uniformly in circuit courts, which have general equity jurisdiction.

Prerequisites.

Final judgment or decree necessary for permanent injunction (SDCL 21-8-15), with establishment of specified grounds of same general nature as required under historical equity practice (SDCL 21-8-14).

Procedure.

Substantially the same as in other actions. See topic 5.02 Actions.

Bond.

Except in particular cases under special statutes (e.g., actions by public authorities to restrain nuisance) preliminary injunction or temporary restraining order is granted only upon undertaking by applicant, with or without sureties, to effect applicant will pay to party enjoined such damages, not exceeding specified amount fixed by court, as he may sustain by reason of such injunction, if court decides applicant was not entitled thereto. Such damages may be ascertained by reference or otherwise, as court directs. (SDCL 15-6-65[c]).

Temporary Injunction.

Procedure provides for both preliminary injunction with notice and temporary restraining order without notice conforming to F.R. 65. Grounds for such orders in statutes which substantially represent codification of equity principles. (SDCL 21-8-2).

5.15 JUDGMENTS:

South Dakota Rules of Civil Procedure (RCP) as to judgments (SDCL 15-6-54 to 63) contain material variations from Federal Rules (F.R.).

Purport of rules is that judgment is final determination, and any other determination made and entered in writing is an order. (SDCL 15-6-54[a]).

Judgment by confession is authorized. (SDCL 21-26-1). Requisites are verified written statement, signed by defendant, stating amount for which judgment may be entered, authorizing entry thereof, and if for money due or to become due, concisely stating facts, and showing that sum confessed is justly due or to become due, and if judgment is to secure plaintiff as against contingent liability, concise statement of facts thereof, and showing sum confessed does not exceed such liability. (SDCL 21-26-2 to 5).

Judgments by consent are commonly entered on stipulation. Also see subhead Offer of Judgment, infra.

Judgment on pleadings may be moved for by any party at any time after pleadings are closed, provided this will not delay trial. (SDCL 15-6-12[c], same as F.R. 12[c]).

Summary Judgments.

Under procedure substantially as provided by F.R. 56, provision is made for application for summary judgment, this at any time after expiration of 30 days from commencement of action, or after service of motion for summary judgment by adverse party, such judgment to be rendered if entire record and affidavits show no genuine issue of fact, and with alternative provision for limitations, if case is to be tried, of fact issues to those actually in question. (SDCL 15-6-56; F.R. 56).

Declaratory Judgments.

Uniform Act adopted. (21-24).

Default Judgments.

When shown by affidavit a party has failed to plead or otherwise defend, judgment by default may be entered against him. If, however, he has appeared in action, he is entitled to at least three days written notice of application, and if he is a minor or incompetent, default may not be entered unless he is represented by guardian, conservator or guardian ad litem. If necessary for entry of judgment or to carry it into effect, or to determine amount of damages, or to establish truth of any averment, court may conduct hearings or order references, or accord jury trial when required by statute. (SDCL 15-6-55[b]). Unless complaint was served with summons, default cannot be entered until complaint has been on file 20 days. (SDCL 15-6-55[b]). Relief granted by default judgment must not differ in kind or exceed in amount that prayed for in complaint. (SDCL 15-6-54[c]).

Offer of Judgment.

15-6-68 is same as F.R. 68.

Docketing is by clerk, with detailed statutory requirements for entry of data applicable to judgment. (SDCL 15-16-6).

Vacation or Modification.

Subject in most instances to due preservation of right for review, grounds on which new trial may be granted include prejudicial irregularity in proceedings, misconduct of jury, accident or surprise, newly discovered evidence, excessive or inadequate damages, insufficiency of evidence, and errors at law at trial. (SDCL 15-6-59). Court may at any time correct clerical mistakes in judgments or orders, this on its own initiative or on motion. (SDCL 15-6-60[a]). On motion within one year after judgment and upon such terms as are just, court may extend relief from judgment for mistakes, inadvertence, surprise or excusable neglect or on newly discovered evidence which by due diligence could not have been discovered in time to move for new trial, or for fraud, and if such motion is within a reasonable time, on ground judgment is void, has been satisfied, or prior judgment on which it is based has been reversed or vacated, or it is no longer equitable that the judgment have prospective application, or any other reason justifying relief. (SDCL 15-6-60[b]).

Lien.

Judgment of court of record is lien on all real estate, except debtor's homestead, in county where judgment was rendered and in counties to which it is transcripted, for ten years from time such judgment is docketed in clerk's office of county where judgment is entered. (SDCL 15-16-5 to 7). Judgment may be renewed for ten years by affidavit of judgment creditor filed prior to expiration of ten years from date of docketing. (SDCL 15-16-33 to 35).

Revival.

Where judgment has been recovered for possession of real property, and party recovering judgment has died subsequent to recovery thereof, his successor in interest in said property, whether by grant, devise, or inheritance, may revive judgment and enforce it by execution on motion within one year after said death, or afterwards on supplementary complaint. (SDCL 15-6-25[e]).

Assignment must be signed by party in whose favor it is rendered, his personal representative, successor in interest, or agent, and acknowledged as prescribed for acknowledgment of deeds, and filed with clerk. (SDCL 15-16-11). Practice is fully to identify judgment by statement of title, court where rendered, date of filing, and amount or nature.

Satisfaction may be by acknowledgment thereof, signed by party in whose favor judgment was obtained, his attorney of record, his personal representative or assignee, and duly acknowledged as required in deed. (SDCL 15-16-14 to 18). Partial satisfaction may be made in like manner. (SDCL 15-16-16). No specific form is prescribed. A form commonly used as follows:

Form

(Complete Title)

I, ..., being one of the attorneys of record herein for the . . . . . . above named, do hereby acknowledge satisfaction of a judgment rendered against . . . . . . in the . . . . . . Court in and for the County of . . . . . . in an action between . . . . . ., plaintiff. . . . and . . . . . ., defendant. . . . for . . . . . . DOLLARS and . . . . . Cents, damages and costs.

Judgment roll filed and Judgment docketed the . . . . . day of . . . . . . Two

Thousand . . . . . in the office of the clerk of said Court.

Dated the . . . . . day of . . . . . ., 20. . . . . .

(Acknowledgment)

(Signature)

Actions.

With certain exceptions applicable only as to judgments rendered by a magistrate court, no action on judgment by South Dakota court may be brought without leave of court, for good cause shown, on notice to adverse party. (SDCL 15-16-12, 13). Such leave of court, however, is not jurisdictional, being intended only as safeguard against an oppressive succession of actions, and in proper case, order may be made nunc pro tunc after action has been started. (72 S. D. 380, 34 N.W.2d 494). Such action may be brought at any time within 20 years after judgment is rendered. (SDCL 15-2-6).

Periodic payments of certain judgments and settlements in medical malpractice cases provided for by statute effective July 1, 1988, based on Model Act. (21-3A).

Foreign Judgments.

Action on judgment of any court of U.S. or any other state or territory within U.S. may be brought within ten years after judgment is rendered. (SDCL 15-2-8).

Revised Uniform Enforcement of Foreign Judgments Act adopted. (15-16A).

Judgment Notes.

See category 3 Business Regulation and Commerce, topic 3.02 Bills and Notes.

5.16 LIMITATION OF ACTIONS:

Actions must be brought within the following periods after the respective causes of action accrue:

Twenty years: To recover real property, except in certain special cases (SDCL 15-3-1); on sealed instrument except a real estate mortgage; on domestic judgment or decree (SDCL 15-2-6).

Fifteen years: To foreclose any real estate mortgage by action or advertisement. (SDCL 15-2-7). At expiration of 15 years from date cause of action accrues on any mortgage such mortgage shall be conclusively presumed to have been paid, and lien shall cease absolutely. (SDCL 15-2-28).

Ten years: On sister state or federal court judgment or decree; for relief not otherwise provided for; action upon an abstracter’s bond given under SDCL 36-13-15; on action by any South Dakota county to recover from any person legally bound for support of mentally ill person at hospital for mentally ill (SDCL 15-2-8); on action for construction errors, ten years after substantial completion of construction (SDCL 15-2A-3).

Six years: On a contract, express or implied, not otherwise provided for; on a liability created by statute other than a penalty or forfeiture; for trespass upon real property; relating to personal property; for criminal conversation or other injury to rights not arising on contract and not otherwise provided for; on action to set aside instrument executed by corporation on ground that corporate charter had expired at time of execution of instrument; for relief on ground of fraud, in cases formerly solely cognizable in chancery. (SDCL 15-2-13). Cause of action accrues when aggrieved party discovers or has actual or constructive notice of facts constituting fraud. (SDCL 15-2-3).

Four years: For breach of contracts of sale under Uniform Commercial Code (SDCL 57A-2-725); for action against licensed public accountant if IRS or Revenue Department has conducted audit or issued audit notice. (SDCL 15-2-14.4).

Three years: Against sheriff, coroner or constable upon liability incurred by act or omission in his official capacity or duty, this with exception of action for escape; for penalty or forfeiture under statute where action is given to party aggrieved, or to state; for personal injury (SDCL 15-2-14); for wrongful death (SDCL 21-5-3); for product liability (SDCL 15-2-12.2); however, statute of limitations does not bar action by state or governmental entity seeking to recover damages for product liability if person providing product failed to warn state or entity of known defect (SDCL 15-2-2); against licensed attorney for malpractice, error or omission, whether based upon contract or tort (SDCL 15-2-14.2); against professional corporations or professional limited liability companies for practice of law (SDCL 15-2-14.3); for actions brought under federal civil rights statutes (SDCL 15-2-15.2); for action against licensed public accountant or accountant's agent or employee (SDCL 15-2-14.4); for action against veterinarian (SDCL 15-2-14.5); for action against real estate licensees, agents, employees, brokers, or companies, but section is prospective only. (SDCL 15-2-14.5 and 14.7).

Two years: For libel, slander, assault, battery or false imprisonment; on statute for forfeiture or penalty to state (SDCL 15-2-15); against physician, surgeon, dentist, hospital, sanitarium, registered nurse or licensed practical nurse, chiropractor, or other practitioner of healing arts (SDCL 15-2-14.1) or professional corporation (except law) (SDCL 15-2-14.3); for medical malpractice whether based on contract or tort, but with provision that such cause of action may be counterclaim in action for services which were involved, brought after expiration of two-year period (SDCL 15-2-14.1); for wages or for any penalty or liquidated damages, or any liability for failure to pay wages, arising by statute or federal statute, or under contract (SDCL 15-2-15), pension distinguished from wages (78 S. D. 349, 102 N.W.2d 322); against municipal corporation for personal injury or death (SDCL 9-24-5); against regional airport authority for personal injury or death (SDCL 15-2-34); for violations of Uniform Security Act of 2002 other than securities registration (earlier of two years after discovery of facts constitutes violation or five years after violation). (SDCL 47-31B-509[j][2]). See topic 5.02 Actions, subhead Conditions Precedent. Cause of action for medical malpractice must be commenced within two years after alleged malpractice occurred. (SDCL 15-2-14.1). Limitation period may be extended by physician's continuing duty to treat or cure. (391 N.W.2d 668).

One year: Against a sheriff or other officer for escape; and on a statute for a forfeiture or penalty to any person who will prosecute; and on person for violation of petty offense. (SDCL 15-2-17). To challenge validity of nonjudicial foreclosure of real estate mortgage running from recording of sheriff's certificate of sale (SDCL 15-2-5.1); for violation of Uniform Securities Act of 2002 for securities registration (SDCL 47-31B-509[j][1]).

Six months: Under bulk sales provisions of Uniform Commercial Code. (SDCL 57A-6-111).

Claims in Probate.

See category 13 Estates and Trusts, topic 13.08 Executors and Administrators.

Special Statute as to Real Estate.

By SDCL 43-30-1, it is provided that a person with an unbroken chain of title for period of 22 years, and in possession thereof, is deemed to have a marketable record title, with specified exceptions of a limited nature. Such title is free of any claim based on a transaction prior to such period of 22 years, with specified exceptions of a limited nature.

Uniform Commercial Code adopted. (Tit. 57A). See topic Commercial Code.

New Actions.

If an action is commenced within the prescribed time and judgment thereon is reversed on appeal, a new action may be commenced within one year after the reversal. (SDCL 15-2-32).

Foreign Causes of Action.

As to any action in South Dakota, limitations are controlled by the South Dakota statutes, regardless of where the cause of action arose, and regardless of the applicable law there. (71 S. D. 630, 28 N.W.2d 700). It has been further held that, even if the action is barred by the statute of the state of defendant's residence, it may still be brought in South Dakota if not barred by the South Dakota statute. (72 S. D. 199, 31 N.W.2d 758).

Disabilities of Plaintiff.

In action other than for recovery of real property, where person entitled to bring action is under disability of minority or insanity, time of such disability is excluded, but period for bringing action cannot be extended more than five years for any disability except infancy, nor in any case longer than one year after disability ceases. (SDCL 15-2-22). Any disability, to be available, must exist when cause of action accrues. (SDCL 15-2-23). Disability does not extend limitation period for foreclosure of real estate mortgage by action or advertisement. (SDCL 15-2-7). Disability by imprisonment does not extend limitation period. (SDCL 15-2-22).

Statute providing three-year limitation for medical malpractice action by minor, or within two years after sixth birthday (SDCL 15-2-22.1) declared unconstitutional (440 N.W.2d 769).

Absence or Concealment of Defendant.

Where a person against whom cause of action exists is out of or departs from state, time of absence is excluded. (SDCL 15-2-20). This provision does not apply to foreclosure of real estate mortgage by action or advertisement. (SDCL 15-2-7).

If defendant was a nonresident when cause of action accrued, and never in state until after commencement of action, period of his absence is still excluded. (71 S. D. 630, 28 N.W.2d 700). However, as in nonresident motor cases, where a party has a remedy unaffected by defendant's absence from state, regular limitation statute applies. (75 S. D. 428, 66 N.W.2d 910). As to concealment, by a resident to evade service of process, for purposes of statute of limitations, an attempt to commence an action is deemed equivalent to commencement, this when summons is delivered for purpose of service thereof, to sheriff or other officer of county where defendant usually or last resided, or if defendant is a corporation, to sheriff or other officer of county in which such corporation was established by law, or where its general business was transacted, or where it kept an office for transaction of business, with further provision that such attempt must be followed by first publication of summons, or service thereof, within 60 days. (SDCL 15-2-30, 31).

For the rule in actions to recover real estate, see category 21 Property, topic 21.02 Adverse Possession.

Mutual Account.

Upon a mutual and current account, where there have been reciprocal demands between the parties, the cause of action is deemed to have accrued from the time of the last item proved in the account on either side. (SDCL 15-2-4).

Interruption of Statutory Period.

No acknowledgment or promise is sufficient evidence of a new or continuing contract, unless contained in some writing signed by the party to be charged, but this does not alter the effect of any payment of principal or interest. (SDCL 15-2-29). However, and as to a promise to pay, this must be definite, and as to a part-payment, it must be voluntary and with the purpose on the part of the debtor to have it applied to the obligation in question. (70 S. D. 250, 16 N.W.2d 914; 72 S. D. 10, 28 N.W.2d 881). Partial payment or new promise other than extension of mortgage duly executed and recorded does not extend limitation period for foreclosure of real estate mortgage by action or advertisement. (SDCL 15-2-7).

Revival of Barred Claim.

The cases cited under the next preceding subhead indicate adherence to the general rule that the requisite promise to pay, or the requisite part-payment is effective, even if made after expiration of the statutory period.

Contractual limitation of time for commencing action is void. (SDCL 53-9-6).

Pleading.

Statute of limitations must be specially pleaded. (SDCL 15-6-8[c]).

5.16A PARTITION:

When several co-tenants hold and are in possession of real property as partners, joint tenants, or tenants in common, in which one or more of them have an estate of inheritance, or for life or lives, or for years, an action may be brought by one or more of such persons for a partition thereof, according to the respective rights of the persons interested therein, and for a sale of such property, or a part thereof, if it appear that a partition cannot be made without great prejudice to the owners. (SDCL 21-45-1). Conservator of minor or protected person may consent to partition with or without action. (SDCL 21-45-2). Referee and conservator disqualified from purchasing at sale. (SDCL 21-45-33). Partition may be in whole or in part based upon equitable considerations. (566 N.W.2d 152).

Jurisdiction and Venue.

Jurisdiction as to partition is in circuit court. (SDCL 16-6-9). Venue is in county in which property, or some part thereof, is situated. (SDCL 15-5-1).

Proceedings.

Complaint must set forth the interests of all persons, known or unknown, so far as known to the plaintiff. (SDCL 21-45-6). Notice of lis pendens must be recorded in office of register of deeds of each county in which the property is situated, immediately after filing of complaint. (SDCL 21-45-7). Summons must be served on all named defendants, and when served by publication must contain a description of the property. (SDCL 21-45-5). Defendants must set forth in their answers, fully and particularly, the origin, nature and extent of their respective interests, including the original amount, date and balance due on any lien. (SDCL 21-45-11). Rights of the several parties may be determined in the action. (SDCL 21-45-12). Court not bound by recommendation of referee(s). (566 N.W.2d 152). Judgment is binding on all parties and their legal representatives, all persons unknown to whom notice has been given by publication, and all others claiming from such parties or persons. (SDCL 21-45-23, 26). Costs expended for the common benefit are borne by parties in proportion to their respective interests, but when litigation arises between some of the parties only, the court may require the expense of such litigation to be paid by the parties thereto, or any of them. (SDCL 21-45-24). All sales pursuant to partition proceedings confirmed by order or judgment prior to Jan. 1, 1992 validated. Actions on any right vested under this section barred if not commenced prior to July 31, 1993. (SDCL 21-45-47).

Partition in Kind or Sale.

If the court finds that partition cannot be made without great prejudice, it may order sale. Court may appoint referees to divide the property or make sale. (SDCL 21-45-15, 28).

5.17 [RESERVED]

5.18 PLEADING:

The code system prevails. Rules of pleading are same as to both law and equity cases.

Federal Rules of Civil Procedure (F.R.) form basis for South Dakota Rules of Civil Procedure (SDCL 15-6-1 to 86). See topic 5.19 Practice.

Pleadings Permitted.

15-6-7(a) is substantially same as F.R. 7(a). Roman numerals may not be used to number paragraphs. (SDCL 15-6-10[d]).

Paper Size.

Eight and one-half inch by 11 inch paper required for all documents except original documents filed as exhibits. (SDCL 15-15-8).

Complaint.

15-6-8 and 9 substantially same as F.R. 8 and 9, omitting reference to pleading jurisdiction. More stringent pleading standards under F.R. 8 adopted in Bell Atl. Corp. v. Twombly, 550 U.S. 544 or , apply in state court, as well. (754 N.W.2d 804).

Answer.

15-6-8 and 9 substantially same as F.R. 8 and 9, omitting reference to pleading jurisdiction.

Counterclaim.

15-6-13 is substantially same as F.R. 13, except counterclaim is not compulsory if claim is not one over which court would have jurisdiction if brought as an original action.

Third-Party Practice.

Defending party as third-party plaintiff may cause summons and complaint to be served on anybody not a party and who is or may be liable to third-party plaintiff for all or part of plaintiff's claim, no leave of court being required if within ten days of service of answer, but with leave of court thereafter required upon notice to all parties. Person served with third-party complaint becomes third-party defendant. Provision is made for further assertion of existing claims and for resulting procedure, analogous to F.R. 14(a). (SDCL 15-6-14).

Reply required to controvert counterclaim or crossclaim but otherwise unnecessary unless ordered by court. (SDCL 15-6-7[a]).

Demurrer is abolished, and questions formerly raised by demurrer are raised by motion. (SDCL 15-6-7[c]).

Amended or Supplemental Pleadings.

15-6-15 is substantially same as F.R. 15.

Affidavits of Merits.

Not specifically required by statute but are frequently and in substance used in interlocutory matters as to which question of merit becomes material.

Affidavits of Defense.

No specific statute but are frequently necessary in substance for relief from default judgment, applications for continuance, etc.

Bill of Particulars.

Superseded by motion for more definite statement. (SDCL 15-6-12[e] is substantially same as F.R. 12[e]).

Verification and Signing.

15-6-11 substantially similar to F.R. 11.

Frivolous Claims.

Court may order plaintiff to pay defendant's expenses, including attorney's fees, if action found frivolous or brought for malicious purpose. (SDCL 15-17-51).

Service.

Unless otherwise required by court order, service of pleadings is upon opposing counsel by delivery of copy, by mailing, by facsimile transmission or by electronic mail under conditions set forth in SDCL 15-6-5(i). (Sup. Ct. Rule 90-1). (SDCL 15-6-5[b] is substantially same as F.R. 5[b]).

Filing of all papers, including pleadings, but excluding trial briefs, is required forthwith upon service thereof, or upon presentation thereof to court. If any such papers are not filed, adverse party may without notice obtain order requiring such filing by specified time. (SDCL 15-6-5[d]). In general, discovery materials are not filed. (SDCL 15-6-5[g]). Civil case filing statements must be filed with complaint, answer or third party proceedings. (SDCL 15-6-5[h]). Forms available through clerk or online.

Time.

If complaint is not served with summons and if defendant within 30 days after service gives notice of appearance and demands copy of complaint, same must within 20 days thereafter be served upon him, and he has 30 days after such service to answer. (SDCL 15-6-4[b]). If he does not so appear he is in default and judgment may be taken against him. (SDCL 15-6-4[a]). 30 days are allowed for answer when complaint is served with summons. (SDCL 15-6-12[a]). For reply to counterclaim 20 days are allowed after service thereof, and provision is made for specified instances whereby time is enlarged when permissible motions are interposed. (SDCL 15-6-12[a]).

Proof of Claims.

It is desirable that claim from another state based on an account be itemized and accompanied by information of objections, if any, asserted against it.

Motions.

Thereby party may raise any of various enumerated questions, which include those formerly raised by demurrer, or by motion to quash service of process. (SDCL 15-6-12[b]).

Small Claims.

See category 6 Courts and Legislature, topic 6.01 Courts.

See topics 5.19 Practice and 5.02 Actions.

5.19 PRACTICE:

Code system of practice prevails.

Federal Rules of Civil Procedure (F.R.) form basis for South Dakota Rules of Civil Procedure. (SDCL 15-6-1 to 86).

Discovery.

Right thereto is extensive. SDCL 15-6-26 to 37 are substantially same as F.R. 26 through 37. SDCL 15-6-26 does not contain 1993 amendments to F.R. 26, and SDCL 15-6-26 to 37 do not contain 2006 or 2007 amendments to F.R. 26 to 37.

Demand for Admission of Facts.

15-6-36 is substantially same as F.R. 36. Under SDCL 15-6-37 effect of refusal as to expense of proving is same as F.R. 37.

Direct Action Against Insurer.

See category 23 Transportation, topic 23.01 Motor Vehicles, subhead Direct Actions.

Small Claims.

See category 6 Courts and Legislature, topic 6.01 Courts.

See also topics 5.02 Actions, Appeal and Error, Depositions and Discovery, Injunctions, Judgments, Pleading, Process; category 8 Debtor and Creditor, topics 8.02 Attachment, 8.05 Executions, 8.09 Garnishment.

5.20 PROCESS:

Civil actions are commenced by service of summons. (SDCL 15-2-30, 31; SDCL 15-6-3). As to special proceedings, statutes as to each thereof provide method of commencement, these varying.

General Requisites.

Summons must be subscribed by plaintiff or his attorney, must be directed to defendant, and must require him to answer complaint and serve copy of his answer on subscriber at place in state to be specified, in which there is post office, within 30 days after service of summons exclusive of day of service, and notify him that in case of his failure to answer, judgment by default may be rendered against him as requested in complaint. (SDCL 15-6-4[a]). If complaint is served with summons, practice is to refer to complaint as annexed and served with summons. If complaint is not so served, summons must state where complaint is or will be filed. (SDCL 15-6-4[b]). Form outlined is proper in ordinary case, but special forms are required in certain proceedings, i.e., partition (SDCL 21-45-3), quieting title (SDCL 21-41-7). See also category 14 Family, topic 14.06 Divorce, subhead Cooling Off Period.

By Whom Issued.

No requirement other than stated in subhead General Requisites, supra.

Who May Serve.

Service of summons within South Dakota may be made by sheriff or constable within his county, or by any other person not party to action who is elector of any state. (SDCL 15-6-4[c]).

Personal service on individual is made by delivering copy to defendant personally, or if defendant cannot conveniently be found by leaving copy at his dwelling house in presence of member of his family over 14 years old, or if he resides in family of another, with member of such age of that family. (SDCL 15-6-4[e]).

Personal service on minor is made by delivering copy to parent or person having custody, and, if the minor is more than 14 years old, also to him personally; also to legal guardian or conservator, if any, and to guardian ad litem, if any. (SDCL 15-6-4[d][3]).

Personal service on incompetent person is made by delivering copy to guardian or conservator, if any, and to superintendent of institution where incompetent is confined, or other person having custody, and also to incompetent, unless he is inmate of institution, and superintendent thereof certifies in writing that service on incompetent personally would be unavailing or injurious to his physical or mental well being, and unless, upon such certificate being filed, court orders service on incompetent dispensed with. (SDCL 15-6-4[d][4]).

Personal Service on Partnership.

If common name is used by partnership, whether it comprises names of partners or not, service on any one of them is sufficient so partnership property will be bound by judgment, but not individual property of any partner not served. (SDCL 15-6-17[b]).

Personal service on domestic corporation is made by delivering copy of process to its president, or other head, secretary, treasurer, cashier, director, managing agent or registered agent, and such service may be made within or without state. If sheriff returns summons with certificate that no such officer, director, etc., can be conveniently found in his county, service may be made by leaving copy of summons and complaint at any office of such corporation in South Dakota, with person in charge of such office. (SDCL 15-6-4[d][1]).

Personal Service on Association.

Same as to service on partnership, see subhead Personal Service on Partnership, supra.

Personal Service on Joint Stock Company.

No specific statutory provision. See subhead Personal Service on Partnership, supra, as to service on partnership.

Personal service on business with fictitious name is made by serving owner or other head of entity, on president, partner, officer, director or registered agent thereof. (SDCL 15-6-4[d][1]).

Personal Service on Public Corporation.

Service on counties, municipalities, townships, school districts and power districts enumerated in SDCL 15-6-4(d)(2).

Long-Arm Statute.

This confers on state courts jurisdiction as to any cause of action arising from specified acts of any individual, corporation or other legal or commercial entity, whether such acts are personal or through an employee or agent. Such specified acts include transaction of business within state; any act wherefrom there accrues within state a tort action; ownership, use or possession of property or an interest therein within state; contracting as insurer as to any property or risk within state at time of contracting; negotiating for or contracting for services to be rendered or materials to be furnished in state; acting as director, trustee, manager or officer of corporation organized under laws of or having its principal place of business in state; or as executor or administrator of any estate within state; failure to support minor child residing in state; having sexual intercourse within state which act creates cause of action for paternity; maintenance of matrimonial domicile in state at time claim arose for divorce, separate maintenance or spousal support; negotiations, mediation, arbitration or litigation involving subject matter located in state; influencing legislation, administrative rule-making, or judicial or administrative decision-making by any official performing duties within state (except that appearance to contest personal jurisdiction not included as such specified act); violation of federal antitrust laws or state laws on restraint of trade, monopolies or discriminatory trade practices; commission of any act, basis of which is not inconsistent with United States or State Constitutions. In such case process may be served outside state in same manner and with same effect as if within state. Provision of this statute pronounces same retroactive. (SDCL 15-7-1 to 5). Foreign corporation without certificate of authority, by operating, conducting, engaging in or doing business in state appoints secretary of state as agent. Any corporation that sells, consigns, or leases tangible or intangible property through brokers, jobbers, wholesalers or distributors to person, firm or corporation in state conclusively presumed to do business in state. Service on foreign corporation specified in SDCL 47-1A-1510.

Personal Service on Foreign Corporation.

Appointment of registered agent is prerequisite for admission of foreign corporation (SDCL 47-1A-1507), with resident agent for service of process (SDCL 47-1A-1507). If such corporation fails to make such appointment or if such registered agent cannot with reasonable diligence be found at registered office, Secretary of State is such agent for service of process (SDCL 47-1A-1510), service on him to be made by delivery to him or clerk in charge of corporation department, of original and one exact copy of such process, such secretary being required immediately to forward by registered or certified mail copies thereof addressed to corporation at its principal office in jurisdiction of its incorporation. If such corporation has property in South Dakota, or if cause of action arose therein, service is authorized on corporation’s president or other head, secretary, cashier, treasurer, director, or managing agent, and service is valid when made personally within South Dakota on corporation’s president, treasurer, secretary or authorized agent for service of process. (SDCL 15-6-4[d][1]). Foreign corporation doing business in state without qualifying is subject to process in same way as if there had been such qualification. (72 S. D. 629, 38 N.W.2d 258).

In 2008, South Dakota adopted Model Registered Agents Act, codified at SDCL 59-11-16. Enactment “does not affect an action or proceeding commenced or right accrued before July 1, 2008.” 2008 SD Laws C. 275.

See category 16 Insurance, topic Insurance Companies as to service of process on insurance corporations.

Personal Service Outside the State.

In any case where service of process by publication is authorized, in lieu thereof and without order of court, personal service may be made outside South Dakota. Also in District of Columbia service may be by U.S. Marshal or one of his deputies. (SDCL 15-6-4[c]).

Service by mail permitted under same provisions as F.R. 4(c)(2)(C)(ii). (SDCL 15-6-4[g], [i] and [j]). If action is against state officer, employee or agent arising out of his office, employment or agency, copy of summons and complaint must be mailed by certified mail to attorney general, together with admission of service and postage prepaid return envelope. (SDCL 15-6-4[d][6]).

Service by Publication.

This is authorized when it is shown by affidavit to satisfaction of court that defendant cannot, after due diligence, be found in South Dakota, that cause of action exists against defendant, or that he is proper party to action relating to South Dakota property, and when: (1) Defendant is a foreign corporation, and cause of action arose in South Dakota, or defendant has property in South Dakota and by attachment, garnishment or other process, property has been brought under court's jurisdiction. (2) Defendant, a South Dakota resident, has departed therefrom with intent to defraud his creditors or avoid service of summons, or keeps himself concealed therein with like intent. (3) Defendant is a nonresident, but has property in South Dakota, and by attachment, garnishment, or other process, property is under court's jurisdiction. (4) Action is for foreclosure of a lien on real or personal property in South Dakota. (5) Subject of action is South Dakota property and defendant has or claims lien or interest therein, or demand is for exclusion of any such claim. (6) Action is for divorce, annulment of marriage, or adoption. (7) Defendant is a domestic corporation with no known office or place of business in state, and no known officer or agent resident in state. (8) There is reason to believe unknown persons might be adversely affected by judgment. (SDCL 15-9-7 to 15).

Before publication, complaint must be filed, and summons as published must state date and place of filing. The complaint need not be published. Except in actions affecting real property, order must designate newspaper in county where action is pending, most likely to give notice to person to be served, and publication must be ordered at least once a week for four successive weeks. The order must also direct mailing forthwith by first class mail to such person at his post-office address (if to a corporation, at its present or last known office or place of business), unless it appears residence and post-office address are unknown and cannot with reasonable diligence be ascertained. In actions affecting real property, order must direct publication in newspaper printed in county where premises or some part thereof are situated. Such service is complete upon last publication, and time for answer commences to run on day thereafter. (SDCL 15-9-16 to 19; SDCL 15-9-21).

Service on Nonresident Hunter.

See category 21 Property, topic 21.01 Absentees.

Service on Nonresident Motorist.

See category 23 Transportation, topic 23.01 Motor Vehicles.

Service of Process on Holiday.

See category 1 Introduction, topic 1.02 Holidays.

Proof of service may be as follows: (1) If by sheriff, his certificate thereof. (2) If by any other person, his affidavit thereof. (3) Written admission of service by party or his representative on whom service might have been made for such party. (4) In case of publication, affidavit of printer, his foreman, or principal clerk, or by publisher of newspaper, and by affidavit showing the required mailing. (SDCL 15-6-4[g]). If there is personal service outside South Dakota, usual practice is to obtain affidavit, instead of certificate, even if service is by sheriff.

5.21 REPLEVIN:

Action for replevin is styled Claim and Delivery in Code. Therein plaintiff, upon filing a summons and complaint, may claim immediate delivery of such property. (SDCL 21-15-1). Complaint must allege that, at time of commencement of action, defendant was in actual or constructive possession of property. (34 S. D. 101, 147 N.W. 272). Common law distinction between replevin and detinue does not exist in this state. (3 S. D. 281, 52 N.W. 1090).

Proceedings.

Upon filing a summons and complaint, an affidavit must be made by plaintiff, or by someone in his behalf: (1) stating that plaintiff is owner of property, particularly describing it, or is entitled to possession thereof (facts in respect to which must be set forth), (2) that it is wrongfully detained by defendant, alleged cause of detention, according to best knowledge, information or belief of deponent, (3) actual value of property, and (4) that it has not been taken for a tax, assessment or fine pursuant to a statute, or seized under an execution or attachment against plaintiff, or, if so seized, that it is by statute exempt from such seizure. (SDCL 21-15-2). Judge of court having jurisdiction shall require cause to be shown by defendant after reasonable notice why plaintiff should not have delivery of property claimed. (SDCL 21-15-3).

Bond.

Plaintiff must also give an undertaking, approved by sheriff, or cash deposit, in double the value of the property. (SDCL 21-15-4). Defendant has three days after service of a copy of the affidavit and undertaking in which to except to the sufficiency of the sureties. (SDCL 21-15-9). If exception is taken, plaintiff's sureties must justify. (SDCL 21-15-10 to 10.4).

Repossession.

The defendant may, within three days after the taking of the property, require the return thereof to him upon giving an undertaking in double the value of the property for the delivery thereof to the plaintiff, if such delivery is adjudged, and for payment of such sum as may for any cause be recovered against the defendant. If a return of the property is not required by the defendant within three days after its taking and service of the replevin papers on him, it must thereupon be delivered to the plaintiff, unless in the meantime the right to its possession is claimed by some third person. (SDCL 21-15-12, 14).

Claims of Third Persons.

A third person may assert a claim to the property in the form of an affidavit stating grounds of his right to possession and serve such affidavit on the sheriff. If this be done the sheriff may, as a condition of the delivery of the property to the plaintiff, require a separate undertaking to indemnify him against the claim of such third person. (SDCL 21-15-15).

Judgment.

In an action to recover the possession of personal property, a judgment for the plaintiff may be for the possession, or for the recovery of possession, or the value thereof in case a delivery cannot be had, and of damages for the detention. If the property has been delivered to the plaintiff, and the defendant claim a return thereof, judgment for the defendant may be for a return of the property, or the value thereof in case the return cannot be had, and damages for taking and withholding the same. (SDCL 15-16-1).

5.22 SEQUESTRATION:

No statutory provisions.

5.235.24 [RESERVED]

5.25 SUBMISSION OF CONTROVERSY:

Parties to a question in difference, the subject of a civil action, may, without action, agree upon a case containing facts upon which controversy depends, and submit same to court having jurisdiction of the action, if brought. Affidavit must show controversy is real, and proceeding is in good faith and brought to determine rights of parties. The court hears and determines case and renders judgment, as if action were pending. (SDCL 21-25-1).

Judgment is entered as in other cases, but without costs for any proceeding before trial (SDCL 21-25-3) and enforced and reviewed as though rendered in action (SDCL 21-25-4).

5.26 VENUE:

Where Subject of Action Situated.

Actions for following causes are tried in county in which subject of action is situated: (1) for recovery of real property, or for determination of an estate or interest therein, or for injuries thereto; (2) for partition of real property; (3) for foreclosure of mortgage of real property; (4) for recovery of personal property distrained; (5) all actions on policy of insurance to recover loss or damage to property insured in county where same is situated at time of loss or damage. (SDCL 15-5-1).

Actions Against Insurers.

Actions on a fidelity bond issued by a South Dakota fidelity or guaranty company are tried in county where involved default or defalcation occurred. (SDCL 15-5-4). Actions on other surety, indemnity or liability policies issued by any such company are tried in county where indemnified resided or where involved loss occurred. (SDCL 15-5-5). Actions on a life, health or accident policy issued by a South Dakota company are tried in county where insured resided when alleged liability accrued. (SDCL 15-5-3).

Where Cause of Action Arose.

Actions for following causes are tried in county where cause arose: (1) for recovery of penalty or forfeiture imposed by statute; (2) against public officer, for act done by virtue of office; (3) on forfeited recognizance, bond or undertaking of bail. (SDCL 15-5-2).

Residence of Defendant; Exceptions.

In all other cases action is tried in county in which defendant or defendants, or any of them, reside at commencement of action, except that actions for conversion of personal property, or for recovery of damages to persons or property may, at option of plaintiff, be brought and tried in county where damages were inflicted and cause arose, and an action upon a promissory note against persons, any one of whom resides in state at commencement of action and was a party to said note when first delivered, must be tried in county in which some defendant who was a party to said note when first delivered shall reside at commencement of action; or, if no defendant resides in state, in any county which plaintiff designates. (SDCL 15-5-6 to 9).

Waiver of Venue.

If the county in which action is brought is not the proper county, trial may nevertheless be had there, unless before time for answer, the defendant in writing demands change of venue to the proper county. (SDCL 15-5-10).

Change of venue may be had if the action is not brought in the proper county or if there is reason to believe an impartial trial may not be had in the county where action is brought, or if convenience of witnesses and ends of justice would be promoted by change. (SDCL 15-5-11).

6 COURTS AND LEGISLATURE

6.01 COURTS:

United States District Court.

Clerk's office: Sioux Falls 57102.

Northern Division is composed of following counties: Brown, Campbell, Clark, Codington, Corson, Day, Deuel, Edmunds, Grant, Hamlin, McPherson, Marshall, Roberts, Spink and Walworth, Sisseton-Wahpeton Indian Reservation and that part of Standing Rock Indian Reservation which lies in South Dakota.

Court sits at Aberdeen.

Southern Division is composed of following counties: Aurora, Beadle, Bon Homme, Brookings, Brule, Charles Mix, Clay, Davison, Douglas, Hanson, Hutchinson, Kingsbury, Lake, Lincoln, McCook, Miner, Minnehaha, Moody, Sanborn, Turner, Union, Yankton and the Yankton Indian Reservation.

Court sits at Sioux Falls.

Western Division is composed of following counties: Bennett, Butte, Custer, Fall River, Harding, Jackson, Lawrence, Meade, Pennington, Perkins, Shannon, and Rosebud and Pine Ridge Reservations.

Court sits at Rapid City and Deadwood.

Central Division is composed of following counties: Buffalo, Dewey, Faulk, Gregory, Haakon, Hand, Hughes, Hyde, Jerauld, Jones, Lyman, Mellette, Potter, Stanley, Sully, Todd, Tripp and Ziebach and Cheyenne River, Lower Brule and Crow Creek Indian Reservations.

Court sits at Pierre.

Filing Fees.

Fee for filing and docketing complaint or for filing and docketing removal papers, in each division, is $350. For filing fees in bankruptcy cases, see 28 USC §§ 1914, 1930.

Supreme Court.

Jurisdiction.

Supreme Court has general appellate jurisdiction and a general superintending control over all inferior courts under such regulations and limitations as may be prescribed by law. It has power to issue writs of habeas corpus, mandamus, quo warranto, certiorari, injunction and other original and remedial writs with authority to hear and determine the same in such cases and under such regulations as may be prescribed by law. (Const., art. V, §§ 2, 5, 12).

Uniform Certification of Questions of Law Act adopted with variations. (15-24A).

Circuit Courts.

Jurisdiction.

Circuit courts have original jurisdiction in all cases except as to any limited jurisdiction granted to other courts by legislature. (Const., Art. V, § 5). They have jurisdiction and power to issue writs of habeas corpus, mandamus, quo warranto, certiorari, injunction and other original and remedial writs with authority to hear and determine same. Clerk of courts has his office at county seat. There are seven circuits.

Filing Fees.

Fee for filing and docketing complaint in most civil actions, $25. (SDCL 16-2-29). Most circuits also charge additional $2 to $5 for law library fee. (SDCL 14-6-1). Certain automation surcharges may also be applicable. (SDCL 16-2-39).

Place of Sitting.

Aurora County: First Circuit; court sits at Plankinton.

Beadle County: Third Circuit; court sits at Huron.

Bennett County: Sixth Circuit; court sits at Martin.

Bon Homme County: First Circuit; court sits at Tyndall.

Brookings County: Third Circuit; court sits at Brookings.

Brown County: Fifth Circuit; court sits at Aberdeen.

Brule County: First Circuit; court sits at Chamberlain.

Buffalo County: First Circuit; court sits at Gann Valley.

Butte County: Fourth Circuit; court sits at Belle Fourche.

Campbell County: Fifth Circuit; court sits at Mound City.

Charles Mix County: First Circuit; court sits at Lake Andes.

Clark County: Third Circuit; court sits at Clark.

Clay County: First Circuit; court sits at Vermillion.

Codington County: Third Circuit; court sits at Watertown.

Corson County: Fourth Circuit; court sits at McIntosh.

Custer County: Seventh Circuit; court sits at Custer.

Davison County: First Circuit; court sits at Mitchell.

Day County: Fifth Circuit; court sits at Webster.

Deuel County: Third Circuit; court sits at Clear Lake.

Dewey County: Fourth Circuit; court sits at Timber Lake.

Douglas County: First Circuit; court sits at Armour.

Edmunds County: Fifth Circuit; court sits at Ipswich.

Fall River County: Seventh Circuit; court sits at Hot Springs.

Faulk County: Fifth Circuit; court sits at Faulkton.

Grant County: Third Circuit; court sits at Milbank.

Gregory County: Sixth Circuit; court sits at Burke.

Haakon County: Sixth Circuit; court sits at Philip.

Hamlin County: Third Circuit; court sits at Hayti.

Hand County: Third Circuit; court sits at Miller.

Hanson County: First Circuit; court sits at Alexandria.

Harding County: Fourth Circuit; court sits at Buffalo.

Hughes County: Sixth Circuit; court sits at Pierre.

Hutchinson County: First Circuit; court sits at Olivet.

Hyde County: Sixth Circuit; court sits at Highmore.

Jackson County: Sixth Circuit; court sits at Kadoka.

Jerauld County: Third Circuit; court sits at Wessington Springs.

Jones County: Sixth Circuit; court sits at Murdo.

Kingsbury County: Third Circuit; court sits at De Smet.

Lake County: Third Circuit; court sits at Madison.

Lawrence County: Fourth Circuit; court sits at Deadwood.

Lincoln County: Second Circuit; court sits at Canton.

Lyman County: Sixth Circuit; court sits at Kennebec.

McCook County: First Circuit; court sits at Salem.

McPherson County: Fifth Circuit; court sits at Leola.

Marshall County: Fifth Circuit; court sits at Britton.

Meade County: Fourth Circuit; court sits at Sturgis.

Mellette County: Sixth Circuit; court sits at White River.

Miner County: Third Circuit; court sits at Howard.

Minnehaha County: Second Circuit; court sits at Sioux Falls.

Moody County: Third Circuit; court sits at Flandreau.

Pennington County: Seventh Circuit; court sits at Rapid City.

Perkins County: Fourth Circuit; court sits at Bison.

Potter County: Sixth Circuit; court sits at Gettysburg.

Roberts County: Fifth Circuit; court sits at Sisseton.

Sanborn County: Third Circuit; court sits at Woonsocket.

Shannon County: Seventh Circuit; court sits at Hot Springs in Fall River County.

Spink County: Fifth Circuit; court sits at Redfield.

Stanley County: Sixth Circuit; court sits at Fort Pierre.

Sully County: Sixth Circuit; court sits at Onida.

Todd County: Sixth Circuit; court sits at Winner in Tripp County.

Tripp County: Sixth Circuit; court sits at Winner.

Turner County: First Circuit; court sits at Parker.

Union County: First Circuit; court sits at Elk Point.

Walworth County: Fifth Circuit; court sits at Selby.

Yankton County: First Circuit; court sits at Yankton.

Ziebach County: Fourth Circuit; court sits at Dupree.

Magistrate Courts.

A magistrate court is established in each circuit, with sufficient magistrates to serve each county and municipality. First, Second, Third, Fourth, Fifth and Seventh Circuits have law trained magistrate. Magistrate courts have concurrent jurisdiction with circuit courts to issue warrants of arrest and for searches and seizures, conduct preliminary hearings, fix bond, take pleas of guilty, not guilty or nolo contendere, and try minor criminal cases, and hear noncontested civil actions. Law trained magistrate judges have additional concurrent jurisdiction with circuit court to act as committing magistrate, try misdemeanor cases, try all small claims proceedings, and try other civil actions where amount involved does not exceed $12,000, and for small claims proceedings, $12,000. (SDCL 16-12B-1 through 18).

Small Claims Courts.

Claims in contract or tort, other than slander and libel, where demand is not more than $8,000, may be determined under informal small claims procedure, applicable by statute in circuit and magistrate courts. (SDCL 15-39-45). Action commenced, upon entry fee of $4, $10 or $20 for actions up to $100, $1,000 or over $1,000 respectively, by completing small claims form and providing written signed statement of cause of action to clerk. (SDCL 15-39-48, 52). Clerk or magistrate sends notice of hearing to defendant by certified mail. (SDCL 15-39-53). Defense is stated in similar docket entry but answer must be in writing. (SDCL 15-39-65). Jury trial and right of appeal waived unless defendant removes case to circuit court or formal side of court where action was begun. (SDCL 15-39-56, 57). Upon determining action, judge or magistrate signs docket card, which constitutes judgment. (SDCL 15-39-72). Court may order judgment paid to prevailing party or into court for his use, at certain date or by installments, and may stay execution during compliance with order. (SDCL 15-39-74). Judgment may be satisfied by filing of written notice from judgment creditor. (SDCL 15-39-76.2). Costs may be awarded. (SDCL 15-39-

73). Forms for use in small claims proceedings set forth in SDCL 15-39-78.

6.02 LEGISLATURE:

Legislature meets in regular sessions annually beginning first Tues. in Jan., for 40 legislative days in odd-numbered years and 35 legislative days in even-numbered years, excluding Suns., holidays and legislative recess. (Const., Art. III, §§ 6 and 7).

Special Extraordinary Sessions.

Governor has power to convene legislature on extraordinary occasions. (Const., Art. IV, § 3).

Initiative and Referendum.

Initiative and referendum are provided for. (Const., Art. III, § 1; 2-1).

6.03 REPORTS:

Decisions of Supreme Court are reported in Dakota Territorial Reports, vols. 1-6, and South Dakota State Reports, vols. 1-90; Northwestern Reporter designated official reporter commencing with 245 N.W. 2d 488.

Digests are Dakota Digest and Northwestern Digest, kept up to date by pocket parts. Also, and as cumulative annual pocket part to S.D. Codified Laws, annotations are published annually showing late statutory amendments, and with annotated South Dakota Supreme Court decisions.

6.04 STATUTES:

Statutory law of State is contained in South Dakota Codified Laws, Supplements thereto, and annual Session Laws. See explanation of citations used in this digest at head of first page.

Uniform Acts adopted are: †Acknowledgment (1941); †Administrative Procedure Act, 1961 Act; †Alcoholism and Intoxication Treatment (1974); Revised Anatomical Gift (2006); Arbitration (1971); Attendance of Witnesses from Without a State in Criminal Proceedings (1937); Business Corporation (2005); Business Records as Evidence (1939); †Certification of Questions of Law (1985); Child Abduction Prevention Act (2006); Child Custody Jurisdiction and Enforcement (1997); †Commercial Code (eff. 1967); Common Trust Fund (1941); Composite Reports as Evidence (1939); †Contribution Among Tortfeasors, 1939 act (1945); Controlled Substances (1970); Criminal Extradition, as revised (1953); †Criminal Statistics (1939); Declaratory Judgments (1925); Determination of Death (1990); Division of Income for Tax Purposes (1976); Electronic Transactions (2000); Enforcement of Foreign Judgments (1975); Expert Testimony (Model Act) with modification of §§ 3 and 8 (1943-1950); Federal Tax Lien Registration (1988); Fiduciaries, 1922 act, omitting § 3 (1943); Foreign Depositions (1921); Fraudulent Transfer (1987); Fresh Pursuit (1939); Governing Secured Creditors' Dividends in Liquidation Proceedings (1941); Interstate Family Support (1994); Judicial Notice of Foreign Law (1937); Limited Liability (1998); Revised Limited Partnership (1986); Mediation (2003); †Non-Profit Corporation (1965); Partnership, 1997 Act (1923); †Periodic Payment of Judgments (1986); Photographic Copies of Business and Public Records as Evidence (1950); †Premarital Agreement (1989); Revised Principal and Income (1997); †Probate Code (1995); Prudent Management of Institutional Funds (2006); Reciprocal Transfer Tax (1945); Registered Agents (2006); Rendition of Accused Persons (1978); Rendition of Prisoners as Witnesses in Criminal Proceedings (2002); † Securities (2002); Simplification of Fiduciary Security Transfers (1961); Trade Secrets (1988); Transfers to Minors (1986); Trusts (1943);† Unclaimed Property (1993); Vendor and Purchaser Risk (1937); Veterans' Guardianship, as revised (1995).

†Adopted with significant variations or modifications. See appropriate topics.

For text of Uniform Acts falling within the scope of the Martindale-Hubbell Law Digests see Uniform and Model Acts section.

6.05 UNIFORM LAWS:

For list of Uniform Acts in force in this state see topic 6.04 Statutes. For text of Uniform Acts within the scope of the Martindale-Hubbell Law Digests see Uniform and Model Acts section.

7 CRIMINAL LAW

7.01 CRIMINAL LAW:

Crimes are covered by provisions of Tit. 22. Generally, actions recognized as crimes include: abuse, neglect, or exploitation of disabled adults (22-46); abuse of judicial process (22-12); arson (22-33); assault (22-18); bestiality (SDCL 22-22-42 through SDCL 22-22-44); breach of peace, disorderly conduct and public nuisance (22-13 and 22-36); bribery and improprieties in public office (22-12A and 22-43); burglary and unlawful entry (22-32); child pornography (22-22); escapes (22-11A); false personation (22-40); forgery and counterfeiting (22-39); fraud and misrepresentation (22-30A); certain types of gambling and lotteries, including Internet gambling (22-25 and 22-25A); homicide and suicide (22-16); “identity theft” or unlawful use of devices to read credit card, debit card or charge card (SDCL 22-40-8 to 22-40-14); intentional exposure to HIV infection (SDCL 22-18-31); kidnapping (22-19); misuse of flags (22-9); obscenity and public indecency (22-24); obstruction of administration of government (22-11); perjury and false official statements (22-29); certain prepaid adult entertainment cards (22-24); riot and unlawful assembly (22-10); robbery and theft (22-30 and 22-30A); sex offenses and prostitution (22-22 and 22-23); “sliming” as assault by prisoner or detainee or against law enforcement official (SDCL 22-18-26.1, SDCL 22-18-29 and SDCL 22-18-29.1); stalking, harassment, and invasions of privacy (22-19A, 22-19B and 22-21); terrorism and terroristic threats (SDCL 22-8-12 and SDCL 22-14A-11, 13, 16, 18, 19, 20, 21 and SDCL 22-11-9.2); threats against judicial or ministerial officer, juror, court services officer, or law enforcement officer or family (SDCL 22-11-15); treason, insurrection and disloyal acts (22-8); unlawful occupancy of premises (22-35); unlawfully obtaining benefits or payments from medical assistance program (22-45); unlawful use or obstruction of cable television and multipoint distribution systems (22-44); unlawful use of controlled substances, marijuana and drug paraphernalia (22-42 and 22-42A); unlawful use of explosives and destructive devices (22-14A); unlawful use of weapons (22-14); vandalism and injuries to property (22-34); and debt adjusting (SDCL 37-34-1 to 3).

Pyramid promotional schemes are prohibited, but enforcement occurs through civil penalties. (37-33).

It is also misdemeanor to use concealed camera to photograph nude person without consent or knowledge. (SDCL 22-21-4).

Criminal procedure governed by Tits. 23 and 23A. Procedure statutes conform generally to Federal Rules of Criminal Procedure. (23A-4; 23A-5; 23A-6; 23A-7; 23A-8; 23A-9; 23A-10; 23A-11; 23A-12; 23A-13; 23A-14; 23A-15; 23A-16; 23A-17; 23A-18; 23A-20; 23A-21; 23A-22; 23A-23; 23A-26; 23A-27; 23A-29; 23A-30; 23A-31; 23A-33; 23A-35; 23A-38; 23A-39; 23A-41; 23A-44; 23A-45). Criminal perpetrators assume risk of injuries arising from criminal conduct, and crime victims are granted immunity from civil suit for use of reasonable force. (22-48). Crime victims may recover restitution (23A-28 and 23A-28A) and apply for compensation (23A-28B). They may address court before it imposes sentence on defendant. (SDCL 23A-27-1.1). They also have rights to various types of notification of proceedings regarding defendant. (23A-28C). Victims of sexual assault may request HIV testing. (23A-35B). Computer voice stress analyzers must be licensed. (SDCL 23-3-35.1 through SDCL 23-3-35.3).

Indictment or Information.

Prosecution may be on indictment or information. (Const., Art. VI, § 10). Detailed procedure for grand jury proceedings and indictment, but use limited by statute for grand juries only when necessary or desirable for investigation of public offenses or misconduct in office. (SDCL 23A-5-1). Prosecutions ordinarily by complaint or information. Complaint is used for Class 2 misdemeanor or petty offenses punishable by $200 fine, 30 days jail, or both, or for city ordinance violations (SDCL 23A-6-1), with no right to preliminary hearing for such offenses. For all offenses with greater penalties (felonies and Class 1 misdemeanors), prosecution is by information filed by state's attorney after preliminary hearing, except where hearing waived or if defendant is fugitive from justice. (SDCL 23A-6-3). Preliminary hearing to be held within 15 days if in custody and within 45 days if not in custody, unless sooner indicted by grand jury. (SDCL 23A-4-3).

Bail.

Bail provisions based substantially on Federal Bail Reform Act, 18 USC § 3146 et seq. All crimes bailable except those punishable by death; or those committed by defendant currently released on personal recognizance bond; bail allowed pending appeal of conviction. Committing magistrate must release defendant pending trial on personal recognizance or unsecured appearance bond unless such release will not reasonably assure appearance. (SDCL 23A-43-2). Burden on defendant to show he will not flee or pose danger if bailed while pending appeal. Judges given wide discretion to fashion suitable conditions of release. (SDCL 23A-43-3, 4). Stated purpose of bail law is elimination of all unnecessary detention. (SDCL 23A-43-30).

Uniform Attendance of Witnesses from Without a State in Criminal Proceedings Act adopted. (SDCL 23A-14-14 to 24).

Uniform Controlled Substances Act adopted with modification. (34-20B).

Uniform Criminal Statistics Act adopted. (23-6). South Dakota's law enforcement agencies and officials also cooperate in collection and maintenance of criminal identification records, including fingerprints and DNA samples. (23-5; 23-5A).

Uniform Criminal Extradition Act adopted. (23-24).

Interstate Agreement on Detainers adopted. (23-24A).

Interstate Fresh Pursuit Act adopted. (SDCL 23A-3-10 to 15).

Intrastate Fresh Pursuit Act adopted. (SDCL 23A-3-17 to 20).

Uniform Rendition of Prisoners as Witnesses in Criminal Proceedings Act adopted. (23A-14A).

Law for Out-of-State Parolee Supervision adopted. (24-16).

Uniform Rendition of Accused Persons Act adopted. (23-26A).

Interstate Compact for Adult Offender Supervision adopted. (24-16A).

Sex Crimes.

Sex offender registration required. (SDCL 22-24A and 22-24B).

Interstate Compact on Juveniles adopted. (SDCL 26-12-15).

8 DEBTOR AND CREDITOR

8.01 ASSIGNMENTS:

Uniform Commercial Code adopted. (Tit. 57A). See category 3 Business Regulation and Commerce, topic 3.09 Commercial Code.

A thing in action, arising out of the violation of a right of property, or out of an obligation, may be transferred by the owner. (SDCL 43-42-2).

Nonnegotiable written contract for payment of money or personal property may be transferred by endorsement, as in the case of negotiable instruments, but subject to all equities and defenses in favor of the maker existing or arising before notice of assignment or indorsement. (SDCL 43-42-3).

Written assignment of account receivable or amounts due on contract is valid without notice of the assignment to the debtor. No bona fide purchaser or creditor of assignor has any right in the accounts so transferred or any obligations substituted therefor superior to the rights of the assignee. Where without knowledge of such assignment, debtor in good faith makes payment to the assignor, or to such creditor, subsequent purchaser, or other assignee, such payment is acquittance to the extent thereof, and the payee becomes a trustee of any sums received, and accountable to the prior assignee. (SDCL 43-42-4 & 5).

Claims for worker's compensation are not assignable. (SDCL 62-4-42).

Unemployment benefit rights are not assignable. Benefits may be withheld by secretary of department of labor and paid to secretary of department of social services if applicant has obligation for child support payments. (SDCL 61-6-28).

Instrument Transferring Title.

See category 21 Property, topic Deeds with respect to real property. Personal property transfers may be filed with register of deeds. No acknowledgment or attestation is necessary.

Filing.

Assignment may be filed with register of deeds (SDCL 7-9-11), fee $10 for first page and $2 for each subsequent page (SDCL 7-9-15).

Uniform Commercial Code adopted. (Tit. 57A). See category 3 Business Regulation and Commerce, topic 3.09 Commercial Code.

Recording.

Recording necessary only with respect to assignment of interest in real property. Certificate of value required to accompany assignment. (SDCL 7-9-7[4]). For form, see category 21 Property, topic 21.06 Deeds.

Notice.

Written assignment of account receivable or amount due or to become due is valid with or without notice thereof to debtor. (SDCL 43-42-4).

Assigned claims can be sued on in name of assignee. Foreign corporation, not entitled to sue in South Dakota on claim owned by it, can transfer claim by assignment absolute on its face, but with understanding that assignee shall collect it and pay net proceeds to corporation, no consideration being paid, and assignee can sue claim in his own name as the real party in interest, and as trustee of express trust. (9 S. D. 614, 70 N.W. 1059; 21 S. D. 117, 110 N.W. 90).

Action by assignee is subject to setoff or other defense existing at time of or before notice of assignment, except as to negotiable paper transferred in due course. (SDCL 15-9-23).

Form.

No prescribed form.

8.02 ATTACHMENT:

Caveat.

Constitutionality of attachment statutes has not been judicially tested. (32 SD L.Rev. 264 [1987]).

Actions in Which Allowed.

If requisite grounds exist, resort may be had to attachment in all actions. (SDCL 21-17A-1).

Courts Which May Issue.

Circuit and Magistrate Court.

In Whose Favor Writ May Issue.

Writ may issue in favor of any plaintiff including nonresident or foreign corporation.

Against Whom Writ May Issue.

No statutory exemptions from writ so far as concern private individuals and private corporations.

Claims on Which Writ May Issue.

Writ may issue on attachment for debt exceeding $50 and if any one of following is asserted: (1) defendant absent from state or concealed in state so that summons cannot be served on him; (2) defendant has disposed of or concealed property or is about to do so with intent to defraud creditors; (3) defendant has removed property from state with intent to defraud creditors or is about to do so; (4) defendant fraudulently incurred obligation; (5) defendant not resident of state; (6) defendant foreign corporation or if domestic no officer or agent can be found in this state on whom to serve summons; (7) action against defendant as principal on official bond to recover money due state or to secure money embezzled by defendant as state officer; (8) action against defendant to recover purchase money for personal property, but only if one of conditions in (1), (5) or (9) hereof and one of conditions in (2) or (3) hereof are alleged; (9) defendant is about to permanently remove residence from county and fails on demand to give security for debt upon which action commenced; or (10) if action against owner of motor vehicle for damages alleged to have been caused by owner’s negligence, motor vehicle may be attached if one of conditions in (1) or (5) above and one of conditions in (2) or (3) also alleged. (SDCL 21-17A-3).

Writ may issue on attachment in tort action if damage exceeds $50 and either: (1) defendant is not resident of state, or residence unknown and cannot be ascertained with due diligence or (2) defendant is foreign corporation. (SDCL 21-17A-4).

Writ may issue on demand not yet due except as mentioned in subdivisions (5), (6) or

(7) of SDCL 21-17A-3. (SDCL 21-17A-5).

Grounds.

See subhead Claims on Which Writ May Issue, supra.

Proceedings to Obtain.

To obtain attachment, plaintiff makes affidavit stating he knows or has good reason to know items set forth in subhead Claims on Which Writ May Issue (SDCL 21-17A-3), and if so, affidavit must state debt not yet due (SDCL 21-17A-5). Writ is issued without hearing in name of court, sealed with its seal, signed by its judge, and directed to sheriff or constable of county where property of defendant located. (SDCL 21-17A-2). Service of writ, affidavit and bond made on defendant in same manner as summons. Sheriff or constable must have property appraised by two disinterested residents of county. Appraisals must be returned with writ and served on defendant. (SDCL 21-17A-10).

Attachment Bond.

Plaintiff must give bond of at least $500 executed by sufficient surety to effect that if defendant recovers judgment, plaintiff will pay all costs awarded defendant and all damages defendant sustains by attachment. (SDCL 21-17A-7). In actions upon demands of sums not yet due, bond shall be three times amount demanded. (SDCL 21-17A-5). Affidavit of surety must state surety resident and worth double sum of bond. (SDCL 21-17A-7). Defendant may apply to judge for additional security not exceeding appraised value of property to be attached. (SDCL 21-17A-8). Bond not exceeding $500 may also be required of plaintiff by sheriff or constable to effect that plaintiff shall indemnify said officer. (SDCL 21-17A-29).

Levy.

Sheriff or constable may seize so much of property of defendant in his county which is not exempt from execution. (SDCL 21-17A-11; 13). To attach real estate he must file copy of writ and his certificate of attachment in office of Register of Deeds. (SDCL 21-17A-12).

Indemnity.

Sheriff or constable may require sufficient security from plaintiff to indemnify him for attaching property if there is reasonable doubt of ownership of property or its liability to be attached. (SDCL 21-17A-14; 29).

Lien.

Service of writ, affidavit, and bond on defendant in same manner as summons creates lien for amount of demand. (SDCL 21-17A-10).

Priorities between successive attachments are according to dates of actual levies.

Release of Property.

Prior to judgment, defendant may deliver to sheriff or constable corporate surety bond or bond executed by two resident sureties for amount alleged by plaintiff to be due, to effect that they shall on demand pay amount of judgment plus costs. (SDCL 21-17A-17). Procedure provided for plaintiff’s objection to defendant’s sureties’ bond. (SDCL 21-17A-18). Upon three days notice defendant may apply to court for order quashing writ. (SDCL 21-17A-20). Motion for release must be accompanied by affidavit supporting factual issue and grounds asserted for release. (SDCL 21-17A-21). Upon motion, hearing is had on basis of pleadings and papers in record. Upon good cause, court may receive additional evidence. (SDCL 21-17A-22; 23).

Sale.

If property seized is likely to depreciate in value before end of action or if keeping it could cause loss or expense, court may order it sold. Sheriff or constable shall hold money in lieu of property. (SDCL 21-17A-15).

8.03 [RESERVED]

8.04 CREDITORS' SUITS:

No statutory provisions, except those auxiliary to execution. (15-20).

8.05 EXECUTIONS:

Judgments requiring payment of money, delivery of real or personal property, sale of specific property, or performance of other act, are enforceable by execution. (SDCL 15-6-69, 70; SDCL 15-18-2).

Federal Rules of Civil Procedure form basis for Rules of Civil Procedure. (15-6). See category 5 Civil Actions and Procedure, topic 5.19 Practice.

Kinds of Execution.

Executions may be had when judgment requires payment of money or delivery of real or personal property, and may be enforced against property of defendant, or if action is one in which defendant might have been arrested, it may also be enforced by execution against person of judgment debtor. (SDCL 15-18-2 and 15-18-3). Execution may also be had when judgment requires sale of property described therein. (SDCL 15-18-4).

Exemptions.

See topic 8.06 Exemptions.

Time of Issuance.

Execution may issue at any time within 20 years after entry of judgment. (SDCL 15-6-70; SDCL 15-18-1).

Stay.

No stay of execution except as stated under category Civil Actions and Procedure, topic Appeal and Error (see SDCL 15-6-62[a] requiring 30 day stay except execution on default judgment). Assets of bank, however, not subject to execution until time for appeal has expired. (SDCL 15-18-8.1).

Lien.

Execution not lien on personal property before actual levy thereon. (SDCL 15-18-30).

Levy.

All property and interests therein, tangible or intangible, not exempt by law subject to levy. (SDCL 15-18-17). Levy not required where property held under other process. (SDCL 15-18-18). Levy on real property made by officer (sheriff or constable) filing with register of deeds of county where property is situated, notice of levy subscribed by him, stating names of parties to action, amount of plaintiff's claim, and description of property levied upon, which notice is recorded and indexed by register of deeds. (SDCL 15-18-22). Levy on personal property capable of manual delivery made by officer taking same into custody, and forthwith delivering notice of levy to person from whose custody property is taken (SDCL 15-18-20). Levy upon personal property which cannot be conveniently removed made by filing with register of deeds notice as required in levy on real property. (SDCL 15-18-23). Levy upon judgment made by serving notice of levy upon clerk of court in which it is docketed describing judgment, and by mailing copy of notice by registered mail to judgment debtor, present owner as shown by docket, and attorneys of record. (SDCL 15-18-21). Upon other personal property by leaving notice of levy showing property levied upon with person holding same. (SDCL 15-18-27). Successive or additional levies, if necessary, may be made under same execution. (SDCL 15-18-29).

Return.

Execution must be returned within 60 days of receipt by officer, unless he levies within such time, in which case time extended for 60 days thereafter. (SDCL 15-18-41).

Priorities.

Officer may apply surplus toward satisfaction of other unsatisfied executions in order of respective priorities. (SDCL 15-18-39).

Claims of Third Persons.

If property levied on is claimed by third persons, officer may summon six qualified persons as jurors to try validity of the claim. He must give notice of claim and of time of trial to plaintiff, who may contest claim before the jury. If verdict is in favor of claimant, officer may relinquish levy unless judgment creditor gives indemnity for proceeding thereon. (SDCL 15-18-31).

Satisfaction.

After paying costs and expenses officer must pay to judgment creditor the proceeds of sale, or of moneys appropriated, or so much thereof as will satisfy the execution. (SDCL 15-18-38).

Limited Partnerships, Limited Liability Company.

Execution on debtor’s interests in limited partnerships and limited liability companies restricted. (SDCL 47-34A-504 and SDCL 48-7-703).

Sale.

Notice of execution sale of personal property must be published in legal newspaper in county where sale is to be made, in one issue, at least ten days before sale. Notice of sale must contain title of action, reference to order, judgment, or execution pursuant to which sale is made, date thereof; if on decree of foreclosure, or execution, amount of judgment; description of property to be sold, terms of sale, and time and place of sale. If no legal newspaper in the county, notice must be posted in five places in county not less than ten days before sale. (SDCL 15-19-3). Court may order special notice, time and manner of sale of perishable property. (SDCL 15-19-4). Sales may be made on any day except Sun., between 9:00 A.M. and 10:00 P.M., at front door of courthouse or at any other public or private place, providing public access thereto is given for inspection, bidding, and removal of property. (SDCL 15-19-5). Property capable of manual delivery must be within view of those attending sale, otherwise sale may be held at such place designated by officer as likely to secure best price therefor. (SDCL 15-19-6).

Notice of execution sale of real property must be published in a legal newspaper, in each county where any part is situated, once each week for four successive weeks, prior to date of sale. If no newspaper in the county, publication may be nearest legal newspaper in the state likely to give notice. (SDCL 15-19-8). Notice of sale must state title of proceeding; decree, order, or execution, which is authority for sale, must be named and referred to by date thereof; amount of judgment or other lien upon which sale is to be made; legal description of property; that sale will be made to highest bidder for cash; whether property is sold subject to redemption; and time and place of sale. (SDCL 15-19-9). Sales may be made on any day except Sunday, between 9:00 A.M. and 4:00 P.M. Sale must be held at front door of courthouse. (SDCL 15-19-10). If real estate is situated in several counties, same must be sold in county in which judgment was rendered unless court shall in such judgment direct otherwise. (SDCL 15-19-11). Sales must be at public auction, to highest bidder, for cash. (SDCL 15-19-13). Where property consists of several distinct lots or tracts, they must be sold separately, unless there is a structure partly on each or there is a paramount lien on two or more. (SDCL 15-19-14). Upon sale purchaser is given certificate of sale by officer making sale. (SDCL 15-19-18). Officer making sale must within ten days after sale file a verified return of such sale. (SDCL 15-19-20).

Redemption.

Only real property held in fee, by life estate, or by leasehold extending more than two years beyond date of sale is subject to redemption. (SDCL 21-52-3). Redemption may be by judgment debtor or his successor having any interest in property sold or by holder of any junior lien. (SDCL 21-52-5). Ordinary period for redemption is one year from date of sale. (SDCL 15-19-23 and SDCL 21-52-12), though short term redemption mortgages following prescribed form can provide for 180 day redemption (SDCL 21-49-12). Provision is made for extension for one year if any redemptioner pays all taxes due on land, and other sums paid by purchaser to protect his interest in property, including insurance premiums and installments of principal and interest upon superior liens plus interest from date of payment, all interest due on judgment at date of sale, interest on principal of mortgage or amount of judgment for one year from date of sale and for one year in advance at legal rate in case of judgment, and in case of mortgage at rate provided in mortgage before maturity, and all costs of sale. (SDCL 21-52-13). Also detailed provision made for successive redemptions by different redemptioners. (SDCL 21-52-19, 20). To redeem, amount payable is amount of purchase price, plus any sums paid by purchaser for specified purposes to protect his interest, with interest at legal rate from date of sale and payment of above sums for protection. (SDCL 21-52-14). Judgment debtor not required to submit any proof of right to redeem, but his successor in interest must make such proof. (SDCL 21-52-17, 18). If no redemption is made, sheriff's deed issues to purchaser. (SDCL 15-19-24). Debtor is entitled to any crops sown on premises prior to issuance of sheriff's deed and retains right of entry to harvest said crops. (SDCL 15-19-17.1).

Supplementary Proceedings.

After return of execution on judgment for $25 or more unsatisfied, plaintiff may obtain order requiring defendant to appear before judge or referee and answer fully concerning his property. (SDCL 15-20-1). In this proceeding receiver of property of judgment debtor may be appointed. (SDCL 15-20-14 to 18).

Body Execution.

If judgment is in an action in which defendant might have been arrested, it may also be enforced by execution against the person of the judgment debtor. (SDCL 15-18-2). No execution against person shall issue unless an order of arrest has been served. (SDCL 15-18-3). Execution requires officer to arrest debtor and commit him to jail until he pays judgment or is discharged according to law. (SDCL 15-18-9). After issuing execution against property and upon proof to satisfaction of court that there is danger that debtor will leave state or conceal himself and there is reason to believe he has property which he unjustly refuses to apply to payment of judgment, warrant for arrest may issue. Court may order undertaking that debtor will appear as he is directed and will not dispose of property not exempt from execution. (SDCL 15-20-5).

8.06 EXEMPTIONS:

Liberal exemptions from executions, attachments, and like processes provided for debtors, some of which exemptions are limited to South Dakota residents. Except for homestead exemption, which is covered elsewhere (see topic 8.10 Homesteads), exemptions exist and may be classified as hereinafter set forth.

Absolute exemptions include all family pictures, church pew, burial lots, Bible, school books, family library up to $200 in value, wearing apparel, provisions and fuel for debtor and family for one year, all property in limited circumstance of judgment against debtor for failure to pay another state's income tax on benefits received from pension or other retirement plan while debtor was resident of this state, and proceeds not exceeding $60,000 from sale of homestead, this last for one year after receipt thereof, but exemption limit increased to $170,000 for person age 70 or older or unremarried surviving spouse of such person if property continues to possess character of homestead. (SDCL 43-45-2, 3). Such absolute exemptions are allowed nonresident, as well as resident. (SDCL 43-45-7). Residents not entitled to federal exemptions under Bankruptcy Code which State does not authorize. (SDCL 43-45-13).

Additional exemptions are allowed only to residents, and do not apply to debtor who is in act of removing with his family from state, or who has absconded, taking with him his family, or who has received assistance from state for children or spouse, by virtue of assignment of support rights to state or for food, clothing and fuel provided for debtor or his family, or for child and spousal support obligations or to debtor for assistance or services furnished to debtor by or through Department of Social Services. (SDCL 43-45-7). Such additional exemptions are money or personal property up to $6,000 to debtor who is head of family, and up to $4,000 to debtor who is not head of family. (SDCL 43-45-4).

Insurance Exemption.

So far as concerns an insured, surviving spouse and children, up to $10,000 proceeds of life, health or accident insurance are exempt from demands of their creditors. (SDCL 43-45-6). This applies not only to amount payable upon death of insured, but also to any cash surrender value (61 S. D. 141, 246 N.W. 632), and any payment under endowment policy. Absent elements which would render premium payments, etc., fraudulent as against creditors, where surviving wife receives insurance payable to her as named beneficiary in policy on her husband's life, this does not reduce or limit her right to full exemption on another policy payable to her husband's estate. (68 S. D. 513, 4 N.W.2d 809). It is not clear whether benefit of this insurance exemption is limited to residents. Life insurance on resident decedent payable to his estate is exempt from debts of decedent, surviving spouse and minor children to $10,000. (SDCL 43-45-6).

Retirement Benefits Exemption.

Total of $1,000,000 and income and distribution therefrom from employee benefit plan exempt, except from right of state and its subdivisions to collect amounts owed to them. (SDCL 43-45-16). Employee benefit plan definition tied to Internal Revenue Code. (SDCL 43-45-17). Court can determine amount of exemption if excessive. (SDCL 43-45-18).

Miscellaneous Instances.

Exemptions are also contained in several statutes relating to particular subjects. Worker's compensation benefits are exempt, except from claims for child and spousal support obligations. (SDCL 62-4-42). If applicant for benefits is obligated for child support payments, department of social services may deduct amount as agreed to between applicant and department. (SDCL 61-6-28).

Substitution.

Except as indicated under Alternative Exemptions, no provision for substitution is made.

Debts Against Which Exemptions Not Allowed.

Property may not be claimed as exempt as against the claim for purchase money thereof, or for agreed or reasonable cost of material or labor in original construction. (SDCL 43-45-8). Only absolute exemptions (including homestead) are allowed as against claims for food, clothing or fuel furnished to debtor or family or for child or spousal support obligations (SDCL 43-45-7), for a debt incurred for property obtained under false pretenses (SDCL 43-45-9), and on judgments for fines, penalties, or costs of criminal prosecutions. Only such absolute exemptions, including homestead, plus personal property to the value of $500, may be claimed exempt from levy on final process on a judgment on an undertaking in a criminal case. (SDCL 43-45-10, 11).

Waiver of Exemption.

Advance waiver not covered by statute. Such waiver may be revoked at any time before it is acted upon. (57 S. D. 299, 232 N.W. 29). See infra, subhead Necessity of Claiming Exemptions, for waiver by failure to claim.

Proceedings.

Statutes outline in detail proceedings for claim of exemptions, answer by creditor, determination of values by appraisers, hearing in case of disputed fact questions, etc. (SDCL 21-19-1 to 30). These should be closely followed.

Necessity of Claiming Exemptions.

Absolute exemptions not waived by failure to claim them. (SDCL 21-19-15). Unless and until relief from default is granted, additional exemptions are waived by failure of debtor or dependent to claim them. (SDCL 21-19-12). Debtor may claim his additional exemptions at any time up to five days after notice of such levy, this by service of such claim on creditor and officer, and filing same with court. (SDCL 21-19-9). If this is not done by debtor, any dependent of debtor may make such claim within five days after expiration of time within which debtor might have made it. (SDCL 21-19-9).

Earnings.

Earnings exempt as detailed in garnishment section. (SDCL 21-18-51 to 53). Earned but unpaid earnings may be included in debt for exemption in bankruptcy filing. (SDCL 43-45-15). See also topic 8.09 Garnishment.

Homestead Exemption.

See topic 8.10 Homesteads.

8.07 [RESERVED]

8.08 FRAUDULENT SALES AND CONVEYANCES:

Uniform Commercial Code adopted. (Tit. 57A). See category 3 Business Regulation and Commerce, topic 3.09 Commercial Code.

Uniform Fraudulent Transfer Act adopted effective July 1, 1987. Rights and remedies of creditors are as therein set forth. (SDCL 54-8A). Uniform Act's definition of "transfer" rejected in prosecution for theft by transfer. (462 N.W.2d 195). Court not bound to list of statutory factors in determining if transfer is fraudulent. (583 N.W.2d 405, 1998 S.D. 99).

Remedies.

Remedies are set forth in Uniform Fraudulent Transfer Act. (SDCL 54-8A-7). Party to any conveyance with intent to defraud creditors is guilty of felony. (SDCL 54-8-22).

Bulk Sales.

Bulk Transfer article of Uniform Commercial Code formerly adopted (SDCL 57A-6), and then repealed by SL 1993, c. 356, § 1. Remains effective as to rights arising prior to July 1, 1993.

Sales Practices.

Certain deceptive sales practices and advertisements declared unlawful. (SDCL 37-24).

Telephone Sales.

Telephone solicitation of sale of goods and services regulated. (SDCL 37-30 and SDCL 37-30A).

Electronic Commerce.

Unsolicited commercial emails regulated, and private right of action permitted. (SDCL 37-24-6[13]; SDCL 37-24-41 to 48, inclusive).

8.09 GARNISHMENT:

Garnishment proceedings may be taken in any court having jurisdiction of the subject of the action, in any action for damages founded upon contract, express or implied, or upon a judgment or decree, against any person, including the state and any municipal or public corporation and any corporation which has power to sue or be sued, who or which is indebted to or has any property whatever, real or personal, in its possession or under its control belonging to such creditor's debtor. (SDCL 21-18-1).

Garnishment of earnings, may only be used following final judgment in principal action. (SDCL 21-18-3.1).

Exempt property may be claimed by debtor. (SDCL 21-19). Procedure is same as that for claim of exemptions against processes of other kinds. See topic 8.06 Exemptions, subhead Proceedings.

Property Which May Be Reached.

Real or personal property in possession or under control of garnishee. (SDCL 21-18-1). Garnishment process may be used to reach property and indebtedness in this state, although principal defendant is served without state. (38 S. D. 22, 159 N.W. 893).

Jurisdiction.

Garnishment may be used in circuit or magistrate courts. (SDCL 21-18-1).

Proceedings to Obtain.

Plaintiff, or some person on his behalf, must make affidavit stating that he verily believes that some person, naming him, is indebted to, or has property, real or personal, in his possession or under his control belonging to defendant, or either or any of defendants in action, naming him, and that such defendant has not property in this state other than property subject to garnishment under 21-18 sufficient to satisfy plaintiff's demand, and that indebtedness or property mentioned in such affidavit is, to best knowledge and belief of person making such affidavit, not by law exempt, and amount of claim sued upon. (SDCL 21-18-3). Plaintiff must annex to such affidavit a garnishee summons requiring garnishee to answer and make disclosure as to any property in garnishee's control or possession (SDCL 21-18-6) and garnishment disclosure (SDCL 21-18-7). Form of disclosure (SDCL 21-18-27.1) is as follows:

Form

IN______________COURT

____

STATE OF SOUTH DAKOTA

COUNTY OF___________

____

Plaintiff,

vs.

____

Defendant   Garnishment Disclosure

and

____

Garnishee

I am the _______ of the garnishee and duly authorized to disclose for the garnishee.

On the _______ day of _________, 20___, the time of service of garnishee summons on the garnishee, there was due and owing the defendant from the garnishee the following:

1. Earnings. For the purposes of garnishment, “earnings” means compensation payable for personal service whether called wages, salary, commission, bonus or otherwise, and includes periodic payments pursuant to a pension or retirement program. “Earnings” does not include social security benefits or veterans’ disability pension benefits, except when the benefits are subject to garnishment to enforce any order for the support of a dependent child. “Earnings” includes military retirement pay. “Disposable earnings” means that part of the earnings of an individual remaining after the deduction from those earnings of amounts required by law to be withheld. If the garnishee summons was served upon you at a time when earnings from a prior completed pay period were owing but not paid, complete the following disclosure for earnings from both the past pay period and the current pay period.

a. Enter on the line below the amount of disposable earnings earned or to be earned by the defendant within the defendant’s pay periods which may be subject to garnishment.____________________

b. Enter on the line below forty times the hourly federal minimum wage times the number of workweeks within the defendant’s pay periods which may be subject to garnishment plus twenty-five dollars $25 per week for each dependent family member residing with garnishment debtor other than garnishment debtor himself or herself. When pay periods consist of other than a whole number of workweeks, each day of a pay period in excess of the number of completed workweeks shall be counted as a fraction of a workweek equal to the number of workdays divided by the number of workdays in the normal workweek.____________________

c. Enter on the line below the difference obtained (never less than zero) when line b is subtracted from line a.____________________

d. Enter on the line below twenty percent of line a.____________________

e. Enter on the line below the lesser of line c and line d.____________________

2. Money. Enter on the line below any amounts due and owing defendant, except earnings, from the garnishee.____________________

3. Property. Describe on the line below any personal property, instruments or papers belonging to the defendant and in the possession of the garnishee.____________________

4. Setoff. Enter on the line below the amount of any setoff, defense, lien or claim which the garnishee claims against the amount set forth on lines 1(e), 2 and 3. Allege the facts by which the setoff, defense, lien or claim is claimed. (Any indebtedness to a garnishee-employer incurred by the judgment debtor within ten days prior to the receipt of the first garnishment on a debt is void and should be disregarded.)____________________

5. Adverse Interest. Enter on the line below any amounts claimed by other persons by reason of ownership or interest in the defendant's property. State the names and addresses of the persons and the nature of their claim, if known. (Any assignment of wages made by the defendant within ten days prior to the receipt of the first garnishment on a debt is void and should be disregarded.)____________________

6. Enter on the line below the total of lines 4 and 5.____________________

7. Enter on the line below the difference obtained (never less than zero) when line 6 is subtracted from the sum of line 1(e), 2 and 3.____________________

8. Enter on the line below one hundred ten percent of the amount of the judgment creditor's judgment which remains unpaid.____________________

9. Enter on the line below the lesser of line 7 and line 8. As garnishee, you are hereby instructed to retain this amount only if it is $10.00 or more. The balance shall be remitted to the debtor in a timely manner.

Signature____________________

Authorized Representative of Garnishee

____

Title

Subscribed and sworn to before me this ______ day of ________, 20_____.

____

Notary Public, South Dakota

My Commission Expires: _____________

Garnishee affidavit and summons must be served upon garnishee and principal defendant. (SDCL 21-18-10). Service may be by certified mail. (SDCL 21-18-7).

Answer of Garnishee.

Garnishee must serve answer or disclosure in form of affidavit admitting liability or denying indebtedness or liability to principal defendant. (SDCL 21-18-26 to 29). Answer may not be made upon information or belief, and may be made by agent or attorney having knowledge of facts. (SDCL 21-18-29).

Practice.

Garnishee must be paid $15 at time garnishee summons is served, to reimburse expense for making disclosure. (SDCL 21-18-9). Answer or disclosure of garnishee is conclusive unless traversed. (SDCL 21-18-30). If plaintiff takes issue with truth of disclosure by notice in writing, issue stands for trial as civil action. (SDCL 21-18-30). If garnishee fails to answer, court may render judgment for amount of judgment against principal defendant. (SDCL 21-18-39). If garnishee admits indebtedness, he may pay or deposit amount thereof with officer or clerk. (SDCL 21-18-32). Either defendant or garnishee may defend principal action upon any ground, including claim of exemption. (SDCL 21-18-42, 43). No trial may be had of garnishment action until plaintiff has judgment in principal action, but garnishment action may be tried at same term, if issue is joined in time. (SDCL 21-18-45).

Adverse Claims.

When answer of garnishee discloses that any other person than defendant claims the indebtedness or property in his hands, and the name and residence of such claimant, the court on motion may order such claimant be made defendant to garnishment action. Thereafter garnishee may pay or deliver to officer or clerk such indebtedness or property, which shall be complete discharge from all liability to any party for amount so paid or property so delivered. (SDCL 21-18-35). Upon service of such order claimant shall be deemed defendant in garnishment action. (SDCL 21-18-36).

Judgment.

Court shall render such judgment in all cases as shall be just to all of parties and properly protect their respective interests. (SDCL 21-18-47). Judgment against garnishee shall acquit and discharge him from all demands by defendant for all money, goods, effects, or credits paid, delivered, or accounted for by garnishee by force of such judgment. (SDCL 21-18-48).

Earnings.

Earnings, including periodic payments pursuant to pension or retirement program, subject to garnishment, but only following final judgment in principal action. (SDCL 21-18-2.1, 3.1). Earnings may be claimed as exempt. See topic 8.06 Exemptions, subhead Proceedings. Maximum amount of aggregate disposable earnings for any workweek subject to garnishment is lesser of: (i) 20% of disposable earnings for that week or (ii) excess of disposable earnings over 40 times federal minimum wage less $25 per week for each dependent family member residing with garnishment debtor other than garnishment debtor himself or herself (SDCL 21-18-51), unless garnishment is sought to enforce support order, in which case maximum amounts raised to 50 or 60% of disposable earnings, depending upon whether defendant is supporting spouse or dependent child. (SDCL 21-18-52). To make wages subject of continuing lien for 60 days following service of garnishee summons, caption of garnishee summons must be marked “continuing lien”, and garnishee disclosure form served must contain this statement:

> “Garnishee will continue to hold nonexempt portion of defendant’s earnings as they accrue through last payroll period ending on or before sixty days from effective date of the garnishee summons, or until sum held equals amount stated in the garnishee summons, or until employment relationship terminates, whichever first occurs.”

Plaintiff must also mail additional copy of disclosure at time of expected termination of garnishment lien, which must be completed by garnishee within ten days. (SDCL 21-18-14.1).

However, when garnishment has been used to reach earnings, and same have been determined exempt, further earnings of such party may not, for period of six months, be garnished on such claim, unless with good faith belief, with reason to support it, that party's financial status has changed to extent that property in excess of exemptions can be reached. (SDCL 21-20-1). Any person who violates these provisions is liable for a penalty of $50. (SDCL 21-20-1). Any attorney or agent who causes like oppressive garnishment to be made, whether on same claim or another claim, after pronouncement of exemption, is liable for like penalty. (SDCL 21-20-2).

8.10 HOMESTEADS:

Who May Sustain Homestead Right.

It is not necessary that a homestead claimant be the head of a family, the right being vested in the family itself. (SDCL 43-31-1, 14). Cited statutes have been construed to effect that a family need not consist of several persons, and one person alone is sufficient to constitute family. (33 S. D. 551, 146 N.W. 716).

Character of Estate Required to Sustain Claim.

The homestead right may be based on any interest in land, such that it might be sold on execution, provided there is right of immediate possession, it being held that a future estate is not sufficient. (6 Dak. 289, 42 N.W. 769; 72 S. D. 202, 31 N.W.2d 759).

Prerequisites.

Subject to limitations as to area, a homestead exists as to (a) house or mobile home used as home by owner (SDCL 43-31-2); or (b) if there is no other homestead, vacant or unoccupied: property will qualify provided owner records with register of deeds description thereof, certified and acknowledged by him, and complies with specified requirements as to such description, and, in certain instances, marking by fixed and visible monuments, and platting (SDCL 43-31-6 to 8) (but it is unclear whether requirements of SDCL 43-31-6 to SDCL 43-31-8 are mandatory); or (c) site intended by owner to be occupied as home, where head of family owns no other residence (78 S. D. 605, 105 N.W.2d 911). Mobile home, to be claimed as homestead, must have been registered in state at least six months prior to claim of exemption. (SDCL 43-31-2).

Limitation of value of property which may be held exempt from creditors is $60,000, except that such limit is increased to $170,000 for homestead of person aged 70 or older or unremarried surviving spouse of such person. (SDCL 43-45-3). However, South Dakota Supreme Court has held that prior version of SDCL 43-45-3, which included unlimited homestead for persons aged 70 or over, was unconstitutional. (681 N.W.2d 452, 2004 S. D. 70). That portion of homestead in excess of $30,000 above incumbrances is subject to levy, subject to foregoing exception. (SDCL 21-19-2).

Limitation of area which may be held exempt is 160 acres of land if in the country, or one acre if in town, or if land the title or right of possession to which was acquired or claimed under the laws of the United States relating to mineral lands, then not more than 40 acres in the country or one acre in town, or if the title was acquired as a placer claim, but was acquired under the laws of Congress as a lode mining claim, then not exceeding five acres. (SDCL 43-31-4).

Debts or Liabilities Against Which Exemption Not Available.

Legislature has no power to differentiate between debts by declaring homestead subject to certain debts but not to others. (67 S. D. 429, 293 N.W. 549). The homestead, except homestead of person aged 70 or older with value of less than $170,000 or unremarried surviving spouse of such person, is liable for and may be sold to pay taxes thereon. (SDCL 43-31-29, SDCL 43-31-1).

Designation of Homestead.

Owner may select and cause homestead to be marked off, platted, and recorded. (SDCL 43-31-6).

Claim of exemption not necessary. (SDCL 21-19-12, 15).

Waiver of Exemption.

Failure to claim exemption does not constitute waiver. (SDCL 21-19-12, 15). Exemption may be waived by contract. (55 S. D. 331, 226 N.W. 343).

Loss of exemption may result from abandonment by actual relinquishment of possession and removal from premises, coupled with intention to abandon. (42 S. D. 613, 176 N.W. 746).

Alienation or Encumbrance.

Title is unaffected by any instrument of conveyance, unless both husband and wife, if South Dakota residents, join therein, or execute separate instruments to same effect; except that spouse of person in Armed Forces officially declared missing in action, captured or forcibly detained, may alone sign conveyance or encumbrance of homestead in connection with home loan under 38 U.S.C. 1701. (SDCL 43-31-17). One spouse, absent concurrence by other, cannot abandon or diminish homestead. (72 S. D. 514, 37 N.W.2d 241). However, cited case is to effect that if both spouses join in requisite acts, there may be abandonment, relinquishment, or estoppel to assert homestead right. See also category 14 Family, topic 14.09 Husband and Wife.

Proceeds of sale, up to $60,000, whether voluntary or forced, exempt for one year after receipt by owner; but such exemption is increased to $170,000 for homestead of person aged 70 or older or unremarried surviving spouse of such person. (SDCL 43-45-3). South Dakota Supreme Court has held prior version of SDCL 43-45-3 exempting entire homestead of persons aged 70 or over was unconstitutional. (681 N.W.2d 452, 2004 S. D. 70). Execution creditor may demand appraisal of homestead (SDCL 21-19-20), and after stipulated procedure (SDCL 21-19-21 to 24) if property is found to be of value in excess of allowed amount, it may be sold, with debtor protected as to proceeds up to allowed amount of homestead, subject to foregoing exception. (SDCL 21-19-28, 29; SDCL 43-45-3).

Rights of Surviving Spouse and Family.

Upon death of either husband or wife, survivor may continue to possess and occupy whole homestead, and upon death of both husband and wife children may continue to possess and occupy whole homestead until youngest child becomes of age. (SDCL 43-31-13).

Unless rights of creditors are affected, stated limit does not apply to rights of surviving spouse and children. See category 13 Estates and Trusts, topic 13.08 Executors and Administrators.

8.118.12 [RESERVED]

8.13 LIENS:

Common law, statute, and contract liens are recognized. (SDCL 21-53-1). The legislature at all times has power to change priorities of common law liens or to abolish liens created by common law. (53 S. D. 544, 221 N.W. 263).

Uniform Commercial Code adopted. (Tit. 57A). See category 3 Business Regulation and Commerce, topic 3.09 Commercial Code.

Agister's Lien.

Person entrusted by owner with feeding, herding, or pasturing domestic animals has a lien for such service and supplies, and he is entitled to retain possession until paid. (40-27).

Attachment Lien.

See topic 8.02 Attachment.

Attorney's Lien.

See category 18 Legal Profession, topic 18.01 Attorneys and Counselors.

Banks and Savings and Loan Association Lien.

General lien, dependent on possession, for balance due from customer in course of business. (SDCL 44-11-11; see also bank's right of offset SDCL 51A-12-14).

Carrier's Lien.

See category 3 Business Regulation and Commerce, topic 3.07 Carriers.

Chattel Mortgage Lien.

See category 20 Mortgages, topic 20.01 Chattel Mortgages.

Collateral Security.

See topic 8.14 Pledges.

Die, Mold, Form or Pattern.

Person who fabricates, casts, or otherwise makes or uses die, mold, form or pattern has lien, dependent on possession, for balance due for any manufacturing or fabrication work. (44-15).

Execution Lien.

See topic 8.05 Executions.

Factor's Lien.

See category 3 Business Regulation and Commerce, topic 3.14 Factors.

Threshing and Processing Liens.

Person owning farm machinery used in harvesting, threshing, shelling, and processing has a lien upon grain or corn worked with such machinery for value of such services. (SDCL 38-17-14).

Hospital Lien.

Lien on damages authorized for hospitalization or other service furnished injured persons not covered by workmen's compensation. (SDCL 44-12-1).

Innkeeper's Lien.

Keeper of any lodging establishment has a lien, dependent upon possession, upon baggage belonging to guest, for payment of reasonable charges due for room, board, storage, and moneys advanced, not exceeding in all sum of $500. (SDCL 44-11-5).

Judgment Lien.

See category 5 Civil Actions and Procedure, topic 5.15 Judgments.

Landlord's Lien.

See category 21 Property, topic 21.10 Landlord and Tenant.

Liens on Exempt Property.

See topic 8.06 Exemptions.

Liens on Homestead.

See topic 8.10 Homesteads.

Manufacturer's Lien.

Manufacturer has lien, dependent on possession, on any die, mold, form or pattern in its possession for balance due from customer for manufacturing or fabrication work. (SDCL 44-15-5).

Transportation Lien.

Dependent on possession for compensation due from owner or property for service rendered. (SDCL 44-11-9).

Mechanic's, Laborer's, Materialmen's Lien on Personal Property.

Person who, at request or with consent of owner or person lawfully in possession, furnishes any service, or materials, for alteration, repair, storage or preservation of any personal property has a lien thereon, dependent on possession, or notice filed in office of register of deeds in accordance with statute within 120 days after loss or surrender of possession, for his reasonable charges, or for price agreed with owner. (SDCL 44-11-1, 3). Lien valid against everyone except purchaser, or encumbrancer in good faith, without notice, and for value whose rights were acquired prior to filing of such statutory notice. (SDCL 44-11-3). Lien may be foreclosed any time after 60 days from date of furnishing last item. (SDCL 44-11-4). Special rules apply to allow transfer of title to motor vehicles to satisfy unpaid repair bill. (SDCL 32-3-1).

Lien on real property, see subhead Mechanics' Liens, infra.

Officer's Lien.

Officer who levies attachment or execution upon personal property has a special lien, dependent on possession, upon such property, which authorizes him to hold same until process is discharged or satisfied, or judicial sale of property is had. (SDCL 44-11-12).

Purchase Money Lien on Personal Property.

Person who sells personal property has a special lien thereon, dependent on possession, if it is in his possession when the price becomes payable, and may enforce his lien in like manner as if property was pledged to him for the price. (SDCL 44-6-5).

Purchase Money Lien on Real Property.

Person who sells real property has a special or vendor's lien thereon, independent of possession, for price remaining unpaid and unsecured. (SDCL 44-6-1). Person who pays owner any part of price of real property under purchase agreement has a special or vendee's lien thereon, independent of possession, for such part of amount paid as he may be entitled to recover back in case of failure of consideration. (SDCL 44-6-2). Such liens are valid against everyone claiming under debtor, except bona fide purchaser or encumbrancer. (SDCL 44-6-3).

Public Aid to Poor Lien.

County has lien on property of a poor person or spouse of such poor person for amount to which it becomes obligated or pays for the care, support, and maintenance of such poor person. (SDCL 28-14-5, 6).

Real Estate Mortgage Lien.

See category 20 Mortgages, topic 20.04 Mortgages of Real Property.

Seed Grain Lien.

Person furnishing seed grain has a lien upon the crop produced from the kind of seed furnished by him, by proper notice thereof in the office of the register of deeds of county in which land on which crop is to be raised is located. (SDCL 38-17-3).

Tax Lien.

See category 22 Taxation, topic 22.15 Property Taxes, subhead Lien.

Unpaid Seller's Lien.

See category 3 Business Regulation and Commerce, topic 3.21 Sales.

Waiver, Loss, or Extinguishment.

Lien for materials, supplies, equipment and services furnished under construction contracts may be waived by endorsement of joint check by person furnishing material and execution of separate written agreement. Endorsement on check must refer to written agreement. (44-9A). Contracts for forfeiture of property subject to lien in satisfaction of obligation secured thereby and contracts in restraint of right of redemption from lien are void. (SDCL 44-1-8). Lien is extinguishable as any accessory obligation. (SDCL 44-5-1). Sale of property on which there is lien toward satisfaction of claim secured thereby, and in case of personal property, its wrongful conversion by person holding lien, extinguishes lien thereon. (SDCL 44-5-3). When lien is dependent on possession, voluntary surrender extinguishes lien unless otherwise agreed by parties, and notwithstanding such agreement, as to creditors of owner and persons subsequently acquiring title to property, or lien thereon, in good faith and for good consideration. (SDCL 44-5-2). Whenever lien has been satisfied by payment, foreclosure, or other means, holder must within 30 days of satisfaction, deliver sworn satisfaction to debtor. However, after written demand by owner of property, holder must execute and deliver sufficient satisfaction to cancel same of record within ten days, and failure to do so entitles owner to recover all damages sustained thereby, including his attorney fees and additional penalty of $100. (SDCL 44-3-8).

Enforcement.

Generally a lien on personal property may be enforced through an action to foreclose same. Such remedy is cumulative to any other existing right or remedy to foreclose or enforce a lien on personal property. (SDCL 21-53-4). In all cases where no special procedure is provided for summary foreclosure of a lien, statutes authorize foreclosure by notice and sale, with detailed provisions for contents of the notice, service and publication thereof, conduct of sale, distribution of proceeds, etc., all of which should be closely followed. (21-54). In all cases, except conditional sales contracts, where foreclosure of personal property lien has been commenced by such summary proceedings, property owner or any person claiming right of possession or any other encumbrancer may at any time before foreclosure sale present to circuit judge and file in office of clerk of courts of county where such proceeding is pending an affidavit stating that he has a defense to such foreclosure and desires same to be conducted by court procedure. Circuit judge must then issue order enjoining summary procedure and requiring foreclosure of lien in court. (SDCL 21-54-3). Foreclosure generally as to personal property liens by action is provided by statute. (21-53).

Motor Vehicle Liens.

See category 23 Transportation, topic 23.01 Motor Vehicles, subhead Liens, for method of filing or recording mechanic's lien on motor vehicle.

Mechanics' Liens.

Any person who, at request of owner or duly authorized agent, or of any contractor, furnishes labor, or materials, for the improvement, development, or operation of property, including erection of buildings or other structures, shall have a first lien thereon and the appurtenances thereto, prior and superior to all liens except those of the state and United States, and excepting liens, mortgages, or other encumbrances then of record or of which lien claimant has actual notice, for the price or value of same, so furnished. (SDCL 44-9-1). Where contribution is made under contract with owner and for an agreed price, lien shall be for sum agreed upon; otherwise, and in all cases as against others than the owner, it shall be for value of work and materials. (SDCL 44-9-6). Subcontractor who furnishes material or labor to contractor can enforce lien. (2 S. D. 577, 51 N. W. 590). Delivery of materials alone insufficient to create lien; same must go into the improvement. (25 S. D. 256, 126 N. W. 271).

Lien does not extend to nor affect rights in homestead so far as same is exempt from levy and sale on execution. (SDCL 44-9-5). Lien attaches from time first item of labor or material is furnished upon premises by lien claimant. (SDCL 44-9-7). As against bona fide purchaser or encumbrancer without notice, no lien attaches until actual or visible beginning of improvement on ground, but person having contract to furnish labor or material for such improvement may file notice of lien with register of deeds. (SDCL 44-9-8). Lien ceases at expiration of 120 days after doing last work, or furnishing last item of labor or materials, unless within such period statement of claim is filed with register of deeds of county in which improved premises are situated. (SDCL 44-9-15). Before filing lien statement, copy thereof must be mailed to property owner at his last known post office address by registered or certified mail and post office receipt must be attached to filed statement. (SDCL 44-9-17). If notice of project commencement has been filed pursuant to SDCL 44-9-50, no lien may be extended unless registered mail notice has been given to contractor and record owner in accordance with SDCL 44-9-53.

Verified statement must set forth: (1) notice of intention to claim and hold lien and amount thereof; (2) such amount is due and owing to claimant for labor performed or services, material, or machinery furnished and for what improvement same was done or supplied; (3) name and post office address of claimant and of person for or to whom performed or furnished; (4) dates when first and last items of contribution were made; (5) description of property to be charged, identified with reasonable certainty; (6) name and address of owner of property at time of making statement, according to best information; and (7) itemized statement of account upon which lien is claimed. (SDCL 44-9-16). List which contains only date and amount of each invoice is not proper itemized statement of account. (89 S.D. 203, 232 N.W.2d 76). {rrpara} Effective July 1, 2000, if owner or person contracting with owner files "notice of project commencement" on required form, no person may claim mechanic's, laborer's or materialman's lien without giving prior written notice of claim to contractor and owner within 60 days after last labor or materials were supplied. This does not apply to claims of individual laborers under $2,000. (SDCL 44-9-50 to 53).

Satisfaction of Mechanics' Lien.

Whenever lien filed with register of deeds has been satisfied by payment, foreclosure, compromise, or other method, creditor must execute and deliver to the owner a satisfaction executed before two witnesses or acknowledged before a notary public, describing lien by date, date of filing, amount claimed, description of property, and names of lien claimants and owner of the property, and upon presentation to register of deeds he must file same and cancel the lien of record. (SDCL 44-9-21). If holder of lien neglects to furnish such satisfaction within ten days after written demand therefor by owner of property or any person interested therein, he shall be liable for all damages, costs, and expenses, including attorney's fees and penalty of $100. (SDCL 44-9-22).

Foreclosure of Mechanics' Lien on Real Estate.

Lien may be enforced by action in circuit court of the county in which improved premises or some part thereof are situated. Action shall be begun in same manner as actions for foreclosure of mortgages upon real estate, except as otherwise specifically provided. (SDCL 44-9-23). Action may be commenced by any lienholder who has filed lien statement, and all other lienholders not joined with him as plaintiffs shall be made defendants. Lienholder not named as defendant may answer complaint and be admitted as a party. All parties having liens may join as plaintiffs. (SDCL 44-9-24). Owner of property, owner's agent, or owner's contractor can demand commencement of foreclosure action within 30 days and, if holder of lien fails to commence action, lien may be cancelled. (SDCL 44-9-26). Upon application court may make order requiring persons claiming interest in property to set up their rights or claims, or be barred. Order must be published in legal newspaper once each week for four successive weeks. (SDCL 44-9-29). Separate actions instituted may be consolidated by court. (SDCL 44-9-30). Claimant must file lis pendens. (SDCL 44-9-28). No lien may be enforced unless holder shall assert same, by complaint or answer, within six years after date of last item of claim as shown in lien statement; nor shall any person be bound by judgment in such action unless he is made a party thereto within such six years. (SDCL 44-9-24). Court may appoint receiver upon petition of majority of lienholders who are parties to the action. (SDCL 44-9-34). Judgment shall direct sale of real estate or other property for satisfaction of all liens charged thereon. (SDCL 44-9-45). No sale deemed complete until reported and confirmed by court. (SDCL 44-9-47).

Redemption from Foreclosure of Mechanics' Lien on Real Estate.

Redemption right is as set forth under Executions, subhead Redemption.

Mechanic's, Laborer's, Materialmen's Lien on Public Improvements.

Person furnishing labor or materials in the carrying on of any work of construction or repair of any public improvement of the state or any of its political subdivisions, and any departments or agencies thereof, to any person who has made any contract or subcontract therefor, has a lien for same on all moneys in the control of such public body or to become due under such contract. (SDCL 5-22-1). Verified account must be filed within 20 days after item furnished or work done, but failure to file does not defeat lien upon amount due contractor at time of filing. (SDCL 5-22-2). Such lien may be enforced in circuit court of county where work or any part thereof is situated. (SDCL 5-22-4).

Bond for Payment for Labor and Materials.

Contractor for public improvements must give bond in an amount not less than the contract price, conditioned for the faithful performance of the contract, and for prompt payment of labor and material claims. (SDCL 5-21-1).

Release of Liens by Undertaking.

Mechanics', laborers', materialmen's liens and certain other liens on real or personal property may be released by filing undertaking under prescribed procedure. (44-4).

8.14 [RESERVED]

8.15 PLEDGES:

Uniform Commercial Code adopted. (Tit. 57A). See category 3 Business Regulation and Commerce, topic 3.09 Commercial Code.

Lien of a pledge is dependent upon possession, and no pledge is valid until property is delivered to pledgee. (SDCL 44-10-2). Increase is pledged with the property. (SDCL 44-10-9). Lien on property may be pledged to extent of lien thereon. (SDCL 44-10-4). One who has allowed another to assume apparent ownership of property for purpose of making transfer of it cannot set up own title to defeat pledge made by the other to a pledgee who received property in good faith and in ordinary course of business and for value. (SDCL 44-10-3). Pledgor and pledgee may deposit property with a third person, called a pledgeholder, who must enforce the rights of the pledgee unless authorized by him to waive them. (SDCL 44-10-6). Pledgeholder for reward cannot exonerate himself from his undertaking; gratuitous pledgeholder can do so only by giving notice to pledgor and pledgee to appoint a new pledgeholder. (SDCL 44-10-7). Pledgee or pledgeholder for reward assumes duties and liabilities of depositary for reward; gratuitous pledgeholder, of a gratuitous depositary. (SDCL 44-10-8). Where debtor fraudulently represents value of property pledged, creditor may demand further pledge; and in default thereof may foreclose pledge as though due. (SDCL 44-10-11).

No evidence of debt, except obligations of governments, states, or their subdivisions, and public and private corporations can be sold by pledgee, but pledgee may collect same when due. (SDCL 44-10-10).

8.16 RECEIVERS:

Jurisdiction.

Is in circuit court, with statutory grounds specified in detail, same largely representing codification of common law and equity principles. (SDCL 21-21-1 to 5). Available upon foreclosure of short term redemption mortgage, including redemption period, if property is abandoned or upon showing of sufficient cause. (SDCL 21-49-13[3]).

Proceedings.

The usual practice is to make application supported by affidavit showing ground for receivership. If the application is ex parte, before making the order the court may require from the applicant an undertaking, with sureties, in an amount fixed by the court, to the effect that the applicant will pay the defendant all damages he may sustain by reason of the receivership if procured wrongfully, maliciously or without sufficient cause, and may at any time thereafter require additional undertaking. (SDCL 21-21-6 to 8).

Eligibility and Competency.

No party or interested person may be appointed without written consent of the parties, filed with the clerk. (SDCL 21-21-7).

Qualification.

Before entering upon his duties the receiver must be sworn to perform them faithfully, and with one or more sureties, approved by the court or judge, execute an undertaking to such person and in such sum as the court or judge may direct, to the effect that he will faithfully discharge the duties of receiver in the action, and obey the orders of the court therein. (SDCL 21-21-8).

Powers and Duties.

Receiver has power to bring and defend actions in own name; take and keep possession of property; receive rents, collect debts, and related transactions, under control of court. (SDCL 21-21-9).

Compensation is fixed by the court.

Discharge is by court order.

Investment of funds in hands of a receiver may be made by court order, entered on consent of all parties. (SDCL 21-21-10).

8.178.19 [RESERVED]

8.20 USURY:

See category 3 Business Regulation and Commerce, topic 3.19 Interest.

9 DISPUTE RESOLUTION

9.01 ALTERNATIVE DISPUTE RESOLUTION:

Mandatory Dispute Resolution.

Written agreement to arbitrate valid and enforceable; Uniform Arbitration Act adopted. (21-25A). Insurance policies excepted as void and unenforceable. (SDCL 21-25A-3). Agreement between patient and hospital or physician to arbitrate past or future disputes binding but may not be prerequisite to health care or treatment. (21-25B). Mediation required to bring action to foreclose mortgage against certain “agricultural land”. (54-13). Court may order mediation in child custody or visitation disputes. (SDCL 25-4-56). Mediation clause required in any contract for agricultural commodity of more than one year in duration between contractor and producer. (SDCL 37-4A-2). Mediation required to bring action over such contract. (SDCL 37-4A-2).

Voluntary Dispute Resolution.

Borrower may request nonbinding mediation as to debt secured by certain “agricultural land” even if no action commenced on debt. (SDCL 54-13-13). Consumer damaged by failure of seed to produce or perform as represented, or as result of negligence of seedsman, seed producer or seed dealer has right to submit claim to arbitration. Such arbitration not prerequisite to legal action by consumer. (SDCL 38-12A-21). Seedsman, seed producer or seed dealer has right to submit claim to arbitration if conspicuous language regarding arbitration requirement is included on label or container. (SDCL 38-12A-22). Report of arbitration committee is nonbinding but may be used as evidence in litigation. (SDCL 38-12A-26). Arbitration on agreement of parties regarding disputes between brewer and wholesaler (SDCL 35-8A-7 and 9); Department of Labor may mediate disputes between employer and employee concerning worker’s compensation claims (SDCL 62-7-37). All information transmitted during mediation is confidential. (SDCL 19-13-32, SDCL 25-4-60).

9.02 ARBITRATION AND AWARD:

Written agreement subsequent to June 30, 1971, to submit any existing controversy to arbitration, or provision in written contract thereafter arising, is valid, enforceable and irrevocable, except upon grounds as exist for the revocation of any contract. (SDCL 21-25A-1).

Uniform Arbitration Act adopted. (21-25A).

Form and Requisites of Submission.

Party to agreement may apply to court if opposing party refuses to arbitrate. (SDCL 21-25A-5). Excepted from act are insurance policies. (SDCL 21-25A-3). Following obligations cannot be specifically enforced: Obligations to render or employ another in personal service; agreement to submit to arbitration except within act; agreement to perform act which party may not lawfully perform; agreement to procure act or consent of spouse of party, or any third person; agreement not sufficiently certain to make precise act to be done clearly ascertainable (SDCL 21-9-2).

Contracts to Arbitrate Future Disputes.

Parties may in written contract submit to arbitration, controversy thereafter arising. (SDCL 21-25A-1). Arbitration provision in lease of real property forecloses all other remedies. (585 N.W.2d 819). Arbitration clause waives tribal immunity as to contract but not tort claims. (50 F.3d 560). Arbitration not enforceable in insurance contracts but is enforceable as between insurance companies who agree to arbitrate. (SDCL 21-25A-3).

Rescission.

Arbitration agreement complying with statute is valid, enforceable and irrevocable. (SDCL 21-25A-1). Arbitration provision may be waived by failure to assert. (466 N.W.2d 643).

Procedure.

Arbitrators are appointed according to provisions of arbitration agreement and should this method fail for any reason, by application to court. (SDCL 21-25A-9). Parties are entitled to be heard, present evidence, cross-examine witnesses (SDCL 21-25A-15) and be represented by counsel (SDCL 21-25A-16).

Powers of Arbitrators.

Arbitrators may issue subpoenas for witnesses and production of documents, administer oaths, and upon application permit depositions. (SDCL 21-25A-12, 13).

Award and Enforcement Thereof.

Award must be in writing, signed by arbitrators and delivered to each party, or as provided in agreement. (SDCL 21-25A-20). Upon application, court shall confirm award, unless within time limits, grounds as set forth in SDCL 21-25A-24 vacating award are urged. (SDCL 21-25A-23).

Judgment on Award.

Upon granting order confirming, modifying or correcting award, judgment or decree is entered in conformity therewith. (SDCL 21-25A-31). Judgment or decree may be docketed as if rendered in action. (SDCL 21-25A-32).

Disputes Between Medical Service Providers and Patients.

Voluntary arbitration agreements between hospitals or physicians and patients relating to past or future services provided for. Agreement to arbitrate shall not be prerequisite to health care or treatment. Health care services, arbitration panel and procedure for appearances before panel established. Separate hearings for liability and damages created. (21-25B). Parents or fiduciaries authorized to enter into arbitration agreements on behalf of person they represent. (SDCL 21-25B-2).

Mandatory Arbitration.

Mediation required prior to bringing action to foreclose mortgage against certain “agricultural land”. (54-13). Borrower may also request non-compulsory mediation. (SDCL 54-13-13). See category 20 Mortgages, topic 20.04 Mortgages of Real Property.

Consumer damaged by failure of seed to produce or perform as represented, or as result of negligence of seedsman, seed producer or seed dealer has right to submit claim to arbitration. Such arbitration not prerequisite to legal action by consumer. (SDCL 38-12A-21). Seedsman, seed producer or seed dealer has right to submit claim to arbitration if conspicuous language regarding arbitration requirement is included on label or container. (SDCL 38-12A-22). Report of arbitration committee is nonbinding but may be used as evidence in litigation. (SDCL 38-12A-26).

9.02A MEDIATION:

Qualifications of and Standards for Mediators.

Not regulated by statute except for foreclosure of agricultural land (54-13) and as to court-appointed mediators in child custody or visitation disputes. Court-appointed mediators in child custody or visitation disputes must have minimum of 40 hours training and consultation with experienced mediator for at least three mediation sessions or, with court approval, five years experience in mediating custody and visitation issues with minimum of 20 mediations during that period. (SDCL 25-4-58.1). Competence in various general areas must also be shown. (SDCL 25-4-58.1). Standards of conduct for mediators in child custody or visitation disputes also regulated. (SDCL 25-4-58.2).

10 DOCUMENTS AND RECORDS

10.01 ACKNOWLEDGMENTS:

Uniform Acknowledgment Act (not Uniform Acknowledgments Act) adopted in 1941, in form identical to that set forth in Part VI of this volume, with only these variations; §§ 2 (6) and (7), 9 (2) and 9 (3) are omitted; also § 8 is changed to require certifying officer to add immediately following his signature endorsement of his name by typewriter or legibly printed with stamp or by pen and ink; also omitted from § 10 are requirements as to authentication and as to homestead conveyances; also § 10 as adopted specifically includes Philippine Islands. (SDCL 18-5-1 to 18). There has also been adopted § 11 substantially as recommended by Conference in 1942. (SDCL 18-4-6 to 9).

State statutes contain various provisions as to other permitted forms of acknowledgments, etc. (SDCL 18-4-1 to 28). As adopted Uniform Acknowledgment Act covers most phases and is almost universally followed.

May be taken by following officers:

Within State: By judge of circuit court; clerk or deputy clerk of circuit court; register of deeds; notary public; or magistrate (SDCL 18-5-2); if by magistrate and used in any county other than county in which magistrate resides, must be accompanied by certificate from clerk of courts (SDCL 18-4-24); or U.S. magistrate (SDCL 18-4-2); also, when acting within county or municipality for which officer was elected or appointed, by county auditor, register of deeds, mayor, or municipal finance officer (SDCL 18-4-2). Also Indian agent or superintendent may, within Indian country, take acknowledgments if he has qualified by filing in office of register of deeds of county in which he is situated, or county to which such county is attached for judicial purposes, certificate of U.S. Secretary of Interior showing appointment and authority. (SDCL 18-4-3).

Outside state but within United States: By any officer specified in § 3, Uniform

Acknowledgment Act (SDCL 18-5-3), and, also, if within U.S., and within jurisdiction of officer, by justice or judge of any court of record of U.S. or any state or territory, or any officer of state or territory authorized so to do by local law, or commissioner appointed for that purpose by governor of South Dakota (SDCL 18-4-4).

Outside United States: By any officer specified in § 4, Uniform Acknowledgment Act (SDCL 18-5-4), and also by Commissioner of U.S., resident and accredited in country where acknowledgment is taken, Commissioner of court of record of such country, officer authorized by laws of such country so to do, or any deputy of any of such officers authorized to appoint deputy (SDCL 18-4-5).

Persons in or with U. S. Armed Forces: Acknowledgments of persons in U. S. armed forces are provided for by SDCL 18-4-6 to 8, which is substantially identical with § 11 of Uniform Acknowledgment Act. In administration of state's military laws, certain officers of State National Guard may administer oaths and have general powers of notary public with regard thereto. Such officers include adjutant general, other designated staff officers, any judge advocate, and trial counsel, assistant trial counsel, and president or recorder of any court martial or military board; also any officer or warrant officer detailed to make investigation; also commissioned officers and warrant officers of armed forces of U.S. may administer oaths of enlistment. (SDCL 33-3-28).

General Requirements as to Taking.

If officer taking acknowledgment knows person described in and who executed instrument, this is sufficient. Otherwise, and if form of certificate is that authorized by Uniform Acknowledgment Act, officer must have satisfactory evidence of identity. (SDCL 18-5-5). If, however, certificate is in form authorized by other state statutes, identity must be proved by satisfactory evidence on oath or affirmation of credible witness. (SDCL 18-4-10).

Married women acknowledge like other persons; no special requirements. (SDCL 43-28-9).

Foreign Acknowledgments.

See subhead Forms, infra.

Proof of execution of instrument, when not acknowledged, may be made either by party executing it, or either of them, or by subscribing witness; but, if by subscribing witness, such witness must be personally known to officer taking proof to be person whose name is subscribed to instrument as witness, or must be proved to be such by oath of credible witness. Subscribing witness must prove that person whose name is subscribed to instrument as party is person described in it, and that such person executed it, and that witness subscribed his name thereto as witness. (SDCL 18-4-17, 18).

The execution of an unacknowledged instrument may also be established in certain cases by proof of the handwriting of the party, or of a subscribing witness. (SDCL 18-4-19).

Authentication.

No authentication is necessary if the acknowledgment is taken in South Dakota or without U.S. by an officer of U.S. (SDCL 18-5-14). As stated above other provisions of Uniform Acknowledgment Act as to authentication contained in § 9 and § 10 were omitted in adoption of Act in South Dakota.

By other applicable statutes, authentication is by officer's seal, if by laws of state, territory or country where acknowledgment is taken or by authority by which he is acting, officer is required to have an official seal. (SDCL 18-4-23). Also as to judges and clerks of courts of record authentication is by seal of court; also as to mayors of cities authentication is by seal thereof. As to acknowledgments taken before a magistrate when used in any county other than that in which he resides, authentication must be by certificate under hand and seal of clerk of courts of county where magistrate resides, setting forth that such magistrate at time of such taking was authorized so to do, that clerk is acquainted with his handwriting and believes signature to original certificate is genuine. (SDCL 18-4-24).

There appears to be no specific statutory provision covering other instances where the officer does not have an official seal. In such instances general rules as to authentication should be followed.

Authentication of certificates of acknowledgment taken in the state for use elsewhere is by certificate of the clerk of the circuit court of the county in which the officer's commission is filed. Fee $2. (SDCL 16-2-29[5]).

Effect.

Except where recording is directed by order or judgment of a court of competent jurisdiction, and except as to a limited number of instances specified by statute, and except as previously stated under subhead Proof, to be entitled to record an instrument must be acknowledged by person executing it. (SDCL 43-28-8, 10). Such record or a certified copy thereof admissible in evidence without further proof. (SDCL 43-28-2, 3).

Forms of acknowledgment as provided by §§ 7 and 10 of the Uniform Acknowledgment Act (see first Act in Part VI of this volume) are now almost exclusively used. Form for acknowledgment of partner added. (SDCL 18-5-12). For other permitted forms, see SDCL 18-4-12 to 15.

Alternative to Acknowledgment or Proof.

No statutory provision.

Validating Act.

As to any instrument affecting real property, recorded in the office of a register of deeds prior to Dec. 31, 1988, same deemed to impart after that date notice to subsequent purchasers and encumbrancers notwithstanding irregularities in or absence of certificate of acknowledgment. Rights of purchasers or encumbrancers prior to Dec. 31, 1988, not affected. (SDCL 43-28-16).

10.02 AFFIDAVITS:

Use of Affidavit.

Affidavits may be used to verify a pleading, prove service of summons, notice or other process in action, to obtain provisional remedy, and establish facts for purposes of motions in progress of suit, but ordinarily not on trial. (SDCL 19-4-2). Affidavits may be made in or out of state before any person who may administer oath. (SDCL 19-4-1).

Who May Administer Oaths.

Following officers are authorized to administer oaths in state: (1) Supreme Court justices, circuit court judges, magistrates, notaries public, and clerk and deputy clerk of Supreme Court, within state, clerks and deputy clerks of circuit court and federal judges and federal magistrates; (2) county auditors, treasurers and registers of deeds, and deputy of each, within county; (3) mayors, town board presidents, municipal finance officers (and their deputies), and township clerks, within their respective municipality or township; (4) sheriffs and deputies if authorized by laws to select commissioners or appraisers, or to impanel juries for view or appraisement of property, or are directed as official duty to have property appraised, or take answer of garnishees;

(5) conservation officers for purposes of taking written statement pursuant to SDCL 23A-2-1; (6) other officers in cases specifically provided; (7) members of Legislature, while acting as member of any legislative committee, when examining persons before committee. (SDCL 18-3-1; SDCL 18-4-24).

Affidavits of persons in U.S. military service or civilians serving therein may be taken before any commissioned officer in such service. (SDCL 18-3-2).

No fee can be charged if oath given in connection with official duty of officer essential to administration of office. (SDCL 18-3-6). Notary public may charge not to exceed $10 for each instrument notarized except no charge allowed for notarizing absentee ballot request. (SDCL 18-1-9).

General Requirements as to Administration.

Authentication is not required if officer's certificate is under seal. Otherwise his identity and authority should be certified by court of record in whose office his commission is filed. Clerk of courts of county authenticates for use outside of state.

Effect.

Affidavit stating facts regarding identity of persons, whether persons are married or single, whether land described is homestead or identifying plats or subdivisions of municipal corporation may be recorded in office of register of deeds and are then prima facie evidence of facts stated. Admissible in evidence without further proof. (43-30).

General Requirements of Jurat.

No necessity of stating date of expiration of officer's commission. See topic Acknowledgments for special rule.

Form commonly used is as follows:

Form

State (or territory) of . . . . . ., County of . . . . . ., ss; . . . . . ., being first duly sworn, deposes and says;

. . . . (Signature).

Subscribed and sworn to before me this . . . . . . day of . . . . . ., 20. . . . .

. . . . (Signature, title and seal).

Form of jurat for affidavit of person in military service: Subscribed and sworn to before me this . . . . . . day of . . . . . . 20. . . ., by . . . . . . to me well known to be in the Military Service of the United States, and who stated to me that his home postoffice address is as follows: . . . .

. . . .

Signature of Officer.

. . . .

Title and Unit. (SDCL 18-3-3).

Alternative to Affidavit.

No statutory provision.

Necessity for Title.

If an affidavit intelligibly refers to an action or a proceeding, it need not bear the title. (SDCL 19-4-3).

10.03 NOTARIES PUBLIC:

Qualification is effected by taking of an oath, giving bond for $5,000, providing an official seal and filing an impression thereof with the oath and bond in the office of the Secretary of State, and filing the commission, an impression of notary’s seal and official signature and application form and fee with Secretary of State. (SDCL 18-1-2 to 4).

Powers and Duties.

Notary public has power to administer oaths anywhere in state (SDCL 18-1-1), to take acknowledgments (SDCL 18-5-1), and to take depositions (SDCL 15-6-28[a]).

Unless the instrument shows that a notary is a principal party, he may exercise his powers and duties with reference to the instrument regardless of his interest, direct or indirect, in the transaction. (SDCL 18-1-7).

Authentication.

See topic 10.01 Acknowledgments.

Expiration of Commission.

Certificate of notary must contain date commission expires. (SDCL 18-1-3.1; SDCL 18-5-13).

Fees are limited to $10 for each instrument notarized. No fee allowed on notary for request of absentee ballot. (SDCL 18-1-9).

Registers of deeds, county auditor, county treasurer and deputy of each are authorized to administer oaths. (SDCL 18-3-1).

Officers of U. S. Armed Forces before whom affidavits, acknowledgments and oaths are given have same standing as a notary public. (SDCL 18-3-2 to 4).

10.04 RECORDS:

Records relating to real property are in charge of county register of deeds.

Uniform Commercial Code adopted. (Tit. 57A). See category 3 Business Regulation and Commerce, topic 3.09 Commercial Code.

Recordable Instruments.

If in such form as to be entitled to record, any instrument affecting title to or possession of real property may be recorded. (SDCL 43-28-1). Unless recorded, every instrument in writing by which any estate or interest in real property is created, alienated, mortgaged, or incumbered, or by which the title to any real property may be affected (except wills, powers of attorney, and a lease for a term not exceeding one year) is void against any subsequent bona fide purchaser or incumbrancer, including an assignee of a mortgage, lease, or other conditional estate whose conveyance is first duly recorded. (SDCL 43-28-17).

Place of recording is office of register of deeds of the county in which the real property affected is situated. (SDCL 43-28-1). *For list of Counties and County Seats see first page for this state in Volume containing Practice Profiles Section.*

Requisites for Recording.

Except as hereinafter stated, to be entitled to record, instruments must be acknowledged or proved. (SDCL 43-28-8). See topic 10.01 Acknowledgments. Exceptions are instruments whose record has been authorized by judgment or order of a court of competent jurisdiction, and: (1) authenticated judgments, (2) patents and final certificates from U. S. land offices or certified copies thereof, (3) patents or certified copies issued by the State of South Dakota, (4) contracts or certified copies for sale of state land, (5) lis pendens signed by attorneys of record, (6) affidavits of identity of persons or places or as to homestead character of premises, (7) certificates of discharge of armed forces personnel, (8) affidavits specifying labor or compliance requirements arising under federal law on mining claims. (SDCL 43-28-2). Deed or contract for deed filed after July 1, 1988 must include or be accompanied by certificate of value containing actual consideration, relationship of buyer and seller, address of buyer and seller, legal description, and terms of payment. (SDCL 7-9-7). Deed, contract for deed, mortgage, oil, gas or other mineral lease, or assignments thereof must contain address of grantee, lessee, mortgagee or assignee. (SDCL 7-9-7). All recorded documents must contain legend stating name, address and phone number of preparer except: (1) documents dated prior to July 1, 1994; (2) documents prepared by U.S., or any other state government or political subdivision; and (3) court certified documents. (SDCL 7-9-1). All real estate documents recorded with Register of Deeds, with exception of plats, must be on paper measuring no larger than 8.5 inches by 14 inches and no smaller than 8.5 inches by 11 inches. (SDCL 43-28-23[1]). Further, any real estate documents must be printed or typewritten in black ink and in no smaller than ten point type. (SDCL 43-28-23[2]). Signature, dates, and notarial acknowledgments may be in blue or black ink. (SDCL 43-28-23[2]). Documents must be on white paper of not less than 20 pound weight and must include no less than three inch blank space at top of first page reserving right half for use by Register of Deeds and left half to be used to designate document preparer's name and address as required by SDCL 7-9-1 and may include other document information. (SDCL 43-28-23[3] and [4]). All other margins must be minimum of one inch. (SDCL 43-28-23[4]). All documents must bear title prominently displayed at top of first page and be sufficiently legible to support copying by Register of Deeds. (SDCL 43-28-23[5] and [6]).

Fees for recording deeds, mortgages and all other instruments not specifically provided for, $10 for first page and $2 for each additional page; for certified copy, $2, plus 20¢ for each page after five; for uncertified copy, $1, plus 20¢ for each page after five. Board of County Commissioners shall establish fees for duplicate microfilm. (SDCL 7-9-15).

Orders.

Certified copy of order affecting title to real estate or determining any matter affecting such title must be recorded in office of register of deeds of county where real estate situated. (SDCL 43-28-4).

Foreign Conveyances or Encumbrances.

Uniform Acknowledgment Act in effect. (18-5). No other statute or decision dealing with validity of conveyance or encumbrance of real estate valid where executed but violative of South Dakota statutory requirements.

Effect of Recording.

Recording of instrument affecting real estate, duly acknowledged or proved, is, in law, constructive notice to all purchasers and incumbrancers of property subsequent to recording.

(SDCL 43-28-15).

Torrens system of land title registration is not in force.

Transfer of decedent's title to real estate is shown of record by deed of distribution from personal representative for probates commenced after July 1, 1995 (SDCL 29A-3-907).

Filing Under Commercial Code.

Effective July 1, 2001, revised Art. 9 took effect and filing rules are as set forth therein. Places for filing are: When collateral is as-extracted collateral or timber to be cut, or goods that are or are to become fixtures, with Register of Deeds. (SDCL 57A-9-501[a][1]). In all other cases where filing is to be made in South Dakota, in office of Secretary of State, whose mailing address is Central Filing System, Secretary of State, 500 E. Capitol, Pierre, S.D. 57501-5089. (SDCL 57A-9-501[a][2]). Filing with Secretary of State of South Dakota will be made only for entities "located" in South Dakota including entities created by filing when filing is in South Dakota; entities not created by filing but whose chief executive office is in South Dakota; and individuals whose principal residence is in South Dakota. (SDCL 57A-9-307). Computerized central filing system adopted. Secured parties also granted access to state's computer system to record liens on real property under SDCL 57A-9-501. (SDCL 57A-9-501.2). In addition to usual requirements, financing statements must contain either social security number or IRS taxpayer identification number of debtor. (SDCL 57A-9-502[a][1]). Standard form UCC-1 financing statement includes Effective Financing Statement ("EFS") form to comply with Food Security Act requirements relating to "farm products". Telephone requests for information permitted, but accuracy and completeness of verbal information not warranted. (SDCL 57A-9-523[d]).

Fees are as follows: For financing statements submitted in writing, $25 for one page and $5 for additional pages; for financing statements communicated by Internet, $20. (SDCL 57A-9-525[a]). For financing statements filed in connection with public-financed transactions and manufactured-home transactions, $40. (SDCL 57A-9-525[b]). For each additional name required to be indexed, $3. (SDCL 57A-9-525[c]). Fee for requesting information $20 if request is communicated in writing and $10 if request is communicated by Internet authorized by filing-office rule. (SDCL 57A-9-525[d]).

Vital Statistics.

Records of births, deaths, marriages and divorces are maintained by State Department of Health, 523 E. Capitol, Pierre, S. D. 57501, and Secretary of Health is director of vital statistics (34-25; SDCL 34-1-7.1), and locally by register of deeds, who is designated as local registrar of vital statistics (SDCL 34-25-4.1). Fee to obtain certified copy of vital record from director is set by administrative cost, plus $2 for each copy thereof. (SDCL 34-25-52, and 52.2). Copies of birth and death certificates may be obtained from register of deeds for $7. Copies of divorce decree may be obtained from clerk of courts. (SDCL 16-2-29). No charge to servicemen, veterans and dependents. (SDCL 34-25-54).

Establishing Unreported Records.

The birth, death or burial of any person, occurring in South Dakota, but not reported or recorded may be established of record by filing of a verified form by any person having knowledge of the facts, with the local registrar in the registration district where the birth, death or burial occurred. (SDCL 34-25-42; SDCL 34-27-13).

10.05 SEALS:

Uniform Commercial Code adopted. (Tit. 57A). See category 3 Business Regulation and Commerce, topic 3.09 Commercial Code.

Seal includes an impression of the seal on the paper alone, as well as upon wax or a wafer affixed to the paper, and also the word “Seal” written or printed on such paper. (SDCL 2-14-2[23]).

Effect of Seal.

All distinctions between sealed and unsealed instruments are abolished, except as presence or absence of a seal on a written instrument affects time within which an action thereon must be commenced. (19 S. D. 617, 104 N.W. 275). See category 5 Civil Actions and Procedure, topic 5.16 Limitation of Actions. Written instrument is presumptive evidence of a consideration. (SDCL 53-6-3).

Corporate seal or corporate acknowledgment attached to deed, mortgage, assignment of mortgage, release of mortgage or other instrument executed and acknowledged by officer of corporation, is prima facie evidence that such officer was duly authorized to execute such instrument. (SDCL 43-25-21).

11 EMPLOYMENT

11.01 [RESERVED]

11.02 LABOR RELATIONS:

Statutory provisions are merely declaratory of the common law. (SDCL 60-1-1 to 5; SDCL 60-2-18, 19; SDCL 60-4-9, 10). Department of Labor responsible for enforcement of labor laws. (SDCL 60-5-11).

Hours of Labor.

Day’s labor for employees is to extent as is usual in business in which they serve not exceeding ten hours in day unless employer and employee expressly agree to contrary. (SDCL 60-2-18). Labor or employment of any unemancipated child under age of 16 years for more than four hours in any school day, 20 hours in any school week, eight hours in any nonschool day, 40 hours in any nonschool week or after 10 p.m. any day preceding school day is prohibited. (SDCL 60-12-1). Day’s labor in any manufacturing or mechanical operation shall consist of eight hours, unless there is express agreement to contrary, or when agreement is for employment by week, month or year. (SDCL 60-11-1). Employees of state, political subdivision, or municipal corporation shall not be employed more than eight hours a day or 48 hours in any calendar week, except in unavoidable emergency and except that full time employees of city fire departments shall have their hours of employment governed by agreements with municipal corporations not exceeding 112 hours in 14 day period, but this does not apply to elected or appointed public officers. (SDCL 3-6-17, 18).

Wages are presumed, in absence of contrary agreement, to be monthly, payable when service is performed. (SDCL 60-1-4). Where breach of obligation to pay wages is malicious, employer may be liable for double amount of wages. (SDCL 60-11-7).

Every employer must pay employees not less than $5.85 an hour unless federal minimum wage is increased, at which point, state minimum wage shall match federal wage. (SDCL 60-11-3). Employer of tipped employee must pay not less than $2.13 an hour if tip credit is claimed against minimum wage. If tips and wages do not equal minimum hourly wage, employer must make up difference as additional wages. Tipped employee is one who customarily and regularly receives more than $35 a month in tips. (SDCL 60-11-3.1). Provisions of SDCL 60-11-3 and SDCL 60-11-3.1 do not apply to baby-sitters, outside salesman or employees under 20 years of age paid opportunity wage under Fair Labor Standards Amendments of 1996. (SDCL 60-11-3, 3.1). This statute contains exception as to apprentices, persons learning employment, and mentally or physically deficient persons working under permit of Department of Manpower Affairs. (SDCL 60-11-5).

Equal Pay for Equal Work.

No employer shall discriminate between employees on basis of sex. (SDCL 60-12-15).

Child Labor.

No child under 14 years of age shall be employed at any time in any factory, workshop or mine, nor in any mercantile establishment except during hours when public schools are not in session, and in no case after 7:00 p.m. (SDCL 60-12-2). No unemancipated child under 16 shall be employed more than four hours in any school day, 20 hours in any school week, eight hours in any nonschool day, 40 hours in any nonschool week, or after 10 p.m. in day preceding school day. (SDCL 60-12-1). No child under 16 shall be employed in any occupation dangerous to life, health, or morals, not including gas stations, nor shall child be exploited by employer, including imposition of unreasonable wages, hours, and working conditions, in manner inconsistent with similar types of employment in area, but law not applicable to minors employed by parents or who have successfully completed safety course and received license, permit or certificate from state or federal agency to operate agricultural equipment or otherwise be employed in agricultural occupation. (SDCL 60-12-3). Department of Labor may issue permit authorizing employment of minor otherwise barred by law when such employment is necessary to minor's support or that of his family. (SDCL 60-12-5). Lists of children employed and required certificates and permits must be kept by employer available for inspection by any interested person or public official. (SDCL 60-12-6). Department of Labor enforces all laws relative to employment of children. (SDCL 60-5-11). Employer is required to provide sanitary working conditions for children employees. (SDCL 60-12-13).

Female Labor.

No discrimination.

Labor Unions.

No person shall be denied employment because of membership in or affiliation with or resignation from labor union, or because of refusal to join or affiliate with labor union; nor shall any corporation or individual or association of any kind enter into any contract written or oral, to exclude from employment members of labor union or persons who refuse to join labor union or because of resignation from labor union. (SDCL 60-8-3 to 6). By constitutional amendment, right to work must not be denied or abridged on account of membership or nonmembership in any labor union or labor organization. (Art. VI, § 2).

Labor Disputes.

In case of strikes, lockouts, or other labor disputes, Department of Labor may endeavor to conciliate parties. If conciliation efforts are unsuccessful, Secretary of Labor if requested by either party within 20 days after conclusion of conciliation procedure, shall make impartial investigation of controversy, giving all parties ample opportunity for presentation of facts, after which he must make his recommendation for settlement and furnish copy thereof to parties and local newspapers. He may call in two capable citizens, not directly interested, one named by each party, to assist in investigation. (SDCL 60-10-1 to 3).

South Dakota Worker's Compensation Law is in force. (Title 62). It provides benefits for injury arising out of and in course of employment but does not include disease except as it results from injury. (SDCL 62-1-1[7]). It applies to state and political subdivisions thereof, municipalities, volunteer workmen of state agencies, students employed in vocational education program off school premises if not paid cash wage by private employer (SDCL 62-1-4.1), and any employer of one or more persons in employer's usual course of trade, business or occupation (SDCL 62-1-2). Executive officers of corporations are considered employees, but officers of charitable and like corporations not included unless corporations cause them to be included as employees. (SDCL 62-1-7, 8). Unless governing bodies elect to treat them as employees, Act does not apply to elected or appointed county, municipal or school district officials (except that highway superintendents, deputy sheriffs, constables, marshals, policemen and firemen, including certain volunteer and county firemen, are covered). (SDCL 62-1-3 to 6). Domestic servants, which include baby sitters, are covered provided they work more than 20 hours in any calendar week and more than six weeks in any 13 week period. (SDCL 62-3-15). Farm or agricultural workers and workfare participants not covered. (SDCL 62-3-15). Employer performing labor incidental to his occupation may be deemed an employee provided he purchases insurance to cover himself. (SDCL 62-1-3). Act extends to operators of threshing machines, grain combines, etc. (SDCL 62-3-16). Act does not apply to employers and employees in interstate or foreign commerce, covered by federal compensation or employer's liability laws. (SDCL 62-3-4).

Administration of Act.

Department of Labor administers compensation law. (SDCL 62-2-5).

Acceptance or Rejection of Act.

Except as hereinafter stated, all employers and employees are presumed to have accepted Act and are bound thereby. (SDCL 62-3-3). Executive officer of a corporation may reject Act by written notice and then withdraw rejection in same manner. (SDCL 62-3-5.1). Also, and in effect, an employer rejects Act if not in compliance with provisions of Act as to securing compensation payment through insurance, or other authorized means. (SDCL 62-5-7). Required insurance, or other security, is specified in detail, including provisions whereby, and on meeting certain requirements for approval of Department of Labor, employer may be self-insurer. (SDCL 62-5-2 to 6). Rights granted employee on account of personal injury or death by accident exclude all other rights against employer or against employee, partner, officer or director of employer, except rights arising from intentional tort. (SDCL 62-3-2). Employee may claim compensation from employer or proceed at law against negligent third party. If employee recovers any like damages, they offset against any worker's compensation otherwise entitled to receive. (SDCL 62-4-38). Upon recovery from third party, employee must reimburse employer. (SDCL 62-4-39). Employer seeking permission to be self-insurer must meet certain requirements. (SDCL 62-5-10 to 16). Election of owner-operators governed separately. (SDCL 62-1-10 to 13).

Effect of Rejection.

If employer is deemed not to operate under this title, employee or dependents of deceased employee may elect to proceed against employer in action at law to recover damages for injury or death, or may proceed against employer in circuit court, as if employer had elected to operate under provisions of this title, and measure of benefits is amount allowed under SDCL 62-4-1, plus twice amount of other compensation allowable under this title, provided that employee or dependents may not recover from both actions. (SDCL 62-3-11).

Notice of Claim.

An employee is required to give employer written notice of injury immediately or as soon as practicable thereafter. (SDCL 62-7-10). Absent employer's actual knowledge or good cause, claim is barred by failure to give notice within three business days after injury or death. (SDCL 62-7-10). Notice need not be in any particular form but must advise employer when, where and how injury occurred. (SDCL 62-7-10). Employer shall keep signed record of all injuries and give copy to injured employee. (SDCL 62-6-1). Employer must report occurrence within seven days to Department of Labor or employer's insurer, if injury requires medical treatment or incapacitates employee for seven days. (SDCL 62-6-2). Failure to keep records or report injuries may constitute misdemeanor. (SDCL 62-6-1, 2). Employer or insurer must investigate and notify claimant within

20 days if coverage denied and reasons therefor. (SDCL 62-6-3).

Claim for Compensation.

Right to compensation barred unless written request for hearing filed within two years after written notice to employee and Department that coverage denied in whole or in part. (SDCL 62-7-35). Right to compensation barred if no medical treatment obtained within seven years after employee files first report of injury. (SDCL 62-7-35.3). Any employer, employee, or beneficiary may petition to have compensation except death benefits paid in lump sum which Director may allow upon proper showing by petitioner. (SDCL 62-7-6). Amount paid shall equal total sum of probable future payments capitalized at present value on basis of interest set by Department. (SDCL 62-7-6).

Defenses.

Employer has defenses of employee’s willful misconduct, intoxication, illegal use of certain drugs, willful failure to use safety appliance, and false representation as to physical condition or health in procuring employment. (SDCL 62-4-37, 46).

Hearing on Claim.

If the parties fail to agree, either may request a hearing (SDCL 62-7-12), which Secretary conducts on notice to parties, usually in community where injury occurred (SDCL 62-7-13). Decision is filed and served on parties by mail. (SDCL 62-7-13). Small claims procedure established for medical expense claims not exceeding $8,000. (SDCL 62-2-12 to 22).

Compensation rates are based on average earnings, with detailed provisions for computation thereof. (SDCL 62-4-3; SDCL 62-4-10; SDCL 62-4-24 to 30).

Rates of Compensation for Death.

Subject to exceptions hereinafter stated, these are: (1) if employee leaves spouse, child, or children, compensation paid for life at same rate as for compensation for injury not resulting in death but if spouse remarries, two years benefits paid spouse in lump sum; and in case of children spouse paid until children reach 18 or for life if children unable to support themselves or until children reach 22 if children are full-time students. (SDCL 62-4-12). If employee leaves child or children under 18, there is also paid $50 per month for each child until such child reaches 18. (SDCL 62-4-13). (2) If no amount is payable under (1), and employee leaves any parent, grandparent or minor brothers or sisters, dependent on him for support, such percentage of amount payable under (1) as average annual contributions of employee to such dependents bear to his earnings for two years preceding injury. (SDCL 62-4-14). (3) If no amount is payable under (1) or (2), and if employee leaves collateral heirs, dependent on employee’s earnings, such percentage of sum payable under (1) as average annual contributions of employee to such support during the two years preceding injury bear to his total earnings during such two years. (SDCL 62-4-15). (4) Not exceeding $7,500 plus transportation of body from foreign state, for burial expense. (SDCL 62-4-16). All compensation must be paid in installments equal to two-thirds of average earnings at intervals when wages were paid, at which time benefits for children under 18 are paid, or weekly. (SDCL 62-4-17). No compensation for death is payable to surviving spouse or dependent who was nonresident of U.S. at time of death or to surviving spouse unless surviving spouse, at time of death, was living with deceased employee, or dependent upon deceased employee for support, or was living apart for justifiable cause or desertion of deceased employee. (SDCL 62-4-21). Should dependent of deceased employee die, right of dependent to compensation ceases, but if surviving spouse dies or remarries while receiving such compensation, that compensation shall be payable to surviving children of deceased employee. (SDCL 62-4-22). Employer has option to pay compensation to personal representative or beneficiaries, but amount paid shall not be less than $500. (SDCL 62-4-8). With consent of Secretary of Labor, employer may pay compensation for minor children to spouse without appointment of guardian. (SDCL 62-4-20).

Rates of Compensation for Injury.

These are: (1) Necessary first aid, medical, surgical, and hospital services, or other suitable and proper care, during disability or treatment of employee, subject to fee schedule established by Department of Labor. (SDCL 62-4-1; SDCL 62-7-8). (2) For temporary total disability, amount of compensation shall be 662/3% of employee’s earnings, but not more than 100% computed to next higher multiple of $1, of average weekly wage in state and not less than one-half of foregoing percentages of average weekly wage of state, except when amount earned is less than 50% of minimum amount per week, in which case compensation shall be average weekly wage earned not to exceed net earnings after any deduction for federal or state taxes or FICA. (SDCL 62-4-3). No compensation paid unless there is seven consecutive days incapacity, and once waiting period is met benefits are computed from date of injury. (SDCL 62-4-2). (3) For temporary partial incapacity one-half difference between average earnings before accident, and average amount employee earns or is able to earn in suitable employment after accident. In no event may total amount received in wages and disability be less than amount employee was receiving for temporary total disability. There must be bona fide job offer employee is physically capable of performing to reduce benefits to temporary partial disability. (SDCL 62-4-5). (4) For various specific injuries (loss of arms, eyes, legs, hearing, injuries to back, etc.), and in addition to compensation during temporary total incapacity for work, and subject to limitations hereinafter stated, varying amounts based on weekly earnings, and grading from ten weeks compensation for loss of toe to 662/3% of average weekly wage for 312 weeks for injury to back, and with several injuries, such as loss of both hands, or both feet, classed as complete and permanent disability. (SDCL 62-4-6). For permanent disability or disfigurement resulting from injury to any part of body not listed in schedule, compensation paid for that portion of 312 weeks which is represented by percentage that such disability bears to body as whole. (SDCL 62-4-6). If employee dies from causes other than injury before full payment of installments, employer must pay balance to employee’s dependents. (SDCL 62-4-8). Permanent partial disability based upon AMA Guides to Evaluation of Permanent Impairment, Fourth Edition. (SDCL 62-1-1.2). (5) For complete disability which renders employee wholly and permanently incapable of work, compensation shall be paid at same rate as for temporary total disability for life, with annual increase geared to change in consumer price index. (SDCL 62-4-7). For injuries occurring on or after July 1, 1993, permanent total disability benefits for employee who is subsequently entitled to Social Security retirement benefits must be 150% of disability rate less retirement benefit. (SDCL 62-4-7). Permanent total disability cases reviewed not less than every five years. (SDCL 62-7-33). Employee entitled to compensation up to 60 days from finding of ascertainable loss if employee is actively preparing to engage in program of rehabilitation as shown by certificate of enrollment. (SDCL 62-4-5.1).

Secretary may allow lump sum settlement with total sum capitalized at present value on basis interest set by department rule with annual rests. (SDCL 62-7-6). Temporary disability, total or partial, continues until employee attains complete recovery or until loss becomes ascertainable which occurs when injured area will get no better or worse because of injury. (SDCL 62-1-1).

Appeals.

Any employer or employee may appeal to circuit court from any final order or decision of Secretary in accordance with regular administrative procedure and rules and appeals from administrative agencies. All intermediate orders or decisions affecting substantial rights may be reviewed. (1-26; 21-23; SDCL 62-7-19).

Enforcement of Awards.

After expiration of time for appeal, either party may present to circuit court of county where injury occurred, copy of approved memorandum or certified copy of any portion of order or judgment, which court then renders judgment in accord therewith, enforceable like other judgments. (SDCL 62-7-31).

Occupational Diseases.

Subject covered by South Dakota Workmen's Occupational Disease Liability Law. (62-8). Employee's remedies thereunder are exclusive. (SDCL 62-8-6). Compensation is payable when by occupational disease employee is disabled from working in last occupation in which he was last injuriously exposed to such disease, or dies as result of such disease. (SDCL 62-8-4). "Occupational disease" is defined as disease peculiar to employee's occupation and due to causes in excess of ordinary hazards of employment and includes any disease due or attributable to exposure to or contact with radioactive material in course of employment. (SDCL 62-8-1). No claim based on silicosis shall be maintained unless there was exposure of not less than two years in this state, but if employed by same employer during whole two-year period, his right to compensation not affected by having been employed part of period outside state. (SDCL 62-8-14). Liability is on employer in whose employment employee was last injuriously exposed. (SDCL 62-8-15). Compensation is based on average weekly wages as provided in Worker's Compensation Law. (SDCL 62-8-15). Notice and claim are required analogous to those under Worker's Compensation Law. (SDCL 62-8-13). Maximum limitations of compensation for disability or death are same as limits of Worker's Compensation Law. (SDCL 62-8-16). Compensation is barred when disability or death is wholly or in part caused by employee's willful misconduct, self-exposure, or disobedience of reasonable regulations that have been and are kept posted in conspicuous places or otherwise brought to attention of employee. (SDCL 62-8-22). Willful self-exposure is presumed from various enumerated acts, these including failure to give employer truthful information as to past history. (SDCL 62-8-23). Secretary may contract with physicians for reports on controversial questions. (SDCL 62-8-40.1). No compensation is payable for occupational disease if compensation is payable under Worker's Compensation Law. (SDCL 62-8-47).

Reciprocity.

Where another state recognizes worker's compensation coverage of South Dakota law as meeting requirements under laws of that state, reciprocity shall be granted worker's compensation coverage pursuant to foreign law in South Dakota. (SDCL 62-3-14).

Unemployment Compensation.

No individual entitled to benefits unless his base period wages in other than his highest quarter equal or exceed 20 times his weekly benefit amount and unless wages for insured work in quarter of highest earnings in base period equal or exceed $728. (SDCL 61-6-7). Applicant must be able and available for work; have made proper claim; registered for work at state employment office and reported there regularly; and waiting period of one calendar week must have elapsed during which no wages are paid to him and if he worked less than one week, wages must have been less than one and one-half times his weekly benefit amount. (SDCL 61-1-36; SDCL 61-6-2). Unemployed individual who has left his employment, such being at least 30 calendar days in duration, voluntarily without good cause shall be denied benefits until he has been reemployed six calendar weeks during his current benefit year and earned wages of not less than his weekly benefit amount in each of those six weeks. (SDCL 61-6-13, 14, 15). Weekly benefits are computed at 1/26 of wages paid in quarter of highest earnings but not to exceed amount determined annually by Department of Labor. (SDCL 61-6-6). Trade readjustment payments may allow individual to receive benefits in excess of 26 weeks. (SDCL 61-6-8). Average weekly wage computed by dividing sum of total wages by average number of workers in covered employment and dividing result by 52. (SDCL 61-6-6). Provisions made for federal supplemental unemployment insurance benefits. (61-6). Employer's reserve ratio for 1991 and thereafter obtained by dividing balance of credits in account by total taxable payroll of employer for preceding three years. (61-5). Benefits not payable or reduced for week in which other compensation received such as severance payments, temporary disability under worker's compensation law, or for retirement from any source contributed to by employer. If remuneration is less than benefits due under unemployment compensation, employee shall receive benefits reduced by amount of remuneration. (SDCL 61-6-20).

Unemployment Coverage.

Employment includes service performed by individuals in employ of state, or its instrumentalities, in hospital or institution of higher education; service performed by individual in employ of state and instrumentality wholly owned by state and other states; and service performed by individual in employ of political subdivision of state or any instrumentality wholly owned by this state and other states, provided all above listed services are excluded from Federal Employment Tax Act. (SDCL 61-1-10.2). Act covers employment with religious, charitable, educational or other organizations under certain conditions. (SDCL 61-1-10.3). Employment includes service of U.S. citizen in employ of American employer performed outside of U.S., except Canada, if employer's principal place of business is located in this state (SDCL 61-1-10.5); and seamen on American ships if operations of vessel controlled within state (SDCL 61-1-10.9). Benefits are paid for temporary disability including pregnancy (SDCL 61-6-3); agricultural labor is covered provided service performed for person who pays $20,000 to employees in any calendar quarter, hires more than ten individuals, and employee is member of crew (SDCL 61-1-24). Domestic servants covered provided service performed for person who paid $1,000 or more in calendar year to individuals employed in private homes, local college clubs, or college fraternities and sororities. (SDCL 61-1-27). Extended benefits granted to exhaustees. (SDCL 61-6-37).

Exempt from coverage are employees of churches, certain schools, certain governmental entities, impaired individuals in rehabilitation facility, employees of work-relief or work-training programs, and inmates (SDCL 61-1-10.4); incidental and student employment by mutual, cooperative, and nonprofit organization if remuneration does not exceed $50, together with other restrictions (SDCL 61-1-22); student nurses, interns, and hospital patients (SDCL 61-1-23); newsboys (SDCL 61-1-26); insurance agents (SDCL 61-1-28); service performed by individual in employ of his children or by child under 21 in employ of parents (SDCL 61-1-30).

11.03 WORKERS' COMPENSATION LAW:

See topic 11.01 Labor Relations.

12 ENVIRONMENT

12.01 ENVIRONMENTAL REGULATION:

General supervision is by Secretary of and Department of Environment and Natural Resources and by Water Management Board and Board of Minerals and Environment, Pierre, S.D. 57501. (34A-1; 34A-2).

Prohibited Acts of Pollution.

Board of Minerals and Environment empowered to adopt rules to establish ambient air quality standards for state, including specific air quality standards for hydrogen sulfide for application to livestock facilities. (SDCL 34A-1-15). Unlawful to cause pollution of any waters of state, or to place or cause to be placed any wastes in location where they are likely to cause pollution of any waters of state. Unlawful to discharge any wastes into any waters of state which reduce quality of such waters below standards set by federal government pursuant to Federal Water Pollution Control Act as amended Jan. 1993 (SDCL 34A-2-13), but under guidelines Water Management Board can grant five year permit. (SDCL 34A-2-1 thru SDCL 34A-2-125). Also unlawful to locate concentrated animal feeding operation that includes number of animals equal to or greater than 1,000 animal units over shallow aquifer without permit from Secretary. (SDCL 34A-3A-24). Board may by rule prohibit installation or use of any machine which may cause or contribute to air pollution, without permit. (SDCL 34A-1-21). Unlawful to dispose of solid waste except in compliance with stringent disposal laws. (34A-6). Discharge of regulated substance prohibited. (SDCL 34A-12-8). Broad definition given to phrase “regulated substance”. (SDCL 34A-12-1).

Enforcement.

Board has authority to enforce water pollution control standards. (SDCL 34A-2-65; SDCL 34A-2-75; SDCL 34A-2-93). Board investigates alleged water pollution on application of any person, association, corporation or agency of state or federal government. (SDCL 34A-2-47). Every municipality also has power to prevent pollution of its water supply within one mile of its limits. (SDCL 9-32-8).

Board has authority to enforce provisions as to air pollution control. (SDCL 34A-1-5). Local governments may also establish air pollution control programs for emission control and open burning requirements, no less stringent than most restrictive requirements fixed by Board. (SDCL 34A-1-36). Board may investigate alleged air pollution on its own initiative. (SDCL 34A-1-40). Board may inspect premises of air contaminant source (SDCL 34A-1-41); hold hearings, compel attendance of witnesses (SDCL 34A-1-43); and issue and enforce its orders (SDCL 34A-1-44). Board’s orders are subject to judicial review (SDCL 1-26-30.2); and private remedies for damages to person or property are unabridged (SDCL 34A-1-54). Action for declaratory and equitable relief may be brought in civil court by any person for protection of air, water or other natural resources. (SDCL 34A-10-1).

Board has similar authority to enforce waste disposal laws and rules. (SDCL 34A-6-1.34).

Department empowered to order corrective actions. Injunctive relief allowed. (SDCL 34A-12-10). Persons who cause discharge of regulated substance strictly liable for corrective action costs expended by Department. (SDCL 34A-12-12).

Penalties.

Violation of water pollution laws or rules is punishable as class 1 misdemeanor (SDCL 34A-2-75), with up to one year in jail (SDCL 22-6-2), and fine or civil penalty of up to $10,000 per day of violation (SDCL 34A-2-75). Violator of air pollution laws or rules is subject to civil penalty of up to $10,000 per day. (SDCL 34A-1-39).Violator of solid waste disposal laws or rules is subject to civil penalty of up to $10,000 per day, and up to 30 days in jail. (SDCL 34A-6-1.4). Corrective action costs shall constitute lien on all property owned by responsible person. (SDCL 34A-12-13).

Permits required to discharge pollution in waters (SDCL 34A-2-27); to operate certain concentrated animal feeding operations (SDCL 34A-2-36.2); to locate certain concentrated animal feeding operations over shallow aquifers (SDCL 34A-3A-24); to install, alter or use machine which causes or contributes to air pollution or is intended to control pollutants (SDCL 34A-1-21, SDCL 34A-1-56); or to install, modify, operate or abandon solid waste facility (SDCL 34A-6-1.13). Applications for variance from air pollution requirements may be granted by Board, for limited periods. (SDCL 34A-1-24 to 34).

Annual fee imposed on all concentrated animal feeding operations that are required to operate under general or individual pollution control permit. (SDCL 34A-2-125). Ethanol production plants are subject to application and annual fees set forth in SDCL 34A-1-58.1.

13 ESTATES AND TRUSTS

13.01 ADMINISTRATION:

See topic 13.08 Executors and Administrators.

13.0213.04 [RESERVED]

13.05 DEATH:

Presumption of Death Arising from Absence.

If any person upon whose life any estate or interest in property depends remains without U.S. or absents himself for seven years together, such person must be accounted naturally dead in any proceeding concerning such property unless sufficient proof be made that he is living. (SDCL 21-44-17). Absentee who has not been seen or heard from for continuous period of five years is presumed dead. (SDCL 29A-1-107[5]). In other cases it is merely evidence of death. (59 S. D. 17, 238 N.W. 126).

Simultaneous Death Act.

In absence of prima facie evidence of death, fact of death may be established by other competent evidence, including circumstantial evidence. (SDCL 29A-1-107[4]). Heirs must survive decedent for 120 hours. (SDCL 29A-2-702).

Survivorship.

Uniform Simultaneous Death Act repealed in 1995. (29-8).

Action for Death.

The right to such action exists when death is caused by a wrongful act, neglect or default of such character that if death had not ensued party injured would have been entitled to maintain action and recover damages on account of injury. (SDCL 21-5-1). Action for causing death must be brought in name of personal representative of deceased (SDCL 21-5-5) against corporation or person who would have been liable on account of injury if death had not ensued or against personal representative of estate of such person. (SDCL 21-5-1). Action must be brought within three years after death of deceased (SDCL 21-5-3) and is for exclusive benefit of wife or husband and children or if there be neither of them then of parents and next of kin of deceased. (SDCL 21-5-5). Jury in such action may give such damages as they think proportionate to pecuniary injury resulting from such death to persons for whose benefit action is brought. (SDCL 21-5-7). Action lies for wrongful death of unborn child, for exclusive benefit of mother or married parents. (SDCL 21-5-1).

Death Certificate.

See category 10 Documents and Records, topic 10.04 Records, subhead Vital Statistics.

Revised Uniform Anatomical Gift Act adopted. (SDCL 34-26-48 to 72).

Survival of Actions.

See category 5 Civil Actions and Procedure, topic 5.02 Actions.

Living Wills.

See topic 13.16 Wills.

13.06 [RESERVED]

13.07 DESCENT AND DISTRIBUTION:

Uniform Probate Code with 1991 amendments adopted at SDCL Title 29A. See topic 13.08 Executors and Administrators.

Adopted Children.

See category 14 Family, topic 14.01 Adoption.

Renunciation.

Anyone entitled to receive property by will, inheritance, as surviving joint tenant or under inter vivos trust or other lifetime transfer may disclaim all or any part of such property. (SDCL 29A-2-801[a]). Time limit for written disclaimer nine months after decedent's death (SDCL 29A-2-801[b], [c] and [d]), nine months after day on which transfer creating present interest in donee was made (SDCL 29A-2-801[e]), or nine months after event determining that taker of future interest is finally ascertained (SDCL 29A-2-801[e]). Time for making disclaimer shall not expire until nine months after day on which person entitled to make disclaimer attains age of 21. (SDCL 29A-2-801[f]). Timely filed disclaimer may be revoked under certain circumstances. (355 N.W.2d 13).

Personal Property.

May be passed by separate written list (SDCL 29A-2-513) or collected by affidavit where total value does not exceed $50,000 and 30 days have elapsed since death of decedent. (SDCL 29A-3-1201).

Real Property.

Deed of distribution required. (SDCL 29A-3-907).

Escheat.

If person cannot be found, missing person's share shall be distributed to person's conservator, if any, otherwise person's share vests in State by court order. Missing person may initiate claim in court within ten years from date of order. (SDCL 29A-3-914).

Uniform Simultaneous Death Act repealed (1995). (29-8).

13.07A ESTATES: (in property)

See category 21 Property, topic 21.16 Real Property.

13.0813.09 [RESERVED]

13.10 EXECUTORS AND ADMINISTRATORS:

Jurisdiction of administration of decedents' estates is in circuit court. (SDCL 16-6-9).

Uniform Probate Code with 1991 amendments adopted with modifications effective 7-1-95. (Title 29A).

Material Variances from Uniform Probate Code.

§ 1-201. Minor definitional differences.

§ 1-302. Omitted.

§§ 1-303 and 1-305. Revised to comply with South Dakota's Guardianship and

Conservatorship Act. (SDCL 29A-5-101 to 118).

§ 1-308. Omitted.

§ 1-309. Omitted.

§ 1-401. Requires copy of petition be given with any notice of hearing. Notice must be given to any interested party or person's attorney by mail or personally or in legal newspaper if address of any person cannot be ascertained with reasonable diligence.

§ 1-403. Omitted.

§ 2-101. Intestate estate determined only after deducting any family allowance, exempt property, homestead, or elective share.

§ 2-102. Increases surviving spouse's share to 100% of intestate estate unless decedent was survived by descendants of another relationship, if so, surviving spouse takes first $100,000, plus half balance of intestate estate. No reference to parents of descendant.

§ 2-104. No requirement that survivorship be proven by clear and convincing evidence.

§ 2-106. South Dakota follows "per stirpes" system of representation, not "per capita at each generation" system of UPC.

§ 2-109. Writing manifesting intent to make advancement need not be contemporaneous with gift.

§ 2-114. Uses South Dakota law regarding establishment of identity of mother and father of individual born out of wedlock. Mother's identity is established by birth. Father's identity may be established by (1) subsequent marriage of parents, (2) written acknowledgement by father, (3) judicial determination of paternity, or (4) presentation of clear and convincing proof in proceeding to settle father's estate. Expands adoption provisions to cover adoption by relatives of birth parents.

§ 2-209. Transfers made at death to spouse, whether in trust or otherwise, are charged against spouse's elective share amount. Spouse cannot disclaim, and later take elective share outright.

§ 2-211. Spouse must file for elective share within nine months after decedent's death, or within four months after administration of will, whichever is longer.

§ 2-212. Right of election defined as property right, exercisable by surviving spouse or surviving spouse's conservator, agent, or should spouse fail to survive election period, by spouse's personal representative. South Dakota deletes any reference to "statutory trust".

§ 2-301. UPC provision limiting surviving spouse's election to that portion of estate not passing to decedent's descendants deleted. Spouse entitled to full intestate share in most cases.

§§ 2-401 to 2-403. South Dakota homestead law does not correspond to UPC. Homestead and exempt property determined under Tit. 43. See topic Homesteads.

§ 2-502. Requires "conscious presence" on part of testator in regard to witnessing of will.

§ 2-603. South Dakota Probate Code addresses only core antilapse issues, leaving more difficult issues to resolution of courts.

§ 2-604. Any residue which fails to pass under will passes by intestate succession.

§ 2-606. Presumption against ademption eliminated. Any specifically devised property not in estate at decedent's death is presumed to have adeemed.

§ 2-609. No requirement that writing be contemporaneous with gift to express intention to adeem.

§ 2-702. No requirement that survivorship by 120 hours be proven by clear and convincing evidence.

§ 2-705. Subsections (b) and (c) of UPC eliminated.

§ 2-706. Omitted.

§ 2-707. Revised for compatibility with South Dakota's version of UPC 2-603.

§ 2-709. Rule of construction provides presumption of per stirpital distribution.

§ 2-801. South Dakota Disclaimer Law differs substantially from UPC. See topic 13.06 Descent and Distribution, subhead Renunciation.

§ 2-802. UPC subsection (b) not adopted.

§ 3-105. South Dakota has no special probate court. Circuit court has broad jurisdiction to resolve all title disputes.

§ 3-108. No formal testacy proceedings can be brought more than three years after death of decedent for purpose of validating exercise of testamentary power of appointment if informal probate has occurred within three years of decedent's death.

§ 3-109. Statute of limitations on cause of action belonging to decedent only suspended for one year following decedent's death.

§ 3-203. Subsection (a)(6) revised to eliminate sixth class preference for creditors. Subsection (c) specifies that concurrence in nomination by those sharing equal priority is required only in informal proceedings. Subsection (f) provides that minimum age for appointment as personal representative is 18. Subsection (f) states that banks or trust companies must be qualified to do trust business in state in order to be appointed.

§ 3-204. Person demanding notice must mail copy of such demand to personal representative.

§ 3-301. Application for informal probate must include decedent's name, social security number, birthdate, date of death, county and state of domicile at time of death, and names and addresses of heirs and devisees, as well as ages of any heirs or devisees who are minors. Application for informal probate must include statement that applicant is unaware of any other testamentary instrument relating to property in estate. Application for appointment as administrator must include name and address of proposed appointee.

§ 3-304. Omitted.

§ 3-306. Revised to reduce time for providing written information from 30 to 14 days.

§ 3-308. Clerk must determine whether notice was given pursuant to § 3-310.

§§ 3-312 to 3-322. Omitted.

§ 3-402. Specific provisions added regarding lost wills.

§ 3-403. Eliminates provisions regarding search for alleged decedents.

§ 3-405. Affidavit of self proof executed in compliance with § 2-504 sufficient.

§ 3-412. Formal testacy order final only as to persons properly notified of proceeding.

§ 3-413. Omitted.

§ 3-414. Revised for consistency with § 29A-3-401.

§ 3-603. Bond requirements completely different from UPC. Bond required unless (1) waived by will, (2) all heirs or devisees file written waiver, (3) personal representative is bank or trust company, or (4) court concludes bond is not in best interests of estate.

§ 3-605. Omitted.

§ 3-607. Court has discretion in setting date and notice requirements for restraining orders.

§ 3-609. Presence of co-representative relieves duty of conservator of incapacitated personal representative, or personal representative of deceased personal representative, from taking over duties of administering estate.

§ 3-610. Written notice of resignation must be given 14 days in advance.

§ 3-613. Omits language regarding duties of successor representative. Duties moved to § 29A-3-716.

§ 3-702. All representatives may recover property if letters later issued in error to another.

§ 3-703. References to Art. 7 omitted. Personal representative to act in best interest of estate, not for interests of successors to estate.

§ 3-705. Information on appointment must be given within 14 instead of 30 days. Information must include copy of will and inform heirs and devisees of right to demand notice under § 29A-3-204.

§ 3-706. Inventory of property due within six months after appointment, or nine months after decedent's death, whichever is later.

§ 3-708. Supplemental inventory must be mailed to all persons sent copy of original inventory and to any other interested persons who so request.

§ 3-715. Personal representative must act for benefit of estate, and not for benefit of interested persons; substitutes trustee investment standard found in SDCL c. 55-5; omits limitations found in §(a)(24) regarding authority of personal representative to continue decedent's unincorporated business; adds section requiring notice 14 days prior to sale of piece of property whose value in not readily ascertainable.

§ 3-716. Includes additional language limiting liability of successor personal representative.

§ 3-717. Majority rules for actions by co-representatives.

§ 3-719. Details factors considered in determination of reasonable compensation for personal representatives, attorneys, accountants, appraisers and other agents.

§ 3-720. Empowers court to award fees to any person who prosecuted or defended action that resulted in substantial benefit to estate.

§ 3-801. Requires written notice to creditors with specified exceptions where creditor has presented claim, has been paid in full, or was neither known nor reasonably ascertainable.

§ 3-802. Two year suspension of statute of limitations.

§ 3-803. Extends self-executing statute from one to three years following decedent's death. Eliminates claim bar on claims arising after death.

§ 3-804. Claimant must both file with clerk, and deliver copy to personal representative.

§ 3-805. No preference given for medical and hospital expenses.

§ 3-808. Personal representative not liable on contract if representative either reveals his representative capacity or identifies estate in contract.

§ 3-902. Abatement procedures simplified but § 3-902(a) is basically followed.

§ 3-903. Right of retainer may be overridden by contrary provision in will.

§ 3-906. Personal representative entitled to ascertain value of assets in any reasonable manner. No detailed provisions outlined.

§ 3-913. Omitted.

§ 3-914. Escheat law extends until ten years right to claim against property vested in state.

§ 3-915. Conforms to State Guardianship and Conservatorship Act provisions for distributions to minors.

§ 3-1001. Subsection (a) rewritten. Petition by personal representative only after four months from appointment. Certain specific provisions required in petition. Accounting may be waived in writing. Order is conclusive as to all persons receiving notice unless reversed, modified or set aside on appeal.

§ 3-1002. Omitted.

§ 3-1003. Estate can be closed within four months instead of six. Closing statement must indicate notice to creditors was properly given. Upon consent of interested persons, any accounting required can be waived.

§ 3-1102. Parents can only act for minor child if there is no conflict of interest. Court can only approve compromise if it finds actual contest or controversy exists and that effect of agreement upon interested persons represented by fiduciaries is just and reasonable.

§ 3-1201. Estate can be valued at up to $50,000.

§ 3-1202. Affiant responsible for proper distribution of property received. Affiant also submits personally to jurisdiction of courts.

§§ 3-1203 to 3-1204. Omitted.

§ 4-204. Will not effective to prove transfer of any property unless admitted to probate in local proceeding. Banks or trust companies shall not have authority to act unless qualified to do trust business in state.

§ 4-303. Omits provision on service of foreign personal representatives, referring to § 29A-1-401 for provisions on notice.

Art. V. State Guardianship and Conservatorship Act substantially different. See category 14 Family, topic 14.07 Guardian and Ward. Power of attorney provisions generally follow standard agency law. (SDCL 59-7-1 to SDCL 59-7-9).

Art. VI. South Dakota adopted pre-1989 Art. VI and note that UPC 6-110 is renumbered as SDCL 29A-6-114. UPC § 6-201 was omitted. Part 3 of 1989 Act—Uniform TOD Security Registration Act.

Art. VII. Omitted.

Provisions of SDCL 55-3-24 to SDCL 55-3-44 are applicable to actions or proceedings relating to estates supervised or administered under Title 29A.

When Administration Unnecessary.

When gross value of entire estate does not exceed $50,000 it may be delivered to certain creditors, heirs or legatees upon affidavit. (SDCL 29A-3-1201).

Small Estates.

See subhead When Administration Unnecessary, supra.

Foreign executors or administrators may release, discharge or assign mortgages and judgments belonging to estate and execute deeds to convey real estate in performance of contracts for sale entered into before creation of estate if no fiduciary has been appointed and qualified in this state, without court order. (SDCL 55-5A-1). Certificate of court or clerk making appointment of foreign fiduciary stating that appointment is still in effect must be attached to instrument. (SDCL 55-5A-2).

Apportionment of Federal Estate Tax.

See category 22 Taxation, topic 22.06 Estate Tax, subhead Apportionment of Federal Estate Tax.

Uniform Fiduciaries Act adopted (55-7) but § 3 repealed.

Revised Uniform Principal and Income Act adopted. (55-13).

Uniform Act for the Simplification of Fiduciary Security Transfers adopted. (55-8).

Revised Uniform Anatomical Gift Act adopted. (34-26-48).

13.1113.14 [RESERVED]

13.15 TRUSTS:

Uniform Trusts Act adopted. (55-4).

Kinds.

Trusts are classified as express or implied, with express trust obligation arising out of personal confidence reposed in and voluntarily accepted by one for benefit of another and implied trust as one created by operation of law. (SDCL 55-1-2, 3, 6).

Creation.

Subject to restrictions as to real property, express trust is treated as to trustor and beneficiary by words or acts of trustor indicating with reasonable certainty his intention to create trust, and subject, purpose, and beneficiary thereof, while as to trustee it is created by his words or acts indicating with reasonable certainty his acceptance or his acknowledgement, upon sufficient consideration, of its existence, and subject, purpose and beneficiary thereof. (SDCL 55-1-4). An express trust as to real estate is valid only if established by written instrument subscribed by trustee or his authorized agent, or created by instrument by which trustee claims estate, or by operation of law. (SDCL 43-10-4). An implied trust arises in these cases: (1) One wrongfully detaining a thing is implied trustee thereof for benefit of owner. (2) One who gains a thing by fraud, accident, mistake, undue influence, violation of a trust, or other wrongful act is, absent other or better right thereto, implied trustee thereof for benefit of person who would otherwise have had it. (3) One to whom property is transferred in violation of trust is implied trustee under such trust, unless he purchased it in good faith and for valuable consideration. (4) When real property transfer is to one person and consideration paid by or for another, a trust is presumed in favor of person by or for whom such payment is made. (SDCL 55-1-6 to 10). Such cases, however, are not exclusive, and court of equity may in other cases establish and declare implied, resulting or constructive trust, this in accord with equitable principles. (SDCL 55-1-11).

Jurisdiction.

Circuit court has jurisdiction to supervise and administer such trust property under rules of practice established by Supreme Court. (SDCL 21-22-1 et seq.). Such jurisdiction is exercised in summary way, with simple procedure. If trust is established by judgment, decree or order of court of record (South Dakota or otherwise), and if any of trust estate is in South Dakota or if trustee or beneficiary resides in state, and except in such cases as assignments for benefit of creditors, probate proceedings, etc., where specific provision for court supervision is made, trustee must submit to court supervision, this by filing inventory, and other designated papers, this in county where trust estate or some part thereof has its situs, or if none of property has situs in South Dakota, then in county where beneficiary resides, and if no beneficiary resides in state, then in county where trustee resides. (SDCL 21-22-2, 3, 5). Trustee, trustor (if living) or any beneficiary may petition court to protect privacy of trust, inventory, reports and all petitions and court orders. (SDCL 21-22-28). At any time thereafter, further court supervision may be dispensed with if court finds supervision impractical or unnecessary, unless some interested party demands it continue. (SDCL 21-22-7). As to any trust other than one established by such judgment decree or order, trustee or any beneficiary may invoke court supervision at any time, same to be discontinued in like manner to that applying to trustees under such judgment, decree or order. (SDCL 21-22-9).

Appointment of Trustee.

When necessary, this may be made by court. (SDCL 21-22-12).

Eligibility and Competency.

Common law rules prevail. Foreign and corporate trustees eligible for appointment.

Qualification.

Absent controlling provisions to contrary in trust agreement, bond required. Even when trust agreement exempts trustee from bond, Court may require bond with sureties for faithful performance and proper accounting. (SDCL 21-22-10, 11). No oath of office is prescribed.

Removal of Trustee.

May be removed by court. (SDCL 21-22-26, 55-3-20.1).

General Powers and Duties.

Common law rules form basis. Powers listed in South Dakota Trustees' Powers Act, similar to Uniform Act but with variations, apply to any trust governed by South Dakota law unless trust agreement specifically excludes power. (55-1A).

Sales are regulated for court supervised trusts by 21-23. In substance, it is provided if sale is authorized by trust instrument or otherwise, trustee need not, but may, seek court approval, and if trustee does, and in cases where approval is required, rules are to be followed. Procedure is prescribed in detail, this including application, order for hearing, notice, report of sale, confirmation, etc.

Investments.

By SDCL 55-5-6 through 14, in investment of trust funds fiduciary is to exercise reasonable care, skill, and caution not in isolation but in context of whole trust portfolio and overall investment strategy considering risk and return objectives reasonably suitable to trust. Trustee or beneficiary may, however, seek advance direction from court. (SDCL 21-22-13). Investment trust advisor may be named by grantor. (SDCL 55-1B-9, 10).

Certificate of Trust.

Grantor or trustee may execute certificate of trust setting forth less than all trust provisions for purpose of selling, conveying, pledging, mortgaging, leasing or transferring title to any real or personal property. Certificate shall include (1) name of trust, if one is given; (2) date of trust instrument; (3) name of each grantor; (4) name of each original trustee; (5) name and address of each trustee empowered to act at time of certificate; (6) statement "the trustees are empowered by the provisions of the trust to sell, convey, pledge, mortgage, lease, or transfer title to any interest in personal property, or real property held in trust" and requisite number of trustees required to execute and deliver such instrument; (7) any other trust provisions grantors or trustees include; (8) statement as to whether trust has been terminated or revoked; and (9) statement that trust is not court supervised or that trust is court supervised and all necessary approval obtained to allow trustee to act under instrument. (SDCL 55-4-42). Certificate may be recorded in real estate records. When recorded or presented, certificate serves to document trust existence, identity of trustees, trustees' powers and other matters contained in certificate. Until certificate amended or revoked or full trust instrument recorded or preserved, certificate is conclusive proof of matters therein and any part may rely on its continued effectiveness unless have actual knowledge to contrary. (SDCL 55-4-43).

Certificates of trust for purposes other than set forth in 55-4-43 may be executed by trustee and include: (1) trust existence and date of execution; (2) identity of settlor; (3) identity and address of current trustee; (4) powers of trustee; (5) whether trust is revocable or irrevocable and identity of person holding power to revoke; (6) authority of cotrustees to sign and whether all or less than all required; and (7) manner of taking title to property. Certificate must state that trust has not been revoked, modified, or amended to cause certification to be incorrect. (SDCL 55-4-51). Recipient of certificate may require of trustee excerpts of trust instrument dealing with trustee power to act in pending transaction. (SDCL 55-4-52).

Securities in Name of Nominee.

Statute allows trustee to hold securities in name of nominee. (SDCL 55-4-9).

Devises to Inter Vivos Trusts.

Uniform Testamentary Additions to Trusts Act adopted. (SDCL 29A-2-511).

Accounting.

If under court supervision, the trustee must account annually and also on final distribution, with notice of hearing as determined by court. (SDCL 21-22-14 to 25).

Compensation.

Provisions of trust instrument control, and if there are no such provisions, compensation is such as may be reasonable in circumstances. (SDCL 55-3-14). If trustee fails to comply with requirements as to administration under court supervision, he may be denied all compensation. (SDCL 21-22-26).

Discharge.

Trustee can be discharged: (a) by extinction or completion of trust: (b) by such means as prescribed in trust instrument; (c) by consent of beneficiary, if beneficiary has capacity to contract; (d) by judgment of competent tribunal that trustee is of unsound mind, or (e) by order of court. (SDCL 55-3-17).

Uniform Common Trust Fund Act adopted (55-6), with requirement that bank or trust company comply with provisions of code chapter on administration of trust estates, in lieu of § 2 of Uniform Act.

Revised Uniform Principal and Income Act 1997 adopted. For every trust or will created after July 1, 2007, 1997 Act (55-13A) applies, unless document expressly provides otherwise. Estates existing on June 30, 2007, and based on wills created prior to July 1, 2007, or trusts existing July 1, 2007, may elect to apply provision of either 1997 Act on Revised 1962 Act (55-13) by providing 60 days written notice to beneficiaries of election. (SDCL 55-13A-602) (SDCL 55-13-18).

Transfers to Minors.

See category 14 Family, topic 14.10 Infants.

Uniform Fiduciaries Act adopted (55-7), except § 3.

Uniform Simplification of Fiduciary Security Transfers Act (55-8) adopted.

Perpetuities.

See category 21 Property, topic 21.11 Perpetuities.

Uniform Testamentary Additions to Trusts Act (SDCL 29A-2-511) adopted.

Act Authorizing Organization and Existence of Business Trusts adopted. (47-14A; 47-14B).

Pour Over Trusts.

Uniform Testamentary Additions to Trusts Act adopted. (SDCL 29A-2-511).

13.16 WILLS:

Articles 1 through 6 of the Uniform Probate Code with Official Amendments of 1984, 1987, 1989 and 1991 adopted with modifications, effective. SDCL 7-1-95. (29A-1 to 29A-4, 29A-6).

Testamentary Disposition.

Every person over age of 18 and of sound mind may make will. (SDCL 29A-2-501). Testator may dispose of property without restriction, subject, however, to spouse's right to elective share and homestead and family allowance. (See subhead Election, infra.) Will may refer to written statement to dispose of tangible personal property. (SDCL 29A-2-513).

Execution.

Will must be in writing, signed by testator or in his name by someone in his conscious presence and at his direction. Will must be signed by two persons who witnessed signing or by testator's acknowledgement of signature. (SDCL 29A-2-502).

Holographic will is will signed by testator and with material portions in testator's handwriting valid without witnesses. (SDCL 29A-2-502).

Nuncupative Wills.

Not recognized.

Revocation.

Will or part of will revoked by subsequent will expressly revoking previous will or part or by inconsistency or by revocatory act (burning, tearing) on will by testator or by his direction. (SDCL 29A-2-507). Divorce or annulment revokes provisions made for former spouse and relatives of former spouse. (SDCL 29A-2-804).

Revival.

If subsequent will that revoked previous will or part of will thereafter revoked, previous will revived if evident from circumstances of revocation or testator's statements intended to revive. (SDCL 29A-2-509).

Testamentary Gifts to Subscribing Witnesses.

Signing of will by interested witness does not invalidate will or any portion of it. (SDCL 29A-2-505).

Devises to Inter Vivos Trusts.

Uniform Testamentary Additions to Trusts Act adopted. (SDCL 29A-2-511).

Testamentary Guardian.

See category 14 Family, topic 14.07 Guardian and Ward.

Anatomical Gifts.

Revised Uniform Anatomical Gift Act (2006) enacted. (34-26).

Probate Jurisdiction.

Circuit court has jurisdiction over estates of decedents and absentees domiciled in state; property of nonresident decedent located in state or coming into control of fiduciary subject to state laws; and multiple bank accounts and other nonprobate and transfers in state. (SDCL 29A-1-301).

Venue.

Probate venue is: (1) In county where decedent was domiciled at time of death or (2) if decedent was not domiciled in state, in any county where property located at time of death. Court of county where first proceeding commenced has exclusive right to proceed unless that court determines venue proper in another court. (SDCL 29A-3-201; SDCL 29A-1-303).

Self-Proved Wills.

Any will may be simultaneously executed, attested, and made self-proved or self proved by separate affidavit. SDCL 29A-2-504 provides alternate forms:

FORM 1

I, ________, the testator, sign my name to this instrument this ______ day of ________, and being first duly sworn, do hereby declare to the undersigned authority that I sign and execute this instrument as my will and that I sign it willingly (or willingly direct another to sign for me), that I execute it as my free and voluntary act for the purposes therein expressed, and that I am eighteen years of age or older, of sound mind, and under no constraint or undue influence.

____

Testator

We, ________, ________, the witnesses, sign our names to this instrument, being first duly sworn, and do hereby declare to the undersigned authority that the testator signs and executes this instrument as [his][her] will and that [he][she] signs it willingly (or willingly directs another to sign for [him][her], that [he][she] executes it as [his][her] free and voluntary act for the purposes therein expressed, and that each of us, in the presence and hearing of the testator, hereby signs this will as witness to the testator's signing, and that to the best of our knowledge the testator is eighteen years of age or older, of sound mind, and under no constraint or undue influence.

____

Witness

____

Witness

The State of ________

County of ________

Subscribed, sworn to and acknowledged before me by ________, the testator, and subscribed and sworn to before me by ________ and ________, witnesses, this ______ day of

________.

(Seal)

(Signed)

____

____

(Official capacity of officer)

FORM 2

The State of ________

County of ________

We, ________, ________, and ________, the testator and the witnesses, respectively, whose names are signed to the attached or foregoing instrument, being first duly sworn, do hereby declare to the undersigned authority that the testator signed and executed the instrument as the testator's will and that [he][she] had signed willingly (or willingly directed another to sign for [him][her], and that [he][she] executed it as [his][her] free and voluntary act for the purposes therein expressed, and that each of the witnesses, in the presence and hearing of the testator, signed the will as witness and that to the best of [his][her] knowledge the testator was at that time eighteen years of age or older, of sound mind, and under no constraint or undue influence.

____

Testator

____

Witness

____

Witness

Subscribed, sworn to and acknowledged before me by ________, the testator, and subscribed and sworn to before me by ________, and ________, witnesses, this ______ day of ________ .

(Seal)

(Signed)

____

____

(Official capacity of officer)

Contest.

Informal probate can be contested by petition to prevent or set aside informal probate.

(SDCL 29A-3-401). In formal probate proceedings, objections must be stated in pleadings. (SDCL 29A-3-404). Claim by any heir or devisee barred three years after decedent's death or one year after distribution. (SDCL 29A-3-1006).

Lapse.

Decedents of (1) grandparent or descendant of grandparent, or (2) stepchild or descendant of stepchild, who die before testator take by representation. (SDCL 29A-2-603). Individual who does not survive event, including death of testator, by 120 hours, is deemed to have predeceased event unless contrary intent in will. (SDCL 29A-2-702).

Legacies.

Personal representative may petition court for order directing distribution at any time after four months from original appointment. Interested person may petition one year after appointment. (SDCL 29A-3-1001). Unless prohibited by court or in supervised administration, may distribute without court approval. Verified statement to close estate informally may be filed no sooner than four months after appointment. (SDCL 29A-3-1003).

Unclaimed Legacies.

See category 21 Property, topic 21.01 Absentees. Uniform Disposition of Unclaimed Property Act repealed effective July 1, 1993. (43-41A). Uniform Unclaimed Property Act effective July 1, 1993. (43-41B). See also topic 13.08 Executors and Administrators.

Apportionment of Federal Estate Tax.

See category 22 Taxation, topic 22.06 Estate Tax, subhead Apportionment of Federal Estate Tax.

Children.

Child born to or adopted by testator after execution of will takes intestate share unless testator (1) mentioned or provided for in will, (2) had no children when will was executed and devised substantially all of his estate to other parent of omitted child, or (3) provided for omitted child by transfer outside will and intent shows intended in lieu of testamental disposition. Omitted child born or adopted when testator makes will not protected. (SDCL 29A-2-302).

Disclaimer.

Right preserved to be exercised not later than nine months after death of testator or intestate. Beneficiary's personal representative may exercise right of disclaimer. (SDCL 29A-2-801).

Election.

Uniform Probate Code as revised in 1993 adopted with these exceptions: (1) spouse cannot disclaim property arrangements made by decedent for spouse's benefit and elect to take elective share outright. Transfers made by decedent for spouse are charged against elective share amount (SDCL 29A-2-209), (2) election to be filed within nine months of death or four months after admission to either informal or formal probate of will, whichever limitation later expires (SDCL 29A-2-211), (3) election may be made by surviving spouse or conservator, agent, or personal representative of surviving spouse (SDCL 29A-2-212).

Foreign Executed Wills.

Will valid if execution complies with law at time of execution of place where executed or law of place where testator domiciled. (SDCL 29A-2-506).

Foreign Probated Wills.

See topic 13.08 Executors and Administrators.

Testamentary Trusts.

See topic 13.11 Trusts.

Simultaneous Death.

See topic 13.02 Death.

Uniform Anatomical Gift Act adopted. (34-26).

Living Wills.

Withholding or withdrawal of life-sustaining treatment may be authorized by written declaration. (34-12D). Declarant must be competent adult. Declaration must be signed by declarant or another at his direction and witnessed by two adults. If declarant does not state preference with respect to artificial nutrition and hydration, such support will not be withheld or withdrawn.

SAMPLE FORM

A declaration may, but need not, be in the following form:

LIVING WILL DECLARATION

This is an important legal document. A living will directs the medical treatment you are to receive in the event you are in a terminal condition and are unable to participate in your own medical decisions. This living will may state what kind of treatment you want or do not want to receive.

Prepare this living will carefully. If you use this form, read it completely. You may want to seek professional help to make sure the form does what you intend and is completed without mistakes.

This living will remains valid and in effect until and unless you revoke it. Review this living will periodically to make sure it continues to reflect your wishes. You may amend or revoke this living will at any time by notifying your physician and other health-care providers. You should give copies of this living will to your family, your physician, and your health care facility. This form is entirely optional. If you choose to use this form, please note that the form provides signature lines for you, the two witnesses whom you have selected, and a notary public.

TO MY FAMILY, HEALTH CARE PROVIDER, AND ALL THOSE CONCERNED WITH MY CARE:

I, _________ direct you to follow my wishes for care if I am in a terminal condition, my death is imminent, and I am unable to communicate my decisions about my medical care.

With respect to any life-sustaining treatment, I direct the following:

(Initial only one of the following options. If you do not agree with any of the following directives, space is provided below for you to write your own instructions).

____ If my death is imminent or I am permanently unconscious, I choose not to prolong my life. If life sustaining treatment has been started, stop it, but keep me comfortable and control my pain.

____ Even if my death is imminent or I am permanently unconscious, I choose to prolong my life.

____ I choose neither of the above options, and here are my instructions should I become terminally ill and my death is imminent or I am permanently unconscious:

____

____

____

Artificial Nutrition and Hydration: food and water provided by means of a tube inserted into the stomach or intestine or needle into a vein.

With respect to artificial nutrition and hydration, I direct the following:

(Initial only one)

____ If my death is imminent or I am permanently unconscious, I do not want artificial nutrition and hydration. If it has been started, stop it.

____ Even if my death is imminent or I am permanently unconscious, I want artificial nutrition and hydration.

Date:____________________

____

(your address)

____

(your signature)

____

(type or print your signature)

The declarant voluntarily signed this document in my presence.

Witness ____________________

Address ____________________

Witness ____________________

Address ____________________

On this the ____ day of _________, ____, the declarant, __________________, and witnesses __________ and __________ personally appeared before the undersigned officer and signed the foregoing instrument in my presence. Dated this ____ day of ________, ____.

____

Notary Public

My commission expires: ______________

See category 21 Property, topic 21.15 Powers of Attorney, subhead Attorneys in Fact for durable power of attorney for health care decisions.

14 FAMILY

14.01 ADOPTION:

Any minor child may be adopted by any adult person at least ten years older than the child. (SDCL 25-6-2). An adult may adopt another adult, with written consent of latter, forthwith upon filing petition, where adoptee has lived in home of adopter for six months during minority. (SDCL 25-6-18). Birth record is changed for adult only if requested in petition. (SDCL 25-6-20).

Consent Required.

Child cannot be adopted without consent of parents. If in best interests of child, court may waive consent from parent or putative father who: (1) Has been convicted of any crime punishable by imprisonment in penitentiary for period that will deprive child of parent's companionship for critical period of time; (2) has abandoned child for period of six months; (3) has substantially and continuously or repeatedly neglected child or refused necessary care and protection; (4) being financially able, willfully neglected to provide child necessary subsistence, education or care or neglected to pay for such items where payment ordered by court; (5) is unfit by reason of habitual abuse of intoxicating liquor or narcotic drugs; (6) has been judicially deprived of custody of child if adjudication is final on appeal to court of last resort or time for appeal has expired; (6A) has caused child to be conceived as result of rape or incest; or (7) does not appear personally or by counsel at hearing to terminate parental rights after notice received at least 30 days prior to hearing. (SDCL 25-6-4). Consent of child, if over age of 12 years, is necessary to its adoption. (SDCL 25-6-5). If adopter not lawfully separated from spouse, consent of spouse necessary. (SDCL 25-6-3). Consent of person adopting child required. (SDCL 25-6-12).

Home or society for care of dependent or neglected children or state welfare department may, by its authorized officer or agent, consent to adoption of child surrendered to it by court of competent jurisdiction. (SDCL 25-6-12).

Father of an illegitimate child is not, as a matter of due process, entitled to notice of adoption unless he is known and identified by mother or unless, prior to entry of order of adoption, he shall have acknowledged child as his own by affirmatively asserting paternity within 60 days after birth. Such assertion is established if he has caused his name to be affixed to birth certificate or has commenced a judicial proceeding claiming a parental right. (SDCL 25-6-1.1). If he has publicly acknowledged child and, with consent of his wife if he is married, received child into his family and treated it as if legitimate, he is deemed to have adopted, without formal proceedings. (SDCL 25-6-1).

Condition Precedent.

Child must live in home of proposed adoptive parent for six months. (SDCL 25-6-9).

Jurisdiction and venue are in circuit court of county where child or adopting parents reside, according to where petition is first filed. (SDCL 25-6-6, 7).

Petition must be verified and state full adoptive name, date of birth, sex, color or race, and place of birth of child, and full name, date of birth, citizenship, residence, color or race, birthplace, and occupation of both adoptive persons; that child adopted has lived with petitioners for six months past; that petitioners are more than ten years older than child; also agreement by adopting parents that child shall be treated as lawful child. (SDCL 25-6-2, 12, 13, 18). Attorney representing adoptive parents should file affidavit as to legal fees and expenses. (SDCL 25-6-4.2).

Proceedings.

Upon filing of petition, judge must fix time for hearing not less than ten days thereafter, and must, except in case of adoption of one not minor or stepparent adopting stepchild, direct court service officer, agent of department of social services, or other discreet and competent person, to make investigation of matter. Adoptive parents' previous child support history must be included in report. (SDCL 25-6-10). No child placed for adoption until home study completed by licensed child placement agency, Department of Social Services or certified social worker with two years' experience in field of specialization. (SDCL 25-6-9.1; SDCL 36-26-17). Petitioner must send notice, petition and home study to Department of Social Services. At hearing, person adopting and child to be adopted must appear personally. Written consent of adoptive parents to treat child as own lawful child required. All other persons whose consent is necessary must appear, unless represented by guardian or person filing power of attorney. (SDCL 25-6-12). Judge must examine all persons appearing separately, and if satisfied as to suitability of child for adoption, financial ability and moral fitness of adopting parents, and that all requirements of law have been met, and that interests of child will be promoted by adoption, he makes order declaring child adopted. (SDCL 25-6-13).

Two or more children may be adopted by the same adopting parents in one proceeding, but a separate order of adoption is required as to each child. (SDCL 25-6-8).

Decree or order declaring child adopted must include full adoptive name, date of birth, sex, color or race and place of birth of child, and full name, date of birth, citizenship, residence, color or race, birthplace and occupation of adoptive persons and finding that adoptive persons financially and morally fit and that best interests of child promoted by adoption. (SDCL 25-6-13).

Order of adoption from foreign nation has same effect as South Dakota order (SDCL 25-6-25). South Dakota court may order adoption without hearing ex parte and direct new birth certificate upon filing (1) Adoption order of foreign nation, (2) translation of order if necessary, (3) proof of date and place of birth of child, (4) proof of IR-3 immigration status, and (5) proof of adopting person resident of South Dakota. (SDCL 34-25-16.1).

Name.

Upon adoption, child may take family name of adoptive parent. (SDCL 25-6-16).

Effect of Adoption.

After adoption child and adoptive parent sustain towards each other legal relation of parent and child and have all rights and are subject to all duties of that relation (SDCL 25-6-16). Adoption terminates right of adopted child or adoptee's descendants to inherit from birth parents, except for birth parent who is spouse of stepparent where adoption is by stepparent and birth parent where adoption is by birth grandparent or descendant of birth grandparent. Inheritance from adopted child or adoptee's descendants is determined solely through adoptive relationship. (SDCL 29A-2-114).

Birth Certificate of Adopted Child.

Within ten days of order of adoption, clerk of court making order forwards certified copy thereof to state department of health (SDCL 34-25-16), who thereupon must make a new record of birth in new name, and with names of adopting parents, unless court, adoptive parents or adopted person request that new certificate not be prepared (SDCL 34-25-16.1). Child's original birth certificate and decree or order declaring child adopted must be sealed, and may be opened only upon order of a court of competent jurisdiction or by state health officer for purposes of administering vital registration system. (SDCL 34-25-16.4). Information on file confidential and identifying information about natural parents may only be disclosed if natural parent consents or upon court order. Nonidentifying information may be disclosed to adoptive parent or adoptee upon reaching age 18. (SDCL 25-6-15, 15.1 to 15.3).

14.02 [RESERVED]

14.03 COMMUNITY PROPERTY:

Community property system not adopted.

14.04 [RESERVED]

14.05 DISSOLUTION OF MARRIAGE:

See topic 14.06 Divorce.

14.06 DIVORCE:

Spouse required to be treated equally in divorce and separate maintenance suits. (SDCL 25-4).

Grounds for Absolute Divorce.

Divorce is granted for: (1) adultery; (2) extreme cruelty; (3) willful desertion; (4) willful neglect; (5) habitual intemperance; (6) conviction of felony; (7) irreconcilable differences. (SDCL 25-4-2). In case of incurable, chronic mania or dementia of either spouse having existed for five years or more, while under confinement by order of court of record, or of board of mental illness as provided by law, court may, in its discretion, grant divorce. (SDCL 25-4-18). If on complaint of irreconcilable differences court finds reasonable possibility of reconciliation, court may continue proceeding not to exceed 30 days. At any time thereafter either party may move for dissolution of marriage or legal separation. (SDCL 25-4-17.2). Willful desertion, willful neglect and habitual intemperance must have continued for one year. (SDCL 25-4-17). Willful neglect is neglect of person to provide common necessaries of life for his or her spouse. (SDCL 25-4-15). Court cannot enter divorce on grounds of irreconcilable differences unless both parties agree or one party has not made general appearance. (SDCL 25-4-17.2).

Grounds for Legal Separation.

Action for separate maintenance may be maintained without request for divorce upon same grounds as for divorce. In such cases court may award temporary alimony, suit money, and permanent support for spouse and children, or any of them, by other spouse. (SDCL 25-4-40). Though divorce is denied, court may provide for maintenance of spouse and children, or any of them, by other spouse. (SDCL 25-4-39).

Residence Requirements.

Plaintiff in action for divorce or separate maintenance must, at time action is commenced, be a resident of state, or be stationed in state while a member of armed services, and in order that each party be entitled to divorce or separate maintenance, that residence or military presence must be maintained until decree is entered. (SDCL 25-4-30).

Jurisdiction.

Circuit court has exclusive original jurisdiction in all actions for divorce. (SDCL 16-6-9).

Venue.

Action for divorce or separate maintenance may be commenced in county of residence of either party, subject to right of defendant to have place of trial changed to county where defendant resides. (SDCL 25-4-30.1). Court may change venue of trial or hearing in postjudgment divorce action if both parties no longer reside in county where action decided, parties agree, or for convenience of witnesses and ends of justice. (SDCL 15-5-14).

Process.

No special provisions.

Pleading.

No special provisions as to complaint. Summons must contain statutory information regarding temporary restraining order. (SDCL 25-4-33.1).

Cooling Off Period.

Action for divorce or separate maintenance must not be tried until at least 60 days have elapsed after completed service of summons and complaint. During waiting period court may issue orders relating to care and custody of children, temporary alimony, suit money, and discovery proceedings may be taken. (SDCL 25-4-34).

Practice.

No special provisions.

Judgment or Decree.

Final judgment or decree is entered immediately on determination that grounds for divorce exist.

Temporary Alimony and Support of Children.

While divorce is pending, court may require one spouse to pay as alimony any money necessary to support other spouse or children. (SDCL 25-4-38).

Allowance for Prosecution of Suit.

Court may require one spouse to pay money to other spouse to prosecute or defend action. (SDCL 25-4-38).

Permanent Alimony and Support of Children.

Where divorce is granted, court may compel one party to make such suitable allowance to other party for support during life of other party, or for shorter period, having regard to circumstances of parties, and court may from time to time modify its orders. (SDCL 25-4-41). See topic 14.10 Infants. Uniform Interstate Family Support Act adopted. (25-9B). See South Dakota Support Obligations. (SDCL 25-7-6.1 et seq.).

Division of Property of Spouses.

All property of spouses including inherited property, regardless of which spouse holds title, may be considered marital property to be divided between spouses at court's discretion. Factors to be considered by court are: (1) duration of marriage, (2) value of property, (3) ages of spouses, (4) health of spouses, (5) competency of spouses to earn living, (6) contribution of each spouse to accumulation of property and (7) income-producing capacity of each spouse's assets. (SDCL 25-4-44; 322 N.W.2d 254). In making division of property, court to consider equity and circumstances of parties. (SDCL 25-4-44). Insured's spouse upon divorce granted conversion privileges for health and accident insurance. (SDCL 58-17-2.2).

Change of Wife's Name.

Where divorce granted, court may allow wife to resume maiden name or name she bore legally before the marriage. (SDCL 25-4-47).

Custody of Children.

Court may, before or after judgment, give such direction for custody, care, and education of children as may seem necessary and proper, and may at any time vacate or modify same. (SDCL 25-4-45). Fault must not be taken into account in awarding custody except as same is relevant to fitness of either parent. (SDCL 25-4-45.1). Court can consider some abuse and assault convictions, as well as conviction for death of other parent (unless vehicular homicide) in awarding custody. (SDCL 25-4-45.5, SDCL 25-4-45.6). Court can also consider history of domestic abuse, including issuance of protective order against parent and any arrest report of parent following response of law enforcement to report of domestic abuse. (SDCL 25-4-45.5, SDCL 25-4-45.7). Parent who keeps minor child from custody of or visitation by other parent is guilty of misdemeanor. (SDCL 22-19-9). Second violation is felony. (SDCL 22-19-9). Court authorized to order mediation or investigation in custody and visitation disputes. (SDCL 25-4-56). Court may grant grandparents and great-grandparents reasonable rights of visitation with grandchild if in best interests of grandchild and visitation will not significantly interfere with parent-child relationship or grandparent has been denied reasonable opportunity for visits. (SDCL 25-4-52). Custody and visitation rights enforceable by contempt. (25-4A). Supreme Court has established standard visitation guidelines. (25-4A, Appendix). Persons other than parent may seek custody and visitation. (SDCL 25-5-29). Uniform Child Custody Jurisdiction and Enforcement Act (SDCL 26-5B-101 et seq.).

Termination of Parental Rights.

See topic 14.10 Infants.

Remarriage.

No restrictions.

Foreign Divorces.

No statutory provisions.

Separation Agreements.

Husband and wife cannot alter their legal relations by contract with each other, except that they may agree in writing to an immediate separation and may make provision for support of either of them and of their children during such separation. Mutual consent of parties is sufficient consideration for such contract. (SDCL 25-2-13).

Antenuptial Contracts.

See topic 14.09 Husband and Wife.

Grounds for Denying Divorce.

Divorce must be denied upon showing of: (1) connivance; (2) collusion; (3) condonation; or (4) unreasonable lapse of time before commencement of action. (SDCL 25-4-19 to 29).

Report Filed.

Clerk of court must report annulment and divorce to S. D. department of health within 40 days. (SDCL 25-3-12; SDCL 25-4-51).

14.07 [RESERVED]

14.08 GUARDIAN AND WARD:

Uniform Probate Code not adopted. Guardian assumes role as personal caretaker and conservator role as property manager.

Venue.

In county where minor or protected person resides or is present. If minor or protected person neither resides nor is present in state, venue is in county where minor or protected person has property. (SDCL 29A-5-108). Change of venue to another county may be obtained upon grounds that interests of minor or protected person will be best served. (SDCL 29A-5-109).

Grounds for Appointment of Guardian or Conservator.

Guardian may be appointed for minor or for person without regard to age who lacks capacity to meet health, care, safety, habilitation, or therapeutic needs without assistance. (SDCL 29A-5-201; 302). Conservator may be appointed for minor or person who lacks capacity to manage affairs or provide support for himself or dependents without assistance or for absentee whose affairs require care. (SDCL 29A-5-201; 303).

Selection of Guardian/Conservator.

Adults and minors 14 years or older may nominate their guardian or conservator in writing or by oral request to court. (SDCL 29A-5-202; 304). Deceased parent may nominate guardian or conservator for unmarried minor by will or other writing. (SDCL 29A-5-202). No nomination may supersede previous court appointment. Nominee must be determined by court to serve in best interests of protected person or minor. If no effective nomination, court shall appoint entity or individual to act in best interest of minor or protected person based upon number of considerations. More than one guardian or conservator may be appointed and same individual or entity need not serve as both guardian and conservator. (SDCL 29A-5-202; 304).

Eligibility and Competency.

Nonresident may act as guardian or conservator, but must designate resident as agent for service of process and file designation with clerk of court in county where appointed. (SDCL 29A-5-113).

Adult individual, public agency or nonprofit corporation not providing substantial services to person may be appointed guardian or conservator. Any bank or trust company may be appointed conservator. Department of human services or social services may be appointed guardian or conservator if no others qualified and willing to serve. No individual or entity other than bank or trust company whose only interest is as creditor may be appointed. (SDCL 29A-5-110).

Appointment of Guardian.

Petition for appointment of guardian, conservator, or both, may be filed by minor or adult alleged to need protection, relative, individual or facility with custody, nominee of minor or protected person, interested person or department of human services or social services. (SDCL 29A-5-203; 305).

Contents of petition for appointment prescribed in detail for minor at SDCL 29A-5-203 and for adult at SDCL 29A-5-305. Petitioner must file statement of financial resources and anticipated income of minor or protected person. (SDCL 29A-5-206).

Notice of hearing and petition must be personally served on minor if age ten or older or on adult alleged to need protection at least 14 days prior to hearing. Notice shall be mailed to all others named in petition. (SDCL 29A-5-204; 308). If person alleged to need protection is absentee, personal service is not required, but copy of notice must be published for three consecutive weeks in newspaper of county where proceeding pending, with last publication to occur at least ten days prior to hearing. Court may order no notice need be given if all persons entitled thereto waive and court determines in best interest of minor and minor's estate. (SDCL 29A-5-308).

Court may appoint attorney or court representative to investigate for minor or adult alleged to need protection. (SDCL 29A-5-205; 309). Minor, if age ten or older, and guardian or conservator shall attend hearing except for good cause shown. (SDCL 29A-5-208). If no attorney or court representative appointed for adult alleged to need protection, adult must attend hearing. (SDCL 29A-5-309). If necessary, temporary guardian or conservator may be appointed in case of minor for six months (SDCL 29A-5-210), and in case of adult for 90 days, provided court may extend for additional 90 days for good cause. (SDCL 29A-5-315).

Qualification.

Guardian or conservator must file acceptance of office. Court may not require bond for guardian except for good cause shown. Court shall determine whether bond necessary for conservator based on considerations listed at SDCL 29A-5-111.

Inventory and Accounting.

Within 90 days of appointment, conservator must file inventory with court and within 14 days thereafter mail to interested parties. (SDCL 29A-5-407). Within 90 days of appointment conservator must file certified copy of letters of conservatorship in office of register of deeds in county of appointment and in any county in which minor or protected person owns real estate. (SDCL 29A-5-418).

Annual reports by guardian and accountings by conservator and hearing thereon required. (SDCL 29A-5-408). Court may waive accountings or change frequency when in minor or protected person's best interest (SDCL 29A-5-409).

Powers and Duties.

Powers of conservator broad and specified in detail at SDCL 29A-5-411. It is responsibility of conservator to apply income and principal for support, care and health, and for minor, education, and for adult, habilitation or therapeutic needs, and to provide for support of legal dependents unable to support themselves. (SDCL 29A-5-404; 405). It is guardian's responsibility to make decisions regarding support, care, and health, and if minor, education and custody, and if adult, rehabilitation and therapeutic treatment and residency. (SDCL 29A-5-401; 402).

Real Estate.

Fourteen days prior to sale of property, value of which is not readily ascertainable, conservator shall provide written notice of property to be sold, purchaser, sales price, terms of payment, and nature of any security to minor, if age ten or older, protected person, their attorneys and those to be named in initial petition for appointment. (SDCL 29A-5-412).

Liability.

Guardian not liable for acts of minor or protected person unless personally negligent. Guardian not required to expend personal funds for minor or protected person's care. (SDCL 29A-5-415). Conservator not personally liable for contract entered as fiduciary, obligations arising from ownership of estate, or torts unless personally negligent. (SDCL 29A-5-416).

Termination of Guardianship/Conservatorship.

Guardianship of minor terminates upon attaining majority, adoption, emancipation, death, or if ordered by court. Under limited circumstances court may continue guardianship until age 21. (SDCL 29A-5-505). Conservatorship of minor terminates upon same factors except adoption and emancipation not included. (SDCL 29A-5-505). Guardianship or conservatorship of protected person terminates upon death or if ordered by court. (SDCL 29A-5-507).

Foreign Guardian/Conservator.

Guardian, conservator or like fiduciary appointed in another state may be appointed in South Dakota upon filing petition, proof of appointment, and certified copy of other state's proceedings and hearing and notice similar to petition for initial appointment in South Dakota. (SDCL 29A-5-114). Resident holding assets belonging to minor or protected person may turn over to fiduciary appointed in another state upon presenting proof of appointment and affidavit that no South Dakota fiduciary appointed nor proceeding pending for such appointment. (SDCL 29A-5-115).

Uniform Veterans' Guardianship Act adopted. (33-17A).

Transfers to Minors.

See topic 14.10 Infants.

Uniform Fiduciaries Act of 1922 adopted, omitting § 3. (SDCL 55-7-2, -15).

Uniform Simplification of Fiduciary Security Transfers Act adopted. (55-8).

14.09 HUSBAND AND WIFE:

Each spouse retains after marriage all civil and property rights of single person except as to homestead. (SDCL 25-2-7). Person must support self and spouse out of own property or by labor. (SDCL 25-7-1). Person must support spouse, if spouse has not deserted him or her, out of separate property, when spouse has no separate property and is unable from infirmity to support self. (SDCL 25-7-5). Neither husband nor wife is answerable for acts of other. (SDCL 25-2-14). Earnings of spouse not liable for debts of other spouse. (SDCL 25-2-12). Separate property of spouse is not liable for debts of other spouse contracted before or after marriage. (SDCL 25-2-6). Husband and wife are jointly and severally liable for food, clothing and fuel purchased by either for their family while living together as husband and wife. (SDCL 25-2-11).

Separate Property.

Except as to homestead, neither husband nor wife has any interest in the property of the other, excepting their respective rights for support as specifically provided by law, and except that neither can be excluded from the other's dwelling. (SDCL 25-2-4).

Contracts.

Either husband or wife may contract with the other, or with any other person, respecting property, which either might if unmarried. (SDCL 25-2-10). Husband and wife cannot by any contract with each other alter their legal relations, except as to property, and except that they may agree in writing to immediate separation and may make provision for support of either of them and of their children during such separation. (SDCL 25-2-13).

Antenuptial Agreement.

Uniform Premarital Agreement Act adopted, but omitting §§ 3(a)(4) and 6(b) with respect to modification or elimination of spousal support. (SDCL 25-2-16 through 25).

Actions.

For injury to reputation, person or property, person may sue in own name without joining spouse as plaintiff, and in like manner actions founded upon separate contracts or torts or relating to individual property may be brought against person without joining spouse as defendant. (SDCL 25-2-15). Spouse has cause of action, independently of any specific statute, against anyone interfering with marital relationship regardless of agency or instrumentality employed to inflict loss. (67 S. D. 161, 290 N.W. 482). Either spouse may sue the other in tort. (68 S. D. 53, 298 N.W. 266).

Agency.

One spouse may act as agent or attorney in fact for the other. (SDCL 59-2-1).

Conveyance or Encumbrance of Property.

Either spouse may convey or encumber his or her property without the consent or joinder of the other except as otherwise provided in case of the homestead (see category 8 Debtor and Creditor, topic 8.10 Homesteads). (SDCL 25-2-7).

Desertion and Nonsupport.

Person abandoned by spouse not liable for spouse’s support unless spouse offers to return or abandonment was justified. Where parties live separate by agreement, neither spouse liable for other spouse’s support unless stipulated for in agreement. (SDCL 25-7-3).

Parents jointly and severally obligated for support of minor. Until established by court order, minimum obligation of parent who fails to furnish child support following continued absence from home is obligor’s share of amount shown in statutory guidelines, based on combined monthly income of both parents. (SDCL 25-7-6.1 through 6.9). Court may deviate from schedule upon entry of specific findings. (SDCL 25-7-6.10). Parent of any child under age of ten who deserts such child, with intent wholly to abandon it, is guilty of Class 4 felony. (SDCL 25-7-15). Parent who intentionally neglects minor child is guilty of misdemeanor. If parent neglects child by leaving state for more than 30 days, is guilty of Class 6 felony. Court may order medical treatment for child. (SDCL 25-7-16). Provision is made for release of defendant on undertaking to provide required support, with detailed provisions for re-arrest and prosecution for noncompliance. (SDCL 25-7-24, 25).

Every spouse having ability to provide for or means to support other spouse, who without good cause abandons or neglects to provide other spouse with necessaries is punishable by imprisonment for not exceeding two years or by fine not exceeding $2,000, or both. (SDCL 25-7-4). Every adult child having financial ability must provide necessaries for parent who is unable to provide for himself. (SDCL 25-7-27).

Uniform Interstate Family Support Act adopted. (25-9B).

Community property system does not apply.

14.10 INFANTS:

Males and females both become of age at 18. (SDCL 26-1-1). Minimum drinking age, effective Apr. 1, 1988, is 21 for all alcoholic beverages. (SDCL 35-9-1, SDCL 35-9-2; 107 S.Ct. 2793).

Emancipation.

Both parents (or survivor) and minor may expressly agree to emancipation, which agreement requires court approval. (SDCL 25-5-19). Minor may also be emancipated if entered into valid marriage, on active duty with armed forces, or judicially declared emancipated. (SDCL 25-5-24). Emancipated minor is considered as over age of majority for purposes of consenting to health care, entering into binding contract, capacity to sue and be sued in own name, right to support by parents, rights of parents to minor's earnings and to control of minor, establishing residence, buying or selling real property, ending all vicarious liability of parents for minor's torts, and enrolling in school or college. Parents or guardians, however, are not relieved from liability for minor's torts arising out of agency relationship, malicious and willful operation of motor vehicle, or something other than parent-child relationship. (SDCL 25-5-25). Legal duty of emancipated child to parent is same as child who had reached majority. (SDCL 25-5-21). Emancipation may be rescinded if court finds minor indigent and with no means of support. (SDCL 25-5-27). Emancipation voidable if obtained by fraud or by withholding material information. (SDCL 25-5-28). Rescission or voiding of declaration does not alter contractual obligations or any property rights or interests arising during period declaration was in effect. (SDCL 25-5-27, 28).

Disabilities.

A minor cannot give a delegation of power, nor under the age of 18 make a contract relating to real property, or relating to any personal property not in his immediate possession or control. (SDCL 26-2-1). With these exceptions a minor may make any other contract, subject to the right of disaffirmance, and also subject to restrictions as to marriage. (See topic 14.11 Marriage. [26-2-3].) Specified adult members of minor's family can make binding agreement between financial institution and minor to establish account. (SDCL 26-2-1). Except as to contracts under express authority or direction of a statute (SDCL 26-2-5), and excepting contract, otherwise valid, to pay reasonable value of things necessary for his support, or that of his family, entered into if not under care of parent, guardian or conservator able to provide for him or them (SDCL 26-2-4), any contract of minor made while he is under 16 years old, may be disaffirmed by him either before his majority or within one year's time afterwards, which disaffirmance if he dies in meantime, may be by his heirs or personal representative (SDCL 26-2-6). However, and if contract was after minor was more than 16 years old, contract may be disaffirmed only on restoration of consideration or its equivalent, with interest. (SDCL 26-2-6).

Ratification of Contracts.

When a minor is permitted to contract, he is bound thereby unless he disaffirms as permitted. (SDCL 26-2-6).

Actions.

A minor may enforce his rights by civil action or proceeding. (SDCL 26-1-3). However, he must do so by his guardian or conservator or guardian ad litem. (SDCL 15-6-17[c]). There is no authorized procedure for prosecution by his next friend. Guardianship and conservatorship provisions in 29A-5.

Support of Minor.

Parents jointly and severally obligated for support of child in accordance with respective means. Until established by court, minimum child support obligation of parent who maintains continued absence from home is set by schedule, based on obligor's proportion of parent's combined monthly net income and number of children. (SDCL 25-7-6.1 to 6.12). Parent who intentionally fails to support child is guilty of misdemeanor and parent who during violation leaves state for more than 30 days is guilty of felony. (SDCL 25-7-16). If parent neglects to provide necessaries, third person may supply same and recover from parent. (SDCL 25-7-10). Professional, sporting, and recreational licenses, registrations, and permits may be denied if applicant has child support arrearages of $1,000 or more. (SDCL 25-7A-56). Duty to support continues until 18 or until child attains age of 19 if full-time student in secondary school. (SDCL 25-5-18.1). Amount may be modified, revoked or commuted upon death of parent. (SDCL 25-5-18.1). Public assistance to dependent child is deemed debt of person responsible for support and state is subrogated to rights of dependent child. (SDCL 25-7A-2, 3). Grandparents also required to support grandchild if parent is minor. (SDCL 25-5-18.2). All orders for support entered and in effect prior to July 1, 2005, may be modified in accordance with chapter without showing change in circumstances. (SDCL 25-7-6.13).

Parental Responsibility for Act of Child.

Liability is imposed on parent or parents for damages to property or personal injury, limited to $1,500 plus court costs, caused by willful or malicious act of child less than 18 years old, living with parent or parents. Law does not apply to damages caused by operation of motor vehicle by minors. (SDCL 25-5-15). Parents, guardian, custodian, or any other person legally obligated to support child may be ordered to pay for costs associated with placement of child pursuant to 26-7A, 26-8A, 26-8B or 26-8C. Foster parent not liable for acts of foster child (except agency or negligent entrustment of motor vehicle) and not responsible for costs under SDCL 26-8B-6 or SDCL 26-8C-7. (SDCL 25-5-23.1).

Uniform Transfers to Minors Act in effect. (55-10A).

Adoption.

See topic 14.01 Adoption.

Uniform Securities Ownership by Minors Act not adopted.

Uniform Child Custody Jurisdiction & Enforcement Act enacted. (26-5B). Any person entitled to custody or visitation may ask court to enter order implementing standard visitation guidelines. (25-4A).

Termination of Parental Rights.

Parental rights may be terminated if in best interests of child. Parental rights may be terminated voluntarily or involuntarily. (25-5A and 26-8A). If child has been adjudicated neglected or abused, child parental rights may be terminated. (SDCL 26-8A-22, 27). Reunification issues addressed in SDCL 26-8A-21 and 21.1.

14.11 MARRIAGE:

Age of consent is 18. Persons between 16 and 18 may consent to and consummate marriage if one parent or legal guardian consents. (SDCL 25-1-9, 13). Marriage must be between man and woman. (SDCL 25-1-1).

Consent Required.

If either party is minor, no marriage license may be issued without written consent of one parent or guardian, duly acknowledged, or proven genuine, and filed with county register of deeds. (SDCL 25-1-9, 13).

License is required; issued by county register of deeds of any county for $40. (SDCL 25-1-10). Each applicant must make personal appearance for license and present proof of age.

Power of attorney cannot be used. (SDCL 25-1-10.1). Divorced applicant for license need not submit copy of decree.

Medical Examination.

No blood test required. Marriage license is void unless marriage is solemnized within 20 days from issuance. (SDCL 25-1-24).

Waiting Period.

None required.

Ceremonial Marriage.

Marriage may be solemnized by justice of Supreme Court, circuit court judge, magistrate, mayor (either within or without corporate limits of municipality from which mayor elected), or any person authorized by church to solemnize marriages. (SDCL 25-1-30).

Marriage Certificate.

Person solemnizing marriage must fill out marriage certificate and deliver it to parties. (SDCL 25-1-35).

Reports of Marriages.

Person solemnizing a marriage must fill out return thereof and file same, within ten days, with county register of deeds (SDCL 25-1-35), who must forward to department of health (SDCL 25-1-37).

Record.

See category 10 Documents and Records, topic 10.04 Records, subhead Vital Statistics.

Common law marriages not permissible since July 1, 1959, but valid when effected before July 1, 1959. (SDCL 25-1-29). No specific authority as to local recognition of out-of-state common law marriage, but see subhead Foreign Marriages, infra.

Proxy marriages not authorized.

Marriages by written contract not authorized.

Prohibited Marriages.

Between parent and child, ancestor and descendant of every degree, brother and sister (half blood included), uncle and niece, aunt and nephew, first cousins (half blood included) (SDCL 25-1-6), or stepparent and stepchild (SDCL 25-1-7). Relationships arising through adoption included in prohibition.

Foreign marriages, if valid by laws of jurisdiction where contracted, are valid in South Dakota, except marriage between two persons of same gender. (SDCL 25-1-38).

Annulment.

Grounds for annulment follow: (1) That party in whose behalf annulment is sought was under age of legal consent and that his or her parents or guardian, or person in charge of him or her, did not consent, and that such party did not, after attaining the age of consent, cohabit with the other. On this ground, such parent, guardian or person in charge may bring action at any time before married minor reaches age of consent, and he or she may bring action at any time within four years after reaching age of consent. (SDCL 25-3-4). (2) That either party had living spouse.

Either party or former spouse may sue on this ground. (SDCL 25-3-1). (3) That either party was of unsound mind, unless after return of reason, there was cohabitation. Relative or guardian of party of unsound mind, or other party, may sue on this ground. (SDCL 25-3-2). (4) That consent of either party was obtained by fraud, unless there was cohabitation after injured party obtained full knowledge of fraud, action by injured party to be commenced within four years after discovery of fraud. (SDCL 25-3-6). (5) That consent of either party was obtained by force, unless injured party afterward freely cohabited with the other, action on this ground to be commenced by injured party within four years after marriage. (SDCL 25-3-5). (6) That either party was at time of marriage physically incapable of entering into marriage state, with such incapacity continuing and appearing incurable, action to be commenced by injured party within four years after marriage. (SDCL 25-3-8). When annulment granted, court may provide for maintenance of former spouse and may give direction for custody and support of children. (SDCL 25-3-10, 11).

Legitimacy of Children.

Where marriage is annulled because bigamous, or for insanity of one party, children begotten before judgment succeed to estate of both parents. (SDCL 25-3-3). Husband and wife presumed parents of child born during marriage or within ten months after dissolution. (SDCL 25-5-3).

Reports Filed.

Clerk of court must report dissolution, divorce, or annulment to S. D. department of health within 40 days. (SDCL 25-3-12; SDCL 25-4-51).

Antenuptial Contracts.

See topic 14.09 Husband and Wife.

14.12 MARRIED WOMEN:

See topics 14.09 Husband and Wife, Marriage; categories 5 Civil Actions and Procedure, topic Evidence, subhead Witnesses; Debtor and Creditor, topic Homesteads; Documents and Records, topic Acknowledgments; Estates and Trusts, topics Executors and Administrators, Wills; Property, topic Dower.

16 INSURANCE

16.01 INSURANCE COMPANIES:

Supervised by Director of Division of Insurance, who is appointed by Secretary of Commerce (SDCL 58-2-2.1), required to devote full time to duties of such office, has official seal, must have had at least five years of practical experience in one or more types of insurance business, or have had other professional and business experience reasonably adequate in character and scope to equip him for duties of position. He appoints various subordinate officers, including chief deputy, additional deputies, competent insurance actuaries, examiners, etc. (58-2). Director is granted broad powers as to making of rules and regulations, conduct of hearings, and has wide discretion in performance of his duties and enforcing applicable laws. (SDCL 58-2-22). State insurance commission, appointed by governor, monitors administration of insurance statutes and advises director. (SDCL 58-2-32 to 38).

Rates.

Regulation applies to insurers generally with exception of life, health and title insurance. (SDCL 58-24-2). Rates as to other insurance risks are made subject to detailed and comprehensive regulation which is stated designed to promote public welfare by regulation to end that rates are not excessive or inadequate and to authorize and regulate cooperative action among insurers in rate making. (SDCL 58-24-1).

Rate filings are to be accompanied by information upon which insurer supports filing, including experience or judgment of insurer or rating organization making filing, interpretation of statistical data, experience of other insurers or any other relevant factors. (SDCL 58-24-13). Each filing, other than specified inland marine and property and casualty rates, does not become effective for 30 days, which may be extended by Director to exceed 30 days if he gives written notice within such waiting period. If filing is disapproved, Director notifies insurer or rating organization with right to hearing on written application to Director. (SDCL 58-24-20, 22).

Incorporation.

Five or more individuals may incorporate as a stock insurer, and ten or more individuals may incorporate as a mutual insurer. Incorporators must be citizens of U.S., at least 21 years of age and a majority thereof must be South Dakota residents. Required articles of incorporation follow usual pattern. Name must be specified, and if company is a “mutual” that word must appear in name. Duration of existence must be specified and this may be perpetual. There must be not less than five nor more than 21 directors with names and addresses of members of initial board. (SDCL 58-5-7). Articles and two executed copies are submitted to Director, together with filing fees, who submits articles to Attorney General for examination and who endorses his approval thereon if he finds compliance with The Insurance Code and state constitution. Director retains one copy of articles and returns original and remaining copy to incorporators who file same with Secretary of State. If Attorney General does not approve such articles, he returns same to Director with written statement of his reasons for disapproval and Director returns all sets with such written statement to incorporators. (SDCL 58-5-10).

Assigned Risk.

Agreements may be made among insurers for equitable apportionment among themselves, with reasonable rate modifications, of insurance afforded applicants but who are unable to procure such insurance through ordinary methods, such agreements and rate modifications to be subject to Director’s approval. (SDCL 58-24-27).

Annual Statements.

Each domestic insurer and foreign insurers if required by Director must annually before Mar. 1, and quarterly before May 15, Aug. 15 and Nov. 15, unless time is extended by Director, file with Director true statement of its financial condition, transactions and affairs as of preceding Dec. 31, Mar. 31, June 30 and Sept. 30, respectively, statement to be in form and content as approved or adopted for current use by National Association of Insurance Commissioners for use as to type of insurer and kinds of insurance to be reported, and any additional information required by Director. Statement of alien insurer must be filed annually on or before Sept. 1 and, unless Director otherwise requires, must relate only to its U.S. business. Director causes condensed summary from annual statement of each company to be published three times, at expense of company at legal rates in legal newspaper published in each judicial circuit of state in which company has licensed agent, such statements required to be published within 60 days from end of time limit for filing thereof. (SDCL 58-6-75 to 78). Detailed statutes also set forth requirements for independent annual audits and filing of audited financial reports. (58-43).

Policies.

Statutes regulating types of policies are: Life insurance and annuities (58-15); group life insurance (58-16); health insurance (58-17); Medicare supplement (58-17A); long-term care insurance (58-17B); group and blanket health insurance (58-18); small businesses’ group and blanket health insurance delivered, issued, renewed or continued after July 1, 1992 (58-18B); credit life on health and group property insurance authorized by credit card insurance (58-19); worker’s compensation insurance (58-20); surety insurance (58-21); liability insurance (58-23);

medical malpractice insurance (58-23A); legal expense insurance (58-42). Statutes also regulate health maintenance organizations (58-41), fraternal benefit societies (58-37A), life, health and workers' compensation insurance administrators (58-29D), pharmacy benefit management (58-29E), multiple employer welfare arrangements (58-33), broker controlled property and casualty insurance (58-44), captive insurance companies (58-46), managed care and health discount plans (58-17C) and set standards for advertisement, solicitation and sale of life and health insurance (58-33A). Policies in general (SDCL 58-11-2 to SDCL 58-11-7). "Uninsured motor vehicle" coverage defined. (SDCL 58-11-9.1).

See category 3 Business Regulation and Commerce, topic 3.10 Consumer Protection, subhead Plain Language.

Cancellation.

Limited to certain conditions as to automobile liability policy. (SDCL 58-11-46, SDCL 58-11-55). No insurer may cease marketing block of business in state unless it submits written notice at least 90 days prior to cessation of marketing. (SDCL 58-11-62).

Discrimination.

There are forbidden any unfair discrimination between individuals of same class and equal expectation of life in rates charged for life insurance or life annuity or in dividends or other benefits payable thereon, or in any other terms and conditions of such policy, and any unfair discrimination between those of same class and of essentially same hazard in amount of premium policy fees or rates charged for any policy of health insurance or in benefits payable thereunder, or any of terms and conditions thereof, or any other manner whatever. (SDCL 58-33-12, 13). With limited exceptions, no insurer may refuse to issue or renew policy solely because of insured's age, residence, race, color, creed, national origin, ancestry, occupation or marital status. (SDCL 58-11-55 to 55.3).

Rebates.

Except as plainly expressed in policy, rebates are comprehensively forbidden as to life, annuity and health insurance. (SDCL 58-33-14).

Liens.

See statutes cited under subhead Policies for standard policy forms covering lien rights.

Insurance Producers.

As to individual insurance producers generally and with specified exceptions, licenses from Director are prerequisites to such employment. (SDCL 58-30-143). Licenses granted on application to Director and passing examination, scope of which covers applicant's knowledge of lines of authority for which application is made, duties and responsibilities of insurance producer and insurance laws and rules of state. (SDCL 58-30-145 to 150). Examination may be waived if upon specified conditions. (SDCL 58-30-52). Licenses continue in force until expired, suspended or revoked, as long as annual fee paid and continuing education requirements met. (SDCL 58-30-153). Special provisions are made as to insurance vending machines (SDCL 58-30-84, 85). Insurers are forbidden to issue policy of any kind on persons or property in South Dakota unless policy is written through licensed resident insurance producer or licensed nonresident insurance producer, when policy is countersigned by resident insurance producer. (SDCL 58-6-62 to 67).

Investments are limited to those authorized by statute. (SDCL 58-27-2). Permitted investments are covered in detail. (58-27).

Foreign insurance companies may be admitted to South Dakota if such company has had two continuous calendar years of operating experience, has been examined within 36 months next preceding application, and has fully satisfied retaliatory requirements of applying company's state of incorporation imposed on South Dakota insurance companies seeking admission to such state. First two requirements can be waived upon showing of special need or circumstance. (SDCL 58-6-13). Such company must also appoint Director agent for service of process. (SDCL 58-6-39). Such foreign company to be admitted must also meet following requirements as to capital or basic surplus and additional surplus: life or health insurance company, capital or basic surplus of $300,000 and additional surplus of $350,000; life and health insurance company, capital or basic surplus of $400,000 and additional surplus of $425,000; property insurance company, capital or basic surplus of $200,000 and additional surplus of $300,000; casualty insurance company (without workmen's compensation), capital or basic surplus of $200,000 and additional surplus of $300,000; casualty insurance company (with workmen's compensation), capital or basic surplus of $300,000 and additional surplus of $350,000; marine and transportation insurance company, capital or basic surplus of $200,000 and additional surplus of $300,000; surety company, capital or basic surplus of $200,000 and additional surplus of $300,000; title insurance company, capital or basic surplus of $200,000 and additional surplus of $300,000; multiple lines insurance company, capital or basic surplus of $400,000 and additional surplus of $400,000. (SDCL 58-6-23).

Application for admission is made to Director. (SDCL 58-6-1). Fees payable on admission include $500 on application for original certificate of authority; and varying specified fees for filing of different papers, appointment of producers, etc. (SDCL 58-2-29). Fee for annual audit, $500. (SDCL 58-2-29). By issuing or delivering policies of insurance to South Dakota residents or to corporations authorized to do business in state or by solicitation of applications for insurance, or by collection of premiums, membership fees, assessments or other consideration for such contracts or any other transaction of insurance business in South Dakota, unauthorized foreign insurance company appoints Director as agent for service of process, with service also authorized on any person within state who in behalf of insurer solicits insurance, or takes part in insurer's South Dakota business. (SDCL 58-8-10). After admission to state, company is required to make annual statements. See subhead Annual Statements, supra. As to taxes, see subhead Premium Tax, infra.

Retaliatory Laws.

When under laws of another jurisdiction there are imposed on South Dakota insurers, their producers or representatives, taxes, fees, fines, penalties, etc., in excess of similar charges under South Dakota law on similar insurers, producers or representatives of such other jurisdiction, so long as such laws of such other jurisdiction continue in force, same charges in aggregate must be imposed by Director upon insurer's producers or representatives of such other jurisdiction. Provision does not apply to life policies or annuity contracts where total first year premium or consideration is $1 million or more. (SDCL 58-6-70).

Premium Tax.

Except as concerns fraternal, county mutual and township mutual insurance organizations, premium tax based on South Dakota business is levied on all insurance companies, foreign and domestic. Tax is at 2½% of premiums except life policies, where tax is 1¼% on policies with face amount of $7,000 or less and 2½% on first $100,000 of annual premium and .08% of annual premium exceeding $100,000 and 1¼% on all consideration received for annuity contracts on first $500,000 of consideration and .08% of consideration exceeding $500,000. There is also tax of $14 for each insurance policy issued or renewed for workers' compensation coverage. (SDCL 10-44-2). Tax is payable to Director upon company making its annual statement or, if no such statement is required, on or before Mar. 1 of each year, and is based upon company's South Dakota business in preceding calendar year. Quarterly prepayments required if company paid more than $5,000 in premium taxes during previous year. Tax credit is allowed for insurer with principal office or regional home office in South Dakota. (SDCL 10-44-4). Tax is in lieu of all other taxes, state and local, other than taxes on real and tangible personal property, retail occupational sales tax and use tax on tangible personal property (insurance policy considered intangible personal property), and tax on fire companies for maintenance of State Fire Marshal. (10-44). In addition to foregoing, and except as to county and township mutual companies and fraternal benefit societies, there is levied on every fire insurer doing business in state tax of ½ of 1% of gross premium receipts. (SDCL 10-44-9)

Privilege Tax.

See subhead Premium Tax, supra.

Direct Actions Against Insurer.

See category 23 Transportation, topic 23.01 Motor Vehicles, subhead Direct Actions.

Surety Companies.

See also topic 16.02 Surety and Guaranty Companies.

Uniform Insurers Liquidation Act.

Repealed and replaced with Insurers Supervision, Rehabilitation and Liquidation Act. (58-29B). South Dakota also has Insurance Guaranty Association (58-29A) and Life and Health Insurance Guaranty Association (58-29C).

No-Fault Insurance.

See category 23 Transportation, topic 23.01 Motor Vehicles, subhead No-Fault Insurance.

Risk Retention Groups.

Model Risk Retention Act adopted. (58-6A).

16.02 SURETY AND GUARANTY COMPANIES:

Organization.

Governed by laws applicable to corporations generally and insurance companies. See topic 16.01 Insurance Companies, subhead Incorporation.

Rights and Powers.

Governed by laws applicable to insurance companies.

Foreign surety insurance company may be admitted to do business in South Dakota if it has had two continuous calendar years of operating experience, has been examined within 36 months, has fully satisfied any retaliatory requirements imposed by laws and regulations which applying company's state of incorporation imposes upon like companies seeking admission to such state and meets requirements hereinbefore stated as to capital and surplus. (SDCL 58-6-13).

Taxation.

No special taxes imposed on surety and guaranty companies as such. See topic 16.01 Insurance Companies, subhead Premium Tax.

17 INTELLECTUAL PROPERTY

17.01 TRADEMARKS AND TRADENAMES:

What May Be Registered.

Any word, name, symbol, emblem, or device used to identify goods made or sold by any person or organization and to distinguish them from goods of others may be registered as a trademark. Any mark used in sale or advertising of services to identify services of one person and distinguish them from services of others may be registered as service mark. Registration not available if trademark or service mark consists of immoral, deceptive, or scandalous matter, or consists of flag of U.S., state, or foreign nation, or of name, signature, or portrait of living individual without his consent, or which is merely descriptive, geographically descriptive, primarily surname, or misdescriptive of goods, or so resembles other registered mark as to be confusing. (37-6). Classes of goods and services defined; registration limited to one class. (SDCL 37-6-12).

Registration is by verified application on form furnished by Secretary of State, to be accompanied by specimen of mark in duplicate no larger than 8½ inches by 11 inches. (SDCL 37-6-5). Upon compliance with requirements of act, certificate of registration is delivered to applicant. (SDCL 37-6-13).

Registration Fee.

Fee for filing application and issuing certificate is $125. Certificate must be renewed in four years; fee for renewal is $125. (SDCL 37-6-5, 14).

Assignment.

Mark and its registration may only be assigned with good will of business or part thereof in which mark used; fee for assignment $125. (SDCL 37-6-17).

Protection Afforded.

Certificate of registration may be received as proof of registration. Owner of registered mark may maintain civil action to enjoin manufacture, use, display, or sale of counterfeit or imitation thereof and recover damages against one who uses any such mark or imitation in connection with sale or advertising of goods, which is likely to cause confusion or deceive as to source of origin of goods. (SDCL 37-6-16; 508 N.W.2d 885).

Tradenames.

No person or co-partnership may engage in or conduct business for profit under any name which does not plainly show true surname of each person interested unless they file fictitious name certificate with register of deeds in each county where such business is maintained, and renew such filing every fifth year. (SDCL 37-11-1). Filing fee for initial filing and each renewal is $10.

17.02 TRADE SECRETS:

Uniform Trade Secrets Act adopted (37-29) effective July 1, 1988 and not retroactive (SDCL 37-29-11). Protection of trade secrets in matters before Board of Economic Development (SDCL 1-16B-14.1) and in water pollution matters (SDCL 34A-2-94). Rules of evidence relating to trade secrets. (SDCL 19-13-20).

18 LEGAL PROFESSION

18.01 ATTORNEYS AND COUNSELORS:

Bar integrated under name “State Bar.” (SDCL 16-17-1, 2). Only active members in good standing may practice as resident attorneys. (SDCL 16-18-1). Annual membership fees are $190 for first five years, $315 for all other active members, and $50 for inactive members, together with additional $25 for active members, whenever Client Security Fund is less than $80,000, and until such Fund reaches $100,000. (State Bar By-Laws, §§ 20, 21 and 32). Person practicing law without license guilty of misdemeanor. (SDCL 16-16-1). Requirements for legal assistants. (SDCL 16-18-34 to SDCL 16-18-34.7).

Jurisdiction over admission is vested in the Supreme Court. (SDCL 16-16-1). Further, Court empowered to enact rules repealing or amending existing statutes as to admission, disbarment, and reinstatement of attorneys. (SDCL 16-3-9).

Eligibility.

Every applicant for license to practice law in South Dakota must be at least 18 years old, of good moral character, and prior to admittance must be resident of this state, or maintain office in state, or designate clerk of supreme court as agent for service of process. (SDCL 16-16-2). Standard of good moral character defined. (SDCL 16-16-2.1 to 2.5). Applicant may be admitted conditionally, and such applicants have continuing burden of proving good character and conditions of admission until terms of admission satisfied. (SDCL 16-16-2.2, SDCL 16-16-17.1). Applicant shall submit to criminal background investigation by means of fingerprint checks. (SDCL 16-16-2.6).

Registration as Law Student.

None required.

Educational Requirements.

Before examination applicant must have graduated, or completed all requirements for graduation, from law school accredited by American Bar Association. (SDCL 16-16-6).

Petition for Admission.

Full information may be obtained from Clerk of Supreme Court, who is secretary of Board.

Examination.

Every applicant must satisfactorily pass examinations conducted by Board of Bar Examiners. Multi-State Bar Examination, Multi-State Essay Examination, Multi-State Performance Test, and Multi-State Professional Responsibility Examination are used and Board may accept transfer of scores on same examination from another jurisdiction. Multi-State Bar Examination covers constitutional law, contracts, criminal law, evidence, real property, torts. Multi-State Essay Examination covers business organizations, commercial transactions, civil procedure, conflicts of law, family law, and wills, trusts and future interests. Multi-State Performance Test covers problem solving, legal and factual analysis, reasoning, communication, organizing and managing legal tasks, and ethical dilemmas. Multi-State Professional Responsibility Examination covers legal ethics. (Appendix to 16-16). Examiners conduct examinations at such time and places as board by rule determines. (SDCL 16-16-9). If applicant fails three times to pass examination, he may take another examination only by permission of Supreme Court. (SDCL 16-16-11). Final admission to practice is by order of Supreme Court, on recommendation of Board, which recommendation is effective for 120 days but court for good cause may extend time, and effective on payment of required fees. (SDCL 16-16-17). Oath of office is administered by justice or judge of any federal district or appellate court or state court of appellate or general jurisdiction. (SDCL 16-16-18).

Admission Without Examination.

None. (Sup. Ct. Rule 82-24).

Required Fees.

Applicant for admission on examination, $300, and $175 for subsequent examinations. Late fee is $75. All fees payable to Secretary of Board of Bar Examiners. (SDCL 16-16-13).

Nonresident Attorneys.

A member of the bar of another state or the District of Columbia actually engaged in any case or matter pending in a South Dakota court or administrative hearing, and who has associated with him in such case or matter member of South Dakota bar, may be permitted to appear in such case or matter, provided both applicant and resident attorney file with court written sworn motions requesting admission and setting forth required information. Nonresident attorney in private practice must apply for South Dakota sales and use tax license, and must submit $100 fee. (SDCL 16-18-2). Nonresident attorneys employed by legal aid bureaus or public defender agencies may be admitted to practice upon sworn written applications, with such admission to remain in effect until failure to sit for first bar examination given subsequent to order of admission or termination of applicant's employment. Examination includes both multistate and state essay examinations. (SDCL 16-16-7.1; SDCL 16-16-7.3).

Disabilities.

A practicing attorney must not be a surety in any suit or proceeding in any South Dakota court. Violation of this section is misdemeanor. (SDCL 16-18-10).

Liabilities.

Common law rules control.

Compensation.

Except as to nominal fees allowed as costs, and except in a limited number of instances, such as divorce, annulment, paternity, separate maintenance, support, alimony, trust administration, probate proceedings, guardianship proceedings, mortgage foreclosures, and in certain taxpayer actions, etc., compensation of attorneys is left to agreement of parties (SDCL 15-17-38, 39, 43, 45). State bar does not have power to fix fees to be charged by members for professional services. (SDCL 16-17-9).

Liens.

An attorney and counselor at law has a lien for a general balance of compensation in and for each case upon: (1) Any paper belonging to his client which has come into his hands in the course of his professional employment in the case for which the lien is claimed; (2) money in his hands belonging to his client in the case; (3) money due his client in the hands of the adverse party or attorney of such party, in an action or proceeding in which the attorney claiming the lien was employed, from the time of giving notice in writing to such adverse party or attorney of such party, if the money is in the possession or under the control of such attorney, which notice must state the amount claimed and, in general terms, for what services; (4) after judgment in any court of record, such notice may be given, and the lien made effective against the judgment debtor, by entering it in judgment docket. (SDCL 16-18-21).

Discipline.

Supreme Court and Disciplinary Board of State Bar of S. D. have exclusive disciplinary jurisdiction. (Sup.Ct. Rule 78-1; 16-19). Grounds for disbarment or discipline include conviction of crime, disobedience of court order, violation of duties of attorney, and willful violation of S.D. code of judicial conduct. (SDCL 16-19-31, 32, 33; 16-2 appendix; 16-19 appendix). Investigation may be initiated by Supreme Court, Board, Attorney General, or individual. (SDCL 16-19-51). Investigations made by Board or Attorney General. (SDCL 16-19-51). Supreme Court directs either Board or Attorney General to file formal accusation to be served upon accused attorney. (SDCL 16-19-51). Accused attorney must answer formal accusation within 30 days and admit or deny allegations. (SDCL 16-19-68). Issues shall be tried by Supreme Court but court may refer matter to circuit judge for taking testimony or making findings and recommendations. (SDCL 16-19-16). Judgment rendered against accused attorney may include necessary disbursements made by prosecution or injunctive relief. (SDCL 16-19-70.1, 35.1). No attorney suspended for over three months or disbarred may resume practice until reinstated. (SDCL 16-19-83). Disbarred attorney may not apply for reinstatement for five years. (SDCL 16-19-83). Petition for reinstatement by disbarred or suspended attorney must be filed with Board, which conducts hearing. (SDCL 16-19-84, 85). Final adjudication in another jurisdiction that attorney has been guilty of misconduct establishes conclusively misconduct for purposes of disciplinary proceeding in this state. (SDCL 16-19-74).

Unauthorized Practice.

Any person engaging in practice of law in violation of law, may be restrained by permanent injunction, in action by attorney general, or by any citizen of this state. (SDCL 16-18-1). Practicing law without license is Class 1 misdemeanor. (SDCL 16-16-1).

Continuing Legal Education.

Not mandatory, but regular programs offered by State Bar.

Attorney Ethics.

American Bar Association Model Rules of Professional Conduct have been adopted with some modifications. (16-18, Appendix). Special notice should be taken of Rules 7.1 and 7.2 regarding communications of lawyer’s services and advertising. S.D. has drafted own definitions and limitations. Standards for trust account records are in place. (SDCL 16-18-20.2). Law practices may be sold. (16-18, Appendix, Rule 1.17). Professional liability insurance not required, but attorney without at least $100,000 in such coverage must disclose lack of coverage on attorney’s letterhead and in every written communication with client, except for government attorneys, in-house counsel, members of judiciary, nonprofit legal services attorneys, and nonresident attorneys who have not represented client in South Dakota for a year. (16-18, Appendix, Rules 1.4, 7.2, 7.5).

Specialty Certification Requirements.

None.

Professional Corporations.

Statutory authorization for formation by lawyers, including limited liability companies. (47-13A). See category 2 Business Organizations, topic 2.03 Corporations, subhead Professional Corporations.

19 MINERAL, WATER AND FISHING RIGHTS

19.00A FISHING RIGHTS:

Fishing rights supervised generally by Department of Game, Fish and Parks. (SDCL 1-39-1, 4, 5). Department shall enforce laws regarding protection and propagation of all game, fish, and harmless animals. (SDCL 41-15-1, SDCL 41-2-18).

No person may acquire any property in, or subject to his dominion or control, any game fish unless taken in manner prescribed by law. (SDCL 41-1-2, SDCL 41-1-3). No person shall wantonly waste or destroy any fish protected under laws of State. (SDCL 41-1-4).

License, Stamp or Permit Required.

Basic or general game and fish license required of all resident subject to exceptions, to which all specific fishing licenses are to be attached. (41-6). Nonresidents shall secure applicable nonresident fishing license. (SDCL 41-6-12). However, privileges associated with resident license continue after change in residency up until time at which license expires. (SDCL 41-1-1[22]). License and/or permit also required for maintenance of commercial fish hatchery, and resident wholesale bait dealer establishment. (SDCL 41-6-39, SDCL 41-6-44). Misdemeanor to barter, sell, or offer for sale at any time or knowingly to purchase any fish taken or killed from waters of State except as provided by law. (SDCL 41-14-25). Use of crossbows for fishing is prohibited, although exceptions for certain persons having disability can be granted by Game, Fish, and Park Commission. (SDCL 41-12-12).

19.01 MINES AND MINERALS:

Mining supervised generally by Dept. of Health (SDCL 1-43-5) and Board of Minerals and Environment (SDCL 1-40-25); surface mining and reclamation, and oil and gas industry by Dept. of Environment and Natural Resources (SDCL 1-40-1, 9, 10).

Operation of Mines.

Discoverer of vein or lode must record claim with register of deeds within 60 days of discovery. (SDCL 45-4-4). Claims recorded only after notice and marking of surface boundaries. (SDCL 45-4-2, 3). Affidavit specifying labor performed or improvements made, or affidavit or recorded document specifying compliance with federal law, shall be recorded with Register of Deeds or on before Dec. 30 of each year. (SDCL 45-4-23). Owner of mine or mining claim entitled to right of way to mining property. (45-5). Condemnation powers given to mine owners to comply with anti-pollution requirements. (SDCL 45-5-1). Mine owners are subject to mined land reclamation requirements. (45-6B).

Safeguarding of Employees.

No provisions.

Inspection of Mines.

No provisions.

Oil and Gas.

Application and permits to drill required. (SDCL 45-9-4). May require plugging and performance bond of $5,000 per well. (SDCL 45-9-15). Much other discretionary authority granted for Board of Minerals and Environment to regulate industry regarding such items as reporting, spacing and operation for pool, prevention of groundwater pollution, blow-outs, seepage. (45-9). Authority for governor to join Interstate Compact to Conserve Oil and Gas. (45-10). Compensation to surface owner for damages provided for in SDCL 45-5A-4.

Surface Mining.

Regulated by comprehensive statute requiring permits upon application with $1,000 fee, $50,000 for large scale precious metal, coal, or uranium mine permit, (SDCL 45-6B-14), after notice by publication and notice by mail to owners and lessees of surface rights (SDCL 45-6B-11, 12, 16, 17) and hearing before board of minerals and environment (SDCL 45-6B-30); criteria for unsuitability of surface mining (SDCL 45-6B-33); socioeconomic impact study required (SDCL 45-6B-33.1); bonding of operators (SDCL 45-6B-20 to 27); contents of reclamation plan (SDCL 45-

6B-7); small scale operation less than ten acres and less than 25,000 tons ore or overburden extracted per year subject to $100 application fee and surety not to exceed $2,500 (SDCL 45-6B-53, 55).

Sand, Gravel and Construction Aggregate Mining.

License required. (SDCL 45-6-65). Reclamation required. (SDCL 45-6-67).

Mineral and Uranium Exploration

Regulated by statutes under supervision of Board of Minerals and Environment and Department of Environment and Natural Resources. (Minerals 45-6C; Uranium 45-6D).

Recording of Oil, Gas, and Mineral Interests.

To be recorded, oil, gas, mineral lease must contain post office address of lessee and legal description of leased premises (SDCL 7-9-7) with recording fee of $6 per page (SDCL 7-9-15). Mineral interests abandoned if unused for 23 years unless claim filed with register of deeds prior to abandonment. (SDCL 43-30A-2, 4). In order to be recorded with register of deeds, any assignment or mortgage of oil, gas, or other mineral must include names of assignor and assignee on instrument. (SDCL 7-9-7[3]).

Taxes.

Energy mineral severance taxed at 4½% of market value (SDCL 10-39A-1); mineral extraction tax on net profits as follows: $4 per ounce of gold severed in state (SDCL 10-39-43); conservation tax of 2.4 mills of taxable value of any energy minerals severed (SDCL 10-39B-2).

19.01A WATER RIGHTS:

Water rights are supervised generally by Department of Environment and Natural Resources (SDCL 1-40-1) and Water Management Board (SDCL 1-40-15). Chief Engineer delegated with authority to act on behalf of Water Management Board in interpreting, applying and enforcing existing rules and laws. (SDCL 46-2-3.1).

General Provisions.

Water of state is property of people of state, though right to use such water may be appropriated. (SDCL 46-1-3). Right to use or flow of water is limited to such water as shall be reasonably required for beneficial use to be served, with domestic purposes being considered highest form of use. (SDCL 46-1-4, 5, 9). Such water rights may be granted for use outside state on same basis. (SDCL 46-1-13).

Appropriation of Surface Waters.

Subject to vested rights and prior appropriations, all waters flowing in definite streams of state may be appropriated, subject to limitations. (SDCL 46-5-5). Irrigation rights are nontransferable and remain appurtenant to land upon which water is used. (SDCL 46-5-34). Applications and permits required to appropriate surface water. (SDCL 46-1-15; SDCL 46-5-10). Process regulated extensively (46-2A), with application being submitted to chief engineer (SDCL 46-2A-2) who will make recommendations to Board. Hearing before board and notice by publication required. (SDCL 46-2A-3). Board shall approve permit if all applicable requirements have been met. As between appropriators, first in time is first in right, though this approach is tempered by natural flow theory. (SDCL 46-5-1, SDCL 46-5-7). Beneficial use must be obtained within limited amount of time, though possible variances may be obtained. (SDCL 46-2A-8).

Loss of Appropriation/Permit.

Water rights are not permanent rights and may be lost. (SDCL 46-2A-18). Failure to beneficially use all water appropriated results in reversion of unused portion to public (SDCL 46-5-36, 37), subject to exception for acreage placed in quota program or otherwise withdrawn as required for participation in other federal programs (SDCL 46-5-37.2). No person may waste water or engage in unauthorized use of water. (SDCL 46-5-46).

Groundwater and Wells.

Groundwater may be appropriated pursuant to procedures contained in SDCL 46-2A, subject to limitations. (SDCL 46-6-3). Well drillers license required and must be displayed at drilling site. (SDCL 46-6-9). Wells are to be constructed so as to prevent waste which is prohibited. (SDCL 46-6-10, 14). Uncontrolled artesian wells, wild wells, and abandoned, unplugged wells are prohibited. (SDCL 46-6-15, 18, 27). Board may adopt rules and regulations governing location and capacity of all types of large capacity wells. (SDCL 46-6-6.1). Regulations are enforceable in circuit court by damaged owner or user of domestic or municipal well, with attorney’s fees, expert fees and court costs recoverable from violator. (SDCL 46-6-25).

20 MORTGAGES

20.01 CHATTEL MORTGAGES:

Uniform Commercial Code adopted. (Tit. 57A). See category 3 Business Regulation and Commerce, topic 3.09 Commercial Code.

What May Be Mortgaged.

Uniform Commercial Code adopted. See category 3 Business Regulation and Commerce, topic 3.09 Commercial Code.

After-acquired Property.

Uniform Commercial Code adopted. See category 3 Business Regulation and Commerce, topic 3.09 Commercial Code. Except as hereinafter noted, a lien may be created on property not yet acquired nor in existence, and in such case the lien attaches when an interest is acquired, to the extent of such interest. (SDCL 44-1-6).

Mortgage of Motor Vehicle.

See category 23 Transportation, topic 23.01 Motor Vehicles, subhead Liens.

Requisites of Instrument.

Uniform Commercial Code adopted. See category 3 Business Regulation and Commerce, topic 3.09 Commercial Code.

Execution of Instrument.

Uniform Commercial Code adopted. See category 3 Business Regulation and Commerce, topic 3.09 Commercial Code.

Filing.

Uniform Commercial Code adopted. See category 3 Business Regulation and Commerce, topic 3.09 Commercial Code.

Fee.

See category 10 Documents and Records, topic 10.04 Records.

Removal of Property by Mortgagor.

Felony for mortgagor or grantor of security interest to remove property covered by mortgage, conditional sales agreement, or security agreement from county where filed, unless with written consent of holder, or in accordance with usual and customary use. (SDCL 44-1-12).

Sale, Concealment, or Injury to Mortgaged Property.

Mortgagor or grantor of security interest guilty of felony if, without written consent of mortgagee, he willfully destroys, conceals, sells, or disposes of mortgaged property; or if without written notice to mortgagee, he materially injures or willfully abandons such property. (SDCL 44-1-12).

Satisfaction.

Uniform Commercial Code adopted. See category 3 Business Regulation and Commerce, topic 3.09 Commercial Code.

Foreclosure.

Uniform Commercial Code adopted. See category 3 Business Regulation and Commerce, topic 3.09 Commercial Code.

Redemption.

No provision for redemption from foreclosure sale.

Foreign Mortgages.

Chattel mortgage valid under laws of another state, on property subsequently removed to South Dakota, will be enforced in South Dakota under rules of comity. (67 S. D. 400, 293 N.W. 530).

Taxation.

No special provision imposing tax on chattel mortgage.

Forms.

Following forms are in general use. (For Financing Statement and Termination Statement, see National Article 9 forms located in Uniform and Model Acts section of Law Digest, Commercial Code Amendments.)

Forms

Security Agreement.

General form.

SECURITY AGREEMENT—GENERAL FORM

. . . ., 20 . . . . . .

1. PARTIES-PROPERTY: The undersigned Debtor (jointly and severally) for value received hereby grants to the undersigned Secured Party or Lender, a security interest pursuant to the uniform commercial code in the following described property: all products of, additions to and replacements thereof and all accessories, accessions, parts and equipment now or hereafter affixed thereto or used in connection therewith, and the proceeds of all property secured hereby (hereinafter called the “collateral”) as set out below:

[insert collateral description]

2. IF FARM PRODUCTS, CROPS OR FIXTURES ARE COLLATERAL: If this instrument includes livestock, then as additional collateral, Debtor assigns, transfers and conveys to Secured Party a security interest in and to all increase and issue thereof and additions, replacements and substitutions therefor, and all feed, both hay and grain, owned by Debtor, all water privileges, and all equipment, used in feeding and handling said livestock and also all of Debtor's right, title and interest in all leases covering lands for pasture and grazing purposes. If crops, this agreement includes annual and perennial crops and products thereof growing or planted on the following described property; either before or after harvest and all additions and substitutions therefor; or if the property covered hereby is livestock, crops or fixtures; it is and will be located on the following described property in . . . . County, South Dakota: (Insert legal description).

3. IF INVENTORY IS COLLATERAL: If this instrument includes inventory then Debtor hereby grants to Lender a security interest in all of his inventory now owned or hereafter acquired and all replacements, substitutions, and additions thereto, and a security interest in all of Debtor's merchandise, raw materials, work in process and finished products.

A. Upon execution of this agreement and upon request of Secured Party at any time while the indebtedness hereby secured remains unpaid, Debtor will furnish to Secured Party a signed statement, in form satisfactory to Secured Party, showing the current status of the inventory herein secured to include for any given period designated by Secured Party the opening inventory, inventory acquired, inventory sold and delivered, inventory sold and held for future delivery, inventory returned or repossessed, inventory used or consumed in Debtor's business, and closing inventory.

B. If at any given time the value of the collateral does not equal or exceed the total amount of indebtedness of Debtor to Secured Party, Debtor shall at once pay the excess of indebtedness to Secured Party or transfer additional collateral to Secured Party to meet Secured Party's satisfaction.

4. OBLIGATIONS SECURED-OPEN END: This security interest is given to secure the performance of the covenants and agreements herein set forth and for the payment of such indebtedness as evidenced by a promissory note(s) or other instrument(s) executed by Debtor payable to the order of said Secured Party as therein provided, and with interest as therein set forth and for the payment of all extensions and renewals thereof and all changes in form of said indebtedness which may be from time to time effected by agreement between Secured Party and for all advances made by Secured Party for taxes, levies and repairs to or maintenance of said collateral against the claims of others; and all money heretofore and hereafter advanced by Secured Party at his option to or for the account of Debtor and all other present or future, direct or contingent liabilities of Debtor to Secured Party of any nature whatsoever and however arising or acquired; and for interest on any money expended by Secured Party for taxes, levies and repairs to or maintenance of said collateral. All sums payable hereunder shall be paid at the place stated in the promissory note or instrument, if any, and if none then at the location of the Secured Party as stated below, and if none, then at the place of residence of the Secured Party.

5. This instrument shall be void upon payment of all obligations secured hereby.

6. INFORMATIONAL (Check one or more).

The address of the Debtor, below, is his residence.

Such address is where the Collateral is kept.

Such address is the Debtors chief place of business.

Debtor is a non-resident of South Dakota.

7. USE OF PROPERTY: Debtor warrants, covenants and agrees that: the property is or is to be used by Debtor primarily (check 1, 2 or 3):

1. In business

Equipment

Inventory

2. For personal, family or household purposes:

3. In farming operations

Farm Products

Farm Equipment

8. PURPOSE: The security interest herein is given on this collateral.

for a purchase money loan;

otherwise.

9. THIS AGREEMENT SPECIFICALLY INCLUDES ALL OF THE ADDITIONAL PROVISIONS SET FORTH ON THE REVERSE SIDE HEREOF, THE SAME BEING INCORPORATED HEREIN BY REFERENCE. DEBTOR ACKNOWLEDGES RECEIPT OF A COPY OF THIS CONTRACT FULLY COMPLETED.

. . . .

(Debtor)

. . . .

(Debtor)

. . . .

(Number and Street)

. . . .

(City)

. . . .

(County) (State)

By . . . .

(Secured Party)

. . . .

(Number and Street)

. . . .

(City)

. . . .

(County) (State)

* Consider the desirability of joinder of spouse.

Reverse Side.

SUCH ADDITIONAL PROVISIONS ARE AS FOLLOWS:

10. PROCEEDS: Proceeds of collateral are also covered by the lien of this instrument; however, such provision shall not be construed to mean that the Secured Party consents to any sale of such collateral, except inventory.

11. WARRANTY: If the collateral herein is for a loan, Debtor represents that he is owner of the above described property free and clear of all liens and encumbrances, unless specifically excepted herein, and will not sell, assign or transfer said property or any part thereof without the written consent of the Secured Party.

12. EXAMINATION AND INSPECTION: For right to inspect collateral, see paragraph 20, below; Inspection of Collateral. If the collateral hereunder is inventory or equipment used for business purposes, the Debtor will keep accurate books and records of the collateral and shall allow the Secured Party or representatives of the Secured Party to examine said books and records at any reasonable time.

13. INSURANCE AND TAXES: Debtor promises and agrees to keep said collateral insured from loss or destruction by fire, windstorm, hail and such other perils as Secured Party requires, in a company or companies satisfactory to the secured party, in an amount not less than the full insurable value of the collateral or the amount secured hereby, whichever is lesser, with appropriate endorsement to secure both parties as their interest appears at and to pay any and all taxes or charges assessed against said collateral, Secured Party may, without notice, at its option but without any obligation or liability so to do, procure insurance, pay taxes or other said charges and add said sums to the balance of the debt herein. Debtor hereby appoints the Secured Party the agent and attorney for the Debtor in adjusting and cancelling such insurance and endorsing settlement drafts and hereby assigns to the Secured Party all sums including return premiums and dividends, as additional security, specifically agreeing that Secured Party may cancel any said insurance upon any default by Debtor and apply any refund to the balance then due. Insurance policies shall promptly be delivered to Secured Party.

14. CARE OF PROPERTY: Debtor shall take good care of this property; shall shelter it and keep it in good repair; and will not permit any waste or damage thereto, shall keep it free from all other liens, encumbrances, charges and claims, whether contractual or imposed by operation of law; shall not make any material change in said property nor use nor permit the same to be used for any unlawful purpose whatsoever; shall not remove it from the Debtor’s residence or place of business without Secured Party’s consent; will promptly supply to Secured Party any new residence address and secure permission from him to change the location of the collateral; and shall give Secured Party immediate written notice of any loss of, or damage to, any of said property.

15. If the collateral is being acquired with the proceeds of the note or notes, Secured Party may disburse directly to the seller the collateral, or debtor agrees to remit said proceeds to the seller of said collateral.

16. IF THE COLLATERAL IS INVENTORY, ACCOUNTS AND/OR CONTRACT RIGHTS;

(a) Debtor agrees to give the Secured Party written notice of any proposed amendment, change, modification or cancellation of any Collateral Contract Right.

(b) The Collateral Accounts listed on the attached Schedule A are genuine and enforceable, and there are no offsets, counterclaims, or defenses to any of them.

(c) Debtor will not grant to any Account Debtor (as that term is defined in the Uniform Commercial Code) on a Collateral Account any rebate, refund, allowance or credit on any Account without the prior written consent of the Secured Party.

(d) The Secured Party shall have the authority, but shall not be obligated to (i) notify any or all Account Debtors (as that term is defined in the Uniform Commercial Code) of the existence of the Secured Party’s Security interest and to pay or remit all sums due or to become due directly to the Secured Party or its nominee; (ii) place on any Chattel Paper received as Proceeds a notation or legend showing the Secured Party’s Security interest; (iii) in the name of the Debtor or otherwise, to demand, collect, receive and receipt for, compound, compromise, settle and give acquittance for, and prosecute and discontinue any suits or proceedings in respect of any or all of the Collateral; (iv) take any action which the Secured Party may deem necessary or desirable in order to realize on the Collateral, including without limitation, the power to perform any contract, to endorse in the name of Debtor any checks, drafts, notes, or other instruments or documents received in payment of or on account of the Collateral; (v) to place upon Debtor’s books and records relating to the Accounts and Contract Rights covered by the Security Interest granted hereby a notation or legend stating that such Account or Contract Right is subject to a Security Interest held by the Secured Party, and (vi) after any Default, to enter upon and into and take possession of all or such part or parts of the properties of Debtor, including lands, plants, buildings, machinery, equipment and other property as may be necessary or appropriate in the judgment of the Secured Party to permit or enable the Secured Party to manufacture, produce, process, store or sell or complete the manufacture, production, processing, storing or sale of all or any part of the Collateral, as the Secured Party may elect, and to use and operate said properties for said purposes and for such length of time as the Secured Party without the payment of any compensation to Debtor therefor.

(e) Debtor will collect all Accounts until receipt of notice from the Secured Party to notify all Account Debtors of the existence of the Secured Party’s Security Interest. Debtor will hold all of the Proceeds of such collections and all returned and repossessed Goods in trust for the Secured Party and will not commingle the same with any other funds or property of the Debtor, and will deliver the same forthwith to the Secured Party at its request; provided, however, that with respect to returned and repossessed Goods, Debtor will on demand pay to the Secured Party the full invoice or contract price thereof.

17. If the collateral is in the possession of the Secured Party the Secured Party shall have the right to use or operate said collateral, to commingle said collateral with his own property, and to repledge the collateral on terms which do not impair the debtor’s right to redeem it.

18. If the value of the Collateral declines in value in the judgment of the Secured Party or becomes unsatisfactory to the Secured Party, the Debtor agrees to deliver to the Secured Party upon its request additional Collateral satisfactory to the Secured Party.

19. The Secured Party shall be deemed to have exercised reasonable care in the custody and preservation of the Collateral if it takes such action for that purpose as the Debtor shall request in writing, but failure of the Secured Party to comply with any such request shall not of itself be deemed a failure to exercise reasonable care, and no failure of the Secured Party to protect or preserve any rights with respect to the Collateral against other parties, or to do any act with respect to the protection or preservation of the Collateral not so requested by the Debtor shall be deemed a failure to exercise reasonable care in the custody or preservation of the Collateral.

20. The Secured Party, in the name of the Debtor or otherwise, shall have the authority but shall not be obligated to demand, collect, receive and receipt for, compromise, compound, settle and give acquittance for and prosecute and discontinue any suits or proceedings in respect of any or all of the Collateral; and take any action which the Secured Party may deem necessary or desirable in order to realize on the Collateral, including, without limitation, the power to perform any contract, to endorse in the name of the Debtor any checks, drafts, notes, or other documents which are Collateral or are received in payment or on account of the Collateral.

21. SUCCESSORS AND ASSIGNS: the rights and privileges of Secured Party under this agreement shall inure to the benefit of his successors and assigns. All covenants, representations, warranties and agreements of Debtor contained in this agreement are joint and several if Debtor is more than one and shall bind Debtor’s personal representatives, heirs, successors and assigns.

22. ASSIGNMENTS AND DEFENSES: that Secured Party shall have the right to negotiate or assign the security interest evidenced by this agreement and the note which it secures, and understands that Secured Party may do so without any notice to Debtor. Debtor specifically agrees that if there is any assignment or transfer of the security agreement, debt instrument, or note, the assignee or transferee shall have all of the Secured Party’s rights and remedies under this agreement and that Debtor will not assert as a defense, counter-claim, set-off, cross complaint or otherwise, any claim, known or unknown, which he now has or hereafter acquires against the original Secured Party herein in any action commenced by an assignee or transferee of this agreement and the note which it secures, and will pay the indebtedness to the assignee of his place of business as it becomes due.

23. NON-WAIVER EXTENSIONS, ETC.: That any extension of time for payment of any installment hereunder, or the acceptance of only a part of such installment, or the failure of the Secured Party to enforce the strict performance of any covenant, promise or condition herein contained on the part of the Debtor to be performed, shall not operate as a waiver of the right of the Secured Party thereafter to require that the terms hereof be strictly performed according to the tenor hereof. No Party to this agreement shall be discharged from liability to the Secured Party by reason of the Secured Party’s extending the time for payment of an installment or installments owing or due upon said loan, or by reason of the Secured Party’s waiver or modification of any terms of the note or instrument evidencing such loan, or any terms of this agreement.

24. LAW APPLICABLE: This agreement shall be deemed to have been made in the State of South Dakota and shall be construed according to the laws of said State. If any provision of this agreement shall for any reason be held to be invalid or unenforceable, such invalidity or unenforceability shall not affect any other provision hereof, but this agreement shall be construed as if such invalid or unenforceable provision had never been contained herein.

25. ACCELERATION OF OBLIGATIONS AND DEFAULT: Upon the occurrence of any of the following events, the Secured Party may at his option, orally or in writing, declare the whole unpaid balance of any obligation secured by this agreement, immediately due and payable and if

not so paid, then may declare Debtor to be in default under this agreement; said events being as follows:

(a) Debtor fails to make payments to the Secured Party as agreed herein or in any note evidencing any obligation hereby secured. (b) Debtor fails to perform the other obligations agreed to be by him performed in any paragraph of this agreement. (c) Debtor or agent has made or furnished a false statement, representation or warranty in a material respect. (d) Debtor fails in his business; or if there occurs the dissolution or termination of its existence; or if there is commenced any proceeding under any bankruptcy or insolvency, laws by or against the Debtor or by any guarantor or surety hereon for the Debtor; or if the Debtor shall make any assignment for the benefit of credits. (e) Occurrence of loss, theft, damage or destruction of the collateral not covered by adequate insurance containing a loss payable clause for the protection of Secured Party. (f) The death of any debtor who is a natural person or of any partner of any debtor which is a partnership. (g) When the secured party at any time, in good faith, deems itself or the collateral secured herein, insecure for any reason.

26. REMEDIES: Upon default as in paragraph 19 above, Secured Party shall have all rights and remedies of a Secured Party under the Uniform Commercial Code of South Dakota and under any other applicable laws. Debtor will, at Secured Party's request, assemble the collateral and make it available to the Secured Party at such place as is designated by the Secured Party, which shall be reasonably convenient. Debtor agrees that any regular business place in the county where this transaction takes place, as designated by the Secured Party shall be deemed reasonably convenient to both parties. Any requirements of reasonable notice by either party to the other or to the guarantors or sureties of Debtor shall be met if such notice is mailed, postage prepaid to the address of the parties shown on the first page of this agreement (or to such other mailing address as either party in writing later furnishes to the other) at least seven days before the time of the event or contemplated action set forth in said notice. Debtor agrees to pay all expenses of retaking, holding, preparing for sale; selling and reasonable attorney's fees and legal expense as may be allowable by law and incurred by Secured Party in enforcing his rights under this Security Agreement. INSPECTION OF COLLATERAL. Debtor hereby authorizes the Secured Party, agents or assigns to enter upon the premises of the Debtor at any reasonable time, and whether or not in default, to inspect the collateral; and if in default to possess, or attempt to possess said personal property and to assert or attempt to assert the rights of the Secured Party under any of the terms and provisions of this agreement. Debtor waives all rights and claims for trespass or conversion and damages in any manner thereby caused by Secured Party, his agents or assigns. All exemptions in and to any of the collateral are hereby waived. INSECURITY. If and when, and so long as the Secured Party believes himself insecure, and even though Debtor is not then in default, the Secured Party, at his option, and without liability for trespass, conversion, and damages may repossess and keep possession of any or all of said collateral as provided herein; but without acceleration of maturity, unless and until the Debtor is in default. RIGHTS AND REMEDIES CUMULATIVE. The rights and remedies herein conferred upon the Secured Party shall be cumulative and not alternative and shall be in addition to and not in substitution of or in derogation of rights and remedies conferred by the Uniform Commercial Code of South Dakota and other applicable law.

27. CONSTRUCTION: Words and phrases herein, including acknowledgment hereof; if any shalt be construed as in the singular or plural number, and as masculine, feminine or neuter gender, according to the context. The paragraph headings of this agreement are for convenience only and shall not limit the terms of this agreement.

20.02 [RESERVED]

20.03 MORTGAGES OF PERSONAL PROPERTY:

See topic 20.01 Chattel Mortgages.

20.04 MORTGAGES OF REAL PROPERTY:

Execution.

A mortgage of real estate must be in writing and executed like a deed. (SDCL 44-8-1). In order to be recorded it ordinarily must be acknowledged. (SDCL 44-8-9).

Recording.

Mortgages are recorded like deeds. (SDCL 44-8-9). Mortgage which does not contain postoffice address of mortgagee, amount of mortgage, and when due, is not entitled to record. (SDCL 7-9-7). Grant of real property, or estate therein, which appears, by any other writing, to be intended as mortgage, must be recorded as mortgage; and if such grant and other writing explanatory of its true character are not recorded together at same time and place, grantee derives no benefit from such record. (SDCL 44-8-11). Record of mortgage, duly made, operates as notice to all subsequent purchasers and encumbrancers. (SDCL 44-8-10).

Fee for recording mortgage is $10 for first page and $2 for each additional page. Rider or addendum is considered additional page. Mortgages failing to conform to SDCL 43-28-23 (see category 10 Documents and Records, topic 10.04 Records, subhead Requisites for Recording) incur additional $10 fee. (SDCL 7-9-15).

Power of attorney to execute a mortgage must be in writing, subscribed, acknowledged or proved, certified, and recorded in like manner as powers of attorney for grants of real property. (SDCL 44-8-2).

Taxes.

See category 22 Taxation, topic 22.15 Property Taxes.

Trust Deeds.

While trust deeds may be used as substitutes for mortgages, this is rarely done.

Illegal provisions in mortgages, which are against public policy and unenforceable, are: (1) Granting the right of possession before the expiration of the period of redemption, or any pledge of any crops or rental therefrom prior to the expiration of the period of redemption in a mortgage on the homestead or adjacent property used in connection therewith, or for the same purpose; (2) any agreement whereby mortgagor agrees to pay taxes of mortgagee on account of the mortgage debt; (3) any waiver of exemption of personal property; (4) any agreement to the appointment of a receiver during foreclosure or the period of redemption. Foregoing do not affect 180 day redemption mortgages, mortgages to U.S., Federal Land Bank or Commissioner, or any agency of U.S. Government. (SDCL 44-8-7).

One Hundred Eighty Day Redemption Mortgages.

May include provisions for attorney fees, receiver, assignment of rents, deficiency, and declaring balance due on sale of mortgaged premises without consent of mortgagee. (21-49).

Collateral Real Estate Mortgages.

May be used to secure commercial, agricultural or consumer loans or lines of credit including revolving notes and credits. Mortgage must be entitled in capital letters: “MORTGAGE—COLLATERAL REAL ESTATE MORTGAGE,” and must contain in capital letters this statement: “THE PARTIES AGREE THAT THIS CONSTITUTES A COLLATERAL REAL ESTATE

MORTGAGE PURSUANT TO SDCL SDCL 44-8-26." Mortgage constitutes valid lien for maximum period of five years plus 60 days unless addendum is filed. (SDCL 44-8-26).

Provision for Attorneys' Fees.

180 day redemption mortgage may include provision allowing for recovery of "reasonable attorneys' fees and actual disbursements" in case of foreclosure. (SDCL 21-49-13[2]). Attorneys' fees also allowed in foreclosure actions where mortgagee is regulated lender. (SDCL 54-3-13).

Priorities.

Subject to the operation of the recording law, purchase money mortgages have priority over all other liens created against the purchaser. (SDCL 44-2-2). See also categories 8 Debtor and Creditor, topic Liens; Documents and Records, topic Records.

Assignment of mortgage is acknowledged and recorded like mortgage, and must contain the name of the mortgagor, mortgagee, assignee and his postoffice address, date of mortgage, date of recording mortgage, county and state, and book and page where recorded, and full description of premises as described in mortgage. This record operates as notice to all parties in interest or parties subsequently dealing with property (SDCL 44-8-13).

Satisfaction.

A mortgage is released by filing for record with the register of deeds a certificate signed by the mortgagee, his personal representatives or assigns, and acknowledged, as in the case of other instruments affecting real property. This certificate must state: names of mortgagor and mortgagee; date of mortgage; date, county, state, book and page of record of mortgage; full description of mortgaged premises or part thereof released; and that mortgage has been fully paid, satisfied and discharged or partially paid to extent stated. (SDCL 44-8-14). On payment of mortgage, lienholder must execute and deliver such certificate or enter a satisfaction or cause a satisfaction to be entered or recorded, within 30 days. However, after written demand by owner of property, mortgagee must execute and deliver written Satisfaction of Mortgage within ten days and any owner of mortgage who fails to do so is liable to owner of property for all damages, including attorney's fees, sustained by reason of such refusal, and may be compelled to also forfeit sum of $100. (SDCL 44-3-8).

The foregoing provisions with regard to the discharge of mortgages apply as well to the discharge of such trust deeds as are in effect mortgages.

In certain circumstances when mortgage has been paid, but no satisfaction filed, title insurance company may file certificate of release which operates as release of mortgage. (SDCL SDCL 44-8-29 to 35).

Foreclosure.

Mortgage may be foreclosed by action or by advertisement. Right to foreclose barred after 15 years from maturity of mortgage. (SDCL 15-2-7). Mortgage is conclusively presumed paid at expiration of 15 years from date that cause of action on mortgage accrues. (SDCL 15-2-28).

Foreclosure by Action.

Action is brought in circuit court of county where property or some part thereof situated. (SDCL 21-47-1). Court has power: to render judgment against mortgagor for amount of mortgage debt due at time of rendition of judgment, and costs of action; to order sale of premises, or such part thereof as is sufficient to pay amount due; to direct in what parcels land shall be offered for sale, order of offering parcels, and offering of parcels for which no bid received in one lot with other parcels; to compel (after right of redemption has expired) delivery of possession of premises to purchaser; and to direct issuing of execution for balance remaining unsatisfied after application of proceeds of sale. (SDCL 21-47-13, 20). Notice of sale must be published once a week during four weeks. Sale is made by referee, sheriff (or deputy) of county where court held, or other person appointed by court for that purpose, and is within county where premises, or some part of them, are situated, and upon like notice and in same manner as sale of real property on execution. (SDCL 21-47-14). Certificate of sale issues to the purchaser. Certificate must show particular description of property sold, price bid for each distinct lot or parcel, and whole price paid, and must be executed and acknowledged and filed and recorded in office of register of deeds where mortgage is recorded within ten days after sale. (SDCL 21-47-21; SDCL 21-48-19). If premises are not redeemed deed issues (SDCL 21-47-24; SDCL 21-48-21) which vests in purchaser, or other person entitled thereto, same estate that was vested in mortgagor at time of execution and delivery of mortgage or at any time thereafter.

Provision is made for service by publication on unknown heirs, devisees, legatees, executors, administrators, creditors and unknown persons generally where mortgagor or another defendant is deceased. (SDCL 21-47-2).

Foreclosure by Advertisement.

Mortgage which contains power of sale to be exercised on default may be foreclosed by advertisement. (SDCL 21-48-1). It is requisite: (1) That some default has occurred on such mortgage, by which power of sale has become operative; (2) that no action or proceeding has been instituted to recover debt secured, or any part thereof, or that same has been discontinued, or that an execution on judgment rendered therein has been returned unsatisfied, in whole or in part; and (3) that mortgage and all assignments thereof have been duly recorded in county where premises located. (SDCL 21-48-2 to 4). Notice of foreclosure is given by publication once a week for four successive weeks in a newspaper in county where premises or part of them are situated. This notice specifies: (1) Names of mortgagor and mortgagee, and assignee, if any; (2) date of mortgage; (3) amount claimed to be due at date of notice; (4) description of mortgaged premises as contained in mortgage; and, (5) time and place of sale (SDCL 21-48-6) which must be at public auction between 9 a. m. and 5 p. m. in county in which premises or some part of them, are situated. Sale must be made by sheriff of such county, or his deputy, to highest bidder. (SDCL 21-48-10). If premises consist of distinct farms, tracts or lots, they must be sold separately, and no more sold than necessary to satisfy amount due, plus interest costs, and expenses allowed by law, except that where there is a paramount lien on two or more lots or parcels not contiguous these may be sold in one parcel subject to the paramount lien. (SDCL 21-48-12). Certificate of sale then issues. (SDCL 21-48-19). If no redemption made, deed issues to original purchaser, or to person entitled thereto. (SDCL 21-48-21). Record of such sale, including affidavit of publication of notice of sale, affidavit as to military status of mortgagor, and showing compliance with Federal Tax Lien Act of 1966, and certificate of sale, must be recorded in office of register of deeds. (SDCL 21-48-23 to 25).

On application, circuit court of county where property or part thereof is located must make order enjoining foreclosure by advertisement and directing that all further proceedings be in court. (SDCL 21-48-9).

Assignment of Rents.

Foreclosure does not constitute satisfaction of assignment of rents during redemption period. (SDCL 21-47-17).

Nonjudicial Voluntary Foreclosure.—(21-48A). Mortgagor and mortgagee may agree that, in return for waiver of any deficiency, mortgagor will convey mortgagor’s interest in property, and right of immediate possession to mortgagee. Statutory form, Disclosure and Notice of Cancellation, must be given to mortgagor; jointly executed document disclosing election to utilize this procedure must be filed with register of deeds; and all junior lienholders must be notified by certified mail of: (a) election to utilize this procedure; (b) all sums necessary to redeem; and (c) they have 60 days to redeem. Junior lienholders may either redeem or commence judicial foreclosure during this 60 day period. If they fail to do so, their liens are released.

Deficiency Judgment.

On foreclosure of a mortgage securing purchase money notes, no deficiency judgment may be had (SDCL 44-8-20); however, deficiency is allowed to lender if lender is not vendor of real estate (SDCL 44-8-25).

Application of Proceeds.

Proceeds of sale are applied as follows: (1) Costs and expenses of sale; (2) costs and disbursements taxed in action in which sale made; (3) debt adjudged by court to be due; (4) balance deposited with clerk of circuit court to be held for benefit of persons entitled thereto. (SDCL 21-48-16, 18).

Redemption.

By terms of a real estate mortgage of an area 40 acres or less and containing power of sale, and in form specified by statute, special 180 day redemption limitation may be imposed on condition that mortgagee give notice required by Act before sale. (21-49). If property subject to 180 day redemption mortgage is abandoned, redemption period may be reduced to not less than 60 days. (SDCL 21-49-13[8]). Except in this limited situation, all persons entitled to redeem, in all cases, have one year from date of sale in which to redeem. (SDCL 21-52-11). Redemption may be made by judgment debtor, or any successors having interest in property sold, and holders of any lien, legal or equitable, subsequent and junior to that from which redemption is made on property sold, or any part. (SDCL 21-52-5). Except in case of 180 day redemption mortgages where no extension is granted, extension of right to redeem may be had by any redemptioner, prior to expiration of one year, paying all taxes and any sums paid by purchaser to protect his interest in property, including insurance premiums, installments of principal or interest upon superior lien, together with interest at legal rate from date of payment, all interest due on date of sale, interest on principal of such mortgage or amount of judgment for one year from date of sale and for one year in advance at legal rate on judgment and at mortgage rate in case of mortgage, and all costs of foreclosure if made by advertisement, and costs of sale if made on execution, in which case redemption shall be extended for one year in favor of all redemptioners. (SDCL 21-52-13). Period of redemption may also be extended by recorded, written stipulation between purchaser and redemptioner. (SDCL 21-52-12).

On redemption by owner, effect of sale is terminated. (SDCL 21-52-24). In case of redemption by a junior lien holder prior to owner's redemption, other subsequent lien holders may, in their turn, redeem. If redemption is so made within 60 days of the close of the period of redemption, other junior lien holders have 60 days from such redemption in which to redeem, and the period of redemption may thus be extended beyond the original year of redemption. After the expiration of 60 days from any redemption so made, the owner may exercise his final right of redemption within 15 days. (SDCL 21-52-23). Payments by lien holders in redemption must be evidenced by a certificate of the sheriff setting forth the action of redemption, the amount paid, and any subsequent liens which the redemptioner is required to pay, and any insurance and taxes paid, which shall be duly acknowledged and recorded. (SDCL 21-52-25).

In case of redemption by co-tenants, the co-tenant redeeming may serve notice thereof on his co-tenants to reimburse within 60 days. If the other co-tenants fail to make such contribution, the co-tenant redeeming is entitled to a sheriff's deed to him as against the other co-tenants. (SDCL 21-52-29).

When the land consists of two or more separate farms or tracts subject to separate liens, a redemptioner seeking to redeem one or more of the tracts sold, but less than the whole property, may bring an action in circuit court within six months after the date of sale, in which action the court may determine the amount to be paid in redemption of the separate tracts. (SDCL 21-52-8).

The following forms are in use (SDCL 44-8-3 to 6):

Forms

Mortgage: This mortgage, made this . . . . . . day of . . . . . ., in the year 20. . . ., by . . . . . . of . . . . . . county and state of . . . . . ., mortgagor. . . ., to . . . . . . of . . . . . . P. O., county of . . . . . . and state of . . . . . ., mortgagee: Witnesseth, that said mortgagor. . . . hereby mortgage. . . . to said mortgagee. . . . the following described premises situated in the county of . . . . . . and State of South Dakota, to-wit: (description) as security for the payment to said mortgagee. . . . at . . . . . . of the principal sum of . . . . . . dollars and interest thereon at . . . . . .% per annum from date, according to . . . . . . certain promissory note. . . . bearing even date herewith, due . . . . . ., 20. . . . . Said mortgagor. . . .further agree. . . . to pay all taxes and assessments that may be levied upon said premises before the same shall become delinquent (and to keep the buildings, if any, upon said premises safely insured for the benefit of said mortgagee. . . . in the sum of . . . . . . dollars against loss by fire . . . . . . and deliver the insurance policies to said mortgagee. . . .). In case of the mortgagor's failure to pay said taxes or assessments before the same become delinquent or to pay insurance premiums for insurance on said buildings, said mortgagee. . . . or assignee may do so and the amounts so paid with interest at . . . . . .% from date of payment, shall be added to and deemed a part of the money secured by this mortgage. Said mortgagor. . . . hereby relinquish. . . . rights of homestead in said premises and warrant that . . . .he. . . . the owner. . . . in fee of said premises, and that the same are free from all incumbrances (state exceptions). In case of default in the payment of said principal sum of money or any part thereof or interest thereon at the time or times above specified for payment thereof, or in case of nonpayment of any taxes, assessments, or insurance as aforesaid, or of breach of any covenant or agreement herein contained, then and in either case, the whole, principal and interest, of said note. . . . shall at the option of the holder thereof, immediately become due and payable, and this mortgage may be foreclosed by action, or by advertisement as provided by statute or the rules of practice relating thereto, and this paragraph shall be deemed as authorizing and constituting a power of sale as mentioned in said statutes or rules and any amendatory thereof.

. . . . (Signature).

(Acknowledgment).

Assignment: For and in consideration of . . . . . . dollars, to . . . . . . in hand paid, ... do. . . . hereby assign unto . . . . . . of . . . . . . P. O. a certain indenture of mortgage and the note secured thereby, executed by . . . . . . to . . . . . . on the . . . . . . day of . . . . . ., A. D. 20. . . ., upon . . . . . . and recorded in book . . . . . . of mortgages, on page . . . . . . in the office of register of deeds of . . . . . . county, State of South Dakota, on the . . . . . . day of . . . . . ., 20. . . ., at . . . . . . o'clock . . . . . . M. Dated this . . . . . . day of . . . . . . A. D. 20. . . . .

. . . . . . (Signature).

(Acknowledgment).

Satisfaction: . . . . . . of . . . . . . state of . . . . . ., hereby certifies that a certain mortgage bearing date the . . . . . . day of . . . . . ., 20. . . ., executed by . . . . . . to . . . . . . of . . . . . . upon the following real property situated in the county of . . . . . . in the State of South Dakota, to-wit: the . . . . . ., and recorded in the office of the register of deeds of said . . . . . . county, South Dakota, in book . . . . . . of mortgages, page . . . . . . on the . . . . . . day of . . . . . ., 20. . . . at . . . . . . o'clock and . . . . . . minutes . . . . M., is, with the indebtedness thereby secured, fully paid, satisfied and discharged. Dated this . . . . . . day of . . . . . ., 20. . . . .

. . . . . . (Signature).

(Acknowledgment).

Moratorium.

Mediation is required prior to bringing any action to foreclose “agricultural land” defined as parcel larger than 40 acres used in farming or ranching operations in regard to loans or judgments of $50,000 or more. (54-13). Creditor required to file request for mediation as prerequisite to filing action unless action follows dismissal of bankruptcy proceeding, abandonment by bankruptcy trustee, release or relief from bankruptcy stay, or release or termination of receivership proceeding. (SDCL 54-13-10). Foreclosure is stayed for period of 42 days after Board of Mediation issues notice of creditor's mediation request unless debtor waives right to mediation. (SDCL 54-13-12, 16). Exception provided where court determines, after notice and hearing, that mediation “would cause irreparable harm because there are reasonable grounds to believe that the borrower may waste, dissipate or divert agricultural property or that the agricultural property is in imminent danger of deterioration”. (SDCL 54-13-10).

Chattel Mortgages.

See topic 20.01 Chattel Mortgages.

21 PROPERTY

21.01 ABSENTEES:

Care of Property.

If heir, devisee, or claimant missing, personal representative to distribute such share to person's conservator, or if none, court to order share vest in State for support of schools. Action to reclaim can be brought within ten years. (SDCL 29A-3-914).

Process agent authorized only in specified instances. See categories 2 Business Organizations, topic Corporations; Insurance, topic Insurance Companies, subhead Foreign Insurance Companies; Transportation, topic Motor Vehicles, subhead Action Against Nonresident.

Action against nonresident hunter, his executor or administrator, for injuries or damages growing out of his hunting in state, may be commenced by filing with Secretary of State copy of process, with $10 filing fee, and either sending notice of such service and copy of process by registered or certified mail to defendant at his last known address within ten days thereafter, or serving process on defendant personally without state within 30 days thereafter. Time for defendant's appearance does not commence to run until such mailing or such personal service. Court may grant continuance to give defendant reasonable opportunity to defend, not exceeding 90 days from date of filing action in court. (SDCL 15-7-13 to 16).

Escheat.

Uniform Unclaimed Property Act effective July 1, 1993. (43-41B). See categories 3 Business Regulation and Commerce, topic Banks and Banking, subhead Unclaimed Deposits;

Estates and Trusts, topics Wills, subhead Unclaimed Legacies, Descent and Distribution, subhead Escheat.

21.02 ADVERSE POSSESSION:

Character of Possession.

Property is possessed or occupied when land is usually cultivated or improved; or protected by a substantial enclosure (SDCL 15-3-13); or, if by a person who claims title founded on written instrument, decree or judgment, is used for fuel supply or fencing timber (SDCL 15-3-11). Person holding under claim of title founded on a written instrument, judgment or decree, is deemed to occupy whole of a known farm or single lot which has been only partly improved. (SDCL 15-3-11). Person holding under claim of title not so founded is deemed to hold adversely only those premises actually occupied. (SDCL 15-3-12). In a tract divided into lots, possession of one lot not deemed possession of any other lot. (SDCL 15-3-10).

Duration of Possession.

Continued occupancy and possession under claim of title for 20 years deemed possession held adversely to the legal title. (SDCL 15-3-7, 10). Actual adverse possession of property for twenty years creates title good against all. (SDCL 43-14-2).

Payment of Taxes.

Where a person is in actual possession of land for ten successive years (such actual possession not being necessary as to vacant and unoccupied land), has a good faith claim and color of title, and pays all taxes, he is legal owner to extent of his paper title. (SDCL 15-3-15, 16). This, however, does not apply to land belonging to U.S., South Dakota, schools, religious or charitable corporations, or held for public purposes, nor to land owned by a person who, at expiration of ten years, is less than 21 years old, insane, or imprisoned for a criminal offense for less than life, unless such person fails within three years from removal of disability, to prosecute with due diligence an action to establish his rights. (SDCL 15-3-17, 18).

Easements may be acquired by hostile or adverse use or possession. (68 S. D. 377, 2 N.W.2d 674).

Disabilities.

Where title by adverse possession is claimed against a person who at expiration of requisite period was less than 21 years old, mentally ill, or imprisoned for criminal offense for less than life, action against claimant may be commenced at any time within ten years after disability terminates, or death of disabled person. (SDCL 15-3-14).

21.0321.04 [RESERVED]

21.05 CURTESY:

Abolished (SDCL 29A-2-112).

21.06 DEEDS:

See topic Real Property for types of estates.

Execution.

An estate in real property, other than estate at will, or for term not exceeding one year, can be transferred only by operation of law, or by instrument in writing, subscribed by party disposing of same, or by his agent thereunto authorized by writing. The execution of grant of such estate in real property, if not duly acknowledged, must, to entitle grant to be recorded, be proved by subscribing witness or as otherwise provided by law. (SDCL 43-25-1; SDCL 43-25-26).

No deed describing land by metes and bounds is entitled to record without having tract platted, except for certain property being transferred to or from S.D. Building Authority. (SDCL 43-21-1).

In order to entitle deed to record, it must contain post-office address of grantee, names of grantor and grantee or lesser and lessee, names of joint tenant, and legal description of property conveyed. (SDCL 7-9-7). Must also contain typed, stamped or printed legend stating words “prepared by” followed by name, address and telephone number of preparer. (SDCL 7-9-1). Deeds ordinarily must be acknowledged to be recorded. (SDCL 43-28-8).

See also topic 21.16 Real Property; categories 8 Debtor and Creditor, topic Homesteads, subhead Alienation or Encumbrance; Family, topic Husband and Wife, subhead Conveyance or Encumbrance of Property.

Corporation Deed.

Any officer authorized by charter, articles of incorporation, by-laws, or consent of board of directors or stockholders, may execute deeds. (SDCL 43-25-20). All conveyances and other instruments affecting title to real property shall be executed by any executive officer of bank, or employee so designated by board of directors under corporate seal of bank. (SDCL 51A-4-11). On any instrument executed and acknowledged by officer of corporation, corporate seal or corporate acknowledgment attached to or made part of deed executed by any corporate officer is prima facie evidence of such officer’s authority. (SDCL 43-25-21).

Recording.

A deed must be recorded in office of register of deeds of county where land lies (SDCL 43-28-1); otherwise it is void as against subsequent bona fide purchaser or incumbrancer (including a bona fide assignee of mortgage, lease, or other conditional estate) whose deed or mortgage is first recorded. (SDCL 43-28-17). Deed must include or be accompanied by Certificate of Value. (SDCL 7-9-7[4]). Format standards for recorded real estate documents are established. (SDCL 43-28-23).

Fee for recording deed is $10 for first page and $2 for each additional page. (SDCL 7-9-15). See also subhead Taxes, infra.

Forms and Operation and Effect.

Statutory forms of warranty and quitclaim deeds are as follows (SDCL 43-25-5; SDCL 43-25-7):

Forms

Warranty deed: . . . . . ., grantor of . . . . . . county, state of . . . . . ., for and in consideration of . . . . . . dollars, grants, conveys and warrants to . . . . . . grantee, of . . . . . . P. O., the following described real estate in the county of . . . . . . in the State of South Dakota: . . . . Dated this . . . . . . day of . . . . . . 20. . . . . (Signature). (Acknowledgment).

Such warranty deed is conveyance in fee simple of premises described to grantee, his heirs and assigns, with covenants on part of grantor, his heirs and personal representatives, that he is lawfully seized of premises in fee simple, and has good right to convey same; that premises are free from all incumbrances; that he warrants to grantee, his heirs and assigns, quiet and peaceable possession thereof; and that he will defend title thereto against all persons who may lawfully claim same. Such covenants are obligatory upon any grantor, his heirs and personal representatives, as fully and with like effect as if written at length in such deed.

Quitclaim deed: . . . . . ., grantor of . . . . . . county, state of . . . . . ., for and in consideration of . . . . . . dollars, conveys and quit-claims to . . . . . . the grantee, of . . . . . . P. O. all interest in the following described real estate in the county of . . . . . . in the State of South Dakota: . . . . . . Dated this . . . . . . day of . . . . . . 20. . . . . (Signature). (Acknowledgment).

Such quitclaim deed is conveyance to grantee, his heirs and assigns, of all right, title, and interest of grantor in premises described, but does not extend to after acquired title, unless words expressing such intention be added.

Certificate of Value: See end of Digest for this Form.

Taxes.

Fee of 50¢ for each $500 or fraction is imposed on transfer to be paid to register of deeds by grantor when deed is presented for recording. (SDCL 43-4-21).

Joinder by Both Spouses.

For circumstances in which required see category 8 Debtor and Creditor, topic 8.10 Homesteads, subhead Alienation or Encumbrance.

21.07 [RESERVED]

21.08 DOWER:

Abolished (SDCL 29A-2-112).

21.09 ESCHEAT:

Common law of escheat generally replaced by South Dakota’s version of Unclaimed Property Act. (43-41B). See topic 21.01 Absentees, subhead Escheat; categories 3 Business Regulation and Commerce, topic Banks and Banking, subhead Unclaimed Deposits; Estates and Trusts, topics Descent and Distribution, subhead Escheat, Wills, subhead Unclaimed Legacies.

21.10 LANDLORD AND TENANT:

Statutory provisions as to general rights and obligations are mainly codification of common law rules.

Leases.

A lease of real property for more than one year must be in writing. (SDCL 43-32-5; SDCL 53-8-2).

Farm tenancy of 40 acres or more under oral lease continues for following crop year under same terms as original lease unless written notice for termination given by either party by Sept. 1, whereupon tenancy terminates Mar. 1 following. (SDCL 43-32-22.1).

Term Limited.

No lease or grant of agricultural land for longer period than 20 years, and no lease or grant of any town or city lot for longer period than 99 years, is valid. (SDCL 43-32-2).

Presumption as to Term.

A lease of real property other than lodgings is presumed to be for one year, and lease of lodgings for unspecified term is presumed to be for such length of time as parties adopt for estimation of rent or, in absence of any such estimation, monthly. (SDCL 43-32-3, 4).

Recording.

A lease of real property for more than one year must be duly recorded by register of deeds of county in which property is situated in order to be effective against subsequent bona fide purchaser or encumbrancer including assignee of mortgage, lease or other conditional estate for valuable consideration, whose instrument is first recorded. (SDCL 43-28-17). However, tenant's possession under unrecorded lease is prima facie notice of his rights, putting purchasers on inquiry as to nature and extent thereof. (28 S. D. 475, 134 N.W. 49).

Oil, Gas and Mineral Leases.

See category 19 Mineral, Water and Fishing Rights, topic 19.01 Mines and Minerals.

Reservation of Title to Crops.

A contract containing reservation in landlord of title to crops until division thereof between landlord and tenant must be filed in office of register of deeds in order to make such reservation valid as against innocent purchaser of grain. (SDCL 38-17-1, 2).

Rent.

In absence of contract or usage to contrary, rents are due as follows: as to agricultural and wild land, annually at end of each year; as to lodgings, monthly at end of each month; with other rents payable quarterly at end of each quarter; and where lease is for shorter period than those specified, at termination of lease. (SDCL 43-32-12).

Lien.

Landlord has lien for costs of handling and storing property having value in excess of $500 and left on residential premises by lessee after lessee quits premises. (SDCL 43-32-26). As to innkeepers, see category 8 Debtor and Creditor, topic 8.11 Liens, subhead Innkeeper's Lien.

Termination of Tenancy.

Before end of agreed term, landlord may terminate lease when tenant uses premises contrary to lease, or fails to make repairs within reasonable time after requested to make repairs that he is bound to make. (SDCL 43-32-18). Tenant may terminate lease when landlord fails within reasonable time after requested, to secure quiet possession or maintain premises, or when greater part of such premises is destroyed, from cause other than negligence of tenant. (SDCL 43-32-19). Death or incapacity of a party does not terminate lease unless lease is terminable at pleasure of deceased or incapacitated party and notice of death or incapacity is given other party. (SDCL 43-32-23).

Holding Over.

Continued possession by lessee after expiration of lease, and lessor's acceptance of rent raises presumption of renewal of lease on same terms and for same time, but not exceeding one year. (SDCL 43-32-14; 76 S. D. 473, 80 N.W.2d 871).

Reentry.

Whenever right of reentry has accrued, such reentry may be made at any time upon three days previous written notice. (SDCL 43-8-11). Where lease provides for reentry, no notice is necessary to maintain action for possession. (SDCL 43-8-12).

Action for forcible entry and detainer will lie where tenant holds over, or fails to pay his rent for three days after due, or commits waste on leased premises, or does or fails to perform any act which operates to terminate lease by terms thereof. (SDCL 21-16-1). Three days written notice to quit is required before proceedings can be commenced for holding over or nonpayment of rent. (SDCL 21-16-2).

Distraint.

There are no statutory provisions relating to distraint.

21.1121.12 [RESERVED]

21.13 PERPETUITIES:

Rule against perpetuities abolished. (SDCL 43-5-8). Generally, absolute power of alienation cannot be suspended by any limitation or condition whatever, for longer period than during continuance of lives of persons in being plus period of 30 years at creation of limitation or condition (SDCL 43-5-1), except that contingent remainder in fee may be created on prior remainder in fee, to take effect in event that persons to whom first remainder is limited die under age of 21 years, or upon any other contingency by which estate of such persons may be determined before they attain majority. (SDCL 43-9-5).

Where trust is for benefit of employees as part of pension plan, profit-sharing plan, etc., same may continue in perpetuity until its purposes are accomplished. (SDCL 43-5-7). Trust for charitable, benevolent, educational, or other public purpose is not invalid as violative of rule against perpetuities. (SDCL 55-9-1, 2). Trust for designated care of animal is valid, subject to provisions of SDCL 55-1-22. (SDCL 55-1-21).

Accumulations.

See 43-6.

See also category 13 Estates and Trusts, topic 13.11 Trusts.

21.14 PERSONAL PROPERTY:

Joint tenancy is permitted in personalty. (SDCL 43-2-14). Tenancy by the entirety is not recognized.

21.15 POWERS OF ATTORNEY:

Statutory provisions are for most part declaratory of common law. (See 59-1 through 59-9, inclusive.)

Uniform Durable Power of Attorney Act not adopted but continuing power of attorney permitted. (59-7).

Attorneys in fact may sell or incumber real or personal property of principal. Power of attorney to execute deed (SDCL 43-25-1) or mortgage (SDCL 44-8-2) must be in writing, and must be subscribed, acknowledged, proved, or certified and recorded same as deed. See topic 21.06 Deeds; category 20 Mortgages, topic 20.04 Mortgages of Real Property.

No statutory form of power of attorney. Following form is sufficient:

Form

Know all men by these presents, that . . . . . . of . . . . . ., in the county of . . . . . . and state of . . . . . ., has made, constituted and appointed, and by these presents does make, constitute and appoint . . . . . . of . . . . . . in the county of . . . . . . and state of . . . . . ., his true and lawful attorney. . . . for him and in his name, place and stead, to . . . . . ., with full authority and power to do and perform all and every act and thing whatsoever requisite and necessary to be done in the premises, as fully, to all intents and purposes, as said . . . . . . might or could do if personally present, with full power of substitution and revocation, and hereby ratifying and confirming all that said attorney shall lawfully do or cause to be done by virtue thereof.

In witness whereof, ... has hereunto set his hand and seal this . . . . . . day of . . . . . . A.D. 20. . . . .

(Signature)

(Two Witnesses)

(Acknowledgment)

If desired, following may be inserted: “This power of attorney shall not be affected by disability of the principal” or “This power of attorney shall become effective upon the disability of the principal,” in which event such intent of principal shall be carried out. If inserted, may also authorize attorney-in-fact to consent to, reject or withdraw consent for medical procedures, treatment or intervention. (SDCL 59-7-2.1). Attorney-in-fact’s health care and treatment decisions regarding principal regulated. (SDCL 59-7-2.5 to 2.8). Immunity granted health care provider relying on written power of attorney. (SDCL 59-7-8).

If recorded with register of deeds, certified copy has same effect as signed original. Effective during lifetime of principal unless revocation recorded with same office of register of deeds. (SDCL 59-7-2.2).

Actual knowledge of death or disability required to terminate agency. Written power of attorney is not terminated by death, disability or incompetence of principal before actual knowledge of same by agent. (SDCL 59-7-3).

Affidavit by agent of lack of knowledge of death, disability or incompetence of principal is, in absence of fraud, conclusive proof of nonrevocation of power. Affidavit is recordable. (SDCL 59-7-4).

Members of Armed Forces.

Report of principal as “missing” or “missing in action” does not constitute actual knowledge or actual notice of death of principal for purposes of terminating agency. (SDCL 59-7-5).

21.16 REAL PROPERTY:

Ownership of property by several persons is either joint interest, partnership interest or interest in common. (SDCL 43-2-11). Every interest created in favor of several persons in their own right is an interest in common unless acquired by them in partnership for partnership purposes or unless expressly declared in the will or transfer by which it is created to be a joint tenancy, or when granted or devised to executors or trustees as joint tenants. Transfer evincing grantor's intention to create joint tenancy between spouses and where grantor is also one of the grantees creates a joint tenancy. (SDCL 43-2-12 to 14). Tenancy by entirety not recognized. Joint tenancy only estate with survivorship quality. (Armstrong v. Hellwig, 18 N.W.2d 284 [S.D. 1945]). Creditor's rights preserved against surviving joint tenant. (SDCL 43-46-2). Transfer of property by deed, contract for deed or other instrument dated after July 1, 1988, requires filing of Certificate of Value. (SDCL 7-9-7[4]). Certificate of trust and trustee's affidavit may be recorded when title to real estate is held by trust. (SDCL 55-4-42 to 47). Any document presented for recording must contain typed, stamped or printed legend stating name, address and telephone number of person who prepared document. Exemptions include documents dated prior to July 1, 1994, documents prepared by USA, State of S.D., or any agency or political subdivision of either, and court certified documents. (SDCL 7-9-1). For form see topic 21.06 Deeds.

Freehold estates include inheritance and life estates. (SDCL 43-7-2). Estates tail are abolished. (SDCL 43-7-4).

Rule in Shelley's case is abolished. (SDCL 43-9-11; Tscherne v. Crane-Johnson Co., 227 N.W. 479 [S.D. 1929]).

Foreign Conveyances or Encumbrances.

No South Dakota statute or decision passes upon validity of conveyance or encumbrance valid where executed but invalid under South Dakota law. See category 10 Documents and Records, topic 10.04 Records.

Condominiums permitted and regulated. (43-15A).

For Curative Act see category 5 Civil Actions and Procedure, topic 5.16 Limitation of Actions.

See also topics 21.03 Curtesy, Deeds, Dower, Landlord and Tenant; categories 5 Civil Actions and Procedure, topic Partition; Debtor and Creditor, topic Homesteads; Family, topic Husband and Wife; Mortgages, topic Mortgages of Real Property.

22 TAXATION

22.01 ADMINISTRATION:

State Taxes.

Secretary of Revenue and Regulation has general supervision over administration of assessment and tax laws of state. (SDCL 10-1-15). Prepared forms or other information may be obtained from Secretary of Revenue and Regulation, Anderson Building, 445 East Capitol, Pierre, South Dakota 57501. C. 10-59 sets forth uniform audit and collection procedures for most state taxes, and permits Secretary of Revenue and Regulation to authorize electronic filing. Secretary may employ collection agencies or attorneys to collect delinquent accounts. (SDCL 10-1-15.2).

County, School and Municipal Taxes.

Municipalities may impose additional sales, use or other non-ad valorem taxes. (10-52; 10-52A). Property taxes may be levied by county, township, municipality, sanitary district or school district. (SDCL 10-12-7).

Assessment of Property Taxes.

Assessments are by county directors of equalization, who prepare assessment rolls and deliver them to local boards of equalization. (SDCL 10-3-28). Local boards of equalization (supervisors of townships, governing bodies of municipalities and member of each school board) meet on 3d Mon. of Mar. to consider assessment roll, hear complaints, adjust assessments, etc. (SDCL 10-11-13).

Appeal of Property Tax Assessments.

Aggrieved person may appeal from local board to county board of equalization (county commissioners), which meets 2d Tues. of Apr., hears complaints, makes adjustments, etc. (SDCL 10-11-22 to 41). If local governments have agreed to consolidate local and county boards of equalization, consolidated board meets 2d Tues. of Apr. (SDCL 10-11-66, 71). Appeal from such county board may be taken, at appellant's option, to circuit court or to office of administrative hearings. (SDCL 10-11-41, 44). Appeal must be made by 3d Fri. in May to office of administrative hearings and, if to circuit court within 30 days after publication of notice required by SDCL 10-11-26.1 or notice has been served of decision of county board of equalization, whichever occurred last. (SDCL 10-11-42, 44). Appeal may be taken from office of administrative hearings to circuit court, but not vice versa. (SDCL 10-11-43; 85 S.D. 630, 188 N.W.2d 833).

Exemptions.

See topics 22.12 Inheritance Tax; 22.15 Property Taxes, subhead Exemptions; 22.17 Sales and 22.19 Use Taxes, subhead Sales Tax, catchline Exemptions From Sales Tax For.

Penalties.

General penalty and interest statute now covers most state taxes. Penalty for non-filing or delinquent filing is greater of $10 or 10% of tax due. (SDCL 10-59-6). General interest rate is 1¼ % per month or portion thereof. (SDCL 10-59-6).

Interstate Co-operation.

South Dakota is member of Multistate Tax Compact (10-54) and adopted Uniform Sales and Use Tax Administration Act (10-45C).

Taxpayer Bill of Rights.

None.

Refunds.

Procedures for obtaining refunds from most South Dakota taxes (other than property taxes) are generally set forth in c. 10-59. Claims for refunds must generally be filed within three years of date tax was paid or within three years from date return was due, whichever date is earlier. (SDCL 10-59-19).

22.02 ALCOHOL, BEVERAGES AND TOBACCO TAXES:

Alcoholic Beverage Taxes.

None.

Cigarette Taxes.

Imposed by 10-50 and 10-50B.

22.03 BUSINESS TAXES:

Provider Tax.

None.

22.03A CONTROLLED DANGEROUS SUBSTANCES TAX:

Marijuana and Controlled Substances Tax.

None.

22.04 CORPORATE TAXES:

Corporate Stock Tax.

None.

Corporation License Taxes.

None.

22.05 EMPLOYMENT TAXES:

Unemployment Compensation Tax.

Employer must contribute at rate determined by Unemployment Compensation Commission according to actual benefit experience. There is no tax on employees. (SDCL 61-1-35).

“Employer” means one who for some portion of a day in each of 20 weeks employs one individual or in any calendar quarter of current or receding calendar year pays wages of $1,500 or more. (SDCL 61-1-4). “Employment” does not include agricultural labor, domestic service, service on navigable waters of U.S., service in employ of son, daughter or spouse, or by child over 21 for his parents, service in employ of organization described in § 501(c)(3) I.R.C. which is exempt from income tax under § 501(a), or service in employ of state or political subdivision thereof or of any other state or of U.S., or in employ of certain employees’ life, health, or accident associations, certain schools as student, foreign government or instrumentality owned by foreign government, student nurse, commission insurance agent, or newsboy under age of 18. (SDCL 61-1-16 to 30). Special rules for tribal unemployment insurance. (61-6A).

Tax is payable quarterly, at office of Unemployment Compensation Commission, at Aberdeen, S.D.

22.06 [RESERVED]

22.07 ESTATE TAX:

Tax imposed equal to maximum allowable credit against Federal Estate Tax for state death taxes. (10-40A).

Valuation Date.

Gross estate means gross estate of decedent as finally determined and valued for federal estate tax purposes. (SDCL 10-40A-1[6]).

Apportionment of Federal Estate Tax.

Federal Estate Tax is apportioned, except as otherwise directed in will, according to value of interest received by each person interested in estate. (SDCL 29A-3-916).

22.07A GAMBLING AND ENTERTAINMENT TAXES:

Gaming tax at rate of 8% on adjusted gross proceeds of gaming. (SDCL 42-7B-28). In addition, 1% tax is imposed on adjusted gross proceeds of gaming. (SDCL 42-7B-28.1).

22.08 GASOLINE AND SPECIAL FUELS TAXES:

Imposed by 10-47B.

22.08A GENERATION SKIPPING TAX:

None.

22.09 GIFT TAX:

None.

22.10 [RESERVED]

22.11 INCOME TAX:

None.

22.12 INHERITANCE TAX:

Repealed effective SDCL 7-1-01. (Const., Art. XI, § 15).

22.12A MINES, MINERALS AND FISHERIES TAXES:

Severance Taxes.

Two separate severance taxes are imposed on energy materials. 10-39A imposes tax equal to 4½% of taxable value of severed energy minerals and 10-39B imposes tax equal to 24/100% of same taxable value. Taxable value is sales price or market value of severed energy mineral. Severance tax on gold of $4 per ounce, and net profits from sale of precious metals subject to 10% tax. Gross yield and net profit are determined in accordance with statute. (10-39).

22.12B MOTOR CARRIER FUELS TAX:

See topic 22.08 Gasoline and Special Fuels Taxes.

22.13 [RESERVED]

22.14 MOTOR VEHICLE TAXES:

Motor Vehicle Usage Tax.

See topic 22.08 Gasoline and Special Fuels Taxes.

22.15 [RESERVED]

22.16 PROPERTY TAXES:

Taxable property includes all real property in this state, and property of corporations, banks and banking companies, except as expressly excepted. (SDCL 10-4-1). Real property includes manufactured homes of 1990 or newer. (SDCL 10-4-2.4). Personal property other than centrally assessed property is exempt from ad valorem tax. (SDCL 10-4-6.1).

Assessment.

All real property subject to taxation is assessed annually. Value is determined as of Nov. 1 preceding assessment. (SDCL 10-6-2). Property is assessed at true and full value and such true and full value is considered as taxable value upon which taxes are computed. (SDCL 10-6-33). Property is classified as agricultural, nonagricultural, owner-occupied single-family dwellings, and nonagricultural acreage property. (SDCL 10-6-31). Dwellings of low income disabled and senior citizens are eligible upon application for real property tax assessment freeze (SDCL 10-6A-2) and, if adopted by appropriate municipality, property tax reduction (10-6B). Counties may freeze property taxes levied for period of five years following purchase of agricultural property by beginning farmer. (SDCL 10-6-31.4 to 31.5). Counties may provide incentive formula for new construction. (SDCL 10-6-35.2 to 35.25). Special procedures exist for valuing agricultural land, residential development land, and residential structures in redevelopment neighborhoods. (10-6).

Exemptions.

(1) Property belonging to or used exclusively by agricultural and horticultural societies. (SDCL 10-4-14). (2) Property belonging to or used exclusively for support of educational institutions in this state, but this with specified exceptions. (SDCL 10-4-13). (3) Property belonging to public charities, benevolent organizations, nonprofit health care organizations and religious societies and used exclusively for charitable, benevolent, health care or religious purposes, with specified exceptions as to property used partially for nonexempt purposes and agricultural land owned by benevolent organizations. (SDCL 10-4-9 to 12). (4) Property owned by industrial development corporation, limited to $100,000. (SDCL 10-4-8.1). (5) Facility operated as multi-tenant business incubator if owned by specified types of charities. (SDCL SDCL 10-4-39). (6) One lot in cemetery for family use. (SDCL 10-4-25). (7) Homestead, excepting mobile home, so far as concerns taxes for state expenses. (SDCL 10-4-24). (8) First $10,000 of value of structures used exclusively for agricultural purposes, situated on agricultural land. (SDCL 10-4-13.1). (9) Personal property other than centrally assessed property. (SDCL 10-4-6.1). (10) Licensed employee day-care facilities may be exempt. (SDCL 10-4-33). As to property claimed to be exempt under (1) through (5) above, application for exemption must be made to County Director of Equalization. (SDCL 10-4-15). No special exemption for member of armed forces, veterans, etc.; except that dwellings used by paraplegics as wheelchair homes shall receive tax reduction based upon household income (SDCL 10-4-24.9 to 24.13) and property owned and occupied by veteran who is rated permanently and totally disabled from service-connected disability, limited to $100,000 (SDCL 10-4-40).

Payment.

Except for mobile home taxes, all taxes become due on Jan. 1st of year following assessment. (SDCL 10-21-4). One-half of real estate taxes becomes delinquent following May 1, other half on Nov. 1. Penalty and interest 5/6% per month, to be added on first day of each month including delinquency date. (SDCL 10-21-23). Taxes of $50 or less are payable in full before May 1. (SDCL 10-21-23). Property taxes reduced by property tax credit. (10-13). Board of County Commissioners may provide for payment of property taxes through use of electronic fund transfers in ten equal monthly installments. (SDCL 10-21-7.1).

Collection.

Taxes are payable to and collected by county treasurer. (SDCL 10-21-1). Various measures, including distress warrant, collection steps, and tax sales of real estate, are provided for enforcement. (10-22 to 10-26). Heads of households who have reached age 70 may in certain circumstances apply for prohibition on collection of real property taxes on single-family dwelling. (SDCL 43-31-32). Taxes which county is prohibited from collecting become lien on property. (SDCL 43-31-38).

Lien.

Taxes (including any applicable penalty and interest) on real property are perpetual lien against all except U.S. and South Dakota. (SDCL 10-21-33).

Sale.

Tax sale is had on published and mailed notice stating that all lands on which taxes for preceding year or years remain unpaid will be sold, time and place of sale, lands to be sold, parties to whom assessed, and amount of real and personal taxes due. (SDCL 10-23-2, 3). Public sale is held on third Mon. of Dec. each year between 9 a.m. and 4 p.m. at courthouse. (SDCL 10-23-7). Tracts are offered separately in numerical order as they appear on tax list, and sold to bidder who will pay taxes at lowest interest rate. (SDCL 10-23-8). Tax sale certificate is issued to buyer. (SDCL 10-23-18). If premises are not redeemed within four years, or three years if property within limits of municipality, tax deed may issue after 60 days notice to record title holder, person in possession, mortgagee, and person in whose name real property is taxed. (SDCL 10-25-1 to 12). Homestead of senior citizen with value of less than $127,000 is exempt from sale for taxes. (SDCL 43-31-1).

Redemption may be made at any time before deed is executed by payment of amount for which land sold, with interest, depending on rate for which property sold, together with any other taxes paid by purchaser, with like interest thereon. (10-24).

Public Utility Companies.

All property, real and personal, belonging to or held under lease or otherwise by any light or power company, heating company, water company or gas company and used by it exclusively in operation of its line or lines in this state, except such as are held under lease and used in such manner as to make it taxable to owner under general property tax laws, must be assessed annually for taxation by Department of Revenue and Regulation and not otherwise. Provision is made for furnishing by public utility companies to Department of Revenue and Regulation of statements and reports concerning property owned by them in state. (10-35). Partial exemption is provided for certain power generating facilities. (SDCL 10-35-1.3 to 1.6). Certain property used as wind farm is subject to alternative annual tax in lieu of certain other taxes. (SDCL 10-35-17 to 22).

Real Estate Conveyance Tax.

See category 21 Property, topic 21.06 Deeds, subhead Taxes.

22.17 SALES AND USE TAXES:

Sales tax at rate of 4% is imposed on substantially all sales of goods and services including: Retail sales of tangible personal property (SDCL 10-45-2); products transferred electronically in certain situations (SDCL 10-45-2.4); business service receipts (SDCL 10-45-4); enumerated businesses and services (SDCL 10-45-5, 5.2); gas, electric and water utility receipts (SDCL 10-45-6); receipts from telecommunications services (SDCL 10-45-6.1); receipts from mobile telecommunications services (SDCL 10-45-6.2); receipts of rents on room or parking sites at lodging establishments or campgrounds to transient guests (SDCL 10-45-7); receipts from ticket sales to amusements and athletic contests or events (SDCL 10-45-8); receipts from intrastate transportation of passengers (SDCL 10-45-71); gross receipts of professional employer organizations, subject to certain deductions (SDCL 10-45-96); auction and consignment sales (SDCL 10-45-92.1). Gross receipts do not include: (i) fees or interest imposed by retailer for late charges on overdue accounts, no account or nonsufficient funds checks (SDCL 10-45-1.1); (ii) refunds of full sales price (SDCL 10-45-1.2); (iii) credit or trade-in value taken as credit or part payment if property taken in trade is subject to sales tax when sold (SDCL 10-45-1.3). Special rules apply to conditional sales contracts extending over more than 60 days. (SDCL 10-45-2.3). Deduction allowed for bad debts. (SDCL 10-45-30). Transportation company engaged in fuel terminal transportation may elect to be taxed under alternative provisions. (SDCL 10-45-75 to 78). South Dakota has adopted Streamlined Sales and Use Tax Agreement.

Exemptions From Sales Tax For: Membership fees paid to lodging house and hotel membership organized or operated for benefit of its members (SDCL 10-45-7.1); sales of tangible personal property and electrical energy, natural and artificial gas and communication service to governmental units, public and charitable, nonprofit agencies and Indian tribes (SDCL 10-45-10); sales of tangible personal property for use as rental property (SDCL 10-45-9.1); sales of gasoline and motor fuel taxed elsewhere (SDCL 10-45-11); goods and services to fulfill warranty (SDCL 10-45-11.1); gross receipts of certain passenger and freight transportation; exempt items specified, including health and educational services, veterinarian services, financial services of financial institutions subject to franchise tax under c. 10-43, 28 day rentals of motor vehicles, etc. (SDCL 10-45-12.1); management services to nonprofit or cooperative rural water systems (SDCL 10-45-12.4); credit services by credit bureaus to financial institutions (SDCL 10-45-12.6); gross receipts from officiating at certain amateur sporting events (SDCL 10-49-12.7); receipts of tickets, admissions, or other fund raising activities by chambers of commerce, educational, or nonprofit groups (SDCL 10-45-13); receipts for sales of services or memberships by membership organizations (SDCL 10-45-13.1); sales of tangible personal property and utility services to religious or private nonprofit educational institutions and charitable hospitals (SDCL 10-45-14); ink and newsprint for production of shoppers' guides (SDCL 10-45-14.2); packaging and container materials sold to retailers (SDCL 10-45-14.5); insulin (SDCL 10-45-14.9); drugs (SDCL 10-45-14.10); medical equipment and prosthetic devices (SDCL 10-45-14.11); medical devices (SDCL 10-45-14.12); agricultural seed sales of 25 lbs. or more (SDCL 10-45-15); agricultural pesticides (SDCL 10-45-16.1); agricultural fertilizer sales of 500 lbs. or more (SDCL 10-45-16); rental of devices to apply pesticides, herbicides, fertilizers and insecticides (SDCL 10-45-16.2); livestock, live poultry, ostrich, emu or rhea sales other than ultimate retail sale (SDCL 10-45-18); swine or cattle semen (SDCL 10-45-18.6); motor fuel used for agricultural or railroad services (SDCL 10-45-19); electricity receipts for power to agricultural irrigation equipment (SDCL 10-45-19.1); engineering, architectural and surveying services on projects located outside South Dakota (SDCL 10-45-12.2); packaging and container material (SDCL 10-45-14.4); bulk water for domestic uses (SDCL 10-45-19.3). Certain services and payments between related entities are exempt from sales tax. (SDCL 10-45-20.1 to SDCL 10-45-20.3). Sales of services to banks and other financial institutions by related companies. (SDCL 10-45-20.5). Also exempt from sales tax are gross proceeds of gaming allowed by c. 42-7B (SDCL 10-45-64); provision of natural gas transportation services by pipeline (SDCL 10-45-67); gross receipts from sale of credit card processing services to retailers (SDCL 10-45-68); transportation of agricultural products by agricultural producer (SDCL 10-45-73); interest other than that paid to pawnbrokers (SDCL 10-45-82, 83); fees or commissions paid to retailer for arranging customer loan to purchase tangible personal property from retailer (SDCL 10-45-84); certain services performed for rodeos (SDCL 10-45-90); sale of certain agricultural and industrial production equipment in interstate commerce (SDCL 10-45-93); sales of and parts or repairs on machinery or equipment used primarily for agricultural purposes (SDCL 10-45-3.4, 3.5); display allowances and purchase discounts (SDCL 10-45-1.6); and sales of coins, currency and bullion (SDCL 10-45-110). Auctioneers may deduct certain direct expense charges for purchases on behalf of clients. (SDCL 10-45-92).

Returns.

Retailer or person engaging in business whose receipts are subject to sales tax must secure permit from Dept. of Revenue and Regulation for each place of business unless statewide permit is granted. (SDCL 10-45-24). Merchant may collect tax from customer. (SDCL 10-45-22). Returns must be filed and tax must be paid pursuant to SDCL 10-59-39, 40. Certain manufacturing, fabricating or processing businesses may apply for extension for up to six months for remitting sales or use tax. (SDCL 10-45-100). Retailer may be authorized to use direct payment permit if retailer purchases goods or services subject to sales tax. (SDCL 10-46-67). Electronic filings authorized. (SDCL 10-59-32, 36, 37). Persons 65 years of age or older and disabled persons, with limited income, entitled to sales tax refund under c. 10-45A. Low income persons entitled to sales tax refund on food purchases under c. 28-1. Criminal penalties exist for certain sales tax violations. (SDCL 10-45-48.1). Uniform Sales and Use Tax Administration Act in effect. (10-45C). Contractor or subcontractor may apply for refund of sales or use tax paid upon certain fabricated tangible personal property. (10-61). See subhead Contractors' Excise Tax, infra for information on sales and use tax refunds.

Use tax at rate of 4% is imposed on use, storage or consumption of tangible property on which sales tax is not paid. (10-46).

Contractors' Excise Tax.

Realty improvement contracts are subject to tax of 2% of total contract price including all materials and labor. Tax rate for new or expanded commercial power production facilities is 1%. (SDCL 10-46C-4). Tax is imposed on prime contractor or subcontractor. (10-46A and 46B). Persons constructing new facility or expanding existing building or structure for processing of agricultural commodity, product or by-product, where costs of project exceed $4.5 million may apply for refund of all of contractors' excise tax or sales or use taxes attributed to project cost. (10-45B). Persons constructing certain new business facilities subject to contractors' excise tax may apply for refund of all or part of contractors' excise tax or sales or use taxes on project costs if project costs are at least $10 million. (10-45B). Persons producing motion pictures, documentaries, television advertisements or television films made in South Dakota may apply for refund of all or part of contractors' excise tax or sales or use tax on project costs if project costs are at least $250,000. Through June 30, 2011. (10-46D).

Tourism Tax.

Tourism tax at rate of 1.5% is imposed on gross receipts from certain visitor related businesses during June, July, Aug. and Sept. (10-45D).

Farm Machinery Tax.

Gross receipts from sale or lease of farm machinery, attachment units and irrigation equipment used solely for agricultural purposes are subject to 4% excise tax. Excise tax at same rate is imposed on use, storage and consumption of such items. (10-45E).

Medical Provider Tax.

Net revenues of intermediate care facilities for mentally retarded are subject to tax of 5½ %. (10-62).

22.17A SPECIAL FUELS TAX:

See topic 22.08 Gasoline and Special Fuels Taxes.

22.18 STAMP AND SEAL TAXES:

Stamp Tax.

No stamps required on corporate stock or other instruments. See category 21 Property, topic Deeds for real estate transfer fee.

22.18A TAX LIENS:

Uniform Federal Lien Registration Act.

Revised Uniform Federal Tax Lien Registration Act in effect. (44-7).

22.19 USE TAXES:

See topic 22.17 Sales and 22.19 Use Taxes.

23 TRANSPORTATION

23.01 MOTOR VEHICLES:

While Uniform Motor Vehicle Act has been enacted (1929, c. 251), and with some changes carried into 1939 Code revision (44.03), subsequent changes have been so numerous and substantial in Title 32, Motor Vehicles, that law has lost identity as uniform act. Department of Public Safety has supervision over Division of Motor Vehicles (1-51), although Secretary and Department of Revenue responsible for titling and registration (SDCL 1-47-5).

Vehicle License.

Owner of motor vehicle, with certain exceptions, operated on public highways of state must apply for vehicle license at office of county treasurer (SDCL 32-5-2, 3, 42), or licensed agent of Department of Revenue (SDCL 32-5-129 to 135), who registers vehicle and issues two license plates, or renewal stickers. Motor carriers may purchase transporter plates to transport vehicles. (SDCL 32-9-57). Applicant must indicate type of fuel used in motor vehicle. (SDCL 32-5-81, 82, 82.1, 83, 83.1, 84, 84.1). Operation of snowmobile without vehicle license is petty offense. (SDCL 32-5-84.2). Temporary snowmobile licenses are available. (SDCL 32-20A-15.1). Registration for noncommercial vehicles, except snowmobiles, expires in staggered fashion, based on owner's last name. (SDCL 32-5-2.1 to 2.6). License plates must be displayed on front and rear of vehicle. (SDCL 32-5-98). Specialty license plates, with organizational decal, may be requested upon approval of organization's decal. (SDCL 32-5-136 to 140). Nonresident who has complied with licensing requirements of his home state (SDCL 32-5-46), including military personnel, person assigned in state under Domestic Volunteer Service Act of 1973, or his dependent (SDCL 32-5-47.1) is exempt. Three-wheeled or four-wheeled all-terrain vehicles used in highway ditch or crossing highway to get to field in course of agricultural work exempt. (SDCL 32-5-1.4). Vehicles for agricultural harvest may require payment of $75 fee to operate on highways. (SDCL 32-9-3.1). Registration and licensing of boats, with some exceptions also necessary. (32-3A). Sale of out-of-state motor vehicles are subject to additional laws. (SDCL 32-5-37).

Operator's license required; issued by Department of Public Safety; expires on licensee's birthday in fifth year following issuance. (SDCL 32-12-42). License not issued to one under age 16, but minor between 14 and 16 may obtain instruction permit to drive for 180 days if accompanied by licensed operator at least 18 years of age occupying passenger seat, with at least one year of driving experience. (SDCL 32-12-11 and SDCL 32-12-29). After 180 days or drivers' education course and 90 days, may apply for restricted permit to drive between 6 a.m. and 10 p.m. with permission of parents or guardian and between 8 p.m. and 6 a.m. if under direction of parent or guardian occupying passenger seat, with exception of agricultural machinery. (SDCL 32-12-12). Traffic violation convictions may result in suspension or revocation of instruction permit or restricted minor's permit. (SDCL 32-12-15). Alcohol violation convictions may also result in suspension of minor's driving privileges. (SDCL 35-9-7). Valid license of one who enters or is in Armed Forces continues while licensee is absent from state and for 30 days after his separation from service or return to state. (SDCL 32-12-45). Nonresident who has valid operator's license from his home state, including military personnel, person assigned in state under Domestic Volunteer Service Act of 1973, or his dependent, exempt. (SDCL 32-12-27). Operator's license may not be issued or renewed by person with child support arrearages of $1,000 or more unless person has made satisfactory arrangements for payment, and Department may revoke license of person failing to make such payment. (SDCL 32-12-116). Driver's license of person convicted of vehicular homicide may be revoked at court's determination. (SDCL 22-16-41). Certain penalties and restrictions also apply to person violating out-of-service order. (SDCL 32-12-119 to 124, SDCL 32-12-81). Restricted license, for work or school, may be issued by Department of Public Safety. (SDCL 32-12-49.4). Appropriate registration with Selective Service required to obtain or renew driver license. (SDCL 32-12-17.12).

Applicant must present birth certificate (or other specified verification of birth) or operator's license and pay $20 fee. (SDCL 32-12-3.1 and SDCL 32-12-16). Color photograph is affixed to license by Department of Public Safety. (SDCL 32-12-17; SDCL 1-35-22). License will also include other identifying information and indications as to donor status, living will, durable power of attorney, and class of vehicles operator is eligible to drive. (SDCL 32-12-17; SDCL 34-26-23.1). License may also include information regarding status as felon, sex offender (SDCL 32-12-17.7), blood type, medical conditions, or allergies (SDCL 32-12-17.8). Residents may obtain nondriver identification cards from Department of Public Safety. (SDCL 32-12-17.2). Personal information maintained in conjunction with motor vehicle records not to be disclosed except in limited circumstances. (SDCL 32-5-144).

Commercial driving licenses are regulated. (SDCL 32-12A-1 et seq.).

Titles.

Manufacturer or importer of new motor vehicle, trailer or semi-trailer must give dealer manufacturer's certificate or statement of origin and no dealer may acquire new motor vehicle, trailer or semi-trailer without obtaining such certificate or statement. (SDCL 32-3-3). Vehicle dealers are subject to electronic title filing system. (SDCL 32-3-38.1). No one can acquire any title to or interest in motor vehicle, trailer or semi-trailer until he receives certificate of title or manufacturer's certificate or statement of origin. (SDCL 32-3-10). Certificate of title is executed in triplicate. Original goes to named owner or as otherwise directed by owner; one copy is filed with county treasurer in county in which vehicle, trailer or semi-trailer is kept; and one copy is retained by Department of Revenue. (SDCL 32-3-28); see also SDCL 32-3 (electronic title provisions). Vehicles previously titled in another state must so disclose on S.D. title. (SDCL 32-3-51.16). Additional requirements imposed for titling rebuilt vehicles, disclosure of damage to vehicle exceeding $5,000, junking certificate, and salvage title for vehicles determined to be total loss. (SDCL 32-3-51.5 to 51.17, 53, 53.2). Boats have similar title procedures and requirements. (32-3A).

Odometer Information.

Each certificate of title issued for vehicle with odometer shall contain odometer disclosure information complying with federal Truth in Mileage Act of 1986. Upon sale, seller must accurately disclose odometer information. False information is crime. (SDCL 32-3-30.1 and SDCL 32-6B-3.2). No person may disconnect, reset or alter odometer of any motor vehicle. Odometer may be replaced or repaired. If mileage changed, notice must be permanently attached to vehicle. (SDCL 32-15-33).

Sales.

Any person selling a motor vehicle must deliver to purchaser a certificate of title with an assignment thereon showing title in purchaser (SDCL 32-3-5, 7, 8): except that a dealer may give purchaser a reassignment of certificate or an assignment of manufacturer's certificate (SDCL 32-3-26). Within 30 days after date of assignment of motor vehicle, application for certificate of title must be filed with Department of Revenue. (SDCL 32-3-18, 26). It is unlawful to deliver or accept certificate of title assigned in blank. (SDCL 32-3-30 to 32). Insurance company need not apply for certificate of title if vehicle is acquired as result of insurance claim settlement and being transferred to licensed motor vehicle dealer. Insurer must give dealer reassignment of title. (SDCL 32-3-26.1).

Upon sale and delivery of any used motor vehicle vendor must within 30 days deliver to vendee a properly endorsed certificate of title. (SDCL 32-3-7). Pending return of a certificate of title from Department of Revenue, dealer who has applied for such certificate may issue to purchaser "interim title receipt," good for 30 days (SDCL 32-3-8). Dealers in vehicles, including passenger vehicles, sell-it-yourself lot operators, snowmobiles, manufactured housing, boats, and commercial vehicles, must be licensed to do business in such sales or rentals. (32-6A, 32-6B, 32-6C, 32-7A, 32-7B, 32-9). Motor vehicle brokering prohibited. (SDCL 32-6B-4.1). Dealers and auctions may sell vehicles on consignment. (SDCL 32-6B-3). Damage to vehicle must be disclosed by dealers. (SDCL 32-3-51.7—32-3-51.18). Ownership and transfer of motor vehicle dealership or franchise regulated. (SDCL 32-6B-73 through SDCL 32-6B-84). Modification to terms of franchiser agreement during term or upon renewal is restricted. (SDCL 32-6B-69). Franchise warranty claims are regulated. (SDCL 32-6B-58).

Liens.

Deposit, filing or recording of chattel mortgage, conveyance intended as mortgage, conditional sales contract, mechanic's lien, or similar instrument other than a financing statement, covering a motor vehicle not required or permitted. (SDCL 32-3-39). No security interest, mechanic's lien, or similar instrument, is valid against creditors, subsequent purchasers, mortgagees or other lienholders of mortgager unless notation of lien has been made on certificate of title by Department of Revenue, county treasurer, seller, buyer, owner, or holder of instrument. (SDCL 32-3-41, SDCL 32-3-38). Manufacturer's certificate is deemed in possession of lienholder while being transmitted by him to Department of Revenue, and until issuance of certificate of title showing such lien. (SDCL 32-3-35). Possessory lien up to $500 available on certain towed vehicles and their contents. (SDCL 32-30-18).

All liens take priority in order of time in which noted on certificate. (SDCL 32-3-35, 36). Lienholder may present his lien to county treasurer for notation of lien on certificate of title and on duplicate, and county treasurer must then notify Department of Revenue, who must note such lien on duplicate certificate of title in his office. (SDCL 32-3-38). Upon receipt of any lien register of deeds must notify holder of certificate of title to deliver original certificate of title within 15 days for notation of such lien, after which original certificate is delivered to owner or as otherwise directed by owner and additional secured party must be notified of their security interest as filed and noted on certificate. (SDCL 32-3-43).

When a lien is discharged, lienholder must deliver a release and original certificate of title to county treasurer within 20 days after payment is received, whereupon register of deeds must note such cancellation of lien on original certificate and on duplicate on file in his office, and notify Department of Revenue to do likewise. Original certificate is then returned to then first lienholder or if none, to owner. (SDCL 32-3-44).

Security interest in motor vehicle acquired for stock purposes governed by Uniform Commercial Code. (Tit. 57A; SDCL 32-3-42).

Under certain conditions, transfer of title may be used to satisfy unpaid repair bills. (SDCL 44-11-1). Law enforcement or towing agency has lien on vehicle and contents to cover costs of towing, subject to certain exceptions. (SDCL 32-30-18).

Alteration of Identification Number.

No person may intentionally remove, deface, alter, destroy or obscure any vehicle identification number of motor vehicle or trailer without written authorization of Department of Revenue. (SDCL 32-4-9). Violation is felony. (SDCL 32-4-9). Any vehicle or component part which has identification or serial number removed, defaced, altered, obscured or destroyed is contraband and subject to forfeiture, and possession or sale is felony. (SDCL 32-4-10 to 10.2).

Operation prohibited by person without valid operator's license, unless exempted (SDCL 32-12-22); by narcotic drug addict or person under the influence of alcohol (0.08% limit) or drugs (SDCL 32-23-1); by person under age of 21 years, with 0.02% or more alcohol in blood, or after having consumed any controlled drug or substance (SDCL 32-23-21); by person whose license or registration (SDCL 32-35-110) or privilege to drive is suspended, canceled or revoked, without temporary license (SDCL 32-12-65, SDCL 32-23-19); of vehicle whose registration is revoked or suspended (SDCL 32-5-101); of vehicle without certificate of title (SDCL 32-3-12); of motorcycle without license, certificate of qualification or completion of approved safety course (SDCL 32-20-5), proper handlebars, protective helmet if operator is under 18, eye protective device or windscreen, and adequate muffler (SDCL 32-20-2 to 5); of motorcycle with loaded or uncased firearm, except by law enforcement or conservation officer or person with permitted concealed pistol. (SDCL 32-20-6.6). Motorcycle and moped passenger under 18 must wear protective helmet. (SDCL 32-20-4). Age restrictions for snowmobile use. (SDCL 32-20A-3). Firearm possession is restricted on motorcycles and off-road vehicles. (SDCL 32-20-6.6). Vehicles may not be abandoned on public roads. (SDCL 32-30-12.2).

Metal Studded Tires.

Vehicles with pneumatic tires in which there are embedded metal studs or wires may not be operated from May 1 to Sept. 13. (SDCL 32-19-3).

Size and Weight Limits.

Regulated by 32-22; SDCL 32-19-6 to 8.

Equipment Required.

Regulated by 32-15—32-19. Truck tractors modified to become recreational vehicles must meet certain national standards. (SDCL 32-3-65, SDCL 32-3-66).

Seat Belts.

Every operator and front seat passenger of passenger vehicle operated on public highway must wear properly adjusted and fastened seat belt, at all times when vehicle is in forward motion. (SDCL 32-38-1). Enforcement by secondary action and violation petty offense. (SDCL 32-38-5). Exceptions exist for vehicles manufactured before Sept. 1, 1973; occupants with written statement from doctor of inability to wear seat belt for medical reasons; vehicles exempt from federal seat belt requirements; and rural mail carriers and persons delivering newspapers or periodicals on assigned home delivery route. (SDCL 32-38-3). Failure to comply with statute not contributory negligence or assumption of risk and evidence of failure to comply may not be introduced as evidence in any civil litigation on issue of injuries or mitigation of damages. (SDCL 32-38-4).

Child Passenger Restraints.

Children under age five must be secured by approved passenger restraint system, although children under age five, but at least 40 pounds in weight, may be secured by seat belts. (SDCL 32-37-1). Passengers between ages of five and 18 must wear seat belts. (SDCL 32-37-1.1 to SDCL 32-37-2). Exemptions include all seats occupied by passengers, and pre-1966 vehicles not equipped with seat belts. (SDCL 32-37-2). Violation is petty offense. (SDCL 32-37-1). Violation not admissible in any civil action. (SDCL 32-37-4).

Lights Required.

Regulated by 32-17.

Inspection.

Certificate of inspection no longer required. (1979, c. 220). Motor vehicles and motor carriers may be stopped for inspection, measurement and weighing, as well as determination of proper registration, licensure, and permit. (SDCL 32-2-7).

Accidents.

If automobile accident causes injury, death or property damage, driver of any vehicle involved must stop, give his name and address, name and address of owner, and license number of vehicle he is driving, to person struck or driver and occupants of other vehicle, and he must render assistance to any persons injured. (SDCL 32-34-3). If automobile accident results in injury, death or property damage of $1,000 or more to any one person's property or $2,000 per accident, driver of any vehicle involved, or if he is disabled, occupant, must give notice immediately to nearest available peace officer who has jurisdiction. (SDCL 32-34-9; SDCL 32-34-7). Failure to do so is misdemeanor. Secretary of Department of Transportation may require supplemental report. (SDCL 32-34-11; SDCL 1-35-27). Driver of any vehicle colliding with or involved in accident with and causing damage to unattended vehicle or other property must stop immediately and notify operator or owner of such vehicle or property either personally or by attaching written notice conspicuously to vehicle or property, of name and address of driver and owner and license number of vehicle he is driving, and must notify police without unnecessary delay. (SDCL 32-34-4). If collision or accident involves snowmobile or boat and causes property damage of $1,000 or more to one person's property or $2,000 or more, total, operator must notify Department of Game, Fish and Parks. (SDCL 32-20A-19 and SDCL 42-8-58). If accident results in arrest for vehicular homicide or vehicular battery, driver's consent to chemical analysis presumed. (SDCL 32-23-10).

Peace officer must affix to vehicle damaged in reportable accident notice that accident is being investigated (SDCL 32-34-10), and garage keeper must not commence repairs unless such notice has been affixed (SDCL 32-34-23).

Liability of Owner.

In the absence of a relationship justifying the application of "respondeat superior" or some analogous principle, the owner of a vehicle is not liable for the acts or negligence of others operating his car. The "family purpose doctrine" has been rejected. (60 S. D. 204, 244 N.W. 268; 63 S. D. 10, 256 N.W. 152). An owner who lends his car to another, knowing that the latter is incompetent, reckless or a careless driver, is liable for such person's negligence; the owner's liability in such cases being based upon his own negligence in intrusting the car to such person. (66 S. D. 450, 285 N.W. 437). Owner who intentionally abandons motor vehicle responsible for towing and storage costs. (SDCL 32-30-12.2, SDCL 32-30-18.1).

Guests.

Note: Guest statute repealed. (1978, c. 240).

Financial Responsibility.

Driver or owner of motor vehicle must maintain financial responsibility on motor vehicle by: (1) Having bond or owner's liability insurance policy to cover at least $25,000 for bodily injury to or death of one person in one accident, $50,000 for two or more persons in one accident, and $25,000 for property damage in one accident; or (2) filing certificate of deposit with state treasurer in amount of $50,000; or (3) having certificate of self-insurance. (SDCL 32-35-113). Person driving motor vehicle required to be registered in state, if requested by law enforcement officer when detained for alleged violation of motor vehicle laws or other offense or involved in accident, must provide proof of financial responsibility. (SDCL 32-35-114, 116). Failure to maintain financial responsibility on motor vehicle or providing false evidence thereof requires suspension of owner's driver's license for one year. (SDCL 32-35-120, 121).

Proof of financial responsibility for future required of persons, subject to certain exemptions, who have been convicted of or forfeited bail for certain motor vehicle offenses or who have failed to pay judgments arising out of ownership, maintenance or use of vehicles. (SDCL 32-35-43). Proof of financial responsibility for future must be given by filing with department of commerce and regulation certificate of insurance or bond, certificate of deposit or certificate of self-insurance. (SDCL 32-35-2, 64, 65, 66, 70, 87, 90 and 91). Insurer who cancels or terminates liability policy certified under this chapter must file written notice of date of cancellation or termination within 15 days. (SDCL 32-35-80).

License and registration of a resident and operating privilege of a nonresident must be suspended immediately unless such proof is given when so required (SDCL 32-35-44, 45, 49 and 52), and maintained for three years following conviction or forfeiture of bail (SDCL 32-35-95). Such suspension extends indefinitely until judgment is satisfied within above limits and until proof of such financial responsibility is given. (SDCL 32-35-57).

Insurance must be written by company authorized to do business in South Dakota or, if written outside state by company not so authorized, company must file power of attorney authorizing Department of Public Safety to accept service of process. (SDCL 32-35-65 and 66).

Requirement of suspension does not apply: to vehicle owned or leased by U.S., state or its subdivisions, or municipalities (SDCL 32-35-53); or if judgment creditor consents in writing (SDCL 32-35-54); or if Secretary finds an insurer was obligated to pay judgment within above limits (SDCL 32-35-55); or if court has entered order permitting payment of judgment in installments (SDCL 32-35-61).

Penalties for various violations run up to $1,000 or one year imprisonment or both. (SDCL 32-35-109 through 123).

Insurance.

All motor vehicle liability insurance policies covering vehicles registered or principally garaged in state, except government owned vehicles, must provide uninsured and underinsured motorist and hit-and-run coverage. (SDCL 58-11-9, 9.4). Uninsured coverage need not exceed $100,000 for bodily injury to or death of one person in one accident or $300,000 for bodily injury to or death of two or more persons in one accident, unless additional coverage is requested by insured. (SDCL 58-11-9). Underinsurance coverage will pay insured for uncompensated damages when judgment recovered exceeds other policy limits but shall be limited to underinsured motorist coverage limits on insured's vehicle less amount paid by other liability insurer. (SDCL 58-11-9.5). Supplemental coverages under SDCL 58-23-8 must be offered. (SDCL 58-23-7). Liability insurer may pay policy limits without obtaining complete release on behalf of its insured, but payment does not abrogate duty to defend. (SDCL 58-11-9.6).

Uninsured and underinsured motorist coverage limits cannot be added together to determine amount of insurance coverage available in one accident. (SDCL 58-11-9.7). Regardless of number of policies, vehicles, persons, claims or premiums shown on policy, limits of liability for uninsured and underinsured motorist coverage for two or more of insured's motor vehicles may not be added together to determine limit of insurance coverage available to person for one accident. (SDCL 58-11-9.8, 9.9).

No-Fault Insurance.

No automobile liability policy may be offered in state without giving insured option to purchase supplemental coverage which provides benefits without regard to fault, either when occupying, entering or alighting from automobile or if insured or member of insured's family is pedestrian struck by motor vehicle. Benefits are: accidental death benefits of at least $10,000 on life of named insured; $60 per week for 52 consecutive weeks of disability from performing usual duties of regular occupation, but policy may provide for 50% reduction in disability benefits if injured named insured is not gainfully employed at time of accident; medical coverage for named insured and any other insured of at least $2,000 per person if incurred within two years from date of accident. (SDCL 58-23-6 to 8).

Foreign vehicle registered in home state and displaying license plates required by laws of home state may be operated without license or registration for 90 days, provided the home state accords similar exemption to South Dakota vehicles. (SDCL 32-5-46 to 48).

Nonresident operator at least 16 years old, with valid license from home state or country in immediate possession, may operate motor vehicle in this state. (SDCL 32-12-24). Exemption applies to extent laws of state of such nonresident grant exemptions to South Dakotans. (SDCL 32-12-26).

Action against nonresident, or resident absent from state continuously for six months following accident, his executor, administrator, or personal representative, arising out of operation of vehicle in state by such nonresident, resident, or agent of either (SDCL 15-7-6), may be commenced by filing with Secretary of State a copy of process, with $2 filing fee, and mailing to defendant at his last known address within ten days thereafter, notice of such service and copy of process. Affidavit of compliance must be attached to summons. Court may grant continuances to give defendant reasonable opportunity to defend, not exceeding 90 days from date of filing action in court. (SDCL 15-7-6 to 8).

Personal Service Outside the State.

See category 5 Civil Actions and Procedure, topic 5.20 Process.

Direct actions against insurer by injured person not authorized unless execution upon judgment returned unsatisfied. (SDCL 58-23-1).

Motor vehicle carriers regulated by Public Utilities Commission. (49-28). Regular license fee (32-5), and certain prescribed compensation for maintenance and upkeep of public highways (32-9) required. Temporary transportation license plates are available. (SDCL 32-9-57). Permit required or compliance with ICC regulations. (SDCL 49-28-36). Disqualification from driving commercial motor vehicle occurs for various periods for violations of stop requirements at grade crossings. (SDCL 32-12A-59). See category 3 Business Regulation and Commerce, topic 3.07 Carriers.

Motor Vehicle Taxes.

In addition to license, registration and compensation fees and in lieu of sales or use tax, excise tax of 3% is imposed on purchase price or fair market value of motor vehicle purchased or acquired by resident for use in state including leased vehicles and required to be registered, subject to specific enumerated exceptions. (SDCL 32-5B-1, 2, 13, 21-24). Any county may, by ordinance, impose wheel tax based on weight not to exceed $4 per wheel on all motor vehicles registered in county. (32-5A).

Gasoline Tax.

See category 22 Taxation, topic 22.08 Gasoline and Special Fuels Taxes.

Lemon Law.

See category 3 Business Regulation and Commerce, topic 3.10 Consumer Protection.

24 FORMS

Certificate of Real Estate Value

(Click here to view)

1
TENNESSEE LAW DIGEST

—Scope —

Revised for 2010 edition by

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(References, unless otherwise noted, are to sections in official Tennessee Code Annotated [1956]. References to Rules are to Tennessee Rules of Civil Procedure unless otherwise noted. Parallel citations to Southwestern Reporter begin with 85 Tenn. and 16 Tenn. App. and end at 225 Tenn. and 63 Tenn. App., after which Southwestern Reporter is official and only citation.)

Note: 2009 legislation includes session laws from c. 1 through c. 611, June 30, 2009. General assembly meets for an organizational session, not to last longer than fifteen consecutive calendar days, on the second Tuesday in January following the biennial election of members of the state house of representatives. The regular legislative session of the general assembly begins on the first Tuesday following conclusion of the organizational session, unless an earlier date is set by joint resolution of both houses.

1 INTRODUCTION

1.01 GOVERNMENT AND LEGAL SYSTEM:

The State of Tennessee is a constituent state of the United States of America. For further discussion of the U.S. federal system, see Introduction to the Federal Government of the United States at the beginning of this volume. A great many laws are promulgated by the federal government of the United States and are not reflected in the topics below. See the Introduction to this volume for references to the federal law topics covered.

Like all but one of the United States, Tennessee has a common law legal system, with roots in English common law. For information on the courts and legislature of Tennessee, see category 6 Courts and Legislature.

In 2002, Art. XI, § 5 of Tennessee Constitution was amended to allow legislature to authorize: (1) State Lottery, net proceeds of which were allocated to provide for financial assistance to: Tennessee citizens to obtain post-secondary education within this State and public school teachers to obtain post-secondary education in math, science or certification in teaching math or science and, thereafter, excess to be allocated to capital outlay projects for K-12 educational facilities, early learning programs, and after school programs (TCA 49-6-702; TCA 49-4-916; TCA 49-4-936); and (2) other lotteries, but only by 2/3 vote of each house of legislature and only for benefit of organizations qualified under § 501(c)(3) of Internal Revenue Code. In 2003, general assembly established Tennessee Education Lottery Corporation, providing for State Lottery. (TCA 4-51-101 et seq.). In 2004, by 2/3 vote of each house of legislature, Tennessee Charitable Gaming Implementation Law was enacted, organizations qualified pursuant to § 501(c)(3) of Internal Revenue Code were authorized, subject to proper registration, approval, and copious limitations, to conduct annual events for their benefit involving certain defined games of chance. (TCA 3-17-101 et seq.).

The Local Government Modernization Act of 2005 was enacted to promote maintenance by local governments of adequate accounting records and compliance with Generally Accepted Accounting Principles. (TCA 9-3-401 et seq.).

The Comprehensive Governmental Ethics Reform Act of 2006 was enacted establishing rules for lobbyists and legislators, campaign finance guidelines and enforcement of both. (TCA 2-10-102). Act also established Tennessee Ethics Commission.

1.02 [RESERVED]

1.03 HOLIDAYS:

Legal holidays are: Jan. 1; 3d Mon. in Jan. (M.L. King Birthday); 3d Mon. in Feb. (Washington Day); Good Friday; last Mon. in May (Memorial Day); July 4; 1st Mon. in Sept. (Labor Day); 2d Mon. in Oct. (Columbus Day); Nov. 11 (Veteran's Day); Thanksgiving Day; Dec. 25; days appointed by governor or by president of U.S. as days of fasting or Thanksgiving; days set for holding statewide county, state or national elections. Noon to midnight of Saturday is half-holiday. (TCA 15-1-101).

Holiday Falling on Sunday or Saturday.

If holiday falls on Sun., following Mon. substituted, and if on Sat., preceding Fri. substituted. (TCA 15-1-101).

Bank transactions on holiday or after noon on Saturday are valid. (TCA 15-1-103). Business activities may be suspended on Wednesday, Thursday or Saturday mornings. (TCA 15-1-104).

Legality of Transactions on Saturday, Sunday or Holidays.

Legal on Saturday or holiday. Generally, no restriction on private or business activity except adult-oriented establishments on Suns., legal holidays, or any day before 8AM or after Midnight (TCA 7-51-1402) and sale of alcoholic beverages by liquor stores between 11PM on Sat. and 8AM on Mon. of each week, New Year's Day, Fourth of July, Labor Day, Thanksgiving and Christmas (TCA 57-3-406).

1.04 OFFICE HOURS AND TIME ZONE:

Tennessee is in both the Central (GMT -06:00) and Eastern (GMT -05:00) time zones. Memphis, Jackson and Nashville areas are in Central time zone. Knoxville and Chattanooga areas are in Eastern time zone. Office hours are generally from 9 a.m. to 5 p.m.

2 BUSINESS ORGANIZATIONS

2.01 AGENCY:

The common law rules of agency apply to questions relating to principal and agent.

2.02 ASSOCIATIONS:

Nonprofit, cooperative associations, with or without capital stock, may be formed to encourage orderly marketing of products of soil. (TCA 43-16-101 et seq.). See also topic 2.03 Corporations, subhead Professional Corporations.

Formation.

Must file articles of incorporation, setting forth information required by TCA 43-16-110.

Rights and Powers.

No statutory provisions.

Liabilities.

While mere membership in association does not of itself impose liability for acts of associates, universal liability of members may arise from a public act of the association itself, or by the acts of officers, agents or members when such acts are known to membership and actively or passively approved. (181 S.W.2d 881 [1944]).

Actions.

No statutory authorization for actions by or against association in its own name. Class action appears necessary when members are too numerous to be joined. (181 S.W.2d 881 [1944]).

Dissolution.

No statutory provision.

Professional Associations.

One or more persons licensed to practice a profession or engage in an occupation or trade permitted to form professional association under specified conditions. (TCA 48-101-601 et seq.). See also topic 2.03 Corporations, subhead Professional Corporations.

2.03 CORPORATIONS:

General Supervision.

Secretary of State. Address for filings and inquiries: Secretary of State, 312 Rosa L. Parks Avenue, 6th Floor, William R. Snodgrass Tower, Nashville, TN 37243.

For Profit Corporations.

Purposes.

Corporation may engage in any lawful business unless more limited purpose is set forth in charter. (TCA 48-13-101).

Name.

Must contain word “corporation”, “incorporated”, “company”, or abbreviation ``corp.'', ``inc.'', ``co.'', or words or abbreviations of like import in another language, except for insurance or banking companies. Domestic or foreign corporation authorized to transact business or making application to do so may elect to adopt assumed corporate name for use in state. Name must be distinguishable from corporate or assumed corporate name of corporation incorporated or authorized to transact business in state; corporate name or assumed corporate name reserved in office of Secretary of State; or, name of not for profit domestic or foreign corporation authorized to transact business in state. Name must not imply: Corporation transacts or has power to transact business when authorization is required by laws of this state unless appropriate written certified authorization has been obtained; affiliation with fraternal, veterans', service, religious, charitable, or professional organization unless so authorized in writing; corporation is agency of U.S. or State of Tennessee or subdivision or agency thereof unless so authorized in writing; or that corporation is organized for purpose other than stated in charter. Reservation of name for nonrenewable four-month period allowed and right to use of reserved name assignable. (TCA 48-14-101; TCA 48-14-102; TCA 48-14-103). Fee for reservation or assignment, $20. (TCA 48-11-303).

Term of Corporate Existence.

Perpetual unless otherwise limited in charter. (TCA 48-13-102).

Incorporators.

One or more persons may act as incorporator or incorporators by delivering charter to Secretary of State for filing. No restrictions on residency. (TCA 48-12-101).

Charter.

Must set forth: Name; number of shares authorized to be issued; street address and zip code of initial registered corporate office and county where located; name of initial registered agent at registered office; name and street address and zip code of each incorporator; street address and zip code of initial principal corporate office; class, preference, limitations and rights of each class of stock including voting rights and rights upon dissolution; and statement that corporation is for profit. Charter may contain additional provisions regulating conduct or affairs. (TCA 48-12-102). Charter must be signed by incorporator if directors not yet selected, or chairman of board, president or authorized officers. (TCA 48-11-301).

Filing of Charter.

File original copy with Secretary of State and certified copy with county register in county of principal office. (TCA 48-11-301-03).

Incorporation Tax or Fee.

See subhead Filing Fees, infra.

Filing Fees.

Filing charter, $100; charter amendment, restated charter, articles of dissolution or termination, annual report, $20; articles of merger or share exchange, $100; application for reinstatement following administrative dissolution, $70. County register may charge $5 plus 50¢ per page in excess of five pages for filing of documents required to be filed locally. (TCA 48-11-303). See subhead Local Filing of Corporate Documents, infra.

Local Filing of Corporate Documents.

Following documents must be recorded in county register's office and in county of corporation's principal office if within state, and in county of principal office of surviving corporation in case of merger: Charter; charter amendment; restatement of charter; amended and restated charter, articles of merger or share exchange; articles of dissolution; and articles of revocation of dissolution. (TCA 48-11-303).

License to Do Business.

Corporate existence begins when charter is filed with Secretary of State unless delayed effective date is specified. Filing is conclusive proof that incorporators satisfied all conditions precedent to incorporation except in proceeding by state to cancel or revoke incorporation or involuntarily dissolve corporation. (TCA 48-12-103).

Organization.

After incorporation, directors named in charter must hold meeting to complete organization, appoint officers, adopt bylaws, and carry on any other business brought before meeting. If no directors named in charter, incorporators must hold organizational meeting on call of majority of incorporators on at least two days notice. Actual meeting not required if all incorporators consent to act without meeting and action taken is set out in written instrument and signed by each incorporator indicating each incorporator's vote or abstention and included in minutes or corporate records. If corporate existence has begun pursuant to TCA 48-12-103, failure to hold organizational meeting will not invalidate action of corporation solely on that basis. (TCA 48-12-105).

Paid in Capital Requirements.

No statutory provision.

Amendment to Charter.

Unless charter provides otherwise, directors may adopt amendments to corporation's charter without shareholder action to: Delete names and addresses of initial directors; delete name and address of initial registered agent or address of registered office if statement of change is on file with Secretary of State; designate or change address of principal office of corporation; change each issued and unissued authorized share of outstanding class of shares into greater number of whole shares if corporation has only shares of that class outstanding; change corporate name by substituting word “corporation”, “incorporated”, “company”, or abbreviation “corp.”, “inc.” or “co.” for similar word or abbreviation in name; designate street address, county, and zip code of corporation's registered office and name of current registered agent at that office; delete initial principal office, if annual report is on file with Secretary of State; or any other change permitted by law to be made without shareholder action. (TCA 48-20-102). Any other amendment requires recommendation by directors and approval by majority of votes entitled to be cast on amendment by any voting group with respect to which such amendment creates dissenter's rights and those votes required by TCA 48-17-206-07, of every other voting group entitled to vote on such amendment, unless charter or board requires otherwise. (TCA 48-20-103).

Increase or Decrease of Authorized Stock.

If charter prohibits reissue of acquired shares, number of authorized shares is reduced by same number of shares acquired by corporation, effective upon amendment of charter. Directors may adopt articles of amendment for this purpose without shareholder action. Amendment must set forth: Name of corporation, reduction in number of authorized shares, itemized by class and series, and total number of authorized shares, itemized by class and series, remaining after reduction of shares. Amendment must be delivered to Secretary of State for filing. (TCA 48-16-302).

Bylaws.

Incorporators or directors must adopt initial bylaws which may contain any provision for managing business or regulating affairs of corporation not inconsistent with law or charter. (TCA 48-12-106). Directors or shareholders may amend or repeal bylaws unless: Tennessee law or charter reserves power to shareholders in whole or part or shareholders, in amending or repealing particular bylaw, expressly provide that directors may not amend or repeal that bylaw. (TCA 48-20-201). Shareholder amendments to bylaws requiring quorum or voting requirements greater than required by law must be adopted under greater of: Quorum or voting requirements then in effect or quorum or voting requirements proposed to be adopted. Such amendment may not be adopted, amended or repealed by directors. (TCA 48-20-202).

Stock.

Charter must prescribe number of shares of each class authorized to be issued. If more than one class authorized, charter must prescribe distinguishing designation for each class and describe preferences, limitations and relative rights incident to that class. Charter must authorize one or more classes that together have unlimited voting rights and one or more classes that together are entitled to receive net assets upon dissolution. (TCA 48-16-101).

Stock Certificates.

Certificate must state on its face at minimum: Name of corporation; statement that corporation is organized under law of state; name of person to whom issued; and number and class of shares and designation of series, if any. If issuing corporation is authorized to issue different classes of shares or different series within class, designations, relative rights, preferences, and limitations applicable to each class and variations in rights, preferences, and limitations for each series must be summarized on front or back of each certificate. Alternatively, certificate may state conspicuously on its front or back that corporation will furnish shareholder this information on request in writing, without charge. Each certificate must be signed by two officers designated in bylaws or by board of directors and may bear corporate seal or facsimile. (TCA 48-16-206). Unless charter or bylaws provide otherwise, shares need not be represented by certificates. (TCA 48-16-207).

Issuance of Stock.

Directors may authorize shares to be issued for consideration consisting of any tangible or intangible property or benefit to corporation including cash, promissory notes, services performed or to be performed, other benefits to be received, or other securities of corporation. Directors must determine if consideration is adequate before shares are issued. Shares may be placed in escrow for promissory note or contract for future services until note paid or services performed. (TCA 48-16-202).

Transfer of Stock.

Charter, bylaws, agreement among shareholders, or agreement between shareholders and corporation may provide for restrictions on transfer or registration of transfer of shares. Restrictions are enforceable against holder and transferee if restriction is authorized under TCA 48-16-208 and is noted on certificate. Restrictions on transfers and registration are authorized for any reasonable purpose. Restriction may obligate shareholder to offer corporation or other person first opportunity to acquire shares; obligate corporation or others to acquire shares; require corporation or others to approve transfer; or prohibit transfer to designated persons. (TCA 48-16-208).

Uniform Securities Ownership by Minors Act not adopted.

Uniform Simplification of Fiduciary Security Transfers Act has been repealed. (TCA 35-8-101 et seq.).

Stock Transfer Tax.

None.

Stockholders.

Unless charter or Tennessee law provides otherwise, each outstanding share, regardless of class, is entitled to one vote on each matter voted on at shareholder meetings. (TCA 48-17-202). If charter provides without qualification that preemptive rights exist, shareholders having shares with general voting rights and preferred rights to distributions or assets have preemptive rights to acquire proportional amount of corporation's unissued shares upon decision of directors to issue shares, except for shares issued as compensation to directors, officers or agents or employees of corporation, shares issued to satisfy conversion or option rights created to provide such compensation, shares sold otherwise than for cash, or shares authorized in charter and issued within six months of effective date of incorporation. (TCA 48-16-301).

Tender Offers.

See category 3 Business Regulation and Commerce, topic 3.24 Securities, subhead Registration of Takeover Offers.

Stockholders' Actions.

Special procedural rule for derivative suits (23.06) patterned after Federal Rule 23.1. Derivative suits governed by TCA 48-17-401, under which expenses and attorney's fees may be awarded to defendant if suit commenced without reasonable cause or for improper purpose corporation may be required to pay plaintiff's reasonable expenses, including attorney's fees, if court finds that proceeding has resulted in substantial benefit to corporation, and/or one party may be required to pay opposing party's reasonable expenses, including attorney's fees, if court finds that filing of pleading, motion or other paper was not well grounded in fact or warranted by existing law or good faith argument for extension, modification or reversal of existing law and was interposed for improper purpose, such as to harass or cause unnecessary delay or needless increase in cost of litigation.

Stockholders' Liabilities.

Not personally liable for any debt or act of corporation, except that shareholder may become personally liable by reason of shareholder's own acts or conduct. (TCA 48-16-203).

Stockholders' Meetings.

Annual meeting required. (TCA 48-17-101). Special meetings may be called by board or, unless charter or bylaws provide otherwise, by shareholders holding not less than 10% of votes entitled to be cast on issue proposed. (TCA 48-17-102). Notice of special and annual meeting required to be mailed or otherwise dispatched at least ten days and not more than two months before meeting. (TCA 48-17-105). Special meeting notice must include description of purpose(s) for meeting. (TCA 48-17-105). Shareholders may vote by proxy. Proxy may be transmitted by facsimile, telegram, or other means of electronic transmission to person who will be holder thereof, provided that facsimile, telegram, or other electronic transmission shall set forth or be submitted with information from which it can be determined that it was sent and authorized by shareholder. (TCA 48-17-203). Proxy, which states it is irrevocable, is irrevocable when appointment of proxy conspicuously states that it is irrevocable and is coupled with interest. (TCA 48-17-203).

Cumulative voting permitted if authorized by charter and if notice requirements are met. (TCA 48-17-209).

Voting Trusts.

By signed written agreement, shareholders may create voting trust and transfer shares to trustee for period of ten years. Trust may be extended for additional ten year periods. Trustee may issue transferable voting trust certificate to shareholders. Voting trust agreement and list of names and addresses of owners of beneficial interests in trust designating number and class of shares transferred to trust must be delivered to corporation's principal office. (TCA 48-17-301).

Directors.

Board may consist of one or more individuals as fixed by charter or bylaws who need not be residents of this state or shareholders unless charter provides otherwise. (TCA 48-18-102-03). Directors are elected at first annual shareholders' meeting and at each annual meeting thereafter unless terms are staggered or directors are elected for terms exceeding one year. (TCA 48-18-103). Unless charter provides otherwise, shareholders or directors may vote to fill vacancy on board. (TCA 48-18-110).

Directors' Meetings.

May be held in or out of state. Special meetings may be called by chairman, president or any two directors. (TCA 48-18-201). Regular meetings may be held without notice unless charter provides otherwise. Special meeting must be preceded by two days notice unless charter or bylaws provide for longer or shorter period. (TCA 48-18-203). Unless charter or bylaws provide otherwise, directors may conduct meetings through means of communication by which all directors participating may simultaneously hear each other, and such participation constitutes presence at meeting. (TCA 48-18-201). Charter or bylaws may authorize quorum to consist of no fewer than one-third of fixed or prescribed number of directors. Otherwise, quorum is majority of number of directors, regardless of whether number is fixed or prescribed. (TCA 48-18-205). Unless charter or bylaws provide otherwise, board action may be taken without meeting if all directors consent in writing setting out each director's vote or abstention on action taken. (TCA 48-18-202).

Powers and Duties of Directors.

Corporate powers and business affairs exercised by or under authority of directors subject to any limitation in charter. Corporation of 50 or fewer shareholders may dispense with board or limit its authority by describing in charter who will perform some or all of duties of board of directors. Such person is subject to same standard of conduct imposed on directors. (TCA 48-18-101). Directors must discharge duties in good faith and with that degree of care ordinarily prudent person in like position would exercise under similar circumstances and in manner reasonably believed by director to be in best interests of corporation. (TCA 48-18-301).

Liabilities of Directors.

Conflict of interest transaction is not voidable by corporation solely because of director's or officer's interest if approval of shareholders or other directors was obtained or transaction was fair to corporation. Corporation may not make loans to officers or directors without approval of majority of shareholders entitled to vote unless directors determine that loan benefits corporation. Personal liability attaches to director participating in unlawful distribution. (Foregoing may, in some instances, be affected, for some corporations, by impact of federal legislation popularly known as Sarbanes-Oxley). (TCA 48-18-301-04).

Officers.

Corporation must have president and secretary but may also have other officers described in bylaws or designated by directors. Unless charter or bylaws provide otherwise, officers are elected or appointed by directors. Duly appointed officer may appoint other officers if authorized by bylaws or by directors. (TCA 48-18-401). Same individual may simultaneously hold more than one office, except offices of president and secretary; however, if corporation has only one shareholder, such shareholder may act as president and secretary. (TCA 48-18-401).

Liabilities of Officers.

Standard of conduct is same as that of directors. (TCA 48-18-403). See subhead Powers and Duties of Directors, supra. (TCA 48-18-303).

Indemnification of Directors and Officers.

Corporation may indemnify director or officer made party to proceeding if director or officer conducted self in good faith and reasonably believed conduct in best interest of or not opposed to best interest of corporation; or in criminal proceeding, director or officer had no reason to believe conduct unlawful. Indemnification mandatory if director or officer wholly successful in defense on merits. Indemnification prohibited if director adjudged liable to corporation in proceeding by corporation or in its right or if adjudged liable in proceeding charging improper benefit to him. (TCA 48-18-502-503).

Principal Office.

Must be designated in charter and is office where principal executive offices of domestic or foreign corporation are located. (TCA 48-11-201; TCA 48-12-102). Corporation must maintain registered office in state which may be same as any of its places of business. (TCA 48-15-101).

Registered Agent.

Corporation must continually maintain registered agent in state who may be individual resident who resides in this state and has business office identical with registered office; or domestic or foreign, profit or not for profit corporation authorized to transact business within state and having business office identical with registered office. (TCA 48-15-101). Registered agent is corporation's agent for service of process, notice and demand required or permitted by law to be served on corporation. (TCA 48-15-104).

General Powers of Corporations.

(a) Sue and be sued, complain and defend in corporate name; (b) have corporate seal and use it; (c) make and amend bylaws not inconsistent with charter or laws of state; (d) purchase, receive, lease and otherwise deal with property of all kinds, or any interest therein; (e) make contracts and guarantees, incur liabilities, borrow money, issue notes, bonds, and other obligations and secure such interest; (f) lend, invest and reinvest funds; (g) purchase, receive, subscribe for or otherwise acquire and deal in shares or other interests in, or obligations of any other entity; (h) be promoter, partner, member, associate, or manager of any partnership, joint venture, trust, or any other entity; (i) conduct its business, locate offices, and exercise powers granted by law within or without state; (j) elect directors and appoint officers, employees, and agents of corporation, define their duties, fix compensation and lend them money and credit; (k) pay pensions and establish pension plans, pension trusts, profit sharing plans, share bonus plans, share option plans and benefit or incentive plans for current or former directors, officers, employees and agents of corporation or subsidiary; (1) make donations for public welfare or charitable, scientific or educational purposes; (m) make payments or donations or do any other act, not inconsistent with law, that furthers business and affairs of corporation; (n) procure for corporate benefit insurance on life of directors, officers or employees, insure life of any shareholder for purpose of acquiring at death shares owned by such shareholder and continue such insurance after relationship terminates; (o) accept gifts, devises, and bequests subject to conditions or limitations contained therein so long as conditions or limitations are not contrary to law or purposes for which corporation is organized. (TCA 48-13-102).

Political Activities Prohibited.

No corporation doing business in state may use any corporate funds or credit to aid in approval or defeat of any candidate in any national, state, county or municipal election. (TCA 2-19-132). Class C misdemeanor to direct or coerce any employee to vote for any measure, party or person in any election, or threaten to discharge any employee for voting or not voting in election. (TCA 2-19-134).

Dividends in form of distributions may be paid, subject to restrictions in charter, and unless corporation would be unable to pay its debts as they become due in usual course of business or corporation's total assets would be less than total liabilities plus amount needed to satisfy preferential rights of shareholders superior to those receiving distribution if corporation were to be dissolved at time of distribution. (TCA 48-16-401). Unless charter provides otherwise, share dividends may be issued on pro rata basis without consideration therefor. (TCA 48-16-204).

Unclaimed Dividends.

See category 21 Property, topic 21.01 Absentees, subhead Escheat.

Sale or Transfer of Corporate Assets.

Corporation may on terms and conditions and for consideration determined by board of directors, sell, lease, exchange, or otherwise dispose of all or substantially all of its property in usual and regular course of business; mortgage, pledge or encumber its property (whether with or without recourse) whether or not in regular course of business; and transfer all property to another corporation, all shares of which are owned by transferring corporation. (TCA 48-22-101). Unless charter provides otherwise, sale, lease, exchange or other disposal of all, or substantially all, property other than in usual and regular course of business requires proposal by directors and approval of majority of shareholders entitled to vote after notice to all shareholders regardless of whether all shareholders are entitled to vote. (TCA 48-22-102).

Books and Records.

Corporation must maintain records of minutes of meetings of shareholders and directors, and actions taken without meeting; record of actions taken by committees on behalf of directors for corporation; accounting records; and record of shareholders with addresses and type of shares held by each. (TCA 48-26-101). Following records must be kept at principal office: Charter; restated charter and amendments thereto, if any; bylaws; restated bylaws and amendments thereto, if any; resolutions of directors creating classes and series of shares and fixing their relative rights, preferences, and limitations, if shares issued pursuant to those resolutions are outstanding; minutes and records of shareholder meetings and actions taken for past three years; written communications to shareholders, including financial statements for past three years; names and business addresses of current directors and officers; and most recent annual report. (TCA 48-26-101). Shareholder inspection allowed of specified records upon five days written notice that includes statement of reason for inspection if demand is made in good faith and describes with reasonable particularity shareholder's purpose and records that shareholder desires to inspect, and records are directly connected with shareholder's purpose. (TCA 48-26-102).

Reports.

Each domestic and foreign corporation must file with Secretary of State annual report setting forth: Name; state or country of incorporation; street address (including zip code) and county of registered and principal office and agent located at registered office; name and business address of directors and principal officers; and federal employee identification number of corporation, or its corporation control number assigned by Secretary of State. (TCA 48-26-203).

Merger and Consolidation.

One or more corporations may merge into for-profit or nonprofit corporation, limited liability company, or domestic or foreign limited partnership or corporation may acquire shares of another corporation or units of another domestic or foreign limited partnership upon directors adopting and recommending to shareholders and majority of shareholders who are entitled to vote approving plan of merger or share exchange with such plan setting forth: Name of merging and surviving entities; names of entity whose shares are acquired and acquiring entity (in share exchange); terms and conditions of transaction; and manner and basis of converting shares or units (in merger) or exchanging shares or units. (TCA 48-21-102-04). Articles of merger or share exchange must be sent to Secretary of State by surviving or acquiring corporation. (TCA 48-21-107).

Corporation owning 90% of outstanding shares of each class and series of subsidiary corporation or units of subsidiary limited partnership may merge subsidiary into itself, merge itself into subsidiary or merge two or more such subsidiaries with and into each other. Directors of parent corporation must adopt merger plan stating name of parent and subsidiary and name of surviving entity; terms and conditions of merger; manner and basis of converting shares or units of each entity into shares, units, obligations, or other securities of surviving entity or any other entity or into cash or other property in whole or in part; and any other provisions deemed desirable by board of directors. Copy or summary of plan must be mailed to shareholders or partners of subsidiary unless waived in writing. Vote of shareholders or partners of subsidiary not required. If parent corporation is survivor, vote of its shareholders not required. If subsidiary corporation is survivor, approval of shareholders of parent in manner provided in TCA 48-21-104 required. (TCA 48-21-105). Articles of merger must be sent to Secretary of State. (TCA 48-21-107). Merger of foreign corporation and domestic corporation allowed by TCA 48-21-109, and merger with foreign or domestic limited liability company allowed by TCA 48-21-110.

Conversion.

Corporation may convert to limited liability company if plan of conversion is adopted by board of directors and approved by shareholders. (TCA 48-21-111). Effects of conversion from corporation to limited liability company are set forth in TCA 48-21-112.

Dissolution.

Corporation may be dissolved by: Majority vote of incorporators or initial directors of corporation which has not commenced business or issued shares (TCA 48-24-101); written consent of shareholders; or recommendation by directors and approval by majority of shareholders entitled to vote on such proposal (TCA 48-24-102). Articles of dissolution must be filed with Secretary of State setting forth name of corporation, date dissolution was authorized and statement that resolution was duly adopted by shareholders and accompanied by such resolution. (TCA 48-24-101, -103).

Corporate existence continues after dissolution for purpose of winding business up. (TCA 48-24-105). Following distribution of assets, articles of termination must be filed setting forth name of corporation, statement that all assets have been distributed to creditors and shareholders, and statement that dissolution has not been revoked. (TCA 48-24-108).

Secretary of State may commence proceeding to administratively dissolve corporation if: Corporation fails to deliver annual report within two months after due date; corporation is without registered agent or office in state for two months or more; name of corporation fails to comply with requirements of TCA 48-14-101; Secretary of State is not notified within two months of change or resignation of registered agent or change or discontinuance of registered office; corporation's period of duration has expired; or corporation submits to Secretary of State check, bank draft or other such instrument for payment of fee and it is dishonored upon presentation for payment. (TCA 48-24-201).

Judicial dissolution available in proceeding by attorney general if corporation: Obtained charter by fraud; exceeds or abuses authority conferred by law; violates any law resulting in forfeiture of charter; or carries on, conducts, or transacts its business or affairs in persistently fraudulent or illegal manner. (TCA 48-24-301, 112 S.W.3d 486 [2002]). Judicial dissolution by shareholders authorized if: Directors are deadlocked in management affairs, shareholders are unable to break deadlock and irreparable harm to corporation is threatened or occurring; directors or others under corporate control are acting in illegal or oppressive manner; shareholders are deadlocked in voting power and fail to elect directors for two consecutive annual meetings; or corporate assets are being misapplied or wasted. (TCA 48-24-301). Judicial dissolution by creditor authorized if: creditor's claim has been reduced to judgment, execution is returned unsatisfied and corporation is insolvent; or corporation has admitted in writing that creditor's claim is due and corporation is insolvent. (TCA 48-24-301).

Insolvency and Receivers.

Court having equity jurisdiction may appoint receiver in proceeding to dissolve corporation for purpose of winding up affairs and liquidating corporate assets, or court may appoint custodian to manage affairs. Court will describe powers and duties of receiver or custodian, which may include: Disposition of assets of corporation at court authorized public or private sale; authority to sue and defend in personal name as receiver of corporation; or exercise of all powers of corporation in place of directors or officers. (TCA 48-24-303).

Close Corporation.

No special statutory provisions.

Appraisal.

Dissent and receipt by shareholder of fair value for shares is available upon: (a) consummation of plan of merger of which shareholder approval is required or corporation is subsidiary that is merged with parent; (b) plan of share exchange; (c) sale or exchange of all or substantially all of property of corporation; (d) amendment to charter materially and adversely affecting rights in respect to shares; or (e) any other matter for which charter, bylaws or board resolution allows dissent. In case of merger, share exchange or sale of assets, only those shareholders entitled to vote on such actions are entitled to dissent and receive fair value. (TCA 48-23-102). Dissenter may not challenge corporate action giving rise to dissent unless action taken is unlawful or fraudulent with respect to shareholder or corporation. (TCA 48-23-102). Fair value is value of shares immediately before effectuation of corporate action giving rise to dissent, excluding appreciation and depreciation occurring in anticipation of corporate action. (TCA 48-23-101). Dissenter may present estimate of fair value and demand payment of estimated value. (TCA 48-23-209). If dispute remains unsettled, corporation must commence proceeding within two months after receiving payment demand for purpose of determining fair value of shares and accrued interest. If corporation fails to do so, amount demanded must be paid. (TCA 48-23-301).

Foreign corporations, except insurance companies, may not transact business in state without certificate of authority. (TCA 48-25-101). Following acts do not constitute transaction of business: (a) maintaining, defending or settling any proceeding, claim, or dispute; (b) holding meetings of directors or shareholders or other activities concerning internal corporate affairs; (c) maintaining bank accounts; (d) maintaining offices or agencies for transfer, exchange, and registration of corporation's securities or appointing and maintaining trustees or depositories for securities; (e) selling through independent contractors; (f) soliciting or obtaining orders if orders require acceptance outside state before becoming contracts; (g) creating or acquiring indebtedness, deeds of trust, mortgages and security interests in real or personal property; (h) securing or collecting debts or enforcing mortgages, deeds of trust, or security interest in property securing debts; (i) owning, without more, real or personal property (except for management and rental of real property) for reasonable time acquired in connection with enforcement of mortgage or deed of trust if owner is attempting to liquidate investment and there is no office or other agency present in state therefor other than independent agency; (j) conducting isolated transaction completed within one month that is not one in course of repeated transactions of like nature; and (k) transacting business in interstate commerce. (TCA 48-25-101).

Application for certificate of authority must state name of corporation and, if different, name under which certificate of authority is to be obtained; state or country in which incorporated; date of incorporation and period of duration, if other than perpetual; street address, including zip code, of principal office; street address, including zip code, and county of registered office and name of registered agent at registered office; names and business addresses, including zip codes, of current directors and officers; and statement that corporation is for profit. Corporation must deliver with completed application certificate of existence authenticated by Secretary of State or other official in state of incorporation. (TCA 48-25-103). $600 fee for application of authority and $20 fee for application for amended certificate of authority. (TCA 48-11-303).

Foreign corporation that fails to comply is denied access to courts in this state until certificate obtained, and is liable for treble amount of fees, penalties, taxes and interest that would have been due. Validity of contracts not impaired and corporation may defend actions brought against it. (TCA 48-25-102).

See also category 22 Taxation, topics 22.01 Administration, 22.10 Income Tax.

Taxation of Corporate Property.

Rules are generally same as for individuals (see category 22 Taxation, topics 22.01 Administration, 22.10 Income Tax).

Income Tax.

None as such, but excise tax (see subhead Excise Tax, infra) imposed on earnings, and privilege tax (see category 22 Taxation, topic 22.10 Income Tax) imposed on sales.

Professional Corporations.

Person or group of persons licensed to practice a profession may practice as a professional corporation governed by TCA 48-101-601 through 635.

Deeds.

See category 21 Property, topic 21.06 Deeds.

Model Non-Profit Corporation Act has not been adopted. Nonprofit corporations governed by TCA 48-51-101 et seq.

Limited Liability Companies.

See topic 2.06 Limited Liability Companies.

2.03A EXCISE AND FRANCHISE TAX:

See category 22 Taxation, topic 22.03 Business Taxes, subheads Excise Tax, Franchise Tax.

2.04 [RESERVED]

2.05 JOINT STOCK COMPANIES:

No statutory provisions.

Professional Associations.

See topics 2.02 Associations, subhead Professional Associations; 2.03 Corporations, subhead Professional Corporations.

2.06 LIMITED LIABILITY COMPANIES:

In 2005, Tennessee Legislature adopted Tennessee Revised Limited Liability Company Act, Public Acts of 2005, c. 286 (“2005 Act”). Under 2005 Act, all LLCs formed under Tennessee Law from and after Jan. 1, 2006, and all LLCs formed prior to Jan. 1, 2006 which affirmatively elect to be governed by 2005 Act, will be governed by new Act. LLCs formed prior to Jan. 1, 2006, will continue to be governed by provisions of TCA 48-201-101 through TCA 48-248-606 (“1994 Act”) unless they affirmatively opt into governance by 2005 Act.

2005 Act.

(TCA 48-249-101—48-249-1133).

General Supervision.

Office of Secretary of State.

Purposes.

Unless more limited purpose set forth in LLC documents, LLC deemed to have purpose of engaging in any lawful business. (TCA 48-249-104).

Formation.

LLC formed by filing articles of organization with secretary of state. Acceptance for filing by secretary of state conclusive proof of satisfaction of all conditions precedent to formation, unless deferred effective date specified in articles. If effective date deferred, additional filing of certificate of formation may be made. If certificate of formation is not filed within 120 days of filing of articles, presumed effective date of formation will be 90 days from date of filing of articles. (TCA 48-249-201).

Powers.

LLC has same powers as individual to do whatever necessary to conduct business, including, but not limited to, power to: (a) Sue and be sued in own name; (b) make and amend operating agreement not inconsistent with law or articles for managing business and regulating affairs; (c) acquire and possess or use real or personal property, or any legal or equitable interest in property, wherever located; (d) dispose of or grant security interest in any or all property; (e) acquire or dispose of, or grant security interest in, shares or other interests in, or obligations of, any entity; (f) make contracts, borrow money, issue debt instruments, and mortgage or otherwise pledge interests in property; (g) lend money, invest funds and take security interests; (h) participate as partner, member, associate, or manager of partnership, joint venture, trust, or other entity; (i) conduct business, locate offices and exercise powers inside or outside Tennessee; (j) elect governors, appoint directors, managers, employees, and agents, and establish terms of employment; (k) pay pensions and establish pension plans; (l) make charitable donation; (m) make any legal expenditure in furtherance of business; (n) purchase life insurance on members; (o) accept gifts if not inconsistent with purposes; (p) accept certain contributions; (r) exercise all powers necessary or convenient to effect business purposes of LLC. (TCA 48-249-104).

Name.

Domestic LLC name must contain words “limited liability company”, or abbreviation “L.L.C.” or “LLC” or words or abbreviations of like import in another language. Must not contain word “corporation” or “incorporated” or abbreviation of either or both. (TCA 48-249-106). Name may not state or imply: (a) That LLC transacts or may transact business for which authorization is required, unless such has been obtained; (b) any affiliation with fraternal, veterans', service, religious, charitable or professional organization unless certified in writing by organization with which affiliation claimed; or any agency or affiliation with U.S., any state thereof or subdivision or agency thereof, unless certified in writing by appropriate federal or state official. (TCA 48-249-106).

Name must be distinguishable in records of secretary of state from other registered LLC, corporate, or limited partnership names unless entities are under common control. (TCA 48-249-106).

Name may be reserved by delivery of application for filing with secretary of state, setting forth name and address of applicant and name proposed to be reserved. If proposed name otherwise meets statutory requirements, can reserve for up to four months. (TCA 48-249-107).

Articles of Organization.

Articles must set forth: (a) Name, satisfying requirements of TCA 48-249-106; (b) street address, zip code and county of initial registered office and name of initial registered agent at that office; (c) address and county of principal executive office; (d) statement of whether LLC will be member-managed, manager-managed or director-managed; (e) if LLC will have more than six members at date of filing of articles, statement of number of members at date of filing (LLC need have only one member); (f) if one or more members are personally liable for debts, obligations and liabilities of LLC, information required by TCA 48-249-114(f); (g) future effective date; (h) if not to engage in business in Tennessee, specific statement that such is prohibited; and (i) duration of LLC, if applicable. (TCA 48-249-202).

Filing of Articles.

Filing with secretary of state effects formation of LLC. (TCA 48-249-201). See subhead Formation, supra.

Amendment of Articles of Organization.

Amendments to articles require approval of all of members; provided majority of members may amend articles to change name, registered agent and registered office, principal office or number of members. (TCA 48-249-204). Articles are amended by filing of articles of amendment with secretary of state. Articles of amendment must set forth: (a) Name of LLC; (b) date of each amendment's adoption; and (c) text of each amendment.

Restated Articles of Organization.

LLC may restate its articles at any time with or without member action. If restatement includes amendment, restated article must be designated as Amended and Restated Articles of Organization, and amendment must be adopted by LLC in same manner as any other amendment. (TCA 48-249-204).

Registered Office and Registered Agent.

Both foreign and domestic LLCs must continuously maintain registered office and registered agent within state. (TCA 48-249-109). Change of either may be made by filing statement of change to secretary of state. (TCA 48-249-110). Registered agent is non-exclusive agent for service of process, notice, or demand to be served on LLC. (TCA 48-249-112). Failure to appoint or maintain registered agent results in secretary of state being default agent for service of process. (TCA 48-249-112). Procedure for service on secretary of state set out at TCA 48-249-113.

Members.

LLC need have only one member. (TCA 48-249-501).

Membership Interest.

Is personal property and carries no interest in specific LLC property. (TCA 48-249-502). Member or holder of financial rights is entitled, upon request, to statement of membership interest, describing voting rights, if any, right to share in profits and losses and distributions as well as any transfer of member's rights then in effect. (TCA 48-249-502). Except for member of family LLC, member has power and right to terminate such member's membership interest at any time. (TCA 48-249-503). Member's membership interest is terminated upon occurrence of certain events set forth in TCA 48-249-503. If membership interest of member is terminated in contravention of articles or operating agreement, then such member forfeits all governance rights and is liable for damages resulting from wrongful termination. (TCA 48-249-504). Effect of termination depends on reason for termination and whether or not business of LLC is continued. (TCA 48-249-505). Except for certain transfers and distribution of membership interests, member whose membership interest has been terminated is entitled to receive from LLC fair value of terminated membership interest as determined in accordance with TCA 48-249-506. (TCA 48-249-505).

Voting.

All members, managers or directors, as applicable, of LLC have equal voting power per capita with each other member, manager or director. (TCA 48-249-405).

Procedures.

Articles and operating agreement may set forth provisions relating to notice of time, place or purpose of any meeting at which any matter is to be voted on, consented to or approved by any members, managers or directors, as applicable; waiver of any such notice; action by consent without meeting; establishment of record date; quorum requirements; voting in person or by proxy; or any other matter with respect to exercise of any such right to vote. On any matter that under this Act or under articles or operating agreement is to be voted on, consented to or approved by members, managers or directors, as applicable, members, managers or directors, as applicable, may take such action without meeting, without prior notice and without vote if consent or consents in writing, setting forth action so taken, shall be signed: (a) In case of members or managers, by minimum number of members or managers that would be necessary to authorize or take such action at meeting; or (b) in case of directors, by all directors entitled to vote thereon. (TCA 48-249-405).

Management.

LLC can elect in its articles to be member-managed, manager-managed or director-managed.

Operating Agreement.

All members of LLC may enter into operating agreement to regulate affairs of LLC and conduct of its business and to govern relations between or among members, holders, managers, directors, officers and LLC, as applicable. Except to extent articles of organization or written provision of operating agreement specifically require otherwise, operating agreement need not be in writing. Written provisions of operating agreement need not be set out in single integrated document. Operating agreement is enforceable in court of equity by injunction or other equitable relief. (TCA 48-249-203). Any amendment to operating agreement must be approved as provided in articles or operating agreement. If neither articles nor operating agreement provide for method by which operating agreement may be amended, all of members must approve any amendment to operating agreement. (TCA 48-249-204).

Waivable and Nonwaivable Provisions of Act.

To extent LLC documents do not otherwise provide, Act governs relations among members, holders of financial rights, managers, directors, officers and LLC, as applicable. (TCA 48-249-205). LLC may modify, alter or waive any provisions of Act except for nonwaivable provisions set forth in TCA 48-249-205(b).

Tax Classification.

LLC can be treated either as partnership or association taxable as corporation for federal income tax purposes. This classification determines tax treatment for state and local Tennessee Tax purposes. (TCA 48-249-1003).

Conflicts of Interest.

Is transaction with LLC where member, manager, director or officer has direct or indirect interest. Conflict of interest is not void or voidable if: (1) Material facts and interest are disclosed to managers or board of directors and is authorized by majority vote of disinterested managers or directors; (2) material facts and interest are disclosed to (a) members entitled to vote and is authorized by majority vote of disinterested members or (b) all members and is authorized, even if one or more members have conflict; (3) transaction was fair to LLC; (4) conflict was waived by LLC articles or operating agreement and is not manifestly unreasonable under circumstances. (TCA 48-249-404).

Limited Liability.

Member, holder of financial interest, director, manager, officer, employee or other agent of LLC not personally liable for acts, debts, liabilities, or obligations of LLC or for acts or omissions of other members, holders of financial interests, managers, officers, directors, employees or agents of LLC, whether in contract, tort or otherwise. (TCA 48-249-114). Limited liability continues regardless of dissolution, winding up, and termination of LLC. Articles may specify that one or more specified members will be personally liable for all of debts, obligations and liabilities of LLC; provided, that, each member identified must sign articles. (TCA 48-249-114).

Records and Reports.

LLC must maintain at principal executive office, or other place properly determined under Act: (a) List of each member, manager, director and officer, including their last known address, and for each member, such member's tax identification number; (b) list of each holder of financial rights including their last known address, description of financial rights held and taxpayer identification number; (c) copy of articles and all amendments thereto; (d) copy of effective operating agreement; (e) copy of federal, state, and local income tax returns for LLC for last three years; (f) financial statements and accounting records of LLC; (g) records of all member and holder proceedings; (h) written consents from members and holder; (i) records of all proceedings of managers or board of directors for last three years; (j) statement of capital contributions by members and agreed value thereof; (k) copy of all contribution agreements to which LLC is bound; and (l) copy of most recent annual report delivered to secretary of state. (TCA 48-249-406). Any member entitled to inspect and copy any above described records of LLC at principal office or other reasonable location specified in articles or operating agreement during regular business hours, upon written demand at least five business days before inspection. (TCA 49-249-308). All LLCs required to file annual report with secretary of state within four months of close of fiscal year. (TCA 48-249-1017).

Contributions of member may consist of tangible or intangible property or other benefit, promissory note, or services rendered. (TCA 48-249-301). Written, signed contribution agreements and enforceability of same allowed. (TCA 48-249-301). Personal liability is imposed on written contributions. (TCA 48-249-302).

Allocations and Distributions.

Unless otherwise provided in articles or operating agreement, allocations of profits and losses and distributions shall be allocated among members and holders of financial rights in equal shares. (TCA 48-249-305).

Transfers of Interest.

Separate rights (financial rights and governance rights) comprise membership interest. Assignment, in whole or in part, of financial rights permitted, unless otherwise restricted by articles, operating agreement or written resolution or agreement among members. Assignee entitled to receive profits, losses and distributions to which assignor would have been entitled. Assignment does not dissolve LLC and confers no rights to cause dissolution or exercise governance rights. (TCA 48-249-507).

Membership interest may be assigned only by assigning both governance rights and financial rights. Sole member of LLC may freely assign governance rights and/or membership interests at any time. For LLCs with two or more members, assignment of governance rights restricted in that, unless consent in accordance with TCA 48-249-508 permitted by articles or operating agreement, unanimous consent of members required to assign governance rights to person not already member at time of assignment. (TCA 48-249-508).

Dissolution.

LLC is dissolved upon first to occur of following: (a) Expiration of period fixed in articles for duration of LLC, if applicable; (b) occurrence of event specified in articles or operating agreement; (c) action of members in accordance with TCA 48-249-603; (d) action of organizers under TCA 48-249-602; (e) by order of court under TCA 48-249-616 or TCA 48-249-617; (f) by action of secretary of state under § 48-249-605; (g) at any time there are no members if LLC files notice of dissolution as provided in TCA 48-249-609 within 90 days after occurrence of event that terminated membership interest of last remaining member, or articles or operating agreement specify that termination of membership interest of last remaining member dissolves LLC. Articles or operating agreement may specify that any person may be substituted as member for last remaining member effective as of date of event that causes termination of membership interest of last remaining member. (TCA 48-249-601).

Termination, dissociation, death, incapacity, withdrawal, retirement, resignation, expulsion, bankruptcy or dissolution of any member or occurrence of any other event that terminates membership interest of any member shall not cause LLC to be dissolved or its affairs to be wound up, and upon occurrence of any such event, LLC shall be continued without dissolution. (TCA 48-249-601).

LLC dissolved shall be wound up and its existence shall be terminated as provided in this chapter. (TCA 48-249-601).

If terminated by members pursuant to nonjudicial termination procedures (TCA 48-249-603) or if dissolution occurs for: (a) Expiration of period fixed in articles or operating agreement, (b) occurrence of events specified in articles or operating agreement, or (c) termination of membership interest of last remaining member under TCA 48-249-601, LLC must file with secretary of state notice of dissolution. (TCA 48-249-609). Winding up procedures set out in TCA 48-249-610- 612. Upon completion of winding up, articles of termination to be filed with secretary of state. (TCA 48-249-612). Except for dissolution resulting from merger that is not properly abandoned, dissolution may be revoked at any time prior to filing of articles of termination. (TCA 48-249-613).

Derivative Action.

Member of manager-managed or director-managed LLC, who was member at time of complained of transaction (or became member or holder through transfer by operation of law from such member), may bring derivative action. Member or holder of financial rights, if member-managed LLC, may commence derivative action only if members or others in authority refuse to bring suit or efforts to cause such members or other persons to bring suit is unlikely to succeed. (TCA 48-249-801). Action commenced by filing complaint (TCA 48-249-802) and may not be discontinued or settled without court approval (TCA 48-249-803).

Conversion to Limited Liability Company.

Any other entity may convert to LLC by complying with TCA 48-249-703 and filing with secretary of state certificate of conversion and articles of organization. Certificate of conversion shall state following: (a) Jurisdiction, date of formation, and type of entity of converting other entity; (b) name of converting other entity; (c) name of domestic LLC as set forth in its articles of organization; (d) that all required approvals of conversion have been obtained by converting other entity; and (e) future effective date or time of conversion, if applicable. (TCA 48-249-703). Conversion effective upon filing of certificate of conversion and articles or at later date as specified in certificate of conversion. (TCA 48-249-703).

Merger.

Agreement or plan of merger must be approved on behalf of domestic LLC by: (1) Majority of managers, if manager-managed, or majority vote of directors, if director-managed; and (2) majority of members. (TCA 48-249-702). In case of merger including any entity not domestic LLC, merger must be permitted under law of jurisdiction of foreign entity and foreign entity must comply with such laws. (TCA 48-249-702). Certificate of merger must be filed with secretary of state and must set forth: (a) Name and jurisdiction of each constituent party to merger; (b) statement that agreement or plan of merger has been approved and executed by each constituent party to merger; (c) name and address of surviving constituent party and principal executive office of surviving entity; (d) in case of merger in which domestic LLC is surviving entity, such amendments, if any, to articles of surviving domestic LLC; (e) effective date or time of merger, if not date of filing of plan; (f) statement that plan is on file at place of business of surviving constituent; (g) statement that copy of plan will be provided by surviving constituent party to any person holding interest in constituent party to merger; (h) statement that surviving entity, if not domestic entity, will designate secretary of state as agent for service of process in lawsuit brought for enforcement of obligation of any entity involved in merger. (TCA 48-249-702). Unless future effective date or time is specified, merger is effective upon filing of certificate of merger with secretary of state, which acts as notice of dissolution and articles of termination of domestic LLC which is not surviving entity. Action pending against non-surviving entity may continue or may substitute surviving entity. (TCA 48-249-702).

Contractual Appraisal Rights.

Articles, operating agreement or plan of merger may provide that contractual appraisal rights with respect to membership interest, financial rights or another interest in LLC shall be available for any class or group of members or holders of financial rights in LLC in connection with any amendment of articles or operating agreement, any merger in which LLC is constituent party to merger, any conversion of LLC to another entity, any sale, lease, transfer or other disposition by LLC of all or substantially all of its property and assets not in usual and regular course of business or any other action or event affecting LLC. (TCA 48-249-706).

Professional Limited Liability Companies.

May form PLLC to render specified professional services. (TCA 48-249-1103). May elect PLLC status for purpose of rendering services within two or more professions only if combination of professional purposes is specifically authorized by licensing law applicable to each profession in combination. (TCA 48-249-1104). PLLC enjoys same powers as other LLCs. May be promoter, general partner, member, associate, or manager of PLLC, professional corporation, partnership, joint venture, trust or other entity only if other entity engaged solely in rendering professional services or in carrying on business authorized by PLLC's articles. (TCA 48-249-1105). May render professional services in Tennessee only through individuals licensed or authorized by Tennessee to render such services. Restriction does not apply if such actions not prohibited by licensing authority. (TCA 48-249-1106). PLLC may render only professional service or engage in business authorized by its articles, but may invest its funds in any type of investment. (TCA 48-249-1107). Domestic PLLC name must contain words “professional limited company”, “professional limited liability company”, “professional LLC”, or “limited liability professional company”, or abbreviations “P.L.C.”, “P.L.L.C.”, “L.L.P.C.” or any of such abbreviations without punctuation. Foreign PLLC name subject to laws of jurisdiction under which it was formed. No PLLC may contain words “corporation” or “incorporated” or abbreviation of either or both. It may not contain language indicating that it is organized for any purpose other than authorized by TCA 48-249-1104 and its articles. (TCA 48-249-1108).

PLLC may have persons not licensed to practice profession described in articles as members or holders of financial rights only if licensing authority specifically authorizes. If permitted by licensing authority, PLLCs may have as members: (a) Individuals authorized by law to render professional service described in PLLC articles; (b) general partnerships in which all partners are qualified persons with respect to PLLC and in which at least one partner is authorized by law in Tennessee to render professional service described in articles; (c) professional corporations and professional associations authorized by law in this state to render professional service described in articles; or (d) PLLC authorized by law in Tennessee to render professional service described in PLLC articles. (TCA 48-249-1109). Specified health care professionals may be members or holders of financial rights of PLLC. (TCA 48-249-1109). Licensing authority may restrict, condition, or revoke in part authority of PLLCs subject to its jurisdiction to have above described members. Membership interest held in violation of statute is void. (TCA 48-249-1109).

Member of PLLC may transfer membership interest, governance rights or financial rights, as applicable, only to qualified individuals, but may pledge interest as collateral for loan. Transfer in violation of statute is void. (TCA 48-249-1110). If member of PLLC becomes disqualified to render professional services for which PLLC was formed, member or holder is deemed to have resigned and withdrawn from PLLC and may have no further interest as member other than right to receive distribution to which previously entitled. Member, manager, agent or employee of PLLC who becomes legally disqualified to render professional services for which PLLC was formed must sever all professional employment and professional relationships with, and financial interests in, PLLC. Failure to require compliance is grounds for forfeiture of PLLC's articles and dissolution or for revocation of foreign PLLC's certificate of authority. (TCA 48-249-1116). If persons other than qualified persons are permitted by licensing authority to serve as directors, managers or officers of PLLC, all officers except secretary and treasurer, all managers, if any, and at least one half of directors, if any, must be qualified persons with respect to PLLC. (TCA 48-249-1117). Each individual who renders professional services is only liable for their own negligent or wrongful acts or omissions. (TCA 48-249-1119).

Foreign PLLC may not transact business in Tennessee unless it obtains certificate of authority from secretary of state. Foreign PLLC may not register unless: (a) Name complies with TCA 48-249-1108; (b) foreign PLLC is organized for purpose referenced in and satisfies requirements of TCA 48-249-1104; and (c) all of members, holders of financial rights (or their equivalent), if any, directors (or their equivalent), if any, managers (or their equivalent), if any, and officers (or their equivalent), if any, are licensed in one or more states to render professional service described in articles unless Tennessee licensing authority permits persons other than qualified persons to serve as directors, managers or officers of PLLC, in which case not less than one half of such persons shall be qualified persons with respect to foreign PLLC, except for secretary, assistant secretary and treasurer. (TCA 48-249-1123). Foreign PLLC is not required to obtain certificate unless it maintains or intends to maintain office in Tennessee. (TCA 48-249-1123). Application for certificate must contain information required in TCA 48-249-904 (see subhead Foreign Limited Liability Companies, infra); must state that it is foreign PLLC; must state purpose is to render specified professional services; and must state that foreign PLLC is in compliance with TCA 48-249-1123(b)(3). (TCA 48-249-1124). Certificate may be revoked administratively if licensing authority certifies that PLLC has violated statute. (TCA 48-249-1125).

PLLC must deliver certified copy of articles and, if foreign, certified copy of certificate, to each licensing authority with jurisdiction over professional service described in articles before rendering services. (TCA 48-249-1127). Licensing authority retains jurisdiction over individuals rendering professional service. (TCA 48-249-1130).

Foreign Limited Liability Companies.

Laws of jurisdiction under which foreign LLC is formed govern formation, internal affairs and dissolution, and liability of members and representatives. (TCA 48-249-901). Actions that do not constitute transacting business requiring foreign LLC to obtain certificate of authority include: (a) Participation in any proceeding, claim, or dispute; (b) holding meetings of members or representatives or conducting other internal affairs; (c) maintaining bank accounts; (d) maintaining offices to transfer, exchange and register foreign LLC's own securities or appointing and maintaining trustees or depositories with respect to those securities; (e) selling through independent contractors; (f) soliciting orders that require acceptance outside Tennessee before becoming binding; (g) creating or acquiring encumbrances in real or personal property; (h) securing or collecting debts; (i) owning property, including managing and renting real property acquired in connection with enforcing mortgage for reasonable time, if attempting to liquidate investment and if no office or agency, other than independent agency, is maintained in Tennessee; (j) engaging in isolated transaction which is completed within one month and is not repeated; (k) engaging in interstate commerce. (TCA 48-249-902). Name of foreign LLC governed by TCA 48-249-106 - TCA 48-249-108. (TCA 48-249-903).

Before conducting business, foreign LLC must obtain certificate of authority. Application filed with secretary of state must contain: (a) Name of foreign LLC; (b) jurisdiction and date of organization; (c) address of registered office in Tennessee and name of registered agent; (d) address of principal executive office of foreign LLC; (e) if provisions of TCA 48-249-309(i) are applicable to foreign LLC, information required under TCA 48-249-309(i); and (f) if foreign LLC has more than six members at date of filing of application for certificate of authority, number of members as of date of filing application for certificate. (TCA 48-249-904). Application must be accompanied by certificate of existence authenticated by secretary of state of jurisdiction of organization. (TCA 48-249-904). Secretary may revoke certificate if: (a) Foreign LLC does not deliver annual report within two months of due date; (b) foreign LLC is without registered agent or office in Tennessee for more than two months; (c) foreign LLC does not properly inform secretary of state that registered agent or office has changed, that registered agent has resigned, or that registered office has been discontinued within two months of change, resignation or discontinuance; (d) name fails to comply with provisions of TCA 48-249-903; (e) member or representative signed document containing known false statement with intent that document be filed with secretary; (f) secretary of state of jurisdiction of organization delivers authenticated certificate stating that foreign LLC has terminated or disappeared by way of merger; (g) foreign LLC exceeds authority; (h) foreign LLC tenders instrument for payment of fee which is dishonored. (TCA 48-249-908). Secretary must notify foreign LLC of determination that grounds for revocation exist. Notice is waived if ground is knowingly false statement contained in filing. If LLC does not correct ground for revocation or demonstrate absence of existence of ground determined by secretary, secretary may revoke certificate. Authority to transact business ceases on date shown on certificate revoking certificate of authority. (TCA 48-249-909).

Foreign LLC may obtain reinstatement which relates back to date of revocation. (TCA 48-249-910).

1994 Act.

Tennessee Limited Liability Company Act adopted in 1994. (TCA 48-201-101—48-248-606).

General Supervision.

Office of Secretary of State.

Purposes.

Unless more limited purpose set forth in articles, LLC deemed to have purpose of engaging in any lawful business. (TCA 48-203-101).

Formation.

LLC formed by filing articles of organization with secretary of state. (TCA 48-203-102). Acceptance for filing by secretary of state conclusive proof of satisfaction of all conditions precedent to formation, unless deferred effective date specified in articles. (TCA 48-203-102). If effective date deferred, additional filing of certificate of formation required. If certificate of formation is not filed within 120 days of filing of articles, presumed effective date of formation will be 90 days from date of filing of articles. (TCA 48-203-102).

Powers.

LLC has same powers as individual to do whatever necessary to conduct business, including, but not limited to, power to (1) sue and be sued in own name; (2) make and amend operating agreement not inconsistent with law or articles for managing business and regulating affairs; (3) acquire and possess or use real or personal property, or any legal or equitable interest in property, wherever located; (4) dispose of or grant security interest in any or all property; (5) acquire or dispose of, or grant security interest in, shares or other interests in, or obligations of, any entity; (6) make contracts, borrow money, issue debt instruments, and mortgage or otherwise pledge interests in property; (7) lend money, invest funds and take security interests; (8) participate as partner, member, associate, or manager of partnership, joint venture, trust, or other entity; (9) exercise powers inside or outside Tennessee; (10) elect governors, appoint managers, employees, and agents, and establish terms of employment; (11) establish pension plans; (12) make charitable donations; (13) make any legal expenditure in furtherance of business; (14) purchase life insurance on members; (15) accept gifts if not inconsistent with purposes; (16) accept contributions subject to TCA 48-232-101, enter into contribution agreements subject to TCA 48-233-101, and enter into contribution allowance agreements subject to TCA 48-234-101; (17) exercise all powers necessary or convenient to effect business purposes of LLC. (TCA 48-212-101).

Name.

Domestic LLC name must contain words “limited liability company”, or abbreviation “L.L.C.” or “LLC”. Must not contain word “corporation” or “incorporated” or abbreviation of either or both. (TCA 48-207-101). Name may not state or imply (1) that LLC transacts or may transact business for which authorization required, unless such has been obtained; (2) any affiliation with fraternal, veterans', service, religious, charitable or professional organization unless certified in writing by organization with which affiliation claimed; (3) any agency or affiliation with U.S., any state thereof or subdivision or agency thereof, unless certified in writing by appropriate federal or state official; or (4) that LLC is organized for purpose other than that permitted by § 48-203-101 and LLC's articles. (TCA 48-207-101).

Name must be distinguishable in records of secretary of state from other registered LLC, corporate, or limited partnership names unless entities under common control. (TCA 48-207-101).

Name may be reserved by delivery of application for filing with secretary of state, setting forth name and address of applicant and name proposed to be reserved. If proposed name otherwise meets statutory requirements, can reserve for up to four months. (TCA 48-207-102).

Articles of Organization.

Articles must set forth: (1) name, satisfying TCA 48-207-101; (2) street address, zip code and county of initial registered office and name of initial registered agent at that office; (3) name and address of organizers; (4) statement of whether LLC will be board-managed or member-managed; (5) number of members at date of filing (LLC need have only one member); (6) deferred effective date if applicable; (7) address and county of principal executive office; (8) power to expel member, if such power exists; (9) duration of LLC, if applicable; (10) provisions regarding management of LLC's business and regulation of affairs; (11) enumeration of LLC powers not necessary; (12) preemptive rights, if any; (13) authority of one or more members, managers or governors to execute instruments for transfer of real property, if desired; (14) if board-managed, and dissolution events may be triggered by action approved by governors or subset of governors and/or right to transfer governor rights dependent on consent of governors or subset of governors, articles must set forth or state that operating agreement may so provide; (15) if not to engage in business in Tennessee, specific statement that such is prohibited; and (16) if pursuant to TCA 48-27-101(f) one or more members or holders are liable for all debts, obligations and liabilities of LLC, information required in TCA 48-217-101(f) required. (TCA 48-205-101).

Filing of Articles.

Filing with Secretary of State effects formation of LLC. (TCA 48-203-102). See subhead Formation, supra.

Amendment of Articles of Organization.

LLC has authority to amend articles at any time to add or change required or permitted provision in articles or to delete provision not required in articles as of date of amendment. (TCA 48-209-101). If LLC board-managed, board of governors may make limited amendments without member action, including changing designation of registered agent, principal office, and limited name change. (TCA 48-209-102). Amendments other than those enumerated in TCA 48-209-102 must be proposed by board of governors, if LLC board-governed, and submitted for approval to members entitled to vote. All members must be notified of meeting and purpose thereof, and be provided copy or summary of amendment. Unless otherwise provided in articles or statute, approval by majority vote required to adopt amendment. Notwithstanding above, unless otherwise provided in articles or operating agreement, any member or group of members in board-managed or member-managed LLC entitled to call meeting can propose amendment to articles and call member meeting to consider. (TCA 48-209-103). Once adopted, LLC must deliver to Secretary of State articles of amendment. (TCA 48-209-104).

Restated Articles of Organization.

Board of governors may restate at any time with or without member action. If restatement includes amendment requiring member approval, must be adopted as provided in TCA 48-209-103. Restated articles must be delivered to Secretary of State. (TCA 48-209-105).

Registered Office and Registered Agent.

Both foreign and domestic LLCs must continuously maintain registered office and registered agent within state. (TCA 48-208-101). Change of either must be registered by delivering statement of change to secretary of state. (TCA 48-208-102).

Registered agent is non-exclusive agent for service of process, notice, or demand to be served on LLC. (TCA 48-208-104). Failure to appoint or maintain registered agent results in secretary of state being default agent for service of process. (TCA 48-208-104). Procedure for service on secretary of state set out at TCA 48-208-105.

Membership Interest.

Is personal property and carries no interest in specific LLC property. (TCA 48-215-101). Member entitled, upon request, to statement of membership interest, describing voting rights, right to share in profits and losses and distribution rights. (TCA 48-215-101).

Member has power, though not necessarily right, to terminate membership interest at any time. Result is dissolution and termination of LLC, unless continued by consent of majority of remaining members, if allowed in articles, or by unanimous consent of remaining members, within 90 days of termination. (TCA 48-245-101 & TCA 48-216-101). If business continued, terminated member loses all governance rights and is considered assignee of financial rights owned prior to termination. If business not continued, terminated member whose membership has terminated except through wrongful withdrawal or wrongful termination retains governance rights through winding up and termination of LLC. (TCA 48-216-101). Unless otherwise provided by articles or operating agreement, if LLC continued, withdrawing member entitled to lesser of fair market value of member's interest on going concern or liquidation basis. If LLC terminated, withdrawing member entitled to distribution under TCA 48-245-1101. Payment due for withdrawing member's interest due within six months of determination of amount. Wrongfully terminating member may be liable to other members and LLC for damages, which may be offset against any amounts due wrongfully withdrawing or terminating member. (TCA 48-216-101).

Membership Meetings.

If member-managed, no membership meetings required unless by articles or operating agreement. If board-managed, must hold at least annual membership meetings to elect governors and conduct any other proper business. (TCA 48-222-101). Meeting of members may be called by chief manager, secretary or any member, if member-managed, or, if board-managed, also by any governor. (TCA 48-222-101). Business transacted at meeting limited to purpose stated in notice, except at annual meeting for board-managed LLC or as otherwise provided in articles or operating agreement. (TCA 48-222-101).

Except in certain circumstances, written notice of all meetings must be given to every member entitled to vote on matters to be considered. (TCA 48-222-102). Nonvoting members entitled to notice of meeting of members where items of business dissolution, liquidation, sale of all or substantially all assets of LLC, or merger. (TCA 48-222-102). Attendance at meeting may be by any means of electronic communication where participants may simultaneously hear each other during conference. (TCA 48-222-103).

Voting.

All members have equal voting power per capita with other members, unless otherwise provided in articles or operating agreement. (TCA 48-224-101). Members holding majority of voting interest entitled to vote at meeting constitutes quorum, unless larger proportion required in articles or operating agreement. (TCA 48-224-102).

Voting agreements between members or between parties to binding contribution agreements allowed if in writing and signed by parties. (TCA 48-226-101).

Management.

LLC can elect in its articles to be either board-managed or member-managed.

Operating Agreement.

Required for board-managed LLC, optional for member-managed. (TCA 48-206-101). Must be in writing. (TCA 48-206-101). May contain any rules, regulations, or provisions regarding management or governance of LLC, conduct of business, and rights and privileges of members, if not inconsistent with laws of state or LLC's articles. Shall contain statement of all membership interests, including: (1) identity of all members and their interests, as well as identity of all persons bound by contributions agreements and membership interest to be acquired upon satisfaction of terms of agreement; (2) capital contributions given in exchange for membership interest; (3) terms of contribution agreements; (4) any distribution rights of members; (5) time at which or events upon which dissolution will occur, to extent not identical to statutory events of TCA 48-245-101; (6) terms of contribution allowance agreements; and (7) any other terms required by cc. 201-248 or which members wish to state in operating agreement. (TCA 48-206-101). Once adopted by agreement of all members or organizers, or by majority vote of members and persons or entities bound by contribution agreements as required in articles, operating agreement binding on LLC and its present and future members or parties to contributions agreements. (TCA 48-206-101, -102).

Amendment of operating agreement requires vote of members as is necessary to amend articles. (TCA 48-206-102). Enforceable in court of equity by injunction or other equitable relief. (TCA 48-206-102).

Tax Classification.

Tennessee Act flexible, such that LLC can be treated either as partnership or association taxable as corporation for federal income tax purposes, depending on features chosen. This classification determines tax treatment for state and local Tennessee tax purposes. (TCA 48-211-101).

Conflicts of Interest.

Is transaction with LLC where governor, manager, or non-governor member of special litigation committee has direct or indirect interest. Conflict of interest is not voidable if: (1) Material facts and governor's or manager's interest are disclosed to board of governors or committee of governors and is authorized by majority vote of disinterested governors; (2) material facts and governor's or manager's interest are disclosed to members entitled to vote and authorized by majority vote of disinterested members; (3) transaction was fair to LLC; (4) conflict was waived by LLC articles or operating agreement and is not manifestly unreasonable under circumstances. (TCA 48-239-116).

Limited Liability.

Member, holder of financial interest, governor, manager, or other agent of LLC not personally liable for acts, debts, liabilities, or obligations of LLC or for acts or omissions of other members, managers, governors, employees or agent of LLC, whether in contract, tort or otherwise. (TCA 48-217-101). Limited liability continues regardless of dissolution, winding up, and termination of LLC. (TCA 48-217-101).

Records and Reports.

Board-managed LLC must maintain at principal executive office, or other place determined by board of governors: (1) list of chief manager, secretary, each member, and governors, including name, business, residence, and mailing address; (2) list of assignees of financial rights and what rights assigned; (3) copy of articles and all amendments thereto; (4) copy of effective operating agreement and any agreements regarding classes or series of membership interests; (5) copy of federal, state, and local income tax returns for LLC for last three years; (6) financial statements and accounting records of LLC; (7) records of all member proceedings; (8) written consents from members; (9) records of all board of governors proceedings for last three years; (10) statement of capital contributions by members and agreed value thereof; (11) copy of all contribution agreements and contribution allowance agreements; (12) copy of most recent annual report delivered to secretary of state. (TCA 48-228-101). Requirements for member-managed LLC same, except for financial statements and records regarding board of governors. (TCA 48-228-101).

Any member entitled to inspect and copy any above-described records of LLC at principal office during regular business hours, upon demand at least five business days before inspection. Right cannot be limited by articles or operating agreement. (TCA 48-228-102).

Board-managed LLC obligated to prepare annual financial statements, including balance sheet and income statement. (TCA 48-228-201). LLC to furnish such statements to each requesting member or holder of financial rights within one month after notice of request. (TCA 48-228-201).

No formal financial reports required by statute for member-managed LLCs, but each member or holder of financial rights entitled to access to true and full information regarding status of business and LLC's financial condition. (TCA 48-228-202).

All LLCs required to file annual report with secretary of state within four months of close of fiscal year. (TCA 48-228-203).

Contributions of member may be in form of cash, property, promissory note, or services rendered. (TCA 48-232-101). Promise to render services or contribute money at future time not appropriate consideration for current interest unless evidenced by written note. Contribution agreement imposes personal liability to LLC for promise.

Act provides for written, signed contribution agreements and contribution allowance agreements and enforceability of same. (TCA 48-233-101, TCA 48-234-101).

Allocations and Distributions.

Unless otherwise provided in articles or operating agreement, distribution of LLC cash or assets equally allocated among members. (TCA 48-236-101).

Transfers of Interest.

Separate rights (financial rights and governance rights) comprise membership interest. Assignment, in whole or in part, of financial rights permitted, unless otherwise restricted by articles, operating agreement or written resolution or agreement among members. Assignee entitled to receive profits, losses and distributions to which assignor would have been entitled. Assignment does not dissolve LLC and confers no rights to cause dissolution or exercise governance rights. (TCA 48-218-101).

Membership interest may be assigned only by assigning both governance rights and financial rights. (TCA 48-218-102). Sole member of LLC may freely assign governance rights and/or membership interests at any time. (TCA 48-232-102). For LLCs with two or more members, assignment of governance rights restricted in that, unless approval in accordance with TCA 48-232-102 permitted by articles or operating agreement, unanimous consent of members required to assign governance rights to person not already member at time of assignment. (TCA 48-218-102). Consent required to allow assignment also constitutes consent necessary to avoid dissolution that would otherwise occur upon assignor ceasing to be member if applicable. (TCA 48-218-102). Articles or operating agreement may provide that governance rights may be transferred to nonmembers who will become members upon such transfer without requiring consent of members or governors. (TCA 48-232-102).

Dissolution.

Unless LLC elects otherwise upon occurrence of any of following events, LLC created prior to July 1, 1999 is dissolved: (1) expiration of period fixed in articles for duration of LLC; (2) termination by organizers pursuant to TCA 48-245-201 or by members pursuant to TCA 48-245-202; (3) by order of court in judicial termination pursuant to TCA 48-245-901—902; (4) by action of secretary of state and administration dissolution pursuant to TCA 48-245-302; (5) upon occurrence of any of following events unless limited or eliminated by articles or operating agreement: (a) death of member, (b) retirement from membership of member, (c) resignation or other withdrawal of member, (d) LLC's acquisition of complete membership interest, (e) assignment of member's governance rights, (f) expulsion of member, (g) bankruptcy of member, (h) dissolution of member, (i) insanity of member, or (j) any other event terminating continued membership of member. (TCA 48-245-101). If LLC formed on or after July 1, 1999, or if LLC formed before July 1, 1999 but elects by providing in articles to be governed by 1999 amendments regarding dissolution events, LLC shall be dissolved upon occurrence of: (a) notice and approval in accordance with TCA 48-245-202; (b) any event specified in articles or operating agreement; or (c) merger in which LLC does not survive. Dissolution resulting from termination of continued membership of any member may be avoided if at least one member remains and existence and business of LLC continued by consent of majority vote of remaining members, or such vote interest as provided in articles. If not continued, LLC must be wound up and terminated. (TCA 48-245-101).

If terminated by members pursuant to nonjudicial termination procedures or dissolution resulting from termination of continued membership of member, LLC must file with secretary of state notice of dissolution unless existence in business continued pursuant to TCA 48-245-101. Winding up procedures set out in TCA 48-245-501—503. Upon completion of winding up, articles of termination to be filed with secretary of state. (TCA 48-245-503). Dissolution may be revoked at any time prior to filing of articles of termination. (TCA 48-245-601).

Derivative Action.

Member of board-managed LLC, who was member at time of complained of transaction, may bring derivative action. Member, if member-managed LLC, may commence derivative action under same terms as board-managed LLC, but only if derivative actions are provided for in LLC articles or operating agreement. (TCA 48-230-101).

Action commenced by filing complaint (TCA 48-230-102) and may not be discontinued or settled without court approval (TCA 48-230-103).

Conversion to Limited Liability Company.

General or limited partnership may convert to LLC, upon approval by general partners, in accordance with partnership agreement or, in limited partnerships formed before Dec. 31, 1993, by all partners, regardless of provisions to contrary in partnership agreement. (TCA 48-204-101). Articles of conversion to be filed with secretary of state, which satisfy statutory requirements for articles of organization and set forth (1) statement of conversion, (2) name and principal business address of former entity, (3) names of all general partners, (4) statement of approval by partners, (5) statement indicating in which county register of deeds office certificate of limited partnership filed, if applicable, and (6) number of members of LLC at date of conversion. (TCA 48-204-101). Conversion effective upon filing of articles of conversion or at later date as specified in articles. (TCA 48-204-101). Articles of conversion amended in same manner as articles of organization. (TCA 48-204-101).

Conversion.

Corporation may convert to limited liability company if plan of conversion is adopted by board of directors and approved by shareholders. (TCA 48-21-111). Effects of conversion from corporation to limited liability company are set forth in TCA 48-21-112.

General partner becoming member of LLC remains liable for liabilities incurred by general or limited partnership prior to conversion. (TCA 48-204-101).

Converted limited or general partnership is deemed same entity as before conversion. When conversion effective, all partnership property vests in converted entity and all obligations and actions or proceedings pending against converting partnership continue against converted entity. (TCA 48-204-102). Winding up of partnership not required. (TCA 48-204-102).

Merger.

Plan of merger must be approved by (1) majority of board of directors, if board-managed, and (2) by members holding more than two-thirds of voting interest. Articles or operating agreement may modify approval requirements, but may not provide for approval by less than 50%

of aggregate voting interest. In case of merger including any entity not domestic LLC, plan must be approved by majority of voting interest of such entity. In case of foreign entity, lower voting interest may approve if specifically provided by law of state or jurisdiction of foreign entity. (TCA 48-244-102).

Certificate of merger must be filed with secretary of state. Certificate must set forth: (1) name, jurisdiction, and date of formation of each entity involved in merger; (2) statement that plan of merger has been approved and executed by each entity involved; (3) name and address of principal executive office of surviving entity; (4) form of surviving entity; (5) effective date of merger, in accord with TCA 48-247-109, if not date of filing of plan; (6) statement that plan is on file at place of business of surviving entity with address; (7) statement that copy of plan will be provided by surviving entity to holder of interest in any of entities involved in merger; (8) statement that surviving entity, if not domestic entity, will designate secretary of state as agent for service of process in lawsuit brought for enforcement of obligation of any entity involved in merger. (TCA 48-244-103).

Except as otherwise notified in accord with TCA 48-247-109, merger is effective upon filing of plan and articles of merger with Secretary of State, which serves as notice of dissolution and articles of termination of domestic LLC which is not surviving entity. Action pending against non-surviving entity may continue or may substitute surviving entity. (TCA 48-244-104).

Dissenter's Rights.

LLC member entitled to dissent from and obtain payment of fair value of membership interest in event of certain enumerated actions. (TCA 48-231-201). Members must be given notice of LLC action creating dissenter's rights (TCA 48-231-202) and dissenters must give notice to LLC of intent to dissent and written notice of actual dissent if challenged action effectuated (TCA 48-231-203-04). Procedure for demanding payment, notification of LLC upon dissatisfaction with payment or offer for value of interest and for court action upon inability to settle demand for payment statutorily defined. (TCA 48-231-205—302).

Professional Limited Liability Companies.

May form PLLC to render specified professional services. (TCA 48-248-103). May elect PLLC status for purpose of rendering services within two or more professions only if combination of professional purposes is specifically authorized by licensing law applicable to each profession in combination. (TCA 48-248-104).

PLLC enjoys same powers as other LLCs. May be promoter, general partner, member, associate, or manager of partnership, joint venture, trust or other entity only if other entity is engaged solely in rendering professional services or in carrying on business authorized by PLLC's articles. (TCA 48-248-201). May render professional services in Tennessee only through individuals licensed or authorized by Tennessee to render such services. Restriction does not apply if such actions not prohibited by licensing authority. (TCA 48-248-202). PLLC may render only professional service or engage in business authorized by its articles, but may invest its funds in any type of investment. (TCA 48-248-203).

Domestic PLLC name must contain words “professional limited company”, “professional limited liability company”, “professional LLC”, or “limited liability professional company”, or abbreviations “P.L.C.”, “P.L.L.C.”, “L.L.P.C.” or any of such abbreviations without punctuation. Foreign PLLC name subject to laws of jurisdiction under which it was formed. No PLLC may contain words “corporation” or “incorporated” or abbreviation of either or both. It may not contain language indicating that it is organized for any purpose other than authorized by TCA 48-248-104 and its articles. (TCA 48-248-301).

PLLC may have persons not licensed to practice profession described in articles as members only if licensing authority specifically authorizes. If permitted by licensing authority, PLLCs may have as members: (1) Individuals authorized by law to render professional service described in PLLC articles; (2) general partnerships in which all partners are qualified persons with respect to PLLC and in which at least one partner is authorized by law in Tennessee to render professional service described in articles; (3) professional corporations authorized by law in this state to render professional service described in article; or (4) PLLC authorized by law in Tennessee to render professional service described in articles. (TCA 48-248-401).

Licensing authority may restrict, condition, or revoke in part authority of PLLCs subject to its jurisdiction to have above-described members. Membership interest held in violation of statute is void. Specified health care professionals may be members or form PLLC pursuant to Act. (TCA 48-248-401).

Member of PLLC may transfer membership interest only to qualified individuals, but may pledge interest as collateral for loan. Transfer in violation of statute is void. (TCA 48-248-402).

If member of PLLC becomes disqualified to render professional services for which PLLC was formed, member is deemed to have resigned and wrongfully withdrawn from PLLC and may have no further interest as member other than right to receive distribution to which previously entitled. Member, manager, agent or employee of PLLC who becomes legally disqualified to render professional services for which PLLC was formed must sever all professional employment and professional relationships with, and financial interests in, PLLC. Failure to require compliance is grounds for forfeiture of PLLC's articles and dissolution or for revocation of foreign PLLC's certificate of authority. (TCA 48-248-403).

All managers except secretary and treasurer, and at least one-half of governors, if any, must be qualified persons with respect to PLLC. (TCA 48-248-404).

Each individual who renders professional services is only liable for their own negligent or wrongful acts or omissions. (TCA 48-248-406).

Foreign PLLC may not transact business in Tennessee unless it obtains certificate of authority from Secretary of State. Foreign PLLC may not register unless: (1) name complies with TCA 48-248-301; (2) foreign PLLC is organized for purpose referenced in and satisfies requirements of TCA 48-248-104; and (3) all of members, all of governors, if any, and all managers are licensed in one or more states to render professional service described in articles unless Tennessee licensing authority permits persons other than qualified persons to serve as governors, if any, or managers of PLLC, in which case not less than one-half of such persons shall be qualified persons with respect to foreign PLLC. (TCA 48-248-501). Foreign PLLC is not required to obtain certificate unless it maintains or intends to maintain office in Tennessee. (TCA 48-248-501). Application for certificate must contain information required in TCA 48-246-301 (see subhead Foreign Limited Liability Companies, infra); must state that it is PLLC; must state purpose is to render specified professional services; and must state that foreign PLLC is in compliance with TCA 48-248-501. (TCA 48-248-502). Certificate may be revoked administratively if licensing authority certifies that PLLC has violated statute. (TCA 48-248-503).

PLLC must deliver certified copy of articles and, if foreign, certified copy of certificate, to each licensing authority with jurisdiction over professional service described in articles before rendering services. (TCA 48-248-601). Annual statement is required. (TCA 48-248-602).

Licensing authority retains jurisdiction over individuals rendering professional service. (TCA 48-248-604).

Foreign Limited Liability Companies.

Laws of jurisdiction under which foreign LLC is formed govern formation and also internal affairs and also liability of members and representatives. (TCA 48-246-101).

Actions that do not constitute transacting business requiring foreign LLC to obtain certificate of authority include: (1) participation in any proceeding, claim, or dispute; (2) holding meetings of members or representatives or conducting other internal affairs; (3) maintaining bank accounts; (4) maintaining offices to transfer, exchange and register foreign LLC's own securities; (5) selling through independent contractors; (6) soliciting orders that require acceptance outside Tennessee before becoming binding; (7) creating or acquiring encumbrances in real or personal property; (8) securing or collecting debts; (9) owning property, including managing and renting real property, if attempting to liquidate investment; (10) engaging in isolated transaction which is completed within one month and is not repeated; (11) engaging in interstate commerce. (TCA 48-246-102).

Name of foreign LLC governed by TCA 48-207-101 and -103. (TCA 48-246-201).

Before conducting business, foreign LLC must obtain certificate of authority. Application filed with secretary of state must contain: (1) name of foreign LLC; (2) jurisdiction and date of organization; (3) address of registered office in Tennessee and name of registered agent; (4) address of office maintained in jurisdiction of organization or of principal executive office; and (5) number of members as of date of filing application for certificate. (TCA 48-246-301). Application must be accompanied by certificate of existence authenticated by secretary of state of jurisdiction of organization. (TCA 48-246-301).

Secretary of state may revoke certificate if: (1) Foreign LLC does not deliver annual report within two months of due date; (2) foreign LLC is without registered agent or office in Tennessee for more than two months; (3) foreign LLC does not properly inform Secretary of State that registered agent or office has changed, that registered agent has resigned, or that registered office has been discontinued within two months; (4) name fails to comply with provisions of TCA 48-246-201; (5) member or representative signed document containing known false statement with intent that document be filed with secretary; (6) secretary of state of jurisdiction of organization delivers authenticated certificate stating that foreign LLC has terminated or disappeared by way of merger; (7) foreign LLC exceeds authority; (8) foreign LLC tenders instrument for payment of fee which is dishonored. (TCA 48-246-501).

Secretary must notify foreign LLC of determination that grounds for revocation exist. Notice is waived if ground is knowingly false statement contained in filing. If LLC does not correct ground for revocation or demonstrate absence of existence of ground determined by secretary, secretary may revoke certificate. Authority to transact business ceases on date shown on certificate revoking certificate of authority. (TCA 48-246-502).

Foreign LLC may obtain reinstatement which relates back to date of revocation. (TCA 48-246-503).

Nonprofit Limited Liability Companies.

In 2006, Tennessee Legislature adopted Tennessee Revised Nonprofit Limited Liability Company Act (TCA 48-101-801) (``2006 Act''). Under 2006 Act, all domestic and foreign nonprofit LLCs formed under Tennessee law from and after July 1, 2006, and all nonprofit LLCs formed prior to July 1, 2006, which affirmatively elect to be governed by 2006 Act, will be governed by new Act. Nonprofit LLCs formed prior to July 1, 2006, will continue to be governed by provisions of TCA 48-101-701 et seq. (``2001 Act'') unless they affirmatively opt into governance by 2006 Act. (TCA 48-101-809). Domestic nonprofit LLC formed by meeting requirements of TCA 48-101-805 and filing articles of organization with secretary of state as required by Tennessee Revised Limited Liability Company Act (see subhead Formation, infra). Before conducting business, foreign nonprofit LLC must obtain certificate of authority as required by Tennessee Revised

Limited Liability Company Act (see subhead Foreign Limited Liability Companies, infra) and meet requirements of TCA 48-101-805. (TCA 48-101-804). Tennessee Revised Nonprofit Limited Liability Company Act addresses filing requirements, membership restrictions, standards of conduct, indemnification rights, limitations of actions, immunity, tax treatment, and conversion of nonprofit corporations. (TCA 48-101-801, -09). Tennessee adopted “Nonprofit Limited Liability Company Act of 2001”. (TCA 48-101-701 et seq.). Nonprofit Limited Liability Company Act of 2001 addresses filing requirements, membership restrictions, standards of conduct, indemnification rights, limitations of actions, immunity, tax treatment, and conversion of nonprofit corporations. To extent not inconsistent with specific provisions of Nonprofit Act, Tennessee Limited Liability Company Act (TCA 48-201-101 et seq.) shall apply to nonprofit limited liability companies as well.

2.07 [RESERVED]

2.08 PARTNERSHIPS:

Revised Uniform Partnership Act (TCA 61-1-101 et seq.) has been adopted with certain variations.

§ 103(b)(10) not adopted.

§ 104(c) is added, and provides that rule that statutes in derogation of common law are to be strictly construed shall have no application to this act.

§ 106(b) varies from Official Text to provide that if partnership agreement is governed by laws of another jurisdiction, laws of such jurisdiction shall govern relations among partners and between partners and partnership.

§ 301(a)(1)(iv) not adopted.

§ 301(b) not adopted.

§ 306 varies from Official Text by providing more specific standards regarding liability of partners.

§ 401(l) is added providing broad delegation powers for partners.

§ 407 is added allowing partnership agreement to provide for classes or groups of partners with different rights, powers and duties.

§ 801 modified to allow majority in interest of remaining partners to continue partnership.

§ 807(b) modified regarding obligations for which partner is not personally liable.

Limited Partnerships.

Revised Uniform Limited Partnership (TCA 61-2-101 et seq.) Act has been adopted. Limited partner is not liable for obligations of limited partnership unless he is also general partner or takes part in control of business. If limited partner participates in control of business, he is liable only to persons who transact business with limited partnership reasonably believing, based on conduct, that limited partner is general partner. (TCA 61-2-302). Term shall be for 50 years unless certificate provides otherwise. (TCA 61-2-201).

Limited Liability Partnership.

Limited Liability Partnership.

Partner in registered limited liability partnership is not liable for debts and liabilities of partnership or another partner arising from negligence or wrongful acts committed in course of partnership business. Partner in registered limited liability partnership is not proper party to proceeding by or against registered limited liability partnership. To become registered limited liability partnership, partnership shall file with Secretary of State following: application stating name of partnership; address of its principal office or registered agent; statement of business engaged in and that partnership described is to be registered limited liability partnership. Application shall be accompanied by fee of $50 for each partner subject to minimum of $250 and maximum of $2,500. Fee must be paid annually. Partnership that registers as registered limited liability partnership shall not be deemed to have dissolved as result thereof and is for all purposes same partnership that existed before registration and continues to be partnership under laws of this state. Partner remains liable for obligations incurred by partnership before partnership registered as registered limited liability partnership. Each registered limited liability partnership must continuously maintain registered office and registered agent in state. Partnership engaged in rendering of professional services may register as registered limited liability partnership subject to laws governing professional services by partnerships and licensing authorities. Domestic or foreign name must contain words “registered limited liability partnership” or “LLP” or “L.L.P.” (TCA 61-1-1001- 1005).

3 BUSINESS REGULATION AND COMMERCE

3.01 BANKS AND BANKING:

Uniform Commercial Code has been adopted. (TCA 47-1-101 et seq.).

Regulated by Tennessee Banking Act (TCA 45-1-101 et seq.) and Bank Customer Dispute Resolution Act of 1981 (TCA 45-1-301 et seq.) and is subject to the Tennessee Business Corporation Act, TCA 48-11-101 et seq. Conversion of intrastate banks and savings and loan institutions and mergers regulated by TCA 45-11-101 et seq. Interstate mergers regulated by TCA 45-3-1401 et seq. Tennessee branches of out-of-state state banks are subject to regulation under TCA 45-2-1407 to 1412.

Uniform Fiduciaries Act has been adopted. (TCA 35-2-101 et seq.).

Organization, consolidation, and merger are subject to approval of Commissioner of Financial Institutions, Department of Financial Institutions, 414 Union Street, Suite 1000, Nashville, TN 37219, (615) 741-2236. (TCA 45-1-101 et seq.).

Stockholders of banking institutions are relieved of double liability to depositors. (TCA 45-2-307).

Deposits.

Whenever deposit made in trust for another, and further notice in writing of terms of trust not given to bank, deposit may be paid to person for whom deposit made on death of trustee. Owner of deposit account may designate to whom funds are payable on death of owner. (TCA 45-2-704). Joint deposits may be paid to either depositor or surviving depositor, and account is subject to assignment by, or claim of creditor of, either depositor subject to right of other to establish such rights to funds in appropriate action against creditor. (TCA 45-2-703). Deposit may be operated in name of minor or two or more persons, one or more of whom are minors, with same effect as if minors were of full age. (TCA 45-2-702).

Unclaimed Deposits.

Unclaimed funds remaining after liquidation retained by Commissioner of Banking, to be disposed of under TCA 66-29-107-08. (TCA 45-2-1501 et seq.). Authorizes sale of abandoned property in safe deposit box by method approved by Commissioner of Financial Institutions or as provided under UCC. (TCA 45-2-907).

See also category 21 Property, topic 21.01 Absentees, subhead Escheat.

Mergers governed by Bank Structure Act. No bank holding company or out-of-state bank shall acquire or merge with Tennessee bank which has not been in operation at least three years (subject to certain exceptions). (TCA 45-2-1403). Bank or bank holding company is prohibited from acquiring any bank in Tennessee if, as result, such bank or holding company would control 30% or more of total amount of deposits in Tennessee. (TCA 45-2-1404). Any Tennessee chartered bank may establish or otherwise acquire and maintain branch office and branch facilities for conduct of its banking business. No branch at which deposits may be accepted shall be established by Tennessee chartered bank until approved by commissioner. (TCA 45-2-614). Only depository institution may own or establish one or more electronic cash dispensing devices. (TCA 45-2-619).

Collections.

Uniform Commercial Code governs. (TCA 47-4-101 et seq.).

Trust Companies.

Regulated by Commissioner of Banking under Tennessee Banking Act. (TCA 45-1-101 et seq.). Banks having paid up capital and surplus of $500,000 may accept and execute trusts, etc. (TCA 45-2-1001). Trust companies have all powers as individual fiduciaries. (TCA 45-2-1002). Private trust companies are subject to regulation under Banking Act. (TCA 45-2-2001).

Uniform Common Trust Fund Act, as amended, in effect. (TCA 35-4-101-05).

Unauthorized banking is Class C misdemeanor. (TCA 45-2-1701).

Foreign banks are subject to examination by Commissioner. (TCA 45-2-1602). See categories 2 Business Organizations, topic Corporations; Estates and Trusts, topic Executors and Administrators; Family, topic Guardian and Ward; Taxation, topic Property Taxes, subhead Assessment.

Statements to Depositors.

Depositors must object in writing to bank statements of account within six years from date of the rendition of such statement. (TCA 45-2-705).

See also topics 3.09 Commercial Code; 3.19 Interest, subhead Installment Loans; 3.12 Consumer Protection, subhead Financial Records Privacy Act.

3.02 BILLS AND NOTES:

Uniform Commercial Code has been adopted. (TCA 47-1-101 et seq.).

Judgment Notes.

Any power of attorney or authority to confess judgment given before an action is instituted, and before service of process therein, is void, and any judgment based thereon is likewise void. (TCA 25-2-101).

Attorney fee and cost of collection clauses are enforceable if reasonable. (172 Tenn. 602, 113 S.W.2d 746).

See also topics 3.09 Commercial Code, Contracts; category 14 Family, topic 14.10 Infants.

Special Defenses.

See topics 3.12 Consumer Protection, and 3.19 Interest, subhead Usury.

3.03 BILLS OF LADING:

See topic 3.07 Carriers.

3.04 BILLS OF SALE:

See topic 3.21 Sales.

3.05 [RESERVED]

3.06 BROKERS:

Uniform Commercial Code has been adopted. (TCA 47-1-101 et seq.).

Real Estate Brokers.

Must obtain license after application and written examination from Tennessee Real Estate Commission, 500 James Robertson Pkwy., Suite 180, Nashville, TN 37243-1151, (615) 741-2273. (TCA 62-13-201). Qualifications for applicants are set forth in TCA 62-13-303. No bond is required. Commission has power to revoke, suspend or downgrade license. (TCA 62-13-312). Separate licensing requirements set out for real estate appraisers. (TCA 62-39-103 and TCA 62-39-338). Upon recording statutory notice of commission sales agreements entered into after Oct. 1, 1997, broker who has earned fee or commission shall have cause of action against subsequent purchaser. Prevailing party in such litigation is entitled to court costs including attorney's fees. (TCA 62-13-501 through 505). Licensed broker must perform services unless waived in writing by client. (TCA 62-13-404).

See also topics 3.09 Commercial Code, 3.12 Consumer Protection, subhead Rental Location Agents.

3.07 [RESERVED]

3.08 CARRIERS:

Uniform Commercial Code has been adopted. (TCA 47-1-101 et seq.).

Common carriers are under control of Tennessee Regulatory Authority, 460 James Robertson Pkwy., Nashville, TN 37243-0505, (615) 741-2904. Vehicles required to obtain certificate of convenience and necessity or contract hauler permit shall be regulated by Tennessee Regulatory Authority. Tennessee regulatory authority shall register all such vehicles operating in intrastate and interstate commerce in Tennessee solely for demonstration of compliance with registration and insurance requirements. (TCA 65-1-101 and TCA 65-15-109).

Rates are fixed both as to freight and passenger service by Tennessee Regulatory Authority. (TCA 65-5-101 et seq.).

Discrimination.

Unjust discrimination is subject to regulation by Authority. (TCA 65-5-101 et seq.). Any corporation which charges more than reasonable rate for service in state commits extortion. It is unlawful for any corporation to give undue or unreasonable or prejudice preference to any person or locality. (TCA 65-4-122).

Limiting Liability.

Common carrier may contract for limited liability for loss of freight from causes other than its own negligence, provided contract is supported by bona fide consideration and is fair and reasonable and assent of shipper is fairly obtained. (12 S.W. 1018 [1889]). Common carrier cannot contract to limit its liability for negligence. (42 S.W. 451 [1897]).

Bills of Lading.

Uniform Commercial Code governs. See topic 3.09 Commercial Code.

Liens.

After written notice from the carrier to the consignee within three days after arrival of goods, failure of the consignee to receive same for 30 days thereafter gives the carrier authority to advertise and sell the goods for charges. Above is not applicable to perishable goods. (TCA 65-20-102).

See also topic 3.09 Commercial Code; category 23 Transportation, topic 23.01 Motor Vehicles.

3.09 COMMERCIAL CODE:

Uniform Commercial Code has been adopted. (TCA 47-1-101 et seq.). Arts. 1, 2 and 5 generally conform to Official Text as amended in 1972, except for following material variations:

§ 1-103 cc. 1-9 of UCC must be liberally construed and applied to promote its underlying purposes and policies including: To simplify, clarify and modernize law governing commercial transactions, to permit continued expansion of commercial practices through custom, usage, and agreement of parties; and to make uniform law among various jurisdictions. Unless displaced by any particular provision, principles of law and equity regarding merchants, capacity to contract, principal and agent, estoppel, fraud, misrepresentation, duress, coercion, mistake, bankruptcy, and other validating or invalidating cause supplement its provisions.

§ 2-315 provides that there is no implied warranty that cattle, hogs, sheep, and horses are free from disease.

§ 2-316(5) is added, providing that implied warranties of merchantability and fitness not applicable regarding human tissue, blood, plasma, blood products and derivatives.

Art. 2A generally conforms to Official Text as amended in 1990.

Art. 4A generally conforms to Official Text as amended in 1989.

Art. 6, Bulk Sales, repealed.

Art. 7 generally conforms to Official Text as amended in 1962.

Art. 3 generally conforms to Revised Art. 3 (1990) except as follows:

§ 3-103 “Good faith” definition not adopted in Tennessee.

§ 3-312 not contained in Official Text but adopted by Tennessee, relating to lost, destroyed or stolen checks.

§ 3-404(d) not adopted.

§ 3-405(b), as adopted in Tennessee, omits second sentence.

§§ 3-411(c)(1) and (c)(2) and 3-411(d) added by Tennessee.

§ 3-420(c), as adopted in Tennessee, extends protection of that subsection to include depository banks.

Art. 4 generally conforms to Amended Art. 4 of UCC (1990), except as follows:

§ 4-106(a) adopted by Tennessee; for (b) and (c) Tennessee adopted Alternative B.

§ 4-406 modifies clause (d)(1) to read: "Such payment or missing or incorrectly credited deposit, if bank also proves that it suffered loss by reason of failure; and".

§ 4-406(e) partially adopted.

§ 4-406(f) not adopted in entirety.

Art. 8 has adopted Official Text of Revised Art. 8. Investment Securities (1994 Revision) (TCA 47-8-101 et seq.).

Under TCA 67-5-513, discussed in topic Taxation, subhead Assessment, unless statutory procedure followed, purchaser, whether or not at bulk sale, may be liable for personal property tax obligations of seller.

Art. 9 generally conforms to Revised Art. 9 (1998) but with number of variations:

§ 9-102(a) (36), as adopted in Tennessee, varies from Official Text.

§ 9-103(e), as adopted in Tennessee, varies from Official Text.

§ 9-108, as adopted in Tennessee, includes subsection (f) not included in Official Text.

§ 9-320(a), as adopted in Tennessee, varies from Official Text.

§ 9-324(a), as adopted in Tennessee, purchase money security interest must occur when debtor receives possession of collateral within 30 days.

§ 9-334(j) not adopted in Tennessee.

§ 9-516, as adopted in Tennessee, varies from Official Text.

§ 9-519, as adopted in Tennessee, varies from Official Text.

§ 9-523, as adopted in Tennessee, varies from Official Text.

§ 9-525, setting filing fees, as adopted in Tennessee, varies substantially from Official Text.

§ 9-612(b), as adopted in Tennessee, applies to both consumer and nonconsumer transactions.

§ 9-625(e), as adopted in Tennessee, provides unauthorized filer ten days to file termination statement after receiving authenticated demand.

§ 9-626, as adopted in Tennessee, applies to both consumer and nonconsumer transactions.

The Code, as adopted in Tennessee, does not require use of specific forms but provides forms which, if used, cannot be refused by Secretary of State (see forms attached at conclusion of this Digest). (TCA 47-9-521).

Following options and alternatives in 1962 Official Text have been exercised:

§ 4-106, Alternate B adopted;

§ 7-204, Tobacco Warehousemen Law (TCA 43-19-101-305) referred to;

For offices for filing and fees under Article 9, see category 10 Documents and Records, topic 10.04 Records, subhead Filing Under Commercial Code—Place; Fees and Taxes.

Permanent Editorial Board's Recommendations for Amendments.

§ 2-702, 1966 Official Amendment not enacted.

§ 3-501, 1966 Official Amendment not enacted.

§ 7-209, 1966 Official Amendment not enacted.

Permanent Editorial Board's Recommendations for Optional Amendments.

§ 1-209, 1966 Official Optional Amendment not enacted.

§ 2-318, 1966 Official Optional Amendment not enacted, thus retaining Alternative A.

§ 9-105, 1966 Official Optional Amendment not enacted.

§ 9-106, 1966 Official Optional Amendment not enacted.

1972 Official Amendments.

Adopted for Arts. 1, 2, 5 and 9.

1973 Official Amendments not adopted.

1977 Official Amendments.

Adopted for Arts. 1, 5, 8, and 9.

1987 Official Amendments.

Adopted for Art. 2A.

1989 Official Amendments.

Adopted for Art. 4A, except that 4A–203(a)(2) differs from Official Amendments.

1994 Official Amendments adopted for Art. 8.

Forms.

See category 20 Mortgages, topic 20.01 Chattel Mortgages, and end of Digest.

See also topics: Banks and Banking, Bills and Notes, Brokers, Carriers, Consumer Protection, Contracts, Factors, Frauds, Statute of, Interest, Sales, Securities, Warehousemen; categories Business Organizations, topic Corporations; Civil Actions and Procedure, topic Limitation of Actions; Debtor and Creditor, topics Assignments, Fraudulent Sales and Conveyances, Liens, Pledges; Documents and Records, topics Records, Seals; Mortgages, topic Chattel Mortgages.

3.10 CONDITIONAL SALES:

See topic 3.21 Sales.

3.11 CONSIGNMENTS:

See topics 3.07 Carriers, 3.14 Factors.

3.12 CONSUMER PROTECTION:

Advertising.

Unfair Trade Practice and Advertising Act prohibits misrepresentation that retailed household goods are being sold at wholesale (TCA 47-25-903) and use by retailer of words “manufacturer”, “broker”, or “wholesaler” in describing business unless such is case (TCA 47-25-904). Buyer may rescind within 12 months from sale (TCA 47-25-905) or have injunctive relief (TCA 47-25-906). Violation misdemeanor punishable by fine up to $50. (TCA 47-25-907). Advertising that seller or lessor of radar or laser detection or jamming device will pay customer's motor vehicle traffic citation violation of Consumer Protection Act. (TCA 47-18-104).

Bait-and-switch advertising for meat and meat products prohibited by TCA 53-7-206; for other products, by TCA 47-18-103 through 104 amended, and TCA 47-18-104 (34). Violation is Class C misdemeanor against commission of which Commissioner of Agriculture may obtain injunction. (TCA 53-7-210).

Motor vehicle dealer or salesman license revocable for false or misleading advertising. (TCA 55-17-114). Unlicensed dealers and cooperatives composed of such dealers must likewise comply with advertising requirement. (TCA 47-18-121).

Commodity in Package Form.

Use of Weights and Measures is governed by TCA 47-26-901 et seq.

Securities.

See topic 3.24 Securities, subhead Advertisements.

Buying Clubs.

Club owner obligations, membership enrollment and cancellation, advertising, etc., regulated. (TCA 47-18-501 et seq.).

Health Maintenance Organizations.

Subject to same requirements regarding prompt payment and bad faith denial of claims as insurance companies under TCA 56-7-105. HMO's must maintain written documentation regarding grievances. Procedure for maintaining and reporting grievances is controlled by TCA

56-32-110.

Health Clubs.

Club owner obligations, contracts, charges, etc. regulated. (TCA 47-18-301 et seq.).

Salvaged Building Materials.

Those who buy, sell, exchange, trade, or deal in surplus or used building materials of any sort must keep record of source of those materials. Dealers must also obtain proper identification of sellers of used or salvaged building materials. (TCA 62-44-101 et seq.).

Rental Location Agents.

Must be licensed by state real estate commission and bonded and are liable to prospective tenants for damages, costs and attorney fees for certain deceptive or unfair practices. Violation of license requirements, misleading tenant as to quality, etc. of rental property Class C misdemeanor. (TCA 62-25-101 et seq.).

Employment Agencies.

Certain practices regulated. (TCA 47-18-1701 et seq.).

Fast Food Delivery Establishments.

Vehicles generally required to be clearly marked by logo of such establishments and must meet requirements for proof of financial responsibility set forth in § 55-12-102(12)(C). Such establishment must keep record of proof of financial responsibility for each delivery employee. (TCA 68-14-701 et seq.).

Foreign Foods.

Manufacturers must mark such articles in accordance with 19 U.S.C. § 1304 prior to selling or distributing in Tennessee. Willful or knowing violations result in treble damages. (TCA 47-18-1801 et seq.).

Commonsense Consumption.

Tennessee Commonsense Consumption Act provides limited immunity from civil liability to manufacturers, packers, distributors, carriers, holders, sellers, marketers, and advertisers of food for claims based on weight gain, obesity, and associated health conditions, except those claims based on adulteration and violation of misbranding requirements and knowing violations of various state and federal laws. (TCA 29-34-205).

Door-to-Door Sales.

Buyer (including lessee) has right to cancel home solicitation sale or lease of goods (other than farm equipment or motor vehicles) or services (other than insurance or securities) until midnight of third business day after sale. (TCA 47-18-703). Excluded are sales of farm animals or produce or similar perishable items, transactions done pursuant to preexisting revolving charge account or prior negotiations, and cash sales of value less than $25. (TCA 47-18-702).

Seller (including lessor) must issue receipt if cash or credit card sale or obtain buyer's signature on written instrument if credit sale. Receipt or instrument must designate transaction date as when buyer makes partial or whole payment or signs. Also must contain readily legible statement of right to cancel. Failure of seller to comply entitles buyer to cancel by notice of intent to seller in any manner. (TCA 47-18-704).

Seller must tender to buyer payments made, note or other evidence of indebtedness within ten days after valid cancellation. (TCA 47-18-705). Seller entitled to fair market value for services done prior to cancellation. Buyer must take reasonable care of goods in possession before cancellation and for reasonable time thereafter. (TCA 47-18-706).

If seller fails to demand goods within 20 days after cancellation, they become property of buyer without obligation to pay. (TCA 47-18-706).

Cemetery merchandise and services are regulated. (TCA 46-1-101 et seq.). Delivery of interment or commemorative merchandise or services generally must be within 60 days of payment therefor. (TCA 46-1-206). Pre-need sales contracts are valid only if within 60 days of seller's receipt of funds, procurement cost of merchandise or services, subject to minimums, plus 20% is deposited in bank trust account. (TCA 46-1-207). Cemetery companies engaging in such sales must file financial reports concerning trust fund accounts. (TCA 46-1-214). Burial ground or mausoleum construction must be begun within 36 months and substantially completed within five years of first sale of burial space. (TCA 46-1-213). Contracts for future funeral services are void unless all monies paid for such contract are deposited in trust account for benefit of purchaser. (TCA 62-5-407). Contract must state whether or not account is revocable. (TCA 62-5-406). Party proving fraud in pre-need and future services contracts is entitled to receive treble damages, attorney's fees, costs, and interest. (TCA 62-5-417). Advertisement by funeral director or embalmer for sale of merchandise or services which indicates price must include itemized listing and price of each item or service. (TCA 62-5-106). Seller must offer purchaser option to pay any applicable sales or use tax at time contract is entered into. (TCA 46-1-207(h)).

Coupon Sales Promotions.

Special provisions apply to coupons (and coupon books) to be offered for sale and which are represented as entitling holder to obtain goods or services at reduced price upon presentation to sponsor. Excluded from coverage are coupons appearing in periodicals; those attached to or within container; coupons offered for sale directly by sponsor where proceeds from sale are returned to him, etc. Act specifies terms which must be included in written contract between promoter and sponsor, and appear on face of coupon, and prohibited acts, which constitute Class C misdemeanor and give rise to civil action by any person suffering ascertainable loss. (TCA 47-25-801 et seq.).

Waiver of Rights.

Sales contract cannot waive buyer's rights to exemplary, punitive or treble damages; if it does, it is deemed unconscionable. (TCA 47-18-708).

Wireless Telecommunications Device and Service.

Contract must have separate acknowledgment of any minimum service period. (TCA 47-18-1901).

Facsimile Advertisements.

Special provisions apply to unsolicited facsimile advertisements, including specific information which must appear on first page thereof, and prohibition of certain acts, which may constitute violation of Tennessee Consumer Protection Act, result in civil penalties, and give rise to any additional civil remedy otherwise allowed by law. (TCA 65-4-501 et seq.).

Invention development services regulated by TCA 47-25-1201 et seq. Developer must make specified disclosures in first oral communication with customer or first written response to customer inquiry, other than for primary purpose of arranging appointment. (TCA 47-25-1204). Development contract must be written (TCA 47-25-1205), must contain provisions specified by TCA 47-25-1206-08 and must be cancelable within seven days after date signed by developer and customer (TCA 47-25-1206). Developer must obtain and file or deposit with Secretary of State bond or cash in amount of greater of $25,000 or 5% of developer's gross income for development services in Tennessee during prior fiscal year. (TCA 47-25-1217-18).

Penalties.

Civil damages of greater of $3,000 or three times actual damages, plus attorney's fees, permitted. (TCA 47-25-1221). Injunctive relief available. Willful violation is misdemeanor. (TCA 47-25-1222).

Referral Sales Schemes.

Buyer or lessee induced to enter into consumer sale, credit sale, or lease by seller or lessor offering rebate or discount for names of prospective customers may rescind agreement or retain goods delivered and benefits performed without obligation to pay, if earning of rebate or discount contingent upon occurrence of event subsequent to sale or lease. Seller or lessor guilty of misdemeanor punishable by fine up to $1,000 and three months imprisonment. (TCA 39-17-507).

Motor Vehicle Warranties.

Special provisions apply to new and leased vehicles, commercial and replacement vehicles. If manufacturer or dealer is unable to correct defect that substantially impairs use or fair market value after reasonable number of attempts, refund or replacement must be made. Refund is determined by statutory formula. (TCA 55-24-101 et seq.).

Credit Cards.

Card holder not liable for unauthorized use if he promptly notifies issuer of loss or theft. Liability for failure to notify limited to $100, unless guilty of fraud, misrepresentation, gross negligence or collusion. (TCA 47-22-103). Caveat: 15 U.S.C.A. § 1643 limits liability to $50.

Unsolicited Credit Card.

One not deemed to have accepted, not subject to terms of agreement governing use of, and not liable for unauthorized use of such card by failure to return to issuer; however, use or retention with intent to use creates liability. (TCA 47-22-102).

Unsolicited Merchandise.

Intended recipient of such of value less than $50 delivered by U.S. Mail or United Parcel Service may refuse delivery, has no duty to return or preserve, or may deem as gift. (TCA 47-18-901 to 902). Unsolicited mail resembling check which is actually loan must be clearly noted as loan in order to be enforced. (TCA 47-18-2401).

Discrimination by creditor or credit card issuer on basis of sex, handicap, or marital status forbidden. (TCA 47-18-802).

Federal Consumer Credit Protection Act compliance satisfies Tennessee statutes relating to disclosure in credit transactions. (TCA 47-14-125).

Financial Records Privacy Act prohibits disclosure (with exceptions listed) by financial institution of financial records unless authorized by customer or in response to subpoena in compliance with Act. (TCA 45-10-101 et seq.). Financial institution not complying with all requirements of subpoena need not file motion to quash but shall notify issuer of grounds of its refusal. (TCA 45-10-107). Upon application of governmental authority, customer notice required under TCA 45-10-106 may be delayed by order of Chancery Court of Davidson County in accordance with provisions of statute. When access to financial records is obtained pursuant to

TCA 45-10-107, unless court has authorized delay of notice, as soon as practical after such records are obtained upon application of government authority, authority must serve upon customer copy of subpoena or other documents rating judicial proceedings. (TCA 45-10-117).

Revised Uniform Deceptive Trade Practices Act not expressly adopted, but TCA 47-18-101 et seq., includes provisions substantially identical to §§ 2(a), 3 and 4 of Revised Act, except that: (1) Willful violation is not condition for awarding attorney fees to prevailing consumer (TCA 47-18-109[e]); (2) exemptions include retailers disseminating in good faith manufacturer's or wholesaler's claims without knowledge that such are deceptive practices (TCA 47-18-111[a][4]); and (3) deceptive practices, defined in TCA 47-18-104, include not only those in § 2(a) of Revised Act but also: falsely representing rights, remedies or obligations under consumer transactions; falsely representing that service, replacement or repair needed; causing confusion as to authority to negotiate final contract terms; failing to disclose that servicing charge based on predetermined rate or charge or guaranty or warranty rather than value of services rendered; disconnecting or resetting motor vehicle odometers; falsely advertising sale as going out of business sale; using chain referral sales plan; falsely representing guarantee or warranty rights; selling or offering to sell pyramid distributorship; assessing penalty for prepayment of charge for utility services; discriminating against handicapped individual; advertising business as “going out of business” more than 90 days before business ceases to operate; misrepresenting geographical location of business in telephone directory; advertising that person is electrician for hire when not properly licensed; and unreasonably raising price or unreasonably restricting supplies of essential goods, commodities, or services in direct response to crime, act or terrorism, war or natural disaster in Tennessee; advertising that contains reference to living trust or revocable living trust without proper disclosures, and also falsely representing that person, person's agent, authorized designee or designee for hire has conducted foreclosure on real property. (TCA 47-18-104[b]).

Telemarketing consumer protection is provided by TCA 47-18-1501 et seq.

Practice of contests, sweepstakes, and other similar giveaways used in promoting or selling products is regulated. (TCA 47-18-124).

Enforcement.

Consumer Affairs Division of Department of Commerce and Insurance may: Promulgate regulations (TCA 47-18-5001-002) and seek injunctive relief, damages for injured consumers, revocation of violator's license or certificate and, for willful violations, fine up to $1,000. (TCA 47-18-108).

Injured consumer may bring action individually, but not in representative capacity, for damages and, unless Consumer Affairs Division has acted, injunction. Treble damages may be awarded for willful violations. (TCA 47-18-109).

Corporation has standing to bring action for treble damages. (TCA 47-18-109[a][4]; 18 S.W.3d 626 [2002]).

Actions under TCA 47-18-101 et seq., must be commenced within earlier of one year from discovery of deceptive practice and five years from date of transaction. (TCA 47-18-110).

Structured settlements are governed by TCA 47-18-2601 et seq.

Plain Language.

Life, health and credit life policies must comply. See category 16 Insurance, topic 16.01 Insurance Companies, subhead Policies.

See also topics 3.19 Interest, Licenses, Business and Professional, subhead Collection

Agencies, Sales; categories 8 Debtor and Creditor, topic Liens, subhead Mechanics' Lien; Insurance, topic Insurance Companies.

Access to Criminal History Records.

In connection with issuance of licenses, permits and registrations, and investigation of consumer complaints, Department of Commerce and Insurance may query Tennessee Bureau of Investigation's Tennessee criminal history records system for certain historical data. (TCA 56-1-107).

3.13 CONTRACTS:

Uniform Commercial Code has been adopted. (TCA 47-1-101 et seq.). See topic 3.09 Commercial Code.

Written contracts signed by the party to be bound are prima facie evidence of consideration. (TCA 47-50-103). All contracts, including notes, security agreements, trust deeds and installment sales contracts, if in writing and signed by party to be bound, constitute prima facie evidence that same expresses true intention of parties and shall be enforced as written. If contract provides that no waiver of terms shall be valid unless in writing, court shall enforce such clause. (TCA 47-50-112).

Married woman has capacity to contract as if not married. (TCA 36-3-504).

Person procuring or inducing breach of lawful contract is liable for treble damages. (TCA 47-50-109). For contract actions against state, see category 6 Courts and Legislature, topic 6.01 Courts, subhead Chancery Courts.

Intended Third Party Beneficiaries.

Requirements for enforcement by third party are: parties to contract have not otherwise agreed; intent by parties for right of enforcement by beneficiary; and terms or circumstances indicate performance will satisfy obligation owed by promise to beneficiary or promise intended to benefit beneficiary. (59 S.W.3d 63).

See also categories 10 Documents and Records, topic Seals; Family, topic Infants.

3.14 FACTORS:

Uniform Commercial Code has been adopted. (TCA 47-1-101 et seq.).

License Requirements.

None.

Consignment Agreements.

No provision for filing or recording consignment agreements to protect the right of the consignor.

See also topics 3.09 Commercial Code and 3.13 Contracts.

3.15 FRANCHISES:

Franchising in general is dealt with in TCA 47-25-1301 et seq. (repurchase of terminated franchise inventory), TCA 47-25-1401 (disposal of dies, molds, and forms), and TCA 47-25-1501 et seq. (franchise terminations, nonrenewals, or modifications). In addition, there is special legislation relating to certain aspects of following industries: Petroleum Products (TCA 47-

25-601—621; TCA 47-25-621—624); Farm Implements and Equipment and Motorcycles (TCA 47-25-1301—1310); Motor Vehicles (TCA 55-13-103); Alcoholic Beverages (TCA 57-3-301; TCA 57-6-104); and Beer (TCA 57-5-501—512). See also, topic Securities.

3.16 FRAUDS, STATUTE OF:

Uniform Commercial Code has been adopted. (TCA 47-1-101 et seq.).

Except in case of certain electronic messages (see topic 3.17 Information Technology, Internet and New Media), unless promise or agreement or some memorandum or note thereof, upon which action is sought, is in writing and signed by party to be charged therewith or by someone lawfully authorized thereto by him, no action may be brought: (1) Against any executor or administrator upon any promise to answer any debt out of his own estate; (2) upon any special promise to answer for debt, default or miscarriage of another person; (3) upon any agreement made upon consideration of marriage; (4) upon any agreement for sale of lands, tenements or hereditaments or making of any lease thereof for longer term than one year; (5) upon any agreement which is not to be performed within space of one year from making thereof; (6) against any lender or creditor upon any promise or commitment to lend money or to extend credit, or to alter, amend, renew, extend, or otherwise modify or supplement any written promise, agreement, or commitment to lend money or extend credit, provided, however, that such promise or commitment need not be signed by lender or creditor if it is in form of promissory note or other writing that describes credit or loan and by its terms is intended by parties to be signed by debtor but not by lender or creditor, has actually been signed by debtor, and delivery of such has been accepted by lender or creditor. (TCA 29-2-101).

Sales of Personal Property.

Uniform Commercial Code governs.

3.17 [RESERVED]

3.18 INFORMATION TECHNOLOGY, INTERNET AND NEW MEDIA:

E-Commerce.

Uniform Electronic Transactions Act has been adopted with minor variations including: creation of information systems council to determine whether and to what extent state and state agencies will create, retain, accept and distribute electronic records; right of local government officials to determine whether and to what extent local governmental entities will create, retain, accept and distribute electronic records; additional requirements on governmental entities for creation, retention, acceptance and distribution of electronic records; pre-implementation and post-implementation review for local governmental entities; intention to supersede § 101 of Electronic Signatures in Global and National Commerce Act, United States Public Law 106-229; and provision for determining when Official Comments to Uniform Electronic Transactions Act adopted by National Conference of Commissioners on Uniform State Laws can be used as evidence in dispute as to proper construction of Act. (TCA 47-10-101).

Uniform Computer Information Transactions Act not adopted.

Uniform Commercial Code has been adopted. (TCA 47-1-101 et seq.). See topic 3.09 Commercial Code.

Advertising.

See topic 3.12 Consumer Protection.

Automated Teller Machines.

See topic 3.01 Banks and Banking.

Electronic Signatures.

Courts may implement procedures for use of electronic signatures for signing of pleadings and other court documents. (TCA 16-1-115).

Criminal Offenses.

See category 7 Criminal Law, topic 7.01 Criminal Law.

Taxation.

See category 22 Taxation, topic 22.17 Sales and Use Taxes, subhead Electronic Commerce.

E-Sign Act.

Tennessee has adopted "E-Sign Act" provisions in 15 U.S.C. §§ 7001-7006 and 7031, providing for validity of electronic signatures in commerce. (TCA 47-10-101 et seq.).

See also topics 3.09 Commercial Code and 3.13 Contracts.

3.193.16

3.17 INTEREST:

Legal rate of interest is 10%. (TCA 47-14-103).

Maximum Rate.

Generally, for written contract signed by party to be charged, four percentage points above average prime loan rate as published by Federal Reserve System, or 24% per annum, whichever is less. (TCA 47-14-103). Exceptions: Installment loans, discussed infra this topic; single payment loans of less than $1,000, where maximum is fixed by rule of Commissioner of Banking, not exceeding 10% (TCA 47-14-104); and home loans amortized over more than 181 months, where maximum is 2% above most recent weighted average yield of accepted offers of Federal National Mortgage Association auction for commitments to purchase conventional home mortgages, not exceeding 18%, as determined by Commissioner of Insurance and published in Tennessee Administrative Register (TCA 47-15-102).

Under general statute, variable rate permitted, and contract may provide for any rate permitted when loan contract executed, loan made, or loan or note evidencing same renewed or extended, where original contract so provides. (TCA 47-14-106).

Under home loan statute, variable rate permitted, and contract may provide for any rate permitted when mortgage loan application made, loan commitment made, or mortgage loan contract executed. (TCA 47-15-104).

Time-price differentials and certain loan charges, broker commissions and commitment fees, defined and limited by statute, are not interest. This also applies to adjustments for trade-ins on automobile transactions. (TCA 47-14-120). Interest does not include discount or fee charged on commercial account purchase transactions. (TCA 47-14-102). Principal and interest are defined terms. (TCA 47-14-102).

Judgments bear interest at 10% or, where based on note, contract or other writing fixing permissible higher rate, at that rate. Interest runs from date jury or court returned verdict without regard to motion for new trial. (TCA 47-14-121-122).

Open Accounts.

Liquidated and settled accounts bear interest from due date, unless specifically expressed otherwise. Interest on instrument accrues according to terms thereof or as provided in Commercial Code. Interest in other cases is computed from date debt payable, unless otherwise provided by contract. (TCA 47-14-109).

Installment Loans.

Banks and trust companies may charge 6% per annum, deducted in advance or added to principal, on installment loans. (TCA 45-2-1106). Upon prepayment, partial interest refund must be made, under statutory formula. (TCA 45-2-1106). Additional charges permitted for: (1) Insurance premiums, official fees, taxes, appraisal, title examination, attorney documenting or closing loan, inspection or control of collateral; (2) lender's direct cost in originating, making, securing, processing, servicing and collecting loan, based on lender's actual average costs, not exceeding 4% of loan amount or $25 in lieu thereof; and (3) late charge of 5% of installment in default over 15 days. (TCA 45-2-1106). On loans of more than $300, may require: (1) Hazard insurance on tangible personal property and (2) credit life insurance on one borrower. Insurance must meet statutory requirements, and proof of coverage and costs must be given borrower within 30 days. (TCA 45-2-1106). Disclosure of loan terms and conditions must be made as required by Federal Consumer Credit Protection Act whenever credit extended. (TCA 45-2-1107). Credit card state bank or domestic lender may charge and collect interest at annual rate not exceeding 21%, in addition to various fees and charges as agreed in writing. (TCA 45-2-1904).

Savings and loan associations may charge 6% per annum, deducted in advance or added to principal, on home improvement installment, mobile home or other installment loans. Under statutory formula, partial interest refund required on prepayment. Additional charges permitted: (1) Late charge of 5% of installment in default over 15 days; (2) premiums on insurance required or obtained as security; (3) fees and taxes paid public officials for filing, recording or releasing any instrument or lien; (4) reasonable expenses of title investigation on realty security, including title insurance and closing costs; (5) reimbursement of necessary expenses in securing and collecting loan not exceeding 4% of gross loan amount, or in lieu of 4%, greater of $10 per loan or $1 per monthly installment. At closing, borrower must be given written statement of: (1) Original principal; (2) insurance premiums; (3) fees and taxes paid or to be paid public officials; (4) total of interest and securing and collecting charges, expressed in dollars per $100 per year; (5) any other charges; (6) unpaid balance; and (7) number, amount and due dates of repayment installments. (TCA 45-3-705).

Retail Installment Sales.

Interest under retail installment contract, as defined in TCA 47-11-102, may not exceed $11.75 per $100 per year on principal balance of each transaction. (TCA 47-11-103). Interest rate under retail charge agreement, as defined in TCA 47-11-102, may not exceed 17½¢ per $10 per month. (TCA 47-11-104).

Industrial loan and thrift companies, industrial investment companies and industrial banks regulated by, and must register with, Commissioner of Financial Institutions. (TCA 45-5-103). On loans less than $100, may charge 7½% per annum interest, deducted in advance, on loan total for full term, but maximum effective rate is 18%. On loans more than $100 and those made under open end credit plans, rate may not exceed 24%. (TCA 45-5-301, -401). May charge 4% of loan total, deducted in advance, for all services, expenses (other than recording fees and taxes paid public officials), detriments and commitments directly incident to loan. In lieu of 4% fee, may make flat service charge of $2 on loans up to $20, plus 50¢ per $5 thereafter on loans in excess of $20 but not exceeding $100, and flat service charge of $10 on loans of more than $100. Flat service charge must be refunded if loan repaid in three business days, and if loan renewed, rescheduled or refinanced within 45 days, flat service charge limited to ½ of regular charge on new money advanced only. 4% and flat service charges prohibited on loan amount used to pay off loan to same borrower or spouse by same lender or affiliate. In addition to 4% or flat service charge, on loans of 90 days or more with monthly installments of at least $15, may charge installment maintenance fee of $2.50 per month on loans of $100 or less, $3.50 on loans of $100-750, $3 on loans of $750-1,250, and $2.50 on loans over $1,250, for period not exceeding original term of loan contract, but no lender can charge such fee on multiple loans existing at same time to any one borrower. May also charge late charge of 5% of installment in default over five days and $15 bad check charge. (TCA 45-5-403). May require hazard insurance at borrower's expense. (TCA 45-5-301-305). May accept but not require credit life, unemployment and disability insurance. (TCA 45-5-305). Insurance must meet statutory requirements. (TCA 45-5-305).

Alternative Charges on Certain Loans.

As alternative to charges described above, registrant may charge (on loans of not more than $1,000 with term of 3-12 months) acquisition fee not in excess of 7.5% of principal amount. In addition to acquisition fee, registrant may charge installment account handling charge not to exceed $12/month on loans of $100-$300: $14/month on loans of $301-$400: $16/month on loans of $401-$500; $17/month on loans of $501-$800; $20/month on loans of $801-$1,000. No insurance charges are permitted on loans established pursuant to these provisions. (TCA 45-5-403).

Equity Participations.

Where initial advance or contemplated series of advances is $500,000 or more, in addition to interest on loan, lender may take equity participation in borrower's enterprise under written agreement with borrower and such participation shall not be deemed to be interest, loan charges, commitment fees or brokerage commissions. (TCA 47-24-102).

Usury.

Any contract on its face requiring payment of usury or excess loan charges, commitment fees or broker commissions is unenforceable, but original lender may sue to recover principal plus lawful interest, charges, fees and commissions. Where usury, etc., does not appear on face of contract, but is proved, only principal plus lawful interest, charges, fees and commissions are recoverable. However, if unconscionable conduct, defined in statute, is found, no interest, charges, fees or commissions are recoverable, and lender must refund charges, fees and commissions and twice interest and pay borrower's reasonable attorney fees. (TCA 47-14-117).

Usury and excess loan charges, commitment fees and broker commissions are recoverable. (TCA 47-14-114). Usury is recognized defense, but burden is on party claiming same. (TCA 47-14-110). Equitable remedies for usury, etc., will be given only if principal plus lawful interest, etc., is paid or tendered into court, except that contract reformation suit as to loan charges, broker commissions or commitment fees may be brought on cost bond or pauper's oath and successful reformation plaintiff may be awarded reasonable attorney fees. (TCA 47-14-115).

Actions must be brought within three years, as to usury claims from earlier of date of last usury payment or foreclosure or court action, and as to excess loan charges, commitment fees and broker commissions, from date of payment. (TCA 47-14-118).

Small Loans.

See subhead Installment Loans, supra.

3.18 [RESERVED]

3.19 LICENSES, BUSINESS AND PROFESSIONAL:

Practically all pursuits are licensed in this state.

State lottery, authorized by constitutional amendment in 2002. See category 1 Introduction, topic 1.01 Government and Legal System.

Athlete Agents.

Uniform Athlete Agents Act (2001) has been adopted with certain variations including following: requirements for registration; grace periods; expiration of registration; suspension or revocation of registration; agency contracts; notice requirements; and criminal and civil liability of athlete agents and student-athletes. (TCA 49-7-2122 et seq.).

Collection Agencies.

Regulated by TCA 62-20-101 et seq. License required. (TCA 62-20-105). Licensing and supervision by Department of Commerce and Insurance, 500 James Robertson Pkwy., Nashville, TN 37243. (TCA 62-20-104). Person placing account for collection is responsible for determining that agency is licensed. (TCA 62-20-118).

Courts hold that collection agency cannot bring suit for its principals, cannot give them legal advice, cannot employ attorney to bring such suits for it or to give such clients advice, and cannot select attorney to represent clients where agency receives fees and pays attorney fixed salary. (43 S.W.2d 918 [1931]).

Deferred Presentment Services.

Must be licensed. (TCA 45-17-101 et seq.).

Check Cashing.

Check Cashing Act of 1997 requires licensing for operation of business of cashing payment instruments. (TCA 45-18-101 et seq.).

Pledge Lenders.

Licensing and regulation of pledge lenders was significantly revised in 2005. (TCA 45-15-102 et seq.).

Access to Criminal History Records.

See topic 3.12 Consumer Protection, subhead Access to Criminal History Records, supra.

3.20 MONOPOLIES, RESTRAINT OF TRADE AND COMPETITION:

Business trusts in restraint of trade are unlawful. (TCA 47-25-101). Vertically integrated petroleum producer presumed to restrain trade under certain circumstances if it cancels dealer franchise or imposes on dealer unreasonable operation requirements or supply quotas. (TCA 47-25-601-07). Violation is Class E felony. (TCA 47-25-103). Violator forfeits charter or right to do business in state. (TCA 47-25-104).

Unfair Trade Practices.

Advertising, offering to sell or selling by retailer or wholesaler, at less than cost, with intent or effect of inducing purchase of other merchandise or of unfairly diverting trade from a competitor or otherwise injuring a competitor, is unfair competition and contrary to public policy. Violation is Class C misdemeanor. (TCA 47-25-201 et seq.).

Financing Sales of Motor Vehicles.

Manufacturer or wholesale distributor of motor vehicles may not: (1) Sell or contract for sale of motor vehicles on condition or agreement that dealer shall finance purchase or sale thereof through a designated finance company; (2) pay or give a subsidy to any finance company; or (3) discriminate against any finance company. Finance company may not accept any such subsidy or benefit of discrimination. (TCA 55-13-101 et seq.).

Resale Price Agreements.

See category 17 Intellectual Property, topic 17.01 Trademarks and Tradenames.

3.213.22

3.23 SALES:

Uniform Commercial Code has been adopted. (TCA 47-1-101 et seq. and may now be cited as ``Uniform Commercial Code'').

Contracts of Sale.

See topic 3.16 Frauds, Statute of. There is no statutory limitation as to type size in printed contracts. Government purchases from and payment requirements to private businesses governed by TCA 12-4-701 et seq.

Bills of sale are not required.

Product Liability.

Controlled by TCA 29-28-101 et seq., under which liability of manufacturers partially limited, liability of nonmanufacturers for sealed container products substantially limited, and strict liability of nonmanufacturers substantially limited. Manufacturer may not be held liable to consumer in absence of privity of contract for commercial loss from defective product under tort misrepresentation doctrine. (821 S.W.2d 925 [1991]). Strict liability in tort for defective product causing personal injury or property damage has been adopted. Manufacturer may be liable to consumer for negligence. (272 S.W.2d 479 [1954]). Actions for personal injury or property damage based on negligence, strict liability, or breach of warranty, including those brought under Tennessee Uniform Commercial Code require no privity of contract. (TCA 29-34-104).

Conditional sales governed by Uniform Commercial Code. (TCA 47-9-101).

Rental-Purchase Agreements governed by TCA 47-18-601 et seq.

Retail Installment Sales.

An act has been adopted regulating such sales in detail. (TCA 47-11-101 et seq.). For interest limitations, see topic 3.19 Interest, subhead Installment Loans.

Consumer Protection.

See topic 3.12 Consumer Protection.

Bulk Sales.

See topic 3.09 Commercial Code and category 22 Taxation, topic 22.13 Property Taxes, subhead Assessment.

Sales of Motor Vehicles.

See category 23 Transportation, topic 23.01 Motor Vehicles.

See also topic 3.09 Commercial Code; category 5 Civil Actions and Procedure, topic 5.16 Limitation of Actions, subhead Product Liability.

3.24 SECURITIES:

Uniform Commercial Code has been adopted. (TCA 47-1-101 et seq.).

Statute governing sale of securities is Tennessee Securities Act of 1980. (TCA 48-2-101 et seq.). Act applies to persons who buy or sell securities from, in or into this state, or who give or receive advice concerning such sale or purchase. Also covered are acts done within state that are instrumental in effecting prohibited conduct. (TCA 48-2-124).

Supervision.

Commissioner of Commerce and Insurance, 500 James Robertson Pkwy., 5th Floor, Nashville, TN 37243-0565, (615) 741-2241, acting through Director of Securities.

Regulatory Powers of Supervising Authority.

Permit for sale not required. Commissioner has power to promulgate rules, forms and orders to further purposes of Act. (TCA 48-2-116). He may also apply to chancery court to enjoin acts that are or may constitute violations (TCA 48-2-119), may deny, suspend or revoke registration of securities and broker-dealers, agents and investment advisers and, when authorized to issue stop order, may impose fine of $5,000 on issuer (TCA 48-2-108; TCA 48-2-112). Proceeds of offerings may be required to be placed in escrow for cause. (TCA 48-2-107). Final orders subject to review by Chancery Court of Davidson County pursuant to State Uniform Administrative Procedures Act. (TCA 48-2-120).

Any applicant for registration and issuer of securities to be offered in state must file irrevocable consent that Commissioner act as attorney-in-fact to receive any lawful process in any proceeding arising under Act. Plaintiff must, however, send notice of service and copy to defendant by registered mail at his address on file. Conduct in violation of Act deemed equivalent to such appointment if personal jurisdiction cannot otherwise be obtained in state. (TCA 48-2-124).

Prerequisites to Sales or Offerings.

Securities, except exempt classes and those sold in exempt transactions, must be registered, and broker-dealers, agents and investment advisers must register annually. (TCA 48-2-104).

Securities to Which Act Applicable.

For purpose of Act governing registration of securities, dealers and salesmen, security means, in general, any interest or instrument commonly known as security, or any certificate of interest or participation in, temporary certificate for, receipt for guarantee of, or warrant or right to subscribe to or purchase same, but does not include drafts, bill of exchange, bank letter of credit, evidence of indebtedness issued in mercantile or consumer, as opposed to investment, transaction, interest in deposit account or insurance or endowment policy or annuity contract under which insurance company promises to pay money in lump sum, periodically for life, or for some other specified period. See 91 S.W.3d 314 (2002) wherein Tennessee Supreme Court ruled that definition of “investment contract” contained in State v. Brewer is Tennessee standard for determining whether “security” exists.

Exempt Securities.

Registration of securities under Act does not apply to: (a) securities issued by U.S. or state public body, political subdivision or agency (but see TCA 9-21-151 providing for disclosure procedures in connection with primary offering of municipal securities); (b) securities issued or guaranteed by: (1) certain foreign governments, (2) any bank organized under laws of U.S., (3) bank, savings or trust institution organized under laws of any state, (4) any federal or federally insured state savings and loan association authorized to do business in Tennessee, (5) certain industrial loan and thrift companies organized under laws of this state, (6) any federal or other credit union supervised under Tennessee law, (7) railroad, common carrier, public utility or holding company which is regulated or supervised by governmental authority of U.S. or any state or, in respect to security, by governmental authority of Canada or its provinces; (8) securities issued by person organized and operated exclusively for religious, educational, benevolent, fraternal, charitable, social, athletic or reformatory purposes and not for pecuniary profit (certain material must be filed, however, with Commissioner at least ten days prior to any sale of such security); (9) any security which meets all of following requirements: (a) if issuer is organized under law of foreign country, agent for service of process designated in prospectus or circular, (b) class of issuer's securities has been registered for three years prior to offering under § 12 of Securities Exchange Act of 1934 and he has filed during preceding 12 months all reports required by §§ 13 or 15(d) of that Act, (c) issuer or significant subsidiary has not had material default in past five years in payment of principal, interest, dividends or sinking fund installment on preferred stock, loans or material leases with term of three or more years, (d) issuer has had consolidated net income of at least $1,000,000 during four of last five fiscal years, including last, (e) if offering is of interest bearing securities, issuer had net income during last fiscal year of at least 1½ times its annual interest expense including present offering, (f) if offering is of stock other than preferred stock, such securities have specified voting rights and, as of date within last six months before offering, at least 750,000 shares of same class were outstanding, with aggregate market value on such date of at least $3,750,000 and owned of record or beneficially by at least 1,200 persons, (g) compliance with special provisions if offering is of interest bearing securities of companies primarily engaged directly (or through consolidated subsidiary) in mortgage, industrial or consumer financing, banking or factoring; (10) securities listed or approved for listing on New York, American or Midwest Stock Exchanges if in compliance with current listing requirements and have not been suspended within last two years for failure to meet requirements of such exchange (Commissioner may at any time for cause remove exchange from this exemption, and he may also approve other stock exchanges); (11) promissory notes, banker's or trade acceptances of at least $50,000 denomination which are payable on demand or mature or are renewed for not more than nine months after date of issuance or renewal, if not offered for sale by advertisement; (12) any security exchanged by issuer exclusively with its existing securities holders if no remuneration given for soliciting such exchange; (13) securities of corporations organized pursuant to Tennessee Cooperative Marketing Law, TCA 43-16-101 et seq.; and (14) any security issued by bank holding company, or savings and loan holding company, which is registered with Federal Reserve Board or Office of Thrift Supervisor and has filed certain specified transaction literature with Commissioner at least ten days prior to any sale in this state. (TCA 48-2-103).

Exempt Transactions.

Requirements for registration of securities and filing of sales and advertising literature do not apply to following transactions: (a) any transaction by person acting as executor, administrator, sheriff, marshal, receiver, trustee in bankruptcy, guardian or conservator; (b) any bona fide pledge transaction; (c) sale to institutional investor or broker-dealer; (d) transaction involving sale, by or on behalf of issuer or affiliate, or its securities if all of following are met: (1) aggregate number of persons in state purchasing such securities from issuer and affiliates in nonexempt transactions 12 months prior to sale does not exceed 15, (2) such securities are not offered in sales literature or public advertisements, and (3) each such purchaser acquires securities for investment and not distribution (holding for two years is prima facie evidence); (e) transaction in outstanding shares of issuer by affiliate if following conditions are met: (1) affiliate is not acting as underwriter, (2) affiliate sells securities through registered broker-dealer in “broker's transactions” as defined by SEC Rule 144, (3) there is no solicitation of orders to purchase, and (4) no payments are made other than to broker-dealer who executes order to sell; (f) certain offerings by issuer in which aggregate amount sold in this state does not exceed $250,000 in any 12 month-period; (g) transactions in outstanding securities at price reasonably related to market price by or on behalf of person not affiliated with issuer if issuer has filed current reports with SEC pursuant to §§ 13 and 15 of 1934 Act if required to do so or, if not required to make such filings, if information required by SEC Rule 15c2-11 is publicly available or issuer is investment company with current reports on file pursuant to Investment Company Act of 1940; (h) isolated transaction not involving issuer, affiliate or underwriter of such securities; (i) issuance of securities in connection with certain stock bonus, pension, profit sharing, savings, thrift or retirement plans for employees or persons self-employed; (j) transactions exempted by rule or order of Commissioner; (k) transaction pursuant to offer to existing security holders of issuer, including persons who at time of transaction are holders of convertible securities, nontransferable warrants, or transferable warrants exercisable within not more than 90 days of issuance if no commission or other remuneration (other than stand-by commission) is paid for soliciting any security holder in Tennessee; (l) transaction in units in unit investment trust registered under Federal Investment Company Act of 1940 if: (1) Units are subject to effective registration statement or exemption from registration, (2) units are sold by registered broker dealer, and (3) units are sold by or on behalf of sponsor or depositor of unit investment trust or affiliate of such sponsor or depositor; (m) transaction in which (1) sales of securities are made only to persons who are, or who issuer reasonably believes are accredited investors (accredited investor status is established upon written certification of purchaser), and (2) issuer reasonably believes that each purchaser is acquiring securities for investment and not distribution (any resale of security within 12 months of sale shall be presumed to have been acquired for distribution and not for investment unless such sale is (A) pursuant to effective registration statement, (B) to accredited investor, or (c) to institutional investor); (n) transaction involving sale of charitable gift annuity; (o) transaction effected by Canadian broker dealer if such Canadian broker dealer has qualified for exemption from registration; (p) non-issuer transaction through registered or exempt broker-dealer in security rated by nationally recognized statistical rating organization in one of its four highest rating categories, or has fixed maturity or fixed interest or dividend, if issuer has not defaulted in payment of principal, interest or dividends on security in previous three years, and not development stage company or in bankruptcy or receivership; (q) non-issuer transaction through broker-dealer in security of foreign issuer that is margin security as defined in regulations of Board of Governors of Federal Reserve System; and (r) non-issuer transaction by investment advisor registered under Investment Advisors Act of 1940 with investments under management in excess of $100 million, acting in exercise of discretionary authority in signed record for account of others. (TCA 48-2-103).

Registration of Securities.

Securities are registered by issuer or registered broker-dealer by filing with Commissioner registration statement and related material in accordance with following alternative procedures.

Registration by coordination of securities for which registration statement has been filed under Securities Exchange Act of 1933 (or notification under Regulation A thereof) in connection with same offering is automatic (if no stop order, denial, suspension or revocation of registration is in effect) when statement declared effective by SEC if such statement is on file with Commissioner for at least five days and is accompanied by latest prospectus or circular filed with SEC (with undertaking to forward promptly amendments) and, if required by Commissioner: charter and by-laws of issuer, underwriter's agreements, indenture or other document governing issuance, specimen of security, other documents filed with SEC under Act of 1933, and any other information as is necessary to determine accuracy of statement. Statement of maximum and minimum proposed offering prices and underwriting discounts and commissions must be on file for two full business days, but Commissioner may shorten or waive this requirement and may also waive five day filing of statement above. Registrant must notify Commissioner promptly and by electronic means of date and time SEC declares statement effective and contents of price amendment, if any, filed with SEC. He must then promptly file post-effective amendment containing information and documents included in price amendment. (TCA 48-2-105).

Registration by qualification of securities is accomplished by filing with Commissioner registration statement including copies of prospectus or circular containing financial statements and information relative to securities, offering, issuer, promoters, directors, officers, security holders and personnel, material contracts, litigation, transactions and remuneration; specimen of security; charter and by-laws of issuer; indenture or other instrument governing offering; signed opinion of counsel that security offered is legal and will be, when sold, legally issued, fully paid, nonassessable and, if debt security, binding obligation of issuer; written consent of attorney, accountant or other private professional if such person is named as having prepared or certified report or valuation used in connection with registration; any advertisement, literature or communication, containing such information as Commissioner may prescribe, to be used in offering; and such additional information as may be necessary to determine accuracy of statement. Registration statement filed under this procedure shall become effective 20 days after filing, but Commissioner may shorten this period or defer effectiveness for cause. (TCA 48-2-106).

All Registrations.

Unless omission is permitted by Commissioner, registration statements filed under either procedure above shall specify (with regard to offering) amount of securities to be offered in Tennessee, states where registration statement or similar document has been or will be filed, and any adverse order or decree by SEC, any court or regulatory authority of any state. Statements are also subject to standards of fairness and reasonableness as may be declared by Commissioner. Period of effectiveness of statement is one year unless sooner terminated by order or notification to Commissioner of completion of offering. During this period there is ongoing obligation to file such reports as Commissioner may by rule require as well as keep statement information reasonably current and disclose progress of offering. Special provisions govern amendment of statements to increase number of securities to be offered. (TCA 48-2-107).

Filing fee of 1/10 of 1% of maximum aggregate offering price in this state must be paid by person filing statement. Maximum fee is $1,000; Commissioner authorized to establish minimum fee by rule. (TCA 48-2-107).

Registration of Broker-Dealers, Agents and Investment Advisers.

Unlawful to transact business as broker-dealer, agent, or investment adviser (with certain exceptions) from or into this state unless registered under Act. (TCA 48-2-109). When agent begins or terminates connection with broker-dealer, both are required to promptly notify Commissioner. Agent's registration ineffective during any period he is not associated with registered broker-dealer. Unless timely renewed, registrations expire annually, on Dec. 31 for agents, broker-dealers and investment advisers. (TCA 48-2-109).

Procedure.

Above persons must file registration application on Commissioner's form containing information relative to applicant's organization, qualifications and business history, including affiliates, officers, directors, etc.; proposed method of doing business; felony convictions; injunctions, orders and misdemeanor convictions involving any aspect of securities business; and financial condition and history. Publication of application may be required. (TCA 48-2-110).

Issuer-dealers who create for sale fractional interests in oil, gas or other mineral rights must register (with certain limited exceptions) but will not be deemed broker-dealers and are subject to limited regulation as long as their securities business is restricted to sale of undivided fractional interests. (TCA 48-2-110).

Filing fee of $200 must accompany application or renewal for broker-dealer and investment advisers ($50 for agents). (TCA 48-2-110).

Denial, Suspension or Revocation of Registration.

Of Securities.

Commissioner may not take action on facts or transactions known to him at time registration became effective unless proceedings are instituted within one year after such time. Otherwise, he may at any time by stop order deny, revoke or suspend registration if such order is in public interest and one or more of following grounds exist: (1) statement contains untrue statement or omission to state material fact necessary to make statements therein not misleading in light of circumstances under which they were made; (2) willful violation of Act, order or rule by person filing statement, issuer or underwriter; (3) security is subject of stop order, injunction or similar proceeding issued not more than one year previously under any other state or federal Act relative to offering if such was based on facts which would currently constitute violation in Tennessee; (4) issuer is engaged in activities illegal where performed; (5) offering has or would tend to operate as fraud upon purchasers. Notice, reasons and opportunity for hearing must be afforded, and Commissioner may vacate or modify order for good cause or complying amendment. (TCA 48-2-108).

Of Broker-Dealers, Agents or Investment Advisers.

Order may be issued under same general circumstances as set forth in previous paragraph. Grounds include: (1) conduct enumerated in (1) and (2) above; (2) conviction of any felony, or within last ten years, convicted of misdemeanor involving any aspect of securities or investment related business; (3) pending injunction by court of conduct as to any aspect of securities or investment related business; (4) U.S. Post Office fraud order or pending stop order by Commissioner or any order issued within past ten years by SEC or securities administrator of another state or other federal or state agency having jurisdiction over investment related businesses, denying or revoking registration or suspending applicant from national stock exchange, if such was based on facts which would currently constitute violation in Tennessee and if Commissioner institutes proceeding within one year from date of order relied upon; (5) dishonest or unethical securities practices; (6) insolvency; (7) failure to reasonably supervise agents or employees; (8) lack of qualification (subject to special provisions). Commissioner may, as alternative to revocation or suspension, impose $5,000 fine for all violations arising from any single transaction. (TCA 48-2-112).

Licenses.

None required as such of dealers and agents, but see subhead Registration of Broker-Dealers, Agents and Investment Advisers, supra.

Bond.

Unless registrant's net capital exceeds $100,000, Commissioner may by rule require broker-dealers, agents and investment advisers to post surety bond up to $10,000. Fidelity bonds or deposits of cash or securities may be accepted. Special provisions and such conditions as may be imposed by Commissioner apply to bonds. (TCA 48-2-110).

Advertisements.

Unless security or transaction is exempt, Commissioner may by rule require that any prospectus, circular, form letter, advertisement or other sales literature or advertising communication intended for prospective investors, clients, etc. be filed. (TCA 48-2-113). It is unlawful to represent that effective registration constitutes approval or finding that any filed documents are complete and not false or misleading. (TCA 48-2-114).

Registration of Takeover Offers.

Regulated by Tennessee Investor Protection Act, TCA 48-103-101 et seq.

No person who directly or indirectly beneficially owns or controls 5% or more of any class of equity securities of corporation, any of which were purchased within one year of proposed takeover offer, shall make any offer or purchase securities pursuant thereto if such might result in offeror's direct or indirect beneficial ownership of 10% or more of any class of that corporation's equity securities until offeror has made full, fair and effective disclosure to public and offerees of offeror's intentions as to changing or influencing management or control of offeree corporation, has filed with Commissioner statement of such intentions, and has on file with Commissioner effective registration statement. (TCA 48-103-103).

For purposes of Act, offeror deemed to own securities of offeree corporation directly or indirectly beneficially owned by: (1) person controlling, controlled by or under common control of offeror; (2) entity of which offeror is officer or partner or direct or indirect beneficial owner of 10% or more of any class of such entity's equity securities; (3) any person directly or indirectly beneficially owning 10% of any class of offeror's equity securities; (4) any trust or similar estate in which offeror has substantial beneficial interest or is trustee or fiduciary; (5) offeror's spouse and relatives of offeror or spouse living in offeror's home. (TCA 48-103-102).

Offer must be made on same terms to all holders of record or beneficial owners of equity securities of offeree company residing in state, such terms to be substantially same as offered to nonresident owners of such securities. Offer must allow tenders to be withdrawn for at least seven and up to 60 days after effective date of offer. If within ten days after later of effective date of offer or date of notice of increased consideration thereunder, more securities are tendered than offeror has agreed to accept, tenders must be accepted on pro rata basis. If consideration offered for securities is increased after effective date, such increased consideration must be paid to all offerees regardless when securities tendered. (TCA 48-103-103).

Offer cannot be effective until ten days after registration statement and consent to service of process on official forms have been filed with Commissioner, or later if Commissioner so orders, and after offeror (no later than date statement filed) has sent by certified mail to offeree company at its principal office copy of statement and has publicly disclosed material terms of offer. (TCA 48-103-104).

Filing fee for registration statement is $100. Additionally, $100 fee must be paid if offeree corporation requests Commissioner to conduct hearing on offer. (TCA 48-103-109).

Copies of all advertisements, circulars, letters and other materials of offeror or offeree corporation soliciting or requesting acceptance or rejection of offer must be filed with Commissioner and offeror or offeree corporation, respectively, no later than time when copies of such materials are first published or used or sent to offerees. (TCA 48-103-105).

Exempt Transactions.

48-103-101 et seq. does not apply to: (1) broker-dealer transactions in ordinary course of business not entered into for purpose of, and not having effect of, changing or influencing control or management of offeree company; (2) exchange offers for equity securities of another issuer if made in good faith for sole account of offeror, if exempt under § 4 of 1933 U.S. Securities Act and not involving any public offering; (3) good faith offers made in isolated transactions for sole account of offeror to not more than 15 persons in state during any 12 month period; (4) offers on substantially equal terms to holders of class of equity securities of offeree company, if there are no more than 50 such holders; (5) offers pursuant to full disclosure on substantially equal terms to all shareholders, as to which directors of offeree company have recommended acceptance; (6) offers involving merger, consolidation or sale of assets for securities of offeror or involving sale of securities for cash or securities of offeror, where shareholder vote held pursuant to charter or statute; (7) banks and bank holding companies, building and savings and loan associations, insurance companies and public utilities and public utility holding companies, where regulated by state or federal law. (TCA 48-103-102[10]; -113).

Liabilities.

Seller in violation of Securities Act liable for consideration paid, plus interest and less income received, upon tender of security. Purchaser in violation is liable to seller for return of security plus income received upon tender of consideration received. Any person who willfully employs fraudulent act or device within meaning of Act shall be liable to any person who purchases or sells security at price which was affected by such conduct for damages sustained as result unless plaintiff knows of violation. Any person who makes false or misleading statement in any document required to be filed under Act or in advice given as investment adviser, as to any material fact, liable to any person who, in reliance and without knowledge, has purchased or sold security at price affected by such statement for damages caused by reliance unless defendant sustains burden of proof to establish good faith, lack of knowledge and that he could not have had notice in exercise of reasonable care. Costs, including reasonable attorneys' fees, may be assessed against either litigant. There is joint and several liability against persons who control, directly or indirectly, violator and other persons who materially aid transaction and knew or should have known of violation. (TCA 48-2-122). See also category 5 Civil Actions and Procedure, topic 5.16 Limitation of Actions.

Takeover offeror purchasing security in violation of statute may be sued in law or equity for rescission plus income received by offeror in connection with security, or for damages equal to greater of value of security at time of suit or sale to offeror, less value at time of suit of consideration received by offeree. Officers and directors of offeror, persons directly or indirectly controlling offeror, and offeror's employees and broker-dealers and agents who materially assist illegal purchase, are liable jointly and severally with offeror, unless proved that such persons did not know and could not reasonably have known of facts upon which liability based. Prior to rescission suit arising out of takeover offer, offeree must tender or give notice of willingness to tender consideration received for security. Two-year statute of limitations on rescission or damages suits under takeover statute. (TCA 48-103-112).

Violation of Securities Act is Class D felony. (TCA 48-2-123). Violation of Investor Protection Act is Class A misdemeanor. (TCA 48-103-111).

Subdivision Offerings.

No special provisions.

Franchising, Pyramid Sales, Etc.

Under TCA 47-25-1301 et seq., upon termination of franchise, franchisee may require franchisor to repurchase part of franchisee's inventory. Under TCA 47-18-104 et seq., discussing Consumer Protection, certain chain referral and pyramid sales plans are prohibited.

Taxation.

Every corporation, company, partnership or individual writing, issuing, servicing and/or collecting installments on income reserve contracts or installment investment trusts (including investors' syndicates, investment associations and the like) is subject to an annual privilege tax of 2% of its gross receipts or income attributable to business done in Tennessee. On or before Sept. 1, return must be made and tax paid to Commissioner of Insurance and Banking for previous fiscal year ended June 30. This tax is in lieu of all other taxes except ad valorem taxes on real property and tangible personal property in the state. All members, etc., are exempt from income tax and privilege taxes on profits, dividends or interest, or income in the nature thereof, received from such company. (TCA 56-4-301-09).

Uniform Simplification of Fiduciary Security Transfers Act repealed. (TCA 35-8-101).

Uniform Transfer on Death Security Registration Act adopted. (TCA 35-12-101).

Uniform Securities Ownership by Minors Act not adopted.

See also topic 3.09 Commercial Code.

3.25 STATUTE OF FRAUDS:

See topic 3.16 Frauds, Statute of.

3.26 TRUST RECEIPT SECURITY:

See topic 3.09 Commercial Code.

3.27 WAREHOUSEMEN:

Uniform Commercial Code has been adopted. (TCA 47-1-101 et seq.).

See topic 3.09 Commercial Code.

Grain Warehouse and Storage Act repealed. (TCA 43-27-101-113).

4 CITIZENSHIP

4.01 ALIENS:

Property.

An alien, resident or nonresident, may take and hold property, real or personal, in this state and dispose of and transmit same as native citizen. (TCA 66-2-101). Heirs or devisees of alien may take any lands so held by descent or otherwise, as if citizen. (TCA 66-2-102).

See also category 11 Employment, topic 11.01 Labor Relations, subhead Employment of Illegal Aliens.

5 CIVIL ACTIONS AND PROCEDURE

5.01 ACCORD AND SATISFACTION:

To constitute accord and satisfaction, offer (with intent to satisfy obligation) and acceptance (with intent that it shall operate as satisfaction) are essential. (330 S.W.2d 578 [1959]).

Contract.

Accord and satisfaction in writing as to right of action in contract is given effect according to intention of parties. (TCA 24-7-106).

Pleading.

Defense of accord and satisfaction must be set forth affirmatively in pleading to a preceding pleading. (Rules of Civil Procedure 8.03).

See also category 3 Business Regulation and Commerce, topic 3.09 Commercial Code.

5.02 ACTIONS:

Tennessee Supreme Court has adopted Rules of Civil Procedure patterned after Federal Rules of Civil Procedure. Rules are codified separately from Code, and references herein are to Rule Number, unless otherwise indicated.

Equity.

Distinction between legal and equitable remedies is still observed, but chancery and law courts have broad area of concurrent jurisdiction.

Forms of Action.

Common law distinctions as to forms of action have been abolished. (8.01).

Commencement.

See topic 5.20 Process.

Parties.

Federal Rules obtain. (17.01 et seq.).

Class Actions.

Federal Rules obtain. (23.06 et seq.).

Intervention.

Federal Rules obtain, except that intervention allowed as a matter of right by stipulation of all parties. (24.01 et seq.).

Interpleader.

Federal Rules obtain. (22.01, 22.02).

Third Party Practice.

Federal Rules obtain. (14.01, 14.02).

Joinder of Causes of Action.

Federal Rules obtain. (18.01 et seq.). In addition, plaintiff may institute claim for money, and to discover and subject to satisfaction of claim for money property of defendant not subject to execution, without first obtaining money judgment. (18.02). Tennessee Rules specify that joint tortfeasors and obligors on joint and several obligations may be sued jointly or severally. (19.01).

Splitting Causes of Action.

All damages resulting from single wrong, whether tort or contract, constitute but one indivisible cause of action and must be sued for in same action; a second suit for omitted damages is barred by the first judgment. (214 Tenn. 371, 380 S.W.2d 793).

Consolidation of Actions.

Federal Rules obtain, except that, in jury trials (other than those in which all parties have waived right to jury trial on certain issues) all material issues must be tried to jury. (42.01 and 42.02).

Severance of Actions.

Federal Rules obtain. (42.02).

Stay of Proceedings.

No statutory provisions. Federal Rules on sanction for refusal to make discovery and failure to pay costs of old action when action refiled have been adopted. (37.02, 41.04).

Abatement and Revival.

Causes of action for tort causing injury, death or property damage, except causes of action for wrongs affecting character, survive death of tortfeasor and may be prosecuted against personal representative (TCA 20-5-103), and causes of action for tortious injury resulting in death survive death of injured person (TCA 20-5-106). Rights of action based on wrongful act or omission of another shall not abate but shall pass as in wrongful death actions. (TCA 20-5-102).

Actions already commenced whether contract or tort, with exception of actions for wrongs affecting character, do not abate upon the death, disability or transfer of interest of either party, if the cause of action survives. (TCA 20-5-101-02). Such actions may be revived by or against appropriate representative, heir or assign. (TCA 20-5-116). No appeal or writ of error is abated by death of either party but may be revived by or against personal representative, heir or assign. (TCA 20-5-101-02). See category 13 Estates and Trusts, topic 13.05 Death.

Limitation of.

See topic 5.16 Limitation of Actions.

Small Claims.

See category 6 Courts and Legislature, topic 6.01 Courts.

Prohibited Actions.

Person rendering free emergency care at accident or disaster or rendering emergency care at public gathering not liable to person treated except for gross negligence. (TCA 63-6-218). Counselor (other than state employee) at nonprofit counseling center operated at least partially with volunteers not liable for suicide or attempted suicide by counseled person. (TCA 33-3-201). Product liability controlled by TCA 29-28-101 et seq., under which liability of manufacturers partially limited, liability of nonmanufacturers for sealed container products substantially limited, and strict liability of nonmanufacturers substantially limited.

Administration.

See category 13 Estates and Trusts, topic 13.08 Executors and Administrators.

Direct Actions Against Insurer.

See category 23 Transportation, topic 23.01 Motor Vehicles, subhead Direct Actions.

5.03 APPEAL AND ERROR:

Rules of Appellate Procedure adopted by Supreme Court of Tennessee under statutory authority (TCA 16-3-402), and govern appellate procedure in civil and criminal proceedings. Rules supersede previous statutory sections where inconsistent. (TCA 16-3-406). Rules are codified separately from Code, and references herein are to Rule number unless otherwise indicated. Appellate Rules correspond only roughly with Federal Rules of Appellate Procedure.

From Administrative Agencies.

Appeal from final state agency decision in contested case, or from preliminary, procedural or intermediate state agency decision in contested case where appeal of final decision will not provide adequate remedy, must be filed in appropriate chancery court within 60 days of decision. (TCA 4-5-322). Direct review of agency order by Court of Appeals where otherwise authorized by statute may be had by filing and service of petition for review. (12).

From Minor Tribunals.

Appeals from judgments of officer of municipality or recorder lie to circuit court. Party appealing has ten days in which to perfect appeal by giving good and sufficient bond. (TCA 27-5-101 et seq.). General Sessions courts supersede justices of peace in most counties. (TCA 16-15-101 et seq.). Appeals from these courts lie to circuit court, with ten days allowed for perfecting appeal. (TCA 27-5-108). Appeal of cases from general sessions court shall be de novo, including damages. (TCA 16-15-729).

From County Court.

Appeals from the county court lie to the circuit court except where the county court has concurrent jurisdiction with circuit and chancery courts, in which cases appeal lies direct to appellate court of review. (TCA 27-4-101 et seq.).

From Juvenile Court.

Appeals from juvenile court of final order or judgment for unruly child proceedings or dependent and neglect proceedings lie to circuit court. Any appeal from any final order or judgment in delinquency proceeding may be made to court having criminal jurisdiction. All other appeals governed by Rules of Appellate Procedure. (TCA 37-1-159).

From Circuit and Chancery Courts.

Appeals of final decisions are to Court of Appeals, Court of Criminal Appeals and Supreme Court, and are of right. (3). Appeal by permission and at discretion of both trial and appellate court may be taken within prescribed time limits from interlocutory orders. (9). Extraordinary appeal of interlocutory orders may be permitted by appellate court in certain narrowly defined circumstances. (10).

Court of Appeals has appellate jurisdiction only over civil or criminal contempt arising out of civil matter and over all civil cases except those involving: (1) Constitutionality of statute or ordinance as sole determinative question; (2) right to hold public office; (3) workers' compensation; and (4) state revenue. In such cases, appeal is directed to Supreme Court. (TCA 16-3-201; TCA 16-4-108). Court of Appeals may hear appeal of order denying or granting class certification if appeal is filed within ten days of entry of order in trial court. (TCA 27-1-125).

Court of Criminal Appeals has appellate jurisdiction only in criminal cases, cases arising under Post-Conviction Procedure Act (TCA 40-30-101 et seq.), and civil or criminal contempt arising out of criminal matter and extradition cases (TCA 16-5-101 et seq.). Where sole question is constitutionality of statute or ordinance, appeal is directed to Supreme Court. (TCA 16-5-108).

Supreme Court has appellate jurisdiction only. It also has jurisdiction over interlocutory appeals arising out of matters over which court has exclusive jurisdiction and discretionary jurisdiction on its own motion over undecided cases of compelling public interest for which notice of appeal or application for interlocutory or extraordinary appeal is filed with intermediate appellate court. (TCA 16-3-201). Appeal from final decision of Court of Appeals or Court of Criminal Appeals is by permission and at discretion of Supreme Court. (11). Appeal from final decision of trial court in civil cases excepted from Court of Appeals jurisdiction (TCA 16-4-108, see subhead Court of Appeals, supra) and in criminal cases excepted from Court of Criminal Appeals jurisdiction (TCA 16-5-108, see subhead Court of Criminal Appeals, supra) is directly to Supreme Court and as of right (3), as is review of death sentence (TCA 39-13-206). Any case appealed by mistake to wrong court must be transferred to proper court. (17).

Appeal Bond.

Bond with “sufficient surety” for costs on appeal must be filed in trial court, with notice of appeal unless bond for stay (which includes security for costs on appeal) has been filed. (6). Appellee may raise by motion objections to trial court to form of bond and sufficiency of surety. Appeal by poor persons is allowed without security for costs or prepayment of fees where appellant was permitted to proceed as poor person in trial court. (18). See topic 5.08 Costs.

Stay of Proceedings.

Initial stay of execution of judgment automatic until 30 days following entry except in injunction, receivership and custody cases, actions that remove public officer, and where defendant endangers satisfaction of judgment. (Rules of Civil Procedure 62.01). Additional stay of 30 days occurs after entry of order on timely motion for new trial, amendment of judgment, additional findings of fact, or judgment in accordance with motion for directed verdict. (Rules of Civil Procedure 62.02). Other relief in certain cases discretionary with trial court. (Rules of Civil Procedure 62.03, 62.07). Stay on appeal effective when bond with sufficient surety to secure judgment, interest, damages for delay, and costs on appeal approved by trial court. Upon motion, and based on such factors as appellant's financial condition and amount of insurance coverage, trial court may set bond in lesser amount. (Rules of Civil Procedure 62.04, 62.05).

All actions awarding, changing or affecting custody, interlocutory or final judgment, by any court of state shall not be stayed after entry unless ordered by that court. (TCA 36-6-111).

Time.

Appeal to Supreme Court and Court of Appeals initiated by filing with clerk of trial court notice of appeal specifying appellant, judgment appealed from and court to which appeal taken (3) within 30 days from later of entry of judgment or entry of order disposing of timely motions in civil cases (4). Copy of notice of appeal in civil cases must be served on counsel within seven days of filing and proof of service must be filed with clerk of trial court within seven days of service. (5).

Extent of Review.

Any question of law may be presented for review except certain issues regarding conduct of court or parties at trial, unless those matters were specifically stated in motion for new trial. (13; 3). Unless otherwise required by statute, review of trial court's findings of fact is de novo upon trial record accompanied by presumption of correctness. Findings of fact by civil jury disturbed only if no material evidence to support verdict. (13). Concurrent findings of fact by master and chancellor and by chancellor and Court of Appeals binding on appellate court. (TCA 27-1-113).

Character of Hearing.

Appeals from minor tribunals, county court and juvenile court to the circuit court are tried de novo. (TCA 27-4-108; TCA 37-1-159).

See also topic 5.19 Practice.

5.04 BONDS:

Sureties.

Fidelity and bonding companies regulated by TCA 56-15-101 et seq. See also topic 5.03 Appeal and Error, subhead Appeal Bond.

Enforcement.

Where costs are adjudged against party, judgment may on motion be against him and his sureties. Execution must issue first against party. (TCA 20-12-136). Bonding companies subject to bad faith penalty as provided in TCA 56-7-105.

5.05 CERTIORARI:

Common law writ of certiorari is available under proper circumstances. The writ may be used upon proper showing, instead of an appeal, in cases begun before a justice of the peace or general sessions court. (TCA 27-8-104).

Jurisdiction is in the judges of trial courts of law to remove causes from any inferior jurisdiction. (TCA 27-8-104).

Grounds.

The writ may be granted where an inferior tribunal has exceeded its jurisdiction or is acting illegally, or when in the judgment of the court there is no other plain, speedy, or adequate remedy. (TCA 27-8-101).

Proceedings.

The petition must be sworn to (TCA 27-8-106) and bond must be given in double amount of judgment complained of (TCA 27-8-110).

Review.

Suits are triable before the appellate court. (TCA 27-8-115). Final judgment is awarded there. (TCA 27-8-117).

5.06 CHARITABLE IMMUNITY:

See topic 5.09 Damages.

5.07 COMMISSIONS TO TAKE TESTIMONY:

See topic 5.11 Depositions and Discovery.

5.08 COSTS:

Liability for costs in civil cases is discretionary with the court. The amount is fixed by statute and taxed as directed by the court. (TCA 20-12-119).

Security for costs must be given upon issuance of all leading process, except that pauper's oath and filing of accompanying affidavit of indigency may be given by resident of state. (TCA 20-12-120; TCA 20-12-127).

5.09 DAMAGES:

Common law prevails as to compensatory damages. Punitive damages are awarded only if court finds defendant acted intentionally, fraudulently, maliciously, or recklessly when wrongful act was done. As to damages for frivolous appeal, see topic 5.03 Appeal and Error.

Comparative Negligence Rule.

Supreme Court of Tennessee adopted modified form of comparative negligence in 1992. (833 S.W.2d 52 [1992]). Plaintiff recovers if negligence of plaintiff is less than combined negligence of all tortfeasors. All tortfeasors need not appear in case. Uniform Comparative Fault Act not adopted.

Fault may not be assessed against patient in medical malpractice action in which patient's negligent conduct provides only occasion for medical attention, care or treatment which is basis for action. (134 S.W.3d 121 [2004]).

Charitable Immunity.

Abrogated as defense, but trust funds used solely for charitable purposes are exempt from execution. (95 S.W.2d 917 [1935]).

Sovereign Immunity.

Controlled generally by TCA 29-20-101 et seq. Immunity of sheriffs and counties for acts or omissions of deputies and special deputies controlled by TCA 8-8-301-03. As general rule, all government entities are immune from suit for any injury which results from proprietary government activities. However, specific exceptions to this general rule are found at 29-20-202 et seq. (TCA 29-20-201 et seq.). Circuit courts have jurisdiction over actions under statute. Judgment may not exceed insurance limits of defendant. (TCA 29-20-311).

No-Fault Insurance.

See category 23 Transportation, topic 23.01 Motor Vehicles, subhead No-Fault Insurance.

Uniform Contribution Among Tortfeasors Act (Revised).

Adopted. (TCA 29-11-101 et seq.)

Wrongful Death of Pet.

Limited monetary recovery allowed for wrongful death of pet. (TCA 44-17-403).

See also category 13 Estates and Trusts, topic 13.05 Death, subhead Action for Death.

5.10 [RESERVED]

5.11 DEPOSITIONS AND DISCOVERY:

Tennessee Supreme Court has adopted Rules of Civil Procedure patterned after Federal Rules of Civil Procedure in effect immediately prior to July 1, 1970. Rules are separately codified from Code, and references herein are to Rule Number, unless otherwise indicated.

Videotape Depositions.

Depositions may be taken on audio videotape according to procedures outlined in Rules of Civil Procedure, 30.02. Notice of deposition and subpoena for attendance must state deposition will be recorded by audiovisual means. (30.02).

Medical Records.

Unless otherwise specified in records subpoena, whether for trial or deposition, hospital licensed in Tennessee not party or location of injury may, within five days of subpoena service, deliver or send by certified or registered mail to court clerk (or judge if for trial or to officer before whom deposition taken) copy of records subpoenaed in lieu of original, and hospital's custodian of records need not appear. Copy of subpoena for records must be delivered to adverse party or his attorney at least ten days prior to trial. (TCA 68-11-402). Copy of subpoenaed records must be in sealed envelope and accompanied by custodian's certification as provided by statute. (TCA 68-11-403; -405). Envelope may not be unsealed without authorization or consent by patient or his agent, unless (1) subpoenaed by patient or his attorney, (2) patient, or someone authorized on his behalf, has consented to or waived privilege of confidentiality, or (3) subpoena is for criminal proceeding. (TCA 68-11-404). Copy is admissible in evidence as original. (TCA 68-11-406).

No liability for disclosing medical information in response to subpoena, court order or request authorized by state or federal law. (TCA 68-11-1503).

Medical records may be used at trial for any purpose without witness testimony provided that: (i) Records are certified by custodian of records or physician, (2) records are true and correct copy, and (3) records were prepared by person whose duty to do so in ordinary course of business. Person using records under (c.) must give 60 days notice. (TCA 24-7-122).

Within State for Use Within State.

May be taken upon notice to other parties at least five days beforehand if taken in county where suit is pending or seven days if taken outside county. Notice must state time and place and identity of witness. Court may on cause enlarge or shorten time for notice. (30.02).

Outside of State for Use Within State.

Notice requirements identical to those for depositions taken within state. It is customary to have commission issued to officer before whom deposition will be taken by judge, clerk or deputy clerk, unless waived by parties.

Perpetuating Testimony.

Federal Rules obtain. (27.01-27.03).

Before Whom Taken.

Unless all parties to case enter into written stipulation, deposition shall not be taken before person who is: (1) Party to action or attorney; (2) relative of any party or party's attorney; (3) employee of party; (4) someone who has had sex with any party within last two years and (5) someone with financial interest in action or its outcome. (2009 c. 427).

Federal Rules obtain, except that depositions may not be taken before certain related or interested parties. (28.01, 28.02, 28.03).

Compelling Attendance of Witnesses.

Deposition subpoena may be issued by officer authorized to take depositions or clerk of court, and may require production of tangible things. Resident of this state can be required to give deposition only in county where he resides or works, unless otherwise ordered by court. (45.04). Physicians, dentists, attorneys and psychologists are not required to testify other than by deposition. (TCA 24-9-101).

Nonresident motorist served with process under TCA 20-2-203-07 (see category 23

Transportation, topic 23.01 Motor Vehicles, subhead Actions Against Nonresidents) may be required to give deposition in county where action pending. (TCA 20-2-203).

Senior psychological examiners may be subpoenaed to testify at deposition but not trial. (TCA 24-9-101[6]).

Examination of Witnesses.

Patterned after Federal Rules, except that identity of expert consulted by other party in anticipation of litigation or preparation for trial and who is not expected to be called as witness at trial is discoverable only upon showing that facts or opinions on same subject can not be obtained by other means. (26).

Return.

Patterned after Federal Rules. (30.06).

See also topic 5.19 Practice; and category 6 Courts and Legislature, topic 6.01 Courts, subhead Courts of General Sessions.

5.12 [RESERVED]

5.13 EVIDENCE:

Witnesses.

Conviction of felony does not disqualify but only goes to credibility. (TCA 40-20-112). See also topic 5.10 Depositions and Discovery.

Privileged Communications.

Confidential communications to one's attorney are privileged (TCA 23-3-105), even after death (118 S. Ct. 2081 [U.S. 1998]).

Ministers, priests, rabbis, etc., who have reached majority, are neither allowed nor required to testify as to information communicated in confidence, in professional capacity and necessary to enable him or her to discharge functions of office, if communicant was seeking spiritual counsel relative to such information. (TCA 24-1-206). Testimony before committee of state legislature regarding paternity is inadmissible in civil proceeding. (TCA 24-7-114). Communications between patient and physician acting as psychiatrist are privileged except when statutory exceptions exist. (TCA 24-1-207). Communications between licensed marital or family therapists and clients are privileged except where statutory exceptions exist. (TCA 63-22-114; TCA 33-3-114). Communications between client and registered nurse nationally certified as, and practicing as, psychiatric or mental health specialist receive equivalent privilege as patient-psychiatrist communications. (TCA 63-7-125).

Communications between accountant and client are privileged in civil actions but not criminal actions. (TCA 62-1-116; Atty. Gen. Opinion 97-028).

Communications between attorney and private detective or investigator, hired by such attorney while acting in their respective professional capacities, are privileged. (TCA 24-1-209).

Child Abuse.

Courts have recognized existence of evidentiary privilege to protect anonymity of reporters, victims, and perpetrators of child abuse pursuant to TCA 37-1-409, am'd 2009, c. 358 and TCA 37-1-612. Reporter's identity remains confidential unless juvenile court determines testimony of reporter is material to indictment or conviction. (2009 c. 358). However, this privilege may be overcome by plaintiffs' need for disclosure during discovery in claim of false allegation of abuse. (952 F. Supp. 1232 [1997]).

Husband and Wife.

In either civil or criminal proceeding, no married person has privilege to refuse to take witness stand solely because that person's spouse is party to proceeding. In civil proceeding, confidential communications between married persons are privileged and inadmissible if either spouse objects, except in proceedings between spouses or concerning abuse of one of spouses or abuse of minor in custody or control of either spouse. (TCA 24-1-201). In criminal proceeding, confidential communications between married persons are privileged, if: (1) communications originated in confidence that they will not be disclosed; (2) element of confidentiality is essential to full and satisfactory maintenance of relation between parties; (3) relationship is one which ought to be sedulously fostered; (4) injury to relation by disclosure of communication outweighs benefit gained for correct disposal of litigation; and (5) either spouse objects. (TCA 24-1-201). Such privilege shall not apply to proceeding concerning abuse of one of spouses or abuse of minor in custody or control of either spouse.

Communications or Transactions with Persons Since Deceased or Incompetent.

In actions by or against executors, administrators or guardians in which judgment may be rendered for or against them, neither party is allowed to testify against the testator as to transaction with the testator, intestate or ward unless asked by the opposite party. This disqualification extends to officers and directors of corporations. (TCA 24-1-203).

It is unlawful for a party to any action to testify as to any transaction or conversation with any opposite party in interest if such party cannot testify because of idiocy, lunacy or insanity unless called by the opposite party and then only in the discretion of the court. The exemption applies to officers or directors of corporations. Party in divorce proceeding may not testify against party's incapacitated or mentally incompetent spouse. (TCA 24-1-202, am'd 2009, c. 281).

Self-incrimination.

Accused in criminal case cannot be compelled to give evidence against himself. (Const., 5th Amendment).

Compelling Attendance.

See topic 5.10 Depositions and Discovery.

5.14 INJUNCTIONS:

Injunctive relief may be obtained by (1) restraining order, (2) temporary injunction, or (3) permanent injunction in final judgment. Restraining order may only restrict doing of act. Injunction may restrict or mandatorily direct doing of act. (Rules of Civil Procedure, 65.01).

Tennessee Supreme Court has adopted Rules of Civil Procedure patterned after Federal Rules of Civil Procedure. Rules are separately codified from Code, and references herein are to rule number, unless otherwise indicated.

The chancery courts have liberal power to grant injunctive relief. (TCA 29-1-102; TCA 16-11-102).

Jurisdiction.

Injunctions are granted by the chancellors, circuit judges, and judges of criminal and special courts, in accordance with the general rules of equity. (TCA 29-1-106).

Prerequisites.

Restraining order and temporary injunction may only be granted upon verified complaint alleging immediate and irreparable damage. (65.03).

Procedure.

Application made by complaint to judge before whom case is pending. Restraining order and temporary injunction must be signed by judge and endorsed by date and time of issuance. (65.03, 65.04).

Bond required on granting restraining order or temporary injunction in amount set by court, unless action brought on pauper's oath. (65.05).

Temporary Injunction.

Notice to adverse party required. Court must make findings of fact and conclusions of law in granting, denying or modifying temporary injunction. Restraining order may be granted without notice. (65.03, 65.04). Temporary restraining order granted without notice expires by its terms within time set by court, not to exceed 15 days, unless extended for good cause shown or by consent. (65.03).

Workplace Violence.

Under certain circumstances, employer may obtain temporary restraining order and injunction prohibiting certain violent acts or threats at workplace, by employee. (TCA 20-14-101 to TCA 20-14-109).

5.15 JUDGMENTS:

Tennessee Supreme Court has adopted Rules of Civil Procedure patterned after Federal Rules of Civil Procedure. Rules are separately codified from Code, and references therein are to rule number, unless otherwise indicated.

Judgments by Confession.

Power of attorney to confess judgment before action commenced and process served is void. Any judgment based thereon is void. (TCA 25-2-101).

Judgments by Consent.

No statutory provision.

Judgments on Pleadings.

Follows Federal Rule. (12.03).

Summary Judgments.

Follows Federal Rule, except that motion for summary judgment may not be filed by claimant until 30 days after commencement of action; adverse party entitled to 30 days notice of hearing on motion. (56.01 et seq.).

Any motion for summary judgment must be accompanied by separate concise statement of material facts as to which moving party contends there is no genuine issue for trial. Each fact must be set forth in separate, numbered paragraph and be supported by specific citation to record.

Default Judgments.

Default judgment entered upon application to court. No default judgment can be entered against persons under disabilities unless represented by guardian or other representative. Effective July 1, 2000, parties against whom judgment is sought shall be served with written notice of application for judgment at least five days before hearing on application, regardless of whether party has made appearance in action. Court may take such evidence as is necessary to determine amount of damages. (55.01).

Offer of Judgment.

Follows Federal Rule, except such is available under Tennessee rules to party prosecuting, as well as defending claim. Tennessee does not provide for offer of judgment after determination of liability and before determination of amount of damages, as do Federal Rules. (68).

Docketing.

Judgment entered of record when signed by judge and signed by or served upon parties or counsel and filed with clerk. (58).

Vacation or Modification.

Follows Federal Rule, except newly discovered evidence and satisfaction, release or discharge of judgment or reversal or vacation of prior judgment upon which judgment based not included as ground for relief from final judgment. (60.01, 60.02).

Lien.

Judgment of court of record and judgment of General Sessions Court over $500 becomes a lien upon debtor's lands from time certified copy of judgment is registered in county where land is located. (TCA 25-5-101). Lien extends to lands acquired after its inception and continues for one year. (22 Tenn. 177 [1842]).

Judgment lien created by registration as provided in TCA 25-5-101, will last for time remaining in ten year period beginning on date of entry of final judgment in court clerk's office. (TCA 25-5-105).

Where valid execution was taken out on or after May 17, 2000, lien will expire ten years from date judgment was rendered. (TCA 25-5-105).

Judgment for $500 or less of General Sessions Court or justice of peace is not a lien on land; (25-5-101[b]); levy of execution is necessary to create lien on such judgments (TCA 16-15-804).

When requested, clerk shall mail copy of judgment to all parties or counsel within five days after entry. (58).

Judgment is not a lien on equity in lands or other property, until certified abstract thereof is registered in office of register of deeds in county where land is situated, and unless suit in equity is filed within 30 days after return unsatisfied of original execution issued at least within time provided for mandatory issuance by clerk. (TCA 25-5-102; -104; 50 S.W. 771 [1898]). See category 8 Debtor and Creditor, topic 8.05 Executions.

Revival.

At any time within ten years after rendition, judgment may be revived by scire facias or action on judgment. After ten years, it may be revived only by scire facias, and the ten year statute of limitations (see topic 5.16 Limitation of Actions), if pleaded, is bar to such revival.

Satisfaction.

Any legal satisfaction produces permanent and irrevocable discharge after which judgment cannot be restored. (69 Tenn. 447 [1878]).

Foreign Judgments.

May be evidenced by copy of judgment attested by officer having custody of judgment record, or his deputy, and certified as provided under Federal Rules. (Tenn. Rules of Evidence 803[8], 902[4]).

Certified copy of final judgment or decree of any court of record may be used as evidence without being supported by record on which judgment or decree based. Copy has same force as if record had been filed with copy. However, use of copy does not preclude direct attack on or challenge to validity of judgment or decree or use of record upon which same based. (TCA 24-6-101).

When creditor has exhausted legal remedies as to judgment recovered in another state against resident thereof, debtor's real or personal property in Tennessee may be subjected to satisfaction of debt, by bill stating facts under oath filed in court of county where property situated. (TCA 16-11-107).

See also subhead Revised Uniform Enforcement of Foreign Judgments Act, infra.

Revised Uniform Enforcement of Foreign Judgments Act adopted. (TCA 26-6-101 et seq.). Judgment filed in office of circuit or chancery court clerk. (TCA 26-6-104). No execution or enforcement of judgment until 30 days after debtor notified of filing by service of summons issued by clerk. (TCA 26-6-105).

5.16 LIMITATION OF ACTIONS:

Except as discussed infra this topic, actions are barred unless commenced within following periods after respective causes of action accrued. (TCA 28-2-111[a]-[c]; TCA 28-3-101-09).

Ten years: On demand note (TCA 28-3-109); on judgment of court of record (TCA 28-3-110); to enforce mortgage, deed of trust, vendor's lien reserved in deed or assignment of realty to secure debt from date of maturity (foreclosure available although debt barred by six years statute) (TCA 28-2-111); against guardian, executor, administrator, sheriff, clerk or other public officer on his bond; any action not otherwise provided for (TCA 28-3-110). Aforementioned liens on realty may be extended for any period agreed on by written instrument duly executed, acknowledged and recorded within ten year period after maturity. (TCA 28-2-111[c]). Delinquent taxes on realty uncollectible ten years from Apr. 1 of year following year in which such taxes become delinquent unless realty is sold within ten year period. (TCA 67-5-1806).

Seven years: To recover real property against adverse possessor. (TCA 28-2-101).

Six years: On bond, note other than demand note, bill of exchange or other written contract, sealed or unsealed; on oral or implied contract; on account (in case of mutual and reciprocal accounts between merchants, time runs from date of last item); against sureties of guardian, executor, administrator, sheriff or other public officer for nonfeasance, misfeasance and malfeasance in office. (TCA 28-3-109).

See also TCA 45-2-710, which contains special provisions related to action to enforce obligation of bank to pay all or part of balance of deposit account or certificate of deposit.

Four years: For breach of any contract for sale, unless limitation reduced by agreement of parties to specified period, not less than one year. (TCA 47-2-725). Actions to recover damages for deficiency in design, planning, supervision, observation of construction or construction of improvement to real property, for injury to property or person or wrongful death arising out of such deficiency shall be brought against person performing or furnishing improvement within four years after substantial completion, unless occurring in fourth year after substantial completion, then within one year from date of occurrence. (TCA 28-3-201-05). Actions for damages against persons engaged in surveying, including determination and description of boundaries, distances and direction for purposes of furnishing legal description thereof, shall be brought within four years of date survey is recorded on plat. (TCA 28-3-114).

Three years: For injury to real or personal property; for detention or conversion of personal property; for civil action on statute creating monetary liability, liquidated damages or other recovery therefor for personal services when statute fixes no other limitation. (TCA 28-3-105). For usury or excess loan charges, commitment fees or broker commissions. (TCA 47-14-118). For action to contest lapse of mineral interest. (TCA 66-5-108). See also category 3 Business Regulation and Commerce, topic 3.19 Interest, subhead Usury.

Two years: For civil action based on violation of securities laws. Proceeding must be instituted within five years after act or within two years after person discovers, or should have discovered in exercise of reasonable diligence, facts constituting violation, whichever occurs sooner. (TCA 48-2-122). See also category 13 Estates and Trusts, topic 13.16 Wills, subhead Contest, catchline Limitation of Actions.

One year: For injury to the person, death, libel, malicious prosecution, false imprisonment, or breach of promise to marry, actions and suits against attorneys or licensed or certified public accountants for malpractice whether in contract or tort; for statutory penalty; civil actions under federal civil rights statutes (TCA 28-3-104); false light invasion of privacy by written statement (53 S.W.3d 640 [2001]). **New action** may be brought within one year from failure to execute process (Rules of Civil Procedure, 3) or inconclusive judgment, dismissal, arrest or reversal (TCA 28-1-105) or from dismissal of action by Federal Court for lack of jurisdiction (TCA 28-1-115).

Six months: For slander by oral statement (TCA 28-3-103); false light invasion of privacy by oral statement (53 S.W.3d 640).

Uniform Commercial Code adopted. (TCA 47-1-101 et seq.).

Miscellaneous: **Action to recover money or goods lost at gambling** must be commenced within 90 days after payment or delivery thereof if brought by loser, but action brought for use of wife, children or next of kin of loser may be brought within one year after expiration of 90 days and action by creditor of loser within two years after such expiration. (TCA 28-3-106).

Product Liability.

Cause of action for personal injury from defective product accrues from date of injury or date injury should have been discovered by reasonable person and is not barred until one year from that date (TCA 28-3-104), except that no action for personal or property injury from product may be brought after later of six years from date of injury, ten years from date of first purchase of product for use or consumption, or one year from legally required anticipated life expiration date placed on product by manufacturer. As to actions for injury caused by silicone gel breast implant, no action may be brought after 25 years from date of implant or four years from date plaintiff knew or should have known of injury. (TCA 29-28-103).

Comparative Negligence.

In suits where comparative fault is issue and defendant names in answer or amended answer person or persons not party to suit as causing injury or damage for which plaintiff seeks to recover, and plaintiff's cause of action would otherwise be barred by applicable statute of limitations, plaintiff is granted additional 90 days from filing answer or amended answer to amend complaint and add such person as defendant. (TCA 20-1-119).

Foreign Causes of Action.

When statute of limitations of another state or country has created bar to action upon cause accruing therein, while party to be charged was resident in such state or under such government, bar is equally effectual in this state. (TCA 28-1-112).

Disabilities of Plaintiff.

If person entitled to commence action is, at time cause of action accrued, under age of 18 or of unsound mind, such person or his representatives and privies, as case may be, may commence action after removal of disability, within time of limitation of particular cause of action, unless it exceeds three years, and in that case within three years from removal of disability. (TCA 28-1-106).

Counterclaims, Cross-Claims and Third Party Complaints.

Counterclaims, cross-claims and third party complaints as to issues arising out of transaction or occurrence which is subject of opposing party's claim are barred only if barred at time claims asserted in complaint were interposed. (TCA 28-1-114).

Absence of Defendant.

If cause of action accrues against person who is out of this state, action may be commenced within time limited therefor, after such person comes into state. If after cause of action has accrued, person against whom it has accrued is absent from or resides out of state, time of his absence of residence out of state is not taken as any part of time limited for commencement of action. (TCA 28-1-111).

Other Limitations

Silica Compensation Fairness Act enacted to establish specific medical criteria in order to bring asbestos or silica related lawsuit. (TCA 29-34-301).

Contractual limitations are valid, except that ordinary life insurance policy may not provide for any limitation less than five years. (TCA 66-29-105).

Revival of Barred Claims.

No statute exists prescribing what promise or act will revive cause of action barred by statutes. Partial payment of debt is acknowledgment of debt and implies promise of payment which operates to keep debt alive for statutory period from that time. (588 S.W.2d 542 [1979]).

Pleading.

Statute of limitations defense must be set forth affirmatively in responsive pleading. (Rules of Civil Procedure, 8.03).

5.16A PARTITION:

Any person having an estate of inheritance, or for life, or for years, in lands, and holding or being in possession thereof, as tenants in common or otherwise, with others, is entitled to partition thereof, or sale for partition. (TCA 29-27-101).

Jurisdiction.

The county, circuit, or chancery courts have concurrent jurisdiction of partition cases. (TCA 29-27-106).

Venue.

The petition may be filed in the court of the county in which the land or any part of it lies, or in which the defendant resides. If all claimants join in the petition, or assent to the partition, it may be filed in any county in the state, whether any of the land lies therein or not. (TCA 29-27-107).

Proceedings.

Partition is made according to the respective rights of the parties, setting apart to such as desire it their shares in severalty, and leaving the shares of others, if desired, in common; and if there are minors, the court may, in its discretion, leave their shares in common, or set them apart in severalty, as may appear to be just and right, upon the proof introduced. (TCA 29-27-104).

Partition in Kind or by Sale.

Partition may be in kind (TCA 29-27-101) or by sale when property is such that it cannot be partitioned or that sale would be to manifest advantage of parties (TCA 29-27-201).

5.17 [RESERVED]

5.18 PLEADING:

Tennessee Supreme Court has adopted Rules of Civil Procedure patterned after Federal Rules of Civil Procedure. Rules are codified separately from the Code, and citations herein are to Rule Number, unless otherwise indicated. See also topic 5.19 Practice.

Pleadings Permitted.

Federal Rules obtain. (7.01, 7.02).

Complaint.

Federal Rules obtain, except that jurisdictional allegations not required. (8.01). Product liability complaint must state amount of damages sought from any defendant. (TCA 29-28-107).

Answer.

Federal Rules obtain except that affirmative defense of comparative fault must be accompanied by identification or description of any other alleged tortfeasors. (8.02, 8.03).

Counterclaim.

Federal Rules obtain, except that as to compulsory counterclaims, tort claims are excluded. Counterclaims not mandatory if jurisdiction of court limited by subject matter or monetary amount to preclude claim. (13.01-13.09).

Reply.

Federal Rules obtain. (7.01).

Demurrer.

Abolished. (7.03).

Amended or Supplemental Pleadings.

Federal Rules obtain, except that time within which any pleading may be amended as a matter of right is changed to 15 days and amendment after verdict to increase amount sued for is not permitted. Federal relation back rule adopted. (15.01, 15.02, 15.03). Ability to amend complaint to reflect defendant's correct name under relation-back provision of Rule 15.03. (954 S.W.2d 36 [1997]).

Verification.

Federal Rules obtain and federal amendments removing mandatory sanctions and providing for notice and response period adopted. (11).

Signature.

Each pleading must state signer's address, telephone number, and Tennessee Board of Professional Responsibility number, if any. (11.01).

Service.

Federal Rules obtain; Tennessee, however, does not permit service by electronic means. (5.01, 5.02, 5.03, 5.04). If process remains unissued for 90 days or is not served within 90 days from issuance, plaintiff cannot rely on original commencement to toll running of statute of limitations unless plaintiff has new process issued within one year from issuance of previous process, or if process was issued, within one year of filing of complaint. (3; 4.03).

Filing.

Federal Rules obtain. (5.05, 5.06).

Time.

Defendant allowed 30 days to file answer after service and plaintiff 30 days to reply to counterclaim after service of answer, unless otherwise provided by statute. (12.01).

Computation of time: Federal Rules obtain. (6.01; 6.02).

Proof of Claims.

Claims are proved either by deposition or by oral testimony in open court. An account on which action is brought, coming from another state or another county of this state or from the county where suit is brought, with the affidavit of the plaintiff or his agent to its correctness, is conclusive against the party sought to be charged, unless he shall on oath deny the account. Upon denial, in interest of justice, judge to continue action to date certain for trial. (TCA 24-5-107).

Form for Proof of Claim.

State of. . . ., County of. . . ., ss. Personally appeared before me. . . ., a. . . . in and for said State and county, duly commissioned, and qualified according to law,. . . ., who, being duly sworn by me, deposes and says he is. . . ., of the firm of. . . ., that the foregoing account against. . . . is correct, due and unpaid; that there are no other credits to be given said account; that said account is for goods and merchandise sold and delivered to the said. . . by the said. . ., that the said. . . . is justly indebted to. . . in the sum of. . . . dollars, together with interest and charges. (Signed).

Sworn to and subscribed before me, at. . . ., this. . . . day of. . . ., 20. . . . .

(Official seal). (Signature and title).

Small Claims.

See category 6 Courts and Legislature, topic 6.01 Courts.

Frivolous Claims.

Penalty for bringing frivolous claims is imposition upon attorney, represented party, or both, of appropriate sanction, including order to pay other party reasonable expenses and attorney fees incurred due to frivolous claims. (11.03).

5.19 PRACTICE:

Pursuant to statutory authority (TCA 16-3-402-07, -601), Tennessee Supreme Court has adopted Rules of Civil Procedure. Rules, as amended, are patterned after Federal Rules of Civil Procedure as in effect immediately subsequent to Dec. 1, 2000. Material variations from Federal Rules are set forth under topics Pleading, and Process.

Discovery.

Substantially identical to Federal Rules as in effect immediately subsequent to July 1, 1975 with material differences noted herein. Rule 26(b)(2) not enacted. Five days notice of deposition required when deposition to be taken in county where action is pending; if to be taken in another county, seven days notice required. (30.02[1]).

Demand for Admission of Facts.

Identical to Federal Rules as in effect immediately subsequent to July 1, 1975. (36.01, 36.02).

Direct Actions Against Insurer.

See category 23 Transportation, topic 23.01 Motor Vehicles, subhead Direct Actions.

Small Claims.

See category 6 Courts and Legislature, topic 6.01 Courts.

See also topics 5.02 Actions, Appeal and Error, Depositions and Discovery, Injunctions, Judgments, Pleading, Process; category 8 Debtor and Creditor, topics 8.02 Attachment, 8.05 Executions, 8.09 Garnishment.

Prefiling Procedures for Claims Based on Construction Defects.

Certain prefiling procedures must be complied with prior to maintenance of actions against contractors, subcontractors, suppliers or design professionals based on design defects in residential or commercial property. (TCA 66-36-103).

5.20 PROCESS:

Tennessee Supreme Court has adopted Rules of Civil Procedure patterned after Federal Rules of Civil Procedure. Rules are codified separately from Code, and citations herein are to Rule Number, unless otherwise indicated.

Civil actions are commenced within meaning of any statute of limitations upon filing a complaint, whether process is returned served or unserved. If process is not served or not returned within 90 days from issuance, plaintiff must either prosecute and continue action by applying for and obtaining issuance of new process periodically, each new process to be obtained within one year of issuance of previous one, or plaintiff must recommence action within one year from issuance of initial process not served or not returned. (3).

In action arising out of ownership or operation of motor vehicle if owner or operator cannot be served personally or through secretary of state, upon return of process unserved, plaintiff may demand that liability insurer disclose any information in its possession as to whereabouts of owner or operator. Demand must be served by certified mail, return receipt, and must be accompanied by certified copy of return of process. Service on foreign insurer must be through Commissioner of Insurance. Failure to disclose demanded information subjects insurer to liability in damages. (TCA 56-7-1103 through 1105). See also category 23 Transportation, topic 23.01 Motor Vehicles, subhead Direct Actions.

General Requisites.

Upon filing complaint, clerk issues summons in name of State of Tennessee, dated and signed by clerk, with name of court and county, title of action and file number. Summons is directed to defendant stating time within which he must appear and defend and notifying him that in case of his failure to do so, judgment by default will be rendered against him. Summons must state name and address of plaintiff's attorney, or, if none, plaintiff's address. (4.02).

By Whom Issued.

Clerk of court. (4.01).

Who May Serve.

Sheriff, deputy, or lawfully appointed civil process server. (TCA 8-8-201). However, service may not be made by sheriff, deputy or constable if such officer is salaried or commissioned employee of any party to action. (TCA 8-8-216). When process is returned unserved, sheriff may appoint in writing adult citizen of state to serve papers after posting bond and in manner otherwise in accordance with law. (TCA 8-8-220). Service may be made by plaintiff or his attorney by mailing certified copy of complaint and summons by registered or certified return receipt mail. (4.04). Personal service of summons may be made by person over 18 not party to action. (4.01).

Service on Sunday.

Process may be issued and served on Sunday upon application and oath that defendant is removing, or about to remove, himself beyond jurisdiction of court. (TCA 20-2-104).

Personal Service on Individual.

Federal Rules obtain, except that service by leaving copies is available only if defendant evades service. (4.04).

Personal Service on Infant.

By delivering copy of summons and complaint to resident guardian or conservator if known to plaintiff; if not known, by delivering copies to parent having custody within this state; if no such parent within this state, by delivering to person within this state having control of individual. If no such person exists, court shall appoint practicing attorney as guardian ad litem to whom copies shall be delivered. Service shall also be made on unmarried infant 14 years of age or more, not otherwise incompetent. (4.04).

Personal Service on Incompetent Person.

Same as service on infant. (4.04).

Personal Service on Partnership.

By delivering a copy of summons and complaint to a partner or managing agent of partnership, or to an agent authorized by appointment, or by law to receive service on behalf of partnership. (4.04).

Personal Service on Domestic Corporation.

By delivering copy of summons and complaint to an officer or managing agent, or chief agent in county wherein action is brought, or by delivering copies to any other agent authorized by appointment or by law to receive service on behalf of corporation. (4.04).

Personal Service on Association.

Same as service on partnership. (4.04).

Personal Service on Joint Stock Company.

No special provision.

Personal Service on Foreign Corporation.

Same as service on domestic corporation. (4.04).

Personal Service Outside the State.

Nonresidents and residents outside state who cannot be personally served within state are subject to jurisdiction of Tennessee courts in actions arising from: (1) transaction of any business within state; (2) any tortious act or omission within state; (3) ownership or possession of any interest in property located within state; (4) entering into any contract of insurance, indemnity, or guaranty covering any person, property or risk located within state at time of contracting; (5) entering into contract for services or materials to be furnished in state; (6) divorce, annulment or separate maintenance action where parties lived in marital relationship within state, and one party still residing in state, as to alimony, custody, child support and property settlement obligations; (7) any basis consistent with constitutions of state or U.S. (TCA 20-2-214). Service may be obtained by forwarding summons to Secretary of State with $20 fee for registered or certified mailing to defendant. Upon filing affidavit by Secretary of State of receipt of defendant's return-receipt, service shall be consummated. Service may also be made by any person over 21 not party to action, who shall file affidavit stating manner, time and place of service. (TCA 20-2-215-19).

Publication.

In the chancery court, personal service on defendant may be dispensed with and service made by publication in the following cases: (1) where defendant is nonresident of state; (2) when, upon inquiry at his usual place of abode, defendant cannot be found so as to be served and there is just ground to believe that he has gone out of state; (3) when sheriff makes return that defendant is not to be found; (4) when name or residence of defendant is unknown and cannot be ascertained on diligent inquiry; (5) when domestic corporation defendant has ceased to do business and has no known officers, directors, trustees or other legal representatives on whom personal service may be had; (6) when attachment will lie against defendant's property. (TCA 21-1-203). Publication must be in newspaper designated by court for four consecutive weeks. (TCA 21-1-204[a]-[e]). Court clerk (or referee in divorce cases with referee) must send copy of complaint or of publication to defendant at last known address by certified or registered mail and must file mail return receipt in record and note return receipt on docket. (TCA 21-1-205).

Long Arm Statute.

See subhead Personal Service Outside the State, supra.

Proof of Service.

Person serving summons must promptly and within time during which person served must respond, make proof to court and identify person served and describe manner of service. When process is served by mail, person making service must endorse over signature on original summons date of mailing certified copies of summons and complaint and date of receipt of return receipt. Receipt and affidavit setting forth compliance with rule must be sent to clerk for filing. If summons not served within 90 days after issuance, it must be returned with reasons for failure to serve stated thereon. (4.03).

Nonresident Motorists.

See category 23 Transportation, topic 23.01 Motor Vehicles.

See also topic 5.19 Practice.

5.21 REPLEVIN:

Replevin lies for recovery of goods or chattels wrongfully seized or detained. (TCA 29-30-101).

Venue is in county where any part of property is located where contract executed, where any defendant resides, or where address of any defendant was stated to be in any writing on which claim is founded. (TCA 29-30-102).

Action is commenced by filing complaint in Circuit or Chancery Court or warrant in General Sessions Court. If claim is founded upon writing, same shall be attached as exhibit. Complaint or warrant must be sworn to, or have attached sworn affidavit. Following facts must be sworn to: (1) plaintiff is entitled to possession of described property and reasons therefor; (2) description reasonably identifying property; and (3) value of property. (TCA 29-30-103).

Process must show on face that possessory hearing will be held at specific date and time, not less than five days nor more than 20 days after service. Plaintiff is allowed possession only after possessory hearing which, however, may be waived by defendant. General Sessions Court replevin process for motor vehicle must have statutory form attached. (TCA 29-30-104). Writ of possession directs officer after hearing to take possession of property and deliver to plaintiff. (TCA 29-30-107). If requested by plaintiff and upon his posting bond in amount set by court, but not exceeding value of property, court may issue concurrent order restraining defendant from concealing, damaging, or removing property from jurisdiction. (TCA 29-30-105).

Alternative procedure is available to expedite proceeding. Application for writ of possession may be made at beginning of first session of court or at other time established by local rule. Plaintiff must file verified complaint and copy of any writing upon which claim is founded. Upon application, court hears parties and orders writ of possession whenever court finds either: (1) that at least five days prior to application plaintiff mailed by certified mail or delivered to defendant notice of time and place of application and that: (a) such notice has been received by defendant or was directed to defendant at address stated in any writing, signed by defendant, on which claim is founded, and (b) notice was accompanied by copy of complaint and copy of any writing on which claim was founded, and, (c) plaintiff is entitled to possession. If at time plaintiff makes application pursuant to (1) defendant fails to appear, writ of possession is issued directing officer to take possession of property, deliver it to plaintiff, and summon defendant to appear and answer within ten days if in General Sessions Court or within 30 days if in any other court. Whenever defendant appears and resists application for writ of possession, court shall at that time either try action or set times for defendant's answer and trial and determine which party is entitled to possession pending trial. Such temporary possession requires posting of bond in amount set by court; or (2) (a) property was obtained by fraud, misrepresentation or theft; or defendant is (b) concealing property, (c) likely to remove property from jurisdiction, (d) likely to dispose of property, (e) endangering property, or (f) seriously impairing plaintiff's security interest either by use other than that contemplated by parties or by failing to maintain hazard insurance on property whenever written instrument on which claim is founded requires such insurance. Writ of possession pursuant to (2) necessitates plaintiff's posting of bond in amount, fixed by court, not less than value of property. Writ directs officer to take possession of property, deliver it to plaintiff, and summon defendant to appear and answer within ten days if in General Sessions Court and within 30 days if in any other court. (TCA 29-30-106).

If property is perishable or threatens to decline speedily in value, court may issue such orders as necessary to preserve same. (TCA 29-30-107).

5.22 SEQUESTRATION:

If court sees proper in first instance, or if upon issuance of attachment, delinquent cannot be found, writ of sequestration may issue against estate of such delinquent, to compel obedience to decree. (TCA 21-1-801).

5.235.24

5.25 SUBMISSION OF CONTROVERSY:

Any parties in interest, executor, administrator, trustee, or assignee for creditors, with or without action brought, may agree upon a case containing the facts upon which the controversy depends and submit the same to the circuit or chancery court of the county in which either party resides or in which a suit might have been brought to determine such a controversy. Parties must give bond for costs or pay them in advance. Unless otherwise agreed costs paid equally by both sides. Judgment will be entered as in other cases and no objection will lie to jurisdiction of either court whether the matter be of legal or equitable cognizance. Parties to such cases are entitled to all benefits of the proceedings for correction of errors. It must appear by affidavit of parties or attorneys that the controversy is real and in good faith to determine rights of parties. (TCA 29-4-101-05).

5.26 VENUE:

Transitory actions may be brought in county where cause of action arose or where defendant resides, or is found. If plaintiff and defendant reside in same county, then action must be brought in common county or in county where action arose. When action is brought either in county where action arose or where defendant resides, process may be sent to another county as in local action, and it is not necessary that defendant be in county of action either when action is commenced, or during time between commencement of action and service of process. (TCA 20-4-101). Suits commenced by attachment against property of person may be brought in any county in which such real property may be found or where any part of personal property may be found (TCA 20-4-103) and service had on nonresident defendant by publication for four consecutive weeks (TCA 29-6-144). Proper venue to probate will is set forth in TCA 32-2-101. In action where parties are motor vehicle manufacturer and motor vehicle dealer, venue shall be State of Tennessee. (TCA 55-17-115).

Real actions must be brought in county where land lies. Suit for partition of lands lying in several counties may be brought in any one of them. (TCA 24-4-103).

Change of Venue.

In all civil cases at law or equity to be tried by jury, either in circuit or chancery court, in all civil cases before judge of court of general sessions, and in all criminal cases, (1) venue may be changed upon good cause or, (2) court may issue order for special venire of jurors from another county if necessary to insure fair trial. (TCA 20-4-201).

See also category 16 Insurance, topic 16.01 Insurance Companies.

6 COURTS AND LEGISLATURE

6.01 COURTS:

United States District Courts.

Eastern District.

Clerk's office: 800 Market Street, Suite 130, Knoxville 37902.

Northern Division is composed of following counties: Anderson, Blount, Campbell, Claiborne, Grainger, Jefferson, Knox, Loudon, Monroe, Morgan, Roane, Scott, Sevier and Union.

Court sits at Knoxville.

Northeastern Division is composed of following counties: Carter, Cocke, Greene, Hamblen, Hancock, Hawkins, Johnson, Sullivan, Unicoi and Washington.

Court sits at Greeneville.

Southern Division is composed of following counties: Bledsoe, Bradley, Hamilton, McMinn, Marion, Meigs, Polk, Rhea and Sequatchie.

Court sits at Chattanooga.

Winchester Division is composed of following counties: Bedford, Coffee, Franklin, Grundy, Lincoln, Moore, Van Buren and Warren.

Court sits at Winchester.

Deposits.

Plaintiff, filing civil suit must deposit $350.

Middle District.

Clerk's office: 801 Broadway, Nashville 37203.

Nashville Division is composed of following counties: Cannon, Cheatham, Davidson, Dickson, Houston, Humphreys, Montgomery, Robertson, Rutherford, Stewart, Sumner, Trousdale, Williamson and Wilson.

Court sits at Nashville.

Columbia Division is composed of following counties: Giles, Hickman, Lawrence, Lewis, Marshall, Maury and Wayne.

Court sits at Columbia.

Northeastern Division is composed of following counties: Clay, Cumberland, DeKalb, Fentress, Jackson, Macon, Overton, Pickett, Putnam, Smith and White.

Court sits at Cookeville.

Deposits.

Plaintiff filing suit must deposit $350.

Western District.

Clerk's office: 167 N. Main St., Rm. 242, Memphis 38103.

Eastern Division is composed of following counties: Benton, Carroll, Chester, Crockett, Decatur, Gibson, Hardeman, Hardin, Haywood, Henderson, Henry, Lake, McNairy, Madison, Obion, Perry and Weakley.

Court sits at Jackson.

Western Division is composed of following counties: Dyer, Fayette, Lauderdale, Shelby and Tipton.

Court sits at Memphis. Under certain limited circumstances, nonjury cases may be heard in Dyersburg.

Deposits.

Plaintiff filing suit must deposit $350.

Supreme Court of Tennessee.

Jurisdiction.

Supreme Court is highest appellate court. Has no original jurisdiction. Supreme Court may direct that cause tried and appealed from in one division of state may be heard by Supreme Court in another division of state. See category 5 Civil Actions and Procedure, topic 5.03 Appeal and Error, subhead Supreme Court.

Court sits at Knoxville, Nashville, and Jackson.

Court of Appeals.

This court was established in 1895 as Court of Chancery Appeals, reorganized in 1907 as Court of Civil Appeals, and again reorganized in 1925 as Court of Appeals. It is composed of 12 judges.

Jurisdiction.

See category 5 Civil Actions and Procedure, topic 5.03 Appeal and Error, subhead Court of Appeals.

Court sits at Knoxville, Nashville and Jackson.

Court of Criminal Appeals.

This court was established in 1967. It is composed of 12 judges, serving eight year terms.

Jurisdiction.

Appellate only. Extends to all criminal cases, felony and misdemeanor; habeas corpus and cases arising under Post-Conviction Procedure Act; criminal contempt proceedings arising out of criminal matter; and extradition cases. (TCA 16-5-108).

Court sits at Nashville, Knoxville, and Jackson.

Chancery Courts.

Jurisdiction.

Chancery courts have general equity jurisdiction where value exceeds $50. (TCA 16-11-103). They have jurisdiction concurrent with circuit courts of all civil cases, except for unliquidated damages for injuries to person or character or injuries to property not arising from breach of contract where objection to jurisdiction has been made. (TCA 16-11-102). Chancery courts have exclusive jurisdiction of probate of wills, administration of estates of decedents and wards under guardianship and related matters, except as otherwise specifically provided by statute. (TCA 16-16-201). See subheads Probate Courts, and County Courts, infra.

Place of Sitting.

See subhead Circuit Courts, infra.

Circuit Courts.

Jurisdiction.

Circuit courts are common law courts, having general original jurisdiction for trial of all crimes and misdemeanor issues made up to contest validity of wills, applications to be restored to citizenship, to enter judgments on awards of arbitrators, and common law actions of contract and tort where value exceeds $50. (TCA 16-10-101, -106). They also have jurisdiction of appeals from municipal courts and general sessions courts. (TCA 27-5-101, -108).

Place of Sitting (Chancery and Circuit Courts).

Anderson County; Seventh District; court sits at Clinton.

Bedford County; Seventeenth District; court sits at Shelbyville.

Benton County; Twenty-Fourth District; court sits at Camden.

Bledsoe County; Twelfth District; court sits at Pikeville.

Blount County; Fifth District; court sits at Maryville.

Bradley County; Tenth District; court sits at Cleveland.

Campbell County; Eighth District; court sits at Jacksboro.

Cannon County; Sixteenth District; court sits at Woodbury.

Carroll County; Twenty-Fourth District; court sits at Huntingdon.

Carter County; First District; court sits at Elizabethton.

Cheatham County; Twenty-Third District; court sits at Ashland City.

Chester County; Twenty-Sixth District; court sits at Henderson.

Claiborne County; Eighth District; court sits at Tazewell.

Clay County; Thirteenth District; court sits at Celina.

Cocke County; Fourth District; court sits at Newport.

Coffee County; Fourteenth District; court sits at Manchester.

Crockett County; Twenty-Eighth District; court sits at Alamo.

Cumberland County; Thirteenth District; court sits at Crossville.

Davidson County; Twentieth District; court sits at Nashville.

Decatur County; Twenty-Fourth District; court sits at Decaturville.

DeKalb County; Thirteenth District; court sits at Smithville.

Dickson County; Twenty-Third District; court sits at Charlotte.

Dyer County; Twenty-Ninth District; court sits at Dyersburg.

Fayette County; Twenty-Fifth District; court sits at Somerville.

Fentress County; Eighth District; court sits at Jamestown.

Franklin County; Twelfth District; court sits at Winchester.

Gibson County; Twenty-Eighth District; court sits at Trenton and Humboldt.

Giles County; Twenty-Second District; court sits at Pulaski.

Grainger County; Fourth District; court sits at Rutledge.

Greene County; Third District; court sits at Greeneville.

Grundy County; Twelfth District; court sits at Altamont.

Hamblen County; Third District; court sits at Morristown.

Hamilton County; Eleventh District; court sits at Chattanooga.

Hancock County; Third District; court sits at Sneedville.

Hardeman County; Twenty-Fifth District; court sits at Bolivar.

Hardin County; Twenty-Fourth District; court sits at Savannah.

Hawkins County; Third District; court sits at Rogersville.

Haywood County; Twenty-Eighth District; court sits at Brownsville.

Henderson County; Twenty-Sixth District; court sits at Lexington.

Henry County; Twenty-Fourth District; court sits at Paris.

Hickman County; Twenty-First District; court sits at Centerville.

Houston County; Twenty-Third District; court sits at Erin.

Humphreys County; Twenty-Third District; court sits at Waverly.

Jackson County; Fifteenth District; court sits at Gainesboro.

Jefferson County; Fourth District; court sits at Dandridge.

Johnson County; First District; court sits at Mountain City.

Knox County; Sixth District; court sits at Knoxville.

Lake County; Twenty-Ninth District; court sits at Tiptonville.

Lauderdale County; Twenty-Fifth District; court sits at Ripley.

Lawrence County; Twenty-Second District; court sits at Lawrenceburg.

Lewis County; Twenty-First District; court sits at Hohenwald.

Lincoln County; Seventeenth District; court sits at Fayetteville.

Loudon County; Ninth District; court sits at Loudon.

McMinn County; Tenth District; court sits at Athens.

McNairy County; Twenty-Fifth District; court sits at Selmer.

Macon County; Fifteenth District; court sits at Lafayette.

Madison County; Twenty-Sixth District; court sits at Jackson.

Marion County; Twelfth District; court sits at Jasper.

Marshall County; Seventeenth District; court sits at Lewisburg.

Maury County; Twenty-Second District; court sits at Columbia.

Meigs County; Ninth District; court sits at Decatur.

Monroe County; Tenth District; court sits at Madisonville.

Montgomery County; Nineteenth District; court sits at Clarksville.

Moore County; Seventeenth District; court sits at Lynchburg.

Morgan County; Ninth District; court sits at Wartburg.

Obion County; Twenty-Seventh District; court sits at Union City.

Overton County; Thirteenth District; court sits at Livingston.

Perry County; Twenty-First District; court sits at Linden.

Pickett County; Thirteenth District; court sits at Byrdstown.

Polk County; Tenth District; court sits at Benton and Ducktown.

Putnam County; Thirteenth District; court sits at Cookeville.

Rhea County; Twelfth District; court sits at Dayton.

Roane County; Ninth District; court sits at Kingston.

Robertson County; Nineteenth District; court sits at Springfield.

Rutherford County; Sixteenth District; court sits at Murfreesboro.

Scott County; Eighth District; court sits at Huntsville.

Sequatchie County; Twelfth District; court sits at Dunlap.

Sevier County; Fourth District; court sits at Sevierville.

Shelby County; Thirtieth District; court sits at Memphis.

Smith County; Fifteenth District; court sits at Carthage.

Stewart County; Twenty-Third District; court sits at Dover.

Sullivan County; Second District; court sits at Bristol, Blountville, and Kingsport.

Sumner County; Eighteenth District; court sits at Gallatin.

Tipton County; Twenty-Fifth District; court sits at Covington.

Trousdale County; Fifteenth District; court sits at Hartsville.

Unicoi County; First District; court sits at Erwin.

Union County; Eighth District; court sits at Maynardville.

Van Buren County; Thirty-First District; court sits at Spencer.

Warren County; Thirty-First District; court sits at McMinnville.

Washington County; First District; court sits at Johnson City and Jonesborough.

Wayne County; Twenty-Second District; court sits at Waynesboro.

Weakley County; Twenty-Seventh District; court sits at Dresden.

White County; Thirteenth District; court sits at Sparta.

Williamson County; Twenty-First District; court sits at Franklin.

Wilson County; Fifteenth District; court sits at Lebanon.

Claims Commission.

Board of Claims, Tennessee Claims Commission and Division of Claims Administration created to resolve monetary claims against State. (TCA 9-8-101 et seq.). Exclusive jurisdiction to determine certain enumerated categories of monetary claims against State vested in Tennessee Claims Commission. (TCA 9-8-307). Matters that must be brought before claims commission include certain claims based in negligence, nuisance, professional malpractice, workers' compensation claims by state employees, breach of written contract duly executed by authorized state officer, unconstitutional taking of private property, as defined in TCA 12-1-202, and claims for recovery of taxes collected or administered by state, except for taxes collected or administered by Commissioner of Revenue and unemployment insurance tax collected or administered by Commissioner of Labor and Workforce Development. (TCA 9-8-307).

County Courts.

Probate jurisdiction, formerly vested in County Courts has been transferred to chancery courts. (TCA 16-16-201). See subhead Probate Courts, infra.

Probate Courts.

Exclusive jurisdiction of probate of wills, administration of estates and related matters is vested in chancery courts and chancery clerk and master, except where otherwise specifically provided by statute. Clerk and master authorized, subject to review by chancellor, to hear and determine all probate matters and to grant letters of administration, letters testamentary, appoint guardians, conservators, executors and administrators, adjudicate claims, determine allowances to family and assignment of homestead, etc. (TCA 16-16-201).

Courts of General Sessions.

Generally, they have all civil and criminal jurisdiction of former justices of peace, and are not courts of record. They have unlimited original jurisdiction in cases of forcible entry and detainer and actions to recover personal property; and up to $25,000 in all other civil cases. (TCA 16-15-501). Civil action commenced by issuance of civil warrant upon execution of $500 cost bond or pauper's oath. (TCA 16-15-716; -718). Attorney fees, court cost, and discretionary costs not included in jurisdictional calculation. (TCA 16-15-501). Full powers of execution granted by levy, attachment or garnishment, and examination in aid of execution may be made under Rules of Civil Procedure for depositions. (TCA 16-15-801 et seq.; TCA 16-15-722). Discovery except physical and mental examinations, may be taken in all civil trials pursuant to Rules of Civil Procedure 26-37 on motion and showing of good cause or exceptional circumstances, with order describing conditions of discovery. Depositions of custodians of hospital and medical records may, however, be taken under same rules as apply in courts of record. (TCA 24-9-102). Defendant who believes he is not at fault, or that another person is at fault, must notify opposing party and clerk of court in writing, within 48 hours of scheduled hearing, of name of any other person at fault. Failure to provide such notification entitles plaintiff to continuance for 30 days so that he can amend civil warrant to include additional defendants. (TCA 16-15-735).

Trial Justice Court.

Special limited jurisdiction. Exist in Anderson, Dyer, Gibson and Montgomery Counties.

Criminal Courts.

Generally original jurisdiction for hearing all crimes and misdemeanors vested in Circuit Court. (TCA 16-10-102). Several districts have special criminal courts, which are branches of circuit court jurisdiction, dealing solely with presentment and indictment for criminal offenses under state statute. Jurisdiction of each court is defined and limited by act creating it.

Small Claims Courts.

See subhead Courts of General Sessions, supra.

City Courts.

Home-rule municipalities may establish city courts to try violators of municipal ordinances (TCA 16-17-101) and may impose maximum penalties of 30 days imprisonment, of $500 fine, or both (TCA 6-54-306). Municipality may recover actual administrative expenses for false threats or hoaxes. (TCA 6-54-306).

6.02 LEGISLATURE:

Sessions of general assembly are held on second Tues. in Jan. next succeeding election of members of House for no more than 15 days. Thereafter, general assembly shall meet on first Tues. next following conclusion of organizational session unless General Assembly by joint resolution of both houses sets earlier date. May by joint resolution recess or adjourn until such time as it shall determine. (Const., Art. 2, § 8).

Ethics.

All members, elected or appointed to their first term or partial term, in General Assembly must undergo orientations including instruction on ethics laws and rules. (TCA 3-1-115).

Special or Extraordinary Sessions.

May be called by governor for specific purpose (Const., Art. 3, § 9), or by presiding officers of both houses on written request of 2/3 of members of each house (Const., Art. 2, § 8).

Initiative and Referendum.

No statutory provisions.

Lobbyists regulated by TCA 3-6-301 et seq. Comprehensive Governmental Ethics Reform Act of 2006. (TCA 3-6-101 et seq.).

Consulting Services.

See also category 7 Criminal Law, topic 7.01 Criminal Law.

6.03 REPORTS:

State reports are: Overton, 2 volumes, 1-2 Tenn.; Cooke, 1 vol., 3 Tenn.; Haywood, 3 vols., TCA 4-5-6 Tenn.; Peck, 1 vol., 7 Tenn.; Martin & Yerger, 1 vol., 8 Tenn.; Yerger, 10 vols., 9 to 18 Tenn.; Meigs, 1 vol., 19 Tenn.; Humphreys, 11 vols., 20 to 30 Tenn.; Swan, 2 vols., 31-32 Tenn.; Sneed, 5 vols., 33 to 37 Tenn.; Head, 3 vols., 38 to 40 Tenn.; Coldwell, 7 vols., 41 to 47 Tenn.; Heiskell, 12 vols., 48 to 59 Tenn.; Baxter, 9 vols., 60 to 68 Tenn.; Lea, 16 vols., 69 to 84 Tenn.; Pickle, 24 vols., 85 to 108 Tenn.; Cates, 19 vols., 109 to 127 Tenn.; Thompson, 26 vols., 128 to 153 Tenn.; Smith, 11 vols., 154 to 164 Tenn.; Beeler, 31 vols., 165 to 196 Tenn.; McCanless, 26 vols., 197 to 222 Tenn.; Pack, 3 vols., 223 to 225 Tenn.

Court of Civil Appeals Reports are Tennessee Court of Civil Appeals Reports also referred to as Higgins Reports, 8 vols.

Court of Appeals Reports are Tennessee Appeals Reports, vols. 1 to 63.

Decisions of Supreme Court and Court of Appeals are also reported in Southwestern Reporter, which is official reporter beginning with 225 Tenn. and 63 Tenn. App.

State digests are: Webb & Meigs Digest; Michie's Digest; Crawford's Digest and supplement; West's Tennessee Digest.

6.04 STATUTES:

The latest official compilation is the Tennessee Code Annotated as enacted by Seventy-ninth General Assembly, Chap. 6, Public Acts 1955, effective Jan. 1, 1956.

Uniform Acts adopted are: Absence as Evidence of Death and Absentees' Property (1941) (TCA 30-3-101 et seq.); Anatomical Gift (1969) (TCA 68-30-101 et seq.); Arbitration (1983) (TCA 29-5-301 et seq.); Athlete Agents (2001) (TCA 49-7-2122 et seq.); Child Custody Jurisdiction and Enforcement (1979) (TCA 36-6-201 et seq.); Commercial Code (1963, 1991, 1993, 1995, 1998) (TCA 47-1-101 et seq.); Common Trust Fund (1953) (TCA 35-4-101 et seq.); Contribution Among Tortfeasors (1968) (TCA 29-11-101 et seq.); Controlled Substances (1971, 1974) (TCA 39-17-401 et seq.); Criminal Extradition (1951) (TCA 40-9-101); Declaratory Judgments (1923) (TCA 29-14-101 et seq.); Determination of Death (1976) (TCA 68-3-501); Disposition of Unclaimed Property (1978) (TCA 66-29-101); Durable Power of Attorney (1983) (TCA 34-6-101 et seq.); Electronic Transactions (2001) (TCA 47-10-101 et seq.); Enforcement of Foreign Judgments (1976) (TCA 26-6-101 et seq.); Extradition of Persons of Unsound Mind (1917) (TCA 33-9-101 et seq.); Fiduciaries (1953) (TCA 35-2-101 et seq.); Fraudulent Transfer (2003) (TCA 66-3-301 et seq.); Insurers Liquidation (1969); Interstate Arbitration of Death Taxes (1951) (TCA 67-8-504); Interstate Compromise of Death Taxes (1951) (TCA 67-8-503 et seq.); Interstate Family Support (1997) (TCA 36-5-2001 et seq.); Judicial Notice of Foreign Law (1943); Revised Limited Partnership (1988) (TCA 61-2-101 et seq.); Management of Institutional Funds (1973) (TCA 35-10-101 et seq.); Principal and Income (1997) (TCA 35-6-101 et seq.); Prudent Investor (2002); Residential Landlord and Tenant (1975) (TCA 66-28-101 et seq.); Revised Partnership Act (2001) (TCA 61-1-101 et seq.); Simultaneous Death (1941) (TCA 31-3-101 et seq.); State Administrative Procedure (1974) (TCA 4-5-101 et seq.); Statutory Rule Against Perpetuities (1994) (TCA 66-1-201 et seq.); Testamentary Additions to Trusts (1961) (TCA 32-3-106); To Secure Attendance of Witnesses from Without a State in Criminal Proceedings (1939) (TCA 40-17-201 et seq.); Trade Secrets Act, TCA 47-25-1701 et seq.; Transfers to Minors (1992) (TCA 35-7-101 et seq.); Transfer on Death Security Registration (1995) (TCA 35-12-101 et seq.); Unclaimed Property (1978) (TCA 66-29-101 et seq.); Veterans' Guardianship (1943) (TCA 34-5-101 et seq.).

†Some have been adopted with significant variations or modifications. See appropriate topics as to Acts within scope of Digests volume.

For text of Uniform Acts falling within the scope of the Martindale-Hubbell Law Digests see Uniform and Model Acts section.

7 CRIMINAL LAW

7.01 CRIMINAL LAW:

Crimes are provided for by TCA 39-11-101 et seq., and criminal procedure by TCA 40-1-104 et seq.

Legislature has adopted Criminal Sentencing Reform Act of 1989, comprehensive revision of criminal code. Act amends and repeals various sections in titles 37, 39, 40, 55, 63, 68, and other titles containing criminal offenses and amends certain portions of Criminal Sentencing

Reform Act of 1982. Act abolishes common law offenses and defenses but does not bar or otherwise affect civil liability for conduct defined as criminal offense.

Classes of Offenses.

Felonies classified into five categories and misdemeanors classified into three categories based on seriousness of offense. Authorized terms of imprisonment and fines for felonies unless otherwise provided by statute are: (1) Class A felony—not less than 15 years nor more than 60 years, fine not exceeding $50,000; (2) Class B felony—not less than eight years nor more than 30 years, fine not exceeding $25,000; (3) Class C felony—not less than three years nor more than 15 years, fine not exceeding $10,000; (4) Class D felony—not less than two years nor more than 12 years, fine not exceeding $5,000; and (5) Class E felony—not less than one year nor more than six years, fine not exceeding $3,000. Fine imposed on corporation for offense defined in Title 39 or for offense defined in any other title for which no specific fine is stated, not to exceed: (1) $350,000 for Class A felony, (2) $300,000 for Class B felony, (3) $250,000 for Class C felony, (4) $125,000 for Class D felony and (5) $50,000 for Class E felony. (TCA 40-35-111). Repeat violent offenders, within meaning of statute, sentenced to life imprisonment without possibility of parole. (TCA 40-35-120).

Authorized terms of imprisonment and fines for misdemeanors unless otherwise provided by statute are: (1) Class A misdemeanor—not greater than 11 months 29 days or fine not exceeding $2,500 or both; (2) Class B misdemeanor—not greater than six months or fine not exceeding $500 or both, and (3) Class C misdemeanor—not greater than 30 days or fine not exceeding $50 or both. (TCA 40-35-111).

Under TCA 8-7-401, victim or his family may employ private counsel as co-counsel for prosecution. However, prior thereto, defendant(s) must be notified and court must conduct hearing on such employment.

State provides limited compensation to victims of certain reported crimes, and their families. Claim including information prescribed by statute must be filed within one year of crime or death of victim with Division of Claims Administration. No award will be made where crime was not reported to proper authorities within 48 hours unless delay is found to be justified. (TCA 29-13-108). Failure of victim to report because physically unable to do so, as in case of victim of sex abuse or domestic abuse, may constitute justification for nonreport. (TCA 29-13-108). Additionally, all income owing to defendant, from whatever source derived, is to be collected by Attorney General and deposited in escrow to be paid to victim or victims of defendant's crime, upon victim bringing civil action within three years of crime. (TCA 29-13-403). District attorney general must report to Attorney General any knowledge of such income.

Indictment or Information.

Prosecution is by indictment by or presentment to grand jury. (TCA 40-3-102). Accused represented by attorney may waive prosecution upon indictment or presentment and consent to prosecution by information. (TCA 40-3-101). All felonies and misdemeanors are indictable offenses. (TCA 40-13-102).

Bail.

All offenses are bailable before conviction, except capital offenses where proof is evident or presumption great. Bail is revoked if defendant is convicted of separate felony while free on appeal. (Const. 1, § 15; TCA 40-11-113). If crime is one of domestic nature, magistrate may hold suspect up to 12 hours to secure victim's safety. (TCA 40-11-150). If alleged victim is of advanced age, offender may be held longer than 12 hours upon written finding that offender would be continued threat to victim. (TCA 40-11-150[k]).

Interstate compact for supervision of parolees and probationers in effect. (TCA

40-28-401).

Uniform Criminal Extradition Act in effect. (TCA 40-9-101-29).

Consulting Services by Public Officials and Lobbyists.

Neither Governor nor any member of General Assembly, nor members of certain officers of executive branch, nor any member of municipal or county legislative bodies, nor other elected county or municipal officers may receive fee for consulting services. Depending on proof, this offense may be misdemeanor or felony. Lobbyist must make certain disclosures. (TCA 2-10-122).

Regulation of Lobbyist Registration.

Intentional violations of specified registration requirements results in Class C misdemeanor for first offense, as Class B misdemeanor for second offense, and as Class A misdemeanor for third and subsequent offenses. (TCA 3-6-306, 2006 c. 1).

7.01A TERRORISM PREVENTION AND RESPONSE:

Tennessee Terrorism Prevention and Response Act of 2002, TCA 39-13-801 et seq. enacted in light of terrorist acts of Sept. 11, 2001, provides legislation relating to possession, manufacture, use, or threatened use of chemical, biological, nuclear or radiological weapons, as well as intentional use of industrial or commercial chemicals as weapons as terrorist act (as defined in TCA 39-13-804).

Hoaxes involving terrorists threats are also subject to sanctions and fines. Act of terrorism is class A felony. (TCA 39-13-805).

Unfair or Deceptive Acts.

Charging price that's grossly in excess of normal price for consumer food item; repair or construction service; emergency supplies; medical supplies; building materials; gasoline; transportation; freight and storage services; or housing, during declared state of emergency is unfair or deceptive act or practice under § 47-18-104(a). (TCA 47-18-5103 through 5104).

Computer Related Offenses.

Tennessee Personal and Commercial Computer Act of 2003 provides for criminal penalties for various computer related prohibited acts. (TCA 39-14-601 through 603).

Homeland Security.

Provision was made in 2004 for implementation of certain protective measures by Commissioner, Tennessee Dept. of Safety, upon application by U.S. Office of Homeland Security. (TCA 38-3-114).

Drug Dealer Liability Act.

Imposes civil liability under market liability model, adopted from products liability arena, on any person who knowingly participates in illegal drug market within Tennessee if there is some nexus between dealer and person, other than user, who is injured by illegal conduct. (TCA 29-38-101 et seq.).

8 DEBTOR AND CREDITOR

8.01 ASSIGNMENTS:

Uniform Commercial Code has been adopted. (TCA 47-1-101 et seq.).

Contractual Rights.

Generally speaking, all rights arising from contracts may be assigned. The right of an assignee may be asserted by suit either in his own name, or in the name of the assignor, for his use and benefit, subject to set-offs or counter-claims in favor of the debtor against the assignor. (TCA 47-50-102).

Notice.

As between assignor and assignee, notice to obligor is not essential. (354 S.W.2d 492 [Tenn. App. 1961]). Assignments are not effective as to obligor or third persons without notice to obligor. (267 S.W.2d 521 [Tenn. App. 1953]).

Priority.

As between successive assignees of choses in action, he who first gives notice to debtor is entitled to preference although his assignment be subsequent to that of other. (188 S.W. 1144 [Tenn. 1916]).

Assignment of expectancy by heir expectant will be sustained in equity when, but not until, property comes into such heir's possession. (201 S.W.2d 659 [Tenn. 1947]).

Wages.

Court may order assignment of wages or income for child support upon finding of prior failure to support in accordance with court order. Assignment is binding on employer (including successive employers) 14 days after service of order by certified mail. Otherwise, assignments of unearned wages are unenforceable as to employer in absence of written assent. (TCA 50-2-105).

Accounts receivable for security are governed by Uniform Commercial Code. (TCA 47-9-101 et seq.).

See also category 3 Business Regulation and Commerce, topic 3.09 Commercial Code.

8.02 ATTACHMENT:

Actions in Which Allowed.

Attachments lie in all civil actions, whether in contract or in tort (TCA 29-6-101 and TCA 29-6-106), without limitation as to amount in controversy in proper cases.

Courts Which May Issue Writ.

Suits by original attachment may be brought in any court, or before any magistrate, having jurisdiction of cause of action. (TCA 29-6-110; TCA 16-15-722).

In Whose Favor Writ May Issue.

Any person is entitled to issuance of writ, whether resident or nonresident (TCA 29-6-101; 227 S.W.2d 35 [Tenn. 1950]), without restriction as to foreign corporations. Where both creditor and debtor are residents of same foreign state, creditor must make oath that property of debtor has been fraudulently removed to this state to evade process in state of residence. (TCA 29-6-109).

Grounds.

The writ lies against property of: (1) nonresident (will not lie against foreign corporation domesticated in Tennessee unless it has no agent on whom process may be served); (2) one who is about to remove or has removed himself or property from state; (3) one who has removed, or is removing himself out of county privately; (4) one who conceals himself so that ordinary processes of law cannot be served upon him; (5) one who absconds or is absconding or concealing himself or his property; (6) one who has fraudulently disposed of, or is about to fraudulently dispose of, his property; (7) decedent resident outside of state liable for debt leaving property in state. (TCA 29-6-101).

Claims on Which Writ May Issue.

Writ may be sued out upon debts or demands not due except when debtor or defendant resides out of state. (TCA 29-6-102). If any other ground exist, it may issue against nonresident. Accommodation endorser or surety may sue out writ as security for his liability. (TCA 29-6-103). No final judgment will be rendered until debt matures. (TCA 29-6-104).

Proceedings to Obtain.

To obtain attachment, the plaintiff, his agent or attorney, must make oath in writing stating the nature and amount of the debt, claim or demand, and that it is a just claim, and also that one or more of grounds for attachment exist (TCA 29-6-113); substantially accurate description of property sought to be attached and its approximate value must be set forth in affidavit or bill, which must be sworn to (TCA 29-6-117). Copy or abstract of, or lis pendens describing, attachment, order, injunction or other writ affecting real property must be recorded in register's office of county where land is situated to be effective against nonparty having or acquiring interest in such property. (TCA 25-5-101).

As to attachment by garnishment, see topic 8.09 Garnishment.

Attachment Bond.

Bond conditioned to prosecute attachment with effect, or, in case of failure, to pay defendant all costs and such damages as he may sustain by reason of the wrongful suing out of the writ, must be filed by plaintiff, his agent or attorney. (TCA 29-6-115). Amount of bond must be: (1) where amount of claim is less than value of property to be attached, equal to asserted claim plus additional sum estimated to cover probable costs and damages; (2) where amount of claim is greater than value of property to be attached, be equal to estimated value of property plus estimated costs and damages; (3) where claim is for unliquidated damages, be equal to value of personal property to be attached plus estimated costs and damages; (4) where real property is attached, sufficient to cover all costs and damages only. (TCA 29-6-116).

Levy.

The writ is levied by the officer upon any real or personal property, whether interest therein is legal or equitable, debts and choses in action, whether due or not due. (TCA 29-6-132). Personalty must be exhausted before levy on real estate. (TCA 29-6-133).

Indemnity.

No provision is made for the officer to require indemnity.

Priorities between different attachments of same property are according to times of levies.

Release of Property.

Principal may discharge attachment of indorser or surety by giving bond, etc., approved by court. (TCA 29-6-105). Defendant in attachment suit may replevy property attached by giving bond, etc., of twice amount of plaintiff's demand or, at defendant's option, twice value of property attached conditioned to pay debt, interest, and costs, or value of property attached, with interest. (TCA 29-6-149).

Sale.

No property levied upon, except it be perishable property, will be sold before final judgment or decree. (TCA 29-6-104).

Vacation or Modification.

Attachments issued without prescribed affidavit and bond may be abated by plea of defendant. (TCA 29-6-123).

8.03 [RESERVED]

8.04 CREDITORS' SUITS:

Jurisdiction.

Where execution has been returned unsatisfied, creditor may proceed in court granting judgment or in any court of general jurisdiction to compel discovery of and execution upon any property of defendant that is possessed by defendant or third party, including interests of defendant in property held in trust for him, except when trust is exempt under TCA §§ 35-15-501 through 35-15-507 of Tennessee Uniform Trust Code. (TCA 26-4-101).

Creditors of a corporation may, without first obtaining a judgment, file a bill in the Chancery Court to attach the property of the corporation and subject same to the satisfaction of their debts when the corporate franchises are not used or have been granted to others. (TCA 29-12-107).

Real property owner, owner's agent or prime contractor may serve written demand on lienor requiring lienor to commence action to enforce lien and such action shall be commenced within 60 days after service or lien shall be forfeited. (TCA 66-11-130).

8.05 EXECUTIONS:

All judgments and decrees of any judicial tribunal of this state for money are enforced by execution. (TCA 26-1-103). Distringas or fieri facias and other types of execution follow judgment of court. (TCA 26-1-105). All are issued by clerk as matter of course or upon demand. (TCA 26-1-207). As to executions by garnishment, see topic 8.09 Garnishment.

Exemptions.

See topic 8.06 Exemptions.

Time of Issuance.

Executions from Supreme Court issue after ten days from final judgment (TCA 26-1-202); from all other courts of record, after 30 days from judgment in any case. (TCA 26-1-203). Execution may not issue until final action taken on timely motions for directed verdict or new trial or alteration or amendment of judgment. (Rules of Civil Procedure 62.02).

Execution may issue immediately upon rendition of judgment before adjournment, by leave of court, upon affidavit showing good cause. (TCA 26-1-206[b]). After adjournment of court, execution may issue before prescribed time upon affidavit that “defendant” is about to fraudulently dispose of, conceal or remove his property, thus endangering plaintiff's judgment. (TCA 26-1-

206[a]; Rules of Civil Procedure 62.01).

Foreclosure on home secured by mortgage or deed of trust or repossession of motor vehicle owned in part by member of Tennessee National Guard who has been called into active military service outside U.S. must be suspended until such time as National Guardsman has returned to Tennessee for 90 days. (TCA 26-1-111).

Stay.

Trial court's power in exceptional cases to stay proceedings upon proper terms and conditions is not limited by Rules. (Rules of Civil Procedure 62.07). Execution may be stayed pending appeal by posting bond. See category 5 Civil Actions and Procedure, topic 5.03 Appeal and Error.

Lien.

Executions are a lien upon all leviable property of the defendant from the date of test, and avoid all intervening sales or assignments (118 S.W.2d 677 [1938]); and they are also lien upon choses in action of corporations (TCA 26-3-103).

Levy is upon goods and chattels first, but if to best of officer's knowledge there are none, or they are not sufficient, then upon lands and tenements. (TCA 26-3-101). It may be upon growing crop, after crop has matured and then subject to landlord's lien. (TCA 26-3-102). It may be upon choses in action of corporation. (TCA 26-3-103). Plaintiff must pay costs incurred by court, sheriff and officer, including transportation, storage and advertising, and has right to obtain reimbursement from defendant. (TCA 26-3-117). Equitable interests are reached by court granting judgment or any court of general jurisdiction after unsatisfied return. (TCA 26-4-101 et seq.).

Return.

Executions returnable to courts of record within 30 days of issue date. (TCA 26-1-401[a]). General Sessions executions returnable within 30 days of issue date either to issuing court or court having possession of original judgment. (TCA 26-1-401[b]).

Sale.

Personalty is sold on ten days notice by poster advertisement at five places in county, one of which is by the courthouse door, another the most public place in neighborhood of the defendant. (TCA 26-5-101-02).

Real property is sold on 20 days notice by publication three times in a newspaper published in the county (TCA 26-5-101 and 35-5-101), unless amount of indebtedness is less than $200, in which event owner of property to be sold may order that advertisement be by posters for 30 days posted at five places in county, one of which must be courthouse door (TCA 35-5-103). Newspaper advertisement dispensed within counties where there is no newspaper. (TCA 35-5-102). At public sale of real property, auctioneer appointed by court to receive fees for services. (TCA 35-5-112).

As to payment of costs, see subhead Levy, supra.

Redemption.

Debtor may redeem by paying to purchaser or anyone claiming under him, the amount bid or paid (including any amount credited on the debt) by him at current composite prime rate as published by Federal Reserve Board as of date of purchase, together with all lawful charges. If creditor redeems from original purchaser or other redeemer, he must, in addition to foregoing, pay to debtor, or credit his debt with, 10% or more on sum bid at sale, or 10% or more on judgment of said creditor, at creditor's election. Such right of redemption continues in debtor and his creditors for two years after sale, no matter how often previously redeemed. If party holding land is absent from usual place of residence, or resides out of county where land lies, redeemer may pay money to clerk of circuit court where land lies, or if land sold by judgment or decree of court, then to clerk of court from which sold. Debtor to be made party to suit to enforce right of redemption brought by transferee of debtor. Suit to be dismissed if transferee engaged in speculation or profiteering rights of redemption. (TCA 66-8-101 et seq.).

Supplementary Proceedings.

After nulla bona return of execution, judgment creditor may, by bill in court granting such judgment or any court of general jurisdiction, subject equitable estate of his debtor in realty to sale for satisfaction of his judgment by filing bill describing property in which equity is sought to be reached. Lien of lis pendens is thereby created which may be enlarged to include bona fide purchases by registration of abstract of claimed lien. Upon filing of such bill, trustee under prior deed of trust has no right to sell land, even though no injunction be ordered, but must proceed, subject to orders of court in cause. Creditor, where execution has been returned nulla bona, in whole or in part, may file bill in chancery against defendant or any other person or corporation, to compel discovery of any property, including stock, choses in action or money due to such defendant or held in trust for him, except under spendthrift trust. Failure to make full discovery in answer to such bill of discovery is punishable as contempt of court. Common-law writ of ne exeat obtains. (TCA 26-4-101 et seq.).

8.06 EXEMPTIONS:

All necessary and proper wearing apparel for actual use of debtor and his family, trunks or receptacles necessary to contain same, family portraits and pictures, family Bible and school books are exempt. (TCA 26-2-104).

Personal property, in addition to that specified supra, in aggregate amount of $4,000 is exempt from execution, seizure or attachment when in hands of one who is bona fide resident permanently residing in state. (TCA 26-2-103).

Debts Against Which Exemptions Not Allowed.

Personal property exemption is not available against taxes or certain criminal fines. (TCA 26-2-113).

Waiver of Exemption.

Exempt property may be conveyed or mortgaged by head of family, but cannot be levied upon and sold under execution. (42 Tenn. 283 [1865]).

Necessity of Claiming Exemption.

$4,000 exemption must be claimed by filing with court list, under oath, of claimed exempt items and value thereof. List may be modified. Exemption claim filed after final judgment does not affect execution issued before claim filed. Judgment creditor, or court on creditor's application, may inquire as to accuracy of exemption claim. Inaccurate claim is ground for denial of exemption. (TCA 26-2-114).

Earnings.

Defined as compensation paid or payable for personal services, including wages, salaries, commission, bonus, and pension and retirement payments, except as discussed infra, subhead Pensions. “Disposable earnings” defined as earnings remaining after deductions required by law. (TCA 26-2-105). Except as against order, judgment, decree or installment thereof for temporary or permanent alimony, where party entitled thereto has not remarried, and as against decree or assignment for support of minor child, as to which earnings are not exempt, maximum garnishable earnings for work week is lesser of: (1) 25% of disposable earnings for week or (2) disposable earnings for week less 30 times federal minimum wage at time earnings due and payable. (TCA 26-2-106). Additional exemption of $2.50 per week allowed for each dependent child under 16. (TCA 26-2-106 and TCA 26-2-107).

Wages earned and payable outside Tennessee are exempt where cause of action arose outside Tennessee, but in such cases, garnishee must plead exemption, unless defendant actually served with process. (TCA 29-7-102).

As to duration of garnishment lien for earnings, see topic 8.09 Garnishment, subhead Adverse Claims.

Stay of Execution, Etc.

Upon: (1) Filing with court clerk of written agreement between parties for payment of judgment in installments, (2) entry of order on written consent of parties or (3) filing of motion by judgment debtor (other than judgment debtor who had admitted debt and is paying judgment by agreed installment payments) for order for payment of judgment in installments, issuance, execution or return of writ of garnishment against earnings is stayed so long as there is compliance with agreement or order. Motion of debtor must be supported by affidavit stating inability to pay with funds other than earnings, name and address of employer, amount of earnings and due dates thereof. (TCA 26-2-216).

Stay by order becomes void immediately upon clerk's noting on record noncompliance of debtor with order, but order may be reinstated or amended on proper showing by affidavit of debtor and hearing that noncompliance was due to unemployment or other justifiable cause beyond control of debtor. (TCA 26-2-217). Stay by filing agreement becomes void immediately if debtor fails to comply strictly with agreement. (TCA 26-2-219).

Insurance.

Proceeds of accident, health and disability insurance are exempt. (TCA 26-2-110[a]). Benefits of any life insurance policy acquired by insured or insured's spouse and payable to or for benefit of insured's spouse and children are exempt. (TCA 56-7-201-02). Net amount payable on life insurance or annuity contract for benefit of, or assigned to, insured's wife, children or dependent relatives, is exempt, even if insured could have changed contract beneficiary. (TCA 56-7-203).

Pensions from state and subdivisions thereof are exempt. Funds payable to participant or beneficiary or interest of participant or beneficiary in Internal Revenue Code § 401(a), § 403(a), § 408 plan exempt, except from claims of state of Tennessee or alternate payee under qualified domestic relations order. (TCA 26-2-104). To same extent that earnings are exempt under TCA 26-2-106, supra subhead Earnings, payments under stock bonus, pension, profit sharing, or similar plan or contract on account of death, age or length of service are exempt unless such plan or contract does not qualify under specified provisions of Internal Revenue Code of 1954 or does not meet other criteria specified by statute. (TCA 26-2-111).

Benefits from social security, unemployment compensation, local public assistance, veterans' programs, illness or disability, or pension that vests as result of disability, as well as any professionally prescribed health care aids, are exempt. (TCA 26-2-111).

Compensation to victim also exempt, not exceeding aggregate of $15,000 or its equivalent in property traceable to: (1) crime victim reparation law (not to exceed $5,000); (2) actual pecuniary loss on account of bodily injury of debtor or person of whom debtor is dependent (not to exceed $7,500); (3) payment or compensation for wrongful death of person of whom debtor was dependent (not to exceed $10,000). (TCA 26-2-111).

Compensation for loss of future earnings of debtor, or person of whom debtor is dependent, is exempt to extent reasonably necessary for support of debtor and dependents. (TCA 26-2-111).

Alimony is exempt as to payments becoming due more than 30 days after debtor asserts right to such exemption in any judicial proceeding. (TCA 26-2-111).

Child Support.

Payments due debtor are exempt as to payments becoming due more than 30 days after debtor asserts right to exemption in judicial proceeding. Additionally, liquid assets, stocks or bonds, up to amount of child support owed by debtor pursuant to court order, are exempt, if such assets are immediately deposited into court or executed upon on behalf of child or children in partial or full satisfaction of child support obligations. (TCA 26-2-111).

Tools of Debtor's Trade.

Debtor's aggregate interest in any tools, implements or professional books of his or dependent's trade is exempt up to $1,900. (TCA 26-2-111).

Bankruptcy Exemptions.

Tennessee citizens are entitled to exemptions provided by state law and are not authorized to claim as exempt property prescribed in Bankruptcy Code. (TCA 26-2-112).

Homestead Exemption.

See topic 8.10 Homesteads.

See also topic 8.09 Garnishment.

8.07 [RESERVED]

8.08 FRAUDULENT SALES AND CONVEYANCES:

Uniform Commercial Code has been adopted. (TCA 47-1-101 et seq.).

Uniform Fraudulent Conveyance Act adopted. (TCA 66-3-301).

Bulk Sales.

Uniform Commercial Code governs. (TCA 47-6-101 et seq.).

See also category 3 Business Regulation and Commerce, topic 3.09 Commercial Code.

8.09 GARNISHMENT:

Garnishment may be in aid of either attachment or execution.

Property That May Be Reached.

All property, debts and effects of defendant, including real estate, judgments, choses in action whether or not due, and money or stock in unincorporated company, in possession or control of garnishee on or after service of notice and before judgment. (TCA 26-2-202).

Salaries, wages or other compensation due from state, county or municipality to officer or employee thereof may be garnished. (TCA 26-2-221).

See also topic 8.06 Exemptions.

Proceedings to Obtain.

Officer may summon, in writing, any person as garnishee, to appear at court from which execution issued or from any other court to whom execution is returnable. (TCA 26-2-203). Garnishment summons shall have attached notice to employer that he is required to withhold and pay into court amount garnished and is liable for failure to do so. (TCA 26-2-216).

Answer of Garnishee.

Garnishee's initial appearance may be in person or through written answer. Garnishee may be required to answer under oath: (1) whether he is, or was at time of garnishment, indebted to defendant, and if so, how and in what amount; (2) whether he had in his possession or control any property, debts or effects of defendant, at time notice was served, or has at time of answering, or has had at any time between date of service and date of answering, and if so, kind and amount; (3) whether there are, to his knowledge and belief, any and what property, debts and effects in possession or control of any other, and, if so, what person; (4) such other questions appearing on or attached to original execution put to him by court of judgment creditor as tend to elicit information sought. (TCA 26-2-204). Answer not conclusive. (TCA 26-2-205). Garnishee receiving execution without defendant's social security or federal taxpayer identification number and who, after reasonable effort, cannot identify defendant, may return execution with statement that garnishee cannot identify or distinguish defendant from information provided. (TCA 26-1-110).

Practice.

If, on answer and examination of garnishee, it appears that he has property, etc., in hand (or under control) that is liable for plaintiff's debt, judgment may be entered and execution awarded for such as will satisfy debt to plaintiff and all costs and charges, whereupon such must be delivered to officer serving garnishment on demand or else judgment will be entered against garnishee for debts and costs when return is made showing failure to deliver. (TCA 26-2-206).

For additional garnishee obligations as to wages, etc., see catchline Wages, Etc., infra.

If garnishee fails to appear or answer, conditional judgment may be entered against him for debt to plaintiff and costs, and thereafter notice must be issued to him to appear and show cause why judgment should not be final. If he does not appear as required and show cause, conditional judgment becomes final. (TCA 26-2-209).

Garnishee against whom judgment rendered is entitled to certificate from court clerk stating date and amount of garnishment judgment, and in whose favor and in what case rendered. Certificate is receipt for original debt and entitles garnishee to credit on original judgment or execution already issued. (TCA 26-2-212).

Debts Not Due.

Choses in action may be collected and sold as court may order, but until same are due, execution may be stayed. (TCA 26-2-211). If, upon disclosure on oath by debtor, it appears that garnishee is indebted to defendant but debt is not yet payable, then judgment of plaintiff is lien on debt until and at time same is due and payable. (TCA 26-2-213).

Wages, Etc.

Garnishee must: (1) pay judgment debtor exempt amount; (2) submit, as part of answer, statement of judgment debtor's dependent children under 16 and residing in Tennessee; (3) furnish judgment debtor prescribed notice, which must be affixed to garnishment summons at time served on garnishee, that debtor may apply for order staying further garnishment and allowing judgment to be paid in installments; (4) hold, to extent of amount due on judgment and costs, subject to court order, nonexempt wages due or subsequently due; (5) remit to court at least once every 30 days all monies withheld. (TCA 26-2-214; -215). Judgment debtor, other than judgment debtor who admitted debt and is paying judgment by agreed installments, may apply once to court to set payments, and garnishment will be stayed. If motion is denied or payments are not met, court has discretion to reinstate order of stay as to subsequent payments for good cause shown. (TCA 26-2-216).

Assignments of wages for child support take priority over garnishments in effect after July 1, 1981. (TCA 50-2-105 and TCA 26-2-108). See topic 8.01 Assignments, subhead Wages.

See also subhead Adverse Claims, infra.

Adverse Claims.

Garnishment judgment is lien on wages, etc., due at time of service of execution and continues as to subsequent wages, etc., until: (1) amount due on judgment and costs are paid and satisfied; (2) expiration of employer's payroll period immediately prior to six months after service; (3) termination of employment; (4) underlying judgment vacated or modified; or (5) garnishment proceedings stayed, whichever occurs first. Lien has priority over subsequent garnishment liens. (TCA 26-2-214). If stay of execution by garnishment becomes void and issuance and service of garnishment had been made prior to proceeding for stay, judgment creditor has lien on wages prior to all liens executed subsequent to original date of issuance. (TCA 26-2-219). Subsequent executions effective for successive calendar month periods in order served. (TCA 26-2-214).

Earnings.

As to amount garnishable, see topic 8.06 Exemptions. As to duration of garnishment lien on, see subhead Adverse Claims, supra.

8.10 HOMESTEADS:

Any individual, whether or not head of family, is entitled to homestead exemption, up to $5,000, on real property owned by him and used by him, spouse or dependent as principal place of residence. (TCA 26-2-301). Exemption applies to life and equitable estates (TCA 26-2-302), to leaseholds of more than two and not exceeding 15 years, except as to rent due thereon (TCA 26-2-303), and to insurance proceeds (not to exceed $5,000) for casualty to homestead, except as to mortgagee's interest evidenced by written contract (TCA 26-2-304).

Homestead exemption is not allowed to alien resident. (82 Tenn. 369 [1884]. See also TCA 26-2-301).

Limitation of value of property in which exemption is allowed is $5,000. Individuals jointly owning and using property as principal place of residence are limited to aggregate of $7,500 if exemptions are claimed in same proceeding. If only one of joint owners is involved in proceeding, his exemption shall be $5,000. Unmarried individual age 62 or older is entitled to exemption of not more than $12,500; married couple where one spouse is 62 or older and other is younger than 62 allowed up to $20,000; married couple where both spouses are 62 or older allowed up to $25,000; individual with one or more minor children in individual's custody shall be entitled to exemption not to exceed $25,000. (TCA 26-2-301).

Limitation of Area.

None.

Debts or Liabilities Against Which Exemption Not Available.

The homestead is not exempt from sale to pay public taxes, purchase money, cost of improvements thereon or certain fines. (TCA 26-2-301; -306).

Designation of homestead before levy permitted. (TCA 26-2-307).

Claim of exemption may be made after levy. (TCA 26-2-308).

Waiver of Exemption.

Exemption does not operate against debt secured by homestead where exemption is waived by written contract. Exemption cannot be waived, however, in note or other debt instrument which does not convey property in which exemption is claimed. (TCA 26-2-301).

Loss of Exemption.

Removal from state constitutes abandonment of exemption. (103 Tenn. 308, 52 S.W. 1068).

Alienation or Encumbrance.

If marital relationship exists, exemption cannot be alienated or waived without joint consent of spouses. (TCA 26-2-301).

Proceeds of Sale.

Where homestead property is sold under foreclosure or execution, proceeds up to $5,000 are exempt until reinvestment in another homestead. Proceeds of voluntary sale are not exempt. (TCA 26-2-309).

Rights of Surviving Spouse and Family.

Upon death of head of family, deceased's exemption inures to spouse and minor children so long as one or other uses property as principal place of residence. (TCA 26-2-301).

See also categories 14 Family, topic Husband and Wife; Property, topics Curtesy, Deeds, and Real Property.

8.11 JUDGMENT NOTES:

Not recognized.

8.12 [RESERVED]

8.13 LIENS:

Uniform Commercial Code has been adopted. (TCA 47-1-101 et seq.).

Campgrounds.

Campgrounds in business of providing accommodations for recreational vehicles may be entitled to lien on all abandoned vehicles which lawfully come upon their premises. (TCA 66-19-105).

Farm laborers have lien second to landlord on crop, for payment of their wages due for cultivating same. (TCA 66-12-113).

Keepers of hotels and boarding houses have lien on all furniture, wearing apparel, baggage or other goods and chattels of any guest or patron to secure payment of all sums due for board or lodging. (TCA 66-17-101).

Employees of corporation or partnership have lien for their wages, subject to certain limitations. (TCA 66-13-101-03).

Artisans have lien on goods left with them for repair, etc., and if such goods are not claimed or called for by owner within six months from time of contract or leaving of goods, such lien may be enforced by sale at public auction, after written notice and advertisement of sale. Owner may reclaim property by paying amount due, plus expenses before sale. Proceeds of sale are applied to artisan's claim and expenses and balance, if any, held for owner of goods and, if not called for in 12 months, turned over to county trustee for benefit of common schools. (TCA 66-14-101-07).

Keeping or Service of Animals.

See TCA 66-20-101-06.

Printers, Etc.

Typographers, printers, lithographers, photoengravers, electrotypers, stereotypers, bookbinders and/or manufacturers have lien on all type set, plates, dies, engravings, etc., and materials prepared or furnished by them or by customer to facilitate production, so long as items remain in plant, custody of manufacturer, etc., being lien to secure unpaid amounts due on such work. Lien is not lost so long as any part of completed or partially completed work remains in custody, except by special written release. Lien is enforced by mailing notice to person for whom work is done at last known address, plus attachment and bill in chancery court. Lienor has 90 days from giving notice of intention to claim lien within which to file said bill in chancery court. (TCA 66-15-103).

Laundries and cleaners can auction customers' articles if not redeemed within 90 days, provided 30 days written notice is given to customers. (TCA 66-16-107-08).

Repair or Improvement of Vehicles.

Every mechanic, contractor, founder, or machinist who undertakes the work, or makes any repair, or puts thereon any improvements, fixtures, machinery, wood, rubber, composition, or metal, on any vehicle used in the transportation of persons or merchandise either by land, by water or through the air has a lien for such work or material on said vehicle and improvements. Lien continues 12 months but is subordinate to rights and title acquired by purchasers without notice. (TCA 66-19-101-02). Lien for materials or repairs against any type of aircraft used in transportation of persons or merchandise must be filed in register's office for county in which repairs or materials were furnished within 90 days after performance. (TCA 66-19-301 et seq.).

Vendors.

The renewal of a purchase money note given for the conveyance of lands, or a new promise before expiration of limitations, will preserve the vendor's lien, and prevent operation of the statute of limitations against it as to the vendee in possession from the maturity of the renewal or date of the new promise. (59 S.W. 766 [1900]).

Foreclosure.

Liens are foreclosed as provided for in the contract or statute, otherwise by attachment in court of proper jurisdiction. (TCA 20-4-103).

Redemption.

There is no right of redemption of property sold under various liens.

Garage keepers and towing firms have lien on all vehicles that come into their possession for payment of reasonable charges. Enforced after 30 days in same manner as artisans' lien, except garage keepers only required to advertise sale one time in newspaper published in place where sale to be held. (TCA 66-19-103). Failure of garage keeper to inform consumer in writing of certain enumerated rights pertaining to estimates of repair costs and repairs not originally authorized by consumer abrogate repair facility's lien rights under TCA 66-19-104.

Mechanics' Liens.

There shall be lien, secured by contract price, upon any lot or tract of real property upon which improvement has been made by prime contractor and any remote contractor. There shall also be lien upon any lot or tract of real property in favor of any land surveyor who has, by contract with owner or agent of owner of real property, performed on such property practice of land surveying, as defined in § 62-18-102(3). Lien will also exist upon any lot or tract of real property upon which improvement has been made, by contract with owner or owner's agent, in favor of any person licensed to practice architecture or engineering, for architectural or engineering services performed with respect to such improvement actually made. Lien for furnishing tools, equipment, or machinery arises under to the following extent: (1) For reasonable rental value for period of actual use and any reasonable period of non-use taken into account in rental contract; except that reasonable rental value and reasonable periods of use and non-use need not be determined solely by contract; or (2) for purchase price of tools, equipment or machinery, but lien for such price only arises if tools, equipment, or machinery were purchased for use in course of particular improvement and have no substantial value to lienor after completion of improvement on which they were used. (TCA 66-11-102). If contract is for improvement of individual one, two, three or four family residential property in which owner resides or intends to reside, lien is upon building and improvements, but lien right exists only in favor of prime contractor. (TCA 66-11-146). Any person may, before judgment is rendered enforcing lien, record with register of deeds of county in which lien was filed bond for amount of lien claimed with surety approved by register of deeds, conditioned upon obligor's satisfying judgment that may be rendered in favor of lienor. Recording of bond discharges lien. (TCA 66-11-142).

Additionally, there is lien upon any leasehold in case where person performs labor, or furnishes materials, fixtures, machines, or other things of value relating to oil, gas, or other materials to leasehold. (TCA 66-11-147). Lien in such cases is as to leasehold interests and begins upon first day of operation or furnishment. Lien expires after 90 days unless registered with registrar in county in which leasehold is located. (TCA 66-11-147). Sworn statement set forth in § 66-11-112 must be filed. (TCA 66-11-147).

Time of Attachment.

Lien relates back to and takes effect from time of visible commencement of operations other than demolition, surveying, excavating, clearing, filling, grading, placement of sewer or drainage lines or other underground utility lines or work preparatory therefor, erection of temporary security fencing and delivery of materials therefor; except if operations ceased over 90 days and then resumed, lien relates back and takes effect at resumption. (TCA 66-11-104).

Prior Mortgage.

Such lien has priority over prior mortgage only if mortgagee had written notice thereof by certified or registered mail before work began or materials furnished and gave written consent thereto; failure of mortgagee to object in writing within ten days after receipt of notice implies consent, provided notice included name and return address to which written objection must be mailed by certified or registered mail. (TCA 66-11-108).

Notice of Nonpayment.

Every remote contractor with respect to improvement, except specified types of residential property, must serve, within 90 days of the last day of each month within which work or labor was provided or materials, services, equipment, or machinery furnished and for which remote contractor intends to claim lien under this chapter, notice of nonpayment for such work, labor, materials, services, machinery, or equipment to owner and prime contractor in contractual privity with remote contractor if its account is, in fact, unpaid. Remote contractor who fails to provide notice of nonpayment in compliance with this section shall have no right to claim lien. (TCA 66-11-145).

Notice of Lien.

Every remote contractor shall have lien provided by this part for such work or labor performed or materials, services, equipment, or machinery furnished by remote contractor in furtherance of improvement; provided, that remote contractor: (1) Satisfies all of requirements set forth in § 66-11-145, if applicable; and (2) within time provided for recording sworn statements set out in TCA 66-11-112(a), serves notice of lien, in writing, on owner of property on which improvement is being made. Lien shall continue for period of 90 days from date of service of notice in favor of such remote contractor, and until final termination of any suit for its enforcement properly brought pursuant to § 66-11-126 within that period. (TCA 66-11-115). Prime contractor's lien shall continue for one year after date improvement is complete or is abandoned, and until final decision of any suit properly brought within that time for its enforcement. (TCA 66-11-106). Suit by one contracting directly with owner may be filed within one year after completion of contract. (TCA 66-11-106). Notice is effective against third parties and innocent purchasers only when claim is registered with county register within 90 days after work is completed; lienor's contract expires or is terminated; lienor is discharged; or work has ceased for 90 days with intent of owner or contractor to cease operations indefinitely or permanently. (TCA 66-11-112, -117). Owner or purchaser may, upon completion of work, register in office of register of deeds in county where real property is located notice of completion or require contractor to do same. Unregistered lien claimants for projects on specified types of residential property must send written notice of lien in time to be received by person designated in notice of completion within ten days of filing of notice of completion; notice by other unregistered claimants must be sent in time to be received within 30 days of filing notice of completion. Failure to send timely notice shall terminate lien rights. Notice filed prior to completion of work is void. (TCA 66-11-143).

Removal of Improvements.

Where any contractor, mechanic or furnisher innocently makes improvements, does labor, or furnishes materials to be used on property of minor, who refuses to recognize lien or pay debt, or where superior lien exists without his knowledge, or where contract is with tenant, and landlord refuses to pay therefor, contractor, mechanic, or furnisher, after giving ten days notice, has right to remove improvements. (TCA 66-11-128).

Enforcement.

Lien can only be enforced by attachment, at law or in equity, except that liens on railroads for work, labor or material can also be enforced by suit at law or in equity. (TCA 66-11-126).

Public Works.

No lien on public works. Bond required of contractor to protect laborers and materialmen, and in order to fix liability against bond, notice by registered mail or in person to contractor or commission letting contract is required after materials furnished and within 90 days after completion of said public works. (TCA 12-4-201 et seq.).

Misapplication of Proceeds.

Owner who procures loan secured by mortgage or other encumbrance on certain real property, representing that proceeds are to be used to improve such real property, and who, with intent to defraud, uses proceeds for purposes other than to pay for labor performed on, or materials furnished for, this specific improvement, while any amount for which he may be or become liable for such labor or materials remains unpaid, is guilty of Class E felony. (TCA 66-11-137). Contractor, subcontractor, or other person who, with intent to defraud, uses proceeds of payment made to him on account of improving certain real property for purpose other than to pay for labor performed on, or materials furnished by his order for, specific improvement, while any amount for which he may be or become liable for such labor or materials remains unpaid, is guilty of Class E felony; provided, however, that there shall be no violation if distribution is pursuant to written agreement or, in certain cases, pursuant to generally accepted accounting principles. (TCA 66-11-138).

Truth in Construction and Consumer Protection Act.

Prior to commencing improvement or making of contract, contractor must deliver to owner, by registered mail or otherwise, written notice that there will be lien upon real property for improvements made by contractor or subcontractors, and that liens of subcontractors or suppliers may be enforced although contractor has been paid in full, if contractor has not paid subcontractors. (TCA 66-11-203). However, where owner of residential property and general contractor are one and same person, lien or right of lien upon such property shall exist only in favor of lienors in contractual privity with owner or general contractor. (TCA 66-11-146). Owner may reject contract by notifying contractor within three days of owner's receipt of notice. (TCA 66-11-204). Upon completion of contract or improvement and receipt of contract price, contractor must deliver to owner by registered mail or otherwise receipt and affidavit which provides that contractor has paid all claims or will pay any claim no later than ten days after bill is rendered, and that contractor will hold owner harmless from liens. (TCA 66-11-205). If liens are perfected and contractor has not complied with Act, contractor is guilty of Class B misdemeanor, but lien rights of contractor actually performing work under contract with owner are not affected by noncompliance. (TCA 66-11-206).

Hospital Lien.

Hospitals have lien for reasonable charges for hospital care of injured persons on causes of action for personal injuries not to exceed one-third amount of damages recovered by judgment or settlement. Lien subordinate to attorney's lien and is not applicable for accidents covered by workmen's compensation. Lien perfected by filing within 120 days after discharge from hospital a verified statement of amount with clerk of Circuit Court of county where hospital is located and by mailing copy within ten days from filing to each person claimed to be liable on account and to their attorneys. Filing fee: $10. Lien contested by motion to quash. (TCA 29-22-101 et seq.). Perfected lien will not apply to insured which obtains release of liability from or pays claim filed by insured prior to perfection of lien. (TCA 29-22-102).

Self-service storage facilities have lien on personal property stored on premises. If occupant has been in default continuously for 30 days, lien may be enforced by public sale after notice and under prescribed procedure. (TCA 66-31-101 et seq.).

Attachment Lien.

See topic 8.02 Attachment.

Attorney's Lien.

See category 18 Legal Profession, topic 18.01 Attorneys and Counselors.

Execution Lien.

See topic 8.05 Executions.

Judgment Lien.

See category 5 Civil Actions and Procedure, topic 5.15 Judgments.

Landlord's Lien.

See category 21 Property, topic 21.10 Landlord and Tenant.

Liens on Exempt Property.

See topic 8.06 Exemptions.

Liens on Homestead.

See topic 8.10 Homesteads.

Public Pledges and Liens.

Perfection, priority, and enforcement of pledges and liens made or granted in connection with issuance of public obligations are governed by Perfection, Priority Enforcement of Public Pledges and Liens Act. (TCA 9-22-101).

Real Estate Mortgage Lien.

See category 20 Mortgages, topic 20.04 Mortgages of Real Property.

Tax Lien.

See category 22 Taxation, topics 22.13 Property Taxes, subhead Lien; 22.12 Inheritance Tax, subhead Lien.

See also category 3 Business Regulation and Commerce, topic 3.09 Commercial Code.

8.14 MECHANICS' LIENS:

If contractor fails to pay supplier for materials for house built for speculative market and supplier fails to file notice of lien before sale of house to owner/occupant, resulting conversion of property to residential classification does not cut off lien. (940 S.W.2d 66 [1996]).

See topic 8.12 Liens.

8.15 PLEDGES:

Uniform Commercial Code has been adopted. (TCA 47-1-101 et seq.).

See category 3 Business Regulation and Commerce, topic 3.09 Commercial Code.

Title Pledge Act adopted providing for licensing of persons engaged in pawn or title pledge trade or business and regulation of such transactions. (TCA 45-6-201 et seq.). Statutory scheme relating to licensing and regulation of title pledge lenders was significantly revised in 2005. (TCA 45-15-102 et seq.).

8.16 RECEIVERS:

General equity rules apply to receivers.

8.178.18

8.19 TRUSTEE PROCESS:

See topic 8.09 Garnishment.

9 DISPUTE RESOLUTION

9.01 ALTERNATIVE DISPUTE RESOLUTION:

Uniform Arbitration Act is adopted. All causes of action, pending suit or not, may be submitted to decision of one or more arbitrators, except, (1) where party is infant or of unsound mind or (2) claim respecting real property, in fee or for life except that controversies regarding estate for term for year or less or for years not exceeding five and controversies regarding partition of real property are not included in bundle. (TCA 29-5-101). Submission may be made by any party in interest, executor, trustee, administrator or assignee for creditors. (TCA 29-5-103). Submission to arbitrators shall be by written agreement, specifying what demands are submitted, the names of arbitrators and court by which judgment on their award is to be rendered. (TCA 29-5-104). Written agreement to submit to arbitration is valid, enforceable and irrevocable, except upon such grounds as exist at law or in equity. (TCA 29-5-302). When award of arbitrator(s) is adopted, it is filed and entered on records, and judgment shall be rendered, including costs and fees. (TCA 29-5-118). Arbitration awards and proceedings are governed by TCA 29-5-301-320.

Upon motion of party, or upon its own motion, court may order parties to eligible civil actions to participate in judicial settlement conferences, mediations or case evaluations. With consent of all parties, court may order parties to participate in nonbinding arbitration, minitrial, summary jury trial or other appropriate alternative dispute resolution proceedings. (Supreme Ct. Rule 31).

Legislature and courts have recognized, as mandatory or voluntary, alternative dispute resolution in specific instances as follows:

Manufacturers of motor vehicles and consumers who assert breach of warranty may resort to informal dispute settlement procedure under provisions of Title 16, CFR, Part 703. If manufacturer establishes or participates in informal dispute settlement procedure, consumer who has not first pursued such informal procedures may not seek remedies provided by applicable statutory provisions. (TCA 55-24-206).

State insurance committee and local insurance committee has authority to promulgate rules for administering group insurance plan, which rules may include provisions for handling and resolution of disputes regarding benefits of insurance plan. (TCA 8-27-102; TCA 8-27-301).

Victim-offender mediation centers for resolution of felony, misdemeanor and juvenile delinquent disputes established to provide forums in which persons may voluntarily participate in resolution of disputes in informal and less adversarial atmosphere. Victim-offender mediation centers established to help meet need for alternatives to courts for resolution of certain disputes. (TCA 16-20-101). Center may be created by corporation organized to resolve disputes and shall be not for profit. (TCA 16-20-102).

Employees must follow grievance procedures contained in collective bargaining agreement when their claim is based upon collective bargaining agreement itself. (592 S.W.2d 322 [1979]).

Circuit courts have jurisdiction to enter judgments on awards of arbitrators and to have and determine agreed cases. (TCA 16-10-105).

Chancery court has jurisdiction, concurrent with all other judicial tribunals of arbitration and agreed cases. (TCA 16-11-112).

9.02 ARBITRATION AND AWARD:

Uniform Arbitration Act adopted effective May 26, 1983. (TCA 29-5-302 et seq.).

Only material variation from 1955 Official Text is in § 1: second sentence deleted and new sentence added providing that in contracts relating to farm property, structures or goods, or to property and structures utilized as residence of party, clause providing for arbitration shall be separately signed or initialed by parties. (See TCA 29-5-302.)

See also topic 9.01 Alternative Dispute Resolution.

10 DOCUMENTS AND RECORDS

10.01 ACKNOWLEDGMENTS:

Within State.

Acknowledgment within the state must be before the clerk or deputy clerk of county, clerk and master of chancery court or notary public. (TCA 66-22-102). Fees of clerk (a) for issuing subpoena for each witness required to be summoned to prove execution of writing, 25¢, and (b) for filing and entering date of presentation of deed or other instrument when its authentication is not completed at time of presentation, in addition to fees allowed by law for taking probates and acknowledgments of deeds and other instruments and certifying same, 10¢. (TCA 66-22-112). For fees of notaries, see topic 10.03 Notaries Public, subhead Fees.

Outside State but Within United States.

Acknowledgments outside of state but within the United States or its territories must be before any court of record or its clerk, a commissioner for Tennessee, or a notary public of any such state or territory, or any other officer of such state or territory authorized by its laws to take proof and acknowledgment of deeds. (TCA 66-22-103). May also be before any other officer of such state, territory or district authorized by laws thereof to acknowledge. In instance, acknowledgment must be accompanied by certificate from Secretary of State or Clerk of Court of that state stating that officer was authorized to acknowledge. (TCA 66-22-103).

Outside the United States.

Acknowledgments outside of United States and its territories must be taken before commissioner for Tennessee, notary public of such country, consul, charge d'affaires, envoy, minister or ambassador of U.S. in country to which he is accredited and where acknowledgment is made. (TCA 66-22-104).

Persons in or with U.S. Armed Forces.

The acknowledgment of a person in the Armed Forces of the United States, whether inside the United States or in foreign service, may be before an officer of the U.S. Army or Marine Corps with the rank of 2nd Lieutenant or higher, officer of U.S. Navy or Coast Guard of rank of Ensign or higher, or officer of any other component part of armed services with equivalent rank. (TCA 58-1-605). Such officer must attest fact that person appearing before officer makes oath to facts contained therein or acknowledges same as his act. Certificate must show date but need not show place of such acknowledgment. Certificate of such attesting officer, his rank and branch of service, is proof of his authority and prima facie evidence that person acknowledging is in such armed service. (TCA 58-1-607). Wife of man in U.S. armed service accompanying husband may acknowledge or prove any instrument before same officers as above. (TCA 58-1-605).

General Requirements as to Taking.

If clerk or deputy clerk does not know, is not acquainted with or does not have satisfactory evidence of identity of person wishing to acknowledge instrument, such person has 20 days within which to produce witnesses to prove identity. (TCA 66-22-106).

General Requirements of Certificate.

All acknowledgments must be under the seal of the officer taking same. (TCA 66-22-110). The expiration date of the commission of the notary public must be shown. Failure of notary public to indicate expiration date of commission on instrument does not invalidate instrument. (TCA 8-16-115).

Married persons acknowledge as though sole; separate examination not necessary. (TCA 66-22-109).

Attorneys in Fact.

No special requirements.

Corporations.

No special requirements except that a special form of certificate is provided. (TCA 66-22-108).

Foreign Acknowledgments.

See subhead Outside the United States, supra.

Effect of Acknowledgment.

Instruments entitled to be registered must be so authenticated. (TCA 66-24-101 et seq.). Any instrument so proved or acknowledged, certified and registered shall be received as evidence. (TCA 66-26-110).

Proof by Subscribing Witnesses.

Instruments may be authenticated by two subscribing witnesses. (TCA 66-22-101).

Authentication.

Acknowledgment taken out of state, but in U. S., by anyone except court of record, clerk of court of record, commissioner for Tennessee appointed by Governor, or a notary public authorized there to take proof or acknowledgments, must have attached thereto a certificate of Secretary of State of such state or territory under seal of such state, or certificate of clerk of court of record of such state, territory, or district in the county in which said officer resides or in which he took said proof or acknowledgment under seal of such court, stating that such officer at time of taking the acknowledgment was duly authorized so to do and that said Secretary of State or clerk of court knows his handwriting and believes his signature to be genuine. If acknowledgment is taken before court of record, copy of entry of acknowledgment on records must be certified by clerk under seal of office and judge, chief justice or presiding magistrate of the court must certify to official character of clerk. (TCA 66-22-103).

Forms.

Any certificate clearly evidencing intent to authenticate, acknowledge or verify document constitutes valid certificate of acknowledgment. No specific form or wording required. Ownership of property or determination of other right or obligation not affected by inclusion or omission of any specific words. (TCA 66-22-114).

Forms for acknowledgments from out of state acceptable if in form prescribed by this state or state in which acknowledgment taken. (TCA 66-22-115). Forms for acknowledgment of natural person acting in his or her own right, of attorney in fact or on behalf of corporation or for other agency position may contain substance of following:

Acknowledgment by Individual.

State of. . . . ., County of. . . . . Personally appeared before me, (name of natural person executing instrument), with whom I am personally acquainted and who acknowledged that (s)he executed the within instrument as his/her free act and deed and for the purposes therein contained. Witness my hand, at office, this. . . . day of. . . . . ., (year). . . . (TCA 66-22-107).

Acknowledgment for Corporation.

State of. . . ., County of. . . . Before me, a Notary Public in and for said State and County, duly commissioned and qualified, personally appeared. . . . ., with whom I am personally acquainted (or proved to me on the basis of satisfactory evidence), and who, upon oath, acknowledged such person to be the (title of officer) of (name of grantor), the within named bargainor, a corporation, and that such person executed the foregoing instrument for the purposes therein contained, by signing the name of the corporation as (title). Witness my hand, etc. (TCA 66-22-108).

Proof by Subscribing Witnesses:

State of. . . . ., County of. . . . . Personally appeared before me (give name of officer and title). . . . . and. . . . ., subscribing witnesses to the within instrument, who being first sworn deposed and said that they are acquainted with. . . . ., the bargainor, and that the bargainor acknowledged the said instrument in their presence to be the bargainor's act and deed, on the day it bears date (or at such date as the witnesses prove the acknowledgment was made). Witness my hand, etc. (TCA 66-23-117).

Alternative to Acknowledgment or Proof.

No statutory provision.

Validating Acts.

Instrument of record for seven years or more presumed valid as to form. (TCA 66-26-106).

10.02 AFFIDAVITS:

In This State.

General sessions judge (TCA 16-15-403), county clerk (TCA 18-6-114), clerk (TCA 18-1-108), deputy clerk (62 Tenn. 354 [1874]), or notary public (TCA 8-16-112), may administer oaths and take affidavits.

In Other States of U.S.

Affidavits may be taken before notary public duly authorized in such state, whose certificate must bear date of commission and statement of expiration date of commission. (TCA 8-

16-121).

Outside of U.S.

In foreign countries oath is taken before any officer authorized to take probate of deeds and authentication in like manner. (TCA 66-22-104).

General Requirements Of Jurat.

Seal of notary must be affixed to and notary must sign instrument. (TCA 8-16-112). Failure to include date of expiration of commission does not invalidate instrument. (TCA 8-16-115).

Form.

State of. . . . ., County of. . . . ., I,. . . . ., first being duly sworn, make oath as follows: (here, insert body of affidavit and signature of affiant). Sworn to and subscribed before me this. . . . . day of. . . . ., (year). . . . (here, insert signature of officer taking affidavit, seal, and date of expiration of commission).

Alternative to Affidavit.

No statutory provision.

10.03 NOTARIES PUBLIC:

Qualification.

Notaries must take oath of office (TCA 8-16-105) and give bond in amount of $10,000. (TCA 8-16-104). And upon moving notary's residence or principal place of business outside of state is no longer qualified and must surrender license. (TCA 8-16-110).

Seal.

Newly elected notaries must use seal, designed and provided by Secretary of State which may be imprinted by rubber or other type stamp and same shall print in only colors other than black or yellow, and appear as black when photocopied on noncolor copier. Impression seals in use in 2004 shall remain until end of notary's term. (TCA 8-16-114).

Powers.

Notaries have usual powers; may administer oaths, take affidavits and depositions, qualify parties to bills in chancery, etc. Notaries must affix seal and sign in ink all such documents. (TCA 8-16-112).

Territorial Extent of Powers.

Notary public commissioned in one county is authorized to exercise functions of notary public in all counties of state. (TCA 8-16-113).

Protest of Commercial Paper.

Attestations, protestations, and other instruments of publication or acknowledgment made by any notary public under seal shall be received into evidence. (TCA 8-16-116).

Expiration of Commission.

Notary must note date of expiration of commission on all certificates of acknowledgment, but absence of such commission expiration date does not invalidate instrument. (TCA 8-16-115).

Disclosure.

Notary Public not licensed to practice law in Tennessee must disclose in all advertising of any type that he or she is not attorney and may not give legal advice or accept fees for legal advice. (TCA 8-16-401).

Fees of notaries are: For recording in notary's book each attestation, protestation and other instruments of publication, $1; for each negotiable instrument protested, without regard to number of parties, $1.50; each acknowledgment or probate of any instrument, 25¢; for each deposition taken, $1; for any other service legally performed by notary, same fees allowed as to other officers for like services. (TCA 8-21-1201).

Officers of U. S. Armed Forces are given general notarial powers. (TCA 58-1-605-06).

10.04 RECORDS:

Uniform Commercial Code has been adopted. (TCA 47-1-101 et seq.).

County Register is officer having charge of records relating to property.

Recordable Instruments.

Writings subject to registration are set forth in TCA 66-24-101. All deeds, judgments, orders and writs affecting real estate, whether absolute or in nature of mortgages, must be recorded with County Register in county in which land lies, to be good against third parties. (TCA 66-24-103-109). *For list of Counties and County Seats see first page for this state in Volume containing Practice Profiles Section.* All deeds or mortgages of personalty may be registered in county where vendor or person executing same resides and in case of his nonresidence where property is. (TCA 66-24-104).

Place of Recording.

See subhead Recordable Instruments, supra.

Requisites for Recording or Registration.

To be recorded or registered, instrument must be acknowledged or proved according to Tennessee law. (See topic 10.01 Acknowledgments.) Registration on defective acknowledgment is invalid.

Instrument to be recorded must recite source from which grantor received equitable interest and character of last registered instrument, if any, dealing with same property or subject, and office, book and page where same was recorded or if no prior instrument is recorded it must so state. (TCA 66-24-110).

Instrument conveying, assigning or encumbering interest in real or personal property must, to be recorded, recite on first page name and address of preparer. (TCA 66-24-115). Deed, except for deed of trust or mortgage, must also include name, address, and license number of surveyor who prepared survey from which legal description was prepared. (TCA 66-24-121). Real property deed other than trust deed or mortgage must recite name and address of one property owner and name of person or entity responsible for payment of property taxes (TCA 66-24-114) and contain parcel identification number (TCA 66-24-113).

Recording Fees.

For Commercial Code filings, see subhead Filing Under Commercial Code—Place; Fees and Taxes, infra. For plat, map, or survey, $15. For each other type of document that may be registered, $10. For each instrument in document in excess of one, each page in document in excess of two, or certified copy of plat, map, or survey, $5. (TCA 8-21-1001). In addition to recording fee, recording tax and 50¢ tax collection fee must be paid on most deeds and all mortgages, deeds of trust and Commercial Code financing statements. See categories 22 Taxation, topic Property Taxes, subhead Real Estate Conveyance Tax; Mortgages, topic Mortgages of Real Property, subhead Tax; and this topic infra, subhead Filing Under Commercial Code—Place; Fees and Taxes.

Foreign Conveyances or Encumbrances.

To be recorded, foreign instrument must conform to Tennessee requisites for recording and registration.

Effect of Record.

Registration constitutes notice to all the world. (TCA 66-26-102). Registered instruments are admissible in evidence but are subject to impeachment. (TCA 66-26-110).

Failure to Record.

Instruments entitled to record or registration but not recorded or registered are not effective against existing or subsequent creditors of maker or bona fide purchasers from maker. (TCA 66-26-103).

Instrument entitled to registration and not registered prior to expiration of 60 days from death of maker is null and void against innocent purchasers for present valuable consideration from those who would have succeeded to such property had such instrument not been made. But holder of such instrument has action for value of property against such sellers within one year from registration of deed to innocent purchasers, if it is required to be recorded; otherwise within one year from consummation of such transfer or sale. (TCA 66-26-104).

Effect of Lapse of Time.

Registration of deed on defective acknowledgment is invalid, but is good after lapse of 20 years. (TCA 66-26-106). Conveyance by one purporting to act as attorney in fact is, after 20 years registration, presumed to have been executed under proper authority, duly executed, whether with or without probate of power of attorney, and is deemed sufficient to pass valid, legal title. (TCA 66-26-108).

Transfer of Decedent's Title.

Probate records are sufficient evidence of transfer of property of resident decedent. Where nonresident dies leaving will, exemplified copy may be probated here and in such case copy of probate records is evidence, or after probate, copy may be registered in county where land lies and copy thereof is evidence, or in case of realty will may be duly proven in proceedings involving title to property as at common law. (TCA 30-2-302). See also category 13 Estates and Trusts, topic 13.06 Descent and Distribution, subhead Determination of Heirship.

Torrens Act.

Not adopted.

Vital Statistics.

Under TCA 68-3-101 et seq., records of births, deaths (including fetal deaths), adoptions, legitimations, paternity adjudications, marriages and divorces are kept by Office of Data Collection, State Department of Health and Environment, 344 Cordell Hull Building, Nashville, Tennessee 37219. Department sets fees for producing copies of its vital records. (TCA 68-3-207).

Fees for certified copies vary.

Establishing Birth Record.

Acceptance for filing of birth certificate ten days or more after birth subject to regulations of Office of Vital Records. (TCA 68-3-308). Rejection of delayed birth certificate subject to special judicial review procedure. (TCA 68-3-309). Errors in birth certificates may be corrected by circuit, probate or county court on application of resident of county in which application made. (TCA 29-8-101).

Filing Under Commercial Code—Place; Fees and Taxes.

Proper place of filing in order to perfect security interest under Art. 9 of Commercial Code is as follows: (1) office designated for filing or recording of record of mortgage on related real property, if: (A) collateral is as-extracted collateral or timber to be cut; or (B) financing statement is filed as fixture filing and collateral is goods that are or are to become fixtures; or (2) office of Secretary of State, in all other cases, including case in which collateral is goods that are or are to become fixtures and financing statement is not filed as fixture filing (TCA 47-9-501). Address for Commercial Code filings with and inquiries to Secretary of State: Secretary of State, Commercial Code Division, 312 Eighth Avenue North, 6th Floor, Snodgrass Tower, Nashville, TN 37243.

Fees are as follows: Original financing statement, or continuation statement, $15; separate statement of assignment $15; termination statement, $15; release of collateral, $15. If any record is over ten pages, fee is $15 plus 50¢ per page. (TCA 47-9-525). Certificate may be obtained from filing office showing whether any presently effective financing statement naming particular debtor or statement of assignment exists; fee therefor is $15. Filing officer will furnish copy of filed financing statement or statement of assignment for fee of $1 per page.

Mortgage tax must be paid on recordation of UCC financing statement as if it were real property mortgage, even if only personal property is covered. See category 20 Mortgages, topic 20.04 Mortgages of Real Property, subhead Tax, for tax rates and provisions.

See also category 3 Business Regulation and Commerce, topic 3.09 Commercial Code.

Electronic Documents.

Writing eligible for registration created or retained as electronic record pursuant to TCA 47-10-112 and other provision of Uniform Electronic Transactions Act may be registered using copy certified as true and accurate by licensed attorney or custodian of record and signature is notarized. (TCA 66-24-101).

10.05 SEALS:

Uniform Commercial Code has been adopted. (TCA 47-1-101 et seq.).

Private and corporate seals are entirely abolished. Addition to or absence from any instrument of corporate seal does not affect its character, validity or legal effect in any respect. (TCA 47-50-101).

See also category 3 Business Regulation and Commerce, topic 3.09 Commercial Code.

10.06 TORRENS ACT:

Not adopted.

10.07 VITAL STATISTICS:

See topic 10.04 Records.

11 EMPLOYMENT

11.01 [RESERVED]

11.02 LABOR RELATIONS:

Employer may not: interfere with employee's selection of family physician (TCA 50-1-302[a]); withhold wages longer than usual term in order to force trade at employer-controlled store (TCA 50-2-106[a], [b]); deny or attempt to deny employment because of affiliation or refusal to affiliate with labor union or employee organization (TCA 50-1-201); terminate employee who refuses to participate or acquiesce in illegal activity (TCA 50-1-304).

Department of Labor & Workforce Development, Andrew Johnson Tower, 8th Floor, Nashville, TN 37243-0655, regulates and supervises any place where any manufacturing process is carried on or labor employed except by domestic workers, or by agricultural employees all of whom are related to other employees as spouse, child, parent, grandparent or grandchild. (TCA 50-3-101 et seq.).

Department of Labor and Workforce Development delivers employment related services and training in compliance with Workforce Investment Act of 1998, 29 U.S.C. § 2801 et seq.

Hours of Labor.

No minor may work during school hours. Minor 14 or 15 may not work between 7 P.M. and 7 A.M. if next day is school day, nor between 9 P.M. and 6 A.M., nor more than three hours per school day and eight hours per nonschool day, nor more than 18 hours per school week and 40 hours per nonschool week. (TCA 50-5-104). Minor 16 or 17 who is enrolled in school may not work between 10 P.M. and 6 A.M. if next day is school day. If guardian or parent provides written consent to employer, minor 16 or 17 may work between 10 P.M. and midnight during evenings preceding school days, but may not work more than three times per week past 10 P.M. during such evenings. (TCA 50-5-105).

Exceptions from above limitations discussed infra, subhead Child Labor.

Wages.

Employees have lien on employer's property for wages. (TCA 66-13-101).

As to wages payable during jury duty, see subhead Jury Duty, infra.

All wages of employees in private employment where five or more are employed, are due and payable at least semimonthly, and every employer must maintain regular paydays, notice of dates of which must be posted in two places where it can be seen by employees. Payment must be in lawful money of U.S., or by valid negotiable check or draft, payable on presentation without discount or exchange. (TCA 50-2-103). Final wages of employee who quits or is discharged must include vacation pay or other compensatory time that is owed to employee by virtue of company policy or labor agreement. (TCA 50-2-103). Employee who quits or is discharged must be paid in full all wages earned no later than next regular pay day following dismissal or voluntary leaving or 21 days following dismissal or voluntary leaving, whichever occurs later. There are no exceptions from this. (TCA 50-2-103).

It is Class C misdemeanor for any person to misrepresent to any employee amount of wages that such employee is to receive on entering into new contract of employment. (TCA 50-2-104).

Jury Duty.

On day after receipt of U.S. or Tennessee jury duty summons, employee of regular employer of five or more persons must show summons to immediate supervisor, whereupon employee is excused from work for days of required jury duty and employer must continue employee's usual compensation, less jury fees and compensation, except that employer must compensate only for time spent serving and traveling to and from jury duty. Violation, or discharge by employer of employee who gives proper notice of jury service, is misdemeanor. (TCA 22-4-108). Juror may request prior to each day's service statement showing number of hours juror spent serving if less than three hours. (TCA 22-4-108[c]).

Volunteer Emergency Personnel.

Volunteer firefighters afforded special protections and rights concerning termination of employment.

Child Labor.

Minor under 14 may not work. (TCA 50-5-103). Minor under 18 may not perform work involving radiation or radioactive substances; explosives; demolition; mining; excavation; logging; wood milling; slaughtering or meat processing; brick or tile manufacture; roofing; posing or modeling while engaged in sexual conduct for purpose of preparing photograph or film; motor vehicle driving; youth peddling; operation of elevators or power-driven hoists or of power-driven machinery used for woodworking, metalworking, baking or paper products; may not sell or take orders for alcoholic beverages or work at place receiving more than 25% of monthly gross receipts from sale of such beverages (TCA 50-5-106); and may not perform occupations interfering with schooling, health or well-being if 14 or 15 (TCA 50-5-104) or health or well-being or during specified hours if 16 or 17 (TCA 50-5-105).

Employer Obligations.

Prior to employing or continuing to employ minor, employer must require proof of age of minor employee or prospective employee by requiring minor to provide employer with copy of minor's birth certificate, passport, driver's license or state issued identification or else minor's parents must appear with minor before judge or officer of juvenile or county court where minor resides and make oath as to minor's age. (TCA 50-5-109). Employer must: (1) keep separate file on minor, containing: (a) employment application, (b) age evidence under TCA 50-5-109, (c) work time records for minor 14 or 15, and (d) records required under TCA 50-5-107, discussed infra this subhead, catchline Exemptions; (2) allow Department of Labor to inspect premises where minors are or could be employed and contents of required separate files; and (3) post and maintain in conspicuous place on premises printed notice furnished by Department. (TCA 50-5-111).

Exemptions.

Child labor laws, including age and work hour restrictions, do not apply to: Housework in minor's home; employment by parent or guardian unless prohibited by TCA 50-5-106, discussed supra this subhead; agriculture; newspaper sales; errands and deliveries by foot, bicycle or public transport; music or entertainment unless relating to posing or modeling while engaged in sexual conduct for purpose of preparing photograph or film; self-employment; 16- or 17-year-old apprentice registered with and employed under standards set by U.S. Department of Labor; minor 16 or 17 participating under written agreement (copy to be kept by employer) in cooperative vocational training program under state or local educational authority or in similar private school program; child certified by federal agency in writing (copy to be kept by employer) as enrolled in federally-funded public employment program; child with high school diploma or equivalent, if copy of minor's high school diploma or equivalent is in employer's records; minor who is or has been married or who is parent, if copy of minor's marriage license or birth certificate of minor's child is in employer's records; minor 16 or 17 with written statement in employer's records from superintendent of schools stating that minor is not enrolled in school or is excused under TCA 49-6-3005. (TCA 50-5-107). Also, Commissioner of Labor may grant special exemption on request of minor and his parents or guardian. (TCA 50-5-108).

See also supra, subhead Hours of Labor.

Discrimination in rate of pay because of sex is prohibited. (TCA 50-2-202). Employer who violates provisions of TCA 50-2-202 may be liable for monetary damages to affected employee as set out in TCA 50-2-204. Discrimination in employment on basis of race, creed, color, religion, sex, age or national origin prohibited. (TCA 4-21-101 et seq.). Discrimination in employment against handicapped is Class C misdemeanor unless handicap prevents or impairs performance of work involved. (TCA 8-50-103).

Maternity Leave.

Employer who employs 100 or more full-time permanent employees at job site must allow employees, employed full-time by same employer for at least 12 consecutive months, who gives three months advance notice unless prevented from doing so by medical emergency, four months leave for pregnancy, childbirth, adoption, and nursing infant if position can be filled temporarily. Leave may be with or without pay. Such employee is to be restored to previous or similar position after leave and leave not to affect employee's status or benefits. Employee need not be reinstated at end of leave if employee worked for another employer during leave or actively pursued other employment opportunities. (TCA 4-21-408).

Labor Unions.

“Right to work” law has been adopted. (TCA 50-1-201 et seq.).

Employment of Illegal Aliens.

Unlawful to knowingly employ illegal aliens unless employer is granted exemption by Department of Labor. Employer may rely on identification. Illegal employment is Class B misdemeanor. (TCA 50-1-103). Person that knowingly used illegal immigrant services in performing contract to supply goods or services to state or state entities may be prevented from contracting with state or bidding on state contracts for one year. (TCA 12-4-124).

Workers' Compensation.

All employers of five or more employees are included except: (a) common carrier engaged in interstate commerce subject to Federal Employers Liability Act; (b) leased operator or leased owner/operator under contract to common carrier electing coverage under policy insuring common carrier; (c) employers of domestic servants; (d) farm and agricultural employers; (e) state, county or municipal departments of government, provided that they may accept terms of Act and comply. (TCA 50-6-106).

Acceptance of Act.

Every employer and employee subject to Act must elect to be covered by same except that corporate officer may elect to be bound by common law. (TCA 50-6-103).

Insurance must be carried in authorized company or employer must obtain valid certificate of authority from Commissioner of Commerce and Insurance by furnishing to Commission proof of financial ability to pay claim, deposit not less than $500,000 in securities or bond, and furnish financial statement annually. (TCA 50-6-405).

Written notice of injury required within 30 days of accident, unless employer has actual notice, or when injury occurs as result of gradual or cumulative events of trauma, in which case, written notice of injury must be given within 30 days after employee knows or reasonably should know he has suffered work related injury. (TCA 50-6-201). Employer must also file, within 30 days, wage statement of employee's wages for previous 52 weeks unless employer stipulates that maximum weekly rate applies. Wage statement must be filed only if accident causes death or injury that keeps employee from returning to work within seven days of accident. (TCA 50-6-201). Claim is barred after one year except where payment has been made to injured person or his dependent during that period, in which case claim is barred after one year from later of date of last authorized treatment and date of last payment. (TCA 50-6-203). If injury is continuing and there is no particular event or incident identifiable as “accident resulting in the injury”, one-year statute of limitations commences at time employee is no longer able to work due to injury. (944 S.W.2d 340 [1997]).

Employer Reports.

Employer must notify director of division of workers' compensation, on director's form, of first benefit payment, change or cessation of benefits other than by final settlement, or benefit denial, and if payments are made without award and then ceased due to election to contest liability, must give director notice of controversy within 15 days of first omitted payment. (TCA 50-6-205).

Hearing.

Parties must exhaust benefit review conference process before filing claim to appropriate court. (TCA 50-6-203). Jurisdiction is in circuit or chancery court in county in which employee resides or in which alleged injury occurred. If employee resides outside Tennessee or if accident occurred outside Tennessee, complaint must be filed in county where employer maintains office. Cause proceeds by petition, service of notice, answer and hearing without jury. (TCA 50-6-225).

Settlements.

Agreed settlements must be affirmed by court subject to right in Division to apply to set same aside within 30 days. (TCA 50-6-206).

Compensation for Injuries.

Schedule of payments for all disabilities, with exception of temporary partial, based on percentage of average weekly wage. (TCA 50-6-207). Calculation of temporary partial disability award is based on 661/3% of difference between wage of worker at time of injury and wage such worker is able to earn in such worker's partially disabled condition; this calculation method does not include average weekly wage definition. (TCA 50-6-207; 48 S.W.3d 148 [2000]). Excluding medical and burial allowances under TCA 50-6-204, maximum benefit is maximum weekly rate then in effect up to 400 weeks except in cases of permanent total disability. (TCA 50-6-205; TCA 50-6-102). There is no limitation on how long claimant may receive benefits for permanent total disability. (TCA 50-6-207; 951 S.W.2d 766 [1997]). Maximum weekly rate increases annually after Aug. 1, 1992 up to specified percentage of state's average weekly wage, but not more than 662/3% of employee's average weekly wage at time of injury. (TCA 50-6-102). Employee claiming mental injury as defined by TCA 50-6-102(15) occurring on or after July 1, 2009 shall be conclusively presumed to be at maximum medical improvement upon earliest of following: (i) Time psychiatrist concludes employee has reached maximum medical improvement; (ii) 104 weeks after employee reached maximum medical improvement; or (iii) 104 weeks after date of injury. (TCA 50-6-207[1]). Court may award attorney fees and reasonable costs, including court reporter and expert witness fees, resulting from employer's failure to furnish medical, surgical, dental or psychological treatment or care or medicine, medical or surgical supplies, etc. to employee as required pursuant to settlement or judgment under this chapter. (TCA 50-6-204; TCA 50-6-226).

Death payments to dependents until death or marriage. Partial dependents receive proportionate allowance. (TCA 50-6-210). If deceased employee leaves no dependents, sum of $20,000 is payable to his estate by employer. (TCA 50-6-209).

Occupational Diseases.

Certain occupational diseases under specified circumstances are covered. (TCA 50-6-301-06).

Disfigurement to head, face, or hands covered under certain conditions. (TCA 50-6-207). In order to recover under disfigurement statute, employee must prove: (1) Serious disfigurement has been sustained, (2) disfigurement materially affects employment, (3) condition is permanent, and (4) work-related injury caused disfigurement.

Occupational Diseases.

See subhead Workers' Compensation, supra.

Employers' Liability Act.

See subhead Workers' Compensation, supra.

Unemployment Compensation.

Governed by TCA 50-7-101 et seq. Unemployed individual is eligible for benefits if he has been paid specified amount for insured work (TCA 50-7-301, 305, am'd 2009, c. 550); has registered for work and continued to report to employment office; is able to and available for work, unless due to illness or disability occurring after registration; is making reasonable effort to secure work; and has been unemployed for waiting period of one week, unless he has been offered same job previously held and has refused same (TCA 50-7-302, am'd 2009, c. 550). No claimant who is otherwise eligible shall be deemed ineligible because claimant applies for or accepts part time work of 20 hours week or less. (TCA 50-7-302[a][4]), am'd 2009, c. 550). Except as provided in TCA 50-7-304(b)(2)(D) no employer's account shall be charged for any benefits paid to former employee who left under conditions which result in imposition of disqualification under TCA 50-7-303(a)(1), (2) or (4) (am'd 2009, c. 479), or as provided by statute. No employer's account shall be charged for any employee who left employer to enter training approved under Trade Act of 1974. (TCA 50-7-403). Benefits shall be denied if former employee was discharged because she placed employer in violation of Fair Labor Standards Act. (TCA 50-7-303, am'd 2009, c. 479).

Benefits range from a minimum of $30 per week to maximum of $169 per week for benefit year established on or after July 5, 1992; $185 per week maximum for benefit year established on or after July 4, 1993; $199 per week maximum for benefit year established after July 3, 1994; $220 per week maximum for benefit year established after July 6, 1996; $240 per week maximum for benefit year established after July 5, 1997; and $255 per week maximum for benefit year established after July 4, 1998 and $275 per week maximum for benefit year established after Aug. 5, 2001. (TCA 50-7-301).

See also category 22 Taxation, topic 22.05 Employment Taxes, subhead Unemployment Compensation Tax.

11.02A VIOLENT ACTS OR THREATS:

Under certain circumstances, employer may obtain temporary restraining order and injunction prohibiting certain violent acts or threats at workplace.

11.03 WORKERS' COMPENSATION LAW:

See topic 11.01 Labor Relations. See also category 16 Insurance, topic 16.01 Insurance Companies.

12 ENVIRONMENT

12.01 ENVIRONMENTAL REGULATION:

Water Quality Control.

General Supervision.

Vested in Commissioner of Health and Environment.

Prohibited Acts.

Unless valid permit held, it is unlawful for any person, other than person who discharges into publicly owned treatment works or person who is domestic discharger into privately owned treatment works, to: (1) Alter physical, chemical, radiological, biological or bacteriological properties of state waters; (2) construct, install, modify or operate any treatment works; (3) increase volume or strength of waste in excess of discharge permitted by existing permit; (4) develop natural resource or construct, install or operate any establishment likely to cause increase in waste discharge or alter physical, chemical, radiological, biological or bacteriological properties of state waters; (5) construct or use any new outlet for waste discharge into state waters; (6) discharge sewage or industrial wastes into waters or at location from which discharge likely to move into waters; (7) construct, install, or operate concentrated animal feeding operation; (8) discharge sewage or industrial wastes into well or at location from which discharge likely to move into well or underground placement of fluids or substances which may affect state waters; or (9) divert water through flume for purpose of generation of electric power by utility. (TCA 69-3-108).

Enforcement.

Commissioner of Health and Environment issues corrective orders. (TCA 69-3-107 through 109). Appeal of corrective order or permit denial made by filing with Board, within 30 days after service of order or delivery of permit denial, petition for hearing. (TCA 69-3-105, am'd 2009, c. 464). Appeal of Board or Panel action made to Chancery Court within 60 days of action, pursuant to Uniform Administrative Procedures Act, TCA 4-5-301 et seq. (TCA 69-3-111).

Penalties.

Violations in specified cases punishable by civil penalty up to $10,000 per day of violation. Negligent pollution Class C misdemeanor punishable by fine up to $25,000. Willful pollution and willful falsification of records, plans, etc., Class E felony punishable by fine up to $25,000 or incarceration or both. (TCA 69-3-115). Commissioner may assess damages to state (TCA 69-3-116) and may apply for injunctive relief (TCA 69-3-117).

Permits.

Required as indicated supra, this subhead. Applications filed with Commissioner. (TCA 69-3-108). Procedure for appealing permit denial discussed supra, this subhead.

Major Energy Projects.

See subhead Major Energy Projects, infra.

Air Quality Control.

General Supervision.

Supervision vested in Air Pollution Control Division (TCA 68-201-105), L&C Tower, 401 Church St., 9th Floor, Nashville, TN 37243-1531, (615) 532-0554, administered by technical secretary (TCA 68-201-107).

Prohibited Acts of Pollution.

Air Pollution Control Board delegated authority to promulgate regulations establishing air quality standards. (TCA 68-201-105).

Enforcement.

Technical secretary is empowered to prosecute complaints before Board. Commissioner of Health and Environment may issue emergency stop order on finding that air contaminant source causes imminent danger to public health. (TCA 68-201-109). Decision of Board or Commissioner may be appealed pursuant to Uniform Administrative Procedures Act, TCA 4-5-301 et seq., unless disposition became final as result of failure to appear at hearing after adequate notice. (TCA 68-201-110).

Penalties.

Knowing violation of rule or regulation is Class C misdemeanor. (TCA 68-201-112). Board may apply for injunctive relief. (TCA 68-201-111).

Permits.

Petition filed with technical secretary to obtain variance by action of Board. (TCA 68-201-118).

Major Energy Projects.

See subhead Major Energy Projects, infra.

Solid Waste Disposal.

General Supervision.

Vested in Department of Health and Conservation, L&C Tower, 401 Church St., 5th Floor, Nashville, TN 37243-0435, (615) 532-0109, acting through its Commissioner (TCA 68-211-105, -107) and Solid Waste Disposal Control Board, which may delegate duties to local health officers under TCA 68-211-108.

Prohibited Acts.

Unlawful to: (1) Deposit solid waste in state waters except in manner approved by Department and Water Quality Board; (2) burn solid waste, except in manner approved by Department and Air Pollution Control Board; (3) construct, alter or operate solid waste processing or disposal facility or site in violation of Commissioner's rules, orders, etc., or in manner creating public nuisance; (4) transport, process or dispose of solid waste in violation of this Title 68, c. 211, Rules or Regulations thereunder or order of Commissioner or Solid Waste Disposal Control Board. (TCA 68-211-104). No new construction or change may be made in solid waste processing or disposal facility or site without approval from Department. (TCA 68-211-105). No such facility or site may be operated or maintained unless registered with Commissioner. (TCA 68-211-106). No permit to construct or operate landfill for disposal of solid or hazardous waste is granted if location of such would violate provisions of TCA 11-13-111. New commercial hazardous waste facilities must be at least 1,500 feet from residential, church, park, school or childcare property. (TCA 68-212-105). Registration may be revoked for noncompliance with provisions of chapter. (TCA 68-211-106[a][1][d]). Bond or deposit of cash or securities in prescribed form and in amount of at least $1,000 per affected acre (or fraction thereof) shall be filed with Commissioner. After notice of noncompliance to operator of facility, Commissioner may suspend registration. Registration may be revoked and bond forfeited in event of further noncompliance. (TCA 68-211-116). Above prohibitions do not apply to private, natural person disposing waste generated in his own household upon his own land provided disposal does not create nuisance or public health hazard, but such exemption shall not apply after Jan. 1, 2004 to person who deposits household waste on sinkhole. (TCA 68-211-110). Commissioner may refuse to issue or renew permit if he finds that applicant or party has: (1) Intentionally misrepresented or concealed any material fact which would have resulted in denial of application submitted or permit issued; (2) has been convicted or incarcerated for felony environmental criminal offense within three years preceding application; (3) has been in contempt of any State court order enforcing Solid Waste Disposal Act or Hazardous Waste Management Act; (4) has been convicted of violation of either State or federal RICO laws.

Enforcement.

Commissioner issues corrective orders. (TCA 68-211-112). Appeal of corrective order or permit denial made by filing with Commissioner (within 30 days after service of order or permit denial) petition for appeal specifying basis for appeal. Appeal of Board actions made to Chancery Court of Davidson County. Any person may file complaint with Commissioner or Board against alleged violators, and unless duplicitous or frivolous, allegations will be investigated with notification (to complainant and violator) of action to be taken. (TCA 68-211-113). Commissioner may apply for injunctive relief. (TCA 68-211-115).

Consent Order.

Once consent order has been entered, commissioner has discretion and is authorized to expend monies from remedial action fund to pay investigation, cleanup, monitoring of inactive hazardous site as provided by statute. Commissioner has discretion in allocation of liability consistent with TCA 68-212-207(b) in consent order with potentially liable party participating in voluntary program; as provided by statute TCA 68-212-224.

Penalties.

Willful violation of statute, regulation or order is Class B misdemeanor. (TCA 68-211-114). Violators also subject to civil penalty of up to $5,000 per day per violation, assessed in prescribed manner and considering extent of harm, economic gain by violators, efforts to comply and enforcement costs, and damages to state, including reasonable expenses for investigation, enforcement and restoration of environment. (TCA 68-211-117).

Permits.

Required as indicated supra, this subhead. Applications filed with Commissioner. (TCA 68-211-105). Procedure for appealing permit denial discussed supra, this subhead. Municipality may use eminent domain powers to establish landfill for solid waste disposal outside its corporate boundaries only if governing body of area in which landfill is to be located approves action by majority vote at two consecutive regularly-scheduled meetings. (TCA 68-211-122).

Solid waste disposal and public and private landfills and other solid waste disposal facilities are subject to extensive regulation. (TCA 68-211-101 et seq.).

Major Energy Projects.

See subhead Major Energy Projects, infra.

General Provisions.

Employers that manufacture or use hazardous chemicals are required to inform employees of presence and/or use of hazardous chemicals in manufacturing process. Additional requirements include maintenance of detailed records, public posting of chemical use, labeling procedures and training programs for employees exposed to hazardous chemicals. Commissioner of Department of Labor has authority to enforce provisions, as set out in TCA 50-3-401 et seq. Violators are subject to injunctions and monetary penalties. (TCA 50-3-2001 et seq.).

Hazardous Waste Management.

General Supervision.

Vested in Department of Environment and Conservation, L&C Tower, 401 Church St., Nashville, TN 37243-0435, (615) 532-0109, acting through its Commissioner (TCA 68-212-107) and Solid Waste Disposal Control Board (TCA 68-211-111). Standards required to obtain operating permit for commercial facilities engaging in storage, treatment or disposal of hazardous waste contained in TCA 68-212-108. No permit shall be issued for portable commercial unit to store, treat or dispose of waste generated in state other than Tennessee. (TCA 68-212-108). Each applicant is required to notify community of, and hold, at least one pre-application community meeting at which time applicant must provide community impact statement. (TCA 68-212-108).

Prohibited Acts.

Unlawful to: (1) Deposit hazardous waste in state waters, except in manner approved by Department or Water Quality Control Board; (2) burn hazardous waste, except in manner prescribed by Department or Air Pollution Control Board; (3) construct, alter, operate, own, close (or maintain after closure) hazardous waste treatment, storage or disposal facility in violation of Commissioner's or Board's orders or rules, or in manner creating public nuisance or health hazard; (4) store, containerize, label, transport, treat or dispose of hazardous wastes in violation of applicable orders or rules, or in manner creating public nuisance or health hazard; or (5) fail to pay assessed fees to Department. (TCA 68-212-105). Sufficient bond and cash deposit to assure perpetual care of facility or site may be required, as well as liability insurance for accidental occurrences, unless waived or variance granted. (TCA 68-212-108). Above prohibitions do not apply to emissions generated within residence or farm (waste from growing and harvesting crops or raising of animals if used as fertilizer, or waste pesticides if disposed of as provided by statute) and incident to operation thereof. (TCA 68-212-103).

Enforcement.

Commissioner issues corrective orders under TCA 68-212-111. Appeal of corrective order or permit denial by filing with Commissioner (within 30 days after service of order or denial) petition for appeal to Solid Waste Disposal Control Board, specifying basis for appeal. If Commissioner fails to act on permit application within 45 days, appeal may be made to Board as if permit had been denied. Appeal of Board actions made to Chancery Court of Davidson County. Person aggrieved by final decision may file petition for review with Commissioner within 30 days of publication of final decision. Person aggrieved is defined to include (1) permit applicant; (2) owner of property within three-mile radius of site proposed for permitting; (3) city and county with authority to submit reports pursuant to TCA 68-212-108(f), and any resident thereof. (TCA 68-212-113). Any person may file complaint against alleged violators under procedure discussed supra, subhead Solid Waste Disposal. Commissioner may file notice with county register of deeds for property placed on list of hazardous substance sites pursuant to TCA 68-212-206, or whenever Commissioner expends money for investigation, identification, containment or cleanup of site. (TCA 68-212-209).

Penalties.

Violation of statute or order is Class A misdemeanor. Violator who willfully and knowingly disposes of hazardous waste is guilty of Class C felony. (TCA 68-212-114). Commissioner may apply for injunctive relief (TCA 68-212-115) and may assess civil penalty up to $50,000 per day per violation. (TCA 68-212-114). In case of aggravated violation, Board may award attorneys' fees (and defined damages in certain situations) to complainant. (TCA 68-212-117).

Permits.

Required as indicated supra, this subhead. Applications filed with Commissioner. Procedure for appealing permit denial discussed supra, this subhead.

Certain underground storage tanks are regulated by Tennessee Petroleum Underground Storage Tank Act. (TCA 68-215-101 et seq.).

Major Energy Projects.

See subhead Major Energy Projects, infra.

Mineral Test Hole Regulatory Act.

General Supervision.

Supervision vested in Department of Environment and Conservation, L&C Tower, 401 Church St., 21st Floor, Nashville, TN 37243-0435, (615) 532-0109, acting under Commissioner of Conservation, to regulate drilling of mineral test holes to prevent pollution of potable water resources. (TCA 60-1-504).

Prohibited Acts of Pollution.

Supervisor delegated authority to promulgate regulations establishing drilling standards. (TCA 60-1-504).

Enforcement.

Supervisor issues notice of determination of violation to owner or operator with order to remedy specified condition. If condition persists, supervisor may, after 60 days from notice, enter property to correct same, expenses for which owner and operator become jointly and severally liable. (TCA 60-1-507). Procedures, including appeals, governed by Administrative Procedures Act. (TCA 60-1-506).

Penalties.

Violation of Act or regulation punishable by civil penalty up to $1,000 for each day violation continues. Supervisor may apply for injunctive relief. Willful violation is Class C misdemeanor. (TCA 60-1-509).

Permits.

Owner must obtain permit from Supervisor. (TCA 60-1-505).

Surface Mining.

General Supervision.

Supervision vested in Commissioner of Conservation, 701 Broadway, Nashville, TN 37219, or his designees. Commissioner delegated authority to promulgate regulations to control strip mining and reclamation standards and to administer and enforce statutes. (TCA 59-8-204).

Coal.

Regulated by Tennessee Coal Surface Mining Act of 1987. (TCA 59-8-401 et seq.).

Other Than Coal.

Regulated by Tennessee Mineral Surface Mining Law of 1972. (TCA 59-8-201 et seq.).

Prohibited Acts.

No operator shall engage in surface mining operations without permit for each operation. (TCA 59-8-205).

Enforcement.

Commissioner issues notice of noncompliance, cease order, or, if necessary, suspension of permit. If violation not corrected within time allowed, revocation of permit and forfeiture of performance bond may be ordered. (TCA 59-8-211).

Penalties.

Violation punishable by civil penalty up to $5,000 for each day of infraction. Willful violation is Class B misdemeanor. (TCA 59-8-222). Commissioner may apply for injunctive relief. (TCA 59-8-223).

Permits.

Issuance depends on: (1) Compliance with detailed statutory criteria (TCA 59-8-205); (2) payment of fee of $250 plus $25 for each affected acre, subject to maximum of $2,500 (TCA 59-8-206); (3) filing of sufficient performance bond (TCA 59-8-207); and (4) filing of reclamation plan meeting statutory criteria. (TCA 59-8-208).

Certain underground storage tanks are regulated by Tennessee Petroleum Underground Storage Tank Act. (TCA 68-215-101 et seq.).

Major Energy Projects.

Applicant may request designation of project (with capital cost of $100,000,000 or more) as major energy project, defined as any project at one physical location, determined to be in state interest, and which is likely to reduce state dependence on imported energy projects. Joint review process or expedited review may be utilized, if approved. All information, including detailed design, economic and environmental impact data, must be included in application. Decision of agency and approval of governor subject to limited judicial review.

If application approved, detailed statutory provisions exist for: Joint review of project by state, local and federal agencies; coordination of permit applications; project decision scheduling and enforcement; consolidated hearings; expedited agency action and judicial review; and modification of agency procedures and requirements. (TCA 13-18-101 et seq.).

Drycleaners.

The Drycleaner Environmental Response Program operates under Department of Environment and Conservation. The Drycleaner Environmental Response Board shall develop and investigate strategies and responses, accept and deny petitions for entry into program, and establish fee schedule. (TCA 68-217-105). Owner or operator of drycleaner (or abandoned drycleaning facility) shall register with Department. Each facility shall pay yearly per site registration fee as established by statute. Drycleaner solvent surcharge is also required to be paid. It shall be unlawful to sell or transfer drycleaning solvent to any person unless operator of drycleaners has conspicuously posted copy of valid certificate evidencing registration of facility.

(TCA 68-217-107). Upon refusal to pay registration or surcharges Commissioner may proceed in court of competent jurisdiction to obtain judgment and seek execution of such judgment. (TCA 68-217-108).

Lead-Based Paint.

Tennessee Lead-Based Paint Abatement Training/Certification Act of 1997 requires certification for all lead abatement professionals. (TCA 68-218-102).

See also category 19 Mineral, Water and Fishing Rights, topic 19.01 Mines and Minerals.

Methamphetamine.

Any property wherein manufacture of methamphetamine occurs may be quarantined by Commissioner of Environment and Conservation. (TCA 68-212-503).

13 ESTATES AND TRUSTS

13.01 ADMINISTRATION:

See topic 13.08 Executors and Administrators.

13.02 [RESERVED]

13.03 ALLOWANCES:

See topic 13.08 Executors and Administrators.

13.04 CLAIMS:

See topic 13.08 Executors and Administrators; category 5 Civil Actions and Procedure, topic 5.17 Pleading.

13.05 DEATH:

Uniform Absence as Evidence of Death and Absentees' Property Act has been adopted. (TCA 30-3-101).

Definition.

Uniform Determination of Death Act has been adopted. (TCA 68-3-501).

Survivorship.

Uniform Simultaneous Death Act has been adopted. (TCA 31-3-101 et seq.).

Action for death, including of fetus which might reasonably have been expected to live outside of mother, accrues, free from claims of creditors, to surviving spouse, and, in case there is no spouse, to children, next of kin, personal representative for benefit of spouse or next of kin, or natural parent(s) if at time of death decedent was in custody of natural parent(s) and had not been legally abandoned by parent(s). (TCA 20-5-106). Parent delinquent on court-ordered child support payments will not be permitted to recover, however, until any such arrearages have been paid in full to parent entitled to receive them. (TCA 20-5-107). Adopted parent has same right as beneficiary that natural parent would have. Action must be commenced within one year after cause of action accrued. (TCA 28-3-104). Damages may be recovered for mental and physical suffering, loss of time and necessary expenses resulting to decedent from injuries, as well as damages resulting to parties for whose benefit cause of action survives. (TCA 20-5-113). No limit on recovery.

Uniform Anatomical Gift Act adopted. (TCA 68-30-101). §§ 2 and 3 of Uniform Anatomical Gift Act of 1987, amending The Uniform Anatomical Gift Act of 1968 adopted with minor variations, including, but not limited to, right of minor children of deceased to authorize anatomical gift in absence of surviving spouse or adult son or daughter. (TCA 68-30-114-116).

Death Certificate.

See category 10 Documents and Records, topic 10.04 Records, subhead Vital Statistics.

Living Wills.

See topic 13.16 Wills, subhead Living Wills.

13.06 [RESERVED]

13.07 DESCENT AND DISTRIBUTION:

Surviving spouse takes all real and personal property if decedent left no issue and takes child's share, but not less than 1/3, if decedent left issue. Balance passes: (1) To children equally, issue of deceased children taking per stirpes; (2) to parents equally; (3) to brothers and sisters equally, issue of deceased brothers and sisters taking per stirpes; (4) half to paternal grandparents or their survivor, or if neither survives, their issue per stirpes, and half to maternal grandparents or their survivor, or if neither survives, their issue per stirpes, but if no grandparents or issue survive on one side, all to grandparents on other side or their survivor, or if neither survives, their issue per stirpes. (TCA 31-2-104).

Surviving spouse has homestead rights (see category 8 Debtor and Creditor, topic 8.10 Homesteads) and right to receive year's support allowance (see topic 13.08 Executors and Administrators, subhead Allowances), in addition to distributive share. Conveyance made fraudulently with intent to defeat distributive share is voidable and includable in decedent's net estate under TCA 31-4-101(b). (TCA 31-1-105). Surviving spouse has no homestead allowance against property in which decedent had life estate. Spouse of intestate decedent may elect to take either intestate share or elective share. (TCA 31-4-101 and TCA 31-4-102).

Renunciation or Disclaimer of Succession.

Party receiving property by gift, trust or from decedent's estate, or through power of appointment, by another's disclaimer, or by any other type of gratuitous transfer, or fiduciary holding fiduciary power, may disclaim all or part of said property, interest, or power by means of signed, irrevocable, unqualified written refusal, describing what is being disclaimed and extent thereof. Writing must be received by transferor, legal representative, holder of title in property, or if property is realty and part of decedent's estate, filed with court (where proceedings are or will be pending) no later than nine months after date of transfer or date person disclaiming attains age of 21. Disclaimer effective only if in writing and person disclaiming has accepted no benefit. (TCA 31-1-103).

Effect of Renunciation.

Unless otherwise provided in decedent's will, interest disclaimed passes as if disclaiming person died intestate and predeceased decedent. Property or powers passing pursuant to power of appointment pass as if person disclaiming predeceased donee of power. Disclaimer relates back for all purposes to date of decedent's death, date of gift, or date of death of donee of power. If disclaimer is made by fiduciary, disclaimer shall be binding on any successor fiduciary. (TCA

31-1-103).

Renunciation barred under TCA 31-1-103 by: (1) Assignment, conveyance, encumbrance, pledge or transfer of any part of property or contract therefor; (2) written waiver of disclaimer or any acceptance of property; (3) sale or other disposition of property by judicial process if made before expiration of period in which disclaimer may be made.

Soil conservation payments due from U.S. to decedent at time of death go: (1) To surviving spouse for use of spouse and minor children; (2) if no surviving spouse, to guardian of minor children; (3) if no surviving spouse or minor children, according to decedent's will or, if none, according to usual rules of distribution. (TCA 31-1-107).

Half Blood.

Inherit as if of whole blood. (TCA 31-2-107).

Posthumous children, if conceived before decedent's death but born thereafter, inherit as if born in decedent's lifetime. (TCA 31-2-108).

Illegitimate child deemed child of mother and also deemed child of father if natural parents participate in marriage ceremony (even if void) or if paternity established by adjudication before death of father (or by clear and convincing proof afterwards). Father and his kindred inherit from or through child only if father has openly treated child as his and has not refused to support child. (TCA 31-2-105). If child chooses to assert right to inherit by virtue of relationship with natural father after death of father, he must assert right within time allowed for creditors to claim rights against estate. (937 S.W.2d 803 [1996]).

Adopted Children.

See category 14 Family, topic 14.01 Adoption.

Determination of Heirship.

Affidavit duly sworn to on personal knowledge of affiant, setting forth facts relative to relationship of anyone to persons deceased (or containing facts pertinent to be ascertained in determining persons legally entitled to any part of estate of such decedent at time of his death), may be recorded in office of register of deeds in any county. Such affidavit or certified copy thereof is prima facie evidence of the facts stated therein in any proceeding (in any state court in county where recorded) involving right of persons to succeed to, or receive property of, decedent named in affidavit. Any person aggrieved by recording of such affidavit may, within six years, sue in chancery court challenging verity thereof, and in such proceeding, burden of proving truth of statements therein is on defendant. (TCA 30-2-712).

Advancements, whether by settlement or otherwise, in the lifetime of the deceased, or by testamentary provision, must be collated and brought into contribution in the partition and distribution of the estate; those in real estate, first in the partition of real estate, and those in personal estate in the distribution of the personal estate. Property given by decedents during their lifetime to their children is treated as advancement only if decedent declared in contemporaneous writing, or child acknowledged in writing, that gift was advancement, or such writing otherwise indicates that gift was intended to be taken into account in computing division and distribution of estate. Should value of advancement in real estate exceed child's share, overplus must be collated and brought into contribution in distribution of personal estate; and should value of such advancements in personal estate exceed share of such child in personal estate, excess must be brought into contribution in partition of real estate. (TCA 31-5-101-05).

Escheat.

If decedent, whether or not domiciliary, leaves no one to take estate or part thereof by will, and no one other than government or government agency or subdivision to take estate or part thereof by intestate succession, same escheats to state as of time of death. Foregoing applies to: (a) Realty located in state; (b) tangible personalty, wherever located at death, which was customarily kept in state prior to death; (c) tangible personalty subject to administration in state, subject to limited rights of other states; (d) intangible personalty if decedent was state domiciliary at death; (e) intangible personalty subject to administration in state, subject to limited rights of other states. Administrators, executors, trustees, guardians and other fiduciaries must report possible escheat property to State Treasurer. State Treasurer receives escheat property and reports thereon and is necessary party to suits regarding same. (TCA 31-6-101 et seq.). Any person claiming any interest in property of any decedent may file claim with State Treasurer under provisions of TCA 66-29-101 et seq., governing disposition of unclaimed or abandoned property. (TCA 31-6-119).

See also categories 3 Business Regulation and Commerce, topic Banks and Banking, subhead Unclaimed Deposits; Estates and Trusts, topic Wills, subhead Unclaimed Legacies; Property, topic Absentees, subhead Escheat.

13.07A ESTATES: (in property)

See category 21 Property, topic 21.16 Real Property.

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13.10 EXECUTORS AND ADMINISTRATORS:

Jurisdiction to appoint personal representative is in chancery court (TCA 16-16-201) or probate court of county where decedent had his usual place of residence. In case decedent had fixed places of residence in more than one county, court of either county may grant letters. Estates of nonresidents are administered where assets are found. (TCA 30-1-101 and TCA 30-1-103).

For listing of activities performed by clerk and master of chancery court, see category 6 Courts and Legislature, topic 6.01 Courts, subhead Probate Courts.

Where no one has applied (or can be procured) to administer estate of decedent in county where he resided or where he had property at time of his death, chancery court, after six months has expired, may appoint administrator. (TCA 30-1-301).

Preferences in Right to Administer.

Surviving spouse is preferred, and thereafter preference is to next of kin, then to creditor filing claim. Court decides between more than one next of kin applying. (TCA 30-1-106).

Executor appointed under foreign will may qualify in Tennessee on admission of foreign will to probate here (see topic 13.16 Wills), but must give bond here. (TCA 32-5-102).

Eligibility and Competency.

Nonresident person (or corporation not authorized to do business in state and not maintaining office in state) may not serve as personal representative unless another person residing in state (or corporation authorized to do business and maintaining office in state) is also appointed. Exceptions include: (1) bank or trust company organized and doing business under laws of any state or U.S. territory, including District of Columbia, or national bank or trust company, duly authorized so to act, may serve in this state as fiduciary, when and to extent that state, territory or district in which fiduciary is organized or has principal place of business grants fiduciary authority to Tennessee bank or Tennessee trust company; (2) spouse, parent, child, grandchild, or sibling of decedent may serve as personal representative if residue of estate is for sole benefit of one or more such family members; (3) any person who is decedent's spouse, parent, grandparent or issue of grandparent of decedent or of decedent's spouse, or spouse of any such relative, may serve as personal representative of estate of decedent regardless of residence of personal representative and whether nonresident is beneficiary of estate, and any other nonresident may serve as personal representative of estate of decedent with approval of court; and (4) certain nonresident trust companies may serve if they have office in Tennessee and, either (i) accept deposits at such office or (ii) meet definition of trust institutions under 12 U.S.C. § 1841(c)(2)(D) and are subsidiaries of Bank Holding Company which has subsidiary which accepts deposits in Tennessee. (TCA 30-1-116; TCA 35-50-107). Any resident or nonresident person may serve as personal representative of estate of decedent. (TCA 35-50-107).

Married woman may act as executrix or administratrix.

Qualification.

An executor or administrator must make oath before the clerk of court or notary public for faithful performance of his duties. (TCA 30-1-111). Executor or administrator must give bond, with two or more sufficient individual sureties or corporate surety. (TCA 30-1-201).

Bond of executor or administrator is fixed by the court in penalty of not less than value of estate nor more than double value of estate. (TCA 30-1-201).

Exemption from Bond.

Personal representative may be exempted from posting bond if excused by will or by other exceptions set forth in statute. (TCA 30-1-201).

Special Kinds of Administration.

Administrators pendente lite, and d. b. n. c. t. a. are appointed in the probate court. (TCA 30-1-108) An administrator ad litem is appointed where a will is the subject of contest or litigation. (TCA 30-1-109). Administrator ad litem may be appointed in any cause where there is no personal representative or personal representative is interested adversely; and no bond is required of administrator ad litem, except where it becomes necessary for him to take charge of assets and property. (TCA 30-1-109).

Public Administrator.

County Court may appoint public administrator, public guardian or public trustee. (TCA 30-1-401).

Inventory and Appraisal.

Executor or administrator must, within 60 days after entering on administration: (1) Notify beneficiaries or distributees by mailing copy of will or pertinent paragraphs thereof or copy of letters of administration; (2) file affidavit that copies have been mailed or that efforts have been made to locate beneficiaries or distributees to whom copies were not sent; (3) make complete and accurate inventory of probate estate; (4) return same to clerk and verify it under oath before clerk or any person authorized to administer oaths either in or out of Tennessee; and (5) file affidavit that Bureau of TennCare has been notified of decedent's death. (TCA 30-2-301).

General powers and duties cover handling of personal estate. Special orders are usually obtained for protection of the personal representative. Court may order continuance of decedent's business for nine months, and thereafter upon proper showing. (TCA 30-2-322).

Marital Deduction.

Executor or administrator may not, by act or omission, cause defeat of U.S. estate or gift tax marital deduction if decedent's express intent was to take advantage of same. (TCA 35-50-112).

Notice to Creditors.

Within 30 days after issuance of letters, clerk of court where estate is administered must, in the name of the personal representative, give notice by two consecutive weekly notices in newspaper in county where administration is granted, or if no newspaper, by written notices posted in three public places in such county, one being usual place for posting notices at courthouse. Personal representative must mail or deliver notice to all creditors of decedent of whom personal representative has actual knowledge or who are reasonably ascertainable, except for creditors who have filed claim, been paid, or issued release. (TCA 30-2-306).

Presentation of Claims.

Generally, within four months from date of notice, all creditors (resident or nonresident, sui juris or not, whether claims are due or not, and whether estate is solvent or not) must file their claims in triplicate with clerk of court in which estate is being administered. If creditor receives actual notice less than 60 days before expiration of four months from date of notice to creditors (or after expiration of four months from date of notice to creditors and more than 60 days before date which is 12 months from decedent's date of death), such creditor's claim is barred, unless filed within 60 days from date of receipt of actual notice. If creditor receives actual notice less than 60 days before date which is 12 months from decedent's date of death (or receives no notice), such creditor's claim is barred, unless filed within 12 months from decedent's date of death. (TCA 30-2-307). If claim is on written instrument, original instrument or copy thereof that is attested by clerk of court as true copy it must be filed; if on judgment, copy thereof that is certified by clerk of court rendering judgment must be filed; if on open account, itemized statement thereof must be filed. Such filing arrests any statute of limitations applicable. Creditor who has timely filed claim against estate may file amended proof of claim within 30 days of date exception to claim is filed or expiration of exception period. (TCA 30-2-307).

Proof of Claims.

Claim must be verified by affidavit stating that it is just and valid obligation of decedent's estate; that neither claimant nor any person in his behalf has received payment either in whole or in part, except as credited thereon; and that no security has been received therefor, except as stated in claim.

Form

Affidavit to Claim Against Estate

State of Tennessee

County of. . . . .

Estate of. . . . .

Deceased.

Personally appeared before me, the undersigned authority, duly commissioned and qualified. . . . . who states on oath that the annexed claim amounting to $. . . . . . is a correct, just and valid obligation of the estate of. . . . ., deceased; that neither the claimant, nor any other person on his behalf, has received payment in whole or in part thereof, except such as is credited thereon, and that no security has been received therefor, except as stated thereon.

(Signed). . . . .

Sworn to and subscribed before me, this the. . . . day of. . . . . ., (year). . . . .

. . . .

Deputy Clerk

Approval or Rejection of Claims.

Anybody interested, including personal representative, may file in triplicate exceptions to any claims with detailed explanations. Validity of claim will then be determined by court at hearing duly set and without formal pleadings and, if creditor files timely amendment, exception may be filed within 30 days of date amendment was filed or expiration of exception period. (TCA 30-2-314).

Payment of Claims.

After expiration of four month period, representative may wait 30 days before paying any claims. If sufficient assets are available, after retaining assets to meet contingent liabilities, uncontested and allowed claims must be paid within 30 days after expiration of seven months following date of notice of creditors. (TCA 30-2-316 et seq.).

Priorities.

Claims have priority in following order: (1) Costs of administration, including fiduciary bonds and compensation of representative and counsel; (2) funeral expenses; (3) taxes, federal and state including claims by Bureau of TennCare; (4) claims of general creditors. (TCA 30-2-316-17).

Sales.

Real estate may be sold at instance of personal representative or creditor where personal property is insufficient to pay debts and expenses, upon petition to court. Beneficiaries and encumbrance holders must be impleaded. Creditors need not be notified. Hearing is according to forms of chancery court. (TCA 30-2-402).

Where personal representative's plea of “fully administered” is sustained, heirs must be summoned by scire facias before creditor may proceed against real estate. (TCA 30-2-410).

Actions by Representative.

Personal representative is proper party to file suit on claims of decedent's estate. (562 S.W.2d 827 [1977]). Next of kin may sue in own name where personal representative is dead or has resigned, or there is no one to represent estate. (TCA 30-2-714).

Actions Against Representative.

Personal representative has three months from qualification to ascertain situation without being liable to suits. (TCA 30-2-501). Except for claims for state taxes, claims and demands not filed within periods required by TCA 30-2-306-09 (or, if later, in which suit is not brought or revived before end of 12 months from decedent's date of death) are barred. (TCA 30-2-310). Intervention of term between death and qualification of personal representative does not work abatement of suit. If no personal representative, suit may be revived against heirs. (TCA 20-5-104).

Allowances.

Surviving spouse of intestate, or spouse electing against decedent's will, is entitled to certain property enumerated in TCA 30-2-101, exempt from claims against estate. Such property belongs to unmarried minor children if there is no surviving spouse. In addition, surviving spouse of intestate, or spouse electing against decedent's will, is entitled to one year's allowance out of estate, exempt from claims against estate. If no surviving spouse, allowance made to unmarried minor children. (TCA 30-2-102). Employers are authorized to pay to surviving spouse any wages or salary due decedent, up to $10,000, which will be chargeable against allowance. Employee may designate beneficiary to receive payment for any wages or salary due such employee upon death. (TCA 30-2-103).

Intermediate Accountings.

Personal representatives must file accounting within 15 months from date of qualification and once every year thereafter until estate is closed, unless decedent by will, or all distributees by consent, waive accounting. (TCA 30-2-601). In connection with accounting, personal representative shall submit with accounting original of each cancelled check written on estate account unless personal representative is bank or savings and loan institution. (TCA 30-2-601).

Final Accounting and Settlement.

After all legal liabilities of estate have been paid and balance delivered to those entitled thereto, or after administration as provided in event of insolvency, personal representative must make and file with court final settlement. (TCA 30-2-701). Notice must be given to interested parties resident within county (or their attorneys) at least five days before time of taking accounting. Nonresidents are notified by ten days notice posted at courthouse door or published in newspaper in county. Notice may be waived in writing by person having interest in estate. (TCA 30-2-603). Notice shall be published in newspaper in county if addresses of heirs, distributees or other interested persons are unknown. (TCA 30-2-603).

Distribution.

On payment of all uncontested claims and making provision for administration expenses, tax obligations and claims that are contingent or not yet due, representative must pay balance in his hands to distributees, beneficiaries, etc., unless granted additional time by court or by instrument under which he acts. (TCA 30-2-701). Federal estate tax may be prorated among beneficiaries. (TCA 30-2-614).

Distribution of Share Not Feasible.

If distributee cannot be located, personal representative must deliver share to county trustee. If distributee is infant or lunatic, court will appoint guardian to receive share, if practicable. If not practicable, share must be delivered into state treasury, unless distribution ordered pursuant to TCA 34-1-107. (TCA 30-2-702). Shares delivered into state treasury are held in trust for distributee. (TCA 30-2-703). Property delivered to state treasurer may be claimed under provisions governing disposition of unclaimed or abandoned property. (TCA 30-2-703).

Liabilities.

Personal representative is liable for devastavit as at common law. (TCA 30-2-307, 506, 710).

Compensation of Representative.

County Court allows reasonable compensation to representative. (TCA 30-5-407).

When Administration Unnecessary.

See subhead Small Estates, infra.

Small Estates.

Where wages due deceased employee are $10,000 or less, employer may pay entire sum to surviving spouse of deceased, same to be chargeable against year's support, homestead and other claims and exemptions of widow. (TCA 30-2-102-03). After 30 days from death, depositor banks may pay deposits under $10,000 to executor named in unprobated will, if known, or, in order of priority, to (1) creditor for funeral expenses; (2) creditor for expenses of last illness; (3) surviving spouse; (4) next of kin. (TCA 45-2-708). Six months from death, where no administration applied for, any person holding less than $10,000 for decedent may pay to surviving spouse and, if none, to guardian of unmarried minor children. (TCA 30-2-103).

Optional Method of Administration.

Where value of estate is $25,000 or less, one or more legatees or devisees (if will was left) or heirs or next of kin (if no will was left) (and, in either testate or intestate estate, any of decedent's creditors who proves such creditor's debt on oath before court) must file with clerk of court, after expiration of 45 days from decedent's death, or sooner upon motion and for good cause shown, affidavit stating: (1) whether decedent left will; (2) list of unpaid debts and creditors' names, addresses, and amounts due; (3) itemized description and value of decedent's property, name and address of each known to possess any property of decedent, and schedule of all insurance on decedent's life payable to estate; (4) name, age, address and relationship, if any, of each devisee, legatee, or heir entitled to receive. Debtor of estate must be furnished copy of affidavit and must pay indebtedness upon demand of affiant. If decedent left will, property passes accordingly. If he left no will, property passes as provided by law. Affiant and those to whom property is delivered by him remain liable, to extent of value of property received, to unpaid creditors and those having prior claims. Those in possession of decedent's property refusing conveyance to affiant may be compelled to execute in court of competent jurisdiction. Affiant shall file bond with sufficient sureties. (TCA 30-4-101-05). Affiant and sureties automatically discharged from liability if, within two years from filing of affidavit, no petition for probate or appointment of administrator or claim against estate has been filed. (TCA 30-4-103). Any competent adult who is not legatee, devisee, personal representative or heir may serve as affiant if all adult legatees, devisees or personal representatives (or heirs if no will) consent in writing. (TCA 30-4-103).

Foreign Executors or Administrators.

Foreign administrator must qualify in the state and give his address to the county clerk. He may be sued as a resident. If the officer is unable to find him, notice is served upon the clerk who notifies representative by registered mail. (TCA 30-1-104). Unless so qualified, foreign administrators and executors have no right to administer assets of estate in this state, and can neither sue nor be sued in this state. (169 S.W.2d 671 [1940]; 78 Tenn. 93 [1882]).

Uniform Fiduciaries Act adopted. (TCA 35-2-101 et seq.).

Uniform Principal and Income Act (1997 version) adopted. (TCA 35-6-101 et seq.). Tennessee version of this act contains few minor variations from uniform act. See TCA 35-6-104(b), TCA 35-6-104(g), and TCA 35-6-107.

Distribution if Abroad.

No provision with respect thereto.

Uniform Simplification of Fiduciary Security Transfers Act adopted. (TCA 35-8-101 et seq.). Not repealed by Uniform Commercial Code. (TCA 47-1-109).

Uniform Anatomical Gift Act adopted. (TCA 68-30-101 et seq.). §§ 2 and 3 of

Uniform Anatomical Gift Act of 1987, amending The Uniform Anatomical Gift Act of 1968 adopted with minor variations, including, but not limited to, right of minor children of deceased to authorize anatomical gift in absence of surviving spouse or adult son or daughter. (TCA 68-30-114-116).

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13.15 TRUSTS:

Uniform Probate Code has not been adopted.

Uniform Trust Code has been adopted with minor changes. (TCA 35-15-101 et seq.).

Kinds.

Express, resulting and constructive trusts are recognized.

Eligibility and Competency.

Nonresident individual or corporation not authorized to do business in state cannot serve as trustee of corporate or personal trust, personal representative, guardian or conservator unless resident fiduciary, individual or corporate, also appointed. Exceptions include: (1) bank or trust company organized and doing business under laws of any U.S. state or territory, or national bank or trust company, when and to extent state or territory in which organized or has principal place of business grants fiduciary authority to bank or trust company of Tennessee; (2) decedent's spouse, parent, issue, grandparent or issue of decedent's grandparent or decedent's spouse's grandparent, or spouse of any such relative, may serve as personal representative of estate regardless of residence and regardless of whether beneficiary of estate; (3) any person, with court approval, may serve as personal representative, regardless of residence; (4) corporation authorized to exercise fiduciary powers can serve as trustee of inter vivos trust; (5) any individual may serve as trustee of trust regardless of residence; (6) person related by blood or marriage may serve as guardian of minor or conservator of incompetent, regardless of residence; (7) any person or corporation authorized to exercise fiduciary powers may serve as agent or attorney-in-fact under power of attorney, regardless of residence; and (8) certain nonresident trust companies may serve if they have office in Tennessee and either (i) accept deposits at such office or (ii) meet definition of trust institution under 12 U.S.C. § 1841(c)(2)(D) and are subsidiaries of bank holding company which has subsidiary which accepts deposits in Tennessee. (TCA 30-1-116; TCA 35-50-107).

Qualification.

Neither oath nor bond required of trustee. All nonresident trustees must appoint Secretary of State as agent for service of process and consent to jurisdiction and service under TCA 20-2-214-19. (TCA 35-50-107).

General Powers and Duties of Trustees.

Uniform Prudent Investor Act adopted, with minor deviations from uniform act. (TCA 35-14-101 to TCA 35-14-114).

Co-fiduciaries may act by majority vote. (TCA 35-50-114). Trustees who are beneficiaries are entitled to limited power. (TCA 35-50-124).

Marital Deduction.

Trustee may not by act or omission cause defeat of U.S. or state estate or gift tax marital deduction if decedent's or settlor's express intent was to take advantage of same. (TCA 35-50-

112).

Charitable Trusts.

No trust having for its object aid of poor or promotion of religion, morality or education will fail because of attempt to create perpetuity or because of lack of trustee. In case there is no provision, or insufficient provision, for trustee, or in case of failure of trustee to carry out and keep alive trust provisions, trustee may be appointed or vacancy filled. (TCA 35-15-704).

Insurance trusts are valid and effective as to all property not affected by exercise of reserved rights, if any. Trust instrument need not be executed like will. (TCA 35-50-102). (Gifts to charities are governed by Tennessee Charitable Beneficiaries Act of 1997. [35-13-101].)

Life insurance may be made payable to trustee named in inter vivos trust agreement or trustee named by will. Proceeds not subject to insured's debts nor considered part of insured's estate for administration purposes. Proceeds may be commingled with other assets of trust. (TCA 35-50-103).

Uniform Common Trust Fund Act adopted. (TCA 35-4-101 et seq.).

Uniform Principal and Income Act (1997 version) is in force. (TCA 35-6-101 et seq.). Tennessee's version of this act has minor deviations from uniform act. See TCA 35-6-104(b), TCA 35-6-104(g), TCA 35-6-106, and TCA 35-7-107.

Investments for trust funds are provided by statutes, which courts have held to be permissive and not mandatory. (TCA 35-3-101 through TCA 35-3-116). Uniform Prudent Investor Act adopted, with minor deviations from uniform act. (TCA 35-14-101 et seq.).

Securities in Name of Nominee.

Trustees owning stocks or registered bonds authorized to hold them in name of nominee. (TCA 35-3-118).

Gifts to Minors.

See category 14 Family, topic 14.10 Infants.

Accounting.

Trustee must keep beneficiaries reasonably informed about administration of trust. (TCA 35-15-813).

Uniform Fiduciaries Act adopted. (TCA 35-2-101 et seq.).

Compensation.

Trustee is entitled to reasonable compensation taking into account size of trust, nature and amount of assets, income produced, time and responsibility required, management or sale of realty, involvement in litigation, etc. (TCA 35-15-708). If terms of trust specify compensation, trustee is entitled to be compensated as specified, but court may allow more or less compensation if duties of trustee are substantially different from those when trust was created, or compensation specified by terms of trust would be unreasonably low or high. (TCA 35-15-708).

Accumulations.

No statutory provisions.

Perpetuities.

See category 21 Property, topic 21.11 Perpetuities.

Pour Over Trusts.

See topic 13.16 Wills, subhead Bequests and Devises to Inter Vivos Trusts.

Renunciation.

Only statutory provision is TCA 31-1-103, discussed in topic Descent and Distribution, subhead Renunciation or Disclaimer of Succession.

Incorporation by Reference.

Certain specifically enumerated fiduciary powers may be incorporated into testamentary and inter vivos trusts by reference to this act. (TCA 35-50-110).

Uniform Testamentary Additions to Trusts Act adopted. (TCA 32-3-106).

Tennessee Investment Services Act of 2007, adopted 2007 (TCA 35-16-101 et seq.) allows settlor to establish investment services trust ("IST"). IST is irrevocable, self-settled trust, which if trust complies with provisions of Act, will protect assets from claims of transferor's creditors as well as creditors of beneficiaries. Protection is available even though transferor retains certain powers or control over disposition of income of trust.

Uniform Prudent Management of Institutional Funds Act has been adopted. (TCA 35-10-201 et seq.). The Act incorporates provisions of modern portfolio theory from Uniform Prudent Investor Act and uniform Principal and Income Act which allows for more efficient management of funds for charitable purposes.

13.16 WILLS:

Persons of sound mind married or unmarried over 18 years of age may execute will. (TCA 32-1-102).

In will construction trial, parol evidence is admissible to explain latent, but not patent, ambiguity. (933 S.W.2d 481 [1996]).

As to contracts to make or not to make or revoke will, see infra, subhead Joint and Mutual Wills.

Testamentary Disposition.

No limitations except that soil conservation payments due to testator do not pass under will if there is surviving spouse or minor children. (TCA 31-1-107).

Execution.

Testator may execute a will other than a holographic or nuncupative will by signing it himself, or acknowledging his signature already made, or directing someone else to sign his name for him in his presence. In any of the above instances the act must be done in the presence of two or more attesting witnesses. Testator must, at time of subscribing or acknowledging his name, declare to attesting witnesses that instrument is his will and request them to attest it. Attesting witnesses must sign in presence of testator and in presence of each other and at testator's request. (TCA 32-1-104).

Attestation Clause.

No specific form is prescribed. The following form is frequently used:

Form

We, the undersigned subscribing witnesses, do hereby certify that we witnessed the foregoing Will of. . . . . ., at his request, in his presence, and in the presence of each other, and that he signed the same in our presence and in the presence of each of us, declaring the same to be his Last Will and Testament.

This the day and date hereof.

....

Witness

....

Witness

Affidavit of attestation by witness before any officer authorized to administer oaths in or out of state stating facts to which affiant witness would have to testify in court to prove will may be written on or appended to will at testator's request or, after testator's death, at request of executor or any person interested under will. Affidavit not required but, if made, must be accepted by court of probate in lieu of affiant witness' testimony in person at probate proceeding when will not contested. (TCA 32-2-110).

No affidavit form prescribed. Following form frequently used:

Form

State of. . . . ., County of. . . . . We,. . . . . and. . . . ., on oath state:

We are the subscribing witnesses to the attached written instrument dated the. . . . . . day of. . . . ., (year). . . . ., which purports to be the Last Will of. . . . . ("Testator").

On this date Testator, in our presence, declared the instrument to be his Will, signed the instrument in our presence, and requested that we attest his execution thereof; whereupon, in the presence of Testator and of each other, each of us signed our respective names as attesting witnesses. At the time of the execution of the instrument Testator was over the age of 18 years and appeared to be of sound mind.

This Affidavit is made and signed at the request of [Testator, etc.].

This. . . . . . day of. . . . ., (year). . . . . .

....

Witness

....

Witness

Subscribed and sworn to before me this. . . . . . day of. . . . ., (year). . . . . ., etc.

Holographic wills made subsequent to taking effect of the Model Act are recognized and governed by TCA 32-1-105. (As to holographic wills made on or prior to Feb. 15, 1941, see TCA 32-1-110.) It is not necessary for witness to sign holographic will but signature and all its material provisions must be in handwriting of testator and his handwriting must be proved by two witnesses. (TCA 32-1-105).

Living wills are recognized and governed by TCA 32-11-101 et seq. Physician who cannot honor terms of will required to make every reasonable effort to transfer patient to physician who will honor will, and compliance with will does not constitute homicide or suicide, and does not subject physician or health care provider to criminal or civil liability. (TCA 32-11-108). Living will does not affect existing life insurance policies or sale of such policies. (TCA 32-11-110). Sample form provided. (TCA 32-11-105).

Nuncupative Wills.

Required elements and manner of making wills are governed by TCA 32-1-106. For method of proving nuncupative wills see TCA 32-2-106.

Joint and Mutual Wills.

Contract to make will or devise, or not to revoke will or devise, or to die intestate, can be established only by: (1) Will stating material provisions of contract; (2) express will reference to contract and evidence of its terms; (3) writing signed by decedent evidencing contract. Execution of joint will or mutual wills creates no presumption of contract to make or to refrain from revoking will. (TCA 32-3-107).

Revocation.

Will or any part thereof is revoked by subsequent will revoking prior will or its parts expressly or by inconsistency; document of revocation, containing express revocation, executed with all formalities of attested, or holographic, will, but not nuncupative will; physical destruction with intent to revoke; or subsequent marriage of testator and birth of child. Divorce or annulment of subsequent marriage does not revive prior will. (TCA 32-1-201). If testator is divorced or marriage annulled after executing will, devise or bequest to spouse or appointment of spouse as executor, trustee, conservator or guardian is revoked unless will provides otherwise. Property passes as if spouse failed to survive testator. (TCA 32-1-202).

Revival.

Revival of a former will is a question of intent; destruction of a later will does not of itself revive a former will. (260 S.W.2d 304 [1953]).

Testamentary Gifts to Subscribing Witnesses.

Will is not invalidated by fact that attesting witness takes gift under will; but unless will is also attested by two disinterested witnesses, interested witness forfeits so much of his gift as exceeds share to which he would have been entitled in case of intestacy. (TCA 32-1-103).

Bequests and Devises to Inter Vivos Trusts.

Uniform Testamentary Additions to Trusts Act adopted. Trust instrument may be amended subsequent to date of testator's will. (TCA 32-3-106).

Power of Appointment.

Holder of power of appointment by will may exercise such power subject to certain conditions. (TCA 32-3-110).

Testamentary Guardians.

See category 14 Family, topic 14.07 Guardian and Ward.

Will Depositories.

Court having probate jurisdiction in county where testator lives may, upon payment of $5 fee, receive for safekeeping testator's written will. Deposit does not submit will to probate or prevent testator from revoking or amending same, whether or not by means of another deposited instrument. (TCA 32-1-112).

Probate.

Domestic will may be probated in common or solemn form. Probate in common form is on petition of any interested party to court having probate jurisdiction (see category 6 Courts and Legislature, topic 6.01 Courts, subhead Probate Courts) and proof of execution by at least one of subscribing witnesses, if living. No notice is necessary, but will so probated may be contested by any interested party, contest being actually tried in circuit court. (TCA 32-2-101 et seq.).

Probate in solemn form (which is seldom used) is on notice to all interested persons and the will must be proved by all living witnesses who can be found and by such other persons as may be produced to support it. (760 S.W.2d 208 [1988]). Persons notified of proceeding must come before court having probate jurisdiction and give notice of their desire to contest will not later than time when it is offered for probate, in which case contest is heard in circuit court. Persons notified and who fail to give notice of their desire to contest will are bound by probate in solemn form and may not later contest will. (26 Tenn. 394 [1846]).

Proof of Wills Out of Court.

See subhead Affidavit of Attestation, supra.

Self-proved Wills.

No provision.

Contest.

Circuit court has jurisdiction of will contests. (TCA 16-10-103). Court having probate jurisdiction sends certificate of contest and original will to appropriate court and requires contestant to enter $500 bond (TCA 32-4-101), or make pauper's oath (TCA 32-4-103). Issues are tried by jury, and verdict and judgment upon validity of will are certified to court having probate jurisdiction to be recorded with will, if established. (TCA 32-4-107).

Voluntary dismissals are not permitted in will contest proceedings. (62 S.W.3d 139 [2001]).

Any court of record having probate jurisdiction has concurrent jurisdiction with Circuit Court of will contests. (TCA 32-4-109).

Limitation of Actions.

Proceedings to set aside probate of any will, however probated, must be brought within two years from entry of order admitting will to probate. Limitation tolled for persons under age of 18, or of unsound mind at time cause of action accrues, until disability removed. (TCA 32-4-108).

Legacies.

See topic 13.08 Executors and Administrators, subhead Distribution.

Right of Specific Legatees and Devisees.

Right to property which is subject of specific legacy or devise vests at death of testator and such rights so vests in proceeds of sale if property was sold during testator's lifetime and contrary intention is not manifest during testator's lifetime. (TCA 32-3-111).

Unclaimed Legacies.

Where one or more payees or distributees of an estate cannot be located or refuses to receive share due such distributee, personal representative of estate of any deceased person must pay or deliver share due any such distributee to state treasurer and show same in his report and settlement. (TCA 30-2-702). Such shares may be claimed under provisions governing abandoned or unclaimed property, TCA 66-29-101 et seq. See also topic 13.08 Executors and Administrators, subhead Distribution of Share Not Feasible.

Lapse.

Whenever the devisee or legatee to whom, or any member of a class to which, an immediate devise or bequest is made, dies before the testator, or is dead at the making of the will, leaving issue which survives the testator, said issue takes the estate or interest so devised or bequeathed, unless a different disposition thereof is made or required by the will. (TCA 32-3-105).

Children.

A child born after the will is made and not provided for in the will nor disinherited (expressly or by implication) therein and not provided for by settlement made by testator in his lifetime takes as though deceased parent had died intestate, with legatees and devisees contributing ratably to raise child's share. (TCA 32-3-103).

Child living when will was executed and not mentioned therein has no rights in estate, except certain statutory exemptions if child is minor at time of father's death. (TCA 30-2-101—105).

Election.

Surviving spouse may elect to take elective share of decedent's estate. Percentage of net estate surviving spouse takes under elective share is determined by total number of years surviving spouse and decedent were married. This election is made by filing in court where will probated and mailing or delivering to personal representative within later of nine months after decedent's death or six months after decedent's will probated petition for elective share. (TCA 31-4-101—103). If litigation pending as to title of surviving spouse to property devised or bequeathed by decedent spouse's will, deadline for filing election petition may be extended one year upon application to court where will probated. (TCA 31-4-102). If at time will probated, surviving spouse has been adjudged incompetent or is under 18, surviving spouse's legal representative or next friend may initiate election proceeding by petition filed in court where will probated within one year of probate. (TCA 31-4-104).

Conveyance made fraudulently with intent to defeat election is voidable and includable in decedent's net estate under TCA 31-4-106(b). (TCA 31-1-105).

Contribution.

Proceeding may be maintained against fewer than all against whom relief could be sought, but no person is subject to contribution in greater amount than he would have been if relief sought against all subject to contribution. (TCA 31-4-102).

Renunciation.

See topic 13.06 Descent and Distribution, subhead Renunciation or Disclaimer of Succession.

Foreign Executed Wills.

Foreign will executed in compliance with laws of this state, or, if written, in compliance with laws of place where executed or laws of testator's domicile at time of execution, is given same force and effect as if executed in this state in compliance with its laws. (TCA 32-1-107). Foreign will not probated in another jurisdiction may be probated here in any county where real estate passed by will is located. Such probate may be made upon true copy of will if original cannot be produced in court of this state. Such probate here has same effect as to said real estate as probate here of will of resident, but none of these provisions is to prevent proving of any such will as at common law and without probate. (TCA 32-5-110).

Foreign Probated Wills.

Uniform Act adopted. (TCA 32-5-101—05). Probate has same force and effect as original probate of domestic will. Such probate may be in common or solemn form; if latter, there must be hearing after such notice as is required for probate of domestic will in solemn form. (TCA 32-5-101—03). Foreign probate is conclusive as to devises of personalty, but devises of realty may be contested. (TCA 32-5-103).

Revised Uniform Anatomical Gift Act has been adopted with minor changes. (TCA 68-30-101 et seq.). Donor may make anatomical gift by authorizing statement or symbol indicating that donor has made anatomical gift to be imprinted on donor's driver's license, in will, living will, durable power of attorney for healthcare or other instrument signed by individual complying with term of Title 32, Chapter 11 or Title 34, Chapter 6, Part 2, or advance directive under Title 68, Chapter 11, Part 18. Donor may also make anatomical gift during terminal illness or injury by any form of communication addressed to at least two adults, at least one of whom is disinterested witness. (TCA 68-30-105).

Simultaneous Death.

See topic 13.05 Death, subhead Survivorship.

Testamentary Trusts.

See topic 13.11 Trusts.

14 FAMILY

14.01 ADOPTION:

Any person over 18 years of age who has lived or maintained regular place of abode in state for six consecutive months may petition to adopt another person. Residence requirement does not apply to: (1) Members of military service who lived or maintained regular place of abode in state for six consecutive months prior to entering military service; (2) actual resident seeking to adopt child who is related. (TCA 36-1-115). Petitioner must have right to custody of child to be adopted. Any person, regardless of place of birth, citizenship, residence, or age may be adopted. (TCA 36-1-107).

No person, agency, association, institution or corporation may send child into state for adoption without written consent of Department of Children's Services which may require bond of $1,000 to $10,000. Child may not be placed outside of state for adoption without written consent of said department. (TCA 37-5-401; TCA 37-5-403).

Consent Required.

Legal and biological parent or parents and guardian of person sought to be adopted must be made parties to adoption proceedings or to separate proceedings seeking termination of those rights, and those rights must be terminated by court, unless parent or guardian has surrendered parental or guardianship rights, executed parental consent which has been confirmed by court, or waived rights pursuant to TCA 36-1-111, or unless parent's or guardian's rights have already been terminated by court order. (TCA 36-1-117). Signing of waiver of interest and notice by alleged biological father, in form set forth in statute, does not irrevocably terminate alleged father's rights and support obligations unless adoption actually takes place; rather, it waives his rights to child and to notice of or involvement in adoption, custody or guardianship proceedings. Said waiver cannot be revoked. (TCA 36-1-111).

If putative biological father has filed petition to establish paternity of child, legitimation proceedings must be concluded before adoption court takes any action to determine whether to grant adoption. (TCA 36-1-117). If petition for legitimation is granted, parental rights of father must be terminated as provided in TCA 36-1-113 or as otherwise provided by law, or he must execute surrender (TCA 36-1-111), file parental consent or cosign petition for adoption before court may order adoption. If legitimation petition is not granted, adoption may proceed without further need to terminate rights of that putative father. (TCA 36-1-117). Parental rights of putative biological father who has not filed petition to legitimate (but has been identified as biological father in one of certain specified ways), must be terminated by surrender, parental consent, termination of parental rights pursuant to TCA 36-1-113, or by waiver of interest before adoption may proceed. (TCA 36-1-117).

Parent may sign petition for adoption for purpose of giving parental consent to adoption, provided petition states that parent understands that order confirming parental consent will terminate parental rights forever. However, act of signing petition will not terminate parental rights until court has entered order confirming parental consent after requiring parent to answer certain specified questions under oath. Parental consent may be revoked at any time prior to entry of this confirming order, by executing revocation form as provided in TCA 36-1-112. (TCA 36-1-117). When child is related (as defined) to one of petitioners or is stepchild of petitioner, and legal or biological parent(s) or guardian(s) sign adoption petition as co-petitioner for specific purpose of consent to adoption, no further surrender, parental consent or termination of rights is required as to parent(s) or guardian(s) thus cosigning petition. (TCA 36-1-117).

In case of adoption of child age 14 or older, adoption court must receive child's sworn, written consent to adoption and must also receive consent and testimony from child in chambers with only child and guardian ad litem present. When person sought to be adopted is age 18 or older, only sworn, written consent of that person shall be required and no order of reference or any home studies need be issued. (TCA 36-1-117).

Minor Parent.

Persons under 18 may surrender child, but court shall have authority to appoint guardian ad litem for minor parent. (TCA 36-1-110).

Surrender.

Unless waiver exists, no surrender shall be valid unless prospective parent has physical custody of child; will receive physical custody within five days; or has right to receive physical custody upon release from health care facility. Prior to execution of parental consent, prospective adoptive parents may request home study for use in proceedings. (TCA 36-1-111). Surrender form shall state beginning and ending period for revocation and procedures for revocation. (TCA 36-1-111). Surrender proceedings governed by TCA 36-1-111. Uniform Child Custody Jurisdiction Act shall govern jurisdiction for disposition of child and proceedings for surrender. (TCA 36-1-111). Person who executed surrender may revoke surrender at any time within ten calendar days as provided by statute. (TCA 36-1-112). Revocation of surrender governed by TCA 36-1-112.

Conditions Precedent.

None prescribed.

Jurisdiction is in the chancery and circuit courts. (TCA 16-10-108).

Venue is (1) where petitioners reside; (2) where child resides; (3) where child resided when it became a public charge; or (4) location of licensed agency having child's custody or guardianship or to whom child has been surrendered. (TCA 36-1-114).

Petition must be personally signed by each petitioner and must be verified. Necessary averments are set forth in law. (TCA 36-1-116). Name sought to be given to child may be used instead of its original name. Only form requesting new certificate of birth by adoption and report required by law are to contain original name of child. (TCA 36-1-116).

If no prior or updated home study of prospective adoptive parents has been filed with court, and if court has not waived requirement for prospective adoptive parents related to child, court will order licensed child-placing agency or licensed clinical social worker chosen by petitioners to submit home study of petitioners and court report concerning child's circumstances and antecedents and proposed adoptive home. If petitioners are indigent under federal poverty guidelines or if child was placed with petitioners by Department of Children's Services, that Department will conduct and submit study and report. (TCA 36-1-116).

Decree.

Unless child is related to petitioners, no final order of adoption shall be entered before home study has been filed, petition has been on file at least six months, and final report is filed with court. This six-months' waiting period may be waived if child has resided in petitioner's home for six months and court is satisfied adoption is in child's best interest. (TCA 36-1-119). If no appeal has been taken, court must complete or dismiss adoption proceeding by entering final order within one year of filing petition, unless petitioner shows good cause why final order should not be entered. (TCA 36-1-119). If appeal is taken, proceeding must be completed by court by entering final order within nine months from final judgment upon appeal, except for good cause shown by petitioner. Final order of adoption governed by TCA 36-1-120.

Termination of parental rights governed by TCA 36-1-113. Termination of parental or guardianship rights may be based upon following: (1) abandonment; (2) substantial noncompliance with foster care plan; (3) child has been removed from home of parent by court order for six months without appropriate change in circumstances; (4) parent or guardian committed severe child abuse; (5) parent or guardian sentenced to more than two years of imprisonment for conduct against another child in the home; (6) parent confined in correctional facility as result of criminal act for more than ten years and child under age eight at time of sentencing; (7) parent or guardian found guilty of, or found civilly liable for, intentional and wrongful death of child's other parent or guardian; (8) parent or guardian mentally incompetent to provide care; or (9) parental rights of one who is not legal parent or guardian may also be terminated subject to statute. (TCA 36-1-113).

Name may be changed in proceedings. (TCA 36-1-120).

Effect of adoption is to establish relationship of parent and child so that adopted child and his descendants inherit from and succeed to property rights of adoptive parents and their lineal and collateral kindred. Adoptive parents and their lineal and collateral kindred inherit from and succeed to rights of adopted child and his descendants, but only as to property acquired by child after adoption. Child under age 21 at time of adoption also shares to same extent as natural child in class gifts, by will or otherwise, not vested in interest and in possession on or prior to Aug. 24, 1995, unless terms of gift clearly indicate donor's contrary intention. No rights of inheritance between adopted child and biological parents or relatives when relationship between them has been terminated by final order of adoption. (TCA 36-1-121).

Disclosure of adoption records governed by TCA 36-1-125 to 127. For certain relevant definitions, see TCA 36-1-102. All adoption records shall be confidential and kept under seal. However, special provision is made for access to certain records of adoptions prior to Mar. 16, 1951. (TCA 36-1-126; TCA 36-1-127).

Procedures for limited access to adoption records, for requesting contact with person identified by records, and for veto of contact by such persons are provided by TCA 36-1-128 to 141.

Interstate Compact on Adoption and Medical Assistance adopted. (TCA 36-1-201 et seq.).

Setting Aside Adoption.

No party may question final decree of adoption directly or indirectly save by appeal duly perfected. (TCA 36-1-122).

14.02 ALIMONY:

See topic 14.06 Divorce.

14.03 COMMUNITY PROPERTY:

System not in force.

14.04 [RESERVED]

14.05 DISSOLUTION OF MARRIAGE:

See topic 14.06 Divorce.

14.06 DIVORCE:

This subject is governed by TCA 36-4-101 et seq.

Grounds for Absolute Divorce.

(1) That either party was at marriage and still is naturally impotent; (2) that either party has knowingly entered into a second marriage, a previous one still subsisting; (3) adultery; (4) willful or malicious desertion or absence for one year without reasonable cause; (5) conviction of an infamous crime; (6) conviction of a crime which is a felony under the laws of this state and sentence to the penitentiary; (7) attempts on life of other by means showing malice; (8) refusal by wife or husband to remove to this state, without reasonable cause, and willfully absenting herself or himself for two years; (9) that woman was pregnant at time of marriage by another without husband's knowledge; (10) habitual drunkenness or abuse of narcotic drugs contracted after marriage; (11) that for continuous period of two years parties have lived in separate residences, not cohabitated, and have no minor children; (12) husband or wife is guilty of cruel and inhuman treatment or conduct towards spouse as renders cohabitation unsafe and improper, which may also be referred to in pleadings as “inappropriate marital conduct”; (13) husband or wife has offered such indignities to spouse's person so as to render spouse's position intolerable, and

thereby forced spouse to withdraw; (14) husband or wife has abandoned spouse or turned spouse out-of-doors for no just cause, and has refused or neglected to provide for spouse while having ability to so provide. (TCA 36-4-101). See also infra, subhead Irreconcilable Differences.

Grounds for Legal Separation.

Party who alleges grounds for divorce may, as alternative to filing complaint for divorce, file complaint for legal separation. Such complaint shall set forth grounds of legal separation in substantially same language as TCA 36-4-101 and pray only for legal separation or for such other and further relief as to which complainant may be entitled. Other party may deny existence of grounds for divorce, but, unless said party specifically objects to granting of order of legal separation, court shall declare parties to be legally separated. If said party specifically objects to legal separation, court may, after hearing, grant order of legal separation notwithstanding such objection if grounds are established pursuant to TCA 36-4-101. Court also has power to grant absolute divorces to either party if there has been order of legal separation for more than two years upon petition being filed by either party setting forth original order for legal separation and that parties have not reconciled. Court granting divorce shall make final and complete adjudication of support and property rights of parties. Court may grant absolute divorce prior to expiration of two-year period. Legal separation permits parties to cease cohabitation. Court may provide for matters such as child custody, visitation, support, and property during legal separation upon motion by either party or by agreement of parties. Party who can establish grounds for absolute divorce pursuant to TCA 36-4-101 is entitled to absolute divorce without going through legal separation. (TCA 36-4-102).

Irreconcilable Differences.

Absolute divorce may be granted on this ground if respondent is served personally or, if nonresident, by mail through Secretary of State under TCA 20-2-215. In lieu of service of process, defendant may enter into written notarized marital dissolution agreement with plaintiff, provided agreement makes specific reference to pending divorce by court and docket number, or agreement states that defendant is aware that divorce will be filed in Tennessee. Agreement must state that defendant waives further service and waives filing answer to complaint. Such waiver of service is valid for period of 180 days from date last party signs agreement. Agreement may include alimony, in solido or in futuro, to either party. Signing of such agreement constitutes general appearance and answer, which gives court personal jurisdiction over defendant and which constitutes default judgment for purposes of granting divorce on grounds of irreconcilable differences. (TCA 36-4-103). Divorce cannot be granted on this ground where there has been contest or denial, unless properly executed marital dissolution agreement is presented to court. Irreconcilable differences complaint cannot be heard until 90 days after filing if there are unmarried minor children, or 60 days after filing if no such children. Ninety and 60-day periods run from filing of original complaint and not from filing of amendment to claim irreconcilable differences. (TCA 36-4-103). If defendant admits facts charged in such complaint, or complaint is taken as confessed, no further proof need be taken. (TCA 36-4-114). Divorce decree on ground of irreconcilable differences must affirmatively find that adequate written child custody and maintenance and property settlement agreement was made and must incorporate agreement into decree. (TCA 36-4-103).

Citizenship Requirements.

None.

Residence Requirements.

No length of residence required where acts committed while plaintiff a bona fide resident of this state and is so at time of filing suit. Divorce may be granted upon proper grounds arising out of state while petitioner resided out of state, provided petitioner or defendant has resided in this state six months next preceding filing of bill. (TCA 36-4-104).

Jurisdiction.

The circuit court has concurrent jurisdiction with the chancery court for the trial of divorce cases. (TCA 16-10-108; TCA 16-11-110). Court may exercise personal jurisdiction over any party to action of divorce if parties lived in this state while married, notwithstanding one party's subsequent departure, provided other party still resides in this state. (TCA 20-2-222).

Venue.

Bill may be filed in county where parties resided at time of their separation or in which defendant resides, but if defendant is a nonresident or a convict, then in county where applicant resides. (TCA 36-4-105). Armed forces personnel or spouses who have lived in this state for one year or more presumed to be residents. Presumption is rebuttable on clear and convincing proof. (TCA 36-4-104).

Process.

Substituted process by publication may be had upon same grounds for which same would issue generally in chancery. (TCA 36-4-108).

Pleading.

Complaint shall set grounds in substantially same language as statute. Where answer filed, court shall, on defendant's motion, require complainant to set forth facts relied upon with reasonable certainty as to time and place. (TCA 36-4-106).

Complaint for legal separation shall set forth grounds therefor in substantially same language as TCA 36-4-101 and pray for such further relief as to which complainant is entitled. In all cases where answer is filed, court shall, on motion of defendant, require complainant to file bill of particulars, stating facts relied on as grounds for legal separation, with reasonable certainty as to time and place. (TCA 36-4-106).

Complaint must state full names (including maiden name of wife), addresses, race, number of previous marriages, of both parties, date and place of marriage, number of minor children, and any litigation concerning custody of such children. Filing party must also set out full names and Social Security numbers of parties, current mailing addresses and dates of birth of parties and all children born of marriage in separate sealed document. (TCA 36-4-106).

Except where sole ground for divorce is irreconcilable differences, complaint must be verified by oath of petitioner “that the facts stated in the bill are true to the best of the complainant's knowledge and belief for the causes mentioned in the bill.” (TCA 36-4-107).

The answer follows usual chancery practice. Cross action is permissible.

Court may require sworn statement from parties and witnesses relative to income, expenses and property interests. (TCA 36-4-116).

Practice.

Jury may be demanded by either party. (TCA 36-4-113). Upon written stipulation of both parties, court may, without prejudice to rights of respective parties, enter order suspending all proceedings to permit parties' attempt at reconciliation. (TCA 36-4-126).

Judgment or Decree.

Court may grant relief by pronouncing marriage void from beginning by dissolving it forever and freeing each party from obligations thereof, or by separation for limited time. (TCA 36-4-119).

Alimony.

Support, pendente lite, and upon granting absolute divorce or temporary separation, may be awarded to either spouse. Amount is in discretion of court and may include counsel fees and expenses of job training and education. Statute lists factors for consideration by court, including relative fault and intangible contributions. Act does not preclude incorporation in decree of agreement for support of spouse. In futuro alimony award may be modified on motion of either party upon showing of substantial and material change of circumstances but, upon remarriage of recipient, award automatically terminates. Where recipient lives with third person, rebuttable presumption is raised that recipient is receiving from or contributing support to that person and court should suspend all or part of alimony obligation of former spouse. (TCA 36-5-121). Commissioner of Department of Human Services is expressly authorized to issue administrative order of income assignment to Commissioner of Department of Labor and Workforce Development against any wages or wage benefits to which obligor is entitled. (TCA 36-5-103).

Division of Property of Spouses.

Tennessee is marital property state. Upon consideration of factors listed, court may equitably divide and distribute marital property, as defined by statute (or reserve division of property until later time), without regard to fault and may divest and reinvest title and where necessary, order sale with proceeds to be divided between parties. Lien may be imposed on marital or separate property as security for support payments. Act does not affect validity of antenuptial agreement or preclude incorporation into decree of property settlement agreement between parties. Court may award home and household effects to either party but must give special consideration to parent with custody of children. (TCA 36-4-121).

Marital Debt.

Debts incurred by either or both spouses during marriage are marital debts. In allocating marital debt consider: (1) Debt's purpose; (2) which party incurred debt; (3) which party benefited from debt; and (4) which party can repay debt. (120 S.W.3d 810 [Tenn. 2003]).

Custody of Children.

Regardless of whether divorce is granted or denied, court may award custody of children to either party, both parties, or to some other suitable person as welfare of children demands. Decree may be modified as exigencies demand. Court may modify upon finding that custodial parent has been convicted of, or found civilly liable for, intentional and wrongful death of other parent or legal guardian. (TCA 36-6-106[b]). Finding of child abuse under TCA 36-6-106(a) or child sexual abuse under TCA 37-1-602 shall give rise to rebuttable presumption that it is detrimental to child and not in best interests of child to award sole custody or joint legal or joint physical custody to perpetrator of such abuse. (TCA 36-6-101). In suit for divorce, annulment or separate maintenance, or in action to modify or change custody, court shall consider all relevant factors, including following: (1) Love, affection and emotional ties between parents and child; (2) disposition of parents to provide food, clothing, medical care, education and other necessary care and degree to which parent has been primary caregiver; (3) continuity in child's life; (4) stability of family unit; (5) mental and physical health of parents; (6) home, school, community record of child; (7) evidence of physical or emotional abuse; (8) character and behavior of any other person who resides in parent's home; (9) reasonable preference of child over 12; (10) each parent's past and potential for future performance of parenting responsibilities, including willingness and ability of each parent to facilitate and encourage close and continuing parent-child relationship between child and other parent, consistent with best interest of child. (TCA 36-6-106[a]). Gender of party seeking custody does not give rise to presumption or constitute factor in favor of, or against award of, custody to such party. (TCA 36-6-101). There is no presumption for or against joint custody, except that there is rebuttable presumption in favor of joint custody if agreed to by both parents. (TCA 36-6-101). If suit is for modification of residential parenting schedule then petitioner must prove by preponderance of evidence material change of circumstances which doesn't require showing of substantial risk of harm. (TCA 36-6-101[a][2][C]). All orders for absolute divorce, legal separation, or annulment shall grant to each parent following rights during non-custody periods, except when not in best interest of child: (1) Right to unimpeded telephone conversations twice per week; (2) right to send mail to child free from censorship; (3) right to receive notice as soon as practicable of any hospitalization, illness, or death of child; (4) right to receive from child's school upon request copies of all school documents concerning child; (5) right to receive medical records of child upon request; (6) right to be free of derogatory remarks being made about parent by other parent to child; (7) right to be given at least 48 hours notice, when possible, of all extra-curricular activities, and opportunity to participate or observe; (8) right to receive from other parent, in event other parent leaves state with minor child or children for more than two days, itinerary and telephone numbers for use in emergency; and (9) right of access and participation in education on same basis that is provided to all parents, provided participation is reasonable. (TCA 36-6-101; TCA 36-6-110). In any child custody or visitation proceeding involving domestic abuse, court may order mediation only if alleged victim agrees to mediation, mediator is trained in domestic violence, and victim is permitted to have supporting person of his or her choice in attendance at mediation. (TCA 36-6-107, 305). Former pilot program for child custody has now been adopted for statewide use; establishes and comprehensively regulates “parenting plans” and provides for use of alternative disputes resolution. (TCA 36-6-401 through 414).

“Move Away” Provision of Child Custody Statute.

If parent who is spending time with child wants to move outside state or 100 miles from other parent within state, moving parent must provide notice to other parent no later than 60 days before said move. Notice must inform nonmoving parent of moving parent's intent to move and location and reasons for move and statement that other parent may file petition in opposition to move. (TCA 36-6-108). If parents cannot agree on revised visitation arrangement, moving parent can request court to alter visitation. Court shall consider best interests of child when determining revised visitation rights and will be guided by factors delineated in TCA 36-6-101, as well as whether primary residential parent will comply with new visitation arrangements. If parents spend equal amount of time with children, nonmoving parent may file petition in opposition to removal of child within 30 days of receipt of notice, and court's determination will be based on statutory factors. (TCA 36-6-108). If parent spending greater amount of time with child wishes to relocate child, nonmoving parent may likewise oppose move. Court will allow relocation in this instance unless court finds no reasonable purpose for move, that move would pose threat of specific and serious harm outweighing threat of harm from change of custody, or if move is intended to defeat or deter visitation rights. Specific and serious harm includes, but is not limited to: (1) parent moving child with serious medical problems to area with inadequate medical facilities; (2) parent moving child with specific educational requirements to area with inadequate educational facilities; (3) parent wishes to relocate and reside with person with history of drug abuse or domestic abuse or who is currently abusing alcohol or other drugs; (4) move would result in severe emotional detriment to child or emotionally disturbed parent would be unable to carry out duties as parent; or (5) parent moving child to foreign country that does not enforce visitation rights, does not have adequate legal system, or poses substantial risk to child. (TCA 36-6-108).

Child Abuse.

Finding of child abuse or child sexual abuse within family gives rise to rebuttable presumption that it is detrimental to child and not in child's best interest to remain in custody of perpetrator of such abuse. (TCA 36-6-101). Visitation may be granted by court only when circumstances guarantee safety of child. To so guarantee, court may order that visit be supervised or that perpetrating parent undergo counseling, forbid overnight visitation until such counseling is successfully completed, order that address of child and non-perpetrating parent be kept confidential, or require other appropriate measures. (TCA 36-6-301 et seq.).

Protective Parent Reform Act.

Ensures that parent who makes good faith allegation based on reasonable belief supported by facts that his/her child is victim of abuse and acts lawfully in response will not be deprived of or restricted in visitation based on those beliefs or actions. (TCA 36-6-112).

State Custody.

Placement of child in custody of any agency of State of Tennessee shall make parents of that child liable for support. In all such cases, court shall immediately order child support or set hearing for such. (TCA 37-1-151). Commissioner of Department of Human Services is expressly authorized to issue administrative order of income assignment against any wages to which obligor is entitled. (TCA 36-5-103). Hearings in all child support cases which are not being enforced shall be heard within 45 days of service of process. (TCA 36-5-402). Court shall set child support as evidence demonstrates and in accordance with child support guidelines. (TCA 37-1-151). If child support order exists, without further order of court, child support payments shall be forwarded to Department of Children's Services. (TCA 37-1-151).

Abduction.

Juvenile Court has concurrent jurisdiction with Circuit and Chancery Court of proceedings arising from 1980 Hague Convention on the Civil Aspects of International Child Abduction. (TCA 37-1-104).

Visitation.

After making award of custody, court shall upon request of non-custodial parent grant such rights of visitation as are proper pursuant to statute. (TCA 36-6-301). Grandparents may be granted visitation rights if in best interest of child, if child is removed from custody of child's parents, guardian or legal custodian and placed in foster care or child care agency, except where child has been adopted by unrelated party. (TCA 36-3-302). Grandparents may be granted reasonable visitation rights with minor child if in best interest of child and either one of parents are deceased, parents are divorced or legally separated, one of parents has been missing for at least six months, court of another state has granted such visitation, child lived with grandparent for year, or grandparent maintained significant relationship with child for year or more. (TCA 36-6-306). (But see 530 U.S. 57 [2000].) Treatment of petitions for visitation by grandparents is set forth in TCA 36-6-306. If custodial parent opposes grandparent visitation, hearing is required. (TCA 36-6-306). Additional best interest of child factors are set forth in TCA 36-6-307. Effective July 1, 2000, multiple violations of visitation orders within six month period may provide basis for denial, suspension, or revocation of certain licenses, not including license to practice law. (TCA 36-6-503). Stepparent may be granted visitation rights if actually contributing to support and in child's best interest. (TCA 36-6-303).

Allowance for Support of Children.

Upon granting of absolute divorce or of perpetual or temporary separation, court may order suitable support and maintenance of children. In determining amount of child support, court applies guidelines of state Department of Human Services as rebuttable presumption. (TCA 36-5-101). Private agreements as to child support payments outside of state guidelines are contrary to public policy. (21 S.W.3d 188 [2000]). Decree may be modified on motion of either party upon showing of substantial and material change of circumstances. (TCA 36-5-101; TCA 36-5-103).

Uniform Interstate Family Support Act.

Adopted. (TCA 36-5-2001 et seq.).

Remarriage.

When marriage is absolutely annulled or dissolved, parties are free to remarry. (TCA 36-4-124).

14.07 [RESERVED]

14.08 GUARDIAN AND WARD:

Any court exercising probate jurisdiction or any other county court of record has power to appoint guardians for persons or property or both within its jurisdiction, and to take cognizance of all matters concerning minors and their estates. (TCA 34-2-101). If minor has no estate, juvenile court has concurrent jurisdiction. (TCA 34-2-101). Permanent guardianship may be created for child at any hearing in which permanent legal disposition of child can be made. (TCA 37-1-801).

Eligibility and Competency.

Parent is preferred unless court thinks interest of minor requires otherwise. (TCA 34-2-103). No personal representative, except parent, grandparent, brother, or sister of infant, having in his hands any of estate of said infant, shall be appointed guardian until his accounts have been settled. (TCA 34-1-120).

Qualification.

Unless waived, bond is required of every guardian. Bond must be in amount equal to fair market value of all personal property plus amount of anticipated income for one-year period from all property. If bond is posted by corporate surety, amount posted may be equal to amount of bond; however, if property is posted for bond, value of property shall be equal to 150% of bond. (TCA 34-1-105).

Inventory must be filed by guardian within 60 days of appointment. (TCA 34-1-110).

Powers and Duties.

Investments by guardians generally are regulated by TCA 34-1-115.

Securities in Name of Nominee.

See category 13 Estates and Trusts, topic 13.11 Trusts, subhead Securities in Name of Nominee.

Gifts to Minors.

See topic 14.10 Infants.

Accounts must be made annually. (TCA 34-1-111). Upon failure so to account guardian may be cited to appear and account. (TCA 34-1-111).

Termination of Guardianship.

Guardianship of minor usually terminates when ward attains age 18, but interested persons may petition to extend guardianship up to age 25 if shown to be in ward's best interest. (TCA 34-2-106).

Guardians may resign with consent of the court. (TCA 34-1-117).

Foreign Guardians.

When a ward and his guardian are nonresidents, or a ward, after having a guardian appointed, removes from the state, the ward's property in this state may, upon court order, be removed to state or territory of his residence. (TCA 34-1-117). Any person not resident of state or any corporation authorized to exercise fiduciary powers but not authorized to do business and not maintaining office in this state is not allowed to serve as guardian or conservator for incompetent person or as guardian for minor, except that: (1) Bank or trust company organized and doing business under laws of the state or territory, including District of Columbia, or national bank or trust company, duly authorized so to act, may serve as fiduciary when and to extent that state, territory or District of Columbia in which such bank or trust company is organized or has its principal place of business grants authority to serve in like fiduciary capacity to bank or trust company organized and doing business under laws of this state or national bank or trust company having its principal office in state; (2) any person may serve as guardian or conservator of incompetent person, regardless of residence of guardian or conservator; (3) certain nonresident trust companies may serve as a fiduciary if they have office in Tennessee and either (i) accept deposits at such office or (ii) meet definition of trust institution under 12 U.S.C. § 1841(c)(2)(D) and are subsidiaries of bank holding company which has subsidiary which accepts deposits in Tennessee. (TCA 35-50-107).

Infirm Persons.

Appointment, duties and powers, and removal of conservators for person with mental illness, developmental disability or other mental incapacity governed by TCA 34-3-101 et seq. Persons over 60 may qualify to have public guardian appointed. (TCA 34-7-101 et seq.).

Uniform Fiduciaries Act adopted. (TCA 35-2-101 et seq.).

14.09 HUSBAND AND WIFE:

Disabilities of Married Women.

Married women are emancipated from all disabilities of coverture and all common law disabilities. (TCA 36-3-504). Nevertheless, tenancy by entirety is still recognized. (TCA 36-3-505).

Separate Property.

A married woman may acquire, hold, manage, control and dispose of all property, real and personal, as though not married. (TCA 36-3-504).

Contracts.

A married woman may contract with or become surety for her husband or any other person. Husband and wife may transact business with each other. (TCA 36-3-504).

Antenuptial contracts and settlements regarding property may be registered (TCA 66-24-101; TCA 66-24-106) and are binding on court and enforceable if entered into freely, knowledgeably, in good faith and without duress or undue influence (TCA 36-3-501). Post-nuptial and voluntary marriage contracts and settlements are void as to existing creditors. (TCA 36-3-502).

Torts.

A married woman is liable for her torts as though unmarried.

Actions.

A married woman may sue or be sued without joinder of her husband. (TCA 36-3-504).

Agency.

Either spouse may act as attorney in fact for the other.

Conveyance or Encumbrance of Property.

Either spouse may convey his or her real estate (except homestead) without joinder of other.

Desertion and Nonsupport.

Repealed.

Community property system does not obtain in Tennessee.

14.10 INFANTS:

Age of majority, 18 for both sexes, except regarding purchase and possession of alcoholic beverages for which required age is 21. (TCA 1-3-113 and, also, Tennessee Uniform Transfers to Minors Act [35-7-102]).

Emancipation.

There is no provision for emancipation by marriage.

Disabilities.

All common law limitations on infants exist.

Removal of Disabilities.

Removal of disability of minority may be decreed by court having jurisdiction for specific purpose. (TCA 29-31-104). Chancery and circuit courts of any county may remove disabilities of nonresident minor who has an interest in any real or personal property as to such interest. Petition filed in county other than county where property located must show no prior applications. (TCA 29-31-101).

Ratification or Disaffirmance of Contracts.

An infant upon coming of age may disaffirm his contracts, other than contracts for necessities, within reasonable time. (30 Tenn. 468 [1850]). Absent overreaching or undue influence, however, if article purchased used by minor, vendor allowed reasonable compensation for use, depreciation, and willful or negligent damage while in minor's hands. (824 S.W.2d 545 [1992]). He may also ratify contracts expressly, or by acts which reasonably imply ratification, or by failure to disaffirm within reasonable time. (14 Tenn. App. 672 [1932]).

Actions.

Suits on behalf of minor are brought by guardian or next friend and may, in proper case, be upon pauper's oath and by filing of accompanying affidavit of indigency. (TCA 20-12-129).

Foreign Protection Orders.

Valid protection orders issued by court of another state, tribe, or territory related to abuse or domestic violence are afforded full faith and credit. (TCA 36-3-622).

Guardian ad litem for infant defendant must be appointed by clerk and master (TCA 21-1-701) or by court (TCA 29-15-106; TCA 34-1-107).

Support of Minor and Spouse.

Any person legally chargeable with care or support of minor is guilty of misdemeanor if he fails to provide, and knows he has duty to provide, such support; is guilty of felony if (i) he leaves or remains outside state to avoid his duty or (ii) has previously been convicted of nonsupport.

(TCA 39-15-101). Expedited procedures to set, enforce, modify or terminate support obligations governed by TCA 36-5-401 et seq. Assignment of income for child or spousal support orders is controlled by TCA 36-5-101 et seq. Court shall order assignment of up to 50% of obligor's income for all orders of child support, regardless of whether payments are in arrears, unless exception applies. Law of state of obligor's principal place of employment shall control for out-of-state employers. Employer may not use assignment of income as basis for discharge of obligor. Assignment is binding on employer and takes priority over most other assignments or garnishment of wages. (TCA 36-5-501).

Parental Responsibility.

Parent or guardian liable up to $10,000 for malicious property damage or personal injuries caused by minor child (TCA 37-10-101-02); full liability for tortious personal or property damage, where child's tendency to commit such wrongful acts are or should be known and where parent or guardian has opportunity to control conduct, but fails to exercise reasonable care to do so (TCA 37-10-103). Parent whose failure to take reasonable steps to prevent unruly conduct by unemancipated child may be ordered by court to participate in child's treatment, seek assistance from school officials, social services officials or other appropriate public or private resources and authorities, complete community service work, or provide supervision to insure that child complies with any and all conditions and requirements that court has ordered. (TCA 37-1-174).

Uniform Transfers to Minors Act adopted. (TCA 35-7-101 et seq.). Age of majority under Act is 21. (TCA 35-7-102). Where donor makes unrestricted gift in trust to minor beneficiary with right to demand immediate possession, parents may exercise such right on behalf of minor. (TCA 67-8-101).

Savings Account.

Savings and loan associations may accept deposits and pay withdrawals on order of minor. Payment to minor discharges association. (TCA 45-3-507).

Missing Children.

Tennessee Missing Children Recovery Act enacted. (TCA 37-10-201 et seq.). In 2005, definition of “child” under this Act was changed to any person under 21 years of age. (TCA 37-10-201).

Termination of Parental Rights.

Juvenile, Circuit and Chancery court have concurrent jurisdiction of proceedings to terminate parental rights. (TCA 36-1-113; TCA 37-1-104). Petition may be made by any person (TCA 37-1-119) and must comply with TCA 36-1-113 or TCA 37-1-120 (TCA 37-1-147). Venue lies in county in which child currently resides, or where petitioners reside, where child resided when he became subject to private or public agency or guardianship, or where child-placing agency or institution with custody or guardianship is located. (TCA 36-1-113, effective Jan. 2009; TCA 36-1-114). Proceedings to terminate parental rights are governed by TCA 36-1-113. Grounds to terminate parental rights include: (1) abandonment as defined by TCA 36-1-102, (2) substantial noncompliance with permanency plan or plan of care; (3) removal from home for more than six months, (4) severe child abuse, (5) certain instances of imprisonment, (6) conviction or civil liability for death of child's other parent or guardian, (7) failure to provide for, support, visit, or assume custody of child, (8) conviction of aggravated rape from which child was conceived. (TCA 36-1-113). Termination of parental rights of child in foster care is governed by TCA 37-2-401 et seq. Parental rights may be terminated by voluntary delivery of newborn to certain healthcare facilities. (TCA 68-11-255; TCA 36-1-102[1]).

Adoption.

See topic 14.01 Adoption.

Uniform Securities Ownership by Minors Act not adopted.

14.11 MARRIAGE:

Statutory age of marriage is 16 years for either party. (TCA 36-3-105). County, probate, juvenile, circuit or chancery judge, upon good cause shown, may order license to issue regardless of restriction as to age. (TCA 36-3-107).

Consent Required.

Clerk, upon receiving application for license, must send notice to both parents, unless parties are at least 18 years of age or are joined in application by both parents. (TCA 36-3-104). Additionally, unless joined by parents, application where either party is under 18 must remain on file, open to public, for waiting period of three days. (TCA 36-3-104). Where either applicant is under 18 years of age, parents or agency having legal custody of such applicant must join in application, under oath, stating that applicant is 16 years of age or over and has consent to marry. (TCA 36-3-106). For right to contest issuance of license see subhead License, infra.

License.

Any county clerk within state may issue license. License valid for 30 days from issuance. (TCA 36-3-103). Application must be sworn to by both applicants. (TCA 36-3-104). No marriage license may be issued where either of contracting parties is under age of 16 unless county, probate or juvenile judge waives age limit and directs clerk to issue license. (TCA 36-3-105; TCA 36-3-107). No license may issue where either party is drunk, insane, or imbecile. (TCA 36-3-109). Marriage consummated by ceremony upon license issued in violation of above provisions is voidable. No license may be issued for any marital union other than between one man and one woman. (TCA 36-3-113).

Any interested person may contest issuance of license by filing contest before any judge or chancellor. (TCA 36-3-110).

Waiting Period.

Before issuance of a license, application therefor must remain on file, open to public in clerk's office, for three days unless both parties over 18 years of age or both parents, guardian, or next of kin joins in application. (TCA 36-3-104). Probate, juvenile, circuit, or chancery court or county executive may suspend three day limit and direct clerk to issue license (TCA 36-3-107).

Medical Examination.

Not required.

Ceremonial Marriage.

No particular form is required other than the mutual assent of the parties to become man and wife, expressed in the presence of the minister or officer performing the ceremony. (TCA 36-3-302). Such officer must be over 18 years of age and may be minister, justice of peace, judge, including resident federal judges and magistrates, chancellor, governor, speaker and former speakers of senate and house of representatives, present and former county executives or clerks, county legislator, mayor of municipality, former chancellors and former judges. (TCA 36-3-301). Reference in code to “county executive” are deemed to be referenced to County Mayor. (TCA 5-6-101).

Report of Marriage.

The person officiating at the marriage must return to the county court clerk the marriage license and form for certificate of marriage (TCA 68-3-401). Thereafter the county court clerk, on the 10th day of each month, reports all marriage certificates filed in his office during the preceding month. (TCA 68-3-401). Copies thereof are available at the state office for a nominal fee. (TCA 68-3-207).

Record.

See category 10 Documents and Records, topic 10.04 Records, subhead Vital Statistics.

Common law marriages are not recognized. Courts consider valid a common law marriage contracted in a state where such marriages are valid. (510 S.W.2d 73 [1974]).

Proxy marriages are not recognized.

Marriages by written contract are not recognized.

Irregular Marriage.

Continued cohabitation after reaching age of marriage is a ratification of marriage theretofore voidable. (37 Tenn. 659 [1858]).

Prohibited Marriages.

Marriage cannot be contracted with lineal ascendant or descendant; lineal ascendant or descendant of either parent; lineal descendant of husband or wife; husband or wife of parent or lineal descendant. (TCA 36-3-101). Marriage between one man and one woman is only legally recognized marriage in this state. (TCA 36-3-113).

Foreign Marriages.

No provision for recognition of foreign marriages, which are recognized by comity.

15 HEALTH

15.0115.04

15.05 FOOD, DRUGS, DEVICES AND COSMETICS:

Tennessee Food, Drug and Cosmetic Act covers following acts in regard to food, drugs, medical devices, or cosmetics: misbranding; adulteration; false advertising; misrepresentation; and improper labeling. (TCA 53-1-101 et seq.).

15.05A GENETIC TESTING:

Department of Health required to establish statewide program to ensure availability of genetic services to citizens of Tennessee who need them for prevention and treatment of mental retardation or other physical dysfunctions. (TCA 68-5-502). Genetic and other testing services are provided only to following: (1) Born children; (2) unborn children whose testing would result in treatment (induced abortion not regarded as treatment); (3) men; (4) nonpregnant women; and (5) those pregnant women whose testing would result in treatment for themselves or their unborn children (induced abortion not regarded as treatment). (TCA 68-5-504). Commissioner empowered to formalize agreements with agencies in other states to provide services as may be needed. (TCA 68-5-505).

15.0615.11

15.12 PUBLIC HEALTH:

Medical Assistance Act of 1968 enacted at TCA 71-5-101 through TCA 71-5-190. Act makes medical assistance possible for those recipients determined to be eligible to receive medical assistance that conforms to requirements of title XIX of Social Security Act and regulations promulgated thereto. Medical assistance pursuant to this part may also be provided pursuant to any federal waiver received by state that waives any or all of provisions of title XIX or pursuant to any other applicable federal law to extent adopted by means of amendment to required title XIX state plan.

Tennessee Medicaid False Claims Act enacted at TCA 71-5-181 to 185. Qui tam actions authorized for violations of TCA 75-5-182. (TCA 71-5-183). Civil actions brought under TCA 71-5-183 may not be brought: more than six years after date on which violation is committed, or more than three years after date when facts material to right of action are known or reasonably should have been known by official of state charged with responsibility to act in circumstances, but in no event more than ten years after date on which violation is committed, whichever occurs last. (TCA 71-5-184). Criminal penalties are authorized for fraudulently obtaining or attempting to obtain benefits or payment for medical assistance. (TCA 71-5-118).

Tennessee Health Care Decisions Act.

Adult or emancipated minor may give current direction, or may execute written advance directive for health care, in accordance with provisions of Tennessee Health Care Decisions Act, enacted in 2004. (TCA 68-11-1801 through TCA 68-11-1815).

Durable Power of Attorney for Health Care is effective to authorize attorney in fact to make health care decisions for principal, provided power of attorney for health care complies with TCA 34-6-201 et seq. Conservator appointed after execution of durable power of attorney for health care does not have power to: (1) Revoke or amend durable power of attorney for health care; or (2) replace attorney in fact. (TCA 34-6-204). Upon application and good cause shown when appointing fiduciary, court may revoke or amend durable power of attorney for health care or replace attorney in fact. (TCA 34-6-204). Principal may revoke durable power of attorney for health care by notifying attorney in fact or health care provider orally or in writing. (TCA 34-6-207). Unless otherwise provided, valid durable power of attorney for health care revokes any prior durable power of attorney for health care. (TCA 34-6-207). Liability of health care provider limited by TCA 34-6-208. Durable power of attorney for health care that is executed outside Tennessee by nonresident of Tennessee is effective if durable power of attorney for health care complies with TCA 34-6-201 et seq., or laws of state of principal's residence. (TCA 34-6-215).

Patient right to privacy governed by Patient's Privacy Protection Act. (TCA 68-11-1501 to 1505). Divulging name, address, or other identifying information is invasion of patient's rights to privacy unless such disclosure is pursuant to the four enumerated exceptions. (TCA 68-11-1503). Such information may be disclosed in following situations: (1) Any statutory required reporting to health or government entities; (2) access by third-party payer (or designee) for purpose of utilization reviews, case management, peer reviews, or other administrative functions; (3) access by health care providers from when patient receives or seeks care; (4) if patient does not object, any directory information including only name of patient, patient's general health status, and patient's location and telephone number; and (5) pursuant to subpoena, court order, or request authorized by state or federal law. (TCA 68-11-1503). Name, address and other identifying information of patient shall not be sold for any purpose. Above confidential information may be subject to subpoena from court of competent jurisdiction. (TCA 68-11-1505).

Uniform Anatomical Gift Act adopted. (TCA 68-30-101 et seq.). Sections of Uniform Anatomical Gift Act of 1987, amending The Uniform Anatomical Gift Act of 1968 adopted with minor variations, including, but not limited to, right of minor children of deceased to authorize anatomical gift in absence of surviving spouse or adult son or daughter. (TCA 68-30-101 et seq.).

15.12A REGULATION OF HEALTH AND HEALTH-RELATED FACILITIES:

Regulated generally by Title 68, c. 11 (Health Facilities and Resources). Also, Commissioner of Commerce and Insurance has regulatory authority over hospital and medical service corporations. (TCA 56-1-201 et seq.).

Department of Health established by TCA 4-3-1801. Under charge and general supervision of Commission of Health. (TCA 4-3-1802).

General supervision vested in Commission of Health. Health Services and Development Agency has jurisdiction and powers relating to certification of need and related reporting of all health care institutions, as defined in TCA 68-11-1604. Department of Health is empowered to license and regulate hospitals, recuperation centers, nursing homes, homes for aged, residential HIV supportive living facilities, assisted-care living facilities, home care organizations, residential hospices, birthing centers, prescribed child care centers, ambulatory surgical treatment centers, facilities operated for provision of alcohol and drug prevention and/or treatment services and outpatient diagnostic centers. (TCA 68-11-202-209). *Note:* TCA 68-11-101 was repealed in 2002 and was replaced by addition of TCA 68-11-1601 et seq.

Covenants Not to Compete.

Employment based covenants with ``health care providers'' are deemed reasonable if: (1) Restriction is set forth in employment agreement or other written document signed by health care provider and employer; and (2) duration of restriction is two years or less; and (3) either: (a) maximum geographic restriction is greater of ten mile radius from primary practice site of health care provider while employed or is county in which primary office of health care provider is located; or (b) if there is no geographic restriction but health care provider has been practicing with employer for less than six years and restriction is limited to facilities at which employing or contracting entity provided services while health care provider was employed. (TCA 63-1-148).

Covenants related to purchase or sale of practice of ``health care provider'' or all or substantially all of assets of practice are enforceable if duration of restriction and allowable are of restriction are reasonable under circumstances. (TCA 63-1-148). There shall be rebuttable presumption that duration and area of restriction agreed upon by parties to purchase/sale agreement is reasonable. (TCA 63-1-148).

Act defines ``health care provider'' as: Podiatrists, Chiropractors, Dentists, Physicians, Surgeons, Optometrists and Psychologists. (TCA 63-1-148). Not included in scope of Act are veterinarians, physician's assistants, nurse practitioners, registered nurses or licensed practical nurses. (TCA 63-1-148). Act also specifically excludes Emergency Medicine and Radiology from its reach and coverage. (TCA 63-1-148).

Health Care Consumer Right-to-Know Act of 1998 mandates that division of health related boards establish system to provide public access to information about certain health care providers and managed care organizations in Tennessee. (TCA 63-51-101 et seq.). “Health care provider” means: physician; osteopathic physician; chiropractor; dentist; podiatrist; optometrist; dietitian or nutritionist; physician assistant; respiratory care practitioner; pharmacist; audiologist and speech pathology therapist; certified nurse practitioner; registered nurse anesthetist; social worker; psychologist; professional counselor, marital and family therapist; clinical pastoral therapist; massage therapist; medical laboratory personnel; alcohol and drug abuse counselor; occupational therapist and physical therapist; dispensing optician; electrologist; veterinarian; and nursing home administrator. (TCA 63-51-102).

Health Maintenance Organization Act of 1986 regulates establishment and operation of Health Maintenance Organizations that participate in TennCare program. (TCA 56-32-201 et seq.).

Nursing homes may be subject to civil-monetary penalties imposed by Commissioner of Health for failure to meet standards under federal Nursing Home Reform Act of 1987 or under TCA 68-11-802 to 804. Nursing home residents/patients are granted certain minimum rights (TCA 68-11-901) which may be abridged, restricted, limited, or amended only when medically contraindicated or necessary to protect and preserve rights and safety of other residents (TCA 68-11-902). Prior to, or within, seven days of employment, criminal background checks must be done on all persons employed by health care facilities in position that involves provision of direct care to resident or patient. (TCA 68-11-256).

Medication Error Reduction Act of 2004.

Creates uniform standard for issuing written or electronic prescriptions by: (1) Podiatrists (TCA 63-3-127); (2) dentists (TCA 63-5-122); (3) physicians and surgeons (TCA 63-6-235); (4) optometrists (TCA 63-8-126); (5) osteopathic physicians (TCA 63-9-115 and TCA 63-5-116); (6) nurse practitioners (TCA 63-7-123); and (7) physician assistants (TCA 63-19-107[2][E]). Prescriber must issue legible prescription, if written, and pharmacist is prohibited from dispensing medication pursuant to prescription which is not comprehensible to pharmacist. (TCA 63-10-213).

Fire Suppression and Detection Devices.

Nursing homes, assisted living facilities and residential homes for aged must post written disclosures as to absence of fire suppression and detection devices and any such absences shall be posted by licensing board on Tennessee website (http://www.state.tn.us). (TCA 68-11-910[c] and TCA 68-11-257). "Nursing homes" and "facilities" shall mean any nursing home as defined in TCA 68-11-201(29) and within 90 days from and after May 3, 2004, shall either be fully sprinklered or provide smoke alarms and/or smoke detectors in each patient room. Further, any nursing home or facility not fully sprinklered on May 4, 2004, must provide sprinkler plan to Dept. of Health, and failure to comply shall be grounds for discipline and/or licensure action pursuant to TCA 68-11-207. (TCA 68-11-235). Dept. of Health must review and approve or disapprove any sprinkler plan for nursing home within 30 days of plan's submission and accelerated dates for compliance by nursing homes are provided by TCA 68-11-235. Similar requirements and procedures are provided concerning assisted living facilities by TCA 68-11-236.

Minority Health.

Office of Minority Health was created in 2004 for purpose of educating public as to minority population health issues, advocating initiatives to enhance quality of life, and address any disparity in availability of health services. (TCA 68-1-2201 et seq.).

Free Health Clinics.

Physicians, dentists, certain other health care professionals, and social workers rendering services in "Free Health Clinics" may be governed by separate licensing and regulatory provisions and may be exempt from certain state taxes. (TCA 63-1-201 et seq.).

The Tennessee Chronic Kidney Disease Screening Act of 2005 urges health care providers who treat patients with diabetes, hypertension, or family history of kidney disease to test and counsel patients about chronic kidney disease. (TCA 68-5-801 et seq.).

Immunity from Liability.

No person licensed, certified, or authorized by board of any of profession of healing arts who renders services within limits of his license, certificate, or authority, voluntarily and without compensation, to any sponsoring organization shall be liable for civil damages, unless such person's act or omission was grossly negligent or willful conduct. (TCA 63-6-708).

16 INSURANCE

16.01 INSURANCE COMPANIES:

Regulated by TCA 56-1-101 et seq.

Supervision by Insurance Department headed by Commissioner of Commerce and Insurance, 500 James Robertson Pkwy., 5th Floor, Nashville, TN 37243-0565. (615) 741-2241. (TCA 56-1-201-02). Supervisory duties include regulation of acquisition of control of domestic insurance companies (TCA 56-10-202 et seq.) and regulation and analysis of premiums for accident and sickness policies issued in State (TCA 56-26-101 et seq.).

Rates for most types of insurance on risks within state are regulated by TCA 56-5-301-322, and shall not be excessive, inadequate or unfairly discriminatory. (TCA 56-5-303). Pursuant to Interstate Insurance Product Regulation Compact Act of 2007, Tennessee has joined with other states in establishing Interstate Insurance Product Regulation Compact to develop uniform regulatory standards and policies. (TCA 56-58-101 et seq.). Commissioner of insurance serves as Tennessee's representative to compact.

Use of credit scores in determining rates and renewability is regulated by TCA 56-5-402. (TCA 56-5-402).

Annual statements and actuarial reports must be filed with Commissioner of Insurance. (TCA 56-1-401 et seq.).

Risk Based Capital Report.

On or before each Mar. 1, each domestic insurer must prepare and submit to Commissioner report setting out certain data related to capital and risks, as specified in TCA 56-46-101-112.

Policies.

Regulated in general by TCA 56-7-101 et seq. Life insurance policies are regulated by TCA 56-7-301 to -702 and TCA 56-7-1601-1609. Life settlement contracts are governed by TCA 56-50-101-111. Health and accident insurance policies are regulated by TCA 56-26-101 et seq. Medical service plans are regulated by TCA 56-27-125-28. Credit life and credit accident and health insurance policies regulated by TCA 56-7-901 et seq. Noncancellable and guaranteed renewable automobile insurance policies are regulated. (TCA 56-7-1102). Group life policies are regulated by TCA 56-7-601-02. Deferred individual annuity contracts are regulated. (TCA 56-7-112; TCA 56-36-101 et seq.).

In compliance with federal Health Insurance Portability and Accountability Act of 1996, Tennessee has adopted Tennessee Health Insurance Portability, Availability, and Renewability Act. (TCA 56-7-2801 et seq.). Under Tennessee Act there is provided special enrollment period respecting TennCare Program. (TCA 56-7-2803).

Both life and health policies issued for delivery within state, including credit life and health and certificates issued pursuant to group policies, must comply with specified standards to promote ease of reading. (TCA 56-7-1601 et seq.).

Bad Faith Denial of Claims.

Insurance company that fails to pay claim within 60 days of loss shall be liable to pay policyholder sum not to exceed 25% of claim, provided that refusal to pay was not in good faith. (TCA 56-7-105). Attorney fees above and beyond 25% bad faith penalty are also available. (TCA 56-7-105).

Producers.

Licensing governed by Tennessee Insurance Producer Licensing Act of 2002, TCA 56-6-1 et seq.

Insurance producers must be licensed, and to be licensed, must file with Commissioner application on prescribed form and, unless exempted by TCA 56-6-107, must pass examination given by Commissioner. (TCA 56-6-133, 135, 136). License renewable each year. (TCA 56-6-142). Nonresident may qualify for license only if such person holds like license and is in good standing in his or her home state, has submitted proper request for licensure, has submitted to commissioner application for licensure, submitted to his or her home state or Uniform Application, and submitter's home state awards licenses to residents of this state on same basis as allowed by Tennessee. (TCA 56-6-101 et seq.). Temporary license, of 180 days duration, may be issued without examination in certain circumstances. (TCA 56-6-141).

Person soliciting insurance is regarded as agent of insurer and not of insured. Agent is personally liable on insurance contract made in state for insurer not authorized to do business in state. (TCA 56-6-148). Agent must not use license to write controlled business. (TCA 56-6-150). Subject to limited exceptions, agent may not place policy with insurer unless he has been appointed by insurer as its agent or limited representative. (TCA 56-6-152). Insurance company that enters into or terminates agency contract with agent or limited representative must notify Commissioner on prescribed form. (TCA 56-6-153).

Surplus lines insurance agents regulated by separate Act. (TCA 56-14-101 et seq.).

Administrators of life or health insurance coverage regulated by TCA 56-6-401 et seq., under supervision of Commissioner of Insurance. Administrator includes any person or entity who collects premiums or adjusts or settles claims on life or health coverage or annuities, with prescribed exclusions including certain licensed insurance companies, agents, brokers, employers and trustees. (TCA 56-6-401). Written agreement with prescribed provisions required between administrator and insurer. Notice of relationship must be given to insured. (TCA 56-6-409). Administrator is fiduciary for persons entitled to funds received by it, and detailed provisions for deposit of funds and record keeping are specified. (TCA 56-6-406). Administrators must be licensed, after application to Commissioner, payment of fee of $100, bond and determination of competency unless such requirements are waived by Commissioner. (TCA 56-6-410-11).

Insurance holding companies regulated by TCA 56-11-201 et seq.

Premium finance companies regulated by TCA 56-37-101 et seq.

Captive insurance companies permitted and regulated by TCA 56-13-101 et seq.

Discrimination.

Unlawful for any person, as defined in statute to discriminate in rates or other terms of: life insurance contracts or annuities, between individuals of same class or expectation of life; accident or health insurance policies, between individuals of same class and of essentially same hazard; and fire and allied hazard, casualty or indemnity contracts, between risks of same class and essentially same hazards. (TCA 56-8-104). It is unlawful for insurance provider to discriminate on basis of genetic testing, or to request or require individual to disclose genetic information. (TCA 56-7-2701 et seq.). No preference or distinction in form, premium, rate, benefits or conditions of insurance in property, marine, casualty or surety insurance shall be made based upon membership, nonmembership or employment by or in any association, corporation or organization, or by fictitious grouping, provided that these restrictions shall not apply to life, health and accident, disability or workmen's compensation insurance or to any domestic company confining its insurance business to this state solely for benefit of its members. (TCA 56-8-104). Except for retrospective rated plans, no insurers may impose additional charge for workers' compensation insurance based upon experience of insured past inception or renewal date of policy. (TCA 50-6-411). Nonrenewal or mid-term cancellation of commercial risk insurance allowed only in certain instances, e.g., nonpayment of premium, fraud in obtaining policy or pursuing claim. (TCA 56-7-1801 et seq.). Persons denied health insurance from private company may be eligible to obtain insurance through Tennessee Comprehensive Health Insurance Pool. (TCA 56-39-101 et seq.). Managed health insurance issuer shall not discriminate against certain classes of providers. (TCA 56-32-237).

Coverage for health benefits may not be denied to victims of abuse, which is defined to include intentionally or recklessly caused bodily injury, physical harm, severe emotional distress, psychological trauma, rape, sexual assault or involuntary sexual intercourse. (TCA 56-8-301 et seq.). Health insurance policy shall not exclude any coverage of drugs for life-threatening illnesses on ground that drug has not been approved by federal FDA if such drug is recognized for treatment of condition in one of standard reference compendia or medical literature. (TCA 56-7-2352). Timely Reimbursement of Health Insurance Claims Act establishes procedures to ensure prompt payment of provider claims submitted to health maintenance organizations, health insurers, nonprofit health service plans, managed care organizations, managed health insurance issuers, and behavioral health insurance organizations. (TCA 56-7-109). Health insurance entities are required to accept credentialing applications from Council on Affordable Quality Healthcare. (TCA 56-7-1009). All individual and group health insurance policies issued after Jan. 1, 2004 and providing coverage on expense incurred basis shall offer, as optional benefit, coverage for colorectal cancer examinations and laboratory tests. (TCA 56-7-2363). Policies providing coverage of neurological disorders must cover treatment of autism spectrum disorders for persons under 12 years of age. (TCA 56-7-23). 30 days prior notice required before coverage terminated for spouse due to divorce or legal separation. (TCA 56-7-2365). Health insurance entities must notify health care providers of results of provider's complete credentialing application within 90 calendar days of receipt. (TCA 56-7-1015).

Rebates.

Unlawful to knowingly permit or offer to give, make, or pay, directly or indirectly, as inducement to contract of insurance: Rebate of premium; special favor or advantage in dividends or benefits; stocks, bonds or securities, or dividends or profits thereon; or any valuable consideration not specified in contract. (TCA 56-8-104).

Unfair Methods of Competition and Deceptive Practices.

56-8-101 et seq. makes unlawful false information, misrepresentations or advertising; defamation; boycott, coercion and intimidation; false statements and entries; unfair claim settlement practices; failure to provide written statement of basic rights upon filing claim, under fine or homeowner's policy, with estimated value at or above $20,000; lessening competition by stock transactions; dual office holding; failure to preserve nonforfeiture benefits; changing classifications and rates after policy expiration or renewal without written consent of insured; use by servicing carrier or representative of information obtained in policy application or in course of servicing policy for purpose of soliciting any form of insurance; and specified practices of lenders regarding insurance incident to extension of credit. Insurance companies may be held liable for unfair or deceptive acts or practices under Tennessee Consumer Protection Act. (TCA 47-18-101; 970 S.W.2d 920 [1998]).

Violation of Gramm-Leach-Bliley Act by person engaged in insurance business is unfair or deceptive trade practice, and violator is subject to certain penalties. (TCA 56-8-119).

Civil and criminal penalties are provided for various acts declared to be insurance fraud under TCA 39-14-133 and Title 56.

Process Agent.

Commissioner of Insurance is agent for process for domestic companies (TCA 56-2-501) and foreign or alien companies generally (TCA 56-2-503). $15 filing fee must accompany process. (TCA 56-2-504). Service of process from any county in this state on Commissioner shall establish proper venue in county where process issued if plaintiff resides in that county. Special provisions for companies not authorized to do business in state. (TCA 56-2-101 et seq.). When suit is brought by Commissioner, Secretary of State is such agent.

Investments by Insurance Companies.

Regulated by TCA 56-3-101-502; TCA 56-21-104, 110; TCA 56-27-113.

Foreign Insurance Companies.

No foreign insurance company will be admitted and authorized to do business unless it has been in business for three years in state of its incorporation; but this requirement does not apply to wholly owned subsidiary of insurance company or health maintenance organization admitted and authorized to do business in this state, to company resulting from merger or consolidation of companies at least one of which prior to merger met all requirements to do business in Tennessee including having been in business for three years in state of its incorporation, to wholly owned subsidiary of holding company owning 100% of common capital stock, excluding qualifying share required to be held by directors of insurance company or health maintenance organization, and authorized to do business in Tennessee, to foreign company originally chartered and licensed in Tennessee making application to redomesticate to this state upon furnishing appropriate documents from Commissioner of Insurance of state of its domicile, or to company owned by trade association or group or trade associations or organized on mutual basis by such associations, at least one of which is domiciled in Tennessee and has 200 corporate members domiciled in Tennessee, provided such foreign insurance company engaged in business in state of incorporation at least one year and offers insurance in Tennessee only to association or its members. (TCA 56-2-113).

Foreign insurance company admitted to do business in Tennessee may become domestic corporation by complying with organization and fee requirements relating to domestic insurance companies and designating principal place of business at place in Tennessee. Foreign credit life reinsurance company with at least 50% of its outstanding voting stock owned by persons or entities domiciled in Tennessee may obtain certificate of corporate existence and license to transact business in Tennessee if Commissioner approves change of domicile to Tennessee, certificate of good standing from current domicile is submitted, requirements of law including payment of fees pertaining to domestic insurance companies are complied with, and situs in Tennessee designated as principal place of business. (TCA 56-2-102).

Alien companies, or their agents, financially owned or controlled by any government or political subdivision thereof outside United States, are prohibited from doing business in this state. (TCA 56-2-401).

Foreign life insurance company must file a certificate that it has on deposit with Treasurer of this state, or proper officer of another state, securities of actual cash value of $200,000 verified by such officer that such officer is satisfied with value and that same are for protection of all policy holders and creditors in U.S. (TCA 56-2-103).

Foreign insurance companies are authorized to transact combination of kinds of insurance while maintaining capital or surplus funds as set forth. (TCA 56-2-114). In addition, new insurers must possess surplus funds as set forth in TCA 56-2-115.

Retaliatory Law.

When home state of any foreign company requires, of companies organized in this state or the agents thereof, deposits greater than are required by this state, or imposes taxes, fines, penalties, license fees or other charges in excess of those imposed by this state, like requirements are imposed on such company and its agent. (TCA 56-2-412). Such retaliatory action is specially provided for foreign title insurance companies. (TCA 56-35-128).

Premium Tax.

All companies, both domestic and foreign, must file semi-annual report on forms furnished by Commissioner of Insurance. Workmen's compensation insurers pay 4% of gross premiums. (TCA 56-4-206). Foreign life insurance companies pay 2% of gross premium receipts from citizens and residents, until 1996, at which time premium percentage decreases to 1.95% and continues to decrease by.05% each year thereafter until year 2000; domestic life insurance companies pay 1¾%. All other companies (except fraternal benefit associations, which are exempt [56-4-103]) pay 2½% of gross premium receipts on premiums paid by or for residents of state or on property located in state (TCA 56-4-205). Substantial penalties for late payment. (TCA 56-4-216). Fire insurance companies pay additional ¾% toward fire marshal support. (TCA 56-4-208). Above taxes are credited on franchise and excise taxes. (TCA 56-4-217; TCA 67-4-408; TCA 67-4-980). Taxes are payable June 1, Aug. 20, Dec. 1 and Mar. 1. (TCA 56-4-205).

Foreign companies must continue to pay taxes on business remaining in force in this state after expiration of license. (TCA 56-4-215).

Privilege Tax.

None as such. All insurance companies must pay franchise and excise taxes imposed on corporations generally (see category 2 Business Organizations, topic 2.03 Corporations), subject to credit for certain premium taxes and payments to Tennessee guaranty association. (TCA 56-4-217; TCA 67-4-408; TCA 67-4-908).

Delinquent Companies.

Rehabilitation or liquidation and dissolution of delinquent domestic companies, and conservation of assets of delinquent foreign companies, are provided for and proceedings therein regulated by TCA 56-9-102 et seq.

Uniform Insurers Liquidation Act adopted. (TCA 56-9-101 et seq.).

Direct Actions Against Insurer.

See category 23 Transportation, topic 23.01 Motor Vehicles, subhead Direct Actions.

No-Fault Insurance.

See category 23 Transportation, topic 23.01 Motor Vehicles, subhead No-Fault Insurance.

Workers' Compensation Insurance.

Certain specified acts, including submission of fraudulent claims for benefits, fraudulent application for rating or renewal of policies, or fraudulent solicitation for sale of such policies, may constitute Class A felony (if $10,000 or less is involved), Class E felony (if more than $10,000 but less than $60,000 is involved) or Class B felony (if $80,000 or more is involved). (TCA 56-47-101-113).

Natural Catastrophic Disaster Property Insurance.

Commissioner of Commerce and Insurance to develop proposal for natural catastrophic disaster property insurance pool to provide full coverage at reasonable fees to commercial and residential property owners unable to obtain coverage due to widespread cancellations due to catastrophic natural disaster. *Note:* Proposal was prepared and submitted in 2005, but no legislation was enacted thereon during 2005.

16.02 SURETY AND GUARANTY COMPANIES:

Guaranty and surety companies of this or other states may become surety on fidelity, fiduciary, appeal, attachment or other court bonds, if so empowered by their charters. (TCA 56-15-101).

17 INTELLECTUAL PROPERTY

17.01 TRADEMARKS AND TRADENAMES:

There is no statutory restriction as to what persons, associations and organizations may acquire trademarks. Tennessee Trademark Act was adopted, effective Apr. 25, 2000, and does not apply to suits, proceedings, or appeals then pending.

What May be Used.

Mark may not be registered if it consists of immoral, deceptive or scandalous matter; disparages or falsely suggests connection with living or dead persons, institutions, beliefs, or national symbols; simulates flag or insignia of U.S., state, municipality or foreign nation; comprises name, signature or likeness of any living person without consent; is merely descriptive or deceptively misdescriptive of applicant's goods or services; is primarily geographically descriptive or misdescriptive; is primarily surname; or is identical or deceptively similar to mark previously registered or used by another. (TCA 47-25-502).

Registration.

Application for registration is filed with Secretary of State. Contents of application are governed by TCA 47-25-503. Application is then examined by Secretary of State's office. (TCA 47-25-504). If mark complies, that office will issue certificate of registration. (TCA 47-25-505). Term of registration is five years and may be renewed upon application. (TCA 47-25-506).

Cancellation.

Registrations for marks may be voluntarily cancelled, or registrations of marks of others may be ordered to be cancelled by court of competent jurisdiction. (TCA 47-25-509). Owners or agents who fraudulently register marks may be further liable for damages to injured parties. (TCA 47-25-511).

Assignment.

Mark and registration may be assigned with good will of business in which mark is used. Assignment shall be executed in writing and may be recorded for fee with Secretary of State, who shall issue new certificate for remainder of term. (TCA 47-25-507).

Infringement.

It is unlawful to use any reproduction of registered mark without consent of registrant in connection with sale or advertising of goods or services where use is likely to deceive or confuse as to origin; or to apply reproduction to label, sign, package or advertisement in conjunction with sale or distribution of such goods or services. (TCA 47-25-512). Violation is Class C misdemeanor. Owner of mark may apply for injunctive relief, and if acts are committed with knowledge that mark is intended to be used to cause confusion, mistake or to deceive, may recover profits and damages. (TCA 47-25-512; -514). Common law rights are preserved. (TCA 47-25-516). Notwithstanding absence of competition or confusion, likelihood of injury to business reputation or dilution of distinctive quality of mark shall justify injunctive relief, whether mark is registered or valid at common law, if mark is famous in state. (TCA 47-25-513).

Drug Trademarks.

Separate section particularly addresses issue of infringement of trademarks for drugs. (TCA 47-25-401 et seq.).

Tradenames.

No requirement of registration.

17.02 TRADE SECRETS:

Effective July 1, 2000, Tennessee has adopted version of Uniform Trade Secrets Act. (TCA 47-25-1701 et seq.). Tennessee act, however, combines aspects of Uniform Trade Secrets Act with aspects of Revised Uniform Trade Secrets Act. Tennessee act also contains material language not appearing in either of aforementioned uniform acts. Tennessee's act does not apply to misappropriations occurring prior to July 1, 2000. (TCA 47-25-1701, compiler's note). Trade secret is defined as “information, without regard to form, including, but not limited to, technical, nontechnical or financial data, a formula, pattern, compilation, program, device, method, technique, process or plan that” is subject to reasonable efforts to keep it secret and has value by its secrecy. (TCA 47-25-1702). Injunctions and damages, including attorney's fees in some circumstances, are available remedies for trade secret misappropriation. (TCA 47-25-1703; 1704; 1705). One who intentionally deprives or withholds control of trade secret from owner, or, with intent to appropriate, steals or embezzles article representing trade secret or makes or causes to be made unauthorized copy of article representing trade secret, is guilty of theft punishable under TCA 39-14-138.

Motion Picture Recordings.

It is offense to knowingly operate audiovisual recording function of device for purpose of recording motion picture in facility where motion picture is being exhibited without consent of owner or lessee of facility. (TCA 39-14-110).

18 LEGAL PROFESSION

18.01 ATTORNEYS AND COUNSELORS:

Membership in Tennessee Bar Association is not mandatory to practice law in Tennessee; only licensure by Tennessee Supreme Court is required. (Supm. Ct. Rule 7, § 1.01).

Jurisdiction over admission vested in State Board of Law Examiners (Board), 706 Church St., Suite 100, Nashville, TN 37243-0740, (615) 741-3234, appointed, supervised and acting under rules promulgated by Supm. Ct. (TCA 23-1-101 et seq.).

Eligibility.

Applicant must be citizen of state who intends to actively engage in practice of law in Tennessee and person of good moral character. (Supm. Ct. Rule 6).

Registration As Law Student.

Not required.

Educational Requirements.

Applicant shall file with Board, as part of application, evidence that prior to study of law applicant received Bachelor's Degree from college on approved list of regional accrediting association or Southern Association of Colleges and Secondary Schools; also, certificate from dean of school of law where enrolled or from which graduated that school is accredited by

American Bar Association or approved by Board of Law Examiners and that applicant has completed all requirements for graduation or that he has average required for graduation and will have credit hours required by date of bar examination. (Supm. Ct. Rule 7, § 2.01).

Foreign-educated applicant must satisfy Board that his education is substantially equivalent to that required of U.S.-educated applicants. (Supm. Ct. Rule 7, § 7.01).

Examination.

Board holds examinations in Feb. and July in one or more of following places: Memphis, Chattanooga, Nashville, or Knoxville; but examination must be held at least once a year in Memphis, Nashville, and Knoxville. (Supm. Ct. Rule 7, § 4.03)Notice of intent to take first examination must be filed with Board no later than Mar. 1 for July exam and no later than Oct. 1 for Feb. exam. (Supm. Ct. Rule 7, § 3.02) Application must be made to Board no later than Apr. 15 for July exam and no later than Nov. 15 for Feb. exam. (Supm. Ct. Rule 7, § 3.03). Application fee set by Board. (Supm. Ct. Rule 7, § 11.01). Local examination may generally include following topics: State and Federal constitutional law; criminal law; criminal procedure; contracts; torts; real and personal property law; evidence; State and Federal civil procedure; agency; partnerships; corporations; commercial transactions; wills and estates; domestic relations; professional responsibility; remedies; and conflicts of law. (Supm. Ct. Rule 7, § 4.04). Also, Multi-State Bar Examination is given, and scores from other jurisdictions are not transferable. (Supm. Ct. Rule 7; Board Rules, TCA 23-1-103).

Clerkship.

No requirement of clerkship before admission.

Admission Without Examination.

Applicant licensed in foreign country must file with Board certified copy of court records showing his admission to bar together with three letters from attorneys or judges, certifying his good standing at that bar. (Supm. Ct. Rule 7, § 5.01). Examination not necessarily required. (Supm. Ct. Rule 7, § 5.01).

Applicant admitted to practice law in another state may be admitted without examination upon demonstrating to Board that he possesses competence in profession provided he has been actively engaged in practice of law for at least five years, has satisfied educational requirements established by Board, and has passed equivalent examination. (Supm. Ct. Rule 7, § 5.01).

Fees for admission without examination set by Board. (Supm. Ct. Rule 7, § 11.01; Board Rules).

Admission Pro Hac Vice.

Nonresident attorney will be permitted to appear, file pleadings and briefs and participate in trial and appellate courts of Tennessee subject to compliance with certain conditions, including association of licensed, resident Tennessee attorney. (Supm. Ct. Rule 19).

Licenses.

License is required. (TCA 23-1-104). Fee set by Board. (Supm. Ct. Rule 7, § 11.01).No annual license fee required, but annual registration assessment must be paid to Disciplinary Board of Supm. Ct. under Supm. Ct. Rule 9, § 20.

Privileges.

Attorneys may testify and give depositions instead of appearing personally in court. (TCA

24-9-101). Attorneys are exempt from initial summons for jury service, but must inform clerk issuing summons of seven day period within next 12 months that he will be available to serve. If such attorney operates solo practice, however, he is completely exempt from jury service. (TCA 22-1-103).

Attorneys may sign bonds for clients in the prosecution and defense of their suits (TCA 23-2-104), bail bonds in criminal cases excepted. (TCA 40-11-149).

Compensation.

Advertisement of fee for legal service is prima facie evidence of reasonableness of such fee, and unless reasonable under circumstances, court may not award fee in excess of advertised figure. (TCA 23-3-109).

Lien upon cause of action is given to attorney of record on court docket. (TCA 23-2-102).

Attorney Ethics.

On Aug. 27, 2002, Tennessee Supreme Court adopted new ethics rules for Tennessee lawyers patterned after ABA Model Rules of Professional Conduct. Effective Mar. 1, 2003, new Tennessee Rules of Professional Conduct represent first complete revision to Tennessee's ethics rules in 32 years and make Tennessee the 45th American jurisdiction to adopt rules based on ABA Model Rules of Professional Conduct.

Disbarment or Suspension.

Tennessee statutes regarding disciplinary proceedings were repealed in their entirety on Mar. 30, 2000.

Professional Responsibility Board of Supm. Ct. may also initiate investigations and seek disciplinary action (including reprimand, suspension and disbarment) by hearing committees established by Supm. Ct. Hearing committee actions appealable under TCA 27-9-101. (Supm. Ct. Rule 9, § 8).

Unauthorized Practice.

No person may practice law without license. (TCA 23-1-104; 23-3-103). Violation is Class A misdemeanor and violator is subject to suit for treble damages. (TCA 23-3-103). Attorney General authorized to seek injunctive relief, civil penalty of up to $10,000 per violation plus restitution to any person who has suffered ascertainable loss. (TCA 23-3-103). Corporation or association may not practice law. But see category 2 Business Organizations, topic 2.02 Associations, subhead Professional Associations; also category 2 Business Organizations, topic 2.03 Corporations, subhead Professional Corporations. Nonresident attorney associated with licensed attorney of state in case pending is allowed to appear without procuring license, when introduced to court by member in good standing of state bar, if all courts of resident state of nonresident grant similar courtesy to Tennessee attorneys. (TCA 23-3-103).

Professional Association.

See category 2 Business Organizations, topic 2.02 Associations, subhead Professional Associations; also category 2 Business Organizations, topic 2.03 Corporations, subhead Professional Corporations.

19 MINERAL, WATER AND FISHING RIGHTS

19.01 MINES AND MINERALS:

Any mineral interest unused for 20 years reverts to surface owner unless statement of claim filed. (TCA 66-5-108).

Contracts.

Printed text of contracts for sale or lease of products to be extracted from or beneath ground and attachments thereto must be at least ten point type size for legibility. Noncomplying documents, except those used by state, are voidable at instance of aggrieved party. (TCA 47-50-110).

Operation of Mines.

Owner or operator opening new or abandoned mine or assuming control of existing mine shall procure nontransferable license from Department of Labor. All licenses valid for one year from date of issuance, renewable annually. (TCA 59-1-115). Certificate of competency required for foremen. (TCA 59-4-208).

See also category 12 Environment, topic 12.01 Environmental Regulation.

Oil and Gas.

State Oil and Gas Board, Suite B30, 701 Broadway, Nashville, TN 37219, delegated authority to promulgate regulations and assess monetary penalties for noncompliance therewith. (TCA 60-1-101, 201). Application for permit to drill well for oil or gas to comply with requirements stated in TCA 60-1-103.

Energy acquisition corporation may be incorporated under TCA 7-39-201 to act on behalf of two or more municipalities. Any gas acquisition corporation shall be subject to TCA 7-39-312. (TCA 7-39-312).

Surface owners are entitled to compensation for damages caused by oil and gas drilling. (TCA 60-1-601 et seq.).

Lease of oil or natural gas rights, or other conveyance of any kind separating such rights from freehold, other than underground natural gas storage right, expires at end of ten years from date of execution thereof unless oil or natural gas is then being produced from said land for commercial purposes, and if after said ten-year period, commercial production of oil and gas terminates for six months all such rights revert to owner of estate from which leasehold was carved. However, during first year after ten-year period, if royalties or rent are being paid or certain activities are being conducted on leased tract or tract unitized or pooled therewith, lessor may exercise any continuation rights in lease. (TCA 66-7-103).

Special provisions which governed construction of gas storage tanks near railroad lines (TCA 68-16-105) were repealed in 2003.

In 2005, legislature passed Landfill Methane Development Act to encourage and govern extracting and processing of methane gas from landfills. (TCA 65-28-201 et seq.).

In 2009, legislature passed Tennessee Renewable Fuel Blending Act to encourage production of ethanol and biodiesel to lessen dependance on foreign oil. (TCA 47-25-2001 et seq.). Refiners, suppliers and permissive suppliers must provide wholesalers with gasoline suitable for blending with ethanol and diesel suitable for blending with biodiesel. (TCA 47-25-2003). Any contract or provision executed after Jan. 1, 2010 which restricts wholesalers ability to blend fuels is void as against public policy. (TCA 47-25-2004). Commission of Agriculture may fine any refiner, supplier or permissive supplier up to $5,000 per day for willful violations of Act. (TCA 47-25-2005).

Any person who performs labor or provides materials in development of leasehold containing oil, gas or other minerals has statutory lien on leasehold. (TCA 66-11-102).

See also categories 12 Environment, topic Environmental Regulation; Taxation, topic Coal and Mineral Severance Tax.

Fishing Rights.

License generally required to hunt, fish, or trap. (TCA 70-2-102). Hunting, fishing, or trapping without license is Class C misdemeanor. (TCA 70-2-102). Owners and tenants of farm lands and their spouses and children, along with their grandchildren and great-grandchildren under age of 16 have right to fish on land of farm owner without license. (TCA 70-2-204). These persons must be Tennessee residents, have permission of farm owner and conduct their activities during appropriate season. (TCA 70-2-204).

20 MORTGAGES

20.01 CHATTEL MORTGAGES:

Covered by Uniform Commercial Code. (TCA 47-9-101 et seq.).

See category 3 Business Regulation and Commerce, topic 3.09 Commercial Code.

Forms.

See end of this Digest for forms of Financing Statement, and Statement of Continuation, Partial Release or Assignment.

Form

Security Agreement.

May generally follow form such as following, with changes to fit transaction. Prudent secured parties will often add other provisions.

THIS AGREEMENT between A. B. of. . . . . (hereinafter called “Debtor”) and C. D. of. . . . . (hereinafter called “Creditor”). WHEREAS Debtor desires to grant Creditor a security interest in certain collateral pursuant to the Uniform Commercial Code (Tenn.), and WHEREAS Debtor, on execution of this agreement will borrow from Creditor the sum of $. . . . . [or describe other premise for security agreement], NOW THEREFORE, WITNESSETH, that Debtor hereby grants to Creditor a security interest in [Describe goods, identifying as consumer goods, equipment, farm products, or inventory, stating location, and stating whether after-acquired property, proceeds, increase, etc., are also included and/or describe other collateral], hereinafter called “Collateral,” in order to secure (1) the repayment to Creditor of the principal and interest of the obligation secured hereby; (2) all costs incident to the collection of the same and to the enforcement of Creditor's rights hereunder; (3) future advances for protection of collateral or for any other purpose whatsoever; and (4) interest on any such funds [or describe other obligation secured]. Debtor warrants that he has power to grant a security interest in such Collateral (or agrees to devote the proceeds borrowed hereunder, together with such other amounts as necessary to the acquisitions of the Collateral; or authorizes Creditor to pay to. . . . . the funds borrowed hereunder for the purchase of Collateral free and clear of all prior interests of any nature whatsoever), and Debtor agrees (1) to maintain Collateral in good condition during the life of this agreement; (2) to notify Creditor of any changes in his place of business (if chattels are to be used in business), or in his place of residence (if chattels will become fixtures, are consumer goods or are used in farming); (3) to pay the costs of filing of all financing statements, amendments to financing statements, and continuation statements necessary to perfect and to maintain the perfection of the security interest; (4) to maintain insurance against such casualties to Collateral as may be selected by Creditor in companies and in amounts satisfactory to Creditor; (5) (if applicable) that the Collateral is personalty and shall not become a fixture of any realty; (6) not to remove any part of the Collateral from the location described herein, [except in the normal course of business,] without the written consent of Creditor; (7) to keep the Collateral free from all other interests, liens, encumbrances or clouds of any nature whatsoever; (8) to allow Creditor to enter the premises of Debtor to inspect the condition of Collateral and inspect all books and records of Debtor relevant to the maintenance, disposition, or proceeds of Collateral. Debtor agrees that in the event of default in the payment of principal or interest of any obligation secured hereby or in breach of any of the conditions herein, Creditor shall have all rights in and to, and remedies with respect to, the Collateral granted under the Uniform Commercial Code of Tennessee, in addition to any and all rights, interests and remedies provided in this Agreement. Debtor waives, as to an assignee of the rights of Creditor herein, all defenses which he might have against Creditor of which such assignee has no notice. This agreement shall inure to and be binding upon the heirs, executors, administrators, successors, and assigns of the parties hereto. Made and entered into at. . . . .,. . . . ., this. . . . . day of. . . . ., (year). . . . .

....

(Debtor)

....

(Creditor)

20.02 [RESERVED]

20.03 MORTGAGES OF PERSONAL PROPERTY:

See topic 20.01 Chattel Mortgages.

20.04 MORTGAGES OF REAL PROPERTY:

Mortgages are practically unused, trust deeds, usually accompanied by notes, being used almost exclusively.

Trustee.

With certain exceptions (including security trust), trustee must be resident of or have principal place of business in state, or, if corporation, be chartered under state or federal law. Trust deed must include trustee's address. (TCA 66-24-123).

Execution.

Trust deeds or mortgages must be in writing (50 Tenn. 562 [1871]), and must be authenticated for registration by acknowledgment of maker's signature or natural person acting on behalf of marker or proved by at least two subscribing witnesses. (TCA 66-22-101).

(See category 10 Documents and Records, topic 10.01 Acknowledgments.)

Recording.

To be good against third persons or operate as notice to creditors or purchasers, trust deed or mortgage must be recorded in office of county register where land lies. (TCA 66-24-103).

See also category 10 Documents and Records, topic 10.04 Records, subhead Requisites for Recording or Registration.

Recording Fees.

See category 10 Documents and Records, topic 10.04 Records, subhead Recording Fees.

Tax.

Prior to recordation of trust deed, mortgage or any instrument evidencing indebtedness, tax of 11½¢ per $100 of indebtedness over $2,000 must be paid. (TCA 67-4-409). Where security property is part within and part without state, tax imposed on portion of total secured indebtedness equal to ratio of value of Tennessee collateral to value of all collateral by applying following mathematical formula: value of Tennessee collateral/value of total collateral = _____% × indebtedness = taxable Tennessee indebtedness. (TCA 67-4-409). Statute recites that nonpayment or underpayment of tax, or failure timely to pay tax on increase in indebtedness, does not affect or impair validity, priority or enforceability of lien but shall result in imposition of tax lien, in amount of any tax and penalties unpaid. Any such nonpayment or underpayment of tax, until cured, subjects holder of debt to statutory penalty; and debtholder may not maintain action on debt, except for action limited to enforcement of lien, until nonpayment is cured.

Future advances clauses in certain mortgages and deeds of trust are enforceable. (TCA 47-28-102). Mortgages or deeds of trust which are for future advances which may be obligatory and which are for commercial purposes, in order to have priority over subsequent encumbrances and conveyances, must contain statement or other notice identifying mortgage or deed of trust as securing obligatory advances and as being for commercial purposes. (TCA 47-28-104). All open-end mortgages (as defined by statute), in order to have priority over subsequent encumbrances and conveyances, must contain following: (1) Statement or other notice conspicuously identifying mortgage as open-end mortgage; (2) fixed, stated duration for open-end credit agreement, not exceeding 30 years from date of original execution; (3) fixed, maximum limit on total principal debt (including precomputed interest and other precomputed charges); (4) conspicuous notice to borrower of right to reduce maximum principal limit; and (5) provision governing borrower's duty to return checks, credit cards or other devices to obtain further advances in certain circumstances. Optional advances made under mortgages securing future advances, other than noncommercial open-end mortgages, are generally superior in priority to any intervening conveyance or encumbrance unless mortgagee has actual notice of same prior to exercising option to make advance. As general rule, all obligatory advances made under any mortgage, other than noncommercial open-end mortgage, take priority over subsequent encumbrances and conveyances; provided, however, all mortgages securing future advances which may be obligatory and which are for commercial purposes, in order to have this priority, must contain statement or other notice identifying mortgage as securing obligatory advances and as being for commercial purposes. (TCA 47-28-101 et seq.). See also category 3 Business Regulation and Commerce, topic 3.13 Contracts.

Discharge.

See subhead Satisfaction, infra.

Satisfaction.

After full payment or satisfaction of mortgage debt, holder must record proper release. Failure to make complete release within 45 days after receipt of written request subjects debtholder to $100 penalty and continued failure to release within 30 days from second written request subjects holder to additional penalty not to exceed $1,000. If holder of mortgage debt has accepted partial payments pursuant to agreement to release portion of property, holder must, on written request, record partial release. Failure to make partial release within 30 days after written request subjects debtholder to $100 penalty and continued failure to make partial release within 30 days after second written request subjects debtholder to additional penalty not to exceed $1,000. (TCA 66-25-101-104). Release or modification of mortgage, deed of trust or lien is to be signed by legal holder of secured debt without necessity of signature by deed of trust trustee. (TCA 66-25-116). Partial or full payment to mortgage lender of record on debt secured by trust deed is satisfaction and discharge against mortgagee or assignee or transferee of debts secured by such instrument, as to amount of such payment. (TCA 66-25-105).

Foreclosure.

Trust deeds generally include power of sale, but, in absence of same, compulsory foreclosure requires a bill in chancery. Tennessee Home Loan Protection Act limits terms, practices and documentation of high-cost home loans. (TCA 45-20-101 et seq.). Notice by registered or certified mail to debtor and co-debtor of public notice of foreclosure is required on or before first date of publication. (TCA 35-5-101).

Sales.

Foreclosure is by trustee's sale, resort to suit being rare. Publication of notice of foreclosure must be made at least 20 days before date of sale and must be published at least three different times in some newspaper published in the county where the sale is to be made. Time of sale must be between 10 A. M. and 4 P. M. Advertisement or notice must give the names of the plaintiff and defendant, or parties interested, describe land in brief terms, including street address if available, and mention time and place of sale. (TCA 35-5-104). Notice must also identify and give specified information regarding federal and state tax liens, if any. (TCA 35-5-104). “Parties interested” includes holder of any junior lien filed more than ten days before first publication. (TCA 35-5-104). Sale without advertisement is not void; but failure to comply is Class C misdemeanor and trustee or other person making sale may be liable for all damages resulting from failure to advertise. (TCA 35-5-106-07).

Deficiency judgments are lawful, and may be taken against party who buys mortgaged property and assumes debt. (101 S.W.2d 1108 [1936]).

Redemption.

Two-year period of redemption applies unless waived in deed of trust. See category 8 Debtor and Creditor, topic 8.05 Executions.

Form of Trust Deed

For the purpose of securing the payment of the following indebtedness to. . . . ., or the owner thereof, viz: (Description of indebtedness, amount, number of notes, due dates, interest, etc.). . . . . hereby bargain, sell, convey and confirm unto. . . . . as trustees,. . . . . County, Tennessee, their successors, heirs, or assigns, forever, the following property situated in Shelby County, State of Tennessee, and described as follows: to-wit:

(Here describe property).

To have and to hold to said trustees their successors, heirs or assigns, the aforesaid property with whom. . . . covenant that. . . . lawfully seized in fee of the same, that. . . . have good right to sell and convey the same; that the same is free from all encumbrances and that we (or I) will forever warrant and defend the title thereto against the lawful claims of all persons whomsoever.

But this is a trust deed.

Now, should the indebtedness secured hereby be paid at maturity, then this deed is satisfied, and the trustee shall execute proper release deed at the expense of the grantor. Should the indebtedness secured hereby, or any part thereof, not be paid when due, then all said indebtedness shall become due for the purpose of foreclosing this trust, and said trustees shall, after advertising time, place and terms of sale for twenty-one days, by publication once a week for three successive weeks in a daily newspaper published in. . . ., Tennessee, sell the property at public outcry, for cash, execute proper conveyances to the purchasers, and apply the proceeds, first, to the payment of necessary expenses of executing this trust, next, to the payment of the said indebtedness and interest, and pay the balance, if any, to. . . . or. . . . heirs, representatives or assigns. Either one of said trustees may alone execute any powers conferred upon them by this trust deed.

The oath and bond of said trustees are expressly waived, and in case of sale hereunder, the grantors hereby expressly waive the equity of redemption, statutory right of redemption, dower and homestead and all other rights and exemptions of every kind in and to said property, and agree that the purchaser shall have an absolute title in fee simple.

Witness our hands and seals this. . . . day of. . . ., (year). . . . .

. . . . (L.S.)

. . . . (L.S.)

(Acknowledgment).

Caveat: Prudent lenders will usually include additional provisions, including environmental provisions, depending upon circumstances of transaction. Deeds of trust seeking priority for future advances will, in most circumstances, need to contain certain specified provisions. See subhead Future Advances, supra. For construction loan mortgages to achieve certain priorities over certain UCC interests, recorded writing must indicate that it is construction mortgage. (TCA 47-9-334[h]).

21 PROPERTY

21.01 ABSENTEES:

Care of Property.

Uniform Absence as Evidence of Death and Absentees' Property Act adopted with minor variations, including: Chancery Court has jurisdiction to appoint receiver; if seven-year absence is relied upon as proof of death relative to life or accident insurance claim, statute of limitations begins running at end of seven years; decree not final until seven years have elapsed from date of court's finding that absentee is dead; 25% deduction for insurance fund for appearing absentees; funds in hands of clerk of court or personal representative to be distributed according to law in effect at date of death. (TCA 30-3-101 et seq.). Chancery or Probate Court has jurisdiction to appoint conservator of estate of absentee who disappears under circumstances indicating that he may have died or disappeared as result of mental derangement, amnesia, or other mental cause upon showing: (1) Absentee has interest in property in Tennessee, or he, spouse or next of kin is legal resident; (2) absentee has not provided adequate power of attorney; (3) necessity exists for providing care for his property or estate. If spouse of absentee, or next of kin if absentee has no spouse, wishes to transfer property with value less than $5,000, he may apply to Chancery or Probate Court for authorization without opening full conservatorship. (TCA 30-3-201 et seq.). See topic Death.

Process Agent.

No statutory provision.

In partition proceedings where any of the parties are absent from the state, and without legal representatives in this state, or are not known or named in the proceedings, the court will direct the shares of such parties to be invested in permanent securities at interest, for the benefit of such parties, until claimed by them or their legal representatives. (TCA 29-27-218).

Escheat.

Tennessee has adopted many provisions of Uniform Unclaimed Property Act (1981). Abandonment period is generally five years, with certain exceptions, including following: sums payable on money orders, seven years; sums payable on traveler's checks, 15 years; deposits and certain other funds held by utility companies and certain court ordered refunds, two years; stock certificates, dividends, distributions, etc., held by business associations or cooperatives, two years; property removed from safe-keeping repository on which rental period has expired, two years (except that surplus proceeds from bank's sale of contents pursuant to TCA 45-2-907 is deemed abandoned immediately if cannot be credited to existing customer account); property held by courts and public and governmental authorities, one year. Intangible property distributable in voluntary or involuntary dissolution is deemed abandoned after date for final distribution or liquidation. Many types of property are also deemed abandoned if owner is known to have died and left no one to take property. $50 minimum for reporting property. Reports due May 1 for property held as of previous Dec. 31. (TCA 66-29-101 et seq.).

Unclaimed or abandoned motor vehicles governed by TCA 55-16-101 et seq.

Unclaimed property payable or distributable in course of demutualization of insurance company is presumed abandoned three years after earlier of date of last contract with policyholder or date property became payable or distributable. (TCA 66-29-101).

See also categories 3 Business Regulation and Commerce, topic Banks and Banking, subhead Unclaimed Deposits; Estates and Trusts, topics Descent and Distribution, subhead Escheat, Executors and Administrators, subhead Distribution of Share Not Feasible; Wills, subhead Unclaimed Legacies.

21.02 ADVERSE POSSESSION:

Character of Possession.

Possession must be adverse, actual, exclusive, continuous, open and notorious, for at least seven years, under claim of right or title. (267 S.W.2d 112 [1953] and TCA 28-2-101 et seq.).

With Color of Title.

Adverse possession by any person or those claiming under him for seven years supported by recorded instrument purporting to convey fee simple title vests good title in fee provided instrument or decree has been registered for seven years in county where land lies. (TCA 28-2-101). Such possession vests title good against all parties, including remaindermen and persons under disability, where instrument or decree has been so recorded for 30 years. (TCA 28-2-105).

Defensive Title.

Any person or one claiming under him maintaining any action for any lands, etc., must do so within seven years after right accrues. (TCA 28-2-103).

Prescriptive Right.

Twenty years actual, visible, continuous, notorious, exclusive and adverse possession of land within enclosures or by actual occupancy confers title by prescription with presumption of grant or other muniment of title. (39 Tenn. 690 [1859]).

Easements.

Acquired by prescription by uninterrupted adverse user for 20 years during which all parties with interest in servient estate are free from disability and in possession. (292 S.W.2d 501 [1954]).

21.03 [RESERVED]

21.04 CONVEYANCES:

See topic 21.06 Deeds.

21.05 CURTESY:

Curtesy, unless vested, abolished as of Apr. 1, 1977. (TCA 31-2-102). For rights of surviving spouse, see category 13 Estates and Trusts, topics 13.06 Descent and Distribution, and 13.16 Wills, subhead Election.

21.06 DEEDS:

Execution.

To authenticate deed for recording, signature of maker or natural person acting on behalf of maker must be acknowledged according to law or proved by at least two subscribing witnesses. (TCA 66-22-101). (See category 10 Documents and Records, topic 10.01 Acknowledgments.) Deed to or by county court clerk may be acknowledged before judge or chairman of his court, clerk and master or notary public. (TCA 66-22-105).

For circumstances in which spouse must join, see categories 8 Debtor and Creditor, topic Homesteads; Family, topic Husband and Wife.

Recording.

Deeds are not good as against third persons until noted for recordation in office of register of county where land lies, but unrecorded deeds are good as between parties thereto and privies. (TCA 66-26-101). Lands held by unrecorded deeds are subject to debts of vendor. (TCA 66-26-103).

See category 10 Documents and Records, topic 10.04 Records, subheads Recordable Instruments; Requisites for Recording or Registration.

Recording Fees.

See category 10 Documents and Records, topic 10.04 Records, subhead Recording Fees.

Tax.

See category 22 Taxation, topic 22.13 Property Taxes, subhead Real Estate Conveyance Tax.

Form of Warranty Deed

This indenture, made this. . . . . day of. . . . ., (year). . . ., between. . . . . . of the County of. . . . . . and State of. . . . . of the one part, and. . . . . of the County of. . . . . and State of. . . . . of the other part.

Witnesseth: That the said. . . . . for and in consideration of. . . . . dollars to. . . . . in hand paid by the said. . . . ., the receipt whereof is hereby acknowledged, hereby sells and conveys unto the said. . . . . heirs and assigns forever the certain tract of lands situated and being in the County of. . . . ., State of Tennessee:

(Description of property conveyed).

To have and to hold, the aforesaid land, with all and singular the hereditaments and appurtenances of and to the same belonging or in anywise appertaining to the said. . . . . heirs and assigns forever; and the said. . . . . for. . . . . heirs and representatives do covenant and agree to and with the said. . . . . heirs or assigns that. . . . . lawfully seized in fee of the aforesaid premises; that the same are free of all encumbrances; (insert encumbrances here if there are any) that they have good right to sell and convey the same to. . . . . as aforesaid; and that the before granted land and premises they will warrant and defend against all lawful claims whatever.

In witness whereof, the said parties have hereto set their hands and affixed their seals the day and year above written. (Signatures.) (Acknowledgment)

Form of Quit-Claim Deed

Know all men by these presents, That. . . . . for and in consideration of. . . . . DOLLARS, does hereby bargain, sell, remise, release, quit claim and convey unto. . . . . the following described real estate located in. . . . ., County of. . . . ., State of. . . . ., to-wit:

(Description of property conveyed).

In testimony whereof, I have executed this instrument this the. . . . . . . day of. . . . . (year). . . . . (Signatures.) (Acknowledgment.)

Corporate Form of Warranty Deed.

Modify individual form to show that corporation was organized and exists under laws of state of. . . . ., and that deed is being executed by corporation by and through its duly authorized officers.

See also topic 21.16 Real Property; categories 8 Debtor and Creditor, topic Homesteads, subhead Alienation or Encumbrance; Family, topic Husband and Wife, subhead Conveyance or Encumbrance of Property.

21.07 DEEDS OF TRUST:

See category 20 Mortgages, topic 20.04 Mortgages of Real Property.

21.08 DOWER:

Dower, unless vested, abolished as of Apr. 1, 1977. (TCA 31-2-102). For rights of surviving spouse, see category 13 Estates and Trusts, topics 13.06 Descent and Distribution, and 13.16 Wills, subhead Election.

21.09 ESCHEAT:

See topic 21.01 Absentees, subhead Escheat; categories 3 Business Regulation and Commerce, topic Banks and Banking, subhead Unclaimed Deposits; Estates and Trusts, topics Wills, subhead Unclaimed Legacies, Descent and Distribution, subhead Escheat, Executors and Administrators, subhead Distribution of Share Not Feasible.

21.10 LANDLORD AND TENANT:

Kinds of Tenancy.

Tenancy for term, periodic tenancy, tenancy at will and by sufferance are recognized.

Maintenance of Residential Rental Property in Certain Urban Areas.

Owners of “residential rental property” or unoccupied residence, in counties having metropolitan government, or counties having in excess of 800,000 in population in 2000 federal census, must maintain exterior of property and lot at level no less than community standards in that area. (TCA 13-66-101 et seq.). Municipality may adopt ordinance to inspect deteriorating residential rental dwelling units. (TCA 13-21-301 et seq.).

Residential Tenancies.

As to certain rental agents for, see category 3 Business Regulation and Commerce, topic 3.12 Consumer Protection, subhead Rental Location Agents.

Residential tenancies in Anderson, Blount, Bradley, Davidson, Hamilton, Knox, Madison, Maury, Montgomery, Sevier, Shelby, and Wilson Counties only (including Nashville, Chattanooga, Knoxville and Memphis) governed by Uniform Residential Landlord and Tenant Act (TCA 66-28-101 et seq.), modified as discussed below. General Sessions and Circuit Courts have jurisdiction under Act. Significant variations from Uniform Act include: (1) Party has notice only if he has actual knowledge or has been given notice at last known mailing address (TCA 66-28-106); (2) landlord acceptance of rent without lease agreement and without reservation creates month-to-month tenancy, and tenant deemed trespasser if he takes possession without signing lease, making oral lease or paying rent (TCA 66-28-202); (3) lease provision regarding landlord attorney fees not prohibited, and tenant limited to actual damages for landlord's willful inclusion in lease of provisions prohibited by statute (TCA 66-28-203); (4) security deposits governed by TCA 66-28-301, nonuniform provision, under which deposits must be in account only for that purpose with lender regulated by Tennessee or U.S. agency, prospective tenants must be informed of location of account, landlord must sign and supply within ten business days of termination of occupancy, but prior to any repairs or cleanup of premises, itemized damage list and repair cost estimate, tenant must either sign list or sign and give landlord written itemized dissent therefrom, and landlord must send written notice of deposit refund amount to tenant's last known or reasonably determinable address and receive no response for 60 days before permanently retaining refund amount; (5) landlord and tenant maintenance obligations do not expressly include plumbing, heating and sewer and water service (TCA 66-28-304-401); (6) no provision allowing tenant to defend action for rent or possession on ground of landlord's material noncompliance with lease, and no procedure by which tenant may terminate lease for such noncompliance, but right to terminate is implicitly recognized (TCA 66-28-501); (7) tenant must give landlord written notice of failure of essential services (TCA 66-28-502); (8) no provision allowing tenant self-help for minor defects or lease termination for landlord failure to deliver possession; (9) month-to-month tenancy terminated upon 30 days prior written notice, and landlord limited to actual damages plus attorney fees for tenant's wrongful holdover (TCA 66-28-512); (10) no statutory presumptions regarding landlord retaliatory conduct (TCA 66-28-514); (11)

nonuniform provision allows termination by landlord upon three days written notice if tenant or person on premises with tenant's consent willfully or intentionally commits violent act or behaves in manner endangering or threatening health, safety or welfare of others on premises (TCA 66-28-517); (12) if written rental agreement requires tenant to have utility services placed in tenant's name, tenant's failure to do so within ten days of occupancy allows landlord to terminate existing services if services are in landlord's name, but only if landlord exercises such right within 45 days of occupancy by tenant (TCA 66-28-521).

Residential Ground Leases.

Ground leases of residential property for term exceeding 15 years regulated by TCA 66-30-101 et seq.

Condominium Conversions.

Before converting any leased space (residential, commercial or otherwise) to condominium, in Davidson, Hamilton, Knox and Shelby Counties only, owner or lessor must give tenant at least two months actual notice of conversion and continue renting at same rate for notice period even if lease sooner terminates. Until proper notice given, tenant rights are superior to any purchaser's. (TCA 66-27-123).

Leases for more than one year must be in writing. (TCA 29-2-101). Authentication is necessary only for registration.

Tenant who has taken possession under parol lease for more than one year becomes tenant from year to year. (14 S.W. 314 [1890]).

Security Deposits.

In addition to TCA 66-28-301, discussed supra, subhead Residential Tenancies, TCA 66-28-104 (12), defines security deposits in Tennessee.

Recording.

Leases for more than three years from date of making must be registered in county in which land lies. (TCA 66-7-101, TCA 66-24-103).

Rent.

In absence of express provision for rent, mere occupancy implies agreement to pay rent.

Refusal to Let Lessee into Possession.

Measure of damages for refusal of lessor to let lessee into possession is difference between rental stipulated and value of leasehold interest.

Injury from Defective Condition of Premises.

Landlord is liable to tenant or tenant's guest for injury resulting from defective condition of leased premises where he knew or ought to have known of defective condition and injured person had no reason to know and did not know of it.

Liens.

Landlord or a person controlling land by lease or otherwise has lien: (1) For rent, for one year, on crops grown on land during year, which lien inures for benefit of assignee; (2) for payment for supplies of necessary food, fuel or clothing, supplied to tenant or sharecropper during year, on crops grown on land during year; (3) for payment for necessary fertilizer, implements, work stock, feed for stock, seed, labor, and insecticides, furnished tenant or sharecropper during year, on crops grown on land during year. Such liens are prior to all other liens or levies, and to any other contracts or encumbrances, regardless of date thereof. They continue until July 1 of year following year crop was grown, and if proceedings for enforcement have been instituted before that date, until termination of such proceedings. They may be enforced in any court having jurisdiction. Purchasers of such crops are liable for amounts of such liens, if delivery is made to them before July 1 of year following crop year, but suit against purchasers must be brought within one year. (TCA 66-12-101 et seq.).

Termination of Tenancy.

Notice to terminate tenancy from year to year must be given six months prior to end of term. Notice to terminate tenancy from quarter to quarter, and nonresidential tenancy from month to month or week to week, must be given quarter, month and week, respectively, before end of term. (193 S.W.2d 100 [1945]). Occupant's tenancy may be terminated where premises are knowingly used to commit crimes involving controlled substances or prostitution. Failure of landlord or owner either to comply with notice requirements to district attorney, or to prosecute such evictions diligently and in good faith, will allow district attorney to evict tenants committing such crimes. (TCA 66-7-107). Tenancy may be terminated where premises or area immediately surrounding premises is knowingly used or occupied in whole or in part to buy, sell, or possess drugs, in violation of TCA 39-17-417, TCA 39-13-513, 515. (TCA 66-7-107[a]). See also subheads Residential Tenancies and Condominium Conversions, supra.

Holding Over.

Tenant holding over may be held, at landlord's election, to another like term. (290 S.W. 972 [1926]).

Dispossession.

Property may be repossessed by landlord by writ of forcible or unlawful detainer. (TCA 29-15-101).

Action is before judge of court of general sessions and judgment may be for possession, rent, interest and damages regardless of amount. (TCA 29-18-125).

Uniform Residential Landlord and Tenant Act.

See subhead Residential Tenancies, supra.

21.1121.12

21.13 PERPETUITIES:

Perpetuities are barred by Tennessee Constitution. (Art. I, § 22). Uniform Statutory Rule Against Perpetuities was adopted in 1994, effective retroactively. (TCA 66-1-201 et seq.). Exclusions from Rule, in addition to those covered in Uniform Rule include employee benefit trusts (TCA 35-50-106), and possibilities of reverter (707 S.W.2d 854). See category 13 Estates and Trusts, topic 13.11 Trusts.

21.14 PERSONAL PROPERTY:

Personal property may be owned as tenants by the entirety. (197 Tenn. 367, 273 S.W.2d 151).

21.15 POWERS OF ATTORNEY:

Attorneys in Fact.

Authority to execute deed or mortgage must be by instrument duly acknowledged and recorded in county where land lies. (TCA 66-24-101).

Instruments in relation to real or personal property, executed by an agent or attorney, may be signed by such agent or attorney for his principal, or by writing the name of the principal by him as agent or attorney, or by simply writing his own name or his principal's name, if the instrument on its face shows the character in which it is intended to be executed. (TCA 66-5-104).

Durable Power of Attorney.

Uniform Act adopted. (TCA 34-6-101 et seq.). Provisions also permit creation of durable power of attorney to make health care decisions for principal if specifically authorized. Instrument must be notarized and signed by at least two witnesses. Certain persons are prohibited from acting as witnesses.

21.16 REAL PROPERTY:

The usual estates are recognized. Estates tail, special or general, have been abolished, and when created they are changed into estates in fee simple, etc. (TCA 66-1-102).

Survivorship in joint tenancy has been abolished. Heirs of joint tenant inherit just as if the estate were in common. (TCA 66-1-107-08). However, right of survivorship may be created by instrument creating joint tenancy if such intention is clearly shown. (40 S.W.2d 1027 [1930]).

Time-share Estate.

Creation, development, offerings and management of time shares and vacation clubs governed by TCA 66-32-101 et seq. Violation of time-share act is Class C misdemeanor. (TCA 66-32-118).

Tenancies by the entirety are recognized. (TCA 36-3-505 and TCA 66-1-109). See also topics 21.05 Curtesy, Deeds, Dower; and category 14 Family, topic 14.09 Husband and Wife.

Rule in Shelley's Case has been abolished. (TCA 66-1-103).

Condominium is recognized as an estate consisting of undivided interest in common together with separate interest in space in apartment building. (TCA 66-27-101-23). Ground lease of condominium property for term exceeding 15 years regulated by TCA 66-30-101 et seq.

See also topics 21.05 Curtesy, Deeds, Dower, Landlord and Tenant; categories 5 Civil Actions and Procedure, topic Partition; Debtor and Creditor, topic Homesteads; Family, topic Husband and Wife; Mortgages, topic Mortgages of Real Property.

21.17 TRUST DEEDS:

See category 20 Mortgages, topic 20.04 Mortgages of Real Property.

21.17A ZONING:

Test as to whether municipality regulation or ordinance must follow statutory zoning procedures is whether it substantially affects property owner's use of land. (152 S.W.3d 466).

22 TAXATION

22.01 ADMINISTRATION:

Taxable Property.

All property, whether real, personal, or mixed, shall be assessed for taxation for state, county, and municipal purposes except such as is declared exempt. (TCA 67-5-101).

State Taxes.

Commissioner of Revenue is vested with authority over collecting agencies of state. (TCA 4-3-1903). Real and personal property taxes are collected by County Trustee. (TCA 8-11-104). Licenses generally are collected by county court clerk. (TCA 18-6-105). Address inquiries to Department of Revenue, 1200 Andrew Jackson State Office Bldg., Nashville, TN 37242-1099, (615) 741-2461.

Assessment of Taxes.

Assessment is by assessor elected in each county. (TCA 67-1-502). Personal property, both tangible and intangible, and real property are assessed annually and as of Jan. 1 for year to which assessment applies. (TCA 67-5-502). Assessment of property and capital stock of Tennessee insurance companies is governed by TCA 67-5-1201. Value of all property is ascertained from “evidences of its sound, intrinsic and immediate value, for purposes of sale between willing seller and willing buyer without consideration of speculative values” (TCA 67-5-601), except that easement, as defined in TCA 67-5-1004, valued according to current use; land classified under TCA 67-5-1005 as agricultural, forest, or open space, value according to formula (TCA 67-5-1008); and dwelling house, as defined in TCA 67-5-601, valued according to current use (TCA 67-5-1008, TCA 67-5-601). If use of property classified under TCA 67-5-1005-1007 as agricultural or forest land, open space land, or easement is changed, owner is liable for certain back taxes unless changed classification results from lack of certification under TCA 67-5-1005 and property continues to be used for agricultural purposes. (TCA 67-5-1005). If sale of such property results in change of use, seller is liable for back taxes unless written contract provides otherwise. (TCA 67-5-1008). If use or ownership of property classified as dwelling house under TCA 67-5-601 changes, property owner has duty of informing assessor. If assessor is not timely notified, taxpayer is liable for difference in taxes, including penalty and interest. (TCA 67-5-601). Real property, except vacant or unused property or property held for use is assessed at 55% of value for public utility property, 40% for residential and commercial property, and 25% for residential or farm property. Real property that is vacant, unused, or held for use is classified according to its immediate most suitable economic use (TCA 67-5-801), except as to agricultural, forest, and open space lands and easements discussed above, which, so long as so used, are classified as farm property (TCA 67-5-1008). Tangible personal property classified as public utility, industrial, or commercial property, except merchandise inventories held by person taxable under business privilege tax, is assessed at 55% of value for public utility property and 30% of value for industrial or commercial property. All other tangible personal property is assessed at 5% of value but deemed to have no value. (TCA 67-5-901).

Upon sale or termination of business, seller must notify assessor and pay taxes, interest, and penalties owing within 15 days. Successor is required to withhold specified sum from purchase money until issuance of certificate and receipt by assessor confirming payment. Upon failure to do so, successor is deemed not innocent purchaser and is jointly liable on tax obligations. (TCA 67-5-513).

Tax Enforcement Procedures Act.

Commissioner of Revenue may collect delinquent taxes by levy upon all property and rights to property and by seizure and sale of same whenever any person liable therefor does not pay within ten days after notice and demand. (TCA 67-1-1404 through 1408). Commissioner may place padlocks on doors of businesses delinquent in filing or paying state taxes or may permit such business to continue operation in order to pay tax or fee owed. (TCA 67-1-1442). Entry of premises without prior approval of Commissioner is Class C misdemeanor. (TCA 67-1-1410).

Recovery of Erroneous Tax Payments.

Governed by TCA 67-1-707 et seq. Provisions apply to all taxes collected by counties and municipalities. (TCA 67-1-911 through 912; TCA 67-1-707).

Protest of Taxes Assessed by Board of Equalization.

County Board of Equalization, consisting of five members, meets first day in June and thereafter until equalization has been completed, but no longer than for stated period depending on county population, for purpose of equalizing assessments, hearing complaints, etc. (TCA 67-1-401 through 404).

State Board of Equalization hears and settles complaints as to, and equalizes evaluation of, all classes of property in state, which board has appellate jurisdiction over assessment of all private property. Action of board is subject to judicial review. (TCA 67-5-1501 et seq.). Board has limited authority to determine location of county boundaries if necessary to settle tax disputes. (TCA 5-2-115 through 116).

Exemptions.

(1) All property of U.S., of State of Tennessee, or of any county, incorporated city, town or taxing district when used exclusively for public, county or municipal purposes, including not-for-profit general welfare corporations financed by U.S. agency for below-cost housing to elderly persons so long as they qualify as exempt charitable or social welfare organizations under Internal Revenue Code, provided however, that in lieu of such taxes, such not-for-profit corporations shall make payments to local government for improvements, facilities, or services furnished. Real property purchased for investment purposes by Tennessee Consolidated Retirement System subject to property tax; and nonprofit corporations operated to recycle or dispose of waste products to convert same to heat or cooling for public buildings where reversionary interest in corporate property is in state or any political subdivision (TCA 67-5-203 through 208); (2) real, personal and leased property of religious, charitable, scientific or nonprofit educational institutions to extent that as determined by tax assessor it is used exclusively for such purposes, or used by another exempt institution for purpose for which it was created under TCA 67-5-212(a)(1)(A); church parsonage on lot three acres or less is exempt; property of labor and fraternal organizations are exempted from federal income tax by 26 U.S.C. § 501(c)(5), to extent determined by tax assessor that it is used for religious, charitable, scientific, and educational activities; property or portion thereof containing one residential dwelling located in community park open to public, where dwelling is owned by nonprofit religious, charitable, educational or scientific organization, maintained to discourage vandalism and is not income producing or compensatory to occupant; certain property on which caretaker's dwelling is located if owned by nonprofit member organization chartered by U.S. Congress (TCA 67-5-212); (3) cemeteries and monuments of dead (TCA 67-5-214); (4) roads, streets, alleys and promenades dedicated or thrown open for public use without charge (TCA 67-5-204); (5) growing crops, direct product of this state, or any state of U.S. (260 S.W. 449 [1923]), in hands of producer or his immediate vendee; articles manufactured from such produce and in hands of manufacturer; livestock and poultry in hands of producer or his immediate vendee for farm use (TCA 67-5-216); (6) money in individual's personal or family checking or savings account and $7,500 worth of household goods, wearing apparel, and other tangible personal property or $15,000 worth if jointly owned by husband and wife, with exemption not used by minor child living at home applicable to tangible personal property used by family in common (TCA 67-5-215); (7) property protected by valid charter or contract exemption (TCA 67-5-211); (8) real estate owned by nonprofit educational institutions and used primarily for dormitory purposes or residence of its chief executive officer; certain real property owned by nonprofit college or university or nonprofit secondary school (that

boards students) and used as residence of faculty or staff; and certain real property owned by nonprofit college or university and used as bookstore (TCA 67-5-213); (9) principal and interest on state, county and municipal bonds of this state (TCA 67-5-205); (10) property, bonds and notes of housing authorities, and interest and income derived therefrom (TCA 67-5-206); (11) personal property which either (a) is moving through State in interstate commerce or (b) is consigned to warehouse in State for storage in transit from outside State to final destination outside State (TCA 67-5-217); (12) personal property transported to plant, warehouse, or establishment in state from outside state for storage or repackaging and held for eventual sale or other disposition, other than at retail, to destination outside state (TCA 67-5-217); (13) runways and aprons of private public use airports (TCA 67-5-219); (14) certain personalty imported from outside U.S., held in foreign trade zone for sale, manufacture, processing or display and sent thereafter to location outside State (TCA 67-5-220); (15) land held by charitable institution for purpose of constructing one or more single family dwellings to be conveyed as residence for low-income household for certain periods of time, depending on types and number of dwellings (TCA 67-5-221); (16) real and personal property owned or operated by religious or charitable institution, exempt under § 501(c)(3) of Internal Revenue Code and having thereon certain kinds of thrift shops (TCA 67-5-212[n]); but land not necessary to support exempt structures may not be exempt (TCA 67-5-212). There are limited exemptions for members of armed forces.

Persons totally and permanently disabled and persons 65 or older and receiving less than $24,000 (and, for subsequent years adjusted amount reflecting cost of living adjustments determined by Social Security Administration) annual income from all sources are entitled to reimbursement from state of all or part of local taxes on first $25,000 of property used as residence for one year prior to assessment. (TCA 67-5-702 through 708). Tax relief is limited to one recipient for given property for any tax year, and no taxpayer is entitled to relief on more than one residence for any tax year. (TCA 67-5-701). State pays all or part of local tax on first $175,000 for tax year beginning on Jan. 1, 2008 of property used by disabled veterans (as defined by statute) and certain surviving spouses as residence for one year prior to assessment. (TCA 67-5-704). Counties and municipalities have option of freezing property taxes on residences of persons 65 and over with $24,000 or less combined annual income (TCA 67-5-705) or, if metropolitan form of government, legislative body may provide for appropriations for tax relief for elderly low-income homeowners (TCA 67-5-701).

When transferring or conveying property results in status of property changing from exempt to nonexempt or vice versa, grantor or lessor of property must promptly report to assessor change affecting status. (TCA 67-5-201[a][3] and TCA 67-5-201[b][4]).

Penalties.

Ad Valorem Tax.

See topic 22.13 Property Taxes, subhead Payment and Collection.

Income Tax.

See topic 22.10 Income Tax.

Inheritance Tax.

See topic 22.12 Inheritance Tax, subheads Returns, Assessment and Payment.

Sales or Use Tax.

See topic 22.17 Sales and Use Taxes.

Franchise, Excise and Gross Receipt Taxes.

See category 2 Business Organizations, topic 2.03 Corporations, subheads Excise Tax and Franchise Tax, and this category, topic Business Taxes, subheads Excise Tax and Franchise Tax.

Privilege Tax.

See topic 22.03 Business Taxes, subhead Privilege Taxes.

Waiver.

Commissioner authorized to waive penalties of $15,000 or less and to authorize subordinate officials to waive penalties of $5,000 or less. Commissioner authorized to waive penalties greater than $15,000, but Attorney General may require prior review and approval. (TCA 67-1-803). County Trustee may waive interest and penalty on personalty tax for 90 days from billing date where billing could not be made before delinquent date. (TCA 67-5-1803). Commissioner may abate statutory penalty in connection with Department of Revenue audit if Commissioner determines that payment of amount less than that due relates to taxable period covered by timely-filed return and is not result of negligent or intentional disregard of tax law or rules and regulations or fraudulent underpayment of tax. (TCA 67-1-802).

Interest.

In addition to any penalty, interest shall accrue and be payable at rate that is in effect at time payment becomes delinquent or deficient, subject to any changes in rate of interest until such deficiency or delinquency is paid. This provision applies to any tax collected or administered by Commissioner of Revenue. (TCA 67-1-801).

Special provisions govern penalty and interest on delinquent property tax assessments which are appealed by taxpayer or are based on reappraised property values. (TCA 67-5-1512).

Interest not imposed on delinquent payments of litigation taxes. (TCA 67-1-801[a][b]).

Interstate Co-operation.

Uniform Interstate Arbitration of Death Taxes and Uniform Interstate Compromise of Death Taxes Acts adopted. (TCA 67-8-501 et seq.).

22.02 ALCOHOL, BEVERAGES AND TOBACCO TAXES:

Alcoholic beverage tax imposed by TCA 57-6-101, et seq. Additional tax on beer barrels. (TCA 57-5-201).

Soft drink tax imposed by TCA 67-4-402, which expires June 30, 2010.

Tobacco tax imposed by TCA 67-4-1001 et seq.

22.03 BUSINESS TAXES:

Excise Tax.

Tax Revision and Reform Act adopted in 1999. For tax years beginning on or after July 1, 1999, with certain exceptions described below, all persons doing business in Tennessee, including corporations, limited liability companies, registered limited liability partnerships, limited partnerships, cooperatives, joint stock associations, business trusts, regulated investment companies, real estate investment trusts, banks, savings and loan associations and other organizations must pay annual excise tax of 6½% of net earnings for business done in state. (TCA 67-4-2007). Following are exempt from this excise tax: (1) General welfare and certain industrial development corporations; (2) corporations formed to operate certain fraternal lodges; (3) regulated investment companies or investment funds taxable as grantor trusts under 26 U.S.C. §§ 671-677 if not less than 75% of value of investments is in any combination of bonds of U.S., State of Tennessee, or any county, municipality or other subdivision of state; (4) federal credit unions, credit unions organized under laws of other taxing jurisdictions, production credit associations, or certain investment companies; (5) venture capital funds if such fund is limited liability company, limited liability partnership or limited partnership, formed and operated for purpose of buying, holding and/or selling securities, primarily in nonpublicly traded companies on its own behalf and not as broker, and capital of which fund is primarily derived from investments by entities and/or individuals who are neither related to nor affiliated with fund or investments by one or more affiliates if such affiliates also qualify as venture capital fund; (6) limited liability companies, limited partnerships and limited liability partnerships if (a) at least 66.67% of entity's activity is farming or holding personal residences in which one or more members resides, and (b) at least 95% of voting rights, capital interest or profits of entity are owned either by natural persons who are relatives of one another or by trusts for their benefit; (7) limited liability companies, limited liability partnerships or limited partnerships existing on May 1, 1999, which were at least 98% owned by corporate members of affiliated group that was organized for purpose of acquiring evidence of indebtedness from its members, that had assets that secure third party's borrowings and at least 80% of its income is included in income of corporation doing business in Tennessee; (8) limited liability companies, limited partnerships, and limited liability partnerships all of whose members or partners are fully liable for debts, obligations and liabilities of entity and who have filed appropriate documentation with Secretary of State, provided that entity is not owned, in whole or in part, directly or indirectly, by corporation other than not-for-profit corporation; (9) any limited partnership or limited liability company organized exclusively for purpose of providing affordable housing that (a) has received allocation of low income housing tax credits pursuant to § 42 of Internal Revenue Code and (b) “extended low-income housing commitment” under § 42(h)(6)(B) of Internal Revenue must be in effect for each residential building owned by entity during period covered by return; (10) entity classified as partnership or trust in accordance with 26 U.S.C. § 7701 or which has elected to be treated as real estate mortgage investment conduit under 26 U.S.C. § 860D or as financial asset securitization investment trust under 26 U.S.C. § 860L and sole purpose of which is asset backed securitization of debt obligations; and (11) any family-owned noncorporate owned entity where substantially all of activities of entity are production of passive investment income, and certain qualifying diversified investing funds. (TCA 67-4-2008).

Excise tax levied on unauthorized substances possessed actually or constructively by dealers. (TCA 67-4-2803).

Computation.

Net earnings and net losses, adjusted as prescribed by TCA 67-4-2006, and provisions are specifically made applicable to refund arising from application of TCA 67-6-507(e)(5). (TCA 67-4-2006). Credits against excise tax allowed for insurance companies, provided certain requirements under TCA 67-4-2009 are met. Any amount taxpayer entitled to receive under Part 4 or Part 5 of Title 67, c. 4 for excise taxes paid or as refund under TCA 67-1-1802 may be applied as credit. Expenditures incurred for construction of child day care facilities may be credited against excise tax provided requirements of TCA 67-4-2009 are met. Specified percentage of purchase price of industrial machinery allowed as credit against excise tax, but such credit is subject to partial recapture if industrial machinery sold or removed from state during useful life. (TCA 67-4-2009). Hospital companies filing franchise/excise tax return on combined basis shall also be allowed credit against combined franchise/excise tax and further credit for cost of medical supplies and medical equipment used or placed in service by members in state during tax year. (TCA 67-4-2009). Credit against excise tax permitted for five years for certain unbudgeted property taxes associated with low income housing tax credit property. (TCA 67-4-2009). Where taxpayer does business both within and without state, allocation and appointment must be in accordance with formula in TCA 67-4-2012. Special allocation and apportionment rules prescribed for railroads, motor carriers, rail and motor carriers, pipelines, air express carriers, air carriers and insurance companies. (TCA 67-4-2013). Taxpayer who is member of “affiliated group” or financial institution affiliated group may elect to compute its net worth on consolidated basis provided each member of group is required to compute its net worth on consolidated basis. (TCA 67-4-2013[D]).

Report and Payment.

Return must be filed on or before 15th day of fourth month following close of taxpayer's taxable year. Taxpayers who have combined franchise and excise tax liability of $5,000 or more for prior or current tax year must make four quarterly estimated franchise and excise tax payments for its current tax year according to following schedule: first payment due on the 15th day of fourth month of current tax year, second on 15th day of sixth month, third on 15th day of ninth month, and final payment on 15th day of first month of next succeeding year. (TCA 67-4-2015).

Delinquency.

Penalty of 5% for each month of underpayment, not to exceed total of 25%, and interest at rate prescribed by TCA 67-1-801, shall be assessed in event of delinquency or deficiency. Extension of six months to file return may be granted. (TCA 67-4-2015).

Franchise Tax.

Tax Revision and Reform Act adopted in 1999. All persons subject to excise tax (see subhead Excise Tax, supra) doing business in state, except those having not-for-profit status, must pay privilege tax of 25¢ per $100 or major fraction thereof of taxpayer's net worth. (TCA 67-4-2106). Tax imposed by this section shall only be levied on first two billion dollars of taxpayer's apportioned net worth or real and tangible property owned or used in Tennessee. (TCA 67-4-2121[a]). Minimum franchise tax payable is $100. (TCA 67-4-2119).

Computation.

Measure of tax may be diminished by loss or deficit arising from business losses such as fire, flood, tornado or other natural disasters, or operating deficits that impair value of corporation's capital stock. Value of taxpayer's interest in any other taxpayer in state shall be deducted from tax of first taxpayer. In certain circumstances, debt owed to or guaranteed by parent or affiliate of taxpayer is deemed part of capital, surplus and profit of taxpayer. (TCA 67-4-2107). Measure of tax is not less than value of property owned or used in state. Property rented in state included according to formula prescribed by TCA 67-4-2108. Credit against franchise tax is allowed for net amount of gross premiums tax paid. Credit also allowed in amount equal to 25% of expenditures incurred by taxpayer in construction of child day care facilities, provided requirements of TCA 67-4-2109 are met. (TCA 67-4-2109). Credits for job creation also allowed, provided certain requirements are met. (TCA 67-4-2109). Credit against franchise tax permitted for five years for certain unbudgeted property taxes associated with low income housing tax credit property. (TCA 67-4-2109[f]).

Allocation and Apportionment.

If taxpayer does business both within and without state, allocation and apportionment shall be in accordance with TCA 67-4-2110-12. Special allocation and apportionment rules are prescribed for railroads, motor carriers, rail and motor carriers, pipelines, insurance companies domiciled in state, insurance companies not domiciled in state, air carriers and air express carriers.

Report and Payment.

Return must be filed on or before 15th day of fourth month following close of taxpayer's taxable year. Taxpayers who have combined franchise and excise tax liability of $5,000 or more for prior or current tax year must make four quarterly estimated franchise and excise tax payments for current tax year according to following schedule: first payment due on 15th day of fourth month of current tax year, second on 15th day of sixth month of said tax year, third on 15th day of ninth month of said tax year, and final payment on 15th day of first month of next succeeding year. (TCA 67-4-2015 and TCA 67-4-2115).

Delinquency.

Penalty of 5% for each month of underpayment, not to exceed total of 25%, and interest at rate prescribed by TCA 67-7-801 shall be assessed in event of delinquency or deficiency. Extension of six months to file return may be granted. (TCA 17-4-2015 and TCA 67-4-2115).

Failure or Refusal to File.

Taxpayer who fails to file statement or franchise and excise tax return or pay certain fees or taxes may have its charter or certificate of domestication revoked if more than 90 days delinquent. Same may be reinstated upon filing of all reports and payment of all fees, taxes, penalty and interest. (TCA 67-4-2116).

Premium tax on insurance companies, see category 16 Insurance, topic 16.01 Insurance Companies.

Privilege taxes are imposed by state, counties, and municipalities on most businesses selling goods or services at retail and on wholesale businesses. (TCA 67-4-1701 et seq.). Tax is computed as percentage of gross sales, at rates determined by class of business. (TCA 67-4-707 through TCA 67-4-709). Tax is no longer levied on privilege of filing most documents with and receiving certain services from Tennessee Secretary of State. Annual tax of $400 is levied for persons actively engaging in following vocations and professions: registered lobbyists, licensed broker-dealers, agents and investment advisors, licensed or registered accountants, engineers, architects, landscape architects, brokers, chiropractors, dentists, physicians, pharmacists, psychologists, optometrists, veterinarians, audiologists, osteopathic physicians, podiatrists, speech pathologists, sports agent as defined in TCA 49-7-2101(12), and attorneys. (TCA 67-4-1702 and TCA 67-4-1703). Privilege tax levied of 4.5% of gross charge for sale, use, consumption, distribution and storage of aviation fuel used to operate airplanes or aircraft motors. (TCA 67-4-2701, which is effective July 1, 2009).

Deductions are allowed for: (a) cash discounts allowed; (b) returned items; (c) trade-in allowance; (d) unpaid balance on repossessed goods in excess of $500; (e) amounts actually paid during business tax period to subcontractor or other persons for real estate improvements, if contractor advises appropriate clerk of name and address of subcontracting firm and amount subcontracted; (f) sales of services substantially performed in other states; (g) proceeds from sale of school supplies and meals on elementary and secondary school campuses except those sales by private contractors; (h) for party making direct payment and that party's subsequent vendees licensed in state, federal excise taxes on beer, gasoline, motor fuel, and tobacco and specified Tennessee taxes on gasoline, motor fuel, tobacco, beer, petroleum products, liquefied gas, and alcohol sales for on-premises consumption; and (i) unpaid balances found worthless and charged off for federal income tax purposes. (TCA 67-4-711).

Exempt Businesses and Services.

Following types of businesses and services are exempt: religious; nonprofit organizations operating on nonprofit membership basis for promotion of members' interest; charitable; domestic; educational; public utilities; banking; insurance; real estate lessors except hotels, motels, rooming houses, camps and trailer parks; promoters licensed by Tennessee Athletic Commission; farmers; manufacturers subject to ad valorem tax. (TCA 67-4-712).

Exempt Parties.

Following parties are exempt: blind persons under certain circumstances and disabled veterans; any person in respect to his employment in capacity of employee or servant as distinguished from independent contractor; manufacturers paying ad valorem taxes; vending machine operators electing to pay gross receipts tax under TCA 67-4-503; person paying receipts tax under TCA 67-4-401 et seq., with respect to receipts taxable thereunder; newspaper carriers; charitable and religious institutions, with respect to profits earned from sale of items donated to or produced by same; persons conducting shows, displays, or exhibits sponsored by nonprofit organization of gun collectors, other than person regularly engaged in business as dealer in guns or who sells guns for future delivery; residents whose only taxable business activity during tax period is conducted at state, or only one county, fair; organizations exempt under IRC § 501(c)(3) which operate historical sites or societies with respect to gross proceeds derived from admission if exempt organization controls and conducts entire function; gross sales made in state of livestock, horses, poultry, nursery stock, and other farm products direct from farm, provided such sales are made directly by producer, breeder, or trainer; businesses in state having total value of sales of less than $3,000 per year; qualified businesses doing business from location within enterprise zone for five years from date such business originally certified as qualified business. (TCA 67-4-712).

Report and Payment.

Requirements vary according to class of business. (TCA 67-4-714).

Penalties.

See topic 22.01 Administration, subhead Interest.

22.04 CORPORATE TAXES:

See category 2 Business Organizations, topic 2.03 Corporations, subheads Taxation of Corporate Property, Income Tax, Excise Tax, and Franchise Tax.

22.05 EMPLOYMENT TAXES:

Unemployment compensation tax, in guise of “contributions”, is imposed. (TCA 50-7-101).

Contributions are exacted from every employer who, for some portion of day (not necessarily simultaneously) in each of 20 different weeks (not necessarily consecutive) in current or preceding calendar year, employed four or more individuals, regardless of whether same individuals were employed on each day. (TCA 50-7-206 through TCA 50-7-401).

Religious, charitable, and educational employers are exempt unless same elect coverage. (TCA 50-7-207).

Standard contribution rate is 5.5% of wages paid during calendar year; rate is varied according to employer's experience record. (TCA 50-7-402 through 403).

Contributions are payable to Tennessee Unemployment Compensation Division on or before last day of month following quarter for which due.

No further contributions are required if tax imposed by Title 9 of Federal Social Security Act, or any other federal tax against which these contributions may be credited, is repealed, amended or held unconstitutional by U. S. Supreme Court. (TCA 50-7-104).

No contributions are required from employees and employer's contributions may not be deducted, in whole or in part, from employees' wages.

22.06 [RESERVED]

22.07 ESTATE TAX:

Estate tax is imposed by State pursuant to Part 2, c. 8, Title 67 of Tennessee Code for purpose of supplementing inheritance tax to assure State secures total tax at least equal to “State Death Tax Credit” allowed by IRC § 2011. Tennessee estate tax is thus equal to amount by which credit against federal estate tax exceeds inheritance tax. (TCA 67-8-201 et seq.).

Franchise, excise, and gross receipts taxes on corporations, see category 2 Business Organizations, topic 2.03 Corporations.

Apportionment Against Inter Vivos Disposition.

Federal estate taxes are prorated equitable among beneficiaries and other persons interested in estate. (TCA 30-2-614 et seq.).

22.08 GASOLINE AND SPECIAL FUELS TAXES:

Taxes are assessed on gasoline and most other petroleum products and on motor vehicle fuel use. (TCA 67-3-201). Aviation gasoline exempt. (TCA 67-3-409). Farmers and operators of nurseries may obtain refund of taxes paid on gasoline used for agricultural purposes as defined by statute. (TCA 67-3-411). Certain governmental purchases exempt. (TCA 67-3-402). “Environmental assurance fee” of.04¢ per gallon is levied on petroleum imported into Tennessee. (TCA 68-215-110).

Nuclear Materials Tax imposed by TCA 67-4-1101, et seq.

22.08A GENERATION SKIPPING TAX:

Generation skipping transfers which are taxed under IRC § 2601 are also subject to state tax if made on or after Jan. 1, 1979, in amount allowable under IRC § 2604 as credit for state inheritance taxes. Apportionment formula provided if taxpayer transfers property outside Tennessee. Return on Commissioner's form and copy of federal return must be filed with Commissioner by federal filing deadline. (TCA 67-8-601-05).

22.09 GIFT TAX:

Gift tax applies to gifts, whether in trust or not and whether direct or indirect, and is imposed on gifts of real property in state and tangible personal property having situs in state, whether donor is resident or nonresident, and also on gifts of intangible personal property where donor is resident. Gift tax also applies to transfer of “qualifying income interest for life”, as defined in IRC § 2056(b)(7), where Tennessee marital deduction (under TCA 67-8-315 or TCA 67-8-105) has been allowed on property. (TCA 67-8-101). Spouse transferring property on which Tennessee marital deduction has previously been allowed is entitled to recover gift tax payable on said transfer from those who receive such property. (TCA 67-8-110). Gift tax is imposed on net gifts during calendar year, which means total amount of gifts less value of all property transferred to U.S., State of Tennessee, political subdivision thereof, or public institution in Tennessee or in state which grants like exemption to such institutions in Tennessee, for exclusively public purposes, or any corporation, society, association, or trust formed for charitable, educational, scientific, or religious purposes where property transferred must be used exclusively for such purposes.

Exemptions, Etc.

For each calendar year, there are single exemptions of $10,000 for all gifts to all Class A donees (husband, wife, lineal ancestor, or descendent, brother, sister, stepchild, son-in-law, daughter-in-law, person related as result of legal adoption, and nieces and nephews of donors having neither children nor grandchildren) and $5,000 for all gifts to all Class B donees (any other person, association, or corporation). If aggregate gifts for any calendar year exceed single exemptions, tax is applicable only to extent that gifts (other than of future interests) to each Class B donee exceed $3,000 and to each Class A donee exceed following: $3,000 for gifts in 1983; $5,000 for gifts in 1984; $7,500 for gifts in 1985; and $10,000 for gifts after 1985. Transfer to trust established for benefit of minor in compliance with IRC § 2503(c) will not be gift of future interest. Also exempt are transfers for educational and medical expenses not treated as transfer of property under IRC § 2503(e). Gift to spouse is deductible in full subject to IRC § 2523(b)-(g), provided election specified in § 2523(f) is made with Tennessee Department of Revenue. At election of both spouses made under rules of Commissioner, gift by one spouse other than to other spouse is deemed made one-half by each spouse unless donor creates general power of appointment in spouse. Election, if made, applies to all gifts during calendar year of election while electing parties are married, so long as neither electing party remarries during year. (TCA 67-8-101-05).

Rates apply to gifts during calendar year, regardless of gifts during any preceding taxable year, and are computed according to total gifts to all members of class and not according to gifts to each individual member. Rates for gift tax for Class A donees are same as for inheritance tax as set out below. There are higher rates of gift taxes to Class B donees. (TCA 67-8-106).

Returns and Payment.

Tax is imposed on donor, who must make return and pay tax to Commissioner of Revenue on or before Apr. 15 of year following year in which gifts were made. (TCA 67-8-108, -110-11).

As to credit on inheritance tax, see topic 22.12 Inheritance Tax, subhead Transfers Taxable.

Lien.

If tax is not paid by donor when due, and if distress warrant against donor's property is returned nulla bona, donee of gift is personally liable for tax to extent of value of such gift. (TCA 67-8-115).

22.10 [RESERVED]

22.11 INCOME TAX:

No general income tax, although for-profit corporations, cooperatives, joint-stock associations, state or national banks, and business trusts must pay tax based on earnings. (See category 2 Business Organizations, topic 2.03 Corporations, subhead Excise Tax.)

There is tax of 6% on incomes from dividends on corporate stock and interest on bonds which includes notes not maturing within six months. (TCA 67-2-101-02). Income from stocks and bonds held by fiduciary and set aside for educational, religious, or like institution organized for general welfare and not for profit or individual gain is exempt. (TCA 67-2-104). Returns must be made and tax paid to Commissioner of Revenue not later than 15th day of fourth month commencing after end of taxpayer's tax year. (TCA 67-2-112).

Tax is imposed on every person, partnership, association, trust, and corporation having legal domicile in Tennessee or maintaining residence in Tennessee more than six months in tax year. (TCA 67-2-102).

Following exemptions are provided: Income not in excess of $1,250 for each individual return, or $2,500 for each joint return, from stocks and bonds; all such income by person 65 or older receiving less than $9,000 annual income from all sources; all such income by spouses filing joint return where one spouse is 65 or older and joint annual income from all sources is less than $15,000 per year; income from obligations of U.S. and from bonds of State of Tennessee or any political subdivision thereof, and exempt-interest dividends from certain regulated investment companies; income from stocks and bonds held by corporation as part of property assessed for ad valorem taxes or as part of assets which determine value of shares assessed to stockholder for ad valorem taxes; income from corporate stock where value of shares is assessed to stockholder for ad valorem taxes; income from stock of state or national bank doing business in Tennessee; dividends from building and savings and loan association to its members, shareholders, or accountholders (TCA 45-3-904); income from stocks and bonds of nonprofit general welfare institutions whose property is exempt from ad valorem taxes, provided such income does not go to private individuals or corporations for profit or gain; income from stocks and bonds owned by blind persons; income from stocks and bonds of pension trusts and profit-sharing trusts exempt from Federal income taxation; distributions made pursuant to decrees ordering divestiture of stock in enforcement of antitrust statutes; income from stocks and bonds held by fiduciary and paid to or irrevocably set aside for benefit of educational, religious, or other like institution organized for general welfare and not for profit or individual gain exempt under TCA 67-5-212; stock or properties held in fiduciary capacity by not-for-profit trust corporation providing fiduciary services to trust created for perpetual care of private cemetery and income from such trust fund if corpus does not exceed $50,000; income from stocks and bonds, mortgages and notes held by persons who are blind or quadriplegic; all income from interest on loan to qualified business for improvement, expansion, or operation, or for real property, within enterprise zone as defined in TCA 13-28-101; income from stock in any publicly traded real estate investment trust as defined in TCA 67-4-2004 (TCA 67-2-104). There are limited exemptions for members of Armed Forces.

Penalty and interest not applicable to persons serving in Armed Forces or in support of Armed Forces in combat zone. (TCA 67-2-114).

Commissioner may grant extensions without penalty on good cause shown by written application. If return not filed and tax not paid within time allowed by extension, tax is subject to penalty of ½ of 1% from original due date for each month of delinquency, not to exceed 10% in aggregate. (TCA 67-2-113). See also topic 22.01 Administration, subhead Interest.

22.12 INHERITANCE TAX:

Following property is taxable, under TCA 67-8-303:

A. When transfer is from resident decedent of this state of: (1) real property situated within state; (2) tangible personal property except such as has its actual situs without this state; (3) all intangible personal property; (4) proceeds of insurance policies except as otherwise provided; (5) proceeds of certain employee benefit trusts and plans; (6) property in which decedent held “qualifying income interest for life”, defined under TCA 67-8-304; and

B. When transfer is from nonresident decedent of: (1) real property situated within this state; (2) tangible personal property which has its actual situs within this state.

Transfers Taxable.

Under TCA 67-8-304, taxable transfers are: (1) transfer by will; (2) transfer by statutes of descent and distribution; (3) transfer by gift within three years prior to death, but excluding bona fide sale for adequate and full consideration; (4) transfer by gift or grant prior to death of transferor but intended to take effect in enjoyment or possession at or after death of grantor; (5) transfer subject to charge, estate, or interest determinable by death of decedent or at any period ascertainable only by reference to death of decedent, as well as any increase accruing to any person or corporation upon termination of such charge, estate, or interest; (6) transfer pursuant to power of appointment held by decedent to same extent taxable under IRC § 2041 except unexercised general power granted by will probated prior to Nov. 1, 1978 and held by decedent who died between May 1, 1980 and May 28, 1981 (TCA 67-8-304); (7) annuity or other payment taxable under IRC § 2039; (8) property in which decedent held “qualifying income interest for life”, as defined in IRC § 2056(b)(7)(B)(ii), where marital deduction was allowed with respect to interest under TCA 67-8-315, by reason of its incorporation of IRC § 2056(b)(7), or under TCA 67-8-105 by reason of its incorporation of IRC § 2523(f), and election specified in IRC § 2056(b)(7) or § 2523(f) was made with Tennessee Department of Revenue. Decedent's estate is entitled to recover inheritance tax payable because of TCA 67-8-304 from those persons receiving such property. (TCA 67-8-317).

If transfer specified in (3), (4) or (5) above is made for valuable consideration, so much thereof as is equal in money value to money value of present consideration received by transferor is not taxable. (TCA 67-8-304). Amount included in estate is value on date of transfer, less exemptions under TCA 67-8-104. Gift taxes paid on lifetime transfer are also included in estate, but will serve as credit against assessed inheritance taxes.

Other taxable transfers are: (1) transfer at death of person having ownership interest in property held by decedent jointly with spouse, in which case one-half of value is property held by decedent jointly with someone other than spouse, in which case entire value of property is included in estate of first to die, except that: (a) where property is acquired for full and adequate consideration in money or money's worth, deduction is allowed for portion of value proportionate to consideration clearly shown to have been contributed by survivor, and (b) where property is acquired for other than full and adequate consideration, such fractional part as was acquired by survivor may be deducted from value (TCA 67-8-305); (3) transfer by deed of trust reserving to transferor, alone or in conjunction with others, power of revocation, etc., upon exercise of which such property would revert to decedent, to extent of property subject to such powers, and with reference to which such powers remain unexercised (TCA 67-8-307); (4) bequest or devise to executors or trustees in lieu of commissions, insofar as it is in excess of reasonable compensation for services rendered (TCA 67-8-308); (5) transfer by operation of law upon death of any person (TCA 67-8-309); (6) passing of proceeds of insurance policies payable to named beneficiaries, decedent's estate, or in such manner as to be subject to claims against his estate, including proceeds of paid-up, investment, or annuity policy contracts (TCA 67-8-306).

Valuation Basis and Date.

Stocks and bonds listed on recognized exchange are valued at quoted value on date of death or nearest exchange business day thereafter, and other property is valued at full and true value at date of death, except that: (1) at election of decedent's personal representative, value is determined at date of disposition of property disposed of within six months from death and at six months from death for other property; and (2) under conditions and limitations of IRC § 2032A, other than those of subsections (b)(1)(C)(ii) and (c)(6)(B), special valuation for farm or other property is available, but if used, property is subject to lien comparable to that under IRC § 6324B. (TCA 67-8-412).

Deductions.

In determining net taxable estate, following deductions are allowed: (1) value of otherwise taxable property transferred to U.S., State of Tennessee or any political subdivision thereof or public institution therein exclusively used for public purposes, or any corporation, society, association, or trust therein, or in state which grants like exemptions to such institutions in

Tennessee, formed for charitable, educational, scientific or religious purposes, provided property is to be used exclusively for such purposes; (2) taxes on real and tangible personal property within state which were lien on such property at date of death; (3) taxes on intangible personal property of decedent or income therefrom which constituted personal obligation of decedent during his lifetime or was lien on such property at date of death; (4) federal income taxes accrued upon income of decedent at date of death; (5) death duties paid or payable to other jurisdictions on intangible personal property, but no deduction for any federal estate taxes; (6) special assessments which at time of decedent's death were lien on real property within state; (7) actual funeral expenses and all other expenses reasonably and actually incurred for purchase of memorial or monument to decedent if resident of state; (8) expenses of administration, including accounting and appraisal fees, court costs, compensation of executors, administrators or trustees and their attorneys, actually allowed and paid, not in excess of lawful rates; (9) federal estate taxes paid pursuant to IRC §§ 6161, 6166, and interest on Tennessee inheritance taxes paid pursuant to TCA 67-8-419(b) for period of 21 months or less; (10) debts of decedent which constituted lawful claims against estate at date of death, provided that in case of resident decedent there shall not be allowed debt secured by property outside this state, except when property by which debt is secured is included in measure of tax imposed, and except when such debt exceeds value of property securing it, in which case excess may be deducted; (11) amount equal to value of any interest in property which passes or has passed from decedent to surviving spouse, but only to extent that such interest is included in determining value of gross estate. In determining amount qualifying for marital deduction, limitations, restrictions, definitions, elections and requirements set out in IRC § 2056(b) and (c) as to "qualifying terminable interest property", shall be applicable, provided that election specified by IRC § 2056(b)(7) must be made to Tennessee Department of Revenue. (TCA 67-8-315).

In case of transfer other than by will or by intestate laws, only deductions permitted are liens subject to which transfer is made and transfer taxes paid or payable to other jurisdictions on intangible personal property. (TCA 67-8-315).

In case of estate of nonresident, only such portion of deductions enumerated (1) through (10) above is allowed as is properly chargeable against property transfer which is subject to taxation. (TCA 67-8-315).

No deduction is allowed on account of any claim against estate arising from contract made by decedent and payable by its terms at or after death unless such claim is supported in whole or in part by valuable consideration, in which event only so much thereof as is equivalent in money value of consideration received by decedent shall be allowed as deduction. (TCA 67-8-315).

Credits.

If gross estate includes property upon transfer of which to decedent tax was imposed by State of Tennessee within five years previously, or property which was received by decedent in exchange for property upon which tax was so imposed, credit on account of such tax actually so previously paid is allowed against tax imposed with respect to particular property. Credit is lesser of: (1) tax paid in previous estate times total property amount transferred to present estate divided by taxable estate of prior estate; or (2) tax due in present estate times total property amount received from prior estate divided by taxable estate of present estate. (TCA 67-8-317). Credit allowed for tax imposed for transfer of property by unexercised general power of appointment, irrevocable prior to Nov. 1, 1978, if property was previously included in taxable estate of decedent spouse and if credit for transfer of that property is not allowable under TCA 67-8-317. Credit is computed according to statutory formula. Estate may apply for refund for failure to take credit. (TCA 67-8-304).

Exemptions and rates, under TCA 67-8-314-16 are:

Transfers to husband, wife, lineal ancestor or descendant, brother, sister, stepchild, son-in-law, daughter-in-law or person related as result of legal adoption (collectively “Class A donees”) and transfers to all other donees (“Class B donees”) qualify for shared exemption of $600,000 for decedents dying after Jan. 1, 1990, with exemption amount increasing to $625,000 on or after July 1, 1998 and increasing to $1,000,000 in 2006. (TCA 67-8-316). For amounts left to these beneficiaries, rates to be applied against taxable estate are:

Net taxable estate	*rate*
not over $40,000,	5.5% of net taxable estate
over $40,000 but not over $240,000	$2,200, plus 6.5% of excess over $40,000
over $240,000 but not over $440,000	$15,200, plus 7.5% of excess over $240,000
over $440,000	$30,200, plus 9.5% of excess over $440,000.

(TCA 67-8-314).

Assessment and Payment.

Tax is assessed by Commissioner of Revenue, who furnishes forms, etc. (TCA 67-8-401).

Returns.

Copy of will, if any, and return executed under penalty of perjury in duplicate, must be filed by personal representative with Commissioner of Revenue within nine months of decedent's death in all estates in which gross estate exceeds maximum single exemption allowed in TCA 67-8-316.

Determination of Tax.

Upon receipt of return, Commissioner makes appraisal and investigation of estate. (TCA 67-8-409). For appraisal principles, see subhead Valuation Basis and Date, supra.

Time and Mode of Payment.

Tax is due and payable no later than nine months after decedent's death. (TCA 67-8-419). If return and inventory are not filed until nine months from date of decedent's death, tax must be paid at time return filed, unless extension of time is granted by Commissioner. (TCA 67-8-409-11). If payment on due date would impose undue hardship upon estate or necessitate sale of any portion of estate at sacrifice or at inadequate price, Commissioner may extend time for payment or agree to payment in installments. (TCA 67-8-419). See also topic 22.01 Administration, subhead Interest.

Lien.

Upon issuance of receipt to administrator or executor who has paid tax imposed by TCA 67-8-301 et seq. and TCA 67-8-501 et seq., executor or administrator is subrogated to any lien or right to proceed against any transferred property which State might have had, provided notice of lien is filed with Register in county where decedent resided, or where any real property affected is situated, within 45 days from issuance of tax receipt. (TCA 67-8-414).

Liability for Taxes.

Executors, administrators, and trustees are liable for all taxes payable on estate, together with any interest or penalties, but in no case are they liable for greater amount than actually received. (TCA 67-8-423).

22.12A MINES, MINERALS AND FISHERIES TAXES:

Coal and Mineral Severance Tax.

Coal severance tax of 20¢ per ton on all coal products. (TCA 67-7-101 et seq.). Tax of 3% of sale price of oil and gas. (TCA 60-1-301-02). Most county governments are authorized to levy tax on severance of sand, gravel, sandstone, chert or limestone, not exceeding 15¢ per ton. Operators must submit return. (TCA 67-7-201 et seq.).

Commercial Fishing or Musseling.

License and fee required for commercial fishing or musseling. (TCA 70-2-205).

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22.16 PROPERTY TAXES:

Assessment.

Property assessed as follows: (1) to person owning same on first day of Jan. of year; (2) property held by executors and administrators in county, district or ward in which decedent resided at time of death, until distribution: if deceased lived in another state, property assessed where personal representative lives; (3) personal property held by trustees and guardians of minors and lunatics to each guardian or trustee in county, ward, or district where minor or lunatic resides, if resident of state; if nonresident, in county, ward, or district in which guardian or trustee resides; provided that guardian held property must be assessed in county where guardian having control thereof renders annual settlement; (4) mineral, timber or other rights in real estate, not defined as products of soil, assessed separate from and independent of fee; (5) leased personal property used by public utility company assessed to public utility company; (6) other leased personal property which is classified according to lessee's use and assessed to lessee, unless such property is subject of lawful agreement between lessee and local government for payment in lieu of taxes; (7) property of all street, railroad, gas, electric light companies and other public utility companies, including franchises within towns, city, or taxing district where office of company is located outside city, town, or district, but with main property within, is taxed in city, town, or taxing district as if office was situated within; and property, including franchises of corporations and joint-stock companies that lie wholly or mainly within or whose chief business is within, is assessed for taxation in such city, taxing district, or town; provided that all real and tangible personal property be taxed in district where situated; and provided that public utility property (real, tangible personal and intangible personal) must be assessed at 55% of value. (TCA 67-5-502). Comptroller of Treasury may establish pilot program for assessing leased tangible personal property to owner/lessor rather than lessee, participation will be voluntary. (TCA 67-5-502[e]).

Leasehold interest assessable under TCA 67-5-502 valued by discounting to present value excess of fair market value over actual and imputed for leased premises, for term of lease including renewal options. Options of lessee to purchase deemed to have no value. (TCA 67-5-605).

Improvement of new building has value for assessment purposes when real property upon which same is located is conveyed to purchaser, or when same has been occupied or used or shall be suitable for occupancy or use, or within one calendar year immediately following date on which construction commenced. If after Jan. 1 and before Sept. 1 building or improvement is moved or substantially damaged by fire, flood, wind, or any other disaster and no improvement constructed in its place before Sept. 1 of that year, assessment is made or corrected on basis of value after damage, provided that assessment of improvement must be prorated for part of year prior to damage or move. (TCA 67-5-603).

Special provisions govern assessment of railroad, telephone, radio common carrier, telegraph, freight, private car, street car, power, express, pipeline, gas, electric light, public utility, water and sewerage companies, certain motor bus and truck carriers, certain commercial air and water transportation carrier companies, and operating property used predominantly to provide cellular or long distance telephone service or radio common carrier service. Assessment is by Comptroller of Treasury. (TCA 67-5-1301 et seq.).

Reappraisal.

Over ten-year period beginning Jan. 1, 1981, and thereafter generally at four or six year intervals, all real property in state shall be reappraised, under supervision and approval of State Board of Equalization and State Division of Property Assessments, and board has authority, under certain circumstances, to approve reappraisal cycle beyond six years. Owner shall be notified of appraised value and assessment and shall have opportunity to be heard. Individual assessments may be adjusted within bounds of equality and uniformity designed to be achieved by program. (TCA 67-5-1601 et seq.).

Deferral.

Legislative body of county or municipality may provide by resolution for property tax deferral for residence of low income persons 65 years or older, or those totally and permanently disabled, for duration and under terms and restrictions specified by statute. (TCA 7-64-101 et seq.). County or municipality may also provide for deferral for same general classes of applicants of amount of tax in excess of 1979 taxes (or tax in year applicant became eligible) for duration and under terms and restrictions specified by statute. (TCA 7-64-201 et seq.).

Where exempt real property is transferred and transfer renders property nonexempt, transferee pays tax from date of transfer to end of taxable year; tax lien attaches on date of transfer, and transferee's liability is not affected by subsequent transfer. (TCA 67-5-201).

Legislative body, municipality or county may create grant program for revitalization of substandard residential rental property or real property located in older residential neighborhood. (TCA 13-5-101 through 107).

Evaluation of Assessment.

Program for evaluation of county appraisals of property of public utilities and railroads has been instituted for purposes of equalization and adjustment of such property in connection with Railroad Revitalization and Regulatory Reform Act of 1976, 49 U.S.C. § 26(c). Program is administered by Board of Equalization pursuant to criteria specified by statute. (TCA 67-5-1605).

Lien.

Taxes on property, together with all penalties, interest, and costs accruing thereon, shall be and remain first lien upon property taxed, as well as personal debt of property owner or owners, from Jan. 1 of each year for which such taxes are assessed (TCA 67-5-2101). Taxes are lien on fee in property, and not merely on interest of person to whom said property is, or ought to be assessed; but to any and all other interests in said property, whether in reversion or remainder, or of lienors, or of any nature whatever. There is no lien assessed against lessee with respect to leased personal property. (TCA 67-5-2102). Partial payment of property taxes, if accepted, does not release tax lien on property. (TCA 67-5-1801 et seq.).

Liens for inheritance and gift taxes discussed infra this category, topic Inheritance Tax, subhead Lien. Lien for all other state taxes, fees, penalties, interest and costs administered by Commissioner of Revenue, from time of initial assessment, attaches to all property in state of party against whom assessment made. Notice of lien must be recorded with register of deeds of each county where taxpayer's business, residence or other property interest is located. Recordation is notice of both original assessment and all subsequent assessments against same party. Upon request of legally entitled party, Department of Revenue must disclose amount of lien claim at given date. Lien is prior to all other liens, etc., except: (1) County and municipal ad valorem taxes; (2) deeds of trust recorded prior to recordation of lien notice; (3) Commercial Code security interest perfected by proper filing or under TCA 47-9-310(b) prior to recordation of lien notice. (TCA 67-1-1403).

Payment and Collection.

The whole proceeding for collection of taxes from the assessment to sale for delinquency is a proceeding in rem and not invalid on account of such land having been listed or reassessed for taxation to any one as owner, or to any person not the owner, or to unknown owners. (TCA 67-5-2103).

All taxes, state, county and municipal (except taxes for municipalities governed by charter or other special act) are payable the first Monday in October. (TCA 67-1-701).

In most cases, interest shall be added to amount of delinquent tax due at rate to be determined by Commissioner as set out in statute. (TCA 67-1-801). See also topic 22.01 Administration, subheads Interest, Penalties. State, county and municipal taxes (unless by special charter provision the municipality has its own collector) are collected by county trustee or agent thereof. (TCA 67-5-1801). Municipality or county may adopt ordinance or resolution providing for discount for early payment. (TCA 67-5-1804).

After taxes become delinquent, the county trustee, who collects all taxes (except for municipalities under special laws), may appoint deputy collectors and furnish certified list of delinquencies. (TCA 67-5-2001). This officer must collect such taxes thereafter, and on Jan. 1 following must make settlement with county trustee of taxes in his hands for collection. (TCA 67-5-2006).

Delinquent taxes collected by trustee by distress warrant and sale of personal property liable therefor; tax books and delinquent lists as aforesaid having force and effect of judgment and execution, and being authority to officer to distrain and sell sufficient personalty to pay taxes, penalties, interest and costs. Prior to distraint of personal property county trustee must give ten days notice of intended distraint by either: (1) delivering such notice in person; (2) leaving such notice at dwelling place or usual place of business of taxpayer; or (3) mailing such notice to taxpayer's last known address. Ten days notice must also be posted in three public places in county, one being at court house door. Property must be present at sale. Leased personal property on which lessee is assessed tax may not be distrained and sold. (TCA 67-5-2003). Officer may also proceed by garnishment. (TCA 67-5-2004).

On or before Jan. 1 following receipt of delinquent lists, officer holding such must return them to the trustee with a return as to what he has done in each instance. (TCA 67-5-2006).

Between Jan. 1 and Feb. 1 trustee must advertise by notice in newspaper of county once a week for two consecutive weeks, that suits for delinquent land taxes will be filed after Feb. 1st, imposing additional penalties and costs and forward notice of delinquency to property owner. (TCA 67-5-2401). Thereafter, between Feb. 1 and Apr. 1, trustee must deliver delinquent lists to attorney who must file suits for all delinquent taxes due state, county and municipality. (TCA 67-5-2404). Upon filing suit, 10% penalty accrues on all taxes, which is allowed attorney. (TCA 67-5-2410). Suit is filed in chancery or circuit court and tried according to chancery practice, and must be prosecuted to sale within five years of filing. Upon failure of county trustee or executive to employ attorney to institute collection suits, District Attorney General must employ attorney or maintain action for writ of mandamus to compel employment of attorney. Each suit must include at least 25 defendants, if that many are delinquent. Sale is for cash subject to equity of redemption. If outside bid is not received sufficient to cover amount due for taxes, interest, penalties and costs, state must bid such amount, unless appropriate county legislative body determines that environmental risks are sufficient to make ownership not in best interest of state. (TCA 67-5-2405-2414-15; 2501-2506). Sale by decree of court in such suit must be advertised by one notice in newspaper in county or by handbills, as court may direct. Notice to parties or others in delinquent tax suits and sales is made as provided in Tennessee Rules of Civil Procedure for service on parties. Notice may be forwarded to address of owner as reflected in office of assessor of property. Search of public records for persons having interest in property to be sold shall be made by delinquent tax attorney, who shall give notice of sale to persons identified by search. Upon sale of severed mineral interest, assessor to notify owner of surface interest who has recorded declaration of surface interest. (TCA 67-5-2502).

Certain municipalities may make back assessments and reassessments, and property owners may appeal. (TCA 67-1-1003).

Adjustment and Refunds.

Procedure to obtain adjustment or refund of taxes previously assessed is set forth in TCA 67-1-707.

Redemption of land sold for taxes is allowed within time and on terms specified in TCA 67-5-2701 et seq. Upon sale of severed mineral interest, surface owner has 120 days to purchase mineral interest beneath tract for percentage of sale amount. (TCA 67-5-2502). See category 8 Debtor and Creditor, topic 8.05 Executions.

Exemptions. Sales to government entities otherwise exempt from sales tax and fuel sales to farmers are exempt from privilege and excise tax. (TCA 67-4-2503).

Real Estate Conveyance Tax.

Prior to recordation of real estate transfer, tax of 37¢ per $100 must be paid on greater of actual consideration for or actual value of property conveyed, except that tax on quit claim deed is based on actual consideration. Tax collection fee of $1 must be paid with tax. Grantee must make affidavit on instrument to be recorded as to greater of actual consideration for or actual value of property conveyed, or, in case of quit claim, as to actual consideration for transfer. Exempt transactions are leases, creation or abolition of estates by entireties, divisions in kind of realty held by tenants-in-common, releases of life estates to remaindermen, domestic settlement decrees and decrees or deeds adjusting property rights between divorcing parties, deeds executed by executor to implement testamentary devise, transfers of real estate to revocable living trust, and transfers to state or state subdivision or agency. No tax is due until title to property is transferred by deed. (TCA 67-4-409).

As to trust deeds, mortgages, and vendor's liens (whether or not evidenced by separate instrument), see category 20 Mortgages, topic 20.04 Mortgages of Real Property, subhead Tax.

22.17 SALES AND USE TAXES:

Sales or use tax based on sale or cost price is imposed on sale or furnishing at retail, delivery in this state at retail, renting, leasing, using, consuming, and storing for use or consumption, of tangible personal property (except stocks, bonds, notes, insurance or other obligations or securities), or selling of merchandising space, charging fee for or subscription to access to satellite or cable television services, occasional and isolated sales or transactions of aircraft, vessels or motor vehicles between corporations and their stockholders, including transactions caused by merger, consolidation or reorganization, and between partnerships and their partners or other partnerships, and of certain services, including repair and installation of tangible personal property, hotel lodging, laundry and dry cleaning, and garage and parking lot storage, etc., on cost-plus or toll enrichment fee basis. (TCA 67-6-201 through 205) (new section effective July 1, 2009). Also taxed are proceeds of sales of certain health and amusement services (TCA 67-6-212).

State general rate is 7% (TCA 67-6-202), but additional 2.75% is added for items more than $1,600 and less than $3,200. Certain food items are still taxed at 5.5%. (TCA 67-6-228). No tax imposed on sales of industrial machinery and farm equipment and lease and rental payments for farm equipment and machinery. (TCA 67-6-206 through TCA 67-6-207). Tax on health and amusement services is at rate of 7%. Local tax permitted not exceeding 2¾% for sales of personal property (on industrial machinery, farm equipment and machinery and water sold to or used by manufacturers, not exceeding ½% if general local rate greater than 1%, otherwise not exceeding 1/3%). Local tax on sale of tangible personal property to common carrier for use outside state at rate of 1.5%. Local tax shall apply only to first $1,100 on sale or use of single item of personal property. Dealers with no location in Tennessee may choose to pay local tax of 2¼% in lieu of local tax otherwise authorized. Sale of tangible personal property on which state sale and use tax is levied is subject to local sales and use tax of 2.25% when obtained from vending machine or device. (TCA 67-6-702). Local tax on sales of health and amusement services has upper limit.

Property imported from another state is subject to tax with credit for sales tax, if any, paid in such state; provided, other state grants similar credit for taxes paid in this state. No use tax is levied on personal effects of person moving to Tennessee. (TCA 67-6-210). Tax credit available for purchases of equipment used to bring purchaser into compliance with pollution emission control standards imposed by regulation. (TCA 67-6-346). Other exemptions exist under Part 3.

Newly expanded or constructed facilities housing international, national, or regional headquarters of corporation or its lessor and costing at least $50 million shall receive tax credit for all sales and use taxes, except taxes for ½%, on building materials, machinery, and equipment. Investment must be made between one year prior to start of construction and one year after substantial completion, up to six years. (TCA 67-6-224). Taxpayer that establishes qualified facility to support emerging industry shall receive credit for all sales and use taxes, except taxes for ½%, on sale or use of qualified tangible personal property. (TCA 67-6-224[a]).

Multi-State Discussion.

State of Tennessee shall enter discussions with other states to discuss 67-6-806 and may be represented by its delegates. (TCA 67-6-804).

Exemptions.

Following property or transactions are exempt from this tax: (1) Sales of livestock, nursery stock, poultry and other farm or nursery products directly from farmer or nurseryman to one other than consumer if 50% of such products are grown or produced in calendar year by such farmer or nurseryman (if less than 50%, exemption applies only to sales of products actually produced by farmer or nurseryman); (2) sales of agricultural commodities by one other than producer to any other person who purchases not for direct consumption but for purpose of acquiring raw products for use or sale in process of preparing, finishing, or manufacturing such agricultural commodities for ultimate retail consumer trade (TCA 67-6-301); (3) sales, use, storage, or consumption of aircraft owned or leased by commercial interstate or international air carriers and parts, accessories, materials, and supplies sold to or used by commercial interstate or international air carriers for use in servicing and maintaining aircraft used principally in interstate or international commerce (exemption not applicable to fuel, petroleum products, shop equipment, and tools) (TCA 67-6-302); (4) proceeds of and payments on all leases and rentals of tangible personal property owned by airport authority to business primarily engaged in repair of commercial aircraft (TCA 67-6-302); (5) sale of motor vehicle to member of uniformed service who either: (a) Has been called into military service and is stationed outside U.S. during hostilities; or (b) is stationed at military reservation located partially within boundary of Tennessee and partially within another state or at naval air station located entirely within Tennessee or at Air Force base engineering development center located entirely within this state, when such vehicle is registered in Tennessee, and sale or use of motor vehicle purchased and used outside U.S. but titled and registered in Tennessee by member of uniformed service stationed or military reservation located outside U.S. (TCA 67-6-303); (6) sale of human blood, blood plasma, or any part thereof by institution or organization exempt under I.R.C. § 501 (c)(3) (TCA 67-6-304); (7) transfer by dealer in personal property of any item from inventory to be used by dealer, agent, or representative for demonstration or display purposes provided that such article of personal property be returned to inventory for sale in usual course of trade within 120 days (TCA 67-6-305); (8) transfer between spouses of automobile when such transfer is result of decree of divorce (TCA 67-6-306); (9) portion of consideration received from sale of steam produced by energy or resource recovery facility owned or operated by municipality which is used to satisfy indebtedness to state if facility has no more than one customer (TCA 67-6-307); (10) sale or lease of tangible personal property or services to U.S. or any agency thereof created by Congress, for consumption or use directly by it through its own government employees (TCA 67-6-308); (11) rental for films to theaters which pay admissions or receipts tax; (12) rental for films, transcriptions, and recordings to radio stations and television stations operating under certificate from Federal Communications Commission (TCA 67-6-309); (13) proceeds derived from sales at gun shows, displays or exhibits, sponsored by nonprofit organization of gun collectors (TCA 67-6-310); (14) sale, transfer, or lease of industrial machinery and construction machinery between parent corporation and wholly-owned subsidiary to extent that sales or use tax previously paid by such parent or subsidiary (TCA 67-6-311); (15) repair services performed within Tennessee on machinery and equipment and associated parts for extracting or removing natural resources, building or improving roads or highways, land clearing, excavation, construction, loading and unloading of containers or truck trailers on and off cars, ships, barges, or aircraft where such property is shipped out of Tennessee; (16) repair service labor performed with respect to aircraft engine equipment and mainframes on aircraft used by commercial interstate or international air carriers; (17) repair parts and labor performed on fire protection equipment and associated parts owned by fire departments in states other than Tennessee; (18) repair services to equipment used primarily in interstate commerce where such repairs are performed outside of Tennessee and original purchase of such equipment was exempt from sales and use tax; (19) repair parts, accessories, material and supplies for certain designated common carrier vehicles, where purchased items are shipped, via purchasing carrier, out of state and purchaser and seller are 100% affiliated corporations (TCA 67-6-313); (20) repair services with respect to railroad rolling stock, where such repairs are initiated, performed or completed within Tennessee; (21) sales of helicopters or airplanes within state to non-Tennessee residents, when intended to have situs outside state and are indeed removed within 15 days of purchase; (22) repair and refurbishment services for such helicopters and airplanes (TCA 67-6-313); (23) computer media exchange services where resulting media are shipped out of Tennessee, or to government agency, or non-taxable entity located within Tennessee (TCA 67-6-313); (24) repair and refurbishment services within Tennessee with respect to airplane component parts which have their situs outside of Tennessee and are removed within 15 days from completion of such repairs if repairs or refurbishments are performed pursuant to and by registered owners of “supplemental type certificate” issued by Federal Aviation Administration (TCA 67-6-313); (25) sales of artificial limbs, items necessary for use or wearing thereof, and necessary maintenance service thereon; (26) sales of wheelchairs and necessary maintenance service thereon; (27) necessary maintenance service on lift devices; (28) sales or repairs of prosthetics, orthotics, special molded orthopedic shoes, walkers, crutches, surgical supports, and other similarly medical corrective or support appliances and devices including sale of computer software designed to treat individuals with learning disabilities, having no residual value for other purposes, and prescribed by licensed practitioner (TCA 67-6-314); (29) charges made by optometrists, opticians, or ophthalmologists to their patients for transfer of tangible personal property used in practice of such professions (TCA 67-6-316); (30) pharmaceutical samples produced or stored in Tennessee for distribution elsewhere, including prescription drugs distributed by manufacturer free of charge (TCA 67-6-319); (31) prescription drugs or medicines, and certain disposable medical supplies issued by licensed pharmacists in accordance with individual prescription; (32) sale of any drug, including over-the-counter drugs, for human use dispensed pursuant to prescription; sale or use of insulin, sale or use of oxygen and supplies to use oxygen where dispensed pursuant to prescription; (TCA 67-6-320); (33) transfer by dealer of railroad rolling stock or of vessels or barges of 50 tons or over displacement where purchaser gives seller affidavit that such vessels or rolling stock are being purchased for use in interstate commerce or outside Tennessee; (34) sales, use, storage, or consumption of parts and accessories, material and supplies, not including fuel or petroleum products or shop equipment or tools, used in servicing and/or maintaining railroad rolling stock currently being used or reasonably intended to be used in interstate commerce (TCA 67-6-321); (35) tangible personal property or taxable services sold, given, or donated to church, university, college, school, orphanage, foster home placement service, home for aged, hospital, girls' club, boys' club, community health council, volunteer fire department, organ bank for transplantable tissue, USO, state historical property, nonprofit community blood bank, senior citizen service center, nonprofit talent or beauty pageant in which contestants compete for scholarships, organization exempt under I.R.C. § 501(c)(3), labor organizations, not-for-profit cemetery companies, war-time era veterans' organization chartered by Congress and exempt under I.R.C. § 501(c)(4). Tangible personal property or services sold or donated to certain nonprofit entities or other entities (TCA 67-6-322); (36) replacement of faulty parts and equipment under warranty (TCA 67-6-324); (37) sales of tangible personal property to telephone cooperatives for their own use and consumption (TCA 67-6-325); (38) sales of tangible personal property to commercial marine vessels for use by such vessels where deliveries of such property are made in midstream of waterways constituting geographical boundaries of this state (TCA 67-6-326); (39) repair services performed on vessels and barges of 50 tons and over displacement used principally in interstate or international commerce and component parts so used (exemption not applicable to fuel and other petroleum products or to shop equipment and tools) (TCA 67-6-327); (40) sales of tangible personal property to watershed districts for use and consumption by such districts (TCA 67-6-328); (41) gasoline upon which privilege tax per gallon is paid or gasoline or diesel fuel used for agricultural purposes; (42) motor vehicle fuel tax (TCA 67-3-201, TCA 67-3-402); (43) gasoline upon which privilege tax per gallon is paid and not refunded; (44) motor vehicle fuel now taxed per gallon by c. 3, Part 2 of Title 67; (45) textbooks and workbooks; (46) all sales made to state or any county or municipality within state; (47) liquefied gas now taxed by c. 3, Part 11 of Title 67; (48) magazines and books that are distributed and sold to consumers by U.S. mail or common carrier; (49) parking privileges sold by colleges, universities, technical institutes or state technology centers to students at those institutions; (50) materials used for lining or protective coating of railroad tank cars; (51) chemicals and supplies used in air or water pollution control facilities; (52) periodicals printed entirely on newsprint or bond paper and regularly distributed twice monthly, or on biweekly or more frequent basis; (53) sale of U.S. and Tennessee flags sold by nonprofit organization; (54) industrial materials and explosives for future processing; (55) materials, containers, labels, sacks, bags or bottles used for packaging tangible personal property; (56) film, including negatives, used in business of printing; (57) home communication terminals, remote control devices, and other similar equipment purchased on or after Jan. 1, 2000; (58) utility poles, anchors, guys, and conduits; (59) aircraft used for and owned by person providing flight training; (60) prepared food, as defined in § 67-6-102; (61) dyed diesel fuel purchased for off-road use; (62) charges for subscription to, access to, or use of video programming services; (63) copies of hospital records; (64) OEM headquarters company vehicles; (65) coin-operated telephone service; (66) automatic teller machine (ATM) service (TCA 67-6-329); (67) admission, dues or fees for events or activities held for or sponsored by public or private schools, kindergarten through grade 12 (K-12); (68) admissions to county or agricultural fairs; (69) membership application fees, dues or contributions, paid to institutions and organizations that have received determination of exemption from internal revenue service; (70)

membership fees or dues of those organizations listed in Major Group No. 86 of Standard Industrial Classification Manual of 1972, as amended; (71) sales price of admissions to amusement or recreational activities conducted, produced, or provided by certain not-for profits, exempt organizations, and others; (72) fees in any form resulting from production of television, film, radio or theatrical presentations, (73) certain events or activities conducted upon rivers and waterways in this state; (74) all sales contractually committed and/or for which money has been paid prior to June 1, 1984; (75) nonprofit sponsored athletic events for participants under 18 years of age; (76) sales price of admissions to amusement or recreational activities or facilities conducted, produced and controlled by municipalities or counties; (77) membership assessments for capital improvements made by recreation club, community service organization or country club against its members; (78) sales price of admissions to beauty pageants or rodeos, provided that this exemption only applies to beauty pageants or rodeos that have been held in same city for 30 years or longer; (79) sales price of admissions to nonprofit sponsored musical concerts; (80) any event or activity held by employer solely for benefit of employer's employees; (81) fishing tournament registration fees collected from tournament participants; (82) dues, membership application fees, admission fees, contributions or rental charges for equipment paid to any corporation or enterprise that offers, on regular, full-time basis, services or facilities for development or preservation of physical fitness through exercise or athletics, provided certain conditions are met; (83) any entry fee or charge that allows entrant to participate in contest or tournament or charity horse show; (84) charges made by landowners for permission to hunt native wildlife on their property that is located partially or entirely in county having population of not less than 31,900 nor more than 32,000; (85) fee paid by establishment operated primarily for sale of prepared food to persons for purpose of providing live entertainment (TCA 67-6-330); (86) transfer by dealer of motor vehicles with gross vehicle weight rating of class three or above and trailers, semi-trailers and pole-trailers used exclusively in service of passenger or cargo transportation by common carrier in interstate or foreign commerce under federal government or state regulatory agency authority (TCA 67-6-331); (87) sums paid or property or services contributed to municipal or county utility, electric cooperative or electric membership corporation by any person required as condition for utility service to make such payment as contribution in aid of capital construction (TCA 67-6-332); (88) charges made by taxidermists for taxidermy (TCA 67-6-333); (89) gas, electricity, fuel oil, coal and other energy fuels sold directly to consumer for residential use (TCA 67-6-334); (90) charges made by dentists to patients in connection with sale or transfer of tangible personal property used in practice of dental profession (TCA 67-6-335); (91) sale or use of used factory-manufactured structure to extent sales or use tax paid at initial sale or use in this state (TCA 67-6-336); (92) sales for which consideration is food stamps or food coupons or supplied by electronic debit card or other electronic device approved by Department of Human Services and issued by such department or by federal government, to purchase eligible food products (TCA 67-6-337); (93) sales for which consideration is voucher issued under Special Supplemental Food Program for Women, Infants and Children, 42 U.S.C. § 1786 (TCA 67-6-338); (94) materials sold to or used by structural metal fabricator for use in performance of contract outside this state (TCA 67-6-339); (95) railroad track materials and locomotive radiators purchased in this state by railroads for use outside this state, but persons seeking to make exempt purchases as provided in this section shall apply to commissioner for certificate (TCA 67-6-340); (96) charges made by local exchange carriers to interexchange carriers and long distance resellers for providing access to local exchange area and charges made by local exchange carriers to cellular telephone companies for interconnection to landline network; (97) charges made between local exchange carriers and interexchange carriers for use of intercompany facilities pursuant to shared network facility arrangements (TCA 67-6-342); (98) occasional and isolated sales of vessels, motor vehicles, or aircraft described at TCA 67-6-102(1), and subject to tax imposed by TCA 67-6-202; (99) sales of vessels, motor vehicles, or aircraft removed from state within three days of purchase for use in another state; (100) sales of motor vehicles subject to registration and titling, but removed to another state within three days from purchase (TCA 67-6-343); (101) sales or use of direct mail advertising materials that are distributed in Tennessee from outside state by person engaged solely and exclusively in business of providing cooperative direct mail advertising (TCA 67-6-344); (102) sale, gift or donation of tangible personal property or taxable services to national organizations of state legislators, or any nonprofit corporations acting as agents for such organizations, in connection with national meetings held in Tennessee; (103) occasional or isolated sales of goods or services by one not in such business, and occasional or isolated sale of aircraft, vessels, or motor vehicles between persons who are married, lineal relatives or spouses of lineal relatives, or siblings; (104) machinery used to package manufactured items used by person in principle business of fabricating or processing tangible personal property for resale (TCA 67-6-102); (105) direct mail advertising materials that are distributed in Tennessee from outside state by person engaged solely and exclusively in business of providing cooperative direct mail advertising (TCA 67-6-344); (106) retail sale of boats, motorboats and other vessels that are not registered and identified in this state, but are removed for use in another state within three calendar days after physical possession of boat, motorboat or other vessel has passed to retail purchaser (TCA 67-6-345); (107) any system, method, improvement, structure, device or appliance appurtenant thereto that is required and primarily used to bring purchaser into compliance with pollution control laws or regulations (TCA 67-6-346); (108) repair services, (including parts and labor) to equipment used in connection with aircraft used for purposes of medical evacuation by not-for-profit hospitals, medications, or government entities (TCA 67-6-347); (109) retail sale of used clothing by 501(c)(3) institution or organization (TCA 67-6-348); (110) consideration received from sale of U.S. or state flags by nonprofit organization up to amount paid by organization for flags; (111) aviation fuel actually used in operation of aircraft (TCA 67-6-386); (112) diesel fuel sold to or used by common carrier and actually used in operation of locomotive (TCA 67-6-386); (113) personal property sold to common carrier for use outside Tennessee, provided persons seeking exemption obtain certificate (TCA 67-6-385); (114) fabrication of computer software by person for such person's own use; (115) tax liability arising solely from movement of taxable aircraft into Tennessee in conjunction with establishing new “headquarters facility” (TCA 67-6-391); (116) purchases of detailing services and repair services performed on motor vehicles held for resale by licensed motor vehicle dealer or licensed auto auction (TCA 67-6-392); (117) private communication services utilized for communications with computer or telecommunications center located in Tennessee when taxpayer of its affiliate has qualified for headquarters tax credit (TCA 67-6-389); (118) multiple personal property items sold on sales tax holiday, which is between 12:01 a.m. on 1st Fri. of Aug. and 11:59 p.m. following Sun. (TCA 67-6-393); (119) use of computer software that is developed and fabricated by affiliated company and repair of computer software; provided, that repair is rendered by affiliated company (either 100% common ownership or control or both companies 100% control or or ownership by common parent) (TCA 67-6-395). Notwithstanding any contrary provisions, pharmacies and home health care providers are consumers or users of tangible personal property or taxable services, and sellers of same must collect appropriate tax on sale unless pharmacy or home health care provider is exempt under TCA 67-6-322. (TCA 67-6-352).

Each seller must register with State Commissioner of Finance and Taxation. Commissioner may by regulation establish filing dates other than monthly. (TCA 67-6-505). Books and records must be kept subject to inspection for three years from Dec. 31 of year in which associated return required by this chapter was filed. (TCA 67-6-523). Out-of-state person making sales in Tennessee, who cannot be required to register for sales and use tax under applicable law but who nevertheless voluntarily registers to collect and remit use tax on items of tangible personal property sold to Tennessee customers, shall be allowed deduction against taxes due of 2% of first $2,500 on each report and 1.15% of amounts over $2,500 on each report. This deduction does not apply to Model 1 sellers under Streamlined Sales and Use Tax Agreement or if report or tax payment is delinquent. (TCA 67-6-509). Overpayments or erroneous payments shall be applied to deficiency before computing any interest and penalty due as result of such examination, earliest overpayments offsetting earliest underpayments for this purpose, and penalty, if any, being computed on amounts of underpayments not offset by overpayments. (TCA 67-6-516). See also topic 22.01 Administration, subhead Interest. Dealer is entitled to credit for overpayment or erroneous payment on transactions in same month before any penalty or interest is computed.

Where articles are taken in trade or part payment for new or used articles the tax is on difference of price of the new or used articles less credit for the articles taken in trade. Further, auto dealer may purchase vehicle for businesses from own inventory and receive same trade-in tax credit as if had purchased from another dealer. (TCA 67-6-510).

22.18 STAMP AND SEAL TAXES:

Stamp Tax.

No requirement of documentary stamps.

22.18A TOBACCO TAX:

See topic Alcohol, Beverages, and Tobacco Taxes.

23 TRANSPORTATION

23.01 MOTOR VEHICLES:

Uniform Vehicle Code is in effect. Chapters administered by Commissioner of Revenue.

Vehicle license required annually. Renewal dates vary and early renewal process set out. (TCA 55-4-104). Issued by county court clerk. (TCA 55-4-101). One plate required for passenger vehicles, to be displayed at rear. One plate required for truck, to be displayed at rear if truck does not exceed ¾ ton and has panel or pick-up body style. One plate required for motor home, to be displayed at rear. One plate required for all other trucks and truck-tractors, to be displayed at front. One plate required for trailer, semi-trailer, dealer's vehicle and motorcycle, to be displayed at rear. (TCA 55-4-109-10).

Upon sale of vehicle seller must remove plates and surrender them to the county court clerk or transfer them to another vehicle, receiving credit for a proportionate part of the fee due on such other vehicle. (TCA 55-4-118). Nonresident owners not regularly operating vehicle about business in state need not register. Where business vehicle is so used but state of registration is subject to reciprocal agreement no registration here is required. Commissioner may enter into reciprocal agreements relating to proportional registration of commercial vehicles in interstate or combined interstate and intrastate commerce. (TCA 55-4-121). Each owner of fleet of rental trucks and truck tractors may register in Tennessee proportional part of fleet determined by dividing mileage of all units in fleet driven in Tennessee during year by total mileage of all units in fleet during period. (TCA 55-4-123). All other nonresidents using vehicle regularly about business in state must register same. (TCA 55-4-120; TCA 55-4-121). No exemptions for members of Armed Forces.

Operator's License.

Uniform Motor-Vehicle Code adopted with modifications. Minimum age for intermediate driver's license, 16 years; for chauffeur's license, 18 years. (TCA 55-50-311). License held by member of Armed Forces continues while he is stationed outside state and for 60 days after separation from service or reassignment to duty within state. (TCA 55-50-338).

Titles.

Certificate of title must be obtained from Division of Motor Vehicles by application to county court clerk of county wherein vehicle is to be registered, or directly to registrar in case of either proportional or apportional registrations and in case of state owned vehicles. (TCA 55-3-103). Joint ownership is indicated on certificate by use of names, separated by conjunction “and”;

all owners must sign to transfer title. (TCA 55-3-114; TCA 55-3-118). No certificate of title is required for foreign vehicle, if nonresident owner has valid foreign certificates of title and registration, and if vehicle is to remain registered in foreign state as well. Off-highway motor vehicles must be titled if purchased after June 1, 1983. (TCA 55-3-101). In case of new car, bill of sale and statement of lien, if any, must accompany application. (TCA 55-3-103). If commissioner is not satisfied as to ownership or that there are no undisclosed security interests, bond may be required as condition to issuance of certificate. (TCA 55-3-103). Motor Vehicle Anti-Theft, Title Reform and Consumer Protection Act of 1996 affects titling of certain damaged and rebuilt passenger motor vehicles. (TCA 55-3-301 et seq.).

Sales.

Owner must endorse an assignment and warranty of title on certificate of title and deliver certificate to transferee. (TCA 55-3-118). Class C misdemeanor for transferor to fail to enter transferee's name on properly endorsed certificate of title. Class C misdemeanor for any person to possess executed certificate of title without name of transferee. (TCA 55-3-127). Transferee must obtain new registration and apply for new certificate of title before operating vehicle. (TCA 55-3-119). If transferee is dealer who holds vehicle for resale, he need not obtain new registration and certificate of title but may do so if vehicle held for resale outside state. Upon resale, such dealer must endorse certificate to his transferee. (TCA 55-3-120). Any motor vehicle dismantler and recycler or scrap metal processor who purchases motor vehicle solely for parts, dismantling and/or scrap that is ten years or older may purchase such motor vehicle without seeing and obtaining copy of title to such vehicle if certain listed information is obtained by buyer. (TCA 55-3-202). Insurance company that obtains title to motor vehicle as result of paying total loss claim must obtain permit to dismantle vehicle unless vehicle more than ten years old and valued at less than $1,500. (TCA 55-3-120).

Liens.

No liens, except possessory liens and certain state tax liens, are valid as to third persons without notice unless lien has been noted on certificate of title by Division of Motor Vehicles. (TCA 55-3-114; TCA 55-3-123; TCA 55-3-125-26). When lien has been discharged, notation to that effect must be entered and acknowledged on certificate of title. (TCA 55-3-114). When lien is assigned, assignee must cause new lien to be noted on certificate of title by Division of Motor Vehicles. (TCA 55-3-124). TCA 55-3-126 makes provision for perfecting of lien.

Identification Marks.

Department shall assign new number to motor vehicle whenever serial or motor number is destroyed or obliterated. (TCA 55-3-116).

Operation Prohibited.

By persons intoxicated or under influence of drugs. (TCA 55-10-401 et seq.). Penalties for this and certain other vehicular offenses enhanced for repeat offenders under Motor Vehicle Habitual Offender Act. (TCA 55-10-601 et seq.). Any person violating provisions of § 55-10-401 shall, upon conviction thereof, for first offense, be fined not less than $350 nor more than $1,500 and court shall prohibit such convicted person from driving vehicle in state of Tennessee for one year. For conviction on second offense, there shall be imposed fine of not less than $600 nor more than $3,500, and person or persons shall be confined in county jail or workhouse for not less than 45 days nor more than 11 months and 29 days, and court shall prohibit such convicted person or persons from driving vehicle in state of Tennessee for two years. For third conviction, there shall be imposed fine of not less than $1,100 nor more than $10,000, and person or persons shall be confined in county jail or workhouse for not less than 120 days nor more than 11 months and 29 days, and court shall prohibit such convicted person or persons from driving vehicle in state of Tennessee for not less than three years nor more than ten years. For fourth conviction, court shall prohibit person from driving motor vehicle for five years. (TCA 55-10-403).

Driver not permitted to possess open container of alcohol during operation. (TCA 55-10-416). No person possessing learner's permit or intermediate driver's license may operate motor vehicle while using cellular or mobile telephone. (TCA 55-50-311).

Size and Weight Limits.

Regulated by TCA 55-7-101 et seq.

Equipment Required.

Regulated by TCA 55-9-201 et seq.

Passenger Restraints.

Unlawful to buy, sell, lease, trade or transfer from or to Tennessee resident, at retail, automobile manufactured after 1963 not equipped with safety belts installed for use in left and right front seats, or automobile manufactured after 1968 not equipped with proper seat belts for every designated seating position. Child passenger restraint system required for transportation of child under age of four. Operator and front seat passengers must wear restraints while vehicle is moving. Use of restraints by passengers of ages 4-15 is responsibility of operator. Failure to use restraint is misdemeanor punishable by fine of $50. (TCA 55-9-602). Violation is not contributory negligence and is inadmissible in civil litigation, except in products liability action, failure to wear safety belt can be admitted as to causal relationship between noncompliance and alleged injuries. (TCA 55-9-604).

Vehicle Air Bags.

Person who knowingly installs or reinstalls object in lieu of airbag may be guilty of Class A misdemeanor. (TCA 59-9-108).

Motor Vehicle Safety.

Drivers shall stop at intersection with flashing red light. If flashing yellow, drivers may proceed with caution. (TCA 55-8-112).

Lights Required.

Regulated by TCA 55-9-401-414.

Accidents.

Driver must stop and give name, address and registration number to person who, or whose property, was injured, and show him his operator's license. (TCA 55-10-103). If accident involves personal injury, death or property damage of $50 or more, driver must report same immediately to police, if occurs in city. (TCA 55-10-106). If driver physically unable to make report, same must be made by other occupant or owner of vehicle, if any. (TCA 55-10-109). Garage operators must report any vehicle appearing to have been in serious accident or struck by bullet. (TCA 55-10-113).

Any person involved in accident occurring on divided, controlled access highway or interstate highway of this state may remove vehicle from road into safe refuge, provided that accident resulted in no personal injury, death, or extensive property damage. (TCA 55-10-117).

Where more than one person was driver of vehicle in accident, only driver contributing to accident may be cited for violation of rules of road. (TCA 55-10-118).

See also infra, subhead Proof of Financial Responsibility.

Owner liable for negligence of others only when present in the car or car operated by his servant or agent within scope of authority or duty. Owner of car kept for family use liable for negligence of any member of family. Registration prima facie evidence that vehicle was driven by owner or his duly authorized servant or operated with owner's consent at time of accident. (TCA 55-10-311).

Guests.

No statutory restriction of liability for injury to gratuitous guest.

Proof of Financial Responsibility governed by TCA 55-12-101 et seq.

Accident Reports.

Motor vehicle operator involved in accident in Tennessee where death or personal injury occurs or property damage is greater than $400 must report accident in writing to Commissioner of Department of Safety within 20 days. (TCA 55-10-107; TCA 55-12-104). If operator fails to make report, owner shall do so as soon as he learns of accident. (TCA 55-12-104). Failure to make required report is ground for suspending licenses, operating privileges and registrations, effective 20 days after notice of suspension mailed. Report to Commissioner not required: (1) As to vehicle owned by U.S. or Tennessee or any subdivision or municipality thereof; (2) from owner or operator where there was no physical contact with another vehicle, object or person; (3) from owner of vehicle legally parked at time of accident. (TCA 55-12-104).

Deposit of Security.

Commissioner, if he finds that owner or operator may be liable and has received notice of claim against owner or operator, must revoke licenses and registrations and, in case of nonresident, privilege of using highways, of potentially liable party, effective no earlier than 20 days after notice of revocation is mailed to such party, unless party files or deposits with Commissioner one of following forms of security: (1) Proof on Commissioner's forms of liability insurance in form of single limit policy not less than $60,000 or split limits policy in amount of $25,000 for personal injury or death of one person, $50,000 for personal injury or death of all persons in one accident, and $10,000 for property damage; (2) cash deposit or bond in amount of $60,000 or in amount equal to all damages ($500 minimum); or (3) notarized releases from all parties filing affidavit of claim with Commissioner. (TCA 55-12-102, 105-07). Exceptions to security requirement include: (1) Vehicles owned by self-insurer (under TCA 55-12-111, owner of 25 or more vehicles with certificate of self-insurance issued by Commissioner); (2) operator or owner who is only injured or damaged party; (3) person submitting on or before revocation proof satisfactory to Commissioner that liability is admitted and that agreement satisfactory to injured party for payment of damages has been made, if agreement is performed for at least three years after accident; (4) vehicle owned by U.S. or by Tennessee or any subdivision or municipality thereof, and operator of any such vehicle; (5) vehicle owned and operated by common carrier under jurisdiction of Department of Public Safety; (6) person licensed and engaged in renting or leasing motor vehicles, as to proof of ability to pay judgment against lessee; (7) operator or owner of vehicle legally parked at time of accident; (8) Federal employee if acting within scope of employment at time of accident; (9) operator or owner where there is no physical contact with another vehicle, object or person, unless judgment has been obtained; (10) person against whom all claims for accident have been discharged in bankruptcy, except that such person must maintain proof of financial responsibility as if his privileges had been revoked. (TCA 55-12-106).

Affidavit of damages or accident report showing amount thereof, for purpose of establishing amount of security to be required, may be filed with Commissioner by any injured party (TCA 55-12-110).

Convictions.

In case of conviction under TCA 55-12-113 (including bail forfeiture) other than for reckless driving, where license is revoked, proof of financial responsibility must be supplied Commissioner to avoid suspension or revocation of registrations. (TCA 55-12-114). When Commissioner receives record of conviction for enumerated offenses, except where record shows that: (1) owner or operator had proper insurance or bond or (2) offending vehicle owned by carrier licensed by U.S. or Tennessee or owned by U.S. or Tennessee or political subdivision thereof and operated with owner's consent, Commissioner must suspend license and registrations and in case of nonresident, privilege of using highways, unless Commissioner receives proof of financial responsibility within 20 days of mailing by Commissioner of demand therefor. (TCA 55-12-115). As provided by statute TCA 55-10-603, driver may be sentenced as motor vehicle habitual offender. District attorney general shall file statement at least ten days before trial if defendant should be sentenced as such. If defendant meets criteria, in addition to sentence imposed for habitual offender defense, defendant shall also be sentenced as provided in TCA 55-10-613, 615, TCA 55-10-618.

Nonpayment of judgment, unless stayed or payment agreement is made, to extent of limits of financial responsibility set forth in TCA 55-12-102, for over 60 days after Commissioner's receipt of certified judgment copy, results in revocation. (TCA 55-12-118).

Intoxication.

Evidence that there was.08% or more by weight of alcohol in defendant's blood constitutes violation of TCA 55-10-401, whether or not driving impaired; but evidence also creates presumption that driving was impaired. Vehicular homicide is Class C felony unless it is proximate result of driver intoxication in which case it is Class B felony. (TCA 39-13-213). Offender sentenced to period of incarceration shall be required to commence service within 30 days of conviction or if space is not available as soon as space is available. If space will not be available for more than 90 days, alternative facilities shall be used. (TCA 55-10-403). If conviction is for 48 hours it shall be served at time when person is off from work. (TCA 55-10-403). Any person who drives motor vehicle shall be deemed to have given consent to blood test provided there is reasonable belief of law enforcement officer that driver is under influence of intoxicants or drugs. (TCA 55-10-406). Law enforcement officer must conduct blood test of driver involved in accident resulting in injury or death if officer has probable cause to believe driver comitted DUI, vehicular homicide or aggravated vehicular homicide. (TCA 55-10-406). Hospital personnel, as established in TCA 55-10-410 and TCA 69-10-217, shall not be held civilly or criminally liable for such blood tests and tests will be considered valid. (TCA 55-10-406; TCA 55-10-410; TCA 69-10-217). Person's second or subsequent violation of TCA 55-10-421 creates inference that court should order such offender's motor vehicle be equipped with functioning interlock device. All interlock devices shall be of type that records and stores driver's blood alcohol content at certain intervals. (TCA 55-10-412).

Duration of Suspension or Revocation.

License and registrations suspended or revoked for failure to make report or deposit security may be renewed and new license or registration issued when: (1) accident report filed, if that was ground for suspension, and $25 fee paid; (2) final judgment rendered relieving from liability person revoked for failure to deposit security; or (3) proof of financial responsibility given, $65 fee paid, license examination successfully retaken and (a) proper security is deposited or one year has passed from date of accident without filing of suit, (b) final judgment satisfying all liabilities of revoked person is rendered and paid, (c) notarized releases from all parties filing claims with Commissioner are filed with Commissioner, (d) all claims against revoked person arising out of accident are discharged in bankruptcy, or (e) Commissioner is satisfied that liability is admitted and agreement satisfactory to all injured parties for payment of damages has been made, if agreement is performed for at least three years after accident. (TCA 55-12-108). To restore license, etc., suspended or revoked for conviction, proof of financial responsibility must be given, either $65 or $100 fee paid and (for residents) license examination successfully retaken.

(TCA 55-12-114; TCA 55-12-117). To restore license, etc., suspended or revoked for nonpayment of judgment, judgment must be paid, proof of financial responsibility must be given, $100 fee paid and license examination successfully retaken. (TCA 55-12-118).

Financial responsibility proven by filing or depositing with Commissioner: (1) Certificate of motor vehicle liability insurance with company meeting requirements of TCA 55-12-120-23; (2) cash or bond to extent of limits of financial responsibility set forth in TCA 55-12-102; or (3) as to self-insured party owning 25 or more vehicles, certificate of self-insurance issued by Commissioner. (TCA 55-12-119). Where party whose license and registration is revoked has job requiring motor vehicle operation, employer may produce required proof and license for work only may be issued. (TCA 55-12-132). Except in case of reckless driving, proof must be maintained three years. (TCA 55-12-126). Department of Safety may release proof of financial responsibility requirement three years after revocation if no civil judgment is unsatisfied. (TCA 55-12-125).

Misdemeanor penalties provided under TCA 55-12-130 for selling vehicle whose registration is revoked without so informing purchaser.

Hearings.

Commissioner must provide hearing upon request made within 20 days of order or act. (TCA 55-12-103).

Insurance.

No requirement for. But see subhead Proof of Financial Responsibility, supra.

Creditor or lender requiring and obtaining collision but not liability insurance as condition of loan, must so notify borrower in writing. (TCA 56-7-1106).

Uninsured motorist clause required in all automobile liability policies (excepting excess or umbrella policies) unless prospective insured expressly refuses such coverage in writing. (TCA 56-7-1201). Compulsory arbitration requirements in uninsured motorist clause unenforceable. (TCA 56-7-1206). Insurer must be served with process if insured intends to rely on uninsured motorist coverage. (TCA 56-7-1206).

John Doe warrant must be issued to bring action against unknown owner of motor vehicle under uninsured motorist statutes. (TCA 56-7-1206).

Any cause of action belonging to an insured against his automobile liability insurer based upon negligence or bad faith shall survive death of such insured, may be assignable by express act of insured, and shall be assigned by operation of law to trustee, receiver or other representative of insured's creditors. (TCA 20-5-120).

No-Fault Insurance.

Not adopted.

Foreign Vehicle.

Nonresident owner of passenger vehicle not operated for hire may operate vehicle in this state for 30 days or for such period as would be permitted to foreign registered vehicle in state of registration, provided same is duly registered in state of residence and license plates are displayed. This provision applies to vehicles registered in another state or territory or in Canada or Mexico. Nonresident owner operating vehicle for compensation or for transportation of merchandise regularly or for consecutive period of 30 days must register vehicle and obtain certificate of title in this state, except this state will grant exemption for same period allowed in state of registration. Commissioner may also enter into reciprocal agreements with other jurisdictions for operation of vehicles of nonresident owners. (TCA 55-4-120, TCA 55-4-121).

Actions Against Nonresidents.

Owner of motor vehicle not licensed in Tennessee, who uses highways of state, thereby consents to service of process on him by serving Secretary of State as agent, in any action against him arising out of accident or injury in state in which such vehicle was involved. Resident absent from state for 30 days may be served by serving Secretary of State. Agency of Secretary of State to accept service of process in actions for personal injuries and property damages continues until cause of action barred by statute of limitations. Secretary may be considered resident of county in which action arose or in which plaintiff resides. (TCA 20-2-203-05).

Direct Actions.

No statutory provision for direct action against insurer by injured party prior to obtaining judgment against insured. However, liability insurance carrier liable for failure to respond to proper demand to disclose information in its possession as to whereabouts of owner or operator of motor vehicle. (TCA 56-7-1103-05). (For requisites of demand, see category 5 Civil Actions and Procedure, topic 5.20 Process.)

Motor Vehicle Carriers.

Department of Safety has full control and jurisdiction over buses and trucks (motor carriers) and contract haulers (those operating under individual contracts). (TCA 65-15-106; 109). Motor carrier, contract hauler, or exempt for-hire motor carrier must receive permit from department or from any state designated as base jurisdiction state for that carrier pursuant to 49 U.S.C. § 11506, as amended. (TCA 65-15-107). Tractor and trailer combinations and tractor and semitrailer combinations are subject to safety inspections but need not obtain interstate or intrastate permits. (TCA 65-15-113). Before any such permit may issue, applicant must post liability insurance policy and, if intrastate carrier, policy of cargo or passenger insurance, satisfactory to Department. (TCA 65-15-110). Department shall inspect and certify homemade or materially reconstructed trailers, semi-trailers, and pole trailers required to be titled or registered for compliance with safety rules. Inspection fee $25 per trailer. (TCA 65-15-113).

Exemptions from motor vehicle carrier provisions set out in TCA 65-15-103.

Jitneys for hire are declared common carriers, and a license and $5,000 bond are required. Counties and incorporated towns and cities may grant permit and impose tax. (TCA 65-19-101 et seq.).

As condition precedent to operating on any public thoroughfare in state, any freight motor vehicle must be registered with Department of Revenue; fee from $48.50 to $1,332.50 according to weight of vehicle and load plus 2.5% safety inspection fee. (TCA 55-4-113). Temporary permit may be obtained; maximum time period 30 days and fee of $10. (TCA 55-4-115). Passenger motor vehicle registration fees range from $37.13 for motor vehicles with not more than seven seats for passengers to $317.63 for motor vehicles with over 35 seats for passengers. (TCA 55-4-112). Freight motor vehicles must display name and address of motor carrier under whose authority it is operated and identifying number on both sides of vehicle. (TCA 55-4-114).

Annual fees per vehicle of 2.5% of registration fees provided for in TCA 55-4-113, for 1994 and thereafter are provided to protect highways and to promote public safety. (TCA 65-15-116).

Motor Vehicle Trailers.

After Dec. 31, 2004, new tires, appropriate for weight, are required on new trailers manufactured in, or sold in, Tennessee, if such trailers weigh more than 3,000 pounds; however, buyer may waive this requirement in writing if trailer was not manufactured in Tennessee. (TCA 55-9-217).

Gasoline Tax.

See category 22 Taxation, topic 22.08 Gasoline and Special Fuels Taxes.

24 FORMS

Commercial Code Forms

(Click here to view)

1

TEXAS LAW DIGEST

—Scope —

Prepared for 2010 edition by LexisNexis(R).

(Unless otherwise indicated, citations refer to articles in Vernon's Texas Statutes ("V.T.S."). The articles are numbered the same in Vernon's Annotated Revised Civil Statutes of 1925 ("Tex. Rev. Civ. Stat. Ann.") with pocket supplements. "Tex. Prob. Code Ann." indicates Probate Code. "Tex. Penal Code Ann." indicates Penal Code. "Tex. Code Crim. Proc. Ann." indicates Code of Criminal Procedure. "Tex. R. Civ. P." indicates Texas Rules of Civil Procedure, promulgated by the Supreme Court of Texas. "Tex. R. App. P." indicates Texas Rules of Appellate Procedure, promulgated by Supreme Court of Texas and Court of Criminal Appeals of Texas. "Tex. R. Evid." indicates Rules of Evidence. "U. C. C." indicates Uniform Commercial Code. "Tex. Bus. Corp. Act Ann." indicates Business Corporation Act. "Tex. Misc. Corp. Laws Act" indicates Miscellaneous Corporation Laws Act. "Tex. Bus. & Com. Code Ann." indicates Business & Commerce Code. "Tex. Ltd. Liab. Co. Act" indicates Texas Limited Liability Company Act. "Tex. Tax Code Ann." indicates Tax Code. "Tex. Ins. Code Ann." indicates Insurance Code. "Tex. Elec. Code Ann." indicates Election Code. "Tex. Fam. Code Ann." indicates Family Code. "Tex. Water Code Ann." indicates Water Code. "Tex. Alco. Bev. Code Ann." indicates Alcoholic Beverage Code "Tex. Lab. Code Ann." indicates Labor Code. "Tex. Nat. Res.Code Ann." indicates Natural Resources Code. "Tex. Parks & Wild. Code Ann." indicates Parks & Wildlife Code. "Tex. Agric. Code Ann." indicates Agriculture Code. "Tex. Loc. Gov't Code Ann." indicates Local Government Code. "Tex. Prop. Code Ann." indicates Property Code. "Tex. Civ. Prac. & Rem. Code Ann.", indicates Civil Practice and Remedies Code. "Tex. Gov't Code Ann." indicates Government Code. "Tex. Health. & Safety Code Ann." indicates Health & Safety Code. "Tex. Admin. Code" indicates Texas Administrative Code. "Tex. Transp. Code Ann." indicates Transportation Code. "Tex. Const." indicates Texas Constitution. "Tex. Fin. Code Ann." indicates Finance Code. "Tex. Occ. Code Ann." indicates Occupation Code. "Tex. Estates Code Ann." indicates Estates Code. Session laws are cited by year and House or Senate Bill numbers. Parallel citations to the Southwestern Reporter begin with 66 Tex. and 21 Tex. App. Since 1963 Southwestern Reporter is the only official reporter for Texas reported cases.)

Note: Legislature meets for 140-day regular session on 2d Tues. of Jan. in odd-

numbered years.

Note: Texas courts prefer citations formatted per the Texas Rules of Form (Greenbook) instead of The Bluebook: Uniform System of Citation

Note: Texas Estates Code adopted, effective Jan. 1, 2014 – significant portions of the Probate Code repealed as of the same date.

Revisions are current through Dec. 31, 2009.

1 INTRODUCTION

1.00A ADMINISTRATIVE PROCEDURE:

Controlled primarily by Administrative Procedure Act. (Tex. Gov't Code Ann. §2001.001 et seq.). Agency rules kept by Secretary of State as Texas Register and Administrative Code. (Tex. Gov't Code Ann. §2002.001 et seq.). Lobbyists before agencies must register, report activities. (Tex. Gov't Code Ann. §305.001 et seq.).

1.01 GOVERNMENT AND LEGAL SYSTEM:

The state of Texas is constituent state of the United States of America. For further discussion of the U.S. federal system, see Introduction to the Federal Government of the United States at the beginning of this volume. great many laws are promulgated by the federal government of the United States, and are not reflected in the topics below. See the Introduction to this volume for references to the federal law topics covered.

Like all but one of the United States, Texas has common law legal system, with roots in English common law. For information on the courts and legislature of Texas, see category 6 Courts and Legislature.

1.02 [RESERVED]

1.03 HOLIDAYS:

Legal holidays include following national holidays: Jan. 1, 3d Mon. in Jan., 3d Mon. in Feb., last Mon. in May., July 4, 1st Mon. in Sept., Nov. 11, 4th Thurs. in Nov., and Dec. 25. Legal holidays also include following state holidays: Jan. 19, Mar. 2, Apr. 21, June 19, Aug. 27, Fri. after Thanksgiving Day, Dec. 24 and Dec. 26. Optional holiday includes Rosh Hashanah, Yom Kippur and Good Friday, and general election days. (Tex. Gov't Code Ann. §662.003). There are no mandatory holidays for Texas banks.

The commencement of civil actions and the issuance or service of process on Sunday is prohibited, except in the case of injunction, attachment, garnishment, sequestration, or distress proceedings (Tex. R. Civ. P. 6), but these restrictions do not apply to legal holiday. Citation by publication published on Sunday is valid. (Tex. R. Civ. P. 6).

Legality of Transactions on Holiday.

Contracts made on Sunday or holiday are valid, unless made in respect to matter prohibited to be done on such day. Judicial acts performed on Sunday are of doubtful validity, but are probably valid when performed on any other holiday.

1.04 OFFICE HOURS AND TIME ZONE:

Texas is in the Central (GMT -06:00) time zone. Office hours are generally from 9 a.m. to 5 p.m.

2 BUSINESS ORGANIZATIONS

2.01 AGENCY:

Common law rules apply.

2.02 ASSOCIATIONS:

Note: The Texas Business Organizations Code, Tex. Bus. Orgs. Code §1.001 et seq. applies to business entities formed on or after Jan. 1, 2006. For business entities formed before that date, the following laws apply until Jan. 1, 2010.

Texas Business Corporation Act, Tex. Bus. Corp. Act Ann. art. 1.01 et seq.

Texas Miscellaneous Corporation Laws Act, Tex. Rev. Civ. Stat. Ann. art. 1302 et seq.

Texas Non-Profit Corporation Act, Tex. Rev. Civ. Stat. art. 1396 et seq.

Texas Limited Liability Company Act, Tex. Rev. Civ. Stat. art. 1528n §1.01 et seq.

Texas Revised Partnership Act, Tex. Rev. Civ. Stat. art. 6132b §1.01 et seq.

Texas Revised Limited Partnership Act, Tex. Rev. Civ. Stat. art. 6132a §1.01 et seq.

Limitation of individual liability may be secured only by forming corporation, limited liability company, or limited partnership. Joint stock companies and associations are treated as partnerships.

Formation.

Various types of associations are too numerous to specify in detail. They are formed by voluntary association of individuals combining for lawful purposes. There are statutory enactments relating to organizations such as fraternal benefit associations, agricultural associations, farmers' societies, educational societies, religious societies, labor organizations, cemetery associations, limited banking associations, etc., but there is no statutory provision governing associations generally.

Rights and Powers.

An association is governed by the provisions of its constitution, articles and by-laws. There is no provision for owning or holding of real property, but trustees may hold same for benefit of association, or title may be declared in members.

Liabilities.

Officers of an association and members who assent to contract are personally liable.

Actions.

An unincorporated association may either sue or be sued in its common name for the purpose of enforcing for or against it substantive right. (Tex. R. Civ. P. 28).

Nonprofit Associations.

Unincorporated nonprofit associations are governed by Tex. Bus. Orgs. Code §252.001

et seq. Nonprofit association, in its name, may acquire, hold, encumber, or transfer estate or interest in real or personal property (Tex. Bus. Orgs. Code §252.004). Nonprofit association is legal entity separate from its members for purposes of determining and enforcing rights, duties, and liabilities in contract and tort (Tex. Bus. Orgs. Code §252.006). Nonprofit association, in its name and, in certain instances, on behalf of its members, may institute, defend, intervene, or participate in judicial, administrative or other governmental proceeding or in arbitration, mediation, or any other form of alternative dispute resolution (Tex. Bus. Orgs. Code §252.007). Nonprofit association must keep correct and complete books and records of account for at least three years (Tex. Bus. Orgs. Code §252.010).

Nonprofit Corporations.

See topic 2.03 Corporations, subheads Introductory Statement, and Nonprofit Corporations.

Limited Liability Company.

Limited liability companies are governed by Tex. Bus. Orgs. Code §101.001 et seq. They may be organized for any lawful purpose (Tex. Bus. Orgs. Code §3.005[a][3]). Organizer must file executed certificate of formation with Secretary of State (Tex. Bus. Orgs. Code §§101.051, 101.0515) and pay appropriate fee (Tex. Bus. Orgs. Code §4.154). Only one member is required. (Tex. Bus. Orgs. Code §101.001[1]). Certificate must state name (including “Limited Liability Company”, “Limited Company”, or abbreviation of either phrase) (Tex. Bus. Orgs. Code §5.056), period of duration which may be perpetual, purpose, address of its initial registered office, name of registered agent at that address, statement whether company is to be managed by managers or by members, and name and address of managers or members and name and address of each organizer (Tex. Bus. Orgs. Code §3.005). Transferee of membership interest has certain rights and duties. (Tex. Bus. Orgs. Code §§101.108–101.110). Members not liable for any debt, obligation, or liability of company, unless company agreement provides otherwise. (Tex. Bus. Orgs. Code §101.114). Foreign limited liability companies must apply for certificate of authority from Secretary of State (Tex. Bus. Orgs. Code §§9.001, 9.004) and pay appropriate fee (Tex. Bus. Orgs. Code §4.160). Special rules apply to professional limited liability companies. (Tex. Bus. Orgs. Code §§5.059, 301.001 et seq.).

Dissolution.

Association termination and winding up procedures governed by Tex. Bus. Orgs. Code §11.001 et seq.

Professional Associations.

Any one or more persons duly licensed to practice profession under laws of Texas may, by complying with certain provisions, form professional association, as distinguished from either partnership or corporation (Tex. Bus. Orgs. Code §§3.015, 302.001 et seq.).

See also topic 2.03 Corporations, subhead Professional Corporations.

2.03 CORPORATIONS:

Private corporations must be created under general laws. (Tex. Const. art. 12, §1).

Introductory Statement.

Note: The Texas Business Organizations Code, Tex. Bus. Orgs. Code §1.001 et seq. applies to corporations formed on or after Jan. 1, 2006. For corporations formed before that date, the following laws apply until Jan. 1, 2010.

Texas Business Corporation Act, Tex. Bus. Corp. Act Ann. art. 1.01 et seq.

Texas Miscellaneous Corporation Laws Act, Tex. Rev. Civ. Stat. Ann. art. 1302 et seq.

Texas Non-Profit Corporation Act, Tex. Rev. Civ. Stat. art. 1396 et seq.

General Supervision.

Secretary of State administers Texas Business Organizations Code (and Code's predecessors until Jan. 1, 2010). Mailing address — Corporations Section, Secretary of State, P.O. Box 13697, Austin, TX 78711.

Purposes.

Corporations may be organized for any lawful purpose or purposes unless otherwise provided by the Code (Tex. Bus. Orgs. Code §§2.001–2.012). Corporations may be organized for single purpose of acting as trust company, subject to certain special provisions. (Tex. Fin. Code Ann. §181.004).

Corporate name of domestic or foreign corporation doing business in state must contain the word “corporation,” “company,” “limited,” or “incorporated,” or abbreviation of one of them (Tex. Bus. Orgs. Code §5.054). Name must not contain any word or phrase indicating it is organized for any purpose not in articles. It must not be same as or deceptively similar to name of domestic corporation, limited partnership, limited liability company, nonprofit corporation, or foreign corporation authorized to transact business in state, or name reserved or registered under Code or any other statute providing for reservation of names by limited partnership or limited liability company. If name is similar, consent may be obtained from corporation having similar name or from corporation or person for whom name is reserved. (Tex. Bus. Orgs. Code §5.053). Words “Veteran”, “Legion”, “War” and similar words prohibited in corporate name without certain approval or permission. (Tex. Bus. Orgs. Code §5.062). Domestic or foreign corporation authorized to transact business in state may employ assumed name upon filing assumed name certificate (Tex. Bus. Orgs. Code §5.051). Filing certificate of formation, name reservation or registration application does not authorize use of corporation name in violation of rights of another under the Code, Federal Trademark Act, or common law. (Tex. Bus. Orgs. Code §5.001). See subhead Tradenames under category Intellectual Property, topic Trademarks and Tradenames.

Reserved Name.

Exclusive right to corporate name may be reserved by any person. Reservation is made by filing with Secretary of State application executed by applicant or attorney or agent and will reserve name for 120 days if it is available. Successive 120 day extensions allowed if filed within 30 days of expiration of last 120 day period. Right to specified name may be transferred by filing with Secretary of State notice of transfer. Reservation of name may be terminated by filing application for cancellation of reservation with Secretary of State. (Tex. Bus. Orgs. Code §§5.101–5.106).

Informal Corporate Name Clearance.

Information Clerk at Secretary of State's Office will, in response to letter, telephone call to (512) 463-5555 or email at corpinfo@sos.state.tx.us, inform inquirer that particular name “appears to be available.” There is no fee for this service. Positive assurance that name is available is given only after official application to reserve or register name. Availability searches can also be performed electronically using SOSDirect system located online at http://direct.sos.state.tx.us/acct/acct-login.asp.

Registered Name.

Any corporation organized for purpose of operating bank, trust company, building and loan association or company, or insurance company currently holding valid certificate of authority to transact business in State of Texas, and any foreign corporation not authorized to transact business in state may register its corporate name provided it is not same as or deceptively similar to name of existing domestic corporation, foreign corporation authorized to transact business in state or name reserved or registered. Application for registration is filed with Secretary of State by officer of corporation listing name of corporation, state or territory where incorporated, date of incorporation, statement that it is carrying on or doing business and brief statement of business in which it is engaged. Also filed is certificate of official having custody of corporate records in its home state that corporation is in good standing, together with required registration fee. See subhead Filing Fees, infra. Registration is effective for one year unless voluntarily withdrawn and may be renewed by refiling annually 90 days before expiration date. (Tex. Bus. Orgs. Code §§5.151–5.155).

See also category 17 Intellectual Property, topic 17.01 Trademarks and Tradenames.

Term of corporate existence presumed to be perpetual unless stated otherwise in governing documents. (Tex. Bus. Orgs. Code §3.003).

Organizers.

Any person having capacity to contract for the person or for another may act as organizer by signing and filing certificate of formation with Secretary of State. (Tex. Bus. Orgs. Code §§3.004, 3.005).

Certificate of Formation.

Certificate of Formation must set forth: (1) corporate name, (2) type of filing entity being formed, (3) purpose or purposes for which corporation is formed, which may be stated to be or include any lawful purpose, (4) period of duration, if corporation is not formed to exist perpetually and is intended to have specific period of duration, (5) street address of initial registered office and the name of initial registered agent, (6) name and address of each organizer, unless corporation is formed under plan of conversion or merger, (7) if corporation is formed under plan of conversion or merger, statement to that effect and, if formed under plan of conversion, the name, address, date of formation, prior form of organization, and jurisdiction of formation of the converting entity; and (8) any other information required by this code to be included in the certificate of formation for the filing entity. (b) The certificate of formation may contain other provisions not inconsistent with applicable law. (Tex. Bus. Orgs. Code §3.005). Additional provisions prohibiting cumulative voting, etc., may also be included. It is not necessary to set forth in certificate any corporate powers enumerated in the Code.

Filing of Certificate.

Certificate of formation filed with Secretary of State, in person to Corporation Division, James Earl Rudder Office Building, 1019 Brazos, Austin, Texas 78701, by mail to Corporations Section, Secretary of State P.O. Box 13697, Austin, TX 78711, or electronically using SOSDirect system located online at http://direct.sos.state.tx.us/acct/acct-login.asp.

Incorporation Tax.

None; however, see subhead Franchise Tax, catchline Initial Tax to Be Paid, infra.

Filing fees charged by Secretary of State are: (1) for filing certificate of formation, $300; (2) for filing certificate of amendment, $150; (3) for filing an application of foreign corporation for registration to transact business in this state, $750; (4) for filing an application of foreign corporation for an amended registration to transact business in this state, $150; (5) for filing restated certificate of formation and accompanying statement, $300; (6) for filing statement of change of registered office, registered agent, or both, $15; (7) for filing statement of change of name or address of registered agent, $15, except that the maximum fee for simultaneous filings by registered agent for more than one corporation may not exceed $750; (8) for filing statement of resolution establishing one or more series of shares, $15; (9) for filing certificate of termination, $40; (10) for filing certificate of withdrawal of foreign corporation, $15; (11) for filing certificate from the home state of foreign corporation that the corporation no longer exists in that state, $15; (12) for filing bylaw or agreement restricting transfer of shares or securities other than as an amendment to the certificate of formation, $15; (13) for filing an application for reinstatement of certificate of formation or registration as foreign corporation following forfeiture under the Tax Code, $75; (14) for filing an application for reinstatement of corporation or registration as foreign corporation after involuntary termination or revocation, $75; and (15) for filing any instrument as provided by the Code, $15. (Tex. Bus. Orgs. Code §4.152).

Effectiveness of Filings.

Certain types of filings may be made effective as of time at future date if statutory requirements are met. (Tex. Bus. Orgs. Code §4.052).

Filings of Reproduction.

Any original instruments required or authorized to be filed with Secretary of State may be electronic, photographic, photostatic, facsimile or other reproduction. Any signature may be facsimile. (Tex. Bus. Orgs. Code §4.003).

License to do Business.

If certificate of formation is approved, Secretary of State sends acknowledgement of filing to corporation or its representative. (Tex. Bus. Orgs. Code §4.002). Corporate existence begins upon filing unless otherwise specified. (Tex. Bus. Orgs. Code §4.051).

Organization.

Except for corporation that is converted entity or incorporated pursuant to plan of merger or conversion which plan contained by-laws and officers of corporation, after issuance of certificate, organizational meeting of directors named in articles must be held upon call of majority of directors for purpose of adopting by-laws, electing officers, and transacting other business. Directors must give at least three days notice by mail to each director stating time and place of meeting. (Tex. Bus. Orgs. Code §21.059).

Paid-in Capital Requirements.

There are no paid-in capital requirements.

Amendment or Restatement of Certificate of Formation.

Corporate certificate of formation may be amended or restated (Tex. Bus. Orgs. Code §§3.051–3.063). Procedures for amendment or restatement of for-profit corporation's certificate are governed by Tex. Bus. Orgs. Code §§21.051–21.056. Procedures for amendment or restatement of nonprofit corporation's certificate are governed by Tex. Bus. Orgs. Code §§22.105–22.109.

Bylaws.

Initial bylaws adopted by directors and may contain any provisions for regulation and management of corporation not inconsistent with law or corporate certificate of formation. Directors may amend or repeal or adopt new bylaws unless power reserved in certificate of formation exclusively to shareholders or shareholders provide in bylaws that directors may not amend or repeal bylaws. Unless certificate of formation or bylaws adopted by shareholders provide otherwise, directors may amend, repeal or adopt bylaws. (Tex. Bus. Orgs. Code §21.057).

Ultra Vires.

Lack of capacity of corporation is no claim or defense at law or in equity, and no act of corporation or conveyance or transfer of property to or by corporation is invalid for this reason. That an act, conveyance or transfer is beyond scope of purposes may be asserted in proceeding by shareholder against corporation for injunction, by corporation acting directly or through receiver, trustee or other representative or through shareholders in representative suit against any officers or directors for exceeding their authority; or in proceeding by Attorney General for dissolution, injunction from transacting unauthorized business, or to enforce divestment of real property acquired or held contrary to law. (Tex. Bus. Orgs. Code §20.002).

Shares may be divided into classes with or without par value, with such designations, preferences, limitations and relative rights as are stated in articles. All shares of same class must be of same par value and must be identical in all respects unless such class has been divided into one or more series in articles. Articles may limit, deny or provide special voting rights for shares of any class or series to extent consistent with Code. Any designation, preference, limitation and relative right may be made dependent upon facts ascertainable outside certificate of formation which may include future Acts of corporation provided manner of operation of facts is clearly and expressly set forth in certificate of formation. Corporation may issue shares of one or more classes: Redeemable, subject to statutory compliance, at option of corporation, shareholder or another person or upon occurrence of designated event; entitling holders to cumulative, noncumulative or partially cumulative dividends; having preference as to dividends; having preference in assets; exchangeable at option of corporation, shareholder, another person, or occurrence of designated event, for shares, obligations, indebtedness, evidence of ownership, rights to purchase securities or other securities or one or more other domestic or foreign corporations or other entities or for other property or combination of above and convertible, at option of corporation, shareholder or another person or upon occurrence of designated event, into shares of other series or class, subject to certain limitations. Special provisions for corporations registered as open-end company under Federal Investment Company Act are set forth. (Tex. Bus. Orgs. Code §21.154).

Variations in relative rights and preferences between different series of shares of class may be fixed by certificate of formation or by directors pursuant to authority in certificate, on compliance with statutory procedure. Authorization to establish series of unissued shares of any class, and to determine their relative rights and preferences within limitations may be given to board of directors by certificate of formation. (Tex. Bus. Orgs. Code §21.155). Corporation may issue stock rights, options and convertible indebtedness. (Tex. Bus. Orgs. Code §§21.151–21.173).

Certificate of formation states number of authorized shares (Tex. Bus. Orgs. Code §21.151) and subscriptions are governed by Tex. Bus. Orgs. Code §§21.165–21.167, which is based on Model Business Corporation Act.

Restrictions on Transfer of Shares.

Reasonable restrictions may be imposed by corporation certificated of formation, bylaws or by written agreement. Share transfer restrictions are invalid as to securities previously issued unless holder voted for restrictions or is party to agreement imposing them. (Tex. Bus. Orgs. Code §21.210).

Preemptive Rights.

No preemptive rights unless granted by certificate of formation (Tex. Bus. Orgs. Code §21.203). For corporations, incorporated prior to Sept. 2003, in limited circumstances, shareholder's preemptive rights are statutorily granted. (Tex. Bus. Orgs. Code §21.208). .

Issuance of Shares.

If expressly authorized by certificate of formation, board of directors may establish series of unissued shares of any class by setting and determining designations, preferences, limitations, and relative rights, including voting rights, of the shares of the series to be established to the same extent that designations, preferences, limitations, or relative rights could be stated if fully specified in certificate of formation (Tex. Bus. Orgs. Code §21.155). Reasonable organization and underwriting expenses may be paid from consideration received for shares. (Tex. Bus. Orgs. Code §21.172). No certificate can be issued until consideration fully paid. (Tex. Bus. Orgs. Code §21.157). Fractional shares, if corporation elects to issue them, may be voted. (Tex. Bus. Orgs. Code §21.163).

Transfer of Shares.

Shares may be transferred per Business Organizations Code (Tex. Bus. Orgs. Code §21.209) subject to restrictions (Tex. Bus. Orgs. Code §§21.210–21.213). See category 3 Business Regulation and Commerce, topic 3.09 Commercial Code.

Uniform Gifts to Minors Act adopted. (Tex. Prop. Code Ann. §141.001 et seq.).

Uniform Securities Ownership by Minors Act.

Not adopted but see Texas Uniform Gifts to Minors Act. (Tex. Prop. Code Ann. §141.001 et seq.).

Uniform Simplification of Fiduciary Security Transfers Act repealed.

Share Transfer Tax.

None.

Shareholders.

No preemptive rights unless granted by certificate of formation (Tex. Bus. Orgs. Code §21.203) or limited circumstances under Tex. Bus. Orgs. Code §21.208) See subhead Share Certificates, catchline Preemptive Rights, supra. Cumulative voting exists only if expressly authorized by certificate of formation and is subject to limitations. (Tex. Bus. Orgs. Code §§21.360–21.362). Corporation incorporated prior to Sept. 1, 2003 have preemptive rights and cumulative voting, unless denied by certificate of formation. (Tex. Bus. Orgs. Code §21.362).

Redemption and Cancellation of Shares.

Subject to Code limitations and certificate of formation, corporation may redeem shares subject to redemption by method prescribed which method includes notice to shareholders not less than 21 nor more than 60 days before date fixed for redemption. (Tex. Bus. Orgs. Code §§21.302–21.305).

Subscription for Shares.

Subscriptions are governed by Tex. Bus. Orgs. Code §§21.165–21.167, which is based on Model Business Corporation Act. Unless otherwise provided therein, subscription for shares of corporation to be organized may not be revoked within six months unless consent of all other subscribers or subscription provides for different time period. Subject to certificate of formation, stock options may be issued (Tex. Bus. Orgs. Code §21.168).

Shareholder Agreements.

Shareholders may execute agreement among themselves and agreement is effective even though inconsistent with provisions of Tex. Bus. Corp. Act, in that it: (1) Restricts discretion or power of board of directors; (2) eliminates boards and establishes another management system; (3) establishes who may be directors or officers and their terms of office, employment; (4) governs distributions and determination of profits and losses; (5) governs exercise and division of voting power; (6) establishes terms and conditions for transfer or use of corporate property; (7) authorizes arbitration or grants authority to any person to resolve issues where there is deadlock in managerial voting; (8) requires dissolution of corporation at shareholder's request or upon occurrence of event or contingency; (9) otherwise governs exercise of corporate power or relationship among shareholders, directors and corporation except in manner that is contrary to public policy. . Agreements must be contained in (A) certificate of formation or bylaws if approved by all shareholders at time of agreement; or (B) written agreement that is (i) signed by all shareholders at time of agreement; and (ii) made known to corporation; and amended only by all of the shareholders at the time of amendment, unless agreement provides otherwise. (Tex. Bus. Orgs. Code §21.101). Existence of agreement must be conspicuously noted on certificates of outstanding shares (Tex. Bus. Orgs. Code §21.103). Person who purchases certificate without notation and without knowledge of agreement may rescind purchase (Tex. Bus. Orgs. Code §21.105). Agreement ceases upon listing of shares on national security exchange, quoting shares on interdealer quotation system or trading shares in market maintained by national securities association (Tex. Bus. Orgs. Code §21.109). Agreement valid for ten years unless specifically provided otherwise. (Tex. Bus. Orgs. Code §21.102).

Shareholders' Liability.

Existence of or performance under shareholders' agreement is not ground for imposing personal liability on shareholder for act or obligation of corporation by disregarding the separate existence of corporation or otherwise, even if agreement or performance under the agreement (1) treats corporation as if corporation were partnership or in manner that otherwise is appropriate only among partners; (2) results in corporation being considered partnership for purposes of taxation; or (3) results in failure to observe corporate formalities otherwise applicable to the matters governed by the agreement. (Tex. Bus. Orgs. Code §21.107).

Shareholders' meetings may be held in or out of state, as provided in by-laws, or by conference telephone, unless restricted by articles or in by-laws, or at registered office. Failure to hold annual meeting as provided in by-laws does not dissolve corporation. If annual meeting not held within any 13-month period and written consent of shareholders has not been executed in lieu of meeting, court in county where principal office of corporation is located may order meeting to be held upon application of any shareholder. Special meetings may be called by president, directors, or other person or persons authorized in articles or by-laws or by holders of at least 10% of all shares entitled to vote unless certificate of formation provide for greater percentage, not to exceed 50%. Record date is date first shareholder signs notice of meeting. Only business within purpose or purposes described in notice may be conducted at special meeting. (Tex. Bus. Orgs. Code §21.352).

Written or printed notice stating place (if not held by teleconference), day and hour of meeting and purpose of special meeting must be delivered to shareholders in person or by mail not less than 10 nor more than 60 days before meeting. Notice need not be given to certain shareholders in certain instances. (Tex. Bus. Orgs. Code §21.353). To determine shareholders entitled to notice, to vote or to receive distribution or share dividend, directors may close share transfer records or fix record date in advance any time at least 10 days before meeting. (Tex. Bus. Orgs. Code §§21.355, 21.357). Provisions for shareholder consents without meeting prescribed by statute. (Tex. Bus. Orgs. Code §21.356). Unless articles provide for greater or lesser number, majority of holders of shares entitled to vote is quorum, but quorum must not be less than 1/3 of shares entitled to vote. Unless articles or bylaws provide otherwise, directors shall be elected by majority of votes of shareholders entitled to vote at meeting of shareholders at which quorum is present. (Tex. Bus. Orgs. Code §21.358). Upon written shareholder consent, notices required may be given electronically. (Tex. Bus. Orgs. Code §21.3531).

Officer or agent in charge of share transfer books must make voting list at least ten days before meeting and produce and keep it open at meeting. Alternatively, list of shareholders may be kept on electronic network accessible only by shareholders of corporation. Failure to do so does not affect validity of action at meeting, but officer or agent is liable to any shareholder suffering damage. (Tex. Bus. Orgs. Code §21.372). Each share is entitled to one vote on each matter, unless otherwise provided in articles. (Tex. Bus. Orgs. Code §21.366). Shareholder may vote in person, or by written proxy; proxy is valid for no more than 11 months, unless otherwise provided in proxy. Proxies are revocable unless otherwise specified, and coupled with interest. If expressly allowed by certificate of formation, after any shareholder gives prior written notice to secretary, including notice by telephone or electronic transmission, each shareholder may accumulate his votes for one or more candidates for director. Corporation, administrator, executor, guardian, conservator or receiver may vote shares he controls and trustee and pledgee may vote shares registered in their names. (Tex. Bus. Orgs. Code §21.367, §21.371).

Action by Consent of Shareholders Without Meeting.

Any action required to be taken at meeting of shareholders may be taken without meeting and without prior notice if consent(s) in writing, setting forth action so taken, is signed by all shareholders entitled to vote. (Tex. Bus. Orgs. Code §6.201).

Voting Trust.

Any number of shareholders may enter into written voting trust agreement, depositing counterpart with corporation at registered office or principle place of business and transferring shares to trustee or trustees. Any number of shareholders may also agree in writing among themselves or with corporation for voting of shares. Counterpart of voting agreement must be deposited at corporation's principal place of business or registered office and share certificates must be endorsed as prescribed by statute. Counterparts of voting trusts and agreements are subject to same examination as books and records of corporation. (Tex. Bus. Orgs. Code §6.251).

Tender Offers.

See category 3 Business Regulation and Commerce, topic 3.24 Securities.

Shareholders' Derivative Actions.

Derivative actions are governed by Tex. Bus. Orgs. Code §21.551 et seq. A shareholder may not institute or maintain derivative proceeding unless: (1) the shareholder (a) was shareholder at the time of act or omission complained of; or (b) became shareholder by operation of law from person that was shareholder at the time of act or omission complained of; and (2) the shareholder fairly and adequately represents corporate interests in enforcing the right of the corporation. To extent shareholder has standing to institute or maintain derivative proceeding immediately before merger, Tex. Bus. Orgs. Code subch. J or ch. 10 may not be construed to limit or terminate shareholder's standing after merger (Tex. Bus. Orgs. Code §21.552). Court having jurisdiction in derivative suit may, upon final judgment for one or more defendants and finding that suit was brought without reasonable cause against such defendants, require plaintiff to pay expenses to such defendants. (Tex. Bus. Orgs. Code §21.561). Alternative rules apply to closely held corporations. (Tex. Bus. Orgs. Code §21.563). See also category 5 Civil Actions and Procedure, topic 5.07 Costs.

Directors.

Except as otherwise permitted by shareholder agreements, powers, business and affairs of corporation are managed under authority and direction of board of directors who need not be residents or shareholders unless certificate of formation or by-laws so require. (Tex. Bus. Orgs. Code §21.402). There must be at least one director, and otherwise number is fixed by certificate of formation or by-laws except as to initial board which is fixed by certificate. Holders of shares entitled to vote shall elect directors annually. Certificate may provide that holders of class or series shall be entitled to elect one or more directors. By-laws may provide for classification and staggered election. (Tex. Bus. Orgs. Code §§21.403–21.408). Vacancies are filled by vote of majority of remaining directors or by organizers or shareholders in certain circumstances. (Tex. Bus. Orgs. Code §21.418).

Unless removed or upon resignation, each director holds office for term for which he is elected and until his successor is elected and qualified. Certificate of formation or bylaws may provide that at any meeting of shareholders called expressly for that purpose any director or entire board may be removed with or without cause by not less than majority vote of holders then entitled to vote. If holders of class or series or any group thereof are entitled to elect one or more directors, only those holders shall be entitled to vote on removal of directors elected by that class or series, and articles may provide directors with more or less than one vote on specified matters. If corporation allows cumulative voting, if less than entire board is to be removed, no one director may be removed if votes cast against his removal would be sufficient to elect him if then cumulatively voted at election of entire board or, if there are classes of directors, at election of class of directors of which he is part. (Tex. Bus. Orgs. Code §§21.407, 21.409). Upon consent, notices to director may be given electronically. (Tex. Bus. Orgs. Code §21.411).

Directors' Meetings.

Meetings of directors may be held in or out of state or by conference telephone and with or without notice, as prescribed in bylaws. (Tex. Bus. Orgs. Code §6.001). Majority is quorum and majority of directors present at meeting with quorum may act, unless different number or portion required by law, or certificate of formation or bylaws. Certificate or bylaws may not provide for less than 1/3 of number of directors as quorum. (Tex. Bus. Orgs. Code §21.413). Interested directors voting on transactions are governed by specified procedures. (Tex. Bus. Orgs. Code §21.418).

Action by Consent of Directors Without Meeting.

Any action required or permitted to be taken at meeting of board of directors or any committee may be taken without meeting if consent in writing, setting forth action so taken, is signed by all members of board of directors or committee, as case may be. (Tex. Bus. Orgs. Code §6.201).

Powers and Duties of Directors.

Board of Directors exercises powers and manages business of corporation and elects officers (Tex. Bus. Orgs. Code §21.417).

If certificate of formation or by-laws so provide, and subject to certain restrictions, directors, by resolution may designate from among its members committees to act in directors' stead to extent authorized. (Tex. Bus. Orgs. Code §21.416).

Waiver of Notice.

Any notice required to be given shareholder or director may be waived by person entitled to notice. (Tex. Bus. Orgs. Code Tex. Bus. Orgs. Code §§6.052, 21.412).

Liabilities of Directors.

In addition to any other liabilities imposed by law, directors are liable when they vote for or assent to distribution that are not permitted (Tex. Bus. Orgs. Code §21.316). Provisions for limiting liability of directors . (Tex. Bus. Orgs. Code §§7.001, 21.106).

Directors are entitled to rely on certain statements, valuations or information, opinions, reports prepared or presented by officers or employees, legal counsel, public accountants, investment bankers or other persons or committees of directors of which he is not member;

consideration of corporate assets of at least book value; financial information of certain other persons under contractual obligations and under certain conditions are entitled to contribution from shareholders and other directors and from shareholders who received improper distributions. (Tex. Bus. Orgs. Code §21.316). See also subhead Franchise Tax, catchline Penalties, infra.

Officers.

Corporate officers shall be president and secretary, elected by directors. Other officers may be chosen as prescribed by by-laws. Any two or more offices may be held by same person. (Tex. Bus. Orgs. Code §21.417).

Liabilities of Officers.

In discharge of duty or power, officer may in good faith and ordinary care rely on information, opinions, reports or statements prepared or presented by officers, employees, directors, legal counsel, public accountants, investment bankers or other persons. Officer or agent of corporation may be personally responsible as corporation itself for tortious acts when participating in wrong doing. (968 S.W.2d. 20). Failure of appropriate officer to prepare voting lists ten days prior to meeting and keep list at meeting results in liability of such officer to damaged shareholder. (Tex. Bus. Orgs. Code §21.220). See also subhead Franchise tax, catchline Penalties, infra.

Indemnification of Directors and Officers.

Corporation may indemnify person who was, is or is threatened to be made named defendant or respondent in proceeding because person is or was director only if it is determined in accordance with procedures specified in Code that person conducted himself in good faith, reasonably believed in case of conduct in official capacity as director that conduct was in corporation's best interests or in all other cases that conduct was at least not opposed to corporation's best interest and in case of criminal proceeding had no reasonable cause to believe conduct was unlawful. Director may not be indemnified in respect of proceeding in which he is found liable on basis that personal benefit was improperly received or in which found liable to corporation. Director may be indemnified against judgments, penalties, fines, settlements and reasonable expenses, including court costs and attorneys' fees, except if person is found liable to corporation or is found liable on basis that personal benefit was improperly received indemnification is limited to reasonable expenses and shall not be made if person found liable for willful or intentional misconduct in performance of his duty to corporation. If person is found liable to corporation or is found liable on basis that personal benefit was improperly received, indemnification is limited to reasonable expenses actually incurred. Determination of indemnification must be made by directors or committee thereof, special legal counsel selected by directors or committee thereof or by shareholders, as provided in Code. Corporation must indemnify director who is wholly successful, on merits or otherwise, in defense of proceeding in which he is named defendant or respondent because he is or was director. Notwithstanding requirements for indemnification set forth in Act, court of competent jurisdiction may order indemnification that it deems proper and equitable upon determination that director is fairly and reasonably entitled to indemnification in view of all relevant circumstances. Subject to certain requirements, corporation may pay or reimburse reasonable expenses in advance of final disposition of proceeding. Provisions in certificate, bylaws, directors' or shareholders' resolution or agreement that makes mandatory payment or reimbursement are deemed authorization of payment or reimbursement. Any indemnity provision relating to directors that is inconsistent with Code, whether contained in certificate, bylaws, shareholders' or directors' resolutions, any agreement or otherwise, is valid only to extent it is consistent with Code as limited by certificate of formation if limitation exists. To extent that it can indemnify and advance expenses to directors, corporation may indemnify and advance expenses to its officers, employees and agents or to persons serving another corporation, employee benefit plan or other enterprise at corporation's request. Such persons may also be indemnified to further extent consistent with law, certificate, by-laws, etc. Corporation may purchase and maintain insurance or other arrangement on behalf of any director, officer, etc. against liability asserted or incurred in such capacity whether or not corporation would have power to indemnify against that liability under Act. Specific provisions with regard to procuring and maintaining insurance or other arrangements concerning indemnification are set forth. Any indemnification or advance to director must be reported in writing to shareholders with or before notice or waiver of notice of next shareholders' meeting or next submission to shareholders of consent to action without meeting and in any case within 12-month period immediately following date of indemnification or advance. Notwithstanding foregoing, corporation may restrict circumstances where indemnification required or permitted by Code in its certificate. (Tex. Bus. Orgs. Code §8.001 et seq.).

Principal Office.

Corporation has option of determining whether location of its registered office and agent shall correspond with its principal place of business, but place of its designated registered office and agent constitutes statutory place of residence of corporation for venue purposes. (364 S.W.2d 194).

Resident Agent.

Each corporation must have registered office in this state and registered agent. (Tex. Bus. Orgs. Code §5.200 et seq.). The resident agent must consent to serve (Tex. Bus. Orgs. Code §5.2011) and has specific duties that include accepting service and providing certain notices. (Tex. Bus. Orgs. Code §5.206). Designating someone as a registered agent without their consent can result in certain penalties and can adversely affect the liability of the entity. (Tex. Bus. Orgs. Code §§5.207, 5.208). Corporation may change its registered office or registered agent, or both, upon filing prescribed statement with Secretary of State and receipt of approval. (Tex. Bus. Orgs. Code §5.202). Failure to maintain registered agent may subject corporation to involuntary dissolution procedures. (Tex. Bus. Orgs. Code §5.251).

General Powers.

Corporation, , except as otherwise provided by Code, has same powers as an individual to take action necessary or convenient to carry out its business and affairs, including: (1) sue, be sued, and defend suit in entity's business name; (2) have and alter seal and use seal or facsimile of it by impressing, affixing, or reproducing it; (3) acquire, receive, own, hold, improve, use, and deal in and with property or an interest in property; (4) sell, convey, mortgage, pledge, lease, exchange, and otherwise dispose of property; (5) make contracts and guarantees; (6) incur liabilities, borrow money, issue notes, bonds, or other obligations, which may be convertible into, or include option to purchase, other securities or ownership interests in entity, and secure its obligations by mortgaging or pledging its property, franchises, or income; (7) lend money, invest its funds, and receive and hold property as security for repayment; (8) acquire its own bonds, debentures, or other evidences of indebtedness or obligations; (9) acquire its own ownership interests, regardless of whether redeemable, and hold ownership interests as treasury ownership interests or cancel or dispose of ownership interests; (10) be promoter, organizer, owner, partner, member, associate, or manager of an organization; (11) acquire, receive, own, hold, vote, use, pledge, and dispose of ownership interests in or securities issued by another person; (12) conduct its business, locate its offices, and exercise powers granted by this code to further its purposes, in or out of this state; (13) lend money to, and otherwise assist, its managerial officials, owners, members, or employees as necessary or appropriate if loan or assistance reasonably may be expected to benefit, directly or indirectly, entity; (14) elect or appoint officers and agents of entity, establish length of their terms, define their duties, and fix their compensation; (15) pay pensions and establish pension plans, pension trusts, profit-sharing plans, bonus plans, and incentive plans for managerial officials, owners, members, or employees or former managerial officials, owners, members, or employees; (16) indemnify and maintain liability insurance for managerial officials, owners, members, employees, and agents of entity or entity's affiliate; (17) adopt and amend governing documents for managing affairs of entity subject to applicable law; (18) make donations for public welfare or for charitable, scientific, or educational purpose; (19) voluntarily wind up its business and activities and terminate its existence; (20) transact business or take action that will aid governmental policy; (21) renounce, in its certificate of formation or by action of its governing authority, an interest or expectancy of entity in, or an interest or expectancy of entity in being offered an opportunity to participate in, specified business opportunities or specified class or category of business opportunities presented to entity or one or more of its managerial officials or owners; and (22) take other action necessary or appropriate to further purposes of entity. (Tex. Bus. Orgs. Code §2.101).

Service of Process.

President, all vice presidents and registered agent are agents for service. If no registered agent appointed or if registered agent cannot with reasonable diligence be found at registered office, Secretary of State may be served. (Tex. Bus. Orgs. Code §§5.252, 5.255).

Distributions and Share Dividends.

Authorization for and restrictions on making distributions and issuing share dividends are set forth in detail. (Tex. Bus. Orgs. Code §21.302 et seq.).

Sale or Transfer of Corporate Assets.

Corporation asset sales and transfers are governed by Tex. Bus. Orgs. Code §§10.001 et seq., 21.452–21.455.

Unclaimed Dividends.

See category 21 Property, topic 21.01 Absentees, subhead Escheat.

Books and Records.

Corporation must keep books and records that are subject to inspection. (Tex. Bus. Orgs. Code §§3.151–3.153).

Reports.

See subheads Franchise Tax, catchline Report of Corporation; Nonprofit Corporations, catchline Reports, infra.

Corporate Bonds or Mortgages.

See subheads General Powers, clause (9) and Sale or Transfer of Corporate Assets, supra.

Merger, Share Exchange or Acquisition.

Mergers, interest exchanges, conversions and sales of assets are governed by comprehensive procedures set forth in Tex. Bus. Orgs. Code §§10.001 et seq., 21.455

Dissolution, Winding Up, and Termination.

Corporate dissolution is required upon (1) expiration of any period of duration specified in company's governing documents, (2) voluntary decision to wind up company, (3) an event specified in the governing documents of company requiring the winding up, dissolution, or termination of company, other than an event specified in Tex. Bus. Orgs. Code §11.051, (4) an event specified in the Code requiring the winding up or termination of company, other than an event specified in §11.051; or (5) court decree requiring winding up, dissolution, or termination of company, rendered under this code or other law. Procedures are set forth in Tex. Bus. Orgs.

Code §11.051 et seq.

Insolvency and Receivers.

Court , Secretary of State, or Attorney General can obtain involuntary termination and winding up of corporation. (Tex. Bus. Orgs. Code §§11.301–11.305). Court decree dissolves corporation (Tex. Bus. Orgs. Code §11.412). Special provisions govern involuntary termination of close corporation. (Tex. Bus. Orgs. Code §21.757)

Close corporations are regulated by Tex. Bus. Orgs. Code §21.701 et. seq.

Close corporation is defined as corporation formed in conformance with Tex. Bus. Orgs. Code ch. 3 (Tex. Bus. Orgs. Code §21.703). Corporation organized under Business Corporation Act may become close corporation by amending certificate per Tex. Bus. Orgs. Code §21.705 or through merger or share exchange. Amendment or plan of merger, conversion, or share exchange by unanimous vote of holders of record of all outstanding shares of each class or series. (Tex. Bus. Orgs. Code §21.706). Corporations which have elected to become close corporations and have not terminated such election prior mandatory application of the Code are considered to be close corporations without further action. (Tex. Bus. Orgs. Code §21.707). Close corporation need not adopt by-laws if provisions required by law to be in by-laws are contained in certificate of formation or shareholders' agreement. By-laws must be adopted immediately upon termination of status as close corporation. (Tex. Bus. Orgs. Code §21.704).

Corporation can terminate close corporation status: (1) On filing certificate of termination; (2) by amendment of certificate; (3) through merger, conversion, or share exchange unless close corporation will continue as resulting or surviving corporation; or (4) when judicially decreed to enforce close corporation provision for termination. (Tex. Bus. Orgs. Code §21.708). Once close corporation status terminated, corporation becomes ordinary corporation. (Tex. Bus. Orgs. Code §21.710).

Close corporation may be managed either by board of directors or, if provided by shareholders' agreement, by one or more shareholders or other parties not shareholders, with or without board. (Tex. Bus. Orgs. Code §21.713).

Following provisions govern certain aspects of close corporations, as indicated: Tex. Bus. Orgs. Code §21.714 (scope of shareholders' agreement), Tex. Bus. Orgs. Code §21.715 (procedures required regarding adoption of shareholders' agreement), Tex. Bus. Orgs. Code §21.718 (filing of statement of operation under shareholders' agreement with Secretary of State), Tex. Bus. Orgs. Code §21.719 (validity and enforceability of shareholders' agreement), Tex. Bus. Orgs. Code §21.720 (binding effect of shareholders' agreement), Tex. Bus. Orgs. Code §§21.725–21.727 (responsibility of shareholders for managerial acts), Tex. Bus. Orgs. Code §21.731 (other permitted agreements among shareholders), Tex. Bus. Orgs. Code §21.732 (share certificates) and Tex. Bus. Orgs. Code §21.751 et seq. (judicial proceedings).

Appraisal.

Shareholder dissent and appraisal are governed by Tex. Bus. Orgs. Code §10.354 et seq. Absent fraud in the transaction giving rise to dissent, these Code provisions are shareholder's exclusive remedy. (Tex. Bus. Orgs. Code §21.368).

Appeal.

If Secretary of State does not approve any document, he must give written notice of disapproval within ten days after delivery to him, specifying reasons therefor. Person or corporation may appeal to any district court of Travis County (Austin) by filing with clerk petition setting forth copy of document sought to be filed and copy of written disapproval by Secretary of State. Matter is tried de novo, and court either sustains Secretary of State or directs him to take such action court deems proper. Appeals from final orders and judgments entered by court may be taken as in other civil actions. (Tex. Bus. Orgs. Code §12.004).

Interrogatories.

Secretary of State may propound to any corporation and any officer or director such interrogatories as may be reasonably necessary and proper to enable him to ascertain whether such corporation has complied with all provisions of Code. They must be answered within 30 days after mailing or such additional time as fixed by Secretary of State, and answers must be full, complete, in writing and under oath. If directed to individual, they must be answered by him and if directed to corporation, they must be answered by officer of corporation. Secretary of State certifies to Attorney General all interrogatories and answers which disclose violation. (Tex. Bus. Orgs. Code §12.002). Interrogatories and answers shall not be open to public inspection nor shall Secretary of State disclose any fact or information obtained therefrom unless his official duty requires or unless required for evidence in any criminal proceedings or other action by state. (Tex. Bus. Orgs. Code §12.003).

Foreign Corporations.

Foreign corporation has no right to transact business in Texas until it procures certificate of authority from Secretary of State, and it may not procure certificate to transact any business which corporation organized under Code is not permitted to transact. (Tex. Bus. Orgs. Code §9.001 et seq.). Registration application procedure is governed by Tex. Bus. Orgs. Code §9.004.

Powers.

Foreign corporation receiving certificate of authority under this Act has same but no greater rights and privileges as domestic corporation organized for purposes set forth in application except laws of jurisdiction of incorporations shall govern internal affairs and liability of members for certain debts, liabilities and obligations of corporation. (Tex. Bus. Orgs. Code §9.203).

Name must contain “corporation,” “company,” “incorporated,” or “limited,” or abbreviation of one, or one of these must be added at end of its name for use in Texas; and name must not be same as or deceptively similar to name of domestic corporation, limited partnership, limited liability company, or foreign corporation authorized to do business, or reserved or registered name. If name is similar, consent may be obtained from corporation or other entity having similar name or from person, corporation or entity for whom name is reserved or registered or, if no consent is given, such foreign corporation may qualify and do business under another name that meets requirements of act. (Tex. Bus. Orgs. Code §5.054). See subhead Tradenames under category Intellectual Property, topic Trademarks and Tradenames. Foreign corporation's authority suspended if name is changed to one not available. (Tex. Bus. Orgs. Code §§5.053, 9.105).

Qualification.

Application executed by officer on forms of Secretary of State must be filed in order to procure certificate of authority to transact business in Texas or renewal thereof. (Tex. Bus. Orgs. Code §9.001). If approved, certificate of authority is issued which authorizes corporation to transact business in Texas for purposes set forth in application (Tex. Bus. Orgs. Code §9.008).

Registered Office and Agent.

Each foreign corporation authorized to transact business in state must have registered office in Texas, which may be but need not be same as its place of business in state, and registered agent which may be individual resident, domestic corporation or foreign corporation authorized to do business in Texas; and business office of registered agent must be identical with registered office. (Tex. Bus. Orgs. Code §5.201). Office or agent may be changed by proper notification to Secretary of State. (Tex. Bus. Orgs. Code §5.202).

Service of Process.

President, all vice presidents and registered agent of foreign corporation authorized to transact business in state are agents for service. If no registered agent, if registered agent cannot with reasonable diligence be found at registered office, or when certificate of authority revoked, Secretary of State is agent for service. (Tex. Bus. Orgs. Code §5.255).

Withdrawal.

Foreign corporation may withdraw from Texas by filing with Secretary of State application for withdrawal and procuring from him certificate of withdrawal. The application must state among other provisions that all sums due and owing to State of Texas have been paid or provided for. When existence of foreign corporation terminates, certificate evidencing such termination in jurisdiction of incorporation must be filed with Secretary of State. (Tex. Bus. Orgs. Code §9.011). A foreign entity that converts to a domestic entity is considered to have withdrawn its registration on the effective date of the conversion. (Tex. Bus. Orgs. Code §9.012).

Revocation.

Certificate of authority may be revoked by decree of district court having statutory jurisdiction or by order of Secretary of State or by Attorney General in certain cases. (Tex. Bus. Orgs. Code §§9.101–9.153).

Failure to Obtain Certificate.

No foreign corporation transacting business in Texas without certificate of authority nor any successor or assignee thereof (except holder in due course or bona fide purchaser of negotiable instrument) can maintain any proceeding in any court of Texas on any cause of action arising out of doing business in Texas, until such corporation obtains certificate of authority. Failure to obtain certificate of authority does not impair validity of any contract or act of corporation and does not prevent it from defending any proceeding in any Texas court. Failure to register makes foreign corporation liable for back taxes, fees, penalties, and interest. (Tex. Bus. Orgs. Code §9.052)..

Change of Name.

If foreign corporation doing business in Texas changes its corporate name to name that would cause entity to be denied an application for registration, corporation's registration must be suspended. Corporation that has been suspended may transact business only after the entity (1) changes its name to name that is available to it under Texas law. (Tex. Bus. Orgs. Code §9.010).

Filing Fees.

For a filing by or for foreign corporation when no other fee has been provided, Secretary of State imposes same fee as filing fee for a similar instrument under Tex. Bus. Orgs. Code §4.151 or §4.152 for a domestic entity. (Tex. Bus. Orgs. Code §4.160).

Lien for Violations.

State has lien on property in state at time of violation or thereafter of any corporation which violates any law of state for which fines or penalties or forfeitures are provided to secure such fines, etc. and costs of suit and collection. (Tex. Bus. Orgs. Code §12.201).

Taxation Generally.

Corporations are taxed like individuals, and numerous taxes on gross receipts and intangible assets are imposed on various classes of corporations. See category 22 Taxation.

Franchise Tax.

Unless exemption is available, franchise tax is imposed on each corporation and each limited liability company that does business in state, or that is chartered or organized in state. Must pay to Comptroller of Public Accounts on or before May 15 of each year for following year franchise tax. (Tex. Tax Code Ann. §§171.001, 171.152[c], 171.154).

Rates of franchise tax are calculated per Tex. Tax Code Ann. §§171.002.

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Initial Tax to Be Paid.

Tax must be paid for initial period (beginning on corporation's beginning date and ending one day before first anniversary of beginning date) within 90 days after expiration of one year from corporation's beginning date (as defined) (or within 91 days after date of merger) plus payment in advance (based on first year's business) for period from first anniversary of beginning date to following Dec. 31. Thereafter tax for each regular annual period (beginning Jan. 1 and ending following Dec. 31) is due on May 15 of each year. However, if first anniversary of beginning date is after Oct. 3 and before Jan. 1, payment of tax covering first regular annual period is due on same date as tax for initial period. (Tex. Tax Code Ann. §§171.151, 171.152, 171.201).

Exemptions.

Among numerous items exempt from franchise tax are: railway terminal corporations having no annual net income from their business, certain companies required to pay gross receipts tax, corporations engaged solely in business involving solar energy devices, certain charitable, religious, educational and civic corporations, industrial development cooperative corporations, credit unions, cooperative and homeowners associations and some investment corporations. (Tex. Tax Code Ann. §§171.051-171.087).

Report of Corporation.

All corporations required to pay annual franchise tax must file initial report setting forth specific information with Comptroller on or before date payment of tax for initial period is due. (Tex. Tax Code Ann. §171.201). Annual report must be filed on or before May 16 of each year after beginning of regular annual period with Comptroller on forms furnished by that officer, showing financial information of corporation; name and address of each director, officer and agent for service and other information required by Comptroller. (Tex. Tax Code Ann. §171.202). Extension of time for filing of annual report will be granted by Comptroller in certain circumstances. (Tex. Tax Code Ann. §171.202). Corporation that does not owe any tax for any period is not required to file initial or annual report for period for which no tax is due. (Tex. Tax Code Ann. §171.2022). Public information report setting forth certain specified information is also required of every corporation on which tax is imposed. (Tex. Tax Code Ann. §171.203). In order to determine amount of franchise tax, or eligibility for exemption from reporting requirements, Comptroller may require officer of corporation on which tax is imposed to file information report stating amount of corporation's taxable capital and earned surplus, or any other information Comptroller may request, such as information from corporation's books and records. (Tex. Tax Code Ann. §§171.204, 171.205). Information report may also be required to determine correctness of franchise tax report. (Tex. Tax Code Ann. §171.204). Certain information will be held as confidential but may be used by Comptroller or Attorney General under certain circumstances. (Tex. Tax Code Ann. §§171.206-171.210). To determine franchise tax liability of corporation, Comptroller may investigate or examine records of corporation. (Tex. Tax Code Ann.

§171.211).

Penalties.

Failure to file any report or pay any tax when due renders corporation (not banking corporation or savings and loan association) liable for penalty of 5% of amount of franchise tax due with additional 5% after 30 days from due date. Delinquent taxes bear interest at 12% per annum beginning 60 days from due date. If report not made or tax or penalty not paid within 45 days after date notice of forfeiture is mailed by Comptroller to corporation (at least 45 days before forfeiture) or if corporation does not permit Comptroller to examine its records, corporation (domestic or foreign) forfeits its corporate privileges in this state without judicial proceeding. If forfeiture, corporation cannot sue or defend in courts of state, and each director and officer is liable for corporation's debt to extent provided in Tax Code. (Tex. Tax Code Ann. §§111.060, 171.251-171.259, 171.362). Comptroller will revive corporate privileges of corporation if corporation, before forfeiture of its charter or certificate of authority, pays any tax, penalty or interest due.

Lien for Taxes and Penalties.

State has prior lien on all corporate property for franchise taxes, penalties and interest. (Tex. Tax Code Ann. §113.001). Such lien does not become effective against bona fide purchaser, mortgagee, judgment creditor, etc. until notice thereof is filed in county where real property is located or, with respect to personal property, where taxpayer resided at time tax became due or in county where taxpayer filed report. (Tex. Tax Code Ann. §§113.002, 113.006, 113.101). State tax lien may not be released until taxpayer pays all other taxes, penalties, interest, fees or sums owed state and administered or collected by comptroller. (Tex. Tax Code Ann. §113.009).

Professional Corporations.

Certificate of formation for professional corporation has special requirements. (Tex. Bus. Orgs. Code §3.007). Professional corporations governed by Tex. Bus. Orgs. Code §§303.001–303.006. Shareholder not required to supervise performance of duties by officer or employee and shareholder is subject to no greater liability than shareholder of for-profit corporation. (Tex. Bus. Orgs. Code §303.002). Share transfer restrictions must be noted on stock certificates or incorporated by reference. (Tex. Bus. Orgs. Code §303.003). See also topic 2.02 Associations, subhead Professional Associations.

Deeds.

See category 21 Property, topic 21.06 Deeds.

Emergency Governance

An emergency exists if a majority of a domestic entity's governing persons cannot readily participate in a meeting because of the occurrence of a catastrophic event. (Tex. Bus. Orgs. Code §3.251). Emergency provisions should be spelled out in the governing documents (Tex. Bus. Orgs. Code §3.252), but only take effect in the event of an emergency. (Tex. Bus. Orgs. Code §3.253). Other provisions in the governing documents that are consistent with the emergency provisions still apply. (Tex. Bus. Orgs. Code §3.254). Actions taken in good faith during an emergency and in accordance with the emergency provisions are binding on the entity and may not be used to impose liability on a managerial official, employee or agent. (Tex. Bus. Orgs. Code §3.255).

Nonprofit Corporations.

Nonprofit corporations are governed by Tex. Bus. Orgs. Code §22.001 et seq. Key provisions are summarized as follows:

Purposes.

Nonprofit corporations may be organized for any lawful purpose or purposes, such as (1) serving charitable, benevolent, religious, eleemosynary, patriotic, civic, missionary, educational, scientific, social, fraternal, athletic, aesthetic, agricultural, and horticultural purposes; (2) operating or managing a professional, commercial, or trade association or labor union; (3) providing animal husbandry; or (4) operating on a nonprofit cooperative basis for the benefit of its members. (Tex. Bus. Orgs. Code §§2.002, 22.051).

Name need not contain “corporation,” “company,” or “incorporated”. (Tex. Bus. Orgs. Code §5.054[b]).

Filing fees charged by Secretary of State are: (1) for filing certificate of formation, $25; (2) for filing certificate of amendment, $25; (3) for filing certificate of merger, conversion, or consolidation, without regard to whether surviving or new corporation is domestic or foreign corporation, $50; (4) for filing statement of change of registered office, registered agent, or both, $5; (5) for filing certificate of termination, $5; (6) for filing an application of foreign corporation for registration to conduct affairs in this state, $25; (7) for filing an application of foreign corporation for an amended registration to conduct affairs in this state, $25; (8) for filing certificate of withdrawal of foreign corporation, $5; (9) for filing restated certificate of formation and accompanying statement, $50; (10) for filing statement of change of name or address of registered agent, $15, except that maximum fee for simultaneous filings by registered agent for more than one corporation may not exceed $250; (11) for filing report under Chapter 22, $5; (12) for filing report under Chapter 22 to reinstate corporation's right to conduct affairs in this state, $5, plus late fee in amount of $5 or in amount of $1 for each month or part of month that report remains unfiled, whichever amount is greater, except that late fee may not exceed $25; (13) for filing report under Chapter 22 to reinstate corporation or registration following involuntary termination or revocation, $25; and (14) for filing any other instrument of domestic or foreign corporation as provided by Code, $5. (Tex. Bus. Orgs. Code §4.153). Person commits Class A misdemeanor if signs or directs filing of instrument that person knows is materially false with intent that filing instrument be delivered on behalf of entity to secretary of state for filing. (Tex. Bus. Orgs. Code §4.008).

Foreign Corporations.

Upon registration, certain nonprofit corporations may conduct business. (Tex. Bus. Orgs. Code §9.008).

Organizers.

Any person having capacity to contract for person or for another may be organizer. (Tex. Bus. Orgs. Code §3.004).

Amendment of certificate is permissible if approved by members with voting rights, managing members, or by board of directors. (Tex. Bus. Orgs. Code §§22.105–22.107).

Members.

Nonprofit corporation may have one or more classes of members or may have no members. If corporation has members, designation of each such class or classes, if any, manner of election or appointment and qualifications and rights of members shall be set forth in certificate or by-laws. Nonprofit corporation may issue certificates or cards or other instruments evidencing membership rights, voting rights or ownership rights as may be authorized in certificate or by-laws. (Tex. Bus. Orgs. Code §22.151).

Membership meetings are subject to provisions similar to those governing shareholders meetings under Business Corporation Act, except that for church notice is sufficient if announced orally at regularly scheduled worship service prior to such meeting, or as otherwise provided in certificate or by-laws; and if corporation has more than 1,000 members, notice may be given by publication in newspaper of general circulation in community if so provided in by-laws, and by-laws may dispense with requirement of notice of annual or regular meetings. (Tex. Bus. Orgs. Code §§22.153–22.157). Unless certificate provide otherwise, members holding one-tenth of votes entitled to be cast, represented in person or by proxy, constitute quorum; and in church incorporated prior to May 12, 1959 , Code presumes church elected members present at meeting, for which notice was duly given, shall constitute quorum. (Tex. Bus. Orgs. Code §§22.158, 22.159).

Board of directors or members may manage corporation. (Tex. Bus. Orgs. Code §§22.201, 22.202). May vote by proxy. (Tex. Bus. Orgs. Code §§22.215). Good faith standards for corporate governance apply. (Tex. Bus. Orgs. Code §§22.221, 22.222).

Officers are elected or appointed in manner and for terms (not to exceed three years) provided in certificate or by-laws. Churches may vest duties, etc. of officers in board of directors or other designated body. (Tex. Bus. Orgs. Code §§22.232, 22.233).

Dividends cannot be distributed to members, directors or officers; but reasonable compensation for services rendered may be paid to members, directors, or officers. (Tex. Bus. Orgs. Code §§22.053, 22.054).

Loans to directors are prohibited. (Tex. Bus. Orgs. Code §22.225).

Merger and consolidation of one or more foreign corporations and one or more domestic nonprofit corporations is permissible as with business corporations, provided that each domestic corporation obtains prior authorization by at least two-thirds of total votes which members present at meeting of members (or of every class if members are entitled to vote as class). Votes may be cast in person or by proxy. If domestic corporation has no members having voting rights, plan of merger or consolidation may be adopted by majority vote of directors. (Tex. Bus. Orgs. Code §22.251).

Sale or Transfer of Corporate Assets.

Sale, lease or exchange of all, or substantially all, corporate assets must have same consent of members having voting rights or directors as merger or consolidation. (Tex. Bus. Orgs. Code §22.252).

Dissolutions, Winding Up, and Terminations, of nonprofit corporations are subject to substantially similar provisions as those governing business corporations except with respect to application and distribution of assets. Special provisions describe manner and timing of filing claims. After all liabilities of corporation are satisfied, assets held by corporation upon condition requiring return, transfer or conveyance upon dissolution, must be so returned, transferred or conveyed. Unless certificate of formation provide otherwise, remaining assets shall be distributed only for tax exempt purposes to one or more organizations exempt under I.R.C. §501(c)(3) or described in I.R.C. §170(c)(1) or I.R.C. §170(c)(2) or their successor statutes. District court shall distribute to such organization or organization's members remaining assets not distributed under plan of distribution in such manner as to accomplish general purposes for which corporation was organized. (Tex. Bus. Orgs. Code §§11.105, 11.413).

Reports may be required of nonprofit corporations every four years by Secretary of State setting forth: (1) Name and state of incorporation, (2) address of registered office and name of registered agent, and address of principal office of foreign corporation, and (3) names and addresses of directors and officers. (Tex. Bus. Orgs. Code §22.357). Other than specified list of certain nonprofit corporations, nonprofit corporations must maintain financial records and prepare annual report of financial activity and such records must be kept at registered or principal office in state for at least three years and must be available for public inspection. Failure to comply is class B misdemeanor. (Tex. Bus. Orgs. Code §22.354). Corporation dedicated by certificate to assist state agency is subject to state audit or required to file annual report with Secretary of State. (Tex. Bus. Orgs. Code §22.356).

Limited Liability Companies.

See topic 2.06 Limited Liability Companies.

2.04 [RESERVED]

2.05 JOINT STOCK COMPANIES:

Joint stock company is recognized by statute (Tex. Rev. Civ. Stat. Ann. arts. 6133-6138) and is hybrid, having characteristics of both corporation and partnership.

Purposes.

Joint stock company may be formed for numerous purposes of business or commercial nature, including ownership and handling of property.

Formation.

Formation is accomplished by execution of articles of agreement or declarations of trust binding members. Unlike most Texas business entities, joint stock association is created by contract rather than filing certificate of formation with Secretary of State. (274 S.W. 554; 19 S.W.2d 99; and/or 253 S.W. 582).

Liability of Members.

Where service of citation is made only on president, secretary, treasurer or general agent of company or association, and judgment is rendered only against company or association, judgment is binding and may be executed on joint property of all stockholders or members, but not on individual property of stockholders or members. (Tex. Rev. Civ. Stat. Ann. art. 6136). Where service of citation is also made on one or more of stockholders or members, any judgment rendered against company or association is equally binding on stockholders or members so served and may be executed against their individual property as well as property of company or association. However, execution may not be issued against individual property of stockholders or members until execution against joint property has been returned without satisfaction (Tex. Rev. Civ. Stat. Ann. art. 6137).

Actions.

Unincorporated joint stock company or association may sue or be sued in its company or distinguishing name (Tex. Rev. Civ. Stat. Ann. art. 6133) and service may be had upon its president, secretary, treasurer or general agent. (Tex. Rev. Civ. Stat. Ann. art. 6134).

Dissolution.

Existence of joint stock companies or associations terminates at date designated in articles of agreement or declaration of trust, or automatically when company or association has disposed of all its property and ceased to do business.

Professional Associations.

See topic 2.02 Associations.

2.06 LIMITED LIABILITY COMPANIES:

Note: The Texas Business Organizations Code, Tex. Bus. Orgs. Code §1.001 et seq. applies to limited liability companies formed on or after Jan. 1, 2006. For limited liability companies formed before that date, Texas Limited Liability Company Act, Tex. Rev. Civ. Stat. art. 1528n §1.01 et seq. applies until Jan. 1, 2010.

Filing Fees.

Fees charged by Secretary of State are same as domestic and foreign for-profit corporation filing fees. See topic 2.03 Corporations, Subhead Incorporation Tax, catchline Filing Fees.

Formation.

Company may be organized for any lawful purpose (Tex. Bus. Orgs. Code §3.005[a][3]). Organizer must file executed certificate of formation with Secretary of State (Tex. Bus. Orgs. Code §§101.051, 101.0515) and pay appropriate fee (Tex. Bus. Orgs. Code §4.154). Only one member is required. (Tex. Bus. Orgs. Code §101.001[1]). Certificate must state name (including “Limited Liability Company”, “Limited Company”, or abbreviation of either phrase) (Tex. Bus. Orgs. Code §5.056), period of duration which may be perpetual, purpose, address of its initial registered office, name of registered agent at that address, statement whether company is to be managed by managers or by members, and name and address of managers or members and name and address of each organizer (Tex. Bus. Orgs. Code §3.005). Special rules apply to professional limited liability companies. (Tex. Bus. Orgs. Code §§5.059, 301.001 et seq.). Any person having capacity to contract for the person or for another may act as organizer by signing and filing certificate of formation with Secretary of State. (Tex. Bus. Orgs. Code §§3.004, 3.005). Certificate of formation may be amended by filing certificate of amendment, executed by authorized manager or member, with Secretary of State. (Tex. Bus. Orgs. Code §§3.051–3.053).

Company Operating Agreement.

Operating agreement may be amended only if each member consents to amendment except where operating agreement permits otherwise and such provision is consistent with company's certificate of formation (Tex. Bus. Orgs. Code §§101.052, 101.053).

Property.

Real or personal property may be held, owned and conveyed in name of limited liability company. (Tex. Bus. Orgs. Code §2.101).

Managers.

Unless reserved to members, and subject to other provisions, powers of limited liability company exercised by or under authority of, and business and affairs managed under direction of, manager(s), who need not be Texas residents or members unless operating agreement so requires (Tex. Bus. Orgs. Code §101.302). If management fully reserved to members, limited liability company need not have managers. (Tex. Bus. Orgs. Code §101.251). Managers shall consist of one or more persons fixed in regulations, except number of initial managers, fixed by certificate of formation (Tex. Bus. Orgs. Code §101.302). Managers shall hold office for elected term and until election of successor or until death, resignation or removal. (Tex. Bus. Orgs. Code §101.303). Managers may be divided into more than one class by operating agreement (Tex. Bus. Orgs. Code §101.307).

Quorum.

Majority of all governing persons, members, or committee members constitutes quorum for purpose of transacting business at meeting of governing authority, members, or committee, as appropriate. (Tex. Bus. Orgs. Code §101.353).

Designation of Officers Authority and Apparent Authority of Officers, Agents, Managers and Members.

Each governing person and each officer or agent vested with actual or apparent authority by governing authority is an agent of company for purposes of carrying out company's business. Act committed by agent for purpose of apparently carrying out ordinary course of business, including execution of an instrument, document, mortgage, or conveyance in the name of company, binds company unless (1) agent does not have actual authority to act for company, and (2) person with whom agent is dealing has knowledge of agent's lack of actual authority. Act committed by agent that is not apparently for carrying out ordinary course of business of company binds company only if act is authorized in accordance with Tex. Bus. Orgs. Code tit. 3. (Tex. Bus. Orgs. Code §101.254).

Effectiveness.

Limited liability company exists upon issuance of certificate of formation. New limited liability company created pursuant to plan of merger or conversion exists on effective date of merger or conversion. (Tex. Bus. Orgs. Code §§3.005, 3.006).

Admission of Members.

When limited liability company formed, person becomes member latter of date of formation or date stated in records. After formation, person becomes member on compliance with operating agreement or upon written consent of all members (Tex. Bus. Orgs. Code §§101.103, 101.105). Transferee of membership interest has certain rights and duties. (Tex. Bus. Orgs. Code §§101.108–101.110).

Classes in Voting.

Operating agreement may establish classes or groups of members having certain relative rights, powers, and duties, including voting rights, and may provide for future creation of additional classes or groups. (Tex. Bus. Orgs. Code §101.104).

Liability to Third Parties.

Members not liable for any debt, obligation, or liability of company, unless company agreement provides otherwise. (Tex. Bus. Orgs. Code §101.114).

Property Interest.

Membership interest is personal property. Member has no interest in specific limited liability company property. (Tex. Bus. Orgs. Code §101.106). Provisions regarding assignment of membership interest set forth in statute. (Tex. Bus. Orgs. Code §§101.108–101.111).

Contribution Not Required.

Person not required, as condition to becoming member of or acquiring membership interest in company, to (1) make contribution to company, (2) otherwise pay cash or transfer property to company; or (3) assume obligation to make contribution or otherwise pay cash or transfer property to company. If one or more persons own membership interest in company, operating agreement may provide for person to be admitted to company as member without acquiring membership interest in company. (Tex. Bus. Orgs. Code §101.102).

Allocation of Profits and Losses.

Profits and losses allocated to each member on basis of agreed value of contributions made by each member, as stated in company's records required under Tex. Bus. Orgs. Code §101.501. (Tex. Bus. Orgs. Code §101.201).

Distributions of cash and other assets made to each member according to agreed value of member's contribution as stated in company's records required under Tex. Bus. Orgs. Code §§3.151, 101.501. (Tex. Bus. Orgs. Code §101.203). Member entitled to receive or demand distribution only in form of cash regardless of the form of member's contribution to company. (Tex. Bus. Orgs. Code §101.202).

Merger provisions are set forth in Tex. Bus. Orgs. Code §§3.006, 10.001 et seq.

Dissolution, Winding Up, and Termination is required upon (1) expiration of any period of duration specified in company's governing documents, (2) voluntary decision to wind up company, (3) an event specified in the governing documents of company requiring the winding up, dissolution, or termination of company, other than an event specified in Tex. Bus. Orgs. Code §11.051, (4) an event specified in the Code requiring the winding up or termination of company, other than an event specified in §11.051; or (5) court decree requiring winding up, dissolution, or termination of company, rendered under this code or other law. Procedures are set forth in Tex. Bus. Orgs. Code §11.051 et seq.

Foreign Limited Liability Companies.

Foreign limited liability companies must apply for certificate of authority from Secretary of State (Tex. Bus. Orgs. Code §§9.001, 9.004) and pay appropriate fee (Tex. Bus. Orgs. Code §4.160).

Series Limited Liability Companies

A company agreement may establish a series of members, managers, membership interests or assets that has separate powers or duties or has a separate business purpose or investment objective. (Tex. Bus. Orgs. Code §101.601 et seq.)

2.07 [RESERVED]

2.08 PARTNERSHIPS:

Note: The Texas Business Organizations Code, Tex. Bus. Orgs. Code §1.001 et seq. applies to partnerships formed on or after Jan. 1, 2006. For partnerships formed before that date, Texas Revised Partnership Act, Tex. Rev. Civ. Stat. art. 6132b §1.01 et seq., and Texas Revised Limited Partnership Act, Tex. Rev. Civ. Stat. art. 6132a §1.01 et seq., applies until Jan. 1, 2010.

General partnerships are governed by Tex. Bus. Orgs. Code §152.001 et seq. Generally, all partners jointly and severally liable for debt or obligation of partnership unless otherwise agreed by claimant or provided by law. (Tex. Bus. Orgs. Code §152.304). General provisions covering definitions, notice and knowledge and officers for all partnerships are in Tex. Bus. Orgs. Code §151.001 et seq.

Filing Fees for general partnership are: (1) for filing limited liability partnership application, $200 for each partner; (2) for filing limited liability partnership renewal application, $200 for each partner on date of renewal; (3) for filing an application for registration by foreign limited liability partnership, $200 for each partner in this state, except that maximum fee may not exceed $750; (4) for filing renewal of registration by foreign limited liability partnership, $200 for each partner in this state, except that maximum fee may not exceed $750; (5) for filing certificate of amendment for domestic limited liability partnership, $10, plus $200 for each partner added by amendment; (6) for filing certificate of amendment for foreign limited liability partnership, $10, plus $200 for each partner in this state added by amendment not to exceed $750; and (7) for filing any other filing instrument, filing fee imposed for similar instrument under Tex. Bus. Orgs. Code §4.155. (Tex. Bus. Orgs. Code §4.158).

Limited Partnership.

Limited partnerships are governed by General partnerships are governed by Tex. Bus. Orgs. Code §153.001 et seq. Generally, limited partner is not liable for obligations of limited partnership unless (1) limited partner is also general partner or (2) in addition to exercise of limited partner's rights and powers as limited partner, limited partner participates in control of business. If limited partner participates in control of business, limited partner is liable only to person who transacts business with limited partnership reasonably believing, based on limited partner's conduct, that limited partner is general partner.

Filing fees for limited partnership are: (1) for filing certificate of formation or application for registration as foreign limited partnership, $750; (2) for filing certificate of amendment or an amendment of registration of foreign limited partnership, $150; (3) for filing restated certificate of formation, $300; (4) for filing statement for change of registered office, registered agent, or both, $15; (5) for filing statement of change of name or address of registered agent, $15, except that maximum fee for simultaneous filings by registered agent for more than one limited partnership may not exceed $750; (6) for filing certificate of termination, $40; (7) for filing certificate of withdrawal of foreign limited partnership, $15; (8) for filing certificate of reinstatement of limited partnership or registration as foreign limited partnership after involuntary termination or revocation under Chapter 11 or Chapter 9, $75; (9) for filing periodic report required under Chapter 153, $50; (10) for reviving limited partnership's right to transact business under Chapter 153, $50 plus late fee in an amount equal to lesser of: (A) $25 for each month or part of month that elapses after date of notice of forfeiture; or (B) $100; (11) for reinstatement of certificate of formation or registration under Chapter 153, $50 plus late fee of $100 and reinstatement fee of $75; (12) for filing any document required or permitted to be filed for limited liability partnership, secretary of state shall impose same fee as filing fee for general partnership under Section 4.158. For purposes of calculation of filing fee, all references to partners in Tex. Bus. Orgs. Code §4.158 as applied to limited partnerships mean general partners only; and (13) for filing any instrument as provided by Code, $15. (Tex. Bus. Orgs. Code §4.155).

Out-of-State Partnerships.

Foreign limited partnership may qualify to transact business in Texas by filing with Secretary of State application for registration containing certain information, including limited partnership's registered office and agent in Texas. (Tex. Bus. Orgs. Code §9.004). Name must meet requirements of Tex. Bus. Orgs. Code §5.055. .

Similar registration requirements for foreign limited liability partnership. Tex. Bus. Orgs. Code §9.007. Name must meet requirements of Tex. Bus. Orgs. Code §5.063.

Filings fees for foreign filing entity when no other fee has been provided is same fee as filing fee for a similar instrument for a domestic entity under Tex. Bus. Orgs. Code §4.151 or §4.152.

Registered Limited Liability Partnership.

Texas registered limited liability partnerships are governed by Tex. Bus. Orgs. Code §§152.801–152.805. Partners may not be held liable for certain obligations of registered limited liability partnerships. (Tex. Bus. Orgs. Code §152.801). Registered limited liability partnership must register with Secretary of State annually and pay appropriate fee. (Tex. Bus. Orgs. Code §152.803). Name must include “limited liability partnership” or “L.L.P.” (Tex. Bus. Orgs. Code §6.063).

3 BUSINESS REGULATION AND COMMERCE

3.01 BANKS AND BANKING:

Introductory Statement.

Banking business is governed by Finance Code. Within Finance Code are Texas Banking Act (Tex. Fin. Code Ann. §§31.001-59.001), Texas Savings and Loan Act (Tex. Fin. Code Ann. §§61.001-89.001), Texas Savings Bank Act (Tex. Fin. Code Ann. §§91.001-119.001), and statutes governing installment and secondary loans (Tex. Fin. Code Ann. §§342.001-342.506). Sale of Checks Act (Tex. Fin. Code Ann. §§152.001-152.508) repealed.

Uniform Commercial Code enacted. (Tex. Bus. & Com. Code Ann. §1.101 et seq.). See topic 3.09 Commercial Code.

Regulated By.

Finance Commission, consisting of nine members, has general powers of supervision. (Tex. Fin. Code Ann. §11.101). Finance Commission may adopt rules to accomplish purposes of Texas Banking Act. (Tex. Fin. Code Ann. §31.003). Finance Commission also has general regulatory powers with regard to savings and loan associations, savings banks, and consumer lenders. (Tex. Fin. Code Ann. §§11.301, 11.302, 11.304). Banking Commissioner must supervise and regulate state banks in accordance with Banking Act, must appoint deputy commissioners, must examine each state bank at least annually, and may appoint examiner and other agents to assist him in his duties. (Tex. Fin. Code Ann. §§12.101-12.109 and 31.101-31.108). Savings and Loan Commissioner is selected by Finance Commission to supervise and regulate savings and loan associations and savings banks as provided by Texas Savings and Loan Act. Savings and Loan Commissioner may appoint deputy commissioners and examiners to assist him in his duties. (Tex. Fin. Code Ann. §§13.002-13.012). Finance Commission may adopt rules to supervise Consumer Credit Commissioner. (Tex. Fin. Code Ann. §11.304).

Acquisition of Control.

Person may not, without prior approval of Banking Commissioner, acquire control of state bank or corporation that owns state bank if, after acquisition, person would control bank. (Tex. Fin. Code Ann. §§33.001-33.007). Principal shareholder that has power to vote greatest percentage of voting securities of bank is considered to control bank. (Tex. Fin. Code Ann. §33.001[b]). There are exempt acquisitions. (Tex. Fin. Code Ann. §33.005).

Investments in Real Estate.

Without prior approval of Banking Commissioner, real estate may not be acquired except to be used as banking facility or in satisfaction of indebtedness. (Tex. Fin. Code Ann. §§34.001-34.003).

Powers.

Generally, bank may exercise one or more of following powers: receive and pay deposits, discount and negotiate promissory notes, borrow or lend money with or without security and interest, invest and deal in securities, buy and sell exchange, coin, and bullion, and exercise incidental powers as necessary to carry on business of banking; act as agent with respect to financial activity; act in fiduciary capacity, without giving bond, as guardian, receiver, executor, administer or trustee; provide financial, investment or economic advisory services; issue or sell instruments representing pools of assets; and engage in any other activity determined by Texas Banking Commissioner to be closely related to banking. (Tex. Fin. Code Ann. §32.001).

Application of Laws Relating to Corporations.

For state banks organized before Jan. 1, 2006, Texas Business Corporation Act, Texas Miscellaneous Corporation Laws Act and Texas Limited Liability Company Act apply to state bank until Jan. 1, 2010 to extent not inconsistent with Texas Banking Act or proper business of state bank. For state bank organized Jan. 1, 2006 or later, Texas Business Organizations Code, to extent not inconsistent with Texas Banking Act or proper business of state bank (Tex. Fin. Code Ann. §32.008).

Parity.

Tex. Const. art. XVI, §16(c) grants to state banks, same rights and privileges that are or may be granted to national banks domiciled in Texas. State bank that intends to exercise right or privilege granted to national banks that is not authorized for state banks under statutes and rules of Texas must submit letter to Banking Commissioner. (Tex. Fin. Code Ann. §32.009).

Change in Outstanding Capital and Surplus.

State bank may not reduce or increase its outstanding capital and surplus through dividend, redemption, issuance of shares, or otherwise, without prior written approval of Banking Commissioner, except prior written approval is not required for increase in capital and surplus accomplished through: (1) issuance of shares of common stock or cash contribution; (2) declaration and payment of pro rata share dividends as defined in Texas Business Organizations Code (Tex. Bus. Orgs. Code Ann. §1.001 et seq.); or (3) adoption by board of resolution directing that all or part of undivided profits be transferred to capital or surplus. (Tex. Fin. Code Ann. §32.103).

Capital Notes or Debentures.

With prior written approval of Banking Commissioner, state bank may issue and sell its capital notes or debentures, which must be subordinate to claims of depositors and may be subordinate to other claims, including claims of other creditors or shareholders. (Tex. Fin. Code Ann. §32.104).

Branch Offices.

State bank may establish and maintain branch offices at any location on prior written approval of Banking Commissioner except bank may not establish or maintain branch on premises or property of affiliate that engages in commercial activity. If Banking Commissioner does not have significant supervisory or regulatory concern regarding proposed branch, applicant, or affiliate, Banking Commissioner shall approve application. Finance Commission may adopt rules establishing additional standards for approval of branch offices. (Tex. Fin. Code Ann. §32.203).

Board of directors of state bank must consist of not fewer than five or more than 25 directors. Each director must submit affidavit stating that person: (1) accepts position and is not disqualified from serving in position; (2) will not violate or knowingly permit office, director, manager, managing participant, or employee of bank to violate any law applicable to conduct of business of bank; and (3) will diligently perform duties of position. Person against whom bank holds judgment, or who was subject of unreimbursed loss due to charge off obligation, or who is subject to order of removal or prohibition, or who has been convicted of felony, cannot serve as director. (Tex. Fin. Code Ann. §33.103). Board of state bank shall hold at least one regular meeting each month. (Tex. Fin. Code Ann. §33.105).

Officers.

Board of directors must annually appoint officers of bank. Bank must have principal executive officer primarily responsible for execution of board policies and operation of bank, and officer responsible for maintenance and storage of all corporate books and records of bank and for required attestation of signatures. These positions may not be held by same person. (Tex. Fin. Code Ann. §33.106).

Transactions With Management and Affiliates.

Without prior approval of disinterested majority of board of directors, state bank may not: (1) Sell or lease asset of bank to officer, director, or principal shareholder or affiliate of bank; or (2) purchase or lease asset in which officer, director, or principal shareholder or affiliate of bank has interest. Officer or director who knowingly participates or permits such act commits third degree felony. (Tex. Fin. Code Ann. §33.109).

Limited Banking Associations.

Terminology.

Manager and board of managers are equivalent of director and board of directors, respectively. Participant is equivalent to shareholder, participation share is considered to be share, and distribution is considered to be dividend. (Tex. Fin. Code Ann. §33.211).

Liability.

Participants and managers of limited banking association may not be held liable for debt, obligations, or liability of limited banking association, including debt, obligation, or liability under judgment, decree, or order of court. (Tex. Fin. Code Ann. §33.201).

Real Estate.

State bank may not acquire real estate except real estate used as bank facility, or with prior written approval of Banking Commissioner, or if necessary to avoid or minimize loss on loan or investment previously made in good faith. (Tex. Fin. Code Ann. §34.003).

Securities.

State bank may purchase and sell equity and investment securities without recourse, solely on order and for account of customer. Except as otherwise provided, state bank may not underwrite issue of securities or invest its money in equity securities unless it is necessary to avoid or minimize loss on loan or investment previously made in good faith. State bank may purchase investment securities for its own account under limitations and restrictions prescribed by rules adoptive under Tex. Bank. Act. (Tex. Fin. Code Ann. §34.101).

Loans.

Generally, absent prior approval by Banking Commissioner, total loans and extensions of credit by state bank to person outstanding at one time may not exceed 25% of bank's unimpaired capital and surplus. (Tex. Fin. Code Ann. §34.201).

Collections.

Uniform Commercial Code applies.

Unclaimed Deposits.

Banks and savings and loan associations holding deposits or accounts in this state, or in other states for residents last known to have resided in this state, which have been dormant or inactive for more than five years must file report of property with Comptroller on or before Nov. 1 of year following fifth year of inactivity in accordance with Tex. Prop. Code Ann. §74.101. During calendar year following holder's report, Comptroller shall publish notice in newspaper and mail owner notice of abandoned property. (Tex. Prop. Code Ann. §74.201). Comptroller must sell at public sale all personal property other than money and marketable securities delivered to it by depository. (Tex. Prop. Code Ann. §74.401). Persons claiming interest in property delivered to state may file claim therefor with Comptroller or with depository which delivered it to state. (Tex. Prop. Code Ann. §74.501 et seq.). See also category 21 Property, topic 21.01 Absentees, subhead Escheat.

3.02 BILLS AND NOTES:

Uniform Commercial Code enacted. (Tex. Bus. & Com. Code Ann. §1.101 et seq.). See topic 3.09 Commercial Code.

Days of Grace.

Uniform Commercial Code applies.

Special Requirements.

Note given for patent right or patent right territory must state such consideration on its face. (Tex. Bus. & Com. Code Ann. §35.40 — **repealed** Apr. 1, 2009).

Judgment Notes.

Provisions in note or other instrument waiving service of process or confessing judgment are invalid. (Tex. Civ. Prac. & Rem. Code Ann. §30.001).

Attorney fee clauses are enforceable. (Tex. Civ. Prac. & Rem. Code Ann. §38.001).

3.03 BILLS OF LADING:

Uniform Commercial Code enacted. (Tex. Bus. & Com. Code Ann. §1.307). See topic 3.09 Commercial Code.

3.04 BILLS OF SALE:

See topic 3.23 Sales.

3.05 BLUE SKY LAW:

See topic 3.24 Securities.

3.06 BROKERS:

Brokers are subject to usual rules of common law. They have no statutory lien.

Uniform Commercial Code enacted. (Tex. Bus. & Com. Code Ann. §1.101 et seq.). See topic 3.09 Commercial Code.

Licenses and Bonds.

Real estate brokers and salesmen are governed by Texas Real Estate License Act. (Tex. Occ. Code Ann. §1101.001).

No real estate salesperson shall accept compensation or pay commission except from or through licensed broker (Tex. Occ. Code Ann. §1101.651). Real estate salesperson must be licensed (Tex. Occ. Code Ann. §1101.351), and must pay real estate recovery fund fee (Tex. Occ. Code Ann. §1101.603).

Licensed real estate brokers are regulated by Texas Real Estate Commission. (Tex.

Occ. Code Ann. §1101.151).

Actions for recovery of commission may be brought only by licensed broker, salesman, or attorney, and must be based on written promise, agreement, or memorandum, signed by or on behalf of party to be charged; and purchaser must be advised in contract to obtain title insurance or have abstract of title examined by attorney. (Tex. Occ. Code Ann. §1101.806).

Other Brokers.

Regulated by State include, inter alia, brokers of mobile homes (Tex. Occ. Code Ann. §1201.159), motor vehicles (Tex. Occ. Code Ann. §2301.007), and motor transportation (Tex. Transp. Code Ann. §646.001).

3.07 [RESERVED]

3.08 CARRIERS:

Rates.

State Railroad Commission has power to supervise, regulate and control motor carrier, rail and some pipeline common carriers and to fix and regulate rates. (Tex. Rev. Civ. Stat. art. 6445, Tex. Nat. Res. Code Ann. §§111.001-.014). Certain scheduled air carriers are subject to economic regulation by State Department of Transportation. (Tex. Rev. Civ. Stat. Ann. art. 46c-6, subd. 3[a], Tex. Transp. Code Ann. §21.001 et seq.).

Discrimination.

Railroad carriers may not give undue or unreasonable preferences or advantages to any particular party, locality or any particular description of traffic; nor may they, without express authority of Railroad Commission, charge more for short haul than long haul. (Tex. Rev. Civ. Stat. Ann. arts. 6670, and 4574).

Limiting Liability.

Except as otherwise provided, duties and liabilities of common carriers are same as are prescribed by common law. (Tex. Transp. Code Ann. §5.001). Such liability cannot be limited in any manner except in conspicuous writing in written arrangement for transportation (Tex. Transp. Code Ann. §5.001[a][2]), or by requiring notice of claim, if such notice satisfies Tex. Civ. Prac. & Rem. Code Ann. §16.071. For household goods, liability is limited to declared or agreed value where carrier has been authorized by Railroad Commission to establish rates dependent on value declared in writing by shipper or agreed upon in writing as value of property. (Tex. Transp. Code Ann. §5.003). Where freight, baggage or other property is transported over lines of connecting carriers, all of such carriers are governed by original contract of shipment made by initial carrier, unless new contract has been entered into by subsequent carrier, and all are liable to shipper for any injury, damage, loss or delay suffered during transportation, and provision is made that any carrier forced to pay judgment thus secured may recover from negligent carrier amount it has been forced to pay. (Tex. Transp. Code Ann. §7.001 et seq.). Air carriers may limit liability for loss or damage to freight or baggage by filing limiting tariff with State Department of Transportation. (Tex. Rev. Civ. Stat. Ann. art. 46c-6, subd. 3[g]).

Bills of Lading.

See topic 3.09 Commercial Code.

Liens.

Uniform Commercial Code enacted. (Tex. Bus. & Com. Code Ann. §1.101 et seq.). See topic 3.09 Commercial Code.

Motor Vehicle Carriers.

See category 23 Transportation, topic 23.01 Motor Vehicles.

3.09 COMMERCIAL CODE:

Uniform Commercial Code adopted. (Tex. Bus. & Com. Code Ann. §1.101 et seq.). Section numbers same as in 1962 Official Text, except dashes in section numbers are replaced by decimal points, subsections are lettered rather than numbered and subparagraphs are numbered rather than lettered.

1972 Official Amendments.

Adopted with indicated amendments.

1977 Official Amendments.

Adopted.

1987 Official Amendments.

Art. 2A—Leases adopted with 1990 amendments to Art. 2A.

1988 Official Amendments.

Art. 6—Bulk Sales adopted and repealed.

1989 Official Amendments.

Art. 4A—Fund Transfers adopted.

1990 Official Amendments.

Art. 3—Negotiable Instruments adopted effective Jan. 1, 1996 with conforming and miscellaneous amendments to Arts. 1 and 4.

1994 Official Amendments.

Art. 8—Investment Securities adopted effective Sept. 1, 1995 with conforming and miscellaneous amendments to Arts. 1, 4, 5, 9 and 10. If security interest in security is perfected under Art. 8 on Sept. 1, 1995, and action by which security interest was perfected would suffice to perfect security interest under Art. 8, as revised by 1994 Official Amendments, no further action is required to continue perfection. If security interest in security is perfected under Art. 8 on Sept. 1, 1995 but action by which security interest was perfected would not suffice to perfect security interest under Art. 8, as revised by 1994 Official Amendments, security interest remains perfected until Jan. 1, 1996, and continues perfected on and after that date if appropriate action to perfect under Art. 8, as revised by 1994 Official Amendments, is taken before Jan. 1, 1996. If security interest is perfected under Art. 8 on Sept. 1, 1995 and security interest can be perfected by filing under Art. 8, as revised by 1994 Official Amendments, financing statement signed by secured party instead of debtor may be filed before Jan. 1, 1996 to continue perfection or filed on or after that date to perfect. (H.R. Res. 3200, §21[b] (1995)).

1999 Official Amendments.

Revised Art. 9 adopted with following alterations:

Adds Tex. Bus. & Com. Code Ann. §9.310(b)(11) to include oil and gas production or their proceeds under Tex. Bus. & Com. Code Ann. §9.343 as not requiring filing of financial statement.

Adds Tex. Bus. & Com. Code Ann. §9.343 Oil and Gas Interest: Security Interest Perfected Without Filing; Statutory Lien.

Adopts Alternative in Tex. Bus. & Com. Code Ann. §9.512 and adds subsection (f) which permits filing of master amendment to change name and address of secured party in more than one financing statement.

Adopts Alternative in Tex. Bus. & Com. Code Ann. §9.518.

Adds Tex. Bus. & Com. Code Ann. §9.5185 Fraudulent Filing.

Adopts Alternative in Tex. Bus. & Com. Code Ann. §9.519.

Adopts Alternative in Tex. Bus. & Com. Code Ann. §9.522.

Adds Tex. Bus. & Com. Code Ann. §9.523(c)(1)(C) regarding duty of filing office to make available record that has lapsed.

Adds Tex. Bus. & Com. Code Ann. §9.525(f) which fixes filing, indexing and furnishing fee for master amendment.

Omits following provisions in Official Revision:

Tex. Bus. & Com. Code Ann. §9-334(j);

Tex. Bus. & Com. Code Ann. §9-406(j);

Tex. Bus. & Com. Code Ann. §9-408(e).

2005 Official Amendments.

Revised Art. 7 adopted with conforming amendments.

Material variations from 1962 Official Text (printed in Uniform and Model Acts section), alternatives adopted, and action taken on 1966 Official Recommendations for Amendment are as follows:

Official Text

Section

Description of Variation or Alternative

1-201(4)

Includes within definition of “Bank”, Savings Bank, Savings and Loan Association, Credit Union and Trust Company.

1-201(9)

Adds to definition of “Buyer in the ordinary course of business”, “A person that sells oil, gas, or other minerals at the wellhead or minehead is person in the business of selling goods of that kind.”

1-203

Relates to lease distinguished from security interest.

1-204

Relates to person giving value for rights.

1-301

New subsection (c) provides that choice of law provisions in “qualified transactions” are governed by Tex. Bus. & Com. Code Ann. §35.51 unless otherwise provided in subsection (b) of this section.

2-108

Repealed.

2-316

Adds new subsection (e) providing that warranties of merchantability and fitness do not apply to human blood, blood plasma, human tissue, or organs. Adds new subsection (f) providing that warranties of merchantability and fitness do not apply to livestock or its unborn young.

2-318

Neither 1962 nor 1966 Official Text followed. Section reads as follows:

“§2.318. Chapter Neutral on Question of Third Party Beneficiaries of Warranties of Quality and on Need for Privity of Contract.

This Chapter does not provide whether anyone other than buyer may take advantage of an express or implied warranty of quality made to the buyer or whether the buyer or anyone entitled to take advantage of warranty made to the buyer may sue third party other than the immediate seller for deficiencies in the quality of the goods. These matters are left to the courts for their determination.”

2-326

In addition, subsection (c), excludes delivery of work of art subject to Artists' Consignment Act. (Tex. Occ. Code Ann. §9018).

2-403(4)

Deletes reference to Art. 6—Bulk Transfers.

2-702

1966 Official Amendment enacted.

2A-102

Amended to add at end of sentence “of goods.” Also added is sentence “This chapter does not apply to transaction that creates an interest in or lease of real estate, except to the extent that provision is made for leases of fixtures by Section 2A.309."

2A-103(1)(e)

Bracketed words included. Blank is completed with "$25,000."

2A-104(1)(a)

Certificate of title statutes listed are: Certificate of Title Act (6687-1), Tex. Parks & Wild. Code Ann. c. 31, and Texas Manufactured Housing Standards Act (Tex. Rev. Civ. Stat. Ann. art. 5221f, §19).

2A-104(1)(c)

Amended to read "(3) consumer law of this state, both decisional and statutory, including, to the extent they apply to lease transaction, the provisions of Chapters 17 and 35,Business & Commerce Code, and the Texas Manufactured Housing Standards Act (Art. 5221f, Vernon's Texas Civil Statutes)."

2A-106(2)

Replace phrase "that would not otherwise have jurisdiction over the lessee" with "located in jurisdiction other than the jurisdiction in which the lessee in fact signed the lease agreement, resides at the commencement of the action, or resided at the time the lease contract became enforceable or in which the goods are in fact used by the lessee".

2A-110

Repealed.

2A-201(d)

Adds new subsection (d)(4) which reads as follows: "(4) if the lease contract would otherwise be enforceable under general principles of equitable estoppel, detrimental reliance or unjust enrichment."

2A-216

No alternative adopted. Instead, section reads "This chapter does not provide whether anyone other than lessee may take advantage of an express or implied warranty of quality made to the lessee or whether the lessee or anyone entitled to take advantage of warranty made to the lessee may sue third party other than the immediate lessor, or the supplier in finance lease, for deficiencies in the quality of the goods. These matters are left to the courts for their determination."

2A-218(c)

Delete remainder of sentence following "retains an insurable interest" and replace with "during the existence of the lease contract."

2A-219(b)(1)(B)

Provides that risk of loss passes to lessee on tender of delivery if lessee is merchant; otherwise risk of loss passes to lessee on lessee's receipt of goods.

2A-308(2)

Subsection (a) deleted.

2A-310

Phrase “The lessor's residual interest in the accessions and” is added at beginning of subsections (2), (3) and (4).

2A-311

Not adopted.

2A-407(a)

After words “consumer lease” add “a term in the lease agreement that provides that” and add “is enforceable.” at end of subsection.

2A-407(c)

Not adopted.

2A-503(c)

In second sentence of this subsection “liquidation” is added prior to “limitation, alteration or exclusion” in two places where list appears.

2A-504(a)

At end of subsection, add sentence “In consumer lease, term fixing liquidated damages that are unreasonably large in light of the actual harm is unenforceable as penalty.”

2A-506(a)

In second sentence of this subsection, after word “may” insert “not expand such period of limitation but, except in the case of consumer lease, may”.

2A-506(b)

First sentence of this subsection is amended by deleting remainder of sentence after words “aggrieved party”. Second sentence of this subsection is amended by adding after word “accrues” and before word “when” introductory phrase “(1) in the case of an indemnity against liability,” and then deleting remainder of sentence after “indemnified party” and adding in its place “; or(2) in the case of an indemnity against loss or damage, when the person indemnified makes payment thereof.”

2A-508(b)

In addition to specific performance and replevin, detinue, sequestration, claim and delivery and “the like” are listed as remedies.

2A-511

Subsections (2), (3) and (4) are deleted from this subsection and moved to end of §2A-512 as subsections (c), (d) and (e) and section references are corrected.

2A-516

Added at end of this section as subsection (f): “Subsection (c) shall not apply to consumer lease.”

2A-516(b)

After words “finance lease” insert “that is not consumer lease”.

2A-516(c)(2)

Phrase “except in the case of consumer lease” is deleted at beginning of this subsection.

2A-517(a)

Following word “lease” add “that is not consumer lease” in subsections (a) and (b).

2A-517(b)

Phrase “Except in the case of finance lease that is not as consumer lease,” is deleted at beginning of this subsection.

2A-521

Title of this section is amended to include “Other Remedies”.

2A-524(a)

1990 amendment not adopted.

2A-529(e)

1990 amendment not adopted.

3-103

Amended to add “Demand Draft” as defined in §3.104.

3-104

Amended to add “Demand Draft” which is writing not signed by customer and created by third party under purported authority of customer for purpose of charging customer's account with bank. It does not include check signed by fiduciary.

3-112

Insert phrase “, and the instrument shall not by virtue of this sentence be considered to violate the provisions of Title 4, Finance Code at end of subsection (b).

3-312

1991 amendment to 1990 Official Amendments adopted.

3-404(d)

Word “substantially” omitted.

3-405(b)

Word “substantially” omitted.

3-406(b)

Word “substantially” omitted.

3-411(c)(i)

Word “obligated” inserted before word “bank”.

3-415

1993 amendment to 1990 Official Amendments adopted.

3-605(i)(ii)

Phrase “either specifically or by general language indicating that parties waive defenses based on suretyship or impairment of collateral” omitted.

4-106

Alternative adopted and Subsection (c) of Alternative B adopted.

4-207(a)

Amended to add that customer or collecting bank that transfers item and receives settlement or other consideration warrants that “(6) if the item is demand draft, the creation of the item according to the terms on its face was authorized by the person identified as the drawer.”

4-207(f)

Added and says, “(f) If the warranty under Subsection (a)(6) is not given by transferor or collecting bank under applicable conflict of law rules, the warranty is not given to that transferor when that transferor is transferee or to any prior collecting bank of that transferee.”

4-208(a)

Amended to add subparagraph (4), which reads, “(4) if the instrument is demand draft, the creation of the draft according to the terms on its face was authorized by the person identified as drawer.”

4-208(b)

Following replaces last sentence of Subsection (b): “If the drawee accepts the draft, breach of warranty is defense to the obligation of the acceptor. If the acceptor makes payment with respect to the draft, the acceptor is entitled to recover from warrantor for breach of warranty the amounts stated in this subsection.”

4-208(g)

Added and reads, “(g) If the warranty under Subsection (a)(4) is not given by transferor under applicable conflict of law rules, the warranty is not given to that transferor when that transferor is transferee.”

4-303(b)

Amended to add at end of Subsection “and before or after the bank's regular banking hours. bank is under no obligation to determine the time of day an item is received and without liability may withhold the amount thereof pending determination of the effect, consequence or priority of any knowledge, notice, stop-payment order, or legal process concerning the same, or interplead such amount and the claimants thereto.”

4-403(b)

Phrase “, but it lapses. . . within that period.” is replaced with “and is binding on the bank only if it is in writing, dated, and signed and describes the item with certainty.”

4-406(a)

“If the bank does not return the items, it shall provide in the statement of account the telephone number that the customer may call to request an item or legible copy of the items pursuant to Subsection (b).” inserted at end of subsection.

4-406(b)

“A bank shall provide, on request and without charge to the customer, at least two items or legible copy of the items with respect to each statement of account sent to the customer.” inserted at end of subsection.

4-406(e)

Word “substantially” omitted.

4A-207(b)(1)

In first sentence of this subsection, after “persons” and before “it” insert “or if the funds transfer is processed by the beneficiary bank in fully automated manner”.

4A-207(b)(2)

In first sentence of this subsection, after “or” and before “knows” insert “any individual processing the funds transfer on behalf of the beneficiary bank”.

4A-507(b)

After “obligations” and before “whether” insert “as to matters of construction and interpretation” and at end of subsection add “, and as to validity, to the extent permitted by §1.301 of this code.”

5-103(c)

Reference to 3.410 replaced with 3.409.

5-112(1)

Bracketed words included.

5-114

Subsections (4) and (5) included.

6-101 to 6-111

Repealed.

7-204(d)

Inserts reference to Tex. Rev. Civ. Stat. Ann. arts. 5545 and 5546.

7-209(a)

First sentence of official subsection (1) is placed in separate subparagraph (a)(1) and balance of official subsection is placed in separate subparagraph (a)(2).

7-209(c)

1966 Official Amendment not enacted. Section reads as follows:

“A warehouseman's lien for security interest under Subsection (b) is effective against any person who so entrusted the bailor with possession of the goods that pledge of them by him to good faith purchaser for value would have been valid but is not effective against person as to whom the document confers no right in the goods covered by it under Section 7.503. However, the warehouseman's specific lien for charges and expenses under Subsection (a)(1) is effective against any security interest. If the warehouseman learns of perfected security interest owned by personas to whom the document confers no right in the goods covered by it under Section 7.503 against the goods and fails thereafter to give such secured party (Section 9.105) written notice of the accrued and unpaid charges and expenses at the time when they have accrued for between two and six months, then the warehouseman's specific lien under Subsection (a)(1) is effective as against such secured party only with respect to unpaid charges and expenses which have accrued by the end of six months.”

7-403(a)(2)

Bracketed words included with variation, viz.: words “case of damage or destruction by fire” are substituted for words “such cases.”

8-308 to 8-321

Deleted.

8-402(c)

Order of subparagraphs (1) and (2) reversed and renumbered accordingly.

8-408

Deleted.

8-503

Last paragraph of Subsection (d) redesignated Subsection (e) and Subsection (e) redesignated Subsection (f) with conforming changes.

8-601 to 8-603

Not adopted.

10-101 to 10-104

Repealed.

10-104

Art. 8 conforming amendment not adopted.

11-101 to 11-108

“January 1, 1974” inserted in blanks relating to the effective date of the new U.C.C. “June 30, 1966” inserted in blanks relating to effective date of old U.C.C.

11-105(b)

Amended to read as follows: “(b) With respect to any collateral, other than fixtures or minerals or the like (including oil and gas) or accounts subject to Subsection (e) of Section 9.103, which are covered by financing statement or security agreement filed as financing statement or continuation statement filed prior to January 1, 1974, and which shall not have lapsed prior to January 1, 1974, acquired by the debtor on or after January 1, 1974, any effective financing statement or security agreement filed as financing statement or continuation statement described in this section and purporting to cover such after-acquired collateral shall apply only if the filing or filings are in the office or offices that would be appropriate to perfect the security interests in the new collateral under the code with its 1973 amendments.”

11-105(d)

Amended to read as follows: “(d) If the filing for record of mortgage would have been effective as to the types of collateral enumerated in Subsection (f) of Section 9.402 if the 1973 amendments had been in effect on the date of the filing for record of the mortgage, the mortgage shall be deemed effective as such filing as to the types of collateral enumerated in Subsection (f) of Section 9.402 of this code, as amended, on January 1, 1974”.

2007 Official Amendments

Tex. SB 1540 revised Art. 9 as follows:

9.503(a)

Provides that financing statement sufficiently provides the name of the debtor if the debtor is registered organization, only if the financing statement provides the name of the debtor indicated on the debtor's formation documents that are filed of public record in the debtor's jurisdiction of organization, rather than of the debtor's jurisdiction, to create the registered organization and that show the debtor to have been organized, including any amendments to those documents for the express purpose of amending the debtor's name, and if the debtor is an individual, if the financing statement provides the individual's name shown on the individual's driver's license or identification certificate issued by the individual's state of residence.

9.516(b)

Provides that filing does not occur with respect to record that filing office refuses to accept because the filing office is unable to index the record because in the case of record filed or recorded in the filing office described in Section 9.501(a)(1), the record does not provide the name of the debtor.

9.517

Provides that the failure of the filing office to index record or to correctly index information contained in record does not affect the effectiveness of the filed record.

9.518(a), (b)

Authorizes any person named as debtor or secured party to file correction statement with respect to record if the person believes that the record is inaccurate or was wrongfully filed. Deletes existing text authorizing person to file in the filing office correction statement with respect to record indexed there under the person's name if the person believes that the record is inaccurate or was wrongfully filed. Provides that filing of correction statement is not effective as an amendment to filed financing statement and is not sufficient to effect change in the manner in which the filing office has indexed financing statement or information contained in financing statement.

9.705(c), (g)

Makes conforming change. Sets forth certain dates relating to financing statement. Sets forth the timeframe of the effectiveness of financing statement.

Filing Fees.

See category 10 Documents and Records, topic 10.04 Records, subhead Filing Under Commercial Code.

Forms.

See end of this Digest.

See also topics: Banks and Banking, Bills and Notes, Brokers, Carriers, Contracts, Factors, Frauds, Statute of, Sales, Securities, Warehousemen; categories Business Organizations, topic Corporations; Civil Actions and Procedure, topic Limitation of Actions; Debtor and Creditor, topics Assignments, Fraudulent Sales and Conveyances, Liens, Pledges; Documents and Records, topics Records, Seals; Mortgages, topic Chattel Mortgages.

3.10 CONDITIONAL SALES:

See topic 3.09 Commercial Code.

3.11 CONSIGNMENTS:

See topic 3.14 Factors.

3.12 CONSUMER PROTECTION:

Deceptive Trade Practices.

Texas Deceptive Trade Practices—Consumer Protection Act prohibits false, misleading or deceptive trade practices in conduct of any trade or commerce. (Tex. Bus. & Com. Code Ann. §§17.41-17.63). Certain of such practices are enumerated by way of example. (Tex. Bus. & Com.

Code Ann. §17.46). Violations are subject to suit by either Attorney General or consumers. In suits by Attorney General, courts determining whether challenged act or practice is prohibited by statute are permitted to look for guidance to both specific prohibitions specified in statute and interpretations of Federal Trade Commission and federal courts in applying Federal Trade Commission Act, 15 U.S.C.S. §45(a)(1). (Tex. Bus. & Com. Code Ann. §17.46). In suits by consumers, courts determining whether challenged act or practice is prohibited by statute are allowed to consider interpretations of courts from other jurisdictions but liability can be found only if one of acts or practices specifically enumerated in statute is found to have been committed. (Tex. Bus. & Com. Code Ann. §§17.46 and 17.50). Statute does not apply to owners and employees of newspapers, magazines, telephone directories, broadcast stations, billboards (in absence of actual knowledge of unlawful character of advertisement or direct or substantial interest in sale of unlawfully advertised good or service in question), certain rendering of professional services, certain contracts exceeding $100,000, and certain transactions in which consumer's consideration exceeds $500,000. (Tex. Bus. & Com. Code Ann. §§17.46 and 17.49). Statute does not apply to acts or practices specifically authorized by rule or regulation of Federal Trade Commission. (Tex. Bus. & Com. Code Ann. §17.49). Tex. Prop. Code Ann. §27.001 prevails over statute to extent of conflict. (Tex. Bus. & Com. Code Ann. §17.44[b]). Penalties and defenses are defined in detail by statute. See subhead General Protection, infra. Statute does not apply to damage incurred in interstate commerce by carrier under receipt or bill of lading. (Hanlon v. UPS 132 F. Supp. 2d 503 [2001]). Discount health care program trade practices governed by the Texas Insurance Code. (Tex. Ins. Code Ann. §§562.001–562.303).

General Protection.

Under state Deceptive Trade Practices-Consumer Protection Act, consumers may sue to obtain: (1) Up to three times amount of economic damages (compensatory damages for pecuniary loss, including costs of repair and replacement), (2) damages for mental anguish, (3) up to three times amount of mental anguish and economic damages if conduct intentional, (4) injunctive relief, (5) restitution, (6) other relief as ordered by court, (7) reasonable and necessary attorneys' fees, and (8) costs of court. (Tex. Bus. & Com. Code Ann. §17.50[b], [d]). Liability may be predicated upon: (1) Commission of one of deceptive trade practices specifically enumerated in statute as false, misleading or deceptive, and reliance to detriment of consumer, (2) breach of express or implied warranty, (3) any unconscionable action or course of action, and (4) violation of Insurance Code. (Tex. Bus. & Com. Code Ann. §17.50[a]). With certain limited exceptions, consumer must provide defendant with written notice of complaint advising person in reasonable detail of amount of economic damages, mental anguish damages, and expenses, including attorneys' fees, at least 60 days prior to suit as precondition to availability of damages. (Tex. Bus. & Com. Code Ann. §17.505[a], [b]). Defendant who does not receive required written notice may file plea in abatement within 30 days after answer filed with court. (Tex. Bus. & Com. Code Ann. §17.505[c]). Court must grant abatement and abatement continues until 60th day after defendant served with written notice. (Tex. Bus. & Com. Code Ann. §§17.505[d] and [e]). Within 90 days of service of petition either party may file motion to compel mediation of dispute. (Tex. Bus. & Com. Code Ann. §17.5051[a]). Court shall order mediation and, unless otherwise agreed, mediation held within 30 days after order signed. (Tex. Bus. & Com. Code Ann. §17.5051[b], [d]). Party may not compel mediation if economic damages less than $15,000, unless compelling party agrees to pay costs of mediation. (Tex. Bus. & Com. Code Ann. §17.5051[f]). With certain time constraints, defendant may tender to consumer written offer of settlement which, if not accepted, will limit consumers amount of attorneys' fees recoverable and limit recovery to lesser of settlement offer or amount of damages found by trier of fact if offer is found by court to be same or substantially same as damages found by trier of fact. (Tex. Bus. & Com. Code Ann. §§17.5052[a] to [h]). Offer of settlement does not constitute admission of liability, and offer or its rejection may not be offered in evidence for any purpose. (Tex. Bus. & Com. Code Ann. §17.5052[k]). It is defense to action brought by consumer under this statute if defendant shows that, prior to transaction at issue, he gave reasonable and timely notice to consumer that he was relying on written information relating to good or service at issue or concerning test required by government agency if such information was false or inaccurate and if defendant could not reasonably have known of such falsity or inaccuracy. (Tex. Bus. & Com. Code Ann. §17.506). It is also defense if defendant, in response to notice from consumer, tendered within 30 days to consumer economic damages, mental anguish damages, and expenses, including attorneys' fees, reasonably incurred by consumer in asserting claim. (Tex. Bus. & Com. Code Ann. §17.506[d]). Generally, any waiver by consumer of provisions of Deceptive Trade Practices-Consumer Protection Act is contrary to public policy and unenforceable unless specific provisions of Act are met, including the signing of conspicuous written waiver by consumer who (1) is not in significantly disparate bargaining position, and (2) is represented by an attorney in seeking or acquiring goods or services. (Tex. Bus. & Com. Code Ann. §17.42).

Residential Home Construction.

With certain exceptions, Residential Construction Liability Act (Tex. Prop. Code Ann. §§27.001-27.004) applies to pre-Sept. 1, 2007 claims against contractors concerning construction defect in new, remodeled or repaired existing residences, as well as appurtenances to residences such as swimming pools (Tex. Prop. Code Ann. §§27.001-27.002). Effective Sept. 1, 2007, Act only applies to (1) application for building permit or certification as builder or Texas Star Builder, or (2) request for state-sponsored inspection and dispute resolution. To extent of conflict, this statute (Tex. Prop. Code Ann. §27.002) prevails over Deceptive Trade Practices—Consumer Protection Act, discussed supra under subheads Deceptive Trade Practices and General Protection. Contractor who complies with Residential Home Construction Act may assert defenses not available in Deceptive Trade Practice—Consumer Protection Act suits. (Tex. Prop. Code Ann. §27.003.) Generally, claimant must give written notice of claimed defect to contractor 60 days prior to suit and on request of contractor provide evidence that depicts nature and cause of defect and nature and extent of repairs necessary to remedy defect including reports, photographs and videotapes if discoverable under Texas Rules of Civil Procedure §192; contractor has 35 days to inspect for defect and may make written settlement offer within 45 days of receiving notice of claims to claimant's last known address or claimant's attorney by certified mail, return receipt requested. (Tex. Prop. Code Ann. §§27.004[a] and [b]). If contractor fails to make reasonable offer, or fails to make reasonable attempt to complete repairs specified in accepted offer, or fails to complete, in good and workmanlike manner, repairs specified in accepted offer, contractor loses limitations to liability and defenses provided by statute. (Tex. Prop. Code Ann. §27.004[f]). Claimant who rejects reasonable settlement offer or does not permit contractor to inspect or make repairs under settlement agreement may not recover amount in excess of fair market value of contractor's last offer of settlement (Tex. Prop. Code Ann. §27.004[e]). Contractor is entitled to dismissal if: claimant failed to provide notice or failed to give contractor reasonable opportunity to inspect property. (Tex. Prop. Code Ann. §27.004[d]).

Consumer Loan Transactions.

Specified lenders must, inter alia, obtain state license and adhere to interest limitations and disclosure requirements set out in statutes governing consumer credit. (Tex. Fin. Code Ann. §§341.001, et seq. [general provisions], 342.001, et seq. [consumer loans], 345.001, et seq. [retail installment sales], 346.001, et seq. [revolving credit accounts], 347.001, et seq. [manufactured home credit transactions], 348.001, et seq. [motor vehicle sales]). Knowing and willful violations of statute may result in administrative penalty of up to $1,000 for each day of violation and for each violation. (Tex. Fin. Code Ann. §14.252). Aggregate amount of penalties assessed during one calendar year may not exceed lesser of (1) $100,000, or (2) amount equal to greater of 5% of creditor's net worth or $5,000. (Tex. Fin. Code Ann. §14.252[b]). With certain limitations, lender's violation of statute relating to interest or time price differential may result in penalties from twice amount of interest to forfeiture of principal, attorneys' fees, and fine. (Tex. Fin. Code Ann. §§349.001-349.005). Lenders who are not licensed, registered, or otherwise exempt, must comply with Federal Trade Commission requirements under 15 U.S.C.S. §45. (Tex. Fin. Code Ann. §350.003). Liability is in lieu of recovery under federal statute. (Tex. Fin. Code Ann. §349.404). Lenders are prohibited from discrimination on basis of sex, race, color, religion, national origin, marital status, or age, or because all or part of individual's income derives from public assistance program in form of social security or supplemental security income, or individual has in good faith exercised any right under Consumer Credit Protection Act. (Tex. Fin. Code Ann. §341.401). Mortgage loan originators regulated by Tex. Fin. Code Ann. Chs. 157, 180. See topic 3.19 Interest.

Consumer Credit Transactions.

Specified retail creditors must, inter alia, adhere to finance charge limitations and disclosure requirements set out in statute. (Tex. Fin. Code §§345.002-345.357). With certain limitations, creditor's violation of statute with respect to interest or time price differential may result in penalties from twice amount of finance charge to forfeiture of principal, attorneys' fees, and fine. (Tex. Fin. Code Ann. §§349.001-349.005). Liability is in lieu of recovery under federal statute. (Tex. Fin. Code Ann. §349.404). Creditors may not misrepresent rate, terms, or conditions of consumer credit transaction through advertising. (Tex. Fin. Code Ann. §308.002). Retail creditors are prohibited from discrimination on basis of sex, race, color, religion, or national origin. (Tex. Fin. Code Ann. §341.401). See topic 3.19 Interest. Retail installment contracts not to be conditioned on purchase of debt cancellation agreement. (Tex. Fin. Code Ann. §348.124). For provisions regulating retail installment purchases of motor vehicles, generally, see Tex. Fin. Code Ann. Ch. 348.

Telephone Solicitation Transactions.

Certain telephone solicitations are regulated by statute. (Tex. Bus. & Com. Code Ann. §§38.001-38.305 — **repealed** eff. Apr. 1, 2009). Seller who makes telephone solicitation from Texas or to person in Texas must obtain registration certificate for business location from which solicitation is made. (Tex. Bus. & Com. Code Ann. §38.101 — **repealed** eff. Apr. 1, 2009). Person who violates this statute is subject to civil penalty of not more than $5,000 for each violation. (Tex. Bus. & Com. Code Ann. §38.302 — **repealed** eff. Apr. 1, 2009). Violation is false, misleading or deceptive act and any public or private right may be used to enforce statute.

Home Solicitation Transactions.

Home solicitation transactions regulated by statute providing for notice of rights and period for cancellation. (Tex. Bus. & Com. Code Ann. §§39.001-39.009 — **repealed** eff. Apr. 1, 2009). Contracts entered into in violation of statute are void and unenforceable. (Tex. Bus. & Com. Code Ann. §39.008 — **repealed** eff. Apr. 1, 2009). Violators subject to same penalties as under Deceptive Trade Practices-Consumer Protection Act, discussed supra.

Disclosures for Charitable Contributions

Disclosures required for collection or solicitation by nonprofit entities using public donation receptacles, telephone or home solicitations, mail solicitations. (Tex. Bus. & Com. Code Ann. §§17.921–17.926).

Debt Collection.

Certain debt collection practices prohibited by statute. (Tex. Fin. Code Ann. §§392.001-392.404). Attorneys are not considered debt collectors when acting as attorney on behalf of client unless attorney employs non-attorneys who regularly engage in debt collection or regularly solicit debts for collection. (Tex. Fin. Code Ann. §392.001[7]). See topic 3.18 Licenses, Business and Professional, subhead Collection Agencies.

Plain Language Law.

Certain consumer loans, including retail installment loans and home equity loans, must be written in plain language designed to be easily understood by average consumer (Tex. Finance Code Ann. §341.502).

Landlord and Tenant.

See category 21 Property, topic 21.10 Landlord and Tenant.

Senior Citizens

Agents or brokers marketing annuities or life insurance not to use misleading designations or certifications asserting senior-specific qualifications. (Tex. Ins. Code Ann. §§1117.001–1117.052).

3.13 CONTRACTS:

Common law rules generally apply.

See topics 3.09 Commercial Code, Consumer Protection; categories 8 Debtor and Creditor, topic Homesteads; Documents and Records, topic Seals; Family, topics Husband and Wife, Infants.

Uniform Commercial Code enacted. (Tex. Bus. & Com. Code Ann. §1.101 et seq.). See topic 3.09 Commercial Code.

Choice of Law.

In transactions where consideration is greater than $1,000,000, parties may choose governing jurisdiction if transaction bears reasonable relation to chosen jurisdiction, excepting determination of law governing certain real property transactions, certain marriage, adoption and will matters and issues that Texas statute or U.S. statute provide are governed by law of particular jurisdiction. (Tex. Bus & Com. Code Ann. §35.51 — **repealed** eff. Apr. 1, 2009). If contract for construction or repair of improvements to real property located in Texas provides that it is subject to laws of another state, provision is voidable. (Tex. Bus. & Com. Code Ann. §35.52 — **repealed** eff. Apr. 1, 2009). If contract with consideration of less than $50,000 which is partially executed in Texas and has Texas resident or entity as party provides that it is subject to laws of another state, provisions are voidable unless set out in noticeable type or print. (Tex. Bus. & Com. Code Ann. §35.53 — **repealed** eff. Apr. 1, 2009).

3.14 FACTORS:

Commission merchant defined as person engaged in business of selling goods, including produce, wares, merchandise, sugar, or cotton, on consignment for commission. (Tex. Occ. Code Ann. §1801.001). Must render full itemized account to consignor of all sales and transactions. (Tex. Occ. Code Ann. §1801.104).

Uniform Commercial Code enacted. (Tex. Bus. & Com. Code Ann. §1.101 et seq.). See topic 3.09 Commercial Code.

Reporting Requirements.

Commission merchants, dealers, brokers and agents dealing in certain farm produce or livestock must keep sales and transportation records. (Tex. Agric. Code Ann. §§147.041–.042)

Liens.

See topic 3.09 Commercial Code.

Bond.

Factors or commission merchants must file bond of $3,000 and meet other requirements in each county where commission merchant maintains office (Tex. Occ. Code Ann. §§1801.051-.052) which may be sued on until reduced to $1,500 or less and new $3,000 bond required (Tex. Occ. Code Ann. §1801.055). Livestock commission merchants must give bond in amount approved by county judge, such amount to be nearest $1,000 multiple above double average daily sales and purchases of livestock for preceding year up to $50,000, plus 10% of amount of sales and purchases in excess of $50,000, but in no case less than $2,000 (Tex. Agric. Code Ann. §147.023) which may be sued on until exhausted. If bond is reduced by half, new bond must be posted to restore to amount of original bond. (Tex. Agric. Code Ann. §147.028).

Consignment Agreements.

See topic 3.09 Commercial Code.

3.15 FRANCHISES:

No general provisions. Special provisions as indicated below.

Uniform Franchise and Business Opportunities Act.

Not adopted. Texas Business Opportunity Act applies (Tex. Bus. & Com. Code Ann. §41.001 et seq. — **repealed** eff. Apr. 1, 2009).

Automobile Dealers.

Franchised dealer must apply for separate dealer's license for each separate and distinct dealership. (Tex. Occ. Code Ann. §2301.257).

Farm and Industrial Equipment Dealers.

Franchise rules applicable to farm, industrial, and outdoor equipment dealers. (Tex. Bus. & Com. Code Ann. §19.01 et seq. — **repealed** eff. Apr. 1, 2009).

Franchise Taxes.

See Tex. Tax Code Ann. §171.001 et seq. Unless qualified passive entity (Tex. Tax Code Ann. §171.003), franchise tax is imposed on each taxable entity that does business in state or is chartered or organized in state.

3.16 FRAUDS, STATUTE OF:

Uniform Commercial Code enacted. (Tex. Bus. & Com. Code Ann. §1.101 et seq.). See topic 3.09 Commercial Code.

Following promises or agreements not enforceable unless in writing and signed by or on behalf of person to be charged: (1) promise by executor or administrator to answer out of his own estate for any claim against estate of deceased; (2) promise by one person to answer for debt, default, or miscarriage of another person; (3) agreement made on consideration of marriage or on consideration of nonmarital conjugal cohabitation; (4) contract for sale of real estate; (5) lease of real estate for term longer than year; (6) agreement not to be performed within year from date of making; (7) promise or agreement to pay commission for sale or purchase of oil or gas mining lease or royalty, minerals, or mineral interest; and (8) agreement, promise, contract, or warranty of cure made by physician or health care provider, except pharmacist. (Tex. Bus. & Com. Code Ann. §26.01).

Part Performance.

Cases conflict on effect of part performance under oral contract not to be performed in year. Complete performance by one party can remove contract from scope of statute. (701 S.W.2d 37). Under some circumstances, part performance will validate oral contract for sale of land. (394 S.W.2d 57).

Pleading.

Statute must be plead as affirmative defense. (Rule 94).

Real estate commission contracts must be in writing or supported by written memorandum and signed by or on behalf of person to be charged. (Tex. Occ. Code Ann. §1101.806[c]). See topic 3.06 Brokers.

3.17 [RESERVED]

3.18 INFORMATION TECHNOLOGY, INTERNET AND NEW MEDIA:

Electronic Transfers.

Uniform Electronic Transactions Act enacted. (Tex. Bus. & Com. Code Ann. §43.001 et seq. **repealed** eff. Apr. 1, 2009).

Insurers

Health insurance providers to adopt information technology to provide real-time information to enrollees and providers. (Tex. Ins. Code Ann. §§1661.001–1661.009).

3.193.16

3.17 INTEREST:

Texas Credit Title Act (Tex. Fin. Code Ann. §301.001 et seq.) applies to all statutorily imposed interest and interest limits.

Definitions.

Interest is compensation allowed by law for use or forbearance or detention of money, but does not include any time price differential however denominated. (Tex. Fin. Code Ann. §301.002[4]). Legal interest is that interest allowed by law in absence of written agreement imposed on obligor to pay contract interest. It does not include judgment interest. (Tex. Fin. Code Ann. §301.002[8]). Contract interest is that interest agreed upon by parties to written contract. It does not include judgment interest. (Tex. Fin. Code Ann. §301.002[1]). Usury is interest in excess of that allowed by law. (Tex. Fin. Code Ann. §301.002[17]). Following terms are also defined statutorily: open-end account (Tex. Fin. Code Ann. §301.002[14]), credit card transaction (Tex. Fin. Code Ann. §301.002[2]), merchant discount (Tex. Fin. Code Ann. §301.002[11]) and lender credit card agreement (Tex. Fin. Code Ann. §301.002[9]).

Legal Interest Rate.

When no specified rate of interest is agreed upon, interest at rate of 6% per annum is permitted on all accounts and contracts ascertaining sum payable, commencing on 30th day from and after time sum is due and payable. (Tex. Fin. Code Ann. §302.002).

Conventional Interest Rates.

Notice Required on Certain Contracts.

If written contract of authorized lender is subject to regulation by Office of Consumer Credit Commissioner, it must contain name, mailing address and telephone number of Office of

Consumer Credit Commissioner. (Tex. Fin. Code Ann. §14.104).

Maximum Rate.

Parties to written agreement may agree to interest rate or time differential that does not produce rate that exceeds: (1) 10% per year unless otherwise provided for by law (Tex. Fin. Code Ann. §302.001[b]), or (2) weekly ceiling computed by multiplying by two, auction rate—average auction rate quoted on bank discount basis for 26–week U.S. issued treasury bills as published by Federal Reserve Bank for week preceding week in which weekly ceiling rate is to take effect—and rounding result to nearest one-quarter of 1% (Tex. Fin. Code Ann. §303.003), or (3) for monthly ceiling rate applicable to variable rate interest, including open-end accounts and not including contracts for personal, family, or household use (Tex. Fin. Code Ann. §303.004), monthly ceiling rate computed by Consumer Credit Commissioner on first calendar day of month, by averaging all weekly ceiling rates for month preceding computation date of monthly ceiling rate (Tex. Fin. Code Ann. §§303.004-303.005), or (4) for quarterly ceiling rate, applicable to agreements including open-end accounts (Tex. Fin. Code Ann. §303.006), quarterly ceiling rate computed by Consumer Credit Commissioner on Dec. 1, Mar. 1, June 1, and Sept. 1, and effective for three calendar months, by averaging all weekly ceiling rates for the three calendar months preceding computation date of ceiling (Tex. Fin. Code Ann. §303.008), or (5) for annualized ceiling, applicable to open-end accounts (Tex. Fin. Code Ann. §303.007), rate computed by Consumer Credit Commissioner on Dec. 1, Mar. 1, June 1, and Sept. 1, and effective for 12 months, by averaging all weekly ceiling rates for the three calendar months preceding computation date of ceiling (Tex. Fin. Code Ann. §303.008). If rate computed for weekly, monthly, quarterly, or annualized ceiling is less than 18% year, ceiling is 18%, and if rate is more than 24%, rate is 24%. For contract made, extended or renewed for business, commercial investment or similar purpose, maximum weekly, monthly, quarterly, or annualized ceiling rate is 28%. For open-end accounts that provide for credit card transactions on which merchant discount is not imposed or received by creditor, ceiling is 21% per year. (Tex. Fin. Code Ann. §303.009). Various notice, disclosure and other requirements are applicable to open-end accounts. (Tex. Fin. Code Ann. §§303.101-303.106). Enforcement of ceiling rates is provided. (Tex. Fin. Code Ann. §§303.401-303.407).

Corporations **may also agree to and stipulate for any rate permitted by Tex. Fin. Code Ann. c. 303.**

Individuals and Entities Other than Corporation.

Parties to any written contract, or any contract under CC. 6, 6A or 7 of Tit. 79, may agree to and stipulate for any rate permitted by Tex. Fin. Code Ann. §303.201. Except as provided in Tex. Fin. Code Ann. §303.201 or otherwise provided by law, maximum rate of interest is 10% per annum. (Tex. Fin. Code Ann. §302.001). See also catchline Loans Secured by Any Interest in Real Property, infra.

Agricultural credit corporations organized under laws of Texas may not charge common stock shareholder interest on loan at rate that is greater than discount rate set by the Farm Credit Administration for discounts made by federal intermediate credit banks plus 3% per year. (Tex. Agric. Code Ann. §54.009[e]).

Loans Secured by Any Interest in Real Property.

Interest rate on loan secured in any part by interest in real property, including lien, mortgage, or security interest, is usurious, if interest rate computed by amortizing or spreading, using actuarial method during stated term of loan, all interest at any time contracted for, charged, or received in connection with loan exceeds maximum rate permitted. If such loan is paid in full before end of stated term of loan and amount of interest received for period that loan exists exceeds amount that produces maximum rate authorized by law for that period, lender shall: (1) refund amount of excess to borrower; or (2) credit excess amount against amounts owing under loan, and upon doing so, lender is not subject to any of penalties provided by law for contracting for, charging, or receiving interest in excess of maximum rate authorized. (Tex. Fin. Code Ann. §302.101).

Judgments.

If based on contract providing for specific rate of interest, earn interest at lesser of rate specified in contract which may be variable rate or 18%. (Tex. Fin. Code Ann. §304.002). Otherwise, judgments of courts of this state together with taxable court costs earn interest compounded annually at rate published by Consumer Credit Commissioner of not less than 5% and not more than 15% depending upon prime rate published by Board of Governors of the Federal Reserve System. Interest begins to accrue on date judgment rendered. (Tex. Fin. Code Ann. §304.003). Every Texas court judgment must state rate of interest to be earned thereon. (Tex. Fin. Code Ann. §304.001). Judgments in wrongful death, personal injury, and property damage cases must include prejudgment interest equal to the postjudgment interest rate applicable at time of judgment. (Tex. Fin. Code Ann. §304.101 et seq.). Post-judgment interest (Tex. Fin. Code Ann. §34, subchapter A) does not apply to judgments in favor of taxing unit in suit to collect delinquent taxes under Tex. Tax Code Ann. §33, subchapter C or judgment that earns interest under Tex. Tax Code Ann. tit. 2, or judgments for unpaid child support under Tex. Fam. Code Ann. §157.265. (Tex. Fin. Code Ann. §304.302).

Usury.

Any person who contracts for, charges or receives interest on loan for personal, family, or household use that exceeds amount authorized in Finance Code, Subtitle A: Interest, shall forfeit to obligor greater of: (1) three times amount computed by subtracting amount of interest allowed by law from total amount contracted for, charged or received or (2) lesser of $2,000 or 20% of principal. (Tex. Fin. Code Ann. §§305.001; 305.003). If creditor charges and receives interest greater than twice amount allowed, creditor is liable to obligor for both principal and interest received. (Tex. Fin. Code Ann. §§305.002). Any person who contracts for or receives interest on commercial loan that exceeds amount authorized in Finance Code, Subtitle A: Interest, shall forfeit to obligor three times amount computed by subtracting amount of interest allowed by law from total amount contracted or received. (Tex. Fin. Code Ann. §305.001[a-1]). Any person who contracts for, charges or receives interest which is in excess of double amount of interest allowed in Finance Code Subtitle A: Interest shall forfeit as additional penalty, all principal as well as interest and all other charges. (Tex. Fin. Code Ann. §305.004). Person liable under either statute shall also pay reasonable attorneys' fees set by court. (Tex. Fin. Code Ann. §305.005). Action for usurious interest must be brought within four years of date interest was contracted for, charged or received. (Tex. Fin. Code Ann. §305.006). Any such person who charges or receives interest that is greater than twice amount authorized, shall be guilty of misdemeanor and upon conviction thereof shall be punished by fine of not more than $1,000. Each contract or transaction in violation of this section shall constitute separate punishable offense. (Tex. Fin. Code Ann. §305.008). Liability may be avoided if usurious interest is result of accidental or bona fide error (Tex. Fin. Code Ann. §305.101) or if, upon discovery of violation, certain corrective measures are undertaken. (Tex. Fin. Code Ann. §305.103).

Consumer Credit.

Consumer credit, including regulated loans, installment loans, secondary mortgage loans, retail installment sales, manufactured home credit transactions and motor vehicle installment sales, is subject to extensive regulation in State of Texas. (See, generally, Tex. Fin. Code Ann. §§342.001 to 342.560.)

Credit Card Agreements.

Rates under credit card agreements subject to extensive regulation in State of Texas. (See Tex. Fin. Code Ann. §§301.002[A], 303.101-303.106, 339.001-339.003 and 346.001–

346.206.)

Revolving loan and revolving triparty accounts are subject to extensive regulation in State of Texas. (See Tex. Fin. Code Ann. §346.001 et seq.)

Financing of insurance premiums is subject to extensive regulation in State of Texas. (See Tex. Ins. Code Ann. §651.001 et seq.)

Pawn Shops.

Interest rate which may be charged by pawnbrokers is subject to extensive regulation in State of Texas. (Tex. Fin. Code Ann. §§371.001-371.306).

Credit unions may make loans to members at rate not exceeding 1½% per month on unpaid monthly balance, or higher rates authorized by law. (Tex. Fin. Code Ann. §124.002). Every loan must be evidenced by written instrument. (Tex. Fin. Code Ann. §124.004).

Mutual loan corporations organized to aid in production of agricultural products or livestock may loan money and charge interest at annual rate up to 3% over rate of discount established by Farm Credit Administration for discounts made by Federal Intermediary Banks. (Tex. Agric. Code Ann. §54.009).

3.18 [RESERVED]

3.19 LICENSES, BUSINESS AND PROFESSIONAL:

Texas Department of Licensing and Regulation is primary state agency responsible for oversight of businesses, industries, general trades and occupations. (Tex. Occ. Code Ann. §51.051). Most businesses and professions are required to take out licenses.

Commercial travelers and solicitors for books, maps, nurseries, newspapers and gravestones are exempt. [**CITE NEEDED FOR THIS**]

Hunting and fishing licenses are required for nonresidents and also for all residents with certain exceptions. (Tex. Parks & Wild. Code Ann. §§42.002, 42.005, 46.001). License required to unload in Texas fish or other aquatic life taken for sporting purposes from waters managed by the Gulf of Mexico Fishery Management Council (Tex. Parks & Wild. Code Ann. §46.001). Fur buyers and trappers must also be licensed. (Tex. Parks & Wild. Code Ann. §71.005).

Liquor Permits.

Various liquor permits and fees are set forth in Alcoholic Beverage Code. (Tex. Alco. Bev. Code Ann. §§11.01 to 75.05).

Horse and Greyhound Racing.

Licensing requirements for horse and greyhound racing are set forth in Texas Racing Act. (Tex. Rev. Civ. Stat. Ann. art. 179e).

Collection Agencies.

Definitions.

Following terms are defined statutorily: debt collection; debt collector; consumer;

consumer debt; creditor; credit bureau; and third-party debt collector. (Tex. Fin. Code Ann. §392.001).

Threats or Coercion.

No debt collector may collect or attempt to collect any debt alleged to be due and owing by any threats, coercion, or attempts to coerce which employ practices specifically set forth statutorily. (Tex. Fin. Code Ann. §392.301).

Harassment; Abuse.

In connection with collection of or attempt to collect any debt alleged to be due and owing by consumer, no debt collector may oppress, harass, or abuse any person by methods which employ practices specifically set forth statutorily. (Tex. Fin. Code Ann. §392.302).

Unfair or Unconscionable Means.

No debt collector may collect or attempt to collect any debt by unfair or unconscionable means employing practices specifically set forth statutorily. (Tex. Fin. Code Ann. §392.303).

Fraudulent, Deceptive, or Misleading Representations.

No debt collector may collect or attempt to collect debts or obtain information concerning consumer by any fraudulent, deceptive, or misleading representations which employ practices specifically set forth statutorily. (Tex. Fin. Code Ann. §392.304).

Deceptive Use of Credit Bureau Name.

No person shall use term “credit bureau”, “retail merchants” or “retail merchants association” in his business or trade name unless such person is in fact engaged in gathering, recording and disseminating favorable as well as unfavorable information relative to credit worthiness, financial responsibility, paying habits and other similar information regarding individuals, firms, corporations and any other legal entity being considered for credit extension so that prospective creditor may be able to make sound decision in extension of credit. This does not apply to nonprofit retail trade associations consisting of individual members and qualifying as bona fide business league as defined by I.R.S., and which nonprofit, retail trade association does not engage in business of debt collection or credit reporting. (Tex. Fin. Code Ann. §392.305).

Use of Independent Debt Collectors.

No creditor may use any independent debt collector who repeatedly and continuously engages in acts or practices which are prohibited after creditor has actual knowledge that independent debt collector is in fact repeatedly and continuously engaging in such acts or practices. (Tex. Fin. Code Ann. §392.306).

Correction of Third-Party Debt Collector's Files; Bond Requirement.

Individual may dispute accuracy of third-party debt collector's file on individual by written notice thereof. Within 30 days of receipt of written notice, third-party debt collector must send written statement to individual denying or admitting inaccuracy or stating it did not have sufficient time to complete investigation. If third-party debt collector admits inaccuracy, item must be corrected within five business days and third-party debt collector must immediately send notice complying with statute. If third-party debt collector did not have sufficient time to complete investigation, item in file must be changed as required by individual and third-party debt collector must send notice complying with statute. (Tex. Fin. Code Ann. §392.202). Third-party debt collector may engage in practice only if obtained $10,000 surety bond satisfying specifically enumerated statutory requirements by surety company authorized to do business in Texas. Copy of bond must be filed with Secretary of State. (Tex. Fin. Code Ann. §392.101).

Bona Fide Error.

No person shall be guilty of violation of above provisions if action complained of resulted from bona fide error notwithstanding use of reasonable procedures adopted to avoid such error. (Tex. Fin. Code Ann. §392.401).

Penalties.

Any person who violates above provisions is guilty of misdemeanor, and upon conviction is punishable by fine of not less than $100 nor more than $500 for each violation. Such misdemeanor charge must be filed within one year of alleged violation. (Tex. Fin. Code Ann. §392.402).

Civil Remedies.

Injunctive relief and actions for actual damages sustained are permitted. Reasonable attorneys' fees and costs may be awarded, if successful. If action is brought in bad faith or for purposes of harassment, court shall award defendant reasonable attorney's fees. (Tex. Fin. Code Ann. §392.403). Remedies provided for under Texas Deceptive Trade Practices — Consumer Protection Act (Tex. Bus. & Com. Code Ann. §17.41 et seq.) also available. Such remedies are cumulative. (Tex. Fin. Code Ann. §392.404).

Report to Consumer.

Credit Bureau shall, within 45 days of request, provide consumer with copy of all information contained in its files concerning such person. (Tex. Fin. Code Ann. §392.201).

3.20 MONOPOLIES, RESTRAINT OF TRADE AND COMPETITION:

Contract, combination, conspiracy in restraint of trade, monopoly, attempted monopoly or conspiracy to monopolize is unlawful. (Tex. Bus. & Com. Code Ann. §15.05). Federal antitrust precedents applicable to state law. (Tex. Bus. & Com. Code Ann. §15.04). Violations punishable by civil and criminal fine, imprisonment up to three years. State may seek injunction or divestiture. (Tex. Bus. & Com. Code Ann. §§15.20–15.22). Private rights of action include injunction, actual damages, threefold damages if willful or flagrant violation, attorney fee. (Tex. Bus. & Com. Code Ann. §15.21). Declaratory action by any person except foreign corporation not having permit or certificate of authority to do business in Texas. (Tex. Bus. & Com. Code Ann. §15.16). Except consent judgments or decrees entered before any testimony taken, final judgment in state action collateral estoppel in private action. (Tex. Bus. & Com. Code Ann. §15.24). Four year limitations period applies after action accrues or within one year after conclusion of any action brought by state per above statutory provisions, whichever is longer. (Tex. Bus. & Com. Code Ann. §15.25). Criteria, procedures, and remedies for enforceability of covenants not to compete. (Tex. Bus. & Com. Code Ann. §§15.50-.51). There are specific requirements to enforce covenant not to compete with physician. (Tex. Bus. & Com. Code Ann. §15.50[b]).

Unfair Trade Practices.

Exclusive distributorships and other vertical combinations unlawful if effect lessens competition. Rule of reason for restrictions on professional employment. (Tex. Bus. & Com. Code Ann. §15.05).

Deceptive Trade Practices.

See topic 3.12 Consumer Protection.

Acquisitions.

Anticompetitive acquisitions unlawful. (Tex. Bus. & Com. Code Ann. §15.05). Commissioner shall consider anticompetitive effect of acquisition of domestic insurer. (Tex. Ins.

Code Ann. §823.157).

3.21 NEGOTIABLE INSTRUMENTS:

See topics 3.02 Bills and Notes and 3.09 Commercial Code.

3.22 RESTRAINT OF TRADE:

See topic 3.20 Monopolies, 3.22 Restraint of Trade and Competition.

3.23 SALES:

Uniform Commercial Code enacted. (Tex. Bus. & Com. Code Ann. §1.101 et seq.). See topic 3.09 Commercial Code.

Contracts of Sale.

No special requirements as to formality for most contracts. In contract for sale of goods for $50,000 or less in which any element of execution occurs in Texas, party to contract is individual resident of state or domestic corporation having its principal place of business in state and choice of law rules of Tex. Bus. & Com. Code Ann. §1.301 do not apply to contract, any provision making contract or any conflict arising thereunder subject to laws of another state must be set out in bold-faced type, capitalized, underlined or otherwise made conspicuous in order to be enforceable. (Tex. Bus. & Com. Code Ann. §35.53 **repealed** eff. Apr. 1, 2009). If contract principally for construction or repair of improvements to real property located in Texas contains provision making contract subject to laws of another state or to arbitration in another state, it is voidable by party against whom it is sought to be enforced. (Tex. Bus. & Com. Code Ann. §35.52 **repealed** eff. Apr. 1, 2009).

Bills of Sale.

Written bill of sale is required in sale of livestock (Tex. Agric. Code Ann. §146.001), and in sale of motor vehicles. See category 23 Transportation, topic 23.01 Motor Vehicles.

Conditions or Warranties.

See topic 3.09 Commercial Code.

Products Liability.

In Texas, products liability action may be predicated on one or more of at least three theories of recovery: strict liability, breach of warranty under U.C.C., and negligence; if either breach of warranty or negligence is alleged in addition to strict liability, product supplier is entitled to submit three defensive issues of contributory negligence, assumption of risk, and misuse, and in addition, may also be entitled to submission of both comparative-negligence issue and comparative-causation (product misuse) issue. (665 S.W. 2d 414). There is no longer requirement of privity of contract. (114 S.W. 2d 646). Texas has adopted §402A of Restatement (Second) of Torts and U.C.C. (557 S.W. 2d 77). Texas U.C.C. neutral on question of third party beneficiaries of warranties of quality and need for privity of contract. (Tex. Bus. & Com. Code Ann. §2.318).

Transfer of Title.

See topic 3.09 Commercial Code.

Delivery.

See topic 3.09 Commercial Code.

Stoppage in Transitu.

See topic 3.09 Commercial Code.

Remedies of Seller.

See topic 3.09 Commercial Code.

Remedies of Buyer.

See topic 3.09 Commercial Code.

Conditional Sales.

See topic 3.09 Commercial Code.

Retail credit sales are subject to extensive statutory regulation. (Tex. Fin. Code Ann. §345.001 et seq.). See topic 3.19 Interest.

Consumer Protection.

See topic 3.12 Consumer Protection.

"Unsolicited goods" statute (Tex. Bus. & Com. Code Ann. §35.42 **repealed** eff. Sept. 1, 2003.

Bulk Sales.

See topic 3.09 Commercial Code.

Sales of Motor Vehicles.

See category 23 Transportation, topic 23.01 Motor Vehicles.

3.24 SECURITIES:

Uniform Commercial Code enacted. (Tex. Bus. & Com. Code Ann. §1.101 et seq.). See topic 3.09 Commercial Code.

Public Securities.

State law requires all new public securities issued by cities, counties or other subdivisions of state to be approved by Attorney General and registered with Comptroller before issuance. (Tex. Gov't Code Ann. §1201.066). For regulations relating to public securities see Public Securities Procedure Act, Tex. Gov't. Code Ann. §1201.001 et seq.

Corporation, company or individual doing business as bond investment company, or company to place and sell bonds and certificates or debentures on partial payment or installment plan, must deposit with State Treasurer $5,000 in cash or securities and deposit semi-annually in cash or securities 10% of all net premiums received until sums deposited amount to $100,000. (Tex. Fin. Code Ann. §155.002).

Stock and bond brokers pay an annual occupation tax of $50.

Blue Sky Law is known as The Securities Act. (Tex. Rev. Civ. Stat. Ann. art. 581-1 et seq.).

Supervision.

Act is administered by State Securities Commissioner under supervisions of State Securities Board. (Tex. Rev. Civ. Stat. Ann. art. 581-2).

Regulatory Powers of Supervising Authority.

With certain exceptions, securities must be registered with State Securities Board and permit for sale must be obtained. (Tex. Rev. Civ. Stat. Ann. art. 581-7[A]). For exceptions, and grounds for denial, see subheads Exempt Securities, and Registration of Securities, respectively, infra. Dealers must register with State Securities Board and obtain license. See subhead Registration of Dealers, Salesmen and Agents, infra.

Prerequisites to Sales or Offerings.

No securities, except those exempt, those sold in exempt transactions, or those registered by notification or coordination, can be sold or offered for sale until permit has been granted to issuer thereof or to registered dealer. (Tex. Rev. Civ. Stat. Ann. art. 581-7A).

Securities to Which Act Applicable.

Term “security” or “securities” includes any limited partner interest in limited partnership, share, stock, treasury stock, stock certificate under voting trust agreement, collateral trust certificate, equipment trust certificate, preorganization certificate or receipt, subscription or reorganization certificate, note, bond, debenture, mortgage certificate or other evidence of indebtedness, any form of commercial paper, certificate in or under profit-sharing or participation agreement, certificate or any instrument representing any interest in or under oil, gas or mining lease, fee or title, or any certificate or instrument representing or secured by interest in any or all of capital, property, assets, profits or earnings of any company, investment contract, or any other instrument commonly known as security, whether similar to those herein referred to or not, whether or not evidenced by written instrument, but this definition does not apply to certain insurance policies and contracts issued by insurance companies subject to supervision of Texas Department of Insurance when form of such policies or contracts have been filed with Department. (Tex. Rev. Civ. Stat. Ann. art. 581-4[A]).

Exempt Securities.

Following securities may be offered for sale, sold, or dealt in by registered dealer or registered salesman of registered dealer without registration by notification or coordination and without permit being granted: (1) Securities of any public service utility subject to rate or security regulation by U.S., state, territory, insular possession, District of Columbia, or Canada and its provinces and certain equipment trust certificates, equipment notes and bonds; (2) securities of nonprofit domestic corporations without capital stock; (3) securities fully listed on American, Boston, New York, Midwest stock exchange, have been designated or approved for designation on notice of issuance on National Association of Securities Dealers Automated Quotation System, or have been fully listed upon any other stock exchange approved by Commissioner and also securities senior to, or if of same issues, upon parity with, any securities so listed or designated or represented by listed subscription rights so listed or designated; (4) commercial paper issued in due course of business and maturing in not more than 24 months; (5) notes, bonds, or other evidences of indebtedness equally secured by deposit with trustee of certain securities; (6) notes, bonds or other evidence of indebtedness of religious, charitable or benevolent organizations. (Tex. Rev. Civ. Stat. Ann. art. 581-6).

Exempt Transactions.

In general, Act does not apply to: (1) Transfers of securities by judicial, executor's or administrator's, guardian's or conservator's sale, or sale by receiver or trustee in insolvency or bankruptcy; (2) sale of pledged securities by pledge holder or mortgagee to liquidate debt; (3) sale by vendor in ordinary course of personal investment of vendor's personal holdings, or change in such investment; (4) sale by insurance company subject to control of Texas Department of Insurance of securities held as legal investment; (5) distribution by corporation of securities to stockholders as stock dividend; (6) sale by issuer of its securities to its existing security holders; (7) issuance of securities to security holders and creditors pursuant to reorganization; (8) issue or sale by one corporation to another corporation or security holders thereof pursuant to vote of security holders in connection with merger, consolidation or sale of corporate assets; (9) exchange of outstanding shares for same or greater or smaller number of shares; (10) exchanges of nonpar for par stock and vice versa; (11) sale to bank, trust company, loan and brokerage company, building and loan association, insurance company, surety or guaranty company, savings institution, investment company as defined in Investment Company Act of 1940, small business investment company as defined in Small Business Investment Act of 1958, or registered dealer; (12) sale or distribution by employer or subsidiary of security under thrift, savings, stock purchase, retirement, pension, profit-sharing, option, bonus, appreciation right, incentive or similar employee benefit plan for employees and directors; (13) sale by issuer of its securities so long as total number of security holders will not exceed 35 persons after taking such sale into account; (14) sale of stock pursuant to grant of an employees' restricted stock option; (15) sale by issuer of its securities within 12 month period to not more than 15 persons; (16) transfer of securities consisting of notes, bonds, etc., secured by mortgage which is transferred therewith in single transaction; (17) issuance by nonprofit religious, educational, benevolent, fraternal, charitable or reformatory corporation or association; (18) sale by issuer or by registered dealer of any security issued or guaranteed by state or national bank, Texas loan and savings association, U.S. or any political subdivision thereof, any state, any municipality or political subdivision thereof; (19) sales by issuer itself, of securities issued by: (a) Federal savings and loan association or (b) Texas farmers cooperative marketing association; (20) sale by registered dealer of securities which form no part of unsold allotment to or subscription by such dealer, and when such securities are offered for sale at prices reasonably related to current market price, provided, however: (a) Securities of same class of issuer are outstanding in hands of public, (b) no part of sale proceeds are paid directly or indirectly to issuer, (c) sale not made for purpose of violating Act, (d) right to sell such securities has not been enjoined, (e) right to sell has not been revoked or suspended by Commissioner, (f) such securities or other securities of same class have been registered under §7 of Act or information as to issuer of such securities appears in recognized securities manual or is furnished in writing to Commissioner in form and extent acceptable to him and issuer is going concern not in organization stage, receivership or bankruptcy; (21) execution by dealer of unsolicited order where initial offering completed and dealer is agent for purchaser only; (22) sales of oil, gas or mining interests where sales by owner do not exceed 35 within 12-month period and no advertising or public solicitation is used; (23) sale by issuer or subsidiary of securities which would be exempt if sold by registered dealer under §6 of Act other than §6E; and (24) certain securities options when sold under specified conditions. Additional exemptions have been prescribed by rule. (Tex. Rev. Civ. Stat. Ann. art. 581-5).

Registration of Securities.

No dealer, agent, or salesman may sell or offer for sale securities except those exempt, those sold in exempt transactions, and those registered by notification or coordination, unless issuer of such securities or registered dealer obtains permit from Commissioner. Such permit will not be granted until issuer or registered dealer submits to Commissioner sworn statement of: (1) names, residences and post-office addresses of officers and directors of company; (2) location of principal and all offices in Texas; (3) copy of certificate of formation or partnership or association, minutes relative to issuance of securities, by-laws and instruments creating trust, if any; (4) amount of capital stock or amount of capital to be employed, number of shares, par value or proposed selling price of no par stock, promotional fees and commissions incident to sale and how paid, consideration to be paid promoters for promotion and organization, and amount of promotion and organization expense to be paid by issuer; (5) copies of securities and any matter to be used in connection with sale thereof, such as prospectus, etc.; (6) balance sheet and income statement for past three years. (Tex. Rev. Civ. Stat. Ann. art. 581-7[A]).

Permit will be issued if Commissioner finds that: (1) proposed plan of business of applicant appears to be fair, just and equitable, (2) consideration paid or to be paid for securities by promoters is fair, just and equitable, and (3) securities and methods to be used in disposing of them will not work fraud upon purchaser thereof. Permit is effective for one year and may be renewed by Commissioner if renewal application satisfies standards governing issuance of original permit. (Tex. Rev. Civ. Stat. Ann. art. 581-10).

Registration by Notification.

Securities issued by issuer in continuous operation for three years and whose net earnings meet qualifications may be registered by filing with Commissioner registration statement in form prescribed by Commissioner. Such registration by notification is effective five days after receipt of filed statement and accompanying papers, but five-day wait may be waived. Upon registration, securities can be sold by registered dealers and registered salesmen. Such registration is effective for one year and can be renewed for additional one year periods if securities still entitled to registration by notification by new filing. (Tex. Rev. Civ. Stat. Ann. art. 581-7[B][2][b]).

Registration by Coordination.

Securities for which registration statement has been filed under federal Securities Act may be registered by coordination by filing with Commissioner registration statement in prescribed form and certain required documents. Commissioner can enter order denying registration if he finds registrant has not proven: (1) Proposed plan of business to be fair, just and equitable, (2) consideration paid or to be paid by promoters for securities is fair, just and equitable, and (3) securities and methods to be used in disposing of them will not work fraud upon purchaser thereof. Such registration automatically becomes effective at moment federal registration statement becomes effective if: (1) No denial order has been entered by Commissioner, (2) registration statement has been on file ten days, and (3) statement of maximum and minimum proposed offering prices and maximum underwriting commissions has been on file two business days and offering is made within those limitations, but Commissioner may waive conditions specified in (2) and (3). Except for open-ended investment companies and unit investment trusts, such registration is effective for one year and may be renewed if securities satisfy same standards of fairness, justice and equity prescribed for original approval. (Tex. Rev. Civ. Stat. Ann. art. 581-7[C]).

Consent to Service.

Unless Board by rule specifies otherwise, if application for permit to sell securities or registration statement to register securities by notification or coordination is filed by issuer not organized under laws of Texas, or filed by dealer offering as agent for such issuer, instrument appointing Commissioner issuer's agent for process must be filed. Such instrument must be executed by authorized agent of issuer under proper resolution or authority. (Tex. Rev. Civ. Stat. Ann. arts. 581-7[B], 7[C], 8).

Registration of Dealers, Salesmen and Agents.

No person, firm, corporation or dealer may, directly or through salesmen or agents, offer or sell securities, except those sold in exempt transactions, without being registered. No salesman or agent may offer or sell securities in behalf of dealer unless registered as salesman or agent. Board may exempt certain classes of persons from registration requirements by rule. (Tex. Rev. Civ. Stat. Ann. art. 581-12).

Registration as dealer can be effected by filing sworn application in form prescribed by Commissioner and certain required documents. Applicant (and in case of corporation or partnership, officers, directors or partners to be licensed by applicant) must pass successfully written examination to determine applicant's qualifications and competency to engage in securities business as dealer or salesman or render services as investment adviser. Certain NASD examinations may be accepted by Commissioner to fulfill examination requirements. (Tex.

Rev. Civ. Stat. Ann. art. 581-13).

Any registered dealer can register salesman or agent by filing application therefor in form prescribed by Commissioner. (Tex. Rev. Civ. Stat. Ann. art. 581-18). All registrations expire at close of calendar year and can be renewed by filing application not less than 30 days before Jan. 1 of ensuing year. (Tex. Rev. Civ. Stat. Ann. art. 581-19).

Licenses.

Upon registration and payment of required fees, Commissioner issues registration certificate. Pending final disposition of application, Commissioner may, for special cause shown, grant temporary permission to transact business as dealer. (Tex. Rev. Civ. Stat. Ann. art. 581-15).

Bonds.

Act does not require dealers, brokers or agents to file bonds.

Advertisements.

Except with respect to exempt securities or securities sold in exempt transactions, it is unlawful for any person to issue or publish any advertisement or make oral offer as to any security unless: (1) Such person is registered as required by Act, (2) such securities have been qualified under permit or have been registered by notification or coordination, and (3) copy of advertisement has been filed with Commissioner. Such advertisements may include names of nonregistered dealers if there are dealers registered in Texas also named. Prior to issue of permit or completion of registration by notification or coordination, printed or written documents filed can be used, if: (1) Copy thereof is first sent to Commissioner, and (2) prescribed legend is printed thereon. (Tex. Rev. Civ. Stat. Ann. art. 581-22).

Liabilities.

Acts in violation of Act and fraudulent practices may be enjoined. (Tex. Rev. Civ. Stat. Ann. art. 581-32). Persons convicted of violations of Act or fraudulent practices can be fined up to $10,000 and/or sentenced to up to life imprisonment. (Tex. Rev. Civ. Stat. Ann. art. 581-29). Any person who offers or sells security: (a) In violation of Tex. Rev. Civ. Stat. Ann. art. §§581–7, 9, 12, 23[C] or any order under 23[A] or 23-2, or (b) any person who sells or buys security by means of any untrue statement of material fact, or omission to state material fact, is liable to purchaser or seller, respectively, who may sue at law or in equity for rescission or for damages if he no longer owns security. Non-selling issuer which registers may be liable to purchaser for recision or damages if prospectus contains untrue statement of material fact or omission to state material fact. (Tex. Rev. Civ. Stat. Ann. art. 581-33). Liability of small business issuance is limited to three times fee paid unless person violating Act is found to have acted intentionally. (Tex. Rev. Civ. Stat. Ann. art. 581-33[N]).

Administrative enforcement actions by Commissioner may include issuance of cease and desist orders, cease publication orders (Tex. Rev. Civ. Stat. Ann. art. 581-23), assessment of fines (Tex. Rev. Civ. Stat. Ann. art. 581-23-1) and suspension or revocation of dealer or salesman registration (Tex. Rev. Civ. Stat. Ann. art. 581-14).

Actions.

No person or company may bring an action for compensation for services rendered in the sale or purchase of securities without alleging and proving that such person or company was duly registered under The Securities Act, or exempt therefrom, and that securities sold were duly registered under provisions thereof at time alleged cause of action arose, unless certain transactions and securities are exempt. (Tex. Rev. Civ. Stat. Ann. art. 581-34).

Uniform Securities Ownership by Minors Act not adopted, but see Texas Uniform Transfers to Minors Act. (Tex. Prop. Code Ann. §141.001 et seq.).

Tender Offers.

No applicable provisions.

3.25 STATUTE OF FRAUDS:

See topic 3.16 Frauds, Statute of.

3.26 TRUST RECEIPT SECURITY:

Uniform Commercial Code enacted. (Tex. Bus. & Com. Code Ann. §1.101 et seq.). See topic 3.09 Commercial Code.

3.27 WAREHOUSEMEN:

Uniform Commercial Code enacted. (Tex. Bus & Com. Code Ann. §1.101 et seq.). See topic 3.09 Commercial Code.

Bonds.

Bond in amount of $5,000 must be filed with county clerk. (Tex. Agric. Code Ann. §14A.004).

Licenses.

Certificate of authority to do business as public warehouseman must be obtained from county clerk. (Tex. Agric. Code Ann. §14A.002).

Warehouse Receipts.

See topic 3.09 Commercial Code.

Lien.

See topic 3.09 Commercial Code.

4 CITIZENSHIP

4.01 ALIENS:

Alien may not: Act as grand juror (Tex. Crim. Proc. Code Ann. §19.08); act as petit juror (Tex. Crim. Proc. Code Ann. §35.16 and Tex. Gov't. Code Ann. §62.102); vote (Tex. Elec. Code Ann. §11.002[2]); hold public office (Tex. Elec. Code Ann. §141.001[a][1]); hold office in labor organization or be labor organizer (Tex. Lab. Code Ann. §101.109[A][1]); hold majority of stock or majority of positions as officer or director in international trading corporation (Tex. Rev. Civ. Stat. Ann. art. 1527 **repealed** eff. Jan. 1, 2006).

Workers' Compensation.

Resident or nonresident alien employee or legal beneficiary is entitled to worker's compensation benefits. (Tex. Lab. Code Ann. §406.092).

Unemployment compensation is not available to alien unless alien was lawfully admitted for permanent residence at time services were performed, was lawfully present for purposes of performing services, and was permanently residing in U.S. under color of law at time services were performed. (Tex. Lab. Code Ann. §207.043).

Property.

Aliens have same rights to real and personal property as do U.S. citizens. (Tex. Prop. Code Ann. §5.005; Tex. Const. art I. §3). No person is disqualified to take as heir because he or person through whom he claims is or has been alien. (Tex. Prob. Code Ann. §41).

Appraisal of Land.

Statute holding that land owned by corporation which is controlled by nonresident aliens is not eligible for appraisal as open-space land unconstitutional. (HL Farm Corporation v. Self, 877 S.W.2d 288 [Tex. 1994]).

5 CIVIL ACTIONS AND PROCEDURE

5.01 ACCORD AND SATISFACTION:

"Accord" is new contract to discharge existing obligation. "Satisfaction" is performance of that contract. "Accord & Satisfaction" will work novation after full performance if parties intended to extinguish original obligation. (992 S.W.2d 570).

Consideration.

"Accord" is independent contract requiring consideration; however good faith dispute as to liability on liquidated or unliquidated claim is sufficient consideration for accord and "satisfaction" is full performance of new agreement. (1 S.W.3d 264).

Claim may be discharged if amount of claim is unliquidated or subject to bona fide dispute, payment was tendered in good faith with conspicuous statement that payment was tendered in full satisfaction of claim, and claimant obtained payment. (Tex. Bus. & Com. Code Ann. §3.311). See category 3 Business Regulation and Commerce, topic 3.09 Commercial Code.

Compromise.

Mutual agreement to settle litigation is sufficient consideration. (56 Tex. 133). Agreements to settle litigation must be in writing, signed and filed of record. (Tex. R. Civ. P. 11).

Pleading.

Accord and satisfaction must be pled as affirmative defense. (Tex. R. Civ. P. 94).

See also category 3 Business Regulation and Commerce, topic 3.09 Commercial Code.

5.02 ACTIONS:

Texas Rules of Civil Procedure, promulgated by Supreme Court of Texas, are based in part upon Federal Rules of Civil Procedure.

Equity.

Distinction between law and equity has been abolished.

Forms of Action.

Common law forms of action have been abolished.

Conditions Precedent.

No conditions precedent imposed for civil actions generally. Many statutory rights of action contain notice requirements, for example Medical Liability Act of 2003 (Tex. Civ. Prac. & Rem. Code Ann. §74.051) requires that health care providers and health care institutions be given notice of health care liability claims at least 60 days prior to filing suit. §17.505 of Deceptive Trade Practices Act (Tex. Bus. & Com. Code Ann. §17.505) requires consumers to give written notice 60 days before filing suit. §27.004 of Property Code requires 60 days notice to contractor before filing suit.

Commencement.

See topic 5.17 Pleading; also topic 5.20 Process.

Parties.

All necessary parties must be joined. (Tex. R. Civ. P. 39). Partnerships, corporations, and unincorporated associations may sue or be sued under assumed name. (Tex. R. Civ. P. 28). Misjoinder of parties not ground for dismissal. (Tex. R. Civ. P. 41).

Class actions allowed under Tex. R. Civ. P. 42, which is based on revised Fed. R. Civ. P. 23.

Nonresidents.

Action may be maintained against nonresident who voluntarily appears or is subject to long-arm jurisdiction. (Tex. Civ. Prac. & Rem. Code Ann. §17.001 et seq.). Concerning actions arising out of automobile accidents occurring in this state, however, see category 23 Transportation, topic 23.01 Motor Vehicles, subhead Action Against Nonresident; see also topic 5.20 Process, subhead Long Arm Statute.

Intervention.

Any party may intervene. Intervention may be stricken for sufficient cause. (Tex. R. Civ. P. 60).

Interpleader.

Either party may join others when such party may be exposed to double or multiple liability. Right to interplead may be invoked even though claims do not have common origin or are not identical, and though it be alleged that party is not liable in whole or in part to any or all of claimants. (Tex. R. Civ. P. 43).

Joinder of Causes of Action.

Either party may join as many claims as he may have, either legal or equitable, against opposing party. (Tex. R. Civ. P. 51). But separate trial may be ordered to avoid prejudice. (Tex. R. Civ. P. 40[b], 174[b]).

Splitting Causes of Action.

Causes of action are not split. However, claims may be severed if suit involves more than one cause of action and each would have been proper subject of separate action. (Tex. R. Civ. P. 41).

Consolidation and Severance of Actions.

Court may order joint trial of all actions involving common question of law or fact, or order separate trial of any claim, cross-claim, counterclaim, third party claim or separate issue, or of any number of claims, etc. (Tex. R. Civ. P. 174[a]; Tex. R. Civ. P. 41).

Stay of Proceedings.

Any action involving issues subject to arbitration must be stayed if order for arbitration has been made. (Tex. Civ. Prac. & Rem. Code Ann. §171.025). Cause of action may be dismissed for failure to prosecute case. (Tex. R. Civ. P. 165a). Case may be reinstated by motion filed within 30 days after dismissal order is signed. (Tex. R. Civ. P. 165a[3]). If insurer is designated “impaired insurer,” automatic stay of all judicial proceedings, including appeals, applies. (897 S.W.2d 871 [Tex App.—San Antonio 1995]). Various statutory rights of action are subject to stay for failure to give required pre-suit notice or demand.

Abatement.

Death of party does not abate action, but such action survives in favor of or against heirs or personal representatives of deceased party. Such heirs or representatives may enter their appearance, or, if this is not done, scire facias will issue requiring them to appear and prosecute suit. (Tex. R. Civ. P. 150-156). Dissolution of corporation does not abate action against it. (Tex. R. Civ. P. 160).

No causes of action for personal injuries and death abate, but survive death of person for, or against, whom cause accrued. (Tex. Civ. Prac. & Rem. Code Ann. §§71.004, 71.008, 71.021). See also category 13 Estates and Trusts, topic 13.09 Executors and Administrators, subhead Actions by Representatives, also subhead Actions Against Representatives.

Limitation of.

See topic 5.16 Limitation of Actions.

Small Claims.

See category 6 Courts and Legislature, topic 6.01 Courts.

Termination of Actions.

Non-suit, default, or final judgment terminates action.

Prohibited Actions.

See category 23 Transportation, topic 23.01 Motor Vehicles, subhead Direct Actions.

Administration.

See category 13 Estates and Trusts, topic 13.09 Executors and Administrators.

Direct Actions Against Insurer.

See category 23 Transportation, topic 23.01 Motor Vehicles, subhead Direct Actions.

Landowner's Liability

An owner, lessee or occupant of land owes different standards of a duty of care and different levels of liability towards trespassers and permissible guests on their land. (Tex. Civ. Prac. & Rem. Code Ann. §75.001 et seq.).

Health Care Liability.

House Bill No. 4, passed by Texas Legislature in its 2003 session, amended Tex. Civ. Prac. & Rem. Code Ann. §74.001 et seq., providing significant evidentiary rules that supersede Rules of Evidence in health care liability claims and limit recoverable damages to maximums of $250,000 and $750,000 overall damage cap depending on circumstances. Constitutional amendment on 9/13/2003 secured legislature's right to limit health care provider's liability for non-economic damages. (Tex. Const. art. III, §66).

Trafficking in Persons

A person who engages in the trafficking of persons or who intentionally or knowingly benefits from participating in a venture that traffics in another person is liable to the person trafficked for damages arising from the trafficking. It is not a defense to liability that a defendant has been acquitted or has not been prosecuted or convicted under Chapter 20A of the Penal Code. (Tex. Civ. Prac. & Rem. Code Ann. §98.001 et seq.).

5.03 APPEAL AND ERROR:

Texas Rules of Civil and Appellate Procedure, promulgated by Supreme Court of Texas, are based in part on Federal Rules of Civil and Appellate Procedure.

Decisions and judgments of courts are reviewable by appeal. Appeal to courts of appeal is perfected by notice of appeal. (Tex. R. App. P. 25). Rules for preservation of appellate complaints are in Tex. R. App. P. 33.

From Justice Court to County Court.

County Court has jurisdiction of appeals from Justice Courts for trial de novo when amount in controversy exceeds $250. (Tex. R. Civ. P. 574b; Tex. Gov't Code Ann. §26.042[e]). In county in which civil jurisdiction of county court has been transferred to district court, party to final judgment in case covered by this section may appeal to district court. (Tex. Civ. Prac. & Rem. Code Ann. §51.001). Action must be taken by appeal within ten days after entry of judgment or order overruling motion for new trial is signed and notice to all parties must be given within five days following action. (Tex. R. Civ. P. 571).

From District and County Courts to Court of Appeals.

When amount in controversy exceeds $250 exclusive of interest and costs, Court of Appeals has jurisdiction of all appeals from District Courts and County Courts in ordinary civil suits (Tex. Gov't Code Ann. §22.220; Tex. Civ. Prac. & Rem. Code Ann. §51.012), and in criminal cases in which death penalty not assessed (Tex. Code Crim. Proc. Ann. art 61.022). A person may take an appeal or writ of error to the court of appeals from the judgment or interlocutory order of a district court, county court at law or county court under the same circumstances that an appeal from a federal district court's order or decision would be permitted by the Federal Arbitration Act. (Tex. Civ. Prac. & Rem. Code Ann. §51.016). In civil case, appeal is perfected when written notice of appeal is filed with trial court clerk. If notice of appeal is mistakenly filed with appellate court, notice is deemed to have been filed same day with trial court clerk, and appellate clerk must immediately send trial court clerk copy of notice. (Tex. R. App. P. 25.1). Notice of appeal must be filed within 30 days after judgment is signed, except that: (a) Notice of appeal must be filed within 90 days after judgment is signed if any party timely files: (1) Motion for new trial, (2) motion to modify judgment, (3) motion to reinstate under Tex. R. Civ. P. 165a, or (4) request for findings of fact and conclusions of law if findings and conclusions either are required by Rules of Civil Procedure or, if not required, could properly be considered by appellate court; (b) in accelerated appeal, notice of appeal must be filed within 20 days after judgment or order is signed; (c) in restricted appeal, notice of appeal must be filed within six months after judgment or order is signed; and (d) if any party timely files notice of appeal, another party may file notice of appeal within applicable period stated above or 14 days after first filed notice of appeal, whichever is later. (Tex. R. App. P. 26.1). In criminal case, appeal is perfected by timely filing notice of appeal. In death-penalty case, however, it is unnecessary to file notice of appeal. Effective, Sept. 1, 2008, in every death-penalty case, trial court clerk must file notice of conviction with Court of Criminal Appeals within 30 days after defendant is sentenced to death. (Tex. R. App. P. 25.2). Defendant must file notice of appeal: (1) Within 30 days after day sentence is imposed or suspended in open court, or after day trial court enters appealable order; or (2) within 90 days after day sentence is imposed or suspended in open court if defendant timely files motion for new trial. Prior to Sept. 1, 2008, State must file notice of appeal within 15 days after day trial court enters order, ruling, or sentence to be appealed. Effective Sept. 1, 2008, State has 20 days to file notice of appeal instead of 15 days. (Tex. R. App. P. 26.2).

Appellate jurisdiction in probate matters is vested in Court of Appeals. (Tex. Prob. Code Ann. §5[g]).

From Court of Appeals to Supreme Court.

Supreme Court exercises discretionary jurisdiction to review decisions of Courts of Appeals in civil matters. (Tex. Gov't Code Ann. §22.001). Supreme Court may review court of appeals' final judgment on petition for review. (Tex. R. App. P. 53.1). Petition must be filed with Supreme Court clerk within 45 days after following: (1) Date court of appeals rendered judgment, if no motion for rehearing is timely filed; or (2) date of court of appeals' last ruling on all timely filed motions for rehearing. Any response must be filed with Supreme Court clerk within 30 days after petition is filed. Any reply must be filed with Supreme Court clerk within 15 days after response is filed. (Tex. R. App. P. 53.7).

Court of Criminal Appeals may review court of appeals' decision in criminal case on its own initiative under Tex. R. App. P. 67 or on petition of party under Tex. R. App. P. 68. (Tex. R. App. P. 66.1). Court of Criminal Appeals may grant review of court of appeals' decision in criminal case, without petition for discretionary review having been filed, by vote of at least four judges, at any time before mandate of court of appeals issues. (Tex. R. App. P. 67.1). Petition for review must be filed within 30 days after either day court of appeals' judgment was rendered or day last timely motion for rehearing was overruled by court of appeals. Even if time specified above has expired, party who otherwise may file petition may do so within ten days after timely filing of another party's petition. (Tex. R. App. P. 68.2).

Appeal Bond.

Repealed. Texas no longer requires filing of bond to perfect civil appeal.

Perfecting Appeal.

Appeal is perfected in civil and criminal cases, upon filing of written notice of appeal (Tex. R. App. P. §§25.1 and 25.2), except that in death penalty cases, it is unnecessary to file notice of appeal. Effective, Sept. 1, 2008, in every death-penalty case, trial court clerk must file notice of conviction with Court of Criminal Appeals within 30 days after defendant is sentenced to death (Tex. R. App. P. §25.2). Additionally, for criminal case in Municipal Court of Record, appeal is perfected by filing written motion for new trial not later than the tenth day after date on which judgment is rendered and by giving oral or written notice of appeal (Tex. Gov't Code Ann. §30.00014); in criminal case in Municipal or Justice Court, where bail has been approved pending appeal, upon filing of bail/appeal bond (Tex. Code Crim. Proc. Ann. art. 45.0426).

Stay of Execution.

Texas provides 30-day automatic stay of execution of judgment. (Tex. R. Civ. P. 627). (Compared to Federal Court's ten-day automatic stay.) Despite 30-day automatic stay, writ of garnishment may issue at any time during or after 30 days following signing of judgment, absent supersedeas bond. (Tex. R. Civ. P. 657). Turnover order may also be entered immediately upon signing of judgment despite 30-day automatic stay. (Tex. Civ. Prac. & Rem. Code Ann. §31.002). Execution of money judgment may be suspended by giving supersedeas bond in at least amount of judgment, interest and costs, conditioned that appellant prosecutes appeal, and provided that amount of bond does not exceed lesser of judgment debtor's net worth or $25,000,000; in other cases, amount is fixed by trial court. (Tex. R. App. P. 24). Court must lower amount of bond on finding after notice and hearing that posting such bond would likely cause judgment debtor substantial economic harm. (Tex. R. App. P. 24.2[b]; Tex. Civ. Prac. & Rem. Code Ann. §52.006). Unless law or these rules provide otherwise, judgment debtor may supersede judgment by: (1)

Filing with trial court clerk written agreement with judgment creditor for suspending enforcement of judgment; (2) filing with trial court clerk good and sufficient bond; (3) making deposit with trial court clerk in lieu of bond; or (4) providing alternate security ordered by court. (Tex. R. App. P. 24.1[a]). Bond must be: (1) In amount required by Tex. R. App. P. 24.2; (2) payable to judgment creditor; (3) signed by judgment debtor or debtor's agent; (4) signed by sufficient surety or sureties as obligors; and (5) conditioned as required by Tex. R. App. P. 24.1(d). (Tex. R. App. P. 24.1[b]). Instead of filing surety bond, party may deposit with trial court clerk: (1) Cash; (2) cashier's check payable to clerk, drawn on any federally insured and federally or state-chartered bank or savings-and-loan association; or (3) with leave of court, negotiable obligation of federal government or of any federally insured and federally or state-chartered bank or savings-and-loan association. Enforcement of judgment must be suspended if judgment is superseded. Enforcement begun before judgment is superseded must cease when judgment is superseded. (Tex. R. App. P. 24.1[c]). Court of Appeals may review security for sufficiency and excessiveness. (Tex. R. App. P. 24.4[a][1]; Tex. Civ. Prac. & Rem. Code Ann. §52.006).

No bond is required on appeal or writ of error by certain state and federal governmental entities and officers, by cities or towns incorporated in state, or by water, levee or drainage districts organized under state laws. (Tex. Civ. Prac. & Rem. Code Ann. §§6.001-6.003).

Extent of Review.

Law and facts are decided de novo on appeal to county and district court. Law and facts are reviewed in Court of Appeals. Law only is reviewed by Supreme Court. (Tex. Gov't Code Ann. §22.001[a]).

Character of Hearing.

Trial is de novo on appeal in county and district court. Court of Appeals and Supreme Court review generally limited to record proceedings of lower court.

Judgment or Order on Appeal.

Judgment of Courts of Appeals is conclusive in all civil cases on facts of case. (Tex. Gov't Code Ann. §22.225[a]). Judgment of Courts of Appeals is conclusive on law and facts in: (1) All civil cases appealed from county court (or from district court when county court had original or appellate jurisdiction) except cases involving probate matters, revenue laws of State Railroad Commission (Tex. Gov't Code Ann. §22.001), or validity or construction of statute; (2) cases of contested elections of every character except for state officers; (3) appeals from interlocutory orders appointing receivers or trustees or granting or denying temporary injunctions; and (4) all other cases except where appellate jurisdiction is given to Supreme Court (Tex. Gov't Code Ann. §22.225[b][5]). Decisions of Courts of Appeals may also be reviewed by Supreme Court where there is disagreement among judges on Court of Appeals on point of law, or where decision conflicts with decision of Supreme Court or another Court of Appeals. (Tex. Gov't Code Ann. §22.001).

See also topics 5.14 Injunctions, 5.19 Practice.

5.04 BONDS:

Issuance of any temporary restraining order or temporary injunction requires execution of bond payable to adverse party. Two or more sufficient sureties or cash are required; sum is discretionary with court. (Tex. R. Civ. P. 684). Judgment debtor may suspend execution of judgment by filing cash or sufficient bond to be approved by clerk and subject to review by court on hearing. In case of money judgment, amount of bond shall be amount of judgment, interest, and costs but shall not exceed lesser of judgment debtor's net worth or $25,000,000. (Tex. R. App. P. 24).

Sureties.

Surety bond executed by qualified surety company is sufficient to comply with requirements of any state regulation or judicial proceeding; provided that if such bond is in amount in excess of 10% of surety company's capital and surplus, surety may be required to certify in writing that surety has reinsured portion of risk exceeding 10% of its capital and surplus with one or more qualified reinsurers. Amount reinsured by any reinsurer may not exceed 10% of reinsurer's capital and surplus. (Tex. Ins. Code Ann. §3503.004).

Enforcement.

When judgment on appeal is rendered against the appellant, it is also rendered against the sureties on his supersedeas bond. Judgment for costs may be rendered against sureties on appellant's appeal or supersedeas bond. (Tex. R. App. P. 43.5).

5.05 CERTIORARI:

Jurisdiction.

Supreme Court may issue extraordinary writs to various judges and officers. (Tex. Gov't Code Ann. §22.002). Certiorari may issue from county or district court to justice court to review judgments of latter court. (Tex. Civ. Prac.& Rem. Code Ann. §51.002[b], Tex. R. Civ. P. 575).

Grounds.

(1) Lower court lacked jurisdiction; or (2) injustice was done by final determination of suit, and injustice was not caused by applicant's own inexcusable neglect. (Tex. R. Civ. P. 578).

Proceedings.

Issuance of certiorari from county or district courts requires affidavit of sufficient cause and bond filed in county court within 90 days after signing of justice court judgment. (Tex. R. Civ. P. 577-582). Within 30 days after service of citation on writ of certiorari, adverse party may move to dismiss certiorari for want of sufficient cause or want of sufficient bond. (Tex. R. Civ. P. 586).

Review.

Decisions of county or district court on writ of certiorari from justice court may be appealed to court of appeals. (Tex. Civ. Prac. & Rem. Code Ann. §51.011).

5.06 CHARITABLE IMMUNITY:

See topic 5.09 Damages.

5.07 [RESERVED]

5.08 COSTS:

See also topics 5.20 Process, Venue; categories 2 Business Organizations, topics Associations, Joint Stock Companies; Business Regulation and Commerce, topic Banks and Banking; Debtor and Creditor, topic Attachment; Insurance, topics Insurance Companies, Surety and Guaranty Companies.

(Tex. R. Civ. P. 125-149).

Each party to suit is responsible for costs incurred by him unless otherwise ordered. Costs may be collected by officers of court in pending cases, up to adjournment of each term, and on failure to pay on demand, cost bill may be placed in hands of sheriff or constable and levy made with same force and effect as execution. Ordinarily, successful party recovers costs from his adversary, but court may order otherwise. (Tex. R. Civ. P. 125-149).

Security for Costs.

Any party or officer of court may, by motion, require any party seeking affirmative relief to give security for costs, but party without means may comply with rule by filing affidavit of inability to pay costs. (Tex. R. Civ. P. 143, 145).

Liability of Attorney.

Attorneys not party to suit are not liable for payment of costs. (Tex. Civ. Prac. & Rem. Code Ann. §7.011). However costs of suit may be imposed on attorneys as sanction. (Tex. R. Civ. P. 215).

5.09 DAMAGES:

Compensatory damages are generally addressed by common law rather than statute. In proportionate responsibility actions, exemplary damages are controlled by statute. (Tex. Civ. Prac. & Rem. Code Ann. §§41.001-.013). If statute applies, exemplary damages are limited to greater of (a) two times amount of economic damages, plus amount equal to any noneconomic damages found by jury, not to exceed $750,000; or, (b) $200,000 total exemplary damages. (Tex. Civ. Prac. & Rem. Code Ann. §41.008). Must establish liability for exemplary damages, based on fraud, malice, or gross negligence, by clear and convincing evidence. (Tex. Civ. Prac. & Rem. Code Ann. §41.003[b]).

Charitable Immunity.

Liability of charitable organizations is limited by statute, but limitations do not apply in case of intentional or reckless acts or certain other circumstances. (Tex. Civ. Prac. & Rem. Code Ann. §§84.001-84.007). Charitable enterprise is subject to vicarious liability under rule of respondeat superior applicable to business organizations operating for profit. (470 S.W.2d 629).

Sovereign Immunity.

Tort Claims Act authorizes property damage, personal injury, and death actions against governmental units. In absence of actual notice by governmental unit, claimant must give notice within six months from date of incident. (Tex. Civ. Prac. & Rem. Code Ann. §§101.021-101.029).

Proportionate responsibility rule adopted. Claimant may not recover damages if his percentage of responsibility is greater than 50%. This rule applies to any cause of action based on tort or brought under Deceptive Trade Practices Act in which defendant, settling person, or responsible third party is found responsible for percentage of harm. This rule does not apply to workers' compensation claim for exemplary damages included in action to which this rule would otherwise apply. Damages are reduced in proportion to amount of responsibility attributed to settling persons. (Tex. Civ. Prac. & Rem. Code Ann. §§33.001, 33.002, 33.012).

Strict Liability.

Proportionate Responsibility Statute applies to strict liability actions (Tex. Civ. Prac. & Rem. Code Ann. §33.002). Product liability actions governed by Tex. Civ. Prac. & Rem. Code Ann. §§82.001-.006.

No-Fault Insurance.

See category 23 Transportation, topic 23.01 Motor Vehicles, subhead No-Fault Insurance.

See also categories 13 Estates and Trusts, topic Death, subhead Actions for Death; Business Regulation and Commerce, topic Sales, subhead Products Liability.

Uniform Contribution Among Tortfeasors Act (Revised).

Not adopted by Texas. For contribution rules applying to personal injury, property damage, death, D.T.P.A., intentional torts, or actions for products liability or grounded in negligence, see Tex. Civ. Prac. & Rem. Code Ann. §33.015. Liable defendant is jointly and severally liable only if percentage of responsibility attributed to defendant is greater than 50% or defendant, in concert with another person and with intent to do harm, committed listed crime and through that crime caused plaintiff's harm. (Tex. Civ. Prac. & Rem. Code Ann. §33.013). For contribution rules applying to workers' compensation, or actions brought under Insurance Code, see Tex. Civ. Prac. & Rem. Code Ann. §§32.001-.003.

Damages For Injury to Convicted Person.

Claimant who has been convicted of felony or misdemeanor generally cannot recover damages for injuries sustained during commission of crime. Statute also bars derivative claims of wrongful death or loss of consortium for injury to convicted person. Claimants whose claim is barred by this statute are liable for defendant's attorney's fees and court costs. (Tex. Civ. Prac. & Rem. Code Ann. §§86.001-007).

Damages in Health Care Liability Claims.

See topic 5.02 Actions.

5.10 DECLARATORY JUDGMENTS:

Uniform Declaratory Judgment Act adopted. (Tex. Civ. Prac. & Rem. Code Ann. §37.001 et seq.).

5.11 DEPOSITIONS AND DISCOVERY:

Texas Rules of Civil Procedure are based in part on Federal Rules of Civil Procedure. See topic 5.19 Practice.

Discovery Limitations.

Extensive rules place limitations on discovery and require declaration in first paragraph of petition, of which discovery plan will be utilized in case. (Tex. R. Civ. P. 190). Parties can modify discovery limitations by agreement. (Tex. R. Civ. P. 191).

Discovery.

Parties may obtain discovery of any matter which is not privileged and is relevant to subject matter in pending action, whether it relates to claim or defense of party seeking discovery, or claim or defense of any other party. It is not grounds for objection that information sought will not be admissible at trial, if information sought appears reasonably calculated to lead to discovery of admissible material. (Tex. R. Civ. P. 192.3).

Under Tex. R. Civ. P. 192.1, permissible forms of discovery include: (a) Request for disclosure (Tex. R. Civ. P. 194), (b) request for production and inspection of documents and tangible things (Tex. R. Civ. P. 196), (c) requests and motions for entry and examination of real property (Tex. R. Civ. P. 196), (d) interrogatories to party (Tex. R. Civ. P. 197), (e) request for admissions (Tex. R. Civ. P. 198), (f) oral and written depositions (Tex. R. Civ. P. 199-200), and (g) motions for mental and physical examinations (Tex. R. Civ. P. 204).

Party may discover identity and location of potential parties and persons having knowledge of relevant facts, whether or not information is admissible or person named has personal knowledge of facts. (Tex. R. Civ. P. 192.3[c]).

Party may discover identity, mental impressions, and opinions of consulting expert whose mental impression and opinion have not been reviewed by testifying expert, and identity, location information, subject matter, facts known, mental impression and opinion, bias and documents, writings, or other tangible things used by testifying experts. (Tex. R. Civ. P. 192.3[e]).

Party may discover existence and contents of insurance agreements and settlement agreements. (Tex. R. Civ. P. 192.3[f]-[g]).

Party may discover written statement made by person with knowledge of relevant facts. (Tex. R. Civ. P. 192.3[h]).

Party may obtain protective order from discovery request that is undue burden, creates unnecessary expense, harasses, annoys, or invades personal, constitutional or property rights. (Tex. R. Civ. P. 192.6).

Party responding to written discovery must do so in writing. Party may object to written discovery either in response or in separate document within time for written response. Party may assert privilege by stating in response to written discovery or in separate document, that information requested is being withheld, and privilege(s) asserted. (Tex. R. Civ. P. 193). Specific rules extend to description of material or information withheld and specific privilege asserted. (Tex. R. Civ. P. 193.3[b]).

Party responding to written discovery has duty to supplement or amend response if party knows that response was incorrect or incomplete when made or is no longer incorrect or incomplete. Supplemental or amended response must be made in reasonably prompt manner and supplemental or amended response made less than 30 days before trial is presumed not to be reasonably prompt. (Tex. R. Civ. P. 193.5).

Party must designate expert witnesses and may compel disclosure of information concerning expert witnesses and their testimony. (Tex. R. Civ. P. 195).

Party may move for mental or physical examination of party when mental or physical condition of party is in controversy or when party whose examination is sought has designated psychologist as testifying expert or has disclosed psychologist report as possible use at trial. (Rule 204). In certain cases, court may order physical or psychological exam on its own. (Tex. R. Civ. P. 204.4).

Requests for Disclosure.

Party may serve on another party request to provide any or all information described in Tex. R. Civ. P. 194.2. There can be no objection to such request. (Tex. R. Civ. P. 194.1).

Interrogatories.

Party may serve on another party written interrogatories to inquire about any matter within scope of discovery, except matters covered by Rule 195, concerning expert witnesses. (Tex. R. Civ. P. 197.1). Response must be served within 30 days, except that defendant served with interrogatories before defendant's answer is due need not respond until 50 days after service of interrogatories. Response must include answers and may include objections and party may elect to respond to certain questions by production of documents. Party must verify responses by signing answers under oath. (Tex. R. Civ. P. 197.2). Answers to interrogatories may be used only against responding party. (Tex. R. Civ. P. 197.3).

Request for Admissions.

Party may serve written request for other party to admit truth of any matter within scope of discovery no later than 30 days before end of discovery period. (Tex. R. Civ. P. 198.1). Party must specifically admit or deny request, explain in detail reasons that party cannot admit or deny request, or assert objection or privilege reason for not responding to request. Responses must be made in good faith and as result of reasonably inquiry. Failure to respond to request is considered admission without court order. (Tex. R. Civ. P. 198.2). Admission may be used solely in pending action and is conclusive against party making admission unless court permits party to withdraw or amend admission. (Tex. R. Civ. P. 198.3).

Depositions.

Oral Depositions.

Party may take depositions orally, via personal appearance of witness, telephone, or other remote electronic means, and by stenographic or non-stenographic recording. (Tex. R. Civ. P. 199.1[a]-[c]). Depositions taken via telephone or other remote electronic means or taken by non-stenographic recording require notice to other parties and witness. (Tex. R. Civ. P. 199.1[b], [c]). Notice of oral depositions must be served on witness and all parties reasonable time before deposition is taken and must identify witness, time and place of deposition and may designate alternative means of conducting or recording deposition or may request production of documents. (Tex. R. Civ. P. 199.2). Party or witness may object to deposition and move to quash or for protective order. Motion to quash or for protective order based on objection to time or place filed within three business days of notice or subpoena automatically stays deposition until court can hear motion. (Tex. R. Civ. P. 199.4). Extensive rules establish examination of witness, objection arising and conduct of parties during deposition. (Tex. R. Civ. P. 199.5). Generally, only objections to form of question or responsiveness of answer are allowed unless examination is shown to be harassing or invading privilege.

Depositions on Written Questions.

Party may take deposition on written questions on notice to witness and other party. Questions propounded to witness must be attached to notice. Any party may object to direct questions and serve cross-questions on all parties within ten days after notice and direct questions are served. Party may object to cross-questions and serve redirect questions within five days of service of cross-questions. Party may object to redirect questions and serve recross questions within three days of service of redirect questions. All parties have five days to object to recross questions. Depositions on written questions must be taken before deposition officer designated in notice and deposition officer shall record responses under oath. (Tex. R. Civ. P. 200).

Deposition in Foreign Jurisdiction for Use in Texas.

Party may take deposition orally or on written question of any person or entity in another state or foreign country by notice, letters rogatory, or other similar device, agreement of parties or court order. Deposition may be taken in foreign jurisdiction by telephone, or other remote electronic means. (Tex. R. Civ. P. 201.1). Upon court of another state or foreign country issuing mandate, writ, or commission requiring oral or written deposition in Texas, witness may be compelled to appear and testify in same manner and by same process as matter pending in Texas. (Tex. R. Civ. P. 201.2).

Depositions Before Suit or to Investigate Claims.

Person may petition court for order to take deposition to perpetuate person's own testimony or testimony of another person for use in anticipated suit, or to investigate potential claim or suit. Extensive rules dictate content, filing, notice and service of petition. Deposition before suit or to investigate claim may be taken orally, on written questions and by telephone, or other remote electronic means. Court may limit use of deposition to protect person not served with notice from unfair prejudice. (Tex. R. Civ. P. 202).

Use of Oral and Written Depositions.

All or part of deposition may be used for any purpose in same proceeding in which it was taken. Same proceeding includes proceeding in different court involving same subject matter and same parties, or their representatives or successors in interest. Deposition is admissible against party joined after taking of deposition if it is admissible under Tex. R. Evid. 804(b)(1) and party had reasonable opportunity to redepose witness. (Tex. R. Civ. P. 203.6[b]). Deposition officer must provide original transcript to witness for signature. Witness may change responses in accordance with law. (Tex. R. Civ. P. 203.1). Deposition officer must serve on all parties and file with court copy of transcript with certification conducting of deposition, delivery of original transcript to witnesses and other designated persons, changes to transcript, amount of time used by each party at deposition, deposition officers charges. (Tex. R. Civ. P. 203.2). At request of party, copies of documents marked at deposition must be attached to transcript of deposition and person producing original must preserve them for trial. (Tex. R. Civ. P. 203.4).

Within State or Outside of State for Use Within State or Elsewhere.

Rules make no distinction based on whether deposition is taken within state or outside state or whether it is for use within state or elsewhere. (Tex. R. Civ. P. 201).

Testimony Required by Foreign Jurisdiction.

If court of another state issues mandate, writ, or commission requiring witness' testimony in Texas, either to written questions or by oral deposition, witness may be compelled to testify in same manner and process used for taking testimony in proceeding pending in Texas. (Tex. Civ. Prac. & Rem. Code Ann. §20.002; Tex. R. Civ. P. 200).

Before Whom Taken.

Following officers are authorized to take depositions: (1) If witness resides within state, any clerk of district court, any judge or clerk of county court, or any notary public of this state; (2) if witness resides outside state but within U.S., any clerk of court of record having seal, notary public, or any duly appointed commissioner of deeds; (3) if witness resides outside U.S., any notary public, any minister, commissioner or chargé d'affaires of U.S. who is resident of and accredited to that country, or any consul general, consul, vice consul, commercial agent, vice-commercial agent, deputy consul or consular agent of U.S. resident in such country; (4) if witness is member of U.S. Armed Forces or of auxiliaries thereof or civilian employed by or accompanying such forces or auxiliaries outside U.S., any commissioned officer of U.S. Armed Forces or U.S. Armed Forces reserve or any auxiliary thereof. (Tex. Civ. Prac. & Rem. Code Ann. §20.001).

Nonparty Witness.

Although nonparty depositions may be taken by agreement, party may only require oral deposition or deposition on written questions or request production of documents of nonparty witness by court order under Tex. R. Civ. P. 196.7, 202, or 204 or by subpoena. (Tex. R. Civ. P. 205).

Probate Proceedings.

Depositions may be taken and read in evidence in probate proceedings, and in case of probate of will and other proceedings in estates when there is no opposing party or counsel upon whom notice may be served, it may be served by posting or publication. (Tex. Prob. Code Ann. §22).

Post-Judgment Discovery.

Scope of discovery authorized in post-judgment matters is same as discovery available in pretrial matters. (Tex. R. Civ. P. 621a). Following judgment rendition, successful party may conduct post-judgment discovery in order to identify existence and location of judgment debtor's nonexempt assets unless judgment suspended by supersedeas bond or court order or has not become dormant. (Tex. R. Civ. P. 621a). Orders issued under Tex. R. Civ. P. 621a are not applicable; reviewable only through mandamus proceeding.

Judgment creditor may bring independent bill of discovery action to compel debtors to disclose facts which allow satisfaction of judgment. (Tex. R. Civ. P. 621a). Rulings on discovery motions brought in post-judgment bill of discovery action are treated as separate, final and appealable judgments. (Tex. R. Civ. P. 621a).

Trial court has continuing jurisdiction over post-judgment discovery. (633 S.W.2d 497).

5.12 EQUITY:

See topic 5.02 Actions.

5.13 EVIDENCE:

Texas Rules of Civil Evidence and Texas Rules of Criminal Evidence have been combined into Texas Rules of Evidence. Texas Rules of Evidence are based largely on Federal Rules of Evidence. Where appropriate, Rules of Evidence have one subsection for civil proceedings and another for criminal proceedings. When cited below, Texas Rules of Evidence are referred to as “R. Evid.” References to “Rule xxx” are to Texas Rules of Civil Procedure. See also topic 5.11 Depositions and Discovery.

Electronic Communication.

With agreement of parties, court may order hearing on preliminary or testimony of witness at trial, if witness was previously deposed, conducted by acceptable two-way electronic communication. (Tex. Civ. Prac. & Rem. Code Ann. §30.012).

Witnesses Subpoena.

Witnesses residing or served within 150 miles of county where suit is pending may be summoned and required to attend court by service upon them of subpoena. (Tex. Civ. Prac. & Rem. Code Ann. §22.002; Tex. R. Civ. P. 176.3). Persons served with subpoena are required to comply with command unless discharged by court or by party summoning them. Person commanded to appear and give testimony must remain at place of deposition, trial or hearing until discharged by court or party summoning them (Tex. R. Civ. P. 176.6[a]) and any witness failing to attend after being duly summoned may be fined by court for contempt, and attachment may issue to compel his attendance, provided his witness fees have been tendered to him. (Tex. R. Civ. P. 176.8). Witness summoned must be paid $10 at time subpoena is served. (Tex. Civ. Prac. & Rem. Code Ann. §22.001). Persons served with subpoena may seek protective order under Tex. R. Civ. P. 192.6(b). (Tex. R. Civ. P. 176.6[e]). Witnesses refusing to testify may be committed to jail without bail until they consent to give evidence. (Tex. R. Civ. P. 180). Parties to suits may be compelled to appear and testify by opposing party at trial by sending subpoena to attorney of record. Parties and certain party representative agents and employees may be compelled to appeal for deposition by simple notice. (Tex. R. Civ. P. 181, 199).

All persons are competent to testify in civil and criminal cases except: (1) persons insane at time when offered as witnesses or when events happened; (2) children or other persons who appear not to possess sufficient intellect to relate transaction or to understand obligations of oath. (Tex. R. Evid. 601).

Privileged communications recognized by statute in Texas are those between attorney and client (Tex. R. Evid. 503, in criminal cases, client can prevent disclosure of any fact which came to knowledge of lawyer or lawyer's representative through attorney-client relationship [Tex. R. Evid. 503(b)(2)]), husband and wife (Tex. R. Evid. 504) and clergyman and penitent (Tex. R. Evid. 505). Privilege also available for political vote, trade secrets, identity of informer, physician/patient communications, and certain mental health information. (Tex. R. Evid. 506-510). There is no accountant/client privilege. There is no physician-patient privilege in criminal proceedings. (Tex. R. Evid. 509). Texas law also recognizes a journalist's qualified testimonial privilege in civil proceedings. (Tex. Civ. Prac. & Rem. Code Ann. §22.021 et seq.).

Husband and wife are competent witnesses except as to confidential communications with each other with certain exceptions (Tex. R. Evid. 504), and are competent witnesses for and against each other in suits for divorce (Tex. R. Evid. 504, Tex. Fam. Code Ann. §6.704).

Communications or Transactions with Persons Since Deceased or Incompetent.

In actions by or against executors, administrators or guardians as such, neither party is permitted to testify to oral statements by testator, intestate or ward, unless testimony is corroborated or witness is called to testify thereto by opposite party, and like rule applies to actions by or against heirs or legal representatives of decedent based in whole or part upon such oral statement. (Tex. R. Evid. 601[b]).

Self-Incrimination.

In all criminal prosecutions, accused may not be compelled to give evidence against himself. (Tex. Const. art. I, §10).

Compelling Attendance.

See topic 5.11 Depositions and Discovery.

Health Care Liability Claims.

Tex. Civ. Prac. & Rem. Code Ann. §74.001 et seq. modified the Rules of Evidence in some respects for health care liability claims.

5.14 INJUNCTIONS:

Injunctive relief available where specifically authorized by statute. See, e.g., Texas Deceptive Trade Practices Act. (Tex. Bus. & Com. Code Ann. §17.50). In addition, injunctive relief available generally where: “(1) the applicant is entitled to the relief demanded and all or part of the relief requires the restraint of some act prejudicial to the applicant; (2) party performs or is about to perform or is procuring or allowing the performance of an act relating to the subject of pending litigation, in violation of the rights of the applicant, and the act would tend to render the judgment in that litigation ineffectual; (3) the applicant is entitled to writ of injunction under the principles of equity and the statutes of this state relating to injunctions; (4) cloud would be placed on the title of real property being sold under an execution against party having no interest in the real property subject to execution at the time of sale, irrespective of any remedy at law; or (5) irreparable injury to real or personal property is threatened, irrespective of any remedy at law.” (Tex. Civ. Prac. & Rem. Code Ann. §65.011). Procedure for obtaining injunctive relief set out in Texas Rules of Civil Procedure which are based in part on Federal Rules of Civil Procedure. (Tex. R. Civ. P. 680-693a).

Jurisdiction.

Judges of district and county courts have jurisdiction to hear and determine applications for writs of injunction. (Tex. Civ. Prac. & Rem. Code Ann. §65.021). For jurisdictional descriptions of such courts generally, see category 6 Courts and Legislature, topic 6.01 Courts, subheads District Courts, Constitutional County Courts and Statutory County Courts. Where resident judge of court having jurisdiction over subject matter or parties to action is unavailable or unwilling to act on application for injunction, nonresident judge may grant injunctive relief under some circumstances. (Tex. Civ. Prac. & Rem. Code Ann. §65.022).

Prerequisites.

Writs of injunction must be sought by verified petition containing plain and intelligible statement of grounds for relief. (Tex. R. Civ. P. 682). Notice must be given to adverse party prior to issuance of any temporary injunction (Tex. R. Civ. P. 681) and prior to issuance of any temporary restraining order unless it clearly appears from specific facts shown by affidavit or by verified complaint that immediate and irreparable injury, loss, or damage will result to applicant before notice and hearing can be had. (Tex. R. Civ. P. 680). To justify issuance of writ, applicant must satisfy principles, practice and procedure generally followed in courts of equity if not in conflict with specific statutory provisions. (Tex. R. Civ. P. 693). Any temporary restraining order or temporary injunction must be predicated on execution and filing of bond in amount fixed by court. See subhead Bond, infra. To form basis for subsequent contempt action, writ issued must meet certain technical form requirements. See subhead Form of Writ, infra.

Procedure.

Temporary restraining order issued without notice must be based on verified complaint or affidavit setting forth immediate and irreparable injury, loss, or damage which will result to applicant before notice and hearing can be had. (Tex. R. Civ. P. 680). Temporary restraining order or order fixing time for hearing on temporary injunction must be filed with copy of petition with clerk and, if such orders do not pertain to pending suit, cause is entered on docket and citation is issued in same manner as in other civil cases. (Tex. R. Civ. P. 685, 686). Defendant may move to dissolve injunction before final hearing based upon verified denial of material allegations of petition. (Tex. R. Civ. P. 690). In case of temporary restraining order issued without notice, defendant may move for dissolution upon two days notice or such shorter notice as court may prescribe. (Tex. R. Civ. P. 680).

Bond.

Orders granting temporary restraining order or temporary injunction must fix security to be given by applicant. Cash bond may be used; otherwise, bond must be executed and filed with clerk prior to issuance of such orders. (Tex. R. Civ. P. 684). Issuing court may, in its discretion, dispense with necessity for bond in connection with ancillary injunction in divorce cases on behalf of one spouse against other. (Tex. R. Civ. P. 693a).

Form of Writ.

Writs issued must comply with certain requirements of form to ensure adequacy to support subsequent contempt action. Temporary restraining order must be endorsed with date and hour of issuance, be filed forthwith in clerk's office and entered of record, define injury to be suffered by applicant, and state that it will expire by its terms within such time as fixed by court, not to exceed 14 days, unless first extended for like period for good cause shown or unless party against whom order directed consents to extension. (Tex. R. Civ. P. 680). TRO entered without notice must state why it was granted without notice. All injunctions and restraining orders must set forth reasons for issuance, be specific in terms, and describe in reasonable detail and not by reference to complaint or other document act or acts restrained. (Tex. R. Civ. P. 683). Writs must: (1) Be styled “The State of Texas,” (2) be directed to person or persons enjoined, (3) state names of parties to proceedings and nature of plaintiff's application and action of judge thereon, (4) command person or persons to whom directed to desist and refrain from commission or continuance of act enjoined, or to obey and execute such order as judge has seen proper to make, (5) in case of temporary restraining order, state day and time for hearing or, in case of

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temporary injunction, made returnable in manner similar to ordinary citations, and (6) be dated and signed by clerk and attested with seal of his office with date of issuance endorsed thereon. (Tex. R. Civ. P. 687).

Appeal.

Interlocutory appeal to Court of Appeals available under expedited procedure from order granting or refusing temporary injunction or granting or overruling motion to dissolve such injunction. (Tex. Civ. Prac. & Rem. Code Ann. §51.014).

5.15 JUDGMENTS:

Texas Rules of Civil Procedure are based in part on Federal Rules of Civil Procedure.

A judgment must conform to the pleadings, the nature of the case proved and the verdict, if any, and must be framed so as to give the successful party all the relief to which he may be entitled either in law or in equity. Upon motion and reasonable notice within no more than 30 days of date judgment was signed, court may: (i) Render judgment non obstante veredicto if directed verdict would have been proper and (ii) disregard any jury finding on question that has no support in evidence. Only one final judgment may be rendered in action unless otherwise specially provided by law. (Tex. R. Civ. P. 301).

Judgments by Confession or Consent.

Judgment may be confessed by defendant or his attorney in open court, without process, provided petition must be filed and justness of debt or cause of action be sworn to by plaintiff. Where judgment is confessed by attorney, power of attorney must be filed and its contents recited in judgment. (Tex. R. Civ. P. 314).

In instrument executed before suit is brought, person may not accept service and waive process, enter appearance in open court, or confess judgment. (Tex. Civ. Prac. & Rem. Code Ann. §30.001).

Consent judgment is normally obtained in writing from defendant or defendant's attorney and is not enforceable unless it is in writing, signed and filed with court as part of record or made in open court and entered of record. (Tex. R. Civ. P. 11). Consent judgment is written agreement and should be interpreted as contract. (905 S.W.2d 760). It is as conclusive as any other judgment as to matters adjudicated and stands as final disposition of cause unless vacated or set aside in manner provided by law. (701 S.W.2d 284).

Judgments on Pleadings.

Judgment must accord with and be warranted by pleadings. (Tex. R. Civ. P. 301).

Summary Judgments.

Summary judgments are provided for. (Tex. R. Civ. P. 166a).

Declaratory Judgments.

Uniform Declaratory Judgment Act adopted. (Tex. Civ. Prac. & Rem. Code Ann. §§37.001-.011).

Default Judgments.

Upon the call of the appearance docket, or at any time after defendant is required to answer, plaintiff may take judgment by default against any defendant who has been duly served with process and has not filed an answer if the citation with return thereon has been on file for ten days. (Tex. R. Civ. P. 239, 107). Where some defendants have answered and others have not, plaintiff may take interlocutory judgment by default against those who have not answered and proceed against remainder. (Tex. R. Civ. P. 240). Where default judgment is rendered upon liquidated demand, damages are assessed by court and final judgment entered unless defendant demands and is entitled to trial by jury (Tex. R. Civ. P. 241), but where demand is unliquidated, court must hear evidence as to damages and render judgment therefor, unless defendant demands and entitled to trial by jury, in which case jury will assess damage (Tex. R. Civ. P. 243).

Where service is by publication and no answer has been filed, nor appearance entered, court is required to appoint attorney to represent absent defendants and judgment is then rendered as in other cases, but in such cases statement of evidence, duly approved and signed by judge, must be filed with papers of cause. (Tex. R. Civ. P. 244).

Notice of intent to take default judgment against State of Texas or agency thereof must be served upon Attorney General by certified mail, return receipt requested at least ten days prior to proposed default judgment in order for judgment to be valid. (Tex. Civ. Prac. & Rem. Code Ann. §§39.001-.002; 30.004).

See also subhead Judgments by Confession or Consent, supra.

Judgment for Property.

Judgment for conveyance of real property or delivery of personal property passes title thereto. (Tex. Civ. Prac. & Rem. Code Ann. §31.001).

Remittitur and Amendment.

Any party in whose favor judgment has been entered may remit any part of it in open court or may execute and file written remittitur. (Tex. R. Civ. P. 315). Clerical mistakes in record of any judgment may, upon application and after due notice to all interested parties, be corrected by court. (Tex. R. Civ. P. 316).

Justice's Judgments.

Rules in regard to judgments of justice courts are substantially similar to rules in district and county courts. (Tex. R. Civ. P. 556-565).

Offer of Judgment.

Judgments in wrongful death, personal injury and property damage cases must include prejudgment interest; settlement offer communicated in writing to party, his attorney or representative tolls running of prejudgment interest during period in which offer may be accepted. (Tex. Fin. Code Ann. §§304.101-304.108). No provision with respect to costs accruing after offer if offer is not accepted.

Docketing.

See category 8 Debtor and Creditor, topic 8.05 Executions.

Vacation or Modification.

Trial court has inherent power over judgment and may, on its own motion or motion of party, vacate, modify, correct, or reform judgment, or grant new trial, at any time before judgment becomes final. (917 S.W.2d 872).

Lien is created by recording abstract of judgment with county clerk. (Tex. Prop. Code Ann. §52.001). Upon indexing, judgment operates as lien on all real estate then owned or thereafter acquired by judgment debtor in county where recorded, which lien continues during life of judgment. (Tex .Prop. Code Ann. §52.001). Judgment does not become dormant where execution is issued within ten years after its rendition and successive executions may issue at any time within ten years after issuance of preceding execution. (Tex. Civ. Prac. & Rem. Code Ann. §34.001).

Abstract of judgment operates only against real estate of judgment debtor; no lien is created against personal property.

There is no lien on personal property until levy thereon under execution.

Revival.

See Tex. Civ. Prac. & Rem. Code Ann. §§31.006, 34.001.

Assignment.

Assignments of judgments, or parts thereof, must be in writing and may be filed with papers of cause. When recorded by clerk appropriately, they operate as notice to all parties. (Tex. Prop. Code Ann. §12.014).

Satisfaction.

Satisfaction of judgment may be shown by: (1) Return upon execution, certified by officer making return; or (2) receipt, acknowledgment, or release signed by judgment holder and duly recorded. (Tex. Prop. Code Ann. §52.005). Such satisfaction is entered at foot of abstract of judgment, upon record. (Tex. Prop. Code Ann. §52.004).

Actions.

See category 8 Debtor and Creditor, topic 8.05 Executions.

Foreign Judgments.

Action on foreign judgment is barred whenever barred in state of its rendition, and, in any event, as to citizens residing in this state for ten years, is barred in ten years. (Tex. Civ. Prac. & Rem. Code Ann. §16.066).

See also topic 5.19 Practice.

Revised Uniform Enforcement of Foreign Judgments Act adopted. (Tex. Civ. Prac. & Rem. Code Ann. §35.001 et seq.).

Uniform Foreign Money-Judgments Recognition Act adopted with significant variations. (Tex. Civ. Prac. & Rem. Code Ann. §36.001-.008). Texas title is “Uniform Foreign Country Money-Judgments Recognition Act”.

5.16 LIMITATION OF ACTIONS:

Uniform Commercial Code enacted. (Tex. Bus. & Com. Code Ann. §1.101 et seq.). See category 3 Business Regulation and Commerce, topic 3.09 Commercial Code.

Actions must be brought within following times:

Ten years: on judgments, domestic or foreign, except that action on foreign judgment is barred in this state if action is barred under laws of jurisdiction where rendered (Tex. Civ. Prac. & Rem. Code Ann. §§16.066[a], 34.001); to recover damages arising out of defective or unsafe conditions of real property against one performing construction or repair thereto (Tex. Civ. Prac. & Rem. Code Ann. §16.009); to recover damages caused by error in survey conducted by registered public surveyor or licensed state land surveyor, except if written claim presented during ten-year period, then period extended two years from date claim presented (Tex. Civ. Prac. & Rem. Code Ann. §16.011).

Five years: action on officer's bond for failure to make return of execution. (Tex. Civ. Prac. & Rem. Code Ann. §16.007).

Four years: actions for specific performance on contract to convey real property; actions for penalty or for damages on penal clause of bond to convey real estate; action for debt, fraud, or breach of fiduciary duty (Tex. Civ. Prac. & Rem. Code Ann. §16.004[a]); action on bond of executor, administrator or guardian, time running from date of death, resignation, removal or discharge of executor, administrator or guardian; actions by one partner against his co-partner for settlement of partnership accounts, actions upon stated or open accounts, or upon mutual and current accounts concerning trade of merchandise between merchant and merchant, their factors or agents, and cause of action accrues on cessation of dealings in which they were interested together (Tex. Civ. Prac. & Rem. Code Ann. §16.004[b]); on notes secured by deeds, mortgages, or deeds of trust, or vendor's liens retained in deeds of conveyance, or vendor's lien notes for purchase money, time running from maturity of debt (Tex. Civ. Prac. & Rem. Code Ann. §16.035); action to recover land, when instrument of record is defective in certain aspects (Tex. Civ. Prac. & Rem. Code Ann. §16.033); on all causes not otherwise specified (Tex. Civ. Prac. & Rem. Code Ann. §16.051). See also category 3 Business Regulation and Commerce, topic 3.09 Commercial Code. As to suits for defalcation on bonds of public officials, see Tex. Gov't Code Ann. §604.007.

Three years: by or against carriers of property for hire for charges or overcharges. (Tex. Civ. Prac. & Rem. Code Ann. §16.006).

Two years: for injuries to person or property; for death, time running from death; for detaining personal property and converting same to own use; for taking or carrying away goods or chattels of another; for forcible entry and detainer (Tex. Civ. Prac. & Rem. Code Ann. §16.003); will contests (Tex. Prob. Code Ann. §93). Health care liability claims must be filed within two years of date of breach or tort or from which subject treatment is completed. Minors under 12 years old have until their 14th birthday to file. Ten year statute of repose applies. (Tex. Civ. Prac. & Rem. Code Ann. §74.251).

One year: for injuries to character or reputation; for malicious prosecution or breach of promise to marry. (Tex. Civ. Prac. & Rem. Code Ann. §16.002).

Extension of Limitations Period.

If last day of limitations period under any statute of limitations falls on Sat., Sun., or holiday, period for filing suit is extended to next day that county offices are open for business. (Tex. Civ. Prac. & Rem. Code Ann. §16.072). Discovery rule applies to certain torts to extend limitations where conduct could not be discovered through use of reasonable diligence.

New Action.

When action is dismissed or judgment set aside or annulled in direct proceeding because of lack of jurisdiction of trial court, and within 60 days thereafter action is commenced in proper court, period between date of first filing and that of commencement of action in proper court is not counted as part of period of limitation, unless first filing was intentional disregard of jurisdiction. (Tex. Civ. Prac. & Rem. Code Ann. §16.064).

Foreign Causes of Action.

No statutory provision regarding foreign causes of action. However, actions based upon foreign judgment or decree are barred if by laws of foreign state or country such action would there be barred and judgment or decree is incapable of being otherwise enforced there; and whether so barred or not, no action against person who shall have resided in this State during ten years next preceding such action shall be brought upon any such judgment or decree rendered more than ten years before commencement of such action. (Tex. Civ. Prac. & Rem. Code Ann. §16.066).

Disabilities of Plaintiff.

Time does not run against insane persons, persons under 18 years of age or, as to real estate, against persons serving in Armed Forces during time of war; but no action to recover real property may be brought more than 25 years after cause accrued. (Tex. Civ. Prac. & Rem. Code Ann. §§16.001, 16.022, 16.027).

Death.

In case of death of person against whom or in whose favor cause of action exists, time ceases to run until 12 months after such death, unless an administrator or executor sooner qualifies, in which case time ceases to run only until such qualification. (Tex. Civ. Prac. & Rem. Code Ann. §16.062).

Absence or Concealment of Defendant.

Absence of defendant from state suspends period of limitation. (Tex. Civ. Prac. & Rem. Code Ann. §16.063).

Counterclaim or Cross Action.

If at time required by law for answer to plaintiff's action, defendant's counterclaim or cross action would otherwise be barred by applicable statute of limitation, period of limitations is extended 30 days following answer date for counterclaim or cross action arising out of same transaction or occurrence made subject matter of opposing party's claim. (Tex. Civ. Prac. & Rem. Code Ann. §16.069).

Revival of Barred Claims.

Debt barred by limitation may be revived by acknowledgment in writing, signed by person to be charged. (Tex. Civ. Prac. & Rem. Code Ann. §16.065). Dormant judgment may be revived by scire facias or action of debt brought not later than second anniversary of date that judgment becomes dormant. (Tex. Civ. Prac. & Rem. Code Ann. §31.006).

Extension of maturity of any evidence of indebtedness secured by mortgage, deed of trust or vendor's lien on real property must be in writing, signed, acknowledged, and recorded, as in case of mortgage. (Tex. Civ. Prac. & Rem. Code Ann. §16.036).

Contractual Limitations.

Time within which to sue may not be limited by contract to less than two years unless contract is for sale of business entity and has aggregate value not less than $500,000 (Tex. Civ. Prac. & Rem. Code Ann. §16.070), and except to extent permitted under Uniform Commercial Code. See topic Commercial Code. Except where contract is for sale of business entity and has value not less than $500,000, contractual stipulation requiring claimant to give notice of claim of damages as condition precedent to right to sue must be reasonable. Notice is presumed unless lack of notice is specifically pleaded under oath. (Tex. Civ. Prac. & Rem. Code Ann. §16.071).

Pleading.

To be available as defense, limitations must be pleaded. (Tex. R. Civ. P. 94).

Immigrants may not be sued on claims incurred prior to arrival in state that are barred in state or country from which they emigrated. Action not barred at time of removal to Texas is not barred until immigrant has resided in state for one year. (Tex. Civ. Prac. & Rem. Code Ann. §16.067).

See also category 21 Property, topic 21.02 Adverse Possession.

5.16A PARTITION:

Any joint owner or claimant of real property or of any interest therein may compel partition thereof between joint owners or claimants thereof. (Tex. Prop. Code Ann. §23.001).

Jurisdiction and Venue.

District court has original jurisdiction of all suits for partition of real property. (Tex. Prop. Code Ann. §23.002[a]). Jurisdiction of suits for partition of personal property is determined by value of property. (Tex. Prop. Code Ann. §23.002[b]).

Actions for partition of real property shall be brought in county in which all or part of property is located. (Tex. Civ. Prac. & Rem. Code Ann. §15.011).

Proceedings.

Partition proceedings governed by Texas Rules of Civil Procedure and Tex. Prop. Code Ann. §23.001 et seq..

Partition of Real Property.

Petition is filed in district court stating name and residence, if known, of each other joint owner or joint claimant; share or interest which plaintiff and other joint owners are claiming, so far as known to plaintiff. Property sought to be partitioned shall be described so that it may be distinguished from any other property and estimated value stated. (Tex. R. Civ. P. 756).

Upon hearing said cause, court must determine share or interest of each of joint owners or claimants and all questions of law or equity affecting title to such property or any part thereof which may arise, and before entering decree of partition court shall determine whether property, or any part thereof, is susceptible of partition; and, if court determines that whole of such property, or any part thereof, is susceptible of partition, then court for that part of such party held to be susceptible of partition shall enter decree directing partition of such real estate describing same, to be made in accordance with respective shares or interests of each of parties entitled thereto, specifying in such decree share or interest of each party, and shall appoint three or more competent and disinterested persons as commissioners to make such partition in accordance with such decree and law, majority of which commissioners may act. (Tex. R. Civ. P. 760, 761).

When commissioners have completed partition they must report same in writing and under oath to court, which report must show: (1) description of property; (2) description of tracts after division; (3) number of shares, land which constitutes each share and estimated value of each share; (4) allotment of each share. Report must be accompanied by such field-notes and maps as may be necessary to make same intelligible. (Tex. R. Civ. P. 769).

Property incapable of division may be sold, by order of the court, and the proceeds divided according to the respective interests. (Tex. R. Civ. P. 770). Any party may file objections to actions of the commissioners, and the matter is tried as in other cases. (Tex. R. Civ. P. 771). The decree of the court confirming the report of the commissioners in partition is of the same effect as full warranty deed made by the parties. (Tex. Prop. Code Ann. §23.004).

Partition of Personal Property.

Proceeding for partition of personal property commenced in same manner as other civil suits. (Tex. R. Civ. P. 772). When partition in kind of personal property is ordered by judgment of court, writ is issued in accordance with such judgment commanding sheriff or constable of county where property may be, to put parties forthwith in possession of property allotted to them. (Tex. R. Civ. P. 773, 774). When personal property will not admit of fair and equitable partition, court ascertains proportion to which each owner thereof is entitled and orders property to be sold, in which case execution is issued to sheriff or any constable of county where property may be, describing such property and commanding such officer to sell same as in other cases of execution and pay over proceeds of sale to parties entitled thereto in proportion ascertained by judgment. (Tex. R. Civ. P. 775).

5.17 [RESERVED]

5.18 PLEADING:

Pleading is governed by Texas Rules of Civil Procedure which are based in part upon Federal Rules of Civil Procedure. See topic 5.19 Practice.

Pleadings Permitted.

Pleadings in district and county court are generally by petition and answer. (Tex. R. Civ. P. 45[a]).

Petition.

Plaintiff in civil action must file petition (Tex. R. Civ. P. 22) that consists of plain and concise statement of his cause of action (Tex. R. Civ. P. 45[b]).

Answer.

Defendant may file answer setting forth any matters of law or fact that he desires for defense, or general denial. (Tex. R. Civ. P. 84-85, 92).

Plaintiff is considered to have denied any special defense pleaded that is not expressly admitted. (Tex. R. Civ. P. 82).

Counterclaim or Set-Off.

Derived from Fed. R. Civ. P. 13. (Tex. R. Civ. P. 97).

Reply.

Plaintiff may answer defendant's counterclaim as though it were an original suit. (Tex. R. Civ. P. 81).

Demurrer.

General demurrer is not in use. Generally, defects, omissions or faults in pleadings, either of form or substance, that are not specifically pointed out by motion or special exception in writing and brought to attention of trial judge are deemed to have been waived. (Tex. R. Civ. P. 90).

Amended or Supplemental Pleadings.

Ordinarily may be filed as often as necessary, but may not be filed within seven days of date of trial without leave of court. (Tex. R. Civ. P. 63).

Affidavits of Merits.

Not in use.

Affidavits of Defense.

Not in use.

Bills of Particulars.

No requirements. See subhead Demurrer, supra.

Verification.

The pleadings that must be verified are set out in Tex. R. Civ. P. 93. Applications for writs of injunction must be verified. (Tex. R. Civ. P. 682). Not necessary to verify pleadings except when specially required.

Frivolous Claims.

Courts may for good cause impose sanctions for filing of pleadings, motions, and other papers that are groundless in law or fact. (Tex. R. Civ. P. 13). Appropriate sanctions available under Tex. R. Civ. P. 215-2b may be imposed against attorneys, parties, or both.

Service.

Copy of all pleadings except citation required on filing action (Tex. R. Civ. P. 99) must be delivered or mailed to adverse party or his attorney of record (Tex. R. Civ. P. 21). Failure to comply with Tex. R. Civ. P. 21 or Tex. R. Civ. P. 21a may result in sanctions set forth in Tex. R. Civ. P. 215-2b. (Tex. R. Civ. P. 21b).

Filing.

Derived from Fed. R. Civ. P. 5(e). (Tex. R. Civ. P. 74).

Time.

In district or county court, answer must be filed on or before 10 a.m. on Mon. following expiration of 20 days after citation was served. (Tex. R. Civ. P. 99). In justice court answer must be filed by 10 a.m. on Mon. following expiration of ten days after service and return. (Tex. R. Civ. P. 535). Date of service is not counted in computation. (Tex. R. Civ. P. 4).

Proof of Claims.

Sworn account, if not denied under oath, constitutes proof of account. (Tex. R. Civ. P. 185).

While rules do not specify procedure for claims sent to Texas from other states, all claims should be accompanied by original instrument on which claim is founded on itemized statement of account.

Small Claims.

See category 6 Courts and Legislature, topic 6.01 Courts.

5.19 PRACTICE:

Practice is controlled by Rules of Civil Procedure promulgated by Supreme Court of Texas which are based in part on Federal Rules of Civil Procedure.

Discovery is provided for (Tex. R. Civ. P. 190-215) and deposition of adverse party and nonparties may be taken (Tex. R. Civ. P. 198).

Demand for admission of facts is provided for (Tex. R. Civ. P. 199, 200) and bad faith refusal to admit facts as to which there is no bona fide controversy is ground for taxing all expense of proving such facts against party refusing to cooperate (Tex. R. Civ. P. 215.4[b]).

Direct Action Against Insurer.

See category 23 Transportation, topic 23.01 Motor Vehicles, subhead Direct Actions.

Small Claims.

See category 6 Courts and Legislature, topic 6.01 Courts.

See also topics 5.03 Appeal and Error, Judgments, Depositions and Discovery; category 8 Debtor and Creditor, topic 8.02 Attachment.

5.20 PROCESS:

Texas Rules of Civil Procedure are based in part on Federal Rules of Civil Procedure.

After petition is filed, clerk of court issues such citations as are requested by the party or his attorney. (Tex. R. Civ. P. 99). See topic 5.19 Practice.

General Requisites.

Citation is directed to defendant and commands him to appear and answer plaintiff's petition on or before 10 A.M. of Mon. following expiration of 20 days from date of service. Citation must be styled “The State of Texas”; signed by Court Clerk; state name and place of court; state date of issuance of citation, file number, names of all parties and warn defendant that failure to appear may cause default judgment; and must be accompanied by copy of petition. (Tex. R. Civ. P. 99).

By Whom Issued.

When petition is filed with clerk, he must promptly issue citations as requested by any party or his attorney. (Tex. R. Civ. P. 99).

Who May Serve.

Service is made by sheriff or any constable or other person authorized by law, or on written order of court may be made by any disinterested person not less than 18 years old. (Tex. R. Civ. P. 103).

Personal Service on Individual.

Service is made by clerk of court, officer or by approved process server: (a) Delivering to defendant copy of citation marked with date of delivery and copy of plaintiff's petition or (b) mailing to defendant copy of citation by registered or certified mail, and copy of petition. When service in above manner has not been successful, court, upon motion, may authorize service by officer delivering same to anyone over 16 years of age at defendant's usual place of business or place of abode, by any disinterested adult named by court in its order, or in any other manner that will be reasonably effective to give defendant notice of suit. (Tex. R. Civ. P. 106).

Personal Service on Incompetent Person.

Special mode of service on persons in mental hospitals. (Tex. Health & Safety Code Ann. §571.010).

Personal Service on Partnership.

Citation served upon one member of partnership or firm is sufficient to authorize judgment against firm and partner actually served. (Tex. Civ. Prac. & Rem. Code Ann. §17.022).

Personal Service on Corporation.

Service on corporations, both domestic and foreign, may be made by serving president, any vice president or registered agent of corporation. If corporation is required to maintain registered agent in Texas but fails to appoint or maintain registered agent in Texas, or registered agent cannot be found at registered office with reasonable diligence, or certificate of authority of foreign corporation has been revoked, then Secretary of State is agent of such corporation for service. Service in connection with collection of delinquent ad valorem tax on corporation whose privileges have been forfeited or involuntarily dissolved, may be made on any officer or director listed in most recent records of Secretary of State or in same manner as unknown shareholders. (Tex. Bus. Orgs. Code §§5.252, 5.255, 5.257).

Service on Joint Stock Association is made by serving president, vice president, secretary, treasurer, cashier or assistant cashier, or local agent of association in county where suit is brought, or by leaving copy of citation at principal office of company during office hours. (Tex. Civ. Prac. & Rem. Code Ann. §17.023). Special provision is made for serving receiver of railroad corporation. (Tex. Civ. Prac. & Rem. Code Ann. §64.076).

Personal Service Outside the State.

Same as prescribed for citation and service of resident defendant; and such citation may be served by any disinterested person competent to make oath of fact of service. Defendant so served is required to appear and answer in same manner and time and under same penalties as if personally served with citation within Texas. (Tex. R. Civ. P. 108).

Substituted Service.

When foreign corporation, association, joint stock company, partnership, or nonresident natural person required to maintain resident agent fails to do so, or two unsuccessful attempts are made to serve such agent, or when such foreign corporation, etc., engages in business in state and is party to suit arising out of such business, service may be made upon Secretary of State as agent for such party. (Tex. Civ. Prac. & Rem. Code Ann. §17.044). Whenever substituted service is made upon Secretary of State, he must forward copy of such service to defendant by registered mail, or by certified mail, return receipt requested. (Tex. Civ. Prac. & Rem. Code Ann. §17.045). After death of nonresident for whom Secretary of State is agent for service of process, Secretary of State is agent for service of process on nonresident administrator, executor or personal representative of estate. (Tex. Civ. Prac. & Rem. Code Ann. §17.044[c]). Whenever process against defendant is served upon Secretary of State, duplicate copies must be delivered, together with statement of address of home office of defendant to which notice and copy of process must be sent. (Tex. Civ. Prac. & Rem. Code Ann. §17.045; **Tex. Bus. Corp. Act Ann. art. 8.10**). Additional methods are provided for service on foreign railroad corporations. (Tex. Civ. Prac. & Rem. Code Ann. §17.093).

Service by Publication.

Nonresident, defendant absent from state, or transient person, or one whose residence is unknown, may be served by publication. (Tex. R. Civ. P. 106 and 109). Concerning such citations see Tex. R. Civ. P. 109-117a.

See also topic 5.19 Practice.

Long Arm Statute.

See subhead Substituted Service, supra. In addition to long arm jurisdiction provided for in Tex. Civ. Prac. & Rem. Code Ann. §§17.041-17.045, long arm statutes provide for jurisdiction in actions against nonresident motorists (Tex. Civ. Prac. & Rem. Code Ann. §§17.061-17.069); under Family Code in actions against nonresident respondents in divorce proceedings (Tex. Fam. Code Ann. §6.305) and suits against nonresidents affecting parent-child relationship (Tex. Fam. Code Ann. §§6.305; 102.11); suits against nonresident property owner for ad valorem taxes (Tex. Civ. Prac. & Rem. Code Ann. §17.091); suits against foreign railway corporations (Tex. Civ. Prac. & Rem. Code Ann. §17.093); suits against corporate fiduciary acting in capacity of executor, administrator, trustee or guardian (Tex. Prob. Code Ann. §105A); and suits against foreign insurance companies (Tex. Ins. Code Ann. §804.103).

Proof of Service.

Officer making service must endorse his return on citation and return it to court. (Tex. R. Civ. P. 107). Return on citation served on nonresident or defendant absent from state should be endorsed on original notice and should be signed and sworn to by person making return. (Tex. R. Civ. P. 108). When citation has been served by registered mail as authorized by Tex. R. Civ. P. 106, officer's return must include return receipt with addressee's signature. Where citation is made by alternative method authorized by Rule 106, proof of service shall be made in manner authorized by court. (Tex. R. Civ. P. 107).

Nonresident Motorist.

See category 23 Transportation, topic 23.01 Motor Vehicles.

5.21 REPLEVIN:

Generally, no such action in Texas. However, common-law principles defining and governing action are resorted to where recovery of personal property is sought. See category 8 Debtor and Creditor, topics 8.02 Attachment and 8.09 Garnishment. Replevin is allowed in some cases under Uniform Commercial Code. See category 3 Business Regulation and Commerce, topic 3.09 Commercial Code.

5.22 SEQUESTRATION:

Sequestration statute (Tex. Civ. Prac. & Rem. Code Ann. §62.001 et seq.) and procedural rules (Tex. R. Civ. P. 696-716) revised to comply with constitutional requirements of due process. Writs of sequestration may be issued at commencement or during progress of, but before final judgment in, civil suit. (Tex. Civ. Prac. & Rem. Code Ann. §62.002; Tex. R. Civ. P. 696).

Property Which May Be Reached.

Personal property, real property, fixtures. (Tex. Civ. Prac. & Rem. Code Ann. §62.001).

Jurisdiction.

Judges of district or county court, or justices of peace may issue writs of sequestration. (Tex. Civ. Prac. & Rem. Code Ann. §62.021).

Grounds for sequestration are: (a) In suit for possession or title to personalty or fixtures or for enforcement of encumbrance thereon where immediate danger exists that defendant or person in possession of property will conceal, dispose of, ill-treat, waste, or destroy property or remove it from county during suit; (b) in suit for possession or title to real property or for enforcement of encumbrance thereon, where immediate danger exists concerning (i) injury to or ill-treatment of real property or (ii) possessor's waste or conversion of timber, rents, fruit or revenues thereof; (c) in suit for title or possession of property from which party seeking writ has been ejected by force or violence; or (d) in suit to try title to real property, or to remove cloud or foreclose thereon, or for partition thereof where defendant(s) are nonresident(s) of state. (Tex. Civ. Prac. & Rem. Code Ann. §62.001).

Proceedings to Obtain.

Writ may be issued at commencement or during pendency of, but prior to judgment in, civil suit upon: (1) Application (a) supported by affidavit, (b) complying with statutory requirements, (c) stating grounds for issuance, (d) including sufficient property description, (e) giving value of property, (f) stating county wherein property located and (g) setting forth facts relied upon to warrant required findings of court; and (2) hearing which may be ex parte. Court, in order granting application must: (a) Make specific findings of fact to support statutory grounds, (b) describe property sufficiently, (c) state value of property, (d) identify county wherein property located, (e) specify amount of bond required by plaintiff and (f) set forth amount of bond required by defendant to replevy. (Tex. R. Civ. P. 696).

Requisites of Writ.

Writ must be directed "To the sheriff or any constable within the State of Texas", and must, among other things, contain following statement in ten-point type:

"YOU HAVE RIGHT TO REGAIN POSSESSION OF THE PROPERTY BY FILING REPLEVY BOND. YOU HAVE RIGHT TO SEEK TO REGAIN POSSESSION OF THE PROPERTY BY FILING WITH THE COURT MOTION TO DISSOLVE THIS WRIT." (Tex. R. Civ. P. 699; Tex. Civ. Prac. & Rem. Code Ann. §62.023).

Dissolution of Writ of Sequestration.

Defendant may, by written, sworn motion, seek dissolution, vacation or modification of writ. Hearing on motion must be held and issue determined within ten days after motion filed unless otherwise agreed by parties. Burden on plaintiff to prove grounds relied upon or else writ shall be dissolved. (Tex. Civ. Prac. & Rem. Code Ann. §§62.041, 62.042, 62.043; Tex. R. Civ. P. 712a). Burden on movant to prove that reasonable value of property sequestered exceeds amount necessary to secure debt, plus interest for one year and probable costs. (Tex. R. Civ. P. 712a). If writ dissolved, action for wrongfully securing issuance of writ must be brought as compulsory counterclaim. (Tex. Civ. Prac. & Rem. Code Ann. §62.044).

Replevy.

Defendant may replevy the property by giving bond in amount set by court. (Tex. R. Civ. P. 701).

5.23 SERVICE:

See topic 5.20 Process.

5.24 STAY OF EXECUTION:

See topic 5.03 Appeal and Error; category 8 Debtor and Creditor, topic 8.05 Executions.

5.25 SUBMISSION OF CONTROVERSY:

No statutory provision.

5.26 VENUE:

The general rule of venue is that the action must be brought in the county in which all or part of cause of action accrued, in county of defendant's residence if defendant is natural person or in county of defendant's principal office in this State if not natural person (Tex. Civ. Prac. & Rem. Code Ann. §15.002), but there are numerous exceptions (Tex. Civ. Prac. & Rem. Code Ann. §15.001 et seq.).

Insurance Company.

Against fire, marine, or inland insurance company, in county where insured property is situated. Against life, health, or accident insurance company, in county where company's principal office is located, where policyholder or beneficiary resided when cause of action accrued, or where loss occurred. (Tex. Civ. Prac. & Rem. Code Ann. §15.032).

Defendant on Written Contract.

In county where contract expressly provides place of performance; but in action on defendant's obligation to pay money based on consumer transaction for goods, services, loans, or credit for personal, household, or agricultural use, in county where defendant signed contract or where he resides when action commences. (Tex. Civ. Prac. & Rem. Code Ann. §15.035).

Manufacturer (Breach of Warranty, Consumer Goods).

In county where any part of cause of action accrued, where manufacturer's principal office is located, or where plaintiff resided when cause of action accrued. (Tex. Civ. Prac. & Rem. Code Ann. §15.033).

Venue of administration: see category 13 Estates and Trusts, topic 13.09 Executors and Administrators; divorce: see category 14 Family, topic Divorce.

Change of venue may be granted upon showing that any party cannot expect fair, impartial trial, or upon other cause sufficient to court. (Tex. R. Civ. P. 257), or upon written consent of parties (Tex. R. Civ. P. 255). Cases may be removed from district court to any county of proper venue in same or adjoining district, and from county court to any adjoining county of proper venue or to any other county agreeable to parties. (Tex. R. Civ. P. 259). Challenge to venue must be made before or at time answer is due by motion to transfer venue or it usually is waived.

6 COURTS AND LEGISLATURE

6.01 COURTS:

United States District Courts.

Northern District.

Clerk's office: 1100 Commerce, Rm. 1452, Dallas 75242-1003, (214) 753-2207.

Deposit of $350 required from plaintiff on commencement of suit and $350 from defendant on filing petition for removal of case from state court.

Abilene Division is composed of following counties: Callahan, Eastland, Fisher, Haskell, Howard, Jones, Mitchell, Nolan, Shackelford, Stephens, Stonewall, Taylor and Throckmorton.

Court sits at Abilene.

Amarillo Division is composed of following counties: Armstrong, Briscoe, Carson, Castro, Childress, Collingsworth, Dallam, Deaf Smith, Donley, Gray, Hall, Hansford, Hartley, Hemphill, Hutchinson, Lipscomb, Moore, Ochiltree, Oldham, Parmer, Potter, Randall, Roberts, Sherman, Swisher and Wheeler.

Court sits at Amarillo.

Dallas Division is composed of following counties: Dallas, Ellis, Hunt, Johnson, Kaufman, Navarro and Rockwall.

Court sits at Dallas.

Fort Worth Division is composed of following counties: Comanche, Erath, Hood, Jack, Palo Pinto, Parker, Tarrant and Wise.

Court sits at Fort Worth.

Lubbock Division is composed of following counties: Bailey, Borden, Cochran, Crosby, Dawson, Dickens, Floyd, Gaines, Garza, Hale, Hockley, Kent, Lamb, Lubbock, Lynn, Motley, Scurry, Terry and Yoakum.

Court sits at Lubbock.

San Angelo Division is composed of following counties: Brown, Coke, Coleman, Concho, Crockett, Glasscock, Irion, Menard, Mills, Reagan, Runnels, Schleicher, Sterling, Sutton and Tom Green.

Court sits at San Angelo.

Wichita Falls Division is composed of following counties: Archer, Baylor, Clay, Cottle, Foard, Hardeman, King, Knox, Montague, Wichita, Wilbarger and Young.

Court sits at Wichita Falls.

Eastern District.

Clerk's office: 106 Federal Bldg., 211 W. Ferguson St., Tyler 75702, (903) 592-8195.

Deposit of $350 required from plaintiff on commencement of suit and $350 from defendant on filing petition for removal of case from state court.

Beaumont Division is composed of following counties: Hardin, Jasper, Jefferson, Liberty, Newton and Orange.

Court sits at Beaumont.

Lufkin Division is composed of following counties: Angelina, Houston, Nacogdoches, Polk, Sabine, San Augustine, Shelby, Trinity and Tyler.

Court sits at Beaumont; papers are filed in Beaumont Division.

Marshall Division is composed of following counties: Camp, Cass, Harrison, Marion, Morris and Upshur.

Court sits at Marshall.

Paris Division is composed of following counties: Delta, Fannin, Lamar, Hopkins and Red River.

Court generally conducts trials in Paris and hearings in Tyler. Office of Clerk in Tyler, Texas is office of record for this division where all pleadings and correspondence should be directed. Headings and pleadings should continue to reflect Paris Division.

Sherman Division is composed of following counties: Collin, Cooke, Denton and Grayson.

Court sits at Sherman.

Texarkana Division is composed of following counties: Bowie, Franklin and Titus.

Court sits at Texarkana.

Tyler Division is composed of following counties: Anderson, Cherokee, Gregg, Henderson, Panola, Rains, Rusk, Smith, Van Zandt and Wood.

Court sits at Tyler.

Southern District.

Clerk's office: P.O. Box 61010, 5300 Federal Building, 515 Rusk St., Houston, 77208, (713) 250-5500.

Deposit of $350 required from plaintiff on commencement of suit and $350 from defendant on filing petition for removal of case from state court.

Brownsville Division is composed of following counties: Cameron and Willacy.

Court sits at Brownsville.

Corpus Christi Division is composed of following counties: Aransas, Bee, Brooks, Duval, Jim Wells, Kenedy, Kleberg, Live Oak, Nueces and San Patricio.

Court sits at Corpus Christi.

Galveston Division is composed of following counties: Brazoria, Chambers, Galveston and Matagorda.

Court sits at Galveston.

Houston Division is composed of following counties: Austin, Brazos, Colorado, Fayette, Fort Bend, Grimes, Harris, Madison, Montgomery, San Jacinto, Walker, Waller and Wharton.

Court sits at Houston.

Laredo Division is composed of following counties: Jim Hogg, LaSalle, McMullen, Webb and Zapata.

Court sits at Laredo.

McAllen Division is composed of following counties: Starr and Hildalgo.

Court sits at McAllen.

Victoria Division is composed of following counties: Calhoun, De Witt, Goliad, Jackson, Lavaca, Refugio and Victoria.

Court sits at Victoria.

Western District.

Clerk's office: U.S. Courthouse, 655 E. Durango, San Antonio 78206, (210) 229-6550.

Deposit of $350 required from plaintiff on commencement of suit and $350 from defendant filing petition for removal of case from state court.

Austin Division is composed of following counties: Bastrop, Blanco, Burleson, Burnet, Caldwell, Gillespie, Hays, Kimble, Lampasas, Lee, Llano, Mason, McCulloch, San Saba, Travis, Washington and Williamson.

Court sits at Austin.

Del Rio Division is composed of following counties: Edwards, Kinney, Maverick, Terrell, Uvalde, Val Verde and Zavala.

Court sits at Del Rio.

El Paso Division is composed of El Paso County.

Court sits at El Paso.

Midland-Odessa Division is composed of following counties: Andrews, Crane, Ector, Martin, Midland, and Upton.

Court sits at Midland and Odessa.

Pecos Division is composed of following counties: Brewster, Culberson, Jeff Davis, Hudspeth, Loving, Pecos, Presidio, Reeves, Ward, and Winkler.

Court sits at Pecos.

San Antonio Division is composed of following counties: Atascosa, Bandera, Bexar, Comal, Dimmitt, Frio, Gonzales, Guadalupe, Karnes, Kendall, Kerr, Medina, Real and Wilson.

Court sits at San Antonio.

Waco Division is composed of following counties: Bell, Bosque, Coryell, Falls, Freestone, Hamilton, Hill, Leon, Limestone, McLennan, Milam, Robertson and Somervell.

Court sits at Waco.

Supreme Court of Texas.

Supreme Court has appellate jurisdiction only in matters of law in civil cases on writs of error to or by certificate from Courts of Appeals (Tex. Gov. Code Ann. §22.001) P.O. Box 12248, Austin 78711, (512) 463-1312.

Court sits at Austin.

Court of Appeals.

There are 14 Courts of Appeals Districts, in each of which is held Court of Appeals, having appellate jurisdiction in cases decided in district and county courts in which death penalty not assessed. (Tex. Gov't Code Ann. §§22.201-22.215, Tex. Code Crim. Proc. Ann. art. 4.03). Amount in controversy or judgment rendered must exceed $100, exclusive of interest and costs. (Tex. Gov't Code Ann. §22.220). Supreme Court has power to equalize dockets of Courts of

Appeals by transferring cases from one Court to another.

Districts, Place of Sitting, and Counties.

Places of holding court of the various districts and counties composing such districts are as follows:

First District, at Houston or at any county in district as necessary and convenient. Counties: Austin, Brazoria, Brazos, Burleson, Chambers, Colorado, Fort Bend, Galveston, Grimes, Harris, Trinity, Walker, Waller, Washington; 1307 San Jacinto, 10th Floor, Houston 77002, (713) 655-2700, Facsimile 752-2304.

Second District, at Fort Worth or at any county in district as necessary and convenient. Counties: Archer, Clay, Cooke, Denton, Hood, Jack, Montague, Parker, Tarrant, Wichita, Wise, Young; Tarrant County Justice Center, 401 West Belknap, Suite 900, Fort Worth 76196, (817) 884-1900, Facsimile 884-1932.

Third District, at Austin or at county seat of any county within district as necessary and convenient; except cases originating in Travis County heard only in same. Counties: Bastrop, Bell, Blanco, Burnet, Caldwell, Coke, Comal, Concho, Fayette, Hays, Irion, Lampasas, Lee, Llano, McCulloch, Milam, Mills, Runnels, San Saba, Schleicher, Sterling, Tom Green, Travis, Williamson; Supreme Court Building, P.O. Box 12547, Austin 78711-2547, (512) 463-1733, Facsimile 463-1685.

Fourth District, at San Antonio or any county seat within district as necessary and convenient; except cases originating in Bexar County heard in same. Counties: Atascosa, Bandera, Bexar, Brooks, Dimmitt, Duval, Edwards, Frio, Gillespie, Guadalupe, Jim Hogg, Jim Wells, Karnes, Kendall, Kerr, Kimble, Kinney, LaSalle, McMullen, Mason, Maverick, Medina, Menard, Real, Starr, Sutton, Uvalde, Val Verde, Webb, Wilson, Zapata, Zavala; Bexar County Justice Center, 300 Dolorosa, Suite 3200, San Antonio 78205-3037, (210) 220-2635, Facsimile 220-2762.

Fifth District, at Dallas or at any county in district as necessary and convenient. Counties: Collin, Dallas, Grayson, Hunt, Kaufman, Rockwall, Van Zandt; 600 Commerce, Second Floor, Dallas 75202-4658, (214) 653-7382, Facsimile 745-1083.

Sixth District, at Texarkana or at any county in district as necessary and convenient; except cases originating in Bowie County heard only in Texarkana. Counties: Bowie, Camp, Cass, Delta, Fannin, Franklin, Gregg, Harrison, Hopkins, Hunt, Lamar, Marion, Morris, Panola, Red River, Rusk, Titus, Upshur, Wood; Bi-State Justice Bldg., 100 N. State Line No. 20, Texarkana 75502-5952, (903) 798-3046, Facsimile 798-3034.

Seventh District, at Amarillo. Counties: Armstrong, Bailey, Briscoe, Carson, Castro, Childress, Cochran, Collingsworth, Cottle, Crosby, Dallam, Deaf Smith, Dickens, Donley, Floyd, Foard, Garza, Gray, Hale, Hall, Hansford, Hardeman, Hartley, Hemphill, Hockley, Hutchinson, Kent, King, Lamb, Lipscomb, Lubbock, Lynn, Moore, Motley, Ochiltree, Oldham, Parmer, Potter, Randall, Roberts, Sherman, Swisher, Terry, Wheeler, Wilbarger, Yoakum; Potter County Courts Bldg., 501 S. Fillmore, Room 2A, P.O. Box 9540, Amarillo 79105-9540, (806) 342-2650, Facsimile 342-2675.

Eighth District, at El Paso or at any county in district as necessary and convenient, except all cases originating in El Paso County, heard only in that county. Counties: Andrews, Brewster, Crane, Crockett, Culberson, Ector, El Paso, Gaines, Glasscock, Hudspeth, Jeff Davis, Loving, Martin, Midland, Pecos, Presidio, Reagan, Reeves, Terrell, Upton, Ward, Winkler; 500 E. San Antonio, Suite 1203, El Paso 79901, (915) 546-2240, Facsimile 546-2252.

Ninth District, at Beaumont. Counties: Angelina, Hardin, Jasper, Jefferson, Liberty, Montgomery, Newton, Orange, Polk, San Jacinto, Tyler; 1001 Pearl, Suite 330, Beaumont 77701, (409) 835-8402, Facsimile 835-8497.

Tenth District, at Waco or any county located within Tenth Court of Appeals District. Counties: Bosque, Brazos, Coryell, Ellis, Falls, Freestone, Hamilton, Hill, Johnson, Leon, Limestone, McLennan, Madison, Navarro, Robertson, Somervell; P.O. Box 1606, McLennan County Courthouse, 501 Washington Ave., Rm. 415, Waco 76703-1606, (817) 757-5200, Facsimile 757-2822.

Eleventh District, at Eastland. Counties: Baylor, Borden, Brown, Callahan, Coleman, Comanche, Dawson, Eastland, Erath, Fisher, Haskell, Howard, Jones, Knox, Mitchell, Nolan, Palo Pinto, Scurry, Shackelford, Stephens, Stonewall, Taylor, Throckmorton; P.O. Box 271, 100 West Main, County Courthouse, Fifth Floor, Eastland 76448, (817) 629-2638, Facsimile 629-2191.

Twelfth District, at Tyler or any county within district as necessary and convenient; except cases originating in Smith County heard in Tyler. Counties: Anderson, Cherokee, Gregg, Henderson, Hopkins, Houston, Kaufman, Nacogdoches, Panola, Rains, Rusk, Sabine, San Augustine, Shelby, Smith, Upshur, Van Zandt, Wood; 1517 W. Front, Suite 354, Tyler 75702 (903) 593-8471, Facsimile 593-2193.

Thirteenth District, at Corpus Christi or at any county in district as necessary and convenient, except that all cases originating in Nueces County heard in that county and all cases originating in Cameron, Hidalgo, or Willacy County heard in Cameron, Hidalgo, or Willacy County. Counties: Aransas, Bee, Calhoun, Cameron, DeWitt, Goliad, Gonzales, Hidalgo, Jackson, Kenedy, Kleberg, Lavaca, Live Oak, Matagorda, Nueces, Refugio, San Patricio, Victoria, Wharton, Willacy; 901 Leopard, Corpus Christi 78401, (361) 888-0416. Facsimile (361) 888-0794.

Fourteenth District, at Houston or at any county in First Supreme Judicial District as necessary and convenient. Counties: Austin, Brazoria, Brazos, Burleson, Chambers, Colorado, Fort Bend, Galveston, Grimes, Harris, Trinity, Walker, Waller, and Washington; 1307 San Jacinto, 11th Floor, Houston 77002 (713) 655-2800, Facsimile 650-8550.

Court of Criminal Appeals.

Court of Criminal Appeals has final appellate jurisdiction in all criminal cases; P.O. Box 12308, Austin 78711, (512) 463-1551.

Court sits at Austin.

District Courts have exclusive, appellate, and original jurisdiction of all actions involving more than $100 as courts of general jurisdiction, proceedings, and remedies, except in cases where exclusive, appellate, or original jurisdiction is conferred on some other court, tribunal, or administrative body. (Tex. Const. art. V, §8; Tex. Gov't Code Ann. §§24.007, 24.008). They have jurisdiction over suits where demand is for at least $500, actions to try title to land or enforce liens thereon, suits for divorce, contested elections, suits for slander or defamation of character, and certain cases affecting state. (See Tex. Gov't Code Ann. §§26.043, 27.031.) Original jurisdiction also vests in District Courts for contested probate matters in all counties which lack statutory court specifically exercising probate jurisdiction. (Tex. Prob. Code Ann. §5). In some counties jurisdiction of county courts is limited to probate matters. In such counties jurisdiction taken from county courts is usually vested in district courts. Courts hold sessions in county seat of each county in state. District may consist of one or more counties, or there may be two or more district courts in same county.

Family District Courts have primary responsibility for cases involving family law matters including, but not limited to: (1) Adoptions; (2) birth records; (3) divorce and marriage annulment; (4) child welfare, custody, support and reciprocal support, dependency, neglect and delinquency; (5) parent and child; (6) husband and wife. Jurisdiction and power of Family District Court is same as that of District Court. (Tex. Gov't Code Ann. §24.601).

Constitutional County Courts.

There is in each county constitutional county court, having original jurisdiction of causes, civil and criminal, when amount of demand or fine that may be imposed exceeds $200. They have concurrent jurisdiction with justice courts in civil cases when matter in controversy (unless land or lien thereon) exceeds $500 and does not exceed $10,000, exclusive of interest; and concurrent jurisdiction with district court in cases when demand (other than slander, divorce, forfeiture of corporate charter, eminent domain case, land or lien thereon, or trial of right to property valued at $500 or more levied on by virtue of any writ of execution, sequestration, or attachment) exceeds $500 and does not exceed $5,000, exclusive of interest; and general jurisdiction of probate courts. (Tex. Gov't Code Ann. §§26.042, 26.043, Tex. Prob. Code Ann. §§4–4H). They have jurisdiction of appeals from justices' courts, but of civil cases only when amount in controversy is of greater value than $250 exclusive of costs. (Tex. Civ. Prac. & Rem. Code Ann. §51.001, Tex. Gov't Code Ann. §26.042[e]). They have power to issue writs necessary to enforce their jurisdiction (Tex. Const. art. V, §16; Tex. Gov't Code Ann. §26.051), as well as writs of habeas corpus (Tex. Gov't Code Ann. §26.047).

In some counties jurisdiction of county court, except as to probate and eminent domain matters, is transferred to district court. (Tex. Gov't Code Ann. §26[Deering's]).

In number of larger counties there are one or more statutory county courts generally designated “County Court at Law of — County.” Generally civil and criminal jurisdiction is shared concurrently with these statutory courts and may also share concurrent jurisdiction with district courts if authorized by statute. (Tex. Gov't Code Ann. §25.0003).

Unless county has criminal district court, county court has exclusive original jurisdiction of misdemeanors other than those involving official misconduct and cases in which highest fine is $500 or less. (Tex. Gov't Code Ann. §26.045).

Statutory County Courts.

Statutory county court's jurisdiction includes entire jurisdiction of constitutional county courts and additionally has concurrent jurisdiction with district court in civil cases in which controversy exceeds $500 but does not exceed $100,000 excluding interest, statutory or punitive damages, penalties, attorneys fees, and costs. Unless county has statutory probate court, statutory county court has concurrent probate jurisdiction with constitutional county court. Statutory county court does not have jurisdiction over roads, bridges, public highways and county business and does not have jurisdiction of statutory probate court. (Tex. Gov't Code Ann. §25.0003).

Probate Courts.

General probate jurisdiction is in county courts. (Tex. Prob. Code Ann. §4). In some larger counties statutory Probate Courts have been created having exclusive jurisdiction over probate matters. (Tex. Gov't Code Ann. §25.0003[e]).

Commissioners' Courts.

County commissioners' court is composed of county judge as presiding officer and four commissioners, and has jurisdiction of county affairs. (Tex. Const. art. V, §18[b]).

Justices' Courts.

There are from two to eight justices' courts in each county, having original jurisdiction, civil and criminal, when amount sued for, exclusive of interest or penalty that may be imposed, does not exceed $5,000. They may render judgments for specific articles, foreclose mortgages and enforce liens on personal property, and have original jurisdiction of all cases of forcible entry and detainer and distraints for rent. They are courts of general jurisdiction within their prescribed limits, and their judgments carry presumptions accordingly. (Tex. Const. art. V, §18; Tex. Gov't Code Ann. §27.031). Also act as coroners. (Tex. Code Crim. Proc. Ann. §49.04[970a]).

Municipal Courts.

One municipal court is created in each municipality. Additional municipal courts or municipal courts of record may be created in certain cities by action governing body of city. These courts have jurisdiction within territorial limits of city over all criminal cases arising under city ordinances and have concurrent jurisdiction with justices of peace within city for other criminal cases arising in city in which punishment is only by fine. (Tex. Gov't Code Ann. §§29 and 30).

Small Claims Courts.

Each Justice of the Peace presides over small claims court in his or her precinct. Jurisdiction of small claims courts is concurrent with justice courts in actions for recovery of money in which amount in controversy does not exceed $10,000, exclusive of costs. (Tex. Gov't Code Ann. §28.003). Businesses engaged in lending money and collection agencies may not sue. Action is commenced by filing sworn statement on form provided. Fees are same as those for justice court action. (Tex. Gov't Code Ann. §§28.003-.012). Execution may issue as in justice courts. When claim exceeds $250, exclusive of costs, adverse judgment may be appealed to county court. On appeal trial is de novo, prior sworn statement is pleading, and judgment is final. (Tex. Civ. Prac. & Rem. Code Ann. §§51.001-.002, Tex. Gov't Code Ann. §§28.052-.054).

Juvenile Courts.

Each district, county, and statutory county court has jurisdiction over juvenile matters and may be designated juvenile court. (Tex. Gov't Code Ann. §23.001).

6.02 LEGISLATURE:

Meets for 140-day regular session on 2d Tues. of Jan. in odd-numbered years. (Tex. Const. art. III, §§5, 24; Tex. Gov't Code Ann. §301.001).

Special or Extraordinary Sessions.

Governor may call 30-day special sessions and designate their subjects. (Tex. Const. art. III, §§5, 40).

Initiative and Referendum.

Not provided.

Lobbyists must register, report activities. (Tex. Gov't Code Ann. §§305.001 et seq.).

6.03 REPORTS:

Decisions of Supreme Court from 1846 to 1963 and decisions of old Commission of Appeals (1920-1945) adopted by Supreme Court are reported in “Texas Reports.” Opinions of Court of Criminal Appeals from 1876 to 1963 are reported in “Texas Criminal Reports.” Decisions of Courts of Civil Appeals from 1892 to 1911 are reported in Texas Civil Appeals Reports (usually disregarded in favor of Southwestern Reporter). Current decisions of Supreme Court, Court of Criminal Appeals, and Courts of Appeals are reported in Southwestern Reporter and on Lexis and Westlaw.

Unofficial Reports.

Pre-1963 decisions of Supreme Court, Commission of Appeals, and Court of Criminal Appeals, as well as most opinions of intermediate Courts of Appeals (called Courts of Civil Appeals until 1981), are also reported in Southwestern Reporter.

Digest.

Texas Digest covers all Texas opinions from earliest time and all federal cases arising in Texas.

6.04 STATUTES:

Last official codification is Revised Statutes of 1925. Other compilations are Vernon's Annotated Civil Statutes, 1925, which are kept up to date with pocket supplements; Vernon's Statutes, 1936, Centennial Edition, to which there are 1939, 1942, 1943 and 1945 supplements; Vernon's Statutes, 1948; and Vernon's Texas Codes Annotated. Article numbers are same in all compilations mentioned. Session laws are available.

Uniform Acts adopted are: Anatomical Gift (1969); † Arbitration (1965); † Bus. Corp. (1955); † Business Records as Evidence (1951); † Child Custody Jurisdiction and Enforcement (1997); Code of Military Justice (1963); † Commercial Code (1965, adopted 1972 Revision of Article 9 and 1977 Revision of Article 8); Condominium Act (1993); Conservation Easement (1983); † Controlled Substances (1973); Crime Victims Reparations (1979); Criminal Extradition (1951); † Declaratory Judgments (1943); Division of Income for Tax Purposes (1967); Electronic Transfers (2001); Enforcement of Foreign Judgments, Revised (1981); † Facsimile Signatures of Public Officials (1961); Family Support (1993); Federal Lien Registration, (1989); † Foreign Money-Judgments Recognition (1981); Fraudulent Transfer (1987); † Gifts to Minors, Revised (1966); † Limited Partnership, 1916 version (1955) (for partnerships organized prior to Sept. 1, 1987);† Limited Partnership, 1976 revision (1987); Management of Institutional Funds (1989); † Non-Profit Corp. (1959); Parentage (2000); Partnership (1961); Premarital Agreement (1987); Principal and Income, 1962 version (1983); † Probate Code (1969); Probate of Foreign Wills (1955); Rendition of Prisoners as Witnesses in Criminal Proceedings (1983); † Rules of Evidence (1983); † Simultaneous Death (1955); † Testamentary Additions to Trusts (1961); To Secure Attendance of Witnesses From Without the State in Criminal Proceedings (1951); Unincorporated Nonprofit Association (1996); † Vendor and Purchaser Risk (1989).

Uniform Commercial Code enacted. (Tex. Bus. & Com. Code Ann. §1.101 et seq.). See topic Commercial Code.

Code Construction Act provides for continuing statutory revision. (Tex. Gov't Code Ann. §311.001 et seq.).

For text of Uniform Acts falling within scope of Martindale-Hubbell Law Digests see Uniform and Model Acts section.

† Adopted with significant variations or modifications, or only partially adopted. See appropriate topics as to Acts within scope of Digests volume.

6.05 UNIFORM LAWS:

For list of Uniform Acts in force in this state see topic 6.04 Statutes. For text of Uniform Acts within the scope of the Martindale-Hubbell Law Digests see Uniform and Model Acts section.

7 CRIMINAL LAW

7.00A BAIL:

See topic 7.01 Criminal Law.

7.01 CRIMINAL LAW:

Subject of crimes is governed entirely by Penal Code. Procedure is governed by Code of Criminal Procedure.

Indictment or Information.

Offenses punishable by death or imprisonment in penitentiary are felonies (Tex. Penal Code §1.07[23]), and must be presented by indictment of grand jury (Tex. Code Crim. Proc. Ann. art. 1.05). Misdemeanors may be presented either by information or by indictment within two years from date of commission of offense. (Tex. Code Crim. Proc. Ann. art. 12.02).

Bail is allowed in all cases except capital offenses where proof is evident (Tex. Const. art. I, §11), and except pending appeal from any felony conviction where punishment exceeds ten years confinement or pending appeal from conviction of certain offenses listed in Tex. Code Crim. Proc. Ann. art. 42.12, §3g(a). (Tex. Code Crim. Proc. Ann. art. 44.04).

Racial Profiling.

Peace officer may not engage in racial profiling. (Tex. Code Crim. Proc. Ann. art. 2.131).

Uniform Act for Out-of-State Parolee Supervision repealed. (Tex. Code Crim. Proc. Ann. art. 42.11).

Uniform Criminal Extradition Act adopted. (Tex. Code Crim. Proc. Ann. art. 51.13).

Uniform Act to Secure Attendance of Witnesses From Without State in Criminal Proceedings adopted. (Tex. Code Crim. Proc. Ann. art. 24.28).

Uniform Act to Secure Rendition of Prisoners in Criminal Proceedings adopted. (Tex. Code Crim. Proc. Ann. art. 24.29).

Use of Electronic Communication Equipment.

When inmate in custody of Texas Dept. of Criminal Justice is required to testify in prosecution of criminal offence, deposition or testimony may be taken by electronic means in compliance with Tex. Civ. Prac. & Rem. Code Ann. §30.012.

Trafficking in Persons

A person who engages in the trafficking of persons or who intentionally or knowingly benefits from participating in a venture that traffics in another person is liable to the person trafficked for damages arising from the trafficking. It is not a defense to liability that a defendant has been acquitted or has not been prosecuted or convicted under Chapter 20A of the Penal Code. (Tex. Civ. Prac. & Rem. Code Ann. §98.001 et seq.).

7.01A SENTENCE:

Community Supervision.

Nicole “Lilly” Lalime Act: Defendant required to register as sex offender under c. 62, as condition of supervision, shall register and submit blood sample or other specimen with Dept. of Public Safety. (Tex. Code Crim. Proc. Ann. art. 42.12, §11[e]).

Crime Committed Because of Bias or Prejudice.

If finding of fact is made in trial of offense other than first degree felony or Class Misdemeanor, that person committing offense intentionally selected victim or property because of bias or prejudice against group on basis of race, color, disability, religion, national origin or ancestry, age, gender, or sexual preference, punishment is increased by one degree. (Tex. Penal Code Ann. §12.47).

Use of Child in Crime.

Use of child in offense that violates certain provisions of Texas Controlled Substance Abuse Act enhances sentence. Court may not order sentence enhancement to run concurrently with any other sentence court imposes on defendant (Tex. Health & Safety Code Ann. §481.140).

8 DEBTOR AND CREDITOR

8.01 ASSIGNMENTS:

In general, any chose in action or species of property may be assigned, with exception of claims under workers' compensation act. (Tex. Lab. Code Ann. §408.202).

Instruments Transferring Title.

No special requirements.

Filing.

See category 3 Business Regulation and Commerce, topic 3.09 Commercial Code.

Recording.

See category 10 Documents and Records, topic 10.04 Records.

Assignment of wages earned is valid, but wages to accrue in future may not be assigned unless expected wages are to be earned under an existing employment or future employment is known and identified at time assignment is made. If employee agrees not to assign wages unless employer consents to such assignment, contract is valid, and any assignment to which employer does not consent cannot be enforced. (126 Tex. 380, 89 S.W.2d 210). No lender may take assignment of wages as security for small loans, installment loans, and secondary mortgage loans, and no retail installment contract, manufactured home sale, or retail charge agreement shall provide for assignment of wages. (Tex. Fin. Code Ann. §§342.503, 348.410). No action can be brought against employer upon assignment of wages unearned at time of assignment unless employer had immediate written notice of such assignment. (Tex. Lab. Code Ann. §63.001).

Uniform Commercial Code enacted. (Tex. Bus. & Com. Code Ann. §1.101 et seq.). See category 3 Business Regulation and Commerce, topic 3.09 Commercial Code.

8.02 ATTACHMENT:

When Allowed.

Attachment may issue either at commencement of suit or at any time during its progress but not before suit instituted. (Tex. R. Civ. P. 592; Tex. Civ. Prac. & Rem. Code Ann. §61.003).

Who May Issue.

Judges and Clerks of District and County Courts and Justices of Peace may issue writs of original attachment. (Tex. Civ. Prac. & Rem. Code Ann. §61.021).

In Whose Favor Writ May Issue.

Plaintiff or plaintiff's agent or attorney may file application for issuance of writ. (Tex. R. Civ. P. 592; Tex. Civ. Prac. & Rem. Code Ann. §61.022).

Against Whom Writ May Issue.

Attachment available against all persons who are indebted to plaintiff in main action whether they are artificial or natural persons, residents or nonresidents.

Claims on Which Writ May Issue.

Attachment cannot issue for unliquidated amount in absence of statute. (Sweatt v. Grogan et al, 25 F. Supp. 585 [N.D. Tex. 1938]). Attachment may be issued upon tort or unliquidated demand. It may issue upon debt not yet due. Final judgment may not be rendered against defendant, however, until debt due. (Tex. Civ. Prac. & Rem. Code Ann. §61.004).

Grounds for Issuance.

Before writ of attachment may issue, plaintiff or his representative must file bond meeting enumerated statutory requirements and affidavit stating that defendant is justly indebted to plaintiff in amount which must be stated, that attachment is not sought to injure or harass defendant, and that unless writ issues, plaintiff will probably lose his debt (Tex. Civ. Prac. & Rem. Code Ann. §§61.001, 61.022 and 61.023); and that defendant: (1) is not resident of Texas, or is foreign corporation, or is acting as such; (2) is about to move permanently out-of-state, and has refused to pay or secure debt due plaintiff; (3) secreted himself so that ordinary process cannot be served; (4) secreted his property to defraud his creditors; (5) is about to remove his property from state, without leaving sufficient remaining for payment of debt; (6) is about to remove his property, or part thereof, from county, with intent to defraud creditors; (7) has disposed of or is about to dispose of all or part of his property with intent to defraud creditors; (8) is about to convert all or part of his property into money to place it beyond reach of creditors; or (9) owes plaintiff for property obtained by false pretences (Tex. Civ. Prac. & Rem. Code Ann. §61.002). In addition to the general grounds, in a suit for sexual assault plaintiff must state additional specific grounds. (Tex. Civ. Prac. & Rem. Code Ann. §61.0021).

Proceedings to Obtain.

Issuance of writ of attachment is upon application supported by affidavits of plaintiff, his agent, his attorney, or other person having knowledge of relevant facts. Application shall comply with statutory requirements and shall state grounds for issuing writ and special facts relied upon by plaintiff to warrant required findings by court. Said application and affidavit shall be made on personal knowledge and shall set forth such facts as would be admissible in evidence; provided that facts may be stated based upon information and belief if grounds of such belief are specifically stated. No writ shall issue except upon written order of court after hearing, which may be ex parte. Court, in its order granting application, shall make specific findings of fact to support statutory grounds found to exist and shall specify maximum value of property that may be attached, and amount of bond required, and shall order that attached property be kept safe and preserved. (Tex. R. Civ. P. 592). Attachment bond payable to defendant, in amount fixed by court, must be filed by plaintiff before writ of attachment will issue. Such bond shall be in amount which, in opinion of court, will adequately compensate defendant in event plaintiff fails to prosecute his suit to effect, and to pay all damages and costs which may be adjudged against him for wrongfully suing out writ of attachment. (Tex. R. Civ. P. 592a). Court shall further find in its order amount of bond required of defendant to replevy. Bond shall be in amount fixed by court order, or, if defendant chooses to exercise option as provided in Tex. R. Civ. P. 599, replevy bond shall be in amount of value sought to be replevied plus one year's accrual of interest if allowed by law on claim, and estimated costs of court. (Tex. R. Civ. P. 592). Certain federal and state entities may be exempted from requirements of filing bond. (Tex. Civ. Prac. & Rem. Code Ann. §6.001).

Form of Attachment Bond, Requisites for Writ, Form of Writ, Delivery of Writ and Service of Writ.

See Tex. R. Civ. P. 592b–598a.

Levy.

Officer serving writ of attachment may levy on any property subject to execution, in same manner as levy is made under writ of execution. (Tex. R. Civ. P. 598).

Indemnity.

Levying officer may retain possession of sequestered property until money necessarily spent in security, management or care of property is repaid by party seeking to replevy or by that party's agent or attorney. (Tex. Civ. Prac. & Rem. Code Ann. §62.063). Court officer executing writ issued by state court shall not require that bond be posted for indemnification of officer. (Tex. Civ. Prac. & Rem. Code Ann. §7.003).

Lien.

Levy creates lien on property levied upon from date thereof. (Tex. Civ. Prac. & Rem. Code Ann. §61.061). Personal property is taken by officer and possession retained until final judgment unless defendant, or third party replevies, property is sold as provided by law, or claimed by third party who posts bond and tries his right to property. (Tex. Civ. Prac. & Rem. Code Ann. §61.042). Should plaintiff recover judgment, attachment lien is foreclosed like any other lien. (Tex. Civ. Prac. & Rem. Code Ann. §61.062).

Priorities among attaching creditors are governed by dates of levies.

Replevy of Property.

Defendant in attachment may recover possession of attached property by filing replevy bond, amount of which shall be set by court, or, at defendant's option, for value of property sought to be replevied (to be estimated by officer), plus one year's interest thereon. (Tex. R. Civ. P. 599).

Sale.

If property attached is perishable, court may order it sold and proceeds held to secure debt, or may make such other order for its preservation or use as it may deem for best interests of parties. (Tex. R. Civ. P. 600-605).

Third Party Claims.

Any third person claiming attached personal property, may file affidavit showing his claim, and give bond in manner provided by law for trial of right of property. (Tex. Civ. Prac. & Rem. Code Ann. §61.044). Procedure is as in cases of executions. See topic 8.05 Executions.

Vacation or Modification.

Attachment may be vacated, modified or dissolved. (Tex. R. Civ. P. 608).

Judgment and Foreclosure.

For provisions relating to judgment and foreclosure of attachment lien, see Tex. Civ. Prac. & Rem. Code Ann. §61.062.

Judgment on Replevied Property.

Judgment against defendant who has replevied attached personal property shall be against defendant and sureties on replevy bond for amount of judgment plus interest and costs or amount equal to value of replevied property plus interest pursuant to terms of replevy bonds. (Tex. Civ. Prac. & Rem. Code Ann. §61.063).

8.03 [RESERVED]

8.04 CREDITORS' SUITS:

Creditors' suits, equitable proceedings brought by judgment creditors to reach property not subject to legal process, are recognized.

Bill of discovery in equity has been repealed. Judgment creditor may obtain discovery in aid of enforcement of judgment by proceeding in same suit in which such judgment was rendered. (Tex. R. Civ. P. 621a). In case where judgment debtor has nonexempt property that is not subject to execution by ordinary legal process, judgment creditor may obtain order compelling turnover of such property and records related to it or appointing receiver over such property. (Tex. Civ. Prac. & Rem. Code Ann. §31.002). See also topics 8.02 Attachment, Executions, Fraudulent Sales and Conveyances, Garnishment, Receivers; category 5 Civil Actions and Procedure, topics 5.22 Sequestration, 5.26 Venue.

8.05 EXECUTIONS:

Texas Rules of Civil Procedure are based in part on Federal Rules of Civil Procedure.

Judgments are enforceable by execution.

See category 5 Civil Actions and Procedure, topic 5.19 Practice.

Kinds of Execution.

Following types of execution available: execution to enforce money judgment (Tex. R. Civ. P. 630) or judgment for costs (Tex. R. Civ. P. 622); execution for possession or value of personal property (Tex. R. Civ. P. 633), or for sale or delivery of real or personal property (Tex. R. Civ. P. 631-632); execution in favor of successor to executor, administrator, guardian or trustee of an express trust (Tex. R. Civ. P. 623).

Exemptions.

See topic 8.06 Exemptions.

Time for Issuance.

Execution may issue after expiration of 30 days from rendition of final judgment or from overruling of motion for new trial by order or by operation of law, or in arrest of judgment, provided no supersedeas bond on appeal or writ of error has been filed and approved. (Tex. R. Civ. P. 627). Such execution may be issued prior to expiration of 30 days upon filing of affidavit of plaintiff in judgment, his agent or his attorney that defendant is about to remove his personal property subject to execution out of county or is about to transfer or secrete such property for purpose of defrauding his creditors. (Tex. R. Civ. P. 628).

If no execution issued within ten years after judgment rendered, judgment becomes dormant and no execution may issue thereon unless judgment is revived. If execution is issued within 10 years after rendition of judgment, judgment does not become dormant until 10 years have elapsed between issuance of executions, and execution may issue at any time within 10 years after issuance of preceding execution. This does not apply to a judgment for child support under the Family Code. (Tex. Civ. Prac. & Rem. Code Ann. §34.001).

Stay.

Stay of execution on judgment of court of record may not be had except in case of appeal. See category 5 Civil Actions and Procedure, topic 5.03 Appeal and Error. Death of defendant after execution is issued operates as supersedeas thereof, but if execution has been levied at time of death and lien acquired, it is not vacated by death. (Tex. Civ. Prac. & Rem. Code Ann. §34.003).

Justice of the peace may stay execution on his judgment for three months. (Tex. R. Civ. P. 635).

Lien.

Levy of execution fixes lien upon property levied upon, but mere issuance of execution fixes no lien.

Levy.

Officer is required first to call upon defendant to designate property upon which execution is to be levied; if defendant fails to designate any property, execution is levied on any property of debtor subject to execution. (Tex. R. Civ. P. 637). Levy on real estate is made by officer's simply endorsing levy upon writ, but to levy on personal property officer must take it into his possession unless third person is entitled to possession of it, in which case levy may be made by giving notice to such person. (Tex. R. Civ. P. 639). Practice is for officer making levy that necessitates interference with possession to require indemnity bond.

Return.

Execution from court of record is returnable in 30, 60 or 90 days, as directed by plaintiff. (Tex. R. Civ. P. 621). On collection of money, execution must be returned forthwith. Officer failing to return or making false return is liable for full amount of debt and damages plus interest and costs. (Tex. Civ. Prac. & Rem. Code Ann. §§34.047, 34.067).

Priorities.

Priority is in order of time of making levy.

Claims of Third Persons.

When personal property levied upon under execution or other similar writ is claimed by third party, such party may obtain possession of property upon sworn written motion containing reasons for claimant's superior right to property, and filing with officer making levy his bond in double amount of value of property, payable to plaintiff in writ, and conditioned that should he fail to establish his claim to property, he shall return same to officer making levy in as good condition as he received it and will pay reasonable value of its use, or if he fails to so return it he will pay plaintiff value of property with legal interest and all damages and costs. (Tex. R. Civ. P. 717-719).

Property will not be transferred to claimant except on written order of court after hearing on motion to be held within ten days of its filing, unless parties agree to extension. (Tex. R. Civ. P. 717-718).

Property is then given to claimant and oath and bond are returned to county where levy was made and to court therein that has jurisdiction of amount of value of property, as assessed by officer making levy (Tex. R. Civ. P. 721-723), except that where value exceeds $500, papers must be returned to district court (Tex. Const., art. V, §8). Cause is then docketed, and right to property is tried out as in ordinary suits except for certain variations in procedure. (Tex. R. Civ. P. 723-729).

Satisfaction.

Defendant may pay amount of execution, or property under execution may be sold. Defendant may procure possession of personal property upon which execution has been levied by giving good and sufficient bond for its return. (Tex. R. Civ. P. 644). Defendant may dispose of property thus replevied after paying stipulated value. (Tex. R. Civ. P. 645).

When property levied upon fails to sell for enough to satisfy judgment, officer shall proceed anew with levy on other property. (Tex. R. Civ. P. 651).

Sale.

Real estate is sold at public auction at court house door of county in which it is situated, unless court orders it sold at situs, on first Tues. of month, between hours of 10 A. M. and 4 P. M. (Rule 646a), after advertising sale by notice in statutory form published once week for three weeks before day of sale, first publication being at least 20 days before day of sale, in newspaper published in county and after giving similar notice to defendant or his attorney in person or by mail. (Tex. R. Civ. P .647). When lots, tracts or parcels in city or town are sold under execution, they must be sold separately unless nature of improvements will not permit separation. (Tex. Civ. Prac. & Rem. Code Ann. §34.042). When land not situated in city or town is sold, defendant is entitled to require that it be sold in lots of not less than 50 acres each and to designate order in which lots shall be sold. (Tex. Civ. Prac. & Rem. Code Ann. §34.043[a]).

Personal property is sold on the premises where taken in execution, or at courthouse door, or at some other place if, owing to nature of property, it is more convenient to exhibit it to purchasers at such place (Tex. R. Civ. P. 649), after first giving notice of time and place of sale by posting notices for 10 days immediately before sale at court house door and at place where property is to be sold (Tex. R. Civ. P. 650).

If purchaser fails to comply with bid, officer must resell on same day if time permits, and if not must readvertise and resell as in first instance. (Tex. R. Civ. P. 653). Defaulting purchaser is liable to execution plaintiff for 20% of value of property and in addition for loss sustained by plaintiff through resale for less amount. (Tex. R. Civ. P. 652).

Redemption.

There is no redemption of property sold under execution.

Supplementary Proceedings.

After rendition of judgment, successful party may, for purpose of obtaining information and enforcement of judgment, initiate and maintain in trial court in which judgment was rendered, and in same suit, any discovery proceeding authorized by procedural rules for pretrial matters. (Tex. R. Civ. P. 621a).

Body Execution.

No provision for body execution.

8.06 EXEMPTIONS:

Personal Property.

Following personal property is eligible for exemption from garnishment, attachment, execution or other seizure: (1) Home furnishings, including family heirlooms; (2) provisions for consumption; (3) farming or ranching vehicles and implements; (4) tools, equipment, books, and apparatus, including boats and motor vehicles used in trade or profession; (5) wearing apparel;

(6) jewelry not to exceed 25% of aggregate limits prescribed by Tex. Prop. Code Ann. §42.001(a); (7) two firearms; (8) athletic and sporting equipment, including bicycles; (9) two-wheeled, three-wheeled, or four-wheeled motor vehicle for every licensed driver of family or for single adult who holds driver's license or for single unlicensed adult who relies on another person to operate vehicle for benefit of unlicensed adult; (10) following animals and forage on hand for their consumption: two horses, mules or donkeys and saddle, blanket, and bridle for each; 12 head of cattle; 60 head of other types of livestock; 120 fowl; and (11) household pets. (Tex. Prop. Code Ann. §42.002[a]).

Limitation of value of exempt personal property is aggregate fair market value of $30,000 for single adult who is not member of family, or $60,000 for family. (Tex. Prop. Code Ann. §42.001[a]). Not included in calculation of fair market value of exempt property is: (1) Current wages for personal services, except for enforcement of court-ordered child support payments; (2) professionally-prescribed health aids of debtor or dependent of debtor; (3) alimony, support or separate maintenance received by debtor for support of debtee or dependent of debtor; and (4) religious bible or other book containing sacred religious writings. (Tex. Prop. Code Ann. §42.001[b]).

Additional exemption is available for rights under qualified retirement plans, individual retirement accounts, health savings accounts, and college savings plans. (Tex. Prop. Code Ann. §§42.0021 and 42.0022).

Security interest or lien may not be voided on grounds that property is exempt under Tex. Prop. Code Ann. §42.002.

Homestead Exemption.

See topic 8.10 Homesteads.

Substitutions.

Debtor is not entitled to hold other property exempt in place of that named in statute. (163 S.W. 630).

Debts Against Which Exemptions Not Allowed.

Exemption of personal property does not apply as against secured creditors with contractual landlord's lien or other security in property to be seized. (Tex, Prop. Code Ann. §42.001[c]).

Necessity for Claiming Exemption.

No special provisions. Exemptions may be claimed by debtor and in certain circumstances by debtor's spouse, children, or representatives after death.

Earnings.

Unpaid commissions for personal services not to exceed 25% of aggregate limitations set forth in Tex. Prop. Code §42.001[a] are exempt and are included in aggregate. (Tex. Prop. Code Ann. §42.001[d]). Current wages for personal services are exempt from seizure and are not included in aggregate. (Tex. Prop. Code Ann. §42.001[b]). Wages lose their constitutional (Tex. Const. art. 16, §28) and statutory protection immediately when paid to and received by wage earner (717 S.W.2d 948). Written authorization for employer to deduct portions of wages of employees to pay assessments due nonprofit hospital association validly waives exemption of current wages as to portion so designated. (346 S.W.2d 636).

Worker's Compensation.

Compensation under Workers' Compensation Act exempt. (Tex, Lab. Code Ann. §408.201).

Life Endowment and Group Annuity Contracts.

All money or benefit of any kind; including policy proceeds and cash value, to be paid or rendered to insured or beneficiary under policy of insurance or annuity contract issued by life, health or accident insurance company, including mutual and fraternal insurance or under any plan or program of annuities or benefits in use by any employer or individual, except premium payments made in fraud of creditors subject to applicable statute of limitations for recovery thereof, insured secured by pledge thereof, shall be fully exempt from execution, attachment, garnishment, or other process to pay any debt or liability of insured or any beneficiary, either before or after such money or benefits is or are to be paid. (Tex. Ins. Code Ann. §§1108.001-.053).

Pension Funds.

Benefits from following pension funds are exempt from garnishment, attachment, etc: State, (Tex. Gov't Code Ann. §811.005); teachers, (Tex. Gov't Code Ann. §821.005); county and district, (Tex. Gov't Code Ann. §841.006); and municipal, (Tex. Gov't Code Ann. §851.006).

Fraud.

Use of any nonexempt property to obtain exempt personal property or interest therein or to make improvements thereon or to pay indebtedness thereon with intent to defraud, delay, or hinder any interested party from obtaining that to which he is or may be entitled will not cause property so acquired to be exempt. If any property is acquired by discharge of encumbrance held by third party, person defrauded, delayed or hindered by that acquisition is subrogated to rights of third party. (Tex. Prop. Code Ann. §42.004[a]). Creditor must assert his claim within two years of transaction complained of and person with unliquidated or contingent claim must assert his claim within one year after it is reduced to judgment. (Tex. Prop. Code Ann. §42.004[b]). Defense to claim made under Tex. Prop. Code Ann. §42.004[b] that transfer made in ordinary course of business.

Child Support Liens.

Tex. Prop. Code Ann. §§42.001, 42.002, and 42.0021 do not apply to child support lien established under Tex. Fam. Code Ann. §157.311 et seq. (Tex. Prop. Code Ann. §42.005).

See also topic 8.09 Garnishment.

8.07 FORECLOSURE:

See topic 8.12 Liens; category 20 Mortgages, topic 20.04 Mortgages of Real Property.

8.08 FRAUDULENT SALES AND CONVEYANCES:

Uniform Commercial Code enacted. (Tex. Bus. & Com. Code Ann. §1.101 et seq.). See category 3 Business Regulation and Commerce, topic 3.09 Commercial Code.

Uniform Fraudulent Transfer Act adopted, with changes. (Tex. Bus. & Com. Code Ann. §§24.001-.013).

Bulk Sales.

See category 3 Business Regulation and Commerce, topic 3.09 Commercial Code.

8.09 GARNISHMENT:

Postjudgment garnishment is valid, constitutional method of enforcing valid original judgment. (Tex. R. Civ. P. 657, Tex. Civ. Prac. & Rem. Code Ann. §63.001[3], and 545 S.W.2d 34). Prejudgment garnishment may be allowed upon reliable proof of grounds for issuance of writ, court order after hearing prior to issuance of writ, findings of facts, fixing value of property or indebtedness that may be garnished, fixing amount of bond as well as amount of replevy bond, and providing for issuance of several writs. (Tex. R. Civ. P. 658, 658a, 663a, 664 and 664a).

Property Which May Be Reached.

Writ of garnishment ordinarily applies only to rights, credits and interests of legal nature and only to interests capable of legal seizure and that may be sold under execution or are subject to original attachment. Liability of garnishee must be absolute and unconditional, and amount must be definitely ascertainable.

Jurisdiction.

Judges and clerks of district and county courts and justices of peace may issue writs of garnishment. (Tex. Civ. Prac. & Rem. Code Ann. §63.002; Tex. R. Civ. P. 659).

Grounds.

Writ is available if: (1) Original attachment has issued; (2) plaintiff sues for debt and makes affidavit that such debt is just, due and unpaid; that within plaintiff's knowledge defendant does not possess property in Texas subject to execution sufficient to satisfy such debt; and that garnishment applied for is not sought to injure either defendant or garnishee; or, (3) plaintiff has valid, subsisting judgment and makes affidavit that within plaintiff's knowledge, defendant does not possess property in Texas subject to execution sufficient to satisfy such judgment. (Tex. Civ. Prac. & Rem. Code Ann. §63.001).

Proceedings to Obtain.

At commencement of suit or thereafter, party may file application for writ of garnishment, supported by affidavits, based upon statutory grounds. Application is granted only upon: (1) Written order of court (a) containing specific findings of fact supporting statutory grounds, (b) specifying maximum value of property or indebtedness that may be garnished, (c) setting amount of bond required of plaintiff, said amount, within discretion of court, to adequately compensate defendant for wrongful garnishment and (d) setting amount of replevy bond; and (2) upon hearing which may be ex parte. (Tex. R. Civ. P. 658).

Answers of Garnishee.

Garnishee must answer under oath (Tex. R. Civ. P. 665), and if he denies allegations of plaintiff, and answer is not controverted, he is entitled to be discharged with his costs and reasonable attorney's fees. (Tex. R. Civ. P. 666). Where garnishee fails to answer, judgment by default may be rendered against him. (Tex. R. Civ. P. 667).

Practice.

Upon granting of application, writ of garnishment is issued directing garnishee to: (1) Appear at hearing Mon. next following expiration of 20 days if filed in district or county court, or ten days if filed in justice court and (2) file answer on or before date of hearing. (Tex. R. Civ. P. 659). Defendant is served with copies of writ, application, support affidavits and court orders. (Tex. R. Civ. P. 663a). Writ must have displayed upon face, in ten-point type, statement set forth in Tex. R. Civ. P. 663a. Defendant may replevy by posting replevy bond in amount set by court. (Tex. R. Civ. P. 664). Sworn, written motion to vacate, dissolve or modify writ or to substitute property or order directing its issuance may be filed by defendant or any intervening party, and such action stays further proceedings under writ, except for orders concerning perishable property. Must have prompt hearing on motion, and issue presented by motion must be determined not later than ten days after its filing. Burden on plaintiff to prove facts supporting statutory grounds alleged for issuance of writ. Burden on movant to prove that reasonable value of property garnished exceeds amount necessary to secure debt, plus interest for one year and probable costs, or facts to justify substitution of property. (Tex. R. Civ. P. 664, 664a).

Adverse Claims.

Plaintiff may controvert any answer of garnishee by his affidavit. Defendant may also controvert answer of garnishee. (Tex. R. Civ. P. 673). Defendant may, at any time before judgment, post bond and replevy any property or proceeds subject to writ of garnishment. (Tex. R. Civ. P. 664).

Judgment.

To support postjudgment garnishment, judgment must be definite, final, and one upon which execution may issue. (341 S.W.2d 564).

Earnings.

Except as otherwise provided by state or federal law, current wages for personal services are not subject to garnishment. (Tex. Civ. Prac. & Rem. Code Ann. §63.004). See topic 8.06 Exemptions.

8.10 HOMESTEADS:

Effect of Homestead.

Texas Constitution exempts homestead and one or more lots used for place of burial exempt from seizure and forced sale, except for certain limited encumbrances described below. (Tex. Const. art. XVI, §50; Tex. Prop. Code Ann. §41). Homestead in Texas is “a secure asylum of which the family cannot be deprived by creditors.” (42 Tex. 195).

Qualification as Urban Homestead.

Must be used for purposes of urban home or both as urban home and as place to exercise calling or business for family, or single adult not otherwise entitled to homestead, and may consist of not more than ten acres of land which may be one or more contiguous lots, including improvements. (Tex. Prop. Code Ann. §41.002[a]). Homestead is considered urban if it is located within limits of municipality, served by police and fire protection and received three services, either electricity, natural gas, sewer, storm sewer, or water from municipality directly or by contract. (Tex. Prop. Code Ann. §41.002[c]).

Qualification as Rural Homestead.

Must be used for purposes of rural home. For family, homestead consists of not more than 200 acres, including improvements. For single adult not otherwise entitled to homestead, homestead consists of not more than 100 acres, including improvements. (Tex. Prop. Code Ann. §§41.002[b]-[c]).

Homestead in Qualifying Trust

Property that a settlor or beneficiary occupies and uses in a manner described by this subchapter and in which the settlor or beneficiary owns a beneficial interest through a qualifying trust is considered the homestead of the settlor or beneficiary. (Tex. Prop. Code Ann. §41.0021).

Limitation of Value.

No limitation of value on urban or rural homestead.

Temporary renting of homestead does not change character of same when no other homestead has been acquired. (Tex. Const. art. XVI, §51; Tex. Prop. Code Ann. §41.003).

Debts or Liabilities Against Which Exemption Not Available.

See subhead Alienation or Encumbrance, infra.

Designation of Homestead.

No requirement to designate homestead prior to execution; may voluntarily designate homestead by instrument recorded in county deed records if homestead is part of one or more parcels exceeding acreage limits. (Tex. Prop. Code Ann. §41.005).

Claim of Exemptions.

After execution is issued, judgment creditor may give judgment debtor notice to designate homestead. Notice shall state that if judgment debtor fails to designate within required time period, court will appoint commissioner to make designation at judgment debtor's expense. (Tex. Prop. Code Ann. §41.021). Judgment debtor may designate by filing written designation, signed by judgment debtor, with justice or clerk of court from which writ of execution was issued together with plat of area designated at any time before 10:00 a.m. on Mon. next after expiration of 20 days after date of service to designate. (Tex. Prop. Code Ann. §41.022). If judgment debtor fails to designate, on motion of judgment creditor, court will appoint commissioner to designate judgment debtor's homestead. (Tex. Prop. Code Ann. §41.023[a]).

Waiver of Exemption.

Homestead is absolute right and cannot be waived, except by alienation and encumbrance as herein stated.

Loss of Exemption.

If homestead claimant is married, homestead cannot be abandoned without consent of claimant's spouse. (Tex. Prop. Code Ann. §41.004).

Alienation or Encumbrance.

Homestead may not be subjected to forced sale unless encumbrance is for one of following: (1) Purchase money indebtedness, (2) taxes due on homestead itself, (3) labor or material used in constructing improvements on homestead if contracted for in writing, (4) owelty of partition imposed against entirety of homestead by court order or written agreement, including division of property in divorce, (5) refinancing of lien against homestead, including refinancing of federal tax lien, (6) extension of credit that meets requirements of Tex. Const. art. XVI, §50(a)(6), or (7) reverse mortgage that meets requirements of Tex. Const. art. XVI, §§50(k)-(p), (Tex. Prop. Code Ann. §41.001[b]). To secure valid lien for labor or materials contract must be in writing, contract must be executed before material is furnished or labor performed, contract must be signed by both spouses, contract must be filed in county where homestead is located, and contract must contain following warning in 10-point bold type, or computer equivalent, next to owner's signature line on contract: “IMPORTANT NOTICE: You and your contractor are responsible for meeting the terms and conditions of this contract. If you sign this contract and you fail to meet the terms and conditions of this contract, you may lose your legal ownership rights in your home. KNOW YOUR RIGHTS AND DUTIES UNDER THE LAW.” (Tex. Prop. Code Ann. §41.007). Affidavit for lien under Tex. Prop. Code Ann. §§53.057, 53.252 or 53.253 relating to owner's homestead must include following notice in 10-point bold type, or computer equivalent, at top of page: “NOTICE; THIS IS NOT LIEN. THIS IS ONLY AN AFFIDAVIT CLAIMING LIEN.” (Tex. Prop. Code Ann. §53.254[f]) and notice of lien must include or have attached following statement, “If subcontractor or supplier who furnishes material or performs labor for construction or improvement on your property is not paid, your property may be subject to lien for the unpaid amount if: (1) after receiving notice of the unpaid claim from the claimant, you fail to withhold payment to your contractor that is sufficient to cover the unpaid claim until the dispute is resolved; or (2) during construction and for 30 days after completion of construction, you fail to retain 10 percent of the contract price or 10 percent of the value of the work performed by your contractor. If you have complied with the law regarding the 10 percent retainage and you have withheld payment to the contractor sufficient to cover any written notice of claim and have paid that amount, if any, to the claimant, any lien claim filed on your property by subcontractor or supplier, other than person who contracted directly with you, will not be valid lien on your property. In addition, except for the required 10 percent retainage, you are not liable to subcontractor or supplier for any amount paid to your contractor before you received written notice of the claim." (Tex. Prop. Code Ann. §53.254[g]). See category 14 Family, topic 14.09 Husband and Wife, subhead Conveyance or Encumbrance of Property.

Sale of all or part of homestead for less than appraised fair market value with leaseback to seller for lease payments that exceed fair rental value is considered loan and is deceptive trade practice unless sale is to certain family members. (Tex. Prop. Code Ann. §41.006).

Proceeds of Sale.

Proceeds of sale of homestead cannot be subject to seizure for creditor's claim for six months after date of sale. (Tex. Prop. Code Ann. §41.001[c]). Another homestead may be designated or purchased upon abandonment of former homestead.

Rights of Surviving Spouse and Family.

Both spouses have right to occupy homestead during life. Homestead may not be partitioned among heirs while surviving spouse elects to occupy it, or while guardian of minor children, under order of court, uses it for them. (Tex. Prob. Code Ann. §284). Adult unmarried child remaining with family of deceased has right to occupy homestead so long as child does not marry.

Property Tax Relief.

Governing body of political subdivision (other than county education district) and voters in county education district at election for such purpose may exempt from ad valorem taxation percentage of market value of resident's homestead. (Tex. Const. art. 8, §§1-b[e]; Tex. Tax Code Ann. §11.13).

See categories 14 Family, topic Husband and Wife, subhead Conveyance or Encumbrance of Property; Property, topics Curtesy, Deeds, subhead Execution.

8.11 JUDGMENT NOTES:

Not recognized but judgment by confession upon judgment in foreign state recognizing such procedure will be given full faith and credit in Texas. (476 S.W.2d 466).

8.12 [RESERVED]

8.13 LIENS:

Vendor and Purchaser.

A vendor of land has an equitable vendor's lien for unpaid purchase money even if not reserved in conveyance.

Mechanic's Liens.

Lien against owner's real property may be acquired by (1) person who by virtue of or under written contract with owner or its representative labors, specially fabricates material, or furnishes labor or material for construction, repair, or demolition of house, building, improvement, levee, embankment or railroad, or (2) architect, engineer or surveyor who by virtue of or under written contract with owner or its representative prepares plat or plan in connection with actual or proposed design, construction or repair of improvements on real property or location of boundaries of real property. (Tex. Prop. Code Ann. §53.021). Lien secures payment for labor done, material furnished, materials specially fabricated (even though not delivered) and preparation of plan or plat by architect, engineer or surveyor. (Tex. Prop. Code Ann. §53.023).

Securing Lien.

Claimant must file affidavit claiming lien with county clerk of county where property is located or into which railroad extends not later than 15th day of fourth calendar month after accrual of indebtedness (as defined in statute) (Tex. Prop. Code Ann. §§53.052, 53.053) and if claimant desires lien on funds retained pursuant to Tex. Prop. Code Ann. §53.101, must send proper notices and file affidavit not later than 30 days after work is completed (Tex. Prop. Code Ann. §53.103). Owner may establish prima facie evidence that work has been completed by filing affidavit and giving notice on or before tenth day after date of completion. (Tex. Prop. Code Ann. §53.106[d]). In addition to filing affidavit, claimant must send copy by registered or certified mail to owner (and original contractor, if claimant is not original contractor) not later than fifth business day following filing of affidavit or filing deadline, whichever is earlier. (Tex. Prop. Code Ann. §53.055). Claimant other than original contractor must also give written notice of unpaid balance: (1) To owner not later than 15th day of third month following each month in which labor performed or material furnished in whole or in part and (2) to original contractor within same period (or not later than 15th day of second month if lien claim arises from debt incurred by subcontractor). (Tex. Prop. Code Ann. §53.056). Claimant having agreement with original contractor or subcontractor providing for retainage may eliminate necessity of giving notice required by Tex. Prop. Code Ann. §53.057). Claimant having order for specially fabricated material must give written notice thereof to owner (and also to original contractor, where order is from subcontractor) not later than 15th day of second month following month in which claimant receives and accepts order and such claimant must further give above-mentioned notice required by Tex. Prop. Code Ann. §53.056 if and when delivery or deliveries have been made, or if and when normal delivery time on job has passed. (Tex. Prop. Code Ann. §53.058). If claimant delivers specially fabricated material but has not given aforesaid authorized notice of order, his lien as to such delivered items will nevertheless be valid if he gives notice required by Tex. Prop. Code Ann. §53.056. Municipality may attach lien on property, other than homestead property, in order to pay costs of bringing pool located on property into compliance with Tex. Loc. Gov't Code Ann. §214.101. Such lien is subordinate to tax liens and previously recorded bona fide mortgage liens. (Tex. Loc. Gov't Code Ann. §214.101).

Form of Affidavit.

Affidavit claiming lien must be signed by claimant or on his behalf, and must contain substantially: (a) Sworn statement of claim and amount, with copy of contract, if any, being optional; (b) name and address of owner or reputed owner; (c) general statement of work done or materials furnished, itemization unnecessary and customary abbreviations and symbols acceptable; (d) name and address of person employing claimant or to whom material or labor was furnished; (e) name and address of original contractor; (f) description of property sought to be charged legally sufficient for identification; and (g) claimant's mailing address and physical address. (Tex. Prop. Code Ann. §53.054).

Form

NOTICE: THIS IS NOT LIEN. THIS IS ONLY AN AFFIDAVIT CLAIMING LIEN

[If lien applies to homestead, the above capitalized notice must appear in 10 point boldface or computer equivalent type.]

THE STATE OF]

TEXAS, COUNTY]

OF . . . .]

. . . .]

AFFIANT]

LIEN AFFIDAVIT AND

CLAIM

as claimant

. . . .

CLAIMANT

doing business in the City of . . . .,. . . . ., County, Texas, Claimant having furnished materials and/or labor to improve the property herein described, for the purpose of perfecting lien on said property and improvements to secure the amount of the claim therefor, makes this affidavit and states under oath that the following statements are true:

A. That . . . . is the owner or reputed owner of said land and . . . . is the owner or reputed owner of the improvements located thereon.

B. That . . . . is the original contractor on the job or that portion thereof for which the hereinafter described material and/or labor were furnished;

C. That said materials and/or labor were furnished to owner (or original contractor or subcontractor) pursuant to contract with such party, it having been furnished for the improvement of property located in . . . . County, Texas.

Land Description

Said house, building, or improvement located thereon is described as follows:

Description of Improvements

The amount of this claim is $. . . . ., and said amount is just, reasonable, and unpaid, and general statement of the kind of work done and/or materials furnished by claimant is as follows:

Work Done and/or Materials Furnished

This lien claim for the amount shown above is upon the land and the improvements described above.

. . . .

Affiant

SWORN TO AND SUBSCRIBED BEFORE ME, under my official hand and seal of office, this the . . . . . . day of . . . ., (year) . . . . .

. . . .

(Seal). (Signature and title of office).

Notice of lien affidavit on homestead must also include or have attached following statement:

"If subcontractor or supplier who furnishes materials or performs labor for construction of improvements on your property is not paid, your property may be subject to lien for the unpaid amount if:

(1) after receiving notice of the unpaid claim from the claimant, you fail to withhold payment to your contractor that is sufficient to cover the unpaid claim until the dispute is resolved; or

(2) during construction and for 30 days after completion of construction, you fail to retain 10 percent of the contract price or 10 percent of the value of the work performed by your contractor.

If you have complied with the law regarding the 10 percent retainage and you have withheld payment to the contractor sufficient to cover any written notice of claim and have paid that amount, if any, to the claimant, any lien claim filed on your property by subcontractor or supplier, other than person who contracted directly with you, will not be valid lien on your property. In addition, except for the required 10 percent retainage, you are not liable to subcontractor or supplier for any amount paid to your contractor before you received written notice of the claim." (Tex. Prop. Code Ann. §53.254).

Written notices are generally required to be by certified or registered mail unless personally delivered. (Tex. Prop. Code Ann. §53.003). To authorize owner to retain funds as provided in Tex. Prop. Code Ann. §53.084 (see infra, catchline Extent of Lien), notice must include statement to effect that if claim remains unpaid owner may be personally liable and his property subjected to lien unless he withholds payment from contractor for payment of such claim or unless claim is otherwise paid or settled. (Tex. Prop. Code Ann. §53.056). See topic 8.10 Homesteads.

Extent of Lien.

Owner is required to retain during progress of work and for 30 days after completion thereof 10% of contract price of work or 10% of value of work measured by proportion that work done bears to work to be done using contract price or reasonable value of completed work as fund for lien claimants with preference to individual artisans and mechanics for wages and fringe benefits earned. (Tex. Prop. Code Ann. §§53.101, 53.102 and 53.104). Failure to retain such fund subjects house, building, structure, fixture, improvements, and lots of land to liens of claimants complying with Act to extent of fund which should have been retained. (Tex. Prop. Code Ann. §53.105). Also, when owner receives notices of above described claims he is authorized to retain, at times and under circumstances specified in Act, from payments or part payments to original contractor, amounts necessary to pay such claims. (Tex. Prop. Code Ann. §53.081). Owner must pay claimants who have given notices in compliance with Act and reduced their claims to final judgment, and owner is liable for any money he may have paid to contractor after he was authorized to retain such money, as well as for 10% retainage required by Tex. Prop. Code Ann. §53.101. (Tex. Prop. Code Ann. §53.084).

Owner to Pay Undisputed Claims.

When an owner has withheld payment from original contractor and claimant has given written notice to owner that claim has accrued or is past due, claimant may make written demand on owner for payment of same, with copy to contractor, and if contractor does not notify owner in writing within 30 days that he intends to dispute claim, he is deemed to have assented to it and claim must be paid by owner. Such demand may accompany the original notice of claim, may be stamped or written on face thereof, or may be subsequently given, but may not be made after expiration of time for securing lien unless the lien has been secured within such time. (Tex. Prop. Code Ann. §53.083).

Equality of Liens.

Except with respect to preferential liens in favor of individual artisans and mechanics under Subchapter E of c. 53 (see supra, catchline Extent of Lien), all liens for labor or material furnished are upon equal footing without reference to date of filing. (Tex. Prop. Code Ann. §53.122). However, inception of lien of persons enumerated in Tex. Prop. Code Ann. §53.021 does not occur until filing of affidavit of lien. (Tex. Prop. Code Ann. §53.124[e]).

Attorneys' Fees.

Court may award costs and reasonable attorney's fees in suit to foreclose lien, enforce claim against bond, or declare lien or claim invalid or unenforceable. (Tex. Prop. Code Ann. §53.156).

Contractor's Bond.

Owner may be relieved of obligations at any time under Subchapters D or E of c. 53 (retainage obligations) and protected against suits by lien claimants by having original contractor furnish bond. (Tex. Prop. Code Ann. §53.201). Bond must be in favor of owner in penal sum not less than total original contract amount, be conditioned on prompt payment for all bills for work, contracts, materials, specially fabricated materials and normal extras not to exceed 15% of contract price, be in favor of owner, have written approval of owner endorsed on it, be executed by original contractor as principal and licensed corporate surety and have clearly displayed name, mailing address, physical address and telephone number of surety company, or directions to obtain same from Dept. of Insurance. (Tex. Prop. Code Ann. §53.202). Bond and contract between original contractor and owner (or memorandum of contract) must be filed with county clerk of county where property is located. (Tex. Prop. Code Ann. §53.203). Such payment bond will inure solely to all claimants who comply with applicable requirements of Subchapter C of c. 53 (see supra, catchline Securing Lien), or who give original contractor all applicable notices required by Subchapter C or if claim relates to residential construction project under Subchapter K, and give to corporate surety, in lieu of notices to owner, all notices required in appropriate Subchapter to be given to owner (with certain exceptions applicable to agreements for retainage and orders for specially fabricated material). (Tex. Prop. Code Ann. §§53.205, 53.206). Owner who received notice or lien under Subchapter C or K shall mail same to surety but failure to do so does not relieve surety from liability under bond in certain circumstances. (Tex. Prop. Code Ann. §53.207). Any such claimant whose claim remains unpaid 60 days after compliance with Act may file suit on bond for amount of his claim and may also recover reasonable attorney's fees. (Tex. Prop. Code Ann. §53.208). No such suit may be filed on bond more than one year after claims are perfected, if bond was recorded at time of perfection, or more than two years after perfection if bond was not then recorded. (Tex. Prop. Code Ann. §53.208[d]).

Payment of Contractors.

Owner must pay contractors within 35 days following receipt of written payment request from contractor for properly performed work or suitably stored or specially fabricated materials, amount requested, less any amount withheld as authorized by statute. Contractor who receives payment from owner in connection with contract to improve real property must pay each of its subcontractors not later than seven days following receipt of such payment from owner, portion of such owner's payment, including interest, if any, attributable to work properly performed or materials suitably stored or specially fabricated by such subcontractor to extent of that subcontractor's interest in owner's payment. Subcontractor must similarly pay each of its subcontractors not later than seven days following receipt of payment from contractor. (Tex. Prop. Code Ann. §28.002). In event of good faith dispute (which includes whether work was performed properly) regarding amount owned, under contract for construction or improvement of detached single-family residence, duplex, triplex or quadruplex, owner, contractor or subcontractor that is disputing its obligation to pay or amount of payment may withhold not more than 110% of difference between amount claimed by obligee and amount obligor claims is due. (Tex. Prop. Code Ann. §28.003[a]). In event similar good faith dispute exists under contract for construction or improvements of real property, excluding detached single-family residence, duplex, triplex, or quadruplex, owner, contractor, or subcontractor that is disputing its obligation to pay or amount of payment may withhold from payment owed not more than 100% of difference between claims by obligee and claims by obligor. Good faith dispute includes dispute regarding whether work was performed in proper manner. (Tex. Prop. Code Ann. §28.003[b]). Unpaid payments accrue interest at rate of 1½% per month. In event that (a) owner has obtained loan intended to pay for all or part of contract to improve real property; (b) owner has timely and properly requested disbursement of proceeds from that loan; and (c) lender is legally obligated to disburse such proceeds to owner, but has failed to do so within 35 days after date owner received contractor's payment request, date of payment required of owner changes from 35th day following date or receipt of contractors payment request to fifth day after owner receives loan proceeds. (Tex. Prop. Code Ann. §28.008). If owner fails to pay contractor undisputed amount within time limits provided by this chapter, contractor or any subcontractor may suspend contractually required performance tenth day after date contractor or subcontractor gives owner and owner's lender written notice informing owner and lender that payment has not been received; and stating intent of contractor or subcontractor to suspend performance for nonpayment. Statute sets forth specific rules relating to circumstances when such notice must be given, what response owner or lender may pursue and what liabilities attach to parties. (Tex. Prop. Code Ann. §28.009). These provisions do not apply to any oral or written agreement to explore, produce, develop, purchase, sell, gather, store, or transport oil, natural gas, natural gas liquids, synthetic gas, sulphur, ore, or other mineral substances, including any lease or royalty agreement, joint interest agreement, production or production-related agreement, operating agreement, farmout agreement, area of mutual interest agreement, for any well or mine services or other related agreement. (Tex. Prop. Code Ann. §28.010).

Claimants Against Public Works Contractor.

Person furnishing material or labor to any contractor under prime contract that does not exceed $25,000 and that is for public improvements in state can obtain lien on money due contractor. (Tex. Prop. Code Ann. §§53.231-.239). Person furnishing labor or materials in connection with public works contract in excess of $25,000 can obtain right against payment bond required of prime contractor or, if government authority fails to obtain payment bond, against funds due prime contractor. (Tex. Gov't Code Ann. §2253.001 et seq.).

Bonding Over Lien.

Where liens, other than one granted by written contract or owner, have been fixed by instruments filed of record, procedure is provided whereby bond can be substituted for such liens. (Tex. Prop. Code Ann. §53.171).

Redemption.

There is no right of redemption after foreclosure, except in connection with foreclosure of certain tax liens. See category 22 Taxation.

Attachment Lien.

See topic 8.02 Attachment.

Attorney's Lien.

See category 18 Legal Profession, topic 18.01 Attorneys and Counselors.

Carrier's Lien.

See category 3 Business Regulation and Commerce, topic 3.07 Carriers.

Chattel Mortgage Lien.

See category 3 Business Regulation and Commerce, topic 3.09 Commercial Code.

Collateral Security.

See category 3 Business Regulation and Commerce, topic 3.09 Commercial Code.

Execution Lien.

See topic 8.05 Executions.

Factor's Lien.

See category 3 Business Regulation and Commerce, topic 3.09 Commercial Code.

Judgment Lien.

See category 5 Civil Actions and Procedure, topic 5.15 Judgments.

Landlord's Lien.

See category 21 Property, topic 21.10 Landlord and Tenant.

Liens on Exempt Property.

See topic 8.06 Exemptions.

Liens on Homestead.

See topic 8.10 Homesteads.

Real Estate Mortgage Lien.

See category 20 Mortgages, topic 20.04 Mortgages of Real Property.

Tax Lien.

See category 22 Taxation.

8.14 MECHANICS' LIENS:

See topic 8.12 Liens.

8.15 PLEDGES:

Uniform Commercial Code enacted. (Tex. Bus. & Com. Code Ann. §1.101 et seq.). See category 3 Business Regulation and Commerce, topic 3.09 Commercial Code.

8.16 RECEIVERS:

Receivers may be appointed by court of competent jurisdiction in this state, in following cases: (1) In action by vendor to vacate fraudulent purchase of property; (2) by creditor to subject any property or fund to his claim; (3) between partners or others jointly owning or interested in any property or fund; (4) in action by mortgagee for foreclosure of his mortgage and sale of mortgaged property; (5) where corporation has been dissolved, is insolvent, in imminent danger of insolvency, or has forfeited its corporate rights; (6) for missing person in accordance with Tex. Civ. Prac. & Rem. Code Ann. §64.001[d], or (7) in all other cases where receivers may be appointed under rules of equity. (Tex. Civ. Prac. & Rem. Code Ann. §64.001). For appointment of receiver under Deceptive Trade Practices—Consumer Protection Act, see Tex. Bus. & Com. Code Ann. §§17.50(b)(4), 17.59, & 17.47[d]. For provisions relating to appointment of receivers for defunct or disorganized churches or congregations, see Tex. Civ. Prac. & Rem. Code Ann. §§126.001-.004.

Jurisdiction.

Court outside Texas may not appoint receiver for: (1) property located in Texas; (2) person who resides in Texas and for whom appointment of receiver is sought in Texas. (Tex. Civ. Prac. & Rem. Code Ann. §64.003).

Proceedings.

When application for appointment of receiver to take possession of fixed and immovable property is filed, judge sets hearing, and notice must be given to adverse party not less than three days prior to hearing. If defendant is nonresident or whereabouts unknown, notice may be served by affixing it conspicuously upon property, or if that is impracticable, in such other manner as judge may require. (Tex. R. Civ. P. 695). Party applying for receiver to take charge of property must file bond in amount fixed by court for payment of damages and costs. Court may dispense with necessity of bond in divorce case. (Tex. R. Civ. P. 695a). Rules of equity govern all matters relating to receiverships. (Tex. Civ. Prac. & Rem. Code Ann. §64.004).

Qualification.

Receiver for property located entirely or partly within State of Texas must, when appointed, be citizen and qualified voter of Texas, and if so qualified and appointed must keep and maintain actual residence in Texas during pendency of receivership; if not so qualified, his appointment as such receiver shall be void insofar as property within Texas is concerned. No party, attorney, or other person interested in any way in action for appointment of receiver shall be appointed receiver therein. (Tex. Civ. Prac. & Rem. Code Ann. §64.021). For provisions relating to qualifications of receivers appointed for defunct or disorganized churches or congregations, see Tex. Civ. Prac. & Rem. Code Ann. §126.003. Where domestic corporation owning property in Texas shall have receiver of such property appointed who is not citizen and qualified voter of Texas, said corporation shall thereby forfeit its charter; and Attorney General shall at once prosecute suit in nature of quo warranto against said corporation for forfeiture of its charter. (Tex. Civ. Prac. & Rem. Code Ann. §64.075).

Oath and Bond.

When receiver is appointed, he shall, before he enters upon his duties, be sworn to perform them faithfully, and shall execute bond that is approved by court appointing him, in sum fixed by court, conditioned upon his faithful discharge of his duties as receiver and obedience to court orders. (Tex. Civ. Prac. & Rem. Code Ann. §§64.022, 64.023).

Powers and Duties.

Receiver has power to: bring and defend actions in his own name as receiver without permission of appointing court; take charge and keep possession of property; receive rents; collect and compromise demands; make transfers; and generally do such acts respecting property as courts may authorize. (Tex. Civ. Prac. & Rem. Code Ann. §§64.031, 64.033). For powers and duties of receivers appointed for defunct or disorganized churches or congregations, see Tex. Civ. Prac. & Rem. Code Ann. §126.004.

Application and Investment of Funds.

For provisions relating to application and investment of funds in possession of receiver, see Tex. Civ. Prac. & Rem. Code Ann. §§64.034, 64.035.

Compensation.

Fees for receiver and his attorney are set by court. (240 S.W.2d 796).

Discharge of receiver does not abate suit against receiver or affect right of party to sue receiver. (Tex. Civ. Prac. & Rem. Code Ann. §64.052[d]).

Receivership Property Held by Financial Institution.

Service or delivery of notice of receivership, or demand or instruction by or on behalf of receiver, relating to receivership property held by financial institution in name of or on behalf of customer of financial institution is governed by Tex. Fin. Code Ann. §59.008. (Tex. Civ. Prac. & Rem. Code Ann. §64.036).

Suits By or Against Receiver.

Receiver may, in his official capacity, sue or be sued in any court of State of Texas having jurisdiction of cause of action, without leave of court appointing him. If judgment is recovered against receiver, court shall order said judgment paid out of any funds in possession of receiver. (Tex. Civ. Prac. & Rem. Code Ann. §§64.033, 64.052, 64.053).

Venue.

For provisions relating to venue of suits against or appointment of receivers, see Tex. Civ. Prac. & Rem. Code Ann. §§64.052(b), 64.071.

In General.

For provisions relating to “betterments,” preference claims, limitations on parties who may seek receiver, corporations, receivers of mineral interests owned by nonresidents or absentees and contingent mineral interests, see Tex. Civ. Prac. & Rem. Code Ann. §§64.051–64.093.

8.17 REDEMPTION:

See topics 8.05 Executions, Liens; categories 3 Business Regulation and Commerce, topic Commercial Code; Mortgages, topic Mortgages of Real Property; Taxation.

8.18 SUPPLEMENTARY PROCEEDINGS:

See topic 8.05 Executions.

8.19 TRUSTEE PROCESS:

See topic 8.09 Garnishment.

8.20 USURY:

See category 3 Business Regulation and Commerce, topic 3.19 Interest.

9 DISPUTE RESOLUTION

9.01 ALTERNATIVE DISPUTE RESOLUTION:

Mandatory Dispute Resolution.

Following statutes require resort to Alternative Dispute Resolution (“ADR”) as alternative or precursor to litigation: (1) seed buyer who claims that seed failed to produce as represented, or as result of seller's negligence, must submit claim to State Seed and Plant Board for arbitration no later than ten days after buyer discovers or should have discovered defect (Tex. Agric. Code Ann. §64.001 et seq.); (2) in dispute between liquor manufacturer and distributor as to whether good cause exists for cancellation of distribution arrangement, or as to what is reasonable compensation for distributor's business, either party may submit matter to arbitration (Tex. Alco. Bev. Code Ann. §102.77); and (3) in appeal of property value assigned to property by Appraisal Review Board, property owner may require court to order nonbinding arbitration. If Appraisal Review Board consents, property owner can require court to order binding arbitration. (Tex. Tax Code Ann. §42.225). Mandatory mediation and dispute resolution program created for out-of-network health insurance claims. (Tex. Ins. Code Ann. §§1467.001–1467.151).

Voluntary Dispute Resolution.

Commissioner's court of county may establish ADR system, for peaceable and expeditious resolution of citizen disputes. (Tex. Civ. Prac. & Rem. Code Ann. §152.002). Commissioners may finance ADR system with court cost not to exceed $15 in all civil cases, except suits for delinquent taxes, condemnation under Tex. Prop. Code Ann. c. 21 and under Tex. Health & Safety Code Ann. subtit. C, tit. 7. (Tex. Civ. Prac. & Rem. Code Ann. §152.004). Commissioners may set additional court cost not to exceed $5 in all civil suits except suits for delinquent taxes or evictions. (Tex. Civ. Prac. & Rem. Code Ann. §152.005). Judge of district court, county court, statutory county court, probate court, or justice of peace court in county in which alternative dispute resolution system has been established may, on motion of party or on judge's or justice's own motion, refer case to system. (Tex. Civ. Prac. & Rem. Code Ann. §152.003).

General ADR procedures are defined in Tex. Civ. Prac. & Rem. Code Ann. §154.021 et seq. Any court may, on its own motion or motion of party, refer dispute to ADR procedure including: (1) ADR system created under Tex. Civ. Prac. & Rem. Code Ann. §152 (above); (2) legal dispute resolution organization; or, (3) nonjudicial and informally conducted forum for voluntary settlement of disputes through intervention of impartial third party that are nonbinding unless agreed to by parties. This third category includes mediation (Tex. Civ. Prac. & Rem. Code Ann. §154.023), mini-trials (Tex. Civ. Prac. & Rem. Code Ann. §154.024), moderated settlement conferences (Tex. Civ. Prac. & Rem. Code Ann. §154.025), summary jury trials (Tex. Civ. Prac. & Rem. Code Ann. §154.026), and arbitration (Tex. Civ. Prac. & Rem. Code Ann. §154.027). Most common of these is mediation.

Party may object to referral to ADR. (Tex. Civ. Prac. & Rem. Code Ann. §154.022). Appointment, required qualifications, duties, compensation, and qualified immunity of third parties to ADR attempts are set out in Tex. Civ. Prac. & Rem. Code Ann. §§154.051-.055.

9.02 ARBITRATION AND AWARD:

Arbitration agreements enforceable under both common law and statutory rules. (745 S.W.2d 78). Uniform Arbitration Act adopted. (Tex. Civ. Prac. & Rem. Code Ann. §§171.001-173.004). Act does not apply to: (1) Collective bargaining agreements, (2) contracts for acquisition by individual, as distinguished from corporation, trust, partnership, association, or other legal entity, of real or personal property, services, or money or credit, in which total consideration is $50,000 or less unless parties agree in writing to submit to arbitration and such agreement is signed by parties and their attorneys, or (3) any claim for personal injury except upon advice of counsel to both parties as evidenced by written agreement signed by counsel to both parties. (Tex. Civ. Prac. & Rem. Code Ann. §171.002).

Form and Requisites of Submission.

Agreement to arbitrate existing dispute or provision in contract for arbitration of future disputes under contract must be in writing. (Tex. Civ. Prac. & Rem. Code Ann. §171.002). As indicated supra, some agreements require signature of parties' counsel to be enforceable. (Tex. Civ. Prac. & Rem. Code Ann. §171.002).

Contracts to Arbitrate Future Disputes.

Agreements within scope of statutory procedure and executed in compliance therewith are valid and enforceable. (Tex. Civ. Prac. & Rem. Code Ann. §171.001). Agreements excluded from statutory coverage or not executed in compliance therewith are not enforceable under common law as to future disputes if objecting party indicates unequivocal repudiation of executory agreement by complete withdrawal from arbitration proceedings or refusal to participate. (559 S.W.2d 348). Under recent case law state courts have begun enforcing under common law executory agreements to arbitrate future disputes even where one party attempts to repudiate agreement to arbitrate. (770 S.W.2d 19). Common law rule prohibiting specific performance of executory arbitration agreements abrogated as to associations or corporations exempt from payment of federal income tax pursuant to I.R.C. §501(c) or incorporated pursuant to Tex. Rev. Civ. Stat. art. 1396-1.01 et seq. (Tex. Civ. Prac. & Rem. Code Ann. §173.001 et seq.).

Rescission.

Agreements within scope of statutory procedure and executed in compliance therewith are revocable only on grounds that exist at law or in equity for revocation of contract. (Tex. Civ. Prac. & Rem. Code Ann. §171.001[b]). Agreements excluded from statutory coverage or not executed in compliance therewith are irrevocable under common law. (745 S.W.2d 78). See subhead Contracts to Arbitrate Future Disputes, supra.

Powers of Arbitrators.

Arbitrators have powers described in Tex. Civ. Prac. & Rem. Code Ann. §§171.041-.046, 171.049-.054.

Award and Enforcement Thereof.

Under statutory procedure, courts are required to deny enforcement to awards upon finding that arbitration agreement or contract provision was unconscionable at time it was made. (Tex. Civ. Prac. & Rem. Code Ann. §171.001). Otherwise, enforcement is in manner described in Tex. Civ. Prac. & Rem. Code Ann. §§171.081-.098. Under common law, awards not corrupted by fraud, mistake, or misconduct enforced by civil suit in same manner as contract action.

Judgment on Award.

Under statutory procedure, judgment rendered as provided by Tex. Civ. Prac. & Rem. Code Ann. §171.092. Under common law, award reduced to judgment by civil suit.

Appeals

A person may take an appeal or writ of error to the court of appeals from the judgment or interlocutory order of a district court, county court at law or county court under the same circumstances that an appeal from a federal district court's order or decision would be permitted by the Federal Arbitration Act. (Tex. Civ. Prac. & Rem. Code Ann. §51.016).

Mandatory Arbitration.

Isolated requirements of mandatory arbitration are established by various statutes. See topic 9.01 Alternative Dispute Resolution.

10 DOCUMENTS AND RECORDS

10.01 ACKNOWLEDGMENTS:

May be taken by following officers (Tex. Civ. Prac. & Rem. Code Ann. §121.001):

Within state: Clerk of district court; judge or clerk of county court; notaries public; county tax assessor-collector or employee of county tax assessor-collector if instrument is required or authorized to be filed in office of county tax assessor-collector; and employee of personal bond office if acknowledgment or proof of written instrument is required or authorized by Tex. Code Crim. Proc. Ann. art. 17.04.

Outside state but within United States or its territories: Clerk of court of record having seal; commissioner of deeds for Texas and notary public. Official seal of notary public must be attached to instrument only if jurisdiction in which certificate is made requires notary public to attach seal. Embossed seal is not required on electronically transmitted certificate of acknowledgment. (Tex. Civ. Prac. & Rem. Code Ann. §121.004[c]).

Outside United States or Its Territories: Minister, commissioner or chargé d'affaires of U.S. who is resident of and accredited in country where taken; consul-general, consul, vice-consul, commercial agent, vice-commercial agent, deputy consul or consular agent of U.S. who is resident in country where taken or notary public or any other official authorized to administer oaths in jurisdiction where taken.

Person in U. S. Armed Forces or Auxiliaries Thereto.

Acknowledgment or proof of written statement by such person or spouse may be taken, within or outside U.S., by commissioned officer in U.S. Armed Forces or auxiliaries thereto. Absence of official seal does not invalidate acknowledgment and certificate of person signing as commissioned officer prima facie evidence that he was such and person whose acknowledgment is taken is one with respect to whom such action is authorized. (Tex. Civ. Prac. & Rem. Code Ann. §121.001[d]).

General Requirements as to Taking.

Officer must know or have satisfactory evidence on oath of credible witness that person making acknowledgment is individual who executed instrument and is described in acknowledgment. (Tex. Civ. Prac. & Rem. Code Ann. §121.005). One who is financially or beneficially interested in transaction evidenced by instrument may not take acknowledgment thereof, except, no employee of corporation that is interested is disqualified from taking acknowledgment by reason of employment and no officer who is shareholder in corporation that is interested is disqualified from taking acknowledgment unless officer owns more than 1/10 of 1% of stock and corporation has fewer than 1,000 stockholders. (Tex. Civ. Prac. & Rem. Code Ann. §121.002).

General Requirements of Certificate.

Seal of officer must appear (Tex. Civ. Prac. & Rem. Code Ann. §121.004), except in case of officer in U.S. Armed Forces (Tex. Civ. Prac. & Rem. Code Ann. §121.001[d]); and except in case of acknowledgments made outside of Texas but inside U.S. or its territories where jurisdiction in which certificate was made does not require that notary public attach official seal (Tex. Civ. Prac. & Rem. Code Ann. §121.004[c]); and application of embossed seal is not required on electronically transmitted certificate of acknowledgment (Tex. Civ. Prac. & Rem. Code Ann. §121.004[d]).

Corporations.

In conveyances by deed of corporate realty, officer, or attorney in fact may acknowledge such deed to be act of corporation with or without seal of corporation. (Tex. Bus. Orgs. Code § 10.253).

Foreign Acknowledgments.

See subhead Outside United States or Its Territories, supra.

Effect of Acknowledgment.

Instrument properly acknowledged or proved is entitled to be recorded thereby creating constructive notice and permitting proof by certified copy of record.

Proof by Subscribing Witness.

To prove written instrument for recording, at least one witness who signed instrument must personally appear before officer authorized to take acknowledgments or proofs and must swear that he saw grantor or person who executed instrument sign it or that such person acknowledged that he executed instrument for purposes and consideration expressed and that such witness signed instrument at request of grantor or person who executed instrument.

Authentication.

No authentication of certificate of officer authorized to take acknowledgment is required. Certificate of authentication may be obtained from Secretary of State, for use in foreign state. Usual fee is $15. Embossed seal is not required on electronically transmitted certificate of acknowledgement except it must reproduce required elements of seal.

Forms

Individual: State of . . . . . ., County of . . . . . ., Before me (name and character of officer) on this day personally appeared . . . . . . known to me (or proved to me on the oath of . . . . . . or through . . . (description of identity card or other document) to be the person whose name is subscribed to the foregoing instrument and acknowledged to me that he executed the same for the purposes and consideration therein expressed. Given under my hand and seal of office this . . . . . . day of . . . . . ., A.D., ... (Signature and title of officer). (Seal). (Tex. Civ. Prac. & Rem. Code Ann. §121.007).

Attorney in fact or other representative: (Venue) Before me (here insert the name and character of the officer), on this day personally appeared . . . . . ., known to me (or proved to me on the oath of . . . . . .) to be the person whose name is subscribed to the foregoing instrument, and acknowledged to me that he executed the same for the purposes and consideration therein expressed, and in the capacity therein stated. Given under my hand and seal of office, etc. (Tex. Civ. Prac. & Rem. Code Ann. §121.006[2]).

Corporation: (Venue) Before me (name and character of officer) on this day personally appeared . . . . . ., known to me (or proved to me on the oath of . . . . . .) to be the person whose name is subscribed to the foregoing instrument, and known to me to be the (title) of . . . . . ., corporation, and acknowledged to me that he executed said instrument for the purposes and consideration therein expressed, and as the act of said corporation. Given under my hand and seal of office, etc. (Tex. Civ. Prac. & Rem. Code Ann. §121.006[4]).

Proof by witness: (Venue) Before me (insert the name and character of the officer), on this day personally appeared . . . . . ., known to me (or proved to me on the oath of . . . . . .) to be the person whose name is subscribed as witness to the foregoing instrument of writing and after being duly sworn by me, stated under oath that he saw (name of grantor) the person who executed the foregoing instrument, subscribe the same (or, that the person who executed the foregoing instrument acknowledged in his presence that he has executed the same for the purposes and consideration therein expressed), and that he had signed the same as witness at the request of the said (name of person who executed the same). Given under my hand and seal of office etc. (Tex. Civ. Prac. & Rem. Code Ann. §121.010).

Short Forms

Individual: State of Texas, County of . . . . This instrument was acknowledged before me on (date) by . . . . (Signature and title of officer) My Commission expires: . . . .

Attorney-in-fact: (Venue) This instrument was acknowledged before me on (date) by . . . . as attorney-in-fact on behalf of (name of principal), etc.

Partnership: (Venue) This instrument was acknowledged before me on (date) by . . . ., partner(s) on behalf of (name of partnership), partnership, etc.

Corporation: (Venue) This instrument was acknowledged before me on (date) by . . . ., (title) of (name of corporation), (state of incorporation) corporation, on behalf of said corporation, etc.

Public officer, trustee, other representatives; (Venue) This instrument was acknowledged before me on (date) by . . . . as (title of representative) of (name of entity or person represented), etc. (Tex. Civ. Prac. & Rem. Code Ann. §121.008).

Validating Acts.

Acknowledgments and recordings made before 1879 in compliance with then-existing laws validated in Tex. Rev. Civ. Stat. Ann. arts. 6653 and 6654 (both repealed—now see Note, Tex. Prop. Code Ann. §11.006). Recording of certain instruments acknowledged before improper officers and recorded before Feb. 9, 1860 is validated by Tex. Rev. Civ. Stat. Ann. art. 6659 (repealed—now see Note, Tex. Prop. Code Ann. §11.006). Certain acknowledgments of married women validated by S. Res. 33, §7 (1967). (See Tex. Rev. Civ. Stat. Ann. art. 6605, Historical Note.)

Alternative to Acknowledgment or Proof.

In certain circumstances, including death of grantor and all witnesses; out-of-state residency of grantor and all witnesses; residence of grantor and witnesses are unknown to person seeking to prove instrument and cannot be ascertained; witnesses have become legally incompetent to testify; or grantor refuses to acknowledge execution of instrument and all of witnesses are dead, not residents of state, legally incompetent or their places of residence are unknown, execution of instrument may be established for recording by proof of handwriting. (Tex. Civ. Prac. & Rem. Code Ann. §121.011).

10.02 AFFIDAVITS:

General Requirements.

Affidavit must be in writing, signed by party making it, sworn to by officer authorized to administer oaths and officially certified to by officer under his seal of office. (Tex. Gov't Code Ann. §312.011). Affidavits in civil suit or proceeding may be made by party, or party's agent or attorney. (Tex. R. Civ. P. 14).

Jurat.

Seal is required and jurat should show that writing has been sworn to and official character of officer.

Use of Affidavit.

At trial, affidavits are generally inadmissible as evidence under hearsay rule. Exceptions are allowed in some instances such as business records. (Tex. R. Evid. 902[10]). Affidavit of person knowledgeable of facts that service of notice of sale under deed of trust or other contract lien was completed is prima facie evidence of service. (Tex. Prop. Code Ann. §51.002). Affidavit as to necessity of services and reasonableness of charges therefor in actions other than on sworn account sufficient to support finding of fact. (Tex. Civ. Prac. & Rem. Code Ann. §18.001).

Form.

No statutory form.

General Form

STATE OF TEXAS §

§

COUNTY OF ____ §

Before me, the undersigned authority, personally appeared _______________, who, being by me duly sworn, deposed as follows: [Insert affiant's statements].

SWORN TO AND SUBSCRIBED before me on the _______, day of ______, (year) ___.

My Commission Expires:

____

____

Notary Public, State of Texas

Notary's Printed Name:

Affidavit for Admission of Business Records

No. ______________________

John Doe (Name of Plaintiff))

)

v.)

)

John Roe (Name of Defendant))

)

)

IN THE ____________________

COURT IN AND FOR

_____ COUNTY,

TEXAS

AFFIDAVIT

Before me, the undersigned authority, personally appeared ____________, who, being by me duly sworn, deposed as follows:

My name is ___________, I am of sound mind, capable of making this affidavit, and personally acquainted with the facts herein stated:

I am the custodian of the records of _________. Attached hereto are _______ pages of records from _______. These said ______ pages of records are kept by ___________ in the regular course of business of ____________ for an employee or representative of ____________, with knowledge of the act, event, condition, opinion, or diagnosis, recorded to make the record or to transmit information thereof to be included in such record; and the record was made at or near the time or reasonably soon thereafter. The records attached hereto are the original or exact duplicates of the original.

____

Affiant

SWORN TO AND SUBSCRIBED before me on the ________ day of ___________, (year) ____.

____

My commission expires:

____

____

Notary Public, State of Texas

Notary's Printed Name:

Alternative to Affidavit.

No statutory provision.

10.03 NOTARIES PUBLIC:

Qualification.

Notaries public are appointed by Secretary of State. (Tex. Gov't Code Ann. §406.001). To qualify one must have attained age of 18, be resident of state, not been convicted of felony of moral turpitude, pay fees to Secretary of State, swear oath of office, and give bond of $10,000. Notary who performs services primarily as state officer or employee is exempt from bond requirement. (Tex. Gov't Code Ann. §§406.004, 406.006, 406.010).

Authentication.

See topic 10.01 Acknowledgments, subhead Authentication.

Seal.—All official acts must be authenticated by seal provided by notary. (Tex. Gov't Code Ann. §406.013). Seal must state “Notary Public, State of Texas” around star of five points, notary's name and date commission expires. Seal must be affixed by seal press or stamp that embosses or prints seal and legibly reproduces it under photographic methods. Embossed seal is not required on electronically transmitted authentication except it must reproduce required elements of seal. (Tex. Gov't Code Ann. §406.013).

Powers and Duties.

Notary has usual powers to administer oaths, take acknowledgments or proofs of written instruments, take depositions of witnesses, protest instruments permitted by law to be protested, and certify copies of documents not recordable in public records and must keep book or electronic record of instruments acknowledged before him. For disabled person, notary may sign the name of individual who is physically unable to sign or make mark on document presented for notarization if directed to do so by individual, in the presence of disinterested witness. (Tex. Gov't Code Ann. §§406.014, 406.016, 406.0165).

Territorial Extent of Power.

Notaries have statewide jurisdiction. (Tex. Gov't Code Ann. §406.003).

Expiration of Commission.

Notary's seal must state date commission expires. (Tex. Gov't Code Ann. §406.013).

Fees for notarial acts are set out in Tex. Gov't Code Ann. §406.024.

Commissioners of deeds may be appointed biennially by Governor with extraterritorial powers. (Tex. Gov't Code Ann. §406.051 et seq.).

Officers of U.S. Armed Forces.

Commissioned officers of Armed Forces and auxiliaries thereof may take acknowledgments of members of armed forces and auxiliaries thereof and of spouses of such members (Tex. Civ. Prac. & Rem. Code Ann. §121.001) and depositions of members of armed forces and auxiliaries thereof and of certain civilians affiliated with armed forces. (Tex. Civ. Prac. & Rem. Code Ann. §20.001).

10.04 RECORDS:

Uniform Commercial Code enacted. (Tex. Bus. & Com. Code Ann. §1.101 et seq.). See category 3 Business Regulation and Commerce, topic 3.09 Commercial Code.

Recordable Instruments.

Following instruments should be recorded, in order to protect holders thereof against claims of subsequent creditors and purchasers in good faith:

(1) All conveyances, mortgages, deeds, deeds of trust, or other instruments of writing concerning any real property or any interest in real property. (Tex. Prop. Code Ann. §13.001).

(2) All extensions or renewals of notes or other evidences of indebtedness secured by lien on real estate. (Tex. Civ. Prac. & Rem. Code Ann. §§16.036-.037). See category 5 Civil Actions and Procedure, topic 5.16 Limitation of Actions, subhead Extension of Maturity.

(3) Judgments in partition proceedings or other suits which determine the title to land. (Tex. Prop. Code Ann. §12.005).

(4) “Lis Pendens” notice as provided by statute of the filing of suit affecting the title to real estate, (Tex. Prop. Code Ann. §12.007) and orders to expunge lis pendens. (Tex. Prop. Code Ann. §12.0071).

Place of Recording.

All such instruments should be recorded in office of county clerk of county in which property is situated. (Tex. Prop. Code Ann. §11.001). Person may strike his driver's license number and social security number from instrument before it is filed in public record. (Tex. Prop. Code Ann. §11.008). *For list of Counties and County Seats see first page for this state in Volume containing Practice Profiles Section.*

Filing Under Commercial Code.

Except as provided in Tex. Bus. & Com. Code Ann. §9.501[b] if local law of this state governs perfection of security interest or agricultural lien, office in which to file financing statement to perfect security interest or agricultural lien is office designated for filing or recording of record of mortgage on related real property, if collateral is as-extracted collateral or timber to be cut; or financing statement is filed as fixture filing and collateral is goods that are or are to become fixtures; or office of Secretary of State in all other cases, including case in which collateral is goods that are or are to become fixtures and financing statement is not filed as fixture filing. (Tex. Bus. & Com. Code Ann. §9.501[a]). Office in which to file financing statement to perfect security interest in collateral, including fixtures, of transmitting utility is office of Secretary of State. Financing statement also constitutes fixture filing as to collateral indicated in financing statement that is or is to become fixtures. (Tex. Bus. & Com. Code Ann. §9.501[b]).

Except as otherwise provided in Tex. Bus. & Com. Code Ann. §§9.515(b)-(g), filed financing statement is effective for period of five years after date of filing. (Tex. Bus. & Com. Code Ann. §9.515[a]). If security interest or agricultural lien becomes unperfected upon lapse, it is deemed never to have been perfected as against purchaser of collateral for value. (Tex. Bus. & Com. Code Ann. §9.515[c]). Succeeding continuation statements may be filed in same manner to continue effectiveness of initial financing statement. (Tex. Bus. & Com. Code Ann. §9.515[e]). Initial financing statement filed in connection with public-finance transaction or manufactured-home transaction is effective for period of 30 years after date of filing if it indicates that it is filed in connection with public-finance transaction or manufactured-home transaction. (Tex. Bus. & Com. Code Ann. §9.515[b]). Continuation statement may be filed only within six months before expiration of 30-year period. (Tex. Bus. & Com. Code Ann. §9.515[d]). Upon lapse, financing statement ceases to be effective and any security interest or agricultural lien that was perfected by financing statement becomes unperfected, unless security interest is perfected otherwise. Succeeding continuation statements may be filed in same manner to continue effectiveness of initial financing statement. (Tex. Bus. & Com. Code Ann. §9.515[e]). If debtor is transmitting utility and filed financing statement so indicates, financing statement is effective until termination statement is filed. (Tex. Bus. & Com. Code Ann. §9.515[f]). Record of mortgage that is effective as financing statement filed as fixture filing or as financing statement covering as-extracted collateral or timber to be cut under Tex. Bus. & Com. Code Ann. §9.502(c) remains effective as financing statement filed as fixture filing or financing statement until mortgage is released or satisfied of record or its effectiveness otherwise terminates as to real property. (Tex. Bus. & Com. Code Ann. §9.515[g]).

Requisites for Recording in County Records.

Instruments concerning real or personal property may be recorded if acknowledged, sworn to with proper jurat, or proved according to law. Instrument conveying real property may not be recorded unless signed and acknowledged or sworn to by grantor in presence of two or more subscribing witnesses, or acknowledged or sworn to before officer authorized to take acknowledgments. (Tex. Prop. Code Ann. §12.001).

Instrument relating to real or personal property may not be recorded unless in English or acknowledged outside U.S. or its territories in accordance with Tex. Civ. Prac. & Rem. Code Ann. §121.001(c)(3) and correct English translation of any non-English portion of certificate, stamp or seal of notary public or other official before whom acknowledgment was taken or apostille relating to acknowledgment is recorded with original, accuracy of translation is sworn to before officer authorized to administer oaths, and any apostille relating to acknowledgment complies with Hague Convention Abolishing the Requirement of Legalisation for Foreign Public Documents. (Tex. Prop. Code Ann. §11.002).

Conveyance of real property without address of each grantee can only be recorded with payment of penalty equal to greater of twice statutory recording fee or $25. Validity of conveyance is not affected by failure to include address of each grantee in instrument. (Tex. Prop. Code Ann. §11.003).

If instrument contains sheets larger than 8½ by 14, fails to contain heading, is illegible, does not have name typed beneath each signature, includes more than one rider or attachment per page or if photocopy, is not black on white background, then county clerk may charge twice statutory filing or recording fee. (Tex. Loc. Gov't Code Ann. §191.007).

Maps or plats of subdivision must be approved by an order of the commissioner's court of county or by the governing body of city and have attachments relating to planned sewer and water systems pursuant to Tex. Loc. Gov't Code Ann. §212.0105 or §232.0035, if applicable, before they can be filed for record. (Tex. Prop. Code Ann. §12.002).

For recording abstracts of judgments, see category 5 Civil Actions and Procedure, topic 5.15 Judgments.

Recording Fees.

Recording fees charged by county clerk are set out in Tex. Loc. Gov't Code Ann. §118.011. See also categories 20 Mortgages, topic Mortgages of Real Property; Property, topic Deeds.

Foreign Conveyances or Encumbrances.

Conveyances or encumbrances of real property which were executed in conformity with laws of place where made are admitted to record in county where such property lies and copy is certified by officer having legal custody of original. (Tex. Prop. Code Ann. §12.004).

Effect of Record.

Record of any grant, deed or instrument of writing authorized or required to be recorded, which has been duly proven or acknowledged for record and duly recorded in proper county, is notice to all persons of existence of such grant, deed or instrument and is subject to public inspection. (Tex. Prop. Code Ann. §13.002).

Torrens Act has not been adopted.

Transfer of decedent's title to devisee may be shown by filing with county clerk of county where land is located certified copies of will, order probating will and letters testamentary. (Tex. Prob. Code Ann. §89). Will probated in another state must be authenticated according to 28 U.S.C.S. §1738. (Tex. Prob. Code Ann. §96).

In case of intestacy, transfer of decedent's title to his heirs at law may be shown by filing certified copy of judgment of court declaring heirs' respective interests in property with county clerk of county where land is located. (Tex. Prob. Code Ann. §56).

Vital Statistics.

Reports of births and deaths must be filed in office of registrar of district in which occurred. (Tex. Health & Safety Code Ann. §191.026). Copy of birth or death certificate may be obtained from Texas Vital Statistics Department of State Health Services, PO Box 12040, Austin, TX 78711-2040. (Tex. Health & Safety Code Ann. §191.051).

Establishing Birth Record.

If birth occurred more than five days but less than one year prior to application, birth certificate may be filed with local registrar together with such substantiating evidence as he may require. (Tex. Health & Safety Code Ann. §192.021). Otherwise delayed birth certificate and substantiating evidence is filed with State Registrar of Vital Statistics. (Tex. Health & Safety Code Ann. §192.022). If State Registrar does not accept certificate, petition may be filed with probate court in county where birth occurred. (Tex. Health & Safety Code Ann. §192.027).

Index of Marriage License Applications.

After Jan. 1, 1966, county clerk files all marriage license applications with Bureau of Vital Statistics, which maintains state-wide index of applications. After Dec. 31, 1969, county clerk also files all declarations of informal marriage with Bureau. (Tex. Health & Safety Code Ann. §194.001). Records of divorces and annulments are filed with district clerk, who in turn files records with Bureau of Vital Statistics. (Tex. Health & Safety Code Ann. §194.002).

Index of Assumed Names.

County clerks file assumed names with Secretary of State who keeps alphabetical index.

Lis Pendens.

Unless lis pendens is filed for record in each county where property is located, third party without actual or constructive notice who acquires interest in or encumbrance on property for valuable consideration takes clear of judgment. (Tex. Prop. Code Ann. §13.004).

10.05 SEALS:

No private seal is required under the Tex. Commercial Code. (Tex. Bus. & Com. Code § 2.203; Tex. Bus. Orgs. Code §§2.101, 10.251).

Uniform Commercial Code enacted. (Tex. Bus. & Com. Code Ann. §1.101 et seq.). See category 3 Business Regulation and Commerce, topic 3.09 Commercial Code.

10.06 TORRENS ACT:

Not adopted.

10.07 VITAL STATISTICS:

See topic 10.04 Records.

11 EMPLOYMENT

11.01 EMPLOYER AND EMPLOYEE:

See topic 11.02 Labor Relations.

11.02 LABOR RELATIONS:

There is no administrative agency in charge of relationships between employers and labor unions. Texas Employment Commission has charge of hours of work and conditions of employment relating to minors (Tex. Lab. Code Ann. §§51.001 to .032) and payment of wages to employees (Tex. Lab. Code Ann. §§61.001 to .084). Statutes grant Commission various investigative and subpoena powers (Tex. Lab. Code Ann. §51.024) and provide for administrative procedures and penalties (Tex. Lab. Code Ann. §§51.033-.046).

Hours of Labor.

Hours of labor of children under 15 are regulated. (Tex. Lab. Code Ann. §51.013). Eight hours constitutes day's work on public works and in contracts made by state or its political subdivisions. (Tex. Gov't Code Ann. §605.001). Compliance with overtime requirements of Federal Fair Labor Standards Act is considered to comply with eight hour day. (Tex. Gov't Code Ann. §605.002). Employees of retail merchants must be given at least one day off per week. (Tex. Lab. Code Ann. §52.001).

Wages.

As general rule, employer must pay to each employee federal minimum wage under FLSA. (29 U.S.C.S. §206; Tex. Lab. Code Ann. §62.051). Minimum wage provided by §3 of c. 62 for governmental entities supersedes wage established in ordinance, order or charter provision governing wages in private employment, other than wages under public contract. (Tex. Lab. Code Ann. §62.0515). Special provisions cover agriculture workers and numerous exemptions are made based upon type of work and employer. (Tex. Lab. Code Ann. §§62.001 to .205). Employers must pay FLSA-exempt employees once month and all other employees semi-monthly, with two pay periods being equal. Employees who are absent on payday may request to be paid on regular business day. Discharged employee must be paid by sixth day after his discharge. Employee who leaves employment for reasons other than discharge must be paid on his next regularly scheduled payday. (Tex. Lab. Code Ann. §§61.011-.020). For assignment of wages, see topic Assignments. Employees not properly paid may file claim with Texas Employment Commission. (Tex. Lab. Code Ann. §§61.051 to .066). Employers must provide employees with information regarding earned income tax credit. (Tex. Lab. Code Ann. §§104.001–104.004).

Final order of Texas Employment Commission against employer indebted to state for penalties or wages, unless timely appealed, is lien on all property belonging to employer. (Tex. Lab. Code Ann. §§61.081-.095).

Child Labor.

No child under age 14 may be employed in any occupation except as specifically provided in Act or in regulations promulgated by Texas Employment Commission. (Tex. Lab. Code Ann. §§51.001 to .032). No child under 16 may work more than eight hours per day or 48 hours per week. There are certain restrictions on employment of children 14-15 years of age in relation to school days. Employment Commission may restrict employment of children age 14-18 in hazardous occupations, in sales of items or services or in solicitation of donations. (Tex. Lab. Code Ann. §51.014). There are various exceptions in Act for agricultural employment, work study programs, rehabilitation programs, newspaper delivery and work supervised by parent or adult with custody. (Tex. Lab. Code Ann. §§51.001 to .032). Employer may not employ or induce child under age 18 to engage in sexual conduct or sexual performance as defined by statute. (Tex. Penal Code Ann. §43.25).

Discrimination.

Employers, employment agencies and labor organizations are prohibited from discriminating against employees or applicants on basis of race, color, disability, religion, sex, national origin, pregnancy or age. Act (Tex. Lab. Code Ann. §§21.001. to .306) is modeled after Tit. VII of Federal Civil Rights Act, 42 U.S.C.S. §2000e as amended by Civil Rights Act of 1991, and Title I of Americans with Disabilities Act, with addition of age status as protected category. State Commission on Human Rights created (with intended deferral status under 42 U.S.C.S. §2000e), and political subdivisions empowered to create local commissions and adopt ordinances to enforce Act. No employer may terminate permanent employee because of service on jury. Employee entitled to reinstatement to position held at time of jury service summons. (Tex. Civ. Prac. & Rem. Code Ann. §122.001). Employers prohibited from discriminating against employees participating in public evacuation. (Tex. Lab. Code Ann. §22.002). Discrimination against persons seeking employment i.e. blacklisting, including those who have participated in strike, is prohibited. (Tex. Lab. Code Ann. §52.031). There is qualified statutory privilege for written truthful reference information furnished at request of prospective employer or employee. Discrimination against mentally retarded persons (in employment opportunities) is prohibited. (Tex. Health & Safety Code Ann. §592.015). There are limitations on employment testing of handicapped persons. (Tex. Hum. Res. Code Ann. §121.010).

Discharge.

Employment-at-will doctrine controls contracts for indefinite term; narrow public policy exceptions, including for termination for refusal to perform illegal act. (687 S.W.2d 733).

Labor Unions.

Right to organize and, by peaceable and lawful means, to induce others to relinquish particular employments, is secured (Tex. Lab. Code Ann. §§101.001 to .004), but labor unions are strictly regulated and required to file reports with Secretary pursuant to §201 of Labor-Management Reporting and Disclosure Act of 1959 (29 U.S.C.S. §431).

Closed, union or agency shop contracts are against public policy and are null and void. (Tex. Lab. Code Ann. §§101.051 to .053). Individuals may not be denied right to work because of membership or nonmembership in union. (Tex. Lab. Code Ann. §101.052). Agreement whereby persons are denied right to work because of membership or nonmembership in union is violation of anti-trust laws. (Tex. Bus. & Com. Code Ann. §15.05).

Payment of Union Dues.

Any contract which permits or requires the retention of any part of an employee's compensation for the purpose of paying labor union dues or assessments, without written consent of such employee delivered to employer, is void. (Tex. Lab. Code Ann. §101.004).

Public employees may not strike or bargain collectively regarding wages, hours, or conditions of employment. (Tex. Gov't Code Ann. §§617.001–617.005).

Labor Disputes.

Injunctive relief from acts of labor unions and in labor disputes is within exclusive jurisdiction of National Labor Relations Board, if subject to regulation by Taft-Hartley Act and the employer is in business affecting commerce. (158 Tex. 214, 309 S.W.2d 834).

Picketing is prohibited if it: blocks ingress to and egress from any premises, is intended to secure breach of collective bargaining agreement, is enjoined by court of competent jurisdiction, or is secondary in nature. (Tex. Lab. Code Ann. §§101.151 to .205). Labor unions are subject to antitrust laws if they violate secondary boycott statute. (Tex. Bus. & Com. Code Ann. §15.05).

Breach of Contract.

Any strike or picketing by labor union in breach of contract is subject to an action for damages for any loss resulting therefrom. (Tex. Lab. Code Ann. §§101.251 to .252)

Temporary Workers and Staff Leasing.

These areas are licensed and regulated in detail. (Tex. Lab. Code Ann. §§91.001-92.031). Person may not engage in or offer staff leasing services in Texas unless person holds license. (Tex. Lab. Code Ann. §91.011).

Workers' Compensation Act.

Applies to all employees except domestic servants, certain farm and ranch laborers, (Tex. Lab Code Ann. §406.091), persons covered by method of compensation under federal law, and independent contractors or volunteers performing services for State of Texas (except volunteers for emergency service organization that is not political subdivision) (Tex. Lab. Code Ann. §406.098), members of state military forces, persons who at time of injury are performing services for federal government and who are covered by federal workers' compensation, prisoners, clients and patients of state institution or agency, employees of State Department of Highways and Public Transportation and persons employed by University of Texas and Texas & M University (Tex. Lab. Code Ann. §§501.024). Recovery of worker's compensation benefits is exclusive remedy of employee or his legal beneficiary for employee's work-related death, except that spouse or heirs may recover exemplary damages caused by employers' “gross negligence” or intentional act or omission. (Tex. Lab. Code Ann. §408.001).

Certain defenses, such as contributory negligence, negligence of fellow employee, and assumed risk, are barred in personal injury actions by employees against employers without workers' compensation coverage; but such actions may be defended upon ground of intentional act by employee to bring injury or intoxication. (Tex. Lab. Code Ann. §406.033).

Employees' right of action at common law and under state statutes may be retained by giving notice thereof to his employer at time of hiring, but such right of action is subject to all defenses previously existing under common law and statutes. If such notice is not given, common law right of action is waived. (Tex. Lab. Code Ann. §406.034).

Compensation is paid in weekly installments. (Tex. Lab. Code Ann. §408.081). Except for liens and child support under Tex. Fam. Code Ann. §158, benefits paid under Workers' Compensation Act are exempt from garnishment, attachment, judgment, and all suits or claims, and, except for death benefits, are not assignable. (Tex. Lab. Code Ann. §§408.201 to .203).

Division of Workers' Compensation within Texas Department of Insurance administers workers' compensation system. Division (replaces “Commission”) files confidential and may not be disclosed except as provided by subtitle. (Tex. Lab. Code Ann. §§402.083 to .092).

Insurance by Employer.

Employer may become subscriber under act by joining employers insurance association or through self-insurance (Tex. Lab. Code Ann. §§407.001 to .133 and §§407A.001 to .404), or taking out policy of insurance in any insurance company lawfully transacting liability or accident business in state (Tex. Lab. Code Ann. §406.051).

Protection of Claimants.

No employer may discharge or in any other manner discriminate against any employee because employee has in good faith filed Workers' Compensation claim, hired lawyer to represent him in claim, instituted or caused to be instituted, in good faith, any proceeding under Texas Workers' Compensation Act, or has testified or is about to testify in any such proceeding. (Tex. Lab. Code Ann. §§451.001 to .003). Whether non-subscribing employer is liable for retaliatory discharge is open question. (898 S.W.2d 817). Employee who sustains on-the-job injury and receives workers' compensation insurance for disability produced by such injury, has “instituted proceeding” for purposes of this provision. (533 S.W.2d 111 [Civ. App. 1976, writ ref'd. n.r.e.]). Information in worker's claim file is confidential and may not be disclosed except in certain instances. (Tex. Lab. Code Ann. §§402.083, .085).

Certain occupational diseases are covered. (Tex. Lab. Code Ann. §401.011[34]).

Coverage is voluntary, but employers must notify employees as to existence of their worker's compensation coverage. (Tex. Lab. Code Ann. §§406.002 and 406.004). Employers who elect not to carry workers' compensation insurance may not raise defenses of contributory negligence, assumed risk or negligence of fellow employee. (Tex. Lab. Code Ann. §406.033). Employers may self-insure if they are willing to meet stringent guidelines. (Tex. Lab. Code Ann. §§407.001 to .133 and §§407A.001 to .404). Application of law to independent contractors is dealt with at length. (Tex. Lab. Code Ann. §§406.121 to .127).

Compensation Procedure.

Employee must notify his/her employer of injury not later than 30th day after injury occurs. (Tex. Lab. Code Ann. §409.001). Within one year, employee must file claim for compensation with Division. (Tex. Lab. Code Ann. §409.003). Employer notified of injury must report to employer's insurance carrier within eight days. (Tex. Lab. Code Ann. §409.005). Insurance carrier must initiate compensation or notify parties of its intent to dispute claim within 15 days of receiving report of injury. (Tex. Lab. Code Ann. §409.021). Employer may contest compensability if insurance carrier does not. (Tex. Lab. Code Ann. §409.011). Employers must inform employees of Ombudsmen Program, which assists injured workers in processing workers' compensation claims. (Tex. Lab. Code Ann. §§404.151-.154).

Adjudication of Disputes.

Disputed claims are heard by Administrative Law Judge. (Tex. Lab. Code Ann. §§410.002-.308). Initial hearing decision may be appealed to appellate board within Division. This final Division decision may be appealed to courts. Party may not seek judicial review unless party has provided written notice to Division. (Tex. Lab. Code Ann. §410.253[b]). Binding arbitration by mutual consent of all parties is allowed. Tex. Lab. Code Ann. §410.104

Injuries Sustained Outside of State.

Any employee hired in Texas or any resident recruited in Texas may be eligible to recover for injuries sustained outside of state. (Tex. Lab. Code Ann. §406.071).

See also category 18 Legal Profession, topic 18.01 Attorneys and Counselors, subhead Compensation.

Employers' Liability Act.

See subhead Workers' Compensation Act, supra.

Unemployment Compensation.

Unemployed individual is entitled to compensation only if Texas Employment

Commission finds that he meets eligibility conditions concerning registering and reporting for work, making of claim for benefits, ability to work and availability therefor, previous wages received from employment by employers, extent of unemployment, and participation in reemployment services when required. (Tex. Lab. Code Ann. §207.021). Verifiable illness, disability, or pregnancy may be considered good cause for leaving employment. (Tex. Lab. Code Ann. §207.045; 540 S.W.2d 758 [Civ. App. 1976, writ ref'd. n.r.e.]). Eligibility requirements of Unemployment Compensation Act, and related definitions in Act, are detailed and complex, but it may be generally stated that compensation is payable to unemployed persons whose previous employment has been: (a) Localized in this state, or (b) not localized in any state but some of services were performed in this state and either (i) base of operations or place from which such service was directed or controlled was in this state or (ii) base of operations or place from which such service was directed or controlled was not in any state in which service was performed but individual's residence was in this state. (Tex. Lab. Code Ann. §201.043). Exempt categories relate mainly to service with respect to which unemployment compensation is payable under Unemployment Compensation system established by Act of Congress (except that agreements for reciprocal treatment are authorized), certain domestic services, family employment, certain religious employment, certain governmental service (both foreign and domestic), certain employment of student nurses, service for insurance agents or solicitors if remuneration is solely by commission, newscarriers under age 18, services by duly ordained, commissioned, or licensed minister, certain employment in rehabilitation facility, certain employment performed as part of unemployment work-relief program, certain employment by prison inmates, certain employment of students, services performed by certain individuals at certain nonprofit or public educational institutions, certain services performed by hospital patients, certain services by real estate brokers and salesmen, certain services performed on fishing vessel, certain private for-profit services as landman, and service performed by nonresident alien during period that alien is temporarily in U.S. under H2-A visa if service is not defined as employment under Federal Unemployment Tax Act (26 U.S.C.S. §3306[c][19]). (Tex. Lab. Code Ann. §§201.061 to .078).

11.03 WORKERS' COMPENSATION LAW:

See topic 11.02 Labor Relations.

12 ENVIRONMENT

12.01 ENVIRONMENTAL REGULATION:

General Supervision.

(1) Texas Commission on Environmental Quality (TCEQ), P.O. Box 13087 Austin, TX 78711-3087, is principal authority in state on matters relating to environmental regulations, including: water quality (Tex. Water Code Ann. §26.127); matters relating to water rights except those primarily concerning National Flood Insurance Program administration (Tex. Water Code Ann. §5.013); administering state's program relating to inactive hazardous substance, pollutant, and contaminant disposal facilities (Tex. Water Code Ann. §5.013); approving new or modified public sewage disposal systems (Tex. Water Code Ann. §26.034[a]); approving plans and specifications for treatment facilities, sewer systems and disposal systems that transport, treat or dispose of primary domestic waste and regulating above ground and underground storage tanks (Tex. Water Code Ann. §26.345); management of industrial solid waste and hazardous municipal waste (Tex. Health & Safety Code Ann. §361.017); management of municipal solid waste (Tex. Health & Safety Code Ann. §361.011); implementing Waste Reduction Policy Act of 1991 (Tex. Health & Safety Code Ann. §§361.501-361.510); administering Hazardous Substances Spill Prevention and Control Act (Tex. Water Code Ann. §26.264) other than discharges of oil in coastal waters (Tex. Nat. Res.Code Ann. §40.004); primarily protection of underground waters (Tex. Water Code Ann. §28.001); administering Injection Well Act with respect to industrial and municipal waste (Tex. Water Code Ann. §27.011); matters relating to quality of air resources in

state, setting standards, criteria, levels, and emission limits for air content and pollution control and implementation of federal Clean Air Act (Tex. Health & Safety Code Ann. §382.001 et seq.); and radiation control (Tex. Health & Safety Code Ann. §401.011).

(2) Railroad Commission of Texas, P.O. Box 12967, Austin, TX 78711-2967, is solely responsible for control and disposition of waste and abatement and prevention of pollution of surface and subsurface water resulting from activities associated with exploration, development, production, and underground storage of oil, gas, geothermal resources, hydrocarbon and uranium except to extent regulated by Department of Health, including pollution associated with exploration (Tex. Water Code Ann. §26.131 and Tex. Nat. Res. Code Ann. §91.203); administering Injection Well Act with respect to oil and gas waste (Tex. Water Code Ann. §27.031); administering Surface Coal Mining and Reclamation Act (Tex. Nat. Res. Code Ann. §134.001 et seq.) and Uranium Surface Mining and Reclamation Act (Tex. Nat. Res. Code Ann. §131.022); for administering Oil and Gas Waste Haulers Act with respect to for-hire hauling and disposal of oil and gas waste resulting from drilling or operation of oil or gas wells (Tex. Water Code Ann. §29.011); regulation of brine mining (Tex. Water Code Ann. §27.036); is state agency responsible for regulating mining pursuant to Texas Aggregate Quarry and Pit Safety Act (Tex. Nat. Res. Code Ann. §133.001 et seq.).

(3) Texas Department of State Health Services, PO Box 149347, Austin, Texas 78714-9347, is responsible for protection of public health, including abatement of nuisances resulting from pollution not otherwise covered by Water Quality Act (Tex. Water Code Ann. §26.130); administering Hazard Communication Act (Tex. Health & Safety Code Ann. §502.002) which requires employers and manufacturing employers who normally store hazardous chemical in excess of 55 gallons or 500 pounds or board determined volume for highly toxic chemicals to provide information and training to employees using or handling hazardous chemicals (Tex. Health & Safety Code Ann. §§502.005-.010); coordinating health risk assessments of Toxic Substance Coordinating Committee (Tex. Health & Safety Code Ann. §503.002); and is responsible under Texas Health Protection Act licensing of persons engaged in asbestos-related activity in public buildings (Tex. Occ. Code Ann. §1954.101 et seq.).

(4) Texas General Land Office, P. O. Box 12873 Austin, Texas 78711-2873, is responsible for prevention of pollution of state waters resulting from oil and gas development on state-owned submerged lands (Tex. Nat. Res. Code Ann. §52.032) and is lead state agency for responding to and clean-up of pollution from unauthorized discharges of oil in coastal waters pursuant to Oil Spill Prevention and Response Act of 1991 (Tex. Nat. Res. Code Ann. §40.004).

(5) Counties and political subdivisions have solid waste management powers except that counties are restricted to areas not within territorial limits of incorporated cities and towns. (Tex. Health & Safety Code Ann. §364.011).

(6) Texas Department of Agriculture, P. O. Box 12847, Austin, TX 78711, is primarily responsible for control of pesticides. (Tex. Agric. Code Ann. §76.101).

(7) Structural Pest Control Board, 9101 FM 1325, Suite 201, Austin, TX 78758, is responsible for structural pest control activities. (Tex. Occ. Code Ann. §§1951.001 et seq.).

Prohibitions.

Prohibitions relating to environmental regulations include: (1) Except as authorized by TCEQ, (a) discharging sewage or municipal, recreational, agricultural or industrial waste into or adjacent to any water in state, (b) discharging other waste into or adjacent to any water in state which causes or will cause pollution, unless activity complies with certified water quality management plan or approved water pollution and abatement plan or (c) engaging in any activity which causes or will cause pollution of any water in state, unless such activity is under jurisdiction of Parks and Wildlife Department, General Land Office, Agriculture Department, or Railroad

Commission; or violating any rule, regulation, permit or other order of TCEQ. (Tex. Water Code Ann. §26.121). (2) Discharging any waste into or adjacent to any water in state which causes or will cause water pollution unless is discharged in strict compliance with all permits, orders or rules of appropriate regulatory agency. (Tex. Water Code Ann. §7.147). (3) Intentionally or knowingly discharging or allowing to discharge waste or pollutant from point source in violation of rule, permit or order of appropriate regulatory agency. (Tex. Water Code Ann. §7.145). (4) Violating any provision of Hazardous Substances Spill Prevention and Control Act or any rule, regulation, or order of (TCEQ) thereunder. (Tex. Water Code Ann. §26.261 et seq.). (5) Except as authorized by TCEQ, causing, suffering, allowing or permitting emission of any air contaminant or performance of any activity which causes or contributes to, or which will cause or contribute to air pollution. (Tex. Health & Safety Code Ann. §382.085). (6) Causing or permitting solid waste, or use or operation of site for disposal of solid waste at unpermitted or unlicensed site. (Tex. Health & Safety Code Ann. §365.012). (7) Violating provisions of Injection Well Act under jurisdiction of Railroad Commission, or any rule or regulation of Railroad Commission pertaining to injection wells, or of any requirements of injection well permit. (Tex. Water Code Ann. §§27.101 and 27.105). (8) Failure or refusal to case or plug water well within 30 days of order of TCEQ requiring casing or plugging, or failure to comply with any other order of TCEQ within 30 days of order. (Tex. Water Code Ann. §7.158). (9) Surface mining, uranium or uranium ore without permit, violating any order of Railroad Commission, interfering with its representatives or refusing to furnish information. (Tex. Nat. Res. Code Ann. §§131.131 and 131.265). (10) For-hire hauling and disposing of oil and gas waste off oil or gas property where it is produced without permit except in connection with drilling or servicing oil or gas well; or knowingly utilizing services of hauler who does not have permit; or disposing of oil and gas waste on public roads or on surface of public land or private property in other than Railroad Commission-approved disposal facility without written authority of Railroad Commission, using saltwater disposal pit for storage or evaporation of oil field brines, or disposing of oil and gas waste on property of another without written authority of landowner; or hauling oil and gas waste in unmarked vehicle. (Tex. Water Code Ann. §§29.041-29.045 and Tex. Nat. Res. Code Ann. §91.452). (11) Violating any rule, regulation or order of Railroad Commission, including those relating to water pollution. (Tex. Nat. Res. Code Ann. §85.381). (12) Violating rules and regulations of Commissioner of General Land Office relating to prevention of pollution of state waters from oil and gas development activities and geological, geophysical and other surveys and investigations on state-owned submerged lands (Tex. Nat. Res. Code Ann. §52.032); failure to meet requirements of agreements with state requiring use of highest degree of care and of all proper safeguards to prevent pollution of streams (Tex. Rev. Civ. Stat. art. 5421c, §8-A); leaving, abandoning, or maintaining derelict vessels or structures at public or private port or dock without consent of Commissioner (Tex. Nat. Res. Code Ann. §40.108); and operation of unregistered terminal facility (Tex. Nat. Res. Code Ann. §40.109). (13) Distributing, except to licensed commercial applicator, non-commercial applicator, or individual working under supervision of licensed applicator, certified private applicator, licensed pesticide dealer, or licensed veterinarian, purchasing, transporting within state, selling or offering for sale unregistered, adulterated, mislabeled, or unpackaged pesticides or regulated herbicides, distributing restricted pesticides without dealer's license, applying restricted pesticides, except in own home, farm, lawn or garden, without commercial or noncommercial or private applicator's license, altering pesticide labels, using pesticides contrary to labeling, storing, handling or disposing pesticides contrary to regulations or so as to harm humans, animals, vegetation, or environment. (Tex. Agric. Code Ann. §§76.071, 76.105, 76.117, 76.131, 76.201; and Tex. Occ. Code Ann. §1951.001, et seq.). (14) Using, manufacturing, producing, transporting, transferring, receiving, acquiring, possessing, processing or disposing of radioactive materials without, or contrary to, license, registration or exemption from Department of Health. (Tex. Health & Safety Code Ann. §401.101). (15) Disposing of litter at other than approved solid waste site except by individuals regarding litter or solid waste generated or disposed of on individuals' land and not pursuant to commercial purpose. (Tex. Health & Safety Code Ann. §365.012). (16) Failure to report fatalities and injuries. (Tex. Health & Safety Code Ann. §502.012).

Enforcement.

Authority of TCEQ to enforce environmental laws of state and requirements and penalties that TCEQ may seek enforcement at times have been consolidated into Tex. Water Code Ann. chs. 5, 7 & 11.

Temporary Orders.

TCEQ may issue emergency or temporary orders or permits and may temporarily suspend or amend existing permits. (Tex. Water Code Ann. §§5.501-5.504). Emergency or temporary orders may relate to bays, estuaries, or streams, nonfunctioning utilities, discharge of waste or pollutants, underground or aboveground storage tanks, imminent and substantial danger under Health and Safety Code, solid waste management, on-site sewage disposal system, air emergency, catastrophe, protect public safety and environment, or to correct for individual activity. (Tex. Water Code Ann. §§5.505-5.516 and Tex. Health & Safety Code Ann. §401.056).

Corrective Action and Injunctive Relief.

TCEQ: (1) May by order or civil action require corrective action, relating to release of hazardous waste (Tex. Water Code Ann. §7.031); (2) through Attorney General may seek injunctive relief for violation or threat of violation of statute within TCEQ's jurisdiction or rule, order or permit issued by TCEQ (Tex. Water Code Ann. §7.032); and (3) may seek reimbursement of funds used to remedy radioactive spills or contamination (Tex. Water Code Ann. §7.033).

Administrative Penalties.

TCEQ may assess administrative penalties for violations of provisions of Water Code and Health and Safety Code that are within jurisdiction of TCEQ or any rule, order or permit issued by TCEQ, except Tex. Water Code Ann. c. 11 (Water Rights Adjudication Act); Tex. Water Code Ann. c. 12 (laws generally applicable to water rights); Tex. Water Code Ann. c. 13 (laws relating to water rates and services); Tex. Water Code Ann. c. 16 (laws generally applicable to water development) and Tex. Water Code Ann. c. 36 (laws relating to groundwater conservation districts), and Tex. Health and Safety Code Ann. c. 341 (laws relating to minimum standards of sanitation and health protection measures). With certain exceptions, administrative penalties for all other violations within jurisdiction of TCEQ may not exceed $10,000 day. (Tex. Water Code Ann. §7.052[c]). Procedures for reporting violation, conducting hearings, determining amount of penalties, and other administrative procedures are set forth in Tex. Water Code Ann. §§7.053-7.075.

Civil Suit.

On request of executive director or commission, attorney general shall institute suit in name of state for injunctive relief and/or to recover civil penalty. TCEQ shall refer matter to attorney general for enforcement in case of: (1) Unauthorized discharge of waste into or adjacent to waters in state at new point of discharge without permit; (2) being subject of two or more finally issued administrative penalty orders for violations of Texas Hazardous Substances Spill Prevention and Control Act occurring at same wastewater management system or other point of discharge within two years immediately preceding date of first alleged violation currently under investigation at that site; (3) operating new solid waste facility without permit; (4) being subject of two or more finally issued administrative penalty orders for violations of Solid Waste Disposal Act (Tex. Health & Safety Code Ann. c. 361) occurring at same facility within two years immediately preceding date of first alleged violation currently under investigation at that site; (5) constructing or operating facility at new plant site without permit required by Texas Clean Air Act (Tex. Health & Safety Code Ann. c. 382); or (6) had been subject of two or more finally issued administrative penalty orders for violations of Texas Clean Air Act for violations occurring at same plant site within two years immediately preceding date of first alleged violation currently under investigation at that site (Tex. Water Code Ann. §7.105). Attorney General's office and executive director may agree to resolve any violation, before or after referral, by administrative order issued by TCEQ with approval of attorney general. (Tex. Water Code Ann. §7.106). Parks and Wildlife

Department, in same manner as TCEQ, may have suit instituted in district court for injunctive relief or civil penalties, or both against person who violates Tex. Water Code Ann. §26.121 (prohibiting discharge of sewage, municipal waste, recreational waste, agricultural waste, or industrial waste into or adjacent to any water in state, or rule, permit, or order of commission that affects aquatic life or wildlife. (Tex. Water Code Ann. §7.109).

Civil Penalties.

With certain exceptions imposing lower penalties for minor violations, violations of statutes, rules, orders, or permits relating to any matter within TCEQ's jurisdiction to enforce, civil penalties not less than $50 nor greater than $25,000 for each day of each violation as court or jury considers proper. Each day of continuing violation is separate violation. (Tex. Water Code Ann. §7.102).

Criminal Offenses and Penalties.

District court may impose following criminal sanctions for indicated offenses:

Unlawful Use of State Water.

Maximum sanctions for various specific offenses relating to unlawful use of state water range from fines not exceeding $1,000 and confinement not exceeding two years or combination of fine and confinement. (Tex. Water Code Ann. §7.142).

Discharge of Pollutants.

(a) Maximum sanctions for various specific offenses relating to unauthorized discharge of waste or pollutants into any water of state, failure to use proper pollution control measures, making false statements in reports or applications to TCEQ, and failing to make reports required by Hazardous Substances Spill Prevention and Control Act, range from fines up to $250,000 and/or confinement up to one year (Tex. Water Code Ann. §§7.145, 7.147, 7.148, 7.149, 7.150); (b) sanctions for failing to pay fee required by Hazardous Substances Spill Prevention and Control Act, or rule, permit or order issued by appropriate regulatory agency, subjects person to fine not more than twice required fee, confinement not exceeding 90 days, or both (Tex. Water Code Ann. §7.151[b]), and person other than individual to fine not more than twice amount of required fee (Tex. Water Code Ann. §7.151[c]); (c) maximum sanctions for various specific offenses relating to intentional or knowing unauthorized discharge into state water, intentional or knowing unauthorized discharged and knowing endangerment, or reckless unauthorized discharge that endangers person can range from fines up to $1,000,000 and confinement up to 20 years, or both (Tex. Water Code Ann. §§7.145, 7.152, 7.153, 7.154); (d) person who operates, is in charge of, or is responsible for facility or vessel that causes discharge or spill as defined by Tex. Water Code Ann. §26.263 and does not report spill or discharge on discovery commits Class misdemeanor (Tex. Water Code Ann. §7.155[b]); (e) person who knowingly falsifies record or report concerning prevention or cleanup of discharge or spill commits felony of third degree (Tex. Water Code Ann. §7.155[c]).

Wells and Subsurface Excavations.

Maximum sanctions for specific offenses relating to wells, injection wells, and subsurface excavations can be fined up to $50,000. (Tex. Water Code Ann. §§7.157, 7.158, 7.159, 7.160).

Solid and Hazardous Waste.

(a) Subject to certain exceptions, operator or hauler who disposes of solid waste in completely enclosed container or vehicle at solid waste site or operation permitted as Type IV landfill (1) without having in possession special permit required by Tex. Health & Safety Code Ann. §361.091, (2) on date or time not authorized by TCEQ, or (3) without commission inspector present to verify that solid waste is free of putrescible, hazardous, and infectious waste commits

Class B misdemeanor (Tex. Water Code Ann. §§7.161[a] and [b]); (b) maximum sanctions for various specific offenses relating to unintentional or knowing violation of requirements pertaining to hazardous waste management range from fines up to $500,000, confinement up to ten years, or both (Tex. Water Code Ann. §7.162); (c) maximum sanctions for various specific offenses relating to hazardous waste management and by that action knowingly placing person in imminent danger of death or severe injury range from fines up to $1,500,000, confinement up to 30 years (Tex. Water Code Ann. §7.163).

Medical Waste.

(a) Maximum sanctions for various specific offenses relating to unintentional or knowing violation of requirements pertaining to measurement of medical wastes range from fines up to $1,000,000, to confinement up to 20 years or both (Tex. Water Code Ann. §§7.164-7.167); (b) maximum sanctions for various specific offenses relating to intentional violation of requirements for management of medical waste which knowingly places person in imminent danger of death or serious bodily injury range from fines up to $1,500,000 to confinement up to 30 years, or both (Tex. Water Code Ann. §§7.168-7.171).

Air Quality Control.

(a) Maximum sanctions for various specific offenses relating to unintentional or knowing violation of Clean Air Act (Tex. Health & Safety Code Ann. c. 382) range from fines up to $250,000 to confinement up to one year or both (Tex. Water Code Ann. §§7.177-7.181); (b) maximum sanctions for various specific offenses relating to intentional or knowing or reckless emission of air contaminants in violation of Clean Air Act, which conduct places person in imminent danger of death or serious bodily injury ranges from fines up to $1,000,000 to confinement up to five years (Tex. Water Code Ann. §§7.182, 7.183).

Miscellaneous.

(a) Violating laws related to weather modification subjects person to sanctions under Subchapter F and G, c. 51, (Tex. Occ. Code Ann. §165c; Tex. Agric. Code Ann. §301.201); (b) person or business entity violates various specific requirements pertaining to management of underground storage tanks; (c) violating laws relating to handling of used oil, subjects individual to fine not less than $1,000 or more than $50,000, confinement not exceeding five years, or both, and individual who has been previously convicted under this section to fine not less than $1,000 or more than $100,000, confinement not exceeding 15 years, or both (Tex. Water Code Ann. §7.176); (d) person who violating laws relating to radioactive waste, commits Class B misdemeanor, and person who has been previously convicted under this section, commits Class misdemeanor (Tex. Water Code Ann. §7.184); (e) person who violates laws relating to disposal of lead-acid batteries, person commits Class misdemeanor (Tex. Water Code Ann. §7.185).

Performance Based Regulation.

TCEQ must establish by rule program to use person's compliance history as factor in taking certain regulatory actions, such as permitting, enforcement, and participation in innovative programs. (Tex. Water Code Ann. §5.751 et seq.).

Regulations.

(1) TCEQ is required to make rules reasonably required to effectuate Water Quality Act, including procedural rules (Tex. Water Code Ann. §26.011), and to set water quality standards for waters in state (Tex. Water Code Ann. §26.023), and may prescribe reasonable requirements for person making waste discharges to monitor and report on his waste collection, treatment, and disposal activities and on quality of any water in state (Tex. Water Code Ann. §26.042), including regulations regarding sewage discharges by boats in inland fresh waters (Tex. Water Code Ann. §26.044). (2) TCEQ may issue rules and regulations necessary and convenient to carry out Texas Oil and Hazardous Substances Spill Prevention and Control Act. (Tex. Water Code Ann.

§26.264). (3) TCEQ has power to make rules and regulations consistent with general intent and purposes of Clean Air Act. (Tex. Health & Safety Code Ann. §382.017). (4) TCEQ may by rule establish and administer vehicle emissions inspection and maintenance program consistent with Federal Clean Air Act. (Tex. Health & Safety Code Ann. §382.202 et seq.). (5) Department of Public Safety may authorize and license inspection stations. (Tex. Transp. Code Ann. §548.304). (6) Department of Health and TCEQ may adopt rules and regulations consistent with general intent and purpose of Solid Waste Disposal Act and may establish minimum standards of operation for all aspects of management and control of solid waste over which they have jurisdiction. (Tex. Health & Safety Code Ann. §361.024). (7) TCEQ and Railroad Commission are required to adopt rules, regulations, and procedures reasonably required for performance of their powers, duties and functions under Injection Well Act. (Tex. Water Code Ann. §§27.019 and 27.034). (8) TCEQ is required to make rules and regulations for conserving, protecting, preserving, and distributing underground, subterranean, and percolating water located in state. (Tex. Water Code Ann. §28.011). (9) Railroad Commission is required to publish rules and regulations pertaining to uranium surface mining and reclamation operations (Tex. Nat. Res. Code Ann. §131.021) and surface coal mining and reclamation (Tex. Nat. Res. Code Ann. §134.013). (10) Railroad Commission is required to adopt rules to effectuate provisions of Oil and Gas Waste Haulers Act. (Tex. Water Code Ann. §29.031). (11) Railroad Commission is required to make rules, regulations and orders in connection with operation, abandonment and proper plugging of oil or gas wells to prevent pollution of surface and subsurface waters of state, which would or might result from escape or release of crude petroleum oil, salt water or other mineralized waters from any such well, or from operations in connection therewith excluding naturally occurring radioactive materials produced as result of exploration. (Tex. Nat. Res. Code Ann. §91.101). (12) Railroad Commission may adopt rules regarding underground storage of hydrocarbons. (Tex. Nat. Res. Code Ann. §91.203). (13) Commissioner of General Land Office is required to adopt rules and regulations as may be necessary to prevent pollution of waters of state from oil and gas development activities and geological, geophysical and other surveys and investigations on state-owned submerged lands (Tex. Nat. Res. Code Ann. §52.032), and may adopt rules to implement Oil Spill Prevention and Response Act of 1991 (Tex. Nat. Res. Code Ann. §40.007). (14) Commissioner of Agriculture is authorized to make and issue regulations for carrying out provisions of Pesticide Control Act. (15) Structural Pest Control Board may promulgate regulations governing structural pest control practices. (Tex. Occ. Code Ann. §1951.205). (16) Department of Health has rule making authority for licensing transport and control of radiation sources and radioactive wastes except nuclear reactor facilities licensed by the federal commission. (Tex. Health & Safety Code Ann. §§401.052, 401.102). (17) TCEQ may adopt rules to administer and enforce dry cleaner environmental response (Tex. Health & Safety Code Ann. §374.051). TCEQ may adopt rules reasonably necessary to preserve, protect and maintain water and other natural resources of state; provide for prompt corrective action of releases from dry cleaning facilities; establish performance standards for dry cleaning solvents and wastes from dry cleaning facilities closed by owner to prevent future releases; criteria to be used in setting priorities for expenditure of money from fund; and criteria under which commission may determine level at which corrective action is complete. (Tex. Health & Safety Code Ann. §374.051). (18) TCEQ may issue one license for single compact waste disposal facility in response to Low Level Radioactive Waste Policy Act. (Tex. Health & Safety Code Ann. §401.202). If applicant cannot reach surface use agreement with private landowner attorney general, upon request of TCEQ, may initiate condemnation proceedings as provided under C. 21 of property code to acquire fee simple interest in mineral right. (Tex. Health & Safety Code Ann. §401.204). (19) TCEQ may issue municipal setting designation certificate where groundwater has been restricted from use as potable water by ordinance or restrictive covenant. (Tex. Health & Safety Code Ann. §361.807). Environmental investigation and response actions are limited if no potable water wells are located within one-half mile beyond boundary of municipal setting designation. (Tex. Health & Safety Code Ann. §361.808).

Permits.

(1) TCEQ may issue permits for discharge of waste into or adjacent to water in state,

including reuse water system contributions and discharges. (Tex. Water Code Ann. §§26.027, 26.0271). Before beginning construction, every person who proposes to construct or materially alter efficiency of any private sewer system, treatment facility, or disposal system must obtain approval by TCEQ of plans for such construction or alteration. (Tex. Water Code Ann. §26.034). TCEQ may issue permits authorizing and governing construction, operation and maintenance of solid waste facilities used to store, process or dispose of solid waste. (Tex. Health & Safety Code Ann. §361.061). (2) Any person who plans to construct any new facility or to engage in modification of existing facility which may emit air contaminants shall apply for and obtain preconstruction permit from TCEQ before any actual work is begun on facility and other permits relating to limitations of air pollution. (Tex. Health & Safety Code Ann. §382.051 et seq.). (3) TCEQ or Railroad Commission may issue disposal well permits under their respective areas of jurisdiction. (Tex. Water Code Ann. §27.051). (4) Railroad Commission may issue permits for surface mining of coal, iron ore, uranium or uranium ore provided adequate insurance, performance bond and reclamation plan filed. (Tex. Nat. Res. Code Ann. §§131.131-131.141, 131.201 and Tex. Nat. Res. Code Ann. §34.051 et seq.). (5) Permit must be obtained from Railroad Commission before any oil field brine is stored in saltwater disposal pit. (Tex. Nat. Res. Code Ann. §§91.452 and 91.453). Permit must be obtained from Railroad Commission before any saltwater or other oil and gas waste from oil and gas operations may be hauled and disposed of. (Tex. Water Code Ann. §§29.011 and 29.041). (6) Railroad Commission may require permit for underground storage of hydrocarbons. (Tex. Nat. Res. Code Ann. §91.204). (7) Prior to construction of or any material or major change to public water supply systems, completed plans and specifications therefor must be submitted to Department of Health for its approval and determination that such facility will conform with state pollution laws. (Tex. Health & Safety Code Ann. §341.035). (8) License required for asbestos-related activity. (Tex. Occ. Code Ann. §1954.101). (9) Any pesticide which is distributed, sold, or offered for sale in state must first be registered and renewed annually with Commissioner of Agriculture. (Tex. Agric. Code Ann. §76.044). Commercial or other non-private use of restricted use pesticides requires license from appropriate state agency. (Tex. Agric. Code Ann. §§76.041, 76.073 and Tex. Occ. Code Ann. §1951.203). (10) Department of Health issues licenses for radioactive materials use and disposal at fee based on agency costs after demonstration of financial security. (Tex. Health & Safety Code Ann. §§401.101-401.119). (11) TCEQ shall collect fees on all wastewater discharge permits, based on fee schedule established by rule by TCEQ. Amount of fee may not exceed $75,000 for each wastewater permit or contract (Tex. Water Code Ann. §26.0291). (12) TCEQ shall collect permit fee of not less than $2,000 nor more than $50,000 for industrial solid waste or hazardous waste permit. (Tex. Health & Safety Code Ann. §361.137). (13) TCEQ shall collect fees for industrial solid waste or hazardous waste generation, hazardous waste facilities, and hazardous waste disposal. Commission shall adopt by rule generation fee schedule. Annual generation fee may not be less than $50 or greater than $50,000 except commission may by rule exempt generators of small quantities. Annual fee shall be imposed on solid waste or hazardous waste facility for processing, storing, or disposing of hazardous waste based on fee schedule established by commission, not less than $250 and not greater than $25,000. Fee set by commission for each dry weight ton for most hazardous wastes disposed through land disposal is imposed on owner or operator of hazardous waste land disposal facility. (Tex. Health & Safety Code Ann. §§361.131-361.137). (14) TCEQ shall assess application and inspection fees, annual operating permit fee, and Federal Clean Air Act fees. (Tex. Health & Safety Code Ann. §§382.062, 382.0621 and 382.0622).

Financing Bonds.

Clean Air Financing Act authorizes issuance of revenue bonds by local governments for purchase of air pollution control facilities. (Tex. Health & Safety Code Ann. §383.021). Water Pollution Control Revolving Fund administered by Water Development Board provides financial assistance for construction of municipal wastewater treatment facilities, for maintenance of community and nonprofit noncommunity safe water drinking systems, and for water systems serving disadvantaged communities. (Tex. Water Code Ann. §15.601 et seq.). Railroad Commission may fund certain surface mining reclamation. (Tex. Nat. Res Code §§131.231-

131.234, 134.144). Solid Waste Resource Recovery Financing Act authorizes local government to issue revenue bonds for acquiring solid waste reclamation facilities. (Tex. Health & Safety Code Ann. §§362.001-362.043).

Grants and Incentives.

For purposes of improving air quality in non-attainment areas, Texas Emission Reduction Plan authorizes certain grants and funds diesel emission reductions, improvements in energy efficiency, and other specific activities to reduce air pollution affecting such areas. (Tex. Health & Safety Code Ann. §386.051 et seq.). TCEQ and local governments can encourage cleanup and development of contaminated property by using voted tax proceeds and set-off projects in enforcement cases. (Tex. Water Code Ann. §7.067[a]).

Judicial Review.

(1) Person affected by any ruling, order, decision or other act of TCEQ under Water Quality Act or Injection Well Act may appeal by filing petition in district court of Travis County within 30 days of Commission's action. In appeal of Commission's action other than cancellation or suspension of permit, issue is whether action is invalid, arbitrary, or unreasonable. In case of cancellation or suspension of permit, there will be trial de novo. (Tex. Water Code Ann. §§5.351-5.357). (2) Person affected by any ruling, order, decision, or other act of TCEQ under Clean Air Act may appeal by filing petition in district court of Travis County within 30 days of Commission's action. In appeal of Board action other than cancellation or suspension of variance, issue is whether action is invalid, arbitrary, or unreasonable. (Tex. Health & Safety Code Ann. §382.032). (3) Person affected by any ruling, order, decision, or other act of TCEQ or Department of Health under Solid Waste Disposal Act may appeal by filing petition in district court of Travis County within 30 days of such action. Person affected by any action of county or political subdivision may appeal by filing petition in district court having jurisdiction in that county or political subdivision within 30 days of such action. In appeal, issue is whether action is invalid, arbitrary or unreasonable. (Tex. Health & Safety Code Ann. §361.321). (4) Any party to administrative proceeding and adversely affected by any ruling, order, decision or other act of Railroad Commission under Uranium Surface Mining and Reclamation Act may appeal by filing petition within 30 days in district court of Travis County or in county in which greater portion of land in question is located. Appeal based on record before commission and substantial evidence rule applies. (Tex. Nat. Res. Code Ann. §131.047). (5) Any person whose permit, or permit renewal, application is refused or whose permit is suspended by Railroad Commission under Salt Water Haulers Act may file petition in district court of Travis County to set aside such action within 30-day period following receipt of notice of such action. After ten days notice suit can be filed in district court of Travis County to compel Railroad Commission to act. (Tex. Water Code Ann. §§29.019-29.021). (6) Assessment of administrative civil penalty by Railroad Commission is reviewable in Travis County District Court under substantial evidence rule. (Tex. Nat. Res. Code Ann. §§81.053, 131.266, 141.013, Tex. Water Code Ann. §§27.101, 29.047). (7) Any interested person affected by conservation laws of state relating to crude petroleum oil or natural gas, and waste thereof, or by any rule, regulation or order made by Railroad Commission thereunder, shall have right to file suit in Travis County against Commission to test validity of such laws, rules, regulations and orders, which are deemed prima facie valid. (Tex. Nat. Res. Code Ann. §§85.241-85.259). (8) Appeal of "stop-sale" order under Pesticide Control Act is by trial de novo in court of competent jurisdiction. (Tex. Agric. Code Ann. §76.183). Under Pesticide Control Act and Structural Pesticide Control Act appeals to district court of Travis County within 30 days of final agency action. (Tex. Agric. Code Ann. §§76.181, 76.182). (9) Any person affected by final decision of TCEQ under Radiation Control Act may appeal by filing petition in Travis County district court within 30 days. Appeal based on record before TCEQ and substantial evidence rule applies. (Tex. Health & Safety Code Ann. §401.341). (10) Petition for judicial review must be filed within 30 days after date TCEQ takes final action on license application under Tex. Health & Safety Code Ann. §401.239(d) for compact waste disposal facility. (Tex. Health & Safety Code Ann. §401.240).

13 ESTATES AND TRUSTS

Texas Estates Code adopted effective January 1, 2014 – significant portions of the Probate Code repealed as of the same date.

13.01 ADMINISTRATION:

See topic 13.09 Executors and Administrators.

13.02 ADVANCEMENTS:

See topic 13.07 Descent and Distribution.

13.03 ALLOWANCES:

See topic 13.09 Executors and Administrators.

13.04 CLAIMS:

See topic 13.09 Executors and Administrators; category 5 Civil Actions and Procedure, topic 5.17 Pleading.

13.05 DEATH:

Presumption of death arises from absence if person is not heard from for seven successive years; but if person actually living he may recover estate of which he has been deprived under presumption, with rents, profits and interest, except if such estate is real property in hands of purchaser for value from person who obtained real property on presumption, in which case recovery is limited to purchase money. (Tex. Civ. Prac. & Rem. Code Ann. §§133.001-133.003).

Survivorship is fact which must be proved or ascertained from pertinent evidence introduced for that purpose. There is no presumption of survivorship based on age or sex where two or more perish by the same calamity. (81 Tex. 678, 17 S.W. 385).

Uniform Simultaneous Death Act Tex. Prob. Code Ann. §47[b] is similar to the Act.

Actions for death lie against any person or corporation except county or school district. (Tex. Civ. Prac. & Rem. Code Ann. §71.002). Action is for sole benefit of surviving spouse, children and parents of deceased, and amount recovered is not liable for debts of decedent. (Tex. Civ. Prac. & Rem. Code Ann. §§71.004, 71.011). Action may be brought by all parties entitled, by one or more or (for benefit of all) by executor or administrator of decedent. (Tex. Civ. Prac. & Rem. Code Ann. §71.004). Action must be begun within two years after death (Tex. Civ. Prac. & Rem. Code Ann. §16.003) and does not abate on death of plaintiff or defendant. (Tex. Civ. Prac. & Rem. Code Ann. §71.021). Discovery rule does not toll limitations beyond two years from date of death. (787 S.W.2d 348). Exemplary damages are limited by statute. (Tex. Civ. Prac. & Rem. Code Ann. §41.008).

Death Certificate.

See category 10 Documents and Records, topic 10.04 Records, subhead Vital Statistics.

Uniform Anatomical Gift Act adopted (Tex. Health & Safety Code Ann. §§692.001-.016), except that person who acts in good faith to identify potential organ or tissue donors under Tex. Health and Safety Code Ann. §§692.013 and 692.014, is not liable except in case of intentional omission, wilful or wanton neglect or conscious indifference (Tex. Health & Safety Code Ann. §692.016), and gift may be made by signed and witnessed statement on reverse of driver's license (Tex. Transp. Code Ann. §521.401; Tex. Health & Safety Code Ann.

§692.003[e]).

Living Wills.

See topic 13.16 Wills.

13.06 DECEDENTS' ESTATES:

See topics 13.07 Descent and Distribution, Executors and Administrators, Wills; categories 8 Debtor and Creditor, topic Homesteads; Family, topic Husband and Wife.

13.07 DESCENT AND DISTRIBUTION:

Note — for significant revision of laws regarding intestate succession taking effect Jan. 1, 2014, see Tex. Estates Code Ann. §§201.001–205.008.

Property of intestate decedent, real or personal, leaving no surviving spouse, passes as follows, each class of which member is living taking to exclusion of subsequent classes: (1) To children and their descendants; (2) to parents equally, but if only one survives, one-half to survivor and one-half to brothers and sisters of decedent and their descendants, but if none, all to surviving parent; (3) to brothers and sisters and their descendants; (4) in equal moieties to paternal and maternal kindred as follows: (a) to grandfather and grandmother equally, if living; (b) if only one survives, one-half to survivor and one-half to descendants of other, but if there are no such descendants, all to survivor; (c) if no surviving grandparents, to their descendants; (d) and in same manner without end, to nearest lineal ancestors and their descendants. (Tex. Prob. Code Ann. §38[a]).

No corruption of blood or forfeiture of estate exists by reason of conviction of crime, except beneficiary of life insurance policy convicted in death of insured, nor is there forfeiture because of death by casualty or self destruction. (Tex. Prob. Code Ann. §41[d]).

Heirs of the same degree take per capita, descendants of deceased members of the class taking per stirpes. (Tex. Prob. Code Ann. §43).

In case of death of joint owner (excluding spouses), his estate does not survive to remaining joint owners but descends to his heirs as in other cases, unless survivorship right is by agreement in writing. (Tex. Prob. Code Ann. §46[a]).

Spouses may agree in writing that all or part of community property, then existing or to be acquired, becomes property of surviving spouse on death of spouse. (Tex. Prob. Code Ann. §§451-462). Community property survivorship agreements governed by Tex. Estates Code Ann. §§112.001–112.253.

Surviving spouse takes as follows: If there be issue, one-third of deceased spouse's separate real property for life and one-third of personalty absolutely; if there be no issue but surviving parents or descendants of parents, one-half of realty and all of personalty; if there be no surviving issue, parents, or brothers or sisters or their descendants, entire estate. (Tex. Prob. Code Ann. §38[b]). As to community property see category 14 Family, topic 14.09 Husband and Wife.

Half Blood.

Collateral kindred of the half blood inherit; but if there are also kindred of whole blood, those of half blood take only half portion which those of whole blood take. (Tex. Prob. Code Ann. §41[b]).

Posthumous children or other issue take as though living at time of decedent's death, but no right of inheritance may accrue to other persons not in being at the time of decedent's death. (Tex. Prob. Code Ann. §41[a]).

Illegitimate children are treated as if legitimate as to mother and maternal kindred. Children of void marriage treated as legitimate. Child is treated as legitimate as to father if child is born or conceived under circumstances described in Tex. Fam. Code Ann. §160.201 or is legitimated by court decree as provided by Tex. Fam. Code Ann. §160 or was adopted by his father or his father executes acknowledgment of paternity as provided in Tex. Fam. Code Ann. §160, Subchapter D, (or similar statement in another jurisdiction). (Tex. Prob. Code Ann. §42).

Adopted Children.

See category 14 Family, topic 14.01 Adoption.

Determination of Heirship.

Action to determine heirship may be instituted in county or probate court by qualified personal representative of estate of decedent, any person claiming to be secured creditor or owner of estate property or by guardian of estate of deceased ward (Tex. Prob. Code Ann. §49[a]), who may seek court authority to pay taxes and expenses and to sell property (Tex. Prob. Code Ann. §748). Citation must be served by registered or certified mail on all known distributees; court may require personal service. To determine if there are unknown heirs, service shall be made by publication. (Tex. Prob. Code Ann. §50). Newly enacted provisions, see Tex. Estates Code Ann. §§202.001–202.206. Genetic testing to determine heirship governed by Tex. Estates Code Ann. §§204.001–204.201.

Alienage of party inheriting or ancestor through whom estate inherited is no bar to inheritance. (Tex. Prob. Code Ann. §41[c]).

Advancements.

Lifetime gifts or non-testamentary transfers to intestate decedent's heirs are advancements only if decedent or heir makes written declaration/acknowledgment that gift or testamentary transfer is advancement or is to be taken into account in distributing decedent's intestate estate. (Tex. Prob. Code Ann. §44). Newly enacted provisions, see Tex. Estates Code Ann. §§201.151, 201.152.

Election.

See topic 13.16 Wills.

Renunciation.

Any person, or guardian of incapacitated person, or personal representative of any deceased person, or guardian ad litem of unborn or unascertained person, with court approval, or any independent executor, without court approval, may renounce all or any part of property receivable as beneficiary by filing written, acknowledged memorandum of disclaimer in probate court where decedent's estate is administered, or if no administration, in county records where decedent resided, or if decedent was nonresident, in county records where real property is located. Unless beneficiary is charitable organization or governmental agency of state, filing must be within nine months of death of decedent. Written disclaimer of future interest must be filed within nine months of event determining that taker of property is finally ascertained and interest is indefeasibly vested. Copy of disclaimer must be timely delivered by hand or by registered or certified mail to executor or administrator, if any, or holder of legal title to property. If beneficiary is charitable organization or governmental agency of state, filing must be within nine months after receiving written notice that it has been named as devisee in will as required by Tex. Prob. Code Ann. §128A. (Tex. Prob. Code Ann. §37A).

Escheat.

See category 21 Property, topic 21.01 Absentees, subhead Escheat.

Simultaneous Death.

Act similar to Uniform Simultaneous Death Act adopted except that if person fails to survive decedent by 120 hours he will be deemed to have predeceased decedent. (Tex. Prob. Code Ann. §47).

Disclaimer.

See topic 13.16 Wills.

See also topic 13.09 Executors and Administrators.

13.08 ELECTION:

See topic 13.16 Wills.

13.08A ESTATES: (in property)

See category 21 Property, topic 21.16 Real Property.

13.09 [RESERVED]

13.10 EXECUTORS AND ADMINISTRATORS:

Note – significant changes in provisions take effect Jan. 1, 2014 — see newly enacted Texas Estates Code.

County court has general jurisdiction of probate court (Tex. Prob. Code Ann. §§4, 605); however, certain counties have statutory probate courts which have exclusive or concurrent subject matter jurisdiction (Tex. Prob. Code Ann. §5). District court has original control and jurisdiction over personal representatives, guardians and wards. (Tex. Prob. Code Ann. §§5, 606).

Probate proceedings must be filed and heard in a court exercising original probate jurisdiction. (Tex. Estates Code Ann. §32.001). County court has original jurisdiction. (Tex. Estates Code Ann. §32.002). Jurisdiction of contested probate proceedings provided for by Tex. Estates Code Ann. §§32.003, 32.004. In county with statutory probate court, such court has exclusive jurisdiction over probate proceedings. (Tex. Estates Code Ann. §32.005). Statutory probate court has jurisdiction over proceedings dealing with trusts and powers of attorney. (Tex. Estates Code Ann. §32.006). In certain circumstances, statutory probate court has concurrent jurisdiction with district court. (Tex. Estates Code Ann. §32.007).

Venue for probate of wills and granting of letters testamentary and of administration may be in following counties: (1) County of residence of deceased; (2) if deceased had no domicile or fixed place of residence in state, but died in state, either where his principal property was situated or place of his death; (3) if he had no domicile or fixed place of residence in state and died outside state, in county where nearest of kin resides; (4) and, in such case, if he had no kindred in state, in county where his principal estate was situated; (5) county where applicant resides when administration is only to receive funds due from government. (Tex. Prob. Code Ann. §6). Where two or more courts have concurrent jurisdiction, court where application is first filed has jurisdiction. (Tex. Prob. Code Ann. §8).

Necessity of administration must be shown before administration will be granted. Necessity is shown by existence of two or more debts against estate or when partition is desired, but court may find other instances of necessity upon proof before it. (Tex. Prob. Code Ann. §178[b]).

Showing Necessary to Grant of Letters Testamentary or of Administration.

Before granting letters testamentary or of administration following facts must appear to court: (1) That person is dead; (2) that four years have not elapsed between his death and filing of application except where administration is necessary in order to receive or recover funds or property due to estate of decedent; (3) that court has jurisdiction and venue of estate; (4) that citation has been properly served and returned; (5) that person for whom letters are sought is entitled to letters and is not disqualified; (6) that there is necessity for administration (but no such showing required for letters testamentary). If letters have been previously granted, applicant need show only (5). (Tex. Prob. Code Ann. §88).

Preferences in Right to Administer.

Letters testamentary or of administration are granted to qualified persons in the following order: (1) Executor named in will; (2) surviving spouse; (3) principal devisee or legatee; (4) any devisee or legatee; (5) next of kin; (6) creditor; (7) any person of good character residing in county; (8) any other person not disqualified. (Tex. Prob. Code Ann. §77).

Eligibility and Competency.

Following are disqualified to serve as personal representative: (1) Incapacitated persons; (2) convicted felons who have not been pardoned or had their civil rights restored; (3) nonresidents with no resident agent to accept service; (4) corporations not authorized to act as Texas fiduciaries; (5) persons whom court finds unsuitable. (Tex. Prob. Code Ann. §78).

Qualification.

Personal representatives must qualify by taking oath and giving bond (Tex. Prob. Code Ann. §§189-190, 192, 194, 196-197), unless will probated in Texas directs that no security shall be required or personal representative is corporate fiduciary (Tex. Prob. Code Ann. §195). New bond may be required in certain cases. (Tex. Prob. Code Ann. §203). Married person appointed personal representative may give bond binding on separate estate, or spouse may join by signature, thus binding him. (Tex. Prob. Code Ann. §§198-199).

Exemption from Bond.

Will may exempt executor, domestic or foreign, from bond. Generally, corporate personal representatives are exempt from bond. (Tex. Prob. Code Ann. §195).

Issuance of Letters.

On qualification by personal representative, clerk of court must issue letters testamentary or of administration, consisting of certificate of clerk, attested by seal of court, stating that representative has duly qualified, date of qualification and name of deceased. (Tex. Prob. Code Ann. §§181-183). Such letters, or certificate of clerk under seal of court that such letters have been issued, are sufficient evidence of appointment and qualification and date of qualification. (Tex. Prob. Code Ann. §186).

Removal.

Court, on its own motion or on motion of any interested person, and with or without notice, may remove personal representatives on enumerated grounds. (Tex. Prob. Code Ann. §222). These provisions do not apply to independent executors, who may be removed upon failure to post bond when properly required and on enumerated grounds. (Tex. Prob. Code Ann. §149C). (See subhead Independent Administration, infra.)

Informal Probate.

Repealed.

Independent Administration.

Any person capable of making will may provide in such will that no other action shall be had in county court in relation to settlement of his estate other than probate and recording of his will and return of inventory, appraisement and list of claims. (Tex. Prob. Code Ann. §145). In such case will is probated as usual, but administration is independent of and without supervision or control of court. When executor is named but not made independent, or where no executor is named in will, or where decedent died intestate, all of distributees may create independent administration by agreement. (Tex. Prob. Code Ann. §§145, 154A). Any party holding claim against estate may sue thereon and recover judgment and have execution against property of estate, subject to debt, in hands of executor, but in no such suit for money is executor required to answer until expiration of six months from date of probate of will. (Tex. Prob. Code Ann. §147). At any time after expiration of 15 months from date independent administration is created and order appointing independent executor is entered, any person interested in estate may demand accounting from independent executor, requiring independent executor to show, among other things, why administration should not be closed and estate distributed. (Tex. Prob. Code Ann. §149A). In addition to or in lieu of right to accounting provided by Prob. C. §149A, at any time after two years from date that independent administration is granted, person interested in estate may petition court for accounting and distribution. (Tex. Prob. Code Ann. §149B). Independent executor may be removed, among other grounds, for gross misconduct or gross mismanagement. (Tex. Prob. Code Ann. §149C).

Community Administration.

When spouse dies intestate, community property passes to surviving spouse, and no administration is necessary. (Tex. Prob. Code Ann. §155) Community property remains liable for debts upon spouse's death. (Tex. Prob. Code Ann. §156). Community property survivorship agreements governed by Tex. Estates Code Ann. §§112.001–112.253.

Temporary Administration.

Whenever it appears to county judge that interest of estate requires immediate appointment of personal representative, he must appoint some suitable person temporary personal representative with such limited powers as circumstances of case require. Such appointment may not continue longer than 180 days unless it is made permanent. Temporary personal representatives exercise only powers expressly conferred upon them by court and are required to take oath and give bond in such sum as county judge may direct. (Tex. Prob. Code Ann. §§131A-135, 190, 192, 194).

Administration cum testamento annexo (with will annexed) is granted where necessity for administration exists and no personal representative is named in will or in position to act. (Tex. Prob. Code Ann. §178).

Administration de bonis non (of goods not already administered) is granted where estate not fully administered is left without representative. Personal representative d. b. n. has all powers of former representative except those conferred by will on former personal representative which differ from ordinary powers of executors. (Tex. Prob. Code Ann. §§223-224).

Public Administrators.

No procedure for public administration exists.

Inventory and Appraisal.

All personal representatives are required to prepare and file, within 90 days of their qualification, sworn inventory, appraisement and list of claims owing to estate unless extension is requested and granted. (Tex. Prob. Code Ann. §250). Court may in its discretion appoint from one to three appraisers to assist personal representative. (Tex. Prob. Code Ann. §248). Additional inventories and appraisements may be required. (Tex. Prob. Code Ann. §§256-259).

General Powers and Duties.

Personal representatives may, upon application and order authorizing same, renew or extend any obligation owing by or owing to estate, purchase or exchange property, take claims or property in payment for debt, compound bad or doubtful debts, make compromises and settlement in relation to property or claims in dispute or litigation, compromise or pay any secured claim by transfer of security, or without application or order, release liens upon payment of debt at maturity, vote stocks by limited or general proxy, pay assessments, insure estate against liability in appropriate cases, insure property of estate against fire, theft and other hazards, abandon administration that is burdensome or worthless, and pay taxes, costs of court and bond premiums. (Tex. Prob. Code Ann. §234).

The acts of one personal representative, where there are several, are valid, but all must join in conveyance of real estate unless court authorizes less than all to act. (Tex. Prob. Code Ann. §240).

Notices to Creditors.

Personal representative must, within one month after receiving letters, send to Comptroller of Public Accounts by certified or registered mail, if decedent remitted or should have remitted taxes administered by Comptroller of Public Accounts and publish in newspaper of county in which letters granted, notice to creditors to present claims within time prescribed by law. (Tex. Prob. Code Ann. §294). Any time before estate is closed, personal representative may give notice by certified or registered mail to unsecured creditors to present claim within four months or claim will be barred. (Tex. Prob. Code Ann. §294[d]). He must also, within four months after receiving letters, give notice by certified or registered mail to all holders of secured claims. (Tex. Prob. Code Ann. §295).

Presentation of Claims.

Claims must be presented to personal representative or clerk any time before estate closed if not barred by statute of limitations. (Tex. Prob. Code Ann. §298). Claim of unsecured creditor is barred if not presented within four months of Tex. Prob. Code Ann. §294(d) notice. (Tex. Prob. Code Ann. §298).

Proof of Claims.

No claim may be approved by personal representative (without liability to him and his surety if found unjust by court) or court unless it is supported by affidavit that claim is just and that all legal offsets, payments and credits known to affiant, have been allowed. If claim is not founded on written instrument, affidavit should also state facts on which claim is founded. Photostatic copy of any exhibit or voucher may be attached to claim in lieu of original. (Tex. Prob. Code Ann. §301).

Form.

There is no statutory form, but claim must be authenticated. (Tex. Prob. Code Ann. §301). Following is acceptable for claim on unsecured account:

Form

Estate of . . . ., ... hereby makes and presents this his claim against Estate of . . . ., viz: . . . ., An account for . . . . (describe subject matter of claim generally) sold (or furnished) by . . . . to . . . . and consisting of the items so dated and shown on the attached Exhibit which is made part hereof, the principal amount due upon this claim being $. . . . . with interest thereon at rate of . . . . .% per annum from . . . ., (year) . . . ., the whole claim totaling on this day $. . . . .; upon which claim there are no payments, offsets or credits, such account representing the transactions upon which such claim is founded.

. . . .

THE STATE OF TEXAS

COUNTY OF . . . . }

BEFORE ME, the undersigned authority, on this day personally appeared . . . ., known to me to be the person whose name is subscribed to the foregoing claim, who being by me duly sworn, on his oath states that he is the owner of such claim, that the same is just, and that all legal offsets, payments and credits known to the affiant have been allowed.

. . . .

Sworn to and subscribed before me by the said . . . . this . . . . day of . . . ., (year) . . . ., to certify which witness my hand and seal of office.

. . . .

Notary Public in and for

the County of . . . .,

State of . . . .

My Commission Expires on

the . . . . . day of . . . ., (year) . . . . .

Approval or Rejection of Claims.

Claim which is properly proved may be allowed by personal representative by memorandum indorsed thereon or attached thereto (Tex. Prob. Code Ann. §309), and is thereafter, if proper, approved and classified by court (Tex. Prob. Code Ann. §312). Failure to act on claim for 30 days is deemed rejection. (Tex. Prob. Code Ann. §310). If claim is rejected, action thereon must be commenced within 90 days after rejection or claim is barred. (Tex. Prob. Code Ann. §313).

Payment of Claims.

If estate is solvent and personal representative has sufficient funds on hand, allowed claims should be paid after filing of first annual account. (Tex. Prob. Code Ann. §401). If claim is not paid, owner may file written complaint, have personal representative cited and obtain order for payment. (Tex. Prob. Code Ann. §§326, 328).

Funeral Expenses.

All funeral expenses are to be charged to decedent's estate and no part of such expenses are to be charged to community share of surviving spouse. (Tex. Prob. Code Ann. §320A).

Priorities.

Claims against estate are classed and have priority as follows: (1) Funeral expenses and expenses of last sickness, to be approved by court and not to exceed $15,000, any excess to be classified and paid with unsecured claims; (2) expenses of administration incurred in preservation, safekeeping, and management of estate; (3) secured claims for money under §306(a), including tax liens, when more than one mortgage, lien, or security interest exists on same property, they shall be paid in order of their priority; (4) claims for principle amount of and accrued interest on delinquent child support and child support arrearages that have been confirmed and reduced to money judgment, as determined under Subchapter F, c. 157, Family Code; (5) claims for taxes, penalties, and interest due under Tex. Tax Code Ann. tit. 2; Tex. Nat. Res. Code Ann. §81.111; Municipal Sales and Use Tax Act (Tex. Tax Code Ann. §321); Tex. Transp. Code Ann. §451.404; or Tex. Transp. Code Ann. subch. I, §452; (6) claims for cost of confinement established by institutional division of Texas Department of Criminal Justice under Tex. Gov't Code Ann. §501.017; (7) claims for repayment of medical assistance payments made by state under Tex. Hum. Res. Code Ann. §32, to or for benefit of decedent; (8) all other claims (Tex. Prob. Code Ann. §322).

Secured Claims.

When secured claim is presented, claimant must specify whether it is desired to have claim allowed: (a) As matured secured claim to be paid in due course of administration in which event it must be so paid, if allowed and approved, or (b) as preferred debt and lien against specific property securing indebtedness and paid according to terms of contract which secures lien, in which event it must be so allowed, although personal representative may pay claim prior to maturity. If secured claim is not presented within six months of date letters are granted or within four months after receipt of Tex. Prob. Code Ann. §295 notice or if not specified how claim is to be treated, it must be treated as claim to be paid as provided under (b) above. When approved under (b) no further claim may be made against other assets, but claim remains preferred lien on property securing same in any distribution or sale that may be made prior to maturity. Claimant presenting secured claim against estate for debt that would otherwise pass with property securing debt to devisee under Tex. Prob. Code Ann. §71A, such claim being allowed as matured secured claim, personal representative must collect each devisee's share of debt and pay it to claimant in satisfaction of claim. If amount of debt is not collectable from devisees, personal representative must sell property securing debt. Claimant presenting unmatured secured claim should ask that such claim be fixed as lien on property securing same, and should not ask for allowance and payment because, by so doing, he would subject property to payment of other claims. If property securing preferred debt and lien claim is not sold or distributed within six months from date letters were granted personal representative must promptly pay all maturities which have accrued on debt according to its terms, and in event of default, on application of claimholder, court shall: (1) Require sale of property subject to unmatured part of said debt, and apply proceeds to liquidation of maturities; (2) require sale of property free of lien and apply proceeds to payment of entire debt; or (3) authorize foreclosure by claimholder. Foreclosure requires application by lienholder, citation, and hearing. (Tex. Prob. Code Ann. §306).

Sales.

No sale may be made without order of court (Tex. Prob. Code Ann. §331) unless terms of will authorize executor to sell (Tex. Prob. Code Ann. §332). Property liable to waste, perish or deteriorate in value, or that will be an expense or disadvantage to the estate if kept must be sold and court may order sale of other personal property, except exempt property and specific legacies. (Tex. Prob. Code Ann. §§333-335).

Creditor may, upon application to court, have property upon which he has lien sold for satisfaction of debt secured thereby. (Tex. Prob. Code Ann. §338).

Real property may be sold, when necessary, to pay debts or when it is in best interest of estate to sell such. Such sale is made on application to court by representative or any person interested in estate; posting of notice of application; and order of court, after hearing and opportunity for interested parties to make contest. Such sale is at public auction, unless in interest of estate judge orders sale at private sale for cash or part cash and part credit, on terms determined by court, provided one-fifth of purchase price must be paid in cash. Notice of public sale of real estate must be given by published advertisement, but in case of private sale no notice is required unless so ordered by court. (Tex. Prob. Code Ann. §§341-50). Full report of sale must be made to court within 30 days and report is then approved or sale set aside. Conveyance is not made until sale approved by court. (Tex. Prob. Code Ann. §§353, 355, 357).

Bond.

Where realty is sold, executor or administrator who is required to file general bond, unless court finds general bond sufficient to protect estate, must increase general bond as court requires or must furnish bond equal to the amount for which the real estate is sold, plus any amount the court may require for the protection of the estate. No bond is required where realty is conveyed in satisfaction of debt unless there is cash balance. (Tex. Prob. Code Ann. §354).

Actions by Representatives.

Suits for recovery of personal property, debts, or damages, and suits for title or possession of lands or any right attached or growing out of same, or for injury or damage done thereto may be instituted by executors, administrators, or guardians appointed representative of decedent's estate in this state. (Tex. Prob. Code Ann. §233A). No security for costs is required of appointed representative suing in his fiduciary capacity. (Tex. Prob. Code Ann. §12[c]). Where plaintiff dies in course of lawsuit, his heirs or his personal representative may be substituted upon suggestion of such death being entered of record. (Tex. R. Civ. P. 151).

Actions Against Representatives.

In every suit against estate of decedent involving title to real estate, executor or administrator, if any, and heirs must be made parties defendant. (Tex. Civ. Prac. & Rem. Code Ann. §17.002). Claims for money may be brought, but presentation of claim to representative is condition precedent to judgment. (Tex. Prob. Code Ann. §314). If rejected claim is not sued on within 90 days subsequent to rejection, claim is barred. (Tex. Prob. Code Ann. §313). If defendant in suit dies, upon petition of plaintiff, clerk shall, by writ of scire facias, require representative or heir to appear and defend. (Tex. R. Civ. P. 152).

Allowances.

When surviving spouse and minor children of deceased have insufficient property of their own adequate for their maintenance, they are entitled to allowance, set aside to them by court, sufficient to maintain them for period of one year from death of testator or intestate. (Tex. Prob. Code Ann. §§286-292). Property of estate may be sold for purpose of providing for such allowance. (Tex. Prob. Code Ann. §293). It is claim prior to all debts except Class 1 claims. (Tex. Prob. Code Ann. §290). Passage of homestead property accomplished in same manner as other real property of decedent. (Tex. Estates Code Ann. §102.003).

All exempt property, including homestead for benefit of surviving spouse and minor children, is set aside to surviving spouse and minor children and unmarried children of deceased immediately after filing of inventory, or upon affidavit and by court order, before filing of inventory. If deceased leaves no exempt property, court may set aside allowance to surviving spouse and children in lieu thereof, which must not exceed $15,000 in lieu of homestead or $5,000 in lieu of other exemptions. Property of estate may be sold to provide such allowance. Homestead shall not be liable for payment of any of debts of estate, except for purchase money thereof. If encumbered property be set aside to surviving spouse as exempt or appropriated to make up allowance in lieu of exempt property, debt secured by such lien may, as necessity requires, be either discharged or continued against such property. This applies to all estates, whether solvent or insolvent. (Tex. Prob. Code Ann. §§270-279).

Widow's Quarantine.

Not recognized.

Intermediate Accountings.

Representative of estate being administered under order of court must file annual accounts. (Tex. Prob. Code Ann. §399). Account must be under oath and filed with clerk. Filing thereof must be noted on docket for ten days before account can be approved. (Tex. Prob. Code Ann. §401). Penalty imposed for noncompliance. (Tex. Prob. Code Ann. §400).

Final Accounting and Settlement.

When all debts known to exist against estate have been paid so far as assets permit, representative must present his final account, verified by affidavit and giving full account of all property of estate and its disposition. (Tex. Prob. Code Ann. §§404-405). Notice of presentment of account is given by personal representative to each heir or beneficiary of decedent by certified mail return receipt unless another type of notice is directed by written order of court. (Tex. Prob. Code Ann. §407[1]). Court has discretion to waive notice. (Tex. Prob. Code Ann. §407[2]). Notice must include copy of account for final settlement. (Tex. Prob. Code Ann. §407). If report is approved by court, all property remaining on hand is partitioned, representative granted his final discharge and administration closed. (Tex. Prob. Code Ann. §408).

Independent executor may file verified final account which terminates his power (Tex. Prob. Code Ann. §151), or distributee may petition court to close such administration (Tex. Prob. Code Ann. §152).

Consent Settlement.

Representative may compromise claim with consent of court. (Tex. Prob. Code Ann. §234[a][4]).

Distribution.

At any time after first term of court after expiration of 12 months from original grant of letters, personal representative, or heirs, devisees or legatees may, by written application request partition and distribution. (Tex. Prob. Code Ann. §373[a]). Court may approve partial distribution after filing of inventory, appraisement and list of claims. (Tex. Prob. Code Ann. §373[c]).

Income from estate may be distributed to beneficiaries during administration where assets are at least double amount of claims, costs and legacies and no legatee or creditor objects. (Tex. Prob. Code Ann. §239).

Court after hearing, may decree partition. (Tex. Prob. Code Ann. §§373-375, 377-382, 385-387). If estate consists of property other than money and debts due estate, it may appoint commissioners to make partition and distribution, which is done in due course by report of commissioners, hearing and approval of report by court, and division of property. (Tex. Prob. Code Ann. §380). Property may be sold under order of court where it lies in another county and cannot be advantageously partitioned. (Tex. Prob. Code Ann. §382). Joint owners of property with estate may have partition. (Tex. Prob. Code Ann. §386).

Distribution If Abroad.

No special provision.

Liabilities.

If representative willfully neglects to use diligence in collecting all claims and debts due estate or in recovering all property to which estate has claim or title, he and sureties on his bond shall be liable for amount of such claims or value of such property as has been lost by neglect. (Tex. Prob. Code Ann. §233). Homestead is not generally liable for debts of estate, with a few exceptions. (Tex. Estates Code Ann. §102.004).

Compensation of Representatives.

Personal representative may receive commission equal to 5% of all sums received in cash and 5% of all sums paid in cash on order by court that personal representative has properly taken care of and managed estate. This commission is not allowed for receiving cash on hand (including certificates of deposit and similar debt instruments from financial institutions) at decedent's death or for collecting proceeds of life insurance policy or for paying money to heirs or legatees as such, but commission can never be more than 5% of gross fair market value of estate. Adjustments can be made for management of business. (Tex. Prob. Code Ann. §241).

When Administration Unnecessary.

See subheads Necessity of Administration, supra, and Small Estates, infra.

Small Estates.

Distributees of an estate of decedent who dies intestate are entitled to net estate without appointment of personal representative when: (1) No petition for appointment of representative has been granted or is pending; (2) decedent has been dead for 30 days; (3) estate, excluding homestead and exempt property does not exceed $50,000, and (4) affidavit is filed by distributees and approved by court evidencing foregoing, giving names and addresses of distributees and stating assets and liabilities of estate and right of distributee to estate properties. Title to decedent's homestead that is only real property in decedent's estate may be transferred by affidavit. (Tex. Prob. Code Ann. §§137-38). If value of estate, excluding homestead and exempt property, does not exceed family allowance (see subhead Allowances, supra), upon petition for administration, court shall order that no administration be had and shall assign whole estate to surviving spouse and minor children. (Tex. Prob. Code Ann. §§139-43).

Withdrawing Estates from Administration.

Heir, devisee or legatee may, by giving bond to county judge in double amount of appraised value of estate conditioned to pay all properly allowed or established debts against estate, withdraw estate from administration and have same partitioned. In such case, however, lien remains upon property in hands of distributees to secure ultimate payment of aforesaid obligation; and creditor may sue on bond or may sue such distributees. (Tex. Prob. Code Ann. §§263-269).

Foreign Executors or Administrators.

When foreign will is admitted to ancillary probate as provided by statute, executor named in such will shall be entitled to receive, upon application, letters testamentary, upon proof that he has qualified as such in jurisdiction in which will was admitted to probate and that he is qualified in Texas. Foreign executor is entitled to have any previous grant of letters revoked and to have letters granted him. (Tex. Prob. Code Ann. §105). Foreign corporate fiduciary may qualify in Texas under specified circumstances. (Tex. Prob. Code Ann. §105A). Foreign personal representative may sue in this state for recovery of debts due decedent in certain circumstances. (Tex. Prob. Code Ann. §107A). See also topic 13.16 Wills, subhead Foreign Probated Wills.

Uniform Fiduciaries Act not adopted.

Uniform Probate Code not adopted except some of language of Art. VI of Uniform Probate Code (which was modified to recognize community property rights) has been adopted. (See Tex. Prob. Code Ann. §§436-450.)

Uniform Principal and Income Act repealed effective Jan. 1, 2004..

13.11 [RESERVED]

13.12 INTESTACY:

See topic 13.07 Descent and Distribution.

13.13 [RESERVED]

13.14 PROOF OF CLAIMS:

See topic 13.09 Executors and Administrators; category 5 Civil Actions and Procedure, topic 5.17 Pleading.

13.15 TRUSTS:

Kinds.

Constructive and resulting trusts are recognized, and rules of common law and equity apply.

Express trusts are governed by Texas Trust Code (Tex. Prop. Code Ann. §101.001 et seq.), but act does not govern "business trusts," resulting trusts or constructive trusts, security instruments or instruments wherein one or more persons are mere nominees. Texas Real Estate Investment Trust Act governs real estate investment trusts until Jan. 1, 2010. (Tex. Rev. Civ. Stat. art. 6138A).

Such trust may be created for any purpose for which binding contract may be made.

Creation.

Express trusts may be created by: (1) Declaration that owner of property holds it as trustee for another; (2) property owner's inter vivos transfer of property to another as trustee for transferor or others; (3) transfer by will to trustee for third persons; (4) appointment by person having power of appointment to another person as trustee for donee of power or for third person; (5) promise by one to another person whose rights thereunder are to be held in trust for third person. An express trust of real property must be created by written instrument. (Tex. Prop. Code Ann. §§112.001, 112.004).

Appointment of Trustee.

Trustee may be appointed by trust instrument or by order of court. Trust does not fail in

Texas for failure of settlor to appoint trustee. (Tex. Prop. Code Ann. §112.009). Successor trustees appointed as per trust instrument or by court if not per instrument. (Tex. Prop. Code Ann. §113.083).

Eligibility and Competency.

Beneficiary and settlor may be trustee. (Tex. Prop. Code Ann. §112.008). Natural person or corporation may be trustee. Foreign corporation is authorized to act as trustee. (Tex. Prob. Code Ann. §105A).

Qualification.

Corporate trustee is not required to give bond. Unless trust instrument or court order provides otherwise, noncorporate trustee must give bond as required by court. (Tex. Prop. Code Ann. §113.058).

Removal of Trustee.

Court may, in its discretion, remove trustees for cause on petition of any person actually interested, or trustee may be removed in accordance with trust instrument. (Tex. Prop. Code Ann. §113.082).

General Powers and Duties of Trustees.

In co-trusteeship, powers may be exercised by majority of available co-trustees. Co-trustee must perform his function unless he is temporarily incapacitated or has successfully delegated function to another trustee. (Tex. Prop. Code Ann. §113.085). Trustee is not liable for action of co-trustees if trustee exercised reasonable care, and did not join action of majority or dissented from action in writing to any co-trustee prior to joining action. (Tex. Prop. Code Ann. §114.006).

In general, trustee may exercise any powers in addition to those authorized by statute if necessary or appropriate to carry out trust purposes (Tex. Prop. Code Ann. §113.002) unless trust instrument, court order or statute conflicts (Tex. Prop. Code Ann. §113.001), and implied powers are recognized (Tex. Prop. Code Ann. §113.024). In particular, absent provision to contrary in trust instrument, trustee has power to: (1) Develop, improve, partition and otherwise handle real property; (2) sell real or personal property for cash or on credit secured by lien; (3) grant or take leases of real property for term of years; (4) make oil and gas leases; (5) raze existing walls or buildings; (6) build new walls or buildings, make ordinary repairs, alterations, changes and additions to buildings, and keep in effect insurance of any nature, in any form and any amount; (7) compromise, contest, arbitrate or settle claims of or against trust estate; (8) abandon property deemed burdensome or valueless; (9) pay stock calls or assessments when proper; (10) exercise rights accruing to stock held by him and participate generally in affairs of corporation; (11) execute any deed or other instrument to do things necessary or desirable for carrying out his powers; (12) employ attorneys, accountants, agents, etc., reasonably necessary to proper administration of trust estate; (13) pay all taxes or assessments levied against trust estate; (14) vote stock directly or by proxy; (15) except for charitable remainder trusts under I.R.C. §664 permit real estate to be occupied by surviving spouse or minor child of trustor and to pay funeral expenses of any beneficiary receiving benefits of trust at his date of death; (16) grant option involving disposition of property or acquire and exercise option for acquisition of property. (Tex. Prop. Code Ann. §§113.001-113.022).

Power to Direct.

Trust may authorize trustee of other person to direct modification or termination of trust or to direct certain actions of trustee. Trustee must follow directions of person authorized to direct actions of trustee, unless direction is manifestly contrary to terms of trust or is breach of director's fiduciary duty to beneficiaries of trust. (Tex. Prop. Code Ann. §114.003).

Sales.

Trustee may contract to sell, sell and convey, or grant option to sell real or personal property for cash or credit with or without security. (Tex. Prop. Code Ann. §113.010).

Dealings by trustee with itself are prohibited with certain exceptions where trustee is corporate and comes within designated class, and then only upon court action. (Tex. Prop. Code Ann. §113.053). Trustee is prohibited from purchasing own stock although stock already owned by trust estate may be retained (Tex. Prop. Code Ann. §113.055) and from selling from one trust estate to another except obligations issued or fully guaranteed by U.S. (Tex. Prop. Code Ann. §113.054).

Actions.

Trustee may be sued in his representative capacity on contract or, under certain conditions, for tort. In either case notice must be given to all known beneficiaries. (Tex. Prop. Code Ann. §§114.083-.084, 115.015).

Personal Liability and Exoneration.

When happening of any event determines or affects distribution of any income or principal of trust estate, trustee is not liable for mistakes of fact made in distribution without actual knowledge or written notice of such event. (Tex. Prop. Code Ann. §114.004).

Trustee who has incurred personal liability for tort is entitled to exoneration if: (1) tort is common incident of activity in which trustee is properly engaged; or (2) neither trustee nor any of his officers or employees is guilty of negligence. If trustee's tort increased value of trust property, he is entitled to reimbursement to that extent. (Tex. Prop. Code Ann. §114.062).

Legally competent beneficiary, aware of all material facts, may, by written instrument, relieve trustee from liability, including past violations. This does not apply to dealings by corporate trustee with itself. (Tex. Prop. Code Ann. §114.005).

Apportionment.

Provision is made for apportionment of receipts and expenses between income and principal. (Tex. Prop. Code Ann. §116.001, et seq.).

Investments.

Trustee must exercise ordinary prudence in making investments. (Tex. Prop. Code Ann. §113.056).

Securities in Name of Nominee.

Trustee may hold title to stock or other securities in name of nominee. (Tex. Prop. Code Ann. §113.017).

Bequests and Devises to Inter Vivos Trusts.

See topic 13.16 Wills.

Accounting.

Absent contrary provision, beneficiary may compel accounting by written demand but not more often than once every 12 months unless more frequent accounting is required by court, and interested person may file suit if trustee fails or refuses to deliver statement on or before 90 days, compelling accounting or finding of sufficient interest. (Tex. Prop. Code Ann. §113.151). District court shall have original jurisdiction to require accounting by trustee as well as other actions concerning trusts. (Tex. Prop. Code Ann. §115.001).

Compensation.

Absent contrary provision, trustee entitled to reasonable compensation which may be denied by court given breach of trust. (Tex. Prop. Code Ann. §114.061).

A trustee has lien for his proper claims against trust estate. (Tex. Prop. Code Ann. §114.063).

Discharge.

Court may accept resignation of trustee and discharge him from trust upon such conditions as rights of interested persons dictate. Trustee may also resign in accordance with trust instrument. (Tex. Prop. Code Ann. §113.081).

Revocation.

Unless it is expressly stated that the trust is to be irrevocable, it may be revoked, modified or amended. (Tex. Prop. Code Ann. §112.051).

Ancillary Trustee.

Texas trustee authorized to name ancillary trustee in another state to act in connection with property located in such other state. (Tex. Prop. Code Ann. §113.023).

Uniform Common Trust Fund Act adopted with added provision regarding members of affiliated group. (Tex. Prop. Code Ann. §§113.171-.172).

Revised Uniform Principal and Income Act adopted with numerous variations, additions and omissions. (Tex. Prop. Code Ann. §116.001 et seq.).

Gifts to Minors.

See category 14 Family, topic 14.10 Infants.

Uniform Fiduciaries Act not adopted.

Uniform Probate Code not adopted except some of language of Art. VI of Uniform Probate Code (which is modified to recognize community property rights) has been adopted. (Tex. Prob. Code Ann. §§436-450).

Uniform Simplification of Fiduciary Security Transfers Act repealed in 1995.

Accumulations.

See category 21 Property, topic 21.12 Perpetuities, subhead Accumulations.

Perpetuities.

See category 21 Property, topic 21.12 Perpetuities.

Pour Over Trusts.

See topic 13.16 Wills, subhead Bequests and Devises to Inter Vivos Trusts.

Renunciation.

Acceptance of interest in trust by beneficiary is presumed, but beneficiary may disclaim interest. (Tex. Prop. Code Ann. §112.010).

13.16 WILLS:

Every person who is 18 years of age, or who has been lawfully married, or who is member of U.S. Armed Forces, auxiliaries thereto, or Maritime Service, at time will is made and is of sound mind, has power to make will. (Tex. Prob. Code Ann. §57).

Testamentary Disposition.

All of testator's property may be disposed of by will, and testator may disinherit heir. (Tex. Prob. Code Ann. §58).

Execution.

Every will, except holographic or nuncupative will, in order to be valid, must be in writing and signed by testator, or by some other person by his direction and in his presence, and be attested by two or more credible witnesses above age of 14 years subscribing their names thereto in presence of testator. (Tex. Prob. Code Ann. §59).

Self-proved Wills.

Will may be made self proved at execution or later during life of testator and witnesses, making testimony of witnesses unnecessary by attaching or annexing affidavits of testator and attesting witnesses before officer authorized to take acknowledgments and administer oaths, evidenced by certificate substantially in following form:

Form

The State of Texas, County of . . . . . ., Before me, the undersigned authority, on this day personally appeared . . . . . ., ..., and . . . . . ., known to me to be the testator and the witnesses, respectively, whose names are subscribed to the annexed or foregoing instrument in their respective capacities, and, all of said persons being by me duly sworn, the said . . . . . ., testator, declared to me and to the said witnesses in my presence that said instrument is his last will and testament, and that he had willingly made and executed it as his free act and deed; and the said witnesses, each on his oath stated to me, in the presence and hearing of the said testator, that the said testator had declared to them that said instrument is his last will and testament, and that he executed same as such and wanted each of them to sign it as witness; and upon their oaths each witness stated further that they did sign the same as witnesses in the presence of the said testator and at his request; that he was at that time 18 years of age or over (or, being under such age, was or had been lawfully married, or was then member of the Armed Forces of the United States or of an auxiliary thereof or of the Maritime Service) and was of sound mind; and that each of said witnesses was then at least 14 years of age. . . . . . ., testator; . . . . . ., witness; . . . . . ., witness.

Subscribed and sworn to before me by the said . . . . . ., testator, by the said . . . . . . and . . . . . ., witnesses, this . . . . . . day of . . . . . ., A. D. . . . .

(Seal) (Signed) . . . .

(Official Capacity of Officer)

(Tex. Prob. Code Ann. §59).

Attestation Clause.

No particular form of attestation is necessary. Following is sufficient:

Form

"We, the undersigned, state that . . . . . . signed the above will in our presence and we at his request and in his presence and in the presence of each other sign as witnesses this . . . . . . day of . . . . . . A. D.. . . . ."

Holographic Wills.

Will wholly written by testator needs no attesting witnesses and may be self proved by testator attaching or annexing affidavit that instrument is his last will; that he was at least 18 when he executed it (or if under 18, was or had been lawfully married, or was member of Armed Forces of U.S. or of auxiliary thereof or of Maritime Service); that he was of sound mind; and that he has not revoked it. (Tex. Prob. Code Ann. §60). If not self proved, it is proved by testimony of two witnesses as to handwriting. (Tex. Prob. Code Ann. §84).

Nuncupative wills disposing of personal property only must have been made at time of last sickness of deceased and at his home or place of residence for at least ten days before date of will, unless he is taken sick and dies away from home, and when value of estate exceeds $30 it must be proved by three credible witnesses that testator called on some person to take notice or bear testimony that such was his will, or words of like import. (Tex. Prob. Code Ann. §§64, 65, 86).

No nuncupative will may be proved within 14 days after death of testator nor without summoning heirs to contest same, if they desire to do so. Nor may nuncupative will be proved more than six months after speaking of testamentary words unless testimony has been committed to writing within six days after making will. (Tex. Prob. Code Ann. §86).

Revocation.

Written will may be revoked by subsequent will, codicil or declaration in writing executed with like formalities, or by testator destroying, or canceling it or causing it to be done in his presence. (Tex. Prob. Code Ann. §63). Will is not affected by subsequent marriage of testator, but divorce of testator after making will voids all provisions relating to divorced spouse. (Tex. Prob. Code Ann. §69). Forfeiture clause may be unenforceable if probable cause for action exists and action maintained in good faith. (Tex. Prob. Code Ann. §64).

Revival.

Cancellation of will expressly revoking all former wills does not revive former will. Testator's declaration of intent to revive former will should be made with same formalities as required for original will and for revocation of will. (267 S.W. 244).

Search for and Delivery of Will.

Person having custody of will has duty to deliver it to county clerk on notice of death of testator. County judge may order person, corporation, etc., having control or possession of papers of decedent, to permit examination thereof, and if will is found to deliver same to clerk of probate court. Custodian of will may be forced to deliver it to court. (Tex. Prob. Code Ann. §75). Provision is also made for deposit of will by testator with county clerk. (Tex. Prob. Code Ann. §71).

Testamentary Gifts to Subscribing Witnesses.

When devise or legacy is made to subscribing witness to will, if such will can only be proved by testimony of such subscribing witness, devise or legacy to such witness is void, but in such case subscribing witness is entitled to take share to which he would have been entitled had there been no will, or so much thereof as does not exceed value of bequest to him under will. (Tex. Prob. Code Ann. §61). If, however, his testimony is corroborated by one or more disinterested and credible persons, such bequest is valid. (Tex. Prob. Code Ann. §62).

Bequests and Devises to Inter Vivos Trusts.

Such devises and bequests are valid. Property devised or bequeathed is added to corpus of trust and governed by provisions of trust instrument, including written amendments made before or after death of testator. (Tex. Prob. Code Ann. §58a).

Probate Jurisdiction.

See topic 13.09 Executors and Administrators.

Probate Proceedings.

Effective Jan. 1, 2014, provisions governing probate of wills covered by Tex. Estates Code Ann. §§256.001 to 256.204.

All applications for grant of letters testamentary or of administration upon an estate must be filed within four years after death of testator or intestate, except where administration is necessary in order to receive or recover funds or other property due to estate of decedent. (Tex. Prob. Code Ann. §74). Requisites of application for probate are prescribed by statute for wills produced in court; wills not produced in court; and nuncupative wills. (Tex. Prob. Code Ann. §81). Citation upon such application is made by posting of notice. If will is not produced in court or is nuncupative, heirs must be served, personally if they are residents whose addresses are known or by publication if they are nonresidents or their addresses are unknown or transient. (Tex. Prob. Code Ann. §128).

If self proved, no other proof of execution is necessary. Otherwise, written will produced in court may be proved by: (1) Sworn testimony or affidavit of one or more of subscribing witnesses taken in open court; (2) if all witnesses are nonresidents of county, or residents who are unable to attend court, by depositions of one or more of witnesses or if no opposition filed before hearing date, in same manner as if witnesses were dead; (3) if all witnesses are dead, or are in Armed Forces out of jurisdiction of court, then by proof of handwriting of testator and subscribing witnesses by two witnesses, or one if two not available, by affidavit in open court or by deposition; and (4) if will is wholly written by testator, then by proof of his handwriting by two witnesses. (Tex. Prob. Code Ann. §84).

All testimony taken in open court upon hearing of application to probate will must be committed to writing at time it is taken, and subscribed and sworn to in open court by witness or witnesses, and filed by clerk, except that in any contested case, court may dispense with this requirement. (Tex. Prob. Code Ann. §87).

Contest.

Any person interested in estate may oppose probate proceedings. (Tex. Prob. Code Ann. §10). Any interested person may bring contest in probate court within two years after will has been admitted to probate, within two years after fraud or forgery is discovered, or if contestant is minor or non compos mentis, within two years after removal of disabilities. (Tex. Prob. Code Ann. §93). Forfeiture clause may be unenforceable if probable cause for action exists and action maintained in good faith. (Tex. Prob. Code Ann. §64). Opposition to probate proceedings generally, governed by Tex. Estates Code Ann. §§55.001, 55.002.

Records.

All original wills, together with probate thereof, are required to be deposited and kept in office of county clerk of county where same were probated. (Tex. Prob. Code Ann. §90). Such wills and proceedings are required to be recorded in probate minutes. (Tex. Prob. Code Ann. §15).

Legacies.

Although gifts under lawful will vest immediately in legatees upon death of testator (Tex. Prob. Code Ann. §37), time for payment or distribution of gifts is within discretion of executor or administrator.

Absent expression of intent in will, gifts abate in following order: intestate property, personal property in residuary estate, real property in residuary estate, general bequests of personal property, general devises of real property. (Tex. Prob. Code Ann. §322B). Ademption applies only to specific bequests and legacies.

Unclaimed Legacies.

No special provisions. See category 21 Property, topic 21.01 Absentees, subhead Escheat.

Lapse.

Legacy or devise to issue does not lapse in case of death before testator if legatee or devisee leaves issue surviving testator by 120 hours. (Tex. Prob. Code Ann. §68).

Children.

If testator has one or more children living at time he executes his last will, children born or adopted after execution of will, including posthumous children, and not provided for in will or by settlement, take share of testator's estate minus any devise or bequest to said children's parent, to which they would be entitled if testator dies intestate. (Tex. Prob. Code Ann. §67[1][A]). If testator makes provision for any such children, then all such children receive: (a) No more than amount provided for children under will and, (b) such amount within above limitation as would have received had testator included all such children with children provided for in will and given each equal share. (Tex. Prob. Code Ann. §67[1][B]). If testator had no children upon execution of last will, children born or adopted after execution of will, including posthumous children, and not provided for in will or by settlement, take share of testator's estate minus any devise or bequest to said children's parent, to which they would be entitled if testator dies intestate. (Tex. Prob. Code Ann. §67[2]).

Election.

If will of husband or wife attempts, by explicit language, to dispose of entire community property, or any specific part thereof, surviving spouse has right to elect whether to take provision, if any, made for him or her by will or to retain, against will, his or her interest in community property. (135 S.W.2d 92). Right of election exists also where testator undertakes to dispose of property belonging to any other beneficiary. Election may be express or implied, by word or by act, but must be made with knowledge that right to elect exists. (135 Tex. 398, 143 S.W.2d 906). Election not required on or before probate of will. (251 S.W. 1043).

There is no right to elect between testamentary provision and distributive share under statute of descent and distribution.

Contribution.

Where surviving spouse elects against will, or after-born child claims intestate share, each beneficiary must contribute pro rata to make up necessary fund.

Foreign Executed Wills.

No provision.

Foreign Probated Wills.

Written will of testator who was not domiciled in Texas at time of his death which would affect any real or personal property in this state may be admitted to probate upon proof that it stands probated or established in any of U.S., its territories, District of Columbia, or any foreign nation. (Tex. Prob. Code Ann. §95). When any will or other testamentary instrument conveying or disposing of land in this state has been duly probated according to laws of any of U.S., territories, District of Columbia, or foreign country, copy thereof and of decree admitting it to probate, attested by clerk of court where same was admitted to probate, and seal of court annexed, if there is seal, together with certificate from judge or presiding magistrate of such court that said attestation is in due form, may be filed and recorded in deed records of any county where such land is situated in same manner as deeds or conveyances without further proof or authentication, subject to contest within four years after its recording. (Tex. Prob. Code Ann. §96). Such copy, attested as above, is prima facie evidence that it is duly probated (Tex. Prob. Code Ann. §97), and such instrument from date of its delivery to clerk of proper court to be recorded takes effect and is valid as conveyance (Tex. Prob. Code Ann. §98), and operates as notice to all parties of existence of same and rights conferred thereby. (Tex. Prob. Code Ann. §99). See topic 13.09 Executors and Administrators, subhead Foreign Executors or Administrators.

Where power of sale of property in this state is given in foreign will to executor thereof, such power may be validly exercised by executor without order of court when such will has been properly filed and recorded as above. (Tex. Prob. Code Ann. §107).

Foreign executor or administrator may sue in this state for debts due decedent in certain circumstances. (Tex. Prob. Code Ann. §107A).

Testamentary Guardian.

See category 14 Family, topic 14.07 Guardian and Ward, subhead Eligibility and Competency.

Simultaneous Death.

See topic 13.05 Death, subhead Survivorship.

Testamentary Trusts.

Designation of testamentary trust to receive insurance and employee benefit plan proceeds is valid. (Tex. Ins. Code Ann. art. 3.49-3 — **repealed** effective Apr. 1, 2009). See topic 13.15 Trusts.

Disclaimer.

Any person who may be entitled to receive any property as beneficiary may irrevocably disclaim all or any part of such property by following statutory procedure. (Tex. Prob. Code Ann. §37A). Disclaimer process in general governed by Tex. Estates Code Ann. §§122.001–122.206.

Living Wills.

Any competent adult may execute written or nonwritten directive for withholding or withdrawal of life-sustaining procedures. Directive must be witnessed by two witnesses meeting statutory requirements and, in latter case, two witnesses plus attending physician. Directive may designate person to make treatment decision in event declarant becomes comatose or incompetent. (Tex. Health & Safety Code Ann. §§166.031-166.043).

Desire of competent qualified patient supersedes previously given directive. (Tex.

Health & Safety Code Ann. §§166.031-166.043). If patient becomes comatose or incompetent without having executed directive, treatment decision may be made by attending physician and patient's legal guardian or, if none, by attending physician and at least two of following listed in order of priority: Spouse, adult children, parents, nearest living relative. (Tex. Health & Safety Code Ann. §§166.031-166.043).

Uniform Anatomical Gift Act adopted with numerous variations, additions and omissions. (Tex. Health & Safety Code Ann. §692.001 et seq.).

14 FAMILY

14.01 ADOPTION:

This subject is governed by Tex. Fam. Code Ann. §162.001 et seq.

Minor.

Subject to requirements for standing (Tex. Fam. Code Ann. §102.006), any adult may adopt minor. Any minor residing in state may be adopted: (a) If parent-child relationship as to each living parent of child has been terminated, (b) proceeding is for stepparent adoption, (c) child is two years old, parent-child relationship has been terminated with respect to one parent, person seeking adoption is child's former stepparent and has been managing conservator or has had actual care, possession and control of child for period of six months preceding adoption or, is child's former step-parent, and nonterminated parent consents, or (d) child is two years old, parent-child relationship has been terminated with respect to one parent, and person seeking adoption is child's former stepparent and has been managing conservator or has had actual care, possession and control of child for period of one year preceding adoption. (Tex. Fam. Code Ann. §162.001).

Consent Required.

If petitioner is married, both spouses must join petition. (Tex. Fam. Code Ann. §162.002). Minor's managing conservator, if any, must consent in writing filed with court, unless court finds consent withheld without good cause. (Tex. Fam. Code Ann. §162.010[a]). If minor at least 12 years old, minor must consent in court or in writing, unless court waives requirement in best interest of minor. (Tex. Fam. Code Ann. §162.010[c]).

Conditions Precedent.

Parent-child relationships of each living natural parent must be terminated, except where natural parent is petitioning spouse. Termination may be by prior decree, by proper affidavit naming Department of Protective and Regulatory Services as managing conservator, or authorizing qualified agency to place child up for adoption and subsequent decree of adoption, or by joining termination proceeding with adoption proceeding. (Tex. Fam. Code Ann. §162.001). Minor must have resided in home of petitioner for at least six months, unless court waives requirement in best interest of minor. (Tex. Fam. Code Ann. §162.009).

Jurisdiction.

District Court juvenile court having same jurisdiction as District Court, or other court expressly given jurisdiction over suit affecting parent-child relationship has jurisdiction. If court has previously acquired continuing exclusive jurisdiction of minor, no other court has jurisdiction, unless court loses its continuing exclusive jurisdiction under Tex. Fam. Code Ann. §155.004 or emergency suit is brought by governmental entity under Tex. Fam. Code Ann. §262.001 et seq.

Venue.

In county where child resides or where petitioners reside. (Tex. Fam. Code Ann. §103.001[b]).

Petition.

Must set forth relevant facts which are set out in Tex. Fam. Code Ann. §§102.008 and 162.002[b].

Proceedings.

Pre-adoption home screening shall be filed with court before court may sign final order in any termination or adoption proceeding except when suit is brought by Dept. of Protective and Regulatory Services. (Tex. Fam. Code Ann. §107.0519). There are minimum qualifications for persons who may serve as Social Study Evaluators. (Tex. Fam. Code Ann. §107.0511). In suit where pre-adoption report is required, post placement investigation must be conducted and report filed with court before court may sign final order. (Tex. Fam. Code Ann. §107.052). In case of stepparent adoption, pre-adoption screening and post placement report may be combined. (Tex. Fam. Code Ann. §107.0519). Contents of report governed by Tex. Fam. Code Ann. §162.007. Both petitioning spouses must attend hearing, unless court waives appearance of one on ground of undue difficulty. (Tex. Fam. Code Ann. §162.014[a]). If minor is at least 12 years old, must attend hearing unless court waives appearance in best interest of minor. (Tex. Fam. Code Ann. §162.014[b]). No jury is authorized in suit in which adoption is sought. (Tex. Fam. Code Ann. §105.002[b]).

Decree.

Court must find all requirements satisfied and adoption in best interest of child in order to grant adoption. (Tex. Fam. Code Ann. §162.016[b]).

Name.

Minor's name may be changed in adoption decree, if requested. (Tex. Fam. Code Ann. §162.016[c]).

Effect of Adoption.

On entry of adoption decree, parent-child relationship exists between adopted child and adoptive parents. (Tex. Fam. Code Ann. §162.017[a]). Adopted child is entitled to inherit from and through his adoptive parents as though he were natural child of parents, and adoptive parents are entitled to inherit from and through adopted child as though he were their natural child. (Tex. Fam. Code Ann. §162.017[b], Tex. Prob. Code Ann. §40). Natural parents do not inherit from and through child, but child does inherit from and through his natural parents. (Tex. Prob. Code Ann. §40). Adoption decree does not affect rights of biological or adoptive maternal or paternal grandparent to reasonable possession or access. (Tex. Fam. Code Ann. §162.017[d]).

Setting Aside Adoption.

Validity of adoption decree is not subject to attack more than six months after decree is rendered. (Tex. Fam. Code Ann. §162.012[a]).

Adults.

Any adult resident of this state may petition to adopt adult person, but if petitioner is married, both spouses must join in petition for adoption. (Tex. Fam. Code Ann. §§162.501 and 162.503[b]). Notwithstanding that both spouses have joined, court may grant adoption to only one spouse. (Tex. Fam. Code Ann. §162.506[b]).

Petition.

Must set forth relevant facts which are set out in Tex. Fam. Code Ann. §§102.008 and 162.503(a).

Consent.

Adult person to be adopted must acknowledge and file with petition his consent to adoption by petitioner. (Tex. Fam. Code Ann. §162.504).

Jurisdiction and Venue.

Petition must be filed in the district court or statutory county court with jurisdiction in county of petitioner's residence. (Tex. Fam. Code Ann. §162.502).

Proceedings.

Petitioner and adult to be adopted must attend hearing unless for good cause they are unable to be present. (Tex. Fam. Code Ann. §162.505).

Effect of Adoption.

On entry of adoption decree, adopted adult becomes son or daughter of adoptive parents for all purposes. Natural parents may not inherit from or through adopted adult. (Tex. Fam. Code Ann. §162.507).

Registry.

State maintains voluntary adoption registry through which adoptees, birth parents, and biological siblings may voluntarily locate each other. (Tex. Fam. Code Ann. §§162.401 et seq.).

14.02 ALIMONY:

See topic 14.04 Divorce.

14.03 COMMUNITY PROPERTY:

See topic 14.09 Husband and Wife.

14.0414.05

14.06 DIVORCE:

This subject is governed by Tex. Fam. Code Ann. §6.001 et seq.

Grounds for Absolute Divorce.

Divorce may be granted without regard to fault where marriage has become insupportable because of discord or conflict of personalities that destroys legitimate ends of marriage relationship and prevents any reasonable expectation of reconciliation, or may be granted in favor of either spouse when: (1) Other is guilty of cruel treatment against complaining spouse, if such treatment is of such nature as to render further living together insupportable; (2) other has voluntarily left complaining spouse for one year with intention of abandonment; (3) other has committed adultery; (4) they have lived apart without cohabitation for three years; (5) other has been convicted, after marriage, of felony, imprisoned for at least one year, and has not been pardoned, and not then if convicted spouse has been pardoned or was convicted on testimony of complaining spouse; (6) other, at time action is commenced, has been confined in mental hospital for three years, and disorder is such that he will probably not adjust, or if he does, that he will probably relapse. (Tex. Fam. Code Ann. §§6.001-6.007).

Defenses.

Defense of recrimination is abolished. Condonation is defense only where there is reasonable expectation of reconciliation. Defense of adultery is abolished. (Tex. Fam. Code Ann. §6.008).

Grounds for Legal Separation.

No action for legal separation exists in Texas. However, where parents are or will be separated, in suit affecting parent-child relationship, court shall appoint at least one managing conservator of child or children. (Tex. Fam. Code Ann. §153.005).

Citizenship Requirements.

None.

Residence Requirements.

At time suit is filed, petitioner or respondent must be domiciliary of state for preceding six months and resident of county in which suit is filed for preceding 90 days. (Tex. Fam. Code Ann. §6.301). Time spent by Texas domiciliary in service of armed forces of U.S. or Texas outside state or county of residence of domiciliary is considered residence in state and county. (Tex. Fam. Code Ann. §6.303). Person not previously resident of Texas who is serving in U.S. armed forces and has been stationed in this state for at least last six months and in county for at least last 90 days is considered domiciliary of state and resident of county. (Tex. Fam. Code Ann. §6.304). If one spouse has been domiciliary of state for at least last six months, spouse domiciled in another state or nation may sue for divorce in county where former spouse is domiciled at time petition is filed. (Tex. Fam. Code Ann. §6.302).

Jurisdiction.

District court has jurisdiction of all suits for divorce. (Tex. Gov't Code Ann. §24.007). Personal jurisdiction may be acquired over nonresident respondent pursuant to Tex. Fam. Code Ann. §6.305.

Venue.

Venue of divorce suits is in county in which plaintiff or respondent resided for 90-day period preceding divorce; provided that plaintiff or respondent shall also have resided in Texas for six-month period preceding divorce. (Tex. Fam. Code Ann. §6.301).

Process.

Citation may be given by publication as in other civil cases, except notice shall be published one time only. (Tex. Fam. Code Ann. §6.409). In suit affecting parent-child relationship, evidence of service signed by court must be made part of record. (Tex. Fam. Code Ann. §102.010).

Pleading.

Pleadings must contain allegations of grounds relied on substantially in language of statute, without detailed statement of evidentiary facts. (Tex. Fam. Code Ann. §6.402). Petition must state whether children under 18 years of age were born or adopted of marriage. (Tex. Fam. Code Ann. §6.406[a]).

Practice.

Suit must have been on file 60 days before divorce may be granted except in cases involving family violence. (Tex. Fam. Code Ann. §6.702). During pendency of suit, if spouse contracts debts against community estate or transfers community property, and any such debt or transfer is void with respect to other spouse if made or incurred with intent to injure rights of other spouse. (Tex. Fam. Code Ann. §6.707).

Temporary Alimony.

After divorce petition is filed, judge may order payments for support of husband or wife until final decree is entered. (Tex. Fam. Code Ann. §6.502[A][2]).

Allowance for Prosecution of Suit.

Court may make such temporary orders respecting property and parties during pendency of suit as may be deemed necessary and equitable. (Tex. Fam. Code Ann. §§6.501, 6.502).

Permanent Alimony.

Party may receive court-ordered maintenance from spouse who was convicted or received deferred adjudication of criminal offense that constituted act of family violence within two years of divorce suit, or if duration of marriage was ten years or longer, spouse may receive support payments for minimum reasonable needs for up to three years in order for that spouse to obtain necessary employment skills or for indefinite period of time if that spouse is unable to support himself or herself because of disability. (Tex. Fam. Code Ann. §§8.001, 8.051 et seq.). Parties can agree that one will make periodic payments to other as part of separation agreement. Such consensual alimony is enforced as contract. Putative spouse who did not have knowledge of existing impediment to valid marriage may be awarded maintenance, if otherwise qualified. (Tex. Fam. Code Ann. §8.060). Unmarried cohabitant is not eligible for maintenance. (Tex. Fam. Code Ann. §8.061).

Division of Property of Spouses.

Court may make division of property in such way as seems to it just and right, having due regard for rights of each party and children. (Tex. Fam. Code Ann. §7.001). Court ordered division of property may be enforced pursuant to Tex. Fam. Code Ann. §§9.001-9.014. Texas is community property jurisdiction. (See topic 14.09 Husband and Wife.)

Change of Name.

For good cause shown, court may change name of either party upon request. (Tex. Fam. Code Ann. §6.706).

Custody of Children.

Provision is made for appointment of either sole or joint managing conservator whenever parent-child relationship is affected. Same is required if court finds parents will be separated. One or both of parents will be appointed unless not in child's interest. (Tex. Fam. Code Ann. §§153.005-.006). Rights and duties of managing conservator set out in statute. (Tex. Fam. Code Ann. §153.132). Uniform Child Custody Jurisdiction and Enforcement Act is adopted with some variations. (Tex. Fam. Code Ann. §§152.001-.317). On application of either party, amicus attorney, or attorney ad litem for child, court shall interview child 12 years of age or older and may interview child under age 12 to determine child's wishes as to conservatorship or as to person who shall determine child's primary residence. (Tex. Fam. Code Ann. §153.009). Court may also interview child by its own motion for these purposes. On application of either party, amicus attorney, or attorney ad litem for child, or on court's own motion, court may interview child to determine child's wishes as to possession, access, or any other issue affecting parent-child relationship. (Tex. Fam. Code Ann. §153.009).

Allowance for Support of Children.

Court may order of either or both parents, periodic payments for support of children until they reach age 18 or later in limited circumstances. (Tex. Fam. Code Ann. §§154.001 and 154.002). Court may also order financially able person whose parental rights have been terminated with respect to child in substitute care to support child until child is adopted or until child reaches age 18 or graduates high school. Court-ordered child support may be enforced pursuant to Tex. Fam. Code Ann. §§157.001-.168 and Uniform Interstate Family Support Act. (Tex. Fam. Code Ann. §§159.001-.901). Court may also order medical support and health care coverage for child. (Tex. Fam. Code Ann. §154.181 et seq.).

Remarriage.

No restriction except that both parties may not marry (except remarriage between parties) until the 31st day after divorce decree unless good cause is shown. (Tex. Fam. Code Ann. §§6.801-6.802).

Foreign Divorces.

Those facets of foreign decree which are in personam, including order that husband convey Texas land to wife, may be enforced in Texas courts as matter of comity, where decree does not violate established public policy of Texas. (162 Tex. 190, 345 S.W.2d 722).

Separation agreements are recognized if parties are actually separated. Agreement which makes division of property is enforceable if it is fair and equitable.

Annulment of Marriage.

See topic 14.11 Marriage.

14.06A FAMILY VIOLENCE:

Definition of Family.

"Family" includes individuals related by consanguinity or affinity, as determined under Tex. Gov't Code Ann. §§573.022 and 573.024, individuals who are former spouses of each other, individuals who are parents of same child, without regard to marriage, and foster child and foster parent, without regard to whether those individuals reside together. (Tex. Fam. Code Ann. §71.003).

Family Violence.

"Family violence" means: act by member of family or household against another member of family or household that is intended to result in physical harm, bodily injury, assault, or sexual assault or that is threat that reasonably places member in fear of imminent physical harm, bodily injury, assault, or sexual assault, but does not include defensive measures to protect oneself; abuse by member of family or household toward child of family or household dating violence. (Tex. Fam. Code Ann. §71.004).

14.07 [RESERVED]

14.08 GUARDIAN AND WARD:

Tex. Prob. Code Ann. §601 et seq. governs guardianship.

Jurisdiction over appointment of guardians of minors, incompetents and persons missing on public service and transaction of all business pertaining to their estates is vested in county, probate, and district courts. (Tex. Prob. Code Ann. §§605-609). To extent applicable and not inconsistent with other provisions of guardianship code, laws which govern estates of decedents are applicable. (Tex. Prob. Code Ann. §603).

Venue for appointment of guardian of estate or person of minor is county where parents (or parent or other party having custody) reside; if minor is orphan, in county where last surviving parent or other party having custody resides at time of death, where minor is found or where principal estate is located. Venue for appointment of guardian of incapacitated person is county where such person resides or where principal estate may be. Where guardian appointed by will, venue is county where will probated or county of appointee's residence if he resides in Texas. (Tex. Prob. Code Ann. §610).

Selection of Guardian.

Proceedings are commenced by written application (Tex. Prob. Code Ann. §682), upon which citation issues and is served by posting. (Tex. Prob. Code Ann. §§632-636). Following must be personally served: (1) Proposed ward who is 12 years of age or older; (2) parents of proposed ward if their whereabouts are known or reasonably ascertainable; (3) any court-appointed conservator; (4) proposed ward's spouse; and (5) person named in application to be appointed guardian, if that person is not applicant. (Tex. Prob. Code Ann. §633[a]). Such other persons on whom service is required and who may be served by mail are set forth in Tex. Prob. Code Ann. §633(d). Such action may also be instituted by court. (Tex. Prob. Code Ann. §683). Statute prescribes requisite proof. (Tex. Prob. Code Ann. §§684, 687).

Temporary Guardian.

Court may appoint temporary guardian, where it is presented with substantial evidence that person may be minor or other incapacitated person, and court has probable cause to believe that person or person's estate, or both, requires immediate appointment of guardian, and guardian will have limited powers required under circumstances. (Tex. Prob. Code Ann. §875).

Sales by Parents.

Upon sworn application to court, parent may sell property of minor if net value of minor's interest in property does not exceed $100,000, no guardianship is required. (Tex. Prob. Code Ann. §889).

Payments to County Clerks.

Payments of liquidated and uncontested sums not in excess of $100,000 may be made to county clerks when no guardian has been appointed. (Prob. C. §887).

Eligibility and Competency.

Following may not be guardians: Minors; persons of notoriously bad conduct; incapacitated persons, person who is party or whose parent is party to lawsuit concerning or affecting proposed ward; debtors of proposed ward; persons asserting claims adverse to proposed ward or proposed ward's property; person, institution or corporation found unsuitable by court; person disqualified in declaration made pursuant to Tex. Prob. Code Ann. §679; and persons whom court deems incapable of properly managing estate. (Tex. Prob. Code Ann. §681). There is no prohibition of nonresidents as testamentary guardians, but nonresidents must file name of resident agent with court. (Tex. Prob. Code Ann. §681[10]).

Appointment of Guardian.

Where parents live together better qualified of parents is entitled to be appointed guardian of estate. Where parents do not live together, their rights thereto are equal, and where one of parents is dead survivor is entitled to guardianship. (Tex. Prob. Code Ann. §676). Surviving parent may appoint guardian by will or written declaration (Tex. Prob. Code Ann. §676), and may exempt such appointee from giving bond by will (Tex. Prob. Code Ann. §702). Where minor is an orphan, nearest ascendant in direct line of such minor, if not disqualified, is entitled to guardianship of both person and estate. If he has no ascendant in direct line, guardianship is given to nearest of kin and if there is no relative qualified, and no other person entitled to such guardianship applies therefor, court may appoint proper person. (Tex. Prob. Code Ann. §676). In case of incapacitated persons other than minors, guardian will be appointed according to circumstances, but if court finds two or more eligible persons who are equally entitled to be appointed guardian, ward's spouse is entitled to appointment if eligible, and then eligible person nearest of kin to ward is entitled to appointment. (Tex. Prob. Code Ann. §677).

Minor over 12 may select guardian of person and estate if court approves choice and finds that choice is in best interest of minor. (Tex. Prob. Code Ann. §680).

No guardian is necessary for husband or wife judicially declared incompetent unless he or she owns separate property or non-incapacitated spouse is disqualified, but spouse may qualify as community survivor. (Tex. Prob. Code Ann. §883).

Qualification.

In order to qualify, guardians are required to take oath to faithfully discharge their duties, and to give bond. (Tex. Prob. Code Ann. §§699-701). The bond of guardian of the person of ward is in an amount to be fixed by the court, (Tex. Prob. Code Ann. §§702, 703), and bond of guardian of estate of ward is in amount deemed sufficient to protect estate and its creditors, which is fixed by judge and which, except in certain situations where amount may be less, is amount equal to estimated value of personal property of estate, plus additional amount to cover revenue anticipated during succeeding 12 months period from interest, dividends, collections and rentals for use of real or personal property. Court may require more than one surety on bond over $50,000. Guardian may deposit cash or securities of his own in lieu of or to reduce amount of bond, and cash, securities or other personal assets of estate may be deposited, upon motion of court or guardian, in which case amount of bond is reduced proportionately. (Tex. Prob. Code Ann. §703). Upon qualification, letters of guardianship will be issued which expire in one year and four months, unless renewed. Letters will not be renewed except by court order unless and until guardian's annual account has been filed and approved. (Tex. Prob. Code Ann. §659).

Inventory.

Guardian must file, within 30 days after his qualification, verified inventory, appraisement and list of claims of estate, in which appraisal he is assisted, if court deems it necessary, by appraisers appointed by court. (Tex. Prob. Code Ann. §§727, 729-731).

Powers and Duties.

Guardian of person is entitled to charge and control of person of ward and care of his support and education, and his duties correspond with his rights. (Tex. Prob. Code Ann. §767). Guardian of estate is required to manage and conserve estate and perform all necessary duties incident thereto. (Tex. Prob. Code Ann. §768). Court may authorize guardian to make tax-motivated or charitable gifts in certain circumstances. (Tex. Prob. Code Ann. §§865, 866). Statutes also provide in detail as to duties in respect to and procedure concerning investing, managing and loaning money of ward. (Tex. Prob. Code Ann. §§855-864). Powers, duties and obligations of guardian of person entitled to governmental funds are not as broad as those of general guardian, and such guardian administers only funds received from governmental agency and earnings therefrom or property acquired therewith. (Tex. Prob. Code Ann. §782).

Securities in Name of Nominees.

Guardians may register personal property in name of nominee. (Tex. Prob. Code Ann. §398A).

Real Estate.

Statutes describe in detail guardian's duties concerning renting and leasing properties (Tex. Prob. Code Ann. §§839-852) and selling properties (Tex. Prob. Code Ann. §§811-837).

Liabilities of Guardian.

Guardian is subject to same liabilities as ordinary fiduciary. (Tex. Prob. Code Ann. §840).

Claims.

Statutes provide in detail for presentment, allowance and payment of claims against estate. (Tex. Prob. Code Ann. §§783-809).

Accounts.

Guardian of estate must file annual accounts (Tex. Prob. Code Ann. §741) and, at close of guardianship, must file final account, of which ward must have notice or have waived notice under Tex. Prob. Code Ann. §§407(2) or (5) (Tex. Prob. Code Ann. §§749, 751). Annual accounts may be waived by court if real estate income is negligible and estate owns no personal property or personal property income is negligible or fixed. (Tex. Prob. Code Ann. §741[g]).

Commissions.

Court may authorize compensation for guardian of person alone, not to exceed 5% of ward's gross income. Guardian of estate is entitled to 5% of gross income of estate and 5% of all money paid out on order by court that guardian has properly taken care of and managed estate. (Tex. Prob. Code Ann. §665). Guardian for a recipient of medical assistance entitled to compensation from the medical assistance program. (Tex. Prob. Code Ann. §670).

Termination of Guardianship.

Unless sooner discharged, guardian of minor serves until minor becomes 18 years of age, has his disabilities removed, dies or marries, and guardian of incapacitated person serves until ward is declared as provided by law to have been restored to full legal capacity, dies, or when spouse qualifies as community survivor; estate of ward is exhausted, income is negligible, assets have been placed in management trust, or court otherwise finds. Guardian appointed to receive money from state or federal government, serves until ward dies or necessity for guardianship ceases. (Tex. Prob. Code Ann. §745). Court must review annually each guardianship to determine whether guardianship should be continued, modified or terminated. (Tex. Prob. Code Ann. §672).

Insane Persons.

Provisions concerning guardians of incapacitated persons are applicable and are discussed in other subheads under this topic, along with provisions concerning guardians of other types of wards.

Nonresident guardian of nonresident ward may procure local letters of guardianship by filing, in county court of county where ward's estate is located, written application for appointment, and certified transcript of record showing his appointment and qualifications in state of their residence and filing oath and bond as provided for residents. Guardian so qualified shall be subject to all provisions of code applicable to domestic guardians. Domestic guardian of nonresident ward may qualify as though ward were resident. (Tex. Prob. Code Ann. §§881-882).

Gifts to Minors.

See topic 14.10 Infants.

Uniform Fiduciaries Act not adopted.

Uniform Simplification of Fiduciary Security Transfers Act repealed.

14.09 HUSBAND AND WIFE:

This relationship in law creates certain responsibilities, duties and privileges.

Disabilities of Married Women.

Married persons have full powers to make contracts (Tex. Fam. Code Ann. §1.104) and sue or be sued in their own name (Tex. Fam. Code Ann. §1.105).

Separate Property.

All property, both real and personal, owned or claimed by either of spouses before marriage and that acquired during marriage by gift, devise or descent and increase thereof are separate property of spouse so owning or acquiring same. (Tex. Const. art. XVI, §15; Tex. Fam. Code Ann. §3.001). Separate property of spouse is not subject to liabilities of other spouse unless both spouses are liable under law. (Tex. Fam. Code Ann. §3.202). Personal injury awards, except for loss of earnings, are separate property of injured spouse. (Tex. Fam. Code Ann. §3.001).

Rents, issues and profits arising out of separate or community property are community (Tex. Fam. Code Ann. §3.102), and this includes cash dividends from capital stock and interest on bonds.

Contracts.

This subject is governed by Tex. Const. art. XVI, §15; Tex. Fam. Code Ann. §§4.101-4.106.

Persons about to marry and spouses, without intention to defraud preexisting creditors, may by written instrument from time to time partition between themselves all or part of their property, then existing or to be acquired, or exchange between themselves community interest of one spouse or future spouse in any property for community interest of other spouse or future spouse in community property then existing or to be acquired. Portion or interest set aside to each spouse shall be and constitute part of separate property and estate of such spouse or future spouse. (Tex. Fam. Code Ann. §4.102). Spouses may from time to time, by written instrument, agree between themselves that income or property from all or part of separate property then owned by one of them, or which thereafter might be acquired, shall be separate property of that spouse. (Tex. Fam. Code Ann. §4.103).

At any time, spouses may agree between themselves that all or any part of their community property, then existing or to be acquired, becomes property of surviving spouse on death of spouse. (Tex. Prob. Code Ann. §451). Agreement between spouses creating right of survivorship in community property must be in writing and signed by both spouses. (Tex. Prob. Code Ann. §452).

Gifts Between Spouses.

If one spouse makes gift of property to other gift is presumed to include all income or property which might arise from that gift of property. (Tex. Const. art. XVI, §15, Tex. Fam. Code Ann. §3.005).

Actions.

Statute gives management and control of separate property to each spouse and of community property to spouse who would have owned it had both spouses been single. (Tex.

Fam. Code Ann. §3.102). Property in spouse's name presumed to be subject to his or her management and control. (Tex. Fam. Code Ann. §3.104).

Agency.

Either spouse may act as agent for other. Husband cannot be agent for wife in transactions involving homesteads. Homestead, whether separate property of husband or of wife or community property, cannot be disposed of except by joint conveyance by both husband and wife. (Tex. Fam. Code Ann. §5.001).

Conveyance or Encumbrance of Property.

Each spouse has sole management, control and disposition of his or her separate property, both real and personal, and may convey or encumber without joinder of the other. (Tex. Fam. Code Ann. §3.101). During marriage, each spouse has sole management, control and disposition of community property that spouse would own if single. (Tex. Fam. Code Ann. §3.102). Joint conveyance of husband and wife is required for homestead, whether community property or separate property of either spouse, but if either spouse is insane or has permanently abandoned other, latter may convey homestead if his or her separate property or community property. (Tex. Fam. Code Ann. §§5.001-5.108).

Antenuptial Contracts.

Uniform Premarital Agreement Act adopted. (Tex. Fam. Code Ann. §§4.001 et seq.).

Desertion and Nonsupport.

It is unlawful for person to intentionally or knowingly fail to provide support for his or her children under 18 who is in needy circumstances. Violation is state jail felony. (Tex. Penal Code Ann. §25.05).

Uniform Interstate Family Support Act (as amended) adopted. (Tex. Fam. Code Ann. §§159.001 et seq.).

Community Property.

All property acquired by either the husband or wife during marriage, except that heretofore defined as separate property, is the common or community property of the husband and wife. (Tex. Fam. Code Ann. §3.002). All property of husband and wife owned by them, during or on dissolution of marriage, is presumed to be community property unless contrary is satisfactorily proven. (Tex. Fam. Code Ann. §3.003). Community property is subject to tortious liability of either spouse incurred during marriage. (Tex. Fam. Code Ann. §3.202[d]). Community property subject to control of one spouse is not liable for any liabilities of other spouse incurred before marriage or for non-tortious liabilities of other spouse except where both are liable under law. (Tex. Fam. Code Ann. §3.202[b]). One spouse may claim reimbursement for economic contribution to marital estate of other spouse. (Tex. Fam. Code Ann. §3.401 et seq.).

Upon dissolution of marriage relation by intestate death, all property belonging to community estate of husband and wife goes to survivor, if: (1) There is no child or other descendant of deceased, or (2) all surviving children and descendants of deceased are also descendants of surviving spouse; but if there is child or other descendant of deceased, who is not also child or descendant of surviving spouse, then survivor is entitled to one-half of said property, and other half passes to such child or descendants. Community estate passes charged with debts against it. (Tex. Prob. Code Ann. §45). For administration of community property see category 13 Estates and Trusts, topic 13.09 Executors and Administrators.

14.10 INFANTS:

Age of majority, 18 both sexes. (Tex. Civ. Prac. & Rem. Code Ann. §129.001). Minimum age provisions of Alcoholic Beverage Code prevail to extent of any conflict. (Tex. Civ. Prac. & Rem. Code Ann. §129.003). For purposes of Family Code, "child" or "minor" means person under 18 who has never been married or has not had disabilities of minority removed. (Tex. Fam. Code Ann. §101.003).

Emancipation.

Minor resident of Texas who is self-supporting and managing his own affairs and is either 17 years of age or 16 years of age and living apart from his parents, managing conservator or guardian, may petition to have disabilities of minority removed, for limited or general purposes and such suit may be instituted in his own name rather than in name of next friend. (Tex. Fam. Code Ann. §31.001). Petition must state, in addition to certain requisite information, reasons why removal of disabilities would be in child's best interest and purposes for which removal is sought. Petition must be verified by parent or guardian. (Tex. Fam. Code Ann. §31.002). Proper venue is district court in county where petitioner resides. (Tex. Fam. Code Ann. §31.003). Court appoints attorney ad litem to represent interests of petitioner at hearing. (Tex. Fam. Code Ann. §31.004).

All persons are emancipated by marriage. (Tex. Fam. Code Ann. §1.104).

Disabilities.

Common law rules govern as to disabilities, and contracts, except for necessaries, are not binding.

Ratification of Contracts.

Minor, on termination of his disability, must disaffirm within reasonable time. (26 S.W. 263). If after his disability is removed, minor disposes of property purchased during period of minority, disposition is regarded as ratification. (59 Tex. 401).

Actions.

Infant having no legal guardian sues by next friend, who may compromise suit with approval of court. (Fed. R. Civ. P. 44). Where action brought against infant without guardian in state, or if infant is party represented by next friend or guardian who appears to have adverse interest, court appoints guardian ad litem. (Rule 173). Suits affecting parent-child relationship and other paternity matters treated in Tex. Fam. Code Ann. §101.001 et seq.

Adoption.

See topic 14.01 Adoption.

Support of Minor.

Parent has duty to support child, including providing child with clothing, food, shelter, medical care and education. (Tex. Fam. Code Ann. §151.001).

Parental Responsibility.

Parent or other person with duty of control and reasonable discipline of child is liable for property damage proximately caused by child's negligent conduct if reasonably attributable to negligent failure to exercise that duty or by willful and malicious conduct of child at least ten, but under 18 years of age. (Tex. Fam. Code Ann. §41.001). Recovery for willful and malicious conduct limited to actual damages not to exceed $25,000 per act plus court costs and attorneys' fees. (Tex. Fam. Code Ann. §41.002).

Authorization Agreement for Nonparent Relative

A parent or both parents of a child may enter into an authorization agreement with a grandparent, adult sibling or adult aunt or uncle of the child to authorize the relative to perform certain acts regarding health and automobile insurance coverage, school-related and employment-related activities, authorizing a child to obtain a learner's permit or driver's license and to apply for and receive public benefits on behalf of the child. (Tex. Fam. Code Ann. §34.001 et seq.).

Termination of Parental Rights.

Parent-child relationship can be terminated voluntarily by parent (Tex. Fam. Code Ann. §161.005) or involuntarily by courts (Tex. Fam. Code Ann. §161.001). Court will appoint suitable, competent adult or authorized agency to serve as managing conservator if parent-child relationship is terminated as to both parents or only living parent. (Tex. Fam. Code Ann. §161.207). Prospective adoptive parents may obtain from pregnant woman or parent statement to confer standing in order to commence adoption proceedings. (Tex. Fam. Code Ann. §102.0035).

Uniform Transfers to Minors Act adopted with modifications effective Sept. 1, 1995, and applicable retroactively to transfers under previous Gifts to Minors Act except to extent such application impairs constitutionally vested rights or extends duration of custodianships in existence as of Sept. 1, 1995. In general, custodianships under new Act terminate on earlier of minor attaining 21 years of age or minor's death (custodianships under previous Act terminate at 18). Permissible transfers are extremely broad. Act may be utilized by guardians, legal representatives and trustees. (Tex. Prop. Code Ann. §141.001 et seq.).

Uniform Securities Ownership by Minors Act not adopted.

14.11 MARRIAGE:

Person under 18 years may not marry without: (i) consent of parent or guardian or (ii) court order. Person under 16 years may not marry without court order. (Tex. Fam. Code Ann. §§2.102-2.103).

Medical Examination.

None.

License required; it is procured from any county clerk. License may not be issued for marriage of persons of same sex. (Tex. Fam. Code Ann. §§1.101, 1.102, 2.001). Both parties must appear before county clerk together or separately and submit proof of age and identity and, if required, documents establishing parental consent or that prior marriage has been dissolved. (Tex. Fam. Code Ann. §§2.002, 2.003). Any adult person may apply on behalf of absent applicant by affidavit. (Tex. Fam. Code Ann. §§2.006-2.007). Clerk may not issue license if either applicant fails to provide information described above (Tex. Fam. Code Ann. §2.009). Clerk may not refuse to issue a license on the grounds that the applicant admits to owing delinquent child support. (Tex. Fam. Code Ann. §2.009). License becomes invalid unless marriage has been conducted within 30 days after license issued. (Tex. Fam. Code Ann. §§2.201, 2.207).

Waiting Period.

Marriage may not take place during 72-hour period following issuance of license unless one applicant is on active duty in armed forces or performs work for Department of Defense, or waiver is obtained from qualified judge. Effective Sept. 1, 2008, additional exception to waiting period for completion of premarital education course (Tex. Fam. Code Ann. §§2.203, 2.204). Divorced person may not marry anyone other than former spouse until 31st day after divorce unless waived by court for good cause shown. (Tex. Fam. Code Ann. §§6.801, 6.802).

Ceremonial marriage may be performed by: licensed or ordained Christian minister or priest; Jewish rabbi; officer of religious organization authorized by organization to perform marriage ceremonies; justice of peace; judge of any court of record; retired judge or justice of the peace. Neither justice of peace nor judge of any court of record can discriminate on basis of race, religion, or national origin. (Tex. Fam. Code Ann. §§2.202, 2.205).

Reports of Marriages.

Clerk records all licenses issued. Person solemnizing rites of matrimony must endorse same on license and return it to county clerk within 30 days after celebration; return is recorded with license. (Tex. Fam. Code Ann. §2.206).

Record.

See category 10 Documents and Records, topic 10.04 Records, subhead Vital Statistics.

Common Law Marriages.

Informal marriages are recognized by statute given sufficient contacts with Texas. Person under 18 or person presently married to third party may not be party to informal marriage. (Tex. Fam. Code Ann. §§2.401-2.405).

Proxy Marriages.

Person unable to appear for marriage ceremony may assent by proxy. (Tex. Fam. Code Ann. §2.203[b]).

Marriages by Written Contract.

No statutory provision.

Prohibited Marriages.

Consanguinity.

Marriage is void if person marries ancestor or descendant (by blood or adoption), brother or sister (whole or half blood or by adoption), parent's brother or sister (whole or half blood), or son or daughter of brother or sister (whole or half blood or by adoption). Such marriages are void. (Tex. Fam. Code Ann. §6.201).

Bigamy.

Marriage is void if either party is married to another and that marriage has not been dissolved by legal action or terminated by death. Marriage that is void due to prior marriage of one party becomes valid when prior marriage is dissolved or terminated and subsequently parties live together as husband and wife and represent themselves as married. (Tex. Fam. Code Ann. §6.202).

Foreign Marriage.

Recognized unless contrary to policy of state.

Annulment.

Marriage of person over 16 years but under 18 years without consent of parents is voidable and subject to 90-day statute of limitations if action is brought by next friend, parent, judicially designated managing conservator, or guardian of the person (Tex. Fam. Code Ann. §6.102). Marriage voidable if petitioner was under influence of alcohol or narcotics and thus lacked capacity to consent, if either party was permanently impotent and petitioner lacked knowledge thereof, or in cases of fraud, duress or force, but in all such cases not if petitioner voluntarily cohabited after fact. (Tex. Fam. Code Ann. §§6.105-6.107). Incompetent party may annul if could not consent or understand nature of act and no voluntary cohabitation during competent period, and competent party may annul if other party could not consent, competent party neither knew nor should have known about incompetency, and competent party has not voluntarily cohabited since discovering incompetency. (Tex. Fam. Code Ann. §6.108). Marriage voidable if concealed divorce within 30 days, suit brought within one year and no voluntary cohabitation after discovery. (Tex. Fam. Code Ann. §6.109). Marriage voidable if performed during 72-hour waiting period if suit within 30 days after marriage. (Tex. Fam. Code Ann. §6.110). No marriage voidable after death of either party. (Tex. Fam. Code Ann. §6.111).

Antenuptial Contracts.

See topic 14.09 Husband and Wife.

14.12 MARRIED WOMEN:

See topics 14.09 Husband and Wife, Marriage; categories 5 Civil Actions and Procedure, topic Evidence, subhead Witnesses; Debtor and Creditor, topic Homesteads; Estates and Trusts, topics Executors and Administrators, Wills; Property, topic Dower.

14.12A PARENTAGE:

Adopted Uniform Parentage Act. (Tex. Fam. Code Ann. §160.001 et seq.).

16 INSURANCE

16.01 INSURANCE COMPANIES:

Regulated by Insurance Code of 1951, as amended. Effective April 1, 2009, the Insurance Code is substantively revised.

Formations and Regulation of Insurance Entities.

Insurance Code general incorporation and regulatory requirements for insurance entities are: companies other than life, accident and health (Tex. Ins. Code Ann. c. 822); life, accident and health insurance companies (Tex. Ins. Code Ann. c. 841); group hospital service corporations (Tex. Ins. Code Ann. c. 842); health maintenance organizations (Tex. Ins. Code Ann. c. 843); certification of certain nonprofit health corporations (Tex. Ins. Code Ann. c. 844); statewide rural health care systems (Tex. Ins. Code Ann. c. 845); multiple employer welfare arrangements (Tex. Ins. Code Ann. c. 846); general casualty companies (Tex. Ins. Code Ann. c. 861); statewide mutual assessment companies (Tex. Ins. Code Ann. c. 881); mutual life insurance companies (Tex. Ins. Code Ann. c. 882); mutual insurance companies other than mutual life insurance companies (Tex. Ins. Code Ann. c. 883); stimulated premium insurance companies (Tex. Ins. Code Ann. c. 884); fraternal benefit societies (Tex. Ins. Code Ann. c. 885); local mutual aid societies (Tex. Ins. Code Ann. c. 886); mutual assessment companies (Tex. Ins. Code Ann. c. 887); burial associations (Tex. Ins. Code Ann. c. 888); farm mutual insurance companies (Tex. Ins. Code Ann. c. 911); county mutual insurance companies (Tex. Ins. Code Ann. c. 912); Lloyd's Plan (Tex. Ins. Code Ann. c. 941); reciprocal and interinsurance exchanges (Tex. Ins. Code Ann. c. 942); nonprofit legal services corporations (Tex. Ins. Code Ann. c. 961); surplus lines insurance (Tex. Ins. Code Ann. c. 981); foreign and alien insurance companies (Tex. Ins. Code Ann. c. 982); redomestication of insurers and health maintenance organizations (Tex. Ins. Code Ann. c. 983); Mexican casualty insurance companies (Tex. Ins. Code Ann. c. 984).

Supervision.

Commissioner of Insurance supervises and controls all matters relating to insurance and insurance companies provided for in Code (Tex. Ins. Code Ann. §31.021), including title insurance and abstract corporations (Tex. Ins. Code Ann. §2501.001 et seq.). Any reference to State Department of Insurance means Commissioner of Insurance or Texas Department of Insurance, as consistent with respective powers and duties of Commissioner and Department. (Tex. Ins. Code Ann. §31.021). Mailing Address: P.O. Box 149104, Austin, Tex. 78714. Sale of insurance securities is regulated under The Securities Act. (Tex. Rev. Civ. Stat. Ann. art. 581-1 et seq.).

Holding Companies.

Insurance holding company systems, including holding companies and affiliations, are regulated by Tex. Ins. Code Ann. c. 823. Books and records must be in control of person domiciled, licensed or admitted to transact business in jurisdiction in U.S. (Tex. Ins. Code Ann. §803.005). Acquisition of control of domestic insurer must be approved by Commissioner. (Tex. Ins. Code Ann. §823.154).

Rates.

Tex. Ins. Code Ann. §5.01 et seq.

Annual Statements.

Times for filing annual statements vary, but all foreign and domestic life, accident, health, life and accident, life and health, health and accident, or life, health and accident insurers, including variable life, credit life, and credit accident and health for profit or mutual benefit must file sworn report covering business transacted during calendar year ending preceding Dec. 31 (Tex. Ins. Code Ann. §§841.255, 982.004), and pay tax on such business to State Treasurer by either Mar. 1, date annual statement is required to be filed with Commissioner, or another date prescribed by Comptroller. (Tex. Ins. Code Ann. §222.004). Times for filing annual statements by companies writing other types of insurance also vary, but all such companies must by Mar. 1 pay tax on business transacted during calendar year ending on preceding Dec. 31. (Tex. Ins. Code Ann. §§222.001-.004). Semiannual prepayments of premium tax required of all insurers with net tax liability for previous calendar year in excess of $1,000. (Tex. Ins. Code Ann. §§221.003, 222.004).

Policies.

Tex. Ins. Code Ann. §§3.42, 5.01-.101.

Discrimination and Unfair Practices.

Discrimination in rates and premiums prohibited. (Tex. Ins. Code Ann. §§1806.053, 1806.105, 1806.153, 21.21). Unfair competition and unfair practices in business of insurance are defined and prohibited; Commissioner is empowered to promulgate and enforce rules to accomplish this purpose; persons injured by any practice declared unlawful by Insurance Code or Commissioner may sue for damages, injunction and attorneys' fees. (Tex. Ins. Code Ann. §21.21). Misrepresentation of policy terms prohibited (Tex. Ins. Code Ann. §21.21A); unfair claim settlement practices, as defined, prohibited (Tex. Ins. Code Ann. §21.21-2). Party injured by prohibited practices may sue for damages and attorneys' fees.

Rebates.

No general prohibition against rebates. Rebates must, however, conform to those specified in policy or contract of insurance. (Tex. Ins. Code Ann. §§1806.053, 1806.104, 1806.153, 21.21, 21.21A).

Fire Insurance.

Regulatory powers are given to State Board of Insurance and Commissioner of

Insurance. Companies must file rates and rating plans, policy forms and endorsements for approval. (Tex. Ins. Code Ann. §5.25 et seq.).

Medical Liability Insurance.

All liability insurers (excluding farm and county mutual insurance companies) are required to be members of state underwriting association. Association authorized to issue policies of medical insurance affording coverage not to exceed $1,000,000 per occurrence, or $3,000,000 in aggregate, per annum, for any individual or organization. Rates subject to approval by State Board of Insurance. (Tex. Ins. Code Ann. §§2203.005, 2203.151-.152).

Prepaid Legal Services.

Nonprofit, nonmembership corporations may be created to offer legal services through contracting attorneys. (Tex. Ins. Code Ann. §961.051). Such corporations are subject to direct supervision of State Department of Insurance, and must agree to contract with any attorney licensed in Texas. (Tex. Ins. Code Ann. §961.304). Contracting attorneys must maintain such professional liability and errors and omissions insurance as nonprofit legal services corporation may require. (Tex. Ins. Code Ann. §961.305).

Title Insurance.

Extensively regulated by Tex. Ins. Code Ann. §2501.001 et seq.

Investments of insurance companies are regulated. See appropriate chapters of Insurance Code covering different forms of insurance.

Agents and brokers of any kind of insurance must procure licenses from State Department of Insurance. (Tex. Ins. Code Ann. c. 4001). Agents shall take qualification exam and continuing education. (Tex. Ins. Code Ann. chs. 4002, 4004). Specific requirements of certain types of insurance are: life, accident and health insurance agents (Tex. Ins. Code Ann. c. 4054); property and casualty agents (Tex. Ins. Code Ann. c. 4051); nonresident agent (Tex. Ins. Code Ann. c. 4056); adjuster (Tex. Ins. Code Ann. c. 4104); surplus lines agent (Tex. Ins. Code Ann. c. 225). Corporations and partnerships meeting statutory requirements may obtain licenses to act as agents (Tex. Ins. Code Ann. §4001.106).

Process Agent.

Rules regarding process agents and service of process on insurance companies are set out in Tex. Ins. Code Ann. c. 804.

Foreign and Alien Insurance Companies.

Foreign insurance company may not engage in business of insurance as life insurance company, accident insurance company, life and accident insurance company, health and accident insurance company, or life, health, and accident insurance company in this state, except for lending of money, without first obtaining certificate of authority. (Tex. Ins. Code Ann. §982.051). Foreign or alien insurance company, other than life insurance company, accident insurance company, life and accident insurance company, or life, health, and accident insurance company, may not engage in business of insuring others against losses without first obtaining certificate of authority. (Tex. Ins. Code Ann. §982.052).

Insurance transactions entered into by Texas residents with unauthorized insurers through surplus lines agents are regulated by statute. (Tex. Ins. Code Ann. §101.001).

Retaliatory Tax.

Whenever laws of any other state impose more stringent taxes, fees, obligations or restrictions upon Texas company doing business in such state than those imposed by Texas directly upon similar company of other state doing business in this state, with certain exceptions, State Board of Insurance must impose upon any such similar company same taxes, obligations or restrictions as are imposed upon Texas company. (Tex. Ins. Code Ann. §§281.0001-.007). Whenever applicable regulatory agency of any other state imposes any sanctions, fines, or requirements upon Texas company doing business in such state because of failure of Texas Department of Insurance to obtain or maintain certification or membership or comply with directives of National Association of Insurance Commissioners, Texas Department of Insurance must impose upon insurance companies of such state same sanctions, fines or requirements as are imposed upon Texas company. (Tex. Ins. Code Ann. §§281.051-.052).

Gross premium tax is levied on each insurance company transacting life, accident, health, life and accident, life and health, health and accident, or life, health and accident insurance, including variable life, credit life and credit accident and health insurance for profit or for mutual benefit (except local mutual aid associations, fraternal benefit societies, or fraternal insurance associations or societies that limit their membership to one occupation), upon amount of gross premium receipts received on policies covering persons located in Texas. (Tex. Ins. Code Ann. §§222.001, 222.002). Specifically exempt are premiums collected from other companies for re-insurance, and premiums collected on group policies for municipal and county employees. (Tex. Ins. Code Ann. §222.002). For such insurance companies transacting business in this state, annual rate of tax is 1.75% of taxable gross premiums, except that first $450,000 of life insurance premiums are taxed at rate of 0.875%. For health maintenance organizations, annual rate of tax is 1.75% of taxable gross revenues received for issuance of health maintenance certificates of contracts, except that first $450,000 of revenues are taxed at rate of 0.875%. (Tex. Ins. Code Ann. §222.002). Semi-annual prepayments of premium tax are required. (Tex. Ins. Code Ann. §222.004).

Gross premium tax is also levied on each insurance company (whether organized in Texas or elsewhere) receiving premiums from any kind of insurance written on property or risks located in this state, including fire, marine, marine inland, accident, credit, livestock, fidelity, guaranty, surety, casualty, workmen's compensation, employers' liability insurance, and crop insurance written by farm mutual insurance company. Each such carrier pays annual tax of 1.6% of its premium receipts. Specifically exempt are premiums received from other companies for re-insurance, and premium receipts received from business of title, life, personal accident, life and accident, and health and accident insurance for profit, written by life insurance company, life and accident company, health and accident company, or for mutual benefit or protection in this state. (Tex. Ins. Code Ann. §221.002).

Premium tax on surplus lines insurance is 4.85% of gross premium. (Tex. Ins. Code Ann. §225.004). Tax rate on reciprocal exchanges (as defined by statute) is equal to 1.7% of gross premiums, however insurer has option to elect tax rate imposed under Tex. Ins. Code Ann. art. 4.10. (Tex. Ins. Code Ann. c. 224).

Privilege Tax.

Companies insuring against natural disasters such as fire, lightning, tornado, windstorm and hail must pay maintenance tax of up to 1.25% of gross premiums received from Texas business. (Tex. Ins. Code Ann. c. 252). Companies writing worker's compensation insurance must pay maintenance taxes of up to 0.6% gross premium for Commissioner of Insurance (Tex. Ins. Code Ann. c. 255); those writing motor vehicle insurance up to 0.2% of gross premiums received (Tex. Ins. Code Ann. c. 254).

Liens.

No statutory provision giving insurer lien on policy.

Uniform Insurers Liquidation Act not adopted.

No-Fault Insurance.

See category 23 Transportation, topic 23.01 Motor Vehicles, subhead No-Fault Insurance.

Plain Language.

See category 3 Business Regulation and Commerce, topic 3.12 Consumer Protection.

16.02 SURETY AND GUARANTY COMPANIES:

Organization and regulation are governed by Tex. Ins. Code Ann. c. 822.

Foreign Companies.

Foreign exchange writing surety bonds must file evidence that it has $100,000 on deposit with comptroller. (Tex. Ins. Code Ann. §942.156). Foreign surety and guaranty companies are permitted to do business on same basis as domestic companies. (Tex. Ins. Code Ann. §982.051).

Taxation.

Surety and guaranty companies that pay or are required to pay annual tax on gross receipts are exempt from franchise taxes. (Tax C. §171.052).

17 INTELLECTUAL PROPERTY

17.01 TRADEMARKS AND TRADENAMES:

Trademarks and Service Marks.

Model State Trademark Act adopted with modifications. (Tex. Bus. & Com. Code Ann. §16.01 et seq.). Any person who uses mark in Texas in connection with person's goods or services may apply for registration. (Tex. Bus. & Com. Code Ann. §16.08).

What May Be Used.

Any mark in actual use may be registered unless it: (1) includes matter which is immoral, deceptive, or scandalous; (2) may disparage, or falsely suggest connection with, or bring into contempt or disrepute person, institution, belief, or national symbol; (3) depicts or simulates flag, coat of arms, or other insignia of U.S., state, municipality, or foreign nation; (4) is or includes name, signature, or portrait of living individual who has not consented in writing to its registration; (5) is merely descriptive or deceptively misdescriptive of applicant's goods or services; (6) is primarily geographically descriptive or deceptively misdescriptive; (7) is primarily merely surname; or (8) is likely to cause confusion or mistake, or to deceive, because, when applied to applicant's goods or services, it resembles another person's unabandoned mark registered in this state. (Tex. Bus. & Com. Code Ann. §16.08).

Registration.

Application is filed with Secretary of State on form prescribed by that office. Filing fee is $50. Examination is substantive. (Tex. Bus. & Com. Code Ann. §16.10).

Assignment.

Mark and its registration are assignable with goodwill of business in which mark is used or with that part of goodwill connected with use of and symbolized by mark. (Tex. Bus. & Com.

Code Ann. §16.17). Assignments must be in writing. Assignments may be recorded with Secretary of State. Fee is $10. Assignment of mark registered in Texas is void against purchaser who purchases mark for value after assignment is made and without notice of it unless assignment is recorded by Secretary of State within three months after date of assignment or before mark is purchased. (Tex. Bus. & Com. Code Ann. §16.18).

Protection Afforded.

Registration of mark is constructive notice of registrant's claim of ownership of mark. (Tex. Bus. & Com. Code Ann. §16.15).

Infringement.

Registration entitles registrant to statutory damages and injunction for infringement of registered mark. Damages are recoverable for all infringements occurring: (1) From and after date two years before suit was filed and (2) only during time infringer had actual knowledge of registrant's mark. (Tex. Bus. & Com. Code Ann. §16.26).

Anti-dilution.

Regardless of whether mark is registered, and regardless of whether there is competition between parties or confusion as to source of goods or services, owner of mark may seek injunction of act likely to dilute distinctive quality of mark. (Tex. Bus. & Com. Code Ann. §16.29).

Olympic Symbols.

Olympic symbols such as five interlocking rings, United States Olympic Committee escutcheon emblem, mark, name, sign, symbol or insignia falsely representing association with or authorization by International or United States Olympic Committees, or words “Olympic”, “Olympiad”, or “Citius Altius Fortius” may not be used without permission of United States Olympic Committee. (Tex. Bus. & Com. Code Ann. §16.30).

Tradenames.

Persons, including individuals, partnerships, corporations, and other legal entities, doing business under assumed name must file one or more acknowledged certificates providing information such as name under which business is conducted, names and addresses of persons conducting it, period (up to ten years) during which name will be used, and other information about person or persons. (Tex. Bus. & Com. Code Ann. §36.10 — **repealed** effective April 1, 2009). Additional information is required for incorporated entities. (Tex. Bus. & Com. Code Ann. §36.11 — **repealed** effective April 1, 2009). Certificates are filed with county clerks, and, in case of incorporated entities, in office of Texas Secretary of State. (Tex. Bus. & Com. Code Ann. §§36.10 & 36.11 — **repealed** effective April 1, 2009). Such certificates are effective for period not to exceed ten years from date of filing, after which period certificate becomes void unless certificate renewing said certificate for additional period has been filed. (Tex. Bus. & Com. Code Ann. §36.13 — **repealed** effective April 1, 2009). New certificate should be filed within 60 days of any event which causes information in existing certificate to become materially misleading. (Tex. Bus. & Com. Code Ann. §36.12 — **repealed** effective April 1, 2009). Intentional violation of assumed name statute is Class misdemeanor. (Tex. Bus. & Com. Code Ann. §36.26). Fees for filing with county clerk: $2 for each certificate or statement, plus 50¢ for each name to be indexed. Fees for filing with Secretary of State: $25 for each certificate or statement, $10 for filing each abandonment of use of assumed name. (Tex. Bus. & Com. Code Ann. §36.15 — **repealed** effective April 1, 2009).

17.02 TRADE SECRETS:

Theft of Trade Secrets.

Person commits third-degree felony offense if he knowingly steals trade secret, makes copy of trade secret, or communicates or transmits trade secret without owner's effective consent. Trade secret is defined as whole or any part of any scientific or technical information, design, process, procedure, formula, or improvement that has value and that owner has taken measures to prevent from becoming available to persons other than those selected by owner to have access for limited purposes. (Tex. Penal Code Ann. §31.05).

18 LEGAL PROFESSION

18.01 ATTORNEYS AND COUNSELORS:

All attorneys must be members of integrated State Bar. Annual fee for membership varies, based on years licensed and residence. No fee of any kind for members older than 70. Board of Law Examiners passes on eligibility and examines candidates for admission under rules prescribed by Supreme Court. (Tex. Gov't Code Ann. §§81.051-81.102).

Exclusive Jurisdiction over Admissions.

The Supreme Court of Texas is vested with power to admit applicants and candidates. (Tex. Gov't Code Ann. §81.061).

Eligibility.

Persons may be admitted to practice if they are U.S. citizens or legal resident aliens, 18 years of age, of good moral character, and if they have met educational requirements and satisfactorily passed examinations before Board of Law Examiners. (Tex. Rules Governing Admission to the State Bar, Rule II). All are subject, however, to certain conditions and requirements hereinafter described.

Registration as Law Student.

Declaration of Intention to Study Law must be filed with Board of Law Examiners by every person beginning law study in approved law school in Texas for first time and who intends to apply for admission to Texas bar not later than Dec. 1 for fall entrants, May 1 for regular spring entrants, June 1 for spring entrants at quarter-hour law schools, and Sept. 15 for summer entrants, showing person's intention to study law on form prescribed by Board of Law Examiners, with proof that he has prerequisite educational and moral qualifications for study of law. (Tex. Gov't Code Ann. §82.023). This provision does not apply to attorneys from other jurisdictions nor to graduates of law schools outside of this state approved by American Bar Association, who do not have their permanent homes in Texas; special rules are applicable, which may be obtained from Board of Law Examiners. See subhead Examinations, infra. Board of Law Examiners must receive declaration by preceding June 1 if applicant taking Feb. examination, or by preceding Nov. 1 if applicant taking July examination. (Tex. Gov't Code Ann. §82.023).

Educational Requirement.

Qualification as candidate for bar examination requires satisfaction of all requirements for graduation from approved law school except for not more than four semester hours or its equivalent in quarter hours; provided person will not be licensed until all requirements for graduation have been met. (Tex. Gov't Code Ann. §82.022).

Application to Take Bar Examination.

Any person desiring to take examination must file with Board of Law Examiners application on form prescribed by Board not later than 180th day before first day of exam applicant is taking. Proof must be made of educational qualification, moral character, age and other qualifications required by Rules. (Tex. Gov't Code Ann. §82.027). Applicants who have filed

Declaration of Intention to Study Law shall be required to complete application with information relating only to period since filing of Declaration. (Tex. Rules Governing Admission to the State Bar, Rule IX).

Examinations.

Held twice per year beginning on Tues. before last Wed. of Feb. and July in such places as Board of Examiners may direct. (Tex. Rules Governing Admission to the State Bar, Rule XI). Information may be obtained from State Board of Law Examiners, P. O. Box 13486, Austin, Texas 78711-3486.

Texas Bar Examination lasts two and one-half days and consists of Multi-State Performance Test, Procedure and Evidence Exam, Multi-State Bar Exam, and Texas Essay Questions. Passing score is 675 scaled points out of 1,000. (Tex. Rules Governing Admission to the State Bar, Rule XI). Texas law students pay $300 in application and other fees. Out-of-state law students pay $415 in application and other fees. Attorneys licensed in another state pay $1,040 in application and other fees. Attorneys qualified for admission without examination pay $890 in application and other fees. Foreign nation attorneys pay $1,140 in application and other fees. Foreign legal consultants pay $990 in application and other fees. (Tex. Rules Governing Admission to the State Bar, Rule XVIII). (Tex. Gov't Code Ann. §82.027).

In addition, applicant must pass Multistate Professional Responsibility Examination (MPRE) with scaled score of 85. (Tex. Rules Governing Admission to the State Bar, Rule V). Information may be obtained from National Conference of Bar Examiners, MPRE Application Dept., P.O. Box 4001, Iowa City, Iowa 52243.

Clerkship.

No requirement.

Attorneys From Other Jurisdictions.

Attorneys licensed to practice in another state shall be eligible to be licensed in Texas after taking and passing Texas Bar Examination if: (1) Applicant has J.D. degree from approved law school and has been actively engaged in practice of law in any state as his principle occupation for at least three of past five years immediately preceding application; or applicant has J.D. degree from unapproved law school and has been actively engaged in practice of law in any state as his principal occupation for at least five of last seven years immediately preceding application; (2) applicant furnishes Board of Law Examiners evidence as to moral character; and (3) applicant is U.S. citizen or lawful resident alien at time of licensing.

Attorney may be licensed without examination if attorney has: (1) J.D. from approved law school; (2) applicant is U.S. citizen or lawful resident alien at time of licensing; (3) failed neither last Texas Bar Examination taken in Texas nor last Short Form Examination taken in Texas; (4) furnished Board of Law Examiners evidence as to moral character; and (5) been actively and substantially engaged in lawful practice of law as principal occupation for at least five of seven years immediately preceding filing of application and payment of fee of $890.

Any attorney shall be eligible for license after taking and passing short form bar examination if: (1) Applicant is U.S. citizen or lawful resident alien at time of licensing; (2) applicant furnished to Board of Law Examiners evidence as to moral character; (3) applicant has not failed last Texas Bar Examination taken nor last bar examination taken in any other state, nor last Short Form Examination taken in any state; and (4) applicant has J.D. from approved law school and actively engaged in law practice for three of five years preceding application or has J.D. from unapproved law school and actively practiced five of seven years immediately preceding application. (Tex. Rules Governing Admission to the State Bar, Rules XIII and XVIII).

Admission Pro Hac Vice.

Reputable nonresident attorney may file motion with court for permission to participate in case in Texas without being licensed to practice in Texas. Information needed for motion found in Tex. Rules Governing Admission to the State Bar, Rule XIX. Motion must be accompanied by motion of resident attorney recommending that court grant permission. Local rules of court may vary admission requirements.

Licenses.

Clerk of Supreme Court issues attorney's license, which license belongs to Texas Supreme Court and shall be surrendered upon proper demand. (Tex. Rules Governing Admission to the State Bar, Rule XVII). Mandatory continuing legal education is required annually for licensees.

Privileges.

No special provisions.

Disabilities.

No special provisions.

Liabilities.

See category 5 Civil Actions and Procedure, topic 5.07 Costs.

Compensation.

Governed generally by Tex. R. Disciplinary Proc. 1.04. No contingent fee in criminal cases. No rule requiring filing of contingent fee agreement in civil cases. In certain instances in which court may award attorneys fees, court may take judicial notice of usual and customary fee for matter. (Tex. Civ. Prac. & Rem. Code Ann. §38.004).

Lien.

Attorney has no statutory lien for his services, but is entitled to common law lien on his client's papers, and on money collected, to secure his fee subject to prejudicial conduct exceptions. (664 S.W.2d 191; 693 S.W.2d 724).

Attorney Ethics.

Texas Disciplinary Rules of Professional Conduct (Tex. Gov't Code Ann. tit. 2, Subt. G, App. A) are based on ABA Model Rules of Professional Conduct, with numerous and extensive modifications.

Disbarment or Suspension.

Upon cause attorney may be disbarred or his license suspended. District courts have jurisdiction to disbar or suspend attorneys. (Tex. Gov't Code Ann. §82.062). Grievance Committee of each congressional district has power to hear complaints, and to disbar or suspend if accused party consents thereto. (Tex. Gov't Code Ann. §§81.077-81.078).

Unauthorized Practice of Law.

All persons not members of state bar are prohibited from practicing law in this state. Supreme Court may promulgate rules of procedure for limited practice of law by attorneys licensed in another state, law students, and unlicensed graduate students attending or having attended approved law school. (Tex. Gov't Code Ann. §§81.101-.106).

Specialty Certification Requirements.

Program administered by Texas Board of Legal Specialization under authority of Texas Supreme Court. Areas of specialty include Administrative Law, Bankruptcy (business and consumer), Civil Appellate Law, Civil Trial Law, Commercial Law, Consumer Law, Criminal Law, Estate Planning and Probate Law, Family Law, Health Law, Immigration, Juvenile Law, Labor and Employment Law, Nationality, Worker's Compensation Law, Oil, Gas and Mineral Law, Personal Injury Trial Law and Tax, Real Estate (residential, commercial, and farm and ranch). Although some requirements vary between specialties, requirements generally include: (1) Member in good standing of State Bar of Texas, (2) currently maintain office within state, (3) in actual, full-time practice of law for at least five years following admission to bar of any state, (4) substantial involvement and special competence in specialty during three years preceding application—this includes showing that anywhere from 25% to 50% of time during at least three years (five of seven years for tax, two years for labor) preceding application was devoted to specified areas within specialty, (5) educational experience within three years preceding application, (6) passing written examination and possibly oral examination, and (7) payment of fees. Application procedure is similar in other requirements for references, proof of character, etc., to initial application for membership in bar. Recertification required every five years. Recertification contingent upon: (1) Satisfactory showing of continuing involvement in specialty during prior certification period, (2) continuing education in specialty during prior certification period, and (3) payment of fees. Information may be obtained from Tex. Bd. of Legal Specialization, P.O. Box 12487, Austin, Tx. 78711.

Professional Associations.

See category 2 Business Organizations, topics 2.02 Associations, subhead Professional Associations, and 2.03 Corporations, subhead Professional Corporations.

Occupational Tax.

Annual occupational tax of $200 is imposed on all licensed, practicing attorneys. (Tex. Tax Code Ann. §191.142). Attorneys over 70 or those who are inactive under State Bar Rules are exempted. (Tex. Tax Code Ann. §191.144).

19 MINERAL, WATER AND FISHING RIGHTS

19.01 MINES AND MINERALS:

Operation of Mines.

Tex. Nat. Res. Code Ann. c. 53 governs mining generally on both State and private lands. Tex. Nat. Res. Code Ann. c. 133 empowers Texas Railroad Commission to oversee and regulate aggregate and pit quarry operations. Tex. Nat. Res. Code Ann. c. 134 regulates surface coal mining and reclamation under rules of Texas Railroad Commission.

Safeguarding of Employees.

Tex. Nat. Res. Code Ann. chs. 133 and 134 contain limited provisions for mine employee safety. Tex. Lab. Code Ann. §411.103 requires that all employers maintain reasonably safe employment and place of employment.

Inspection of Mines.

See subhead Operation of Mines, supra.

Oil and Gas.

Texas has extensively developed common and statutory law on many oil and gas issues. Texas Railroad Commission has general authority to regulate industry at all stages including: exploration, production, conservation, transportation, storage and property management during and after exploration and production phases. Railroad Commission also enforces environmental laws and regulations pertaining to industry. See generally, Tex. Nat. Res. Code Ann. chs. 81 and 85-89, 91, 92, 101-103 and 111. Commission has authority to compel pooling on application of interested owner of working interest or unleased non-royalty interest. (Tex. Nat. Res. Code Ann. §102.011).

Surface Mining.

Tex. Nat. Res. Code Ann. c. 134 governs surface coal mining and reclamation. Tex. Nat. Res. Code Ann. c. 133 governs pit extraction of aggregates and quarries. Tex. Nat. Res. Code Ann. c. 131 governs uranium surface mining. Railroad Commission oversees and regulates surface mining.

Taxes.

Mines, quarries, improvements thereon, and minerals in situ are real property subject to ad valorem taxation. (Tex. Tax Code Ann. §1.04). Ownership interests attached to minerals in situ are taxable real property. (Tex. Tax. Code Ann. §25.12). Oil, gas and minerals cease to be taxable real property upon extraction. Severance Tax is imposed on extracted gas, oil and sulphur. (Tex. Tax Code Ann. chs. 201-202). Additional taxes and fees are imposed on oil and gas production (Tex. Tax Code Ann. chs. §201.001 et seq.), for various operations and for hazardous waste generation (NRC c. 91). Fee is imposed on first sale of odorized liquefied petroleum gas. (Tex. Nat. Res. Code Ann. §113.244). Occupation tax imposed on persons providing oil or gas well services for hire. (Tex. Tax. Code Ann. §191.082).

See also category 21 Property, topic 21.01 Absentees.

20 MORTGAGES

20.01 CHATTEL MORTGAGES:

Uniform Commercial Code enacted. (Tex. Bus. & Com. Code Ann. §1.101 et seq.). See category 3 Business Regulation and Commerce, topic 3.09 Commercial Code.

What May Be Mortgaged.

See category 3 Business Regulation and Commerce, topic 3.09 Commercial Code.

After Acquired Property.

See category 3 Business Regulation and Commerce, topic 3.09 Commercial Code.

Future Advances.

See category 3 Business Regulation and Commerce, topic 3.09 Commercial Code.

Form of Obligation.

See category 3 Business Regulation and Commerce, topic 3.09 Commercial Code.

Filing.

See category 3 Business Regulation and Commerce, topic 3.09 Commercial Code.

Refiling or Extension.

See category 3 Business Regulation and Commerce, topic 3.09 Commercial Code.

Removal of Property by Mortgagor.

See category 3 Business Regulation and Commerce, topic 3.09 Commercial Code.

Sale or Disposal of Property by Mortgagor.

See category 3 Business Regulation and Commerce, topic 3.09 Commercial Code.

Sales by Mortgagee.

See category 3 Business Regulation and Commerce, topic 3.09 Commercial Code.

Foreclosure by Court Proceedings.

See category 3 Business Regulation and Commerce, topic 3.09 Commercial Code.

Redemption.

See category 3 Business Regulation and Commerce, topic 3.09 Commercial Code.

Assignments.

See category 3 Business Regulation and Commerce, topic 3.09 Commercial Code.

Satisfaction.

See category 3 Business Regulation and Commerce, topic 3.09 Commercial Code.

Foreign Mortgage.

See category 3 Business Regulation and Commerce, topic 3.09 Commercial Code.

Motor Vehicles.

See category 3 Business Regulation and Commerce, topic 3.09 Commercial Code, also category 23 Transportation, topic Motor Vehicles.

Forms.

See end of this Digest.

20.02 COLLATERAL SECURITY:

See category 3 Business Regulation and Commerce, topic 3.09 Commercial Code.

20.03 MORTGAGES OF PERSONAL PROPERTY:

See topic 20.01 Chattel Mortgages and category 3 Business Regulation and Commerce, topic 3.09 Commercial Code.

20.04 MORTGAGES OF REAL PROPERTY:

Mortgages of real property are valid and enforceable in Texas. Mortgagor retains title and mortgagee obtains lien.

Execution.

Mortgages and deeds of trust on land are required to be executed and acknowledged or attested in the same manner as deeds.

Recording.

Mortgages and deeds of trust must, as against creditors and subsequent bona fide purchasers for value, be acknowledged, sworn to or proven and filed for record with county clerk of county in which land, or part thereof, is situated. Unrecorded mortgages and deeds of trust are binding upon parties, each party's heirs, and subsequent purchaser who does not give value or who has notice. (Tex. Prop. Code Ann. §13.001).

Recording Fee.

Fee for recording is $5 for first page, plus $4 for each additional page, plus $4 for all or part of each 8½ x 14 attachment or rider plus 25¢ for each name which is indexed over five. (Tex. Loc. Gov't Code Ann. §118.011). County clerk may charge, in lieu of above, 20¢ per 100 words for each page having more than 500 words if clerk manually registers or records instrument. (Tex. Loc. Gov't Code Ann. §118.013[b]). Master form of mortgage may be recorded without being acknowledged or proved, and may be incorporated by reference in any subsequent instrument. (Tex. Prop. Code Ann. §12.009).

Taxes.

Mortgages are expressly exempted from taxation by Texas Constitution. (Tex. Const. art. VIII, §2).

Trust Deeds.

In practice, mortgages have been virtually superseded by deeds of trust. Under deed of trust, title does not pass to trustee.

Future Advances.

Mortgage may cover indebtedness to arise in future. (15 S.W.2d 68).

Priorities.

Recorded mortgage or deed of trust has priority over all subsequent conveyances and encumbrances (15 S.W.2d 155), with certain exceptions with respect to mechanics' liens, tax liens, security for future advances and in after-acquired collateral. Mechanics liens and tax liens may relate back to date before filing for priority purposes.

Subordination Agreements.

Agreement between mortgagor and mortgagee purporting to subordinate lien of mortgagee to that of subsequent lienor is valid and enforceable. (292 S.W.2d 636).

Assignment.

The assignment of the note or other evidence of debt carries with it the lien. Such assignments may be recorded, if properly acknowledged or proven. (Tex. Prop. Code Ann. §12.017). Mortgage or deed of trust and note are construed together. (951 S.W.2d 901).

Release.

Mortgagor is entitled to release of mortgage upon payment of debt. (27 Tex. 134). Part of mortgaged property may be released from lien of mortgage. Mortgage or deed of trust may incorporate clause providing for such partial release on agreed terms and such clause runs with land. (99 S.W.2d 276). If mortgagee or holder of deed of trust fails to execute and deliver release of lien on property consisting of one to four family residence (including residential unit in condominium regime) within 60 days of date of receipt of payment of mortgage or deed or trust by mortgagee or deed of trust holder in accordance with payoff statement furnished by mortgagee or trust deed holder or its servicing agent, then borrower can require authorized officer of title company to execute affidavit stating that debt secured by mortgage or deed of trust has been paid in full and other information required by statute. Affidavit executed and recorded as provided by Tex. Prop. Code Ann. §12.017 operates as release of mortgage or deed of trust described in affidavit. Person who knowingly causes affidavit with false information to be executed and recorded is liable for certain penalties. (Tex. Prop. Code Ann. §12.017[i]).

Satisfaction.

See subhead Discharge, infra.

Discharge.

Lien of mortgage is extinguished or discharged by tender of amount of mortgage debt (288 S.W. 477) or by satisfaction of note evidencing debt secured by mortgage (53 S.W.2d 644).

Foreclosure is by ordinary suit upon debt and for foreclosure. Deeds of trust usually contain power of sale, and foreclosure may be had either under the power therein contained or through court action. Notwithstanding any agreement to contrary, holder of debt (or mortgage servicer) must serve debtor in default under deed of trust or other contract lien on real property used as debtor's residence with written notice by certified mail stating that debtor is in default and must give debtor at least 20 days to cure default before debt is accelerated and notice of sale can be given. Entire calendar day on which such 20 day notice is given, regardless of time of day given, is included in computing 20 day notice period, and entire calendar day on which notice of sale is given is excluded in computing said 20 day notice period. (Tex. Prop. Code Ann. §51.002).

Limitations.

Person must bring suit to recover or foreclose real property lien not later than four years after accrual of cause of action; but where series of installment notes or note payable in installments is given, time does not begin to run until maturity of last note or installment. (Tex. Civ. Prac. & Rem. Code Ann. §16.035). Agreement by debtor to suspend statute of limitations must be signed, acknowledged, and recorded in like manner as deeds are executed and recorded. (Tex. Civ. Prac. & Rem. Code Ann. §16.036[b]).

Sales.

Sales of real property under powers conferred by deeds of trust or contracts must be made in strict compliance with terms therein set out and must be made at public venue, at county courthouse in county in which land, or any part thereof, is situated or another location designated by commissioners court, between hours of 10 A.M. and 4 P. M., on first Tues. of month, after posting notice of sale at courthouse door where property is located and by filing copy of such notice in office of clerk of county in which sale to be made at least 21 days preceding date of sale, said notice to set out time and place of such sale as provided for in case of judicial sales, or as provided for in deed of trust or contract lien. Notice of sale must include statement of earliest time at which sale will begin and sale must begin at such times or not later than three hours thereafter. Sale must occur in area at courthouse designated by commissioners court. Delays in posting permitted if courthouse or clerk's office closed because of Acts of God or inclement weather (Tex. Prop. Code Ann. §51.002).

In addition written notice must be given at least 21 days prior to sale to each debtor obligated to pay debt. Such notice must be sent certified mail. Affidavit as to such service of notice shall be prima facie evidence of fact of such service. (Tex. Prop. Code Ann. §51.002). Entire calendar day on which notice of sale is given, regardless of time of day given, is included in computing 21 day notice period and entire day of foreclosure sale is excluded.

Deficiency judgment may be had in foreclosure suit. (Tex. R. Civ. P. 309). If sale price at judicial or nonjudicial foreclosure is less than fair market value, any obligor, including guarantor against whom judgment has or has not been rendered, may be required to offset deficiency by difference between foreclosure sale price and fair market value. Lender's private mortgage guarantee insurance proceeds are credited to obligor's account without affecting insurer's subrogation rights. (Tex. Prop. Code Ann. §§51.003-.005).

Mortgage Loan Originators

Enactment regulating licensing and operation of mortgage loan originators – Texas Secure and Fair Enforcement for Mortgage Licensing Act of 2009. (Tex. Fin. Code Ann. §§180.001–180.252). Mortgage banker registration and residential mortgage loan originator licensing also governed by Tex. Fin. Code Ann. §§157.001–157.031.

Moratorium.

None in effect.

Redemption.

There is no provision for redemption of property sold under mortgage or deed of trust. Property seized by taxing authority may be redeemed. (Tex. Tax. Code Ann. §34.05).

Forms.

There is no statutory form. Form found at end of Digest is acceptable.

Chattel Mortgages.

See topic 20.01 Chattel Mortgages.

21 PROPERTY

21.01 ABSENTEES:

If an absentee served with process by publication (see category 5 Civil Actions and Procedure, topic 5.20 Process), fails to appear and answer, the court is required to appoint an attorney ad litem to represent him. (Tex. R. Civ. P. 244). In such cases new trial may be granted on petition showing good cause supported by affidavit within two years after judgment was signed. (Tex. R. Civ. P. 329).

Judge of probate court may appoint attorney ad litem to represent interests of nonresident or unknown heir in probate proceedings. (Tex. Prob. Code Ann. §34A).

Care of Property.

If missing spouse is reported by executive department of U.S. to be prisoner of war or missing on public service, spouse may petition district court for control of all community property until missing spouse returns not earlier than six months after date of notice. Attorney ad litem for missing spouse must be appointed. (Tex. Fam. Code Ann. §§3.302-3.304, 3.306-3.308).

Process Agent.

Foreign corporations doing business in Texas must apply for Certificate of Authority with Secretary of State which, among other things, designates registered agent. (Tex. Bus. Orgs. Code §§9.001, 9.004). President and all vice presidents of foreign corporation authorized to transact business in Texas and duly registered agent of such foreign corporation are agents upon whom process may be served. If required designation is not made, Secretary of State is deemed appointed for service of process. (Tex. Bus. Orgs. Code §§5.252, 5.255).

Operation of motor vehicle by nonresident or his agent is deemed equivalent to appointment of Chairman of Texas Transportation Commission as agent for service of process after any accident within state arising from such operation. (Tex. Civ. Prac. & Rem. Code Ann. §17.062-.069).

Escheat.

Real or personal estate of person dying intestate without heirs is subject to escheat. (Tex. Prop. Code Ann. §71.001). Person is presumed dead if absent for seven years and not known to exist. (Tex. Prop. Code Ann. §71.002). Person is presumed to have died intestate if no will has been recorded or probated in county where property is situated on or before seven years after individual's death (Tex. Prop. Code Ann. §71.003). Person is presumed to have died without heirs if no lawful claim or act of ownership has been asserted for seven years preceding court's determination. (Tex. Prop. Code Ann. §71.004). Annual reports to state treasurer must be filed by persons holding personal property subject to escheat, whether held within this state, or without state for person or beneficiary whose last known residence was in this state. (Tex. Prop. Code Ann. §74.101). The holder of property valued at more than $250 that is presumed abandoned must also mail written notice to the owner's last known address stating that the holder is holding the property and that the holder may be required to delivery the property to the comptroller on or before November 1 if the property is not claimed. (Tex. Prop. Code Ann. §74.1011). Provision is made for sale of escheated property, and for administrative determination of subsequent claims of persons having interest in such property. (Tex. Prop. Code Ann. §74.401-506). Tex. Prop. Code Ann. c. 73 contains special provisions concerning dormant deposits and inactive accounts held by banking institutions and savings and loan associations. Tex. Prop. Code Ann. c. 71 governs escheat proceedings generally. See also categories 3 Business Regulation and Commerce, topic Banks and Banking, subhead Unclaimed Deposits, and Estates and Trusts, topic Wills, subhead Unclaimed Legacies.

Receiver of Mineral Interest.

Where action filed in district court by one claiming undivided mineral interest in Texas land against nonresident or unknown defendant owning undivided mineral interest in said land and such defendant has not paid taxes for five successive years immediately preceding filing of action, district court may appoint county judge or any other resident of county in which land located as receiver of defendant's interest upon filing of verified petition, publication of notice to defendant, proof of diligent search for defendant, and proof of risk of substantial injury to plaintiff without appointment of receiver. Where interest is undivided leasehold interest in mineral lease, persons eligible to be appointed receiver are not limited to county judge. (Tex. Civ. Prac. & Rem. Code Ann. §64.091). A district court may appoint a receiver for royalty interests owned by nonresident or absentee defendant in an actions brought by a person claiming or owning an undivided mineral interest in land that has one or more defendants who claim such interest. (Tex. Civ. Prac. & Rem. Code Ann. §64.093).

21.02 ADVERSE POSSESSION:

Character of Possession.

Possession is peaceable if continuous and not interrupted by adverse suit to recover property held. Possession is adverse if there is actual and visible appropriation of real property commenced and continued under claim of right that is inconsistent with and is hostile to claim of another person. (Tex. Civ. Prac. & Rem. Code Ann. §16.021). To satisfy limitations period, peaceable and adverse possession may be claimed through predecessor in title if there is privity of estate between predecessor and claimant. (Tex. Civ. Prac. & Rem. Code Ann. §16.023).

Three Years Possession.

Subject to tolling of limitations period for disabilities, suit must be brought to recover real property held by another in peaceable and adverse possession under title or color of title not later than three years after day cause of action accrues. (Tex. Civ. Prac. & Rem. Code Ann. §16.024). Title means regular chain of transfers from and under sovereignty of soil. Color of title means consecutive chain of transfers to person in possession with some irregularity. (Tex. Civ. Prac. & Rem. Code Ann. §16.021).

Five Years Possession.

Subject to tolling of limitations period for disabilities, suit must be brought to recover real property held in peaceable and adverse possession by another who cultivates, uses or enjoys property, pays applicable taxes on property and claims property under duly registered deed not later than five years after day cause of action accrues. These rights do not apply to claim based on forged deed or deed executed under forged power of attorney. (Tex. Civ. Prac. & Rem. Code Ann. §16.025).

Ten Years Possession.

Subject to tolling of limitations period for disabilities, suit must be brought to recover real property held in peaceable and adverse possession by another who cultivates, uses or enjoys property not later than ten years after day cause of action accrues. In absence of title instrument, peaceable and adverse possession is limited to 160 acres (including improvements), unless larger number of acres is enclosed, in which case peaceable and adverse possession extends to real property actually enclosed. Peaceable possession held under duly registered deed or other memorandum of title that fixes boundaries of possessor's claim extends to boundaries specified in instrument. (Tex. Civ. Prac. & Rem. Code Ann. §16.026). Tract of land owned by one person and entirely surrounded by land owned, claimed and fenced by another is not considered enclosed by fence that encloses any part of surrounding land, and possession of interior tract by owner of surrounding tract is not peaceable and adverse unless interior tract is separated from surrounding land by fence, or at least one-tenth of interior tract is cultivated and used for agricultural purposes or manufacturing purposes. (Tex. Civ. Prac. & Rem. Code Ann. §16.031). Possession of land that belongs to another by person owning or claiming 5,000 or more fenced acres that adjoin land is not peaceable and adverse unless land is separated from adjacent enclosed tract by substantial fence, or at least one-tenth of land is cultivated and used for agricultural purposes or manufacturing purposes, or there is actual possession of land. (Tex. Civ. Prac. & Rem. Code Ann. §16.032).

Twenty-Five Years Possession.

Without regard to disabilities, suit must be brought to recover real property held in peaceable and adverse possession by another who cultivates, uses and enjoys property within 25 years of day cause of action accrues. (Tex. Civ. Prac. & Rem. Code Ann. §16.027). Without regard to disabilities, person may not maintain suit for recovery of real property held in peaceable and adverse possession for 25 years before commencement of action by another who holds property in good faith and under deed or other instrument purporting to convey property that is recorded in deed records of county where property is located. (Tex. Civ. Prac. & Rem. Code Ann. §16.028). Adverse possession of real property held under recorded deed or other recorded instrument extends to and includes all of property described in instrument, even though instrument is void on its face or in fact. (Tex. Civ. Prac. & Rem. Code Ann. §16.028). In suit involving title to real property not claimed by state, it is prima facie evidence that title to property has passed to adverse possessor if it is shown that for one or more years during 25 years preceding filing of suit person holding apparent record title to property did not exercise dominion over or pay taxes on property and adverse possessor has openly exercised dominion over and asserted claim to land and paid taxes on it annually. (Tex. Civ. Prac. & Rem. Code Ann. §16.029).

Property Dedicated for Public Use.

Person may not acquire through adverse possession any right of title to real property dedicated to public use. (Tex. Civ. Prac. & Rem. Code Ann. §16.030).

Disabilities.

If person entitled to sue for recovery of real property is under legal disability at time property vests or adverse possession commences, time of disability is excluded from three, five and ten year limitations periods. Person is under legal disability if person is younger than 18 years of age, of unsound mind, or serving in U.S. Armed Forces during time of war. (Tex. Civ. Prac. & Rem. Code Ann. §16.022).

21.03 [RESERVED]

21.04 CONVEYANCES:

Municipality with less than 1.9 million inhabitants may transfer real property or interest in real property to nonprofit organization without requiring notice and bidding requirements of Tex. Loc. Gov't Code Ann. §272.001[a] or other law. (Tex. Loc. Gov't Code Ann. §253.011).

See topic 21.06 Deeds.

21.05 CURTESY:

Does not exist in Texas.

21.06 DEEDS:

Conveyance of estate of inheritance or freehold or estate for term of more than one year in land and tenements must be in writing, subscribed and delivered by conveyor or his agent authorized in writing. (Tex. Prop. Code Ann. §5.021). See topic Real Property for types of estates.

Execution.

Deed must be executed by grantor or agent, but no seal or witness is required (except seal is required where grantor is corporation not governed by Tex. Bus. Corp. Act). Each spouse may convey his or her separate property without joinder of other (Tex. Fam. Code Ann. §3.101), or community property that such spouse would have owned if single. All other community property must be conveyed jointly by husband and wife. (Tex. Fam. Code Ann. §3.102). Joint conveyance of husband and wife required for homestead, whether community property or separate property of either spouse, but if either spouse is insane or has permanently abandoned other or homestead, other may convey homestead if his or her separate property or community property. (Tex. Fam. Code Ann. §§3.301, 5.001, 5.002, 5.101, 5.102; Tex. Prob. Code Ann. §883). See category 10 Documents and Records, topic 10.01 Acknowledgments, subhead Married Woman. See also topic 21.16 Real Property; category 8 Debtor and Creditor, topic 8.10 Homesteads, subhead Alienation or Encumbrance; Family, topic Husband and Wife, subhead Conveyance or Encumbrance of Property.

Acknowledgment and Recording.

To be good against creditor or subsequent purchaser for valuable consideration without notice conveyance must be acknowledged or sworn to by grantor before officer entitled to take same (see topic Acknowledgments), or in presence of two credible witnesses, subscribing thereto, and proven according to law by said witnesses, and filed for record with county clerk of county in which land or part thereof is located (Tex. Prop. Code Ann. §§11.001, 12.001, 13.001), otherwise conveyance good only between parties thereto, each party's heirs and subsequent purchaser who does not give valuable consideration or has notice. To be recorded conveyance must include each grantee's mailing address or penalty filing fee must be paid. (Tex. Prop. Code Ann. §11.003). See also category 10 Documents and Records, topic 10.04 Records.

Owner who subdivides land may commit misdemeanor if he fails to have plat approved and recorded as required by law or fails to comply with terms of plat and may be subject to recovery of damages or injunction. (Tex. Loc. Gov't Code Ann. §§212.050, 212.0175, 212.018, 232.005). For platting requirements generally, see Tex. Loc. Gov't Code Ann. §§212, 232. Seller using subdivision description in deed or sales contract without such plat having been approved and filed for record is guilty of misdemeanor, and such action considered prima facie evidence of intent to defraud. (Tex. Prop. Code Ann. §12.002[e]).

Recording Fees.

Fee for recording deed is $5 for first page, plus $4 for each additional page, plus $4 for all or part of each 8.5 x 14 attachment or rider plus 25¢ for each name which is indexed over five. (Tex. Loc. Gov't Code Ann. §118.011[a][2]). For manually copying instruments to be recorded, county clerk may charge, in lieu of above, 20¢ per 100 words for each page having more than 500 words. (Tex. Loc. Gov't Code Ann. §118.013[b]). Twice amounts above may be charged for pages not meeting various technical requirements. (Tex. Loc. Gov't Code Ann. §§191.007[h]-[j]). See also category 10 Documents and Records, topic 10.04 Records.

Fees for Preparation.

Only attorney or real estate broker licensed by State of Texas, or real estate sales person performing act of real estate broker pursuant to Real Estate License Act (Tex. Occ. Code Ann. §1101.001 et seq.) may charge or receive, directly or indirectly, any compensation for preparation of legal instrument affecting title to real property, including deed, deed of trust, note, mortgage and transfer or release of lien, but excluding transactions concerning mineral interest (Tex. Gov't Code Ann. §83.001).

Covenants.

Use of words “grant” or “convey” in conveyance implies following covenants: (1) prior to execution of conveyance grantor has not conveyed same estate or interest therein to person other than grantee; (2) at time of execution of conveyance estate is free from encumbrances. (Tex. Prop. Code Ann. §5.023).

Operation and Effect.

Conveyance that purports to convey greater estate than that possessed by grantor conveys title to such estate as grantor is entitled to convey. (Tex. Prop. Code Ann. §5.003[a]).

Corporations.

Deeds by corporation governed by Tex. Bus. Corp. Act (see category 2 Business Organizations, topic 2.03 Corporations) need not be sealed but only need be signed and acknowledged by officer or attorney in fact, when authorized by resolution of directors. Recorded deed signed by officer is prima facie evidence of proper resolution. (Tex. Bus. Orgs. Code §§10.251, 10.253).

Taxes.

No Texas property conveyance tax.

Property in County Bordering Gulf of Mexico.

Person who sells or conveys interest, other than mineral, leasehold, or security interest, in real property located seaward of Gulf Intracoastal Waterway to its southernmost point and then seaward of longitudinal line also known as 97 degrees, 12’, 19” which runs southerly to international boundary from intersection of centerline of Gulf Intracoastal Waterway and Brownsville Ship Channel must include statutory disclosure as to such fact in any executory contract and failure to do so entitles purchaser to terminate contract. (Tex. Nat. Res. Code Ann. §61.025). Failure to disclose such information prior to closing whether or not there was executory contract, constitutes deceptive act under Tex. Bus. & Com. Code Ann. §17.46. (Tex. Nat. Res. Code Ann. §61.025[d]).

Property in General Law Districts.

Person who sells or conveys real property located within designated area of district shall supplement notice to purchaser required by Water Code by inserting following into general notice after first sentence: “The real property described below, which you are about to purchase, is also located within designated area of the district and your land will be subject to higher tax than other land within the district. Your rate of taxes will be higher by $____ on each $100 of assessed valuation than land not within the designated area.” (Tex. Water Code Ann. §54.812).

Property in Unzoned Municipalities.

City may adopt ordinance empowering it to enforce private deed restrictions and may require that sellers of property within municipality provide written notice at or before closing of sale of such restrictions and of city's enforcement powers. Notice must be signed and acknowledged by seller and purchaser and recorded in county real property records. Failure to comply does not affect validity of sale or restrictions but seller subject to penalty of up to $500. (Tex. Loc. Gov't Code Ann. §212.155).

Property Containing Underground Storage Tank.

Sellers of property containing underground storage tank must provide purchaser with written notice at or before sale stating name and address of purchaser and seller, number of tanks involved, description of tanks, Texas Commission on Environmental Quality's facility identification number. (30 Tex. Admin. Code §334.9).

Hotels.

See category 22 Taxation, topic 22.10 Hotel and Restaurant Taxes, subhead Hotel Occupancy Tax.

Residential Property Disclosure.

Seller of residential real property comprising not more than one dwelling unit must give to purchaser written property disclosure notice regarding property. Notice is to be completed to best of seller's belief and knowledge as of date of notice and signed by seller. If information required by notice is unknown to seller, seller must so state. No disclosure form is required for transfer: (i) Pursuant to court order or foreclosure sale; (ii) by trustee in bankruptcy; (iii) to mortgagee by mortgagor or successor in interest, or to beneficiary of deed of trust by trustor or successor in interest; (iv) by mortgagee or beneficiary under deed of trust who has acquired real property at sale conducted pursuant to power of sale under deed of trust or sale pursuant to court ordered foreclosure or has acquired real property by deed in lieu of foreclosure; (v) by fiduciary in course of administration of decedent's estate, guardianship, conservatorship, or trust; (vi) from one co-owner to one or more other co-owners; (vii) made to spouse or person or persons in lineal line of consanguinity of one or more of transferors; (viii) between spouses resulting from decree of dissolution of marriage or decree of legal separation or from property settlement agreement incidental to such decree; (ix) to or from any governmental entity; (x) of new residence of not more than one dwelling unit which has not previously been occupied for residential purposes; or (xi) of real property where value of any dwelling does not exceed 5% of value of property. Notice must be delivered by seller to purchaser on or before effective date of executory contract binding purchaser to purchase property. If contract is entered without seller providing notice, purchaser may terminate contract for any reason within seven days after receiving notice. Seller or seller's agent shall have no duty to disclose information related to whether death by natural causes, suicide or accident unrelated to condition of property occurred on property or whether previous occupant had, may have had, has or may have AIDS, HIV related illnesses, or HIV infection. (Tex. Prop. Code Ann. §5.008).

Form.

Notice must, at minimum, read substantially similar to following:

FORM

SELLER'S DISCLOSURE NOTICE

CONCERNING THE PROPERTY AT . . . .

(Street Address and City)

THIS NOTICE IS DISCLOSURE OF SELLER'S KNOWLEDGE OF THE CONDITION OF THE PROPERTY AS OF THE DATE SIGNED BY SELLER AND IS NOT SUBSTITUTE FOR ANY INSPECTIONS OR WARRANTIES THE PURCHASER MAY WISH TO OBTAIN. IT IS NOT WARRANTY OF ANY KIND OF SELLER OR SELLER'S AGENTS.

Seller . . . . is . . . . is not occupying the Property. If unoccupied, how long since Seller has occupied the Property? . . . .

1. The Property has the items checked below: Write Yes (Y), No (N), or Unknown (U) . . . .

. . . . Range

. . . . Dishwasher

. . . . Washer/Dryer Hookups

. . . . Security System

. . . . TV Antenna

. . . . Ceiling Fan(s)

. . . . Central A/C

. . . . Plumbing System

. . . . Patio/Decking

. . . . Pool

. . . . Pool Equipment

. . . . Fireplace(s) & Chimney (Woodburning)

. . . . Gas Lines (Nat/LP)

. . . . Oven

. . . . Trash Compactor

. . . . Window Screens

. . . . Fire Detection Equipment

. . . . Smoke Detector

. . . . Smoke Detector--Hearing Impaired

. . . . Carbon Monoxide Alarm

. . . . Emergency Escape Ladder(s)

. . . . Cable TV Wiring

. . . . Attic Fan(s)

. . . . Central Heating

. . . . Septic System

. . . . Outdoor Grill

. . . . Sauna

. . . . Pool Heater

. . . . Fireplace(s) & Chimney (Mock)

. . . . Gas Fixtures

. . . . Microwave

. . . . Disposal

. . . . Rain Gutters

. . . . Intercom System

. . . . Satellite Dish

. . . . Exhaust Fan(s)

. . . . Wall/Window Air Conditioning

. . . . Public Sewer System

. . . . Fences

. . . . Spa

. . . . Hot Tub

. . . . Automatic Lawn Sprinkler System

Garage: . . . . Attached . . . . Not Attached . . . . Carports

Garage Door Opener(s): . . . . Electronic . . . . Control(s)

Water Heater: . . . . Gas . . . . Electric

Water Supply: . . . . City . . . . Well . . . . MUD . . . . Co-Op

Roof Type: . . . .   Age: . . . . (approx)

Are you (Seller) aware of any of the above items that are not in working condition, that have known defects, or that are in need of repair?

. . . . Yes . . . . No . . . . Unknown

If yes, then describe. (Attach additional sheets if necessary): . . . .

2. Are you (Seller) aware of any known defects/malfunctions in any of the following? Write Yes (Y) if you are aware, write No (N) if you are not aware . . . .

. . . . Interior Walls

. . . . Exterior Walls

. . . . Roof

. . . . Walls/Fences

. . . . Plumbing/Sewers/Septics

. . . . Ceilings

. . . . Doors

. . . . Foundation/Slab(s)

. . . . Driveways

. . . . Electrical Systems

. . . . Floors

. . . . Windows

. . . . Basement

. . . . Sidewalks

. . . . Lighting Fixtures

Other Structural Components (Describe): . . . .

If the answer to any of the above is yes, explain. (Attach additional sheets if necessary): .

. . . .

3. Are you (Seller) aware of any of the following conditions? Write Yes (Y) if you are aware, write No (N) if you are not aware . . . .

. . . . Active Termites (Includes wood-destroying insects)

. . . . Termite or Wood Rot Damage Needing Repair

. . . . Previous Termite Damage

. . . . Previous Termite Treatment

. . . . Previous Flooding

. . . . Improper Drainage

. . . . Water Penetration

. . . . Located in 100-Year Floodplain

. . . . Present Flood Insurance Coverage

. . . . Landfill, Settling, Soil Movement, Fault Lines

. . . . Previous Structural or Roof Repair

. . . . Hazardous or Toxic Waste

. . . . Asbestos Components

. . . . Urea formaldehyde insulation

. . . . Radon Gas

. . . . Lead Based Paint

. . . . Aluminum Wiring

. . . . Previous Fires

. . . . Unplatted Easements

. . . . Subsurface Structure or Pits

. . . . Previous Use of Premises for Manufacture of Methamphetamine

If the answer to any of the above if yes, explain. (Attach additional sheets if necessary): . . . .

4. Are you (Seller) aware of any items, equipment, or system in or on the property that is in need of repair? . . . . Yes (if you are aware) . . . . No (if you are not aware). If yes, explain (attach additional sheets as necessary) . . . .

5. Are you (Seller) aware of any of the following? Write Yes (Y) if you are aware, write

No (N) if you are not aware . . . .

. . . . Room additions, structural modifications, or other alterations or repairs made without necessary permits or not in compliance with building codes in effect at that time.

. . . . Homeowners' Association or maintenance fees or assessments.

. . . . Any “common area” (facilities such as pools, tennis courts, walkways, or other areas) co-owned in undivided interest with others.

. . . . Any notices of violations of deed restrictions or governmental ordinances affecting the condition or use of the Property.

. . . . Any lawsuits directly or indirectly affecting the Property.

. . . . Any condition on the Property which materially affects the physical health or safety of an individual.

If the answer to any of the above is yes, explain. (Attach additional sheets if necessary): . . . .

. . . .

6. Are you (Seller) aware of any of the following? Write Yes (Y) if you are aware, write No (N) if you are not aware.

. . . . Room additions, structural modifications, or other alterations or repairs made without necessary permits or not in compliance with building codes in effect at that time.

. . . . Homeowners' Association or maintenance fees or assessments.

. . . . Any "common area" (facilities such as pools, tennis courts, walkways, or other areas) co-owned in undivided interest with others.

. . . . Any notices of violations of deed restrictions or governmental ordinances affecting the condition or use of the Property. Any lawsuits directly or indirectly affecting the Property.

. . . . Any condition on the Property which materially affects the physical health or safety of an individual.

If the answer to any of the above is yes, explain. (Attach additional sheets if necessary): . . . .

. . . .

If the property is located in coastal area that is seaward of the Gulf Intracoastal Waterway or within 1,000 feet of the mean high tide bordering the Gulf of Mexico, the property may be subject to the Open Beaches Act or the Dune Protection Act (Chapter 61 or 63, Natural Resources Code, respectively) and beachfront construction certificate or dune protection permit may be required for repairs or improvements. Contact the local government with ordinance authority over construction adjacent to public beaches for more information.

Date

. . . .

Signature of Seller

The undersigned purchaser hereby acknowledges receipt of the foregoing notice.

. . . .

Date

. . . .

Signature of Purchaser

Subdivided Property Outside Municipality.

County commissioners court may require that subdivider of land outside limits of municipality include statement in sales contract describing availability of water to subdivision. (Tex. Loc. Gov't Code Ann. §232.003[6]).

Uniform Vendor and Purchaser Risk Act.

Adopted with immaterial variations (Tex. Prop. Code Ann. §5.007).

Form.

Covenant of warranty is not required. Deed may include any clause or use any form not in contravention of law. Following statutory form or one substantially similar suffices (Tex. Prop. Code Ann. §5.022):

Form

The State of Texas; County of . . . . . .: Know all men by these presents, That I, ..., of the (give name of city, town or county) in the state aforesaid, for and in consideration of . . . . . . dollars, to me in hand paid by . . . . . ., have granted, sold and conveyed, and by these presents do grant, sell and convey unto the said . . . . . ., of the (give name of the city, town or county), in the state of . . . . . ., all that certain (describe the premises). To have and to hold the above described premises, together with all and singular the rights and appurtenances thereto in any wise belonging, unto the said . . . . . ., his heirs or assigns forever. And I do hereby bind myself, my heirs, executors and administrators to warrant and forever defend all and singular the said premises unto the said . . . . . ., his heirs and assigns, against every person whomsoever, lawfully claiming or to claim the same, or any part thereof. Witness my hand, this . . . . . . day of . . . . . ., A. D. (year). . . . . Signed and delivered in the presence of . . . .

21.07 DEEDS OF TRUST:

See category 20 Mortgages, topic 20.04 Mortgages of Real Property.

21.08 DOWER:

Does not exist in Texas.

21.09 ESCHEAT:

See topic 21.01 Absentees, subhead Escheat; category 3 Business Regulation and Commerce, topic 3.01 Banks and Banking, subhead Unclaimed Deposits.

21.10 LANDLORD AND TENANT:

Whether parties in any particular case are in relationship of landlord and tenant is fact question, determination of which may depend on parol evidence.

Leases of Personal Property.

Governed by Tex. Bus. & Com. Code Ann. §2A.101 et seq. See category 3 Business Regulation and Commerce, topic 3.09 Commercial Code.

Kinds of Tenancy.

Texas recognizes tenancy for definite term or term of years; periodic tenancy, as from year to year or month to month; tenancy at will; and tenancy at sufferance.

Statute of Frauds.

Leases of real property for more than one year must be in writing to be enforceable. (Tex. Prop. Code Ann. §5.021; Tex. Bus. & Com. Code Ann. §26.01). Possession of property by tenant puts subsequent purchaser on notice of tenant's rights, even though lease is not recorded. (470 S.W.2d 406).

Security Deposits; Residential Tenants.

Landlord must refund security deposit within 30 days after tenant surrenders premises, provided tenant has given landlord forwarding address for refund. (Tex. Prop. Code Ann. §§92.103 and 92.107). Requirement that tenant give advance notice of surrender as condition to refund effective only if requirement underlined or printed in conspicuous bold print in lease. (Tex. Prop. Code Ann. §92.103). Landlord may deduct damages or charges for which tenant is legally liable or as result of breaching lease, but not for ordinary wear and tear. (Tex. Prop. Code Ann. §§92.104[a]-[b]). If landlord retains all or part of deposit, landlord must give tenant written description and itemized list of deductions unless at time of surrender tenant owes rent and no controversy exists concerning amount of rent owed. (Tex. Prop. Code Ann. §92.104[c]). Tenant may not withhold last month's rent on grounds that security deposit is security for unpaid rent. Penalties provided for wrongful withholding by tenant of last month's rent and wrongful withholding by landlord of security deposit. (Tex. Prop. Code Ann. §§92.108 and 92.109). Tenant's claim to security deposit takes priority over claim of any other creditor of landlord, including trustee in bankruptcy. (Tex. Prop. Code Ann. §92.103[c]). Landlord who receives security deposit or rent prepayment from tenant who fails to occupy dwelling may not retain security deposit or rent prepayment if either landlord or tenant secures replacement tenant satisfactory to landlord, and replacement tenant occupies dwelling on or before commencement date of lease. If replacement tenant is secured, landlord may deduct from security deposit or rent prepayment either sum agreed to in lease as cancellation fee or actual expenses incurred by landlord in securing replacement tenant. (Tex. Prop. Code Ann. §92.1031).

Swimming Pool.

Landlord has duty to inspect, repair and maintain pool located on his property and must satisfy various safety requirements relating to such pool. (Tex. Health & Safety Code Ann. §757.001 et seq.).

Landlord's Lien.

Agricultural Tenants.

Landlord has preferential lien for rent. (Tex. Prop. Code Ann. §54.001). Lien attaches to property on leased premises furnished to tenant to grow crops and to crops grown on leased premises in year that rent accrues or property is furnished. (Tex. Prop. Code Ann. §54.002). Lien does not arise if tenant provides everything necessary to cultivate leased premises and rent exceeds 1/3 of value of grain and ¼ of value of cotton grown, or if landlord furnishes everything except labor and rent exceeds ½ of value of grain and cotton grown. (Tex. Prop. Code Ann. §54.003). Lien exists while property to which it is attached remains on leased premises and for one month thereafter or while placed in bonded warehouse. (Tex. Prop. Code Ann. §54.004). If rent is unpaid, tenant may not remove agricultural products or other property to which lien is attached without landlord's consent. (Tex. Prop. Code Ann. §54.005). Landlord or his agent, attorney or legal representative may apply to justice of peace for distress warrant if tenant owes rent or advance, is about to abandon leased premises, or is about to remove tenant's property from leased premises. (Tex. Prop. Code Ann. §54.006).

Commercial Tenants.

Landlord has preferential lien on property of commercial tenant or subtenant for rent that is due or becomes due, but only for current contract year. (Tex. Prop. Code Ann. §54.021). Lien not enforceable for rent more than six months past due unless landlord files sworn lien statement with county clerk of county where building is located. (Tex. Prop. Code Ann. §54.022). Lien exists while tenant occupies building and for one month after tenant abandons building. (Tex. Prop. Code Ann. §54.024). Landlord or his agent, attorney or legal representative may apply to justice of peace in precinct where building is located for distress warrant if tenant owes rent, is about to abandon building, or is about to remove tenant's property from building. (Tex. Prop. Code Ann. §54.025).

Residential Tenants.

Landlord has lien for unpaid rent that is due. (Tex. Prop. Code Ann. §54.041). Lien attaches only to nonexempt property that is in residence or that tenant has stored in storage building. (Tex. Prop. Code Ann. §54.041). Exemptions include wearing apparel, family portraits, food and foodstuffs, etc. (Tex. Prop. Code Ann. §54.042). Contractual landlord's lien not enforceable unless underlined or printed in conspicuous bold print in lease agreement. (Tex. Prop. Code Ann. §54.043). Landlord may not seize exempt property and may seize nonexempt property only if authorized by lease and can be accomplished without breach of peace. (Tex. Prop. Code Ann. §54.044). Property seized may not be sold unless sale or disposition is authorized in lease. (Tex. Prop. Code Ann. §54.045). Landlord must satisfy statutory notice requirements regarding seizure and sale of seized property. (Prop. Code §54.045). At any time before judgment in suit for unpaid rent, tenant may replevy seized property by posting bond in amount approved by court. (Tex. Prop. Code Ann. §54.048).

Interruption of Utilities.

Residential Tenants.

Unless interruption results from bona fide repairs, construction or emergency, landlord may not interrupt or cause interruption of utility service paid for directly to utility company. (Tex. Prop. Code Ann. §92.008[a]). Unless interruption results from bona fide repairs, construction or emergency, landlord may not interrupt or cause interruption of water, wastewater, gas or electrical service furnished to tenant by landlord. (Tex. Prop. Code Ann. §92.008[b]). If landlord violates, tenant may recover possession of premises or terminate lease, and recover tenant's actual damages, one months' rent or $500, whichever is greater, plus attorneys' fees and court costs less any delinquent rent owed to landlord. (Tex. Prop. Code Ann. §92.008[f]). Rights may not be waived by tenant. (Tex. Prop. Code Ann. §92.008[g]). Residential tenant has a right to restoration after unlawful utility disconnection. (Tex. Prop. Code Ann. §92.0091). Landlord who agrees to furnish and pay for water, gas or electrical service to tenant's dwelling is liable if utility company cuts off service because of landlord's nonpayment of utility bills. (Tex. Prop. Code Ann. §92.301).

Commercial Tenants.

Unless interruption results from bona fide repairs, construction or emergency, landlord may not interrupt or cause interruption of utility service paid for directly to utility company. (Tex. Prop. Code Ann. §93.002[a]).

Removal of Property and Exclusion of Tenant.

Residential Tenants.—Landlord may not remove any door, window, attic hatchway cover, lock, latch, hinge, hinge pin, doorknob or other mechanism connected to door, window or attic hatchway cover from leased premises or remove furniture, fixtures or appliances furnished by landlord from leased premises except in connection with bona fide repair or replacement, which must be promptly performed. (Tex. Prop. Code Ann. §92.0081). Landlord may not intentionally exclude tenant from leased premises except by judicial process unless exclusion results from: (1) Bona fide repairs, construction or emergency; (2) removing contents after abandonment by tenant; or (3) changing locks of tenant who is delinquent in paying rent. (Tex. Prop. Code Ann. §92.0081[b]). If landlord changes locks of tenant delinquent in payment of rent, landlord must place written notice on tenant's front door stating name and location of individual from whom new key may be obtained at any hour and provide new key to tenant at any hour regardless of whether tenant pays delinquent rent. (Tex. Prop. Code Ann. §92.0081[c]). If landlord violates, tenant may recover possession of premises or terminate lease, and may recover tenant's actual damages, one months' rent or $500, whichever is greater, plus attorneys' fees and court costs less any delinquent rent or other sums owed to landlord. (Tex. Prop. Code Ann. §92.0081[h]). Rights may not be waived by tenant. (Tex. Prop. Code Ann. §92.0081[j]).

Commercial Tenants.

Landlord may not remove any door, window, attic hatchway cover, lock, latch, hinge, hinge pin, doorknob or other mechanism connected to door, window or attic hatchway cover from leased premises or remove furniture, fixtures or appliances furnished by landlord from leased premises except in connection with bona fide repair or replacement, which must be promptly performed. (Tex. Prop. Code Ann. §93.002[b]). Landlord may not intentionally exclude tenant from leased premises except by judicial process unless exclusion results from: (1) Bona fide repairs, construction or emergency; (2) removing contents after abandonment by tenant; or (3) changing locks of tenant who is delinquent in paying rent. (Tex. Prop. Code Ann. §93.002[c]). Tenant is presumed to have abandoned premises if property is being or has been removed to indicate probable intent to abandon and removal is not in normal course of tenant's business. (Tex. Prop. Code Ann. §93.002[d]). Landlord may remove and store property of tenant that abandons premises. Landlord may dispose of property within 60 days after date stored if tenant does not claim. Landlord must deliver written notice by certified mail to tenant's last known address stating landlord's rights to dispose of property if not claimed within 60 days. (Tex. Prop. Code Ann. §93.002[e]). If landlord changes locks of tenant delinquent in payment of rent, landlord must place written notice on tenant's front door stating name and address or telephone number of individual or company from which new key may be obtained. New key is required to be provided only during tenant's regular business hours and only if tenant pays delinquent rent. (Tex. Prop. Code Ann. §93.002[f]). If landlord violates, tenant may recover possession of premises or terminate lease, and may recover tenant's actual damages, one months' rent and $1,000, plus attorneys' fees and court costs less any delinquent rent or other sums owed to landlord. (Tex. Prop. Code Ann. §93.002[g]). Terms of written lease supersede statutory provisions. (Tex. Prop. Code Ann. §93.002[h]).

Forcible Entry and Detainer.

In addition to lockout provisions described above, tenant who refuses to surrender possession may be ousted by forcible entry and detainer action in justice court. (Tex. Prop. Code Ann. §24.002; Tex. R. Civ. P. 738-755). Parties may represent themselves in such actions or be represented by authorized agents, who need not be attorneys. (Tex. Prop. Code Ann. §24.011).

Commercial Repairs.

Commercial lease implies warranty of suitability for intended commercial purpose. (747 S.W.2d 373).

Residential Repairs.

Landlord of residential property has duty to repair or remedy within reasonable time after notice from tenant of any condition materially affecting health or safety of tenant except where caused by tenant, another lawful occupant, tenant's family or guests or invitees. (Tex. Prop. Code Ann. §92.052). Upon landlord's failure to repair after reasonable time, tenant may give second notice specifying one of three remedies that tenant plans to exercise and, subject to certain statutory grace periods, if tenant is not in default in rent payments at time two required notices given, landlord will be liable to tenant for those remedies. (Tex. Prop. Code Ann. §§92.056, 92.0561, 92.0563). As one remedy, tenant may have condition repaired and deduct repair costs (not to exceed one month's rent) from rent. Conditions permitting tenant to exercise self-help include: (1) Sewage back-up or flooding, (2) interruption in water supply within three days of delivery of tenant's second notice, (3) interruption in heating or cooling systems within three days of delivery of tenant's second notice, if local authorities give notice that disrepair materially affects health or safety of ordinary tenant or (4) any other condition within seven days of tenant's second notice, if local authorities give notice that condition materially affects health or safety of ordinary tenant. Landlord is not directly liable to repairmen or subject to lien for costs, and tenant must furnish copy of repair bill and receipt for payment along with balance of rent. (Tex. Prop. Code Ann. §§92.056[e][2] and [3], 92.0561). As second remedy, tenant may elect to terminate lease if repairs not made within seven days after tenant's second notice. (Tex. Prop. Code Ann. §92.056[e][1]). As third remedy, tenant may seek certain judicial remedies, some of which may also be available in cases where lease is terminated or repairs are made. (Tex. Prop. Code Ann. §§92.056[e][4], 92.0563). Landlord diligently attempting to repair condition but subject to specified hindrances may temporarily delay tenant's right to repair, if tenant has not already contracted for repairs, by delivering affidavit to tenant in conformance with statute. (Tex. Prop. Code Ann. §92.0562). Certain retaliatory acts by landlord and tenant prohibited. (Tex. Prop. Code Ann. §§92.331, 92.334). Tenant may agree to make required repairs at landlord's expense or, under very limited circumstances, may waive such requirement. (Tex. Prop. Code Ann. §§92.006[d], [e], [f]). More liberal waiver provisions apply to leases executed or renewed between Aug. 31, 1989 and Mar. 1, 1990. (S. Res. 1607, §13[b] (1989)). Landlord who knowingly contracts to waive repair obligations in violation of Tex. Prop. Code Ann. §92.006 liable for actual damages, one month's rent, $2,000 and reasonable attorney's fees. (Tex. Prop. Code Ann. §92.0563[b]).

Security Devices for Residential Tenancies.

Subject to certain exceptions, landlord is required, without necessity of request by tenant, to equip each dwelling unit in possession of tenant with certain security devices on exterior doors (including sliding doors) and windows, including window latches, doorknob locks or keyed dead bolts, sliding door pin locks, handle locks or security bars, and keyless bolting devices and door viewers. (Tex. Prop. Code Ann. §92.153). Not later than seventh day following each tenant turnover date, landlord must rekey security devices operated by key, card or combination. At tenant's request and expense, landlord must perform additional rekeying or changing of security devices (except on interior doors and closet locks). (Tex. Prop. Code Ann. §92.156). At tenant's request and expense, landlord must install certain security devices not otherwise required to be installed by landlord. (Tex. Prop. Code Ann. §92.157). Landlord must repair and replace such security devices during term of lease upon notice from tenant that such device is inoperable or in need of repair or replacement. (Tex. Prop. Code §92.158). Tenant's request or notice pursuant to Tex. Prop. Code Ann. §§92.156, 92.157 and 92.158 may be given orally unless written lease requires notice to be written and such requirement is underlined or in boldfaced print in such lease. (Tex. Prop. Code Ann. §92.159). Landlord must comply with tenant's request within reasonable time. Subject to certain exceptions (such as crime in complex in which tenant's dwelling located), reasonable time is presumed to be not later than seventh day after date of receipt of request by landlord. (Tex. Prop. Code Ann. §92.161). Landlord may not require tenant to pay for repair or replacement of security device due to normal wear and tear. If underlined provision of written lease authorizes landlord to do so, landlord may require tenant to pay for repair or replacement of security device necessitated by misuse or damage by tenant, member of tenant's family, occupant or guest. Misuse or damage presumed to be caused by tenant, member of tenant's family, occupant or guest; tenant has burden of proving misuse or damage caused by other party. Landlord may require tenant to pay in advance for security devices requested by tenant if tenant is more than 30 days delinquent in reimbursing landlord for charges or if request for repair, installation, change or rekeying same security device was made within 30 days preceding tenant's request. (Tex. Prop. Code Ann. §92.162). Security devices installed by landlord are fixtures and except as provided by statute, cannot be removed, changed, rekeyed, replaced or altered by tenant without landlord consent. (Tex. Prop. Code Ann. §92.163). In event of landlord failure to comply with provisions regarding installing or rekeying security device required to be installed by landlord, tenant may: (i) Install such security device and deduct reasonable cost thereof from tenant's next rent payment; (ii) unilaterally terminate lease without court proceedings; (iii) sue landlord without serving request for compliance and obtain judgment for (a) court order directing landlord to comply, (b) tenant's actual damages, (c) punitive damages if tenant suffers actual damages due to landlord's intentional, malicious or grossly negligent failure to comply, (d) civil penalties of one month's rent, (e) court cost, (f) attorney's fees (except in suits for recovery of property damages, personal injuries or wrongful death); and (iv) serve request for compliance on landlord and, subject to certain conditions, if landlord does not comply, file suit against landlord and obtain judgment for those items described in (iii) above plus $500. (Tex. Prop. Code Ann. §92.165). Tenant is required to give notice of rent deduction to landlord. (Tex. Prop. Code Ann. §92.166). Landlord and management company or agent managing property for landlord are provided certain defenses to liability regarding installation of security devices. (Tex. Prop. Code Ann. §92.167).

Termination of Tenancy.

Unless otherwise provided by contract, tenancy from month-to-month may be terminated by one month's notice; tenancy for shorter periods may be terminated by notice equal to such period. Termination of tenancy need not be at end of rent-paying period. (Tex. Prop. Code Ann. §91.001). Landlord may terminate lease after tenant has exhausted all appeals if tenant finally convicted under Tex. Penal Code Ann. ch. 43 relating to public indecency. (Tex. Prop. Code Ann. §91.003). Residential tenants have a right to vacate and avoid liability following family violence incidents (Tex. Prop. Code Ann. §92.016), certain sexual offenses (Tex. Prop. Code Ann. §92.0161), and certain decisions related to military service (Tex. Prop. Code Ann. §92.017).

Uniform Residential Landlord and Tenant Act.

Not adopted.

Occupancy Limits.

Maximum number of adults (18 years of age or older) that landlord may allow to occupy dwelling is three times number of bedrooms in dwelling. Notwithstanding foregoing, landlord may allow occupancy rate of more than three adults per bedroom to extent state or federal fair housing law so requires or if adult whose occupancy causes violation of occupancy rate is seeking temporary sanctuary from family violence, as defined by Tex. Fam. Code Ann. §71.004, for period of not more than one month. Individual who owns or leases dwelling within 3,000 feet of dwelling as to which landlord has violated occupancy limits, or governmental entity or civic association acting on behalf of individual, may file suit against landlord to enjoin violation and may recover, in addition to court costs and reasonable attorneys fees, $500 from landlord for each violation. (Tex. Prop. Code Ann. §92.010).

Building Codes.

International Residential Code is adopted as municipal residential building code in this state (Tex. Loc. Gov't Code Ann. §214.212). National Electrical Code is adopted as municipal residential electrical construction code in this state (Tex. Loc. Gov't Code Ann. §214.214). International Building Code is adopted as municipal commercial building code in this state (Tex. Loc. Gov't Code Ann. §214.216).

21.11 LEASES:

See topic 21.10 Landlord and Tenant.

21.12 [RESERVED]

21.13 PERPETUITIES:

Forbidden. (Tex. Const. art. I, §26). Common law rule applies, and unless estate must vest, if at all, not later than 21 years after some life in being at creation of interest, it comes within rule against perpetuities and is void. (106 S.W.2d 247). Under statute, however, interest that would violate rule will be reformed or construed by court within limits of rule to give effect to general intent of creator of interest. (Tex. Prop. Code Ann. §5.043). Rule is not applicable to gifts for charitable purposes (161 S.W.2d 273), and pension trusts are expressly exempt (Tex. Prop. Code Ann. §121.004).

Accumulations.

Accumulation of income restricted by rule against perpetuities per Tex. Const. Art. I, §26 (81 S.W. 54).

21.14 PERSONAL PROPERTY:

Tenancy by entirety is not recognized because Texas is community property state. False, misleading, and deceptive trade practices in connection with purchase or lease of goods and services are prohibited by statute. (Tex. Bus. & Com. Code Ann. §17.41 et seq.). See category 3 Business Regulation and Commerce, topic 3.12 Consumer Protection.

21.15 POWERS OF ATTORNEY:

Attorneys in Fact.

Power of attorney should be in writing. Authority of agent to mortgage, convey, or lease (for term of more than one year) real property must be in writing. (Tex. Prop. Code Ann. §5.021). Agent with written authorization may manage or withdraw funds from accounts in savings and loan association until authority revoked by writing, actual notice, or written notice of death or adjudication of incompetency of account holder. (Tex. Fin. Code Ann. §§65.107, 95.105).

Durable Power of Attorney.

There are two statutory schemes for durable power of attorney. Durable Power of Attorney for Health Care (Tex. Health & Safety Code Ann. §§166.151-166.161) sets forth requirements and limitations for principal to designate agent to make health care decisions on principal's behalf. Durable Power of Attorney Act (Tex. Prob. Code Ann. §§481-506) sets forth requirements and limitations for principal to designate agent who shall exercise authority notwithstanding subsequent disability or incapacity of principal.

Duty of Attorney and Rights of Principal.

Attorney in fact has duty to inform and account for actions taken pursuant to power of attorney. Principal may require attorney in fact to account for actions taken. (Tex. Prob. Code

Ann. §489B).

Effect of Bankruptcy Proceeding.

After execution of durable power of attorney, filing of voluntary or involuntary petition in bankruptcy in connection with principal's debts does not revoke or terminate agency as to principal's attorney in fact or agent. Any act attorney in fact or agent may undertake with respect to principal's property is subject to limitations and requirements of United States Bankruptcy Code until final determination is made in bankruptcy proceeding. (Tex. Prob. Code Ann. §487A).

Formalities.

There are no statutory requirements as to formalities of execution or form. Power of attorney with authority to convey or mortgage real property and durable power of attorney for real property transactions requiring execution of instrument to be recorded must be recorded. (Tex. Prob. Code Ann. §§482-506). No other seal is required.

Revocation.

Death of principal revokes power of attorney unless power is coupled with interest in subject of agency. When written power of attorney is signed by adult principal, designates another person as attorney in fact, is acknowledged by principal before officer authorized to take acknowledgments to deeds of conveyance and to administer oaths and provides expressly for nontermination on disability of principal, agent's authority continues after disability or incompetence of principal until appointment and qualification of guardian for principal. (Tex. Prob. Code Ann. §481 et seq.).

Consumer Loans.

Lender may not take confession of judgment or power of attorney authorizing lender or third party to confess judgment or appear for borrower in judicial proceeding. (Tex. Fin. Code Ann. §342.504). Retail installment contract or retail charge agreement, including contract or agreement of sale of motor vehicle or mobile home (Tex. Fin. Code Ann. chs. 345, 347 and 348) may not contain power of attorney to confess judgment.

Members of Armed Forces.

No legislation.

21.16 REAL PROPERTY:

Following estates in land are recognized: leasehold estates (see topic 21.10 Landlord and Tenant), life estates, remainders, reversions, fee simple absolute, determinable fee and fee on condition subsequent. Estates may be created to begin in futuro. (Tex. Prop. Code Ann. §5.041).

Perpetuities, primogeniture and entailments are prohibited. (Tex. Const. art. I, §26).

Where property is owned jointly, and one joint owner dies before severance, his interest does not survive to remaining joint owner, but descends to decedent's heirs or legal representatives (Tex. Prob. Code Ann. §46). However, right of survivorship may be created by agreement in writing. (Tex. Prob. Code Ann. §§46, 451 et seq.).

Rule in Shelley's Case abolished. (Tex. Prop. Code Ann. §5.042).

Foreign Conveyances or Encumbrances.

See category 10 Documents and Records, topic 10.04 Records.

Condominium.

Texas has adopted Uniform Condominium Act. (Tex. Prop. Code Ann. c. 82). Uniform Condominium Act will apply to all condominiums for which declaration was recorded on or after Jan. 1, 1994, and certain sections of Act also apply to condominiums for which declaration was recorded before Jan. 1, 1994. (Tex. Prop. Code Ann. §82.002). Prior Condominium Act (Tex. Prop. Code Ann. c. 81) is not applicable to condominiums for which declaration was recorded on or after Jan. 1, 1994, unless unit owners vote to amend declaration and file amendment in county condominium records, but continues to be applicable to condominiums for which declaration was recorded before Jan. 1, 1994.

Timeshare Interests.

Texas Timeshare Act regulates creation, operation and sale of timeshare interests. (Tex. Prop. Code Ann. §221.001 et seq.). Vacation ownership interests and vacation ownership plans are also governed by the Timeshare Act. (Tex. Prop. Code Ann. §221.037).

See also topics 21.05 Curtesy, Deeds, Dower, Landlord and Tenant; categories 5 Civil Actions and Procedure, topic Partition; Debtor and Creditor, topic Homesteads; Family, topic Husband and Wife; Mortgages, topic Mortgages of Real Property.

Homeowners' Association.

Exercise of discretionary authority by association concerning restrictive covenant is presumed reasonable unless court determines it to be arbitrary, capricious or discriminatory. Damages for violation of restrictive covenant may not to exceed $200 for each day of the violation (Tex. Prop. Code Ann. §202.004).

21.17 TRUST DEEDS:

See category 20 Mortgages, topic 20.04 Mortgages of Real Property.

22 TAXATION

22.01 ADMINISTRATION:

State Taxes.

Property Tax Code provides for statewide administration for property taxation, including appraisal districts in each county. Code repealed numerous taxation statutes and codified state taxation statutes under following subtitles: (A) General Provisions; (B) Property Tax Administration; (C) Taxable Property and Exemptions; (D) Appraisal and Assessment; (E) Collections and Delinquency; and (F) Remedies. Repeal of superseded provisions and enactment of Code was generally effective Jan. 1, 1982. In addition, effective Jan. 1, 1982, many other tax laws of Texas have been codified. Citations herein are to Tax Code, which includes both Property Tax Code and all such other codified laws. State does not levy ad valorem tax. (Tex. Const. art. VIII, §1[e]). County and other political subdivisions tax rates are fixed by governing authorities. (Tex. Tax Code Ann. §26.05). State is allowed to redistribute among other school districts ad valorem taxes levied and collected by school district. (Tex. Const. art. VII, §3[e]).

County, School and Municipal Taxes.

Taxes for municipal school district may be collected by either assessor and collector of taxes for city or town or by board of trustees of municipal school district through county assessor-collector of taxes. (Tex. Educ. Code Ann. §24.07). Municipality may also tax owner of railway. (Tex. Transp. Code Ann. §§312.023, 313.045). County equalization tax is imposed on all taxable property in county. (Tex. Educ. Code Ann. §18.13).

Assessment of taxes are done by county or municipal board under statute authorizing imposition of tax.

Protest of Taxes Assessed by State.

Payment of occupation, license, franchise and other privilege taxes may be made under protest. Suit to recover taxes so paid must be brought in district court of Travis County within 90 days after payment. (Tex. Tax Code Ann. §§112.001-112.052). As alternative to suit for privilege tax refund, refund claim may be filed with Comptroller. If claim and motion for rehearing denied, claimant may sue in Travis County district court within 30 days of denial of rehearing motion. (Tex. Tax Code Ann. §§111.104, 112.001, 112.151).

Appeals.

In most cases taxpayer appeals are limited to administrative process before appraisal review board at county central appraisal district which occurs upon notice of protest by taxpayer. (Tex. Tax Code Ann. §41.41). Thereafter, taxpayer may appeal to district court on trial de novo basis. (Tex. Tax Code Ann. §§42.01-.43). Certain taxes must be paid as prerequisite to maintaining appeal. (Tex. Tax Code Ann. §42.08). However, taxpayer may instead be able to file oath of inability to pay. (Tex. Tax Code Ann. §42.08[d]). Failure to follow administrative procedures in subsequent court appeal may result in forfeiture of remedies. (Tex. Tax Code Ann. §42.08).

Penalties.

Property Taxes.

See topic 22.15 Property Taxes, subhead Payment.

Inheritance Taxes and Additional Inheritance Taxes.

If not paid when due, results in penalty of 5% of amount of tax, plus additional penalty of 5% if not paid within 30 days after due date. Delinquent taxes due on or before Dec. 12, 1999, bear interest at 12% per annum after which rate to be charged is prime rate as published by Wall Street Journal on first day of each calendar year plus 1% beginning nine months after date of death or original due date. (Tex. Tax Code Ann. §§211.258, 211.259).

Occupation Taxes.

Due on last day of Jan., Apr., July and Oct., and must be paid by due date; penalty of 5% of tax is incurred if not paid when due, and additional 5% penalty is incurred if not paid within next 30 days. Delinquent taxes draw 12% per annum interest beginning 60 days after due date. (Tex. Tax Code Ann. §§111.060, 182.082, 182.102, 191.087). Failure to make report by due date penalized by same penalty as if tax not paid. (Tex. Tax Code Ann. §§182.081; 182.102).

Use Taxes and Sales Taxes.

Payable on or before 20th day of month following each monthly or quarterly period; frequency depends upon dollar amounts due. Penalty for failure so to pay is 5% of tax; plus additional 5% if not paid within next 30 days. Delinquent taxes due on or before Dec. 12, 1999, bear interest at 12% per annum after which rate to be charged is prime rate as published by Wall Street Journal on first day of each calendar year plus 1%. Failure to make report by due date penalized by same penalty as if tax not paid. (Tex. Tax Code Ann. §§111.060, 151.401, 151.703). Same penalties regarding hotel occupancy taxes. (Tex. Tax Code Ann. §§111.060, 156.151, 156.202).

Gasoline Taxes.

Collected in preceding month must be remitted by distributor by 25th day of each month; penalty for failure to file report or pay tax is 5% of tax; plus additional 5% if not filed or paid within next 30 days; delinquent taxes bear interest at 12% per annum beginning 60 days from due date. (Tex. Tax Code Ann. §§162.401, 162.403, 162.405). Criminal penalties apply. (Tex. Penal Code Ann. §§12.21-12.23, 12.34).

Gas Taxes.

Due on 20th day of second month after production. (Tex. Tax Code Ann. §201.201). Failure to remit by due date results in penalty of 5% of amount of tax, plus additional penalty of 5% if not paid within 30 days after due. (Tex. Tax Code Ann. §201.351). Delinquent taxes due on or before Dec. 12, 1999, bear interest at 12% per annum after which rate to be charged is prime rate as published by Wall Street Journal on first day of each calendar year plus 1%. (Tex. Tax Code Ann. §111.060).

Oil Taxes.

For prior month must be remitted by 25th day of each month, and failure to remit by due date results in penalty of 5% of amount of tax, plus additional penalty of 5% if not paid within 30 days after due. Delinquent taxes due on or before Dec. 12, 1999, bear interest at 12% per annum after which rate to be charged is prime rate as published by Wall Street Journal on first day of each calendar year plus 1%. (Tex. Tax Code Ann. §§111.060, 202.151, 202.301).

Coin Operated Machines Taxes.

Must be paid to get license. Failure to display license results in forfeiture by owner of $50 to $2,000 for each day of violation. Failure to display license by possessor or exhibitor is misdemeanor punishable by fine not to exceed $500. (Tex. Occ. Code Ann. §§2153.159, 2153.258).

Tobacco Taxes.

As to cigarette taxes, criminal penalties are imposed for numerous violations including selling or knowingly smoking (Tex. Tax Code Ann. §154.502) or transporting more than 200 cigarettes without stamp being affixed to each individual package as provided by Tex. Tax Code Ann. §154.024(a) (Tex. Tax Code Ann. §154.511), and failing to keep records or make reports (Tex. Tax Code Ann. §154.501). Delinquent taxes due on or before Dec. 12, 1999, bear interest at 12% per annum after which rate to be charged is prime rate as published by Wall Street Journal on first day of each calendar year plus 1%. (Tex. Tax Code Ann. §111.060). Similar as to cigar and tobacco products taxes. (Tex. Tax Code Ann. §§155.201, 155.202, 155.209).

Unemployment Compensation Taxes.

Must be paid as prescribed by commission; late payment results in penalty of 1½% of tax for each month, or portion thereof, that contribution and penalty are not paid in full, with total penalty not to exceed 37½% of tax. Failure to make reports results in following forfeiture: For first 15 days, or part thereof, of violation $15, and for remainder of month, $30 plus 1/20th of 1% of taxable wages not reported; for second month, or part thereof, additional $30 plus 1/10th of 1% of taxable wages not reported; for third month, or part thereof, additional $30 plus 1/5 of 1%. (Tex. Lab. Code Ann. §§213.021-.022).

Real and Personal Property Taxes.

See also topic 22.17 Sales and Use Taxes, subhead Sales Tax.

Persons required to pay, collect or withhold taxes or file reports and who fail to do so may be enjoined from continuing in business until such taxes are paid or reports filed. (Tex. Tax Code Ann. §111.011). Refusal to permit Comptroller to examine records results in forfeiture of charter or permit to do business. (Tex. Tax Code Ann. §111.0047).

Interstate Cooperation.

Multistate Tax compact adopted. (Tex. Tax Code Ann. §141.001 et seq.).

22.02 ALCOHOL, BEVERAGES AND TOBACCO TAXES:

Alcoholic Beverage Taxes.

Imposed by Tex. Alco. Bev. Code Ann. tit. 5.

Liquor Permit Fees.

See category 3 Business Regulation and Commerce, topic 3.18 Licenses, Business and Professional.

Cigarette Taxes.

Tobacco taxes imposed under Tex. Tax Code Ann. §§154.001-155.241.

22.03 BUSINESS TAXES:

Franchise Tax.

See category 2 Business Organizations, topic 2.03 Corporations.

Insurance Companies.

See category 16 Insurance, topic 16.01 Insurance Companies.

Occupation taxes are based on gross receipts, are imposed as follows: Gas, electric light, electric power and waterworks companies, .581% of receipts from business in cities of more than 1,000 and less than 2,500, 1.07% of receipts from business in cities of 2,500 or more and less than 10,000 and 1.997% of receipts from business in cities of 10,000 or more (Tex. Tax Code Ann. §182.022); cementing, shooting, fracturing, acidizing, surveying or testing oil and gas wells, 2.42% of gross receipts (Tex. Tax Code Ann. §191.083); sulphur producers, $1.03 per long ton of sulphur produced (Tex. Tax Code Ann. §203.003); tax of $200 per year is imposed on each attorney licensed to practice law in Texas (Tex. Tax Code Ann. §§191.141-191.145).

22.04 [RESERVED]

22.05 EMPLOYMENT TAXES:

Unemployment Compensation Tax.

Any employer paying $1,500 or more in wages for one calendar quarter, or employing one or more persons for 20 days, each day being in different week, during period of year (Tex. Lab. Code Ann. §201.021), must pay tax (termed “contribution”) at rate fixed by statute (Tex. Lab. Code Ann. §§204.041-204.043). Contributions are not exacted from employees, and employer's contributions may not be deducted from their wages. (Tex. Lab. Code Ann. §204.003).

22.05A GAMBLING AND ENTERTAINMENT TAXES:

Coin Operated Machines Tax.

Coin operated machines are taxed annually at rate of $60 per machine. (Tex. Occ. Code Ann. §2153.401). Among items exempt from operation of this tax are: food vending machines, beverage vending machines, merchandise vending machines, confection vending machines, gas meters, service oriented coin operated machines, cigarette vending machines, stamp vending machines. (Tex. Occ. Code Ann. §2153.004), music, skill and pleasure machines for personal use and amusement (Tex. Occ. Code Ann. §2153.006) and machines owned by nonprofit corporations and associations organized for religious, charitable, educational or benevolent purposes (Tex. Occ. Code Ann. §2153.005). Annual license fee of $200 to $500 required for music and skill or pleasure coin-operated machines. Amount of fees varies with number of machines of licensee. (Tex. Occ. Code Ann. §2153.154).

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22.08 GASOLINE AND SPECIAL FUELS TAXES:

Gasoline tax of 20¢ per gallon for first sale, distribution, or use of gasoline and diesel fuel within state imposed by Tex. Tax Code Ann. §§162.102 and 162.202.

Gas Tax.

Gas produced and saved within this state is subject to tax of 7½% of market value. (Tex. Tax Code Ann. §§201.051, 201.052). Condensate, as defined, is taxed at same rate as oil. (Tex. Tax Code §201.055). High cost gas produced from approved wells after Aug. 31, 1996 is exempt. (Tex. Tax Code Ann. §201.057). Credit against tax may be allowed for discovery wells spudded during 1994. (Tex. Tax Code Ann. §204.002). Other reductions may be available depending on when well was spudded and gas was produced. (Tex. Tax Code Ann. §201.057). Oil field cleanup regulatory fee is 1/15 of 1¢ per 1,000 cubic feet of gas. (Tex. Nat. Res. Code Ann. §81.117).

Oil Tax.

Oil produced in state is subject to tax of 4.6¢ per barrel or 4.6% of market value whichever rate results in greater amount of tax. Oil produced from approved enhanced recovery project is generally subject to tax of 2.3% of market value. (Tex. Tax Code Ann. §§202.051, 202.052). Credit against tax may be allowed for discovery wells spudded during 1994. (Tex. Tax Code Ann. §204). There is additional tax of 3/16 of 1¢ per barrel. (Tex. Nat. Res. Code Ann. §81.111). Additional oil field cleanup regulatory fee is 5/8 of 1¢ per barrel of oil. (Tex. Nat. Res. Code Ann. §81.116).

Special Fuels Tax.

Tax on motor vehicle fuels other than gasoline of 15¢ per gallon imposed by Tex. Tax Code Ann. §162.301.

22.08A GENERATION SKIPPING TAX:

See topic 22.12 Inheritance Tax, subhead Tax on Property Included in Generation-Skipping Transfer.

22.09 GIFT TAX:

None.

22.10 HOTEL AND RESTAURANT TAXES:

Hotel Occupancy Tax.

Imposed by Tex. Tax Code Ann. §156.051, equal to 6% of consideration paid by occupant of room. Certain cities and counties are also empowered to levy tax at various rates. (Tex. Tax Code Ann. §§351.001-351.106 and §§352.001-352.108). Successor to hotel owner must withhold tax from purchase price. (Tex. Tax Code Ann. §351.0041).

22.11 INCOME TAX:

No general income tax, but some occupation taxes (see topic 22.03 Business Taxes, subhead Occupation Taxes) are based on gross receipts. Regarding Federal income tax, employers must provide employees with information regarding earned income tax credit. (Tex. Lab. Code Ann. §§104.001–104.004).

22.12 INHERITANCE TAX:

All property within jurisdiction of state, whether belonging to residents or nonresidents, and whether located within or without state, is subject to inheritance tax on passing absolutely or in trust by will, descent or distribution, by general power of appointment or by transfer intended to take effect after death of transferor. For inheritance tax applicable to decedents dying prior to Sept. 1, 1983, see Tex. Rev. Civ. Stat. Ann. tit. 122A of Revised Civil Statutes of Texas [Taxation General]. After that date, Texas Inheritance Tax on residents and nonresidents will be as set forth, infra.

For all estates of decedents who die on or after Sept. 1, 1983, tax will be as follows:

Tax on Property of Resident.

Tax equal to amount of federal credit is imposed on transfer at death of property of every resident. If estate of resident is subject to death tax imposed by another state or states for which federal credit is allowable amount of tax due under this article is reduced by lesser of: (1) Amount of death tax paid other state or states and that is allowable as federal credit; or (2) amount determined by multiplying federal credit by fraction, numerator of which is value of resident's gross estate less value of property of resident, that is included in gross estate and denominator of which is value of resident's gross estate. Property of resident includes real property having actual situs in this state whether or not held in trust; tangible personal property having actual situs in state; and all intangible personal property, wherever notes, bonds, stock certificates, or other evidence, if any, of intangible personal property may be physically located or wherever banks of other debtors of decedent may be located or domiciled; except that real property in personal trust is not taxed if real property has actual situs outside this state. (Tex. Tax Code Ann. §211.051).

Tax on Property of Nonresident.

Tax imposed on transfer at death of property located in Texas of every nonresident determined by multiplying federal credit by fraction, numerator of which is value of property located in Texas that is included in gross estate and denominator of which is value of nonresident's gross estate. Property located in Texas of nonresident includes real property having actual situs in this state whether or not held in trust and tangible personal property having actual situs in this state, but intangibles that have acquired actual situs in this state are not taxable. (Tex. Tax Code Ann. §211.052).

Tax on Property of Alien.

Tax imposed on transfer at death of property located in Texas of every alien determined by multiplying federal credit by fraction, numerator of which is value of property located in Texas that is included in gross estate and denominator of which is value of alien's gross estate. Property located in Texas of alien includes real property having actual situs in this state whether or not held in trust; tangible personal property having actual situs in this state; and intangible personal property if physical evidence of property is located within this state or if property is directly or indirectly subject to protection, preservation, or regulation under law of this state, to extent that property is included in decedent's gross estate. (Tex. Tax Code Ann. §211.053).

Tax on Property Included in Generation-Skipping Transfer.

Tax imposed on generation-skipping transfer determined by multiplying generation-skipping transfer tax credit by fraction, numerator of which is value of property located in Texas included in generation-skipping transfer and denominator of which is value of all property included in generation-skipping transfer. Property located in Texas includes real property having actual situs in this state whether or not held in trust; tangible personal property having actual situs in this state; and tangible personal property owned by trust having its principal place of administration in this state at time of generation-skipping transfer. (Tex. Tax Code Ann. §211.054).

Maximum Tax.

Amount of taxes imposed may not exceed amount of tax imposed by I.R.C. §2001 reduced by unified credit under I.R.C. §2010. (Tex. Tax Code Ann. §211.055).

Return.

Inheritance tax report is due within nine months from date of death, except when extended by Internal Revenue Service. (Tex. Tax Code Ann. §211.102). If IRS denies extension, state inheritance tax return must be filed within ten days of denial. If no federal estate tax return is required, no inheritance tax return is required. (Tex. Tax Code Ann. §§211.103, 211.106).

Payment is due nine months from date of death, except when extended by Internal Revenue Service. If IRS denies extension, estimated inheritance tax must be paid within ten days of denial. (Tex. Tax Code Ann. §§211.102-211.104). Interest accrues on tax due beginning nine months after date of death or original due date. (Tex. Tax Code Ann. §211.259). Present interest rate for taxes due on or before Dec. 12, 1999, 12% per annum after which rate to be charged is prime rate as published by Wall Street Journal on first day of each calendar year plus 1%. (Tex. Tax Code Ann. §111.060). If accrued interest less than $5, it does not have to be paid. (Tex. Tax Code Ann. §211.259). If tax not paid when due, penalty of 5% of tax due is levied and additional penalty of 5% of tax due is levied if such tax is not paid within 30 days after due date, unless it is shown that failure to pay tax is due to reasonable cause and not due to willful neglect. (Tex. Tax Code Ann. §211.258). If personal representative of estate transfers property of estate without paying tax, penalty, and interest due, he is personally liable to extent of value of property transferred. (Tex. Tax Code Ann. §211.201). This provision does not apply to banks and corporations. (Tex. Tax Code Ann. §211.201[b]).

Apportionment Against Inter Vivos Dispositions.

Apportionment of federal and state death taxes required by Tex. Prob. Code Ann. §322A. For newly enacted provisions governing apportionment of estate taxes, see Tex. Estates Code Ann. §§124.001–124.052.

22.13 [RESERVED]

22.14 MOTOR VEHICLE TAXES:

Motor Vehicle Retail Sales and Use Tax.

6¼% tax is collected from purchaser on retail sale of motor vehicle in state, and use tax of 6¼% of retail price is collected on motor vehicle purchased at retail outside of state and brought into state for use on public highways by resident or person doing business in state. Also collected are $90 use tax on motor vehicles brought into state by new resident (in lieu of vehicle use tax), $5 tax on each party to even exchange of motor vehicles, and $10 tax on donee of motor vehicle. (Tex. Tax Code Ann. §§152.021-152.025). Exempt from these taxes are motor vehicles owned by motor vehicle dealer, purchased in state, and lent free by such dealer to public school for use in driver training course; motor vehicles purchased by volunteer fire departments and used exclusively for fire fighting purposes; motor vehicles used by religious institutions to transport persons to and from services or meetings; motor vehicle modified and used for transportation of orthopedically handicapped person; motor vehicle transported out of state, prior to any use in state, for exclusive use out of state; and vehicles sold to be used in State-Federal Enterprise Zone. (Tex. Tax Code Ann. §§152.081-152.089). No tax is due upon purchase of motor vehicle for renting to others, but receipts from such rentals are taxable at 10% if rental is for 30 days or less and 6¼% if rental is for longer than 30 days. (Tex. Tax Code Ann. §152.026).

22.15 [RESERVED]

22.16 PROPERTY TAXES:

All real and personal property subject to tax (Tex. Tax Code Ann. §11.01), unless exempted (Tex. Prop. Code Ann. §§11.11-11.31; Tex. Const. art. VIII, §1[b]; see also subhead Exemptions, infra). Criteria for establishing that property is in interstate commerce, and therefore possibly not subject to taxation, set forth in Tex. Tax Code Ann. §§11.251, 11.436 and §21.01 et seq.

Assessment.

Property is required to be rendered for taxation by owner (Tex. Tax Code Ann. §22.01), but if he fails to do so, it is assessed in his name by assessor (Tex. Tax Code Ann. §25.01). Property is to be assessed at its full value and assessment ratios are prohibited. (Tex. Tax Code Ann. §26.02). Central appraisal district is established for each county. (Tex. Tax Code Ann. §6.01). Chief appraiser retained by central district prepares tax rolls and determines property valuation. (Tex. Tax Code Ann. §25.01). Property owner entitled to notice if property added to rolls for first time, if value is increased over last year, if value higher than rendition by taxpayer is proposed, if property reappraised, or if ownership of property changed in preceding year. (Tex. Tax Code Ann. §25.19). Special appraisal provisions applicable to inventory (Tex. Tax Code Ann. §23.12), special inventory (Tex. Tax Code Ann. §23.121), taxable leaseholds (Tex. Tax. Code Ann. §23.13), insurance company intangibles (Tex. Tax Code Ann. §23.15), intangibles of savings and loans (Tex. Tax Code Ann. §23.16), nonproducing mineral interests (Tex. Tax Code Ann. §23.17), future income from oil or gas produced on real property (Tex. Tax Code Ann. §23.175), certain property owned by homeowner's organizations (Tex. Tax Code Ann. §23.18), land designated for agricultural use (Tex. Tax Code Ann. §§23.41-23.46), agricultural land (Tex. Tax Code Ann. §§23.51-.57), timberland (Tex. Tax Code Ann. §§23.71-.79), recreational, park and scenic land (Tex. Tax Code Ann. §§23.81-.87); private land used as airport (Tex. Tax Code Ann. §§23.91-.97). State level appraisal required for railroad rolling stock. (Tex. Tax Code Ann. §§24.31-.40).

Exemptions.

Public property (Tex. Tax Code Ann. §§11.11 and 11.111); property exempt from federal ad valorem tax (Tex. Tax Code Ann. §11.12); portion of residence homestead (Tex. Tax Code Ann. §11.13); all tangible personal property not held or used for production of income (local option) (Tex. Tax Code Ann. §11.14); family personal supplies (Tex. Tax Code Ann. §11.15); farm products owned by their producer (Tex. Tax Code Ann. §11.16); implements of farming or ranching (Tex. Tax Code Ann. §11.161); cemeteries (Tex. Tax Code Ann. §11.17); certain property of charitable, youth spiritual, mental and physical development, and religious organizations and schools (Tex. Tax Code Ann. §§11.18-11.21); charitable organizations improving property for low-income housing (Tex. Tax Code Ann. §11.181); portion of property owned by disabled veterans (Tex. Tax Code Ann. §11.22); historic sites (Tex. Tax Code Ann. §11.24); increase in value from solar or wind-powered energy systems (Tex. Tax Code Ann. §11.27); mothballed offshore drilling equipment (Tex. Tax Code Ann. §11.271); portions of property designated as reinvestment zone under Property Redevelopment and Tax Abatement Act (Tex. Tax Code Ann. §§11.28; 312.001-.402); land used as Intracoastal Waterway dredge disposal site (Tex. Tax Code Ann. §11.29); land owned by water supply or sewer service corporation (Tex. Tax Code Ann. §11.30); and control of air, water or land pollution (Tex. Tax Code Ann. §11.31); property held by organization engaged primarily in performing charitable functions (Tex. Tax Code Ann. §11.184) are exempt from taxation. Miscellaneous exemptions are set forth at Tex. Tax Code Ann. §11.23.

Payment.

Taxes are due on receipt of tax bill and are delinquent if not paid before Feb. 1 of year following calendar year for which taxes are imposed. (Tex. Tax Code Ann. §31.02). Penalties imposed for late payment ranging up to 12% with interest at 1% per month. (Tex. Tax Code Ann. §33.01). Persons who are 65 and over and/or disabled, after providing notice to taxing agent and claiming elderly homestead exemption may pay under installment plan. (Tex. Tax Code Ann. §31.031). Certain split payment options (Tex. Tax Code Ann. §31.03) and discounts (Tex. Tax Code Ann. §31.05) are available at option of local authorities. Collector may adopt policy of allowing payments to be designated to particular taxing units, even if single bill is sent. (Tex. Tax Code Ann. §§31.07[b], [c]).

Collection is by local assessors or by private attorneys. Collection cost penalties are limited by Tex. Tax Code Ann. §33.07. Collection through seizure and summary proceedings is provided. (Tex. Tax Code Ann. §§33.21-.25, 33.41-.54).

Lien and Liability.

Taxes are lien on property as of first day of each calendar year even if not imposed until later, are personal liability of party owning property and as of such date are in rem obligation of property itself, with priority over certain creditors. (Tex. Tax Code Ann. §§32.01-.07).

Redemption.

Residential homestead property or mineral interest property used for agricultural use sold at tax sale to purchaser other than taxing unit may be redeemed by owner within two years for price paid by purchaser for property plus taxes and other costs plus 25% of preceding amounts if redeemed in first year and 50% if redeemed in second year. (Tex. Tax Code Ann. §34.21). Other real property sold at tax sale may be redeemed, within 180 days of when purchaser's deed is recorded, for price paid for property plus taxes and other costs. (Tex. Tax Code Ann. §34.21).

Real Estate Conveyance Tax.

None.

22.17 SALES AND USE TAXES:

Sales Tax.

6¼% tax on purchase price of retail sale (as defined) of tangible personal property and certain services within state is collected by seller from purchaser. (Tex. Tax Code Ann. §151.051). Taxable services include amusement services, cable television services, certain personal services, vehicle parking and storage, telecommunications services, repair, remodeling, maintenance and restoration of tangible personal property, credit reporting services, debt collection services, insurance services, information services, real property services, security services, data processing services, telephone answering services, and real property repair and remodeling. (Tex. Tax Code Ann. §151.0101). Such amount is paid monthly and is due on or before 20th day of subsequent month or, if tax is less than $500 for calendar month or $1,500 for calendar quarter, quarterly, by seller to Comptroller of Public Accounts of State of Texas. (Tex. Tax Code Ann. §151.401). No tax is payable for portions of unpaid sales written off as bad debts for federal tax purposes. (Tex. Tax Code Ann. §151.426). Each person conducting business as seller must obtain permit from Comptroller. (Tex. Tax Code Ann. §§151.201, 151.202; 151.2021). Among numerous items exempt from sales tax are: water; items sold to volunteer fire departments; interstate long-distance telecommunications services; gas and electric services for other than commercial use; sales for shipment out of state by seller or by common carrier; services performed for use outside of state; certain intercorporate services; certain lawn and yard services; items sold to participating entity in connection with joint research and development venture as defined by 15 U.S.C.S. §4301; goods sold for use of U.S., State of Texas or any of its political subdivisions; goods sold for use of religious, educational and charitable institutions and organizations qualified under I.R.C. §§501(c)(3), (4), (8), (10), or (19) if related to purpose of organization; occasional sales (as defined), including transfer in bulk of entire business or division; food and food products for human consumption; certain food stamp purchases; university and college student organizations, containers, court reporting services, internet access services, clothing and footwear for limited periods, information services and data processing services; voluntary and mandatory gratuities when separately stated as such and actually passed on to waiter by employer; prescription drugs and medicines; hypodermic syringes or needles; therapeutic devices dispensed or prescribed by licensed physician and purchased and used by patient; corrective lenses and related supplies dispensed or prescribed by ophthalmologist or optometrist; specialized equipment and ancillary materials which enable deaf person to communicate by telephone; locomotives and rolling stock; component materials (except rented or leased materials) to be consumed in turning out finished product; certain coins and precious metals when total sales price of all items sold equals $1,000 or more; certain packages, wrappings, and containers; feeds, seeds, fertilizer, farm equipment, and farm animals; goods sold to be resold, leased, or rented; amusement and personal services provided through customer operated coin operated machines; repairs and maintenance required for environmental or energy conservation purposes; commercial vessels (eight ton load displacement) sold by builder and repairs to, including materials, equipment and component parts of such vessels; oil drilling and production equipment to be used outside state; certain aircraft to be used as licensed carriers or exclusively used for licensed courses of instruction; books containing writings sacred to any religion; specially prepared advertising circulars to be distributed as part of newspaper; goods produced by elderly person and sold to raise funds for nonprofit organization created for sole purpose of assisting elderly; items sold to or used by Development Corporations; equipment used in enterprise zone; agribusiness items; sales by or to certain Indian tribes; and certain items already taxed under other statutory provisions (e.g., oil, sulphur, motor vehicles, motor fuels, special fuels, and cement, mixed and alcoholic beverages, oil well services, insurance premiums); newspaper distributed free of charge or sold by individual copy or subscription; and certain magazine subscriptions. (Tex. Tax Code Ann. §§151.301-151.353). There is airline service fee of 5¢ for each individual serving of alcoholic beverage on commercial passenger plane. (Tex. Alco. Bev. Code Ann. §34.04).

Local Tax.

Generally, incorporated cities may impose local sales tax of up to 1%, amount determined by formula, and ½%, respectively, on sales of taxable items(Tex. Tax Code Ann. §321.103). Special taxing authority may impose sales tax at rate authorized and set as provided by the law authorizing the creation of the taxing entity (Tex. Tax Code Ann. §322.101). County can impose sales tax of 1/2 of 1% or only 1% if county includes no territory within limits of municipality (Tex. Tax Code Ann. §323.103).

Use Tax.

6¼% tax is collected on storage, use, or other consumption in state of tangible personal property purchased, leased, or rented from any retailer (as defined). (Tex. Tax Code Ann. §151.101). Each retailer must register with Comptroller and, if new or delinquent registrant, furnish bond or other security of up to $100,000 or four times taxpayer's average monthly tax liability, whichever is greater if he intends to sell, lease, or rent such tangible personal property for storage, use, or other consumption in state. (Tex. Tax Code Ann. §§151.106, 151.251, 151.253). Purchaser or user of such goods is primarily liable for tax, but it is duty of retailer to collect it. (Tex. Tax Code Ann. §§151.102, 151.103). Taxes are paid monthly or, if tax is less than $500 for calendar month or $1,500 for calendar quarter, quarterly to Comptroller. (Tex. Tax Code Ann. §151.401). In addition to exemptions listed supra under subhead Sales Tax, which all apply to use tax, following items are also exempt from use tax: temporary storage in state of goods bought outside state and used outside state; goods acquired outside state which would be exempt from sales tax and use tax if acquired within state; and goods which are subject to sales tax or on which use tax has been previously paid (credit is allowed for all sales taxes and use taxes paid out of state if such state has reciprocal provision). (Tex. Tax Code Ann. §§151.303, 151.330).

Local Tax.

Generally, incorporated cities (Tex. Tax Code Ann. §321.104), special taxing authorities (Tex. Tax Code Ann. §322.102) and counties (Tex. Tax Code Ann. §§323.104, 352.101) having sales tax also impose use tax of up to 1%, amount determined by formula, and ½%, respectively. However, special taxing authority rate is determined by law creating the taxing entity (Tex. Tax Code Ann. §322.101).

Manufactured Housing.

Tax imposed, effective Mar. 1, 1982, on initial sale or use in Texas of mobile home or modular home. (Tex. Tax Code Ann. §§158.051, 158.057). Amount of tax is 5% of 65% of actual price paid by purchaser to retailer as shown on actual invoice or bill of sale. Sales price excludes shipping, freight, and delivery charges if those charges are separately stated on invoice or bill of sale. (Tex. Tax Code Ann. §§158.051, 158.052). Sales tax is collected by manufacturer from retailer or purchaser, and is remitted monthly to Comptroller. (Tex. Tax Code Ann. §§158.053, 158.056). Use tax is paid by user; credit allowed for sales or use taxes previously paid to another state if such state has reciprocal provision. (Tex. Tax Code Ann. §158.057). Sales to federal, state, and local governments and agencies are exempt, as are sales to organizations created for religious, educational, charitable or eleemosynary purposes. (Tex. Tax Code Ann. §158.101). Manufacturers must obtain permits from Comptroller (Tex. Tax Code Ann. §158.054) and comply with certain certification and continuing education programs (Tex. Occ. Code Ann. §1201.113).

22.18 STAMP AND SEAL TAXES:

Stamp Tax.

None.

23 TRANSPORTATION

23.01 MOTOR VEHICLES:

Federal Commercial Motor Vehicle Safety Act of 1986 (49 U.S.C.S. §14301 as am'd) enacted as Texas Commercial Driver's License Act (Tex. Transp. Code Ann. §522.001 et seq.). Uniform Act Regulating Traffic on Highways has been adopted. (Tex. Transp. Code Ann. chs. 541-553, 600). Driver's License Compact of 1993 enacted. (Tex. Transp. Code Ann. c. 523). Agency having general supervisory powers over Act is Texas Department of Transportation, Motor Vehicle Division, 125 East 11th Street . Austin, Texas 78701.

Vehicle License.

Vehicles must be registered annually. (Tex. Transp. Code Ann. §§502.002, 502.158). License plates are issued once every five years; other years Department issues symbol, tab or other device to be attached to front windshield or other authorized location evidencing registration. (Tex. Transp. Code Ann. §502.180). License number plates must be displayed front and rear. (Tex. Transp. Code Ann. §502.404). No exemption for members of Armed Forces. Evidence of financial responsibility must also be submitted to register vehicle. (Tex. Transp. Code Ann. §502.153).

Operator's License.

All drivers (except exempt persons) of vehicles must have class A, class B or class C license. (Tex. Transp. Code Ann. §521.021). These licenses are issued by Department of Public Safety and expire six years after issuance. (Tex. Transp. Code Ann. §§521.271, 521.273-521.274). License may not be issued to certain persons, including: (1) Persons under 15; (2) persons under 18 except under certain regulations; (3) persons addicted to alcohol, controlled substance or another drug that renders person incapable of driving; (4) mental incompetents; (5) those who fail to pass required examination or whose licenses are suspended, revoked or cancelled in this state or any other; (6) mental or physical defectives, if such defects would prevent ordinary control of vehicle; (7) any minor who fails to appear for traffic offense, or fails to pay fine; (8) anyone under 18 who has not obtained high school diploma, its equivalent, or is not pursuing it. (Tex. Transp. Code Ann. §§521.161, 521.201, 521.203, 521.204). Licenses may be suspended or revoked for certain reasons. (Tex. Transp. Code Ann. §§521.291-521.295, 521.300, 521.303-521.377). Members of Armed Forces are not generally exempt, but persons in service of U.S. are exempt when operating official motor vehicle in such service. (Tex. Transp. Code Ann. §§521.027-.028). License is automatically suspended upon conviction of certain enumerated offenses. (Tex. Transp. Code Ann. §§521.341-.346, 521.371-.377). Evidence of financial responsibility must be submitted to obtain original or renewal driver's license. (Tex. Transp. Code Ann. §521.143).

Titles.

Owner (not including manufacturer or importer) of any motor vehicle registered in this State may not operate vehicle without certificate of title (Tex. Transp. Code Ann. §501.022) and must, before making sale, mortgage or transfer of any interest in such vehicle, procure certificate of title by making application to County Tax Collector upon form prescribed by Department of Transportation (Tex. Transp. Code Ann. §§501.021-.029). Department of Transportation will furnish all necessary forms on application. (Tex. Transp. Code Ann. c. 501).

Sales.

Sale, mortgage or other transfer of interest in motor vehicle without complying with the regulations of the State Highway Department is unlawful and void. No sale may be made unless the owner designated in the certificate of title transfers said certificate and written disclosure of odometer reading on form prescribed by Department. (Tex. Transp. Code Ann. §§501.021, 501.071-.072). See also category 8 Debtor and Creditor, topic 8.08 Fraudulent Sales and Conveyances.

Liens.

No lien on any non-inventory motor vehicle is valid as against third parties without actual notice thereof unless notation of said lien has been caused to be made on certificate of title. (Tex. Transp. Code Ann. §§501.111-.112). Security interests in motor vehicles which are inventory are governed by U.C.C. §9.302. Department of Transportation has jurisdiction of all matters relating to certificates of titles on motor vehicles. (Tex. Transp. Code Ann. §§501.111-.116).

Fees.

Fee of up to $33 is charged for each application for certificate of title or re-issuance thereof. (Tex. Transp. Code Ann. §501.138).

Identification Marks.

Unauthorized person commits third degree felony if person stamps or places motor number, serial number, manufacturer's vehicle identification number, or derivative number on any vehicle with intent to change its identity. (Tex. Transp. Code Ann. §501.151). Alteration or blurring of license number plate is punishable by fine if unintentional and is Class B misdemeanor if intentional. (Tex. Transp. Code Ann. §502.409).

Odometer Alteration.

Alteration of odometer is unlawful. (Tex. Transp. Code Ann. §727.002[a]). First conviction for violation is punishable by imprisonment in county jail for not more than two years, or by fine not exceeding $1,000, or by both. (Tex. Transp. Code Ann. §727.002[b]). Second or any subsequent conviction for violation is punishable by confinement in county jail for not less than 30 days nor more than two years, and by fine not exceeding $2,000. (Tex. Transp. Code Ann. §727.002[c]).

Operation Prohibited.

By user of controlled substance or person under influence of any drug which renders him “intoxicated”. (Tex. Penal Code Ann. c. 49). See also subhead Operator's License, supra.

Size and Weight Limits.

Regulated by Tex. Transp. Code Ann. chs. 621, 622.

Equipment Required.

Regulated by Tex. Transp. Code Ann. c. 547.

Mandatory Seat Belt Use.

Persons over age 15 riding in front seat of passenger cars generally must wear safety belts; violation is offense punishable by fine of not less than $25 nor more than $50. Children under eight years and less than four feet, nine inches in height must be in child passenger safety seat system; violation is offense punishable by fine of not more than $25 for a first offense nor more than $250 for a subsequent offense. (Tex. Transp. Code Ann. §§545.412-.413).

Lights Required.

Regulated by Tex. Transp. Code Ann. §§547.302-.383, 547.701-.703.

Inspection.

No license of, and no transfer of title to, motor vehicle (including commercial motor vehicles) may be made unless such vehicle has passed annual inspection made under direction and supervision of Department of Public Safety. Vehicle cannot be operated on public highways without certificate of inspection. Vehicle may be inspected by state inspector or by state appointed inspection stations. Compulsory inspection fee is $12.50 for motor vehicle and $50 for commercial motor vehicle. (Tex. Transp. Code Ann. c. 548). New vehicles not previously registered in any state are subject to initial inspection expiring at end of two years. Inspection fee is $21.75. (Tex. Transp. Code Ann. §§548.102, 548.501-.503). In certain areas, safety inspection certificate may not be obtained unless vehicle passes emissions inspection. (Tex. Health & Safety Code Ann. §382.037, Tex. Transp. Code Ann. §§548.301-.305).

Traffic Regulations.

Uniform Act Regulating Traffic on Highways adopted. (Tex. Transp. Code Ann. chs. 541-553, 600).

Accidents.

Operator of vehicle involved in an accident causing injury or death must stop and give his name, address, registration number of his vehicle, name of his motor vehicle liability insurer as well as render such aid as may appear necessary, and must immediately report accident. Driver of vehicle colliding with unattended vehicle must notify operator or owner of such vehicle or leave written notice giving name and address of driver and owner of vehicle doing striking and statement of circumstances thereof. Written reports to Department of Public Safety are required. (Tex. Transp. Code Ann. §§550.021-550.080).

Liability of Owner.

Owner is not liable for negligence of other persons operating car unless he is negligent in entrusting car to operator. Family car doctrine is not recognized.

Guests.

Guest statute held unconstitutional (699 S.W.2d 194).

Proof of Financial Responsibility.

Texas has adopted Motor Vehicle Safety Responsibility Act. (Tex. Transp. Code Ann. c. 601).

Security After Accident.

Operator of motor vehicle, except certain Government vehicles, involved in accident not investigated by law enforcement officer in which any person is killed or injured, or in which damage to property of any one person is sustained in excess of $500, must file report of such accident within ten days with Department of Public Safety. (Tex. Transp. Code Ann. §601.004). If motor vehicle involved in accident was not covered by motor vehicle liability insurance policy or bond, accident resulted in injury or death, or property damage in excess of $1,000, and Department finds reasonable probability that judgment will be rendered against owner or operator of vehicle, Department shall suspend driver's license and vehicle registration of person unless owner or operator deposits with Department security in amount determined by Department to be sufficient to satisfy any judgment or judgments for damages resulting from such accident. (Tex. Transp. Code Ann. §§601.151-601.169). If vehicle is not registered in Texas, impoundment may be used to enforce these provisions. (Tex. Transp. Code Ann. §§601.291-601.297).

Proof of Responsibility for the Future.

Whenever any person fails to satisfy judgment arising out of motor vehicle accident, his license and registration are suspended, and such suspension continues until the such judgment debtor satisfies the judgment or furnishes proof of financial responsibility. (Tex. Transp. Code Ann. §§601.331-601.334, 601.338-601.342).

Proof of financial responsibility may be given by filing with the Department of Public Safety: (1) Certificate of liability insurance in the amount of $20,000 for injury or death to one person, $40,000 for two or more persons in any one accident, and $15,000 for damage to property; or (2) bond with at least two individual sureties and conditioned for payments in amounts as required for liability insurance policy; or (3) certificate of deposit with Comptroller of $55,000 in cash or securities, with market value of $55,000 cash money, as may be purchased by savings bank or trust funds; or (4) certificate of self-insurance issued by Department in its discretion to persons in whose name more than 25 vehicles are registered; or (5) certificate evidencing deposit of $55,000 with county judge of county in which vehicle is registered. (Tex.

Transp. Code Ann. §§601.051-601.053, 601.083-601.084, 601.121-601.124, 601.234).

Insurance.

Effective Apr. 1, 2008 until Dec. 31, 2010, automobile liability insurance required in minimum coverage of $25,000 bodily injury or death of one person in any one accident ($50,000 bodily injury or death of two or more persons in any one accident) and $25,000 property damage in any one accident. Effective Jan. 1, 2011, automobile liability insurance required in minimum coverage of $30,000 bodily injury or death of one person in any one accident ($60,000 bodily injury or death of two or more persons in any one accident) and $25,000 property damage in any one accident. (Tex. Transp. Code Ann. §601.072).

No-fault insurance per se not adopted..

Foreign Vehicles.

Owner of passenger car duly registered in resident state or country may operate car in Texas for length of time license plates are valid, if visitor and engages in no gainful employment. This provision does not apply to vehicles operated for compensation, which may not make more than two trips per month of four days each without being registered. These provisions apply only when laws of state where vehicle registered gives same privileges to vehicles registered in Texas. Exception is made for vehicles used for marketing farm products raised by owner, for resident of adjoining state or country operating private vehicles for trips to his employment or shop, and for occasional trips of private vehicle. (Tex. Transp. Code Ann. §502.288). Special provision is made for temporary permits for vehicles used in hauling during harvest season. (Tex. Transp. Code Ann. §502.355). Also provision is made for issuance of temporary or annual permits by Texas Department of Transportation for foreign commercial vehicles which are not authorized to travel on Texas public roads due to lack of registration or lack of reciprocity with state or province in which such vehicles are registered. (Tex. Transp. Code Ann. §§502.352-502.353).

Motor vehicle transported through or from this state, over the highways thereof, for purpose of sale, is liable for registration fee of $5, to county through or from which it first passes. Thirty-day registration available for fee of $25. (Tex. Transp. Code Ann. §502.354).

Nonresident Operators.

Reciprocity is granted to any nonresident over 18 years old who holds valid license from home state. (Tex. Transp. Code Ann. §521.030).

Action against nonresident arising out of accident or collision in which he, his agent, servant, employee, heir, legal representative, executor, commenced by service of process on Chairman of Texas Transportation Commission, and such service is sufficient provided notice thereof and copy of process is forthwith sent to defendant, his agent, servant, heir, legal representative, executor, administrator, or guardian by registered mail. Defendant's return receipt and plaintiff's affidavit of compliance are appended to return of officer making service. (Tex. Civ. Prac. & Rem. Code Ann. §17.061 et seq.).

Direct actions by injured person against liability insurer not generally allowed. Third party may sue insurer if insured's liability has been established. (37 S.W.3d 59).

Motor vehicle carriers are regulated by Department of Transportation. Must have certificate containing single registration number, regardless of number of vehicles requiring registration. Must have cab card for each vehicle requiring registration carrier operates. Owner must protect employees with workmen's compensation insurance or accidental insurance coverage. (Tex. Transp. Code Ann. §643.001 et seq.). These provisions do not apply to motor vehicles registered as cotton vehicles (Tex. Transp. Code Ann. §643.002) or motor vehicles exempted by rule because vehicle subject to comparable registration and safety program administered by another agency (Tex. Transp. Code Ann. §§643.001 et seq.).

Motor Vehicle Taxes.

See category 22 Taxation.

Gasoline Tax.

See category 22 Taxation, topic 22.06 Gasoline and Special Fuels Taxes, subhead Gasoline Tax.

Lemon Law.

See category 3 Business Regulation and Commerce, topic 3.12 Consumer Protection.

23.02 RAILROADS:

See category 3 Business Regulation and Commerce, topic 3.07 Carriers.

24 FORMS

Commercial Code Forms

(Click here to view)

1

UTAH LAW DIGEST

—Scope —

Revised for 2010 edition by

VAN COTT, BAGLEY, CORNWALL & McCARTHY, of Salt Lake City.

(Citations, unless otherwise indicated, are to titles, chapters and sections of Utah Code Annotated, 1953 as amended. Session laws are cited by year and chapter number. R.C.P. indicates Utah Rules of Civil Procedure. Utah R. Crim. P. indicates Utah Rules of Criminal Procedure. Utah R. App. P. indicates Utah Rules of Appellate Procedure. R. Evid. indicates Utah Rules of Evidence. R. Judic. Admin. indicates Utah Rules of Judicial Administration. Utah Admin. Code indicates Utah Administrative Code. Utah Ct. R. Prof. Practice indicates Utah Supreme Court Rules of Professional Practice. Text of Utah Code may be found at Utah State Legislature’s internet site, address of which is http://www.le.state.ut.us/~code/code.htm.)

Note: All legislation through end of 2009 General Session of Legislature, Mar. 12, 2009, has been reviewed in preparation of this annual revision. Legislature meets annually beginning on 4th Mon. in Jan.

1 INTRODUCTION

1.01 GOVERNMENT AND LEGAL SYSTEM:

Utah is constituent state of United States of America. For further discussion of U.S. federal system, see Introduction to Federal Government of United States at beginning of this volume. Many laws are promulgated by federal government and are not reflected in topics below. See Introduction to this volume for references to federal law topics covered.

Like all but one of the United States, Utah has a common law legal system, with roots in English common law. For information on courts and legislature of Utah, see category 6 Courts and Legislature.

1.02 [RESERVED]

1.03 HOLIDAYS:

Legal holidays, in addition to Sundays, are: Jan. 1, 3d Mon. in Jan., 3d Mon. in Feb., last Mon. in May, July 4, July 24, 1st Mon. in Sept., 2d Mon. in Oct. 1 , Nov. 11, 4th Thurs. in Nov., Dec. 25, any day set apart by Governor or President for fast or thanksgiving. Also each employee entitled to select one additional day, called Personal Preference Day. (UCA 63G-1-301).

Holiday Falling on Sunday.

When holiday falls on Sun. following Mon. is holiday.

Holiday Falling on Saturday.

When holiday falls on Sat. preceding Fri. is holiday.

Legality of Transaction on Saturday, Sunday, or Holiday.

Whenever act of secular nature, other than work of necessity or mercy, is appointed by law or contract to be performed on a particular day, which day falls on a holiday, such act may be performed upon next business day with same effect as if performed on day appointed. (UCA 68-3-8).

Footnotes for 1.03

1 State offices are open on the second Monday in October. 16 Utah Bull. 1 (August 15, 2008).

1.04 OFFICE HOURS AND TIME ZONE:

Utah is in the Mountain (GMT -07:00) time zone. Office hours are generally from 7 a.m. to 6 p.m., Mon. through Thurs. State offices closed on Fri. Office hours for essential services which must continue normal hours of operation are 9 a.m. to 5 p.m., Mon. through Fri. 16 Utah Bull. 1 (Aug. 15, 2008).

2 BUSINESS ORGANIZATIONS

2.01 AGENCY:

Generally common law rules apply. Utah Statute of Frauds (UCA 25-5-1 et seq.), Utah Uniform Commercial Code (Tit. 70A), and Utah Uniform Fiduciaries Act (UCA 22-1-1 et seq.) may apply. See category 21 Property, topic 21.15 Powers of Attorney.

2.02 ASSOCIATIONS:

Revised Model Nonprofit Corporation Act has been substantially adopted effective Apr. 30, 2001. (UCA 16-6a-101 et seq.). Name of act is “Utah Revised Nonprofit Corporation Act.” (UCA 16-6a-101).

Formation.

Cooperative association not subject to insurance or credit union laws or health insurance purchasing organization may incorporate under nonprofit corporation act subject to limitations on issuance of stock, dividends, and voting of shares. (UCA 16-6a-207; UCA 3-1-11). Agricultural cooperative association may be formed as corporation under Uniform Agricultural Cooperative Associations Act. (UCA 3-1-1 to -46). Association may be dissolved by shareholder action under certain circumstances. (UCA 3-1-20.1[2]). Cooperative association may be incorporated and use word “cooperative” as part of corporate or business name. (UCA 16-6a-207). Corporation organized under Utah Uniform Agricultural Cooperative Association Act may convert into cooperative association by adopting appropriate amendments to articles of incorporation. (UCA 16-6a-207[3][a]).

No statutory provisions concerning unincorporated associations.

Limited Liability Companies.

See topic 2.06 Limited Liability Companies.

Professional Associations.

See topic 2.03 Corporations, subhead Professional Corporations.

Material variations from Revised Model Nonprofit Corporation Act (1987) follow. Individual deviations in wording and format too numerous to detail. Citations are to section of Utah Act.

Rights and powers include following: (1) Perpetual duration of name, (2) carry out activities and affairs, (3)sue and be sued, complain and defend name, (4) have, use and alter corporate seal, (5) make and amend bylaws, (6) deal with real property or interests in real property, (7) dispose of property and assets, (8) deal in and with shares of interests, (9) make contracts, (10) lend money, invest and reinvest funds, (11) be agent or trustee, (12) conduct business outside of state, (13) elect directors and appoint employees, (14) pay compensation, (15) pay pensions, and (16) make contributions, (17) pursue lawful activities that aid governmental policy, (18) act in manner that furthers business and affairs of corporation, (19) establish rules governing conduct of business and affairs of corporation, (20) impose dues and admission fees on members, (21) establish conditions of membership, (22) carry on business, (23) indemnify directors, officers, employees, fiduciaries, or agents, and (24) cease activities and dissolve. (UCA 16-6a-302).

Liabilities.

Directors, officers, employees, and members of nonprofit corporation are not personally liable in their capacity for acts, debts, liabilities, or obligations of nonprofit corporation. (UCA 16-6a-115). Nonprofit corporations may eliminate or limit liability of director to nonprofit corporation or members for monetary damages for action taken or failure to take any action as director in articles of incorporation, bylaws, or resolution. (UCA 16-6a-823).

Actions.

Director, officer, delegate, or member may petition district court for action. (UCA 16-6a-117). Action that may be taken at any annual or special meeting of members may be taken without meeting and without notice if one ore more consents in writing, setting for action taken, are signed by members having not less than minimum voting power necessary to authorize or take action at meeting. (UCA 16-6a-707). Any action that may be taken at any annual, regular, or special meeting of members may be taken without meeting if corporation delivers written ballot to every member entitled to vote on matter. (UCA 16-6a-709). If bylaws or Utah Code provide for voting by single voting group on matter, action on matter deemed taken when voted upon by that voting group. (UCA 16-6a-715[1]). If bylaws or Utah Code provide for voting by two or more voting groups on matter, action on matter deemed taken only when voted on by each voting group. (UCA 16-6a-715[2]). Unless otherwise stated in bylaws, any action required or permitted by Utah Code to be taken at board of directors meeting may be taken without by unanimous written consent. (UCA 16-6a-813[1]).

Dissolution.

After dissolved, corporate existence continues but cannot carry on any affairs except those enumerated to liquidate affairs. (UCA 16-6a-1405).

Professional Associations.

See topic 2.03 Corporations, subhead Professional Corporations.

Corporate Name.

Corporate name of nonprofit corporation may, but need not, contain words “corporation”, “incorporated”, or “company”. (UCA 16-6a-401[1][a]).

Registered Office and Registered Agent.

Law providing that nonprofit corporation must continuously maintain in this state registered office and registered agent and that nonprofit corporation may not serve as its own registered agent, (UCA 16-6a-501), repealed by Senate Bill 88 (2008).

Directors and Officers.

Two or more nonprofit corporations may have members, directors, or officers that are common to each nonprofit corporation. (UCA 16-6a-826).

Conversion to Corporation.

Domestic nonprofit corporation may convert to corporation subject to Tit. 16, c. 10a, Utah Revised Business Corporation Act, by filing amendment of articles of incorporation with division. (UCA 16-6a-1008).

Conversion to LLC.

Domestic nonprofit corporation may convert to LLC subject to Tit. 48, c. 2c, Utah Revised Limited Liability Company Act, by complying with §§ 16-16a-1008.7 and UCA 48-2c-1401. (UCA 16-6a-1008.7).

Distribution.

Nonprofit corporation may: (1) Make distributions or distribute its assets to member that is domestic or foreign nonprofit corporation or of mutual benefit corporation, not inconsistent with its bylaws; (2) pay compensation in reasonable amount to its members, directors, or officers for services rendered; (3) if cooperative nonprofit corporation, make distributions consistent with its purposes; and (4) confer benefits upon its members in conformity with its purposes. (UCA 16-6a-1302).

Foreign Nonprofit Corporation.

If two or more foreign nonprofit corporations authorized to conduct affairs in state are party to statutory merger permitted by laws of state or country under laws of which they are incorporated, within 30 days after merger becomes effective surviving nonprofit corporation must file with division certificate of fact of merger certified by proper officer of state or country under laws of which statutory merger was effected. (UCA 16-6a-1512). Foreign nonprofit corporation authorized to conduct affairs in this state on Apr. 30, 2001, is subject to chapter, but is not required to obtain new certificate of authority to conduct affairs under chapter. (UCA 16-6a-1702[1]). Chapter does not apply to corporations sole, except with respect to mergers and consolidations, or domestic or foreign nonprofit corporations governed by Tit. 3, c. 1, General Provisions Relating to Agricultural Cooperative Associations. (UCA 16-6a-1703).

2.03 CORPORATIONS:

(Tit. 16, c. 10a). **Introductory Statement.**—Utah Revised Business Corporation Act adopted July 1, 1992, based on Revised Model Business Corporation Act (1984) prepared by Committee on Corporate Laws of Business Law Section of American Bar Association but with modifications tailored to Utah law. For text of Model Act, see Uniform and Model Acts section.

Tit. 16, c. 7 continues to apply to corporations sole.

General Supervision.

Department of Commerce, Division of Corporations and Commercial Code ("Division"), 160 East 300 South, Salt Lake City, Utah 84111, (801) 530-4849. References to "Secretary of State" in Model Act should be replaced by "Division".

Purposes.

C. 3 (Part 3). For any lawful business to be within purpose of corporation, articles of incorporation must so state. (UCA 16-10a-301[1]).

Name.

C. 4 (Part 4).

Corporate Name.

§ 4.01 (UCA 16-10a-401). Omits "limited" and "ltd." as options in name. (UCA 16-10a-401[1][a]). Prohibits using "Olympic", "Olympiad", or "Citius Altius Fortius" without written consent of U.S. Olympic Committee. (UCA 16-10a-401[1][c]). Prohibits use of "university", "college", or "institute" without written consent of Division of Consumer Protection. (UCA 16-10a-401[1][d]). Names must also be distinguishable from corporations/nonprofit corporations, limited liability companies, partnerships, and names/marks registered by Division. (UCA 16-10a-401[2]). Corporation may use another corporation's name if it merged with other corporation or has been formed by reorganization with other corporation. (UCA 16-10a-401[4]). Name distinguishable if it contains one or more different letters or numerals, or has different sequence of letters or numerals. (UCA 16-10a-401[5][a]). Non-distinguishable differences include: words/abbreviations of "corporation", "company", etc.; presence/absence of "the", "and", or "a"; punctuation/special characters; capitalization; differences between singular and plural forms of words. (UCA 16-10a-401[5][b]). Name may not imply corporation is agency of state or political subdivision if not associated with state or political subdivision. (UCA 16-10a-401[6]).

Reserved Name.

§ 4.02 (UCA 16-10a-402). Name reservation may be renewed for 120 days. (UCA 16-10a-402[1]). Name reservation does not authorize name use until registered as trade name or articles of incorporation filed or application for authority to transact business filed. (UCA 16-10a-401[3]).

Registered Name.

§ 4.03 (UCA 16-10a-1507). Foreign corporations may register name if name would be available for domestic corporation. (UCA 16-10a-1507[1]). Foreign corporation may add “inc.”, etc. to make name comply. (UCA 16-10a-1507[1]). Registered name effective until end of calendar year. (UCA 16-10a-1507[3]). Foreign corporation with registered name may apply for authority to transact business or assign registration to another foreign corporation by filing with Division assignment of registration that states registered name, name of assigning foreign corporation, and name of assignee concurrently with assignee’s filing for registration of name. (UCA 16-10a-1507[5]). Foreign corporation with registered name may terminate registration by filing statement of termination stating name and registration is terminated. (UCA 16-10a-1507[6]). Registration of corporate name constitutes authority by Division to file application for authority to transact business. (UCA 16-10a-1507[7]).

Corporate Name—Limited Rights.

(UCA 16-10a-403). Authorization by Division to file articles under corporate name or reserve name does not: (1) Abrogate or limit law governing unfair competition or trade practices; (2) derogate from common law, equity, or statutory right to acquire and protect names and trademarks; or (3) create exclusive right in geographic or generic terms. (UCA 16-10a-403).

Assumed Names for Businesses.

All applicable statutes repealed.

Terms of Corporate Existence.

Corporate existence begins when articles of incorporation filed, which is conclusive proof that all conditions precedent to incorporation have been satisfied. (UCA 16-10a-203).

Incorporators.

§ 2.01 (UCA 16-10a-201). One or more persons may act as incorporators of corporation. Incorporator who is natural person must be at least 18 years old.

Articles of Incorporation.

§ 2.02 (UCA 16-10a-202). Articles must also set forth: (1) Purposes for which corporation organized, which may include any lawful activity for which corporations may be organized (UCA 16-10a-202[1][a]); (2) information on each class of authorized shares (UCA 16-10a-202[1][d]); and (3) signature of initial registered agent (UCA 16-10a-202[1][e]). Must be signed by each incorporator and meet Division filing requirements. (UCA 16-10a-202[5]). Two copies must be filed. (UCA 16-10a-120[11]).

Material variations from Revised Model Business Corporation Act (1984) as reprinted in Uniform and Model Acts section of this volume follow. Individual deviations in wording and format too numerous to detail. Citations are to section of Revised Model Act followed by corresponding section of Utah Act.

General Provisions.

C. 1 (Part 1).

Reservation of Power to Amend or Repeal.

§ 1.02 of Model Act not adopted.

Filing Requirements.

§ 1.20 (UCA 16-10a-120). Document filed must be executed or true copy. (UCA 16-10a-120[6]). Signature of each person constitutes acknowledgment, under penalties of perjury, that document is act of signer or principal and that facts in document are true. (UCA 16-10a-120[9]). Articles filed with Division. (UCA 16-10a-120[11]). See subhead General Supervision, supra.

Forms.

§ 1.21 (UCA 16-10a-121). § 1.21 of Model Act modified to provide that Division may prescribe forms for documents and, if so, must furnish them. (UCA 16-10a-121[1]). However: (1) Use of forms not mandatory unless Division specifically requires use; and (2) requirement that form be used does not preclude inclusion in document of any item not prohibited nor require inclusion of item not required. (UCA 16-10a-121[2]).

Incorporation Tax or Fee and Filing Fees.

§ 1.22 of Model Act not adopted. Division charges and collects fees as provided in UCA 63J-1-303. (UCA 16-10a-122).

Document Fee

Articles of Incorporation/Organization/Certificates (profit corp)..........$70

Articles of Incorporation/Organization/Certificates (nonprofit corp)..........$30

Requalification/Reinstatement (profit)..........$70

Requalification/Reinstatement (nonprofit)..........$30

Requalification/Reinstatement (foreign)..........N/A

Voluntary Dissolution or Withdrawal..........Free

Merger/Amendment (profit corp)..........$37

Merger/Amendment (nonprofit corp)..........$37

Merger/Amendment (foreign corp)..........$37

Registration Information Change Form..........$15

Annual Renewal (profit corp)..........$15

Annual Renewal (nonprofit corp)..........$10

Late Annual Renewal (foreign/profit corp)..........$25

Late Annual Renewal (nonprofit corp)..........$20

Service

Photocopies..........$0.30/page

Certified Copies..........$12

Certification of Status..........$12

Certification of Good Standing..........$12

Long Form of Good Standing..........$20

Certification of Existence/Non Existence..........$12

Corporation Search..........$10

DBA Registration or renewal..........$22

DBA Amendment..........$15

Limited Liability Partnerships (LLP) Registration/Renewal..........$22

Limited Liability Partnership Changes..........$12

Limited Liability Partnership Cancellation..........Free

Trademark Registration..........$50

Trademark Assignments..........$7

DBA/Trademark Cancellations..........Free

Business Name Registration/Reservation..........$22

Telecopier (FAX) Transmittal..........$5/first page + $1/additional page

Collection Agency Registration..........$32

Expedited Service..........$75

Fee schedule located at: http://corporations.utah.gov/pdf/fees09.pdf.

Effective Time and Date of Filed Documents.

§ 1.23 (UCA 16-10a-123). If delayed effective time but no date specified, document effective on date filed, at later of time specified as effective time or time specified in Division's time and date endorsement. (UCA 16-10a-123[2][a]). If document specifies delayed effective date later than 90th day after document filed, document effective on 90th day after filed. (UCA 16-10a-123[2][c]). If document specifies delayed effective date, document may be prevented from becoming effective by delivering to Division, prior to specified effective date, certificate of withdrawal, stating: (1) Document revoked by appropriate corporate action or court order and is void; and (2) in case of court order, that order entered by court having jurisdiction. (UCA 16-10a-123[3]).

Correcting Filed Documents.

§ 1.24 (UCA 16-10a-124). Articles of correction may be filed by any person who may execute documents or who executed corrected document. (UCA 16-10a-124[3]).

Filing Duty of Division.

§ 1.25 (UCA 16-10a-125). Division has ten days to return document it refuses to file. (UCA 16-10a-125[3]).

Appeal from Division's Refusal to File Document.

§ 1.26 (UCA 16-10a-126). Appeal to district court of county of principal office or, if no principal office in state, of registered office. (UCA 16-10a-126[1]).

Certificates Issued by Division.

§ 1.28 (UCA 16-10a-128). Anyone may also apply for certificate that sets forth any facts of record in office of Division. (UCA 16-10a-128[1]).

Penalty for Signing False Documents.

§ 1.29 (UCA 16-10a-129). Class A misdemeanor. Maximum fine: $2,500. (UCA 16-10a-129[2]).

Powers of Division.

§ 1.30 Division has power necessary to perform duties required. (UCA 16-10a-104). See also subhead General Supervision, supra.

Definitions.

§ 1.40 (UCA 16-10a-102). “Delivery” to Division means actual receipt by Division. (UCA 16-10a-102[12]). “Principal office” means office, in or out of state, designated by corporation as principal office in most recent document on file with Division providing such information, including annual report, application for certificate of authority, or notice of change of principal office. (UCA 16-10a-102[25]). “Proceeding” includes civil suit, arbitration, mediation, or criminal, administrative, or investigatory action. (UCA 16-10a-102[26]). Adds definitions of “address”, “affiliate”, “assumed corporate name”, “bylaws”, “cash” and “money”, “control” or “controlling interest”, “corporate name”, “Division”, “effective date”, “mail” or “mailed” or “mailing”, “qualified shares”, “receive”, “registered office”, “related person”. Deletes definitions of “includes”, “means”, “person”, “state”, “United States”.

License to Do Business.

Anyone may apply to division for certificate of existence for domestic corporation, authorization for foreign corporation, or certificate that sets forth any facts of record. (UCA 16-10a-128).

Organization of Corporation.

§ 2.05 (UCA 16-10a-205). Organizational meetings permissive not mandatory. (UCA 16-10a-205). Incorporators may do whatever necessary to complete organization, including electing officers and adopting or amending bylaws. (UCA 16-10a-205[1][b]).

Paid in Capital Requirements.

None.

Amendment of Certificate or Articles.

Amendment of Articles of Incorporation and Bylaws.

C. 10 (Part 10).

Amendment by Board of Directors.

§ 10.02 (UCA 16-10a-1002). § 10.02(1) of Model Act not adopted. Board may solely amend articles in limited situations. (UCA 16-10a-1002[1]). Board may adopt amendment to change corporate name in connection with reinstatement following administrative dissolution. (UCA 16-10a-1002[2]).

Amendment by Board of Directors and Shareholders.

§ 10.03 (UCA 16-10a-1003). Notice shall be given to shareholders entitled to vote on amendment. (UCA 16-10a-1003[4]). Bylaws may require greater vote if authorized by articles. (UCA 16-10a-1003[5]). To be adopted, amendment must also be approved by majority of votes entitled to be cast on amendment by any voting group whose rights would be materially and adversely affected because amendment alters or restricts rights of preference, redemption, preemption, voting, or full shares. (UCA 16-10a-1003[5][b]). Amendment imposing personal liability on shareholders for debts of corporation must be approved by all outstanding shares affected. (UCA 16-10a-1003[6]).

Voting on Amendments by Voting Groups.

§ 10.04 (UCA 16-10a-1004). Rights created by section on voting groups may be restricted if so provided in original articles, amendment creating class or series or adopted prior to issuance, or amendment approved by majority of class or series. (UCA 16-10a-1004[5]).

Amendment Before Issuance of Shares.

§ 10.05 (UCA 16-10a-1005). Board of Directors may adopt amendments to Articles of Incorporation before shares are issued.

Articles of Amendment.

§ 10.06 (UCA 16-10a-1006). Certain requirements listed. Filed with Division. See subhead Filing Requirements, supra.

Restated Articles of Incorporation.

§ 10.07 (UCA 16-10a-1007). Board of Directors may restate articles at any time without shareholder action. Incorporators may restate if no shares issued and no directors appointed. (UCA 16-10a-1007[1]). If shareholder approval required, notice shall be given to shareholders entitled to vote on restatement. (UCA 16-10a-1007[3]). Information on separate certificate required by § 10.07(d) of Model Act should be set forth in restatement; no separate certificate need be filed. (UCA 16-10a-1007[4]). If restatement contains amendment to original articles, restatement must contain information required in articles of amendment. (UCA 16-10a-1007[4][c]). See catchline Articles of Amendment, supra. If restatement does not contain amendment to original articles, it must so state. (UCA 16-10a-1007[4][d]). § 10.07(f) of Model Act not adopted.

Amendment of Bylaws by Board of Directors or Shareholders.

§ 10.20 (UCA 16-10a-1020). Board of Directors may amend bylaws except when power reserved to shareholders. (UCA 16-10a-1020[1]). Omits express board authorization to repeal bylaws. (UCA 16-10a-1020[1]). § 10.20(b)(2) of Model Act not adopted.

Bylaw Changing Quorum or Voting Requirement for Shareholders.

§ 10.21 (UCA 16-10a-1021). Shareholders may also repeal bylaw if authorized by articles. (UCA 16-10a-1021[1]).

Increase or Decrease of Authorized Capital Stock.

Professional corporation may only issue or transfer to persons who are licensed to render same professional services. (UCA 16-11-7). All persons, firms, partnerships, associations can acquire and dispose of capital stock in development corporation. (UCA 16-13-5[1]).

Bylaws.

§ 2.06 (UCA 16-10a-206). Adoption permissive, rather than mandatory. (UCA 16-10a-

206). Board may adopt initial bylaws for corporation; if no board, then, incorporators may; if board or incorporators do not, shareholders may. (UCA 16-10a-206[1]). Bylaws may contain any provision for managing business and regulating affairs of corporation not inconsistent with law or articles of incorporation and may include emergency provisions. (UCA 16-10a-206[2]).

Emergency Bylaws.

§ 2.07 of Model Act not adopted. Bylaws may include emergency provisions. See subhead Bylaws, supra. (UCA 16-10a-206[2]).

Number of Shareholders.

§ 1.42 (UCA 16-10a-102[34]). Included in definition of "shareholder". Where shareholder record not maintained according to accepted practice, persons who would have been identified as owner on record included. (UCA 16-10a-102[34][b][iii]).

Incorporation.

C. 2 (Part 2). Corporation deemed incorporated and its corporate existence begins when articles of incorporation filed by division or if delayed effective date is specified. (UCA 16-6a-203[1], UCA 16-10a-203[1]). Filing of articles of incorporation by division is conclusive proof that all conditions precedent to incorporation are satisfied. (UCA 16-6a-203[2], UCA 16-10a-203[2]).

Shares.

C. 6 (Part 6). Shares assessed under Share Assessment Act. (UCA 16-4-101 et seq.).

Share Certificates.

§ 6.25 (UCA 16-10a-625). Board's authority must be summarized on share certificate. (UCA 16-10a-625[3]). Certificates may contain other information corporation considers necessary or appropriate. (UCA 16-10a-625[4][c]). Signatures of officers may be facsimiles, if countersigned by transfer agent or registered by registrar other than corporation or employee of corporation. (UCA 16-10a-625[5]). If signing officer ceases to be officer before certificate issued, certificate has same effect. (UCA 16-10a-625[6]).

Issuance of Shares.

§ 6.21 (UCA 16-10a-621). Acceptable consideration includes arrangements for future services. (UCA 16-10a-621[2]). Terms of future property rights must be in writing, but failure to do so does not affect status of shares. (UCA 16-10a-621[2]). Board may authorize committee or officer to approve issuance, sale, or contract for sale of shares. (UCA 16-10a-621[6]).

Transfer of Shares.

§ 6.27 (UCA 16-10a-627). Restriction may affect shares issued before restriction adopted if holders of shares vote for or otherwise consent to restriction. (UCA 16-10a-627[1]). Restriction on transfer or registration of transfer of shares may require condition that persons, including corporation or shareholders, approve, if transfer/registration not manifestly unreasonable. (UCA 16-10a-627[4][c]). Enumerated restrictions not exhaustive. (UCA 16-10a-627[5]).

Uniform Simplification of Fiduciary Security Transfers Act Adopted.

(UCA 22-5-1 et seq.). Uniform Commercial Code adopted. (Tit. 70A). See category 3 Business Regulation and Commerce, topic 3.09 Commercial Code. Uniform Simplification of Fiduciary Security Transfers Act survives adoption of Uniform Commercial Code and controls inconsistencies. (UCA 70A-10-104).

Share Transfer Tax.

None.

Authorized Shares.

§ 6.01 (UCA 16-10a-601). Articles of incorporation must prescribe classes of shares and number of shares of each class that corporation is authorized to issue. If more than one class of shares is authorized, articles of incorporation must prescribe distinguishing designation for each class and preferences, limitations, and relative rights of that class must be described in articles of incorporation. All shares must have preferences, limitations, and relative rights identical with other shares of same class. (UCA 16-10a-601[1]). Articles of incorporation must authorize one or more classes of shares that together have unlimited voting rights and one or more classes of shares that together are entitled to receive net assets of corporation on dissolution. (UCA 16-10a-601[2]). Articles may also authorize special rights for series within class. (UCA 16-10a-601[3]).

Terms of Class or Series Determined by Board of Directors.

§ 6.02 (UCA 16-10a-602). If articles so provide, Board may amend articles without shareholder approval to: create series within class and fix number of shares for series (UCA 16-10a-602[1][b]); alter or revoke preferences, limitations, and relative rights of wholly unissued class or series (UCA 16-10a-602[1][c]); and change number of shares in series, either before or after issuance, but not below number of series outstanding nor above number of class available for designation as part of series (UCA 16-10a-602[1][d]). Statement in articles of amendment that amendment duly adopted by board must also say done without shareholder action and shareholder action not required. (UCA 16-10a-602[4][d]). If amendment alters or revokes preferences, limitations, or relative rights of wholly unissued class or series, articles of amendment must say no affected shares issued. (UCA 16-10a-602[4][e]).

Subscriptions for Shares.

§ 6.20 (UCA 16-10a-620). Corporation may consent to revocation of pre-incorporation subscription. (UCA 16-10a-620[1]). Subscription not irrevocable if considered revocable under federal securities laws. (UCA 16-10a-620[1]). Corporation’s acceptance of pre-incorporation subscription and authorization of issuance subject to provisions for issuance of shares. (UCA 16-10a-620[2]). Shares issued pursuant to pre-incorporation subscriptions are fully paid and non-assessable when corporation receives consideration specified in subscription agreement. (UCA 16-10a-620[4]).

Share Options and Other Rights.

§ 6.24 (UCA 16-10a-624). Subject to articles, corporation may create and issue, whether or not in connection with issue and sale of securities, options and other rights for purchase of shares or assets of corporation. (UCA 16-10a-624[1]). Terms of options may include restrictions that: (1) Preclude or limit exercise, transfer, or receipt of options by persons owning or offering to acquire percentage of outstanding securities of corporation or any transferee; or (2) invalidate options. (UCA 16-10a-624[2]). Provisions of UCA 16-10a-624 apply to all options notwithstanding date of grant. (UCA 16-10a-624[3]).

Corporation’s Acquisition of Its Own Shares.

§ 6.31 (UCA 16-10a-631). Corporation may acquire own shares; such shares are authorized but unissued. (UCA 16-10a-631[1]). Board may adopt amendment to articles without shareholder action to reduce number of authorized shares by amount equal to number of shares acquired by corporation. (UCA 16-10a-631[2][b]). Articles of amendment must also contain statement that amendment adopted by board without shareholder action and shareholder action not required. (UCA 16-10a-631[3][d]).

Shareholders.

C. 7 (Part 7).

Distributions to Shareholders.

§ 6.40 (UCA 16-10a-640). Board of directors may authorize and corporation may make distributions to shareholders subject to any restriction in articles of incorporation and no distribution may be made if corporation would not be able to pay its debts as they come due in usual course of business or corporation's total assets would be less than sum of its total liabilities plus amount needed to satisfy preferential rights of shareholders on dissolution. (UCA 16-10a-640[1], [3]). Board may only fix record date if no applicable bylaw. (UCA 16-10a-640[2]).

Shareholder Action Shareholder's Action.

§ 8.63(b) of Model Act not adopted. Shareholder's action respecting transaction is effective for purposes of this chapter if quorum existed and majority of votes entitled to be cast by holders of qualified shares present in person or by proxy at meeting were cast in favor of transaction after notice to shareholders. (UCA 16-10a-853[1]). To constitute quorum for purposes of action in compliance with this chapter must have majority of votes entitled to be cast by holders of all qualified shares. (UCA 16-10a-853[2]). See also catchline Indemnification of Officers, Employees, Fiduciaries, and Agents, infra.

Shareholder's Liabilities.

§ 6.22 (UCA 16-10a-622). Purchaser from corporation of shares issued by corporation not liable to corporation or its creditors except to pay or provide consideration for which issuance of shares was authorized. (UCA 16-10a-622[1]). Shareholder or subscriber not personally liable for debts of corporation solely because of share ownership. (UCA 16-10a-622[2]).

Shareholder's Meetings.

§ 7.01 (UCA 16-10a-701). Corporation must hold shareholder meeting annually. (UCA 16-10a-701[1]). Failure to hold annual meeting at time fixed in bylaws does not work forfeiture or dissolution of corporation. (UCA 16-10a-701[3]).

Special Meeting.

§ 7.02 (UCA 16-10a-702). If not otherwise fixed, record date for determining shareholders entitled to demand special meeting is earliest date of any demand or 60 days prior to date first written demand received by corporation, whichever is later. (UCA 16-10a-702[2]). Business not within purposes described in meeting notice may be conducted at special meeting if notice waived by all shareholders. (UCA 16-10a-702[4]).

Court-ordered Meeting.

§ 7.03 (UCA 16-10a-703). District court of county where principal office located may order meeting: (1) On application of shareholder entitled to participate if no annual meeting held within 15 months after last annual meeting or, if none, after date of incorporation; or (2) on application of person who participated in call or demand for special meeting if: (a) notice not given within 60 days after date of call or date of last demand, or (b) special meeting not held in accordance with notice. (UCA 16-10a-703[1]).

Notice of Meeting.

§ 7.05 (UCA 16-10a-705). If meeting is adjourned for more than 30 days or if after adjournment new record date must be fixed, notice of adjourned meeting must be given to shareholders of record entitled to vote at meeting. (UCA 16-10a-705[4][b]). Notice not required to be given to shareholder to whom: (1) Notice of two consecutive-annual meetings and all notice of meetings or action without meeting during period between meetings, mailed and returned undeliverable; or (2) at least two payments of dividends or interest on securities during 12 month period mailed and returned undeliverable. (UCA 16-10a-705[5][a]). Action taken or meeting held without notice to shareholder to whom notice excused has same effect as if notice given. If shareholder to whom notice excused delivers to corporation written notice of current address or address otherwise provided to corporation, notice requirement reinstated. No filed certificate need state notice not given to shareholders to whom excused. (UCA 16-10a-705[5][b]).

Record Date.

§ 7.07 (UCA 16-10a-707). Bylaws may also fix record date for determining shareholders entitled to take action without meeting. (UCA 16-10a-707[1]). If not otherwise fixed, record date for determining shareholders entitled to notice of and to vote at meetings is close of business on day before first notice delivered to shareholders. (UCA 16-10a-707[2]).

Meetings by Telecommunication.

(UCA 16-10a-708). Unless otherwise provided in bylaws, shareholders may participate in meetings by any means of communication by which all persons participating can hear each other. Shareholders participating thus deemed to be present at meeting. (UCA 16-10a-708).

Shareholders’ List for Meeting.

§ 7.20 (UCA 16-10a-720). Shareholders’ list available for inspection beginning on earlier of ten days before meeting for which list prepared or two business days after notice of meeting given and continuing through meeting and adjournments. (UCA 16-10a-720[2]). Provision requiring shareholder to copy list at own expense omitted. (UCA 16-10a-720[2]). Shareholder may inspect list at meeting for purposes germane to meeting. (UCA 16-10a-720[3]). If court orders inspection or copying of list, unless corporation proves it refused inspection or copying in good faith because it had reasonable basis for doubt about right of shareholder to inspect/copy: (1) Court must order corporation to pay shareholder’s costs, including attorney’s fees; (2) court may order corporation to pay shareholder for damages incurred; and (3) court may grant shareholder other remedies. (UCA 16-10a-720[5]).

Voting Trusts.

§ 7.30 (UCA 16-10a-730). Shareholders may create voting trust, conferring on trustee right to vote or act for them. (UCA 16-10a-730[1]). Trustee must promptly inform corporation of changes in beneficial interest list and amendments to voting trust agreements. (UCA 16-10a-730[1]). Voting trust becomes effective on date first shares subject to trust registered in trustee’s name. (UCA 16-10a-730[2]). Voting trust valid for period provided in agreement, but no more than ten years unless extended. (UCA 16-10a-730[2]).

Voting Entitlement of Shares.

§ 7.21 (UCA 16-10a-721). Each fractional share entitled to corresponding fractional vote. (UCA 16-10a-721[1]). § 7.21(b) of Model Act modified; Utah Act replaces “special circumstances” exception with exception for order by court upon finding that purpose of subsection would not be violated. (UCA 16-10a-721[2]).

Proxies.

§ 7.22 (UCA 16-10a-722). Without limiting ways in which shareholder may appoint proxy, following ways valid: (1) Appointment form; or (2) electronic transmission providing written statement of appointment. (UCA 16-10a-722[2]). Appointment valid for 11 months or longer if form expressly provides. (UCA 16-10a-722[3]). Appointment coupled with interest may include enumerated persons or their designees. (UCA 16-10a-722[4]). Transferee may revoke irrevocable appointment if unknown at time of acquisition and not conspicuous on certificate or accompanying information if not certificated. (UCA 16-10a-722[8]).

Shares Held by Nominees.

§ 7.23 (UCA 16-10a-723). Corporation may establish procedure by which beneficial owner of shares registered in name of nominee is recognized by corporation as shareholder. (UCA 16-10a-723[1]). Corporation may set forth types of nominees to which it applies, rights that corporation recognizes in beneficial owner, manner in which procedure may be used by nominee, information that must be provided by nominee when procedure is used, period for which nominee's use of procedure is effective, and other aspects of rights and duties created. (UCA 16-10a-723[2]).

Corporation's Acceptance of Votes.

§ 7.24 (UCA 16-10a-724). Procedures regarding corporation's acceptance of votes apply as well to proxy appointment revocations. (UCA 16-10a-724[1]). Corporation may also accept name signed not corresponding to shareholder name if acceptance otherwise proper under rules established by corporation. (UCA 16-10a-724[2][f]). If shares registered in names of two or more persons or if two have same fiduciary relationship respecting same shares, unless corporation's secretary is given written notice to contrary and furnished with copy of instrument appointing them, acts with respect to voting have following effect: (1) If only one votes, act binds all; (2) if more than one vote, act of majority so voting binds all; (3) if more than one vote, but vote evenly split on any matter, each faction may vote securities proportionately; (4) if instrument shows tenancy held in unequal interests, majority or even split is majority or even split in interest. (UCA 16-10a-724[3]).

Greater Quorum or Voting Requirements.

§ 7.27 (UCA 16-10a-727). Amendment to articles that changes greater quorum or voting requirement must meet same quorum requirement and be adopted by same vote and voting groups required to take action under quorum and voting requirements then in effect. (UCA 16-10a-727[2]).

Voting for Directors—Cumulative Voting.

§ 7.28 (UCA 16-10a-728). At each election of directors, unless otherwise provided in articles or Act, each shareholder entitled to vote at election has right to cast all votes to which shareholder's shares entitled for as many persons as are directors to be elected and for whose election shareholder has right to vote. (UCA 16-10a-728[1]). § 7.28(d) of Model Act not adopted. Shares entitled to vote cumulatively may be voted cumulatively at each election of directors unless articles provide alternative procedures. (UCA 16-10a-728[5]).

Voting Agreements.

§ 7.31 (UCA 16-10a-731). Two or more persons, one or more of whom are shareholders, may provide manner in which shareholders will vote shares by signing agreement for that purpose. (UCA 16-10a-731[1]). Voting agreements may be specifically enforceable. (UCA 16-10a-731[2]).

Shareholder Agreements.

(UCA 16-10a-732). Agreement among shareholders effective even though inconsistent with other provisions in that it: (1) Eliminates board or restricts board discretion or powers; (2) governs distributions; (3) establishes directors or officers, or their terms or manner of selection or removal; (4) governs voting rights; (5) establishes terms for use of property or services among corporation, shareholders, directors, officers, and employees; (6) transfers authority to manage business and affairs of corporation; (7) requires dissolution upon contingency; or (8) otherwise governs exercise of corporate powers or management, not contrary to public policy. (UCA 16-10a-732[1]). Agreement must be: (1) Set forth: (a) in articles or bylaws and approved by all shareholders; or (b) in written agreement signed by all shareholders and made known to corporation; (2) subject to amendment only by all shareholders, unless agreement provides otherwise; and (3) valid for ten years, unless agreement provides otherwise. (UCA 16-10a-732[2]). Existence of agreement must be noted conspicuously on front or back of share certificates, but failure to note existence does not affect validity of agreement. Purchaser of shares without knowledge entitled to rescission. Rescission action must be commenced within earlier of 90 days after discovery of existence of agreement or two years after purchase. (UCA 16-10a-732[3]). Agreements cease to be effective when shares listed on national exchange or regularly traded in market. Board may then adopt amendment to delete agreement in articles or bylaws. (UCA 16-10a-732[4]). Agreements limiting discretion or powers of board relieve directors of liability to extent powers limited and impose liability for acts or omissions upon persons in whom powers vested. (UCA 16-10a-732[5]). Existence of agreement may not be grounds for imposing personal liability on shareholders for acts or debts of corporation. (UCA 16-10a-732[6]). Incorporators or subscribers may act as shareholders with respect to agreement if no shares issued when agreement made. (UCA 16-10a-732[7]).

Derivative Proceedings.

Complaint in derivative proceeding must be: (1) Verified, and (2) allege with particularity demand made to obtain action by board of directors. (UCA 16-10a-740[3][b]). Derivative proceeding must comply with procedures of Utah Rules of Civil Procedure, Rule 23.1. (UCA 16-10a-740[3][c]).

Directors.

C. 8 (Part 8).

Directors' Meetings.

Board of Directors may hold regular or special meetings in or out of state. (UCA 16-10a-820[1]). Unless prohibited by articles of incorporation or bylaws, directors can participate in meeting through use of any means of communication by which all can hear. (UCA 16-10a-820[2]). Regular meetings do not require notice; special meetings require two days notice of time, date, and place of meeting. (UCA 16-10a-822).

Powers and Duties of Board of Directors.

§ 8.01 (UCA 16-10a-801). § 8.01(c) of Model Act not adopted. All corporate powers must be exercised by or under authority of its board of directors, and board must manage business and affairs of corporation, subject to limitation set forth in articles of incorporation. (UCA 16-10a-801[2]).

Number and Election of Directors.

§ 8.03 (UCA 16-10a-803). Before shares issued, board may consist of one or more individuals. (UCA 16-10a-803[1][b][i]). After shares issued, board must consist of minimum of three. (UCA 16-10a-803[1][a]). If fewer than three shareholders entitled to vote for directors, board must consist of number at least as great as number of shareholders. (UCA 16-10a-803[1][b][ii]). Number of directors fixed in accordance with bylaws. Unless articles provide otherwise, number of initial directors stated in articles superseded by number stated in bylaws. (UCA 16-10a-803[1][c]). § 8.03(b) of Model Act not adopted. Number of directors may be changed by amending bylaws, but decrease may not shorten term of incumbent director. (UCA 16-10a-803[1][d]). In absence of bylaw or article provision, number of directors is greater of: (1) Number then in office; or (2) three. (UCA 16-10a-803[1][e]). Bylaws may establish variable range of board size. (UCA 16-10a-803[2]). Provision in § 8.03 of Model Act allowing only shareholders to change range after shares issued omitted.

Election of Directors by Certain Classes of Shareholders.

§ 8.04 (UCA 16-10a-804). Articles of incorporation may authorize election of directors by holders of authorized classes or series of shares. (UCA 16-10a-804). Applies to series as well.

Terms of Directors Generally.

§ 8.05 (UCA 16-10a-805). Terms of initial directors expire at first shareholders' meeting at which directors elected, unless initial directors had staggered terms. (UCA 16-10a-805[1]). Director elected to fill vacancy created other than by increase in number of directors must be elected for unexpired term of director's predecessor or for lesser period as prescribed by board. (UCA 16-10a-805[4][a]). If director elected to fill vacancy created by increase in number of directors, term of director expires at next shareholders' meeting at which directors elected, unless vacancy filled by vote of shareholders, in which case term expires on later of: (1) Next meeting of shareholders at which directors elected; or (2) term designated for director at time of creation of position being filled. (UCA 16-10a-805[4][b]). Director whose term has ended may deliver to Division for filing statement to that effect. (UCA 16-10a-805[6]). See subhead Filing Requirements, supra.

Staggered Terms for Directors.

§ 8.06 (UCA 16-10a-806). Terms of two or three years, as case may be, begin upon expiration of initial staggered terms.

Resignation of Directors.

§ 8.07 (UCA 16-10a-807). Director may resign at any time by giving notice. (UCA 16-10a-807[1]). Director who resigns may deliver to Division for filing statement of resignation. (UCA 16-10a-807[3]). See subhead Filing Requirements, supra.

Removal of Directors by Shareholders.

§ 8.08 (UCA 16-10a-808). Subject to Articles of Incorporation, shareholders may remove directors with or without cause. (UCA 16-10a-808[1]). Director removed by shareholders may deliver to Division for filing statement to that effect. (UCA 16-10a-808[5]). See subhead Filing Requirements, supra. (UCA 16-10a-120).

Removal of Directors by Judicial Proceeding.

§ 8.09 (UCA 16-10a-809). District Court may remove directors subject to certain conditions. (UCA 16-10a-809[1]). Director removed by judicial proceeding may deliver to Division for filing statement to that effect. (UCA 16-10a-809[4]). See subhead Filing Requirements, supra. (UCA 16-10a-120).

Vacancy on Board.

§ 8.10 (UCA 16-10a-810). Unless articles of incorporation provide otherwise, if vacancy occurs on board: (1) Shareholders may fill vacancy; (2) board may fill vacancy; or (3) directors remaining in office may fill vacancy by majority vote. (UCA 16-10a-810[1]). Unless articles provide otherwise, if vacant office held by director elected by voting group: (1) If one or more directors elected by same voting group, only they are entitled to vote to fill vacancy if filled by directors; and (2) only holders of shares of that voting group entitled to vote to fill vacancy if filled by shareholders. (UCA 16-10a-810[2]).

Action Taken Without Meeting.

§ 8.21 (UCA 16-10a-821). Action by Board of Directors can be taken without meeting if all board members consent. (UCA 16-10a-821[1]). Action taken without meeting at time last director signs writing describing action taken, unless, prior to that time, any director has revoked consent. (UCA 16-10a-821[2]). Action taken without meeting effective at time taken, unless board established different effective date. (UCA 16-10a-821[3]).

Waiver of Notice.

§ 8.23 (UCA 16-10a-823). Waiver of notice should be delivered to corporation for filing with corporate records, but delivery and filing not conditions to its effectiveness. (UCA 16-10a-823[1]). Director's attendance constitutes waiver. (UCA 16-10a-823[2]).

Committees.

§ 8.25 (UCA 16-10a-825). Unless articles of incorporation or bylaws provide otherwise, board of directors may create committees and appoint members. (UCA 16-10a-825[1]). § 8.25(e) of Model Act not adopted.

Director Conflict of Interest.—§ 8.31 of Model Act not adopted.

Loans to Directors.

§ 8.32 of Model Act not adopted.

Liabilities of Directors.

(UCA 16-10a-841). If so provided in articles, bylaws, or by resolution, corporation may eliminate or limit liability of director to corporation or shareholders for monetary damages for any action taken or failure to take action as director, except liability for: (1) Amount of financial benefit received by director to which not entitled; (2) intentional infliction of harm on corporation or shareholders; (3) unlawful distribution; or (4) intentional violation of criminal law. (UCA 16-10a-841[1]). This section does not eliminate or limit liability of director for act or omission occurring prior to date provision effective. (UCA 16-10a-841[2]). Any provision authorized under this section for inclusion in articles may also be adopted in bylaws or by resolution, but only if provision approved by same percentage of shareholders of each voting group as required to approve amendment to articles of incorporation including provision. (UCA 16-10a-841[3]). Foreign corporation authorized to transact business in state, including federally chartered depository institution, may adopt provision under this section. (UCA 16-10a-841[4]). Depository institution regulated by Department of Financial Institutions or by federal agency may include provision eliminating or limiting director or officer liability to corporation's members or depositors. (UCA 16-10a-841[5]).

Liability of Directors for Unlawful Distributions.

§ 8.33 (UCA 16-10a-842). Director who votes for distribution in violation of UCA 16-10a-640 or articles of incorporation is personally liable to corporation for amount of distribution exceeding amount not in violation (UCA 16-10a-842[1]). Amount of contribution from each shareholder who knowingly accepted unlawful distribution is amount of distribution to shareholder multiplied by percentage of amount of distribution to all shareholders that exceeded what could have been distributed to shareholders without violating law governing distributions or articles of incorporation. (UCA 16-10a-842[2][b]).

Officers.

C. 8 (Part 8).

Required Officers.

§ 8.40 (UCA 16-10a-830). No specifically required officers. Officers may be appointed by board or in any other manner as board or bylaws provide. (UCA 16-10a-830[2]).

Standards of Conduct for Officers.

§ 8.42 Ordinary prudent person standard. (UCA 16-10a-840).

Resignation and Removal of Officers.

§ 8.43 (UCA 16-10a-832). Officer may resign at any time by giving notice. (UCA 16-10a-832[1]). If officer's resignation made effective at later date, board may fill vacancy and provide that successor not take office until effective date or remove officer at any time prior to effective date and fill resulting vacancy. (UCA 16-10a-832[3]).

Liabilities of Officers.

Articles of incorporation may limit personal liability if official for monetary damages of breach of fiduciary duty. (UCA 3-1-13.1[1]). May not limit for enumerated reasons. (UCA 3-1-13.1[1]).

Indemnification of Directors and Officers.

Indemnification Definitions.

§ 8.50 (UCA 16-10a-901). Definition of "director" as used in this part includes individual who, while director of corporation, was serving as fiduciary of another corporation, person, or employee benefit plan. (UCA 16-10a-901[2]). "Officer", "employee", "fiduciary", and "agent" include any person who, while serving indicated relationship to corporation, otherwise fits description of "director" as modified above. (UCA 16-10a-901[5]). Definition of "official capacity" includes fiduciary relationship undertaken by person other than director on behalf of corporation. (UCA 16-10a-901[6][a][ii]). "Official capacity" does not include service for any other corporation, person, or employee benefit plan. (UCA 16-10a-901[6][b]).

Authority to Indemnify Directors.

§ 8.51 (UCA 16-10a-902). § 8.51(a)(2) of Model Act modified to provide that director must have reasonably believed that his conduct was in, or not opposed to, corporation's best interests. (UCA 16-10a-902[1][b]).

Determination and Authorization of Indemnification of Directors.

§ 8.55 (UCA 16-10a-906). Corporation may not advance expenses to director unless authorized in specific case after written affirmation and undertaking received and required determination made. (UCA 16-10a-906[1]). § 8.55(b)(4) modified to provide that determination to be made by shareholders, by majority of votes entitled to be cast by holders of qualified shares present in person or by proxy at meeting. (UCA 16-10a-906[2][d]). Majority of votes entitled to be cast by holders of all qualified shares constitutes quorum. Shareholders' action not affected by presence or voting of holders of non-qualified shares. (UCA 16-10a-906[3]). § 8.55(c) of Model Act modified to except authorization required by bylaws. (UCA 16-10a-906[4]).

Indemnification of Officers, Employees, Fiduciaries, and Agents.

§ 8.56 of Model Act also applies to fiduciaries of corporation. (UCA 16-10a-907). Requirement in § 8.56(1) and (2) of Model Act that officer, employee, fiduciary, or agent not be director omitted. (UCA 16-10a-907[1], [2]).

Insurance.

§ 8.57 of Model Act applies as well to fiduciaries of corporation. (UCA 16-10a-908). Insurance may be procured on behalf of directors, officers, etc. from any insurance company designated by board, whether formed under laws of state or not, including company in which corporation has interest. (UCA 16-10a-908).

Limitations on Indemnification of Directors.

§ 8.58 (UCA 16-10a-909). Contract referred to in § 8.58 of Model Act does not include insurance policy. (UCA 16-10a-909[1]).

Definitions Relating to Conflicting Interest Transactions.

§ 8.60 (UCA 16-10a-850). “Conflicting interest” also includes transactions involving entity, other than corporation, to which director owes fiduciary duty, or individual who is beneficiary of fiduciary duty owed by director, other than fiduciary duty arising because director is director of corporation. (UCA 16-10a-850[1][b][i], [ii]). Definition of “related person” found in Act’s definition section. (UCA 16-10a-102[31]).

Judicial Action.

§§ 8.61(a) and (b) of Model Act modified to provide that transactions may not be set aside solely because of director’s interest. (UCA 16-10a-851[1], [2]).

Directors’ Action.

§ 8.62(b)(2) of Model Act not adopted. Director’s action respecting transaction is taken for purposes of UCA 16-10a-851(2)(a) if transaction received affirmative vote of majority of those qualified directors on board or on duly empowered committee of board who voted on transaction after either required disclosure to them, to extent information was not known by them (UCA 16-10a-852). Action by committee effective only if all members are qualified directors and members are either all of qualified directors or are appointed by affirmative vote of majority of qualified directors. (UCA 16-10a-852[1]). Majority of qualified directors or on committee constitutes quorum for purposes of action under this section. (UCA 16-10a-852).

Principal Office.

C. 5 (Part 5). § 5.01 (UCA 16-10a-501). Corporation must maintain registered office and agent in state. (UCA 16-10a-501[1][a]). Corporation may not serve as its own registered agent. (UCA 16-10a-501[2]).

Resident Agent.

Law providing that registered agent may be domestic or foreign corporation or domestic or foreign limited liability company repealed by Senate Bill 88 (2008). (UCA 16-10a-501[1][b][iv]). Corporation amending articles of incorporation after May 3, 2004 must maintain name, title, and street address of official representative with Divisions of Corporation and Commercial Code. (UCA 16-7-15). Law requiring statement of resignation must include declaration that notice of resignation given to corporation at principal office repealed by Senate Bill 88 (2008). (UCA 16-10a-503[1]). Law providing division may serve corporation’s registered agent by first class U.S. mail repealed by Senate Bill 88 (2008). (UCA 16-10a-504[1]).

General Powers of Corporations.

§ 3.02 (UCA 16-10a-302). Every corporation has perpetual duration and succession in corporate name and has same powers as individual to do all things necessary or convenient to carry out permitted business purposes, activities, and affairs. Includes power to sue and be sued; defend name; have, use, and alter seal; make and amend bylaws; enter contracts; deal in real property; lend money; invest; conduct business; elect directors; pay pensions and compensations; make donations; and establish rules governing conduct of corporation in emergency. (UCA 16-10a-302).

Sole Corporations.

May not be formed after May 3, 2004. (UCA 16-7-16).

Emergency Powers.

§ 3.03 of Model Act not adopted. See subhead Bylaws, Emergency Bylaws, supra. (UCA 16-10a-206).

Dividends.

§ 6.23 (UCA 16-10a-623). Shares may be issued pro rata without consideration to shareholders. (UCA 16-10a-623[1]). Bylaws or, in absence of bylaw, board may fix future record date. If none fixed, record date is date of board authorization. (UCA 16-10a-623[3]).

Unclaimed Dividends.

See category 21 Property, topic 21.01 Absentees, subhead Escheat.

Sale or Transfer of Corporate Assets.

C. 12 (Part 12).

Books and Records.

C. 16 (Part 16).

Corporate Records.

§ 16.01 (UCA 16-10a-1601). Mandatory records include records of all waivers of notices of meetings of shareholders, board, or committees. (UCA 16-10a-1601[1]). Shareholder record must have names and addresses in form that permits preparation of shareholder list: (1) Arranged by voting group and class or series; (2) alphabetically within each class or series; and (3) showing address of and number of shares of each class and series held by shareholder. (UCA 16-10a-1601[3]). § 16.01(e)(3) of Revised Model Act not adopted.

Inspection of Records by Shareholders and Directors.

§ 16.02 (UCA 16-10a-1602). Directors entitled to inspect and copy records as well. (UCA 16-10a-1602[1]). Waivers of notices included in material subject to inspection and copying. (UCA 16-10a-1602[2][a][iv]). “Proper purpose” means purpose reasonably related to shareholder’s or director’s interest as shareholder or director. (UCA 16-10a-1602[4]). Right of inspection granted may not be abolished by articles or bylaws, but provision from Revised Model Act providing right may not be limited is omitted. (UCA 16-10a-1602[5]). Shareholder or director may not use information obtained through inspection/copying for purposes other than those set forth in demand. (UCA 16-10a-1602[7]).

Scope of Inspection Right.

§ 16.03 (UCA 16-10a-1603). Shareholder’s or director’s agent or attorney has same inspection and copying rights as shareholder or director represented. (UCA 16-10a-1603[1]).Corporation may charge reasonable amount for copying but may not charge for information respecting shares. (UCA 16-10a-1603[3]).

Court-Ordered Inspection.

§ 16.04 (UCA 16-10a-1604). If court orders inspection or copying of records, it may: (1) Impose reasonable restrictions; (2) order corporation to pay damages incurred as result of denial if corporation did not act in good faith; (3) if inspection or copying ordered pursuant to application by party denied, order corporation to pay expenses of inspection and copying if corporation did not act in good faith; or (4) grant any other legal remedy. (UCA 16-10a-1604[4]).

Information Respecting Shares.

(UCA 16-10a-1606). Upon written request of shareholder, corporation at own expense must mail information respecting shares, whether or not information also on shareholder's share certificate. Corporation may comply by mailing articles. (UCA 16-10a-1606).

Reports.

C. 16 (Part 16).

Annual Report for Division.

§ 16.07 (UCA 16-10a-1607). Annual report filed with Division. See subhead Filing Requirements, supra. Report must also set forth state or country under whose law corporation incorporated. (UCA 16-10a-1607[1][b]). §§ 16.22(a)(6) and (7) of Revised Model Act not adopted. Division must deliver copy of prescribed form of annual report to corporation. (UCA 16-10a-1607[2]). § 16.22(c) of Revised Model Act not adopted. Annual report must be delivered annually to Division by end of second calendar month following calendar month in which report form mailed by Division. Corporation complies if proves to satisfaction of Division that report mailed. (UCA 16-10a-1607[4]). Fact that individual's name signed on annual report form is prima facie evidence for Division purposes that individual authorized to certify report on behalf of corporation. (UCA 16-10a-1607[6]). Annual report form provided by Division may be designed to provide simplified certification by corporation if no changes made from last report. (UCA 16-10a-1607[7]). Corporation may be required to deliver to Division for filing amendment to annual report reflecting any change in information contained in annual report as last amended. (UCA 16-10a-1607[8]).

Statement of Person Named as Director or Officer.

(UCA 16-10a-1608). Person named as director or officer of corporation in annual report or other document on file with Division, may, if he does not hold named position, file statement setting forth: (1) Name; (2) corporation's name; (3) information identifying report; and (4) date on which he ceased to be director or officer, or statement he did not hold position. (UCA 16-10a-1608).

Financial Statements for Shareholders.

§ 16.20 of Revised Model Act not adopted. Upon written request of shareholder, corporation must mail most recent annual or quarterly financial statements showing in reasonable detail assets, liabilities, and results of operations. (UCA 16-10a-1605).

Transitional Provisions.

C. 17 (Part 17).

Application to Existing Domestic Corporations.

§ 17.01 (UCA 16-10a-1701). Effective date July 1, 1992. Act also applies to actions taken by directors, officers, and shareholders of such corporations after July 1, 1992.

Saving Provisions.

§ 17.03 (UCA 16-10a-1704). Preemptive rights provisions of Act may not operate to deny preemptive rights to shareholders who, immediately prior to July 1, 1992, were entitled to preemptive rights by failure of articles to deny preemptive rights, and corporation will be treated for all purposes as if articles elected preemptive rights, until resolution providing otherwise approved by same percentage of shareholders of each voting group as would be required to include resolution in amendment to articles. Such preemptive rights subject to same provisions of Act governing preemptive rights. (UCA 16-10a-1704[3]). Provisions governing action without meeting may not operate to permit corporation in existence prior to July 1, 1992, to take action by written consent of fewer than all shareholders entitled to vote with respect to subject matter of action, until date resolution providing otherwise approved either: (1) By consent in writing, setting forth proposed resolution, signed by all shareholders entitled to vote with respect to subject matter of resolution; or (2) at duly convened meeting of shareholders by vote of same percentage of shareholders of each voting group as would be required to include resolution in amendment to articles. (UCA 16-10a-1704[4]).

Repeal.

§ 17.05 not adopted. Utah Revised Model Business Corporation Act (Title 16, c. 10a) replaces repealed Utah Business Corporation Act (Tit. 16, c. 10).

Effective Date.

§ 17.06 of Revised Model Act not adopted. Effective date July 1, 1992. See catchline Application to Existing Domestic Corporations, supra.

Publication.

(UCA 16-10a-1703). Division must annually publish copies of Act, together with applicable annotations and commentary, for sale and distribution to public. Division may charge reasonable amount. Proceeds from sales deposited in Commerce Service Fund and may be appropriated to Division for defraying production, publication, republication, or distribution costs.

Corporate Mortgages.

§ 12.01 (UCA 16-10a-1201). Corporation may sell, lease, exchange, and dispose of property in course of business. (UCA 16-10a-1201[1][a]).

Sale of Property Requiring Shareholder Approval.

§ 12.02 (UCA 16-10a-1202). Disposition of property pursuant to court order not subject to shareholder approval. (UCA 16-10a-1202[1]). With respect to disposition of property of another entity that corporation controls and if interests held by corporation in other entity constitute all or substantially all property of corporation in regular course of business, then corporation can consent to transaction only if board proposes and shareholders approve consent, if corporation entitled to vote or otherwise consent. (UCA 16-10a-1202[2]). Notice of meeting at which transaction will be voted upon need be given only to shareholders entitled to vote on transaction. (UCA 16-10a-1202[5]). § 12.02(e) of Model Act modified to provide that unless Act, articles, bylaws, or board require greater vote, transaction must be approved by each voting group entitled to vote on transaction by majority of all votes entitled to be cast on transaction by that voting group. (UCA 16-10a-1202[6]).

Merger and Consolidation.

C. 11 (Part 11).

Merger.

§ 11.01 (UCA 16-10a-1101). Domestic corporations may merge into another domestic corporation if board of directors and shareholders of each corporation approve plan of merger. (UCA 16-10a-1101[1]). Plan of merger must set forth any amendment to articles of surviving corporation to be effected by merger. (UCA 16-10a-1101[2]).

Action on Plan.

§ 11.03 (UCA 16-10a-1103). Board of Directors must submit plan of merger to shareholders except in certain situations. Corporation need only give notice of shareholder meeting to voting shareholders. Requirements set forth to adopt plan. (UCA 16-10a-1103[4]). Bylaws may require greater vote. (UCA 16-10a-1103[5]). Plan of merger or share exchange may be abandoned at any time before effective date. (UCA 16-10a-1103[9]). If merger or share exchange abandoned after articles of merger or share exchange filed by Division specifying delayed effective date, merger or share exchange may be prevented from becoming effective by delivering to Division for filing, prior to specified effective date, statement of abandonment stating that by appropriate corporation plan abandoned. (UCA 16-10a-1103[10]).

Merger of Parent and Subsidiary.

§ 11.04 (UCA 16-10a-1104). Parent corporation may merge subsidiary into self or self into subsidiary. (UCA 16-10a-1104[1]). Board must adopt and shareholders approve, if shareholders so required, plan of merger. (UCA 16-10a-1104[2]). Plan of merger must set forth: (1) Names of parent and subsidiary and of surviving entity; (2) terms and conditions of merger; (3) manner and basis of converting shares of each corporation; (4) any amendments to articles of surviving corporation to be effected by merger; and (5) any other provisions relating to merger deemed desirable. (UCA 16-10a-1104[2]). Vote of shareholders of subsidiary may not be required with respect to merger. If subsidiary will be surviving corporation, approval of shareholders of parent must be sought. If parent will be surviving corporation, no vote of its shareholders required if action on plan of merger not required. If action on plan of merger required, approval of shareholders must be sought. (UCA 16-10a-1104[3]). §§ 11.04(d) and (e) of Model Act not adopted. Effective date of merger may not be earlier than date on which all shareholders of subsidiary waived mailing requirement or ten days after date parent mailed copy or summary of plan of merger to each shareholder or subsidiary who did not waive mailing requirement. (UCA 16-10a-1104[5]).

Share Exchanges or Acquisitions.

Articles of Merger or Share Exchange.

§ 11.05 (UCA 16-10a-1105). If merger of parent and subsidiary, articles of merger must set forth: (1) Statement that immediately prior to merger parent owned at least 90% of outstanding shares of each class of subsidiary; and (2) effective date of merger and statement that effective date complies with law. (UCA 16-10a-1105[1][d]). Effective date may not be prior to date of filing. (UCA 16-10a-1105[2]).

Effect of Merger or Share Exchange.

§ 11.06 (UCA 16-10a-1106). Transfer to and vesting of property in surviving corporation occurs by operation of law. No consent or approval of any person required unless specifically required by law or express provision in contract or order. (UCA 16-10a-1106[1][b]). Surviving corporation has all liabilities of each corporation party to merger. (UCA 16-10a-1106[c]). Proceedings pending any corporation party to merger may continue as if no merger or surviving corporation may be substituted. (UCA 16-10a-1106[d]).

Merger or Share Exchange with Foreign Corporations.

§ 11.07 (UCA 16-10a-1107). Foreign corporation wishing to merge must also provide address of principal office. (UCA 16-10a-1107[1][c]). § 11.07(b) of Model Act not adopted. Once merger or share exchange takes effect, surviving foreign corporation must either: (a) Agree service of process to enforce rights of shareholders of domestic corporations party to merger may be made according to UCA 16-16-301 or (b) promptly pay dissenting shareholders or corporation party to merger or share exchange amount to which entitled under dissenters' rights provisions; and (3) comply with foreign corporation provisions if it is to transact business in state. (UCA 16-10a-1107[2]). See subhead Foreign Corporations, infra.

Dissenters' Rights.

C. 13 (Part 13).

Definitions.

§ 13.01 (UCA 16-10a-1301). "Interest" compounded annually at statutory rate set forth in UCA 15-1-1, currently 10%. (UCA 16-10a-1301[5]).

Right to Dissent.

§ 13.02 (UCA 16-10a-1302). Shareholders entitled to dissent whether or not entitled to vote. (UCA 16-10a-1302[1]). § 13.02(a)(4) of Model Act not adopted. Shareholders may dissent from disposition of all or substantially all property of entity controlled by corporation if shareholders entitled to vote upon consent of corporation to disposition. (UCA 16-10a-1302[1][d]). Except as provided in articles, bylaws, or resolution of board, shareholder not entitled to dissent if shares listed on national exchange or NASDAQ or corporation had more than 2,000 shareholders at time of record date or, if corporate action authorized other than by shareholder vote, effective date. (UCA 16-10a-1302[3]). This limitation does not apply if shareholder will receive for shares anything except: (1) Shares of surviving corporation; (2) shares of corporation which at effective date of plan of merger or share exchange either will be listed on national exchange or NASDAQ or will have more than 2,000 shareholders; (3) cash in lieu of fractional shares; or (4) any combination of these. (UCA 16-10a-1302[4]).

Dissent by Nominees and Beneficial Owners.

§ 13.03 (UCA 16-10a-1303). Corporation may require that, when record shareholder dissents with respect to shares held by beneficial shareholders, each beneficial shareholder must certify to corporation that both he and record shareholders of all shares owned beneficially by him have asserted or will assert dissenters' rights as to all shares unlimited on ability to exercise dissenters' rights. Certification requirement must be stated in dissenters' notice. (UCA 16-10a-1303[3]).

Notice of Dissenters' Rights.

§ 13.20 (UCA 16-10a-1320). § 13.20 modified to provide that if proposed corporate action creating dissenters' rights submitted to vote at shareholders' meeting, meeting notice must be sent to all shareholders of corporation as of applicable record date, whether or not entitled to vote at meeting. Notice must state shareholders are or may be entitled to assert dissenters' rights. Notice must be accompanied by copy of Part 13 of Act and materials required to be given shareholders entitled to vote on proposed action at meeting. Failure to give notice as required does not affect any action taken at shareholders' meeting for which notice was to have been given. (UCA 16-10a-1320[1]). If proposed corporate action creating dissenters' rights authorized without meeting of shareholders, any solicitation of shareholder to execute written consent to action without shareholder meeting must be accompanied or preceded by written notice stating shareholders are or may be entitled to assert dissenters' rights, by copy of Part 13 of Act, and by material required to be given to shareholders entitled to vote on proposed action if proposed action were submitted to vote at shareholders' meeting. Failure to give written notice does not affect any action taken for which notice was to have been given. (UCA 16-10a-1320[2]).

Demand for Payment-Eligibility and Notice of Intent.

§ 13.21 (UCA 16-10a-1321). If proposed corporate action creating dissenters' rights authorized without meeting of shareholders, shareholder who wishes to assert dissenters' rights may not execute writing consenting to proposed corporate action. (UCA 16-10a-1321[2]). To be entitled to payment for shares, unless otherwise provided in articles, bylaws, or board resolution, shareholder must have been shareholder with respect to shares for which payment demanded as of date proposed corporate action creating dissenters' rights approved by shareholders, if shareholder approval required, or as of effective date of corporate action, if authorized other than by shareholder vote. (UCA 16-10a-1321[3]).

Dissenters' Notice.

§ 13.22 (UCA 16-10a-1322). If proposed corporate action creating dissenters' rights is authorized, corporation must give written notice to all entitled to demand payment for shares. (UCA 16-10a-1322). Dissenters' notice must: (1) State corporate action authorized and effective date; (2) state address at which corporation will receive payment demands and address at which certificates for certificated shares must be deposited; (3) inform holders of uncertificated shares to what extent transfer of shares will be restricted after payment demand received; (4) supply form for demanding payment, which requests dissenter to state address to which payment made; (5) set date by which corporation must receive payment demand and by which certificates for certificated shares must be deposited at address indicated in dissenters' notice, between 30 to 70 days after date dissenters' notice given; (6) state requirement that beneficial shareholders and record shareholders must give notice of intent to dissent; and (7) be accompanied by copy of Part 13 of Act. (UCA 16-10a-1322[2]).

Procedure to Demand Payment.

§ 13.23 (UCA 16-10a-1323). § 13.23(a) and (b) of Model Act substantively modified. Shareholder who wishes to assert dissenters' rights according to terms of dissenters' notice must: (1) Deliver to corporation payment demand, which may be payment demand form or another writing; (2) deposit certificates for certificated shares in accordance with terms of dissenters' notice; and (3) if required by corporation, certify in writing whether or not he or person on whose behalf he asserts dissenters' rights acquired beneficial ownership of shares before date of first announcement to media or shareholders of terms of proposed corporate action creating dissenters' rights. (UCA 16-10a-1323[1]). Shareholder who demands payment retains all rights of shareholder except right to transfer shares until effective date of proposed corporate action giving rise to exercise of dissenters' rights and has only right to receive payment for shares after effective date of corporate action. (UCA 16-10a-1323[2]).

Payment.

§ 13.25 (UCA 16-10a-1325). Payment made to shareholder on later of effective date of corporate action and receipt by corporation of payment demand. (UCA 16-10a-1325[1]). Balance sheet and statements sent with payment must be audited if corporation customarily provides such statements to shareholders. (UCA 16-10a-1325[2][a][ii]).

Special Provisions Relating to Shares Acquired After Announcement of Proposed Corporate Action.

§ 13.27 (UCA 16-10a-1327). Corporation may require shareholder to certify in writing whether he acquired beneficial ownership before date of first announcement to media or shareholders of proposed corporate action. (UCA 16-10a-1327[1]).

Tender Offers.

Control Shares Acquisition Act adopted. (UCA 61-6-1 et seq.).

Dissolution.

C. 14 (Part 14).

Authorization of Dissolution Prior to Issuance of Shares.

§ 14.01 of Model Act not adopted. If corporation has not issued shares, majority of directors, or if no directors, majority of incorporators may authorize dissolution. (UCA 16-10a-1401).

Authorization of Dissolution After Issuance of Shares.

§ 14.02 of Model Act not adopted. After shares issued, board must propose dissolution to shareholders unless there is conflict of interest. (UCA 16-10a-1402[1]). Proposal to dissolve must be approved by each voting group entitled to vote separately on proposal and by majority of all votes entitled to be cast on proposal by that voting group, unless greater vote required by articles, bylaws, or board. (UCA 16-10a-1402[5]).

Articles of Dissolution.

§ 14.03 (UCA 16-10a-1403). Articles of dissolution must also set forth: (1) Name; (2) date of dissolution; (3) address of principal office, or if none, (4) statement that none and address to which service of process may be mailed; if dissolution authorized by board, statement to that effect; and (5) any additional information required by Division. (UCA 16-10a-1403[1]).

Disposition of Known Claims by Notification.

§ 14.06 (UCA 16-10a-1406). Written notice to known claimants must state that unless sooner barred by other state statute limiting action, claim barred if not received by deadline. (UCA 16-10a-1406[2][d]). Claims not rejected by dissolved corporation in writing within 90 days after receipt of claim considered accepted. (UCA 16-10a-1406[4]). Failure of dissolved corporation to give notice to any known claimant does not affect disposition of any claim by other known claimant. (UCA 16-10a-1406[5]).

Disposition of Claims by Publication.

§ 14.07 (UCA 16-10a-1407). Disposition of claims by publication applies to all claims, known or unknown, due or to become due, absolute or contingent, liquidated or unliquidated. (UCA 16-10a-1407[4][a]). Action to enforce claim may be civil action or binding arbitration. (UCA 16-10a-1407[4][b]). If dissolved corporation does not publish newspaper notice of dissolution, all actions to enforce claims are barred if not commenced within seven years after corporation dissolved, unless sooner banned by applicable statute of limitations. (UCA 16-10a-1407[5]). § 14.07(d)(2) of Model Act modified to provide that claim may be enforced against shareholder of dissolved corporation, if assets distributed in liquidation; but shareholder’s total liability may not exceed total value of assets distributed to him, as value determined at time of distribution. Any shareholder required to return any portion of value of assets entitled to contribution from all other shareholders. Contribution must be in accordance with shareholders’ respective rights and interests and may not exceed value of assets received in liquidation. (UCA 16-10a-1408[2]).

Grounds for Administrative Dissolution.

§ 14.20 (UCA 16-10a-1420). Division may commence proceeding for administrative dissolution if: (1) Corporation does not pay taxes, fees, or penalties when due; (2) corporation does not deliver annual report to division when due; (3) corporation goes 30 days without registered agent in state; (4) corporation does not give notice within 30 days registered agent changed or resigned; or (5) corporation’s period of duration stated expires. (UCA 16-10a-1420[1]-[5]). No 60 day grace period before Division may proceed to dissolve corporation. (UCA 16-10a-1420[1] to [4]). Dissolution proceeding may be commenced for failure to deliver to Division any corporate report. (UCA 16-10a-1420[2]).

Procedure for and Effect of Administrative Dissolution.

§ 14.21 (UCA 16-10a-1421). Corporation’s date of dissolution is five days after date division mails written notice of dissolution. (UCA 16-10a-1421[2]). Law requiring Division becomes agent of dissolved corporation repealed by SB 192 (2009).

Reinstatement Following Administrative Dissolution.

§ 14.22 (UCA 16-10a-1422). Application for reinstatement must also include: (1) Address of registered office and name of registered agent (UCA 16-10a-1422[1][g], [h]); (2) corporate name (UCA 16-10a-1422[1][b], [d]); (3) other information required by Division (UCA 16-10a-

1422[1][i]); (4) written consent to appointment by designated registered agent (UCA 16-10a-1422[2][a]); and (5) certificate from Tax Commission stating all taxes paid (UCA 16-10a-1422[2][b]). Division must serve corporation in manner provided in UCA 16-10a-1421(6).

Dissolved corporation may apply to division for reinstatement within two years after effective date of dissolution by delivering to division for filing application for reinstatement that states: (1) Effective date of corporation's dissolution; (2) corporation's corporate name as of effective date of dissolution; (3) grounds for dissolution either did not exist or have been eliminated; (4) corporate name under which corporation is being reinstated; (5) that corporate name satisfies statutory requirements of UCA 16-10a-401; (6) that all taxes, fees, or penalties imposed pursuant to this chapter, otherwise owed by corporation to State Tax Commission, or imposed by applicable laws of this state have been paid; (7) address of its registered office in this state; (8) name of its registered agent at its registered office; and (9) and any additional information division determines to be necessary or appropriate. (UCA 16-10a-1422).

Grounds for Judicial Dissolution.

§ 14.30 (UCA 16-10a-1430). Corporation may be dissolved in judicial proceeding by Division director in same manner as by attorney general. (UCA 16-10a-1430[1]).

Procedure for Judicial Dissolution.

(UCA 16-10a-1431). Proceeding to dissolve corporation must be in district court of county of principal office or in district court of Salt Lake County. (UCA 16-10a-1431[1]). Shareholders need not be party to proceeding to dissolve unless relief sought against them individually. (UCA 16-10a-1431[2]). § 14.31(d) of Revised Model Act not adopted.

Decree of Dissolution.

§ 14.33 (UCA 16-10a-1433). Decree of dissolution may be appealed as in other civil proceedings. (UCA 16-10a-1433[3]).

Election to Purchase in Lieu of Dissolution.

§ 14.34 (UCA 16-10a-1434). If corporation files election to purchase all shares owned by petitioning shareholder, corporation must purchase shares. (UCA 16-10a-1434[2][a]). If corporation does not file election, but shareholders do, corporation must give notice to all shareholders within ten days after later of: (1) End of time period allowed for filing of elections to purchase; or (2) notification from court of election by shareholders to purchase all shares owned by petitioning shareholder. (UCA 16-10a-1434[2][b]). Notice must also state date by which any notice of intent to participate must be filed with court. (UCA 16-10a-1434[2][b][ii]). Filing of election irrevocably obligates shareholder to participate in purchase of shares upon terms and conditions of Act, unless court otherwise directs. (UCA 16-10a-1434[2][d]). Provisions of § 14.34(c) of Revised Model Act modified to 60 days after earlier of: (1) Corporation's filing of election to purchase all shares owned by petitioning shareholder; or (2) corporation's mailing of notice to shareholders of filing election by shareholders. (UCA 16-10a-1434[3]). In allocating petitioning shareholders' shares among holders of different classes, court may not require any electing shareholder to purchase more shares than number purchasing shareholder may have set forth in his election. (UCA 16-10a-1434[5][b]).

Deposit with State Treasurer.

§ 14.40 of Revised Model Act modified. (UCA 16-10a-1440). Cash from assets deposited with state treasurer in accordance with Unclaimed Property Act. See category 21 Property, topic 21.01 Absentees, subhead Escheat.

Insolvency and Receivers.

Receiver appointed only after notice to commissioner. (UCA 7-2-5).

Close Corporations.

No separate act in effect.

Appraisal.

Available when demand for payment unresolved. (UCA 16-10a-1330[1]). Proceedings must be initiated in state district court where corporation's principal office located. (UCA 16-10a-1330[2]). Court may appoint appraisers to receive evidence and recommend fair value. (UCA 16-10a-1330[4]).

Foreign Corporations.

C.15 (Part 15).

Authority to Transact Business Required.

§ 15.01 (UCA 16-10a-1501). Foreign corporation may not transact business in state until application for authority to transact business filed with Division. (UCA 16-10a-1501[1]). Applies to foreign corporations that conduct business governed by other statutes only to extent this part of Act not inconsistent with those other statutes. (UCA 16-10a-1501[1]). Other activities not constituting "transacting business" defined. (UCA 16-10a-1501[2][m]). This section does not affect right to subject foreign corporation to jurisdiction of courts. (UCA 16-10a-1501[3]).

Consequences of Transacting Business Without Authority.

§ 15.02 (UCA 16-10a-1502). In addition to corporation, no person may maintain proceeding on corporation's behalf until application filed. (UCA 16-10a-1502[1]). Civil penalty for transacting business without authority: $100 per day, not to exceed $5,000 per year. Officers and agents of corporation who participate in unauthorized transactions subject to civil penalty up to $1,000. (UCA 16-10a-1502[4]). Court must issue injunction in addition to or instead of civil penalty. (UCA 16-10a-1502[5]).

Application for Authority to Transact Business.

§ 15.03 (UCA 16-10a-1503). Application for authority to transact business must also set forth date corporation commenced or expects to commence transacting business in state. (UCA 16-10a-1503[1][g]). Corporations that file on or after May 4, 1998, are required to state which type of corporation they conducted or transacted business under within five-year period prior to current filing. See UCA 16-10a-1503(1) for additional information required by division. Certificate of existence must be dated within 90 days prior to filing application for authority to transact business. (UCA 16-10a-1503[2]). Application for authority to transact business, or accompanying document, must contain written consent to appointment by registered agent. (UCA 16-10a-1503[3]).

Corporate Name and Assumed Corporate Name of Foreign Corporation.

§ 15.06 (UCA 16-10a-1506). §§ 15.06(a), (b), and (c) of Revised Model Act not adopted in Revised Model Act format. Foreign corporation whose name does not meet requirements for domestic corporate name must assume name that does. (UCA 16-10a-1506[1]). See subhead Name, catchline Corporate Name, supra. Foreign corporation may use non-distinguishable name by filing either: (1) Signed written consent and undertaking to change name to distinguishable name by person entitled to use name, or (2) judgment establishing prior right. (UCA 16-10a-1506[2]). § 15.06(d)(3) of Revised Model Act not adopted.

Registered Office and Registered Agent of Foreign Corporation.

§ 15.08 (UCA 16-10a-1508). Law repealed by Senate Bill 88 (2008).

Resignation of Registered Agent of Foreign Corporation.

§ 15.10 (UCA 16-10a-1510). Statement of resignation filed by registered agent must contain declaration that notice of resignation given to corporation. (UCA 16-10a-1510[1]). §§ 15.10(b)(2) and (3) of Revised Model Act not adopted.

Withdrawal of Foreign Corporation.

§ 15.20 (UCA 16-10a-1520). §§ 15.20(b)(3), (4), (5), and (c) of Revised Model Act not adopted. Foreign corporation authorized to transact business in this state may not withdraw from state until application for withdrawal filed by division. (UCA 16-10a-1520[1]). Application for withdrawal must also contain: (1) State or country under which incorporated; (2) address of principal office, or statement that corporation will not maintain principal office and address where process may be served; (3) whether registered agent will continue to be authorized to accept service re cause of action arising while corporation authorized; and (4) additional information required by Division. (UCA 16-10a-1520[2][b], [c], [e], and [f]). Application for withdrawal may not be filed until outstanding fees and taxes paid and Tax Commission clears. (UCA 16-10a-1520[3]).

Service on Withdrawn Foreign Corporation.

(UCA 16-10a-1521). Withdrawn foreign corporation must either: (1) Maintain registered agent in state, or (2) be considered to have authorized service of process to address of principal office or address in application for withdrawal. (UCA 16-10a-1521[1]). Service perfected at earliest of date withdrawn corporation receives process, date shown on signed return receipt, or five days after mailing. (UCA 16-10a-1521[2]). Means of service described not exhaustive. (UCA 16-10a-1521[3]).

Grounds for Revocation.

§ 15.30 (UCA 16-10a-1530). Division may commence proceeding to revoke authority to transact business if: (1) Foreign corporation does not deliver annual report to division; (2) foreign corporation does not pay taxes, fees, or penalties when due; (3) foreign corporation is without registered agent in state for 30 days; (4) foreign corporation does not inform division within 30 days of change or resignation of registered agent; (5) incorporator, director, officer, or agent of foreign corporation signs document known to be false; or (6) division receives certificate from lieutenant governor stating corporation has dissolved by merger. (UCA 16-10a-1530). No 60 day grace period before Division has grounds for revocation of authority to transact business. (UCA 16-10a-1530[1]-[4]).

Domestication of Foreign Corporation.

Foreign corporation may become domestic corporation by filing articles of domestication meeting requirements for articles of incorporation (UCA 16-10a-120 to -122), except articles need not include name or signature of foreign incorporators but must refer to state registered agent and directors in office at time of filing. (UCA 16-10a-1533[1]-[2][a]). Articles must include date when and jurisdiction where corporation first formed; name and principal place of business prior to filing; and statement indicating board and shareholder approval of domestication. (UCA 16-10a-1533[2][b]).

Business trusts must register with state prior to doing business in state (UCA 16-15-104), and must maintain agent for service in state (UCA 16-15-109).

Taxation of Corporate Property.

Same rules as for taxation of property of individual. See category 22 Taxation, topic Property Taxes, subhead Taxable Property.

Taxation of Corporate Shares.

None.

Franchise Tax.

For privilege of exercising its corporate franchise or of doing business within state, each domestic and foreign corporation, other than corporations exempted, must pay annual tax of 5% of Utah taxable income. (UCA 59-7-104[2]). Utah taxable income is computed under method of accounting on basis of which corporation computes its income for federal tax purposes or, if corporation did not file federal income tax return, its income in keeping its books. (UCA 59-7-501[2][a]). Adjustments to federal taxable income are required. (UCA 59-7-105, 106, and 107). In no event will tax be less than $100. (UCA 59-7-104[3]).

Following corporations are exempt: (1) Organizations meeting requirements of § 501, of Internal Revenue Code; (2) organizations exempt under § 528 of Internal Revenue Code; (3) insurance companies which are otherwise taxed upon their premiums; (4) building authorities; (5) farmers' cooperatives; and (6) public agencies with respect to or as result of ownership interest in project or in facilities providing additional project capacity. (UCA 59-7-102[1]).

Accounting Periods.

If corporation changes taxable year for federal income tax purposes, new taxable year is corporation's taxable year for franchise or income tax purposes. (UCA 59-7-502[1]). If corporation which does not file federal tax return changes accounting period, new accounting period is taxable year for Utah corporate franchise or income tax, if approved. (UCA 59-7-502[2]).

If corporation changes tax year, must make separate return for period of less than 12 months between close of last taxable year for which return made and close of new taxable year. (UCA 59-7-503[1]). Tax for separate return calculated at rate provided in UCA 59-7-104 for period covered by return. (UCA 59-7-503[2]). Taxable income must be computed upon basis of: (1) Same taxable period used for federal income tax purposes; (2) corporation's annual accounting period if corporation did not file federal income tax return; or (3) calendar year if corporation has annual accounting period other than fiscal year, has no annual accounting period, or does not keep books and does not file federal income tax return. (UCA 59-7-501[1]). Taxable income must be computed under method of accounting on basis of which corporation computes: (1) Income for federal income tax purposes; or (2) income in keeping books if corporation did not file federal income tax return. If no method of accounting regularly used by corporation or if method employed does not clearly reflect net income computed and apportioned to state for taxable year, net income must be computed in accordance with method which in opinion of Tax Commission clearly reflects net income. (UCA 59-7-501[2]).

Returns.

Each corporation subject to act must make return stating specifically items of gross income and deductions. Return must be signed by responsible officer of corporation; signature deemed under oath. (UCA 59-7-505[1][a]). Receivers, trustees in bankruptcy, or assignees required to make return in same manner as corporation. (UCA 59-7-505[1][b][i]). Returns must be made on or before 15th day of fourth month following close of taxable year. (UCA 59-7-505[2]). Extensions may be granted by Tax Commission for period not exceeding six months if properly applied for on or before due date of return. (UCA 59-7-505[3]). All returns made to Commission. (UCA 59-7-505[4]).

Corporation incorporated or qualified to do business in Utah prior to Jan. 1, 1973, not liable for filing return or paying tax measured by income for taxable year in which it legally terminates its existence. (UCA 59-7-505[5]). Corporation incorporated or qualified to do business or which had authority to do business reinstated on or after Jan. 1, 1973, must file return and pay tax measured by income for each period during which it had right to do business and return must be filed and tax paid within three months and 15 days after close of this period. (UCA 59-7-505[6]).

Corporation failing to file return when required subject to penalty as provided in UCA 59-1-401.

Payment.

Tax payable to Tax Commission when return filed. (UCA 59-7-507[1]). If application made to Commission to extend time for filing return as provided in UCA 59-7-505, payment must accompany application in amount equal to lesser of: (1) Greater of 90% of total tax reported on return for current taxable year, or 100% of minimum tax described in UCA 59-7-104; of (2) 100% of total tax liability for taxable year immediately preceding current taxable year. (UCA 59-7-507[1][b]). If payment not made as provided in Subsection (1)(b), Commission shall add extension penalty as provided in UCA 59-1-401, until tax is paid during period of extension. (UCA 59-7-507[1][c]).

At request of taxpayer, Commission may extend time for payment of tax or any part for period not to exceed six months from date prescribed for payment. Amount in respect of which extension granted shall be paid on or before date of expiration of period of extension. (UCA 59-7-507[2]).

Estimated Tax Payments.

Corporation expecting tax liability of $3,000 or more in current tax year or that had tax liability of $3,000 or more in previous tax year must make payments of estimated tax in same manner as provided in Internal Revenue Code. (UCA 59-7-504[1]). Exception for first year corporation required to file Utah return if corporation makes payment on or before due date of return, without extensions, equal to or greater than minimum tax required under UCA 59-7-104 or UCA 59-7-201. (UCA 59-7-504[2][a]). If quarterly estimated tax payment underpaid, penalty added. (UCA 59-1-401[3]).

Deficiency.

Interest upon amount of deficiency assessed at time of deficiency. (UCA 59-7-510). Interest must be paid on notice and demand from commission. (UCA 59-7-510). Penalty added to underpayments of tax as provided in UCA 59-1-401. (UCA 59-7-511).

Failure to Pay Tax.

If tax not paid before 5 p.m. on last day of 11th month after date of delinquency, if domestic corporation, corporate powers, rights, privileges are suspended; if foreign corporation, right to transact intrastate business in state forfeited. (UCA 59-7-534[1]).

Any person attempting or purporting to exercise rights, privileges, or powers of suspended domestic corporation or who transacts or attempts to transact intrastate business in state in behalf of forfeited foreign corporation is guilty of Class B misdemeanor. (UCA 59-7-535[1]).

Allocation of Income.

Uniform Division of Income for Tax Purposes Act adopted with substantial variations. (UCA 59-7-302 et seq.).

Income Tax Rate.

Five percent of Utah taxable income derived from sources within this state other than income included in corporate franchise tax base. (UCA 59-7-201[1], [2]). Tax may not be less than $100. (UCA 59-7-201[3]).

Any franchise tax imposed is offset against income tax. (UCA 59-7-203).

Utility Franchise Tax Limitation.

No county or municipality may impose upon public service provider local charges on basis of gross revenues of public service provider derived from sales, use, or both sales and use of service within county or municipality and which charges total more in total amount that is greater than 6% of gross revenues. (UCA 11-26-1[2]). Sales of gas and electricity as special fuel for motor vehicles and local charges are not included in determining gross revenues. (UCA 11-26-1[3]).

Professional Corporations.

May be formed by one or more Utah licensed physicians, dentists, osteopaths, chiropractors, podiatric physicians, optometrists, veterinarians, architects, public accountants, naturopaths, pharmacists, engineers, attorneys, real estate brokers or real estate agents, psychologists, certified social workers, physical therapists, nurses and landscape architects. (UCA 16-11-2). Must provide only one type of professional service. (UCA 16-11-6). Articles must meet requirements of Utah Revised Business Corporation Act and also must include profession, names and street or mailing addresses of all original shareholders, directors and officers. (UCA 16-11-4[2]). Number of shareholder members of board of directors may be less than number of shareholders, except if corporation has only one shareholder, board may consist of that shareholder. (UCA 16-11-4[2][c]). If conflict between Professional Corporation Act and Utah Revised Business Corporation Act, former takes precedence. (UCA 16-11-5). May also be organized under Utah Revised Business Corporation Act. (UCA 16-11-15).

Professional corporation may only issue and shareholders may only transfer capital stock to persons licensed to render same services as those for which corporation organized, or other persons allowed by applicable licensing act for profession for which corporation organized. (UCA 16-11-7).

Person may not be officer, director, or shareholder unless licensed to render same professional services as those for which corporation organized or allowed to do so by licensing act for profession for which corporation organized. (UCA 16-11-8[1]).

Professional corporation may render services only through its officers, employees, and agents Utah licensed to render services for which corporation was formed. (UCA 16-11-9).

Deeds.

See category 21 Property, topic 21.06 Deeds. (57-1 et seq.).

Model Non-Profit Corporation Act.

Substantially adopted. See topic 2.02 Associations.

Business Development Corporations.

Governed by UCA 16-13-1 et seq.

Limited Liability Companies.

See topic 2.06 Limited Liability Companies.

2.04 FOREIGN CORPORATIONS:

See topic 2.03 Corporations, subhead Foreign Corporations.

2.05 JOINT STOCK COMPANIES:

No statutory provisions concerning organization of companies other than corporations and partnerships.

Two or more persons associated as joint-stock company may be sued under common name of company. (R.C.P. 17[d]).

Professional Associations.

See topics Associations or Corporations, supra.

2.06 LIMITED LIABILITY COMPANIES:

General Supervision.

Regulated by UCA 48-2c-101 (Utah Revised Limited Liability Company Act).

Formation.

May generally be formed for any lawful business (UCA 48-2c-105). Limited liability company must have at least one member at formation and at all times after formation. (UCA 48-2c-402[2]). Failure to maintain at least one member will be event of dissolution. (UCA 48-2c-402[2][c]). If formed from industrial bank, industrial loan company, as defined in § 7-8-21, or S-Corporation must receive prior approval from commissioner. (UCA 7-1-810[1]-[2]).

Purposes.

Purpose is to conduct any business, unless more limited purpose laid out in Articles of Organization. (UCA 48-2c-105).

Powers.

May sue or be sued, purchase or deal in real or personal property, dispose of property, lend money, acquire shares, make contracts, conduct business, maintain offices, elect or appoint managers, render professional services, and have and exercise powers of individuals. (UCA 48-2c-110). Operating agreement may provide for series of members, managers or interests with separate rights, powers and duties. (UCA 48-2c-606 et seq.).

Name.

Must contain words limited company, limited liability company, L.C., or L.L.C. but not association, corporation, incorporation, limited, or limited partnership. (UCA 48-2c-106).

Articles of Organization.

Articles must state name (including “limited company”, “limited liability company”, “L.C. or LC”, “L.L.C. or LLC” (UCA 48-2c-106[1]), business purpose, name and address of registered agent, agent’s signature, statement that director may be served if agent unavailable, address of designated office, name and address of nonmember organizer. (UCA 48-2c-403[1]). Company organized to render professional services under this chapter may render only one specific type of professional service and may not engage in any other business. (UCA 48-2c-1507).

Filing Articles of Organization.

Must file at Salt Lake office of Division of Corporations and Commercial Code of the Utah Department of Commerce. (UCA 48-2c-201).

Registered Office.

Law requiring limited liability companies must continuously maintain designated office at specific geographic location where required records are maintained, (UCA 48-2c-111), repealed by Senate Bill 88 (2008).

Management.

No formalities are needed to maintain limited liability. (UCA 48-2c-605). No member of company is personally liable for debt, obligation, or liability of company or any other member of company. (UCA 48-2c-601). However, member is liable to company for difference between amount of member's contributions to company, which have been actually made; amount which is stated in operating agreement or other contract; and for any unpaid contribution to company which member agreed to make in future. (UCA 48-2c-602[2]). State tax treatment is consistent with federal classification for federal tax purposes. (UCA 48-2c-117, repealed by SB 23 [2009]; UCA 59-10-1403[4]).

Dissolution.

After dissolution, former corporation may not carry on any business except that needed to "wind up" or liquidate. (UCA 48-2c-1203).

Filing Fees.

See topic 2.03 Corporations, subhead Fees. See also topic 2.08 Partnerships, subhead Limited Liability Partnership.

2.07 LIMITED PARTNERSHIP:

See topic 2.08 Partnerships.

2.08 PARTNERSHIPS:

Uniform Partnership Act adopted with limited omissions and changes. (Tit. 48, c. 1).

Limited liability partnership is general partnership that is registered. (UCA 48-1-42[1]). Name must end with "limited liability partnership", "L.L.P.", or "LLP". (UCA 48-1-45). Partner or employee in L.L.P. is not personally liable for acts or omissions of any other partner or employee of L.L.P. (UCA 48-1-46[2]).

Limited liability partnership must register and renew registration annually with Division of Corporations and Commercial Code of Department of Commerce ("Division"), stating name, address, registered agent in state, number of partners, and description of business. (UCA 48-1-42[1][b]). L.L.P. rendering professional services may render only one type of professional service and services ancillary to that type. (UCA 48-1-48[1]).

Foreign limited liability partnership must register with Division. (UCA 48-1-44[1]).

Revised Uniform Limited Partnership Act (1976), as amended in 1985, adopted with some variation. (Tit. 48, c. 2a). Important variations follow:

Certificate of Limited Partnership must be executed and filed with Division and include latest date upon which limited partnership will dissolve, name and street address of limited partnership, agent for service of process, and each general partner. (UCA 48-2a-201[1]). Director of Division appointed agent for service of process if no agent identified in certificate or if agent's authority is revoked. (UCA 48-2a-201[1][c]).

Certificate may be canceled involuntarily by district court upon petition by director of

Division or party in interest for fraud or abuse of authority by limited partnership. (UCA 48-2a-203.5[1]). Limited partnership that fails to file annual report within prescribed time or maintain registered agent for 60 consecutive days is considered delinquent. (UCA 48-2a-203.5[2]). Failure by limited partnership to respond to delinquency notices issued by state will lead to involuntary cancellation of certificate. (UCA 48-2a-203.5[4]).

Foreign limited partnership must register with Division before transacting business in state (UCA 48-2a-902[1]); activities not constituting transacting business specified. (UCA 48-2a-902[2]).

Limited partnership may require plaintiff to give security for costs and reasonable expenses incurred in defense of action. (UCA 48-2a-1005).

Partnership Name.

See category 17 Intellectual Property, topic 17.01 Trademarks and Tradenames.

3 BUSINESS REGULATION AND COMMERCE

3.01 BANKS AND BANKING:

Uniform Commercial Code has been adopted. See topic 3.09 Commercial Code. Uniform Consumer Credit Code repealed. See topic 3.11A Consumer Credit.

Regulated by: Tit. 7 (Financial Institutions Act), Tit. 70A, c. 4 (Uniform Commercial Code), Tit. 70C (Utah Consumer Credit Code), Tit. 70D, c. 1 (Mortgage Lending and Servicing Act). Noncompliance with federal law is violation of Financial Institutions Act. (UCA 7-1-325).

Supervision.

Following are under jurisdiction of State Department of Financial Institutions: all depository institutions chartered under laws of Utah, including out-of-state branches; all Utah depository institutions chartered by federal government, but only to extent authorized by federal law or appropriate federal regulatory agency; or all Utah branches of depository institutions chartered under laws of another state or by federal government; all trust companies; all escrow companies; all persons or institutions engaged in business of: (1) Guaranteeing or insuring deposits, savings accounts, share accounts, or other accounts in depository institutions, (2) operating loan production office for Utah, out-of-state, or foreign depository institution, (3) allowing persons to effect third party payments from loan, charge, or other accounts by checks, drafts, or other instruments or electronic means; or (4) check casher or deferred deposit lender, as defined in UCA 7-23-102; (5) all corporations or other business entities owning or controlling institution subject to jurisdiction of department; (6) all subsidiaries and affiliates of institution subject to department's jurisdiction; and (7) any person or institution that transacts business as, or holds itself out as being, depository institution, trust company, or any other person or institution described above. (UCA 7-1-501). Department is responsible for execution of state law relating to financial institutions. Department consists of: (1) Commissioner, (2) Board, (3) Chief Examiner, (4) Supervisor of Banks, (5) Supervisor of Savings and Loans, (6) Supervisor of Industrial Loan Corporations, (7) Supervisor of Credit Unions, and (8) other necessary supervisors, examiners and personnel. (UCA 7-1-201).

Agents.

Any depository institution may act as agent of other depository institution that is subsidiary of same depository institution holding company. (UCA 7-1-716[1]). Depository institution acting as agent may receive deposits, renew time deposits, engage in activities authorized for loan production office, service loans and receive payments on loans. (UCA 7-1-716[3]). Depository institution may not open or originate deposit, savings, or share accounts;

evaluate or approve loans; disburse loan funds; or conduct activity as agent that law prohibits principal from conducting. (UCA 7-1-716[4]).

Branches.

Commissioner may establish criteria to be applied in approving applications for new branches. (UCA 7-1-301[5][a][ii]).

Foreign Companies.

State Department of Financial Institutions regulates establishment of foreign depository institutions and restricts and regulates acquisition of assets or control of depository institutions doing business in Utah. (UCA 7-18a-101 et seq.). Utah depository institution or Utah depository institution holding company is expressly authorized to acquire control of, merge with, acquire all or portion of assets, or assume all or portion of liabilities of foreign depository institution or foreign depository institution holding company. (UCA 7-1-702[1]). Foreign depository institution or foreign depository institution holding company may acquire control of, merge with, acquire all or portion of assets, or assume all or portion of liabilities of Utah depository institution or Utah depository institution holding company. (UCA 7-1-702[2]). Authorization to engage in transactions subject to approval by commissioner. (UCA 7-1-705[1]). Commissioner may examine, supervise, and regulate branch operated in Utah by depository institution chartered by another state and take any action against that branch. (UCA 7-1-323[1][a]).

Statement to Depositors.

Statement accompanied by canceled checks conclusively presumed correct after two years unless action begun (UCA 7-1-602[1]); credit balance in savings passbook conclusively presumed correct after six years unless action begun (UCA 7-1-603).

Private Banking.

Establishment or operation of private or partnership banks is prohibited. (UCA 7-3-2[1]). Institution may establish or maintain main office or branch in Utah to conduct business only if: (1) It is legitimately chartered bank, and (2) its home state is not Utah and it is authorized to have branch in Utah under laws of Utah and laws of its home state. (UCA 7-3-2[2]).

Deposits in trust permitted. (UCA 7-1-604[1]). Joint deposits permitted (UCA 7-1-612); see catchline Joint Deposits, infra. Minor may make and draw deposit in own name. (UCA 7-1-611[1]). Parent or guardian of minor must not in capacity as parent or guardian have power to attach or in any manner transfer any savings account issued to or in name of minor. (UCA 7-1-611[4]). In event of death of minor, receipt or acquittance of either parent or person standing in loco parentis to minor will be valid and sufficient discharge of institution for any sum or sums not exceeding in aggregate $2,500, unless minor gave written notice to institution not to accept signature of parent or person. (UCA 7-1-611[4]).

Joint Deposits.

Pledge or hypothecation to any depository institution of all or part of joint savings account by joint tenant or tenants authorized to make withdrawals is valid pledge and transfer if account terms do not specifically provide to contrary do not operate to sever or terminate joint and survivorship ownership of all or any part of account. (UCA 7-1-612).

Uniform Probate Code effective July 1, 1977. (UCA 75-1-101 et seq.). See category 13 Estates and Trusts, topic 13.16 Wills.

Deposit Production Office.

It is unlawful to establish or operate deposit production office or similar office for purpose of soliciting deposits or similar evidence of indebtedness or participation interests in indebtedness. (UCA 7-1-618[1]). Prohibition not applicable to: (1) Activities conducted at main office or branch of depository institution, or (2) activities conducted at main office or branch of affiliate depository institution acting as agent. (UCA 7-1-618[2]).

Unclaimed Deposits.

Deposits in financial institution considered abandoned after three years if location of owner is unknown, unless, within three years, owner changed amount or communicated with institution about deposits. (UCA 67-4a-204[1]).

Unclaimed Property Act enacted. (UCA 67-4a-101 et seq.).

See also category 21 Property, topic 21.01 Absentees, subhead Escheat.

Reserve Accounts in Real Estate Loans.

Lender must pay at least 5½% interest on account unless account is required by governmental insurer or guarantor, principal exceeds 80% of property's value or interest is prohibited by law. (UCA 7-17-3).

Collections.

See topic 3.09 Commercial Code.

Banks.

Upon issuance of permit by Commissioner, banks may act as assigns, agents, receivers, guardians of estates of minors and incompetent persons, executors and administrators, registrars of stocks and bonds, and execute trusts of every description not inconsistent with law. (UCA 7-3-10).

Credit Unions may be organized by ten or more residents of this state belonging to same group of 200 persons or more under provisions of Utah Business Corporations Act with consent of commissioner of financial institutions. (UCA 7-9-6[1]).

Banking laws apply. No limit to capitalization. (UCA 7-9-25[1]). Par value of shares determined in multiples of $5 as prescribed in bylaws. (UCA 7-9-25[3]). Capital, deposits, and surplus funds may be loaned to members or applied to restricted investments. (UCA 7-9-26[1]). Amount of loan to individual member is by percentage of capital and surplus. (UCA 7-9-20). Certain restrictions on business loans. (UCA 7-9-58). There is no state deposit cap or concentration limit under Utah Law. (UCA 7-1-617[1]). Credit union is nonexempt if it has field of membership that includes all residents of at least two first- or second-class counties. (UCA 7-9-55[1]).

Joint credit union accounts are payable to survivor as joint tenant. (UCA 7-9-32[2]).

Bank Holding Companies and Financial Holding Companies.

Without prior written approval of commissioner, no person may: (1) Acquire control of holding company, (2) take any action that causes depository institution to become subsidiary of depository institution holding company, or (3) merge or consolidate with holding company. (UCA 7-1-703[1]).

Geographic Expansion.

Out-of-state credit unions must be authorized by state and federal law and department before doing business through branch in Utah. (UCA 7-9-46[2]).

Trust companies have power to: (1) Act as executors, administrators, guardians, assignees, receivers, personal representatives, conservators, depositaries, or trustees under appointment as trustee for any purpose permitted by law; (2) buy, sell or mortgage real or personal property, lend money on real estate or other security, sell and assign mortgages, endorse negotiable instruments, and make, execute and deliver bonds, notes and bills of exchange; and (3) receive deposits and pay interest thereon, but if commercial or savings deposits are received, general provisions concerning liability of stockholders and restricting loans are applicable. (UCA 7-5-1 et seq.).

Uniform Common Trust Act.

Adopted with substantial modifications. See category 13 Estates and Trusts, topic 13.15 Trusts.

Industrial loan corporations may not accept or hold deposits unless its accounts are insured by federal deposit insurance agency. (UCA 7-8-21[2]).

Credit Services Organization.

Operation of credit service organizations is permitted as authorized by UCA 13-21-1 et seq. Credit service organizations must register with Division of Corporations. (UCA 13-21-3.5[1]).

Mortgage Lenders and Servicers.

Department of Financial Institutions regulates companies that originate or service mortgage loans. (Tit. 70D, c. 1). Mortgage officers and principal lending manager must be licensed pursuant to specified requirements. (UCA 61-2c-201). Mortgage lenders and brokers must give applicant written notice that loan or servicing of loan may be sold or assigned. (UCA 70D-2-302). Upon closing any mortgage loan, lender must notify mortgagor in writing giving name and address of initial servicer. (UCA 70D-1-303[1]). If servicing of mortgage loan is assigned, both assigning servicer and successor servicer must notify mortgagor within ten days of first payment due after assignment. (UCA 70D-1-303[2]). Before conducting business, all mortgage lenders, brokers, and servicers must notify department in writing and pay required fees, unless authorized under Utah or federal law to do business as depository institution. (UCA 70D-2-201[1]). Violators are liable to any injured party for actual damages. (UCA 70D-2-501[1]). Any person who willfully violates this chapter is guilty of Class A misdemeanor. (UCA 70D-2-501[2]).

Foreign Banks.

See categories 13 Estates and Trusts, topic Executors and Administrators; Family, topic Guardian and Ward.

3.02 BILLS AND NOTES:

Uniform Commercial Code adopted. (Tit. 70A). See topic 3.09 Commercial Code. See topic 3.11A Consumer Credit. (Tit. 70C).

Secured Notes and Bonds.

Holder of note secured solely by mortgage on real property cannot sue maker on note but must first foreclose mortgage and then obtain deficiency judgment against maker (UCA 78B-6-901), unless real property is environmentally impaired (UCA 78B-6-909). See category 20 Mortgages, topic 20.04 Mortgages of Real Property, subheads Foreclosure and Sales, and Deficiency Judgments.

Instrument falling due on day which is not full business day is payable next following business day. (UCA 70A-3-503[3]).

Judgment Notes.

Recognized.

Attorney Fees.

Allowed only when provided in note or otherwise permitted by statute.

Special Requirements.

See topic 3.11A Consumer Credit. Utah Consumer Credit Code prohibits seller or lessor of consumer goods from taking negotiable instrument, other than check, as evidence of buyer's obligation in consumer credit transaction. Holder in due course status denied one taking such instrument. (UCA 70C-2-204). See topic 3.12 Consumer Protection.

3.03 BILLS OF LADING:

See topic 3.08 Carriers.

3.04 BILLS OF SALE:

See topic 3.23 Sales.

3.05 BLUE SKY LAW:

See topic 3.24 Securities.

3.06 BROKERS:

Uniform Commercial Code adopted. (UCA 70A-1a-101 et seq.). See topic 3.09 Commercial Code.

Licenses.

Municipality may license, tax, and regulate brokers. (UCA 10-1-203[2]).

Bond.

Real Estate Recovery Fund allows for reimbursement for damages up to $15,000 caused by individual real estate licensees in real estate transaction. (UCA 61-2a-2[1]). Reimbursement not made for judgments against corporations, partnerships, or other legal entities. (UCA 61-2a-2[1]).

Real Estate Brokers.

Principal real estate brokers, associate real estate brokers, and real estate sales agents must be licensed. (UCA 61-2-1[1]). Any person outside state must be licensed with respect to transactions or business involving real estate located within state. (UCA 61-2-1[2]). Real Estate Commission established and responsible to regulate real estate brokers. (UCA 61-2-5.5[1]). One act, for compensation, of buying, selling, leasing, managing, or exchanging real estate for another, qualifies person as real estate broker or real estate sales agent. (UCA 61-2-4).

Applicants for sales agent or broker licenses must complete educational program and pass examination. (UCA 61-2-6[1]). Three years' full-time experience as real estate sales agent, or its equivalent, required before applicant may apply for principal broker or associate broker license. (UCA 61-2-6[1]). Nonresident principal broker may be licensed by complying with all requirements except that of residency and nonresident associate broker or sales agent may be licensed by conforming to all requirements except that of residency and by being employed or engaged as independent contractor by or on behalf of nonresident or resident principal broker who is licensed in Utah. (UCA 61-2-6[3]). If licensee violates standards of conduct, Commission may issue order revoking, suspending, placing on probation, denying renewal, reinstatement, or application for original license or certificate, or imposing civil penalty not to exceed greater of $2,500 or amount of gain derived from each violation. (UCA 61-2-11; UCA 61-2-12). Exceptions to licensing requirements. (UCA 61-2-3). License issued for period of not less than two years. (UCA 61-2-9[1][c]). All applicants for license must pass criminal background screening. (UCA 61-2-9[1][d]). License renewal procedures set forth. (UCA 61-2-9[2]).

Conditions for associate broker or sales agent to accept commission from person other than principal broker with whom he is affiliated. (UCA 61-2-10[1]). Associate broker or sales agent can only affiliate with one principal broker at same time. (UCA 61-2-10[3]). Division may issue specialized sales licenses and specialized property management licenses with scope of practice limited to specialty. (UCA 61-2-10[4][b]). Except as provided by rule, principal broker may be responsible for only one real estate brokerage at same time. (UCA 61-2-10[4][c]). Division may audit principal broker's trust account, and if audit shows gross mismanagement, commingling, or misuse of funds, division may order complete audit by certified public accountant at expense of licensee or take other action. (UCA 61-2-24[1]). Licensee may obtain agency or judicial review, and division may bring action in district court to enjoin acts and to enforce compliance. (UCA 61-2-24[2]-[3]).

Agricultural Broker.

Any person who, on behalf of dealer, producer, or livestock market, as defined in UCA 4-30-1, solicits or negotiates consignment, storage or purchase of any product of agriculture is regulated by statute as broker. (UCA 4-7-1 to -14). Livestock market means public market place consisting of pens or other enclosures where all classes of livestock or poultry are received on consignment and kept for subsequent sale either through public auction or private sale. (UCA 4-30-1[2][a]). "Dealer" is any person who receives any product of agriculture, including livestock, from producer for sale or storage on commission for account of producer. (UCA 4-7-3[3]). Agricultural brokers and dealers must be licensed by Commissioner of Department of Agriculture. (UCA 4-7-4; UCA 4-7-6; UCA 4-7-7). Dealer must post corporate surety bond, irrevocable letter of credit, trust fund agreement, or other reasonable security agreement in amount not less than $10,000 nor more than $200,000, as determined by Commissioner or required by Packers and Stockyards Act of 1921, 7 U.S.C. § 181 et seq. (UCA 4-7-8[1]). Grounds for refusing to issue license set forth in UCA 4-7-7(5); grounds for suspension or revocation set forth in UCA 4-7-13.

Trading Stamp Broker.

All applicable statutes repealed.

Insurance Brokers.

See category 16 Insurance, topic 16.01 Insurance Companies.

Securities Brokers.

See topic 3.24 Securities.

3.07 BULK SALES:

See topic 3.09 Commercial Code; also category 8 Debtor and Creditor, topic 8.08 Fraudulent Sales and Conveyances.

3.08 CARRIERS:

(Tit. 54).

Public Service Commission supervises utilities including carriers.

All railroad and other transportation companies are declared to be common carriers and subject to legislative control, and such companies shall receive and transport each other's passengers and freight without discrimination or unnecessary delay. (Utah Const. Art. XII, § 12).

Licenses.

Common carrier not required to obtain more than one license for sales on conveyances operated by that carrier within state. All conveyances owned by common carrier are considered one place of business. (UCA 59-14-202[4]).

Rates.

Under federal law, motor carriers exempt from Public Service Commission's determination of rates. (UCA 54-3-2[2]).

Discrimination.

Forbidden between persons. Unreasonable preferences or discrimination between classes of services or localities prohibited. (UCA 54-3-8[1]).

Uniform Commercial Code adopted. See topic 3.09 Commercial Code.

Bills of Lading.

Uniform Commercial Code adopted. See topic 3.09 Commercial Code. Motor carrier must issue bills of lading for all intrastate shipments and is liable to lawful holder of property for any loss, damage, or injury to property caused by motor carrier. (UCA 72-9-401[1][a]).

Limitation of Liability.

Carrier issuing bill of lading is liable for full amount of all loss, damage, or injury to property caused by it or by any motor carrier to whom it is transferred for final delivery, regardless of restrictions in bills of lading, except property received for transportation concerning which carrier is authorized or required by Commission to establish and maintain rates dependent on value declared by shipper in which case recovery is limited to amount so declared. (UCA 72-9-401[3][b]).

Lien.

Statute permitting lien on baggage for freight, etc., charges, repealed.

Time Limitations.

For any loss, damage, or injury to property, motor carrier must allow 90 days to give notice of claim, four months to file such claims, and two years for initiation of suit. (UCA 72-9-402[1]).

Unclaimed Shipments.

Where any baggage or freight transported by any carrier other than express company is unclaimed for 60 days, carrier may deliver such freight to warehouseman for storage, subject to carrier's charges. (UCA 38-4-4).

Motor Vehicle Carriers.

See category 23 Transportation, topic 23.01 Motor Vehicles.

3.09 COMMERCIAL CODE:

Uniform Commercial Code has been adopted. (Tit. 70A). Revised c. 1 adopted as c. 1a, effective Apr. 30, 2007. C. 2a adopted, effective July 1, 1990. Chapter 4a adopted, effective Apr. 23, 1990. Revised Chapter 7 adopted as Chapter 7a, effective May 1, 2006. Official Comments have not been adopted. With exception of Chapters 3, 8, and 9a, following summaries cover material variations and omissions from 1962 text of Uniform Commercial Code (see Uniform and Model Acts section). Chapter 3 is compared with 1990 official text of Article 3, Chapter 8 is compared with 1994 official text of Art. 8, and Chapter 9a is compared with 1998 official text of Art. 9 of Uniform Commercial Code. Variations and optional provisions adopted are included in sequence in below listed sections:

1a-101 et seq.: 2001 Revision of Art. 1 adopted as c. 1a, with exceptions noted below, effective Apr. 30, 2007.

1-301: Subsections (a) through (f) omitted. Except as otherwise provided, when transaction bears reasonable relation to state and another state or nation, parties may agree law either of state or other state or nation shall govern rights and duties. Failing such agreement, title applies to transactions bearing appropriate relation to state. (UCA 70A-1a-301[1]).

1-301(g): Substantially adopted. (UCA 70A-1a-301[2]).

2-105(1): Substantially adopted.

2-107(1), (2): 1972 Amendment adopted.

2-210(3): Substantially adopted.

2-210(4): Substantially adopted.

2-316: Subsection (5) added. If contract for sale of livestock, including cattle, hogs, sheep and horses, does not include written statement of warrant of merchantability or fitness for purpose, no implied warranty that livestock is free from disease at time of sale, and seller not liable for damage.

2-318: Alternative C adopted.

2-512: 1995 Official Amendments adopted.

2-801 et seq. Assistive Technology Warranty Act. One year warranty imposed on manufacturer who sells or leases assistive technology to consumer. (2-803). Assistive technology is any new device worth $1,000 or more which is used for major life activity including breathing, walking, standing, speaking, hearing, seeing, communicating, learning, working, performing manual tasks, or caring for oneself. (2-802). Additional remedies provided. (2-804).

2a-103(1)(e): 1990 Amendments adopted.

2a-103(1)(g): 1990 Amendments adopted.

2a-103(1)(k): Substantially adopted.

2a-104: 1990 Amendments adopted.

2a-104(1): Substantially adopted.

2a-104(3): Substantially adopted.

2a-106(1): Adds goods that are to be used in more than one jurisdiction but not jurisdiction of residence of lessee in which lease is executed.

2a-201(1)(a): Substantially adopted.

2a-208(2): Omits as between merchants.

2a-209: 1990 Amendments adopted.

2a-209(3): Substantially adopted.

2a-216: Alternative A adopted.

2a-303: 1990 Amendments adopted.

2a-304: 1990 Amendments adopted.

2a-307: 1990 Amendments adopted.

2a-308(1): Substantially adopted.

2a-309: 1990 Amendments substantially adopted.

2a-309(6): Substantially adopted.

2a-311: 1990 Amendments adopted.

2a-406(1)(b): Substantially adopted.

2a-407: 1990 Amendments adopted.

2a-501: 1990 Amendments adopted.

2a-501(5): Substantially adopted.

2a-503: 1990 Amendments adopted.

2a-506(b): Adds: cause of action for indemnity accrues when indemnified person makes payment.

2a-507: 1990 Amendments adopted.

2a-508: 1990 Amendments adopted.

2a-516(2): Adds: Acceptance can be revoked in case of finance lease in which supplier assisted in preparation or negotiation of terms of lease.

2a-516(3): Substantially adopted.

2a-516(4)(a): Substantially adopted.

2a-517: 1990 Amendments adopted.

2a-518: 1990 Amendments substantially adopted.

2a-519: 1990 Amendments substantially adopted.

2a-523: 1990 Amendments adopted.

2a-525: 1990 Amendments substantially adopted.

2a-527: 1990 Amendments adopted.

2a-527(3): Adds: if lessor's disposition of lease agreement qualifies under Subsection (2), lessor may proceed under Subsection (2) of UCA 7A-2a-528.

2a-528(1): Adds: section applies whether lease agreement qualifies under section.

2a-529: 1990 Amendments substantially adopted.

2a-529(1)(b): Section applies to goods identified to lease contract where lessor never delivered, possessed or effectively tendered back, if lessor is unable to dispose of goods at reasonable price after reasonable effort.

2a-529(5): 1990 Amendments not adopted.

2a-532: Substantially adopted.

2a-533: Effective Date.

2a-533(1): Except as provided in Subsection (2), act effective July 1, 1990 and applies to lease contracts first made or effective on or after effective date but does not apply to lease contracts made or effective prior to date unless parties specifically agree that contract be governed under this section.

2a-533(2): Amendments to Sections UCA 70A-1-201, UCA 70A-9-113, UCA 70A-9-306, and UCA 70A-9-318 effective July 1, 1990.

2a-534: Adds minimum warranties and additional remedies for consumer leases of Assistive Technology (as defined and in accordance with Assistive Technology Warranty Act, UCA 70A-2-801 et seq.).

3-121: Alternative B adopted.

3-312: Adopts 1991 revision providing procedures for treatment of lost, destroyed, or stolen cashier's checks, teller's checks, or certified checks.

4-101 et seq. Chapter 4: 1990 Official Amendments adopted.

4a-101 et seq. Chapter 4a adopted, effective Apr. 23, 1990.

5-101 et seq.: 1995 Revision of Art. 5 adopted, with exceptions and options noted below, effective July 1, 1997.

5-101: Substantially adopted.

5-102: Subsections (b) and (c) omitted.

5-102(a): Substantially adopted.

5-115: Substantially adopted.

5-118: Substantially adopted.

5-119: Substantially adopted.

Article 6—Bulk Sales.—Repealed, 1996.

7a-101 et seq.: 2003 Revision of Article 7 adopted as Chapter 7a, effective May 1, 2006.

8-101 et seq.: 1994 Revision of Article 8 adopted, effective Apr. 29, 1996.

1998 Official Text of Revised Article 9—Secured Transactions, adopted effective July 1, 2001. Material variations as follows:

9-102(a)(11): (a) Chattel paper defined as record evidencing both monetary obligation and security interest. Monetary obligation defined as obligation secured by goods, including software used in goods. (b)(ii) adds Chattel paper does not include records that show right to payment arising out of use of credit or charge card. (9a-102[11]).

9-102(a)(53): Substantially adopted. (9a-102[53]).

9-102(a)(60): Substantially adopted. (9a-102[60]).

9-102(a)(64): Substantially adopted. (9a-102[64]).

9-108: Substantially adopted. (9a-108).

9-109(d): Assignment of claim, right to receive compensation for injuries described in 26 U.S.C. 104(a)(1) or (a)(2), or benefits under special needs trust as described in 42 U.S.C. 1396p(d)(4) constitute security interest if created after May 6, 2002. (9a-109[4]).

9-201: Substantially adopted. (9a-201).

9-304: Substantially adopted. (9a-304).

9-305: Substantially adopted. (9a-305).

9-311: Reference to UCA 41-1a-601 inserted. (9a-311).

9-311(d): Substantially adopted. (9a-311).

9-320: Adds Subsection (6)(a): secured party may not enforce security interest in farm products against buyer, commission agency, or selling agent who purchases or sells farm products in ordinary course of business from or for person engaged in farming unless secured party has complied with (6)(b). Directed or Corporate and Commercial Codes issue rules to implement control filing system. (9a-320).

9-334: Subsection (j) not enacted. (9a-334).

9-406: Subsection (j) not enacted. (9a-406).

9-408: Subsection (e) not enacted. (9a-408).

9-501: Substantially adopted. (9a-501).

9-502(b)(3): Text in brackets not adopted. Otherwise substantially adopted. (9a-502[2][c]).

9-502: Adds Tit. 57 does not apply to filed or recorded financing statement covering as-extracted collateral, timber to be cut, or goods becoming fixtures. For purposes of security agreement, Tit. 57 includes requirements related to execution, acknowledgment, certification, and originality. (9a-502).

9-509(a)(1): Person may file amendment that adds debtor or collateral to financing statement if debtor authorizes filing in authenticated record. (9a-509[1][a]).

9-512: Alternative B substantially adopted. (9a-512).

9-513: Substantially adopted. (9a-513).

9-514: Substantially adopted. (9a-514).

9-518: Alternative B substantially adopted. (9a-518).

9-519(b): Substantially adopted. (9a-519[2]).

9-519(d): If financing statement is filed as fixture filing or covers as extracted collateral or timber to be cut, financing statement must be filed and filing office must index it. (9a-519[4]).

9-519(e)(2): Substantially adopted. (9a-519[5][b]).

9-519(f): Alternative B substantially adopted. (9a-519[6]).

9-519(i): Subsections (2) and (8) do not apply to filing office described in 9a-501(1)(a). (9a-519[7]).

9-520(b): Bracketed text adopted. (9a-520[b]).

9-520: Adds Subsection (5) exempting a filing office described in (9a-501[1][a]).

9-522(a): Alternative B substantially adopted. (9a-522[1]).

9-523(c)(1)(A): Bracketed text adopted. (9a-523[3][a][1]).

9-523(d): Second bracketed text adopted. (9a-523[4]).

9-523(f): Substantially adopted. (9a-523[6]).

9-523: Adds Subsection (7): (a) Subsections (1)-(6) apply to records filed in Division of Corporations and Commercial Code. For filing statements filed with county recorder, recorder must provide receipt, acknowledgment of filing and copies, and permit searches of records as if financing statement were mortgage records. (9a-528[7]).

9-525: Fee for filing and indexing and requests for information must be determined by Division of Corporations and Commercial Code, reasonable and fair, and reflect cost of services. (9a-525[3][a]). No fee required for record of mortgage effective as filing statement, filed as fixture filing, or covering as-extracted collateral or timber to be cut. Recording and satisfaction fees still apply. (9a-525[3][b][i]). This section does not apply to fees described in UCA 70A-9a-501(1)(a). (b)(ii) Filing office described in UCA 70A-9a-501(1)(a) must charge fees according to UCA 17-21-

18.5. (9a-525[3][b][i]).

9-526: Substantially adopted. (9a-526).

9-613: National form adopted. (9a-613).

9-614: National form adopted. (9a-614).

9-617: Optional bracketed text not adopted. (9a-617).

9-701: Substantially adopted. (9a-701).

9-702(b): Substantially adopted. (9-702[2]).

10-101: Effective date: Jan. 1, 1966.

10-102—Acts Repealed: Uniform Negotiable Instruments Act, Tit. 44, UCA, 1953; Uniform Warehouse Receipts Act, Tit. 72, UCA, 1953; Uniform Sales Act, Tit. 60, UCA, 1953; Uniform Stock Transfer Act, Tit. 16, Chapter 3, UCA, 1953; Uniform Trust Receipts Act, Tit. 9, Chapter 2, UCA, 1953; Tit. 9, Chapters 1 and 3, UCA, 1953; Tit. 25, Chapters 2, 3 and 4, UCA, 1953; Sections UCA 7-3-48, UCA 7-3-49, UCA 7-3-52, UCA 7-3-63, UCA 7-3-64, UCA 7-3-65, UCA 11-6-2, UCA 56-1-23, UCA 56-1-24, UCA, 1953.

10-104: Chapter 7 does not repeal or modify laws prescribing form or content of documents of title or services provided by bailees or otherwise regulating bailees' businesses if not specifically indicated. Violation of law does not affect statute of documents complying with section UCA 70A-1-201.

11-101: Effective date: July 1, 1977.

11-103: Dates: Dec. 31, 1965 and July 1, 1977.

11-105: Effective date: July 1, 1977.

11-106: Effective date: July 1, 1977.

11-107: Effective date: July 1, 1977.

11-108: Effective date: July 1, 1977.

1972 Official Amendments.

Adopted.

1977 Official Amendments.

Adopted in substantial part.

1994 Revised Article 8 and Conforming Amendments.

Adopted.

1995 Revised Article 5 and Conforming Amendments.

Adopted.

1999 Revised Article 9 and Conforming Amendments.

Adopted.

2001 Revised Article 1.

Adopted.

2003 Revised Article 7.

Adopted.

See also topics: Banks and Banking, Bills and Notes, Brokers, Carriers, Consumer Credit, Contracts, Factors, Frauds, Statute of, Sales, Securities, Warehousemen; categories Business Organizations, topic Corporations; Civil Actions and Procedure, topic Limitation of Actions; Debtor and Creditor, topics Assignments, Fraudulent Sales and Conveyances, Liens, Pledges; Documents and Records, topics Records, Seals; Mortgages, topic Chattel Mortgages.

Filing Fees.

See category 10 Documents and Records, topic 10.04 Records, subhead Filing Under Commercial Code.

Forms.

Utah accepts National Article 9 forms. See Uniform and Model Acts section of this Digest, Commercial Code Amendments.

3.10 CONDITIONAL SALES:

See topics 3.09 Commercial Code, 3.11A Consumer Credit.

3.11 CONSIGNMENTS:

See topic 3.14 Factors.

3.11A CONSUMER CREDIT:

Utah’s version of Uniform Consumer Credit Code has been repealed. (Tit. 70B). Utah Consumer Credit Code adopted. (Tit. 70C). Utah Consumer Credit Code contains some provisions of Uniform Consumer Credit Code, but Utah code differs so substantially reference should be made directly to Utah Consumer Credit Code. (UCA 70C-1-101 et seq.). Consumer Credit Protection Act adopted to protect information in consumer credit databases. (13-42 et seq.).

3.12 CONSUMER PROTECTION:

See topic 3.11A Consumer Credit. Uniform Unfair Trade Practices Act not adopted. Uniform Consumer Sales Practices Act adopted. (Tit. 13, c. 11). Following summaries cover material variations and omissions from 1971 Draft of Uniform Consumer Sales Practices Act.

§ 1: Subsection (6) added. “[T]o recognize and protect suppliers who in good faith comply with the provisions of this act.” (UCA 13-11-2[6]).

§ 2(1)(2): Definitions.

Charitable solicitation is any request for money, credit, property, financial assistance, or anything of value made on representation that it will be used for charitable purposes. Manner of solicitation includes: (1) Oral or written requests, (2) distribution of written publications, or (3) sale, offer, or request of donation for any article in connection with which appeal made for charitable purposes where name of organization used as inducement for purchase or donation or where statement is made that proceeds go to charitable purposes. Solicitation considered complete when made, whether contribution collected or sale made. (UCA 13-11-3[1]).

Consumer transaction is sale, lease, assignment, award by chance, or other disposition of goods, services, or tangible or intangible property (except securities and insurance), to person for: (1) Personal, family, or household purposes, (2) purposes relating to business opportunity that requires expenditure of money or property and requires performance of personal services on continuing basis for which person not previously engaged. (UCA 13-11-3[2][a]).

Consumer transaction includes offer, solicitation, agreement, performance of agreement, or charitable solicitation. (UCA 13-11-3[2]). Enforcing authority means Division of Consumer Protection. (UCA 13-11-3[3]).

§ 3(b): Supplier commits deceptive act if supplier knowingly indicates that subject of consumer transaction: (1) Has sponsorship, approval, characteristics, accessories, uses, or benefits that it does not; (2) is of particular standard, quality, grade, model, if it is not; (3) indicates subject is new or unused, if it is not; (4) is available to consumer for reason that does not exist; (5) has been supplied in accordance with previous representation and has not; (6) will be supplied in greater quantity than supplier intends; (7) needs replacement or repair when does not; (8) has specific price advantage when it does not; (9) supplier has sponsorship, approval, or affiliation when it does not; (10) indicates that transaction involves or does not involve warrant or other rights, remedies, or obligation if representation is false or fails to honor warranty or particular warranty term; (11) indicates customer will receive inducement in return for supplying names of prospective consumers if receipt of benefit is contingent on event occurring after consumer enters into transaction; (12) after payment fails to ship goods or furnish services within 30 days, unless within time period supplier provides buyer with option to cancel agreement and receive full refund or extend shipping date to date proposed by supplier but refund to be mailed or delivered within ten business days after seller receives written notice from buyer of buyer's right to cancel and receive refund; (13) fails to furnish notice of purchaser's right to cancel direct solicitation sale within three business days of time of purchase if sale is made other than at supplier's established place of business pursuant to supplier's mail, telephone, or personal contact and if sale price exceeds $25, unless supplier's cancellation policy is communicated to buyer and provides greater rights than required, which notice must be conspicuous statement written in dark bold at least 12 point type which, on first page, reads: "YOU, THE BUYER, MAY CANCEL THIS CONTRACT AT ANY TIME PRIOR TO MIDNIGHT OF THE THIRD BUSINESS DAY" (or time period reflecting supplier's cancellation policy but not less than three business days) "AFTER THE DATE OF THE TRANSACTION OF RECEIPT OF THE PRODUCT, WHICHEVER IS LATER."; (14) promotes pyramid scheme as defined by Tit. 76, Chapter 6a, Pyramid Scheme Act; (15) represents that funds or property conveyed in response to charitable solicitation will be used for particular purpose or by particular organization if representation is false; (16) engages in other activities specifically prohibited if consumer indicates intention to make claim for motor vehicle repair against motor vehicle insurance policy; (17) includes any contract, receipt, other written documentation of transaction, or addendum to contract, any confession of judgment, or waiver or rights; (18) charges consumer for consumer transaction not previously agreed to by consumer; (19) solicits or enters into consumer transaction with person who lacks mental ability to comprehend consequences of transaction or person's ability to benefit from transaction; (20) with certain exceptions solicits for sale of product or service by providing consumer with unsolicited check or negotiable instrument presentment of which obligates consumer to purchase product or service; (21) sends unsolicited mailing that appears to be billing, statement or request for payment for product not ordered or used, or service not requested or received; or (22) issues gift certificate, instrument, or other record in exchange for payment to provide bearer goods or services in specified amount without printing in readable manner any expiration date or information concerning fee to be charged and deducted. (UCA 13-11-4[2]-[3]). Former statute stating that person other than supplier commits deceptive act if guilty of identify fraud (UCA 13-11-4.5) repealed by Laws of Utah 2004, c. 55.

§ 4(e): In determining whether act or practice is unconscionable, court considers whether supplier knew or had reason to know. (UCA 13-11-5[3]).

§ 4A: District courts given jurisdiction. (UCA 13-11-6).

§ 5(a): Omits paragraph (6).

§ 5(b): Omitted.

§ 5: Subsection added: On motion of enforcing authority or own motion, court may impose civil penalty of not more than $5,000 for each day temporary restraining order, preliminary injunction, or permanent injunction issued under this chapter is violated, if supplier received notice of restraining or injunctive order. Civil penalties imposed under section paid to General Fund. (UCA 13-11-7[3]).

§ 7: Alternative B adopted. (UCA 13-11-9).

§ 7A-F: Repealed.

§ 8(d): Bracketed material referring to attorney general and false swearing is omitted.

§ 9: Enforcing authority may bring action: (1) To obtain declaratory judgment that act violated chapter; (2) to enjoin supplier who has violated or is violating chapter; and (3) to recover damages or to obtain relief under (2)(b) for consumers who complained to authority within reasonable time after proceedings instituted under chapter. (UCA 13-11-17[1]). Enforcing authority may bring class action on behalf of consumers for actual damages under certain circumstances. (UCA 13-11-17[2][a]). On motion of enforcing authority, court may appoint master or receiver or sequester assets, but only if defendant is threatening or about to remove, conceal, or dispose of defendant's property to damage persons for whom relief is requested. (UCA 13-11-17[2][b][i]). Appropriate orders may include order to: (1) Reimburse consumers for damage; (2) carry out transaction to reasonable expectation; (3) strike or limit unconscionable clauses of contracts; or (4) grant other relief. (UCA 13-11-17[2][b][i][A]-[D]). Court may assess expenses of master or receiver against supplier. (UCA 13-11-17[2][b][ii]). If act or practice unjustly enriches supplier and damages can be computed with reasonable certainty, damages recoverable for consumers who cannot be located will be transferred to state treasurer pursuant to Unclaimed Property Act (UCA 67-4a). (UCA 13-11-17[2][c]). If supplier shows by preponderance of evidence that violating chapter resulted from bona fide error, recovery limited to amount by which supplier was unjustly enriched. (UCA 13-11-17[2][d]). Action may not be brought more than two years after violation. (UCA 13-11-17[2][e]). Enforcing authority may terminate action other than class action on acceptance of supplier's written assurance of compliance. (UCA 13-11-17[3][a]). Acceptance of assurance may be conditioned on commitment to reimburse or take other corrective action. (UCA 13-11-17[3][a]). Assurance is not evidence of prior violation. (UCA 13-11-17[b]). Unless assurance is rescinded by agreement or voided by court for good cause, failure to comply with assurance is prima facie evidence of violation. (UCA 13-11-17[3][b]). In addition to other powers in this chapter and Tit. 13, Chapter 2, Division of Consumer Protection, division director may issue cease and desist order and impose administrative fines up to $2,500 for each violation of chapter. (UCA 13-11-17[4][a]). Funds received through administrative fines imposed under this section are deposited in Consumer Protection Education and Training Fund created by UCA 13-2-8. (UCA 13-11-17[4][b]).

Non-uniform section: any judgment granted in favor of enforcing authority for violations of this chapter shall include monetary award, injunctive relief, reasonable attorney's fees, court costs, and costs of investigation. (UCA 13-11-17.5).

§ 11(b): Consumers not in class action who suffer loss due to violation of this chapter may recover actual damages or $2,000, whichever is greater, plus court costs. (UCA 13-11-19[2]).

§ 11(c): Omits “except damages” following “relief”.

§ 11(d)(3): Substitutes “shall be transferred to the state treasurer pursuant to Tit. 67, Chapter 4a, Unclaimed Property Act” for bracketed material. (UCA 13-11-17[2][c]).

§ 11(h): Omits “within one year after the last payment in a consumer transaction involved in a violation of this Act.”

§ 12(d)(3): Adds “a member who requests inclusion may, if he desires, enter an appearance through his counsel.” (UCA 13-11-20[4][c]).

§ 13(a)(2): Substantially adopted.

§ 14(a): Adds subsection exempting any public utility subject to regulation by Public Service Commission. (UCA 13-11-22[1][e]).

Department of Business Regulation.

Contains Division of Consumer Protection which administers following consumer protection acts: (1) Unfair Practices Act, (2) Music Licensing Practices Act, (3) Utah Consumer Sales Practices Act, (4) Business Opportunity Disclosure Act, (5) New Motor Vehicles Warranties Act, (6) Credit Services Organizations Act, (7) Charitable Solicitations Act, (8) Health Spa Services Protection Act, (9) Telephone and Facsimile Solicitation Act, (10) Telephone Fraud Prevention Act, (11) Price Notices Regulation Act, (12) Pawnshop Transaction Information Act, (13) Utah Postsecondary Proprietary School Act, (14) Price Controls During Emergencies Act, and (15) Uniform Debt-Management Services Act. (UCA 13-2-1).

Unlawful Discriminations.

Unlawful for any person engaged in commerce to: (1) Discriminate in price between different purchases of commodities of like grade and quality, (2) to pay or receive commission or discount except for actual cost of services rendered in connection with a sale or purchase, (3) pay a customer compensation for services in connection with sale of goods unless available to all customers on equal terms, (4) discriminate in favor of one purchaser against another purchaser of commodity bought for resale by furnishing any services or facilities connected with processing, handling, and sale of such commodity, and (5) knowingly induce or receive discrimination in price prohibited by this section. (UCA 13-5-3).

Nonconforming Motor Vehicle.

If new motor vehicle does not conform to all applicable express warranties and consumer notifies manufacturer, its agent, or its authorized dealer during term of warranty or within one year after delivery, manufacturer, its agent or its authorized dealer must make necessary repairs. (UCA 13-20-3).

False Advertising.

Unlawful for any person engaged in business within state to advertise goods, wares, or merchandise advertiser unprepared to supply. (UCA 13-5-8).

Prize Notices.

Regulated by Division of Consumer Protection. (UCA 13-28-1 to -9). Prize is defined as gift, award, or other item or service of value. (UCA 13-28-2[2]). Prize notice is notice given to individual that contains representation that individual has been selected or may be eligible to receive prize and conditions receipt of prize on payment or donation from individual or requires or invites individual to make contact to learn how to receive prize. (UCA 13-28-2[2][a]). Solicitor who represents to individual in written prize notice that individual has been awarded prize must provide prize to individual unless prize is not available. If prize not available, solicitor must provide individual with another prize listed in written prize notice that is available and is of equal or greater value, verifiable retail value of prize in form of cash or money order, or voucher, certificate, or other evidence of obligation stating prize will be shipped to individual in 30 days or less at no cost to individual. (UCA 13-28-6[1]). Violation of this chapter results in cease and desist order and fine of not less than $100 nor more than $5,000 for each violation. Intentional violation is guilty of class A misdemeanor and may be fined $10,000. (UCA 13-28-7). Division must investigate and assess administrative fines for violations. Attorney general or district/county attorney may bring action for temporary or permanent injunction or other relief in any court of competent jurisdiction. Court may award restitution. (UCA 13-28-8). Person suffering pecuniary loss because of violation by other person may bring action in court of competent jurisdiction and recover greater of $500 or twice amount of pecuniary loss and court costs and reasonable attorney's fees. (UCA 13-28-9).

Pyramid Scheme.

Pyramid scheme defined as any sales device or plan under which person gives consideration to another person in exchange for compensation or right to receive compensation which is derived primarily from introduction of other persons into sales device or plan rather than from sale of goods, services, or other property. (UCA 76-6a-2[4]). Person may not participate in, organize, establish, or promote pyramid scheme. (UCA 76-6a-3[1]). Criminal conviction under this chapter is prima facie evidence of violation of any violation of UCA 13-11-4 and any violation of this chapter also constitutes violation of Utah Consumer Sales Practice Act (UCA 13-11-4). (UCA 76-6a-3[3]). It is not defense if sales device or plan limits number of persons who may be introduced into it, if sales device or plan includes additional conditions affecting eligibility for introduction into it or when compensation is received from it, or if person receives property or services in addition to compensation or right to receive compensation in connection with pyramid scheme. (UCA 76-6a-5).

Telephone Solicitation.

Telephone solicitation defined as initiation of telephone call or message for commercial purpose to seek financial donations including calls encouraging purchase, rental, or investment in property, goods, or services, soliciting sale or extension of credit, soliciting information, or soliciting charitable donation. (UCA 13-25a-102[7]). Telephone solicitor may not make or cause to make telephone solicitation to person who has informed solicitor, either orally or in writing, that person does not wish to receive further calls from that solicitor. (UCA 13-25a-107.2).

Automated Telephone Solicitation.

Except as otherwise stated, person may not operate automated telephone dialing system to make telephone solicitation. (UCA 13-25a-103[1]). May operate dialing system if has prior express consent of person solicited, or person is one with whom solicitor has established business relationship, or call made by or on behalf of charitable organization as defined in UCA 13-22-2. (UCA 13-25a-103[2]). Automated dialing systems must not place calls to residential telephone before 8:00 a.m. or after 9:00 p.m., on Sunday, or legal holiday, without recipient's prior express consent. (UCA 13-25a-103[3]). Telephone solicitor may not withhold display of solicitor's number from caller identification equipment if caller ID service is available. (UCA 13-25a-103[6]). State no-call database maintained by Division consists of Utah telephone numbers contained in national do-not-call registry maintained by Federal Trade Commission. (UCA 13-25a-109).

Plain Language.

No plain language statute.

Civil Relief.

Members (and their dependents) of National Guard in active service entitled to relief from variety of actions, including foreclosure of real property, repossession of personal property, eviction by landlords, execution of judgment and stay of proceedings and statutes of limitations. (Utah Service Members' Civil Relief Act, UCA 39-7-101 et seq.). Interest on obligation may not exceed 6% per annum during military service unless obligee convinces court that ability to pay not affected by service. (UCA 39-7-111).

Service Contracts.

Service Contracts Act prohibits automatic renewal of service contracts unless seller notifies consumer of automatic renewal. (UCA 15-10-101 et seq.).

3.13 CONTRACTS:

Uniform Commercial Code adopted. (Tit. 70A).

Contractors.

Regulated by Construction Services Commission within Department of Commerce. (UCA 58-55-103). "Contractor" means any person who, for compensation other than wages as employee, undertakes any work in construction, plumbing, or electrical trade for which licensure required. (UCA 58-55-102[12]). Any person engaged in construction trades licensed under this chapter, as contractor regulated under this chapter, as alarm business or company, or as alarm company agent, must become licensed under this chapter before engaging in that trade or contracting activity in this state unless specifically exempted from licensure under UCA 58-1-307 or UCA 58-55-305. (UCA 58-55-301[1][a]). Exemptions and unlawful activities. (UCA 58-55-305, UCA 58-55-501). Licenses expire in accordance with two-year renewal cycle established by rule. (UCA 58-55-303). Contractor may not exceed scope of license. (UCA 58-55-308, UCA 58-55-501).

Contractor or alarm company must allege and prove proper license when contract sued upon was entered into and when alleged cause of action arose in order to act as agent or commence or maintain action in any state court for collection of compensation for performance of any act where license is required. (UCA 58-55-604).

See topics 3.09 Commercial Code; Consumer Protection; categories 14 Family, topic Infants; Documents and Records, topic Seals.

3.14 FACTORS:

Uniform Commercial Code adopted. (Tit. 70A). See topic 3.09 Commercial Code.

License Requirements.

Governed by Uniform Commercial Code. See topic 3.09 Commercial Code.

Liens.

Governed by Uniform Commercial Code and Tit. 38.

Consignment Agreements.

Governed by Uniform Commercial Code. See topic 3.09 Commercial Code.

3.15 FRANCHISES:

Franchise provisions of Uniform Franchise and Business Opportunities Act not adopted.

Business Opportunity Sales.

Business Opportunity Disclosure Act is substantially drawn from Uniform Franchise and Business Opportunities Act Articles I (General Provisions), IV (Business Opportunities), and V (Administration; Prohibited Practices; Remedies). Business opportunity or assisted marketing plan is defined as in Uniform Act. (UCA 13-15-2; Uniform Act Art. I, § 101, 5[i]). Substantial variations from Uniform Act are described below.

Unlawful to sell business opportunity without first filing disclosure document with Division of Consumer Protection of Department of Commerce. (UCA 13-15-4[1]). Document similar to application for registration and disclosure document in Uniform Act but must include individual detailed statement covering previous five years of business experience of seller and information about selling assisted marketing plans in other lines of business. (UCA 13-15-4[1]; Uniform Act Art. IV, §§ 402-404). Seller of assisted marketing plan shall pay fee as determined by department. (UCA 13-15-4[2]). Seller must also provide warning with any representation that no guarantee of earnings can be made. (UCA 13-15-4[5]). Disclosure statement with warning (UCA 13-15-4) and notice (UCA 13-15-5) prescribed by Utah statute must be furnished also to purchaser ten days prior to purchase (UCA 13-15-5).

Assisted Marketing Plan does not include: (1) Sale of on-going business; (2) not-for-profit sale of demonstration equipment, materials, or samples for total price of $300 or less; or (3) sale of package or product franchise defined by and in compliance with Federal Trade Commission rules governing franchise and business opportunity ventures. (UCA 13-15-2[1][b]). If provisions of Act are violated, Division may issue cease and desist order, and purchaser may sue for rescission, court costs, attorney's fees, and greater of either actual damages or $2,000. (UCA 13-15-6[1]-[2]). In addition to other penalties, Division may impose administrative fine up to $2,500; all money received shall be deposited to Consumer Protection Education and Training Fund. (UCA 13-15-6[4]).

New Automobile Franchises.

New motor vehicle franchises regulated pursuant to statute and under regulations promulgated by Utah Motor Vehicle Franchise Advisory Board. (UCA 13-14-101 to UCA 13-14-307).

3.16 FRAUDS, STATUTE OF:

Uniform Commercial Code adopted. (Tit. 70A).

Following agreements are void unless agreement or note or memorandum of agreement is in writing, signed by party to be charged: (1) Agreement not to be performed within one year; (2) promise to answer for debt, default or miscarriage of another; (3) promise made upon consideration of marriage, except mutual promises to marry; (4) special promise of executor or administrator to answer demands or pay debts of decedent out of own estate; (5) agreement authorizing or employing agent to sell or purchase real estate for compensation; and (6) credit agreements. (UCA 25-5-4[1]). Transfer of realty (UCA 25-5-1) or lease thereof (UCA 25-5-3) for more than one year must also be in writing.

Contracts of Sale.

See topic 3.09 Commercial Code.

Part Performance.

See topic 3.09 Commercial Code.

3.17 [RESERVED]

3.18 INFORMATION TECHNOLOGY, INTERNET AND NEW MEDIA:

Advertising.

Person may not display pop-up ads by means of spyware if triggered by response to specific mark or visit to specific website or in violation of federal or state trademark law. (UCA 13-40-201).

Computer Crime.

Unauthorized Access.

Regulated by Utah Computer Crimes Act. (UCA 76-6-701). Person who, without authorization, gains access to and alters, damages, destroys, discloses, or modifies any computer system causing damage or obtains benefit from any person without legal right is guilty of computer crime. (UCA 76-6-703). Except retailer who uses technology to identify, track or price goods and that technology is located within retailer's location, person who intentionally and without authorization interferes with or interrupts computer services is also guilty of computer crime. (UCA 76-6-703[2]). Penalties established. (UCA 76-6-703). Affirmative defense exists for person who obtained access in response to and for protection against or investigation of prior breach of security of computer network, system, or property. (UCA 76-6-703[5]).

Spyware.

Person may not display pop-up advertisement by means of spyware if pop-up advertisement is: (1) Displayed in response to specific mark or is displayed in response to specific internet website address, (2) constitutes infringement of registered trademark, and (3) is purchased or acquired by person other than mark owner, licensee, authorized agent of owner, authorized user, or person engaged in fair or permissible use of mark. (UCA 13-40-201[1]). Computer software providers can remove, disable, or refuse to install any computer program if provider reasonably believes that computer program will be used for nonconsensual gathering of confidential information. (UCA 13-40-202).

Communications Fraud.

Elements for fraud set forth for any person who has devised any scheme or artifice to defraud another or to obtain from another money, property, or anything of value by means of false or fraudulent pretenses, representations, promises, or material omissions, and who communicates directly or indirectly with any person by any means in UCA 76-10-1801[1]. Penalties set forth also in UCA 76-10-1801.

Digital Signatures.

All applicable statutes repealed.

Government Agencies.

Governed by State Information Technology Act. (UCA 63D-2-101 et seq.). Limits state's ability to collect personally identifiable information. (UCA 63D-2-103). Limits personally identifiable information posted on court website. (UCA 63D-2-104).

3.19–3.16 [RESERVED]

3.17 INTEREST:

(Tit. 15, c. 1).

Uniform Consumer Credit Code adopted. See topic 3.11A Consumer Credit.

Legal rate in absence of contract fixing rate, 10% per annum. (UCA 15-1-1). May not exceed 6% per annum for National Guard members on active service unless court determines otherwise. (UCA 39-7-111). See topic 3.12 Consumer Protection, subhead Civil Relief.

Maximum Rate.

See topic 3.11A Consumer Credit.

Judgments on contract bear interest as agreed, other judgments bear interest at federal post judgment interest rate as of Jan. 1 of each year plus 2%. (UCA 15-1-4).

Open Accounts.

See topic 3.11A Consumer Credit.

Additional Charges.

See topic 3.11A Consumer Credit.

Small Loans.

See topic 3.11A Consumer Credit.

Pawnbrokers.

No county, city, town, or other political subdivision may set interest rates or other charges which pawnbrokers may charge. (UCA 11-6-4).

Usury.

See topic 3.11A Consumer Credit.

3.18 [RESERVED]

3.19 LICENSES, BUSINESS AND PROFESSIONAL:

State and local governments require licensing for wide variety of businesses, occupations and professions. (UCA 58-1-101 et seq.). Among those occupations, professions and establishments licensed by Utah Department of Commerce, Division of Occupational and Professional Licensing are: Accountants, Acupuncturists, Architects, Athletic Trainers, Backflow Device Testers, Barbers and Cosmetologists, Certified Nurse Midwives, Certified Shorthand Reporters, Chiropractors, Contractors, Dental Hygienists, Dentists, Dietitians, Dispute Resolution Provider, Electricians, Employee Leasing Companies, Engineers and Land Surveyors, Environmental Health Scientist, Facial Operators, Funeral Establishments, Health Care Assistants (registration only), Health Facility Administrators, Hearing Aid Specialists, Hearing Instrument Specialists or Interns, Home Inspectors, Insurance Agents, Landscape Architects, Marriage and Family Therapists, Massage Establishments and Technicians, Mental Health Therapists, Naturopaths, Nurses, Occupational Therapists, Optometrists, Osteopaths, Personal Introduction Services, Physicians and Surgeons, Physician's Assistants, Pharmacists, Pharmacist's Interns, Pharmacies, Physical Therapists, Plumbers, Podiatrists, Pre-need Agents, Private Investigators, Psychologists, Radiologists, Recreational Therapists, Respiratory

Therapists, Sanitarians, Social Workers, Speech Pathologists and Audiologists, Veterinarians, Waste Tire Transporters, etc. (UCA 58-1-101 et seq.). All licensing, annual registration and other fees are determined by Division of Occupational and Professional Licensing pursuant to UCA 4-2-2(2). (UCA 4-1-6). Occupational and Professional Licensure Review Committee shall: (1) Conduct sunrise review in accordance with UCA 36-23-107 for all applications submitted in accordance with UCA 36-23-105; (2) conduct sunset review for occupational or professional license classifications referred to committee by any other legislative committee by applying criteria in UCA 36-23-107, and criteria in Tit. 63I, c. 1, Legislative Oversight and Sunset Act, and any other appropriate criteria; (3) submit written report by no later than Dec. 31 each calendar year to speaker of House of Representatives, president of Senate, chair of House Rules Committee, chair of Senate Rules Committee, and chairs of Commerce and Revenue Appropriations Subcommittee. (UCA 36-23-106[1]). Written report shall include all findings and recommendations made by Committee in that calendar year and summary report for each sunrise review conducted. (UCA 36-23-106[2]).

Among other operations, persons, and businesses licensed by state are following:

Agricultural Products Dealers and Brokers.

See topic 3.06 Brokers.

Aircraft.

All civil aircraft must be registered by this state. Exemptions available for aircraft assessed by State Tax Commission and aircraft licensed by foreign country with which U.S. has reciprocal registration agreement. (UCA 72-10-109). Fee determined by State Tax Commission. (UCA 72-10-110).

Athlete Agents.

Uniform Athlete Agents Act requires registration of athlete agents, governs their conduct, and contains provisions specific to student athletes. (UCA 15-9-101 et seq.). Pete Suazo Utah Athletic Commission Act creates independent commission to regulate boxing and unarmed combat and prohibits unregulated club fighting. (UCA 63C-11-301 et seq.).

Brokers.

See topic 3.06 Brokers.

Cigarettes.

Any person or entity who manufactures, imports, distributes, barters, sells, exchanges, or offers cigarettes for sale must first obtain license from State Tax Commission. Minimum bond of $500 required. (UCA 59-14-201).

Concealed Firearms.

Permits are issued for lawful self-defense by Department of Public Safety to persons 21 or older upon proof of good character. (UCA 53-5-704). Criteria for demonstrating good character includes: applicant has not been convicted of felony, has not been convicted of crime of violence, has not been convicted of offense involving use of alcohol, has not been convicted of offense involving unlawful use of narcotics, has not been convicted of offense involving moral turpitude, has not been adjudicated by court as mentally incompetent unless reversed or withdrawn, and is qualified to purchase and possess firearm. (UCA 53-5-704[2]). Person may carry concealed dangerous weapon accessible for immediate use if that person has permit and if weapon is firearm. (UCA 76-10-504). Exception for private residences and houses of worship after notice that firearms are prohibited is given. (UCA 76-10-530). Person carrying concealed dangerous weapon, as defined in UCA 76-10-501, which is not firearm or which is not securely encased, is guilty of Class B misdemeanor. (UCA 76-10-504[1]). Person carrying concealed dangerous weapon without permit is guilty of Class B misdemeanor if weapon is firearm and contains no ammunition; if weapon contains ammunition, guilty of Class A misdemeanor. (UCA 76-10-504[2]). Person who carries sawed-off shotgun or sawed-off rifle is guilty of second degree felony. (UCA 76-10-504[3]). If concealed firearm is used in commission of crime of violence and person is party to offense, person is guilty of second degree felony. (UCA 76-10-504[4]). Person with permit to carry concealed weapon may not carry weapon in area where firearms are prohibited, in any airport secure area, or in any house of worship or private residence where dangerous weapons are prohibited. (UCA 53-5-710). All others are guilty of Class A misdemeanor if firearm possessed knowingly or intentionally; if firearm possessed recklessly or with criminal negligence, guilty of infraction. (UCA 76-10-529).

Controlled Substances.

Any person or entity who manufactures, produces, distributes, dispenses, prescribes, administers, or conducts research with or performs laboratory analysis upon any controlled substance in Schedules II through V, or who proposes to engage in such activity, must be licensed by Department of Occupational and Professional Licensing. (UCA 58-37-6).

Fish and Game.

Licenses, certificates of registration, permits, and tags required for hunting, trapping, fur harvesting, fishing, or seining protected wildlife, or for engaging in sale, trade, or barter of protected wildlife. (UCA 23-19-1 et seq.).

Healthcare Facilities.

Annual licensing by State Division of Health required. (UCA 26-21-8).

Liquor Licenses.

Restaurant must obtain license before selling or allowing consumption of liquor on premises. (UCA 32A-4-101[1]). Restaurant and private liquor licenses are issued by Alcoholic Beverage Control Commission. (UCA 32A-4-101, UCA 32A-5-101). Licensing procedures. (UCA 32A-4-101 et seq.).

Manufactured Homes.

Manufactured home defined as transportable factory built housing unit constructed on or after June 15, 1976, according to HUD Code, in one or more sections in which traveling mode is eight body feet or more in width or forty body feet or more in length, or when erected on site is 400 or more square feet, and is built on permanent chassis and designed to be used as dwelling with or without permanent foundation when connected to required utilities and includes plumbing, heating, air-conditioning, and electric systems. (UCA 58-56-3). Dealers of factory built housing must be registered with Division of Occupational and Professional Licensing. Division shall issue each registration on two year renewal cycle. (UCA 58-56-16).

Real Estate Brokers and Sales Agents.

Licensing procedures and requirements listed in UCA 61-2-6. Exemptions provided. (UCA 61-2-3). Continuing education requirements listed in UCA 61-2-9(2).

Sales and Use Tax License.

Any person required by Tit. 59, c. 12 to collect sales or use tax must obtain license to do so from State Tax Commission prior to engaging in business within state. (UCA 59-12-106).

Security Company.

Persons acting as contract security company, armed private security officer, unarmed private security officer, or alarm response runner must be licensed. (UCA 58-63-301 et seq.). To receive license, applicants must qualify, pay fee, and pass examination. (UCA 58-63-302). License also required for Alarm System Security Company. (UCA 58-55-301).

Telephone Soliciting Business.

See topic 3.23 Sales, subhead Telephone Sales.

Commercial Travelers.

No statutory provisions.

Collection Agencies.

Must file $10,000 bond with Division of Corporations. (UCA 12-1-2[1]). Bond term must be one year and no action on it may be begun after two years from its expiration. (UCA 12-1-1 to -3). Requirements do not apply to attorney at law licensed to practice in State of Utah, to national bank, to bank or trust company created under Utah law, or to title insurance agency or title insurance producer. (UCA 12-1-7).

Health and Medical Licenses.

See category 15 Health, topic 15.08 Licensure and Certification.

3.20 MONOPOLIES, RESTRAINT OF TRADE AND COMPETITION:

Antitrust Act.

Contracts or conspiracies in restraint of trade are illegal. (UCA 76-10-914). Monopolies, attempts to monopolize, and combinations or conspiracies to monopolize, any part of trade or commerce are unlawful. (UCA 76-10-914). Exceptions include activities of public utilities, insurance, securities, banks, savings and loan associations, emergency medical service providers, municipal activities, and labor, agricultural, or horticultural organizations not having capital stock or conducted for profit. (UCA 76-10-915). Attorney general authorized to enforce Act, may bring action and has power to investigate violations through demand for documentary material, oral testimony, or both. (UCA 76-10-916, 917). State may recover actual damages or civil penalty for each violation, in addition to injunctive relief, costs of suit, and reasonable attorney's fees. (UCA 76-10-918). Any individual who violates Antitrust Act is subject to civil penalty of not more than $100,000 for each violation. (UCA 76-10-918[2]). Any person other than individual who violates Antitrust Act is subject to civil penalty of not more than $500,000 for each violation. (UCA 76-10-918[2]). Persons damaged may bring action for injunction, treble damages, costs of suit and attorney's fees. Court may reduce judgment if it will cause insolvency of defendant but may not reduce to amount less than damages sustained plus costs and reasonable attorney's fees. (UCA 76-10-919). No damages, costs, or fees recoverable from political subdivision or its official or employee acting in official capacity. (UCA 76-10-919[4]). Criminal penalties permissible up to $100,000 and three years imprisonment for individuals or $500,000 fine for organizations. (UCA 76-10-920).

Public Works Projects.

Capital projects of local government entities must be opened for public bid if estimated costs exceed $40,000 for improvement or $125,000 for public works project. (UCA 11-39-101 et seq.).

Unfair Practices Act.

Applicable to intrastate commerce, Act prohibits price discrimination, taking or offering commissions except for services rendered, payments for benefit of customers, discrimination among purchasers, inducing discriminations, sales at less than cost to injure competitors, and advertising goods not prepared to supply. (UCA 13-5-1 et seq.). Violator may be enjoined, and plaintiff may recover greater of treble damages or $2,000, plus court costs. (UCA 13-5-14). Criminal penalty up to $5,000, 12-month imprisonment, or both. (UCA 13-5-15). Certain specified sales are exempted. (UCA 13-5-12). State division of consumer protection may file suit to enjoin unfair competition. (UCA 13-5-1 et seq.).

Agricultural Fair Trade Act.

Prohibits unfair, discriminatory or injurious practices in producing, processing, handling, marketing, selling, or distributing agricultural products. (UCA 4-8-1 et seq.).

Utah Fair Trade Act.

Declared unconstitutional. (5 Utah 2d 326, 301 P.2d 741).

Gasoline Products Marketing Act.

Prohibits unfair or injurious practices and regulates marketing agreements on part of refiner of oil products or distributor of gasoline or motor fuels and oil products. (UCA 13-12-1 et seq.).

Motor Fuel Marketing Act.

Prohibits sale of motor fuel below cost if intent or effect is to injure or unfairly divert trade from competitor. (UCA 13-16-1 et seq.).

3.21 NEGOTIABLE INSTRUMENTS:

See topic 3.02 Bills and Notes.

3.22 RESTRAINT OF TRADE:

See topic 3.20 Monopolies, 3.22 Restraint of Trade and Competition.

3.23 SALES:

Uniform Commercial Code adopted. See topic 3.09 Commercial Code.

Contracts of Sale.

No statutory limitation as to type size in printed contract.

Bills of Sale.

No statutory requirements.

Product Liability.

Defective condition which made product unreasonably dangerous to user or consumer must exist at time of sale. “Unreasonably dangerous” means dangerous beyond expectation of ordinary user. Manufacturing in conformity with government standards creates rebuttable presumption of no defect. (UCA 78B-6-703). Fault, for purposes of determining comparative negligence under UCA 78B-5-818, includes fault from alteration or modification of product after sale. (UCA 78B-6-705). No dollar amount in prayer for damages. (UCA 78B-6-704). Claimant has two years after discovery of harm and cause to bring civil action. (UCA 78B-6-706). Manufacturer of product which may become dangerous if improperly used has duty to any member of public using product for purpose and in manner intended. (3 Utah 2d 354, 284 P.2d 471). See topic 3.09 Commercial Code.

Retail Credit Sales.

See topics 3.11A Consumer Credit, 3.19 Interest.

Consumer Protection.

See topics 3.11A Consumer Credit, 3.12 Consumer Protection.

Bulk Sales.

See topic 3.09 Commercial Code.

Conditions or Warranties.

See topic 3.09 Commercial Code.

Transfer of Title.

See topic 3.09 Commercial Code.

Delivery.

See topic 3.09 Commercial Code.

Remedies.

See topic 3.09 Commercial Code.

Sales of Motor Vehicles.

See category 23 Transportation, topic 23.01 Motor Vehicles.

International Sales of Goods.

See Part V this volume, Selected International Conventions.

Sales of Business Opportunities.

Sellers of business opportunities via assisted market plans must file disclosure statement with State Trade Commission and must provide copy of statement to prospective purchasers. (UCA 13-15-1 to -7).

Telephone Sales.

Governed by Telephone and Facsimile Solicitation Act. (UCA 13-25a-101). Annual registration with Division of Consumer Protection and minimum of $25,000 surety required of telephone soliciting business. (UCA 13-26-3). Exemptions from registration and bonding requirements. (UCA 13-26-4). See topic 3.12 Consumer Protection.

3.24 SECURITIES:

Uniform Securities Act substantially adopted. (UCA 61-1-1 et seq.) For text of Uniform Act, see Uniform and Model Acts section.

Uniform Commercial Code adopted. See topic 3.09 Commercial Code.

Some of deviations from Uniform Securities Act follow:

Supervision.

Division of Securities (“Division”) has supervisory authority. (UCA 61-1-18 et seq.).

Offices are located at 160 East 300 South, Salt Lake City, Utah 84114.

Regulatory Powers of Supervising Authority.

Five member Securities Commission appointed by Governor and approved by Senate makes recommendations and acts in advisory capacity to Division. Commission has duty to formulate and make recommendations to director regarding policy and budgetary matters, submit recommendations regarding registration requirements and division rules, formulate and make recommendations to director regarding establishment of reasonable fees, and act in advisory capacity to director with respect to exercise of duties, powers, and responsibilities. Commission has power to conduct administrative hearings, impose sanctions (through Division) and review rules Division issues. (UCA 61-1-18.5[1]).

Prerequisites to Sales or Offerings.

It is unlawful for any person to offer or sell securities unless they are registered under Act, security or transaction is exempt under UCA 61-1-14, or security is federal covered security for which notice filing has been made under UCA 61-1-15.5. (UCA 61-1-7).

Securities to Which Act Applicable.

Omits §§ 401(k)(5) and 401(k)(6)(A), (B), (C) of Uniform Act. Offer or sale does not include good faith gift, transfer by death, transfer by termination of trust or beneficial interest in trust, certain security dividends, or securities split or reverse split, or any act incident to judicially approved reorganization in which security is issued. (UCA 61-1-13[1][v][iv]).

Exempt Securities.

§ 402(a)(5) of Uniform Act omitted. (UCA 61-1-14[1][g]). Any security issued by corporation incorporated under provisions of Agricultural Cooperative Associations Act is exempt. (UCA 61-1-14[1][e]). Any security that is offered or sold under § 4(5) of Securities Act of 1933 that is “mortgage related security” as defined in § 3(a)(41) of Securities Exchange Act of 1934, may not be exempt. (UCA 61-1-11[11][a]). Interests in certain limited liability companies not securities. (UCA 61-1-13[1][z]).

Exempt Transactions.

§ 402(b)(9) of Uniform Act omitted. Distribution of securities as dividend if person distributing dividend is issuer of securities distributed (UCA 61-1-14[2]); any nonissuer transaction effected by or through registered broker-dealer where broker-dealer or issuer files with Division and broker-dealer maintains prescribed information reasonably available to any person (UCA 61-1-14[2][m]); any transaction not involving public offering (UCA 61-1-14[2][n]); offer or sale of “condominium units” or “time period units” if provisions of Condominium Ownership Act or Condominium Act of state in which condominiums are located, Uniform Land and Sales Practices Act, Utah Timeshare and Camp Resort Act, and Uniform Consumer Credit Code are complied with (UCA 61-1-14[2][o]); transaction or series of transactions including merger, consolidation, reorganization, recapitalization, reclassification, or sale of assets, if consideration is in whole or part issuance of securities of person or persons, if securities holders meet certain characteristics, filing requirements are met and Division does not deny or revoke exemption (UCA 61-1-14[2][p]); transactions that do not exceed $500,000 (or greater amount as allowed under rule of Division) in aggregate where not more than 15 purchasers and no general advertising or solicitation and no commission paid other than to licensed broker-dealer or agent (UCA 61-1-14[2][q]); transactions involving commodity contract or option (UCA 61-1-14[2][r]). Transaction pursuant to offer to existing security holders of issuer is only exempt where no commission or other remuneration is paid. (UCA 61-1-14[2][j]). Transaction with isolated nonissuer is exempt. (UCA 61-1-14[2][a]). Preorganization exemption prohibits general advertising or solicitation and does not prohibit payment by subscribers. (UCA 61-1-14[2][i]).

Division may deny or revoke exemption and impose fine with respect to specific security, transaction, or series of transactions or with respect to any person or issuer or affiliate or successor to person, issuer, any entity subsequently organized by or on behalf of person, or issuer generally. (UCA 61-1-14[4]).

Registration of Offerers.

No requirements other than in connection with registration of securities and dealers and agent. See subheads Registration of Securities, Brokers and Agents, infra.

Registration of Securities.

Securities must be registered with Division or exempt from registration before being offered or sold. (UCA 61-1-7). Act allows registration by notification (UCA 61-1-8), co-ordination (UCA 61-1-9), and qualification (UCA 61-1-10). Registration statement effective for one year only. (UCA 61-1-11[8]). Filing fees for registration statement determined by Division. (UCA 61-1-11[2]). If no stop order is in effect and no proceeding is pending regarding stop order, registration statement automatically becomes effective at 3:00 p.m. Mountain Standard Time, second full business day after filing registration statement or last amendment. (UCA 61-1-8[3], repealed by Laws of Utah [2009]).

Registration of Dealers.

See subhead Brokers and Agents, infra.

Brokers and Agents.

Broker-dealer means person engaged in business of effecting transactions in securities for account of others of for own account and does not include: (1) General partner who organizes and effects transactions in securities of three or fewer limited partnerships in any 12-month period; (2) person whose participation in securities transactions is confined to transactions made by or through licensed broker-dealer; (3) licensed real estate broker who effects transactions in evidence of indebtedness secured by real or chattel mortgage or deed of trust, or by agreement for sale of real estate or chattels, if it is offered and sold as unit; (4) person effecting transactions in commodity contracts or options; (5) agent; (6) issuer; (7) depository institution or trust company; (8) certain persons with no place of business in this state; or (9) other person Division may designate as not within intent of this section. (UCA 61-1-13[1][c]). License becomes effective 30 days after application filed. (UCA 61-1-4[1][e][i]). Licenses expire on Dec. 31 each year for broker-dealers, agents, investment advisors, and investment advisor representatives. (UCA 61-1-4[1][d]). Licensing of broker-dealer automatically constitutes licensing of only one partner, officer or director, or person occupying similar status or performing similar functions. (UCA 61-1-4[1][e][iii]). Initial and renewal fees to be reasonable as determined by Division and nonrefundable. (UCA 61-1-4[3]). Licensed broker-dealer must within 24 hours after demand furnish customer or principal for whom any order has been executed written statement showing time, place, and price of security purchase and sale. (UCA 61-1-5[2]). Securities Commission may suspend, revoke, cancel or withdraw license, impose fine, or any combination thereof. (UCA 61-1-6[1]). Director may deny license. (UCA 61-1-6[1]. Division must comply with requirements of Utah Administrative Procedures Act. (UCA 61-1-18.6, UCA 63-46b-1 et seq.).

Bonds.

Division may require licensed broker-dealers and investment advisors to post bond. (UCA 61-1-4[6]). No bond required of licensee whose minimum net capital exceeds amount determined by division. (UCA 61-1-4[6][c]).

Advertisements.

Division may require filing of sales literature or advertising communication intended for distribution to prospective investors. (UCA 61-1-15).

Liabilities.

Division must comply with Utah Administrative Procedures Act. (UCA 61-1-18.6, UCA 63-46b-1 et seq.). Director may issue order to show cause why order should not be entered directing person to cease and desist from engaging in any practice constituting violation of Act, with hearing to be held no sooner than ten days after issuance of order. (UCA 61-1-20[1]).

If Division chooses to bring action in appropriate court to enjoin acts or practices and enforce compliance with Act court may in addition to other specified remedies enter declaratory judgment, order disgorgement, rescission, restitution, impose fine not more than $500 for each violation, or enter any other relief court considers just. (UCA 61-1-20[2]). Any person who willfully violates Act is guilty of third degree felony if matter is worth $10,000 or less; if matter is worth $10,000 or more, person violating act is guilty of second degree felony. (UCA 61-1-21). Any person aggrieved by final order under Chapter 1 of Tit. 64 may obtain judicial review. (UCA 61-1-23).

Liabilities for violations of Subsection UCA 61-1-1(2) are imposed on purchasers as well as sellers. (UCA 61-1-22[1][a]). In suit brought regarding security sold or purchased in violation of Subsection UCA 61-1-1(2), court may award amount equal to three times damages, together with interest (at 12%), costs, and attorneys' fees. (UCA 61-1-22[1][b]). Action must be brought before five years after act or transaction constituting violation or two years after discovery by plaintiff of facts constituting violation. (UCA 61-1-22[7]).

Tender Offers.

Control Shares Acquisition Act adopted. (UCA 61-6-1 et seq.).

Subdivision Offerings.

Utah Uniform Land Sales Practices Act adopted. (UCA 57-11-1 et seq.). Utah Timeshare and Camp Resort Act adopted. (UCA 57-19-1 et seq.).

Franchising, Pyramid Sales, Etc.

Business Opportunity Disclosure Act adopted. (UCA 13-15-1 et seq.). See also topics 3.12 Consumer Protection and 3.15 Franchises.

Uniform Simplification of Fiduciary Security Transfers Act adopted. (UCA 22-5-1 et seq.). If conflict between this Act and Chapter 8 of Uniform Commercial Code, this Act governs.

Uniform Securities Ownership by Minors Act not adopted.

3.25 STATUTE OF FRAUDS:

See topic 3.16 Frauds, Statute of.

3.26 TRUST RECEIPT SECURITY:

See topic 3.09 Commercial Code; category 8 Debtor and Creditor, topic 8.15 Pledges.

3.27 WAREHOUSEMEN:

Uniform Commercial Code adopted. (Tit. 70A, c. 7a). See topic 3.09 Commercial Code.

4 CITIZENSHIP

4.01 ALIENS:

Aliens have same rights as citizens to take by intestate succession. (UCA 75-2-112).

Alien is disqualified: (1) From voting (Utah Const. Art. IV, § 5); (2) from unemployment compensation if not "permanently residing under color of law" and not authorized to work (737 P.2d 180). When employing persons in construction of public works, preference given to citizens and those who have declared their intention to become citizens. (UCA 34-30-1).

Property.

Alien not disqualified from taking as heir. (UCA 75-2-111).

Location of Mining Claim by Alien.

Voidable on direct attack by government. (29 Utah 443, 82 P. 475).

Uniform Probate Code, with 1975 Official Amendments, adopted (with modifications) effective July 1, 1977. (UCA 75-1-101 et seq.). 1977, 1982, 1997, 1998, 2002, and 2003 Official Amendments not adopted. 1979 and 1984 Official Amendments adopted with significant variations. 1987 and 1993 Official Amendments adopted in part. 1990 Official Amendment adopted in substantial part.

5 CIVIL ACTIONS AND PROCEDURE

5.01 ACCORD AND SATISFACTION:

Governed by common law. (844 P.2d 322).

Uniform Commercial Code adopted. See topic Commercial Code. (Tit. 70A). As to modification of contract see UCA 70A-2-209.

Compromise.

Any release entered into within 15 days of injury may be voided. (UCA 78B-5-812). Evidence regarding settlements or offers to settle is not admissible to prove liability or invalidity of claim. (R. Evid. 408).

See topic 5.15 Judgments; categories 8 Debtor and Creditor, topics Executions, Liens; and Mortgages, topic Mortgages of Real Property.

Pleading.

Must be affirmatively pleaded as a defense. (R.C.P. 8[c]).

5.02 ACTIONS:

Federal Rules of Civil Procedure form basis of Utah Rules of Civil Procedure. See also topics 5.19 Practice, 5.18 Pleading.

Forms of Action.

There is only one form of action known as "civil action". (R.C.P. 2).

Equity.

Law and equity may be administered in same action. (26 Utah 2d 124, 485 P.2d 1402).

Conditions Precedent.

Prior to initiating malpractice action, notice of intent to commence action must be served, as prescribed by Utah Rules of Civil Procedure or by certified mail, upon health care provider at least 90 days prior to commencement of action. (UCA 78B-3-41). Action regarding delinquent student loan may be commenced only within 20 days after order issued by hearing examiner (UCA 53B-14-107), which hearing is held after notice to borrower (UCA 53B-14-102 et seq.). Itemized claim or demand against county must be made to county auditor within one year after last item of account or claim accrued (UCA 17-50-401[4]), and action may be commenced within one year after claim is rejected (UCA 17-50-403[1]). See subhead Governmental Immunity Act, infra.

Commencement.

See topics 5.20 Process, 5.18 Pleading.

Parties.

Infant, insane, or incompetent person must appear through general guardian or guardian ad litem appointed by court. (R.C.P. 17[b]). Associates using common name may sue or be sued under common name. (R.C.P. 17[d]). Rule 71B repealed effective Apr. 1, 2006.

Limitation of.

See topic 5.16 Limitation of Actions.

Class Actions.

Federal Rule substantially adopted. (R.C.P. 23).

Intervention.

Federal Rule substantially adopted. (R.C.P. 24).

Interpleader.

Federal Rule substantially adopted. (R.C.P. 22).

Third Party Practice.

Federal Rule substantially adopted. (R.C.P. 14).

Joinder of Claims.

Federal Rule substantially adopted. (R.C.P. 18).

Consolidation.

Federal Rule substantially adopted. (R.C.P. 42).

Severance of Actions.

Federal Rule substantially adopted. (R.C.P. 42).

Stay of Proceedings.

Federal Rules substantially adopted. (R.C.P. 3[b]; 37[b]; 41).

Abatement and Revival.

See category 13 Estates and Trusts, topic 13.09 Executors and Administrators.

Small Claims.

See category 6 Courts and Legislature, topic 6.01 Courts.

Termination of Actions.

Federal Rule substantially similar. (R.C.P. 41).

Prohibited Actions.

No specific provisions.

Direct Actions Against Insurer.

See category 23 Transportation, topic 23.01 Motor Vehicles, subhead Direct Actions.

Governmental Immunity Act.

Except as provided, government entities and employees immune from suit for injury resulting from exercise of government function. (UCA 63G-7-201[1]). Notwithstanding immunity waiver provisions in UCA 63G-7-301, government entities, officers, and employees immune from suit for injury or damage resulting from implementation of or failure to implement measures to: (1) Control causes of epidemic and communicable diseases and other conditions significantly affecting public health; (2) investigate and control suspected bioterrorism and disease; and (3) respond to national, state, or local emergency, public health emergency, or declaration by President of United States or other federal official requesting public health related activities. (UCA 63G-7-201[2]).

Administration.

See category 13 Estates and Trusts, topic 13.09 Executors and Administrators.

Direct Actions Against Insurer.

See category 23 Transportation, topic 23.01 Motor Vehicles, subhead Direct Actions.

See also category 21 Property, topic 21.01 Absentees, subhead Process Agent.

5.03 APPEAL AND ERROR:

Federal Rules of Civil Procedure Form Basis of Utah Rules of Civil Procedure.

See topic 5.19 Practice.

Utah Rules of Appellate Procedure (Utah R. App. P.) govern.

From Final Judgments.

Appeal of final orders and judgments taken from district court or juvenile court to Court of Appeals or Supreme Court by filing timely notice of appeal with clerk of court from which appeal is taken. (Utah R. App. P. 3[a]).

Time for Taking.

In matter in which appeal is permitted as matter of right from district court or juvenile court to Court of Appeals or Supreme Court, notice of appeal must be filed with clerk of court from which appeal is taken within 30 days after date of entry of judgment or order appealed from. (Utah R. App. P. 4[a]). Any other party may file notice of appeal within 14 days after first notice was filed. (Utah R. App. P. 4[d]).

How Taken.

Appeal taken from district court or juvenile court to Court of Appeals or Supreme Court, except as otherwise provided by law, by filing notice of appeal with clerk of court from which appeal is taken within time allowed. (Utah R. App. P. 3[a]). Notice of appeal must specify party or parties taking appeal; designate judgment or order, or part thereof appealed from; court from which appeal is taken; and designate that appeal is taken to Court of Appeals or Supreme Court. (Utah R. App. P. 3[d]). Filing fee for notice of appeal $205. (UCA 78A-2-301[l][h]).

From Interlocutory Orders.

Only on petition and order of Supreme Court or Court of Appeals.

Time for Taking.

Appeal may be taken within 20 days after entry of order of court from which appeal is taken. (Utah R. App. P. 5[a]).

How Taken.

Appeal may be sought by any party by filing petition for permission to appeal from interlocutory order with Clerk of Court of Appeals or Supreme Court. (Utah R. App. P. 5[a]). Petitioner must file with Clerk of Court of Appeals original and four copies or with Clerk of Supreme Court original and five copies of petition. Filing fee for notice of appeal on interlocutory order $205. (UCA 78A-2-301[l][h]). If order is issued authorizing appeal, Clerk must give notice of such order by mail to respective parties and transmit certified copy of order, together with copy of petition and filing fee, to court from which appeal is taken where petition and order must be filed in lieu of notice of appeal. (Utah R. App. P. 5[b]). Petition must contain: (1) Statement of facts necessary to understanding of controlling question of law determined by order of court from which appeal is taken; (2) statement of question of law and demonstration that question was properly raised before court from which appeal is taken and that question was ruled upon; (3) statement of reasons why immediate interlocutory appeal should be permitted; and (4) statement of reasons why appeal may materially advance termination of litigation. (Utah R. App. P. 5[c]). Petition must include copy of order from which appeal is taken and any findings of fact, conclusions of law and opinion relating thereto. (Utah R. App. P. 5[c][3]).

Docketing Statement.

Within 21 days after filing notice of appeal, appellant or petitioner must file original and two copies of docketing statement with Clerk of appellate court. (Utah R. App. P. 9[a]). Statement must provide date of judgment or order sought to be reviewed; authority conferring court’s jurisdiction; concise statement of nature of proceeding; concise statement of material facts; issues presented by appeal; statutes, rules, or cases believed to be determinative of respective issues stated; and references to all related or prior appeals in matter. (Utah R. App. P. 9[c]). If appeal is from order certified as final judgment under Rule 54(b), Utah R.C.P., appellant/petitioner must identify whether similarity of facts underlying remaining claims will constitute res judicata as to remaining claims. (Utah R. App. P. 9[c][5][B]) In addition, docketing statement for appeal to Court of Appeals and Supreme Court must include date of all motions pursuant to R.C.P. 50(a) and (b), 52(b), 54(b), or 59, and date and effect of orders disposing of such motions, (Utah R. App. P. 9[d]); date of notice of appeal (Utah R. App. P. 9[c]); if appeal is subject to assignment by Supreme Court to Court of Appeals, statement so indicating (Utah R. App. P. 9[e]); and if jurisdiction could be in either court, statement explaining why Supreme Court should decide case. (Utah R. App. P. 9[e]).

Appeal Bond.

Except in criminal cases, at least $300 required, or such amount as court from which appeal is taken may order on appellee’s motion to insure payment of appeals cost. Exemptions: (1) Waiver in writing by appellee, (2) supersedeas bond filed, or (3) filing accompanied by affidavit of impecuniosity. (Utah R. App. P. 6).

Stay of Proceedings.

Application for stay of proceedings pending appeal must ordinarily be made in first instance in court from which appeal is taken. Motion for such relief may be made to Court of Appeals or Supreme Court under certain conditions. (Utah R. App. P. 8[a]). Relief available under Rule may be conditioned on filing of bond or other acceptable security in lower court. (Utah R. App. P. 8[b]). Stays pending in which defendant has been sentenced governed by UCA 77-20-10 and Rule 27 Utah R. Crim. P. (Utah R. App. P. 8[c]).

Extent of Review.

Review is made upon original papers and exhibits filed in court from which appeal is taken, including, transcript of proceedings, if any, index prepared by clerk of court from which appeal is taken; and docket sheet, if available. (Utah R. App. P. 11[a]).

Judgment or Order on Appeal.

Court of Appeals and Supreme Court may reverse; affirm; modify; may order trial court to add to, modify or complete findings; may direct trial court to enter judgment in accordance with findings when corrected; or may order new trial or other proceedings. (Utah R. App. P. 30[a]).

Character of Hearing.

Party aggrieved by judgment in justice court, whether rendered in default or after trial, may appeal to district court for trial de novo. Judgment after trial de novo may not be appealed unless court rules on constitutionality of statute or ordinance. (UCA 78A-7-118). Appeal to district court is trial de novo and must be tried according to procedures of small claims department. Trial de novo cannot be heard by small claims court judge pro tempore. Decision of trial de novo may not be appealed unless court holds state statute or local ordinance unconstitutional. (UCA 78A-8-106).

Appeals From Court of Appeals.

Petition for writ of certiorari may be made to Supreme Court from Court of Appeals. (Utah R. App. P. 45). Acceptance of petition is within discretion of Supreme Court. (Utah R. App. P. 46). Petition must be filed within 30 days after entry of decision by Court of Appeals (Utah R. App. P. 48[a]) and must contain specific information and meet certain requirements (Utah R. App. P. 49).

Appeals from Courts of Limited Jurisdiction.

Appeal from final order or judgment of juvenile court may be taken to Court of Appeals within 15 days from date of entry, if matter involves abuse, neglect, dependency, termination, or adoption proceedings, all others may be taken within 30 days from date of entry except as otherwise provided by UCA 78-2-2. (UCA 78A-6-1109). Either party may appeal judgment of small claims department of justices' court to district court of county by filing notice of appeal within ten days of notice of entry of judgment. (UCA 78A-8-106).

See topic 5.05 Certiorari.

5.04 BONDS:

Sureties.

Generally, sureties may be either surety companies or qualified individuals. Former statute prohibiting attorney from becoming surety in any proceeding in which engaged as attorney (UCA 78-51-38) repealed by Laws of Utah 2001, c. 4.

Insurance.

Undertaking to stand as surety must be issued by insurer authorized to do surety business in Utah. (UCA 31A-22-103). No indemnity or security agreement changes liability of principal debtor or of sureties from terms established in bond. No surety may be indemnified through funds held by principal debtor in fiduciary capacity. (UCA 31A-22-104[1]).

Enforcement.

Criminal Procedure.

Sureties on written undertakings must be real or personal property holders within state. Qualifications and bonding limits of bail bond sureties engaged in for-profit, commercial business of posting property bonds established by Bail Bond Surety Oversight Board and insurance commissioner. All other sureties must collectively have net worth of at least twice amount of undertaking, exclusive of property exempt from execution. (UCA 77-20-5[1]). Undertaking must also provide that each surety submits to jurisdiction of court and irrevocably appoints clerk of court as agent upon whom any papers affecting liability on undertaking may be served and that liability may be enforced on motion and upon such notice as court may require without necessity of independent action. (UCA 77-20-5[3]).

Civil Procedure.

In all cases where undertaking is required by rules of civil procedure, deposit in court in amount of such undertaking, or such lesser amount as court may order, is equivalent to filing of undertaking. (R.C.P. 62[i]). Party whose judgment is stayed may object to amount of surety and is entitled to hearing thereon. (R.C.P. 62[j]).

5.05 CERTIORARI:

Petition for review for extraordinary relief permissible in certain circumstances. (R.C.P. 65B[a]). Special forms of pleadings and of habeas corpus, mandamus, quo warranto, certiorari, prohibition, and other extraordinary writs are abolished. (R.C.P. 65B[a]). Petitioner entitled to relief pursuant to R.C.P. 65B(b) only if petition is filed within one year after cause of action accrued. Accrual dates identified. (UCA 78B-9-107).

Jurisdiction.

Relief may be granted by Supreme Court (UCA 78A-3-102[2]), Court of Appeals (UCA 78A-4-103[1]), or district courts (UCA 78A-5-102[2]).

Grounds.

Wrongful imprisonment; wrongful restraint on personal liberty; wrongful use of public or corporate authority; wrongful use or failure to exercise judicial authority. (R.C.P. 65B[a]).

Proceedings.

Upon filing complaint or petition (Utah R. App. P. 19), court may require notice to adverse party, issue orders to show cause, or grant temporary relief (R.C.P. 65B[c][3], [d][3]).

Review.

Limited to determining whether inferior tribunal, board, or officer has regularly pursued its authority. (R.C.P. 65B[d][4]).

See topic 5.03 Appeal and Error.

5.06 CHARITABLE IMMUNITY:

See topic 5.09 Damages.

5.07 COMMISSIONS TO TAKE TESTIMONY:

See topic 5.11 Depositions and Discovery.

5.08 COSTS:

Prevailing party recovers costs as of course, unless court otherwise directs. (R.C.P. 54[d][1]; UCA 78A-8-107 [small claims court]). Federal Rules of Civil Procedure forms basis of Utah Rules of Civil Procedure.

Witness fees and compensation in all civil case must be paid by party who causes witness to attend. Such fees may be taxed as costs against losing party. (UCA 78B-1-147).

In action to recover money, if defendant tendered full amount to which plaintiff was entitled before commencement of action, plaintiff cannot recover costs if it prevails. (R.C.P. 68[a]).

Postponement of trial may be conditioned upon payment of costs by party requesting postponement. (R.C.P. 40[b]).

Small business may recover litigation expenses from state if court finds state's regulatory action lacking substantial justification. (UCA 78B-8-504).

Security for Costs.

Out-of-state plaintiff may be required, upon defendant's request, to file security bond in amount of $300 (R.C.P. 12[j]), and failure to do so may result in dismissal (R.C.P. 12[k]).

Liability of Attorney.

Federal Rules substantially adopted. (R.C.P. 11; 26[g]; 37[e]). Court of Appeals and Supreme Court may impose sanctions upon attorneys who practice before them. (Utah R. App. P. 40[b]).

5.09 DAMAGES:

Common law generally prevails.

When items of special damage are claimed, they must be specifically stated. (R.C.P. 9[g]). Prejudgment interest on special damages at 7.5% per annum may be recovered. (UCA 78B-5-824).

Comparative Negligence Rule.

Fault of person seeking recovery may not alone bar recovery by that person. He may recover from any defendant or group of defendants whose fault exceeds his own. However, no defendant is liable to any person seeking recovery for any amount in excess of proportion of fault attributable to that defendant. (UCA 78B-5-818).

Charitable Immunity.

Person who renders emergency care at or near scene of or during emergency, gratuitously and in good faith, not liable for any civil damages or penalties as result of any act or omission by person rendering emergency care, unless person is grossly negligent or caused emergency. (UCA 78B-4-501).

Sovereign Immunity.

For injuries alleged to occur by government entities before July 1, 2004, claims governed by provisions of Tit. 63, Chapter 30, Utah Governmental Immunity Act; injuries occurring after July 1, 2004, governed by Tit. 63G, Chapter 7, Utah Governmental Immunity Act. (UCA 63G-7-101 et seq.).

No-Fault Insurance.

See category 23 Transportation, topic 23.01 Motor Vehicles, subhead No-Fault Insurance.

Maximum amount for which defendant may be liable to any person seeking recovery is that percentage or proportion of damages equivalent to percentage or proportion of fault attributed to that defendant. No defendant is entitled to contribution from any other person. (UCA 78B-5-820). Persons seeking recovery or any defendant who is party to litigation may join as parties any defendant, except persons immune from suit who may have caused or contributed to injury or damage for which recovery is sought for purposes of having determined respective proportions of fault. Persons immune from suit not namable as defendants may have fault allocated to them only for determining fault of actual parties, and are not subject to any liability. (UCA 78B-5-821).

Collateral Source Rule.

In all malpractice actions against health care providers in which damages are awarded to compensate plaintiff for loss sustained, court must reduce award by amount paid to plaintiff from all collateral sources available to plaintiff, except for collateral sources in which subrogation right exists. (UCA 78B-3-405[1]). Upon finding of liability and awarding damages by trier of fact, court must receive evidence concerning total amounts of collateral sources paid to or for benefit of plaintiff or otherwise available to him. Court must take testimony of any amount paid, contributed, or forfeited by, or on behalf of plaintiff or members of immediate family, to secure plaintiff's right to any collateral source benefit which he is receiving as result of injury, and must offset any reduction in award by those amounts. Evidence may not be received nor reduction made with respect to future collateral source benefits. (UCA 78B-3-405[2]). Provider of collateral sources not entitled to recover any amount of benefits from health care provider, plaintiff, or other person/entity as reimbursement for collateral source payments made prior to settlement or judgment except to extent subrogation rights to amounts paid prior to settlement or judgment are preserved as provided. (UCA 78B-3-405[6]).

Medical Malpractice.

In malpractice action against health care provider, injured plaintiff may recover noneconomic losses to compensate for pain, suffering, and inconvenience up to $250,000 for action arising before July 1, 2001; $400,000 (adjusted for inflation) thereafter. This limitation does not affect awards of punitive damages. (UCA 78B-3-410). Future damages which equal or exceed $100,000, less amounts payable for attorneys' fees and costs, must be paid by periodic rather than lump sum payments. (UCA 78B-3-414). Lost future earnings to be paid over judgment creditor's work life expectancy. Judgment debtor required to post security to assure full payment of future damages. Obligation to make periodic payments for all future damages, other than damages for loss of future earnings, cease upon death of judgment creditor. (UCA 78B-3-414).

Ski Area Operator's Liability.

No action may be brought for injury resulting from inherent risks of skiing or snowboarding (UCA 78B-4-403), which include: Weather; snow or ice conditions; surface or subsurface conditions such as vegetation, rocks, stumps, streambeds, cliffs, trees and other natural objects; variations in terrain, including constructed and natural features; impact with lift towers and other structures; collision with other skiers; participating in or training for special events; or failure to ski within ability (UCA 78B-4-402). Operator must post notices at prominent locations of inherent risks of skiing and limitation of liability of operator. (UCA 78B-4-404).

Landowner Liability.

Owner owes no duty to keep premises safe for entry or use by any person entering or using premises for any “recreational purpose” or to warn of dangerous conditions. (UCA 57-14-3). Owner who invites or permits person to use land for any “recreational purpose” without charge or for nominal fee of not more than $1 per year does not represent that premises are safe, does not confer upon person legal status of invitee or licensee to whom duty of care is owed, and does not assume responsibility for any injury to persons caused by act or omission of that person or other persons who enter upon land. (UCA 57-14-4). In addition, owner’s use of land for recreational purposes is not curtailed. (UCA 57-14-4). Owner owes duty to refrain from willful and malicious injury or failure to warn or guard. (UCA 57-14-6).

Nuclear Incident Liability.

Except as otherwise provided, any person who owns, holds under license, transports, ships, stores, or disposes of nuclear materials is liable, without regard to conduct of any other person, for harm from nuclear incidents arising in connection with or resulting from ownership, transportation, shipping, storage, or disposal. (UCA 78B-3-603).

Any person who owns, designs, constructs, operates or maintains facilities, structures, vehicles, or equipment used for handling, transportation, shipment, storage, or disposal of nuclear materials is liable, without regard to conduct of any other person, for harm from nuclear incidents arising in connection with or resulting from ownership, design, construction, operation, maintenance. (UCA 78B-3-603).

Claimant entitled to full compensation of claimant’s radiological injuries if trier of fact determines that it is more likely than not that such injuries resulted from nuclear incident. (UCA 78B-3-604).

Volunteers’ Liability Protection.

Volunteer for nonprofit organization not liable for any act or omission if volunteer acted in good faith and within scope of his duties (UCA 78B-4-102[1]) unless nonprofit organization does not provide financially secure source of recovery for injured individuals (UCA 78B-4-102[2]) or if volunteer acted outside scope of his or her duty and acted intentionally or knowingly (UCA 78B-4-103).

Transient Housing Immunity.

Transient shelters, owners, operators, and employees of transient shelters and persons who contribute products or services without consideration are immune from damages or injuries arising out of or related to damaged or injured person’s use of products or services provided by transient shelter, except for injury intentionally caused or resulting from gross negligence. (UCA 78B-4-503).

Uniform Contribution Among Tortfeasors Act (Revised).

Not adopted. Defendant not entitled to contribution from any other person. (UCA 78B-5-820[2]).

Wrongful Life.

Cause of action is not allowed and damages are not recoverable on claim that but for act or omission of another, person would have not been permitted to have been born alive. (UCA 78B-3-109). Failure or refusal of any person to prevent live birth of person does not constitute defense in any action and is not considered in awarding damages or child support or imposing penalty in any action. (UCA 78B-3-109[3]).

See also category 13 Estates and Trusts, topic 13.05 Death, subhead Actions for Death.

5.10 DECLARATORY JUDGMENTS:

See topic 5.15 Judgments.

5.11 DEPOSITIONS AND DISCOVERY:

Federal Rules of Civil Procedure form basis of Utah Rules of Civil Procedure. (R.C.P. 26 et seq.). See topics 5.19 Practice, Affidavits, and 5.13 Evidence, subhead Witnesses.

Within State of Use Within State.

Any party may take deposition of any person, including party, upon oral examination or written questions for purpose of discovery or use as evidence. (R.C.P. 26[a][6][b]).

Within State for Use Elsewhere.

Party to action or proceeding in another state may take deposition of any person within Utah in same manner and subject to same conditions and limitations as if such action or proceeding were pending in Utah. In order to obtain subpoena, notice of taking of deposition must be filed with clerk of court of county in which person whose deposition to be taken resides or is to be served. All matters arising during taking of such deposition that are required to be submitted to court must be submitted to court in county where deposition taken. (R.C.P. 26[h]).

Outside of State for Use Within State.

Deposition for use within state may be taken outside of state or in foreign country. (R.C.P. 28).

De Bene Esse.

Federal Rule 27 substantially adopted. (R.C.P. 27). See subheads Before Action and Pending Appeal, infra.

Perpetuating Testimony.

See subheads Before Action and Pending Appeal, infra.

Leave of Court.

Party may generally take testimony of any person by deposition without leave of court. (R.C.P. 30[a][1]). Leave required if person to be examined is imprisoned; if without written stipulation of parties, deposition would result in more than ten depositions being taken; person to be examined has already been deposed; or party seeks to take deposition before time specified in Rule 26(d), unless notice contains certification that person to be examined is expected to leave state and will be unavailable for examination unless deposed before that time. (R.C.P. 30[a][2]). Party or party’s attorney must sign notice, and signature constitutes certification subject to sanctions provided by Rule 11. (R.C.P. 30[b]).

Before Action.

One who desires to perpetuate his testimony or that of another may file a verified petition in district court of county where expected adverse party may reside. (R.C.P. 27[a][1]). Petition must show (1) petitioner expects to be party but is presently unable to bring action; (2) subject of expected action and his interest therein; (3) facts he desires to establish and reasons for desiring to perpetuate testimony; (4) names or description, and addresses of persons he expects will be adverse parties; (5) names and addresses of persons to be examined and substance of testimony expected; (6) request for order authorizing taking of deposition for purpose of perpetuating testimony. (R.C.P. 27[a][1]). Notice and copy of petition must be served at least 20 days before hearing on expected adverse parties, which notice must state that petitioner will apply at stated time and place for order sought. (R.C.P. 27[a][2]). Service may be by publication pursuant to court order if personal service cannot with due diligence be made upon expected adverse party. (R.C.P. 27[a][2]).

Pending Appeal.

If appeal has been taken or if time has not expired, district court may allow perpetuation of testimony for use in event of further proceedings. Application and notice as if action were pending in district court, except that notice must show: (1) Names and addresses of persons to be examined and substance of testimony; (2) reasons for perpetuating testimony. (R.C.P. 27[b]).

Before Whom Taken.

Within United States.

Before officer authorized to administer oaths by laws of U.S. or of place of examination or before person appointed by court in which action is pending. (R.C.P. 28[a]).

In Foreign Countries.

(1) On notice before person authorized to administer oaths in place where examination is held, (2) before person commissioned by court, or (3) pursuant to letter rogatory. (R.C.P. 28[b]).

Commissions.

See subhead Before Whom Taken, supra.

Stipulation.

If parties stipulate in writing or into record, deposition may be taken before any person, at any time or place, with or without notice, and in any manner. (R.C.P. 29).

On Oral Examination.

Party desiring to take deposition must give reasonable notice to every other party, stating time, place, names, and addresses of persons to be examined. (R.C.P. 30[b][1]). Court may, on motion and for cause shown, enlarge or shorten time. (R.C.P. 30[d]). Parties may stipulate in writing or court may order on motion that testimony be recorded by other than stenographic means, in which event order will designate manner of recording, preserving, and filing deposition, and may include other provisions to assure that recorded testimony will be accurate and trustworthy; objections, changes made by witness, officer certification, and witness signature or officer statement must accompany deposition and be in writing. (R.C.P. 30[b][7]). Party may arrange to have stenographic transcription made at his own expense. (R.C.P. 30[b][2]). Party may, in his notice, name as deponent corporation, partnership, association, or governmental agency and may designate with reasonable particularity matters on which examination is requested. (R.C.P. 30[b][6]). Organization must designate one or more officers, etc., to consent to testify on its behalf, and may set forth, for each person designated, matters on which he will testify. (R.C.P. 30[b][6]). Parties may stipulate in writing or court may, on motion, order that deposition be taken by telephone. Such deposition is considered taken at location of deponent. (R.C.P. 30[b][7]).

Court may order that discovery not be had; that discovery may be had only on specified terms and conditions, including designation of time and place; that discovery may be had only by method of discovery other than that selected by party seeking discovery; and that certain matters not be inquired into or that scope of discovery be limited to certain matters; that discovery be conducted with no one present except persons designated by court; that deposition after being sealed be opened only by order of court; that trade secret or other confidential research, development or commercial information not be disclosed or to be disclosed only in designated way; and that parties simultaneously file specified documents or information enclosed in sealed envelopes to be opened as directed by court. (R.C.P. 26[c]).

Compelling Attendance of Witnesses.

Proof of service of notice authorizes clerk to issue subpoena or subpoena duces tecum. Resident may be required to attend only in county of residence or business or at convenient place fixed by court; nonresident only in county of this state where served or at convenient place fixed by court. (R.C.P. 45[c]). Service outside Utah for deposition outside Utah must meet requirements of jurisdiction where made. Failure to obey is contempt. (R.C.P. 45[g]).

Written Questions.

A party desiring to take deposition on written questions must serve them on every party, with notice of name and address of person to answer and name or descriptive title of officer before whom deposition is to be taken. (R.C.P. 31[a][3]). Within 14 days, party served may serve cross-questions; within seven days thereafter redirect may be served. Within seven days after being served with redirect questions, party may serve recross questions. (R.C.P. 31[a][4]). Copy of notice and all questions must be delivered by party taking deposition to officer who must promptly proceed, as in case of oral examination, to take deposition, prepare, certify, file or mail deposition to clerk for filing. (R.C.P. 31[b]). Notice of filing must be given promptly to all parties by one taking deposition. (R.C.P. 31[b]).

Record of Examination.

Officer must put witness under oath, testimony taken stenographically or recorded by any means ordered by court. If requested by one of parties, testimony must be transcribed. All objections made at time of examination to qualifications of officer, manner of taking, evidence presented, conduct of any party, and any other objection to proceeding must be noted by officer. Evidence objected to must be taken subject to objection. Party served with notice may transmit written interrogatories to officer who must propound them to witness and record answers verbatim. (R.C.P. 30[c]).

Termination and Limiting Examination.

At any time during taking, on motion of any party or deponent and upon showing that examination is being conducted in bad faith or unreasonably annoys, embarrasses, or oppresses deponent or party, court where action is pending or where deposition is being taken may order officer to cease forthwith or may limit scope and manner of taking of deposition. If so terminated, examination must be resumed only on order of court in which action is pending. (R.C.P. 30[d][4]). Unless authorized by court or stipulated by parties, deposition limited to one day of seven hours. (R.C.P. 30[d][2]). Any discovery may be limited if court determines that it is unreasonably cumulative or duplicative, unduly burdensome or expensive, obtainable from more convenient sources, or if discovering party has had ample opportunity to obtain information sought. (R.C.P. 30[d]3]). Court may specify conditions for discovery. (R.C.P. 26[b][2]).

Signing and Certification.

If requested, deponent has 30 days after notice of availability of transcript in which to review transcript. Changes made must be entered with reasons. (R.C.P. 30[e]). Officer must certify on deposition that witness was duly sworn and that deposition is true record of testimony. He must securely seal deposition, endorse with title of action, and mark “Deposition of. . . .” and must promptly send record to attorney who requested deposition, or if not attorney, file it with clerk of court. (R.C.P. 30[f]).

Examination of Witnesses.

Unless otherwise ordered by court, deponent may be examined regarding any matter, not privileged, which is relevant. (R.C.P. 26[b][1]). Documents and tangible things otherwise discoverable and prepared in anticipation of litigation, for trial by or for another party, or by or for that party's representative (including his attorney, consultant, surety, indemnitor, insurer, or agent) may be discovered only upon showing that parties seeking discovery have substantial need of materials in preparation of case and are unable without undue hardship to obtain substantial equivalent of materials by other means. (R.C.P. 26[b][4]). Party may obtain without required showing statement concerning action or its subject matter previously made by him. (R.C.P. 26[b][4]). Party may depose expert whose opinion may be presented at trial. Deposition must be within 60 days of filing of required expert witness report. (R.C.P. 26[b][5][A]). Party may discover facts or opinions of experts not expected to be called at trial only if examining physician in court-ordered exam or upon showing of exceptional circumstances under which obtaining facts or opinions on same subject by other means is impracticable. (R.C.P. 26[b][5][B]).

Use of Deposition.

So far as admissible, deposition may be used against any party who was present or had notice: (1) To contradict or impeach or for any other purpose permitted by Utah Rules of Evidence; (2) deposition of agent of adverse entity may be used by adverse party for any purpose; (3) may be used if court finds that witness is dead; at greater distance than 100 miles from place of trial; is out of U.S.; unable to testify because of age, sickness, infirmity or imprisonment; party is unable to procure attendance by subpoena; or, in exceptional circumstances, in interest of justice. (R.C.P. 32[a]).

Uniform Foreign Deposition Act not adopted.

Return.

Done in accordance with Rules 30(f) and 31(b).

Production of Documents, Entry on Land for Inspection.

Any party may serve on any party request to produce and permit party making request to inspect and copy any designated documents; to inspect and copy, test, or sample any designated documents, electronically stored information, or tangible things which constitute or contain matters within scope of discovery rules and which are in possession, custody, or control of party upon whom request is served; or to permit entry upon designated land or other property in possession or control of party upon whom request is served for purpose of inspection and measuring, surveying, photographing, testing or sampling property, or any designated object or operation thereon. (R.C.P. 34[a]). Request may not, without leave of court or written stipulation, be served until parties have agreed to discovery plan. Party upon whom request is served must serve written response within 30 days after service of request and response must state, with respect to each item or category, that inspection and related matters will be permitted as requested, unless request is objected to, in which event reasons for objection must be stated. Party submitting request may move for order of court to compel discovery with respect to any objection or other failure to respond to request or any part thereof or any failure to permit inspection as requested. (R.C.P. 34[b][2]). Rule does not preclude independent action against person not party for production of documents and things and permission to enter upon land. (R.C.P. 34[c]).

Completion of Discovery.

Unless otherwise stipulated by parties or ordered by court, fact discovery must be completed within 240 days after first answer filed. (R.C.P. 26[d]).

Physical and Mental Examination.

If physical or mental condition of party in controversy, court may order him to submit to examination by disinterested and impartial physician. (R.C.P. 35[a]). Party ordered to submit may, upon request, obtain report of examining physician. Court may order physical and/or mental examination of minor concerning whom petition is filed. After notice and hearing set for this purpose, court may also order physical and/or mental examination of minor's parent or guardian if such may be factor causing neglect, dependency, or delinquency of minor. (UCA 78A-6-108[6]).

Forms.

The following may be used:

Oral Examination.

BE IT REMEMBERED that on. . . . . . the. . . . . . day of. . . . . ., 20. . . ., the deposition of. . . . . . produced as a witness at the instance of the. . . . . . in the above entitled action now pending in the above named court, was taken before me,. . . . . ., a Certified Shorthand Reporter and Notary Public in and for the State of Utah, commencing at the hour of. . . . . . o'clock. . . . m. of said day at. . . . . .,. . . . . .,. . . . . . .

That there were present as counsel at the taking of said deposition,. . . . . ., Esq., on behalf of the. . . . . .; and. . . . . ., Esq., on behalf of the. . . . . . .

That the deposition was taken pursuant to notice.

. . . . . ., produced as a witness at the instance of the. . . . . ., having been first duly sworn to testify the truth, the whole truth, and nothing but the truth in said cause, was interrogated and made answers as follows:

DIRECT EXAMINATION

BY MR. . . . . . .:

* * * * * *

I have read the foregoing testimony consisting of. . . . . . pages, pages. . . . . . to. . . . . ., inclusive, and the same is a true and correct transcript of said testimony, except as I have in ink corrected or changed it, giving the reason therefor, and affixed my initials thereof.

....

Witness

Subscribed and sworn to before me this. . . . . . day of. . . . . ., 20. . . . .

....

Notary Public

CERTIFICATE

STATE OF UTAH

SS:

COUNTY OF SALT LAKE

This is to certify that the deposition of. . . . . ., the witness in the foregoing deposition named, was taken before me,. . . . . ., a Certified Shorthand Reporter and Notary Public in and for the State of Utah, pursuant to notice.

That the said witness was by me before examination duly sworn to testify the truth, the whole truth, and nothing but the truth in said cause.

That the testimony of the said witness was reported by me in shorthand and thereafter by me caused to be transcribed into typewriting, and that a full, true and correct transcript of said testimony so taken and transcribed is set forth in the foregoing pages numbered. . . . . . to. . . . . ., inclusive, and said witness deposed and said as in the foregoing annexed deposition set out.

I further certify that I am not of kin or in anywise associated with any of the parties to said litigation and that I am not interested in the event thereof.

WITNESS my hand and official seal at. . . . . ., Utah, this. . . . . . day of. . . . . ., 20. . . . .

. . . .

NOTARY PUBLIC in and for

the State of Utah residing at

. . . .

My Commission expires:

. . . .

Written Interrogatories.

Come now the plaintiffs and submit the following written interrogatories to be presented to the witness,. . . . . ., for. . . . . . to answer before a notary public at. . . . . . .

* * * * * *

STATE OF UTAH

SS:

COUNTY OF SALT LAKE

On the. . . . . . day of. . . . . ., 20. . . .,. . . . . ., whose signature appears above, personally appeared before me and upon being first duly sworn, on oath, answered under oath the above questions in the manner above set forth, and thereafter duly subscribed. . . . . . name thereto and stated under oath that said answers were true of. . . . . . own knowledge.

. . . .

NOTARY PUBLIC in and for

the State of Utah residing at

. . . .

My Commission expires:

. . . .

CERTIFICATE

I,. . . . . ., Notary Public in and for the State of Utah, do hereby certify:

That on the. . . . . . day of. . . . . ., 20. . . ., at. . . . . .,. . . . . . County, Utah,. . . . . ., of. . . ., Utah, appeared before me and, being first duly sworn upon oath, made answer to interrogatories number 1 to. . . . . ., both inclusive, submitted by counsel for. . . . . . in the above entitled cause, which interrogatories are attached hereto.

That the answers of the said witness. . . . . . made to said interrogatories respectively were reduced to writing by me in the presence of said witness at the time said interrogatories were respectively read to the witness by me.

That the answers of the witness as made to said interrogatories respectively are set forth in the above and foregoing pages numbered. . . . . . and. . . . . . .

That the answers of the witness to said interrogatories as shown on pages. . . . . . and. . . . . . above were read by the witness after being typewritten by me and were then duly subscribed by the witness and were duly sworn to by said witness as hereinabove shown.

In Witness Whereof, I hereunto affix my signature this. . . . . . day of. . . . . ., 20. . . . .

. . . .

NOTARY PUBLIC, residing at

. . . .

My Commission Expires:

. . . .

Discovery.

Required disclosures include initial disclosures, disclosures of expert testimony, and pretrial disclosure. (R.C.P. 26).

Demand for Admission of Facts.

Party may serve on another party written request for admission of genuineness of any relevant document described in and exhibited with request or of truth of any relevant matter of fact set forth. Matter admitted unless, within 30 days after service, party to whom request is directed serves upon party requesting admission written answer or objection. (R.C.P. 36[a][1]).

Each matter of which admission is requested must be separately set forth. Matter is admitted unless party to whom request is directed serves written answer or objection on matter. (R.C.P. 36[a][2]). Party who has requested admissions may move to determine sufficiency of answers or objections. (R.C.P. 36[a][3]). Any matter admitted is conclusively established unless court, on motion, permits withdrawal or amendment of admission. (R.C.P. 36[b]).

Interrogatories to Parties.

Any party may serve any other party written interrogatories, and they may, without leave of court, be served upon plaintiff after commencement of action and upon any other party after service of summons and complaint. (R.C.P. 33[a]). Party upon whom served must serve copy of answers and objections, if any, within 30 days after service. (R.C.P. 33[b][3]). Party submitting interrogatories may move for order to compel discovery with respect to any objection to or other failure to answer interrogatory. (R.C.P. 33[b][5]).

5.12 EQUITY:

See topic 5.02 Actions.

5.13 EVIDENCE:

Witnesses.

Parties and interested persons who are competent may be witnesses. Witness not disqualified by conviction of crime or by reason of religious belief. (UCA 78B-1-128).

Every person is competent to be witness except as otherwise provided in Utah Rules of Evidence. (UCA 78B-1-127).

See also topic 5.11 Depositions and Discovery; category 10 Documents and Records, topic 10.02 Affidavits.

Privileged Communications.

Without client's consent, attorney cannot be examined as to any communication made by client to attorney or as to advice given by attorney to client in course of professional employment. Attorney's secretary, stenographer, or clerk cannot be examined regarding information acquired in such capacity without consent of their employer. (UCA 78B-1-137[2]).

A clergyman or priest cannot, without consent of person making confession, be examined as to any confession made to him in his professional character in course of discipline enjoined by church to which he belongs. (UCA 78B-1-137[3]).

A physician or surgeon cannot, without consent of his patient, be examined in civil action as to any information acquired in attending patient which was necessary to enable him to prescribe or act for patient. (UCA 78B-1-137[4]). Physician-patient privilege waived by patient in action where patient's medical condition is element of claim or defense (UCA 78B-1-137[4]) nor does this privilege apply as ground for excluding evidence in cases involving physical abuse to minors (UCA 62A-4a-403[1]).

A public officer cannot be examined as to communications made to him in official confidence when public interests would suffer by disclosure. (UCA 78B-1-137[5]).

With few exceptions, sexual assault counselor cannot, without victim's consent, be examined in proceeding regarding any confidential communication. (UCA 78B-1-137[6]). Based upon representations of counselor that it is in best interest of minor victim, disclosure might be allowed. (UCA 77-38-204).

Husband and Wife.

One spouse cannot be examined for or against other without consent of latter; nor can either, during marriage or afterwards, be, without consent of other, examined as to any communication made by one to the other during marriage, except in civil action or proceeding by one against other, in criminal action or proceeding for crime committed by one against other, or in civil or criminal proceeding for child abuse or neglect and certain other crimes. (UCA 78B-1-137[1]).

Communications or Transactions with Persons Since Deceased or Incompetent.

Decedent's hearsay statements admissible against plaintiff in wrongful death action. (R. Evid. 601[b]). Relevant hearsay statement of deceased based on personal knowledge is admissible when offered in action against deceased declarant's estate unless circumstances show lack of trustworthiness. (R. Evid. 601[c]).

Self Incrimination.

Person accused of crime may not be compelled to give evidence against himself. (Utah Const. Art. I, § 12).

Compelling Attendance.

See topic 5.11 Depositions and Discovery.

Bill of Rights.

Witnesses have right to: (1) Information of level of protection available in regard to witness tampering provided by law enforcement, prosecution, or corrections personnel; (2) information provided by criminal justice agencies as to role of witness in criminal justice process, and explanations of relevant legal proceedings; (3) pretrial waiting area removed from defendant and defendant's family and friends; (4) expeditious return of personal property seized as evidence; (5) consideration of employment schedules to avoid conflicts, and if conflict unavoidable, intercession by judicial officers with employers to minimize loss of pay; (6) speedy disposition of entire criminal justice process; and (7) timely notice of judicial proceedings or cancellation. (UCA 77-37-3[1]). Victims of sexual offenses have right to information regarding right to request voluntary testing for HIV infection and request mandatory testing of convicted sexual offender for HIV infection. (UCA 77-37-3[1][j]).

Child witnesses have additional rights: (1) Protection from physical and emotional abuse; (2) protection from questions implying child's responsibility for inappropriate adult behavior; (3) minimum of interviews, conducted by persons sensitive to children's needs; and (4) information regarding community resource services available to them. (UCA 77-37-4).

5.14 INJUNCTIONS:

Federal Rules of Civil Procedure form basis of Utah Rules of Civil Procedure.

(R.C.P. 65A). See also topic 5.19 Practice.

Jurisdiction.

Supreme Court (UCA 78A-3-102), Court of Appeals (UCA 78A-4-103) and District Courts (UCA 78A-5-102) each have original jurisdiction with appellate jurisdiction in Supreme Court and Court of Appeals (UCA 78A-4-102, UCA 78A-4-103).

Prerequisites.

Restraining order or preliminary injunction may be granted when: (1) Applicant will suffer irreparable harm unless order or injunction issues; (2) threatened injury to applicant outweighs whatever damage proposed order or injunction may cause party restrained or enjoined; (3) order or injunction would not be adverse to public interest; and (4) substantial likelihood that applicant will prevail on merits of underlying claim, or case presents serious issues on merits that should be subject of further litigation. (R.C.P. 65A[e]). Preliminary injunction may not be issued without notice to adverse party. (R.C.P. 65A[a]).

Procedure.

Every restraining order and order for injunction must set forth reasons for issuance in specific terms and describe acts to be retrained in detail. (R.C.P. 65A[d]).

Temporary Restraining Order.

Will not be granted without notice unless it clearly appears from specific facts shown by affidavit or verified complaint that immediate and irreparable injury, loss, or damage will result before notice can be served and hearing had. (R.C.P. 65A[b][1]). Order granted without notice must expire by its terms within ten days. (R.C.P. 65A[b][2]). On two days notice, party enjoined may move for dissolution or modification. (R.C.P. 65A[b][3]).

Bond.

Generally, upon granting of injunction or restraining order, bond must be filed in amount specified by court for costs and damages that may be sustained by party enjoined. (R.C.P. 65A[c]).

Temporary Injunction.

None entered without notice to adverse party. (R.C.P. 65A[a][1]). Court may order trial on action of merits to be consolidated on hearing of application. (R.C.P. 65A[a][2]).

5.15 JUDGMENTS:

Judgment includes decree and any appealable order. Federal Rules of Civil Procedure form basis of Utah Rules of Civil Procedure. (R.C.P. 54 et seq.). See also topic 5.19 Practice.

Judgments by Confession.

Authorized for money due or to become due or to secure any person against contingent liability. (UCA 78B-5-205). Party seeking judgment must file statement verified by defendant as follows: (1) If judgment is for money, state claim and sum justly due or to become due; (2) if judgment is to secure against contingent liability, state claim and that sum confessed does not exceed claim; and (3) authorization of entry of judgment for specified sum. (R.C.P. 58A[f]). Creditor may not receive from consumer debtor obligation which includes cognovit, confession of judgment, warrant of attorney, or other waiver of right to notice and hearing. (UCA 70C-2-201).

Uniform Consumer Credit Code repealed. (Tit. 70B). Utah Consumer Credit Code adopted. (Tit. 70C). See topic Consumer Credit.

Judgment by Consent.

No statutory provision.

Judgment on Pleadings.

Federal Rule substantially adopted. (R.C.P. 12[c]).

Summary Judgments.

Federal Rule substantially adopted. (R.C.P. 56).

Declaratory Judgments.

Federal Rule substantially adopted. (R.C.P. 57). Uniform Declaratory Judgments Act adopted with minor variations. (UCA 78B-6-401 et seq.).

Default Judgment.

When party against whom judgment for affirmative relief is sought fails to plead or defend, clerk must enter default of that party. (R.C.P. 55[a]). On plaintiff's request, clerk must enter judgment for amount claimed and costs against defendant, if: (1) Default of defendant is for failure to appear; (2) defendant is not infant or incompetent; (3) defendant has been personally served; and (4) claim against defendant is for sum certain or for sum that can be made certain by computation. In all other cases, party entitled must apply to court. (R.C.P. 55[b][1]). When default not entered by clerk, party entitled to judgment by default must apply to court. Court may conduct hearings or issue orders as deemed necessary and proper to take account or determine damages, to establish truth of evidence, or make investigation into any matter. (R.C.P. 55[b][2]).

Offer of Judgment.

In action for recovery of money, only if defendant alleges that before action he tendered full amount and thereupon deposits in court amount tendered, and allegation is true, plaintiff cannot recover but must pay costs. At any time more than ten days before trial, party defending against claim may serve offer to allow judgment to be taken against him for money, property, or to effect specified in offer with costs. If offer is accepted within ten days, judgment is entered accordingly. If not accepted and judgment obtained is not more favorable than offer, offeree must pay costs incurred after offer. (R.C.P. 68).

Docketing.

Clerk keeps judgment docket. (R.C.P. 58A).

Vacation or Modification.

Federal Rule substantially adopted. (R.C.P. 60).

Lien.

District court judgment entered before July 1, 1997 becomes lien, as soon as entered, on all real property of debtor then owned or thereafter acquired situated in county where judgment entered. (UCA 78B-5-202[2]). District court judgment entered after July 1, 1997, becomes lien on all real property of debtor in county in which entered as soon as judgment entered in Registry of Judgments of district court of county where property is situated. To fix lien on real property in any other county, it is necessary to file abstract of judgment in office of clerk of district court of county where such real property is situated.

A judgment of small claims division of any court or of justice court entered before July 1, 1997, and after May 15, 1998, creates no lien unless abstract of such judgment is filed in office of clerk of district court of county where property is situated. (UCA 78A-7-117; UCA 78B-5-202[4]). After July 1, 2002, judgment entered by district or justice court becomes lien when judgment or abstract of judgment is recorded in office of county recorder where debtor's real property then owned or after acquired is situated. (UCA 78B-5-202[7]; UCA 78B-5-201; UCA 78A-7-117).

Judgment lien lasts for eight years from date of entry. If judgment appealed and sufficiently secured, court will terminate lien and grant judgment creditor perfected lien in deposited security. (UCA 78B-5-202[1]).

Revival.

No statutory provisions.

Assignment.

No statutory provisions.

Satisfaction.

Judgment may be satisfied by written instrument acknowledged by owner or attorney or by signed acknowledgment of satisfaction entered on docket and witnessed by clerk. (R.C.P. 58B).

Actions.

Action on judgment must be brought within eight years. (UCA 78B-2-311).

Foreign Judgments.

Authenticated foreign judgment may be filed with any district court clerk and has same effect and is subject to same enforcement, satisfaction, procedures, defenses, and procedures for reopening, vacating, setting aside, or staying as judgment of state court. (UCA 78B-5-302). No enforcement may proceed until 30 days after filed. (UCA 78B-5-303).

Revised Uniform Enforcement of Foreign Judgments Act.

Adopted with revisions. (UCA 78B-5-301 et seq.).

Uniform Foreign Money Claims Act.

Adopted. (UCA 78B-5-401 et seq.).

Judgment Notes.

See topic Bills and Notes.

Child Support.—Obligation becomes automatic judgment on date due, unless modified by tribunal. (UCA 78B-12-112).

See topic 5.03 Appeal and Error; categories 3 Business Regulation and Commerce, topic Interest; and Debtor and Creditor, topic Executions.

5.16 LIMITATION OF ACTIONS:

Actions must be brought within following periods after respective causes of action accrue.

Eight years: On judgment or decree of any court of U.S. or any state or territory within U.S. (UCA 78B-2-311).

Seven years: To recover real property (UCA 78B-2-204, 207 and 208), including actions by state. (UCA 78B-2-201).

Six years: For mesne profits of real property; on contract, obligation, or liability founded on instrument in writing (no distinction between sealed and unsealed instruments); to recover fire suppression costs or other damages caused by wildfire. (UCA 78B-2-309). Action by state or subdivision against public officer for malfeasance, misfeasance, or nonfeasance. (UCA 78B-2-310). Action by commission under UCA 59-5-108 for recovery of severance tax due and unpaid or foreclose lien for payment of tax. (UCA 59-5-114[1]). Taxpayer claims with commission for overpayment of taxes. (UCA 59-5-114[2]).

Four years: On contract, obligation or liability not founded on instrument in writing; on open account for goods, wares, merchandise; for work, labor, or services rendered or for materials furnished; for price of any article charged on store account; for personal injury; for fraudulent transfers actionable under UCA 25-6-5(1)(a), (b) and UCA 25-6-6(1) (UCA 78B-2-307); and on father’s liability for support and past education (UCA 78B-15-109); sales contracts (UCA 70A-2-725).

Three years: For waste or trespass on real property; for taking, detaining, or injuring personal property or for specific recovery thereof; for relief on ground of fraud or mistake; on liability created by statute of this state other than penalty or forfeiture, except where different period is prescribed; for injury resulting from nuclear incident (UCA 78B-2-305); on actions on insurance policy (UCA 31A-21-313[1]). Action by commission under to recover unpaid tax, fee, or charge. (UCA 59-1-1414[4]; UCA 59-9-106[3]); former wine and liquor tax statute (UCA 59-16-102[3]) repealed by Laws of Utah 2007, c. 284. Period of limitation is tolled during appraisal or arbitration procedures prescribed by policy or law or as agreed to by parties.

Two years: For injury to personal rights of another against state and its employees, or against political subdivision or its employees arising after May 1, 2000, if not otherwise provided by state or federal law; for wrongful death; against marshal, sheriff, constable or other officer for official misfeasance or nonfeasance, including nonpayment of money collected on execution (UCA 78B-2-304); for malpractice against health care provider after patient discovers or should have discovered injury, but not to exceed four years after date of act, omission, neglect or occurrence, except where foreign object wrongfully left in body or health care provider affirmatively acted to fraudulently conceal misconduct, claim must be brought within one year of discovery of wrongful act (UCA 78B-3-404); and for product liability, failure to warn or breach of implied warranty after discovery of harm and its cause (UCA 78B-6-706).

One year: For liability created by statutes of foreign state; for libel, slander, assault, battery, false imprisonment or seduction; for penalty or forfeiture, unless statute imposing same prescribes different period; on undertaking in criminal action; against municipal corporation for damage or injuries to property caused by mob or riot; against sheriff or other officer for escape of prisoner; for fraudulent transfers actionable under UCA 25-6-5(1)(a) and UCA 25-6-6(2); and for claims under Utah Religious Land Use Act. (UCA 78B-2-302). Provision governing claims against Public Transit District (UCA 17A-2-1056) repealed by Laws of Utah 2007. Prior Governmental Immunity Act (UCA 63-30-1 et seq.), including provision governing claims against governmental entity or employee of entity for all noncontractual actions (UCA 63-30-15), repealed by Laws of Utah 2004, c. 267.

Six months: To recover goods or other property or money seized by any officer in his official capacity as tax collector or the price thereof, or for money paid to such officer under protest, or for damage to person or property done in making such seizure. (UCA 78B-2-301).

Actions not specifically provided for must be brought within four years. (UCA 78B-2-307).

Defective Design or Construction of Improvement.

Action must be commenced within six years after completion or abandonment. All other actions must be commenced within two years from earlier date of discovery of cause of action or when cause of action should have been discovered. No action may be commenced more than nine years after completion or abandonment. Certain exceptions apply. (UCA 78B-2-225). Any action against surveyor in performance of boundary survey must be commenced within five years. (UCA 78B-2-226).

Asbestos Damage.

For damage from construction materials containing asbestos. Actions may be commenced until July 1, 1991 or three years after discovery of damages. (UCA 78B-2-117). State may commence such action at any time. (UCA 78B-2-116).

Actions Against Decedents' Estates.

Claim against decedent's estate must be commenced within one year of death (UCA 75-3-803[1][a]), 90 days of publication of notice, or 60 days of mailed notice, whichever is earlier. (UCA 75-3-801[2]). See category 8 Debtor and Creditor, topic Executors and Administrators.

When Period Begins to Run.

Generally, when cause of action accrues; action for relief on ground of fraud, mistake, or malpractice, when aggrieved party discovers or should have discovered wrongful conduct; action on open account or for price of articles purchased from store, from date of last charge or payment; action for waste or trespass committed by underground works on mining claim, from discovery of facts; action the subject of which is "live stock" that strayed or was stolen without fault of owner and had recorded brand or mark on it at time of loss, from time when owner had actual knowledge of facts which would have put a reasonable person on inquiry as to possession of defendant. (UCA 78B-2-305).

New Actions.

If action fails, otherwise than on merits, plaintiff has one year after failure to begin new action; on and after Dec. 31, 2007, plaintiff may commence new action only once. (UCA 78B-2-111).

Foreign Cause of Action.

Action that is barred by laws of place where it arose is barred in Utah, except in favor of citizen of state who has held such cause of action from time it accrued. (UCA 78B-2-103).

Disabilities of Plaintiff.

If person in whose favor cause of action accrues is infant or mentally incompetent and without legal guardian, time of such disability is not part of period. (UCA 78B-2-108). Disabilities do not toll medical malpractice limitations. (UCA 78B-3-404).

Absence or Concealment of Defendant.

In case of personal actions, if defendant is out of state at time action accrues, statute does not run until his return; and if defendant departs after cause of action accrued, statute ceases to run during such absence. (UCA 78B-2-104).

Death of a Party.

If person entitled to bring action dies before expiration of limitation, and cause of action survives, decedent's estate may bring action after expiration of limitation, within one year after death. (UCA 78B-2-105). If person against whom action accrues dies before expiration of limitation, and cause of action survives, action may be brought after such expiration against decedent's estate within one year after issuance of letters of administration. (UCA 78B-2-105).

Interruption of Statutory Period.

A bona fide payment of any part of principal or interest or acknowledgment of liability signed by defendant cuts off all previous time and starts statutory period anew. (UCA 78B-2-113).

Revival of Barred Claim.

Acknowledgment or new promise does not revive barred claim unless in writing signed by party to be charged thereby. (UCA 78B-2-113).

Contractual limitations permitted. (UCA 78B-2-111). See also category 16 Insurance, topic 16.01 Insurance Companies, subhead Policies.

Pleading.

Bar of statute waived unless pleaded. (R.C.P. 8[c]; 22 Utah 296, 61 P. 901).

See categories 3 Business Regulation and Commerce, topic Commercial Code and Property, topic Adverse Possession. See also category 3 Business Regulation and Commerce, topic 3.12 Consumer Protection, subhead Civil Relief Act.

5.17 NEGLIGENCE:

See topic 5.09 Damages.

5.18 PLEADING:

Governed by Rules of Civil Procedure (R.C.P. 7 et seq.) which are patterned largely on Federal Rules. See topic 5.19 Practice.

Pleadings Permitted.

Complaint and answer; reply to counterclaim; answer to cross-claim; third party complaint and third party answer. Court may order reply to answer or third party answer. (R.C.P. 7).

Frivolous Claims.

In civil actions, court may award reasonable attorney's fees to prevailing party if court determines that action or defense to action was without merit and not brought or asserted in good faith, unless court finds party filed affidavit of impecuniosity in action before court or court enters in record reason for not awarding fees. (UCA 78B-5-825).

Federal Rule 11 substantially adopted. (R.C.P. 11).

Lawyer must not bring or defend proceeding, or assert or controvert issue therein, unless there is basis in law and fact for doing so that is not frivolous, which includes good faith argument for extension, modification or reversal of existing law. (Utah Rules of Prof. Conduct 3.1).

Complaint.

Federal Rule substantially adopted. (R.C.P. 8, 9). Designation of unknown defendant allowed. (R.C.P. 9[a][2]). Not necessary to state intrinsic facts showing application of defamatory matter to plaintiff in defamation action. (R.C.P. 9[j][1]).

Answer.

Federal Rule substantially adopted. (R.C.P. 8, 9). Not necessary to state facts when pleading statute of limitations defense but may allege generally that cause of action is barred by provisions of statute relied on. (R.C.P. 9[h]). Affirmative defenses must be specially pleaded. (R.C.P. 8[c]). Defenses and objections are substantially similar to Federal Rules (R.C.P. 12), except defendant may require foreign plaintiff to furnish security for costs and charges that may be awarded against plaintiff (R.C.P. 12[j]). Defendant may also move for dismissal if plaintiff fails to furnish security. (R.C.P. 12[k]).

Counterclaim or Set-Off.

Federal Rule substantially adopted. (R.C.P. 13).

Reply.

Required to counterclaim denominated as such. Court may order reply to answer or third-party answer. (R.C.P. 7).

Demurrer.

Abolished. (R.C.P. 7[c]).

Amendments or Supplemental Pleadings.

Any pleading may be amended once as matter of course before time for responsive pleading has expired. Further amendment allowed at discretion of court. (R.C.P. 15[a]). Court may, upon notice and just terms, permit party to serve supplemental pleading setting forth transactions or occurrences or events since date of pleading sought to be supplemented. (R.C.P. 15[d]).

Affidavits of Merits.

Rule 56(e) applies to affidavits supporting motion for summary judgment. (R.C.P. 56[e]).

Affidavits of Defense.

Rule 56(e) applies to affidavits opposing motion for summary judgment. (R.C.P. 56[e]).

Bills of Particulars.

If pleading to which responsive pleading permitted is so vague or ambiguous that party cannot reasonably be required to frame responsive pleading, party may move for more definite statement. (R.C.P. 12[e]).

Verification.

Pleadings need not be verified or accompanied by affidavit, unless specifically required by rule or statute. Pleadings must be signed by party, or if party is represented by attorney, party's attorney must sign pleading. (R.C.P. 11). Verified complaint required for temporary restraining order without notice. (R.C.P. 65A[b]). Affidavit required to perpetuate testimony of persons regarding matters that may become cognizable in court before action is filed. (R.C.P. 27[a][1]).

Service.

All pleadings, written notices, and motions are served on adverse party or attorney. (R.C.P. 4, 5). See topic 5.20 Process.

Filing.

All pleadings are filed with clerk of court. (R.C.P. 4, 5).

Time.

Defendant must serve answer within 20 days after completion of service of summons and complaint if within state and within 30 days after completion of service of summons and complaint if outside state. Party served with pleading stating cross-claim must serve answer within 20 days after service. Plaintiff must serve reply to counterclaim in answer within 20 days after service of answer or, if reply ordered by court, within 20 days after service of order, unless order otherwise directs. (R.C.P. 12[a]). Demand for jury trial must be made not later than ten days after service of last pleading directed to such issue. (R.C.P. 38[b]).

Proof of Claims.

No statutory provision or form.

Small Claims.

See category 6 Courts and Legislature, topic 6.01 Courts.

5.19 PRACTICE:

Governed by Rules of Civil Procedure. Federal Rules of Civil Procedure form basis of Utah Rules of Civil Procedure. See topics 5.02 Actions, Appeal and Error, Depositions and Discovery, Injunctions, Judgments, Pleading, Process; categories 6 Courts and Legislature, topic Courts; Debtor and Creditor, topics Attachment, Executions, Garnishment. Significant variations from federal rules are as follows:

Commencement of civil action is either by filing complaint or service of summons. If by service of summons, complaint, summons and proof of service must be filed within ten days of service. (R.C.P. 3[a]).

Order for payment of money may be enforced as if judgment. (R.C.P. 7[f][1]).

Depositions of persons within Utah by parties to action in another state are subject to same limitations and conditions as if action were pending in Utah, provided that notice of deposition must be filed with court clerk of county where witness resides or is to be served in order to obtain subpoena. (R.C.P. 26[h]). Warrant may be issued to compel attendance of witness who evades service or fails to attend deposition. (R.C.P. 45[h]).

Production of documents is usually required to be made as documents are kept in usual course of business. (R.C.P. 34[b][3]).

Requests for admissions must advise answering party of consequences of failure to respond. (R.C.P. 36).

Jury is waived if statutory fee not paid, demand not served as required, and demand not filed as required by Rule5(d). (R.C.P. 38[d]).

Foreign jurisdiction’s law is presumptively proven by producing copy of that jurisdiction’s law as it would be relied upon by courts thereof. (R.C.P. 44[f]).

Findings of fact and conclusions of law may be waived under certain circumstances. (R.C.P. 52[c]).

Costs must be claimed by filing and service of memorandum within five days after entry of judgment. (R.C.P. 54[d][2]).

Other Procedural Rules.

Local rules of practice are found in R. Judic. Admin.

Proof of Writings.

There can be no evidence of the contents of a writing (other than the writing) except (1) lost or destroyed original, (2) where writing is in hands of adverse party and he fails to produce it after reasonable notice, (3) where original is in custody of public officer, (4) where original is recorded and record or certified copy is made evidence by statute, (5) where original consists of numerous accounts and evidence sought is only the general result of the whole. (UCA 78B-5-615).

Direct Actions Against Insurer.

See category 23 Transportation, topic 23.01 Motor Vehicles.

Small Claims.

See category 6 Courts and Legislature, topic 6.01 Courts.

Choice of Forum in Construction Contracts.

Provision in certain construction agreements requiring disputes to be resolved in out of state forum not enforceable if one party is domiciled in Utah and work to be done and equipment and materials to be supplied under agreement involve construction project in Utah. (UCA 13-8-3[2]).

5.20 PROCESS:

Civil action may be commenced by service of summons before filing complaint or by filing complaint. (R.C.P. 3[a]). Federal Rules of Civil Procedure form basis of Utah Rules of Civil Procedure. See topic 5.19 Practice.

General Requisites.

Summons must contain name of court, address of court, name of parties to action, and county in which it is brought. Summons must be directed to defendant, state name, address and telephone number of plaintiff's attorney, and must notify defendant that judgment by default will be taken unless defendant answers complaint within specified time. (R.C.P. 4[c]). If action is commenced by filing complaint, summons and copy of complaint must be served within 120 days or such longer period as may be allowed by court. (R.C.P. 4[b]).

By Whom Issued.

Issued by attorney for plaintiff or plaintiff. (R.C.P. 4[a]).

Who May Serve.

Sheriff, constable, U.S. marshal or deputy, or any other person 18 years of age or older and not party to action or party's attorney. (R.C.P. 4[d][1]).

Personal Service on Individual.

Personal service may be made on individuals age 14 years or older by delivering copy of summons and/or complaint to defendant or by leaving such copy at his usual place of abode with some person of suitable age and discretion there residing or with defendant's authorized agent. (R.C.P. 4[d][1][A]).

Personal Service on Minor.

Under age of 14 years made by delivering copy of summons and/or complaint to such minor and also to his father, mother, or guardian, or if none can be found within state, to any person having care and control of minor or with whom he resides or in whose service he is employed. (R.C.P. 4[d][1][B]).

Personal Service on Incompetent Person.

Made by delivering copy of summons and/or complaint to legal guardian or if no guardian, to person who has care, custody, or control of such incompetent person. (R.C.P. 4[d][1][C]).

Personal Service on Corporation or Partnership or Unincorporated Association.

May be made by delivering copy of summons and/or complaint to officer, managing or general agent, or other agent authorized by appointment or law to receive service of process. If no such officer or agent can be found within state and defendant has or holds itself out as having office or place of business within state or elsewhere or does business within state or elsewhere, upon person in charge of such office or place of business. (R.C.P. 4[d][1][E]).

Personal Service on Incorporated City or Town.

May be made by delivering copy of summons and/or complaint to recorder. (R.C.P. 4[d][1][F]).

Personal Service on County.

May be made by delivering copy of summons to county clerk. (R.C.P. 4[d][1][G]).

Personal Service on School District or Board of Education.

May be made by delivering copy of summons and complaint to superintendent or business administrator of board. (R.C.P. 4[d][1][H]).

Personal Service on Irrigation or Drainage District.

May be made by delivering copy of summons and complaint to president or secretary of its board. (R.C.P. 4[d][1][I]).

Personal Service on State.

Made by delivering copy to Attorney General. (R.C.P. 4[d][1][J]). Service upon state agency is made by delivering copy to any member of its governing board or to executive employee or secretary. (R.C.P. 4[d][1][K]).

Personal Service on Insurer, Nonresident Producer, Consultant, etc.

May also be made by optional service on state officer, with 40-day response time. (UCA 31A-2-309, 310).

Personal Service on Joint Stock Company.

See subhead Service on Corporation or Partnership or Unincorporated Association, supra.

Personal Service on Foreign Corporation.

May be made: (1) By any internationally agreed means reasonably calculated to give notice, such as those means authorized by the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents; (2) if no internationally agreed means of service, in manner prescribed by law of foreign country, as directed by foreign authority in response to letter of request, or by delivery to individual by any form of mail requiring signed receipt, unless prohibited by law of foreign country; or (3) by other means not prohibited by international agreement as may be directed by the court. (R.C.P. 4[d][3]).

Personal Service Outside State.

Service outside state may be made pursuant to R.C.P. 4. (UCA 78B-3-208).

Service by Mail.

Under certain circumstances, including filing of motion supported by affidavit stating grounds therefore, service by mail may be made by clerk of court. (R.C.P. 4[d][2]).

Service by Publication.

Can be made in certain cases where identity or whereabouts of person to be served are unknown and cannot be ascertained through reasonable diligence, where service upon all parties is impracticable, or where there is good cause to believe person to be served is avoiding service of process. Party seeking service by publication may file motion supported by affidavit. Affidavit must set forth efforts made to identify, locate or serve party to be served or circumstances that make it impracticable to serve all of individual parties. (R.C.P. 4[d][4]).

Substituted Service.

Where identity or whereabouts of person to be served unknown and unascertainable, where service upon all individual parties impracticable, or where there exists good cause to believe that person to be served is avoiding service of process, party seeking service of process may file motion supported by affidavit requesting order allowing service by publication or by some other means. (R.C.P. 4[d][4][A]).

Long Arm Statute.

As matter of legislative policy, public interest demands state provide citizens with effective means of redress against nonresident persons. Courts of State have jurisdiction over nonresidents who incur obligations to citizens entitled to State's protection through certain minimal contacts with State. Such jurisdiction is to fullest extent permitted by due process clause of Fourteenth Amendment to U.S. Constitution. Default may not be entered until 30 days after service. (UCA 78B-3-201).

Proof of Service.

Must be filed within ten days after service. (R.C.P. 4[e]). If served by sheriff, constable, or U.S. Marshal or deputy, proof of service must be made by certificate with statement as to date, place, and manner of service. If served by any other person, proof of service must be made by affidavit with statement as to date, place, and manner of service. Proof of service by mail must include receipt signed by defendant or defendant's agent for service of process. (R.C.P. 4[e][1]). If person to be served refuses to accept copy of process, service is sufficient if person serving process states name of process and offers to deliver copy thereof. (R.C.P. 4[d][1]).

Nonresident Motorist.

See category 23 Transportation, topic 23.01 Motor Vehicles.

5.21 REPLEVIN:

(R.C.P. 64, 64A, 64B).

Plaintiff, in action to recover possession of personal property, may claim delivery of such property after filing complaint and at any time before judgment in following manner:

Proceedings.

Writ of replevin available after claim filed and before judgment only upon written court order, after notice and hearing. (R.C.P. 64A[a], [e]). Writ of replevin available to compel delivery to plaintiff of specific personal property held by defendant. (R.C.P. 64B[a]). To obtain writ of replevin before judgment, plaintiff must file motion, security as ordered by court, and supporting affidavit. (R.C.P. 64A[b]). Affidavit must set forth following grounds: (1) Plaintiff entitled to possession; (2) defendant wrongfully detains property; (3) property not earnings and not exempt from execution; (4) writ not sought to hinder, delay, or defraud creditor of defendant; (5) substantial likelihood plaintiff will prevail on merits of underlying claim; and (6) at least one of the following: defendant avoiding service of process; or defendant has, or is about to have assigned, disposed of or concealed property with intent to defraud creditors; or defendant has left, or is about to leave state with intent to defraud creditors; or defendant has fraudulently incurred subject obligation; or property will materially decline in value; or plaintiff has ownership or special interest in property; or probable cause of losing remedy unless court issues writ. (R.C.P. 64A[b], [c] and 64B[b]).

Supporting affidavit must also state nature, location, account number and estimated value of property, and name, address, and phone number of person holding property; that property not taken for tax, assessment or fine; that property not seized under writ against property of plaintiff or exempt from seizure; name and address of any person known to plaintiff to claim interest on property and if motion is writ of garnishment; name and address of garnishee; that plaintiff has attached garnishee fee established by UCA 78A-2-216. (R.C.P. 64A[d]).

Clerk of court shall issue writs. If writ directs seizure of real property, clerk shall issue writ to sheriff of county where property located. If writ directs seizure of personal property, clerk may issue writ to officer of any county. (R.C.P. 64[d][1]).

Repossession.

At any time before notice of sale of property or before property delivered to plaintiff, defendant may file security and motion to discharge writ. If writ discharged, court shall order any remaining property and proceeds of sales delivered to defendant. (R.C.P. 64[f][1], [3]).

Claims of Third Persons.

Any person claiming interest in property has same rights and obligations as defendant. Any claimant named by plaintiff and served with writ and accompanying papers must exercise rights and obligations with same time allowed for defendant. Any claimant not named by plaintiff and not served with writ and accompanying papers may exercise rights and obligations at any time before property sold or delivered to plaintiff. (R.C.P. 64[e][1]). Court may order any named claimant joined as defendant. (R.C.P. 64[e][2]). If plaintiff requests officer seize or sell property claimed by third party, officer may request court to require plaintiff to file security. (R.C.P. 64[e][3]).

Judgment or Order.

Clerk issues writ directing sheriff or officer to take specific action on property and to serve writ and accompanying papers on defendant or third party claimant. (R.C.P. 64[d]).

5.22 SEQUESTRATION:

No statutory provision.

See topics 5.14 Injunctions, Replevin; category 8 Debtor and Creditor, topic 8.02 Attachment.

5.23 SERVICE:

See topic 5.20 Process.

5.24 STAY OF EXECUTION:

See topic 5.03 Appeal and Error; also category 8 Debtor and Creditor, topic 8.05 Executions.

5.25 SUBMISSION OF CONTROVERSY:

No statutory provision.

5.26 VENUE:

(Tit. 78B, c. 3).

Actions Affecting Realty.

In county where realty or part thereof situated. (UCA 78B-3-301). As to personal actions, general rule is county where cause of action arose or where defendant resides or corporate defendant has place of business. Special rules provided for certain classes of actions. (UCA 78B-3-302 to 306). Action against nonresidents may be brought in any county designated by plaintiff in complaint. (UCA 78B-3-307).

Change of Venue.

Motion may be brought for usual reasons: (1) Improper county; (2) reason to believe impartial trial cannot be had; (3) convenience of witnesses and ends of justice; (4) by stipulation. (UCA 78B-3-309).

Contract Provisions.

Action to enforce interest in real property securing consumer obligation may only be brought in county where real property located or where defendant resides. (UCA 78B-3-302[1]). Other actions may be brought in county of performance, in county where defendant resides, or where contract was signed. (UCA 78B-3-304[2]). No specific statutory or case law on enforceability of contract provision directly fixing venue.

5.27 WITNESSES:

See topic 5.13 Evidence, subhead Witnesses.

6 COURTS AND LEGISLATURE

6.01 COURTS:

United States District Court.

Clerk’s office: 350 So. Main St., Rm. 150, Salt Lake City, UT 84101-2180. Court sits at Salt Lake City.

Northern Division is composed of following counties: Box Elder, Cache, Davis, Morgan, Rich and Weber.

Central Division is composed of following counties: Beaver, Carbon, Daggett, Duchesne, Emery, Garfield, Grand, Iron, Juab, Kane, Millard, Piute, Salt Lake, San Juan, Sanpete, Sevier, Summit, Tooele, Uintah, Utah, Wasatch, Washington and Wayne. Court sits at Salt Lake City (part-time magistrate judges sit at Monticello and St. George).

Fee of $350 required on filing complaint in civil action.

Supreme Court.

Supreme Court composed of five justices, each appointed initially to serve until first general election held more than three years after effective date of appointment. Thereafter, term of office is ten years and until successor appointed and qualified. Election of Chief Justice from among members of court by majority vote of all justices. Term of Chief Justice is four years and may serve successive terms. (UCA 78A-3-101).

Original Jurisdiction: (1) Answer questions of state law certified by federal court; (2) issuance of all extraordinary writs and authority to issue all writs and process necessary to carry into effect its orders, judgments, and decrees or in aid of its jurisdiction. (UCA 78A-3-102[1][2]).

Appellate Jurisdiction: Includes jurisdiction of interlocutory appeals, over final orders or judgments of Court of Appeals, cases certified to Supreme Court by Court of Appeals prior to final judgment by Court of Appeals, discipline of lawyers, final orders of Judicial Conduct Commission, final orders and decrees in formal adjudicative proceedings originating with: Public Service Commission, State Tax Commission, Board of State Lands and Forestry, School and Institutional Trust Lands Board of Trustees, Board of Oil, Gas and Mining and state engineer; final orders and decrees of district court review of informal adjudicative proceedings of these agencies; final judgment or decree of any court holding federal or state statute facially unconstitutional under Constitution of U.S. or Utah; interlocutory appeals from any court involving charge of first degree or capital felony: appeals from district court involving conviction of first degree or capital felony; orders, judgments and decrees of any court over which Court of Appeals does not have original appellate jurisdiction; and appeals from district court orders, judgments and decrees ruling on legislative subpoenas; Supreme Court may transfer to Court of Appeals any matters over which Supreme Court has original appellate jurisdiction, except matters proscribed under UCA 78A-3-102[4][a][f]. Supreme Court has sole discretion in granting or denying petition for writ of certiorari for review of Court of Appeals adjudication, but Supreme Court must review cases certified to it by Court of Appeals prior to final judgment. (UCA 78A-3-102[3],[4]).

Court sits at Salt Lake City but may perform any of its functions in any location within state.

Court of Appeals.

Composed of seven judges, each appointed initially to serve until first general election held more than three years after effective date of appointment. Thereafter, term of office is six years and until successor appointed and qualified. Court of Appeals sits in panels of three judges. Election of presiding judge from among members of court by majority vote of all judges. Term of office of presiding judge is two years and until successor elected. (UCA 78A-4-105).

Jurisdiction.

Issuance of all extraordinary writs and to issue all writs and process necessary to carry into effect its judgments, orders, and decrees or in aid of its jurisdiction. (UCA 78A-4-105).

Appellate Jurisdiction.

Includes jurisdiction of interlocutory appeals over final orders and decrees of state agencies or appeals from district court review of informal adjudicative proceedings of state agencies, except Public Service Commission, State Tax Commission, Board of State Lands, School and Institutional Trust Lands Board of Trustees, Board of Oil, Gas and Mining, and state engineer, appeals from district court review of adjudicative proceedings of agencies of political subdivisions of state, or other local agencies, appeals from juvenile courts, interlocutory appeals from any court in criminal cases except those involving charge of first degree or capital felony, appeals from district court in criminal cases except those involving conviction of first degree or capital felony, appeals from orders on petitions for extraordinary writs involving criminal conviction, except those involving first degree felony, appeals from orders on petitions for extraordinary writs challenging decisions of Board of Pardons except in cases involving first degree or capital felony, appeals from district court involving domestic relations cases including divorce, annulment, property division, child custody, support, visitation, adoption and paternity, appeals from Utah Military Court, and cases transferred to Court of Appeals from Supreme Court.

(UCA 78A-4-103[2]). Court of Appeals, upon its own motion only and by vote of four judges of court, may certify to Supreme Court for original appellate review and determination any matter over which Court of Appeals has original appellate jurisdiction. (UCA 78A-4-103[3]).

Court sits at Salt Lake City but may perform any of its functions in any location within state. (UCA 78A-4-104).

District Court.

State divided into eight judicial districts, each with two to 30 judges. (UCA 78A-1-103). Judges appointed initially until first general election held more than three years after effective date of appointment, thereafter, term of office for six years and until successor appointed and qualified. (UCA 78A-5-105).

Original Jurisdiction.

All matters civil and criminal, including review of agency adjudicative proceedings, not excepted in Utah constitution and not prohibited by law. (UCA 78A-5-102[1]). Judges have power to issue all extraordinary writs and other writs necessary to carry into effect their orders, judgments, and decrees. (UCA 78A-5-102[2]).

Fee: $155 for filing civil complaint in excess of $10,000; $155 for divorce complaint; $50 if sum claimed in complaint or amount of interpleader is $2,000 or less, exclusive of court costs, interest and attorney fees; $95 if sum claimed in complaint or amount of interpleader is greater than $2,000 and less than $10,000, exclusive of court costs, interest and attorney fees. (UCA 78A-2-301). Additional fees for motions and papers issued by court. (UCA 78A-2-301). Other fees may also be required. (UCA 78A-2-301). See http://www.utcourts.gov/resources/fees.htm.

Place of Sitting.

(UCA 78A-1-102). County seat of each county is location of district court. (UCA 78A-5-101):

Beaver County: Fifth District; court sits at Beaver.

Box Elder County: First District; court sits at Brigham City.

Cache County: First District; court sits at Logan.

Carbon County: Seventh District; court sits at Price.

Daggett County: Eighth District; court sits at Manila.

Davis County: Second District; court sits at Farmington.

Duchesne County: Eighth District; court sits at Duchesne, Roosevelt.

Emery County: Seventh District; court sits at Castle Dale.

Garfield County: Sixth District; court sits at Panguitch.

Grand County: Seventh District; court sits at Moab.

Iron County: Fifth District; court sits at Cedar City, Parowan.

Juab County: Fourth District; court sits at Nephi.

Kane County: Sixth District; court sits at Kanab.

Millard County: Fourth District; court sits at Fillmore.

Morgan County: Second District; court sits at Morgan.

Piute County: Sixth District; court sits at Junction.

Rich County: First District; court sits at Randolph.

Salt Lake County: Third District; court sits at Salt Lake City, West Valley City.

San Juan County: Seventh District; court sits at Monticello.

Sanpete County: Sixth District; court sits at Manti.

Sevier County: Sixth District; court sits at Richfield.

Summit County: Third District; court sits at Coalville.

Tooele County: Third District; court sits at Tooele.

Uintah County: Eighth District; court sits at Vernal.

Utah County: Fourth District; court sits at Provo.

Wasatch County: Fourth District; court sits at Heber City.

Washington County: Fifth District; court sits at St. George.

Wayne County: Sixth District; court sits at Loa.

Weber County: Second District; court sits at Ogden.

Probate Court.

Probate jurisdiction exercised by District Court. (UCA 75-1-201[8]).

Juvenile Courts.

State divided into eight juvenile court districts. (UCA 78A-1-104).

District No. 1: Box Elder, Cache, and Rich Counties;

District No. 2: Weber, Davis, and Morgan Counties;

District No. 3: Salt Lake, Tooele, and Summit Counties;

District No. 4: Utah, Wasatch, Juab, and Millard Counties;

District No. 5: Beaver, Iron, and Washington Counties;

District No. 6: Garfield, Kane, Piute, Sanpete, Sevier, and Wayne Counties;

District No. 7: Carbon, Emery, Grand, and San Juan Counties;

District No. 8: Daggett, Duchesne, and Uintah Counties.

Original Jurisdiction.

Exclusive, original jurisdiction over child who has violated federal, state, local law, or municipal ordinances, or any person under 21 years who has violated any law or ordinance before becoming 18, excluding violations of traffic laws and ordinances; over any person 21 or older who fails or refuses to comply with juvenile court order to pay fine or restitution if order imposed before person's 21st birthday; over any abused, neglected, or dependent child, or habitual truant from school; traffic offenses that are part of single criminal episode filed in petition that contains offense over which court has jurisdiction; questions of custody, support and visitation certified to it by district court; ungovernable or runaway children referred by Division of Family Services; over parent of child committed to secure facility to order group rehabilitation therapy; over proceedings to appoint guardian of any child within court's jurisdiction under other provisions, to terminate legal parent-child relationship, for judicial consent to marriage, employment or enlistment of child when consent required; for treatment or commitment of mentally ill or mentally retarded child within court's jurisdiction; and child under Tit. 55, c. 12, Interstate Compact for Juveniles. (UCA 78A-6-103). Court has exclusive jurisdiction over any traffic offense committed by child under 16. (UCA 78A-6-103). Court also has exclusive jurisdiction over following traffic offenses committed by child 16 or older: automobile homicide, operating vehicle while under influence of alcohol or drugs, reckless driving, unauthorized control of motor vehicle, trailer, or semitrailer, and fleeing peace officer. (UCA 78A-6-103). Court has concurrent jurisdiction over all other traffic offenses committed by child. (UCA 78A-6-103). Court may, under certain circumstances, transfer protective order for child to district court. (UCA 78A-6-103).

If criminal information alleges commission of act which would constitute felony if committed by adult, and if court finds that it would be contrary to best interest of child or public to retain jurisdiction, court may direct child to be held for criminal proceedings in district court. (UCA 78A-6-703). District Court has exclusive original jurisdiction over all persons 16 or older charged with offense which would be murder or aggravated murder if committed by adult. (UCA 78A-6-701). District Court also has exclusive jurisdiction over offense which would be felony if committed by adult if child has been previously committed to secure facility (unless offense is committed in secure facility). (UCA 78A-6-701[1]). When action filed by county attorney, district attorney, or attorney general charging child 16 or older alleges felony violation of aggravated assault, aggravated robbery, aggravated arson, aggravated sexual assault, discharge of firearm from vehicle, attempted aggravated murder, attempted murder, aggravated burglary, aggravated kidnapping, or any offense involving use of dangerous weapon which would be felony if committed by adult and child has been previously adjudicated or convicted of offense involving use of dangerous weapon which would be felony if committed by adult, child may be bound over to District Court; District Court retains jurisdiction over child for sentencing. (UCA 78A-6-702).

Circuit Courts.

All circuit courts merged into district courts. District courts will have jurisdiction over all matters filed in courts formerly denominated as circuit courts. (UCA 78A-1-105).

Municipal and County Justice Courts.

Municipality that is not municipal department or primary location of district court may create justice court pursuant to UCA 78A-7-101 et seq. Jurisdiction over Class B and C misdemeanors and infractions and small claim cases. (UCA 78A-7-106). Certain municipalities may elect to assume local responsibility for matters within exclusive jurisdiction of justice courts. (UCA 78A-7-102). Judicial Council responsible for promulgating and publishing minimum requirements for creation of new courts and recertification of existing courts. (UCA 78A-7-103).

Jurisdiction.

Exclusive, original jurisdiction over offenses committed within territorial jurisdiction of court relating to city or town ordinances and motor vehicle violations (Tit. 41), with exception of alcohol or drug related driving offenses and reckless driving, otherwise concurrent jurisdiction with district court except those offenses over which Juvenile Court has exclusive jurisdiction. (UCA 78A-7-106 et seq.).

Small Claims Courts.

Small claims courts are departments of district and justice courts. Their jurisdiction extends to cases involving: (1) Recovery of money not to exceed $7,500, including attorney fees but excluding court costs and interest, and where defendant resides or indebtedness was incurred within court's jurisdiction; or (2) interpleader under Rule 22 of R.C.P. in which amount claimed does not exceed court jurisdiction. (UCA 78A-8-102). Former provision stating actions against governmental entities cannot be tried as small claims actions (UCA 63-30-16) repealed by Laws of Utah 2004, c. 267.

Actions commenced by completing affidavit forms provided by court clerks. Filing fee is $45 for claim of $2,000 or less (UCA 78A-2-301); $70 for claim greater than $2,000 but less than $10,000; other costs may be applicable (UCA 17-22-2.5). Counter action may be filed if actions arise out of transaction or occurrence that is subject matter of opposing party's claim and when party maintaining counter action executes counter affidavit setting forth counterclaim. Counter claim may not be raised for first time in trial de novo of small claims action. (UCA 78A-8-102[3]).

Attachment, garnishment, and execution may issue after judgment and upon payment of fees. (UCA 78A-8-104). Assignee may not file assigned claim. (UCA 78A-8-103).

Appeal is to district court of county when matter heard in small claims department of district or justices' court and must be within 30 days from entry of judgment. (UCA 78A-8-106). Appeal to district court is trial de novo under small claims department procedures. Decision of trial de novo may not be appealed unless court holds state statute or local ordinance unconstitutional. (UCA 78A-8-106).

See also category 9 Dispute Resolution, topic 9.02 Arbitration and Award.

6.02 LEGISLATURE:

Sessions of legislature held annually at Salt Lake City, Utah, beginning on 4th Mon. in Jan. No general session of legislature exceeds 45 calendar days and no special session exceeds 30 calendar days, except in cases of impeachment. (Utah Const. Art. VI, §§ 2, 16).

Special or Extraordinary Sessions.

May be called by Governor. (Utah Const. Art. VII, § 6).

Initiative and Referendum.

Provided. (Utah Const. Art. VI, § 1; UCA 20A-7-101 et seq.).

Lobbyists.

Regulated under UCA 36-11-101 et seq.

See topic 6.04 Statutes.

6.03 REPORTS:

Decisions of Utah Supreme Court and Utah Court of Appeals reported in Pacific Reporter, Utah Reporter, and Utah Advance Sheets (unofficial).

Digests.

Utah and Pacific Digests cover all Utah cases.

6.04 STATUTES:

Statutory law is contained in Utah Code Annotated, 1953, and subsequent session laws.

Uniform Acts of the National Conference of Commissioners on Uniform State Laws (NCCUSL) and Model Acts of NCCUSL or American Bar Association (ABA) that have been adopted are: Adult Guardianship and Protective Proceedings Jurisdiction (2008); Aeronautical Regulatory (1937); Airports (1937); Revised Anatomical Gift (2007); Arbitration (2002); Athlete Agents (2001); To Secure Attendance of Witnesses From Without a State in Criminal Proceedings (1937); Child Abduction Prevention (2007); Child Custody Jurisdiction & Enforcement (2000); Civil Liability for Support (1957); *Revised Commercial Code (1965, 2001, 2007), Chapter 2a-Leases (1990), Chapter 4a-Funds Transfers (1990); Chapter 5-Letters of Credit (1997); Chapter 7-Documents of Tit. (2003) (adopted as Chapter 7a); Chapter 8-Investment Securities (1996); Chapter 9a-Secured Transactions (2000); *Common Trust Fund (1951, 1982); Consumer Sales Practices (1973); Controlled Substances (1971); Criminal Extradition (1937, 1980); Debt-Management Services (2005); Declaratory Judgments (1951); Determination of Death (1989); *Division of Income for Tax Purposes (1967); *Durable Power of Attorney (1975); Electronic Transactions (2000); Enforcement of Foreign Judgments (1983); Environmental Covenants (2003); Evidence (1983); Exemptions (1981); Fiduciaries (1925); Foreign Money Claims (1990); Fraudulent Transfer (1988); Limited Cooperative Association Act (2007); Interstate Depositions and Discovery Act (2007); Interstate Enforcement of Domestic Violence Protection Orders (2002); Interstate Family Support (1996); Joint Obligations (Model) (1929); Land Sales Practices (1973); *Revised Limited Partnership (1921, 1990); Management of Institutional Funds (1997); Mandatory Disposition of Detainers (1965, 1980); Mediation (2003); *Model Business Corporation (1984); Model Registered Agents (2006); Partnership (1921, 1990); Paternity (1965); Photographic Copies of Business and Public Records as Evidence (1951); Premarital Agreement (1994); *Principal and Income (1962 Probate Code (1975 Act) (1977); Prudent Management of Institutional Funds (2006); Rendition of Prisoners as Witnesses in Criminal Proceedings (1980); Rules Relating to Discovery of Electronically Stored Information (2007); *Securities (1956 Act) (1963); Simplification of Fiduciary Security Transfers (1961); Simultaneous Death (1953, 1975); Transfer on Death Security Registration (1996); Testamentary Additions to Trusts (1961, 1975); Trade Secrets (1989); Transfers to Minors (1990); Trust Code (2004); Unclaimed Property (1983); Utah Uniform Parentage (2005).

*Adopted with significant variations. See appropriate topics.

For text of NCCUSL Uniform Acts and NCCUSL or ABA Model Acts falling within scope of Martindale-Hubbell Law Digests, see Uniform and Model Acts section.

Other Uniform Acts adopted are: Commercial Driver License (1989); Fiscal Procedures (1975); Franchise and Privilege Taxes (1967); Fresh Pursuit (1980); Local Sales and Use Tax (1959); Municipal Fiscal Procedures (1979); Operator License (1987); Weapons (1973).

6.05 UNIFORM LAWS:

For list of Uniform Acts in force in this state, see topic 6.04 Statutes. For text of Uniform Acts within scope of Martindale-Hubbell Law Digests, see Uniform and Model Acts section.

7 CRIMINAL LAW

7.01 CRIMINAL LAW:

Governing law primarily consists of Utah Criminal Code, Tit. 76; motor vehicle offenses, UCA 41-6a-102 et seq.; Code of Criminal Procedure, Tit. 77; and Utah Rules of Criminal Procedure.

Indictment or Information.

Prosecution of public offenses and all criminal prosecutions are by indictment or information, sworn to by person having reason to believe offense has been committed. (Utah R. Crim. P. 4[a], 5[a]).

Bail.

A matter of right except capital offenses, certain felonies, or where court finds by clear and convincing evidence that defendant would flee or would pose substantial danger to any other person or to community if released. (UCA 77-20-1 and Utah Const. Art. I, § 8). Pleas of guilty or no contest may be held in abeyance up to 18 months for ultimate dismissal of case or reduction of charge upon agreement with prosecution and court approval. (UCA 77-2a-1 et seq.). Bail may be forfeited by judgment of court if court finds by preponderance of evidence that defendant failed to appear as required, surety was given notice of defendant's nonappearance, surety failed to bring defendant to court within six months, and prosecutor complied with notice requirements. (UCA 77-20b-104[2]). Bond may be revoked upon surety providing written proof to court and prosecutor, prior to judgment, that defendant has been booked for failure to appear regarding charge bond was issued for or defendant is in custody and surety served defendant's bond revocation on custodial authority. (UCA 77-20b-105).

Insanity Defense.

Includes "insanity" and "diminished mental capacity" defenses. (UCA 76-2-305[2]). It is defense to prosecution under statute or ordinance that defendant, as result of mental illness, lacked mental state required as element of offense charged. (UCA 76-2-305[1][a]). Mental illness does not otherwise constitute defense but may be mitigating factor in certain circumstances. (UCA 76-2-305[1][b]).

Pleas.

Plea options include: not guilty, guilty, no contest (with court approval), not guilty by reason of insanity, or guilty and mentally ill at time of offense. (UCA 77-13-1[1]; Utah R.Crim.P. 11). Alternative plea of not guilty or not guilty by reason of insanity may be entered. (UCA 77-13-1[2]).

Incompetent Defendants.

No trial or punishment if defendant is incompetent to proceed with defense. (UCA 77-15-1 et seq.). Under certain circumstances, incompetent defendant may be involuntarily medicated to render defendant competent to proceed. (UCA 77-15-6.5).

Punishments.

Includes imprisonment (indeterminate, concurrent, consecutive, and mandatory minimum sentencing), fines, restitution, forfeiture, probation, parole. (UCA 76-3-101 et seq.). Death penalty may be imposed for certain offenses if justified and appropriate. (UCA 76-3-207[5][b]). Penalties for first, second, and third degree felonies (UCA 76-3-203), if offense in concert with two or more persons (UCA 76-3-203.1), minor may be subjected to enhanced penalties if minor's actions would cause him to be party if he were adult, and also for certain repeat sexual offenders (UCA 76-3-407), including habitual violent offenders (UCA 76-3-203.5). Court can record conviction and sentence for next lower degree of offense under certain circumstances. (UCA 76-3-402[1]). Offense committed with intent to terrorize or intimidate increases degree of offense. (UCA 76-3-203.3[2]). Public harm and fear are aggravating factor in sentencing and parole hearing. (UCA

76-3-203.4[1]). Aggravating factor to commit violent offense in presence of child. (UCA 76-3-203.9[2]). Occupying position of trust is aggravating factor in criminal homicide imprisonment. (UCA 76-3-406.5[2]).

Search and Seizure.

Provisions governing contained in Code of Criminal Procedure. Former statutory provisions (UCA 77-23-201 et seq.) repealed by Laws of Utah 2007, c. 153.

Expungement.

Prior criminal records may be expunged under certain circumstances. (UCA 77-18-9 et seq.).

Public Assistance Fraud.

Any person applying for public assistance who intentionally, knowingly, or recklessly fails to disclose any material fact required to be disclosed is guilty of public assistance fraud. (UCA 76-8-1205). Severity of offense for public assistance fraud is classified in accordance with value of payments, assistance, or other benefits received, misappropriated, claimed, or applied. (UCA 76-8-1206).

Interstate Compact for Supervision of Parolees and Probationers in effect. (UCA 77-27-24 et seq.).

Uniform Criminal Extradition Act in effect. (UCA 77-30-1 et seq.).

Interstate Compact for Juveniles in effect. (UCA 55-12-100 et seq.).

Interstate Agreement on Detainers in effect. (UCA 77-29-5 et seq.).

Interstate Corrections Compact adopted. (UCA 77-28a-1 et seq.).

Western Interstate Corrections Compact adopted. (UCA 77-28-1 et seq.).

Utah Computer Crimes Act in effect. (UCA 76-6-701 et seq.).

False Claims Act adopted regarding medical benefits. (UCA 26-20-1 et seq.).

Insurance Fraud Act adopted. (UCA 31A-31-101 et seq.; UCA 76-6-521).

Security Fraud governed by UCA 61-1-1 et seq.

Pornography Complaints Ombudsman—Powers.

Obscenity and Pornography Complaints Ombudsman in Office of the Attorney General. (UCA 67-5-18[2][a]). Obscenity to develop and maintain expertise in and understanding of: (1) Laws designed to control or eliminate obscenity; and (2) pornography and legal standards governing regulation or elimination of obscenity and pornography. (UCA 67-5-18[3]).

8 DEBTOR AND CREDITOR

8.01 ASSIGNMENTS:

Accounts Receivable.

See category 3 Business Regulation and Commerce, topic 3.09 Commercial Code.

Assignment of Insurance Proceeds.

See category 16 Insurance, topic 16.01 Insurance Companies.

Instrument Transferring Title.

Assignment must be by instrument in writing, setting forth name, residence, and business of assignor; name, residence, and business of assignee; general description of property assigned. Writing must be executed and acknowledged in county where assigned property located. Assignor must annex inventory under oath of estate, real and personal, and list his creditors and amount of their respective demands. (UCA 6-1-3).

Filing.

Assignment must be filed in office of clerk of district court of county in which property located. (UCA 6-1-3).

Recording.

Assignment must be recorded in office of recorder of county where assigned property located. Assignor must attach inventory of estate and creditors. (UCA 6-1-3).

Notice.

Assignee must give notice of assignment by publication in newspaper having general circulation in county where assigned property located at least once weekly for six weeks. Assignee must also send notice by mail to each creditor of whom he is informed, requiring such creditor to present within three months his claims. (UCA 6-1-5).

Effect.

Assignment of interest in contract gives assignee same rights as assignor and nothing more. (751 P.2d 1131).

Assignment of Wages.

Creditor may not receive from debtor obligation containing or constituting assignment of wages unless: (1) Assignment is expressly at will of debtor, (2) assignment is payroll deduction plan authorized by debtor, or (3) assignment applied only to wages or earnings already earned at time of assignment. (UCA 70C-2-202). See category 3 Business Regulation and Commerce, topic 3.11A Consumer Credit.

In General.

When cross demands have existed between persons under such circumstances that if action had been brought counterclaim could have been set up, neither can be deprived of benefit thereof by assignment or death. (R.C.P. 13[i]). Liens are assignable. (UCA 38-1-26). Assignee may commence and prosecute actions thereon in his own name. (UCA 38-1-26). Assignment with purpose of defeating or obstructing creditor's claim is Class A misdemeanor. (UCA 76-6-511).

To Labor Organization.

Employee may direct employer to deduct from wages amount not to exceed 3% of monthly wage for union dues to be paid to labor or other organization of employees. (UCA 34-32-1[2]). Not applicable to employer subject to NLRA or carriers subject to Railway Labor Act. (120 Utah 294, 233 P.2d 685).

To Farm Organization.

Farmer may direct dealer or processor to deduct up to 3% of price paid for produce and pay same to farm organization. (UCA 34-32-2).

Uniform Consumer Credit Code adopted. See category 3 Business Regulation and Commerce, topic 3.11A Consumer Credit.

Insolvent Debtors.

Insolvent debtors may assign for benefit of creditors. (UCA 6-1-1 et seq.).

8.02 ATTACHMENT:

(R.C.P. 64, 64A and 64C).

Writ of attachment available to seize property in possession or under control of defendant after claim filed and before judgment only upon written court order. (R.C.P. 64A[a] and 64C[a]).

Actions in Which Allowed.

Attachment may be obtained in action upon contract, or in action against nonresident of state or foreign corporation, or when authorized by statute. (R.C.P. 64C[b][2]).

Courts Which May Issue Writ.

Writ issued upon written motion and pursuant to written order of court in which action is pending. (R.C.P. 64A[a], [b]).

In Whose Favor Writ May Issue.

In proper case, attachment may be had by any plaintiff, including nonresident or foreign corporation that has right to sue in state courts. (R.C.P. 64C[a]).

Against Whom Writ May Issue.

See subhead Grounds, supra.

Claims on Which Writ May Issue.

See subheads Actions in Which Allowed, supra, and Unmatured Claims, infra.

Unmatured Claims.

Former provision repealed in 2004.

Grounds.

In addition to grounds required in Rule 64A, see subhead Proceedings to Obtain, infra: (1) Defendant indebted to plaintiff; (2) action upon contract against nonresident of state or foreign corporation, or authorized by statute; and (3) payment of claim not secured by lien upon property in state. (R.C.P. 64C[b]).

Proceedings to Obtain.

Prejudgment writ of attachment available after claim filed and before judgment only upon written court order, after notice and hearing. (R.C.P. 64A[a], [e]). Writ of attachment available to seize property in possession or under control of defendant. (R.C.P. 64C[a]). To obtain writ of attachment before judgment, plaintiff must file motion, security as ordered by court, and supporting affidavit. (R.C.P. 64A[b]). Affidavit must set forth following grounds, in addition to those set forth in subhead Grounds, supra: (1) Property not earnings and not exempt from execution;

(2) writ not sought to hinder, delay, or defraud creditor of defendant; (3) substantial likelihood plaintiff will prevail on merits of underlying claim; and (4) at least one of following: defendant avoiding service of process; or defendant has, or is about to have assigned, disposed of or concealed property with intent to defraud creditors; or defendant has left, or is about to leave the state with intent to defraud creditors; or defendant has fraudulently incurred subject obligation; or property will materially decline in value; or plaintiff has ownership or special interest in property; or probable cause of losing remedy unless court issues writ. (R.C.P. 64A[b], [c] and 64C[b]).

Supporting affidavit must also state nature, account number and estimated value of property, and name, address, and phone number of person holding property; that property not taken for tax, assessment or fine; that property not seized under writ against property of plaintiff or exempt from seizure; name and address of any person known to plaintiff to claim interest on property and if motion is writ of garnishment; name and address of garnishee; that plaintiff has attached garnishee fee established by UCA 78A-2-216. (R.C.P. 64A[d]).

Attachment Bond.

When security required of party, party must provide security in sum and form court deems adequate. For security by plaintiff amount should be sufficient to reimburse other parties for damages, costs and attorney fees incurred as result of writ wrongfully obtained. For security by defendant, amount should be equivalent to amount of claim or judgment or value of defendant's interest in property. Court should consider any relevant factor in fixing amount and may relieve party from necessity of providing security if it appears that no party will incur damages as result of writ wrongfully obtained or if some other substantial reason for dispensing with security exists. Amount of security does not establish or limit amount of damages, costs or attorney fees recoverable if write wrongfully obtained. (R.C.P. 64[b][1]).

Issuance of Writ.

Clerk of court shall issue writs. If writ directs seizure of real property, clerk shall issue writ to sheriff of county where property located. If writ directs seizure of personal property, clerk may issue writ to officer of any county. (R.C.P. 64[d][1]).

At time of issuance of writ, or at any time thereafter, writ of garnishment may issue in aid thereof. See topic 8.09 Garnishment.

Property Subject to Attachment.

Former provision repealed in 2004.

Levy.

Former provision repealed in 2004.

Indemnity.

See subhead Attachment Bond, supra.

Lien.

No statutory provision.

Priorities.

Former provision repealed in 2004.

Release of Property.

At any time before notice of sale of property or before property delivered to plaintiff, defendant may file security and motion to discharge writ. (R.C.P. 64[f][1]). Plaintiff may discharge writ by filing release and serving it upon defendant. (R.C.P. 64[f][2]). If writ discharged, court shall order any remaining property and proceeds of sales delivered to defendant. (R.C.P. 64[f][3]).

Sale.

Former provision repealed in 2004.

Third Party Claims.

Any person claiming interest in property has same rights and obligations as defendant. Any claimant not named by plaintiff and not served with writ and accompanying papers may exercise rights and obligations at any time before property sold or delivered to plaintiff. (R.C.P. 64[e][1]). Court may order any named claimant joined as defendant. (R.C.P. 64[e][2]). If plaintiff requests officer seize or sell property claimed by third party, officer may request court to require plaintiff to file security. (R.C.P. 64[e][3]).

Vacation.

Former provision repealed in 2004.

See topics 8.05 Executions and 8.09 Garnishment.

8.03 [RESERVED]

8.04 CREDITORS' SUITS:

Actions by creditors governed by Uniform Fraudulent Transfer Act adopted, in entirety in Utah. See topics 8.08 Fraudulent Sales and Conveyances, Executions; and category 13 Estates and Trusts, topic 13.09 Executors and Administrators.

8.05 EXECUTIONS:

See also category 5 Civil Actions and Procedure, topic 5.19 Practice.

Federal Rules of Civil Procedure form basis of Utah Rules of Civil Procedure.

(R.C.P. 64, 64E, 69A, 69B).

See also category 5 Civil Actions and Procedure, topic 5.19 Practice.

Kinds of Execution.

Writ of execution available to seize property in possession or under control of defendant following entry of final judgment or order requiring delivery of property or payment of money. (R.C.P. 64E[a]). To obtain writ, plaintiff must file application stating amount of judgment or order and amount due on judgment or order; nature, location and estimated value of property; and name and address of any person known to plaintiff to claim interest in property. (R.C.P. 64E[b]). If plaintiff dies, writ of execution may be issued upon affidavit of authorized executor, administrator, or successor in interest. (R.C.P. 64[d][1]). Writ issued by court clerk. If writ directs seizure of real property, clerk must issue writ to sheriff of county where real property located. If writ directs seizure of personal property, clerk may issue writ to officer of any county. (R.C.P. 64[d][1]).

Exemptions.

See topic 8.06 Exemptions.

Time for Issuance.

Former provision repealed in 2004.

Stay.

Former provision repealed in 2004.

Lien.

See category 5 Civil Actions and Procedure, topic 5.15 Judgments.

Levy.

Former provisions repealed in 2004.

Return.

Within ten days after service, officer must return writ to court with proof of service. If property has been seized, officer shall include inventory of property. (R.C.P. 64[d][3][C]).

Priorities.

Conflicting perfected security interests and agricultural liens rank according to priority in time of filing or perfection. (UCA 70A-9a-322[1][a]). Lessor's lien preferred to all other liens or claims except claims for taxes and mechanic's liens, perfected security interests, and claims of employees for wages which are preferred by law. (UCA 38-3-2). Attorney's lien on real property has as priority date and time when notice of lien filed with county recorder. (UCA 38-2-7).

Claims of Third Persons.

Any person claiming interest in property has same rights and obligations as defendant. Any claimant not named by plaintiff and not served with writ and accompanying papers may exercise rights and obligations at any time before property sold or delivered to plaintiff. (R.C.P. 64[e][1]). Court may order any named claimant joined as defendant. (R.C.P. 64[e][2]). If plaintiff requests officer seize or sell property claimed by third party, officer may request court to require plaintiff to file security. (R.C.P. 64[e][3]).

Satisfaction.

See category 5 Civil Actions and Procedure, topic 5.15 Judgments.

Sale.

Officer may sell property before judgment if perishable or likely to decline speedily in value or if court finds parties' interests served by sale. (R.C.P. 69B[a]). Officer shall set date, time and place for sale and serve notice on defendant and any third party named by plaintiff as garnishee. Service must be no later than initial publication of notice of sale. (R.C.P. 69B[b]). Officer may postpone sale upon finding sufficient cause. (R.C.P. 69B[c]). All sales must be at auction to highest bidder. Officer must sell only enough as necessary to satisfy amount due. (R.C.P. 69B[d]).

Redemption.

Real property may be redeemed within 180 days after sale, unless estate is less than leasehold of two-years' unexpired term, in which case sale is absolute, by defendant or creditor having lien on property junior to that on which property was sold or by their successors in interest. (R.C.P. 69C[a], [b], [d]). To redeem, redemptioner must pay amount required to purchaser and must serve on purchaser certified copy of judgment or lien under which claims right to redeem, assignment properly acknowledged if necessary to establish claim, and affidavit showing amount due on judgment or lien. (R.C.P. 69C[c]).

Supplementary Proceedings.

Court may appoint referee to monitor hearings and may conduct hearings as necessary to identify property and apply property toward satisfaction of judgment or order. Witnesses may be subpoenaed to appear, testify and produce records. Court may permit discovery and may forbid any person from transferring, disposing or interfering with property. (R.C.P. 64[c][1], [2], [3]).

Body Execution.

None.

See topic 8.02 Attachment and category 5 Civil Actions and Procedure, topic 5.03 Appeal and Error.

8.06 EXEMPTIONS:

Utah Exemptions Act exempts from execution debtor’s homestead and several enumerated articles of personal property, in some instances limited as to value. (UCA 78B-5-501 to -513).

Substitution.

No provision.

Debt Cancellation Agreements.

Commissioner may authorize depository institution to issue debt cancellation or suspension agreement (UCA 7-1-324[2]), where debtor and creditor enter agreement and where, for separate consideration, creditor agrees to waive or suspend all or part of debt payment in event of accident, sickness, or unemployment (UCA 31A-21-109[1][b]).

Debts Against Which Exemptions Not Allowed.

Subject to provisions of Utah Uniform Consumer Credit Code, creditor may levy against exempt property to enforce claims for alimony, support, or maintenance; unpaid earnings of up to one month’s compensation or full-time equivalent of one month’s compensation for personal services of employee; or state or local taxes. (UCA 78B-5-508[1][a]). Creditor may levy against exempt property to enforce claim for: (1) Purchase price of property or loan made that enabled individual to purchase property; (2) labor or materials furnished to make, repair, improve, preserve, store or transport specific property; and (3) special assessment imposed to defray costs of public improvement benefiting property. (UCA 78B-5-508[c]).

Waiver of Exemption.

Waiver of exemptions executed in favor of unsecured creditor before levy on individual’s property is unenforceable. (UCA 78B-5-509).

Necessity of Claiming Exemption.

If declaration of homestead exemption not filed or served as required, title passes to purchaser upon execution free and clear of all homestead rights. (UCA 78B-5-504[3]).

Earnings.

Utah Uniform Consumer Credit Code provides that garnishment of earnings during pay period cannot exceed lesser of 25% of disposable earnings for pay period or amount by which disposable earnings exceed 30 hours per week times Federal minimum hourly wage. (UCA 70C-7-103[2]). No execution by garnishment before judgment. (UCA 70C-7-102). See category 3 Business Regulation and Commerce, topic 3.11A Consumer Credit. Alimony exempt to extent necessary for support of individual and dependents. (UCA 78B-5-505[1][a][vii]).

Life Insurance.

Proceeds of insurance accruing as result of bodily injury of individual or of wrongful death or bodily injury of another individual of whom individual was or is dependent are exempt to extent that those proceeds are compensatory. (UCA 78B-5-505[1][a][x]). Proceeds or benefits of life insurance payable to debtor or any trust of which debtor is beneficiary upon death of spouse or children of debtor and proceeds and benefits of life insurance policy paid or payable to spouse or children of debtor or any trust of which spouse or children are beneficiaries upon debtor's death are exempt if policy has been in existence uninterrupted for one year. (UCA 78B-5-505[1][a][xi], [xii]). Proceeds and avails of unmatured life insurance contracts owned by debtor or any revocable grantor trust created by debtor are exempt except for payments made on contract during year immediately preceding creditor's levy or execution. (UCA 78B-5-505[1][a][xiii]). Any benefits due to disability, illness, or unemployment are also exempt. (UCA 78B-5-505[1][a][iii]).

8.07 FORECLOSURE:

See category 20 Mortgages, topic 20.04 Mortgages of Real Property.

8.08 FRAUDULENT SALES AND CONVEYANCES:

Uniform Fraudulent Transfer Act adopted (UCA 25-6-1 to -14) and replaces Uniform Fraudulent Conveyance Act. Fraudulent transfer not voidable against person who took in good faith and for reasonably equivalent value or against any subsequent transferee or obligee. (UCA 25-6-9[1]).

Uniform Commercial Code adopted. (Tit. 70A). See category 3 Business Regulation and Commerce, topic 3.09 Commercial Code.

Remedies.

Creditor may obtain avoidance of transfer or obligation, attachment against property of transferee, injunction against further disposition by debtor or transferee, appointment of receiver to take charge of asset transferred, or any other relief circumstances may require. (UCA 25-6-8).

Bulk Sales.

Uniform Commercial Code applies. See category 3 Business Regulation and Commerce, topic 3.09 Commercial Code.

8.09 GARNISHMENT:

(R.C.P. 64, 64A and 64D).

Writ of garnishment available to seize property of defendant in possession or under control of person other than defendant, after final judgment or after claim filed and prior to judgment. (R.C.P. 64D[a].)

Property Which May Be Reached.

Property subject to garnishment includes but is not limited to non-exempt real and personal property, tangible and intangible property, right to property whether due or to become due, and obligation of third person to perform for defendant. (R.C.P. 64[a][9]).

Jurisdiction.

Court in which action filed or court from which execution of judgment may be issued. (R.C.P. 64[b], [d]).

Proceedings to Obtain.

Prejudgment writ available after claim filed and before judgment only upon written court order, upon filing motion, security as ordered by court and affidavit, and after notice and hearing. (R.C.P. 64A[a], [b], [e]). Affidavit must state facts showing following grounds for relief: (1) Defendant indebted to plaintiff; (2) action upon contract or against non-resident defendant or against foreign corporation not qualified to do business in state; (3) payment of claim not secured by lien upon property in state; (4) garnishee possesses or controls property of defendant; (5) plaintiff has attached garnishee fee established by UCA 78A-2-216; (6) property not earnings and not exempt from execution; (7) writ not sought to hinder, delay or defraud creditor of defendant; (8) substantial likelihood that plaintiff will prevail on merits of underlying claims; and (9) at least one of following: defendant avoiding service of process; or defendant has, or is about to have assigned, disposed of or concealed property with intent to defraud creditors; or defendant has left, or is about to leave state with intent to defraud creditors; or defendant has fraudulently incurred subject obligation; or property will materially decline in value; or plaintiff has ownership or special interest in property; or probable cause of losing remedy unless court issues writ. (R.C.P. 64A[b], [c] and 64D[b]).

After Entry of Judgment.

Application for post-judgment writ of garnishment must state: (1) If known, nature, location, account number and estimated value of property and name, address and phone number of person holding property; (2) whether any of property consists of earnings; (3) amount of judgment and amount due on judgment; (4) name, address and phone number of any person known to plaintiff to claim interest in property; (5) that plaintiff has attached garnishee fee established by UCA 78A-2-216. (R.C.P. 64D[c]).

Exceptions to Sureties.

Former provision repealed in 2004.

Answer of Garnishee.

Writ must direct garnishee to complete following within seven business days of service of writ upon garnishee: (1) Answer interrogatories under oath or affirmation; (2) serve answers on plaintiff; (3) serve writ, answers, notice of exemptions and two copies or reply form upon defendant and any other person shown by records of garnishee to have interest in property; and (4) file answers with court clerk. (R.C.P. 64D[g]). Within ten days after service of answers or amended answers, plaintiff or defendant may file and serve upon garnishee reply to answers and request hearing. (R.C.P. 64D[h]). Garnishee who acts in accordance with rule, writ or court order released from liability, unless answers to interrogatories successfully controverted. (R.C.P. 64D[j][1]). If garnishee fails to comply, court may order garnishee to appear and show cause why garnishee should not be ordered to pay just amounts, including value of property or balance of judgment, whichever is less, and reasonable costs and attorney's fees incurred as result of garnishee's failure. (R.C.P. 64D[j][2]).

Practice.

Garnishee must not deliver property until property is due defendant. Unless writ directs otherwise, garnishee must retain property until 20 days after service by garnishee. If garnishee served with reply within that time, garnishee must retain property and comply with court order entered after hearing on reply. Otherwise, garnishee must deliver property as provided in writ. (R.C.P. 64D[i]). If property secures payment of debt to garnishee, property need not be applied at that time but writ remains in effect, and property remains subject to being applied upon payment of debt. (R.C.P. 64D[k]). After final judgment, plaintiff may obtain writ of continuing garnishment against any non exempt periodic payment. (R.C.P. 64D[l]).

Adverse Claims.

Any person claiming interest in property has same rights and obligations as defendant. Any claimant named by plaintiff and served must exercise those rights and obligations within same time allowed defendant. Any claimant not named by plaintiff and not served with writ and accompanying papers may exercise those rights and obligations at any time before property sold or delivered to plaintiff. Court may order any named claimant joined as defendant in interpleader. Plaintiff must serve order on claimant and claimant is thereafter defendant to action and must answer within ten days and set forth any claim or defense. (R.C.P. 64[e][1], [2]).

Judgment.

Former provision repealed in 2004.

Earnings.

Maximum portion of disposable earnings of individual subject to seizure is lesser of: (1) 50% of defendants disposable earnings for writ to enforce payment of judgment for failure to support dependent children or 25% of defendant's disposable earnings for any other judgment; or (2) amount by which defendant's disposable earnings for pay period exceeds number of weeks in that pay period multiplied by thirty times federal minimum hourly wage prescribed by Fair Labor Standards Act in effect at time earnings payable. (R.C.P. 64D[a][1], [2]).

See topics 8.02 Attachment, 8.03 Creditors' Suits, and 8.05 Executions.

8.10 HOMESTEADS:

Homestead, which may be claimed in primary personal residence, is exempt from judicial lien and from levy, execution, or forced sale, with some exceptions. (UCA 78B-5-503).

Limitation of Value.

Individual: $5,000 if property is not primary personal residence and $20,000 if property is primary personal residence; joint: $10,000 exemption per household if property is not primary personal residence and $40,000 exemption per household if property is primary personal residence. (UCA 78B-5-503[2]).

Limitation of Area.

None.

Debts or Liabilities Against Which Exemption Not Available.

Exemption not available against statutory liens for property taxes and assessments on property, security interests in property, judicial liens for debts created for purchase price of such property, judicial liens obtained on debts created by failure to provide support or maintenance for dependent children, and consensual liens on debts created by mutual contract. (UCA 78B-5-503[3]). Water rights exempt from execution to extent used to supply property with domestic or irrigation water but not from assessments and calls by entity issuing water rights. (UCA 78B-5-503[4]).

Designation of Homestead.

Individual may select and claim homestead with county recorder in county or counties in which property located. Declaration must contain: (1) Statement that claimant is entitled to exemption, and, if claimant is married, statement that claimant's spouse has not filed declaration of homestead; (2) description of property; (3) estimated cash value of property; and (4) statement specifying amount of homestead claimed and stating name, age, and address of any spouse and dependents claimed to determine value of homestead. (UCA 78B-5-504[1[2]]).

Claim of Exemption may be made by serving signed and acknowledged declaration of homestead upon sheriff or other officer conducting execution prior to time stated in notice of such execution. (UCA 78B-5-504[1]).

Waiver of Exemptions.

Waiver executed in favor of unsecured creditor before levy on individual's property is unenforceable. (UCA 78B-5-509).

Selection.

Sale and disposition of one homestead does not prevent selection or purchase of another. (UCA 78B-5-03[6]). In claim or action by Internal Revenue Service, homestead exemption on real property in this state is considered property right. (UCA 78B-5-503[7]).

Loss of Exemption.

If declaration of homestead is not filed or served as provided, title passes to purchaser upon execution free and clear of all homestead rights. (UCA 78B-5-504[3]).

Alienation or Encumbrance.

If individual is married, no conveyance of or security interest in or contract to convey or create security interest in property recorded as homestead prior to time of such conveyance, security interest, or contract is valid, unless both husband and wife join in execution of conveyance, security interest, or contract. (UCA 78B-5-504[4]).

Proceeds of Sale.

When homestead is conveyed by owner of property, conveyance may not subject property to any lien to which it would not be subject in hands of owner; and proceeds of any sale, to amount of exemption existing at time of sale, are exempt from levy, execution, or other process for one year after receipt of proceeds by person entitled to exemption. (UCA 78B-5-503[5]).

Rights of Surviving Spouse and Family.

See categories 13 Estates and Trusts, topic Executors and Administrators, subhead Allowances; Property, topics Deeds and Real Property; Family, topic Husband and Wife.

8.11 JUDGMENT NOTES:

See category 3 Business Regulation and Commerce, topic 3.02 Bills and Notes.

8.12 LEVY:

See topics 8.02 Attachment, 8.05 Executions.

8.13 LIENS:

Following liens are provided for by statute: Feeding and caring for animals (UCA 38-2-1); attorney's judgment liens (UCA 38-2-7); claim against decedent's estate (UCA 75-3-814); lien on real estate for judgment docketed before July 1, 1997 and for judgment rendered or recorded on or after July 1, 1997 recorded in Registry of Judgments of district court in which property located. (UCA 78B-5-202; UCA 78B-5-201); hotel and boarding house keepers (UCA 38-2-2); hospital liens on recovered damages (UCA 38-7-1); inheritance tax liens (UCA 59-11-110); lessor's lien (UCA 38-3-1); lien for oil and gas severance tax (UCA 59-5-108); lien for mining severance tax (UCA 59-5-208); lien for labor or services bestowed on personal property (UCA 38-2-3; UCA 38-2-3.1); lien for common condominium expenses (UCA 57-8-20); lien on property when selling or quitting business for unpaid sales tax (UCA 59-12-112); lien for expenses incurred in plugging of wasting well (UCA 73-2-21); lien for dry cleaning and laundry services (UCA 38-2-3.1); repair of shoes (UCA 38-2-3.1); tax liens on oil and gas (UCA 40-6-14[5][b]); child support lien (UCA 62A-11-312.5); lien for rent and labor on personal property located at self-service storage facility (UCA 38-8-2); lien for federal taxes (UCA 38-6-1); lien for judgments of U.S. district courts (UCA 38-5-1); liens for contractors and subcontractors (UCA 38-1-3); mold liens (UCA 13-31-101 et seq.); oil, gas, and mining liens (UCA 38-10-101); and aircraft liens (UCA 38-13-101).

Uniform Commercial Code (UCA 70A-1a-101 et seq.).—See category 3 Business Regulation and Commerce, topic 3.09 Commercial Code.

Waiver, Loss or Extinguishment.

Waiver of rights or privileges may not be varied by agreement. (UCA 38-1-29).

Enforcement.

Certain liens on personal property may be foreclosed after at least 30 days notice to property owner and others claiming interest in property by sale of liened property, subject to provisions of statute. (UCA 38-2-4). Lien claimant must give 30 days notice to person against whom lien is filed; failure to give notice precludes award of costs and attorneys' fees. (UCA 38-12-101 et seq.).

Wrongful Lien.

Person entitled to record mechanic's lien, who intentionally causes claim of lien against property to be recorded or filed with intent to cloud title, to exact from owner more money than due, or to procure unjustified advantage is guilty of Class B misdemeanor. (UCA 38-1-25). Lien claimant who causes wrongful lien to be recorded against real property is liable for actual damages. (UCA 38-9-4[1]). If lien claimant refuses to correct wrongful lien within ten days from date of written request, person is liable for greater of $3,000 or treble actual damages, and reasonable attorneys' fees and costs. (UCA 38-9-4[2]). Person who records or files wrongful lien against real property, with reason to know document is forged, groundless or false, is liable to owner for greater of $10,000 or treble actual damages, and reasonable attorneys' fees. (UCA 38-9-4[3]). Criminal penalty may be third degree felony, if person had no reasonable basis to believe he had interest in property. (UCA 76-6-503.5[2], [3]). Any person who believes that he or she is victim of wrongful lien may file written petition for civil wrongful lien injunction against person seeking lien. (UCA 38-9a-201).

Mechanics' Liens.

(UCA 38-1-1 et seq.). Contractors, subcontractors, and all persons per forming any services or furnishing or renting any materials or equipment to be used on construction or repair of any structure, or improvement upon land (except any public building, structure or improvement), have lien upon property upon which they have rendered service or furnished or rented materials or equipment to extent owner or lessee may have interest in real estate, except as barred by UCA 38-11-107. (UCA 38-1-3). Includes also licensed architects, engineers, and artisans who have furnished designs, plats, plans, maps, drawings, estimates of cost, surveys, or other like professional service. (UCA 38-1-3). No alteration of any contract may affect any such lien.

Liens provided for are preferred to any lien, mortgage, or other encumbrances which may have attached subsequent to time when building, improvement, or structure was commenced, work done, or materials commenced to be furnished, also to any prior lien or encumbrance of which lien holder had no notice and which was not recorded. (UCA 38-1-5). No attachment, garnishment, or levy under execution upon money due original contractor from lien of subcontractor or materialman, and no garnishment, attachment, or levy upon money due to subcontractor or materialman from contractor is valid against lien of laborer employed by day or piece. (UCA 38-1-6).

Person claiming lien must file with county recorder of county in which property is located written notice to hold and claim lien within 180 days after date of final completion of original contract if no notice of completion filed; or 90 days after date of notice of completion filed. (UCA 38-1-7[1][a][i][A], [B]). Final completion of original contract defined. (UCA 38-1-7[1][a][ii]). If subcontractor performs substantial work after applicable dates established in UCA 38-1-7(1)(a)(i)(A) and (B), subcontractor's subcontract is considered original contract for determining listed events. (UCA 38-1-7[1][b]). Notice in UCA 38-1-7(1)(a) must include required information. (UCA 38-1-7[2][a]). Substantial compliance is sufficient. (UCA 38-1-7[2][b]). Within 30 days, lien claimant must deliver notice by certified mail to owner. (UCA 38-1-7[3]). Written waiver or impairment of lien right enforceable under certain circumstances. (UCA 38-1-39).

Enforcement.

Lien claimant must file to enforce lien within 180 days from day on which lien claimant filed notice of claim. (UCA 38-1-11[2]). Burden of proof is on lien claimant to show actual knowledge. (UCA 38-1-11[3][b]). Lien under Tit. 38 C. 1 is automatically and immediately void if action to enforce lien is not filed within time required. (UCA 38-1-11[4][a]).

Liens are foreclosed by action. Court causes property to be sold in satisfaction of liens and costs as in foreclosure of mortgages and such sale is subject to right of redemption of owner and creditors as in case of execution sale. If proceeds of sale not sufficient to satisfy whole amount of lien, then proceeds must be paid in order designated. (UCA 38-1-15). (See topic 8.05 Executions.) Where different liens are claimed against same property liens or classes of liens are satisfied in following order: (1) Subcontractors who were laborers or mechanics working by day or piece, but without furnishing materials herefor; (2) all other subcontractors and all material men; (3) original contractors. (UCA 38-1-14; UCA 38-1-15).

Contractors' Bonds.

(UCA 63G-6-102 et seq.). Contractor undertaking construction or alteration of, or addition to any public building, work, or improvement, must furnish bond (amount not designated in statute) for faithful performance of contract and prompt payment to all persons supplying labor or material used in prosecution of the work. Bonds are binding on parties upon execution of contract. Performance bond is amount equal to 100% of price specified in contract. (UCA 63G-6-505). Failure to require bond renders state, county, municipal corporation, etc., liable. Bidder on work materials or supplies for state or political subdivision may be required to furnish security, not to exceed 5% of amount bid, which will be forfeit if bid is accepted and bidder refuses to sign contract. (UCA 63G-6-504).

In contract involving $50,000 or more for construction, alteration, or repair of or addition to any building, owner of land, before contract is awarded, must obtain from contractor bond in sum equal to contract price unless owner is barred from filing lien under UCA 38-11-107. (UCA 14-2-1). Unless barred, failure to obtain such bond renders owner personally liable to all persons furnishing material or performing labor. (UCA 14-2-2).

Aircraft Lien.

Repairman who makes repairs, alterations, or performs labor on aircraft at request of owner or other person entitled to possession may obtain lien on aircraft for reasonable value of labor performed and materials furnished. (UCA 38-13-201[1]). Repairman may retain possession of aircraft until amount due is paid. (UCA 38-13-201[2]). Repairman must file lien with Federal

Aviation Administration within 90 days of last day on which repairman makes repairs, alterations, or performs labor on aircraft. (UCA 38-13-201[3]). Lien is effective beginning last day on which repairman performs labor on aircraft, notwithstanding day on which repairman files lien with federal aviation administration. (UCA 38-13-201[3][c]).

Attachment Lien.

No statutory lien.

Attorney's Lien.

See category 18 Legal Profession, topic 18.01 Attorneys and Counselors.

Collateral Security.

See topic 8.15 Pledges.

Execution Lien.

See topic 8.05 Executions.

Carriers Lien.

See category 3 Business Regulation and Commerce, topic 3.08 Carriers.

Common Carrier's Lien.

(UCA 38-4-4). When railroad company or other common carrier, except express company, has transported any baggage or freight to place of consignment within this state, and owner, consignee, or person entitled to receive same must omit, for period of sixty days after arrival of bag or freight, to accept and remove same and pay charges thereon, it is lawful for carrier to deliver freight for storage. (UCA 38-4-4).

Condominium Lien.

See category 21 Property, topic 21.16 Real Property.

Insurer's Lien.

No statutory lien.

Judgment Lien.

See category 5 Civil Actions and Procedure, topic 5.15 Judgments.

Landlord's Lien.

See category 21 Property, topic 21.10 Landlord and Tenant.

Lessor's Lien.

See category 21 Property, topic 21.10 Landlord and Tenant.

Liens of Exempt Property.

See topic 8.06 Exemptions.

Liens on Homestead.

See topic 8.10 Homesteads.

Real Estate Mortgage Lien.

See category 20 Mortgages, topic 20.04 Mortgages of Real Property.

Tax Lien.

See category 22 Taxation, topics 22.01 Administration, subhead Tax Liens; Property Taxes, subhead Liens.

Warehouseman’s Lien.

(UCA 70A-7a-209). Warehouse has lien against bailor on goods covered by warehouse receipt or storage agreement or on proceeds in its possession for charges for storage or transportation. Warehouse may also reserve security interest against bailor for maximum amount specified on receipt for charges other than those specified in this section. Warehouse’s lien or security interest also effective against person that entrusted bailor with possession of goods, but is not effective against certain other persons. (UCA 70A-7a-209[1], [2], [3]).

8.14 MECHANICS’ LIENS:

See topic 8.13 Liens.

8.15 PLEDGES:

Common law rules apply to pledges. It is customary to hold sales by advertisement.

Person who signs security agreement or guaranty agreement with manufacturer or wholesaler may not be required to pledge or encumber his personal assets in value in excess of amount of indebtedness secured. (UCA 13-14a-5[2]). If any manufacturer or wholesaler fails to comply with UCA 13-14a-5(2), then guaranty or security agreement affected is considered canceled or terminated. (UCA 13-14a-5[3]).

Title Loans.

Title Lending Registration Act passed. (UCA 7-24-101 et seq.). Persons who make title loans must register. (UCA 7-24-201[1][a]). Illegal to operate mobile facility to extend title loans. (UCA 7-24-201[1][b]). Title lender may not rollover title loan unless person receiving title loan requests rollover of loan. May not extend more than one title loan on any vehicle at one time. May not extend title loan that exceeds fair market value of vehicle. Loans may not be extended without regard to ability of borrower to repay loan. (UCA 7-24-202[3]). Sole remedy of lender in case of default is to seek repossession and sale of property secured by title loan, and seller must return any excess proceeds to borrower. (UCA 7-24-204). Depository institutions not subject to requirements of this chapter. (UCA 7-24-305).

Remedies of Pledgee.

Covered by Uniform Commercial Code—Secured Transactions. (UCA 70A-9a-101 et seq.).

Uniform Commercial Code adopted. See category 3 Business Regulation and Commerce, topic 3.09 Commercial Code.

8.16 RECEIVERS:

(R.C.P. 66).

Jurisdiction.

Court may appoint receiver to wind up and liquidate. Court must hold hearing after notice to all parties before appointing receiver. Court appointing receiver has exclusive jurisdiction over corporation and all of its property wherever located. (UCA 16-10a-1432[1]).

Proceedings.

Court may appoint receiver: (1) In any action in which property is in danger of being lost, removed, damaged or is insufficient to satisfy judgment, order or claim; (2) to carry judgment into effect, to dispose of property according to judgment and to preserve property during pendency of appeal; (3) when writ of execution has been returned unsatisfied or when judgment debtor refuses to apply property in satisfaction of judgment; (4) when corporation has been dissolved or is insolvent or in imminent danger or insolvency or has forfeited its corporate rights; or (5) in all other cases in which receivers have been appointed by courts of equity. (R.C.P. 66). In action to dissolve corporation, court may appoint receiver. (UCA 16-10a-1432[1]). Same applies as to liquidation of nonprofit corporation. (UCA 16-6a-1416). Utah case law suggests there is no independent cause of action for appointment of receiver. (82 Utah 117, 22 P.2d 164).

Eligibility and Competence.

No party, attorney or person interested may be appointed without written consent of all parties. (R.C.P. 66[b]).

Qualification.

Oath and bond in sum fixed by court are required. (R.C.P. 66[c][d]).

Powers and Duties.

Receiver has, under direction of court, power to bring and defend actions, to seize property, to collect, pay and compromise debts, to invest funds, to make transfers, and take other action as court may authorize. (R.C.P. 66[e]).

Investments.

Funds may be invested upon court order.

Compensation.

Court may order compensation paid and expense disbursements or reimbursements made from assets of corporation or proceeds from sale of assets to: receiver, custodian, or receiver’s or custodian’s attorney. (UCA 16-6a-1416[5]; UCA 16-10a-1432[5]).

Discharge.

Action in which receiver has been appointed must not be dismissed except by order of court.

8.17 REDEMPTION:

See category 20 Mortgages, topic 20.01 Chattel Mortgages.

8.18 SUPPLEMENTARY PROCEEDINGS:

See topic 8.05 Executions.

8.19 TRUSTEE PROCESS:

See topic 8.09 Garnishment.

8.20 USURY:

See category 3 Business Regulation and Commerce, topic 3.19 Interest.

9 DISPUTE RESOLUTION

9.01 ALTERNATIVE DISPUTE RESOLUTION:

Mandatory Dispute Resolution.

Consumer's remedies limited under automobile lemon law if consumer fails to resort to manufacturer's established informal dispute settlement procedures under 16 C.F.R., Part 703. (UCA 13-20-7). Medical malpractice claims must be submitted to prelitigation review panel. (UCA 78B-3-416[1]). Request for prelitigation panel review must be filed within 60 days after service of notice to commence legal action. (UCA 78B-3-416[2]). Specific requirements apply for arbitration agreements between health care providers and patients. (UCA 78B-3-421).

Voluntary Dispute Resolution.

Program for referral of civil cases to alternative dispute resolution in Second, Third and Fourth Judicial District Courts. (UCA 78B-6-205; R. Judic. Admin. 4-510). Case proceeds to mediation unless within 30 days of mailing of notice, parties agree to nonbinding arbitration; one or more parties file statement requesting deferral to later date; or all parties opt out of program and agree to binding arbitration under Utah Uniform Arbitration Act (UCA 78B-11-101 et seq.) or Federal Arbitration Act (9 U.S.C. § 1). (R. Judic. Admin. 4-510[6][A][i]). Party opting out of program must state that party has reviewed program videotape; discussed proceeding under program with legal counsel; and determined that participation in program should be deferred. (R. Judic. Admin. 4-501[6][A]). Roster of providers established, but parties may select persons not on roster. (R. Judic. Admin. 4-510[11][B]). Fees of provider equally divided and paid in advance by parties. (R. Judic. Admin. 4-510[12]).

Minimum procedures for arbitration in experimental program (UCA 78B-6-206): Award must be in writing and may, in discretion of arbitrators, state reasons for award. Award is final and enforceable unless party demands trial de novo within 30 days after filing of award. Party may file written request with arbitrators to modify award for evident miscalculation of figures or description of persons or property, failure to dispose of all issues presented, or purporting to resolve issues not submitted. Award need not be filed with court unless rights of third parties affected. At any time, parties may stipulate to referral of case to arbitration pursuant to Utah Uniform Arbitration Act (UCA 78B-11-101 et seq.) or Federal Arbitration Act (9 U.S.C. § 1 et seq.). See topic 9.02 Arbitration and Award.

Minimum procedures for mediation in program (UCA 78B-6-207, -208): Unless otherwise agreed, only parties, their representatives, and neutral admitted to mediation sessions. (UCA 78B-6-207[2]). Recording of sessions is disallowed. (UCA 78B-6-208[1]). Cannot compel disclosure of oral or written communications prepared for, or expressed, in course of proceedings. Includes memoranda, notes, records, or work product of mediator, party, or its representative. (UCA 78B-6-208[4]). Information disclosed or obtained in violation of foregoing may not be admitted into evidence in judicial proceeding between same parties. (UCA 78B-6-208). Settlement agreement may, but need not, be filed with court. (UCA 78B-6-207[3]).

Evidence about proceedings not subject to discovery and inadmissible at civil trial of same case or same issues between same parties. (UCA 78B-6-208[2]-[3]). Provider may not disclose or discuss information about proceedings to anyone, including judge to whom case is assigned. (UCA 78B-6-208[5]).

9.02 ARBITRATION AND AWARD:

Upon motion of any party showing existence of arbitration agreement, court will order parties to arbitrate. (UCA 78B-11-108). If arbitration agreement specifies procedure, it must be followed. (UCA 78B-11-112[1]). If no procedure specified or agreed method fails or cannot be followed, any party may move court to appoint arbitrator. (UCA 78B-11-112[1]).

Procedure.

Notice of arbitration must be served not fewer than five days before date of hearing (UCA 78B-11-116[3]). Each party in proceeding is entitled to be heard, to present evidence material to controversy, and to cross-examine witnesses appearing at hearing. (UCA 78B-11-116[4]). Parties may be represented by attorney. (UCA 78B-11-117).

Form and Requisites of Submission.

Agreement to submit existing or future controversy to arbitration is valid, enforceable, and irrevocable, except upon grounds existing at law or equity to set aside agreement. (UCA 78B-11-107[1]).

Contracts to Arbitrate Future Disputes.

Contracts to submit future disputes to arbitration are valid. (UCA 78B-11-107[1]).

Rescission.

Agreement to submit existing controversy is irrevocable without consent of all parties, except upon grounds existing at law or equity to set aside agreement. (UCA 78B-11-107[1]).

Powers of Arbitrators.

Arbitrators appoint time and place for hearing and notify parties. May adjourn from time to time as necessary, and may for good cause shown by either party on application postpone hearing to date not beyond time fixed for making award. If after reasonable notice, any party neglects to appear, arbitrators may proceed to hear and determine controversy upon evidence produced before them. (UCA 78B-11-116[3]). Arbitrators may administer oaths and issue subpoenas for attendance of witnesses or production of documents (UCA 78B-11-118[1]). Arbitrators may also order party to provide any other party with any information arbitrator decides is appropriate under circumstances or use requests for discovery. (UCA 78B-11-118[3], [4]).

Award and Enforcement Thereof.

Arbitration award must be in writing and signed by arbitrators who join in award. Notice and copy of award must be provided to each party. (UCA 78B-11-120[1]). Arbitration award must be made within time set by agreement, or court order. Parties may, at any time, by written agreement, extend time for award. (UCA 78B-11-120[2]).

Judgment on Award.

Upon motion by any party to arbitration proceeding for confirmation of award, court must confirm award unless award is modified, corrected, or vacated. (UCA 78B-11-123). Award may be corrected or modified by court after notice and hearing for evident mistake in calculation or description, award made on matters not submitted to arbitrators, or imperfections of form not affecting merits. (UCA 78B-11-121, -125). Court may vacate award when procured by corruption, fraud, or other undue means; for corruption or partiality in arbitrators; for misconduct by arbitrators in exercise of powers; if arbitrator exceeds powers; if there was no agreement to arbitrate; or for inadequate notice. (UCA 78B-11-124). Notice of motion to vacate, modify, or correct award must be given to all parties within 20 days after notice of award is received by moving party. (UCA 78B-11-121[2]). Agreement to arbitrate confers exclusive jurisdiction on court to enter judgment on award. (UCA 78B-11-127[2]).

Mandatory Arbitration.

For labor disputes between firefighters and city, town, or county after 30 days of unsuccessful negotiations. (UCA 34-20a-7).

Arbitration in Third Party Motor Vehicle Accident Cases.

Person injured in motor vehicle accident may elect to submit all third party bodily injury claims to arbitration by filing notice of submission of claim to binding arbitration in district court. (UCA 31A-22-321).

10 DOCUMENTS AND RECORDS

10.01 ACKNOWLEDGMENTS:

No uniform law adopted. See, however, subhead Persons in or with U.S. Armed Forces, infra.

May be taken by following officers (UCA 57-2a-1 et seq.):

Within State.

Notary public, judge or court clerk having seal, county clerk or county recorder. (UCA 57-2a-3[1]). Maximum fee is $5 for each acknowledged signature. (UCA 46-1-12).

Outside State but within U.S.

Authorized notary public; judge, clerk or deputy clerk of any court where acknowledgment performed; authorized officer of foreign service of U.S.; consular agent; or any person authorized by regulation of U.S. Department of State. (UCA 57-2a-3[2]).

Outside U.S.

Same as Outside State but within U.S., supra.

Persons in or with U.S. Armed Forces.

Commissioned officer. Statutory provision similar to § 11 of Recognition of Acknowledgments Act. (UCA 57-2a-3[2][d]).

General Requirements as to Taking.

Definition of phrase “acknowledged before me,” as used in certificate means officer knew, or had satisfactory evidence of identity of person acknowledging document. (UCA 57-2a-2[1][d]). See also topic 10.03 Notaries Public.

General Requirements of Certificate.

Certificate of acknowledgment is acceptable if used by authorized individual and if certificate is in form authorized by laws of state of Utah or place where acknowledgment taken or contains words “acknowledged before me.” (UCA 57-2a-6). Officer taking acknowledgment must cause certificate to be endorsed on or attached to document. (UCA 57-2a-5).

Married women acknowledge like other persons; no special requirements.

Attorneys in Fact.

No statutory provision.

Corporations.

No statutory provision.

Foreign Acknowledgments.

Proof of authority of person taking acknowledgment under laws of foreign country is sufficient if: Foreign service officer of U.S. or diplomatic or consular officer of foreign country certifies that person taking acknowledgment is so authorized; official seal of person taking acknowledgment is affixed to document; or title and indication of authority to take acknowledgment of person appears in digest of foreign law or other source of similar information. (UCA 57-2a-4).

Effect of Acknowledgment.

Entitles instrument to be recorded. (UCA 57-3-101[1]). Certificate of acknowledgment or proof of instrument (except will) is prima facie evidence of execution (5 Utah 205, 14 P. 338), and may be evidence of delivery and thus instrument's validity (695 P.2d 102).

Proof by Subscribing Witness.

For purpose of recording there may be proof by subscribing witness instead of certificate of acknowledgment. Such witness must be known to officer or his identity proved. (UCA 57-2-10 et seq.).

Authentication.

See subheads General Requirements as to Taking and General Requirements of Certificate, supra.

The following Forms are statutory:

Forms

Statutory Short Form of Acknowledgment.

STATE OF ____________________

COUNTY OF __________________ } ss.

The foregoing instrument was acknowledged before me this (date) by (person acknowledging, title, or representative capacity, if any).

____

(Signature of Person Taking Acknowledgment)

Title

(Seal)

My commission expires:

____

Residing at:

____

The phrases “My commission expires” and “Residing at” may be omitted if this information is included in the notarial seal. (UCA 57-2a-7).

Validating Acts.

Recorded document imparts notice of its contents regardless of any defect, irregularity, or omission in execution, attestation, or acknowledgment. (UCA 57-4a-2).

Alternative to Acknowledgment or Proof.

Documents may be self authenticated by affixing signature to document under penalty of perjury. (UCA 78B-5-705).

10.02 AFFIDAVITS:

(UCA 78B-5-701 et seq.).

Within State.

Before any judge, clerk of any court, justice court judge, or notary public. (UCA 78B-5-701).

Outside State but Within United States.

Before a commissioner appointed by the Governor of Utah, any notary public, or judge or clerk of court having seal. (UCA 78B-5-702).

Outside United States.

Before an ambassador, minister, consul, vice consul, or consular agent of U.S., or before any judge of a court of record having a seal in such foreign country. (UCA 78B-5-703).

Authentication.

If taken before judge or court outside of this state, genuineness of signature of judge, existence of court, and that such judge is member thereof, must be certified by clerk of court, under its seal. (UCA 78B-5-704).

General Requirements as to Administration.

No statutory provisions.

General Requirement of Jurat.

Affidavits must bear certificate authenticated by seal in which person authorized to administer oaths certifies that affiant personally appeared before officer and took oath or gave affirmation and subscribed his signature vouching for veracity of affidavit. (UCA 46-1-2[5]).

Uses.

To verify pleading or paper in special proceeding; to prove service of summons, notice or other paper in action or special proceeding; to obtain provisional remedy, examination of witness, or stay of proceedings; to establish facts upon motion; any other case expressly provided for by code. (See, e.g., UCA 26-6b-5[2][a]; UCA 78B-3-206; UCA 38-1-11.)

Recording.

Affidavits affecting real property may be recorded in real property records of county recorder (UCA 57-1-1, UCA 57-3-102) and when so recorded give constructive notice of their contents (UCA 57-3-102). Recitals in recorded affidavits are presumed to be true. (UCA 57-4a-

4[1][j]).

Form.

No statutory form.

Alternative to Affidavit.

No statutory provision.

See topic 10.03 Notaries Public; category 5 Civil Actions and Procedure, topics 5.11 Depositions and Discovery; 5.13 Evidence, subhead Witnesses; 5.18 Pleading.

10.03 NOTARIES PUBLIC:

Qualification.

Must be 18 years or older, resident of state for at least 30 days, able to read and write English, submit application and pass examination, registered voter or have permanent resident status under § 245 of Immigration and Nationality Act, and endorsed by two registered voters of state. (UCA 46-1-3[2]). Must take oath and file $5,000 bond. (UCA 46-1-4[1]).

Disqualifications.

Notary may not perform notarial act if notary: (1) Is signer of or named in document that is to be notarized; (2) is named in document that is to be notarized, except in case of self-proved will or attorney listed in document only as representing another person named in document; (3) is connected with financial transaction in which notary is named; or (4) will directly receive real property transaction in which notary is named as grantor, grantee, mortgagor, mortgagee, trustor, trustee, beneficiary, vendor, vendee, lessor, or lessee. (UCA 46-1-7).

Authentication.

See topic 10.01 Acknowledgments, subhead Authentication.

Seal.

Notary must have official seal that is photographically reproducible; bears notary’s exact name as indicated on commission; includes words “notary public,” “State of Utah,” and “My Commission Expires (Date);” include facsimile of great seal of state; and include business or residence address (UCA 46-1-16[3][c]). Seal must be affixed near notary’s official signature, and must use purple ink. (UCA 46-1-16[2][c], [3][c]). If electronic document, no seal needed; all other informational requirements must be in electronic document. (UCA 46-1-16[7]).

Powers.

Notaries may perform following acts: (1) Acknowledgments; (2) copy certifications; (3) jurats; and (4) oaths or affirmations. (UCA 46-1-6).

Territorial Extent of Powers.

Notaries may act anywhere within state for term of four years. (UCA 46-1-3[4]).

Expiration of Commission.

Notary seal must contain words “notary public,” “state of Utah,” and “my commission expires on (commission expiration date).” (UCA 46-1-16[3][c][iii]).

Fees.

Acknowledgments, not more than $5; oaths and affirmations without signature, not more than $5 per person; jurats, not more $5 per signature; certified copies, not more than $5 per page. (UCA 46-1-12).

Commissioners of Deeds.

No statutory provision.

Officers of U.S. Armed Forces.

No general notarial powers. See topic 10.01 Acknowledgments, subhead Persons in or with U.S. Armed Forces.

Digital Signatures Act.

All applicable statutes repealed.

10.04 RECORDS:

County recorder has charge of records relating to property. (UCA 17-21-1). Uniform Commercial Code Adopted. (Title 70A). See category 3 Business Regulation and Commerce, topic 3.09 Commercial Code.

Recordable Instruments.

Each of following imparts notice to all persons of their contents: document executed, acknowledged and certified in manner prescribed by Title 57, c. 3; original document or certified copy of document complying with UCA 57-4a-3, whether or not acknowledged; and, each financing statement complying with UCA 70A-9a-502, whether or not acknowledged; from time of recording with appropriate county recorder. (UCA 57-3-102[1]). Security interests must be filed before they are perfected. Exemptions stated. (UCA 70A-9a-310). See category 3 Business Regulation and Commerce, topic 3.09 Commercial Code.

Place of Recording.

Place of recording is in office of recorder of county where property affected is located (UCA 57-3-101[1]) or where collateral is fixture (UCA 70A-9a-501[1][a]), or with Division of Corporations and Commercial Code in all other cases (UCA 70A-9a-501[1][b]). For list of Counties and County Seats see first page for this state in Volume containing Practice Profiles Section.

Requisites for Recording.

Document or instrument must contain certificate of acknowledgment or proof of execution. (UCA 57-3-101[1]). Instruments which affect real property must contain legal description of property to be recorded unless document is master form complying with UCA 57-3-202. (UCA 57-3-105). Property transfer instrument must contain names and addresses of grantees unless document is master form. (UCA 57-3-105[3]).

Recording Fees.

Specific fees enumerated in UCA 17-21-18.5. For any instrument not otherwise provided for, $10 for first page and $2 for each additional page, with added fee of $1 for each additional description. (UCA 17-21-18.5[1][b]).

See also particular topics for particular fees.

Recording Taxes.

See category 22 Taxation.

Foreign Conveyances or Encumbrances.

Document or certified copy of document may be recorded without acknowledgment if: (1) Executed under law existing at time of execution; (2) evidences or affects title to real property; and (3) issued under authority of another state, court of record, foreign government, or Indian tribe. (UCA 57-4a-3).

Effect of Record.

From date of record, subsequent purchasers, mortgagees and lienholders are charged with notice. (UCA 57-3-102[1]). However, unrecorded instrument affecting real estate is valid as between parties and as to all other persons having notice of document. (UCA 57-3-102[3]).

Torrens Act.

Not in force.

Transfer of Decedent's Title.

Receipt by distributee of personal representative deed or deed of distribution from personal representative affecting title to real property is conclusive evidence that distributee has succeeded to interest of estate. (UCA 75-3-908). In case of nonresident, title may be transferred in similar manner either by local personal representative (UCA 75-4-207) or if there is no local personal representative, by domiciliary foreign personal representative who has complied with UCA 75-4-204 (UCA 75-4-205).

Filing Under Commercial Code.

When collateral is or is to become fixture, filing is in office where mortgage on real estate concerned would be recorded. (UCA 70A-9a-501[1]). Filing fee with county recorder is same as recording fee. (UCA 70A-9a-525[3][a]). In all other cases filing is in office of Division of Corporations and Commercial Code. (UCA 70A-9a-501[1][b]).

Vital Statistics.

Records of births and deaths are filed with Department of Health Office of Vital Records and Statistics, and to local registrar (UCA 26-2-23[3]); records of marriages with county clerks (UCA 30-1-12).

Establishing Birth Records.

Upon filing of verified petition, district courts have authority to establish time and place of death or birth of person with no recorded certificates. (UCA 26-2-15[1]). Procedure for foreign-born adoptees. (UCA 26-2-28).

Fees.—Birth certificates $15, death certificates $13. Marriage license fees set by individual county, but certification summary of same available from Department for $9. Additional copies of same instrument $8. (http://silver.health.utah.gov/feeschedule.htm).

Access.

Every person has right to inspect and to take copy of public record. (UCA 63G-2-201[1]). All records are public unless otherwise expressly provided by statute. (UCA 63G-2-201[2], -301). Private, confidential and protected documents may be disclosed under certain circumstances. (UCA 63G-2-202).

Lis Pendens.

Immediately after filing complaint, in action for enforcement of lien or for partition of real property, plaintiff must file with county recorder notice of pendency of action. (UCA 38-1-11[3], 78B-6-1204[1]). All persons are deemed to have notice of action from time of filing. (UCA 78B-6-1204[2]). In any action affecting title to or right of possession of real property, parties may file notice of pendency of action with county recorder. Purchaser or encumbrancer affected by action deemed to have constructive notice of pendency of action against parties designated by real names. (UCA 78B-6-1303).

10.05 SEALS:

Uniform Commercial Code adopted. (UCA 70A-2-203). See category 3 Business Regulation and Commerce, topic 3.09 Commercial Code.

Corporate Seals.

No special provisions.

Effect of Seal.

Private or corporate seal not required on private writing. Seal has no special significance, negotiability of commercial paper unaffected, inoperative on sale contracts. Also see topics Acknowledgments (UCA 57-2, 57-2a) and Notaries Public (UCA 46-1-16).

10.06 TORRENS ACT:

Not in force.

10.07 VITAL STATISTICS:

See topic 10.04 Records.

11 EMPLOYMENT

11.01 EMPLOYER AND EMPLOYEE:

See topic 11.02 Labor Relations.

11.02 LABOR RELATIONS:

Department of Workforce Services has all policymaking functions, regulatory enforcement powers, rights, duties, and responsibilities affecting employers and employees except as provided in Utah Labor Code, Title 34A, and Labor in General, Title 34. (UCA 35A-1-103[1]).

New Hire Registry.

Department must maintain database containing names and social security numbers of most employees hired after Oct. 1, 1997. (UCA 35A-7-103). Employers must provide information on new hires to department within 20 days of hiring. (UCA 35A-7-104[2]).

Labor Commission Act.

Labor Commission is created with all policymaking functions, regulatory and enforcement powers, rights, duties, and responsibilities in Utah Labor Code, Title 34A, and Labor in General, Title 34. (UCA 34A-1-103[1]).

Hours of Labor.

Fair Labor Standards Act governs except where state law provides greater employee rights of protections. See Utah Minimum Wage Act. (UCA 34-40-101 et seq.). See also subhead Child Labor, infra.

Wages.

Payment must be paid in full within ten days of close of payroll period by checks or drafts convertible into cash on demand at full face value, or by electronic transfer to depository institution designated by employee. (UCA 34-28-3[b], [e]). If payday is Sat., Sun. or holiday, wages must be paid on day preceding. (UCA 34-28-3[c]). Wages to be paid regularly and at least semimonthly. (UCA 34-28-3[a]). If on yearly salary, payment may be on monthly basis, pay day to be on or before seventh of month following. (UCA 34-28-3[d]). Employee may elect to not have wages deposited by electronic transfer by filing written request with employer, with some exceptions. (UCA 34-28-3[3]). Employer may not designate depository institution for payment or deposit of check for wages. (UCA 34-28-3[3][c]). On discharge of employee, wages must be paid within 24 hours, and if not so paid after demand, wages continue for period not to exceed 60 days. (UCA 34-28-5[1]). On resignation of employee, wages and any deposit belonging to employee must be paid on next regular payday. (UCA 34-28-5[2]). Utah Minimum Wage Act adopted. (UCA 34-40-101 et seq.).

Public Works Wages.

Except when required by federal law, state may not require public works contractor to pay predetermined wage or benefits. (UCA 34-30-14[2]).

Minimum Wage.

Labor Commission sets minimum wage. (UCA 34-23-301). Increases to $7.25 per hour effective July 24, 2009. (http://www.dol.gov/esa/minwage/america.htm#Utah). Minors may be paid $4.25 per hour, as training wage, for first 90 days of employment. (http://www.dol.gov/dol/topic/youthlabor/wages.htm).

Child Labor.

No minor under 18 years of age may be employed in any hazardous occupation as defined by Fair Labor Standards Act except where closely supervised and authorized by Utah Labor Commission in writing. (UCA 34-23-201). No minor under 16 years of age may work during school hours without permission by school authorities (UCA 34-23-202[1]). Minors over 16 years of age may work in non-hazardous occupations and those which include use of motor vehicles. (UCA 34-23-203). Minors ten years or older may be employed in any occupation not determined harmful by division. (UCA 34-23-206).

Female Labor.

No special provisions.

Discrimination.

Utah Antidiscrimination Act. (UCA 34A-5-101 et seq.). Prohibits discrimination based on race, color, sex, pregnancy, childbirth, or pregnancy-related conditions, age (if individual is 40 years of age or older), religion, national origin, or disability. (UCA 34A-5-106[1]). Compulsory retirement at age 65 is permitted for bona fide executives in high policy-making positions if statutory prerequisites regarding retirement benefits are met. (UCA 34A-5-106[6]). Discrimination complaint requesting agency action must be filed within 180 days after alleged discriminatory employment practice occurred. (UCA 34A-5-107[1][c]). Complaints investigated by Division of Antidiscrimination and Labor. (UCA 34A-5-107[3]). Party may file written request for evidentiary hearing to review director’s determination and order within 30 days of order. (UCA 34A-5-107[4][c]). In any proceedings, division must present factual and legal basis for its determinations. (UCA 34A-5-107[6]). Procedures are exclusive remedy under state law for employment discrimination.

(UCA 34A-5-107[15]). Federal action for relief bars any proceeding before Division of Antidiscrimination and Labor on state claims. (UCA 34A-5-107[16]). Public officers and employees in military service not to be prejudiced thereby, but to be granted leave of absence. (UCA 39-3-1).

Preference.

Government employers must grant veteran's preference upon initial hiring to eligible veterans. (UCA 71-10-2[1]).

Labor Unions.

No employer, labor organization, etc., may require any person to become, remain, or refrain from becoming member of labor union, labor organization, or any other type of association. (UCA 34-34-7). Violations may be enjoined. (UCA 34-34-11, -12). Unions may not require contributions to certain political groups as condition of membership (UCA 20A-11-1403) or expend union dues for political purposes, except to establish or administer political fund or to communicate directly with members about political issue or candidate (UCA 20A-11-1404). Employee may direct, in writing, employer to deduct from employee's wages specified sum, not to exceed 3% per month, to be paid to labor organization designated by employee as union dues. (UCA 34-32-1[2][a]).

Labor Disputes.

Labor Relations Act, patterned after National Labor Relations Act, has been adopted. (UCA 34-19-1 et seq.). Administered by Labor Relations Board. (UCA 34-20-3).

No employee of employer whose employees are on strike or lockout may be deputized. (UCA 34-19-12). Blacklisting is forbidden. (UCA 34-24-1).

Employee may not be charged fee for physical examination. (UCA 34-33-1).

Employer may not discharge or threaten employee for attending deposition or hearing in response to subpoena. (UCA 78B-1-132[1]).

As to injunctions in labor disputes, see category 5 Civil Actions and Procedure, topic 5.14 Injunctions.

Workers' Compensation Law.

(UCA 34A-2-101 et seq.). Provisions are administered by Department of Workforce Services. Utah Administrative Procedures Act (UCA 63G-4-101 et seq.) does not govern initial determination of eligibility for benefits under workers' compensation or occupational disease disability compensation (UCA 31A-33-104[3]).

County, City, Town, and School District Employers.

Must secure payment of workers' compensation benefits for their employees either by: (1) Insuring with state workers' compensation fund; (2) insuring with stock corporation or mutual association authorized to transact business of workers' compensation insurance in this state; or (3) self-insuring under authority of department. (UCA 34A-2-201). Penalty of greater of $1,000 or treble avoided premium imposed on employer conducting business without securing payment of benefits. (UCA 34A-2-211[2][b]). Posting of notice of compliance with law required. (UCA 34A-2-204). Employer and its insurance carrier are responsible for compensation and payment of medical, nursing, hospital services and medicines, and funeral expenses for accidents arising in course of worker's employment. (UCA 34A-2-401[2]). Payment of benefits provided by Utah Occupational Disease Act, must commence within 30 calendar days after any final award by commission. (UCA 34A-2-401[3]).

Self-insured Employers and Carriers.

May adopt managed health care program. (UCA 34A-2-111[2]). Each carrier will maintain agent in state. (UCA 34A-2-113). Carriers may require, with certain conditions met, employers to establish workplace safety programs. (UCA 34A-2-111[3]). Employers who fail to establish safety programs may have premiums increased by 5%. (UCA 34A-2-111[4]).

Compliance with Utah Occupational Disease Act.

Failing employers liable to employees in civil action for personal injuries suffered, and such employers are deprived of defenses of fellow-servant rule, assumption of risk, and contributory negligence. (UCA 34A-2-207[1]). Proof of injury constitutes prima facie evidence of employer negligence, and employer has burden of showing freedom from negligence. (UCA 34A-2-207[2]). Employee may recover costs and attorneys' fees. (UCA 34A-2-207[4]).

Uninsured Employer Fund.

Created for purposes of paying workers' compensation benefits of insolvent employer. (UCA 34A-2-704[1]). State treasurer is custodian of Fund. (UCA 34A-2-704[2][c][i]). Fund is given by subrogation all rights of employee against employer's failure to pay. (UCA 34A-2-704[6]). Liability of state is limited to assets in Fund. (UCA 34A-2-704[12]). In any claim against employer by Fund, burden of proof is on employer objecting to claim. (UCA 34A-2-704[16][a]).

Exclusiveness of Remedy.

Right of employee to recover under Act is exclusive remedy against common law employer, including professional employer organization (UCA 34A-2-105[1], [2]), except recovery under Utah Occupational Disease Act, UCA 34A-3-101 et seq., or where employer is not insured as required by Act (UCA 34A-2-105, formerly UCA 35A-3-105 as interpreted in 770 P.2d 125). Injured worker may maintain action for damages against subcontractors, general contractors, independent contractors, property owners, or lessees or assigns who do not occupy employee-employer relationship with injured worker at time of injury. (UCA 34A-2-106[4], formerly UCA 35A-3-106 as interpreted in 777 P.2d 428).

Mine Lessees and Employees.

Employees of lessee covered by Act unless lessee provides coverage as employer. (UCA 34A-2-104[2]).

Employment Outside of State.

Person hired in state but employed elsewhere and injured within six months after leaving state entitled to compensation. (UCA 34A-2-405).

Volunteer State Workers.

Considered government employee for purposes of receiving workers' compensation medical benefits. (UCA 67-20-3[1][a]). Intern participating in certain internships is considered volunteer government worker eligible to receive workers' compensation medical benefits as exclusive remedy for all injuries. (UCA 53A-29-103, UCA 53B-16-403).

Workers' Compensation Fund.

(UCA 31A-33-101 et seq.).

Injured Worker Reemployment Act.

Promotes state's and employer's capacity to assist injured worker in returning to work force. (UCA 34A-8-102). If injured worker's disability compensation exceeds 90 days or if worker is disabled injured worker, employer or its insurance carrier required within 30 days thereafter to file assessment report on need of vocational assistance for worker. (UCA 34A-8-106). Employer or insurance carrier required within ten days of report to refer worker to State Office of Rehabilitation or private reemployment service. (UCA 34A-8-107).

Reporting Industrial Injuries.

Employee must notify employer or Department of Workforce Services promptly, at least within 180 days of injury. (UCA 34A-2-407[2], [3]). If employee is unable, employee's next-of-kin or attorney may notify employer. (UCA 34A-2-407[2][b]). Workers' compensation claims by emergency medical services providers must be filed with Division of Adjudication within one year. (UCA 34A-2-902[3]). Employers and attending physicians or surgeons must report injuries to Department of Workforce Services. (UCA 34A-2-407[5], [9]). Failure to comply is Class C misdemeanor, unless good cause for filing late report. (UCA 34A-2-407[8], [11]).

Fraud.

Workers' compensation fraud prohibited. (UCA 34A-2-110).

Limitation of Claims.

Claim for death benefits is barred unless application for hearing is filed within one year of date of death of employee. (UCA 34A-2-417[3]). Claim for occupational disease or industrial accident survives employee if claim filed before employee dies. (UCA 34A-2-423[2]).

Amount of Compensation.

Act provides specific compensation for temporary and permanent disability. Subject to appellate review, department has exclusive jurisdiction to determine whether treatments and services are reasonably related to industrial injury or occupational disease and compensable under Act. (UCA 34A-3-108[12]). Attorney fees may also be awarded. (UCA 34A-1-309). For temporary total disability, employee receives 662/3% of that employee's average weekly wage at time of injury not to exceed 100% of state average weekly wage and not to be less than $45 per week, plus $5 for dependent spouse and $5 for each dependent minor child under 18 years up to and including four such minor children. Compensation not to exceed 312 weeks. (UCA 34A-2-410[1]). Potential wage increases of injured employee may be considered in arriving at average weekly wage. (UCA 34A-2-409[4]). Compensation for permanent total disability is 662/3% of average weekly wage at time of injury, not to exceed 85% of state average weekly wage and not less than $45 per week plus $5 for dependent spouse and $5 for each dependent minor child under 18 years, up to four. Payments continue to death of employee. After 312 weeks, minimum weekly compensation is 36% of current state weekly wage. (UCA 34A-2-413[2]). Permanently totally disabled employee may be periodically reexamined to determine if remains permanently totally disabled. (UCA 34A-2-413[11]). For temporary partial disability, employee receives 662/3% of difference between employee's average weekly wage before accident and average weekly wage after accident, but not to exceed 100% of state average weekly wage at time of injury plus $5 per dependent spouse and $5 per dependent minor child under age of 18 years up to four such minor children. (UCA 34A-2-411[1]). Duration of payments may not exceed 312 weeks nor continue more than 12 years after date of injury. (UCA 34A-2-411[3]). Additional compensation awarded for permanent partial disability. (UCA 34A-2-412). If injury causes death within 312 weeks from date of injury, employer must pay burial expenses. (UCA 34A-2-702[5]). If there are dependents, payments will equal 662/3% of decedents average weekly wage, not to exceed 85% of state average weekly wage at time of injury and not less than $45 per week plus $5 for dependent spouse and $5 for each dependent minor child under 18 up to and including four such minor children. After 312 weeks, dependency is determined and payments to dependents are reduced by 50% of social security death benefits. Payments by employer or insurance carrier not to exceed six years or 312 weeks after date of injury. (UCA 34A-2-702[5]). Finding of permanent total disability is tentative only until employee is referred to division of vocational rehabilitation and it has been certified that he cannot be rehabilitated. (UCA 34A-2-413[6]). There are also allowances for medical and hospital services, burial expenses and artificial means and appliances of reasonable sums. (UCA 34A-2-418). Artificial appliance lost or broken as result of compensable accident must be replaced. (UCA 34A-2-418[3]). Department may require replacement of artificial means or appliance by reason of breakage, wear and tear, deterioration, or obsolescence. (UCA 34A-2-418[4]).

Where injury is caused by willful failure of employer to comply with law or any lawful order of Department or employer's own written workplace safety program, compensation provided for under Act is increased 15% except in case of injury resulting in death. (UCA 34A-2-301[2]). Where injury is caused by willful failure of employee to use safety devices where provided by employer, or from employee's willful failure to obey any order or reasonable rule adopted by employer for safety of employee, compensation is reduced 15% except in case of injury resulting in death. (UCA 34A-2-302[3]; UCA 34A-3-112[2][a]). Except when employer permitted, encouraged, or had actual knowledge of employee's conduct, no disability compensation is awarded to employee when major contributing cause of injury or disease is employee's use of illegal substances, abuse of drugs, or intoxication. (UCA 34A-2-302[3][b]; UCA 34A-3-112[2][b]). No compensation for disability or death when action was caused by purposeful self-exposure of employee. (UCA 34A-3-112[1]). Department will make permanent partial disability award at any time prior to 12 years after date of injury to employee whose physical condition resulting from such injury is not fully healed and who filed application for such purposes prior to expiration of 12-year period. (UCA 34A-2-411[2]). Department, under special circumstances and when deemed advisable, may commute periodic benefits to one or more lump payments. (UCA 34A-2-421). Department may request county attorney to enforce judgment against uninsured employer. (UCA 34A-2-212[2]).

Mental stress claims arising from employment are compensable only where there is sufficient legal and medical causal connection. (UCA 34A-2-402[1]). Alleged discrimination, harassment, or unfair labor practices may not be basis of claim. (UCA 34A-2-402[5]). Employee alleging occupational disease involving mental stress bears burden of proof to show causation by preponderance of evidence. (UCA 34A-3-106[6]).

Member with public service credit may purchase additional credit equal to period of member's service. (UCA 49-11-403[1]). Member must have at least four years service and forfeited service under another plan and pay amount adopted by board to purchase credit. (UCA 49-11-403[2]). Purchase may be made through payroll deductions or lump-sum deposit. (UCA 49-11-403[4]). Total payment must be completed prior to retirement. (UCA 49-11-403[5]).

Public employees may participate in noncontributory retirement credit system unless excluded by UCA 49-13-203, -205. Qualifications for service requirement under Utah State Retirement and Insurance Benefit Act. (UCA 49-13-401). Member may purchase maximum of five years service credit which cannot otherwise be purchased, but member must retire immediately after purchase and pay at least 5% of purchase cost. (UCA 49-13-408[1]). Employer must adopt nondiscriminatory participation standards. (UCA 49-13-408[3]). Long-term disability benefits provided for employees of employers participating in any system administered by State Retirement Office. (UCA 49-21-105). State must cover all its eligible employees. (UCA 49-21-201[1]). Coverage of employees optional with other employers. (UCA 49-21-201[3]). Public Employees Long-Term Disability Trust Fund provides for payment of benefits. (UCA 49-21-104).

Upon determination that eligible employee is totally disabled due to accidental bodily injury or physical illness not in scope of employment, disability benefit is 2/3 of regular monthly salary (UCA 49-21-401[4]); if in scope of employment, disability benefit is full monthly salary (UCA 49-21-401[6]). Psychiatric illness disability further limited. (UCA 49-21-401[5]). Office has authority to compel medical examination of recipient. (UCA 49-21-401[8]). Absent showing of circumstances justifying delay, claim for long-term disability benefits barred if not brought within one year from date of disability. (UCA 49-21-401[9]). Disability benefits reduced by any amount received by employee during disability period from any of following sources: Social Security; workers' compensation; monies received by judgment, legal action, or settlement from third party liable to employee for disability; unemployment compensation benefits; automobile no-fault, medical payments, or similar insurance payments; and any monies received by judgment, settlement, or other payment as result of claim against employer. (UCA 49-21-402[2]). Any amounts listed above payable to disabled employees are considered as amounts received by employee, whether amounts were actually received. (UCA 49-21-402[5]). Disability allowance must be paid to qualified member, including employees who relinquish rights to retirement benefits, until date member has accumulated between 20-30 years of service, or from one to five years, depending on age upon receipt of disability benefits. (UCA 40-21-403[1]). All disability benefits paid by Public Employees Disability Trust Fund terminate when disabled member qualifies for full retirement under system covering employee before disability. Upon termination, employee retires under that system. (UCA 49-21-403[2]). Adjustment in benefit made for cost of living. (UCA 49-21-404). If office refers eligible employee to disability specialist for written rehabilitation plan and employee fails to participate in office-approved rehabilitation program, disability benefit may be suspended or terminated. (UCA 49-21-406[3]). Public Employees Noncontributory Retirement Act adopted. (UCA 49-13-101 et seq.).

Utah Protection of Public Employee Act requires public employer not to discharge, threaten, or otherwise bring personal action against any employee affecting in any manner employee's employment, whenever employee reports improper governmental activity, unless: (1) Employee has not given written notice of violation; (2) employee has not conformed to reasonable procedures established by employer; or (3) employee knows report is malicious, false, or frivolous. (UCA 67-21-3). Employee who alleges violations by government may bring civil action for injunctive relief and/or actual damages within 180 days of violation. (UCA 67-21-4[2]).

Utah Occupational Safety and Health *Act* adopted. (UCA 34A-6-101 et seq.).

Duties of Employers and Employees.

Each employer must provide each employee with safe place of employment according to standards of Utah Occupational Safety and Health Act. (UCA 34A-6-201[1]). Employees shall comply with occupational, safety, and health standards of Utah Occupational Safety and Health Act. (UCA 34A-6-201[2]).

Vehicles furnished by employer to be used to transport employees to and from their places of employment shall be maintained in safe condition and operated in safe manner. (UCA 34-36-1).

Employers should encourage and support parents and members of community in efforts to become involved in public education system. (UCA 53A-1a-105[2][c]).

Occupational Diseases.

Compensation is payable for certain designated occupational diseases and other diseases directly arising as natural incident of exposure occasioned by employment and not of character to which general public is commonly exposed. (UCA 34A-3-101 et seq.).

Reporting Occupational Diseases.

Employer and attending physicians or surgeons of occupationally diseased employee must report disease to department on forms or by methods proscribed by commission. (UCA 34A-3-108[4], -[8]). Absent good cause, failure to comply is Class C misdemeanor. (UCA 34A-3-108[7]).

Medical panel, medical director, or medical consultant appointed by department determines amount of disability and percentage, if any, attributable to occupation, subject to objection, examination, and review. (UCA 34A-2-601[2][c]).

Autopsy may be ordered by commission to determine cause of death where death claim is filed. (UCA 34A-2-603[1]). No cause of action against one who participates in or requests such autopsy. (UCA 34A-2-603[5]).

Conditions for Liability.

No payment need be paid unless disability or death claim is filed within one year after cause of action arises. Cause of action arises on date employee first suffered incapacity from occupational disease and knew or in exercise of reasonable diligence should have known disease was caused by employment. Cause of action arises in death case when dependent knew or reasonably should have known that death was caused by exposure to occupational disease. (UCA 34A-3-109[3][a]). Cause of action is forever barred to dependents of employee unless written claim is filed with department within six years from date of death of employee. (UCA 34A-3-109[3][b]).

Employers Liable.

Every employer is liable for exposure to hazards, except when last exposure was prior to 1941. (UCA 34A-3-104). Employer proportionally liable if employee was employed for less than 12 consecutive months. (UCA 34A-3-105).

Employment Security Act adopted 1997. (UCA 35A-4-101 et seq.).

Employers' Liability Act.

See subhead Occupational Diseases, catchline Employers Liable, supra.

Unemployment Compensation.

Employees are entitled to benefits if they have made proper claim for benefits, have registered for work and have continued to report at employment office unless excused by rule, are able to work and are available for work, are acting in good faith to secure work, have been unemployed for waiting period of one week, have furnished department any separation and other reports required by rule, have performed services during base period entitling individual to wages meeting base period wage requirements, and individual applying for benefits in successive benefit year has employment in preceding benefit year equal to at least six times weekly benefit amount in insured work. (UCA 35A-4-403[1]). Individual in approved training program eligible for benefits. (UCA 35A-4-403[2]). Employees ineligible for benefits, or for purposes of establishing waiting period for periods of time set forth in various sections of statute, who have voluntarily left work without good cause; have left work voluntarily to accompany, follow, or join spouse in new locality; have been discharged for misconduct; have failed to apply for or accept work without good cause; are unemployed due to stoppage of work which exists because of strike involving their grade, class, or group of workers (which includes honoring picket line of another union—13 Utah 2d 262, 372 P.2d 987); have willfully made false statement or omitted material fact to obtain benefits; are seeking or receiving benefits from another state; or are receiving, have received, or are entitled to receive wages in lieu of notice, dismissal or separation pay, or accrued vacation or terminal leave pay. (UCA 35A-4-405). Weekly benefit amount reduced by 100% of retirement income attributable to week. (UCA 35A-4-401[2][c]). Ineligibility due to voluntarily leaving work without good cause, discharge for misconduct, or failure to properly apply for work continues until claimant has gained employment and has earned wages of at least six times weekly benefit amount. (UCA 35A-4-405). Person who makes false statement or omission of material fact may be guilty of misdemeanor or felony. (UCA 76-8-1301).

Employer References.

Employer providing information, in good faith, about former employee's work performance, at request of prospective employer, not civilly liable for consequences of providing information. (UCA 34-42-1[1]). There is rebuttable presumption that employer is acting in good faith in providing such information. (UCA 34-42-1[2]).

Laborers' Liens.

When property of any person is seized through any court process or person's business is suspended by creditors or put into hands of receiver or trustee, amount owing to workmen, clerks, salesmen, or servants for work or labor performed within five months preceding seizure or transfer treated as preferred debt, and such workers are preferred creditors. If insufficient proceeds to pay in full, same must be paid pro rata after paying costs. (UCA 34-26-1). Notice of claim for wages is required within ten days after seizure or within 30 days after business placed in hands of receiver, trustee, or assignee. (UCA 34-26-2).

Drug Testing.

Testing of employees or prospective employees for drugs and alcohol permitted by any employer, excluding federal or state government or local political subdivisions. (UCA 34-38-1, 2). Employer must assume all costs; employee's time counts as work time. (UCA 34-38-5). Testing must be conducted according to specified procedures (UCA 34-38-6) and within terms of written policy available for review (UCA 34-38-7). Positive test results indicating violation of written policy or refusal to submit to test constitute grounds for employer actions, including rehabilitation program, suspension with or without pay, termination, refusal to hire, or other disciplinary actions. (UCA 34-38-8). No cause of action against employer created by: (1) Failure to test, failure to detect, or termination of program by employer with established policy (UCA 34-38-9); (2) failure to establish program (UCA 34-38-12); or (3) employer actions, unless based on false test result. Rebuttable presumption of validity of test result if employer followed statutory procedure; no monetary damages if reliance reasonable and in good faith (UCA 34-38-10[2]). Actions for defamation, libel, slander, or damage to reputation limited to information based on false test result disclosed with malice to unauthorized persons and satisfying all elements of action complained of. (UCA 34-38-11). All information obtained through testing program confidential, with limited exception for Division of Occupational and Professional Licensing. (UCA 34-38-13). Persons testing positive not "person with disability" for antidiscrimination purposes. (UCA 34-38-14). No physician-patient relationship created between employer and employee. (UCA 34-38-15).

11.03 WORKERS' COMPENSATION LAW:

See topic 11.02 Labor Relations.

12 ENVIRONMENT

12.01 ENVIRONMENTAL REGULATION:

Relevant regulations include Air Conservation Act (UCA 19-2-101 et seq.), Utah Indoor Clean Air Act (UCA 26-38-1 et seq.), Water Quality Act (UCA 19-5-101 et seq.), Safe Drinking Water Act (UCA 19-4-101 et seq.), Solid and Hazardous Waste Act (UCA 19-6-101 et seq.), Hazardous Waste Facility Siting Act (UCA 19-6-201 et seq.), Hazardous Substances Mitigation Act (UCA 19-6-301 et seq.), Hazardous Waste Facilities Management Act (UCA 19-9-101 et seq.), Underground Storage Tank Act (UCA 19-6-401 et seq.), Pesticide Control Act (UCA 4-14-1 et seq.), Solid Waste Management Act (UCA 19-6-501 et seq.), Environmental Self-Evaluation Act (UCA 19-7-101 et seq.), Environmental Institutional Control Act (UCA 19-10-101 et seq.), Radiation Control Act (UCA 19-3-101 et seq.), Used Oil Management Act (UCA 19-6-701 et seq.), Northwest Interstate Compact on Low-Level Radioactive Waste (UCA 19-3-201 et seq.), Illegal Drug Operations Site Reporting and Decontamination Act (UCA 19-6-901 et seq.), Waste Tire Recycling Act (UCA 19-6-801 et seq.), Clean Fuels and Vehicle Technology Program Act (UCA 19-1-401 et seq.), Voluntary Cleanup Program (UCA 19-8-101 et seq.), Environmental

Institutional Control Act (UCA 19-10-101 et seq.), Western Interstate Nuclear Compact (UCA 19-11-101 et seq.), Utah Pesticide Control Act (UCA 4-14-1 et seq.), and Hazardous Waste Facility and Nonhazardous Solid Waste Facility Tax Act (UCA 59-25-101 et seq.).

General Supervision.

Dept. of Environmental Quality, 168 N. 1950 W., Salt Lake City, UT 84116 (UCA 19-1-104); Air Quality Board (UCA 19-1-106); Div. of Air Quality, 150 N. 1950 W., Salt Lake City, UT 84116 (UCA 19-1-105); Div. of Water Quality, P.O. Box 144870, Salt Lake City, UT 84114; Water Quality Board; Div. of Drinking Water, P.O. Box 144830, Salt Lake City, UT 84114-4830.

Prohibited Acts of Pollution.

Interfering with air contaminant source inspection. (UCA 19-2-108[6]). Discharging pollutant or causing pollution that constitutes menace to public health and welfare; or is harmful to wildlife, fish or aquatic life; or impairs domestic, agriculture, industrial, recreational, or other beneficial uses of water. (UCA 19-5-107[1]). Placing wastes where there is probable cause to believe they will cause pollution. Any discharge not authorized by permit. (UCA 19-5-107[3]). Violation of Act, rule, or order of Drinking Water Board. (UCA 19-4-109). Knowingly transporting, treating, storing, or disposing of any hazardous wastes without approved plan or permit. Material omissions and false material statements. Transporting hazardous waste without manifest. (UCA 19-6-113[3]). Delivering product to, placing petroleum in, or accepting petroleum for placement in tank not covered by certificate of compliance. (UCA 19-6-416). Distribution of pesticide (i.e., substance intended to prevent, destroy, control, repel, attract, or mitigate any insect, weed, or other plant or animal life considered pest) without proper registration. (UCA 4-14-2[21]). Distributing pesticide not registered with Department (UCA 4-14-3[1]) or restricted-use pesticide without license (UCA 4-14-3[7]). Failure to satisfy pesticide labeling requirements. (UCA 4-14-4). Each improper disposal of lead acid battery. (UCA 19-6-607[2]).

Smoking prohibited in all enclosed indoor places of public access, with certain exceptions, and in nonpublic workplaces except in designated smoking areas. (UCA 26-38-1 et seq.). Exception for Native Americans using traditional pipe in American Indian tribal religious ceremony. (UCA 26-38-3.5). Violation punishable by fine of up to $500. (UCA 26-38-8).

Enforcement.

Air.

Owners and operators of stationary air pollutant sources must submit reports to Air Quality Board regarding compliance with state and federal requirements. (UCA 19-2-120). Board representatives may inspect air pollutant source for compliance at any reasonable time. (UCA 19-2-108[6]). Board may establish emission controls by rule. (UCA 19-2-109[2]). Any state political subdivision may regulate air pollution consistent with Air Conservation Act. (UCA 19-2-121).

Water.

Any discharge permit may be revoked, modified, or suspended in whole or in part for cause. (UCA 19-5-109). Board may issue notices of violation. (UCA 19-5-111). Spills or discharges of pollutants into waters of state must be reported immediately to executive secretary. (UCA 19-5-114). Water Quality Board may notify violator of facts of violations, require correction, and require that violator appear before Board at hearing. (UCA 19-5-111).

Solid and Hazardous Waste.

Enforcement by Dept. of Environmental Quality (UCA 19-1-104), Solid and Hazardous Waste Control Board (UCA 19-1-106), Div. of Solid and Hazardous Waste (UCA 19-1-105).

Pesticides.

Department may sample, inspect, and analyze pesticides distributed, used, or applied in state and inspect equipment used to apply pesticides. (UCA 4-14-7[1]). If sample fails to comply, Department must provide written notice of violation. (UCA 4-14-7[2]). Department may enter upon private premises to sample and inspect. (UCA 4-14-7[3]).

Environmental Self-Evaluation Act.

Encourages voluntary compliance with environmental laws and provides incentives for compliance. (UCA 19-7-101 et seq.; UCA 19-7-102). Act allows for waiver of civil penalties for noncompliant entities that meet self-evaluation conditions. (UCA 19-7-109[2]). Environmental Audit Reports created as result of environmental self-evaluation may not be admitted as evidence in administrative or judicial proceeding if information is divulged, disseminated, or otherwise disclosed in violation of Utah R.Evid. 508. (UCA 19-7-104). Environmental Audit Report is privileged in administrative proceeding. (UCA 19-7-105). Person seeking disclosure of report must request in camera review of report. (UCA 19-7-106[1]).

Penalties.

Air.

Violators subject to fine of up to $10,000 for each day of violation. (UCA 19-2-115[2][a]). One knowingly violating implementation plan 30 days after written notice, or violating implementation plan order or knowingly handling or disposing of asbestos in violation of promulgated rules subject to fine of up to $25,000 each day on first offense, $50,000 each day on subsequent offenses. (UCA 19-2-115[7]). Knowingly violating reporting requirements is Class A misdemeanor. (UCA 19-2-115[3]). Penalties for violations described in 207 of Federal Asbestos Hazard Emergency Response Act of 1986 may not exceed amount specified in that section. (UCA 19-2-115[2][c]). Injunction available to enforce act. (UCA 19-2-116).

Water.

Any person who violates Act or any permit, rule, or order issued under Act is subject to civil penalty of up to $10,000 per day. (UCA 19-5-115[2]). Any person who with criminal negligence violates Act is guilty of Class A misdemeanor and is subject to imprisonment and fine of up to $25,000 per day. (UCA 19-5-115[3][a]). Any person who knowingly violates Act is guilty of third degree felony and is subject to imprisonment and fine of up to $50,000 per day. (UCA 19-5-115[3][b]). Any person who knowingly falsifies records or tampers with monitoring device is subject to fine of up to $10,000 or imprisonment not exceeding six months or both. (UCA 19-5-115[4]).

Up to $1,000 per day for violation of any rule, regulation or order under Safe Drinking Water Act. (UCA 19-4-109[1]). Willful violations may result in Class B misdemeanor and fines of up to $5,000 per day; additional civil penalties of up to $5,000 per day may be imposed. (UCA 19-4-109[2]).

Hazardous Waste.

Any person violating rules is subject to penalty of up to $10,000 per day for each violation. (UCA 19-6-306[1]). Injunction available to enforce Act. (UCA 19-6-306[4]). Illegal transportation and disposal of hazardous waste is felony; violator subject to fine of up to $50,000 for each day of violation, or imprisonment for term not to exceed five years, or both; imprisonment may be for 15 years if act places another in imminent danger of serious injury or death. Corporation or partnership may be fined up to $1,000,000 for same violation. (UCA 19-6-113[4]). Improper disposal of lead acid battery is Class B misdemeanor. (UCA 19-6-607[2]).

Pesticides.

Revocation or suspension of registration of pesticide. (UCA 4-14-8). Persons liable for negligent misuse or misapplication of pesticide. (UCA 4-14-7, -12).

Permits.

Air.

Operating permit from executive secretary required to operate source of air pollution requiring permit under federal 1990 Clean Air Act Amendments. (UCA 19-2-109.1[2][a]). Air Quality Board has established private sector air quality permitting professionals program and accompanying expedited review of permit applications. (UCA 19-2-109.5). Board may grant variance following public meeting if compliance with rules and regulations would produce serious hardship without equal or greater benefits to public. (UCA 19-2-113[1]). Judicial review of variance or denial of renewal available. (UCA 19-2-113[5]). Notice must be given to executive secretary before installing new source or indirect source, making modification to existing source, or installing air cleaning or emission control device. (UCA 19-2-108[1]). Certification of persons engaged in asbestos abatement required. (UCA 19-2-104[3]).

Water.

Discharge permit for fixed term not exceeding five years must be obtained from Water Quality Board. Board may impose conditions upon permit. (UCA 19-5-108).

Pesticides.

License required to distribute restricted-use pesticide or to apply pesticide for hire. Registration and license must be renewed annually by payment of fee. (UCA 4-14-3[1]). Experimental use permit required to accumulate information necessary to register pesticide. (UCA 4-14-5[1]). Pesticide applicator business must register by submitting application, paying registration fee, and certifying compliance. (UCA 4-14-3).

Hazardous Materials.

See subhead Hazardous Materials, infra.

Hazardous Materials.

Hazardous waste facilities authorities may enter into cooperative agreements with federal government for cleanup of inactive hazardous waste sites. (UCA 19-9-105). Solid and Hazardous Waste Control Board must develop statewide plan for siting hazardous waste treatment, disposal, and storage facilities. (UCA 19-6-201 et seq.). Executive Director of Department of Environmental Quality regulates hazardous substance releases by making rules consistent with federal Comprehensive Environmental Response Compensation and Liability Act, including developing hazardous substances priority list. (UCA 19-6-303, -311). Executive director may recover only proportionate share of costs from each responsible party. (UCA 19-6-310[1], -316[1]). Any party who incurs costs exceeding proportionate share may seek contribution from other responsible parties. (UCA 19-6-309; UCA 19-6-316[4]; UCA 19-6-318[3]). Ability of responsible party to pay not factor in apportionment of liability. (UCA 19-6-316[2][f]; UCA 19-6-318[1][f]). Executive director may order or seek court order requiring owners or operators to respond to release. (UCA 19-6-309[1], -316). See also subhead Penalties, supra.

Permits.

Any person who owns, constructs, modifies, or operates facility for treating, storing, or disposing of nonhazardous solid waste or hazardous waste must submit and receive approval from Solid and Hazardous Waste Control Board of operation plan. Approval by Governor and legislature also required. (UCA 19-6-108[3]). Terms “treatment” and “disposal” specifically exclude recycling, reuse, or reprocessing of certain wastes. (UCA 19-6-102.1). Control Board may issue variance if compliance with Act would cause undue or unreasonable hardship to any person. (UCA 19-6-111[1]). Waste entering Utah classified by Utah as nonhazardous and by originating state as hazardous must be treated according to originating state’s standards. (UCA 19-6-108.5).

Fees.

See category 22 Taxation, topic 22.06 Environmental Taxes, subhead Hazardous Waste Tax.

Hazardous Waste Facilities Management Act.

Mechanism for creation of hazardous waste facilities authority empowered to establish hazardous waste treatment, disposal, or storage facilities and to do all other things necessary to comply with Resource Conservation and Recovery Act of 1976. (UCA 19-9-101 et seq.). Any person may file petition seeking to create and establish facilities authority. (UCA 19-9-103[1]).

Hazardous Materials Emergency.

Division of Comprehensive Emergency Management may recover expenses of responding to hazardous materials emergencies involving sudden or unexpected release of substances that present immediate threat to public safety or environment from those persons whose negligent actions caused expenses to be incurred. (UCA 53-2-105[1]).

Closure and Postclosure of Treatment Facilities.

The Hazardous Waste Control Board may evaluate financial sustainability of long-term storage of hazardous waste following closure or postclosure of any commercial hazardous waste storage, treatment or disposal facility. (UCA 19-1-307).

Land Use Planning.

Governor’s Office of Economic Development created to assist development and planning in rural areas. (UCA 63M-1-1601 et seq.). Environmental Institutional Control Act allows for creation of environmental institutional controls which limit or otherwise affect use of real property, if necessary for public health, safety, or welfare, or environment. (UCA 19-9-101 et seq.).

Conservation Easements.

Property owner may grant “conservation easement” to be used for preserving land or water areas predominantly in natural, scenic, or open condition, or for recreation, cultural benefit, or wildlife habitat consistent with protection of open land. (UCA 57-18-2, -4).

Recycling.

Used Oil Management Act controls disposal of used oil. (UCA 19-6-701 et seq.). With certain exceptions, disposal of used oil in any solid waste treatment, storage, or disposal facility; sewers, drainage systems, septic tanks, surface or ground waters, watercourses or any body of water; or on ground is violation unless exempted by Board. (UCA 19-6-706[1][a]). Any owner or operator of used oil collection center, transfer facility, processing or re-refining facility, aggregation point, or “do-it-yourself” collection center must be approved and registered by Board. (UCA 19-6-708, -710[1]). Person may not act as used oil transporter without holding permit or act as used oil marketer without holding registration number. (UCA 19-6-710[2]). Violation is Class B misdemeanor and subject to fine of up to $10,000 per day. (UCA 19-6-721, -722).

Remediation.

Voluntary Cleanup Program permits applicant to enter into cleanup agreement with Dept. of Environmental Quality and obtain certificate which provides release of liability in certain respects. (UCA 19-8-101 et seq.).

Solid Waste Management.

See subhead Hazardous Materials, supra. Solid Waste Management Act (UCA 19-6-501 et seq.) authorizes governing body of each county, municipality, or service district, subject to power and rules of Dept. of Environmental Quality, to regulate or provide facilities for solid waste generated within and without jurisdiction (UCA 19-6-503[1][a], [1][b]), issue industrial revenue bonds to finance facilities (UCA 19-6-503[1][o]), and issue and assess fees (UCA 19-6-506).

Underground Storage Tank Act.

(UCA 19-6-401 et seq.). Requires Control Board to regulate underground storage tanks (UST) as defined under Subtitle I of federal Resource Conservation and Recovery Act. (UCA 19-6-401 et seq.).

General Supervision.

Dept. of Environmental Quality (UCA 19-1-104), Solid and Hazardous Waste Control Board (UCA 19-1-106), Div. of Environmental Response and Remediation (UCA 19-1-105).

Prohibited Acts.

Delivering product to, placing petroleum in, or accepting petroleum for placement in tank not covered by certificate of compliance. (UCA 19-6-416).

Enforcement.

Executive secretary may revoke certificates of compliance (UCA 19-6-414), recover response costs from responsible parties (UCA 19-6-418), identify responsible parties and order owners and operators to respond to release (UCA 19-6-420), use monies from tank fund or state appropriation to respond to release (UCA 19-6-420[2][b]), or enter into settlement agreements with responsible parties or apportion liability among responsible parties (UCA 19-6-424.5).

Permits.

To receive product, tanks must be registered, tested for tightness, and covered by certificate of compliance. (UCA 19-6-407, -412, -413, -416). Valid certificate of compliance evidenced by approved tag or other identifiable method. (UCA 19-6-411[7]). Installers must notify executive secretary of new tank installations. (UCA 19-6-407[2]). To be eligible for reimbursement of response costs from tank fund, claim must be based on release occurring during period for which that tank was covered by fund or prior to issuance of certificate of compliance. (UCA 19-6-424).

Penalties.

$1,000 fine for failure to register tank or notify of tank installation. (UCA 19-6-407[2]). $1,000 penalty per facility for failure to pay annual registration fee. (UCA 19-6-408[5]). $10,000 per day for each day of violation of act, order, or rule. (UCA 19-6-425[1]). $500 per tank and installer for installing tank without permit. (UCA 19-6-416.5). $500 penalty for delivering product to, placing petroleum in, or accepting petroleum for placement in tank not covered by certificate of compliance. (UCA 19-6-416[2]). Good faith defense available. (UCA 19-6-416[4]).

Private Cost Recovery.

Any party that incurs response costs exceeding proportionate share may seek contribution from other responsible parties. (UCA 19-6-424.5[6]).

Nuclear Waste.

Hazardous Waste Facility and Nonhazardous Solid Waste Facility Tax Act passed. (UCA 59-25-101 et seq.). Placement of high level nuclear waste in Utah must be approved by Governor, with concurrence of legislature. (UCA 19-3-301). No entity may accept in state or apply for license to accept in state for commercial storage, decay in storage, treatment, incineration, or disposal: (1) Class B or class C low-level radioactive waste; or (2) radioactive waste having higher radionuclide concentration than highest radionuclide concentration allowed under licenses existing on effective date of this section that have met all requirements of § 19-3-105. (UCA 19-3-103.7).

Radiation Control Act.

(UCA 19-3-101 et seq.).

General Supervision.

Dept. of Environmental Quality (UCA 19-1-104), Radiation Control Board (UCA 19-1-106), Div. of Environmental Response and Remediation (UCA 19-1-105).

Penalties.

Any person who violates act or rules or terms of license, permit, or registration certificate is subject to civil penalty not exceeding $5,000 per violation. (UCA 19-3-109[1]). Person knowingly violating Act subject to Class B misdemeanor for first violation and third degree felony for subsequent similar violations within two years. (UCA 19-3-110[1]). Board may impound radioactive material to protect health or safety or for violations of Act, rules, orders, license, permit, or registration certificate. (UCA 19-3-111).

Permits.

All sources of ionizing radiation, including ionizing radiation producing machines, must be registered or licensed by department. (UCA 19-3-104[3]). Board may also establish criteria for siting commercial low level radioactive waste treatment or disposal facilities. (UCA 19-3-104[11]). Board may take action and issue orders. (UCA 19-3-103.5). Owning, constructing, modifying, or operating facility requires radioactive material license. Constructing new commercial radioactive waste transfer, storage, decay in storage, treatment, or disposal facility requires approval of Dept. of Environmental Quality, Governor, legislature, and local zoning authority. (UCA 19-3-105[3]). Same requirements apply to renewal or amendment of existing license under certain circumstances. (UCA 19-3-105[4]). Exceptions noted. (UCA 19-3-105[10]).

Fees.

See category 22 Taxation, topic 22.06 Environmental Taxes, subhead Hazardous Waste Tax.

12.02 WATER LAW:

Rights to use of unappropriated public waters in this state may be acquired only as provided by statute. (UCA 73-1-1 et seq.). No appropriation or permanent or temporary changes of purpose of use, place of use, or point of diversion may be made unless application has been made to Div. of Water Rights. (UCA 73-3-1, UCA 73-3-3). To update water right ownership on records of state engineer, water right owner must submit report of water right conveyance to state engineer. Report of water right conveyance must be on forms provided by state engineer. Report must be prepared by, or prepared under direction of and certified by, any of following persons licensed in Utah: (1) (a) Attorney; (b) professional engineer; (c) title insurance producer; or (d) professional land surveyor; or (2) water right owner as authorized by rule of state engineer. (UCA 73-1-10[3]). Between appropriators, one first in time is first in right except in times of scarcity.

(UCA 73-3-21). No right to use of water either appropriated or unappropriated can be acquired by adverse use or adverse possession. (UCA 73-3-1). Water right or portion thereof can be abandoned by nonuse for five years unless holder applies for extension of time to resume use. Action for forfeiture must be commenced within 15 years from final date of abandonment. (UCA 73-1-4[3]). Water right evidenced by stock in corporation must be transferred in accordance with procedures applicable to securities in Uniform Commercial Code. (UCA 73-1-10[2]). License and bond required to drill well. (UCA 73-3-25). Permit required to recharge and recover ground water. (UCA 73-3b-101 et seq.). Conservation and use of sewage effluent authorized and regulated. (UCA 73-3c-101 et seq.).

12.03 WILDLIFE AND ENDANGERED SPECIES:

Wanton destruction of endangered or protected species is third degree felony. Wanton destruction of other wildlife is third degree felony or misdemeanor. (UCA 23-20-4[3]). Violators also subject to monetary restitution. (UCA 23-20-4.5[1]). Using wildlife as commercial venture for financial gain prohibited except as provided. (UCA 23-13-13). Holding protected wildlife in captivity generally prohibited. (UCA 23-13-4; UCA 23-15-9; UCA 23-20-3). Pollution of waters containing protected aquatic life, insects, and crustaceans prohibited. Each day of pollution is separate offense. (UCA 23-15-6).

Division of Wildlife Resources may transplant sensitive species only under species management plan. Public must be allowed to comment and make recommendations on plan. (UCA 23-14-21). Division may determine management, protection, and conservation of plant species on state lands. (UCA 65A-2-3). Director of School and Institutional Trust Lands Administration may determine management, protection, and conservation of plant species on trust lands. (UCA 53C-2-202).

13 ESTATES AND TRUSTS

13.01 ADMINISTRATION:

See topic 13.09 Executors and Administrators.

13.02 ADVANCEMENTS:

See topic 13.07 Descent and Distribution.

13.03 ALLOWANCES:

See topic 13.09 Executors and Administrators.

13.04 CLAIMS:

See topic 13.09 Executors and Administrators.

13.05 DEATH:

Uniform Determination of Death Act in force (1980, adopted 1989). (UCA 26-34-1 et seq.). Uniform Evidence of Death and Absentees' Property Act not adopted. Person absent for continuous period of five years and not heard from, and whose absence is not satisfactorily explained after diligent inquiry, is presumed dead. Death presumed to have occurred at end of period unless there is sufficient basis for determining that death occurred earlier. (UCA 75-1-107[1][e]).

Survivorship.

Uniform Simultaneous Death Act in effect (1992, adopted 2003). (UCA 75-2-702).

Actions for Death.

Parent or guardian may maintain action for death of minor child caused by wrongful act of another. (UCA 78B-3-102). Heirs or personal representatives for benefit of heirs may maintain action for death of non-minor by wrongful action or neglect. (UCA 78B-3-106). Action must be commenced within two years. (UCA 78B-2-304[2]). Action does not lie where Workers' Compensation Act (see category 11 Employment, topic 11.02 Labor Relations) provides exclusive remedy.

Right of action for death may never be abrogated and amount recoverable may not be subject to any statutory limitation except in cases where compensation is provided by law. (Utah Const. Art. 16, § 5; 71 Utah 112, 263 P. 78).

Survival of Action.

Action does not abate upon death of wrongdoer or injured person. If injured person dies before judgment or settlement of causes other than injury received as result of wrongful act, damages limited to out-of-pocket expenses. (UCA 78B-3-107[1]).

Death Certificate.

See category 10 Documents and Records, topic 10.04 Records, subhead Vital Statistics.

Revised Uniform Anatomical Gift Act adopted (2007). (UCA 26-28-101 et seq.). See topic 13.16 Wills.

Living Wills.

See topic 13.16 Wills, subhead Living Wills.

13.06 DECEDENTS' ESTATES:

See topics 13.09 Executors and Administrators, 13.07 Descent and Distribution, and 13.16 Wills.

13.07 DESCENT AND DISTRIBUTION:

Abatement.

Unless will has express or implied abatement order, and except in case of spouse electing to take against will, shares of distributees abate in following order without preference or priority between real and personal property: (1) Property not disposed of by will; (2) residuary devises; (3) general devises; and (4) specific devises. (UCA 75-3-902[1], [3]).

Uniform Probate Code, with 1975 Official Amendments, adopted 1983, with modifications. (UCA 75-1-101 et seq.). 1977, 1982, 1997, 1998, 2002, and 2003 Official Amendments not adopted. 1979 and 1984 Official Amendments adopted with significant variations. 1987 and 1993 Official Amendments adopted in part. 1990 Official Amendment adopted in substantial part.

See topics 13.09 Executors and Administrators; Wills; category 8 Debtor and Creditor, topic 8.10 Homesteads.

Surviving Spouse.

Intestate share of surviving spouse is entire estate if decedent has no surviving descendant who is not also descendant of surviving spouse. (UCA 75-2-102).

Half Blood.

Relatives of half blood receive same share they would inherit if of whole blood. (UCA 75-2-107).

Posthumous Children or Other Issue.

Individual in gestation at particular time treated as living at that time if individual lives 120 hours or more after birth. (UCA 75-2-108). Other provisions apply to omitted after-born or after-adopted children. (UCA 75-2-302).

Illegitimates.

If not adopted, individual is child of individual's natural parents, regardless of marital status. (UCA 75-2-114). Parent and child relationship may be established under Utah Uniform Parentage Act (2000, adopted 2005). (UCA 78B-15-101 et seq.).

Adopted Children.

See category 14 Family, topic 14.01 Adoption.

Determination of Heirship.

Personal representative or interested person may petition for order to determine heirs. (UCA 75-3-1001[1]).

Advancements.

Taken into account against heir's intestate share only if: (1) Decedent declared in contemporaneous writing, or heir acknowledged in writing that gift is advancement, or (2) writing or acknowledgment otherwise indicates gift to be taken into account in distributing estate. (UCA 75-2-109[1]).

Election.

Surviving spouse of decedent who dies domiciled in Utah has right of election to take elective-share amount equal to value of 1/3 of augmented estate. (UCA 75-2-202). See topic 13.16 Wills.

Renunciation/Disclaimer.

Devisees and heirs or their agents may disclaim partial or entire interest in estate by filing, within time limits prescribed by UCA 75-2-801[2], written and signed instrument containing description of property or interest disclaimed. (UCA 75-2-801[1]).

Escheat.

If no takers, intestate passes to state to benefit state school fund. (UCA 75-2-105).

13.08 ELECTION:

See topic 13.16 Wills.

13.08A ESTATES: (in property)

See category 21 Property, topic 21.16 Real Property.

13.09 [RESERVED]

13.10 EXECUTORS AND ADMINISTRATORS:

Uniform Probate Code, with 1975 Official Amendments, adopted with modifications. (UCA 75-1-101 et seq.). 1977, 1982, 1997, 1998, 2002, and 2003 Official Amendments not adopted. 1979 and 1984 Official Amendments adopted with significant variations. 1987 and 1993 Official Amendments adopted in part. 1990 Official Amendment adopted in substantial part. See topic 13.16 Wills.

Jurisdiction and Venue.

Jurisdiction of administration of estates is in district courts. (UCA 75-1-201[8]). Venue for first proceedings after decedent's death is in county of decedent's domicile at death or, if no Utah domicile, any county where decedent's property was located at time of death. (UCA 75-3-201[1]). Venue for subsequent proceedings is same as first proceedings unless initial proceeding transferred. (UCA 75-3-201[2]).

Preferences in Right to Administer.

Persons not disqualified have priority for appointment as personal representative in following order: Person with priority as determined by probated will; surviving spouse, if devisee; other devisees; surviving spouse; other heirs; 45 days after death, any creditor. (UCA 75-3-203[1]).

Eligibility and Competency.

Persons under age 21 and persons found unsuitable by court in formal proceedings not qualified to be personal representative. (UCA 75-3-203[6]). If no local administration or application or petition therefor pending, domiciliary foreign personal representative may file authenticated copies of appointment and official bond in county where property located (UCA 75-4-204) and may exercise all powers of local personal representative, subject to general rules for nonresidents (UCA 75-4-205). For person other than individual acting as foreign personal representative to qualify, state of principal place of business of such foreign personal representative must provide similar provisions applicable to personal representatives from Utah. (UCA 75-4-205). See subhead Foreign Executors or Administrators, infra.

Qualification.

Personal representative appointed by court or registrar. (UCA 75-3-103). To qualify, personal representative must file with appointing court any required bond and statement of acceptance of duties. (UCA 75-3-601). Acceptance of appointment subjects personal representative to court's jurisdiction with respect to estate. (UCA 75-3-602).

Exemption from Bond.

No bond required of personal representative in formal or informal proceedings except: (1) Upon appointment of special administrator without notice having been given; (2) when specifically required by will; (3) when requested prior to appointment by interested party; or (4) when required upon demand pursuant to UCA 75-3-605 by one with interest or claim in excess of $5,000. (UCA 75-3-603). Bond not required if personal representative is trust company and exempt from bond under Title 7. (UCA 7-5-1[1][b]). Bond requirement may be dispensed with if court finds it unnecessary. (UCA 75-3-603).

Issuance of Letters.

Letters of appointment issued by order of court or registrar. Administration of estate commenced by issuance of letters. (UCA 75-3-103).

Removal.

Interested person may petition for removal of personal representative for cause at any time. Notice of proceedings must be given to personal representative and such other persons as court orders. (UCA 75-3-611[1]). Cause exists when: (1) Removal would be in best interests of estate; (2) personal representative or person seeking his appointment intentionally misrepresented material facts in proceedings leading to appointment; or (3) personal representative has disregarded order of court, become incapable of discharging duties of office, mismanaged estate, or failed to perform any duty. (UCA 75-3-611[2]).

Special Kinds of Administration.

Supervised administration authorized (UCA 75-3-501), under which no distributions may be made without prior order of court (UCA 75-3-504). Court may appoint special administrator upon petition of interested person and finding after notice and hearing that appointment necessary to preserve or properly administer estate. If emergency exists, appointment may be ordered without notice. (UCA 75-3-614[1][a]). Prior to appointment of or after termination of appointment of personal representative, registrar may appoint special administrator upon application of interested person when necessary to protect estate. (UCA 75-3-614[1][b]). Special administrator appointed by registrar in informal proceedings has duty to collect, manage, account for, preserve, and deliver to personal representative assets of estate. (UCA 75-3-616). Special administrator appointed by court in formal proceeding has power of personal representative as limited by court. (UCA 75-3-617).

Public Administrators.

No statutory provision.

Inventory and Appraisal.

Within three months of appointment, personal representative must prepare inventory of property owned by decedent at time of death, showing fair market value and type and amount of existing encumbrances. Personal representative must send copy of inventory to interested persons who request it and may file original of inventory with court. (UCA 75-3-705).

General Powers and Duties.

Personal representative has all powers specified in UCA 75-3-714, to extent consistent with decedent’s will or order of court in formal proceeding, and subject to priorities stated in UCA 75-3-902, including power to sell, mortgage, or lease assets. (UCA 75-3-714[23]). Personal representative has same power over title to property that absolute owner would have and may exercise power without notice, hearing, or order of court, unless otherwise specifically provided by code. (UCA 75-3-710). Duties of personal representative include: Settle and distribute estate expeditiously in accordance with probated and effective will and consistent with best interests of estate (UCA 75-3-703[1]), inventory and appraise assets (UCA 75-3-705), and possess or control estate (UCA 75-3-708). Personal representative must observe standard of care governing trustees under UCA 75-7-902 of prudent person dealing with property of another. (UCA 75-3-703[1]). See subhead Inventory and Appraisal, supra.

Notice of Appointment.

See subhead Notice to Creditors, infra.

Notice to Creditors.

Upon appointment, unless specified notice has already been given, personal representative must publish notice to creditors once a week for three successive weeks in newspaper of general circulation in county notifying creditors to present claims within three months of first publication or be forever barred. (UCA 75-3-801[1]). Personal representative may mail or deliver to creditors notice to file claims within later of above date or 60 days from mailing or other delivery of notice. (UCA 75-3-801[2]).

Presentation of Claims.

All claims which arose before decedent's death must be presented within earliest of following dates: (1) One year after decedent's death, (2) later of 60 days after mailing or delivery of notice or 90 days after first publication for known creditors, or (3) within three months after date of first publication for all claims barred by publication. Claims arising at or after death must be presented within later of one year of death and three months after arising or, if claim based on contract with personal representative, within three months after personal representative's performance due. Excepted are enforcement of mortgages, pledges or other liens, and actions to establish decedent's or representative's liability covered by insurance. (UCA 75-3-803). Barring of claims subject to constitutional due process requirements. (485 U.S. 478).

Proof of Claims.

Claimant may present claim by mailing or delivering to personal representative or personal representative's attorney of record, or by filing in court written statement including basis and amount of claim, name and address of claimant, description of contingent or unliquidated nature of claim, any security held for claim, and due date of claim not yet due. (UCA 75-3-804[1]).

Form.

No particular form of proof of claim is prescribed except as may be prescribed by court rule.

Approval or Rejection of Claims.

Claims must be approved or rejected by personal representative. Claims disallowed by appropriate notice are barred unless claimant files petition for allowance or commences proceeding within 60 days of mailing of notice of disallowance. Failure of personal representative to mail notice to claimant of action on claim within 60 days after time for original presentation of claims has expired amounts to notice of allowance. Personal representative may later change decision, but may not change disallowance after claim has been barred. (UCA 75-3-806[1]).

Payment of Claims.

Personal representative may pay claims, after three months from date of first publication of notice to creditors, after making provision for statutory allowances, claims already presented, and unbarred claims which may yet be presented, including costs and expenses of administration. (UCA 75-3-807).

Priorities.

(1) Reasonable funeral expenses; (2) costs and expenses of administration; (3) debts and taxes preferred under Federal law; (4) expenses of last illness; (5) debts and taxes preferred under Utah law; and (6) all other claims. (UCA 75-3-805).

Sales.

Except as restricted or otherwise provided by Code, by will, or by court order in formal proceeding, and subject to priorities in UCA 75-3-902, personal representative may sell any real or personal property or any interest in it for cash, credit, or for part cash and part credit, and with or without security for unpaid balances. (UCA 75-3-714[23]).

Actions by Representative.

Except as to proceedings which do not survive death of decedent, personal representative has same standing to sue in courts of Utah and courts of any other jurisdiction as decedent had immediately prior to death. (UCA 75-3-703[3]). Representative may maintain action to recover possession of property or to determine title thereto. (UCA 75-3-708). Claim by decedent not barred by statute of limitations at his death may not be barred sooner than 12 months after death. (UCA 75-3-108).

Actions Against Representative.

Actions arising and not barred by statute of limitations before death of decedent are barred against estate, personal representative, and heirs and devisees unless claims are presented in accordance with UCA 75-3-804. Running of any statute of limitations measured from some event other than death or advertisement of claims against decedent is suspended during three months following death. (UCA 75-3-802). Claim in writing may be delivered or mailed to personal representative or personal representative's attorney of record, or filed with court, or proceeding may be commenced in any court having jurisdiction over personal representative. (UCA 75-3-804[1]). See subhead Presentation of Claims, supra.

Allowances.

For decedents domiciled in Utah, following are available: (1) Homestead allowance of $15,000 to surviving spouse, or divided among dependent children and children under 18 if no spouse survives. Homestead allowance is exempt from and prior to all claims against estate. Homestead allowance is in addition to any intestate succession share, but is chargeable against any share passing by will, unless will provides otherwise. (UCA 75-2-402). (2) Family allowance to surviving spouse, children under 18, and dependent children. Family allowance is exempt from and prior to all claims except homestead allowance. Family allowance is in addition to any intestate succession share, elective share, or share passing by will, unless will provides otherwise. (UCA 75-2-404). Family allowance limited to $18,000 for one year unless larger amount ordered by court. (UCA 75-2-405). (3) Exempt property allowance of $10,000, in excess of any security interests in household furniture, automobiles, furnishings, appliances, and personal effects, to surviving spouse, or if no surviving spouse, to children of decedent jointly. If not $10,000 of exempt property, other assets of estate must make up $10,000 value. Exempt property allowance prior to all claims and right to assets to make up deficiency of exempt property abates to permit prior payment of homestead allowance and family allowance. Exempt property allowance in addition to any benefit passing by intestate succession, but chargeable against share passing by will, unless will provides otherwise. (UCA 75-2-403). Statutory allowances may be waived by surviving spouse, in whole or in part, before or after marriage, by writing signed by waiving party after fair disclosure. (UCA 75-2-213[1]).

Widow's Quarantine.

None.

Intermediate Accountings.

Required if property not included in original inventory comes to knowledge of personal representative or personal representative learns value or description in original inventory for any item erroneous or misleading. Personal representative must make supplementary inventory or appraisement showing market value as of date of decedent's death of new item or revised market value or descriptions, and appraiser's or other data relied upon, if any, and file it with court if original inventory was filed, or furnish copies thereof or information thereof to persons interested in new information. (UCA 75-3-707).

Final Accounting and Settlement.

Personal representative may petition at any time for estate to be settled and any interested person or devisee may petition after one year from appointment of original personal representative, except no petition entertained until time for presenting claims which arose prior to death of decedent has expired. (UCA 75-3-1001; UCA 75-3-1002). Unless under court prohibition or supervision, personal representative may close estate by filing with court no earlier than four months after date of original appointment of general personal representative, verified statement that he, or prior personal representative, has determined that time limitation for presentation of creditors' claims has expired, and that he has fully administered estate and made complete accounting thereof to all distributees. (UCA 75-3-1003[1]). Accounting under UCA 75-3-1001, UCA 75-3-1002, or UCA 75-3-1003 may be waived if all distributees consent in writing. (UCA 75-3-1003[3]).

Consent Settlement.

Personal representative may compromise claims against estate, if in best interest of estate. (UCA 75-3-813).

Distribution.

Unsupervised Administration.

Personal representative may settle and distribute estate without adjudication, court order, or direction, but may present questions to court. (UCA 75-3-704).

Supervised Administration.

After receiving notice of filing of petition for supervised administration, personal representative may not distribute (UCA 75-3-503[3]), and supervised personal representative may not distribute without court order (UCA 75-3-504). Partial distribution may be ordered by court during pendency of supervised administration upon application of personal representative or any interested person. (UCA 75-3-505).

Interest.

General pecuniary devises bear interest at legal rate beginning one year after first appointment of personal representative, unless contrary intent indicated by will. (UCA 75-3-904).

Distribution if Abroad.

No statutory provisions.

Liabilities.

Unless otherwise provided in contract, personal representative is not individually liable on contract unless he fails to reveal representative capacity and identify estate in contract, but is personally liable for obligations and torts committed during administration if personally at fault. (UCA 75-3-808).

Compensation of Representatives.

Personal representative and attorney are entitled to reasonable compensation for services. (UCA 75-3-718[1]). Personal representative may renounce compensation set forth in will and be entitled to reasonable compensation unless compensation is set by contract with decedent. Personal representative may renounce his right to any or all compensation. (UCA 75-3-718[3]).

When Administration Unnecessary.

Any successor may collect indebtedness or personal property owed decedent at his death by affidavit asserting that: (1) Net estate is $100,000 or less; (2) 30 days have elapsed since death; (3) no pending proceedings to appoint personal representative; and (4) successor has right to payment or delivery of property. (UCA 75-3-1201[1]). Successor may receive title of not more than four registered boats, motor vehicles, trailers, or semitrailers upon presentation of affidavit as provided above and upon payment of necessary fees, except in lieu of language indicated above affidavit must state that value of net estate, other than those motor vehicles, trailers or semitrailers, does not exceed $100,000. (UCA 75-3-1201[3]).

Small Estates.

If, after inventory and appraisal, estate value, minus liens and encumbrances, is less than homestead allowance, exempt property allowance, family allowance, costs and expenses of administration, reasonable funeral expenses, and reasonable and necessary expenses of last illness, personal representative, without giving notice to creditors, may make immediate distribution and close estate by filing verified statement stating: (1) Nature and value of estate's assets at distribution; (2) that estate did not exceed allowances above; (3) that personal representative has distributed estate to those entitled thereto; and (4) that personal representative has sent copy of closing statement to all distributees and to all creditors whose claims are neither paid nor barred and has furnished full written accounting of administration to distributees. (UCA 75-3-1203; UCA 75-3-1204[1]). If no proceedings involving personal representative are pending in court one year after filing of closing statement, personal representative's appointment terminates. (UCA 75-3-1204[2]).

Foreign Executors or Administrators.

If no administration or application or petition therefor pending in Utah, domiciliary foreign personal representative may file authenticated copies of appointment and bond (if any) from appointing court in county in Utah where property located (UCA 75-4-204), and may exercise all powers of local personal representative, subject to general rules for nonresidents (UCA 75-4-205). For persons other than individuals acting as domiciliary foreign personal representative to qualify, state of principal place of business of such foreign personal representative must provide reciprocal provisions applicable to personal representatives from Utah. (UCA 75-4-205). Petition for Utah administration terminates power of foreign personal representative. (UCA 75-4-206). See subhead Eligibility and Competency, supra.

Joint Administrators.

Upon petition by any person interested in two or more estates, court may grant letters upon these estates jointly before administration has commenced with respect to any such estates if any part of estate of one decedent has descended from another decedent or two or more decedents held property as tenants in common and if same persons are entitled under wills of these decedents or under law of intestate succession to receive estates of these decedents. (UCA 75-3-109[1]). Estates so joined must be administered as one estate except that claims may be enforced only against estate to which they relate. (UCA 75-3-109[2]).

Uniform Fiduciaries Act adopted. (1922, adopted 1953). (UCA 22-1-1 et seq.).

Revised Uniform Principal and Income Act adopted, with substantial modifications. (2001, adopted 2004). (UCA 22-3-101 et seq.).

Uniform Simplification of Fiduciary Security Transfers Act adopted. (1990, adopted 1995). (UCA 22-5-1 et seq.).

Uniform Anatomical Gift Act (1987, adopted 1990).

See topic 13.16 Wills.

Uniform Trustee's Powers Act adopted; repealed in 2004 and reenacted with substantial modifications as Utah Uniform Trust Code. (UCA 75-7-101 et seq.).

13.11 FIDUCIARIES:

See topics 13.09 Executors and Administrators, and Trusts; category 14 Family, topic 14.08 Guardian and Ward.

13.12 INTESTACY:

See topic 13.07 Descent and Distribution.

13.13 LIVING WILLS:

See topic 13.16 Wills.

13.14 PROOF OF CLAIMS:

See topic 13.09 Executors and Administrators; category 5 Civil Actions and Procedure, topic 5.18 Pleading.

13.15 TRUSTS:

Uniform Probate Code, with 1975 Official Amendments, adopted with modifications. (UCA 75-1-101 et seq.). 1977, 1982, 1997, 1998, 2002, and 2003 Official Amendments not adopted. 1979 and 1984 Official Amendments adopted with significant variations. 1987 and 1993 Official Amendments adopted in part. 1990 Official Amendment adopted in substantial part. Utah Probate Code omits 7-101 to 7-104 of Official Text pertaining to trust registration. See topic 13.16 Wills.

Uniform Trustee's Powers Act adopted; repealed in 2004 and reenacted with substantial modifications as Utah Uniform Trust Code. (UCA 75-7-101 et seq.).

Conveyances.

When trustee takes title to real property as trustee, terms of trust may be given in deed of trust or in instrument sigend by grantor and recorded in same office as grant to trustee. (UCA 75-7-816[1]). If terms of trust not made public, conveyance from trustee absolute in favor of purchasers who take property without notice of trust terms. (UCA 75-7-816[2]).

Kinds.

Inter vivos and testamentary trusts are recognized.

Creation.

Inter vivos trusts in personalty may be created by parole declaration and proved by parole evidence. (UCA 75-7-407). Trusts relating to realty can be created only by act or operation of law or deed or conveyance in writing. (UCA 25-5-1). Preceding limitation does not affect power of testator to dispose of real estate by will. (UCA 25-5-2).

Appointment and Removal of Trustee.

Vacancy in trusteeship must be filled in following order of priority: by person designated in terms of trust to act as successor trustee; by person appointed by unanimous agreement of qualified beneficiaries; or by person appointed by court. (UCA 75-7-704[3]). Vacancy in trusteeship occurs when person designated as trustee rejects trusteeship, person designated as trustee cannot be identified, trustee resigns, trustee disqualified or removed, trustee dies, or guardian or conservator appointed for trustee. (UCA 75-7-704[1]). District courts have exclusive jurisdiction over proceedings concerning trusts administered in state. (UCA 75-7-201[1][a]). This includes proceeding to appoint or remove trustee, review trustee's fees, review and settle interim or final accounts, ascertain beneficiaries, determine any question arising in administration or distribution of any trust, instruct trustees, determine existence of immunity, power, privilege, duty, or right, or to order transfer of trust to another state. (UCA 75-7-201[c]). District court may appoint additional trustees when necessary, regardless of any vacancy in trusteeship. (UCA 75-7-704[5]).

Trustee may be removed by court's own initiative or upon request by settlor, cotrustee, or qualified beneficiary. (UCA 75-7-706[1]). Court may remove trustee if trustee committed serious breach of trust, if lack of cooperation among cotrustees substantially impairs administration of trust, if court determines removal of trustee best serves interests of beneficiaries, if substantial change of circumstances occurred, or if removal requested by all qualified beneficiaries. (UCA 75-7-706[2]).

Eligibility and Competency.

Individual, corporation, or business entity holding itself out to public as engaged in trust business must comply with UCA 7-5-1 et seq. (UCA 7-5-1). No statutory authority precluding nonresident from acting as trustee. Institution must not engage in trust business unless authorized to do so. (UCA 7-5-2[1]). No trust company may accept appointment as trustee unless it obtains permit from Commissioner of Financial Institutions (not applicable to companies lawfully engaged prior to July 1, 1981). (UCA 7-5-2[1]). Criteria for granting permit are in UCA 7-5-3. Commissioner may revoke authority of trust company in certain cases. (UCA 7-5-5).

Qualifications.

Trustee need not provide bond unless required by trust or court. (UCA 75-7-702[1]). Trustee so named in reliance upon trustee's representation that trustee has special skills or expertise must use those special skills or expertise. (UCA 75-7-806).

General Powers and Duties of Trustees.

Trustee may exercise following without court authorization: powers conferred by terms of trust; or, except as limited by terms of trust, all powers over trust property which unmarried competent owner has over individually owned property, any powers appropriate to achieve proper investment, management, and distribution of trust property, and any powers conferred under UCA 75-7-101 et seq. (UCA 75-7-813[1]). Exercise of power by trustee subject to fiduciary duties. (UCA 75-7-813[2]). Duties of trustee include duty to administer trust (UCA 75-7-801), duty of loyalty (UCA 75-7-802), duty of impartiality (UCA 75-7-803), duty of prudent administration (UCA 75-7-804), and duty to inform and report (UCA 75-7-811). Except as altered by provisions of trust, trustee owes duty to comply with prudent investor rule. (UCA 75-7-901, -902). If trustee named on basis of representations of special skills or expertise, trustee has duty to use those skills. (UCA 75-7-901[1], UCA 75-7-806). See Utah Uniform Trust Code for list of general powers. (UCA 75-7-101 et seq.). See also Uniform Fiduciaries Act. (UCA 22-1-1 et seq.).

Sales.

Trustee has general powers to acquire or sell property for cash or on credit at public or private sale and to exchange, partition, or otherwise change character of trust property. (UCA 75-7-814[1][b], [c]). Trust instrument governs.

Investments.

Governed by statute. (UCA 7-5-7; UCA 75-7-902 et seq.). Prudent investor rule applies. (UCA 75-7-901). Trustee must invest and manage trust assets as prudent investor would and must exercise reasonable care, skill, and caution. (UCA 75-7-902[1]). Trustee's investment and management decisions respecting individual assets evaluated in context of trust portfolio as whole, not in isolation. (UCA 75-7-902[2]). Trustee may invest in any kind of property or type of investment. (UCA 75-7-902[5]). Trustee must diversify investments of trust unless trustee reasonably determines purposes of trust better served without diversification. (UCA 75-7-903). Self dealing prohibited. (UCA 7-5-11). Trust company may establish common trust funds. (UCA 7-

5-13). Trustee may delegate investment and management function that prudent trustee of comparable skills could properly delegate. (UCA 75-7-814[2]).

Securities in Name of Nominee.

Trust company acting in state as fiduciary may cause investment to be registered and held in name of nominee of trust company. (UCA 7-5-9[1]). Trust company liable for acts of nominee. (UCA 7-5-9[1]). Corporation or transfer agent registering security in name of fiduciary not bound to inquire into fiduciary relationship and may assume owner continues as fiduciary until corporation or transfer agent receives written notice that fiduciary no longer acting as such with respect to particular security. (UCA 22-5-3).

Bequests and Devises to Inter Vivos Trusts.

See topic 13.16 Wills.

Accounting.

Trustee must inform qualified beneficiaries of his name, address, and telephone number within 60 days of acceptance of trust. (UCA 75-7-811[2][b]). Upon reasonable request, beneficiary entitled to statement of accounts including report of trust property, liabilities, receipts, and disbursements, annually and upon termination of trust; former trustee must send report upon change of trustee. (UCA 75-7-811[3]). Beneficiary entitled to copy of relevant information about trust assets and administration. (UCA 75-7-811[1], [2]). One remedy available for breach of trust is for court to order trustee to account. (UCA 75-7-1001[2]). Questions of liability between trust estate and trustee individually may be determined in proceeding for accounting. (UCA 75-7-1010[4]). Trust company operating collective investment funds not required to render court accounting with regard to those funds, but may, by application to district court, secure approval of such accounting on such conditions as court may establish. (UCA 7-5-13[3]).

Compensation.

Terms of trust to specify trustee’s compensation, otherwise trustee entitled to compensation reasonable under circumstances. (UCA 75-7-708). Fees provided for by trust instrument may be paid free of judicial intervention and without judicial order. (UCA 75-7-201[2][b]).

Discharge.

Trustee may resign with court approval or upon at least 30 days’ notice to qualified beneificiaries, settlor (if living), and all cotrustees. (UCA 75-7-705[1]). Liability of resigning trustee or any sureties on trustee’s bond for acts or omissions of trustee not discharged or affected by trustee’s resignation. (UCA 75-7-705[3]). Upon depositing balance of proceeds from trustee’s sale and filing affidavit of balance, trustee discharged from further responsibility. (UCA 57-1-29[1][c]).

Uniform Common Trust Fund Act adopted with substantial modification. 1952 Amendments not adopted. Person cannot participate in collective investment funds established by affiliate unless plan establishing collective investment fund specifically authorizes participation. (UCA 7-5-13[1]).

Uniform Principal and Income Act adopted, with substantial modifications. (2001, adopted 2004). (UCA 22-3-101 et seq.).

Gifts to Minors.

Uniform Transfers to Minors Act adopted. (1983, adopted 1990). (UCA 75-5a-101 et seq.). See category 14 Family, topic 14.10 Infants.

Uniform Fiduciaries Act adopted, with modifications. (1922, adopted 1953). (UCA 22-1-1 et seq.).

Uniform Act for Simplification of Fiduciary Security Transfers adopted, with modifications. (1993, adopted 1995). (UCA 22-5-1 et seq.). If conflict between this Act and Chapter 8 of Uniform Commercial Code, this Act governs.

Accumulations.

No statutory provision.

Perpetuities.

See category 21 Property, topic 21.13 Perpetuities.

Pour Over Trusts.

See topic 13.16 Wills, subhead Bequests and Devises to Inter Vivos Trust.

Renunciation.

Person may disclaim in whole or in part right of transfer to person of any property or interest in it by delivering or filing written disclaimer. (UCA 75-2-801[1]). Generally, interest must be disclaimed within nine months of effective date of instrument or contract transferring present interest and within nine months of vesting of future interest. (UCA 75-2-801[2]). Right to disclaim exists notwithstanding any limit on interest of disclaimant in nature of spendthrift provision or similar restriction or any restriction on right to disclaim contained in governing instrument. (UCA 75-2-801[1]).

Discretionary Trusts for Disabled Persons.

Trust established for benefit of individual who, at time trust created, is under 65 and has disability. (UCA 62A-5-110[1][a][i]). Trustee has power to determine distributions. (UCA 65A-5-110[1][a][ii]). Irrevocable, and beneficiary may not control or demand payment. (UCA 65A-5-110[1][a][iii], [v]). Trust must contain assets of beneficiary and be established for benefit of beneficiary by parent, grandparent, legal guardian, or court. (UCA 65A-5-110[1][a][iv]). Trust invalid to extent funded by property subject to, or which may be subject to, lien by state. (UCA 65A-5-110[1][a][vi]). At death of beneficiary, state receives all amount remaining in trust, up to amount equal to total medical assistance paid on behalf of beneficiary. (UCA 62A-5-110[1][a][vii]).

13.16 WILLS:

Uniform Probate Code, with 1975 Official Amendments, adopted (with modifications) effective July 1, 1977. 1977, 1982, 1997, 1998, 2002, and 2003 Official Amendments not adopted. 1979 and 1984 Official Amendments adopted with significant variations. 1987 and 1993 Official Amendments adopted in part. 1990 Official Amendment adopted in substantial part. Uniform Probate Code designated as Utah Code Annotated, Title 75, with chapter and section number citations generally following pattern set forth in Uniform Probate Code, but with many differences.

Uniform Transfer on Death Security Registration Act (UCA 75-6-301 et seq.) allows individuals to obtain registration of security in beneficiary form (UCA 75-6-303). Registration must include designation of beneficiary to take ownership at death of owner or multiple owners. (UCA 75-6-305). On death of sole or multiple owners, ownership of registered security passes to beneficiary who survives. (UCA 75-6-308). Registering entity protected and discharged from claims to security by estate, creditors, heirs, or devisees if it registers transfer of security. (UCA 75-6-309[3]).

Testamentary Disposition.

Any person 18 or more years of age who is of sound mind may make will. (UCA 75-2-501). Testator may dispose of property in any manner he wishes, subject, however, to right of surviving spouse to elect to take up to one-third of augmented estate against will. (UCA 75-2-201 et seq.). There are no limitations as to amount which may be given to religious, charitable, etc. institutions, nor as to gifts to such institutions in wills made less than specified time prior to testator's death.

Execution.

Will must be in writing, signed by testator, or in his name by someone in his conscious presence and by his direction. (UCA 75-2-502[1][a], [b]). Will must be signed within reasonable time by at least two persons, each of whom witnessed either signing or testator's acknowledgment of signature of will. (UCA 75-2-502[1][c]). Witness must be competent to sign. (UCA 75-2-505[1]).

Holographic Wills.

Will which does not comply with UCA 75-2-502[1] valid as holographic will, whether or not witnessed, if signature and material portions of document in testator's handwriting. (UCA 75-2-502[2]). Intent that document constitutes testator's will can be established by extrinsic evidence including portions of document not in testator's handwriting. (UCA 75-2-502[3]). Document not executed in compliance with UCA 75-2-502 treated as executed in compliance, if proponent establishes by clear and convincing evidence that decedent intended writing to be decedent's will or amendment, revocation, or revival thereof. (UCA 75-2-503).

Nuncupative Wills.

Not recognized.

Revocation.

Will or any part thereof revoked by subsequent will which revokes prior will or part of such will expressly or by inconsistency, or by its being burned, torn, canceled, obliterated, or destroyed, with intent and for purpose of revoking it, by testator or by another person in his presence and by his direction. (UCA 75-2-507[1]). Subsequent wills not expressly revoking previous will revokes previous will by inconsistency if testator so intended. (UCA 75-2-507[2]). Testator presumed to intend subsequent will to replace rather than supplement previous will, if subsequent will makes complete disposition of testator's estate. (UCA 75-2-507[3]). Testator presumed to intend subsequent will to supplement rather than replace previous will, if subsequent will does not make complete disposition of estate. (UCA 75-2-507[4]). Killing of decedent by means of disqualifying homicide revokes any revocable disposition of property made by decedent to killer, any provision conferring general or nongeneral power of appointment on killer, and any nomination of killer to serve in fiduciary capacity. (UCA 75-2-803[3]). Unless expressly stated in terms of governing instrument, court order, or contract relating to division of marital estate before or after marriage, divorce or annulment of marriage revokes any revocable disposition of property made by divorced individual to former spouse and to relative of former spouse, revokes any provision conferring general or nongeneral power of appointment on divorced individual's former spouse or relative of former spouse, and revokes any nomination of divorced individual's former spouse or former spouse's relative to serve in any fiduciary capacity. (UCA 75-5-804[2]). Provisions revoked solely by application of this section are revived by testator's remarriage to former spouse. (UCA 75-2-804[5]). Severance does not affect third party interest acquired for value and in good faith. (UCA 75-2-803[4]). See also subhead Children, supra.

Revival.

If subsequent will which, had it remained effective at death, would have revoked previous will in whole, thereafter revoked by acts under UCA 75-2-507(1)(b), previous will revived only if evident from circumstances of revocation of subsequent will or from testator's contemporary or subsequent declarations that he intended first will to take effect as executed. (UCA 75-2-509[1]). If subsequent will that partly revoked previous will thereafter revoked by acts under UCA 75-2-507(1)(b), revoked part of previous will revived unless evidence from circumstances of revocation of subsequent will or from testator's contemporary or subsequent declarations that testator did not intend revoked part to take effect as executed. (UCA 75-2-509[2]). If subsequent will that revoked previous will in whole or in part revoked by another later will, previous will remains revoked in whole or in part, except to extent terms in third will show intent that first will be effective. (UCA 75-2-509[3]).

Testamentary Gifts to Subscribing Witnesses.

Will or any provision thereof not invalid because will signed by interested witness. (UCA 75-2-505[2]).

Bequests and Devises to Inter Vivos Trust.

Will may devise property to trustee of trust established or to be established during testator's lifetime by testator, by testator and some other person, or by some other person, or to be established at testator's death by testator's devise to trustee if trust identified in testator's will and terms set forth in written instrument other than will, executed before, concurrently with, or after execution of testator's will. (UCA 75-2-511[1]). Unless testator's will provides otherwise, property devised to trust not held under testamentary trust of testator but becomes part of trust to which devised. (UCA 75-2-511[2]). Revocation or termination of trust before testator's death causes devise to lapse. (UCA 75-2-511[3]).

Testamentary Guardians.

See category 14 Family, topic 14.08 Guardian and Ward.

Probate.

Jurisdiction over probate matters vested in district court. Venue for informal or formal testacy or appointment proceedings after decedent's death in county of decedent's domicile or residence at time of death or, if decedent was not domiciled in this state, in any county where property of decedent was located at time of death. (UCA 75-3-201[1]). Interested persons have right to select either formal or informal procedures in probate of estate. (UCA 75-3-301 to -311; UCA 75-3-401 to -414).

Self-proved Wills.

Any will may be simultaneously executed, attested, and made self-proved by acknowledgment of it by testator and affidavits of witnesses, each made before officer authorized to administer oaths under laws of state where execution occurs and evidenced by officer's certificate, under official seal, in form and content substantially as follows (UCA 75-2-504[1]):

Forms

"I, ______________________________, the testator, sign my name to this instrument this ____ day of ______________________, and being first duly sworn, do hereby declare to the undersigned authority that I sign and execute this instrument as my will and that I sign it willingly (or willingly direct another to sign for me), that I execute it as my free and voluntary act for the purposes therein expressed, and that I am 18 years of age or older, of sound mind, and under no constraint or undue influence.

____

Testator

We, ________________________________, ______________________, the witnesses, sign our names to this instrument, being first duly sworn, and do hereby declare to the undersigned authority that the testator signs and executes this instrument as [his] [her] last will and that [he] [she] signs it willingly (or willingly directs another to sign for [him] [her]), and that each of us, in the presence and hearing of the testator, hereby signs this will as witness to the testator's signing, and that to the best of our knowledge the testator is 18 years of age or older, of sound mind, and under no constraint or undue influence.

____

Witness

____

Witness

STATE of..........

COUNTY of..........   :   ss.

Subscribed, sworn to, and acknowledged before me by ____________________, the testator and subscribed and sworn to before me by ______________________________ and ________________________, witnesses, this _______________________ day of ________________________.

(Signed) ____________________

____

(Official capacity of officer)"

Attested will may at any time after its execution be made self-proved by acknowledgment of it by testator and affidavits of witnesses, each made before officer authorized to administer oaths under laws of state where acknowledgment occurs and evidenced by officer's certificate, under official seal, attached or annexed to will in form and content substantially as follows:

"STATE of ____________________

COUNTY of ____________________   :   ss.

We, ____________________________, ______________________________, and ______________________________, the testator and the witnesses, respectively, whose names are signed to the attached or foregoing instrument, being first duly sworn, do hereby declare to the undersigned authority that the testator signed and executed the instrument as the testator's will and that [he] [she] had signed willingly (or willingly directed another to sign for [him] [her]), and that [he] [she] executed it as [his] [her] free and voluntary act for the purposes therein expressed; and that each of the witnesses, in the presence and hearing of the testator, signed the will as witness and that to the best of [his] [her] knowledge the testator was at that time 18 years of age or older, of sound mind, and under no constraint or undue influence.

____

Testator

____

Witness

____

Witness

Subscribed, sworn to, and acknowledged before me by ________________________, the testator, and subscribed and sworn to before me by __________________________ and ________________________, witnesses, this _____________________ day of ________________________.

(Signed) ____________________

____

(Official capacity of officer)"

Living Wills.

Advance Health Care Directive Act, effective Jan. 1, 2008. (UCA 75-2a-101 et seq.). Healthcare professional described in UCA 75-2a-106[2] may prepare "life with dignity" order according to requirements of UCA 75-2a-106. Adult may create advance health care directive according to provisions of UCA 75-2a-107. Surrogates specified and authority defined. (UCA 75-2a-108 to -110). Directive may be revoked any time by declarant by writing "void" across document, by obliterating, burning, tearing or otherwise destroying document in manner indicating intent to revoke, by instructing another to one of those acts, by written revocation signed and dated, or by oral expression of intent to revoke directive in presence of qualified witness. (UCA 75-2a-114[1]). Optional form. (UCA 75-2a-117). Reciprocity with heath care directives created in other states or under former law. (UCA 75-2a-121). Immunity from civil or criminal liability for heath care professionals acting in accordance with advanced health care directive or "life with dignity" order. (UCA 75-2a-121[1]; UCA 75-2a-106[6]).

Contest.

Informal probate can be contested by petition in court to prevent or set aside informal probate. (UCA 75-3-401[1]). In formal probate proceedings, written objections opposing probate of will must be filed. (UCA 75-3-404). After formal probate order, vacation or modification may be sought by: (1) Proponents of later-offered will, if without knowledge of its existence at first proceeding or if without knowledge and without actual notice of first proceeding; (2) heirs (in case of order of intestacy and determination of heirs) without knowledge of decedent's death, their heirship or actual notice of proceedings; or (3) others for good cause. Time for filing petition to vacate or modify depends on proceedings used in first probate. (UCA 75-3-412, 413).

Alleged decedent may always recover property or its proceeds if not dead, if in hands of personal representative, or even if distribution has been made, if recovery equitable. (UCA 75-3-412[2]).

Except for fraud, actions against distributees to recover improper distributions barred at later of three years after decedent's death or one year after distribution, except for actions by creditors which are barred one year after decedent's death. (UCA 75-3-1006[1]).

Legacies.

Personal representative in formal or informal probate may petition court for order directing distribution at any time after time for presenting claims has expired. Interested party may petition one year after appointment of personal representative and must wait until after time for presenting claims. (UCA 75-3-1001[1], -1002). Except in supervised probate, personal representative may distribute without court approval and file closing statement with court no earlier than four months after appointment. (UCA 75-3-1003[1]).

Ademption of securities and certain specific devises limited by UCA 75-2-607, -608. Ademption by satisfaction occurs only if expressly stated in will or other contemporaneous writing by testator, or if devisee acknowledges satisfaction in writing. (UCA 75-2-609[1]). Property given during lifetime valued at earlier of time devisee came into possession of property or testatotor's death. (UCA 75-2-609[2]). If devisee fails to survive testator, gift treated as full or partial satisfaction unless testator's contemporaneous writing provides otherwise. (UCA 75-2-609[3]).

Unclaimed Legacies.

If person dies intestate leaving no heirs or if person dies testate and heirs, devisees, or claimants of his estate cannot be found (or do not have conservator), then unclaimed portion of estate passes to State Treasurer for benefit of State School Fund. (UCA 75-2-105; UCA 75-3-914). See category 21 Property, topic 21.01 Absentees, subhead Escheat.

Lapse.

If devisee who is heir of testator and is grandparent, descendant of grandparent, or stepchild of testator or donor, fails to survive testator then devisee's surviving descendants, if any, substituted for devisee so long as devise not class gift. (UCA 75-2-603[2][a]). Substituted descendant of deceased devisee takes per capita at each generation. (UCA 75-2-603[2][a]). If devise is class gift other than certain general classes ("issue" or "heirs", etc.), substitute gift created in surviving descendants of deceased devisee. (UCA 75-2-603[2][b]). Words of survivorship, including "if he survives me" or "to my surviving children", sufficient to prevent application of anti-lapse rule absent clear and convincing evidence of other intent. (UCA 75-2-603[2][c]). Except as provided in UCA 75-2-603, devise (other than residuary devise) which fails for any reason becomes part of residue. (UCA 75-2-604[1]). Except as provided in UCA 75-2-603, if residue devised to two or more persons and share of one of residuary devisees fails, his share passes to other residuary devisee, or devisees in proportion to their interests in residue. (UCA 75-2-604[2]).

Children.

Intestate share given to any child born or adopted after execution of will and not provided for therein unless will devised all or substantially all of estate to other parent of omitted child and other parent survives testator. (UCA 75-2-302[1][a]). Omitted child does not receive intestate share if: (1) Appears from will omission intentional; or (2) testator provided for child outside will and statements of testator or other evidence show that this intended to be in lieu of testamentary provision. (UCA 75-2-302[2]). Children living when will executed and not mentioned in will have no statutory right to take against will, unless testator believed child to be dead at time will executed. (UCA 75-2-302[3]).

Election.

Surviving spouse may, within nine months after date of death, or within six months after probate of decedent's will, whichever occurs last, elect to take against will by filing in court and mailing or delivering to personal representative, if any, petition for elective share. (UCA 75-2-211[1]). Court may extend time for election for cause shown at any time prior to expiration of time limitation. (UCA 75-2-211[2]). Right of election exercised only by surviving spouse living when petition for elective share filed or on surviving spouse's behalf by conservator, guardian, or agent. (UCA 75-2-212[1]). In case of protected person, right of election may be exercised only by order of court in which proceedings as to protected person's property are pending, after finding that exercise necessary to provide adequate support for protected person during probable life expectancy. (UCA 75-2-212). Electing spouse may be entitled to receive elective share equal to value of one-third of "augmented estate," as defined in UCA 75-2-202, multiplied by fraction computed under UCA 75-2-201.

Contribution.

Where surviving spouse elects to take against will, property already received by spouse charged against elective share and legacies and devises abate ratably. (UCA 75-2-207[1]). Where pretermitted child takes share of estate, devises made by will abate as provided in UCA 75-3-902. (UCA 75-2-302[4]).

Renunciation.

Devisees and heirs may renounce interest in estate by filing, within time limits prescribed by UCA 75-2-801(2), written and signed instrument containing description of property or interest renounced and declaration of intent to renounce (UCA 75-2-801[1]).

Foreign Executed Wills.

Written will valid if its execution complies with law at time of execution of place where will executed, or law of place where testator domiciled, has place of abode, or is national at time of execution or time of death. (UCA 75-2-506).

Foreign Probated Wills.

See topic 13.09 Executors and Administrators, subheads Foreign Executors and Administrators and Eligibility and Competency.

Simultaneous Death.

Uniform Simultaneous Death Act in effect. (1993, adopted 2003). (UCA 75-2-702).

Testamentary Trusts.

See topic 13.15 Trusts.

Revised Uniform Anatomical Gift Act adopted (2007). (UCA 26-28-101 et seq.).

14 FAMILY

14.01 ADOPTION:

This subject governed by Title 78B, c. 6.

Utah Adoption Act (UCA 78B-6-101 et seq.).

Uniform Act on Paternity repealed.

Uniform Parentage Act adopted. (2000, adopted 2005). (UCA 78B-15-101 et seq.).

Adult may adopt any minor child or "vulnerable adult" as defined in UCA 78B-6-115[1]. (UCA 78B-6-117[1], UCA 78B-6-115[1]). Adult may adopt another adult under certain restrictions. (UCA 78B-6-115[2]).

Consent Required.

Consent to adoption of adult required from adoptee, person adopting adult, spouse of person adopting adult, and legal guardian or custodian of adoptee. (UCA 78B-6-116[1]; 78B-6-120[1]). Married person not separated from spouse may not adopt without consent of spouse if spouse capable of consenting. (UCA 78B-6-114). Birth mother may not consent to adoption until at least 24 hours after birth of child. (UCA 78B-6-125[1]). No notice or consent required of parent whose parental rights have been terminated by court. (UCA 78B-6-127). Consent of unmarried biological father required only if he has developed substantial relationship with child, taken some responsibility for child, provided financial support as able, and either visited child at least monthly if able, maintained regular communication with child if able, or openly lived with child for at least six months directly preceding adoption. (UCA 78B-6-121[1]; see also UCA 78B-1-6-122). Unmarried biological father may preserve right to notice and consent by initiating paternity action and filing notice with state registrar, prior to mother's execution of consent. (UCA 78B-6-121[3]). When parents release custody of child to licensed child placing agency, consent of agency required. (UCA 78B-6-120[1][g]). Consent required of surviving parents of adoptee, conceived or born within marriage, unless adoptee 18 years or older. (UCA 78B-6-120[2][a]).

Consent of adoptee, over 12 years of age necessary, unless adoptee lacks mental capacity to consent. (UCA 78B-6-120[1][a]).

Minor parent has power to consent to adoption of child or to relinquish custody to licensed child placing agency, and such consent or relinquishment cannot be revoked upon parent attaining majority. (UCA 78B-6-123[1]-[3]).

Consent of parents of adopted adult not required. (UCA 78B-6-116[1]). Consent and notice provisions do not apply to biological fathers where child conceived as result of any proscribed sexual offense, whether or not father charged or convicted. (UCA 7878B-6-111).

Child Placing Agency.

Both licensed agency and private adoptions are authorized. (UCA 62A-4a-602[1], [2]). Any agency soliciting money or assistance for child placing must have valid written license from Dept. of Human Services. (UCA 62A-4a-602[1]). Anyone violating license requirement forfeits all proceeds of transaction and may be assessed civil penalty of up to $10,000 for each violation. (UCA 62A-4a-603[3]). Attorneys and physicians may assist in private placements, but may not receive payment or reimbursement for assistance. (UCA 62A-4a-602[2][a]). Payment of fees for medical or legal services in connection with care of mother and child or of delivery and adoption proceedings authorized. (UCA 62A-4a-602[3]).

Interstate Compact on Adoption and Medical Assistance.

Division of Child and Family Services and adoptive parents, or any state and adoptive parents may enter "adoption assistance agreement" to provide adoption and medical assistance under Adoption Assistance and Child Welfare Act of 1980. (UCA 62A-4a-709).

Conditions Precedent.

No final decree of adoption may be entered until child has lived with adoptive parent six months, unless, based on finding of good cause, court orders final decree of adoption at earlier time. (UCA 78B-6-135[7][a]). When adoptive parent is spouse of birth parent, child must live with adoptive parent one year. (UCA 78B-6-135[7][b]). Pre-placement adoptive study required, except as otherwise provided. (UCA 78B-6-128[1]).

Alien Child.

When adopting child under 16 years of age, who is not citizen or national of U.S., person adopting must file with petition for adoption, written evidence of lawful admission of child into U.S. (UCA 78B-6-108[1], [2]). Adoption order from foreign country recognized and enforced. (UCA

78B-6-142[1]).

Jurisdiction in district court where person adopting resides, or if person adopting is not resident of state, in district where child born, where child resides on day petition filed, or where parent of child resides on day petition filed (UCA 78B-6-105[1]); or in juvenile court if that court has previously entered order terminating rights of parent (UCA 78A-6-103[1][p]). District court has jurisdiction to hear and decide petition to terminate parental rights if party who filed petition is seeking to terminate parental rights for purpose of facilitating adoption. (UCA 78B-6-112[1]).

Venue.

Petition must be filed with clerk of district court in district where person adopting resides if person adopting is resident of Utah, else where proposed adoptee born, where proposed adoptee resides on day petition filed, or where parent of proposed adoptee resides on day petition filed. (UCA 78B-6-105[1][a], [b]) or in juvenile court if that court has previously entered order terminating rights of parent (UCA 78B-6-105[1][c]; UCA 78A-6-103[1][p]).

Proceedings.

Adopter, adoptee and each person whose consent is necessary must appear, and court examines separately all such persons. (UCA 78B-6-137).

Notice of adoption proceedings must be given to any person or agency whose consent required; any person who has filed notice of paternity with state registrar of vital statistics, any legally appointed custodian or guardian of adoptee, petitioner's spouse if petitioner's spouse not joined in petition, adoptee's spouse if any, any person who has previously been listed on birth certificate as father, with mother's consent; adoptee's custodian or guardian; spouse of petitioner; and spouse of adoptee, any person openly living in same household with child and holding himself out to be child's father, and any person married to child's mother at time she executes consent to adopt. (UCA 78B-6-110[2]). Notice must specify that petition must be contested within 30 days and state where copy of petition may be obtained. (UCA 78B-6-110[5]).

Decree declares child must thenceforth be regarded and treated in all respects as child of adopter. (UCA 78B-6-137).

Affidavit itemizing fees and expenses must be filed with court prior to final decree. (UCA 78B-6-140).

Name.

Adoptee may take family name of adopter. (UCA 78B-6-139).

Effect of Adoption.

Creates legal relationship of parent and child, having all rights and subject to all duties of relationship. (UCA 78B-6-139). Birth parents of adoptee are released from duties and responsibilities and have no further rights. (UCA 78B-6-138). Adopted individual is child of adopting parent or parents and not natural parents, but adoption by spouse of either natural parent has no effect on relationship between child and that natural parent; or right of child or his descendant to inherit from or through other natural parent. (UCA 75-2-114[2]).

Setting Aside Adoption.

No statute.

Adoption Information Registry.

When adoption finalized, agency or other person representing adoptive parents must file report containing health, genetic, and social history of adoptee with Bureau of Vital Statistics and must provide copy to adoptive parents. (UCA 78B-6-143[1], [3]). Report must not contain information identifying birth parents or members of their families. (UCA 78B-6-143[2]). Report available to adoptive parents, adoptee, legal guardian in event of adoptive parent's death, adoptee's spouse in event of adoptee's death if spouse is parent of adoptee's child, adoptee's descendants, birth parents, and adoptee's adult siblings. (UCA 78B-6-143[4]). Before giving child up for adoption, parent has right to counseling. (UCA 78B-6-119[1]).

Bureau of Vital Statistics must establish registry of identifying information available to adult adoptee and birth parents when requests for such information have been received from both. (UCA 78B-6-144[1]). Requested information may not be released if adult adoptee has sibling of same birth parent under 21 years of age who was raised in same family as adult adoptee. (UCA 78B-6-144[1][c]).

Reports and registry provisions do not apply to adoptions by stepparent whose spouse is adoptee's birth parent, and only apply to adoptions of adoptees born in this state. (UCA 78B-6-104).

Assistance and information regarding adoption may be made available by Department of Health and school boards.

14.02 ALIMONY:

See topic 14.06 Divorce.

14.03 COMMUNITY PROPERTY:

System does not obtain in Utah. See topic 14.06 Divorce.

14.04 DESERTION:

See topics 14.06 Divorce; 14.09 Husband and Wife.

14.05 DISSOLUTION OF MARRIAGE:

See topic 14.06 Divorce.

14.06 DIVORCE:

Governed by Title 30, c. 3.

Uniform Child Custody Jurisdiction and Enforcement Act adopted. (1968, adopted 2000). (UCA 78B-13-101 et seq.).

Uniform Act on Paternity repealed.

Uniform Parentage Act adopted. (2000, adopted 2005). (UCA 78B-15-101 et seq.).

Cohabitant Abuse Act adopted. (UCA 78B-7-101 et seq.).

Custody and Visitation for Persons Other than Parents Act adopted. (adopted 2008) (UCA 30-5a-101 et seq.)

Uniform Premarital Agreement Act adopted. (UCA 30-8-1 et seq.).

Grounds for absolute divorce: (1) Impotency at time of marriage; (2) adultery subsequent to marriage; (3) willful desertion for more than one year; (4) willful neglect to provide common necessaries of life; (5) habitual drunkenness; (6) conviction of felony; (7) cruelty causing bodily injury or great mental distress; (8) irreconcilable differences; (9) incurable insanity; (10) separation for three consecutive years without cohabitation under decree of separate maintenance. (UCA 30-3-1[3]). Same grounds available to husband and wife. (UCA 30-3-2).

Except for good cause or upon completion of mandatory educational course for divorcing parents, no hearing on complaint until after 90 days from filing. (UCA 30-3-18[1]). 90-day waiting period not applicable where both parties completed mandatory educational course for divorcing parents. (UCA 30-3-18[2]).

Grounds for Legal Separation.

Action for temporary separation order without filing divorce petition may be filed if petitioner lawfully married to respondent and both parties are residents of Utah for at least 90 days prior to filing date. (UCA 30-3-4.5[1]). Temporary orders valid for one year from date of hearing or until petition filed or case dismissed. (UCA 30-3-4.5[2]). See subhead Separate Maintenance, infra.

Citizenship Requirements.

No statutory requirement.

Residence Requirements.

Petitioner or respondent must have been actual bona fide resident of state and county for three months before action commenced. (UCA 30-3-1[2]).

Jurisdiction.

When controversy exists between spouses which may result in dissolution or annulment of marriage, and there is child of spouses or either of them under 17 years of age whose welfare might be affected, family court division of district court has jurisdiction over controversy, parties, and all persons having any relation to controversy. (UCA 30-3-16.1). Family court may make orders in divorce or conciliation proceedings as deemed necessary for protection of family interests. (UCA 30-3-16.1).

Venue in county of petitioner's or respondent's residence. (UCA 30-3-1[2]).

Process.

Proceedings in divorce commenced and conducted as provided by law for proceedings in civil causes, except as provided in title 30, c. 3. (UCA 30-3-1[1]).

Pleading.

Complaint must be in writing and signed by petitioner or attorney. (UCA 30-3-4[1]).

Practice.

File, except decree of divorce, classified as private upon motion of either party. (UCA 30-3-4[2]).

Decree.

Decree becomes absolute on date signed by court and entered by clerk unless on appeal, or at expiration of time period designated by court. (UCA 30-3-7[1]). No default decree except upon legal evidence submitted on petitioner's affidavit and with approval of court. (UCA 30-3-4[1][b]). If parties have children, no divorce decree until both parties attend mandatory education course, as described in UCA 30-3-11.3, and mandatory orientation course, as described in UCA 30-3-11.4. Court may waive education course if not necessary, appropriate, or feasible. (UCA 30-3-4[1][c]; UCA 30-3-11.4[11]). Court, on its own motion or upon application, may waive, alter or extend designated period of time before decree becomes absolute, but not to exceed six months from signing and entry of decree. (UCA 30-3-7[2]).

Allowance for Prosecution of Suit.

Court may order either party to pay costs, attorney fees, and witness fees to enable other party to prosecute or defend action. (UCA 30-3-3[1]). Court may order petitioner in modification of child custody or visitation provisions of court order to pay reasonable attorney's fees expended by prevailing party if petition without merit and not asserted or defended against in good faith. (UCA 30-3-5[6]).

Alimony.

Court may award possession of any real or personal property of one spouse to other and decree monies for support of spouse and minor children and may provide how and when payments are to be made. (UCA 30-4-3[1]). Court will consider numerous factors, including financial needs and earning capacity of recipient spouse, ability of payor spouse to provide support, length of marriage, whether recipient spouse has custody of minor children requiring support, whether recipient spouse worked in business owned or operated by payor spouse, whether recipient spouse directly contributed to any increase in payor spouse's skill by paying for education received by payor or allowing payor spouse to attend school during marriage. (UCA 30-4-5[8][a]). Fault of parties also considered in determining alimony. (UCA 30-4-5[8][a]). Court should consider and may attempt to equalize parties' standards of living. (UCA 30-3-5[8][c], [d]). Court exercises continuing jurisdiction to change alimony based on circumstances unforeseeable at time of divorce, but may not modify alimony after decree except in extenuating circumstances. (UCA 30-3-5[8][g]). Duration of alimony may not exceed years of marriage absent extenuating circumstances. (UCA 30-3-5[8][h]). Unless decree states otherwise, alimony automatically terminates upon remarriage or death of recipient spouse (UCA 30-3-5[9]). Alimony also terminates upon establishment by payor that former spouse cohabitating with another. (UCA 30-3-5[10]).

Division of Property of Spouses.

Equitable distribution theory. Court may make orders in relation to children, property, debts or obligations, as may be equitable. (UCA 30-3-5[1]). Claims of creditors remain unchanged unless contract or divorce decree states otherwise. (UCA 15-4-6.5[1]).

Revocation of Death Benefits by Divorce or Annulment.

Upon entry of decree of annulment or divorce on and after May 3, 1999, any revocable beneficiary designation contained in then-existing written contract owned by one party that provides for payment of any death benefit to other party revoked. (UCA 75-2-804[2]).

Change of Wife's Name.

Maiden name may be restored. (See UCA 42-1-1).

Custody of Children.

Neither spouse may remove other or their children from home without consent of other unless owner of property provides another suitable homestead. (UCA 30-2-10). In case of abandonment, spouse remaining with child retains custody of child unless otherwise directed by court. (UCA 30-2-10). In case of separation or void or dissolved marriage, court must determine custody of minor children considering best interests of child, including past conduct and demonstrated moral standards of each parent; which parent is most likely to act in best interests of child, including allowing frequent and continuing contact with noncustodial parent; extent of bonding between parent and child; and those factors outlined in UCA 30-3-10.2. (UCA 30-3-10[1]

[a]). Joint custody to be considered in every case. (UCA 30-3-10[1][b]). Children must not be required to testify unless extenuating circumstances exist. (UCA 30-3-10[1][c]). Court may inquire of children their preferences in custody; however, preferences are not controlling and custody may be determined otherwise. (UCA 30-3-10[1][d]). Added weight given to desires of children 16 years old or older. (UCA 30-3-10[1][d]). Interviews with children may be conducted by judge in camera only with prior consent of parties, but prior consent of parties not necessary if court determines interview is only method to ascertain child's desires regarding custody. (UCA 30-3-10[1][e]). Court may not discriminate against disabled parent in granting or modifying custody if disability does not inhibit ability to provide for physical or emotional needs or parent has sufficient resources available to supplement parent's abilities. (UCA 30-3-10[4][a]). Joint custody allowed but not required; widest discretion allowed to choose parenting plan in best interest of child. (UCA 30-3-10[5]). Court may authorize peace officer to enforce parent-time or visitation order. (UCA 30-3-5[5][b]). Custody of children and allowances for support may be changed at any time. (UCA 30-3-5[3]). Any party requesting joint custody or any other type of shared parenting arrangement must file and serve proposed plan at time of filing petition or answer of counterclaim. (UCA 30-3-10.8[1]).

Allowance for Support of Children.

Court may order payment of support for children during pendency. (UCA 30-3-3[3]). Included in decree of divorce are orders relating to maintenance and health care of parties and children. Court to include in every decree of divorce order assigning responsibility for payment of medical and dental expenses of dependent children. (UCA 30-3-5[1][a]). Court has continuing jurisdiction to make subsequent changes in child support. (UCA 30-3-5[3]). Court must order violator of child support or visitation orders to perform compensatory service and participate in workshops and/or counseling. (UCA 78B-6-316[1], [5]).

Remarriage of either party (except with the other) prohibited until divorce absolute. If appeal taken, divorce not absolute until after affirmance. (UCA 30-3-8).

Foreign Divorces.

No statutory provision.

Separation Agreements.

No statutory provision.

Antenuptial Contracts.

See topic 14.09 Husband and Wife.

Separate Maintenance.

Upon filing of complaint alleging desertion or neglect by spouse living separately from petitioner, court may order deserting spouse to pay temporary alimony, costs, expenses, and attorneys' fees during pendency of proceedings, as it deems necessary and proper as in actions for divorce. (UCA 30-4-1).

Annulment of Marriage.

See topic 14.11 Marriage.

Court Commissioners—Domestic Relations.

See category 6 Courts and Legislature, topic 6.01 Courts.

See topics 14.09 Husband and Wife, 14.11 Marriage.

14.07 DOMESTIC PARTNERS:

Marriage between persons of same sex prohibited. (UCA 30-1-2[5]).

Cohabitant Abuse Act adopted. (UCA 78B-7-101 et seq.).

See also topic 14.11 Marriage, subhead Common Law Marriages.

14.08 GUARDIAN AND WARD:

Uniform Probate Code, with 1975 Official Amendments, adopted with modifications. (UCA 75-1-101 et seq.). 1977, 1982, 1997, 1998, 2002, and 2003 Official Amendments not adopted. 1979 and 1984 Official Amendments adopted with significant variations. 1987 and 1993 Official Amendments adopted in part. 1990 Official Amendment adopted in substantial part.

See category 13 Estates and Trusts, topic 13.16 Wills.

Eligibility and Competency.

Any person whose appointment is in best interest of minor, considering minor's physical, mental, moral, and emotional health needs. (UCA 75-5-206[1][a]). Court must appoint person nominated by minor if minor is 14 years or older, unless court finds appointment contrary to best interest. (UCA 75-5-206[2]). Court may deny appointment of guardian if: (1) Minor is older than 11, minor has not secured certificate from police department where minor resided past two years proving no criminal charges against minor, or minor does not give release form to school superintendent giving superintendent access to criminal records of minor; (2) minor's primary purpose for guardianship is to avoid payment of tuition for nonresident; or (3) minor unwilling to abide by law or school rules. (UCA 75-5-206[3]).

Appointment of Guardian.

Parents of unemancipated minor may appoint guardian by written instrument which becomes effective upon filing petition for appointment in court having probate jurisdiction in county of residence of last parent to die, if death occurred in state, otherwise in county in which minor resides, and guardian files acceptance. (UCA 75-5-202.5[1]). Persons interested in welfare of minor, or minor 14 years or older, may file written objection to appointment before acceptance or within 30 days after notice of acceptance with court in which will probated or written instrument filed. (UCA 75-5-203). Court may appoint guardian for unemancipated minor if all parental rights of custody terminated or suspended prior to court order. (UCA 75-5-204). Guardian appointed by will or written instrument whose appointment not prevented or nullified has priority over guardian appointed by court. (UCA 75-5-204).

Qualification.

Court may require guardian to furnish bond. (UCA 75-5-105).

Inventory.

Conservator must prepare and file with appointing court complete inventory of estate of protected person, with oath that inventory is, to best of his knowledge, complete and accurate. (UCA 75-5-418).

Powers and Duties.

Guardian of minor has powers and responsibilities of parent not deprived of custody of unemancipated minor, except guardian not legally obligated to expend own funds for minor and not liable to third persons because of parental relationship for acts of minor. (UCA 75-5-209[2], [4][a]). Powers and duties include taking reasonable care of personal effects of guardian's ward, commencing protective proceedings to protect other property, receiving money payable for support of ward, receiving money or property of ward, exercising due care to conserve any excess money or property for ward's future needs, instituting proceedings to compel performance by any person of duty to support ward or pay sums for welfare of ward, facilitating ward's education, and consenting to marriage of guardian's ward. (UCA 75-5-209[3]).

Investments.

See category 13 Estates and Trusts, topic 13.15 Trusts.

Securities in Name of Nominee.

See category 13 Estates and Trusts, topic 13.15 Trusts, subhead Securities in Name of Nominee.

Real Estate.

Conservator, acting reasonably, may without court authorization or confirmation, collect, hold, and retain assets of estate, including land in another state, until, in his judgment, disposition of assets should be made. (UCA 75-5-424[3][a]). He may also subdivide, develop, or dedicate land to public use; make or obtain vacation of plats and adjust boundaries; adjust differences in valuation on exchange or partition by giving or receiving considerations; dedicate easements to public use without consideration; enter for any purpose into lease as lessor or lessee with or without option to purchase or renew for term within or extending beyond term of conservatorship. (UCA 75-5-424[3][i], [j]).

Liabilities of Guardian.

Guardian not liable to third persons by reason of guardian's relationship for acts of ward. (UCA 75-5-209[4][a][ii]). Unless provided in contract, conservator not individually liable on contract properly entered into in fiduciary capacity in course of administration of estate unless he fails to reveal representative capacity and identify estate in contract. (UCA 75-5-429[1]). Conservator individually liable for obligations arising from ownership or control of property of estate or for torts committed in course of administration of estate only if personally at fault. (UCA 75-5-429[2]). Claims based on contracts entered into by conservator in fiduciary capacity, on obligations arising from ownership or control of estate, or on torts committed in course of administration of estate, may be asserted against estate by proceeding against conservator in fiduciary capacity regardless of whether conservator individually may be determined in proceeding for accounting, surcharge, indemnification, or other appropriate proceeding or action. (UCA 75-5-429[4]).

Accounts.

Conservator must account to court for administration of trust upon resignation or removal and at other times as court may direct. (UCA 75-5-419). On termination of protected person's minority or disability, conservator may account to court, or to former protected person or his personal representative. (UCA 75-5-419). In connection with account, court may require conservator to submit to physical check of estate in his control in any manner specified by court. (UCA 75-5-419).

Termination of Guardianship.

Guardian's authority and responsibility terminate upon death, resignation, or removal of guardian or upon minor's death, adoption, marriage, or attainment of majority, but termination does not affect liability for prior acts or obligation to account for funds and assets of ward. (UCA 75-5-210). Resignation of guardian does not terminate guardianship until approved by court. (UCA 75-5-210).

Incapacitated Persons.

Guardian for incapacitated persons appointed by provision in will or by filing petition with court. (UCA 75-5-301[1]; UCA 75-5-303). When petition filed, incapacitated person must be represented by counsel whether by own choice or by court appointment. (UCA 75-5-303[2]). Courts must prefer limited guardianship, as opposed to full guardianship, and may grant full guardianship only if no other alternative exists. (UCA 75-5-304[2]). Person alleged to be incapacitated bears cost of counsel unless petition without merit. (UCA 75-3-303[2]). Notice of hearing given on court-approved form to all parties listed in UCA 75-5-309[1].

Accounting.

Guardian who is not parent must submit annual report and fee to court. For estates in excess of $50,000 (excluding residence owned by ward), guardian must submit full accounting to court annually. (UCA 75-5-312[2][e][ii]). For estates less than $50,000 (excluding residence owned by ward), guardian must submit informal annual report. (UCA 75-5-312[2][e][ii]). Report must include: Assets at beginning and ending of reporting year, income, disbursements, physical condition of ward, residence of ward, and others living in same household. (UCA 75-5-312[2][e][ii]). Annual report to be examined and approved by court. (UCA 75-5-312[2][e][ii]).

Foreign Guardian.

If no local conservator appointed and no petition in protective proceeding pending, domiciliary foreign conservator may file with court in this state in county in which property belonging to protected person located, and authenticated copies of his appointment and official bond given. Thereafter, he may exercise as to assets in state all powers of local conservator and may maintain actions and proceedings in state subject to any conditions imposed upon nonresident parties generally. (UCA 75-5-432).

Gifts to Minors.

See topic 14.10 Infants.

Uniform Fiduciaries Act adopted, with modifications. (1922, adopted 1953). (UCA 22-1-1 et seq.).

Uniform Act for Simplification of Fiduciary Security Transfers adopted. (1993, adopted 1995). (UCA 22-5-1 et seq.). If conflict between this Act and Chapter 8 of Uniform Commercial Code, UCC governs. (UCA 70A-10-103).

Uniform Transfers to Minors Act adopted. (1983, adopted 1990). (UCA 75-5a-101 et seq.).

Uniform Trustees' Powers Act repealed in 2004.

Uniform Trust Code adopted. See category 13 Estates and Trusts, topic 13.16 Wills.

14.09 HUSBAND AND WIFE:

(Title 30, cc. 1 to 8).

Disabilities of Married Women.

All disabilities of married women have been removed. (UCA 30-2-2 and UCA 78B-3-107).

Separate Property.

Husband's or wife's wages, earnings or property, or rents or income from such property, are not liable for separate debts of other, except each spouse is personally liable for expenses incurred on behalf of minor child for medical and dental expenses and other necessities as ordered by court or administrator. (UCA 30-2-5[c]). Earnings of wife are her own. (UCA 30-2-4).

Contracts.

Married woman may contract for herself, and liabilities may be incurred or enforced by or against her to same extent and same manner as if unmarried. (UCA 30-2-2).

Antenuptial Contracts.

Governed by Uniform Premarital Agreement Act. (1983, adopted 1994). (UCA 30-8-1 et seq.).

Liability for Debts of Spouse.

Husband and wife may be sued jointly or separately for family and educational expenses. (UCA 30-2-9). Spouse not liable for separate debts, obligations, or liabilities of other incurred before, during, or after marriage, except per UCA 30-2-9 and expenses for minor child per UCA 3-2-5[c] (UCA 30-2-5).

Liability for Torts.

Husband not liable for wife's torts, except in cases in which he would be jointly liable with her if marriage did not exist. (UCA 30-2-7).

Actions.

Should husband or wife obtain possession or control of property belonging to other before or after marriage, owner of property may maintain action in same manner and to same extent as if unmarried. (UCA 30-2-6). If husband and wife are sued jointly, either or both, may defend their own right, or may defend for both parties. (UCA 78B-3-101[1]). Party to marriage may sue or be sued as if unmarried. (UCA 78B-3-101[2]). Where husband or wife has deserted family, remaining spouse may prosecute or defend any action which other might have prosecuted or defended. (UCA 78B-3-101[3]). Spouse may maintain action for loss of consortium due to personal injury of other spouse. (UCA 30-2-11[2]). Spouse subjected to or in danger of abuse may seek protective order, regardless of whether action for divorce between parties pending. (UCA 78B-7-103[1], [2]).

Agency.

Husband or wife may constitute other his or her attorney in fact to control and dispose of his or her property for their mutual benefit or otherwise. (UCA 30-2-8).

Conveyance or Encumbrance of Property.

Conveyance, transfer, or lien executed by either husband or wife to or in favor of other valid to same extent as between other persons. (UCA 30-2-3). See also category 8 Debtor and Creditor, topic 8.10 Homesteads.

Desertion and Nonsupport.

Person commits criminal nonsupport if knowingly fails to provide support for wife or children under 18 when any of them is in needy circumstances. (UCA 76-7-201[1]). Inability to provide support affirmative defense. (UCA 76-7-201[5]). Where spouse deserts other without good cause, court must upon filing of complaint decree as alimony use of such part of real and personal estate or earnings of deserting spouse as court determines in its discretion. Court may also require deserting spouse to pay costs and attorney's fees in same manner as in actions for divorce. (UCA 30-4-1).

Punishment.

Criminal nonsupport is felony of 3d degree if: (1) Actor convicted one or more times of nonsupport; (2) actor committed offense while outside Utah; or (3) actor commits crime of nonsupport in each of 18 individual months within any 24-month period, or total arrearage in excess of $10,000. (UCA 76-7-201[3]). Class A misdemeanor otherwise. (UCA 76-7-201[2]). In lieu of imprisonment court may, with defendant's consent and upon condition of defendant entering condition of recognizance, impose order directing defendant to pay sum for support of dependents for period no longer than term of sentence. (UCA 76-7-202[1], [2][c]).

Revised Uniform Reciprocal Enforcement of Support Act repealed. Replaced by Uniform Interstate Family Support Act. (UCA 78B-14-101 et seq.)

Uniform Interstate Family Support Act.

Adopted with minor amendments. (1993, adopted 1997). (UCA 78B-14-101 et seq.).

Utah is not community property state. See UCA 30-3-5.

Abortions.

Abortion only legal when performed by physician licensed under Utah Medical Practice Act or osteopathic physician licensed under Utah Osteopathic Medical Practice Act and when unborn child not yet viable or for viable unborn children only when: (1) Necessary to save pregnant woman's life; (2) necessary to avert serious risk of substantial and irreversible impairment of major bodily function of pregnant woman; (3) two qualified physicians concur in writing that fetus has uniformly diagnosable and lethal defect; (4) pregnancy is result of rape that was reported to law enforcement; (5) pregnancy is result of incest that was reported to law enforcement. (UCA 76-7-302[2], [3]). Physician must notify parents 24 hours prior to performing abortion on minor, and parental consent must be obtained, subject to exceptions allowing for emergencies and situations where minor is victim of abuse. (UCA 76-7-304[3], [4]). Minor seeking abortion may obtain court order allowing abortion in lieu of parental consent. (UCA 76-7-304.5[4]). No abortion may be performed absent voluntary and informed consent from woman upon whom abortion is to be performed, except in cases of emergency. (UCA 76-7-305[1], [2]). Informed consent includes mandatory 24-hour waiting period. (UCA 76-7-305[2][a]). Exceptions to informed consent requirement. (UCA 76-7-305[7]). No person may intimidate or coerce another into obtaining abortion. (UCA 76-7-312). Partial birth abortion prohibited. (UCA 76-7-326). Public funds may not be used for abortion, subject to exceptions. (UCA 76-7-331[2]; UCA 26-18-4[2]).

14.10 INFANTS:

(Title 15, c. 2).

Majority Age.

18 years, except all minors obtain majority by marriage. (See topic 14.11 Marriage.) Courts in divorce actions may order support to age 21. (UCA 15-2-1).

Emancipation.

Minors at least 16 years old who are capable of living independently of parents or guardian and managing own financial affairs may petition court for emancipation (UCA 78A-6-803[1]), which would allow emancipated minor to enter into contracts, buy and sell property, sue or be sued, retain own earnings, borrow money, and obtain healthcare, among other things. (UCA 78A-6-805[1]). Emancipated minors not considered adults under criminal laws of state or for purposes of health and safety regulations, such as use of alcoholic beverages, possession of firearms, and voting privileges. (UCA 78A-6-805[2]). All minors attain majority by marriage. (UCA 15-2-1). See topic 14.11 Marriage, infra.

Disabilities.

In general, common law rules apply. Person under 16 years of age incapable of contracting for marriage, except in specific circumstances. (UCA 30-1-2[2]). See topic 14.11 Marriage.

Powers.

Depository institution may issue savings account to any minor as sole and absolute owner of savings account, and receive payment thereon by or for such owner, and pay withdrawals, except pledges to institution, and act in any other manner with respect to those accounts on order of minor. (UCA 7-1-611[1]).

Medical Services.

Health care provider must obtain informed consent of parent, guardian, or other authorized person subject to exceptions. (UCA 78B-3-406). Physician must notify parents 24 hours prior to performing abortion on minor, and parental consent must be obtained, subject to exceptions allowing for emergencies and situations where minor is victim of abuse. (UCA 76-7-304[3], [4]). Minor seeking abortion may obtain court order allowing abortion in lieu of parental consent. (UCA 76-7-304.5[4]).

Uniform Securities Ownership by Minors Act not adopted.

Ratification of Contracts.

Minor bound for reasonable value of necessaries; also bound by his other contracts, unless he disaffirms before or within reasonable time after attaining majority and restores to other party all moneys or property received by virtue of said contract and remaining within his control, at any time after attaining majority. (UCA 15-2-2). Emancipated minors can enter into valid legal contracts. (UCA 78A-6-801 to -804). Minor may not disaffirm contract where, on account of minor's own misrepresentation as to his majority, or from his having engaged in business as adult, other party had good reason to believe minor capable of contracting. (UCA 15-2-3). Minor 16 years of age or older otherwise competent to contract under Utah law may contract for insurance. (UCA 31A-21-103).

Services.

When contract for personal service of minor has been made with him alone, and those services afterward performed, payment made therefor to such minor, in accordance with terms of contract, is full satisfaction for those services, and parent or guardian cannot recover therefor second time. (UCA 15-2-4).

Actions.

Minor may sue or be sued, but must appear by guardian. (R.C.P. 17[b]). Juvenile court obtaining jurisdiction over minor retains jurisdiction until age 21 unless terminated sooner. (UCA 78A-6-103[1][a]). Jurisdiction remains beyond 21 years if person fails to pay fines or restitution ordered by court. (UCA 78A-6-103[1][b]). See also category 13 Estates and Trusts, topic 13.05 Death, subhead Actions for Death.

Support of Minor.

When obligor becomes delinquent in child support payments, obligor's income may be withheld by employer or other payor and delivered to Department of Human Services. Withheld income limited to 50% of aggregate disposable income of obligor. (UCA 62A-11-401 et seq.). Child support orders entered or modified on or after Oct. 13, 1990, subject to immediate withholding regardless of whether delinquency occurs unless court determines good cause exists or parties have executed agreement providing alternative arrangement. (UCA 62A-11-404). Child support orders entered prior to Oct. 13, 1990, and unmodified since that date, subject to withholding only when delinquency occurs. (UCA 62A-11-405). Obligee can obtain assistance from County Attorney's Office for recovery of child support. (UCA 78B-12-114).

Child support payments may be withheld from unemployment compensation. (35a-4-103[5][c]).

Responsibility for child support continues notwithstanding child's status as ward of state. (UCA 78B-12-106[1]).

Child Support Bond.

Department of Human Services or obligee may petition court for order requiring obligor to post bond or provide security for payment of support debts when department deems it appropriate and obligor is more than 90 days delinquent. (UCA 62A-11-321[1]).

Child Support Services Act adopted. Augments existing law providing for support by responsible parents of deserted and unsupported children. (UCA 62A-11-301 et seq.).

Interstate Child Support Collection.

In accordance with Uniform Interstate Family Support Act (UCA 78B-14-101 et seq.), Department of Human Services, upon request of agency of another state, may collect child support from resident obligor, even if obligee resides in another state. (UCA 62A-11-305[1]).

Intercept of State Income Tax.

Department of Human Services may intercept state income tax refund of obligor delinquent in child support payments. (UCA 59-10-529[1][b][ii]).

Utah Child Support Act adopted (1953, adopted 1957); prior to 2008 known as Uniform Civil Liability for Support Act (UCA 78B-12-101 et seq.).

Parental Responsibility.

In action to recover support due or owing, if obligee has received public assistance, Department of Human Services must be joined as party plaintiff. (UCA 78B-12-113[2][c]). Parent or guardian of minor child liable for up to $2,000 of property damage intentionally caused by minor child (UCA 78A-6-1113[1]), unless parent or guardian made reasonable effort to supervise and direct child (UCA 78A-6-1113[7]). Parent or guardian having legal custody of minor liable for up to $5,000 of property damage sustained when minor commits offense for benefit of, at direction of, or in association with, criminal street gang. (UCA 78A-6-1113[2]). Parent or guardian and minor child are jointly liable for value of shoplifted merchandise, court costs, and attorney's fees, unless parent or guardian made reasonable effort to restrain taking. (UCA 78B-3-108[5]).

Termination of Parental Rights Act (UCA 78A-6-501 to -505).—Certain parties may petition for termination of parental rights. (UCA 78A-6-504). Court may terminate parents' rights if court finds parent or parents: (1) Abandoned, neglected, or abused child; (2) unfit or incompetent; (3) failed to correct condition that caused removal of child from home; (4) have made only token effort to care for child; (5) voluntarily relinquished parental rights; or (6) after period of trial during which child returned to live in child's own home, parent substantially and continuously or repeatedly refused or failed to give child proper parental care and protection. (UCA 78A-6-507[1]). Order for termination divests child and parent or parents of all legal rights with respect to each other, except child's right to inherit from parent. (UCA 78A-6-513[1]).

Adoption.

See topic 14.01 Adoption.

Uniform Transfers to Minors Act adopted. (1983, adopted 1990). (UCA 75-5a-101 et seq.). Age of majority is 21. (UCA 75-5a-102). See also category 13 Estates and Trusts, topic 13.16 Wills.

Interstate Compact on Juveniles adopted. (UCA 55-12-100 et seq.).

Uniform Child Custody Jurisdiction and Enforcement Act adopted. (1997, adopted 2000). (UCA 78B-13-101 et seq.).

Child Abuse.

When any person, including persons licensed under Title 58, c. 67, Utah Medical Practice Act or Title 58, c. 31b, Nurse Practice Act, has reason to believe that child has been abused or neglected, that person must immediately notify nearest law enforcement agency, which must then immediately notify nearest office of Division of Child and Family Services. (UCA 62A-4a-403[1][a]). Notification requirements do not apply to clergymen or priests without consent of person making confession regarding confessions made to him in his professional character in course of discipline enjoined by church to which he belongs. (UCA 62A-4a-403[2]). Exemption does not cover other efforts required by law to prevent further abuse or neglect. (UCA 62A-4a-403[3][b]). One who has reason to believe child has died because of child abuse must report that fact to local law enforcement agency. No exceptions to this requirement exist. (UCA 62A-4a-405[1]). Exemption does not cover other efforts required by law to prevent further abuse or neglect. (UCA 62A-4a-403[3][b]). Photographs and X-rays of trauma areas of abused child may be taken by appropriate medical and/or law enforcement personnel and must be made available to division, law enforcement officials, and court in any case. (UCA 62A-4a-406). Physician may take child suspected of being abused into protective custody for up to 72 hours and must document grounds upon which child was taken into custody and notify Division immediately of such custody. (UCA 62A-4a-407[1]). Any interested person may file petition to commence proceedings alleging minor is abused, neglected, or dependant, but must first make referral with Division. (UCA 78A-6-304[1]). Juvenile Court has concurrent jurisdiction over adults who commit acts of child abuse. (UCA 78A-6-322). Division has access to criminal background information and is authorized to request complete Federal Bureau of Investigation criminal background check for purpose of investigating child abuse. (UCA 62A-4a-202.4[1], [2]). Statute of limitations for filing civil action for child sexual abuse four years after victim reaches age 18, or four years after abuse discovered if it not discovered until after victim is 18. (UCA 78B-2-308[2]). Any interested person, after first making referral to Division, may file petition for protective order on behalf of child being abused, sexually abused, neglected, or abandoned or in imminent danger of such harm. (UCA 78B-7-202[1]).

Any person, official, or institution that takes pictures or X-rays, assists investigator, serves as member of child protection team, or has protective custody of child immune from liability. (UCA 62A-4a-410[1]). Government employees immune only as provided in Governmental Immunity Act of Utah, 63G-7-101 et seq. (UCA 62A-4a-410[2]). No immunity when person, official, or institution acted with fraud or willful misconduct, gave false testimony, or intentionally or knowingly fabricated evidence or failed to disclose evidence. (UCA 62A-4a-410[3]). Anyone who willfully fails to file required report of suspected child abuse within four years from date of knowledge of offense, guilty of Class B misdemeanor. (UCA 62A-4a-411).

Any person who attends birth of child or cares for child and determines child has fetal alcohol syndrome or fetal drug dependency must report finding to division. (UCA 62A-4a-404).

Abuse, Neglect, and Dependency Proceedings. (UCA 78A-6-302 et seq.).—Any person may attend hearing unless court determines person's presence would be detrimental to best interests of child, impair fact-finding process, or otherwise be contrary to interests of justice.

(UCA 78A-6-114[1][a]). Interviews with children during investigation of abuse must be videotaped at existing Children's Justice Center or soft interview room. (UCA 62A-4a-414[1][a], [2]).

Sexual Exploitation of Children Act adopted (UCA 76-5a-1 et seq.).—Guilty of sexual exploitation of minor when knowingly produces, possesses, or possesses with intent to distribute child pornography, intentionally distributes or views child pornography, or if minor's parent or guardian knowingly consents to or permits minor to be sexually exploited. (UCA 76-5a-3[1]). Sexual exploitation of minor is second-degree felony. (UCA 76-5a-3[2]). Guilty of voyeurism when intentionally uses camcorder, motion picture camera, photographic camera of any type, concealed or disguised to secretly videotape, film, photograph, record, or view individual for purpose of viewing individual's body when individual has reasonable expectation of privacy and when individual does not know or consent regardless of whether individual's body covered with clothing. (UCA 76-9-702.7[1]). Voyeurism against child is third-degree felony. (UCA 76-9-702.7[2]).

Utah Child Abuse Act adopted (UCA 76-5-109).—Imposes criminal penalties of varying degrees for inflicting serious physical injury or allowing others to inflict physical injury on child. Child abuse also results where commission of domestic violence occurs in presence of child. (UCA 76-5-109.1). Criminal penalties also imposed for child abuse homicide. (UCA 76-5-201[2]). No penalty imposed under this act for parents or legal guardians who provide child with treatment by spiritual means alone, in accordance with religious beliefs, in lieu of medical treatment. (UCA 76-5-109[6]). Reasonable discipline or defense of self or another not considered abuse. (UCA 76-5-109[8]).

Child Protection Registry to be created which allows schools and adults to register domains and email addresses. (UCA 13-39-201[1]). No person may send email with content harmful to minor or advertise product that would be illegal for minor to purchase to registered contact point. (UCA 13-39-202[1]). Civil damages of $1,000 and criminal charge of misdemeanor or felony for violation. (UCA 13-39-301; UCA 13-30-302).

Missing Children.

Central register for identification of missing children operated by Department of Public Safety. (http://publicsafety.utah.gov/bci/missingpersons.html).

14.11 MARRIAGE:

Consent Required.

Consent of parent or guardian necessary to obtain marriage license if either under 18 and has not been married before. (UCA 30-1-9[2]). Written authorization of juvenile judge or court commissioner required if under 16. (UCA 30-1-9[2][b]). Both parties to marriage required to complete premarital counseling if under 15 unless counseling not readily available. (UCA 30-1-9[3][b]). (See subhead Prohibited Marriages, infra.) Parent or guardian who knowingly consents or allows minor child to enter into marriage prohibited by law guilty of third degree felony. (UCA 30-1-9.1).

Medical Examination.

No statutory requirement.

License.

Required; issued by county clerk of any county. (UCA 30-1-7[1], [2]). Marriage must be solemnized within 30 days of issuance. (UCA 30-1-7[3]). Each party must sign application for license before clerk or deputy. License issued within state may only be used within state. (UCA 30-1-7[2]).

Premarital Counseling.

County commissioners authorized to provide for premarital counseling and to require use of premarital counseling as condition precedent to issuance of marriage license to persons under 19 years of age and to persons who have been previously divorced. (UCA 30-1-30 to -39).

Waiting Period.

None.

Ceremonial Marriage.

Marriage may be performed only by: (1) Governor, lieutenant governor, judges of supreme, appeals, district, juvenile, or justice court; (2) county clerk of any county; (3) mayor of municipality or county executive; (4) minister, rabbi, or priest over age 18 and in regular communion with religious society; (5) Native American spiritual leader; (6) judge or magistrate of U.S.; and (7) president of state Senate or speaker of the House. (UCA 30-1-6[1]).

Record.

See category 10 Documents and Records, topic 10.04 Records, subhead Vital Statistics.

Common Law Marriages.

Unsolemnized marriage arising out of contract valid if court or administrative order finds man and woman: (1) Of legal age and capable of consent; (2) legally capable of solemnized marriage; (3) have cohabited; (4) mutually assume marital rights, duties, and obligations; and (5) hold themselves out as and are believed to be husband and wife. (UCA 30-1-4.5[1]). Determination must be made during or within one year of termination of relationship. (UCA 30-1-4.5[2]).

Proxy Marriages.

No statutory provision.

Marriages by Written Contract.

See subhead Common Law Marriages, supra.

Prohibited Marriages.

Marriages between following, whether legitimate or illegitimate relationship, are incestuous and void ab initio: (1) Parent and child; (2) ancestor and descendant of any degree;(3) brother and sister (whole or half blood); (4) uncle and niece; aunt and nephew;(5) first cousins unless both parties are 65 years of age or older, or if both parties are 55 years of age or older and either party found by court to be unable to reproduce (UCA 30-1-1[2]); or (6) any persons related within and not including fifth degree of consanguinity, computed according to civil law rules (UCA 30-1-1).

Marriage prohibited and void when: (1) Undivorced spouse living; (2) male or female under 16 years of age at time parties attempt to enter into marriage; (3) male or female under 18, unless consent obtained as provided by law; (4) with person divorced but divorce not absolute, and if appealed, until decree affirmed; (5) between persons of same sex. (UCA 30-1-2).

Foreign Marriages.

Marriages solemnized in any other country, state or territory, if valid where made, are valid in Utah unless those marriages would be prohibited and void in Utah per UCA 30-1-2, or unless parties are related per UCA 30-1-1. (UCA 30-1-4, -4.1).

Annulment.

Marriage may be annulled for any of following causes existing at time of marriage: (1) When marriage prohibited or void under statute (see subhead Prohibited Marriages, supra); (2) upon grounds existing at common law. (UCA 30-1-17.1).

When there is doubt as to validity of marriage, either party may, in court of equity where either party domiciled, demand its avoidance or affirmance, but when one of parties was under age of consent at time of marriage, other party, being of proper age, no such proceeding for that cause against party under age. Judgment in action must either declare marriage valid or annulled and conclusive upon all persons concerned with marriage. (UCA 30-1-17).

Antenuptial Contracts.

Uniform Premarital Agreement Act adopted with minor variations. (1983, adopted 1994). (UCA 30-8-1 et seq.).

14.12 MARRIED WOMEN:

All disabilities removed. See topic 14.09 Husband and Wife.

15 HEALTH

15.01 ABORTIONS:

Abortion only legal when unborn child not viable or, for viable unborn children, only if: (1) Necessary to save pregnant woman’s life; (2) necessary to avert serious risk of substantial and irreversible impairment of major bodily function of pregnant woman; (3) pregnancy is result of rape that was reported to law enforcement; (4) pregnancy is result of incest that was reported to law enforcement; or (5) abortion is necessary to prevent birth of child that would be born with uniformly diagnosable and lethal defects. (UCA 76-7-302[3]). Physician must notify parents 24 hours prior to performing abortion on minor, and parental consent must be obtained, subject to exceptions allowing for emergencies and situations where minor is victim of abuse. (UCA 76-7-304[3] to -304.5). Minor seeking abortion may obtain court order allowing abortion in lieu of parental consent. (UCA 76-7-304.5[1][b]). No abortion may be performed absent voluntary and informed consent from woman upon whom abortion is to be performed, except in cases of emergency. (UCA 76-7-305[1]). Informed consent includes mandatory 24-hour waiting period. (UCA 76-7-305[2]). Exceptions to informed consent requirement. (UCA 76-7-305[7]). No person may intimidate or coerce another into obtaining abortion. (UCA 76-7-312). Partial birth abortion prohibited. (UCA 76-7-326). Public funds may not be used for abortion, subject to exceptions. (UCA 76-7-331[2]; UCA 26-18-4).

15.02 ADMINISTRATION:

Health laws administered by Department of Health, P.O. Box 141010, Salt Lake City, UT 84114. (UCA 26-1-4).

15.02A ANIMAL EXPERIMENTATION:

Institutions Allowed.

Any educational, hospital, or scientific establishment concerned with investigation of or instruction concerning structure or functions of living organisms, cause, prevention, control or cure of diseases, or abnormal condition of human beings or animals authorized to obtain impounded animals. (UCA 26-26-1 to -2). Animals must be impounded for at least five days before they may be made available to approved institution for research or educational purposes. (UCA 26-26-3). Each establishment must keep record of animals used and disposed of. (UCA 26-

26-5).

15.03 DISEASES:

Following must report to Department regarding individual suspected of having communicable disease: Health care provider, health care facilities, nursing and mental health care facilities, testing laboratories, and child care programs. (UCA 26-6-6). Patient confidentiality requirements waived for mental health care providers reporting suspected communicable disease. (UCA 58-60-114). Information reported to Department generally held confidential. (UCA 26-6-27[1]). Several exceptions enumerated for purposes of better treating individual or interrupting spread of disease. (UCA 26-6-27[2]).

Emergency medical personnel exposed while providing emergency services may petition to have person to whom he was significantly exposed submit for testing. (UCA 78B-8-402[1]). Victim of sexual offense may learn HIV status of convicted offender. (UCA 76-5-504[2]).

Informed Consent.

Informed consent for treatment presumed when person submits to health care rendered by health care provider. (UCA 78B-3-406[1]).

Occupational Diseases.

See category 11 Employment, topic 11.03 Workers’ Compensation Law, topic 11.02 Labor Relations, subhead Occupational Diseases.

15.04 DURABLE POWER OF ATTORNEY:

See category 21 Property, topic 21.15 Powers of Attorney.

15.05 FOOD, DRUGS, DEVICES AND COSMETICS:

Pharmacists.

Must be licensed (UCA 58-17b-301) and license must be renewed every two years (UCA 58-17b-308[1]). May not pay, offer, receive, or solicit rebates or compensation in form of commission, bonus, rebate, kickback, or split fee arrangement with health care provider for purpose of obtaining referrals. (UCA 58-17b-502[2]). May not engage in sale or purchase of drug samples or packages bearing inscription “sample” or similar words (UCA 58-17b-102[28]; UCA 58-17b-501[4]), and may not accept back and then redistribute any unused drug after it has left premises of any pharmacy, if not in original, sealed container (UCA 58-17b-502[5]). Limited exceptions for drugs distributed to health care facilities. (UCA 58-17b-503[2]).

15.06 FRAUD AND ABUSE:

Health care providers may not practice without license (UCA 58-1-501[1][a]) or issue prescription for drug or device without establishing diagnosis, or based solely on questionnaire completed by patient over toll-free number or Internet (UCA 58-1-501[2][m]). Physicians may not refer patients, clients, or customers to any facility in which physician has any financial relationship unless physician discloses fact to patient, client, or customer in writing. (UCA 58-67-801[1]).

15.06A HEALTH CARE ASSISTANTS:

Registration.

To obtain certification as physician assistant, applicant must submit application, pay fee, be of good moral character, have successfully completed accredited physician assistant program, and have passed required exams. (UCA 58-70a-302).

To obtain certification as medication aide, applicant must submit application, pay fee, possess high school diploma or equivalent, possess current certification as nurse aide and be in good standing, have at least 2,000 hours experience in prior two years as nurse aid in long-term care facility, obtain specified letters of recommendation, certify in writing that he or she is free from physical or mental conditions that could prevent applicant from practicing, and have completed an approved education program and passed required exams. (UCA 58-31b-302[1]).

To obtain certification as licensed practical nurse or registered nurse, applicant must submit application, pay fee, possess high school diploma or equivalent, certify in writing that he or she is free from physical or mental conditions that could prevent applicant from practicing, and have completed approved education program and passed required exams. (UCA 58-31b-302[2] and [3]). Applicant for certification as advance practice registered nurse must additionally hold current registered nurse certification or be qualified as registered nurse, have earned applicable graduate degree or advance education program, and have completed advanced coursework as specified. (UCA 58-31b-302[4]). Additionally, every applicant under this chapter must submit to criminal background check. (UCA 58-31b-302[5]).

15.07 HEALTH INSURANCE BENEFITS:

Low-Income Children.

Any bona fide Utah resident citizen or legal resident of U.S., under 19 years of age, who does not have access to or coverage under any other health insurance, who is ineligible for Medicaid benefits, is not inmate of public institution, and who resides in household whose gross family income at or below 200% of federal poverty level is eligible to be covered by Utah Children’s Health Insurance Act. (UCA 26-40-105[1]). Qualified child not to be denied enrollment due to diagnosis or pre-existing condition. (UCA 26-40-105[2]).

15.08 LICENSURE AND CERTIFICATION:

Health Care Facilities.

License required to operate health care facility. (UCA 26-21-8[1]). License not transferable. (UCA 26-21-8[2]). Medicaid certified nursing home must meet conditions and receive approval to transfer license to new operator or new facility. (UCA 26-18-503[2]). Additional licenses only issued upon finding that current or projected occupancy rate of existing facilities is at least 90%. (UCA 26-18-503[5]).

Managed Care Organizations.

Certificate of authority required to operate health maintenance organization. (UCA 31A-8-102[1]). Applicant must have demonstrated willingness and potential ability to furnish services, demonstrated quality assurance program, and procedures to develop, compile, evaluate, and report statistics relating to cost, utilization, and availability and accessibility of services, and other matters reasonably required by director of Department of Health. (UCA 31A-8-104[1]).

Health Discount Programs.

Any organization, other than Health Care Insurance Providers or Health Maintenance Operators, that enters into contracts or arrangements in which person pays fees, dues, charges, or other consideration in exchange for program that provides access to health care providers who agree to provide discount for health care services needs to obtain license and provide information under Health Discount Program Consumer Protection Act. (UCA 31A-8a-201; See also UCA 31A-8a-101 et seq.). Operators of health discount programs may not use any marketing that could confuse health discount programs with other types of health insurance. (UCA 31A-8a-204[1]). Operators of health discount programs must provide each purchaser or potential purchaser with copy of terms of program at time of purchase. (UCA 31A-8a-205[1]). Operators of health discount programs may not place any restrictions on enrollees' access to health care providers such as waiting or notification periods. (UCA 31A-8a-206[1]).

Professionals.

Regulated by Utah Medical Practice Act. (UCA 58-67-101 et seq.). Oversight of physicians and surgeons is in Physicians Licensing Board. (UCA 58-67-201). Licensing of other health care professions regulated by Podiatric Physician Licensing Act (UCA 58-5a-101 et seq.), Utah Optometry Practice Act (UCA 58-16a-101 et seq.), Pharmacy Practice Act (UCA 58-17b-101 et seq.), Physical Therapy Practice Act (UCA 58-24b-101 et seq.), Nurse Practice Act (UCA 58-31b-101 et seq.), Nurse Licensure Compact (UCA 58-31c-101 et seq.), Advanced Practice Registered Nurse Compact (UCA 58-31d-101 et seq.), Recreational Therapy Practice Act (UCA 58-40-1 et seq.), Speech-language Pathology and Audiology Licensing Act (UCA 58-41-1 et seq.), Nurse Midwife Practice Act (UCA 58-44a-101 et seq.), Hearing Instrument Specialist Licensing Act (UCA 58-46a-101 et seq.), Massage Therapy Practice Act (UCA 58-47b-101 et seq.), Dietician Certification Act (UCA 58-49-1 et seq.), Radiology Technologist and Radiology Practical Technician Licensing Act (UCA 58-54-1 et seq.), Respiratory Care Practices Act (UCA 58-57-1 et seq.), Mental Health Professional Practice Act (UCA 58-60-101 et seq.), Psychologist Licensing Act (UCA 58-61-101 et seq.), Utah Osteopathic Medical Practice Act (UCA 58-68-101 et seq.), Dentist and Dental Hygienist Practice Act (UCA 58-69-101 et seq.), Physician Assistant Act (UCA 58-70a-101 et seq.), Naturopathic Physician Practice Act (UCA 58-71-101 et seq.), Acupuncture Licensing Act (UCA 58-72-101 et seq.), Chiropractic Physician Practice Act (UCA 58-73-101 et seq.), Direct-entry Midwife Act (UCA 58-77-101 et seq.). License that would otherwise expire extended until 90 days after end of active duty status for deployed reservist or National Guard member. (UCA 39-1-64[2]).

15.09 LIVING WILLS:

See category 13 Estates and Trusts, topic 13.16 Wills, subhead Living Wills. Uniform Health Care Decisions Act not adopted.

15.09A ORGAN DONATION:

Revised Uniform Anatomical Gift Act adopted (2007). (UCA 26-28-101 et seq.).

15.09B PATIENTS' BILL OF RIGHTS:

Uniform Health-Care Information Act not adopted.

15.10–15.11 [RESERVED]

15.12 PUBLIC HEALTH:

Medicaid regulations contained in Title 26, chapter 18. Financial help available through Baby Your Baby Medicaid program administered by Department of Health, offering prenatal care for low-income individuals. See http://www.babyyourbaby.org. Other programs available. See http://hlunix.hl.state.ut.us/medicaid/provhtml/Medical%20Programs%20in%20Utah.htm.

15.13 SMOKING REGULATIONS:

Smoking in Public Places.

Regulated by Utah Indoor Clean Air Act. (UCA 26-38-1). Smoking prohibited in publicly owned facilities and areas with certain exceptions. (UCA 26-38-2 to -3). Special exception for Native American ceremonies. (UCA 26-38-3.5). Violation may result in civil penalty up to $500. (UCA 26-38-8).

Smoking in Workplace.

Prohibited, except in areas not open to public of owner-operator businesses where owner is sole employee. (UCA 26-38-3[2][a], UCA 26-38-1 et seq.).

Tobacco Sales.

Sale of tobacco must be through direct, face-to-face exchange, with some exceptions for mail-order sales. (UCA 76-10-105.1[2], [3][a]). Use of vending machines or other self-service displays prohibited unless retailer ensures no person under 19 has access to area. (UCA 76-10-105.1[3][b]). Limits on advertising. (UCA 76-10-102). Providing tobacco to any person under age 19, prohibited. (UCA 76-10-104). Penalties for use by minor set forth in UCA 76-10-105.

16 INSURANCE

16.01 INSURANCE COMPANIES:

Regulated by.

Insurance Code, Title 31A.

Supervision by.

Laws relating to insurers are administered by Insurance Department, headed by Insurance Commissioner. (UCA 31A-2-101, UCA 31A-2-102).

Rates and Rate Service Organizations.

Regulated by UCA 31A-19a-101 et seq.

Policies.

No insurance policy form may be issued, delivered, sold, or used unless filed with and approved by Commissioner or statutorily exempted from approval. (UCA 31A-21-201[1]). Commissioner may prohibit use of form at any time upon finding form inequitable, unfairly discriminatory, misleading, deceptive, obscure, unfair, encourages misrepresentation, or not in public interest. (UCA 31A-21-201[3]).

Policy must include in conspicuous position and separate clauses: (1) Exact name and address of insurer, (2) information concerning several liability between two insurers, (3) statement if policy assessable, (4) statement that benefits are variable (method of calculation need not be in prominent position), (5) right to return policy, (6) beginning and ending dates of protection. (UCA 31A-21-301). Must also include total premium or explain in detail calculation of premium. (UCA 31A-21-302[1]).

Termination.

No insurance policy may be canceled by insurer prior to expiration of agreed term or one year from effective date of policy or renewal, whichever less, except for failure to pay premium when due or on grounds stated in policy. (UCA 31A-21-303[2][b]). Cancellation effective not sooner than 30 days after delivery or first class mailing of written notice to policy holder, except cancellation for nonpayment of premium. (UCA 31A-21-303[2][c][i]). Cancellation for nonpayment of premium effective no sooner than ten days after delivery or first class mailing. (UCA 31A-21-

303[2][c][ii]). Notice of cancellation for nonpayment of premium must include statement of reason for cancellation. (UCA 31A-21-303[2][d]). Foregoing provisions do not apply to any insurance contract that has not been previously renewed if contract has been in effect less than 60 days when notice of cancellation mailed or delivered. (UCA 31A-21-303[2][e][i]). No such cancellation effective until at least ten days after delivery to insured of written notice of cancellation. (UCA 31A-21-303[2][e][ii]).

Joint Issuance.

Two or more insurers may together issue policy or surety bond and liability must be joint and several. Service of process on any of insurers is service on all. Joint policy must include statement concerning proportion of premium and liability for each insurer. (UCA 31A-21-306).

Group and blanket insurers must issue certificate for each member of group as soon as reasonable. (UCA 31A-21-311[1][a][i]). Certificate must contain exact name of insurer, state of domicile of insurer, and summary of essential features of insurance coverage, including any rights of conversion to individual policy and, in case of group life insurance, any continuation of coverage during total disability and incontestability provision. (UCA 31A-21-311[1][a][ii]). Upon receiving written request, insurer must also inform any insured how insured may inspect, during normal business hours at place reasonably convenient to insured, copy of policy or summary of policy containing details relevant to certificate holder. (UCA 31A-21-311[a][iii]). Certificate must be provided in manner reasonably calculated to bring it to attention of holder. (UCA 31A-21-311[1][c][ii]).

Renewal.

Policy holder has right to renew policy. (UCA 31A-21-303[4]). New terms effective on renewal date, if insurer gives 30 days notice of new terms. (UCA 31A-21-303[6][a][i]). Certain limitations and exclusions exist on renewal. (UCA 31A-30-107).

Assignment of Proceeds.

Policy holder may enter into viatical settlement to designate beneficiary, assign, or transfer ownership of policy. (UCA 31A-36-101 et seq.). Viator need not be terminally or chronically ill unless expressly provided. (UCA 31A-36-102[12][b]). Viatical settlement interest deemed security. (UCA 61-1-13[1][ee][R]). See category 3 Business Regulation and Commerce, topic 3.24 Securities.

General Rules.

Action on policy must be commenced within three years of loss. (UCA 31A-21-313[1]). Policy may not provide that no action may be brought, subject to arbitration provision. (UCA 31A-21-313[3][c]). Policy may not prescribe in what court action may be brought on policy or limit time for beginning action to time less than authorized by statute. (UCA 31A-21-313[3][a], [b]). Action may not be brought against insurer on policy to compel payment until earlier of: (1) 60 days after proof of loss furnished, (2) waiver by insurer of proof of loss, or (3) insurer’s denial of full payment. (UCA 31A-21-313[4]).

No insurance policy contract delivered or issued for delivery in this state and covering subjects located, resident, or to be performed in this state may: (1) Require it to be construed according to laws of any other state (except as necessary to meet requirements of other jurisdictions’ compulsory insurance laws); (2) deprive Utah courts of jurisdiction, except as provided in acceptable arbitration provisions; or (3) limit time for commencing action to less than three years. (UCA 31A-21-314).

Oral contracts for insurance valid only for casualty insurance, liability insurance, property insurance, vehicle liability insurance, worker’s compensation insurance, and combinations of these. Written policy or binder should be issued as soon as reasonable. (UCA 31A-21-102[2]). No statement, representation, or warranty made by any person representing insurer in negotiation for individual or franchise insurance contract affects insurer's obligations under policy unless stated in policy or in written application signed by applicant. (UCA 31A-21-105[1][a]). No misrepresentation or breach of affirmative warranty affects insurer's obligations under policy unless: (1) Insurer relies on it and it is either material or made with intent to deceive, or (2) fact misrepresented or falsely warranted contributes to loss. (UCA 31A-21-105[2]). No trivial or transitory breach of or noncompliance with any provision of Utah Law is basis for avoiding insurance contract. (UCA 31A-21-105[7]).

Any person 16 years of age or older otherwise competent to contract under Utah law and not subject to legal disability may contract for insurance. (UCA 31A-21-103).

If insurer cancels health insurance policy for reasons other than material misrepresentation, insurer must refund unearned portion of collected premium. (UCA 31A-21-315[2]). If insurer cancels policy because of material misrepresentation on application, insurer must refund all premiums paid minus paid claims. (UCA 31A-21-315[3]).

No insurance policy may contain any agreement or incorporate any provision not fully set forth in policy or in application or other document attached to and made part of policy at time of its delivery, except rate schedules, classifications of risks, and short-rate tables filed with Insurance Commissioner. (UCA 31A-21-106[1][a], [b][i]). By rule or order, Insurance Commissioner may authorize incorporation by reference of provisions for administrative arrangements, premium schedules, and payment procedures for complex contracts. Policy may incorporate by reference, by citation in policy, federal law or regulation, state law or rule, or public directive of federal or state agency. (UCA 31A-21-106[1][b][ii], [d]).

If policy exceeds authority of insurer, it is still enforceable against insurer according to its terms. (UCA 31A-21-107[1]). Conditions or provisions not in compliance with Code do not render otherwise valid policy invalid. Those conditions will instead be construed as if they were in compliance. (UCA 31A-21-107[2]).

Insured has ultimate responsibility for paying health care services; insurer has primary responsibility to pay valid covered claims in timely manner. (UCA 31A-26-301.5[1]).

Authorized Clauses.

Except under certain circumstances, Insurance Commissioner may not adopt mandatory uniform clauses. (UCA 31A-21-203[1]).

Special Requirements.

Surety, liability, motor vehicle, life, group life, disability, group disability, credit life and disability, fraternal, worker's compensation, legal expense, reinsurance, aircraft, armed security guards, unusual vehicles, common carrier's insurance and long term care each have special requirements. (UCA 31A-22-101 et seq.).

Annual statements must be verified by oaths of two of insurer's principal officers and filed with Insurance Commissioner by Mar. 1 for condition as of close of preceding year. (UCA 31A-4-113[1]).

Discrimination.

Rates may not be unfairly discriminatory. (UCA 31A-19a-201[1]). Insurers may not discriminate by charging different premiums or offering different coverage except on basis of risk or expenses involved. (UCA 31A-23a-402[3][a]). Insurer may not unfairly discriminate between policyholders in payment of dividends, savings, or unabsorbed premium deposits. (UCA 31A-19a-

210[2]). Individual whose coverage terminated, may, after exhausting COBRA benefits, purchase converted policy from same company. (UCA 31A-22-723[2][b]). Employer must provide notification of right to converted policy within 30 days of termination of coverage. (UCA 31A-22-723[4]).

Charging of Rates.

Person or organization may not: (1) Willfully withhold from commissioner any rate service organization or any insurer information that will affect rates or premiums chargeable under this chapter; or (2) knowingly give false or misleading information to commissioner, rate service organization, or any insurer. (UCA 31A-19a-215). Insurer may not knowingly: (1) Charge or demand rate or receive premium that departs from rates, rating plans, classifications, schedules, rules, and standards in effect on behalf of insurer; or (2) issue any such policy or contract. (UCA 31A-19a-216).

Rebates.

No licensee or officer or employee of licensee may induce any person to enter into, to continue, or to terminate existing insurance contract by offering benefits not specified in policy to be issued, including premium or commission rebates. (UCA 31A-23a-402[2][a]). No title insurer or producer or any officer or employee of either may pay, allow, or give, directly or indirectly, as inducement to obtaining title insurance business any rebate, reduction, or abatement of any rate or charge made incident to issuance of insurance; any special favor or advantage not generally available to others; or any money or other consideration or material inducement. (UCA 31A-23a-402[2][c]).

Liens.

No statutory provision granting insurance company lien on policies.

Agents and Brokers.

Agents, brokers, consultants and adjusters must be licensed. (UCA 31A-26-201[1]). Producers, limited line producers, customer service representatives, consultants, managing general agents, and reinsurance intermediaries must be licensed. (UCA 31A-23a-103[1]). Partnerships or corporations may be agents or brokers. Agents, brokers, consultants, and adjusters must be 18 years of age (if individual), sign nonresident jurisdiction agreement if nonresident, be competent and trustworthy, fulfill education requirements, pass examination, complete training period, and pay required fees. (UCA 31A-23a-101 et seq.). Licenses remain in force until Insurance Commissioner revokes or suspends; license surrendered in lieu of administrative action; or licensee fails to pay fees, dies, or adjudicated incompetent. (UCA 31A-23a-111[1], UCA 31A-26-213[1]).

Agencies licensed under this chapter must report to Commissioner name of at least one person who has authority to act on behalf of agency in all matters pertaining to compliance with this article. (UCA 31A-23a-302[5]). Commissioner must impose continuing education requirements in accordance with two-year licensing period. (UCA 31A-26-206[2][a]). Agencies must report changes in adjusters acting for them at interval determined by Insurance Commissioner. (UCA 31A-26-210[2]).

Insurer must report to Commissioner all appointments and terminations of agents. (UCA 31A-23a-115[1][b]).

Process Agent.

Commissioner is agent for receipt of legal process relating to Utah court or administrative agency, except when action brought by state, in which event Lieutenant Governor is agent for service. (UCA 31A-2-309[1]). Any insurer, producer, consultant, adjuster, or third party administrator doing business in Utah is considered to have irrevocably appointed Commissioner and Lieutenant Governor as his agents for process. (UCA 31A-2-309[2]). Service upon Commissioner or Lieutenant Governor is service upon principal when specified conditions met. (UCA 31A-2-310[1]).

Investments regulated by UCA 31A-4-108, -109; UCA 31A-18-101 to -110.

Third Party Administrators.

Administrators required to hold valid license issued by Commissioner. (UCA 31A-25-201[1]). Must be at least 18 years of age, show good faith, and be competent and trustworthy. (UCA 31A-25-204). Administrator must maintain bond or insurance while licensed and for one year after, execute jurisdictional agreement if nonresident, and have written agreement with each insurer represented. (UCA 31A-25-205[1]).

Foreign insurance company must have certificate of authority (UCA 31A-14-202); file with Commissioner its articles and bylaws (UCA 31A-14-201[2][b][i]); financial statements for most recent complete fiscal year (UCA 31A-14-201[2][b][ii]); financial summary for preceding ten years or period of existence if less than ten years (UCA 31A-14-201[2][b][iii]); names and addresses of directors and officers, directors' and officers' occupations for preceding ten years (UCA 31A-14-201[2][b][iv]); list of previous insurance jurisdictions and name of and circumstances surrounding any officer, director, or controlling shareholder ever being subject to felony indictment or conviction of civil, criminal, or administrative action alleging fraud (UCA 31A-14-201[2][b][vi]); description of present operations (UCA 31A-14-201[2][b][vii]); list of documents distributed within last five years (UCA 31A-14-201[2][b][viii]); statement that organization is complete (UCA 31A-14-201[2][b][x]); plan for conducting business in Utah (UCA 31A-14-201[2][b][xii]). Incorporated alien insurers must also have operated in their domicile three years or otherwise show solidity, supply bond or deposit, and file agreement with Commissioner. (UCA 31A-14-209[1]). Foreign insurers may not deviate from their filed business plan for two years without filing with Commissioner (UCA 31A-14-212[1]), and must file and obtain approval of Commissioner before released from Utah regulation (UCA 31A-14-216). Foreign insurer may not conduct business in state unless requirements in UCA 31A-14-202 are met, except as allowed by UCA 31A-15-103.

Retaliatory Laws.

Whenever laws of foreign state or country require of Utah companies any taxes, licenses, other fees, deposit requirements, or other material obligations, prohibitions, or restrictions greater than those required by Utah from similar companies of such foreign state or country, or whenever any conditions precedent to doing business in such state or country are imposed by laws thereof beyond those imposed by Utah, all such companies of such other state or country must comply with same conditions precedent and satisfy same liabilities and obligations, computed on same basis as those provided by such other state or country. (UCA 31A-3-401[1]). Commissioner may by rule waive retaliatory requirements for person doing business or seeking to do business in Utah. (UCA 31A-3-401[3]).

Taxation.

Every insurance company must pay, on or before Mar. 31 of each year, tax of 2¼% of total premiums received during preceding calendar year from insurance covering property or risks located in Utah (other than worker's compensation, title insurance premiums, ocean marine insurance and annuity considerations, and insurance premiums paid by institutions within state system of higher education named in UCA 53B-1-102) less: (1) Premiums returned or credited to policy holders on Utah business, (2) premiums received for reinsurance of property or risks located in this state, and (3) dividends paid or credited to policy holders within this state or applied in abatement or reduction of premiums. (UCA 59-9-101[1]). Every workers' compensation insurer must pay on or before Mar. 31 of each year premium of 1% to 8% of total premium income, less most reductions listed above for general insurers. Labor Commission must determine amount of premium to be assessed before Oct. 15 of preceding year. (UCA 59-9-101[2]). Title insurers must pay on or before Mar. 31 tax of 0.45% of total premiums received from property insured in Utah. (UCA 59-9-101[3]). Insured whose total tax obligation under this section for preceding taxable year was $10,000 or more must pay taxes levied under this section in quarterly installments. (UCA 59-9-104[1]).

If insurance company has paid property tax, fee for examination, or assessment under guaranty association, it may deduct from this tax amount of such tax paid for general state purposes. (UCA 59-9-102[1]).

Nonforfeiture Law.

No life insurance policy (with exceptions) issued on or after July 1, 1961 may be issued or delivered in Utah unless it contains nonforfeiture provisions meeting state statutory requirements. (UCA 31A-22-408[2]). Not applicable to group life insurance. (UCA 31A-22-408[1]).

Medicare Supplement Insurance subject to special provisions. (UCA 31A-22-620).

Standard Valuation Law.

Insurance Commissioner must annually value reserve liabilities for all outstanding life insurance policies and annuity and pure endowment contracts of every life insurance company doing business in state. (UCA 31A-17-402[2], -502). Commissioner must value assets of insurers in accordance with current insurance business practices, considering any method approved by National Association of Insurance Commissioners. (UCA 31A-17-401[1]).

See also category 3 Business Regulation and Commerce, topic 3.11A Consumer Credit.

Service Insurance Corporations.

Corporations organized under Utah law as providers of insurance services subject to special provisions. (UCA 31A-6a-101 et seq.).

Health maintenance organizations are subject to special provisions. (UCA 31A-8-101 et seq.).

Nonprofit Health Service Corporations.

Nonprofit corporations organized under Utah law for purpose of operating nonprofit plan to subscribers to provide hospital, medical-surgical, dental care and other health care services subject to special provisions. (UCA 31A-7-101 et seq.).

Direct Actions Against Insurer.

See category 23 Transportation, topic 23.01 Motor Vehicles, subhead Direct Actions.

Insurance Holding Companies.

Authorized. (UCA 31A-16-101 et seq.). All information, documents, and copies thereof, obtained by or disclosed to Commissioner or any other person in course of examination or investigation generally confidential and not subject to subpoena or disclosure. (UCA 31A-16-109).

Guaranty Associations.

Utah Life and Health Insurance Guaranty Association and Property and Casualty Insurance Guaranty Association exist. Enumerated insurers must belong as condition of authority to transact insurance business in Utah. (UCA 31A-28-106[1], -205[1]). Annuity business of nontraditional insurers exempt from Life and Disability Guaranty Association. (UCA 31A-10-203[2][f]).

Uniform Insurers Liquidation Act not adopted. Rehabilitation and liquidation of insurers regulated by Insurer Receivership Act. (UCA 31A-27a-101 et seq.).

No-Fault Insurance.

See category 23 Transportation, topic 23.01 Motor Vehicles, subhead No-Fault Insurance.

Title Insurance.

Domestic title insurance companies must be organized as stock corporations, have minimum capital of $200,000, deposit guarantee fund with Insurance Commissioner, among other requirements. (UCA 31A-5-211). Title insurance industry governed by Title and Escrow Commission under Title and Escrow Commission Act. (UCA 31A-2-401 to -405).

Deposit required from domestic insurers in amount of required capital for stock insurers or minimum surplus for mutuals. (UCA 31A-4-105).

Plain Language.

No plain language statute. See category 3 Business Regulation and Commerce, topic 3.12 Consumer Protection.

16.02 SURETY AND GUARANTY COMPANIES:

See topic 16.01 Insurance Companies.

17 INTELLECTUAL PROPERTY

17.01 TRADEMARKS AND TRADENAMES:

(Title 70, c. 3a).

Any person who uses mark may file application for its registration. (UCA 70-3a-302[1][a]).

What May Be Used.

Trademark can be any word, term, name, symbol, design, or device or any combination used to identify and distinguish goods from goods made or sold by others, and to indicate source of goods, even if unknown. (UCA 70-3a-103[1][h]). Service mark means any word, term, name, symbol, design, or device or any combination used to identify services of one person and distinguish them from services of others, and to indicate source of services, even if unknown. (UCA 70-3a-103[1][g]).

Registration.

Trademark or service mark may not be registered if immoral, deceptive, scandalous, disparaging, falsely suggests connection with person (living or dead) or with institution/belief/national symbol, primarily geographically descriptive, or confusingly similar to trademark, service mark, or assumed name registered in Utah or to name of corporation qualified to do business in Utah. (UCA 70-3a-301[1]). Registration made on forms furnished by Division of Corporations and Commercial Code, accompanied by two identical specimens or facsimiles of trademark or service mark as actually used and regulatory fee as determined by division in accordance with § 70-3a-203. (UCA 70-3a-302[1][c]).

Assignment.

Registration assignable in writing with good will of business and must be recorded with Division of Corporations and Commercial Code within three months of assignment or prior to subsequent purchase to be valid against subsequent purchaser without notice. (UCA 70-3a-306[1][a], [b]). Filing fee determined by Division in accordance with § 70-3a-203. (UCA 70-3a-306[1][b][ii][B]).

Protection Afforded.

Common law trademark and service mark rights are enforceable. (UCA 70-3a-104). Certificate of registration effective for five years and may be renewed for successive five-year terms. (UCA 70-3a-305[1], [2]). Certificate of registration or certified copy thereof admissible in Utah courts as sufficient proof of registration of trademark or service mark. (UCA 70-3a-304[3]).

Infringement renders one liable to civil action for injunctive relief and compensatory damages. Registrant may not recover profits or damages unless infringer had knowledge that use would cause confusion, deception, or mistake. (UCA 70-3a-402[1], -404). Infringer may also be prosecuted under penal law. (UCA 70-3a-404[4]). See UCA 76-10-1001 to -1010 for penal law provisions.

Trade Names.

Every person conducting business under assumed name, whether as individual, association, partnership, corporation, or otherwise, must file certificate with Division of Corporations and Commercial Code within 30 days after commencing use of assumed name, setting forth assumed name, full names of persons owning and conducting such business, and business address or addresses of such persons. (UCA 42-2-5[1]). Every certificate filed with Division of Corporations and Commercial Code under this chapter must include following notice in conspicuous place on face thereof: “NOTICE - THE FILING OF THIS APPLICATION AND ITS APPROVAL BY THE DIVISION OF CORPORATIONS AND COMMERCIAL CODE DOES NOT AUTHORIZE THE USE IN THE STATE OF UTAH OF AN ASSUMED NAME IN VIOLATION OF THE RIGHTS OF ANOTHER UNDER FEDERAL, STATE, OR COMMON LAW (SEE UTAH CODE ANN. SECTIONS UCA 42-2-5 ET SEQ.).” (UCA 42-2-5[4]). Assumed name may not imply purpose other than that stated in application and may not be same or deceptively similar to other specified categories of names unless consent from owner of other name or final judgment from court establishing right to use name obtained. (UCA 42-2-6.6). Assumed name not in English must be translated into English and transliterated into English alphabet. (UCA 42-2-6.6[4]). Each certificate on file effective for three years from date of filing and renewable for like periods. (UCA 42-2-8). Persons may not maintain action in court until provisions of this chapter have been complied with. (UCA 42-2-10).

17.02 TRADE SECRETS:

Uniform Trade Secrets Act adopted. (1985, adopted 1989). (UCA 13-24-1 et seq.).

Employment Inventions.

Utah Employment Inventions Act defines conditions under which employment agreement may require employee to assign inventions to employer. (UCA 34-39-1 to -3).

18 LEGAL PROFESSION

18.01 ATTORNEYS AND COUNSELORS:

Governed by Rules of Court, Rules of Utah State Bar.

State Bar integrated. (Utah Ct. R. Prof. Practice 14-102[a][1]).

Admission to practice by Supreme Court entitles any person to be enrolled in Utah Bar and to thereafter practice upon payment of annual license fee. (Utah Ct. R. Prof. Practice 14-104[b]).

Jurisdiction over Admission.

Board of Commissioners certifies to Supreme Court those applicants found to be qualified. (Utah Ct. R. Prof. Practice 14-702[a]).

Eligibility.

Any citizen of U.S., 21 years of age, who is of good moral character and who possesses necessary qualifications of learning and ability entitled to admission as attorney and counselor in all courts of this state. (Utah Ct. R. Prof. Practice 14-704).

Registration as Law Student.

No statutory requirement. Law students may participate in certain matters under supervision of licensed attorney. (Utah Ct. R. Prof. Practice 14-807).

Educational Requirements.

Every student applicant must graduate with LL.B., J.D., or equivalent from resident A.B.A. approved law school. To apply as attorney applicant, must have been admitted to practice law of sister state, territory, or District of Columbia for at least five years and have been substantially and lawfully engaged in practice of law for four of previous five years preceding application. (Utah Ct. R. Prof. Practice 14-703, -704[a][4]).

Petition for Admission.

Applicant must file application for bar examination and admission on form prescribed by Bar. Applications must be filed on or before Oct. 1 for Feb. examination, Mar. 1 for July examination. (Utah Ct. R. Prof. Practice 14-707[a], [b]).

Student applicant must furnish: (1) Official certificate of law school graduation; (2) six character reference letters, three completed by individuals generally known to applicant, and three completed by attorneys generally known to applicant; (3) fingerprints; (4) criminal background check; (5) photograph; and (6) certificate of passage of Multi-state Professional Responsibility Examination with scaled score of 86 or better. (Utah Ct. R. Prof. Practice 14-701[n], -707[b], -713[a]). Also see Utah State Bar Application Form at http://www.utahbar.org/admissions/Assets/filing_instructions.pdf.

Attorney applicant must furnish: (1)(a) Certificate from highest court and jurisdiction in which applicant resided and practiced, dated not more than three months prior to filing application, showing date of admission, standing, and whether disciplinary action taken, or (b) certificate from chief administrative office of bar of state from which admission exists; (2)(a) reference letters from nine people: Three by people generally known to applicant, three by attorneys generally known to applicant, three by clients of applicant, or (b) letter from dean of accredited law school in which applicant has engaged in teaching law, or (c) letter from secretary of state or other proper officer of state wherein applicant has served as judge, or (d) letter from judge advocate department showing service in legal capacity; (3) fingerprints; (4) criminal background check; (5) photograph; and (6) certificate of passage of Multi-state Professional Responsibility Examination with scaled score of 86 or better. (Utah Ct. R. Prof. Practice 14-701[n], -707[b], -713[a]). Also see Utah State Bar Application Form at http://www.utahbar.org/admissions/Assets/filing_instructions.pdf.

Readmission after resignation by petition to Board. (Utah Ct. R. Prof. Practice 14-717).

Filing Fees.

Resident and nonresident student applicant, $450; attorney application, $625; disciplinary reinstatement, $725; resignation reinstatement, $550. (See Utah State Bar, http://www.utahbar.org/admissions/fees_and_deadlines.html).

Examinations conducted by committee of at least three members of bar appointed by Board of Commissioners. No transfers of multi-state scores accepted unless taken during same examination period during which essay component taken in Utah. (Utah Ct. R. Prof. Practice 14-712). Student bar examination includes essay component and Multi-state Bar Examination ("MBE"). Essay component consists of up to eight essay questions, one of which will be based on legal ethics, and two MPT questions. Essay questions may be taken from MEE or include local subjects involving torts, agency, state and federal procedure, business entities, wills and estate planning, constitutional law, evidence, property, conflicts of law, administrative law, ethics, contracts, criminal law, family law, debtor/creditor, landlord/tenant and commercial transactions, including U.C.C. and U.C.C.C. Multistate Performance Test (MPT). (Utah Ct. R. Prof. Practice 14-710). Student applicant must achieve combined score of 270. (Utah Ct. R. Prof. Practice 14-711[d]). Attorney examination consists of essay portion of student bar examination.. (Utah Ct. R. Prof. Practice 14-710). Attorney examination consists only of essay portion. (Utah Ct. R. Prof. Practice 14-710[b]).

Clerkship.

Not required.

Admission Without Examination.

No longer permitted.

Admission Pro Hac Vice.

In an individual case, no member of bar of any jurisdiction may appear in courts of this state without associating licensed active attorney upon whom pleadings and other papers may be served. (Utah Ct. R. Prof. Practice 14-806[e], [f]). Admission pro hac vice only permitted when court determines doing so will serve interests of parties and efficient and just administration of case. (Utah Ct. R. Prof. Practice 14-806[b]). Consult local courts for additional rules.

Attorney Ethics.

American Bar Association Model Rules of Professional Conduct adopted, with modification. (Utah Ct. R. Prof. Practice 13 et seq.)

Authority.

Attorney has authority: (1) To execute in name of client bond or other written instrument necessary and proper for prosecution of action or proceeding about to be or already commenced, or for prosecution or defense of any right growing out of action, proceeding, or final judgment rendered therein; (2) to bind client in any of steps of action or proceeding, by agreement filed with clerk, or entered upon minutes of court, and not otherwise; (3) to receive money claimed by client in action or proceeding, during pendency thereof, or after judgment, unless revocation of authority filed, and upon payment thereof, and not otherwise, to discharge claim or acknowledge satisfaction of judgment.

Annual License Fee.

$350 for over three years. $190 for under three years, $120 for inactive full service, and $80 for inactive. (Utah Ct. R. Prof. Practice 14-716); Utah State Bar, http://www.utahbar.org/rules_ops_pols/policies/licensing_policy.html).

Privileges.

No unusual privileges granted.

Disabilities.

Unlawful for attorney, for purpose of bringing action upon claim, to buy same or have it assigned to him. Nor may he become surety in civil or criminal proceedings in which he is engaged. See also Rules of Professional Conduct.

Liabilities.

See category 5 Civil Actions and Procedure, topic 5.08 Costs.

Compensation.

Contingent fee in malpractice action against health care provider limited to one-third. (UCA 78B-3-411). See also Rules of Professional Conduct.

Lien.

Attorneys have lien upon client's cause of action or counterclaim, time of employment of attorney by client, which attaches to settlement, verdict, report, decision, or judgment in client's favor, and proceeds thereof, in whosesoever hands they may come. (UCA 38-2-7[2], [3]). Lien cannot be affected by any settlement between parties before or after judgment. (UCA 38-2-7).

Disbarment or Suspension.

See Utah Ct. R. Prof. Practice 14-501 et seq., 14-601 et seq. Attorney must be disbarred for conviction of felony or misdemeanor involving moral turpitude. Disbarment for knowingly misstating fact on bar application or in connection with disciplinary matter. (R. Prof. Cond. 8.01). May be disbarred for professional misconduct upon recommendation of Board of Commissioners to Supreme Court. (R. Judic. Admin. 14-605[a]). Suspension lies for professional misconduct or criminal conduct that adversely reflects on lawyer's fitness to practice law. (R. Judic. Admin. 14-605[b]). Order of Board of Commissioners recommending discipline, suspension, or disbarment subject to review by Supreme Court on petition or own motion. Standards of professionalism and civility enumerated. (Utah Ct. R. Prof. Practice 14-301).

Unauthorized Practice.

Unlawful to practice without obtaining license and being admitted to practice in this state. (UCA 78A-9-103[1]). Enforcement by civil action. (UCA 78A-9-103[2]).

Mandatory Continuing Legal Education.

Must accumulate 24 hours, including three hours on topic of ethics or professional responsibility, every two fiscal years. (Utah Ct. R. Prof. Practice 14-404[a]).

Specialty Certification Requirements.

Lawyer may communicate fact lawyer does or does not practice in particular fields of law. (Rule Prof. Cond. 7.04[a]). Lawyer must not hold self out publicly as specialist and must not indicate any certification or designation as specialist, except as follows: (1) Lawyer admitted to practice before U.S. Patent and Trademark office may use designation "patent attorney" or substantially similar designation; and (2) lawyer engaged in Admiralty practice may use designation “Admiralty,” “Proctor in Admiralty” or substantially similar designation; and (3) in accordance with plan regulating lawyer specialization approved and promulgated by Utah Supreme Court. (Rules Prof. Cond. 7.04[b]-[d]).

Professional Association.

See category 2 Business Organizations, topic 2.03 Corporations, subhead Professional Corporations.

19 MINERAL, WATER AND FISHING RIGHTS

19.01 MINES AND MINERALS:

Regulated by Board of Oil, Gas and Mining. (UCA 40-6-4).

Operation of Mines.

Lode mining claim in state may equal but must not exceed 1,500 feet in length along vein or lode, and may extend 300 feet on each side of middle of vein at surface; endlines must be parallel. (UCA 40-1-1).

Monument and Notice.

Locator at time of making discovery must erect monument at place of discovery and post thereon his notice of location, which notice must contain: (1) Name of claim; (2) name of locator or locators; (3) date of location; (4) if lode claim, number of linear feet claimed in length along course of vein each way from point of discovery, with width on each side of center of vein, and general course of vein or lode, as near as may be, and such description of claim, located by reference to some natural object or permanent monument, as will identify claim; (5) if placer or mill site claim, number of acres or superficial feet claimed, and such description of claim or mill site, located by reference to some natural object or permanent monument, as will identify claim or mill site. (UCA 40-1-2).

Boundaries of all claims and mill sites must be marked distinctly on ground so boundaries can be readily traced. (UCA 40-1-3).

Recording.

Copy of location notice must be recorded in office of county recorder of county in which claim situated within 30 days after date of posting location notice. (UCA 40-1-4).

Forfeiture.

Owner of unpatented mining, mill, or tunnel site claim who performs work or makes improvements required by laws of U.S. to prevent forfeiture of claim must, within 30 days after end of annual period specified in 30 U.S.C. § 28, file with county recorder in county where claim located affidavit showing: (1) Name and address of claim’s owner; (2) name of claim and serial number, if any, assigned by BLM; (3) statement that such work was performed if annual assessment work required under federal statute; (4) statement that owner intends to hold claim if assessment work not required; and (5) statement that claim maintenance fee paid if required under applicable federal law. (UCA 40-1-6[2]).

Safeguarding of Employees.

Inspection of coal mines, and all related matters under jurisdiction of Labor Commission assisted by Utah Coal Mine Safety Office. (UCA 40-2-201). Each mine owner must maintain mine rescue team at each mine or otherwise ensure availability of one in accordance with Federal Mine Safety and Health Act of 1977 and appropriate regulations. (UCA 40-5-6[1]). Individuals or mine owners who participate in mine rescue operations during emergency are not liable for damages to injured person assisted during rescue operation. (UCA 40-5-6[2]). Protection for miners who report unsafe conditions in mines. (UCA 40-2-302).

Inspection of Mines.

If Division suspects violation of statute or permit, it must immediately order inspection of mining operation alleged to be in violation. (UCA 40-8-9[3][a]; UCA 40-10-22[1][a]).

Mineral Leases.

Minimal rental fee of not less than $1 per acre per year for leases acquired from division of state lands. (UCA 65A-6-4[2][a]). Lease may provide for rental credit, minimum rental, or minimum royalty when production begins. (UCA 65A-6-4[2][b]). Primary term may not exceed 20 years for oil shale and tar sands and ten years for other minerals (including oil and gas), with extensions possible if production in paying quantities or lessee engaged in diligent operations, exploration, or development, and lessee pays minimum royalty. (UCA 65A-6-4[3], [4]).

Oil and Gas.

See category 12 Environment, topic 12.01 Environmental Regulation, subhead Used Oil Management Act.

Geothermal.

Utah Geothermal Resource Conservation Act. (UCA 73-22-1 et seq.).

General Supervision.

Department of Natural Resources Division of Water Rights. (UCA 73-22-3[2], UCA 73-22-5).

Regulations.

Division has authority to prevent waste and establish cooperative units. (UCA 73-22-7[2]).

Enforcement.

When apparent violation of Act, Division may bring suit in name of state in district court for injunction. (UCA 73-22-5[5]). Act must not impair or delay any private cause of action for damages against any person violating Act. (UCA 73-22-5[6]).

Coal Mining and Reclamation.

(Title 40, c. 10). Board and Division of Oil, Gas and Mining have authority to regulate coal mining and reclamation on nonfederal lands and have authority for cooperative jurisdiction over federal lands. (UCA 40-10-2[1]). Permit from Division required for surface coal mining. (UCA 40-10-9[1]). Performance bond required. (UCA 40-10-15[1]). Board has authority to set environmental standards for restoration and reclamation of surface mine land. (UCA 40-10-17[2]). Board regulates surface effects of underground coal mining. (UCA 40-10-18[1]). If owner fails to reclaim, Board may reclaim after proper notice and hearing. (UCA 40-10-27[1]).

Enforcement.

Division has rights of entry and inspection and authority to issue orders and otherwise enforce provisions of Act. (UCA 40-10-19[2]). Penalty for violation of chapter up to $5,000 per day. (UCA 40-10-20[1]). $10,000 or imprisonment for willful violation. (UCA 40-10-20[5]).

Mined Land Reclamation.

(Title 40, c. 8). Board of Oil, Gas and Mining has authority to regulate mined land reclamation. (UCA 40-8-5[1]). Notice of intent to mine required. (UCA 40-8-13[1][a]). Notice must include identification of all owners of interest in deposit or surface land, copies of mine maps, locations of drill holes, area maps, and summary of proposed excavation. (UCA 40-8-13[1][b]). Surety required prior to mining. (UCA 40-8-14[1]). Notice of commencement within 30 days required. (UCA 40-8-15). Every operator must reclaim land and be responsible for costs and expenses thereof. (UCA 40-8-12.5).

Enforcement.

Penalty for willful violation under Act up to $10,000 per violation. (UCA 40-8-9[1][a]). Each day of willful violation constitutes separate violation. (UCA 40-8-9[1][b]).

Taxes.

Mines and mining claims are taxed at 100% of fair market value unless otherwise exempt under Utah Constitution. (UCA 59-2-201[1][a]). Assessment made by State Tax Commissioner. (UCA 59-2-201[1][a]). Fair market value of productive mining property determined by capitalized net revenue method unless commission adopts another method or taxpayer demonstrates other method to be reasonably determinative of fair market value of property. (UCA 59-2-201[3]).

Severance tax of 3% of value at well of oil produced and saved, sold, or transported, up to and including first $13 per oil barrel and 5% of value from $13.01 and above per oil barrel. (UCA 59-5-102[2][a]). Severance tax of 3% of value at well of gas produced and sold up to and including first $1.50 per thousand cubic feet (“MCF”) for gas, and 5% of value from $1.51 and above per MCF for gas. (UCA 59-5-102[2][b]). Severance tax rate for natural gas liquids is 4% of taxable value for natural gas liquids. (UCA 59-5-102[2][c]). Severance tax of 2.6% of taxable value of all metals or metalliferous minerals sold. (UCA 59-5-202[1]). First six months of certain development well production, and first 12 months of certain wildcat well production exempted. (UCA 59-5-102[5]). Oil and gas incentive credit account provides tax credits equal to 20% of recompletion or workover expenses to working interest owner. (UCA 59-5-102[6][a]). Tax credit may not exceed $30,000 per well during each calendar year. Credit may be carried forward for three years. (UCA 59-5-102[6][b]). Shipping oil, gas, metals, or metalliferous minerals out of state constitutes sale. (UCA 59-5-202[2]). Oil, gas, metals, or metalliferous minerals stockpiled more than two years subject to severance tax. (UCA 59-5-102[4]; UCA 59-5-202).

Withholding Tax.

Withholding tax of 5% on mineral production required to be remitted quarterly. (UCA 59-6-102, -103).

Oil and Gas Tax.

Charge of .002 on value at well of oil and gas produced, saved, sold or transported. (UCA 40-6-14[1]). Fee paid in proportion to ownership interest at time of production. (UCA 40-6-14[3][a]). Operator pays fee quarterly for all interested persons, due two months from end of quarter in which fee accrued. (UCA 40-6-14[4]). Penalty for late payment, together with interest at rate of 2% above federal short term rate from date of delinquency until paid. (UCA 40-6-14[5]; UCA 59-1-402[3]). Fee and accrued interest constitute lien on oil and gas. (UCA 40-6-14[5]).

20 MORTGAGES

20.01 CHATTEL MORTGAGES:

Uniform Commercial Code adopted. Chattel mortgages governed by Revised Art. 9 of Uniform Commercial Code. (UCA 70A-9a-101 et seq.). See category 3 Business Regulation and Commerce, topic 3.09 Commercial Code.

Utah Consumer Credit Code adopted. (Title 70C). See category 3 Business Regulation and Commerce, topic 3.11A Consumer Credit.

What May be Mortgaged.

Uniform Commercial Code adopted; accounts (UCA 70A-9a-109); consumer goods (UCA 70A-9a-102[23]); equipment (UCA 70A-9a-102[33]); farm products (UCA 70A-9a-102[34]); general intangibles (UCA 70A-9a-102[42]); inventory (UCA 70A-9a-102[48]); proceeds (UCA 70A-9a-315). See generally category Business Regulation and Commerce, topic Commercial Code.

After-Acquired Property.

Uniform Commercial Code adopted; security interest may be taken in after-acquired property. (UCA 70A-9a-204[1]).

Future Advances.

Uniform Commercial Code adopted; security interest may secure future advances. (UCA 70A-9a-204[3]).

Filing.

Uniform Commercial Code adopted. (UCA 70A-9a-310).

Place of Filing.

Financing statement should be filed in office designated for filing or recording of mortgage record on property if collateral as-extracted or timber to be cut or if financing statement filed as fixture filing. (UCA 70A-9a-501[1][a]). In all other cases, filing should be with Division of Corporations and Commercial Code, including cases where filing to perfect security interest in collateral or transmitting utility. (UCA 70A-9a-501[1][b]).

Fees.

County Recorder fees for filing instruments, papers, or notices are $10 for first page, $2 for each additional page, and $1 for additional descriptions. (UCA 17-21-18.5[1][b]).

Fees for filing each financing statement or assignment of interest determined by Division of Corporations and Commercial Code; must be reasonable and fair and reflect cost of services provided. (UCA 70A-9a-525[1]).

See also category 10 Documents and Records, topic 10.04 Records.

Release of Collateral.

Uniform Commercial Code adopted; fees for filing statements of release must be reasonable and fair and reflect cost of services provided. (UCA 70A-9a-525[1]).

Taxation.

No special provisions.

Forms.

UCC forms are available on Utah Division of Corporations and Commercial Code website, http://corporations.utah.gov/ucc-cfs/ucc.html. Forms include UCC 1 Financing Statement (http://corporations.utah.gov/pdf/uccone.pdf), UCC 3 Financing Statement Amendment (http://corporations.utah.gov/pdf/ucc3.pdf), and UCC 11 Information Request (http://corporations.utah.gov/pdf/ucc11.pdf). Additionally, UCC 1 filing may now be completed online at https://secure.utah.gov/ucc/.

20.02 COLLATERAL SECURITY:

See category 8 Debtor and Creditor, topic 8.15 Pledges.

20.03 MORTGAGES OF PERSONAL PROPERTY:

See topic 20.01 Chattel Mortgages and category 3 Business Regulation and Commerce, topic 3.09 Commercial Code.

20.04 MORTGAGES OF REAL PROPERTY:

Characteristics of Real Property Security Devices.

Both mortgages and trust deeds serve as real property security devices. Each considered to create lien on real property subject thereto. Upon default of obligation secured thereby, (1) mortgagee entitled to judicially foreclose, and (2) beneficiary of trust deed entitled to either judicially foreclose or exercise power of sale. (UCA 57-1-23). Trust deed more commonly used.

Execution.

Title 57, c. 1. Both mortgages and trust deeds are considered conveyances of interest in real property and must be executed with same formalities as deeds. See categories 10 Documents and Records, topic Acknowledgments; Property, topic Deeds, subheads Execution and Recording.

Recording.

Mortgage or trust deed must be recorded in county where property located in order to impart notice to third parties. (UCA 57-3-102). See also category 10 Documents and Records, topics 10.04 Records, 10.01 Acknowledgments.

Recording Fees.

See category 10 Documents and Records, topic 10.04 Records.

Taxes.

No transfer taxes are imposed when mortgage or trust deed executed or recorded.

Qualifications for Trustees of Trust Deeds.

Must be: (1) Member of Utah State Bar with office in Utah; (2) depository institution as defined in UCA 7-1-103, or insurance company authorized to do business and actually doing business in Utah; (3) corporation conducting authorized trust business in Utah; (4) title insurance or abstract company conducting authorized business in Utah; (5) agency of federal government; or (6) association or corporation licensed, chartered, or regulated by Farm Credit Administration. (UCA 57-1-21[1][a]). Beneficiary may appoint successor trustee at any time by recording substitution of trustee. (UCA 57-1-22[1][a]).

Power of sale conferred by UCA 57-1-23 may only be exercised by trustee of trust deed qualified by subheads above.

Future Advances.

No statutory restriction.

Priorities.

If no actual notice, priority of encumbrances determined by time of recording. (UCA 57-3-102). As mechanic's lien attaches as of commencement of work or furnishing materials on ground, it may gain priority over trust deed or mortgage recorded after such time. (UCA 38-1-5). See also category 22 Taxation, topic Property Taxes, subhead Liens.

Subordination Agreements.

No statutory restriction.

Assignment.

Recording of assignment of beneficial interest in trust deed does not in itself impart notice to trustor so as to invalidate payment to person holding instrument evidencing obligation. (UCA 57-1-36). Recording of assignment of mortgage not in itself deemed notice of assignment to mortgagor so as to invalidate payment made to mortgagee. (UCA 57-1-15).

Release.

Partial release of property permitted. (UCA 57-8-18).

Satisfaction.

When obligation secured by trust deed satisfied, upon written request by beneficiary, trustee must reconvey trust property. (UCA 57-1-33.1[1][a]). Beneficiary on trust deed, mortgagee on mortgage, and any other secured lender or servicer who does not release security interest on secured loan within 90 days after receiving final payment on secured loan must pay to another secured lender on real property or owner or titleholder greater of $1,000 or treble actual damages as well as attorney fees and court costs, unless secured lender failed to release security interest because of inaction on part of party beyond its control. (UCA 57-1-38[3], [4]). Reconveyances and discharges are considered conveyances of interest in real property and must be executed with same formalities as deeds. See categories 10 Documents and Records, topic Acknowledgments; Property, topic Deeds, subheads Execution and Recording.

Discharge.

See subhead Satisfaction, supra.

Foreclosure and Sales.

Requirement of lien holder to proceed against other security first. (UCA 78B-6-1221). Exceptions to this "security first" rule if real property environmentally impaired. (UCA 78B-6-909[3]). Beneficiary under trust deed may exercise power of sale or judicially foreclose. (UCA 57-1-23). Mortgagee may judicially foreclose. Limitations on foreclosure when beneficiary service member. (UCA 39-7-115). See category 3 Business Regulation and Commerce, topic 3.12 Consumer Protection, subhead Civil Relief.

Judicial foreclosure commenced in appropriate district court. No person holding conveyance or lien not recorded need be made party. (UCA 78B-6-903). Court determines amount of debt and directs sheriff to auction property according to provisions of sales on execution. (UCA 78B-6-901[2]). See category 8 Debtor and Creditor, topic 8.05 Executions.

If power of sale exercised, specific statutory provisions must be followed, summarized as follows: Notice of default must be issued and filed of record by trustee, and thereafter party in default has three months to cure default. (UCA 57-1-24). After three months, notice of sale must be published once per week for three consecutive weeks in newspaper of general circulation in county in which property located and notice must be posted at least 20 days before date of sale in conspicuous place on property to be sold and at office of county recorder of county in which property located. (UCA 57-1-25[1]). Sale date must be between ten and 30 days after last publication date. (UCA 57-1-25[1][a][i][C]). Trustee sells property at auction at courthouse of county where property located. (UCA 57-1-25[2][c]). Notice of default and notice of sale must be given those requesting same in recorded document. (UCA 57-1-26).

Deficiency Judgments.

In judicial foreclosure, if proceeds of sheriff's sale are insufficient to satisfy obligation, court clerk dockets judgment in amount equal to difference between amount of obligation and such proceeds. (UCA 78b-6-902). If power of sale exercised, deficiency judgment can be pursued by bringing separate action against trustor within three months after trustee's sale. (UCA 57-1-32). Deficiency limited to difference between amount of obligation and fair market value of property as of date of sale as found by court (i.e., not necessarily sale price of property). (UCA 57-1-32).

Redemption.

Property sold pursuant to judicial foreclosure subject to right of redemption. (UCA 78B-6-906[1]). See category 8 Debtor and Creditor, topic 8.05 Executions, subhead Redemption. No right of redemption from trustee's sale. (UCA 57-1-28[3]).

Forms.

Mortgage of land may be substantially in following form:

Form

"____ (here insert name), mortgagor of ___________________________ (insert place of residence), hereby mortgages to __________________________ (insert name), mortgagee, of __________________________ (insert place of residence), for the sum of ___________________ dollars, the following described tract _______________________________ of land, in ________________________________ County, Utah, to wit: (here describe the premises).

"This mortgage is given to secure the following indebtedness (here state amounts and form of indebtedness, maturity, rate of interest, by and to whom payable, and where).

"The mortgagor agrees to pay all taxes and assessments on said premises, and the sum of _____________________ dollars attorneys' fee in case of foreclosure.

"Witness the hand of said mortgagor this _____________________ (month\day\year)."

(Acknowledgment). (UCA 57-1-14).

Mortgage Lenders and Servicers.

See category 3 Business Regulation and Commerce, topic 3.01 Banks and Banking.

Chattel Mortgages.

See topic 20.01 Chattel Mortgages.

See also category 21 Property, topic 21.16 Real Property.

21 PROPERTY

21.01 ABSENTEES:

Uniform Probate Code, with 1975 Official Amendments, adopted with modifications. (UCA 75-1-101 et seq.). 1977, 1982, 1997, 1998, 2002, and 2003 Official Amendments not adopted. 1979 and 1984 Official Amendments adopted with significant variations. 1987 and 1993 Official Amendments adopted in part. 1990 Official Amendment adopted in substantial part. Also see category 13 Estates and Trusts, topic 13.16 Wills.

Care of Property.

Share of absentee heir or claimant given to his conservator, if any. Otherwise share distributed to State Treasurer for benefit of State School Fund. (UCA 75-3-914[1]; UCA 75-2-105). State Treasurer must pay share to formerly absent claimant upon proof of right to money. (UCA 75-3-914[2]). See also category 13 Estates and Trusts, topics 13.05 Death, 13.07 Descent and Distribution.

Process Agent.

Nonresident person, other than insurance organization, doing business in own name or common tradename, conducted by manager, superintendent, or agent of nonresident, must file (on or before Jan. 15 of each year) certificate under oath with Division of Corporations and Commercial Code giving name and address of manager, superintendent, or agent in this state upon whom service of process may be had. (UCA 78B-3-203).

Escheat.

If person dies intestate leaving no heirs or if person dies testate and heirs, devisees, or claimants of estate cannot be found (or do not have conservator), then unclaimed portion of estate passes to State Treasurer for benefit of State School Fund. (UCA 75-2-105; UCA 75-3-914).

Unclaimed Property Act enacted. (UCA 67-4a-101 et seq.).

State may take custody of unclaimed intangible property if last-known address of apparent owner or person entitled to property in Utah or under other specified circumstances. (UCA 67-4a-103[1]). Property considered abandoned or unclaimed if in possession of holder; apparent owner's identity, status, or location unknown; and property cannot be given to apparent owner after statutory dormancy period. (UCA 67-4a-201[1][a]). Property may not be considered abandoned if ownership disputed and property holder notified of this fact. (UCA 67-4a-201[1][b]). Statutory dormancy periods and rules governing abandonment vary for specific kinds of intangible property. (UCA 67-4a-202 to -214). Person holding property considered abandoned and subject to state custody must file report describing property (UCA 67-4a-301[1][a]) and pay or deliver to administrator property itself, or, in case of stocks and other intangibles, duplicate certificate or other evidence of ownership (UCA 67-4a-302[1][b], [c]). Upon good faith payment or delivery of property to administrator, state assumes custodial responsibility for property's safekeeping and holder relieved of any liability for claims or interest on property. (UCA 67-4a-303[2]). If property subsequently claimed by owner, holder may reclaim property from administrator or pay owner and request reimbursement from administrator. (UCA 67-4a-303[3]-[4]). Administrator will defend and indemnify holder against subsequent claims. (UCA 67-4a-303[6]). Owner may recover from administrator principal amount of any property turned over to state. (UCA 67-4a-401). Administrator's sale of abandoned property regulated by UCA 67-4a-403. Administrator may destroy property of insubstantial value. (UCA 67-4a-404). Proceeds of sale to be deposited in trust fund. (UCA 67-4a-405). Procedure for filing claim to ownership of abandoned property set forth in UCA 67-4a-501. Procedure for another state to file claim of right to recover property set forth in UCA 67-4a-502. Holders required to retain records of name and last-known address of owner. (UCA 67-4a-601). Administrator empowered to examine records (UCA 67-4a-701), impose interest and penalties (UCA 67-4a-703), and enforce provisions of Act (UCA 67-4a-702), subject to judicial review (UCA 67-4a-704). Foreign transactions excluded from application of Act. (UCA 67-4a-802).

See also category 3 Business Regulation and Commerce, topic 3.01 Banks and Banking, subhead Unclaimed Deposits.

21.02 ADVERSE POSSESSION:

(Title 78B, c. 2).

Title to real property may be quieted by adverse possession action where claimant shows quiet, peaceful, open, and notorious possession for seven consecutive years and has paid all taxes. (UCA 78B-2-208).

Character of Possession.

Possession by one claiming under written instrument, judgment, or decree sufficient, when land has been: (1) Usually cultivated or improved; (2) protected by substantial enclosure; or (3) used for supply of fuel or fencing timber, husbandry, pasturage, or ordinary use of occupant. Part of known farm or lot not cleared or enclosed in accord with usual custom deemed occupied. (UCA 78B-2-211).

One not claiming under written instrument adversely holds only land actually occupied. (UCA 78B-2-212). Land deemed to be actually occupied only where: (1) Protected by substantial enclosure; (2) usually cultivated or improved; or (3) money or labor amounting to $5 per acre has been expended for irrigation. (UCA 78B-2-213).

Duration of Possession.

Party or his predecessor must have occupied, claimed possession, and paid all taxes for seven continuous years before commencement of case. (UCA 78B-2-208[2], -209[1], -210[1][c], -214).

Easements.

Prescriptive easement acquired after open, continuous, and adverse use for period of 20 years. (788 P.2d 520). If use permissive, only license results. (123 Utah 488, 260 P.2d 535).

Disabilities.

If person entitled to commence action or make defense is under age of majority or mentally incompetent at time title first descends or accrues, time of such disability excluded. (UCA 78B-2-224).

21.03 CONDOMINIUMS:

See topic 21.16 Real Property.

21.04 CONVEYANCES:

See topic 21.06 Deeds.

21.05 CURTESY:

No curtesy rights in Utah. (UCA 75-2-112).

Uniform Probate Code, with 1975 Official Amendments, adopted with modifications. (UCA 75-1-101 et seq.). 1977, 1982, 1997, 1998, 2002, and 2003 Official Amendments not adopted. 1979 and 1984 Official Amendments adopted with significant variations. 1987 and 1993

Official Amendments adopted in part. 1990 Official Amendment adopted in substantial part. See category 13 Estates and Trusts, topic 13.16 Wills.

21.06 DEEDS:

Execution.

Conveyance of estate or interest in real property (other than lease for term not exceeding one year) must be in writing signed by grantor or agent authorized in writing. (UCA 25-5-1). While not necessary for validity of deed between parties, acknowledgment, legal description of property, and name and mailing address of grantee are necessary to entitle document to be recorded unless document is master form. (UCA 57-3-101, -105). Neither witness nor seal necessary. See also category 8 Debtor and Creditor, topic 8.10 Homesteads, subhead Alienation or Encumbrance.

Recording not necessary for validity of deed between parties and does not affect persons who have notice of deed. (UCA 57-3-102[3]). Deed properly acknowledged and containing legal description of property and name and mailing address of grantee entitled to be recorded in office of county recorder where property located. (UCA 57-3-101, -105). Deed not recorded void against subsequent purchaser in good faith for valuable consideration whose conveyance first duly recorded. (UCA 57-3-103). See category 10 Documents and Records, topic 10.04 Records.

Recording Fees.

See category 10 Documents and Records, topic 10.04 Records.

Operation and Effect.

Warranty deed, in form set out below, conveys fee simple with covenants that grantor has right to immediate possession, has good right to convey and guarantees quiet possession, that premises are free of encumbrances, and that grantor and grantor's heirs and personal representatives will forever warrant and defend title. (UCA 57-1-12). Unless it appears from conveyance that lesser estate intended, fee simple title presumed. (UCA 57-1-3). Conveyance to husband and wife presumed to be joint tenancy with right of survivorship, unless expressly declared otherwise. (UCA 57-1-5[1][a]). Every ownership interest granted to more than one person that are not husband and wife presumed to be tenancy in common unless otherwise expressly declared. (UCA 57-1-5[1][b]). Deed which declares right of survivorship presumed to convey joint tenancy; no right of survivorship presumed to convey tenancy in common. (UCA 57-1-5[2]) Tenants by entirety considered joint tenants. (UCA 57-1-5[7]). Quitclaim conveys entire right, title, interest, and estate of grantor at time of conveyance. (UCA 57-1-13).

Taxes.

Real estate conveyance tax not imposed.

Forms.

Only real estate licensee must use certain forms approved by Division of Real Estate. See http://realestate.utah.gov/realestate/real_forms.html for samples. Conveyances of real property may be substantially in following forms:

Forms:

"Warranty Deed

____ (here insert name), grantor, of

____ (insert place of residence), hereby conveys and warrants to ____ (insert name), grantee, of ____________________________________ (insert place of residence), for the sum of _______________________________________ dollars, the following described tract ____ of land in ____ County, Utah, to wit: (here describe the premises).

Witness the hand of said grantor this ___________________ (month\day\year).”

(UCA 57-1-12[1]).

Quitclaim Deed

____ (here insert name), grantor, of _____________________________________ (insert place of residence) hereby quitclaims to ____ (insert name), grantee, of _________________________________ (here insert place of residence), for the sum of _______________________________________ dollars, the following described tract _________________________________of land, in _________________________________ County, Utah, to wit: (here describe the premises).

Witness the hand of said grantor, this ______________________ (month\day\year).

(UCA 57-1-13).

Special Warranty Deed

____ (here insert name), grantor, of ____ (insert place of residence), hereby conveys and warrants against all who claim by, through, or under the grantor to ____ (insert name), grantee, of ____ (insert place of residence), for the sum of ____ dollars, the following described tract ____ of land in ________________________________ County, Utah, to wit: (here describe the property).

Witness the hand of said grantor this ______________________ (month\day\year). (UCA 57-1-12.5[1]).

21.07 DEEDS OF TRUST:

See category 20 Mortgages, topic 20.04 Mortgages of Real Property.

21.08 DOWER:

No dower rights in Utah. (UCA 75-2-112). Uniform Probate Code, with 1975 Official amendments, adopted with modifications. (UCA 75-1-101 et seq.). 1977, 1982, 1997, 1998, 2002, and 2003 Official Amendments not adopted. 1979 and 1984 Official Amendments adopted with significant variations. 1987 and 1993 Official Amendments adopted in part. 1990 Official Amendment adopted in substantial part. See category 13 Estates and Trusts, topic 13.16 Wills.

21.09 ESCHEAT:

Unclaimed Property Act enacted. (UCA 67-4a-101 et seq.). See topic 21.01 Absentees, subhead Escheat; categories 3 Business Regulation and Commerce, topic Banks and Banking, subhead Unclaimed Deposits; Estates and Trusts, topic Descent and Distribution, subhead Escheat, topic Wills, subhead Unclaimed Legacies.

21.10 LANDLORD AND TENANT:

Uniform Commercial Code Art. 2A (leases) adopted. (UCA 70A-2a-101 et seq.).

Kinds of Tenancy.

Tenancies may be at will or at sufferance, periodic, or for certain term.

Leases for longer than one year must be in writing. (UCA 25-5-3). Discriminatory housing practices prohibited. (UCA 57-21-5).

Security Deposits.

Deposits must be returned by owner to residential tenant at termination of tenancy or written explanation must be given stating why deposit retained. (UCA 57-17-1). If portion of deposit nonrefundable, it must be so stated when deposit taken. (UCA 57-17-2). At termination of residential tenancy, deposit may be applied, at owner's option, to payment of accrued rent, damages to premises, or cleaning. (UCA 57-17-3).

Recording.

To impart constructive notice to third persons, leases must be acknowledged and recorded like deeds. (UCA 57-3-102[1]). See category 10 Documents and Records, topic 10.04 Records.

Rent.

County, city, or town may not control rent or fees without legislative approval. (UCA 57-20-1[1]).

Lien.

Lessors, with certain exceptions, have lien for rent due, on property of lessee not exempt from execution as long as lessee occupies leased premises and for 30 days thereafter. (UCA 38-3-1). This lien has priority over other liens, except taxes, perfected security interests, mechanics' liens, and liens of employees for services. When lessee adjudged bankrupt, makes assignment for benefit of creditors, or his property put into possession of receiver, lien limited to rent for 90 days prior thereto. (UCA 38-3-2). Lien may be enforced by attachment if tenant about to remove property. (UCA 38-3-3).

In rent agreement between owner of self-service storage facility and occupant, owner has lien on all personal property located at facility for rent, labor, and other charges, present or future, in relation to personal property and expenses necessary for its preservation or expenses reasonably incurred in its sale or other disposition. (UCA 38-8-2[1]).

Termination of Tenancy.

Tenancy for specified term terminates without notice at end of term and holding over constitutes unlawful detainer. (UCA 78B-6-802[1][a]).

Holding Over.

Where tenancy for indefinite term with periodic rent, holding over after 15 days notice before rent period constitutes unlawful detainer. (UCA 78B-6-802[1][b]).

Fit Premises Act.

Owner has duty to maintain residential rental unit in condition fit for human habitation and in accordance with local regulations and rules of board of health (UCA 57-22-3[1]), and to provide and maintain safe and sanitary common areas, electrical systems, plumbing, heating, hot and cold water, and, in some cases, waste removal (UCA 57-22-4[1]). Renter may give written notice to owner of noncompliance with Act and allow reasonable time for corrective action (UCA 57-22-4[2]), and owner may refuse to correct condition and terminate lease (UCA 57-22-4[4]). Numerous duties of renter are noted in UCA 57-22-5. Renter may recover damages, injunctive relief, and attorney's fees for owner's violation of this chapter but only if renter in compliance with UCA 57-22-5. (UCA 57-22-6). No recovery for mental suffering or anguish. (UCA 57-22-4[5]).

Agricultural Lands.

Agricultural tenant who holds over for more than 60 days after expiration of his term without demand of possession entitled to hold for another full year without being guilty of unlawful detainer. (UCA 78B-6-803).

Unlawful Detainer.

Tenant of real property for term less than life guilty of unlawful detainer: (1) When he continues in possession after expiration of his term (UCA 78B-6-802[1][a]); (2) when having leased for indefinite time with monthly or other periodic rent reserved he continues in possession after end of any such period where owner 15 days or more prior to end of such period has served notice requiring him to quit at end of period, or in cases of tenancies at will where he remains in possession after expiration of notice of not less than five days (UCA 78B-6-802[1][b]); (3) where he continues in possession after default in payment of rent or other amounts due after written notice requiring alternative payment of rent or surrender of premises has remained uncomplied with for three days after service (UCA 78B-6-802[1][c]); (4) when he assigns or sublets premises contrary to provisions of lease or commits or permits waste thereon, carries on unlawful business thereon, or permits or maintains any nuisance, commits criminal act on premises, and remains in possession after service of three days notice to quit (UCA 78B-6-802[1][d]); or (5) when he continues in possession after failure to perform any condition or covenant of lease other than those above mentioned after notice requiring alternative performance of such condition or surrender of property (UCA 78B-6-802[1][h]). Remedies for unlawful detainer include restitution of premises, rent, and treble damages. (UCA 78B-6-811).

Dispossession.

On verified complaint charging unlawful detainer, summons may be endorsed by judge, court clerk, or plaintiff's counsel giving defendant three business days to appear, unless court determines facts of case should allow more time. (UCA 78B-6-807[3]). Court procedures outlined in UCA 78B-6-810. Judgment of unlawful detainer includes restitution of premises. (UCA 78B-6-811[1][b]). Restitution procedures outlined in UCA 78B-6-812. Person or entity may seek court order for abatement of nuisance defined in UCA 78B-6-1107 through 78B-6-1114 and eviction of tenant. (UCA 78B-6-1108[1]). Except for retaking of abandoned premises under UCA 78B-6-816(2), exclusion of tenant without judicial process prohibited. (UCA 78B-6-814).

Distress.

See subhead Lien, supra.

Possession Bonds.

Plaintiff may file possession bond, at or after filing complaint, in amount probable cost of suit and damages to defendant in event that suit has been improperly instituted. (UCA 78B-6-808[1]). If plaintiff files possession bond, then for defendant to retain possession, he may either pay rent and utilities, if nonpayment sole cause of action, file counter bond, or demand hearing. Rent payment, bond filing, or hearing must occur within three days of receipt of notice of plaintiff's possession bond. (UCA 78B-6-808[2]). If hearing demanded, and at hearing court determines that all issues can be adjudicated without further proceedings, court will enter judgment on merits. (UCA 78B-6-808[4]). If defendant does none of above, on ex parte motion sheriff must place plaintiff in possession. (UCA 78B-6-808[3]). In case of suit seeking order of abatement of nuisance by eviction, court must condition order's issuance on giving of security by applicant, unless no party will incur costs, fees, or damages in event of wrongful order or substantial reason exists for no security requirement. (UCA 78B-6-1112[1]).

Abandonment.

Presumed if tenant has not notified landlord tenant will be absent and: (1) Rent is more than 15 days delinquent, and no reasonable evidence tenant occupying other than tenant's personal property; or (2) rent delinquent, tenant's personal property removed, and no reasonable evidence that tenant occupying. (UCA 78B-6-815). When abandoned, owner may retake and attempt to rerent. (UCA 78B-6-816[1]). Tenant liable for landlord's damages. (UCA 78B-6-816[1][a], [b]). Landlord must store abandoned personal property at tenant's expense and make reasonable efforts to notify tenant for 30 days before selling it to satisfy tenant's obligations or donating it to charity. (UCA 78B-6-816[2][b]).

Mobile Home Park Residency Act.

Contains special requirements for terms of lease, grounds for lease termination, procedures for lease termination and eviction, and lienholder liability for rents with respect to leases of mobile home spaces. (UCA 57-16-1 et seq.).

Uniform Residential Landlord and Tenant Act.

Not adopted.

21.11 LEASES:

See topic 21.10 Landlord and Tenant.

21.12 PARTITION:

Co-tentants in possession of real property, as joint tenants or tenants in common, may bring action to partition property for benefit of each tenant. Action may require sale of such property or part thereof if partition cannot be made without great prejudice to owners. (UCA 78B-6-1201).

Jurisdiction and Venue.

Action must be tried in district court in county in which property situated, subject to right of court to change place of trial as provided in Judicial Code. (UCA 78B-3-301).

Proceedings.

Complaint must set forth interests of all persons known or unknown as specifically and particularly as known to plaintiff. (UCA 78B-6-1202[1]). If party or share or quantity of interest of any party unknown to plaintiff or uncertain or contingent, that fact must be set forth in complaint. (UCA 78B-6-1202[2]). No person having conveyance or claiming lien on property need be made party unless conveyance or lien of record. (UCA 78B-6-1203).

Lis pendens must be recorded in county where property situated. (UCA 78B-6-1204[1]).

Summons may be served by publication as per Utah R. Civ. P. (UCA 78B-6-1206).

Partial Partition.

Court may make partial partition if it believes complete partition impracticable. (UCA 78B-

6-1209[1]).

Owelty.

Court may order compensation from one party to other if equal partition cannot be made. (UCA 78B-6-1241[1]).

Sale.

If land cannot be partitioned without great prejudice to owners, court may order sale for cash and direct referee to divide proceeds. (UCA 78B-6-1212). In making partition, referees must divide property and allot several portions thereof to respective parties, relative quality and quantity considered, according to respective rights of parties as determined by court. (UCA 78B-6-1213[1]). In all cases, court must direct referees to allot share of each of parties owning interest in whole or any part of premises sought to be partitioned, and to locate share of each co-tenant, so as to embrace improvements made by such co-tenant of property. (UCA 78B-6-1213[3]). Value of improvements made by tenants in common must be excluded from valuation in making allotments, and land must be valued without regard to such improvements, as long as it can be done without material injury to parties. (UCA 78B-6-1213[4]). When action for partition of mining claim among tenants in common, joint tenants, co-partners, or parceners thereof, court must fix time for division of same by referees, which must not be less than 20 nor more than 40 days, except by consent of parties in interest who have appeared in action. (UCA 78B-6-1213[5], [7]).

Sales in partition are made by referees at public auction. Notice must be published as required for sale on execution. (UCA 78B-6-1224). See category 8 Debtor and Creditor, topic 8.05 Executions.

21.13 PERPETUITIES:

Common law rule against perpetuities in force. (584 P.2d 875). Charitable uses are not within rule. (17 Utah 331, 53 P. 1015).

Uniform Statutory Rule Against Perpetuities adopted. (1990, adopted 1998). (UCA 75-2-1201 et seq.). Significantly weakened by subsequent amendments. Certain interests not invalid if they vest within 1,000 years. (UCA 75-2-1203[1]).

Accumulations.

No statutory restrictions.

See category 13 Estates and Trusts, topic 13.15 Trusts.

21.14 PERSONAL PROPERTY:

Tenancy by Entirety.

Same as joint tenancy. (UCA 57-1-5[7]).

21.15 POWERS OF ATTORNEY:

Attorneys in Fact.

Recorded document affecting title to real property creates presumption that agency pursuant to which it was executed was not revoked and agent acted for principal who was neither incompetent nor minor at any relevant time. (UCA 57-4a-4[1][c], [g][iii]).

Formalities.

If exercise of power of attorney requires execution and delivery of any instrument recordable under state law, affidavit authenticated for record likewise recordable. (UCA 75-5-502[2]). Unless expressly authorized, power of attorney does not grant authority to create, modify, or revoke inter vivos revocable trust; fund trust not created by principal; make or revoke gift of principal's property; or designate or change beneficiaries. (UCA 75-5-503). Loan, sale, or encumbrance on behalf of principal voidable if attorney-in-fact affected by conflict of interest. (UCA 75-5-504).

Revocation.

Agency of attorney-in-fact who acts in good faith under power of attorney not terminated by death, disability, or incompetence of principal who has executed power of attorney in writing. His actions so taken binds principal and his heirs, devisees, and personal representatives. (UCA 75-5-502[1]). Affidavit executed by attorney-in-fact or agent stating he did not have, at time of performing act pursuant to power of attorney, actual knowledge or notice of revocation or termination of power of attorney, is, in absence of fraud, conclusive proof of non-revocation or nontermination of power of attorney. (UCA 75-5-502[2]). Power of attorney ends at death. (UCA 75-5-502[3]).

Uniform Durable Power of Attorney Act adopted. (1987, adopted 1994). (UCA 75-5-501 et seq.). If written power of attorney states "This power of attorney shall not be affected by disability of the principal," or other statutorily prescribed or similar language, power exercisable regardless of later disability of or uncertainty as to whether principal dead or alive. (UCA 75-5-501[1]).

Members of Armed Forces.

No special statutory provisions.

21.16 REAL PROPERTY:

(Title 57).

Term "real property" or "real estate" construed as coextensive in meaning with land, tenements, hereditaments, water rights, rights of way, possession rights, and mining and land claims. (UCA 57-1-1[3]). Term "heirs" or other technical words of inheritance or succession not required to transfer fee in real estate. (UCA 57-1-2). Fee simple title presumed unless conveyance indicates lesser estate intended. (UCA 57-1-3). Every interest in real estate granted or devised to two or more persons in their own right tenancy in common unless expressly declared otherwise in grant or devise. (UCA 57-1-5[1][b]). Joint tenancies may be created by express declaration. (UCA 57-1-5[2][a]). Sole owner of real property can create joint tenancy with himself and others by transfer to himself and others declaring creation of joint tenancy. (UCA 57-1-5[3][a]). Solar easement may be created; filed and recorded writing required. (UCA 57-13-2[1]).

Rule in Shelley's Case.

Has not been abolished by statute; present status undetermined.

Foreign Conveyances or Encumbrances.

No statutory provisions. See category 10 Documents and Records, topic 10.04 Records.

After-acquired Title of Grantor.

If person conveys real estate in fee simple absolute and does not have legal estate in such real estate at time of conveyance but afterwards acquires same, legal estate subsequently acquired immediately passes to grantee, his heirs, successors, or assigns, and conveyance valid as though such legal estate had been in grantor at time of conveyance. (UCA 57-1-10[1]).

Marketable Record Title Act.

If person has unbroken chain of record title for 40 years and no one else filed notice of claim during said 40 years, all conflicting claims based upon any title transaction prior to 40-year period are extinguished and person deemed to have marketable title that can be conveyed free and clear of all interests, claims, or charges that occurred prior to effective date of root of title. (UCA 57-9-1 et seq.).

Condominiums.

Condominium ownership permitted. (UCA 57-8-1 et seq.). Each unit, together with its undivided interest in common areas and facilities, constitutes real property and may be individually conveyed. (UCA 57-8-4). Each unit owner entitled to undivided interest in common areas and facilities which must remain undivided. (UCA 57-8-7[2]). Enforceable covenants, conditions, and restrictions can be imposed which run with land. (UCA 57-8-8, -9). Amendments to covenants, conditions, and restrictions must be recorded. (UCA 57-8-12[1]). Bylaws and declaration govern administration of property. (UCA 57-8-15, -16, -16.5).

Condominium Lien.

Failure to pay assessment when due constitutes lien on interest of owner in property. When recorded, lien has priority over other liens, except taxes, special assessment liens, and prior recorded liens which, by law, would take priority. (UCA 57-8-20[4][a]). Suit or foreclosure to recover money judgment for nonpayment of assessment maintainable without waiving lien securing it. (UCA 57-8-20[3]). Prevailing party in action entitled to recover costs of suit and reasonable attorneys' fees. (UCA 57-8-20[4][c]). After nonpayment of assessment, association management may also terminate rights to receive utility services and use recreational facilities, after giving proper notice and opportunity to be heard. (UCA 57-8-20[5]). If owner fails to pay assessment, association may demand tenant pay rents to association, and owner may not sue tenant for failure to pay rent. (UCA 57-8-20[6]).

See also category 2 Business Organizations, topic 2.03 Corporations, subhead Franchise Tax.

Uniform Land Sales Practices Act adopted. (1983, adopted 1987). Substantial adoption of Model Act but contains numerous variations, omissions, and additions. (UCA 57-11-1 et seq.). Utah regulates sale or disposition of subdivided land, requiring that persons disposing of subdivided land file registration statement (UCA 57-11-6[1]) with Division of Real Estate of Department of Commerce ("Division") (UCA 57-11-5). Exemptions. (UCA 57-11-4). Utah adds to exemptions lands within cities or counties employing planning and zoning board or at least one professional planner and which land is subject to ordinances for zoning, planning, and improvements. (UCA 57-11-4[1][f]).

Contract or agreement of disposition of subdivided lands may be rescinded by purchaser within five days of execution of contract or agreement; this provision may not be waived by purchaser. (UCA 57-11-5[3]). Utah requires subdividers of land within state who represent that culinary water is available under lots to either present proof of such before subdivided lands can be registered with Division or be adjudicated exempt from registration. (UCA 57-11-4[3]). Investigation and enforcement of provisions of act are vested in Division (see UCA 57-11-6, -7 for details of registration). Division may revoke, suspend, or deny registration. (UCA 57-11-14[1]). Criminal and civil penalties provided. (UCA 57-11-16, -17).

Real Estate Cooperative Marketing Act.

Individual may not offer, sell, or dispose of cooperative interest in real estate unless licensed by Division of Real Estate and without making oral and written disclosure to prospective purchaser of actual interest being sold. (UCA 57-23-5, -6).

Real Estate Appraiser Registration and Certification Act.

Real estate appraisers must be certified or registered. To qualify as state-licensed appraiser, applicant must pass licensing examination with satisfactory score as determined by board. (UCA 61-2b-10, -16).

Time Share and Camp Resort Act.

Utah regulates sale and disposition of time share and camp resort interests by requiring filing of registration statement with Division of Real Estate of Department of Commerce. (UCA 57-19-1 et seq.). Salespersons marketing registered project must register. (UCA 57-19-14[1]). Exceptions. (UCA 57-19-26). Registration of project effective for one-year period subject to renewal. (UCA 57-19-9[1]). Certain disclosure must be made to purchasers. (UCA 57-19-11). Purchasers of time share or camp interest have absolute right to cancel agreement within five day period. (UCA 57-19-12[1][a][ii]). Notice of right to cancel must appear on purchase agreement. (UCA 57-19-12[2]).

Assumption of Real Estate Security Interests.

Provisions related to assumption of indebtedness on residential real property repealed, 2008.

Title in Trustee.

When title to real property granted to person as trustee, terms may be in deed of transfer or instrument signed by grantor and recorded in same office as grant to trustee. (UCA 75-7-816[1]).

See also topics 21.05 Curtesy, Deeds, Dower, Landlord and Tenant; categories 3 Business Regulation and Commerce, topic Banks and Banking; Property, topic Partition; Debtor and Creditor, topic Homesteads; Estates and Trusts, topic Trusts; Family, topic Husband and Wife; Mortgages, topic Mortgages of Real Property.

21.17 TRUST DEEDS:

See category 20 Mortgages, topic 20.04 Mortgages of Real Property.

22 TAXATION

22.01 ADMINISTRATION:

Regulated by Title 59.

State Tax Commission has general supervision.

Interstate Cooperation.

Former statute allowing State Tax Commission to compromise tax with approval of state district court when liability of estate doubtful or value uncertain (UCA 59-12-43) repealed by Laws of Utah 1987, c. 2.

Collection.

State Tax Commission has general powers of collection and supervision. (UCA 59-1-210[3], [5]).

Payment to Commission. For income tax, prepayment of 90% of tax due or 100% of prior year tax liability. (UCA 59-10-516[2]). No prepayment discount.

Penalties.

Income Tax.

Penalty for filing late tax return is greater of $20 or 10% of unpaid tax due on return. (UCA 59-1-401[2][b], [c][i][A], [B]). Penalty is greater of $20 or 10% of unpaid tax for failure to pay tax due on timely filed return; failure to pay within 90 days tax due on late filed return; or failure to pay within 30 days tax due from date of notice of deficiency unless appealed, from date of commission's final decision, or from date of judicial decision. (UCA 59-1-401[3][b]). In case of extensions for filing, if payment by due date not including extensions is less than 90% of total tax reported or less than 100% of prior year's tax, penalty of 2% per month on unpaid tax imposed. (UCA 59-1-401[2][c]). Effective on day specified in UCA 59-1-401(1)(c), certain taxes subject to following penalty schedule: greater of $20 or (1) 2% of unpaid obligation if filed no later than five days late; (2) 5% of unpaid obligation if filed more than five days but no later than fifteen days late; or (3) 10% of unpaid obligation if filed more than fifteen days late. (UCA 59-1-401[1], [2][c], [3][c]). Same schedule applies for additional taxes effective on day specified in UCA 59-1-401(1)(d). (UCA 59-1-401[1][e], [2][c], [3][c]). Additional penalties for underpayment of tax are: (1) 10% of underpayment if due to negligence; (2) 15% of underpayment if due to intentional disregard of law; (3) greater of $500 per period or 50% of tax due for intent to evade tax; and (4) greater of $500 or 100% of underpayment if due to fraud with intent to evade tax. (UCA 59-1-401[7][a]). Penalty for failure to file information return or report or complete supporting schedule is $50 for each return or schedule up to $1,000. (UCA 59-1-401[8]). Any taxpayer who, with prima facie intent to delay or impede tax administration, files incomplete or substantially incorrect return is subject to $500 penalty. (UCA 59-1-401[9]). Any person who, with intent to evade tax, fails to make, render, sign, or verify return, supply information, make, render, sign, or verify false return or statement, or supply false or fraudulent information is guilty of third degree felony and subject to penalty of not less than $1,000 but no more than $5,000. (UCA 59-1-401[12][c]). Any person who willfully attempts to evade or defeat any tax or payment guilty of second degree felony and subject to fine of between $1,500 and $25,000. (UCA 59-1-401[12][d]). Person who prepares, procures, or advises in preparing materially false return, claim, or affidavit guilty of second degree felony and subject to penalty between $1,000 and $25,000. (UCA 59-1-401[12][e]). Interest at rate of 2% above federal short-term rate assessed for deficiencies. (UCA 59-1-402). Commission may waive or reduce civil penalties. (UCA 59-1-401[13]).

Franchise and Privilege Tax.

Except as affected by 59-401(1) Phase I and Phase II schedules, same interest on deficiencies and penalties apply generally to franchise and privilege taxes as to income taxes. (UCA 59-1-401, -402). See catchline Income Tax, supra. When corporation fails to pay tax within 11 months after delinquent, corporate powers, rights, and privileges of corporation suspended if domestic corporation, and right to do intrastate business forfeited if foreign corporation. (UCA 59-7-534[1]). Any person who thereafter attempts to exercise any powers, rights, or privileges of delinquent corporation will be guilty of misdemeanor and fined not less than $250 and imprisoned not less than 50 days. (UCA 59-7-535[1]). See categories 2 Business Organizations, topic Corporations; Insurance, topic Insurance Companies.

Additional penalty of greater of $20 or 10% of unpaid tax imposed on every person who, without fraudulent intent, fails to make, render, sign, or verify return, or to supply information, unless tax is Phase I or Phase II obligation as defined in UCA 59-1-401(1), in which case penalty controlled by UCA 59-7-401(2)(c) and -401(3)(c). (UCA 59-1-401; UCA 59-7-528). Maximum penalty of $25,000 imposed on every person who fraudulently intends to evade tax. (UCA 59-7-529; UCA 59-1-401[12][c]).

Estate Tax (Inheritance Tax).

Inheritance Tax Act adopted. (UCA 59-11-101 et seq.). Failure to pay tax within time period prescribed subjects personal representative to penalties applicable to income tax, UCA 59-1-401, and to interest at 2% above federal short-term rate. (UCA 59-1-402[3][a]; UCA 59-11-107).

Gasoline and Motor Fuel Tax.

Motor and Special Fuel Tax Act adopted. (UCA 59-13-01 et seq.). Failure of distributor to make or file return or pay tax when due and payable results in revocation of license and penalty imposed as set forth under income tax, UCA 59-1-401. (UCA 59-13-205[2]; UCA 59-13-206[3]; UCA 59-13-209[2][b]; UCA 59-13-212). Additionally, interest at rate of 2% above federal short-term rate from date of delinquency imposed. (UCA 59-1-402[3][a]).

Mine Occupation Tax.

Failure to make or file return or pay tax when due and payable results in penalty as set forth under income tax, UCA 59-1-401, with interest imposed at rate of 2% above federal short-term interest rate per annum, per UCA 59-1-402. (UCA 59-5-106, -107).

Sales and Use Tax.

Sales and Use Tax Act adopted. (UCA 59-12-101 et seq.). Penalties set forth under income tax, UCA 59-1-401, apply to persons that: (1) Fail to remit timely full amount of tax (UCA 59-12-107[8]); (2) pay less than amount of tax due whether because of negligence, intentional disregard of law, intent to evade tax, or fraud with intent to evade tax (UCA 59-12-107[8]; UCA 59-12-110[4]); (3) make any false or fraudulent return or false statement on any return to evade payment of tax or fail to furnish any return or supplemental return or other data (UCA 59-12-117[1][b]); (4) make, render, sign, or verify any report or make any false or fraudulent return or statement with intent to defeat or evade assessment or determination of amount of tax (UCA 59-12-117[6]). Late payment of tax required to be prepaid subject to penalties as provided in UCA 59-1-401. (UCA 59-12-108[5]). Commission may impose penalty and interest on deficiency if deficiency due to negligence, intentional disregard of law or rule, or fraud with intent to evade tax. (UCA 59-10-537[2]).

Property Tax.

Property Tax Act adopted. (UCA 59-2-101 et seq.). Any person failing to furnish statement with respect to assessment by Tax Commission subject to penalty equal to 10% of estimated tax due, but not less than $100. (UCA 59-2-202[3]). Commission may waive, reduce, or compromise penalty imposed under this section if commission finds reasonable grounds for waiver, reduction, or compromise. (UCA 59-2-207[3][c]). Owner or operator of every mine or mining claim and other valuable mineral deposit that willfully refuses to furnish statement with respect to Tax Commission assessment subject to penalty equal to 10% of estimated tax due, but not less than $100 for each refusal. (UCA 59-2-207, -307). Any person willfully refusing to furnish required statements or information to county assessor subject to tax equal to 10% of estimated tax due but not less than $100 for each refusal. (UCA 59-2-307[1][a]). Any property willfully concealed, removed, transferred, or misrepresented by owner to evade taxation subject to penalty equal to tax on its value. (UCA 59-2-309[2]). Destruction or removal of property to avoid tax may be enjoined. (UCA 59-2-1359, -1361[4][a]).

Personal property for which assessed tax not paid may be seized and sold. (UCA 59-2-1303).

Commission may declare taxes on real property and mines immediately due and payable upon discovery of removal or destruction of property where collection of tax rendered doubtful thereby. (UCA 59-2-1359).

Taxpayer may request redetermination of deficiency. (UCA 59-1-501[2]). After redetermination, any remaining deficiency must be paid within 30 days from mailing of notice and demand from Commission. (UCA 59-1-503[1]).

Delinquent property taxes subject to penalty of 2%, but not less than $10, and interest rate on total amount at rate 6% above targeted federal funds rate existing on Jan. 1 following date of delinquency. (UCA 59-2-1331[2][a], [c]).

Class B misdemeanor to willfully obstruct collection (UCA 76-8-406) or to refuse assessor list of employees or deny access to place of employment (UCA 76-8-409), to give false tax receipt (UCA 76-8-408), or to refuse unlawfully on demand to give assessor list of property subject to taxation, swear to such list, or give false name (UCA 76-8-407).

In case of failure to file any return required by Title 59, Tax Commission has authority to compel taxpayer by writ of mandate to file return. (UCA 59-1-707[1][a]).

As to delinquent real and personal property taxes, see also topic Property Taxes, subhead Sales.

Tax Liens.

Any agency or other authority of state government may collect delinquent account receivable by giving notice of delinquency, obtaining hearing about delinquency, and, through abstract order, gain lien upon account receivable against any state income tax refund or overpayment due debtor for period of eight years. (UCA 63A-3-302 et seq.).

22.02 ALCOHOL, BEVERAGES AND TOBACCO TAXES:

Beer, Wine and Liquor Tax.

$12.80 per 31-gallon barrel excise tax imposed on all beer imported or manufactured for sale, use, or distribution in state. (UCA 59-15-101[1][b][ii]). Penalty set forth under UCA 59-1-401 applies to beer tax not timely remitted or not paid. Interest at 2% above federal short-term interest rate imposed. (UCA 59-15-102).

Cigarette Tax.

Cigarette and Tobacco Tax and Licensing Act adopted. (UCA 59-14-101 et seq.). Tax imposed upon sale, use, or storage of cigarettes levied at following rates: (1) 3.475¢ each cigarette for all cigarettes weighing not more than 3 lbs. per 1,000 cigarettes (UCA 35-14-204[2][a]); (2) 4.075¢ each cigarette for all cigarettes weighing in excess of 3 lbs. per 1,000 cigarettes (UCA 35-14-204[2][b]). Equity charge of 1.75¢ on each cigarette of manufacturers not participating in Master Settlement Agreement. (UCA 59-14-214[2][a]). Credit or refund for tax paid on tobacco product destroyed or returned to manufacturer. (UCA 59-14-409[2]).

Tobacco Tax.

Tax imposed on sale, use, or storage of tobacco products at rate 35% of manufacturer's sale price. (UCA 59-14-302[4][a]). Sale price equals amount charged by manufacturer less all discounts, and includes original Utah destination freight charges, whether products shipped f.o.b. origin or f.o.b. destination and regardless of who pays freight charge. (UCA 59-14-302[1][b]).

22.03 BUSINESS TAXES:

Franchise Taxes.

See categories 2 Business Organizations, topic Corporations; Insurance, topic Insurance Companies.

Insurer's Tax.

See category 16 Insurance, topic 16.01 Insurance Companies.

Venture Capital.

Utah Venture Capital Enhancement Act provides tax credits for certain investments in Utah businesses. (UCA 63M-1-1201 et seq.).

22.04 CORPORATE TAXES:

See category 2 Business Organizations, topic 2.03 Corporations.

22.05 EMPLOYMENT TAXES:

Unemployment Compensation Tax.

In form of contributions imposed on individual or employer employing one or more individuals for some portion of day during calendar year. (UCA 35A-4-203[1]). Rate determined each year by formula and must be between 1.1% and 9% of total wages paid. (UCA 35A-4-303[4][a]). Tax payable to Commission on 15th day of each month. No contributions required from employees, and employer must not deduct contributions from wages of employees. (UCA 35A-4-302[1]).

Local Employment Tax.

No provision.

Exemptions and Credits.

Act has broad range of exceptions paralleling Federal Unemployment Tax Act, including exceptions for employees of government, agriculture, college students working for institution, nonprofit education, family members, ministers, members of National Guard and Air National Guard, mining workers, commissioned salespeople, and health care workers. (UCA 35A-4-205[1]).

22.06 ENVIRONMENTAL TAXES:

Hazardous Waste Tax.

Owner or operator of commercial hazardous waste or mixed waste disposal facility or site must collect from generator of waste $28 per ton or fraction. (UCA 19-6-118[2][a]). Maximum fee for filing operation plan review: (1) Class I facility $200,000 (UCA 19-6-120[4]); (2) Class II, $150,000 (UCA 19-6-120[5][b]); (3) Class III, $100,000 (UCA 19-6-120[6][b]); and (4) Class IV, $50,000 (UCA 19-6-120[7][b]). Maximum fee for filing and review for each major modification plan and major closure plan for Class I, II, or III facilities is $50,000. (UCA 19-6-120[8][a]). Maximum fee for minor modifications or any modifications to Class IV facilities is $20,000. (UCA 19-6-120[8][b]). Commercial non-hazardous solid waste disposal facility or incinerator which primarily receives waste from off-site sources not owned, controlled, or operated by facility owner or operator must collect from generator of waste 13¢ per ton for municipal waste and incinerator ash, 50¢ per ton for construction or demolition waste, yard waste, dead animals, or waste fires, and $2.50 per ton for non-hazardous solid waste. (UCA 19-6-119[1]). Waste facility owned by political subdivision operating solely for benefit of same political subdivision must pay annual facility fee. (UCA 19-6-119[2]). Waste that is subject to more than one fee under UCA 19-3-118, UCA 19-3-118.5, or UCA 19-3-119 is subject only to highest applicable fee. (UCA 19-6-117.5).

Radioactive Waste.

Commercial waste treatment or disposal facility that receives radioactive waste must collect from generator of waste fee of: (1) 15¢ per cubic foot, or fraction of cubic foot of radioactive waste other than byproduct material; and (2) $1 per curie, or fraction of curie of radioactive waste, other than byproduct material. (UCA 19-3-106[1][b][i]). Owner or operator of active commercial radioactive waste treatment or disposal facility must pay annual fee of $400,000 to be deposited in Radioactive Waste Perpetual Care and Maintenance fund. (UCA 19-3-106.2[2][a]). Generator or broker may not transfer radioactive waste to commercial radioactive waste treatment or disposal facility in state without first obtaining generator site access permit. (UCA 19-3-106.4[1]). Other fees of 5% to 12% assessed on gross receipts of radioactive waste treatment facility. (UCA 59-24-103.5[2]).

Used Oil.

Lubricating oil vendors must collect recycling fee of 4¢ per quart or 16¢ per gallon of oil sold, except on sales shipped out of state, five-gallon or smaller containers of oil used in mining operations, or bulk containers of 55 gallons or more. (UCA 19-6-714[1], [2]). Fee in addition to other state, county, and municipal fees imposed on sale of lubricating oil, and exemption from sales and use tax does not apply. (UCA 19-6-714[3], [4]).

Mines, Minerals and Fisheries Taxes.

See category 19 Mineral, Water and Fishing Rights, topic 19.01 Mines and Minerals, subhead Taxes.

Severance Taxes.

See category 19 Mineral, Water and Fishing Rights, topic 19.01 Mines and Minerals, subhead Taxes.

Recycling Tax.

Tax credit available for 5% of purchase price of machinery used in composting or facility that manufactures or produces recycled items of tangible personal property for sale, or reduces or reuses postconsumer waste material. (UCA 59-7-610[1][a]; UCA 59-10-1007[1][a]). Credit of 20% of expenditures to third parties for rent, wages, supplies, tools, test inventory, and utilities available for establishing and operating recycling or composting technology in Utah, with annual maximum credit of $2,000. (UCA 59-7-610[1][b]; UCA 59-1-1007[1][b]).

22.07 ESTATE TAX:

Imposed under Utah Inheritance Tax Act. (UCA 59-11-101 et seq.).

Taxable Transfers of Resident Estates.

Real property located in Utah, tangible personal property having situs in Utah, intangible property owned by resident, regardless of location. (UCA 59-11-103[3]).

Taxable Transfers of Nonresident Estates.

Real property and real property interests located in Utah, including mineral interests, royalties, production payments, leaseholds, or working interests in oil, gas, or any other minerals; tangible personal property having situs in Utah, including money; intangible personal property having trade or business situs in Utah, including bank deposits, negotiable instruments, debts, receivables, stocks, bonds, notes, evidences of interest in property, evidences of debt, and choses in action; and securities of corporation or other entity organized under laws of Utah. (UCA 59-11-104[3]). Tax on nonresident's transfers of intangible personal property and securities exempt to extent that same type of property of resident exempt in state where nonresident resides. (UCA 59-11-104[4]). "Transfer" defined in I.R.C. § 2001. (UCA 59-11-102[11]).

Amount.

Tax on estate of Utah resident equal to amount of federal credit for estate death taxes allowed by I.R.C. § 2011; provided, that if estate of resident is subject to death tax of another state not qualified by reciprocal provision allowing property to be taxed in this state, tax due reduced by lesser of: Amount of death tax paid other state and credited against federal estate tax; or amount computed by multiplying federal credit by value of property subject to other state's death tax over value of decedent's gross estate. (UCA 59-11-103[2]). Tax on nonresident estates computed by multiplying federal credit by: value of property located in Utah over value of decedent's gross estate. (UCA 59-11-104[2]). State taxable income of resident estate or trust is unadjusted income of resident estate or trust, adjusted by UCA 59-10-202, -209.1 and -210. (UCA 59-10-201.1).

Deductions.

"Gross estate" and "taxable estate" are determined by reference to I.R.C. §§ 2031 and 2051, respectively. (UCA 59-11-102[3], [10]).

Waiver.

Tax may be waived by Commission upon adequate showing that property not of sufficient value. (UCA 59-11-110[2]).

Disclosure of Estate Tax Return.

Prohibited except to specified persons. (UCA 59-11-114).

Apportionment.

Unless otherwise provided in will or other dispositive instrument, tax apportioned among all persons interested in estate, in proportion that value of each interest bears to total value of all interests. (UCA 75-3-916[2]). Fiduciary may withhold from any interested person amount equal to tax attributable to his interest. (UCA 75-3-916[4][a]).

Apportionment Against Inter Vivos Dispositions.

No statute.

Interstate Cooperation.

Uniform Acts on Interstate Arbitration of Death Taxes and Interstate Compromise of Death Taxes not adopted.

Time of Payment.

Payment of tax due on or before date federal return due to be filed. (UCA 59-11-106[1]). When estate obtained extension for payment of federal estate taxes, time for payment of state tax will extend for same period. (UCA 59-11-106[2]). No final settlement of decedent's probate estate will be approved by court until tax paid. (UCA 59-11-112). So much of estate as necessary may be sold to pay tax regardless of whether portions of estate included in specific bequests or devises unless legatee or devisee pays his proportionate share. (UCA 59-11-111[1]). Personal representative of estate personally liable for unpaid tax to extent of value of property which comes into his possession. (UCA 59-11-111[2]).

Filing of Returns.

Copy of federal estate tax return must be filed with state tax return. (UCA 59-11-105[1]). Extension for filing of federal return operates as extension under Utah Law if copy of instrument of extension filed with Utah State Tax Commission. (UCA 59-11-105[2]). Additional extensions, not to exceed three years, may be granted on showing of good cause. (UCA 59-11-105[3]).

Interest.

Taxes not paid bear interest at 2% above federal short-term rate per annum as per UCA 59-1-402. (UCA 59-11-107[1]). If return not timely filed, estate must pay penalty prescribed under UCA 59-1-401 for each month return overdue. (UCA 59-11-107[2]).

Amended Tax Returns.

If amended federal return filed, copy of amended return and any additional tax owed must be filed with Commission. (UCA 59-11-113[2], [3]).

Deficiency Assessments.

If, upon final determination of federal tax due, deficiency assessed by federal government, personal representative must give written notification to Commission and pay any additional tax (and interest) due thereby within 90 days. (UCA 59-11-113[2], [3]).

Refunds bear interest at 2% above federal short-term rate per UCA 59-1-402[3][a]. (UCA 59-11-109[2]). Refund claim must be made within three years from date tax was deposited. (UCA 59-11-108[10], -109[2]).

Lien.

Tax is lien on estate from time of decedent’s death until paid. (UCA 59-11-110[1]).

22.08 GASOLINE AND SPECIAL FUELS TAXES:

Gasoline and Motor Fuel Tax.

Imposed at rate of 24½¢ per gallon on all motor fuel sold, used, or received for sale or use in state. (UCA 59-13-201[1][a]). Rate is 4¢ per gallon on all “clean fuels” (propane, natural gas, electricity, others meeting federal clean fuel standards). (UCA 59-13-201[1][b]). No tax imposed upon: (1) Motor fuel sold in original package as purely inter-state commerce sale; (2) motor fuel exported from state if proof of export made within 180 days after export; (3) motor fuel sold to U.S., Utah, or its political subdivisions; (4) motor fuel or motor fuel components sold and used in state distilled from coal, oil shale, rock asphalt, bituminous sand, or solid hydrocarbons located in state. (UCA 59-13-201[3][a]).

Claimants, estates, or trusts that purchase and use motor fuel within state for purpose of operating stationary farm engines and self-propelled farm equipment used for non-highway use entitled to refund of motor fuel tax. (UCA 59-13-202[2]). Retailers, wholesalers, or distributors who suffer certain catastrophic losses entitled to refund or credit for taxes paid. (UCA 59-13-202.5[1][a]). Persons applying for refund must supply certain requested information to Tax Commission. (UCA 59-13-202.5[1][b]). Aviation fuel subject to tax of 9¢ per gallon. (UCA 59-13-401[2]). Aviation fuel purchased for use by federally certificated air carrier subject to tax of 4¢ per gallon. (UCA 59-13-401[3]).

Each distributor of motor fuel required to obtain license from Tax Commission. (UCA 59-13-203.1[2]). Licensed distributors liable for motor fuels tax and required to report receipt of and pay tax to Commission. (UCA 59-13-204[1]). Motor fuels taxes due and payable by distributor on or before last day of each month to Commission for number of gallons of motor fuel sold, used, or received for sale or use by distributor during preceding calendar month. (UCA 59-13-209[1][a]).

Interstate fuel tax agreements tax authorized. (UCA 59-13-502).

22.09 GIFT TAX:

None; but estate tax applies to gifts in contemplation of death or intended to take effect after death of donor. (UCA 75-2-205).

22.10 HOTEL AND RESTAURANT TAXES:

State tax of 4.70% on tourist home, hotel, motel, or trailer court accommodations and services for less than 30 consecutive days (UCA 59-12-103[1][i], [2][a]) and on sales of prepared food (UCA 59-12-103[1][e], [2][a]). In addition to other sales taxes, city or town in which transient room capacity is greater than or equal to 66% of permanent census population may impose sales tax of up to 1.1% on most transactions subject to state sales or use tax. (UCA 59-12-401[1][a]). Any county may impose transient room tax which may not exceed 4.25% of rental price. (UCA 59-12-301[1][a]). Municipality may impose transient room tax of up to 1% (UCA 59-12-352[1][a]) and county may impose tax of up to 1% on restaurant sales (UCA 59-12-603[1][a][ii]) and up to 0.5% on tourist homes, hotels, motels, or trailer court accommodations and services. (UCA 59-12-603[1][a][iii]).

22.11 INCOME TAX:

Personal.

Income tax imposed on state taxable income of each resident individual, estate, or trust for taxable year. “State taxable income” in case of individual means federal taxable income under § 62, I.R.C. (UCA 59-10-103[1][w]), with numerous adjustments. Some notable adjustments include adding state taxes deducted on federal return and out-of-state government bond interest, and subtracting one-half of federal income tax paid or payable, adoption expenses, some retirement income, some capital gains, and some disability payments. These and others enumerated. (UCA 59-10-114). Commission also required to allow equitable adjustments to state taxable income to prevent double tax detriment or benefit. (UCA 59-10-115[1]). Added to federal taxable income of resident or nonresident estate or trust is: (1) Amount of income tax imposed to extent deducted from federal adjusted total income; and (2) lump sum distribution allowed as deduction, to extent deductible. (UCA 59-10-202[1]). Trust or estate income also entitled to certain fiduciary adjustments. (UCA 59-10-210).

Rates.

Tax imposed on state taxable income of resident individual at rate of 5%. (UCA 59-10-104[2]).

Nonresident taxed on state taxable income at same rate as resident found in UCA 59-10-104(2) but multiplied by ratio of income from Utah sources to total income (less military service income). (UCA 59-10-116[1];-117). Federal adjusted gross income derived from Utah sources includes income attributable to ownership in Utah of any interest in real or tangible personal property or conducting of business, trade, profession, or occupation in Utah (UCA 59-10-117[1]), or any dividend, interest, distributive share of income, gain, or loss from real estate investment trust (UCA 59-10-117[2][i]). Income from intangible personal property, including annuities, dividends, interest, and gains is only income from Utah sources to extent derived from property employed in trade, business, profession, or occupation carried on in state. (UCA 59-10-117[1]).

Employer must pay to Commission on or before last day of Apr., July, Oct., and Jan. amount required to be deducted and withheld from wages paid to employee for previous quarter. (UCA 59-10-406[1][a]). Employers whose withholding exceeds $1,000 per month must also make monthly prepayments for first two months of quarter. (UCA 59-10-407[2][a]).

Corporate.

Corporate tax rate in Utah is 5% of Utah taxable income, with minimum tax of $100. (UCA 59-7-104[2], [3]).

Assessment.

Commission must assess tax within three years after taxpayer files return unless taxpayer files false return with intent to evade or does not file for purposes of taxing admitted insurers of administering inheritance tax. (UCA 59-11-113[3][a][i]). Commission may extend three-year period to make assessment or to commence proceeding to collect tax. (UCA 59-11-113[3][a][ii]). Six year assessment deadline imposed for severance tax on oil, gas, and mining. (UCA 59-5-114[1][a]).

Medical Care Savings Account Act.

Applies only to medical care savings accounts established to get tax deduction under UCA 59-10-1021. (UCA 31A-32a-101[2]). To establish medical care savings account, employer, except as otherwise provided by contract or collective bargaining agreement, may offer account program to employees; and resident individual may establish account program for self or dependents. (UCA 31A-32a-103[1]). Contribution to account limited to greater of $2,000 in taxable year or sum of all medical expenses paid that year. (UCA 32A-32a-103[2][a]). Account administrator must administer account from which payment of claims made and has fiduciary duty to person for whose benefit account administrator administers account. (UCA 31A-32a-104[1]).

Tax Credits.

Certain tax credits allowable against Utah individual income tax, including credit for taxes paid to another state (UCA 59-10-1003); credit for limited cash contributions not claimed as deduction to certain facilities for disabled operating in Utah (UCA 59-10-1004); credit for employers who hire individuals with disabilities (UCA 59-7-608[2][b]); credit for individuals owning interest in entity that qualifies for federal low-income housing tax credit (UCA 59-7-607[2]; UCA 59-10-1010[2]); credit for live organ donation (UCA 59-10-1015[2][c]); credit for occupational health and safety donations (UCA 59-9-102.5); credit for sale of repossessed vehicle (UCA 59-12-104.3[1][b][i][A]); limited amounts spent on alternative energy systems (UCA 59-7-614); 50% of amount spent for motor vehicles running on clean burning fuels, up to $2,500 (UCA 59-7-605[2][c]; UCA 59-10-1009[2][c]); purchase amount over $250 of hand tool used in farming (UCA 59-7-614.1[1][c]); credit for certain amounts spent to rehabilitate historic residential building (UCA 59-10-1006[1][a]; UCA 59-7-609[1][a]); credit for at-home parent of child less than 12 months old (UCA 59-10-1005[2]); credit for contributions to qualified Utah Educational Savings Plan (UCA 59-10-1017[2]); credit for certain research activities and equipment (UCA 59-7-613, -614; UCA 59-10-1012, -1013); and taxes paid for motor fuel used to operate certain farm machinery (UCA 59-13-202[2]).

As to franchise tax on corporations, based on income, see categories 2 Business Organizations, topic Corporations; Insurance, topic Insurance Companies.

22.12 INHERITANCE TAX:

None. As to estate tax, see topic 22.07 Estate Tax.

22.13 LOCAL AND MUNICIPAL TAXES:

See topics 22.13B Real and Personal Property Taxes, 22.14 Sales and 22.19 Use Taxes.

22.13A MOTOR VEHICLE AND TRANSPORTATION TAXES:

Sales tax payment required on all vehicle sales. (UCA 41-1a-510[1]). Driver education tax, property tax, and annual registration fee required. (UCA 41-1a-203[d]-[f]). Certain vehicles exempt from registration fees. (UCA 41-1a-202[2]). County legislative bodies may charge fee of up to $10 for every motor vehicle registration for highway construction and in order to preserve local transportation corridor. (UCA 41-1a-1222[1][a][i]). See also category 23 Transportation, topic 23.01 Motor Vehicles.

Automobile Rental Surcharge.

2.5% on all short-term leases and rentals less than 30 days, in addition to any other state, county, and municipal fees. (UCA 59-12-1201[1]).

Road Tax.

None.

Uniform Aircraft Tax.

Levied in lieu of ad valorem tax on aircraft required to be registered with state equal to 0.2% of average wholesale market value of aerial applicators as defined in UCA 59-2-102, and 0.4% for all other aircraft. (UCA 59-2-404).

22.13B REAL AND PERSONAL PROPERTY TAXES:

Taxable Property.

Property Tax Act adopted. (UCA 59-2-101 et seq.). All non-exempt tangible property taxed at uniform and equal rate based on fair market value. (UCA 59-2-103[1]). Fair market value of up to one acre of residential property reduced by 45% for assessment purposes. (UCA 59-2-103[2], [3]). Intangible property exempt from taxation. (UCA 59-2-1101[3][g]).

See also category 19 Mineral, Water and Fishing Rights, topic 19.01 Mines and Minerals.

Assessment.

By May 1 of each year State Tax Commission must assess at 100% of fair market value, as valued on Jan. 1: (1) Property operated as unit in more than one county; (2) property of public utilities; (3) property of airline, charter, or air contract service; (4) geothermal fluids and resources; (5) mines, deposits, and mining claims used for mining purposes; (6) machinery used in mining and property or surface improvements appurtenant to mines or claims including processing plants, mills, reduction works, and smelters, regardless of actual location. (UCA 59-2-201[1][a]). Property of state-assessed businesses that does not contribute to ordinary income assessed separately by county assessors. (UCA 59-2-201[5]).

All other property must be assessed by county assessor before May 22, valued as of Jan. 1. (UCA 59-2-303[1]). Uniform fee of 1.5% of fair market value of certain tangible personal property required to be registered with state. (UCA 59-2-405[3]). Also see Uniform Fees and Certified Tax Rates on tangible personal property.

Transitory personal property assessed for proportionate part of taxable year it is within state, but not less than 25% of full year's assessment. (UCA 59-2-402[1]). Undistributed or unpartitioned property of deceased persons may be assessed to heirs, guardians, executors, or administrators. (UCA 59-2-308[2]).

See also category 19 Mineral, Water and Fishing Rights, topic 19.01 Mines and Minerals.

Credit.

Homeowner's credit and renter's credit allowed for low-income persons over 65 and surviving spouses. (UCA 59-2-1201 et seq.).

Exemptions.

(1) Property exempt under laws of U.S.; (2) property of state or political subdivision, school district, or public library; (3) property owned by nonprofit entity used exclusively for religious, charitable, or educational purposes; (4) burial sites not held or used for private or corporate benefit; (5) farm equipment and machinery; (6) intangible property; (7) ownership interest in out-of-state public agency (UCA 59-2-1101[3]); (8) lands to which title remains in state, held or occupied by any person under contract of sale or lease from state, with exceptions (UCA 59-2-1103[1]); (9) up to amount of adjusted taxable value limit from previous year plus certain amounts in property owned by disabled veterans or their unremarried surviving spouses and minor orphans, with limitations (UCA 59-2-1104[1][a], [2][a]); (10) property used for generating and delivering electrical power, portion of which used for pumping water for irrigation of state lands (UCA 59-2-1110[1]); (11) household furnishings, furniture, and equipment used to maintain personal residence (UCA 59-2-1113); (12) up to $11,500 of real and tangible personal property owned by blind persons or their unremarried surviving spouses and minor orphans (UCA 59-2-1106[1][a]); (13) abatement of taxes of any indigent person over 65, as defined in UCA 59-2-1109, in amount not exceeding lesser of homeowner's credit for lowest bracket under UCA 59-2-1208 or 50% of current year tax assessment (UCA 59-2-1107, -1109); (14) property used for irrigation of lands within state (UCA 59-2-1111); (15) tangible personal property held for sale or shipping to final out-of-state destination within 12 months and inventory of retailer, wholesaler, distributor, processor, manufacturer, farmer or livestock raiser, but inapplicable to mineral deposits under UCA 59-2-201, UCA 59-2-205, UCA 59-2-207 through UCA 59-2-211 or mining severance tax (UCA 59-5-202 et seq.; UCA 59-2-1114[1]); (16) exempt livestock in state (UCA 59-2-1112); (17) exempt state bonds (UCA 63B-2-114); and (18) tangible personal property with aggregate value of $3,500 or less (UCA 59-2-1115[2][a]).

Payment.

Real and personal property taxes are delinquent if unpaid or postmarked after Nov. 30 after levying date. (UCA 59-2-1331[1]). Penalty of 2% of amount of taxes or $10, whichever greater, for each separately assessed parcel. (UCA 59-2-1331[2][a]). Taxes and penalty unpaid by Jan. 16 bear interest on per annum basis from Jan. 1 at rate 6% above federal funds rate. (UCA 59-2-1331[2][b], [c]). Tax commission authorized to employ private collectors for accounts more than 12 months delinquent. (UCA 59-1-1101). Persons may apply for adjustment or deferral of assessed taxes. (UCA 59-2-1347[1][a]). Adjustment or deferral granted when best human interests and interests of state and county served thereby. (UCA 59-2-1347[1][b]).

Local government may authorize developer to prepay ad valorem property taxes to help mitigate impact of development. (UCA 63M-5-102,-103,-201; UCA 63M-5-306). Political subdivisions may impose impact fees on development. (UCA 11-36-101 et seq.).

Collection.

County assessor collects personal property taxes at time of assessment unless taxpayer posts bond in amount 20% in excess of tax, conditioned on payment prior to Nov. 30. (UCA 59-2-1302[1][c]). County treasurer collects real property taxes (except common carrier taxes regulated by UCA 59-2-1307) by mailing notice or delivering notice to residence or business. (UCA 59-2-1317[1][b]).

Liens.

Taxes on realty or improvements are lien on property assessed and realty on which improvements stand. Lien attaches Jan. 1 of each year. (UCA 59-2-1325). Taxes on personal property are lien on real property of owner. Lien attaches on Jan. 1 of each year. (UCA 59-2-

1302[2][b]). Taxes on net proceeds on mines are lien on mines, mining claims, machinery, and improvements. Lien attaches Jan. 1 of each year. (UCA 59-2-210[2]). If person fails to pay withholding, use, sales, or fuel tax, state has lien on all real or personal property of person which attaches when assessment made. (UCA 59-1-302).

Student Loans.

If person fails to repay student loans, eight-year lien placed on tax refunds. (UCA 53B-14-106[1]).

Mobile Homes.

Mobile home or manufactured home, as defined in UCA 70D-1-19, may not be transported unless tax clearance obtained from assessor of county where home last located. (UCA 41-1a-1320[1]). Mobile or manufactured home in housing unit park taxed as personal property unless owner also owns real property where home located. (UCA 59-2-1503[1]). Mobile or manufactured home not in housing park taxed as personal property unless improvement. (UCA 59-2-1503[2]).

Real Estate Conveyance Tax.

Not imposed.

Redemption.

Real property may be redeemed from tax sale by county for four years after property tax became delinquent. (UCA 59-2-1346[1][a]).

Review of Assessments.

Appeals may be taken from assessment and equalization by assessor to county board of equalization, and review of decision by county board of equalization may be had before State Tax Commission. (UCA 59-2-1004[1][a], [5], -1006). Denials by Commission may be appealed to district court within 30 days from day on which application denied. (UCA 59-2-1007[6][c]). Decisions of board of equalization to be made within 60 days after filing of application to appeal, and will contain determination of property value and conclusion that value equalized with comparable properties. (UCA 59-2-1004[4][b], [d]). If value deviates more than 5% from assessed value of comparable properties, assessor, board, or Commission will adjust property to market value. (UCA 59-2-1004[4][f], -1006). Commission apportions total assessment among counties. (UCA 59-2-1009).

Sale.

By Dec. 31, county treasurer must publish delinquent list and notice that interest will accrue as of Jan. 1 following delinquency date unless taxes and penalty are paid before Jan. 16. (UCA 59-2-1332.5[2][a][ii], [b]). County auditor required to select date in May or June of current year for tax sale of property with existing delinquency and must send notice of tax sale to last known recorded owner, occupant, and all other interests of record at last known addresses by certified and first class mail. (UCA 59-2-1351[1], [2]). Final tax sale at public auction to highest bidder if bid sufficient to pay taxes, penalties, interest, and administrative costs, with excess treated as unclaimed property. (UCA 59-2-1351.1[4]). Upon closure of sale based upon accepted bid, bidder may not rescind unilaterally. Terms may be enforced by county in amount of bid, interest, and attorney’s fees. (UCA 59-2-1351.1[6]). If part of land sold at tax sale, access must be available to remainder. (UCA 59-2-1355). Property offered for sale with no purchaser becomes struck off to county. (UCA 59-2-1351.3[1]).

Unless taxes on personal property assessed by county assessor are paid or secured as provided for under UCA 59-2-1302, assessor must collect taxes, including accrued interest, by seizure and sale of any personal property owned by person against whom tax assessed. (UCA 59-2-1303, -1310[1]). Assessor must seize and sell personal property with unpaid tax at any time, with notice. (UCA 59-2-1303).

Actions must be brought within six months to recover goods or other property seized by any officer in his official capacity as tax collector, or to recover price thereof, and for money paid to such officer under protest or seized by such officer in his official capacity. (UCA 78B-2-301).

22.14–22.16 [RESERVED]

22.17 SALES AND USE TAXES:

Imposed at rate of 4.70% on amount paid of following: (1) Retail sales of tangible personal property; (2) amount paid to telephone service provider for telephone services with exceptions for mobile telecommunications services; (3) amount paid to telegraph corporations; (4) sales of gas, electricity, or other fuels furnished for commercial use; (5) meals sold; (6) admission to places of amusement, entertainment, or recreation; (7) services for repairs or renovations of tangible personal property or service to install property in connection with other tangible personal property; (8) cleaning or washing of tangible personal property; (9) tourist home, hotel, motel, or trailer court accommodations and services for less than 30 consecutive days; (10) laundry and dry cleaning services; (11) leases and rentals of tangible personal property if property in state, if lessee took possession in state, or if property stored, used, or otherwise consumed in state; (12) tangible personal property stored, used, or consumed in state; (13) prepaid telephone calling cards. (UCA 59-12-103[1], [2][a]). Imposed at rate of 2% on amount paid for gas, electricity, or other fuels furnished for residential use. (UCA 59-12-103[1][d], [2][b]).

Any county, city, or town within organized transit district may impose additional sales and use tax of .25% to fund public transportation system. (UCA 59-12-501[1][a][i]).

Any county may impose additional sales and use tax of .25% to raise county revenues (UCA 59-12-1102[1][a][i]) and .30% to fund highways, or fix guideways or public transit (UCA 59-12-1502, -1503[1][a][i][C]). Town may also impose sales and use tax, not to exceed 1%. (UCA 59-12-1301 to -1302[1]).

Any county may impose additional sales and use tax of .1% to fund rural radio stations and botanical, cultural, and zoological organizations, upon majority vote in countywide election. (UCA 59-12-701[1]; UCA 59-12-703[1][a][i]).

In addition to other sales taxes, city or town in which transient room capacity is greater than or equal to 66% of permanent census population may impose sales tax of up to 1.1% on most transactions subject to state sales or use tax. (UCA 59-12-401[1][a]). Any county may impose transient room tax which may not exceed 4.25% of rental price. (UCA 59-12-301[1][a]).

County or municipality may not enter into sales tax agreement with person to induce business development or relocation. (UCA 11-41-101 et seq.).

Exemptions.

Numerous exceptions in UCA 59-12-104. Some notable exceptions include sales: To state or subdivisions thereof, by religious or charitable institutions in conduct of regular religious or charitable activities, of motor vehicles (to nonresidents and not registered in state), of drugs and medical devices purchased with prescription, of certain machinery purchases and leases, of some farming equipment, and of property purchased for resale in state. (UCA 59-12-104).

Persons operating ski resort in Utah entitled to investment incentive in amount not to exceed costs incurred in purchase or lease of snow-making or -grooming equipment or passenger tramways. (UCA 59-12-120[1]).

Payment and Collection.

Each seller responsible for collection of amount of sales or use tax. Seller not required to maintain separate account for taxes collected, but deemed to be person charged with receipt, safekeeping, and transfer of all public monies. (UCA 59-12-107[2][d]).

Each person receiving any payment or consideration upon sale of property or service subject to tax must maintain and preserve proper records of all sales (UCA 59-12-111) and make returns and pay taxes quarterly on or before last day of month succeeding each calendar quarterly period (UCA 59-12-107[3][a]).

Each seller required to pay or collect and remit sales and use taxes imposed by this Act, if, within this state, seller: (1) Utilizes or has office, warehouse, or other place of business; (2) maintains stock of goods; (3) regularly solicits retail sale of tangible personal property; (4) regularly engages in delivery of property in this state other than by common carrier or U.S. Mail; or (5) regularly engages in any activity in connection with leasing or servicing of property located within state. (UCA 59-12-107[1][a]).

Any person whose tax liability was $50,000 or more for previous year must file return with commission on or before last day of month following month for which seller collects tax under this chapter. (UCA 59-12-108[1][a]). If tax liability $96,000 or more for previous year, tax must be transmitted by electronic funds transfer. (UCA 59-12-108[1][a][ii][A]). Seller who must remit taxes on monthly basis may retain up to 1.31% of amount seller required to remit to Commission under this chapter and 1% of amount seller required to remit under certain other chapters, for cost of collecting and remitting taxes to Commission on monthly basis. (UCA 59-12-108[2][b], [d]).

Each person storing, using, or consuming tangible personal property not subject to tax collection by seller is responsible for remitting use tax. (UCA 59-12-107[1][c]).

Local Sales and Use Tax Act enacted in 1959 (c. 114, § 1) to enable counties, cities, and towns to levy sales and use taxes. Provides for collection of such taxes by State Tax Commission and for integration of such taxes in order to establish uniformity of taxation within county. (UCA 59-12-201 et seq.).

22.18 STAMP AND SEAL TAXES:

Stamp Tax.

No documentary stamp tax.

22.18A TAX LIENS:

Uniform Federal Tax Lien Registration Act of 1926 in effect. (UCA 38-6-1).

22.19 USE TAXES:

See topic 22.14 Sales and 22.19 Use Taxes.

22.20 UTILITIES TAX:

Municipal Energy Sales and Use Tax Act adopted. (UCA 10-1-301 et seq.). Grants municipalities authority to tax utilities. (UCA 10-1-304[1]). Local taxes and other charges to public service provider may not exceed amount equal to 6% of gross revenues of public service provider. (UCA 10-1-304[1][a][ii]; UCA 11-26-1[2][c]). Municipalities exempt from limit if approved by voters. (UCA 11-26-2). Energy sales and use tax may be in addition to sales and use tax imposed under Title 59, c. 12. (UCA 10-1-304[2]). See topic 22.14 Sales and 22.19 Use Taxes. Requirements for municipal energy sales and use tax. (UCA 10-1-305).

Municipal Telecommunications License Tax Act adopted. (UCA 10-1-401 et seq.). Provides for tax upon telecommunications providers. (UCA 10-1-403[1][a][i]).

23 TRANSPORTATION

23.01 MOTOR VEHICLES:

Motor Vehicle Act adopted. (UCA 41-1a-101 et seq.). Motor vehicle law administered by State Tax Commission, through Motor Vehicle Division. (UCA 41-1a-103, -107). Division's address: 210 North 1950 West, SLC, UT 84134. Activities relating to traffic law enforcement, licensing and control of drivers, accident records, financial responsibility of drivers, and safety education administered by Department of Public Safety. (UCA 53-1-101 et seq.).

Vehicle License.

Registration required for every motor vehicle, trailer, semitrailer, off-highway vehicle, or vessel in state, unless exempted. (UCA 41-1a-201). Owners must register within 60 days of establishing residency. (UCA 41-1a-202[3]). Residency does not include out-of-state student; member of military temporarily stationed in Utah; individual domiciled in another state or foreign country and engaged in public, charitable, educational, or religious services for government agency or tax-exempt organization, and not compensated. (UCA 41-1a-202[1][b][ii]). Exemptions: Vehicles which only cross highways; implements of husbandry only incidentally operated or moved on highway; special mobile equipment; vehicles owned or leased by U.S.; vehicles not used to transport passengers or property for hire, or used for such but having gross laden weight of less than 26,000 lbs., registered in another state, and owned and operated by nonresident; trailers of 750 lbs. or less unladen weight not used to transport persons or property; manufactured homes or mobile homes not on permanent chassis; off-highway vehicles being towed or otherwise lawfully operated, registered under UCA 41-22-3; electric assisted bicycles or motor assisted scooters, or electric personal assistive mobility device defined under UCA 41-6a-102. (UCA 41-1a-202[2]). Certificates of title and license plates issued by Division of Motor Vehicles. (UCA 41-1a-108[1]). Tax or fee clearance must be obtained from County Assessor of county where vehicle has situs (UCA 41-1a-206[1]), and from Division showing sales tax paid to state or not due (UCA 41-1a-510[1][a]). Registration certificates and license plate decals, but not license plates or certificates of title, must be reissued annually. License plates for vehicles other than motorcycle, trailer, or semitrailer must be attached to both front and rear of vehicle. (UCA 41-1a-404[1]). License plates must be fastened in horizontal position at height of not less than 12 inches from ground and must be clearly visible and clearly legible and must be placed on rear of motorcycle, trailer, or semitrailer, and on front and rear of all other vehicles. (UCA 41-1a-404[3]). Fleets of commercial vehicles not operated solely in Utah and registered in other jurisdictions may proportionally register and license each fleet; temporary permits may be granted in lieu of these registering requirements. (UCA 41-1a-301[1], [5][c]). Unless exempted under UCA 41-22-9, off-highway vehicles must be registered. (UCA 41-22-3[1]).

Government Vehicles.

No fee required. (UCA 41-1a-1209).

Operator's License.

Required of all persons who are in physical control of motor vehicle upon highway. (UCA 53-3-202[2]). Some exceptions. (UCA 53-3-202[1][b], [c]). Person under 16 years may not be licensed as operator, and initial operator's license will not be issued unless approved driver's training course completed. (UCA 53-3-204[1][a]). Examination must be taken and passed. (UCA

53-3-204[2][d]). Division will issue license indicating type or general class of vehicles licensee may drive. (UCA 53-3-207[2][a]). Division may issue to persons under 21 years of age provisional license involving separate point system, facilitating earlier counseling and penalization. (UCA 53-3-209[1], [2][a]). First ticket—warning. Second ticket within three years of first—hearing. Third ticket—suspension of license. (UCA 53-3-209[2][b]). Division may issue temporary learner, instruction, or practice permit to applicant who is at least 15 years old and meets other requirements. (UCA 53-3-210.5[1]). No one under 21 may qualify to drive school bus or any motor vehicle when used to transport persons or property for compensation. (UCA 53-3-213[1]). Special licensing procedures established for mentally, emotionally, or nonstable physically impaired persons. (UCA 53-3-304[1][a]). Operation of vehicle by persons under 17 between 12:00 a.m. and 5:00 a.m. prohibited generally. (UCA 41-8-2[1]). Drivers' License Compact adopted. (UCA 53-3-601 et seq.).

See also subheads Liability of Owner and Nonresident Operators, infra.

Revocation and Suspension.

Mandatory revocation, suspension, or denial of license in following cases, among others: (1) Manslaughter or negligent homicide resulting from operation of motor vehicle or automobile homicide; (2) driving or being in actual physical control of vehicle while under influence of alcohol or any drug or combination thereof to degree which renders person incapable of safely driving vehicle as prescribed in UCA 41-6a-502; (3) driving or being in actual physical control of vehicle with blood or breath alcohol concentration of .08 grams or greater per 100 ml of blood as prohibited in UCA 41-6a-502, or having concentration of .05 grams or greater per 100 ml of blood if transporting passenger(s) 16 or under and committed within ten years of prior conviction; (4) perjury or making false affidavit to motor vehicle division with regard to registration of motor vehicles; (5) any felony in which motor vehicle used to facilitate offense; (6) failure to stop and render aid in event of motor vehicle accident resulting in death or personal injury of another; (7) two charges of reckless driving committed within period of 12 months, but if upon first conviction of reckless driving, judge recommends suspension of convicted person's license, division may, after hearing, suspend license for period of three months; (8) failure to bring vehicle to stop at command of peace officer as prescribed in UCA 41-6a-210; (9) discharging or allowing discharge of firearm from vehicle; (10) using, allowing use of, or causing to be used any explosive, chemical, or incendiary device from vehicle; (11) operating or being in actual physical control of motor vehicle while having any measurable controlled substance in driver's body in violation of UCA 41-6-44.6, or in violation of UCA 53-3-232; (12) engaging in motor vehicle speed contest or exhibition of speed on highway in violation of UCA 41-6a-606; and (13) upon conviction for drug-related crime under tit. 58, c. 37 through 37d. (UCA 53-3-220[1]). License suspended or denied if person under 21 years of age found operating vehicle or motorboat with any detectable level of alcohol in system. (UCA 53-3-231[2][a]). License may not be reinstated until requirements of UCA 41-6a-502 are fulfilled. (UCA 41-6a-517[2]).

Operators of emergency vehicles exempt from regulations under certain circumstances. (UCA 41-6a-212[1]).

Every person convicted of reckless driving is guilty of Class B misdemeanor. (UCA 41-6a-528[2]).

License of driver may be revoked without trial or conviction if Division has reason to believe that person: (1) Has committed offenses which would require mandatory revocation of his license upon conviction; (2) through improper operation of vehicle caused or contributed to accident resulting in death, serious injury, or extensive property damage; (3) is incompetent to drive due to mental or physical disabilities; (4) has seriously violated state motor law; (5) has permitted unlawful use of license as defined in UCA 53-3-229; or (6) has been frequently convicted of serious violations of motor vehicle regulations to indicate disrespect for such regulations. (UCA 53-3-221[1]).

Health care provider providing medical care to any person involved in motor vehicle crash may notify, as soon as reasonably possible, nearest peace officer or law enforcement agency if he has reason to believe, as result of any test performed in course of medical treatment, that: (1) Person's blood alcohol concentration meets or exceeds limit under UCA 41-6a-502(1)(a); (2) person younger than 21 years of age and has any measurable blood, breath, or urine alcohol concentration in person's body; or (3) person has any measurable controlled substance or metabolite of controlled substance in person's body which could violate Subsection UCA 41-6a-502(1)(b) or UCA 41-6a-517. (UCA 41-6a-525[2]). Health care provider acting in good faith immune from liability for such actions. (UCA 41-6a-525[4]).

Division must not suspend license of any person for longer than one year except as provided in UCA 53-3-221(9). Division may suspend license of any person if it has reason to believe license issued through error or fraud. (UCA 53-3-221[10][a]). Division may require any person suspected of being incompetent to drive to submit to examination upon five days notice. (UCA 53-3-221[11][a]). Division, upon notification, immediately suspends license of any person convicted under following: (1) Utah Controlled Substances Act; (2) Utah Drug Paraphernalia Act; (3) Imitation Controlled Substances Act; (4) Utah Controlled Substance Precursor Act; or (5) Clandestine Drug Lab Act; or any criminal offense, including conspiracy and attempt that prohibits possession, distribution, manufacture, cultivation, sale, or transfer of any substance prohibited in above acts. (UCA 53-3-220[1][c]). Division may suspend or revoke license of nonresident for same reasons. (UCA 53-3-221[7][a]).

Violation.

Any person whose driving privilege has been suspended, disqualified, revoked, or denied who continues to drive is guilty of Class C misdemeanor or, in certain circumstances, Class B misdemeanor. (UCA 53-3-227[1], [2]).

Bicycle Safety.

Operators of motor vehicles may not intentionally, knowingly, or recklessly operate vehicle within three feet of moving bicycle, unless operator of motor vehicle operates motor vehicle within reasonable and safe distance of bicycle. (UCA 41-6a-706.5).

Titles, Sales.

Title must identify total loss salvage vehicle as rebuilt or restored, and seller must provide salvage certificate, copy of branded title, original vehicle damage disclosure (UCA 41-1a-1004), or buyback vehicle nonconformities (UCA 41-3-406 et seq.). Illegal to knowingly sell vehicle originally delivered for sale in foreign country without notifying buyer on form furnished by Division. (UCA 41-1a-712[1]). License required of dealers and salesmen of new, used, or salvaged vehicles. (UCA 41-3-201 et seq.).

Dealer or broker guilty of equity skimming of vehicle if he transfers vehicle when he should have known vehicle is subject to lease or security interest, without obtaining written authorization. (UCA 76-6-522[2]).

Motor Vehicle Business Regulation Act (UCA 41-3-101 et seq.).—Motor Vehicle Enforcement Division has authority to license and administer motor vehicle dealers.

Motor Vehicle Consignment Sales Act (UCA 41-3-801 et seq.).—Rights and duties of consignees and consignors specified.

Liens.

Lien not dependent solely on possession is not valid against creditors or subsequent purchasers without notice until application for registration filed. (UCA 41-1a-601[1]). Dealer that fails to follow procedures established for paying off lien of vehicle traded in is subject to suit for all consideration given. (UCA 41-3-403[2]).

Identification Marks.

Special anti-theft laws in effect. (UCA 41-1a-1401 et seq.). Possession of vehicle with altered marks unlawful; felony to buy or sell.

Odometer Alteration.

Unlawful to disconnect, turn back, replace, or reset, with intent to reduce true number of miles indicated upon gauge; or to knowingly sell, transfer, or exchange without disclosure as required in UCA 41-1a-902 any motor vehicle on which odometer has been disconnected, turned back, or reset (UCA 41-1a-1319); or to operate vehicle knowing odometer to be disconnected or nonfunctional (UCA 41-1a-1310[3]). Transferor must furnish odometer mileage disclosure statement. (UCA 41-1a-902[2]).

Operation Prohibited.

Driver License Division or peace officer may confiscate license or registration that is fictitious, altered, unlawfully or erroneously issued or displayed, or as required in UCA 41-6a-520, 53-3-223, -231, or -418. (UCA 53-3-226[1]). Person may not permit car he owns, including rental car, to be driven by unlicensed person. (UCA 53-3-203[1]). Person adjudged to be mentally incompetent and not restored to competency may not be granted license. (UCA 53-3-204[2][c]).

Size, Weight, and Load Limits.

Regulated by UCA 72-7-401 to -409; UCA 41-1a-229.

Equipment Required.

Regulated by UCA 41-6a-1601 et seq.

Seat Belt Usage Required.

Regulated by UCA 41-6a-1628; UCA 41-6a-1801 to -1806. Seat belt required of all occupants of vehicle. (UCA 41-6a-1803). Noncompliance not contributory or comparative negligence. (UCA 41-6a-1806[1]). Inadmissible in civil litigation. (UCA 41-6a-1806[2]).

Child Restraint Devices.

Driver transporting child in motor vehicle required to use approved child restraint device for child younger than eight years of age who is 57 inches tall or less, and must provide either restraint device or approved safety belt for child between ages of eight and 16. (UCA 41-6a-1803[1][b]). Violation is infraction with fine of not more than $45 per offense. (UCA 41-6a-1805[1][a]). Failure to provide restraints not considered comparative negligence, nor is failure admissible as evidence in civil action with regard to negligence. (UCA 41-6a-1806).

Pollution Control.

Every vehicle equipped by manufacturer with air pollution control devices must have such devices in good working order and constant repair; control devices may not be disconnected. (UCA 41-6a-1626[3][a]).

Inspection.

Yearly inspections required, except for off-highway vehicles and vehicles less than eight years of age (which may be inspected every two years). (UCA 53-8-205[1], [2]). Safety inspection certificate required for renewal or registration of vehicle. (UCA 41-1a-205[1]). Inspection must be no more than two months prior to renewal of registration. (UCA 41-1a-205[2]). Following motor vehicles exempt: (1) New motor vehicles registered for first time, provided new car predelivery inspection made by dealer; (2) motor vehicles bearing dealer or other special plates, but if vehicle propelled by own power and not being moved for repair or dismantling, vehicle must comply with safe mechanical conditions requirements; (3) vintage vehicles. (UCA 41-1a-205[3]).

Emissions inspection and maintenance program for motor vehicles required under federal law, to be utilized in designated counties. Certificate of emissions inspection, waiver, or exemption is condition precedent to registration or renewal of registration of motor vehicle. (UCA 41-6a-1642[1]). Emissions inspection required within same time limit as safety inspection pursuant to UCA 41-1a-205. (UCA 41-6a-1642[7]). Counties have option to require inspection only biennially for cars six or fewer years old. (UCA 41-6a-1642[6][c]). Agricultural implements of husbandry and certain farm trucks exempt. (UCA 41-6a-1642[4]).

Traffic Regulations.

Federal Highway Safety Act adopted. (UCA 41-19-1). Speed limit 20 m.p.h. in reduced speed school zones, 25 m.p.h. in urban districts; and 55 m.p.h. in non-urban areas where not otherwise posted. (UCA 41-6a-601[2]).

Speeding in Construction Zones.

Vehicle operator who commits speeding violation in highway construction or maintenance site where workers are present fined at least double the fine in uniform recommended fine schedule. (UCA 41-6a-209[2][a]). Highway construction or maintenance site must be clearly marked and have signs posted that warn of doubled fine. (UCA 41-6a-209[2][b]).

Accidents.

Driver involved in accident must stop, and give name, address, registration number and insurance information. (UCA 41-6a-401[2][a], -401.7). If accident results only in damage to vehicle or property, operator of vehicle authorized to move vehicle off road or freeway to nearest safe location not obstructing traffic but must remain at scene of accident until operator fulfills all other requirements. (UCA 41-6a-401[1][a]). In case of death or injury to person or damage of $1,500 or more to property, law enforcement must be notified immediately. (UCA 41-6a-401[3], -401.7[2]). If accident results in injury or death, driver must immediately stop and remain at scene until requirements fulfilled under UCA 41-6a-401.7. (UCA 41-6a-401.3, -401.5). License may be revoked of any person failing to report accident as requested under UCA 41-6a-402 until report has been filed. (UCA 41-6a-402[5]).

Liability of Owner for negligence of others in operation of car generally dependent on existence of master and servant or principal and agent relationship. (47 Utah 598, 155 P. 437). Family car doctrine not adopted.

Operator’s license not issued to minor under age of 18 unless application signed by parent or guardian or, if applicant has neither parent nor guardian, by any adult willing to assume obligations imposed by this chapter. (UCA 53-3-211[1], [2]). Person signing becomes jointly and severally liable with minor for any civil compensatory damages caused, unless minor files proof of financial responsibility on vehicle owned or operated by him. (UCA 53-3-211[2], [3][b]). Owner causing or knowingly permitting minor under age of 18 to operate his vehicle on highway and any person who gives or furnishes vehicle to such minor is jointly and severally liable with minor for minor’s negligence. (UCA 53-3-212[1]).

Guest Statute.

Statute repealed.

Proof of Financial Responsibility.

Resident vehicle owner must maintain security. (UCA 41-12a-301[2][a]). Nonresident owner of vehicle physically present in state more than 90 days during last year must maintain security. (UCA 41-12a-301[2][b]). Off-highway vehicles, farm implements, electric assisted bicycles, and motor assisted scooters and mobility devices exempt. (UCA 41-12a-301[5]).

Insurance.

To satisfy security requirements, policy limits must be at least $25,000 per person and $65,000 per accident for bodily injury or death and $15,000 for property damage, or in lieu of foregoing limits, single limit of not less than $80,000. (UCA 31A-22-304). Insurer authorized under certain conditions to cancel policy after adequate notice. (UCA 31A-23a-602[6]). Insurer required to participate in Uninsured Motorist Database Identification Program. (UCA 31A-22-315[2][a]).

No-Fault Insurance.

Utah has adopted “no-fault” insurance as to personal injury. (UCA 31A-22-301 et seq.). No-fault liability coverage need not insure against property damage claims. (UCA 31A-22-303[3][c]). Every resident owner must maintain insurance policy that qualifies under c. 12a, Title 41 and includes motor vehicle liability coverage, and uninsured, and underinsured motorist coverage. (UCA 31A-22-302[1]). Uninsured motorist coverage may be rejected by writing to insurer by insured (UCA 31A-22-305[4][a][i]), as may underinsured motorist coverage (UCA 31A-22-305.3[2][g][i]). Insurance must provide minimum of: Medical benefits—reasonable value of all health care services not greater than $3,000 per person; loss of gross income benefits—lesser of $250 per week or 85% of loss of gross income and earning capacity for maximum of 52 weeks plus $20 per day for maximum of 365 days for household expenses; funeral expenses—$1,500 per person; survivor benefits—$3,000 per person. (UCA 31A-22-307[1]). Insured may waive loss of gross income benefits if insured and insured’s spouse unemployed within 31 days of applying for coverage and at least 180 days from date of written waiver and during insurance period. (UCA 31A-22-307[4]).

Personal injury coverage applicable to: (1) Insured and related persons by blood, marriage, adoption, or guardianship; (2) any other person who occupies vehicle with express or implied consent of insured; or (3) pedestrian injured by insured’s vehicle. (UCA 31A-22-308).

If injured party insured by another policy, primary coverage will be paid by policy insuring vehicle out of which accident arose. (UCA 31A-22-309[4]). Payment of benefits to be made 30 days after insurer receives proof of fact. (UCA 31A-22-309[5][b]). Interest at rate of 1½% per month assessed for late payment. (UCA 31A-22-309[5][c]). No person for whom direct coverage is provided may maintain direct action except where there has been caused: (1) Death; (2) dismemberment; (3) permanent disability or permanent impairment; (4) permanent disfigurement; or (5) medical expenses in excess of $3,000. (UCA 31A-22-309[1][a]). Insurer issuing personal injury protection coverage may only exclude from coverage benefit for: (1) Injuries sustained by injured while occupying another motor vehicle owned by insured and not insured under policy; (2) injuries to persons using insured vehicle without consent of owner; (3) injury intentionally inflicted to self; (4) injury sustained while committing felony; (5) injury arising out of use of motor vehicle while located for use as a residence or premises; (6) injury due to war; (7) injury resulting from radioactive, toxic, explosive, or other hazardous properties of nuclear materials. (UCA 31A-22-309[2][a]). When its insured would be held legally liable for personal injuries for which benefits have been paid, insurer must reimburse other insurer. (UCA 31A-22-309[6][a]). Issue of liability determined by mandatory arbitration between insurers. (UCA 31A-22-309[6][a][ii]). Every policy, except for motorcycles, trailers, and semitrailers, must include personal injury protection. (UCA 31A-22-302[2]).

Foreign Vehicles.

Owner of foreign vehicles with gross weight less than 6,000 pounds must provide signed statement certifying that vehicle complies with all federal laws and regulations. (UCA 41-1a-225[1]). Division may issue temporary permit, not to exceed 120 days, pending compliance. (UCA 41-1a-225[3]).

Nonresident Operators.

Nonresidents exempt from operator's license if at least 16 years of age and have in possession valid license from home state or country. (UCA 53-3-202[1][d], [e]).

Actions Against Nonresidents.

Use and operation by nonresident or agent of motor vehicle on highways of state deemed appointment of Division of Corporations and Commercial Code as agent for service of legal process in action growing out of such use or operation. (UCA 41-12a-505[1]). Service made by serving Division or by filing in office, paying reasonable fee, and mailing copy of process and notice of service to defendant within ten days. (UCA 41-12a-505[2]). Court may order continuance up to 90 days to give reasonable opportunity to defend. (UCA 41-12a-505[3]).

Nonresident Violator Compact (UCA 53-3-701 to -709).—Upon failure of nonresident motorists to comply with terms of Utah traffic citation, failure reported to proper licensing authority in jurisdiction where traffic citation was issued. (UCA 53-3-705[3][a]). Information regarding failure then transmitted to offender's home jurisdiction (UCA 53-3-705[4]). Home jurisdiction may initiate action to suspend license upon receipt of report. (UCA 53-3-706[1]).

Direct Actions.

If execution against insured returned unsatisfied, action may be maintained against insurer to extent liability covered by policy. (UCA 31A-22-201).

Motor Vehicle Carriers.

Oversight by Department of Transportation and Motor Carrier Advisory Board. (UCA 72-9-201[1]). Common carriers must provide services without discrimination. (Utah Const. Art. XII, § 12).

Motor Vehicle Taxes.

See category 22 Taxation, topic 22.13A Motor Vehicle and Transportation Taxes.

Gasoline Tax.

See category 22 Taxation, topic 22.08 Gasoline and Special Fuels Taxes.

Lemon Law.

New Motor Vehicle Warranties Act. adopted. (UCA 13-20-1 et seq.). See category 3 Business Regulation and Commerce, topic 3.12 Consumer Protection, subhead Nonconforming Motor Vehicle.

Young Drivers.

Must be at least 16 years of age to get license. (UCA 53-3-204[1][a][i]). Must not operate motor vehicle with any passenger who is not member of driver's immediate family until earlier of six months from date driver license issued or person reaches 18 years of age, with some exceptions. (UCA 41-8-3[1]). Several affirmative defenses to charge that driver violated this provision exist. (UCA 41-8-3[2]).

23.02 RAILROADS:

See category 3 Business Regulation and Commerce, topic 3.08 Carriers.

23.02A UNIFORM COMMERCIAL CODE FORMS:

Uniform forms adopted. See particular topics for other forms. Forms also available online at http://corporations.utah.gov/ucc-cfs/ucc.html.

1
VERMONT LAW DIGEST

—Scope —

Revised for 2010 edition by

RYAN SMITH & CARBINE, LTD., of Rutland.

(References, unless otherwise indicated, are to titles and sections of Vermont Statutes, Annotated. Letters “sc” indicate subchapter. “VRCP” means Vermont Rules of Civil Procedure; “VRCrP” means Vermont Rules of Criminal Procedure; “VRSCP” means Vermont Rules of Small Claims Procedure; “VRECP” means Vermont Rules of Environmental Court Procedure; “VRPP” means Vermont Rules of Probate Procedure; “VRAP” means Vermont Rules of Appellate Procedure; “VRE” means Vermont Rules of Evidence; “VRFP” means Vermont Rules for Family Proceedings; “Local F.R.Civ.P.” means United States District Court for the District of Vermont Federal Rules of Civil Procedure; Parallel citations to the Atlantic Reporter begin with 58 Vt.)

Note: 2009 Legislation includes Session Laws enacted through July 1, 2009. Legislature meets biennially in Jan. of odd years. However, practice is to continue odd-year session to following Jan. as “adjourned session”, with effect that legislature meets every year.

1 INTRODUCTION

1.01 GOVERNMENT AND LEGAL SYSTEM:

The State of Vermont is a constituent state of the United States of America. For further discussion of the U.S. federal system, see Introduction to the Federal Government of the United States at the beginning of this volume. A great many laws are promulgated by the federal government of the United States and are not reflected in the topics below. See the Introduction to this volume for references to the federal law topics covered.

Like all but one of the United States, Vermont has a common law legal system, with roots in English common law. For information on the courts and legislature of Vermont, see category 6 Courts and Legislature.

1.02 [RESERVED]

1.03 HOLIDAYS:

Following days are legal holidays: Jan. 1; 3d Mon. in Jan.; Feb. 12; 3d Mon. in Feb.; 1st Tues. in Mar.; last Mon. in May; July 4; Aug. 16; 1st Mon. in Sept.; 2d Mon. in Oct.; Nov. 11; 4th Thurs. in Nov.; Dec. 25. (1 VSA 371).

All state departments, agencies and offices shall observe any legal holiday which falls on Sat. on preceding Fri., and any legal holiday which falls on Sun. on following Mon. (1 VSA 371).

1.04 OFFICE HOURS AND TIME ZONE:

Vermont is in the Eastern Standard (GMT -05:00) time zone. Office hours are generally from 9 a.m. to 5 p.m. 4:30 p.m. for state offices.

2 BUSINESS ORGANIZATIONS

2.01 AGENCY:

Much of agency law in State of Vermont is based upon common law and many cases follow sections from Restatement of Agency.

2.02 ASSOCIATIONS:

An unincorporated association is fundamentally a partnership (118 Vt. 438, 111 A.2d 727), with similar rights and liabilities (79 Vt. 1, 63 A. 938).

Formation.

An association is two or more co-owners carrying on a business as co-owners for profit. (11 VSA 3201).

Rights and Powers.

As to relation of associates to one another, see 11 VSA 3231.

Liabilities.

Where loss or injury to third person nonmember of association is caused by wrongful act of a member acting in ordinary course of business of association or with authority of association, association is liable therefore to same extent as associate. (11 VSA 3225). Associates are jointly and severally liable for wrongful acts and breaches of trust chargeable to association, and jointly for all other debts and obligations of association. (11 VSA 3226).

Actions.

In an action against an unincorporated association, process may be served on any officer or member. (12 VSA 814).

Dissolution.

Certificate with date and fact of cessation filed with Secretary of State within ten days of cessation. (11 VSA 1628).

Professional Associations.

See topic 2.03 Corporations, subhead Professional Corporations.

2.03 CORPORATIONS:

Vermont's corporation code shall be known as “Vermont Business Corporation Act”. (11A VSA 1.01).

General supervision of corporations is exercised by Secretary of State, Heritage

Building, 81 River Street, Montpelier, Vermont 05602. (802) 828-2386.

Purpose.

Every corporation incorporated under title 11A has purpose of engaging in any lawful business unless more limited purpose is set forth in articles of incorporation.

Name.

Must contain “corporation”, “incorporated”, “company”, or “limited” or abbreviation “corp.”, “inc.”, or “ltd” or words or abbreviations of like import in another language and shall not contain “co-operative” or any abbreviation thereof unless authorized under title 11A c. 8. (11A VSA 4.01). Corporate name shall not be deceptively similar to or likely to be confused with or mistaken for other corporations. (11A VSA 4.01[b]).

Term of Corporate Existence.

Unless its articles of incorporation provide otherwise, every corporation has perpetual duration. (11A VSA 3.02).

Incorporators.

One or more natural persons of majority age may act as incorporator or incorporators of corporation by delivering articles of incorporation to Secretary of State for filing. (11A VSA 2.01). Incorporators need not be residents of Vermont. (11A VSA 2.01).

Certificate of Articles of Incorporation.

Articles shall set forth: (1) corporate name; (2) classes of shares; (3) number of shares corporation is authorized to issue; (4) street address; (5) name and address of each incorporator; (6) one or more classes of shares that together have unlimited voting rights; and (7) one or more classes of shares entitled to receive net assets of corporation upon dissolution. Articles may but need not, set forth; (1) names and addresses of individuals who are to serve as initial Board of Directors; (2) provisions not inconsistent with law regarding: purpose of organization, provisions establishing designations, preferences, limitations, and relative rights of share classes, par value for authorized shares or classes of shares and imposition of personal liability on shareholders for debts of corporation; (3) any provision that under this title is required or permitted to be set forth in bylaws; and (4) provision eliminating or limiting liability of director to corporation or its shareholders for money damages. (11A VSA 2.02). Person executing document shall sign it and state beneath or opposite his or her signature capacity in which he or she signs. Document must be accompanied by one exact or conformed copy. (11A VSA 1.20).

Filing of Certificate or Articles.

Documents must be filed with office of Secretary of State along with correct filing fee. (11A VSA 1.20).

Filing Fees.

Articles of Incorporation, $75; Application for Reserved Name, $20; Application for Registered Name of Foreign Corporation, $25; Amendment of Articles of Incorporation, $25; Articles of Merger or Share Exchange, $50; Articles of Dissolution, $20; Application for Certificate of Authority, $100; Application for Certificate of Withdrawal, $20; Annual Report of Foreign Corporation, $175; Annual Report of Domestic Corporation, $35 (11A VSA 1.22[a]); $25 to reinstate corporation involuntarily terminated for failure to file annual report (11A VSA 1.22[d]).

Fee of $20 for serving process on Secretary of State. (11A VSA 1.22[b]).

Filings effective, if in proper form, on date of filing. Corrective filings allowed of initial Articles, by act of incorporators.

License to Do Business.

Anyone may apply to Secretary of State to furnish certificate of good standing setting forth authority to do business. (11A VSA 1.28).

Organization Meeting.

If initial directors are named in articles of incorporation, organizational meeting shall be held at call of majority of directors. If initial directors are not named in articles of incorporation, incorporators shall hold organizational meeting at call of majority of incorporators. (11A VSA 2.05).

Paid in Capital Requirements.

Corporate existence begins when Secretary of State issues certificate of incorporation, after finding that articles of incorporation conform to law, and that all fees imposed have been paid.

Amendment of Certificate or Articles.

Corporation may amend articles of incorporation at any time to add or change or delete provision. Shareholder of corporation does not have vested property right resulting from any provision in articles of incorporation. (11A VSA 10.01).

Increase or Decrease of Authorized Capital Stock.

Corporation amending its articles of incorporation shall deliver to Secretary of State for filing articles of amendment setting forth amendment adopted, if amendment provides for exchange, reclassification, or cancellation of issued shares. Provisions for implementing amendment if not contained in amendment itself.

By-laws.

Incorporators or Board of Directors shall adopt initial by-laws. By-laws of corporation may contain any provisions for managing business and regulating affairs of corporation that are not inconsistent with law or articles of incorporation. (11A VSA 2.06).

Stock.

Articles of incorporation must prescribe classes of shares and number of shares of each class. If more than one class of shares is authorized, articles of incorporation must prescribe distinguishing designation for each class and preferences, limitations and rights of that class. (11A VSA 6.01[a]). Articles of incorporation must authorize one or more classes of shares that together have unlimited voting rights and one or more classes of shares that together are entitled to receive net assets of corporation upon dissolution. (11A VSA 6.01[b]). Articles of incorporation may authorize one or more classes of shares that have special voting rights, are redeemable or convertible, entitle holders to distributions calculated in any manner including dividends that may be cumulative, or otherwise, and have preferences over any other class of shares. (11A VSA 6.01[c]).

Stock Certificates.

Shares may but need not, be represented by certificates, unless required by bylaws. (11A VSA 6.26). At minimum each share certificate must state name of issuing corporation, name of person to whom issued, number and class of shares and designation of series, if any, certificate represents and restrictions on transfers if any. (11A VSA 6.25).

Issuance of Stock.

Board of Directors may authorize shares to be issued for consideration consisting of tangible or intangible property or benefit to corporation, including cash, services performed, or other securities of corporation. Future services shall not constitute consideration.

Uniform Simplification of Fiduciary Security Transfer Act.

Not adopted.

Uniform Commercial Code.

Adopted. See Title 9A. See category 3 Business Regulation and Commerce, topic 3.09 Commercial Code.

Stockholders' action respecting director's conflicting interest transaction is effective if majority of votes cast by holders of all qualified shares was cast in favor of transaction after: (1) Notice to shareholders describing director's conflicting interest transaction; (2) provision of information referred to in subsection (b) of this section; and (3) required disclosure to shareholders who voted on transaction to extent not known by them. (11A VSA 8.63[a]). Director who has conflicting interest respecting transaction must, before shareholders' vote, inform secretary or other officer or agent of corporation authorized to tabulate votes, in writing, of number of shares director knows are not qualified shares and identity of holder of those shares. (11A VSA 8.63[b]).

Stockholders' Liabilities.

Shareholder is not personally liable for acts or debts of corporation, except that shareholder may become personally liable by reason of shareholder's own acts or conduct. (11A VSA 6.22[b]). Any person becoming assignee or transferee of shares in good faith and without knowledge or notice that no consideration therefore has not been paid shall not be personally liable to corporation or its creditors for any unpaid portion of such consideration. (11A.6.22[c]).

Stockholders' Meeting.

Annual shareholders' meetings must be held in state unless permitted in by-laws to be held outside state. If no place is stated in or fixed in accordance with by-laws, annual meetings must be held at corporation's principal office. Annual meeting may be conducted by any means of electronic or telecommunications mechanism, including video-conference telecommunication. Failure to hold annual meeting at time stated or fixed in accordance with by-laws does not affect validity of corporate action. (11A VSA 7.01). Special shareholders' meetings must be held in state unless permitted in by-laws of corporation to be held out of state. (11A VSA 7.02[c]). Corporation shall notify shareholders of date, time, and place of annual and special shareholders' meeting no fewer than ten nor more than 60 days before meeting date. Corporation is required to give notice only to shareholders entitled to vote at meeting. (11A VSA 7.05). Shareholder may appoint proxy to vote or otherwise act for shareholder by signing appointment form, either personally or by shareholders' attorney-in-fact. Appointment of proxy is revocable by shareholder unless appointment form conspicuously states that proxy is irrevocable and appointment is coupled with interest. (11A VSA 7.22). Shares entitled to vote as separate voting group may take action on matter at meeting only if quorum of those shares exist. Majority of votes is quorum unless articles of incorporation or Title 11A states otherwise. (11A VSA 7.25). Shareholders do not have right to accumulate votes for directors unless articles of incorporation so provide. (11A VSA 7.28).

Voting Trusts.

One or more shareholders may create voting trust, by conferring on trustee right to vote for them and transferring their shares to trustee. When voting trust agreement is signed, trustee shall prepare list of names of all owners of beneficial interest in trust together with number and class of shares transferred. Voting trust is valid for not more than ten years after its effective date unless all or some of parties agree to extend it for another period not greater than ten years. (11A VSA 7.30).

Directors.

Director need not be resident of Vermont or shareholder of corporation unless articles of incorporation or by-laws so prescribe. (11A VSA 8.02). Corporation, not close corporation, must consist of three or more individuals unless shareholders total less than three, then number of directors may equal number of shareholders. (11A VSA 8.03[a]). Directors are elected at first annual shareholders' meeting and at each annual meeting thereafter unless their terms are staggered. (11A VSA 8.03[b]). Shareholders may remove directors with or without cause unless articles of incorporation provide only for cause. (11A VSA 8.08). Directors may be removed by judicial proceeding commenced either by corporation or by shareholders holding at least 10% of outstanding shares of any class if Superior Court finds that director engaged in fraudulent or dishonest conduct to corporation, or in gross abuse of authority or discretion relating to corporation; and removal is in best interest of corporation. (11A VSA 8.09). Directors shall discharge directors' duties in good faith; with care ordinarily prudent person in like position would exercise under similar circumstances; and in manner director reasonably believes to be in best interests of corporation. In determining what director reasonably believes to be best interests of corporation, director may consider interests of corporation's employees, supplies, creditors and customers, economy of state, region and nation, community and societal considerations, and any other factors director reasonably considers appropriate. (11A VSA 8.30).

Directors' Meetings.

Board of Directors may hold regular or special meetings in or outside this state. (11A VSA 8.20). "Meeting" means any structured communications conducted by participants in person or through use of electronic or telecommunications medium permitting simultaneous or sequentially structured communications for purpose of reaching collective agreement. (11A VSA 1.40[26]). Board may permit any or all directors to participate in regular or special meeting by, or conduct meeting through use of, any means of communication, including electronic, telecommunications, and video or audio-conferencing conference telephone call by which all directors participating may simultaneously communicate with each other. Director participating in meeting by this means is deemed to be present. (11A VSA 8.20). Unless bylaws provide otherwise, no notice of regular board meeting needs to be given; if special meeting is called, then at least two business days notice of date, time, and place must be given. (11A VSA 8.22).

Powers and Duties of Directors.

Director shall discharge his or her duties as director in good faith, with care of ordinary prudent person in like position would exercise under similar circumstances and in best interest of corporation. (11A VSA 8.30).

Liabilities of Directors.

Director who votes for or assents to distribution made in violation is personally liable to corporation for amount of distribution that exceeds what could have been distributed. Director held liable is entitled to contribution from every other director who could be held liable and from each shareholder who knew distribution was made in violation. Proceeding under this section must be commenced within six years. (11A VSA 8.33).

Officers.

Corporation has officers described in its bylaws or appointed by Board of Directors in accordance with bylaws. Board of Directors may elect individuals to fill one or more corporate offices. Officer may appoint one or more officers or assistant officers if authorized by bylaws or Board of Directors. Bylaws or Board of Directors shall assign to one of officers responsibility for preparing minutes of directors' and shareholders' meetings and for authenticating and maintaining records of corporation required by law to be kept. That same individual may simultaneously hold more than one office. (11A VSA 8.40).

Liabilities of Officer.

Each officer has authority and shall perform duties set forth in bylaws or, to extent consistent with bylaws, duties prescribed by board of directors or by direction of officer authorized by board of directors to prescribe duties of other officers. (11A VSA 8.41).

Indemnification.

Corporation may indemnify individual made party to proceeding because individual is or was director under certain circumstances. (11A VSA 8.51). Corporation shall indemnify director who was wholly successful, in defense of any proceeding to which director was party because director is or was director of corporation against reasonable expenses incurred by director in connection with proceeding. Corporation may not indemnify director if director was adjudged to be liable to corporation or improperly received personal benefit. (11A VSA 8.51[d]). Court may order indemnification of director. (11A VSA 8.54). Indemnification of officers, employees and agents is same as for directors unless corporation's articles of incorporation limit indemnification. (11A VSA 8.56).

Principal office means office (in or out of this state) so designated in annual report where principal executive offices of domestic or foreign corporation are located. (11A VSA 1.40[15]).

Resident Agent.

Each corporation must continuously maintain in this state registered agent who may be individual who resides in this state, domestic corporation or not-for-profit domestic corporation whose business office is identical with registered office or foreign corporation or not-for-profit foreign corporation authorized to transact business in state whose business office is identical with registered office. (11A VSA 5.01).

General Powers of Corporations.

Unless its articles of incorporation provide otherwise, every corporation has perpetual duration and has same powers as individual to carry out its business and affairs including power to sue and be sued. Court or other adjudicative body shall permit corporation to appear through non-attorney representative if representative is authorized; representative demonstrates adequate legal knowledge and skills without unduly burdening opposing party or court; and representative shares common interest with corporation. (11A VSA 3.02).

Dividends.

Articles of incorporation can restrict rights of distribution to shareholders. (11A VSA 2.02). Board of Directors may authorize and corporation may make distributions to shareholders subject to restrictions by articles of incorporation. (11A VSA 6.40, 6.23). No distribution may be made if corporation is not able to pay debts as they become due, or corporation's total assets would be less than sum of its total liabilities plus amount that would be needed, if corporation were to be dissolved at time of distribution, to satisfy preferential rights upon dissolution of shareholders whose preferential rights are superior to those receiving distribution. (11A VSA 6.40).

Unclaimed Dividends.

See category 21 Property, topic 21.01 Absentees, subhead Escheat.

Sale or Transfer of Corporate Assets.

Corporation may sell, lease, exchange, or otherwise dispose of all, or substantially all, of its property in usual and regular course of business on terms and conditions determined by Board of Directors. Corporation may mortgage or otherwise encumber any or all of its property whether or not in usual and regular course of business. Corporation may transfer any or all of its property to corporation all shares of which are owned by transferring corporation. (11A VSA 12.01). Sale, lease, exchange, or other disposition of assets other than one described in 11A VSA 12.01, requires approval of shareholders if disposition would leave corporation without significant continuing business activity. If corporation retains business activity that represented at least 25% of total assets at end of most recently completed fiscal year and 25% of either income from continuing operation before taxes or revenue from continuing operation for that fiscal year, in each case of corporation and subsidiaries on consolidated basis, corporation will conclusively be deemed to have retained significant continuing business activity. (11A VSA 12.02). Shareholder is entitled to dissent from and obtain payment of fair value of shareholder's shares in certain circumstances including merger, share exchange, sale of assets, amendment to articles, or market exception under certain conditions. (11A VSA 13.02).

Books and Records.

Corporation shall permanently keep records of minutes, maintain appropriate accounting records, and keep record of all shareholders. Corporation must maintain its records in written form or in other form, including electronic form, capable of conversion into written form in reasonable time. (11A VSA 16.01). Corporation shall keep following records at its principal office: articles of incorporation, bylaws, resolutions adopted by board creating one or more classes of stock, minutes of shareholder meetings, all written or electronic communications to shareholders in past three years, list of names and business addresses of officers and directors, and copy of most recent annual report submitted to Secretary of State. (11A VSA 16.01).

Reports.

Annual report must be filed with Secretary of State. (11A VSA 16.22). Must furnish shareholders with copies of annual financial statements within 120 days after ending fiscal year. (11A VSA 16.20).

Corporate Bonds or Mortgages.

Unless articles of incorporation provide otherwise, corporation has power to do things necessary to carry out its affairs, including mortgaging property. (11A VSA 3.02).

Merger and Consolidation.

One or more corporations may merge into another corporation if Board of Directors of each corporation adopts and its shareholders approve. Merger plan must set forth name of each corporation planning to merge and name of surviving corporation into which each other corporation plans to merge, terms and condition and manner and basis of converting shares. (11A VSA 11.01).

Share Exchanges or Acquisitions.

Corporation may acquire all of outstanding shares of one or more classes or series of another corporation if Board of Directors of each corporation adopts and its shareholders approve exchange. (11A VSA 11.02).

Tender Offers.

For tender offer or merger of domestic insurance company see 8 VSA 3683.

Dissolution.

Majority of incorporators or initial directors of corporation that has not issued shares or has not commenced business may dissolve corporation by delivering to Secretary of State for filing articles of dissolution. (11A VSA 14.01). Corporation's board of directors may propose dissolution for submission to shareholders. (11A VSA 14.02). Corporation may revoke its dissolution within 120 days of its effective date. (11A VSA 14.04). Dissolved corporation continues its corporate existence but may not carry on any business except that appropriate to wind up and liquidate its business and affairs. (11A VSA 14.05). Dissolved corporation may dispose of known claims against it by following statutory procedures. (11A VSA 14.06). Dissolved corporation may send and publish notice of dissolution and request that persons with claims against corporation present them. (11A VSA 14.07). If corporation fails to file annual report, corporation shall terminate and Secretary of State shall notify corporation of such termination. If such terminated corporation shall file annual report, together with any fee required by law, its charter shall be reinstated by Secretary of State. (11A VSA 14.20[a]). Reinstatement shall relate back to and take effect as of date of corporation's termination as if termination had never occurred. (11A VSA 14.20[b]). Superior Court may dissolve corporation if corporation obtained articles of incorporation through fraud or corporation has continued to exceed or abuse authority conferred upon it by law. (11A VSA 14.30). Court in judicial proceeding brought to dissolve corporation may appoint receiver to wind up and liquidate corporation's business and affairs. (11A VSA 14.32). If Court decides after hearing that judicial dissolution is warranted, Court may enter decree dissolving corporation, specifying effective date of dissolution. (11A VSA 14.33).

Close Corporations.

Shareholders shall not exceed 35. (11A VSA 20.02). Close corporation need not adopt by-laws if provisions required by law to be contained in by-laws are contained in articles of incorporation or shareholder agreement. (11A VSA 20.06). New code gives opportunities to close corporations to operate and manage corporation with less formality and more flexibility.

Close corporation may operate without board of directors if articles of incorporation contain statement that liability imposed by law on directors is instead imposed upon each person in whom board's power is vested. (11A VSA 20.08). Merger or consolidation of close corporation shall be approved by vote of at least 2/3 of outstanding shares. (11A VSA 20.10).

Foreign Corporations.

Foreign corporation may not transact business in Vermont until it obtains certificate of authority from Secretary of State. Foreign corporations do not need to obtain certificate of authority to maintain, defend, or settle any proceedings; maintain bank accounts; own real or personal property; or transact business in interstate commerce. (11A VSA 15.01). Any foreign corporation transacting business in Vermont without certificate of authority may not maintain proceeding nor may it raise counterclaim, cross-claim, or affirmative defense in any court in this state. (11A VSA 15.02).

Foreign corporation is liable to Vermont for civil penalty of $50 per day, not to exceed $1,000 per year, if it transacts business in Vermont without certificate of authority. (11A VSA 15.02[d]).

Professional Corporations.

One or more persons may incorporate professional corporation by delivering to Secretary of State for filing articles of incorporation that state is professional corporation and its purpose is to render specified professional service. Corporation incorporated under general law of this state may elect professional corporation status by amending its articles of incorporation to comply with 11 VSA 820(a) and 11A-c.10. Name must contain words "professional corporation", "professional association", "limited" or "service corporation".

Deeds.

See category 21 Property, topic 21.06 Deeds.

Model Nonprofit Corporation Act.

Model act not adopted. See Vermont Nonprofit Corporation Act. (11B VSA 1.01). See Act 106 (2008) authorizing “low profit limited liability” companies to carry on charitable or educational purpose.

2.04 FOREIGN CORPORATIONS:

See topic 2.03 Corporations.

2.05 [RESERVED]

2.06 LIMITED LIABILITY COMPANIES:

(11 VSA 3001 et seq.).

General Supervision.

Supervision by Secretary of State.

Formation.

One or more persons may organize limited liability company, consisting of one or more members, by delivering articles of organization to office of Secretary of State for filing. (11 VSA 3022). Existence of limited liability company begins when articles of organization are filed. (11 VSA 3022).

Liability.

Except as stated in 11 VSA 3043(b), debts, obligations, and liabilities of company, tort or contract, are solely debts, obligations, and liabilities of company. Member or manager not personally liable for debt, obligation, or liability of company solely by reason of being member or manager, except member or manager may be personally liable for own acts or conduct. (11 VSA 3043[a]). Members are liable in capacity as members for all or specified debts, obligations, or liabilities of company if stated so in articles of organization and member has consented in writing to provision or to be bound. (11 VSA 3043[b]).

Name as set forth in its articles shall contain abbreviation “L.L.C.”, “LLC”, “L.C.”, or “LC”. (11 VSA 3005).

Articles of organization shall set forth name of company, address of initial designated office, service of process, name and address of each organizer, duration of term, whether company is to be manager-managed and whether members are to be liable for its debts and obligations. (11 VSA 3023).

Filing Articles of Organization.

Original signed copy, together with duplicate copy that may be either signed, photocopied or conformed copy, of articles of organization shall be delivered to Secretary of State.

Registered Office and Registered Agent.

Corporation, upon filing articles of organization, must select agent to receive process on behalf of company. (11 VSA 3011).

Management.

In member managed limited liability company each member has equal rights in management and conduct of company's business. In manager-managed limited liability company managers have exclusive authority. Manager must be designated, appointed, elected, removed or replaced by vote, approval or consent of majority of members. (11 VSA 3054).

Dissolution.

Limited liability is dissolved upon occurrence of any of following events: event specified in operating agreement, consent dissociation of member-manager, illegality, judicial decree. (11 VSA 3101).

Fees.

Secretary of State shall collect following fees: articles of organization, $100; application for certificate of authority, $100; amendment of articles of certificate of authority, $25; cancellation of certificate of authority, $5; application for reserved name, $20; notice of transfer of reserved name, $5; application for registered name, $25; application for renewal of registered name, $25; statement of change designated agent or designated office or both, $5; agent's statement of resignation, no fee; restatement of articles of organization, $25; articles of correction, $25; application for certificate of existence or authorization, $5; articles of merger, $50; annual report of domestic LLC, $25; annual report of foreign LLC, $125; and reinstatement, $25.

2.07 LIMITED PARTNERSHIP:

See topic 2.08 Partnerships.

2.08 PARTNERSHIPS:

Uniform Partnership Act of 1997, which contains uniform limited liability partnership provisions, has been adopted. (11 VSA 3201 et seq.).

Formation.

Statement may be filed in office of Secretary of State. Certified copy of statement that has been filed in office of Secretary of State has effect provided for recorded statements. Statement filed by partnership must be executed by at least two partners. Secretary of State shall collect fee for filing or providing certified copy of statement. (11 VSA 3212).

Name.

Must include "limited partnership", or "L.P." (11 VSA 3402). Shall not be similar to other business names and shall not include "incorporated" or "limited" by itself. (11 VSA 3402).

Rights and Liabilities of Partners Inter Se.

Each partner is deemed to have account that is: (1) credited with amount equal to money plus value of any other property, net of amount of any liabilities, partner contributes to partnership and partner's share of partnership profits; and (2) charged with amount equal to money plus value of any other property, net of amount of any liabilities, distributed by partnership to partner and partner's share of partnership losses. (11 VSA 3231).

Each partner is also entitled to equal share of partnership profits and each partner is chargeable with share of partnership losses, whether capital or operating, in proportion to partner's share of profits. (11 VSA 3443). Partnership shall reimburse partner for payments made and indemnify partner for liabilities incurred by partner in ordinary course of business of partnership or for preservation of its business or property. Partnership shall reimburse partner for advance to partnership beyond amount of capital partner agreed to contribute. Payment or advance made by partner which gives rise to partnership obligation constitutes loan to partnership which accrues interest from date of payment or advance. Each partner has equal rights in management and conduct of partnership business. Partner may use or possess partnership property only on behalf of partnership. (11 VSA 3231).

Rights and Liabilities of Partners as to Third Persons.

All partners are liable jointly and severally for all obligations of partnership. Partnership may sue and be sued in name of partnership. Judgment against partnership is not by itself judgment against partner. Judgment against partnership may not be satisfied from partner's assets unless there is also judgment against partner. (11 VSA 3227).

Dissolution.

Partnership is dissolved in partnership at will, when partnership has notice from partner of partner's express will to withdraw as partner, or on later date specified by partner. Or upon expiration of 90 days after partner's dissociation by death. Partners may also agree upon event in partnership agreement resulting in winding up of partnership business. Illegality or judicial determination may also dissolve partnership. (11 VSA 3275).

Administration of Partnership Property.

In winding up partnership's business, assets of partnership, including contributions of partners required by this section, must be applied to discharge its obligations to creditors, including, to extent permitted by law, partners who are creditors. Any surplus must be applied to pay in cash net amount distributable to partners in accordance with their right to distributions. Each partner is entitled to settlement of all partnership accounts upon winding up partnership business. (11 VSA 3106).

Limited Partnership.

Partnership formed by two or more persons under laws of this state and having one or more general partners and one or more limited partners. (11 VSA 3401).

Each limited partnership shall continuously maintain in this state office, which may but need not be place of its business in this state, at which shall be kept records and agent for service of process on limited partnership, which agent must be individual resident of this state, domestic corporation, partnership, limited liability company, or foreign corporation, partnership, or limited liability company authorized to do business in this state. (11 VSA 3293).

Each limited partnership shall keep at office current list of full name and last known business address of each partner, copy of certificate of limited partnership, copies of limited partnership's federal, state and local income tax returns and reports, if any, for three most recent years and copies of any then effective written partnership agreements and of any financial statements of limited partnership for three most recent years. (11 VSA 3293).

3 BUSINESS REGULATION AND COMMERCE

3.01 BANKS AND BANKING:

Uniform Commercial Code adopted, see Title 9A. Also see topic 3.09 Commercial Code.

Regulatory Structure.

Financial institutions regulated by 8 VSA 10101 et seq. Also regulated by 8 VSA 2500 et seq. for money service transactions related to real estate closings. These regulations do not apply to financial institution as defined in 32 VSA 11101, financial institution holding company under 33 VSA 11101, credit union, office of international banking corporation, foreign bank branch, corporation organized under Bank Services Company Act or under Edge Act under either federal or state law if person does not issue, sell or provide payment instruments or stored value through authorized delegate that is not such person. See http://www.leg.state.vt.us/docs/2002/acts/ACT055.htm. Credit unions regulated by 8 VSA 30101 et seq.

Deposits.

Deposit powers listed in 8 VSA 14201-14211. Types of deposits recognized include, trusts deposits, insurance deposits, joint deposits, payable on death accounts.

Unclaimed Deposits.

See category 21 Property, topic 21.01 Absentees, subhead Escheat.

Collections.

Uniform Commercial Code has been adopted. In any conflict between Code and any other provision of law, including corporate charters of banks, Code prevails. See topic 3.09 Commercial Code.

Trust Company.

See 8 VSA 2409 for list of powers in financial transactions.

Uniform Common Trust Fund Act not adopted.

Security.

Generally controlled by 8 VSA 14404 & 8 VSA 14104. Requirements may vary depending on type of institution listed in 8 VSA 12101 et seq. Needed for real estate closing transactions. (8 VSA 2507). (Effective Jan. 1, 2002.)

Investigations.

Regular examinations conducted at least once every three years. (8 VSA 11501). Can be initiated by Commissioner at any time she/he determines it is prudent for protection of residents of state. Cost borne by licensee or person investigated. (8 VSA 2530 & 8 VSA 11501[c]).

Records.

Record keeping requirements governed by Commissioner’s rules. (8 VSA 11301).

Penalties apply for violations of consumer privacy and other violations under 8 VSA 10205; 8 VSA 11601-11603.

Procedures.

General enforcement. (8 VSA 11601). Regarding applications see 8 VSA 11702. For real estate money transactions, Administrative Procedures Act in Title 3 applies.

Funded Settlements.

Governed by 9 VSA 201 et seq.

Foreign banks may do business in Vermont only if they obtain certificate of authority from Secretary of State. (11A VSA 15.01). See categories 13 Estates and Trusts, topic Executors and Administrators, and Family, topic Guardian and Ward.

Franchise Tax.

On taxable income under law of U.S., reduced by amount of tax payable by banking corporation or loan association for taxable year under 32 VSA 5832. (32 VSA 5836).

3.02 BILLS AND NOTES:

Uniform Commercial Code has been adopted. See topic 3.09 Commercial Code. Negotiable instruments July 2001. (9A VSA 3-101 to 9A VSA 3-605).

Special Requirements.

Vermont makes negotiable instruments subject to its own consumer protection statutes and final state court decisions existing on effective date of article. Vermont's consumer protection law will control if in conflict with UCC. (9A VSA 3-102).

Gaming Notes.

A note is void when the consideration therefore is money won by gaming or borrowed or loaned for such purpose at time and place of gaming. (9 VSA 3982).

Judgment Notes are not recognized.

Attorney Fees.

"American Rule" followed. Attorneys' fees generally not recoverable unless authorized by contract or statute. (See 12 VSA 4527; V.R.C.P. 80.1 re: collection of attorneys' fees when authorized by mortgage or note.)

Special Defenses.

Infancy of obligor, duress, lack of legal capacity, illegality of transaction, fraud, or insolvency. (9 VSA 3-305).

3.03 BILLS OF LADING:

See topic 3.08 Carriers.

3.04 BILLS OF SALE:

See topic 3.23 Sales.

3.05 BLUE SKY LAW:

See topic 3.24 Securities.

3.06 BROKERS:

Common law rules apply.

Uniform Commercial Code has been adopted. See topic 3.09 Commercial Code.

Licenses.

Real estate brokers must be at least 18 years of age, pass examination, have one year experience as salesperson, and have passed course of instruction of at least eight hours. Real estate salesperson must be at least 18 years of age, pass examination, and become associated with licensed broker. (26 VSA 2292).

Real estate brokers require license from Commission of which Governor appoints chairman. Initial license fee is $50, license fee thereafter is $175 biennially. (26 VSA 2212, 2255).

Commissioner may issue nonresident broker's license subject to certain conditions. (26 VSA 2297).

3.07 BULK SALES:

Bulk Sales Article of UCC repealed in Vermont.

3.08 CARRIERS:

Public Service Board has power to supervise and regulate common carriers, fix rates, pass on issuance of stocks, bonds and other securities, prevent discrimination, etc. (30 VSA 203).

Revised Uniform Commercial Code-Document of Title 1999 has been adopted. See topic 3.09 Commercial Code.

Rates.

Public service board has authority to set rates and hear disputes. (30 VSA 209; 30 VSA 218). Rebates and exceptions. (30 VSA 229). Suspension and Refund. (30 VSA 227).

Discrimination in rates is prohibited and public service board has jurisdiction over such claims. (30 VSA 209).

Bills of Lading.

Uniform Commercial Code applies. (9A VSA 7-101 to 9A VSA 7-603).

3.09 COMMERCIAL CODE:

Revised Uniform Commercial Code has been adopted, effective July 1, 2001. (9A VSA 1-101-9-607). For 1967 Official Text of Uniform Commercial Code, see Uniform and Model Acts section.

Material Variations from 1967 Text.

1999 UCC Amendments enacted. Effective July 1, 2001. Vermont variations to 1999 UCC Amendments as follows:

9-102(11) Chattel Paper redefined. Includes monetary obligations and security interest in specific goods and software.

9-102(60) Original debtor redefined, except as used in 9 VSA 310(c), person as debtor entered into security agreement to which new debtor is bound under 9 VSA 302(d).

9-102(64) Proceeds redefined to exclude use under 9 VSA 609(b).

9-109(c) Original subparagraph 2 replaced by original subparagraph 3. New subparagraph 3 confers superiority and independency to transferee beneficiary or nominated person under letter of credit under 5 VSA 114.

9-311 Adds, "subject to statute specified in subdivision (a)(2)" in first line and strikes out "or leasing" in third line and strikes out "as debtor" in fourth line.

9-317 Security interest or agricultural lien is subordinate to rights of: (a) person with priority under 9 VSA 322; and except under (e), lien creditor before earlier of time: (A) perfection of security interest or agricultural lien; or (B) one condition under 9 VSA 203(b)(3) met and financing statement covering collateral filed.

9-406 Title changed. (b) subject to subsection (h), notification ineffective under subsection (a): (3) at option of account debtor, if notification notifies account debtor to make less than full installment or other periodic payment to assignee even if: (A) only portion of account, chattel paper or payment intangible assigned to assignee.

9-509 **Person entitled to file a record.** (a) person may file initial financing statement, amendment that adds collateral covered by financing statement or adds debtor to financing statement only if: (1) debtor authorizes filing by authenticated record or under (b) or (c); or (2) holds agricultural lien effective at time of filing and financing statement covers only collateral subject to agricultural lien.

9-513(d) **Termination Statement.** (d) except as stated in 9 VSA 510, upon filing of termination statement with filing office, financing statement relating to termination statement ceases effectiveness. Except as to 9 VSA 510 when applying 9 VSA 519(g), 9 VSA 523(c), filing with filing office of termination statement relating to financing statement that indicates debtor's transmission of utility, results in lapse of financing statement.

9-608 **Application of Proceeds or Collection or Enforcement; Liability for Deficiency and Rights to Surplus.** Strikes out "this section", replaced with 9 VSA 607, subparagraph (1) line 2. Strikes out "this section" replaced with 9 VSA 607, subparagraph (3) line 2.

9-613 **Contents and Form of Notification Before Disposition of Collateral: General.** Except in consumer goods transactions, these rules apply: (1) contents of notification of disposition are sufficient if notification: (e) states time and place of public disposition under 9 VSA 610 in following order: (c) secured party need not apply or pay over application noncash proceeds of disposition under § 9-610 unless failure is commercially unreasonable. Secured party that applies or pays over application of noncash proceeds to be done in commercially reasonable manner.

9-625 **Remedies for Secured Party's Failure to Comply with Article.** (b) strikes out "[with a request under subsection 210]". § (g) added. If secured party fails compliance with request listing collateral or statements of account under 9 VSA 210, secured party may claim security interest only as shown in list or statement included in request against person that is reasonably misled by failure.

§ 11 Repealed.

§ 23 of Act No. 106, 2000. Repealed.

§ 12. 9A-Art 9 pt. 7, Following sections added:

9-701. **Effective Date.** Act No. 106, 2000, repealing and reenacting Article 9 effective July 1, 2001.

9-702. **Savings Clause.** (a) Except as otherwise provided, provisions of this article which take effect July 1, 2001 apply to transaction or lien within scope of such provisions, even if transaction or lien predates July 1, 2001. (b) Except as provided in subsection (c) of this section and §§ 9-703–9-709 as they existed subsequent to July 1, 2001: (1) transactions and liens not previously governed by title as they exist prior to July 1, 2001, were validly entered into or created before July 1, 2001, and would be subject to articles in effect on July 1, 2001, if they had been entered into or created on or after July 1, 2001, and rights, duties, interests flowing from those

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transactions and liens remain valid on or after July 1, 2001; and (2) transactions and liens may be terminated, completed, consummated and enforced as required/permitted by article as in effect on or after July 1, 2001, or by law that otherwise would apply if provisions had not taken effect. (c) provisions of article as in effect on and after July 1, 2001, do not affect case, action or proceeding commenced before July 1, 2001.

9-703. **Security Interest Perfected Before Effective Date.** Addresses lien perfection when dates close to July 1, 2001.

9-704. **Security Interest Unperfected Before Effective Date.** See 9 VSA 703.

9-705. **Effectiveness of Action Taken Before Effective Date.** Outlines effectiveness of financing statements and status of lien holder.

9-706. **When Initial Financing Statement Suffices as Continuation Statement.** Effectiveness of financing statements filed pre- and post-July 1, 2001.

9-707. Outlines amending financing statements filed pre-July 1, 2001.

9-708. **Persons Entitled to File Initial Financing.** Include: (1) secured party of record; (2) filing is necessary under this part; (A) continued effectiveness of financing statement pre-July 1, 2001, (B) or perfection or continuation of perfection of security interest.

9-709. **Priority.** (a) Pre-July 1, 2001, relative priorities fixed before then are determined under old law. Otherwise provisions after July 1, 2001 determine priority. (b) For 9 VSA 322(a) as in effect on or after July 1, 2001, priority of security interest that becomes perfected under 9 VSA 704 as in effect on or after July 1, 2001, dates from time applicable requirements for perfection are satisfied. Subsection does not apply to conflicting security interests each of which becomes perfected security interest under 9 VSA 704 as in effect on or after July 1, 2001. (c) For purposes of 9 VSA 322(a) as in effect on and after July 1, 2001, priority of security interest enforceable under 9 VSA 203 as in effect on or after July 1, 2001, dates from July 1, 2001 if security interest is perfected under provisions of this article as in effect on or after July 1, 2001, by filing of financing statement prior to July 1, 2001 which would not have been effective to perfect security interest under provisions as in effect prior to July 1, 2001.

27A-3-116(b)(3). Deleted “[Article 3 of this title].” Replaced by “chapter 3 of Title 27.”

Filing Fees.

See category 10 Documents and Records, topic 10.04 Records, subhead Filing Under Commercial Code.

See also topics: Banks and Banking, Bills and Notes, Brokers, Carriers, Contracts, Factors, Frauds, Statute of, Sales, Securities, Warehousemen; categories Business Organizations, topic Corporations; Civil Actions and Procedure, topic Limitation of Actions; Debtor and Creditor, topics Assignments, Fraudulent Sales and Conveyances, Liens, Pledges; Documents and Records, topics Records, Seals; Mortgages, topic Chattel Mortgages.

3.10 CONDITIONAL SALES:

See topic 3.23 Sales.

3.11 CONSIGNMENTS:

See topic 3.14 Factors.

3.12 CONSUMER PROTECTION:

Unfair competition or deceptive practices, antitrust and consumer fraud, as those terms used in federal trade commission act, declared unlawful. (9 VSA 2453). Predatory pricing prohibited. (9 VSA 2461c).

Lemon Law.

For new vehicle that has been inoperable for 30 or more days, owner is entitled to replacement or refund. (9 VSA 4173). Any disputes over new motor vehicle must be brought before Vermont Motor Vehicle Arbitration Board. (9 VSA 4174). For any other problems with personal property it may be best to look in UCC sales sections under nonconforming goods, and express and implied warranties.

Home solicitation sales may be cancelled until midnight of third business day, except in specified circumstances. (9 VSA 2454).

Credit Cards.

Liability of cardholder limited to $100 where card is accepted, notice of loss instructions given, and unauthorized use occurs before adequate notice given to issuer. (9 VSA 4042).

Credit Reports.

Credit reporting agencies required to give disclosure under federal law (15 USC § 1681[g]) and must provide consumers notice that they may obtain free annual credit reports. (9 VSA 2480[b]). Effective July 1, 2005, consumer who has been victim of identity theft may place security freeze on credit report, under which credit reporting agency must not disclose credit report without consumer’s permission. (9 VSA 2480[h]).

Telemarketing Transactions.

Unfair and deceptive for telemarketer to procure services of any third-party delivery service to obtain consumer’s payment for goods, unless goods are delivered at time that consumer’s payment is obtained by courier. Unfair and deceptive for telemarketer to obtain or submit for payment negotiable instrument drawn from person’s depositary account without consumer’s prior written authorization. Unfair and deceptive for telemarketer to obtain funds from person’s financial account by electronic funds transfer unless consumer has initiated telephone call to telemarketer or telemarketer and consumer have current written agreement for provision of goods or services, or consumer has purchased goods or services from telemarketer within previous two years; and telemarketer has obtained consumer’s express oral authorization to transfer prior to initiating debit. (9 VSA 2464[b]). Unfair and deceptive for party other than federally-insured depository institution to process for payment from consumer’s financial account, in connection with telemarketer’s transaction with consumer negotiable instrument drawn on or debited against such account without consumer’s prior written authorization; or electronic funds transfer from such account for goods or services offered by telemarketer, unless consumer has initiated telephone call to telemarketer; or telemarketer and consumer have current written agreement for provision of goods or services, or consumer has purchased goods or services from telemarketer within previous two years; and telemarketer has obtained consumer’s express oral authorization to transfer prior to initiating debit. (9 VSA 2464[c]). Telephone calls that violate Federal Trade Commission or Federal Communications Commission’s “do not call” rules are prohibited. (9 VSA 2464[a]).

Unsolicited merchandise or services intended for personal use may be retained or disposed of without obligation. (9 VSA 4401).

Plain Language.

Vermont does not provide for any statutory language with respect to plain language in certain legal documents.

Disclosure.

Certain requirements of disclosure as to demand notes and co-signers. (9 VSA 101, 102).

Uniform Deceptive Trade Practices Act not adopted.

See topics 3.17 Interest, 3.23 Sales.

3.13 CONTRACTS:

Uniform Commercial Code has been adopted. See topic 3.09 Commercial Code.

See also categories 10 Documents and Records, topic Seals; Family, topic Infants.

3.14 FACTORS:

Common law rules govern. No license required.

Uniform Commercial Code has been adopted. See topic 3.09 Commercial Code.

3.15 FRANCHISES:

Following types of franchises are governed by statute: Beer and wine distributorships (7 VSA 701-710), motor vehicle dealerships (9 VSA 4083-4100f) and petroleum products dealerships (9 VSA 4101-4110). Uniform Franchise and Business Opportunities Act has not been adopted.

3.16 FRAUDS, STATUTE OF:

Following agreements must be reduced to writing and signed to be valid, according to one particular statute: Special promise of executor or administrator to answer damages out of his own estate; special promise to answer for debt, default or misdoings of another; agreement made in consideration of marriage; contract for sale of lands, tenements, or hereditaments, or of interest in or concerning them; or agreement not to be performed within one year from making thereof, or contract relating to medical care. (12 VSA 181).

If person orally conveys lease estate in real property without reducing it to writing, then tenancy at will is created. (27 VSA 302). If one assigns lease without reducing it to writing then tenancy at will is created, even if lease was term of years. (27 VSA 302).

No action may be brought to charge a person upon representation made concerning the character, conduct, credit, ability, trade or dealings of another person, unless such representations are in writing and signed by the party to be charged. (12 VSA 182).

Sale of Securities.

Contract or modification of contract for sale or purchase of security is enforceable whether or not there is writing signed or record authenticated by party against whom enforcement is sought, even if contract or modification is not capable of performance within one year of its making. (8 VSA 113).

Sale of goods for price of $500 or more is not enforceable by way of action or defense unless there is some writing sufficient to indicate that contract for sale has been made between parties and signed by party against whom enforcement is sought or by his authorized agent or broker. Writing is not insufficient because it omits or incorrectly states term agreed upon but contract is not enforceable under this paragraph beyond quantity of goods shown in such writing. (9A VSA 2-201).

Uniform Commercial Code has been adopted. See topic 3.09 Commercial Code.

Contracts of Sale.

Uniform Commercial Code applies. (9A VSA 1-206; 9A VSA 2-201; 9A VSA 2-209[3]; 9A VSA 2-326[4]).

Part performance may take some contracts out of the statute. (167 Vt. 357, 706 A.2d 947).

3.17 INTEREST:

Legal rate of interest is 12% unless otherwise authorized by law. (9 VSA 41[a]). For single payment loans by federal savings & loans and other loaning institutions, rate shall not exceed 18%. For retail installment contracts, rate shall not exceed 18% of first $500, and 15% of balance. Interest on loan secured by current or previous model year motor vehicle, mobile home, farm equipment, and like, shall not exceed 18%; on older collateral 20%. (9 VSA 41[a]). For bank credit card account or revolving line of credit, rate shall be rate agreed upon by lender and borrower. No finance charge may be imposed for any monthly billing period in which there is not previous balance, or during which sum of payments received and other credits issued are equal to or exceed amount of previous balance, except for cash advances. (9 VSA 41[a]).

Judgments.

Interest rate on judgments allowed is 12% per annum. (12 VSA 2903).

Usury.

Lender who knowingly or willfully makes loans at rate in excess of legal rate (determined under 9 VSA 41a) may forfeit all interest and one-half of principal. (9 VSA 50). First offense fined $500 or imprisoned not more than six months or both. Second offense $1,000 or imprisoned not more than one year.

3.18 [RESERVED]

3.19 LICENSES, BUSINESS AND PROFESSIONAL:

Licenses, obtained from various officials on payment of specified fees, are required for large number of businesses, occupations, etc. See 26 VSA 3102 for enumeration. Superior court may enjoin unauthorized practice of regulated profession or assess civil penalty of not more than $1,000, or both. (3 VSA 127[b]). Unauthorized practice also punishable by fine of not more than $5,000 or imprisonment for not more than one year, or both. (3 VSA 127[c]).

Hotels and Restaurants.

License from Department of Public Health necessary for operation of hotel, restaurant, tourist camp, etc. (18 VSA 4351).

Commercial travelers do not need licenses.

Collection Agencies.

Debt adjustors must be licensed. (8 VSA 4862).

3.20 MONOPOLIES, RESTRAINT OF TRADE AND COMPETITION:

Vermont's consumer fraud laws are intended to protect consumers from paying increased prices based upon unfair competition and antitrust behavior in marketplace. (9 VSA 2453). Businesses are not considered consumers unless goods are purchased for use and benefit of business in connection with its operation, and goods must not be used for resale. (9 VSA 2451a).

Public Service Board may restrict competition when considering merger or consolidation under their jurisdiction. (30 VSA 311).

Unfair Trade Practices.

Consumer fraud law prohibits unfair methods of competition, and unfair or deceptive acts or practices in commerce. (9 VSA 2453). Common law provides remedy for unfair competition. (800 A.2d 1085).

3.21 NEGOTIABLE INSTRUMENTS:

See topic 3.02 Bills and Notes.

3.22 RESTRAINT OF TRADE:

See topic 3.20 Monopolies, 3.22 Restraint of Trade and Competition.

3.23 SALES:

1999 Uniform Commercial Code has been adopted. See topic 3.09 Commercial Code. Uniform Commercial Code applies. (9A VSA 2-101 through 9A VSA 2-725).

Bill of sale is not required to convey title to personal property; if given it need not be acknowledged or recorded.

Product Liability.

Vermont law does not require privity in products liability suit against manufacturer charging breach of implied warranty where personal injury results. (125 Vt. 158, 212 A.2d 69).

Retail Credit Sales.

Requirements, limitations and restrictions set forth in 9 VSA 2401-2409. For motor vehicle credit sales, see 9 VSA 2351-2361.

Consumer Protection.

See topic 3.12 Consumer Protection.

Bulk Sales.

Article 6 of Commercial Code repealed.

Sales of Motor Vehicles.

See category 23 Transportation, topic 23.01 Motor Vehicles.

3.24 SECURITIES:

Uniform Securities Act (1985, adopted 1989), effective until July 1, 2006. 9 VSA 4201-4240, 7C Uniform Laws Annotated: Business and Financial Laws 1 VSA 101 (2000). *Note:* Effective July 1, 2006, Uniform Securities Act (2002, adopted 2005) adopted, 9 VSA 5101-5612, 7C Uniform Laws Annotated: Business and Financial Laws 1 VSA 100 (2004 supp.).

Every corporation, co-partnership, company, association or individual located in this state that sells or negotiates for sale of any lands situated outside of this state, or for sale of any stocks, bonds or other securities of any kind or character (except certain securities specified in statute) to any person in this state is denominated as domestic investment company, and if located in another state, as foreign investment company. (9 VSA 4201-4240).

Uniform Commercial Code has been adopted. See topic 3.09 Commercial Code. (9A VSA 8-101 through 9A VSA 8-511).

Supervision.

Commissioner of Banking, Insurance Securities and Health Care Administration, 89 Main Street, Drawer 20, Montpelier, VT 05620 VSA 3101, has general regulator powers and supervision over sale of securities, issuance, and transfer. (9 VSA 4207).

Securities to Which Act Applicable.

Securities defined in 9 VSA 4202a are too numerous to list.

Exempt Securities.

For list of exempt securities see 9 VSA 4203a, and 9 VSA 4204a.

Registration of Securities.

Securities are registered by notification or qualification.

Registration by Notification.

Following securities are entitled to registration by notification, i.e., by notifying Commissioner of Banking, Insurance, Securities and Health Care Administration that applicant desires to register securities: (1) Those of property, business or industry which has been in continuous operation for not less than three years and which can show over period of not less than two years nor more than ten years next prior to close of last fiscal year preceding offering, average net earnings, after deducting all prior charges (not including charges on securities to be retired out of proceeds of sale) as follows: (a) in case of preferred stock not less than one and one-half times annual dividend requirements of such preferred stock and all other outstanding stock of equal rank; (b) in case of interest bearing securities not less than one and one-half times annual interest charge thereon and on all other outstanding interest bearing securities of equal rank; (c) in case of common stock, not less than 6% on all outstanding common stock of equal rank, together with amount of common stock then offered for sale, reckoned on price at which such stock is then offered for sale or sold. (2) Notes or bonds secured by first mortgage on real estate or leaseholds on real estate (not including oil, gas or mining property) situated in any state or territory of United States or in District of Columbia or in Dominion of Canada: (a) when mortgage is on agricultural lands used and valuable principally for agricultural purposes and aggregate face value of notes or bonds (not including interest notes or coupons) covered by such notification together with all notes or bonds already outstanding and equally secured by such mortgage, does not exceed 60% of then fair market value of said land, including any improvements appurtenant thereto; (b) when mortgage is on city or village property and proposed securities do not exceed 60% of market value and property has possible income equal to annual interest on proposed securities plus 3% of principal of mortgage indebtedness, and if building is to be erected, when reasonably adequate provisions have been made for financing full completion of building. (9 VSA 4207).

Registration by Qualification.

Securities required to be registered, and not registered by notification, must be registered by qualification, i.e., if on examination of any application the Commissioner finds that the sale of the security referred to therein would not be fraudulent and would not work or tend to work a fraud on the purchaser, and that the enterprise or business of the issuer is not based on unsound business principles, he must, upon payment of the fee provided, record registration of such security, and security may be then sold by issuer and registered dealer subject, however, to any further order of the Commissioner. Commissioner may require applicant to submit information regarding issues. (9 VSA 4208).

Failure of Commissioner to take formal action on application within ten day period constitutes a registration of security. (9 VSA 4207-08).

Registration of Dealers.

Application and fee for broker-dealer's registration relating to securities shall be filed in office of Commissioner along with fee of $250. (9 VSA 4214). Fee of each annual renewal shall be $250. (9 VSA 4218). Separate fee of $100 is required for each branch office. (9 VSA 4214). Fee for each sales representative shall be $45. (9 VSA 4217).

Licenses.

Dealer must make application with Commissioner of Banking, Insurance, Securities and Health Care Administration, and pay $250 fee. (9 VSA 4214).

Bonds.

Commissioner may, by rule or order, require registered broker-dealers, sales representatives, investment advisors, and investment advisor representatives to post bonds in amounts as commissioner may prescribe. (9 VSA 4216).

Advertisements.

No person shall advertise securities that have not been registered. (9 VSA 4234). Must file advertisement with Commissioner within 48 hours of publication, and advertisement must carry name and address of broker and shall make no reference that securities have been registered by Commissioner, or that broker has been licensed by Commissioner. (9 VSA 4234).

Liabilities.

Criminal penalties for person who violates this act could result in up to one year in jail and $25,000 fine. (9 VSA 4239). Civil penalties include liability of seller-dealer to buyer for consideration paid, as well as lawyer fees and costs. (9 VSA 4240).

Tender offers not covered by Vermont law, except for merger or acquisition of domestic insurance company. (8 VSA 3683).

Uniform Simplification of Fiduciary Security Transfers Act has not been adopted.

See also topic 3.06 Brokers.

3.25 STATUTE OF FRAUDS:

See topic 3.16 Frauds, Statute of.

3.26 TRUST RECEIPT SECURITY:

See category 8 Debtor and Creditor, topic 8.15 Pledges.

3.27 WAREHOUSEMEN:

Uniform Commercial Code has been adopted. See topic 3.09 Commercial Code.

Warehouse Receipts.

Uniform Commercial Code applies. (9A VSA 7-101 through 9A VSA 7-210; 9A VSA 7-401 through 9A VSA 7-603).

4 CITIZENSHIP

4.01 ALIENS:

Alien is any person who is not citizen of U.S., and aliens can only work in State of Vermont if they have required certificate under Immigration and Naturalization Act. (21 VSA 444a). If there is shortage of physicians or engineers State has power to employ aliens for limited time. (3 VSA 262). No alien shall be allowed to sit on jury. (12 VSA 64).

5 CIVIL ACTIONS AND PROCEDURE

5.01 ACCORD AND SATISFACTION:

1999 Amendments to UCC adopted. See category 3 Business Regulation and Commerce, topic 3.09 Commercial Code.

Party claiming accord and satisfaction must prove that: (1) claim is disputed; (2) party offered to pay less than amount allegedly due; and (3) in full settlement of claim, other party accepted and retained lesser amount offered. (For negotiable instruments governed by UCC, creditor may not avoid third element by reservation of rights.) (9A VSA 3-311).

5.02 ACTIONS:

Pursuant to rule-making authority given it by Vermont Constitution and Legislature, Supreme Court has promulgated Vermont Rules of Civil Procedure (cited VRCP) governing commencement and prosecution of civil actions in superior courts; Vermont Rules of Probate Procedure (cited VRPP) governing commencement and duration of probate proceedings; Vermont Rules of Family Proceedings (cited VRFP) governing commencement and duration of family court proceedings except for cases transferred from probate courts involving involuntary guardianships and adoptions governed by VRPP; and also Vermont Rules of Appellate Procedure (cited VRAP) governing appellate procedure. These rules in general conform to Federal Rules of Civil and Appellate Procedure with significant additions that are required for adaptation to state practice and some changes believed advisable for Vermont courts. See also topic 5.19 Practice.

Form of Action.

There is one form of action known as “civil action.” (VRCP 2).

Commencement.

See topic 5.20 Process; 5.18 Pleading.

Parties.

Every action shall be brought in name of real party in interest, guardians or representatives may sue or defend for infant or incompetent person. (VRCP 17). Actions may not be defeated for misjoinder of parties unless it goes to jurisdiction. (VRCP 18 VSA 21). No dismissal for nonjoinder unless party indispensable and unavailable. (VRCP 19[b], 21; 130 Vt. 242, 290 A2d 42).

Class Actions.

Rule is identical to Federal rule. (VRCP 23).

Intervention.

Person shall have right to intervene in action if upon timely application when statute confers such right, or when applicant has interest relating to property of transaction that is subject of action. (VRCP 24[a]). Permissive intervention is allowed when statute confers conditional right to intervene, or where applicant's claim or defense has common question of fact or law that is similar in action pending. (VRCP 24[b]).

Interpleader.

Persons having claims against plaintiff in action in superior court may be joined as defendants and required to interplead when their claims are such that plaintiff is or may be exposed to double or multiple liability. (VRCP 22).

Joinder of Causes of Action.

An action is not defeated because of misjoinder of causes of action unless it goes to jurisdiction. (VRCP 18 VSA 21).

Consolidation of actions can be accomplished by court order only with consent of parties. (VRCP 42[a]).

Severance of Actions.

Court may order separate trial of any claim, cross-claim, counterclaim, or third-party claim, or of any separate issue. (VRCP 42[b]).

Stay of Proceedings.

No specific rule governs stay of proceedings. Presiding judge generally has discretion to control scheduling of proceedings. (See VRCP 16.2). Judgments and other orders may not be enforced for 30 days pending appeal and during appeal, with exceptions for injunctions and other judgments and orders. (VRCP 62).

Abatement and Revival.

Causes of action in law or equity commenced in life time of decedent, survive to personal representative, or may be commenced by such personal representative, in following cases: Actions surviving by common law; ejectment or other proper actions to recover seisin or possession of lands, tenements or hereditaments; replevin; tort on account of wrongful conversion of personal estate or trespass or for damages to real or personal estate; actions for recovery of damages for bodily hurt or injury where either party dies (14 VSA 1451-53); death from wrongful act (14 VSA 1491). For technical provisions concerning abatement and effect of death of parties upon various types of proceedings see VRCP 17(a), 25(a); 12 VSA 557, 815, 4823; 9 VSA 1926; 14 VSA 1451.

Limitation of.

See topic 5.16 Limitation of Actions.

Small Claims.

See category 6 Courts and Legislature, topic 6.01 Courts.

Administration.

See category 13 Estates and Trusts, topic 13.09 Executors and Administrators.

Direct Actions Against Insurer.

See category 23 Transportation, topic 23.01 Motor Vehicles, subhead Direct Actions. Action against insurer shall be commenced within one year after judgment against insured. (8 VSA 4203).

5.03 APPEAL AND ERROR:

Vermont Rules of Appellate Procedure patterned after Federal Rules form basis of Vermont procedural statutes. See also topic 5.19 Practice.

From Courts of General Jurisdiction.

In any action or proceeding, civil or criminal, appealable from any Superior Court or District Court, appeal may be taken by filing notice of appeal with clerk of tribunal appealed from. Bills of exception and writs of error are abolished. (VRAP 3). Appeals in small claims actions are to Superior Court and are taken by filing notice of appeal with Clerk of Superior Court. (VRSCP 10).

Time Allowed.

Notice of appeal must be filed within 30 days from date of entry of judgment or order appealed from, except that appeal by state in criminal case shall be taken within seven days of date of entry of judgment or order appealed from. (VRAP 4). Proceedings in certiorari within one year after judgment. (12 VSA 2497).

Appeal Bond.

No appeal bond required except within court's discretion as condition for stay pending appeal. (VRAP 7; VRAP 8).

Stay of Proceedings.

Judgments and other orders may not be enforced for 30 days pending appeal and during appeal, with exceptions for injunctions and other judgments and orders. (VRCP 62; VRPP 62; VRFP 12). As to judgments and orders that are not automatically stayed, lower courts may order stay, subject to review by Supreme Court. (VRCP 62; VRPP 62; VRFP 12; VRAP 8).

Extent of Review.

All questions of law or mixed questions of law and fact pass to reviewing court for decision. (VRAP 10). In its discretion and before final judgment, a superior, probate, or district court may permit an appeal to be taken by any party in a civil or criminal cause or proceeding to Supreme Court for determination of questions of law. If decision is in favor of state in criminal action case shall be remanded. (VRAP 5).

From Probate Court.

A person interested in an order, sentence, decree or denial of probate court, who considers himself injured thereby may appeal to superior court. (VRCP 72). Judgment of superior court may be appealed to Supreme Court. Supreme Court via direct appeal from probate court will review only pure questions of law, resolution of which do not depend upon factual distinctions and do not require review of record. (158 Vt. 557).

Character of Hearing.

Appeals before judgment, ruled by VRAP 5, after judgment, by VRAP 3 VSA 4. Appeal of traffic tickets and ordinances to district court can be de novo upon request. (VRCP 80.6). Appeals of zoning and other matters taken to environmental court must be by de novo trial. (VRECP 5).

Appeal from probate matter to superior court is de novo. (VRCP 72).

5.04 BONDS:

Bonds are not usually required, but bond or other security may be required to secure payment of costs damages for wrongful injunction, (VRCP 65; 12 VSA 4447), and security by way of recognizance may be required, e.g., for trustee process (12 VSA 3087). Recognizance means good and sufficient surety bond if furnished. (12 VSA 3471). Where recognizance is required, court may accept good and sufficient surety bond in lieu of recognizance. (12 VSA 3472).

Where bond is required, personal bond with sufficient surety satisfies the law. Action lies on the bond. (12 VSA 5241).

Sureties.

Surety company must be licensed in State of Vermont by Department of Banking, Insurance, Securities and Health Care Administration.

See also topic 5.03 Appeal and Error; categories 8 Debtor and Creditor, topic Receivers; Estates and Trusts, topic Executors and Administrators; Family, topic Guardian and Ward.

5.05 CERTIORARI:

Writs of certiorari have been abolished. (VRCP 81[b]). Actions for extraordinary relief are governed by VRAP 21.

5.06 CHARITABLE IMMUNITY:

See topic 5.09 Damages.

5.07 COMMISSIONS TO TAKE TESTIMONY:

See topic 5.11 Depositions and Discovery.

5.08 COSTS:

Prevailing party is entitled to costs in Supreme Court for civil cases unless in its discretion Supreme Court apportions costs as equity may require. (VRAP 39).

In district, superior or supreme court where plaintiff receives judgment for nominal sum for debt or damages, in its discretion, court may make such order in respect to plaintiff’s costs as is equitable, but not to exceed taxable costs. (12 VSA 2136, VRCP 54, VRAP 39).

Other instances where costs may be available set forth in 12 VSA 2137, 12 VSA 2142 - 2148, 12 VSA 2150 - 2152.

Liability of Attorney.

The attorney for the plaintiff is not liable for costs by reason of his employment. (77 Vt. 433, 60 A. 802).

5.09 DAMAGES:

Common law generally prevails as to compensatory damages. Punitive damages allowable where malicious conduct is proven. (169 Vt. 118, 730 A.2d 1086).

Comparative Negligence adopted. Contributory negligence does not bar recovery if plaintiff’s negligence was not greater than causal total negligence of defendant or defendants, but damage shall be diminished in proportion to amount of negligence attributed to plaintiff. Where recovery is allowed against more than one defendant, each defendant shall be liable for that proportion of total dollar amount awarded as damages in ratio of amount of his causal negligence to amount of causal negligence attributed to all defendants against whom recovery is allowed. (12 VSA 1036). Uniform Comparative Fault Act has not been adopted.

Charitable Immunity doctrine has been abrogated. (153 Vt. 235, 571 A.2d 592).

Sovereign immunity not recognized for proprietary nongovernmental functions. State liable for certain injuries to same extent as private individuals (12 VSA 5601) subject to certain exceptions (12 VSA 5601[e]). Liability not to exceed $250,000 to any one individual or $1,000,000 to all persons arising out of act or omission. (12 VSA 5601). Immunity also waived if municipal governmental entity has purchased liability insurance, although liability cannot exceed amount of insurance coverage. (29 VSA 1403). State employees absolutely immune from suit except for gross negligence or willful misconduct. (12 VSA 5602). In Hudson v. Town of East Montpelier, two municipal employees were held personally liable for their negligent repair of town road, but in 2003 legislature created statute that expressly relieves municipal employees of all personal liability and places burden on municipalities for all acts or omissions arising out of employees' scope of employment, but not act or omission that was willful, intentional, or outside scope of employee's authority. (161 Vt. 168, 638 A.2d 561; 24 VSA 901a).

No-Fault Insurance.

See category 23 Transportation, topic 23.01 Motor Vehicles, subhead No-Fault Insurance.

Uniform Contribution Among Tortfeasors Act.

Not adopted.

Skiing.

No liability attaches against ski area or employees or agents for accidents occurring outside open and designated ski trails. Skier is liable in civil action for rescue and medical efforts if person used facilities of ski area to access terrain outside open and designated ski trails. (12 VSA 1038).

See category 13 Estates and Trusts, topic 13.05 Death, subhead Actions for Death.

5.10 DECLARATORY JUDGMENTS:

See topic 5.15 Judgments.

5.11 DEPOSITIONS AND DISCOVERY:

Vermont Rules for Civil Procedure pertaining to depositions were largely taken from Federal Rules. Taking of depositions is controlled by VRCP 26, 27, 28, 29, 30, 31, and 37 and may be taken generally under same circumstances as in Federal Courts.

Within State for Use Within State.

Depositions may be taken in this State as long as they are before justice of peace, notary public, or other person appointed by court. (VRCP 28[a][1]).

Within State for Use Elsewhere.

Any Superior Judge in county where deponent resides, is employed, or transacts business in person, may on petition, order subpoena therefore. (VRCP 28[d]).

Outside of State for Use within State.

Depositions taken outside Vermont, whether within U.S. or in a foreign country, may be taken on notice before an officer authorized to administer oaths at place of taking or alternatively by a person specifically appointed by court in which action was pending or pursuant to a letter rogatory. (VRCP 28[a][2]; VRCP 28[b]). Person appointed in another state to take deposition in this state for use in this state has same powers to take as if appointed in this state. (12 VSA 1248).

Perpetuating Testimony.

Generally, testimony of witnesses must be taken orally in open court. (VRCP 43[a]). Person who expects to be party to suit but is unable to bring it or cause it to be brought may obtain pre-suit discovery in form of deposition to perpetuate testimony. Person must file a verified petition with superior court in county of residence of any expected adverse party. If judge is satisfied that perpetuation of testimony may prevent failure or delay of justice, judge may order deposition of designated person and deposition may be used as authorized by VRCP 32 (see below). (VRCP 27).

Depositions may be used at trial or hearing as long as evidence is admissible, party against whom they are being used was present or represented at deposition, and court finds: witness is exempted from testifying by ruling of court on ground of privilege; or refuses to testify at trial despite order of court to do so; or testifies to lack of memory; or is unable to be present at hearing because of death or then existing physical or mental illness or infirmity; or is absent from hearing and proponent of deposition has been unable to procure witness' attendance by process or other reasonable means. (VRCP 32). Allowing testimony via deposition contrary to Rule 32 is reversible error. (158 Vt. 653, 609 A.2d 988).

Before Whom Taken.

Within state deposition shall be taken before justice of peace, notary public, or person appointed by court. (VRCP 28).

Compelling Attendance of Witnesses.

When a subpoenaed witness, legally served, does not attend, an attachment to compel his attendance may issue and if he fails to appear he is liable in an action of tort to party subpoenaing him for all just damages plus $10 forfeiture. However, a person cannot be compelled to travel more than 50 miles to give deposition. (VRCP 45).

Examination of Witnesses.

Officer before whom deposition is being taken shall place witness under oath and record testimony of witness. Examination may take place as long as provisions of Vermont rules of evidence are followed. Evidence shall be taken, but it is subject to objections. Any objection to evidence shall be concisely stated in non-argumentative fashion. (VRCP 30).

Interrogatories.

Any party may serve upon other interrogatories to be answered fully and under oath, and any reason for not answering question must be stated in response. (VRCP 33). Requests to produce documents are covered by VRCP 34.

5.12 EQUITY:

See topic 5.02 Actions.

5.13 EVIDENCE:

Vermont has adopted rules of evidence patterned on Federal Rules of Evidence with alterations.

Witnesses.

As general rule every witness is competent unless witness is incapable of expressing himself in understandable manner, or witness is unable to understand duty to tell truth. (VRE 601). Person not disqualified in civil cause by interest as party or otherwise, but interest may be shown to affect credibility. (12 VSA 1601).

Person convicted of crime, even perjury, not disqualified as witness. (12 VSA 1608).

Privileged Communications.

Attorney cannot divulge communication by client in course of professional employment without client's consent. Burden is on person claiming privilege. (149 Vt. 643).

Minister or priest may not testify as to statements made to him in religious confessional. (12 VSA 1607, VRE 505).

Physicians, dentists, chiropractors, nurses, or mental health professionals cannot disclose information acquired in attending patient in professional capacity without patient's consent or unless privilege waived by express provision of law. (12 VSA 1612, VRE 503).

Prosecution's privilege to withhold identity of informer extends to point at which it conflicts with accused's right to confrontation. (132 Vt. 266, 315 A.2d 254, VRE 509).

Interpreter for hearing impaired person must not disclose or testify to communication made to interpreter while acting as interpreter or information obtained by interpreter as result of serving as interpreter. (1 VSA 339).

Husband and Wife are competent witnesses for and against each other, but neither may testify against the other (except in divorce cases) as to matters which violate marital confidence. (12 VSA 1605, VRE 504).

Communications or Transactions with Persons Since Deceased or Incompetent.

In actions where one of original parties to a contract or cause of action in issue and on trial is dead or insane, other party may not testify in his own favor except to meet or explain testimony of living witnesses produced against him; to meet testimony of deceased or insane upon a question upon which his testimony has been taken in writing or by a stenographer in open court to be used in such action and is admitted as evidence therein; to meet evidence of entries in a cash or account book showing receipts or payments of money in due course of business made prior to death and before controversy; in tort actions to meet or explain memoranda or declarations of deceased. (12 VSA 1602-1603). See also Vt. slip op. No. 84 VSA 574.

Self-Incrimination.

In any proceeding before or ancillary to a court or grand jury, presiding judge, upon request of attorney general or state's attorney, may issue an order requiring an individual to give testimony or provide information which he refuses to give or provide on basis of his privilege against self-incrimination, but individual may not be prosecuted for, or on account of any transaction, matter or thing concerning his testimony or information and no testimony or information so given shall be received against him in any criminal proceeding except a prosecution for perjury, giving false statement or otherwise failing to comply with order. (12 VSA 1664).

Compelling Attendance.

See topic 5.11 Depositions and Discovery.

5.14 INJUNCTIONS:

Injunctions issued from superior court and are of three types: (1) Temporary restraining order issued without notice in limited circumstances and for limited time at commencement of action; (2) preliminary injunction which grants relief pending final determination of merits and is issued upon notice and hearing either after temporary restraining order or at outset of action; (3) permanent injunction granted after merits have been heard. (VRCP 65).

Vermont rules of civil procedure are patterned on federal rules of civil procedure with alterations. See topic 5.19 Practice.

Procedure.

Temporary restraining order may be granted without written or oral notice to adverse party only if it clearly appears from specific facts shown by affidavit or by verified complaint that immediate and irreparable injury, loss, or damage will result to applicant before adverse party can be heard. No preliminary injunction shall be issued without notice and hearing. Application for preliminary injunction may be included in complaint or may be made by Motion. (VRCP 65).

Bond.

Security bond to enjoined party in such sum as court deems proper for payment of such costs or damages as may be incurred by a party wrongfully enjoined or restrained will be required. However, for good cause, court may waive giving of security. (VRCP 65c).

5.15 JUDGMENTS:

Vermont rules of civil procedure are patterned on federal rules of civil procedure with alterations. See topic 5.19 Practice.

Judgments by Confession.

A justice of the peace may accept and record a confession of a debt made by the debtor personally, with or without antecedent process, and render judgment on such confession provided a specification of such claim is filed with him. Such judgment has the same effect as if it had been rendered in the ordinary course of proceedings. (12 VSA 4671-72). The right to take a judgment by confession is limited to justices of the peace.

Judgments on Pleadings.

Defense in any action must in first responsive pleading to court raise all defenses such as (1) lack of jurisdiction over subject matter; (2) lack of jurisdiction over person; (3) improper venue; (4) insufficiency of process; (5) insufficiency of service of process; (6) failure to state claim upon which relief can be granted; (7) failure to join party under Rule 19. All these defenses must be consolidated into first responsive pleading to court or they are waived. (VRCP 12).

Summary Judgments.

Motion for summary judgment can be made anytime after 20 days from commencement of action. There must be no genuine issue as to any material fact and moving party must be entitled to judgment as matter of law. (VRCP 56).

Declaratory Judgments.

Uniform Act adopted. (12 VSA 4711-25).

Default Judgments.

If no defense is interposed and there has been personal service, judgment will be rendered on motion of plaintiff. (VRCP 55).

Lien.

Judgment may be recorded so as to constitute lien on any real property of judgment debtor. (12 VSA 2901-2905).

Revival.

Action for revival of judgment must be brought within eight years. (12 VSA 506).

Assignment.

Judgments may be assigned, and action brought by assignee. (14 Vt. 450).

Actions on a judgment may be brought within eight years after entry. (12 VSA 506). Writs of scire facias have been abolished. (VRCP 81b).

Foreign Judgments.

They may be enforced in this state by suit. A record of such foreign judgment cannot be contradicted if the court in which the judgment was rendered had jurisdiction. Judgments of other states are proved by exemplified copy of the record. (12 VSA 1698).

Uniform Enforcement of Foreign Judgments Act has not been adopted.

5.16 LIMITATION OF ACTIONS:

Uniform Commercial Code has been adopted. See category 3 Business Regulation and Commerce, topic 3.09 Commercial Code.

Actions must be commenced within the following periods:

Fifteen Years.

For recovery of real estate (12 VSA 501), except that grantee under tax sale deed may not be sued for possession after three years (32 VSA 5263).

Eight Years.

On judgment or for revival of judgment (12 VSA 506); on covenant of warranty in deed (12 VSA 504); on specialties (signed, sealed and delivered in writing). (108 Vt. 404; 12 VSA 507).

Six Years.

A civil action, except one brought upon the judgment or decree of a court or record of the United States or of this or some other state, and except as otherwise provided, shall be commenced within six years after the cause of action accrues and not thereafter. (12 VSA 511). Cause of action accrues upon discovery of injury and cause. (Vt. slip op. No. 88 VSA 181). Actions based on residential building standards shall be commenced within six years after cause of action accrues. (12 VSA 524).

Six years on action to enforce obligation of party to pay note payable at definite time after due date or dates stated in note. If accelerated within six years from date of acceleration.

Four Years.

Actions for breach of contract for sale of goods. (9A VSA 2-725).

Three Years.

For assault and battery, false imprisonment, slander, libel, personal injury or damage to personal property. (12 VSA 512). Injuries to person are deemed to accrue as of date of discovery. (12 VSA 512[4]). For possession, against grantee under tax sale deed. (32 VSA 5263). Presentation of claims against estate where no administration taken out. (14 VSA 931). For misappropriation of trade secrets. (12 VSA 523).

Two Years.

Action for wrongful death must be brought within two years from discovery of death. (14 VSA 1492). Action for sale of intoxicating liquor, dram shop liability, must be commenced within two years after cause of action accrues. (7 VSA 501[d]). Actions for payment of wages must be brought within two years after cause of action accrues. (12 VSA 520).

One Year.

For injuries sustained in skiing (12 VSA 513); direct action against insurer, after judgment entered against insured (8 VSA 4203).

Commencement of Action.

Action deemed commenced when complaint filed provided summons and complaint are timely served or waiver of service is timely filed (or when summons and complaint are served, provided complaint is timely filed). (12 VSA 466; VRCP 3).

New Actions.

Where action, brought within time limited, fails for some reason other than adverse decision on merits, such as insufficiency of process, lack of jurisdiction, improper venue, failure to join indispensable party or death of party, new action on same cause of action may be commenced within one year after such determination of original action. (12 VSA 558).

Foreign Causes of Action.

Vermont statute does not apply to cause of action arising outside of state if parties were nonresidents when cause of action arose. (12 VSA 552).

Disabilities of Plaintiff.

If party is imprisoned, is minor, or is insane, time of limitation does not run until disability is removed. (12 VSA 551).

Absence of Concealment of Defendant.

Time does not run in favor of defendant while he is absent from state without known attachable property in state. (12 VSA 552).

Contractual limitations are permitted.

Pleading.

The defense of limitations must be pleaded affirmatively. (VRCP 12).

5.17 NEGLIGENCE:

See topic 5.09 Damages.

5.18 PLEADING:

Pleading in superior court is governed by Vermont Rules of Civil Procedure, which are patterned after Federal Rules.

Complaint must contain caption setting forth name of court and county, title of action, docket number and word “complaint.” All claims must be made in separate numbered paragraphs. (VRCP 8).

Answer.

Defendant must answer complaint within 20 days after being served with summons, or within 60 days from date waiver of service was sent. (VRCP 12).

Counterclaims and Set-off.

Cross-claims and third party actions exist in Vermont state superior courts and are governed by VRCP 13 and 14. Party may also permissively add any other claim they have against party that did not arise out of same transaction or occurrence. (VRCP 13). Set-off may be pled as affirmative defense and is waived if party fails to plead it. (149 Vt. 54 [1987]; VRCP 8[c]).

Amended and Supplemental Pleadings.

Party may amend pleading as matter of course within 20 days after it is served or before responsive pleading is served. If after 20 days party must amend with leave of court. (VRCP 15).

Verification is generally not required. (VRCP 11). Ex parte motion for temporary restraining order shall only issue upon specific facts alleged in affidavit attached to complaint, or by verified complaint. (VRCP 65).

Filing.

All pleadings must be filed with clerk of court and served on opposing attorney of record. (VRCP 5).

Service of complaint can be done either by summons, or waiver of service. (VRCP 4, 12). Other pleadings may be served by delivery or by mail. (VRCP 5).

Small Claims.

See category 6 Courts and Legislature, topic 6.01 Courts.

5.19 PRACTICE:

Law and Equity are merged. Practice is governed by Vermont Rules of Civil and Appellate Procedure in superior court and by District Court Civil Rules in district courts, both of which are generally based after Federal Rules of Civil Procedure.

Small Claims.

See category 6 Courts and Legislature, topic 6.01 Courts.

See also topics 5.02 Actions, Appeal and Error, Depositions and Discovery, Injunctions, Judgments, Pleading, Process; category 8 Debtor and Creditor, topics 8.02 Attachment, 8.05 Executions, 8.09 Garnishment.

5.20 PROCESS:

VRCP 3 and 4 based on Federal Rules of Civil Procedure form bases for procedural rules and method of service of process in commencement of a civil action. Civil actions are commenced by service of a summons and complaint or by filing a complaint with court.

General Requisites.

Summons must bear signature of plaintiff's attorney or if plaintiff has no attorney by any Superior Judge or a judge or clerk of court to which returnable, contain name of court and names of parties, be directed to defendant, state name and address of plaintiff's attorney, and time within which defendant must answer, and must notify him that in case of his failure to answer, judgment by default will be rendered against him for relief demanded in complaint. (VRCP 4).

By Whom Issued.

Summons is filled out by plaintiff's attorney. (VRCP 4).

Who May Serve.

Service is made by a sheriff or deputy sheriff, constable or indifferent other person authorized by law within county or by some person specially appointed by court for that purpose. Service may be made by mail pursuant to VRCP 4(f).

Personal Service on Individual.

Service can be made either by delivering a copy of summons and complaint to defendant personally or by leaving them at his usual place of abode with some person of suitable age residing there. (VRCP 4[d][1][i]).

Personal Service on Infant.

Service is made on infant and also to guardian, if he has one within state, and if not, then to his father or mother or other person with whom he resides. (VRCP 4[d][i]).

Personal Service on Incompetent Person.

Service is made to guardian or competent member of his family with whom he resides or if he is living in an institution, then to director of institution, and also to incompetent unless otherwise ordered. (VRCP 4[d][1][ii]).

Personal Service on Partnership.

Service may be made upon an officer or member thereof or an agent authorized by appointment or by law to receive service. (VRCP 4[d][8]).

Personal Service on Domestic Corporation.

Service is made on any officer, director or general agent, or if none of foregoing persons is present in state such copies may be delivered to any person in actual employment of corporation or to one of stockholders or if no such person is found, may be left at an office or place of business of corporation within state. (VRCP 4[d][7]).

Personal Service on Association.

Service can be completed by serving copy of summons and complaint to officer, managing or general agent, superintendent, or any person appointed to receive process by law. (VRCP 4[d][8]).

Personal Service on Joint Stock Company.

Service can be completed by serving copy of summons and complaint to officer, managing or general agent, superintendent, or any person appointed to receive process by law.

(VRCP 4[d][8]).

Personal Service Outside the State.

Service in same manner and effect as if such service were made within state, by any person authorized to serve civil process by laws of place of service, or by a person specially appointed to serve on following persons: (1) Person whose contact or activity in state or such contact or activity imputable to him is sufficient to support a personal judgment against him; (2) person whose interest in, title to, or right to possession of goods, chattels, rights, credits, land tenements, or hereditaments in state has been attached or secured by trustee process in commencement of action, or will be affected by judgment in action; (3) person against whom judgment for divorce or annulment of marriage is sought. (VRCP 4[e]).

Foreign corporation doing business in state appoints Secretary of State process agent. Service made by delivery to Secretary of State who forwards to defendant. (12 VSA 855-856).

Service By Mail.

Allowed where service cannot, with due diligence, be made personally within state. Service may be made by registered or certified mail, return receipt requested, with instructions to deliver to addressee only, in following cases: (1) Where plaintiff has attached or trusteed property within state; (2) where pleading demands judgment affecting title to property within state; or (3) divorce or annulment actions. (VRCP 4[f][1]). When service may be made upon officer of state as statutory agent for service of process under which VRCP 4 (c)(1)(7) or (8), service under statute may be made by mailing copy of summons and complaint by first class mail, postage prepaid, to officer. (VRCP 4[f][2]).

Service by Publication.

Court, on motion and showing that service cannot, with due diligence, be made by another prescribed method may order service by publication in following instances: (1) Against persons domiciled in state or who have submitted to jurisdiction of state; (2) where plaintiff has attached or trusted property within state; (3) actions affecting title to property within state; or (4) divorce or annulment actions.

Notice must be published once a week and at least seven days apart for two or more successive weeks in designated newspaper or newspapers reasonably calculated to give notice to defendant. (VRCP 4[g][2]). In addition, service is made by mail to defendant's last known address. First publication of summons is made within 20 days after order allowing it is granted. Service is complete on 21st day after first publication. Plaintiff files with court an affidavit that publication has been made. (VRCP 4[g]).

Long Arm Statute.

Statutes allow exercise of jurisdiction over out-of-state defendant to extent allowed by U.S. Constitution. (11A VSA 15.10; 12 VSA 855, 856; 12 VSA 913).

Nonresident Motorist.

See category 23 Transportation, topic 23.01 Motor Vehicles.

5.21 REPLEVIN:

When goods are unlawfully taken or unlawfully detained from the owner or person entitled to the possession thereof, or are attached, the owner may cause them to be replevied into his possession. (VRCP 64). Notice and hearing are required, with limited exceptions. (VRCP 64).

Proceedings can be held ex parte, or with notice given to defendant. (VRCP 64[b][2][3]). Complaint must be supported by affidavit(s). (VRCP 64[b][2][3]). Office must, before serving writ, take from plaintiff bond to defendant in penalty double value of property to be replevied and return same with writ to clerk of court. If defendant prevails in suit, bond is his protection for return of his property, his damages and his costs. For good cause shown and recited in order, court may accept personal bond, without surety. (VRCP 64).

Demand and Refusal.

Where action is for detention only, complaint must allege demand and refusal. (VRCP 64).

Judgment or Order.

On default of defendant or on finding that goods were unlawfully taken or detained by him, plaintiff has judgment for his damages caused thereby and his costs. (VRCP 64). When defendant is successful, judgment is for return of goods to him and damages caused by seizure and costs.

A special replevin form has been adopted by statute. (VRCP Form 14).

5.22 SEQUESTRATION:

See category 8 Debtor and Creditor, topic 8.02 Attachment.

5.23 SERVICE:

See topic 5.20 Process.

5.24 STAY OF EXECUTION:

See topic 5.03 Appeal and Error; category 8 Debtor and Creditor, topic 8.05 Executions.

5.25 SUBMISSION OF CONTROVERSY:

No statutory provision.

5.26 VENUE:

Change of venue may be had for cause. (12 VSA 404). Probate change of venue see VRPP 38. Criminal change of venue see VRCrP 21.

Contract Provisions.

Enforceability of contract provision stating all disputes be held in certain venue is enforceable for personal jurisdiction, and presumptively venue. (147 Vt. 105, 510 A.2d 1325).

Superior court actions must be brought in county in which one of parties resides if either resides in state; if neither party resides in state action may be brought in any county; but actions for ejectment, mortgage foreclosures and for trespass on freehold must be brought in county in which lands lie. (12 VSA 402).

Replevin is to be brought in the county where goods are detained. (12 VSA 5331).

6 COURTS AND LEGISLATURE

6.01 COURTS:

United States District Court.

Clerk's office: Burlington 05402.

Court sits at Bennington, Brattleboro, Montpelier, St. Johnsbury, Windsor, Burlington and Rutland.

Filing fee of $274 is required in order to commence action in bankruptcy pursuant to c. 13 and $299 is required to commence action in bankruptcy pursuant to c. 7.

Supreme Court.

Supreme Court of Vermont is comprised of five members, including Chief Justice and four associate justices, who have final jurisdiction of appeals from all lower courts, agencies and boards. Fee for appeal to Supreme Court of Vermont is $250. (32 VSA 1431).

Court sits at Montpelier.

Superior courts possess original jurisdiction and concurrent jurisdiction, with supreme courts, of proceedings in certiorari, mandamus, quo warranto and prohibition and issuance of all writs. (4 VSA 113). Superior courts have original jurisdiction of prosecutions for criminal offenses. (4 VSA 114). Superior courts also have jurisdiction of cases in law, criminal offenses within county have jurisdiction of appeals from probate courts and family courts. (4 VSA 114). Fee for entry of cause in superior court is $250. (32 VSA 1431).

Place of Sitting.

Addison County at Middlebury.

Bennington County, at Manchester and at Bennington

Caledonia County, at St. Johnsbury.

Chittenden County, at Burlington.

Essex County, at Guildhall.

Franklin County, at the City of St. Albans.

Grand Isle County, at North Hero.

Lamoille County, at Hyde Park.

Orange County, at Chelsea.

Orleans County, at City of Newport.

Rutland County, at City of Rutland.

Washington County, at Montpelier.

Windham County, at Newfane.

Windsor County, at Woodstock.

Court of Chancery.

Chancery courts are abolished and jurisdiction and powers formerly vested in Court of Chancery are now vested in superior courts and all rights, powers and duties of chancellor are now vested in presiding judge of superior courts. (VRCP 1).

Probate Court.

Procedure governed by VRPP. Probate court has jurisdiction of probate of wills, settlement of estates, appointment of guardians, and wards, trusts created by will and of absent persons' estates, charitable trusts, irrevocable trusts created by inter vivos agreements, amendments of certificates of birth, marriage, and death, and of powers, duties, appointment and rights of guardians and wards, changes of name, and of adoption proceedings. (4 VSA 311). There is probate court in each probate district which is always open. (4 VSA 353). Appeals lie from probate courts to superior courts, but questions of "pure" law may be certified direct to Supreme Court. (VRCP 72). Judges of probate are also judges of court of insolvency for same district.

Probate districts and location of courts are as follows (Except as otherwise indicated, the district comprises the entire county. If judicial position becomes vacant in probate districts of Fair Haven, Hartford, Marlboro, Rutland, or Westminster before Feb. 1, 2011, county containing district with vacant judge position shall become single probate district county effective upon date of vacancy. Otherwise, effective Feb. 1, 2011, all counties will become single probate district counties. [Act 4, §§ 118–125 (2009)]):

Addison District, Middlebury.

Bennington District, Bennington.

Caledonia District, St. Johnsbury.

Chittenden District, Burlington.

Essex District, Island Pond.

Franklin District, St. Albans.

Grand Isle District, North Hero.

Lamoille District, Hyde Park.

Orange District, Chelsea.

Orleans District, Newport.

Rutland County:

Rutland District, Rutland City, towns of Brandon, Chittenden, Clarendon, Danby, Ira, Mendon, Middletown Springs, Mt. Holly, Mt. Tabor, Pittsfield, Pittsford, Proctor, Rutland Town, Rutland City, Sherburne, Shrewsbury, Tinmouth, Wallingford and West Rutland.

Fair Haven District, Fair Haven, towns of Benson, Castleton, Fair Haven, Hubbardton, Pawlet, Poultney, Sudbury, Wells and West Haven.

Washington District, Montpelier.

Windham County:

Marlboro District, Brattleboro, towns of Brattleboro, Dover, Dummerston, Gilford, Halifax, Marlboro, Newfane, Summerset, Stratton, Vernon, Wardsboro, Whitingham and Wilmington.

Westminster District, Bellows Falls, towns of Athens, Brookline, Grafton, Jamaica, Londonderry, Putney, Rockingham, Townshend, Westminster and Windham.

Windsor County:

Hartford District, Woodstock, towns of Barnard, Bethel, Bridgewater, Hartford, Hartland, Norwich, Pomfret, Rochester, Royalton, Sharon, Stockbridge and Woodstock.

Windsor District, Windsor, towns of Andover, Baltimore, Cavendish, Chester, Ludlow, Plymouth, Reading, Springfield, Weathersfield, Weston, West Windsor and Windsor.

District courts have jurisdiction over appeals of final decisions of judicial bureau, DUI license suspension hearings, extradition proceedings, drug, fish and wildlife, and liquor forfeiture proceedings, and hearings relating to refusal to provide DNA sample, automobile forfeiture and immobilization proceedings and sex offender notification proceedings. (4 VSA 437). District court has jurisdiction over prosecutions for felonies. (4 VSA 439). District court has jurisdiction concurrent with superior court over prosecutions for misdemeanors. (4 VSA 440). District court has jurisdiction over prosecutions for violations of by-laws or ordinances of village, town, or city. (4 VSA 441).

Appeals from district court may be taken only to Supreme Court. (4 VSA 443).

One district court having statewide jurisdiction is created. For administrative purposes, Supreme Court has divided state into three units and into 14 circuits, each comprising one county in area.

Small Claims Courts.

Procedure governed by VRSCP. Superior courts have jurisdiction in small claims proceedings. Complaint must be on form provided by clerk and must include information identifying plaintiff and defendant and concise statement of nature and amount of claim. Clerk serves summons and complaint on defendant by mail. Entry fee of $75 if claim is for more than $1000 and $50 if claim is for $1000 or less. (32 VSA 1431[c]). Court may issue, for cause shown, post-judgment writs of attachment of property and trustee process. (VRSCP 3[c]; 12 VSA 5534). Trial shall be by court unless defendant requests trial by jury. (VRSCP 5; 12 VSA 5535). If trial is by jury, Vermont Rules of Evidence apply. If trial is by court, evidence is admissible if it is of type commonly relied upon by reasonably prudent persons in conduct of their affairs, and Vermont Rules of Evidence are inapplicable except for rules respecting privilege. (VRSCP 6[b]). Maximum amount collectible in small claims court is $5,000. (V.R.S.C.P. 2[a]; 12 VSA 5531[a]).

Family Courts.

All family law matters are in exclusive jurisdiction of family courts. (4 VSA 454). Appeals are to Supreme Court. (4 VSA 456). Also have jurisdiction relating to dissolution of civil unions. (4 VSA 454[17]).

Environmental Court.

Has statewide jurisdiction and is subject to authority granted to Supreme Court. Jurisdiction over all environmental matters. (4 VSA 1001-1004).

6.02 LEGISLATURE:

Vermont constitution provides for biennial sessions commencing in Jan. of odd years. (Const., c. II, § 7). However, practice is to continue odd-year session to following Jan. as an "adjourned session," with effect that legislature meets every year.

Special or Extraordinary Sessions.

Governor may call special sessions. (Const., c. II, § 20).

Initiative and Referendum.

No provisions for referendum or initiative.

Lobbyists.

(2 VSA 261-268). For federal regulation, see 2 U.S.C. 261 et seq.

6.03 REPORTS:

The Vermont Reports are: Nathaniel Chipman 1 vol., 1789 VSA 91 (cited N. Chip.); Royall Tyler 2 vols., 1800 VSA 3 (cited 1 Tyl.); William Brayton 1 vol., 1815 VSA 20 (cited Brayt.); Daniel Chipman 2 vols., 1789 VSA 91, 1797, 1813 VSA 15, 1821 VSA 23 (cited 1 D. Chip.); Asa Aikens 2 vols., 1823 VSA 28 (Cited Aik.); Vermont Reports beginning with vol. 1. Vermont decisions are also published in Atlantic Reporter.

Digests are: Roberts' Vermont Digest 1789 VSA 1905 up to and including vol. 77 of Vermont Reports, 1 volume published in 1910; Horton's Continuation of Roberts' Digest 1905 VSA 1910 includes vols. 78 to 83 inclusive, published 1911; West Publishing Company's Vermont Digest covering all Vermont cases.

6.04 STATUTES:

The latest compilation of the statutes of Vermont of general application is Vermont Statutes Annotated (1959) kept current by pocket parts. Session laws published after biennial sessions of General Assembly should be consulted for special legislation. Rules of Court are published in a separate volume of Vermont Statutes Annotated.

Uniform Acts adopted are: Adoption (1996); Anatomical Gift (1990); Arbitration Act (1969); Business Corporation (1971), 1973, 1975 and 1976 Model Act Amendments not adopted; Business Records as Evidence (1939); Child Custody Jurisdiction (1980); Commercial Code, (1999); Common Interest Ownership (1999); Criminal Extradition (1933); Declaratory Judgments (1931); Desertion and Non-support (1933); Disclaimer of Property Interests (1986); Disposition of Unclaimed Property (1954) (repealed 2006, but transitional provision of repealing act still refers to it); Estate Tax Apportionment (1976); Extradition of Persons of Unsound Mind (repealed 1968); Flag (1941); Gifts to Minors (1957); Interstate Arbitration of Death Taxes (1947); Interstate Compromise of Death Taxes (1947); Interstate Family Support (1996); Revised Limited Partnership (1997); Mediation (2003; adopted 2006) (governs mediation pursuant to referral or agreement to mediate made on or after July 1, 2006; on or after July 1, 2008 governs agreement to mediate whenever made); Motor Vehicle Certificate of Title and Anti-Theft Act (1969); Narcotic Drug (1951); Non-Profit Corporation (1972); Partnership (1996); Photographic Copies of Business and Public Records as Evidence (1953); Principal and Income (1957); Prudent Management of Institutional Funds (2006; adopted 2009); Revised Reciprocal Enforcement of Support (1968); Securities (1985, repealed by 2002); Simultaneous Death (1941); State Administrative Procedure (1961); To Secure Attendance of Witnesses From Without a State in Criminal Proceedings (1937); Trade Secrets (1995); Trust Code (adopted 2009); Unclaimed Property (1995; adopted 2006); Veterans Guardianship (1943).

No significant variations or modifications, except as to Uniform Arbitration Act, Revised Model Business Corporation Act, and Uniform Trust Code.

For text of Uniform Acts falling within the scope of the Martindale-Hubbell Law Digests see Uniform and Model Acts section.

6.05 UNIFORM LAWS:

See topic 6.04 Statutes.

7 CRIMINAL LAW

7.01 CRIMINAL LAW:

Crimes and criminal procedure are governed by statute in conjunction with common law. Prosecutions are commenced by presentment, information and indictment. Any offense punishable by imprisonment for two years or more, or by death, constitutes felony; all other offenses are misdemeanors. (13 VSA 1).

Indictment or Information.

Criminal action is deemed to have started when officer has made arrest without warrant, defendant has been cited and is required to appear in court, or information has been presented to judicial officer for purpose of obtaining summons or indictment. (13 VSA 4508). Most specific crimes have their own procedure, with probable cause being common element of all indictments. In cases of capital offense there must be indictment. (126 Vt. 112, 223 A.2d 462).

Bail is allowed unless offense is punishable by life imprisonment and evidence of guilt is great. (13 VSA 7553).

Criminal Code.

Completely revised code adopted. (13 VSA 1 et seq.).

8 DEBTOR AND CREDITOR

8.01 ASSIGNMENTS:

Common law rules apply.

Uniform Commercial Code has been adopted. (T.9A). See category 3 Business Regulation and Commerce, topic 3.09 Commercial Code.

Instrument transferring title must be acknowledged and recorded. (27 VSA 301).

Notice to debtor is required to protect assignee. (16 Vt. 558).

Assignment of wages must be in writing and recorded in order to be valid against trustee process. (12 VSA 3022).

Workers' compensation claims are not assignable unless specific exception applies. (21 VSA 681).

Action by Assignee.

Every action shall be prosecuted in name of real party in interest. (VRCP 17). Subrogated insurance claims using name of assured for damages from alleged wrongful acts claimed by subrogation or assignment require 10 day notice to assured prior to asserting claim. (VRCP 17[c]).

8.02 ATTACHMENT:

Actions in Which Allowed.

In any civil action, along with summons and complaint, except for malicious prosecution, libel or slander. (VRCP 4.1).

Courts Which May Issue Writ.

Superior Court has original and concurrent jurisdiction. (4 VSA 113).

In Whose Favor Writ May Issue.

To plaintiff if reasonable likelihood of judgment is shown. (VRCP 4.1). Not necessary for plaintiff to be resident of state.

Grounds.

Plaintiff, must show reasonable likelihood of judgment in his/her favor in order for attachment to be granted at start of proceedings. (VRCP 4.1). For plaintiff to succeed on ex parte attachment, must show reasonable likelihood of judgment in his/her favor, as well as showing by specific facts that if defendant were notified in advance, he might hide, destroy, or conceal property that may be used to satisfy judgment. (VRCP 4.1).

Proceedings to Obtain.

Possessory attachments require motion, supporting affidavits, five days notice of hearing and finding by court of reasonable likelihood of recovery. (VRCP 4.1).

Nonpossessory attachments require same due process protections as possessory attachments. (12 VSA 3295).

Attachment Bond.

Required if writ is requested ex parte. (VRCP 4.1[b][3]).

Release of Property.

Debtor may release his property from attachment by filing a bond. A part of the property may be released by order of the court when it appears that the value of the property attached is greatly in excess of the claim, or for hardship. (VRCP 4.1).

Sale.

Attached property is generally held and sold on execution at auction by the sheriff, but it may be sold before judgment on agreement of parties, and the money held to protect both parties in a declining market. (12 VSA 3401). The sheriff may sell perishable personal property or property which cannot be kept without great expense, or would be greatly reduced in value by keeping, upon the request of either party. (12 VSA 3403).

Vacation or Modification.

Any time prior to final judgment, defendant may move for dissolution or modification on basis of lack of probable basis for plaintiff’s complaint. (VRCP 4.1).

8.03 CONSUMER CREDIT:

Uniform Consumer Credit Code has been adopted. (9A VSA 2A-108).

8.04 CREDITORS' SUITS:

Creditors' bill lies as at common law.

When an execution has been levied upon real estate and any part has been conveyed away or encumbered, or is held in fraud of levying creditor's rights, creditor may maintain an action in superior court for satisfaction of his execution. (12 VSA 2808).

8.05 EXECUTIONS:

Process to enforce judgment shall be by writ of execution, unless court directs otherwise. (VRCP 69). Court may, on motion for cause shown, order immediate execution unless appeal from judgment is intended or certain motions affecting judgment are made. (VRCP 62).

Exemptions.

See topic 8.06 Exemptions.

Time for Issuance.

Supreme and superior courts may issue executions on final judgments rendered by them, which shall be made returnable within 60 days from date thereof. Such executions may be issued so long as judgment remains unsatisfied, but not after eight years from date of rendition of judgment. (12 VSA 2681, VRCP 69).

Stay.

Any stay shall be granted upon such terms as court considers necessary to protect interests of any party. Timely motion for stay acts as further stay until motion can be heard and determined, which shall be at earliest possible time. (VRCP 62).

Lien.

See category 5 Civil Actions and Procedure, topic 5.15 Judgments.

Levy.

When execution with costs is not paid on demand officer shall levy same upon goods or chattels of debtor or such as are shown to him by creditor, and same shall be safely kept by officer at debtor's expense, until sold or execution is otherwise satisfied. (12 VSA 2731). Houses, lands and tenements belonging to person in his own right in fee, or for his own life, or life of another, paying no rents for same, or for years, or unlimited time, paying rents for same, and rights in equity of redeeming lands mortgaged, or in reversion or remainder, as well as his personal estate, shall stand charged with debts and demands owing by such person, and may be taken in execution for same at election of creditor, unless debtor, his agent or attorney, exposes and tenders personal estate sufficient to satisfy execution and charges, subject to homestead exemption. (12 VSA 2681). When execution is levied upon real estate, same or undivided fractional part thereof sufficient to satisfy execution with costs shall be sold at public auction by officer to highest bidder, in satisfaction of execution, either upon such real estate or at some public place in town where it is situated or, if situated in unorganized town or gore, in adjoining town. (12 VSA 2786).

Return.

Officer commencing proceedings for sale on execution of real estate or right to collect and receive rents, issues and profits thereof, may make such sale, although return day of execution has passed, and shall return execution within five days after sale. Failure to make such return shall not affect purchaser's title to property. (12 VSA 2791).

Satisfaction.

Moneys arising from such sales shall be applied to payment of charges and satisfaction of execution. Officer shall pay on demand residue, if any, to debtor. (12 VSA 2735). In levying execution, officer shall collect per diem interest from date of entry of judgment to and including date of satisfaction. If execution is returned partially satisfied, return shall show date of partial satisfaction. Amount collected shall be first applied to interest accrued to that date. Interest on portion of judgment remaining unsatisfied shall be computed from date of partial satisfaction and collected in same manner on any subsequent levy of execution. (VRCP 69).

Sale.

Officer shall forthwith advertise goods taken on execution by posting at public place in town where taken, notice enumerating them and stating time and place for sale at public auction, which time must not be less than 14 days from time of posting such notice. (12 VSA 2733). If debtor does not satisfy execution, with costs, before time of sale officer shall sell same or part thereof sufficient to satisfy execution to highest bidder, and apply money from such sale to satisfy execution, and residue, if any, be paid to debtor on demand. (12 VSA 2734). Real estate is also sold at auction after due notice and advertisement (12 VSA 2786) subject to homestead rights (27 VSA 101-103). Costs available to either party. (12 VSA 2697).

Redemption.

Judgment debtor may redeem real property sold under execution, within six months of sale, provided bond is filed within ten days of sale. (12 VSA 2796).

Body execution is no longer available in civil actions for money damages. (VRCP 69).

8.06 EXEMPTIONS:

There are numerous exemptions from attachment and execution of specified articles of personal property, in many instances limited as to value. (12 VSA 2740).

Substitution.

The debtor may not hold other articles or money exempt in lieu of articles specifically exempted but not owned by him.

Debts Against Which Exemptions Not Allowed.

See 12 VSA 2740.

Waiver of Exemption.

Exemption may be waived by turning out property to levying officer. (12 VSA 2740).

Necessity of Claiming Exemption.

When there is reasonable doubt as to ownership of goods or chattel or as to their liability to be taken on writ of attachment or execution, officer may require sufficient security to indemnify him for taking same. If creditor, his agent or attorney does not, within reasonable time after request, give security to officer, he may release them to person from whom they were taken, at any time before sale of goods or chattel. (12 VSA 2742).

Earnings exempted from collection will be 75% of weekly disposable income or 30 times federal minimum wage, whichever is greater. If debt arose from consumer credit transaction, 85% of weekly disposable income or 40 times federal minimum wage shall be exempt. (12 VSA 3170).

Exemptions of Personal Property.

Allowed exemptions from attachment are $2,500 in interest of motor vehicle, $5,000 in trade books or tools, wedding ring, $500 interest in other jewelry, $2,500 in household furnishings, $5,000 in crops, $400 in any property and up to $7,000 in unused exemptions, cooking stove, one refrigerator, ten cords of firewood, 500 gallons of gas, one cow, two goats, ten sheep, ten chickens, three swarms of bees, one yoke of oxen or two horses. (12 VSA 2740).

Exemptions of Accounts.

Accounts that are exempt are $700 in bank deposits, all pensions, annuities, retirement accounts, Keogh plans, all simplified employee pension plans, but some plans are only exempt to extent contributions were deductible from federal taxation at time of contribution. (12 VSA 2740).

Exemptions of Benefits.

To extent necessary for support of debtor social security benefits, veterans benefits, disability benefits, alimony, compensation award, life insurance, and certain payments are exempt. (12 VSA 2740).

8.07 FORECLOSURE:

See category 20 Mortgages, topic 20.04 Mortgages of Real Property.

8.08 FRAUDULENT SALES AND CONVEYANCES:

Fraudulent and deceitful conveyances of lands or goods and chattels, or actions, judgments and executions made or had to avoid a right, debt or duty of another person shall, as against the party whose right, debt or duty is attempted to be avoided, his heirs, executors, administrators or assigns, be null and void. (27 VSA 542). Statute does not extend to claims in tort which have not been perfected by judgment. (127 Vt. 545).

Uniform Commercial Code has been adopted. See category 3 Business Regulation and Commerce, topic 3.09 Commercial Code.

Uniform Fraudulent Conveyance Act has not been adopted.

Bulk Sales.

Uniform Commercial Code does not apply. Bulk Sales statutes repealed.

8.09 GARNISHMENT:

Trustee process available in conjunction with commencement of action where attachment would be available. Attachment rules as to hearing, notice and affidavits apply. (VRCP 4.2). Earnings subject to garnishment are anything over 75% of weekly disposable income of debtor or 30 times federal minimum wage, whichever is greater. If debt arose from consumer credit transaction, anything over 85% of weekly disposable income or 40 times federal minimum wage. (12 VSA 3170). Process by summons on trustee similar to other process noting duty to respond and disclose. (VRCP 4.2).

Jurisdiction.

Superior court has general jurisdiction over all civil matters. (4 VSA 131).

Judgment.

Any party intending to contest information provided by trustee or to produce other evidence is entitled to hearing upon written request. (VRCP 4.2[g]).

Proceedings to Obtain.

Garnishment cannot be obtained until claim has been reduced to judgment. (VRCP 4.2[j]). At hearing on motion court shall order what it deems just. (VRCP 4.2[j][4]).

Answer of Garnishee.

Garnishee shall have opportunity to answer by motion and upon hearing when court is moved by opposing counsel to order trustee process and garnishment. (VRCP 4.2[j][4]).

Earnings.

Not prior to a judgment; there limited as to amount and period. (VRCP 4.2). Expanded Sniadach doctrine applies. Limited to 75% of debtor's weekly disposable earnings or 30 times federal minimum hourly wage, whichever is greater.

8.10 HOMESTEADS:

A dwelling house, outbuildings and the land used in connection therewith, owned, used or kept as homestead, not exceeding $125,000, together with rents, issues, profits and products thereof are exempt from attachment and execution. (27 VSA 101).

Limitation of value of homestead which may be held exempt is $125,000. (27 VSA 101). This exemption applies to mortgagor's equity of redemption and not overall worth of property. (149 Vt. 523, 546 A.2d 787).

Limitation of Area.

None.

Debts and Liabilities against Which Exemption Not Available.

Debts contracted prior to purchase of homestead or taxes assessed thereon. (27 VSA 107-08).

Designation of Homestead.

If property is valued at more than $125,000, then extra property must be divided up by fixing boundaries and sold. (27 VSA 102).

Claim of Exemption.

When an execution is levied upon a homestead of greater value than $125,000, owner may designate part thereof to which exemption shall apply, and officer may levy upon remainder. Upon failure so to designate, officer may appoint three disinterested free holders, who must fix location and boundaries of such homestead and officer must then proceed with sale of remainder. (27 VSA 102). If mortgaged property includes homestead, any amendment to mortgage which increases amount of indebtedness secured thereby or extends date of maturity, shall be executed and acknowledged by both spouses otherwise lien inoperative if challenged effective May 24, 2000. (27 VSA 141[c]).

Alienation or Encumbrance.

Husband and wife must join in conveying or mortgaging the homestead interest, except in case of a purchase money mortgage. (27 VSA 141).

Proceeds of Sale.

New homestead shall not be liable for causes of action against him or her to which such prior homestead would not have been liable, if such new homestead is acquired with consideration derived from sale or other disposition of such prior homestead, or with other means not derived from property of such person. (27 VSA 109).

Rights of Surviving Spouse and Family.

If person dies leaving surviving spouse, homestead to value aforesaid passes and vests in surviving spouse without being subject to payment of debts of deceased, unless legally charged during deceased's lifetime and surviving spouse shall take same estate therein of which her husband or his wife dies seised. Probate court sets out homestead to surviving spouse. (27 VSA 105). Upon application by surviving spouse or interested parties, probate court may order homestead sold as in case of sale of real estate for payment of debts under certain circumstances. (27 VSA 185).

See categories 21 Property, topics Curtesy, Deeds, Dower and Real Property; Family, topic Husband and Wife.

8.11 JUDGMENT NOTES:

See category 3 Business Regulation and Commerce, topic 3.02 Bills and Notes.

8.12 LEVY:

See topics 8.02 Attachment, 8.05 Executions.

8.13 LIENS:

Uniform Commercial Code (1999) has been adopted. See category 3 Business Regulation and Commerce, topic 3.09 Commercial Code.

Waiver, Loss or Extinguishment.

After filing contractor's lien, action must be brought to enforce lien within 180 days after payment becomes due, or from time memorandum is sent. (9 VSA 1924). However, important note is that attachment must be complete within three months, and not merely filed within that time period. (142 Vt. 499). Thus, one should file action in superior court at least two weeks before three months accrue. (142 Vt. 499).

Artisans.

Every person who makes, alters, launders, dry cleans or repairs any article of personal property at the request of the owner thereof has a lien thereon for his reasonable charges therefore, and may retain possession thereof until such charges are paid, and may, if such charges remain unpaid for three months, on ten days notice, by posting in two or more public places in the town where lien accrues, sell same at public auction in such town, and apply proceeds to satisfaction of such debt and expenses of sale, and balance shall be paid to owner within ten days. (9 VSA 1951-52).

Manufacturer's Mold Lien.

Manufacturers of molds, dies, forms or patterns shall have lien, dependent on possession, for balance due from customers. Lien attaches and perfects 30 days after any payment is due. (9 VSA 4155).

Animal Pasturage, etc.

Person to whom charges are due for pasturing, boarding or keeping domestic animals may if charges become due while such animals remain in his possession, retain same until charges are paid and may, after three months, sell same in manner hereinbefore described. (9 VSA 2075).

Mechanics' Liens.

When contract or agreement is made, whether in writing or not, for erecting, repairing, moving or altering improvements to real property or for furnishing labor or material therefore, person proceeding in pursuance of agreement or contract shall have lien upon aforesaid improvements and lot of land on which same stand to secure payment of same. Lien becomes effective following proper notice to owner or agent of owner and continues for not more than 120 days unless notice of lien is filed in office of town clerk. Contractor's lien will not take precedence over deed or other conveyance to extent that consideration therefore has been paid in good faith before lien was recorded. If potential mortgagee receives written notice that lien is to be claimed, lien shall take precedence over any future mortgage unless mortgagee can show that any such advances were expended to complete improvements to property. Lien may cover all of land used or designed in connection with improvements, but shall not extend to other adjacent lands used for purposes of profit. Such lien may not be waived in advance. (9 VSA 1921).

Attorney's Lien.

See category 18 Legal Profession, topic 18.01 Attorneys and Counselors.

Collateral Security.

See topic 8.15 Pledges.

Execution Lien.

See topic 8.05 Executions.

Judgment Lien.

See category 5 Civil Actions and Procedure, topic 5.15 Judgments.

Landlord's Lien.

See category 21 Property, topic 21.09 Landlord and Tenant.

Liens on Exempt Property.

See topic 8.06 Exemptions.

Liens on Homestead.

See topic 8.10 Homesteads.

Real Estate Mortgage Lien.

See category 20 Mortgages, topic 20.04 Mortgages of Real Property.

Tax Lien.

See category 22 Taxation, topics 22.13 Property Taxes, subhead Lien; 22.18A Tax Liens, subhead Revised Uniform Federal Tax Lien Registration Act.

8.14 MECHANICS' LIENS:

See topic 8.13 Liens.

8.15 PLEDGES:

Uniform Commercial Code has been adopted. See category 3 Business Regulation and Commerce, topic 3.09 Commercial Code. Uniform Commercial Code (1999) applies. (9A

VSA 1-201[32]; 9A VSA 8-306[4]; 9A VSA 9-101 through 9A VSA 9-507).

Remedies of Pledgee.

A pledgee upon default of the pledgor has no right of strict foreclosure, but he may receive equitable relief in the nature of a foreclosure and thereon have a decree for judicial sale of the property, or he may sell the pledge without judicial process upon reasonable notice to the pledgor. (77 Vt. 123, 59 A. 197). Sale is usually made by an officer in a manner similar to sales of personal property on levy of execution, although there are no statutory requirements about such sales.

If debt due at rendering, attaching creditor may pay or tender within ten days after rendering, to pledgee and retain and sell such property free and clear of pledge. If debt is not due, other rules apply. (12 VSA 3353 - 3355). Creditor who pays or tenders debt to pledgee of lien, shall be subrogated to all rights of such pledgee and may cause same to be sold in same manner that unencumbered personal property may be sold on mesne or final process. (12 VSA 3356). Purchaser shall be subrogated to all rights of pledgee and may hold same as security for amount so paid in discharge of original claim. Purchaser will have same benefit of foreclosure, sale and disposition of property of original pledgee. (12 VSA 3358).

8.16 RECEIVERS:

Court in judicial proceedings brought to dissolve corporation, may appoint one or more receivers to wind up and liquidate, or one or more custodians to manage affairs of corporation.

Jurisdiction.

Court in county where corporation is being dissolved shall have exclusive jurisdiction over appointment of receivers. (11A VSA 14.32, 11B VSA 14.32).

Proceedings.

Court shall hold hearings before appointments and notify all interested parties. Court may appoint individual, domestic or foreign corporation (authorized to conduct business in state). (11A VSA 14.32).

Eligibility and Competency.

Court makes determination as to eligibility and competency of receiver before appointment to position. (11A VSA 14.32).

Qualifications.

Court may require receiver or custodian to post bond, with or without sureties in amount court directs. (11A VSA 14.32).

Powers and Duties.

Receiver may dispose of all or any part of corporation’s assets and may sue or be sued in his own name as receiver in all courts of this State. (11A VSA 14.32).

Compensation.

Court from time to time may order compensation by sale of assets if necessary. (11A VSA 14.32).

8.17 REDEMPTION:

See category 20 Mortgages, topic 20.01 Chattel Mortgages.

8.18 SUPPLEMENTARY PROCEEDINGS:

See topic 8.05 Executions.

8.19 TRUSTEE PROCESS:

See topic 8.09 Garnishment.

8.20 USURY:

See category 3 Business Regulation and Commerce, topic 3.17 Interest.

9 DISPUTE RESOLUTION

9.01 ALTERNATIVE DISPUTE RESOLUTION:

Uniform Arbitration Act has been adopted in substantially modified version. (12 VSA 5651). Actual statutory provisions should be consulted. Parties to dispute must voluntarily agree to arbitration. Parties' agreement to arbitrate is binding. For other material alterations of special interest see topic 9.02 Arbitration and Award.

Uniform Mediation Act (2003; adopted 2006) has been adopted. (12 VSA 5711 - 5723).

Alternative dispute resolution is required in all civil actions, except small claims cases. (VRCP 16.3). Effective Nov. 1, 2003, Rule 16.3 will be permanent rule applicable in all counties.

Court Rules.

After period for limited discovery, litigants in U.S. District Court for District of Vermont shall meet with neutral evaluator who is knowledgeable in subject matter of litigation to discuss all aspects of case. Purpose is to increase settlement and narrow issues for trial. Special exceptions and procedures should be consulted. (Local F.R.Civ.P. 16.3).

9.02 ARBITRATION AND AWARD:

Uniform Arbitration Act has been adopted in substantially modified version. (12 VSA 5651). Act does not apply to labor interest arbitration nor arbitration agreements contained in insurance contracts nor to grievance agreements. (12 VSA 5653).

Contracts to Arbitrate Future Disputes.

No agreement to arbitrate is enforceable unless accompanied by or containing written acknowledgment of arbitration signed by parties and their representatives. Acknowledgment should provide substantially as follows:

Acknowledgment of Arbitration

I understand that this agreement contains an agreement to arbitrate. After signing this document, I understand that I will not be able to bring a lawsuit concerning any dispute that may arise which is covered by the arbitration agreement, unless it involves a question of constitutional or civil rights. Instead I agree to submit any such dispute to an impartial arbitrator. (12 VSA 5652).

Powers of Arbitrators.

Arbitrators shall have power to set time and date of hearing not less than five days in advance, adjourn hearing as they see necessary, and to hear and determine controversy. (12 VSA 5666).

Award and Enforcement.

Application to vacate award shall be made within 30 days of award. It will be granted when award was procured by corruption, fraud, or arbitrators were not impartial. (12 VSA 5677). Application by party shall be made within 30 days after delivery of award to applicant. (12 VSA 5678).

Judgment on Award.

Upon granting of order confirming or modifying award, award will be treated and enforced same as any other judgment. (12 VSA 5679).

Mandatory Arbitration.

Common interest unit owners associations may require, by regulation, that disputes between executive board and unit owners or between two or more unit owners must be submitted to non-binding alternative dispute resolution. (27A VSA 3-102).

10 DOCUMENTS AND RECORDS

10.01 ACKNOWLEDGMENTS:

Within State.

Affidavits may be made before any officer who may administer oaths, including judges of courts of record, justices of peace and notaries. (12 VSA 5853-54).

Outside of State but Within United States.

Acknowledgment may be taken in accordance with laws of place where taken, or before justice of peace, magistrate or notary public within U.S. (27 VSA 379).

Outside U.S.

Acknowledgment may be taken before justice, magistrate, or notary public in foreign country, or before commissioner appointed for that purpose by Governor of Vermont, or before minister, charge d'affaires, consul or vice-consul of U.S. in foreign country. (27 VSA 379).

Persons in or with U.S. Armed Forces.

Acknowledgment of member of U.S. Armed Forces may be taken by any officer of such forces of rank of captain or higher in army or equivalent rank in other branches of service, whose certificate must show his rank and title. (12 VSA 5855).

General Requirements as to Taking.

Acknowledgment by grantor must be before town clerk, notary public, master, county clerk or judge or register of probate. (27 VSA 341).

General Requirements of Certificate.

Acknowledgment is valid without official seal being affixed to signature. Notation of expiration of term of notary is not required. (27 VSA 341).

Married Women.

Private examination not required.

Attorneys in Fact.

No special requirements.

Corporations.

Fraternal Benefit Societies must have seven or more citizens of U.S., majority of whom are citizens of this state, who desire to form fraternal benefit society, may make, sign and acknowledge before some officer, competent to take acknowledgments of deeds, articles of incorporation. (8 VSA 4464).

Foreign Acknowledgments.

Uniform Recognition of Acknowledgments Act has not been adopted. (27 VSA 379).

Proof by Subscribing Witness.

When a grantor or lessor dies or leaves state, without acknowledging his deed, execution thereof may be proved by subscribing witness before Supreme Court or Superior Judge. (27 VSA 371).

Authentication of certificate of officer taking acknowledgment is not required. Most banks, however, request a certificate on all papers acknowledged without state. If acknowledgment taken within state, for use elsewhere, authentication may be by county clerk, fee $5. However, one conformed copy of any court shall be furnished to party of record free of charge. (32 VSA 1751).

Forms.

The following form may be used for individuals.

Forms

State of Vermont:. . . . . . County, ss: Be it remembered that on the. . . . . . day of. . . . . ., A. D. 20. . . ., personally appeared. . .. . ., signer and sealer of the foregoing written instrument and acknowledged the same to be. . . . . . free act and deed.

Before me,. . . . . .

(Signature and title of officer).

Acknowledgment of a deed of a corporation is as follows:

State of Vermont:. . . . . . county, ss: At. . . . . ., this. .. . . . day of. . . . . . A. D. 20. . . ., personally appeared. . . . .., agent of the said. . . . . ., signer and sealer of the foregoing written instrument, and acknowledged the same to be. . . . . . free act and deed, and the free act and deed of said corporation.

Before me,. . . . . .

(Signature and title of officer). (22 Vt. 274).

Alternative to Acknowledgment or Proof.

No statutory provision.

10.02 AFFIDAVITS:

Within State.

See topic 10.01 Acknowledgments.

Outside State.

See topic 10.01 Acknowledgments.

General Requirements as to Administration.

There are no requirements that notary have knowledge of identity of person taking oath, but notary can be held liable for damages for her/his official conduct, which may possibly include failure to ask for ID. (24 VSA 446). No legal prohibition against administration on Sunday. No need to keep journal of notarial acts, but it is suggested. (The Short Guide for Vermont Notaries Public).

General Requirements of Jurat.

Any person notarizing affidavit need not affix his/her seal. (12 VSA 5854). Nothing is mentioned in statutes requiring, or not requiring, line about "my commission expires," yet it is suggested in The Short Guide for Vermont Notaries Public, that affidavit "should" include "subscribed and sworn to before me this ___ day of ________, 20___".

Use of Affidavit.

No particular form required. For affirmation, "Swear" may be omitted and replaced with "affirm" and "so help you God" replaced with "under pains and penalties of perjury" due to religious scrupulousness of swearing. No seal is required. (12 VSA 5852 & 12 VSA 5854).

10.03 NOTARIES PUBLIC:

Qualification.

Notaries are appointed by judges of Superior Court to hold office until ten days after expiration of term of office of such judges. Clerk of Supreme Court, county clerks, district court clerks, family court clerks, justices of the peace and town clerks and their assistants shall be ex officio notaries public. County or town clerk is ex officio notary. (24 VSA 441). Notary is not required to give bond.

Authentication.

See topic 10.01 Acknowledgments, subhead Authentication.

Seal.

Provision for seal was repealed in 1983. (24 VSA 444).

Powers and Duties.

A notary may take depositions (VRCP 28) or affidavits, administer oaths (12 VSA 5852, 54), issue subpoenas (VRCP 45) and take acknowledgments (24 VSA 445).

Territorial Extent of Powers.

A notary may act anywhere within the state. (24 VSA 441). Nonresident may be appointed as notary public provided individual resides in state adjoining Vermont and maintains, or is employed in, place of business in Vermont. (24 VSA 441a).

Expiration of Commission.

Notaries are not required to state the date of expiration of their commission.

Fees of notary are $2 for protest and 50¢ for certificate under seal. (32 VSA 1759).

Officers of U.S. Armed Forces.

Any military personnel of rank captain or superior are given general notary powers. (12 VSA 5855).

10.04 RECORDS:

Town clerks have general duty and power to keep records of all land transactions and deeds in their jurisdiction. (27 VSA 402).

Uniform Commercial Code (1999) has been adopted. See category 3 Business Regulation and Commerce, topic 3.09 Commercial Code.

Recordable Instruments.

Except as hereinafter stated recording is necessary only to give notice to third persons; in practice, town and city clerks will record almost any instrument for which fees are paid. Recording of certain instruments in connection with land sales (32 VSA 5255) and of decree of foreclosure within 30 days after expiration of redemption period (12 VSA 4529-30) are necessary. Possession under unrecorded deed is notice to third persons of rights of possessor. (100 Vt. 318, 137 A. 196). Re references in deeds to surveys, see category 21 Property, topic 21.06 Deeds, subhead Recording.

Place of Recording.

Records of deeds, real estate mortgages, leases for more than one year, chattel mortgages, conditional sales contracts, liens, including U.S. tax liens, attachments and vital statistics are maintained by town and city clerks. (27 VSA 341).

Requisites for Recording.

In order to be recorded deeds and other instruments conveying land or interest therein must be signed and acknowledged by grantor before town clerk, notary, master, county clerk or judge, or register of probate (27 VSA 341), and accompanied by Vermont Property Transfer Return, Health Board Certificate, and Land Use and Development Plans Act Certificate. Re references in deeds to surveys, see category 21 Property, topic 21.06 Deeds, subhead Recording.

Recording Fees.

Mortgage trust deeds—$10 per page. Filing complaint for foreclosure on mortgage $10 per page, exam of records by town clerk $5 per hour but no more than $25 for exam on any given day. Exam of records by others $2 per hour. For recording, filing, or both, of any document that is to become matter of public record in town clerk's office $10 per page. Uncertified copies of records on file, $1 per page with minimum fee $2. Survey plats $15 per 11x17″ sheet, $15 per 18x24″ sheet and $15 for 24x36″ sheet. Meeting minutes of municipal meetings, etc. shall be provided at cost. Fees are $10 if record communicated in writing and consists of one or two pages, $15 if record is communicated in writing and consists of more than two pages. $10 if record is communicated by any other medium authorized by filing officer. Filing and indexing of initial financing statement under 9 VSA 502(c), $6 per page. $2 additional for each name more than two if in writing, $10 for each debtor requested. Responding to request for information from filing office, including certificates whether there is information on file, $10. For mortgage filings there is no fee for filing initial financing statement for mortgage under 9 VSA 502(c) for fixture or financing statement as extracted collateral or timber to be cut. Recording and satisfaction fees of $6 per page otherwise applicable to recording mortgage do apply. (9A VSA 9-525; 9 VSA 2013).

See also subhead Filing, under category Business Regulation and Commerce, topic Commercial Code.

Recording Taxes.

See category 22 Taxation.

Effect of Record.

The recording of an instrument is constructive notice of the execution thereof to subsequent purchasers and encumbrances.

Torrens Act not adopted.

Transfer of Decedent's Title.

Recording of wills is not necessary. Custom is to file with clerk where land records are recorded a certified copy of decree of probate court by which heirs or devisees acquire title to real estate. License from probate court to an administrator or executor to sell real estate must be recorded where deed is to be recorded. (14 VSA 1651).

Filing under Commercial Code.

Filing for UCC records where Vermont law governs perfection of security interest or agricultural lien, office to file such financing statement is: (a)(1) office designated for recording of mortgage on real property; (A) collateral is as-extracted collateral; or timber to be cut; or (B) financing statement filed as fixture filing and collateral goods are or are to become fixtures; or (2) Secretary of State, in all other cases, including where collateral comprised of goods that are or are to become fixtures and financing statement is not filed as fixture filing. (b) Secretary of State for perfection of security interest in collateral of transmitting utility. (9A VSA 9-501). Fees for filing and indexing records are $10 if record is not more than two written pages. (9A VSA 9-525[1]). Fee for responding to request for information from filing office is $10. (9A VSA 9-525[d]). Vermont Secretary of State's Office, 81 River Street, Drawer 09, Montpelier, VT, 05609, (802) 828 VSA 2363.

Vital Statistics.

Births, marriages, civil unions, civil marriages and deaths are recorded in town where they occur. (18 VSA 5007). Marriages are recorded in town where party to marriage resides, or if both are nonresidents by any town clerk in state. (18 VSA 5131).

Fees.

Provided to town clerk. Civil marriages, $45 by applicant. $2 for birth certificates corrected or completed. $1 for each certificate of facts relating to birth, death, civil unions and marriages and $10 for certified copies of same.

Establishing Birth Records.

A person born in this state, for whom no certificate of birth is filed or recorded during first year after birth, or whose birth certificate is incorrect, or parent or guardian of such person, may apply to probate court of district in which such person was born, and after hearing court must find facts with respect to birth of such person, issue decree setting forth such facts and fill out birth certificate or corrected certificate, which may be filed with town clerk of town in which such person was born. (18 VSA 5075-76).

10.05 SEALS:

Uniform Commercial Code has been adopted. See category 3 Business Regulation and Commerce, topic 3.09 Commercial Code.

Deeds and other conveyances of land or of estate or interest no longer require seal. (27 VSA 341).

Corporate Seals.

For corporation or public officials and court officers impression of seal on paper alone or on wafer or wax affixed thereto is sufficient. (1 VSA 133).

Effect of Seal.

For natural person scroll with letters “L. S.” or word “seal” is sufficient (1 VSA 134) where seal is required by law (108 Vt. 414).

10.06 TORRENS ACT:

Not adopted.

10.07 VITAL STATISTICS:

See topic 10.04 Records.

11 EMPLOYMENT

11.01 EMPLOYER AND EMPLOYEE:

See topic 11.02 Labor Relations.

11.02 LABOR RELATIONS:

Vermont Labor Relations Act is non-binding panel where employers or employees can bring their disputes before state representative. (21 VSA 1504). Vermont also has numerous violations of employment laws in unfair labor practices statute. (21 VSA 1726).

Wages.

Any person having employees in his service doing and transacting business in state must pay each week in lawful money each employee’s wages to a day not more than six days prior to such payment. (21 VSA 342).

There are certain statutory lien preferences of wages. (9 VSA 1971-72).

Minimum wage is $7.25 per hour. *Note:* Beginning Jan. 1, 2007, and annually thereafter, minimum wage to increase by 5% or percentage increase of specified Consumer Price Index, whichever is smaller. (21 VSA 384[a]). For employees who customarily and regularly receive more than $120.00 in tips per month in hotel, motel, tourist place, and restaurant industry, minimum wage is $3.25 per hour. *Note:* Beginning Jan. 1, 2008, and annually thereafter, minimum tip wage rate to increase at same percentage rate as minimum wage rate.

Child Labor.

Child under 16 years of age may not be employed unless certificate from Commissioner of Labor and as to eligibility of child is deposited with employer. Such child may not be employed more than eight hours a day, more than six days a week, earlier than 6 A.M. or later than 7 P.M. except in agriculture or domestic service. (21 VSA 431, 34).

A child under 16 years of age may not be employed or permitted to work more than eight hours a day and 40 hours a week in certain hazardous occupations. Under certain conditions commissioner may allow person who is at least 14 years of age to work in such shops and factories if he or she is enrolled in approved technical education program. (21 VSA 437-38).

Child under 14 years old may not be employed in any gainful occupation except during vacation and before and after school and occupation must be one accepted by commissioner, by rule, to be appropriate. (21 VSA 436). If children under 16 are going to be working regularly they first need certificate of eligibility from commissioner. (21 VSA 431). This restriction does not apply to employment as actor or performer in motion pictures, theatrical productions, radio or television. (21 VSA 434).

Discrimination.

No employer, employment agency or labor organization shall discriminate against individual based upon race, color, religion, ancestry, national origin, sex, sexual orientation, gender identity, place of birth, age, or disability. No employer may require employee to refrain from disclosing amount of his or her wages, require employee to waive right to disclose amount of his or her wages, or discriminate against employee who discloses amount of his or her wages. (21 VSA 495).

Labor Unions.

No legislation requiring recognition of unions or collective bargaining; fair employment practices. (21 VSA 495).

Labor disputes can be brought before non-binding panel with state representative. (8 VSA 4464). See 21 VSA 1726 for unfair labor practices act.

Workers' Compensation Act.

This chapter shall apply to all employment in state and in certain cases employment out of state. (21 VSA 616 & 21 VSA 623). Persons not considered employees subject to certain exclusions: casual employment, not in trade or business of employer; person engaged in amateur sports; agricultural and farm employment whose aggregate payroll is less than $10,000 per calendar year; employers family dwelling in house; person engaged in services in or about private dwelling; sole proprietor or partner owners of unincorporated business provided six-part test is met; real estate brokers or salespeople. (21 VSA 601[14]).

Employer to file First Report of Injury within 72 hours of receiving notice or knowledge for lost time injury or requires medical attention. Employee must give notice of injury as soon as practicable and must file claim within six months after date of injury. In no event can claim for compensation benefits be commenced more than six years from date of injury. (21 VSA 656 & Department Rule 3).

If compensation is not fixed by agreement either party may apply to Commissioner of Labor for hearing and award. (21 VSA 663).

Within 30 days after copies of an award have been sent to the parties interested, either party may appeal to superior court. (21 VSA 670). If appeal is taken to superior court, court's jurisdiction is limited to questions of fact or mixed question of fact and law certified to it by Commissioner. (21 VSA 671). Trial will be de novo. (110 Vt. 27, 1 A.2d 695). Appeal from superior court to Supreme Court may be taken within 30 days of entry of judgment in superior court. (VRAP 4[a]). If neither party appeals Commissioner's award to superior court, either party may appeal award directly to Supreme Court. (21 VSA 672). If appeal is taken to Supreme Court, Court's jurisdiction is limited to questions of law certified to it by Commissioner.

Occupational Diseases.

Occupational Disease Act has been repealed. Subject now covered under Workers' Compensation Act.

Unemployment Compensation.

As to those persons entitled, see 21 VSA 1251-1255, 1343 VSA 1344. Entitlement varies. (21 VSA 1338).

11.03 WORKERS' COMPENSATION LAW:

See topic 11.02 Labor Relations.

12 ENVIRONMENT

12.01 ENVIRONMENTAL REGULATION:

General Supervision.

Agency of Natural Resources, Department of Environmental Conservation, 103 South Main Street, Building 1 South, Waterbury, VT 05671-0401.

Prohibited Acts of Pollution.

Unauthorized discharge of any wastes into waters of state. (10 VSA 1259). Unauthorized dumping or burning of solid waste. (24 VSA 2201). Improper disposal of products containing mercury. (10 VSA 6621a). Secretary shall set rules for air contaminants that contribute to air pollution. (10 VSA 555).

Enforcement.

Secretary and Land Use Panel of Natural Resources Board have authority to enforce certification of technicians, air quality, water pollution control and water quality standards, resources management, public water supply, dams and stream alterations, algaecides, pesticides, herbicides, well drillers, beverage containers, storage tanks, water supply and waste water, Title 10 items relating to land use, mobile home parks, solid waste, hazardous waste, low-level radioactive waste, subdivisions, lands under public waters, Texas Low-Level Radioactive Waste Disposal Compact. (10 VSA 8004). Also have powers of criminal proceedings, or civil proceedings under cc. 47, 56, & 159 of Title 10.

Penalties.

Violation of statute or provision subjects polluting violators to fine or imprisonment or both. (10 VSA 568, 10 VSA 1274 & 10 VSA 1275, 10 VSA 6612, 10 VSA 8221, 10 VSA 2297a, 10 VSA 8010, etc.).

Permits.

See 10 VSA 1263, 10 VSA 1265, 10 VSA 1283, 10 VSA 1941, 10 VSA 6231, 10 VSA 6606 (hazardous waste), etc.

13 ESTATES AND TRUSTS

13.01 ADMINISTRATION:

See topic 13.09 Executors and Administrators.

13.02 ADVANCEMENTS:

See topic 13.07 Descent and Distribution.

13.03 ALLOWANCES:

See topic 13.09 Executors and Administrators.

13.04 CLAIMS:

See topic 13.09 Executors and Administrators.

13.05 DEATH:

Where a person has been absent and unheard of for a period of five years certificate of presumed death is issued under 18 VSA 5219, administration on his estate may be granted, and estate may be distributed, as in case of his death, five years after administration was taken out if bond be given by distributees or seven years after administration was taken out without any bond being given. If person whose estate has been thus distributed proves to be alive, distributees are liable to him, but administrator is not liable. (14 VSA 919-20).

Survivorship.

Uniform Simultaneous Death Act has been adopted. (14 VSA 621-627).

Actions for Death.

When death of person is caused by wrongful act, neglect or default of another, and person dying would have had right of action if death had not ensued, then representative of that person has right of action, to be commenced within two years from time of death, and compensatory damages may be recovered by representative of deceased for benefit of surviving husband or wife and next of kin. There is no statutory limitation on amount of recovery. (14 VSA 1491-92). Wrongful death action may be brought for benefit of parents of deceased child who is adult if parents are next of kin. Damages may be awarded for parents' loss of love and companionship of child and for destruction of parent-child relationship. (171 Vt. 655, 768 A.2d 1264; 156 Vt. 614, 596 A.2d 905).

Death Certificate.

See category 10 Documents and Records, topic 10.07 Vital Statistics.

Uniform Anatomical Gift Act.

See topic 13.16 Wills.

Living Wills.

See topic 13.16 Wills.

13.06 DECEDENTS' ESTATES:

See topics 13.09 Executors and Administrators, 13.07 Descent and Distribution, 13.16 Wills.

13.07 DESCENT AND DISTRIBUTION:

Any part of decedent's estate not effectively disposed of by will passes by intestate succession to decedent's heirs, except as modified by decedent's will. (14 VSA 301). Estates of dower and curtesy are abolished. (14 VSA 302). Balance of intestate estate that does not pass to surviving spouse passes to decedent's descendants by right of representation. If there is no such descendant, estate passes in this order: (1) To decedent's parents equally or to surviving parent; (2) to decedent's siblings and descendants of any deceased siblings by right of representation;

(3) one-half of intestate estate to paternal grandparents equally or to surviving paternal grandparent and one-half to maternal grandparents equally or to surviving maternal grandparent and if surviving grandparents are only on one side, to that grandparent or those grandparents; (4) in equal share to next of kin in equal degree. (14 VSA 314).

Uniform Probate Code not adopted.

Surviving Spouse.

After payment of debts, funeral charges, and expenses of administration, intestate share of decedent's surviving spouse is: (1) Entire intestate estate if no descendant of decedent survives decedent or if all of decedent's surviving descendants are also descendants of surviving spouse; (2) if there shall survive decedent, one or more descendants of decedent who are not descendants of surviving spouse and are not excluded by decedent's will from inheriting from decedent, surviving spouse shall receive one-half of intestate estate. (14 VSA 311).

Upon motion, surviving spouse may receive out of decedent's estate all furnishings and furniture when decedent leaves no descendants who object. If objection is made, court to decide what spouse may receive. (14 VSA 312). When intestate, decedent's estate consists principally of vessel, snowmobile, or all-terrain vehicle, surviving spouse shall be deemed to be owner; title automatically passes to surviving spouse. (14 VSA 313).

Probate court may make reasonable allowance for expenses and maintenance of surviving spouse and any minor children until settlement of estate, which allowance may take priority over debts of estate. (14 VSA 316).

Half Blood.

Kindred of half blood inherit same share they would inherit if they were of whole blood. (14 VSA 331).

Posthumous children: individual in gestation at particular time is treated as living at that time if individual lives 120 hours or more after birth. (14 VSA 303).

Illegitimates: individual is child of his or her parents regardless of their marital status. (14 VSA 315).

Adopted Children.

See category 14 Family, topic 14.01 Adoption.

Advancements.

Real or personal property given by the intestate in his lifetime to a child or other lineal descendant must be reckoned toward the share of such heir, and for that purpose must be considered a part of the estate of the intestate. (14 VSA 1723). For detailed provisions concerning establishment of advancement see 14 VSA 1723, 1724, 1726, 1728.

Election.

Surviving spouse may waive provisions of decedent's will and, in lieu thereof, elect to take one-half of balance of estate after payment of claims and expenses. (14 VSA 319).

Escheat.

If decedent left no kindred or surviving spouse, entire estate escheats to city or town where deceased resided upon his death. (14 VSA 681-83). Interested parties have 17 years to appear and make claims after decree of escheat is rendered. (14 VSA 684).

See also topic 13.09 Executors and Administrators.

13.08 ELECTION:

See topic 13.16 Wills.

13.08A ESTATES: (in property)

See category 21 Property, topic 21.16 Real Property.

13.09 [RESERVED]

13.10 EXECUTORS AND ADMINISTRATORS:

The state is divided into probate districts with a probate court in each, which has jurisdiction of matters relating to estates of decedents living within that district at time of decease and estates of nonresidents of state which are located in district. (4 VSA 311[a]). Portions of Uniform Probate Code have been adopted. (14 VSA 2603, 14 VSA 2656).

Preferences in Right to Administer.

In case of intestacy, administration is granted in the following order: (1) To the surviving spouse or next of kin, if suitable, or some one designated by them; (2) if these are unsuitable or fail to apply for administration within 30 days after decedent's death, to a creditor; (3) if no creditor applies or no creditor is deemed competent by the court, to some other suitable person named by the court. (14 VSA 903).

In case of partial intestacy, the executor administers the entire estate. (14 VSA 930).

Eligibility and Competency.

Nonresidents may be appointed as personal representatives at the discretion of the court provided, however, on application of spouse, children or parents, court must appoint a nonresident administrator, but they are required to file forthwith a written designation of a resident of the probate district in which they are appointed, as agent for service of process. (14 VSA 904).

A married woman may act as executrix or administratrix. (14 VSA 912).

Qualification.

Before letters of administration are issued person to be appointed shall give bond in amount court directs. (14 VSA 906).

Exemption from Bond.

If it is requested in will that no bond shall be required then executor can be exempt. (14 VSA 907).

Removal.

Executor or administrator may be removed by the probate court when it appears that person has failed to comply with procedures required by law or that estate is not being promptly and properly administered, or that fiduciary is incapable or unsuitable to discharge his duties. (14 VSA 917).

Special kinds of administration may be appointed to preserve estate when there is delay in appointing executor or administrator. Commissioners may be appointed to pass on claims during his administration. (14 VSA 962-63).

Inventory and Appraisal.

Executor or administrator within 30 days after appointment shall prepare inventory of decedent's property at time of death giving fair market value of each item on date of death, stating whether or not encumbrances or liens exist. Original inventory to be filed with probate court and copies mailed to beneficiaries. Probate court may extend filing time but not beyond 90 days. (14 VSA 1051). Supplementary inventory or appraisal for purpose of adding to or correcting original inventory may be filed. (14 VSA 1052). Appraisers may be employed to assist in determining fair market value. (14 VSA 1052). Name and address of appraiser used shall be indicated on inventory.

Notice to Creditors.

Unless waiver is obtained, must be published once a week for two successive weeks, seven days apart, in designated newspaper. First publication must be within 30 days of issuance of letters testamentary or letters of administration. Copy must be filed with probate court within ten days of last publication. (VRPP 64[a]).

Presentation of claims which arose before death of decedent except claims to real estate and personal injury are barred if not presented within four months of first publication of notice to creditors; if no notice published, then within three years. (14 VSA 1203). Where no administration taken out, all claims not presented within three years barred. (14 VSA 931).

Proof of Claims.

No particular form is required; claimants submit itemized bill or letter stating claim to executor or administrator and probate court. If claim is disallowed, claimant must file petition for allowance or commence proceeding against executor or administrator within 60 days. Failure on part of executor or administrator to give notice of action on claim to claimant will be interpreted as allowance. (14 VSA 1204, VRPP 64).

Priorities.

Where estate insufficient to pay all claims in full, payment made in following order: (1) Expenses of administration; (2) expenses of funeral, burial, headstone and perpetual care, not to exceed $3,800, exclusive of governmental payments and reasonable expenses of last illness; (3) employee wages earned within three months prior to death, not to exceed $300 to each claimant; (4) all other claims (no preference given for claims in same class). (14 VSA 1205).

Sales may be granted by probate court when beneficial to interested persons upon petition of executor or administrator after notice and hearing. (VRPP 5.1[b][1]). License may include surviving spouse's share when consent in writing given. (14 VSA 1653).

Actions by Representative.

Representative of decedent can sue on all claims decedent had or has. (14 VSA 1401, 14 VSA 1402).

Actions Against Representative.

Actions pending at time of his death, may be continued against his executor or administrator if cause of action survives. (14 VSA 1401). New causes of action, which survive, may be commenced against executor or administrator within two years of issuance of letters testamentary or of administration and not after. (12 VSA 557).

If cause of action survives (see category 5 Civil Actions and Procedure, topic 5.02 Actions), executor or administrator may begin suit thereon or continue suit pending by decedent at time of his death. (14 VSA 1401-02).

Allowances.

Surviving spouse and children are entitled to reasonable support pending closing of estate, not to exceed eight months maintenance where estate insolvent. (14 VSA 404).

Final Accounting and Settlement.

Personal representatives must render accounts of their administration to probate court within one year after appointment and annually thereafter and at such other times as court directs. (14 VSA 1055).

Distribution is decreed after payment of debts, funeral charges, expenses of administration and other specified items and distributees may recover their share. (14 VSA 1721).

Partial distribution may be authorized by probate court if court is satisfied that sufficient assets are being reserved to satisfy expenses and claims. (14 VSA 1743).

Distribution if Abroad.

There is no special procedure governing distribution to nonfeasible or impermissible beneficiaries.

Liabilities.

Executors or administrators are liable for failure to account, negligence or willful wrong. (14 VSA 1056, 14 VSA 1063). If removed by probate court for neglect or disobeying orders, executors and administrators may be ordered to pay to other parties reasonable expenses incurred because of act or omission. (14 VSA 917).

Compensation of representatives of executors or administrators is $4 per day while attending to duties of office, and probate court may allow further compensation in cases of unusual difficulty or responsibility. (32 VSA 1143).

Small Estates.

Inventory and bond conditioned upon payment of funeral expenses may be filed with petition. (14 VSA 1901). After filing of said petition, if no real estate and personal estate value less than $10,000, probate court may grant administration and issue letters without further notice. (14 VSA 1902). Administrator or executor may be discharged upon payment of funeral expenses and balance to widow, without further accounting and without notice. (14 VSA 1903). Procedure for small estates governed by VRPP 80.3.

Uniform Fiduciaries Act has not been adopted.

Uniform Principal and Income Act adopted. (14 VSA 3301-3313).

Uniform Prudent Investor Act was adopted (9 VSA 4651 et seq.) then repealed (Act 20, § 29 [2009], effective July 1, 2009). Act still applies to trustees. (14A VSA 901 — 908).

Uniform Simplification of Fiduciary Security Transfers Act has not been adopted.

Uniform Anatomical Gift Act adopted. (18 VSA 5238-5247 and 9A VSA 2-208).

Uniform Estate Tax Apportionment Act adopted. (32 VSA 7301-7309).

Uniform Trust Code adopted. (14A VSA 101 — 1204).

13.11 FIDUCIARIES:

See topics 13.09 Executors and Administrators, and Trusts; also category 14 Family, topic 14.07 Guardian and Ward.

13.12 INTESTACY:

See topic 13.07 Descent and Distribution.

13.13 LIVING WILLS:

See topic 13.16 Wills.

13.14 PROOF OF CLAIMS:

See topic 13.09 Executors and Administrators; category 5 Civil Actions and Procedure, topic 5.18 Pleading.

13.15 TRUSTS:

Uniform Trust Code adopted, with modifications, as Vermont Trust Code. (14A VSA 101 — 1204). Common law rules applicable to trusts supplement statute. Uniform Prudent Investor Act repealed but remains in effect and sets standard of care, portfolio strategy, and risk objective to better protect beneficiaries and trust assets. (14A VSA 901 — 908).

Kinds of Trusts.

See Vermont Trust Code. (14A VSA 101 — 1204).

Creation.

Trust concerning lands, except one arising or resulting by implication of law, must be evidenced by instrument in writing signed by party creating or declaring same, or by his attorney. (27 VSA 303). Trust may be created by transfer of property to another person as trustee or to trust in trust's name during settlor's lifetime or by will or other disposition taking effect upon settlor's death; by declaration of property owner that owner holds identifiable property as trustee; by exercise of power of appointment in favor of trustee; pursuant to statute, judgment or decree that requires property to be administered in manner of express trust; or by agent or attorney-in-fact under power of attorney. (14A VSA 401).

Trust is created only if settler has capacity to create trust; settler indicates intention to create trust; trust has definite beneficiary or is charitable trust, trust for care of animal, trust for noncharitable purpose; trustee has duties to perform; and same person is not sole trustee and current and sole beneficiary. (14A VSA 402).

Qualification.

Trustee must give bond only if probate court finds bond is required by terms of trust and probate court has not dispensed with requirement, or probate court finds by clear and convincing evidence that bond is needed to protect interests of beneficiaries. (14A VSA 702).

Removal of Trustee.

Settlor, cotrustee or beneficiary may ask probate court to remove or replace trustee. Probate court may remove trustee if trustee is obviously unsuitable; trustee has committed serious breach of trust; lack of cooperation among cotrustees substantially impairs administration of trust; because of unfitness, unwillingness or persistent failure of trustee to administer trust effectively, court determines that removal of trustee best serves interests of beneficiaries; there has been substantial change of circumstances or removal is requested by all qualified beneficiaries, probate court finds that removal of trustee best serves interests of all beneficiaries and not inconsistent with material purpose of trust, and suitable cotrustee or successor trustee is available; or for any cause, if interests of trust estate require it. Probate court may remove existing trustee and appoint replacement trustee if court finds that change in trustee would be in keeping with settlor's intent. (14A VSA 706).

General Powers and Duties of Trustees.

Trustee must administer trust in good faith, in accordance with trust's terms and purposes and beneficiaries' interests, and in accordance with Vermont Trust Code. (14A VSA 801). Trustee has duties of loyalty (14A VSA 802), impartiality (14A VSA 803), and prudent administration (14A VSA 804). Trustee, without authorization by probate court, may exercise powers conferred by terms of trust and, except as limited by terms of trust, powers over trust property which unmarried competent owner has over individually owned property, other powers appropriate to achieve proper investment, management and distribution or trust property, and any other powers conferred by Vermont Trust Code. (14A VSA 815).

Sales.

License from probate court for sale of real estate by trustee no longer required by statute. Trustee may have power to sell real estate as provided by terms of trust and Vermont Trust Code. (14A VSA 815, 816).

Investments.

See Uniform Prudent Investor Act, as incorporated in Vermont Trust Code, for details on trust management relating to investments. (14A VSA 901 — 908).

Securities in Name of Nominee.

Certain fiduciaries allowed to hold securities in name of nominee. (8 VSA 14408 and 14409).

Bequests and Devises to Inter Vivos Trusts.

See topic 13.16 Wills.

Accounting.

Before July 1, 2009, trustees were required annually to render to the probate court a full account of the management of trust estates showing their receipts, disbursements and charges therein and the condition of such estates. (14 VSA 2324). Effective July 1, 2009, trustees of testamentary trusts had to account in same manner and in same frequency as required by probate court prior to that date unless otherwise ordered by probate court. (14A VSA 1204).

Trust is not subject to continuing judicial supervision unless ordered by probate court. (14A VSA 201). Trustee must send to distributees or permissible distributees of trust income or principal, and to other beneficiaries who request it, at least annually and at termination of trust, report of trust property, liabilities, receipts and disbursements. (14A VSA 813). Interested persons may invoke probate court's jurisdiction (14A VSA 201), which may, among other actions, order trustee to account. (14A VSA 1001).

Compensation of trustees. If terms of trust do not specify trustee's compensation, trustee is entitled to compensation that is reasonable under circumstances. If terms of trust do specify trustee's compensation, trustee is entitled to be compensated as specified, but probate court may allow more or less compensation if duties of trustee are substantially different from those contemplated when trust was created or compensation specified by terms of trust would be unreasonably low or high. Factors probate court must consider in deciding on trustee's compensation are specified by statute. (14A VSA 708).

Uniform Common Trust Fund Act not adopted.

Uniform Principal and Income Act has been adopted (14 VSA 3301-3313).

Gifts to Minors.

See category 14 Family, topic 14.10 Infants.

Uniform Fiduciaries Act has not been adopted.

Uniform Simplification of Fiduciary Security Transfers Act has not been adopted.

Perpetuities.

See category 21 Property, topic 21.13 Perpetuities.

Pour Over Trusts.

See topic 13.16 Wills, subhead Bequests and Devises to Inter Vivos Trusts.

13.16 WILLS:

Every person of full age and sound mind may devise, bequeath and dispose of his real and personal estate by his last will and testament. (14 VSA 1).

Testamentary Disposition.

When will has been allowed, probate court issues letters of testamentary. Person who accepts trust gives bond as required. (14 VSA 902).

Execution.

All wills, except nuncupative wills, must be in writing, signed by the testator or by the testator's name written by some other person in his presence by his express direction, and be attested and subscribed by two or more credible witnesses in the presence and at the request of the testator, and in the presence of each other. (14 VSA 5). Effective July 1, 2006, number of witnesses changed from three to two. Effective Apr. 21, 2005, military will, providing that it is prepared pursuant to 10 USC § 1044d, legally executed and shall be of same force and effect as if executed in compliance with Vermont law. (14 VSA 7).

Attestation Clause.

Usual attestation clause is as follows:

Form

"Signed, sealed, published and declared by the said. . . . . . as his last will and testament in the presence of us who have hereunto subscribed our names as witnesses thereto at the request of and in the presence of said testator, and in the presence of each other." Add place and date and signatures of three witnesses.

Holographic wills are not recognized unless statutory formalities are satisfied. (14 VSA 5).

Nuncupative Wills.

A nuncupative will shall not pass personal estate in excess of $200, nor shall such will be proved and allowed unless a memorandum thereof is made in writing, by a person present at the time of the making of said will, within six days from the making of the will, nor unless it is presented for probate within six months from the death of the testator but such provision shall not prevent a soldier in actual service or a mariner or seaman at sea from disposing of his wages or other personal estate as he might otherwise have done at common law. (14 VSA 6-7).

Revocation.

A will may be revoked only by burning, tearing, canceling or obliterating with the intention to revoke it, by subsequent will or codicil or by implication of law. (14 VSA 11). A will is not revoked by subsequent marriage or birth of a child. (45 Vt. 145).

Revival.

Former will may revive upon revocation of a later will and republication of former will is not necessary. (72 Vt. 316, 47 A. 1082).

Testamentary gifts to subscribing witnesses, other than heir at law, or his spouse, is void unless there are three other competent witnesses. (14 VSA 10).

Bequests and Devises to Inter Vivos Trusts.

Pour over trusts are valid. Under certain circumstances trust instrument may be amended subsequent to date of testator’s will. (14 VSA 2329).

Testamentary Guardians.

See category 14 Family, topic 14.07 Guardian and Ward.

Probate.

Resident’s will is probated in district where he lived at time of his death; nonresident’s in any district where he left estate. (4 VSA 312-313). After will delivered to probate court having jurisdiction, accompanied by petition for probate, probate court sets time and place for hearing on will and notice to interested persons is given by proponent by personal service or by certified mail, and by publication to all unknown persons at least 14 days before hearing. (VRPP 4). Executor, after delivery of will to probate court but pending probate thereof, shall have power to assume custody of estate unless or until special administrator is appointed and qualifies. (14 VSA 107). Appeal from decisions of probate court are usually to superior court for trial de novo, and must be in writing and within 20 days (12 VSA 2555), but if only questions of law are involved appeal may be to Supreme Court (12 VSA 2551; 158 Vt. 557, 613 A.2d 703).

If there is no appearance for contest, probate may be granted by court upon testimony of one subscribing witness and, if probate is assented to in writing by surviving spouse and heirs at law, will may be allowed without testimony. (14 VSA 108).

Self-proved Wills.

No provision.

Living Wills.

Any person of sound mind who is 18 years of age or older may execute document directing that no extraordinary measures be used to prolong his life when he is in terminal state. (18 VSA 5251). See category 14 Family, topic 14.07 Guardian and Ward, subhead Health Care.

Contest may be had in probate court in first instance. (14 VSA 107).

Legacies.

Time for payment is within discretion of probate court.

Probate judge must, within 30 days of probate of will, mail notice to each beneficiary. (14 VSA 111).

Unclaimed Legacies.

See category 21 Property, topic 21.01 Absentees.

Lapse.

A devise or legacy to child or other kindred of testator does not lapse where devisee or legatee dies before testator but leaves issue who survive the testator and where the will requires no different disposition. (14 VSA 558). A devise or legacy to any other person lapses in case of death of the devisee or legatee before the testator, unless the will provides otherwise. (69 Vt. 388, 38 Atl. 83).

Children.

Child of testator born after execution of will (including posthumous child) and not provided for therein takes the share which he would take if testator had died intestate, unless it is apparent from the will that testator intended not to provide for him. (14 VSA 555). Where testator omits to provide for children or issue of deceased children and it appears that such omission was due to mistake or accident, such children or issue take as though testator had died intestate. (14 VSA 556).

Election.

Where testamentary provision is made for surviving spouse in lieu of dower or curtesy, the surviving spouse may elect to relinquish such provision and take dower or curtesy. Such election must be made within eight months after probate or grant of administration, by notice in writing filed with probate court. (14 VSA 474-75, 551). See also topic 13.07 Descent and Distribution, subhead Surviving Spouse.

Foreign Executed Wills.

Wills made out of state in mode prescribed by law either at place where executed or testator’s domicile shall be deemed to be legally executed if in writing and subscribed by testator. (14 VSA 112).

Foreign Probated Wills.

Wills proved and allowed out of state according to laws of such state or country may be allowed, filed and recorded in probate court of district in which testator has real or personal estate on which such will may operate. Such will may be proved by duly authenticated copy and certificate showing allowance in such state or country. Local administrator is appointed in such case. (14 VSA 113-114).

Simultaneous Death.

See topic 13.05 Death.

Testamentary Trusts.

See topic 13.15 Trusts.

Uniform Anatomical Gift Act adopted. (18 VSA 5238 et seq.).

14 FAMILY

14.01 ADOPTION:

Any person may adopt or be adopted by another person to create parent and child relationship. (15A VSA 1-102).

Consent Required.

If direct placement of minor for adoption by placement authorized parent or guardian, petition to adopt may be granted only if consent to adoption has been executed by (1) consent of woman who gave birth to minor, (2) biological father, (3) man married to woman if minor was born during or within 300 days after marriage was terminated, (4) man who acknowledged paternity or has established custodial, personal, or financial relationship with child, (5) minor's guardian, agency, or current adoptive parents required, etc. (15A VSA 2-401). Written consent of child is also necessary if 14 years of age or older. (15A VSA 2-401[c]).

Jurisdiction of adoption proceedings is in probate court in all cases. (15A VSA 3-101). Family court has jurisdiction over parental rights and responsibilities, parent-child contact, child support. (15A VSA 1-112).

Venue is in district in which adopter resides or has legal residence at or adoptee resides, or where office of agency or department that placed adoptee is located. (15A VSA 3-102).

Petition.

For detailed provisions concerning contents of petition, see 15A VSA 3-304, 305.

Decree.

Decree of adoption is final order for purposes of appeal when entered.

Name for adoptee depends on circumstances of adoption such as who is adopting and age of child. (15A VSA 3-705).

Effect of Adoption.

Same rights, duties and obligations exist between parties as though adoptee were legitimate child of adopter. Adoptee has same right of inheritance and succession as legitimate child of adoptive parent unless instrument states otherwise or excludes adoptee by name or classification not based on family or parent-child relationship. (15A VSA 1-104). Adoptee loses right of inheritance through natural parents, and natural parents lose right of inheritance through adoptee. (15A VSA 1-105).

14.02 ALIMONY:

See topic 14.06 Divorce.

14.03 COMMUNITY PROPERTY:

See topic 14.06 Divorce.

14.04 DESERTION:

See topics 14.06 Divorce, 14.09 Husband and Wife.

14.05 DISSOLUTION OF MARRIAGE:

See topic 14.06 Divorce.

14.06 DIVORCE:

Uniform Marriage and Divorce Act has not been adopted.

Grounds for Absolute Divorce.

The grounds upon which absolute divorce may be decreed are as follows: (1) Adultery; (2) confinement at hard labor in the state prison for at least three years, if defendant is actually confined at the time of bringing the libel; (3) intolerable severity; (4) willful desertion or absence for seven years without being heard of; (5) on petition of either party when one spouse has sufficient pecuniary or physical ability to provide suitable maintenance for other and, without cause, persistently refuses or neglects so to do; (6) that either husband or wife is incurably insane and has been confined in an insane asylum of this or a sister state for at least five years preceding commencement of action, (7) that married person has lived apart from spouse for six consecutive months and resumption of marital relations is not reasonably probable. (15 VSA 551, 15 VSA 631).

Grounds for Legal Separation.

Legal separation forever or for limited time may be granted for any of causes for which absolute divorce may be granted. (15 VSA 555).

Residence Requirements.

Either party must have actually resided within state for six months before commencement of action and either party must have actually resided within state for one year immediately preceding final hearing. (15 VSA 592). Libellant must have actually resided within state for two years immediately preceding commencement of action for divorce on ground of insanity of spouse. (15 VSA 631).

Jurisdiction of divorce proceedings is in family court. (4 VSA 454).

Venue of divorce proceedings is in county in which either party resides. (4 VSA 458 and 15 VSA 593).

Process.

Personal service in cases not involving minor children is governed by VRCP 3, 4. Personal service in cases involving minor children is governed by VRFP 4.

Practice is by family court sitting without jury. (15 VSA 591). Testimony is taken orally or depositions may be used. (VRCP 32). Parties may testify. (12 VSA 1605).

Judgment or decree does not become absolute until three months after its date, but then becomes absolute without further proceedings. Court may fix earlier date. If party dies prior to expiration of waiting period, decree deemed absolute prior to death. (15 VSA 554[a]).

Permanent Alimony.

Court may allow alimony to either party in accordance with circumstances. (15 VSA 752). Court may modify decree on petition of either party and due notice. (15 VSA 758).

Division of Property of Spouses.

Court shall decree such disposition of property owned by parties separately, jointly or by entirety, as shall appear just and equitable, having regard to respective merits of parties, to condition in which they shall be left by such divorce, to party through whom property was acquired. (15 VSA 751).

Change of Wife's Name.

On granting divorce to a woman, the court may allow her to resume her maiden name or the name of a former husband. (15 VSA 558).

Custody of Children.

Court in divorce action makes order concerning parental rights and responsibilities relating to any minor child based on "the best interests of the child". (15 VSA 665).

Allowance for Support of Children.

State of Vermont may enforce support orders through real and personal property of responsible parents, including assignment of wages. (15 VSA 711; VRFP 4; 15 VSA 780-799). Guidelines for child support are set by secretary of Human Services and reflect percentage of combined available income which parents living in same household in Vermont ordinarily spend on their children. (15 VSA 654). Child support obligation is divided between parents in proportion to their respective available incomes. (15 VSA 656). Support orders may be modified upon showing of real, unanticipated, and substantial change of circumstances. (15 VSA 660). Such change exists if either parent's income varies by more than 10%. (15 VSA 661). Stepparents have duty to support their stepchildren in certain circumstances. (15 VSA 296).

Remarriage.

Either party may remarry upon decree absolute. (15 VSA 560).

Antenuptial Contracts.

See topic 14.09 Husband and Wife.

14.07 [RESERVED]

14.08 GUARDIAN AND WARD:

Probate court on application of minor, or person interested in welfare of minor may appoint guardian when: (1) Minor has no parent living authorized to act as guardian, or (2) parent is under guardianship or shown to be incompetent or unsuitable to have custody of person of minor, or (3) parent of minor resides outside state and has so resided for three years and has not contributed to minor's support during such time, or (4) when no parent objects and transfer of custody is in best interest of minor and is not solely for purpose of establishing residence for school purposes, or (5) when minor has parent living and such minor is owner of real or personal property. (14 VSA 2645).

Adult who desires assistance with management of his affairs may petition probate court for voluntary guardianship. (14 VSA 2671).

Guardians are appointed for persons on due notice and hearing. (14 VSA 2684).

When nonresident requiring guardian has property in Vermont, probate court may, on application, appoint guardian of property but not of person. (14 VSA 2711).

Guardianships are available for person who is unable to manage, without supervision of guardian, some or all aspects of his or her personal or financial affairs as result of: (a) Significantly subaverage intellectual functioning which exists concurrently with deficits in adaptive behavior; or (b) physical or mental condition that results in significantly impaired cognitive functioning which grossly impairs judgment, behavior, or capacity to recognize reality. (14 VSA 3060-81).

Selection of Guardian.

A minor 14 years of age or over may choose his guardian, subject to approval of probate court. (14 VSA 2650). If guardian is appointed before minor is 14 years of age, minor may choose new guardian on attaining that age. (14 VSA 2652). Proposed guardian is subject to background check, must provide court with necessary consents for background check. (14 VSA 3067[d]).

Eligibility and Competency.

Nonresident may not act as guardian except under a will or if relative of ward, in which case appointment is discretionary with court.

Probate court may remove guardian who ceases to be domiciled in Vermont. (14 VSA 2603).

Qualification.

Guardian must give bond with such sureties as the court directs. (14 VSA 2751).

Inventory.

Guardian must file inventory and give copies to all parties entitled to notice within 30 days after appointment. (14 VSA 2751, VRPP 66[a]).

Powers and Duties.

Guardian has possession and management of ward’s estate (14 VSA 2653, 2692, 2798, 2803); may sue and defend (VRCP 17). Guardians of adult in need of guardianship are to be given powers only to extent required by respondent’s actual mental and adaptive limitations. (14 VSA 3069). Guardian must report to probate court one year from time of appointment and at such other times as court directs. (14 VSA 2751). Guardian must also insure minor gets medical attention, schooling, housing, nutrition, dental services and other appropriate services. (14 VSA 3071). Person under guardianship retains same legal and civil rights guaranteed to all Vermont residents under Vermont and U.S. constitutions, laws, and regulations. (14 VSA 3068a). Guardian must always serve interest of person under guardianship and must bring any potential conflicts of interest to court’s attention. (14 VSA 3071[c]).

Investments.

Guardian can invest money with approval of court in selected accounts. (14 VSA 2653).

Securities in Name of Nominee.

See category 13 Estates and Trusts, topic 13.15 Trusts, subhead Securities in Name of Nominee.

Real estate of ward cannot be sold or mortgaged without license of probate court. (14 VSA 2881-82). License may be granted to nonresident. (14 VSA 2886).

Termination of Guardianship.

If guardian for minor neglects to render account as required by rules of probate procedure or to appear, or to perform order of decree of probate court, or absconds or becomes mentally disabled or otherwise incapable or unsuitable to discharge trust, probate court may remove or may allow guardian to resign. Marriage shall not extinguish guardian's authority. (14 VSA 3001).

Insane Persons.

Upon death of insane person, guardian makes final account to probate court. Administrator appointed by court winds up estate. If no guardian, court appoints administrator under normal probate procedure.

Foreign Guardians.

Probate Court shall not appoint guardian who is not domiciled in this state at time of appointment, except where guardian is named in will or is relative of ward and in that case same shall be discretionary with court. Probate court may remove guardian who ceases to be domiciled in this state. (14 VSA 2603).

Gifts to Minors.

See topic 14.10 Infants.

Uniform Fiduciaries Act has not been adopted.

Uniform Simplification of Fiduciary Security Transfers Act has not been adopted.

14.09 HUSBAND AND WIFE:

Disabilities of Married Women.

All disabilities removed.

Separate Property.

A married woman holds as her separate property all real property owned by her prior to marriage and in her own name (with exceptions) and all personal property, including rights of action acquired by her either before or after marriage, except gifts from husband. (15 VSA 66). Her separate property, and rents, products and profits thereof, including any rights husband may have therein, are not liable for debts of husband, excepting that annual products are liable for his debts, created for necessaries for his wife and family, or for labor or materials furnished upon, or for cultivation or improvement of, her real property. (15 VSA 68).

Contracts between parties to marriage are void at law, but enforceable in equity if fair and just. (106 Vt. 155, 170 A. 917). However, one may convey real estate directly to one's spouse. (27 VSA 349). Contract made through intervention of trustee for wife in separation agreement is enforceable at law. (109 Vt. 422, 199 A. 242).

Except as stated above, a married woman may contract and bind herself and her separate property, as though unmarried. (15 VSA 61).

Antenuptial Contracts.

Although void at law, antenuptial contracts are enforceable in equity. (95 Vt. 103, 113 A. 521). Subject to statute of frauds, but can be removed therefrom by being reduced to writing after marriage, if there is oral agreement before marriage. (94 Vt. 201, 110 A. 12). Antenuptial contracts can be found in violation of public policy and will not be enforced if one spouse is financially secure and stable and other borders on need for public assistance. (156 Vt. 353, 593

A.2d 82).

Actions.

A married woman may sue and be sued as to her contracts, whether made before or during coverture, without her husband being joined. Execution may issue on judgment against her and levy may be made on her separate property. (15 VSA 61).

Wife may sue husband for personal injuries received by her during her marriage while riding as a guest in automobile operated by husband. (131 Vt. 98, 300 A.2d 637).

Agency.

Either spouse may act as agent for the other, but the mere fact of marriage does not of itself warrant an inference of such authority. (107 Vt. 226, 179 A. 149).

Conveyance or Encumbrance of Property.

A married woman may convey or mortgage by her separate deed real estate of which she is seized in her own right to her sole and separate use, as she might do by her separate deed, if unmarried. A married woman may, by her sole deed, convey or mortgage and may manage and control any other real estate acquired by her on or after February 13, 1919, except that a homestead or other real estate of which she is seized jointly with her husband may be conveyed or mortgaged only by the joint deed of herself and husband. (15 VSA 64).

Desertion and Nonsupport.

Uniform Desertion and Non-Support Act has been adopted. Penalty not more than two years imprisonment or $300 fine or both; court may order payment of fine to needy spouse, parent or to guardian, custodian or trustee of child. (15 VSA 201-10).

Where married person deserts or fails to support spouse, spouse may petition superior court for support, custody and maintenance. (15 VSA 291).

Revised Uniform Reciprocal Enforcement of Support Act.

Vermont has adopted Uniform Interstate Family Support Act that is similar to above, which helps determine if person is true parent of child. (15B VSA 701).

Community property system does not apply.

14.10 INFANTS:

Age of majority is 18 for both sexes. (1 VSA 173). Marriage does emancipate. (117 Vt. 134; 85 A.2d 569).

Emancipation.

Minor is emancipated if (a) married, (b) on active duty with Armed Forces, or (c) ordered by Probate Court. Court may order if, among other things, minor is 16 or 17. (12 VSA 7151). If emancipated, parental tort liability terminates, contracts not voidable, prosecuted as adult, may buy and sell real estate. (12 VSA 7156).

Ratification of Contracts.

Contract of infant is voidable, subject to making restitution where possible. (108 Vt. 130, 183 A. 487). Disaffirmance after majority must be express and within reasonable time. (109 Vt. 294, 196 A. 276).

Actions.

Infant may sue by next friend. Guardian ad litem should be appointed for infant defendant. Court has power to appoint or allow person as next friend of minor, to commence, prosecute, or defend action on his behalf. (14 VSA 2657).

Parental Responsibility.

When unemancipated minor under age of 18 years willfully or maliciously causes damage to any property, public or private, or injury to person, either of his parents shall be liable to owner of such property or to person injured, in action on this statute, for damage to property, injury to person, or either, in amount not to exceed $5,000 provided such minor would be liable had such minor been adult. (15 VSA 901).

Adoption.

See topic 14.01 Adoption.

Uniform Gifts to Minors Act adopted. (14 VSA 3201 to 3209). Adult is defined as person who has attained his majority. (14 VSA 3201[1]). Gift given to minor is irrevocable and conveys vested legal right. Majority is 18 years of age.

14.11 MARRIAGE:

Couples who want to enter into civil marriage must apply for license to clerk of town where one party resides or if neither resides in state, then to any town clerk in state. (18 VSA 5131).

Consent Required.

Clerk shall not issue marriage license when either party to intended marriage has not attained majority without consent in writing of one of parents if there is one competent to act, or guardian of such minor. Before Sept. 1, 2009, clerk could not issue marriage license if either party to intended marriage was under 16 years of age unless parent or guardian consented, party was at least 14 years of age, and clerk was furnished with certificate of probate, district or superior judge, of district or county in which one of applicants resides. Effective Sept. 1, 2009, no one under age of 16 can marry under any circumstances. (18 VSA 5142).

Medical Examination.

None required.

Licenses.

A marriage license must be procured from town clerk. (18 VSA 5131).

Waiting Period.

None.

Civil marriage may be solemnized by Supreme Court Justice, Superior Court Justice, District Judge, Judge of Probate, assistant judge, Justice of Peace, officiant registered with Secretary or State, member of clergy residing in State or, when specially authorized by probate court, by clergy residing in some other state in U.S., or in Dominion of Canada. Marriage among Friends or Quakers, Christodelphian Ecclesia, and Baha’i Faith may be solemnized in manner heretofore used in such societies. (18 VSA 5144).

Marriage may not take place until person authorized to solemnize marriage has marriage license of parties. (18 VSA 5145).

Record.

See category 10 Documents and Records, topic 10.07 Vital Statistics.

Common law marriages are not recognized. (68 Vt. 1, 33 A. 829).

Proxy marriages are not provided for.

Marriages by written contract are not provided for. No right of action for breach of contract to marry. (15 VSA 1001).

Civil Unions.

From 2000 until Sept. 1, 2009, Vermont law allowed same-sex couples to enter relationship called "civil union". Civil union means two eligible persons who have established relationship pursuant to this chapter and may receive benefits and protections subject to responsibilities of spouses. (15 VSA 1201). Following criteria had to be satisfied: (1) Not to be party to another civil union or marriage; (2) be of same sex and therefore excluded from marriage laws of this state; (3) meet obligations and criteria set forth in 18 VSA 5160 et seq. (15 VSA 1202). Town clerk was in charge of verifying that applicants met criteria for civil union through affidavits in form prescribed by board or other form. (18 VSA 5162). Civil union license could be issued to person under 18; person non compos mentis; under guardianship without consent of guardian. (18 VSA 5163). Person could not enter into civil union with relative as defined under 15 VSA 1203. Effective Sept. 1, 2009, same-sex couples became eligible for civil marriage; laws authorizing new civil unions were repealed.

Rights.

Parties to civil unions have all of same benefits, protections and responsibilities under law, whether they derive from statute, administrative, or court rule, policy, common law or any other source of civil law, as are granted to spouses in marriage. Law of domestic relations applies including annulment, separation and divorce, child custody and support, property division and maintenance. List of applicable benefits under subsection (e). (15 VSA 1204).

Family court has jurisdiction over dissolutions. Dissolution follows same procedures and be subject to same substantive rights and obligations that are involved in dissolution of marriage. (15 VSA 1206).

Income taxation adjustment for civil unions listed in 32 VSA 5812 et seq. Estates of parties to civil union shall be subject to tax based on their actual federal estate tax liability and federal credit for state death taxes. (32 VSA 7401).

Prohibited Marriages.

No person shall marry his or her parent, grandparent, child, grandchild, sibling, sibling's child, or parent's sibling. (15 VSA 1a). In case relationship is founded on prohibited marriage, prohibition continues in force notwithstanding dissolution of such marriage by death or divorce, unless divorce is for cause which shows marriage originally void or unlawful. (15 VSA 3).

Marriage prohibited by law on account of consanguinity or affinity, or on account of prior undissolved marriage of either party, is void, if performed in this state. (15 VSA 511).

Annulment.

When either party was under 16 at time of marriage, if action is started before plaintiff reaches age of consent; cohabitation thereafter bars action; idiocy or lunacy; physical incapacity if action is started within two years; and consent obtained by force or fraud. (15 VSA 512, 513,

515).

Antenuptial Contracts.

See topic 14.09 Husband and Wife.

14.12 MARRIED WOMEN:

See topic 14.09 Husband and Wife.

15 HEALTH

15.0115.04 [RESERVED]

15.05 FOOD, DRUGS, DEVICES AND COSMETICS:

Manufacture, sale and delivery see 18 VSA 4052, penalties see 18 VSA 4054, hearings see 18 VSA 4053, and misbranded cosmetics see 18 VSA 4067.

15.0615.12 [RESERVED]

15.13 SMOKING REGULATIONS:

Possession of lighted tobacco products prohibited in common areas of enclosed indoor places of public access, publicly owned buildings and offices and any workplace. (18 VSA 1421, 1742). Exception for areas not commonly open to public of owner-operated businesses with no employees. (18 VSA 1743). Proprietor required to enforce prohibition. (18 VSA 1745). Person who smokes pipe, cigar or cigarette in mill, factory, barn, stable or other outbuilding belonging to or occupied by another person, or in public building in which notice containing this section, prohibiting such smoking, signed by owner, agent, occupant or custodian of same is posted conspicuously near main entrance thereof, shall be fined not more than $5. (20 VSA 2752). *Note:* Effective May 1, 2006, except for cigarette inventories existing as of that date, only reduced ignition propensity cigarettes may be sold. (20 VSA 2757).

16 INSURANCE

16.01 INSURANCE COMPANIES:

Supervision.

Commissioner of Banking, Insurance, Securities, and Health Care Administration, 89 Main St., Drawer 20, Montpelier, VT 05602 VSA 3101, has general supervision of all insurance. (8 VSA 12).

Rates.

Health insurance and worker’s compensation rates must be approved by Commissioner. (8 VSA 4062, 4687).

Annual Statements.

Must be filed with Commissioner. Filing fee $100. (8 VSA 3314). $50 filing fee for forms, rates, and contracts submitted for approval. (8 VSA 4109[a], 4201[a], 4515[a]).

Policies.

Following types of insurance are specifically regulated by statute; life (8 VSA 3301, 8 VSA 3701-3825); fire and casualty (8 VSA 3861-4002); health insurance (8 VSA 4061-4100 d); credit life, accident and health (8 VSA 4103-15); liability (8 VSA 4201-4256); workers' compensation (8 VSA 4361-4374).

Discrimination and Rebates.

Life, fire and casualty companies must not discriminate in favor of individuals in amount of premiums, rates, dividends or in any of terms and conditions of contract, nor may they pay rebates. (8 VSA 3861, 4083, 4085, 4724[7]). No discrimination allowed based on "sexual orientation". (8 VSA 4724[7][B]). No discrimination between married couples and parties to civil unions. (8 VSA 4724[E]).

Agents and Brokers.

Must be licensed by Commissioner. Agents' applications must be accompanied by certificate of authorization from insurer and $30 fee. For licensing requirements and fees see 8 VSA 4800 et seq.

See also subhead Process Agent, infra.

Process Agent.

Foreign insurance companies cannot do business in state until Secretary of State has been designated process agent. (11 VSA 692). 11 VSA 692 does not prevent foreign/alien insurer from transacting more than one kind of insurance business, provided corporation charter authorizes such transactions and capital is sufficient for each kind of business. Also, unauthorized foreign insurer must file bond or other security before filing any pleading in any suit. (8 VSA 3387).

Foreign Insurance Companies.

Foreign insurance company may not transact business in this state until it first obtains license from Insurance Commissioner. (8 VSA 3361). Such license must be renewed annually on Apr. 1. Application fee $200; license fee and renewal $300. (8 VSA 3361).

Retaliatory Laws.

Where another state or country requires company of this state to pay taxes, fines, etc., which exceed those imposed by this state on foreign companies, then foreign companies organized under laws of such state or country and doing business in this state are subject to equal taxes, fines, etc. (8 VSA 3367).

Premium Tax.

Foreign companies must pay annual tax to Commissioner at the rate of 2% on gross premium deposits on risks located in this state. (8 VSA 3866).

Uniform Insurers Liquidation Act.

Not adopted.

No Fault Insurance.

See category 22 Taxation, topic Motor Vehicle Taxes.

Plain Language.

See category 3 Business Regulation and Commerce.

16.02 SURETY AND GUARANTY COMPANIES:

Any entity licensed or authorized to transact fidelity insurance or corporate suretyship business in this state may make bonds or contracts of insurance to guarantee fidelity of persons holding positions of trust in private or public capacity. (8 VSA 4144a).

17 INTELLECTUAL PROPERTY

17.01 TRADEMARKS AND TRADENAMES:

Term “trademark” as used herein includes any word, name, symbol or device or any combination thereof adopted and used (1) by manufacturer or merchant to identify his goods and distinguish them from those manufactured or sold by others, or (2) by another person on goods produced by his labor. (9 VSA 2521).

What May Be Used.

Secretary of State shall not register trademark that is immoral, deceptive, scandalous, or which may disparage or falsely suggest connection with persons, dead or alive, institutions, beliefs, or national symbols, or bring them into contempt. Any symbols of U.S., states themselves, or foreign governments such as flags and the like will also be denied registration. (9 VSA 2528).

Registration.

Person or persons registering such mark shall pay $10 to Secretary of State for filing of such statement. (9 VSA 2523). Registrations recorded under provisions of this subchapter shall be effective for ten years and shall be renewable for like periods upon application to Secretary of State and payment of $10 fee. (9 VSA 2524).

Assignment.

Written assignments shall be recorded by secretary of state upon payment of fee of $10. When such assignment is recorded, new certificate of registration shall be issued in name of assignee. (9 VSA 2525).

Infringement.

If person knowingly and willfully counterfeits, imitates, possesses, or sells items with false trademark she faces up to $500 fine and one year in prison. (9 VSA 2530, 31).

Tradenames.

Person doing business in this state under any name other than his or her own, and every co-partnership or association of individuals (except corporations and limited liability companies) shall record with secretary of state return setting forth name under which such business is carried on, name of town wherein such place of business is located, brief description of kind of business. (11 VSA 1621).

Fee for filing return is $20 and must be paid to secretary of state. Failure to file results in $10 forfeiture (11 VSA 1629) and are without standing in court to enforce obligations unless before filing of complaint have filed returns and paid registration fee (11 VSA 1634).

17.02 TRADE SECRETS:

Uniform Trade Secrets Act adopted. (9 VSA 4601 et seq.). Differences include no cap on punitive damages (9 VSA 4603[b]), no provision for attorney’s fees (see § 4 model act), action for misappropriation shall be commenced within three years after cause of action accrues. Accrual as of date of misappropriation discovered or reasonably should have been (12 VSA 523), and no severability provision (see § 10 model act).

18 LEGAL PROFESSION

18.01 ATTORNEYS AND COUNSELORS:

State Bar is not integrated.

Justices of The Supreme Court make and publish rules regulating admission of attorneys to practice of law before several courts. (4 VSA 901).

Jurisdiction over Admissions.

Supreme Court makes and publishes rules concerning admission of attorney to practice law. (4 VSA 901).

Eligibility.

Applicant for admission must be citizen of U.S. or alien lawfully present in U.S., at least 18 years of age and of good moral character. (Rules of Admission to Bar of Vermont Supreme Court, § 6[f]). Applicant who is graduate of approved law school shall also have pursued study of law within this state in office of judge or practicing attorney for not less than three months. (Rules of Admission to Bar of Vermont Supreme Court, § 6[i]).

Registration as Law Student.

Person who commences study in office of Judge or attorney must file notice within 30 days; certificate must also be filed by judge or attorney. Filings must be made with Office of Court Administrator. Termination notice also required to obtain credit toward clerkship requirement. (Administrative Rules, Licensing of Attorney).

Educational Requirements.

Every candidate must have successfully completed three quarters of work accepted for bachelor’s degree at college approved by court before commencing study of law. Applicants may qualify for admission by examination by graduation from approved law school or by study under supervision of attorney in practice in Vermont who has been admitted to practice not less than three years prior to commencement of study. Study at approved law school without graduation or study at unapproved law school may be treated as equivalent of study under supervision of Vermont attorney provided that last two years of study are accomplished under supervision of Vermont attorney. (Rules of Admission to Bar of Vermont Supreme Court, § 6[f]).

Petition for Admission.

Applicant must file with Clerk of The Supreme Court on or before May 1 for summer exam; on or before Dec. 1 for winter exam, verified petition in duplicate. Examination fee is $240 and must accompany petition. (Rules of Admission to Bar of Vermont Supreme Court, § 9).

Examination is multi-state and state essay and is conducted by Board of Bar Examiners. Examination usually takes place in Montpelier; summer examination is scheduled on last Wed. and Thurs. in July and winter examination will take place on last Wed. and Thurs. of Feb. Application deadline for summer examination is May 1. Application deadline for winter examination is Dec. 1.

State subjects which may be tested include 21 areas of State law. Multi-state score of

135 or above may be transferred from another jurisdiction.

Clerkship.

Graduate of approved law school must complete three months of clerkship by pursuing study of law within state in office of judge or practicing attorney. (Rules of Admission to Bar of Vermont Supreme Court, § 6[i]). Applicant who has not graduated from approved law school must complete four years of study under supervision of attorney in practice in state who has been admitted not less than three years before commencement of study. (Rules of Admission to Bar of Vermont Supreme Court, § 6[g]).

Admission without Examination.

Each applicant who has been admitted to practice of law in another jurisdiction of U.S. may be admitted upon motion and without examination in this State provided that at time of application applicant has been engaged in practice of law for five of preceding ten years. Such person must have completed three months study in office and under supervision of attorney practicing in state. (Rules of Admission to Bar of Vermont Supreme Court, § 7[a], [d]). Fee for admission on motion without examination is $600. (Rules of Admission to Bar of Vermont Supreme Court, § 9[b]). Special rules for attorneys admitted in New Hampshire. (Rules of Admission to Bar of Vermont Supreme Court, § 7[e]).

Admission Pro Hac Vice.

Member of bar of another state or District of Columbia who wishes to practice in Vermont court for particular case must file with Vermont Supreme Court Office of Attorney Licensing pro hac vice licensing statement accompanied by certificate of good standing from state in which applicant is admitted, with $200 fee. (Vermont Supreme Court Administrative Order 41, Licensing of Attorneys, § 13). Then, on motion by member of Vermont Bar who is actively associated with him or her in that action, particular court in which case is pending may grant permission to practice in that case. (VRCP 79.1[e]; VRCrP 44.2[b]; VRFP 15[e]; VRAP 45.1[e]).

Licenses.

Attorney must file licensing statement and fee of $400 payable before July 1 of every other year. (Vermont Supreme Court Administrative Order 41, Licensing of Attorneys, § 1).

Compensation.

Contingent fee must be in writing and state method of calculation for fee. (Vt. Prof. Cond. Rule 1.5). Rule varies from ABA Model Rule.

Lien.

Attorney has general lien upon all money and papers of his client in his hands not only for services and expenses incurred in particular suit, but for any balance due him. (66 Vt. 510, 29 A. 993). See category 20 Mortgages, topic 20.04 Mortgages of Real Property.

Disbarment or Suspension.

Professional Responsibility Board created to administer professional responsibility program under auspices of Vermont Supreme Court, including discipline of members. (Permanent Rules Governing Establishment And Operation Of The Professional Responsibility Program, A.O. 9).

Unauthorized Practice.

May be restrained by court injunction, (109 Vt. 83, 191 A. 918), or punished by contempt. (Vermont Supreme Court Administrative Order 41, Licensing of Attorneys, § 1). Eligible intern may appear as counsel, to prepare and sign documents in connection with pending matter with written consent of client, supervising attorney, and court's permission. (Rules of Admission to Bar of Vermont Supreme Court, § 13).

Mandatory Continuing Legal Education.

Supreme Court rules require minimum of 20 hours of accredited continuing legal education every two years. At least two of the 20 hours must be in Legal Ethics. (Rules for Mandatory Continuing Legal Education, § 3).

Professional Association (or Corporation).

Incorporation of professional persons authorized. (11 VSA 801-813). Professional corporations formed after July 1, 2002 are governed by Professional Corporation Act. (11 VSA 815-881).

19 MINERAL, WATER AND FISHING RIGHTS

19.01 MINES AND MINERALS:

All minerals found on public lands or beneath waters owned by the state belong to the state. Such minerals may be mined or quarried by any citizen of the United States after a bond is filed with the Secretary of State conditioned for the payment of 2% of the market value of such minerals to the state. (29 VSA 301-02).

Operation of Mines.

Person proposing to work mine or quarry upon such lands or beneath such waters, before commencing, shall file with commissioner of building and general services bond.

Oil and Gas.

State land managers may execute oil and gas leases and other related contracts for lands under their jurisdiction. Terms and conditions must be most beneficial to state. No person shall drill well for oil or gas exploration without permit issued by board.

Taxes.

Interest of grantee in severance from surface ownership in mines, quarries, or right of mining and quarrying, shall be set in list as real estate, but this section shall not apply to leases.

20 MORTGAGES

20.01 CHATTEL MORTGAGES:

Uniform Commercial Code has been adopted. See category 3 Business Regulation and Commerce, topic 3.09 Commercial Code. Uniform Commercial Code applies. (9A VSA 9-101 to 9A VSA 9-507).

Filing.

Machinery attached to or used in shop, mill, quarry, mine, printing office or factory may be mortgaged by deed executed, acknowledged and recorded as deeds of real estate. (27 VSA 441). Within 15 days after chattel mortgage, sufficient memorandum of conditional vendor's lien or memorandum of discharge of such mortgage or lien has been delivered to town clerk for recording, accompanied by requisite recording fee and sum to cover return postage, such clerk shall record such mortgage, lien or discharge and return original to person entitled thereto. (24 VSA 1156).

Forms.

National recognized forms accepted.

20.02 COLLATERAL SECURITY:

See category 8 Debtor and Creditor, topic 8.15 Pledges.

20.03 MORTGAGES OF PERSONAL PROPERTY:

See topic 20.01 Chattel Mortgages.

20.04 MORTGAGES OF REAL PROPERTY:

Mortgages of real estate must be executed like other deeds, and are in form of a warranty deed with a defeasance clause as a condition subsequent. (27 VSA 341). Title theory prevails.

Execution.

Mortgage must be signed by grantor and acknowledged by grantor before town clerk, notary public, master, county clerk, or judge or register of probate. (27 VSA 341).

Recording.

Mortgages must be recorded in office of clerk of town in which land lies. (27 VSA 341).

Recording Fees.

Recording fee is $10 per page. (32 VSA 1671). See also category 10 Documents and Records, topic 10.04 Records.

Taxes.

None.

Trust deeds are frequently used instead of mortgages in large corporate transactions.

Future advances may be provided for.

Assignment of mortgage should be executed like a deed and recorded in clerk’s office where the mortgage is recorded. (24 VSA 1158). Mortgages may be assigned by delivery of the notes secured, but such an assignment is not good against subsequent purchasers and mortgagees without written notice. (27 VSA 342).

Satisfaction.

Mortgages may be discharged by entry on margin of record, signed by mortgagee or his representative, acting under duly executed and recorded power of attorney, such signature to be witnessed by town clerk or assistant. (27 VSA 461). Mortgages may also be discharged by mortgagee, or his representative, acting under recorded power of attorney, acknowledging payment thereof by entry on mortgage deed, signed in presence of one or more subscribing witnesses, which entry shall be recorded. (27 VSA 462). Discharge by written instrument separate from mortgage must be executed like deed. (27 VSA 463).

Discharge.

Mortgages may be discharged by entry on margin of record signed by mortgagee or attorney acting under power of attorney. (27 VSA 461).

Mortgage may be discharged by acknowledgment of satisfaction separate from mortgage, which must be executed like deed and be substantially in following form:

I hereby certify that the following described mortgage is paid in full and satisfied, viz: _____________ mortgagor to ________________ mortgagee, dated _____________ 20____, and recorded in book __________, page _____, of the land records of the town of _______________________.

(27 VSA 463).

Mortgagee who fails to execute discharge within five days after request accompanied by tender of reasonable charges is liable for damages occasioned thereby. (27 VSA 464).

Foreclosure.

Mortgages foreclosed in superior court. Ejectment abolished. Action commenced by summons and complaint setting forth name, date, debt, description and prayer for foreclosure. Complaint must also explain that defendant must enter appearance in order to receive notice of foreclosure judgment which sets forth amount required to redeem and period of time allowed to deposit this amount. Motion for summary judgment may also be included. (12 VSA 4523, VRCP 80.1).

When foreclosure action relates to owner occupied one-to-four-family residential property, mortgage holder must file notice of foreclosure with commissioner of banking, insurance, securities and health care administration and certify to court that this notice has been sent to commissioner. (12 VSA 4532a).

Supplemental bill is allowed to join a new party in the suit even after some progress with the foreclosure and without further notice. (12 VSA 4524).

Copy of complaint filed in office of each town where premises located. (12 VSA 4523).

Exception to strict foreclosure pursuant to federal law provided for period of redemption and sale of mortgaged premises. (12 VSA 4531[b]).

Notice Form:

PLEASE TAKE NOTICE that you have defaulted under Loan No.   by [mortgage condition breached] required by your Promissory Note dated   , 20 . This default also constitutes a breach of the Mortgage, dated   , 20 , recorded in Volume   at Page   of the Land Records, which secures the Loan. As a result of your default, we have accelerated the maturity of all indebtedness due on the Loan and secured by the Mortgage, totaling $ as of today's date. In order to cure this default, you must pay to us on or before   [a date not less than thirty (30) days after the date of this Notice] the sum of $, plus interest at the rate of $ per day to the date of payment. If you do not cure this default by making the payments required, it is our intention to foreclose by exercising the power of sale contained in the above Mortgage. You will be sent notice of the foreclosure sale at least sixty (60) days prior to the sale, and you will be entitled to redeem your interest in the mortgaged property at any time prior to the sale by paying the full amount due under the Mortgage, including the costs and expenses of the sale. If you do not cure the default or redeem your interest, your ownership of the mortgaged property will be terminated.

Sales.

Strict foreclosure allowed only when property's value does not exceed mortgage debt found to be due, plus assessed but unpaid property taxes. (12 VSA 4528[b]). Court may order sale where requested or where power contained in mortgage, except for principal residence within seven months of complaint where no waste. (12 VSA 4531a). Court may order judicial foreclosure sale even if mortgage does not contain sale provision. (12 VSA 4531[a]).

Redemption.

Period of redemption is six months for mortgages from date of decree, but in fixing redemption period court must consider whether property's value exceeds mortgage debt, debt to junior lienholders, assessed but unpaid property taxes, property's condition, and other equities. (12 VSA 4528[a]). Motion to shorten may be included with complaint. (VRCP 80.1). Upon failure to redeem, property vests absolutely in mortgagee. (VRCP 80.1).

Forms.

The usual form of a mortgage is a warranty deed (see topic Deeds for form), with the following defeasance clause inserted before the attestation clause:

Provided nevertheless, that if. . . . . . the said. . . . . ., heirs, executors or administrators shall well and truly pay, or cause to be paid to the said. . . . . . heirs, executors, administrators or assigns, the sum of. . . . . . dollars, specified in. . . . . . promissory note signed by. . . . . . dated. . . . . ., and payable. . . . . ., and shall at all times keep the buildings on said lands satisfactorily insured against loss by fire for the benefit of the mortgagee herein, and also pay when due all taxes and assessments upon said premises, then this deed to be null and void, otherwise to remain in full force and virtue. And in case of failure to keep said premises so insured or to pay such taxes or assessments when due, the legal holder of this mortgage shall have the right to cause such buildings to be so insured in the owner's name and to pay such taxes and assessments, when due, adding the proper expense thereof to the principal sum secured under this mortgage. It is also expressly agreed that in case this mortgage shall be foreclosed and a decree obtained therein, there shall be included in such decree a reasonable attorney's fee in addition to all sums and costs allowed in that behalf by law. A power of sale to foreclose this mortgage pursuant to the provisions of 12 VSA 4531 VSA 4533, both inclusive, is hereby granted.

The statutory form of discharge is as follows:

"I hereby certify that the following described mortgage is paid in full, viz. . . . . . . mortgagor to. . . . . . mortgagee, dated. . . . . . and recorded in book. . . . . ., page. . . . . of the Land Records of the town of. . . . . . ."

21 PROPERTY

21.01 ABSENTEES:

When nonresident testator has devised or bequeathed property, minor portion of which is in this state, to nonresident trustee for benefit of nonresident beneficiaries, and trustee under will has been appointed in state of testator's domicile, and domiciliary estate fully settled, probate court in this state, on petition of nonresident trustee and after notice to commissioner of taxes, upon final settlement, may decree trust property in this state to nonresident trustee to be administered as part of foreign testamentary trust. (14 VSA 2311).

Care of Property.

Where a person having a domicile or property in this state remains unheard of for three years, or suddenly and mysteriously disappears under such circumstances as to lead the court reasonably to believe he is lost, insane or dead, the probate court where any property is located must upon application of relatives, or, if they do not apply, of town service officer of town where absentee had last known domicile in state or one holding legacy or devise for absentee, appoint one or more trustees of absentee's estate. (14 VSA 2305-06). See also category 13 Estates and Trusts, topic 13.05 Death.

Process Agent.

Whenever corporation fails to appoint or maintain registered agent, then Secretary of State shall be agent.

Escheat.

Uniform Unclaimed Property Act (1995; adopted 2006) has been adopted. (27 VSA 1241-1270).

21.02 ADVERSE POSSESSION:

Character of Possession.

Possession of land or easements which will work an ouster of owner must be open, notorious, hostile and continuous for period of 15 years; occupation consistent with nature of premises and their use is sufficient. (12 VSA 501; 149 Vt. 353, 543 A.2d 262; 143 Vt. 178, 465 A.2d 248).

Duration of Possession.

Adverse possessor must be in possession of said land for minimum of 15 years in order to establish claim. (12 VSA 501).

Easements.

Elements necessary to establish prescriptive easement and adverse possession are essentially same: adverse use or possession which is open, notorious, hostile and continuous for period of 15 years, and acquiescence in use or possession by person against whom claim is asserted. (151 Vt. 152, 559 A.2d 1068).

21.03 CONDOMINIUMS:

See topic 21.16 Real Property.

21.04 CONVEYANCES:

See topic 21.06 Deeds.

21.05 CURTESY:

A widower is entitled to one-third of all the real estate of which his wife died seised, and if the wife left only one heir, who is the issue of said husband, or the heir by adoption of both husband and wife, the husband is entitled to half in value of such real estate. Husband may be barred of such third or half if he accepts under provisions of her will or if he is otherwise provided for under § 551. (14 VSA 474).

21.06 DEEDS:

Deeds must be signed by maker(s), acknowledged, and recorded in office where such deed is required to be recorded. (27 VSA 341). 2004 amendment to 27 VSA 341 eliminates requirement of subscribing witness, which applies retroactively to all deeds whenever signed or executed, except any deed "the validity of which is being contested in a suit begun or pending before a court or which has been invalidated by a court for lack of a signature of a witness prior to Nov. 1, 2004." (Act 150 VSA 5 2004). No seal is required. (27 VSA 341). Defective deed may be treated as contract to convey land. (131 Vt. 77). Written instrument recorded in office of proper town clerk for period of 15 years, shall be valid despite defect as to stated consideration, witnesses, acknowledgments or invalid issuance of license to sell. (27 VSA 348). Spouse must join where conveyance involves homestead. (27 VSA 141). See categories 8 Debtor and Creditor, topic Homesteads; Family, topic Husband and Wife. Also, see topic Real Property for types of estates.

Execution.

Deed of bargain and sale, mortgage or other conveyance of land in fee simple or for term of life, or lease for more than one year from making thereof shall not be effectual to hold such lands against any person but grantor and his heirs, unless deed or other conveyance is acknowledged and recorded. (27 VSA 342). See also topic 21.16 Real Property; categories 8 Debtor and Creditor, topic Homesteads, subhead Alienation or Encumbrance; Family, topic Husband and Wife, subhead Conveyance or Encumbrance of Property.

Recording.

In order to be effective against subsequent bona fide purchasers or mortgagees for value from the grantor, a deed signed by one or more witnesses and acknowledged by grantor before town clerk or notary must be recorded in town clerk's office of town in which property is situated. (27 VSA 341-42). Deed or other conveyance of land which includes reference to survey prepared or revised after July 1, 1988 may be recorded only if accompanied by survey, or reference to land records where survey was previously recorded. (27 VSA 341).

At time of recording deed, there must also contain certificate in such form as Secretary of the Agency of Natural Resources and Commissioner of Taxes jointly shall sign under oath or affirmation. (32 VSA 9606[c]).

Vermont Land Use and Development Plans Act certificate, including indication of whether or not conveyance creates partition or division of land, which is incorporated in property transfer return must be completed and filed with town clerk at time of recording deed. (32 VSA 9608). If conveyance creates partition or division of land, must append current Act 250 disclosure statement as required by 10 VSA 6007.

Flood hazard areas certificate must be included in property transfer return before filing return with town clerk. (32 VSA 9606[e]).

Recording Fees.

See topic Documents and Records.

Taxes.

Transfer tax of 1¼% of value of property transferred is payable by purchaser unless parties otherwise agree; exception in case of principal residence of purchaser, first $100,000 being taxable at 5/10 of 1% and balance at 1¼%. Check payable to Vermont Tax Department and return must accompany deed. (32 VSA 9601; 32 VSA 9602). For exceptions see 32 VSA 9603. Leases and other interests in property lasting 25 years or more are subject to transfer tax. Interests lasting less than 25 years are subject to transfer tax if renewal right could extend beyond 25 years or if rights to purchase and develop are included. (1989, Act No. 119, § 20).

Purchasers of Vermont real estate from non-resident must withhold 2½% of consideration and transmit it to Commissioner of Taxes to be credited against seller's income tax. Failure to comply makes purchaser personally liable for tax. (32 VSA 5847).

Conveyance by Attorney in Fact.

Deed or other conveyance of lands or of estate or interest therein, made by virtue of power of attorney, shall not be of any effect unless such power of attorney is signed, witnessed by one or more witnesses, acknowledged and recorded in office where such deed is required to be recorded. (27 VSA 305).

The following form of warranty deed is used generally in Vermont:

Forms

Know all men by these presents: That. . . . . . of. . . . . . in the county of. . . . . . and state of. . . . . . in consideration of. . . .. . dollars paid to. . . . . . full satisfaction by. . . . . . of. . . . .. in the county of. . . . . . and state of. . . . . . by these presents, do freely give, grant, sell, convey and confirm unto the said. . . . . . and. .. . . . heirs and assigns forever, a certain piece of land in. . . . . . in the county of. . . . . . and State of Vermont, described as follows, viz.: To have and to hold said granted premises, with all the privileges and appurtenances thereof, to the said. . . . . . heirs and assigns, to their own use and behoof forever; and. . . . . . the said. . . . . . for. . . . . . and. . . . . . heirs, executors and administrators, do covenant with the said. . . . . . heirs and assigns, that until the ensealing of these presents. .. . . . the sole owner of the premises, and have good right and title to convey the same in manner aforesaid; that they are free from every encumbrance;. . . . . . and. . . . . . hereby engage to warrant and defend the same against all lawful claims whatever. . . . . . . In witness whereof.. . . . . hereunto set. . . . . . hand. . . . and seal. . . . this. . . .. . day of. . . . . ., A. D. 20. . . . .

. . . .

In presence of

A quitclaim deed may be in the following form:

Know all men by these presents, that. . . . . . of. . . . . ., in the county of. . . . . . and state of. . . . . . for the consideration of.. . . . . dollars, received to. . . . . . full satisfaction of. . . . . . in the county of. . . . . . and state of. . . . . ., have remised, released and quit-claimed, and by these presents do remise, release and forever quitclaim unto the said. . . . . . heirs and assigns, all. . . . . . right and title in and to a certain piece or parcel of land, situate in. . . . . ., in the county of. . . . . . and state of. . . . . . and described as follows, namely:. . . . . . To have and to hold the above remised, released and quitclaimed premises with the appurtenances thereof unto the said grantee,.. . . . . heirs and assigns, to them and their own proper use, benefit and behoof forever; so that neither. . . . . ., the said grantor, nor. . . . . . heirs nor any person or persons claiming under. . . . . . or them, shall at any time hereafter by any way or means, have, claim or demand any right or title to the aforesaid premises or appurtenances or to any part or parcel thereof forever. In witness whereof,. . . . . . ha. . . . hereunto set. . .. . . hand and seal, this. . . . . . day of. . . . . . A. D. . . . . . .

21.07 DEEDS OF TRUST:

See category 20 Mortgages, topic 20.04 Mortgages of Real Property.

21.08 DOWER:

Estates of dower and curtesy are abolished. (14 VSA 302). Instead, see 14 VSA 311 — 313, 316. Generally, surviving spouse to receive one-half of deceased spouse's intestate estate, if decedent is survived by descendants who are not also descendants of surviving spouse, or all of intestate estate, if decedent is survived by no descendants or only by descendants who are also decedents of surviving spouse. (14 VSA 311).

Release.

Bar.

Election.

See general statement above, or see category 13 Estates and Trusts, topic 13.07 Descent and Distribution. Surviving spouse may waive provision of decedent's will and in lieu thereof, elect to take one-half of balance of estate after payment of claims and expenses. (14 VSA 319).

21.09 [RESERVED]

21.10 LANDLORD AND TENANT:

General principles of the common law prevail.

Uniform Commercial Code Art. 2A has been adopted in title 9A of Vermont Statutes.

Leases.

Lease of real property that has term of more than one year from making of lease need not be recorded at length if notice or memorandum of lease, which is executed, witnessed and acknowledged as provided in subsection (a) of this section, is recorded in land records of town in which leased property is situated. (27 VSA 341[c]). To determine if lease is enforceable or not, see 9A VSA 2A-201. No need for seal. (9A VSA 2A-203). If lease is conveyed orally, no matter time agreed upon, estate created shall be at will only. (27 VSA 302).

Security Deposits.

Residential landlord must return to tenant deposit and written statement itemizing any deductions within 14 days from date on which landlord discovers that tenant vacated or abandoned dwelling unit, or date tenant vacated dwelling unit, provided landlord received notice from tenant of that date. Landlord has 60 days to return deposit with certain seasonal rentals. Municipality may adopt ordinance authorizing payment of interest on security deposit. (9 VSA 4461).

Rent.

Expedited action for payment of rent into court is available to landlords. (12 VSA 4853a). Residential landlords must give 60 days notice before increasing rent. (9 VSA 4455). Tenant may withhold rent under certain circumstances. (9 VSA 4458).

Lien.

Landlord has no lien on property of tenant. (24 Vt. 123).

Termination of Tenancy.

Landlord may terminate residential tenancy for nonpayment of rent by providing actual notice to tenant of date on which tenancy will terminate. Such notice shall be at least 14 days after date of actual notice. (9 VSA 4467). "Actual notice" means receipt of written notice hand-delivered or mailed to last known address. Rebuttable presumption that notice was received three days after mailing is created if sending party proves that notice was sent by first class or certified US mail. (9 VSA 4451). Rental agreement must not terminate if tenant pays or tenders rent due through end of rental period in which payment is made or tendered. (9 VSA 4467). Tenant may not defeat notice to terminate by payment of arrearages more than one time in 12 months. (12 VSA 4773). Acceptance of partial payment of rent shall not constitute waiver of landlord's remedies for nonpayment of rent. (9 VSA 4467).

Landlord may terminate residential tenancy for failure of tenant to comply with material term of rental agreement or with obligations imposed statute, by actual notice given to tenant at least 30 days prior to termination date specified in notice. When termination is based on criminal activity, illegal drug activity, or acts of violence, any of which threaten health or safety of other residents, landlord may terminate residential tenancy by providing actual notice to tenant of date on which tenancy will terminate which must be at least 14 days from date of actual notice. (9 VSA 4467[b]).

Holding Over.

If residential tenant remains on premises landlord may bring action to seek possession according to Title 12 of Vermont Statutes. (9 VSA 4468). See Title 12 for proceedings on ejectment. (12 VSA 4851-4856).

Dispossession.

Landlord may dispossess holdover tenant or tenant who has breached agreement through writ from superior court. (12 VSA 4851).

Uniform Residential Landlord and Tenant Act.

Not adopted.

21.11 LEASES:

See topic 21.09 Landlord and Tenant.

21.12 PARTITION:

Jurisdiction and Venue.

Superior court in county where land is located shall have jurisdiction over any dispute. (12 VSA 5163).

Proceedings.

Person by serving complaint and summons on all persons interested in estate, may bring action to partition real estate in county court of county where real estate or any part thereof is situated. Complaint shall state title by which real estate is held, names of several owners, as far as known, and particular description of premises. (12 VSA 5163).

Partition in Kind or Sale.

If issue is determined in favor of complainant, court must order that partition be made and appoint three disinterested residents of such county to set off each share to several persons interested. (12 VSA 5169). Sale is provided for in certain cases. (12 VSA 5175).

21.13 PERPETUITIES:

Common law rule partially in effect. (96 Vt. 183, 118 A. 527). Any interest which would violate rule against perpetuities, shall be reformed to reflect intention of testator within bounds of rule. (27 VSA 501). Under old common law principles, if interest violated rule against perpetuities, interest was void from beginning and must be stricken from document. Based upon adoption of §

501, Vermont is “wait and see” state, which means rule is inoperative until 21 years after death of some life in being at creation of interest. (157 Vt. 233). Rule against perpetuities not only applies to trusts, but also to restrictive covenants and alienability of real property. (157 Vt. 233).

21.14 PERSONAL PROPERTY:

Tenancy by the entirety exists in personalty. (94 Vt. 76, 108 A. 515; 138 Vt. 514, 419 A.2d 321).

21.15 POWERS OF ATTORNEY:

General power of attorney recognized. (14 VSA 3501-3516). Health care properly executed before Sept. 1, 2005 still valid despite repeal of prior law governing same. (Act 55 § 8[b], 2005). Effective Sept. 1, 2005, authorization of agent to make health care decisions governed by law on advance directives. (18 VSA 9700-9720).

Attorneys in Fact.

Power of attorney determines scope of agent’s authority and may authorize agent to act as to all lawful subjects and purposes, subject to limitations set forth in statute. (14 VSA 3504). Deed or other conveyance of real estate made through power of attorney is ineffective unless power of attorney is recorded in land records. (27 VSA 305).

Formalities.

Durable power of attorney for health care must be signed by principal and witnessed by at least two people who are not agent authorized by durable power, principal’s health or residential care providers or employee thereof, principal’s funeral director, crematory operator, cemetery official or employee thereof, principal’s spouse, heir, reciprocal beneficiary or any person entitled upon principal’s death to any part of principal’s estate, or person who has claim against principal’s estate. (18 VSA 5267). Durable power of attorney for health care properly executed before Sept. 1, 2005 remains valid, despite repeal of prior law governing same. (Act 55 § 8[b], 2005). Effective Sept. 1, 2005, authorization of agent to make health care decisions governed by law on advance directives. (18 VSA 9700-9720).

General power of attorney must be in writing, name agent, give agent power to act on behalf of principal, and be executed according to 14 VSA 3503. Effective Apr. 21, 2005, military power of attorney prepared pursuant to 10 USC § 1044d deemed legally executed and is of same force and effect as if executed in compliance with Vermont law. (14 VSA 3502). Execution requires signing by principal, in presence of one witness, and acknowledgment by notary other than witness, and agent shall not serve as witness or notary. (14 VSA 3503).

Revocation.

Advance directive, including durable power of attorney for health care properly executed before Sept. 1, 2005, may be revoked, amended or suspended by principal with capacity by executing new advance directive. Principal with or without capacity may revoke all or part of advance directive, including durable power of attorney for health care properly executed before Sept. 1, 2005, by: (1) Signing statement revoking agent’s designation, (2) personally informing principal’s clinician, (3) burning, tearing obliterating advance directive or durable power of attorney properly executed before Sept. 1, 2005, or, for any provision other than designation of agent, orally, in writing, or by any other act evidencing specific intent to suspend or revoke. (18 VSA 9704).

Uniform Durable Power of Attorney Act has not been adopted.

21.16 REAL PROPERTY:

Unless stated otherwise in the grant or deed, all property conveyed to two or more persons, except to husband and wife or in trust, is owned by them as tenants in common. (27 VSA 2).

Subsequent to June 1, 1941, a person who becomes seized in fee tail of lands is deemed to be seized in fee simple. (27 VSA 1).

Without intervening conveyance person may convey interests in real property directly to self in different legal capacity, or to spouse, or self and one or more other persons including spouse. (27 VSA 349).

Rule in Shelley's Case is not in force. (29 Vt. 240; 110 Vt. 332, 6 A.2d 17).

Foreign Conveyances or Encumbrances.

Foreign deed may be acknowledged in accordance with laws of place where acknowledgment of proof is taken. (27 VSA 379).

Condominiums created before Jan. 1, 1999 are governed by Condominium Ownership Act. (27 VSA 1301). Uniform Common Interest Ownership Act (1994) (27A VSA 1-101 et seq.) applies to condominiums and converted communities created after Jan. 1, 1999. Condominiums created after Apr. 26, 2006, that will contain no more than 12 units and that are not subject to development rights are exempt from certain provisions of Uniform Common Interest Ownership Act (1994), unless declaration provides that Act applies. (27A VSA 1-209).

See topics 21.05 Curtesy, Deeds, Dower, Landlord and Tenant; categories 5 Civil Actions and Procedure, topic Partition; Debtor and Creditor, topic Homesteads; Documents and Records, topic Records; Family, topic Husband and Wife; Mortgages, topic Mortgages of Real Property.

21.17 TRUST DEEDS:

See category 20 Mortgages, topic 20.04 Mortgages of Real Property.

22 TAXATION

22.01 ADMINISTRATION:

Vermont Department of Taxes, 109 State Street, Montpelier, VT 05609 VSA 1401, has general supervision.

Real and Personal Property Taxable.

Taxable real estate is set to last owner or possessor thereof. (32 VSA 3651). Tax rate varies as set by different towns.

Exemptions.

Property owned by the state or United States is exempt. Church and school property, property held for benefit of college fraternity, household furniture and equipment of every person and aircraft and motor vehicles are exempt. (32 VSA 3802). Property used for public, pious or charitable purposes generally exempt. (32 VSA 3802). Lands used for cemetery purposes, grounds and property owned and occupied by agricultural societies. (32 VSA 3802). Procedure for obtaining exemption set forth in 32 VSA 3840. Town may by vote exempt certain manufacturing establishments for term of years not exceeding ten and residences up to $15,000 of appraised value for not more than three years. (32 VSA 3834, 36). Real and personal property exemption is available to certain veterans (32 VSA 3802); and to unoccupied industrial buildings subject to mortgage to authority or State of Vermont (32 VSA 3753 —32-3756), payments shall be made directly to municipality (10 VSA 236).

Agricultural land may be assessed at its “current use” value instead of “best use” (32 VSA 3751-3762) with reimbursement to town from state for lost revenue.

Review of Assessment.

Person aggrieved with amount of his tax may appear before listers of town on grievance day and state his objections to appraisals or any other acts of listers. Such hearings shall not be held later than June 2d. (32 VSA 4221). If party interested is still aggrieved, he may, within 14 days after date of notice thereof, appeal from final decision of listers to board of civil authority, giving notice thereof to town clerk who should record same. (32 VSA 4404). Clerk shall forthwith call meeting of said board and decision of board shall be final, unless appeal is taken to director of Superior Court of county in which property is situated. Appeal must be within 30 days of entry of decision. (32 VSA 4403, 4461). Director shall refer appeal in writing to person not employed by director appointed as appraiser. (32 VSA 4465).

Collection.

Interest on overdue taxes is payable only when so voted by town, school district or fire district and when so voted interest at rate of no more than 1% per month or fraction thereof for first three months and thereafter 1½% per month or fraction thereof from due date of such tax. (32 VSA 5136).

If property tax is collected by treasurer in accordance with town vote, then costs of collection can be collected along with taxes overdue. (32 VSA 1674). Tax collector may collect from taxpayer commission of 8% on all taxes collected on treasurer’s warrants and when it is necessary to levy on persons or property collector is allowed, as further compensation, such fees as sheriff is allowed for levying executions. Municipality may vote to allow commission lower than 8%. (32 VSA 1674).

Sale.

After ten days notice, the collector may distrain the goods, chattel or capital stock, of person or corporation whose tax is not paid. (32 VSA 5191). If tax is not paid within four days after distress made, collector may, after posting public notice of sale for six days, sell property at public auction in town where property was taken. (32 VSA 5193). Real estate may be sold upon notification by advertising three weeks in newspaper and ten days written notice (20 days if delinquent or lienholder is not resident of town) by registered mail to delinquent taxpayer, mortgagees and other lien holders of record. (32 VSA 5252).

Interstate Cooperation.

When dispute arises as to domicile of decedent, Commissioner of Taxes, with approval of Attorney General may make agreement with tax authorities of another state to submit controversy to board of arbitrators, whose decision shall be final for purpose of imposing and collecting death taxes. (32 VSA 7102).

Apportionment.

Laws are numerous and in depth according to each statute and type of taxation, see Title 32 for specific topic of taxation inquiry.

22.02 ALCOHOL, BEVERAGES AND TOBACCO TAXES:

Alcohol and Tobacco Tax.

Alcohol tax imposed by 7 VSA 421 and 7 VSA 422. Tobacco products tax imposed by 32 VSA 7811. Cigarette tax imposed by 32 VSA 7771.

22.0322.04 [RESERVED]

22.05 EMPLOYMENT TAXES:

Unemployment compensation tax is imposed on employers who, in any calendar quarter in either current or preceding calendar year paid for service in employment wages of $1,500 or more, or have one employee for some portion of a day in each of 20 different calendar weeks in either current or preceding calendar year or had at least one individual (irrespective of whether same individual was in employment in each such day) (numerous qualifications) (21 VSA 1301[5]). Rate is 5.4% of pay roll (21 VSA 1324), with base of contribution $6,000 from Dec. 31, 1976—Dec. 31, 1982 and $8,000 subsequent (21 VSA 1321). There is no tax on employees. Payments are to the Unemployment Compensation Commission (21 VSA 1322), and may be in full by Jan. 31 or in installments by the end of the month following each calendar quarter, as Jan. 31, etc.

22.06 [RESERVED]

22.07 ESTATE TAX:

See topic 22.07A Estate and 22.09 Gift Tax.

22.07A ESTATE AND GIFT TAX:

Estate Tax.

Tax imposed on Vermont estates of residents and nonresidents dying after Jan. 1, 2002. Base amount of tax is equal to credit for state taxes which is claimed on Federal return.

Vermont taxable estate is value of Vermont gross estate (federal gross less value of property located outside Vermont at time of death), reduced by proportion of deductions and exemptions from value of federal gross estate allowable, which value of Vermont gross estate bears to value of federal gross estate. (32 VSA 7402).

Filing.

Required of any person required to file under federal law (32 VSA 7444) at same time as federal return (32 VSA 4446); tax payable by executor at time federal estate is filed (32 VSA 7447); extension may be granted if it would result in undue hardship to estate (32 VSA 7448).

Apportionment Against Inter Vivos Dispositions.

No tax apportionment statute.

Penalties.

Failure to file 15 days after notice may result in court action and for penalties (32 VSA 7477); late filing without fraud or willful intent results in late filing fee not to exceed $50; late filing with fraud or willful intent results in penalty of $25 per month (32 VSA 7482); delinquent payment absent fraud results in addition of interest; delinquent payment with fraud results in penalty (32 VSA 7484).

Gift Tax.

Vermont taxable gifts shall reflect taxpayer's ability to pay as measured by value of his federal taxable estate or federal taxable gifts for taxable year. (32 VSA 7401). Also see 32 VSA 7402 for list definitions.

22.08 GASOLINE AND SPECIAL FUELS TAXES:

Gasoline Tax.

Imposed by 23 VSA 3106.

Diesel Fuel Tax.

Imposed by 23 VSA 3003.

22.09 GIFT TAX:

See topic 22.07A Estate and 22.09 Gift Tax.

22.10 [RESERVED]

22.11 INCOME TAX:

Income tax is imposed on individuals and estates and trusts. (32 VSA 5822).

Nonresidents are taxed on income derived from property owned and business or occupation carried on in this state. (32 VSA 5811).

Credit.

Taxpayer of this state who pays taxes to another state or territory of U.S. is entitled to credit. In no case shall credit allowed by this section exceed portion of that taxable year. (32 VSA 5825).

Vermont net income is same as "taxable income" under Internal Revenue Code, except it does not include "gross-up of dividends" in connection with taxpayer's election of foreign tax credit. (32 VSA 5811[18]).

Exemptions.

Personal exemptions are automatically included under definition of Vermont net income; military pay for full-time active duty with armed services. (32 VSA 5823). (See generally, 32 VSA 5823.)

Rates.

Rate of Vermont's personal income tax is 24% of Federal income tax liability. (32 VSA 5822).

Fiduciaries.

Every fiduciary must make return if individual, trust or estate is required to file U.S. income tax return and earned or received $100 of Vermont income in that year. (32 VSA 5861).

Returns and Payment.

Every individual, trust or estate subject to taxation for any taxable year under § 5822 shall file a Vermont personal income tax return for that taxable year if that individual, trust or estate is required to file a U.S. income tax return for that year and earned or received more than $100 of Vermont income in that year. (32 VSA 5861).

Return shall be filed on or before date a U.S. return is required to be filed by individual, trust or estate under laws of U.S. for taxable year. (32 VSA 5861).

Every individual subject to taxation under § 5822 shall make an estimate of his non-withheld tax for any taxable year if amount of taxpayer's non-withheld tax for 12 month period immediately preceding that taxable year was more than $125. Amount of that estimated non-withheld tax shall be payable as follows unless Commissioner otherwise prescribes: one-fourth of that amount shall be paid not later than date on which tax return of taxpayer for next preceding taxable year is required to be filed. Balance shall be paid in four equal installments, on Apr. 15, June 15, Sept. 15, and Jan. 15 of following year. (32 VSA 5852).

Persons engaged in farming and fishing and receiving two-thirds of their income from such industries are not required to file estimates. (32 VSA 5852).

Withholding.

Every person who is required under Federal laws to withhold Federal income tax from payments shall deduct and withhold such amount as Commissioner by regulation shall prescribe. These regulations should result in withholding of such amounts as shall closely approximate income tax liabilities of those payments with respect to those wages for that year. (32 VSA 5841).

Debt Collection.

Claimant agency may submit any debt of $50 or more to Department for collection. (32 VSA 5933).

Business Associations.

S corporations, partnerships and limited liability companies given pass-through tax treatment whereby tax imposed on business income at shareholder, partner, or member level. (32 VSA 5920, 5921).

22.12 INHERITANCE TAX:

See topic 22.07A Estate and 22.09 Gift Tax.

22.1322.15 [RESERVED]

22.16 PROPERTY TAXES:

Assessment.

Municipalities may contract with property owners to fix assessment or rate. (24 VSA 2741).

On or before Apr. 20, unless otherwise required, every taxable person shall procure such inventory form, make full answers to all interrogatories therein, subscribe same, make oath thereto, and deliver or forward same to one of listers in town wherein such person owns or possesses property required by law to be set to him in grand list. (32 VSA 4004).

Lien.

If taxes are delinquent, tax collector must seek approval of alderman, or selectman, for tax lien on personal property of taxpayer to be filed in personal property section of clerk's records. (32 VSA 5071). If lien is sought against real property for delinquent taxes, then tax lien may be filed in land records at clerk's office, and tax lien has priority over mortgages and all other liens on property. (32 VSA 5061).

Redemption.

Lands sold on execution for taxes may be redeemed within one year, by the owner of any other person in interest. The amount for which the property sold, with expenses, fees and interest at 1% per month from day of sale to day of payment must be paid. (32 VSA 5260).

Real Estate Conveyance Tax.

Tax on transfer of title to real property is 1¼% of value of property. (32 VSA 9602). For exception see 32 VSA 9602, or further list of exceptions see 32 VSA 9603.

Land Sale or Exchange Gains Tax.

Gain from sale or exchange of land is not taxed if land was held for six years or longer or if land not exceeding ten acres (up to 25 acres if required by zoning) was used as sellers' principal residence or will be used as purchasers' principal residence, or if farmland or open-space land is sold to qualifying organizations for preservation. (32 VSA 10002). Tax rate, basis, definition of gain, holding period, procedure, relationship to installment sales, and penalties are set forth at 32 VSA 10003, 32 VSA 10005. Definition of principal residence at 32 VSA 10002(a).

Payment.

Property tax payments must be made to municipality no later than Dec. 1 of each year. (32 VSA 5136).

22.17 SALES AND USE TAXES:

Sales Tax.

There shall be tax of 5% upon all tangible personal property sold at retail in state, public utility services including gas and electricity, excluding water and transportation, all producing, fabricating and printing of tangible property, amusement rides, and prepaid calling cards. (32 VSA 9771). For sales not taxed see list of 47 exceptions at 32 VSA 9741.

Use Tax.

Unless property is already covered by sales tax, use tax of 5% shall be added to all tangible property purchased by retail, and for all tangible personal property manufactured or assembled by user. (32 VSA 9773). For exemptions from use tax see 32 VSA 9744. Motor Vehicle purchase and use tax see 32 VSA 8903.

22.18 STAMP AND SEAL TAXES:

Stamp Tax.

No requirement of stamps on corporate stock or other instruments.

22.18A TAX LIENS:

Uniform Federal Lien Registration Act Amended.

Not adopted.

Penalties.

Tax violations are usually covered in each statute that imposes tax and penalties vary greatly for every kind of violation. Estate Tax and Income Tax have statements of penalties included, see supra.

23 TRANSPORTATION

23.01 MOTOR VEHICLES:

Commissioner of Motor Vehicles, 120 State Street, Montpelier, Vt. 05603 VSA 0001, has general supervision.

Vehicle license required annually. (23 VSA 301). Expires 12 months from date of issue. Not transferable. (23 VSA 321). Commissioner may require one or two plates to be displayed. If only one plate is furnished, it must be displayed on rear. (23 VSA 511).

Any resident of this state must register vehicle, and foreign partnership, firm, association or corporation doing business here must register vehicles garaged here. (23 VSA 4, 23 VSA 301).

Operator’s License.

All operator licenses issued under this chapter shall expire every four years on eve of anniversary of date of birth of applicant. Quadrennial fee required to be paid shall be $40. Licensee may request biennial license renewal. Fee for license issued pursuant to biennial renewal shall be $25. (23 VSA 601, 23 VSA 608). Resident who has moved into state with valid operator’s license must procure license within 60 days of moving into state. (23 VSA 601). Operator of commercial motor vehicle must have proper class of commercial license or endorsement in possession while operating commercial motor vehicle. (23 VSA 4107).

Members of Armed Forces.

A resident of Vermont who is a member of armed forces of U.S. and who held a valid Vermont operator’s license at time of his induction, call on reserve commission, or enlistment, or term of service, shall, notwithstanding expiration of such license, be entitled to operate motor vehicle without new license thereof during his term of service and until 30 days after receiving discharge from armed forces, provided, that he shall not be so entitled for longer period than four years from date of expiration of his license. (23 VSA 616).

Titles.

Owner must obtain certificate of title, issued by Commissioner of Motor Vehicles, and good for life of car when held by original holder. (23 VSA 2015). On sale, certificate and warranty of title must be assigned to purchaser (23 VSA 2023[a]) who must apply to Commissioner of Motor Vehicles for new certificate of title (23 VSA 2027). Provision made for certificate of origin for manufacturer, its agents, or franchise dealer (23 VSA 2011), involuntary transfers (23 VSA 2025), and suspension or revocation of certificate (23 VSA 2029). Anyone selling or trading vehicle that has been rebuilt or salvaged required to disclose, in writing and on bill of sale, that vehicle has been salvaged or rebuilt. (23 VSA 2093).

Liens.

Applicant for certificate of title must indicate on application names and addresses of all lienholders, including date of such security agreement. (20 VSA 2015). Upon transfer of any certificate issued, transferor must execute assignment and warranty of title to transferee. (23 VSA 2023). Upon request, lienholder having possession of certificate, by reason of lien, must deliver certificate to transferee for delivery to Commissioner. Alternatively, transferee may forward owner's assignment, application for new title accompanied with fee to lienholder who will then forward it to Commissioner (23 VSA 2023[b]).

With certain exceptions (23 VSA 2041), a security interest in a vehicle for which a certificate of title is required is not valid against creditors of owner or subsequent transferees or lienholders of vehicle unless perfected (23 VSA 2042). Perfection accomplished by delivering existing certificate of title or application with name and address of lienholder and date of his security agreement and required fee to Commissioner. Provision made for perfection when vehicle brought from other state (23 VSA 2042[2]), duties of owner and lienholder (23 VSA 2043), assignment (23 VSA 2044), and release of security interest (23 VSA 2045).

Identification Marks.

Misdemeanor to alter or remove serial number, motor number or identifying marks of manufacturer or knowingly to deal with or possess car so altered. (23 VSA 1701-04).

Odometer Alteration.

Any person who sells, attempts to sell or causes to be sold any motor vehicle, motorboat, all-terrain vehicle or snowmobile and has actual knowledge that odometer has been changed and willfully misrepresents odometer reading on odometer disclosure statement or similar statement, title or bill of sale shall be fined not more than $1,000 for first offense and fined not more than $2,500 for each subsequent offense. (23 VSA 1704a).

Operation Prohibited.

By: Person under 15 years of age (23 VSA 615); when person's alcohol concentration is 0.08 or more; when person's alcohol concentration is 0.02 or more while operating school bus; when person's alcohol concentration is 0.04 or more while operating commercial motor vehicle (23 VSA 1201); any person who operates vehicle knowingly without consent of owner (23 VSA 1094). Special exception for farm tractors and highway equipment. (23 VSA 602[a]).

Implied Consent.

Any person operating a motor vehicle in Vermont is deemed to have given his consent to the taking of a sample of his breath for purpose of determining alcohol or presence of drugs in his blood. (23 VSA 1202).

Constitutionality of 23 VSA 1202.

Meets fair notice requirements of criminal statute. (137 Vt. 473, 408 A.2d 622).

Size and Weight Limits.

Regulated by 23 VSA 1392, 23 VSA 1431. Permit fee and insurance requirements for overweight and oversize vehicles imposed by 23 VSA 1402.

Equipment Required.

Regulated by 23 VSA 4, 23 VSA 304, 23 VSA 1249.

Motorcycle (definition, 23 VSA 4[18]). Motorcycle rider training program. (23 VSA 733). Headgear and windshield or glasses required. (23 VSA 1255-56).

Seat Belts.

All motor vehicles registered in state must be equipped with safety belts. (23 VSA 4[37]). No person may operate motor vehicle, other than type I school bus, unless every child under age of 16 riding in vehicle is properly restrained in federally-approved child passenger restraining system as follows: any child under age of one or weighing less than 20 pounds must be placed in rear facing child's restraining system, which must not be placed in front of air bag; children over 20 pounds and between ages of one and eight must be placed in children's restraining system; children between ages of eight and 15 can use car's safety belt system or child passenger restraining system. $25 for first violation, $50 for second, and $100 for all future violations. (23 VSA 1258).

Driver of any motor vehicle with federally approved safety belts with passengers above age of 16 is responsible for, and subject to fine, for each person not wearing safety belt. Mail trucks, buses, taxis, and other vehicles are excluded from this section. $25 for first violation, $50 for second, and $100 for all future violations. Failure to wear safety belt shall not constitute negligence or contributory negligence in any civil proceeding. (23 VSA 1259).

Lights Required.

Regulated by 23 VSA 1250.

Inspection of all motor vehicles, trailers and semi-trailers by official inspection stations is required annually. (23 VSA 1222).

Traffic Regulations.

Stopped vehicles may be moved or removed by enforcement officer. (23 VSA 1102).

Accidents.

Driver must stop, give assistance if necessary, and give his name, residence and license number and name of owner of vehicle. (23 VSA 1128). Must report facts to Commissioner within 72 hours when person injured or property, including his vehicle, damaged to extent of $1,000. (23 VSA 1129).

Liability of owner for negligence of others depends on common law principles of master and servant or principal and agent. "Family purpose doctrine" is not recognized. (104 Vt. 5). No duty to control conduct of others to protect third party from harm, unless special relationship exists and provides control over person's conduct. (146 Vt. 61).

See also category 14 Family, topic 14.09 Husband and Wife, subhead Actions.

Guests.

No statutory restriction of liability for injury to gratuitous guest.

Proof of financial responsibility in amount of at least $25,000 for one person and $50,000 for two or more persons killed or injured and $10,000 for damages to property in any one action shall be required from persons convicted of violations of laws of road, careless and negligent operation, driving while intoxicated, failing to stop and render assistance, operating without consent of owner, operating after license revocation, or who, due to own fault, are involved in accident (23 VSA 801); or against whom there are outstanding unsatisfied judgments for damages arising out of motor vehicle accidents; from operators involved in motor vehicle accidents without automobile liability insurance or self insurance; from persons applying for operator's license when such license was suspended, revoked or refused in state of operator's former residence or in state in which his last license was obtained, for failure to file, when such state required insurance or evidence of personal liability (23 VSA 801). Operators license may be suspended if driver fails to furnish proof of financial responsibility; within 20 days of request by Commissioner, hearing must be had within reasonable time after temporary suspension. (23 VSA 802).

Insurance.

Insurance compulsory in amount of at least $25,000 for one person and $50,000 for two or more persons killed or injured and $10,000 for damages to property in any one accident. (23 VSA 800). Violations of this provision are punishable by fine not to exceed $100. (23 VSA 800). No policy may be delivered in state if it does not provide for uninsured motorist coverage. (23 VSA 941[a]).

No Fault Insurance.

No statutory provisions in Vermont.

Foreign vehicles, registered in home state or country are considered as registered in Vermont, provided home state accords reciprocity, except as to motor trucks used for transportation of property for hire between points within state and motor vehicles carrying auxiliary fuel tank. (23 VSA 411). Any vehicle registered in another jurisdiction which is eligible for apportionment under international registration plan but is not apportioned with Vermont must obtain trip permit and pay $15 which is valid for three day permit. (23 VSA 3702). In addition, use permit is required for trucks having gross weight of 18,000 lbs. or more. Use permit fee is $6.50. (23 VSA 416). Vermont is member of international registration plan. (23 VSA 3701).

Nonresident operators are entitled to same privileges and subject to same exceptions as foreign vehicles. (23 VSA 411, 13, 14).

Action against nonresident or his estate arising out of operation of car may be commenced by service of process on Commissioner of Motor Vehicles and sending copy to defendant by registered mail. Operation of car in state is acceptance of this provision. (12 VSA 891). Legislature has enacted nonresident violator compact (23 VSA 3551) which will become effective once adopted by two or more jurisdictions (23 VSA 3558[a]).

Direct Actions.

Insurer or surety may be made co-defendant with owner of jitney in an action for personal injury, death of a person, or damage to property. (23 VSA 842). See category 16 Insurance, topic 16.01 Insurance Companies, subhead Direct Actions Against Insurer.

Motor Vehicle Taxes.

Residents must pay purchase tax of 6% of taxable cost of motor vehicle or $1,100 per vehicle, whichever is lesser; or use tax of same amount at time of first registration or transfer of registration if purchase tax has not previously been paid. (32 VSA 8903). Penalty for nonpayment is 1% of taxable cost or $150, whichever is smaller. (32 VSA 8905).

Gasoline Tax.

See category 22 Taxation, topic 22.08 Gasoline and Special Fuels Taxes.

Lemon Law.

See topic Business Regulation and Commerce, topic Consumer Protection.

23.02 RAILROADS:

See category 3 Business Regulation and Commerce, topic 3.08 Carriers.

—Scope —

Revised for 2010 edition by

BOLT NAGI, P.C., of Virgin Islands.

(References, unless otherwise indicated, are to the Virgin Islands Code Annotated, effective Sept. 1, 1957, as amended published by authority of § 8(e) of the Revised Organic Act of the Virgin Islands, 68 Stat. 500, Title 48 U.S.C., § 1574(e), by Secretary of the Interior. References to the Code herein are by title and section, e.g., (15 VIC 191), (2 VIC 41, 47), etc. Citations such as LRCi, LRCr, V.I.S.Ct.R., Sup.Ct.R. and Supplemental Rule refer to Local Rules of Civil Procedure of the District Court of the Virgin Islands, Local Rules of Criminal Procedure of the District Court, Rules of Supreme Court of Virgin Islands, Rules of the Superior Court of the Virgin Islands and Fed. Supplemental Rules for Admiralty of the District Court, respectively. In absence of statute, Restatements of Law approved by American Law Institute constitute common law of Virgin Islands.)

Note: This revision covers legislation passed by Legislature and approved by Governor through Sept. 1, 2009. Regular sessions of Legislature are held annually.

1 INTRODUCTION

1.01 GOVERNMENT AND LEGAL SYSTEM:

The Virgin Islands is an unincorporated territory of the United States of America. For further discussion of the U.S. federal system, see Introduction to the Federal Government of the United States at the beginning of this volume. A great many laws are promulgated by the federal government of the United States and are not reflected in the topics below. See the Introduction to this volume for references to the federal law topics covered.

Public Law No. 517, 83d Congress (S. 3378; 68 Stat. 497), known as the “Revised Organic Act of the Virgin Islands” [replacing the prior Organic Acts of June 22, 1936 and of Mar. 3, 1917, which implemented the Convention between the United States and Denmark for the Cession of the Danish West Indies of Aug. 4, 1916 (Treaty Series No. 629) by which the United States purchased the Virgin Islands in 1917 for $25,000,000] became law on July 22, 1954. It is the “Constitution” of the Virgin Islands of the United States and, besides providing a Preamble, Bill of Rights, franchise qualifications, system of accounts reviewable by the Comptroller General of the United States, certain new tax features, fiscal and miscellaneous provisions, sets up a civil government consisting of the usual legislative, executive and judicial branches.

“Revised Organic Act of the Virgin Islands” is not substantially changed from preceding Organic Act of 1936 in effect or scope, its main difference being to eliminate prior political division of islands into two “municipalities” (districts) with separate legislatures known as municipal councils which met jointly as territorial or “state” legislature and to provide for one unicameral legislature of eleven members, and one fiscal and central government for all islands located at capital in Charlotte Amalie on island of St. Thomas. It maintains substantive law of islands as heretofore; provides that Secretary of the Interior shall arrange for preparation of code of laws of Virgin Islands to be entitled “Virgin Islands Code,” which shall be consolidation, codification, and revision of local laws and ordinances in force in Virgin Islands (Code of St. Thomas and St. John and Code of St. Croix) and which shall be effective when thereafter enacted by Legislature (all local laws, ordinances and codes continuing in force and effect meanwhile); and provides for Presidential Commission to recommend to Congress within one year which statutes of United States not applicable to Virgin Islands should be declared applicable, and which of applicable statutes should be declared inapplicable.

Virgin Islands Code, referred to above, was adopted, and went into effect Sept. 1, 1957.

The Revised Organic Act provides for “District Court of the Virgin Islands” with general original jurisdiction as heretofore with dual capacity as Territorial or “state” Court and as United States (Federal) District Court with two Article I judges appointed by President of the United States for term of ten years. It makes chapter 33 of Title 28 USCA (Appointment of U.S. Marshal by U.S. Attorney General); 28 USCA § 2072 (Federal Rules of Civil Procedure); 28 USCA § 2073 (Federal Admiralty Rules, since repealed); and Sec. 30 of Bankruptcy Act applicable to District Court of Virgin Islands and places United States Attorney for Virgin Islands under Attorney General of United States. It provides for two divisions of District Court of Virgin Islands; one comprising island of St. Croix and one comprising islands of St. Thomas and St. John.

For more information on the courts and legislature of the Virgin Islands, see category 6 Courts and Legislature. For further discussion of the U.S. federal system, see Introduction to the Federal Government of the United States at the beginning of this volume. A great many laws are promulgated by the federal government of the United States and are not reflected in the topics below. See the Introduction to this volume for references to the federal law topics covered.

1.02 [RESERVED]

1.03 HOLIDAYS:

Following days are legal holidays in Virgin Islands: Every Sun.; Jan. 1 (New Year’s Day); Jan. 6 (Three King’s Day); 3d Mon. in Jan. (Martin Luther King, Jr.’s Birthday); 3d Mon. in Feb. (Presidents Day); Mar. 31 (Transfer Day); Holy Thursday; Good Friday; Easter Monday; last Mon. in May (Memorial Day); July 3 (V.I. Emancipation Day); July 4 (Independence Day); 1st Mon. in Sept. (Labor Day); 2d Mon. in Oct. (Columbus Day and Puerto Rico Friendship Day); Nov. 1 (D. Hamilton Jackson Day); Nov. 11 (Veterans Day); 4th Thurs. in Nov. (Thanksgiving Day); Dec. 25 (Christmas Day); Dec. 26 (Christmas Second Day); and such other days as President or Governor may by proclamation declare to be holidays. (1 VIC 171).

Holiday Falling on Sunday.

Whenever any holiday (other than Sun.) falls upon Sun., Governor by Proclamation may, grant administrative leave on following Mon., except that Organic Act Day (3d Mon. in June), Supplication Day (4th Mon. in July) and Local Thanksgiving Day (3d Mon. in Oct.) shall be observed on preceding Sun. (1 VIC 171).

Holiday Falling on Saturday.

No statutory provision.

Legality of Transactions on Holiday.

Legal.

1.04 OFFICE HOURS AND TIME ZONE:

Virgin Islands are in Atlantic Standard (GMT -04:00) time zone. Virgin Islands do not observe Daylight Savings Time. Office hours are generally from 8 a.m. to 5 p.m.

2 BUSINESS ORGANIZATIONS

2.01 AGENCY:

See Restatements of Law.

2.02 ASSOCIATIONS:

No provision in Code for unincorporated associations without shares of stock.

Professional Associations.

No statutory authorization. See also topic 2.03 Corporations.

2.03 CORPORATIONS:

General Supervision.

Office of the Lieutenant Governor, No. 18 Kongens Gade, St. Thomas, Virgin Islands 00802.

Purposes.

Three or more persons of lawful age may unite by articles of incorporation to form a stock corporation for any lawful business purpose except the carrying on of a banking business. (13 VIC 1, 34).

Name of corporation must not be same as, nor so similar as to cause confusion with, name of any other domestic or foreign corporation admitted to do business in Virgin Islands, and must be such as to indicate that it is corporation as distinguished from natural person or partnership. (13 VIC 2). Although procedure is not statutory, availability of corporate name may be determined by contacting Corporate and Tradename Division of Office of Lieutenant Governor, Charlotte Amalie, St. Thomas, Virgin Islands 00801. There is no fee for name clearance procedure.

Term of Corporate Existence.

Perpetual or limited number of years. (13 VIC 2).

Incorporators.

Must be three or more (13 VIC 1); provided that professional corporation may have only one (13 VIC 704). Incorporators are not required to be residents. (13 VIC 1).

Articles of Incorporation.

Must be made in duplicate originals, each signed by each of incorporators and acknowledged by at least three of them before any officer authorized to take acknowledgment of deeds. (13 VIC 3). Must set forth corporation name and purpose for which formed; minimum amount of capital with which it will start business, which shall not be less than $1,000; name, street address and town of principal office or place of business in Virgin Islands; name of resident agent which may be individual or corporation; period of existence if life is limited; number of directors which must be at least three or statement that bylaws will set number of directors, number of which shall be less than three; and names and places of residence of incorporators. If corporation authorized to issue one class of stock, articles must set forth total number of shares; par value of share or statement that all shares are to be without par value. If authorized to issue more than one class, articles must set forth total number of shares of all classes; number of shares of each class that are to have par value and par value of each share, and/or number of shares that are to be without par; and statements of all designations, powers, preferences, rights, qualifications and limitations of any class(es) of stock. (13 VIC 2).

Filing of Articles.

One original must be filed in St. Thomas or St. Croix office of Lieutenant Governor, Division of Corporations and Trademarks; and second must be retained by corporation. (13 VIC 3).

Filing Fee.

Except for corporation which declares at time of filing its original articles of incorporation its intention to become foreign sales corporation or to be considered exempt corporation, minimum fee of $150 must be paid to Lieutenant Governor upon filing original articles of incorporation, with fee to be computed 1/3 cent each share par value stock authorized up to and including 20,000 shares, ¼ cent each share in excess of 20,000 to and including 200,000 shares, 1/5 cent each share in excess 200,000. For no par value stock 1/3 cent per share up to and including 20,000, ¼ cent in excess of 20,000 to 2,000,000 and 1/5 cent each in excess 2,000,000. (13 VIC 431). Corporation which declares at time of filing its original articles of incorporation, its intent to elect to become foreign sales corporation shall pay minimum fee of $400. Corporation which elects to become foreign sales corporation subsequent to filing its original articles of incorporation shall pay, within ten days of such election, additional fee of $500. (13 VIC 431).

License to Do Business.

Lieutenant Governor issues certificate of incorporation as evidence of corporation's right to do business in Virgin Islands. General Business licenses are issued by Department of Licensing and Consumer Affairs. Also, see category 3 Business Regulation and Commerce, topic 3.18 Licenses, Business and Professional.

Organization.

First meeting may be called by any incorporator upon not less than 30 days written notice on all incorporators, notice to state time, place and purpose of meeting. Notice may be waived by all incorporators and first meeting must be held within one year of filing of articles or corporation will ipso facto be dissolved. (13 VIC 8).

Paid in Capital Requirements.

Minimum amount of capital with which corporation will commence business must be $1,000. (13 VIC 2).

Amendment of Articles.

Before Payment of Capital.—Incorporators, or directors if any have been elected and qualified, before payment of any of its capital, may file with Lieutenant Governor amendment(s) of its articles of incorporation, duly signed by incorporators named in original articles of incorporation, or by directors if any have been elected, and duly acknowledged in manner for articles of incorporation. Lieutenant Governor will furnish certified copy of any such certificate under their hand and seal of office. (13 VIC 221).

Upon filing and recording of certificate of amendment, articles of incorporation of said corporation are deemed amended accordingly as of date on which original articles of incorporation were filed. Nothing herein contained permits insertion of any matter not in conformity with provisions of this chapter. (13 VIC 221).

After Payment of Capital.

(a) Any corporation created under provisions of this chapter, may, from time to time, when and as desired, amend its articles of incorporation by: (1) Addition to its corporate powers and purposes, or diminution thereof, or both; or (2) substitution of other powers and purposes, in whole or in part, for those prescribed by its articles of incorporation; or (3) increasing or decreasing its authorized capital stock or reclassifying same, by changing number, par value, designations, preferences, or relative, participating, optional, or other special rights of shares, or qualifications, limitations or restrictions of such rights, or by changing shares with par value into shares without par value, or shares without par value into shares with par value either with or without increasing or decreasing number of shares; or (4) changing its corporate title; or (5) making any other change or alteration in its articles of incorporation that may be desired. Any or all such changes or alterations may be effected by one certificate of amendment. All articles of incorporation as so amended, changed or altered, may contain only such provisions as would be lawful and proper to insert in original articles of incorporation made at time of making such amendment. (b) Whenever issued shares having par value are changed into same, a greater, or less number of shares without par value, whether of same or different class(es) of stock, aggregate amount of capital of corporation represented by such shares without par value must be same as aggregate amount of capital represented by shares so changed; and whenever issued shares without par value are changed into other shares without par value to a greater or less number, whether of same or different class(es), amount of capital represented by new shares in aggregate must be same as aggregate amount of capital represented by shares so changed. (c) Certificate of amendment of any articles of incorporation effecting any change in issued shares of corporation must set forth that capital of corporation will not be reduced under or by reason of amendment. (d) Every amendment authorized by subsection (a) above must be made and effected in following manner: Board of directors must adopt resolution setting forth proposed amendment, declaring advisability, and calling meeting of stockholders entitled to vote in respect thereof for consideration of amendment. Meeting must be called and held upon such notice as articles of incorporation or bylaws of corporation provide, or, in absence of such provision, upon notice thereof to each stockholder so entitled to vote, either delivered to stockholder or mailed to him, at their post office address, if known, at least ten days before date fixed for meeting. Notice must set forth amendment in full or brief summary of changes effected thereby, as directors deem advisable. At meeting, vote of stockholders entitled to vote, in person or by proxy, will be taken for and against proposed amendment, which vote must be conducted by two judges, appointed for purpose either by directors or by meeting. Judges will decide upon qualifications of voters, and accept votes, and when vote is completed, count and ascertain number of shares voted respectively for and against amendment, and will declare whether natural or juridical persons holding majority of voting stock of corporation (or of each class of stock entitled to vote thereon, when such vote is to be taken by classes) have voted for or against proposed amendment; and will make out certificate accordingly, stating number of shares of stock, issued and outstanding and entitled to vote thereon, and number of shares voted for and number of shares voted against amendment respectively, and will subscribe and deliver certificate to secretary of corporation. If it appears by certificate of judges that natural or juridical persons holding majority of stock of corporation entitled to vote (or of each class of stock when such vote is to be taken by classes) have voted in favor of amendment, certificate setting forth amendment and certifying that such amendment has been duly adopted in accordance with provisions of this section will be made under seal of corporation and signed by its president or vice-president, and its secretary or assistant secretary and president or such vice-president will acknowledge certificate before officer authorized by laws of Virgin Islands to authenticate signatures. Certificate, so executed and acknowledged, must be filed in Lieutenant Governor’s office, and copy thereof, certified by Lieutenant Governor, must be filed in office of clerk of district court in judicial division in which original articles of incorporation are filed. (But note that requirement that one original of articles of incorporation be filed in office of clerk of District Court in judicial division where corporation maintains its principal office, was statutorily deleted.) Upon filing same, articles of incorporation of corporation will be deemed amended accordingly. If any proposed amendment would alter or change preferences, special rights or powers given to any one or more classes of stock by articles of incorporation, or would affect such class(es) of stock, or would increase or decrease amount of authorized stock of such class(es) of stock, or would increase or decrease par value thereof, then holders of stock of each class of stock so affected by amendment will be entitled to vote as class upon such amendment, whether by terms of articles of incorporation such class be entitled to vote or not; and affirmative vote of majority in interest of each such class of stock so affected by amendment will be necessary to adoption thereof, in addition to affirmative vote of majority of all other stock entitled to vote thereon. Amount of authorized stock of any such class(es) of stock may be increased or decreased by affirmative vote of holders of majority of stock of corporation entitled to vote, if so provided in original articles of incorporation or in any amendment thereto which created such class(es) of stock or in any amendment thereto which was authorized by resolution(s) adopted by affirmative vote of holders of majority of such class(es) of stock. (e) No amendment to articles of incorporation may be filed in Office of Lieutenant Governor unless corporation shall have paid in full all franchise taxes due and payable, including penalties and interest, if any. (13 VIC 222).

Increase or Decrease of Authorized Capital Stock.

See subhead Amendment of Articles, supra.

By-laws.

Original by-laws of corporation may be adopted by incorporators. Thereafter, stockholders of any corporation formed under this chapter have power to make, alter or repeal by-laws for management of affairs of corporation, not inconsistent with provisions of this chapter, or of other existing laws. Articles of incorporation may, however, vest in board of directors authority to make and to adopt by-laws, subject to right of majority of stockholders to amend, repeal, alter, or modify such by-laws at any regular meeting, or at any special meeting called for such purpose. (13 VIC 9).

Stock.

Every corporation may issue one or more classes of stock or one or more series of stock within any class thereof, any or all of which classes may be of stock with par value or stock without par value, with such voting powers, full or limited, or without voting powers and in such series and with such designations, preferences and relative, participating, optional or other special rights, and qualifications, limitations or restrictions thereof, as are stated and expressed in articles of incorporation or of any amendment thereto, or in resolution(s) providing for issue of such stock adopted by board of directors pursuant to authority expressly vested in it by provisions of articles of incorporation or of any amendment thereto, which resolution(s) will be preceded by a determination by directors, and include statement that directors have determined that preferences and relative, participating, optional or other special rights, and qualifications, limitations or restrictions thereof stated and expressed therein are under circumstances prevailing at time of adopting such resolution(s) fair and equitable to all existing stockholders. Power to increase or decrease or otherwise adjust capital stock as provided in this chapter applies to all or any such classes of stock. (13 VIC 91).

Stock Certificates.

Every holder of stock in corporation shall be entitled to have certificate or certificates, however board of directors may provide by resolution that some or all of any or all classes of stock shall be uncertificated shares. Notwithstanding adoption of such resolution, shares represented by certificate shall not become uncertificated until such certificate is surrendered to corporation. Every holder of stock in corporation shall be entitled to have certificate signed in name of corporation by president, vice-president and treasurer or assistant treasurer, or secretary or assistant secretary of such corporation, representing number of shares owned by him in such corporation. Subject to applicable provisions of Uniform Commercial Code-Investment Securities, such entitlement shall apply equally to holder of uncertificated shares, notwithstanding adoption of resolution by board providing for issuance of uncertificated shares, who make written request of corporation. Where certificate is signed: (1) By transfer agent or assistant transfer agent, or (2) by transfer clerk acting on behalf of such corporation and registrar, signature of president, vice-president, treasurer, assistant treasurer, secretary or assistant secretary may be facsimile. In case any officers who have signed, or whose facsimile signatures have been used on any such certificates ceases to be such officers of such corporation, whether because of death, resignation or otherwise, before such certificates have been delivered by such corporation, such certificates may nevertheless be adopted by such corporation and be issued and delivered as though persons who signed such certificates or whose facsimile signatures have been used thereon had not ceased to be such officers of such corporation. (13 VIC 104).

Issuance of Stock.

Payment.

Subject to such additional limitations as may be provided in articles of incorporation subscriptions to, or purchase price of, capital stock of any corporation organized under this chapter may be paid for, wholly or partly, by cash, by services actually rendered, or by property; and stock so issued is declared and taken to be fully paid stock and not liable to any further call, nor is holder thereof liable for any further payments under provisions of this chapter. In absence of actual fraud in transaction, judgment of directors, as to value of such services actually rendered or of such property is conclusive. (13 VIC 98).

No Par Stock.

Shares of capital stock without par value, whether common or preferred or special, may be issued by corporation from time to time for such purchase price as fixed from time to time by board of directors thereof, unless in articles of incorporation power to fix such purchase price has been reserved to stockholders, in which event such power may be exercised by stockholders by consent in writing or by vote of holders of record of two-thirds of total number of shares of each class of stock then outstanding and entitled to vote in respect thereto, said vote being given at meeting called for purpose in such manner as prescribed by by-laws. If any shares of stock of corporation without par value has been subscribed or issued any resolution of directors or of stockholders fixing purchase price for issue of shares of stock without par value must be preceded by a determination by directors and must include statement that directors or stockholders as case may be have determined that such purchase price under circumstances prevailing at time of adopting such resolution is fair and equitable to all existing stockholders. Although such power has been reserved to stockholders, directors may nevertheless fix such purchase price for first issue of stock, and such issue cannot exceed 10% of whole amount of such stock authorized by articles of incorporation.

Any and all shares without par value so issued for which purchase price so fixed has been paid or delivered is deemed fully paid stock and is not liable to any further call or assessments thereon, and holders of such shares are not liable for any further payments in respect of such shares under provision of this chapter. (13 VIC 99).

Partly Paid Shares.

Any corporation may issue whole or any part of its shares as partly paid and subject to call for remainder of purchase price to be paid therefor. Upon face or back of certificates issued to represent any such partly paid shares total amount of purchase price to be paid therefor and amount paid thereon must be specified. Corporation may declare and pay dividends upon any such shares upon basis of percentage of purchase price actually paid thereon. (13 VIC 102).

Transfer of Stock.

See category 3 Business Regulation and Commerce, topic 3.09 Commercial Code.

Board of directors may close stock transfer books of corporation for period not exceeding 50 days preceding date of any meeting of stockholders or date for payment of any dividend or date for allotment of rights or date when any change or conversion or exchange of capital stock goes into effect or for period of not exceeding 50 days in connection with obtaining consent of stockholders for any purpose. In lieu of closing stock transfer books as aforesaid, by-laws may fix or authorize board of directors to fix in advance a date, not exceeding 50 days preceding date of any meeting of stockholders, or date for payment of any dividend, or date for allotment of rights, or date when any change or conversion or exchange of capital stock goes into effect, or a date in connection with obtaining such consent, as record date for determination of stockholders entitled to notice of, and to vote at, any such meeting and any adjournment thereof, or entitled to receive payment of any such dividend, or to any such allotment of rights, or to exercise rights in respect of any such change, conversion or exchange of capital stock, or to give such consent, and in such case such stockholders and only such stockholders as are stockholders of record on date so fixed are entitled to such notice of, and to vote at, such meeting and any adjournment thereof, or to receive payment of such dividend, or to receive such allotment of rights, or to exercise such rights, or to give such consent, as case may be, notwithstanding any transfer of any stock on books of corporation after any such record date fixed as aforesaid. (13 VIC 183).

Uniform Transfers to Minor Act adopted. Uniform Commercial Code adopted. (Title 11A). See category 3 Business Regulation and Commerce, topic 3.09 Commercial Code.

Stock Transfer Tax.

No statutory provisions.

Stockholders.

Unless otherwise provided in articles of incorporation, each stockholder is at every meeting of stockholders entitled to one vote in person or by proxy for each share of capital stock held by such stockholder, but no proxy can be voted on after one year from its date, unless proxy provides for a longer period, and, except where transfer books of corporation have been closed or a date has been fixed as record date for determination of its stockholders entitled to vote as provided in § 183 of this title, no share of stock can be voted on at any election for directors which has been transferred on books of corporation within 20 days next preceding such election of directors. (13 VIC 182).

Tender Offers.

No statutory provision.

Stockholders Actions.

Rule 23.1 Federal Rules of Civil Procedure.

Stockholders’ Liabilities.

When whole of price payable for shares of corporation has not been paid in, and assets are insufficient to satisfy claims of its creditors, each holder of such shares is bound to pay on each share held by him sum necessary to complete amount of par value of such share as fixed by articles of incorporation, or such proportion of that sum as is required to satisfy debts of corporation, or, in case of stock without par value, this liability is limited to unpaid balance of price for which such shares were issued by corporation. (13 VIC 107).

Amounts which are payable as provided in preceding paragraph may be recovered on behalf of creditors in action to which corporation is party, for benefit of all creditors of corporation brought by receiver, trustee in bankruptcy, or other competent representative of all creditors. (13 VIC 107).

Anything in this chapter to contrary notwithstanding, holder of shares who has acquired such shares in good faith without knowledge that they were not paid in full or to extent stated in certificate for such shares is not liable either to corporation or to its creditors for any amount beyond that shown by such certificate to be unpaid on shares represented thereby. Any holder who derives their title through such holder and who is not himself party to any fraud affecting issuance of such shares has all rights of such former holder. (13 VIC 107).

Stockholders' Meetings.

In all cases after first meeting of incorporators, meetings of stockholders of every corporation must be held annually. Stockholders and directors may hold their meetings and have office(s) outside Virgin Islands, if by-laws so provide. (13 VIC 181).

Annual stockholders' meeting for election of directors and transaction of any other business must be held at time and place within or without Virgin Islands named in by-laws, and which must not be changed within 60 days next before day on which election is to be held. Notice of change must be given to each stockholder 20 days before election is held, in person or by letter mailed to their last known post office address. By-laws may state city, town, or village in which meetings of stockholders for election of directors, after first meeting, may be held and authorize board of directors to fix place within such city, town, or village for holding of such meeting. At least ten days' notice must be given to stockholders of place so fixed. (13 VIC 191).

Cumulative Voting.

Articles of incorporation of any corporation may provide that at all elections of directors of corporation, each stockholder be entitled to as many votes as equals number of votes which (except for such provision as to cumulative voting) they would be entitled to cast for election of directors with respect to their shares of stock multiplied by number of directors to be elected, and that they may cast all of such votes for single director or may distribute them among number to be voted for, or for any two or more of them as they may see fit, which right when exercised, is termed cumulative voting. (13 VIC 184).

Voting Trusts.

Stockholder, by agreement in writing, may transfer their stock to voting trustee(s) for purpose of conferring right to vote thereon for a period not exceeding ten years upon terms and conditions therein stated. Every other stockholder may transfer their stock to same trustee(s) and thereupon be a party to such agreement. Certificates of stock so transferred are then surrendered and cancelled and new certificates therefor issued to such trustee(s) in which it must appear that they are issued pursuant to such agreement, and in entry of such ownership in proper books of such corporation that fact must also be noted, and thereupon such trustee(s) may vote upon stock so transferred during term of such agreement. Duplicate of every such agreement must be filed in principal office of corporation in Virgin Islands and at all times during business hours be open to inspection by any stockholder or their attorney. Trustee(s) must keep at their office or at place available to certificate holders correct books of account of all their business and transactions, and book to be known as certificate book containing names, alphabetically arranged, of all persons who are voting trust certificate holders, showing their places of residence, number of shares of stocks represented by certificates held by them respectively, and time when they respectively became owners thereof. Certificate book must be open daily, during at least three business hours, for inspection by any person who has been a certificate holder for at least six months immediately preceding their demand. Persons so entitled to inspect certificate book may make extracts therefrom. Any trustee who neglects or refuses to keep or cause to be kept such books or to keep any certificate book open for inspection, as herein required, forfeits sum of $50 for every day they so neglect or refuse; it is duty of U.S. attorney to sue for and recover in name of Government of Virgin Islands penalty above provided, and same, when so recovered is paid into Treasury of Government of Virgin Islands. If any trustee willfully neglects or refuses to make any proper entry in such book(s) or neglects or refuses to exhibit any such certificate book or to allow any such certificate book to be inspected and extracts taken therefrom as provided in this section, each such trustee must, in addition, forfeit and pay to party injured penalty of $50 for every such neglect or refusal, and all damages resulting to him therefrom. (13

VIC 187).

Directors.

Management.

Business of every corporation organized under this chapter must be managed by board of directors, except as hereinafter or in its articles of incorporation otherwise provided. (13 VIC 61).

Number of directors which constitutes whole board is such as from time to time is fixed by, or in manner provided in, articles of incorporation or, pursuant to authority given in articles of incorporation, in by-laws, but in no case may number be less than three. (13 VIC 62).

Term of Office.

Directors will hold office until successors are respectively elected and qualified. (13 VIC 63).

Filling Vacancies.

Whenever any vacancies happen among directors by death, resignation or otherwise, except by removal and election of successor, they are filled by appointment by majority of remaining members of board of directors, though less than a quorum, for unexpired term of such vacancies. (13 VIC 64).

Committees.

Board of directors may, by resolution passed by majority of whole board designate one or more committees, each committee to consist of two or more of directors of corporation, which to extent provided in resolution or in by-laws of corporation, will have and may exercise powers of board of directors in management of business and affairs of corporation, and may authorize seal of corporation to be affixed to all papers which require it. Such committee(s) will have such name(s) as may be stated in by-laws of corporation or as may be determined from time to time by resolution adopted by board of directors. (13 VIC 65).

Classes of Directors.

Directors of any corporation organized under this chapter may, by articles of incorporation or any amendment thereto, or by vote of stockholders, be divided into two or three classes: term of office of those of first class to expire at annual meeting next ensuing; of second class one year thereafter; of third class two years thereafter, and at each annual election held after such classification and election, directors will be chosen for full terms, as case may be, to succeed those whose terms expire. (13 VIC 66).

Election of Directors.

All elections of directors must be by ballot, unless otherwise provided in articles of incorporation. First meeting for election of directors, at which meeting any business may be transacted, must be held at any place either within or without Virgin Islands fixed by majority of incorporators in a writing signed by them, and thereafter meetings of stockholders must be held annually for election of directors and transaction of any other business at time and place within or without Virgin Islands named in by-laws, and which must not be changed within 60 days next before day on which election is to be held. Notice of any change must be given to each stockholder 20 days before election is held, in person or by letter mailed to their last known post office address. By-laws may state city, town, or village in which meetings of stockholders for election of directors, after first meeting, may be held and authorize board of directors to fix place within such city, town, or village for holding of such meeting. At least ten days' notice must be given to stockholders of place so fixed. (13 VIC 191).

Directors' Meetings.

Place.

Meetings of board of directors may be held at any time and any place, including outside Virgin Islands if authorized by articles of incorporation or by-laws. (13 VIC 68).

Quorum.

Majority of directors will constitute a quorum for transaction of business, unless by-laws provide that a different number constitutes a quorum, which in no case may be less than one-third of total number of directors nor less than two directors. (13 VIC 63).

Powers and Duties of Directors.

No specific statutory provisions.

Liabilities of Directors.

Effect of Reliance upon Books of Account.

Directors of any corporation organized under provisions of this chapter, or member of any committee designated by board of directors, is, in performance of their duties, fully protected in relying in good faith upon books of account or reports made to corporation by any of its officials, or by independent certified public accountant, or by an appraiser selected with reasonable care by board of directors or by any such committee, or in relying in good faith upon other records of corporation. (13 VIC 67).

Liability for Watered Stock and Bonds and Loans to Stockholders.

If any stock or bond of any corporation is fraudulently issued for property at more than cash value, or if a reduction of capital is made in guise of loan to stockholders, directors of corporation are jointly and severally liable to creditors of corporation for any loss or damage arising therefrom. (13 VIC 74).

Liability as to Dividends.

Director is fully protected in relying in good faith upon books of account of corporation or statements prepared by any of its officials as to value and amount of assets, liabilities and/or net profits of corporation, or any other facts pertinent to existence and amount of surplus or other funds from which dividends might be properly declared and paid. (13 VIC 116).

In case of any willful or negligent violation of provisions of § 117 of this title, directors under whose administration same may happen are jointly and severally liable, at any time within six years after paying such unlawful dividend, to corporation and to its creditors, in event of its dissolution or insolvency, to full amount of dividend unlawfully paid, with interest on same from time such liability accrued. Any director who may have been absent at time when act or resolution was adopted by which unlawful dividends were subsequently paid, or who may have dissented from said act or resolution, may exonerate themselves from such liability by causing their dissent to be entered at large on books containing minutes of proceedings of directors immediately after they have notice of act or resolution, or at time same was adopted, if they were present at meeting and dissented, or by causing statement of their dissent to be published, within two weeks after they have notice of said act or resolution, in a newspaper of general circulation in the Virgin Islands. (13 VIC 118).

Officers.

Every corporation organized under this chapter must have a president, secretary and treasurer, who must be chosen by directors. President is chosen from among directors. Secretary records all proceedings of meetings of corporation and directors in book to be kept for that purpose, and performs such other duties as are assigned to him. Treasurer may be required to give bond in such sum and with such surety or sureties as are provided by by-laws for faithful discharge of their duty. (13 VIC 69).

Corporation may have such other officers and agents as are appropriate, who are chosen in such manner and hold their offices for such terms as are prescribed by by-laws, or determined by board of directors or other governing body, and may secure fidelity of any or all of such officers by bond or otherwise. (13 VIC 69).

Any two offices (but not more than two), other than offices of president and secretary, may be held by same person. (13 VIC 69).

Failure to elect annually president, secretary, treasurer or other officers does not dissolve corporation. (13 VIC 69).

Liabilities of Officers.

For Loans to Officers and Directors.

No loans can be made by corporation to its officers or directors, and no loans may be made by corporation secured by its shares, and if any such loan is made, officers who make it or assent thereto are jointly and severally liable until repayment of sum so loaned with interest. Provisions of this section do not apply to corporations organized exclusively as savings and loan associations. (13 VIC 71).

For False Statements as to Condition of Business.

If directors or officers of any corporation organized under this chapter, shall knowingly cause to be published or give out any written statement or report of condition or business of corporation that is false in any material respect, officers and directors causing such report or statement to be published, or given out, or assenting thereto, will be jointly and severally liable for any loss or damage resulting therefrom. (13 VIC 72).

Principal Office.

Every corporation will maintain principal office or place of business in Virgin Islands. (13 VIC 51).

Resident Agent.

Every corporation will have resident agent in charge of its principal office in Virgin Islands, and such resident agent may be officer of corporation, or individual resident in, or corporation located in Virgin Islands on whom service of legal process against corporation can be made. (13 VIC 51).

General Powers of Corporation.

Every corporation is governed by provisions and subject to restrictions and liabilities contained in this chapter, so far as same are appropriate to and not inconsistent with its charter or act under which corporation was formed. No corporation will possess or exercise any other corporate powers, except such incidental powers as are necessary to exercise of power so given. (13 VIC 31). Every corporation created under these provisions shall have power of indemnification for directors or officers from suit. (13 VIC 32).

Dividends.

Directors of every corporation created under this chapter which has issued capital stock, subject to any restrictions contained in its articles of incorporation, may declare and pay dividends upon shares of its capital stock but only out of its net assets in excess of its capital as computed under accepted accounting practice. (13 VIC 114).

No corporation nor its directors will pay dividends upon any shares of corporation except in accordance with provisions of this chapter. Dividends may be paid in cash, in property, or in shares of capital stock, in case of shares with par value at par, and in case of shares without par value at such price as may be fixed by board of directors. (13 VIC 117).

Unclaimed Dividends.

See category 21 Property, topic 21.01 Absentees, subhead Escheat.

Sale or Transfer of Assets.

On action of board all assets may be sold when authorized by majority of stock issued at stockholders meeting called for that purpose, or when authorized by written consent of holders of majority of stock. Articles may require vote or written consent of larger proportion, but not to exceed ¾. (13 VIC 281).

Books and Records.

Corporation must keep correct books of account of its business transactions, and a stock ledger at principal office in Virgin Islands, open daily to stockholders for inspection at reasonable times. (13 VIC 73).

Reports.

Annual report must be filed with Lieutenant Governor, authenticated by signature of president or vice-president and of treasurer or assistant treasurer, and shall contain true and exact statement of capital used in conducting business within Virgin Islands, general balance sheet of last fiscal year, profit and loss statement for last fiscal year, such other information relating thereto as may be required by Lieutenant Governor. Annual report must also include list of names and addresses of all directors and officers and expiration of their terms of office. Corporation which has declared at time of filing of its original articles of incorporation its intention to elect to become foreign sales corporation is not required to include either general balance sheet or profit and loss statement of its last fiscal year in its annual report. (13 VIC 371).

Corporate Bonds or Mortgages.

No statutory provisions.

Merger and Consolidation.

Permitted by two or more domestic corporations, or by one or more domestic corporations with one or more corporations originating under the law of any state or states. Must be approved by votes representing two-thirds of total number of shares of capital stock. (13 VIC 251, 252).

Dissolution.

Dissolution procedure may be initiated by majority of directors and must be approved by two-thirds of stockholders having voting power. If all stockholders consent to dissolution, on the filing of such consent the Lieutenant Governor must issue certificate of dissolution which board of directors will publish in newspaper of general circulation for four consecutive weeks at least once a week. (13 VIC 283). No certificate of dissolution will be issued until all taxes, penalties or fees due to Virgin Islands have been paid. (13 VIC 284). U. S. attorney, or creditor or stockholder if U. S. attorney omits to act, may procure judgment or dissolution for enumerated reasons. (13 VIC 288).

Insolvency and Receivers.

Appointment of Receiver by Court on Creditor's or Stockholder's Application.

When any corporation is dissolved in any manner whatever, district court, on application of any creditor or stockholder at any time, may either continue directors liquidating trustees as aforesaid, or appoint one or more persons to be receivers of such corporation, to take charge of estate and effects thereof and to collect debts and property due and belonging to corporation with power to prosecute and defend, in name of corporation or otherwise, all actions necessary or proper for purpose aforesaid, and to appoint an agent(s) under them, and to do all other acts which might be done by such corporation, of its unfinished business; and powers of such trustees or receivers may be continued as long as court thinks necessary for such purpose. (13 VIC 287).

Failure of Corporation to Obey Court Order.

Whenever any corporation refuses, fails, or neglects to obey any order or decree of a competent court within time fixed by court for its observance, such refusal, failure or neglect is sufficient ground for appointment of receiver of corporation. If corporation is a foreign corporation, such refusal, failure or neglect is sufficient ground for appointment of receiver of assets of corporation within Virgin Islands. (13 VIC 343).

Equally Divided Vote.

Whenever, by reason of equally divided vote of stockholders, there is failure to elect directors, and such failure for such reason exists at two successive annual elections, district court, on petition of any stockholder may in absence of existing agreement for arbitration appoint one or more persons to be receivers of and for such corporation, with all powers of corporation and power to continue corporate business until otherwise ordered by court. (13 VIC 195).

Forfeiture of Articles upon Proof of Insolvency.

U.S. attorney, or creditor or stockholder of corporation upon U.S. attorney's failure to act, may maintain action to dissolve corporation where it is insolvent, as evidenced by return of no property found on execution, or by judgment or decree in insolvency proceedings or adjudication of bankruptcy, where corporation has suspended business for at least one year, where corporation was party to illegal restraint of trade, where corporation is in violation of law that imposes dissolution, where corporation has violated any law under which it was incorporated, where corporation exercises any rights or privileges that have not been conferred upon it by law and where incorporation of corporation was procured through fraud. Court shall have power by appointment of receiver or otherwise to administer and liquidate affairs of any corporation dissolved in this manner. (13 VIC 288).

Close Corporations.

No special statutory provisions.

Appraisal.

No special statutory provisions.

Foreign Corporations.

Before doing business, must file with Lieutenant Governor certified copy of charter or certificate of incorporation. Certificate signed by president or vice-president under corporate seal and attested by secretary or assistant secretary, stating name of authorized agent in Virgin Islands upon whom process may be served, sworn statement of assets, liabilities and capital stock at close of last fiscal year. Certification of Lieutenant Governor of filing of foregoing, delivered after payment of fees, shall be prima facie evidence of right to do business in Virgin Islands. (13 VIC 401). Filing fee is $150, which includes fee for certificate of qualification. Fee for filing statement required by § 853(a)(3) of this Title 13, for certain exempt companies, shall be $400. (13 VIC 431). Whenever foreign corporation amends its charter or shall be party to merger or consolidation, it must file with Lieutenant Governor within 30 days after amendment of merger or consolidation effective, duplicate copies of amendment or copy of articles of merger or consolidation. (13 VIC 402). Penalty for transaction of business without compliance with law is fine of not more than $500 for each offense. (13 VIC 406). Procedure for withdrawal from business in Virgin Islands is enumerated in § 407 of this Title 13. (13 VIC 407).

Taxation of Corporate Property.

Same as for property of individual. (See category 22 Taxation, topic 22.13 Property Taxes.)

Taxation of Corporate Income.

All corporations with liability to pay Virgin Islands income tax must pay tax surcharge of 10% of each corporation’s total income tax liability. (33 VIC 581).

Franchise Tax.

Every corporation incorporated under laws of Virgin Islands and every foreign corporation qualified to do business or doing business in Virgin Islands must pay to Lieutenant Governor franchise tax. Rate is $1.50 for each $1,000 of capital stock used in conducting business. Minimum tax for any corporation, except V.I. foreign sales corporation, is $150 even though no capital or capital stock is so used. Tax for V.I. foreign sales corporation is $300. Full year’s tax shall be collected for any portion of any tax year in which corporation was in existence after Dec. 1, 1993. (13 VIC 531).

Corporation cannot commence or maintain any action in any court if it has not paid its annual franchise tax last due. However, before pending case may be dismissed, corporation shall be given reasonable time to provide proof that arrangement has been made to pay any delinquent franchise taxes once matter is brought to court’s attention and if proper proof is presented to court, pending case shall be allowed to proceed without being dismissed. If corporation fails to pay franchise tax for period of more than one year from and after date when payment became due, such failure will be prima facie evidence of its insolvency. (13 VIC 533). No amendment to articles of incorporation may be filed with Lieutenant Governor until corporation has paid all franchise taxes due and payable, including penalties and interest. (13 VIC 222).

Professional Corporations.

Professional Service Corporations Act of Virgin Islands permits incorporation of professionals including attorneys, accountants, architects, engineers, and physicians. (13 VIC 701 et seq.).

Deeds.

See category 21 Property, topic 21.06 Deeds.

Model Non-profit Corporation Act not adopted. Nonprofit corporations authorized under 13 VIC 491 to 501.

Cooperative Corporations allowed under 13 VIC 551 et seq.

2.04 [RESERVED]

2.05 JOINT STOCK COMPANIES:

No legislation.

Professional Associations (or Corporations).

See topics 2.02 Associations, and 2.03 Corporations.

2.06 LIMITED LIABILITY COMPANIES:

Uniform Limited Liability Company Act adopted. (13 VIC 1101 et seq.).

2.07 [RESERVED]

2.08 PARTNERSHIPS:

Revised Uniform Partnership Act adopted. (26 VIC 1 et seq.).

Limited Liability Partnership.

(26 VIC 221 et seq.).

Limited Partnership.

Uniform Limited Partnership Act (1998) adopted. (26 VIC 321 et seq.).

Limited Liability Limited Partnership.

(26 VIC 574).

Foreign Limited Partnerships.

(26 VIC 521 et seq.).

Out-of-State Partnerships.

No special registration required applicable to partnerships or limited partnerships formed out-of-state.

3 BUSINESS REGULATION AND COMMERCE

3.01 BANKS AND BANKING:

Stockholders.

Every bank established after June 16, 1949, which fails to have its capital stock paid in as required by this section must, within three months after receiving notice thereof from Banking Board (Banking Board of Virgin Islands established in Office of Lieutenant Governor) cover deficiency in its capital stock by pro rata assessment on shareholders, or by means of new shareholders. If any bank fails to have its capital stock paid in and refuses to go into liquidation as provided by this title, after receiving notice from Banking Board, receiver must be appointed to liquidate business of bank according to provisions of this title. No bank shall make new issue of stock until all stock previously authorized has been paid in. If interest of a bank requires prompt payment of its shares, board of directors may resolve to call for such immediate payment of an assessment on stock as may be necessary, and will report fact to stockholders at next general meeting. (9 VIC 35).

If any shareholder neglects or refuses, after three months' notice, to pay assessment provided herein, board of directors will cause sufficient amount of capital stock of such shareholder to be sold at public auction (upon 30 days' notice to be given by posting such notice of sale in office of bank or by publication) to make good deficiency; and balance, if any, will be returned to delinquent stockholder. (9 VIC 36).

Rights and Liabilities of Stockholders and Creditors.

No bank shall be organized and established in U.S. Virgin Islands with subscribed capital less than $500,000. Capital stock of each bank shall be divided into shares of $100 each, or into such shares of lesser amount as may be provided in articles of incorporation, and shall be transferable on books of bank in such manner as may be prescribed in its bylaws or articles of incorporation. Every person becoming shareholder by such transfer shall, in proportion to their shares, succeed to all rights and liabilities of prior holder of such shares; and no change shall be made in articles of incorporation by which rights or security of existing creditors of bank shall be impaired. (9 VIC 35).

Deposits.

No statutory provisions other than those contained in Uniform Commercial Code. See topic 3.09 Commercial Code.

Unclaimed Deposits.—Controlled by Virgin Islands Uniform Unclaimed Property Act. (28 VIC 651 et seq.).

Collections.

Controlled by Uniform Commercial Code. (Title 11A). See topic 3.09 Commercial Code.

Amount of Stock to be Paid In.

At least 50%, but in no case less than $500,000, of its subscribed capital stock shall be paid in before it shall be authorized to commence business; and remainder shall be paid in monthly installments of at least 10% each, on whole amount of subscribed capital stock from time bank is authorized by Banking Board to commence business. Payment of each installment shall be certified to Banking Board, under oath, by president or manager of bank. (9 VIC 35).

Trust Companies.

Every bank established in Virgin Islands has power to take, accept and comply with or execute all kinds of trusts that may lawfully be committed to it, acting as trustee in all cases prescribed by law, receiving deposits of money in trust for any special or specific purpose whatever; as an executor, administrator, registrar of stocks and bonds, guardian of estates, assignee, receiver, or committee of estates of lunatics or in any other fiduciary capacity; and in general, to carry out all kinds of trusts or other fiduciary transactions with ample power and authority. It being understood, that in order to act as trustee in all such trusts as are granted and committed to it, banks shall previously deposit with Office of Lieutenant Governor such sum as may be promulgated by Banking Board, payable in cash or in bonds of Virgin Islands or Federal government at which time Office of Lieutenant Governor will notify Banking Board of such deposit. After such deposit has been made, Office of Lieutenant Governor upon recommendation of Banking Board will issue license to bank to act as trustee. (9 VIC 121).

Uniform Common Trust Fund Act.

Not in effect. Uniform Trusts Act adopted eff. Sept. 1, 1957. (15 VIC 1091 et seq.).

Foreign Banks.

Upon compliance with qualification provisions, any banking corporation organized under laws of any other territory or state or any foreign country, which operates bank or does business at place of its incorporation, may do business and establish offices in Virgin Islands. After such qualification, foreign banks may enjoy same general powers of banks organized under laws of Virgin Islands. (9 VIC 101, 121). See category 13 Estates and Trusts, topic 13.08 Executors and Administrators.

3.02 BILLS AND NOTES:

Uniform Commercial Code adopted. (Title 11A). See topic 3.09 Commercial Code. (3 VIC 101 et seq.).

Special Requirements.

None.

Judgment Notes.

No statutory provisions.

Attorney Fees.

No statutory provisions.

Special Defenses.

No statutory provisions.

3.033.05 [RESERVED]

3.06 BROKERS:

Licenses.

No statutory provisions for general brokers' licenses. See subhead Real Estate Brokers, infra.

Bond.

No statutory provision for general broker's bond. See subhead Real Estate Brokers, infra.

Real Estate Brokers.

Statutory provisions regarding real estate brokers are administered by Virgin Islands Real Estate Commission. (27 VIC 422). Licenses are required, and are normally issued only after making application therefor and successfully completing written examination. (27 VIC 423, 424, 425, 426). Annual fee for license is $250. (27 VIC 302). Standard commission on real estate transactions is 6% on improved property, and 10% on unimproved property.

Insurance Brokers.

Resident broker fee $200, nonresident broker fee $400. Bond of $10,000 required to be posted by all brokers. (27 VIC 301 et seq.).

Mortgage Brokers.

Broker license fee $400. Bond of $25,000 required to be posted by all brokers. License application fee of $200. (9 VIC 361-381).

Mortgage Bankers and Brokers.

Licensure granted by Banking Board once requirements of § 363 of Title 9 have been met to satisfaction of Banking Board. (9 VIC 361 et seq.).

3.07 [RESERVED]

3.08 CARRIERS:

Uniform Commercial Code adopted. (Title 11A). See topic 3.09 Commercial Code.

Rates.

No statutory provisions.

Discrimination.

Prohibited. (10 VIC 1 et seq.).

Limiting Liability.

See topic 3.09 Commercial Code.

Bills of Lading.

See topic 3.09 Commercial Code.

Liens.

Any person who is common carrier, or, at request of owner or lawful possessor of personal property, carries, conveys, or transports same from one place to another will have lien upon such property for their just and reasonable charges for labor, care and attention bestowed, and may retain possession of such property until charges are paid. (28 VIC 582). If such charges are not paid within three months after service is rendered person having such lien may enforce it by legal action. (28 VIC 583, 589). Such liens are preferred liens and are prior to any and all other liens. (28 VIC 585). Within 30 days after rendering such services, person claiming such lien must file for record in recorder's office of judicial division where property situated, claim which must be verified by oath of himself or some other person for him to effect that affiant believes same to be true. Claim must contain: (1) Statement of their demand, and account thereof, after deducting all credits and offsets; (2) name of person by whom they were employed; (3) statement of terms and conditions of contract, if any, and if no express contract, statement of what service, work, or labor is reasonably worth; and (4) description of property to be charged with lien sufficient for identification with reasonable certainty. (28 VIC 587). No such lien will bind any property for longer than six months after such claim has been filed, unless action is commenced within that time to enforce same. (28 VIC 586). In action to enforce lien, judgment must be rendered in favor of each person having lien for amount due him, and court must order any property subject to lien to be sold by marshal in same manner that personal property sold on execution. (28 VIC 592). See topic 3.09 Commercial Code.

3.09 COMMERCIAL CODE:

Uniform Commercial Code adopted, effective July 1, 1965. (Title 11A).

Article 1—General Provisions, Parts 1 and 2, §§ 1-101 to 208 repealed and replaced with new Article 1—General Provisions, Parts 1 and 2, §§ 1-101 to 310, Feb. 20, 2002. (11A VIC 1-101 to 310).

Article 2A—Leases adopted, effective Jan. 1, 2001. (11A VIC 2A-101 to 532).

Article 3—Commercial Paper, Parts 1 VIC 8, §§ 3-101 to 805 repealed and replaced with new Article 3—Negotiable Instruments, Parts 1 VIC 16, §§ 3-101 to 605, effective Jan. 1, 2001. (11A VIC 3-101 to 605).

Article 4—Bank Deposits and Collections, Parts 1 VIC 5, §§ 4-101 to 504 repealed and replaced with new Article 4—Bank Deposits and Collections, Parts 1 VIC 5, §§ 4-101 to 504, effective Jan. 1, 2001. (11A VIC 4-101 to 504).

Article 4A—Fund Transfers adopted, effective Jan. 1, 2001. (11A VIC 4A-101 to 504).

Article 5—Letters of Credit, §§ 5-101 to 117 repealed and replaced with new Article 5—Letters of Credit, §§ 5-101 to 118, effective Jan. 1, 2001. (11A VIC 5-101 to 118).

Article 6—Bulk Transfers repealed Feb. 20, 2002. (11A VIC 6-101 to 111).

Article 8—Investment Securities, Parts 1 VIC 4, §§ 8-101 to 406 repealed and replaced with new Article 8—Investment Securities, Parts 1 VIC 5, §§ 8-101 to 511, Feb. 20, 2002. (11A VIC 8-101 to 511).

Article 9—Secured Transactions; Sales of Accounts, Contract Rights and Chattel Paper, Parts 1 VIC 6, §§ 9-101 to 507 repealed and replaced with new Article 9—Secured Transactions, Parts 1 VIC 7, §§ 9-101 to 709, Feb. 20, 2002. (11A VIC 9-101 to 709).

Forms.

Forms at end of this Digest may be used: Financing Statement (UCC-1), Termination Statement (Addendum to page 3 of Form UCC-1), Statement of Continuation, Partial Release, Assignment, etc. (Form UCC-3).

See also topics: Banks and Banking, Bills and Notes, Brokers, Carriers, Contracts, Factors, Frauds, Statute of, Sales, Securities, Warehousemen; categories Business Organizations, topic Corporations; Civil Actions and Procedure, topic Limitation of Actions; Debtor and Creditor, topics Assignments, Fraudulent Sales and Conveyances, Liens, Pledges; Documents and Records, topics Records, Seals; Mortgages, topic Chattel Mortgages.

3.103.11 [RESERVED]

3.12 CONSUMER PROTECTION:

Regulated by Department of Licensing and Consumer Affairs. Commissioner of Licensing and Consumer Affairs appointed by Governor heads that Department. (3 VIC 270).

Duties and Powers.

Department has following duties and powers: to provide and administer consumer services and programs; to establish, administer, coordinate and supervise regulation and licensing of private business and professions; and to administer services to agencies, boards and commissions. (3 VIC 271). Department may inform public through available means of any illegal, fraudulent and deceitful practices committed in goods and service market. (3 VIC 272).

Prohibited Practices.

Every type or kind of act, practice, advertisement or publicity is prohibited which constitutes or tends to constitute fraud or deceit, where article, product, or service is falsely represented or which creates in consumer image or erroneous impression of brand, price, amount, size, quality, grade, salubrity or any other characteristics of product, article or service. (3 VIC 272).

Penalties.

Any violations of consumer services laws, rules and regulations created thereunder, or of orders and resolutions issued by Director, will constitute misdemeanor punishable by fine of not more than $1,000 or by imprisonment not to exceed six months, or by both penalties at discretion of Court. (3 VIC 272).

Uniform Deceptive Trade Practices Act.

Not adopted, but similar unfair trade practices law enacted providing for civil penalties, and private and class actions. (12A VIC 101 et seq.).

Plain Language.

Consumer contract entered into on or after Oct. 30, 1984 must be written in clear, simple, understandable, and easily readable language. Court or primary regulator determining compliance must consider guidelines set forth in statute. (12A VIC 252). Consumer contract, which includes writings required to complete consumer transaction, means written agreement in which natural person: (1) Leases or licenses personal property or leases real property for residential purposes; (2) obtains credit; (3) obtains personal insurance coverage; (4) borrows money; (5) purchases personal property; or (6) contracts for services, including professional services for cash or on credit, and credit, money, property or services are obtained for personal family or household purposes. (12A VIC 251a). Creditor, seller, insurer, or lessor who fails to comply is liable to consumer who is party to consumer contract for actual damages sustained, plus punitive damages up to $1,000, and reasonable attorneys' fees and costs. (12A VIC 253). Class actions may be brought but amount of punitive damages is limited to $10,000 against any one seller, lessor, insurer, or creditor. (12A VIC 254). There is no liability if: (1) Both parties to contract have performed their obligations under agreement; (2) creditor, seller, insurer, or lessor attempts in good faith to comply in preparing consumer contract; (3) contract is in conformity with rule, regulation, or opinion or interpretation of territorial official authorized to issue approvals of form of contract; (4) consumer supplied contract or portion of contract in question; or (5) specific language used in consumer contract is required, permitted, or approved by law, regulation, rule, or published interpretation of territorial or federal agency. (12A VIC 255). Plain Language Act does not apply to consumer contracts involving amounts of more than $25,000, except for home owners and tenant insurance policies. Real estate transactions, including title insurance policies, are excluded from Plain Language Act except real estate leases for residential purposes are included. (12A VIC 258).

Consumer Funds Transfer Facilities.

Definitions. (9 VIC 132). Transaction fees. (9 VIC 133).

3.13 CONTRACTS:

Uniform Commercial Code adopted. (Title 11A). See topic 3.09 Commercial Code. See Restatements of Law.

Section 3 of the Revised Organic Act of the Virgin Islands (July 22, 1954, c. 558, § 3, 68 Stat. 497) provides that no law impairing the obligation of contracts shall be enacted.

Plain Language.

See topic 3.10 Consumer Protection.

See categories 10 Documents and Records, topic Seals; and Family, topic Infants.

Rental Purchase Agreements.

Rental Purchase Disclosure Act (12A VIC 280 et. seq.) requires merchants to disclose in clear and conspicuous manner to consumer certain information including, but not limited to payments and title to personal property.

3.14 FACTORS:

See Restatements of Law.

Uniform Commercial Code adopted. (Title 11A). See topic 3.09 Commercial Code.

3.15 FRANCHISES:

See Title 12A § 130 et seq.

3.16 FRAUDS, STATUTE OF:

See Restatements of Law.

No interest in land, other than a lease for a term not exceeding one year, nor any trust or power over or concerning lands, can be created, granted, assigned, surrendered, or declared unless by operation of law or by deed of conveyance in writing, subscribed by the party creating, granting, assigning, surrendering or declaring the same. This does not affect disposition of property by will, nor prevent trust by operation of law. Every contract for leasing for a longer period than one year from making thereof, or for sale of any lands, or any interest in lands, shall be void unless contract or some note or memorandum be in writing and signed by party to be charged. In following cases, every agreement shall be void unless such agreement, or some note or memorandum thereof, be in writing and subscribed by party to be charged therewith: (1) every agreement by its terms not to be performed within one year; (2) every special promise to answer for debt, default or misdoings of another person; (3) every agreement, promise or undertaking made upon consideration of marriage, except mutual promises to marry; (4) every special promise made by executor or administrator to answer damages out of their own estate. (28 VIC 241 to 246).

Contracts of Sale.

Regarding real estate, dealt with in preceding paragraph. Regarding personal property, Uniform Commercial Code adopted. See topic 3.09 Commercial Code.

Part Performance.

See Restatements of Law.

3.17 INTEREST:

Rate of interest is 9% per year on all (1) monies which have become due; (2) money received to use of another and retained beyond reasonable time without owner’s consent; (3) money due upon settlement of matured accounts from day balance is ascertained; and (4) money due or to become due where there is contract and no rate is specified. (11 VIC 951).

Maximum Rate.

On written contracts, by express agreement of parties, maximum rate of interest per annum must not exceed 18½% on loans of $9,000 or less. All loans in excess of $9,000 are exempted from any maximum interest rate limitations. On first priority mortgage loans on real estate where amount of first priority mortgage loan is $100,000 or less, maximum rate of interest shall be not more than 1½ percentage points above Federal Home Loan Mortgage Corporation's posted yield on last business day of month on 30 year standard conventional fixed rate mortgages committed for delivery within 60 days, rounded to nearest ¼%, which rate shall take effect on first day of immediately subsequent month and continue in effect for remainder of said month, and apply to all commitments made by lender during said month. Lender may also charge maximum of $150 application fee, 50% of which shall be refunded to borrower unless application is approved, together with 1½ points at time of mortgage closing. First priority mortgage loans in excess of $100,000, adjustable rate mortgage loans, mortgage loans to entities other than natural persons, commercial mortgage loans, and home equity mortgage loans, however, are exempt from these interest, fee and point limitations. Chairman of Banking Board shall ascertain permissible rate for said first priority mortgage loans of $100,000 or less for each month and make it available to public. No interest rate shall be usurious if such rate is in conformity, at time of loan commitment, with rate ascertained and published by Chairman of Banking Board. (11 VIC 951).

No fee, penalty, or other form of payment may be charged borrower for prepayment of all or part of balance of loan. On first priority mortgage loans, no handling fee or other form of administrative cost for servicing loan may be charged other than application fee and points mentioned above; provided, however, that actual out-of-pocket costs such as appraisal fees, document recordation charges, legal fees, survey costs and cost of credit check may be charged by lender to borrower. Such fees are to be included in good faith estimate and disclosure statement required under provisions of Truth in Lending Act. These provisions do not apply to following: (1) Loan of money, credit sale, or extension of credit which provides that rate of interest charged on unpaid balance may be adjusted from time to time as provided in promissory note or other documents evidencing loan, and which is secured, in whole or in part, directly or indirectly, by mortgage on real property located in Virgin Islands, (2) loans on which interest rate may be converted from one type of rate to another, and (3) loans to entities other than natural persons, including but not limited to corporations, partnerships, limited partnerships, limited liability companies and other legal entities. (11 VIC 951).

Judgments.

Rate of interest on judgments and decrees for payment of money is 4%. (5 VIC 426).

Open Accounts.

Interest runs at 9% per year on money due upon settlement of matured accounts from day balance is ascertained. (11 VIC 951).

Small Loans.

Any individual, firm, voluntary association, joint stock company, incorporated society, partnership, trust, corporation, or any other legal entity licensed under statutory provisions pertaining to small loans may lend any sum of money, goods, or things of value not exceeding in amount of value $7,500, may charge, contract for and receive interest charges of 26% per annum, but not less than 19.5% per annum, subject to other statutory provisions. (9 VIC 181 et seq.).

Usury.

Prohibited. Contract for usurious interest works on forfeiture of entire interest on debt. Action to recover double amount of usurious interest paid may be brought within two years after such payment. (11 VIC 952, 953, 954). No corporation or general or limited partnership, however, shall plead any law against usury in any court as defense in any action instituted to enforce payment of any bond, note or other evidence of indebtedness issued or assumed by such entity. (13 VIC 347).

3.18 [RESERVED]

3.19 LICENSES, BUSINESS AND PROFESSIONAL:

Every person or association wishing to engage in any business, occupation, profession, or trade must as a condition precedent apply in writing to and obtain from Commissioner of Licensing and Consumers Affairs license to engage in or conduct such business, occupation, profession or trade. Applications for licenses must be made on forms prescribed and furnished by Commissioner on which applicant must furnish information concerning their identity, personal history, experience, business record, purposes, record of any conviction of any offense which is felony or crime involving moral turpitude, and other pertinent facts that Director may require. No license issued hereunder may be transferred to any other person or association, except that business license to natural person is transferred automatically on death of licensee to widow or widower of licensee so long as widow or widower remains unmarried, and except that business license held and used by corporation may be transferred on sale of corporation. (27 VIC 301).

Commercial Travelers.

No person may go into or upon any private or commercial premises in Virgin Islands, not having been requested or invited to do so by owner, owners, occupant or occupants of said private residence, as solicitor, peddler, hawker, salesman, itinerant vendor or transient merchant, for purpose of selling or procuring orders or subscriptions thereto (except magazines and newspapers published in Virgin Islands), or for any other commercial or business purposes without first obtaining door-to-door license. For purposes of this chapter “Itinerant Vendor” license is required for all persons selling and delivering merchandise at retail other than from retail store located within Virgin Islands. No door-to-door salesman or itinerant vendor may solicit business or advertise or sell merchandise in any business district or shopping area in Virgin Islands or at point closer than 500 feet from any retail store or shop selling merchandise similar in nature or description; provided, however, that provisions of this sentence do not apply to sale of merchandise or goods produced, manufactured, prepared or assembled within Virgin Islands, nor to portable or mobile refreshment stands. (27 VIC 302).

Collection Agencies.

No specific statutory provisions.

3.20 MONOPOLIES, RESTRAINT OF TRADE AND COMPETITION:

Virgin Islands Antimonopoly Law. (11 VIC 1501 et seq.).

Uniform Trade Secrets Act adopted.

3.213.22 [RESERVED]

3.23 SALES:

Sales law governed exclusively by Uniform Commercial Code. (Title 11A). See topic 3.09 Commercial Code.

Contracts of Sale.

No statutory limitation exists regarding type size in printed contract. See topic 3.09 Commercial Code.

Bills of Sale.

No special requirements.

Product Liability.

See topic 3.09 Commercial Code. Also see Restatements of Law.

Retail Credit Sales.

No specific restrictions. See topic 3.17 Interest.

Consumer Protection.

See topic 3.10 Consumer Protection.

Bulk Sales.

See topic 3.09 Commercial Code.

Sales of Motor Vehicles.

See category 23 Transportation, topic 23.01 Motor Vehicles.

3.24 SECURITIES:

Uniform Securities Act adopted. Uniform Commercial Code adopted. (Title 11A). See topic 3.09 Commercial Code.

Uniform Simplification of Fiduciary Security Transfers Act not adopted.

Uniform Transfers to Minors Act adopted.

3.253.26 [RESERVED]

3.27 WAREHOUSEMEN:

Uniform Commercial Code adopted. (Title 11A). See topic 3.09 Commercial Code.

4 CITIZENSHIP

4.01 ALIENS:

Federal law applicable. Persons born in U.S. Virgin Islands are U.S. citizens.

For residency requirements for tax purposes, see Title 29 U.S.C. 937.

5 CIVIL ACTIONS AND PROCEDURE

5.01 ACCORD AND SATISFACTION:

Revised Uniform Commercial Code adopted, effective Jan. 1, 2001. (11A VIC 3-311). See category 3 Business Regulation and Commerce, topic 3.09 Commercial Code. Also see Restatements of Law.

5.02 ACTIONS:

Federal Rules of Civil Procedure prescribed by U.S. Supreme Court apply to District Court of Virgin Islands. (Revised Organic Act of 1954, § 24). District Court may from time to time prescribe additional rules consistent with Federal Rules, such additional rules are limited and primarily administrative in nature.

In 1984 amendments to Revised Organic Act of 1954, Congress granted Territorial—now Superior—Court of the Virgin Islands authority to promulgate rules governing practice and procedure of courts established by local law and times and places of holding court. Rules of the Superior Court govern all actions in Superior Court; however, Local Rules of the District Court of the Virgin Islands, Federal Rules of Civil Procedure, Federal Rules of Criminal Procedure, and Federal Rules of Evidence apply to Superior Court proceedings to extent that they are not inconsistent with Superior Court rules. (Sup.Ct.R. 7). See topic 5.13 Evidence.

Equity.

Classic distinctions between legal and equitable remedies not observed.

Forms of Actions.

Sup.Ct.R. 21; Fed.R.Civ.P. 2.

Conditions Precedent.

No statutory provisions requiring service of notice of claim or injury on which action based. See Rule 9 of Federal Rules of Civil Procedure. (5 App.I R.9).

Commencement.

Sup.Ct.R. 22; Rule 3 of Federal Rules of Civil Procedure; LRCi 3.1. See also topics 5.17 Pleading, 5.20 Process.

Parties.

Rules 17, 18, 19, 20 and 21 of Federal Rules of Civil Procedure; 5 VIC 71-80.

Class Actions.

Uniform Class Actions Act not adopted. Rule 23 of Federal Rules of Civil Procedure.

Intervention.

Rule 24 of Federal Rules of Civil Procedure.

Interpleader.

Rule 22 of Federal Rules of Civil Procedure.

Third Party Practice.

Rule 14 of Federal Rules of Civil Procedure.

Joinder of Causes of Action.

Sup.Ct.R. 37; Rule 18 of Federal Rules of Civil Procedure.

Splitting Causes of Action.

Rule 42 of Federal Rules of Civil Procedure.

Consolidation of Actions.

Rule 42 of Federal Rules of Civil Procedure.

Severance of Actions.

Federal Rules of Civil Procedure.

Stay of Proceedings.

Federal Rules of Civil Procedure.

Abatement and Revival.

Revival of Tort Actions.

Thing in action arising out of wrong which results in physical injury to person or out of statute imposing liability for such injury shall not abate by reason of death of wrongdoer or any other person liable for damages for such injury, nor by reason of death of person injured or of any other person who owns any such thing in action. When person entitled to maintain such action dies before judgment, damages recoverable for such injury may include loss of earnings and expenses sustained or incurred as result of injury may include damages for pain, suffering and disfigurement, or punitive or exemplary damages, or prospective profits or earnings after date of death. Damages recovered shall form part of estate of deceased. Nothing in this section shall be construed as making such thing assignable. (5 VIC 77).

Substitution of Parties.

No action will abate by death or disability of party or by transfer of any interest therein if cause of action survives or continues. In case of death or disability of party, court may at any time within two years thereafter, on motion, allow action to be continued by or against their personal representative or successor in interest. (5 VIC 78). See also Rule 25 of Federal Rules of Civil Procedure.

Death of Party After Decision of Action.

Action for wrong will not abate by death of any party after decision has been given therein, but action will proceed thereafter in same manner as in cases where cause of action survives. (5 VIC 79). See also Rule 25 of Federal Rules of Civil Procedure.

See also category 13 Estates and Trusts, topic 13.08 Executors and Administrators.

Limitation of.

See topic 5.16 Limitation of Actions.

Magistrate Division.

On July 1, 2009, pursuant to 4 VIC 120 et seq., Magistrate Division was established within Superior Court, in which procedure, unless otherwise specified, is according to Superior Court Rules. (Sup.Ct.R. 310). Magistrate Division consists of no fewer than two magistrates per judicial district and other officers and employees as Presiding Judge of Superior Court considers necessary for proper administration and performance of duties and functions of division. (4 VIC 121; Sup.Ct.R. 310.1).

Magistrate Division will hear following types of cases: All non-felony traffic offenses, litter cases, misdemeanor criminal cases where maximum punishment is limited to not more than six months imprisonment; arraignment and probable cause hearings in any criminal or traffic offense matter; small claims cases and probate matters; forcible entry and detainer and landlord and tenant actions; domestic violence cases in which restraining order is sought. Magistrate may also administer oaths and affirmations and issue civil and criminal process, including warrants of arrest, search warrants, subpoenas, and orders, including orders for release on bail, for detention of persons pending trial and for contempt; take acknowledgments, affidavits and depositions; and conduct marriages. (4 VIC 123).

Upon designation by judge of Superior Court, pursuant to rules adopted by court, magistrate may: (1) Hear and determine any pretrial matter pending before court, including matters before Family Court, except motion for injunctive relief, for judgment on pleadings, for summary judgment, for dismissing or quashing indictment or information made by defendant, suppression of evidence in criminal case, dismissal or to permit maintenance of class action, dismissal for failure to state claim upon which relief can be granted, and to involuntarily dismiss action. (2) Conduct hearings, including evidentiary hearings, to submit proposed findings of fact and recommendations for disposition, by Superior Court judge, of any motion excepted in subsection (b)(1) of applications of post trial relief made by individuals convicted of criminal offenses and of prisoner petitions challenging conditions of confinement.

Judge of Superior Court may reconsider any pretrial matter handled by magistrate where it has been shown that magistrate’s order is clearly erroneous or contrary to law.

Upon consent of parties and approval of presiding judge, magistrate may conduct all proceedings in jury or non-jury civil matter, including trial, and enter judgment in case. Order entered pursuant to this subsection is Order of Court, appealable to Supreme Court of Virgin Islands as any other Order. (4 VIC 123).

Small Claims.

See category 6 Courts and Legislature, topic 6.01 Courts.

Termination of Actions.

Federal Rules of Civil Procedure.

Prohibited Actions.

No counterclaims permitted in summary proceedings between landlord and tenant for recovery of possession of premises and for forcible entry and detainer. (Sup.Ct.R. 37).

Administration.

See category 13 Estates and Trusts, topic 13.08 Executors and Administrators.

Taxpayers’ Suits.

Taxpayer may maintain action in Superior Court to restrain illegal or unauthorized acts by territorial officer or employee, or wrongful disbursement of territorial funds. (5 VIC 80).

Direct Actions Against Insurer.

See category 23 Transportation, topic 23.01 Motor Vehicles, subhead Direct Actions.

5.03 APPEAL AND ERROR:

From Superior Court.

On Jan. 29, 2007, V.I. Supreme Court assumed jurisdiction of all appeals arising from final judgments, final decrees, and final orders of Superior Court, or as otherwise provided by law.

(4 VIC 32). Practice in V.I. Supreme Court is governed by V.I. Supreme Court Rules. (4 VIC 34). For first 15 years following establishment of V.I. Supreme Court, Third Circuit Court of Appeals shall have jurisdiction to review by writ of certiorari all final decisions of V.I. Supreme Court. (Revised Organic Act 1954, § 23 as amended; 48 U.S.C. 1613).

From District Court to Third Circuit Court of Appeals.

Appeals may be taken from District Court pursuant to Federal Rules of Appellate Procedure and Rules of Third Circuit Court of Appeals.

From District Court to U.S. Supreme Court.

Appeals may be taken from District Court to U.S. Supreme Court pursuant to Federal Rules of Appellate Procedure.

5.04 BONDS:

No general statutory provisions.

5.05 CERTIORARI:

Petition to Supreme Court of U.S. for writ of certiorari must be made in manner and within time prescribed by its Revised Rules, as adopted Apr. 14, 1980, effective June 30, 1980. Petition to U.S. Court of Appeals for Third Circuit for writ of certiorari to review decision of V.I. Supreme Court is governed by Third Circuit L.A.R. Misc. 112. Certiorari is likely to be granted when V.I. Supreme Court decides “a question in a way that conflicts with applicable decisions of [the Third Circuit], other appellate courts, or the United States Supreme Court”.

5.06 CHARITABLE IMMUNITY:

See topic 5.09 Damages.

5.07 [RESERVED]

5.08 COSTS:

Costs which may be allowed in civil actions include fees of officers, witnesses and jurors, deposition expenses, publication expenses, masters’ fees, copying costs and attorneys’ fees. Compensation of attorneys must be left to agreement, but prevailing party is allowed such sums as court in its discretion may fix for attorneys’ fees in maintaining or defending action. (5 VIC 541).

Security for Costs.—If plaintiff is nonresident of Virgin Island or is foreign corporation, defendant may serve notice requiring security for costs which may be awarded against plaintiff. Such security is given either by filing with clerk undertaking with sufficient sureties, not to exceed $1,000; or by depositing with clerk amount which court directs. Whenever more than one defendant is named undertaking will be increased not to exceed $500 for each additional defendant, not to exceed total of $3,000. Foregoing does not apply to actions in Small Claims Division of Superior Court. (5 VIC 547).

Liability of Attorney.

No statutory provisions.

5.09 DAMAGES:

In any cases in which point of law in question is not dealt with specifically in

Restatements of Law, common law generally prevails. See also category 3 Business Regulation and Commerce, topic 3.09 Commercial Code.

Ad Damnum Clause.

No complaint or cross-complaint shall specify amount of damages but must contain prayer for general relief and must state that damages are within jurisdictional limits of court. (5 VIC 5). No prohibition under local District Court rules.

Comparative Negligence Rule adopted Feb. 15, 1973. Applies to causes of action arising after Apr. 15, 1973. (5 VIC 1451). Uniform Comparative Fault Act not adopted.

Charitable Immunity.

No statutory provisions. See category 13 Estates and Trusts, topic 13.02 Death, subhead Actions for Death. See Restatements of Law.

Sovereign Immunity.

Government of Virgin Islands waives its immunity from liability with respect to injury or loss of property or personal injury or death caused by negligent or wrongful act or omission of government employee while acting within scope of their office or employment under circumstances when government, if private person, would be liable to claimant in accordance with law of place where act or omission occurred, up to sum of $25,000. (33 VIC 3408, 3411).

No-Fault Insurance.

See categories 13 Estates and Trusts, topic Death, subhead Actions for Death; Transportation, topic Motor Vehicles, subhead No-Fault Insurance.

Uniform Apportionment of Tort Responsibility Act.

Not adopted.

Uniform Punitive Damages Act.

Not adopted.

5.10 [RESERVED]

5.11 DEPOSITIONS AND DISCOVERY:

Federal Rules of Civil Procedure 26-37 and Local Rules of Civil Procedure apply. (Sup.Ct.R. 39; LRCi. 26.1-30.1).

Uniform Foreign Depositions Act adopted. (5 VIC 695).

Uniform Interstate and International Procedure Act adopted. (5 VIC 4901 et seq.).

Within Territory for Use Within Territory.

Federal Rules of Civil Procedure apply. (Sup.Ct.R. 39).

Within Territory for Use Elsewhere.

Article III of Uniform Interstate and International Procedure Act applies. (5 VIC 4922).

Outside of Territory for Use Within Territory.

Article III of Uniform Interstate and International Procedure Act applies. (5 VIC 4921).

De Bene Esse.

Federal Rules of Civil Procedure apply.

Perpetuating Testimony.

Federal Rules of Civil Procedure apply.

Before Whom Taken.

Federal Rules of Civil Procedure apply.

Commissions.

Uniform Interstate and International Procedure Act applies. (5 VIC 4921).

Compelling Attendance of Witnesses.

Uniform Foreign Depositions Act applies, Uniform Interstate and International Procedure Act applies, and Federal Rules of Civil Procedure apply.

Criminal Cases.

Federal Rules of Criminal Procedure apply. (Sup.Ct.R. 130). See also Sup.Ct.R. 121-29,131-37. For procedure in territorial criminal cases generally, see 5 VIC 3501 et seq.

Examination of Witnesses.

See subhead Compelling Attendance of Witnesses, supra.

Return.

See subhead Compelling Attendance of Witnesses, supra.

Form.

Standard introduction of persons present in their respective capacities, and statement of stipulations under which deposition is to be taken.

5.12 EQUITY:

See topic 5.02 Actions.

5.13 EVIDENCE:

If federal law governs, Federal Rules of Evidence applicable. In recent opinion, however, V.I. Supreme Court decided issue which had split of authority in local courts, holding that if Virgin Islands law governs, then Uniform Rules of Evidence as adopted by Legislature (5 VIC 771 et seq.), rather than Federal Rules of Evidence, will apply in both civil and criminal cases. (51 V.I. 258; 5 VIC 771 et seq.).

Witnesses.

Federal Rules of Evidence adopted.

Lawyer-Client Privilege.

Subject to certain exceptions, communications between lawyer and client, in course of relationship and in professional confidence, are privileged and client has privilege: (a) If they are witness to refuse to disclose any such communications, and (b) to prevent their lawyer from disclosing it, and (c) to prevent any other witness from disclosing such communication if it came to knowledge of such witness in course of its transmittal between client and lawyer, or in manner not reasonably to be anticipated by client, or as a result of breach of lawyer-client relationship. Privilege may be claimed by client in person or by their lawyer, or if incompetent, by their guardian, or if deceased, by their personal representative. Privilege available to corporation or association terminates upon dissolution. (5 VIC 854; 17 V.I. 32).

Physician-Patient Privilege.

With certain exceptions, person, whether or not party, has privilege in civil action or in prosecution for misdemeanor to refuse to disclose, and to prevent witness from disclosing, communication if they claim privilege and if judge finds that: Communication was confidential communication between patient and physician; and patient or physician reasonably believed communication to be necessary or helpful to enable physician to make diagnosis of condition of patient or to prescribe or render treatment therefor; and witness is holder of privilege or at time of communication was physician or person to whom disclosure was made because reasonably necessary for transmission of communication or for accomplishment of purpose for which it was transmitted or is any other person who obtained knowledge or possession of communication as result of intentional breach of physician’s duty of nondisclosure by physician or their agent or servant; and claimant is holder of privilege or person authorized to claim privilege for him. (5 VIC 855).

Priest-Penitent Privilege.

Person, whether or not party, has privilege to refuse to disclose, and to prevent witness from disclosing communication if they claim privilege and judge finds that communication was penitential communication and witness is penitent or priest, and claimant is penitent, or priest making claim on behalf of absent penitent. (5 VIC 857).

Husband and Wife.

With certain exceptions, spouse who transmits to other information which constitutes communication, has privilege during marital relationship which they may claim whether or not they are party to action, to refuse to disclose and to prevent other from disclosing communications found by judge to have been had or made in confidence between them while husband and wife. Other spouse or guardian of incompetent spouse may claim privilege on behalf of spouse having privilege. (5 VIC 856).

In Criminal Actions.

Accused in criminal action has privilege to prevent their spouse from testifying in such action with respect to any confidential communication had or made between them while they were husband and wife, excepting only: (a) In action in which accused is charged with crime involving marriage relation, or crime against person or property of other spouse or child of either spouse, or desertion of other spouse or child of either spouse, or (b) as to communication, in action in which accused offers evidence of communication between himself and their spouse. (5 VIC 851).

Communications or Transactions with Persons Since Deceased or Incompetent.

Dying declarations are exceptions to hearsay rule. (Fed.R.Evid. 804; 5 VIC 932).

Self-Incrimination.

With certain exceptions, every person has, in any criminal action in which they are accused, privilege not to be called as witness and not to testify. (5 VIC 851). See also U.S. Const. Amend. V.

Compelling Attendance.

See topic 5.10 Depositions and Discovery.

5.14 INJUNCTIONS:

Federal Rules of Civil Procedure form basis for procedural statutory provisions concerning injunctions. See topic 5.19 Practice.

Jurisdiction.

Superior Court has jurisdiction concurrent with District Court of all actions for writs of injunction or for relief available by mandamus. (4 VIC 76; 13 VIC 531).

Prerequisites.

See Federal Rules of Civil Procedure.

Procedure.

See Federal Rules of Civil Procedure.

Bond.

See Federal Rules of Civil Procedure.

Temporary Injunction.

See Federal Rules of Civil Procedure.

5.15 JUDGMENTS:

Federal Rules of Civil Procedure form basis for procedural statutes. See topic 5.19 Practice.

Judgments by Confession.

Confession of Judgment in Pending Action.

On confession of defendant, with assent of plaintiff or their attorney, judgment may be given against defendant in any action, before or after answer, for any amount or relief not exceeding or different from that demanded in complaint.

When action is against public or private corporation, confession must be made by person who at time sustains relation to such corporation as would authorize service of summons upon him. In all other cases confession must be made by defendant in person.

When action is upon a contract, and against one or more defendants jointly liable, judgment may be given on confession of one or more defendants against all defendants thus jointly liable, whether such defendants have been served with summons or not, to be enforced only against their joint property and against joint and separate property of defendant making confession.

Confession and assent thereto must be in writing, and subscribed by parties or their attorneys making same, and acknowledged by each before officer authorized to take acknowledgments of deeds, but acknowledgment is not required if parties or their attorney appear in court when judgment is given. In all cases confession and assent thereto and acknowledgment, if any, must be filed with clerk. (5 VIC 421).

Confession of Judgment Without Action.

On confession of any person capable of being made party defendant to action, judgment may be given against such person without action, in favor of anyone, either for money due or to become due, or to secure any person against contingent liability on behalf of defendant in such judgment, or both, if it is in favor of same person.

Confession must be made, assented to and acknowledged, and judgment given in same manner as confession in action pending. Confession must be verified by oath of party making it and must authorize judgment to be given for particular sum. If it is for money due or to become due it must state plainly and concisely facts out of which such indebtedness arose and must show that sum confessed therefor is justly due or to become due.

If for purpose of securing plaintiff in judgment against contingent liability, it must state plainly and concisely facts constituting such liability and must show that sum confessed therefor does not exceed same. When judgment is given so as to be payable in installments, executions may issue to enforce payment of such installments, as they become due. (5 VIC 422).

Judgments by Consent.

Parties to question in controversy, which might be subject of action in court of record, may submit same to determination of such court without action.

Parties as plaintiff and defendant state, in writing, case containing facts upon which controversy depends and subscribe same in person or by their attorneys. Such statement must be verified by oaths of parties or, where there is more than one plaintiff or defendant, by at least one of each, to effect that controversy is real, and proceeding is taken in good faith to determine rights of parties. Where either party to controversy is public or private corporation, statement of case may be subscribed and verified by any person who at time sustains relation to such corporation as would authorize service of summons upon him.

Statement must be filed with clerk of court and from date of filing court has jurisdiction of controversy as if same were action pending after special verdict found, and will proceed to hear and determine it accordingly. (5 VIC 423).

Judgments on Pleadings.

See Rule 12(c) of Federal Rules of Civil Procedure.

Summary Judgments.

See Rule 56 of Federal Rules of Civil Procedure.

Declaratory Judgments.

Uniform Declaratory Judgments Act adopted. (5 VIC 1261 et seq.).

Default Judgments.

See Sup.Ct.R. 48; Rule 55 of Federal Rules of Civil Procedure.

Offer of Judgment.

See Rule 68 of Federal Rules of Civil Procedure.

Docketing.

See Sup.Ct.R. 49 and 51; Rule 58 of Federal Rules of Civil Procedure.

Vacatur or Modification.

See Sup.Ct.R. 50; Rules 59, 60, and 61 of Federal Rules of Civil Procedure and corresponding District Court Local Rules; LRCi 7.4. In criminal cases, motion for new trial is governed by Sup.Ct.R. 135, and motion for correction or reduction of sentence is governed by Sup.Ct.R. 136.

Lien.

At any time after entry and docketing of judgment, while an execution might issue upon such judgment, and the same remains unsatisfied in whole or in part, judgment creditor, or in case of their death, their representative, may file certified transcript of judgment in office of recorder. Upon filing of such transcript recorder shall docket same in judgment docket of their office and note same in property register against such property or properties as requested by judgment creditor. From date of docketing transcript of judgment, such judgment shall be lien upon such real property of defendant. Such judgment may also be recorded against all after acquired property with like effect, upon request of judgment creditor.

Lien will expire if no execution is issued within ten years after entry of judgment, but judgment for overdue child support will not expire. (5 VIC 425).

Revival.

Whenever, after entry of judgment, period of five years has elapsed without execution being issued on judgment, thereafter execution will not issue unless party in whose favor judgment was given files motion with clerk of court where judgment entered for leave to issue execution. (5 VIC 488).

Assignment.

No statutory provisions.

Satisfaction.

Following form may be used:

Form

(Title of Action) It is hereby acknowledged that the judgment entered herein on. . . . . . in favor of the plaintiff in the sum of $. . . . . . has been fully satisfied, and the clerk of the Court is hereby authorized to cancel and discharge the said judgment.

Dated:. . . . . .

....

(Signature of plaintiff’s attorney)

Actions.

No specific statutory provisions.

Foreign Judgments.

Uniform Enforcement of Foreign Judgments Act (1964) adopted. (5 VIC 551 et seq.).

Interest on Judgments.

Pre-judgment interest is 9% per annum. (11 VIC 951). Pre-judgment interest not available for non-contractual tort (44 V.I. 300) or against government (5 VIC 426). Post-judgment interest is 4% per annum. (5 VIC 426).

5.16 LIMITATION OF ACTIONS:

Uniform Commercial Code adopted, eff. July 1, 1965. (Title 11A). See category 3 Business Regulation and Commerce, topic 3.09 Commercial Code.

Actions must be brought within the following periods after the respective causes of action accrue:

Twenty Years.

Action for recovery of real property, or for recovery of the possession thereof; action upon a judgment or decree of any court of the United States, or of any State, Commonwealth or Territory within the United States; action upon a sealed instrument.

Fourteen Years.

Action to recover damages for any injury to real or personal property or to person, or for wrongful death arising out of any latent deficiency in design, specifications, surveying, planning, supervision or observation of construction or construction of improvement to, or survey of real property. (5 VIC 32b). Exceptions if injury, death, or property damage arise from intentional act or gross negligence; fraud; breach of express warranty/guarantee; defective product; prolonged exposure to hazardous waste; or intentional concealment, contractual waiver, or minor. (5 VIC 32c).

Ten Years.

Action for any cause not otherwise provided for.

Seven Years.

Action to recover damages for any injury to real or personal property or to person, or for wrongful death arising out of any latent deficiency in performing or furnishing design, specifications, surveying, planning, supervision or observation of construction or construction of improvement to real property. (5 VIC 32b). Exceptions if injury, death, or property damage arise from intentional act or gross negligence; fraud; breach of express warranty/guarantee; defective product; prolonged exposure to hazardous waste; or intentional concealment, contractual waiver, or minor. (5 VIC 32c).

Six Years.

Action upon a contract or liability, express or implied, except action upon sealed instrument mentioned above; action upon liability created by statute, other than penalty or forfeiture; action for waste or trespass upon real property; action for taking, detaining, or injuring personal property, including action for specific recovery thereof.

Four Years.

Action for breach of any contract for sale of goods as defined in Uniform Commercial Code. (11A VIC 2-725).

Three Years.

Action against a marshal, peace officer or coroner, upon a liability incurred by the doing of an act in their official capacity or in virtue of their office, or by the omission of an official duty, including the non-payment of money collected upon an execution. This does not apply to an action for an escape. Action upon a statute for penalty or forfeiture, where the action is given to the party aggrieved, or to such party and the Government of the Virgin Islands, except where the statute imposing it prescribes a different limitation.

Two Years.

Action for libel, slander, assault, battery, seduction, false imprisonment, or for any injury to the person or rights of another not arising on contract and not herein especially enumerated, or to set aside sale of real property for nonpayment of real property taxes.

One Year.

Action against a marshal, peace officer, or other officer for the escape of a person arrested or imprisoned on civil process. (5 VIC 31).

New Actions.

No statutory provisions.

Foreign Causes of Action.

When cause of action has arisen in any state, commonwealth, territory, or country between nonresidents of Virgin Islands, and by laws of state, commonwealth, territory, or country where cause of action arose action cannot be maintained thereon by reason of lapse of time, no action may be maintained thereon in Virgin Islands. (5 VIC 41).

Disabilities of Plaintiff.

If any person entitled to bring action is, at time cause of action accrues (1) under age of 21 years; (2) insane; or (3) imprisoned on criminal charge, or in execution under sentence of court for term less than their natural life then time of such disability may not be a part of time limited for commencement of action, but period within which action may be brought may not be extended in any case longer than two years after such disability ceases.

No person may avail himself of disability unless it existed when their right of action accrued.

When two or more disabilities exist at time right of action accrues limitation may not attach until all such disabilities are removed. (5 VIC 36).

Absence or Concealment of Defendant.

If cause of action accrues against any person who is out of Virgin Islands or concealed therein, such action may be commenced within terms herein respectively limited, after return of such person into Virgin Islands, or end of their concealment.

If, after cause of action accrues, any person departs from and resides out of Virgin Islands, or conceals himself, time of their absence or concealment may not be computed as any part of time limited for commencement of such action. (5 VIC 35).

Interruption of Statutory Period.

If person entitled to bring action dies before expiration of time limited for commencement thereof, and cause of action survives, action may be commenced by their personal representatives, after expiration of time and within one year from their death.

If person against whom action may be brought dies before expiration of time limited for commencement thereof, and cause of action survives, action may be commenced against their personal representatives after expiration of that time, and within six months after issuing of letters testamentary or of administration. (5 VIC 37).

In action upon new promise, fraud, or mistake, limitation is deemed to commence only from making of new promise or discovery of fraud or mistake. (5 VIC 32).

Revival of Barred Claims.

No statutory provisions.

Contractual Limitations.

No general statutory provisions. See category 3 Business Regulation and Commerce, topic 3.09 Commercial Code.

Pleadings.

Rule 8 of Federal Rules of Civil Procedure.

5.16A PARTITION:

When several persons hold and are in possession of real property as tenants in common, in which one or more of them have estate of inheritance, or for life or years, or when several persons hold as tenants in common a vested remainder or reversion in any real property, any one or more of them may maintain action of equitable nature for partition of such real property according to respective rights of persons interested therein, and for sale of such property, or part of it, if it appears that partition cannot be had without great prejudice to owners. (28 VIC 451).

Proceedings.

Complaint.

Interest of all persons in property, whether such persons are known or unknown, must be set forth in complaint, specifically and particularly, as far as known to plaintiff. If one or more of parties, or share or quantity of interest of any of parties, is unknown to plaintiff, or is uncertain or contingent, or ownership of inheritance depends upon executory devise, or remainder is contingent remainder, so that such parties cannot be named, that fact must be set forth in complaint. (28 VIC 452).

Lien Creditors as Parties.

Plaintiff will make creditors having liens upon property or any portion thereof, defendants in action. When lien is upon undivided interest or estate of any of parties, if partition is made, such lien is thenceforth lien only upon share assigned to such party, but such share will be first charged with its just proportion of costs of partition, in preference to such lien. (28 VIC 453).

Form of Summons.

Summons must be directed by name to all tenants in common who are known, and in same manner to all lien creditors who are made parties to action, and generally to all persons unknown, having or claiming interest or estate in property. (28 VIC 454).

Service of Summons by Publication.

If party having share or interest in or lien upon property is unknown, or any of known parties resides out of Virgin Islands or cannot be found therein, and such fact is made to appear by affidavit, summons may be served upon such absent or unknown party by publication, directed by court, as in ordinary cases. When service of summons is made by publication, it must be accompanied by brief description of property which is subject of action. (28 VIC 455).

Answer.

Defendant must set forth in their answer, nature and extent of their interest in property, and if they are lien creditor, how such lien was created, amount of debt secured thereby, and remaining due, and whether such debt is secured in any other way, and if so, nature of such other security. (28 VIC 456).

Determination of Rights and Title.

Rights of several parties, plaintiffs as well as defendants, may be put in issue, tried, and determined in partition action. Where defendant fails to answer, or where sale of property is necessary, title must be ascertained by proof to satisfaction of court before judgment for partition or sale is given. (28 VIC 457).

Partition in Kind or Sale.

If it is alleged in complaint and established by evidence, or if it appears by evidence, without such allegation in complaint, to satisfaction of court, that property, or any part of it, is so situated that partition cannot be made without great prejudice to owners, court may order sale thereof, and for that purpose may appoint one or more referees. Otherwise, upon requisite proofs being made, court may adjudge partition according to respective rights of parties, as ascertained by court, and appoint three referees therefor. Court will designate portion to remain undivided for owners whose interests remain unknown or not ascertained. (28 VIC 458).

5.17 [RESERVED]

5.18 PLEADING:

Federal Rules of Civil Procedure form basis of Virgin Islands' procedural statute. (Sup.Ct.R. 7). See topic 5.19 Practice.

Pleadings Permitted.

Rule 7 of Federal Rules of Civil Procedure.

Complaint.

Rule 8 of Federal Rules of Civil Procedure.

Answer.

Sup.Ct.R. 32 and 33; Rules 8 and 12 of Federal Rules of Civil Procedure.

Counterclaim or Set-Off.

Sup.Ct.R. 34; Rules 8 and 13 of Federal Rules of Civil Procedure. (5 App.I R.8, R.13).

Reply.

Rules 8 and 12 of Federal Rules of Civil Procedure.

Demurrer.

Not in use. See instead Rule 12(b) of Federal Rules of Civil Procedure.

Amended or Supplemental Pleadings.

Rule 15 of Federal Rules of Civil Procedure.

Affidavits of Merits.

Not in use.

Affidavits of Defense.

Not in use.

Bills of Particulars.

Sup.Ct.R. 31; Rule 12 of Federal Rules of Civil Procedure.

Verification.

Required in divorce complaints and complaints filed under Supplemental Rules for Certain Admiralty and Maritime Claims. (Supplemental Rule C).

Service.

Sup.Ct.R. 9; Rules 4 and 5 of Federal Rules of Civil Procedure; LRCi 5.4.

Filing.

Rule 5 of Federal Rules of Civil Procedure. LRCi 5.4 directs that all pleadings and other documents in District Court must be electronically filed using Court's Electronic Filing System.

Time.

Federal Rules of Civil Procedure in general; Rule 6 of Federal Rules of Civil Procedure and LRCi 6.1 and 7.0.1 in particular.

Proof of Claims.

No statutory provisions. Original documents to substantiate claim should be forwarded well before time to present to court.

Small Claims.

4 VIC 111-112; Sup.Ct.R. 61-69. See category 6 Courts and Legislature, topic 6.01 Courts, subhead Inferior Courts. Jurisdictional limit for small claims is $10,000.

5.19 PRACTICE:

Federal Rules of Civil Procedure form basis of Virgin Islands' procedural statutes.

Motion Practice.

Sup.Ct.R. 36; Rules 7 and 12 of Federal Rules of Civil Procedure; LRCi 7.1-7.4.

Discovery.

Rule 26 through Rule 37 of Federal Rules of Civil Procedure, and LRCi. 26.1-37.2. See topic 5.10 Depositions and Discovery.

Demand for Admission of Facts.

Rule 36 of Federal Rules of Civil Procedure.

Direct Actions Against Insurer.

See category 23 Transportation, topic 23.01 Motor Vehicles, subhead Direct Actions.

Small Claims.

See category 6 Courts and Legislature, topic 6.01 Courts, subhead Inferior Courts.

See also topics 5.02 Actions, Appeal and Error, Depositions and Discovery, Injunctions, Judgments, Pleading, Process; category 8 Debtor and Creditor, topics 8.02 Attachment, 8.05 Executions, 8.09 Garnishment.

5.20 PROCESS:

Federal Rules of Civil Procedure form basis of Virgin Islands' procedural statutes. (Sup.Ct.R. 7). See topic 5.19 Practice.

Civil action is commenced by filing of summons and complaint with clerk of court.

General Requisites.

Rule 4(a) of Federal Rules of Civil Procedure. See also Sup.Ct. R. 22-25.

By Whom Issued.

Rule 4(b) of Federal Rules of Civil Procedure. See also Sup.Ct. R. 22-23.

Who May Serve.

Sup.Ct.R. 27(a); Rule 4(c) of Federal Rules of Civil Procedure.

Personal Service on Individual.

Rule 4(e) of Federal Rules of Civil Procedure.

Personal Service on Infant.

In cases referred to in Rule 4(d)(2) of Federal Rules of Civil Procedure, service will be made upon infant by delivering copy of summons and of complaint to infant personally, and also to their father, mother, or guardian, or if there is none within Virgin Islands then to any person having care or control of such infant, or with whom they reside, or in whose service they are employed. (Fed.R.Civ.P.4[g], 5 VIC 111).

Personal Service on Incompetent Person.

In cases referred to in Rule 4(d)(2) of Federal Rules of Civil Procedure service will be made upon person judicially declared to be of unsound mind or incapable of conducting their own affairs for whom guardian has been appointed, by delivering copy of summons and complaint to defendant personally and also to such guardian. (Fed.R.Civ.P.4[g], 5 VIC 111).

Personal Service on Partnership.

Rule 4(h) of Federal Rules of Civil Procedure.

Personal Service on Domestic Corporation.

Rule 4(h) of Federal Rules of Civil Procedure.

Personal Service on Association.

Rule 4(h) of Federal Rules of Civil Procedure.

Personal Service on Joint Stock Company.

Rule 4(h) of Federal Rules of Civil Procedure.

Personal Service on Foreign Corporation.

Rule 4(h) of Federal Rules of Civil Procedure.

Personal Service Outside of Territory.

Rule 4(e)(f) of Federal Rules of Civil Procedure and 5 VIC 4911.

Personal Jurisdiction Based upon Enduring Relationship.

Court may exercise personal jurisdiction over person domiciled in, organized under laws of, or maintaining their principal place of business in, this territory as to any claim for relief. (5 VIC 4902).

Personal Jurisdiction Based on Conduct.

Court may exercise personal jurisdiction over person, who acts directly or by agent, as to claim for relief arising from person's transacting any business in this territory; contracting to supply services or things in this territory; causing tortious injury by act or omission in this territory; causing tortious injury in this territory by act or omission outside this territory if they regularly do or solicit business, or engage in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered, in this territory; having interest in, using, or possessing real property in this territory; or contracting to insure any person, property, or risk located within this territory at time of contracting; causing woman to conceive child, or conceiving or giving birth to child; or abandoning minor in this territory. When jurisdiction over person is based solely upon this section, only claim for relief arising from acts enumerated in this section may be asserted against him. (5 VIC 4903).

Manner and Proof of Service.

When law of this territory authorizes service outside territory, service, when reasonably calculated to give actual notice may be made by personal delivery in manner prescribed for service within this territory; in manner prescribed by law of place in which service is made for service in that place in action in any of its courts of general jurisdiction; by any form of mail addressed to person to be served and requiring signed receipt; as directed by foreign authority in response to letter rogatory; or as directed by court.

Proof of service outside this territory may be made by affidavit of individual who made service or in manner prescribed by law of this territory, order pursuant to which service is made, or law of place in which service is made for proof of service in action in any of its courts of general jurisdiction. When service is made by mail, proof of service must include receipt signed by addressee or other evidence of personal delivery to addressee satisfactory to court. (5 VIC 4911).

Individuals Eligible to Make Service.

Service outside this territory may be made by individual permitted to make service of process under law of this territory or under law of place in which service is made or who is designated by court of this territory. (5 VIC 4912).

Individuals to be Served.

When law of this territory requires that in order to effect service one or more designated individuals be served, service outside this territory under this chapter must be made upon designated individual or individuals. (5 VIC 4913).

Assistance to Tribunals and Litigants Outside this Territory.

District Court may order service upon any person who is domiciled or can be found within this territory of any document issued in connection with proceeding in tribunal outside this territory. Order may be made upon application of any interested person or in response to letter rogatory issued by tribunal outside this territory and will direct manner of service.

Service in connection with proceeding in tribunal outside this territory may be made within this territory without order of court.

Service under this section does not, of itself, require recognition or enforcement of order, judgment, or decree rendered outside this territory. (5 VIC 4914).

Service by Mail.

Service upon party outside territory by certified mail, return receipt requested, may be effective. (5 VIC 4911). See subhead Personal Service Outside of Territory, supra. Not available for service within territory. (Rule 4[e] of Federal Rules of Civil Procedure).

Substituted Service.

See subhead Service by Publication, infra.

Service by Publication.

When service of summons cannot be made as prescribed in Rule 4 of Federal Rules of Civil Procedure, and defendant after due diligence cannot be found within Virgin Islands, and when that fact appears by affidavit to satisfaction of court, and it also appears that cause of action exists against defendant, or that they are proper party to action relating to real or personal property in Virgin Islands, court may grant order that service be made by publication of summons in any of following cases: (1) When defendant is foreign corporation, and has property within Virgin Islands, or cause of action arose therein; (2) when defendant, being resident of Virgin Islands, has departed therefrom with intent to defraud their creditors or to avoid service of summons, or with like intent keeps himself concealed therein, or has departed from Virgin Islands and remained absent therefrom six consecutive weeks; (3) when defendant is not resident of Virgin Islands, but has property therein, and court has jurisdiction of subject of action; (4) when action is to have marriage declared void, or for divorce in cases prescribed by law; (5) when subject of action is real or personal property in Virgin Islands, and defendant has or claims lien or interest actual or contingent therein, or relief demanded consists wholly or partly in excluding defendant from any lien or interest therein; or (6) when action is to foreclose, satisfy, or redeem from mortgage, or to enforce lien of any kind on real estate in Virgin Islands, or satisfy or redeem from same.

Summons published must contain name of court and title of cause, succinct statement of relief demanded, date of order for service by publication, and time within which defendant is required to answer complaint.

Order will direct publication to be made in newspaper of general circulation in jurisdiction designated by court as most likely to give notice to person to be served for reasonable length of time, not less than once a week for four weeks. In case of publication, court will also direct copy of summons and complaint to be deposited in post office, directed to defendant at their place of residence, unless it appears that residence is neither known to party making application nor can with reasonable diligence be ascertained by him. Alternatively, order will direct copy of summons and complaint to be deposited in post office, directed to defendant, by any form of mail requiring signed receipt therefor. Defendant will appear and answer within 30 days after completion of period of publication, and in case of any form of mailing requiring signed receipt, within 30 days from date of receipt as indicated by signed receipt.

Personal service of copy of summons and complaint out of Virgin Islands will be equivalent to publication and deposit in post office. In case of personal service out of Virgin Islands defendant must appear and answer within 30 days from date of service.

Defendant as to whom publication is ordered, or their personal representatives, on application and sufficient cause shown, at any time before judgment will be allowed to defend action. Defendant as to whom publication is ordered, or their representatives, may in like manner, upon good cause shown, and upon such terms as may be proper, be allowed to defend after judgment and within one year after entry of such judgment on such terms as may be just; and if defense be successful, and judgment or any part thereof has been collected or otherwise enforced, such restitution may thereupon be compelled as court will direct. But title to property sold upon execution issued on such judgment to purchaser in good faith will not be thereby affected. (5 VIC 112).

Long Arm Statute.

See subhead Personal Service Outside of Territory, supra.

Proof of Service.

Proof of service of summons and complaint or of deposit thereof in post office will be as follows: If service or deposit in post office is by marshal or their deputy, certificate of such officer; if by any other person, their affidavit thereof; in case of publication, affidavit of publisher or their representative, together with copy of publication; or written admission of defendant. In case of service otherwise than by publication, certificate, affidavit, or admission must state time and place of service; and in case of deposit in post office, time and place thereof. (5 VIC 114). Also see subhead Personal Service Outside of Territory, supra.

When Jurisdiction Acquired by Voluntary Appearance.

From time of service of summons or allowance of provisional remedy, court will be deemed to have acquired jurisdiction and to have control of all subsequent proceedings. Voluntary appearance of defendant will be equivalent to personal service of summons upon him. (5 VIC 115).

Nonresident Motorist.

See category 23 Transportation, topic 23.01 Motor Vehicles.

5.21 REPLEVIN:

In action to recover possession of personal property plaintiff, at any time after action has commenced, and before judgment, may claim immediate delivery of property. (5 VIC 211).

Proceedings.

Affidavit.

When delivery is claimed affidavit must be made by plaintiff, or by someone in their behalf, showing that plaintiff is owner of property claimed (particularly describing it) or is lawfully entitled to possession thereof by virtue of special property therein, facts in respect to which must be set forth; that property is wrongfully detained by defendant; alleged cause of detention thereof, according to their best knowledge, information and belief; that same has not been taken for tax, assessment or fine, pursuant to statute, or seized under execution or attachment against property of plaintiff, or if so seized, that it is by statute exempt from such seizure; and actual value of property. (5 VIC 212).

Plaintiff may thereupon by indorsement upon affidavit, require marshal to take property from defendant and deliver it to plaintiff. (5 VIC 213).

Bond.

Upon receipt of affidavit and indorsement thereon, with written undertaking executed by two or more sufficient sureties approved by marshal, to effect that they are bound in double value of property as stated in affidavit for prosecution of action for return of property to defendant, if return thereof be adjudged, and for payment to him of such sum as may for any cause be recovered against plaintiff, and after at least five days written notice to defendant of plaintiff's intent to take possession of property and opportunity of defendant to be heard, marshal will forthwith take property described in affidavit, if it is in possession of defendant or their agent, and retain it in their custody. They will also, without delay, serve on defendant copy of affidavit, indorsement thereon, and undertaking, by delivering same to him personally, if they can be found, or to their agent from whose possession property is taken; or, if neither can be found, by leaving them at usual place of abode of either with some person of suitable age and discretion; or, if neither have any known place of abode, by putting them in post office directed to defendant at post office nearest to him. (5 VIC 214).

Exception to Sureties by Defendant.

Defendant may, within three days after service of copy of affidavit and undertaking give notice to marshal that they except to sufficiency of sureties. If they fail to do so, they will be deemed to have waived all objection to them. When defendant excepts, sureties must justify on notice in like manner as upon bail on arrest. Marshal will be responsible for sufficiency of sureties until objection to them is waived, as above provided, or until they justify or new sureties are substituted and justified. If defendant excepts to sureties, they cannot reclaim property, as provided in § 216 of this title. (5 VIC 215).

Repossession.

Bond.

At any time before delivery of property to plaintiff, defendant may, if they do not except to sureties of plaintiff, require return thereof upon giving to marshal written undertaking, executed by two or more sufficient sureties, to be approved by marshal, to effect that they are bound in double value of property as stated in affidavit of plaintiff, for delivery thereof to plaintiff, if such delivery be adjudged, and for payment to him of such sum as may, for any cause, be recovered against defendant. If return of property is not so required within three days after taking and service of copy of affidavit and undertaking to defendant, it will be delivered to plaintiff, except as provided in § 221 of this title. (5 VIC 216).

Justification of Defendant's Sureties.

Defendant's sureties, upon notice to plaintiff or their attorney of not less than two nor more than six days, will justify before judge or clerk of court in which action is pending, in same manner as upon bail on arrest. Upon such justification marshal will deliver property to defendant. Marshal will be responsible for defendant's sureties until they justify, or until justification is completed or expressly waived, and may retain property until that time; but if they or others in their place fail to justify at time and place appointed they will deliver property to plaintiff. (5 VIC 217).

Claims of Third Persons.

If property taken is claimed by any other person than defendant or their agent, and such person makes affidavit of their title thereto or their right to possession thereof, stating grounds of such title or right, and serves same upon marshal before delivery of property to plaintiff, marshal will not be bound to keep property or deliver it to plaintiff unless plaintiff, on their or their agent's demand, will indemnify marshal against such claim by undertaking, executed by two sufficient sureties, accompanied by their affidavits that they are each worth double value of property as specified in affidavit of plaintiff, over and above their debts and liabilities, exclusive of property exempt from execution.

No claim to such property by any other person than defendant or their agent will be valid against marshal unless made as aforesaid; and notwithstanding such claim when so made they may retain property reasonable time to demand such indemnity. (5 VIC 221).

Judgment or Order.

No specific statutory provisions. See Restatements of Law.

5.22 SEQUESTRATION:

No statutory provisions.

5.235.24 [RESERVED]

5.25 SUBMISSION OF CONTROVERSY:

Parties may submit controversy which might be subject of action in court of record for determination of court without action. Plaintiff and defendant must state case in writing, subscribe to same in person or by attorneys. Statement must be verified by oath of parties that controversy is real and proceeding is taken in good faith. From date of filing, court has jurisdiction as if it were action after special verdict found, and shall hear and determine it accordingly. (5 VIC 423).

5.26 VENUE:

Civil actions in Superior Court will be brought in judicial division (St. Thomas - St. John, or St. Croix) where defendant resides, or where cause of action arose, or where defendant may be served with process. Criminal actions will be brought in judicial division where alleged criminal offense was committed. Actions of criminal conspiracy may be brought in either division in which any of alleged overt acts were committed. (4 VIC 78).

Matters of venue in District Court of Virgin Islands are governed by 28 U.S.C. § 1391 et seq. and rules 18, 20, 21 and 22 of Federal Rules of Criminal Procedure.

Change of Venue.

For convenience of parties and witnesses, judge of Superior Court may, with approval of Presiding Judge, transfer any action pending in one judicial division to other for hearing and determination. (4 VIC 78).

Change of venue in District Court of Virgin Islands governed by 28 U.S.C. § 1404 et seq. and Federal Rules of Criminal Procedure.

Contract Provisions.

No statutory provisions.

6 COURTS AND LEGISLATURE

6.01 COURTS:

District Court.

District Court of Virgin Islands has dual jurisdiction of United States District Court and of insular possession or Superior (state/territorial) Court. There are two judicial divisions. (Rev. Org. Act, §§ 22, 25; 48 U.S.C. §§ 1405, 1406, 1611 to 1617, incl.).

Division of St. Thomas - St. John.

This division includes islands of St. Thomas - St. John. District Court is located in Ron de Lugo Federal Building and U.S. Courthouse, Charlotte Amalie, St. Thomas. Clerk's office: 5500 Veterans Drive, Suite 310, Charlotte Amalie, St. Thomas, Virgin Islands 00802.

Division of St. Croix.

This division includes island of St. Croix, with towns of Frederiksted and Christiansted. District Court sits at Estate Golden Rock, Christiansted, St. Croix. Clerk's office: 3013 Estate Golden Rock, Christiansted, St. Croix, VI 00820.

Jurisdiction.

District Court has jurisdiction of District Court of U.S. and that of bankruptcy court of U.S. District Court has exclusive jurisdiction over all criminal and civil proceedings in Virgin Islands with respect to income tax laws applicable to Virgin Islands, except ancillary laws relating to income tax enacted by Legislature of Virgin Islands. District Court has general original jurisdiction in all causes in Virgin Islands jurisdiction over which is not vested by local laws in local courts of Virgin Islands. But jurisdiction of District Court here will not extend to civil actions in which matter in controversy does not exceed $500, exclusive of interest and costs; to criminal cases in which maximum punishment which may be imposed does not exceed fine of $100 or imprisonment for six months or both except those offenses committed on federal property and/or arising under Assimilative Crimes Act 18 U.S.C. § 13 and/or when joined with any other offense properly within Court's criminal jurisdiction; and to violations of local police and executive regulations. (Revised Organic Act § 22, 4 VIC 32).

District Court also has concurrent jurisdiction with Superior Court over those offenses against criminal law of Virgin Islands which are similar to or based on same act(s) or which constitute part of common scheme or plan if such act(s) constitute(s) offense against statute(s) over which District Court has jurisdiction. (Revised Organic Act § 22).

Supreme Court.

Supreme Court of Virgin Islands was established pursuant to § 21(a) of Revised Organic Act of Virgin Islands, as highest court of Virgin Islands. Supreme Court shall hold regular sessions on island of St. Croix, but may hold special sessions in any location throughout Territory of Virgin Islands. (4 VIC 21).

Jurisdiction.

Supreme Court has jurisdiction of original proceedings for mandamus, prohibition, injunction, and similar remedies to protect its appellate jurisdiction, including all appeals arising from final judgments, final decrees or final orders of Superior Court. Court shall also have inherent powers, including power to issue writs. Supreme Court may transfer any action or proceeding, except where it has exclusive jurisdiction, to any other court within judicial branch having jurisdiction of subject matter. Supreme Court has exclusive jurisdiction to regulate admission of persons to practice of law and discipline of persons admitted to practice of law. Supreme Court has adopted rules of court for Superior Court of Virgin Islands. (4 VIC 32).

Magistrate Judges.

Magistrate judges are authorized in Superior Court of Virgin Islands. (4 VIC 120, 121).

Inferior Courts.

There are two Superior Courts in Virgin Islands, one for division of St. Thomas - St. John, and one for division of St. Croix. Territorial judges are appointed by Governor.

Exclusive Jurisdiction.

Superior Courts have original exclusive jurisdiction of all civil actions wherein matter in controversy does not exceed sum of value of $500, all criminal cases wherein maximum punishment which may be imposed does not exceed fine of $100 or imprisonment for six months, or both, and all violations of police and executive regulations. (4 VIC 75).

Original Jurisdiction.—Subject to original jurisdiction conferred on District Court by § 22 of Revised Organic Act of 1954, Superior Court has original jurisdiction in all civil actions regardless of amount in controversy; to supervise and administer estates and fiduciary relations; to appoint and supervise guardians and trustees; to hear and determine juvenile, divorce, annulment and separation proceedings; to grant adoptions and changes of name, to establish paternity; to legitimize children and to make orders and decrees pertaining to support of relations. Subject to concurrent jurisdiction conferred on District Court by §§ 21 and 22 of Revised Organic Act, Superior Court has original jurisdiction in all criminal actions. (4 VIC 76)

Unless transferred by judge of District Court, all civil cases originally filed in Superior Court shall be tried and concluded in that court, and judge of District Court may cause cases pending in Superior Court to be transferred to District Court and may transfer cases pending in District Court to Superior Court provided such transferred case is within jurisdiction competence of court to which transfer is made. (4 VIC 77). Practice and procedure in Superior Court shall be as prescribed by rules adopted by District Court. (4 VIC 83).

St. Thomas Superior Court.

Sits in Alexander A. Farrelly Justice Center, St. Thomas.

St. Croix Superior Court.

Sits in R.H. Amplett Leader Justice Complex in Kingshill, St. Croix.

Small Claims Courts.

Each Superior Court has small claims division with jurisdiction up to $10,000 (recently increased from $5,000). Procedure is as informal and summary as is consistent with justice. (4 VIC 111, 112).

Family Division.

New law requiring appointment of permanent family court judges by Governor and confirmation by Legislature. Replaces provisions vesting appointment powers in presiding judge of Superior Court. (4 VIC 171).

Family Division has original jurisdiction: (a) Concerning any child living or found within geographical limits of its jurisdiction: (1) Who is neglected or abused, (2) whose occupation, behavior, condition, environment or associations are such as to injure or endanger their welfare or that of others, (3) who is “person in need of supervision”, (4) who is alleged to have committed delinquent act within territory; except that any child 16 years and over, charged with traffic offense (other than 20 VIC 504) shall be within jurisdiction of Traffic Division of Superior Court; (b) concerning treatment or commitment to any mental institution of mentally defective or mentally disordered or emotionally disturbed child; (c) concerning any adult, living or found within geographical limits of court's jurisdiction, alleged to have committed or to have attempted to commit delinquent act within territory prior to having become 18 years of age; (d) to determine custody or guardianship of person of any child living within judicial division, for adoption or other care provision and to determine parental rights in connection with such proceedings; and (e) for judicial consent for marriage of child when such consent is required by law. (4 VIC 172).

When jurisdiction shall have been obtained by Family Division in case of any child, such jurisdiction may be retained by Division until they become 19 years of age, unless they are discharged prior thereto by court. This section does not affect jurisdiction of other divisions of this court or other courts over offenses committed by child after they reach age of 18 years. If child already under jurisdiction of Family Division is convicted in Superior Court or District Court of crime committed after age of 18, conviction shall terminate jurisdiction of Family Division. If child is transferred to another court, and child is convicted in that court for crime pursuant to transfer, conviction shall terminate jurisdiction of Family Division. For any crimes after such conviction, child shall be considered adult for purpose of determining jurisdiction. (4 VIC 173).

Small Claims.

See subhead Inferior Courts, supra.

Family Division.

See subhead Inferior Courts, supra.

6.02 LEGISLATURE:

Unicameral 15-member body. Regular sessions of Legislature are held annually, commencing on 2d Mon. in Jan. (unless Legislature by law fixes different date), and continue for such term as Legislature may provide. (Revised Organic Act of 1954, § 7).

Regular Sessions.

Legislature sets its calendar for each year at its first meeting on 2d Mon. in Jan.

Special or Extraordinary Sessions.

Governor may call special sessions of Legislature at any time when in their opinion public interest may require it. No legislation may be considered at any special session other than that specified in call therefor or in any special message by Governor to Legislature while in such session. All sessions of Legislature are open to public and President of Legislature or their designee will notify news media on each island no later than noon Thurs. of week preceding day(s) upon which Legislature will meet. (Revised Organic Act of 1954, § 7).

Initiative and Referendum.

Referendum permitted.

Lobbyists.

No statutory provisions.

6.03 REPORTS:

Published decisions of Superior Court, District Court of Virgin Islands, and U.S. Court of Appeals for the Third Circuit, regarding appeals taken from District Court of Virgin Islands, are reported in Volumes 1 to 45, and current case services of Virgin Islands Reports.

Unofficial Reports.

Decisions of U.S. Court of Appeals for Third Circuit regarding appeals from District Court of Virgin Islands are also reported in Federal Reporter system.

Digests.

Virgin Islands Digest covers Virgin Islands cases.

6.03A RULES:

District Court.

Applicable Federal Rules; Local Rules of Civil and Criminal Procedure. See category 5 Civil Actions and Procedure, topic 5.02 Actions.

Supreme Court.

Rules Governing Supreme Court of Virgin Islands as adopted periodically.

Superior Court.

Rules Governing the Superior Court of the Virgin Islands. See category 5 Civil Actions and Procedure, topic 5.02 Actions.

Administrative Agencies.

Virgin Islands Rules and Regulations. (3 VIC 933).

6.04 STATUTES:

Virgin Islands Code Annotated became effective Sept. 1, 1957. See note at head of this digest.

Uniform Acts adopted are: Act to Provide for the Appointment of Commissioners (1988); Anatomical Gift (1987); Arbitration (1956); Athlete Agents (2000); Business Records as Evidence (1957) (covered by Uniform Rules of Evidence, Rule 63[13]); Child Custody Jurisdiction and Enforcement (1997); Commercial Code (2002 VIC 2003); Conservation Easement (1981); Controlled Substances (1974); Criminal Extradition (1957); Declaratory Judgments (1957); Desertion and Nonsupport (1957); Determination of Death (1980); Durable Power of Attorney (1987); Electronic Transactions Act (2003); Enforcement of Foreign Judgments (1992); Environmental Covenants (2003); Fiduciaries (1957); Foreign Depositions (1957); Foreign Money Claims (1989); Foreign Money Judgments Recognition (1962); Fraudulent Conveyance (1957); Interstate Enforcement of Domestic Violence Protection Orders (2002); Interstate Family Support (1996); Interstate and International Procedure (1965); Judicial Notice of Foreign Law (1957) (covered by Uniform Rules of Evidence, Rules 9 VIC 12); Limited Liability Company (1996); Limited Partnership (1985); Money Services Act (2004); Partnership (1997); Photographic Copies of Business Records and Public Records as Evidence (1957) (covered by Uniform Rules of Evidence, Rule 72); Proof of Statutes (1957) (covered by Uniform Rules of Evidence, Rules 9, 63 [30], 68); Prudent Investor (2004); Reciprocal Enforcement of Support (1957); Recognition of Acknowledgments (1981); Rights of the Terminally Ill Act (1989); Rules of Evidence (1974); Securities Act (2004); Simultaneous Death (1993); To Secure the Attendance of Witnesses From Without a State in Criminal Proceedings (1957); Trade Secrets Act (2004); Transfers to Minors Act (1986); Trustees' Accounting (1957); Trusts (1957); Unclaimed Property Act (1995); and Veterans' Guardianship (1957).

No significant variations or modifications in Uniform Acts adopted.

7 CRIMINAL LAW

7.01 CRIMINAL LAW:

Title 14 of Virgin Islands Code governs crimes and Local Rules of Criminal Procedure, Federal Rules of Criminal Procedure and 5 VIC 3501 through 5 VIC 4633 govern criminal procedure. In cases of general procedure not covered by Local Rules of Criminal Procedure, then Local Rules of Civil Procedure shall apply. (LRCr 1.2). Virgin Islands has codified in Title 14 most common-law crimes and misdemeanors alphabetically.

Indictment and Information.

Criminal actions in District Court may be prosecuted by either indictment by grand jury or by information. (5 VIC 3581, 48 U.S.C. § 1614). Prosecution in Superior Court by Attorney General is solely by complaint for misdemeanors and by information for felonies.

Bail.

Whenever person charged with offense is before judge for release on bail prior to trial, judge will be guided by and apply appropriate provisions of Bail Reform Act, 18 U.S.C. 3146, in considering release of such person. (FRCP 46, Sup.Ct.R. 141).

Interstate Compact for Supervision of Parolees and Probationers not adopted.

Parole.

Except for prisoner sentenced to term of life imprisonment without parole, every prisoner confined for violation of Virgin Islands law for definite term of over 180 days or for term of their natural life whose record or conduct shows that they have observed rules of institution where they are confined, upon recommendation of Director of Bureau of Corrections supported by recommendation of psychiatrist and/or psychologist, may be released on parole after serving one half of such term or terms or 15 years of life sentence or sentence of 30 years or more or after serving minimum sentence required by law. Board of Parole, subject to approval of Governor, by at least 2/3 affirmative vote of its members, may fix earlier eligibility date for release of prisoner on parole after serving 1/3 of their term(s) or after serving ten years of life sentence or sentence of 30 years or more. (5 VIC 4601).

Uniform Criminal Extradition Act in effect. (5 VIC 3801 et seq.).

Sex Offender Registration.

Person convicted or found not guilty by reason of insanity, or after July 1, 1994 of criminal offense against minor, or of sexually violent offense shall register pursuant to requirements set forth in 14 VIC 1724, et seq.

Animal Abuse.

Codified at 14 VIC 181 et seq.

Assisted Suicide.

Codified as felony at 14 VIC 2141.

Drinking Age.

18. (14 VIC 485).

Firearms.

Carrying of firearms, openly or concealed, requires mandatory minimum jail sentence. (14 VIC 2253).

Grand Larceny.

Occurs whenever defendant takes property that is of $100 or more in value. (14 VIC 1083).

Self-defense.

Virgin Islands law specifies that killing in self-defense is lawful and justifiable homicide, and that self-defense is statutory right. (14 VIC 927).

Stalking.

Prohibited by 14 VIC 2071 et seq.

Statutory Rape.

Second-degree rape: sexual relations (not amounting to first-degree rape) between any person over age of 18 and at least five years older than person (not spouse) who is under age of 18 but over age of 16. (14 VIC 1702). Third-degree rape: any person under age of 18 but over age of 16 who has sexual relations (not amounting to first-degree rape) with person (who is not spouse) under age of 16 but over age of 13. Matter shall be transferred to Family Division of the Superior Court. (14 VIC 1703).

8 DEBTOR AND CREDITOR

8.01 ASSIGNMENTS:

Uniform Commercial Code adopted. (Title 11A). Also see Restatements of Law.

Assignment of Things in Action.

In case of assignment of thing in action, action by assignee will be without prejudice to any setoff or other defense existing at time of or before notice of assignment; but this will not apply to negotiable instrument transferred in good faith and upon valuable consideration before due. In case of assignment of account in secured transaction, provisions of Art. 9 of Uniform Commercial Code will apply. (5 VIC 71).

8.02 ATTACHMENT:

Actions in Which Allowed.

Allowed in action upon contract, express or implied, for direct payment of money, and which is not secured by mortgage, lien, or pledge upon real or personal property, if so secured, when such security has been rendered nugatory by act of defendant; and in action upon contract, express or implied, against defendant not residing in Virgin Islands. (5 VIC 251).

Courts Which May Issue Writ.

Clerk of any court in which action is commenced or pending. (5 VIC 252).

In Whose Favor Writ May Issue.

Writ may issue in favor of any plaintiff. (5 VIC 251).

Against Whom Writ May Issue.

Writ may issue against any defendant. (5 VIC 251).

Proceedings to Obtain and Claims on Which Writ May Issue.

After notice and hearing writ will issue. Writ will issue whenever plaintiff or anyone in their behalf files affidavit showing: (1) That defendant is indebted to plaintiff upon contract, express or implied, for direct payment of money, and that payment of same has not been secured by any mortgage, lien or pledge upon real or personal property; and (2) that sum for which attachment is asked is actual bona fide, existing debt, due and owing from defendant to plaintiff, and that attachment is not sought nor action prosecuted to hinder, delay, or defraud any creditor of defendant. (5 VIC 252).

Attachment Bond.

After filing affidavit, plaintiff will be entitled to have writ issue as soon as they file their undertaking, with one or more sureties, in sum not less than $100, and equal to amount for which plaintiff demands judgment. With undertaking plaintiff will also file affidavits of sureties from which affidavits it must appear that such sureties are qualified, and that, taken together, they are worth double amount of sum specified in undertaking, over all debts and liabilities and property exempt from execution. (5 VIC 253).

Levy.

Marshal to whom writ is delivered will execute as follows: (1) Real property will be attached by leaving with occupant thereof, or if there be no occupant, in conspicuous place therein, copy of writ certified by marshal; (2) personal property capable of manual delivery to marshal, and not in possession of third person, will be attached by taking it into their custody; and (3) other personal property will be attached by leaving certified copy of writ, and notice specifying property attached with person having possession of same, or if it be a debt, then with debtor, or if it be rights or shares in stock of association or corporation, or interest or profits thereof, then with such person or officers of such association or corporation as Rule 4 of Federal Rules of Civil Procedure authorizes summons can be served upon. (5 VIC 256).

If real property is attached, marshal will make a certificate containing title of cause, names of parties, description of real property, and statement that same has been attached by action of plaintiff and date thereof. Within ten days from date of attachment, marshal will deliver such certificate to recorder of deeds who will file and record same in their office in judicial division in which property is located. When such certificate is so filed for record, lien in favor of plaintiff will attach to real property described in certificate from date of attachment, but if filed afterwards will attach, as against third persons, from date of such subsequent filing. (5 VIC 258).

Release of Property.

Marshal may deliver any property attached to defendant, or to any other person claiming it, upon their giving written undertaking thereof, executed by two or more sufficient sureties, engaging to redeliver it or pay value thereof to marshal, to whom execution upon judgment obtained by plaintiff in action may be issued. If action is brought upon such undertaking against principal or their sureties, it will be defense that property for which undertaking was given did not, at execution of writ, belong to defendant against whom it was issued. (5 VIC 260). If defendant has already appeared in action they must apply to court in which action is pending or clerk of such court for order discharging attachment upon execution of undertaking executed by one or more sureties to effect that sureties will pay to plaintiff amount of judgment that may be recovered against defendant in action. (5 VIC 263).

Sale.

If any property attached is perishable, marshal will sell same in manner in which property is sold on execution, and proceeds thereof together with other property attached will be retained by him to answer any judgment that may be recovered in action. (5 VIC 259).

If judgment is recovered by plaintiff, and property has been attached in action and has not been sold as perishable property or discharged from attachment as provided by law, court will order that property be sold to satisfy plaintiff's demands, and if execution issues thereon, marshal will apply property attached by him, or proceeds thereof, upon execution, and if there is any such property or proceeds remaining after satisfying execution, they will upon demand deliver same to defendant. (5 VIC 261).

Third Party Claims.

From date of attachment until it is discharged or writ executed, plaintiff as against third persons will be deemed purchaser in good faith and for valuable consideration of property, real or personal, attached, subject to conditions prescribed regarding attachment of real property and recording of such attachment. From time of service of copy of writ and notice, until attachment is discharged or any judgment recovered by plaintiff is satisfied, any person, association, or corporation mentioned under subhead Levy herein, will be liable to plaintiff for amount of property, stock, or debts specified in notice, unless such property, stock, or debts are delivered, transferred, or paid to marshal. (5 VIC 257).

Vacation.

If judgment is not recovered by plaintiff, all property attached, or proceeds thereof, or undertaking, will be returned to defendant upon their serving upon marshal a certified copy of order discharging attachment. (5 VIC 262).

Defendant debtor will be given notice and opportunity for judicial offer to decide if prejudgment attachment would issue. (Crown Bldrs., Inc. v. Stowe Eng'g Corp., 8 F. Supp. 2d 483, 1998 U.S. Dist. LEXIS 8926, 39 V.I. 249 [D.C.V.I. 1998]; 5 VIC 252).

8.03 [RESERVED]

8.04 CREDITORS' SUITS:

No statutory provisions other than those referred to herein. See category 3 Business Regulation and Commerce, topic 3.09 Commercial Code.

8.05 EXECUTIONS:

Judgments of District or Superior Courts enforceable by writ of execution are those which require payment of money, delivery of real or personal property, or either of them, subject to provisions of Federal Rules of Civil Procedure. (5 VIC 471).

Kinds.

Three kinds: (1) Against judgment debtor's property, (2) against judgment debtor's person, (3) for delivery of possession of real or personal property, or delivery with damages for withholding same. (5 VIC 472).

Exemptions.

See topic 8.06 Exemptions.

Time of Issuance.

For period beginning ten days after judgment and ending five years after judgment. After five years, must apply to court for leave to execute. (5 VIC 488).

Writ is issued by clerk and directed to marshal; contains name of court, names of parties and title, description of judgment, and directions to marshal depending on whether against realty, personalty or for arrest of debtor. (5 VIC 473).

Executed.

Writ against property of judgment debtor executed by marshal: (1) By payment to clerk of proceeds of sales of perishable property or debts; (2) sale of other property in their custody; (3) if still unsatisfied, levy on other property; (4) property shall be levied on in like manner and with like effect as similar property is attached; (5) until levy, property shall not be affected by execution; (6) return to judgment debtor property or proceeds left over. (5 VIC 480).

Stay.

Rule 62 of Federal Rules of Civil Procedure.

Lien.

Judgment creditor may file certified transcript of judgment in office of recorder of deeds. Recorder will docket same in judgment docket and note same in property register against properties of judgment debtor situated in judicial division as may be requested by judgment creditor in writing, which shall be filed with transcript of judgment. Such judgment may be noted against all after acquired property of judgment debtor with like effect, upon request of judgment creditor. Such judgment shall be lien against judgment debtor’s real property against which it is noted. Conveyance of real property or any portion thereof or interest therein shall be subject to lien of judgment unless such conveyance has been recorded at time of docketing transcript of such judgment. Lien thereof shall expire whenever period of ten years elapses after entry of judgment without execution being issued on such judgment. “Judgment” includes any determination by court or hearing officer (as defined in Title 16, § 341 of this Code) that person’s child support obligation is overdue. Notwithstanding provision of subsection (d) of this section, judgment for overdue child support shall not expire. (5 V.I.C. 425).

Return.

Marshal endorses upon writ of execution time when they received same, and such writ must be promptly executed by marshal and is returnable, within 60 days after its receipt by marshal, to clerk’s office from which it is issued. (5 VIC 474).

Priorities.

No statutory provisions as to priorities between different executions or levies.

Claims of Third Persons.

No statutory provisions.

Satisfaction.

By sale, by further levy and sale, or by payment. (5 VIC 485).

Sale.

Both real and personal property may be sold. Notice of sale of personalty: posting written notice not less than ten days before in a public place in or near the office of the clerk and publishing copy. Notice of sale of personal property: once not less than ten days prior to sale. Notice of sale of realty: same posting for four weeks prior to sale and publishing a copy once a week for four weeks. All sales by auction between 9 A. M. and 4 P. M. Property capable of manual delivery must be within view, and real property sold in such parcels as will bring highest price and separately sold. Marshal may postpone sale by public proclamation, or adjourn sale not beyond 30 days of day at which writ is made returnable on consent of plaintiff and approval by court. On all sales of personal property, marshal must give acknowledged bill of sale. (5 VIC 484 to 487).

Redemption.

Upon sale of real property, when estate is less than leasehold of two years' unexpired term, sale will be absolute. In all other cases, property will be subject to redemption. At time of sale marshal will give purchaser certificate of sale containing: Particular description of property sold; price bid for each distinct lot or parcel; whole price paid; and statement as to whether subject to redemption. Matters contained in certificate will be substantially stated in marshal's return of their proceedings upon writ. (5 VIC 492).

Persons Who May Redeem.

Property sold subject to redemption may be redeemed by following persons, or their successors in interest: Judgment debtor or successor in interest in whole or any part of property separately sold; and creditor having lien by judgment, or mortgage, on any portion of property, or any portion of any part thereof separately sold, subsequent in time to that on which property was sold. (5 VIC 493).

Redemption by Lien Creditor from Purchaser.

Lien creditor may redeem property within 60 days from date of order confirming sale by paying amount of purchase money with interest at legal rate per annum thereon from time of sale, together with amount of any taxes which purchaser may have paid thereon; and if purchaser is also creditor having lien prior to that of redemptioner, amount of such lien with interest. (5 VIC 494).

Redemption by Judgment Debtor.

Judgment debtor or their successor in interest may redeem property at any time prior to confirmation of sale on paying amount of purchase money, with interest at legal rate per annum thereon from date of sale, together with amount of any taxes which purchaser may have paid thereon after purchase. If judgment debtor does not redeem until after confirmation of sale, thereafter they must redeem within six months from such order of confirmation and not otherwise. (5 VIC 496).

Supplementary Proceedings.

Examination of Judgment Debtor.

After issuance of execution against property and upon proof by affidavit of plaintiff in writ, or otherwise, to satisfaction of court that judgment debtor has property liable to execution which they refuse to apply toward satisfaction of judgment, such court may, by an order, require judgment debtor to appear and answer under oath, concerning same before such court or before a district court commissioner, at time and place specified in order. (5 VIC 501).

Examination of Witnesses and Order for Application of Property or Levy Thereon.

Either party may examine witnesses in their behalf, and if by such examination it appears that judgment debtor has any property liable to execution court before whom proceeding takes place, or to whom report of commissioner is made will make an order requiring judgment debtor to apply same in satisfaction of judgment, or that such property be levied on, by execution, in manner and with effect as provided in this chapter or both, as may seem most likely to effect object of proceeding. (5 VIC 502).

Restraining Disposition of Property and Contempt.

At time of allowing order prescribed in paragraph above, or at any time thereafter pending proceedings, court may make order restraining judgment debtor from selling, transferring, or in any manner disposing of any of their property liable to execution pending proceeding. For disobeying any order or requirement authorized by this section and two preceding paragraphs, judgment debtor may be punished as for contempt. (5 VIC 503).

Body Execution.

Instead of order requiring attendance of judgment debtor, as provided in §§ 501-503 of this title, court may, upon proof by affidavit of party, or otherwise to its satisfaction that there is danger of debtor leaving Virgin Islands, or concealing himself therein, and that there is reason to believe they have property which they unjustly refuse to apply to such judgment, issue warrant requiring marshal to arrest him and bring him before court. Upon being brought before court, they may be examined on oath, and if it then appears that there is danger of debtor leaving Virgin Islands, and that they have property which they unjustly refuse to apply to such judgment, they may be ordered to enter into undertaking with one or more sureties that they will from time to time attend before court, as may be directed, and that they will not, during pendency of proceedings, dispose of any portion of their property not exempt from execution. In default of entering into such undertaking they may be committed to jail by warrant of court. (5 VIC 504).

8.06 EXEMPTIONS:

All property other than homestead, including franchises or rights or interests therein, of judgment debtor is liable to execution, except as provided below. Following property is exempt from execution if selected and reserved by judgment debtor or their agent at time of levy, or as soon thereafter before sale thereof as same will be known to him, and not otherwise: (1) Necessary wearing apparel owned by any person for use of himself or their family, except that watches or jewelry are not exempt; (2) tools, implements, apparatus or library necessary to enable artisan, mechanic or professional person to carry on trade, occupation or profession by which person habitually earns living; (3) following property, if owned by head of family and in actual use or kept for use by and for their family, or when being removed from one habitation to another on change of residence: Household goods, furniture, and utensils to value of $3,000; (4) all property of any public corporation or Government of Virgin Islands. (5 VIC 479).

Substitution.

No statutory provisions.

Debts Against Which Exemptions Not Allowed.

No article of property or if same has been sold or exchanged, then neither proceeds of such sale nor articles received in exchange therefor, will be exempt from execution issued on judgment recovered for its price. (5 VIC 479).

Waiver of Exemption.

No statutory provisions.

Necessity of Claiming Exemption.

Exempt property must be selected and reserved by judgment debtor or their agent at time of levy. (5 VIC 479).

Earnings.

See topic 8.09 Garnishment.

8.07 [RESERVED]

8.08 FRAUDULENT SALES AND CONVEYANCES:

Uniform Commercial Code adopted. (Title 11A). See category 3 Business Regulation and Commerce, topic 3.09 Commercial Code.

Fraudulent Intent as Question of Fact.

Question of fraudulent intent in all cases arising under provisions of this code is deemed question of fact and not of law. (28 VIC 171).

Conveyances With Intent to Defraud Purchasers.

Every conveyance of interest in lands, or rents or profits thereof, and every charge upon lands or upon rents and profits thereof, made or created with intent to defraud prior or subsequent purchasers for valuable consideration of same lands, rents, or profits, as against such purchasers is void.

No such conveyance or charge will be deemed fraudulent in favor of subsequent purchaser who has actual or legal notice thereof at time of their purchase, unless it appears that grantee in such conveyance or person to be benefited by such charge was privy to fraud intended. (28 VIC 172).

Conveyances With Power to Revoke, Determine, or Alter.

Every conveyance or charge of or upon any estate or interest in lands containing any provisions for revocation, determination, or alteration of such estate or interest, or any part thereof, at will of grantor, is void as against subsequent purchasers from such grantor for valuable consideration of any estate or interest so liable to be revoked or determined, although same is not expressly revoked, determined, or altered by such grantor by virtue of power reserved or expressed in such prior conveyance or charge.

Where power to revoke conveyance of any lands, or rents and profits thereof, and to reconvey same, is given to person other than grantor in such conveyance, and such person thereafter conveys same lands, rents, or profits to a purchaser for valuable consideration, such subsequent conveyance is valid in same manner and to same extent as if power of revocation were recited therein and intent to revoke former conveyance expressly declared.

If conveyance to purchaser under this section is made before person making same is entitled to execute their power of revocation, it will nevertheless be valid from time power of revocation actually vests in such person, in same manner and to same extent as if then made. (28 VIC 173).

Transfer of Personal Property in Trust for Transferor.

All deeds of gift, all conveyances, and transfers or assignments, verbal or written, of goods and chattels or things in action, made in trust for person making same, are void as against creditors, existing or subsequent, of such person. (28 VIC 174).

Rights of Successors or Assigns of Creditors.

Every conveyance, charge, instrument, or proceeding declared by law to be void as against creditors, purchasers, or mortgagees is equally void as against heirs, successors, personal representatives, or assigns of such creditors, purchasers, or mortgagees. (28 VIC 175).

Rights of Purchaser for Valuable Consideration.

Provisions of this chapter must not be construed in any manner to affect or impair title of purchaser for valuable consideration unless it appears that such purchaser had previous notice of fraudulent intent of their immediate grantor, or of fraud rendering void title of such grantor. (28 VIC 176).

Uniform Fraudulent Conveyance Act adopted. (28 VIC 201 et seq.).

Remedies.

See subhead Uniform Fraudulent Conveyance Act, supra.

Bulk Sales.

Art. 6 of Uniform Commercial Code repealed Feb. 20, 2002. (11A VIC 6-101 to 111). See category 3 Business Regulation and Commerce, topic 3.09 Commercial Code.

8.09 GARNISHMENT:

As an aid to attachment or execution, plaintiff has right to subject money or property of defendant in possession of third person to claims against debtor by garnishment. (Giurdanella v. Giurdanella, 358 F.2d 321, 322 at n. 1 [3d. Cir. 1966]).

Property Which May Be Reached.

Real property, personal property, debts, and rights or shares in stock of association or corporation or interest or profits thereof. (5 VIC 256, 265).

Jurisdiction.

Writ may be issued by any court before which matter is being heard.

Proceedings to Obtain.

Whenever marshal with writ of attachment against defendant applies to any person or officer in possession of money or property belonging to defendant for purpose of attaching property, person or officer will furnish him with certificate designating amount and will give description of any property in their possession belonging to defendant or any debt owing to defendant, or number of rights or shares of defendant in stock of association or corporation, with any interest or profits or encumbrances thereon. If person or officer refuses to do so, or if certificate when given is unsatisfactory to plaintiff, person having such money or property may be required by court in which action is pending to appear before court and be examined on oath concerning same, and disobedience to order may be punished as contempt. (5 VIC 265). After allowance of order and before garnishee or officer thereof is required to appear, or within time to be specified in order, plaintiff may serve upon garnishee or officer thereof written allegations and interrogatories touching on any of property liable to attachment as property of defendant. (5 VIC 265).

Answer to Garnishee.

On day when garnishee or officer thereof is required to appear before court, they must return allegations and interrogatories of plaintiff to court with their written answer, unless for good cause shown a further time is allowed. Such answer must be on oath, and must contain full and direct response to all allegations and interrogatories. (5 VIC 267).

Practice.

See subhead Proceedings to Obtain, supra.

Adverse Claims.

No statutory provisions.

Judgment.

If garnishee or officer thereof fails to answer, court, on motion of plaintiff, may compel him to do so, or plaintiff may at any time after entry of judgment against defendant in action have judgment against garnishee for want of such answer.

In no case will judgment be given against garnishee for greater amount than judgment against defendant in action. (5 VIC 268).

If by answer it appears, or if upon trial it is found, that garnishee, at time of service upon him or officer thereof of copy of writ of attachment and notice, had any property of defendant liable to attachment, and as to which such garnishee or officer thereof is required to give certificate beyond amount admitted in certificate, or in any amount if certificate was refused. judgment may be given against such garnishee for value thereof in money. (5 VIC 271).

Earnings.

Attachment or execution levied upon wages may become lien and continuing levy upon gross wages due or to become due to judgment debtor from employer-garnishee for amounts specified in levy, if so decreed by courts, but subject to following limitation: 10% of so much of gross wages as exceeds $30 due or to become due to judgment debtor from employer-garnishee for any weekly pay period, or its equivalent for any pay period of different duration. Lien shall be continuing until judgment, costs, and interest are paid. Only one levy upon wages of judgment debtor may be satisfied at one time. Levy first delivered to marshal has priority.

Above percentage limitation does not apply in case of execution upon judgment, order, or decree of any court in Virgin Islands for payment of any sum for support or maintenance of persons’ spouse, or former spouse, and such execution, judgment, order or decree will, in discretion of court, have priority over any other levy against judgment debtor’s wages. In case of execution upon judgment, order, or decree for payment of such sum for support or maintenance, limitation will be 50% of gross wages due or to become due to any person for pay period or periods ending in any calendar month. (5 VIC 522).

8.10 HOMESTEADS:

Family’s homestead, or proceeds thereof, is exempt from judicial sale to satisfy any liability hereafter contracted or for satisfaction of any judgment obtained on such debt. Must be actual abode of and owned by family claiming exemption or some members thereof. (5 VIC 478).

Limitation of Value.

Cannot exceed $30,000, whether located in country or in town. (5 VIC 478).

Limitation of Area.

Cannot exceed five acres if in country or one-fourth acre if in town. (5 VIC 478).

Debts or Liabilities Against Which Exemption Not Available.

Not applicable to decrees for foreclosure of properly executed mortgage, but if homestead owners are married, it does apply unless mortgage is executed by husband and wife. (5 VIC 478).

Designation of Homestead.

No statutory provisions.

Claim of Exemption.

When any officer levies on homestead, owner, agent or attorney of such owner, may notify such officer that they claim such premises as their homestead, describing same by metes and bounds, lot or block, whereupon such officer notifies creditor of such claim. (5 VIC 478).

Waiver of Exemption.

No statutory provisions.

Loss of Exemption.

No statutory provisions.

Alienation or Encumbrance.

No specific statutory provisions.

Proceeds of Sale.

Where proceeds of sale exceed amount of exemption creditor shall receive such excess after first defraying the costs. (5 VIC 478).

Rights of Surviving Spouse and Family.

In case of death of homestead owner, other family members have right to claim homestead exemption as long as homestead remains abode of and owned by some members of family. (33 VIC 2305).

8.118.12 [RESERVED]

8.13 LIENS:

Liens for Labor or Materials.

Any person who makes, alters, repairs, or bestows labor on any article of personal property at request of owner or lawful possessor thereof may have lien upon such property so made, altered, or repaired, or upon which labor has been bestowed, for their just and reasonable charges for labor they have performed and material they have furnished, and such person may hold and retain possession of same until charges are paid. (28 VIC 581). See also subhead Mechanics' Liens, infra.

Liens for Transportation or Storage of Personal Property or Care of Livestock.

Any person who is common carrier, or, at request of owner or lawful possessor of any personal property, carries, conveys, or transports same from one place to another; or safely keeps or stores any grain, wares, merchandise, or personal property at request of owner or lawful possessor thereof; or pastures or feeds any horses, cattle, hogs, sheep, or other livestock, or bestows any labor, care or attention upon same at request of owner or lawful possessor thereof may have lien upon such property for their just and reasonable charges for labor, care, and attention they have bestowed and food they have furnished, and they may retain possession of such property until such charges are paid. Foregoing does not apply in any transaction governed by Art. 7 of Title 11A (Art. 7 of UCC). (28 VIC 582).

Uniform Commercial Code adopted. (Title 11A).

Refer to Restatements of Law regarding liens.

Waiver, Loss or Extinguishment.

Filing of Claim for Lien.

Within 30 days after rendition of services, or after performing work or labor, mentioned in §§ 581 and 582 of this title, every person who claims benefit of this chapter must file for record in recorder's office of judicial division where property is situated, claim which must be verified by oath of himself or some other person for him to effect that affiant believes same to be true. Claim must contain: Statement of their demand, and amount thereof, after deducting, as nearly as possible, all just credits and offsets; name of person by whom they were employed; statement of terms and conditions of contract, if any, and if there is no express contract, statement of what service, work, or labor is reasonably worth; and description of property to be charged with lien sufficient for identification with reasonable certainty. (28 VIC 587).

Duration of Lien.

Person rendering service or doing work or labor indicated above is only entitled to liens as provided herein for services, work, or labor for period of six months, or any part thereof next preceding filing of claims as provided above.

No lien provided for in this chapter may bind any property for longer period than six months after claim has been filed, unless action is commenced within that time to enforce same. (28 VIC 586).

Enforcement.

Action to Enforce Lien.

Enforced by action and governed by laws regulating proceeding relating to mode and manner of trial and proceeding and laws to secure property so as to hold it for satisfaction of any lien that may be against it. (28 VIC 589).

Enforcement Against All or Part of Property.

Any person who brings an action to enforce lien, or any person having lien, who is made party to any such action, has right to demand that such lien be enforced against whole or any part of property. (28 VIC 590).

Judgment and Sale of Property.

In an action to enforce lien, judgment may be rendered in favor of each person having lien for amount due him, and court may order any property subject to lien to be sold by marshal in same manner that personal property is sold on execution. Court may apportion proceeds of sale to payment of each judgment pro rata, according to amount of such judgment. (28 VIC 592).

Mechanics' Liens.

Existence of Construction Lien.

Except as provided in § 254, even though owner has not made agreement giving real estate security interest, prime contractor, subcontractor or subsubcontractor, upon compliance with § 264 has to extent provided in this chapter lien to secure payment of contract price on contracting owner's real estate which is being improved. They also have lien on interest in real estate being improved of any owner, other than contracting owner, who, in writing, has either requested that improvement be made or agreed specifically that their interest may be bound by lien. (28 VIC 253).

Exclusion from Lien.

Notwithstanding § 253, person making improvement pursuant to real estate improvement contract with Government of Virgin Islands is not entitled to lien under this chapter. (28 VIC 254).

Limitation of Lien for Materials Supplied.

(a) Lien for supplying materials arises only if they are furnished with intent, evidenced by contract of sale, delivery order, or by claimant's delivery to site, that they be used in construction or incorporated in improvement on particular real estate against which lien is asserted; (b) if separate lots, parcels or tracts of real estate are being improved under single notice of commencement (see § 262) and real estate improvement contract does not specifically apportion materials among lots, parcels or tracts, intent, evidenced in manner specified in (a), that materials be used generally on separate lots, parcels or tracts, is sufficient to enable supplier to secure lien against all lots, parcels or tracts on which materials were actually used or in which they were incorporated. Delivery by claimant to any one of separate lots, parcels or tracts will be sufficient delivery under (a) to give lien on all lots, parcels or tracts. Delivery to any one of separate lots, parcels or tracts, whether or not by claimant, creates presumption that materials were used in construction or incorporated into all separate lots, parcels or tracts, being improved in same percentages of claimant's claim as cost to owner of improvements on each separate lot, parcel or tract bears to total cost to owner of all improvements being made under single notice of commencement, and claimant has lien on each separate lot, parcel or tract for that percentage of their claim unless owner or other adverse party accounts for all materials for which claim is asserted, showing particular lots, parcels or tracts into which they were incorporated or in connection with which they were used. (28 VIC 255).

Amount of Lien; Notice of Claim of Lien.

(a) Amount secured by lien of prime contractor is unpaid part of prime contract price less aggregate amount secured by liens of all subcontractors and subsubcontractors; (b) except as modified by (c) and by § 258, lien of subcontractor is for lesser of: (1) amount unpaid under their contract, or (2) part of contract price (A) remaining unpaid under prime contract at time owner receives notification under § 256(e) of subcontractor's right to claim lien, and (B) any additional part of prime contract price paid prior to filing of notice of commencement under § 262; (c) lien of subcontractor is reduced by amounts owed by subcontractor to their subsubcontractor if subsubcontractor has claimed lien for amounts; (d) except as modified by § 258, lien of subsubcontractor is for amount unpaid under their contract, but not more than lesser of: (1) part of contract price (A) remaining unpaid under prime contract at time owner receives notification of subsubcontractor's right to claim lien, and (B) any additional part of prime contract price paid prior to filing of notice of commencement, or (2) part of contract price remaining unpaid under subcontract at time prime contractor received notification of subsubcontractor's right to claim lien; (e) notification to owner or prime contractor of right to claim lien may be given at any time after subcontractor or subsubcontractor has entered into contract pursuant to which their lien may arise. To be effective under (b) and (d) notice must be in writing and must be either delivered personally to or sent by registered or certified mail to last known address of person specified in notice of commencement (see § 262) and must contain: (1) Name of claimant, (2) name of person with whom they contracted, (3) general description of services and materials provided or to be provided, (4) amount unpaid, whether or not due, to claimant for services or materials (if no amount is fixed by contract, good faith estimate of amount must be made), (5) statement that any payments to prime contractor after receipt of notification will not reduce amount of claimant's lien; and, if claimant is subsubcontractor, statement that any payments to subcontractor after notification has been received by both owner and prime contractor will not reduce amount of claimant's lien. (28 VIC 256).

Notice to Owner.

Notice given to owner who made contract for improvement is also effective against any other owner against whom person giving notice can acquire lien under this chapter. (28 VIC 257).

Attachment and Priority of Lien.

(a) If claimant records notice of lien as provided in § 264, while notice of commencement is effective, claimant's lien attaches as of time notice of commencement was recorded as provided in § 262; (b) if claimant records notice of lien when there is no effective notice of commencement covering improvement, claimant's lien attaches at time they record their notice of lien; (c) except as provided in (d), construction lien takes priority over conveyance, security interest, another construction lien, judgment, or other claim against real estate which was not properly recorded or perfected; (d) all liens which attach as of time of recording notice of commencement (see [a]) have equal priority and share funds available in same ratio as ratio of particular claimant's lien bears to total of all liens; (e) "funds available" in case of subcontractors, means total of: (1) Sums paid by owner to prime contractor prior to recording of notice of commencement, (2) sums paid by owner in disregard of any notice of right to claim lien, and (3) sums unpaid under prime contract; (f) "funds available" in case of subsubcontractors, means funds available as defined in (e) but not more than amount to which their subcontractor is entitled; (g) owner pays in disregard of notice of lien claim if they fail, after receipt of notification of right to claim lien, to withhold from prime contractor amount sufficient to pay amount of lien to subcontractor or subsubcontractor provided for in (b), (c) and (d) of § 256 or pays subcontractor amounts to which subcontractor is not entitled because of receipt by owner of notification of right to claim lien from subsubcontractors who have contracted with subcontractor; (h) except as provided in (i), lien takes priority over subsequent advances made under prior recorded security interest if subsequent advances are made after notice of lien has been recorded; (i) notwithstanding notice that lien has attached, subsequent advances made under prior recorded security interest take priority over lien if advance: (1) was made under "construction security interest", or (2) was applied to payment of cost of real estate improvement, or to payment of any lien or encumbrance which is prior to lien given by this chapter, or to maintenance or preservation of real estate or of secured creditor's interest therein; (j) security interest is "construction security interest" if instrument recorded to perfect interest so denominates it, and debtor incurs obligation for purpose of making improvement, whether or not proceeds are in fact so used. (28 VIC 258).

Contractor's Payment Bond; No Lien Attaches.

(a) No lien will attach to real estate in behalf of any claimant other than prime contractor if owner or prime contractor, prior to commencing improvement under contract between owner and prime contractor, procures from surety company authorized to do business in Virgin Islands payment bond meeting requirements of section; (b) subject to (c) bond must obligate surety company to pay all sums due to subcontractors and subsubcontractors for services and materials supplied to prime contractor or to subcontractor pursuant to contract under which lien would otherwise arise; (c) amount of payment bond must be not less than following percentages of total contract price payable to prime contractor; (1) 50% of contract price up to $1,000,000, (2) 40% of that portion of contract price above $1,000,000 and up to $5,000,000, and (3) 35% of that portion of contract price above $5,000,000. If total amount payable by terms of owner's contract with prime contractor is indefinite, payment bond must be in sum which owner and prime contractor in good faith believe is at least one-half of amount which is or would have been due to prime contractor if they perform, or would have performed contract according to its terms; provided, subcontractors and subsubcontractors to whom payment bond applies may file notice of lien, but lien will be enforceable only against real estate for amount which is not covered by bond. In addition to requirements of § 264, notice of lien hereunder must state that notice of payment bond has been filed and must give reference location for notice of payment bond; (d) if bond has been procured pursuant to this section, notice thereof must be recorded under § 267; (e) person acquiring bond must furnish true copy of any bond procured under this section at cost of reproduction thereof to any claimant on request, and, for refusal to furnish copy without justifiable cause, will be liable to claimant for any damages caused by refusal or failure; (f) no claimant may recover under surety bonds provided in this section unless they: (1) within 60 days after completion of their performance, give surety and contractor notice of amount due, and (2) institute suit against surety within one year after completion of their performance; (g) subcontractor or subsubcontractor having claim under bond has direct right of action against surety; (h) obligation of surety under this section will not be affected by any change or modification of contract between prime contractor and owner but total liability of surety will not be greater than penal sum of bond. (28 VIC 259).

Substitution of Surety Bond; Release of Lien.

(a) If owner of property, or owner of any interest therein, sought to be charged with claim of lien, or any original contractor or subcontractor disputes correctness or validity of any claim of lien, they may record in office of recorder in which notice of lien was recorded, either before or after commencement of action to enforce such claim of lien, notice of bond executed by corporation authorized to issue surety bonds in Virgin Islands, in penal sum equal to 1½ times amount of claim or 1½ times amount presumptively allocated under § 255 to parcel or parcels of real property sought to be released, which bond must be conditioned for payment of any sum which claimant may recover on claim together with their costs of suit in action, if they recover therein. Upon recording of such bond real property described in such bond is released from lien and from any action brought to foreclose such lien. Principal upon such bond may be either owner of property or owner of any interest therein, or any original contractor, subcontractor, or subsubcontractor affected by such claim of lien. Person procuring bond must mail copy of bond by registered or certified mail to claimant of lien sought to be released; (b) release of real estate from lien under this section does not otherwise affect rights of claimant and they may proceed to establish their claim under this chapter and, upon determination that they are entitled to lien, court will order surety company to pay sums found to be due. (28 VIC 260).

Place of Recording; What Constitutes Recording; Recording Fee.

(a) All documents authorized or required to be recorded by this chapter must be recorded as provided for by law, in office of recorder in district in which real estate improvement is to be undertaken; (b) in addition to other requirements imposed on him by law, recording officer must: (1) index each notice of commencement and notice of lien in tract index and in name of owner and claimant, and (2) note recording of any other document entitled to recording under this chapter at index entry for notice of lien and notice of commencement to which it relates; (c) any recorded document substantially complying with applicable provisions of this chapter is effective even though it contains minor errors which are not seriously misleading. (28 VIC 261).

Recording Notice of Commencement; Notice of Termination.

(a) Notice of commencement of real estate improvements signed by owner may be recorded; (b) notice of commencement must be denominated “notice of commencement” and must state: (1) Real estate being improved, with description thereof sufficient for identification, (2) name and address of owner, their interest in real estate, and name and address of fee simple title holder, if other than owner filing notice of commencement, (3) name and address of person to whom notifications concerning construction liens may be given; (c) except as provided in (e), notice of commencement continues effective for period of five years from date it is recorded; (d) notice of commencement is effective as to all improvements made on real estate whether or not they were contemplated at time of recording; (e) owner may terminate period of effectiveness of notice of commencement by filing notice of termination which contains: (1) Same information as notice of commencement, (2) recording office document reference number and date of notice of commencement, and (3) statement of date as of which notice of commencement is terminated, which date may not be earlier than 30 days after notice of termination is filed. Notice of termination may apply to all or any portion of real estate subject to notice of commencement; (f) notice of termination is effective to terminate notice of commencement at later of 30 days after filing of notice of commencement or date stated in notice of termination as date on which notice of commencement is terminated. (28 VIC 262).

Wrongful Recording of Notice of Termination.

(a) Owner has obligation to lien claimants not to record notice of termination except after stoppage or completion of work on improvement or in connection with sale of completed portion of real estate being improved; (b) if owner improperly records notice of termination they are personally liable to lien claimant to extent that claimant is unable to realize on lien because of improper recording. (28 VIC 263).

Recording Notice of Lien; Recording Cancellation of Lien.

(a) Claimant's lien does not attach and will not be enforced unless they have, not later than 90 days after their final furnishing of materials or services, recorded notice of lien; (b) notice of lien recorded prior to time claimant is entitled to final payment is effective only if portion of price due him is past due, or notice of commencement is effective as to real estate at time of recording; (c) notice of lien must be signed by claimant and state: (1) Name and address of claimant, (2) name and address of person with whom claimant contracted, (3) services performed or to be performed or materials furnished or to be furnished for improvement and contract price thereof, (4) amount unpaid, whether or not due, to claimant for services or materials (if no amount is fixed by contract good faith estimate of amount to be due must be made), (5) time when first and last services were performed and materials were furnished or if either event has not yet occurred, estimate of time or times, (6) real estate subject to lien, with description thereof sufficient for identification, (7) name of person against whose interest in real estate lien is claimed, and (8) either reference to notice of commencement under which notice of lien is recorded with recording office document location reference thereto or statement of date when contract price or part thereof became due, (9) if separate lots, parcels or tracts of real estate are being improved under single notice of lien, and if contract specifies how materials are to be apportioned among lots, parcels or tracts, notice of lien must state information required hereunder, and, in addition, must state how furnishing of materials is to be apportioned; (10) reference location for payment bond as required by § 259(c) of this title; (d) recording of notice of lien is not notice to owner of any claim of lien and owner may continue making payments under their contract which reduce their liability to claimant until they receive notification from claimant of their right to claim lien as provided in § 256; (e) claimant must record signed statement that notice of lien will be cancelled, in full or in part, when claimant's lien has been fully or partially satisfied by payment of part or all of contract price by recovery of judgment either through foreclosure of lien or through personal judgment recovered for part or all of contract price. Cancellation statement must include reference location for notice of lien being fully or partially cancelled, and must be recorded within ten days of full or partial satisfaction of lien. (28 VIC 264).

Amendment of Notice of Lien; Notice of Extension of Credit.

(a) any notice of lien may be amended or credit extended as provided in § 271 by additional recording at any time during 90-day period following recording of notice of lien. Amendment which increases amount of claimed lien, or describes different or additional real estate or owners, is effective only from time of recording of amendment; (b) amendment does not extend period of effectiveness of recorded lien except as provided in (a); (c) extension of credit extends period of effectiveness of recorded lien as provided in § 271; (d) amendment or notice of extension of credit must set forth recording office document location reference and date of recording of notice of lien being amended or under which credit is being extended and must state respects in which original notice of lien is being amended or that recording is for purpose of giving notice of extension of credit. If separate lots, parcels or tracts of real estate are being improved under single notice of lien, amendment or notice of extension of credit must specify which lot, parcel or tract is being affected by amendment or extension of credit; if amendment or notice of extension of credit does not so specify, presumption under § 255(b) will apply. (28 VIC 265).

Filing Assignment of Lien.

(a) Claimant may assign or record their right under notice of lien by recording written statement of assignment signed by him which sets forth name of claimant of record, name and address of assignee, person against whom lien is claimed, real estate affected with description of it sufficient for identification, and recording office document location reference and date of recording of notice of lien; (b) recording of assignment is not notice to owner and they may continue to deal with original claimant in respect to claim until they receive notice of assignment and direction that no arrangements or payments may be made without assignee's consent; (c) unless statement of assignment is recorded, assignee need not be party to any action to foreclose security interest, lien, or other encumbrance; (d) unless otherwise provided by law, failure to record statement of assignment will not otherwise affect its validity. (28 VIC 266).

Filing Notice of Payment Bond.

(a) If prime contractor or owner has secured payment bond under § 259, notice of surety bond must be recorded; (b) notice must be signed by contractor or owner and by surety company and state: (1) Real estate being improved with description thereof sufficient for identification, (2) name and address of owner and prime contractor, (3) name and address of surety company and name of person on whom service of process may be made, (4) statement that bond meets requirements of § 259, and (5) amount of payment bond. (28 VIC 267).

Recording Notice of Surety Bond for Release of Lien.

Notice of surety bond recorded as provided in § 260 must state: (1) Real estate being improved with description thereof sufficient for identification; (2) name and address of person in whose behalf bond was procured; (3) amount of bond, name of surety company, address at which claims may be presented to it, name and address of person on whom service of process may be made and that it is authorized to do business in this Territory; (4) name of claimants, for which surety bond was procured, amount of their claims, and applicable recording office document location references. (28 VIC 268).

Recording Notice of Commencement of Action.

(a) Claimant, after instituting action to enforce lien, must record notice of commencement of action in office in which notice of lien was recorded. Notice must be signed by claimant or their attorney and must refer to notice of lien under which it is recorded, giving recording office document location reference and date of recording of notice of lien, name of owner and of claimant, amount of lien claimed, and identifying reference to action commenced; (b) only from time of recording such notice will purchaser or encumbrancer of property affected thereby be deemed to have constructive notice of pendency of action, and in that event only of its pendency against parties designated by their real names. (28 VIC 269).

Discharge of Lien.

(a) Lien provided by this chapter will be discharged of record by any of following methods: (1) Signed statement of claimant of record, recorded in office where notice of lien is recorded, stating that lien is satisfied and may be cancelled of record, or (2) by failure to record notice of commencement of action to enforce lien or notice that no cause of action has accrued within time prescribed in § 271, or (3) by recording in office where notice of lien is recorded original or certified copy of judgment or decree of court of competent jurisdiction showing final determination of action adverse to claimant; (b) statement under (a)(1) or judgment under (a)(3) must set forth recording office document location reference and date of recording of notice of lien to which it applies. (28 VIC 270).

Duration of Lien, Extension if Credit Given; Maximum Time after Completion.

(a) No notice of lien provided for in this chapter binds any property for period of time longer than 90 days after recording of notice of lien unless within that time action to foreclose lien is commenced in proper court or unless within that time claimant has recorded affidavit, as provided in (b) below, that no cause of action has accrued to him under contract for which they recorded notice of lien, except that, if credit is given and notice of fact and terms of such credit is recorded in office of recorder subsequent to recording of such notice of lien and prior to expiration of such 90-day period, then such lien continues in force until 90 days after expiration of such credit. In no case will lien continue in force longer than one year from time of completion of improvement; (b) claimant may record in office in which lien was recorded affidavit which states that no cause of action has accrued to him under contract for which they recorded notice of lien. Affidavit must refer to notice of lien concerned, giving recording office document location reference and date of recording of notice of lien, name of owner and of claimant, and must state date when cause of action will accrue to claimant. If no exact date is known, affidavit must give good faith estimate of date. If no exact date is known, affidavit must be effective for only 90 days, and new affidavit must be filed. New affidavit must state all information required in this section. If separate lots, parcels or tracts of real estate are being improved under single notice of lien, affidavit under this section must specify information according to lot, parcel or tract; (c) as against any purchaser or encumbrancer for value and in good faith whose rights are acquired subsequent to expiration of 90-day period following recording of claim of lien, no giving of credit will be effective unless evidenced by notice recorded in office of recorder prior to acquisition of rights of such purchaser or encumbrancer. (28 VIC 271).

Suit to Enforce Lien.

(a) If action to foreclose lien is not brought to trial within two years after commencement thereof, court may in its discretion dismiss same for want of prosecution; (b) in all cases dismissal of action to foreclose lien (unless it is expressly stated that same is without prejudice) or judgment rendered therein that no lien exists will be equivalent to cancellation and removal from record of such lien; (c) in addition to any other costs allowed by law, court in action to foreclose lien must also allow as costs money paid for verifying and recording lien, such costs to be allowed each claimant whose lien is established, whether they are plaintiff or defendant; (d) whenever on sale of property subject to any liens provided for in this chapter, under judgment of foreclosure of such lien, there is deficiency of proceeds, judgment for deficiency may be entered against any party personally liable therefor in like manner and with like effect as in action for foreclosure of mortgage. (28 VIC 272).

Personal Actions; Credit for Money Collected.

Nothing contained in this title will be construed to impair or affect right of any claimant to maintain personal action to recover their debt against person liable therefor either in separate action or in action to foreclose their lien, nor any right they may have for issuance of writ of attachment or execution. Judgment, if any, obtained by plaintiff in such personal action will not impair or merge any lien held by plaintiff under this chapter, but any money collected on such judgment will be credited on amount of such lien. (28 VIC 273).

Defense by Contractor at Own Expense; Withholding and Deducting Funds Due Contractor; Recovery of Judgment and Costs by Owner.

In all cases where claim of lien is recorded for labor, services, equipment, or materials furnished to any contractor, they must defend any action brought thereon at their own expense, and during pendency of such action owner may withhold from original contractor amount of money for which claim of lien is recorded. In case of judgment in such action against owner or their property upon lien, owner will be entitled to deduct from any amount then or thereafter due from him to original contractor amount of such judgment and costs. If amount of such judgment and costs exceeds amount due from him to original contractor, or if they have settled with original contractor in full, they will be entitled to recover back from original contractor, or sureties on any bond given by them for faithful performance of their contract, any amount of such judgment and costs in excess of contract price, and for which original contractor was originally party liable. (28 VIC 274).

Wrongful Conduct under this Chapter; Remedies.

(a) If owner or any claimant, in bad faith, deprives or attempts to deprive any owner, claimant or other person of benefits to which they are entitled under this chapter by giving or recording false affidavits, invoices, statements, or in any other manner, (1) any person injured thereby is entitled to recover any damage caused to him, and (2) court may issue temporary and permanent injunctions, whether or not irreparable damage has been or will be done; (b) if claimant in bad faith overstates amount for which they are entitled to lien, or fails to record statement of cancellation as required by § 264(e) court may: (1) Declare their lien void, (2) award owner or any other person injured thereby actual damages suffered, and (3) award owner punitive damages in amount not exceeding difference between amount claimed as lien and amount which claimant was actually entitled to claim as lien; (c) damages awarded under this section may include costs of securing cancellation of lien of record, including reasonable attorney's fees and court costs. (28 VIC 275).

Form of Documents.

Office of Lieutenant Governor will prescribe form of all documents which this chapter requires or permits to be recorded. (28 VIC 276).

Attachment Lien.

See topic 8.02 Attachment.

Attorney's Lien.

No statutory provisions.

Collateral Security.

See topic 8.14 Pledges.

Execution Lien.

See topic 8.05 Executions.

Judgment Lien.

See category 5 Civil Actions and Procedure, topic 5.15 Judgments.

Landlord's Lien.

See category 21 Property, topic 21.10 Landlord and Tenant.

Liens on Exempt Property.

See topic 8.06 Exemptions.

Liens on Homestead.

See topic 8.10 Homesteads.

Motor Vehicle Lien.

See category 23 Transportation, topic 23.01 Motor Vehicles, subhead Liens.

Real Estate Mortgage Lien.

See category 20 Mortgages, topic 20.04 Mortgages of Real Property.

Tax Lien.

See category 22 Taxation, topics 22.09 Gift Tax, subhead Lien for Tax; 22.13 Property Taxes, subhead Lien.

8.14 [RESERVED]

8.15 PLEDGES:

No specific statutory provisions. Uniform Commercial Code adopted. (Title 11A). See category 3 Business Regulation and Commerce, topic 3.09 Commercial Code. Also refer to Restatements of Law.

Remedies of Pledgee.

No statutory provisions.

8.16 RECEIVERS:

A receiver may be appointed in any civil action or proceeding other than an action for the recovery of specific personal property: (1) Provisionally, before judgment, on application of either party when right to property sued for and in possession of other party is probable and property or its rents and profits in danger of being lost, injured or impaired; (2) after judgment, to carry same into effect; (3) to dispose of property according to judgment or preserve it pending appeal or when execution unsatisfied or debtor refuses to apply property to satisfy judgment; (4) in cases provided in codes, or by ordinances when corporation has been dissolved or is insolvent or in imminent danger of insolvency or forfeited its corporate rights; (5) when debtor has been declared insolvent.

Qualification.

Before entering on duties, receiver must be sworn faithfully to perform their duties to the best of their ability and file undertaking with one or more sureties in sum fixed by court. Sureties justify as in bail on arrest.

9 DISPUTE RESOLUTION

9.01 [RESERVED]

9.02 ARBITRATION AND AWARD:

Uniform Arbitration Act not adopted. See Restatements of Law and Federal Arbitration Act (9 U.S.C. § 1 et seq.).

9.02A MEDIATION:

Uniform Mediation Act not adopted.

Jurisdictional Mediation Acts.

See Rule 3.2 of Local Rules of Civil Procedure and Sup.Ct.R. 40.

Credentials of/Qualifications of/Standards for Mediators.

See Rule 3.2 of Local Rules of Civil Procedure and Sup.Ct.R. 40. Many civil cases mediated voluntarily or by court referral to American Mediation Institute.

10 DOCUMENTS AND RECORDS

10.01 ACKNOWLEDGMENTS:

Uniform Acknowledgment Act adopted with minor variations. (28 VIC 81 et seq.).

Within Territory.

Acknowledgments may be taken by notary public authorized to perform notarial acts in Virgin Islands, judge, clerk, or deputy clerk of any court of record in Virgin Islands having seal, or commissioner or recorder of deeds. (28 VIC 81). Each notary public may charge and retain fee not to exceed $5 for each document notarized or for each time their seal is affixed to document. (3 VIC 778).

Outside Territory.

Acknowledgments may be taken by notary public authorized to take acknowledgments where performed, judge, clerk, or deputy clerk of any court of record where performed, or officer of U.S. foreign service authorized by U.S. State Department regulations to take acknowledgments where performed; or, if taken for member of, or person serving with or accompanying, U.S. armed forces, by commissioned officer in active service authorized by regulation to take acknowledgments. (28 VIC 82).

Requirements of Certificate.

Officer taking acknowledgment must certify that person acknowledging appeared before such officer and acknowledged that they executed instrument and that officer knew or had satisfactory evidence that person acknowledging was person described in and who executed instrument. (28 VIC 84).

Words “acknowledged before me” mean all of foregoing and that person acknowledged they executed instrument for purposes stated therein or acknowledged they executed it by proper authority as act of corporation, partnership, or principal described therein for such purposes, or acknowledged they executed it by proper authority in their stated capacity as public officer, trustee, administrator, guardian, or other representative for such purposes. (28 VIC 86).

Married Women.

No special requirements.

Attorneys in Fact.

No special requirements.

Corporations.

No special requirements.

Foreign Acknowledgments.

See subhead Outside Territory, supra.

Effect of Acknowledgment.

Documents affecting real property required or permitted to be recorded shall be recorded in office of recorder of deeds in judicial district in which property is located. (28 VIC 121).

If document affects real property in both judicial divisions, it shall be recorded in both offices. (28 VIC 121).

Documents affecting real property which are acknowledged or proved or certified as provided by law are admissible in evidence in any court in Virgin Islands without further proof. (28 VIC 132[a]).

Record of any document in office of recorder of deeds, or copy of such record, is admissible in any court in Virgin Islands if attested as a correct copy of record by custodian of record. (28 VIC 132[b]).

Proof by Subscribing Witness.

Subscribing witness may prove execution of conveyance before any officer authorized to take acknowledgments who is personally acquainted with witness or has satisfactory evidence that they are subscribing witness. (28 VIC 43).

Authentication.

If acknowledgment is taken by any of persons authorized by law other than person authorized to perform notarial acts by laws or regulations of foreign country, signature, rank or title and serial number of person are sufficient proof of their authority to perform act. (28 VIC 83).

If acknowledgment is taken by person authorized by laws of foreign country, proof of their authority is sufficient if certified by either foreign service officer of U.S. resident in country where act is performed or diplomatic or consular officer of foreign country resident in U.S.; or if their official seal is affixed to document; or if their title and indication of their authority appears in digest of foreign law or other customary source of such information. In all other cases proof of authority is sufficient if clerk of court of record certifies to official character of person and of their authority to take acknowledgment. (28 VIC 83).

Forms.

Certificate of acknowledgment is acceptable if in form prescribed by laws of Virgin Islands, or by laws applicable where taken or if it contains words “acknowledged before me” or their substantial equivalent. (28 VIC 85).

Statutory short forms of acknowledgment are as follows:

Forms

For Individuals Acting in Their Own Right.

Territory of the Virgin Islands

District of. . . . .

The foregoing instrument was acknowledged before me this (date) by (name of person acknowledged).

(Signature of person taking

acknowledgment)

(Title or rank)

(Serial number, if any).

For a Corporation.

Territory of the Virgin Islands

District of. . . . .

The foregoing instrument was acknowledged before me this (date) by (name of officer or agent), (title of officer or agent) of (name of corporation acknowledging) a (state or place of incorporation) corporation, on behalf of the corporation.

(Signature of person taking

acknowledgment)

(Title or rank)

(Serial number, if any).

For a Partnership.

Territory of the Virgin Islands

District of. . . . .

The foregoing instrument was acknowledged before me this (date) by (name of acknowledging partner or agent), partner (or agent) on behalf of (name of partnership) a partnership.

(Signature of person taking

acknowledgment)

(Title or rank)

(Serial number, if any).

For an Individual acting as Principal by an Attorney in Fact.

Territory of the Virgin Islands

District of. . . . .

The foregoing instrument was acknowledged before me this (date) by (name of attorney in fact) as attorney in fact on behalf of (name of principal).

(Signature of person taking

acknowledgment)

(Title or rank)

(Serial number, if any).

For any Public Officer, Trustee, or Personal Representative.

Territory of the Virgin Islands

District of. . . . .

The foregoing instrument was acknowledged before me this (date) by (name and title of position).

(Signature of person taking

acknowledgment)

(Title or rank)

(Serial number, if any).

Alternative to Acknowledgment or Proof.

No statutory provision.

Validating Acts.

Acknowledgments taken before effective date of Virgin Islands Code (Sept. 1, 1957) are not affected by law contained therein. (28 VIC 92).

10.02 AFFIDAVITS:

May be taken in the Virgin Islands before any officer authorized to administer oaths, including every court, judge, clerk of court, district court commissioner, notary public and every officer or person authorized to take testimony in any action or proceeding or to decide upon evidence. (5 VIC 693, 692).

Affidavit to be used in the Virgin Islands may be taken in any state, territory, district, commonwealth or possession of the U. S., or in any foreign country, before (1) commissioner appointed for such purpose by Governor of Virgin Islands; or (2) clerk of any federal court, clerk of any state court of record, notary public, commissioner of deeds, person authorized by law of state to take acknowledgments; or (3) consular officer or agent of U.S. accredited to country where acknowledgment is made, notary public, judge or clerk of court of record of country where acknowledgment is made. (5 VIC 694).

General Requirements of Jurat.

No statutory provisions.

Use of Affidavit.

Affidavit may be used (1) To prove service of a summons, notice or other paper in an action; (2) to obtain a provisional remedy; (3) to obtain examination of a witness; (4) to obtain a stay of proceedings; (5) upon a motion; or (6) in any other case expressly provided for by law or rules of court. (5 VIC 696).

Whenever a provisional remedy has been allowed upon affidavit, party against whom it is allowed may serve upon party by whom it was obtained, notice requiring any person making affidavit to be produced before some officer authorized to administer oaths for cross-examination. Party to whom remedy was allowed will lose benefit of affidavit and all proceedings founded thereon if they fail to produce affiant for examination before such officer within eight days or receipt of notice. (5 VIC 697).

Proof of publication of document or notice required by law, or by order of court, to be published in newspaper, may be made by affidavit of printer of newspaper or their foreman or principal clerk, annexed to copy of document or notice, specifying times when and paper in which publication was made. Such affidavit must be made within six months after last day of publication. If such affidavit is made in action or proceeding pending in a court, it must be filed with clerk thereof, and same is primary evidence of facts stated therein. (5 VIC 698).

Form of Jurat.

Form

SUBSCRIBED and SWORN TO before me this. . . . . . day of. . . . .., 20. . . . .

....

Title:..........

My Commission Expires:..........

Alternative to Affidavit.

Statement of attorney authorized by law and admitted to practice in Courts of Virgin Islands, who is not party to action, when subscribed and affirmed by him to be true under penalties of perjury, may be served or filed in action in lieu of and with same force and effect as affidavit duly notarized. (5 VIC 699).

10.03 NOTARIES PUBLIC:

Lieutenant Governor may appoint and commission not more than 600 notaries public for Virgin Islands, exclusive of notaries ex-officio and members of Virgin Islands Bar, who will hold office for period of four years. Lieutenant Governor may also authorize and empower employees of Government of Virgin Islands or of U.S., not exceeding 40 in number, to take acknowledgments of deeds and administer oaths and affirmations, and such employees will be appointed and commissioned as notaries public with terms of office at pleasure of Lieutenant Governor. (3 VIC 771, 801).

Qualification.

Every person appointed a notary public will: Be citizen of U.S. at least 21 years of age and resident of Virgin Islands for at least five years preceding appointment, provided, however, that notaries ex-officio and members of Virgin Islands Bar commissioned in accordance with law will not be required to comply with five years residency requirement; be graduate of accredited high school or have passed high school equivalency test; continue to reside within Virgin Islands during term of office and shall not have been convicted of any crime either within or without Virgin Islands. (3 VIC 772).

Each notary public will pay to Treasury of Virgin Islands initial fee of $100 for commission and after that, on Jan. 1st of each year, annual fee of $25. If notary public fails to pay annual fee, Lieutenant Governor will, after giving notary public 30 days notice of their intention to do so, cancel such appointment. (3 VIC 773).

Each notary public must execute $5,000 bond in favor of Government of Virgin Islands, from any insurance/bonding company authorized to do business in Virgin Islands; or submit two resident sureties who are owners of real property in Virgin Islands. Real property must have value of $10,000 over and above encumbrances on it. Bonds must be approved by Presiding Judge of Superior Court who must notify Office of Lieutenant Governor and applicant of bond approval. (3 VIC 773).

Each notary public, upon approval of their bond and after having taken official oath, must transmit such bond and oath, duly signed by him, to office of Lieutenant Governor, whereupon Lieutenant Governor may issue commission. (3 VIC 773).

Authentication.

See topic 10.01 Acknowledgments, subhead Authentication.

Seal.

(a) Each notary public must keep official impression seal bearing their name, expiration date of commission, and judicial division. (b) Notary public must affix their impression seal to each document and either write, print or stamp their name in legible fashion on document. (c) Document is not properly notarized until seal has been impressed on it and name of notary public has been affixed to it. (3 VIC 776).

Powers and Duties.

Notaries public may take acknowledgments of deeds and other instruments, administer oaths and affirmations, and perform such other acts as may be authorized by law. No notary public may certify, attest or take oath or acknowledgment for or to instrument to which they are interested party. Each notary public will administer oath or inquire of each person executing document as to truth and authenticity of such document; and must request identification of person(s) requiring notarial service. Failure to do so will subject notary public to administrative fine of $100 or revocation of their commission, or both, in Lieutenant Governor's discretion. (3 VIC 777).

Each notary public must keep official record in which memorandum of all official acts are noted. Lieutenant Governor may inspect official record of any notary public at anytime. Upon expiration of term of office, notary public's official record and seal will be filed in Office of Lieutenant Governor in judicial division of their residence for five years. Lieutenant Governor will make impression of seal and keep impression with notary public's records.

Notary public's records will include document date, nature or name of document, consideration named in document, if any, parties making oath and such other information as Lieutenant Governor may, by regulation, deem necessary.

Notary public will not be eligible for renewal of office unless receipt showing deposit of official records and seal with Lieutenant Governor is presented with renewal application. (3 VIC 775).

Territorial Extent of Powers.

Powers extend throughout U.S. Virgin Islands.

Expiration of Commission.

Commission expires four years after date of issuance. (3 VIC 771).

Fees.

Each notary public may charge and retain fee not to exceed $5 for each document notarized or for each time their seal is affixed to document. Lieutenant Govenor's office will collect $5 fee for providing certificates of authenticity for documents to be sent out of Territory or when such certificates are otherwise required. (3 VIC 778).

Commissioners of Deeds.

No statutory provisions.

Officers of U.S. Armed Forces.

See topic 10.01 Acknowledgments.

10.04 RECORDS:

Regarding instruments affecting interest in real property, recording fee is dependent upon consideration recited: Deeds & Mortgages—$15.00 for first $3,000.00; $1.00 each additional $1,000.00 plus $1.00 per page; plus $4.00 for each additional lot or parcel or unit attached; attached documents (such as riders or exhibits)—$2.50 plus $1.00 per page. Miscellaneous documents—$25.00 plus $1.00 per page. Title & Encumbrance statements—$20.00; for certified copies, fee shall be $10.00 for first page and $1.00 for each additional page. Release of Liens—$10.00. Cancellation of instruments prior to Sept. 1999 is equal to number of thousand of original mortgage, divided by four; after Sept. 1999, is equal to number of thousand plus two divided by four.

Mortgages.

$15.00 for first $3,000.00; $1.00 each additional $1,000.00 plus $1.00 per page; plus $4.00 for each additional lot or parcel or unit attached; attached documents (such as riders or exhibits)—$2.50 plus $1.00 per page. Cancellation of instruments prior to Sept. 1999 is equal to number of thousand of original mortgage divided by four; after Sept. 1999, is equal to number of thousand plus two divided by four.

Both real and personal property instruments on record are recorded in one of two offices of Recorder of Deeds. For District of St. Thomas - St. John, recorder's office is located in Office of Lieutenant Governor, Charlotte Amalie, St. Thomas, Virgin Islands, and for District of St. Croix, recorder's office is located in Office of Lieutenant Governor, Christiansted, St. Croix, Virgin Islands.

Uniform Commercial Code adopted. (Title 11A). See category 3 Business Regulation and Commerce, topic 3.09 Commercial Code.

Recordable Instruments.

Any instrument effecting a conveyance or encumbrance of any interest in real property may be recorded, as is case with any instrument effecting a lien or security interest in personal property. Any such instruments must be recorded to effect notice to third parties.

Place of Recording.

Office of Recorder of Deeds for division (either St. Thomas - St. John, or St. Croix) in which property is located. (28 VIC 121). If document affects real property located in both judicial divisions, it shall be recorded in both offices. (28 VIC 121).

Requisites for Recording.

Instruments effecting conveyance or encumbrance of real property will not be entitled to be recorded in Office of Recorder of Deeds unless acknowledged, proved, or certified. (28 VIC 122). Instruments effecting lien or security interest in personal property must be executed in accordance with provisions of Uniform Commercial Code.

Recording Fees.

Regarding instruments effecting an interest in real property, recording fee is dependent upon consideration recited: Up to $400, $11; $400 to $600, $12; $600 to $1,000, $13; $1,000 to $2,000, $14; $2,000 to $3,000, $15; for each additional $1,000 add $1; for entering it, 50¢ per sheet. For cancellation of instruments, ¼th of fee for recording such instrument. (28 VIC 133).

Foreign Conveyances or Encumbrances.

Conveyances or encumbrances executed in any state of U.S. or in any foreign country may be executed according to laws of such state or country, but to be entitled to be recorded in Virgin Islands must be acknowledged in accordance with Virgin Islands law. (28 VIC 42). See topic 10.01 Acknowledgments.

Effect of Record.

Instruments recorded effective as notice for all purposes of conveyance, encumbrance, or security interest described therein.

Instruments acknowledged, proved, or certified as provided by law of this territory will be admissible in evidence in any court in territory without further proof thereof. Record of any instrument in Office of Recorder of Deeds, or copy of such record, will be admissible in evidence in any court in territory. (28 VIC 132).

Torrens Act not adopted.

Transfer of Decedent's Title.

Official record of transfer of decedent's title to real estate to heirs or devisees is effected by recording certified copy of final adjudication of court in which decedent's estate proceeding is filed.

Filing Under Commercial Code.

Documents under Uniform Commercial Code filed in Recorder's Office for division (St. Thomas - St. John, or St. Croix) in which property is located. Address for Recorder's Office for Division of St. Thomas - St. John is c/o Office of the Lieutenant Governor, P.O. Box 450, St. Thomas, Virgin Islands 00801, and for Recorder's Office for Division of St. Croix is No. 1121 King Street, Suite 101, P.O. Box 490, Christiansted, St. Croix, Virgin Islands 00820.

Vital Statistics.

Certified copies of records of births and deaths available for $12 each from Office of Vital Statistics. For division of St. Thomas - St. John: Knud Hansen Memorial Hospital, Charlotte Amalie, St. Thomas, Virgin Islands 00801. For division of St. Croix: Charles Harwood Memorial Hospital, Christiansted, St. Croix, Virgin Islands 00820. Marriage records kept in Superior Courts. For St. Thomas: Superior Court of Virgin Islands, Division of St. Thomas - St. John, Charlotte Amalie, St. Thomas, Virgin Islands 00801. For St. Croix: Superior Court of Virgin Islands, Division of St. Croix, Christiansted, St. Croix, Virgin Islands 00820. Certified copy of marriage license, $2.

10.05 SEALS:

Private seals and scrolls as substitute are abolished and are not required to be affixed to any instrument, but effect thereof, when used, will remain unchanged. (5 VIC 743).

Uniform Commercial Code adopted. (Title 11A). See category 3 Business Regulation and Commerce, topic 3.09 Commercial Code.

Corporate Seals.

Every Virgin Islands corporation will have power to have corporate seal, which may be altered at pleasure, and to use same by causing it or facsimile thereof to be impressed or affixed or reproduced or otherwise. (13 VIC 32).

Effect of Seal.

See category 5 Civil Actions and Procedure, topic 5.16 Limitation of Actions, subhead Twenty Years.

11 EMPLOYMENT

11.01 [RESERVED]

11.02 LABOR RELATIONS:

Commissioner of Labor administers provisions of Code relating to fair labor standards and labor relations. Provisions relate to minimum wages, maximum hours, overtime rates, rights of employees, unfair labor practices, representatives of employees, elections and penalties. (24 VIC 61 to 79).

Mandatory Rest Periods.

Except as otherwise provided for in written contract or by collective bargaining agreement, employer shall allow paid rest periods of minimum of ten minutes within each four hours of continuous work, except if employees' total daily work time is less than four hours. If rest period is not given within four-hour time frame, employee shall make up missed rest period within same work day or pay period, or employer shall pay employee one-half hour pay in compensation for each period not provided. However, employer is not required to provide paid rest period when all of following conditions are met: Employee is 18 years or older, working alone, employed in retail or service establishment and is allowed to leave assigned station to use restroom facilities. (24 VIC 20a).

Mandatory Meal Break.

Except as otherwise provided for in written contract or by collective bargaining agreement, no later than five hours after start of work period, employer shall provide its employees who work for continuous period of seven hours or longer with uninterrupted meal period of not less than 30 minutes during which employee is relieved of all duties. If it is not provided, employer must show that nature or circumstances of work prevents employee from being relieved from duty. (24 VIC 20b).

Exemption.

Employee may voluntarily agree to forego any rest period or meal period. Employer may apply to Commissioner of Labor for exemption from providing to all or to one or more employees benefits conferred upon employee. (24 VIC 20c).

Hours of Labor.

No employer will employ any of their employees for more than five consecutive days, or longer than total of 40 hours in work week, unless otherwise provided in this title, or for workday longer than eight hours unless employee receives compensation for their employment on a 6th and/or 7th consecutive day of work, or in excess of 40 hours in work week, or in excess of eight hours in workday, whichever excess is calculated to give employee greatest compensation at rate not less than 1½ times regular rate at which they are employed.

Notwithstanding above, employer in tourist service or restaurant industry may employ employee for six consecutive days provided employee is employed for not less than 40 hours in work week during which any part of six consecutive days are worked. No such employer will employ any employee for more than six consecutive days, or longer than total of 40 hours in work week, unless otherwise provided in this title, or for workday longer than eight hours, unless such employee receives compensation for employment on seventh consecutive day of work, or in excess of 40 hours in work week, or in excess of eight hours in workday, whichever excess is calculated to give employee greatest compensation at rate not less than 1½ times regular rate at which they are employed.

Except in case of either tourist service or restaurant industry, whenever employee is regularly required to work on more than one shift, all of which falls within one calendar day, and interval between such shifts exceeds two hours, employer will pay compensation to employee at regular rate for period of such interval in excess of two hours. (24 VIC 20).

Wages.

Each year minimum wage rate in effect will be reviewed by Virgin Islands Wage Board. Board may determine minimum wage rate equal to not more than 50% of average private, nonsupervisory, nonagricultural hourly wage as determined by Board for previous Nov., rounded to nearest multiple of 5¢, but not less than effective Federal Minimum Wage. (24 VIC 4).

Wrongful Discharge.

Unless modified by union contract employer may dismiss any employee, who engages in business which conflicts with their duties or makes him rival of their employer; whose insolent or offensive conduct toward customers injures employer's business; whose use of intoxicants or controlled substances interferes with proper discharge of their duties; who willfully and intentionally disobeys reasonable and lawful rules, orders and instructions of employer, provided, however, that employee may not be barred from patronizing employer's business after employee's working hours are completed; who performs their work in negligent manner; whose continuous absence from their place of employment affects interests of their employer; who is incompetent or inefficient, thereby impairing their usefulness to their employer; who is dishonest; or whose conduct is such that it leads to refusal, reluctance or inability of other employees to work with him. Any employee discharged for reasons other than those stated shall be considered to have been wrongfully discharged; however, employer is not prohibited from terminating employee as result of cessation of business operations, general cutback in work force due to economic hardship or as result of employee's participation in concerted activity that is not protected by this title. (24 VIC 76).

Child Labor.

No person who has not reached age of 18 years will be employed or permitted to work in any occupation involving heavy construction work; operation of power-driven, metal-forming, punching and shearing machines; making of alcoholic beverages in bottling plants; electric and power generating plants; steam laundries; any quarry; operation of power-driven woodworking machines; spray painting or occupations involving exposure to lead or its compounds, or to dangerous or poisonous dyes and chemicals; any other business, industry or any other occupation that commissioner, upon investigation and after public notice and hearing, finds and by order declares to be particularly hazardous for employment of minors or detrimental to their health, safety, morals, or well being. (24 VIC 402. 403).

Female Labor.

See subhead Discrimination, infra.

Discrimination.

Notwithstanding provisions of any other law, it is unlawful for an employer to discriminate against any individual in compensation or in terms, conditions, or privileges of employment because of race, sex, age, religion, color or ancestry. It is also unlawful for any employer or employment agency to print, circulate or cause to be printed or circulated any statement, advertisement or publication or to use any form of application for employment or to make inquiry in connection with prospective employment, which expresses, directly or indirectly, any limitations, specification or discrimination as to race, sex, age, religion, color or ancestry, unless based on a bona fide occupational qualification as determined by this chapter. (24 VIC 451). Discrimination "because of sex" includes discrimination because of sexual harassment and because of or as to pregnancy, childbirth, or related medical conditions. (10 VIC 64; 24 VIC 451). See topic Sexual Harassment, infra.

Worker Freedom Act—Employer may not require employees to participate in activities that communicate employer's opinions on political or religious matters. (24 VIC 620). Political or religious employers excluded. (24 VIC 621). Private right of action with remedy that includes actual economic damages and award of attorneys' fees. (24 VIC 622).

Sexual Harassment.

Statutorily defined and prohibited in workplace. Employers must adopt policy that defines sexual harassment, establishes process for filing complaints, and provides consequences for offenders. Mandates training for government employees and employers that employ five or more employees, and enhanced training for supervisory and managerial employees to minimize sexual harassment complaints. (10 VIC 64a).

Retaliation.

Employer shall not discharge, threaten, or otherwise discriminate against employee regarding employee's compensation, terms, conditions, location, or privileges of employment because employee, or person acting on behalf of employee, reports or is about to report, verbally or in writing, violation or suspected violation of this chapter, regulation or rule promulgated pursuant to law of this territory or U.S. to public body, unless employee knows that report is false, or because employee is requested by public body to participate in investigation, hearing or inquiry held by that public body, or court action. (24 VIC 451a).

Worker Freedom Act—Employer may not discipline employee for refusing to participate in activities that communicate employer's opinions on political or religious matters or retaliate against employee for reporting violations of Act. (24 VIC 620).

Labor Unions.

Any number of persons, not less than five, may associate themselves together and become a body corporate and politic for improvement of their several social and material interests, regulation of their wages, laws and conditions of their employment, protection of their joint and individual rights in prosecution of their trades or industrial avocations, collection and payment of funds for benefit of sick, disabled or unemployed members, securing of benefits to families of deceased members, and for such other and further objects of material benefit and protection as are germane to purposes of this chapter. Persons so associating must execute articles of association as hereinafter provided, sign and acknowledge same before some officer duly authorized by laws of Virgin Islands to take acknowledgment of deeds, and upon execution and acknowledgment of said articles of association aforesaid, said association will become a body politic for purposes set forth in said articles of association. (13 VIC 601).

Labor Disputes.

No court of Virgin Islands will have jurisdiction to issue any restraining order or temporary or permanent injunction in any case involving or growing out of labor dispute, to prohibit any person(s) participating or interested in such dispute from doing, whether singly or in concert, any of following acts: Ceasing or refusing to perform any work or to remain in any relation of employment; becoming or remaining a member of any labor organization; paying or giving to, or withholding from, any person participating or interested in such labor dispute any strike benefits, strike insurance, or other moneys or things of value; by all lawful means aiding any person participating or interested in any labor dispute who is being proceeded against in, or is prosecuting, any action or suit in any court of Virgin Islands; giving publicity to existence of or facts involved in any labor dispute, whether by advertising, speaking, patrolling, or by any other method not involving fraud or violence; assembling peaceably to act or to organize, or to act in promotion of their interests in labor dispute; refusing to support any party to said dispute, or recommending to, advising, or persuading others, not to support any party to said dispute; advising or notifying any person of intention to do any acts heretofore specified; agreeing with other persons to do or not to do acts heretofore specified; advising, urging, or otherwise promoting or inducing, without fraud or violence, acts heretofore specified. (24 VIC 342).

Workmen's Compensation Act.

To What Employers and Employees Applicable.

All employers employing one or more employees; and all employees except any person employed as domestic servant in private home; any person employed, for not exceeding ten consecutive work days, to do maintenance, repair, remodeling, or similar work in or about private home of employer, or, if employer has no other employees subject to this Act, in or about premises where such employer carries on their trade, business or profession; any person performing services in return for aid or sustenance only, received from any religious or charitable organization; any person for whom rule of liability for injury or death is provided by laws of U.S. (24 VIC 251).

Acceptance or Rejection of Act.

Besides certain employers and employees exempt under terms of Act, Act is mandatory. Employers and employees exempt under act may elect to accept terms and conditions thereof. (24 VIC 251).

Notice of Injury and Report by Employer.

By personal delivery or by mail, written notice of accidental injury must be given by person injured or someone in their behalf to employer or any of their agents within 48 hours after injury. In case of occupational disease notice must be given by person injured or someone in their behalf to employer or any of their agents within 30 days from first distinct manifestation thereof. Such notice must contain name of person, nature of injury or occupational disease, and when and where it occurred. Unless written notice of injury or occupational disease is given as above, or unless employee's immediate superior has actual knowledge of injury or occupational disease, compensation may be denied. For reasonable cause shown, commissioner may accept written notice of injury given later than 48 hours, but not later than 30 days, after injury and in case of occupational disease, commissioner may accept written notice given later than 30 days, but not later than 90 days after first distinct manifestation thereof; which time limit for filing of reports also applies to injuries of a tuberculous origin arising out of employment.

Within eight days after receipt of written notice of injury referred to in preceding paragraph, employer must complete employer's report of injury and forward same together with employee's notice of injury to commissioner by personal delivery or by mail. Failure to employer to file such reports within such period will not prejudice claim of employee. (24 VIC 257).

Filing of Claim.

First claim for compensation for injury must be filed in writing within 60 days after injury on forms to be furnished by commissioner. Such claims must be filed at office of commissioner or deposited in mail properly stamped and addressed to commissioner or to any person whom commissioner may designate. Each claim must be sworn to by injured person or whoever acts in their behalf, and must be accompanied by doctor's certificate stating nature and probable extent of disability, or by death certificate.

Supplementary claims, if any, for protracted disability or for any additional compensation claimed, must be filed in manner directed by commissioner.

For good and reasonable cause shown, commissioner may extend time limit set by this section. (24 VIC 258).

Proceedings on Claims, Judicial Review and Enforcement of Orders.

Provisions of this chapter are administered uniformly throughout Virgin Islands by Deputy Commissioner under general supervision of Commissioner of Labor. Deputy Commissioner assigned to administer this chapter must devote their full time to such duties, and in name of Commissioner of Labor will have power to compile register of employers affected by this chapter for that purpose; to demand all pertinent information; to hold hearings and investigations; to inspect and examine places of employment; to receive claims in writing; to notarize claims and other pertinent documents filed with commissioner; to prescribe rules and regulations; to make studies of safety devices and to issue safety orders to employers; to issue subpoenas; to compel attendance of witnesses; to administer oaths; to compel production of relevant documents; to issue orders awarding compensation; to refuse claims; to reopen claims; to review and revise awards; and to bring suit on behalf of commissioner, or in name and in behalf of any beneficiary.

Proceedings before commissioner must be according to such rules as they may prescribe. Parties have right to be represented by counsel. Commissioner must approve fee for attorneys appearing for employees.

Orders of commissioner must be served by personal delivery or by registered mail. Any person aggrieved by final order of commissioner may obtain review of order by filing written petition with court of competent jurisdiction in Virgin Islands within 30 days after its issuance. Finding of commissioner as to facts, if supported by substantial evidence, is conclusive. Upon application of commissioner or any beneficiary, any court of competent jurisdiction must enforce obedience to orders of commissioner. (24 VIC 256).

Rates of Compensation for Injuries.

(a) Rehabilitation income: For covered injury, employee will be entitled to all medical services including chiropractic and dental services, appliances, supplies and transportation. In addition employee will be paid additional sum of not more than $200 weekly when service of attendant is necessary. Employee will be entitled to maximum of $75,000 in benefits, except that in cases determined by Commissioner to require specialized medical attendance outside Virgin Islands, maximum allowable benefit will be $200,000. (24 VIC 254a). Income benefits during vocational rehabilitation will be 75% of employee’s earnings at time of injury not to exceed average weekly wage in Virgin Islands nor less than $75 a week. If wages earned were less than $75 a week, compensation will be equal to said wages. (24 VIC 254b).

(b) Income benefits for temporary total disability will be 662/3% of employee’s weekly wage rate at time of injury, not to exceed 662/3% of average weekly rate in Virgin Islands, nor be less than $60. If wages less than $60 a week, benefits will be equal to said wages. Compensation for temporary partial disability will be 662/3% of difference between weekly wage rate at time of injury, and wages, if any, earned by injured worker during partial disability, payable weekly or as Commissioner may order. (24 VIC 254c).

(c) Scheduled income benefits for permanent partial disability will be 662/3% of average weekly wage rate in Virgin Islands, and are paid pursuant to schedule. (24 VIC 254c).

(d) Compensation known as continuous income benefits will be paid for permanent total disability, and such disability must ensue within four years of injury. Benefits will be 662/3% of employee’s weekly wage rate at time of injury, rate of compensation not to exceed 90% of average weekly wage rate, and will be paid during continuance of disability, lapsing upon death of recipient. (24 VIC 254d).

Rates of Compensation for Death.

If death ensues at time of injury, or within four years as consequence of it, and employee leaves no relative who depended on him for support, benefits will be limited to payment of funeral expenses not exceeding $4,000 and expenses for medical services, medicine, and hospitalization. If employee is survived by spouse or parent or any heirs, including illegitimate children, who depended on him for support partially or totally at time of death, they may receive compensation payable in manner indicated below in amount not less than $25,000 nor more than $50,000. But in case of volunteer fireman, policemen, members of Police Auxiliary and Corrections Officers, compensation will be not less than $25,000 or more than $50,000. (24 VIC 254i).

If decedent is survived by parent(s) only, all of compensation will be paid to such surviving parent(s). If decedent is survived by parents and spouse, compensation will be paid 1/3 to parent and 2/3 to spouse. If decedent is survived by parents, spouse, and children, compensation will be paid 20% to parents, 20% to spouse, and 60% to children. If decedent is survived by spouse and children, compensation will be paid 40% to spouse and 60% to children. Term “spouse” includes any female, in case of male decedent, and any male, in case of female decedent, who has lived with decedent for three consecutive years immediately preceding death. (24 VIC 254i).

Payment will cease to any beneficiary upon death; and to minor upon reaching age 18 unless minor is permanently disabled or unmarried and is attending full-time accredited school or college; or for good cause shown to Commissioner, in all of which cases payment will not be made after beneficiary reaches 22. (24 VIC 254i).

Upon application of beneficiary, compensation may be paid in lump sum or in installments, in discretion of Commissioner. Only for good cause shown may lump sum payments be awarded. Total aggregate compensation for injury and death will not exceed $27,500 in case of firemen, appointed volunteer firemen, policemen, members of Police Auxiliary and Correction Officers; and will not exceed $18,000 in case of all other employees. (24 VIC 254i).

Occupational Diseases.

Every employer shall pay compensation for disability or death of employee resulting from occupational disease arising out of and in course of employment. (24 VIC 252).

Employers’ Liability Act.

No statutory provisions.

Unemployment Compensation.

Employers, with few exceptions, employing one or more individuals must make payments into unemployment insurance fund. All insured workers entitled to benefits of unemployment insurance unless otherwise disqualified by law. Maximum weekly benefit amount payable to any insured worker during their benefit year will be amount equal to 65% of Virgin Islands average weekly wage in insured work effective on first day of such benefit year. (24 VIC 302, 303).

12 ENVIRONMENT

12.01 ENVIRONMENTAL REGULATION:

General Supervision.

Most environmental regulation within ambit of Department of Planning and Natural Resources, air, water and hazardous waste control agencies. (12 VIC 203, 702). Commissioner of Planning and Natural Resources responsible for wildlife restoration and conservation, protection of indigenous, endangered and threatened fish, wildlife and plants, pesticides, and coastal zone management. (12 VIC 1, 101, 801, 904).

Prohibited Acts of Pollution.

Water—No pollutant may be discharged without permit. (12 VIC 185).

Air— Commissioner will establish regulations limiting levels, concentrations, or quantities of emissions of various air contaminants. It is illegal to cause, suffer or allow emission or obnoxious, pungent, odorous or ill-smelling gasses, fumes or other air pollutants which are determined to be objectionable. (12 VIC 208, 217).

Oil— Discharge of oil, petroleum products, or their by-products, or other pollutants into or upon any coastal waters, estuaries, tidal flats, beaches and land adjoining seacoast prohibited. (12 VIC 704).

Pesticides— No person shall purchase, possess, or use any “restricted use pesticide” without complying with certification requirements as determined by Commissioner through regulations preventing unreasonable adverse effects on environment, applicator and other persons. (12 VIC 805, 806, 807, 808).

Permits.

Water—Commissioner may after public notice and opportunity for public hearing, issue permit for discharge of pollutant or combination of pollutants into waters of Virgin Islands upon condition that such discharge meets or will meet all applicable territorial and Federal waters quality standards and effluent limitations and all other requirements of law. Each permit so issued will have fixed term not to exceed five years. Upon expiration of permit, new permit may be issued by Commissioner, after review in accordance with prescribed rules and regulations, after notice and opportunity for public hearing, and upon condition that discharge meets or will meet all standards, limitations and requirements referred to above. Commissioner is authorized to require as condition for permits issued achievement of effluent limitations based upon application of such levels of treatment technology and processes as are required under Federal Water Pollution Control Act, as amended, or any more stringent effluent limitations necessary to meet water quality criteria established pursuant to territorial or Federal law or regulation. No permit will be issued authorizing: (1) Discharge of radiological, chemical or biological warfare agent or high-level radioactive waste; (2) discharge which Secretary of Army, acting through Chief of Engineers, finds would substantially impair anchorage and navigation of waters of U.S.; (3) discharge to which Administrator of U.S. Environmental Protection Agency has objected; or (4) discharge which is in conflict with areawide waste treatment management plan. Commissioner has power to impose further conditions concerning publicly owned treatment works. Permits issued may be revoked, modified or revised, in whole or in part, during their term for cause, including, but not limited to, violation of condition of permit; obtaining permit by misrepresentation or failure to disclose fully all relevant facts; change in condition that requires either temporary or permanent reduction or elimination of permitted discharge; or promulgation by Administration, subsequent to issuance of permit, of any toxic pollutant standard more stringent than that in effect at time such permit was issued. (12 VIC 185).

Air— Commissioner may, by regulation, prohibit installation, alteration, or use of machine, equipment, device or other article which they find may cause or contribute to air pollution or is intended primarily to prevent or control emission of air pollutants, unless permit therefor has first been obtained. Applications for such permits may be accompanied by plans, specifications, and such other information as deemed necessary. Commissioner, by rules and regulations, will provide for issuance, suspension, revocation and renewal of required permit. Before issuance of permit for erection, construction, reconstruction, alteration or occupancy of building or structure, Building Permits Division under Department of Planning and Natural Resources must submit application and plans and specifications therefor to Commissioner for review and approval if such plans and specifications provide for fuel-burning or refuse-burning equipment, or chimney or smokestack, or occupancy of building for industrial purposes. (12 VIC

206).

Pesticides— Commissioner may classify or subclassify certificates. (12 VIC 805). Commissioner may suspend, deny or revoke certification for false or misleading statements in application for certificate, use of pesticide inconsistent with registered labeling, fraudulent practices in application of pesticide, failure to keep records or has falsified records, failure to demonstrate knowledge pertaining to proper use and application. (12 VIC 809). Commissioner may promulgate regulations governing storage and disposal of pesticides and pesticide containers. (12 VIC 818). Applicators must maintain records for period of three years, submit reports on purchasing, possession, use, application, storage, transportation, and disposal. (12 VIC 811 to 819).

Penalties.

Water—Any person who violates provision of water pollution laws, or of permit, rule, regulation, standard or order issued or promulgated thereunder, will be subject to civil penalty not to exceed $50,000 per day of such violation. Any person who willfully or negligently: (1) Violates any provision of water pollution laws or any rule, regulation, permit or any requirement imposed in pretreatment program; or (2) introduces into sewer system or into publicly owned treatment works, any pollutant or hazardous substance that person knew, or reasonably should have known could cause personal injury or property damage or who introduces into such treatment works pollutant or hazardous substance, other than in compliance with all applicable laws, permits or requirements which causes treatment works to violate any effluent limitation or condition in permit issued to treatment works, upon conviction shall be punished by fine of not less than $5,000 nor more than $75,000 per day of violation, or by imprisonment for not more than three years, or both. If conviction of person is for violation committed after first conviction of such person under this paragraph, punishment shall be by fine of not more than $100,000 per day of violation, or by imprisonment of not more than six years, or by both imprisonment and fine. (12 VIC 190).

Air— Any person who violates any provision of air pollution laws or permit, rule, regulation, standard or order issued or promulgated pursuant to air pollution laws shall be subject to civil penalty up to $50,000 per day per violation. Any person who knowingly violates any provisions of air pollution laws or any rule, regulation, order, emission standard, emission limitation, or emission prohibition promulgated pursuant to air pollution laws shall, upon conviction, be punished by fine of not more than $10,000 per day per violation or by imprisonment for not more than one year, or by both. (12 VIC 215).

Oil— Violations of Oil Spill Prevention and Pollution Control Act will be punishable by civil penalty of up to $50,000. Each day during any portion of which violation occurs constitutes separate offense. Penalties assessed under Act for discharge will be only penalties assessed by Virgin Islands, and assessed person will be excused from paying additional penalty assessable under Virgin Islands water pollution laws. Penalty provision will not be applied to discharge promptly reported and removed in accordance with appropriate rules, regulations and orders. (12 VIC 709, 716).

Pesticides— Any person who violates any provision of pesticide laws, or of permit, rule, regulation, standard or order issued or promulgated thereunder, will be subject to misdemeanor charges—for first offense $50-$200 fine and imprisonment of less than one year, may be fined maximum of $500 for each subsequent violation. (12 VIC 822).

Enforcement.

Commissioner of Planning and Natural Resources is charged with duty of enforcing environmental laws. Whenever Commissioner has reason to believe that violation of any provision of environmental law or any regulation or order of Commissioner pursuant thereto or any water quality standard, effluent limitation, or permit, has occurred, they may cause written complaint to be served upon alleged violator, which complaint will specify provision of law or regulation or order alleged to be violated, facts alleged to constitute violation, and will order that necessary corrective action be taken within reasonable time to be prescribed in such order. Any such order will become final unless person named therein requests in writing hearing before Commissioner no later than 30 days after date order is served. In lieu of such order, Commissioner may require alleged violator to appear at time and place specified in notice and answer charges complained of. Whenever Commissioner finds that emergency exists requiring immediate action to protect public health or welfare, they may without notice or hearing issue order reciting existence of such emergency and requiring that such action be taken as they deem necessary to meet emergency. With regard to water pollution, any resident of Virgin Islands is authorized to commence civil action for appropriate relief, including permanent or temporary injunction, for any violation or threatened violation for which Commission is authorized to issue compliance order. Any such action will be brought in Superior Court of Virgin Islands, and Court will have jurisdiction to restrain such violation and to require compliance. (12 VIC 188, 190, 209, 702, 819).

Hazardous Materials.

Subject to rules and regulations developed by Department of Planning and Natural Resources. (19 VIC 1558).

Recycling.

Regulated by V.I. Waste Management Authority. (29 VIC 499).

Remediation.

Brownfields revitalization. (12 VIC 551-557). Tax credits and incentives available for clean up and redevelopment of Brownfields sites. (29 VIC 708c).

Solid Waste Management.

Regulated by V.I. Waste Management Authority. (29 VIC 499).

Underground Storage Tanks.

Regulation and enforcement—V.I. Department of Planning and Natural Resources can order integrity tests, order remedial measures, enter upon premises to inspect, issue emergency orders, initiate administrative proceedings to enforce regulations, and seek injunctive or judicial remedies. (12 VIC 654, 666-67, 670, 674, 676-79).

Registration of USTs—All USTs must be registered with Department. (12 VIC 655-56).

Permits—New USTs. (12 VIC 657-58 & 660). Existing USTs. (12 VIC 659-60).

Operating Requirements—Applicable to all USTs. (12 VIC 661).

Certification—Standards to be established by Commissioner. (12 VIC 663). Commissioner may deny or suspend certification. (12 VIC 664).

Penalties—Civil penalty not to exceed $25,000 for each day of violation for each UST system in violation. Criminal penalty not less than $2,500 but not more than $25,000 per day of violation, or imprisonment of not more than one year, or both. (12 VIC 680).

Wildlife Restoration & Conservation.

(12 VIC 81 to 99).

Wildlife Restoration Projects—Commissioner may determine areas for selection, restoration, rehabilitation, and improvement of areas of land or water adaptable as feeding, resting or breeding places for wildlife. Commissioner may acquire areas by purchase, condemnation, lease or gift suitable for such purpose. (12 VIC 81).

Establishment of Game Preserves—Commissioner may designate any area game preserve for purposes of protecting wildlife and prohibiting hunting of all types thereon for one season per year. (12 VIC 91).

Control and Supervision of Game Preserves and Wildlife Sanctuaries—Commissioner controls and supervises all game preserves and wildlife sanctuaries in U.S. Virgin Islands. (12 VIC 92).

Island and Cays to be Administered by Department—Commissioner has authority and responsibility to manage, control and use all islands and cays off shores of St. Croix, St. Thomas - St. John, owned by Government of United States Virgin Islands. (12 VIC 94).

Prohibited Acts in Wildlife and Marine Sanctuaries—Except under permit or specific authorization of Commissioner of Planning and Natural Resources, it is unlawful in any wildlife or marine sanctuary to take or possess any bird, fish or other wildlife, or part thereof. (12 VIC 96).

Establishment of Wildlife or Marine Sanctuaries—Commissioner of Planning Natural Resources may for purposes of propagating, feeding and protecting birds, fish and other wildlife, designate and establish wildlife and marine sanctuaries as well as accept donations of funds and birds, fish, and all other wildlife for any wildlife or marine sanctuary. (12 VIC 97).

Penalties—Whoever violates any provisions of wildlife restoration and conservation shall be subject to fine of no more than $5,000, imprisonment of 30 days or both. (12 VIC 99).

Protection of Indigenous, Endangered and Threatened Fish, Wildlife and Plants.

(12 VIC 101).

Endangered Preservation Commission Power and Duties—Commission has primary responsibility for identification, conservation, and protection of threatened and endangered species in Territory. (12 VIC 103, 104).

Prohibited Activities—No person shall take, catch, possess, injure, harass, kill or attempt to take, catch, possess, injure, harass, kill, or transport, export or import, whether or not for sale any indigenous species, threatened or endangered species, unless person holds valid collecting permit. (12 VIC 105).

Penalties—Person violating any provision of this chapter shall upon conviction thereof, be subject to fine $100-$10,000, and may be sentenced to serve term of no more than 60 days. For purposes of assessing penalty, each specimen is separate offense. (12 VIC 107).

Coastal Zone Management.

(12 VIC 903).

Open Shorelines—Public, individually and collectively, has and shall continue to have right to use and enjoy shorelines of United States Virgin Islands, from seaward line if low tide, running inland distance of 50 ft.; or to extreme seaward boundary of natural vegetation which spreads continuously inland; or to natural barrier. Whenever shoreline is extended into sea by filling or dredging, boundary of shoreline shall remain at line of vegetation as previously established. (12 VIC 401, 402).

Obstruction of Shorelines Prohibited—No person, firm, corporation, association, or other legal entity, shall create, erect, maintain, construct any obstruction, barrier or restraint of any nature whatsoever upon, across or within shorelines of United States Virgin Islands, which would interfere with public's right, individually and collectively to use and enjoy any shoreline. (12 VIC 403).

Coastal Zone Management Commission—Commission shall have primary responsibility for implementation of Coastal Zone Land and Water Use Plan. Commission shall promulgate rules and regulations necessary to carry out provisions of this chapter, provided that no such rules or regulations are promulgated without notice and public hearings. (12 VIC 904, 907).

Coastal Zone Permit—Person wishing to perform or undertake development of first tier of coastal zone shall obtain coastal zone permit in addition to any other permit required by law. (12 VIC 910).

Enforcement, Penalties and Judicial Review—Any person may maintain action for declaratory and equitable relief to restrain any violation of this chapter. (12 VIC 913b). Any person who violates any provision of this chapter, or regulation or order issued shall be subject to civil fine not to exceed $10,000. (12 VIC 913c). Petition for writ or review may be filed with Superior Court in case of any person aggrieved by granting or denial of application for coastal zone permit, including permit or lease for development or occupancy of trust lands or other submerged or filled lands, or issuance of cease and desist order, within 45 days after such decision or order has become final provided such administrative remedies have been exhausted. (12 VIC 913d).

Uniform Conservation Easement Act (1981).

Adopted.

Uniform Environmental Covenants Act (2003).

Adopted.

13 ESTATES AND TRUSTS

13.01 ADMINISTRATION:

See topic 13.08 Executors and Administrators.

13.0213.04 [RESERVED]

13.05 DEATH:

Absence for ten years or more, when whereabouts are not discoverable by reasonable diligence, raises a presumption of death intestate which warrants commencement of administration proceedings regarding the absentee's property. (15 VIC 168).

Survivorship.

Uniform Simultaneous Death Act substantially adopted. (15 VIC 88).

Actions for Death.

Right of Action.

When death of person is caused by wrongful act, negligence, default, or breach of contract or warranty of any person, including those occurring on navigable waters, and event would have entitled person injured to maintain action and recover damages if death had not ensued, person or watercraft that would have been liable in damages if death had not ensued will be liable for damages as specified herein notwithstanding death of person injured, although death was caused under circumstances constituting a felony. (5 VIC 76[c]).

Parties.

Action must be brought by decedent's personal representative, who will recover for benefit of decedent's survivors and estate all damages, as specified herein, caused by injury resulting in death. When personal injury to decedent results in their death, any action for personal injury shall survive, whether or not filed at time of death, and shall not abate. Wrongdoer's personal representative shall be defendant if wrongdoer dies before or pending action. Defense that would bar or reduce survivor's recovery if they were plaintiff may be asserted against him, but shall not affect recovery of any other survivor. (5 VIC 76[d]).

Damages.

Potential beneficiaries of recovery for wrongful death, including decedent's estate, will be identified in complaint and their relationships to decedent will be alleged. Damages may be awarded as follows: (1) Each survivor may recover value of lost support and services from date of decedent's injury to their death, with interest, and future loss of support and services from date of death and reduced to present value. In evaluating loss of support and services, survivor's relationship to decedent, amount of decedent's probable net income available for distribution to particular survivor, and replacement value of decedent's services to survivor may be considered. In computing duration of future losses, joint life expectancies of survivors and decedent and period of minority in case of healthy minor children may be considered; (2) surviving spouse may also recover for loss of decedent's companionship and protection and for mental pain and suffering from date of injury; (3) children of decedent may also recover for lost parental companionship, instruction and guidance and for mental pain and suffering from date of injury; (4) each parent of deceased child may also recover for mental pain and suffering from date of injury; (5) medical or funeral expenses due to decedent's injury or death may be recovered by survivor who has paid them; (6) decedent's personal representative may recover for decedent's estate following: (a) loss of earnings of deceased from date of injury to date of death, less lost support of survivors excluding contributions in kind, with interest. If decedent's survivors include surviving spouse or lineal descendants, loss of net accumulations beyond death, reduced to present value, may also be recovered, (b) medical or funeral expenses due to decedent's injury or death that have become charge against their estate or that were paid by or on behalf of decedent, excluding amounts recoverable under item (5), above, and (c) evidence of remarriage of decedent's surviving spouse is admissible; (7) all awards for decedent's estate are subject to claims of creditors who have complied with requirements of probate law concerning claims. (5 VIC 76[e]).

Form of Verdict.

Amounts awarded to each survivor and to estate must be stated separately in verdict. (5 VIC 76[f]).

Protection of Minors and Incompetents.

Court must provide protection for any amount awarded for benefit of minor child or incompetent pursuant to guardianship law. (5 VIC 76[g]).

Death of Survivor Before Judgment.

Survivor's death before final judgment will limit survivor's recovery to lost support and services to date of their death. Personal representative must pay amount recovered to personal representative of deceased survivor. (5 VIC 76[h]).

Court Approval of Settlements.

While action is pending, no settlement as to amount or apportionment among beneficiaries which is objected to by any survivor or which affects survivor who is minor or incompetent will be effective unless approved by Court. (5 VIC 76[i]).

Litigation Expenses.

Attorney's fees and other expenses of litigation must be paid by personal representative and deducted from awards to survivors and estate in proportion to amount awarded to them, but expenses incurred for benefit of particular survivor or estate will be paid from their awards. (5 VIC 76[j]).

Certificate.

Issued by Bureau of Vital Statistics, Virgin Islands Department of Health, 1303 Hospital Ground, Suite No. 10, Charlotte Amalie, St. Thomas, Virgin Islands 00801 or Virgin Islands Department of Health, 3500 Richmond, Christiansted, St. Croix, Virgin Islands 00820. Contains at least items of standard form approved by U.S. Secretary of Health, Education and Welfare. Fee for obtaining certificate: Original $15, certified copy $15.

Uniform Anatomical Gift Act not adopted.

13.06 [RESERVED]

13.07 DESCENT AND DISTRIBUTION:

All existing modes, rules and canons of descent are abolished. (15 VIC 82).

Real property of a deceased person, male or female, not devised, shall descend, and the surplus of their personal property, after payment of debts and legacies, and if not bequeathed, shall be distributed, one-third to surviving spouse, and residue in equal portions to children and such persons as legally represent children who die before the deceased. Thereafter parents, brothers and sisters, nephews and nieces take as provided by statute. (15 VIC 84).

Surviving spouse receives one-third if there are children, $5,000 and one-half of residue where parent or parents survive and no child or descendants survive, $10,000 and one-half of residue if there be a brother or sister, nephew or niece, and no descendant or parent, and entire estate if no descendant, parent, brother or sister, nephew or niece. (15 VIC 84). No distributable share to validly divorced spouse, to husband who has failed to provide for or has abandoned wife, to wife who has abandoned husband, or in case of estate of a child to a parent who has neglected or refused to provide for or who has abandoned child. (15 VIC 87).

Half Blood.

Relatives of half blood take equally with those of whole blood in same degree. (15 VIC 84).

Posthumous Children.

Take in the same manner as if born in lifetime of deceased and had survived him. (15 VIC 84).

Illegitimates.

Considered to have same status as if born in lawful wedlock, provided that where ancestor is a father, he admitted paternity by signing birth certificate, was adjudged father of child, or recognized the child by written acknowledgment. (15 VIC 84).

Adopted Children.

See category 14 Family, topic 14.01 Adoption.

Advancements.

Are taken into account in distributing estate. If advancement to be adjusted consists of realty, adjustment must be made out of realty. If consists of personal property must be made out of surplus of personal property. If either species insufficient, then deficiency adjusted out of other.

Election.

See topic 13.16 Wills.

Renunciation.

No statutory provision.

Escheat.

In default of heirs, both real and personal property escheat to the Territory. (15 VIC 121).

See also topic 13.08 Executors and Administrators.

13.07A ESTATES: (in property)

See category 21 Property, topic 21.16 Real Property.

13.0813.09 [RESERVED]

13.10 EXECUTORS AND ADMINISTRATORS:

Subject to original jurisdiction conferred on District Court by § 22 of Revised Organic Act of 1954, as amended, Superior Court has original jurisdiction to supervise and administer estates and fiduciary relations. (4 VIC 76).

Preferences in Right to Administer.

Letters testamentary issued to executor named in will who accepts and qualifies. Administration of estate of intestate will be granted and letters issued as follows: (1) to widow or next of kin or both in discretion of court; (2) to one or more of principal creditors; (3) to any other competent, qualified person selected by court. (15 VIC 236).

Eligibility and Competency.

Following persons are not qualified to act as executors or administrators: Nonresidents of Virgin Islands; minors; judicial officers of district court; persons of unsound mind; or persons who have been convicted of felony or misdemeanor involving moral turpitude. Term “nonresident” will not be construed to include foreign bank which has branch or branches established in Virgin Islands, or national banking associations. Person named in will as executor who is nonresident or minor is entitled to qualify as executor upon removal of disability if they apply therefor within 30 days of such removal, if otherwise competent. Nonresident named in will as executor may be appointed to act as such executor provided: they otherwise qualify under these provisions; they file such bond as may be required and approved by court; and they appoint agent or attorney resident in Virgin Islands upon whom service of all papers may be made, such appointment to be made in writing and filed with clerk. (15 VIC 235).

Qualification.

No executor or administrator qualified to act until they file undertaking in sum to be determined by court of not less than probable value of estate with one or more sureties, approved by court. (15 VIC 239).

Exemption from Bond.

When testator by terms of will expressly declares that no bond be required of their executor, executor may act upon taking oath to faithfully fulfill their trust without filing undertaking. In addition, in discretion of court, executor may be permitted to act without bond also upon taking oath to faithfully fulfill their trust without filing undertaking. Such executor will be criminally and civilly liable as other executors and administrators are for any dereliction of duty. (15 VIC 239).

Issuance of Letters.

When will is proven, letters testamentary will be issued to person or persons therein named as executors or to such of them as give notice of their acceptance of trust and are qualified. (15 VIC 233).

Removal.

Executor or administrator may be removed when they become of unsound mind, are convicted of felony or misdemeanor involving moral turpitude, are unfaithful or neglectful of their trust, become a nonresident, or fail to provide new undertaking when so required. (15 VIC 240, 241; Sup.Ct.R. 203).

Public Administrators.

None.

Special Administrator.

When there is delay in issuing letters and danger that property may be lost, injured or depreciated, court may appoint special administrator who qualifies as usual, with full powers except to pay debts of or discharge any obligation against deceased. (15 VIC 238).

Inventory and Appraisal.

Executor or administrator shall make and file within one month from date of appointment inventory, verified by their oath, of all real and personal property of deceased. (15 VIC 312). Inventory shall contain account of all money belonging to deceased or statement that none has come into possession of executor or administrator, statement of all debts due deceased with written evidence of such debt. (15 VIC 313). Before inventory is filed property it contains shall be appraised at its true cash value by two disinterested and competent persons appointed by court. (15 VIC 314).

Notice to Creditors.

Every executor or administrator must, immediately after their appointment, publish notice thereof in newspaper published in district as often as once a week for four successive weeks, and oftener if so directed. Notice must also be posted in at least three public places, designated by court, one of which must be at post office nearest residence of decedent at time of their death. Notice shall also require all persons having claims against estate to present them, with proper vouchers, within six months from date of notice, to executor or administrator at specified place within district. (15 VIC 391).

Presentation of Claims.

Claims presented to executor or administrator must be verified by affidavit of claimant or someone on their behalf who has personal knowledge of fact that amount claimed is justly due, that no payments have been made, and that there is no just counterclaim to it. (15 VIC 391 to 393). Contingent claim presented as any other. Claim not presented within six months is not barred, but cannot be paid until properly presented claims are satisfied. Until administration completed, claim not barred by statute of limitations may be presented, allowed and paid out of assets not otherwise appropriated or liable. Executor or administrator may demand production of written evidence of claim or explanation of nonproduction. (15 VIC 392 to 393).

Proof of Claim.

Form

SUPERIOR COURT OF THE VIRGIN ISLANDS OF THE UNITED STATES, Division of. . . . .

(PROBATE DIVISION)

PROBATE NO. — 20 .

Estate of..........

.........., Deceased.

CREDITOR'S CLAIM

The Undersigned................

....

presents this Claim against the Estate of. . . . .

.............., Deceased, for approval, viz:

ESTATE of................

.........., Deceased, To.........., DEBTOR.

....

....

....

....

(Signature.)

Municipality of................ss.

I,. . . . . being duly sworn according to law, say: I have personal knowledge of the matters alleged in this Claim; the amount claimed is justly due; no payments have been made thereon, except as stated; and there is no just counterclaim thereto, to the best of my knowledge, information and belief.

Sworn to and subscribed before me

this . . . . day of . . . . 20. .

. . . .

Notary } ....

EXAMINED and................

(State whether Approved or Rejected.)

Date..........

....

Approval or Rejection of Claims.

Upon presentation, executor or administrator shall endorse “examined and approved” upon it, sign it and pay it in due course; or endorse “examined and rejected,” and sign it. List of claims shall be kept and presented to court every three months, showing rejections and allowances. (15 VIC 394). Rejected claimant may present claim to court on 30 days notice to executor or administrator which shall be heard in summary manner with competent or satisfactory evidence other than testimony of claimant. No claim barred by Statute of Limitations allowed under any circumstances. (15 VIC 395).

Payment of Claims.

Claims presented and allowed or disallowed and subsequently established shall be paid, in following order: (1) Funeral charges; (2) taxes; (3) expenses of last sickness; (4) debts preferred by law; (5) debts which were liens on property; (6) debts due employees; (7) all other claims. (15 VIC 421).

Priorities.

See supra, subhead Payment of Claims. If, after payment of administration expenses, estate is insufficient to pay all claims of any one class, each creditor of such class shall be paid in proportion to the amount of their claim and not otherwise. (15 VIC 423).

Sales.

No sale of property of estate is valid unless made by order of court on petition, and in case of real property on citation to heirs and others interested in property; or unless otherwise authorized by law or decedent’s will. (15 VIC 491). Sales may be for cash or on credit or both, in discretion of court. Sales will be in same manner as sales on execution. (15 VIC 498). Within ten days of sale, executor or administrator must make return of their proceedings concerning sale, and after objections and hearing, sale will be confirmed. (15 VIC 499).

Actions by Representative.

It is duty of executor or administrator to apply by petition to court for leave to bring action to have any fraudulent conveyance, sale, transfer or judgment by or against decedent declared void and property affected thereby discharged from effect thereof. Executor may be claimant against the estate. All causes of action by one person against another, whether arising out of contract or otherwise, survive to the personal representative of former and against personal representative of latter. When cause of action survives, executor or administrator may sue. (15 VIC 521 to 525, 601).

Actions Against Representative.

Where assets are in hands of executor or administrator, sufficient to pay claim, and they refuse to pay, claim and judgment thereon may be enforced personally against him. In action against several executors or administrators, they are considered as one; judgment may be against all, although only part are served. Action may be commenced against executor or administrator after 12 months from granting of letters and until final settlement and discharge, and not otherwise. On claim, executor can only be sued if claim first presented and disallowed. Arrest and attachment not allowed. (15 VIC 601 to 607).

Allowances.

Before administration of estate and filing of inventory, widow and minor children are entitled to remain in possession of homestead, all wearing apparel, household furniture, and have reasonable provision allowed by Court for their support. (15 VIC 351). Upon filing of inventory, Court must set aside for widow and minor children exempt portion of estate. (15 VIC 352). If exempt property is insufficient for their support, Court must order sufficient amount. (15 VIC 353). If it appears that entire intestate's estate does not exceed property exempt from execution, Court must set aside entire estate for widow and children, and no further proceedings in administration is necessary, unless further property is discovered. (15 VIC 354).

Intermediate Accountings.

Executor or administrator must, within three months from date of notice of appointment, and every three months thereafter until administration is completed and they are discharged from trust, render account, verified by their own oath, and file same with court. Account must show amount of money received and expended by him, from whom received and to whom paid, with proper vouchers for such payments, amount of claims presented against estate and allowed or disallowed and name of claimants of each, and any other matter necessary to show condition of affairs thereof. (15 VIC 561). Executor or administrator who fails to file account, as required above, may be required by citation, or ordered by court to appear and do so, either upon application of heir or creditor, or other person interested in estate, or without it. If executor or administrator refuses or neglects to appear when cited, or to file account as required, they may be punished as for contempt, or by warrant of court be committed to jail until they consent to do so. (15 VIC 562).

Final Accounting and Settlement.

When estate is fully administered, representative must file verified final account, and within 30 days of its filing there must be hearing of objections to such final account and settlement of it. (15 VIC 564).

Consent Settlement.

Court may authorize executors, administrators and trustees to adjust by compromise any controversy that may arise between different claimants, between persons claiming as devisees or legatees under wills, and between persons claiming as heirs under laws of descent and distribution. All other parties who claim interest in estate and whose interests are affected by proposed compromise will be made parties in person or by guardian. Agreement of compromise made in writing pursuant to this section, if found by court to be just and reasonable in its effect upon interest in estate or property of infants, lunatics, persons of unsound mind, unknown persons, or future contingent interest of persons not in being, will be valid and binding upon such interests as well as upon interests of adult persons of sound mind. Application for approval of compromise pursuant to this section must be made by petition duly verified, which will set forth provisions of any instruments or documents by virtue of which any claim is made to property or estate in controversy and any and all facts relating to claims of various parties to controversy and possible contingent interest of persons not in being and all facts which made it proper or necessary that proposed compromise be approved by court. Court will inquire into circumstances and make such order or decree as justice requires. (15 VIC 11).

Distribution.

If all charges and claims have been satisfied upon first distribution of assets or as soon thereafter as they may be, court will direct payment of legacies and distribution of remaining proceeds of personal property among heirs or other persons entitled thereto. (15 VIC 427). Real property of deceased is property of those to whom it descends by law or is devised by will, subject to possession of executor or administrator, and to be applied to satisfaction of claims against estate, as by this chapter provided. Upon settlement of estate and termination of administration thereof so much of such real property as remains unsold or unappropriated is discharged from such possession and liability without any order therefor. But if there is any surplus of proceeds of sale of such real property or any part thereof, court will order and direct distribution of such surplus among those who would have been entitled to land if same had not been sold. (15 VIC 428).

Distribution If Abroad.

No statutory provisions.

Liabilities.

Administrator shall not profit by increase, nor suffer loss for decrease of estate without fault; Administrator shall account for excess over appraisal value and is not responsible for loss unless by their fault; accountable for uncollectable debts only for their fault; cannot purchase claim against estate. (15 VIC 567).

Compensation of executor or administrator is allowed by the court in amount it considers just, unless fixed by will (15 VIC 569); all necessary expenses, including reasonable attorney’s fees may be allowed (15 VIC 568).

When Administration Unnecessary.

See subhead Small Estates, infra.

Small Estates.

Estates, wherein value of assets is less than $300, may be administered in summary manner, under such general and special rules as may be prescribed by Superior Court. (15 VIC 167).

Foreign Executors or Administrators.

Where real or personal property, or both, or interest therein, situated within Virgin Islands has been devised or bequeathed by written will of nonresident testator executed in conformity with laws of testator’s domicile and will has been established or admitted to probate at testator’s domicile and has there been filed or recorded as prescribed by laws thereof, and thereafter authenticated copy of will and of proofs or of record thereof has been recorded in office of recorder of deeds in judicial division in which such property is situated, devisees or legatees entitled under will to property in Virgin Islands may apply to Superior Court to be recognized and placed in possession of such property. Such application must be by petition setting forth: (1) Name and residence of testator, (2) date of their death, supported by death certificate when available and procurable, (3) date of their will and date when and court in which it was established or admitted to probate, (4) name and address of domiciliary executor or administrator, (5) date when and office of recorder of deeds in which will was recorded in Virgin Islands, (6) names and capacities of devisees or legatees entitled under will to property in Virgin Islands and proportions due each, and (7) that there are no unpaid debts owing by testator or that petitioners choose to and do assume and will pay such debts as may be owing by testator which may not be paid by domiciliary executor or administrator and which are or might become charge upon or payable out of such property. Petition ends with prayer that petitioners be recognized as persons entitled under testator’s will to property in Virgin Islands and that as such they be placed in possession of such property. There must be annexed to petition true copy of testator’s will and inventory and valuation of their property in Virgin Islands sworn to by two responsible persons.

Before presentation of such petition to court for consideration it must be submitted to attorney general who, if satisfied as to correctness of valuation as shown by inventory and sworn to, will approve valuation in margin of petition and certify amount of inheritance tax to be paid to Virgin Islands. If attorney general refuses to approve valuation, petitioners may apply to court for issuance of rule on attorney general ordering him to show cause why valuation should not be approved and inheritance tax fixed.

After publication of notice to creditors once a week for four successive weeks and four weeks notice by certified mail to domiciliary executor or administrator and upon approval by attorney general, or by judgment on rule of valuation, petitioners will cause amount of inheritance tax to be deposited with clerk of court and not until after such notice has been given and proof thereof filed and such deposit has been made will petition be considered by court and judgment pronounced thereon. After judgment has been rendered by court, clerk of court pays inheritance tax to proper fiscal officer for account of Virgin Islands and files receipt therefor with petition and judgment.

In judgment recognizing persons entitled to property of testator in Virgin Islands and placing them in possession of it, property, if real estate, must be described in detail. Registration in office of recorder of deeds of proper judicial division of said judgment is prima facie proof of title to said property in persons named therein. (Sup.Ct.R. 210).

Uniform Fiduciaries Act adopted. (15 VIC 1041 et seq.).

Revised Uniform Principal and Income Act not adopted.

Uniform Simplification of Fiduciary Security Transfers Act not adopted.

Uniform Anatomical Gift Act adopted.

13.1113.14 [RESERVED]

13.15 TRUSTS:

Uniform Trusts Act adopted. (15 VIC 1091 et seq.). See Restatements of Law.

Kinds.

No specific statutory provisions.

Creation.

Every grant or assignment of any existing trust in lands, goods or things in action, will be void unless same is in writing, subscribed by party making same, or by their lawful agent under written authority. Fact that trust is not in writing will not prevent it from arising or being extinguished by implication or operation of law. (28 VIC 241, 243).

Appointment of Trustee.

No specific statutory provisions.

Eligibility and Competency.

No specific statutory provisions.

Qualification.

No specific statutory provisions.

Removal of Trustee.

If trustee violates any provisions of law regulating actions of trustees in general, trustee may be denied compensation in whole or in part, and any beneficiary, co-trustee, or successor trustee may treat violation as breach of trust. (15 VIC 1110). Court may also relieve trustee of duties. (15 VIC 1109).

General Powers and Duties of Trustees.

Unless otherwise provided by trust instrument, or amendment thereof, or by court order, all powers of trustee will be attached to office and will not be personal. Unless it is otherwise provided by trust instrument, or amendment thereof, or by court order, any power vested in three or more trustees may be exercised by majority of such trustees; but no trustee who has not joined in exercising power will be liable to beneficiaries or to others for consequences of such exercise, nor will dissenting trustee be liable for consequences of act in which trustee joins at direction of majority trustees, if trustee expressed their dissent in writing to any of their co-trustees at or before time of such joinder.

Nothing in this section will excuse co-trustee from liability for inactivity in administration of trust nor for failure to attempt to prevent breach of trust. (15 VIC 1100, 1101).

Sales.

Trustee Buying from or Selling to Self.

No trustee will directly or indirectly buy or sell any property for trust from or to itself or affiliate; or from or to director, officer, or employee of such trustee or of affiliate; or from or to relative, employer, partner, or other business associate. (15 VIC 1095).

Trustee Selling from One Trust to Another Trust.

No trustee will as trustee of one trust sell property to itself as trustee of another trust. (15 VIC 1096).

Corporate Trustee Buying its own Stock.

No corporate trustee will purchase for trust shares of its own stock, or its bonds or other securities, or stock, bonds or other securities of affiliate. (15 VIC 1097).

Investments.

Investments of fiduciaries. (15 VIC 1002 et seq.).

Uniform Prudent Investor Act adopted.

Securities in Name of Nominee.

Trustee owning stock may hold it in name of nominee, without mention of trust in stock certificate or stock registration book; provided that trust records and all reports or accounts rendered by trustee clearly show ownership of stock by trustee and facts regarding its holding; and nominee will deposit with trustee signed statement showing trust ownership, will endorse stock certificate in blank, and will not have possession of stock certificate or access thereto except under immediate supervision of trustee. Trustee will be personally liable for any loss to trust resulting from any act of such nominee in connection with stock so held. (15 VIC 1099).

Bequests and Devises to Inter Vivos Trusts.

See topic 13.16 Wills.

Accounting.

Uniform Trustees' Accounting Act adopted. (15 VIC 1141 et seq.).

Compensation.

No specific statutory provisions as to amount. See subhead Removal of Trustee, supra.

Discharge.

No specific statutory provisions. See subhead Removal of Trustee, supra.

Uniform Common Trust Fund Act not adopted.

Revised Uniform Principal and Income Act not adopted.

Gifts to Minors.

See category 14 Family, topic 14.10 Infants.

Uniform Fiduciaries Act adopted. (15 VIC 1041 et seq.).

Uniform Simplification of Fiduciary Security Transfers Act not adopted.

Accumulations.

No statutory provisions.

Perpetuities.

See category 21 Property, topic 21.11 Perpetuities.

Pour Over Trusts.

See topic 13.16 Wills, subhead Bequests and Devises to Inter Vivos Trusts.

Renunciation.

No statutory provision.

13.16 WILLS:

Every person of sound mind may by will in writing dispose of real property if 18 or over. (15 VIC 2).

Testamentary Disposition.

No person having husband, wife, child, descendant or parent may bequeath more than one-half of estate to religious, charitable, etc., institutions. (15 VIC 9).

Execution.

Every last will and testament of real or personal property, or both, must be executed and attested in following manner: It must be subscribed by testator at end of will; such subscription must be made by testator in presence of each of attesting witnesses, or must be acknowledged by him, to have been so made, to each of attesting witnesses; testator, at time of making such subscription or at time of acknowledging same, must declare instrument so subscribed, to be their last will and testament; there must be at least two attesting witnesses, each of whom must sign their name as witness, at end of will, at request of testator. (15 VIC 13).

Witnesses to any will must write opposite to their names their respective places of residence; and every person who signs testator's name to any will by their direction must write their own name as witness to will. Omission to comply with either of these provisions will not affect validity of any will; nor will any person be excused or incapacitated on account of such omission from testifying respecting execution of such will. (15 VIC 14).

Attestation Clause.

The following is acceptable:

Form

The foregoing instrument consisting of. . . . . . pages was on the date thereof signed by the testator,. . . . . ., in our presence and the testator at the same time declared the same to be their last will and testament; whereupon we, at their request and in their presence and in the presence of each other, have hereunto subscribed our names as attesting witnesses thereto.

Holographic Wills.

No holographic will, bequeathing or devising personal or real estate, will be valid, unless made by soldier or sailor while in actual military or naval service, or by mariner while at sea and written entirely in handwriting of maker even though same may be unattested. Any such disposition of property by soldier or sailor will become invalid and unenforceable upon expiration of one year following their discharge from military or naval service provided they possessed testamentary capacity at time of such expiration. If, however, testator lacks testamentary capacity at expiration of one year from date of such discharge, it will continue to be valid and enforceable until expiration of one year from time testator regains testamentary capacity. (15 VIC 8). This section is limited in its applicability to wills that do not otherwise satisfy formal requirements of testation; and handwritten will dated and executed by testatrix and signed by five witnesses satisfied formal requirements of execution and was therefor not deemed holographic will. (13 V.I. 345).

Nuncupative Wills.

Same as for holographic wills except must be orally made within hearing of two persons and execution and tenor thereof proved by at least two witnesses. (15 VIC 8).

Revocation.

No will in writing, except in cases hereinafter mentioned, nor any part thereof, will be revoked, or altered, otherwise than by some other will in writing, or some other writing of testator, declaring such revocation or alteration, and executed with same formalities with which will itself was required by law to be executed; or unless such will be burnt, torn, canceled, obliterated or destroyed, with intent and for purpose of revoking same, by testator himself, or by another person in their presence, by their direction and consent; and when so done by another person, direction and consent of testator, and fact of such injury or destruction, must be proved by at least two witnesses. (15 VIC 26).

Bond or Agreement to Convey Property Devised or Bequeathed.

Bond, covenant, or agreement made for valuable consideration by testator, to convey any property devised or bequeathed in any last will previously made, will not be deemed revocation of such previous devise or bequest, but such property will pass by devise or bequest, subject to same remedies on such bond, covenant, or agreement, for specific performance or otherwise, against devisees or legatees, as might be had by law against heirs of testator, or their next of kin, if same had descended to them. (15 VIC 28).

Charge or Incumbrance Not Revocation.

Charge or incumbrance upon any real or personal estate for purpose of securing payment of money or performance of any covenant or agreement will not be deemed revocation of any will relating to same estate previously executed. Devises and legacies therein contained will pass and take effect subject to such charge or encumbrance. (15 VIC 29).

When Conveyance Not Deemed Revocation.

Conveyance, settlement, deed, or other act of testator, by which their estate or interest in property, previously devised or bequeathed by him, will be altered, but not wholly divested, will not be deemed revocation of devise or bequest of such property; but such devise or bequest will pass to devisee or legatee, actual estate or interest of testator, which would otherwise descend to their heirs, or pass to their next of kin; unless in instrument by which such alteration is made, intention is declared, that it will operate as revocation of such previous devise or bequest. (15 VIC 30).

When Conveyance Deemed Revocation.

If provisions of instrument by which alteration referred to in § 30 of this title is made are wholly inconsistent with terms and nature of such previous devise or bequest, such instrument will operate as revocation thereof, unless such provisions depend on condition or contingency, and such condition is not performed, or such contingency does not happen. (15 VIC 31).

Revival.

Destruction, cancellation or revocation of a later will does not revive an earlier will, unless republished or intention to revive first will is shown. (15 VIC 32).

Testamentary gift to subscribing witnesses is void unless there are at least two other competent witnesses who are not beneficiaries under will, and, in any event, is void if will cannot be proved without testimony of such witness. If, however, witness would be entitled to share in estate in case of intestacy they may recover such share up to, but not in excess of, testamentary gift. (15 VIC 19).

Bequests and Devises to Inter Vivos Trusts.

No statutory provisions.

Testamentary Guardian.

See category 14 Family, topic 14.07 Guardian and Ward, subhead Eligibility and Competency.

Probate.

Proof of will shall be taken: (1) When testator was inhabitant of Virgin Islands and left assets there; (2) when nonresident testator died in Virgin Islands and left assets there; (3) when nonresident testator died outside Virgin Islands and left assets there; (4) when nonresident testator dies outside Virgin Islands, did not leave any assets there, but assets come into Virgin Islands after their death. (15 VIC 231). Proceeding is instituted by filing of will and Petition For Probate and for letters testamentary or of administration with will annexed and affidavit of authenticity. (Sup.Ct.R. 191). Waiver, citation or publication necessary for all heirs and next of kin. Citation must be returnable not less than ten days after issuance and must be served five days before return day. Citation may be served outside jurisdiction by certified mail and affidavit of mailing with signed return receipt attached is proof of service. Publication must be for three consecutive weekly insertions in newspaper of general local circulation in judicial division where deceased lived or had assets, returnable not less than 20 days after first publication. Upon compliance with formal requirements, proponent makes proof before judge of proper execution of will. Order for probate then submitted. Letters then issue upon waiver or furnishing of bond. Appraisal and inventory follow, as in administration, and distribution and final account. (Sup.Ct.R. 192, 194, 195).

Self-proved Wills.

Proof of proper execution of will may be done by affidavits of subscribing witnesses, executed at or subsequent to its execution. Affidavit must be made and signed before any officer authorized to administer oaths, and must set forth facts as would be required upon oral testimony to establish proof. Affidavit may be written upon will, or on some securely attached paper, and may be filed for safe keeping with last will or testament to which it relates. There may also be filed with will, affidavits of qualified physicians licensed or permitted to practice in Virgin Islands, certifying that maker of will was of sound mind at time of its execution, together with any facts supporting such opinion. (15 VIC 22, Sup.Ct.R. 194).

Contest.

Any person claiming any interest in an estate may, at any time before final distribution, file a declaration of contest which, before filing, must be served on proponent and such service set forth therein. Proponent must answer as to a complaint in a civil action. Contest calendared and brought on for hearing like a civil action. (Sup.Ct.R. 193).

Legacies.

Distributions will be made immediately after entry of final adjudication. (Sup.Ct.R. 201).

Unclaimed Legacies.

When any person dies without heirs entitled by law to inherit, leaving any real or personal property in territory, same will escheat to and become property of territory. (15 VIC 121).

Lapse.

None; descendants of deceased legatee who predeceased testator take as though legatee had survived. (15 VIC 21).

Children.

Whenever testator has child born after making will, either in lifetime or after death of testator, and dies leaving such child unprovided for by any settlement or mentioned in will, every such child will succeed to same portion of testator's real and personal estate as would have descended or been distributed to such child if testator had died intestate, and will be entitled to recover same portion from devisees and legatees in proportion to and out of parts devised and bequeathed to them by will. Action may be maintained against devisees and legatees to recover share. (15 VIC 18, 20).

Election.

Where testator dies and leaves surviving husband or wife, personal right of election is given to surviving spouse to take their share of estate as in intestacy, provided surviving spouse will never be entitled to take more than one-half of net estate of decedent after deduction of debts, funeral and administration expenses, and estate tax. Surviving spouse's right to take their share is also subject to certain limitations, conditions and exceptions regarding instances where testator has devised or bequeathed certain amounts in trust to surviving spouse. Election must be served in writing upon representative of estate personally within six months from date of issuance of letters testamentary or letters of administration. Husband or wife, during lifetime or other, may waive or release right of election to take as against particular will, or as against any will of other spouse. (15 VIC 10).

Contribution.

Where surviving spouse has made election to take their statutory share, will is valid as to residue remaining after elective share has been deducted and terms of will remain effective as far as possible. Regarding contribution resulting from statutory share received by child born after making will, see subhead Children, supra. (15 VIC 10).

Renunciation.

No statutory provision.

Foreign Executed Wills.

Will executed without Virgin Islands in mode prescribed by law, either of place where executed, or of testator's domicile, will be deemed to be legally executed, and will be of same force and effect as if executed in mode prescribed by laws of Virgin Islands, provided such will is in writing and subscribed by testator. (15 VIC 15).

Foreign Probated Wills.

After authenticated copies of will and proofs have been recorded in office of recorder of deeds in judicial division in which property is situated, devisees or legatees entitled under will to property in Virgin Islands may apply to court to be recognized and placed in possession of said property. Application will be by petition and set forth name and residence of testator, date of their death supported by death certificate, date of their will and date when and court in which it was established or admitted to probate, name and address of domiciliary executor or administrator, date when and office of recorder of deeds in which will was recorded in this territory, names and capacities of devisees or legatees entitled under will to property in Virgin Islands and proportions due each, and that there are no unpaid debts owing by testator or that petitioners choose to and do assume and will pay such debts as may be owing by testator which may not be paid by domiciliary executor or administrator and which are or might be charged upon or payable out of property. There must be annexed to petition true copy of testator's will and inventory and valuation of their property in Virgin Islands sworn to by two responsible persons. After petition is submitted to Attorney General for certification of amount of inheritance tax and notices published once a week for four consecutive weeks, inheritance tax will be deposited with clerk upon which petition will be considered by court and judgment pronounced thereon. (Sup.Ct.R. 210).

Living Wills.

Uniform Rights of the Terminally Ill Act adopted.

Simultaneous Death.

Uniform Simultaneous Death Act adopted.

Testamentary Trusts.

See topic 13.11 Trusts.

Uniform Anatomical Gift Act adopted.

14 FAMILY

14.01 ADOPTION:

Uniform Adoption Act not adopted.

Any inhabitant of Virgin Islands may petition proper court to adopt child not their own, who is in Virgin Islands. If person petitioning has spouse, petition will not be granted unless spouse joins in petition. If so desired, petition may also ask for change in child's name. (16 VIC 141).

Consent Required.

Parents of child, or survivor, must consent in writing to adoption. If no parents living, guardian of child or next of kin in Virgin Islands may give such consent; and if no next of kin, guardian ad litem will be appointed by Court to give consent. If parent insane, or imprisoned under sentence for more than two years, or has deserted and neglected to provide proper care and maintenance for child for one year before time of filing petition or is unfit person to have custody of child, Court may proceed as if parent dead and in its discretion may appoint guardian ad litem of child and give or withhold required consent. Notice to parents not laboring under such disabilities of insanity or imprisonment is required. (16 VIC 142).

If child 14 years or upwards, adoption not to be made without their consent given to court on privy examination. (16 VIC 144).

Nonconsenting parent must be served with copy of petition and order if found within Virgin Islands, and if not, by publication for three weeks with last publication to be at least four weeks before date of hearing. In all cases copy of petition and order must be served on the child. Like notice must be published when child has no parent, next of kin or guardian in Virgin Islands. (16 VIC 143).

Parent not having received personal notice before hearing for petition for adoption of his child may at any time within one year after actual notice apply to court for hearing de novo and such hearing must be granted. (16 VIC 143).

Jurisdiction.

Subject to original jurisdiction conferred on District Court by § 22 of Revised Organic Act of 1954, as amended, Superior Court has original jurisdiction to grant adoptions. (4 VIC 76).

Order of Adoption.

Court shall issue decree of adoption where it finds that child has resided with petitioner sufficient length of time to indicate that proposed adoption is in child's best interest, that Commissioner of Public Welfare has issued its report and recommendation as to proposed adoption, court is satisfied of identity and relations of persons, petitioner is of sufficient ability to and in all respects proper person to bring up child and provide suitable nurture and education, having reference to degree and condition of parents, and it is fit and proper that such adoption shall take place. (16 VIC 145).

Sealing of Records.

If order of adoption granted, original birth record of adopted child, and all records or files in custody of any governmental agency or of court relating to adoption proceedings shall be sealed and thereafter shall not be open to inspection by any person other than adopted person, except upon order of court for good cause shown. (16 VIC 145).

Name.

Petition for adoption may request change of name, and if adoption granted court may adjudge change of name and grant certificate thereof which shall be furnished by clerk of court to local registrar of vital statistics. (16 VIC 145).

Effect of Adoption.

Adopted child deemed child of adoptive parents as if born to them for purpose of inheritance and all of legal consequences of natural relations of parents and children, except not capable to take property expressly limited to heirs of body or bodies of parents by adoption, nor property from lineal or collateral kindred of such parent by right of representation. Natural parents are deprived of all legal rights and child is freed from all obligations of maintenance and obedience to natural parents. (16 VIC 146).

14.02 ALIMONY:

See topic 14.06 Divorce.

14.0314.04 [RESERVED]

14.05 DISSOLUTION OF MARRIAGE:

See topic 14.06 Divorce.

14.06 DIVORCE:

This topic is governed by 16 VIC 101 to 111.

Ground for Absolute Divorce or Legal Separation.

Decree granting a legal separation or dissolving a marriage may be entered when court is satisfied from evidence presented that there has been a breakdown of marriage relationship to extent that legitimate objects of matrimony have been destroyed and there remains no reasonable likelihood that marriage can be preserved. (16 VIC 104).

Action for Separation or Dissolution of Marriage.

Husband and wife may maintain action against other for legal separation or dissolution of marriage contract, or to have same declared void. (16 VIC 101).

Citizenship Requirements.

None.

Residence Requirements.

In action for dissolution of marriage contract or for legal separation plaintiff therein must be inhabitant of Virgin Islands who is domiciled therein at commencement of action and who has resided therein continuously and uninterruptedly for at least six weeks prior thereto, which residence will be sufficient to give court jurisdiction without regard to place where marriage was solemnized or cause of action arose. Evidence of such six weeks' residence will be presumptive proof of domicile. (16 VIC 106).

Jurisdiction.

Subject to original jurisdiction conferred on District Court by § 22 of Revised Organic Act of 1954, as amended, Superior Court has original jurisdiction to hear and determine divorce, annulment and separation proceedings. (4 VIC 76).

Venue.

St. Croix regarding residents of that island and St. Thomas regarding residents of St. Thomas - St. John.

Process.

May be served personally within and without territory; and, upon court order, by publication once a week for four weeks, accompanied by mailing copy of summons and complaint to defendant's residence. (5 VIC 112). Article II of Uniform Interstate and International Procedure Act applies regarding service outside territory. (5 VIC 4911 et seq.).

Pleading.

See category 5 Civil Actions and Procedure, topic 5.17 Pleading.

Practice.

Nothing peculiar to matrimonial actions.

Judgment or Decree.

Judgment declaring marriage void or dissolved by action or claim of either party will terminate marriage as to both parties, except that neither party can contract marriage with third person until appeal has been heard and determined, and if no appeal be taken, until expiration of period allowed by law to take appeal; and if they so contract, such party will be liable as if judgment had never been given; provided, however, that parties to uncontested action to void or dissolve marriage can contract marriage with third person immediately after judgment is declared. (16 VIC 111). Such judgments are entitled to full faith and credit. (28 U.S.C. 1738).

Interlocutory Orders.

After commencement of action, and before judgment therein, court may, in its discretion, provide by order (1) that party in need obtain from other party such funds as may be necessary to enable party in need to prosecute or defend action; (2) for care, custody, and maintenance of minor children of marriage during pendency of action; or (3) court may restrain either or both parties from disposing of property of either party pending action. (16 VIC 108).

Temporary Alimony.

Although no statutory provisions, right to support or current maintenance is so fundamental in its nature that it is recognized even in absence of statutory authority. (Poe v. Poe, 7 VIC 30, [3d Cir. 1969]; 409 F.2d 40).

Final Orders.

Whenever marriage is declared void or dissolved, court may, without regard to any determination of fault, further decree: (1) For future care and custody of minor children of marriage; (2) for child support from non-custodial parent; (3) alimony; (4) delivery of personal property; (5) for appointment of one or more trustees to collect, receive, manage or invest alimony or child support monies; (6) to change wife's last name.

Support of Children.

Parent is obligated to support his or her children until child reaches age of 21, since legislative history of amendment to age-of-majority statute (16 VIC 261), changing age of majority from 21 to 18, did not demonstrate any legislative intent to modify divorce or support-of-relations laws. (16 VIC 109; 16 VIC 342; Rhymer v. Rhymer, Terr. Ct. St. T. & St. J. 1984, 21 VI 176).

Division of Property.

Under Virgin Islands Code, Territorial Court (now Superior Court) has statutory authority to dispose of two types of marital assets: marital homestead, and couple's personal property. (16 VIC 109; Fuentes v. Fuentes, 1997 V.I. LEXIS 23, 38 V.I. 29 [Terr. Ct. St. C. 1997]).

Domestic Violence Finding and Child Custody.

Determination that domestic violence has occurred raises rebuttable presumption that it is in best interest of child to reside with parent who is not perpetrator of domestic violence in location of that parent's choice, within or outside territory or with legal guardian. Presumption also applies when parent has been convicted of death of other parent, or when child has been conceived by rape. (16 VIC 109[b]).

In addition to factors court must consider in determining custody of child or visitation, where Court has made finding of domestic violence, court must also consider: 1) Safety and well-being of child and of parent who is victim of domestic violence; 2) perpetrator's history of causing physical harm, bodily injury, assault, or causing reasonable fear of physical harm, bodily injury or assault to another person; 3) if parent is absent or relocates because of act of domestic violence by other parent, absence or relation may not be factor that weighs against parent in determining custody or visitation. (16 VIC 109).

Visitation by Parent Who Committed Domestic Violence.

Court may award visitation to parent who committed domestic violence only if court finds that adequate provision for safety of child and parent who is victim of domestic violence can be made. In visitation order, court may take any of following actions: 1) Order exchange of child to occur in protected setting; 2) order visitation supervised in manner to be determined by court; 3) order perpetrator to attend and complete program of intervention for perpetrators or other counseling; 4) order perpetrator abstain from possession or consumption of alcohol or controlled substances during visitation and 24 hours preceding visitation; 5) order perpetrator to pay fee to defray cost of supervised visitation; 6) prohibit overnight visitation; 7) require bond from perpetrator for return and safety of child; and 8) impose any other condition necessary to provide for safety of child, victim or other family or household member. (16 VIC 109). Domestic violence is defined in 16 VIC 91.

Modification of Final Orders.

At any time after judgment is given by court, upon motion of either party on notice, court may set aside, alter or modify so much of judgment as may provide alimony or for appointment of trustees, for care and custody of minor children, or nurture and education thereof, or maintenance of either party in action. (16 VIC 110).

Remarriage.

No statutory restrictions on remarriage of divorced persons.

Foreign Divorces.

No statutory provisions that foreign divorces will not be recognized under certain circumstances.

Separation Agreements.

No statutory provisions. Separation agreements between parties may be helpful to court in arriving at appropriate terms for alimony, but court is not bound to accept judgment of parties on this issue. Accordingly, property settlement agreements and stipulations are regarded by courts as recommendations, to which they accord great weight, but which may be approved or disapproved, in whole or in part, or modified. (316 F.2d 31).

14.07 [RESERVED]

14.08 GUARDIAN AND WARD:

Subject to original jurisdiction conferred on District Court by § 22 of Revised Organic Act of 1954, as amended, Superior Court has original jurisdiction to appoint and supervise guardians. (4 VIC 76). Contact Family Division of Superior Court.

Selection of Guardian.

Minor over 14 may nominate own guardian with approval of court; otherwise, court appoints. When court appoints, nearest relative who is not legally responsible for support of minor has priority provided he is of good moral character and is otherwise competent to discharge duties of guardian to ward. (15 VIC 822, 823).

Rights of Guardians and Parents.

Guardian appointed has custody and tuition of minor and care and management of his estate, and shall continue in office until minor arrives at age of 18 years, or until guardian has been discharged according to law, except that father of minor, if living, and in case of his death mother, while she remains unmarried, being themselves respectively competent to transact their own business, shall be entitled to custody of person of minor and care of his education. (15 VIC 824).

Duty of Guardian to File Bond.

Upon appointment guardian must execute and file bond to be approved by court in amount not less than estimated value of personal estate and anticipated income of ward during ensuing year. Bond must be in form and be conditioned as court may require. Court may from time to time require guardian to file additional bond. (15 VIC 881).

Inventory.

Every guardian appointed for minor will make true inventory of all real estate and all goods, chattels, rights, and credits of ward that come to their possession or knowledge, and return same to court at such time as it may order. (15 VIC 825). Upon taking of inventory, estate and effects comprised therein must be appraised by two suitable persons, to be appointed and sworn in as is required with respect to inventory of deceased testator or intestate. (15 VIC 882).

Powers and Duties.

Guardian must: (1) Pay all just debts of ward out of ward’s personal estate, if sufficient, and if not, out of ward’s real estate, upon obtaining order for sale thereof; (2) settle all accounts of ward; (3) demand, sue for, and receive all debts due to him, or compromise, with approbation of court, same and give discharge to debtor upon receiving fair and just dividend of amount due ward’s estate; (4) appear for and represent ward in all legal actions and proceedings, except when another person is appointed for that purpose as guardian or next friend; (5) manage estate of ward frugally and without waste; (6) apply income and profits thereof, so far as may be necessary for comfortable and suitable maintenance and support of ward and family, if there be any; and (7) if income and profits be insufficient for that purpose, sell real estate, upon obtaining order therefor, and apply proceeds of such sale, so far as may be necessary, for maintenance and support of ward and family. (15 VIC 881).

Investments.

Investments are governed by 15 VIC 963, and 15 VIC 1001 et seq.

Securities in Name of Nominee.

See category 13 Estates and Trusts, topic 13.11 Trusts, subhead Securities in Name of Nominee.

Real Estate.

Petition for Order to Sell Ward's Real Estate.

In order to obtain order for sale of real estate, guardian must present to court petition therefor, setting forth condition of estate of ward and facts and circumstances under which it is founded, tending to show necessity or expediency of such sale, which petition must be verified by oath of petitioner. (15 VIC 915). If it appears to court from petition for order to sell real estate that it is necessary or would be beneficial to ward that real estate or some part of it should be sold, it will make order directing next of kin of ward and all persons interested in estate to appear before it at time and place to be therein specified, not less than four nor more than eight weeks from time of making such order, to show cause why order should not be granted for sale of such estate. (15 VIC 916).

Sale of Real Estate to Maintain Ward.

When income of estate of any person under guardianship, whether as minor, insane person or spendthrift, is insufficient to maintain ward and family, guardian may sell real estate for that purpose, upon obtaining order therefor and proceeding as provided in this subchapter.

If estate is sold for maintenance of ward and family, guardian must apply proceeds of sale for that purpose, so far as necessary, and must put out residue, if any, on interest, or invest it in best manner in their power, until capital will be wanted for maintenance of ward and family, in which case capital may be used for that purpose, so far as may be necessary, in same manner as if it had been personal estate of ward. (15 VIC 912[b]).

Selling Ward's Real Estate and Investing Proceeds Therefrom.

When it appears upon representation of guardian that it would be for benefit of ward that real estate, or any part thereof, should be sold, and proceeds thereof be put out on interest or invested in some productive stock, guardian may sell same accordingly, upon obtaining order therefor and proceeding therein as provided in this subchapter.

If estate is sold in order to put out and invest proceeds, guardian must make investment according to their best judgment, or in pursuance of any order of court relating thereto. (15 VIC 913[b]).

Status of Proceeds from Sale of Real Estate upon Settlement of Guardianship.

In every case of sale of real estate as provided in this subchapter, residue of proceeds, if any, remaining upon final settlement of accounts of guardianship, are considered as real estate of ward and must be disposed of among same persons and in same manner as real estate would have been if it had not been sold. (15 VIC 914).

Liabilities of Guardian.

Upon complaint made to court by guardian, ward, creditor, or other person intersested in ward's estate, or by persons having claims thereto in expectancy, as heir or otherwise, against anyone suspected of having concealed, embezzled or conveyed away any of money, goods or effects of ward, court may cite and examine such suspected person. (15 VIC 885, 926).

Accounts.

See subhead Powers and Duties, supra.

Termination of Guardianship.

Minors.

Guardians of minors will have custody and tuition of minor and care and management of their estate, and will continue in office until minor becomes 18 years old, or until guardian is discharged according to law. (15 VIC 824).

Removal and Resignation of Guardian.

When any guardian appointed either by testator or by court becomes insane or otherwise incapable of discharging their trust or be unsuitable therefor, court, after notice to such guardian and to all others interested, may remove him.

Every guardian upon their request, may be allowed to resign their trust when it appears to court proper to allow same. Upon every such resignation or removal and also upon death of any guardian, court will appoint another in their stead. (15 VIC 883).

Discharge of Guardian.

Marriage of any female who is under guardianship as minor operates as discharge of her guardian. Guardian of any insane person or spendthrift may be discharged by court when it appears, on application of ward or otherwise, that such guardianship is no longer necessary. (15 VIC 884).

Insane Persons.

Superior Court, when it appears necessary and convenient, may appoint guardians for all insane persons, idiots, and others incapable of conducting their own affairs, who are inhabitants or residents in Virgin Islands and have any estate within same. Superior Court may appoint guardians for such persons to take care, custody and management of estates, real and personal of such persons; maintain their families; and educate their children. (4 VIC 76; 15 VIC 841). Contact Family Division of Superior Court.

Foreign Guardians.

Sale of Ward's Real Property by Foreign Guardians.

Upon every sale of ward's real estate by foreign guardian proceeds of sale, or as much thereof as may remain upon final settlement of accounts of guardianship, is considered as real estate of ward, and must be disposed of among same persons and in same proportions as real estate would have been according to laws of Virgin Islands if it had not been sold.

Foreign guardian must, in every case, before making sale give bond to Government of Virgin Islands, with sufficient sureties, with condition to account for and dispose of same according to law. (15 VIC 922).

Requirements on Sale by Foreign Guardian.

Every foreign guardian ordered to sell real estate must take and subscribe oath in like case of guardians appointed in Virgin Islands and must give notice of time and place of sale, and conduct same in same manner prescribed for guardians appointed in Virgin Islands, and may perpetuate evidence of notice in same manner. (15 VIC 921).

Gifts to Minors.

Uniform Transfers to Minors Act adopted.

Uniform Fiduciaries Act adopted. (15 VIC 1041 et seq.).

Uniform Simplification of Fiduciary Security Transfers Act not adopted.

14.09 HUSBAND AND WIFE:

Disabilities of Married Women.

All disabilities removed which do not also apply to married men.

Separate Property.

Neither husband nor wife has interest in property individually owned by each other. (16 VIC 62).

Contracts.

Wife may make contracts and incur liabilities and same be enforced against her as if she were unmarried. (16 VIC 71).

Antenuptial Contracts.

No statutory provision.

Actions.

Interspousal Immunity Abolished.

Common law doctrine of interspousal immunity has been abolished, and either spouse may sue and be sued not only free from other spouse's participation and control, but either also may sue other for personal injury or property damage to same extent as if unmarried. (16 VIC 63).

Liability of Spouse for Debts of Other.

Neither spouse is liable for debts or liabilities of other incurred before marriage, and, except as otherwise provided in this chapter, they are not liable for separate debts of each other nor is rent or income of property of either liable for separate debts of other. (16 VIC 66).

Liability for Civil Injuries Committed by Married Woman.

For all civil injuries committed by married woman damages may be recovered from her alone, and her husband is not responsible therefor, except in case where he would be jointly responsible with her if marriage did not exist. (16 VIC 70).

Agency.

Either spouse may constitute the other spouse's attorney in fact, to control or dispose of property, and may revoke same to same extent and manner as other persons. (16 VIC 65).

Conveyance or Encumbrance of Property.

Conveyance, transfer or lien executed by either husband or wife to or in favor of other, is valid to same extent as between other persons. (16 VIC 64).

Support of Relations.

Husbands and wives are legally obligated to support each other. (16 VIC 341). Amount of support shall be proportioned to resources of person giving such support and to necessities of party receiving it, and shall be reduced or increased in proportion to resources or necessities of latter. (16 VIC 345).

Interstate Family Support Act adopted.

Uniform Reciprocal Enforcement of Support Act adopted.

Uniform Enforcement of Foreign Judgments Act adopted.

Domestic Violence.

Victim may file complaint alleging commission of act of domestic violence with Family Division of Superior Court. (16 VIC 90 et seq.).

Uniform Interstate Enforcement of Domestic Violence Protection Orders (2002) adopted. (5 VIC 581 et. seq.)

Community Property.

System does not exist in Virgin Islands.

14.10 INFANTS:

Age of majority for both sexes is 18. (16 VIC 261).

Emancipation.

Emancipation to Administer Property.

Any minor who has completed age of 16 years may, with consent of parent(s), be emancipated by decree of district court for purpose of administering their property, in manner prescribed in this subchapter. Emancipation may be petitioned for either by relative of minor or by minor himself. (16 VIC 231).

Emancipation Against Will of Parents.

Minor may be emancipated against will of father or mother when they ill treat him or refuse to maintain and educate him or when they give him corrupt examples. (16 VIC 232).

Capacity of Emancipated Minor.

Emancipation by court capacitates minor to govern their property and person as if minor were of age; but until they attain their majority such emancipated person cannot make any promise or contract any obligation exceeding in value amount of their income for one year. Neither can minor encumber or sell their real property, without consent of court. Nor may minor appear in suit without appearance of guardian ad litem. (16 VIC 233).

Emancipation by Marriage.

Minor, whether male or female, becomes emancipated of right by marriage. Nevertheless, in order to alienate and mortgage any real property or to contract loans, minor emancipated by marriage requires consent of their father, in default of their father that of their mother, and in proper case, that of their guardian. (16 VIC 241).

Judicial Emancipation.

Minor who has lost both parents may obtain benefits of majority by decree of district court, upon petition by U.S. attorney. (16 VIC 251). Guardian may oppose such emancipation in which case district court will hear parties at oral hearing in which reasons for and against such emancipation may be alleged and proven. (16 VIC 252). Such judicial emancipation requires that: Minor be more than 18 years of age and have necessary ability to manage and administer their property; minor consent to emancipation; and such emancipation be deemed advantageous to minor. (16 VIC 253).

When court decrees emancipation of minor, it orders that they be considered as of age, for all legal effects, except as limited above. (16 VIC 254).

Emancipation by Majority.

All persons are deemed to have arrived at majority at age of 18 years, and thereafter have control of their own actions and business and have all rights and be subject to all liabilities of persons of full age. (16 VIC 261).

Disabilities.

See subhead Emancipation, catchlines Emancipation to Administer Property and Emancipation by Marriage, supra.

Ratification of Contracts.

No statutory provisions.

Actions.

Federal Rules of Civil Procedure apply.

Parental Responsibility.

Parent or legal guardian, other than Department of Human Services, having custody of minor child, will, if such minor willfully, maliciously or unlawfully damages or destroys real or personal property of another, be held liable for such damage or destruction in civil action brought in Superior Court. In order to impose liability it must be shown that parent or legal guardian knew, or by exercise of reasonable care should have known, that activities of minor would be likely to result in damages to another, or was otherwise negligent, and that such negligence was proximate cause of damages. Liability imposed here will not exceed $10,000. Restitution is absolute defense in all actions here. (14 VIC 484).

Adoption.

See topic 14.01 Adoption.

Revised Uniform Transfers to Minors Act.

Adopted. Gifts to minors governed by V.I. Uniform Transfers to Minors Act enacted July 18, 2001. (15 VIC 1251a et seq.).

14.11 MARRIAGE:

Age of Consent.

Males 16; females 14. (16 VIC 2).

Consent Required.

If male or female under 18 and not previously married seek license, father, or mother if there be no father, or if there be no father or mother, guardian must consent to marriage either personally to court or by attested instrument in writing. (16 VIC 36).

License is required. Contracting parties must be examined by clerk of Superior Court under oath and they must ascertain full name and age, date and place of birth, nationality and usual residence, the names of parents or guardians, relationship, and whether previously married. Application for license must be posted for public examination in office of clerk of court for eight days. In special cases license may be issued without application being posted. (16 VIC 35, 37).

Ceremonial Marriage.

Required. Marriage must either be performed by clergyman or minister of any religion whether they reside in Virgin Islands or elsewhere in U.S.; or witnessed by Local Spiritual Assembly of Bahai according to usage of their religious community; or performed by any judge or any court of record. (16 VIC 32).

Report and Certificate.

Person authorized by Superior Court to perform marriage is required to execute return within ten days showing date and names of parties married and certificate of marriage, which is delivered to parties. (16 VIC 38).

Record.

See category 10 Documents and Records, topic 10.04 Records, subhead Vital Statistics.

Common Law Marriage.

Not recognized in Virgin Islands, but such marriages if valid in other jurisdictions will be recognized in Virgin Islands.

Proxy Marriages.

No statutory provisions.

Marriages by Written Contract.

No statutory provisions.

Prohibited Marriages.

Void Marriages.

Marriage is prohibited and void from beginning, without being so decreed and its nullity may be shown in any collateral proceeding, when it is between: (1) A man and his grandmother, grandfather's wife, wife's grandmother, father's sister, mother's sister, mother, stepmother, wife's mother, daughter, wife's daughter, son's wife, sister, son's daughter, daughter's daughter, son's son's wife, daughter's son's wife, wife's son's daughter, wife's daughter's daughter, brother's daughter or sister's daughter; (2) a woman and her grandfather, grandmother's husband, husband's grandfather, father's brother, mother's brother, father, stepfather, husband's father, son, husband's son, daughter's son, son's daughter's husband, daughter's daughter's husband, husband's son's son, husband's daughter's son, brother's son or sister's son; or (3) any persons either of whom has been previously married and whose previous marriage has not been terminated by death or decree of divorce. Any of such marriages may also be declared to have been null and void by judicial decree. (16 VIC 1).

Voidable Marriages.

Marriage is illegal and will be void from time its nullity is declared by decree, if either party thereto is idiot or person adjudged lunatic; has consented thereto by reason of fraud or force; is incapable, from physical causes, of entering into marriage itself; or is under age of consent. (16 VIC 2).

Foreign Marriages.

If any marriage declared illegal by §§ 1 and 2 of this title is entered into in another jurisdiction by persons having and retaining their domicile in Virgin Islands, such marriage is deemed illegal, and may be decreed void in same manner as if it had been celebrated within Virgin Islands. (16 VIC 4).

Annulment.

Grounds for Annulment.

Marriage may be declared void from beginning at action of either party, for any of causes specified under catchline Void Marriages, supra, and whether so declared or not is deemed and held to be void in any action or proceeding whatever in which same may come in question. However, marriage once declared to be valid by judgment of court having jurisdiction thereof, in action for that purpose, cannot afterwards be questioned for same cause, directly or otherwise.

Marriage will not be declared void for any of causes specified under catchline. Voidable Marriages, supra, except at action or claim of party laboring under disability, or upon whom force or fraud was imposed or practiced; nor at action or claim of such party if it appears that parties freely cohabited together as husband and wife after party had arrived at legal age, acquired sufficient understanding, been restored to reason, freed from force, or discovered fraud, as case may be. (16 VIC 102).

Residency Requirements for Annulment.

When marriage has been solemnized in Virgin Islands an action may be maintained to declare it void if plaintiff is an inhabitant of Virgin Islands at commencement of action. If marriage has not been solemnized in Virgin Islands, such action can only be maintained when plaintiff has been inhabitant thereof for six weeks prior to commencement of action. (16 VIC 105).

Proceeding to Declare Marriage Valid.

When either husband or wife claims or pretends that marriage is void or voidable, as provided in §§ 1 and 2 of this title, same may be declared valid and lawful at action of other, and in such action court may, if pleadings and proof authorize it, declare such marriage void from beginning or from time of judgment, or that it is valid and lawful, and binding on parties thereto. (16 VIC 103).

16 INSURANCE

16.01 INSURANCE COMPANIES:

Regulated by Title 22.

Supervision by Commissioner of Insurance, Office of Lieutenant Governor, P. O. Box 450, St. Thomas, Virgin Islands 00801. (22 VIC 53).

Captive insurance, reinsurance, and alternative insurance companies governed exclusively by 22 VIC 1312-95 and are exempt from other provisions of Title 22. (22 VIC 1313).

Rates.

Commissioner may review any health property or casualty insurance rate to determine if there is actuarial basis for it and if it is supported by actual and credible loss and expense statistics or, if new coverage, by reasonable projections of losses and expenses. Pre-approval of rates is not required, but Commissioner must be notified 30 days in advance of effective date of any rate increase. If Commissioner determines that there is not sufficient evidence to justify new rate, such increase may be disallowed. (22 VIC 53a).

Annual statements must be filed with Commissioner of Insurance on or before Mar. 1 of each year. (22 VIC 602).

Policies.

Standard insurance policy of State of Washington or State of New York, or The Standard Foreign Policy (English Foreign Form) as authorized and on file in Office of Commissioner of Insurance of State of Washington or of New York on Jan. 1, 1952, together with subsequent changes, is established as standard form of insurance policy for Virgin Islands. (22 VIC 812).

Disability Insurance (22 VIC 851 et seq.); Group and Blanket Disability Insurance (22 VIC 901 et seq.); Life Insurance and Annuities (22 VIC 951 et seq.); Industrial Life Insurance (22 VIC 1001 et seq.); Property Insurance (22 VIC 1051 et seq.); Surety Insurance (22 VIC 1101 et seq.); Title Insurers (22 VIC 1151 et seq.).

Discrimination.

Prohibited. (22 VIC 844).

Rebates.

Prohibited. (22 VIC 1214, 1217 & 1218).

Liens.

No statutory provisions.

Agents and Brokers.

Regulated by Commissioner of Insurance, and licensed by both Commissioner of Insurance and Licensing Division of Department of Finance. (22 VIC 751 et seq.; 27 VIC 301 et seq.). Fees: Agent, $200; resident broker, $300; nonresident $750. (22 VIC 601).

Process Agent.

Before certificate of authority to transact business in Virgin Islands is issued to any domestic, foreign or alien insurance company it must file with Commissioner resolution adopted by its board of directors consenting that service of process upon Commissioner in any action or proceeding against company, brought or pending in Virgin Islands upon any cause of action arising in or growing out of business transacted in Virgin Islands is valid service upon company, and consent is irrevocable, so long as policy of insurance of such company remains in force in Virgin Islands or any loss remains unpaid therein.

All domestic, foreign or alien insurance companies transacting business in Virgin Islands must at all times have one or more known places of business therein and designated and authorized agent present upon whom process may be served in all cases, and name and business address of agent must be filed in Office of Commissioner. Process may be served on designated agent until such time as agent’s authority is revoked by notice in writing, filed in Office of Commissioner, by personal service on agent or by leaving certified copy of process at business address of agent as filed in Office of Commissioner.

Service may be had on either authorized agent or Commissioner. (22 VIC 218).

Investments.

Regulated by statute. (22 VIC 551 et seq.).

Foreign and Alien Insurance Companies.

All foreign and alien insurers must file with Commissioner, as condition for doing business in Virgin Islands and for protection of policyholders, at least $500,000 which may be in form of financial guarantee bond, certificate of deposit, letter of credit or U.S. Treasury Notes. (22 VIC 207).

Amount required to be deposited pursuant to foregoing will not be subject to withdrawal until all liabilities secured by deposit have been fully paid or have been fully reinsured with insurers authorized to transact same kind of business in states or foreign countries where liabilities exist. (22 VIC 207).

Each bond filed pursuant to § 207 above must be with condition that surety or sureties on bond be answerable to amount of bond for all judgments, decrees, or orders given, made or rendered against principal on bond by any court of Virgin Islands for payment of money.

In case of any breach of condition of any bond filed pursuant to § 207 above, Commissioner may, and upon demand and receipt of satisfactory assurance for payment of costs must, enforce bond either in their own name or in name(s) of any persons as obligees therein by appropriate proceedings in any court of competent jurisdiction for use and benefit of any person injured by breach.

Surety or sureties on any bond filed pursuant to said § 207 may withdraw from same by giving Commissioner written notice not less than 90 days prior to date on which then existing certificate of authority or insurer is to expire. Such surety or sureties will, however, remain liable on bond for all judgments, decrees, or orders given, made, or rendered against principal, based on obligations incurred during period of suretyship. (22 VIC 208).

Retaliatory Laws.

No statutory provisions.

Premium Tax.

Each insurer must, on or before first day of Feb., May, Aug. and Nov., pay to Office of Commissioner of Finance tax of 5% on quarterly gross receipts premiums on all types of insurance transacted in Virgin Islands except annuities, less return premiums and less reinsurance premiums on such business received from insurance companies authorized to do business in Virgin Islands. This tax is in lieu of any gross receipt taxes otherwise levied on insurer. (22 VIC 603).

Contracts for health and/or life insurance procured by Government of Virgin Islands shall be exempt from payment of premium tax requirements. (22 VIC 603A).

Privilege Tax.

No statutory provisions.

Uniform Insurers Liquidation Act.

Not adopted.

Direct Actions Against Insurer.

See category 23 Transportation, topic 23.01 Motor Vehicles, subhead Direct Actions.

No-Fault Insurance.

See category 23 Transportation, topic 23.01 Motor Vehicles, subhead No-Fault Insurance.

Plain Language.

See category 3 Business Regulation and Commerce, topic 3.10 Consumer Protection.

16.02 SURETY AND GUARANTY COMPANIES:

No legislation.

17 INTELLECTUAL PROPERTY

17.01 TRADEMARKS AND TRADENAMES:

Regarding trademarks, there are no statutory provisions other than those set out in subhead Registration, infra. See Restatements of Law.

What May Be Used.

See subhead Registration, infra.

Registration.

Although there are no statutory provisions permitting trademarks to be registered locally, Virgin Islands Rules and Regulations do provide that certificates of registration of trademarks issued by U.S. Patent Office may be recorded in Virgin Islands upon filing with Lieutenant Governor of Virgin Islands application accompanied by officially certified copy of trademark certificate plus copy or facsimile of trademark. Recording fee is $100.

Tradenames for businesses conducted under name other than true name of owner may be registered with Office of Lieutenant Governor. Filing fee is $50. Application to renew tradename and fee of $50 must be filed every two years. Any person, partnership, co-partnership, association, company, or corporation which fails to renew its tradename within six months of expiration date shall cease title to tradename and tradename shall become available to anyone who files for tradename and pays required registration fee. (11 VIC 1201 et seq.).

Assignment.

No specific statutory provisions.

Protection Afforded.

No specific statutory provisions. See Restatements of Law.

Infringement.

No specific statutory provisions. See Restatements of Law.

Resale Price Agreements.

No specific statutory provisions.

17.02 TRADE SECRETS:

Uniform Trade Secrets Act adopted.

Owner of trade secrets may be protected from disclosure or dissemination. See 5 VIC 860 and 14 VIC 1665.

18 LEGAL PROFESSION

18.01 ATTORNEYS AND COUNSELORS:

Membership of Virgin Islands Bar shall consist of attorneys admitted pro hac vice pursuant to V.I.S.Ct.R. 201, government attorneys specially admitted to practice pursuant to V.I.S.Ct.R. 202, and attorneys regularly admitted to practice pursuant to V.I.S.Ct.R. 204.

Any attorney licensed to practice by Supreme Court of Virgin Islands may be admitted as attorney at law in District Court of Virgin Islands on motion of member of bar of District Court, made in open court, and upon taking prescribed oath and signing roll. (LRCi 83.1).

Jurisdiction over Admissions.

Supreme Court has jurisdiction over admission of attorneys at law to practice in courts of Territory and over discipline of persons so admitted and may make rules and regulations governing practice of law in Territory. (4 VIC 32).

Eligibility.

Applicant for regular admission to Virgin Islands Bar must allege and prove that said applicant is (1) at least 21 years of age; (2) U.S. citizen or resident non-U.S. citizen who is legal immigrant; (3) person of good moral character; (4) current member in good standing of bar of any jurisdiction previously admitted to; and (5) graduate of accredited law school approved by American Bar Association. (V.I.S.Ct.R. 204).

Registration as Law Student.

With Court's approval, eligible law student may appear under supervision of attorney who is member of Virgin Islands Bar and maintains bona fide office in Virgin Islands. (LRCi 83.1).

Educational Requirements.

Applicant must be graduate of accredited law school approved by American Bar Association. (V.I.S.Ct.R. 204).

Petition for Admission.

On motion to Supreme Court on behalf of their departments or agencies, V.I. Attorney General, U.S. Attorney, General Counsel of Superior Court, Chief Legal Counsel of Legislature of Virgin Islands, Chief Territorial Public Defender, Federal Public Defender, and Supervising Attorney of Legal Services, attorney in good standing of bar of any court of U.S., or of highest court of any state, District of Columbia, commonwealth, territory or possession of U.S., who is not regularly admitted to practice before Supreme Court of Virgin Islands, and who is not under suspension or disbarment by any court, and who has paid all appropriate membership dues and licensing fees, may be specially admitted to practice law in their capacity as employee of moving department or agency. Special Admission is limited to period of two years; provided, if applicant takes VI bar examination, such period may be extended additional year. (V.I.S.Ct.R. 202).

Examination.

Applicant for regular admission to Virgin Islands is required to pass Multi-State Bar Examination, Local Law Essay Examination, Multi-State Professional Responsibility Examination and Character Examination and Personal interview. MBE and Essay exams shall be held semiannually in Feb. and July on St. Thomas, and when warranted by number of applicants, may be held simultaneously on St. Croix. Date of MBE will coincide with national date, and Essay exam will be on day following MBE. MPRE will be held on dates established by National Conference of Bar Examiners. Applicant shall also be examined as to character and character investigation and personal interview may be conducted as are required. (V.I.S.Ct.R. 204).

MBE and MPRE scores obtained in another jurisdiction may be accepted provided that minimum passing score required by V.I. Bar has been achieved and certified in writing by other jurisdiction and scores certified are no more than five years old. (V.I.S.Ct.R. 204).

Application for admission shall be made in writing to Supreme Court at least 30 days prior to date of semi-annual Bar exam and shall be accompanied by fee of $350. (V.I.S.Ct.R. 204).

Clerkship.

No statutory requirement.

Admission without Examination.

No statutory provisions.

Admission Pro Hac Vice.

Attorney who is currently in good standing as active member of bar of any state or territory of U.S. or of any foreign country, who has not suffered any disbarment or suspension of license to practice before any jurisdiction, who has been retained or requested to represent any party involved in any legal matter in Virgin Islands and who has paid all appropriate membership dues and licensing fees may, in discretion of judge before whom such litigation has been assigned or is pending and on motion of regularly admitted attorney of record in such litigation, be admitted pro hac vice to participate in that legal matter only. Attorney admitted pro hac vice will be bound by grievance procedures established in Rules of Virgin Islands Bar and will be subject to disciplinary and contempt jurisdiction of any court of Virgin Islands, in course of their practice during their pro hac vice admission, whether such disciplinary action is taken before or after termination or revocation of their admission pro hac vice. (V.I.S.Ct.R. 201).

Licenses.

Annual business license fee imposed by Commissioner of Licensing & Consumer Affairs is $500. (27 VIC 301, 302).

Disabilities.

Attorneys are not qualified to act as sureties for bail. (5 VIC 180).

Liabilities.

No statutory provisions.

Compensation.

Generally governed by Rule 1.5 of Model Rules of Professional Conduct as adopted by American Bar Association.

In civil actions, measure and mode of compensation of attorneys will be left to agreement, express or implied, of parties, but there will be allowed to prevailing party in judgment such sums as court in its discretion may fix by way of indemnity for their attorneys fees in maintaining action or defenses thereto. (5 VIC 541). Contingency fee for attorney representing plaintiff prosecuting medical malpractice must not exceed 25%. But this limit is subject to discretion of court to increase or decrease. (27 VIC 166f).

Lien.

No statutory provisions. See Restatements of Law.

Disbarment or Suspension.

For misconduct and for good cause shown, and after notice and opportunity to be heard, any attorney admitted to practice before court may be disbarred, suspended from practice, reprimanded or subjected to such other disciplinary action as circumstances may warrant. (V.I.S.Ct.R. 203).

Attorney Ethics.

Model Rules of Professional Conduct as adopted by American Bar Association, and as amended from time to time apply to professional conduct of attorneys in Virgin Islands. Process to file complaint with Professional Ethics and Grievance Committee of V.I. Bar Association is governed by V.I.S.Ct.R. 207.1.

Unauthorized Practice.

Monitored and enforced by V.I. Bar Association Committee on Unauthorized Practice of Law. (V.I.S.Ct.R. 203). Appears to abrogate 4 VIC 443, which has not been repealed.

Mandatory Continuing Legal Education.

Every active member of U.S. Virgin Islands Bar shall complete and certify attendance at minimum of twelve hours per year of approved Continuing Legal Education courses of which at least two hours shall be in area of legal ethics or professionalism. (V.I.S.Ct.R. 208).

Specialty Certification Requirements.

None.

Professional Association or Corporation.

See category 2 Business Organizations, topic 2.03 Corporations, subhead Professional Corporations.

19 MINERAL, WATER AND FISHING RIGHTS

19.01 MINES AND MINERALS:

No legislation.

20 MORTGAGES

20.01 CHATTEL MORTGAGES:

Uniform Commercial Code adopted, eff. July 1, 1965, amended May 2003. (Title 11A).

Filing.

Uniform Commercial Code adopted, eff. July 1, 1965, amended May 2003. (Title 11A).

Taxation.

No statutory provisions.

Forms.

Forms at end of this Digest may be used: Financing Statement (UCC-1), Termination Statement (Addendum to page 3 of Form UCC-1), Statement of Continuation, Partial Release, Assignment, etc. (Form UCC-3).

20.02 [RESERVED]

20.03 MORTGAGES OF PERSONAL PROPERTY:

See topic 20.01 Chattel Mortgages; category 3 Business Regulation and Commerce, topic 3.09 Commercial Code.

20.04 MORTGAGES OF REAL PROPERTY:

Mortgage of real property will not be deemed conveyance so as to enable owner of mortgage to recover possession of real property without foreclosure and sale according to law, and judgment thereon. (28 VIC 290).

Execution.

If executed in Virgin Islands, must be executed in presence of two subscribing witnesses and acknowledged (Milligan v. Khodra, 46 V.I. 305 [D.V.I. 2004]). If executed outside Virgin Islands, may be executed according to laws of jurisdiction and execution may be acknowledged. (28 VIC 42).

Recording.

Unnecessary to validity as between parties, but necessary to constitute notice to third persons. Mortgages should be recorded in office of recorder of deeds for district in which mortgaged property is located. Conveyance will be considered as recorded at time it was so received. (28 VIC 121, 123, 124). If mortgage is to be recorded, it must be acknowledged in accordance with law. See category 10 Documents and Records, topic 10.01 Acknowledgments. If document affects real property in both judicial divisions, it shall be recorded in both offices. (28 VIC 121).

Although Virgin Islands is race-statute jurisdiction, courts have interpreted 28 VIC 124 as race-notice statute at least with respect to mortgages. (Morris v. Ernest, 2002 V.I. LEXIS 3, 44 V.I. 153 [Terr. Ct. 2002]).

Recording Fees.

$11 on valuation $1 to $400; $12 on valuation $400 to $600; $13 on valuation $600 to $1,000; $14 on valuation $1,000 to $2,000; $15 on valuation $2,000 to $3,000; $1 on each additional $1,000 or part thereof, plus copying fee of 50¢ per page. In addition to recording fee, fee of $1 per page shall be paid. For attached documents (i.e., riders, etc.), fee of $2.50 plus $1 per page. (28 VIC 133).

Taxes.

No statutory provisions.

Trust Deeds.

No general statutory provisions. See category 3 Business Regulation and Commerce, topic 3.09 Commercial Code.

Future Advances.

Mortgages and other instruments securing optional future advances. (28 VIC 1032).

Priorities.

See subhead Foreclosure, infra.

Subordination Agreements.

Although there are not statutory provisions, subordination agreements are permitted and given effect.

Assignment.

Recording of assignment of mortgage will not in itself be deemed notice of such assignment to mortgagor, their heirs or personal representatives, so as to invalidate any payment made by them or either of them to mortgagee. (28 VIC 126).

Release.

Partial releases are effected in generally same manner as satisfactions. See subhead Satisfaction, infra.

Satisfaction.

Mortgage may be discharged upon record thereof by recorder in whose custody it may be whenever there is presented to him certificate executed by mortgagee, their personal representatives or assigns, acknowledged or proved and certified as prescribed by law to entitle conveyance to be recorded, specifying that mortgage has been paid or otherwise satisfied or discharged.

Every such certificate and proof or acknowledgment thereof must be recorded at full length, and reference made to book and page containing such record of discharge of such mortgage made by recorder upon record thereof. (28 VIC 127).

Discharge.

See subhead Satisfaction, Supra.

Foreclosure.

Lien upon real property, other than that of judgment, whether created by mortgage or otherwise, may be foreclosed, and property adjudged to be sold to satisfy debt secured thereby, by action of equitable nature. In such action, in addition to judgment of foreclosure and sale, if it appears that promissory note or other personal obligation for payment of debt has been given by mortgagor or other lien debtor, or by any other person as principal or otherwise, court may also adjudge recovery of amount of such debt against such person or persons, as case may be, as in case of ordinary judgment for recovery of money. (28 VIC 531).

Other Lien Holders as Defendants.

Any person having lien subsequent to plaintiff upon same property or any part thereof, or who has given promissory note or other personal obligation for payment of debt or any part thereof, secured by mortgage or other lien which is subject of action, must be made defendant in action. Any person having a prior lien may be made defendant at option of plaintiff, or by order of court when deemed necessary. (28 VIC 532).

Priority of Liens.

When it is adjudged that any of defendants have lien upon property, court will make like judgment in relation thereto and debt secured thereby as if such defendant were plaintiff in action. When judgment is given foreclosing two or more liens upon same property or any portion thereof in favor of different persons not united in interest such judgment will determine and specify order of time, according to their priority, in which debts secured by such lien will be satisfied out of proceeds of sale of property. (28 VIC 533).

Sales.

Judgment may be enforced by execution as ordinary judgment for recovery of money, except as otherwise or specially provided. When judgment of foreclosure and sale is given, execution may issue thereon against property adjudged to be sold. If judgment is in favor of plaintiff only, execution may issue as in ordinary cases, but if it is in favor of different persons not united in interest, it will issue upon joint request of such persons, or upon order of court, on motion of either of them. (28 VIC 534).

Deficiency Judgments.

When judgment is also against defendants or any one of them in person, and proceeds of sale of property upon which lien is foreclosed are not sufficient to satisfy judgment as to sum remaining unsatisfied to either, judgment may be enforced by execution as in ordinary cases. When in such case judgment is in favor of different persons not united in interest, it may be deemed separate judgment as to such persons, and may be enforced accordingly. (28 VIC 534).

Moratorium.

No statutory provisions.

Redemption.

Judgment of foreclosure will not have effect of barring equity of redemption, and real property sold on execution issued upon such judgment may be redeemed, in like manner and with like effect, as real property sold on execution issued on judgment may be redeemed, except that redemption must be made within six months after confirmation of sale. Judgment debtor or their successor in interest, on paying amount of purchase money, with interest at legal rate per annum thereon from date of sale, together with amount of any taxes which purchaser may have paid thereon after purchase, may redeem within six months after order of confirmation of sale. Right of redemption may be waived in writing by judgment debtor or their successor in interest provided such waiver was not contemporaneous with underlying mortgage. Nothing herein contained will preclude voluntary conveyance by mortgagor to mortgagee in lieu of foreclosure, which conveyance will be deemed to convey full estate of mortgagor including right to redemption. (28 VIC 535).

Forms.

No statutory forms for mortgages; assignment or satisfaction of mortgages; release of part of mortgaged property or trust deed.

21 PROPERTY

21.01 ABSENTEES:

Care of Property.

Uniform Unclaimed Property Act (2008) adopted. (28 VIC 651 et seq.). See Unclaimed Property Act, c. 29. (Act July 11, 2008, No. 6999).

Process Agent.

Uniform Unclaimed Property Act (2008) adopted. (28 VIC 651 et seq.). See Unclaimed Property Act, c. 29.

Escheat.

Uniform Unclaimed Property Act (2008) adopted. (28 VIC 651 et seq.). Real or personal property left by persons dying without heirs entitled by law to inherit will escheat to territory. (15 VIC 121). See categories 3 Business Regulation and Commerce, topic Banks and Banking, subhead Unclaimed Deposits; and Estates and Trusts, topic Wills, subhead Unclaimed Legacies.

21.02 ADVERSE POSSESSION:

Uninterrupted, exclusive, actual, physical, adverse, continuous, notorious possession of real property under color and claim of title for 15 years or more is conclusively presumed to give title thereto except as against the Government. (28 VIC 11).

21.0321.04 [RESERVED]

21.05 CURTESY:

Abolished in estate of any person who dies after Sept. 1, 1957. (15 VIC 83).

21.06 DEEDS:

See topic Real Property for types of estates.

A conveyance of lands, or of any estate or interest therein, may be made by deed, signed by person from whom estate or interest is intended to pass, being of lawful age, or by their lawful agent or attorney and acknowledged or proved and recorded. (28 VIC 41).

Execution.

If executed in Virgin Islands must be executed in presence of two subscribing witnesses and acknowledged. If executed anywhere outside Virgin Islands may be executed according to laws of state or country where executed and execution may be acknowledged. (28 VIC 42).

See also categories 8 Debtor and Creditor, topic Homesteads, subhead Alienation or Encumbrance; Family, topic Husband and Wife, subhead Conveyance or Encumbrance of Property; and Property, topic Real Property.

Recording.

In office of Recorder of Deeds in judicial division where property is located. If document affects real property located in both judicial divisions, it must be recorded in both offices. No deed will be recorded unless proof in writing from V.I. Department of Finance (fee = $25) is submitted that all property taxes due have been paid. (28 VIC 121).

Deed not recorded is void against any subsequent innocent purchaser if good faith and for valuable consideration whose conveyance is first duly recorded. (28 VIC 124). Although Virgin Islands is race-statute jurisdiction, courts have interpreted 28 VIC 124 as race-notice statute at least with respect to mortgages. (Morris v. Ernest, 2002 V.I. LEXIS 3, 44 V.I. 153 [Terr. Ct. 2002]). See also category 10 Documents and Records, topic 10.04 Records.

Recording Fees.

Dependent upon consideration recited: up to $15 for first $3,000; $1 on each additional $1,000 or part thereof, plus $1 per page. (28 VIC 133).

Taxes.

See category 22 Taxation, topic 22.18 Stamp and Seal Taxes.

Deed of quitclaim and release shall be sufficient to pass all the real estate grantor can lawfully convey by deed of bargain and sale. (28 VIC 3).

Forms

Quitclaim Deed.

THIS INDENTURE, made............, 20........, between............ (herein called the “Grantor”),............ (address).............., and............ (herein called the “Grantee”),.......... (address)......................,

WITNESSETH: That for and in consideration of Ten Dollars ($10.00) and other good and valuable consideration, receipt of which is hereby acknowledged,

THE GRANTOR HEREBY GRANTS, SELLS, RELEASES AND QUITCLAIMS to the Grantee, their heirs and assigns, all of their right, title, and interest in the real property described as follows:

(same type of property description used in Warranty Deed) being the same premises as were conveyed from............. to the Grantor named herein by Warranty Deed dated................, 20........, and recorded............., 20........, in document., No........., in the Office of the Recorder of Deeds, St. Thomas, Virgin Islands;

TOGETHER WITH any improvements thereon and the rights, privileges, and appurtenances belonging thereto;

TO HAVE AND TO HOLD the premises conveyed hereby in fee simple forever;

SUBJECT, HOWEVER, to Virgin Islands zoning regulations, and to covenants, restrictions and easements of record.

For stamp tax purposes, the value of the interest conveyed hereby is $..........

IN WITNESS WHEREOF, the Grantor has signed this instrument as of the date first written above.

WITNESSES:

. . . .

. . . .

(Acknowledgement)

. . . .

, Grantor

Warranty Deed.

THIS INDENTURE, made. . . . ., 20. . . .
between. . . . . (herein called the “Grantors”),. . . . . . .
(address). . . . . and. . . . . (herein called the
“Grantees”),. . . . . (address). . . . .,

WITNESSETH: That for and in consideration of the sum of. . . . . Dollars ($. . . . . .), and other goods and valuable consideration, receipt of which is hereby acknowledged,

THE GRANTORS HEREBY GRANT AND CONVEY to the Grantees, as tenants by the entirety with right of survivorship and not as tenants in common, their assigns and the heirs and assigns of the survivor of them, the real property described as follows:

Parcel No. . . . . Estate. . . . ., No. . . . . Quarter, St. Thomas, Virgin Islands,as shown on Office of Lieutenant Governor, Drawing No. . . . ., dated. . . . ., as morefully described in the metes and bounds description thereof attached hereto and incorporated herein by reference,

being the same premises as were conveyed from. . . . . to the Grantors named herein by Warranty Deed dated. . . . ., 20. .. . . ., and
recorded. . . . ., 20. . . . . in Volume. . . . .,
Page. . . . ., No. . . . ., in the Office of the Recorder of Deeds, St. Thomas, Virgin Islands;

TOGETHER WITH any improvements thereon and the rights, privileges, and appurtenances belonging thereto;

TO HAVE AND TO HOLD the premises conveyed hereby in fee simple forever;

SUBJECT, HOWEVER, to Virgin Islands zoning regulations, and to covenants, restrictions and easements of record.

AND THE GRANTORS WARRANT that they are seized of the premises in fee simple and have good right to convey the premises; that the Grantees shall quietly enjoy the premises; that the premises are free from encumbrances except as set forth or referred to herein; that the Grantors will execute or procure any further necessary assurances of title to the premises; and that the Grantors will forever warrant and defend title to the premises.

IN WITNESS WHEREOF, the Grantors have signed this instrument as of the date first written above.

WITNESSES:

....

....

(Acknowledgement)

....

, Grantor

....

, Grantor

By Corporations and Married Persons.

When either of above forms of deed are used to effect conveyance in which corporation or married persons are party, variations to such forms are for most part grammatical, and same as those used in most jurisdictions when documents are drafted for execution by corporations or married persons.

21.07 [RESERVED]

21.08 DOWER:

Abolished in estate of any person who dies after Sept. 1, 1957. (15 VIC 83).

21.09 ESCHEAT:

See topic 21.01 Absentees, subhead Escheat; categories 3 Business Regulation and Commerce, topic Banks and Banking, subhead Unclaimed Deposits; Estates and Trusts, topics Descent and Distribution, subhead Escheat, Wills, subhead Unclaimed Legacies.

21.10 LANDLORD AND TENANT:

General rights and liabilities arising out of relation of landlord and tenant controlled by 28 V.I.C. §§ 751 — 794.

Kinds of Tenancy.

No statutory provisions.

Leases.

No specific statutory provisions regarding requisites of leases. For determination of whether leases must be in writing, see category 3 Business Regulation and Commerce, topic 3.16 Frauds, Statute of. Leases need not be recorded to be valid as between parties, but if parties choose to record lease, it must be in proper form. See category 10 Documents and Records, topic 10.01 Acknowledgments.

Security Deposits.

No statutory provision.

Recording.

If parties choose to record lease, it should be recorded in Office of Recorder of Deeds in judicial division in which premises in question are located. No statutory provisions regarding actual possession of tenant as notice of unrecorded lease.

Rent.

Every person in possession of land out of which any rent is due, whether it was originally demised in fee, or for any other estate or freehold, or for any term of years, is liable for amount of proportion of rent due from land in their possession, although it is only a part of what was originally demised.

Such rent may be recovered in action and deed or demise, or any other instrument in writing, if any, showing provisions of lease, may be used in evidence by either party to prove

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amount due from defendant.

Nothing contained in this section will deprive landlords of any other legal remedy for recovery of their rents, whether secured to them by their leases or provided by law. (28 VIC 751).

Rent Control Act in effect.

No statutory provision pertaining to right to withhold.

Lien.

No statutory provisions.

Termination of Tenancy.

All estates at will or by sufferance may be determined by either party, by three months notice in writing given by other party. When rent received in lease at will is payable at periods of less than three months, time of such notice will be sufficient if it is equal to interval between times of payment. In all cases of neglect or refusal to pay rent due on lease at will, 14 days notice to quit given in writing by landlord to tenant, will be sufficient to determine lease. (28 VIC 752).

Holding Over.

No statutory provision.

Dispossession.

When forcible entry is made upon any premises, or when entry is made in peaceable manner and possession is held by force, person entitled to premises may maintain action to recover possession thereof.

If unpaid rent or value of real property involved does not exceed $500, exclusive of interest and costs, Superior Court has exclusive jurisdiction of such action. In all other cases, Superior Court and district court have concurrent jurisdiction. (28 VIC 782).

Distress.

Permitted as part of action for forcible entry or detainer. (28 VIC 787).

Uniform Residential Landlord and Tenant Act.

Not adopted.

21.1121.12 [RESERVED]

21.13 PERPETUITIES:

No specific statutory provisions. See Restatements of Law.

Accumulations.

See Restatements of Law.

21.14 PERSONAL PROPERTY:

No statutory provisions regarding whether or not tenancy by entirety in personalty exists.

21.15 POWERS OF ATTORNEY:

Uniform Durable Power of Attorney Act adopted. (15 VIC 1261).

Attorneys in Fact.

Conveyance of lands, or of any estate or interest therein, may be made by deed, signed by person from whom estate or interest is intended to pass, being of lawful age, or by their lawful agent or attorney and acknowledged or proved, and recorded as directed in this title, without any other act or ceremony. (28 VIC 41).

Power of attorney regarding sale or encumbrance of real property must be recorded. General form of power of attorney is sufficient as long as it specifically describes property involved and is in recordable form.

Formalities.

Power of attorney regarding sale or encumbrance of real property must be executed in same manner as deeds. See topic 21.06 Deeds, subhead Execution.

Members of Armed Forces.

No specific statutory provisions.

21.16 REAL PROPERTY:

Conveyance or devise of lands or interests therein made to two or more persons, other than to executors and trustees and to husband and wife, creates tenancy in common unless expressly declared that grantees or devisees take as joint tenants. (28 VIC 7).

Conveyance or devise to husband and wife creates estate by the entirety unless otherwise provided in the deed or will, but upon divorce or annulment of marriage they become tenants in common. (28 VIC 7).

No entailed estates will be valid in Virgin Islands and all provisions of any deed or will creating or attempting to create such estates will be void. (28 VIC 7).

Rule in Shelley’s Case.

If any person by last will devises any real estate to any person for term of such person’s life, and after their death, to their children or heirs, or their heirs in fee, such devise will vest an estate for life only in such devisee, and remainder in fee simple in such children.

Where any estate, real or personal, is given by deed or will to any person for their life, and after their death to their heirs, or to heirs of their body, conveyance will be construed to vest estate for their life only in such person, and remainder in fee simple in their heirs or heirs of their body. (28 VIC 6).

Foreign Conveyances or Encumbrances.

Deeds executed in any state of U.S. or in any foreign country may be executed according to laws of such state or country and execution thereof may be acknowledged as provided by Virgin Islands’ law. (28 VIC 42). See category 10 Documents and Records, topic 10.01 Acknowledgments.

Condominiums permitted. Local Condominium Act adopted. (28 VIC 901 et seq.).

See topics 21.03 Curtesy, Deeds, Dower, Landlord and Tenant; categories 5 Civil

Actions and Procedure, topic Partition; Debtor and Creditor, topic Homesteads; Family, topic Husband and Wife; Mortgages, topic Mortgages of Real Property.

22 TAXATION

CAUTION: Territory of United States Virgin Islands is not part of United States for Internal Revenue Code (IRC) purposes. (IRC sec. 7701[a][9]). Therefore, IRC does not apply to Virgin Islands and Virgin Islands taxpayers, unless either (1) IRC section is income tax law, IRC Subtitle A (§§ 1 - 1563), which is interpreted to include administration of income tax laws, in which case term “Virgin Islands” is substituted for “United States” and resulting tax, interest and penalty is paid to Virgin Islands (48 USC 1397), or (2) IRC expressly states that specific IRC sections apply to Virgin Islands. (Cf. IRC 3121[e]).

United States Tax Court is administrative law court of limited jurisdiction that hears disputes between taxpayers and IRS. Exclusive jurisdiction to hear income tax disputes between taxpayers and Virgin Islands Bureau of Internal Revenue is vested in District Court of Virgin Islands. (Revised Organic Act of 1954, § 22; Dudley v. C.I.R., 258 F.2d 182 [3d Cir. 1958]).

22.01 ADMINISTRATION:

Virgin Islands Bureau of Internal Revenue, Charlotte Amalie (P. O. Box 3186), St. Thomas, Virgin Islands 00801, and Office of Lieutenant Governor, No. 18 Kongens Gade, St. Thomas, Virgin Islands 00802, have general supervision over administration of tax laws.

Apportionment Against Inter Vivos Dispositions.

No statutory provisions.

Interstate Cooperation.

Internal Revenue Service (IRS) and Virgin Islands Bureau of Internal Revenue (known locally as “BIR”) tax officials established partnership to work together on common tax enforcement issues. Virgin Islands joined 48 states, District of Columbia and New York City on list of tax agencies that have signed partnership agreements with IRS.

Partnership is designed to enable federal, territorial, state and local tax agencies to join together in ensuring all taxpayers pay tax amount they are legally obligated to pay. The BIR will be working with IRS to combat abusive tax avoidance transactions by sharing information and leveraging resources. (IR-2004-123).

Penalties.

Note caveat above. These penalties do not apply to income taxes if they conflict with IRC. They do apply to both Virgin Islands internal revenue taxes and Virgin Islands income taxes.

Conspiracy to Evade or Defeat Tax.

Fine of not more than $10,000 or imprisonment for not more than five years, or both. (33 VIC 1522).

Willful Failure to Collect or Pay Over Tax.

Whoever, being required by Virgin Island internal revenue or income tax law to collect, account for, and pay over any tax imposed by Virgin Islands internal revenue or income tax law, willfully fails to collect or truthfully account for and pay over such tax, will, in addition to other penalties provided by law, be fined not more than $10,000 or imprisoned not more than five years, or both, together with costs of prosecution. (33 VIC 1523).

Willful Failure to File Return, Supply Information, or Pay Tax.

In addition to other penalties provided by law, fine of not more than $10,000 or imprisonment of not more than one year, or both, together with costs of prosecution. (33 VIC 1524).

Fraud and False Statements.

Fine of not more than $5,000 or imprisonment of not more than three years, or both, together with costs of prosecution. (33 VIC 1525).

Fraudulent Returns, Statements, or Other Documents.

Fine of not more than $1,000 or imprisonment of not more than one year, or both. (33 VIC 1526).

Offenses Relating to Stamps.

Counterfeiting, use of mutilated, insufficient or counterfeited stamps, or reuse of stamps. Fine of not more than $10,000 or imprisonment of not more than five years, or both. (33 VIC 1527).

Unauthorized Use or Sale of Stamps.

Fine of not more than $1,000, or imprisonment of not more than 180 days, or both. (33 VIC 1528).

Failure to Obey Summons.

Fine of not more than $1,000 or imprisonment of not more than one year, or both, together with costs of prosecution. (33 VIC 1529).

False Statements to Purchasers or Lessees Relating to Tax.

Fine of not more than $1,000 or imprisonment of not more than one year, or both. (33 VIC 1530).

Attempts to Interfere with Administration of Internal Revenue Laws.

By corrupt or forcible interference: Fine of not more than $5,000 or imprisonment of not more than three years, or both, except that if offense is committed only by threats of force, person convicted thereof will be fined not more than $3,000 or imprisoned not more than one year, or both. By forcible rescue of seized property: Fine of not more than $500 or not more than double value of property so rescued, whichever is greater, or imprisonment of not more than two years. (15 VIC 1531).

Unauthorized disclosure of information on income returns by any officer or employee of Government or by any shareholder of corporation, or unauthorized printing or publishing of such information by any person, is punishable by fine not more than $1,000 or imprisonment not more than one year, or both, together with cost of prosecution. If offender is officer or employee of Government, they will be dismissed or discharged, and they may not be hired by any Government agency for period of one year from date of dismissal. Unauthorized disclosure by employee or officer of Government of operations of manufacturer or producer is punishable by fine not exceeding $1,000 or imprisonment not more than one year, or both, together with cost of prosecution; and offender will be dismissed or discharged. (33 VIC 1532).

Offenses by Officers and Employees of Virgin Islands.

Any officer or employee of Virgin Islands acting in connection with any revenue law of Virgin Islands (including income tax law) who: is guilty of any extortion or willful oppression under color of law; knowingly demands other or greater sums than are authorized by law, or receives any fee, compensation, or reward, except as by law prescribed, for performance of any duty; with intent to defeat application of any provision of Virgin Islands income tax law fails to perform any of duties of their office or employment; conspires or colludes with any other person to defraud Virgin Islands; knowingly makes opportunity for any person to defraud Virgin Islands; does or omits to do any act with intent to enable any other person to defraud Virgin Islands; makes or signs any fraudulent entry in any book, or makes or signs any fraudulent certificate, return, or statement; having knowledge or information of violation of any revenue law by any person, or of fraud committed by any person against Virgin Islands under any revenue law, fails to report, in writing, such knowledge or information to Commission; or demands, or accepts, or attempts to collect, directly or indirectly as payment or gift, or otherwise, any sum of money or other thing of value for compromise, adjustment, or settlement of any charge or complaint for any violation or alleged violation of law, except as expressly authorized by law so to do will be dismissed from office or discharged from employment and, will be fined not more than $10,000 or imprisoned not more than five years, or both. Court may in its discretion award out of fine so imposed amount, not in excess of one-half thereof, for use of informer, if any, who will be ascertained by judgment of court. Court will also render judgment against said officer or employee for amount of damages sustained in favor of party injured, to be collected by execution. (33 VIC 1533).

22.02 TAX EXEMPTIONS:

Background.

Virgin Islands residents who meet bona fide residence requirements of IRC 937, pay income tax only to Virgin Islands. (IRC 932[c]). United States taxpayers who have Virgin Islands source income allocate their income tax between United States and Virgin Islands, taking amount of income tax paid to Virgin Islands for taxable year as credit on their Federal return for that taxable year. (IRC 932[a] and [b]). In addition to inherent authority of Virgin Islands to grant exemptions to its own taxes, IRC grants Virgin Islands authority to reduce income taxes (IRC 934), but Virgin Islands may not reduce income taxes for United States taxpayers. (IRC 934[b]). Virgin Islands grants number of income tax reductions and exemptions, among them agriculture, certain Virgin Islands and foreign corporations in addition to those granted exemption pursuant to IRC 501(c), etc., Protected Cells of Research and Technology Park Protected Cell Corporation, environmental cleanup (Brownsfields) developers, Affordable Housing developers, businesses in Enterprise Zones and Virgin Islands Lottery winnings. Most notable is economic development program.

Economic Development Commission (EDC) administers granting of tax incentives to businesses that employ local residents and meet other requirements. Tax benefits under Virgin Islands Industrial Development Program (EDC program) are derived from authority granted by territorial government of Virgin Islands and authority of government of Virgin Islands to exempt from tax Virgin Islands source income and income effectively connected with Virgin Islands trade or business. (29 VIC 701; IRC 934[b]). It is important to note that agreement may be terminated on six months’ notice.

Administration.

Program is administered by Economic Development Commission (EDC), body of government officials and other persons appointed by Governor. Grant of benefits must be formally approved by Governor. (29 VIC 717[a]). EDC imposes conditions on granting of benefits, usually involving employment of specified number of local residents, but may also include specified amounts of contributions to local charities or work training grants. There are annual and quarterly reporting requirements to assure compliance with conditions of grant of benefits, and there are annual fees ranging from $500 to $2,500. (29 VIC 708[a]).

Benefits.

Benefits that EDC may grant are exemptions from income (29 VIC 713[b])[sic], excise, property, and gross receipts taxes (29 VIC 713[a])[sic], and customs duties (29 VIC 713[c])[sic].

Eligibility.

To receive benefits, applicant must be Virgin Islands individual or business entity and meet number of organizational and operational criteria. Foreign corporations are eligible if they register to do business in territory. (29 VIC 708[b]). Local investment, excluding inventory, for EDC applicant must be at least $100,000. (29 VIC 708[a]). There are special provisions for businesses qualifying as Small Businesses. (29 VIC 708[b]).

22.03 TAXES:

Customs Duties.

Customs duties are imposed on articles of foreign origin imported into Virgin Islands and shipped from within United States Customs Zone to total six percent. (33 VIC 525).

Container Tax.

Large standard size metal boxes into which cargo is packed for shipment configured for oceangoing ships brought into Virgin Islands are taxed at: $50 up to 50 feet in length and $100 if 40 or more feet in length except transshipment and in bond containers. (33 VIC 75).

Gross Receipts Tax.

There is tax of 4% on gross receipts of every individual and firm, corporation and other association doing business in Virgin Islands, unless specifically exempt. This tax is not to be stated separately, except on sale of motor vehicles when it must be stated separately. Individuals, firms, corporations and other associations whose annual gross receipts are less than $225,000 are exempt from gross receipts tax for first $9,000 in gross receipts each month. (33 VIC 43).

22.04 [RESERVED]

22.05 EMPLOYMENT TAXES:

Virgin Islands employers are subject to Federal Insurance Contributions Act taxes (Social Security and Medicare) which are reported on Forms 941-SS to IRS (IRC 3121[e][2]) and Federal Unemployment Tax Act taxes (IRC 3306[j][2]). Virgin Islands employers are required to file separate Forms 941VI with VI BIR to report income tax withholding.

Unemployment Compensation Tax.

Employers newly subject to law will be liable to pay contributions at rate of 1% of taxable wages until they become eligible for contribution rates based on their experience with contributions and cost of benefits paid to employees. Registration is with VI Department of Labor. (24 VIC 308).

Contributions will become due and be paid by employer to Commissioner of Finance for Unemployment Fund not less frequently than quarterly, and will not be deducted from wages of employees. (24 VIC 308).

Credit against FUTA tax may be taken. (IRC 3306[j][1]). Virgin Islands unemployment insurance law is in state of flux to ensure compliance with Federal regulations in order that Virgin Islands employers may continue to take this credit.

Workers' Compensation Insurance.

Employers with few exceptions must cover their employees with workers' compensation insurance which must be procured through VI Department of Labor. (24 VIC 272).

22.06 [RESERVED]

22.07 ESTATE TAX:

Federal Estate Tax law applicable. Taxable estate of person born in Virgin Islands (or other possession) or who became citizen because of residency in Virgin Islands (or other possession) is only property sited in 50 States and District of Columbia. (IRC 2106, 2208, 2209).

22.07A EXCISE TAXES:

Every individual, firm corporation and other association doing business in Virgin Islands, except those specially taxed, exempted or excluded, must pay excise tax on all goods, merchandise or commodities manufactured in or brought into Virgin Islands for personal use in business, for disposition or sale in business, for processing or manufacturing, or for any other business purpose, based on volume or value of such items. Value will be cost price of such items plus mark-up of 5%. Where item is sold more than once in course of business, its value will be included in excise tax calculation of manufacturer, importer or other first seller in Virgin Islands. (33 VIC 42).

Excise tax duties on certain specifically identified items have been removed in order to stimulate tourist industry in Virgin Islands. (33 VIC 42).

Federal excise taxes do not apply unless IRC section imposing tax expressly states it applies to Virgin Islands. Virgin Islands and Puerto Rico receive rebate of excise tax imposed on distilled spirits produced in those possessions and imported into 50 states and District of Columbia.

22.07B EXEMPT COMPANIES:

Regular corporations either with qualifying owners or that are engaged in specific activities may make election to be treated as Virgin Islands exempt company. Exempt company is exempt from income tax on its non-Virgin Islands and non-U.S. source income (13 VIC 855[b]), as well as gross-receipts tax (13 VIC 856, 33 VIC 43f), business license fees (13 VIC 859), and withholding tax (13 VIC 858).

Primary feature that distinguishes Virgin Islands exempt company from other Virgin Islands corporations is requirement that exempt company be at least 90% owned by non-U.S. and non-Virgin Islands persons. (IRC § 934[b]; 13 VIC 854[a]). For this purpose, non-U.S. person is anyone who is not resident of U.S., territories of U.S., or citizen of U.S. (IRC § 7701[a][3]; 13 VIC 851[f] & [g]).

Special types of exempt companies may be established for international banking (9 VIC 371) or as captive insurance company (22 VIC 1400).

Corporations granted income tax exemption under IRC 501(c) and other income tax provisions of IRC are exempt from Virgin Islands income tax.

22.08 GASOLINE AND SPECIAL FUELS TAXES:

Gasoline Tax.

Territorial tax of 7¢ is imposed on each gallon of gasoline and diesel fuel manufactured, sold, consumed or otherwise disposed of in Virgin Islands. (33 VIC 91). Virgin Islands also imposes tax at various rates on crude oil, unfinished oils or end products derived from oil and any other hydrocarbon mixture used in Virgin Islands. (33 VIC 97).

22.09 GIFT TAX:

Person is exempt from payment of Federal gift taxes if that person is considered "nonresident not a citizen of the United States" under 26 USC 2501(c), or Virgin Islands gift taxes if person was resident of Virgin Islands at time gift was made. (33 VIC 31). See "Estate Taxes" above. (IRC 2501[b]). For practical purposes, no Virgin Islands residents pay Virgin Islands gift taxes.

Imposition of Tax.

Tax computed as follows will be imposed upon transfer during a calendar year by any individual, resident or nonresident of property by gift, which property has its situs in Virgin Islands. Tax will apply whether transfer is in trust or otherwise, whether gift is direct or indirect, and whether property is real or personal, tangible or intangible. (33 VIC 21).

Computation of Tax.

Tax for each calendar year will be an amount equal to a tax computed in accordance with following rate schedule: 2½% on all net gifts from husband to wife, from wife to husband, from ascendants to descendants, or from children to parents; 5½% on all net gifts from brothers and sisters to brothers or sisters and latter's issue; and 7½% on all net gifts from others not mentioned above. (33 VIC 22).

Transfer for Less Than an Adequate and Full Consideration.

Where property is transferred for less than adequate and full consideration in money or money's worth, then amount by which value of property exceeded value of consideration will, for purpose of tax imposed, be deemed a gift, and must be included in computing amount of gifts made during calendar year. (33 VIC 23).

Net Gifts: Exclusions from Gifts.

Term "net gifts" means total amount of gifts made during calendar year, less deductions provided below. In case of gifts (other than of future interests in property) made to any person by donor during calendar year, first $3,000 of such gifts to such person will not, for purpose of imposition of this tax, be included in total of gifts made during year. (33 VIC 24).

Deductions.

In computing net gifts for calendar year there will be allowed as a deduction amount of all gifts made during year to or for use of: Virgin Islands for exclusively public purposes; corporation, or trust, or community chest, fund, or foundation, organized and operated exclusively for religious, charitable, scientific, literary, or educational purposes, including encouragement of art and prevention of cruelty to children or animals; no part of net earnings of which inures to benefit of any private shareholder or individual, and no substantial part of activities of which is carrying on propaganda, or otherwise attempting to influence legislation. (33 VIC 25).

Returns.

Any individual who within calendar year makes any transfers by gift (except those which are not to be included in total amount of gifts for such year) must make a return under oath in duplicate. Return must set forth: (1) Each gift made during calendar year which is to be included in computed net gifts; (2) deductions claimed and allowable; (3) such further information as may be required by regulations made pursuant to law. Return must be filed on or before 15th day of Mar. following close of calendar year. (33 VIC 26).

Payment of Tax.

Tax imposed by this statute must be paid by donor on or before 15th day of Mar. following close of calendar year. At request of donor, Director may extend time for payment of amount determined as tax by donor, for period not to exceed six months from date prescribed for payment of tax. In such case amount in respect of which extension is granted must be paid on or before date of expiration of period of extension. (33 VIC 27).

Lien for Tax.

Tax imposed by this statute will be lien upon all gifts made during calendar year, for ten years from time gifts are made. If tax is not paid when due, donee of any gift will be personally liable for such tax to extent of value of such gift. Any part of property comprised in gift sold by donee to a bona fide purchaser for adequate and full consideration in money or money's worth will be divested of lien imposed and lien, to extent of value of such gift, will attach to all property of donee (including after-acquired property) except any part sold to bona fide purchaser for adequate and full consideration in money or money's worth. If Director is satisfied that tax liability has been fully discharged or provided for, Director may under regulations prescribed by Bureau issue certificate, releasing any or all of property from lien imposed. (33 VIC 28).

22.10 [RESERVED]

Highway User's Tax.

Every person who purchases vehicle for use in Virgin Islands (except taxicab or bus) must pay tax at rate of 16 cents per unladen pound, minimum $25. (33 VIC 72).

Hotel Room Tax.

Guests for less than 90 days in hotel, apartment, condominium, or timeshare pay tax of 8% of gross room rent or rental. (33 VIC 54).

22.11 INCOME TAX:

Federal income tax laws in force in U.S. and those which may hereafter be enacted will be held to be likewise in force in Virgin Islands except that proceeds of such taxes will be paid into Treasury of Virgin Islands. Income tax is collected locally, and U.S. and Virgin Islands are distinct taxing jurisdictions although their income tax laws arise from identical statute applicable to each. (33 VIC 1931; 48 U.S.C. 1397).

10% surtax permitted on income taxes permitted by 48 USC 1397 is only imposed on corporate taxes, and is added before percentage reductions. See "Tax Exemptions" above. That is, Virgin Islands corporation qualifying for 90% reduction in income taxes would pay 11% of tax United States corporation pays on same taxable income. (33 VIC 581).

Inhabitants of Virgin Islands are required to pay their tax on income from all sources both within and without Virgin Islands into Treasury of Virgin Islands. (IRC 932[c]; Revised Organic Act of 1954, § 28). United States taxpayers with Virgin Islands source income allocate their income tax proportionately, taking tax paid to BIR for taxable year as credit on Federal tax return for taxable year. (IRC 932[b]).

Following provisions have been enacted to amend Internal Revenue Code as it applies in Virgin Islands:

Dividend Tax for Nonresident Aliens and Foreign Corporations.

Virgin Islands has reduced tax rate imposed by IRC §§ 871(a)(1), 881 and 884 to 10% (33 VIC 541), to which is added 10% corporate surtax if applicable, (33 VIC 581), making effective rate 11%.

Withholding Taxes for Nonresident Aliens and Foreign Corporations.

Rate of withholding tax imposed by §§ 1441 & 1442 of U.S. Internal Revenue Code as amended and as it applies to Virgin Islands is 10%.

Exemption for Mortgage Interest.

Interest payments received from sources within Virgin Islands for loans secured by mortgage or real estate located in Virgin Islands shall be exempt from tax imposed by IRC §§ 871(a)(1), 881 & 884 and withholding imposed by IRC §§ 1441 and 1442 (imposed upon nonresident aliens and foreign corporations), as amended and as it applies to Virgin Islands. (33 VIC 543).

22.12 INHERITANCE TAX:

Inheritances are exempt from payment of inheritance taxes if decedent, when living, would have been considered “nonresident not a citizen of the United States” under 26 USC 2501(c), or if decedent was resident of Virgin Islands or owned property situated in Virgin Islands, at time of their death, effectively abolishing Virgin Islands inheritance tax. Inheritances from estates of decedents who died prior to Sept. 18, 1984 are taxed at rates set forth below. (33 VIC 5).

Tax on Inheritances to and from Lineal Relatives.

Tax of 2½% is imposed on inheritances which fall from husband to wife, from wife to husband, from ascendants to descendants or from children to parents, which may be described as Class I inheritances. For purposes of computing tax on Class I inheritances, taxable amount of inheritances may be determined by deducting from total value thereof exemption of $50,000, prorated to each person receiving Class I inheritance in ratio that each inheritance bears to total amount of all Class I inheritances. (33 VIC 1).

Tax on Inheritances to Brothers and Sisters.

Tax of 5% is imposed on inheritances which fall to brothers and sisters and their issue, irrespective of their being sole heirs or inheriting jointly with one of their parents, which may be described as Class II inheritances. For purposes of computing tax on Class II inheritances, taxable amount of inheritances may be determined by deducting from total value thereof exemption of $30,000, prorated to each person receiving Class II inheritance in ratio that each inheritance bears to total amount of all Class II inheritances. (33 VIC 2).

Tax on Inheritances to Distant Relatives and Strangers.

Tax of 7½% is imposed on inheritances which fall to persons other than those mentioned above, which may be described as Class III inheritances, except however no tax may be imposed upon bequests to Government of Virgin Islands or any department or agency thereof, or to any charitable, educational or religious institution. For purposes of computing tax on Class III inheritances, taxable amount of inheritances may be determined by deducting from total value thereof exemption of $5,000, prorated to each person receiving Class III inheritance in ratio that each inheritance bears to total amount of all Class III inheritances. (33 VIC 3).

22.1322.15 [RESERVED]

Performances and Entertainments Tax.

This tax is imposed at rate of 5% of gross receipts on cockfights, horse races, theatrical performances, motion picture shows, boxing matches circuses and concerts (but not dances), except if event is held by or sponsored by religious, charitable, benevolent, civic, educational or other organization when not engaged in conduct of business for profit. (33 VIC 47).

Production Taxes.

Virgin Islands imposes production taxes, but only on manufacture of woolen yard goods. (33 VIC 501).

22.16 PROPERTY TAXES:

Real and Personal Property Taxable.

All real property, that is, immovables, things which from their nature, destination or object to which it applied, cannot move itself or be removed, is taxable. Generally speaking there is no personal property tax. (33 VIC 2401).

Exemptions.

Following property is exempt from taxation: Property of U.S., unless otherwise provided by Congress of U.S.; property of Government of Virgin Islands; every building used and set apart exclusively for religious worship or educational, literary, scientific or charitable purposes and every tract of land not exceeding five acres, upon which such buildings are situated, if such buildings and grounds are not used or leased with view to pecuniary profit of either owner or lessee; all cemeteries, subject to same condition as in preceding sentence; and all property to extent of homestead exemption provided for in § 2305 of this title. (33 VIC 2304).

Homestead Exemption and Tax Credits.

Certain tax credits are granted to eligible real property owners on real property levied against their homesteads. Tax credits are exclusive and not cumulative and with exception of homestead exemption where individuals may have one additional tax credit to homestead tax credit for each tax year, property owner eligible for more than one tax credit must elect single tax credit for year. Tax Assessor must provide tax credit of $400 to property owners and their spouses who reside in homestead; tax credit of $650 to property owners who are veterans or widows of veterans; tax credit of $500 to property owners who are 60 years of age or older on Jan. 1 of applicable tax year; and tax credit of $500 to property owners who have been found to suffer from disability, as determined by Social Security Administration, on Jan. 1 of applicable tax year. Senior citizen and disability tax credits are subject to income restrictions for property owner and household. (33 VIC 2305).

Farmland Exemption.

There will be exemption of 95% on real property taxes imposed on total area of land, including structures and improvements thereon, used actively and solely for agricultural or horticultural purposes. (33 VIC 2342).

Exemptions to Nonprofit Organizations.

There will be exempt from property taxes all real property owned by or held in trust for nonprofit organization when property is used or held for recreational, natural, historical or educational purposes. (33 VIC 2355a).

Assessment.

Duties of Tax Assessor.

Tax Assessor will at least once every five years, in case of noncommercial property and biennially in case of commercial property, upon actual view, value and assess all property subject to taxation in Virgin Islands. Assessor will have access to records of recorder of deeds, Commissioner of Public Works, or any other office of Government, and will list all alienations of property subject to taxation and will perform such other duties as may be required by law. (33 VIC 2402).

Method of Making Assessments.

Tax Assessor, in making assessment or in revising existing assessments, will list each piece or parcel of real estate separately, and give to each its assessed value, together with description of parcel and name and address of owner, insofar as such information can be obtained. Where real property embraces both land and improvements, assessed value of land and of improvements will be given separately. (33 VIC 2403).

Factors to be Considered in Assessment of Property.

In computing actual value of real property subject to taxation, assessor will take into consideration all of following elements and incidents: Location and surroundings; quality or fertility; condition of structures; recent cost to present owner; recent sale price of adjacent property; recent bona fide offer; accessibility; proximity to public facilities, conveniences and utilities; and rental or income derived directly from property. If property being assessed is commercial property, assessor may utilize capitalization of income method of assessment in conjunction with utilization of factors listed, so long as utilization of such method results in greater assessment than if not utilized. (33 VIC 2404).

Review of Assessment.

Any person aggrieved by action of assessor in relation to valuation of their property may make written complaint thereof to Board of Tax Review. Appeal forms are available at Office of the Tax Collector where property taxes are paid and can be filed at Office of the Lieutenant Governor. No such complaint or claim will be considered by Board unless it is presented by Sept. 15 succeeding year which assessment made and no statements or arguments on behalf of such complaint or appeal will be considered except those presented by aggrieved person, their duly accredited agent or attorney. (33 VIC 2451[a]).

Payment.

Rate of Tax.

For every calendar year value of real property will be assessed at 100% of its fair market value. There will be levied and collected tax of 0.004946 of such value on unimproved non-commercial real property; 0.003770 of such value on residential property; 0.007110 of such value on commercial property; and 0.014070 of such value on timeshare value. But this does not apply to unimproved real property which owner has acquired by Class I inheritance, that is inheritance from one spouse to other, ascendants to descendants, or children to parents. (33 VIC 2301).

Due Date and Penalty.

Taxes imposed on real property will be due and payable on June 30th of each year. Such taxes will become delinquent if not paid by Aug. 30th of each year. Office of the Tax Collector will collect additional sum of 1% of amount due for each month or fraction thereof for which taxes are delinquent not to exceed 25% of principal amount due. (33 VIC 2494).

Collection.

Tax Assessor will compute, upon assessed valuation of property of each person recorded in assessment records, amount of taxes to be paid by such person and such amount will be entered, with sufficient particularization and description of persons and property taxed, upon suitable records. Tax Assessor will deliver in due time, to Tax Collector, such tax receipts or tax-rolls as may be necessary and Tax Collector will be responsible for collection of taxes. Possession of such tax receipts or tax-rolls for taxes due upon any property will be sufficient warrant, on part of Tax Collector, for collection of said taxes and for attachment and sale of said property, in manner hereinafter provided, if said taxes are not paid within period of time provided by law. (33 VIC 2492).

Lien.

Unpaid taxes on real property shall be first lien against real property including any improvements thereon or that may be subsequently placed thereon. Lien shall be prior to all other liens on property whether they attach before or after lien. (33 VIC 2331).

Sale.

Lieutenant Governor shall collect by attachment and sale of property of delinquent taxpayer, any taxes not paid within 30 days from date of first publication of general notice of delinquent taxes published by Lieutenant Governor. (33 VIC 2541, 33 VIC 2496).

Lieutenant Governor shall prepare written notice of attachment of real property on which taxes are owing. Attachment shall be enforceable as soon as notice thereof shall have been served by leaving copy with debtor or any member of their family or attendants of legal age, or with two neighbors of debtor who shall be witnesses of service if debtor or family cannot be found, or if no witnesses can be found willing to receive notice, notice shall be posted in or attached to property of debtor. After levy of attachment Lieutenant Governor shall affix to notice certificate describing property attached and shall cause said certificate to be recorded in Office of Recorder of Deeds. (33 VIC 2541).

After levy of attachment, Lieutenant Governor shall advertise property for sale. Advertisement shall be published at least once in different newspaper of general circulation in each island district. (33 VIC 2546). At expiration of three weeks property shall be sold by Lieutenant Governor at public auction to highest bidder. No bid shall be accepted for amount less than taxes upon said property together with all costs and penalties thereon, and unless accompanied by cash deposit of 10% of amount bid. (33 VIC 2547).

Redemption.

Owner of any real property sold for nonpayment of real property taxes, their heirs, agents, or assigns or any person having right or interest therein may redeem same within one year from date of sale at public auction by paying to Office of the Lieutenant Governor full amount of all taxes for which property was offered at public auction, plus interest at rate of 12% per year computed on full amount of purchase money to date 30 days after tender is made to Office of the Lieutenant Governor, together with all penalties, costs incurred, taxes and public sewer system fee, user fees due and administrative fee of $15. (33 VIC 2581).

Real Estate Conveyance Tax.

None other than stamp tax. See topic 22.18 Stamp and Seal Taxes, subhead Stamp Tax.

22.17 SALES AND USE TAXES:

[Ed. Note: Personal Use Tax, 33 VIC 60, was repealed]

Vehicle Tire Tax.

Every person, business, partnership, firm, corporation or other association in Virgin Islands that purchases motor vehicle tires shall pay tax equal to $1 per tire 18 inches or under and tax of $2 per tire over 18 inches. (33 VIC 80).

22.18 STAMP AND SEAL TAXES:

Stamp tax on real property transferred by instrument of conveyance and personal property transferred by bill of sale at rate of 2% for property valued up to $350,000, 2½% for property valued from $350,001 to $1,000,000, 3% for property valued from $1,000,001 to $5,000,000, and 3½% for property valued over $5,000,001 is imposed. Stamp tax at rate of $25 is imposed on each certified copy of order, judgment, decree or other document issued by District or Superior Court of Virgin Islands. (33 VIC 121).

23 TRANSPORTATION

23.01 MOTOR VEHICLES:

General supervision over motor vehicles, registration and licensing is in Bureau of Motor Vehicles (amended Oct. 27, 2005 by Act 6761, § 3, Sess. L. 2005). For Division of St. Thomas, St. John: Bureau of Motor Vehicles, Charlotte Amalie, St. Thomas, Virgin Islands 00801. For Division of St. Croix: Bureau of Motor Vehicles, Christiansted, St. Croix, Virgin Islands 00820.

Vehicle License.

License plates will be of type prescribed by Director of Motor Vehicles and bear distinctive license numbers or personalized license number assigned by Director. License plates are effective for license year, expiring each year on last business day of month represented by last digit of license plate number. License plate may be made effective for such additional years as is deemed appropriate by Director, expiring each year as above, by proper placement of registration sticker prescribed and issued by Director on each license plate or on windshield of licensed vehicle. Buses, motorcycles and bicycles will be inspected in Aug. of each year and all vehicles belonging to Virgin Islands Government will be inspected in Dec. of each year. For motorcycles, mopeds, bicycles and trailers, one plate will be issued which must be carried in position clearly visible from rear. (20 VIC 334).

Operator's license required. Before issuing operator's license, applicant must successfully complete examination and Director may require proof that applicant is physically and mentally fit to operate motor vehicle. Every operator's license is effective until holder's birthday date in third calendar year following issuance. No person under 18 years of age will be granted license to operate motor vehicle, except that learners' permits may be granted to persons 16 or more years of age, licenses may be granted to persons 16 or more years of age to operate motor vehicles provided they have successfully completed approved driver education program, or licenses may be granted to persons 15 or more years of age to operate motor scooters, motorcycles, mopeds or motor bicycles of weight not exceeding 300 lbs. and powered by motor not more than 250 cc. capacity. No license will be issued to any minor less than 18 years of age, unless sooner emancipated, except on written consent to issuance of such license and written assumption of financial responsibility for damages resulting from any torts committed by minor arising from their operations of motor vehicle, by parent, guardian or other person responsible for care, custody or control of minor. No exemptions for members of Armed Forces. (20 VIC 371—20-375).

Titles.

See subhead Sales, infra. Certificates of Title. (20 VIC 201).

Sales.

If ownership of motor vehicle is transferred, transferor must, within 24 hours of such transfer, notify Director of Motor Vehicles on forms provided by Director. Upon receipt of such notice, Director will note such transfer of ownership on registration license of transferor, will cancel registration license by marking word “cancelled” across its face, and will void license plate issued with such registration license. Cancellation and voiding will not be effective until 48 hours after Director receives notice of transfer. (20 VIC 335).

Liens.

Any person who is injured by motor vehicle or whose property is damaged thereby may have lien against such motor vehicle for their claim of damages, if they record such lien with Director of Motor Vehicles within period of eight days from date of injury or damage and if they commence action against owner of motor vehicle in court of competent jurisdiction within period of 30 days from date of injury or damage. Transfer of property in motor vehicle during such period will not divest injured or damaged person of their right of lien thereon. (20 VIC 542).

Liens may also be filed under provisions of Motor Vehicle Certificate of Title Act. See category 3 Business Regulation and Commerce, topic 3.09 Commercial Code.

Traffic ticket constitutes lien on title of motor vehicle upon which ticket was placed which lien will continue in existence until ticket is paid or discharged according to law. No motor vehicle will be registered or licensed, nor will a change of ownership be registered until all liens on vehicle have been discharged. (20 VIC 497).

Identification Marks.

Person who willfully removes or falsifies identification number of vehicle or of engine for vehicle is guilty of misdemeanor. (14 VIC 1386).

Operation Prohibited.

No specific statutory provisions other than those pertaining to operator’s license.

Size and Weight Limits.

Regulated by 20 VIC 500 and 20 VIC 351 et seq.

Equipment Required.

Regulated by 20 VIC 462, 463, 464.

Lights Required.

See subhead Equipment Required, supra.

Inspection.

Before issuing registration license to owner of motor vehicle, Director of Motor Vehicles will see that it is in satisfactory condition to insure safety on public highways, and that its equipment is in full compliance with requirements of this title. At any time that it is deemed necessary, Director may examine and inspect any motor vehicle to insure safety on public highways, and may order owner or operator to make necessary repairs. (20 VIC 461).

Registration of motor vehicles required annually. Submit proof of insurance, show driver’s license, pass motor vehicle inspection, have no outstanding traffic citations, and pay appropriate fee.

Traffic Regulations.

Governed by 20 VIC 491 et seq.

Accidents.

In case of accident to person or property due to operation of motor vehicle or bicycle, person operating such vehicle must stop and give their name and address and license number to person injured, or to any policeman or other person interested, and if they are not owner of vehicle, also name and address of such owner. They must also report details of such accident at nearest police station. In case of personal injury, motor vehicle causing such injury will take injured person(s) to hospital, if desired, or residence of such injured person. (20 VIC 541).

Liability of Owner.

No specific statutory provisions. See Restatements of Law.

Guests.

No specific statutory provisions. See Restatements of Law.

Proof of Financial Responsibility.

No motor vehicle shall be registered except upon filing by owner of vehicle with Police Commissioner proof of coverage by satisfactory “owner’s” policy of liability insurance. (20 VIC 701).

Proof shall include written certificates of any insurance carrier admitted and duly authorized to do business in Virgin Islands, certifying that there is in effect motor vehicle liability policy for benefit of person required to furnish proof of coverage by satisfactory liability insurance. (20 VIC 707).

In addition to filing of certificate of insurance, owner of motor vehicle which is required to provide such proof shall affix to vehicle identifying sticker showing that vehicle is covered by required insurance. (20 VIC 708).

Insurance.

Compulsory Automobile Liability Insurance is required in Virgin Islands. (20 VIC 701).

No-Fault Insurance not adopted.

Nonresident Operators.

If person holds bona fide unexpired operator’s license issued by State of U.S. or territory or possession thereof, such person shall be permitted to operate motor vehicle in Virgin Islands as if they held valid Virgin Islands operator’s license; however, said person shall be required to obtain Virgin Islands operator’s license as provided in this chapter within 90 days after their date of arrival in Virgin Islands. If person holds bona fide unexpired operator’s license issued by foreign country, Director of Motor Vehicles shall issue temporary permit to drive for period not exceeding 30 days upon payment of fee prescribed by law. (20 VIC 376).

Actions against Nonresidents.

Any nonresident who operates motor vehicle in Virgin Islands, and any nonresident who owns motor vehicle which is operated in Virgin Islands with their express or implied consent, is deemed to have appointed Lieutenant Governor of Virgin Islands as their agent upon whom may be served process in any action against him arising out of any accident or collision occurring within Virgin Islands in which motor vehicle is involved while being so operated. Such operation is signification of agreement by such nonresident that any process so served will be of same force and validity as if served upon him personally within Virgin Islands.

Such nonresident is also deemed to have agreed that such appointment is irrevocable and binding upon their executor or administrator. If nonresident dies prior to commencement of action under this section, service of process will be made on their executor or administrator in same manner as that provided by this section for service upon nonresident. (20 VIC 543).

Limitations on Recovery.

Total amount recoverable for noneconomic damage (pain and suffering; physical impairment; disfigurement; and non-pecuniary damages) for injury to person in action arising in motor vehicle accident may not exceed $75,000. This limitation shall not apply upon finding of gross negligence or willful conduct. (20 VIC 555). Virgin Islands is contributory negligence jurisdiction with burden of proof on defendant. (5 VIC 1451).

Virgin Islands has medical malpractice recovery cap where total amount recoverable for any injury of patient may not exceed $250,000 per occurrence. (27 VIC 166[b]). There is two-year statute of limitations. (27 VIC 166[d]).

Direct Actions.

No statutory provisions.

Moving Violations Point System.

System is established to improve highway safety by identifying those drivers who have repeatedly been convicted of moving violations. (20 VIC 801).

Motor Vehicle Carriers.

No statutory provisions.

Motor Vehicle Taxes.

Every person or firm (except person or firm who or which purchases motor vehicle to be used as either taxicab or bus to be operated under franchise granted by Governor) before registering motor vehicles (whether new, used or licensed previously as taxicab) in Virgin Islands for first time will pay highway user's tax according to weight of vehicle at rate of 16¢ per pound. Minimum tax will be $25. (33 VIC 72).

Gasoline Tax.

See category 22 Taxation, topic 22.08 Gasoline and Special Fuels Taxes, subhead Gasoline Tax.

24 FORMS

Commercial Code Forms

(Click here to view)

1
VIRGINIA LAW DIGEST

—Scope —

Revised for 2010 edition by

McGUIREWOODS LLP of Almaty, Atlanta, Baltimore, Brussels, Charlotte, Charlottesville, Chicago, Jacksonville, London, Los Angeles, New York, Norfolk, Pittsburgh, Raleigh, Richmond, Tysons Corner, Washington, D.C., and Wilmington.

(General citations refer to official Code of Virginia; Const. refers to Constitution of Virginia; Rules refer to Rules of Supreme Court of Virginia published in Vol. 11 of the Code of Virginia. Parallel citations to the South Eastern Reporter begin with 83 Va.)

Note: 2009 legislation includes session laws through Special Session I (Aug. 19, 2009). Legislature convenes annually on 2d Wed. in Jan.

1 INTRODUCTION

1.01 GOVERNMENT AND LEGAL SYSTEM:

The Commonwealth of Virginia is a constituent state of the United States of America. For further discussion of the U.S. federal system, see Introduction to the Federal Government of the United States at the beginning of this volume. A great many laws are promulgated by the federal government of the United States and are not reflected in the topics below. See the Introduction to this volume for references to the federal law topics covered.

Like all but one of the United States, Virginia has a common law legal system, with roots in English common law. For information on the courts and legislature of Virginia, see category 6 Courts and Legislature.

1.02 [RESERVED]

1.03 HOLIDAYS:

Legal holidays are: Jan. 1, Fri. preceding 3d Mon. of Jan., 3d Mon. of Jan., 3d Mon. of Feb., last Mon. of May, July 4, 1st Mon. of Sept., 2d Mon. of Oct., Nov. 11, 4th Thurs. of Nov., Fri. next following 4th Thurs. of Nov., Dec. 25, and any day appointed by President or Governor. If holiday falls on Sat., preceding Fri. is holiday, or if holiday falls on Sun., following Mon. is holiday. (2.2-3300). Banks permitted to close any office on Sat. and any such Sat. constitutes legal holiday with respect to such office. (6.1-5.4). No transaction of contract, or in administration of justice, or relating to banking is invalid because done on legal holiday or Sat. (2.2-3301).

1.04 OFFICE HOURS AND TIME ZONE:

Virginia is in the Eastern time zone. Office hours are generally from 9 a.m. to 5 p.m.

2 BUSINESS ORGANIZATIONS

2.01 AGENCY:

Presumption of General Agency.

Unless displaced by particular provisions of law, general principles of law relative to principal and agent shall apply.

Corrupt Practices.

Corruptly influencing agent, or agent being corruptly influenced, to prejudice of principal, is misdemeanor. (18.2-444).

2.02 ASSOCIATIONS:

Formation.

Organization of unincorporated associations is not regulated by statute. If they have a system of lodges with representative government and provide benefits they are regulated as fraternal benefit societies. (38.2-4100, et seq.). Five or more persons may form cooperative association, society, company or exchange to conduct housing, agricultural, fishing, dairy, mercantile, merchandise, brokerage, water, sewer, manufacturing, service or mechanical business on cooperative plan or to represent or provide financing for such cooperative association, exchange, company or society. Except for cooperative association organized to conduct business as water and sewer company, no cooperative association shall conduct any business in Commonwealth as public service company or exercise any privileges of such company. (13.1-301). In particular, agricultural cooperative associations governed by statute. (13.1-313, et seq.).

Actions.

Unincorporated association or order may sue or be sued under name by which it is commonly known or under which it does business. Judgments, orders and executions bind its real and personal property as if it were incorporated. (8.01-15).

Service on foreign unincorporated association or order that transacts business or affairs in Virginia may be made on clerk of State Corporation Commission, who will send it by registered mail pursuant to Va. Code 12.1-19.1, or service may be on any officer, trustee, director, staff member, or agent in jurisdiction. (8.01-306). If service may not be had in this way, order of publication may be awarded. (8.01-306, -316, -317). Service on domestic unincorporated association or order may be made on any officer, trustee, director, staff member or other agent. (8.01-305). Any person subject to service as set forth in §§ 8.01-301 through 8.01-306 (except for Secretary of the Commonwealth and Clerk of the State Corporation Commission) who receives actual notice of action may have duty to avoid any unnecessary costs of serving process. (Va. Code 8.01-286.1).

Trustees for Churches, Etc.

Courts may appoint trustees to hold limited amounts of real and personal property for churches (57-7.1, -8), cemetery associations (57-22, -23, -26), Freemasons, Odd Fellows, Sons of Temperance, Elks, or any benevolent or literary association or school league, or veterans association (57-18, et seq.).

Professional Associations.

See topic 2.03 Corporations, subhead Professional Corporations.

2.03 CORPORATIONS:

Virginia has revised “Virginia Stock Corporation Act”, effective Jan. 1, 1986, which is applicable to all stock corporations whether formed before or after Act took effect. (13.1-601 et seq.). Act is modeled to some extent on Revised Model Business Corporation Act, prepared and sponsored by Committee on Corporate Laws of the Section of Corporation, Banking and Business Law of the American Bar Association reproduced in Uniform and Model Acts section.

State Corporation Commission, The Tyler Bldg., 1300 E. Main St., Richmond, Va. 23219, has general control of corporations. (12.1-12). Appeal from its action lies to Supreme Court. (12.1-39).

Name.

Must contain “corporation”, “incorporated”, “company”, “limited”, “corp.”, “inc.”, “co.” or “ltd.”, must be distinguishable from other corporate names and must not indicate unauthorized corporate purposes. (13.1-630). Name may be reserved for renewable 120 day period (13.1-631) for $10 fee (13.1-616). Availability of name can be determined by phone to clerk of State Corporation Commission.

Term of Corporate Existence.

Duration of corporate existence is perpetual unless otherwise specified. (13.1-627).

Incorporators.

Following minimum numbers of incorporators are required: Credit union, five (6.1-225.13); cooperative association, five (13.1-301); other stock corporations, one (13.1-618); non-stock corporations, one (13.1-818).

Articles of Incorporation.

Must be signed by incorporators (13.1-618), and must set forth: name of corporation; address of its initial registered office; name and qualification of initial registered agent; number of authorized shares, designated by class or series if more than one class or series; classes of insurance, if insurance corporation; and certain other information if public service company, railroad, bank, trust company, savings and loan or industrial loan association, savings bank or credit union. (13.1-619, -620).

Filing.

One copy of articles of incorporation must be filed with State Corporation Commission. (13.1-618).

Charter Fees.

Upon granting charter, fee is payable by every domestic corporation according to its number of authorized shares. Fees for corporations with 1,000,000 or fewer authorized shares are $50 for each 25,000 authorized shares or fraction thereof. Fee is $2,500 for corporations with greater than 1,000,000 authorized shares (13.1-615.1). Fee for non-stock corporation is $50. (13.1-815.1).

Certificate of Incorporation.

State Corporation Commission, after receipt of articles of incorporation and payment of fees, shall order issuance of certificate of incorporation. (13.1-621).

Organization.

Incorporators deliver to State Corporation Commission articles of incorporation and State Corporation Commission issues certificate of incorporation upon issuance of which corporate existence begins. (13.1-621). If initial directors named in articles, majority of such directors calls meeting of directors who proceed to elect officers, adopt by-laws, accept subscriptions to stock and transact other business. If initial directors not named in articles of incorporation, incorporator(s) may elect directors and complete organization or elected directors complete organization. (13.1-623).

Paid in Capital Requirements.

None.

Amendment of Articles.

With exception of housekeeping amendments which may be adopted by board of directors without shareholder action (13.1-706), following steps are required: (1) Board of directors must adopt proposed amendment (13.1-707); (2) board of directors recommend amendment or make no recommendation because of conflict of interest or other special circumstances which it explains to shareholders (13.1-707); (3) notice of shareholders' meeting must be given not less than 25 nor more than 60 days before meeting, to voting and nonvoting shareholders alike, accompanied with copy of proposed amendment (13.1-658, -707); (4) more than two-thirds of shares entitled to vote must approve amendment; however, articles of incorporation may allow shareholder approval upon majority of votes cast or any greater affirmative vote and board of directors may add special conditions including increasing shareholder vote required for approval (13.1-707); (5) articles of amendment containing information required by § 13.1-710 must be signed in name of corporation by chairman or any vice-chairman of board of directors, or president or any other authorized officer and filed with State Corporation Commission together with required fees (13.1-604). Certain rights of classes of shares cannot be affected without approval of shares of such class. (13.1-708).

Amendment of By-Laws.

Unless otherwise stated in articles of incorporation or by-laws, board of directors may amend or repeal. Shareholders may also amend or repeal. (13.1-714).

Shares.

Corporations may have one or more classes of shares and series of shares within class. Par value not required. Each class or series must have distinguishing designation. Prior to issuance of shares, class or series' preferences, limitations and relative rights must be described in articles of incorporation. (13.1-638). If articles so provide, directors may classify or reclassify any unissued shares of any class or series. (13.1-639). Class or series may have special, conditional or limited voting rights, be redeemable or convertible as specified in articles of incorporation, entitle holders to cumulative dividends, have preference over other classes or series with respect to distributions and have other specified rights. (13.1-638).

Share Certificates.

If corporation authorized to issue different classes of shares or different series, share certificate must contain statement or summary of relative rights or state that such information will be furnished on request and without charge. (13.1-647).

Issuance of Shares.

Subscriptions for shares may be paid in cash, promissory notes, property or services, including contract for future services, in accordance with terms of subscription. (13.1-643).

Preemptive Rights.

Shareholders of corporation incorporated on or before Dec. 31, 2005 have preemptive rights unless limited or denied in articles of incorporation. Unless otherwise provided for in articles of incorporation, shareholders of corporation incorporated after Dec. 31, 2005 have no preemptive right to acquire corporation's unissued shares upon decision of board of directors to issue them. Unless expressly conferred in articles of incorporation, there is no preemptive right with respect to shares issued to directors, officers or employees pursuant to plan approved by shareholders or shares sold other than for money. Shares with preferential rights do not have preemptive rights to any other shares. Shares without preferential rights have no preemptive rights to shares with preferential rights. Shares without general voting rights and without preferential rights have no preemptive rights to shares with general voting rights but without preferential rights. (13.1-651).

Record Date.

Record date may be fixed by bylaws or by board of directors up to 70 days before meeting or action requiring determination of shareholders. (13.1-660).

Dividends may be declared on shares in cash, property or corporation's own shares, except when contrary to articles of incorporation or provisions of § 13.1-653.

Uniform Commercial Code.

Adopted. (8.1A-101 et seq.). See category 3 Business Regulation and Commerce, topic 3.09 Commercial Code.

Uniform Act for Simplification of Fiduciary Security Transfers.

Repealed 1996, effective Jan. 1, 1997.

Shareholder Derivative Actions.

Permitted if plaintiff was shareholder of corporation at time of alleged wrongdoing and fairly represents interests of corporation in enforcing, and proves that written demand was made on corporation to take suitable action and 90 days has expired from date demand made unless demand is rejected or irreparable injury to corporation would result by waiting until end of 90 day period. (13.1-672.1).

Shareholders' Liabilities.

When full subscription price is paid shares are fully paid and non-assessable. (13.1-643).

Shareholders' Meeting.

May be held in or out of state unless bylaws provide otherwise. (13.1-654). Meetings other than annual meeting may be held at any time on call of chairman of board, president, board of directors or others as provided in articles of incorporation or bylaws. (13.1-655). In case of corporations with 35 or fewer shareholders, holders of 20% of shares may call special meeting unless articles of incorporation provide for greater or lesser percentage. (13.1-655). Notice to shareholders of date, time and place of each annual and special meeting must be given not less than ten nor more than 60 days before meeting (not less than 25 days in case of amendment of articles, merger or share exchange, domestication or entity conversion, sale of assets or dissolution). In most cases notice required only to shareholders entitled to vote. Except in certain cases, annual meeting notice need not state purpose. Notice of special meeting must state purpose. Notice not required to shareholder if certain mailings have been returned undeliverable. Notice obligation reinstated once corporation receives new address. (13.1-658). Shareholder may waive notice in writing or by attendance at meeting, unless attendance is to object. (13.1-659). Shareholders' list must be made available as prescribed for ten days prior to meeting. (13.1-661). Unless otherwise provided by articles of incorporation or by statute, majority of shares entitled to vote constitutes quorum. (13.1-666). Shareholders may act without meeting by unanimous written consent of all shareholders entitled to vote; no board action required. If articles permit, shareholders of corporation that is not public corporation may act by written consent of minimum number of votes required to take such action at meeting of all shareholders entitled to vote. (13.1-657).

Shareholder Agreements.

Corporation that is not public corporation may be governed by rules agreed to by shareholders in lieu of applicable statutory provisions. Agreement must be set forth in articles or bylaws and approved by all shareholders or in shareholder agreement signed by all shareholders. Agreement valid for ten years unless agreement provides otherwise or corporation becomes public corporation. (Va. Code 13.1-671.1).

Voting.

Unless otherwise provided in statute or articles, each person in whose name share stands on books of corporation at date fixed is entitled to one vote, in person or by proxy, including electronically transmitted proxy, for each share in his name. Shares held by subsidiary cannot be voted. (13.1-662; -663). Proxies expire 11 months after date unless otherwise provided in the proxy, and are revocable unless proxy states otherwise and is coupled with interest. (13.1-663).

Control Share Acquisitions.

Statute (Va. Code 13.1-728.1 to -728.9) provides that shares whose acquisition would cause acquiring person to cross any of three stock ownership thresholds (20%, 33.3% or 50%) shall have no voting rights unless such rights are granted by vote of majority of shares entitled to be cast by disinterested shareholders (13.1-728.1, -728.3). Applies to all Virginia public corporations, unless corporation's bylaws or articles of incorporation provide otherwise, and to all acquisitions except those specifically exempted by statute. (13.1-728.1, -728.2). Vote on granting voting rights to control shares shall be voted on at special meeting of shareholders called for that purpose or at subsequent annual meeting. (13.1-728.5). Any acquiring person may, after any control share acquisition or before any proposed one, deliver control share acquisition statement prior to public corporation at its principal office. (13.1-728.4).

Voting Trusts.

May be created for term up to ten years and may be extended for additional ten year terms. (13.1-670). Voting agreements, authorized by 13.1-671 are not similarly restricted.

Directors.

Number of directors fixed in bylaws or in articles of incorporation, but may be changed by vote of board of directors. Articles or bylaws may establish variable range. At least one director required. No director may be named without prior consent. (13.1-675). Director need not be resident of state or shareholder unless articles or bylaws so prescribe. (13.1-674). Term of director normally one year. (13.1-677). Staggered terms are permitted with terms of two or three years. (13.1-678). Unless articles provide otherwise, director vacancies may be filled by shareholders or by board of directors. (13.1-682). Unless otherwise provided in articles or bylaws, directors elected by plurality of votes cast. Articles may authorize cumulative voting. (13.1-669).

Emergency by-laws in case of catastrophic event preventing quorum of directors permitted under 13.1-625.

Liability of Directors.

Director not liable for action taken as director, or any failure to take action if duties discharged in accordance with good faith business judgment of best interests of corporation. (13.1-690). Observing this standard of conduct will protect director from liability even for unlawful distributions. (13.1-692). Director is entitled to rely in good faith on reports of officers, employees, counsel, accountants, other professionals, and committees of board of directors. (13.1-690). In proceeding brought by or in right of corporation or by or on behalf of its shareholders, director and officer liability is limited or, if approved by shareholders in articles of incorporation or bylaws, eliminated, unless misconduct was willful or involved knowing violation of criminal law or federal or state securities law. Amendment of articles of incorporation or bylaws may not affect such limitation or elimination with respect to earlier acts or omissions. (Va. Code 13.1-692.1).

Director Conflict of Interest.

Transaction with corporation in which director has interest that precludes him from being disinterested. Conflicts of interest transaction may be voidable by corporation, but not solely because material facts of transaction and director's involvement were disclosed or known to board of directors or shareholders who approved transaction, or transaction was fair to corporation. Additional requirements must be met for corporation to authorize, approve, or ratify conflicts of interest transaction. (13.1-691).

Directors' Meetings.

Directors may hold meetings in or out of state and may participate by telephone. (13.1-684). Majority of directors constitutes quorum unless greater number required by articles or bylaws. (13.1-688). Unless prohibited by articles or bylaws, directors may take action by unanimous written consent. (13.1-685).

Officers.

Corporation must have officers with titles and duties as stated in bylaws or in resolution of board of directors not inconsistent with bylaws and as may be necessary to execute documents that comply with subsection F of 13.1-604. One person may hold more than one office. (13.1-693).

Indemnification of Officers and Directors.

Indemnification authorized by statute for conduct in good faith believed to be in best interests of corporation (or if person not acting in official capacity, conduct believed not to be opposed to corporation's best interest) and, in case of criminal proceedings, if person had no reasonable cause to believe conduct was unlawful. (13.1-697). Unless limited by articles of incorporation, director or officer who “entirely prevails” in defending proceeding against him is entitled to indemnification against reasonable expenses, including attorney's fees. (13.1-698, -702). Articles of incorporation, bylaw made by shareholders, or resolution adopted by shareholders, before or after event, may provide for indemnification in addition to that authorized or mandated by statute except that no indemnity is permitted for willful misconduct or knowing violation of criminal law. Amendment of articles of incorporation or bylaws may not reduce right to indemnification with respect to earlier acts or omissions. (13.1-704).

Registered Office and Agent.

Corporation must have registered office and registered agent. Registered agent must be (i) individual who is resident of state and either officer or director of corporation or member of Virginia State Bar, and whose business office is registered office or (ii) domestic or foreign stock or nonstock corporation, limited liability company or registered limited liability partnership authorized to transact business in state, business office of which is identical with registered office provided such registered agent shall not be its own registered agent and shall designate one or more natural persons upon whom any process, notice or demand may be served and shall continuously maintain at least one such person at that office. (13.1-634). Corporation subject to automatic termination if fails to replace resigned registered agent within period of no less than two months following notice from State Corporation Commission. (13.1-752[C]).

General Powers of Corporations.

See subhead Articles of Incorporation, supra.

Unclaimed Dividends.

See category 21 Property, topic 21.01 Absentees, subhead Escheat.

Sale or Transfer of Corporate Assets.

Unless articles provide otherwise, no shareholder approval required for corporation to: (1) Sell, lease, exchange, or otherwise dispose of any or all of corporation's assets in regular course of business; (2) mortgage, pledge or dedicate to repayment of debt, or otherwise encumber any or all of corporation's assets, whether or not in regular course of business; (3) transfer any or all of corporation's assets to one or more wholly-owned domestic or foreign corporations or eligible entities; or (4) distribute assets pro rata to holders of one or more classes or series of corporation's shares. (13.1-723). Sale, lease, exchange or other disposition of corporation's assets, other than disposition described in § 13.1-723, requires shareholder approval if disposition would leave corporation without significant continuing business activity. (13.1-724). Unless articles or bylaws provide otherwise, corporation deemed to have retained significant continuing business activity if it retains business activity that represented at least 20% of total assets at end of most recently completed fiscal year, and 20% of either: (1) Income from continuing operations before taxes, or (2) revenues from continuing operations for that fiscal year. (13.1-724). For disposition requiring shareholder approval, board of directors must adopt resolution and submit to shareholders for approval with recommendation to approve (unless board makes no recommendation to approve because of conflict of interest or other special circumstances which it explains to shareholders) and approval by more than two-thirds of shares entitled to vote at meeting held on not less than 25 or more than 60 days' notice stating purpose of meeting. Articles of incorporation may allow shareholder approval upon majority of votes cast or any greater affirmative vote. Board of directors may add special conditions including increasing shareholder vote required for approval. (13.1-724). Dissenters' rights are available. (13.1-730).

Affiliated Transactions.

Unless articles provide initially or articles or bylaws provide through shareholder amendment (approved by majority of disinterested shareholders) that these provisions do not apply, no corporation with more than 300 shareholders may engage in affiliated transactions with or proposed by interested shareholder for three years after such shareholder became interested shareholder unless approved by majority of disinterested directors and two-thirds of disinterested shareholders. After three-year period, either approval by majority of disinterested directors, approval by two-thirds of disinterested shareholders, or payment of “fair value” to disinterested shareholders is required. Interested shareholders include beneficial owners of more than 10% of any class of outstanding voting shares and affiliates or associates of corporation who were interested shareholders within preceding three years. Affiliated transactions include mergers; share exchanges; sales of assets, and guaranties, outside ordinary course of business for amounts greater than 5% of corporation's net worth; sales of greater than 5% of aggregate fair market value of stock; dissolution; and certain reclassifications and recapitalizations. Certain conditions may render these provisions inapplicable to specific transactions. (13.1-725 to -727.1).

Corporate Bonds or Mortgages.

Corporation may mortgage its assets or otherwise encumber any or all of its property whether or not in usual and regular course of business on terms and conditions and for consideration determined by board of directors. Unless articles require it, shareholders need not approve. (13.1-723).

Capital.

Stated capital abolished.

Merger and Share Exchange.

One or more corporations or eligible entities may merge into one or more corporations or eligible entities pursuant to plan of merger. (13.1-716). Corporation may also acquire all outstanding shares of one or more classes or series of another corporation or all eligible interests of one or more classes or series of eligible interests of eligible entity pursuant to plan of share exchange. (13.1-717). Short form mergers to form holding companies also permissible. (Va. Code 13.1-719.1). Absent statutory exception, merger or share exchange must be adopted and recommended by board of directors (unless board makes no recommendation because of conflict of interest or other special circumstances which it explains to shareholders) and must be approved by more than two-thirds of shares entitled to vote at meeting held on not less than 25 or more than 60 days' notice stating purpose of meeting. (13.1-718). Articles may allow shareholder approval upon majority of votes cast or any greater affirmative vote. Board of directors may add special conditions, including increasing shareholder vote required for approval. (13.1-718). Dissenters' rights may be available. (13.1-730). Plan of merger or share exchange need not be approved by shareholders of surviving or acquiring corporation if articles will not change (except for amendments permitted by § 13.1-706), and shareholders will hold same number of shares with identical preferences, limitations, and rights before and after effective date of merger or share exchange. (13.1-718). After approval, articles of merger or share exchange filed with State Corporation Commission which issues certificate of merger. (13.1-720). Unless articles provide otherwise, 90% subsidiary may be merged into parent without shareholder approval (13.1-719); parent may merge into 90% subsidiary without subsidiary shareholder approval (13.1-719). Similarly, if specified conditions met, constituent corporation may merge indirect subsidiary into itself, or merge itself into indirect subsidiary, to form holding company, without approval of shareholders of constituent corporation or directors or shareholders of indirect subsidiary. (13.1-718). See subhead Sale or Transfer of Corporate Assets, catchline Affiliated Transactions, supra.

Dissolution and Receivers.

Voluntary dissolution may be undertaken upon recommendation of board of directors and approval of shareholders. Articles of dissolution must be filed with State Corporation Commission which then issues certificate of dissolution. (13.1-742, -743). Corporation must then wind up and liquidate its business. (13.1-745). When corporation has distributed all its assets to its creditors and shareholders, it shall file articles of termination of corporate existence (and statement as to filing all returns and payment of all state taxes) with State Corporation Commission. (13.1-750). Articles of termination may be filed by incorporators or initial directors before issuance of stock or commencement of business. (13.1-751). Upon finding articles of termination of corporate existence in order, Commission shall issue certificate of termination of corporate existence upon which existence of corporation shall cease. (13.1-750). Upon failure of corporation to file annual report or pay annual registration fee, corporate existence shall automatically cease as of last day of fourth month immediately following due date and its properties and affairs shall pass automatically to its directors as trustees in liquidation. Commission may order involuntary termination of corporate existence when: (1) Corporation has continued to exceed or abuse its authority; (2) has failed to maintain registered office or registered agent in state; (3) has failed to file any Commission-required document; or (4) has been convicted for violation of 8 U.S.C. § 1324a(f), as amended, for actions of its officers and directors constituting pattern or practice of employing unauthorized aliens in state. (13.1-753). Dissolution may be subject to affiliated transactions provisions. See catchline Affiliated Transactions in subhead Sale or Transfer of Corporate Assets, supra. See also subhead Registered Office and Agent, supra.

Insolvency and Receivers.

Courts of record have power to liquidate assets and business under certain conditions, and on finding it is in best interests of both creditors and stockholders to appoint custodians to manage corporations. (13.1-747).

Close Corporations.

No statutory provisions relating thereto. See subhead Shareholder Agreements, supra.

Appraisal.

Merger and share exchange. (13.1-730). Sale, lease, exchange or other disposition of corporate assets if shareholder entitled to vote on disposition under § 13.1-724. (13.1-730).

Domestication.

Domestic corporation not required by law to be domestic corporation may become foreign corporation. (Va. Code 13.1-722.2).

Foreign Corporations.

Foreign corporation must make application to State Corporation Commission for certificate of authority to transact business in state. (13.1-757). Application must set forth among other things (1) name of corporation, and if corporation is prevented by § 13.1-762 from using its own name in Commonwealth, designated name that satisfies § 13.1-762(B), (2) jurisdiction of incorporation, (3) date of incorporation and period of duration, (4) street address of principal office, (5) address of registered office and name and qualification of registered agent, (6) name and business address of current directors and officers and (7) authorized capital. Form of application is prescribed by Commission. (13.1-759). Corporation is authorized to do business in state upon issuance of certificate of authority but has no greater rights than domestic corporation. (13.1-761). It must maintain registered office in state and registered agent who must be (i) individual resident of state and either officer or director of corporation or member of Virginia State Bar whose business office is identical with such registered office, (ii) domestic or foreign stock or nonstock corporation, limited liability company, or registered limited liability partnership authorized to transact business in state, business office of which is identical with registered office; provided such registered agent shall not be its own registered agent and shall designate one or more natural persons upon whom any process, notice or demand may be served and shall continuously maintain at least one such person at that office. (13.1-763). Copy of articles and all amendments must be filed with application and any subsequent amendments must also be filed with Commission. (13.1-759, -760). Unless limited statutory exception applies, corporation must file with Commission articles of merger in event it is surviving corporation of merger. Corporation must also procure amended certificate of authority in event of change of its corporate name. (Va. Code 13.1-766.1). Corporation may withdraw from state upon filing of all tax returns and payment of all taxes and charges and delivering to Commission statement of withdrawal in form required by Act. (13.1-767). Failure to file annual report required or to pay annual registration fee before last day of fourth month immediately following due date or to replace resigned registered agent within two months of written notice, shall result in automatic revocation of Certificate of Authority. (13.1-768). Commission, after notice and opportunity to be heard, may revoke certificate of authority if corporation exceeds authority conferred upon it by law, fails to maintain registered office or registered agent as required, has failed to file any document required by Act to be filed with Commission or no longer exists under laws of jurisdiction of its incorporation. (13.1-769).

No foreign corporation doing business in state may maintain any proceeding in any court in state until such corporation has obtained certificate of authority. (13.1-758). Failure to procure certificate of authority does not impair validity of any contract or act of such corporation. Transacting business in state without certificate of authority makes directors, officers and employees of corporation doing such business knowing that certificate of authority is required subject to fine of up to $5,000 by Commission (13.1-758); any such person shall be guilty of Class 1 misdemeanor (13.1-613).

Entrance fees of $50 for each 25,000 authorized shares or fraction thereof or $2,500 for corporations with more than 1,000,000 authorized shares are paid by foreign corporations upon granting of its charter. (13.1-615.1). Foreign corporations without shares shall pay $50. (13.1-815.1). Charter amendments increasing number of authorized shares will require corporation to pay additional fee equal to difference between fee already paid and fee that would have been owed had amendment been in effect initially. (13.1-615.1).

Taxation of Corporate Property.

See category 22 Taxation.

Annual Registration Fee.

Payable by all foreign and domestic corporations as follows: If authorized shares are 5,000 or less—$100; if authorized shares are more than 5,000—$100 plus $30 for each 5,000 shares or fraction thereof in excess of 5,000 up to maximum of $1,700. (13.1-775.1). Failure to pay annual fee results in penalty of greater of 10% of registration fee or $10. (13.1-775.1, 13.1-752[B][1], 13.1-768[B][1]). Non-stock corporations must pay $25. (13.1-936.1). Failure of non-stock corporation to pay annual fee results in $10 penalty. (13.1-936.1, 13.1-914[B][1], 13.1-930[B][1]).

Annual Report of Domestic and Foreign Corporations.

Annual reports of domestic and foreign corporations due to Commission by last day of 12th month after date of incorporation or authorization to do business and no earlier than three months before due date. Form for annual report provided by Commission. (13.1-775).

Professional Corporations.

May be organized by any individual or group of individuals or professional business entities licensed to perform same professional services, limited to, pharmacists, optometrists, physical therapists and physical therapist assistants, practitioners of healing arts, nurse practitioners, practitioners of behavioral sciences, veterinarians, surgeons, dentists, architects, professional engineers, land surveyors, landscape architects, certified interior designers, accountants, attorneys, insurance consultants, audiologists or speech pathologists and clinical nurse specialists. Persons incorporating under Professional Corporation Act must be in compliance with any laws applicable to practice of such profession in corporate form. (13.1-543, -544). Certain limitations on qualification of shareholders apply. (13.1-549, -549.1).

Deeds.

See category 21 Property, topic 21.06 Deeds.

Model Non-Profit Corporation Act.

Not adopted.

2.04 FOREIGN CORPORATIONS:

See topic 2.03 Corporations.

2.05 JOINT STOCK COMPANIES:

Joint stock companies do not appear to be recognized in Virginia. On the few occasions term is used (see e.g. 8.8A-103; 18.2-113), context indicates that stock corporations are meant (Cf. 121 Va. 353, 93 S.E. 625).

Professional Associations.

See topic 2.03 Corporations, subhead Professional Corporations.

2.06 LIMITED LIABILITY COMPANIES:

Virginia Limited Liability Company Act adopted. (13.1-1000).

General Supervision.

State Corporation Commission, The Tyler Building, 1300 E. Main Street, Richmond, VA 23219.

Formation.

One or more persons may act as organizers by signing and filing articles of organization with Commission. (13.1-1010). Organizers need not be members upon formation. (13.1-1010). LC may have one or more members.

Purpose/Power.

LC may engage in any lawful business, purpose or activity, whether for profit or not, except as otherwise limited by Virginia law and may transact any lawful business that corporation, partnership or other business entity may conduct. (13.1-1008; -1009).

Name.

Must contain words “limited company” or “limited liability company” or abbreviation “L.C.”, “LC”, “L.L.C.”, or “LLC”. (13.1-1012).

Articles of Organization.

Must provide LC name, address of principal office and registered office, and name and qualification of initial registered agent. (13.1-1011). Articles need not set forth any powers provided by statute. (13.1-1011).

Limited Liability.

Members, managers, organizers and agents shall not have personal obligation for liabilities, whether in contract, tort or otherwise, solely by reason of being member, manager, organizer or agent. (13.1-1019).

Management.

Members may enter into operating agreement to regulate or establish affairs, conduct of business and relations of members. Operating Agreement may provide rights to any person, including person not party to operating agreement. Operating agreement includes signed writing(s) by sole member and any agreement, written or not, if LC has manager who is other than sole member. (13.1-1023). Agreement may contain provisions regarding affairs and conduct of business to extent that provisions are not inconsistent with state laws or articles. (13.1-1023). Unless otherwise provided for in statute, articles or operating agreement, management is vested in members, members vote in proportion to their contributions as adjusted, action may be taken upon majority vote of members, members may act by written consent without meeting or notice, members may vote by proxy and members may delegate rights and powers. (13.1-1022). Members and managers may transmit consent or proxy electronically. (13.1-1022, -1024). LC is bound by operating agreement whether executed or not. (13.1-1023).

Allocations and Distributions.

Profits and losses and distributions of assets allocated on basis of value of contributions made by member to extent received by LC unless specifically allocated in writing in articles or operating agreement. (13.1-1029, -1030).

Transfers.

Membership interest is personal property and, unless provided otherwise in articles or operating agreement, assignable in whole or part. Unless articles or operating agreement provide otherwise, membership interest may be evidenced by certificate of interest issued by LC. (13.1-1038, -1039). Assignment does not by itself dissolve LC. (13.1-1039). Although membership interest may be freely assigned, assignee cannot participate in management and affairs or exercise rights as member. (13.1-1039). Unless otherwise specified in writing in articles or operating agreement, majority of member-managers (other than assignor member) of manager-managed LC of which one or more members is manager, or by majority vote of members (other than assignor member) of any other LC must consent to assignee becoming member. (13.1-1040). Assignee is entitled to share of profits and losses and distributions allocable to interest until actually becoming member. (13.1-1039).

Dissociation of Members.

Statute establishes events that, unless otherwise provided in articles or operating agreement, result in dissociation of member. (13.1-1040.1). Unless otherwise provided in articles or operating agreement, dissociation does not trigger dissolution of LC and does not affect membership interest held by dissociated member. Dissociated members retain rights equivalent to assignee. (13.1-1040.2).

Duration and Dissolution.

LC will dissolve as specified in writing in articles or operating agreement or upon unanimous written consent of members, decree of judicial dissolution, automatic cancellation of certificate for failure to pay annual registration fee, or involuntary cancellation of its existence pursuant to § 13.1-1050.3. (13.1-1046). Under certain circumstances LC may be continued by successor in interest of last member. (13.1-1038.1).

Treatment of Foreign LC.

Must register with State Corporation Commission to conduct business. (13.1-1052). Foreign LC's designated name must be on its application for registration. Secretary of State or other official having custody of foreign LC records in other state must authenticate such foreign LC's records. (13.1-1052). Once registered, possesses no greater rights and privileges than, and subject to same limitations as, domestic LC. (13.1-1051).

Domestication of Non-United States Entities.

Non-United States entities may be domesticated as LC. (13.1-1010.3). Effective Nov. 1, 2006, specific procedures by which foreign LC may become domestic LC established. (13.1-1074).

Professional Limited Liability Companies.

Governed by Virginia Professional Limited Liability Company Act. (13.1-1100 to 13.1-1123).

2.07 LIMITED PARTNERSHIP:

See topic 2.08 Partnerships.

2.08 PARTNERSHIPS:

Virginia Uniform Partnership Act (1996) (50-73.79 to -73.150) effective July 1, 1997, governs partnerships formed on or after effective date and partnerships that elect to be so governed (50-73.147). Former Uniform Partnership Act (50-1 to -43.12) repealed. Effective Jan. 1, 2000, all partnerships governed by 1996 Act. (50-73.147). Revised Uniform Limited Partnership Act (50-73.1 to -73.78) adopted. Limited partnerships formed before Jan. 1, 1987 must file new certificate of limited partnership under RULPA whenever partnership would have been required to file amendment under prior limited partnership act. (50-73.77). Limited partnership may register as limited liability partnership. (50-73.78). General partnership that converted pursuant to former § 50-73.11.1 is deemed for all purposes same entity that existed prior to conversion. (50-73.11:4). General or limited partnership may convert to limited liability company (13.1-1010.1); deemed for all purposes same entity that existed prior to conversion (13.1-1010.2).

Partnership Statements.

1996 Act eliminated requirement for filing certificates; partnership may instead file statements (50-73.83), including statement of partnership authority (50-73.93), of denial (50-73.94), of dissociation (50-73.115), of dissolution (50-73.121), and of merger (50-73.131).

Limited Partnership.

Name must contain “limited partnership”, “a limited partnership”, “L.P.” or “LP”, or if also registered limited liability partnership comply with applicable name requirements under § 50-73.78. (50-73.2). Limited partnerships must maintain registered agent and specified office (may be outside Virginia), and registered office (in Virginia) where certain records must be kept (50-73.4, -73.8). Foreign limited partnership must register to transact business in state (50-73.53, -73.54); and must file with State Corporation Commission (50-73.11). Effective Apr. 1, 2009, following filing fees apply: certificate of limited partnership, registration as foreign limited partnership, amended and restated certificate of limited partnership—$100; certificate of amendment or restated certificate of limited partnership, copy of amendment or correction, articles or instruments of merger or entity conversion, certificates of cancellation—$25; name reservation, renewal or transfer of name, certificate of withdrawal—$10; and for issuing certificate pursuant to § 50-73.76:1—$6. (50-73.17). Limited partner may have voting rights. (50-73.23).

Registered Limited Liability Partnerships.

Name must contain “Registered Limited Liability Partnership”, “Limited Liability Partnership”, “R.L.L.P.”, “L.L.P.”, “RLLP” or “LLP”. (50-73.133).

Formation.

Must file statement of registration with State Corporation Commission stating name, address (including city or county) of principal office, address of initial registered office, name and qualification of initial registered agent at that office. (50-73.132). Filing fee is $100 and $50 fee must accompany annual report. (50-73.83).

Limited Liability.

Partner in LLP is not, solely by being partner, individually liable for debts, obligations or liabilities of partnership, whether in tort, contract or otherwise. (50-73.96).

Withdrawal.

May cancel registration by filing statement of cancellation with State Corporation Commission. Cancellation requires consent of all partners. (50-73.137).

Treatment of Foreign LLP.

Must file certificate of status from jurisdiction in which it is registered and statement of registration. (50-73.138). May withdraw by filing statement of cancellation. (50-73.139). Relationship of partners, whether or not registered under 50-73.140, to partners and LLP and liability of partners on obligations of LLP governed by law of jurisdiction under which agreement formed. (50-73.141).

Proof of Partnership.

In litigation, partnership of any parties need not be proved, unless put in issue by a pleading with affidavit denying partnership attached. (8.01-279).

Actions.

Partnership may sue and be sued in its own name. (50-73.97).

3 BUSINESS REGULATION AND COMMERCE

3.01 BANKS AND BANKING:

Uniform Commercial Code has been adopted. (8.1A-101 et seq.). See topic 3.09 Commercial Code.

“Bank” means corporation authorized by statute to accept deposits and to hold itself out to public as engaged in banking business; “bank holding company” means any company which directly or indirectly owns, controls or holds with power to vote, 25% or more of voting shares of one or more banks or of company which is or becomes bank holding company, or which controls in any manner election of majority of directors of one or more banks, or for benefit of whose shareholders or members 25% or more of voting shares of one or more banks or bank holding companies is held by trustees (6.1-4); “trust company” means corporation, including affiliated trust company, authorized to engage in trust business under Trust Company Act with powers expressly restricted to conduct of general trust business (“trust business” means the holding out by person or legal entity to public at large by advertising, solicitation or other means that person or legal entity is available to act as fiduciary in Virginia or is accepting and undertaking to perform duties of fiduciary in regular course of its business). (Va. Code 6.1-32.11). Only corporations chartered under laws of Virginia or banking associations created under laws of U.S. and authorized to do business in Virginia may engage in banking or trust business in Virginia, except banks which may be authorized to establish and operate branches in Virginia under Va. Code 6.1-44.1 et seq. and Va. Code 6.1-44.15 et seq. relating to interstate branches, or banks or trust companies authorized to establish and operate trust offices in Virginia under Va. Code 6.1-32.31, et seq. (6.1-5). Additional restrictions apply to industrial loan companies. (6.1-227).

Banks may be incorporated under general corporation law and must state intention to do banking business in articles of incorporation. (6.1-6, 13.1-620). See Va. Code 6.1-194.48 for activities which are not considered “doing business”.

Regulated By.

Every bank is under supervision of State Corporation Commission, and must obtain from it certificate authorizing it to commence business, to be issued after investigation of compliance with law. (6.1-13). State Corporation Commission may amend powers of state banks. (Va. Code 6.1-5.1).

Bank Agency.

Bank may act as agent of any other depository institution in receiving deposits and providing other services. (Va. Code 6.1-39.5). Bank may be incorporated for purpose of becoming bankers' bank. (Va. Code 6.1-6.1).

Deposits.

Any bank may pay balance of deceased or incompetent person's account to personal representative, curator, conservator or committee upon receipt of letter of qualification. (6.1-70). This does not include accounts belonging to minors. (6.1-74). When balance of deceased person's account does not exceed $15,000 and there has been no qualification upon such person's estate, bank may, after 60 days from date of death, pay balance to spouse or next of kin. (6.1-71). Deposits in joint account may be paid to any party to joint account. (Va. Code 6.1-125.10). Subject to debts of decedent's estate, deposits accessible to decedent during lifetime and designated afterwards to survivor may be claimed by survivor on proof of death. (Va. Code 6.1-125.11). Joint accounts must specify whether with or without survivorship. (Va. Code 6.1-125.15).

Unclaimed Deposits.

Uniform Disposition of Unclaimed Property Act (1960) adopted. (55-210.1 et seq.).

Loans aggregating over 15% of sum of capital, surplus, and loan loss reserve may not be made to any person, partnership, association, limited liability company or corporation except in certain enumerated cases and not then unless authorized by resolution of majority of directors or executive committee recorded in minutes. Commission may by rule or regulation authorize state banks to make loans to one borrower in such amounts as may be authorized under any lending limit laws applicable to national banks. (6.1-61).

Loans to Executive Officers or Directors.

Maximum amount of loans and other extensions of credit bank may make to any of its executive officers or directors, and conditions and procedures for approval of such extensions of credit, are governed by Federal Reserve Board Regulation O, 12 C.F.R. Part 215, whether or not bank is member of Federal Reserve System. (6.1-62).

Savings banks, institutions and associations, see Va. Code 6.1-194.1 et seq.

Credit Unions, see Va. Code 6.1-225.1 et seq. Fields of membership and eligibility for membership in state credit unions comparable to Federal Credit Union Act. (Va. Code 6.1-225.23). Reserve requirements set by Federal National Credit Union Administration apply to credit unions. (Va. Code 6.1-225.58).

Trust companies are incorporated under general corporation law, are subject to regulations under Trust Company Act (Va. Code 6.1-32.11 to -32.29) and must state intention to do trust business in articles of incorporation (13.1-620). No trust company shall engage in trust business without obtaining certificate of authority from State Corporation Commission pursuant to requirements under Va. Code 6.1-32.18. State banks which obtain permission from State Corporation Commission to do trust business and every trust company chartered prior to Jan. 1, 1993 which is permitted to do commercial banking shall establish separate trust department. (6.1-16 et seq.). “Trust company holding company” means corporation that controls trust company, which means ownership by 25% or more of voting stock of trust company or control as defined in Bank Holding Act of 1956 (12 U.S.C. § 1841 et seq.), or as determined by State Corporation Commission, exercise of controlling influence over management and policies of trust company (Va. Code 6.1-32.11). For powers of trust companies, see 6.1-17.

Uniform Common Trust Fund Act not adopted but similar provisions found in Va. Code 6.1-30.1 et seq.

Private Bankers.

Any person, copartnership or corporation may lend money on real estate and personal security or collateral, guarantee payment of obligations, or buy or sell stocks and bonds, and natural persons may act in fiduciary capacity. (6.1-5).

Foreign Banks and Trust Companies.

Bank incorporated under laws of another state may not do banking or trust business in Virginia, except when acquiring insolvent savings and loan association or conducting out-of-state credit card operations (6.1-5, Va. Code 6.1-194.88, 6.1-391 et seq.) and except when out-of-state bank has established one or more branches in Virginia pursuant to interstate branching laws (Va. Code 6.1-44.1 et seq., and Va. Code 6.1-44.15 et seq.) or trust offices pursuant to Multistate Trust Institutions Act (Va. Code 6.1-32.31 et seq.).

Debt Counseling Agencies.

Credit counseling agencies required to obtain license from State Corporation

Commission in order to provide or offer to provide debt management plans to consumers. Act does not apply to person licensed to practice law in Commonwealth. (Va. Code 6.1-363.2, et seq.).

Interstate Banking.

Interstate branching (Va. Code 6.1-44.6-.7) and interstate mergers (Va. Code 6.1-44.18-.20) of banks are permitted. Establishment and operation of interstate trust offices of banks and trust companies is permitted. (Va. Code 6.1-32.31 et seq.). Restrictions apply to out-of-state industrial loan companies, and may be enforced by fines and penalties. (6.1-227).

Taxation.

Banks and trust companies pay franchise tax at rate of $1 for each $100 of net capital. (58.1-1204, -1204.1). Net capital is defined in 58.1-1205. Cities, towns and counties may impose local taxes to extent authorized by 58.1-1208, -1209, and -1210, which are credited against state taxes assessed in amount not to exceed such authorization. (58.1-1213).

Multiple Party Accounts.

See Va. Code 6.1-125.1 et seq.

3.02 BILLS AND NOTES:

Uniform Commercial Code has been adopted. (8.1A-101 et seq.). See topic 3.09 Commercial Code.

Special Requirements.

Unlawful for retailer to accept, in payment for food sold to customer, promissory note in amount in excess of twice sale price. (18.2-241). Except as otherwise provided by law, no contract shall be made for loan payment of interest on money at greater than 12% per year. (Va. Code 6.1-330.55). Exceptions apply, for example, to depository and regulated lenders (Va. Code 6.1-330.60 et seq.), credit unions (Va. Code 6.1-330.64), certain non-depository lenders (Va. Code 6.1-330.65 et seq.), certain real estate loan transactions (Va. Code 6.1-330.69 et seq.), certain commercial transactions (Va. Code 6.1-330.75 et seq.) and certain consumer transactions (Va. Code 6.1-330.77 et seq.). See topic 3.19 Interest.

Judgment Notes.

Power of attorney incorporated in note authorizing confession of judgment must specifically name person authorized to confess judgment and clerk's office in which it is to be confessed. (8.01-435). Note, bond, or other evidence of debt entered into after Jan. 1, 1993 to be enforced pursuant to confession of judgment contained therein must contain on its face the following statement in boldface print of not less than 8 pt. type:

IMPORTANT NOTICE

THIS INSTRUMENT CONTAINS A CONFESSION OF JUDGMENT PROVISION WHICH CONSTITUTES A WAIVER OF IMPORTANT RIGHTS YOU MAY HAVE AS A DEBTOR AND ALLOWS THE CREDITOR TO OBTAIN A JUDGMENT AGAINST YOU WITHOUT ANY FURTHER NOTICE.

(Va. Code 8.01-433.1).

Attorney fee clause is enforceable. (183 Va. 83, 31 S.E.2d 340).

3.03 BILLS OF LADING:

Uniform Commercial Code governs. (8.7-101 et seq.).

3.04 BILLS OF SALE:

See topic 3.23 Sales.

3.05 BLUE SKY LAW:

See topic 3.24 Securities.

3.06 BROKERS:

Uniform Commercial Code has been adopted. (8.1A-101 et seq.). See topic 3.09 Commercial Code.

Real Estate Brokers.

Any person, partnership, association, corporation, or LLC acting as real estate broker or salesman subject to several exemptions must be licensed by Virginia Real Estate Board. (54.1-2100 to -2111).

Mortgage Lenders and Brokers.

Any individual, firm, corporation, partnership, association, trust, or legal or commercial entity or group of individuals holding itself out to general public as mortgage lender or mortgage broker, or engaging in business as mortgage lender or mortgage broker must be licensed by State Corporation Commission, subject to several exceptions found in § 6.1-411. Requirements for mortgage lenders and brokers are set out in 6.1-408 to -431. After July 1, 2010, mortgage loan originators will be required to obtain license. (6.1-431).

3.07 BULK SALES:

Uniform Commercial Code governs. (8.6A-101 to 8.6A-110; 8.9A-101, et seq.). See topic 3.09 Commercial Code.

3.08 CARRIERS:

Regulation and Rates.

The State Corporation Commission has power to supervise, regulate and control common carriers, fix rates and prevent discrimination. (Const., Art. IX, § 2). See 56-99.2, et seq. for statutory regulation.

Uniform Commercial Code has been adopted. (8.1A-101 et seq.). See topic 3.09 Commercial Code.

Liability.

When rates, fares and charges are published in tariff (excluding those covered by contracts), it is unlawful for company to charge different rates, fares or charges. (56-102).

Discrimination.

Carriers may not vary authorized or specified and published rates set by Corporation Commission. (56-102).

Bills of Lading.

Uniform Commercial Code governs. (8.7-101 et seq.).

Liens.

Uniform Commercial Code governs. (8.7-307–8.7-308).

Motor Vehicle Carriers.

See category 23 Transportation, topic 23.01 Motor Vehicles.

Air Carriers.

State Corporation Commission supervises air carriers doing business in Virginia. (5.1-92). Certificate of public convenience and necessity must be obtained before engaging in intrastate business. (5.1-94). Discrimination is prohibited and rates must be approved by Corporation Commission. (5.1-132 et seq.).

3.09 COMMERCIAL CODE:

Uniform Commercial Code was adopted at 1964 session of General Assembly and became effective on Jan. 1, 1966. (8.1A-101 et seq.). Form of Article 2A-Leases adopted. (8.2A-101 et seq.). Form of Article 4A-Funds Transfers adopted. (8.4A-101 et seq.). Form of Art. 3A-Negotiable Instruments adopted. (8.3A-101 et seq.). Form of Revised Article 5A-Letters of Credit (8.5A-101 et seq.) adopted effective Jan. 1, 1998. Form of Revised Article 6A-Bulk Sales (8.6A-101 et seq.) adopted effective July 1, 1997. Form of Revised Article 7-Documents of Title (8.7-101 et seq.) adopted effective Jan. 1, 2005. Form of Revised Article 8A-Investment Securities (8.8A-101 et seq.) adopted effective Jan. 1, 1997. Form of Revised Article 9A-Secured Transactions (8.9A-101 et seq.) adopted effective July 1, 2001. None of Official 1966 Amendments or Optional Amendments has been adopted. Set out below are references to other variations from 1962 Official Text of Code as set out in Uniform and Model Acts section:

2-318—substantially broader in elimination of lack of privity of contract as defense.

6-106—omitted.

8-107—gives transferor clearer and more certain remedy than official text.

8-313(3)—notice of adverse claim to financial intermediary or purchaser after financial intermediary takes delivery as holder for value is not notice to either financial intermediary or purchaser.

9-104(g)—adds contract for an annuity.

9-203(4)—reference to unrepealed acts applicable to same subject:6.1-244 to -309 (Consumer Finance Act).11-4 (Size of Type Act).

9-301(2)—time period is 20 days.

9-302(1)(b)—time period is 20 days.

9-312(4)—time period is 20 days.

9-401—Third Alternative Subsection (1) adopted (local filing in office of clerk of court in which deeds recorded, central filing in office of State Corporation Commission); Alternative Subsection (3) not adopted.

9-402—name of record owner of real estate on which fixtures located required; number of original financing statement required on amendments.

9-407—omitted.

Fees.

Fee for filing and indexing initial financing statement or other record under Revised Article 9A is $20. (8.9A-525[a]). Number of names required to be indexed does not affect amount of fee. (8.9A-525[c]). Fee for responding to request for information from filing office, other than State Corporation Commission, including for issuing certificate showing whether there is on file any financing statement naming particular debtor, is $20. (8.9A-525[d]). Fees for responding to requests for information from State Corporation Commission made under Revised Article 9A are: for search and written response, $7; for search and provision of copy of record, $7 plus 50¢ per page; for affixing seal of Commonwealth to certificate, $3; and for furnishing or making available information contained in Commission's records by computer or other means, reasonable fees as are fixed by Commission order or rule that reflect all costs related to furnishing or making available information and providing service. (Va. Code 12.1-21.1). State Corporation Commission may also charge and collect fees for requested expedited or special handling of Uniform Commercial Code filings, requested expedited provision of copies of records, and requested expedited provision of services or issuance of certificates. (Va. Code 12.1-21.1 and Va. Code 12.1-21.2).

1972 Official Amendments.

Adopted in 1973, effective July 1, 1974. Variations from 1972 Official Text as set out in Uniform and Model Acts section are listed below:

9-104(e)—omitted

9-105(1)(m)—slightly reworded. Person listed as secured party on filed financing statement treated as secured party of record.

9-105(1)(n)—omitted

9-204.1—deals with security interest in consumer goods sold. Does not apply to open end credit plans.

9-302—alters filing provisions relating to interests in watercraft, interests created by public service corporations and indebtedness of State or political subdivisions

9-307—eliminates as of Dec. 23, 1986 farm products exception to general rule providing protection to buyers. Modifies subsection (1) and adds subsections (4) through (12) which require debtor giving security interest in farm products to provide secured party with written list of potential buyers and prohibits debtor from selling to buyers not on list without prior written consent of secured party. Buyer does not take free of security interest in certain situations.

9-313(4)(e)—time period is 20 days

9-401—designation of proper places of filing for resident and nonresident corporations added.

9-402—crops treated the same as timber to be cut or minerals

9-402(3)—if collateral is crops, fixtures, timber, minerals, or accounts subject to 9-103(5), and financing statement is to be indexed against such real estate, following statement must caption statement:

"THE SECURED PARTY DESIRES THIS FINANCING STATEMENT TO BE INDEXED

AGAINST THE RECORD OWNER OF THE REAL ESTATE."

9-402(10)—financing statements and related documents may be electronically filed with State Corporation Commission. (Effective Mar. 15, 1999.)

9-403(4)—filing officer will index 9-402 statement under name of debtor, year statement filed and name of record owner of real estate.

9-403(6),(7)—omitted, uniform fee $3, real estate mortgage effective as fixture filing remains effective until mortgage released, satisfied or otherwise terminated.

9-407 (optional)—omitted

1973 Official Amendment.

Adopted.

1977 Official Amendments adopted in 1984, effective Jan. 1, 1985. Variations from 1977 Official Amendments as set out in Uniform and Model Acts section are listed below:

8-107—subsection (1) omitted and subsection (2) slightly altered. Seller allowed to recover agreed price of securities when buyer wrongfully fails to pay.

1987 Official Amendments Adopting Art. 2A and 1990 Official Amendments to Art. 2A.

Adopted 1991, effective Jan. 1, 1992. Variations from Official Amendments as set out in Uniform and Model Acts section are listed below:

2A-103(1)(e)—bracketed language omitted.

2A-104(1)(a) to (c)—reads "(a) Certificate of Title statute of this Commonwealth such as Article 2 (§ 46.2-616 et seq.) of Chapter 6 of Title 46.2 and Article 2 (§ 29.1-712 et seq.) of Chapter 7 of Title 29.1; (b) Certificate of Title statute of another jurisdiction (§ 8.2A-105); or (c) Consumer protection statute of this Commonwealth, such as Chapter 17 (§ 59.1-196 et seq.) of Title 59.1, or final customer protection decision of a court of this Commonwealth existing on the effective date of this title."

2A-109(2)—reads "(1) The benefit of a supplier's promises to the lessor including those of any third party provided in connection with or as part of the supply contract and of all warranties, whether express or implied, under the supply contract, extends to the lessee to the extent of the lessee's leasehold interest under a finance lease related to the supply contract, but is subject to the terms of the warranty and of the supply contract and all defenses or claims arising therefrom."

2A-216—reads "Lack of privity between the plaintiff and the defendant shall be no defense in any action brought against the manufacturer or lessor of goods, other than as lessor under a finance lease, to recover damages for breach of warranty, express or implied, or for negligence, although the plaintiff did not lease the goods from the defendant, if the plaintiff was a person whom the manufacturer or lessor might reasonably have expected to use, consume, or be affected by the goods."

2A-407(3)—reads "This section does not affect the validity under any other law or a covenant in any lease contract making the lessee's promises acceptance of the goods."

2A-506(3)—omits "from voluntary discontinuance or".

2A-521—omits reference to “replevin”.

2A-524(1)—introductory text reads: “A lessor aggrieved under subsection (1) of § 8.2A-523 may:”

2A-529(4) and (5)—Subsec. (4), omits “and in accordance with”. Subsec. (5) reads: “(5) After a lessee has wrongfully rejected or revoked acceptance of goods, has failed to pay rent then due, or has repudiated (§ 8.2A-402), a lessor who is held not entitled to rent under this section shall nevertheless be awarded damages for nonacceptance under §§ 8.2A-527 and 8.2A-528.”

1989 Official Amendments Revising Art. 6.

Adopted in 1997, effective July 1, 1997. Variations from official amendments as set out in Uniform and Model Acts section are listed below:

6-102(1)(e)(iii)—Alternative A adopted.

6-103(3)(i)(iv) and 6-103(3)(j)(iii)—Phrase “[Secretary of State]” replaced with “clerk of the circuit court of the county or city where the seller's business is located.”

6-109(4) reads “The fee for filing and indexing and for stamping a copy furnished by the person filing to show the date and place of filing is ten dollars.”

6-109(s)—last two sentences omitted.

1989 Official Amendments Adopting Art. 4A.

Adopted in 1990, effective Jan. 1, 1991.

1990 Official Amendments Revising Art. 3.

Adopted in 1992, effective Jan. 1, 1993. Conforming Amendments to Art. 4 also adopted. Variations from 1992 Official Amendments as set out in Uniform and Model Acts section are listed below:

Acts 1992, c. 693, which enacted amendments, provides: “That the provisions of this act governing statutes of limitation and accrual of actions shall apply prospectively to all actions accruing on or after January 1, 1993.”

3-118—subsection added to clarify that appropriate statute of limitations on note is in this Article, not in § 8.01-246.

3-415(a)—omits reference to subsec. (e).

1994 Official Amendments Revising Art. 8.

Adopted in 1996, effective Jan. 1, 1997. Corresponding amendments are made to other articles of UCC, particularly Art. 9, effective Jan. 1, 1997. Uniform Act for the Simplification of Fiduciary Security Transfers (§ 13.1-424 et seq.) is repealed, effective Jan. 1, 1997.

1995 Official Amendments Revising Art. 5.

Adopted in 1997, effective Jan. 1, 1998. Conforming amendments adopted. Variations from 1995 Official Amendments as set out in Uniform and Model Acts Section are listed below:

5-115—Substitutes “cause of action” for bracketed material in both instances.

5-118—omitted. “Applicability” and “Savings Clause” provisions added.

2000 Official Amendments Adopting Art. 9A.

Adopted in 2000, effective July 1, 2001. However, adopted only in part conforming amendments to § 2-716. Variations from 2000 Official Amendments as set out in Uniform and Model Acts Section are listed below:

9A-103—adds subsection (i) dealing with goods covered by negotiable document.

9A-109—adds subsections (d) (14) and (e) dealing with inapplicability of Revised Article 9A to certain security interests, liens, pledges, and sales of promissory notes made by Commonwealth or unit thereof.

9A-204.1—no conforming section. Deals with security interest of seller in consumer goods sold.

9A-317—adopts official revisions to § 9-317 as adopted by American Law Institute (ALI) and National Conference of Commissioners on Uniform State Laws (NCCUSL) on Aug. 16, 1999.

9A-406—enacts optional subsection (j) exempting certain transactions from operation of subsection (d). Also adds subsection (k) dealing with Structured Settlement Protection Act. (59.1-475).

9A-408—enacts optional subsection (e) and adds subsection (f) exempting certain payment intangibles from operation of subsections (a) and (c).

9A-512—adopts alternative A for subsection (a).

9A-518—adopts alternative A for subsection (b).

9A-519—adopts alternative A for subsection (f).

9A-522—adopts alternative A for subsection (a).

9A-525—sets filing fees routinely at $20 and does not incorporate various fee formulas in § 9-525. Also adopts alternative A for subsection (c).

9A-526—makes promulgation of rules by State Corporation Commission implementing Revised Article 9A not mandatory.

9A-527—makes annual report of State Corporation Commission to Governor and General Assembly not mandatory.

9A-612—deletes clause in subsection (a) of § 9-612 stating that issue of reasonable notification is question of fact and deletes language in subsection (b) of § 9-612 excluding consumer transactions from operation of section.

9A-615—omits subsection (g) dealing with cash proceeds received by junior secured party.

9A-625—omits subsections (e) and (f) dealing with statutory damages. Subsection (e) is subsection (g) of § 9-625.

9A-626—omits subsection (b) dealing with limitation of rules in subsection (a) to transactions other than consumer transactions.

9A-703—adds subsection (c) dealing with liens, pledges, and security interests granted by Commonwealth or unit thereof.

9A-707—adopts official revisions to § 9-707 as adopted by ALI and NCCUSL on Jan. 15, 2000.

9A-708—adopts official revisions to § 9-708 as adopted by ALI and NCCUSL on Jan. 15, 2000. Conforms to § 9-707 of 1998 Official Text.

9A-709—adopts official revisions to § 9-709 as adopted by ALI and NCCUSL on Jan. 15, 2000. Conforms to § 9-708 of 1998 Official Text.

2001 Official Amendments Revising Art. 1.

Adopted in 2003, effective Jan. 1, 2004. Conforming amendments adopted. However, adopted only in part amendments to §§ 3-103 and 4A-105, and did not enact amendments to §§ 2-103, 2A-103, 4-104, 8-102, and 9-102. Variations from official amendments as set out in Uniform and Model Acts section are listed below:

1-201(b)(20)—“Good faith” means honesty in fact in conduct or transaction concerned.

1-301—(a) This section applies to transaction to extent that it is governed by another title of Uniform Commercial Code. (b) Except as otherwise provided in this section, when transaction bears reasonable relation to this state and also to another state or nation parties may agree that law either of this state or such other state or nation shall govern their rights and duties. (c) In absence of agreement effective under subsection (b), rights and obligations of parties are determined by law that would be selected by application of this State's conflict of laws principles. (d) To extent that Uniform Commercial Code governs transaction, if one of following provisions of Uniform Commercial Code specifies applicable law, that provision governs and contrary agreement is effective only to extent permitted by law so specified: (1) Rights of creditors against sold goods (§ 8.2-402); (2) applicability of title on leases (§§ 8.2A-105 and 8.2A-106); (3) applicability of title on bank deposits and collections (§ 8.4-102); (4) applicability of title on funds transfers (§ 8.4-507); (5) letters of credit (§ 8.5A-116); (6) bulk transfers subject to title on bulk sales (§ 8.6A-103); (7) applicability of title on investment securities (§ 8.8A-110); (8) law governing perfection, effect of perfection or nonperfection, and priority of security interests and agricultural liens (§§ 8.9A-301 through 8.9A-307).

2003 Official Amendments Revising Art. 7.

Adopted in 2004, effective Jan. 1, 2005. Conforming amendments adopted. Variations from 2003 Official Amendments as set out in Uniform and Model Acts section are listed below:

7-102(a)(8)—issuer means bailee who issues document except that in relation to unaccepted delivery order it means person who orders possessor of goods to deliver.

7-104—(1) Except as otherwise provided in subsection 3, document is negotiable: (a) If by its terms goods are to be delivered to bearer or to order of named person; or (b) where recognized in overseas trade, if it runs to named person or assigns.

7-201(b)—receipt issued for goods “has like effect” as warehouse receipt.

Other Amendments.

1-208—places burden on proving good faith on party seeking to exercise power of acceleration in transactions arising out of sale or financing of consumer goods.

2-716—buyer's right changed from replevin to detinue.

4-104(3)—“banking day” does not include Sat., Sun., or legal holiday.

4-106—branch or separate office of bank is not required to maintain its own deposit ledgers in order to be considered separate bank for purposes of check handling and presentation.

4-406—banks' furnishing of copies of statement of account complies with this section.

7-209(3)(b)—“warehouseman's lien” on household goods effective against all persons if depositor had legal possession of goods. Lien on household goods effective against prior perfected security interest to extent of $150.

9A-503(a)—requires individual debtor's name on financing statement to match name on identification card issued by debtor's state of residence.

9A-503(f)—defines ``identification card issued by individual's state of residence''.

Forms.

Virginia has adopted uniform form of written financing statement and amendment as set out in § 9-521 of Uniform and Model Acts Section.

See also topics: Banks and Banking, Bills and Notes, Brokers, Carriers, Contracts, Factors, Frauds, Statute of, Sales, Securities, Warehousemen; categories Business Organizations, topic Corporations; Civil Actions and Procedure, topic Limitation of Actions; Debtor and Creditor, topics Assignments, Fraudulent Sales and Conveyances, Liens, Pledges; Documents and Records, topics Records, Seals; Mortgages, topic Chattel Mortgages; Transportation, topic Motor Vehicles.

3.10 CONDITIONAL SALES:

See topic 3.23 Sales.

3.11 CONSIGNMENTS:

See topic 3.14 Factors.

3.12 CONSUMER PROTECTION:

Virginia has broad Consumer Protection Act which prohibits misrepresentations of goods or services, deceptive advertising and other specified fraudulent acts or practices committed by supplier in connection with consumer transaction. (59.1-196 et seq.). Certain industries and transactions are excluded. (59.1-199). Attorney General or local Commonwealth Attorney or county, city or town attorney, may bring suit to enjoin violations. (59.1-203). Individual who is harmed is entitled to recover $500 or actual damage, whichever is greater; if violation is willful, individual may recover three times actual damages or $1,000, whichever is greater. In addition to damages, reasonable attorneys' fees and court costs may be awarded. Any person who accepts cure offer under Virginia Consumer Protection Act may not bring another legal action that is substantially based on same allegations of fact on which action under Act was based. (59.1-204). Rebuttable presumption in cases of children's products if U.S. Consumer Product Safety Commission recalled product. (59.1-200). Penalty for willful violation of Act is fine of not more than $2,500 per violation; for violating injunction or agreement to comply, fine of not more than $5,000 per violation, plus expenses up to $1,000 per violation and attorney's fees. (59.1-206).

Invention Development Services are regulated. (59.1-208 et seq.).

Uniform Deceptive Trade Practices Act not adopted.

Equal Credit Opportunity.

The Virginia Equal Credit Opportunity Act, among other things, makes it unlawful for any creditor to discriminate against any applicant, with respect to any aspect of credit transaction, on basis of race, color, religion, national origin, sex or marital status, or age, or because of income from any public assistance program. (Va. Code 59.1-21.19 et seq.).

Home Solicitation.

Unless in an emergency buyer requests seller to provide goods or services, seller must provide fully completed receipt or obtain buyer's signature on written contract which contains, in at least 10 point bold type under conspicuous caption, on front side of receipt or contract or immediately above buyer's signature statement of buyer's rights, including right to cancel anytime prior to midnight of third business day after transaction. (Va. Code 59.1-21.4). Seller must, within ten days after cancellation, tender back any payments. Until seller complies, buyer may retain possession. (Va. Code 59.1-21.5). Goods become buyer's without obligation if seller fails to demand possession within 20 days after cancellation. (Va. Code 59.1-21.6).

Real Estate Settlements.

Purchaser or borrower has right to select settlement agent to provide escrow closing or settlement services. (6.1-2.21). All contracts involving purchase of real estate containing not more than four residential dwelling units must include specific disclosure language found in 6.1-2.22.

Telephone Solicitation.

Virginia Telephone Privacy Protection Act, among other things, prohibits telephone solicitation calls to residences at any time other than between 8 a.m. and 9 p.m. Solicitors must identify themselves, must not block caller identification services and must not call number when person at such number has stated that he does not wish to receive solicitation calls or to telephone number on National Do Not Call Registry maintained by federal government. (59.1-510 et seq.). Solicitors may not use automatic dialing services, subject to several exceptions. (59.1-518).

Fair Housing.

The Virginia Fair Housing Law, among other things, makes it unlawful for any lending institution to discriminate in residential real estate transactions because of race, color, religion, national origin, sex, age, familial station, or handicap. (36-96.1 et seq.).

Credit Card.

No liability for unsolicited credit card until election to use. (11-31). This shall not apply to card renewals. (11-32). Costs and attorney's fees awarded to defendant in successful defense of suit arising out of use of unsolicited credit card by one other than defendant. (11-33). No person may require or record credit card number in connection with purchase made by check. (11-33.1). Holder of telephone credit card not protected except under 11-33.1. (11-34). Parties that accept payment devices for any purpose cannot print more than last four digits of payment devices or expiration dates of these cards on receipts. Violation is punishable with damages caused to cardholder or deviceholder due to use of card/device without holder's permission or state may bring suit seeking equitable or other remedies, and failure to comply with equitable remedies may result in up to $1,000 in civil penalties per violation. (11-33.2).

Unsolicited Goods.

Unsolicited goods are deemed to be an absolute gift to recipient. (11-2.2).

Automobile Repair Facilities Act.

Applies penalties of Consumer Protection Act to motor vehicle repair. Customer may demand written estimates and return of any replaced parts. (Va. Code 59.1-207.1 et seq.).

Motor Vehicle Warranty Enforcement Act.

Enables consumer to demand replacement of or refund for motor vehicle not brought into conformity with express warranty. (Va. Code 59.1-207.9 et seq.)

Trade Secrets.

Uniform Trade Secrets Act has been adopted codifying basic principles of common law trade secret protection. (59.1-336 et seq.).

Business Opportunity Sales Act.

Regulates sale of products, equipment, supplies or services sold to purchaser upon payment exceeding $500 to start business. Exempts sales of securities, franchises, certain licenses, and on-going businesses. (59.1-262 et seq.).

Virginia Post-Disaster Anti-Price Gouging Act.

During any time of disaster, it is unlawful for any supplier to sell, lease, or license, or to offer to sell, lease, or license, any necessary goods and services at unconscionable price within area for which state of emergency is declared. (59.1-525 et seq.). Governor authorized to issue, without hearing, emergency order for period not to exceed 30 days, directing supplier to reduce price to prevailing price in local market. (Va. Code 59.1-529.1).

Plain Language.

Virginia does not have comprehensive “Plain Language” statute although provisions in contracts for sale of personal property must be clearly and plainly printed or written and must satisfy certain type size requirements. (11-4).

Structured Settlement Protection Act.

No direct or indirect transfer of structured settlement payment rights shall be effective unless authorized in advance by court of competent jurisdiction or responsible administrative authority. (59.1-475 et seq.).

See also topics 3.19 Interest; 3.23 Sales, subhead Retail Credit Sales.

3.13 CONTRACTS:

Uniform Commercial Code has been adopted. (8.1A-101 et seq.). See topic 3.09 Commercial Code.

Void and Voidable Contracts.

Certain unwritten contracts void as to creditors and bonafide purchasers. (11-1).

Pre-Need Burial Contracts.

Establishes trust funds to insure seller's performance of contractual obligations. (54.1-2820 to -2825).

Public Contracts.

Bidder on public contract other than highway project may withdraw bid if too low because of good faith mistake that was clerical rather than judgment mistake. Notice of withdrawal must be within two days of conclusion of bid opening or, if contracting body requires, within two hours of bid opening. (2.2-4330). Regulation of public contracts generally, see 2.2-4300 et seq.

Seals.

See category 10 Documents and Records, topic 10.05 Seals. (11-3).

Infants.

See category 14 Family, topic 14.10 Infants.

3.14 FACTORS:

Uniform Commercial Code has been adopted. (8.1A-101 et seq.). See topic 3.09 Commercial Code.

License and Bond.

A commission merchant dealing in farm products must obtain license from Commissioner of Agriculture and Consumer Services for $10 fee. (3.1-696). Except for persons operating tobacco warehouse where tobacco is sold at auction or operating livestock auction market posted by U.S. Department of Agriculture and operated pursuant to terms of Packers and Stockyards Act, such commission merchant shall post bond for $3,000 ($5,000 in case of livestock auction markets) if average daily gross commission business is $5,000 or less, with $1,000 added to bond for each additional $5,000 average daily gross commission business done for previous year; maximum bond required is $10,000. (3.1-696 and 3.1-699). Commissioner may revoke or refuse to grant or renew commission merchant's license upon enumerated grounds. (3.1-709).

Liens.

Consignor or owner of consigned farm products has lien on estate of deceased or insolvent commission merchant for proceeds thereof, subject only to liens created and recorded prior to death or insolvency, unless he permits proceeds to remain at interest, or for over 30 days after notice of sale, with commission merchant, without requesting payment. Enforcement of such lien is by circuit courts. (43-62).

3.15 FRANCHISES:

Uniform Franchise and Business Opportunities Act not adopted. Under Virginia Retail Franchising Act (13.1-557, et seq.), franchises (as defined in 13.1-559[b]), must be registered before offered or exempted from registration by rule or order of Corporation Commission (13.1-560). Franchises registered with Corporation Commission (13.1-561) in accordance with rules promulgated by it (13.1-572). Unlawful for franchisor to engage in certain fraudulent acts in granting franchises (13.1-563[a], [b] and [c]): To fail to provide franchisee with certain disclosure documents before executing franchise agreement (13.1-563[e]); to cancel franchise without reasonable cause or to use undue influence to induce franchisee to surrender any right under franchise agreement (13.1-564).

Franchise is voidable upon certain conditions if offer of franchise was unlawful: Franchisee not given opportunity to negotiate franchise provisions; or if franchisee not furnished copy of disclosure documents and franchise agreement at least 72 hours before execution. (13.1-565). Corporation Commission may enjoin violations of Act (13.1-568), impose civil penalties and request rescission and restitution (13.1-570). Certain violations constitute crimes. (13.1-569). Franchisee who declares franchise void or who suffers damages from violation of 13.1-564 may sue for damages, costs and attorney's fees. (13.1-571).

Virginia has Business Opportunities Sales Act (59.1-262, et seq.) which requires delivery of disclosure statement before purchaser signs business opportunity contract (59.1-264) which regulates certain other aspects of business opportunity offerings. “Business opportunity” does not include franchise subject to Retail Franchising Act. (59.1-263).

Virginia has following acts which regulate aspects of relationship between parties within named industries: Petroleum Products Franchise Act (Va. Code 59.1-21.8, et seq.); Motor Vehicle Dealers Franchise Act (46.2-1566, et seq.); Beer Franchise Act (4.1-500, et seq.); Wine Franchise Act (4.1-400, et seq.).

See topics 3.20 Monopolies, 3.22 Restraint of Trade and Competition, and 3.24 Securities.

3.16 FRAUDS, STATUTE OF:

Unless agreement, or some memorandum or note thereof, be in writing and signed by party to be charged, or his agent (consideration may be proved by other evidence), no action may be brought thereon: (1) To charge any person upon or by reason of representation or assurance concerning character, conduct, credit, ability, trade, or dealings of another, to intent or purpose that such other may obtain thereby, credit, money or goods; (2) to charge any person upon promise made, after full age, to pay debt contracted during infancy, or upon ratification after full age, of contract made during infancy; (3) to charge personal representative upon promise to answer any debt or damages out of his own estate; (4) to charge any person upon promise to answer for debt, default, or misdoings of another; (5) upon any agreement made upon consideration of marriage; (6) upon any contract for sale of real estate or for lease thereof for more than year; (7) upon any agreement or contract for services to be performed in sale of real estate by party (as defined in 54.1-2100, -2101); (8) upon any agreement that is not to be performed within year; or (9) upon any agreement or promise to lend money or extend credit in aggregate amount of $25,000 or more. (11-2).

Uniform Commercial Code has been adopted. (8.1A-101 et seq.). See topic 3.09 Commercial Code.

Gift of Interest in Real Estate.

No estate of inheritance or freehold or for a term of more than five years in lands shall be conveyed unless by deed or will, nor shall the right to a conveyance accrue to a donee of such estate under a gift or promise of gift of the same not in writing, although followed by possession and improvements. (55-2).

Contracts of Sale of Goods.

Uniform Commercial Code governs. (8.2-201).

Part Performance.

A parol contract for the sale of land will be enforced when the following conditions are complied with: (1) the parol agreement relied on must be certain and definite in its terms; (2) the acts proved in part performance must refer to, result from, or be made in pursuance of the agreement proved; (3) the agreement must have been so far executed that refusal of full execution would operate a fraud upon the party, and place him in a situation which does not lie in compensation. (165 Va. 55, 181 S.E. 433).

New Promise After Bankruptcy.

No action may be maintained at law or in equity upon any promise, made after adjudication or discharge in bankruptcy, to pay a debt incurred before bankruptcy, unless such promise is in writing. (11-2.01).

3.17 [RESERVED]

3.18 INFORMATION TECHNOLOGY, INTERNET AND NEW MEDIA:

Uniform Computer Information Transactions Act (UCITA) has been adopted. (59.1-501.1 et seq., effective July 1, 2001).

Generally.

Establishes contracting regime for computer information transactions. Excludes financial services transactions, insurance services transactions, contracts concerning television or motion picture programming or sound recordings, compulsory licenses, employment contracts (except for independent contractors), certain hardware provisions, subject matter governed by Uniform Commercial Code Arts. 3, 4, 4A, 5, 6, 7 and 8, and certain de minimis transactions. (59.1-501.3).

Scope.

Defines “computer information” as “information in electronic form that is obtained from or through the use of a computer or that is in a form capable of being processed by a computer.” (59.1-501.2[a][10]).

Consumer Protection Law Governs.

UCITA does not limit, modify or supersede consumer protection statute, administrative rule, regulation or procedure.

Mass-market Licenses.

Provides framework for creation and enforcement of mass-market licenses, such as “shrinkwrap” or “clickwrap” contracts. (59.1-502.9).

Choice of Law.

Parties in their agreement may choose applicable law; however, choice is not enforceable in consumer contract to extent it would vary statute, administrative rule, or regulation that may not be varied by agreement under state law. (59.1-501.9).

Variation by Agreement.

Effect of any provision of UCITA, including allocation of risk or imposition of burden, may be varied by agreement of parties, subject to rules not variable by agreement. (59.1-501.15).

Prior Law.

Contracts that are enforceable and right of action that accrue before effective date of UCITA are governed by law then in effect unless parties agree to be governed by UCITA. (59.1-509.2).

Uniform Electronic Transactions Act (UETA) has been adopted. (59.1-479).

Generally.

Does not change substantive contract law, but establishes procedural framework for legal recognition of electronic records, signatures and contracts.

Substance.

Provides that record or signature may not be denied legal effect or enforceability solely because it is in electronic form. Provides that contract may not be denied legal effect or enforceability solely because electronic record was used in its formation. Under UETA, where law requires written record or signature, electronic versions are legally sufficient. (59.1-485).

Prior Law.

UETA applies to any electronic record or electronic signature created, generated, sent, communicated, received, or stored on or after effective date of UETA. (59.1-482).

Applicability.

UETA chapter applicability limited to transactions which parties have agreed to conduct electronically. (59.1-483).

Virginia Computer Crimes Act has been adopted. (18.2-152.1–18.2-152.15). It defines computer time and services as property which can be subject of larceny, embezzlement or theft by false pretenses. Identifies six computer crimes: computer fraud, computer trespass, computer invasion or privacy, theft of computer services, personal trespass by computer and harassment by computer. Also criminalizes uses of computer in forgery and use of encryption in criminal activity. Provision of Act prohibiting sending of unsolicited bulk emails (spam) ruled unconstitutionally overbroad. (276 Va. 443, 666 S.E.2d 303).

Internet Privacy.

Every public body that has Internet website associated with that body is required to adopt Internet privacy policy, to be posted conspicuously on its website for public viewing. (2.2-3803).

Immunity from Liability for Defamatory Material on Internet.

Virginia has state law analog to immunity provided by § 230 of Communications Decency Act. Under it, no provider or user of interactive computer service on Internet may be treated as publisher or speaker of any information provided to it by another information content provider. No provider or user of interactive computer service is liable for (a) any action voluntarily taken by it in good faith to restrict access to, or availability of, material that provider or user considers to be obscene, lewd, lascivious, excessively violent, harassing, or intended to incite hatred on basis of race, religious conviction, color, or national origin, or (b) any action taken to enable, or make available to information content providers or others, technical means to restrict access to information provided by another information content provider. (8.01-49.1).

3.16 [RESERVED]

3.17 INTEREST:

Generally.

Except as provided in 8.3A-112 and Va. Code 6.1-330.54, legal rate of interest of 6% per annum is implied where interest obligation exists but rate is not provided in contract. (6.1-330.53). Except as otherwise provided by law, no contract shall be made for loan payment of interest on money at greater than 12% per year. (6.1-330.55). Exceptions apply, for example, to depository and regulated lenders (6.1-330.60 et seq.), controlled subsidiaries of banks (6.1-58.1), credit unions (6.1-330.64), certain non-depository lenders (6.1-330.65 et seq.), certain real estate loan transactions (6.1-330.69 et seq.), certain commercial transactions (6.1-330.75 et seq.) and certain consumer transactions (6.1-330.77 et seq.). Legislature may not enact special law regulating interest. (Const., Art. IV, § 14).

Judgments.

Judgment rate of interest is 6% per annum. Where no rate is fixed by contract, both prejudgment and post-judgment interest shall be charged at judgment rate. Applicable judgment rate at time of entry, not affected by subsequent rate changes. (6.1-330.54). Except as otherwise provided in Art. 3 of Uniform Commercial Code (8.3A-101 et seq.) and in absence of special agreement, time from which interest on account runs is in discretion of jury, and if verdict does not provide for interest, sum thereby found shall bear interest from date of verdict at rate provided in Va. Code 6.1-330.54 (8.01-382).

Particular Classes of Loans.

Installment Loans—Charges in Advance—Add-on Interest.

Any bank and savings institution making loan payable in installments may impose finance charges and other charges and fees at such rates and in such amounts and manner as may be agreed by borrower. (6.1-330.60). Any installment loan made by industrial loan association, may be enforced at rate agreed upon in contract of indebtedness. Also, loan fee not exceeding 2% of principal amount of loan may be charged in advance of loan. (6.1-330.60 and 6.1-330.68). Credit unions may loan to members and other credit unions doing business in Commonwealth at interest rate as agreed by borrower provided such interest is not charged in advance. (6.1-330.64). Any seller of goods or services under closed-end installment credit plan may impose finance charge as may be agreed upon by seller and purchaser. (6.1-330.77). Where there is no written agreement for closed-end credit under Va. Code 6.1-330.77 and no open-end plan under Va. Code 6.1-330.78, seller or provider of credit may collect interest at rate specified in Va. Code 6.1-330.53 if payment in full not made within 60 days. (6.1-330.77:1). On closed-end credit, no additional charge may be made for deferrals or extensions of time except as provided in Va. Code 6.1-330.77, and debtor has right to prepayment, and rebate of prepaid finance charges in excess of those earned using Rule of 78 method of amortization. (6.1-330.77).

Real Estate Loans.

Loans secured by first mortgage or first deed of trust on real estate, including leaseholds of not less than 25 years, are enforceable at interest rate stated therein. Interest rates on these loans may be indexed to external standard and may vary with standard. (6.1-330.69). Any person, other than lenders listed in Va. Code 6.1-330.73 may charge add-on interest that results in annual yield of not more than 18% plus (under certain circumstances) 2% loan fee charge on loan secured by subordinate mortgage or deed of trust on residential real estate improved by construction of one to four family dwelling units. (6.1-330.71). Lender may also charge borrower with actual costs of loan listed under § 6.1-330.72, but in addition to these charges, a loan fee not exceeding 5% may be imposed by lender. (6.1-330.71). Lender may require borrower to obtain fire, decreasing term life, and extended coverage insurance, and any premiums for such coverage are not part of charge. (6.1-330.72). Va. Code 6.1-330.85 to -330.86:1 provide for prepayment of loans described in Va. Code 6.1-330.71 and certain other loans and credit sales and rebates for unearned interest. Code provides for prepayment and acceleration laws (6.1-330.81 to -330.90), late charges (6.1-330.80) and other charges on certain real estate loans (6.1-330.70, -330.71).

Revolving Accounts—Monthly Rates.

Bank or savings institution may charge such finance and other charges as agreed between it and borrower under contract for revolving credit and, with respect to credit card accounts, such finance charge may be imposed only if payment in full is not received by lender prior to next billing date (which shall be at least 25 days later than prior billing date). (6.1-330.63). Any seller or lender under open-end credit plan or similar plan under which finance charge is imposed upon obligor, if payment in full is not received by creditor prior to next billing date (which shall be at least 25 days later than prior billing date), may impose finance and other charges as may be agreed upon by seller or lender and obligor. (6.1-330.78).

Consumer Finance Act Loans.

For loans up to $2,500, licensees under Consumer Finance Act or Small Loan Act (6.1-

244 to -310) may charge rate of interest at single rate not to exceed 36%. For loans of more than $2,500, lender may charge only at such single annual rate as stated in written contract signed by borrower. Lender may impose late charges not to exceed 5% of delinquent installment, and loan processing fees. (6.1-272.1). However, rate may not exceed 6% per annum: (a) after 90 days from date of adjudication on loan properly scheduled and dischargeable in bankruptcy (6.1-274), (b) after 90 days from date of death of borrower (6.1-275) or (c) after six months from date of maturity of loan (6.1-276). Interest on amount of judgment is computed under Va. Code 6.1-330.54. (6.1-273).

Student Loans.

Loans made by private college or university in Commonwealth for certain educational expenses are enforced as agreed by contract. (6.1-330.66). Loans made under programs conducted by State Education Assistance Authority for educational expenses are enforced as agreed by contract. (6.1-330.66:1).

Other Loans.

Code also provides special interest rate provisions for extension of credit under Securities and Exchange Act (6.1-330.65) and loans up to one year by certain lenders (6.1-330.62).

Usury.

Defense of usury may not be used to defeat payment of interest on loans from certain federal agencies or on loans from Virginia Housing Development Authority (6.1-330.74) or upon loans made by bank or savings institution to defray educational expenses (6.1-330.60[B]). Neither usury defense nor any other provision of this chapter or any case law relating to usury or compounding of interest is available to any corporation, partnership, real estate investment trust or joint venture whose purpose is to hold, develop, and manage real estate for profit (6.1-330.76) or to any person or entity which borrowed for business or investment purposes $5,000 or more (6.1-330.75). If borrower sustains plea of usury, principal only may be recovered. (6.1-330.56). If person who paid usurious interest brings suit within two years from date of last scheduled payment or date of payment in full, whichever is earlier, he may recover total interest paid in excess of that allowed by statute; twice total amount of interest paid during two years immediately preceding date of filing of suit; and court costs and reasonable attorney's fees. Injunction may issue to stay sale of encumbered property. (6.1-330.57). Borrower cannot waive benefits of this chapter. (6.1-330.58). See topic 3.12 Consumer Protection.

3.18 [RESERVED]

3.19 LICENSES, BUSINESS AND PROFESSIONAL:

Various professions and occupations require state license.

Local license taxes, in addition to state licenses, are authorized in cities, towns and certain counties. (58.1-3703). Charter provisions of some cities and towns give broader licensing powers than those provided by general state laws.

3.20 MONOPOLIES, RESTRAINT OF TRADE AND COMPETITION:

Virginia Antitrust Act.

Contracts, combinations or conspiracies to monopolize or in restraint of trade or commerce are unlawful. (59.1-9.5, -9.6). Discriminatory practices in pricing, payment or acceptance of certain commissions, services, or other things of value, also made unlawful. (59.1-9.7). Attorney General has power to investigate possible violations and require attendance of witnesses, production of relevant books and papers, and statement in writing, or otherwise under oath, as to pertinent facts and circumstances. (59.1-9.10). Civil penalty of not more than $100,000 for each willful or flagrant violation. (59.1-9.11). In personal suit or suit by state, subdivision or agency, actual damages, costs and reasonable attorney's fees recoverable, but up to treble damages for willful or flagrant violation. (59.1-9.12-.15). Courts may issue injunctions to prevent violations. (59.1-9.8).

Motion Picture Fair Competition Act.

Blind bidding for right to exhibit motion pictures in Virginia is prohibited. (59.1-258). Right of private action for violation. (59.1-260).

Cigarette Sales Below Wholesale Cost Act repealed.

Unfair Sales Act repealed.

Fair Trade Act repealed.

See topic 3.15 Franchises.

3.21 NEGOTIABLE INSTRUMENTS:

See topic 3.02 Bills and Notes.

3.22 RESTRAINT OF TRADE:

See topic 3.20 Monopolies, 3.22 Restraint of Trade and Competition.

3.23 SALES:

Uniform Commercial Code has been adopted. (8.1A-101 et seq.). See topic 3.09 Commercial Code.

Contracts of Sale.

Uniform Commercial Code governs. (8.2-101 et seq.).

Products Liability.

Uniform Commercial Code governs as to privity. (8.2-318).

Conditional Sales.

Uniform Commercial Code governs. (8.9A-101 et seq.).

Contracts for sale, with future delivery, of personal property to citizens of Virginia, on forms printed and furnished by seller doing business in Virginia, are invalid unless plainly printed or written. Covenants and stipulations as to rights of seller must not be printed in smaller type than ten-point. Any provision to effect that seller is not bound by all agreements or modifications of printed terms must be printed as a separate paragraph or paragraphs, in type not smaller than pica. If type is smaller than required, evidence of all statements is admissible in evidence. (11-4). § 11-4 does not apply to transaction to which 8.2-316(2) is applicable. (229 Va. 561, 331 S.E.2d 456).

Retail Credit Sales.

No special restrictions except those involving personal solicitation at residence of buyer and pyramid promotional schemes. (59.1-21.1 et seq.; 18.2-239, -240).

Bills of Sale.

Uniform Commercial Code governs. (8.1A-101 et seq.).

Bulk Sales.

Uniform Commercial Code governs. (8.6A-101 et seq.). See category 8 Debtor and Creditor, topic 8.08 Fraudulent Sales and Conveyances.

Sales of Motor Vehicles.

See category 23 Transportation, topic 23.01 Motor Vehicles.

Consumer Protection.

Uniform Deceptive Trade Practices Act not adopted. Untrue, deceptive or misleading advertising connected with sale of merchandise, securities or services to public is unlawful. (18.2-216). Credit card fraud punishable as felony if value of all money, goods and services furnished exceeds $200 in any six-month period. Credit card factoring with intent to defraud is felony. (18.2-195, -195.1). No seller to remove or alter identification or serial number of household appliances. (18.2-215). No seller to advertise false prices. (18.2-217). Seller must indicate whether merchandise is secondhand or defective “seconds”. (18.2-218). See topic 3.12 Consumer Protection.

3.24 SECURITIES:

Uniform Commercial Code has been adopted. (8.1A-101 et seq.). See topic 3.09 Commercial Code.

Uniform Securities Act.

Virginia Securities Act is based on Uniform Securities Act. (13.1-501 et seq.).

Supervision.

State Corporation Commission has general charge of administration of Virginia Securities Act. (13.1-501 et seq.).

Regulatory Powers of Supervising Authority.

Permit for sale not required.

Prerequisites to Sale or Offering.

It is unlawful for any person to offer or sell any security unless the security is registered under the Act or the security or transaction is exempt under the Act. (13.1-507).

Securities to Which Act Applicable.

“Security” means any note; stock; treasury stock; bond; debenture; evidence of indebtedness; certificate of interest or participation in any profit-sharing agreement; collateral trust certificate; preorganization certificate of subscription; transferable share; investment contract; voting-trust certificate; certificate of deposit for a security; oil, gas or other mineral lease, right or royalty, or any interest therein; or, in general, any interest or instrument commonly known as a “security,” or any certificate of interest or participation in, temporary or interim certificate for, guarantee of, or warrant or right to subscribe to or purchase, any of foregoing. (13.1-501). “Security” does not include any insurance policy or agreement, endowment policy, annuity contract, variable annuity contract, or any contract in relation to and in consequence of any such policy or contract, issued by regulated insurance company, when form of such policy or contract has been duly filed with State Corporation Commission Bureau of Insurance. (13.1-501).

Exempt Securities.

Following securities are among those exempt from securities registration requirements of Act: Securities issued or guaranteed by U.S., any state or political subdivision thereof or any foreign government with which U.S. maintains diplomatic relations if security is recognized as a valid obligation by such foreign issuer or guarantor; any security issued by and representing interest in or debt of, or guaranteed by, any national bank, state-chartered bank, or trust subsidiary organized under § 6.1-32.1 et seq., any federal savings and loan association or savings bank, or by any savings and loan association or savings bank organized under laws of this state; securities issued by credit unions, industrial loan associations, consumer finance companies, railroads, common carriers, public service companies, insurance companies, supervised by Corporation Commission; securities listed on New York Stock Exchange, American Stock Exchange (by rule, Corporation Commission has exempted securities designated as NASDAQ/NMS securities); or any other exchange approved by State Corporation Commission; securities issued by issuer organized under laws of foreign country and approved by State Corporation Commission; securities constituting commercial paper arising out of current transactions evidencing obligations to pay cash within nine months; securities issued in connection with employee stock purchase, savings, pension, profit-sharing or similar benefit plans; securities issued by co-operative association organized as corporation under laws of any state. (13.1-514).

Exempt Transactions.

Following are among transactions exempted from registration requirements of Act: Isolated transactions by owner or pledgee of security if not for benefit of issuer; nonissuer distribution by registered broker-dealer of security outstanding for past five years if dividends have been paid on common stock of issue in each of past three years of at least 4% of its current market price; transactions by registered broker-dealer pursuant to unsolicited order or offer to buy; transactions constituting issue of evidences of indebtedness secured by mortgage if offered and sold as unit; sale pursuant to court order by receiver, trustee in bankruptcy or other judicially appointed officer; offers or sales to corporation, investment company, or pension or profit-sharing trust or to broker-dealer; any sale of its securities by issuer if, after sale, it has not more than 35 security holders, and if its securities have not been offered to general public by advertisement or solicitation; sales to existing security holders of issuer if no remuneration is paid for solicitation or if issuer obtains exemption from Corporation Commission; offers (but not sales) of securities for which registration statements have been filed under Act and under Federal Securities Act of 1933, but only for those periods that registration statements are not effective; issuance of not more than three shares of common stock to incorporators; sales of issue of bonds, aggregating $150,000 or less, secured by first lien deed of trust on realty situated in Virginia, to 30 persons or less who are residents of Virginia; any offer or sale by issuer or by duly Virginia licensed real estate broker or agent of any interest in any partnership, corporation, association or other entity created solely to provide residential housing within Commonwealth; any offer or sale by Virginia church if only to or by its members who are Virginia residents and who do not receive remuneration or compensation as offerors or sellers; any offer or sale of securities by professional business entity to person licensed to render in state same professional services rendered by professional business entity; any offer that is communicated on Internet, World Wide Web or similar proprietary or common carrier electronic system and that is in compliance with rules of Corporation Commission; any transaction by bank pursuant to unsolicited offer or order to buy or sell any security, provided such transaction is not affected by employee of bank who is also employee of broker-dealer. (13.1-514).

Corporation Commission is authorized to create by rule limited offering exemption. (13.1-514).

Registration of Securities.

Securities may be registered with the Corporation Commission by (1) Notification, if the issuer meets certain standards (13.1-508); (2) coordination, if the securities are also being registered under the Federal Securities Act of 1933, by filing the prospectus, and such other documents filed pursuant to the Federal Securities Act of 1933 as the Corporation Commission may require (13.1-509); and (3) qualification effected by filing a registration statement and other documents as required (13.1-510).

Registration of Broker-Dealer and Agents.

Broker-dealers, investment advisors, investment advisor representatives and other agents are required to file application for registration with Corporation Commission which will, if approved by Commission, constitute registration which must be renewed annually per rules of Commission. Corporation Commission may make such investigation as it deems appropriate before approval of application and may require reasonable surety bond not in excess of $25,000 as evidence of financial responsibility. (13.1-505). Corporation Commission may require dissemination of additional information with respect to investment advisors to protect investors. (13.1-505.1). Corporation Commission may, after due notice and hearing, revoke registration for cause. (13.1-506).

Advertisements.

The Corporation Commission may require that copies of advertisements and other sales literature be filed with it. (13.1-515).

Civil Penalties.

Corporation Commission may impose fine of up to $10,000 for each violation of 13.1-501 et seq., and may revoke any authority or registration of defendant regardless of whether fine imposed. Corporation Commission may order rescission of sales and restitution to purchaser. (13.1-521).

Liabilities.

Any person who sells a security, or participates or aids in such sale, or provides investment advice in violation of Act is liable to purchaser or customer for consideration paid (less income received on security or from advice) plus 6% interest, costs and attorney's fees upon tender of such security, or for damages if he no longer owns them (in case of securities sale). Suit must be brought within two years after the transaction upon which it is based. (13.1-522).

Uniform Simplification of Fiduciary Security Transfers Act.

Repealed 1996, effective Jan. 1, 1997.

Uniform Securities Ownership by Minors Act not adopted.

Gifts to Minors.

See category 14 Family, topic 14.10 Infants.

Franchises.

See topic 3.15 Franchises.

3.25 STATUTE OF FRAUDS:

See topic 3.16 Frauds, Statute of.

3.26 TRUST RECEIPT SECURITY:

See category 8 Debtor and Creditor, topic 8.15 Pledges.

3.27 WAREHOUSEMEN:

Uniform Commercial Code has been adopted. (8.1A-101 et seq.). See topic 3.09 Commercial Code.

Tobacco warehouses (61.1-38 to -46.1) are subject to regulations not applicable to other warehouses.

Licenses.

Tobacco warehouses may be public or private. If public they are subject to numerous regulations and restrictions. (61.1-38 to -46.1). If private conduct is same as if public, except as to inspection of tobacco. (64 Va. 184).

Lien.

See topic 3.09 Commercial Code.

4 CITIZENSHIP

4.01 ALIENS:

Property.

Aliens not enemies may acquire and hold real property and transmit in same manner as citizens. (55-1). Title by descent may be derived through aliens. (64.1-4).

Employment.

Employment or paid referral for employment of alien who cannot provide documents of eligibility for employment in U.S. is illegal. Permits issued by U.S. Department of Justice authorizing alien to work in U.S. shall constitute proof of eligibility for employment. (Va. Code 40.1-11.1).

5 CIVIL ACTIONS AND PROCEDURE

5.01 ACCORD AND SATISFACTION:

Part performance of an obligation, promise or undertaking either before or after breach, expressly accepted in satisfaction and rendered in pursuance of an agreement for that purpose, though without any new consideration, extinguishes obligation. (11-12).

Accord and satisfaction by use of instrument is governed by 8.3A-311 which provides that conspicuous statement to effect that instrument was tendered as full satisfaction of disputed claim discharges claim unless claimant, if it is organization, previously notified person against whom claim is made that such payments are to be sent to designated person, place or office and such designee did not receive payment or unless claimant tenders repayment within 90 days.

Compromise with joint debtor does not release co-debtors (11-10), but full share of debtor released is credited on debt, except where compromise is with surety, when only sum paid is credited (11-11). Compromise does not affect right of contribution between co-debtors. (11-13). Court in which matter is pending shall have authority to approve and confirm compromise when party to action is under disability. (8.01-424).

Pleading.

Must be pleaded affirmatively and burden of proof on party raising. (204 Va. 450, 132 S.E.2d 450).

See category 3 Business Regulation and Commerce, topic 3.09 Commercial Code.

5.02 ACTIONS:

Equity.

Actions traditionally distinguished between law and equity are administered in same courts. There shall be one form of civil case, known as civil action. (Rule 3:1).

Condition Precedent.

Action against municipality for injury to person or property or death cannot be maintained unless written statement of claim is filed with county, city or town attorney or mayor or chief executive within six months after cause of action accrued. If claimant was under disability when cause of action accrued, tolling provisions of 8.01-229 shall apply. This section takes precedence over conflicting provisions of municipal charters. (15.2-209).

Tort action against Commonwealth cannot be maintained unless written statement of claim is made to Attorney General or Director of Division of Risk Management within one year after cause of action accrued. Notice deemed filed when received in office of designated official. Delivery may be by hand, by any form of United States mail service (including regular, registered or overnight mail), or by commercial delivery service. Signed United States mail return receipt indicating date of delivery, or any other signed and dated acknowledgment of delivery given by authorized personnel shall be prima facie evidence of filing notice. (Va. Code 8.01-195.6). If claimant under disability at time cause of action accrued, tolling provisions of 8.01-229 shall apply.

At any time within 30 days of filing responsive pleading in malpractice action against health care provider, plaintiff or defendant may request review by medical malpractice review panel. Action is stayed during pendency of such panel review. (Va. Code 8.01-581.2).

Commencement.

See topic 5.19 Practice. In general district court actions are commenced by warrant (16.1-79) or by motion for judgment (16.1-81).

Class Actions.

Uniform Class Actions Act not adopted. No statute or rule governing class actions in general. Under common law, taxpayers as group allowed to sue for injunctive relief against illegal taxes (103 Va. 477, 49 S.E. 633), and against administrative orders (77 Va. 335). Traditional equity power to allow class actions where parties are numerous and all members have common interest has been recognized. (89 Va. 455, 16 S.E. 360). Groups of policyholders can be bound by prior representative adjudication. (173 Va. 313, 4 S.E.2d 395). Creditors have been allowed to sue as class. (47 Va. 174). Time-share estate owner may bring class action only with written authorization of all other owners. (55-384).

Parties.

Actions or suits do not abate for non joinder or misjoinder, but parties may be dropped by order of court or may be added, unless not residents of, or subject to service of process in, the state, or not liable under statutes of frauds or limitations. (8.01-5, -7).

Tenants in common may be joined as plaintiffs or defendants. (8.01-10).

Insurer.

The statute does not permit joinder of insurance company by reason of its having issued liability policy to party. (8.01-5[B]).

Minors.

Either or both parents may sue on behalf of minor as his next friend. (8.01-8).

Intervention.

FRCP 24 not adopted. However, new party may by leave of court file pleading to intervene as plaintiff or defendant to assert any claim or defense germane to subject matter of proceeding. (Rule 3:14). State joinder rule is identical with FRCP 19, except that motion to join additional party must be filed with clerk of court within 21 days after service of complaint and served on party sought to be joined. (Rule 3:12).

Person claiming interest in property taken under distress or fieri facias may appear, give bond and assert claim. (8.01-365).

Persons having claim to personal property subject to sale to enforce lien of mechanics, inn-keepers, garages or bailee may file petition asserting claim before property is sold or proceeds of sale distributed. (43-35).

Person whose property or interest therein will be lost or damaged as result of eminent domain taking may, by petition filed by leave of court, assert any claim or defense germane to proceeding. (25.1-218).

Interpleader.

Any person who is or may be exposed to multiple liability through existence of claims by others to same property or fund held by him or on his behalf may file pleading and require such parties to interplead their claims. (8.01-364). Virginia's statute is patterned in large part upon FRCP 22 and 28 USC § 1335.

Consolidation and Severance.

Statutes explicitly permit consolidation of actions involving six or more plaintiffs. Common questions of law or fact which arise out of same transaction or occurrence must predominate. Decision to consolidate is committed to court's discretion, as long as court considers enumerated factors. (Va. Code 8.01-267.1-267.3). Joined actions may be severed unless cases satisfy standards for ordering consolidation. (Va. Code 8.01-267.5). These explicit provisions for consolidation, joinder and severance do not limit court's discretionary right to order such procedures as provided by common law or by statute. (Va. Code 8.01-267.9).

Where action by infant plaintiff is pending against tortfeasor for personal injury, parent or guardian entitled to recover medical expenses may bring action against tortfeasor in same court either in such pending action or in separate action.

Payment into court, in a personal action, of money admitted to be due may be accepted as full satisfaction, or as part satisfaction and action continued as to remainder. (8.01-421).

Abatement will not be caused by marriage. (8.01-19). Neither will it result from death, insanity, conviction of party of felony or cessation of powers of personal representative or committee occurring after verdict. (8.01-20, -21). Nor does such event cause abatement as to any of joint parties if cause of action survives. (8.01-22).

Revival.

See topic 5.19 Practice.

Limitation of.

See topic 5.16 Limitation of Actions.

Small Claims.

See category 6 Courts and Legislature, topic 6.01 Courts.

Direct Actions Against Insurer.

See category 23 Transportation, topic 23.01 Motor Vehicles, subhead Direct Actions.

Third Party Practice.

See topic 5.19 Practice.

Joinder of Causes of Action.

See topic 5.19 Practice.

5.03 APPEAL AND ERROR:

From Courts of Record to Supreme Court.

See generally Rules 5:1 et seq. Appellate review from all circuit courts in most civil matters is by petition for appeal to Supreme Court. (8.01-670). Automatic review from: Convictions imposing death sentence; final circuit court decision on habeas corpus; and final decision of State Corporation Commission. (Rule 5:21, 5:22).

Petition must be presented within three months from date of judgment except 30 day extension may be granted in discretion of court in criminal case. (8.01-671).

Bonds are required in all civil cases, except by estates of decedents, persons under disability, indigents, or claimants appealing decision of Workers' Compensation Commission who remain unemployed, or by Commonwealth, counties, cities and towns of state, before appeal is effective. They must be filed within 15 days from date of certificate of appeal. (Va. Code 8.01-676.1).

Suspension of execution pending preparation of appeal may be had in court below by order fixing time and bond to be filed, and thereafter until petition is acted on if filed in time. (Va. Code 8.01-676.1).

From Courts of Record to Court of Appeals.

See generally Rules 5A:1 to 5A:36. Appeal of right to Court of Appeals from circuit court family law final decisions; circuit court final decisions on appeal from administrative agency or grievance hearing decisions; Virginia Workers' Compensation Commission final decisions; and interlocutory decrees or orders from decisions above, granting, dissolving or denying injunction. (17.1-405). Appeal by petition to Court of Appeals from final convictions in circuit courts of traffic infractions, crimes not involving death sentence, final orders involving involuntary treatment of prisoners, or final orders for declaratory or injunctive relief regarding religious freedom under 57-

2.02. (17.1-406). Petition for appeal in criminal cases must be presented within 40 days after filing of record with Court of Appeals, but 30 day extension may be granted at Court's discretion. (17.1-408).

Appellate review from Court of Appeals by petition for appeal to Supreme Court. No right of appeal from traffic and misdemeanor cases where there is no incarceration imposed, cases originating in administrative agencies or Workers' Compensation Commission, family law cases and appeals involving involuntary treatment of prisoners. (17.1-410-411).

Bonds are required to effect appeal, except by decedents' estates, persons under disability, indigents, or claimants appealing decision of Industrial Commission who remain unemployed, or by counties, cities and towns. Appeal bond must be filed simultaneously with notice of appeal of right to Court of Appeals; within 15 days from date of certificate of appeal on petition for appeal to Court of Appeals or Supreme Court. (Va. Code 8.01-676.1).

Suspension of execution pending preparation of appeal automatic upon posting of bond and may also be ordered during appeal by Court of Appeals or by Supreme Court upon granting appeal. (Va. Code 8.01-676.1).

From General District Courts.

In civil cases involving over $50 or constitutionality of statute or ordinance, or enforcement of Virginia Freedom of Information Act, appeal may be taken as matter of right within ten days on bond being given or deposit made for payment of judgment, damages and costs. Clerk thereupon delivers original papers to appellate clerk. (16.1-106 to -108, -112). Party appealing judgment rendered in general district court in civil action must post bond within 30 days of date of judgment, except for appeal from judgment of general district court on unlawful detainer. (16.1-107, 221 Va. 1092, 277 S.E.2d 213).

Appeal lies to circuit court having jurisdiction in territory of court from which appeal is taken. (16.1-106).

Trial on appeal is de novo with right to jury if either party so requests and amount in controversy exceeds $50. (16.1-113).

In penalty suits arising from failure to construct railroad cattle guards appeal is of right regardless of amount involved. (56-435).

From Juvenile and Domestic Relations Court.

Appeal of right from juvenile and domestic relations court lies to circuit court when sought within ten days and shall be heard de novo. (16.1-132, -296). In cases involving support, bond is required in amount and with sufficient surety to satisfy judgment as may be rendered. (16.1-296).

From State Corporation Commission.

Appeal of right by state or any party aggrieved from State Corporation Commission may be taken within four months to Supreme Court. (12.1-39 to -41).

From Conservators of the Peace.

Appeal from conservators of peace lies of right to circuit court. Case is heard de novo. Bail may be required by conservator. (19.2-24).

From Board of Supervisors.

On the disallowance of any claims over $10 against a county by a board of supervisors, appeal lies to the circuit court of the county, within 30 days if claimant was present, if not, within

30 days after notice, but in no event after more than six months, by serving written notice on the clerk of the board and filing appeal bond. (15.2-1246).

Filing deadlines are mandatory and jurisdictional. (215 Va. 328, 210 S.E.2d 140).

5.04 BONDS:

Bonds given before court, board, or officer, unless otherwise provided, must be made payable to Commonwealth (49-12). Bonds in civil proceedings may be payable to party entitled to benefit thereof. (49-20). They must contain homestead waiver, and are approved by court, board, or officer before whom taken. (49-12). Action or motion on bond in name of Commonwealth may be maintained for benefit of any party injured. (49-19).

When new bonds are accepted, old are discharged and sureties on old bonds shall be discharged for breach committed after new bonds are accepted unless it is otherwise expressly provided. (49-14). When additional bonds are accepted, old is liable for any previous default, and old and new jointly for any subsequent default. (49-14).

Sureties.

Every bond given before a court, board, or officer, unless otherwise provided, must be made payable to the Commonwealth with surety deemed sufficient by the court, board, or officer. (49-12). Surety company with paid-up cash capital of not less than $250,000 and incorporated or qualified in Virginia may become surety on bond. (49-15).

On cost (17.1-608) and injunction bonds (8.01-632), sureties may move for additional security, as may parties.

Exceptions.

In detinue (8.01-117), and attachment (8.01-554), exceptions to sufficiency of bonds may be filed and passed upon by court. In attachment, if bond is not good, officer must file a good bond or be liable on his official bond, but may have a remedy on bad bond. (8.01-554).

Judgment on Bonds.

On cost bonds if plaintiff is nonresident, judgment may be entered on motion for amount due defendant. (17.1-607). On appeals from courts not of record, judgment on affirmance is entered against principal and surety on appeal bond. (16.1-113). For procedure to be followed in other cases, see topic 5.19 Practice.

5.05 CERTIORARI:

Jurisdiction and Grounds.

Writs of certiorari to all inferior tribunals may be granted by circuit courts. (17.1-513). Grounds and extent of inquiry are as at common law. (121 Va. 666, 93 S.E. 566).

Supreme Court may after reasonable notice to counsel in appellate court, award writ of certiorari and bring before it, when part of record is omitted, whole or any part of such record. (8.01-673). Judge has power to grant writ of certiorari in chambers or in vacation. (2 Va. Cas. [4 Va.] 268). Copy of record must accompany application for certiorari. (4 Hen. & M. [14 Va.] 1).

5.06 CHARITABLE IMMUNITY:

See topic 5.09 Damages.

5.07 COMMISSIONS TO TAKE TESTIMONY:

See topic 5.11 Depositions and Discovery.

5.08 COSTS:

Costs at law are recovered by the prevailing party (17.1-601) against party in interest (17.1-603). They are discretionary in equity (17.1-600) and allowed to party substantially prevailing on appeal to Court of Appeals or Supreme Court (17.1-604). $200 allowed as expense of printing brief in Supreme Court. (17.1-605).

Nonresident plaintiffs may be required to give security for costs, within 60 days, by bond payable to the Commonwealth. One resident surety sufficient. Judgment may be entered on such bond on motion for benefit of defendant or an officer entitled thereto. (17.1-607).

See also category 16 Insurance, topic 16.01 Insurance Companies, subhead Actions.

5.09 DAMAGES:

Common law generally prevails. Uniform Comparative Fault Act and Uniform Contribution Among Tortfeasors Act not adopted.

Comparative negligence rule not adopted, except in certain railroad crossing accident cases. (56-416).

Charitable immunity prevails (200 Va. 878, 108 S.E.2d 388), modified in case of hospitals (8.01-38).

Licensed or certified health care professionals who, voluntarily and without compensation, render health care services at free clinics are immune from civil liability, except for acts or omissions constituting gross negligence or willful misconduct. (54.1-106). Persons rendering emergency care and obstetrical services may be exempt from liability under certain circumstances. (8.01-225).

Members of churches, synagogues, or religious bodies are immune from liability in tort or contract where claim arises from actions of any officer, employee, or other member thereof. (Va. Code 8.01-220.1:3).

Teachers employed by local school boards are not liable for civil damages resulting from supervision, care, or discipline of students when acting in good faith within scope of their employment. (Va. Code 8.01-220.1:2).

Officers and directors who serve without pay for tax exempt organizations are immune from liability when acting in such capacity, with certain exceptions. (Va. Code 8.01-220.1:1).

Sovereign Immunity.

State cannot be sued without its consent. (174 Va. 82, 4 S.E.2d 746). Effective July 1, 1982, state may be held liable for damages for tort, but damages for actions accruing prior to July 1, 1988 may not exceed $25,000. For actions accruing on or after July 1, 1988, damage cap is $75,000, actions accruing on or after July 1, 1993, cap is $100,000 or limits of any insurance in force, whichever is greater. (Va. Code 8.01-195.1 to -195.8). Municipalities are liable for torts committed in exercise of proprietary function, but immune for torts committed in exercise of governmental function. (97 Va. 722, 34 S.E. 883).

Medical Malpractice.

For acts of malpractice occurring on or after Aug. 1, 1999, total amount of damages recoverable may not exceed 1.5 million dollars. Statute provides for annual increases in cap until

July 1, 2008. (Va. Code 8.01-581.15). Committee, board members and consultants shall have civil immunity for functions related to patient safety. (Va. Code 8.01-581.16). Under limited circumstances, physicians shall have civil immunity for failure to review or act on results of laboratory tests or examinations which physician neither requested nor authorized for patient. (Va. Code 8.01-581.18:1). Reports and patient safety data in patient safety organization's possession is confidential. Employer may not retaliate against employees who make good faith report to such organizations. (Va. Code 8.01-581.17).

Immunity for Emergency Assistance.

To persons (8.01-225) and to animals (Va. Code 8.01-225.2).

No-Fault Insurance.

See category 23 Transportation, topic 23.01 Motor Vehicles, subhead No-Fault Insurance.

Release of Claims.

Release or covenant not to sue, including so-called “high-low” agreements, given to one of two or more persons liable in tort for same injury does not discharge other persons unless its terms so provide. Recoveries against other persons will be reduced by any amount given in consideration for covenant or release. Person who enters into release or covenant with claimant cannot recover by way of contribution from other persons whose liability is not extinguished by release or covenant. Release or covenant not to sue need not be in writing if parties to pending action state in open court that they have agreed to enter into such release or covenant and to set forth same in writing. (Va. Code 8.01-35.1).

Punitive Damages.

Effective July 1, 1988, total punitive damages against all defendants cannot exceed $350,000. (Va. Code 8.01-38.1).

Exemplary Damages.

Finder of fact may award exemplary damages to plaintiff if plaintiff was injured by intoxicated driver that acted with malice or such willful or wanton conduct as to show conscious disregard for others. If intoxicated driver unreasonably refuses to submit to test of blood alcohol content, then driver's conduct may be deemed sufficiently willful or wanton to give rise to action for exemplary damages. (Va. Code 8.01-44.5). To be held liable for exemplary damages, it must be proven that at time defendant began drinking alcohol or during time he was drinking alcohol or when he was operating motor vehicle, he knew or should have known that his ability to operate vehicle, engine, or train would be impaired. (Va. Code 8.01-44.5).

Assisted Suicide.

Persons who intentionally and knowingly assist another to commit suicide may be liable in civil action for damages and subject to injunctive relief. (Va. Code 8.01-622.1).

5.10 DECLARATORY JUDGMENTS:

See topic 5.15 Judgments.

5.11 DEPOSITIONS AND DISCOVERY:

See topic 5.15 Judgments.

Depositions of party, or any witness designated under Rule 4:5(b)(6) to testify on behalf of party, shall be taken in county or city in which suit is pending, or in adjacent county or city, except upon agreement of parties or alternative designation, for good cause, by court. Restrictions do not apply to resident parties who fail to file responsive pleadings or to otherwise make appearance. Unless otherwise provided by law of jurisdiction where nonparty witness resides, deposition of nonparty witness shall be taken in county or city where nonparty witness resides, is employed, or has his principal place of residence; at place upon which witness and parties agree; or at place that court may, for good cause, designate. (Va. Code 8.01-420.4). Depositions of any person, including party, are taken upon notice, after commencement of action. (Rule 4:5). Deposition of any witness may be read by any party for any purpose except summary judgment, if court finds: (a) witness is dead; or (b) witness is out of state or more than 100 miles from place of trial or hearing; or (c) witness is unable to attend because of age, illness, infirmity, or imprisonment; or (d) party offering deposition has been unable to secure witness's attendance by subpoena; or (e) upon application and notice, that such exceptional circumstances exist to make it desirable to allow deposition to be used; or (f) if witness is judge, superintendent of hospital for insane that is more than 30 miles from place of trial, or is physician, surgeon, dentist or other individual whose presence is excused. (Rule 4:7).

Parties may by written stipulation: (1) Provide that depositions may be taken before any person, at any time or place, upon any notice and in any manner, and (2) modify procedures provided by Rules except those extending time. (Rule 4:4).

Within State.

Any person authorized by law to administer oaths may take depositions which may be received without proof of signature, if certified by his hand. (Rule 4:3).

Outside State.

In any other state, territory or insular possession subject to dominion of U.S., depositions may be taken before any officer authorized to take depositions in jurisdiction wherein witness might be, or before any commission appointed by Governor of Virginia; or if in foreign country, any representative of U.S., including commissioned officers of armed services of U.S., or mayor or other magistrate of any city, town or corporation, or any notary. (Rule 4:3).

No authentication is required of certificate of officer who attaches his official seal. If officer has no seal, genuineness of his signature must be authenticated by some officer of same state or country, under his official seal, except no seal is required of commissioned officer of armed services of U.S., but his signature must be authenticated by commanding officer of his base or ship. (Rule 4:3).

Notice.

Reasonable notice (at least seven days) in writing of time and place of taking deposition must be given to every other party to action. Notice must state time and place of taking deposition and name and address of each person to be examined. If subpoena duces tecum will be served on person being examined, designation of materials as set forth in subpoena must be included in notice. (Rule 4:5). All errors and irregularities in notice are waived unless written objection is promptly served to party giving notice. (Rule 4:7). If party giving notice fails to serve subpoena upon witness, who because of such failure does not attend, and another party attends, court may order party giving notice to pay other party reasonable expenses incurred. (Rule 4:5).

Taking After Judgment.

If appeal has been taken or time for taking has not expired, court may allow taking depositions of witnesses to perpetuate their testimony. Party desiring perpetuation may make motion to court for leave to take depositions, and must show: (1) Names and addresses of persons to be examined and testimony expected to be elicited; and (2) reasons for perpetuating testimony. (Rule 4:2).

Probate Proceedings.

In proceedings for probate of a will, deposition of an attesting witness, who lives without state, or if in state, who is confined in another county or corporation under legal process, or is unable to attend before court or clerk from sickness, age, or other cause, may be taken as in other cases, but without notice except to a person opposing probate who has made himself a party. Same applies in case of witness to handwriting of holographic will. Will may be temporarily withdrawn for purposes of proof if an attested copy be left in its place. (64.1-87). Such deposition may be taken prior to probate and filed at time will offered; provided, if probate contested, opposing party may examine such witness. (64.1-87). Such depositions may be subsequently used on trial by jury, if witness cannot be produced. (64.1-91).

Depositions to Perpetuate Testimony.

Any person desiring to perpetuate testimony may file petition therefor with court and must show: (1) Petitioner expects to be party to action cognizable in court of this State but is presently unable to bring it or cause it to be brought; (2) subject matter of expected action and interest therein; (3) facts desired to be established by proposed testimony and reasons for perpetuating; (4) names or descriptions and addresses of persons expected to be adverse parties; (5) names and addresses of persons to be examined and expected testimony. At least 21 days before date of hearing notice must be served to all expected adverse parties in petition, or court may make order for service by publication. Court must appoint attorney to represent and cross-examine deponent for persons not served. After hearing, court may make order naming person and subject matter of deposition. (Rule 4:2).

Uniform Audio-Visual Deposition Act has been adopted. (8.01-412.2 to 8.01-412.7).

Uniform Interstate Depositions and Discovery Act has been adopted. (8.01-412.8 to 8.01-412.15).

Compelling Attendance of Witnesses.

Summons may be issued to compel attendance of witness before commissioner or other person appointed by authority of another state, as in domestic cases, but only if witness be citizen of Virginia and summons requires attendance at place within his city or county. Summons is issued by clerk of circuit court. (8.01-407). Attendance of a witness may be compelled by subpoena. (Rule 4:5).

Return.

When completed, deposition must be certified and returned by officer taking, and lodged with party initiating deposition or, in divorce or annulment case, filed with court. (Rule 4:5). Notice must be produced and proved. (53 Va. 484). Better practice is to annex agreement or notice to deposition.

Requisites.

The requisites for a deposition are not prescribed. The following suggestions may avoid objections. The caption should indicate the court and proceeding for which taken, the notice or agreement for taking, the place and time, and the official designation, if any, of the person taking. The notice or agreement should be returned with or annexed to the deposition. Adjournments should be noted and further examination conducted only at time to which adjournment was taken. Appearances should be noted. Questions and answers should be written, or typewritten or taken stenographically and subsequently written or typewritten by the officer or under his direction, and then shown or read to witness, and then subscribed by witness. Exhibits should be clearly identified. Witnesses should be sworn by person taking. Parties or their representatives are entitled to be present, and examine or cross-examine, and offer evidence, but should not take or assist in writing or as interpreter. The person taking should sign a certificate thereof, adding his official title if any, and annexing seal if any.

No form is prescribed. The following may be used:

Form

. . . ., Plaintiff

v.

. . . ., Defendant

Depositions of . . . ., witnesses, taken before me, C. D., a . . . . for the . . . . of . . . . in the State of . . . ., on the . . . . day of . . . ., and the other days hereinafter mentioned, in pursuance of the annexed notice, at . . . . in the . . . . of . . . . and State of . . . ., between the hours of . . . . and . . . . to be read in evidence in a suit (or action), in which . . . . is plaintiff, and . . . . is defendant, pending in the . . . . court for the . . . . of . . . . in the State of Virginia.

Examination of witness: Present . . . . counsel for plaintiff. . . . . counsel for defendant.

A. B. (the witness) being first duly sworn, deposeth and saith in answer to interrogatories as follows: (Insert testimony and have witness sign same).

When the depositions are completed, the officer taking the same will annex the following certificate:

State of . . . .

. . . . . . of . . . ., to wit:

I, C. D., a . . . . for the . . . . of . . . ., in the State of . . . ., do hereby certify that the foregoing depositions were duly taken, reduced to writing, and signed by the witnesses, respectively, before me, at the place and the times therein mentioned, pursuant to the annexed notice.

In witness whereof I have hereunto set my hand and affixed my official seal at . . . . aforesaid, this . . . . day of . . . ., 20. ..

(Officers' fee for taking depositions should always be written upon the depositions).

5.11A DETINUE:

Proceedings.

Where specific personal property is unlawfully detained or withheld, detinue lies for recovery of possession, or in alternative, of its value, with damages and costs. (8.01-114 to 123; 8.01-470 to 472).

Petition in detinue shall commence on warrant or motion for judgment if pretrial seizure not sought at time for filing. (8.01-114). Petition in detinue for pretrial seizure, filed by motion for judgment or warrant, shall describe kind, quantity, estimated fair market value of property to be seized, basis of entitlement and allege one or more grounds in 8.01-534. (8.01-114). When petition filed, costs, fees and taxes must be paid. (8.01-114). Evidence received in form of sworn petition only. (8.01-114). Process commanding seizure issued with form for request for hearing on claimed exemption. (8.01-114). If immediate possession of personal property is sought, process directing seizure and delivery to plaintiff will issue ex parte if bond for double value posted and 8.01-114.A. requirements are set forth and reasonable cause shown. (8.01-114.B.; 8.01-115). Within 30 days after issuance of order pursuant to 8.01-114, or upon application, court shall conduct hearing to review decision to issue order or other process described in 8.01-114. (8.01-119). If combined with hearing on claimed exemption, hearing must be conducted within ten business days of filing request. (8.01-119).

Repossession.

Defendant or any person claiming title may secure return of property by giving bond for double value, conditioned to pay damages and costs and that property will be forthcoming. (8.01-116). Bonds may be excepted to, and court may make such order thereon as may seem just. (8.01-117).

Claims of Third Persons.

Same rights as defendant to secure return of property. (8.01-116).

Judgment of Order.

Verdict, if for possession should specify alternative value, and if does not, another jury may be impaneled to ascertain value. (8.01-120). On judgment for personal property, plaintiff has option between writ of possession and damages and costs or fieri facias for alternative value. (8.01-472). On judgment for specific real or personal property writ of possession and fieri facias for damages or profits and costs may issue. (8.01-470). When claim is on contract to secure payment of money, judgment must be for sum due, or else property and costs, and defendant has his election. Court may grant defendant up to 30 days to discharge judgment, if sufficient security given. (8.01-121). When such property involves animal as defined in Va. Code 3.1-796.66 (domestic animals, including agricultural and companion animals) court may order return of animal to prevailing party without regard to alternative methods of recovery. (8.01-121).

5.12 EQUITY:

See topic 5.02 Actions.

5.13 EVIDENCE:

See topic 5.11 Depositions and Discovery.

Witnesses.

No person is incompetent because interested or party, but at law such witnesses may be required to testify ore tenus, under penalty of exclusion of their depositions. (8.01-396).

See also topic 5.11 Depositions and Discovery.

Conviction of felony or perjury does not render the convicted person incompetent, but may be shown to affect credibility. (19.2-269).

Defendant who takes stand in his own defense and testifies on direct examination that he has previously been convicted of certain number of felonies, cannot be questioned as to nature of offenses unless they involved perjury. (225 Va. 419, 304 S.E.2d 2).

Adverse party may be examined as on cross-examination, and party refusing to testify when required may be penalized by dismissal of his proceeding, or striking out of his pleading of defense or part thereof. (8.01-401).

Necessity for Corroboration.

Testimony of adverse or interested party must be corroborated as against one incapable of testifying, or his committee, trustee, executor, administrator, heir or other representative, except where party incapable of testifying has rendered himself unable to testify by intentional self-inflicted injury. Such testimony makes admissible all relevant memoranda and declarations of incapable person made while capable. (8.01-397). If testimony relates to conversations protected by patient-physician relationship, higher degree of corroboration is required. (255 Va. 482, 499 S.E.2d 833).

Husband and wife are competent witnesses to testify for or against each other in all civil actions. In any civil proceeding, person has privilege to refuse to disclose and prevent anyone else from disclosing any private communication between spouse and self during their marriage, regardless of whether person is married to spouse at time of objection to disclosure. Privilege unavailable at any proceeding in which spouses are adverse parties, or in which either spouse is charged with crime or tort against person or property of other or against minor child of either. (8.01-398).

In criminal cases, neither husband nor wife may be compelled, nor, without consent of other, allowed to testify against other, except for offense committed: (1) By one against other, property of other, or minor child of either; (2) where one is charged with forging name of other or with uttering or attempting to utter writing bearing alleged forged signature of other; or (3) in any proceeding relating to violation of laws pertaining to criminal sexual assault or abuse of children. (Va. Code 19.2-271.2). Except in prosecution for criminal case set forth in § 19.2-271.2, interspousal confidential communication privilege provided in 8.01-398 applies also to criminal cases. (Va. Code 19.2-271.2).

Where one spouse indicted for offense against other and also offense against third party, both offenses arising from common criminal enterprise, witness-spouse can testify against defendant-spouse on both charges. (Va. Code 19.2-271.2; 223 Va. 601, 292 S.E.2d 319).

Spousal testimony permitted in prosecution for offenses by one spouse against property of other as well as against person. (Va. Code 19.2-271.2; 223 Va. 601, 292 S.E.2d 319, overruling 186 Va. 775, 43 S.E.2d 858).

Competency of Minor.

No child deemed incompetent to testify solely because of age. (Va. Code 8.01-396.1).

Religious practitioner immune from testifying in criminal proceedings as to confidential information received in professional capacity. (Va. Code 19.2-271.3).

Self-incrimination.

Person may not be compelled to give testimony which may be self-incriminating. (Const., Art. I, § 8).

Compelling Attendance.

See topic 5.11 Depositions and Discovery.

Crime Victims and Witnesses.

Judge may prohibit testimony as to current address or telephone number of victim or witness in criminal proceeding on motion of Commonwealth Attorney if such information is not material to case. (Va. Code 19.2-269.2).

Testimony by Judicial Officers.—Judges, clerks and magistrates may testify in limited circumstances. (19.2-271).

5.14 INJUNCTIONS:

Jurisdiction.

Every circuit court has power to issue interlocutory and final injunctions according to principles of equity. (8.01-620). State Corporation Commission, sitting as court of record, may enjoin: Violations of Retail Franchising Act (13.1-568); violations of Securities Act (13.1-519); violations of law regulating public service corporations (56-6); and may issue summary order prohibiting payment of dividend by public service corporation to affiliated interest (56-83).

Venue is where the act to be restrained is being or may be committed, except that bill to restrain judicial proceedings must be filed in the same court, unless the proceeding is in a district court. In this case bill must be filed in circuit having jurisdiction over county or city of such district court (8.01-261[15]), but any circuit judge may award injunction (8.01-620), and direct order to clerk of proper court (8.01-627).

Statutes Authorizing Injunctions.

Injunctions are authorized by statute to restrain or enjoin: violations of Uniform Statewide Building Code (8.01-620); willful and malicious injury of reputation, trade, business or profession (18.2-500); public nuisances and criminal street gang activity (48-8); violation of public service corporation statutes (56-6); use for trade or advertising of name or picture of any person living or dead without due authority (8.01-40); in aid of attachment (8.01-549); to protect homestead or other exemptions (34-2); on bill of review (8.01-623); sale, removal or concealment of property in suit at law or in equity for specific property (8.01-622); unlawful condemnation of property (25.1-238); failure of domestic insurance company to remain solvent or comply with regulations of law (38.2-1508); unlicensed foreign insurance company from doing business (38.2-1039); illegal sale, storage, use, etc., of intoxicating liquors (4.1-335); restraint of trade by insurers (Va. Code 38.2-1916.2); wrongful transfer of securities (8.8A-403); violation of restrictions in condominium development (55-79.30); pyramid promotional schemes (18.2-240); removal of trade mark or use of untrue, deceptive or misleading advertisements (18.2-245; Va. Code 59.1-68.2); activity by brokers unable to adequately protect other persons (54.1-2116); usury or other violation of Consumer Finance Act (6.1-303); Housing Development Authority from acts unlawful or in violation of bond or noteholders' rights (36-55.47); violation of statutes governing automobile clubs (Va. Code 13.1-400.6); unfair methods of competition, deceptive acts, etc., by motor vehicle dealers (46.2-1505); violation of Home Solicitation Act and unlawful dealing in records, tapes, etc. (Va. Code 59.1-68.2); continuing violation of municipal ordinance (15.2-1432); sale or distribution of obscene books (18.2-384) or motion pictures (18.2-385); violation of zoning laws (15.2-2208); unlawful invasion of personal privacy by state agency (2.2-3809); violation of statute authorizing state operation of public utilities in face of threat of curtailment or interruption of operation (56-525); improper operation of water works (15.2-2156, 32.1-176); violation of water control laws, orders, quality standards, etc., (Va. Code 62.1-44.23); obstruction or contamination of state waters (Va. Code 62.1-194.1); unlawful use of subaqueous beds (28.2-1211); enjoin violation of regulations governing installation of sewerage systems (15.2-2133); removal of sand or gravel from area adjacent to state waters (62.1-192); tenant from committing waste pending suit to recover land (55-216); enjoin violation of Landlord-Tenant or Manufactured Home Lot Rental Acts (55-248.40, 248.48); violation of health rules, regulations, requirements or Board orders (32.1-27); operation without license of child welfare agency (63.2-1711); home for adults (63.2-1711); or new health care facility without certificate of need (Va. Code 32.1-102.8); employer from doing business for failure to satisfy unemployment compensation taxes (60.2-522); abridgment of right to work (40.1-67); illegal interference or picketing (40.1-53); discrimination based on sex or marital status in violation of Equal Credit Opportunity Act (Va. Code 59.1-21.23); religious discrimination in hotel advertising (57-2.1); discrimination in housing based on race, color, religion, national origin or sex (51.5-46, 36-96.18); illegal gambling (18.2-339); dealings in prepared term papers, theses or dissertations (18.2-507); attorneys at law from running, capping, soliciting and maintenance (54.1-3943); or barratry (18.2-454).

Procedure.

See generally topic Practice, subhead Equity Practice and Procedure. When court of competent jurisdiction grants an injunction or refuses to award injunction or dissolves temporary injunction, judge of Supreme Court may award, reinstate or employ injunction (8.01-626). For jurisdiction of Court of Appeals, see topic 5.03 Appeal and Error, subhead From Courts of Record to Court of Appeals. Court may require reasonable notice to adverse party. (8.01-629). Court with jurisdiction may dissolve injunction after reasonable notice to adverse party setting forth grounds (8.01-625) where injunction to stay proceeding or judgment for money is dissolved, damages may be assessed at 10% per annum on amount involved (8.01-633).

Bond usually must be given before injunction takes effect, with such conditions as court may deem proper. It must be given before clerk of court having jurisdiction of bill. Bond not required where injunction sought by state. (8.01-631). When injunction is to restrain removal of property from state, forthcoming bond may be required from defendant, on failure to give which court may order officer serving to take possession of property until further order. (8.01-630).

Temporary Injunction.

Interlocutory relief may be granted in court or vacation either with or without notice (8.01-624), if court is satisfied by affidavit or otherwise of plaintiff's equity. (8.01-628). However, ex parte injunctions generally require showing of irreparable damage. (157 Va. 71, 160 S.E. 36). Affidavit of corporate executive alleging truth of bill is sufficient compliance with requirement of 8.01-628. (102 Va. 483, 46 S.E. 784).

5.15 JUDGMENTS:

Decrees and Orders.

Decrees for land or specific personal property, and decrees or orders for payment of money, have the effect of judgments and are considered judgments as regards docketing, enforcement and satisfaction. Decrees or orders other than for payment of money may be enforced as equity decrees. (8.01-426). Persons entitled to benefit of any decree or order for payment of money are deemed judgment creditors, though fund be required to be paid into court, bank, or other depository. If time is specified in decree, execution will not issue until then. (8.01-427).

Confession of Judgment.

Judgment may be confessed for such amount as creditor may accept, whether proceedings are pending or not. The clerk must forthwith enter such judgment, and note the day and hour, from which time lien attaches. (8.01-431, -432). Confession of judgment may be by debtor personally, or by his attorney in fact acting under power of attorney duly acknowledged, or under power of attorney incorporated in note or bond authorizing confession on default in payment at maturity, which need not be acknowledged, but must name attorney and clerk's office in which confession may be made. If confession be under power of attorney, form is prescribed, to be prepared by clerk and signed by attorney. (8.01-435). See form 8.01-436. Execution may issue forthwith on confessed judgment. Such confessed judgment may be set aside within 21 days following notice to him that such judgment has been entered, and after notice to judgment creditors on any grounds constituting adequate defense or set-off in action on note, bond, etc., in which event cause is placed on trial docket. (8.01-433). Judgment is void if confessed by attorney-in-fact unless there be service of copy of order entered on judgment debtor within 60 days after entry of order, but service on nonresident may be by officer of foreign state or by registered or certified mail to last known address. (8.01-435-438, -441). Notes, bonds or other evidences of debt containing confession of judgment provisions entered into after Jan. 1, 1993, must have conspicuous notice that confession of judgment provision is included. (Va. Code 8.01-433.1).

Default Judgments.

See appropriate subheads under topic Practice.

Persons served by publication and not appearing may petition for rehearing within two years after entry of judgment, decree or order, but if personally served with copy of judgment, decree or order, time is limited to one year thereafter. (8.01-322).

Pursuant to Servicemembers Civil Relief Act, in any civil action or proceeding in which defendant does not make appearance, court shall not enter judgment by default until plaintiff files with court affidavit: (1) Stating whether or not defendant is in military service or (2) if plaintiff is unable to determine whether or not defendant is in military service, stating that plaintiff is unable to make determination. Failure to file affidavit shall not constitute grounds to set aside otherwise valid default judgment against defendant who was not military service member at time of service of process or entry of default judgment. (Va. Code 8.01-15.2).

Summary Judgment.

No motion for summary judgment or to strike evidence shall be sustained if based in whole or in part upon any discovery depositions, unless parties agree to such use. (8.01-420).

Declaratory Judgments.

In cases of actual controversy, binding adjudications of right may be made, either with or without consequential relief. (8.01-184). Virginia statutes on declaratory judgments are based on Uniform Declaratory Judgments Act.

Judgments of District Court.

Judges of district courts must endorse their judgments on the writings or papers on which warrant issued, except that such endorsement is not mandatory if action is on a lease for recovery of rent or possession of property. (16.1-94). They must deliver an abstract for docketing to any person interested, and if office be vacant or judge be absent, this may be done by his clerk or substitute clerk, by his successor or by another judge in jurisdiction. (16.1-95). Upon request of judgment creditor, his assignee or his attorney, fieri facias may be issued, returnable in 90 days (except that writ of fieri facius issued for wage garnishment returnable not more than 180 days after date of issuance). If after return day of writ and completion of any garnishment, interrogatory or other proceeding in connection therewith, papers in case have been returned to circuit court, then writ and other papers in connection with such proceeding shall likewise be returned to circuit court and filed with papers in case. (16.1-98, -99). Further executions are issued by clerk or judge as on judgments of his court. (16.1-100).

Docketing.

Judgments for specific amounts of money are docketed by clerk of each court of every circuit. Specific judgment for money must state that it is judgment for money in specific amount against named party, with that party's address, and must state time from which judgment bears interest. (8.01-446).

Federal court of appeals or district court judgments rendered in state may be docketed and indexed as are state judgments. (8.01-447). Unless indexed, judgment is not docketed. (8.01-450). Whenever name of judgment debtor is changed clerk must docket and index in his new name upon satisfactory proof of change. (8.01-451). Clerk may require submission of form indicating that judgment debtor has acquired new name and stating new name as satisfactory proof of new name. Execution may thereafter issue against judgment debtor in prior name, new name, or both. When judgment is revived it shall be lien when again docketed, effective from date of original docketing. Any judgment or decree properly docketed under provisions of 8.01-458 shall, if real estate subject to lien of such judgment has been annexed to or merged with adjoining city subsequent to such docketing, be deemed to have been docketed in proper clerk's office of such city. (8.01-458).

Judgments of the State Corporation Commission are docketed and indexed as other judgments, on presentation of a certified copy for that purpose. (12.1-37).

Bonds and recognizances having the force of judgments are subject to the same rules as to docketing. (8.01-465).

Liens.

Judgments rendered in the state, by any state or federal court or by confession of judgment, are liens on all real estate of which defendant is or becomes entitled or possessed, from the time judgment is recorded on the judgment lien docket of the clerk's office of the county or city where the land is located. (8.01-458). Decree for future alimony, or for maintenance, support and education of infant children, or for monetary award for future installments as provided for in § 20-107.3 shall be lien upon such real estate of obligor as court shall, from time to time, designate by order or decree. (8.01-460). In order for such decree to be lien on real estate, it must be docketed and indexed in judgment lien docket book. Decrees, orders or judgments for support and maintenance or for monetary award in accordance with § 20-107.3 are not to be docketed unless specifically ordered by court in decree. (8.01-460). On termination of homestead exemption judgments attach in order of their priority. (34-24).

Abstract of judgment will be granted on motion on its rendition, subject to future action by court rendering it. (8.01-461). Trustees and creditors secured by deeds of trust are purchasers. (75 Va. 757). Lien of deed of trust to secure purchase money is superior to judgment against purchaser. (118 Va. 34, 86 S.E. 869; 118 Va. 414, 87 S.E. 569).

Venditioni exponas issues against lands if state is plaintiff. (8.01-201). Otherwise lien of judgment is enforced by bill in equity. Sale of all or part of estate subject to lien may be decreed, provided it is shown that rents and profits thereof will not satisfy lien in five years. (8.01-462). When judgment does not exceed $20 exclusive of interest and costs, 30 days notice must be given before filing bill. (8.01-463). Liens for medical services may only be created by service of written notice of lien. (Va. Code 8.01-66.5).

Lien of judgment is not impaired by recovery of another judgment thereon, or by forthcoming bond having force of judgment, taken on execution. (8.01-251).

When real estate retained by debtor is more than sufficient to satisfy lien, such land retained by debtor is first liable, then land aliened to volunteers in inverse order of alienation, then land aliened for value in like order. Alienee for value of volunteer ranks as alienee for value as of time of his purchase from voluntary donee. (8.01-464; 220 Va. 1042, 266 S.E.2d 438). Lands sold same day are considered as if sold contemporaneously. (60 Va. 366).

No judgment creditor or attorney for judgment creditor shall have notice of lien served on financial institution unless such judgment creditor or attorney has reasonable basis to believe that judgment debtor is entitled to payment from such institution. Any person violating this section shall be liable to financial institution for $100 for each notice of lien wrongfully served. Financial institution served with valid notice of lien must provide written response to judgment creditor or attorney for judgment creditor within 21 days after being served with notice of lien indicating amount of money held by financial institution. (Va. Code 8.01-502.1).

Bonds and recognizances which have the force of judgments are governed by the same rules as to liens. (8.01-465).

Limitations.

No execution shall be issued and no action on judgment, including judgment in favor of Commonwealth and judgment rendered in another state or country, may be brought after 20 years from date of such judgment or domestication of such judgment, unless period is extended pursuant to 8.01-251.

Limitation for proceedings against grantee for value of judgment debtor is ten years from recordation of his deed (8.01-251); time limitations as affecting persons under disabilities, defendants obstructing suit, absconding, concealing selves, etc., are tolled, except no case can be brought by person under disability after 20 years from time right accrued (8.01-229); no action shall be brought upon bond of any fiduciary except within ten years next after right to bring such action shall have first accrued. (8.01-245).

Limitations on suit to enforce lien of judgment are same as on scire facias or action on judgment. (8.01-251.F).

Orders or injunctions rendered by foreign courts which limit or prevent access by any person to Virginia courts, without that person having had notice and opportunity for hearing prior to entry of such foreign order, are not required to be given full faith and credit in Virginia courts. (8.01-389).

Persons becoming entitled to subrogation while a judgment lien is in force may bring proceedings to enforce such right within five years from its accrual. (8.01-251).

Assignment of Judgment.

Notation of assignment may be made by clerk on docket where judgment is recorded. Assignment must be in writing, show date thereof, name of assignor and assignee, the amount of the judgment, when and by what court granted, and must be acknowledged. Notation of assignment may be made on docket by judgment creditor or his attorney of record. (8.01-452).

Satisfaction.

If satisfaction in whole or part appear from return of execution, clerk must note it on docket, and certify it to clerk of court which rendered judgment. (8.01-453). Any other satisfaction in whole or part must be caused to be entered on docket within 30 days by creditor, or if judgment be not docketed, in execution book of clerk issuing execution, under penalty of up to $50 fine if not entered within ten days after notice so to do by judgment debtor. Entry must be signed by creditor, his agent, or attorney and attested by clerk. (8.01-454). Satisfaction, or entry of discharge in bankruptcy may be ordered by court rendering judgment, on application of defendant after ten days notice to plaintiff, which may be by publication if he be nonresident without attorney in state. Such order must be certified by court to docketing clerk. (8.01-455). When judgment creditor cannot be found, entry of satisfaction is ordered on payment into court. (8.01-456). Bonds and recognizances having force of judgments are satisfied in same manner as judgments are. (8.01-465).

Uniform Enforcement of Foreign Judgments Act adopted. (Va. Code 8.01-465.1 to 465.5).

Foreign Country Money-Judgments Recognition Act adopted. (Va. Code 8.01-465.6 to -465.13).

5.16 LIMITATION OF ACTIONS:

Uniform Commercial Code has been adopted. (8.1A-101 et seq.). See category 3 Business Regulation and Commerce, topic 3.09 Commercial Code.

Legal proceedings must be brought within the following periods after the respective causes of action accrue:

Twenty Years.

No execution must be issued and no action brought on judgment, including judgment in favor of Commonwealth and judgment rendered in another state or country, after 20 years from date of such judgment or domestication of such judgment, unless extended as provided in Code. (8.01-251).

Fifteen Years.

Entry on or action to recover any land. (8.01-236).

Ten Years.

Mortgages, deeds of trust, and liens reserved for unpaid purchase money (from time original obligation last maturing must have become due and payable). Limitation may be extended by recordation of certificate in form provided in § 8.01-241.1, prior to expiration of limitation period, in clerk's office in which such lien is recorded. Extension is for ten years from date of recordation depending on when secured obligation became due and payable. (8.01-241). Bill to repeal state grant (8.01-238); recognizances, except bail in civil suit (8.01-246); ground rents (8.01-239); to surcharge or falsify settled account of fiduciary (8.01-245); suit to enforce lien of judgment against judgment debtor's grantee for value, after recordation of his deed, this limitation applying against state (8.01-251).

Six Years.

Action to enforce obligations of bank to pay all or part of deposit balance. (Va. Code 8.3A-118.1).

Five Years.

Written contracts, unless otherwise prescribed (8.01-246); action for injury to property (8.01-243); accounts between partners, or merchant and merchant (8.01-246); to set aside conveyances constructively fraudulent, except bulk sales (8.01-253); distress for rent (55-230); for damages for injury to property, including actions by parent or guardian of infant against tort-feasor for expenses of curing such infant from result of personal injury or loss of services of such infant (8.01-243); for damages for any injury to property, real or personal, or for bodily injury or for wrongful death, arising out of defective and unsafe condition of improvement to real property, or actions for contribution or indemnity for damages sustained as result of said injury, where action is brought against any person performing or furnishing design, planning, surveying, supervision of construction, or construction of such improvement, but this limitation does not apply to manufacturers or suppliers of equipment that becomes part of real property after Mar. 13, 1968 (8.01-250; 217 Va. 751, 232 S.E.2d 895; 640 F.2d 497).

Five Years/Two Years.

Action for injury to property or person from violation of Virginia Computer Crime Act to commence earlier of: (i) Five years after last act of violation or (ii) two years after plaintiff discovers or should have discovered last act. (Va. Code 8.01-40.1).

Four Years.

To recover for breach of contract for sale of goods under Uniform Commercial Code. (8.2-725). To recover actual damages or civil penalty in antitrust action, unless action by attorney general, commonwealth attorney, city or county attorney has been concluded, in which case action may be brought within one year of conclusion, whichever is later. (Va. Code 59.1-9.14).

Three Years.

Oral contracts, express or implied, not otherwise prescribed (8.01-246); bail in civil suit (8.01-246); action for unlawful entry or detainer (8.01-236).

Two Years.

Action for personal injuries. (8.01-243). Bringing of action against unknown motor vehicle operator as John Doe tolls statute of limitations for three years following date such action is commenced for purposes of bringing action against owner or operator who caused injury or damages if his identity becomes known. (38.2-2206). Action for fraud. (8.01-243). Statutory liability of director of corporation (13.1-692); petition for rehearing after judgment against defendant served by publication (8.01-322); attach on judgment of reentry for defects in proceedings, if possession is held (55-248); action on security dealer's bond for fraudulent sale of securities (13.1-522); and where federal securities law is silent (353 F. Supp. 968); action for wrongful death, subject to provisions of § 8.01-243 (8.01-244), but see topic Death, subhead Action for Death by Wrongful Act; action for damages for asbestos-related death (8.01-249); claim against Commonwealth, where notice of claim filed prior to July 1, 1984 (Va. Code 8.01-195.7); all personal actions for which no limitation is otherwise prescribed.

One Year.

Petition for rehearing by defendant not served with process, after service of copy of judgment or decree more than one year before end of two year period of limitation (8.01-322); damages by establishment of cemetery (57-26); bill for relief against executed judgment of reentry (55-240, -247); writs of possession in case of unlawful entry and detainer (8.01-471); claims against Commonwealth (Va. Code 8.01-195.6, -195.7); actions for slander, libel, defamation and insulting words; to recover under bulk sales provisions of Uniform Commercial Code (8.6A-110); and claim for negligent failure to diagnose malignant tumor or cancer, where health care provider’s underlying act or omission occurred prior to July 1, 2008 (8.01-243).

Right to recover for fraud, mistake or violations of Consumer Protection Act is deemed to accrue when such fraud, mistake or violation is or should have been discovered. (8.01-249).

Three Months.

To recover money lost gaming. (11-15).

Accrual.

When right of action is deemed to accrue is defined in 8.01-230. When cause of action deemed to accrue in certain personal actions defined in 8.01-249.

Asbestos.

Action by Virginia counties, cities, towns, school boards, or charitable or educational agencies to recover for removal of asbestos, other corrective measures, and reimbursement for prior removal or correction, may be commenced prior to July 1, 1990. (Va. Code 8.01-250.1).

Personal Actions Not Specifically Provided For.

Two years after right to bring action accrues. (8.01-248).

No action may be maintained against any county, city or town for injury sustained by reason of negligence of county, city or town, unless within six months after such injury written statement setting forth nature of claim, and time and place of occurrence, is filed with city or town attorney or mayor. If claimant was under disability at time cause of action occurred, tolling provisions of 8.01-229 apply. (15.2-209).

Time does not run: Against parties or those who come into a creditor's suit, after decree for account (99 Va. 350, 38 S.E. 182); while commencement of action is stayed by injunction; or while action is prevented by defendant's filing petition in bankruptcy, filing petition for extension or arrangement under U.S. Bankruptcy Act or using any other direct or indirect means to obstruct filing of action, but only as against party at fault, and this provision does not apply to suit to enforce lien of judgment (8.01-229); during period of worker's compensation payments if later found to be improper; in any personal action for damages during period criminal prosecution is pending that arises out of same incident. (8.01-229).

New Actions.

If proceeding duly commenced in time abates or is dismissed without determining merits, time action is pending will not be computed as part of period within which such action may be brought. If judgment or decree be arrested or reversed on grounds not precluding further proceedings, or if made necessary by loss of papers or records, new proceedings may be commenced within one year from such event. If plaintiff suffers voluntary nonsuit limitation with respect to such action is tolled by commencement of nonsuited action, and plaintiff may recommence his action within six months from date of order entered by court, or within original period of limitation; or in case of decedent's personal representative, within one year of qualification; whichever is longer. If criminal prosecution is commenced and grand jury indictment is returned or waived after period within which civil action arising out of same facts may be brought, civil action may be brought within one year of date of final order of trial court, date of final disposition of appeal, or date time for appeal expires whichever date occurs last, but no more than ten years after date of crime or two years after cause of action arises, whichever date occurs last. (8.01-229).

Amendment of Pleadings.

For purposes of statute of limitations, addition of claim or defense against party in amended pleading relates back to date of original pleading if it arose out of same conduct, transaction or occurrence; amending party was reasonably diligent in asserting new claim or defense; and other party will not be substantially prejudiced by amendment. (Va. Code 8.01-6.1). Pleading which states claim against party whose trade name or corporate name is substantially similar to trade name or corporate name of another entity can be amended at any time by inserting correct party's name, if such party had actual notice of claim prior to expiration of statute of limitations for filing claim. (Va. Code 8.01-6.2). Statute of limitations is also tolled where pleading against estate of decedent is served or attempted on executor who, at time of service, had no authority to accept service. (Va. Code 8.01-6.2).

Disabilities of Plaintiff.

Persons who are unemancipated infants or insane when right accrues may bring action within prescribed limitation period after such disability is removed; time of disability shall not be counted as part of period of limitations except for any period during which infant was emancipated which will count as part of limitations period (8.01-229), except that minor's medical malpractice action must be brought within two years of accrual of cause of action, unless minor is under eight years old, in which case action must be brought prior to tenth birthday (Va. Code 8.01-243.1). No disabilities or tacking thereof shall preserve to any person or his successor right to make entry or bring action to recover land for more than 25 years after right first accrues, although such person or persons shall have been disabled entire 25 years. (8.01-237). Persons under disability have one year after removal of disability in which to file bill to establish or impeach will, which has been ruled on in probate proceedings. (64.1-90).

Absence of resident defendant from the state or his absconding or concealing himself, prevents running of statute while absence or concealment continues. (8.01-229).

Decedents.

If person entitled to bring personal action dies before action pending, action may be commenced before limitation period ends or within one year after qualification of representative, whichever is later. (8.01-229.B.1). If person against whom personal action may be brought dies before commencement of action, action may be filed against decedent's estate or commenced against personal representative before applicable limitation period expires or within one year of qualification, whichever occurs later. (8.01-229.B.2). Where suit is filed after defendant deceased, papers may be amended to substitute personal representative as party defendant before expiration of limitation period or within two years after date papers filed, whichever occurs later. (8.01-229.B.2.b). One year from death of any party in interest to mortgage or deed of trust is excluded in computing limitation period. (8.01-241, -242). Time does not run from filing of claim against decedent's estate with commissioner of accounts, but from termination of proceedings before him. (64.1-173). If there be more than two years between death of anyone in whose favor or against whom cause of action accrued or shall accrue and qualification of representative, such qualification shall be deemed to have occurred on last day of two year period. (8.01-229).

New Promise.

On new promise in writing there is same limitation as on original cause of action. Acknowledgment in writing from which promise may be implied is deemed new promise. (8.01-229). Suit may be brought on either, unless new promise is such that right merges. (8.01-229). New promise by personal representative does not bind estate, nor does new promise by joint contractor bind his co-contractors. (8.01-232).

Part payment will not remove bar of statute. (171 Va. 317, 198 S.E. 923).

Devise Subject to Debts.

Will devising real property subject to debts will not be construed to stop limitation unless such intent is plainly apparent. (8.01-229).

Foreign Causes of Action.

No action may be brought on contract governed by law of another state or country if it is barred by those laws or by law of Virginia. (8.01-247).

Contractual limitations are permitted, except that limitation of less than one year in insurance policy is invalid. (38.2-314).

Pleading.

Objection that action is not commenced within statute of limitations can only be raised as affirmative defense specifically set forth in responsive pleading. (8.01-235). § 8.01-235 applies to all limitations periods, without regard to whether or not statute prescribing such limitation period shall create new right. (8.01-235).

Actions by Commonwealth.

Statutes of limitation which do not expressly apply to Commonwealth of Virginia are not bar to any proceeding by or on behalf of same. (8.01-231).

5.16A PARTITION:

Suit may be brought by or against tenants in common, joint tenants, executors with power to sell if power is properly exercisable at that time under circumstances and coparceners of real property, including mineral rights east and south of Clinch River, or by lien creditors or any owner of undivided estate in realty. Court has jurisdiction of all questions of law affecting title arising between such parties. (8.01-81).

Jurisdiction and Venue.

Suit may be brought in any court having general equity jurisdiction in the county or corporation where the estate or any part of it is situated. (8.01-81, -262).

Proceedings and Decrees.

Decree of partition vests title in allotted portions. (8.01-88). Two or more parties may have their shares apportioned together if this can conveniently be done. (8.01-82). When entire property or any distinct portion cannot be conveniently partitioned, allotment may be made, or sale of all or of such portion may be ordered, and proceeds distributed, preserving rights of creditors of deceased owners and of persons holding liens. (8.01-83). Court, however, must first determine that partition by sale is in parties' best interests (232 Va. 250, 349 S.E.2d 141), and parties must prove partition in kind cannot be conveniently made (235 Va. 424, 368 S.E.2d 699). Shares of persons under disability must be invested by order of court. If under $4,000, they may be paid, in court’s discretion, to proper guardian or committee. Shares held in trust must be paid to trustee. Amounts under $4,000 become personal property. (8.01-76).

Proceeds of a sale in partition are deemed personal estate from confirmation of the sale, except shares of persons under disability, which, if such persons continue incapable of making will until death, will pass as real property. (8.01-77, -88, -89).

When the name or share of any person in interest is unknown, the known facts are stated in the bill. (8.01-90).

Court will allow reasonable fees to counsel for complainants out of shares of parties not represented by counsel. (8.01-92).

The clerk of court must transmit a copy of any decree of partition to the proper recording officer of each county or corporation where any part of the land lies, with such description of the land as appears in the papers, which must be recorded and indexed as are deeds. (55-138).

When homestead property is the subject of partition the share of the person entitled thereto must be paid to him. (34-8).

Personal Property.

When equal division of goods and chattels cannot be made in kind among those entitled thereto, court of equity may direct same sold and distribute proceeds. (8.01-93). General district court may proceed in same manner where value of property is more than $20 and not more than $15,000, except that if value exceeds $4,500 defendant may have proceedings removed to court of record. (Va. Code 16.1-77.2).

5.17 [RESERVED]

5.18 PLEADING:

See also topic 5.19 Practice.

Demurrer must be in writing, except in criminal cases, and shall state specifically grounds of demurrer. (8.01-273).

Affidavit of Merits.

If, in action on contract for payment of money, plaintiff files with his motion for judgment or civil warrant affidavit made by himself or his agent stating amount of plaintiff's claim, that amount is justly due and time from which interest is claimed, together with copy of account any filed with motion for judgment, he shall be entitled to judgment without further evidence unless defendant appears and denies under oath that plaintiff is entitled to recover. (8.01-28).

Affidavit of Defense.

Except as otherwise provided by § 8.3-308 of Uniform Commercial Code where pleadings allege that person made, endorsed, assigned or accepted any writing, no proof of handwriting is required unless denied by affidavit accompanying plea putting it in issue. (8.01-279). Where pleading alleges that person or corporation, at stated time, owned, operated, or controlled any property or instrumentality, no proof of fact alleged is required unless denied by affidavit filed with pleading. (8.01-279). Fact of partnership or incorporation of plaintiffs or defendants when they sue or are sued as such need not be proved unless denied by affidavit. (8.01-279).

Verification.

Except as otherwise provided in §§ 16.1-260 and 63.2-1901, all pleadings must be signed by responsible attorney or unrepresented party verifying that he has read pleading, that pleading is well grounded in fact, and that it is not interposed for improper purpose. Court may impose sanctions, including attorney's fees, for violations. (Va. Code 8.01-271.1).

Frivolous Claims.

See subhead Verification, supra.

Proof of Claim.

While no procedure is specified for claims sent to Virginia from other states, all claims should be accompanied by the original instrument upon which the claim is founded or an itemized statement of account. An affidavit should accompany the claim; see subhead Affidavit of Merits, supra.

Small Claims.

See category 6 Courts and Legislature, topic 6.01 Courts.

5.19 PRACTICE:

Practice in courts of record has been materially revised by Rules of Supreme Court. (See 8.01-3.) Rules are applicable to all proceedings. (Rule 1:1). Discovery rules apply to all civil cases in Circuit Courts. (Rule 4:0). Circuit courts may prescribe local rules necessary to promote proper order and decorum and efficient use of courthouse facilities. (8.01-4).

Rules Applicable to All Proceedings.

Allegation of fact not denied, where responsive pleading required, deemed admitted. (Rule 1:4[e]). Allegation of lack of knowledge treated as denial. (Rule 1:4[e]).

All pleadings (except notices of motion for judgment), and requests for subpoenas duces tecum must be served on each counsel of record by delivery or mailing on or before filing date (Rule 1:12), and drafts of orders and judgments must be endorsed by all counsel or notice given of time and place of presenting for entry, unless court in its discretion directs otherwise (Rule 1:13).

Counsel or party, if unrepresented, must sign pleadings and state his address. (Rule 1:4[c]). If statute requires pleading either to be sworn to or accompanied by affidavit, and neither is done, objection must be made within seven days after pleading is filed by motion to strike; otherwise, objection is waived. (Rule 1:10). At any time before court rules on motion, pleading may be sworn to or affidavit filed. (Rule 1:10).

Electronic filing available in any court in Commonwealth that has established system and procedures approved by Supreme Court of Virginia for filing, provided case has been designated by consent of parties and agreement of clerk, as electronically filed case. (Rule 1:17). Rule 1:17 outlines system and procedures for electronic filing and service.

Time allowed for filing pleadings may be extended by court in its discretion, even though time fixed has expired; except time fixed for filing of motion challenging venue may not be extended except to extent permitted by 8.01-264. (Rule 1:9).

Amendments to pleadings are liberally granted in discretion of court. (Rule 1:8).

All final decrees may be modified, vacated or suspended by court, but only within 21 days after date judgment, order, or decree is signed by judge. (Rule 1:1).

Practice and Procedure in Civil Actions.

Civil action commenced by filing complaint in Clerk's office. When statute or established practice requires, proceeding may be commenced by pleading styled “petition.” Upon filing of pleading, action is then instituted and pending as to all parties defendant. Statutory writ tax and Clerk's fees due before summons issued. (Rule 3:2). Duty of officer to make service within five days after receipt. (Rule 3:6). Plaintiff furnishes Clerk with as many copies of complaint as there are defendants. (Rule 3:4).

When order entered overruling all motions, demurrers and other of defendant's pleas, defendant must (unless he has already done so) file answer within 21 days after entry of such order, or within such shorter or longer time as court may prescribe. (Rule 3:8).

Bill of particulars may be ordered to amplify any pleading that does not provide notice of claim for defense adequate to permit adversary fair opportunity to respond or prepare case. (Rule 3:7).

Defendant shall file pleadings in response within 21 days after service on him or within 60 days after date when request for waiver of service sent, or within 90 days after that date if defendant was addressed outside Virginia. (Rule 3:8).

Within 21 days after service on him of summons and complaint (or within 60 days after date when request for waiver of service sent, or within 90 days after that date if defendant was addressed outside Virginia) defendant may file counterclaim. Court may order separate trial of any cause of action asserted in counterclaim. (Rule 3:9). If demurrer, plea, motion to dismiss, or motion for bill of particulars is filed within 21 days after service of summons and complaint (or within 60 days after date when request for waiver of service sent, or within 90 days after that date if defendant was addressed outside Virginia), defendant may file any counterclaim at any time up to 21 days after entry of court’s order ruling upon all such motions, demurrer, and other pleas, or within such shorter or longer time as court may prescribe. (Rule 3:9). Defendant may within same period of time plead as cross-claim any cause of action he may have against one or more other defendants growing out of any matter pleaded in complaint. Court may order separate trial of any cause of action asserted in cross-claim. (Rule 3:10). Party on whom counterclaim or cross-claim is served must file response within 21 days after it is served. (Rules 3:9, 3:10).

If a plea, motion or affirmative defense sets up new matter and contains words expressly requesting reply, adverse party must, within 21 days, file reply admitting or denying such new matter. If it does not contain such words, allegations of new matter are taken as denied or avoided without further pleading. All allegations contained in reply are taken as denied or avoided without further pleading. (Rule 3:11).

Motion to join additional party shall be filed within 21 days after service of complaint. (Rule 3:12).

If party becomes incapable of prosecuting or defending because of death, disability, conviction of felony, removal from office, or other cause, his successor in interest may be substituted as party on motion of successor or of any party to action. (Rule 3:17).

Particulars of negligence or contributory negligence need not be specified. (Rule 3:18[b]). Contributory negligence as defense must be affirmatively pleaded. (Rule 3:18[c]).

Allegation that action is barred by statute of limitations need not specify particular statute relied upon. (Rule 3:18[d]).

Defendant who fails to timely file responsive pleading as prescribed in Rule 3:8 is in default, and is not entitled to notice of any further proceedings in case. He waives trial by jury. Court in such cases, on motion of plaintiff, will enter judgment for relief appearing to be due. Where service of process was effected by posting, judgment by default cannot be entered until ten days' notice given. If relief demanded is unliquidated damages court will hear evidence and fix amount thereof, unless plaintiff demands trial by jury, in which event jury is impaneled to fix damages. (Rule 3:19). Court may dismiss action without notice to parties if case has been on docket for three years with no orders or proceedings, except for continuances. Clerk must provide notice to parties after dismissal and parties have one year to move for reinstatement. (8.01-335).

Any party may file motion for summary judgment at any time after parties are at issue, except in action for divorce or annulment of marriage. Summary judgment may be entered as to undisputed portion of contested claim or on issue of liability alone even if there is genuine issue as to amount of damages. Summary judgment will not be entered if any material facts are genuinely in dispute. Summary judgment cannot be based upon discovery depositions unless all parties agree that such deposition may be so used. (Rule 3:20).

Third-party practice is allowed. Defendant must obtain leave of court unless third-party motion for judgment filed within 21 days of defendant's original response. Third-party defendant's response must be filed within 21 days (or within 60 days after date when request for waiver of service sent). Third-party defendant may assert all defenses that third-party plaintiff has against plaintiff. Plaintiff may assert claim against third-party defendant and third-party defendant may assert claim against plaintiff arising out of subject matter of original action. Third-party defendant may bring in additional parties under this rule. Plaintiff, after counterclaim, may bring in third party who is or may be liable to plaintiff on counterclaim. (Rule 3:13).

Discovery may be obtained by depositions on oral examination or written interrogatories (Rules 4:1-4:8), by order for inspection of documents or property (Rule 4:9), or by physical or mental examination of parties (Rule 4:10). Discovery is permitted regarding any matter, not privileged, which is relevant to subject matter involved in pending action. (Rule 4:1[b]).

After commencement of an action, a party may serve upon any other party a written request for admission by latter of genuineness of any relevant document or truth of any relevant matters of fact. (Rule 4:11). Discovery may be compelled and sanctions are available against party failing to respond to discovery request. (Rule 4:12).

Pre-trial Conference.

Court may direct attorneys to appear for conference to consider: (1) Determination of issues; (2) plan and schedule of discovery; (3) limitations on scope and methods of discovery; (4) necessity or desirability of amendments to pleadings; (5) possibility of obtaining admissions of fact and of documents which will avoid unnecessary proof; (6) limitation of number of expert witnesses; (7) advisability of preliminary reference of issues to master for findings to be used as evidence when trial is to be by jury; and (8) such other matters as may aid disposition of action. (Rule 4:13).

Depositions Before Action or Pending Appeal.

Perpetuation of testimony by deposition before formal action is taken may be had by filing a verified petition in circuit court in county or city of residence of any expected adverse party and giving notice to all expected adverse parties. (Rule 4:2[a]). If appeal has been taken from judgment of circuit court or before taking of appeal if time therefor has not expired, court in which judgment was rendered may allow taking of depositions of witnesses to perpetuate their testimony for use in event of further proceedings in that court. (Rule 4:2[b]).

Direct Actions Against Insurer.

See category 23 Transportation, topic 23.01 Motor Vehicles, subhead Direct Actions.

Small Claims.

See category 6 Courts and Legislature, topic 6.01 Courts.

See also topics 5.02 Actions, Appeal and Error, Depositions and Discovery, Injunctions, Judgments, Pleading, Process; category 8 Debtor and Creditor, topics 8.02 Attachment, 8.05 Executions, 8.09 Garnishment.

5.20 PROCESS:

See also topic 5.19 Practice; category 23 Transportation, topic 23.01 Motor Vehicles, subhead Actions Against Nonresidents.

Process to commence civil action is filing complaint. (Rule 3:2). In courts not of record, process is warrant or motion for judgment. (16.1-79, -81). All are hereinafter referred to as summonses.

General Requisites.

Summons runs in name of Commonwealth of Virginia and is attested by clerk of court issuing it.

Issuance and Return.

In courts of record summons is issued by clerk and is delivered as plaintiff may direct. It is duty of officers to make service in five days after receipt (Rule 3:6) and make return to clerk's office within 72 hours of service, or if due on weekend or legal holiday, on following day. (8.01-325). Failure to make return of service of process within required 72 hours does not invalidate service of process or judgment based thereon. If delay in return interferes with court's administration of case or prejudices party, court may continue case, require additional or substitute service, or take other appropriate measure. (8.01-294).

Supreme Court.

Summons is issued by clerk in any case in Supreme Court (Rule 5:23) and at least 15 days notice of approximate time of hearing must be given (Rule 5:35).

Who May Serve.

Service may be by an officer, whose return is proof, or by any other disinterested person, whose verified return is proof. (8.01-293, -325).

Service on Individuals; Waiver.

In action pending in circuit court, plaintiff may notify defendant of commencement of action and request that defendant waive service of process. (Va. Code 8.01-286.1). Any person (with exception of Secretary of Commonwealth and Clerk of State Corporation Commission) who receives actual notice and request of waiver of service of process as set forth in § 8.01-286.1 has duty to avoid any unnecessary costs of serving process. Absent waiver, and unless otherwise prescribed, summons may be served on natural persons, by delivering copy to person, or if he be not found at his usual abode, by delivering copy and stating its purport to member of family over 16 or if none found at such place, by leaving copy posted at front door of such abode, provided that party serving or his attorney or agent mails to party served copy of pleading within ten days and thereafter files certificate of such mailing with clerk of court. (8.01-296). Actual receipt in time is sufficient, though service was informal, except for process commencing divorce, annulment or other actions where service is specifically prescribed by statute. (8.01-288). One copy is necessary for each person served. (8.01-291). Person executing such service shall note manner and date of such service on original and copy of process.

Effect of Appearance As Counsel.

Service may be upon any attorney authorized to practice in Virginia who has made general appearance for party sought to be served. Court shall direct manner of service where attorney objects by motion within five days of receiving service. (8.01-314).

Service on Infant or Insane Person.

Guardian ad litem must be appointed, unless such person already represented by attorney (8.01-9).

Service on Carrier or Association.

Subject to § 8.01-286.1, process against unincorporated association or order or unincorporated carrier may be served on any officer or trustee, director, staff member or agent thereof. (8.01-305). Subject to § 8.01-286.1, service on foreign unincorporated association, order, or carrier may be made on clerk of State Corporation Commission. (8.01-306).

Service on Partnership.

Subject to § 8.01-286.1, process may be served on any partner. (8.01-304).

Persons Doing Business Under Assumed Name.

Persons conducting business under an assumed or fictitious name in a city or county in which they do not reside must file, in the clerk's office where deeds are admitted to record in such city or county, a written power of attorney appointing some practicing attorney at law, residing in state, their attorney in fact for service of process against them. If this not done, process against such persons may be served on clerk of court, who must mail copy of process to defendants named therein. (59.1-69).

Service on Domestic Corporations.

Subject to § 8.01-286.1, may be made on any officer, director, or registered agent, or by substituted service. (8.01-299).

Service on municipal corporations where case is against city or town may be made on mayor, manager, attorney, councilman, or trustee. Where municipal corporation is county, service may be made on its treasurer, attorney, Commonwealth's Attorney, supervisor or commissioner of revenue. (8.01-300). If case is against supervisor, county officer, employee, or agent of county board arising out of official actions of such person, then in addition to named defendant, each supervisor and county attorney, or if no county attorney, clerk of county board, shall also be served. (8.01-300).

Service on Foreign Corporation.

Subject to § 8.01-286.1, if foreign corporation is authorized to do business in Commonwealth, then service may be on any officer, director, or registered agent, or on clerk of State Corporation Commission. (8.01-301, 13.1-766, -928). If foreign corporation is not authorized to do business in Commonwealth, then service may be made on any officer, director or agent transacting business in Commonwealth where such individual may be found within Commonwealth (8.01-301), or upon clerk of State Corporation Commission (13.1-758). Whether or not authorized to do business in Virginia, service may be made on Secretary of Commonwealth in certain instances (8.01-301, -328, -329), or by publication where jurisdiction in rem or quasi-in-rem is authorized (8.01-301). Service by mail will be sufficient upon person to be served, provided that notice of such service, copy of process or notice, and copy of affidavit are mailed by certified mail, return receipt requested, by secretary to person or persons to be served. (8.01-329).

Service When Corporation Operated by Receiver, Etc.

Subject to § 8.01-286.1, when corporation is operated by any of them, service may be on trustee, lessee or receiver, or if none are in jurisdiction on any agent, or, if none found in state, by any other authorized mode of service upon corporation. (8.01-303).

Service on Nonresident Motorists.

See category 23 Transportation, topic 23.01 Motor Vehicles.

Service on Nonresident Commercial Landlord.

Any individual nonresident leasing four or more units must appoint a resident agent. (55-218.1).

Service by Publication.

Service of notice on nonresidents may be by publication once a week for four weeks in local newspaper. (8.01-317). Where party was originally served by publication and notice of further proceedings is required but no method of service is specified by statute or rule of court, then notice shall be by publication for two successive weeks in same newspaper. (8.01-319). Order of service of writ by publication is granted on affidavit showing that defendant is foreign corporation, foreign unincorporated association, order, or unincorporated common carrier, or nonresident individual or that diligent search has failed to locate defendant, or on return of officer indicating inability to make service for period of 21 days in jurisdiction in which (according to plaintiff's affidavit) defendant last resided. Also, if pleading states that there are or may be unknown parties interested, order of publication may be granted. If over ten defendants have been served in equity, and it appears that those served represent like interests with others not served, court only may grant order of publication as to those not served. In all other cases either court or clerk may enter order of publication. Cost of such publication shall be paid by petitioner or applicant; however, such costs shall ultimately be recoverable by party seeking service if that party is given final judgment. (8.01-316).

An order of publication must direct defendant to appear on stated date, which must be no sooner than 50 days after entry of order of publication. Publication is once a week for four weeks in such newspaper as order directs, but if deemed proper, court may dispense with newspaper publication. Within ten days after entry of order of publication, clerk must post copy of order at front door of courthouse and mail copy of order to each defendant at address, if any, provided in affidavit of party seeking service. (8.01-317). Order of publication in proceeding by county, city or town to enforce lien for taxes against real estate need not be published more than once a week for two successive weeks. (8.01-321).

Personal Service Outside the State.

Subject to § 8.01-286.1, personal service may be made outside of state on nonresident, by any person not otherwise interested, which will have same effect as service by publication. (8.01-320). Return must be verified, and show time and place of service. (8.01-325).

Acceptance of Service.

Service of process may be accepted by person for whom it is intended by signing proof of service and indicating jurisdiction and state in which it was accepted. However, service of process in divorce or annulment actions may only be accepted as provided in § 20-99.1:1. (8.01-327).

Acceptance of Service for Another.

Where written instrument authorizes person other than obligor to accept service on behalf of obligor and service is so accepted, no judgment may be entered on the instrument unless person served file affidavit that, at least ten days before judgment, notice of request for judgment was mailed to last known address of obligor. (8.01-315).

Long Arm Statute.

When personal jurisdiction authorized by “Long Arm Statute,” service of process may be made in same manner as is provided supra this topic, or when on nonresident and there be no other provision, by service upon any agent of nonresident in county or city wherein agent lives or on Secretary of Commonwealth. Such service shall have same effect as personal service on nonresident within Commonwealth. (8.01-320). When upon Secretary of Commonwealth, return must show copy of process sent by certified or registered mail to defendant's last known post office address and affidavit of compliance by Secretary of Commonwealth. (8.01-328 to -330).

Timeliness of Service.

Service of process in action or suit within 12 months of commencement of action or suit against defendant shall be timely as to that defendant. Service of process on defendant more than 12 months after suit or action was commenced shall be timely upon finding by court that plaintiff exercised due diligence to have timely service made on defendant. (Va. Code 8.01-275.1).

Motion to Quash.

Person upon whom process has been served may move to quash process for any defects in issuance, service or return of process. Court may strike proof of service or permit amendment of process or its return. Person upon whom process has not been served within one year of commencement of action against him may make special appearance (which does not constitute general appearance) to file motion to dismiss. (8.01-277).

5.21 REPLEVIN:

Action of replevin is abolished. (8.01-218). See topic 5.11A Detinue.

5.22 SEQUESTRATION:

No statutory provision. In equity rents and profits may be sequestrated to discharge incumbrance. (42 Va. 289).

5.23 SERVICE:

See topic 5.20 Process.

5.24 STAY OF EXECUTION:

See topic 5.03 Appeal and Error; category 8 Debtor and Creditor, topic 8.05 Executions.

5.25 SUBMISSION OF CONTROVERSY:

No statutory provisions.

5.26 VENUE:

Preferred Venue.

In actions for review of state administrative regulations or decisions brought by Commonwealth or agency thereof, venue lies where respondent resides, regularly conducts business, or has any property affected by administrative action. If moving party is other than Commonwealth or agency thereof, then venue lies where such party resides, regularly conducts business, or where property affected by administrative action is located. In action against officer of Commonwealth in official capacity, venue is in county or city where such person has his official office. Venue lies in city or county wherein land is situated in following actions: To recover or partition land, to subject land to debt, to sell or lease land of persons under disabilities, to release dower or curtesy of spouse under disability, to sell wastelands, to establish boundaries, for unlawful entry and detainer, and for ejectment or to remove clouds on title. In actions for writs of mandamus, venue lies in county or city where record is located. To impeach or establish will, in county or city where will was or should be probated. In actions for collection of state or local taxes, where taxpayer resides, owns property, or regularly conducts business or if taxpayer has left Virginia venue at time of departure. (8.01-261). In proceedings by writ of quo warranto, venue lies in city or county where any of defendants reside. If defendant is corporation, venue lies in city or county where its office is registered, city or county where its chief officer resides, or City of Richmond if there is no office and none of defendants reside in Commonwealth. In proceedings to award injunction to any judgment of circuit court, venue lies in city or county in which judgment was rendered. For judgments of district courts and other acts of proceedings, venue lies in circuit court of city or county in which judgment rendered, or in city or county where act is to be done or is being done. In disbarment or suspension proceedings against attorney, venue lies in city or county where defendant resides, has principal office, resided or had principal office when misconduct occurred, or has any pending case as to which any misconduct took place. In actions under Virginia Torts Claim Act, Art. 18.1 of c. 3 of Title 8.01, venue lies in city or county where claimant resides, city or county where act or omission occurred, or City of Richmond if both claimant's residence and site of act or omission are outside Commonwealth. (8.01-261). In cases of divorce, affirmance, annulment, established preferred venue lies in (i) location parties last cohabited, (ii) where defendant resides, or (iii) if by order of publication against defendant, where plaintiff resides. (§§ 8.01-259, -261). In actions arising under construction contracts, established preferred venue lies in jurisdiction where project is located. (Va. Code 8.01-262.1).

Permissible Venue.

In actions not referred to as having preferred venue, appropriate forum shall be: (1) Where defendant resides or has principal place of employment, or, if defendant is corporation, where its mayor, rector, president or other chief officer resides, (2) where defendant has registered office or appointed agent, (3) where defendant regularly conducts substantial business activity, (4) where cause of action arose, (5) in actions to recover or partition personal property, where property or evidence thereof is located, (6) in actions against fiduciary, county or city where he qualified, (7) in actions for improper message transmission or misdelivery, where message was transmitted or delivered, (8) in action based on delivery of goods, where goods were received, (9) when all defendants are unknown or nonresidents or if there is no other forum available, then where any plaintiff resides. (8.01-262).

Surety company may be sued where principal obligor may be sued or where it has become surety or assumed obligation, but if state is party, suit must be brought in Circuit Court of Richmond. (38.2-2415).

Provisions in construction contracts mandating that any action on contract be brought in location outside Commonwealth are unenforceable. (Va. Code 8.01-262.1).

Venue is not jurisdictional, so no judgment is voidable solely on ground of improper venue. (8.01-258).

Change of Venue.

Venue laid in improper forum is subject to objection in writing, but such objection is waived if defendant fails to object by motion within 21 days after service in circuit court actions. In general district court actions, initial pleading must advise other party of right to object to venue if action is not brought in proper or permissible venue, and objections may be made by letter or other written communication before day of trial. Waiver by any defendant does not constitute waiver for any other defendant. (8.01-264). No action will be dismissed for improper venue if there is forum in state where venue is proper. (8.01-264). When defendant whose presence created venue is dismissed, remaining defendants may object to venue within ten days upon showing that dismissed defendant was not properly joined or was added as party defendant for purpose of creating venue. (8.01-264).

Change of venue may be granted upon motion by any party and for good cause; provided that, except by agreement of all parties, no action brought in preferred forum may be transferred to non-preferred forum, and that no action brought in permissible forum may be dismissed on basis that forum outside Commonwealth is more convenient. Good cause includes but is not limited to, agreement of parties or avoidance of substantial inconvenience to parties or witnesses or complying with law of any other state or United States. (8.01-265).

Transfer of Venue.

Allows juvenile court to transfer venue of case referred from circuit court for enforcement of order for support, maintenance, or custody directly to another appropriate forum. (16.1-243).

6 COURTS AND LEGISLATURE

6.01 COURTS:

United States District Courts.

Eastern District.

Clerk's office: Richmond 23219.

Counties composing District.

Accomack, Amelia, Arlington, Brunswick, Caroline, Charles City, Chesterfield, Dinwiddie, Essex, Fairfax, Fauquier, Gloucester, Goochland, Greensville, Hanover, Henrico, Isle of Wight, James City, King and Queen, King George, King William, Lancaster, Loudoun, Lunenburg, Mathews, Mecklenburg, Middlesex, New Kent, Northhampton, Northumberland, Nottoway, Powhatan, Prince Edward, Prince George, Prince William, Richmond, Southampton, Spotsylvania, Stafford, Surry, Sussex, Westmoreland and York and all cities within area of counties.

Court sits at Alexandria, Newport News, Norfolk, Richmond.

Filing fee of $350 is required on commencement of suit.

Western District.

Clerk's office: Roanoke 24011.

Counties composing District.

Albemarle, Alleghany, Amherst, Appomattox, Augusta, Bath, Bedford, Bland, Botetourt, Buchanan, Buckingham, Campbell, Carroll, Charlotte, Clarke, Craig, Culpeper, Cumberland, Dickenson, Floyd, Fluvanna, Franklin, Frederick, Giles, Grayson, Greene, Halifax, Henry, Highland, Lee, Louisa, Madison, Montgomery, Nelson, Orange, Page, Patrick, Pittsylvania, Pulaski, Rappahannock, Roanoke, Rockbridge, Rockingham, Russell, Scott, Shenandoah, Smyth, Tazewell, Warren, Washington, Wise and Wythe and cities within area of counties.

Courts sits at Abingdon, Big Stone Gap, Charlottesville, Danville, Harrisonburg, Lynchburg, Roanoke.

Filing fee of $350 is required on commencement of suit.

Note.

Divisions in Virginia are not statutory but are created by rule of court and thus federal statutes relating to divisions are not always applicable to divisions in Virginia.

Supreme Court.

Supreme Court has no original jurisdiction, except to issue writs of mandamus, prohibition, and habeas corpus. (17.1-309, -310). Supreme Court has initial jurisdiction by petition for appeal from: (1) judgment in controversy concerning: (a) title to or boundaries of land, (b) condemnation of property, (c) probate of will, (d) appointment or qualification of personal representative, guardian, committee, or curator, (e) mill, roadway, wharf, or landing, (f) right of Commonwealth or county or municipal corporation to levy tolls or taxes, (g) construction of any statute, ordinance or county proceeding imposing taxes; (2) order refusing writ of quo warranto or final judgment on any such writ; or (3) final judgment in any other civil case, except those in which Court of Appeals has initial jurisdiction. (8.01-670). Supreme Court also has jurisdiction by petition for appeal in any case on equitable claim in which there is interlocutory decree or order: (1) Granting, dissolving or denying injunction; (2) requiring money to be paid or changing title or possession of land; or (3) adjudicating principles of cause, except where Court of Appeals has jurisdiction. (8.01-670). Jurisdictional amount is $500 unless title, or bounds of land, or some other matter not merely pecuniary is at issue. (8.01-672). Court has appellate jurisdiction over decisions of State Corporation Commission, irrespective of amount in controversy. (12.1-39). Review of death sentences is mandatory. (17.1-313). Supreme Court also has appellate jurisdiction of cases in which ordinance of county, city or town held unconstitutional. (19.2-317).

Supreme Court also has jurisdiction by petition for appeal to review Court of Appeals decisions, except that in traffic infraction and misdemeanor cases in which no incarceration was imposed, administrative and workers' compensation cases, family law cases, criminal appeals by state or cross appeals, and in certain prisoner treatment appeals, Supreme Court will accept appeal only if there are substantial constitutional issues or matters of significant precedential value. (17.1-410). See generally Rules 5:1 to 5:3.

Court consists of seven justices, any four of whom form a quorum. Chief Justice elected by majority vote to four-year term. (17.1-300).

Clerk's office: 100 North Ninth St., 5th Floor, Richmond, Va., 23219

Court sits at Richmond. (Rule 5:2). In state of emergency, Supreme Court may convene at such time and location, and for such purposes as court determines necessary. Under such circumstances, court may satisfy quorum by presence of justices through use of technology. (17.1-304).

Court of Appeals.

Court of Appeals has appellate jurisdiction by appeal of right from circuit court on family law final decisions; circuit court final decisions on appeal from administrative agency or grievance hearing decisions; Workers' Compensation Commission decisions; and interlocutory decrees or orders in these cases granting, dissolving or denying injunction. (17.1-405). Court of Appeals has jurisdiction by petition for appeal from circuit court in traffic and criminal cases, except death sentence cases. (17.1-406). See generally Rules 5A:1 to 5A:36.1.

Court of Appeals consists of 11 judges (17.1-400) who sit in panels of at least three judges all of whom must be present to form quorum (17.1-402). Court of Appeals may sit en banc in any case on its own motion if approved by majority of Court. Court of Appeals must sit en banc when aggrieved party makes request and four judges approve request, or when judge on panel finds decision in conflict with prior decision and three judges agree. (17.1-402).

Court of Appeals has its own clerk. (17.1-403).

Court sits at locations which provide access to various geographic areas of state. (17.1-402).

Circuit Courts.

There are 31 circuits in Virginia, each presided over by judge or judges elected by legislature for eight years. (17.1-506 to 17.1-509). Circuit courts shall have original and general jurisdiction of all civil cases except cases upon claims to recover personal property or money not of greater value than $100 exclusive of interest, or if claim is assigned to another tribunal; all civil and criminal cases which may be appealed to Supreme Court; all indictments for felonies and of presentments, informations and indictments for misdemeanors. (17.1-513). Appellate jurisdiction in all civil and criminal cases in which appeal may be taken from judgment of general district courts. Cities of Alexandria, Bristol, Buena Vista, Charlottesville, Chesapeake, Colonial Heights, Danville, Fredericksburg, Hampton, Hopewell, Lynchburg, Martinsville, Newport News, Norfolk, Petersburg, Portsmouth, Radford, Richmond, Roanoke, Salem, Staunton, Suffolk, Virginia Beach, Waynesboro, Williamsburg, and Winchester, and each county in Virginia have circuit court, which is sole court of record and has jurisdiction over all matters heard by former courts of record. (17.1-500).

Probate Courts.

Probate jurisdiction is in circuit court. (64.1-75). Judge or clerk or deputy clerk of court has original jurisdiction to admit wills to probate (64.1-75) except in cases of persons presumed dead or appointment of curator when presumption of death not applicable. (64.1-107). Appeals of right are made to court whose clerk or deputy clerk made order. (64.1-78).

General District Courts.

All courts not of record, except family courts, having exclusive jurisdiction over civil actions involving $4,500 or less and concurrent jurisdiction with circuit courts of actions up to $15,000. (16.1-77). Jurisdictional limit of $15,000 inapplicable to distress warrants for rent, actions of unlawful entry or detainer if they relate to property used for business, commercial or agricultural purposes. (16.1-77). Appeal of right to circuit court de novo in civil case where matter in controversy over $50, constitutional question, question of validity of statute or ordinance, or where FOIA enforcement is sought. (16.1-106). Practice in general district courts is governed by Parts 7A, 7B and 7C of Rules of Supreme Court. (Rules 7A:1 to 7C:7). Each circuit has one general district court. (16.1-69.1). Judges elected to six-year term by legislature. (16.1-69.9). Juvenile and domestic relations district courts established: Original jurisdiction over all matters involving custody, visitation, support, control, or disposition of children; child neglect, abuse, or abandonment; juvenile criminal adjudications; admission of children to mental helath facilities; judicial consent for emergency medical care for child; any offense where family member accused of violence against family member. (16.1-241). Transfer to circuit court available for trial. (16.1-269.1). Appeal of right of final order or judgment to circuit court in jurisdiction. (16.1-296). Justice of Peace abolished; magisterial system established. (19.2-26). Magistrates vested with power to issue criminal arrest and search warrants, consider bail, issue civil warrants, administer oaths and acknowledgments, and act as conservators of peace. (19.2-45).

Small Claims Courts.

Established by each general district court. Concurrent jurisdiction with general district court for all claims not exceeding $5,000, exclusive of interest. (16.1-122.2). No jurisdiction over Tort Claims Act cases. (16.1-122.1). Action commenced by filing small claims civil warrant. (16.1-122.3). Generally, self-representation occurs. (16.1-122.4). Appeals same as general district court. (16.1-122.7).

Drug Treatment Courts.

Drug Treatment Court Act established in 2004. Classified as specialized court dockets within Virginia's court system, offering judicial monitoring of intensive treatment and supervision of addicts in drug and drug-related cases. Oversight by Supreme Court of Virginia. No drug treatment court may be established without specific statutory authorization. (Va. Code 18.2-254.1).

6.01A EMERGENCY SERVICES:

Emergency Service and Disasters.

Governor required to conduct annual statewide drill on response to large-scale natural disaster. Results of drill reported to chairs of House Committee on Militia Police and Public Safety and Senate Committee on General Laws by Nov. 30 of each year. (44-146.17:2).

Municipality Alert and Warning Systems.

All localities with population greater than 50,000 must establish alert and warning system for dissemination of adequate and timely warning to public in event of warning or threatened disaster. (44-146.19). All localities must prepare and keep current emergency operations plan for area.

6.02 LEGISLATURE:

Regular Session.

General Assembly consisting of 40 Senators and 100 Delegates convenes annually on second Wed. in Jan. (Const., Art. IV, §§ 2, 3, 6). Regular sessions convene for up to 60 days in even-numbered years and for up to 30 days in odd-numbered years, but can be extended for up to 30 days with concurrence of two-thirds of members of both houses. (Const., Art. IV, § 6). Reconvenes on sixth Wed. after adjournment of regular or special session to consider bills vetoed or amended by Governor. (Const., Art. IV, § 6).

Special Sessions.

Governor shall call special sessions on application of two-thirds members of both houses, or when, in Governor's opinion, interest of State may require. (Const., Art. IV, § 6).

Effective Dates of Laws.

Bills passed at regular session and signed by Governor take effect on July 1 following adjournment or date specified within bill, and bills passed at special session and signed by Governor take effect on first day of fourth month after adjournment of special session. If emergency specified in bill and bill approved by four-fifths of members voting in each house, bill becomes law upon signature by Governor or date specified within bill. (Const., Art. IV, § 13).

Lobbyists.

Term “lobbying” means influencing or attempting to influence executive or legislative action through oral or written communication with executive or legislative official, or solicitation of others to influence executive or legislative official. Does not include requests for appointments, information on status of pending executive and legislative actions, or other ministerial contacts if there is no attempt to influence executive or legislative actions; responses to published notices soliciting public comment submitted to public official designated in notice to receive responses; solicitation of association by its members to influence legislative or executive action; or communications between association and its members and communications between principal and its lobbyists. (2.2-419). Each lobbyist must register annually with Secretary of Commonwealth (2.2-422) and file annual report of expenditures, including gifts, for each principal for whom he lobbies by July 1 for preceding 12 month period complete through Apr. 30 (2.2-426).

6.03 REPORTS:

The official Virginia reports are: Washington, 2 vol., Va. 1-2; Virginia Cases, 2 vol., Va. 3-4; Call, 6 vol., Va. 5-10; Hening & Munford, 4 vol., Va. 11-14; Munford, 6 vol., Va. 15-20; Gilmer, 1 vol., Va. 21; Randolph, 6 vol., Va. 22-27; Leigh, 12 vol., Va. 28-39; Robinson, 2 vol., Va. 40-41; Grattan, 33 vol., Va. 42-74; Va. 75 to date. Other reported Virginia cases are: Jefferson, 1 vol., 1730-1772; Wythe, 1 vol., 1790-1799; Virginia Decisions, 2 vol., 1871-1900, covering cases omitted from official reports; Patton Jr. & Heath, 2 vol., 1855-57, reporting a temporary Special Court of Appeals; Virginia Colonial Decisions, 2 vol., 1728-1743. Court of Appeals decisions officially reported in Court of Appeals Reports, cited Va. App.

Virginia decisions are also reported in the South Eastern Reporter.

Selected Virginia Circuit Court opinions unofficially reported in Virginia Circuit Court Opinions, published by LexisNexis.

Digests are: Virginia and West Virginia Digest Annotated; Encyclopedic Digest (Michie); South Eastern Digest.

6.04 STATUTES:

The Code of 1950 became effective Feb. 1, 1950 (1-2), except as provided in 1-2.1. All statutes of a general nature preceding the code were repealed. (1-3). Statutes subsequent to the Code of 1950 are in cumulative pocket supplements in the back of each volume.

An unofficial code, known as Michie's Code, 1942, with 1948 Supplement, contains all general laws in force up to end of year 1948.

Uniform Acts of National Conference of Commissioners on Uniform State Laws adopted are: Adoption and Medical Assistance (1988); Anatomical Gift (1970) (2006) (2007); Arbitration (1986) (1998); Attendance of Witnesses From Without a State in Criminal Proceedings, Act to Secure (1950) (1960) (1975); Audio-Visual Deposition (1978); Child Custody Jurisdiction and Enforcement (1997); Code of Military Justice (1987); †Commercial Code (1966); Computer Information Transactions Act (2000); Condominium (1974); Conservation Easement (1988); Controlled Substances (1970) (1990) (1994); Criminal Extradition (1936); Custodial Trust (1990); Declaratory Judgments (1922); Disclaimer of Property Interests Act (1999); Disposition of Community Property Rights at Death (1981); Disposition of Unclaimed Property Act (1960); Electronic Transactions (2000); Enforcement of Foreign Judgments (1988); Extradition of Person of Unsound Mind (1916); Federal Lien Registration (1970); Flag (1917); Foreign Depositions (1920); Foreign-Money Claims Act (1991); Foreign Money-Judgments Recognition (1990); International Wills (1995); Interstate Arbitration of Death Taxes (1948); Interstate Compromise of Death Taxes (1948); Interstate Depositions and Discovery (2007) (2009); Interstate Family Support (1994) (2001); Land Registration (1916); Limited Partnership (1985) (1998); Machine Gun (1932); Prudent Management of Institutional Funds (1987) (2006) (2008); Nonprobate Transfers on Death (1994); Out-of-State Parolee Supervision (1938); Partnership (1918) (1997); Photographic Copies of Business and Public Records as Evidence (1950); Premarital Agreements (1986); Principal and Income (1997) (2008); Prudent Investor (1999); Real Estate Cooperative (1981); Real Property Electronic Recording (2006); Reciprocal Enforcement of Support Act (adopted 1952, repealed 1994); Recognition of Acknowledgments (1968); Residential Landlord and Tenant (1974); Residential Mortgage Satisfaction (2006); †Securities (1958); Simultaneous Death (1942); Status of Children of Assisted Conception (1991); Statutory Rule Against Perpetuities (2000); To Secure Attendance of Witnesses from Without a State in Criminal Proceedings (1936); Testamentary Additions to Trusts Act (1991); TOD Security Registration Act (1994); Trade Secrets (1986); Transfers to Minors (1988); Trust Code (2005); Unclaimed Property (1981).

Other Uniform Acts adopted are: Trademarks (1998).

For text of Uniform Acts falling within the scope of the Martindale-Hubbell Law Digests see Uniform and Model Acts section.

†Adopted with significant variations or modifications. See appropriate topics.

6.05 UNIFORM LAWS:

For list of Uniform Acts in force in this state see topic 6.04 Statutes. For text of Uniform Acts within the scope of the Martindale-Hubbell Law Digests see Uniform and Model Acts section.

7 CRIMINAL LAW

7.00A BAIL:

See topic 7.01 Criminal Law.

7.01 CRIMINAL LAW:

Crimes and criminal procedure are governed by titles 18.2 and 19.2 of Code of 1950, and later legislation. Indictment will lie for common law offenses. (87 Va. 257, 12 S.E. 385).

Prosecutions, unless provided otherwise, are by presentment, indictment or information. (19.2-216). Felonies must be by indictment or presentment. Information may be filed on presentment or indictment by grand jury or on verified complaint. (19.2-217).

Central Criminal Records Exchange.

Law enforcement agencies are required to submit within 72 hours report to state police identifying individual for whom felony warrant or capias issued. (19.2-390).

Bail is authorized. Procedures for having bail hearing are set forth in 19.2-76 and 19.2-80. If court should refuse bail or fix excessive bail, appeal lies to next higher court or judge thereof up to Supreme Court or justice. (19.2-124).

Interstate Compact for Supervision of Adult Offenders adopted in place of Interstate Compact for Supervision of Adult Offenders. (53.1-176.1). Governed by 52.1-176.2.

Uniform Criminal Extradition Act, old Act in effect. (19.2-84 to -118).

Uniform Act to Secure the Attendance of Witnesses from Without a State in Criminal Proceedings adopted. (19.2-272 to -282).

Uniform Act for Out-of-State Parolee Supervision adopted. (53.1-166-167).

Handgun purchases limited to one within 30 day period by person who is not licensed firearms dealer unless person is law enforcement officer, is active duty service member of United States Armed Forces or Virginia National Guard, or undergoes enhanced criminal history records check and obtains police authorization and certification or holds valid Virginia permit to carry concealed handgun, purchases handgun through private sale for enhancement of personal collection of curios or relics. (Va. Code 18.2-308.2:2).

Virginia Racketeer Influenced and Corrupt Organization Act.

RICO Act for Virginia under which various violations of alcoholic beverage, banking, and criminal law become racketeering if conducted by persons in concert for purpose of racketeering. (18.2-512 et seq.).

8 DEBTOR AND CREDITOR

8.01 ASSIGNMENTS:

Assignee of a nonnegotiable chose in action, except as provided in 8.9A-403, may maintain action thereon in his own name. (8.01-13). Life insurance policies may be assigned if not obtained merely for purpose of assignment. (38.2-3111). Claims for compensation under Workmen's Compensation Law may not be assigned and are exempt from claims of creditors with certain exceptions for spousal and child support. (65.2-531).

Uniform Commercial Code has been adopted. (8.1A-101 et seq.). See category 3 Business Regulation and Commerce, topic 3.09 Commercial Code.

Assignment of Wages.

Only valid if (i) in writing and notice to enforce served on employer or (ii) employer consents in writing. (40.1-31). Partial assignment of wages not enforceable. (40.1-32). If debtor wishes to assign income for benefit of creditors, court may appoint trustee to receive salary, wages, or income and pay off obligations. Majority of creditors, in both number and amount of debt, must consent. Written consent of debtor's employer also required. (55-161).

8.02 ATTACHMENT:

Actions in Which Allowed.

Writ may be had on legal or equitable claim to any specific personal property or on claim for debt, including rent, or for damages for breach of contract or tort. (8.01-533).

Courts Which May Issue Writ.

Jurisdiction is in circuit courts. (8.01-535). Where amount in controversy, exclusive of interest and attorney fees, does not exceed $15,000, jurisdiction is before district courts. (16.1-77).

In Whose Favor Writ May Issue.

Writ may issue in favor of any person or corporation holding claim, legal or equitable, against debtor. (8.01-533).

Against Whom Writ May Issue.

Writ may issue against any person or corporation, including one who is indebted to or has possession of personal property belonging to principal debtor, and any person claiming interest in attached property. (8.01-534, -539).

Claims on Which Writ May Issue.

Writ may issue on claim to specific property, or to any debt, or to damages for breach of contract, or to damages for wrong. If claim is for debt not due attachment will not lie where only ground for writ is that defendant or one of them is foreign corporation or nonresident having estate or debts owing to him within state, but will lie on any other ground. (8.01-533). As to attachment of ships, boats and other vessels of more than 20 tons, see 8.01-538.

Grounds are that principal defendant or one of principal defendants: (1) Is a foreign corporation or nonresident and has estate or debts owing within county or city where attachment is or that defendant being nonresident is entitled to benefit of lien, legal or equitable on real or personal property within county or city where attachment is; (2) is about to remove from state with intent to change domicile; (3) intends to remove, is removing or has removed specific property claimed, or his own property, or proceeds thereof, or material part thereof, from state, endangering satisfaction of judgment when recovered; (4) is converting, is about to convert or has converted his property or some part thereof into money, securities or evidences of debt with intent to hinder, delay or defraud creditors; (5) has assigned or disposed of his estate or some part thereof with intent to hinder, delay or defraud creditors, or is about to do so; (6) has absconded or is about to abscond, or has concealed himself or his property to injury of creditors, or is fugitive from justice. (8.01-534.A).

Grounds also exist if specific personal property sought will be: (1) Sold, removed, secreted or otherwise disposed of by defendant so as to be unavailable to answer final judgment in favor of plaintiff; (2) destroyed, damaged or injured if allowed to remain in defendant possession; or (3) in action for rent, if there is immediate danger that property subject to landlord's lien will be destroyed or concealed. (8.01-534.B.).

Proceedings to Obtain.

Proceeding to recover debt or damages for breach of contract by attachment is commenced by filing verified petition for writ stating particulars of claim, sum certain which at minimum should be recovered, when claim will be due, and one or more grounds therefor. (8.01-537). Petitioner must pay appropriate costs, fees, and taxes. (8.01-537.B.). Defendant may answer or demur. No other pleadings are required. (8.01-536). Any amendment conducive to justice is permitted. No writ will be dismissed for formal defects. (8.01-545).

Issuance.

Writs are issued by judge or magistrate, returnable to court having jurisdiction. (8.01-540, -541). Other attachments may issue on same petition. (8.01-543). If defendant not served, further attachments or summons may issue until service, or order of publication may be made against nonresident. (8.01-544).

Attachment Bond.

Plaintiff must, at time of suing out attachment or other pretrial levy or seizure, give bond. If plaintiff seeks only pretrial levy on property and bond with surety or cash bond is posted, amount shall be at least fair market value of property to be levied. If property bond is posted, amount shall be at least double estimated fair market value. If plaintiff seeks pretrial seizure of property, bond amount is double fair market value of property to be seized. Bond shall contain condition to pay costs and damages which may be awarded against plaintiff or sustained by any person by reason of wrongful levy or seizure. (8.01-537.1; -551).

Release of Property.

Defendant may secure release and return of any property by forthcoming bond. (8.01-553). Defendant may move to quash attachment. If attachment is invalid on face, if no grounds for attachment exist, or if plaintiff is unlikely to succeed on merits of claim, defendant recovers property, plus costs and damages for loss of use. (8.01-568).

Transfer of Cause.

If real estate is involved in attachment issued out of general district court, suit is transferred to court of record having jurisdiction over actions removed therefrom. (16.1-105).

Levy.

Officer makes levy, or if possession is requested by plaintiff in petition and proper bond is posted, may seize property. (8.01-550, -551). Plaintiff has lien from time of levy. (8.01-557). Perishable property or property expensive to keep may be sold by order of court. (8.01-561). Restraining orders may be made or receiver appointed to secure property. (8.01-549).

Land may be levied upon. (8.01-546, -547, -548, -550, -572).

Sale.

Property levied on which is perishable or expensive to keep may be sold before judgment. (8.01-561). No real estate may be sold until other property is exhausted. (8.01-572).

Notice of attachment or lis pendens on real property should be recorded as protection against subsequent bona fide purchasers for value without notice. Court may in appropriate cases, impose sanctions as provided in Va. Code 8.01-271.1 on one who files notice of attachment or lis pendens. (8.01-268, -269).

Priorities between successive attachments of the same property are according to time of levies thereon or from time of service upon codefendant having property in his possession. (8.01-557). Holder in due course of negotiable paper shall have priority over attachment levied thereon. (8.01-557). Lien of fieri facias is superior to attachment subsequently levied. (8.01-478; 348 F. Supp. 277).

Third-Party Claims.

Any person claiming interest in property attached may file petition before property sold or proceeds paid to plaintiff, giving security for costs, and without other pleading, court holds inquiry, with jury if requested. (8.01-573).

Rehearing.

A defendant served by publication, and not having appeared, may petition for rehearing within one year after being personally served with copy of judgment, otherwise within two years from entry thereof, on giving security for costs. (8.01-575).

8.03 [RESERVED]

8.04 CREDITORS' SUITS:

Creditors' suits may be maintained as at common law for the benefit of all similarly situated (77 Va. 631), and to reach deposits of insolvent surety or insurance companies in the hands of the State Treasurer (38.2-1046) or escheated lands after exhaustion of person property (55-195), or to subject to a valid lien the curtesy or dower interest of a surviving spouse in real estate, which dower or curtesy right vested prior to Jan. 1, 1991 (64.1-19.2).

To protect the lien against subsequent bona fide purchasers, a notice of lis pendens accompanied by a memorandum describing claim, should be filed. (8.01-268).

See topic 8.08 Fraudulent Sales and Conveyances.

8.05 EXECUTIONS:

Kinds of Executions.

Writs of levari facias, extendi facias, elegit, capias ad satisfaciendum and distringas are abolished. (8.01-467). On money judgments writ of fieri facias issues (8.01-466) against money, bank notes and tangible personal property only (8.01-474, -478), unless state is plaintiff (8.01-201). For recovery of specific property, real or personal, writ of possession issues, and also fieri facias for damages and costs (8.01-470; 16.1-98), or at option of plaintiff fieri facias for alternative value of property with damages and costs (8.01-472; 16.1-98).

Exemptions.

See topic 8.06 Exemptions.

Stay of execution may be had pending determination of motion to quash upon posting of bond. (8.01-477). See category 5 Civil Actions and Procedure, topic 5.03 Appeal and Error.

Time for Issuance.

Fieri facias issues, if requested by party in interest, at expiration of 21 days from date of entry of judgment. (8.01-466). Execution, including those in favor of Commonwealth, as well as those rendered in another state or country, may be issued or action brought within 20 years after date of judgment or domestication of such judgment, except that if action is against personal representative of decedent it must be brought within two years. This section does not reduce time for enforcing judgment limitation upon which was extended prior to June 29, 1948. (8.01-251). When these limitations have expired, no execution may issue, or action be brought on judgment, unless times are extended upon motion before limitations expired. (8.01-251). However, time does not run while right is suspended by terms of judgment or by legal process (8.01-251) or when defendant obstructs filing of action (8.01-229.D). There is also saving provision as to persons under disability. (8.01-229). After judgment is rendered in general district court, writ of fieri facias or writ of possession issues only if requested by judgment creditor, his assignee or his attorney. (16.1-98).

Real Property.

If state is plaintiff, fieri facias issues against lands as well as personal property. (8.01-201). Personal property must be levied on before real estate. (8.01-203). Sale of lands is held at court house, between 60 and 90 days after posting notice thereof (8.01-204) on terms of six months' credit to purchaser who furnishes bond for payment (8.01-206). Bond has force of judgment, and execution issues thereon (8.01-209), but if party is dead, action at law lies against representatives (8.01-210). On failure to sell, writ of venditioni exponas may issue to sheriff of adjoining county, who sells. (8.01-211 to -214).

In other cases, to subject real property to judgment lien, bill in equity must be filed, and if profits of land will not satisfy judgment in five years, sale may be ordered. (8.01-462). Sale is by commissioners appointed therefor; on terms ordered by court (8.01-96), subject to confirmation (83 Va. 525, 5 S.E. 673). Thirty days notice of suit is required if judgment is less than $20. (8.01-463). Limitations on judgments apply to suits in equity to enforce lien. (8.01-251).

See category 5 Civil Actions and Procedure, topic 5.15 Judgments.

Levy may be made under fieri facias on all goods and chattels, including money (8.01-474, -478) except those exempt (see topic 8.06 Exemptions), and excepting growing crops (8.01-489). No unreasonable levy shall be made, and live animals must be fed while in possession of officer. (8.01-490). Personal property subject to liens, may be levied upon, and sold subject to lien if not payable, or free from lien if payable and proceeds applied first to lien. (8.01-480).

Priority.

Writs have priority in order received by officer. If received at same time, they share ratably. If indemnifying bonds are required, those furnishing bonds share in order of priority. (8.01-488).

Liens.

Personal property levied upon before return day is bound from time of delivery of writ to officer. (8.01-501). Personal property capable of being levied upon and not levied upon is bound only until return day from delivery to officer. Property levied on may be sold within reasonable time after return day. If supplementary proceedings under 8.01-506 are begun before return day, lien on property not levied upon in time may be subsequently enforced, but summons issued and not served does not constitute act of proceeding against debtor. (8.01-478, -479). From delivery of writ to officer, personal property from its nature not capable of being levied upon (intangible) is subject to lien, if owned by execution debtor at any time between such delivery and return day inclusive, except exempt homestead property, and except as against assignee for value, or person making payment to debtor, if such are without written notice, which notice must be served by officer and must describe judgment and execution in detail and be signed by plaintiff or his attorney (must have reasonable basis to serve notice on financial institution). (8.01-501, -502 -502.1). Employer, however, is not required to withhold wages until he is duly served with process of garnishment. (8.01-503). Lien on intangible assets ceases to exist only when right to enforce judgment ceases, or upon expiration of one year from return day of execution or from determination of amount owed by third person to judgment debtor, whichever is longer. (8.01-505).

Territorial extent of lien of fieri facias is bailiwick of officer as to tangible property and jurisdiction of state as to intangible. (8.01-481). Enforcement may be by suit at law or in equity, in name of officer or person designated by court. Officer may require indemnity bond for costs and expenses he may incur or become liable for, or any party in interest may sue in name of officer at his own cost. (8.01-497). Subsequent writs do not impair liens under previous writs. (8.01-475).

See topic 8.09 Garnishment.

Sale.

Notice of sale of personal property under fieri facias must be posted at least ten days before sale, near residence of owner, and in two or more public places in officer's bailiwick. Property which is perishable or expensive to keep may be sold in less than ten days by court order. Sale is for cash to highest bidder. (8.01-492).

Sales may be adjourned if there is not sufficient time to finish selling. (8.01-493). On failure of bidder to comply with terms officer may resell, either at same sale or under new advertisement. First purchaser is liable for any damages thereby to either party. (8.01-494).

Redemption.

There is no redemption of property sold under execution. Statutes and courts are silent on this subject and common law rule applies in practice.

Return.

Executing officer files return showing his action. (8.01-483,-484, -487). If he has surplus money from sale, debtor is entitled thereto. (8.01-495). Summons in garnishment, whether issued by circuit court or district court, is returnable within 90 days of writ's issuance, except that, in case of wage garnishment, summons is returnable within 180 days. (8.01-514).

Forthcoming Bonds.

Bond, provided that property will be forthcoming at time of sale, may be given to officer levying under fieri facias by party having possession of chattels, to retain possession until sale (8.01-371, -526) unless writ is against public officer, or on forthcoming bond, or on any execution where law requires no security to be taken (8.01-531).

Subsequent Writs.

Subject to limitations on judgments (8.01-426 et seq.), subsequent executions may be issued at expense of creditor at any time, even though prior writs not yet returnable, and if return has been made on former writ showing no execution, or that all or part of amount not levied, or that levy was discharged by legal process not preventing execution, subsequent execution may issue at expense of debtor (8.01-475). Subsequent executions do not impair liens under prior writs. (8.01-475). Where property sold or its value has been recovered as against purchaser or surety on indemnity bond, after reasonable notice to debtor, subsequent execution will issue on motion made within five years. (8.01-476).

Writ of venditioni exponas will issue if return shows property levied on to be unsold. Proceedings are as on fieri facias, but if failure to sell on first writ was for lack of bidders or for insufficient bid, advertisement of sale shall so state, and shall also state that sale will be peremptorily made. (8.01-485).

Venditioni exponas also issues to successors of officers dying before sale. New officer takes possession, advertises, and sells. (8.01-486).

Third Party Claims.

When property levied on or required to be levied on is claimed by third party, officer may refuse to levy or sell unless indemnifying bond is given. (8.01-367). Sale may be suspended if claimant furnishes suspending bond, and proceeds to determine title within 30 days. (8.01-370). Claimant may retain possession on giving forthcoming bond, but perishable property or property expensive to keep may be sold by order of court. (8.01-371, -372). Trial of title for property is under interpleader provision. (8.01-364, -365).

Supplementary Proceedings.

After issuance of execution, clerk or justice, on application of execution creditor, and after execution creditor has filed affidavit that six months has elapsed since creditor has made use of this provision against debtor, issues summons to execution debtor, or any officer of corporation debtor having office in this state, or any debtor or bailee of debtor, to appear at time and place designated, before commissioner in chancery named, to answer interrogatories. If execution creditor requests that summons require execution debtor to appear before like court of county or city in which execution debtor resides or contiguous county or city, case may be filed or docketed in accordance with requirements of § 8.01-506.2 prior to issuance of summons. (8.01-506). Commissioner may order conveyance or delivery of real estate, tangible or intangible personal property or evidences of debt outside state forthwith to officer executing writ or some other designated person. (8.01-507). Interrogatories and answers are returned to court upon request of any party. (8.01-507.1). Commissioner may order arrest of debtor for failure to answer or convey or deliver, subject to review by court. (8.01-508). Property conveyed or delivered may be sold by order of court, or in manner provided for sale of personal property. (8.01-509). See subhead Sale, supra.

Body Execution.

(Capias ad satisfaciendum) has been abolished. (8.01-467).

8.06 EXEMPTIONS:

Property.

In addition to his homestead exemption, householder entitled to exemption of enumerated articles of personal property, in some instances limited as to value. (34-26, -27).

Waiver of Exemptions.

Exemptions enumerated in 34-26, -27 and exempted wages, 34-29, cannot be waived. (34-22).

Earnings.

Maximum part of income of any individual for any work week subject to garnishment will be lesser of: 25% of his disposable earnings for that week, or amount by which his disposable earnings for that week exceeds 40 times minimum wage prescribed by 29 U.S.C. § 206(a) (1). (34-29). If this exemption is avoided by proceedings in another state, on assignment or otherwise, parties responsible are liable to fine not less than $10 nor more than $100 and civilly liable for full amount recovered in proceedings elsewhere than in state plus interest and costs. (34-32).

Wages of minors are not liable, by garnishment or otherwise, for debts of parents. (34-33).

Salaries of state officers, but not other state employees, are exempt. (8.01-522).

Homestead Exemption.

See topic 8.10 Homesteads.

Special exemptions are also granted with respect to assets of retirement systems created and retirement allowances and benefits accrued under Virginia Retirement System (51.1-124.4), assets of retirement plans intended to satisfy §§ 401, 403(a), 403(b), 408, 408A, 409 (as in effect prior to repeal by Public Law 98-369) or 457 of Internal Revenue Code (34-34), proceeds of life insurance retained by company at maturity if policy so provides (38.2-3118, -3119), proceeds of life insurance whether or not right is reserved to change beneficiary (except as to cash surrender or loan value), payable to householder or head of family, their beneficiaries or assignees, as to creditors of insured and of persons taking out insurance (38.2-3122, -3123), installments on health or accident insurance recoveries (38.2-3406), benefits paid by fraternal beneficial associations (38.2-4118), benefits paid by burial societies (38.2-4021) or cooperative nonprofit life benefit companies (38.2-3811), unemployment compensation benefits (60.2-600) and growing crops (8.01-489).

8.07 FORECLOSURE:

See topic 8.13 Liens; category 20 Mortgages, topic 20.04 Mortgages of Real Property.

8.08 FRAUDULENT SALES AND CONVEYANCES:

Any transfer of interest in property made, or legal proceeding commenced, or written instrument given with intent to delay, hinder or defraud any person is void as to such person and those claiming under him, unless transfer was to bona fide purchaser. (55-80). Any transfer without valuable consideration, or in consideration of marriage, by insolvent transferor or by transferor thereby rendered insolvent, is void as to existing creditors, but not as to subsequent creditors. (55-81).

Uniform Commercial Code has been adopted. (8.1A-101 et seq.). See category 3 Business Regulation and Commerce, topic 3.09 Commercial Code.

Uniform Fraudulent Conveyance Act not adopted.

Possession for Five Years Under Loan, etc.

If goods or chattels remain in possession of any person for five years, any rights claimed by reason of a loan, or any reservation or limitation thereof or thereon, are void as to creditors of or purchasers from the person in possession unless evidenced by recorded will or deed. (55-87).

Unwritten and Unrecorded Contracts, etc.

Every contract not in writing, respecting real property or goods and chattels in consideration of marriage, or for conveyance or sale of real estate, or a term therein over five years, and every bill of sale or contract for the sale of goods and chattels, where possession remains with the seller, is void, at law or in equity, as to purchasers for value without notice and as to creditors; if such contract or bill of sale creates a security interest as defined in Uniform Commercial Code, its validity and enforceability shall be governed thereby. (11-1). Such contracts are valid if in writing and recorded, from time of record (55-95, -96), but only as to property in county or corporation where recorded (55-97). Possession of real estate is not of itself notice of an interest or estate therein. (55-96).

Remedies.

Creditor may institute suit to avoid voluntary and fraudulent sales and conveyances whether his claim is due and payable or not and in such suit may have same relief to which he would be entitled after judgment or decree on his claim. Creditor lien attaches at time he brings suit. (55-82). Attorney's fees may be awarded. (55-81.1).

Bulk Sales.

Uniform Commercial Code governs (8.6A-101 to 8.6A-110; 8.9A-101 et seq.). See category 3 Business Regulation and Commerce, topic 3.09 Commercial Code.

8.09 GARNISHMENT:

Garnishment, subject to exemptions (see topic 8.06 Exemptions), is available in aid of attachment, execution, and collection of taxes. (8.01-511 to -525).

Jurisdiction.

Garnishment proceedings are brought in court in which judgment was obtained or execution was returned. (8.01-511, -512.3).

Proceedings to Obtain.

On suggestion by a judgment creditor that by reason of the lien of his writ of fieri facias, there is liability of another than the judgment debtor, summons and notice and claim for exemption form required pursuant to Va. Code 8.01-512.4 shall be served on garnishee. Copy must also be served on judgment debtor promptly after service on garnishee. (8.01-511).

Answer of Garnishee and Judgment.

Person summoned is examined under oath, or may file a verified statement. If the judgment creditor or judgment debtor disputes verity of statement, he may require appearance in person. (8.01-515, 8.01-511).

Person summoned may pay judgment debtor exempt wages. (8.01-517).

On default in appearance, or on suggestion of failure to fully disclose, proceedings are the same as in attachment (see topic 8.02 Attachment), under like conditions, except that general district court must proceed without jury. (8.01-519).

A person so summoned may, before the return day, deliver what he is liable for to clerk of court (8.01-520), and so escape costs, which are otherwise discretionary (8.01-521). Certain garnishee-employers may collect fee of up to $10 from judgment-debtor employee for expenses incurred in processing garnishment summons. (8.01-512.2).

Suit at law or in equity may be maintained to recover any estate subject to a judgment or fieri facias, in the name of the executing officer, or of another officer designated by the court, by any party in interest, at his own expense, or by the officer, but the officer may refuse to bring suit unless furnished with an indemnity bond. (8.01-497).

Earnings.

Earnings in excess of exemption (see topic 8.06 Exemptions) are subject to garnishment subject to statutory limit. (34-29).

Taxes.

Tax Commission may apply in writing to any person indebted to or having in his hands estate of taxpayer for payment of any taxes assessed under § 58.1-313 or § 58.1-631 or of any taxes more than 30 days delinquent out of such debt or estate. Tax, penalties and interest become lien upon receipt of application. If person applied to does not pay full amount Tax Commissioner shall produce summons directing such person to appear in court, where proper payment may be enforced. Such person shall have rights of removal and appeal as are applicable to individuals. (58.1-1804).

8.10 HOMESTEADS:

Every householder may, besides other exemptions (see topic 8.06 Exemptions), exempt from creditor process arising out of debt, real and personal property, or either, selected by householder, including money and debts due householder not exceeding $5,000, or if householder is over age 65, not exceeding $10,000 in value (34-4), except for claims for purchase price of property, including purchase money deeds of trust (34-28), or of property for which it was received in exchange, or for spousal or child support obligations (34-5). Deeds of trust placed on exempt real property are void unless they secure purchase money financing for exempt real property or personal property exempt pursuant to § 34-26(7) and (8). (34-28). Exemption is not allowed as to property for which exemption has been waived. (34-22). Exemption is not allowed for fines for crimes against Commonwealth (70 Va. 714), or for breach of promise to marry (78 Va. 468), or for court costs in criminal case (215 Va. 274, 208 S.E.2d 752). Additional exemptions may be taken by householders supporting dependents (34-4) and by certain veterans (34-4.1).

Rents, profits and increase in value of property exempted other than by improvements are exempt. (34-18).

If property of value in excess of allowed exemption amount is set aside, or if excess of value is caused by permanent improvements, made other than by means derived from exempt property, creditors may reach excess by bill in equity. (34-19). When property has once been set aside under 34-4, right is exhausted. (34-21).

Designation.

Declaration of intention to claim the exemption, in writing, describing the property and stating valuation thereof must be signed by the person claiming and recorded as to real estate, in county or city where real estate is located if such real estate is located in Commonwealth of Virginia or in county or city where claimant resides if such real estate is located outside Commonwealth of Virginia (34-6), or as to personal property, in county or city of his residence. (34-14). This writing only required to secure exemptions created by §§ 34-4, 34-4.1, and 34-13. (34-6, -14). Claim may be made at any time before property designated is sold under process, except that in case of voluntary or involuntary bankruptcy it must be made on or before fifth day after date of meeting of creditors. (34-17).

Form of Homestead Deeds.

Homestead deed for real property shall be in following form or one substantially similar (34-6):

HOMESTEAD DEED FOR REAL PROPERTY

Name of Householder . . . .

Name of title holder of record (if different).

Is the householder a disabled veteran entitled to claim the additional exemption under § 34-4.1? . . . .

Address of Householder . . . .

Name(s) and age(s) of dependent(s) . . . .

County/city/state in which real property claimed as exempt is located . . . .

Description of property claimed as exempt . . . .

Value of property described above . . . .

Number of homestead deeds that have been filed by the Householder. . . . .

Exemption amount previously claimed on prior homestead deeds . . . .

List the jurisdictions where previous homestead deeds were filed . . . .

[ACKNOWLEDGMENT]

. . . .

(Signature of Householder)

Homestead deed for personal property shall be in following form or one substantially similar (34-14):

HOMESTEAD DEED FOR PERSONAL PROPERTY

Name of Householder . . . .

Is the householder a disabled veteran entitled to claim the additional exemption under § 34-4.1? . . . .

Address of Householder . . . .

Name(s) and age(s) of dependent(s) . . . .

County/city in which householder resides . . . .

Description of property claimed as exempt and its value . . . .

. . . .

. . . .

[ACKNOWLEDGMENT]

. . . .

(Signature of Householder)

Householder.

Homestead exemption is available to any resident of Virginia. (34-1).

Sale or Exchange.

Exemption attaches to property received in exchange for exempt property, or proceeds thereof, or property in which proceeds are invested, but a new designation or a certified copy of court order, if any, must be recorded. (34-20).

If real property is sold under prior lien, surplus not exceeding allowed exemption amount may be invested as exempt. (34-7). If sold in partition, exempt share may be invested as exempt. (34-8). Exempt real property may be conveyed as other real property (34-9).

Waiver.

Exemption may be waived in written instrument, by writing thereon or annexing thereto following or equivalent words: “I (or we) waive the benefit of my (our) exemption as to this obligation.” (34-22). Waiver must be pleaded to have such waiver noted on judgment. (34-25). Unless specific lien is given, unexempt property in same jurisdiction must be exhausted before exempt property. Debts as to which homestead is waived share in decedent's estate with debts as to which there is no such waiver before resorting to exempt property. (34-23).

Surviving spouse and minor children of deceased householder are entitled to homestead allowance of $15,000. This is in lieu of any share passing to them by will or intestate succession, unless such share is less than $15,000 in value, in which case homestead allowance is amount sufficient, when added to share, to equal $15,000. (64.1-151.3). Separate from homestead allowance or any share passing by will or intestate succession, surviving spouse and minor children are entitled to exempt property allowance of $15,000 (64.1-151.2) and family maintenance allowance (64.1-151.1).

Termination.

Homestead rights terminate when householder or head of family ceases to be such, or when person entitled thereto removes from state. Property of decedents then passes as in other cases. On termination of exemption judgments or decrees attach only to property held at time exemption ceases, in order of their priority. (34-24). Right of surviving spouse and minor children to elect homestead allowance in lieu of any share passing to them by will or intestate succession terminates one year from deceased spouse's death. (64.1-151.3, -151.5).

8.11 JUDGMENT NOTES:

See category 5 Civil Actions and Procedure, topic 5.15 Judgments, subhead Confession of Judgment.

8.12 LEVY:

See topics 8.02 Attachment, 8.05 Executions.

8.13 LIENS:

Uniform Commercial Code has been adopted. (8.1A-101 et seq.). See category 3 Business Regulation and Commerce, topic 3.09 Commercial Code.

Mechanics (artisans) have liens for repairs of personal property made at request of owner for his just and reasonable charges therefor, and may retain possession. As to property requiring ordinary repairs for use, as against a deed of trust, reservation of title or other lien, artisan or mechanic may claim lien to extent of $800 and lien against proceeds, if any, remaining after satisfaction of all prior security interests or liens, and may retain possession if repairs were made at request of party lawfully in possession. Possession of property may be obtained by owner upon filing of proceeding and issuance of bond against which payment of mechanic's lien may be charged. (43-33, 46.2-644.02).

Cleaners, launderers, dyers and pressers have lien on clothing or other fabrics for their charges. If debt not paid within 90 days after due, property may be sold after giving ten days notice by registered mail to owner and reasonable advertising of time and place of sale; provided, notice and advertisement are not required where owner is given receipt bearing words “the property evidenced hereby may be sold if unclaimed after one hundred and eighty days except in the case of stored property which shall not be subject to sale until such property is unclaimed for two hundred forty days.” (43-63).

Keepers of inns and boarding houses have liens on and may retain possession of property of guests or boarders, which is on the premises, or of their employers, which was brought on the premises in the course of employment, for charges for board and lodging. (43-31).

Keepers of livery stables, marinas, hangars, or tie-downs, or persons pasturing or keeping animals, have lien on animals, boats, aircraft and harness, for care thereof, until paid but in case of boat or aircraft subject to chattel mortgage, security agreement or deed of trust, lien for storage is limited to $500 and lien for alteration or repair is limited to $800. Keeper of hangar or tie-down entitled to lien for "usual and reasonable charges" for storage. Keeper of hangar or tie-down must file lien with Federal Aviation Administration. (43-34.1). In case of storage lien, to obtain priority for amount in excess of $300 person asserting lien must give written notice by certified mail to secured party of record. Any such keeper also entitled to lien against proceeds, if any, remaining after satisfaction of all prior security interests or liens, and may retain possession of property until charges paid. (43-32).

Keepers of garages have lien on vehicles for towing, storage, recovery and care thereof, until paid, but if vehicle is subject to chattel mortgage, security agreement or deed of trust, lien for storage is limited to $500 and lien for alteration and repair is limited to $800. Any person providing towing and recovery entitled to lien for normal costs on seven days' notice to secured parties. In case of storage lien, to obtain priority for amount in excess of $300 person asserting lien must give written notice by certified mail to secured party of record. Lien does not extend to personal property not attached to vehicle. Keeper of garage entitled to lien against proceeds, in any, remaining after satisfaction of all prior security interests or liens, and may retain possession of property until charges paid. (46.2-644.01).

Owners of stallions, jackasses or bulls have lien on their offspring, which must be recorded as against innocent purchasers. (43-41 to -43).

Owner of enclosed grounds may impound trespassing animals and after judgment of court lien thereon for damages enures to owner. (55-307, -308).

Hospitals, Nursing Homes, Physicians and Nurses.

For its charges up to $2,000 for treatment of person injured by negligence of another, hospital or nursing home has lien on right of action for such injuries, enforceable against negligent party after notice. Physicians, nurses and physical therapists have similar liens to extent of $500 (and $200 for each ambulance service). (8.01-66.2 to -66.12). In order for lien to be effective, party asserting lien must provide written notice of lien to negligent party. (8.01-66.5). To extent state pays medical and related charges pursuant to medical assistance program (32.1-323 to -330.3), maternal and child health program or crippled children's program, it has lien (8.01-66.9). Attorney General may compromise lien on personal injury claim. (8.01-66.9).

Crops.

Landlords and farmers have a lien for advances in money or supplies to one who cultivates or raises livestock, on crops or livestock raised during year in which advances were made. This lien is prior to all other liens on such crops or livestock. (43-29).

Vendor and Purchaser.

A vendor of land has no lien for unpaid purchase money unless a lien be expressly reserved in the deed. (55-53). If so reserved, such lien is good against vendee, or those claiming under him, until waived or satisfied (95 Va. 285, 28 S.E. 321), subject to following limitation: If original obligation thereby secured became due and payable between July 1, 1988 and July 1, 2000, such lien will not be enforced after July 1, 2010 unless beneficiary of deed of trust or mortgage obtains extension by filing certificate in circuit court. Limitation does not affect right of persons (i) who acquire interest in property between July 1, 2008 and Mar. 16, 2009, and (ii) who would otherwise have priority over such lien. (8.01-241). Such liens must be satisfied of record as in case of mortgages. See category 20 Mortgages, topic 20.04 Mortgages of Real Property.

A purchaser of land, before record of a prior deed, has a lien on the land as against the person claiming under such deed, for the amount of purchase money paid before notice. (55-104, -105).

Secured Parties.

In absence of contrary provision in deed, if secured party makes advances with respect to lien which is prior to secured party lien or in order to protect secured party lien, advances are added to amounts secured by secured party lien, together with interest as provided in deed of trust, and are paid after expenses of executing trust. (55-59).

Property Owners' Associations.

Property owners' association shall have lien on every lot within subdivision for unpaid assessments. Memorandum of lien must be filed within 90 days of due date of assessment for subdivisions and within 12 months for developments. (55-344, 44-79.84, 55-516).

Mining, Manufacturing and Transportation.

Certain employees of individuals or companies engaged in business of mining, manufacturing or transportation, and persons furnishing supplies to transportation companies, have a prior lien for amounts due them, provided verified memorandum of claim is filed for record, or with trustee, assignee or receiver, within 90 days after last item became due (43-24, -25), and assignees of such claims have same right (43-26). Lien is enforced in equity. (43-25).

Owner of Self-service Storage Facility.

Owner has lien on all personal property stored within each leased space for rent, labor and other charges. Lien is effective as of date property was stored and has priority over existing liens to extent of $250, or $500 if leased space is climate-controlled facility. (55-418).

Enforcement.

Liens of mechanics (artisans) for repairs, of keepers of inns and boarding houses, of keepers of livery stables, etc., and of any bailee, except where otherwise provided, are liens at common law on personal property, if amount due is not paid within ten days after due. If value of property does not exceed $7,500, such liens are enforced by sale of property at public auction after advertisement, and, if value of property other than motor vehicle required to be registered in Virginia exceeds $600, ten days written notice to owner if he is in county or city and to any secured party who has filed financing statement covering such property; if value of property exceeds $7,500 but is less than $15,000, lien may be enforced by petition to general district court wherein property is, or if its value exceeds $15,000 by petition to circuit court. If personal property is motor vehicle that is at least six years old, worth less than $3,000 and which Department of Motor Vehicles cannot determine owner and has no record of any lien holder, person asserting lien against such vehicle may apply for and receive from Department of Motor Vehicles title to vehicle free of all liens and claims of ownership. (43-34, 46.2-644.03).

Mechanics' Liens.

Any person performing labor or furnishing materials, of value of $50 or more, for construction, removal, repair or improvement of a structure permanently annexed to freehold (including well, shrubbery and certain other accessories for improvement of grounds on which such structure is situated) or for construction of a railroad, may perfect a lien on structure, and sufficient land for convenient use thereof, or upon railroad and its franchises, for labor and material. Any person providing labor or materials for installation of streets, sanitary sewers or water lines to individual lots in development may perfect lien on each individual lot for its fractional share of costs. (43-3). Such persons are classified as: general contractors—those who contract directly with owners; subcontractors—those who contract directly with general contractors; and persons dealing only with subcontractors. (43-1, -3). Any person entitled to mechanic's lien may waive it in whole or in part at any time. (43-3).

Mechanic's Lien Agents.

Real property owners shall appoint attorney, title insurance company or financial institution as owner's “mechanic lien agent” authorized to receive notice from anyone entitled to claim mechanic's lien against one- or two-family dwelling unit wherein building permit contains name, address, etc. of mechanic's lien agent. Successor agent must be named upon death, resignation or incapacity of originally named mechanics' lien agent. Notice by potential lienor to mechanic's lien agent must contain name, address, etc. of claimant, building permit number, description of property and statement that potential lienor seeks payment for work performed or materials furnished. Potential lienor must provide notice to agent within 30 days of issuance of building permit or within 30 days of first day that potential lienor performs labor or furnishes material, or if potential lienor furnished work before building permit was posted, within 30 days of issuance of permit in order to perfect lien. Failure to notify agent limits effect of any memorandum of lien as to labor and materials provided after notice is given. At time of sale of any such property, any owner of one- or two-family residential dwelling unit must submit affidavit (or signed statement attested to by witness) of payment with respect to all contractors and subcontractors dealt with or affidavit giving name, address and amount owed to all such contractors and subcontractors. Willful failure to provide such statement or any willful material misrepresentation with respect to such statement which causes monetary loss is Class 5 felony if owner is also developer or contractor of project and Class 3 felony otherwise. (36-98.01; 43-1, -43-4.01 to -13.3).

Perfecting Lien.

General contractor must perfect his lien within 90 days from last day of month in which he last performed labor or furnished materials, but in no event later than 90 days from time such building, structure, or railroad is completed, or work thereon otherwise terminated, by filing verified memorandums of lien claim for record where structure or road, or part thereof is situated. (43-4). Form of lien memorandum and affidavit for general contractor is set forth in 43-5. Mechanic's lien claimant may not file lien for labor or materials furnished more than 150 days before last day on which labor was performed or materials furnished prior to filing of lien. (43-4). Verified memorandum may include amounts withheld as retainages with respect to labor performed or materials furnished prior to filing of memorandum so long as such amounts do not exceed 10% of contract price. Memorandum may also include sums not yet due because party with whom lien claimant contracted has not yet received such funds from owner or other third party. Subcontractor must perfect his lien as required for general contractor, and give notice thereof in writing to owner or his agent. His lien is limited to amount due to general contractor at time of notice or subsequent thereto, and it shall be affirmative defense that owner is not indebted to general contractor. (43-7). Lien claim and notice should be in statutory form or to like effect. (43-7, -8). Person dealing with subcontractor must perfect his lien as required for general contractor, and also give notice thereof in writing to owner or his agent, and also to general contractor or his agent. His lien is limited to amount for which subcontractor could perfect lien. Lien claim and notices should be in statutory form or to like effect. (43-9, -10).

Hearing on Validity of Lien.

Any person having an interest in real property against which a lien has been filed may petition in equity for a determination of validity of lien. If court finds lien invalid, it is removed from record. (43-17.1).

Personal Liability to Subcontractor.

The owner or general contractor may be made personally liable to subcontractors, laborers and materialmen, but notice must be served as required for other judicial notices and recorded in the deed book. (8.01-288, -293, -296, -325; 43-4.1, -11).

Miscellaneous.

Such liens must be recorded and indexed in deed books, and indexed also in general deed index. (43-4.1). Sheriffs and constables must serve required notices. (43-14.1). Inaccuracy of lien claim will not be fatal if property can be reasonably identified, and statutory forms are substantially conformed to, and memorandum is not willfully false. (43-15). Lien of a general contractor inures for benefit of a subcontractor or a person dealing with a subcontractor, who has perfected no lien, provided written notice of claim is given to owner or his agent before lien is actually paid or discharged. (43-18). Assignments of contracts, or claims thereunder, and writs of fieri facias, attachment, or other process against any contractor, are subject to such liens. (43-19).

If the owner must complete the work on failure of the general contractor to perform his contract, the amount expended in completion takes precedence over such liens. (43-16). If the person contracting as owner owns less than a fee simple estate, liens affect only his interest. (43-20). Except as indicated hereinafter, prior liens on the land do not affect the structure until mechanics' liens are satisfied. Liens on the land created after work was commenced or material furnished do not operate on land or structure until mechanics' liens are satisfied. The enforcement of prior liens is limited to the value of the land before the work was begun or materials furnished, excluding the structure, any residue being applied to mechanics' liens, but liens for repairs or improvement of buildings are subject to prior encumbrances of record against land and building. In case of subordination of a purchase money deed of trust to a construction money deed of trust, priorities of mechanics' and materialmen's liens are unaffected unless otherwise provided in agreement. (43-21).

How Enforced.

No suit or petition to enforce lien may be brought after six months from time when memorandum of lien was recorded or after 60 days from time building, structure or railroad was completed or work thereon otherwise terminated, whichever time shall last occur. (43-17). Enforcement is by bill in equity, and all lienors may file petitions in the suit. Statutory requirements that lienor file petition to enforce lien not satisfied by lienor being named defendant in petition filed by other lienor. (222 Va. 330, 281 S.E.2d 811). Subcontractors have preference over general contractors. Persons dealing with subcontractors are preferred over subcontractors. Persons performing labor are preferred over materialmen to extent of last 30 days of labor. (43-22, -23).

Release or Discharge.

Owner of property general contractor or other parties in interest may have lien released by paying money into court or giving bond; five days notice must be given to lien holder. (43-70, -71).

Mechanics' liens, when discharged, must be satisfied of record like mortgages. (43-67).

Public Works.

Mechanics' lien statutes do not apply to contracts with Commonwealth of Virginia, or political subdivisions thereof, for construction of public improvements, and do not give subcontractor any lien on sums due by Commonwealth or political subdivision thereof to contractor for construction of public improvements. (156 Va. 497, 159 S.E. 196).

Performance and payment bonds are required of any prime contractor awarded contract exceeding $100,000 or transportation-related projects exceeding $250,000. Such bonds shall be in amount of contract. At option of public body, bonds may be required for contracts less than $100,000 (for nontransportation-related projects) or $250,000 (for transportation-related projects). Prime contractor may require each subcontractor to post payment bond in full amount of contract with subcontractor. (2.2-4337).

Redemption.

After property has been sold to satisfy lien, no right of redemption exists except in case of real estate sold for taxes.

Revised Uniform Federal Tax Lien Registration Act adopted. (55-142.1 to 55-142.9).

Attachment Lien.

See topic 8.02 Attachment.

Attorney's Lien.

See category 18 Legal Profession, topic 18.01 Attorneys and Counselors.

Collateral Security.

See category 3 Business Regulation and Commerce, topic 3.09 Commercial Code.

Execution Lien.

See topic 8.05 Executions.

Judgment Lien.

See category 5 Civil Actions and Procedure, topic 5.15 Judgments.

Landlord's Lien.

See category 21 Property, topic 21.10 Landlord and Tenant.

Liens on Exempt Property.

See topic 8.06 Exemptions.

Liens on Homestead.

See topic 8.10 Homesteads.

Real Estate Mortgage Lien.

See category 20 Mortgages, topic 20.04 Mortgages of Real Property.

Warehouseman's Lien.

See category 3 Business Regulation and Commerce, topic 3.09 Commercial Code.

8.14 MECHANICS' LIENS:

See topic 8.13 Liens.

8.15 PLEDGES:

See specific topics, such as: Assignments; categories Business Regulation and Commerce, topic Commercial Code; Mortgages, topics Chattel Mortgages, Mortgages of Real Property; Transportation, topic Motor Vehicles.

Public Deposits.

Standardized procedure for pledge of securities as collateral for public deposits. (2.2-4400).

Uniform Commercial Code has been adopted. (8.1A-101 et seq.). See category 3 Business Regulation and Commerce, topic 3.09 Commercial Code.

Trust Receipts.

Uniform Commercial Code governs. (8.9A-101 to 8.9A-108).

8.16 RECEIVERS:

Circuit courts have general power to appoint receivers in case of insolvency, fraud, waste or improper conduct. (8.01-582; 245 Va. 38, 425 S.E.2d 484). There are statutory provisions for receivers of insurance companies (38.2-1500 to -1521), insolvent banks (6.1-100 to -110), trust companies (6.1-32.28), and corporations (13.1-748).

Bonds are required, unless an officer already under bond is appointed. (67 Va. 108).

Actions.

A receiver may be sued as to his own acts without leave of court (8.01-597), and judgment against him shall be treated in same manner as if claim had been proved and allowed in case in which receiver was appointed. (8.01-598). Trial of action against receiver in general district court requires ten days notice. (8.01-599).

Accounts of all special receivers must be settled within four months after funds in hand should be distributed or at other intervals fixed by court and same may be ordered for general receivers. (8.01-617). Reports of examinations by commissioner are made to court for its action. (8.01-618).

8.17 REDEMPTION:

See topics 8.05 Executions, Liens; categories 20 Mortgages, topic Mortgages of Real Property; Taxation, topic Taxes.

8.18 SUPPLEMENTARY PROCEEDINGS:

See topic 8.05 Executions.

8.19 TRUSTEE PROCESS:

See topic 8.09 Garnishment.

8.20 USURY:

See category 3 Business Regulation and Commerce, topic 3.19 Interest.

9 DISPUTE RESOLUTION

9.01 ALTERNATIVE DISPUTE RESOLUTION:

General.

Judicial Referral Generally.

On motion of court or any party, court may refer any contested civil matter or selected issues to mandatory, no cost (8.01-576.7), single orientation session to promote resolution of disputes. (8.01-576.5). Written statement of objection within 14 days from any party excuses attendance. (8.01-576.6). Chief judge of general district court or juvenile and domestic relations district court may establish voluntary civil mediation program for alternate resolution of disputes. (Va. Code 16.1-69.35).

Arbitration and Award.

Uniform Arbitration Act adopted. (8.01-581.01 to -581.16). See topic 9.02 Arbitration and Award.

Mediation.

Certified mediators and mediation programs are immune from civil liability absent bad faith, malicious intent, or willful, wanton disregard of rights. (8.01-581.23). Mediation files are confidential, with certain exceptions. (8.01-581.22).

Summary Jury Trials.

Parties may agree to hold summary jury trial at any time prior to civil trial, unless court determines that such agreement was made to delay. Judge presides. Result not binding on parties unless previously agreed. (8.01-576.1 to -576.3).

Specific Disputes.

Administrative Procedure.

Agencies governed by Administrative Process Act must ascertain fact basis for their decisions of cases through informal conference or consultation proceedings unless named party and agency consent to waive such conference or proceeding to go directly to formal hearing. Certain agencies and certain agency actions are excluded from operation of § 2.2-4019. (2.2-4002). Public bodies governed by Virginia Administrative Dispute Resolution Act may use dispute resolution proceedings to narrow or resolve any issue in controversy, provided parties to dispute agree. (2.2-4116). Dispute resolution under this chapter does not include arbitration. (2.2-4115). Decisions by public body to participate in dispute resolution are at its discretion and are not subject to judicial review and agreement arising out of resolution is not binding unless affirmed by public body. (2.2-4116).

Alcohol Producers and Distributors.

If winery or brewery disrupts its commercial relationship with wholesale distributor without good cause, Alcohol Beverage Control Board may order compensation to be paid to wholesaler, amount of which, in absence of agreement between parties, must be determined by mandatory binding arbitration. (4.1-409, 4.1-508).

Condemnation Proceedings.

Following filing of petition initiating condemnation proceeding, court must refer matter to mandatory dispute resolution evaluation session. (25.1-205.1).

Construction Contracts.

Arbitration proceedings pursuant to construction contract for work performed on structures located in Virginia must be held in Virginia, and any contract provision to contrary is unenforceable. (8.01-262.1).

Consumer Disputes.

Commissioner of Agriculture and Consumer Services is responsible for creation and administration of dispute resolution programs for consumer complaints involving alleged violations of consumer protection laws. (3.2-102).

Counties.

Governing bodies of counties are authorized to enter into contract containing arbitration provision or execute such contract. (15.2-1404).

Domestic Relations.

In case in which custody or visitation of minor children is at issue, mediation must be used as alternative to litigation where appropriate. (20-124.2).

Death Taxes.

Uniform Act on Interstate Compromise and Arbitration of Death Taxes adopted. Tax Commissioner with approval of Attorney General may settle with another state regarding decedent's domicile by written compromise agreement or, with approval of Attorney General and by agreement, by submission of controversy to board of arbitrators. (58.1-920 to -930).

Hazardous Waste Facilities.

Department of Waste Management must compile, maintain, and make available to public, information on use and availability of conflict resolution techniques so that controversies over local impacts of hazardous waste facility siting decisions may be resolved by negotiation, mediation or similar techniques. (10.1-1434).

Insurance.

Insurers must arbitrate and settle all disputed claims made for automobile physical damage between them in accordance with terms of Nationwide Intercompany Arbitration Agreement (NIAA) or any successor thereto, unless otherwise mutually agreed or insurer cannot furnish proof of NIAA membership. Mandatory arbitration is limited to issues of liability and damages. (38.2-2231).

Medical Malpractice.

At any time within 30 days from filing of responsive pleading in medical malpractice action, plaintiff or defendant may request review of matter by medical malpractice review panel. (8.01-581.2). Panel's determination is nonbinding but may be submitted as evidence at trial. (8.01-581.8).

Motor Vehicle Franchise.

Either party to franchise agreement for sale or service of motor vehicles may demand nonbinding mediation of dispute arising out of that agreement as condition precedent to right of hearing before Commissioner of Department of Motor Vehicles. (Va. Code 46.2-1572.2).

Motor Vehicle Warranties.

If motor vehicle manufacturer provides dispute resolution procedure, consumer may choose to use such procedure before seeking statutory remedies. (Va. Code 59.1-207.15).

Public Procurement Contracts.

Public bodies may enter into agreements to submit to arbitration disputes arising from public procurement contracts, and use mediation and other alternative dispute resolution procedures, but those procedures are not binding on school boards and state departments and agencies. (2.2-4366).

Public Service Companies.

Upon request of parties, State Corporation Commission, as far as possible, must effect by mediation, claims adjustments, and settlements between public service companies and their employees and patrons. (56-38).

Real Estate Associations.

Condominium instruments may provide for arbitration or other means of alternative dispute resolution. (55-79.53). Same; real estate cooperatives. (55-492). Same; property owners' associations. (55-515).

State Agencies and Employees.

Director of Department of Employment Dispute Resolution must establish alternative processes, including statewide mediation program, for resolving employment disputes. (2.2-1001). Appeals process for state employees' denial of health care claims includes review by impartial health entity. (2.2-2818).

Teachers.

In event grievance not settled at lower step, teacher or school board may elect to hold fact-finding hearing prior to school board decision. (22.1-310).

Workmen's Compensation.

At request of party or direction of Commissioner, contested claims and applications for hearing will be evaluated and may be referred for informal dispute resolution. (Va. Worker's Compensation Comm. Rule 1.9).

9.02 ARBITRATION AND AWARD:

Uniform Arbitration Act adopted. (Va. Code 8.01-581.01 to -581.016).

Deviations from Uniform Act.

§ 1 of Uniform Act is modified by provision that no right to arbitration is created with respect to any controversy concerning terms and conditions of employment of any Commonwealth officer or employee. (8.01-581.01).

§ 15 of Uniform Act was excluded and has no effect.

§ 18 of Uniform Act modified by provision that venue of application shall be determined according to c. 5 of tit. 8 (8.01-257 et seq.) unless otherwise set out in arbitration agreement.

Additionally, parties may submit controversy to arbitration and agree that submission be entered of record in court. Upon proof of such agreement out of court, or by consent of parties or their counsel given in court, submission agreement must be entered of record and a rule made that parties submit to award made. (8.01-577). Any court in Commonwealth with jurisdiction over subject matter may confirm or vacate arbitration award.

State as a Party to Arbitration.

Commonwealth is not “person” or “party” within meaning of 8.01-577; all arbitration agreements entered into by agent of state are ultra vires and void ab initio. (224 Va. 618, 299 S.E.2d 346).

Dispute Resolution Proceedings.

On motion of court or party, court may refer contested civil matter or selected issues to mandatory, no cost (8.01-576.7), single orientation session to promote resolution of disputes. (8.01-576.5). In reporting outcome to court, neutral must indicate whether agreement was reached, terms of agreement if authorized by parties, fact that no agreement was reached, or fact that orientation session or mediation did not occur. (Va. Code 8.01-576.9). Written settlement agreements enforceable as any other contract. (Va. Code 8.01-576.11). Agreement may be vacated if procured by fraud or duress, or unconscionable, or if in certain domestic relations cases lack of full property and financial disclosure where same are in dispute, or if evident partiality or misconduct by neutral. (Va. Code 8.01-576.12).

10 DOCUMENTS AND RECORDS

10.01 ACKNOWLEDGMENTS:

Uniform Recognition of Acknowledgments Act adopted. (55-118.1 to .9).

May be taken by following officers:

Within State.

Commissioner in chancery, clerk or deputy clerk of any court of record, or notary public. Circuit court of any county or city may take acknowledgment for record by such court or officer. (55-106, -113). Notary's fee, up to $5; for electronic documents, maximum fee of $25. (47.1-19).

Outside State but Within U.S., Its Possessions, Etc.

Clerk, deputy clerk, or commissioner in chancery, of any court of record; notary public; commissioner for Virginia. (55-113). Also those officers listed in Uniform Recognition of Acknowledgments Act.

Outside the United States.

Ambassador, minister plenipotentiary, minister resident, chargé d'affaires, consul general, consul, vice-consul or commercial agent of United States; proper officer of any court of record; mayor or other chief magistrate of any city, town or corporation; all under official seal. (55-114).

Persons in or With U.S. Armed Forces.

Acknowledgment of person in active service in U.S. Armed Forces, or whose consort is in such service, including state National Guard that is federally recognized, may be taken before commissioned officer in same branch of service. Certificate should state rank of person acknowledging and of person taking acknowledgment, branch of service and home address of each. (55-115).

Persons Subject to Uniform Code of Military Justice.

Acknowledgment of person who was (1) Member of any armed forces of U.S., wherever located, (2) employed by, or accompanying such armed forces outside U.S. and outside other listed areas; or (3) subject to Uniform Code of Military Justice of U.S. outside of U.S., upon certificate of authorized person. (55-114.1).

Officer Taking.

Notary or other officer duly authorized may take acknowledgment of execution of instrument by corporation of which he is officer or stockholder, if he is not otherwise interested and did not execute instrument. (55-121).

General Requirements as to Taking.

Person taking acknowledgment shall certify that acknowledging person appeared before him and acknowledged he executed instrument, and that he was known to person taking acknowledgment or had satisfactory evidence of identity. (55-118.3).

Certificate of notary must state when commission expires. (47.1-16). Any notary who legally changes his name during his term of office shall state his name as he was commissioned. Any electronic notary who legally changes his name must apply with Secretary of Commonwealth for new commission within 90 days of name change. (47.1-17).

Foreign Acknowledgments.

Uniform Recognition of Acknowledgments Act. (55-118.1 to 118.9).

Effect of Acknowledgment.

If writing is or may be recorded, court or clerk shall admit to record. (55-106). Clerk may refuse to record if name(s) under which document is to be indexed is illegible. (55-106.5).

Proof by Subscribing Witnesses.

Writings may be admitted to record on certificate of proof by two subscribing witnesses before any officer authorized to take acknowledgments. (55-113).

Authentication.

Authentication of certificate of notary taking acknowledgment or proof is not required unless notary's authorization is under laws or regulations of foreign country. (55-118.2).

Forms

For individuals, the following form or one to like effect is sufficient (55-113 to -118.6[4]; 47.1-6):

State of . . . . . ., County (or City) of . . . . . ., to wit: I, ..., a notary public for the County (or City) aforesaid, in the State of . . . . . ., do certify that . . . . . . (or . . . . . . and . . . . . ., etc.), whose name (or names) is (or are) signed to the writing above (or hereto annexed), bearing date on the . . . . . . day of . . . . . ., has (or have) acknowledged the same before me in my County (or City) aforesaid.

Given under my hand and official seal this . . . . . . day of . . . . .

My term of office expires on the . . . . . . day of . . . . .

. . . .

Notary Public

[Note: In the case of an acknowledgment taken in a territory or district, or by an officer other than a notary public, appropriate changes should be made to describe the territory or district, or office, and where the office is not that of a notary public the expiration of the term of office may be omitted.]

For corporations the following form or one to like effect is sufficient (55-118.6[2]; 55-119 to -120):

State of . . . . . ., County (or City) of . . . . . ., to wit: I, ..., a notary public in and for the State and County (or City) aforesaid, do certify that . . . . . . (or . . . . . . and . . . . . .), whose name (or names), as . . . . . . (or . . . . . . and . . . . . .) of . . . . . . (here insert name of corporation), is (or are) signed to the writing above, bearing date on the . . . . . . day of . . . . . ., has (or have) acknowledged the same before me in my County (or City) aforesaid.

Given under my hand and official seal this . . . . . . day of . . . . .

My term of office expires on the . . . . . . day of . . . . .

. . . .

Notary Public

[See Note following catchline *For Individuals*, supra.]

A certificate of proof by subscribing witnesses may be in the following form or to like effect (55-113):

State (or territory, or district) of . . . . . ., county (or city) of . . . . . ., to wit: I, ..., clerk (or, deputy clerk, or, a commissioner in chancery) of the . . . . . . court (or, a notary public) for the county (or city) aforesaid, in the State (or, territory, or, district) of . . . . . . (or, a commissioner appointed by the Governor of the State of Virginia for said state, or territory, or district of . . . . . .), do certify that the execution of the writing above (or hereto annexed) bearing date on the . . . . . . day of . . . . . . by A.B. or A. B. and C. D., and so forth) whose name (names) is (are) signed thereto, was proved before me in my county (or city, or state) aforesaid, by the evidence on oath of E. F. and G. H., subscribing witnesses to said writing.

Given under my hand (and official seal, when executed out of state) this . . . . . . day of . . . . .

My term of office expires on the . . . . . . day of . . . . (For notaries only.)

Alternative to Acknowledgment or Proof.

No statutory provision.

Validating Acts.

There are a number of validating acts: 55-122 to 55-137.2.

10.02 AFFIDAVITS:

General Requirements as to Administration.

Any affidavit may be taken by notary, commissioner in chancery, commissioner appointed by Governor, magistrate, commissioner, clerk or deputy clerk of State Corporation Commission, judge or clerk or deputy clerk of court, clerks governing bodies of local governments, surveyor ordered by court to make survey, in relation thereto, or by any officer of any state or country authorized to administer oaths. (49-4). Also, see topic 10.01 Acknowledgments.

Authentication is required in cases of officers of other states or countries, by certificate of a clerk or other officer of a court of record, under official seal, verifying genuineness of signature and authority to administer oaths, except when affidavit made before notary who has subscribed and attached his official seal. (49-5).

Affirmation Instead of Oath.

Solemn affirmation may be made by any person having religious scruples as to taking oath, which has the same effect as oath. (49-9).

Corporations.

Affidavits by or for a corporation may be made by its president, vice president, general manager, cashier, treasurer, director or attorney without special authorization, or by any person authorized by a majority of the stock holders or the directors. (49-7).

Form.

Following may be used:

Form

State of . . . . . ., County of . . . ., to wit:

I, ..., being first duly sworn, depose and say as follows: (insert facts sworn to).

. . . .

Signature of affiant.

Subscribed and sworn to this . . . . . . day of . . . . . . 20. . . ., in the county and state aforesaid, before me, the undersigned, a notary public in and for said county and state, as witness my hand and official seal.

My commission expires the . . . . . day of . . . .,

. . . . (SEAL)

. . . .

Notary Public.

Alternative to Affidavit.

No statutory provision.

10.03 NOTARIES PUBLIC:

Notaries are appointed by Governor upon application with Secretary of Commonwealth. Qualifications for appointment: (1) 18 years of age; (2) citizen of U.S.; (3) ability to read and write English; and (4) shall never have been convicted of felony under laws of United States or any state (unless pardoned, conviction vacated on writ of actual innocence, or rights restored). Nonresident regularly employed in Va. and otherwise qualified may be appointed notary, including U.S. military personnel. (47.1-3 to -5).

Seal.

No statutory provisions as to duty of notary to provide seal for domestic acknowledgment; however, affidavit made before Notary Public of another state or country deemed duly authenticated if subscribed by notary with his official seal attached. (49-5). Additional requirements apply for performing electronic notarial acts. (47.1-7).

Powers and Duties.

Notaries may take acknowledgments, administer oaths and affirmations, certify copy of document as true copy, and certify affidavits or depositions of witnesses. (47.1-12).

Wills.—Notary is not prohibited from notarizing will which names notary as fiduciary. (47.1-30).

Commission.

Notary's commission expires in fourth calendar year after issuance of commission, on last day of month in which notary was born. (47.1-21).

Territorial Extent of Powers.

Notaries may act throughout Va.; and outside Va. where acts to be performed in connection with any writing to be admitted to record in Va. (47.1-13).

Fees.

For taking and certifying acknowledgment of any writing, or administering and certifying oath, or certifying affidavits and depositions of witnesses, or certifying that copy of document is true copy thereof, notary may charge fee up to $5. For taking and certifying acknowledgment of any electronic document, or administering and certifying oath or affirmation, or certifying electronic affidavits and depositions of witnesses, or certifying that copy of electronic document is true copy thereof, notary may charge fee not to exceed $25. Certain persons and expenses exempt. (47.1-19).

Notary must state at foot of affidavits or depositions of witnesses fees therefor, to whom charged, and by whom paid. (17.1-270).

Certificates.

See topic 10.01 Acknowledgments, subheads General Requirements as to Taking Authentication, and Forms.

10.04 RECORDS:

Writings entitled to recordation are admitted to record by proper court, its clerk or his deputy (55-106), and recorded by or under direction of clerk (17.1-223), in county or city where property affected is (55-96 to -97). All documents to be recorded and that were prepared in Commonwealth of Virginia must include name of entity or person drafting instrument. (17.1-223).

For list of Counties and County Seats see first page for this state in Volume containing Practice Profiles Section.

Uniform Commercial Code has been adopted. (8.1A-101 et seq.). See category 3 Business Regulation and Commerce, topic 3.09 Commercial Code.

Filing Under Commercial Code.

To perfect security interest or agricultural lien, file as follows: (a) For as-extracted collateral or timber to be cut, or financing statement filed as fixture filing for goods that are or are to become fixtures, in office designated for filing or recording of record of mortgage on related real property; (b) for financing statement filed to perfect security interest in collateral, including fixtures, of transmitting utility, in office of State Corporation Commission; and (c) in all other cases, including for goods that are or are to become fixtures and financing statement is not filed as fixture filing, in office of State Corporation Commission or any office duly authorized by it.

(8.9A-501). (See category 3 Business Regulation and Commerce, topic 3.09 Commercial Code, subhead Fees.)

Necessity for Recording.

Real estate contracts, deeds conveying estate or term of more than five years, deeds of gift, deeds of trust, options to purchase real property, mortgages conveying real estate or goods and chattels and bills of sale or contracts for the sale of goods and chattels, where possession is allowed to remain with the grantor, are void as to nonparty purchasers for valuable consideration without notice and lien creditors until and except from time admitted to record. (55-57.2, 55-96, 11-1).

Loan of goods and chattels which are allowed to remain in borrower's possession for more than five years is void as to creditors and purchasers unless memorandum thereof is recorded within that period. (55-87).

Requisites for Recording.

For instrument to be recorded, it must be acknowledged by person whose name is signed thereto except as in 55-113 or proved by two witnesses as to him in court in which it is offered for record, or before clerk or his deputy. (55-106). Clerk has authority to reject any writing for filing or recordation unless: (a) Each individual surname is underscored or in capital letters when it first appears; (b) each page is numbered; (c) section under which any exemption from recordation taxes is claimed is clearly stated on face of instrument; (d) names of all grantors and grantees are listed and in conformity with cover sheet's list; (e) if prepared in Commonwealth, first page shows name of person or entity that drafted instrument, and if name (or names) under which document is to be indexed is legible or otherwise furnished. (17.1-223, 55-106.5).

Place of Recording.

Standards for writings to be recorded prescribed by statute (55-108) and regulations adopted by State Library Board (42.1-82). If writing which does not conform to legal recordation standards is accepted for recordation, it shall nonetheless be validly recorded and clerk shall have no liability for accepting such writing which does not meet enumerated criteria in all particulars. (55-108). Powers of attorney may be recorded anywhere. (55-107). See also categories 3 Business Regulation and Commerce, topic Commercial Code; Mortgages, topic Mortgages of Real Property; Property, topic Deeds.

Recording Fees.

See categories 3 Business Regulation and Commerce, topic Commercial Code; Debtor and Creditor, topic Liens; Mortgages, topics Chattel Mortgages, Mortgages of Real Property; Property, topic Deeds.

Foreign Conveyances.

To be admitted to record, a writing (conveyance or encumbrance) must be executed and acknowledged in conformity with the law of Virginia. (55-106). Uniform Recognition of Acknowledgments Act has been adopted. (55-118.1-118.9).

Effect of Recordation.

A copy of any record or paper in any clerk's office, attested by clerk or certain public officers, is admissible in evidence in lieu of original. (8.01-391).

Unless recorded in county or corporation where property is, instrument is ineffective, except in those instances specified by 55-96, though recorded elsewhere where other property affected may be, and except as to deed releasing deed of trust which may also be recorded in county or city in which property so released was situated at time of recordation of deed of trust. (55-97). See topic Motor Vehicles. When two or more instruments are recorded at same time on same day, numerical order of those instruments determines their priority. (55-101).

In cases of failure to record, all purchasers and creditors are protected who, except for the unrecorded writing, would have title to property or right to subject it to debts. (55-103). Where all of purchase price is not paid by subsequent purchaser before notice, protection extends to amount paid. (55-104). Where purchase price is paid by subsequent purchaser surcharges before notice, protection only up to amount paid. (65 B.R. 832). Purchasers are not affected by records of deeds or contracts made by persons under whom their titles are not derived, nor those made before grantor therein acquired legal title of record. (55-105). Bona fide purchasers are protected in absence of record of lis pendens or notice of attachment. (8.01-268). Memoranda of lis pendens may be filed in connection with actions seeking to establish interest in real property or enforce zoning ordinances. (8.01-268).

In cases of lost writings, a certified copy from the records of another county, with affidavit of loss, are admissible to record. (55-109).

Torrens system of land registration has been adopted (55-112) but is not generally used.

Transfer of Decedent's Title.

Duly certified copy of will admitted to probate must be recorded in each county or city in which decedent owned real estate at time of death. (64.1-94). Bona fide purchaser for value without notice from heir-at-law is protected unless will devising real estate is recorded in county or city wherein real estate lies within one year after testator's death, or if devisee is under disabilities within one year after removal of disabilities. (64.1-90, 64.1-95). Where will affecting real estate within state has been probated in another state an authenticated copy of will, with certificate of probate thereon, should be probated in a county or city in which real estate is situated, and copy of foreign will, duly certified by clerk of court in state in which probated, should be recorded in other cities or counties of this state wherein real estate is situated. (64.1-92).

In the case of intestacy, nothing need be done to show of record the transfer of decedent's real estate to his heirs.

Vital Statistics.

Department of Health, Division of Vital Records and Health Statistics keeps records of births and deaths (32.1-257, -263), adoptions (32.1-262), marriages (32.1-267), and divorces (32.1-268). Certified copies of any such record may be obtained from Office of Vital Records, P.O. Box 1000, Richmond, Virginia 23218; fee, $12 per certificate or search; up to $8 per copy; one copy free for benefit of veterans in certain circumstances. (32.1-272, -273).

Establishing Birth Record.

Person born in Commonwealth whose birth is not registered may file delayed certificate of birth on prescribed form with satisfactory evidence (32.1-259), and if certificate is rejected, may petition appropriate Commonwealth court for order establishing record of date and place of birth and parentage. (32.1-260).

Agency or other person assuming control of living infant of unknown parentage must file certificate which will be acceptable in lieu of birth certificate. (32.1-258).

Lis Pendens.

To bind or affect subsequent bona fide purchaser for value without actual notice, memorandum setting forth title of cause of action, object thereof, court in which action is pending, amount of claim asserted, description of property, name of person whose estate will be affected thereby (and in action to enforce zoning ordinance, description of alleged violation) must be admitted to record by clerk of circuit court of county/city where property is located. (8.01-268). Filing serves merely as notice of suit, does not create lien. (842 F.2d 742).

10.05 SEALS:

Uniform Commercial Code has been adopted and supersedes all common law and statutory rules governing effect of seals in commercial matters. Accordingly, common law rules as to necessity of seals and distinctions between sealed and unsealed instrument are no longer in force with following limitation: Commercial Code leaves untouched any aspects of seal which relate merely to signatures or to authentication of execution and the like. (8.2-203). See category 3 Business Regulation and Commerce, topic 3.09 Commercial Code.

10.06 TORRENS ACT:

See topic 10.04 Records.

10.07 VITAL STATISTICS:

See topic 10.04 Records.

11 EMPLOYMENT

11.01 EMPLOYER AND EMPLOYEE:

See topic 11.02 Labor Relations.

11.02 LABOR RELATIONS:

State Commissioner of Labor and Industry supervises enforcement of laws concerning labor, factories, employment agencies, and the collection of labor statistics. (40.1-1, -5, -6).

Certificates and Permits.

Juvenile court has discretion to grant or withhold permit to protect child's health and welfare. (16.1-278.13). Parent or guardian's notarized statement granting permission for child's employment is sufficient in lieu of personal appearance. (40.1-92). Each juvenile and domestic court has jurisdiction to grant work permits for children separated from parent or legal guardian. (16.1-241).

Wages.

All employers operating business must pay salaried employees at least once a month and hourly workers at least once each two weeks or twice a month, except (1) any secondary school, institution of higher learning or trade school may pay students enrolled in work study program once a month and (2) employees whose weekly wages total more than 150% of average weekly wage of Commonwealth, upon agreement of employee, may be paid once a month. (40.1-29). Payment must be (i) in lawful money of U.S., (ii) by check payable at face value upon demand in lawful money, (iii) by electronic automated fund transfer in lawful money of U.S. into account in name of employee at financial institution designated by employee, or (iv) by credit to prepaid debit card or card account from which employee is able to withdraw or transfer funds with full written disclosure by employer of any applicable fees and affirmative consent thereto by employee. However, employer that elects not to pay wages or salaries in accordance with clause (i) or (ii) to employee who is hired after Jan. 1, 2010, shall be permitted to pay wages or salaries by credit to prepaid debit card or card account in accordance with clause (iv), even though such employee has not affirmatively consented thereto, if employee fails to designate account at financial institution. Failure to make prompt payment is Class 1 misdemeanor (if value of wages earned and not paid is less than $10,000) and can subject employer to civil penalty up to $1,000. Employer who fraudulently fails or refuses to pay wages is guilty of Class 6 felony if amount of wages is $10,000 or more, or if it is second or subsequent conviction. (40.1-29). Commissioner of Labor and Industry authorized to engage private attorney to collect monies owed to employee whose wages unlawfully withheld. Commissioner also authorized to assess one-third attorney's fees. (40.1-29[F]). Under Virginia Minimum Wage Act, every employer must pay his employees at rate prescribed by Fair Labor Standards Act. (29 U.S.C. § 201 et seq.). State minimum and training wages will mirror federal wages. (40.1-28.10). As to liens for wages, see topic Liens, subhead Mining, Manufacturing and Transportation.

Child Support Withholding.

When individual hired, employer must request that employee disclose whether he has income withholding order at time of hiring. If employee discloses child support must be withheld, employer must begin withholding. (60.2-114.1).

Child Labor.

Employment of children under 14 is prohibited, with certain exceptions, and employment of children under 16 years of age is restricted and regulated. (40.1-78 et seq.). No child under 16 years may work more than number of hours per week or hours per day or during hours of day Commissioner of Labor and Industry shall determine by regulations concerning lives, health, safety and welfare of children. (40.1-80.1[A]). No child may work more than five hours continuously without 30 minute lunch period and no period less than 30 minutes shall be deemed to interrupt continuous period of work. (40.1-80.1[B]).

Commissioner of Labor and Industry authorized to promulgate regulations defining and governing agricultural occupations deemed hazardous to children. Children employed on farms owned or operated by parent or legal guardian are exempt. (40.1-79.01[B]). Persons exposing children to recognized hazard capable of causing death subject to monetary penalty. (40.1-100.1). Children aged 16 years or older employed on farms, gardens or orchards may operate, assist in operating or otherwise perform work involving trucks or farm vehicles, except tractor trailers. (40.1-100[D]1). Children aged 14 years or older may work as helper on truck or commercial vehicle while engaged in work on farm, garden or orchard. (40.1-100[D]2). Children at least 17 years of age are permitted to drive automobiles or trucks on public roadways if enumerated criteria are satisfied, including requirements that vehicle's gross weight not exceed 6,000 pounds, driving occur in daylight hours, and driving occur within 30 miles of place of employment. Violating cruelty to children provisions Class 6 felony. (40.1-103). Children under 18 years prohibited from performing or being subject of sexually explicit visual material. Employers violating provision guilty of Class 6 felony. (40.1-100.2).

Labor Unions.

Union membership or payment of union dues may not be made a condition of employment or continuation of employment by any employer nor may an employer require any person as a condition of employment or continuation of employment, to abstain or refrain from membership in any labor organization. (40.1-59, -60, -61).

Labor Disputes.

No person may interfere with another's right to work by threats, force, intimidation, insults, or picket by force or violence, or picket so as to obstruct or interfere with free use of public ways (40.1-53), nor may two or more persons conspire to willfully and maliciously injure another in his reputation, trade, business or occupation by any means whatsoever or compel another to do act against his will, or hinder any lawful act (18.2-499), nor may any person or entity force or induce another person or entity to violate provisions of right to work law (§ 40.1-58), by lockouts, layoffs, boycotts, picketing, work stoppages, etc. (40.1-66). Notice of proposed modification or termination of contract covering employees of utility, to which federal legislation does not apply, must be given to Department of Labor and Industry, which in turn must notify Governor. Mediation and conciliations are provided for. (40.1-70 et seq.).

New Hire Reporting.

Each employing unit must report initial employment of any person, as defined in Va. Code § 60.2-212, to Virginia New Hire Reporting Center, operated under authority of Division of Child Support Enforcement within 20 days of such employment. (63.2-1946). Information to be provided shall include only that information that is required by federal law, and may be provided by mailing copy of employee's W-4 form. (63.2-1946).

Polygraph Testing.

No employer may ask questions during polygraph examination concerning prospective employee's sexual activities as condition of employment unless such employee has sex-related criminal conviction. (40.1-51.4:3).

No law-enforcement agency or regional jail may require employee to submit to lie detector test or discharge, demote or otherwise discriminate against any employee for refusal or failure to take such test, except employee may be required to take lie detector test related to particular administrative investigation concerning allegations of misconduct or criminal activity. No employee required to take lie detector test may be discharged, demoted or otherwise discriminated against solely on basis of results of such test. (40.1-51.4:4).

Injunctions.

See category 5 Civil Actions and Procedure, topic 5.14 Injunctions.

Workers' Compensation Act.

Act is administered by Virginia Workers' Compensation Commission, consisting of three members. It requires reports, hears cases and makes awards. Its office is in Richmond, but cases are heard in county or city where injury occurred, unless Commission designates other location. One or more commissioners may act, subject to right of rehearing by entire commission within 20 days after award. (65.2-200 et seq.; 65.2-705).

Appeal lies only on questions of law, notice to be filed within 30 days of notice of award, to Court of Appeals and Commission. (65.2-706). Costs are in discretion, and fees and charges subject to approval. (65.2-713, -714).

Act does not apply to railroads, casual employees, farm or horticultural laborers (unless employer of such laborers regularly has in service more than two full-time employees), domestic servants, and employers of less than three employees (other than operators of underground coal mines) as defined under Act, but employers and their employees may elect to operate under Act. (65.2-101). General contractors can elect to provide coverage under Act to independent contractors if insurer agrees in writing and notice is given to Workers' Compensation Commission. (65.2-101). Volunteer firefighting, lifesaving and rescue squad members are not employees under Act when engaged in activities related principally to his participation as member of such squads, whether or not volunteer continues to receive compensation from his employer for time away from work. Volunteer firefighter, lifesaving or rescue squads or companies may elect to be covered under Act. Firefighters and law enforcement officers undertaking law enforcement or rescue activities in off-duty capacities or outside shift or work location are deemed to be in course of employment. (65.2-101, -102).

Election Not to Operate Under Act.

Employees are conclusively presumed to be under act, except an executive officer who elects by notice to employer not to be covered. No employee can be exempted in respect to occupational diseases under 65.2-400 et seq. (65.2-300).

Victim of sexual assault who can identify attacker may elect to pursue action-at-law against attacker even if attacker is employer or co-employee in lieu of pursuing benefits under Act. (65.2-301[B]).

Sexual Harassment.

Act does not create remedy for sexual harassment nor bar any action at law that might exist. (65.2-301).

Financial Responsibility of Employers.

Employers must insure, or establish ability to pay, furnishing security if required. (65.2-801). Commission may license two or more employers with similar businesses as group self-insurance association, provided all employers are solvent, financially capable of meeting obligations, and able to pay compensation. Such association must meet requirements of Commission and is subject to review and enforcement by Commission. These groups also may enter into agreements to pool employer liabilities for workers' compensation benefits arising under laws of other jurisdictions and for employee death, disablement or injury that fall outside coverage of Workers' Compensation Act (65.2-801, -802, -815).

Principal contractors are liable to employees of subcontractors. (65.2-302[B]).

Contribution.

Employer who is dismissed as defendant from personal injury action because its employees have been compensated under Virginia Workmen's Compensation Act cannot be sued in third-party action for contribution or indemnity. (221 Va. 979, 277 S.E.2d 149).

Written notice of accident must be given to employer within 30 days in order to receive compensation or medical benefit unless reasonable excuse is made to satisfaction of Commission for not giving such notice and Commission is satisfied that employer has not been prejudiced. (65.2-600[D]).

Assignment of compensation claim is not permitted. (65.2-531).

Claims for compensation are exempt as against creditors of claimant, except that compensation is subject to spousal and child support claims, provided that these claims do not exceed 60% of person's weekly net income or 50% if person already supports spouse or other dependent. (65.2-531, 34-29).

Orders or awards of Commission are equal to orders of circuit court upon certification by Commission of noncompliance. (65.2-710).

Awards may not be made for injuries arising from employee's willful misconduct, attempt to injure another, failure to use safety appliances or perform statutory duties, breach of rules duly approved, intoxication, or use of non-prescribed controlled substances. (65.2-306).

Home Care of Spouse.

Employer must pay for home care rendered by spouse where medical attention is performed under direction and control of physician, and care rendered by spouse is of type usually rendered only by trained attendants and is beyond scope of normal household duties. (221 Va. 1108, 277 S.E.2d 488).

Employees' refusal of selective employment may be used by employer as affirmative defense. (65.2-510; 224 Va. 48, 294 S.E.2d 818).

Employee claim for compensation subrogates employer to employee's rights against third party. (65.2-309, -310). Employer who has paid out compensation benefits has right of subrogation against proceeds recovered by injured employee pursuant to uninsured or underinsured motorist provisions of policy carried by and at expense of employer. (65.2-309.1). Employer or its insurance carrier may be fined up to $1,000 for failing to file with Workers' Compensation Commission memorandum of agreement for compensation to injured employee, within 14 days of execution. (65.2-701). Commission can award attorney fees and accrued interest on benefit payments unreasonably delayed by employer. (65.2-713).

It is unfair labor practice to discharge employee under excessive absences policy where absences due to work-related injury compensable under Workers' Compensation Act. (40.1-27.1).

Employer has duty to provide injured employee physician and other necessary medical attention free of charge for as long as necessary after accident. Commission may require employer to furnish certain medically necessary appliances and to make certain modifications to employee's home, all not to exceed $25,000. Employer shall also furnish or cause to be furnished, at direction of Commission, certain rehabilitation training services. (65.2-603). Hearings before Commission may be requested for approval of disputed services. (65.2-603).

Health care providers must refrain from all debt collection activities related to medical treatment received by employee who has made claim for benefits under Act until award is made on employee's claim. (65.2-601.1).

Health care providers may not balance-bill (which occurs when [i] employer or employer's insurance carrier declines to pay all of health care provider's charge or fee and [ii] health care provider seeks payment of balance from employee) employee in connection with treatment, service, appliances or supplies furnished to such employee in connection with injury for which award of compensation is made. (65.2-714[D]).

Injury that results from employee's voluntary participation in employer-sponsored off-duty recreational activity, which is not part of employee's duties, is not compensable.

Ordinary Diseases of Life.

Hearing loss and carpal tunnel syndrome are ordinary diseases of life. They are only compensable if claimant establishes by clear and convincing evidence that disease arose out of and in course of employment and did not result from causes outside employment. Claimant must also prove by clear and convincing evidence that disease either (i) follows as incident of occupational disease, (ii) is disease contracted in course of employment within medical or similar field or (iii) is characteristic of employment and was caused by conditions peculiar to employment. (65.2-400, -401).

Notice of Accident.

Allows statutory employer to be held responsible for injured employee's workers' compensation benefits even if such employer does not receive notice of accident, provided that (i) statutory employer has at least 60 days' notice of hearing to ascertain compensability of accident and (ii) statutory employer was not prejudiced by lack of notice of accident. (65.2-600).

Insurance; Premium Discounts; Drug-Free Workplace Programs.

Requires workers' compensation insurance carriers to provide premium discounts of up to 5% to employers instituting drug-free workplace programs. Programs must, however, satisfy criteria established by carriers. (65.2-813.2).

Computation of Average Wage; Total Incapacity, Partial Incapacity.

When incapacity for work is total, employer shall pay 662/3% of employee's average weekly wages, with minimum of not less than 25% and maximum of not more than 100% of average weekly wage of Commonwealth. Weekly compensation on account of total and permanent incapacity shall continue for lifetime of injured employee without limit as to total amount. (65.2-500). When incapacity for work is partial, employer shall pay 662/3% of difference between average weekly wages before injury and average weekly wages able to earn thereafter, not to exceed 100% of average weekly wage of Commonwealth. (65.2-502). Award may be reviewed on ground of change in condition (65.2-708), and cost of living supplements are available (65.2-709). Maximum death benefits are limited to average weekly wage of Commonwealth for 400 weeks except for certain specified dependents who are entitled to 500 week payment period and up to $10,000 burial expenses and up to $1,000 transportation for deceased. (65.2-512).

Passenger Tramway Safety.

Responsibilities for administering Passenger Tramway Safety Act transferred to Board of Housing and Community Development. (36-98.3).

Occupational Diseases.

Employer in whose employment employee was last exposed to hazards causing occupational disease, or, under certain circumstances, ordinary disease of life, is solely liable for employee's injury. (65.2-400 et seq.). Employee must give employer written notice within 60 days of diagnosis of occupational disease. (65.2-405). Notice must state name and address of employee and nature and cause of disease. (65.2-600). Claim must be filed with Workers' Compensation Commission within following times: For coal miner's pneumoconiosis, three years from diagnosis or five years from last injurious exposure in employment; for byssinosis, two years from diagnosis or seven years from last injurious exposure in employment; for asbestosis, two years after diagnosis; for employees infected with human immunodeficiency virus while working in health care laboratory, two years from positive test for HIV infection; for diseases directly attributable to rescue and relief efforts following attack of Pentagon on Sept. 11, 2001, two years after diagnosis of disease is first communicated to employee; for all other occupational diseases, two years after diagnosis or five years from last injurious exposure. (65.2-406). If death results, claim must be filed within three years after death. (65.2-406). See subhead Workers' Compensation Act with regard to compensation for injuries.

Unemployment Compensation.

Unemployed individual shall be entitled to receive benefits if: (a) He earned in highest two quarters of base period wages exceeding amount specified in table contained in 60.2-602; (b) unemployment is not due to labor dispute; (c) he is not receiving unemployment benefits under law of another state or U.S.; (d) he is not on bona fide paid vacation; (e) he has registered for work and has continued to report at employment office in accordance with regulations; (f) he has made claim for benefits in accordance with regulations; (g) he is able and available for work and is actively seeking and is unable to obtain suitable work; (h) he participates in reemployment services, such as job search assistance services; (i) he is not imprisoned or confined in jail; (j) he has given notice of resignation to his employer and employer subsequently made termination of employment effective prior to date of termination as given in notice—but compensation benefits awarded here cannot exceed two weeks. (60.2-612). Individual may be disqualified from receiving benefits for voluntarily leaving work without good cause or if employee was discharged for misconduct. Misconduct includes but shall not be limited to testing positive for non-prescribed controlled substance or intentionally false or misleading statement concerning past criminal convictions on job application leading to prompt termination. (60.2-618).

Payment.

If Commissioner accepts payment for unemployment compensation taxes by means that incur charge, Commission shall add that charge to such payment. (60.2-521).

Penalties and Interest.

Commissioner has authority to assess interest on all past-due penalties and administrative costs incurred in collection of penalties for violations of health and safety standards. (40.1-49.4[A][4[[a]).

Employment Contracts for Teachers.

School Boards must execute contracts with each teacher employed by it, except those who are temporarily employed, before such teacher enters upon duties. Separate contracts with each employee who receives monetary supplement for any athletic coaching assignment must be executed. Termination of coaching contract by either party does not constitute cause for terminating separate teaching contract. Any party intending to terminate coaching contract must give other party reasonable notice before termination shall be effective. (22.1-302).

Cause of Action for Unlawful Discharge.

Employer with more than five but fewer than 15 employees may not discharge employee on basis of race, color, religion, national origin or sex, pregnancy, childbirth or related medical conditions, including lactation, or age if employee is 40 years old or older. Affected employee may bring action in general district or circuit court to recover up to 12 months of back pay. Court may not award compensatory or punitive damages or order reinstatement. Court shall award attorney's fees from amount recovered, not to exceed 25% of back pay awarded. (2.2-2639).

11.03 WORKERS' COMPENSATION LAW:

See topic 11.02 Labor Relations.

12 ENVIRONMENT

12.01 ENVIRONMENTAL REGULATION:

General Supervision.

Governor appoints seven-member State Air Pollution Control Board (10.1-1301), seven-member State Water Control Board (Va. Code 62.1-44.8), and seven-member Virginia Waste Management Board (10.1-1401), to exercise general supervision in their respective areas of environmental law. These regulatory boards are responsible for adopting regulations and approving certain permits. Department of Environmental Quality (DEQ) staff administers regulations as approved by boards. Effective Apr. 1, 1993, DEQ consolidated Department of Air Pollution Control, State Water Control Board, Department of Waste Management into one agency. (10.1-1183). Separate divisions for air, water and waste and boards themselves continue in existence under supervision of Director of Department, who is appointed by Governor. (10.1-1184, -1185). DEQ maintains headquarters in Richmond and operates six regional offices located throughout State. Regional Director oversees operation of each regional office. Regional offices have lead responsibility and authority for water and air permitting. However, waste permitting remains centralized in Richmond. Regional offices also have lead role in enforcement matters, unless case has not been resolved within six months at which time it will be transferred to headquarters. Functions of Council on Environment, which is abolished, are transferred to Department. (10.1-1183). Department has broad management mandate to coordinate, evaluate, plan, and establish procedures for permitting, inspecting, monitoring and enforcement programs. (10.1-1182 et seq.). Soil and Water Conservation Board coordinates programs and appropriates financial and other assistance to directors of Soil and Water Conservation Districts. (10.1-500, et seq.). State Water Control Board supervises all sewage systems and sewage treatment works. (Va. Code 62.1-44.18). State Water Control Board supervises use of ground water. (62.1-254, et seq.). State Water Control Board regulates installation, maintenance and cleanup of underground and aboveground tanks used to store oil and has established Virginia Petroleum Storage Tank Fund to pay for administration and cleanup costs where responsible party is not identifiable or unable to pay. (Va. Code 62.1-44.34:8 et seq.). Virginia Water Quality Improvement Fund provides grant funding to point and non-point source pollution prevention projects. Minimum public participation requirements are specified for development of guidelines describing eligibility requirements, priorities, and criteria for such grants. (10.1-2117, et seq.).

Point source funds must be provided to publicly owned treatment works, institutions of higher learning, and privately owned facilities providing treatment of domestic wastewater to cover costs of nutrient reduction projects until tributary plans are developed and implemented, unless Director finds that sufficient funds are available in Water Quality Improvement Fund for substantial and continuing progress in implementation of tributary plans. (10.1-2128 et seq.). Non-point source funds may be provided to local governments, soil and water conservation districts, institutions of higher education and individuals who propose specific initiatives that are likely to achieve reductions in non-point source pollution, including excess nutrients and suspended solids. (10.1-2132). Virginia Landfill Clean-up and Closure Fund used for grants to local governments for proper closure of landfills without adequate liner and leachate control systems. (Va. Code 10.1-1413.2). Department of Conservation and Recreation administers Clean Farm Award Program, recognizing farms implementing conservation practices that effectively address agricultural non-point source pollutants (e.g., vegetative riparian buffers, cover crops, conservation tillage, livestock exclusion from waterways, and nutrient management plans). (Va. Code 10.1-104.3). Virginia Resources Authority finances facilities to meet state needs for water supply, drainage, resource recovery, and disposal and treatment of solid waste and wastewater. Virginia Resources Authority has power to establish credit enhancement surety bond program and to use state aid intercept program when local government defaults on any local obligations held or credit enhanced by Authority. (62.1-197 et seq.). State also subscribes to Ohio River Valley Water Sanitation Compact with Illinois, Indiana, Kentucky, New York, Ohio, Pennsylvania, Tennessee and West Virginia. (62.1-70 et seq.). Virginia Environmental Emergency Response Fund used for emergency response to environmental pollution incidents and for development and implementation of corrective actions, other than incidents addressed through Virginia Petroleum Storage Tank Fund. (10.1-2500 et seq.). Fund may also be used to assist small businesses with purchase and installation of air pollution control equipment needed to comply with federal Clean Air Act or pollution control equipment that allows implementation of voluntary pollution prevention measures. (10.1-2500). Office of Small Business Ombudsman and Small Business Environmental Compliance Advisory Board were created in 1992 to facilitate compliance by small businesses with federal Clean Air Act. (10.1-1323 et seq.). In 1997 fund was created to make or guarantee loans to small businesses to purchase and install air pollution control equipment needed to comply with federal Clean Air Act or pollution control equipment that allows small business to implement voluntary pollution prevention measures. (Va. Code 10.1-1197.1 et seq.). Water Supply Assistance Grant Fund established for grants to localities and owners of waterworks to assist in provision of safe drinking water. (Va. Code 32.1-171.2).

Prohibited Acts of Pollution.

Air.

State Air Pollution Control Board promulgates rules and regulations abating, controlling and prohibiting air pollution. (10.1-1308). Regulations and case decisions are subject to judicial review in accordance with Administrative Process Act. (10.1-1317). Board administers preconstruction review and permit program; see subhead Permits, infra. Virginia Indoor Clean Air Act prohibits smoking in certain public places and restaurants. (15.2-2820 et seq., effective Dec. 1, 2009). Unlawful for distributor or manufacturer to knowingly sell or offer for sale, for purposes of resale, any packaging materials that contain fully halogenated chlorofluorocarbons as blowing or expansion agent. (Va. Code 10.1-1424.1). Regulations available from Department of Environmental Quality, Air Division, 629 East Main Street, 8th Floor, Richmond, Virginia 23219.

Water.

State Water Control Board adopts regulations to enforce general water quality management program (Va. Code 62.1-44.15), and to designate surface water management areas to regulate withdrawals where drought/low-flow conditions threaten instream uses (62.1-242 to -253). Governing body of every county, city or town authorized must adopt stormwater control program consistent with state and federal regulation by establishing utility or enacting system of service charges. (15.2-2114). Unlawful to discharge into State waters inadequately treated sewage, industrial wastes, stormwater, or other noxious or deleterious substances, or to alter physical, chemical or biological properties of such State waters in detrimental manner, or to excavate or conduct specified activities in wetland, unless certificate has been issued to permit such acts. Any person in violation of these provisions who discharges or allows discharge of sewage, industrial waste, stormwater, or other wastes, or any noxious or deleterious substance into or upon state waters, or that may reasonably be expected to enter state waters shall, upon learning of discharge, promptly notify, but in no case later than 24 hours, Board, Director of Department of Environmental Quality or coordinator of emergency services appointed pursuant to § 44-146.9 for political subdivision reasonably expected to be affected by discharge. (Va. Code 62.1-44.5). See subhead Permits, infra. It is unlawful to dump any garbage, refuse, dead animal, trash, carton, can, bottle, container, box, lumber, timber or like material, or other solid waste into State waters; it is rebuttable presumption that owner or operator of boat from which such matter is ejected is responsible for unlawful dumping. (62.1-194). Unlawful to discharge into Chesapeake Bay and tidal portions of its tributaries sewage from boat or vessel that has not been adequately treated; unlawful to discharge treated or untreated sewage from boat or vessel in area designated as no discharge zone by U.S. EPA. (Va. Code 62.1-44.33). Unlawful to discharge oil into or upon state waters, lands or storm drain systems or to obstruct or contaminate state waters or navigable tidal waters. (Va. Code 62.1-44.34:18, -194, -194.1, -194.2). Department of Environmental Quality must provide information to local health departments on confirmed oil releases and discharges. When requested by private well owners in area, Department will test water supply of well for oil contamination. (Va. Code 32.1-176.5:1, Va. Code 62.1-44.15:4.1). Unlawful to drill for oil or gas in waters of Chesapeake Bay or its tributaries, save and except in Tidewater, Virginia. (Va. Code 62.1-195.1). Applicable regulations and statutes are available from Public Affairs Office, State Water Control Board, c/o Department of Environmental Quality, 629 East Main Street, P.O. Box 1105, Richmond, Virginia 23219.

Solid and Hazardous Waste.

Virginia Waste Management Board promulgates regulations to carry out its duty to control solid and hazardous waste management activities regulating storage, transportation, processing, treatment, and disposal of solid and hazardous waste and taking action to contain and clean up improperly managed sites. (10.1-1402). Virginia Waste Management Board must approve construction of solid and hazardous waste facilities. (10.1-1426 & 1433 et seq.). Waste management facility operators must be certified by Virginia Waste Management Board and solid waste management facilities must be operated under direct supervision of such certified facility operator (Va. Code 10.1-1408.2). Disposal of solid waste in open dumps prohibited. (Va. Code 10.1-1408.1). Unlawful to sell or offer for sale beverage containers connected to each other with rings or other plastic devices which are not degradable or recyclable. (Va. Code 10.1-1415.2). Board regulates transport, loading and offloading of nonhazardous solid waste and regulated medical waste on navigable waters of Virginia. (Va. Code 10.1-1454.1). Applicable regulations and statutes are available from Department of Environmental Quality, Waste Division, 629 East

Main Street, Richmond, Virginia 23219.

Enforcement.

Audit Confidentiality.

Virginia has adopted privilege for voluntary environmental assessments and immunity from civil penalties for voluntary disclosure of results of assessment to state or local authorities. (10.1-1198, -1199). No person shall be compelled to disclose results of voluntary assessment or materials assembled during conduct of assessment. Privilege does not apply to information that demonstrates clear, imminent, and substantial danger to public health or environment, or to assessment documents developed in bad faith. (10.1-1198[B]). Environmental assessment is defined as voluntary evaluation of activities or facilities designed to identify noncompliance with environmental laws, promote compliance with those laws, or identify opportunities for improved efficiency or pollution prevention (10.1-1198[A]).

At hearing, party seeking disclosure of information for which privilege is asserted must show, through independent knowledge, that information does not qualify for privilege. If judge or hearing officer finds that probable cause exists to believe information qualifies for exception to privilege, he or she may conduct in camera review of information. (10.1-1198[C]).

Privilege does not apply to documents required by law or prepared independently of voluntary environmental assessment process. (10.1-1198[B]). Enactment of statutory privilege does not alter, limit, waive, or abrogate scope of any statutory or common law privilege. (10.1-1198[B]).

Act also limits civil penalties for voluntary reports of violation, to extent consistent with requirements imposed by federal law. (10.1-1199). Disclosure is considered voluntary if it is not otherwise required by law, it is made promptly after discovery during environmental assessment, and violation is corrected “in a diligent manner”. Immunity will not be accorded if voluntary disclosure is made in bad faith. (10.1-1199).

Appeals of Agency Action (Standing).

Permits issued by either State Water Control Board or State Air Control Board may be appealed by aggrieved persons. (10.1-1318, -1457, Va. Code 62.1-44.29).

Administrative Civil Penalties.

DEQ may issue administrative “special orders” after informal fact-finding conference. These special orders may have duration of up to one year and contain penalties up to $10,000. (10.1-1182, -1186).

Environmental Mediation.

DEQ may employ nonbinding mediation or dispute resolution to development of regulation or issuance of permit. (10.1-1186.3).

Supplemental Environmental Projects.

As partial settlement of civil enforcement action, DEQ or court of competent jurisdiction may provide for person to complete environmentally beneficial project not otherwise required by law. (Va. Code 10.1-1186.2). Performance of project is enforceable in same manner as any other provision of administrative order.

Prosecution by Attorney General.

Attorney General may prosecute environmental crimes under Virginia Waste Management Act, State Water Control Law, or Air Pollution Control Law, with concurrence of local Commonwealth Attorney. (2.2-511). In addition, Attorney General is authorized to intervene in any action pending in federal court in order to resolve dispute already being litigated in that court by U.S. through Environmental Protection Agency. (10.1-1186.4).

Air.

State Air Pollution Control Board is authorized to initiate and receive complaints as to air pollution, hold hearings and enter orders abating causes of air pollution and enforcing regulations, and institute legal proceedings for that purpose. (10.1-1307[D]). Board is also authorized to issue special orders to owners who are permitting or causing air pollution, who have failed to construct facilities in accordance with approved plans, or who have violated air quality standard or Board order to cease and desist and to comply with any decision of Board. (10.1-1309). Board is authorized to issue special orders requiring closure plans and demonstration of financial capability to implement closure plans. (10.1-1309.1). Board may also resort to injunction, mandamus, or other appropriate remedy. (10.1-1316). Board regulations and decisions may be appealed in accordance with provisions of Administrative Process Act. (10.1-1317, -1318).

Water.

State Water Control Board may issue special orders and enforce its rules, regulations or orders in any appropriate court through injunction, mandamus or appropriate remedy. (62.1-44.23). Board is authorized to issue special orders requiring closure plans and demonstration of financial capability to implement closure plans. (62.1-44.15:1.1). Board can intervene on public's behalf in civil actions pertaining to withdrawal of state's surface waters. (62.1-44.23:1). Aggrieved owners of sources of pollution may demand hearing to challenge actions taken by Board without formal hearing (62.1-44.25), and final decisions of Board may be appealed in accordance with Administrative Process Act (62.1-44.24). Virginia Soil and Conservation Board permits, regulates and controls storm water runoff in Commonwealth. (10.1-603.2 to -603.15).

Solid and Hazardous Waste.

DEQ's Waste Management Division administers regulations established by Board. (10.1-1404). Waste Management Board is authorized to issue orders requiring compliance with statutes or regulations. (10.1-1455). DEQ has right to inspect or conduct sample tests on any property to determine compliance with health laws, regulations, orders or permit conditions. (10.1-1456). Waste Management Board must also be notified of any changes in capacity, design or operation of hazardous waste facilities. (10.1-1446). Board or DEQ may request Attorney General to seek injunction, mandamus or other appropriate court remedy. (10.1-1455). Final decisions may be appealed pursuant to Administrative Process Act. (10.1-1457). Voluntary Remediation Program administered by Virginia Waste Management Board allows persons who own, operate, have security interest in, or enter into contract for purchase of contaminated property, to voluntarily remediate releases of hazardous substances, hazardous waste, solid waste, or petroleum on property. (10.1-1232). Voluntary remediation is available where remediation has not been mandated by some other federal or state program or statute.

Penalties.

Air.

Any owner convicted of knowingly violating air pollution control statutes, rules, any permit condition, or failing to comply with lawful order of State Air Pollution Control Board shall be guilty of misdemeanor and liable for fine of not more than $10,000 for each violation, and each day of continued violation after conviction constitutes separate violation. (10.1-1320). Owners are also subject, in discretion of court, to civil penalty not to exceed $32,500 for each day of violation. (10.1-1316). Any person who ceases operations of regulated source and knowingly and willfully fails to implement closure plan or provide adequate funds for implementation of closure plan shall be liable to state and guilty of Class 4 felony if failure results in significant harm or imminent and substantial threat of significant harm to human health or environment. (Va. Code 10.1-1309.1). Court awarding temporary or permanent injunction to state or its officers or agencies requiring party to abate, control, prevent, remove or contain any substantial or imminent threat to public health or environment or develop closure plan shall require defendant to demonstrate financial ability to comply with injunction. (8.01-631.1). Violation of prohibition of sale of packaging materials containing fully halogenated chlorofluorocarbons punishable as Class 3 misdemeanor. (10.1-1424.1). Any person who continues to smoke in smoking-prohibited area after being asked to refrain is subject to civil penalty of up to $25. (15.2-2824, -2825, -2826).

Water.

Any owner who violates a provision of chapter or fails to comply with any final order of Board or of court will be subject to civil penalty up to $32,500 in discretion of court. Each day of violation is separate offense. Willful or negligent violation by owner, agent or contractor of any provision or failure to comply with Board or court order is misdemeanor punishable by confinement up to 12 months and fine not less than $2,500 nor more than $32,500, either or both. (62.1-44.32). Knowing misstatement on form submitted or knowingly rendering inaccurate any monitoring device or method is felony resulting in imprisonment of one to three years, or imprisonment up to 12 months with fine of $5,000 to $50,000 for each violation by individual. Non-individual violator subject to fine of not less than $10,000 for each violation. Each violation day constitutes separate offense. (62.1-44.32). With consent of owner, Board may impose civil penalty of up to $32,500 per violation (not to exceed $100,000 per order) in lieu of other penalties. (62.1-44.15). Local governments in Chesapeake Bay Preservation areas may enact ordinances allowing for assessment of $10,000 per violation, with consent of violator. (10.1-2109). Alternatively, local court may assess civil penalty of up to $5,000 per day of violation of local program. (10.1-2109). Any person discharging or causing discharge of oil that threatens to or actually enters into or upon state waters, lands, or storm drain systems and any operator of any facility, vehicle, or vessel from which there is actual or threatened discharge into or upon state waters, lands, or storm drain systems is liable for all costs of investigation, containment and cleanup. (62.1-44.34:18[C]). Operator that incurs cost to contain and clean up oil spill, or must pay claims to Commonwealth or third parties relating to oil spill may seek contribution from any person whose act or emission contributed to spill. (62.1-44.34:18). Failure of person causing or permitting oil discharge to report discharge or cooperate in cleanup will result in civil fine of $1,000 to $50,000 for initial violation and $10,000 per day of violation thereafter. (62.1-44.34:20[C]). Virginia Petroleum Storage Tank Fund, administered by State Water Control Board, used for costs associated with corrective action taken when petroleum leaks from underground and aboveground storage tanks or when oil is discharged into state waters. (62.1-44.34:11). Underground storage tanks regulated by Art. 9 of State Water Control law are exempt from liability associated with discharge of oil into waters under Art. 11 of State Water Control law, except liability to political subdivision if discharge is at facility having aggregate capacity of greater than one million gallons. (62.1-44.34.23[B]). Any unlawful casting of garbage into waters constitutes misdemeanor punishable by fine not to exceed $1,000 or confinement in jail for 30 days, or both. (62.1-194). Unlawful discharge of treated or untreated sewage from boats and vessels is Class 1 misdemeanor. (62.1-44.33). Person who ceases operations of regulated facility and knowingly and willfully fails to implement closure plan or provide adequate funds for implementation of plan shall be liable to state and any political subdivision thereof and guilty of Class 4 felony if failure results in significant harm or imminent and substantial threat to human health or environment. (62.1-44.15:1.1). Court will require demonstration of financial capability to comply with injunction ordering party to abate, control, prevent, remove or contain any substantial or imminent threat to public health or environment, or develop closure plan. (8.01-631.1). Ground Water Management Act of 1992 establishes similar penalty program for person who violates provisions. Criminal prosecution must be commenced within three years of offense discovery. (62.1-270). Owners and operators of injection wells which contaminate or diminish ground water beneficially used by anyone residing within ½ mile of well must provide such person with replacement water supply. (45.1-361.41). Civil penalties imposed on confirmed animal feeding operations shall not exceed $2,500 for any confined animal feeding operation covered by Virginia Pollution Abatement permit. (62.1-44.17:1).

Solid and Hazardous Waste.

Willful violation of health statute or regulation is misdemeanor unless different penalty specified. (10.1-1455[D]). Person violating Solid and Hazardous Waste Management Articles or any regulation or order of Board is subject to civil penalty of not more than $32,500 for each day of violation. (10.1-1455). Waste Management Board may issue administrative orders containing penalties of up to $32,500 per violation, and may require violator to take corrective action and cease activities in cases where solid waste management laws, regulations, permits or orders are not being complied with. (10.1-1455). Any person who knowingly transports hazardous waste to unpermitted facility; who knowingly transports, treats, stores, or disposes of hazardous waste without permit; or who knowingly makes any false statement or representation in any application, label, disclosure statement, manifest or other document used for purposes of hazardous waste program compliance shall be guilty of felony and is subject to imprisonment for one to five years or fine of up to $32,500 per day of violation or both. (10.1-1455[B]). Any person who knowingly unlawfully transports, treats, stores, or disposes of hazardous waste and knows he thereby places another person in imminent danger of death or serious bodily injury, shall be guilty of felony punishable by two to 15 years in prison or up to $250,000 fine, or both. Nonindividual violator is subject to fine not exceeding greater of $1 million or amount three times economic benefit realized by defendant as result of violation for first offense and $2 million or amount six times economic benefit for subsequent offenses. (10.1-1455[I]). Person who knowingly and willfully abandons solid or hazardous waste management facility without proper closure or providing adequate financial assurance for closure shall be liable to state and any political subdivision thereof and shall be guilty of Class 4 felony if failure to close results in significant harm or imminent and substantial threat of significant harm to human health or environment. (10.1-1410; -1428). Court will require demonstration of financial capability to comply with injunction ordering party to abate, control, prevent, remove or contain any substantial or imminent threat to public health or environment, or develop closure plan. (8.01-631.1). Civil penalty assessed pursuant to civil action brought by locality for improper disposal of solid waste on land owned by local government shall be paid to local government. (10.1-1418.1[E]).

Permits.

Air.

Owners may not construct, reconstruct, or modify facility that discharges pollutants without permit. Air Pollution Control Law requires Board to establish annual permit fee program for air pollution sources based on actual emissions (not to exceed 4,000 tons per year) of each regulated pollutant as defined in § 502 of federal Clean Air Act. Air Pollution Permit Program Fund to be established for carrying out purposes of maintaining state permit program. Present air permit fee assessments to be deposited into Fund. (10.1-1322 et seq.). State Air Pollution Control Board has authority to issue local variances from rules and regulations when local conditions warrant. (10.1-1307[C]). In promulgating rules and approving variances and permits Board must consider relevant facts and circumstances bearing upon reasonableness of activity involved and of controlling regulations. (10.1-1307[E]). Air Pollution Control Board is authorized to establish emissions trading program based upon emission caps to achieve and maintain National Ambient Air Quality Standards. (10.1-1322.3).

Water.

Before owner erects, constructs, opens, reopens or expands any industrial establishment or sewage treatment facility, certificate from State Water Control Board and authorization from State Department of Health must be obtained. (62.1-44.19). State Water Control law requires

Board to implement fee schedule to recover portion of costs associated with permit applications and establish permit fund to maintain permit program. (62.1-44.15:6 et seq.; effective until July 1, 2026). Board has established general permit to govern certain conservation activities that will improve water quality. (62.1-44.15:5.1). State also administers NPDES program. Board will grant such certificate only after applicant has provided complete, detailed information on plant and its pollution control equipment. Board must provide public notice to localities and riparian property owners ¼ mile upstream and ¼ mile downstream on tidal waters and ½ mile upstream and ½ mile downstream on nontidal waters from applicant. (62.1-44.15:4[D]). Board may prohibit discharge of sewage or other wastes if it would threaten public health and safety, interfere with treatment works, or interfere with usage of state waters. Certificate may be revoked for failure to comply with any pollution control requirements or for other good cause. (62.1-44.16, -44.19). State Water Control Board must develop regulatory program for poultry waste management. Board will develop general permit and requirements for nutrient management for certain growers with more than 200 units of poultry. (62.1-44.17:1.1). State Water Control Board must conduct ongoing assessments of amounts of toxics in Virginia's waters and develop plan to reduce those amounts. (62.1-44.17:3). Board must also provide annual reports, conduct monitoring, and develop plans to identify and address impaired waters in state. (62.1-44.19:5, et seq.). Ground Water Management Act of 1992 requires existing ground water users to obtain permits based on actual present use together with water savings achieved through conservation. (62.1-254 et seq.). Permit is also required for use of any groundwater or construction or operation of any well within groundwater management area unless amount used does not exceed 300,000 gallons a month, or is withdrawn by licensed ground water heat pump, or is specially exempted by Board. Permits for ten years. Except for initial permits for existing users, State Water Control Board must approve water conservation and management plan proposed by each withdrawal permit applicant. (62.1-254 et seq.). Virginia Water Protection Permit, obtained from Water Control Board, constitutes certification required under § 401 of Clean Water Act. (62.1-44.15:20). Owners of sewage treatment works who land apply, market or distribute sewage sludge must obtain and comply with Virginia Pollutant Discharge Elimination System (VPDES) or Virginia Pollution Abatement (VPA) permit. (62.1-44.19:3). Department of Health and Department of Environmental Quality provide guidelines for use of gray water and rainwater. (32.1-248.2). Coal loading facilities not regulated under Virginia's surface mining laws must receive discharge certificate from State Water control Board. (45.1-226 et seq., 62.1-44.16).

Solid and Hazardous Waste.

Permit required for any person who operates any facility for disposal of solid waste (10.1-1408.1), or transports, stores, treats, or disposes of hazardous waste (10.1-1426). Fees based on type of permit. State Program is authorized by USEPA. Permits for nonhazardous solid waste management facilities require closure and post closure financial assurance and third party liability insurance. (Waste Management Board Regulations at 9 VAC 20-20-20, et seq.). Local governments may enact ordinances regulating siting of solid waste management facilities within their boundaries. (15.2-929). DEQ must annually report amount of solid waste disposed of in Commonwealth, amount and origin of waste generated outside of Commonwealth, and method of its disposal. Permitted facilities that treat, store, or dispose of solid waste must provide this information to DEQ upon request. (10.1-1413.1). Application for facility permit must first be filed with local governing body for certification that facility's location and operation will be consistent with local ordinances. (10.1-1408.1). Applicants proposing to operate certain landfills must include description of public participation steps taken prior to submitting application. (Va. Code 10.1-1408.1[B][4]). Local governments or public authorities applying to operate certain types of landfills must include description of public participation process, including formation of citizens advisory group, prior to applying for permit. (10.1-1408.1[B][5]). After July 1, 2007, no permit for new sanitary landfill, incinerator, or waste-to-energy facility will be issued until solid waste planning unit within which facility is located has solid waste management plan approved by Board. (10.1-1411). Issuance of permits for new or expanded solid waste landfills in wetland areas is prohibited. (10.1-1408.4). DEQ must satisfy certain review requirements relating to human health and environmental impacts, and hold public hearing in affected political subdivision prior to issuing permit for new solid waste management facility. (10.1-1408.1). Virginia Waste Management Board also authorized to promulgate regulations for local and regional solid waste management plans. Local and regional solid waste planning units must maintain minimum of 25% recycling rate unless statutory exception applies. (10.1-1411). Virginia Waste Management Act requires Waste Management Board to establish permit assessment system and establish permit program fund to maintain permit program. (10.1-1402). Waste Management Board's authority to revoke, suspend or amend permit is enhanced to include cases where key personnel of applicant/permit holder have been convicted of enumerated state or federal criminal offenses (gambling, extortion, antitrust, etc.) or of violating state or federal environmental protection laws. (10.1-1427). Waste Management Board also issues permits to facilities receiving nonhazardous solid waste or regulated medical waste arriving in navigable waters of Virginia. (10.1-1454.1).

Virginia Waste Management Board is charged with developing regulations for containers carrying certain wastes by ship, barge, or other vessels on waters of Commonwealth (10.1-1454.1).

13 ESTATES AND TRUSTS

13.01 ADMINISTRATION:

See topic 13.08 Executors and Administrators.

13.02 ADVANCEMENTS:

See topic 13.07 Descent and Distribution.

13.03 ALLOWANCES:

See topic 13.08 Executors and Administrators.

13.04 CLAIMS:

See topic 13.08 Executors and Administrators; category 5 Civil Actions and Procedure, topic 5.17 Pleading.

13.05 DEATH:

Person who has resided in state and remains out of state or disappears for seven successive years and is not heard from, or person who does not reside but owns real or personal property in state and disappears for seven successive years from his residence and is not heard from, or person who disappears in foreign country upon issuance of report of presumptive death by U.S. State Department is presumed dead. (64.1-105). Person disappearing from vessel on high seas or aircraft lost at sea presumed dead after six months or upon finding of board of inquiry. (64.1-105). Administration of estate may be granted by court after four weeks advertisement of application. (64.1-108).

Uniform Simultaneous Death Act adopted. (Va. Code 64.1-104.1 thru Va. Code 64.1-104.9).

Action for death by wrongful act may be maintained by personal representatives, if brought within limitations period set forth in § 8.01-243. (8.01-50, -244). If deceased was infant in custody of parent pursuant to court order or custody agreement with other parent, custodial parent has preferential administration for 30 day period after death. (8.01-50). If decedent accepted satisfaction for injury before death, action is barred. (8.01-51). Jury may award such damages as to it may seem fair and just. Punitive damages may be recovered for willful or wanton conduct. Such damages may be awarded, free from liabilities of decedent, to husband, wife, children, or children of any deceased child, or if none, to parents, brothers and sisters. If there are none of these, damages become assets of estate. (8.01-52, 53, 54). Parties in interest or their authorized representatives may be convened for approval by court of settlement of wrongful death claim. (8.01-55). Right of action survives death of wrongdoer. (8.01-25, -56). In wrongful death actions, authenticity and reasonableness of medical bills is rebuttably presumed. (8.01-413.01).

Death Certificate.

See category 10 Documents and Records, topic 10.04 Records, subhead Vital Statistics.

Revised Uniform Anatomical Gift Act adopted. (32.1-291.1 to -291.25).

Death Penalty.

Death sentence executed by electrocution or lethal injection to be decided by prisoner. (53.1-233, 234).

Natural Death Act.

See topic 13.16 Wills, subhead Living Wills.

13.06 DECEDENTS' ESTATES:

See topics 13.07 Descent and Distribution, Executors and Administrators, Wills; category 8 Debtor and Creditor, topic 8.10 Homesteads.

13.07 DESCENT AND DISTRIBUTION:

Real property if any, descends as follows, each class of which member is living taking to exclusion of subsequent classes: (1) Surviving spouse of intestate, unless one or more of intestate's children are not children and/or descendants of surviving spouse in which case one-third to intestate's spouse and two-thirds to all of intestate's children; (2) all children and/or descendants of deceased children; (3) parents or surviving parent; (4) brothers and sisters and/or descendants of deceased brothers and sisters; (5) one moiety each to paternal and maternal kindred as follows: (a) grandparents or surviving grandparent; (b) uncles and aunts and/or descendants of deceased uncles and aunts; (c) great grandparents or surviving great grandparent; (d) greatuncles and greataunts and/or descendants of deceased greatuncles and greataunts; (e) in other cases without end, to nearest lineal ancestors or descendants of deceased nearest lineal ancestors; (6) on failure of either paternal or maternal kindred, all to kindred on other side; (7) kindred of spouse as though spouse died entitled to estate. (64.1-1). Distribution of personal property same except with regard to surviving spouse. (64.1-11). See subhead Surviving Spouse, infra.

Community Property.

Uniform Disposition of Community Property Rights at Death Act adopted. (64.1-197 et seq.).

Per Capita or Per Stirpes.

Where heirs and distributees are of equal degree of kindred to decedent, they take per capita; where of unequal degree they take per stirpes, the eldest generation of which a member is living constituting the stock. (64.1-3).

Surviving Spouse.

If intestate left descendants who are not descendants of surviving spouse, surviving spouse of intestate is entitled to one-third of surplus of personal estate. If intestate left no descendants who are not descendants of surviving spouse, surviving spouse is entitled to all of surplus of personal estate. (64.1-11). Spouse takes intestate share where marriage occurs after execution of will which makes no provision for spouse, unless will shows contrary intent. (Va. Code 64.1-69.1). Until rights in principal residence are determined, spouse may occupy residence without charge for rent, repairs, taxes or insurance. (Va. Code 64.1-16.4).

Half Blood.

Collaterals of the half blood take half portions. (64.1-2).

Illegitimates inherit and transmit from, to, and through mothers. (Va. Code 64.1-5.1). Illegitimates inherit from and through fathers if paternity is established by clear and convincing evidence or parents marry. Statute includes non-exclusive list of acceptable evidence. (Va. Code 64.1-5.1 to -5.2). Father cannot inherit through his illegitimate child unless father openly treated child as his own and has not refused to support child. (Va. Code 64.1-5.1). Subsequent marriage of parents and recognition at any time by both parents legitimates. Issue of marriages deemed null or dissolved are legitimate. (20-31.1). Child conceived by artificial insemination, in vitro fertilization or other reproductive technology presumed legitimate natural child if born to married woman and both woman and husband consented in writing to procedure and acceptance of parentage. (20-158). Donors of sperm or ova have no parental rights. (32.1-257). Rules for determining parent-child relationship apply to both testamentary disposition and intestate succession. (64.1-5.1).

Posthumous children and other afterborn relatives conceived before decedent's death take as if born during life of decedent. (Va. Code 64.1-8.1).

Adopted Children.

See category 14 Family, topic 14.01 Adoption.

Acts Barring Descent or Distribution.

No slayer may acquire by descent or distribution or by will any interest in estate of another whom such person has slain. Slayer shall mean any person: (1) Who is convicted of murder or voluntary manslaughter of decedent, or (2) in absence of such conviction, who is determined by preponderance of evidence to have committed murder or voluntary manslaughter resulting in death of decedent with burden of proof on party seeking to establish that decedent was slain by such person. (55-401 to 55-415). Spouse or parent is barred if guilty of willful desertion or abandonment continuing to death of other spouse or child. (Va. Code 64.1-16.3). Unless otherwise provided, orders terminating parental rights terminate right of parent to take from or through child. (Va. Code 64.1-5.1).

Advancements must be brought into hotchpot before person receiving them shares in descent or distribution. (64.1-17).

Elective share may be claimed within six months of administrator's qualification by surviving spouse before court or in writing. (64.1-13). If claimed, surviving spouse takes one-third of augmented estate if decedent had surviving issue; one-half if decedent left no surviving issue. (64.1-16). If decedent dies domiciled outside of Virginia, surviving spouse's elective share in Virginia property governed by law of decedent's domicile. (64.1-13).

Heirs.

Real property of a decedent is liable for his debts (64.1-181) after personal property (92 Va. 383, 23 S.E. 747). An heir or devisee selling such land is liable to creditors for value thereof with interest, but land is not liable if: (a) Conveyance was bona fide; (b) at time of conveyance, no suit had been brought for administration of assets and no report filed of debts and demands of those entitled; and (c) if conveyance made within year of death of decedent, no suit for administration of assets is filed within one year of death, or sale is under court decree and proceeds are paid to a special commissioner. (64.1-183, -184). Creditor may proceed in equity (64.1-185), but, if claim does not exceed $20, 30 days notice must be given before suit (64.1-186).

Escheat.

Land, heirs to which are unknown, after inquest by escheator of city or county with jury, is sold by order of Governor, and proceeds paid into state treasury. Persons aggrieved may file petition in circuit court before sale, which cannot be within one year. Creditors may recover by bill in equity after personal estate is exhausted. Rights of tenants and those entitled to any rent or profit are protected. (55-168 et seq.). When there is no other distributee for personal property, the commonwealth takes. (64.1-12).

Administration.

See topic 13.08 Executors and Administrators.

13.07A ESTATES: (in property)

See category 21 Property, topic 21.16 Real Property.

13.0813.09

13.10 EXECUTORS AND ADMINISTRATORS:

Probate jurisdiction is in circuit courts. (17.1-500, 64.1-75). Clerk or deputy clerk of court may act (64.1-75, -77), except in cases of persons presumed dead (64.1-107). Appeal as of right lies from clerk to court within six months. (64.1-78).

Venue.

Venue is: (1) At place of mansion house or known residence of decedent; (2) if none, where real estate is situated; (3) if none, where decedent died or where he has estate. (64.1-75). Where one is a patient in nursing or convalescent home, rebuttable presumption legal residence is that residence prior to becoming such a patient. (64.1-76).

Notice of Probate.

Personal representative or proponent of will must give written notice of probate of will or qualification of personal representative to surviving spouse, heirs at law (whether or not there is will), beneficiaries under will, and others, if known assets of decedent exceed $5,000. Form and instructions for giving notice provided by clerk of court. Failure to give notice does not affect validity of will. (Va. Code 64.1-122.2).

Uniform Probate Code not adopted.

Preferences in Right to Administer.

Sole distributee is appointed administrator, or may waive his right to be appointed in favor of administrator designated by him. In absence of sole distributee, preference is given to any distributee or designee who presents written waivers of right to qualify from all other competent distributees. After 30 days have passed since intestate's death, clerk may grant administration to first distributee, or his designee, who applies therefor. After 45 days have passed since intestate's death, clerk may grant administration to any charitable organization that operated as conservator or guardian for decedent at time of his death. After 60 days have passed since intestate's death, one or more creditors or any other person may be appointed. Clerk must be satisfied that person named is suitable and competent. (64.1-118).

Curators.

Pending or during contest of a will, infancy or absence of an executor, or appointment of an administrator, a curator may be appointed under bond. He may receive or sue for assets, pay claims if payment does not affect priority rights, and he must account to executor or administrator. (64.1-93).

Court Ordered Administrator.

Any person may be appointed administrator or administrator de bonis non, with will annexed if there is will, without additional oath or security, when two months have elapsed without there being executor or administrator, except during infancy or absence of executor or contest of will. Such appointment may be revoked by court or clerk or terminated by resignation and another person permitted to qualify. (64.1-131).

Administrators c. t. a. may be appointed when will names no executors, or when all named refuse to serve, fail to qualify, die, resign, or are removed. (64.1-116). Executor of executor is without authority over estate of first testator. (64.1-137).

Administrators d. b. n.

When the powers of a personal representative have ceased, an administrator de bonis non may administer assets of estate and is authorized to sue predecessor to recover misappropriated funds. (64.1-166).

Eligibility and Competency.

Nonresident may qualify in Virginia, and act as personal representative or trustee under will of decedent, subject to provisions of § 64.1-116, et seq. (26-59).

Resident trust company may act (6.1-17), but foreign corporation not authorized to do business in Virginia may not serve as personal representative or testamentary trustee (26-59).

Professional law corporations may qualify as executor, administrator or in other fiduciary capacities. (Va. Code 13.1-546.1). Court or clerk must be satisfied that person nominated as administrator is suitable and competent. (64.1-116, -118).

Qualification.

Executors (64.1-136) and administrators (64.1-119) must personally take oath and give bond when they qualify. In case of estates not exceeding $15,000 no surety is required, in discretion of court or clerk. (26-4). New bond may be required at any time as court deems proper. (26-3).

Executors may not act until qualified, except to provide for and pay reasonable expense of burial, and prevent waste. (64.1-136).

Exemption from Bond.

If will so directs or if all distributees or beneficiaries are also personal representatives, no security is required on bond of executor or administrator except for cause or if all personal representatives are nonresidents. (64.1-121). Exemption applies if personal representatives become only beneficiaries or distributees by reason of instruments of disclaimer filed prior to, or at time of, qualification. (64.1-121).

Letters.

A copy of the order in which certificate is granted to the personal representative for obtaining probate or letters of administration, is effectual substitute for probate or letters made out in due form but, on request, the clerk must prepare such probate or letters in due form, under seal of court, certified by the judge. (64.1-122).

Bank Deposits.

At any time after decedent's death, banks may pay balance in decedent's account to personal representative on presentation of certificate of qualification in state. (6.1-70). Personal representative is not obligated to assert claim to joint bank account which was subject to withdrawal by surviving joint depositor, unless party in interest requests that such claim be asserted within six months from date of initial qualification on estate. (64.1-140).

Inventories.

Must be filed by personal representative and other fiduciaries within four months from qualification of all property under supervision and control of personal representative and all other property of which personal representative has knowledge. (26-12). Form to be provided by clerk of circuit court. When estate is valued at or below $15,000, and heir, beneficiary, or creditor whose claim exceeds its value seeks qualification, inventory requirement is waived. (26-12.3).

Sales.

Except to pay funeral expenses, debts or charges of administration, property which the will directs not to be sold may not be sold. (64.1-153). Otherwise, property likely to be impaired in value by keeping must be sold. Credit may be given if purchaser gives bond. (64.1-154). Other goods may be sold to make necessary payments, with due regard to specific legacies and exemptions. (64.1-155).

Uniform Transfers on Death Security Registration Act adopted. (Va. Code 64.1-206.1 thru Va. Code 64.1-206.8).

Transfer of Securities.

See category 3 Business Regulation and Commerce, topic 3.09 Commercial Code.

Taxes.

Personal representatives or heirs are responsible for payment of taxes on estates. (58.1-3342). Administration tax must be paid before grant of administration. (58.1-1715). See category 22 Taxation, topic 22.06 Estate Tax, subhead Wills and 22.01 Administration. Estate not over $15,000 is free from tax. (58.1-1712).

Apportionment.

Federal and state estate taxes including any interest and penalty must be apportioned to beneficiaries and personal representative must require contribution by each beneficiary unless will or inter vivos instrument otherwise directs. (64.1-160 thru Va. Code 64.1-165.1).

Allocation.

Virginia estate taxes of decedents allocated among QTIP property and remainder of gross estate as under federal law.

Claims should be filed with personal representative, or with commissioner of accounts who takes proof of debts and demands (see subhead Accounts, infra); otherwise estate may be distributed without payment thereof. (64.1-179). When report of accounts of personal representative and of debts and demands against estate has been filed with clerk, provided six months have elapsed since qualification on estate, personal representative (or successor or substitute personal representative) or any distributee or legatee may, on motion, have order entered requiring creditors to show cause why there should not be distribution with or without requiring refunding bonds, and court may thereafter direct distribution after two successive weeks publication of show cause order. (64.1-179). See form § 64.1-180.

Where commissioner has accounts of personal representative for settlement, legatee, distributee, personal representative or any creditor may request proof of debts and demands (64.1-171), and in such cases proof of claim should be filed with commissioner (64.1-173). Personal representative must give written notice to any claimant of disputed claim at debts and demand hearing. (64.1-171). See also subhead Accounts, infra.

Creditors paid in order of classification and class paid ratably. (64.1-158).

A personal representative who pays a debt 12 months after his qualification is not personally liable for any debt of the decedent of equal or superior dignity unless he had notice of such debt before payment. (64.1-158).

Form.

No form for presenting claim is prescribed. Any person desiring to prove a debt must file his claim or a written statement thereof with commissioner. (64.1-173).

Personal Liability.

Refunding bonds taken and filed protect personal representatives from personal liability on claims subsequently established, unless they had notice thereof within six months from qualification, or before distribution. (64.1-178). They are liable for negligence or failure to defend. (26-5). On suit or motion, if court enters of record that proceeding would not have been brought if duties had been prudently discharged, costs are assessed against personal representatives personally. (26-6).

Legatees and Distributees.

Personal representatives may not be compelled within six months to pay legacies or distributive shares, and thereafter only if refunding bonds are given. (64.1-177). Whether or not refunding bonds are given, legatees or distributees are liable to refund if suit brought within five years. (64.1-179).

Distribution if Abroad.

No specific legislation.

Heirs.

List of heirs, with names, ages, addresses, and degree of kinship which must be verified and include certificate that diligent inquiry has been made, must be filed by personal representatives (or heir or devisee if no personal representative qualifies within 30 days after decedent's death) whether decedent died testate or intestate. (64.1-134). Upon death of intestate owner of real estate, interested person may record affidavit where land is located, describing briefly real estate and heirs and referring to intestacy. (64.1-135).

Actions.

There is no suspension of right to sue on claim against decedent's estate and action thereon may be commenced at any time before claim is barred by general statute of limitations applicable thereto. (64.1-144, -145). Statute enlarges common law to include injury to business or property. (421 F.2d 937). Action pending against decedent at time of death may be continued against personal representative if cause of action survives. (8.01-25).

Personal representative may sue or be sued on judgments for or against or any contract of or with his decedent (64.1-144), or at law for carrying away goods or waste of estate by decedent (64.1-145), or for personal injuries due to decedent's wrong (8.01-25). See topic 13.05 Death, subhead Action for Death by Wrongful Act.

Creditor establishing claim after distribution by judgment, decree, or allowance by report of commissioner, may maintain suit on refunding bond (64.1-178), or within five years from order of distribution against distributees (64.1-179). If personal property is insufficient, they may proceed against heirs or devisees. (64.1-185).

Accounts.

Judges of each circuit appoint commissioners of accounts, who have general supervision of all fiduciaries. (26-8). Fiduciaries must account before commissioner of accounts of jurisdiction wherein he qualified. (26-17.3). Upon application to appropriate circuit court estate of $15,000 or less may be exempted from filing future accountings. Commissioner of accounts may exempt estate of $15,000 or less. (8.01-606). If all distributees or residuary beneficiaries are also personal representatives, and six months have elapsed since qualification, they may file sworn statements in lieu of accountings. (26-20.1).

On motion of any creditor, legatee or distributee, or of personal representative when accounts of such a representative are before a commissioner for settlement, commissioner must set a time and place for receiving proof of debts. Notice thereof is published once in a newspaper and posted at front door of court house 10 days before date fixed. (64.1-171). Within 60 days commissioner must make account of all debts which are sufficiently proven. (64.1-172). Claims must, in such cases, be filed with commissioner. (64.1-173).

Lists of pending accounts of personal representatives must be posted at court house during first week of each month. Account may not be closed unless posted in such a list ten days or more before closing. (26-27). When complete, commissioner's report is filed. (26-32). Court examines all exceptions filed and passes thereon; if no exception filed, report stands confirmed 15 days after report is filed. (26-33). When confirmed, account is deemed correct, unless in suit for purpose, it is surcharged or falsified, but no such suit may be brought by party to exceptions filed to report. (26-34). Form to be provided by clerk of circuit court. May use form or any other clear format.

Compensation of Representatives.

Reasonable expenses and compensation are allowed to personal representative in administering estate and rendering services with regard to real estate. (26-30). Amount of compensation depends upon circumstances of each case.

Vendor Contracts and Money Obligations.

Personal representative must fulfill contracts of decedent for conveyance of real property, and conveyance and contract must be recorded. (64.1-148). Personal representative may also renew notes or other money obligations of decedent for sum not greater than original obligation, but without court order such renewals must be made payable within two years from first qualification on estate. (64.1-143).

Insolvent Estates.

Assets, when insufficient to meet claims, are applied, subject to liens acquired during lifetime of decedent (64.1-159), in following order: (1) Administration charges; (2) family allowance, exempt property, homestead allowance (Va. Code 64.1-151.1 to -151.3); (3) funeral expenses (up to $3,500); (4) debts and taxes with preference under Federal law; (5) claims for medical expenses of last illness, up to $400 for each hospital and nursing home, $150 for each person furnishing services or goods; (6) debts due state; (7) debts due as trustee or fiduciary qualified within state and moneys collected for another; (8) debts due localities and municipal corporations of Commonwealth; and (9) all other claims (64.1-157). Each class is paid in full before subsequent classes. Persons in same class share ratably. Personal representative is not liable to claimants entitled to preference, for payments to subsequent class, when made without notice after 12 months from qualification. (64.1-158). Contingent claims or claims not finally passed upon at time payment is ordered are protected by reserving assets to meet them (64.1-174), and as to such assets they are preferred to superior claims for which no reservation was made. (64.1-175).

Real estate is asset for payment of debts if personalty is insufficient. (64.1-181). Creditor may sue heir or devisee in equity. (64.1-185).

Allowances and Exemptions.

In addition to benefits passing to surviving spouse or minor children by will, intestate succession, statutory share, surviving spouse and minor children, or surviving spouse if there are no minor children, are to receive reasonable family maintenance allowance in money during estate's administration for period of at least one year not to exceed $18,000. (Va. Code 64.1-151.4). Surviving spouse or minor children, in addition to family allowance, are entitled to select and exempt personal property from estate up to $15,000 in value. (Va. Code 64.1-151.2). See category 8 Debtor and Creditor, topics 8.06 Exemptions and 8.10 Homesteads. In addition to family allowance and exempt property, surviving spouse or minor children are entitled to $15,000 homestead allowance. This homestead allowance is in lieu of any share passing by will or intestate succession. (Va. Code 64.1-151.3). Surviving spouse and minor children have one year within which to elect to take family allowance, exempt property and homestead allowance. (Va. Code 64.1-151.5).

When Administration Unnecessary.

State, U.S., trustee of trust, personal representative of estate or employer of decedent owing him not over $15,000 or transfer of stocks by corporation organized under laws of any state provided value of such stock does not exceed $15,000 (64.1-123, -123.3), or bank in which decedent has on deposit not over $15,000 (6.1-71), may, after 60 days from death, pay to surviving spouse or, if none, to distributees, or, in case of trustee or personal representative to distributees of decedent or other person entitled thereto under state law, if there has been no estate qualification.

Small Estates.

When entire personal probate estate of decedent does not exceed $50,000, person entitled to such personal property by will or intestate succession may acquire it from whoever is in possession by presentation of his affidavit that: (1) Personal probate estate does not exceed $50,000, (2) 60 days have passed since decedent's death, (3) no application for appointment of personal representative has been granted or is pending, (4) any will has been duly probated, and (5) affiant is entitled to property and states basis of his entitlement. (Va. Code 64.1-132.2). Recipient of affidavit who pays, delivers, transfers or issues personal property in reliance thereon is discharged and released as if dealing with decedent's personal representative. (Va. Code 64.1-132.3).

Foreign and Ancillary Administration.

When decedent was a nonresident, an administrator or an administrator cum testamento annexo may be appointed. Surplus assets, after settling claims in the state, may be ordered paid to domiciliary representative. Domiciliary representative will be preferred in making a local appointment. (55 Va. 229).

Stock or certificates of debt of Virginia corporations may be transferred by foreign representative, if transfer officer has no knowledge of personal representative within state. (64.1-129).

Virginia real estate of nonresident decedent may be conveyed if will properly executed and conferring authority to convey has been probated in another state, authenticated copy has been proven in this state and ancillary administrator has qualified and signs and acknowledges deed. (64.1-149, -150).

Where a nonresident dies owning tangible or intangible personal property located in state, such property, if its value is less than $15,000 may, after 90 days from decedent's death, be delivered to personal representative qualified in decedent's domicile; if value is $15,000 or more, such delivery may be made after such 90 days and lapse of 30 days from completion of four weeks publication of notice of intention to transfer; provided in either case transferor has no knowledge of appointment of personal representative in this state. (64.1-130).

Tax on Wills and Administration.

See category 22 Taxation, topic 22.06 Estate Tax, subhead Wills and 22.01 Administration.

Revised Uniform Anatomical Gift Act.

See topic 13.16 Wills.

Uniform Fiduciaries Act not adopted.

Uniform Principal and Income Act adopted effective Jan. 1, 2000. (55-277.1 to -277.33). See topic 13.15 Trusts.

Uniform Prudent Investor Act adopted, effective Jan. 1, 2000. (26-45.3 to -45.14).

Uniform Transfers on Death Security Registration Act adopted. (Va. Code 64.1-206.1 thru Va. Code 64.1-206.8).

13.11 [RESERVED]

13.12 INTESTACY:

See topic 13.07 Descent and Distribution.

13.13 [RESERVED]

13.14 PROOF OF CLAIMS:

See topic 13.08 Executors and Administrators; category 5 Civil Actions and Procedure, topic 5.17 Pleading.

13.15 TRUSTS:

Rules of common law and equity apply generally. (100 Va. 169, 40 S.E. 655). Uniform Trust Code adopted, effective July 1, 2006. (55-541.01, et seq.).

Appointment and Qualification of Trustee.

Trustee appointed by deed in which qualification is not required may voluntarily qualify. (26-1.1). Trustee required by deed to qualify and testamentary trustees qualify before clerk, deputy clerk or court having probate jurisdiction. (26-46.1, -46.2).

Appointment of New Trustee.

Court having jurisdiction in equity to administer trust may on motion of any person interested or in suit to administer or enforce trust authorize resignation of trustee, or remove trustee and appoint another in his place whenever for any cause this appears proper. (26-1, 26-52).

When trustee named in will, deed or other writing dies or becomes incapable of executing trust because of physical or mental disability or confinement in prison, or, fails to meet statutory residency requirements, or declines to act, or if trustee is corporation and is adjudicated bankrupt, or loses its charter, or for any good cause shown, circuit court of county or city in which will was probated, or deed or other writing was or might be recorded, or if corporation, in which its principal office is located, or in which trustee resides may, on motion of party in interest remove or authorize resignation of incumbent and appoint substituted trustee. (26-48). Notice of motion for substitution of trustee must be given to interested parties. (26-50). Pending appointment of successor trustee personal representative of deceased sole trustee, or remaining trustee, if there were more than one trustee, may act. (26-51).

Bond.

After reasonable notice court may, on motion of party in interest, if it appears proper for the security of trust estate, require trustee to give bond with surety. (26-1). When will directs that trustee need not post bond, clerk will not require it unless requested by interested person. (26-46.1).

Duties and Powers of Trustee.

Trustee shall administer trust and invest trust assets in good faith, in accordance with its terms and purposes and interests of beneficiaries, and in compliance with Uniform Prudent Investor Act (§ 26-45.3, et seq.) and Uniform Principal and Income Act (§ 55-277.1, et seq.; 55-548.01-.17). Duty of loyalty applies. (55-548.02). Trustee must act impartially in investing, managing and distributing trust property. (55-548.03).

Powers of Surviving and Substituted Trustees.

Vacancy in trusteeship of noncharitable trust that is required to be filled is filled by: (1) Person designated by trust to act as successor trustee; (2) person appointed by unanimous agreement of qualified beneficiaries; or (3) person appointed by court. Vacancy in trusteeship of charitable trust that is required to be filled is filled by: (1) Person designated by trust to act as successor trustee; (2) person selected by charitable organizations expressly designated to receive distributions from trust; or (3) person appointed by court. Whether or not vacancy in trusteeship exists, or is required to be filled, court may appoint additional trustee or special fiduciary when necessary for administration of trust. (55-547.04). Trustee may petition court for administrative powers (Va. Code 64.1-57.1).

Rights of Beneficiary's Creditor or Assignee.

Generally, to extent beneficiary's interest is not subject to spendthrift provision, court may authorize creditor or assignee of beneficiary to reach beneficiary's interest by attachment of present or future distributions. (55-545.01). Spendthrift provision valid only if it restrains both voluntary and involuntary transfer of beneficiary's interest; exceptions apply. (55-545.02, .03). Special rules apply for certain claims for reimbursement for public assistance (55-545.03:1);

discretionary trusts (55-545.04); creditor's claim against settlor (55-545.05); and overdue distributions (55-545.06). Trust property is not subject to personal obligations of trustee, even if trustee becomes insolvent or bankrupt. (55-545.07). Specific rules govern revocable trusts. (55-546.01-.04).

Modification or Termination of Trusts.

In addition to methods of termination prescribed by §§ 55-544.11 through 55-544.14, trust terminates to extent revoked or expires pursuant to its terms, no purpose of trust remains to be achieved, or purposes of trust have become unlawful, contrary to public policy, or impossible to achieve. Proceeding to approve or disapprove proposed modification or termination under §§ 55-544.11 through 55.544.16, or trust combination under § 55-544.17, may be commenced by trustee or beneficiary. Settlor of charitable trust may maintain proceeding to modify under § 55-544.13. (55-544.10).

Combination and Division of Trusts.

After notice to qualified beneficiaries, trustee may combine two or more trusts into single trust or divide trust into two or more separate trusts, if result does not materially impair rights of any beneficiary or adversely affect achievement of purposes of trust. (55-544.17).

Nonresident Trustees.

Property held in trust for nonresidents may be transferred to nonresident trustees by order of court, and property may be sold and proceeds transferred. (26-60, -66).

Bequests and Devises to Inter Vivos Trusts.

See topic 13.16 Wills.

Sales.

File petition in court where estate is. (8.01-261).

Inventories and Accounts.

See topic 13.08 Executors and Administrators, subheads Inventories, Accounts. *Note:* Testamentary trustees qualified prior to July 1, 1993, may file accounts on annual basis. (26-17.6). Trustees qualifying thereafter must file on calendar year basis, due May 1. If will contains waiver of obligation to account, or if sole beneficiary of trust is also trustee, trustee will not be required to file accounts provided trustee within 90 days after qualification notifies adult beneficiaries in writing, provides each with copy of applicable will provisions, advises each of his right to require annual accounting, provides each with copy of code § 26-17.7. Notice (or statement that notice has been given) must be filed with Commissioner. Beneficiaries may demand annual accounting despite waiver provision. Trustee does not have to file inventory or accounting if trustee obtains written consent of all adult beneficiaries to whom income or principal could be distributed after providing those beneficiaries with documents and information specified supra and files those consents with Commissioner on or before date inventory or next required accounting would be due. (26-17.7).

Uniform Prudent Investor Act adopted, effective Jan. 1, 2000. (26-45.3 to -45.14). Certain government obligations, federally insured accounts, time deposits and certificates of deposit are conclusively presumed to be prudent investments. (26-40.01).

Compensation.

Trustee may receive reasonable expenses and fees. (26-30).

Self Dealing by Bank or Trust Company.

Purchase or sale of property between fiduciary and itself as trustee of trust or estate allowed if approved by court, consented to by all beneficiaries, approved by Commissioner of Financial Institutions, or authorized by instrument creating fiduciary relationship. Purchase or sale between fiduciary as trustee with itself as trustee of another estate or trust allowed if permissible fiduciary investment under Title 26, transaction fair to both and is not prohibited by any instrument. (6.1-24).

Uniform Custodial Trust Act adopted. (55-34.1 to -34.19).

Uniform Prudent Management of Institutional Funds Act adopted. (55-268.12-20).

Uniform Principal and Income Act adopted effective Jan. 1, 2000. (55-277.1 to -277.33). 2008 NCCUSL Amendments adopted effective July 1, 2009. Noncharitable unitrusts permitted under specified rules, and trustee permitted to determine internal income in order to preserve marital deduction. (55-277.4:1).

Uniform Fiduciaries Act not adopted.

Uniform Testamentary Additions to Trusts Act adopted. (Va. Code 64.1-73.1).

Gifts to Minors.

See category 14 Family, topic 14.10 Infants.

Accumulations.

No statutory limitation on accumulation of income.

Perpetuities.

See category 21 Property, topic 21.12 Perpetuities.

Pour Over Trusts.

See topic 13.16 Wills, subhead Bequests and Devises to Inter Vivos Trusts.

13.16 WILLS:

Any person may dispose by will of any estate or right capable of succession, except persons of unsound mind and unemancipated infants. (64.1-46, -47).

Testamentary Disposition.

No limitations.

Execution.

Will must be in writing, signed by testator or by some one in his presence and by his direction. Unless will is holographic, signature must be made or will acknowledged by testator, in presence of at least two competent witnesses, present at same time, who must subscribe will in presence of testator. (64.1-49).

Attestation.

No form of attestation is necessary. (64.1-49). Witnesses need not sign in presence of each other, but all witnesses must be present when testator signs or acknowledges will. (52 Va. 220). They must subscribe as witnesses, though in no particular form or place, and word witness need not appear. (80 Va. 293). While attestation must be by two witnesses, proof may be by one. (108 Va. 670, 62 S.E. 973).

Witnesses.

Except to prove handwriting of a holographic will (64.1-49), no person is incompetent as a witness in any case, because of interest (8.01-396, 64.1-51).

Holographic Wills.

If a will is wholly in handwriting of testator, neither acknowledgment nor witnesses are necessary. Proof of handwriting must be by at least two disinterested witnesses. (64.1-49). Signature must be intended as such. (115 Va. 160, 78 S.E. 600). Under certain circumstances, although document or writing added upon document was not executed in compliance with § 64.1-49, it shall be treated as if it had been executed in compliance if proponent of document or writing establishes by clear and convincing evidence that decedent intended it to constitute: (1) decedent's will, (2) partial or complete revocation of will, (3) addition to or alteration of will, or (4) partial or complete revival of his formerly revoked will or portion thereof. (Va. Code 64.1-49.1).

Living Wills.

Health Care Decisions Act recognizes right of any adult capable of making informed decision to make oral or written declaration to address any or all forms of health care in event declarant is later determined to be incapable of making informed decision. (54.1-2981, et seq.). This includes declaration instructing physician to withhold or withdraw life-prolonging procedures or to designate another to make treatment decision for him, in event such person is incapable of making informed decision. (54.1-2983). Life prolonging procedure includes hydration and nutrition. Terminal condition means condition from which to reasonable degree of medical probability there can be no recovery and death is imminent. Includes persistent vegetative state. (54.1-2982). Capacity is presumed, but agent can be designated to make health care decisions if declarant is determined to be incapable of making informed decision: such determination must be made by attending physician and second physician or licensed psychologist who is not otherwise involved in declarant's treatment. (54.1-2983.2). However, single physician may determine that declarant is again capable. (54.1-2983.2). Agent can be designated to make anatomical gifts in accordance with declarant's directions. (54.1-2984). Certain close family members can also make decision if there is no declaration. (54.1-2986). Written declaration must be signed by declarant in presence of two subscribing witnesses; oral declaration may be made by competent adult in presence of physician and two witnesses. (54.1-2983). Declarant can include statement in declaration authorizing agent to enroll declarant in approved medical research (54.1-2983.1) or directing specific procedure or treatment. (54.1-2984). Declaration may be revoked at any time by declarant. (54.1-2985, -2990). Agents have decision-making priority over relatives or other decision-makers, including declarant's guardian, and are obligated to make good faith effort to ascertain risks, benefits, and alternatives, and to base decisions on declarant's values and preferences to extent possible. (54.1-2986.1). If patient protests action, physician must not act unless action is medically appropriate, does not involve life prolonging procedures, and either is expressly authorized by declaration signed by physician to certify declarant's capacity at time, or if no declaration, is based on patient's values, previously expressed preferences, or best interests and has been affirmed as ethically acceptable by facility's ethics committee or two physicians not otherwise currently involved with patient. (54.1-2986.2). Advance Health Care Directive Registry established, pending final regulations to implement. (54.1-2994, et seq.). Additional requirements must apply for submission to registry. (54.1-2983, -2984). Physician who refuses to comply with declaration or treatment decision of person designated to do so shall make reasonable effort to transfer patient to another physician. (54.1-2987). One qualified to authorize withholding or withdrawal of life-prolonging procedures, or one qualified to so withhold or withdraw, is immune from criminal prosecution or civil liability if such person acts in accordance with Act. (54.1-2988). Act does not authorize mercy killing or euthanasia. (54.1-2990). Withholding or withdrawal of life-prolonging procedures from qualified patient is not suicide, and does not impair existing life insurance policy. (54.1-2991).

Nuncupative Wills.

A soldier in actual service or a mariner or seaman at sea may dispose of personal property by nuncupative will. (64.1-53).

Revocation.

If testator divorced a vinculo matrimonii, or his marriage annulled, all provisions in will which would pass property to divorced spouse or give divorced spouse any power of appointment or fiduciary capacity are revoked, and property or power passes as if divorced spouse had predeceased testator. (64.1-59). Revocation of entire will must be by subsequent will or codicil or writing to that effect executed as will, or by mutilation or destruction by testator, or by another in his presence and at his request, with intention to revoke. If testator executes will or codicil partially revoking or containing provisions inconsistent with former will or codicil, former will or codicil is revoked to extent of express revocation or inconsistency if later will or codicil becomes effective at testator's death. (Va. Code 64.1-58.1). When executed copy of will is traced to testator's custody and cannot be found at his death, presumption arises that it was destroyed by him with intent to revoke. (216 Va. 716, 222 S.E.2d 543). Except for divorce or annulment, no act or change of circumstance subsequent to execution, except revocation, prevents operation of will as to such interest as testator might dispose of at his death. (64.1-61).

Title of bona fide purchaser for value from devisee or personal representative under will is not affected by any other devise by testator in another will, unless such will be probated within one year after testator's death. Title of bona fide purchaser for value from devisee or personal representative also protected by later impeachment of testator's will(s) resulting in intestacy unless bill in equity filed within one year. (64.1-96).

Revival.

If provisions of will or codicil revoked solely by operation of law pertaining to divorce or annulment, and no subsequent will or inconsistent codicil, testator's remarriage to former spouse will revive such provisions. (64.1-59). Otherwise revoked will or codicil may be revived only by reexecution or by codicil executed as will, and then only to extent to which intention is shown. (64.1-60).

Probate Jurisdiction.

Circuit courts, and clerks and deputy clerks of such courts have jurisdiction of probate. (64.1-75). From ruling of clerk or deputy clerk, appeal of right lies to court (64.1-78), which hears matter de novo (114 Va. 285, 76 S.E. 327). Any such court may compel production of will. (64.1-83).

Venue.

Probate venue is in the county or city where decedent had mansion house or where decedent owned place of residence, or if none, real estate. If none of these, where he died or had any estate. (64.1-75).

Probate and Contest.

Probate may be ex parte (64.1-85), or inter partes (64.1-79 to -82). Persons in interest not parties to probate proceeding may file bill in equity to impeach or establish will within one year from ruling (64.1-88, -89), and parties residing out of state or served by publication and not appearing may file such bill within two years (64.1-90). In case of appeal from clerk to court, time runs from ruling of court. (64.1-89). Persons under disability have one year from removal of disability. (64.1-90).

Self-proved Wills.

Will may be self-proved by testator's acknowledgment and witnesses' affidavits made before officer authorized to administer oaths, under laws of Virginia or of state where acknowledgment occurred, and evidenced by attaching to will officer's certificate in form set out in statute. Will that has been acknowledged in foreign country before foreign service officer, diplomat or “person authorized by U.S. State Department to perform notarial acts” may be self-proved. (Va. Code 64.1-87.1, -87.2).

Records.

Probated wills must be recorded by clerk, indexed in General Index of Wills. Certified copies may be recorded in any county in which property is affected. Personal representative must cause copies to be recorded in each county wherein real property is affected. Record is notice to all persons. (64.1-94). Bona fide purchasers from heirs are protected unless will, or authenticated copy of foreign will, is filed for probate within one year of death, and afterwards admitted and recorded. (64.1-95).

Testamentary Additions to Trusts.

Unless one trustee is resident or entity authorized to do trust business in Virginia, trustee must file written consent designating resident agent to accept service. (Va. Code 64.1-73.1). See topic 13.15 Trusts.

Tangible Personal Property.

Testator may dispose of tangible personal property not otherwise specifically bequeathed in separate writing. Writing must describe items of property and their intended recipients with reasonable certainty and must be signed by testator, but writing need not satisfy will statute formalities. (Va. Code 64.1-65.1). Unless contrary intent is clearly set out in will, specific devise or bequest of real or personal property passes, subject to any mortgage, pledge, security, interest, or other lien existing at date of death, without right of exoneration. Some statutory exceptions apply. (Va. Code 64.1-157.1).

Bequests and Devises to Inter Vivos Trusts.

Pour over wills valid. (64.1-73, -73.1).

Uniform Testatmentary Additions to Trusts Act adopted. (64.1-73.1).

Testamentary Guardians.

See category 14 Family, topic 14.07 Guardian and Ward.

Legacies need not be paid for six months after qualification of executor, but after such time legatees may compel payment by giving refunding bond or on order to show cause. (64.1-177, -179).

Unless contrary intent appears from will, interest on pecuniary legacies runs from one year after date of testator's death. (64.1-68).

Unclaimed Legacies.

Uniform Disposition of Unclaimed Property Act adopted. (55-210.1 et seq.). Unclaimed legacies not exceeding $25 become part of residue unless contrary intention appears in will. (Va. Code 64.1-65.1[C]).

Advancement.

Lifetime gift not deemed full or partial satisfaction of devise or bequest unless so provided in will or testator declares such in contemporaneous writing or devisee or legatee acknowledges such satisfaction in writing. (Va. Code 64.1-63.1).

Ademption.

When conservator, guardian, committee, or agent under durable power of attorney sells specifically devised or bequeathed property or fiduciary receives proceeds of fire or casualty insurance as to such property, devise or bequest is deemed pecuniary amount. (Va. Code 64.1-62.3).

Lapse.

If devisee or legatee predeceases testator and is grandparent or descendant of grandparent of testator, children or their descendants of such devisee or legatee take devise or legacy unless will provides otherwise. If all takers of same degree of kinship from such legatee or devisee, they take equally. If takers of unequal degree, those of more remote degree take by representation. (Va. Code 64.1-64.1). Otherwise, if devise or bequest other than residuary devise or bequest fails, it becomes part of residue. (Va. Code 64.1-65.1).

Election.

Whether or not provision is made for husband or wife in spouse's will, survivor may, within six months claim elective share in spouse's augmented estate. (64.1-13). If election is made, survivor takes one-third of decedent's augmented estate if there are surviving children, or their descendants, otherwise one-half (not all as in case of intestacy). Augmented estate defined to include probate estate, certain transfers made by decedent during life, life insurance and retirement benefits. (Va. Code 64.1-16.1). See topic 13.07 Descent and Distribution.

Spouse Not Provided For.

If testator fails to provide for surviving spouse, spouse shall take equivalent to intestate share unless will or valid marital agreement indicate intentional omission. (Va. Code 64.1-69.1).

Issue Not Provided For.

If child born or adopted subsequent to execution of will, and be neither provided for nor mentioned therein, such child, or his descendants, takes as in intestacy, or, if less, share equal to largest share left to any child under will. Other beneficiaries contribute ratably to share of after-born child, but on death of such child, or his descendants, under age, unmarried, without issue, contributions are returned so far as unexpended. (64.1-70, -71). Children living when will is executed may be disinherited by mere failure to mention them therein.

Foreign Wills.

Wills of persons domiciled out of state at time of death are valid as to personal property if executed according to law of domicile. (64.1-53). Authenticated copy of will proved out of state, with certificate of probate, may be offered for probate in Virginia, if it relates to property within state. In absence of evidence to contrary, it will be presumed to have been duly executed and probated at domicile of testator, and will be admitted to probate as will of personalty. If it appears from such copy that it was so executed as to be valid will of lands in Virginia, it may be admitted to probate as will of real estate. Authenticated copy of will self-proved under laws of another state will be admitted in Va. as will of personalty and real estate. (64.1-92).

Uniform Statutory Rule Against Perpetuities Act adopted, effective July 1, 2000. (55-12.1 to 12.6).

Tax on wills and administration, see category 22 Taxation, topic 22.06 Estate Tax, subhead Wills and 22.01 Administration.

Simultaneous Death.

See topic 13.05 Death.

Testamentary Trusts.

See topic 13.15 Trusts.

Revised Uniform Anatomical Gift Act adopted. (Va. Code 32.1-291.1 to -291.25). May also designate agent to make anatomical gifts. (§ 54.1-2981 et seq.).

Uniform International Wills Act adopted. (Va. Code 64.1-96.2 to 96.11).

14 FAMILY

14.01 ADOPTION:

Any natural person who resides in Commonwealth or who has custody of child placed by child-placing agency of Commonwealth may file petition for leave to adopt minor child. If petitioner is married person or persons who were previously married who are permitted to adopt child under § 63.2-1201.1, petition must be that of both husband and wife or former spouses, but single petition is sufficient for concurrent adoption by same petitioners of two or more children who have same natural parents. Petition for adoption of child placed by child-placing agency must be filed in name by which child will be known after adoption but must include registration number of child's original birth certificate. (63.2-1227). Any natural person who is resident of Commonwealth may file petition for adoption of stepchild 18 years of age or older to whom he has stood in loco parentis for period of at least three months, or close relative (as defined in § 63.2-1242.1) of 18 years of age or older, or for adoption of any person 18 years of age or older who resided in home of petitioner for period of at least three months prior to becoming 18 years of age; or for adoption of any person 18 years of age or older, provided that person to be adopted is at least 15 years younger than petitioner, that petitioner and person to be adopted have known each other at least one year immediately prior to filing of petition. (63.2-1243).

Consent Required.

There must be filed with petition written consent signed under oath and acknowledged by: (1) Child to be adopted if 14 years of age or older (unless court finds best interests of child will be served by not requiring consent), and (2) birth mother and any man who is either acknowledged, adjudicated, or presumed father or who has registered with Putative Father Registry pursuant to § 63.2-1249 et seq.; (3) child-placing agency or local board having custody of child, with right to place for adoption, through court commitment or parental entrustment agreement; or (4) agency outside Commonwealth that is licensed to place children for adoption. (63.2-1202). No consent required of parent who has not contacted or visited child for six month period prior to filing petition for adoption; payment of child support alone does not constitute contact with child. (63.2-1202). When natural parents have entrusted child to licensed child-placing agency or local Board having custody of child, either birth parent may revoke entrustment agreement until child is ten days old or seven days have lapsed from execution of agreement. In addition, valid entrustment agreement is revocable by either birth parent if child has not been placed in physical custody of prospective adoptive parents. (63.2-1223). Prior to placing child for adoption, child-placing agency must counsel birth parents concerning intended disposition of child. (63.2-1224). Where court finds consent is withheld contrary to best interest of child, or if valid consent unobtainable, court may grant petition without such consent. (63.2-1203). However, court may not grant petition over protest of natural parent solely because of that parent's homosexuality. (222 Va. 736, 284 S.E.2d 799). Parent under 18 has legal capacity to consent. (63.2-1202). Consent of parent placing child for adoption directly shall not be valid unless child is at least in third calendar day of life at time consent is signed. (63.2-1233). If child is not in custody of licensed child-placing agency and both parents are deceased, court, after proper hearing, may grant petition without such consent. (63.2-1203).

In case of adoption of persons 18 or older, no consent of either parent required, and consent of person to be adopted always required. (63.2-1243).

Jurisdiction and Venue.

Circuit courts have jurisdiction of adoption proceedings in county or city in which petitioner resides, in city or county in which child-placing agency which places child is located, or county or city in which birth parents executed consent. (63.2-1201).

Petition must be joint in case of married persons, but if child to be adopted is legally child by birth or adoption of one of petitioners, that petitioner unites for purpose of indicating consent to adoption only. Petition must disclose circumstances under which child came to live and is living in home of petitioner. (63.2-1201). Consent, where required, must be filed with petition. (63.2-1202).

Proceedings.

Upon receiving petition and order of reference from circuit court, applicable agency shall make thorough investigation of matter and report in writing to circuit court within 60 days after petition and all exhibits thereto were forwarded. (63.2-1208). No investigation is required if child to be adopted has been placed for adoption by its parent or guardian and proper consent executed. (63.2-1238). Investigation must address financial, moral, physical and mental fitness of petitioner, physical and mental condition of child, why parents wish to have child adopted, whether parents have abandoned child or are morally unfit for custody, circumstances under which child is living with petitioner, whether child is suitable for adoption by petitioner and what fees petitioner has paid to assisting adoption agency. (63.2-1208, -1238). After entry of interlocutory order, there is probationary period of six months during which time child is visited at least three times, such visits to be made whenever practicable within six months period immediately following date of entry of interlocutory order. Written report must be made to court of findings made pursuant to visitations and copies made available to counsel. (63.2-1212). Court may omit probationary order and enter final order if: (1) Child is legally child by birth or adoption of one of petitioners; (2) one of petitioners is step-parent of child; (3) child has been placed in physical custody of petitioner by child-placing agency which certifies that child has resided in home of petitioner continuously for at least six months immediately preceding filing of adoption petition; (4) child has been in physical custody of petitioner continuously for at least three years immediately prior to filing of petition; (5) child has been legally adopted under laws of foreign nation and has been in physical custody of petitioner for one year and representative of child-placing agency has visited at least once in six months immediately preceding filing of petition; (6) child has been legally adopted under laws of foreign nation, been in physical custody of petitioner for six months immediately preceding filing of petition and been visited three times within six months by child-placing agency or welfare department with no fewer than 90 days between first and last visits and last visit has occurred within six months immediately prior to filing of petition; or (7) child brought into state from foreign country for purpose of adoption placement, has been in physical custody of petitioner for at least six months immediately prior to filing of petition and has been visited by agency representative three times within six-month period with no fewer than 90 days between first and last visits. (63.2-1210). When foster parent desires to adopt child previously placed in foster parent's home and: (1) Child has continually resided with foster parent for at least 18 months, and (2) natural parents' rights to child have been terminated, court shall accept petition and order investigation. (63.2-1229).

Court may approve post-adoption contact and communication agreement authorized under § 16.1-283.1 and filed with petition for adoption if court finds in best interest of child. Consent to post-adoption contact and communication agreement required by adoptive parents, birth parents and child if 14 years of age or older. (63.2-1228.1).

Decree.

Court, when satisfied with investigative report or home study that best interests of child will be promoted by adoption, enters interlocutory order of adoption and thereafter, subject to probationary period and final order, child is child of petitioner. (63.2-1209). Child placed for adoption should not be removed from adoptive home before interlocutory order is entered except with consent of adoptive parents, or upon order of domestic relations or circuit court of competent jurisdiction. (63.2-1207). Interlocutory order may be revoked at any time prior to final order. (63.2-1211, -1213). After consideration of report of Commissioner of Social Services final order of adoption may be entered. (63.2-1213). Probationary period and interlocutory order may be dispensed with in certain cases. (63.2-1210). Where probationary period is omitted (see supra, subhead Proceedings) final order may be entered at time interlocutory order would otherwise be entered. (63.2-1213).

Name.

Name of child changed if requested in petition and if court finds in best interest of child. (63.2-1209). In case of person over 18, entry of final adoption order shall be deemed as meeting statutory requirement for voluntary name change. (63.2-1243).

Effect of Adoption.

Upon entry of interlocutory order, or final order where no interlocutory order is entered, adopted child is for all purposes child of person adopting him unless and until order is revoked, and shall be entitled to all rights, privileges and subject to all obligations of child or such person. (63.2-1215). For purposes of determining property and inheritance rights adopted person is child of adopting parent and not biological parents, except adoption by spouse of biological parent has no effect on relationship between child and either biological parent. (64.1-5.1). Adopted child retains right to inherit from biological parents, but biological parents lose right to inherit from child once their parental rights have been terminated. (64.1-5.1).

Setting Aside Adoption.

No attack, direct or collateral allowed six months after entry of final order of adoption. (63.2-1216).

14.02 ALIMONY:

See topic 14.06 Divorce.

14.03 COMMUNITY PROPERTY:

System does not obtain.

14.04 DESERTION:

See topics 14.06 Divorce, Husband and Wife; category 13 Estates and Trusts, topic 13.07 Descent and Distribution.

14.05 DISSOLUTION OF MARRIAGE:

See topic 14.06 Divorce.

14.06 DIVORCE:

Divorce from bond of matrimony may be decreed for sodomy or buggery committed outside marriage, for adultery, for conviction of either party of felony and confinement for more than one year, for cruelty (after one year of separation for such act), and after one year for willful desertion, after one year of separation without any cohabitation, or after six months of separation without cohabitation, if there are no minor children. (20-91). (See subhead Divorce from Bed and Board, infra.)

If suit on grounds of adultery, sodomy or buggery, divorce will not be granted if parties voluntarily cohabited after knowledge of act, if act occurred more than five years before institution of suit, or if such act was committed by procurement or connivance of party alleging it. (20-94).

Insanity of guilty party after commencement of desertion is no defense. (20-93).

It is no bar to divorce on ground of separation that either party was adjudged insane before or after period of separation commenced. (20-91).

Divorce from bed and board may be decreed for cruelty, reasonable apprehension of bodily hurt, willful abandonment or desertion. (20-95). If decree is for perpetual separation, effect is same as if decree for divorce from bond of matrimony, except that neither may remarry. (20-116).

Decree from bed and board may be revoked on submission to same court which entered decree of order endorsed by both parties or counsel (20-120) or merged into decree for divorce from bond of matrimony, where separation has been continuous and reconciliation has not occurred and is improbable, on application of either party after one year has elapsed since event that gave rise to divorce or parties have entered separation agreement, six months have elapsed and there are no minor children born. (20-121). Injured party does not need to give notice of application, but guilty party must give ten days notice. (20-121).

Residence.

One of parties must be domiciled in and a bona fide resident of state when suit is commenced and must have been such for at least six months preceding suit. (20-97).

If member of Armed Forces of U.S. has been stationed or resided in state and has lived with his or her spouse for period of six months or more in state preceding separation between such parties and such member or spouse continue to live in state until suit is commenced such member and spouse shall be presumed to be domiciled in and to have been bona fide resident of state during such period. (20-97). If member has been stationed in any territory or foreign country at time of or immediately preceding suit and was domiciled in state for period of six months or more preceding being stationed in such territory or country, such member is presumed domiciled in and bona fide resident of state during such period. (20-97).

Jurisdiction.

Circuit court has divorce jurisdiction. (20-96).

Appeals are to Court of Appeals. (17.1-405). Methods of trials and appeals governed by applicable statutes and Rules of court.

Dismissal of divorce action on jurisdictional grounds is not adjudication of merits and does not bar subsequent suit for custody and support. (221 Va. 827, 273 S.E. 2d 564).

Venue is in county or city where parties last cohabited, or, at option of plaintiff, where defendant resides, or, in cases in which an order of publication may be issued against defendant under 8.01-316, where plaintiff resides. (8.01-261.19).

Practice.

Process or notice shall be served in state by methods in § 8.01-296 (see category 5 Civil Actions and Procedure, topic 5.20 Process) or on nonresident by any person authorized to serve process under § 8.01-320. (20-99). Defendant may accept service by signing proof of service before officer authorized to administer oaths. (20-99.1:1). Service may be accepted or waived by voluntary execution of notarized writing or by general appearance in court, or by defendant filing answer in suit. (20-99.1:1). Service may be obtained by publication where defendant is nonresident or cannot be found. No order of publication must be required where plaintiff determined indigent by court pursuant to § 19.2-159; order must be mailed to defendant at his last known address and posted on main entrance of circuit courthouse in locality wherein suit filed. No depositions may be taken until ten days after publication or mailing and posting. (20-104). Orders of publication in any two or more suits for annulment or divorce may be combined into a single order. (20-104.1). Bills may not be taken as confessed and cause is heard independent of any admissions.

Final decree may be entered immediately on determination of issues.

Alimony.

In cases involving spouse who seeks spousal support after having separated from his spouse, court may enter any appropriate order to protect welfare of spouse seeking support. Pending suit, court may order payment for maintenance of spouse and children, including health care coverage or cash medical support or both, and to enable spouse to conduct suit and may prevent either spouse from restraining personal liberty of other. Formula for determination of pendente lite spousal support provided in § 16.1-278.17. Court may make orders to preserve estate of man or woman to meet decree or require security thereof. Court may exclude one party from family dwelling if there is reasonable apprehension of physical harm to other party. In addition, court shall order parties with minor child or children whose custody or visitation is contested to attend educational seminars or programs conducted by qualified person or organization approved by court, on effects of separation or divorce on minor children, parentive responsibilities, options for conflict resolution and financial responsibilities. Fee for such seminar or program cannot exceed $50. Court may grant exemption from attendance for good cause shown. Other than statements or admission of criminal activity or neglect or child abuse or neglect, no statement or admission made in seminar or program is admissible in evidence in any subsequent proceeding. (20-103).

On decreeing dissolution, court may make further decree concerning maintenance and support of parties. (20-107.1). Court may also make further decree concerning custody, or visitation and support of minor children of parties as provided in 20-124.1 et seq. (20-107.2). Court has no authority to decree support of children or spouse to continue after death of person ordered to pay. (20-107.1, -124.2). In determining support and maintenance, following are considered: (1) obligations and needs and financial resources of parties, including but not limited to income from all pension, profit sharing or retirement plans, of whatever nature, (2) standard of living established during marriage, (3) duration of marriage, (4) age and physical and mental condition of parties and any special circumstances of family, (5) extent to which age, physical or mental condition or special circumstances of any child of parties would make it appropriate that party not seek employment outside home, (6) contributions, monetary and nonmonetary of each party to well-being of family, (7) real and personal property interests of parties, (8) provisions made with regard to marital property under equitable distribution, § 20-107.3, (9) earning capacity, including skills, education and training of parties and present employment opportunities for persons possessing such earning capacity, (10) opportunity for, ability of, and time and costs involved for party to acquire appropriate education, training and employment to obtain the skills needed to enhance his or her earning ability, (11) decisions regarding employment, career, economics, education and parenting arrangements made by parties during marriage and their effect on present and future earning potential, including length of time one or both of parties have been absent from job market, (12) extent to which either party has contributed to attainment of education, training, career position or profession of other party, and (13) such other factors, including tax consequences to each party, as are necessary to consider equities between parties. (20-107.1). In any proceeding on issue of determining child or spousal support, court shall consider all relevant evidence presented, however there is rebuttable presumption that child support should be awarded in amount set forth in guideline in 20-108.2. Liability for child support shall be determined retroactively from date judicial or administrative proceeding was commenced provided complainant exercised due diligence in serving respondent. (20-108.1). In determining amount of child support, income is not imputed to custodial parent who is voluntarily unemployed or underemployed if child is not in school and child care services are not available. Court shall also consider any written agreement between parties which set out amount of child support. Child support payments received by parent for benefit of child in custody shall not be subject to garnishment. (20-108.1). No permanent support for spouse will be awarded if spouse found to have committed adultery. However, notwithstanding such finding, court may award support if failure to do so causes manifest injustice. (20-107.1). Court in its discretion may award periodic and/or lump sum support payments. (20-107.1, -107.3). Periodic payments may be of specified duration ("rehabilitative alimony"). (20-107.1). Entry of decree for spousal or child support shall constitute final judgment for any sums in arrears, and shall include amount for interest at judgment rate (unless obligee waives collection of interest in writing submitted to court) and may include reasonable attorneys' fees if total arrearage for support and maintenance, excluding interest is equal to or greater than three months of support and maintenance. (20-78.2). Decree may reserve right of Court to award spousal support in future, with rebuttable presumption that reservation will continue for period equal to 50% of length of time between date of marriage and date of separation. (20-107.1). Decree concerning care, custody and maintenance may be revised on application of either party as circumstances of parents or needs of children may require. Upon petition of either party court may alter support to be paid to spouse as long as contract between parties does not prohibit change. Unless otherwise provided for by contract, support for spouse ceases on death or remarriage. Valid agreement between parties concerning support and maintenance may be incorporated in court decree. (20-107.1 to -110). See subhead Contract for Support, infra.

Court may require security for compliance with order or decree for support, maintenance or alimony. (20-113, -114).

See also category 5 Civil Actions and Procedure, topic 5.15 Judgments, subhead Liens.

Changing Support/Contract for Support.

Decree directing payment of suit money, alimony, etc., must be in accordance with stipulation or contract if filed before entry of final decree. Court, upon motion of either party, shall modify amount or duration of support. Payments to former spouse to cease on remarriage or death, unless contract otherwise specifically provides. Upon order of court based on clear and convincing evidence that spouse receiving support has been habitually cohabiting with another person in marriage-like relationship for one year or more commencing on or after July 1, 1997, court may decrease or terminate spousal support unless otherwise provided by contract or if obligee spouse can prove that such reduction or termination of support would be unconscionable. Provisions apply to all orders or decrees for spousal support, regardless of date of suit, date of entry of order or decree, or date of petition for modification of support. Court may consider modification of defined-duration alimony upon petition of either party filed within time covered by award (provisions apply only to suits for alimony and suits for initial alimony filed on or after July 1, 1998, and suits for modification of alimony arising from suits for alimony filed on or after July 1, 1998). (20-109). Agreements not filed may be incorporated into decree dissolving marriage or by separate decree at discretion of court. (20-109.1).

Division of Property of Spouses.

Division of property is by process of equitable distribution. (20-107.3). Court may grant monetary award, payable as lump sum or in installments. In determining amount of award, court shall consider both parties as having interest in marital property. (20-107.3).

Property Rights.

Contingent rights of either spouse in property of other are extinguished by divorce from bond of matrimony. Tenancy with right of survivorship is terminated and becomes tenancy in common. (20-111). Any revocable beneficiary designation providing for payment of death benefit to former spouse is revoked upon divorce or annulment. Payment shall be made as if former spouse predeceased decedent. Former spouse personally liable where federal law preempts § 20-111 and payment of death benefit actually received when otherwise not entitled. (20-111.1).

Marital property includes real, personal, tangible or intangible property acquired during marriage and not considered separate property including that portion of pensions, profit sharing or retirement plans acquired during marriage. (20-107.3). Marital property is presumed to be jointly owned unless shown otherwise. Court may determine that any given property is part separate and part marital in nature. In addition, court may apportion marital debts between parties and may direct payment of percentage of any personal injury or workers' compensation recovery of either party which is attributable to lost wages. (20-107.3). Circuit court may provide equitable distribution of property of parties of divorce in foreign jurisdiction. (20-107.3).

Premarital Agreement Act (20-147 to -155) enacted to govern agreements entered after July 1, 1986 (20-147). Prospective spouses may enter premarital agreement regarding support, disposition of property and other matters upon separation, marital dissolution, death or other event. (20-150). Married persons have same right to execute marital agreements with each other and they are effective immediately upon their execution. (20-155). Agreement must be in writing and signed by both parties but is enforceable without consideration. (20-149).

Effect on Will.

See category 13 Estates and Trusts, topic 13.16 Wills, subhead Revocation.

Change of Name.

Court must allow either party to resume former name. (20-121.4).

Children.

Pending suit (20-103) and in final decree court may make order as it deems expedient concerning custody or visitation and support of minor children. (20-107.2). In determining best interests of child for purposes of awarding custody or visitation, court must consider as factor any history of sexual abuse. (20-124.3). Both pending suit and in final or subsequent decrees, court must use statutory guideline tables to calculate child support. (20-103, -108.1, -108.2). Child support calculated from statutory guideline tables is correct as rebuttable presumption. (20-108.2). Court at its discretion, may incorporate any agreement between parties concerning custody and maintenance of children into its final decree or into separate decree. (20-109.1). Final decree may be revised in this regard from time to time. (20-108).

Support for child over age of 18 will continue to be paid if child is full-time student, living at home of parent receiving support, and not self-supported. Such support shall continue until child reaches age of 19 or graduates from high school, whichever occurs first. (20-124.2). Court may also order continuation of support for any child over age of 18 who is disabled, unable to support himself, and resides in home of parent seeking support. (20-124.2). Court may order party to execute forms to grant other party right to take federal and state income tax dependency exemption for any child. (20-108.1).

Reconciliation.

Reconciliation of parties after signing of separation or property settlement agreement abrogates agreement unless otherwise expressly stated in agreement. (20-155).

Remarriage.

On dissolution of bond of matrimony, if cause arose after marriage and objections are noted, court shall decree that neither party shall remarry pending perfection of appeal. Marriages violating any prohibition against remarriage are not invalid if parties resided together until July 1, 1960. (20-118).

Annulment of Marriage.

See topic 14.11 Marriage.

Revised Uniform Reciprocal Enforcement of Support Act repealed.

Uniform Interstate Family Support Act has been adopted. (20-88.32 to 20-88.82).

Uniform Child Custody Jurisdiction and Enforcement Act has been adopted. (20-146.1 to -146.38).

14.07 [RESERVED]

14.08 GUARDIAN AND WARD:

Circuit Courts have general jurisdiction over guardians and wards, accounts, removal of guardians, appointment of new guardians, custody and tuition of wards and preservation and investment of their estates. (31-14).

Natural Guardians.

Natural guardians of person are father and mother of unmarried minor child if living together, or survivor, or parent who has not abandoned family. (31-1).

Appointment.

A testamentary guardian, for the testamentary estate only, may be appointed by will by either parent of infant. (31-2). Such appointment fails if appointee declines or fails to qualify within six months. (31-3).

A general guardian for an infant may be appointed by either parent by will, or by circuit court or clerk thereof, of county or city where infant resides, if resident, or where infant has estate if nonresident. (31-2, -4). If infant is over 14 and nominates guardian approved by court, such person is appointed. In other cases court selects. (31-5). Only one qualification and one bond is necessary where one person qualifies upon estate of wards who are members of same family. With some exceptions every guardian must give bond with security. (31-6). Trust companies may qualify. (6.1-17).

Where infant is entitled to a fund or to tangible or intangible personal property, not more than $15,000 in value, court may direct payment or delivery directly to infant without intervention of guardian or, if infant is of tender years, to parent for his maintenance or if no living parent, then to be applied to maintenance by other means. Amount less than $15,000 may be distributed by commissioner of accounts in like fashion. (8.01-606).

Curators.

Until a guardian shall give bond, or while there is no guardian, the court may appoint a curator, who qualifies and has the same powers, duties, and responsibilities as a guardian. (31-7).

Qualification.

Guardian must give bond with security unless, in case of testamentary guardian, will otherwise directs and judge or clerk deems it unnecessary. (31-6). Where estate does not exceed $15,000 court may dispense with security. (26-4).

Nonresident may qualify in Virginia, and act as guardian of person and property if they appoint resident as registered agent and post surety. (26-59).

Powers, Duties and Liabilities.

A guardian, except a testamentary guardian and guardian of person only, has custody of ward and possession, care and management of estate, and must provide for maintenance and education from proceeds, unless minor has parent under duty to support who is capable of providing support. (31-8, -8.1). Guardian has powers set forth in § 64.1-57 and as follows: (i) ratify or reject contracts entered into by ward; (ii) make payments to or for benefit of ward; (iii) maintain insurance; (iv) execute instruments and manage ward's estate; and (v) borrow funds. Court may impose limitations on guardian before sale of real estate, upon report to, and findings of, Commissioner of Accounts. Powers may be disclaimed. (31-14.1). Guardian may be allowed compensation for services rendered with regard to real estate owned by ward. (26-30).

A guardian has reasonable time not exceeding four months in which to invest funds which should be invested, unless instrument under which guardian acts expressly provides otherwise. (26-39). Guardian is liable for losses caused by negligence or improper conduct (26-5), may resign, after properly accounting (26-46).

Guardian may move court to approve compromise of claim for personal injuries to ward. Notice must be given to interested parties. (8.01-424).

Investments.

See category 13 Estates and Trusts, topic 13.15 Trusts.

Gifts to Minors.

See topic 14.10 Infants.

Termination of Guardianship.

Trust terminates as to a ward when he becomes 18. Testamentary guardianship terminates at end of period set out in will. (31-9).

Inventories and Accounts.

See category 13 Estates and Trusts, topic 13.08 Executors and Administrators. Guardian's first account covering transactions within first four months due to commissioner of accounts within six months of qualification. Accounts for each succeeding 12-month period due within 16 months of preceding accounting period. (26-17.4).

Incapacitated Persons.

On petition of any person, notice to such person and at least three specified family members, appointment of guardian ad litem, guardian may be appointed for person who, because of impaired health or physical disability, has become mentally or physically incapable of taking care of his person or property. (37.2-1002). If need for guardian established by clear and convincing evidence, court shall appoint suitable person who may be spouse of incapacitated person. (37.2-1007). On motion of Veterans Administration or any person in interest, trustee may be appointed for incompetent ex-service persons or their beneficiaries. (37.2-1008). If incapacitated person is indigent, court may waive fees and costs of proceedings to appoint guardian. (37.2-1008).

Foreign Guardians.

If infant or insane person entitled to property or money in Commonwealth is nonresident, his guardian or committee qualified in state of his residence may file petition in circuit court of jurisdiction wherein property or money is located to remove property or money to infant's residence. (26-60). When proceeds of sale of lands of nonresident infant or incapacitated person are invested or required to be invested under direction of a court, on petition of guardian, committee or trustee appointed or qualified in state of residence, the court, with consent of persons residing in Virginia who would be infant's or incapacitated person's heirs, may order removal of such proceeds. (26-61). Notice of application for removal must be published once a week for four successive weeks in newspaper and documentary evidence must show that foreign guardian or committee has given sufficient bond with surety in state of qualification unless it be shown that such state does not require bond. (26-62, -63).

Standby Guardians.

Parent who is or may become chronically unable to care for minor child as result of illness, injury or disease may designate standby guardian to temporarily assume duties of guardian of child without terminating parental rights. (16.1-349-355). Only parents diagnosed by physician in writing as afflicted with progressive or chronic condition qualify. Designations must be in writing meeting requirements of § 16.1-351 and signed by parent. (16.1-349). Petition for approval of standby guardian with or without qualifying designation may be made by any person to juvenile and domestic relations district court where child resides. Petition must meet listed requirements of § 16.1-350, including notice to parents and summons to child if child is over 12 years old. (16.1-350).

Uniform Fiduciaries Act not adopted.

Uniform Probate Code not adopted.

14.09 HUSBAND AND WIFE:

Married woman may hold, use and dispose of property as though unmarried and her husband's marital rights shall not entitle him to possession or use, or to rents, issues and profits nor shall wife's property be subject to debts or liabilities of husband. (55-35). Curtesy is abolished except if interest vested as of Jan. 1, 1991, or creditor or other third party has interest in real property that would be affected by abolition. (64.1-19.2). She may contract, or be contracted with, sue or be sued, as though unmarried. For torts she is entitled to recover entire damage. (55-36). Common-law doctrine of interspousal immunity in tort has been abolished in Virginia. (8.01-220.1). However, spouse not liable for any contract of other spouse, whether before or after marriage. (55-37). Doctrine of necessaries applies equally to both spouses except where permanently living separate and apart, but in no event shall create liability between spouses. (55-37). No lien arising out of judgment under this section shall attach to judgment debtors' principal residence held by them as tenants by entireties. (55-37). Either spouse may sue other with respect to property rights. (141 Va. 146, 126 S.E. 194).

Agency.

Marriage relationship alone does not create agency, but can be inferred from facts and circumstances. (203 Va. 394, 124 S.E.2d 16). Wife may appoint husband agent. (55-43).

Equitable separate estates no longer exist, and any language and any writing, whenever executed, which purports to convey real property as equitable separate estate has no legal or equitable significance after Jan. 1, 1991, except as provided in § 64.1-19.2. (55-47.01).

Conveyances.

Conveyances by husband and wife pass all interest of spouse, but covenants or warranties in deed conveying spouse's land are binding on spouse only when expressly so stated. When husband and wife sign and deliver writing purporting to convey any estate, real or personal, such writing whether admitted to record or not shall (i) if delivered prior to Jan.1, 1991, operate to convey from spouse right of dower or curtesy in real estate embraced therein, and (ii) if delivered after Dec. 31, 1990, operate to manifest spouse's written consent or joinder to transfer embraced therein. (55-41). No act by husband alone can deprive wife or her heirs of any right to any land that is inheritance of his wife. (55-39). Valid power of attorney authorizing execution of deed or other writing may be executed by married woman but must be executed and acknowledged in same manner as deed. (55-43).

Desertion and Nonsupport.

Spouse without cause deserting or failing to support his or her spouse is guilty of misdemeanor. (20-61). Proof of desertion is prima facie evidence of willfulness. Proof of nonsupport of family for 30 days or that spouse has left other spouse or children in necessitous circumstances is prima facie evidence of intention to abandon. (20-81). Provision is made for extradition. (20-84). Proceedings are by petition (20-64, -65) unless affidavit is made of reasonable cause to believe defendant is about to leave jurisdiction with intent to desert spouse or child, when any justice may issue warrant of arrest (20-70). Temporary and permanent orders for support may be made and violation is punishable as contempt. (20-71 to -79). Upon conviction, spouse may be fined, jailed, or both, or subjected to either work release employment or performance of public service work. (53.1-60, 20-115). Payment for his labor made for benefit of spouse or child. (20-61, -63). Order may be entered for payment of certain amount or percentage of earnings for support. Bonds may be required to make payments as ordered. (20-72). Every initial order entered on or after July 1, 1995 directing person to pay child support shall include provision for immediate withholding from income of obligor for amount of support order, unless alternative arrangement is agreed upon or court finds good cause for not imposing immediate withholding. (20-79.2). Department of Social Services may initiate reviews of amount of support ordered by any court, and may request court to modify support order due to material change in circumstances. Material change in circumstances occurs when difference between existing child support and amount which results from application of guidelines is at least 10% of existing child support award but not less than $25 per month. (20-60.3; 63.2-1921). Appeal lies as in other cases, but any order remains in effect until modified. (20-68). In any suit for divorce or suit for support and maintenance, court may, in any decree of divorce, final decree for support and maintenance, or subsequent decree in such suit, transfer to juvenile and domestic relations district court all matters pertaining to alimony, maintenance, support, care and custody of children. Jurisdiction of court which has entered any order for support and maintenance of spouse or children shall cease and order become inoperative upon entry of decree in divorce suit by circuit court with respect to any matter incorporated in decree. (20-79). But support order continues in effect if divorce decree is silent as to support. (212 Va. 623, 186 S.E.2d 76). Either party may request provision in divorce decree for support and maintenance from spouse or for support, care or custody of children in accordance with 20-124.1 et seq. or for counsel fees and costs. (20-79). Only Virginia divorce decrees nullify Virginia support orders. (320 F. Supp. 929).

Uniform Interstate Family Support Act in effect. (20-88.32 to 20-88.82). Jurisdiction is in juvenile and domestic relations district courts. (20-88.33).

Community Property.

System does not obtain.

14.10 INFANTS:

An infant is a person under 18 years of age. (1-204). Although age of majority is 18, no person may buy or consume alcohol unless 21. (4.1-304).

Contracts of infants are voidable, subject to making restitution where possible, as at common law (82 Va. 769, 1 S.E. 113), except for following statutory provisions. They may become depositors in banks and give valid checks, orders or receipts. (6.1-74). If not less than 15, minor may insure his own life, with limitations as to beneficiaries, provided that if living with parents, one parent approved original application in writing. Premiums paid may not be recovered, but note or other evidence of debt for first year's premium is not protected. Minor may give valid discharge of such contract or create liens thereon for money borrowed, premiums or interest, provided beneficiary, if not less than 15, joins in discharge of lien. (38.2-3105). On or after Jan. 1, 1991, infant spouse, whether married before or after Jan. 1, 1991, may release marital rights in other spouse's real or personal property by writing in any contract, deed or other instrument executed by other spouse or by commissioner of court. (55-42.1). Curtesy is abolished except if interest vested as of Jan. 1, 1991, or creditor or other third party has interest in real property that would be affected by abolition. (64.1-19.2). Minor transacting business as trader is barred from pleading infancy unless notice that he is minor is given by conspicuous sign kept posted at place of business and by advertisement for two weeks in local newspaper. (8.01-278). Minor is liable for repayment of loan for college education if institution has been approved by certain educational associations. (8.01-278).

Actions.

A minor may sue by next friend. Either or both parents may sue on behalf of minor as next friend. (8.01-8). Guardians ad litem should be appointed for infant defendants, attorney-at-law if one is available (8.01-9), but appearance by attorney is not ground for arrest or reversal of judgment in favor of and not prejudicial to infant (8.01-678). Court shall require bond of any guardian for estate of minor. (31-6).

A compromise approved by the court in litigation in which an infant is a party, is open to attack by infant only for fraud. (8.01-424). Decrees or orders affecting infants may be attacked by them through next friend before majority. (95 Va. 721, 30 S.E. 372). Guardian ad litem may appeal, and if he does not, infant may by next friend. (107 Va. 435, 59 S.E. 413).

Parental Responsibility.

Parents are liable for torts of their children's willful destruction of public or private property up to $2,500. (8.01-43, -44).

Sale of infants' lands is by proceedings in equity (8.01-68, -69, -261), and proceeds are invested by direction of court, or turned over to fiduciary under bond, or if not more than $4,000 may be turned over to infant's parent(s) by direction of court. (8.01-76). Similar disposition is made of proceeds over $2,500 of infant's share in partition. (8.01-85).

Support of Minor.

Support proceedings may be instituted by verified petition, filed by spouse, child, probation officer, law-enforcement or welfare officer, or any person having knowledge of facts. (20-64). Jurisdiction lies in juvenile and domestic relations district courts. (20-67). See topic 14.06 Divorce, subhead Jurisdiction. Order for support remains in effect until reversed or modified by appeal. (20-68). Any spouse who without cause deserts or willfully neglects to support his child under 18 is guilty of misdemeanor unless child is eligible for and receiving certain state or federal aid. (20-61). Commissioner of Department of Motor Vehicles may enter into agreement with

Department of Social Services where DMV may suspend or refuse to renew driver's license of any person if that person is delinquent in payment of child support by 90 days or for $5,000 or more or has failed to comply with subpoena, summons or warrant relating to paternity or child support. (46.2-320). Every initial order entered on or after July 1, 1995 directing person to pay child support shall include provision for immediate withholding from income of obligor for amount of support order, unless alternative arrangement is agreed upon or court finds good cause for not imposing immediate withholding. (20-79.2). Parent and child relationship between child and man may be established prima facie by proof of voluntary written statement of father and mother made under oath acknowledging paternity, or scientifically reliable genetic tests, including blood tests, which affirm at least 98% probability of paternity. Person making acknowledgment of paternity may rescind within 60 days of signing unless person rescinding was party to action in which order has been entered relating to child. (20-49.1). Standard of proof in any action to establish parentage shall be by clear and convincing evidence and relevant evidence on issue of paternity shall be admissible, including scientifically reliable genetic tests including blood tests. (20-49.3, -.4). If in any legal proceedings man voluntarily testifies under oath or affirmation concerning child's paternity, court may require that he complete acknowledgment of paternity form that shall be admissible against him in any paternity proceeding. (20-49.5). Determination of paternity made by another state shall be given full faith and credit in Virginia for purposes of establishing duty to pay child support. (20-49.8).

Uniform Gifts to Minors Act.

Repealed.

Virginia Uniform Transfers to Minors Act adopted. (31-37 to -59). Age of majority under Act is 18, unless transferor specifies that Act apply until age 21 (see § 31-45D).

Uniform Securities Ownership By Minors Act not adopted.

Adoption.

See topic 14.01 Adoption.

14.11 MARRIAGE:

Age of consent: 18 for both males and females. Minimum age of marriage with consent of parent or guardian is 16, provided that in event of pregnancy, where either party under 16, clerk may issue license on doctor's certificate that female is pregnant or has been pregnant within nine months previous to examination and consent of parent or guardian, or of judge if person under age is ward of state. (20-48).

Consent Required.

Persons under 18, unless previously married or emancipated must have consent of father, mother or guardian. Emancipated minor does not need parental, judicial or other consent to marry. (16.1-334, 20-49). Consent must be given personally before officer issuing license or judge, or in writing signed or sworn to in presence of witness who must subscribe, or sworn to and acknowledged. If there is no person to consent, court may authorize license. If person applying for license is under 18 and ward of state as delinquent, dependent, or neglected, consent must be by judge with jurisdiction over person's custody. If such person has been committed to Department of Youth Services or any organization approved by it for custody, consent must be in writing, attested or sworn, by Director of Dept. of Youth Services, some person authorized by him, or principal executive officer of such organization. (20-49).

License.

Every marriage must be under a license. (20-13). Licenses may be obtained at any circuit court regardless of person's county or city of residency. Marriage under license, solemnized by person professing to be authorized, may not be deemed void for want of such authority, or for any defect of license, if otherwise lawful and consummated with full belief of persons married or either of them of its legality. (20-31). Licenses are issued by clerk or deputy clerk of circuit court of county or city in which either applicant resides, or if neither is resident, by clerk or deputy clerk of any court authorized to issue marriage licenses in state. If these officers are unable to issue license, judge of proper court may do so. (20-14). Any person authorized to issue licenses must provide each applicant with information on AIDS and tests available. (20-14.2). License void unless solemnization of marriage occurs within 60 days. (20-14.1). Parties desiring license need not appear in person, but must give information required to complete marriage record either under oath before clerk issuing license or by affidavits made by them and filed with clerk. (20-16).

With license must be issued two certificates containing vital statistics. Person performing ceremony must, within five days, return license, certificates, and his own certificate of time and place of marriage to clerk. If said person dies or is incapacitated, issuing official, with court order, may complete certificate. (20-16, 20-20 to 20-22, 32.1-267).

Except as above stated, there is no statutory requirement of any delay between application for and issuance of license, nor between issuance of license and marriage ceremony.

Marriage register must be kept by clerk of court in which he must index names of both parties and file original license and certificate. (20-20). Clerk may correct marriage records established in his office upon application under oath and submission of evidence deemed by clerk to be sufficient and shall correct such records upon order of court in which marriage record was established. (20-16.1).

Record.

See category 10 Documents and Records, topic 10.04 Records, subhead Vital Statistics.

Ceremonial Marriage.

Every marriage must be solemnized. (20-13). Marriages may be solemnized by ministers authorized by circuit court, which may also authorize other persons, residents of their districts. All appointees, other than ordained ministers and retired judges or justices, must give surety bonds for $500. (20-23, -25). Marriages between members of religious society without ordained ministers may be solemnized according to practice of such society. Such society must appoint one member to complete certificate of marriage, and such person must give surety bond for $500. (20-26).

Common law marriages are void if celebrated in Virginia (20-13); common law marriages are recognized if contracted in a state where they are valid (20-37.1).

Proxy Marriages.

Not authorized.

Marriages by Written Contract.

Not authorized.

Antenuptial Contracts.

See topic 14.06 Divorce, subhead Premarital Agreement Act.

Prohibited Marriages.

Marriage during life of former consort is crime, unless former consort has been absent seven years without being known to be alive, or in good faith was believed dead, or there has been divorce, or former marriage was void. (18.2-362, -364). Marriages by residents outside state to avoid statutes are crimes. (18.2-363, 20-40).

Following marriages are prohibited: marriage prior to dissolution of a previous marriage of one of parties; marriage between ancestor and descendant, or brother and sister, whether related by whole or half blood, or adoption; marriage between uncle and niece or aunt and nephew whether related by whole or half blood. (20-38.1). Prohibited marriages and marriages solemnized at time with either party lacked capacity to consent are void. (20-45.1). Marriage between persons of same sex is prohibited and marriage entered into by persons of same sex and any contractual rights created by such marriage in another state or jurisdiction are void in Virginia. (20-45.2).

Civil Unions Between Persons of Same Sex.

Prohibited. Civil union, partnership contract or other arrangement between persons of same sex purporting to bestow privileges or obligations of marriage prohibited. Any such arrangement entered into in another state or jurisdiction is void in all respects. (20-45.3).

Annulment.

Marriages prohibited because either party had living consort are void without decree or legal proceedings. (20-43).

Marriages prohibited by law or marriages lacking required parental consent are void. (20-45.1). Following render marriage voidable: Impotency at time of marriage contract, felony conviction of one party before marriage and without other party's knowledge, pregnancy of wife by another man at time of marriage and without husband's knowledge, husband's fathering of child born to another woman within ten months of solemnization, and prostitution of party before marriage without knowledge of other party. (20-89.1). Also voidable is marriage where either party is mentally incapacitated at time of marriage. (20-45.1; 160 Va. 183, 168 S.E. 439). Cohabitation after knowledge of relevant facts or expiration of two years since time of marriage precludes suit to annul on these grounds and for fraud or duress. (20-89.1).

Suit for annulment may be brought on any ground for which marriages are declared void or voidable, except that such suit may not be brought for lack of age to consent by one who was of such age at time of marriage. (20-89.1). Jurisdiction, practice, alimony and custody of children in such suits are same as in divorce. (20-96, -99, -107.1 to 107.3).

Affirmance.

If either party to marriage denies or doubts its validity, other may bring suit for affirmance thereof. (20-90).

Foreign Marriages.

If resident leaves state for purpose of marrying to evade statutes and with intention of returning and subsequently returns validity of marriage is determined by laws of this state. (18.2-363, 20-40).

14.12 MARRIED WOMEN:

See topics 14.09 Husband and Wife, Marriage; categories 5 Civil Actions and Procedure, topic Evidence, subhead Witnesses; Debtor and Creditor, topic Homesteads; Documents and Records, topic Acknowledgments; Estates and Trusts, topics Executors and Administrators, Wills; Property, topic Dower.

15 HEALTH

—Scope —

State Board of Health consists of 15 residents of state appointed by Governor for terms of four years each.

15.00A DISEASE PREVENTION AND CONTROL:

Physicians practicing in state and laboratory directors doing business in state must report to Board of Health any disease required by Board to be reported. (32.1-36). Board must promulgate from time to time list of diseases, including diseases caused by exposure to any toxic substance, which are required to be reported. (32.1-35).

15.00B ENVIRONMENTAL HEALTH SERVICES:

Sewage Disposal. (32.1-163 et seq.). Public Water Supplies. (32.1-167 et seq.). Mosquito Control Districts. (32.1-187 et seq.). Migrant Labor Camps. (32.1-203 et seq.).

15.00C FAMILY ACCESS TO MEDICAL INSURANCE SECURITY PLAN:

Department of Medical Assistance Services must provide coverage under Family Access to Medical Insurance Security Plan for individuals, up to age 19, who meet eligibility requirements. (32.1-351).

15.00D HEALTH CARE PLANNING:

State Board of Health may develop, and revise, as necessary, State Health Plan with support of Department of Health and assistance of regional health planning agencies. (32.1-122.03). Board of Health must establish criteria to identify medically underserved areas within state. (32.1-122.5).

15.00E REGULATION OF MEDICAL ASSISTANCE:

Civil penalties for fraudulently obtaining excess or attempting to obtain excess benefits pursuant to state Plan for Medical Assistance as provided in 32.1-325. (32.1-312, -313). Criminal penalties for offenses related to obtaining payments. (32.1-314 et seq.).

15.00F REGULATION OF MEDICAL CARE FACILITIES AND SERVICES:

Hospital and Nursing Home Licensure and Inspection. (32.1-123 et seq.). Hospice Program Licensing. (32.1-162.1 et seq.). Home Care Organization Licensing. (32.1-162.7 et seq.).

15.00G STATE/LOCAL HOSPITALIZATION PROGRAM:

Board of Medical Assistance Services promulgates regulations to establish uniform eligibility criteria defining those persons who will qualify for payment for medical care under program. (32.1-347).

15.00H VIRGINIA INDIGENT HEALTH CARE TRUST FUND:

Repealed.

15.00I VIRGINIA FOUNDATION FOR HEALTHY YOUTH:

Foundation created to accept, hold, and administer funds to entities whose goal is to discourage, eliminate or prevent use of tobacco products by minors. (32.1-356). Foundation name changed from Virginia Tobacco Settlement Foundation to Virginia Foundation for Healthy Youth. (2.2-2696, 32.1-355).

16 INSURANCE

16.01 INSURANCE COMPANIES:

Supervised by State Corporation Commission. Commissioner of Insurance, Box 1157, Richmond, Va. 23218.

General Provisions.

Insurance is under supervision of State Corporation Commission (38.2-200) which may examine any insurance company in state whenever deemed expedient but must examine every licensed insurer at least once in every five years (38.2-1317). It may accept home state examination of foreign company only upon certain conditions. Commission determines whether examination of foreign companies was performed in manner consistent with standard of Commission. (38.2-1317). It issues licenses (38.2-200; 38.2-1024) which must be renewed annually (38.2-1025) and may suspend or revoke same if company is insolvent or has failed to pay any final judgment, fees, taxes or charges assessed against it within 60 days after imposition or has violated any state law or has notified insured that his automobile policy will be cancelled if insured institutes any legal action against company to pursue any of his rights under policy (38.2-1040). Contracts made in violation of state laws may be enforced against company. (38.2-319). Unfair trade practices are prohibited (38.2-500 to -517), fair business standards in processing and payment of claims for health care services are established (38.2-3407.13), and state antitrust provisions apply (38.2-705).

Classes of insurance are defined in substantial accordance with New York definitions. No company shall write any class of insurance unless it has current annual license from Commissioner to do so. (38.2-135).

Capital and Surplus Requirements.

Every domestic and foreign stock company must have and maintain a fully paid-in capital stock of at least $1,000,000 and surplus of at least $3,000,000. (38.2-1028). Insurers must file reports with Commission for review and possible regulatory action. (38.2-1300 et seq.). Every domestic and foreign mutual company must have and maintain surplus over and above all liabilities of at least $1,600,000. (38.2-1029). Every alien stock and mutual company must have and maintain trusteed surplus of at least $4,000,000. (38.2-1031). Mutual assessment companies governed by most provisions relating to other insurance companies. (38.2-3900 to -3923).

Annual statement showing financial condition at end of previous calendar year must be filed by Mar. 1. (38.2-1300).

Deposit Requirements.

Except (in discretion of Commission) those insurance companies which certify to Commission that they have $500,000 in acceptable securities on deposit with appropriate official of some other state or states for protection of all policyholders (38.2-1049), all insurance companies, domestic or otherwise, must deposit with State Treasurer securities authorized for public sinking funds and for other public funds in amount fixed by Commission not less than $50,000 nor more than $500,000 (38.2-1045) for protection of state, residents thereof and others owning property therein (38.2-1046). Such deposits are for benefit first of policyholders and next of general creditors who have ratable liens thereon. (38.2-1046). Bond with surety approved by Commission will be accepted instead of above deposit. (38.2-1045).

Statements in Application.

Statements of insured in applications are deemed to be representations and not warranties. No statement in application, or in an affidavit before or after loss, may bar recovery, unless material to risk when assumed and untrue. (38.2-309).

Policies.

Copies of forms of policies, applications, riders and endorsements for life, industrial or group life, accident and sickness, fraternal benefit and annuity insurance, together with rate manuals, must be filed with and approved in writing by Commission before policy delivered or issued in state. (38.2-316). Premium rate changes, applicable to individual accident or sickness policies, subscriber contracts of health service plans, dental or optometric service plans, fraternal benefit contracts or Medicare supplement policies, must be approved in writing by Commission. (38.2-316). All explanations of benefits forms issued in connection with accident and sickness policies, subscription contracts, or health maintenance organization contracts must be approved by Commission as being clear and accurate. (38.2-514; 38.2-3407.2). Provisions in policies printed in type smaller than eight point or brevier (38.2-311), limiting actions to less than one year (38.2-314) and requiring that contract be construed according to laws of another state or depriving state courts of jurisdiction (38.2-312), are invalid. Breach of warranty or condition in contract is not valid defense unless breach existed at time of loss. (38.2-315). Except as to title insurance (38.2-4605) binders of temporary insurance may be used for period not exceeding 60 days pending issuance of policy (38.2-304). Insurable interest is defined. (38.2-301, -303). Beneficiary need not have insurable interest in life of person who procures contract on own life. (38.2-301). Insured must have knowledge of or consent to contract on own life, except in case of insurance by husband or wife upon person of the other and in case insured is minor dependent of person effecting contract or in whom such person has insurable interest. (38.2-302).

Provisions which must be contained in policies are set out for accident and sickness (38.2-3503 et seq.), fire (38.2-2101 et seq.), liability (38.2-2200 et seq.), legal services (38.2-2300 et seq.), life (38.2-3300 et seq.), industrial life (38.2-3319.1 et seq.) and group life (38.2-3319.1 et seq.) insurance. Health insurance plans for small employers are partially exempt from minimum policy coverages if selling policy allows uninsured to be insured. (38.2-3406.1).

Rates.

All rates must be approved by Corporation Commission. (38.2-2006). Individual casualty insurers need not file rates with Commission if member of or subscriber to rate service organization licensed pursuant to § 38.2-1914 et seq., which files rates. (38.2-2004).

Renewability.

Every individual policy, subscription contract, or plan shall provide for renewability of such coverage at sole option of insured. (38.2-3514.2). However, insurer may refuse to renew policy for nonpayment, fraud, abuse or misuse of network providers, eligibility of individual insured for Medicare, or failure to maintain residence within service area. (38.2-3514.2). Certain policies or plans may be exempt from this section. (38.2-3514.2).

Interstate Insurance Product Regulation Compact.

Under which, Virginia is Compacting State. Compact: (i) Promotes and protects interest of consumers of individual and group annuity, life insurance, disability insurance, and long-term care insurance products; (ii) develops uniform standards for those insurance products; (iii) acts as central clearinghouse to review insurance products and advertisements; (iv) approves product filings and advertisements; (v) improves coordination of regulatory resources and expertise among state insurance departments regarding uniform standards and review of relevant insurance products. (38.2-6200-38.2-6201).

Discrimination.

No life, accident or health company can discriminate between individuals of same class or life expectancy in rates or premium charged, dividends payable or in other terms of contract.

No life or health insurance company can consider status of victim of domestic violence as criterion in decisions as to underwriting, pricing, renewal, scope of coverage or payment of claims. Insurer or insurance professional is not prohibited from asking about medical condition even if medical information is related to medical condition that insurer or professional knows or has reason to know resulted from domestic violence. No insurance company can refuse to insure or limit coverage available to individual, or charge different rate for such coverage, solely because of blindness or partial blindness, except where refusal, etc. is based on sound actuarial principles. (38.2-508). No insurer or agent shall refuse to issue policy of automobile insurance solely because of age, sex, race, residence, color, creed, national origin, ancestry, marital status or lawful occupation of person seeking coverage. (38.2-2213).

Preexisting Condition.

Insurers providing group accident and sickness or individual health company providing hospital, medical and surgical, major medical or cancer-only coverage on expense incurred basis and Medicare or similar plans, and corporations providing individual or group accident and sickness contracts, and health maintenance organizations providing health care plan for health care services cannot deny issuance or renewal of, or cancel, policy, contract or plan or include any exception or exclusion of benefits for persons who have fibrocystic condition or nonmalignant lesion or solely due to family history of insured related to breast cancer or who have had breast cancer but have been free from breast cancer for five years. (38.2-3407.11:3).

Rebates or other inducements, and agreements not expressed in the policy are prohibited as to all companies, but industrial companies on weekly payment plan may allow saving of cost of collection to policyholders who pay direct, and companies may allow commissions to employees on their personal policies. (38.2-509).

Life Insurance.

Policy cannot be issued to take effect more than six months prior to date when application made. (38.2-3104). Minor who is at least 15 years of age can contract for insurance on own life but permitted beneficiaries are limited. (38.2-3105).

In action on policy of life insurance subject to laws of Virginia, it is no defense that insured committed suicide or was put to death by execution under law unless there is express provision in body of policy limiting liability of insurer in case insured, within two years from date thereof, dies by his own act; such provision is valid, but insurer must return or pay at least amount of premiums paid on such policy. (38.2-3106). Except as to nonpayment of premiums and, if policy so provides, as to disability and accidental death benefits, contestability period for any life policy is two years. (38.2-3107). In case of misstatement of age, insurer is liable for only amount which premium paid would have purchased at true age of insured. (38.2-3108).

Unless policy provides otherwise, or unless taken out for purpose of assignment, policy may be assigned without regard to insurable interest. (38.2-3111). Beneficiary of life policy is entitled to proceeds free from claims of insured's creditors (38.2-3122), unless right to change beneficiary is reserved in which case creditors may claim cash surrender value (38.2-3123). Policies must contain standard nonforfeiture provisions. (38.2-3202). Except as to reinsurance, group annuity purchased under retirement plan, or variable, investment, immediate, reversionary annuities plan of deferred compensation established by employer or employee organization, any contract of annuity must comply with Standard Nonforfeiture Law for Individual Deferred Annuities. (38.2-3219).

Automobile Liability Insurance.

Except for policies with primary purpose to supplement other valid policies, all policies must carry uninsured motorist endorsement undertaking to pay to insured all sums legally recoverable as damages from uninsured motorist. (38.2-2206). Any one named insured can reject additional uninsured motorist coverage by notifying insurer. (38.2-2206). To invoke uninsured or underinsured provisions of policy, insured must formally serve process on company issuing policy. (38.2-2206). No action, verdict or release arising out of suit brought by insured shall give rise to any defenses in any other action brought in subrogated party's name, including res judicata and collateral estoppel. (38.2-2206).

Every insurer issuing policy of motor vehicle insurance which provides comprehensive or collision coverage must offer in writing option of purchasing rental reimbursement coverage. (38.2-2230). Every automobile liability or physical damage insurer doing business in Commonwealth must be member of Nationwide Intercompany Arbitration Agreement and must arbitrate and settle all disputed claims for automobile physical damage between them in accordance with its terms, unless parties mutually agree to another arbitration forum. (38.2-2231).

Liens.

Mutual Assurance Society has lien on property insured, for quotas assessed, if it has prepared and caused to be kept in proper court clerk's office book to record such liens, and has caused to be entered therein description of property, date and amount of policy and to whom issued, and date of entry. (43-66).

Policyholders and subordinately general creditors have lien on bonds deposited by insurance or guaranty companies with State Treasurer. (38.2-1046). Lienholders must be sent notice of cancellation of automobile insurance securing their debt. (38.2-2212). Insurer may transmit notice electronically if insured consents. (38.2-325).

Agents and Brokers.

Agents and underwriters' agencies must be licensed by State Corporation Commission. (38.2-1822). Agents are licensed according to classification. (38.2-1822). Except as to ocean marine insurance policy negotiated by licensed property and casualty insurance agent or ocean marine insurance agent for company not licensed in state and except as to licensed surplus lines brokers, any person acting as agent for unlicensed insurance company is guilty of misdemeanor. (38.2-1802). Premium payment made to agent or broker, where policy, written binder, or other contract of temporary insurance issued, whether new or renewal, shall be payment to insurer so that insurer is liable for covered losses. (38.2-1801[B]). Person authorized by company to solicit insurance is deemed company agent. (38.2-1801). When agent is appointed insurer must submit to Commission appointment fee of not less than $7 or more than $25. (38.2-1833). Appointments are renewed upon payment by insurer of renewal fee each year by Aug. 10, or first business day thereafter if Aug. 10 falls on weekend or holiday, unless appointment is terminated, suspended, or revoked. No later than ten calendar days after notice of termination, suspension or revocation, agent or agency shall immediately cease selling or soliciting on behalf of insurer. Upon failure of insured to pay fee by due date, Commissioner shall impose penalty of $50 per day. In addition, Commissioner may terminate agent's appointment. (38.2-1834). Property and casualty insurance consultants must be licensed, and qualified. (38.2-1838). In addition, written contract is required between consultant and client. (38.2-1839). Any agent soliciting or negotiating insurance in conjunction with any automobile club service agreement or accidental death and dismemberment policy must disclose to applicant in writing premium quotation as well as cost of any dues or assessments. (38.2-514.1). This requirement shall not apply to sale of group insurance. (38.2-514.1). Reciprocal agent licensing provisions of NAIC Producer Licensing Model legislation (Interstate Insurance Product Regulation Compact) necessary to comply with Gramm-Leach-Bliley Act adopted. (38.2-6200, et seq.).

Process Agent.

Unlicensed Insurers Process Act adopted. (38.2-801 to 807). Service of process or notice upon foreign or alien company doing business in Virginia, by mail or otherwise, can be made upon the Clerk of Commission. (38.2-801).

Reciprocal Insurance.

Reciprocal or interinsurance contracts, providing indemnity against any insurance risks except life insurance, annuities and title insurance (38.2-1202), may be entered into by individual and corporation (38.2-1204). No foreign reciprocal insurer shall be licensed to transact business in this state unless it files with Commission certificate of supervising insurance official of state in which it is organized that it is authorized and is actively engaged in transacting in that state kind of insurance it proposes to transact in this Commonwealth (38.2-1208). Specified reserves must be maintained (38.2-1215) and domestic or foreign reciprocal insurers must agree through their attorney that service of process made on Secretary of Commonwealth will be binding on them in suits in Commonwealth arising from such contracts (38.2-1216). No person shall act in this Commonwealth as reciprocal insurer without first procuring license from Commission to do so pursuant to requirements of 38.2-1800 et seq. Separate license must be procured for each reciprocal insurer represented. (38.2-1211). Prior written approval of Commission is required for material transaction between domestic reciprocal and any of its related parties or between two or more of reciprocal's related parties when material transaction involves more than 3% of domestic reciprocal's reported assets. (38.2-1230). Transactions between parties involving more than 0.5% shall be reported to Commission. (38.2-1230). Failure of Commission to act within 60 days shall constitute approval of transaction. (38.2-1230).

Foreign and Alien Companies.

Companies of other states are termed foreign, and of other countries, alien. (38.2-100). Each of these must obtain certificate of authority to do business (38.2-1027) and must file with Commissioner financial statement (38.2-1024) and must maintain in state registered office and registered agent (13.1-921). They must obtain license from State Corporation Commission before doing business (38.2-1024) in addition to certificate required under 38.2-1027. No foreign insurer may issue policies unless it has $4,000,000 of surplus. As to agents and brokers, see subhead, Agents and Brokers, supra. As to retaliatory laws, see subhead Retaliatory Laws, infra. Valuations of reserves for life policies by home states may be accepted in Virginia. (38.2-3127). Foreign insurance company may transfer state of domicile to Virginia, and vice versa. (38.2-1019 to -1023). Foreign and alien companies are generally subject to applicable rules governing domestic companies by terms of various sections of code.

Any foreign or alien company, not authorized to do business in Virginia, which, by mail or otherwise, issues or delivers contracts to resident persons or corporations, or which solicits applications for contracts, or collects premiums or transacts any other insurance business, is deemed to have appointed the Clerk of the Commission as agent for service of process. (38.2-801).

See also category 5 Civil Actions and Procedure, topic 5.14 Injunctions, subhead Statutes Authorizing Injunctions.

Taxation Generally.

Real estate and tangible personal property in this state of any insurance company and fraternal benefit society transacting insurance in this state is listed, assessed and taxed in same manner as other real estate and tangible personal property. (58.1-2508). Tax on such property and license tax on gross premium income (see subhead Premium Tax, infra) are in lieu of all other fees, licenses, taxes or levies, state, county or municipal, except license fee required of agents. (58.1-2508[B]).

Retaliatory Laws.

When any state imposes on an insurance company of this state requirements as to deposits, taxes, fines, conditions for the privilege of doing business, etc., greater than Virginia, the same requirements apply to companies of such state in Virginia. (38.2-1026). Affected companies shall file annual reports on or before Mar. 1 with Commission. No insurance policy shall contain any provision that deems policy to be invalid due to absence of signature or counter signature of agent or company representative. (38.2-323).

Premium tax is imposed by 58.1-2501 et seq., 38.2-400 et seq.

Insurance companies are required to pay an annual license tax measured by direct gross premium income or, in certain situations, subscriber fee income (see infra) derived from business in state during each year ending Dec. 31 prior to year for which tax is to be paid; but no tax is payable on premiums derived from workmen's compensation insurance on which a premium tax is imposed nor upon consideration for contracts for annuities. (58.1-2501, -2502). License expires on June 30 in each year and is not issued for less than one year except that when company first commences business in state. (58.1-2504[B]). 58.1-2505 provides for estimation of premium income and revision of estimates after Dec. 31 of beginning year. Insurers writing fire, miscellaneous property, or marine insurance are assessed, according to direct gross premium income on business done in Virginia, tax earmarked for Fire Programs Fund. Minimum assessment is $100. (38.2-401). Insurers writing flood insurance are assessed, according to direct gross premium income on business done in Virginia, tax earmarked for Flood Prevention and Protection Assistance Fund. (38.2-401.1).

Nonstock insurance corporations lose preferred tax status upon failure to make their open enrollment periods year-round. These organizations must notify State Corporation Commission of election to discontinue open enrollment programs. (38.2-4216.1).

Basis of Tax.

License tax for company commencing business is measured by estimate of direct gross premium income. (58.1-2505). Subscriber fee income is defined as gross premium or deposit income collected, received or derived from and credited to accounts of subscribers from business in Commonwealth during preceding year ending Dec. 31, decreased by all returns for cancellation and all amounts returned to subscribers or credited to their accounts as savings. Direct gross premium income means gross amount of all premiums, assessments, dues and fees collected, received or derived, or obligations taken therefor, from business in this Commonwealth during each year ending Dec. 31, excluding premiums received from reinsurance assumed from licensed insurance companies, without any deduction for dividends paid or deduction on any other account except for premiums returned on cancelled policies, or on account of reduction in rates or reduction in amount insured, and excluding premiums received or derived to provide insurance of kinds classified in 38.2-102 and 38.2-109 issued on group basis by insurance company insuring its employees, agents and representatives. In computing direct gross premium income on insurance issued by mutual insurance companies other than life insurance companies, refunds or returns made to policyholders otherwise than for losses may be deducted. (58.1-2500).

Rates.

Tax rate on fire, marine, surety, fidelity, liability, health, accident, steam boiler and similar insurance premium is 2¼% of subscriber fee income or direct gross premium income. (58.1-2501[A]1).

Tax rate on life insurance is 2¼% of direct gross premium income, including premiums paid for additional benefits for accidental death, etc. (58.1-2501[A]2).

Tax rate on companies chartered by and doing business solely in state which are purely mutual and have no capital stock, and do not pay dividends, or which have capital stock not exceeding $25,000 and which pay losses from assessments is 1% of direct gross premium income. (58.1-2501[B]).

Rates do not apply to certain mutual assessment fire insurance companies doing local business in state, or to fraternal benefit societies. (58.1-2502).

Reports.

Insurance companies must make reports on or before Mar. 1 in each year to State Corporation Commission, on forms furnished, of direct gross premium income derived from business in the state during the preceding year. (58.1-2506).

Payment.

Tax is payable on or before Mar. 1 of each year. (58.1-2503). Company beginning business must pay tax before license issued. (58.1-2504).

Declarations of Estimated Tax.

Provisions are found at 58.1-2520 et seq.

Actions.

Insured may be awarded costs and attorneys fees upon determination that insurer did not act in good faith and denied coverage or failed or refused to make payments to insured. (38.2-209).

Direct Actions Against Insurer.

See category 23 Transportation, topic 23.01 Motor Vehicles, subhead Direct Actions.

No-Fault Insurance.

See category 23 Transportation, topic 23.01 Motor Vehicles.

Uniform Insurer's Liquidation Act has not been adopted in Virginia.

16.02 SURETY AND GUARANTY COMPANIES:

Surety and guaranty companies are classified under fidelity and surety insurance and are governed by the same general rules applicable to insurance companies. See topic 16.01 Insurance Companies. (38.2-120, -121 and -2400 to -2420).

Rights and Powers.

Bonds must be accepted by court, judge, public officer, board or organization upon presentation of evidence satisfactory to court, judge or other officer authorized to approve bond that insurer is licensed to transact surety insurance. (38.2-2405). Except as otherwise provided in title 38, no insurer transacting business in Commonwealth shall by execution of bond expose itself to loss on any one risk or hazard in amount exceeding 10% of its surplus to policyholders. (38.2-208). Any risk or portion of any risk reinsured by insurer meeting standards set forth in Va. Code 38.2-1316.1 et seq. shall be deducted in determining limitation of risk prescribed in 38.2-208.

Anyone required to give bond may agree with his surety to deposit funds or assets for which he and surety are responsible in bank, savings bank, safe deposit company or trust company authorized by law to do business as such, or other depository approved by court. (38.2-2409).

Any fidelity and surety insurer licensed to transact surety business in Commonwealth may become surety for any guaranteed arrest bond certificate issued in same year by automobile club or association by filing undertaking with Commission. (38.2-2407). Such undertaking must be in form prescribed by Commission. (38.2-2407). Such bond shall be accepted as bail bond in lieu of cash bail for violation of any motor vehicle law or ordinance of any municipality, but not for offense of driving while intoxicated or for any felony. (38.2-2408).

Suit may be instituted in place where company has become surety or assumed any obligation that may be subject of suit or other civil proceeding, or where principal obligor may be sued; but when Commonwealth is party, suit must be in Circuit Court of City of Richmond. (38.2-2415).

17 INTELLECTUAL PROPERTY

17.01 TRADEMARKS AND TRADENAMES:

Model State Trademark Act (1992, revised 1996, rewritten 1998).

Adopted in 1998 as Virginia Trademark and Service Mark Act. (59.1-92.1 et seq.). Rewritten without substantive changes, except as noted.

Definitions.

"Abandoned" means discontinuance of use of mark with intent not to resume. Nonuse for three consecutive years shall constitute prima facie evidence of abandonment ("three" was substituted for "two" in 1998). Substitutes definition of "Commission", referring to State Corporation Commission, for definition of "Secretary". In definitions of "service mark" and "trademark", deletes language providing that mark must indicate source of services or goods. In definition of "service mark", also deletes sentence providing that titles, character names, and other distinctive features of radio or television programs may be registered as service marks. In definition of "trade name", substitutes "enterprise" for "vocation". Deletes definitions of "person", "juristic person", and "dilution". (59.1-92.2).

Registrability.

§ 59.1-92.3 defines marks that may not be registered based on certain criteria. Following are changes enacted in 1998: Deletes "disparage or" before "falsely suggest". (59.1-92.3[2]). Inserts "in this Commonwealth" after "distinctive" in subparagraph (iii). Inserts "prima facie" before "evidence". (59.1-92.3[5]).

Application for Registration.

§ 59.1-92.4 provides information necessary for application for registration of mark. Following are changes enacted in 1998: Deletes "either federally or" after "registered the mark". (59.1-92.4[4]). Substitutes single specimen for three specimens. Inserts "nonrefundable" before "application fee". Deletes paragraph requiring information about federal applications to register mark. (59.1-92.4).

Filing of Applications.

Controlled by § 59.1-92.5. Following are changes enacted in 1998: Deletes "or a fresh application may be required to be submitted" after "consent". (59.1-92.5[D]). Inserts "in writing" after "notify the applicant thereof" and substitutes "ninety days" for "a reasonable period of time". (59.1-92.5[E]). Deletes paragraphs (f) and (g) discussing proceedings after final refusal, priority of applications, and cancellation. (59.1-92.5).

Certificate of Registration.

Upon compliance with requirements of trademark chapter, Commission shall issue certificate of registration. (59.1-92.6). Following are changes enacted in 1998: Deletes language providing that certificate shall be issued “under the signature of the Secretary and the seal of the state”. Inserts language providing that certificate shall be prima facie evidence of registrant's ownership and exclusive right to use mark within Commonwealth for specified goods or services. (59.1-92.6).

Assignments and Changes of Name.

Assignability of marks governed by Va. Code 59.1-92.8. Following are changes enacted in 1998: Adds “The Commission shall prescribe the form and content of such certificate”. (59.1-92.8[B]&[C]). Deletes paragraphs (C) and (D) discussing other instruments and effect of acknowledgments. (59.1-92.8).

Cancellation controlled by Va. Code 59.1-92.10. Following are changes enacted in 1998: Substitutes language providing that Commission shall find, on its own motion or third-party petition, for ``a court of competent jurisdiction shall find''. (59.1-92.10[A][3]). Substitutes ``as a result of a clerical error'' for ``improperly''. (59.1-92.10[A][3][c]). Substitutes ``previously used in this Commonwealth'' for language establishing federal registration, and deletes language prohibiting cancellation of federally registered marks. (59.1-92.10[A][3][f]). Deletes paragraph (4) providing for cancellation on any ground. Inserts paragraphs discussing partial cancellation and notice of proceedings. (59.1-92.10[B]&[C]).

Fraudulent Registration.

Deleted.

Infringement provisions found in Va. Code 59.1-92.12. Following are changes enacted in 2008: Inserts “or attorneys' fees” after “damages”. Substitutes “knowledge that such mark is intended to be used” for “the intent”. (59.1-92.12[2]).

Injury to Business Reputation; Dilution.

Deleted.

Remedies set forth in Va. Code 59.1-92.13. Following are changes enacted in 2008: Substitutes “in force and effect” for language indicating mark's registered status. Deletes provision for treble damages. Permits recovery of attorneys' fees although deletes bad faith requirement for such recovery. (59.1-92.13[A]). Substitutes criminal penalties for language reserving rights in criminal prosecution; knowing and intentional violation constitutes Class 1 misdemeanor and subsequent violations constitute Class 6 felony. (59.1-92.13[B]).

Forum for Actions Regarding Registration; Service on Out of State Registrants.

Service may be effected on Clerk of Commission. Deletes paragraph (A) discussing appropriate forum. (59.1-92.14).

Severability.

Deleted.

Time of Taking Effect—Repeal of Prior Acts; Intent of Act.

Effective July 1, 1998. Deleted paragraph discussing intent and construction.

Additional Trademark Provisions.

Judicial Proceedings.

In all proceedings, Commission may consider final judgments of courts of record. (59.1-

92.17). Final actions of Commission may be appealed by right to Virginia Supreme Court. (59.1-92.18).

Regulations.

Commission may promulgate regulations and forms as necessary. (59.1-92.19).

Olympic Committee Marks.

Prohibits unauthorized use of marks associated with Olympic Committees. (59.1-92.21).

Marks on Certain Containers and Articles.

Ownership of names or marks on containers of certain beverages, medical preparations, oils, or on linens may be established by filing and publication as prescribed by statute. (59.1-94). Unauthorized use, removal, or alteration of such names or marks constitutes misdemeanor. (59.1-96).

Timber Brands may be protected by filing as prescribed by statute. (59.1-109). Knowingly using or attempting to use timber brand, without authorization, constitutes misdemeanor and creates liability for damages. (59.1-110).

Tradenames.

Person, partnership, limited liability company or corporation conducting business under assumed name must sign and acknowledge certificate setting forth name under which business conducted and names and addresses of every person or corporation owning same, and file such certificate where deeds are recorded for place wherein business conducted. (59.1-69). Filing fee is $10. (59.1-74). Limited partnership, limited liability company or corporation must also file attested copy of such certificate with State Corporation Commission and pay $10 fee. (59.1-70). See also category 2 Business Organizations, topic 2.08 Partnerships. Actions by parties conducting business under assumed names precluded until certificate filed. (59.1-76). No person or business entity may use assumed name to intentionally misrepresent geographic origin or location of any such person or entity. (59.1-69). Violation of assumed name laws constitutes misdemeanor, punishable by maximum $2,500 fine and/or maximum one year in jail. (59.1-75).

17.02 TRADE SECRETS:

Uniform Trade Secrets Act (1979, am'd 1986).

Adopted. (59.1-336 et seq.). Rewritten without substantive changes, except as noted.

Definitions.

Deletes “before a material change of his position” with respect to “[a]cquired by accident or mistake”. (59.1-336[2][b][4]). In definition of “trade secret”, introductory text inserts “but not limited to” after “including”. In definition of ``improper means'', adds ``use of a computer or computer network without authority'' after ``misrepresentation''. (59.1-336).

Damages.

Inserts sentence providing that reasonable royalty may be imposed if greater amount of damages may not be proven by other measurement methods. (59.1-338[A]). Substitutes “punitive” for “exemplary” and caps punitive award at $350,000. (59.1-338[B]).

Attorneys' Fees.

Deletes paragraph (ii), “a motion to terminate an injunction is made or resisted in `bad faith"'. (59.1-338.1).

Uniformity of Application and Construction.

Deleted.

Severability.

Not set out. (59.1-342).

Time of Taking Effect.

Effective July 1, 1986. In sentence discussing continuing misappropriation, deletes "the continuing" after "shall not apply to". (59.1-343).

18 LEGAL PROFESSION

18.01 ATTORNEYS AND COUNSELORS:

Supreme Court has adopted Rules for Integration of the Virginia State Bar. All attorneys engaged in practice of law in state must be members of Virginia State Bar. (54.1-3910).

State Bar is also authorized to regulate operation of legal aid societies. (54.1-3916).

Attorney Ethics.

Supreme Court has adopted Virginia Code of Professional Responsibility which differs in important respects from model code of American Bar Association.

Jurisdiction over Admissions.

Board of Bar Examiners appointed by Supreme Court conducts examinations and otherwise ascertains qualifications of applicants for admission to bar. (54.1-3919, -3920). Person desiring to take bar examination must file with Board of Bar Examiners an application therefor by May 10 for July exam and Dec. 15 for Feb. exam. Application is timely filed if it is mailed postage prepaid to Office of Secretary of the Board by registered or certified mail and official receipt shows mailing on or before deadline. (54.1-3925). For applications for examinations given after July 31, 1993, before issuing license to practice law, Board must find from satisfactory evidence produced by applicant in such form as Board may require that applicant possesses requisite fitness to practice law. (54.1-3925.1). Applicant must hold degree from law school approved by American Bar Association or Board, or have completed equivalent of three-year academic course of accredited college. Applicant who does not hold law degree must furnish satisfactory evidence that he has required academic qualifications and also that he has studied law for three years with attorney or retired circuit court judge under conditions specified in statute, provided that study in law school be not required. (54.1-3926). Examination may only be taken five times, provided that Board may allow applicant to take additional examination when, in Board's discretion, applicant has shown mitigating circumstances which constitute good and sufficient cause for applicant's failure to pass prior examinations. (54.1-3930).

Registration as law student is not required.

Admission Without Examination.

Any lawyer entitled to practice law in highest court of any other state or territory of U.S. or District of Columbia for not less than five years may be admitted to practice in Virginia without examination, upon compliance with certain formalities, if lawyers licensed in Virginia may be licensed without examination in such jurisdiction. (Supreme Court, Rule 1A:1; 54.1-3931). Any person attached to foreign embassy or legation may be, in discretion of Supreme Court, granted certificate to appear in courts of Virginia in matters connected with his official duties if admitted to practice in court of last resort of jurisdiction of embassy or legation to which he is attached or if holder of degree from law school approved by American Bar Association. (54.1-3931).

Admission Pro Hac Vice.

Lawyers from other states or other territories or possessions of United States, or District of Columbia may apply to appear as counsel pro hac vice in particular case before any court, board or administrative agency in Commonwealth. Out-of-state lawyer must associate with local counsel. Application fee of $250. (54.1-3900; Rule 1A:4).

Qualifying and Licenses.

A lawyer must qualify in each court in which he intends to practice, by evidence of his license and by taking oath of office, provided that any attorney who has qualified before Supreme Court of Virginia and who has paid fee required by State Bar is deemed to have qualified in all other courts. (54.1-3903). He must pay an annual fee. (54.1-3912). It is misdemeanor to practice without authority or license. (54.1-3904). Furnishing advice for compensation in connection with debt pooling plan pursuant to which debtor deposits funds for distribution to creditors, except as authorized for certain nonprofit agencies, is deemed to be practicing law. (54.1-3905). Limited practice by third-year law students under supervision of lawyer permitted pursuant to Supreme Court rules. (54.1-3900).

Compensation and Lien.

An attorney may contract for services, and then has lien on cause of action. If written notice of such lien be given to opposing party, his attorney or agent, settlement of case is void as against lien. In causes of action for annulment or divorce, attorney may not exercise his claim until divorce judgment final and all disputes as to marital property concluded. Also, in causes of action for annulment or divorce, court may, in its discretion, exclude spousal support and child support from scope of lien. (54.1-3932).

Disbarment or Suspension.

Board may revoke license for good cause before lawyer makes qualification under it. (54.1-3934). State Bar may investigate any allegations of ethical violations, and attorney is entitled to legal representation. Any license suspension or reprimand may be stayed on appeal, but license revocation may not be stayed. (54.1-3935).

State Bar Disciplinary Board not bound by circuit court's determination arising out of same facts. (224 Va. 161, 295 S.E.2d 267).

Unauthorized Practice.

Only persons who have license to practice and have paid license tax or, to limited extent, who are third year law students under supervision of attorney, may practice law, except that persons authorized to practice in other states may appear in occasional case when associated with resident attorney. (54.1-3900). Employee of State agency may represent his agency in administrative hearings in course of employment, limited to examination of witnesses relating to personnel matters and agency policy. (54.1-3900).

Professional Associations.

Attorneys may form professional corporations, professional limited liability companies, or registered limited liability partnerships, provided that each member is authorized to practice law in Virginia. (54.1-3902). See category 2 Business Organizations, topic 2.03 Corporations, subhead Professional Corporations.

19 MINERAL, WATER AND FISHING RIGHTS

19.01 MINES AND MINERALS:

The Chief of the Division of Mines is appointed by the Governor and under direction of Director of Department of Mines, Minerals and Energy. (45.1-161.1, .15). Chief is in charge of Division of Mines and is charged with appointing mine inspectors (45.1-161.18) and enforcement of laws for safety of persons at coal mines and mine properties (45.1-161.1-.21). Director is also charged with regulation of surface and mineral mining and land reclamation and has authority to seek injunctions to eliminate threatened or actual violations. (45.1-180 et seq.; 45.1-161.93). Director also oversees Chief of Division of Geology and Mineral Resources and State Geologist, who shall conduct examinations, surveys and tests on Commonwealth's geological formations and mineral resources and prepare maps and reports thereon. (45.1-383 to -389). Director promulgates regulations necessary to ensure safe working conditions in mines. (45.1-161.305). Virginia Mine Safety Board acts in advisory role to Chief of Division of Mines on matters relating to health and safety of persons working in coal mining industry. (45.1-161.98, .100).

Operation of Mines.

No mine may be operated without proper permits, including original operating permit renewable annually after satisfactory inspection. (45.1-181).

No owner or tenant of mining property may excavate within five feet of a division line without written consent of all owners of adjoining property, under penalty of forfeiture of $500 to every person whose consent is required but not obtained. (45.1-161.310; 45.1-161.311:1). Entry must be permitted by adjoining owners for survey, not more than once a month. (45.1-311; 45.1-161.311:2).

Safeguarding of Employees.

Following personnel must hold certificates granted by Board of Coal Mining Examiners or Board of Mineral Mining Examiners, as appropriate: First class mine foremen; first class shaft or slope foremen; surface foremen; surface foremen open pit; underground foremen; preparation plant foremen; electrical maintenance foremen; dock foremen; top person; underground shot firer; surface blaster; hoisting engineer; electrical repairmen; automatic elevator operator; mine inspector; qualified gas detector; diesel engine mechanic; diesel engine mechanic instructor; first aid instructor; advanced first aid; chief electrician; general coal miner and general mineral miner. (45.1-161.28; 45.1-161.292:19). Appropriate Board shall require examination of applicants for mine inspector certification and may require other examinations. (45.1-161.29; 45.1-161.292:20). Miscellaneous safety provisions must be observed. (45.1-161.105-.309). Underground mines must be inspected every 180 days, surface mines every year, and any mine must be inspected upon when deemed appropriate by Director or requested by mine employees. (45.1-161.81; 45.1-161.292:54).

Oil and Gas.

Virginia Gas and Oil Board has general policy-making and regulatory powers relating to oil and gas extraction. (Va. Code 45.1-361.13 to 361.26).

Director has general enforcement and supervisory responsibilities and authority to issue emergency orders regarding spacing, pooling, permitting, drilling, production, etc. of coalbed methane gas from coal seams and rock strata. (45.1-361.27). Drillers, owners and operators of oil and gas wells must register with Director (45.1-361.37) and must secure permit to drill (45.1-361.29, .37). Holders of permits for gas or oil well must send copies of activity reports by mail to local commissioner of revenue of locality where well is located. (45.1-361.38). Holders of permits for gas or oil well must send copies of activity reports by mail to local commissioner of revenue of locality where well is located. (45.1-361.38).

Taxes.

For tax purposes, mineral rights are assessed separately from surface value of mineral lands. (58.1-3286). Counties and cities may impose license tax for severance of coal, gases or oil from earth. (58.1-3712, -3712.1).

20 MORTGAGES

20.01 CHATTEL MORTGAGES:

Uniform Commercial Code has been adopted. (8.1A-101 et seq.). See category 3 Business Regulation and Commerce, topic 3.09 Commercial Code.

Tax Sales.

Security interest, perfected prior to any distraint for taxes has priority over all taxes, except those specifically assessed either per item or in bulk against goods and chattels so assessed. (58.1-3942).

Recordation.

Security interests governed by Uniform Commercial Code must be filed as financing statements in filing office under Va. Code § 8.9A-501. Except as otherwise provided, fee for filing and indexing initial financing statements is $20. (8.9A-525).

Except for security interests governed by Uniform Commercial Code, deeds of gift, bills of sale, mortgages or deeds of trust affecting chattels, when grantor retains possession, are void as to bona fide purchasers for value unless recorded in county or city where chattels are by filing as financing statements under § 8.9A-501, with grantor as debtor and grantee as secured party; provided, chattels retained by merchant-seller are governed by § 8.2-402 (Uniform Commercial Code). (55-96). If in more than one city or county, must record in each. (55-97). See category 10 Documents and Records, topic 10.04 Records.

Recording Fee.

For such filings, clerk's fee for recording is $16 for ten or fewer pages, $30 for 11-30 pages and $50 for 31 or more pages. (17.1-275).

Limitation of time within which mortgage or deed of trust may be enforced, except as above stated, is ten years from maturity of last maturing original obligation, but this may be extended by recordation of certificate in form provided in Va. Code 8.01-241.1 prior to expiration of limitation period by beneficial titleholder upon certificate recorded in clerk's office, for ten years from date of endorsement. (8.01-241).

Forms.

Security Agreement.

There is no prescribed form; following form is illustrative and should be modified to meet one's special situation.

Form

. . . . (hereinafter called “Debtor”), does hereby grant to . . . . (hereinafter called “Secured Party”) a security interest in the following property: [describe collateral] together with all equipment, accessories, attachments and other accessions now or hereafter installed in or affixed thereto (all hereinafter called “Collateral”), to secure the payment of the sum of $. . . . . which the Secured Party agrees to advance and all additional sums hereafter advanced by the Secured Party to the Debtor from time to time as agreed upon (all such sums, and any extensions and renewals, thereof being hereinafter called “Indebtedness”); and to secure the performance by the Debtor of the agreements hereinafter set forth.

DEBTOR WARRANTS: [Insert warranties desired, including warranty as to Debtor's residence or chief place of business in Virginia and, if collateral is equipment or consumer goods, as to use for personal, family or household purposes, farm purposes or business purposes; if collateral is to be acquired with funds advanced by Secured Party, include warranty that such funds will be used exclusively for that purpose.]

DEBTOR CONVENANTS: [Insert convenants desired]

UPON DEFAULT by Debtor in the performance of any covenant or agreement herein or in the discharge of any indebtedness to the Secured Party, or if any warranty should prove untrue, the Secured Party shall have all of the rights and remedies of a secured party under the Uniform Commercials Code or other applicable law, and all rights provided herein, in the Indebtedness mentioned above, all of which rights and remedies shall, to the full extent permitted by law, be cumulative.

IN WITNESS WHEREOF, Debtor and Secured Party have executed this agreement this . . . . day of . . . ., 20. . .

Financing Statement.

There is no prescribed form; however, 8.9A-502 outlines formal requisites of financing statements and form at end of Digest is recommended by State Corporation Commission.

20.02 COLLATERAL SECURITY:

See category 8 Debtor and Creditor, topic 8.15 Pledges.

20.03 MORTGAGES OF PERSONAL PROPERTY:

See topic 20.01 Chattel Mortgages; category 3 Business Regulation and Commerce, topic 3.09 Commercial Code.

20.04 MORTGAGES OF REAL PROPERTY:

Mortgages, while valid and enforceable in equity (92 Va. 86, 22 S.E. 854), have been almost entirely superseded in Virginia by deeds of trust, under which sale may be made by trustee, on default, without suit (55-59). See category 21 Property, topic 21.06 Deeds. Trustee is agent for both parties and must act impartially. (101 Va. 63, 43 S.E. 189). Bonds may be required from him, by court, on application of any person in interest, or, for cause, substitute trustee may be appointed. (26-1). Substitute trustee may be appointed for any reason by party secured by deed of trust and has same powers as original trustee. (55-59). Performance of conditions is defense in ejectment brought by mortgagee or trustee, if it would be defense in equity. (8.01-147).

The usual evidence of debt is one or more promissory notes, but bonds, or other forms of obligation are sometimes secured.

Execution.

Mortgage or deed of trust may be in form prescribed by statute. (55-58). Acknowledgment is necessary for recordation but not to validate between parties. (55-106).

Recordation.

Mortgages and deeds of trust are recorded as deeds. (17.1-227). As against purchasers for value without notice, and lien creditors, they are void unless and until recorded. Mere possession of land is not notice of interest therein. (55-96). Recordation is not notice as to lands outside the city or county in which the instrument is recorded, and it should be recorded in each jurisdiction wherein lands are affected. (55-97). Standards for writings to be recorded are prescribed by statute (55-108) and regulations adopted by State Library Board (42.1-82).

Recording fees are the same as for deeds. See categories 10 Documents and Records, topic Records; Property, topic Deeds, subhead Recording Fees.

Recording Tax.

See category 22 Taxation, topic 22.13 Property Taxes, subhead Recording Tax.

Assignment.

Transfer of debt carries with it security, without assignment or delivery. (82 Va. 190). Assignee of installment note secured by interest in mobile home must give notice by mail of action to foreclose or repossess at least ten days prior to enforcement to any assignor liable under recourse endorsement or by virtue of reserve account, but failure to notify will not affect assignee's rights against principal debtor or against other person with recourse or with rights in reserve account. (55-66.1:1). Upon recordation of deed or instrument granting, transferring of assigning interest in leases, rents or profits arising from real property described in deed or instrument, grantee's, transferee's or assignee's interest is fully perfected as to any assignor or third party without necessity for taking subsequent action such as giving notice to assignor, obtaining possession of property, appointment of receiver or impounding rents. Lessee's obligation to pay rent is satisfied by payment to assignor, even after transfer, unless and until lessee gives notice of transfer. (55-220.1).

Foreclosure.

Trustee usually has power of sale granted in deed of trust, and may proceed to sale at auction after default. (55-99). Deed of trust may be enforced in equity (90 Va. 370; 18 S.E. 843, overruled on other grounds, 99 Va. 353; 38 S.E. 181), but application should be made to court only when its aid is necessary (101 Va. 63, 43 S.E. 189).

Mortgages may be foreclosed by bill in equity. (92 Va. 86, 22 S.E. 854). A bill may be filed in equity to protect rights under a trust deed, and jurisdiction may be retained and sale ordered (62 Va. 334). Personal decree for deficiency may be made in such suit after sale. (84 Va. 630, 6 S.E. 367).

Limitations.

Limitation on suit or sale is ten years from maturity of last maturing original obligation, subject to rules relating to death of party, and disabilities. (See category 5 Civil Actions and Procedure, topic 5.16 Limitation of Actions.) Before its expiration, time may be extended by recordation of certificate in form provided in Va. Code § 8.01-241.1. (8.01-241).

Sales.

When sale is made under decree or order, the terms may be fixed by the court, and one or more commissioners appointed to sell, who must give bonds unless already under bond. (8.01-96). While terms of sale are discretionary (80 Va. 855), in judicial sales under instruments in which terms are agreed upon, contract governs (82 Va. 190). Confirmation of sale by court is necessary, and for injurious irregularity it may be refused or, if given, rescinded, and resale ordered. (75 Va. 455). Setting aside sale after confirmation must be on motion or petition, after notice to all parties, and for good cause. (77 Va. 470).

Under deed of trust, unless it provides otherwise, trustee should sell, on default, when required by creditor, at public auction, property or as much as may be necessary after reasonable notice of time and place of sale. Trustee or secured party must give written notice including time, date and place of any proposed sale to (i) present owner; (ii) any subordinate lienholder who holds note against property secured by deed of trust; (iii) any assignee of such note if assignment and address of assignee are recorded; and (iv) any condominium unit owners' association, property owners' association or proprietary lessees' association that has filed lien. Written notice shall be given pursuant to (ii)-(iv) hereof only if assignment or lien is recorded at least 30 days before proposed sale. ``Inadvertent'' failure to give notice imposes no liability on trustee or secured party. (55-59.1). If indebtedness secured by deed of trust lost or unavailable, trustee may proceed to sale upon receipt of affidavit from beneficiary. Beneficiary must notify debtor 14 days in advance by certified mail that instrument lost and request for sale will be made. Debtor may petition court to use ``any reasonable means'' to protect from claimant other than beneficiary. (55-59.1). Trustee must, within six months after sale, return account of sale to commissioner of accounts of court where trust deed was first recorded. Unless trustee returns his report, he is not entitled to commissions unless allowed by court. (26-15). Additional notice requirements apply to ``high-risk mortgage loans'' until July 1, 2010. (55-59.1:1).

Proceeds must be applied first to expenses of sale, including reasonable commission for trustee; then to taxes, levies and assessments; then in order of priority, if any, to remaining debts and obligations secured by deed of trust; and any residue shall be paid to grantor or his assigns. (55-59.4).

Under second deed of trust, sale of equity of redemption may be made. (69 Va. 657). Trustee should follow provisions of deed. (64 Va. 266). Details not provided are within discretion of trustee, who should consult parties, and in case of doubt apply in equity for instructions. He is subject to control of court. (90 Va. 370, 18 S.E. 843, overruled on other grounds, 99 Va. 353, 38 S.E. 181).

Sale under deed of trust should be advertised as deed provides with certain minimum requirements or if deed provides no means of advertisement, as required by statute. Sales voidable by court if trustees fail to comply with advertising requirements. (55-59.2). Contents of advertisement prescribed by statute. (55-59.3). Wishes of debtor should be consulted as to place of sale, if not agreed upon. (90 Va. 370, 18 S.E. 843, overruled on other grounds, 99 Va. 353, 38 S.E. 181; 55-59).

Deficiency judgments may be obtained.

Redemption.

Suit in equity may be brought to redeem mortgaged property and subrogation follows redemption by a junior interest (75 Va. 407). Absolute deeds given to secure debts are equitable mortgages. (40 Va. 148). On decree in foreclosure, court in discretion may fix period for redemption, usually six months, though less time may be allowed. (38 Va. 294). Otherwise there is no redemption after sale.

Under deed of trust grantor retains equity of redemption before sale by trustee similar to equity of redemption under mortgage (62 Va. 112), and after sale to receive any surplus (58 Va. 289).

After execution of judgment of reentry, mortgagee or trustee not in possession may redeem within 12 months. (55-241).

Release.

Lienor may record Deed of Release, Certificate of Satisfaction, Deed of Partial Release or Certificate of Partial Satisfaction, on any one or more parcels of property encumbered by lien of Deed of Trust. Certificate of Partial Satisfaction or Deed of Partial Release shall refer to parcels of land being released either by description or reference to recorded deed or plat containing description of released parcels. (55-66.4:1). In certain jurisdictions full or partial release of lien of Deed of Trust accomplished by marginal notation on recorded Deed of Trust showing full or partial release of Deed of Trust. Must contact circuit court clerk to determine when marginal partial release permitted in particular jurisdiction. (55-66.3; 17.1-228). If person petitions court for release of mortgage or deed of trust and court finds that holder of that mortgage or deed of trust has unjustifiably failed to release such instrument, court may order holder to pay petitioner's costs and attorney fees. (55-66.5). Partial marginal release or certificate of partial satisfaction may be made in same manner as satisfaction of entire lien and if there is recorded deed or plat, cross reference shall be made to it in margin or certificate. (55-66.4).

Satisfaction.

On satisfaction of debt secured by mortgage or deed of trust, and also in cases of vendors' and mechanics' liens, unless deed of release be given, creditor must have entry made of satisfaction on margin of record of incumbrance or record certificate of satisfaction. Must call clerk of court to determine if marginal release permitted in particular jurisdiction. (55-66.3; 17.1-228). Within 90 days of partial or full satisfaction of debt secured by mortgage or deed of trust, and also in case of vendors' and mechanics' liens, unless deed of release be given, creditor must either record satisfaction certificate, enter satisfaction on margin of record incumbrance, or deliver to appropriate clerk's office, obligor or obligor's designee executed certificate of satisfaction and note marked “paid”. Creditor may satisfy requirement by mailing certificate by certified mail, return receipt requested, or by hand-delivery, when there is proof of receipt from clerk's office. Creditor who fails to comply with these requirements forfeits $500 to lien obligor, and, obligor's costs and attorney's incurred in collecting this sum if not paid within ten days after demand. Creditor or his duly authorized agent or attorney or any person to whom instrument has been endorsed or assigned for purpose of effecting release, must sign entry, and either produce cancelled evidence of debt or file affidavit that debt was paid to creditor, who was then entitled to receive payment, and that evidence of debt has been cancelled and returned to debtor, or is lost or destroyed. If creditor cannot make this affidavit, lien debtor may file similar affidavit after entry of satisfaction. This entry when attested by clerk, operates as release or reconveyance. (55-66.3). Any person in interest may apply to court for order to have such lien discharged of record, on 20 days notice to holder of lien, and proof. (55-66.5). Release or reconveyance may be to original grantor, though he be dead, and it inures to benefit of successors in title. (55-66.2). If deed of release be recorded, clerk, within ten days, must record certificate of satisfaction. (55-66.6). Clerk's failure to comply with recordation requirements shall be liable for any damage any person may sustain by reason of such failure and shall be fined not less than $25 and no more than $100. (55-66.6).

Enforcement.

Limitation on enforcement after maturity date is ten years. (8.01-241). This limitation may be extended by filing certificate in form provided in Va. Code § 8.01-241.1. Deed of trust is presumed satisfied after 15 years after maturity date. (55-66.5). Credit line deed of trust with no stated maturity date may not be enforced after 40 years from date of such deed of trust. (8.01-242).

Discharge.

See subheads Release; Satisfaction, supra.

Insurance.

Lenders making loans secured by deeds of trust or mortgages may not require fire insurance coverage exceeding replacement value of improvements on real property. (Va. Code

6.1-2.6:1).

Forms.

Deed must list each grantor and grantee under whose name instrument will be indexed as required by Va. Code § 17.1-249. (55-48). Such instrument may be in following form or to same effect:

“This deed, made the . . . day of . . . ., in the year . . . ., between . . . . (here insert names of parties as grantors or grantees), witnesseth: that in consideration of (here state the consideration), the said . . . . doth (or do) grant unto the said . . . ., all (here describe the property, including the name of the city or county in which the property is located, and insert covenants or any other provisions). Witness the following signature and seal (or signatures and seals)." (55-48).

Deed of trust must name each grantor, trustee, and grantee (if applicable) under whose name full instrument will be indexed as required by Va. Code § 17.1-249 (55-58). Full name and address of trustee must be disclosed. Trustee must be resident of Virginia. (55-58.1). Such Instrument may be in following form or to same effect:

“This deed made the . . . . day of . . . . in the year . . . . between . . . . (the grantor), of the one part, and . . . . (the trustee), of the other part, witnesseth: that the said…, (the grantor) doth (or do) grant unto the said. . . .(the trustee), the following property (here describe it): In trust to secure (here describe the debts to be secured or the sureties to be indemnified and insert covenants or any other provisions the parties may agree upon).Witness the following signatures and seals (or signature and seal)." (55-58).

Nor form of deed or release is provided by statute. Permissible form in general use is as follows: ``This deed made the. . . . day of. . . . in the year. . . . between. . . . (trustee) and . . . . (grantor of trust deed), and. . . . (creditor), witnesseth that whereas the (grantor of trust deed) did by deed bearing date the. . . . day of. . . . in the year. . . . and recorded, etc., convey to. . . . , trustee, the following property, (description), in trust to secure the following (state liability secured) and whereas the said debt has been fully paid, as evidenced by said note (or other obligation) having been exhibited to the trustee marked paid, and the (creditor) signing this deed: Now, therefore, in consideration of the premises, and of the sum of five dollars to him in hand paid, the (trustee) doth release unto the (grantor of trust deed) all interest, right, claim, or title, which he may have in or to the above described property, by virtue of the said deed of trust. Witness the following signatures and seals."

Usual practice is to recite that evidence of debt has been exhibited to trustee marked paid. If this is done, it is not usual to have creditor sign release.

Forms for certificate of release or partial release must conform substantially with form set forth in Va. Code § 55-66.4:1, set out below. Such release must be in conformity with Va. Code §§ 55-66.3, 55-66.3:1 and 55-66.4. (55-66.4:1).

CERTIFICATE OF SATISFACTION

Place of Record . . . .

Date of Note/Deed of Trust . . . .

Face Amount Secured/Face Amount of Note: . . . .

Deed Book . . . .Page . . . .

Name(s) of Grantor(s)/Maker(s): . . . .

Name(s) of Trustee(s) . . . .

Face Amount of Note(s) $. . . . .

I/we, holder(s) of the above-mentioned note(s) secured by the above-mentioned deed of trust, do hereby certify that the same has/have been paid in full, and the lien therein created and retained is hereby released. GIVEN UNDER MY/OUR HAND(S) THIS . . . ..DAY OF . . . ..20 . . . .

. . . .

. . . .

(NOTE HOLDERS)

Commonwealth of Virginia,

County/City of . . . .to wit:

Subscribed, sworn to and acknowledged before me by . . . .

This . . . .day of . . . ., 20 . . . .

My Commission expires: . . . .

. . . .

(NOTARY PUBLIC)

VIRGINIA:

IN THE CLERK'S OFFICE OF THE CIRCUIT COURT

This certificate was presented, and with the Certificate annexed, admitted to record on . . . . . . .at . . . . . . o'clock . . . . . . .m.

Clerk's fees: $. . . . . . .have been paid.

Attest: . . . . , Deputy Clerk

Or:

CERTIFICATE OF PARTIAL SATISFACTION

Place of Record . . . .

Date of Deed of Trust . . . .

Deed Book . . . . .Page . . . .

Name(s) of Grantor(s) . . . .

Name(s) of Trustee(s) . . . .

Maker(s) of Note(s) . . . .

Date of Note(s) . . . .

Face Amount of Note(s) $ . . . .

The lien of the above-mentioned deed of trust securing the above-mentioned note is released insofar as the same is applicable to . . . .(description of property) recorded in deed book . . . . .at page . . . .. in the clerk's office of this court. The undersigned is/are the legal holder(s) of the obligation, note, bond or other evidence of debt secured by said deed of trust.

Given under my/our hand(s) this. . . . . day of. . . . ., 20. . . . .

. . . .

. . . .

(NOTE HOLDERS)

Commonwealth of Virginia,

County/City of. . . . . to wit:

Subscribed, sworn to and acknowledged before me by . . . ..

This. . . . . day of. . . . ., 20. . .

My Commission Expires: . . . .

. . . .

(NOTARY PUBLIC)

Credit Line Deed of Trust: Credit Line Deed of Trust must state on front page, either in capital letters or in language underscored, the words “THIS IS A CREDIT LINE DEED OF TRUST.” Document must specify maximum aggregate amount of principal to be secured at any one time. In addition, document must set forth name of noteholder secured and address at which communication may be mailed or delivered to him. Such address may be amended or modified by duly recorded amendment to deed of trust. (55-58.2). Debtor's signature is no longer required to amend Deed of Trust to show address change for creditor.

Chattel Mortgages.

See topic 20.01 Chattel Mortgages.

21 PROPERTY

21.01 ABSENTEES:

Care of Property.

Conservators may be appointed for persons who have disappeared, absented themselves from their usual place of abode or have been reported or listed as missing, or missing in action, or interned, or captured by an enemy. Proceedings may be brought to sell real estate of absentee if heirs cannot be located. (26-68.1).

Property held in trust for or belonging to nonresident infants, insane persons, or cestuis que trustent, may, on petition, be ordered by court to be paid over to foreign guardians, committees or trustees (26-60, -61), or property may be ordered sold and proceeds paid over (26-66).

Escheat.

Land owned by persons dying intestate without any known heir or testate without disposing of property by will and without any known heir, after inquiry, escheats to state. (55-171). Process for escheats generally is located in Va. Code §§ 55-168-201.1

Virginia has also adopted Uniform Disposition of Unclaimed Property Act (55-210.1 et seq.). Act presumes, with some exceptions, that property unclaimed by owner more than five years after it became payable is abandoned. (55-210.2:1).

See categories 3 Business Regulation and Commerce, topic Banks and Banking, subhead Unclaimed Deposits; Estates and Trusts, topics Descent and Distribution, subhead Escheat, Wills, subhead Unclaimed Legacies.

21.02 ADVERSE POSSESSION:

Character of Possession.

Possession must be actual, hostile, exclusive, visible and continuous for statutory period. (220 Va. 553, 260 S.E. 2d 457).

Duration of Possession.

Entry on or action for unlawful entry or detainer must be effected within 15 years after right to make entry or bring such action first accrued to claimant or person through whom he claims. (8.01-236). Any action for unlawful entry or detainer must be brought within three years after such entry or detainer. (8.01-236).

Easements.

To establish private right of way over the lands of another by prescription, the use and enjoyment thereof by the claimant must be adverse, under a claim of right, exclusive, continuous, uninterrupted, with the knowledge and acquiescence of the owner, and must have continued for at least 20 years. (157 Va. 661, 162 S.E. 184).

Disabilities.

Person who is infant or insane at time right to make entry or bring action to recover land accrues, or person claiming through such person, may make entry or bring action within 15 years after removal of disability or death of person under disability, whichever occurs first (8.01-236, -229), but in either event, entry must be made or action brought within 25 years from time right first accrued (8.01-237).

21.03 [RESERVED]

21.04 CONVEYANCES:

See topic 21.06 Deeds.

21.05 CURTESY:

Abolished, except if interest vested prior to Jan. 1, 1991, or creditor or other third party has interest in real property that would be affected by abolition. (Va. Code 64.1-19.2). However, unless lawfully barred, husband may claim elective share of wife's augmented estate. (Va. Code 64.1-13). See category 13 Estates and Trusts, topic 13.16 Wills.

21.06 DEEDS:

Execution.

Witnesses are not ordinarily used, nor is acknowledgment necessary to validity of a deed as between parties and their privies. Deed must be signed by grantor or attorney-in-fact. (55-23). Seal is not necessary so long as ``this deed'' or other words importing sealed document are used. (11-3).

Corporations.

Deeds by corporations may be signed in the name of the corporation, by the president, acting president, any vice president, or other person authorized by the directors. Person signing must acknowledge. (55-120).

Recordation.

Deeds, to be effective against subsequent purchasers for value without notice or lien creditors of vendor, must be recorded in the city, or if not in a city, in the county where the land lies. (55-96). See category 10 Documents and Records, topic 10.04 Records.

In order to be recorded, deed must be acknowledged by grantor or proved by oath of two subscribing witnesses. (55-106, 113). For circumstances in which spouse must join, see categories 8 Debtor and Creditor, topic Homesteads; Family, topic Husband and Wife, subhead Conveyances.

Recording Fees.

Recording clerk's fee is $16 for ten or fewer pages, $30 for 11-30 pages and $50 for 31 or more pages. Charge for plat is $15. (17.1-275). See category 10 Documents and Records, topic 10.04 Records.

Recording Tax.

See category 22 Taxation, topic 22.13 Property Taxes, subhead Real Estate Conveyance Tax.

Construction.

Deed is construed to convey all estate, right, title and interest of grantor, at law or in equity, unless otherwise excepted in instrument. (55-49). Deed is also construed to include buildings, privileges and appurtenances, unless excepted. Adopted children and children born out of wedlock are presumptively included in terms “children”, “issue”, “heirs” and similar words of classification but are presumptively excluded by such terms as “natural children” and “issue of the body”. (55-49.1).

Covenants.

Covenants by grantor are construed to be for himself, his heirs, representatives or his or their assigns. (55-67). Short forms of covenants are construed as effective as though common law form were used, as follows: “that he will warrant generally the property hereby conveyed” (55-68) or “with general warranty” (55-70); “that he will warrant specially the property hereby conveyed” (55-69) or “with special warranty” (55-70), for covenant to defend against grantor and those claiming under him; “that he has the right to convey the said land to grantee” (55-71); “that the grantee shall have quiet possession of the said land” (55-72); “free from all encumbrances” added to quiet possession, for covenant against encumbrances (55-72); “that he will execute such further assurances of the said lands as may be requisite” (55-73); and “that he has done no act to encumber the said lands” (55-74). “With English Covenants of Title” (55-70) includes following covenants: (1) “right to convey”; (2) “quiet possession” and “free from encumbrances”; (3) “further assurances”; and (4) “no act to encumber”. (55-70-74). There are implied warranties on new homes that home is free from structural defects and constructed in workmanlike manner. (55-70.1).

Defective deed may be good between the parties. (55-51).

Forms.

Every deed, corrected or amended deed, deed of release, or memorandum or addendum to any of these instruments, including those with vendor's liens, shall name in first clause each grantor and each grantee under whose names instrument is to be indexed as required by § 17-249 and may be made in following form, or to same effect (55-48):

“This deed, made the . . . . day of . . . ., in the year . . . ., between (here insert names of parties as grantors or grantees), witnesseth: that in consideration of (here state the consideration), the said . . . . doth (or do) grant unto the said . . . ., all (here describe the property, including the name of the city or county in which the property is located, and insert covenants or any other provisions). Witness the following signature and seal (or signatures and seals).”

A release deed, using these words, “the said grantor (or the said . . . .) releases to the said grantee (or the said . . . .) all his claims upon the said lands,” is construed to fully remise, release and quitclaim all the right, title and interest of grantor at law or in equity as against grantor, his heirs, personal representatives, or his or their assigns. (55-75). See category 20 Mortgages, topic 20.04 Mortgages of Real Property.

Uniform Federal Lien Registration Act has been adopted. (55-142.1 et seq.).

21.07 DEEDS OF TRUST:

See category 20 Mortgages, topics 20.01 Chattel Mortgages, 20.04 Mortgages of Real Property.

21.08 DOWER:

Abolished, except if interest vested prior to Jan. 1, 1991, or creditor or other third party has interest in real property that would be affected. (Va. Code 64.1-19.2). However, unless lawfully barred, wife may claim elective share of husband's augmented estate. (Va. Code 64.1-13). See category 13 Estates and Trusts, topic 13.16 Wills.

21.09 ESCHEAT:

See topic 21.01 Absentees, subhead Escheat; categories 3 Business Regulation and Commerce, topic Banks and Banking, subhead Unclaimed Deposits; Estates and Trusts, topics Descent and Distribution, subhead Escheat, Wills, subhead Unclaimed Legacies.

21.10 LANDLORD AND TENANT:

Uniform Residential Landlord and Tenant Act has not been adopted in Virginia. However, Virginia Residential Landlord and Tenant Act, (55-248.2 et seq.), comprehensively covers rental or dwelling units and rights and obligations of landlords and tenants. Key provisions deal with application fees (55-248.6:1), handling of security deposits (55-248.15:1) and inspections (55-248.11:1), landlord's obligation to maintain fit premises and his inability to contract away certain of these obligations (55-248.13), tenant's obligation to maintain dwelling unit (55-248.16), certain prohibited provisions in rental agreements (55-248.9), tenant's remedies (55-248.21 to 55-248.27), landlord's remedies (55-248.31 to 55-248.38:3), prohibition of retaliatory conduct (55-248.39) and manufactured home lot rental (55-248.41 to 55-248.52). Virginia Landlord and Tenant Act excepts from its application occupancy in single family residences where owners are natural born persons and landlord owns no more than ten rental units or four condominium units. (55-248.5[A][10]).

Tenants are liable for waste. (55-211). Double damages available for wanton waste. (55-214).

Kinds of Tenancy.

Tenancy for life, years, year to year, month to month, and tenancy at will or by sufferance are recognized in Virginia.

Leases.

Lease for more than one year must be in writing to enforce. (11-2). Unless UCC applies, lease for more than five years must be recorded to be enforceable against purchasers for value without notice and creditors. (11-1; 55-96). Memorandum of lease may be recorded in lieu of recording lease. (55-57.1).

Security Deposits.

Landlord may not demand or receive security deposit in excess of two months' rent. Upon termination of tenancy, security deposit may be applied solely to accrued rent, amount of damages suffered by reason of tenant's failure to maintain building properly, less reasonable wear and tear excepted, and charges as provided in rental agreement. Landlord must itemize deductions from such security deposit within 45 days after termination of tenancy and delivery of possession. Landlord must apply security deposit within 45 day period. Landlord must notify tenant of any deductions to be made from security deposit during course of tenancy. Notice must be made within 30 days of date they are determined. If tenancy ends within 30 day period, landlord need not itemize. Tenant may request to be present when landlord inspects property. Such inspection must be made within 72 hours of delivery of possession. Upon completion of inspection landlord must give tenant itemized list of damages found. If landlord willfully fails to comply with section, court must order return of security deposit and interest, plus actual damages and reasonable attorney's fees. (55-248.15:1). Any security deposit held by firm or sole proprietorship must be placed in escrow, unless otherwise agreed to in writing by principals to transaction. (Va. Real Estate Board Regs., 18 VAC 135-20-180). If rental agreement is terminated on account of landlord's noncompliance, landlord must return entire security deposit plus accrued interest. (55-248.21).

Inspection of Premises.

Landlord must, within five days after occupancy of dwelling unit itemize damages existing at time of occupancy, provided, however, that landlord may adopt policy (i) allowing tenant to prepare written report of move-in inspection or (ii) providing for joint preparation of report by landlord and tenant. Reports are deemed correct unless objected to within five days after receipt. (55-248.11:1).

Mold in Dwelling Unit.

Landlord must use reasonable efforts to maintain premises in such condition as to prevent accumulation of moisture and growth of mold, and promptly respond to written notices from tenant as provided in § 55-248.16. (55-248.13).

Personal Property.

Sheriffs have authority to store or sell personal property removed from residential premises pursuant to landlord's action of unlawful detainer or ejectment, subject to notice and recovery. (55-237.1,248.38:2).

Form of Lease.

A deed of lease may be in the following form or to like effect:

“This deed, made the . . . . day of . . . ., in the year . . . ., between (herein insert names of parties), witnesseth: that the said . . . ., doth (or do) demise unto the said . . . . his personal representative and assigns, all (here describe the property), from the . . . . day of . . . ., for the term of . . . ., thence ensuing, yielding therefor during the said term the rent of (here state the rent and mode of payment). Witness the following signature and seal (or signature and seals)." (55-57).

Short forms of covenant are authorized by statute as follows: ``to pay the rent", ``to pay the taxes" (55-76); that ``he will not assign without leave", that ``he will leave the premises in good repair" (55-77); that ``the lessor may reenter for default of. . . . days in the payment of rent, or for breach of covenants" (55-79); by lessor, ``for the lessee's quiet enjoyment of his term" (55-78).

Covenants for rent or good repair, in absence of words showing intent that lessee is so bound, are ineffective on destruction of buildings without fault of tenant, or if he be deprived of possession by public enemy. If buildings are partly destroyed reasonable reduction in rent must be made until buildings of as much value to tenant are again on premises. Like reduction is made for time tenant is deprived of possession. (55-226).

Rent.

Tenant asserting material noncompliance by landlord with rental agreement, provisions of law, or implied warranty of habitability must pay rent due into court escrow pending resolution of dispute. (55-248.27).

Rent and interest on rent may be recovered by distress or action. (55-227). Tenant may use landlord's noncompliance as defense to actions for nonpayment of rent so long as rent is paid into court escrow pending resolution of dispute. (55-248.25).

Lien.

Landlord is given a fixed and specific lien (55-231, -233), independent of the right of distress or attachment, which are merely remedies for enforcing it. (182 Va. 351, 28 S.E.2d 741 [1944], reversed on other grounds, 323 U.S. 353).

Termination of Tenancy.

Either party may terminate a tenancy from year to year by notice in writing three months before the end of any term of one year. Monthly tenancy may be terminated similarly by written notice 30 days before next rent due date. Notwithstanding terms of lease, landlords may terminate lease due to rehabilitation or change in use of building containing at least four residential units, upon 120 days prior written notice to tenant. Notice by landlord may be served on tenant or any sub-tenant. Notice by tenant may be served on anyone owning all or part of premises or his agent, or according to common law. Notice may be waived by agreement.

However, 120 day notice period may not be waived. Period of less than 120 days may be agreed upon in written instrument separate from rental agreement or lease executed after such notice is given and applicable only to 120 day notice period. If term ends at specified time, neither need give notice. All notices required to be in writing must be separate from rental agreement or lease. (55-222).

When tenant's breach of obligations or rental agreement is criminal or willful act which is not remedial and poses threat to health and safety, landlord may terminate rental agreement immediately. (55-248.31).

On desertion of the premises while rent is unpaid, without sufficient goods thereon subject to distress to pay the rent, the landlord may post a notice requiring rent to be paid in ten days, in case of a monthly tenant, or in one month, in case of a yearly tenant. If the notice is not complied with, the landlord has the right to reenter, and the tenant's rights cease, but he is liable for rent to the time specified by the notice. (55-224).

Partition or sale does not affect rights of tenants. (8.01-91). On termination of life estate or other uncertain estate in land, tenant is entitled to hold until end of current year of tenancy, rent being duly apportioned. (55-252).

Holding Over.

A tenant by his mere failure to vacate, if for unavoidable cause will not be held a tenant for a new term, but will be liable for use and occupation and any other damages. (55-223).

Reentry for failure to pay rent, or for breach of covenant or condition, may be had by ejectment. Service may be made on a tenant in possession, or if the premises be vacant, by affixing on premises, which service shall be in lieu of demand and reentry. Judgment for the land may be entered by default on affidavit, or on contest by proof that rent is due, or covenant or condition broken, that there is not on the premises sufficient goods liable to distress, and the right of plaintiff to reenter. In unlawful detainer action, tenant may request continuance or contested trial but must pay into court amount equal to amount of rent due through trial date as condition for granting request. (55-248.25:1).

Payment or tender of rent, interest and costs to plaintiff, his attorney, or into court will bar ejectment and action of unlawful detainer seeking possession of residential dwelling. (55-243). If time for reentry be specified in lease, action of ejectment must not be prematurely begun. (55-244). On bill for relief from ejectment, amount due and costs must be paid into court. Landlord is accountable only for actual profits, and if these be less than rent, balance must be paid him before possession is restored. (55-242).

A defendant (55-240), or a mortgagee or trustee of the lands (55-241), may within one year pay the rent, interest and costs, and secure possession, or file a bill in equity for relief against the forfeiture. On bill for relief, injunction may not issue to stay ejectment, unless the amount due be paid into court or deposited in a bank within the state, to the credit of the cause, within 30 days after answer to the bill. (55-242). The limitation of one year runs from first publication of act of reentry. (55-247). There is also a limitation barring proceedings to attack reentry for defects in proceedings after person has held actual possession for two years. (55-248).

Dispossession.

An action lies for forcible or unlawful entry on lands or for detention by a tenant after his right has expired, without consent of person entitled to possession. (8.01-124). Remedy may include rent and actual damages from breach, including reasonable attorney's fees and costs of notice. (55-248.35). Initial hearing should be held within 21 days, or as soon as is practicable, from time of complaint. (8.01-126). Appeal from order of general district court to circuit court must be made within ten days. (8.01-129).

Distress.

Warrant for distress may be issued by a judge or clerk of a general district court or magistrate for county or city on affidavit within five years after rent becomes due. (55-230). Levy may be made on goods of lessee, or his assignee, or under tenant, found on premises, or removed therefrom within 30 days. If goods when carried on premises were subject to lien valid against creditors, tenant's interest only may be subjected to levy. If lien was created subsequently, goods are liable, whether rent became due before or after lien was created, for rent not to exceed six months if premises are located in city or town or are used for residential purposes, and for not more than 12 months' rent if premises are used for farming. No other goods are liable, and goods of undertenant are liable only to extent of his indebtedness to tenant at time of levy. (55-231).

Crops.

Rights as to emblements are as at common law (55-249), but tenant must pay proportionate rent for part of land occupied (55-250). Tenant is also entitled to reasonable compensation for land prepared for crop under such circumstances as would have entitled him to emblements if crop were planted. (55-251). Removal of any part of crop from rented land by tenant without consent of landlord, before rents and advances are satisfied, is misdemeanor. (18.2-100).

When rent is payable in share of crop, share of crop belonging to landlord who owes taxes, but only that share, is subject to distress for taxes. (58.1-3943). Unless tenant contracted to pay taxes, he is entitled to credit against landlord for crops taken. (58.1-3944).

The landlord has a prior lien on crops for advances to tenants or laborers, recoverable as in case of rent (see subhead Rent) by attachment or distress. (43-29).

Notice to Tenant.

Notices to tenant must be sent to tenant's last known address which may or may not be rental unit. (55-248.6).

21.11 LEASES:

See topic 21.10 Landlord and Tenant.

21.12 [RESERVED]

21.13 PERPETUITIES:

Virginia has adopted Uniform Statutory Rule Against Perpetuities. Rule supplies alternative vesting period for 90 years to common law rule, so that interest invalid under common law rule is not deemed invalid until it fails to vest after 90 years. (55-12.1 et seq.). Statutory rule applies to nonvested property interests and powers of appointment created on or after July 1, 2000. (55-12.5).

21.14 PERSONAL PROPERTY:

Personal property may be held by a husband and wife as tenants by the entireties. (55-20.2). Any person may own personal property as joint tenants with or without right of survivorship. (55-20.1).

21.15 POWERS OF ATTORNEY:

Attorney in fact has power to sell or encumber property of certain principals. (See 55-43.) Person interested in welfare of incompetent principal may require attorney-in-fact to disclose actions taken on behalf of principal. Attorney-in-fact must make such disclosure within five years of date of request or within five years of death of principal. (11-9.6).

Uniform Durable Power of Attorney Act not adopted. If written power of attorney so provides, agent's authority does not terminate on principal's disability, incompetence or incapacity. (11-9.1). Agent's authority survives principal's death until agent receives actual knowledge or notice of death; agent's affidavit that at time of action agent had no actual knowledge or notice of principal's death is conclusive proof of nontermination. Mere passage of time since execution of power of attorney, where no termination date, will not invalidate power. (11-9.2). Power of attorney for member of armed forces not revoked by “missing in action” designation. (11-9.3). Person without actual knowledge to contrary may rely on affidavit of attorney in fact or agent that contingency has occurred in accepting contingent power of attorney. (11-9.4). Individual may designate in signed and notarized writing person to arrange burial or disposal of remains; designee shall accept in writing. (54.1-2825).

21.16 REAL PROPERTY:

Among estates recognized are: Fee simple, estates for life, for years or at will; remainders; reversions; joint tenancy; tenancy in common; tenancy by entireties.

Any husband and wife may own real property as tenants by entireties. (55-20.2). Any persons may own real property with or without right of survivorship. (55-20.1). There is no survivorship between joint tenants except where they hold as executors or trustees or the instrument creating joint tenancy clearly shows intent that there shall be survivorship, or in case of joint judgments or decrees, or certain contract rights. (55-20.1, 20.2).

Acts Barring Property Rights.

See category 13 Estates and Trusts, topic 13.07 Descent and Distribution, subhead Acts Barring Descent or Distribution.

Dower and Curtesy.

Interests of dower and curtesy are abolished. However, such abolition shall not change or diminish nature or right of (i) any dower or curtesy interest of surviving spouse whose dower or curtesy vested prior to Jan. 1, 1991, or (ii) creditor or other interested third party in any real estate subject to right of dower or curtesy. (Va. Code 64.1-19.2).

Installment Sales.

Sale or disposition of land whereby purchaser does not receive deed conveying property purchased until part or all installment payments have been made is covered by Virginia Subdivided Land Sales Act. (55-336 et seq.).

Residential Property Disclosure.

All contracts for sale of residential property in Virginia must contain certain statutory disclosures.

The Property Owners' Association Act (55-508 et seq.) and Condominium Act (55-79.39 et seq.), require financial disclosure packages be provided. The Virginia Residential Property Disclosure Act (55-517 et seq.), requires disclosure about condition of property. Fact that mechanic and materialmen liens may affect property must be disclosed. (43-1 et seq.). The Wet Settlement Act requires notification at closing that title insurance is available. (Va. Code 6.1-

2.13). Federal law requires lead based paint disclosures. The Consumer Real Estate Settlement Protection Act (Va. Code 6.1-2.19 et seq.) requires disclosure regarding choice of settlement agent and this Act also requires anyone handling residential closings to be licensed. Act also requires disclosure that purchaser or borrower has choice of settlement agent. (6.1-2.22). Notice to purchaser is required to be given by seller that owner makes no representations with respect to information on any sexual offenders and that purchaser is advised to exercise whatever due diligence they deem necessary in regard to obtaining information about registered sex offenders. (55-519).

Rule in Shelley's Case has been abolished. (55-14). Doctrine of worthier title has been abolished. (55-14.1).

Foreign Conveyances or Encumbrances.

See category 10 Documents and Records, topic 10.04 Records.

Condominiums.

Condominium Act recognizes condominium principle of real estate ownership. (55-79.39, et seq.).

Cooperatives.

Virginia Real Estate Cooperative Act recognizes cooperative principle of real estate ownership, and regulates cooperatives. (55-424 et seq.).

Real Estate Investment Trusts.

See category 13 Estates and Trusts, topic 13.15 Trusts, subhead Real Estate Investment Trusts.

Time-Sharing.

Virginia Real Estate Time-Share Act (55-360 et seq.) comprehensively covers arrangements for time-sharing, whereby use, occupancy, or possession of real property circulates among owners according to fixed or floating time schedule on periodic basis occurring over any period of at least five years.

Fair Housing.

Virginia Fair Housing Law establishes as policy of Commonwealth provision of fair housing for all citizens regardless of race, color, religion, national origin, sex, elderliness, familial status or handicap and establishes and prohibits discriminatory housing practices. Guarantees right to jury trial in fair housing cases and ensures there is no limitation on punitive damages. (36-96.1 et seq.).

Property Owners' Associations.

Property Owners' Association Act requires maintenance of detailed operational and administrative records and allows access to all associations' books and records by member in good standing or authorized agent. Certain records may be withheld from inspection. Sale of lot shall include in contract disclosure statement regarding location of lot in development subject to Act and availability of disclosure packet. Purchaser may cancel contract within three days after receiving disclosure packet or notification that packet unavailable, provided cancellation right not waived and exercised before settlement. Provisions are also included in Act pertaining to contents of disclosure packet, adoption and enforcement of rules by board of directors of association, authority to levy special assessments, declaration compliance and liens for assessments. (55-508 et seq.).

See also topics 21.05 Curtesy, Deeds, Dower, Landlord and Tenant; categories 5 Civil Actions and Procedure, topic Partition; Debtor and Creditor, topic Homesteads; Documents and Records, topic Records; Estates and Trusts, topic Descent and Distribution; Family, topic Husband and Wife; Mortgages, topic Mortgages of Real Property.

21.17 TRUST DEEDS:

See category 20 Mortgages, topics 20.01 Chattel Mortgages, 20.04 Mortgages of Real Property.

22 TAXATION

22.01 ADMINISTRATION:

State Tax Commissioner supervises taxation. (58.1-202 et seq.). Effective July 1, 1997, Virginia Taxpayer Bill of Rights governs taxpayers' rights in assessment, collection and enforcement processes and Tax Commissioner shall designate taxpayers' rights advocate within State Department of Taxation. (58.1-1845).

Circuit courts of counties and cities have various powers relating to taxes, and are mentioned herein as the court.

Provision is made for appointment of boards of equalization in cities and counties for equalizing real estate assessments. (58.1-3370 to -3389). In certain cities and counties continuing assessors have powers of boards of equalization. (58.1-3260).

Commissioner of revenue and treasurer are elected in each city and county. (Const., Art. VII, § 4). Principal duties of commissioners relate to receiving returns and assessment of taxes, and of treasurers to collection of taxes. (58.1-3100 to -3122.2; 58.1-3123 to -3172.1).

Exemptions.

Property owned by nonprofit organizations described in specified classifications, by organizations specifically designated, and by organizations designated by city, town or county is exempt. (Const., Art. X, § 6; 58.1-3609 to -3622; 58.1-3650; -3651). Also, following property may be exempt under grandfather provision: property owned directly or indirectly by state or any political subdivision thereof and obligations of state; property of church or religious body; burial grounds, educational institutions, libraries, charitable, religious and community associations, not for profit; and certain memorial societies. (Const., Art. X, § 6; 58.1-3606; -3607). There are various other exemptions specific to particular tax.

Appeals.

Local boards of equalization in each county and city may supervise real estate assessment work and hear applications for review. Boards may summon taxpayers and examine accounts and records. Any taxpayer may apply for review to local board, or county, town or city may apply for increase of any real estate assessment. Governing body of any county or city may set deadlines for applications and local board determinations. Either party may appeal from local board to local court. (58.1-3378 to -3387).

Application to court to correct assessment must be made within later of (i) three years after assessment or (ii) one year from date of Tax Commissioner's determination on administrative appeal, in case of state taxes (58.1-1825), and (i) within three years from last day of tax year for which any such assessment is made (ii) within one year from date of assessment, (iii) within one year from date of final determination under Va. Code 58.1-3703.1 or Va. Code 58.1-3983.1, or (iv) within one year from date of final determination under 58.1-3981, whichever is later in case of local taxes (58.1-3984). Double assessment on property may be corrected at any time. (58.1-1827, -3986). Appeal lies to Supreme Court for tax decision of any circuit court or State Corporation Commission. (58.1-1828).

Apportionment.

After partition of real estate and upon motion, taxes must be apportioned by court. (58.1-3225). Five days notice of application for apportionment must be given to tax authorities. (58.1-3226). Circuit court may apportion city taxes on land which has become property of separate owners after assessment. (58.1-3224).

Refund.

Upon determination by court that assessment of tax is erroneous, or that action with respect to transferred credit or other tax attribute is erroneous, it may order refund in amount of overpayment or correction of action. (58.1-1826; -3987).

22.02 ALCOHOL, BEVERAGES AND TOBACCO TAXES:

Alcoholic Beverages Tax.

Tax of 40¢ on each liter of wine sold by Alcoholic Beverage Control Board. Tax of 20% on sale of other alcoholic beverages by Board. (4.1-234). Beer and wine-coolers taxed by volume. (4.1-236).

Soft Drink Excise Tax.

Imposes upon wholesalers and distributors of carbonated soft drinks excise tax of varying amounts depending on annual gross receipts. (58.1-1701, -1702).

22.03 [RESERVED]

22.04 CORPORATE TAXES:

Public Service Corporations.

Special provisions are made with respect to taxation of railway and canal companies, freight car companies and rolling stock of motor vehicle carriers (58.1-2652 to -2659); telegraph and telephone companies, pipeline transmission companies and water or heat, light and power companies (58.1-2620 to -2634); road tax on motor carriers, calculated on fuel used within state (58.1-2700 to -2712.2); insurance companies (58.1-2500 to -2530); and bank and trust companies (58.1-1200 to -1217).

License Taxes.

See category 3 Business Regulation and Commerce, topic 3.19 Licenses, Business and Professional.

Franchise and Registration Taxes.

See category 2 Business Organizations, topic 2.03 Corporations.

Taxation of Insurance Companies.

See category 16 Insurance, topic 16.01 Insurance Companies.

Taxation of stock in bank or trust company, see category 3 Business Regulation and Commerce, topic 3.01 Banks and Banking.

22.05 EMPLOYMENT TAXES:

Unemployment Compensation Tax.

Imposed on employers at rate of up to 6.2% of wages paid, according to benefit experience of employer. (60.2-515). There is no tax on employees, nor may tax be deducted, in whole or in part, from their wages. (60.2-107). By regulation of Unemployment Compensation Commission, tax is payable to Commission quarterly.

22.06 [RESERVED]

22.07 ESTATE TAX:

(58.1-900 to -938). Virginia estate tax (often called “death tax”) has been repealed by legislation enacted in 2006 that is effective for estates of Virginians who die on or after July 1, 2007. (58.1-901). In case of resident of Virginia with date of death prior to July 1, 2007, estate tax in amount of federal credit for state death taxes allowable by I.R.C. § 2011 is imposed on taxable estate, subject to credit against such estate tax for lesser of: (i) Death taxes paid to other states for which I.R.C. § 2011 credit is allowed or (ii) I.R.C. § 2011 credit multiplied by fraction, numerator of which is value of that part of gross estate over which other states have jurisdiction to extent that Virginia would exert jurisdiction with respect to residents of such other states and denominator of which is value of decedent's gross estate. (58.1-902).

In case of nonresident of Virginia who is resident of U.S., estate tax is imposed on his real property located in Virginia and tangible personal property having actual situs in Virginia in amount equal to that portion of I.R.C. § 2011 credit allocable to such property located in or having actual situs in Virginia. (58.1-903).

In case of nonresident of U.S., estate tax is imposed on his real property situate in Virginia, tangible personal property having actual situs in Virginia, and intangible personal property physically present within Virginia in amount equal to that portion of I.R.C. § 2011 credit allocable to such property in Virginia. Stock in corporation organized under laws of Virginia is deemed to be physically present within Virginia. (58.1-904).

Returns and Payment.

Personal representative must file state return and copy of federal estate tax return with Department of Taxation on or before date on which federal estate tax return is required to be filed, which date includes any extension of time granted for filing federal estate tax return. (58.1-905).

Estate tax must be paid by personal representative to Department of Taxation by return due date or extended due date if federal estate tax extension has been granted provided that if extension of time to file federal return is granted. (58.1-905).

If personal representative files amended federal estate tax return, he must also immediately file with Department of Taxation amended state estate tax return. If, upon final determination of federal estate tax due, deficiency is assessed, personal representative must give written notice of such deficiency to Department of Taxation within 90 days after determination. (58.1-906).

Lien.

Unless estate tax is sooner paid in full, there is lien in amount of unpaid tax for ten years after decedent's death upon all real property and tangible personal property of decedent located in Virginia. (58.1-908).

Lien attaches to resident or nonresident decedent's personal estate only upon filing by Department of Taxation of memorandum in clerk's office of county or city wherein decedent resided, and to real estate only upon filing of memorandum in clerk's office in county or city wherein such real estate is located. (58.1-908).

Generation Skipping Transfer Tax.

Where original transferor was resident of Virginia, tax is imposed in amount equal to credit for state legacy taxes allowed under I.R.C. § 2602, to extent such credit exceeds aggregate amount of taxes on transfer paid to other states. Where original transferor was not resident of Virginia, but generation skipping transfer includes real or personal property that has situs in Virginia, tax is imposed in amount equal to I.R.C. § 2604 credit, reduced by that proportion of I.R.C. § 2604 credit that value of transferred property taxable by states other than Virginia bears to value of gross generation skipping transfer. (58.1-935 to -938). For generation-skipping transfers after Oct. 22, 1986, Virginia generation-skipping transfer tax shall conform to generation-skipping transfer provisions of Tax Reform Act of 1986. (58.1-936).

Recapture Tax on Certain Use-Valuations.

If decedent's estate contains certain farm or business real property which qualifies for special valuation under I.R.C. § 2032A and property is valued in manner provided by I.R.C. § 2032A for Virginia estate tax, copy of election made at time of filing federal estate tax return shall be attached to Virginia estate tax return when filed. Such return shall include agreement signed by each person having interest, whether or not in possession, in such property. (58.1-931A).

If, within 15 years after decedent's death and before death of qualified heir, qualified heir disposes of any interest in property, other than to member of his family, or ceases to use property for qualified use, additional Virginia estate tax is imposed as computed in I.R.C. § 2032A(c). (58.1-931B).

Apportionment.

If executor, administrator or other fiduciary pays estate tax, amount of tax must be prorated among persons interested in estate, except that in such proration each person is entitled to any exemptions or deductions allowed him. (64.1-161).

Interstate Co-operation.

Uniform Act on Interstate Compromise and Arbitration of Death Taxes has been adopted and appears at 58.1-920 to -930.

Wills and Administration.

Tax is levied on wills and administration as follows: for probate of will or grant of administration, 10¢ for every $100 of value of property of decedent taxable in Virginia, or fraction thereof, but no tax if value is $15,000 or less. (58.1-1712). Payment must be made before qualification of representative. Tax return filed with clerk of court when will offered for probate. (58.1-1714). Tax is payable to court clerk. (58.1-17.12, Tax on Wills and Administration 23 VAC 10-310-20). Any county or city may impose additional tax on probate of will or grant of administration equal in amount to one-third of state tax on such probate or grant of administration. (58.1-1718). Tax return filed with clerk of court when will offered for probate. (58.1-1714).

22.08 GASOLINE AND SPECIAL FUELS TAXES:

Gasoline Tax.

17.5¢ per gallon on gasoline and gasohol, except 5¢ per gallon on aviation fuel. (58.1-2217). 17.5¢ per gallon on alternative fuel used to operate highway vehicle. (58.1-2249).

22.09 GIFT TAX:

No statutory provisions.

22.10 [RESERVED]

22.11 INCOME TAX:

Rates on net income of individuals are: 2% on first $3,000 of Virginia taxable income or part thereof, 3% on income in excess of $3,000 but not in excess of $5,000, 5% on next $12,000 or part thereof, 5¾% on excess over $17,000. (58.1-320). Residents' Virginia taxable income is computed on federal adjusted gross income, subject to modifications set forth in 58.1-322. “Resident”, for these purposes, means persons domiciled in Virginia at any time during taxable year and persons maintaining place of abode in Virginia for aggregate of more than 183 days of taxable year, whether or not domiciled in Virginia. (58.1-302). Nonresidents' Virginia taxable income is sum bearing same proportion to Virginia taxable income, computed as if resident, as net amount of income, gain, loss, and deductions from Virginia sources bears to net amount of income, gain, loss, and deductions from all sources. (58.1-325).

Withholding.

Every employer must withhold specified amount of wages of each employee. (58.1-461).

Information Reporting.

Certain nonresidents owning real property in Virginia must report rent payments and sales transactions involving real property to Department of Taxation. (58.1-316, -317).

Personal exemptions are allowed in conformity with federal law. See subhead Deductions, infra. Determination of marital status and definition of dependent same under federal law. (58.1-301).

Members of Armed Forces who are stationed on military reservations within state but are not domiciled in Virginia and who maintain no place of abode in state are not liable for income tax for compensation received from military or naval service. (58.1-321).

Deductions are permitted as under federal law (with certain exceptions) including standard deduction or low income allowance, plus $930 for each personal exemption allowed for federal tax purposes. (58.1-322). Nonresidents may elect to take standard deduction or other deductions to extent connected with income taxable in Virginia. (58.1-322, -325).

Estates and trusts are taxed at rates applicable to individuals. (58.1-360).

Pass-through entities are not taxed as such, but individual owners are taxed on their distributive shares of income subject to some modifications. (58.1-391, -322).

Corporations are taxed at rate of 6% of net income (58.1-400) but are not taxed on foreign source income (58.1-400, -402, -421). Dividends received by corporation are allocable to state of commercial domicile. (58.1-407). Income of corporation earned in several states generally is apportioned by multiplying such income by fraction, numerator of which is property factor plus payroll factor, plus twice the sales factor, and denominator of which is four, reduced by number of factors having no denominator. (58.1-408 to -421). Qualified corporations engaged in specified activities may be eligible for credits against Virginia income tax, as provided in 58.1-432 to -439.17. S Corporations are exempt from income tax. (58.1-401[4]).

Returns and Payment.

Corporations and pass-through entities must file returns with Department of Taxation on or before 15th day of fourth month following close of fiscal year. (58.1-441, -392). Corporate taxes are due when return is filed and penalties and interest are added to any amount unpaid. (58.1-455).

Individual and fiduciary tax returns must be filed on May 1, or on 15th day of fourth month following close of fiscal year. (58.1-341, -381). Declaration of estimated tax by individuals, trusts, and estates with respect to any taxable year ending two or more years after decedent's death must be filed by May 1 of taxable year if Virginia tax liability, other than from wages on which tax is withheld, is reasonably expected to exceed amount set by Tax Commissioner. (58.1-490). Payment of estimated tax will be made in installments depending on when declaration is filed. (58.1-491). Residents file with commissioner of revenue of county or city of residence; nonresidents file with commissioner of revenue of county or city in which all or part of income from sources in state was derived. Fiduciaries file with commissioner of county or city where fiduciary qualified; if no qualification in state, where fiduciary resides, has office or where beneficiary resides. (58.1-343, -382). Individual and fiduciary taxes are payable to treasurer of city or county where return was filed, on or before May 1, or on 15th day of fourth month following close of fiscal year. (58.1-351). Department of Taxation may extend time in which individual or fiduciary may file tax return. (58.1-344).

Local Income Tax.

Particular localities may under certain conditions enact local income taxes. (58.1-540 to -549).

Penalties.

Willful failure or refusal to make return at time required by law is Class 1 misdemeanor and making any false statement in such return with intent to defraud State is Class 6 felony. (58.1-348). False or fraudulent understatement of income with intent to evade tax is subject to penalty of 100% with interest at rate established pursuant to 58.1-15 from time return was required to be filed until paid. (58.1-308). Penalty for filing return after time prescribed is 6% of amount of taxes assessable for first month, with additional 6% each additional month, not exceeding 30% in aggregate. (58.1-347).

22.12 INHERITANCE TAX:

No statutory provisions.

22.1322.15

22.16 PROPERTY TAXES:

Taxable Property.

Only local taxes may be imposed on coal and other mineral lands, real estate, tangible personal property, machinery and tools, capital of merchants, except rolling stock of railroads. (Const. Art. X, § 4; 58.1-3000). Other property is subject only to state taxation. (58.1-100).

Intangible personal property is segregated from state taxation only and is exempt from local taxation. (58.1-1101). State tax on intangibles was repealed effective Jan. 1, 1985 (c. 729, Laws 1984), but statutes continue to define intangible personal property, including certain kinds of tangible personal property used by businesses, as reserved for state taxation only (58.1-1101). Capital of merchants as defined in 58.1-3510 is not taxed by state, but is subject to local taxes. (58.1-1100; -1101).

Assessment.

Valuations must be at fair market value. (Const., Art. X, § 2). Property is assessed for taxation on Jan. 1 each year. (58.1-3281).

General assessment of real estate required every two years in cities, except that cities with populations of 30,000 or less may reassess every four years. (58.1-3250). General reassessment of real estate required in counties in varying years, depending upon population and other conditions. Counties with populations of 50,000 or less may reassess real estate every five or six years thereafter; other counties must reassess real estate every four years thereafter. (58.1-3252). General reassessment authorized at more frequent intervals in counties and cities. (58.1-3253).

General reassessment is by professional assessor or by board of assessors appointed by governing body. (58.1-3270, -3271). Revenue commissioners annually assess mineral lands, with separate valuations for minerals and surface. (58.1-3286, -3287).

Personal property is valued by commissioners of revenue from returns required from taxpayers. (58.1-3107, -3103).

State Corporation Commission values all property of all public service corporations for all tax purposes. (58.1-2600 to -2683).

Liens.

Taxes and levies, together with penalties and interest, are prior lien on real property and rents for current year, and may be enforced by suit in equity. (58.1-3340).

Any person in interest may file petition in court for ascertainment of amount of taxes due on any real property, payment of which discharges all tax liens. (58.1-3959).

Uniform Federal Lien Registration Act (Revised) adopted. (55-142.1 to -142.9).

Payment and Collection.

Taxes are payable to treasurer of city or county on or before date prescribed by governing body. (58.1-3127A, -3913). Penalty of 5% is added to late payments unless delay is not taxpayer's fault (58.1-3915), and treasurer must make demand and collect by distress or otherwise, but if removal is contemplated by taxpayer action may be before Dec. 5 (58.1-3919). Interest at 10% begins day following day taxes are due. (58.1-3918). Additional provisions for collection of delinquent taxes are found in 58.1-3921 to -3938.

Distraint may be against all goods of the person assessed and his lands may be seized and leased for a term not over one year. (58.1-3940 to -3948).

Property of tenant or person in possession, up to amount of rent contracted for, is liable if landlord's property is insufficient. (58.1-3943; -3944). Taxes specifically assessed against goods and chattels constitute lien against property so possessed and have priority over all security interests; merchant's capital tax is deemed specifically assessed against inventory; no security interest in goods or chattels prevents same from being distrained and sold for taxes; security interest, perfected prior to any distraint for taxes has priority over all taxes, except those specifically assessed against goods and chattels so assessed. (58.1-3942). Collection may be had out of estate in hands of or debt due by third party. (58.1-3952).

Sales.

Lands may be sold for delinquent taxes, after advertisement, by treasurer of county, or of city if in a city, on Dec. 31 in year following second anniversary of date on which taxes were due. (58.1-3965). Proceedings shall be by bill in equity. (58.1-3967). Right of redemption exists prior to sale. (58.1-3974). Action for sale of property may be suspended on entry and recording of agreement by owner for payment of delinquent amounts within 24 months. (58.1-3965).

Recording Tax.

Deeds and contracts relating to real or personal property are taxed 25¢ per $100 or fraction thereof of consideration paid or actual value of interest conveyed, whichever is greater. (58.1-801, -807). Deeds of trust or mortgages, except deeds of trust on realty on which tax has been paid for construction loan within three years are taxed 25¢ per $100 thereof of amount of bonds or obligations secured thereby. (58.1-804). Depending on value of deed of trust or mortgage, various maximum recording tax rates apply. (58.1-803). For deeds of real estate, additional tax of 50¢ for each $500 of value applies, with exemption of deeds involving less than $100. (58.1-802). For deeds of release or partition, tax is 50¢. (58.1-805, -806). If conveyance or contract relates to rolling stock or other railroad equipment, tax is 25¢ for each $100 or fraction, apportioned by percentage of mileage in state. (58.1-808). No instrument may be admitted to record until tax is paid to recording clerk. (58.1-812). Deed of subordination or modification altering priority of instrument, except amount of principal obligation secured thereby, is exempt from tax. (58.1-809). Deed conveying land to church; nonprofit college; state or political subdivision thereof; U.S. for public purpose; nonstock corporation operating nonprofit hospital; Virginia Division of United Daughters of Confederacy; partnership when grantors and partners are same persons; trustee when grantor and beneficiaries are same persons; original beneficiaries of trust from trustees holding title under deed of trust; or involving certain mergers; or when title is transferred to decedent's spouse or kin pursuant to dispositive trust provision of which decedent was settlor; or by deed of gift; or from any church or religious body, is exempt. (58.1-811). City or county may impose recordation tax equal to one-third of state recordation tax. (58.1-3800 to -3804).

Real Estate Conveyance Tax.

Not imposed. See subhead Recording Tax, supra.

22.17 SALES AND USE TAXES:

Imposed by 58.1-600 et seq.

“Sale” includes selling at retail or leasing tangible personal property or services. (58.1-602, -603). “Use” includes use or consumption of tangible personal property in this State, or storage of such property outside State for use or consumption in this State. (58.1-602, -604). State rate for “sale” is 4% (additional local rate of 1% also applies) of sales price to be computed on gross sales. (58.1-603). State rate for “use” is 4% of cost price (additional local rate of 1% also applies) except if brought into State six months or more after acquisition basis of rate is current market value; provided tax to be proportioned to cost price or current market value as duration of time of use within this State bears to total useful life of such property. (58.1-604). Additional use tax on certain equipment temporarily brought into State for construction purposes. (Va. Code 58.1-604.1 to -604.3).

Aircraft Sales and Use Tax.

A tax of 2% of sale price is levied on sale price of airplanes if sold in state or first licensed in state within six months. Tax is 2% of market value if licensed six months or more after acquisition. (58.1-1500, -1502).

Watercraft Sales and Use Tax.

Tax of 2% of sales price is imposed on vessels propelled by machinery or sail-powered vessels in excess of 18 feet long. (58.1-1400 to -1410). Amount of tax levied upon sales of watercraft shall not exceed $2,000. (58.1-1402).

Exclusions.

Sales and use tax provides for exemptions in following general categories: (1) Governmental and commodities; (2) agricultural; (3) commercial and industrial; (4) service; (5) media-related; (6) miscellaneous. See Va. Code 58.1-609.1 to Va. Code 58.1-609.10.

Payment of Tax.

Tax levied shall be collectible from dealers. (58.1-612). Dealer shall file return on or before 20th day of month with Department of Taxation or local commissioner of revenue or local treasurer (58.1-615); payment of tax due should accompany return (58.1-616). Dealer is given discount for filing his return and paying amount due by him within prescribed time. (58.1-622). Credit against use taxes will be given for similar taxes paid in another state, provided, credit shall not exceed taxes imposed by this State. (58.1-611).

Every person desiring to engage in or conduct business as a dealer shall file with Commissioner, application for certificate of registration for each place of business in this state. (58.1-613).

Motor Vehicle Sales and Use Tax.

Tax of 3% of sales price imposed on sale or use of motor vehicles; 4% on gross proceeds from rentals of motor vehicles. Tax paid to Division of Motor Vehicles when title issued. (58.1-2400 et seq.).

22.18 STAMP AND SEAL TAXES:

Seal Tax.

There is tax of $2 for each impression of seal of state, payable to Secretary of Commonwealth. (58.1-1725).

No tax is required for seal affixed to document to be used in obtaining benefit of any pension, revolutionary claim, money due for military services, or land bounty, under federal or state statute. (58.1-1726).

Stamp Tax.

None.

22.18A TAX LIENS:

Uniform Federal Lien Registration Act.

Adopted. (55-142.1 to -142.9).

22.18B TAX ON SUITS:

There is $5 tax upon: (1) Commencement of every civil action in court of record; (2)

removal or appeal of cause of action from district court to court of record; (3) appeal from decision of county, city, or town governing body to court of record; (4) attachment returnable to court of record; and (5) writ of mandamus sued out of any court (except Supreme Court of Virginia). When debt or demand for damages exceeds $50,000 but not $100,000, tax is $15; when debt or demand for damages exceeds $100,000, tax is $25. No writ may issue until tax paid to clerk where suit commenced. (58.1-1727, -1728, -1729).

23 TRANSPORTATION

23.01 MOTOR VEHICLES:

Governing statutes in Title 46.2 of Code. Subtitles include: General Provisions, Department of Motor Vehicles; Titling, Registration, and Licensure; Operation; Dealers; Commercial Training Schools and Scrappage Program; and Motor Carriers. Department of Motor Vehicles responsible for administration of Motor Vehicle laws and regulations. (46.2-200). Address of Commissioner of Department of Motor Vehicles is P.O. Box 27412, 2300 W. Broad Street, Richmond, VA 23269.

Vehicle license must be obtained annually from Department of Motor Vehicles. Number plates must be displayed on front and rear of vehicle. One plate may be used on rear of motorcycle, trailer, semitrailer or vehicle of person licensed as motor vehicle dealer or as transporter of unladen vehicle, or on front of tractor trucks. (46.2-715). Registration of cars is on annual basis, and is effective for 12 months. (46.2-646). All motor vehicles, trailers, and semitrailers registered in Commonwealth may be placed on monthly registration schedule at discretion of Commissioner, to distribute registrations as evenly as possible among months (46.2-646); Commissioner may offer optional multi-year registration for all motor vehicles, trailers, and semitrailers except those either uninsured or registered under International registration (46.2-646); if necessary, Commissioner may grant 15 day grace period extending expiration of license plates (46.2-647).

Member of armed services exempt from vehicle license requirements when operating an official armed forces vehicle, but not while driving his own vehicle. (46.2-305).

Operator's License.

All drivers, except those exempted in Code 46.2-303 through 308, must have driver's license issued by D.M.V. (46.2-300). Exemptions for nonresidents with valid licenses from other states (46.2-307) and armed services personnel operating official vehicles (46.2-306). Learner's permit may be issued to minor over 15 years and six months. (46.2-335). Restrictions apply to drivers under 19. (46.2-334.01). Minimum age for driver's or chauffeur's license is 19 years, but driver's license may be issued to minor over 16 years and three months if application is signed by parent, guardian or juvenile judge. If minor is married or otherwise emancipated, may present evidence of marriage or order of emancipation. Minor previously convicted of offense in juvenile and domestic relations court or found by court to be child in need of supervision will be issued license only on written approval of judge who made adjudication or finding. Minor applicant who is required to attend school pursuant to 22.1-254 et seq. must provide evidence of compliance in writing by minor's parent, or presentation of high school diploma or its equivalent. (46.2-334). Court must suspend driver's license of minor who has ten consecutive unexcused absences from public school. (46.2-334.001). Commissioner must cancel unmarried or unemancipated minor's license for six months, or until 19th birthday, if sooner, upon written request of parent, or guardian. Applicants 16 years and three months to 19 years old with valid license from another state are eligible for temporary driver's license valid for six months, provided applicant has not been found guilty of or responsible for offense involving operation of motor vehicle. (46.2-334). Resident over age 16 licensed as driver, and resident over 19 years licensed as chauffeur, under law of another state or country requiring licensing of drivers, may drive without Virginia license on state highways for first 60 days of residency. (46.2-308). Driver's licenses are renewable for five years. (46.2-330). D.M.V. cannot issue license to person having defective vision (46.2-311); to one adjudged incapacitated (46.2-314); to one who in opinion of D.M.V. suffers from physical or mental disease or disability preventing reasonable control of motor vehicle (46.2-315); to one convicted of certain offenses set out in 46.2-316 or who has forfeited bail. Restricted licenses issued for persons using bioptic telescopic lenses. (46.2-312). No driver's license or learner's permit issued to any person who is 80 years old or older will be renewed unless applicant for renewal appears in person and either: (i) Passes vision examination or (ii) presents report of vision examination, made within 90 days prior thereto by ophthalmologist or optometrist indicating that applicant's vision meets or exceeds standards contained in § 46.2-311. (46.2-330). Persons failing to pay fines or costs may (subject to various notice requirements) have driver's license revoked or suspended. (46.2-395). Grounds for refusal or suspension of license including certain child support delinquencies are set forth in 46.2-320.

Titles.

Before operating motor vehicle on state highways, owner or authorized attorney-in-fact must obtain registration card and certificate of title from D.M.V. Application must contain statement of applicant's title and of all liens or encumbrances upon vehicle. (46.2-623). Forms furnished by Commissioner. (46.2-621). D.M.V. must be notified within 30 days of any change of address shown on registration, certificate of title, or application. (46.2-606).

Sales.

Title to motor vehicle is transferred by owner's endorsing assignment and warranty on certificate of title with statement of all security interests thereon. (46.2-628). Transferee then signs certificate and, unless he is auto dealer (46.2-631), forwards it within 30 days (46.2-630) to D.M.V. which, upon proper application, issues new certificate, registration card, and license plates (46.2-619). Inspection required before sale by dealer (46.2-1539), except for certain sales to out-of-state purchasers (46.2-1540). Repossessed vehicle purchased out of state by Virginia dealer can be resold in state without obtaining Virginia title. (46.2-633.1).

Security interests upon motor vehicles must be set out and described in application for a certificate of title (46.2-623) and must appear on certificate itself (46.2-636). When subsequently created, security interests must be reported by filing application to Department which issues a new certificate showing all security interests in order of priority according to date of filing of application. (46.2-637). No other recording is necessary or required. (46.2-638). If application is filed within 30 days from date of applicant's purchase of such vehicle, security interest is valid as if registered on day lien acquired. (46.2-639).

Identification Marks.

Felony offense to knowingly remove, alter, or conceal serial or identification number (46.2-1074), or to knowingly possess vehicle or vehicle part with altered or removed identification numbers (46.2-1075). Misdemeanor to, with fraudulent intent, alter, forge or counterfeit any license plate or decal or assignment thereof (46.2-722) or to tamper with gross vehicle weight ratings (46.2-1075.1).

Operation Prohibited.

By person without license (46.2-300) or under influence of alcohol or drugs (18.2-266); of vehicle equipped with any type of air conditioning unit not approved by Superintendent of State Police (46.2-1088), with hood scoops exceeding certain prescribed dimensions (Va. Code 46.2-1088.1), with any device to make smoke screens (46.2-1086), with muffler cut-outs (46.2-1047); of motorcycle not equipped with muffler or other sound dissipative device in good working order and in constant operation (46.2-1050). Non-transparent material on windshields or windows prohibited unless required or permitted by Superintendent of State Police or unless vehicle equipped with mirror on each side to reflect view of highway at least 200 feet behind vehicle.

(46.2-1052). Sun-shading materials on windows permitted if medically necessary and written authorization obtained from Commissioner (46.2-1053) or if can be proved that materials were installed before July 1, 1987 (46.2-1052). Suspended objects or alterations which obstruct driver's view of highway are prohibited except for rear side windows or rear windows of any multipurpose passenger vehicle or pickup truck where sunshading or tinting films reduce total light transmittance below 35%. (46.2-1054). Television receiver visible to driver prohibited except if authorized by statute. (46.2-1077). Unlawful to operate motor vehicle, bicycle, electric power-assisted bicycle or moped on state highways while using earphones (not prosthetic devices or certain non-prosthetic noise-cancellation devices or if installed in helmets worn by motorcycle operators and riders and used as part of communications system) on or in both ears. (46.2-1078). Operation of vehicle equipped with radar detection device or radar jamming device and use of such device prohibited. Violation does not require proof that device was operative or being operated at time of alleged offense, but no infraction if device had no power source and was not readily accessible for use. (46.2-1079). Unlawful to drive in Virginia, other than for snow removal or similar emergency situations, for over 13 hours in any 24 hour period or for such period when driving time in any other state is included. (46.2-812). Aggressive driving shall be punished as Class 2 misdemeanor. However, aggressive driving with intent to injure another person shall be punished as Class 1 misdemeanor. (46.2-868.1). Unlawful to operate motor vehicle while text messaging or emailing. (46.2-1078.1).

Size and Weight Limits.

Regulated by 46.2-1101, et seq. Violations constitute misdemeanors. (46.2-1104). Lesser weights and sizes may be prescribed by Transportation Commissioner for safety reasons or to protect highways or bridges. (46.2-1104). If federal regulation of interstate commerce permits greater size, weight, or load limit over any Virginia highway, similar limit may be prescribed for vehicles in intrastate commerce. (46.2-1103). Upon written application, Transportation Commissioner or local authorities may issue permit for operation of vehicle with size or weight exceeding statutory limits. (46.2-1139). Cities may regulate weight limits over highways under their jurisdiction. (46.2-1138.1). Signs stating reduced limits must be posted at each end of affected sections of highway. (46.2-1104).

Equipment Required.

Regulated by 46.2-1000 to 46.2-1100.

Child restraint devices must be used for children up to age eight; appropriate safety belts must be used for children between eight and 16 years of age. (46.2-1095).

Lights Required.

Regulated by 46.2-1010 to 46.2-1040.

Inspection.

Superintendent of State Police may compel inspection of any motor vehicle, trailer or semi-trailer registered in Virginia and operated on state highways, except for properly licensed antique motor vehicles, certain commercial vehicles, trailers, semitrailers and vehicles licensed to transport well-digging machinery. (46.2-1157). Practice is to require inspection after first registration and every year thereafter. (46.2-1158).

Accidents.

Driver of vehicle involved in an accident resulting in personal injury or damage to property must stop, give other person his name, address, license and registration numbers, render reasonable assistance to injured persons, take them to a physician or hospital if requested or if apparently necessary, unless as result of injuries received in accident driver is unable to comply. Violation is Class 5 felony if accident results in injury to or death of any person, or if accident results in more than $1,000 of damage to property. Violation is Class 1 misdemeanor if accident results in damage of $1,000 or less to property. (46.2-894). Driver or some person acting for him must make immediate report of accident to state or local police if accident results in bodily injury or death (46.2-371). If accident results in bodily injury, death, or in property damage, driver may make written report to Commissioner on form prescribed by Department of Motor Vehicles. Leaving scene of such accident is Class 5 felony. (46.2-894). Driver must make reasonable attempt to find owner of any unattended vehicle or other unattended property damaged in accident. If owner or custodian of damaged vehicle not found, driver must leave note in conspicuous place at accident scene and report in writing within 24 hours to state police or local law-enforcement agency. (46.2-896). Accident resulting in more than $1,500 in damages is reportable. (46.2-373).

Liability of Owner.

Owner of motor vehicle causing or knowingly permitting an unlicensed minor, under 16 years of age, to drive such vehicle upon a highway, or person who gives or furnishes a motor vehicle to such a minor, is jointly and severally liable with such minor for any damages caused by the negligence of minor in driving such vehicle. (8.01-64). If owner carries burden of proving his lack of consent or knowledge, it is valid defense to such action. (8.01-65).

Guests.

Owner or operator is liable for death of or injury to guest in car resulting from negligent operation of vehicle. (8.01-63). However, statute does not limit defenses otherwise available.

Proof of financial responsibility may be given by liability insurance policy in full force, by bond, by certificate of self-insurance, or by deposit of money or securities. (46.2-435 through 46.2-463).

Insurance.

Every motor vehicle owner's insurance policy must explicitly designate all vehicles covered and must insure person named as insured, and any other person responsible for using vehicle with his permission, against loss from liability for personal or property damages caused by accident or arising out of ownership or use of vehicle. (46.2-472). Policy amounts subject to limit, exclusive of interest and costs, with respect to each motor vehicle, of $25,000 for bodily injury to or death of one person in any one accident, $50,000 for bodily injury to or death of two or more persons in any one accident, and $20,000 for damage to property of others. (46.2-472). Driver's policy must insure against liability for damages arising out of insured driver's use of any motor vehicle not owned by him, subject to limits of liability set forth with respect to motor vehicle owner's policy. (46.2-473). Automobile liability insurance policies must carry uninsured motorists endorsement undertaking to pay to insured all sums legally recoverable for damages caused by uninsured motorists. (38.2-2206). Person registering uninsured motor vehicle must pay additional fee of $500 (46.2-706) which is paid into Uninsured Motorists Fund (46.2-710).

Liability of Judgment Debtor.

Upon application of judgment creditor, Commissioner of D.M.V. will suspend driver's license of any person who failed for 30 days to satisfy motor vehicle accident judgment. (46.2-417). Exception allowed where proper liability insurance was carried when claim arose and insurance company thereafter went into liquidation or where Commissioner finds that insurer authorized to do business in state is obligated to pay judgment. Judgment deemed satisfied when paid in full or when there has been credited $25,000 for injury or death of one person, or $50,000 for injury or death of more than one person, or $20,000 for damage to property, or when judgment has been discharged in bankruptcy. (46.2-419).

License or registration cannot be suspended if judgment debtor obtains court order permitting installment payments and if debtor gives proof of future financial responsibility. (46.2-421). If judgment debtor gives proof and creditor consents in writing to allow return of debtor's license and registration, Commission may allow return for six months after date of consent and then until consent revoked in writing. (46.2-423). During suspension, vehicle may not be registered in any other name where to do so would defeat purpose of act. Judgment debtor with suspended license or registration cannot obtain new license or registration for another vehicle until previous suspension is terminated. (46.2-427).

Reinstatement.

Appeal to Circuit Court may be taken from action of Commissioner requiring suspension or revocation of license or registration, except where action was mandatory. Either party may appeal as of right to Court of Appeals from final decision of circuit court. (46.2-410). After hearing upon petition, if circuit court finds order of Commissioner of suspension or revocation is manifestly unjust, court may order that Commissioner modify suspension or issue restricted license. (Va. Code 46.2-410.1).

No-Fault Insurance.

Not adopted.

Foreign Vehicles.

Provided the same privileges are granted by the state of the nonresident owner to resident owners of this state (46.2-655), foreign passenger car, registered in home state and displaying number plates issued by such state, may be operated for not over six months, without Virginia license or registration (46.2-656). If registration is not required of Virginia car operated in home state, nonresident is not required to register in Virginia. (46.2-657). If operated for other than pleasure, four or more times in one month being considered regular operation, foreign vehicle must be registered as if owned by resident.

Nonresident operators or chauffeurs, duly licensed in home state and over 16 years and three months of age may drive in Virginia while carrying license issued by home state. (46.2-307). Right of nonresident to operate motor vehicle in Virginia can be withdrawn and restored under same conditions as for residents. (46.2-430, -431).

Actions Against Nonresidents.

Summons in action growing out of accident or collision in which nonresident was involved while motor vehicle was operated in this state may be served on Commissioner of Department of Motor Vehicles, with same effect as if defendant nonresident or his personal representative is personally served while a resident. Nonresident includes anyone resident at time of accident but continuously out of state for 60 days next preceding day of service, and includes any person against whom an order of publication can be issued under 8.01-316. (46.2-601; 8.01-307). Notice of such service must forthwith be mailed by Commissioner by registered mail to defendant at his last known post-office address. If plaintiff files with Commissioner affidavit that defendant's address is unknown and cannot be ascertained, service is valid without mailing. (8.01-310, -312, -313). Court may order such continuances as may be necessary to afford defendant reasonable opportunity to defend the action. No judgment may be entered against such nonresident until at least ten days after process has been served on Commissioner. (8.01-311, -315).

Direct Actions.

Any person having insurance coverage protecting such person as an insured against injury or damage caused by a person operating a motor vehicle without liability insurance must, if an action is instituted by the insured against the owner or operator of an uninsured motor vehicle, serve a copy of the process upon the insurance company issuing the policy as though such insurance company were a party defendant. Thereafter, such insurance company has right to file pleadings and take other action allowable by law in name of owner or operator of the uninsured motor vehicle or in its own name. (38.2-2206). Insurer may not be joined as a party to an action on account of issuance of a policy of liability insurance. (8.01-5).

Motor vehicle carriers are regulated by comprehensive statute administered by Department of Motor Vehicles. (46.2-2000, et seq.). They must obtain certificate of public convenience and necessity (46.2-2001.3), and file insurance policy, bond, certificate of insurance, or unconditional letter of credit to pay final judgments for injuries to persons or property (46.2-2053). Chapter does not apply to school buses or to motor vehicles confining their business within limits of city or town, or, except as to requirement of insurance, to taxicabs and for hire vehicles operating only in city or town which regulates such taxicabs by ordinance, or to vehicles owned or operated by or on behalf of hotels used exclusively for transporting hotel patronage between hotel and local common carrier stations, vehicles owned and operated by federal, state or local governments, vehicles used exclusively in transporting employees to and from places of employment, provided operator of such vehicle secures necessary permit and identification marker for each vehicle so operated, vehicles transporting not more than 15 passengers in addition to driver, if driver and passengers are engaged in share the ride undertaking and if they share not more than expenses of operation of vehicle, or to minibuses operated by bona fide nonprofit corporation (except as to insurance requirement), or to vehicles while operated under exclusive regulatory control of transportation district commission pursuant to 15.2-4500 et seq. or to antique motor vehicles used for round trip excursions or to vehicles used to transport passengers by nonprofit, nonstock corporations solely funded by government subsidies. (46.2-2000.1). Motor vehicle carriers, including those engaged in interstate commerce, are subject to special fees and charges for use and maintenance of highways and for emergency medical services. (46.2-694, et seq. and 46.2-206).

Regulations of household goods carriers set forth in § 46.2-2100, et seq.

Road Tax.

Motor carrier operating in state must pay road tax imposed by 58.1-2700, et seq.

Gasoline Tax.

See category 22 Taxation, topic 22.08 Gasoline and Special Fuels Taxes.

23.02 RAILROADS:

See category 3 Business Regulation and Commerce, topic 3.08 Carriers.

1
WASHINGTON LAW DIGEST

—Scope —

Revised for 2010 edition by **LexisNexis**(R)

PERKINS COIE LLP, of the Seattle Bar.

(References, unless otherwise indicated, are to sections of Revised Code of Washington. Session laws are cited by year and chapter number. See also topic Statutes herein as to the status of the Revised Code of Washington. CR means Civil Rules; GR means General Rules; RAP means Rules of Appellate Procedure; CrR means Superior Court Criminal Rules; JCR means Justice Court Civil Rules; JCrR means Justice Court Criminal Rules; APR means Admission to Practice Rules; RPC means Rules of Professional Conduct; RLD means Rules for Lawyer Discipline; ER means Rules of Evidence; SPR means Superior Court Special Proceedings Rules; MAR means Mandatory Arbitration Rules; RALJ means Rules for Appeal of Decisions of Courts of Limited Jurisdiction; WAC means Washington Administrative Code; GALR means Guardian Ad Litem Rules. Parallel citations to the Pacific Reporter begin with 1 Wash.)

Note: This revision covers Acts of 2009, adopted and approved by governor up to and including Chapter *581*, Regular Session, adjourned *Apr. 26, 2009*. Regular legislative *sessions convene annually, not more than 105 days in odd years and 60 days in even years commencing on second Mon. in Jan. Special sessions of not more than 30 days may be convened by governor. (Const. Art. II, §12).*

1 INTRODUCTION

1.01 GOVERNMENT AND LEGAL SYSTEM:

The State of Washington is a constituent state of the United States of America. For further discussion of the U.S. federal system, see Introduction to the Federal Government of the United States at the beginning of this volume. A great many laws are promulgated by the federal government of the United States and are not reflected in the topics below. See the Introduction to this volume for references to the federal law topics covered.

Like all but one of the United States, Washington has a common law legal system, with roots in English common law. For information on the courts and legislature of Washington, see Category 6 Courts and Legislature.

1.02 [RESERVED]

1.03 HOLIDAYS:

Following are legal holidays: Sun.; Jan. 1; 3d Mon. of Jan.; 3d Mon. of Feb.; last Mon. of May; July 4; 1st Mon. of Sept.; Nov. 11; 4th Thurs. of Nov., and day following; and Dec. 25. Employees of state and political subdivisions (except school districts and certain employees of institutions of higher education) may choose one additional day per year. If any of above specified state legal holidays are also federal legal holidays but observed on different dates, only state legal holidays shall be recognized as paid legal holiday for employees of state and its political subdivisions, except for port district, municipal transit, and law enforcement agencies, which may recognize either holiday but not both. (RCW 1.16.050).

When holiday falls on Sunday next day is holiday. (RCW 1.16.050).

When holiday falls on Sat. preceding day is holiday. (RCW 1.16.050).

Business transactions on Sun. are not rendered void by the laws of this state.

Banks may remain closed on Saturdays. Any Saturday on which a bank remains closed is a holiday and all acts required to be performed on a Saturday may be performed on next business day without loss of rights. (RCW 30.04.330).

1.04 OFFICE HOURS AND TIME ZONE:

Washington is in the Pacific (GMT -08:00) time zone. Office hours are generally from 9 a.m. to 5 p.m.

2 BUSINESS ORGANIZATIONS

2.01 AGENCY:

In general, common law rules apply.

2.02 ASSOCIATIONS:

Unincorporated associations are governed by rules of common law.

Business associations in form of Massachusetts Trusts are authorized. (RCW 23.90.010-.900). See topic 2.04 Joint Stock Companies.

Professional Associations.

See topic 2.03 Corporations, subhead Professional Corporations.

2.03 CORPORATIONS:

Note: Washington Business Corporation Act (Title 23B), which became effective July 1, 1990, is substantially same as Revised Model Business Corporation Act prepared by American Bar Association. References to Model Act as revised through 2004. See Uniform and Model Acts section. Section numbers refer to Model Act; corresponding sections of Washington Act stated in parentheses.

General Supervision.

§1.30 adopted in substance. (RCW 23B.01.300).

Purposes.

§3.01 adopted in substance (RCW 23B.03.010), except businesses of banking and insurance may not be organized under Title 23B (RCW 23B.03.010[2]).

Name.

§4.01 adopted in substance except (1) name containing words indicating corporate status in other language not expressly allowed (RCW 23B.04.010[a]); (2) name may not contain certain words (RCW 23B.04.010[c]); (3) except as otherwise authorized, name must be distinguishable from fictitious names of certain foreign corporations (RCW 23B.04.010[d][iii]); (4) name must be distinguishable from certain domestic or foreign limited partnerships (RCW 23B.04.010[d][v]); limited partnership, limited liability company, limited liability partnership and noncorporate holder of name may consent to use of name or reserved name if consenter files with secretary of state to change name to available name (RCW 23B.04.010[2][a]); (5) title does not control use of assumed business names or “trade names” (RCW 23B.04.010[b][4]).

§4.02 adopted in substance, except corporate name may be reserved for 180-day period. (RCW 23B.04.020).

§4.03 adopted in substance, except (1) name sought to be registered by foreign corporation must be distinguishable on records of secretary of state from names specified in RCW 23B.04.010(1) (RCW 23B.04.030[1]); (2) description of nature of business not required; (3) registration effective until close of calendar year in which application for registration filed (RCW 23B.04.030[3]); (4) consent to use of name by foreign or domestic limited partnership will also cause registered name protection to terminate (RCW 23B.04.030[5]). Fee for registration of name: See subhead Fees, infra.

Term of Corporate Existence.

§3.02 adopted in substance. (RCW 23B.03.020[1]).

Incorporators.

§2.01 adopted in substance. (RCW 23B.02.010).

Articles of Incorporation.

§§2.02(a) and 8.03(a) adopted in substance. (RCW 23B.02.020[1], [2]). Unless articles of incorporation provide otherwise, specified statutory provisions obtain. (RCW 23B.02.020[3]). §2.02(b) adopted in substance. (RCW 23B.02.020[5]). Articles of incorporation or bylaws may contain provisions that set forth restrictions on transfer or registration of corporate shares, that allow shareholders' meetings to be held under any circumstances in which all participants can hear each other, and that set quorum of board of directors for as few as one-third of directors. (RCW 23B.02.020[6]). §2.02(c) adopted in substance. (23.B.02.020[7]).

Filing of Articles.

§1.20 adopted in substance, except (1) secretary of state may impose additional requirements for filing (RCW 23B.01.200[4]) and (2) document delivered for filing must be accompanied by exact or conformed copy, correct filing fee or charge, including license fee, penalty and service fee, and any attachments required for filing (RCW 23B.01.200[9]).

Incorporation Fee.

See subhead Fees, infra.

Fees.

Filing Fees.

$175 for articles of incorporation or applications for certificates of authority. Other fees established by rule by secretary of state. (RCW 23B.01.220).

Initial License Fee.

Included in initial $175 fee for filing articles of incorporation for domestic and foreign corporations. (RCW 23B.01.520; .540).

Annual License Fee.

$50 for both domestic and foreign corporations. (RCW 23B.01.530; .550).

License to Do Business.

§2.03 adopted in substance. (RCW 23B.02.030).

Organization.

§2.05 adopted in substance. (RCW 23B.02.050; RCW 23B.04.010).

Paid in Capital Requirements.

None.

Amendment of Articles.

§10.01 adopted in substance. (RCW 23B.10.010). §10.02 adopted in substance, except: (1) Provision allowing amendment of par value if only one class of stock outstanding substituted for §10.02(1) (RCW 23B.10.020[2]); (2) provision allowing amendment for change in number of authorized shares to effectuate stock split or dividend if only one class of stock outstanding substituted for §10.02(4) (RCW 23B.10.020[4]); (3) amendment to change corporate name not limited to addition of specified terms (RCW 23B.10.020[5]). §10.03 adopted in substance, except: (1) Summary of proposed amendment not acceptable substitute for copy of amendment in notice to shareholder (RCW 23B.10.030[4]); (2) minimum vote of each voting group necessary to pass amendment increased to two-thirds (majority for public company) and, for other than public companies, allows for lesser vote if provided for in articles of incorporation, so long as not less than majority vote required for any voting group (RCW 23B.10.030[5]). Plurality voting for directors may be modified in bylaw under specified circumstances. (23B.10.205). §10.04 adopted in substance, except: (1) Only class of shares affected by proposed amendment in one of ways described in §10.04(a) entitled to vote as separate voting group (RCW 23B.10.040[3]) and (2) all shares within class, which would be similarly affected by proposed amendment, vote as single voting group (RCW 23B.10.040[4]). §10.05 adopted in substance, except incorporators can act only if initial directors not named in articles of incorporation and not elected. (RCW 23B.10.050). §10.07 adopted in substance, except that provision for statement that amendment approved by shareholders in cases where shareholder approval required substituted for §10.06(6). (RCW 23B.10.060[6]). §10.07 adopted in substance, except: (1) Restatement may be by officer of corporation and not board of directors and shareholder approval may be required (RCW 23B.10.070[1], [2]) and (2) application for restatement must include, if restatement does not include amendment to articles of incorporation, statement to that effect (RCW 23B.10.070[4][a]). §10.08 adopted in substance. (RCW 23B.10.080). §10.09 adopted in substance. (RCW 23B.10.090).

Bylaws.

§2.06 adopted in substance, except: (1) Number of directors or process by which number fixed must be specified in bylaws or articles of incorporation (RCW 23B.02.060[2]); (2) statutory provisions, which obtain if no provisions made in bylaws or articles of incorporation, are specified (RCW 23B.02.060[3]); (3) provisions, which may be included in bylaws, are specified (RCW 23B.02.060[4]). §2.07 adopted in substance. (RCW 23B.02.070). §10.20 adopted in substance, except: (1) unless power is reserved to shareholders, board of directors may also adopt new bylaws (RCW 23B.10.200[1]) and (2) shareholders may adopt new bylaws (RCW 23B.10.200[2]). §10.21(c) adopted except in cases involving public corporations, and §10.22 adopted in substance. (RCW 23B.10.210).

Stock.

Authorized Shares.

§6.01 adopted in substance, except that provision made for designations, preferences, limitations and relative rights of class or series of shares to be made dependent on facts ascertainable outside of articles of incorporation or resolution providing for issuance of such shares. (RCW 23B.06.010).

Preferred or Special.

§6.02 adopted in substance, except (1) board of directors may also designate number of shares within series (RCW 23B.06.020[1]) and (2) unless articles of incorporation provide otherwise, board of directors may reduce number of shares outstanding series, but not below number of shares of that series then outstanding (RCW 23B.06.020[5]).

Issued and Outstanding Shares.

§§6.03 and 7.21(d) adopted in substance. (RCW 23B.06.030).

Fractional Shares.

§6.04 adopted in substance. (RCW 23B.06.040).

Subscription.

§6.20 adopted in substance, except that preincorporation subscription agreement must be in writing. (RCW 23B.06.200).

Issuance of Shares.

§6.21 adopted in substance, except (1) issuance of shares must be approved by board of directors (RCW 23B.06.210[2]); (2) requirement that directors determine adequacy of consideration before shares issued is omitted (RCW 23B.06.210[3]); (3) addition that conclusive presumption that shares fully paid and non-assessable if board of directors makes good faith determination and it cannot be determined that outstanding shares fully paid and non-assessable (RCW 23B.06.210[5]).

Share Dividends.

§6.23 adopted in substance. (RCW 23B.06.230; RCW 23B.07.070[3]).

Options.

§6.24 adopted in substance, except that articles of incorporation may limit or affect corporation's authority to issue rights, options or warrants. (RCW 23B.06.240[1]).

Certificates.

§6.25 adopted in substance. (RCW 23B.06.250).

Shares Without Certificates.

§6.26 adopted in substance. (RCW 23B.06.260).

Transfer of Stock.

Fixing Record Date.

See subhead Shareholders' Meetings, catchline Record Date, infra.

Uniform Commercial Code adopted. (Title 62A). See category 3 Business Regulation and Commerce, topic 3.09 Commercial Code.

Uniform Simplification of Fiduciary Security Transfers Act adopted. (21.17). See subhead Uniform Simplification of Fiduciary Security Transfers Act, infra.

Uniform Securities Ownership by Minors Act not adopted.

Uniform Transfers to Minors Act adopted in substance. (11.114).

Uniform Simplification of Fiduciary Security Transfers Act (21.17) repealed, effective July 1, 1995 (1995, c. 48, §52).

Stock Transfer Tax.

None.

Shareholders have preemptive rights to acquire unissued shares unless articles of incorporation provide otherwise. (RCW 23B.06.300[1]). Remainder of §6.30 adopted in substance, subject to articles of incorporation, and §6.30(b)(3)(iii) modified to deny preemptive rights to shares issued pursuant to corporation's initial plan of financing. (RCW 23B.06.300[3][c]).

Tender Offers.

Certain domestic and foreign publicly held corporations headquartered in Washington prohibited from entering into certain significant business transactions with persons who acquired over 10% of corporation's stock within five years prior to such transactions. (23B.19). Transactions prohibited under 23B.19 are void and, if transaction not exempt under RCW 23B.19.100, corporation's certificate of authority will be revoked. (RCW 23B.14.200; RCW 23B.15.300).

Shareholder Actions.

§7.40 adopted in substance. (RCW 23B.07.400). Statute is superseded by CR 23.1 (identical with FRCP 23.1).

Shareholders' Liabilities.

§6.22 adopted in substance, except §6.22(b) omitted. (RCW 23B.06.220).

Shareholders' Meetings.

Meetings of Shareholders.

§7.01 adopted in substance. (RCW 23B.07.010).

Special Meetings.

§7.02 adopted in substance, except (1) articles of incorporation of public corporation may limit or deny right of shareholders to call special meeting (RCW 23B.07.020[2]) and (2) for other than public corporations articles of incorporation or bylaws may specify greater percentage of votes (but not more than 25%) to call special meeting (RCW 23B.07.020[3]).

Court-Ordered Meetings.

§7.03 adopted in substance, except (1) jurisdiction is in county of corporation's registered office (RCW 23B.07.030[1]); (2) application may be made by shareholders entitled to vote in election of directors at annual meeting (RCW 23B.07.030[1][a]); (3) court may order meeting only after notice to corporation (RCW 23B.07.030); (4) court may determine shares and shareholders entitled to vote and may prescribe form and content of notice (RCW 23B.07.030[2]).

Corporate Action Without Meeting.

§7.04 adopted in substance (RCW 23B.07.040), and (1) shareholder may withdraw consent only by delivering notice in form of record to corporation before all consents in possession of corporation (RCW 23B.07.040[3]); (2) unless consent specifies later date, action effective when all consents delivered to corporation (RCW 23B.07.040[4]). Articles of incorporation of nonpublic corporation may allow for corporate action without meeting to be taken by no less than minimum number of shareholders required to authorize such action at meeting. (RCW 23B.07.040).

Notice of Meeting.

§7.05 adopted in substance, except 20-day minimum notice provided for meeting to act on amendment to articles of incorporation, plan of merger or share exchange, certain proposed sales of assets or dissolution of corporation. (RCW 23B.07.050).

Waiver of Notice.

§7.06 adopted in substance. (RCW 23B.07.060).

Record Date.

§7.07 adopted in substance and §§6.23(c), 6.40(b) and 7.05(d) added. (RCW 23B.07.070).

Communication Equipment.

Shareholder participation by communication equipment may be provided in articles of incorporation. (RCW 23B.07.080).

Voting Record.

§7.20 adopted in substance, except (1) alphabetical list must be of shareholders on record date who are entitled to notice (RCW 23B.07.200[1]); (2) list must be available ten days prior to meeting (RCW 23B.07.200[2]); (3) requirement of written demand of inspection of list prior to meeting deleted (RCW 23B.07.200[2]); (4) provision made for shareholder's right to copy shareholders' list (RCW 23B.07.200[5]).

Voting Entitlement of Shares.

§7.21 adopted in substance. (RCW 23B.07.210; RCW 23B.06.030[3]).

Proxies.

§7.22 adopted in substance, except (1) appointment form may also be signed by agent (RCW 23B.07.220[2]) and (2) appointment form must indicate that proxy is irrevocable and appointment is coupled with interest. (RCW 23B.07.220[4]). Electronic transmission is allowed. (RCW 23B.07.220[8]).

Shares Held by Nominees.

§7.23 adopted in substance. (RCW 23B.07.230).

Corporation's Acceptance of Votes.

§7.24 adopted in substance, except name signed may also purport to be partner of entity. (RCW 23B.07.240[2][a]).

Quorum and Voting Requirements.

§7.25 adopted in substance, except shares represented solely to object to holding meeting or transacting business not deemed present for quorum purposes. (RCW 23B.07.250[2]).

Action by Single and Multiple Voting Groups.

§7.26 adopted in substance. (RCW 23B.07.260).

Greater or Lesser Quorum or Voting Requirements.

§7.27 adopted in substance, except (1) quorum may not be less than one-third of votes entitled to be cast (RCW 23B.07.270[1]) and (2) provision made for votes on amendments to articles of incorporation, mergers, share exchange, certain sales of corporate property and dissolution (RCW 23B.07.270[3], [5]).

Cumulative Voting for Directors.

§7.28 not adopted. Corporation has cumulative voting unless articles of incorporation provide otherwise. (RCW 23B.07.280).

Inspectors.

Public corporation must, and others may, appoint one or more inspectors to confirm vote. (RCW 23B.07.035).

Voting Trusts and Agreements.

§7.30-.32 adopted in substance (RCW 23B.07.300-.320), except extension is valid until earlier of ten years from date first shareholder signs extension agreement or date of expiration of agreement (RCW 23B.07.300[3]).

Directors.

§8.01 adopted in substance (RCW 23B.08.010), except power to dispense with, or limit authority of, board of directors, not limited to corporations with 50 or fewer shareholders (RCW 23B.08.010[3]).

Qualifications of Directors.

§8.02 adopted in substance. (RCW 23B.08.020).

Number and Election.

§8.03 adopted in substance, except subsections (b) and (c). (RCW 23B.08.030).

Election of Directors by Certain Classes or Series of Shares.

§8.04 adopted in substance. (RCW 23B.08.040). Plurality voting for directors may be modified by law in specified circumstances. (RCW 23B.10.205).

Terms of Directors Generally.

§8.05 adopted in substance. (RCW 23B.08.050).

Staggered Terms for Directors.

§8.06 adopted in substance (RCW 23B.08.060), except (1) provision that there be at least nine directors eliminated (RCW 23B.08.060[1]) and (2) if cumulative voting is authorized at least three directors shall be elected at each annual shareholders' meeting (RCW 23B.08.060[2]).

Resignation.

§8.07 adopted in substance, except president may also receive notice. (RCW 23B.08.070).

Removal by Shareholders.

§8.08 adopted in substance, except removal may be only at special meeting. (RCW 23B.08.080).

Removal by Judicial Proceedings.

§8.09 adopted in substance, except gross abuse of authority eliminated as cause for removal. (RCW 23B.08.090).

Vacancy.

§8.10 adopted in substance, except phrase “if it is filled by the shareholders” deleted from §8.10(b). (RCW 23B.08.100).

Compensation.

§8.11 adopted in substance. (RCW 23B.08.110).

Directors' Meetings.

General.

§8.20 adopted in substance, except any directors may participate in meeting by any means of communication by which all can hear each other. (RCW 23B.08.200).

Corporate Action Without Meeting.

§8.21 adopted in substance, except consents may be before or after action taken. (RCW 23B.08.210).

Notice.

§8.22 adopted in substance. (RCW 23B.08.220).

Waiver.

§8.23 adopted in substance. (RCW 23B.08.230).

Quorum and Voting.

§8.24 adopted in substance (RCW 23B.08.240), except (1) quorum consists of majority of directors fixed in accordance with articles of incorporation or bylaws unless greater or lesser number specified in articles or bylaws, but in no event may less than one-third of directors be specified in articles or bylaws (RCW 23B.08.240[1], [2]) and (2) reference to members of committee in §8.24(d) deleted and written notice of dissent or abstention must be delivered within reasonable time (RCW 23B.08.240[4]).

Committees.

§8.25 adopted in substance (RCW 23B.08.250), except committee may authorize distributions according to general formula or method prescribed by board of directors and §8.25(e)(7) deleted (RCW 23B.08.250[5]).

Liabilities of Directors.

Standards of Conduct.

§8.30 adopted in substance. (RCW 23B.08.300).

Unlawful Distributions.

§8.31 adopted in substance. (RCW 23B.08.310).

Limitation on Liability of Directors.

Revised Model Business Corporations Act has no counterpart to RCW 23B.08.320, which permits articles of incorporation to eliminate or limit directors' personal liability with certain exceptions.

Officers.

Required.

§8.40 adopted in substance. (RCW 23B.08.400).

Duties.

§8.41 adopted in substance. (RCW 23B.08.410).

Standards of Conduct.

§8.42 adopted in substance. (RCW 23B.08.420).

Resignation and Removal.

§8.43 adopted in substance, except provision for filling vacancies with later effective date deleted and provision made for removal by officers of officer or assistant officer who was appointed by another officer. (RCW 23B.08.430).

Contract Rights.

§8.44 adopted in substance. (RCW 23B.08.440).

Indemnification of Directors and Officers.

Definitions.

§8.50 adopted in substance. (RCW 23B.08.500).

Authority to Indemnify.

§8.51 adopted in substance. (RCW 23B.08.510).

Mandatory Indemnification.

§8.52 adopted in substance. (RCW 23B.08.520).

Advance for Expenses.

§8.53 adopted in substance, except §8.53(a)(3) deleted and provision made for authorization of payments. (RCW 23B.08.530).

Court-Ordered Indemnification.

§8.54 adopted in substance (RCW 23B.08.540), except (1) court may also order advance of expenses; (2) circumstances set out for which payments in addition to reasonable expenses may be ordered (RCW 23B.08.540[2]); (3) permission given for director to sue for expense advances pursuant to charter, bylaw or other provision committing corporation to advance expenses (RCW 23B.08.540[3]).

Determination and Authorization of Indemnification.

§8.55 adopted in substance. (RCW 23B.08.550).

Shareholder Authorized Indemnification and Advancement of Expenses.

Separate grant of shareholder authority to indemnify, without regard to limitations in other sections of title. Full indemnification allowed, including fines and judgments as well as expenses. Authority extends to actions by corporation and derivative suits, as well as actions by third parties and government officials. Revised Model Business Corporation Act contains no similar provision. (RCW 23B.08.560).

Indemnification of Officers, Employees and Agents.

§8.56 adopted in substance. (RCW 23B.08.570).

Insurance.

§8.57 adopted in substance. (RCW 23B.08.580).

Validity of Indemnification or Advance for Expenses.

§8.58 adopted in substance. (RCW 23B.08.590).

Report to Shareholders.

§16.21 adopted in substance, except indemnification under RCW 23B.08.570; also gives rise to obligation to report. (RCW 23B.08.600).

Definitions.

§8.60 adopted in substance. (RCW 23B.08.700).

Judicial Action.

§8.61 adopted in substance. (RCW 23B.08.710).

Directors' Action.

§8.62 adopted in substance. (RCW 23B.08.720).

Shareholders' Action.

§8.63 adopted in substance. (RCW 23B.08.730).

Registered Office and Registered Agent.

§5.01 adopted in substance (RCW 23B.05.010), except (1) geographic location of office must be specified (RCW 23B.05.010[a][1]) and (2) provision made for filing of consent to appointment (RCW 23B.05.010[2]).

Change of Registered Office or Registered Agent.

§5.02 adopted in substance, except address of current registered office and name of current registered agent need not be included in statement of change. (RCW 23B.05.020).

Resignation of Registered Agent.

§5.03 adopted in substance, except only one signed original and one conformed copy are required (RCW 23B.05.030[1]) and secretary of state need not send copy of statement to registered office (RCW 23B.05.030[2]).

Service on Corporation.

§5.04 adopted in substance (RCW 23B.05.040), except (1) provision made for service on secretary of state if corporation fails to appoint or maintain registered agent or if registered agent cannot be found with reasonable diligence at registered office (RCW 23B.05.040[2]) and (2) provision regarding perfection of service deleted.

Purposes and Powers.

Purposes.

§3.01 adopted in substance, except insurers and banking activities may not be organized under Title 23B. (RCW 23B.03.010).

General Powers.

§3.02 adopted in substance (RCW 23B.03.020), except (1) powers to make guarantees expanded (RCW 23B.03.020[2][h]) and (2) provision for fixing directors' compensation and making loans for directors added (RCW 23B.03.020[2][m]).

Emergency Powers.

§3.03 adopted in substance (RCW 23B.03.030), except that word “ordinary” deleted from §3.03(c) (RCW 23B.03.030[3]).

Ultra Vires.

§3.04 adopted in substance (RCW 23B.03.040), except court's power in shareholder proceedings expanded (RCW 23B.03.040[3]).

Distribution to Shareholders.

§6.40 adopted in substance (RCW 23B.06.400) and supersedes other state statutes regarding legality of distributions (RCW 23B.06.400[6]).

Unclaimed Dividends.

Uniform Unclaimed Property Act adopted. (RCW 63.29.033). See category 21 Property, topic 21.01 Absentees, subhead Escheat.

Sale or Transfer of Corporate Assets.

Sale of Assets in Regular Course of Business and Mortgage of Assets.

§12.01 adopted in substance (RCW 23B.12.010), except that transfer to wholly owned subsidiary omitted.

Sale of Assets Other Than in Regular Course of Business.

§12.02 adopted in substance (RCW 23B.12.020), except two-thirds vote required unless lesser vote provided in articles of incorporation (RCW 23B.12.020[5]). Board of directors may be relieved of liability upon assumption of control over corporate assets by assignee or receiver. (RCW 23B.12.010).

Dissenters' Rights.

Definitions.

§13.01 adopted in substance. (RCW 23B.13.010).

Right to Dissent.

§13.02 adopted in substance (RCW 23B.13.020), except (1) RCW 23B.13.020(1)(d) provides for dissenters' rights in case of amendment of articles of incorporation, which affects redemption or cancellation of all shareholders' shares where corporation to pay cash or other consideration for shares, and (2) provision made for termination of right to receive fair value for shares when certain events occur (RCW 23B.13.020[3]).

Dissent by Nominees and Beneficial Owners.

§13.03 adopted in substance. (RCW 23B.13.030).

Notice of Dissenters' Rights.

§13.20 adopted in substance, except that notice required by corporation within ten days after effective date of corporate action giving rise to dissenters' rights. (RCW 23B.13.200[2]).

Notice of Intent to Demand Payment.

§13.21 adopted in substance. (RCW 23B.13.210).

Dissenters' Notice.

§13.22 adopted in substance. (RCW 23B.13.220).

Duty to Demand Payment.

§13.23 adopted in substance, except shareholder's rights continue until proposed corporate action effected. (RCW 23B.13.230[2]).

Share Restrictions.

§13.24 adopted in substance. (RCW 23B.13.240).

Payment.

§13.25 adopted in substance (RCW 23B.13.250), except (1) payment required within 30 days of later of effective date of corporate action or date payment demand received (RCW 23B.13.250[1]) and (2) corporation must supply explanation of how value of shares was calculated (RCW 23B.13.250[2][b]).

Failure to Take Action.

§13.26 adopted in substance. (RCW 23B.13.260).

After-Acquired Shares.

§13.27 adopted in substance, except corporation must provide explanation of how value of shares estimated. (RCW 23B.13.270).

Procedure if Shareholder Dissatisfied.

§13.28 adopted in substance. (RCW 23B.13.280).

Court Action.

§13.30-.31 adopted in substance (RCW 23B.13.300-.310), and corporation may join certain noncomplying shareholders (RCW 23B.13.300[4]).

Books and Records.

Corporation Records.

§16.01 adopted in substance (RCW 23B.16.010), except §16.01(e)(3) deleted, and under §16.01(e)(7) initial report required to be kept at principal office prior to issuance of first annual report.

Inspection of Records by Shareholders.

§16.02 adopted in substance. (RCW 23B.16.020).

Scope of Inspection Right.

§16.03 adopted in substance and includes right to receive copies in electronic and other nonwritten forms. (RCW 23B.16.030).

Court-Ordered Inspection.

§16.04 adopted in substance. (RCW 23B.16.040).

Reports.

Financial Statements for Shareholders.

§16.20 adopted in substance, except (1) statement must be furnished within four months of close of fiscal year and in any event before annual meeting (RCW 23B.16.200[1]); (2) shareholder entitled to specified financial statements upon request (RCW 23B.16.200[2]); (3) shareholder deemed to include beneficial owner (RCW 23B.16.200[4]).

Other Reports to Shareholders.

§16.21 not adopted.

Annual Report for Secretary of State.

§16.22, without subsection (d), adopted in substance (RCW 23B.16.220), except (1) filing of initial report required if prior to issuance of first annual report (RCW 23B.16.220); (2) address of principal office required for foreign corporation only (RCW 23B.16.220[1][c]); (3) address of principal place of business in Washington must be supplied (RCW 23B.16.220[1][d]); and (4) only directors' names and addresses need be supplied (RCW 23B.16.220[1][e]). Annual report may be filed electronically. (RCW 23B.16.220[4]).

Merger and Share Exchange.

§11.01-.02 adopted in substance (RCW 23B.11.010-.020), with addition of provisions for merger of partnerships, limited partnerships or limited liability companies with corporations (RCW 23B.11.080-.110).

Action on Plan of Merger of Share Exchange.

§11.03 adopted in substance, except (1) in absence of other designated percentage, two-thirds vote required to approve (RCW 23B.11.030[5]) and (2) shareholder action not required, inter alia, if number of voting shares and number of participating shares do not exceed number of total of each type of share authorized by articles of incorporation immediately before merger (RCW 23B.11.030[7][c]-[d]).

Merger of Subsidiary.

§11.04 adopted in substance, except subsection (d), and copy of plan must be delivered to subsidiary's shareholders within ten days after corporate action. (RCW 23B.11.040[3]).

Articles of Merger of Share Exchange.

§11.05 adopted in substance, except subsection (b), and, if approval of shareholders required, articles must contain statement that action duly approved by shareholders. (RCW 23B.11.050[3]). Holders of shares that would be affected in substantially similar ways shall vote as single voting group unless articles of incorporation provide otherwise. (RCW 23B.11.035).

Effect of Merger or Share Exchange.

§11.06 adopted in substance, except that former shareholders not automatically entitled to have shares converted. (RCW 23B.11.060[f]).

Merger or Share Exchange With Foreign Corporation.

§11.07 adopted in substance. (RCW 23B.11.070).

Dissolution.

Dissolution by Initial Directors or Incorporators.

§14.01 adopted in substance, except copy of revenue clearance certificate must be filed. (RCW 23B.14.010[1]).

Dissolution by Board of Directors and Shareholders.

§14.02 adopted in substance, except two-thirds vote is required unless other percentage designated. (RCW 23B.14.020[5]).

Articles of Dissolution.

§14.03 adopted in substance, except copy of revenue clearance certificate must also be filed. (RCW 23B.14.030[1][a]).

Revocation of Dissolution.

§14.04 adopted, except that (1) statement that name is proper, or alternative name, must be included (RCW 23B.14.040[3][a]) and (2) statement that revocation was duly approved by shareholders must be included (RCW 23B.14.040[3][f]).

Effect of Dissolution.

§14.05 adopted in substance. (RCW 23B.14.050).

Known Claims Against Dissolved Corporation.

§14.06 adopted in substance. (RCW 23B.14.060).

Rights of Creditors.

§14.07 not adopted. Certain holders of unpaid claims, not otherwise barred, may commence action against dissolved corporation. (RCW 23B.14.070).

§14.08 adopted in substance. (RCW 23B.14.065).

Administrative Dissolution—Grounds.

§14.20 adopted in substance, except corporation may be dissolved for failure to pay license fees (RCW 23B.14.200[1]) and if period of duration stated in articles of incorporation expired before July 1, 1990, even if all fees have been paid and laws complied with (RCW 23B.14.200[6]).

Administrative Dissolution—Procedure and Effect.

§14.21 adopted in substance, except notice need not be “served” by secretary of state. (RCW 23B.14.210[1]).

Reinstatement Following Administrative Dissolution.

§14.22, without subsection (a)(4), adopted in substance. (RCW 23B.14.220).

Judicial Dissolution—Grounds.

§14.30 adopted in substance with lack of business activity as added grounds (RCW 23B.07.320); jurisdiction in superior courts (RCW 23B.14.300).

Judicial Dissolution—Procedure.

§14.31 adopted in substance, with venue in county of corporation's registered office, except that directors added as nonnecessary parties. (RCW 23B.14.310[2]).

Receivership or Custodianship.

§14.32 adopted in substance. (RCW 23B.14.320).

Decree of Dissolution.

§14.33 adopted in substance. (RCW 23B.14.330).

Survival of Remedy After Dissolution.

Specified claims against corporation, directors, officers and shareholders survive for two years after dissolution. (RCW 23B.14.340).

Deposit With State Treasurer.

§14.40 adopted in substance. (RCW 23B.14.400).

Close Corporation.

Revised Model Business Corporation Act substantially adopted. See, for deviations, subheads Bylaws; Directors; Officers; and Shareholders' Meetings, supra.

Foreign Corporations.

Authority to Transact Business Required.

§15.01, with additional transactions that will not constitute transacting business in state, adopted in substance. (RCW 23B.15.010).

Consequences of Transacting Business Without Authority.

§15.02 adopted in substance (RCW 23B.15.020), except liability for transacting business without certificate equal to fees which would have been imposed and penalties for nonpayment of such fees (RCW 23B.15.020[4]).

Application for Certificate of Authority.

§15.03 adopted in substance (RCW 23B.15.030), except certificate of existence in state in which foreign corporation incorporated, issued no more than 60 days before date of application, must be supplied with application (RCW 23B.15.030[2]).

Amended Certificate of Authority.

§15.04, except subsection (a)(3), adopted in substance. (RCW 23B.15.040).

Effect of Certificate of Authority.

§15.05 adopted in substance. (RCW 23B.15.050).

Corporate Name of Foreign Corporation.

§15.06, except subsection (d)(3), adopted in substance (RCW 23B.15.060), except rules similar to those applicable to names of domestic corporations added.

Registered Office and Registered Agent of Foreign Corporation.

§15.07 adopted in substance (RCW 23B.15.070), except rules similar to those applicable to domestic corporations added.

Change of Registered Office or Registered Agent of Foreign Corporation.

§15.08, except subsections (a)(2) and (4), adopted in substance. (RCW 23B.15.080).

Resignation of Registered Agent of Foreign Corporation.

§15.09 adopted in substance. (RCW 23B.15.090).

Service on Foreign Corporation.

§15.10 adopted in substance (RCW 23B.15.100), except that default service may be made on secretary of state.

Withdrawal of Foreign Corporation.

§15.20 adopted in substance (RCW 23B.15.200), except application must be accompanied by revenue clearance certificate.

Revocation of Certificate of Authority—Grounds.

§15.30 adopted in substance (RCW 23B.15.300), except failure to pay fees also grounds for revocation.

Revocation—Procedure.

§15.31 adopted in substance (RCW 23B.15.310), except notice by mail authorized.

Appeal From Revocation.

§15.32 not adopted.

Filing and Annual Fee.

See subhead Fees, supra.

License fees for foreign corporations same as prescribed for domestic corporations. (RCW 23B.01.520-.550). See subhead Fees, supra. License fees for domestic corporations due on expiration date of corporate license (RCW 23B.01.530) and, for foreign corporations, on July 1 of each year or other date established by secretary of state (RCW 23B.01.550).

Taxation of Corporate Property.

Rules are same as for taxation of property of individual. See category 22 Taxation, topic 22.15 Property Taxes, subhead Miscellaneous Property Tax Provisions.

Franchise Tax.

Annual license fees payable by both domestic and foreign corporations at annual rate of $50 and $10 for inactive corporations. (RCW 23B.01.530; .550). Annual fee paid by public service corporations to Washington Utilities and Transportation Commission deductible from corporate annual license fee. (RCW 23B.01.590). Domestic corporation must pay fees to secretary of state by annual license expiration date. (RCW 23B.01.530). Foreign corporation must pay license fee by July 1 or other date secretary of state may establish. (RCW 23B.01.550).

Penalty for late payment is amount established by secretary. (RCW 23B.01.570). Secretary of state must give not less than 30 nor more than 90 days notice to domestic corporation that its annual license fee is due and annual report required and that corporation will be dissolved if it fails to pay or file; secretary of state's failure to provide such notice does not relieve corporation of obligations. (RCW 23B.01.500). Notice to foreign corporations required no less than 30 days nor more than 90 days prior to July 1, or prior to expiration date. (RCW 23B.01.510). Domestic and foreign corporations can avoid such automatic dissolution and revocation of certificate of authority for failure to comply with annual fee and licensing requirements if all current and past due license fees and penalties are paid prior to such occurrence. (RCW 23B.01.570). Secretary of state may waive penalty. (RCW 23B.01.580).

Business and Occupation Tax.

See category 22 Taxation, topic 22.03 Business Taxes, subhead Business and Occupation Tax.

Professional Corporations.

Persons who must be licensed to, and do, render personal service to public authorized to form professional service corporations. Such persons include certified public accountants, chiropractors, dentists, osteopaths, physicians, podiatrists, chiropodists, other health care professionals, architects, veterinarians and attorneys. (RCW 18.100.030; .050).

Deeds.

See category 21 Property, topic 21.06 Deeds.

Model Nonprofit Corporation Act adopted. (24.03).

Limited Liability Companies.

See topic 2.06 Limited Liability Companies.

2.04 [RESERVED]

2.05 JOINT STOCK COMPANIES:

Unincorporated companies having transferable shares of stock. Sovereign grant under general laws required before joint stock company may possess or exercise powers or privileges of corporations not possessed by individuals or partnerships. (Const. Art. XII, §§1, 5; 62 Wn.2d 91, 381 P.2d 123).

Professional Corporations.

See topic 2.03 Corporations.

Massachusetts Trusts.

Business associations in form of Massachusetts Trusts are authorized. (RCW 23.90.010-.900).

Filing Trust Instrument.

Trust instrument must be filed with Secretary of State. (RCW 23.90.040[1]).

Rights, Powers and Liabilities.

Same as for corporations. (RCW 23.90.040[4]).

Actions.

Same as for corporations. (RCW 23.90.040[4]).

Cooperative Associations.

Authorized under 23.86, for business, agriculture, dairy, mercantile, mining, manufacturing, or mechanical. (RCW 23.86.020). Employee cooperative corporations authorized. (23.78).

2.06 LIMITED LIABILITY COMPANIES:

Washington Limited Liability Company Act, effective Oct. 1, 1994, permits formation of limited liability company (“LLC”). (25.15).

Formation.

One or more persons must execute certificate of formation, which must include LLC's (a) name; (b) address of registered office and name and address of registered agent for service of process; (c) address of principal place of business; (d) if specific dissolution date, latest such date; (e) statement if management is vested in manager or managers; and (f) other optional provisions. (RCW 25.15.070). Original and duplicate filed with secretary of state. (RCW 25.15.095).

Purpose.

LLC may carry on any lawful business other than that of insurer. (RCW 25.15.030). Conditions are provided for formation or conversion of banks and bank holding companies. (RCW 25.15.270; RCW 30.08.025; RCW 32.08.025).

Name.

LLC's name must contain words Limited Liability Company, Limited Liability Co., or L.L.C. Name must be distinguishable from that of other entities. (RCW 25.15.010).

Initial and Annual Reports.

Initial report must be filed by domestic and foreign LLCs within 120 days of filing domestic certificate of formation or submission of foreign company's application for registration. Reports must contain: (a) Name of company and state of organization; (b) address of Washington registered office and name of registered agent; (c) if foreign LLC, address of principal office where organized; (d) address of principal place of business in Washington; (e) member names and addresses, or if nonmember managed, names and addresses of manager or managers; (f) brief description of nature of business. (RCW 25.15.105).

Limitation of Liability and Indemnification.

LLC agreement may limit liability of member or manager to LLC or its members other than for intentional acts, knowing violations, making excessive distributions, or conflict of interest transactions and, subject to foregoing exceptions, may provide for indemnification of member or manager. LLC agreement may expand or restrict member or manager duties otherwise provided at law or in equity. (RCW 25.15.040).

Limited Liability Company Agreement.

Written agreement of members as to affairs of LLC and conduct of its business which is binding on all members. (RCW 25.15.005[5]).

Limited Liability Company Interest.

Member's share of profits and losses and right to receive distributions of assets. (RCW 25.15.005[6]). Interest is personal property and member has no interest in specific LLC property. (RCW 25.15.245).

Limited Liability.

No member or manager personally liable for obligations of LLC solely by reason of being member or manager. (RCW 25.15.125).

Management.

Unless otherwise provided in agreement, LLC must be managed by members. (RCW 25.15.150). If management is by managers and, unless provided to contrary in LLC agreement, vote of more than 50% of managers required. (RCW 25.15.165[1]). Manager need not be member of LLC or natural person. (RCW 25.15.150). Manager protected by good faith reliance on LLC's records and upon other information presented to LLC by other managers, members, officers, employees or committees of LLC, or by any other person as to matters manager reasonably believes to be within such person's professional or expert competence if such person selected with reasonable care by or on behalf of LLC. (RCW 25.15.175). If no provision in agreement, upon death, resignation or removal of sole remaining manager, or upon occurrence of other specified events relating to sole manager, LLC becomes member managed unless new manager is elected within 90 days. (RCW 25.15.185).

Members.

LLC agreement may provide for voting and classes of members. (RCW 25.15.120). Single member LLC is allowed. (RCW 25.15.005[4], am'd 2008, c. 198, §4). Unless otherwise provided in agreement, consent of all members required to relieve member of obligation to make contribution or return money or other property improperly distributed. Unless otherwise provided in LLC agreement, member not relieved of obligation to contribute cash or property, or to perform services by death, disability or other reason. LLC at its option may accept cash equal to agreed value of unmade contributions. Creditor may enforce obligation of member to make contribution to extent that creditor, in extending credit, reasonably relied on such obligation. (RCW 25.15.195).

In absence of provision in LLC agreement, profits, losses and distributions allocated according to agreed value of contributions made or required to be made. (RCW 25.15.200; .205). Distributions not allowed if, after distribution, all liabilities of LLC, other than liabilities to members on account of their interests and liabilities for which recourse of creditors is limited to specific property of LLC, exceed fair value of its assets (including equity in assets subject to nonrecourse liabilities). If member knowingly receives improper distribution, LLC may recover distribution within three years. (RCW 25.15.235).

Member's interest is personal property and member has no interest in specific property of LLC. (RCW 25.15.245). Member's interest assignable unless provided to contrary in LLC agreement. Assignee acquires no right to participate in management except as upon approval of all members other than assigning member, or as provided in LLC agreement. (RCW 25.15.250).

Records.

Required records, to be kept at principal place of business, include: (a) Current and past list of member and manager names and last known mailing addresses; (b) copy of certificate of formation, including amendments; (c) copy of current LLC agreement and amendments, and copy of prior agreements; (d) unless contained in certificate of formation or LLC agreement, (i) agreed value and description of cash, property or services contributed by member or member's predecessor, and which member has agreed to contribute, (ii) times or events which render due future contributions, (iii) right of member to receive contributions, including return of member's contributions; (e) three most recent years' federal, state and local tax returns and reports; and (f) three most recent years' financial statements, if any. Member, agent or attorney to have reasonable access to records for inspection. Manager has right to inspect if reasonably related to position as manager. (RCW 25.15.135).

Derivative Actions.

Member may bring derivative action in right of LLC if managers or members with authority to do so have refused to bring action, or if effort to cause action to be brought not likely to succeed. (RCW 25.15.370). Plaintiff must state with particularity effort to secure initiation of action by proper member or manager, or, if no effort was made, reasons for not doing so. (RCW 25.15.380). Member bringing action must be member at time of bringing action and at time of transaction complained about, or must have received interest by operation of law or pursuant to LLC agreement from member at time of transaction. (RCW 25.15.375).

Resignation.

If dissolution not caused by dissociation, dissociating member entitled to receive distribution to which member entitled and to receive, within reasonable time, fair value of LLC interest as of date of dissociation, based on member's right to share in distributions. (RCW 25.15.220).

Voting.

Except for matters involving amendment of LLC agreement or authorization of act in contravention of LLC agreement that require unanimous consent, and except as specifically provided, measure is approved by vote of members contributing or required to contribute more than 50% of agreed value (as stated in required records) of contributions made or required to be made. (RCW 25.15.120).

Merger and Consolidation.

Domestic LLC may merge with domestic limited partnerships, domestic LLCs or domestic corporations. Plan of merger must contain: (a) Names of merging entities and name of surviving entity; (b) terms and conditions of merger; (c) manner and basis of converting LLC interests, partnership interests or corporate shares into interests in surviving entity; and may contain other enumerated items. (RCW 25.15.395). Unless otherwise provided in LLC agreement, merger must be approved by members contributing more than 50% of agreed value to LLC, or if there are classes of members, by more than 50% of agreed value of contributions in each class; and if domestic limited partnership a party, in accordance with RCW 25.10.761; and if domestic corporation a party, in accordance with 23B.11. (RCW 25.15.400).

Dissolution and Winding Up.

LLC dissolved and its affairs wound up upon first to occur of: (1) Date specified in LLC agreement or, if no date specified; (2) happening of events specified in LLC agreement; (3) written consent of all members; (4) event of dissociation of last-remaining member, unless new member admitted; (5) entry of decree of judicial dissolution; or (6) expiration of five years after administrative dissolution without reinstatement of LLC. (RCW 25.15.270). Reinstatement may be sought within 120 days of dissolution. (RCW 25.15.293). Manager, who has not wrongfully dissolved LLC or, if none, members, may wind up LLC's affairs. (RCW 25.15.295). Actions may be brought against dissolved limited liability company, its managers or members within three years of dissolution. (RCW 25.15.303).

Upon winding up, assets distributed as follows: (a) To creditors of LLC; (b) unless otherwise provided in LLC agreement, to members in satisfaction of liabilities for distributions; and (c) unless otherwise provided in LLC agreement, to members, first, for return of contributions and, second, in respect of their LLC interests in proportions in which members share in distributions. (RCW 25.15.300).

Foreign LLC Qualification.

Foreign LLC must file application for registration with secretary of state, which contains: (1) Name of LLC and, if different, name which LLC proposes to use in Washington; (2) place where LLC formed and duly authenticated certificate indicating that LLC validly exists as of date of filing; (3) nature of business to be conducted in Washington; (4) address of registered office and name and address of registered agent; (5) address of principal place of business of foreign LLC; statement that secretary of state is appointed agent for service of process; and date on which business commenced or intended to be commenced in Washington. (RCW 25.15.315). Transactions described which do not constitute transacting business. (RCW 25.15.350). Secretary of state may revoke registration of foreign LLC which is without Washington registered agent or registered office for 60 days or fails to notify secretary of change in registered agent or office. (RCW 25.15.355). Provision is made for notice by mail of intent to revoke foreign LLC's registration. (RCW 25.15.366). Foreign LLC has 60 days after effective date of notice to respond. (RCW 25.15.366).

Professional LLCs.

Professional LLCs subject to rules set out in 18.100, applicable to professional corporations. At least one manager of LLC, each resident manager or member in charge of office in Washington, and each resident manager or member personally engaged in practice in Washington must be licensed, or otherwise authorized to practice in Washington. Professional LLC must maintain minimum of $1,000,000 liability insurance or such greater amount as designated by insurance commissioner. (RCW 25.15.045).

Accountancy LLCs.

Licensing statute for certified public accountants amended to allow organization of LLC. (RCW 18.04.195, am'd 2008, c. 16, §3).

Piercing Corporate Veil.

Rules, factors and policies applicable to piercing veil of Washington business corporation applicable. (RCW 25.15.060).

2.07 [RESERVED]

2.08 PARTNERSHIPS:

1996 Uniform Partnership Act adopted as follows (25.05), generally effective June 11, 1998.

§101 adopted in substance (RCW 25.05.005), except .005(13) “statement” does not include statement of merger, qualification, or foreign qualification.

§102 adopted in substance. (RCW 25.05.010).

§103 adopted in substance. (RCW 25.05.015).

§104 adopted in substance (RCW 25.05.020), except .020 unstated interest rate is deemed to be that in RCW 19.52.010(1).

§105 adopted in substance (RCW 25.05.025), except subsections (b) and (f) not included.

§106 adopted in substance. (RCW 25.05.030).

§107 adopted in substance. (RCW 25.05.035).

§201 adopted in substance. (RCW 25.05.050).

§202 adopted in substance. (RCW 25.05.055).

§203 adopted in substance. (RCW 25.05.060).

§204 adopted in substance. (RCW 25.05.065).

§301 adopted in substance. (RCW 25.05.100).

§302 adopted in substance. (RCW 25.05.105).

§303(a) adopted in substance, except that filed statement of partnership authority may specify names and addresses of all partners or agent and names of partners authorized to execute real estate transfer. (RCW 25.05.110[1][b]).

§303(b) not adopted. §303(c) not adopted. §303(d)(1) not adopted. §303(d)(2)-(g) adopted in substance. (RCW 25.05.110).

§304 adopted in substance. (RCW 25.05.115).

§305 adopted in substance. (RCW 25.05.120).

§306 adopted in substance. In addition, professional services limited liability partnership and foreign professional services limited liability partnership may be required to provide evidence of financial responsibility in amount of $1,000,000 to $3,000,000. (RCW 25.05.125).

§307 adopted in substance. (RCW 25.05.130).

§308 adopted in substance. (RCW 25.05.135).

§401 adopted in substance. (RCW 25.05.150).

§402 adopted in substance. (RCW 25.05.155).

§403 adopted in substance. (RCW 25.05.160).

§404 adopted in substance. (RCW 25.05.165).

§405 adopted in substance. (RCW 25.05.170).

§406 adopted in substance. (RCW 25.05.175).

§501 adopted in substance. (RCW 25.05.200).

§502 adopted in substance. (RCW 25.05.205).

§503 adopted in substance, with addition that transferee of partner's transferable interest also has right to allocations of profit and loss to which transferor would otherwise be entitled. (RCW 25.05.210).

§504 adopted in substance. (RCW 25.05.215).

§601 adopted in substance, with addition that dissolution and winding up of business of limited liability company that is partner constitutes event causing dissociation. (RCW 25.05.225).

§602 adopted in substance, with addition that any event described in RCW 25.05.230(6) will constitute wrongful dissociation. (RCW 25.05.230).

§603 adopted in substance. (RCW 25.05.235).

§701 adopted in substance. (RCW 25.05.250).

§702 adopted in substance. (RCW 25.05.255).

§703 adopted in substance. (RCW 25.05.260).

§704 adopted in substance. (RCW 25.05.265).

§705 adopted in substance. (RCW 25.05.270).

§801 adopted in substance. (RCW 25.05.300).

§802 adopted in substance. (RCW 25.05.305).

§803 adopted in substance. (RCW 25.05.310).

§804 adopted in substance. (RCW 25.05.315).

§805 adopted in substance, except that statement of dissolution cancels all previously filed statements of partnership authority. (RCW 25.05.320).

§806 adopted in substance. (RCW 25.05.325).

§807 adopted in substance. (RCW 25.05.330).

§901 adopted in substance. (RCW 25.05.350).

§902 adopted in substance, with addition that if partnership was converted to domestic limited partnership, certificate must also include name of limited partnership, address of records office and name and address of agent for receipt of process, names and addresses of general partners, latest date on which limited partnership to dissolve, and other matters inserted by general partners. (RCW 25.05.355).

§903 adopted in substance. (RCW 25.05.360).

§904 adopted in substance. (RCW 25.05.365).

§905 adopted in substance, except that merger allowed among any combination of domestic partnerships, domestic limited partnerships, domestic limited liability companies, and domestic corporations; plan of merger may include amendments to certificates of formation of merging entities and other provisions relating to merger; merger is effective as of later of date specified or date of filing of articles of merger, but in no event later than 90 days after filing. (RCW 25.05.370).

§905(c) adopted in substance, with requirement that plan of merger also be approved as required under RCW 25.10.761, if domestic limited partnership involved; under RCW 25.15.400, if domestic limited liability company involved; and under 23B11, if domestic corporation involved. (RCW 25.05.375).

Articles of merger must be filed by surviving entity after approval or adoption of plan and must contain plan of merger; statement if approval of any parties not required; and statement reflecting required approval(s). (RCW 25.05.380).

§906(a)(1)-(4) adopted in substance. (RCW 25.05.385).

Certificate of surviving entity amended to extent provided in plan of merger; rights of partners, members and shareholders limited to those provided in plan of merger; and entities, which are not surviving entity, are not required to wind up affairs. (RCW 25.05.385).

§907 not adopted.

§908 adopted in substance. (RCW 25.05.385).

Dissenters' rights are provided for partners in domestic partnership. (RCW 25.05.420).

Partnership must send notice of right to dissent, together with copy of statute, not less than ten days prior to approval of merger. (RCW 25.05.430). Within ten days after plan is approved, partnership must send notice to partner entitled to dissent, together with statute and form for demanding payment, specifying date, between 30 and 60 days from date of notice, for payment demand to be received and other specifics. (RCW 25.05.440). Provision is made for partnership to petition court to determine fair value of dissenter's interest in event of dispute. Partnership has 60 days after receiving payment demand to petition court. (RCW 25.05.470).

§1001 adopted in substance, with additional requirements. Fee for registration of limited liability partnership is $175. Annual fee is provided for. (RCW 25.05.470).

§1002 adopted in substance, except “Registered Limited Liability Partnership” and “RLLP” may not be used. (RCW 25.05.505).

§1003 not adopted.

Provision is made for professional service limited liability partnerships. (RCW 25.05.510).

Provisions adopted regarding service of process and registered agent and office for service (RCW 25.05.530–.536) and similar provisions for foreign limited liability partnerships. (RCW 25.05.580–.589).

§1101 adopted in substance, except to extent local law affects professional service limited liability partnerships. (RCW 25.05.550).

§1102, requiring registration with secretary of state, adopted in substance.

§1102(a)(1)-(d) not adopted. (RCW 25.05.555).

§1103 adopted in substance. (RCW 25.05.560).

§1104 adopted in substance. (RCW 25.05.565).

§1105 adopted in substance. (RCW 25.05.570).

§1201 adopted in substance. (RCW 25.05.904).

§1202 adopted in substance. (RCW 25.05.905).

§1203 adopted in substance. (RCW 25.05.906).

Effective date is generally Jan. 1, 1999, except that partnership may elect to be covered prior to that date. (RCW 25.05.901).

§1207 adopted in substance. (RCW 25.05.907).

RCW 25.04.010 through RCW 25.04.750 are repealed. (1998, c. 103, §1308).

Illegal Partnership.

When partners equally culpable for entering into illegal partnership, court will not enforce partnership agreement or grant accounting but will leave parties where it found them, notwithstanding that one party benefits at expense of other. (110 Wn.2d 555, 756 P.2d 129).

Limited Partnership.

Uniform Limited Partnership Act of 1976 and 1985 amendments adopted with variations. (25.10).

Formation.

File duplicate original certificates with Secretary of State. (RCW 25.10.201). Maintain office at specific geographical location and agent who must accept appointment in writing. (RCW 25.10.121).

Name.

Must contain “limited partnership” or “L.P.” and may be similar to name already reserved only with written consent of holder of reservation or with judicial decree. (RCW 25.10.061).

Amendment.

File amendment promptly for change of name, office, agent or date of dissolution; restate by filing duplicate original certificates of restatement setting forth name, date and place of filing of original certificate and operative provisions of certificate. (RCW 25.10.211).

Dissolution.

Certificate of cancellation filed on completion of winding up; effective date of cancellation is filing of certificate or later date certain. (RCW 25.10.571).

Partnerships Formed under Prior Acts.

Limited partnership in existence on or prior to June 6, 1945 not affected. (RCW 25.10.670). Under 2009 act, limited partnership in existence on or before January 1, 2010 not affected. (RCW 25.10.911).

3 BUSINESS REGULATION AND COMMERCE

3.01 BANKS AND BANKING:

Branches.

Statewide and extraterritorial branching, and out-of-state banks, permitted subject to restrictions and limitations set out in 30.38 for banks and trust companies, in RCW 32.04.030 for mutual savings banks, and in RCW 33.08.110 for savings and loan associations.

Uniform Commercial Code adopted. (Title 62A). See category 3 Business Regulation and Commerce, topic 3.09 Commercial Code.

Regulated by Titles 30-33.

Stockholders' Liability.

Stockholders are subject to assessment upon notice to levy by supervisor of banking and consent of two-thirds of stockholders. (RCW 30.12.180; RCW 30.44.020).

Directors' Liability.

Personal liability imposed on directors for knowing violations of laws and regulations. (RCW 30.12.240).

Deposits.

Joint.

Any bank, trust company, mutual savings bank, savings and loan association or credit union having deposit in name of two or more persons payable to any of such persons may pay deposit, interest or dividends thereon to any such named persons. (RCW 30.22.140).

Joint with Right of Survivorship.

Any deposit including additions and accumulations thereto in name of two or more persons payable to any of such persons or survivor is held by such persons in proportion to net funds on deposit owned by each with right of survivorship and is payable to survivor. (RCW 30.22.090-.100). See category 13 Estates and Trusts, topic 13.05 Death, subhead Survivorship.

Deposits in trust are payable to beneficiary on death of depositor. (RCW 30.22.100[4]).

Disability of depositor may be disregarded unless written notice to withhold payment is received from guardian. (RCW 30.22.150). See category 14 Family, topics 14.10 Infants, subhead Bank Deposits; and 14.09 Spouses and Domestic Partners.

Surviving Spouse.

Deposits covered by community property agreement are payable to surviving spouse without probate. (RCW 30.22.190[1]). Upon conditions specified by statute, deposits not exceeding $2,500 are payable to surviving spouse, next of kin or creditors without probate. (RCW 30.22.190[2]). Upon affidavit that estate is less than $125,000 and existence of other statutory conditions, deposits are payable to persons entitled thereto. (RCW 30.22.190[3]; RCW 11.62.010, am'd 2008, c. 6, §923; and RCW 6.13.030).

Stop Payment Orders; Forged/Altered Instruments; Delay in Presentment; Withdrawals.

Uniform Commercial Code adopted. (Title 62A). See topic 3.09 Commercial Code.

Disclosure of Customer Information.

Bank not liable for good faith disclosure. Procedures established. (RCW 30.22.240). Bank records to be admitted as evidence when properly certified. (RCW 30.22.245). Certain false statements made to financial institutions are gross misdemeanors. (RCW 9.38.015).

Unclaimed Deposits and Other Property.

Uniform Unclaimed Property Act adopted. (63.29). See category 21 Property, topic 21.01 Absentees, subhead Escheat.

Collections.

Uniform Commercial Code adopted. (Title 62A).

Trust companies may act as trustee or receiver or as assignee for benefit of creditors and may also act as executor, trustee or administrator of estate of a deceased person or as guardian of estate of incompetent; and may act in various other capacities as set out in RCW 30.08.150. Trust companies to have powers of federally chartered trust companies. (RCW 30.08.155).

Uniform Common Trust Fund Act substantially adopted. (RCW 11.102.010-.050). Nonmembers of federal reserve system must comply with supervisor of banking regulations relative to such funds. (RCW 11.102.010).

Foreign Banks.

Bank organized in another state allowed to do business in Washington, subject to qualifications and limitations in RCW 30.38.010-.080. Alien bank may establish branch or agency in state upon approval of director of financial institutions upon compliance with specified conditions including: allocation and maintenance in state of at least $200,000 of paid in capital; segregation of local office assets; and proof that Washington based bank may be established in alien bank's country. (RCW 30.42.060-.090). Subject to certain limitations, approved alien bank may: make loans and guarantee obligations (RCW 30.42.105); solicit and accept deposits (RCW 30.42.115-.120); and engage in other specified banking activities (RCW 30.42.155). Foreign trust companies generally may not do business on more favorable terms. (RCW 30.04.280).

Mutual savings banks may be organized. (32.08). Amount held therein for any one depositor may be limited by bank. (RCW 32.12.010). Mutual savings banks acting as trustee for common trust funds for benefit of more than one beneficiary under more than one trust agreement must give notice to supervisor 60 days prior to creation of fund. (RCW 32.08.215).

Savings and loan associations may be organized. (33.08).

Stock savings banks may be organized. (32.35).

Conversion Allowed.

Domestic savings bank may convert to federal mutual or savings bank and federal savings bank with home office in Washington may convert to domestic savings bank under procedure at 30.49.

Industrial loan companies may be incorporated pursuant to 31.04.

Private Banking.

Unincorporated individuals may not engage in banking business. (RCW 30.04.280; RCW 30.08.010).

Bank Holding Companies.

State or national bank may not be owned by bank holding company whose operations are principally conducted outside state unless bank to be acquired has existed at least five years (RCW 30.04.232) or director determines that: Bank or domestic holding company to be acquired is in danger of closing, failing, or insolvency; no state bank, trust company, or national banking association doing business in Washington or domestic holding company with sufficient resources is willing to acquire bank on equally favorable terms; applicant out-of-state holding company has provided all requested information and documents; and applicant has demonstrated acceptable record of meeting community credit needs, including those of low and moderate income neighborhoods, consistent with safe and sound operations (RCW 30.04.230[4]).

Limited Liability Companies.

Conditions for formation or conversion of bank or bank holding company as limited liability company are provided. (RCW 30.08.025; RCW 32.08.025).

3.02 BILLS AND NOTES:

Uniform Commercial Code adopted. (Title 62A). See topic 3.09 Commercial Code.

Special Requirements.

Public utility bonds payable only out of special revenue fund are expressly made negotiable. (RCW 35.92.100). Toll bridge bonds expressly made negotiable. (RCW 47.56.140). Notes and checks given for gambling debts are void except for holders in good faith, without notice of illegality. (RCW 4.24.090). Telegraphic checks, due bills, notes authorized. (RCW 5.52.040).

Judgment Notes.

Valid judgment based on confession of judgment clause will be enforced. (9 Wn. App. 32, 510 P.2d 654). Judgment by confession may be entered based on verified writing signed by debtor which authorizes judgment for specified sum, states concisely facts out of which indebtedness arises, and shows sum confessed is justly due. (RCW 4.60.050-.060).

Attorney fee clauses are enforceable, and do not affect negotiability. (6 Wash. 403, 33 P. 1056). If clause is included, fees will be awarded to whichever party prevails. (RCW 4.84.330). See topic 3.09 Commercial Code.

3.03 BILLS OF LADING:

See topic 3.09 Commercial Code.

3.04 BILLS OF SALE:

See topic 3.23 Sales.

3.05 BLUE SKY LAW:

See topic 3.24 Securities.

3.06 BROKERS:

Uniform Commercial Code adopted. (Title 62A). See topic 3.09 Commercial Code.

Real estate brokers must be licensed; condition precedent in action to recover compensation. (RCW 18.85.100, am'd 2008, c. 23, §15; rec'd 2008, c. 23, §49). Brokers must maintain office in state (RCW 18.85.180, am'd 2008, c. 23, §24; rec'd 2008, c. 23, §49), be 18 and meet educational and other standards (RCW 18.85.090, am'd 2008, c. 23, §11; rec'd 2008, c. 23, §49). Qualification by examination. (RCW 18.85.120, am'd 2008, c. 23, §17; rec'd 2008, c. 23, §49). Out-of-state brokers must work with licensed Washington broker and satisfy statutory conditions. (RCW 18.85.560, am'd 2008, c. 23, §47; rec'd 2008, c. 23, §49). License will be suspended due to default on certain student loans. (RCW 18.85.255). Brokerage income taxed. (RCW 82.04.255). Unwritten brokerage contracts void. (RCW 19.36.010). Broker acting as seller's agent has duty to buyer to verify statements of seller prior to repeating them to buyer; buyer has no duty to verify seller's agent's representations absent indication of no reliability. (51 Wn. App. 692; 754 P.2d 1262). Conduct of brokers and salesmen may be subject to Consumer Protection Act. (19.86; RCW 19.86.145). Supervisory duties of designated or managerial broker. (2008, c. 23, §21). Land Development Act regulates offerings for lots in developments. (58.19).

Other Regulated Brokers.

Agricultural products (see topic 3.19 Factors); bucket shops (RCW 9.47.080-.100); cemetery (RCW 68.40.085); commodities, contracts and options (21.30); employment (RCW 49.44.050); insurance (see category 16 Insurance, topic 16.01 Insurance Companies); mortgage brokers (19.146); petroleum products (RCW 82.36.150); securities (see topic 3.24 Securities); and time shares (RCW 64.36.070).

See also topic 3.10 Consumer Protection.

3.07 BULK SALES:

See topic 3.09 Commercial Code.

3.08 CARRIERS:

Common carriers, contract carriers, auto transportation carriers, passenger charter carriers, railroads, steam boat companies, solid waste collection companies, street railways, motor freight carriers, and commercial limousine operators are subject to regulation by Utilities and Transportation Commission. (81.04).

Rates.

Tariffs must be filed with Commission. (RCW 81.28.040). Rates, services, and transactions subject to regulation. (81.04; .08; .12; .16; .28).

Discrimination.

Rate discrimination and rebates prohibited. (RCW 81.28.180; .190; .210).

Railroads.

Commission shall regulate consistent with Interstate Commerce Commission policies. (RCW 81.34.010).

Limiting Liability.

Carrier's ability to limit liability restricted by statute. (RCW 81.29.020). Liability and property damage insurance or surety bond required of auto transportation companies (RCW 81.68.060) and solid waste collection companies (RCW 81.77.060). Liability and property damage insurance, surety bond or qualified self-insurance required of passenger charter carriers. (RCW 81.70.280), excursion service carriers (RCW 81.70.280-.290) and commercial limousine operators (RCW 46.72A.060; RCW 81.90.090-.100).

Bills of Lading.

Carrier receiving property for transportation within state must issue receipt or bill of lading. (RCW 81.29.020). See topic 3.09 Commercial Code.

Uniform Commercial Code adopted. (Title 62A). See topic 3.09 Commercial Code.

Liens.

Carrier has lien for charges on personal property shipped or stored and has right to sell. (RCW 60.60.010). Property may be sold upon ten days notice, if charges unpaid 30 days after due. (RCW 60.60.030). See category 8 Debtor and Creditor, topic 8.13 Liens.

3.09 COMMERCIAL CODE:

Uniform Commercial Code adopted, effective July 1, 1967, as Title 62A.

Numbering system of Title 62A corresponds to numbering system of Uniform Commercial Code (1962 Official Text, Uniform and Model Acts section), e.g., RCW 62A.1-101 corresponds to §1-101 of Uniform Commercial Code. Section numbers herein referred to are those of Uniform Commercial Code.

Material Variations From 1962 and 1972 Text as amended by 1977 Official Amendments and Art. 4A (1989 Official Amendments).—

§1-201(5) amended to read: " 'Bearer' means the person in possession of an instrument, document of title, or certificated security payable to bearer or indorsed in blank."

§1-201(14) amended to read: " 'Delivery' with respect to instruments, documents of title, chattel paper, or certificated securities means voluntary transfer of possession."

§1-201(20) amended to read: " 'Holder' with respect to an instrument, certificated security, or document of title means the person in possession if (a) in the case of an instrument, it is payable to bearer or to the order of the person in possession, (b) in the case of a security, the person in possession is the registered owner, or the security has been indorsed to the person in possession by the registered owner, or the security is in bearer form, or (c) in the case of a document of title, the goods are deliverable to bearer or to the order of the person in possession."

§1-201(20) amended effective July 1, 1994 to read: " 'Holder' with respect to a negotiable instrument, means the person in possession if the instrument is payable to bearer or, in the case of an instrument payable to an identified person, if the identified person is in possession. 'Holder' with respect to a document of title means the person in possession if the goods are deliverable to bearer or to the order of the person in possession."

§1-201(37) excludes lease purchase agreements under RCW 63.19.010-.110; .900, from definition of "security interest."

§1-208—Does not include: "The burden of establishing lack of good faith is on the party against whom the power has been exercised."

§2-201—Promissory Estoppel Doctrine of §217A, Restatement (Second) of Contracts, cannot be applied to render enforceable contracts for sales of goods that violate statute of frauds. (96 Wn.2d 291, 635 P.2d 103).

§2-316(3)(d) (added subsection): "In sales of livestock, including but not limited to horses, mules, cattle, sheep, swine, goats, poultry, and rabbits, there are no implied warranties as defined in this article that the livestock are free from sickness or disease: Provided, that the seller has complied with all state and federal laws and regulations that apply to animal health and disease, and the seller is not guilty of fraud, deceit or misrepresentation."

§2-316(4) amended to read: "Notwithstanding the provisions of subsections (2) and (3) of this section and the provisions of RCW 62A.2-719, as now or hereafter amended, in any case where goods are purchased primarily for personal, family or household use and not for commercial or business use, disclaimers of the warranty of merchantability or fitness for particular purpose shall not be effective to limit the liability of merchant sellers except insofar as the disclaimer sets forth with particularity the qualities and characteristics which are not being warranted. Remedies for breach of warranty can be limited in accordance with the provisions of this Article on liquidation or limitation of damages and on contractual modification of remedy (RCW 62A.2-718 and 2-719)."

§2-403—Subsection (1)(d) not included.

§2-616—Subsection (3) not included.

§2-719(3) amended to read: "Limitation of consequential damages for injury to the person in the case of goods purchased primarily for personal, family or household use or of any services related thereto is invalid unless it is proved that the limitation is not unconscionable. Limitation of remedy to repair or replacement of defective parts or nonconforming goods is invalid in sales of goods primarily for personal, family or household use unless the manufacturer or seller maintains or provides within this state facilities adequate to provide reasonable and expeditious performance of repair or replacement obligations.

"Limitation of other consequential damages is valid unless it is established that the limitation is unconscionable."

Art. 2A, Leases (1987 Official Amendments) adopted (62A.2A) with following modifications:

§2A-103(e)—"Consumer lease" limited to those in which total payments, excluding payments for option to renew or buy, do not exceed $25,000.

§2A-103(g)(iii)(D)—Not adopted.

§2A-104(1)(c) deletes reference to consumer protection decisions.

§2A-105 deletes reference to consumer protection decisions.

§2A-106(1) adds law of jurisdiction other than that in which lessee executes lease.

§2A-106(2) designates improper forum as one other than (a) lessee's residence at time of execution of lease or within 30 days; (b) one in which goods are to be used; or (c) one in which lease is executed.

§2A-107—Subsections (2) and (4) not adopted.

§2A-216—"Alternative A" adopted.

§2A-306 amended to provide for priority of possessory, preparer and processor liens. (RCW 62A.2A-306).

§2A-310(3) and (4) except residential gas conversion burners.

§§2A-406(1)(b) and 407 omit reference to consumer lease.

§3-105—Public utility bonds made negotiable even though payable only out of special revenue fund. (RCW 35.92.100).

§3-106 (added subsections) provides: "(2) A rate of interest that cannot be calculated by looking only to the instrument is a stated rate of interest in subsection (1) of this section if the rate during any period is readily ascertainable by a reference in the instrument to a published statute, regulation, rule of court, generally accepted commercial or financial index, compendium of interest rates, or announced or established rate of one or more named financial institutions.

(3) Graduated, variable, annuity or price-level adjusted payments are stated installments in subsection (1) of this section if such payments are provided for in the instrument."

Subsection (2) renumbered "(4)".

§3-109 (added subsection) provides: "or (e) by variable, graduated, annuity or price-level adjusted payments."

§§3-515, -520, -522, -525 (added sections) provide that drawer of check who has been sent statutory form for notice of dishonor may be required to pay amount of check, together with three times face amount of check or $300, whichever is less, interest, collection costs and attorney fees to holder of check.

Art. 3, Negotiable Instruments (1990 Official Amendments) adopted (62A.3) with following modifications:

§3-512 adds prohibition against recording credit card number given as identification or as proof of creditworthiness when payment for goods or services is made by check or draft.

§§3-515, 520, 522, 525 retain preexisting Washington law, which provides that drawer of check who has been sent statutory form for notice of dishonor may be required to pay amount of check, together with three times face amount of check or $300, whichever is less, plus interest, collection costs and attorney fees to holder of check.

Art. 4, Bank Deposits and Collections (1990 Official Amendments) adopted (RCW 62A.4-101,-504; RCW 30.22.230; RCW 62A.11-111) with following modifications:

§4-104(3)—"Banking day" shall not include Sat., Sun. or legal holiday.

§4-106—"Alternative B" adopted.

§4-401—Bank may not collect fee based on customer's giving notice to bank of postdating.

§4-404—Not adopted.

§4-406(a)—Statement of account provides sufficient information until Jan. 1, 1998. Bank must provide telephone number for customer to request copies of items if bank does not return items paid or copies of items paid.

§4-406(b)—Bank must furnish at least two items without charge. Fees, where allowed, are 50¢ per copy, plus retrieval fees no greater than allowed when complying with Internal Revenue Service summons. Requests for ten items or less must be processed and completed within ten business days.

§4-406(e)—Customers, other than natural persons seeking to recover on personal, family or household account, must report within 60 days. Language prohibiting bank from recovering where there is preclusion, not adopted.

Art. 6, Bulk Transfers, repealed effective July 23, 1993.

§7-204—Subsection (4) reads: “This section does not impair or repeal the duties of care or liabilities or penalties for breach thereof as provided in Chapters 22.09 (agricultural commodities), 22.32 (general penalties relating to warehouses).”

§7-309—Official text is preceded by “Save as otherwise provided in RCW 81.29.010 and RCW 81.29.020” relating to liability of common carriers. Following sentence omitted from §(1): “This subsection does not repeal or change any law or rule of law which imposes liability upon a common carrier for damages not caused by its negligence.”

§8-102(3)—Definition of “clearing corporation” adopted.

RCW 62A §§9-101 through 9-507 were repealed effective July 1, 2000 (2000, c. 250, §9A) and are replaced by RCW 62A, §§9A-101 through 9A-708.

Permanent Editorial Board's Recommendations for Amendment of Uniform Commercial Code.

See infra.

1966 Official Amendments.

Not adopted.

1972 Official Amendments.

Adopted.

1973 Official Amendments.

Adopted.

1977 Official Amendments.

Adopted.

1987 Official Amendments (new Art. 2A, Leases).

Adopted effective July 1, 1994.

1989 Official Amendments (new Art. 4A, Funds Transfers).

Adopted.

1989 Official Amendments (revised Art. 6, Bulk Sales).

Not adopted.

1989 Official Text (Repealer of Art. 6, Bulk Transfers).

Adopted with modifications.

1990 Official Amendments (Art. 3, Negotiable Instruments, and Art. 4, Bank Deposits and Collections).

Adopted effective July 1, 1994.

1994 Official Amendments (Art. 8, Investment Securities).

Adopted effective July 1, 1995.

2000 Official Amendments (Art. 9, Secured Transactions).

Adopted effective July 1, 2001 with material variations from Official Text as follows:

§9-102 adopted with following changes:

Subsection 11: Chattel paper does not include credit card records or rights to payment. (RCW 62A.9A-102[11]).

Subsection 25: "consumer obligation" means one not more than $40,000, or secured by personal property used, or expected to be used, as principal dwelling.

Subsection 44: "goods" does not include manufactured home converted to real property under 65.20.

Subsection 47: "instrument" also does not include writings that do not contain promise or order to pay or writings that are not expressly transferable or not assignable.

Subsection 53: "Manufactured home" means manufactured or mobile home as defined in RCW 46.04.302.

§9-108 adopted, except subsection (c), such description may be sufficient for financing statement. (§9A-108).

§9-109 adopted, except subsections (d)(13), section is further limited to accounts on which checks can be drawn; and (d)(14) article is also inapplicable to transfer by this state or governmental unit thereof. (§9A-109).

§9-309 adopted, except that under subsection (2), significant part of assignor's outstanding accounts and payment intangibles is more than $50,000 or 10%. (§9A-309).

§9-310 adopted, with further exception that filing not necessary to perfect agricultural lien within RCW 60.11.020(7). (§9A-310).

§9-334 adopted, except: subsection (d)(4) not adopted; subsection (g) made applicable to both subsections f(1) and (2); and subsection (j) reads "subsection (l) of this section prevails over inconsistent provisions of any other statute except RCW 60.11.050." (§9A-334).

§9-317 amended to include alternate conditions which may suffice. (§9A-317).

§9-333 amended to provide circumstance under which preparer, processor, or depositor's liens take priority. (§9A-333).

§9-406 adopted, except 406 (f) not adopted. (§9A-406).

§9-501 adopted, except that in subsections (a)(2) and (b), Department of Licensing designated filing office. (§9A-501).

§9-512 adopted, and subsection (a) alternative "A" selected. (§9A-512).

§9-515 adopted, except subsection (b) not adopted. (§9A-515).

§9-518 adopted, subsection (b) alternative "A" selected. (§9A-518).

§9-519 adopted, subsection (f) alternative "A" selected. (§9A-519).

§9-522 adopted, subsection (a) alternative “A” selected. (§9A-522).

§9-523 adopted, except subsection (d) filing office need not issue “written certificate”; and subsection (f) disclosure of list of individuals also authorized. (§9A-523).

§9-525(a) not adopted; enacted subsection (a) provides that fees for filing with Department of Licensing to be set by that department.

§9-525(b) not adopted; enacted section provides that fee for filing in other filing offices is that applicable to recording of mortgage as set out in RCW 36.18.010.

§9-525(c) alternative “A” adopted; 9-525(d) adopted in substance and different fee may also be charged if request is for expedited service; 9-525(e) adopted; 9-525(f) added to provide for Department of Licensing to set and deposit fees and surcharges. (§9A-525, am'd 2008, c. 290, §2[f][2]).

§9-527 adopted in substance and requires report on or before Dec. 31; subsections (1) and (2) not adopted. (§9A-527).

§9-601 adopted in substance; subsection (b) added to provide that rights and remedies relating to certain health care insurance receivables or general intangibles subject to RCW 62A.9A-408. (§9A-601).

§9-602 adopted, except subsection (8) not adopted. (§9A-602).

§9-604 adopted and expanded to include manufactured homes. (§9A-604).

§9-607 adopted, except that under subsection (b) copy of security agreement to be attached to affidavit. (§9A-607).

§9-611 adopted, except that subsection (c) (3) (A) not adopted. (§9A-611).

§9-615 adopted, except subsection (f) not adopted. (§9A-615).

§9-620 adopted, except that subsection (a) expanded to include as condition that if collateral is consumer goods collateral not in possession of debtor when debtor consents to acceptance; and subsection (g) not adopted. (§9A-620).

§9-625 adopted, except subsection (b) expanded to include damages for filing false statement under RCW 62A.9A-607(b) or RCW 62A.9A-619; and subsection (e) expanded to include failure to comply with RCW 62A.9A-209. (§9A-625).

§9-626 adopted, except subsections (a)(5) and (b) not adopted. (§9A-626).

§9-707 adopted and amended to provide for amendment of preeffective date financing statement. (§9A-707).

§9-708 adopted and amended to enumerate persons entitled to file initial financing statement. (§9A-708).

§9-709 adopted and amended to provide for priority in case of conflicting claims. (§9A-709).

APPENDIX 1 to Revised Art. 9 (2000).

Conforming Amendments (Promulgated by Commissioners on Uniform Laws to conform other Uniform Commercial Code Sections to Revised Art. 9 (2000), effective July 1, 2001.

Conforming amendment to RCW 62A.1-105 adopted, §9A-801.

Conforming amendment to RCW 62A.1-201 adopted, §9A-802.

Conforming amendment to RCW 62A.2-103 adopted, §9A-803.

Conforming amendment to RCW 62A.2-210 adopted, except subsection (7) added to provide that, notwithstanding subsections (2) and (3), assignment that would be breach but for 62A. (RCW 62A.2A-406 may create reasonable grounds for insecurity with respect to due performance of assignor. [62A.2-6089].) (§9A-804).

Conforming amendment to RCW 62A.2-326 adopted, §9A-805.

Conforming amendment to RCW 62A.2-502 adopted, §9A-806.

Conforming amendment to RCW 62A.2-716 adopted, §9A-807.

Conforming amendment to RCW 62A.2A-103 adopted, §9A-808.

Conforming amendment to RCW 62A.2A-303 adopted, §9A-809 amended to provide for priority of possessor, preparer and processor liens. (RCW 62A.2A-306).

Conforming amendment to RCW 62A.2A-307 adopted, §9A-810.

Conforming amendment to RCW 62A.2A-309 adopted, §9A-811.

Conforming amendment to RCW 62A.2A-310 adopted, and amended to add to subsection (4) creditor with security interest perfected under certificate-of-title statute under RCW 62A.9A-311(b). (§9A-812).

Conforming amendment to RCW 62A.4-210 adopted, §9A-813.

Conforming amendment to RCW 62A.5-118 not adopted.

Conforming amendment to RCW 62A.6-102 not adopted.

Conforming amendment to RCW 62A.6-103 not adopted.

Conforming amendment to RCW 62A.7-503 adopted, §9A-814.

Conforming amendment to RCW 62A.8-103 adopted, §9A-815.

Conforming amendment to RCW 62A.8-106 adopted, §9A-816.

Conforming amendment to RCW 62A.8-110 adopted, §9A-817.

Conforming amendment to RCW 62A.8-301 adopted, §9A-818.

Conforming amendment to RCW 62A.8-302 adopted, §9A-819.

Conforming amendment to RCW 62A.8-510 adopted, §9A-820.

Filing Fees.

See category 10 Documents and Records, topic 10.04 Records, subhead Filing Under Commercial Code.

Forms.

See end of this Digest.

See also topics: Banks and Banking, Bills and Notes, Brokers, Carriers, Contracts, Factors, Frauds, Statute of, Sales, Securities, Warehousemen; categories Business Organizations, topic Corporations; Civil Actions and Procedure, topic Limitation of Actions; Debtor and Creditor, topics Assignments, Fraudulent Sales and Conveyances, Liens, Pledges; Documents and Records, topics Records, Seals; Mortgages, topic Chattel Mortgages.

3.103.11

3.12 CONSUMER PROTECTION:

Pyramid schemes, chain letters and related schemes are illegal. (RCW 19.275.010, .030). Such practices are violations of Consumer Protection Act and are unfair or deceptive trade practices. (RCW 19.275.040).

Charitable Solicitations.

(19.09). Organization or person who solicits contributions for any charitable purpose professional fundraisers must register with Secretary of State. (RCW 19.09.065). Registration applications submitted with filing fee in amount determined by secretary must disclose solicitation history of person or organization for past three years and include irrevocable appointment of secretary of state to receive service of process in noncriminal proceedings. (RCW 19.09.075; .079). Board or committee must review and accept report. (RCW 19.09.097). Registration effective for one year. (RCW 19.09.085). Exemptions provided for charitable organizations that raise less than amount set by rule by secretary, that conduct all activities through unpaid volunteers, political organizations' appeals that benefit named individuals, and that use no monies to benefit officers or members of organization and, for foreign charitable organizations, that file with secretary of state registration required under foreign state laws. (RCW 19.09.076). Tiered reporting requirements may be established. (RCW 19.09.540). No person may use name of any other person for purpose of soliciting contributions from persons in Washington without written consent of such other person. (RCW 19.09.230). No organization or person soliciting contributions may use name, symbol, or statement so closely related or similar to that used by another charitable or governmental agency that use thereof would tend to confuse or mislead public. (RCW 19.09.240). Person or organization soliciting charitable contributions shall disclose orally or in writing name of individual making solicitation, name of charitable organization, purpose of solicitation, and name of organization that will receive funds. Upon request, percentage of collected money which will be applied to cost of solicitation shall also be disclosed. (RCW 19.09.100). Charitable organizations required to provide annual financial statements to attorney general or county prosecutor upon request. (RCW 19.09.210). Violations deemed unfair practices for purpose of Consumer Protection Act (see subhead Consumer Protection Act, infra). (RCW 19.09.340).

Collection Agencies.

(19.16). Prohibited acts by collection agencies include “bad debt lists”; representing collection agency as having official connections with law enforcement agency; failing to provide debtor with information required by statute; communicating existence of claim to third persons not liable on claim; threatening debtor with impairment of his credit rating; communicating directly with debtor represented by attorney; and harassing debtor as defined in statute. (RCW 19.16.250). Violations deemed unfair practices for purposes of Consumer Protection Act (see subhead Consumer Protection Act, infra). (RCW 19.16.440). Additional penalty for violation is ban on collection of interest, costs and attorney fees. (RCW 19.16.450). Violations may be enjoined by Attorney General or Prosecuting Attorney. (RCW 19.16.460). Certain licensing and operating requirements and penalties made applicable to out-of-state collection agencies. (RCW 19.16.100-.240).

Consumer Protection Act.

The Unfair Business Practices—Consumer Protection Act (19.86) prohibits unfair or deceptive acts or practices in conduct of any trade or commerce. (RCW 19.86.020). Violation of Act subjects persons to civil penalties, injunctive decrees, and private treble damage actions including liability for costs and attorney fees. (RCW 19.86.090). Treble damages for consumer protection violations may not exceed $25,000. (RCW 19.86.090). Party requesting injunctive relief under RCW 19.86.090 must serve copy of initial pleading on Attorney General. (RCW 19.86.095). Other statutes supplement Act's general prohibition by specifying particular acts or practices that are unfair or deceptive and thus subject to remedies provided by 19.86. (See other subheads in this section.) Civil investigative demand procedure available to obtain investigative information prior to decision on filing of lawsuit. (RCW 19.86.110). To prevail in private action under Act and be entitled to attorney fees, plaintiff must establish: (1) Unfair or deceptive act or practice; (2) occurring in trade or commerce; (3) public interest impact; (4) injury to plaintiff's business or property; and (5) causation. In essentially consumer transaction, following factors are relevant to establish public interest: (1) Whether alleged acts were committed in course of defendant's business; (2) whether acts are part of pattern or generalized course of conduct; (3) whether repeated acts were committed prior to act involving plaintiff; (4) whether there is real and substantial potential for repetition of defendant's conduct after act involving plaintiff; and (5) in single transaction, whether many consumers were affected or are likely to be affected by it. In essentially private dispute, factors indicating public interest include: (1) Whether alleged acts were committed in course of defendant's business; (2) whether defendant advertised to public in general; (3) whether defendant actively solicited this particular plaintiff, indicating potential solicitation of others; and (4) whether plaintiff and defendant occupied unequal bargaining positions. All factors in either consumer or private dispute need not be present in order to find public interest impact. In addition, public interest element may be satisfied per se by showing that statute has been violated which contains specific legislative declaration of public impact. (105 Wn.2d 778, 719 P.2d 531). Act is not to be construed to prohibit acts or practices that are reasonable in relation to development and preservation of business or that are not injurious to public interest or to authorize those acts or practices that unreasonably restrain trade or are unreasonable per se. (RCW 19.86.920).

Electronic Authentication.

Note: Act providing standards for authentication of electronic signatures and messages, effective Jan. 1, 1998. (19.34).

Employment Agencies, Listing Services and Directories.

(19.31). Agency must provide each applicant with copy of contract between applicant and agency containing: (1) Copy of RCW 19.31.170; (2) name, address, telephone number of agency; (3) trade name; (4) contract date; (5) applicant name; (6) amount of fee to be charged or method of computation, and time and method of payments; (7) directly above space reserved for signature of applicant in 8-point boldface type, “This is a contract. If you accept employment with any employer through [employment agency] you will be liable for the payment of the fee as set out above. Do not sign this contract before you read it or if any spaces intended for the agreed terms are left blank. You must be given a copy of this contract before you sign it,” preceded by caption in 10-point boldface or larger type **“NOTICE TO APPLICANT READ BEFORE SIGNING.”** (RCW 19.31.040). Agency cannot accept fee unless it has procured employment for applicant. (RCW 19.31.150; .190[2]). Fee limitations specified. (RCW 19.31.170). Agency may not share fee with employer. (RCW 19.31.190). For other rules of conduct, see RCW

19.31.180-.190.

Franchises.

See topic 3.15 Franchises.

Interest.

See topic 3.17 Interest.

Law Against Discrimination.

Washington State Human Rights Commission can address discrimination in employment, including whistleblower retaliation; in credit, insurance, real property, financial and health maintenance organizations transactions; and in places of public accommodation because of race, creed, color, national origin, sex, marital or family status, sexual orientation, age, or presence of any sensory, mental, honorably discharged veteran, military status, or physical disability, including actual or perceived HIV infection or hepatitis C. (RCW 49.60.010, 174-.224). Any person discriminated against and/or their attorney may petition Commission (RCW 49.60.230) or seek any remedy otherwise available. Complaint must be filed within six months after discriminatory act, except that complaint based on unfair real estate practice must be filed within one year and whistleblower retaliation complaint must be filed within two years. (RCW 49.60.230, am'd 2008, c. 266, §7[2]). State marriage laws are not affected. (RCW 49.60.020). Commission may issue cease and desist order or require affirmative action to effectuate purpose of this chapter. (RCW 49.60.250, am'd 2008, c. 266, §8). Commission can petition court for enforcement of its orders and court must order show cause hearing to determine why final order should not be enforced according to its terms. (RCW 49.60.260). Party aggrieved by final order may obtain judicial review in accordance with Administrative Procedure Act, 34.04. (RCW 49.60.260-.270).

State may neither discriminate against nor grant preferential treatment on basis of race, color, ethnicity or national origin in public employment, public education or public contracting. (49.60).

Monopolies and Restraint of Trade.

See topic 3.20 Monopolies, 3.22 Restraint of Trade and Competition.

Motor Vehicle Warranties.

Manufacturers of motor vehicles sold in Washington with express warranties must maintain or designate facilities near sales facilities to carry out warranty work. (RCW 19.118.010). For purposes of Act, term “new motor vehicle” means self-propelled vehicle designed for transportation over public highways that was purchased or leased in Washington but excludes vehicles purchased or leased by business as part of fleet of ten or more vehicles, motorcycles and trucks with 19,000 pounds or more gross vehicle weight rating. (RCW 19.118.021[11]).

Dealer who sold new motor vehicle or manufacturer is required to diagnose and make repairs to conform new motor vehicle to warranty if nonconformity is reported during lesser of written warranty period, which may not be less than one year or 12,000 miles whichever first occurs, or warranty period, which is two years or 24,000 miles, whichever first occurs. (RCW 19.118.031).

New motor vehicle dealer required to provide to consumer fully itemized statement indicating diagnosis and repairs made. (RCW 19.118.031[5]).

If manufacturer or new motor vehicle dealer unable to conform new motor vehicle to warranty after reasonable number of attempts, manufacturer must within 40 days of written notice from consumer replace or repurchase new motor vehicle, at consumer's option. (RCW

19.118.041[1]). Reasonable number of attempts deemed to have occurred if: (1) Same serious safety defect has been subject to diagnosis or repair two or more times, at least one of which is during manufacturer's written warranty period and serious safety defect continues to exist; (2) same nonconformity has been subject to diagnosis or repair four or more times, at least one of which is during manufacturer's written warranty period and nonconformity continues to exist; or (3) vehicle is out of service by reason of diagnosis or repair of any nonconformity for total of 30 days, at least 15 of which are during manufacturer's written warranty period. (RCW 19.118.041[2]). Affirmative defense to any claim under chapter that: (1) Nonconformity does not substantially impair use, value or safety of new motor vehicle or (2) alleged nonconformity is result of abuse, neglect or unauthorized modifications. (RCW 19.118.090[5]). “Substantially impair” means to render new motor vehicle unreliable or unsafe for ordinary use or to diminish resale value below average resale for comparable motor vehicles. (RCW 19.118.021[20]).

Motor vehicle repurchased under chapter may be resold only if nonconformity corrected, complete disclosure made to purchaser, and manufacturer warrants nonconformity corrected. (RCW 19.118.061).

Disputes between consumers and manufacturers subject to mandatory arbitration. (RCW 19.118.080[3]). Consumer may accept arbitration award or appeal to superior court. Written notification of acceptance or rejection must be sent to arbitration board within 60 days of receiving decision. Failure to respond within 60-day period considered rejection appealable within 120 days. (RCW 19.118.090[8]). If consumer accepts award, manufacturer must either appeal within 30 days or comply with arbitration award within 40 days. (RCW 19.118.090[9]).

If consumer prevails in appeal to superior court, consumer may recover monetary value of award, attorney fees and costs and, if arbitration board awarded replacement or repurchase of vehicle and manufacturer did not comply, damages of $25 per day from date manufacturer required to comply with arbitration award if manufacturer did not comply with award or provide loaner replacement vehicle. (RCW 19.118.100[3]). If party appealed without good cause or to harass, court shall award double damages and may award triple damages. (RCW 19.118.100[3]).

New motor vehicle dealer required to provide consumer with explanation of rights under chapter prepared by attorney general. Notice to also indicate if request for modification will void warranty. (RCW 19.118.031[2]). Any agreement attempting to limit, waive or disclaim rights under chapter are void. (RCW 19.118.130).

Consumers and manufacturers have no claim against dealer under chapter, except in limited circumstances. (RCW 19.118.041[4]). Consumer may pursue rights or remedies under any other law. (RCW 19.118.140). Violation of any obligation imposed on dealer or manufacturer is per se violation of Consumer Protection Act. (RCW 19.118.041[4]; .120).

Motorized Wheelchairs.

Manufacturer must provide one-year, non-waivable, express warranty. (RCW 19.184.020; .050). Remedies provided for nonconforming products. (RCW 19.184.030). Rights are in addition to other consumer rights. (RCW 19.184.040). Consumer entitled to double damages, costs, disbursements, attorney fees and equitable relief. (RCW 19.184.060).

Auto Repair.

Repairman must provide written estimate with specified information if repair estimated to exceed $100. (RCW 46.71.015).

Invoice for work done must include specified information. (RCW 46.71.015). Replaced parts to be available to customer. (RCW 46.71.021). Not more than 110% of estimate may be charged without authorization. (RCW 46.71.025[2]). Notice of customer rights must be posted.

(RCW 46.71.031). Penalties and loss of lien provided for violation of statute. (RCW 46.71.035; .041). Unlawful acts include false or deceptive advertising, materially understating price, obtaining payment for parts not delivered or work not performed, unauthorized operation of vehicle, failing to provide document at no charge, retaining duplicate for work done under warranty or extended service contract, and charging for unnecessary repairs. (RCW 46.71.045). Violation of statute is deceptive practice under Consumer Protection Act, 19.86. (RCW 46.71.070).

Personal Property Leasing.

Leasing is legally recognized and distinct form of transaction having legal consequences different from loans or installment sales. (RCW 63.10.010).

Consumer lease is lease for use of personal property, by natural person, for more than four months, for total contractual obligation of less than $25,000, except lease purchase agreements and consumer leases of motor vehicles. (RCW 63.10.020).

Transaction may retain character of lease even if liability at end of lease period is based on value of leased property. (RCW 63.10.020).

Lease shall contain: (1) Description of leased property, (2) total amount to be paid at consummation of lease, (3) total amount payable for fees, registration, taxes, itemized charges, insurance, (4) warranties and guarantees, (5) party responsible for maintaining property, (6) disclosure of any security interest, (7) amount of any penalties, (8) whether there is option to purchase, and (9) condition of termination. (RCW 63.10.040). Gross capitalized costs and disclosures must be stated in consumer lease of motor vehicles. (RCW 63.10.040[1][p]).

Violation of this chapter is unfair act or practice under 19.86, Consumer Protection Act. (RCW 63.10.050).

No person may plead defense of usury or maintain action thereon if transaction is consumer lease. (RCW 63.10.060).

Lease purchase agreements controlled by 63.19. (UCC Art. 2A, Leases, adopted effective July 1, 1994.)

Product Liability.

Manufacturers are strictly liable in tort if product not reasonably safe because of construction or warranty defects (RCW 7.72.030[2]) and possibly for design defects and failure to provide adequate warnings with product (107 Wn.2d 232, 728 P.2d 585). Manufacturers are liable under negligence theory if product not reasonably safe because of design or warning defects. (RCW 7.72.030[1]). In determining whether product is “not reasonably safe”, trier of fact is to consider whether product is unsafe to extent beyond that which would be contemplated by ordinary consumer. (RCW 7.72.030[3]). Firearm or ammunition is not deemed defective in design on basis that benefits of product do not outweigh risk of injury when discharged. (RCW 7.72.030). Under certain circumstances, manufacturers may be liable under market share alternative liability. (102 Wn.2d 581, 689 P.2d 368; 107 Wn.2d 584, 733 P.2d 507). Owners and operators of aircraft not strictly liable for ground damage caused by operation of aircraft. (109 Wn.2d 581, 746 P.2d 1198). Product sellers other than manufacturers liable only for harm caused by own negligence, breach of express warranty, or intentional misrepresentation or concealment. (RCW 7.72.040[1]). Product seller liable as manufacturer where no solvent manufacturer is reachable, controlled subsidiary relationship exists between seller and manufacturer, seller provided specifications for product, or product marketed under seller's brand name. (RCW 7.72.040[2]). Pharmacist dispensing prescription product in commercial form not strictly liable in tort or under implied warranty per UCC. (RCW 7.72.040). Liability generally limited to injuries occurring during “useful safe life” of product. (RCW 7.72.060[1]). Useful safe life presumed to be 12 years from first sale, but presumption may be overcome by preponderance of evidence. (RCW 7.72.060[2]). Action must be commenced within three years after claimant discovered or should have discovered harm and its cause. (RCW 7.72.060[3]; 111 Wn. 2d 315, 759 P.2d 405). No liability when product manufactured in accordance with mandatory government contract specifications. (RCW 7.72.050[2]). Claim for economic loss restricted to contract remedies. (RCW 7.72.010[6]). Economic loss determined by risk of harm analysis, including factors such as nature of product defect, type of risk, manner in which injury arose. (112 Wn.2d 847, 774 P.2d 1199). Law applies to claims arising on or after July 26, 1981. Manufacturer, sellers and others in line of distribution of food or nonalcoholic beverage, not liable for consumer's weight gain, obesity or related health condition from long-term consumption of item. (RCW 70.72.070).

Lemon Law.

After Jan. 1, 1988, manufacturer must, within 40 days after demand, repurchase or replace any motor vehicle which has had serious safety defect diagnosed or repaired two times or has had any other nonconformity repaired four times within two years or 24,000 miles after original delivery, or has been out of service for repairs for 30 cumulative days, at least 15 days of which were during period of manufacturer's written warranty or within one year or 12,000 miles after delivery. (19.118).

Attorneys.

Entrepreneurial acts of attorneys are subject to Washington's Consumer Protection Act. (103 Wn.2d 52, 691 P.2d 163).

Land Developments.

Regulated by Land Development Act. (58.19). Except for exempt transactions (RCW 58.19.030), no person may offer or sell, in Washington, any interest in any land development located inside or outside state unless public offering statement provided to purchaser more than two days before purchase. (RCW 58.19.045). Public offering statement contains detailed information prescribed by statute regarding developer and development plus copies of covenants, restrictions, subdivision map, owners' association rules, etc. (RCW 58.19.055). Failure to provide public offering statement entitles purchaser to cancel purchase contract within two days of receipt of statement. (RCW 58.19.045). Developer may not require purchaser to pay any amount in addition to purchase price for constructing, completing or maintaining improvements to development unless sums are paid to: (1) Government agency; (2) person not affiliated with developer, in trust, and on terms acceptable to director of licensing; or (3) association comprised of persons who have purchased lots in development, or their assignees. Terms requiring payment of additional sum must be set forth in public offering. (RCW 58.19.185). Violations deemed unfair practices for purpose of Consumer Protection Act but only attorney general can sue. (RCW 58.19.270).

Retail Installment Sales Act.

(63.14). Statute applies to sales of chattels and services primarily purchased for personal, family and household use and not for commercial or business use. (RCW 63.14.010). Includes transactions involving both retail installment contracts and retail charge accounts in all cases where service or finance charges made. Does not apply to lender (bank) credit card transactions (RCW 63.14.165) or to consumer leases (RCW 63.14.010).

Printed or typed portion of each retail installment contract must be in a size equal to at least 8-point type. (RCW 63.14.020). Copy of contract must be delivered to buyer if nonmail-order transaction. If not delivered, required to pay only cash price. Any acknowledgment by buyer of delivery or copy of contract must be at least 10-point bold type and if contained in contract must be directly above buyer's signature. (RCW 63.14.030).

Statute requires that document set forth names of seller and buyer, place of business of seller and address of buyer, description of goods or services and following items in following sequence: (a) Cash sale price of each item of goods or services; (b) amount of down payment identifying cash paid and trade-in allowance; (c) difference between (a) and (b); (d) aggregate of amounts included for insurance, specifying types of insurance and coverage; (e) aggregate amount of official fees; (f) amount paid, or to be paid, by retail seller to discharge interest of secured party or lessor in goods traded in; (g) principal balance (sum of [c], [d], [e] and [f]); (h) dollar amount or rate of service charge; (i) amount of time balance (sum of [g] and [h]); (j) maximum number of installment payments required, due date of each and amount of each. Last requirement unnecessary if installment payments stated as series of equal scheduled amounts and if amount of final installment also stated. (RCW 63.14.040).

Cautionary “Notice to Buyer” in 10-point bold face type must be included; notice must advise buyer of specified statutory rights including right to cancel purchase within three business days if agreement signed at place other than seller's business address. (RCW 63.14.040).

Provisions are made for retail installment contracts negotiated by mail if catalog clearly sets forth the statutory terms of sale. (RCW 63.14.060).

Seller may not obtain buyer's signature until essential blank spaces are filled. (RCW 63.14.070). Buyer has right to prepay in full if contract is not in default and is entitled to refund credit of unearned finance charge, according to “rule of seventy-eights” as defined in statute. (RCW 63.14.080).

Provision is made for consolidation of subsequent purchases with previous contracts of same buyer, but in effect requires that payments made under consolidation agreement be proportionately applied to the several purchasers consolidated. (RCW 63.14.110).

Where transaction involves a retail charge agreement seller required to advise buyer that a finance or service charge will be computed. (RCW 63.14.120). Seller is required to supply buyer with a statement at end of each monthly or other period agreed upon showing: (1) Unpaid balance at beginning and end of each such period; (2) description of goods purchased during the period and cash sale price of each purchase; (3) payments or other credits during period; (4) amount of service charge during the period; and (5) a legend that the total unpaid balance may be paid at any time. (RCW 63.14.120[2]).

Cautionary “Notice to Buyer” in at least 10-point bold face type must be included; notice must advise buyer of specified statutory rights including right to cancel purchase within three business days if agreement signed at place other than the seller's business address. (RCW 63.14.120[3]).

Service or finance charge may include only charges incident to investigation and making of retail installment contract. Charge for privilege of making installment payments may not exceed dollar amount agreed to by contract and disclosed under statute. (RCW 63.14.130). Term “service charge” does not include insurance premium charges, late charges, attorney fees, court costs, vehicle dealer administrative fee, or other “official fees”. (RCW 63.14.010[11]).

Any provision that buyer agrees not to assert defenses against seller or an assignee or that buyer agrees to submit to suit in county other than county of buyer's residence, place of business or county where contract signed is invalid. (RCW 63.14.150).

Compliance with disclosure provisions of Tit. I of Truth in Lending Act (82 Stat. 146, 15 U.S.C. §1601) constitutes compliance with “disclosure requirements” of Act (RCW 63.14.151), but it is not clear if “Notice to Buyer” provisions are “disclosure requirements” within meaning of Act.

In addition to other rights, buyer has right to cancel, without additional liability, retail installment transaction entered into at place other than seller's business address within three business days by notice by certified mail to seller; seller must refund to buyer within ten days all deposits, including down payments and/or goods traded-in; seller entitled to reclaim goods. (RCW 63.14.154).

Where insurance is contracted for and it does not include liability coverage the contract must so state. It must also state whether insurance is to be procured by buyer or seller and if by seller, the charge for insurance must not exceed actual premium unless it is less than $1. Insurance policy, certificate or notice thereof must be delivered to buyer within 45 days. (RCW 63.14.140).

Buyer may not validly waive any provision of the act or the remedies provided therein. (RCW 63.14.160).

Wilful and intentional violation of Act constitutes misdemeanor. (RCW 63.14.170). Any such violation bars recovery by seller of any service charge, official fees, collection or delinquency charge; seller however may recover from buyer an amount equal to cash price of goods or services and cost of any included insurance. (RCW 63.14.180). Violations of Act are enjoinable by state attorney general or county prosecuting attorney in actions brought in name of state. (RCW 63.14.190). Court may refuse to enforce all or part of unconscionable agreement. (RCW 63.14.136).

Affirmative defense provided for failure to make payment or other breach of contract due to year 2000 failure of electronic computing device, which not proximately caused by obligee. (RCW 4.24.650).

Going Out of Business Sales.

Applies to persons who engage in retail sale of merchandise in regular course of business. (RCW 19.178.900). Notice of sale must be recorded with county auditor 14 days before sale (RCW 19.178.030) and posted prominently on sale premises (RCW 19.178.020). Seller must elect to make either inventory list of merchandise to be sold or compilation of purchase orders issued by business within 30 days of recording notice of sale. Inventory list or compilation of purchase orders must be permanently attached to affidavit. (RCW 19.178.040). Going out of business sale may not be conducted for more than 60 days. (RCW 19.178.060). Statute restricts merchandise to be offered at sale. (RCW 19.178.070). Person conducting going out of business sale under one-year disability with respect to same business. (RCW 19.178.080-.090). Frequency and periods of advertising for going out of business sales and moving sales regulated. (RCW 19.178.100). Violation of statute is unfair or deceptive act and unfair competition under Consumer Protection Act, 19.86. (RCW 19.178.110).

Fair Credit Reporting Act.

(19.182). Circumstances in which consumer reporting agency may furnish report restricted. (RCW 19.182.020-.030). Other than in situations involving credit transactions in excess of $50,000, life insurance in excess of $50,000, and employment at greater than $20,000 per year, following information may not be furnished: Bankruptcies more than ten years old; suits and judgments more than seven years old or beyond limitations period, if longer; paid tax liens more than seven years old; collection or charged off accounts more than seven years old; certain criminal records more than seven years old; and other adverse information more than seven years old. (RCW 19.182.040). Circumstances under which investigative consumer reports procured or caused to be prepared, restricted. (RCW 19.182.050). Consumer reporting agency must establish procedures to conform to act and to make required disclosures to consumers. (RCW 19.182.060-.080). Except for information furnished with malice or intent to injure consumer, remedies under statute exclusive. (RCW 19.182.080[6]). Credit reporting agency must investigate disputed item without charge within 30 days of notice from consumer and take subsequent action required by statute. (RCW 19.182.090). Allowable fees provided. (RCW 19.182.100). Person who takes adverse action based in whole or in part on information in consumer report must notify consumer. (RCW 19.182.110). Action to enforce liability under 19.182, must be commenced within two years of accrual of claim, except in case of material and wilful misrepresentation of information required to be disclosed, action may be brought within two years of discovery. (RCW 19.182.120). Fines and imprisonment for certain violations of statute provided. (RCW 19.182.130). Violation of statute actionable under Consumer Protection Act, 19.86; actual damages, costs and reasonable attorney fees available; in addition, in case of wilful failure to comply with statutory requirements, award includes $1,000 penalty. (RCW 19.182.150). Consumer reporting agency is required to block identity theft victim's information. (RCW 19.182.160, .170). Identity theft victim may prevent consumer reporting agency from releasing information. (RCW 19.182.180). Agency not bound by security freeze if merely reseller of credit information. (RCW 19.182.190). Other specified entities not bound by security freeze. (RCW 19.182.200-.210).

Lease Purchase Agreements.

(63.19). Lease of personal property for personal, family, or household use must disclose information required by statute. (RCW 63.19.040). Agreement may not contain confession of judgment; negotiable instrument; security interest in goods other than those delivered by lessor; wage assignment; waiver of claims or defenses; or authorization to enter consumer's premises or to commit breach of peace in repossession of goods. (RCW 63.19.050). Violation constitutes breach of Consumer Protection Act. (RCW 63.19.110).

UCC Art. 2A, Leases, adopted, effective July 1, 1994.

Unsolicited Goods.

Unsolicited newspapers, periodicals and other goods or services received in mail may be treated as gift. Recipient has no obligation to return or pay for goods. (19.56).

Other Regulated Areas.

Statutes also regulate many businesses, including without limitation: Hearing aid dispensing advertising (18.35); proprietary schools (18.82); investment advisors and financial planners (21.20); mortgage brokers (19.146, am'd 2008, c. 78, §§1-3; c. 108, §21; c. 109, §1; and c. 110, §12); prearranged funeral services (18.39); for hire vehicles (46.72); chauffeurs (46.72A); telephone solicitations (19.58); gift certificates (19.240); trading stamps and coupons (19.83, .84); time share sales persons (64.36); business opportunity fraud (19.110); pyramid schemes (19.275); franchise investments (19.100); camping clubs (19.105); motor vehicle and mobile home sales (43.63B; 46.70); landlord-tenant relationships (59.18, am'd 2008, c. 43, §1; c. 75, §§1, 2; c. 113, §4; and c. 278, §§12 and 13; 59.20); mobile home park landlord (59.20-.22, am'd 2008, c. 116); condominium warranties (RCW 64.34.443-.450, am'd 2008, c. 113, §1); usury (19.52); sale of organic foods (15.86); vision care (18.195); denturists (18.30); roofing and siding contracts (19.186); disclosures by lenders on residential mortgage loans (19.149); money transmission and currency exchanges (19.230); marketers of living trusts (19.295); exchange facilitators (19.310); and sales of residential real estate and mobile and manufactured homes (64.06). 18.235 provides disciplinary procedures for listed licensed businesses and professions. Penalties include, inter alia, revocation or suspension of license or fines up to $5,000 per violation. (RCW 18.235.110). Acts constituting unprofessional conduct are listed. (RCW 18.235.130).

Uniform Deceptive Trade Practices Act not adopted.

Sales.

(1) Express warranties of goods by seller are created by any affirmation of fact or promise, any description of goods, or sample which is made part of basis of bargain (RCW 62A.2-313); (2) warranty that goods shall be merchantable is implied in contract for sale if seller is merchant with respect to goods of that kind (RCW 62A.2-314); (3) where seller at time of contracting has reason to know of any particular purpose for which goods are required and that buyer is relying on seller's skill or judgment to select goods, there is implied warranty that goods shall be fit for such purpose unless excluded (RCW 62A.2-315); (4) in any case where goods are purchased primarily for personal, family or household use and not for commercial or business use, disclaimers of warranty of merchantability or fitness for particular purpose shall not be effective to limit liability of merchant sellers except insofar as disclaimer sets forth with particularity qualities and characteristics which are not being warranted (RCW 62A.2-316[4]); (5) remedies for breach of warranty can be limited in accordance with provisions of this Article on liquidation or limitation of damages and on contractual modification of remedy (RCW 62A.2-316[4]); (6) no implied warranty of freedom from illness in livestock sales, provided seller has complied with all pertinent laws and regulations and is not guilty of fraud, deceit or misrepresentation (RCW 62A.2-316[3][d]); (7) limitation of consequential damages for injury to person in case of goods purchased primarily for personal, family or household use or of any services related thereto is invalid unless it is proved that limitation is not unconscionable (RCW 62A.2-719[3]). Limitation of remedy to repair or replacement of defective parts or nonconforming goods is invalid in sales of goods primarily for personal, family or household use unless manufacturer or seller maintains or provides within this state facilities adequate to provide reasonable and expeditious performance of repair or replacement obligations. (RCW 62A.2-719[3]).

Limitation of other consequential damages is valid unless it is established that limitation is unconscionable. (RCW 62A.2-719[3]).

Service Contracts.

Providers must register and pay $250 fee. (RCW 48.110.030). Report and $20 fee required annually. (RCW 48.110.040). Financial responsibility standards established for provider. (RCW 48.110.050). Service contracts required to be in clear, understandable language, easy to read and to contain specified items. (RCW 48.110.070). Reimbursement insurance policies must fully insure obligations of service contract provider. (RCW 48.110.060).

Plain Language Statute.

No plain language statute.

3.13 CONTRACTS:

Uniform Commercial Code adopted. (Title 62A). See topic 3.09 Commercial Code.

Common law rules prevail. See also topic 3.23 Sales; categories 10 Documents and Records, topic Seals; Family, topic Infants, subhead Ratification of Contracts.

Attorney Fees.

In action on contract or lease executed after Sept. 21, 1977, containing clause for attorney fees even if unilateral, prevailing party entitled to reasonable attorney fees; waiver of mutuality void. (RCW 4.84.330).

Government Contract.

Where governmental entity lacks substantive authority to enter particular type of contract or fails to conform to mandatory statutory procedures, ultra vires doctrine renders contract void and unenforceable to protect citizens, taxpayers or rate payers from ill-considered, unauthorized actions of their representatives. (99 Wn.2d 772, 666 P.2d 329).

3.143.17

3.18 INFORMATION TECHNOLOGY, INTERNET AND NEW MEDIA:

Among areas regulated are: Electronic Authentication Act (19.34); commercial electronic mail (19.190); identity theft (9.35, am'd 2008, c. 207, §§1-4); electronic digital fraud (RCW 9.38.060); computer spyware (19.270); and trade-in or exchange of computer hardware (19.194).

Fraudulent Email.

Unauthorized use of other's domain name, misrepresenting or obscuring transmission path, or inclusion of false or misleading information in subject line of commercial email violate consumer protection act. (RCW 19.190.030). Damages to recipient of fraudulent email or commercial electronic text message are greater of actual damages or $500. (RCW 19.190.040[1]). Damages to interactive computer service from fraudulent email are greater of actual damages or $1,000. (RCW 19.190.040[2]). Electronic mail service provider not liable. (RCW 19.190.010). Computer spyware illegal (19.270, am'd 2008, c. 66, §§1-6) as is inducing person to reveal personal information (RCW 19.190.080). Damages and injunctive relief provided for. (RCW 19.190.090).

Taxes.

Multistate Tax Compact adopted. (RCW 82.56.010).

Business and Occupations Tax.

Creation and distribution of custom software and customization of canned software are subject to tax at rate of 1.5% of gross proceeds. (RCW 82.04.29001). Digital products and services are subject to tax equal to a percentage of gross proceeds. (RCW 82.04.257). Gross proceeds from provision of Internet access are subject to tax rate of 1.5%. (RCW 82.04.297). Tax credit is provided for manufacturing software or programming in rural counties. (RCW 82.04.4456; .4457).

Sales and Use Taxes.

Canned software is subject to sales and/or use tax. (RCW 82.04.050 and RCW 82.12.020). Custom software or customization of canned software, not subject to sales tax. (RCW 82.04.050[6]). Washington has not adopted Uniform Sales and Use Tax Administration Act. Simplified Sales and Use Tax Administration Act adopted. (82.58).

Property Tax.

Computer software defined. (RCW 84.04.150). Following are exempt from tax: custom software (except embedded), retained rights in software, and master or golden copies of software. (RCW 84.36.600).

3.193.13

3.14 FACTORS:

Common law rules govern generally except as modified by Uniform Commercial Code. See topic 3.09 Commercial Code.

License Requirements.

Commission merchants, dealers, brokers, cash buyers, agents, and boom loaders must apply for license before renewal date each year, from Director of Agriculture for sale of agricultural products. License fees are prescribed by Director by rule. (RCW 20.01.040). Application to be on form provided by Director. (RCW 20.01.070). Exceptions: (1) Any cooperative marketing association or federation incorporated under, or whose articles of incorporation and bylaws meet, requirements of chapter 23.86 and related provisions; (2) any producer who exclusively sells his own products; (3) any public livestock market operating under bond required by state or federal government (such market is subject to all provisions of statute except license fee); (4) retailers with permanent place of business within state, but only for retail business at such place of business; (5) person buying products for his own use; (6) warehouseman or grain dealer licensed under state grain warehouse act with respect to handling of agricultural products as defined under such act; (7) nurseryman licensed under state horticultural laws; (8) person licensed under state dairy laws; (9) producer purchasing less than 15% of his volume to fill orders; (10) persons licensed under 67.16, regulating horse racing; (11) certain domestic wineries. (RCW 20.01.030).

Before license issued, commission merchant or dealer must provide bond by surety company authorized to do business in state. Bond for commission merchant or dealer is percentage of net proceeds. Minimum bond for commission merchant, or dealer in turf, forage, vegetable seed, hay or straw is $15,000; for commission merchant or dealer in livestock is $10,000 plus $5,000 for each agent; for all other dealers is $10,000. (RCW 20.01.210). Grain dealers regulated with warehousemen and must post bond of not less than $50,000 but not more than $750,000 to be licensed. (RCW 22.09.090). See topic 3.27 Warehousemen. Grain dealers must pay assessments for grain indemnity fund. (RCW 22.09.405-.471).

Liens.

Every person, firm or corporation who as a commission merchant, carrier, wharfinger or storage warehouseman makes advances for freight, transportation, wharfage or storage of another's goods, shall have a lien on such property so long as he has possession. (RCW 60.60.010). See also topic 3.09 Commercial Code.

Consignment Agreements.

See topic 3.09 Commercial Code.

Uniform Commercial Code adopted. See topic 3.09 Commercial Code.

3.15 FRANCHISES:

Franchise Investment Protection Act adopted. (19.100). Unlawful for franchisor or subfranchisor to sell or offer franchise in Washington unless offer is registered or exempted under RCW 19.100.030. (RCW 19.100.020). If offer subject to registration, persons offering or selling must be registered. (RCW 19.100.140). No person may publish advertisement offering franchise unless copy of advertisement filed with director of Department of Licensing. (RCW 19.100.100). No person may publish advertisement offering franchise if director of Department of Licensing finds advertisement contains false or misleading statements. (RCW 19.100.110). Unfair or deceptive acts (RCW 19.100.180) deemed unfair practice under Consumer Protection Act (see topic 3.10 Consumer Protection, subhead Consumer Protection Act) (RCW 19.100.190). Unlawful for any person in connection with offer, sale or purchase of any franchise or subfranchise to make any oral or written communication which includes untrue statement of material fact. (RCW 19.100.170). For other prohibited acts in sale of registered franchise, see RCW 19.100.100; .110; .140; .170. Franchise may not be terminated prior to expiration of term except for good cause as defined in RCW 19.100.180. Any person who sells or offers franchise in violation of this chapter liable to franchisee or subfranchisor for damages, for rescission, or for other relief court deems appropriate; treble damages and attorney fees at court's discretion. (RCW 19.100.190). Attorney General or director of Department of Licensing may sue for injunction and for civil and criminal penalties. (RCW 19.100.210).

3.16 FRAUDS, STATUTE OF:

Uniform Commercial Code adopted. (Title 62A). See topic 3.09 Commercial Code.

The following agreements are void unless in writing, signed by the party to be charged or someone authorized by him: (1) Agreement that, by its terms, is not to be performed within one year; (2) promise to answer for debt, default, or misdoings of another; (3) agreement, promise, or undertaking made upon consideration of marriage, except mutual promises to marry; (4) promise made by executor or administrator to answer in damages out of his own estate; (5) agreement authorizing or employing agent or broker to sell or purchase real estate for compensation or commission. (RCW 19.36.010).

Lease for more than one year must be in writing and acknowledged. (RCW 59.04.010; RCW 59.18.210). Mobile home space rentals must be in writing regardless of term. (RCW 59.20.050-.060).

Every conveyance or encumbrance of real estate must be by written deed, signed by party to be bound and acknowledged. (RCW 64.04.010-.020). To satisfy statute of frauds, contract or deed for conveyance of real estate must contain, or incorporate by reference, description of real estate sufficiently definite to locate it without recourse to oral testimony. (43 Wn. App. 267, 716 P.2d 937).

No personal representative is chargeable for damages or debts of decedent out of his estate unless promise is in writing and signed by him or someone specially authorized by him. (RCW 11.48.040).

Promise to pay another's debt does not fall within statute of frauds if primary purpose of promise is to benefit promisor. (36 Wn. App. 860, 678 P.2d 346).

Writing is necessary to enforce suretyship agreement only when creditor seeks to enforce suretyship obligation against surety. (106 Wn.2d 614, 724 P.2d 356).

Statute of frauds defense is personal to parties to contract. (9 Wn. App. 640, 513 P.2d 1053). To satisfy statute of frauds, writing must contain all essential and material terms. (104 Wn.2d 105, 702 P.2d 459). Requirement may be satisfied by several documents connected by internal reference. (98 Wn.2d 600, 656 P.2d 1086).

Contracts of Sale.

See §§2-201 and 8-319 of Uniform Commercial Code.

Part Performance.

Oral contract may be exempted from statute of frauds where acts allegedly constituting part performance point unmistakably and exclusively to existence of claimed agreement. (76 Wn.2d 457, 457 P.2d 603). Sufficient evidence of part performance may “remove” oral agreement for sale or lease of real property from operation of statute of frauds. (93 Wn.2d 709, 612 P.2d 371).

3.17 INTEREST:

In absence of written agreement fixing rate, legal rate is 12% per annum. (RCW 19.52.010[1]). Unless contract provides for compounding, interest is simple. (50 Wn. App. 688, 749 P.2d 1304). Lease not considered loan subject to this statute if consumer lease or lease purchase (RCW 19.52.010; RCW 63.10.020) or would be consumer lease but for lessee not natural person, lease not for personal, family or household purposes or obligation exceeds $25,000 (RCW 19.52.010[2]).

Maximum rate is higher of 12% per annum or four points above equivalent coupon issue yield of average bill rate for 26 week treasury bills as determined at first bill market auction conducted during calendar month immediately preceding later of: (i) Establishment of interest rate by written agreement of parties to contract, or (ii) any adjustment in interest rate in case of written agreement permitting adjustment in interest rate. (RCW 19.52.020). Maximum rate is calculated monthly by state treasurer and published in Washington State Register. (RCW 19.52.025). Any rate in excess of 12% per annum must be agreed to by parties in writing. Requirement is satisfied if written agreement provides for payment of money at end of or installments over agreed period of time. (RCW 19.52.010). Service charges in retail installment sales contracts and retail charge agreements may not exceed schedule or rate agreed to by contract and disclosed as required by statute. (RCW 63.14.130[1]). Any person wilfully and intentionally violating provision of 63.14 or RCW 40.04.030-.090, is guilty of misdemeanor punishable by up to $1,000 fine, up to six months imprisonment, or both. (RCW 63.14.170). Financial institution credit cards (e.g., bank cards) are subject to general usury statute 19.52. (RCW 63.14.165; RCW 19.52.115).

Judgments founded on written contracts providing for interest at a specified rate bear interest at such rate (RCW 4.56.110), provided interest rate is within statutory limit (34 Wn. App. 210, 660 P.2d 764) and set forth in judgment. All other judgments, including tort judgments against state and municipal corporations (RCW 4.56.115) and eminent domain judgments (RCW 8.28.040), bear interest at 2% above treasury bill rate (RCW 4.56.110). Prejudgment interest allowable when liquidated claim or claim for amount due on specific contract for payment of money and determinable by fixed contract standard for computation without reliance on opinion or discretion. (74 Wn.2d 25, 442 P.2d 621).

Open Accounts.

Interest upon open account runs at legal rate from date of last item of account. (135 Wash. 512, 238 P. 17).

Industrial Loan Companies—Open-End Loans.

Interest charges on any open-end loan from industrial loan company pursuant to 31.04 shall not exceed 25% per annum; and must be computed using simple interest, except that add-on method may be used in specified circumstances. (RCW 31.04.125).

Usury.

In action on usurious contract, lender is entitled only to principal less amount of accruing interest at contract rate. If interest has been paid, lender is entitled only to principal less twice amount of interest paid and less amount of unpaid accrued interest. Debtor is entitled to costs, reasonable attorney fees and amount paid in excess of what lender is entitled to. (RCW 19.52.030[1]). See also topic 3.10 Consumer Protection. Debtor, if natural person, may seek declaratory judgment that loan is usurious. (RCW 19.52.032). Loan made outside state to person residing in state is subject to state usury laws to same extent as if made in state. (RCW 19.52.034). Usury defense not available to corporations, trusts, associations, partnerships and governmental agencies; nor to individuals if transaction is primarily for agricultural, commercial investment or business purposes. (RCW 19.52.080). “Business purposes” determined by borrower's representations to lender. (111 Wn.2d 76, 757 P.2d 523). Usury defense not available if transaction constitutes consumer lease (RCW 63.10.020) or would be consumer lease but for lessee not natural person, lease not for personal, family or household purposes or obligation exceeded $25,000 (RCW 63.10.060).

Federal Preemption.

Washington has not acted pursuant to Depository Institutions Deregulation and Monetary Control Act of 1980 (Public Law 96-221) to override federal preemption of state usury laws provided in §501(a) of Act.

3.19 LICENSES, BUSINESS AND PROFESSIONAL:

Licenses are required for large number of businesses and occupations. See, e.g., topics Brokers, Warehousemen; category Transportation, topic Motor Vehicles.

18.235 provides disciplinary procedures and penalties for listed licensed businesses and professions. Penalties include, inter alia, revocation or suspension of license or fines up to $5,000. (RCW 18.235.110). Acts constituting unprofessional conduct are listed. (RCW 18.235.130).

Collection agencies, including out-of-state agencies (not including lawyers or persons whose collection activities are carried on in their true name and are directly related to business other than collection agencies) regulated by statute. (19.16). Agencies must apply to Washington state collection agency board for license and file $5,000 surety bond with director of board. (RCW 19.16.110; .130-.140; .190). Customers of agency may sue upon bond for failure of agency to comply with any agreement entered into with agency. (RCW 19.16.200). Act lists 19 prohibited practices by collection agencies violations of which are civil in nature. (RCW 19.16.250; .900). No debt may be assigned to collection agency unless creditor has attempted to advise debtor of existence of debt and that debt may be assigned to collection agency if not paid, and at least 30 days have elapsed from date notice was sent. (RCW 19.16.500). See topic 3.10 Consumer Protection, subhead Collection Agencies.

3.20 MONOPOLIES, RESTRAINT OF TRADE AND COMPETITION:

Unfair Business Practices.

Consumer Protection Act declares every contract, combination or conspiracy in restraint of trade or commerce to be unlawful. (RCW 19.86.030). Unfair methods of competition and unfair or deceptive acts or practices also unlawful. (RCW 19.86.020). It is unlawful to monopolize, attempt to monopolize, or combine or conspire to monopolize any part of trade or commerce (RCW 19.86.040); to lease or sell or contract to sell goods or services on condition that lessee or purchaser thereof shall not use or deal in goods or services of competitor where effect of same may be to substantially lessen competition or tend to create monopoly in any line of commerce (RCW 19.86.050); or for corporation to acquire whole or part of stock or assets of another corporation where effect of acquisition may be to substantially lessen competition or tend to create monopoly in any line of commerce (RCW 19.86.060). Intent of legislature that courts applying Act will be guided by final decisions of federal courts and final orders of Federal Trade Commission interpreting similar federal statutes. (RCW 19.86.920). Act is not to be construed to prohibit acts or practices which are reasonable in relation to development and preservation of business or which are not injurious to public interest or to authorize those acts or practices which unreasonably restrain trade or are unreasonable per se. (RCW 19.86.920). Violation of antitrust provisions of Act subjects persons to civil penalties, injunctive decrees and private treble damage actions. (RCW 19.86.080-.095). Actions or transactions permitted, prohibited or regulated under laws administered by Washington utilities and transportation commission or federal power commission exempt. (RCW 19.86.170). Actions or transactions permitted by federal or state regulatory agencies exempt. (RCW 19.86.170). Federally chartered savings and loan institution exempt from Consumer Protection Act. (33 Wn. App. 456, 656 P.2d 1089).

Unfair Trade Practices.

Unfair Practices Act repealed. (1983, c. 288).

Resale Price Agreements.

Fair Trade Act repealed. (1975, c. 55).

Antitrust.

See generally Antitrust Commission Report, Washington State Bar Association (1983).

3.21 NEGOTIABLE INSTRUMENTS:

See topic 3.02 Bills and Notes.

3.22 RESTRAINT OF TRADE:

See topic 3.20 Monopolies, 3.22 Restraint of Trade and Competition.

3.23 SALES:

Uniform Commercial Code adopted. (Title 62A). See topic 3.09 Commercial Code.

Bills of Sale.

See topic 3.09 Commercial Code.

Conditional Sales.

See topic 3.09 Commercial Code. See also category 23 Transportation, topic 23.01 Motor Vehicles, subhead Liens and Encumbrances.

Product Liability.

For actions filed on or after Aug. 1, 1986, Tort Law Revisions apply, including comparative fault (RCW 4.22.005-.020, am'd 2008, c. 6, §401) and limitations on joint and several liability (RCW 4.22.070) and requirement that personal injury claimant elect whether or not to waive physician-patient privilege within 90 days of filing action (RCW 5.60.060, am'd 2008, c. 6, §402). RCW 4.56.250 placing cap on noneconomic damages in tort actions unconstitutional violation of right to jury trial. (112 Wn.2d 636, 771 P.2d 711). For claims arising after July 26, 1981 comprehensive product liability statute applies (7.72); also affects trials after July 26, 1981 (RCW 4.22.920[2]). See topic 3.10 Consumer Protection, subhead Product Liability. Manufacturers are strictly liable in tort for product's failure to conform to express or implied warranties. (RCW 7.72.030[2]). Whether or not product conforms to implied warranty is determined under Title 62A. See topic 3.09 Commercial Code. Warranty disclaimer or consequential damages exclusion may be invalid unless negotiated and conspicuous. (Compare 86 Wn.2d 256, 544 P.2d 20 with 127 Wn.2d 124, 896 P.2d 1258). Disclaimer by merchant seller of goods purchased for personal use must state qualities not warranted with particularity. (35 Wn. App. 99, 666 P.2d 899). "As is" term may suffice. (123 Wn. App. 1046). See topic 3.09 Commercial Code. Commercial builder warrants to first purchaser of new house built for resale that it has no structural defect affecting habitability. (76 Wn.2d 428, 457 P.2d 199; 87 Wn.2d 567, 554 P.2d 1349; 106 Wn.2d 714, 725 P.2d 422).

See category 5 Civil Actions and Procedure, topic 5.09 Damages.

Going Out of Business Sales.

Regulated under 19.78.

Retail Installment Sales.

See topic 3.10 Consumer Protection, subhead Retail Installment Sales Act.

Consumer Protection.

See topic 3.10 Consumer Protection.

Bulk Sales.

See topic 3.09 Commercial Code.

Sales of Motor Vehicles.

See category 23 Transportation, topic 23.01 Motor Vehicles.

3.24 SECURITIES:

Comprehensive Act adopted entitled Securities Act of Washington. (21.20). Although Securities Act is substantial adoption of Uniform Securities Act, it contains numerous variations, omissions and additions to Uniform Act. Most significant variations include: (a) Requirement that certain issuers of securities registered at any time in past file annual reports containing audited financial statements (RCW 21.20.740) with specific liability provisions extending to officers and directors for failure to file (RCW 21.20.745); (b) restrictions on companies which issue debt obligations and which invest or trade in real estate or chattel mortgages, deeds of trust, real estate or personal property contracts, or UCC security agreements and financing statements (RCW 21.20.705-.725); (c) elimination of registration by notification; (d) inclusion of nonpublic offering exemption (RCW 21.20.320[1]); (e) inclusion of offering exemption for offerings not exceeding $5,000,000 (RCW 21.20.320[9]). Extensive regulations have been adopted. (WAC 460).

Uniform Commercial Code adopted. (Title 62A). See topic 3.09 Commercial Code.

Supervision.

Director of Department of Financial Institutions administers Securities Act (RCW 21.20.450) through appointed Administrator of Securities (RCW 21.20.460) and with assistance of seven-member Advisory Committee (RCW 21.20.550-.590).

Regulatory Powers of Supervising Authority.

Director of Department of Licensing may by order disallow, revoke, withdraw or condition availability of certain exemptions from registration (RCW 21.20.325); issue stop orders denying, suspending or revoking effectiveness of registration statements (RCW 21.20.200; .280-.300) and condition effectiveness of registration statements (RCW 21.20.230; .250). In addition, Director registers (RCW 21.20.040; .070) broker-dealers, salesmen, financial planners, investment counselors, investment advisers and investment adviser salesmen; may renew (RCW 21.20.090), deny, suspend, revoke (RCW 21.20.110; .702), or cancel (RCW 21.20.130) their registrations; and inspects their records (RCW 21.20.100). Director has power to issue interpretive opinions (RCW 21.20.530), initiate public or private investigations (RCW 21.20.370), to obtain information, testimony and records by subpoena (RCW 21.20.380), to issue cease and desist orders or obtain permanent or temporary injunctions against violations (RCW 21.20.390), to petition court for appointment of receiver when it appears that issuer has become insolvent (RCW 21.20.390[3]), and to seek restitution or damages on behalf of persons injured by violations of Securities Act, if private civil action, by class action or otherwise, is impractical (RCW 21.20.390[4]).

Prerequisites to Sales or Offerings.

No person may offer or sell a security in State of Washington, other than exempt securities (RCW 21.20.310) or securities sold in exempt transactions (RCW 21.20.320) unless registered by coordination or qualification (RCW 21.20.140). Director may require additional filings with respect to federal covered securities. (RCW 21.20.327). See subheads Exempt

Securities, Exempt Transactions and Registration of Securities, infra.

Securities to Which Act Applicable.

Definition of “security” is similar to Uniform Securities Act but includes certain transactions involving charitable gift annuities and investments in risk capital of venture by investors who expect valuable benefit therefrom and who receive no right to exercise control over managerial decisions of venture. (RCW 21.20.005[12]).

Exempt Securities.

Securities exempt under Securities Act are similar to those exempt under Uniform Securities Act (USA). (RCW 21.20.310; USA §402[a]). Principal variations include: (a) Requirements for filing notification of exemption by nonprofit organizations (RCW 21.20.310[11]); (b) exemption for government revenue obligations specifically excludes security payable solely from revenues received from nongovernmental industrial or commercial enterprise unless such enterprise is within enumerated exceptions or Director finds registration unnecessary to protect investors (RCW 21.20.310[1]); (c) exemption for securities of utilities or railroads which are municipally regulated and for equipment trust certificates for equipment sold or leased to regulated utilities or common carriers (RCW 21.20.310[7]); (d) exemption for any security which meets criteria for investment grade securities that Director may adopt by rule (RCW 21.20.310[8]); and (e) exemption for charitable gift annuities issued by state or regional universities or by insurers or institutions holding certificates of exemption under RCW 48.38.010 (RCW 21.20.310[12], [13]).

Exempt Transactions.

Transactions exempt under Securities Act are similar to those exempt under Uniform Securities Act. (RCW 21.20.320; USA §402[b]). Principal variations from Uniform Act include: (a) Nonpublic offering exemption by statute (RCW 21.20.320[1]) and safe harbor by regulation (WAC 460-44A-500-503; 506); (b) limited offering exemption for offerings not exceeding $5,000,000 pursuant to rules of Director (RCW 21.20.320[9]); (c) any transaction effected in accordance with any rule adopted by Director establishing limited offering exemption (RCW 21.20.320[17]) and uniform offering exemption for limited offers and sales of securities not exceeding $5,000,000 (WAC 460-44A-500-503; 505); and (d) exemptions for: (1) Issuances of stock dividends (RCW 21.20.320[13]); (2) transactions incident to right of conversion or statutory or judicially approved reclassification, recapitalization, reorganization, stock split, merger consolidation or sale of assets (RCW 21.20.320[14]); and (3) nonissuer trading by broker-dealers of previously legally issued securities that are not part of unsold underwriter's allotment and that are sold at current market prices and with payment of no more than usual or customary commissions (RCW 21.20.320[15]), except for securities not registered with Securities Division which were sold pursuant to Regulation D promulgated by Securities and Exchange Commission pursuant to Federal Securities Act of 1933 (WAC 460-44A-200). Certain transactions by mutual or cooperative associations also exempt under Securities Act. (RCW 21.20.320[16]; .321).

Registration of Securities.

All securities must be registered by either coordination (RCW 21.20.180-.200) or qualification (RCW 21.20.210-.230) unless securities are exempt, are sold in exempt transactions, or are federal covered (RCW 21.20.140). Securities are registered with Department of Financial Institutions, Securities Division, P.O. Box 9033, Olympia, Washington 98507-9033. (RCW 21.20.450). Types of registrations permitted and disclosures required are similar to Uniform Securities Act (RCW 21.20.140-.300; USA §§301-306), except that registration by notification not permitted and that audited financial statements must be submitted with registration statements which cover offerings with proceeds exceeding $1,000,000 (RCW 21.20.210[14][c]), and with registrations by coordination which cover offerings with proceeds exceeding $1,000,000 (RCW 21.20.180[8]). Sole owner or multiple owners with survivorship rights may register in beneficiary form and thereby transfer ownership to beneficiary at death of sole owner or death of last to die of multiple owners. (21.35).

Registration of Broker-Dealers, Salesmen, Investment Advisers and Investment Adviser Salesmen.

Broker-dealers, salesmen, financial planners, investment counselors, investment advisers and investment adviser salesmen must register, provided that licensed real estate salesmen may sell or resell condominium units in connection with an investment contract without being registered under Securities Act. (RCW 21.20.040; WAC 460-20B). “Investment adviser” defined to include financial planners. (RCW 21.20.005[6]). Requirements for registration of broker-dealers, salesmen, investment advisers and investment adviser salesmen are similar to Uniform Securities Act. (RCW 21.20.050-.135; USA §§201-204). Broker-dealers of mortgage paper securities may elect optional registration process. (WAC 460-33A-020).

Brokers and Agents.

See subhead Registration of Broker-Dealers, Salesmen, Investment Advisers and Investment Adviser Salesmen, supra. “Salesmen” in Securities Act is defined similar to “Agents” in Uniform Securities Act. (RCW 21.20.005[2]; USA §401[b]).

Licenses.

See subhead Registration of Broker-Dealers, Salesmen, Investment Advisers and Investment Adviser Salesmen, supra.

Bonds.

Minimum capital requirement or bond may be imposed by Director of Licensing as condition of registration (RCW 21.20.060; WAC 460-24A-170) and insolvency is ground for either denial, suspension or revocation of registration (RCW 21.20.110).

Liabilities.

Civil Liability.

Securities Act contains an anti-fraud provision identical to Uniform Securities Act. (RCW 21.20.010; USA §101). Express civil liability arises for purchases or sales of securities in violation of anti-fraud provision (RCW 21.20.010) or for sales of securities in violation of registration requirements (RCW 21.20.140-.230). Proof of scienter not required to establish fraud or misrepresentation except in action against members of governmental bodies and public officers (RCW 21.20.430; 93 Wn.2d 223, 608 P.2d 264). Attorney fees may be recovered (id.) and controlling persons, partners, directors, officers, broker-dealers or salesmen who materially aid in such transactions are jointly and severally liable to same extent as seller or buyer, unless they sustain burden of proof that, with exercise of reasonable care, they could not have known of facts upon which liability is predicated. (RCW 21.20.430[3]). Statute of limitations for violation of registration requirements is three years from time of sale; for violation of anti-fraud provision, three years from date of violation or from date violation would have been discovered in exercise of reasonable care. (RCW 21.20.430[4][b]). However, receipt of appropriate rescission offer, which has been passed upon by Director before suit, estops purchaser or seller from maintaining suit for civil liability under Securities Act (id.). No liability for acts in good faith in conformity with any rule or order of Director. (RCW 21.20.490).

Criminal liability for wilful violations of any provision of Securities Act is Class B felony. Destroying or altering document with intent to impair its integrity is Class B felony, fine of not more than $500,000, or both. (RCW 21.20.400[2]).

Excessive Transactions.

Churning of customers' accounts prohibited. (21.20).

Subdivision Offerings.

Regulated under Land Development Act. (58.19). Uniform Land Sales Practices Act not adopted.

Uniform Simplification of Fiduciary Security Transfers Act. (21.17) repealed effective July 1, 1995 (1995, c. 48, §52).

Uniform Securities Ownership by Minors Act not adopted.

3.25 STATUTE OF FRAUDS:

See topic Frauds, Statutes of.

3.26 TRUST RECEIPT SECURITY:

See topic 3.09 Commercial Code.

3.27 WAREHOUSEMEN:

General.

Storage warehousemen deregulated. (RCW 62A.7-204; RCW 81.04.010; RCW 81.08.010; RCW 81.12.010; and RCW 81.24.040).

Warehousemen defined as persons owning, operating or controlling warehouse in State of Washington. Warehouse, or public warehouse, means any elevator, mill, or other structure used to store agricultural products (except warehouses conditioning less than 300 tons annually, exclusively cold-storage warehouses or those storing fresh fruits and vegetables). (RCW 22.09.011). Warehousemen subject to regulation and inspection by Department of Agriculture (RCW 22.09.020) from which license must be obtained unless federally licensed under 7 U.S.C. 241 (RCW 22.09.030). Warehousemen must post bond or certificate of deposit in amount based on storage capacity, but not less than $50,000 nor more than $750,000 (RCW 22.09.090), and must file evidence of casualty insurance protecting commodities in storage (RCW 22.09.110). Discrimination prohibited. (RCW 22.09.190).

Uniform Commercial Code adopted. (Title 62A). See topic 3.09 Commercial Code.

Lien.

Warehouseman has lien for charges and advances (RCW 60.60.010; RCW 62A.7-209) enforceable by sale of bailed goods after statutory notice (RCW 60.60.020-.040; .060; RCW 62A.7-210).

4 CITIZENSHIP

4.01 ALIENS:

Property.

Alien may acquire and hold land by purchase, devise or descent, and may convey land, in same manner as citizen. (RCW 64.16.005).

Restrictions on Activities.

Aliens, except those who have declared intention to become citizens, may not carry or possess firearms without license from State Director of Licensing. (RCW 9.41.170). No commercial fishing license may be issued to any person not bona fide resident of U.S., nor to any corporation not authorized to do business within state. (RCW 77.65.040).

Deportation.

State shall arrange for deportation of mentally ill aliens. (RCW 72.25.010). Aliens must be given notice of potential consequences of entering guilty plea to crime under state law, i.e., deportation, exclusion from admission to U.S. or denial of naturalization. (RCW 10.40.200).

5 CIVIL ACTIONS AND PROCEDURE

5.01 ACCORD AND SATISFACTION:

See category 3 Business Regulation and Commerce, topic 3.09 Commercial Code.

The common law rules in regard to accord and satisfaction apply in this state. (68 Wn.2d 718, 415 P.2d 73).

Pleading.

Must be pleaded as a defense. (CR §8[c]).

5.02 ACTIONS:

Rules of Court adopted based on Federal Rules of Civil Procedure. See topic 5.19 Practice.

Equity.

Court may give full relief either legal or equitable. Basic principles of equity recognized.

Forms of Action.

There is but one form of civil action, formal distinction between actions at law and suits in equity having been abolished. (CR 2).

Conditions Precedent.

In action in tort, a notice of claim required before beginning action against state (RCW 4.92.110), counties (RCW 36.45.010-.040), cities and towns (RCW 35.31.020-.040) and other political subdivisions (RCW 4.96.010-.020). See 85 Wn.2d 810, 539 P.2d 845 (nonclaim statutes requiring presentation of tort claims before expiration of otherwise applicable statute of limitations unconstitutional as violative of equal protection). See 92 Wn.2d 807, 601 P.2d 163 (statute requiring cost bond in actions against state held unconstitutional).

See also topic 5.16 Limitation of Actions, subhead Actions Against Governmental Units.

Commencement.

See topics 5.20 Process, 5.17 Pleading.

Parties.

Action to be prosecuted in name of real party in interest. (CR 17[a]). Either spouse may sue on behalf of community. (RCW 4.08.030). Husband and wife may join in all actions arising from injuries to person or property of either or both. (RCW 4.08.040). Infants and incapacitated persons must appear by guardian or guardian ad litem. (RCW 4.08.050-.060). Joinder of parties permitted if claims by or against them arise out of same transaction or occurrence and involve common questions of law or fact. (CR 20[a]).

Class Actions.

One or more person may sue or defend for others similarly situated. (CR 23).

Intervention.

Person may intervene when statute confers unconditional right or when he has interest in litigation. Person may be allowed to intervene when statute confers conditional right or when there is common question of law or fact. Applicant must serve motion on all parties. (CR 24).

Interpleader.

Persons with claims that expose plaintiff to multiple liability may be joined as defendants and required to interplead. (CR 22). Person having property or money subject to conflicting claims may bring action against claimants to have rights determined, and may deposit said money or property in court. (RCW 4.08.160-.180).

Third Party Practice.

Defending party may serve summons and complaint on any person who may be liable to him for all or part of plaintiff's claim. (CR 14).

Joinder of Causes of Action.

Party asserting claim to relief may join as many claims as he has against opposing party. (CR 18[a]).

Consolidation of Actions.

When actions involve common questions of law or fact, court may order actions consolidated for trial. (CR 42[a]).

Severance of Actions.

To further convenience, promote economy or avoid prejudice, court may order separate trial of any claim. (CR 42[b]).

Abatement.

All causes of action survive in favor of and against personal representatives of decedents. Recovery cannot include damages for pain and suffering, anxiety, emotional distress or humiliation personal to deceased, except in favor of specified beneficiaries. (RCW 4.20.046, am'd 2008, c. 6, §409). No action shall abate by death, marriage or other disability of party if cause of action survives; court may substitute representatives or successors in interest within one year. (RCW 4.20.050). See category 13 Estates and Trusts, topic 13.08 Executors and Administrators.

Limitation of.

See topic 5.16 Limitation of Actions.

Small Claims.

See category 6 Courts and Legislature, topic 6.01 Courts.

Administration.

See category 13 Estates and Trusts, topic 13.08 Executors and Administrators.

Direct Actions Against Insurer.

See category 23 Transportation, topic 23.01 Motor Vehicles, subhead Direct Actions.

5.03 APPEAL AND ERROR:

From Superior Court.

See category 6 Courts and Legislature, topic 6.01 Courts, subheads Supreme Court and Court of Appeals.

From Court of Appeals.

See category 6 Courts and Legislature, topic 6.01 Courts, subhead Supreme Court.

Appeal Bond.

Appeal bond is no longer required.

How Appeal Taken.

In civil actions, review of acts of superior court is obtained through appeal or through discretionary review by filing written notice of appeal or notice of discretionary review, together with statutory filing fee of $125 (for filing petition for review of court of appeals decision terminating review, $100) (RCW 2.32.070), with clerk of superior court, generally within 30 days of entry of judgment or order appealed from (RAP 5.2). Appeal is available as matter of right from final judgment or certain other acts listed in RAP 2.2. Discretionary review is available under RAP 2.3 in event of obvious error, probable error substantially altering status quo, or substantial departure from accepted judicial proceedings. Existence of controlling question of law as to which there may be substantial difference of opinion may be factor. Motion for discretionary review must be filed within 15 days of notice of discretionary review. (RAP 6.2).

Review is by court of appeals unless review by supreme court is authorized by statute, act of government has been declared unconstitutional, or in violation of federal statute or treaty, case presents issue on which there is conflict among decisions of court of appeals or supreme court, case involves urgent issues of broad public importance, action is in nature of mandamus, quo warranto, prohibition or injunction against state officer or death penalty has been decreed. (RAP 4.2). Cross-appeals must be filed within longer of 30 days from entry of decision or 14 days after service by trial court clerk of notice of appeal or notice for discretionary review on party seeking to cross-appeal. (RAP 5.2).

Notice of appeal is jurisdictional requirement. (68 Wn.2d 398, 413 P.2d 340).

In cases before court of appeals, party filing notice of appeal must file civil appeal statement if, and in manner, directed by clerk. Court of appeals, or agreement of all parties, determines if mandatory settlement conference appropriate; settlement conference judge may make order consistent with agreement of parties at conference. (RAP 5.5).

Stay of Proceedings.

Supersedeas bond or other security required to obtain stay of enforcement of money judgment or decision affecting property. (RAP 8.1). Individual Washington resident who is not party may act as surety if net worth, excluding exempt property, equals at least twice penalty in bond. Bond must be accompanied by affidavit describing assets and liabilities of surety. (RAP

8.4[a]).

Record on Review.

Within 30 days after notice of appeal filed or discretionary review granted, all clerk's papers and designations of exhibits should be served and filed by party seeking review. (RAP 9.6). Within 30 days after notice of appeal filed or discretionary review granted, party seeking review must file with appellate court, and serve on all parties of records, statement of arrangements for transcription of verbatim report of proceedings (RAP 9.2[a]) unless party will prepare narrative or agreed report of proceedings (RAP 9.3; 9.4). Party wishing to add to verbatim report has ten days to file and serve additional designation. (RAP 9.2[c]). Verbatim report, provided at public expense, will not include voir dire examination or opening statement unless ordered by trial court. (RAP 9.2[b]). Within 60 days after statement of arrangements filed, report of proceedings must be filed with clerk of trial court. Court reporter must file verbatim report of proceedings and provide copy to filing party, serve and file notice of filing on all other parties. Filing party should serve adverse party and all other parties and file proof of service. (RAP 9.5). Objections or amendments must be served and filed within ten days. (RAP 9.5). Petitioner must file brief within 45 days after report of proceedings is filed. (RAP 10.2). Respondent in civil action must file brief within 30 days after petitioner's brief is served. (RAP 10.2). Reply brief is due 30 days after respondent's brief or 14 days before oral argument. (RAP 10.2). Party who caused report of proceedings to be filed should at time of filing serve notice that report of proceedings has been filed and serve and file proof of service on all other parties. (RAP 9.5[a]). Content and form of briefs are outlined in RAP 10.3 and 10.4. Additional grounds for review may be stated and additional time for briefing allowed. (RAP 10.10).

Extent and Character of Review.

Appellate court will review decision or parts of decision which are designated in notice of appeal or notice for discretionary review. Appellate court will review nondesignated orders or rulings if such orders or rulings prejudicially affect decision designated in notice and order is entered before appellate court accepts review of designated decision. (RAP 2.4). Error must be raised in trial court unless it involves lack of jurisdiction, failure of proof, or manifest constitutional error. (RAP 2.5).

Where trial court has weighed evidence, appellate review is limited to ascertaining whether decision is supported by findings of fact and whether findings are supported by substantial evidence. (69 Wn.2d 616, 419 P.2d 586). Cases that are controlled by settled law, that are factual and supported by substantial evidence, or that involve only issues of discretion may be decided by motion on merits. (RAP 18.14). Motion on merits should be separate document from brief and should not exceed 25 pages, excluding attachments. (RAP 18.14[c]).

Judgment or Order on Appeal.

Appellate courts may affirm, reverse, modify or take any other action as merits and justice require. (RAP 12.2).

Appeals from Courts of Limited Jurisdiction.

Party aggrieved by final decision of district court, municipal court, or any court statutorily required to have lawyer judge may appeal to superior court within 14 days. (RALJ 2.4; 2.5). Appeal is heard on electronic record as well as pleadings and exhibits. (RALJ 6.1). Format for briefs provided at RALJ 7.3. Discretionary review of superior court decision on review of court of limited jurisdiction will be accepted if decision is in conflict with decisions of appellate courts, involving significant question of constitutional law or public interest, or is substantial departure from accepted judicial proceedings. Question of law as to which there is substantial ground for difference of opinion may be factor. (RAP 2.3[d]). Party aggrieved by final decision of other court of limited jurisdiction, such as small claims court, may appeal to superior court for de novo trial within 14 days if amount in controversy requirement is in excess of $250 and if bond of $100 is posted. Bond in twice amount of judgment and costs must be given to stay proceedings on judgment pending appeal. (RCW 12.36.010; .40.120; JCR 73).

Further Review.

In civil actions, discretionary review of all or any part of decision of court of appeals terminating review is sought by filing petition for review within 30 days after judgment or denial of timely motion for reconsideration. First petitioning party must pay statutory fee at time of filing. (RAP 13.4). Answer to motion should be filed within 30 days after service. (RAP 13.4[d]). Factors governing acceptance of further review are generally those determining whether appeal could have been filed in supreme court initially. (RAP 13.4). Discretionary review of interlocutory decision of court of appeals requires filing of motion for discretionary review in supreme court and copy in court of appeals within 30 days after decision is filed. Motion should not exceed 20 pages double-spaced, excluding appendices. (RAP 13.5). Factors governing acceptance of interlocutory review are generally those determining interlocutory review of superior court decision. (RAP 13.5).

5.04 BONDS:

Where required by statute, and upon motion of party, court has power to prescribe amount of bond. (RCW 4.44.470). No bond void for want of form or substance, recital or condition. (RCW 19.72.170). Bonds for costs may be required where plaintiff resides out of county, is foreign corporation, or assignee. (RCW 4.84.210).

Sureties.

Each surety on bond must be resident of state and have separate property (or community property if other spouse joins in execution of bond) worth amount specified in bond over all debts, liabilities and exemptions. If bond given in court proceedings, court may allow more than two sureties to justify severally in amounts less than specified in bond, provided whole justification equal to that of two sufficient sureties. (RCW 19.72.020; .030). Attorneys, sheriffs, court clerks and other court officers disqualified as sureties. (RCW 19.72.020). Surety bond not liable for tort or inadequate coverage. (RCW 19.72.107).

Surety companies subject to Insurance Code. (RCW 19.72.060; 48.28).

Enforcement.

Surety on contract discharged if creditor does not bring action within reasonable time. (RCW 19.72.101). Sureties have right of subrogation (RCW 19.72.070) and contribution against cosureties (RCW 19.72.080).

5.05 CERTIORARI:

Writ of certiorari may be denominated writ of review. (RCW 7.16.030).

Jurisdiction and Grounds.

Statutory writ of review may be granted by any court, except municipal or district court, when inferior tribunal, board or officer exercising judicial functions has exceeded its jurisdiction, acted illegally, or held erroneous or void proceeding, and there is no appeal nor any plain, speedy and adequate remedy. (RCW 7.16.040). However, writ of review does not apply to state agency action reviewable under Administrative Procedure Act. (34.05). Procedure for seeking review of trial court decisions established in RAP supersedes review process formerly available through writ of certiorari. (RAP 2.1[b]). See topic 5.03 Appeal and Error; category 6 Courts and Legislature, topic 6.01 Courts.

Proceedings.

Application is made by affidavit of party beneficially interested. (RCW 7.16.050). Writ must be applied for within time allowed for appeal or, if none, within analogous time period. (103 Wn.2d 717, 695 P.2d 994). Court may require notice of application to adverse parties, may grant order to show cause why writ should not be allowed, or may grant writ without notice. (RCW 7.16.050). Writ commands party to whom directed to certify fully to court issuing writ, at time and place specified by court, transcript of record and proceedings for review. (RCW 7.16.070). Inclusion in writ of stay of proceedings being reviewed lies in discretion of issuing court. (RCW 7.16.080).

Review.

Court determines whether: Body or officer had jurisdiction; determination was made in mode required by law; parties' rights were violated; and there was competent proof of necessary facts supported by substantial evidence. (RCW 7.16.120).

5.06 CHARITABLE IMMUNITY:

See topic 5.09 Damages.

5.07 COMMISSIONS TO TAKE TESTIMONY:

See topic 5.11 Depositions and Discovery.

5.08 COSTS:

Generally, attorney fees not recoverable by prevailing party absent statutory or contractual basis (94 Wn.2d 605, 617 P.2d 1023), or recognized basis in equity (157 Wn.2d 251, 138 P.3d 943). Private attorney general doctrine rejected in Washington. (107 Wn.2d 112, 727 P.2d 644).

In any action in superior courts, prevailing party is entitled to costs and disbursements, including filing fees, fees for service of process, certain notary fees, reasonable expenses of obtaining records admitted at trial or in any mandatory arbitration, statutory attorney and witness fees, necessary expense of depositions used at trial or in mandatory arbitration, and referee's compensation. (RCW 4.84.010-.080). Costs and statutory attorney fees provided in district court. (RCW 12.20.060). In mortgage foreclosures and other cases in which attorney fees are provided for by contract or statute, amount is fixed by court, regardless of contract stipulation, but in no case more than contract rate. (RCW 4.84.020). In action for recovery of money only, plaintiff considered prevailing party if 1) defendant makes full or partial payment and 2) plaintiff had notified defendant that such payment might result in award of costs. (RCW 4.84.015). In action on contract or lease entered into after Sept. 21, 1977, where contract or lease provides for award of attorney fees and costs incurred to enforce contract provisions, prevailing party is entitled to reasonable attorney fees and costs whether he is party specified in contract or not; such fees are not subject to waiver. (RCW 4.84.330).

In actions for $10,000 or less, attorney fees are awarded to prevailing party. Defendant prevails when plaintiff recovers no more than last written settlement offer. (RCW 4.84.250-.300).

Reasonable expenses, including attorney fees, may be awarded to prevailing party if court finds action, claim or defense was frivolous. (RCW 4.84.185; CR 11).

On Appeal.

Party which substantially prevails on review is entitled to award of costs unless appellate court directs otherwise. (RAP 14.2). Party seeking expenses allowed as costs (RAP 14.3) must file and serve proper cost bill (RAP 14.4).

Security.

Plaintiffs who reside out of the county, foreign corporations and assignees, may be required, upon motion of the defendant, to give security for costs. In such cases proceedings are stayed until $200 bond is filed, or $200 deposited in lieu thereof. Additional bond may be ordered if original bond is insufficient. (RCW 4.84.210). Ninety days after notice to post bond or additional bond is served, court may dismiss action for failure to furnish security. (RCW 4.84.230). In district court maximum amount of security required is $50. (RCW 12.04.170).

Liability of Attorney.

Attorney subject to sanctions, including costs and attorney fees, for signing frivolous pleading, motion or legal memorandum (CR 11), or pursuing frivolous appeal (RAP 18.9).

5.09 DAMAGES:

Common law generally governs compensatory damages. Punitive damages are not allowed except where specifically provided by statute. (76 Wn.2d 750, 458 P.2d 889). Double damages are provided by statutes relating to nonresidential unlawful detainer (RCW 59.12.170; RCW 59.18.420), unlawful withholding of wages (RCW 49.52.070) and wilful or malicious misappropriations of trade secrets (RCW 19.108.030[2]); treble damages are provided in statutes relating to cutting of timber on state lands (RCW 79.02.320), trespass to trees (RCW 64.12.030), waste (RCW 64.12.020), certain unfair business practices and consumer protection (RCW 19.86.090), release of confidential records regarding treatment for mental illness (RCW 71.05.440); stolen or wilfully damaged livestock (RCW 4.24.320); second act of trespass by swine knowingly or negligently permitted to run at large (RCW 16.12.020); unlicensed employment agencies (RCW 19.31.245); rental of dwelling unit after notification by government agency that dwelling unit has been condemned or is in violation of applicable code, statute, ordinance or regulation (RCW 59.18.085). Punitive damages up to $10,000 may be awarded for harassment because of race, color, religion, ancestry, national origin, gender, sexual orientation or mental, physical or sensory handicap. (RCW 9A.36.080).

Comparative Fault Rule adopted (RCW 4.22.005-.020, am'd 2008, c. 6, §401) for actions arising on or after July 26, 1981 (RCW 4.22.920[1]). Recovery for all unintentional tort claims, including strict liability and products liability claims, will be reduced by degree of plaintiff's contributory fault. (RCW 4.22.005-.015). In action brought for wrongful death or loss of consortium, contributory fault of decedent or injured person imputed to claimant. (RCW 4.22.020, am'd 2008, c. 6, §401). Fault includes negligence, recklessness and acts that subject one to strict liability or products liability. (RCW 4.22.015). Assumption of risk operates as damage-reducing factor in strict liability cases. (96 Wn.2d 439, 635 P.2d 728). For actions filed on or after Aug. 1, 1986, share of fault of released parties determined at trial and proportional amount subtracted from plaintiff's recovery except where joint liability retained. (RCW 4.22.070). Where joint liability retained, plaintiff's recovery against nonsettling, jointly liable parties adjusted first by reducing total damages by degree of plaintiff's fault, then by subtracting settlement amount paid or such amount as determined to be reasonable. (RCW 4.22.060-.070; 100 Wn.2d 537, 673 P.2d 179).

Charitable immunity doctrine abrogated in its entirety. (65 Wn.2d 174, 396 P.2d 546).

Civil Immunity.

In any action filed on or after Aug. 1, 1986, director or officer of nonprofit corporation not individually liable (except to corporation or its members) for acts in official capacity unless discretionary decision or failure to decide constitutes gross negligence. (RCW 4.24.264). Volunteers with nonprofit or governmental entities not liable for negligent acts performed on behalf of entity if specified liability insurance limits are met. (RCW 4.24.670). Directors or members of hospital governing boards not individually liable for injuries resulting from care provided by person granted hospital privileges unless grant of privileges constitutes gross negligence. (RCW 7.70.090). Appointed or elected official or member of governing body of any public agency immune from civil liability for any discretionary decision or failure to decide within his official capacity but liability remains on public agency for tortious conduct of its officials and members of governing body. (RCW 4.24.470). Certain agencies coordinating or assisting activities at scene of hazardous-materials incident are not liable for civil damages resulting from any act or omission in good-faith performance of duties, except for gross negligence or wilful or wanton misconduct. (RCW 70.136.050-.070). Persons appointed by state emergency response commission to serve on state or local hazardous materials or emergency planning committees not liable for civil damages resulting from any act or omission in development, review or implementation of plans, except for gross negligence or wilful misconduct. (RCW 4.24.480). County coroners and medical examiners immune from civil liability for official acts in determining cause and manner of death. (RCW 68.50.015). Except for acts of actual malice, fraud or bad faith, any person who files or reports required information to Commissioner of Insurance or to National Association of Insurance Commissioners is immune from civil liability therefor (RCW 48.01.190). Paramedics, emergency medical technicians and their medical program director, supervising physician, hospital, hospital officers, staff, nurses and employees, training agency, licensed ambulance service and governmental units not liable for good faith actions of paramedics and emergency medical technicians while rendering emergency medical service under supervision and control of physician or approved medical program director. (RCW 18.71.210). Any person who in good faith communicates complaint or information to any governmental agency regarding matter of reasonable concern to agency not liable for claims based upon that communication. Statutory damages of $10,000 awarded to one prevailing upon defense, together with expenses and reasonable attorneys' fees. (RCW 4.24.510). With certain exceptions, equine activity sponsor or equine professional not liable for injury or death of participants engaged in equine activity. (RCW 4.24.540). Except for gross negligence or wilful or wanton misconduct, persons who without compensation or expectation of compensation offer emergency care at scene of emergency or participate in transportation of injured person for emergency medical treatment not liable for civil damages resulting from act or omission in rendering such emergency care or transportation. (RCW 4.24.300). Uncompensated, licensed health care provider in community health care setting not liable for ordinary negligence. (RCW 4.24.300). Law enforcement officer responding reasonably and in good faith to call regarding resident of secure facility, and city and county employing officer, immune. (RCW 4.24.551). Governments, law enforcement officers, and other employees not liable in civil action arising out of electronic monitoring, unless bad faith or gross negligence. (RCW 4.24.545). Limited jurisdiction court that provides misdemeanant supervision, not liable in absence of gross negligence. (RCW 4.24.760). Health care provider, facility or their agent not liable in civil action brought by parent, domestic partner, or guardian based only on lack of parent's, domestic partner's, or guardian's consent, if consent was given by another parent or guardian of minor. (RCW 26.09.310, am'd 2008, c. 6, §1022). Good faith release of mental health information by one authorized to collect such information not actionable in absence of gross negligence. (RCW 4.24.558).

Construction contract clause waiving damages for delay void for contracts executed after Sept. 1, 1979. (RCW 4.24.360; .380). Indemnification agreements in construction contracts indemnifying against liability for sole negligence of indemnitee are against public policy, void and unenforceable. (RCW 4.24.115[1]). Indemnification agreements in construction contracts entered into after June 11, 1986 indemnifying against liability for damage caused by concurrent negligence of indemnitor and indemnitee enforceable only to extent of indemnitor's negligence, and only if specifically and expressly provided therefor in agreement. (RCW 4.24.115[2]).

Future Economic Damages.

In personal injury and property damage cases filed on or after Aug. 1, 1986 where award of $100,000 or more in future economic damages is made, court must at request of party enter judgment providing for periodic payment of some or all of these damages. (RCW 4.56.260).

Industrial Insurance Actions.

Payments to permanently disabled workers reduced by amount of social security disability payments received. (RCW 51.32.220; 108 Wn.2d 143, 736 P.2d 265). Plaintiff must notify workers' compensation department or self-insurer of action against third person for industrial injury so it may file notice of statutory interest in recovery or intervene to protect its interest. (RCW 51.24.030[2]). Third-party recovery for asbestos-related disease subject to lien by department to extent medical aid fund not otherwise reimbursed by another insurer. (RCW 51.12.102). No dual capacity (employer-manufactured product causing harm to employee) exception to employer's immunity. (104 Wn.2d 30, 700 P.2d 742; 105 Wn.2d 217, 713 P.2d 92). Waiver of employer's immunity in construction contract entered into after June 11, 1986 must be specific, express and negotiated. (RCW 4.24.115[2]).

Joint and Several Liability.

Doctrine modified in cases filed on or after Aug. 1, 1986. (RCW 4.22.030; .070). Trier of fact determines proportionate share of fault attributable to every entity, whether or not party to lawsuit or immune or released. Where injured party is partially at fault, each defendant is only severally liable in amount representing that defendant's proportionate share of plaintiff's total damages. Where injured party is not at fault, defendants against whom judgment is entered are jointly and severally liable only for sum of their proportionate shares of plaintiff's total damages. Joint and several liability continues to apply in cases involving tortious interference with contracts or business relations, hazardous wastes and solid waste disposal sites, and manufacture or marketing of fungible products in generic form, and as between persons acting in concert of defendant and its agent or servant. (RCW 4.22.070).

Limit on Noneconomic Damages.

4.56.250 placing cap on noneconomic damages in personal injury or wrongful death actions unconstitutional violation of plaintiff's right to trial by jury. (112 Wn.2d 636, 771 P.2d 711).

Sovereign Immunity.

Doctrine abolished as to state (RCW 4.92.090) and all political subdivisions, municipal and quasi-municipal corporations (RCW 4.96.010) except for “discretionary” acts (67 Wn.2d 246, 407 P.2d 440, but see 156 Wn.2d 441, 128 P.3d 574), performance of quasi-judicial functions (118 Wn.2d 195, 822 P.2d 243), and particular immunities granted by statute (99 Wn.2d 645, 664 P.2d 1202). Tort nonclaim statutes requiring presentation of claims to governmental entity in period shorter than usual statute of limitation were held unconstitutional (85 Wn.2d 810, 539 P.2d 845), as were specialized commencement of action provisions (85 Wn.2d 883, 540 P.2d 1363) and cost bond requirements (92 Wn.2d 807, 601 P.2d 163), although provision requiring presentation of claim prior to commencement of action was upheld (93 Wn.2d 205, 608 P.2d 261; 110 Wn.2d 49, 750 P.2d 626). State, its officers, employees, agents and members of state militia not civilly liable for damages arising from activities of militia while its members are considered federal employees. (RCW 38.40.025). See also topic 5.02 Actions, subhead Conditions Precedent.

Loss of consortium may be claimed by wife; common law prohibition overruled. (94 Wn.2d 91, 614 P.2d 1272). Children may claim loss of parental consortium. (103 Wn.2d 131, 691 P.2d 190). Parents of adult child must prove financial dependency. (RCW 4.24.010).

No-Fault Insurance.

See category 23 Transportation, topic 23.01 Motor Vehicles, subhead No-Fault Insurance.

Uniform Contribution Among Tortfeasors Act (Revised).

Not adopted. Right of contribution exists between or among two or more persons who are jointly and severally liable upon same indivisible claim for same injury, death, or harm. Contribution is based on comparative fault. (RCW 4.22.040). Applies to all untried actions as of July 26, 1981 unless prior release or agreement entered into. (RCW 4.22.920). Release or covenant not to sue between claimant and party discharges party from all liability for contribution. (RCW 4.22.060[2]). Action for contribution not barred by reason of running of statute of limitations period on plaintiff's claim against party from whom contribution is sought. (106 Wn.2d 298, 721 P.2d 508).

5.10 DECLARATORY JUDGMENTS:

See topic 5.15 Judgments.

5.11 DEPOSITIONS AND DISCOVERY:

Depositions and discovery are covered by Civil Rules for Superior Court. (CR 26-37). Civil Rules relating to depositions and discovery follow Federal Rules of Civil Procedure with minor changes. See topic 5.19 Practice.

Uniform Foreign Depositions Act not adopted.

Within State.

Depositions may be taken before court commissioners, superior courts, judicial officers, judges, notaries public, special commissions (CR 28), or any other person pursuant to written stipulation (CR 29). Arrangements for court reporting services or fees must be offered to all parties on equal terms. (CR 28).

Outside of State for Use Within State.

Depositions may be taken before an officer authorized to administer oaths by laws of U.S. or of place where examination is held, or before person appointed by court in which action is pending. (CR 28). Depositions in foreign countries may also be taken pursuant to letter rogatory. (CR 28[b][3]).

De Bene Esse.

See CR 27, patterned after Federal Rules.

Before Whom Taken.

See CR 28. See subheads Within State and Outside of State for Use Within State, supra.

Commissions may be issued on application and notice on terms that are just and appropriate. (CR 28[b]).

Compelling Attendance of Witnesses.

Attendance may be compelled by use of subpoena. (CR 45). Parties, or officer, director or managing agent of party, may be compelled to attend by notice, in lieu of subpoena. (CR 43[f][1]). Party seeking to compel attendance of deponent not party or managing agent of party must serve subpoena under CR 45. (CR 30[b][1]). Sanctions may be awarded for failure to give five days notice to deponent not party or managing agent of party. (CR 30[b][1]). If witness does not appear because of failure of party who gives notice to serve subpoena, and if other party attends in person or by attorneys, court may order payment of expenses of such attendance, including reasonable attorney fee. (CR 30[g][2]). If party or managing agent refuses to attend and testify, possible sanctions include striking of his pleading and rendering of default judgment. (CR 37[b,d]). Failure to respond to subpoena may be treated as contempt. (CR 45[g]).

Perpetuating Testimony.

See CR 27, patterned after Federal Rules.

Examination of Witnesses.

See CR 26(b), 30(b) and (d), patterned after Federal Rules. Parties given right to depose persons other parties expect to call as expert witnesses at trial. (CR 26[b][5][A][ii]). Parties may videotape depositions after 20 days written notice and, subject to certain limitations, videotape may be offered at trial. (CR 30[b][8]).

Return.

See CR 30(f), patterned after Federal Rules.

Form.

See CR 30(f).

Discovery.

See CR 26, patterned after Federal Rules. Party may depose other party's expert witnesses without seeking court order. (CR 26[b][5][A][ii]). Sanctions can be awarded for failure to supplement responses. (CR 26[e][4]). Where settlement or award provides for all or part of recovery to be paid in future, party entitled to payments may discover actual cost to defendant, but only after settlement contract entered by parties or final award made. (CR 26[b][3]).

Demand for Admission of Facts.

See CR 36, patterned after Federal Rules. Requests for admissions may not be combined in same document with any other form of discovery. (CR 36[a]). Time to answer or object is 30 days after service or 40 days after service of summons and complaint upon that defendant. (CR 36[a]).

Interrogatories.

See CR 33, patterned after Federal Rules. Interrogatories must be so arranged that blank space for response is left after each separate question. Time to answer or object is 30 days after service or 40 days after service of summons and complaint upon that answering defendant. (CR 33[a]). Parties may shorten or lengthen time for response by agreement, without court order. (CR 29).

5.12 EQUITY:

See topic 5.02 Actions.

5.13 EVIDENCE:

Witnesses.

Rules of Evidence (ER) similar in many respects to Federal Rules of Evidence adopted.

Every person of sound mind and discretion, except as hereafter stated, may be witness in any action or proceeding. (RCW 5.60.020; ER 601). Following are not competent to testify: Persons of unsound mind, or who are intoxicated at time of their production for examination; those who appear incapable of receiving just impressions of facts respecting which they are examined, or of relating them truly. (RCW 5.60.020; .050). Judge presiding at trial may not testify in that trial. (ER 605).

No person offered as witness may be excluded from giving evidence by reason of his interest in the event of the action, as a party thereto or otherwise; but such interest may be shown to affect his credibility. (RCW 5.60.030). But see catchline Communications or Transactions with Persons Since Deceased or Incompetent, infra.

Evidence of conviction of serious crime or one involving dishonesty or false statement is admissible to attack credibility of witness under certain circumstances. Such evidence is generally not admissible following pardon or based upon juvenile offense proceeding. See ER 609.

Privileged communications include confidential communications between attorney and client or parent of minor client (RCW 5.60.060[2]); confessions made to clergymen within discipline of church (RCW 5.60.060[3]); information acquired by physicians and surgeons or osteopathic physicians or surgeons (including psychologists [18.83.110] and optometrists [18.53.200]) in attending patients for purposes of treatment (RCW 5.60.060[4]), except in child abuse cases (RCW 5.60.060[4][a]); confidential communications to public officers when public interest would suffer by disclosure (RCW 5.60.060[5]); statements made to mental health counselor, social worker or therapist RCW 5.60.060[9]); and statements to peer support group counselors made in course of counseling (RCW 5.60.060[6]). Statements by insured to his or her insurer are covered by attorney work product doctrine. (104 Wn.2d 392, 706 P.2d 212). Also privileged is information acquired by registered nurses in attending patients, except information relating to contemplation or execution of future crimes or abuse of children or vulnerable adults. (RCW 5.62.020-.030). Sexual assault advocate may not be examined with respect to victim's communications. (RCW 5.60.060). Qualified testimonial privilege exists for journalists both in criminal and civil cases. (RCW 5.68.010). Ninety days after filing action for personal injuries or wrongful death, plaintiff is deemed to waive physician-patient privilege. (RCW 5.60.060[4][b]). Defense counsel may not engage in ex parte contacts with plaintiff's physicians. (110 Wn.2d 675, 756 P.2d 138). Privilege may be based on state constitutional right to privacy. (157 Wn.2d 416, 138 P.3d 1053).

Spouse and Domestic Partner.

Spouse or domestic partner may not be examined for or against other spouse or domestic partner without consent of other; nor may either, during marriage or afterwards, without consent of other, be examined as to any communication made to other during marriage. (RCW 5.60.060[1], am'd 2008, c. 6, §402). Privilege does not apply in proceedings relating to family or domestic partner desertion (RCW 26.20.071, am'd 2008, c. 6, §1041), in civil action by one spouse against other, nor in criminal action for crime committed by one spouse or domestic partner against his child or against other spouse or domestic partner or where marriage or domestic partnership occurred after filing of criminal charges (RCW 5.60.060[1], am'd 2008, c. 6, §402).

Communications or Transactions with Persons Since Deceased or Incompetent.

In an action or proceeding where adverse party sues or defends as executor, administrator or legal representative of any deceased person, or as deriving right or title by, through, or from any deceased person, or as guardian or limited guardian of estate or person of any incompetent or disabled person or of any minor under age of 14, then party in interest or to record shall not be admitted to testify in his own behalf as to any transaction had by him with, or any statement made to him or in his presence by, any such deceased, incompetent or disabled person or any such minor. But this exclusion does not apply to parties of record who sue or defend in representative or fiduciary capacity and who have no other or further interest in action. (RCW 5.60.030).

Self-incrimination.

No witness can be compelled to answer any question where such answer may tend to incriminate himself (Const. Art. 1, §9).

Compelling Attendance.

Any person within jurisdiction of court may be compelled to attend as a witness before any court of record, judge, commissioner or referee, but if witnesses reside outside of county or more than 20 miles from court, court must fix allowance for travel, meals and lodging on ex parte application by party desiring attendance. Amount thus fixed must be endorsed on subpoena and tendered to witness at time of service. Witnesses residing within county or within 20 miles of court entitled to such fees only if demanded at time of service of subpoena. (RCW 5.56.010).

See topic 5.11 Depositions and Discovery.

5.14 INJUNCTIONS:

In general, ordinary rules of equity apply. Civil rules (CR) based on Federal Rules of Civil Procedure. Civil Rules supplement but do not modify statutes prescribing basis for obtaining injunctive relief, except in case of procedural conflict. (CR 65[e]). See also topic 5.19 Practice.

Jurisdiction.

Injunctions and restraining orders may be granted by superior court or any judge thereof. (RCW 7.40.010).

Obscene Materials.

Prosecuting attorneys authorized to seek injunction to prohibit sale or distribution of obscene materials. (7.42).

Prerequisites.

Party seeking relief must show: (1) Clear legal or equitable right; (2) well-grounded fear of immediate invasion of right; and (3) acts complained of causing or will cause substantial injury. (52 Wn.2d 317, 324 P.2d 1099). In contempt actions against unions for violating injunction, “clear proof”, or proof by substantial margin, of union's or union officer's participation in, authorization of, or ratification of unlawful acts of individual union members is required. (35 Wn. App. 36, 664 P.2d 1306).

Procedure.

Federal Rules adopted for temporary restraining orders and preliminary injunctions. (CR 65[a] & [b]). In light of due process requirements, specific, comprehensive allegation of fact and showing of critical and immediate need for protection of person or property required to establish emergency justifying ex parte issuance of temporary restraining order. (RCW 7.40.050; 8 Wn. App. 441, 506 P.2d 1328).

Bond.

Except in cases under Marriage Dissolution Act (26.09) and where petitioner is governmental entity, no temporary restraining order or preliminary injunction may be granted until party requesting it posts bond in amount fixed by court with surety to satisfaction of clerk (RCW 7.40.080; CR 65[c]). Subsequent determination that temporary injunction was properly granted does not preclude liability on bond if party restrained ultimately prevails. (92 Wn.2d 643, 600 P.2d 1257). Special considerations govern setting bond amount for injunctions against public construction projects. (RCW 7.40.085).

Temporary Injunction.

Grounds.

Order may be granted when: (1) It appears that plaintiff is entitled to demanded relief for restraint of some act which would produce great injury to plaintiff during litigation; (2) during litigation it appears that acts of defendant in violation of plaintiff's rights regarding action tend or will tend to render judgment ineffectual; (3) where relief consists of restraining proceedings on final order or judgment; or (4) defendant threatens or is about to remove or dispose of property with intent to defraud creditors. (RCW 7.40.020). See also general rule stated above under subhead Prerequisites.

Time of Granting.

May be granted at time of commencing action or any time thereafter prior to judgment. (RCW 7.40.040).

Form and Scope of Order.

Governed by CR 65(d), based on Federal Rule.

5.15 JUDGMENTS:

Judgment is final determination of rights of parties in action and includes any decree and order from which an appeal lies. (CR 54). Federal Rules of Civil Procedure form basis of jurisdiction's procedural rules.

Judgment of district court, including small claims judgment (RCW 12.40.110), when certified and filed with clerk of superior court, becomes to all intents and purposes judgment of superior court, which is court of record (RCW 4.56.200).

Judgment by Confession.

Defendant, with the assent of plaintiff, may, before or after answer, have judgment rendered against him on his own confession in writing and verified by his oath, for an amount or relief not exceeding or inconsistent with the demand of the complaint. (RCW 4.60.010).

Summary Judgment.

See CR 56, patterned after Federal Rules.

Declaratory Judgments.

CR 57. Uniform Act adopted. (7.24). Court may stay pending proceedings upon commencement of declaratory judgment proceeding. (RCW 7.24.190). Not applicable to agency action reviewable under 34.05. (RCW 7.24.146).

Default Judgment.

See CR 55, patterned after Federal Rules with provisions requiring five days notice of motion for default if defendant has appeared, ten days notice if action has been pending for more than a year, and statement of basis for venue in motion for default.

Offer of Judgment.

See CR 68, patterned after Federal Rules. Offer must be served at least ten days prior to trial. (RCW 4.84.280).

Docketing.

Motion for judgment notwithstanding verdict is governed by CR 50, patterned after Federal Rules. Attorney for prevailing party presents form of judgment within 15 days of verdict, with five days notice of presentation unless emergency is shown, notice is waived, or counsel is present in open court at time of presentation. Claim for costs, disbursements, attorneys' fees, and expenses must be filed within ten days after entry of judgment. (CR 54). Judgments deemed entered from time of delivery to clerk for filing. (CR 58).

Vacation or Modification.

See CR 59 and 60, patterned after Federal Rules. Motion for new trial or to alter or amend judgment, order or other decision shall be served not later than ten days after entry, to be heard within 30 days after entry. (CR 59[b]). Grounds for motion are specified in CR 59(a). Party must specify reasons in fact and law for motion. Court must give statement of reasons for granting new trial. (CR 59[f]). Grounds for relief from judgment are similar to federal rule, with additional provisions for minors or persons of unsound mind, service by publication, death of party before judgment, and unavoidable casualty. (4.72; CR 60[a]).

Lien.

Judgment of superior court (including district court judgment filed with superior court), or federal district court in state is lien on all real property of judgment debtor in county in which such judgment is rendered. Judgment becomes lien on real estate of debtor in any other county (and judgments of state supreme court and court of appeals become liens on such real estate in any county) on filing certified abstract with clerk of county in which real estate is situated. (RCW 4.56.190-.200). Real property subject to lien does not include vendor's interest in real estate contract. (RCW 4.56.190). If judgment debtor owns real estate jointly or in common with any other person, judgment shall be lien on interest of judgment debtor only. (RCW 4.56.190). Homestead is exempt from attachment and execution except as otherwise provided in 6.13.

Verdicts are entered on execution docket and any person takes real estate with constructive notice thereof. Judgment thereafter entered is a lien as of 8 A.M. on day following entry of verdict. (RCW 4.64.020).

There is no lien on personal property until actual levy. (RCW 4.56.190).

Judgment ceases to be lien at expiration of ten years from time of its entry, unless underlying judgment reversed. (RCW 4.56.210).

Execution, Sale and Supplemental Proceedings.

Proceedings to enforce judgments are governed by 6.17, 6.21, 6.23 and 6.32.

Revival.

No provisions for revival of judgment.

Assignment.

Filing of a duly acknowledged assignment of judgment in office of clerk of county where judgment is recorded and filing of certified copy in any county where abstract of judgment has been filed constitutes notice of assignment. (RCW 4.56.090).

Satisfaction.

Money judgment may be satisfied by payment to clerk of court or by filing duly acknowledged satisfaction. Clerk must note satisfaction on record in execution docket, and certificate of such clerk of entry of satisfaction should be filed in any county where abstract of judgment is filed. Satisfaction must designate judgment creditor and debtor, their attorneys, amount or type of satisfaction, whether full or partial satisfaction, cause number, and date of entry of judgment. (RCW 4.56.100).

Foreign Judgments.

Uniform Foreign Money-Judgments Recognition Act adopted. (6.40).

Revised Uniform Enforcement of Foreign Judgments Act adopted with minor changes. (6.36).

5.16 LIMITATION OF ACTIONS:

Actions must be commenced within following periods of time after cause of action has accrued:

Ten Years.

For recovery of real property, suit on judgment, action for child support enforcement, and to collect any special assessment for local improvements. (RCW 4.16.020, .030). Additional ten-year period may be granted for execution on judgment, garnishment or other legal process. (RCW 6.17.020).

Eight Years.

Medical malpractice, unless prior actual or constructive discovery. (RCW 4.16.350).

Six Years.

Upon contract in writing or liability due to written agreement; upon accounts receivable in ordinary course of business, for rents and profits, or use and occupation of real estate (RCW 4.16.040); to enforce rights arising out of issuance or ownership of warrant of irrigation or drainage district, time running from issuance of warrant (RCW 4.16.050). Upon residential construction contract. (RCW 4.16.326[g]). Same limitation applies to action on irrigation district bonds where district taken over by U.S., time running from maturity of bonds. (RCW 4.16.060). See also subhead Four Years, infra.

Five Years.

By heirs or other persons claiming under a decedent for recovery of real estate sold by executor or administrator under laws of this state; by ward for recovery of real property sold by guardian, time running from termination of guardianship. If person suing was under disability when right of action accrued, he may sue any time within three years of removal of disability. (RCW 4.16.070).

Four Years.

For breach of contract for sale under UCC, but may be reduced by contract to no less than one year. (RCW 62A.2-725).

Three Years.

For professional negligence against hospital licensed by state, hospital personnel, or member of healing arts from date of wrongful act, or one year from time patient discovered or should have discovered injury, whichever period later but in no event more than eight years after wrongful act (limitation period tolled on proof of fraud, intentional concealment, or presence of nontherapeutic foreign body; knowledge of custodial parent or guardian imputed to minor) (RCW 4.16.350); against trustee of express trust from earlier of time: (1) Breach was or should have been discovered, (2) trustee was discharged, or (3) trust was terminated or repudiated (RCW 4.16.370); for intentional sexual abuse of child, action accruing from later of date of wrongful act or time victim discovered that act caused injury for which claim is brought (knowledge of custodial parent or guardian not imputed to minor), except that limit is tolled until child reaches 18 (RCW 4.16.340); for waste or trespass upon real property; for taking, detaining or injuring personal property or for recovery thereof; to set aside tax deed; upon contract or liability not in writing (except accounts receivable in ordinary course of business); for fraud (action accruing upon discovery of fraud); against sheriff, coroner or constable upon official liability other than for action for escape; upon statute for penalty or forfeiture, except where statute prescribes different limitations; for seduction and breach of promise of marriage; against officer charged with misappropriation of or failure to account for public funds (action accruing upon discovery by aggrieved party); civil action under criminal profiteering statute; or for any other injury to person or rights of another not hereinafter enumerated (RCW 4.16.080-.090; RCW 9A.82.100); against dissolved limited liability company, its managers or members (RCW 25.15.303); or against dissolved corporation, its directors, officers or shareholders (RCW 23B.14.340). See also category 3 Business Regulation and Commerce, topic 3.10 Consumer Protection, subhead Product Liability.

Two Years.

For libel, slander, false light invasion of privacy, assault, assault and battery, or false imprisonment; upon statute for forfeiture or penalty to state (RCW 4.16.100); for worker's compensation claims for occupational hearing loss, disease or infection (RCW 51.28.055); for any relief not otherwise provided for (RCW 4.16.130); for action under Fair Credit Reporting Act (RCW 19.182.120).

One Year.

Against sheriff or other officer for escape of prisoner held on civil process (RCW 4.16.110); for worker's compensation claims other than for occupational diseases or illnesses (RCW 51.28.050); after actual or constructive discovery, more than three years after tortious act, in medical malpractice action (RCW 4.16.350).

Thirty Days.

For appeal from decision of school board or official. (RCW 28A.645.010).

Uniform Commercial Code adopted. (Title 62A). See category 3 Business Regulation and Commerce, topic 3.09 Commercial Code.

Action Against Personal Representative.

Action by heir, legatee, or other interested party against personal representative for breach of fiduciary duty must be brought prior to discharge of personal representative. (RCW 11.96A.070).

Commencement of Action.

For purpose of tolling any statute of limitations, action deemed commenced when complaint filed or summons served, whichever occurs first, provided other occurs within 90 days. (RCW 4.16.170).

New Actions.

If action commenced within prescribed time and judgment for plaintiff is reversed on error or appeal, new action may be commenced within one year after reversal. (RCW 4.16.240).

Real Property Construction and Improvements.

Claims arising from services rendered in connection with construction of, and improvements to real property barred unless they accrue, and applicable statute of limitations begins to run, within six years (plus 60 days if written notice of defect was given) from substantial completion of construction or termination of services. (RCW 4.16.300-.320).

Foreign Causes of Action.

If cause of action between nonresidents barred in state, territory or country where it arose, it is barred in this state. (RCW 4.16.290). Uniform Conflict of Laws—Limitations Act adopted. (4.18).

Disabilities of Plaintiff.

Where person entitled to bring action, except action for penalty or forfeiture, or against sheriff or other officer for escape, is minor or incompetent or disabled determined under guardianship provisions (11.88), or imprisoned on criminal charge prior to sentencing, time of such disability is not part of limitations period (RCW 4.16.190).

Absence or Concealment of Defendant.

Statute does not run while defendant conceals himself or is nonresident or absent from state unless defendant can be served under long-arm statute. (RCW 4.16.180; 75 Wn.2d 808, 454 P.2d 224).

Death of Party.

If person entitled to bring action dies before expiration of limitations period and cause of action survives, action may be commenced by his representatives after expiration of time and within one year from his death. If right of action is against him, and it survives, action may be brought against his representatives after expiration of statutory period and within one year after issuing of letters testamentary or of administration. (RCW 4.16.200).

Open Accounts.

Where action is to recover balance due on mutual open and current account, and there have been reciprocal demands between parties, cause of action accrues from time of last item in account on either side, but when more than one year has elapsed between any of series of items or demands they are not deemed such account. (RCW 4.16.150).

Interruption of Statutory Period.

When part payment is made upon existing contract after same is due, limitations period commences from time of last payment. (RCW 4.16.270).

Revival of Barred Claims.

Exclusive of any payment of principal or interest, acknowledgment or promise reviving barred claim must be in writing and signed by party to be charged. (RCW 4.16.280).

Contractual Limitations.

Parties to contract for sale governed by UCC may reduce period of limitation to not less than one year but may not extend it. (RCW 62A.2-725[1]).

Actions Against Governmental Units.

Tort claims against state must be filed with risk management division, before action may be commenced. (RCW 4.92.100). Action must be commenced within applicable limitations period, which is tolled during 60-day claim period. (RCW 4.92.110). All claims against counties, cities, noncharter cities, and towns must be filed in manner set forth in 4.96. (RCW 36.45.010; RCW 35.31.020; .040). Such nonclaim statutes requiring presentation of tort claims before expiration of otherwise applicable statute of limitations unconstitutional. (85 Wn.2d 810, 539 P.2d 845). Actions challenging certain governmental actions relating to environment must be commenced within appropriate period as provided in RCW 43.21C.033 and .080.

Actions by Governmental Units.

All statutes of limitation unless otherwise expressly provided are applicable to actions by any county, municipality or quasi-municipality. No limitation as to actions brought in name of or for benefit of state or any agency thereof (RCW 4.16.160), except limitation for claims arising from services rendered in connection with improvements to real property (RCW 4.16.300-.320). School district held to be agency of state. (103 Wn.2d 111, 691 P.2d 178).

Pleading.

Bar of statute must be pleaded. (CR 8[c]).

5.16A PARTITION:

Proceedings.

Any person who holds and is in possession of real property as tenant in common with others, and has estate of inheritance or for life or years, may maintain action in superior court for partition thereof, according to respective rights of persons interested, and for sale of such property, or part of it, if it appears that partition cannot be made without great prejudice to owners. (RCW 7.52.010). Interest of all parties must be set forth in complaint specifically, and if any party is unknown or cannot be named or share of interest of any party is unknown, uncertain or contingent, that fact must be set forth in complaint. (RCW 7.52.020). Lien creditors, except judgment creditors, may be made parties at plaintiff's option (RCW 7.52.030), but if such creditors have not been made parties, before making order of sale court must order plaintiff to file supplemental complaint making such creditors defendants (RCW 7.52.150). Referees are appointed to make partition or sale, as case may be. (RCW 7.52.080). Sale is at public auction to highest bidder, in manner required for sale of real property on execution, terms of sale being fixed by court. (RCW 7.52.270; .280).

Investment of Proceeds of Sale.

Where there are proceeds of sale belonging to an unknown owner, or to a person without the state who has no legal representative within it, or where there are proceeds arising from the sale of an estate subject to the prior estate of a tenant for life or years, which are paid into the court or otherwise deposited by order of the court, the same shall be invested in securities on interest for the benefit of the persons entitled thereto. (RCW 7.52.400).

Venue.

In county where property is situated. (RCW 4.12.010).

In probate proceedings, partition may be had in connection with the administration and settlement of decedents' estates. (RCW 11.76.050).

Property Types.

Common areas and facilities of condominium (RCW 64.32.050; .230); homesteads (RCW 6.12.220); irrigation ditch or reservoir (RCW 90.03.440); trust property (RCW 11.98.070).

5.17 [RESERVED]

5.18 PLEADING:

Notice Pleading Prevails.

Pleading in equity cases same as in law cases. Provisions of Washington Civil Rules for Superior Court (CR) generally conform to Federal Rules of Civil Procedure. Pleadings generally prescribed by CR 7-16. See also topic 5.19 Practice.

Pleadings Permitted.

Conforms to Federal Rules. (CR 7[a]).

Complaint.

Generally conforms to Federal Rules. (CR 8[a]). Issues concerning laws of other jurisdictions must be specifically set forth. (CR 9[k]).

Answer.

Conforms to Federal Rules. (CR 8[b]-[c], 12).

Counterclaim or Set-Off.

Generally conforms to Federal Rules. (CR 13). Specific provisions for set-offs against assignees (CR 13[j]) and in cases involving trustees (RCW 4.32.120) and probate (RCW 4.32.130-.150).

Reply.

Conforms to Federal Rules. (CR 7[a]).

Demurrer.

Conforms to Federal Rules. (CR 7[c]).

Amended or Supplemental Pleadings.

Conforms to Federal Rules. (CR 15). No amendment by erasure or interlineations without leave of court. (CR 15[e]).

Affidavits of Merits.

Must be filed by defendant, where action is brought in wrong county, to obtain venue change to proper county. (CR 82[b]).

Bills of Particulars.

In criminal case, motion for bill of particulars may be made before or within ten days of arraignment, or with leave of court thereafter. (CrR 2.1[e]). Defendant in juvenile criminal proceedings entitled to bill of particulars as matter of right. (JCrR 2.04[b]).

Verification.

Petitions for dissolution, separation, declarations concerning validity of marriage, custody and modification of decrees must be verified. (CR 11).

Frivolous Claims.

Prevailing party in civil action upon motion made within 30 days of entry of order dismissing action entitled to reasonable expenses including attorney fees incurred in opposing action, claim or defense determined frivolous by court. (RCW 4.84.185). Party or attorney by signing pleading certifies belief that pleading well grounded in fact and warranted by existing law or good faith argument for change in law exists. (CR 11). Attorney has ethical duty not to raise frivolous claim or defense. (RPC 3.1).

Service.

Generally conforms to Federal Rules. However, civil action commenced by either filing complaint or serving summons and complaint. (CR 3[a]). Service of pleadings by mail deemed complete on third business day after mailing. (CR 5[b] [2]).

Filing.

Generally conforms to Federal Rules. However, deposition materials not filed with court unless for use in proceeding or trial or on order of court. (CR 5[d]; CR 5[i]).

Time.

Generally conforms to Federal Rules. Answers to complaints due in 20 days, except 60 days where service by publication, personally out of state or on Secretary of State, as provided by statute. (CR 12[a]).

Proof of Claims.

No established mode of preparing claims from other states for action in this state.

Small Claims.

Pleading rules substantially same as in Superior Court. However, action commenced only by filing complaint, not service of summons and complaint. (JCR 3). No verification requirements. (JCR 11). See category 6 Courts and Legislature, topic 6.01 Courts, subhead Courts of Limited Jurisdiction.

5.19 PRACTICE:

Practice is under Title 4, and rules adopted by Supreme Court. Common law, so far as consistent with Constitution and laws of U.S. and of state, and compatible with institutions and condition of society in state, is rule of decision. (RCW 4.04.010).

Supreme Court has adopted Civil Rules for Superior Court (CR) based on Federal Rules of Civil Procedure.

Discovery.

See CR 26-37. Discovery of insurance policy limits provided for. (CR 26[b][2]).

Demand for Admission of Facts.

See CR 36, based on Federal Rules of Civil Procedure.

Small Claims.

See category 6 Courts and Legislature, topic 6.01 Courts, subhead Courts of Limited Jurisdiction.

See also topics 5.02 Actions, Appeal and Error, Depositions and Discovery, Injunctions, Judgments, Pleading, Process; category 8 Debtor and Creditor, topics 8.02 Attachment, 8.05 Executions, 8.09 Garnishment.

5.20 PROCESS:

Process is governed by 4.28 and Civil Rules for Superior Court (CR). See also category 6 Courts and Legislature, topic 6.01 Courts.

Civil action is commenced by service of summons and complaint or filing complaint.

(CR 3[a]). Action not deemed commenced for purpose of tolling any statute of limitations except as provided in RCW 4.16.170. (CR 3[a]). Federal Rules of Civil Procedure form basis of state's procedural rules. See topic 5.19 Practice.

General Requisites.

Summons must be subscribed by plaintiff or his attorney and directed to defendant requiring appearance within 20 days after service. (CR 4[a], [b]).

Who May Serve.

Except where service is made by publication, summons must be served by sheriff of county wherein service is made, or his deputy, or by any person over 18 years of age who is competent to be witness in action, other than party. (CR 4[c]). See topic 5.13 Evidence, subhead Witnesses.

Personal Service on Individual.

Personal service accomplished by leaving copy of summons and complaint with defendant personally, or by leaving copy at his usual abode with person of suitable age and discretion then resident therein. (RCW 4.28.080[15]). If person cannot be served with reasonable diligence, person may be served by leaving copy at usual mailing address with person of suitable age and discretion, who is resident, proprietor, or agent thereof, accompanied by mailing of copy. Usual mailing address does not include U.S. Post Office box or place of employment. (RCW 4.28.080[16]).

Personal Service on Incompetent Person.

Upon person for whom guardian has been appointed, by delivering copy to such guardian. (RCW 4.28.080[12]).

Personal Service on Domestic Corporation.

Upon company or corporation other than one governed by certain special provisions (e.g., railroads, domestic insurers; see RCW 4.28.080[1]-[8]), by delivering copy to president or other head of corporation, secretary, cashier or managing agent thereof (RCW 4.28.080[9]) or by service on registered agent or, if none exists or can be found, on Secretary of State (RCW 23B.05.040).

Personal Service on Infant.

Upon minor under 14, to minor personally and to parent or guardian, or if there is none within state, then to any person having care or control of minor, or with whom he resides or in whose service he is employed. (RCW 4.28.080[11]).

Personal Service on Partnership.

Process must be served personally on each member of partnership to render judgment effective against separate property of partners; process served upon one member of partnership will render judgment effective against joint property of partners. (CR 20[d]).

Service by Publication.

When defendant cannot be found in state, and after plaintiff or his attorney files affidavit to that effect, and to effect that he has deposited copy of summons and complaint in post office directed to defendant at his last known address, and to effect that defendant is not resident of state or cannot be found therein, service may be made by publication in following cases: When defendant is foreign corporation and has property in this state; when defendant, being resident, has departed from state with intent to defraud creditors, or has concealed himself; when defendant is not resident of state but has property therein and court has jurisdiction of subject of action; in actions for divorce; when subject of action is real or personal property in state and defendant has or claims lien thereon or interest therein, or demand consists of excluding defendant therefrom; when action is to foreclose or satisfy or redeem from mortgage or lien on real property; when action is against any corporation organized under laws of this state and no proper officer thereof can be found; when action is brought to determine conflicting claims to property in this state. (RCW 4.28.100). Publication must be in newspaper of general circulation in county where action is brought, once per week for six consecutive weeks. Publication must not be made before complaint has been filed. Defendant has 60 days from date of first publication within which to appear and answer. (RCW 4.28.110).

Personal Service Outside State.

Personal service of process may be made upon any party outside of state. If upon resident of this state or upon person who has submitted to jurisdiction of courts of this state, such process has same force and effect as service within this state, otherwise it shall have force and effect of service by publication. Defendant has 60 days from date of such service to appear and answer. (RCW 4.28.180).

Long Arm Statute.

Person deemed to have submitted to jurisdiction of state courts if cause of action arises from: (1) Transaction of any business within state; (2) commission of tortious act within state; (3) ownership, use or possession of real or personal property situated within state; (4) contract insuring any personal property or risk within state; (5) act of sexual intercourse within state which may have conceived child; (6) living in marital relationship within state notwithstanding subsequent departure from state, as to all proceedings under dissolution of marriage act. Personal service outside state has same force and effect as such service within state. Such service is available only when causes of action are those enumerated, and then only upon affidavit that service cannot be made within state. If defendant thus served prevails in action, he is entitled to allowance of reasonable attorney fee. (RCW 4.28.185).

Personal Service on Foreign Corporations.

Service upon foreign insurance companies accomplished by service of duplicate copies upon Insurance Commissioner in person or by registered mail (RCW 48.05.200; .210; .215), and upon other foreign corporations doing business within state by service of copy of summons on agent, cashier or secretary thereof (RCW 4.28.080[10]).

See also category 16 Insurance, topic 16.01 Insurance Companies, subhead Process Agent.

Proof of service made by return of sheriff or affidavit of other person making service, affidavit of publisher, if served as provided in CR 4(d), affidavit of serving party if served as provided in CR 4(d)(4), or admission of defendant or his attorney; if served outside of state, by affidavit of person making service, sworn to before notary public, with seal attached, or before clerk of court of record. (CR 4[g]). In case of service other than by publication, return, acceptance, admission or affidavit must state time, place and manner of service; failure to make proof of service does not affect validity of service. (CR 4[g][7]).

Service by mail of summons and other process in circumstances justifying service by publication if court determines that service by mail is as likely to give actual notice as service by publication. Defendant has 90 days from date of mailing to appear and answer. (CR 4[d][4]). Also, service by mail of every order required by its terms to be served and pleading subsequent to original complaint is permitted. Mail papers, postage prepaid, to party being served. Service is complete on third day after mailing unless third day is Sat., Sun. or legal holiday. (CR 5[b]).

Nonresident Motorist.

See category 23 Transportation, topic 23.01 Motor Vehicles, subhead Actions Against Nonresidents.

5.21 REPLEVIN:

In action to recover possession of specific personal property, plaintiff may claim and obtain immediate delivery thereof after hearing. Remedies provided under 7.64 are in addition to any other available remedy. (RCW 7.64.010).

Proceedings.

Jurisdiction.

Procedure applies in both superior (7.64) and district courts (RCW 12.28.005).

Application.

At or after time complaint filed, plaintiff may petition ex parte for order directing defendant to appear and show cause why order putting plaintiff in possession should not issue. (RCW 7.64.020).

Affidavit.

Plaintiff or someone on plaintiff's behalf must make affidavit or declaration showing: (1) Plaintiff is owner, or entitled to possession of property by virtue of special interest therein (including security interest), setting forth facts regarding interest and describing property with particularity; (2) property is wrongfully detained by defendant; (3) property has not been taken for tax, assessment or fine pursuant to statute or seized under execution against property of plaintiff, or if so seized, it is by law exempt from seizure; and (4) approximate value thereof. (RCW 7.64.020).

Show cause order must contain date, time and place of hearing. Certified copy of show cause order must be served on defendant no later than five days before hearing, with copy of plaintiff's affidavit attached. (RCW 7.64.020).

Hearing.

If plaintiff establishes right to possession or defendant fails to appear after proper service, court may issue order awarding possession to plaintiff and directing sheriff to put plaintiff into possession. Order awarding possession shall state that show cause hearing was held, describe property and its location, direct sheriff to take possession and put plaintiff into possession. If, at time of hearing, more than 20 days have elapsed after service of summons and complaint, and defendant does not raise issue of fact requiring trial on issue of possession or damages, court may enter final judgment awarding plaintiff possession, damages, court costs, including reasonable attorney fees, and costs of recovery. (RCW 7.64.035).

Bond.

Order will not issue prior to final judgment until plaintiff executes and files bond to defendant in amount fixed by court, with surety approved by clerk, conditioned that plaintiff will prosecute action without delay and, if wrongfully sued out, will pay all damages, court costs, reasonable attorney fees, and costs of recovery that defendant may incur by reason of replevin order. Bond may be waived if properly served defendant fails to appear or object. (RCW 7.64.035).

Transmittal and Sheriff's Bond.

After issuance of order awarding possession, plaintiff shall deliver copy of bond and certified copy of order awarding possession to sheriff of county where property located and provide sheriff with all available information as to location and identity of defendant and property. (RCW 7.64.045). Before taking possession of personal property, sheriff may require indemnity bond of plaintiff in addition to replevin bond. (RCW 36.28.050). If plaintiff obtains possession of property without assistance of sheriff, plaintiff must notify sheriff as soon as possible. (RCW 7.64.045).

Duties of Sheriff.

Sheriff must take possession of property and serve copies of bond and order awarding possession on defendant or person in possession of property. If copies of bond and order awarding possession not served on defendant at time of taking possession, sheriff must give notice to defendant within reasonable time. Sheriff must release property to plaintiff as soon as possible after taking possession of property and receiving lawful fees for taking possession and necessary expenses, unless before release defendant has given redelivery bond to sheriff or filed redelivery bond with court and notified sheriff. (RCW 7.64.047; .050). Sheriff must file return of proceedings with court within 20 days after taking possession of property. (RCW 7.64.050).

Delivery to Plaintiff.

If defendant's sureties fail to justify redelivery bond at time and place appointed, sheriff must release property to plaintiff. (RCW 7.64.050).

Repossession.

At any time before sheriff takes possession of property, or delivers property to plaintiff, defendant may post redelivery bond executed by one or more sufficient sureties in amount equal to bond filed by plaintiff and retain possession of property pending final judgment. Defendant's sureties shall justify as provided by law. (RCW 7.64.050).

Claims of Third Persons.

If property taken by sheriff is claimed by person other than defendant or his agent, claimant may assert claim by intervening in plaintiff's action for possession. (RCW 7.64.100).

Judgment.

To extent final judgment entered at show cause hearing or at any other time not satisfied by proceeding under order awarding possession, judgment executed in same manner as any other judgment. (RCW 7.64.115). In action to recover possession of personal property, in case delivery or return not available, judgment may be had by either party for possession, or for value thereof and damages for detention. (RCW 4.56.080). See also catchline Hearing, supra.

5.22 SEQUESTRATION:

See CR 64 and CR 70, based on similar Federal Rules of Civil Procedure.

Superior courts have inherent power of sequestration to preserve funds or other property pending outcome of litigation and to aid court in carrying into effect future orders in reference to such property, although strong showing is required to justify such relief. (82 Wn.2d 337, 510 P.2d 1123). Where party admits he possesses or controls money or fungible goods that are subject of litigation, and where property belongs to or is held by other party as trustee, court may order such property deposited with court or delivered to proper party, with or without security, subject to further court order. (RCW 4.44.480).

Superior Court, in case of judgment to compel party to execute conveyance of real estate, may enforce judgment by sequestration. (RCW 6.28.080).

5.23 SERVICE:

See topic 5.20 Process.

5.24 STAY OF EXECUTION:

See topic 5.03 Appeal and Error; category 8 Debtor and Creditor, topic 8.05 Executions.

5.25 SUBMISSION OF CONTROVERSY:

Controversies may be submitted, without action, to any court which would have jurisdiction of action upon subject-matter, upon agreed statement of facts; but it must appear by affidavit that controversy is real and proceeding in good faith to determine rights of parties. (RCW 4.52.010). Judgment is rendered (RCW 4.52.020) and enforced as in action and is subject in same manner to appeal (RCW 4.52.030).

5.26 VENUE:

General.

Except for actions specified under subhead Exceptions, infra, action may be brought in county where any defendant resides at time of commencement of action. (RCW 4.12.025).

Corporate Defendant.

For purpose of venue, corporation is deemed to reside in any county where corporation transacts business, has office for transaction of business, transacted business at time cause arose, or where any person resides upon whom process may be served upon corporation. Also, plaintiff has option to sue in county where: (1) Tort was committed; (2) work was performed for corporation; (3) agreement with corporation was made; or (4) corporation has residence. (RCW 4.12.025).

State as Defendant.

Actions against State of Washington may be brought in Thurston County or any county where: any plaintiff resides; any plaintiff maintains principal place of business; cause arose; real property that is subject of action is situated; or action may properly be commenced by joinder of additional defendant. (RCW 4.92.010).

Accident Involving Personal Injury or Property Damage.

Action for damages arising from personal injuries or damage to personal property may be brought either in county where cause of action (or some part thereof) arose or in county where any defendant resides. (RCW 4.12.020).

Exceptions.

Local Actions.

Jurisdictional venue statutes govern following local actions: Actions for recovery, possession or partition of, foreclosure of mortgage on, enforcement of lien on, or determination of title or for injuries to, real property, or involving possession or title of specific personal property, must be brought in county in which subject of action or some part thereof is situated. (RCW 4.12.010; RCW 2.08.210). Actions to recover statutory penalty or forfeiture and actions against public officer or his appointee for official acts must be tried in county where cause arose. (RCW 4.12.020).

Nonresident Defendant.

Action against nonresident of state may be brought in any county: (1) Where service of process may be had; (2) in which any act was done which gave rise to service under “long arm” statute; or (3) in which any of plaintiffs reside. (CR 82[a]).

Improper Venue.

Action brought in wrong county may be tried therein, unless defendant, at time of appearing and answering files affidavit of merits and requests trial in proper county. (CR 82[b]).

Change of venue may be granted where: Action brought in wrong county; reason to believe that impartial trial cannot be had in present county; convenience of witnesses or ends of justice forwarded; or judge disqualified. (RCW 4.12.030).

Contract provision fixing venue is enforceable if not unreasonable (69 Wn.2d 37, 416 P.2d 680), except in contract covered by Retail Installment Sales Act (RCW 63.14.150). See category 3 Business Regulation and Commerce, topic 3.23 Sales.

6 COURTS AND LEGISLATURE

6.01 COURTS:

United States District Courts.

Eastern District.

Clerk's office: P.O. Box 1493, Spokane 99210; P.O. Box 2706, Yakima 98907; 825 Jadwin Ave., Rm. 174, Richland 99352. Counties: Adams, Asotin, Benton, Chelan, Columbia, Douglas, Ferry, Franklin, Garfield, Grant, Kittitas, Klickitat, Lincoln, Okanogan, Pend Oreille, Spokane, Stevens, Walla Walla, Whitman and Yakima. Court held at Spokane, Yakima, Walla Walla and Richland. (28 U.S.C. §128[a]).

Western District.

Clerk's offices: 700 Stewart St., Lobby Level, Seattle 98101; 1717 Pacific Ave., Rm. 3100, Tacoma 98402-3200. Counties: Clallam, Clark, Cowlitz, Grays Harbor, Island, Jefferson, King, Kitsap, Lewis, Mason, Pacific, Pierce, San Juan, Skagit, Skamania, Snohomish, Thurston, Wahkiakum and Whatcom. Court held at Bellingham, Seattle and Tacoma. (28 U.S.C. §128[b]).

Supreme Court.

Clerk's Office.

Temple of Justice, P.O. Box 40929, Olympia 98502-0929. Nine judges elected statewide for staggered six-year terms. (RCW 2.04.070; .071).

Jurisdiction.

Original jurisdiction concurrent with courts of appeals and superior courts in habeas corpus, and concurrent with superior courts in quo warranto and mandamus. (Const. Art. IV, §4; RCW 2.04.010; RAP 16.2-16.15). Court renders opinions on questions of Washington law certified from federal court. (RCW 2.60.020; RAP 16.16). Court has authority to approve or disapprove admissions, discipline, or disbarment of attorneys. (RCW 2.48.060).

Appellate jurisdiction from trial court on direct review where: (1) Authorized by statute;

(2) trial court has held law invalid as repugnant to U.S. or state constitution, federal statute or treaty; (3) conflicting appellate decisions or inconsistency in supreme court decisions; (4) fundamental and urgent public issues involved; (5) action against state officer involved; (6) death penalty decreed. (RAP 4.2[a]). Party seeking direct review must, within 15 days of filing notice of appeal or notice for discretionary review, serve on all other parties and file statement of grounds in supreme court. (RAP 4.2[b]). “Statement of grounds for direct review” should be so captioned, contain title of case and contain in order: (1) Nature of case and decision; (2) issues presented for review; (3) grounds for direct review. (RAP 4.2[c]). Respondent may file answer within 14 days after service of statement. (RAP 4.2[d]). If supreme court denies direct review, trial court decisions reviewable as matter of right transferred without prejudice or costs to court of appeals. (RAP 4.2[e][1]).

Motion for discretionary review of trial court decision may be granted, denied or transferred to court of appeals. If supreme court denies, moving party may not file same motion in court of appeals. (RAP 4.2[e][2]).

Appellate jurisdiction from court of appeals only by petition for discretionary review. (RAP 13.1; 13.3).

Clerk may accept documents filed by electronic facsimile. (GR 17).

Court of Appeals.

Divisions.

Court sits in panels of three in each division; judges may be transferred among divisions. (RCW 2.06.040). Judges elected statewide from districts within divisions to six-year staggered terms. (RCW 2.06.070). Trial court decisions must be reviewed in appropriate division. (RCW 2.06.020; RAP 4.1). Court may hold sessions in cities as designated by rule. (RCW 2.06.040).

Division 1: Clerk's office, One Union Square Building, 600 University St., Seattle 98101. Counties: King (district 1); Snohomish (district 2); Island, San Juan, Skagit, Whatcom (district 3).

Division 2: Clerk's office, 950 Broadway, Suite 300, Tacoma 98402. Counties: Pierce (district 1); Clallam, Grays Harbor, Jefferson, Kitsap, Mason, Thurston (district 2); Clark, Cowlitz, Lewis, Pacific, Skamania, Wahkiakum (district 3).

Division 3: Clerk's office, 500 N. Cedar St., Spokane 99201. Counties: Ferry, Lincoln, Okanogan, Pend Oreille, Spokane, Stevens (district 1); Adams, Asotin, Benton, Columbia, Franklin, Garfield, Grant, Walla Walla, Whitman (district 2); Clallam, Douglas, Kittitas, Klickitat, Yakima (district 3).

Jurisdiction.

Original jurisdiction concurrent with supreme court in habeas corpus. (RAP 16.3). Exclusive appellate jurisdiction in all cases except those for which supreme court has appellate jurisdiction. (RCW 2.06.030; RAP 4.2). Jurisdiction does not include initial review of agency decisions (10 Wn. App. 586, 521 P.2d 742) nor actions for recovery of money or property where amount in controversy does not exceed $200 (RCW 2.06.030).

Appeal as of Right.

Unless otherwise prohibited by statute, party may appeal from following superior court decisions: (1) Final judgment in any action or proceeding regardless of whether attorney fees or costs are to be later determined; (2) written decision affecting substantial right in civil case which in effect determines action and prevents final judgment or discontinues action; (3) order of public use and necessity in condemnation; (4) decision affecting dependency or finding of guilt by juvenile court; (5) decision depriving person of all parental rights; (6) decision declaring adult legally incompetent or establishing guardianship for adult; (7) decision ordering commitment; (8) order granting or denying motion for new trial or amendment of judgment; (9) order granting or denying motion to vacate judgment; (10) order arresting or denying arrest of judgment in criminal case; (11) order denying motion to vacate order of arrest in civil case; (12) final order made after judgment which affects substantial right. (RAP 2.2[a]).

Government may appeal in criminal case only if defendant will not be placed in double jeopardy and only following: (1) Decision which abates, discontinues or determines case other than by judgment or verdict of not guilty; (2) pretrial order suppressing evidence and trial court expressly finds that it effectively terminates case; (3) order arresting or vacating judgment; (4) order granting new trial; (5) disposition in juvenile offense proceeding below standard range or which state or local government believes involves miscalculation of standard range; (6) sentence in criminal case outside standard range or which state or local government believes involves miscalculation of standard range. (RAP 2.2[b]).

In case with multiple parties, claims or counts, final judgment not disposing of all claims or counts as to all parties is appealable only after trial court's express direction for entry of judgment and express determination in judgment, supported by written findings, that there is no just reason for delay. (RAP 2.2[d]).

Discretionary Review.

Unless otherwise prohibited by statute or court rule, party may seek discretionary review of any act of superior court not appealable as matter of right. (RAP 2.3[a]).

Superior Courts.

Clerk's Offices.

Except where otherwise noted, clerk's office is located at county seat.

Place of Sitting.

Adams: Courthouse, 210 W. Broadway, P.O. Box 187, Ritzville 99169-0216.

Asotin: P.O. Box 159, County Courthouse, Asotin 99402-0159 (Judges also sit in Columbia and Garfield Counties).

Benton: (County seat Prosser) 7122 W. Okanogan Pl., Kennewick 99336-2359 (Judges also sit in Franklin County).

Chelan: P.O. Box 3025, Wenatchee 98807-3025 (Judges also sit in Douglas County).

Clallam: Courthouse, 223 E. 4th St., Port Angeles 98362-3015.

Clark: County Courthouse, P.O. Box 5000, Vancouver 98666-5000.

Columbia: Courthouse, 341 E. Main, Dayton 99328-1361 (Judges also sit in Asotin and Garfield Counties).

Cowlitz: Hall of Justice, 312 S.W. First Ave., Rm. 233, Kelso 98626-1724.

Douglas: County Courthouse, P.O. Box 516, Waterville 98858-0516 (Judges also sit in

Chelan County).

Ferry: Courthouse, 350 E. Delaware Ave. #4, Republic 99166-9747 (Judges also sit in Stevens and Pend Oreille Counties).

Franklin: (County seat Pasco) 1016 N. 4th Ave., Rm. 306, Pasco 99301-3706 (Judges also sit in Benton County).

Garfield: Courthouse, 789 Main St., P.O. Box 915, Pomeroy 99347-0915 (Judges also sit in Asotin and Columbia Counties).

Grant: Courthouse, P.O. Box 37, Ephrata 98823-0037.

Grays Harbor: Courthouse, 102 Broadway Ave. W., Rm. 203, Montesano 98563-3621.

Island: Courthouse, P.O. Box 5000, Coupeville 98239-5000 (Judges also sit in San Juan County).

Jefferson: Courthouse, P.O. Box 1220, Port Townsend 98368-0920.

King: County Courthouse, 516 3d Ave., Rm. E609, Seattle 98104-2363.

Kitsap: County Courthouse, 614 Division St., Port Orchard 98366-4692.

Kittitas: Courthouse, 205 W. 5th Ave., Suite 211, Ellensburg 98926-2887.

Klickitat: 205 S. Columbus Ave., Goldendale 98620-9279 (Judges also sit in Skamania County).

Lewis: 345 W. Main St., MSCLK01, Chehalis 98532-4802.

Lincoln: Courthouse, 450 Logan St., P.O. Box 68, Davenport 99122-0068.

Mason: Courthouse, 419 N. 4th St., P.O. Box 340, Shelton 98584-0340.

Okanogan: Courthouse, P.O. Box 72, Okanogan 98840-0072.

Pacific: Courthouse, P.O. Box 67, South Bend 98586-0067 (Judges also sit in Wahkiakum County).

Pend Oreille: Courthouse, 229 S. Garden Ave., P.O. Box 5020, Newport 99156-5020 (Judges also sit in Stevens and Ferry Counties).

Pierce: County-City Building, 930 Tacoma Ave. S., Rm. 110, Tacoma 98402-2177.

San Juan: Courthouse, 350 Court St., Suite 7, Friday Harbor 98250-7901 (Judges also sit in Island County).

Skagit: Courthouse, 205 W. Kincaid, Suite 103, Mt. Vernon 98273-4225.

Skamania: Courthouse, P.O. Box 790, Stevenson 98648-0790 (Judges also sit in Klickitat County).

Snohomish: Courthouse, 3000 Rockefeller Ave., Everett 98201-4046.

Spokane: 1116 W. Broadway, Spokane 99260-0350.

Stevens: Courthouse, 215 S. Oak St., Rm. 206, Colville 99114-2862 (Judges also sit in Pend Oreille and Ferry Counties).

Thurston: Courthouse, Building Two, 2000 Lakeridge Dr. S.W., Olympia 98502-6001.

Wahkiakum: Courthouse, P.O. Box 116, Cathlamet 98612-0116 (Judges also sit in Pacific County).

Walla Walla: Courthouse, P.O. Box 836, Walla Walla 99362-0259.

Whatcom: Courthouse, 311 Grand Ave., Rm. 301, Bellingham 98225-4048.

Whitman: Courthouse, 400 N. Main St., P.O. Box 390, Colfax 99111-0679.

Yakima: Courthouse, 128 N. 2d St., Room 323, Yakima 98901-2639.

Jurisdiction.

Superior courts have original jurisdiction in their respective counties in all cases: (1) In equity; (2) involving title or possession of real property; (3) involving validity of any tax, impost, assessment, toll or municipal fund; (4) which involve $300 or more; (5) involving felonies; (6) for misdemeanors not otherwise provided for; (7) of forcible entry and detainer; (8) of insolvency; (9) to prevent or abate nuisance; (10) of probate, of divorce and for annulment of marriage; (11) for such special cases and proceedings as not otherwise provided for; and (12) of all proceedings in which jurisdiction shall not have been by law vested exclusively in some other court. (Const. Art. IV, §6; RCW 2.08.010).

Superior courts have concurrent jurisdiction with supreme court and courts of appeals in habeas corpus, and concurrent jurisdiction with supreme court in quo warranto and mandamus. Superior courts have concurrent jurisdiction with district courts in cases at law involving not more than $75,000 and of all misdemeanors and gross misdemeanors committed in their respective counties, and of all violations of city ordinances. (RCW 2.08.010; RCW 3.66.020, am'd 2008, c. 227, §1).

Superior courts have appellate jurisdiction in cases arising in courts of limited jurisdiction in their respective counties (Const. Art. IV, §6; RCW 2.08.020; RCW 3.66.020, am'd 2008, c. 227, §1; .060) and from administrative agencies (10 Wn. App. 586, 521 P.2d 742).

Mandatory Arbitration.

Suits for money judgment not exceeding $15,000, or in some counties not exceeding $30,000, are subject to mandatory arbitration in Clallam, Douglas, King, Kitsap, Mason, Pierce, Snohomish, Spokane, Thurston and Yakima counties. (7.06). See category 9 Dispute Resolution, topic 9.02 Arbitration and Award.

Court Commissioners.

Superior courts may appoint court commissioners. (RCW 2.24.010). Court commissioners shall have concurrent jurisdiction with superior courts to hear and determine, inter alia: (1) All matters of probate; (2) all matters and actions referred to them by superior court; (3) all proceedings supplemental to execution of judgment; (4) all petitions for adoption of children and dissolution of incorporation; (5) all applications for commitment; (6) all complaints for commitment of minors; and (7) ex parte and uncontested civil matters. (RCW 2.24.040).

Probate Courts.

Superior courts exercise probate jurisdiction.

Courts of Limited Jurisdiction.

District Courts.

Each county has at least one district judge elected to serve full or part time for four-year term. (RCW 3.34.010, am'd 2008, c. 63, §1; .040; .050). Counties may establish district court districts, with number of judges in each district varying with population. (RCW 3.38.010-.060).

District courts have jurisdiction of civil actions where sum claimed does not exceed $75,000, except actions involving title to or right of possession or lien upon real property. District courts also have original jurisdiction to hear and determine traffic infractions and to take recognizance, approve bail and arraign defendants in certain cases. They have concurrent jurisdiction with superior courts in misdemeanors and gross misdemeanors, and of all violations of city ordinances. (RCW 3.66.020, am'd 2008, c. 227, §5; .030; .060).

Municipal Courts.

Cities over 400,000 have municipal courts presided over by elected judges with jurisdiction to try violations of all city ordinances and all other actions brought to enforce or recover license penalties or forfeitures under city ordinances and concurrent jurisdiction with superior courts and district courts in all civil and criminal matters within jurisdiction of district courts. (RCW 35.20.010; .030; .250).

Cities of 400,000 or less may create municipal courts presided over by elected or appointed municipal judges, to have exclusive jurisdiction over traffic infractions arising under city ordinances and exclusive original criminal jurisdiction over all violations of city ordinances and original jurisdiction over actions to enforce or recover license penalties or forfeitures under city ordinances or state statute. (RCW 3.50.010; .020, am'd 2008, c. 227, §5; .040; .050).

Procedure.

Courts of limited jurisdiction, except small claims court, are regulated by Justice Court Civil Rules (JCR) and by Justice Court Criminal Rules (JCrR). Action commenced by filing complaint. (JCR 3). Summons and complaint is served by sheriff or citizen over age 18, attaching notice signed by judge or clerk requiring appearance in person or by attorney within 20 days after service of summons and complaint. (JCR 4). Pleadings are complaint and answer, reply to counterclaim, answer to cross-claim, third-party complaint and answer. Demurrers, pleas and exceptions not used. (JCR 7). Every pleading of party represented by attorney must be dated and signed by the one attorney of record and individual name, with address stated. Pro se party must sign date and give address. Pleadings need not but may be verified or accompanied by affidavit. (JCR 11). Provisions are made for interpleader, intervention and joinder of parties. (JCR 18-24). Depositions and all other formal discovery are available only upon prior permission of court. (JCR 26). Judgments may be in writing or oral, confirmed by entering in record. (JCR 54). Judgment and final decisions may be appealed to court of limited jurisdiction on notice of appeal filed within 30 days. (JCR 72; RALJ 2.4; 2.5). See category 5 Civil Actions and Procedure, topic 5.03 Appeal and Error, subhead Appeals from Courts of Limited Jurisdiction.

Small Claims Courts.

Every district court has small claims department with nonexclusive jurisdiction over cases for recovery of money only where amount claimed does not exceed $5,000. (RCW 12.40.010, am'd 2008, c. 227, §2). Action commenced by plaintiff by filing claim with Department and payment of filing fee of $14. Additional surcharge of $10 applies until July 1, 2011. (RCW 12.40.020; .050). Upon filing claim, court sets time for hearing and issues notice of claim to be served upon defendant. (RCW 12.40.030; .060). Without consent of judge of district court, neither attorney nor anyone other than plaintiff and defendant may be involved in litigation, although each party may offer evidence by witnesses appearing at hearing. Corporation plaintiff may not be represented by attorney or paraprofessional. (RCW 12.40.080). No formal pleadings other than claim and notice are required and hearing of such actions is informal. (RCW 12.40.090). If judgment is against defendant, it is to be paid upon terms prescribed by court. (RCW 12.40.100). If unpaid within 30 days, upon notice court is to certify judgment and enter it on district court's judgment docket, and may enter it on superior court's judgment lien docket. (RCW 12.40.110). Judgment increased by costs of enforcement and reasonable attorney fees. (RCW 12.40.105). No appeal permitted where amount claimed was under $100 nor by party who invoked jurisdiction of small claims court where amount claimed less than $1,000. (RCW 12.40.120).

6.02 LEGISLATURE:

Bicameral legislature is composed of Senate and House of Representatives. (Const. Art. II, §1—Amendment 72). Regular sessions convene annually, not more than 105 days in odd years and 60 days in even years commencing on second Mon. in Jan. (Const. Art. II, §12—Amendment 68; RCW 44.04.010). This revision covers Acts of 2008 adopted and approved by governor up to and including c. 329, Regular Session, adjourned Mar. 13, 2008.

Special or Extraordinary Sessions.

Special sessions of not more than 30 consecutive days each may be convened by governor (Const. Art. II, §12—Amendment 68; Const. Art. III, §7) or by legislature by affirmative vote of 2/3 of membership of each house (Const. Art. II, §12—Amendment 68).

Initiative and Referendum.

Powers of initiative and referendum are provided and veto power of governor does not extend to such measures. (Const. Art. II, §1—Amendment 72).

Ethics.

Government ethics code adopted. (42.52).

Lobbyists.

Persons who for compensation or other consideration attempt to influence legislation or state agency rules must register with Public Disclosure Commission and must report compensation, expenditures and gifts to state elected official or executive state officer or immediate family member of either. (RCW 42.17.020; .150; .170).

6.03 REPORTS:

Decisions are reported in Washington Territory Reports, 3 vols., Washington Reports, and Washington Reports, Second Series and Pacific Reporter, Third Series, the current series, and Washington Appellate Reports, current series. They are also unofficially reported in Pacific Reporter, Pacific Reporter, Second Series and Pacific Reporter, Third Series, current series.

Digests are: Remington's Washington Digest, 1919, covering 1-3 Wash. Terr. and 1-103 Wash., and Supplement, 1926, covering 104-135 Wash.; Remington's Desk Book, 1931, covering 136-165 Wash.; Washington Digest, 1854 to date, by West Publishing Co. and Bancroft-Whitney Co., covering all Washington cases.

6.04 STATUTES:

Revised Code of Washington adopted as official compilation.

Revised Code of Washington Annotated is the unofficial compilation. There are also session laws containing legislation of each session of legislature.

Uniform Acts of the National Conference of Commissioners on Uniform State Laws adopted are: Alcoholism and Intoxication Treatment (1972, rev'd 1989); †Anatomical Gift, 1987 (1993); Arbitration (2000); Athlete Agents (2000); Attendance of Witnesses From Without a State in Criminal Proceedings, Act to Secure (1943); †Certification of Questions of Law (1967); Child Custody Jurisdiction and Enforcement (1997); †Commercial Code (1965, am'd 1989); †Common Trust Fund; Comparative Fault; Condominium; Conflict of Laws-Limitations; Controlled Substances (1970, 1990, 1994); Declaratory Judgments; Division of Income for Tax Purposes; Dormant Mineral Interests; Durable Power of Attorney; Enforcement of Foreign Judgments, 1964 (1953, am'd 1979); Environmental Covenants; Estate Tax Apportionment, 1964 (2003); Evidence, Rules of (1974); Facsimile Signatures of Public Officials; Federal Lien Registration; Foreign Money Claims; Fraudulent Transfer; Interstate Family Support (1996, 2001); †Limited Partnership, 1976 (1981, am'd 1987); Management of Institutional Funds; †Marriage and Divorce; Mediation; Minor Student Capacity to Borrow (Model); Money Services; Nonprobate Transfers on Death; Parentage (2000); Partnership (1997); Photographic Copies of Business and Public Records as Evidence; †Principal and Income (1997); Prudent Investor; Rules of Evidence (1974); Real Property Electronic Recording; †Securities (1956); Simultaneous Death (1940); Model State Administrative Procedure (1981); †Testamentary Additions to Trusts (1960); TOD Security Registration; Trade Secrets; †Transfers to Minors; Unclaimed Property (1981); Environmental Covenants; Veterans' Guardianship (1942).

† Adopted with significant variations or modifications. See appropriate topics as to Acts within scope of Digests volume.

Other Uniform Laws adopted are: Judicial Notice of Foreign Law (1941).

Uniform Commercial Code adopted. See category 3 Business Regulation and Commerce, topic 3.09 Commercial Code.

For text of Uniform Acts falling within the scope of the Martindale-Hubbell Law Digests see Uniform and Model Acts section.

6.05 UNIFORM LAWS:

For list of Uniform Acts in force in this state see topic 6.04 Statutes. For text of Uniform Acts within the scope of the Martindale-Hubbell Law Digests see Uniform and Model Acts section.

7 CRIMINAL LAW

7.00A BAIL:

See topic 7.01 Criminal Law.

7.01 CRIMINAL LAW:

Crimes and punishments, and the rights and custody of persons accused or convicted of crime, are governed by the criminal code. (Titles 9 and 9A). Felony offenses involving motor vehicles governed by 46.61. Capital punishment crimes and punishments governed by 10.95. Drug offenses governed by Uniform Controlled Substances Act. (69.50). Individuals less than 18 years old are subject to Juvenile Justice Act unless transferred to adult court. (13.40, am'd 2008, c. 158, §1 and c. 230, §3). Youth court is created for juvenile offenders. (RCW 3.72.010). Crimes involving sales and possession of firearms governed by RCW 9.41.040. Alien possession of firearms governed by RCW 91.4.171–175. Crimes involving sex offenders governed by 9A.44.

Procedure in criminal actions is governed by Title 10, RAP, CrR and JCrR.

Indictment or Information.

Prosecutions are by information filed by the prosecuting attorney, or by indictment by a grand jury except in misdemeanor or gross misdemeanor cases before district or municipal judge. (RCW 10.37.015).

Bail.

Release on personal recognizance required unless: (1) Such recognizance will not reasonably assure defendant's appearance or (2) if likely danger exists that defendant will commit violent crime, intimidate witnesses or unlawfully interfere with administration of justice in which case court can impose conditions. (CrR 3.2[a]). Preliminary appearance required following warrantless arrest. (CrR RCW 3.2.1). Defendant charged with capital offense, must not be released unless release conditions reasonably assure defendant's appearance, defendant will not significantly interfere with administration of justice and defendant will not pose substantial danger to another or community; defendant may be detained without bail if any condition above exists. (CrR 3.2[g]). Court may revoke, modify or suspend terms of release or bail after defendant found guilty or pleads guilty. (CrR 3.2[h]; RAP 7.2[f]).

Sentencing Reform Act of 1981 sentencing guidelines for adult felony offenses and prosecuting standards for charging and plea dispositions are in effect. (RCW 9.94A.035; .310-.450 [treatment-oriented sentencing for drug offenders]; RCW 9.94A.129 [armed crimes]). Disposition standards for juvenile offenders set by legislature. (RCW 13.40.035). Sentencing alternatives provided for by RCW 9.94A.650–.690.

Uniform Controlled Substances Act is in effect. (69.50).

Uniform Act on Fresh Pursuit is in effect. (10.89).

Uniform Act to Secure Attendance of Witnesses from Without a State in Criminal Proceedings is in effect. (10.55).

Uniform Criminal Extradition Act is in effect. (10.88).

Uniform Rendition of Accused Persons Act is in effect. (10.91).

Interstate Compact for Supervision of Parolees and Probationers is in effect. (RCW 9.95.270).

8 DEBTOR AND CREDITOR

8.01 ASSIGNMENTS:

Uniform Commercial Code adopted. (Title 62A). See category 3 Business Regulation and Commerce, topic 3.09 Commercial Code.

Any lien, or right of lien, is assignable. (RCW 60.04.080). An assignment made in trust for use and benefit of person making same is void as against existing or subsequent creditors of assignor. (RCW 19.36.020).

Instrument Transferring Title.

An assignment must be in writing and signed by person authorized to make same. (RCW 4.08.080). To be recorded in execution docket assignment of judgment must be acknowledged. (RCW 4.56.090).

Actions.

Assignees of judgments, specialties, book accounts, or other choses in action, for the payment of money, may sue in their own names against the obligor notwithstanding the assignor may have an interest in the thing assigned, but any debtor may plead any defense against original owner. (RCW 4.08.080). Executions on assigned judgments may issue in name of assignee after assignment has been recorded in execution docket. (RCW 6.04.070).

Defenses by way of set-off are not defeated by assignments, except in case of transfer of negotiable paper to holder in due course. (CR 13[j]). But no judgment based on demand against assignor may be rendered against plaintiff who sues on claim assigned to him before commencement of action. (RCW 4.56.070). Assignors who retain any interest in assigned claim are jointly and severally liable for wrongful attachment by their assignees. (RCW 7.12.060).

Assignment of Wages.

No assignment of future wages to secure a loan less than $300 is valid as against employer unless (1) accepted in writing by employer and (2) such acceptance is filed and recorded with county auditor of county where employee resides. (RCW 49.48.090). No assignment of future wages of married person without written consent of spouse. (RCW 49.48.100).

8.02 ATTACHMENT:

Actions in Which Allowed.

Attachment may issue in any action at any time before judgment. (RCW 6.25.020).

Courts Which May Issue Writ.

Writs are issued by court in which action is pending. (RCW 6.25.030). District courts may issue writs of attachment when amount claimed in action does not exceed $75,000 but may not issue writs upon real property or any interest therein and may not issue writs to be executed outside county where they are located. (RCW 3.66.020, am'd 2008, c. 227, §1).

In Whose Favor Writ May Issue.

There is no statutory provision against issuance of writ of attachment on behalf of nonresident or foreign corporation, except that foreign corporation doing business in state may not maintain action in state court without having obtained certificate of authority. (RCW 23B.15.020). See category 2 Business Organizations, topic 2.03 Corporations, subhead Foreign Corporations.

Against Whom Writ May Issue.

See subhead Grounds, infra.

Claims on Which Writ May Issue.

Under certain circumstances, property may be attached prior to time debt becomes due when nothing but time is wanting to fix indebtedness. (RCW 6.25.040).

Grounds for attachment are that defendant: (1) Is foreign corporation; (2) is nonresident; (3) conceals himself so that ordinary process cannot be served on him; (4) has absconded or absented himself from usual abode so that ordinary process cannot be served on him; (5) has removed or is about to remove property from state, with intent to delay or defraud creditors; (6) has assigned, secreted, or disposed of property, or is about to do so, with intent to delay or defraud creditors; (7) is about to convert property into money to place it beyond reach of creditors; (8) has been guilty of fraud in incurring obligation which is basis of action; or that (9) damages for which action is brought are for injuries arising from commission of felony, gross misdemeanor, or misdemeanor. (RCW 6.25.030[1]-[9]). Final subsection authorizing attachment if action is brought to recover on express or implied contract declared unconstitutional except in “extraordinary” circumstances (RCW 6.25.030[10]; 6 Wn. App. 971, 497 P.2d 250), but constitutional defect may be overcome by giving prior notice to defendant and use of show cause hearing to determine probable validity of plaintiff's claim (RCW 2.28.150; 9 Wn. App. 500, 513 P.2d 285).

Proceedings to Obtain.

Plaintiff or someone in his behalf must file affidavit showing that defendant is indebted to plaintiff in a specified amount over and above all just credits and offsets, that attachment is not sought and action is not prosecuted to hinder, delay or defraud any creditor of defendant, and that statutory ground for attachment exists. (RCW 6.25.060).

Notice must be given in form provided in statute (RCW 6.25.070[1]), and defendant given opportunity for hearing except under specified conditions (RCW 6.25.070[2]).

Attachment Bond.

Plaintiff must give bond for double amount of his demand; but in no case less than $3,000 in superior court or $500 in district court. (RCW 6.25.080). Upon proper showing, court may alter amount of bond. (RCW 4.44.470; RCW 6.25.090).

When it is desired to attach real estate only, and such fact is stated in the affidavit for attachment, and the ground of attachment is that the defendant is a foreign corporation, or is not a resident of the state, or conceals himself so that the ordinary process of law cannot be served upon him, or has absconded or absented himself from his usual place of abode, so that the ordinary process of law cannot be served upon him, the writ of attachment may issue without bond by the plaintiff. (RCW 6.25.080).

Levy.

The writ is directed to the sheriff of any county where property of the defendant may be, requiring him to attach and keep property of the defendant to the amount stated in the affidavit, and the sheriff, wherever possible, will levy on property 50 per cent greater in valuation than the amount so stated. Sheriff's reasonable charges are to be allowed by court. (RCW 6.25.110).

Real property is attached by filing a copy of the writ, together with a description of the property, with the county auditor of the county in which it is situated. Personal property, capable of manual delivery, is attached by the sheriff's taking it into custody. (RCW 6.17.160[1], [2]). Levy on goods covered by negotiable document governed by UCC RCW 62A.7-602. Except where security has been surrendered to issuer, provision governing attachment of stocks or shares is governed by RCW 62A.8-317(1), providing that no attachment is valid until security is actually seized by attachment officer. (RCW 6.17.160[3]).

Indemnity.

Before attaching personal property, sheriff may require indemnity bond of plaintiff in addition to attachment bond. (RCW 36.28.050).

Lien of attachment arises at moment of levy and continues until property is sold in satisfaction of judgment. (23 Wash. 693, 63 P. 555).

Priorities.

Attachments against same defendant must be executed in order in which they were received by sheriff. (RCW 6.25.130). Priority between attachments upon same property is awarded according to order of their levy. (12 Wash. 71, 40 P. 623).

Release of Property.

If defendant, at any time before judgment, executes sufficient bond to plaintiff to effect that he will perform judgment of court, attachment must be discharged and property or proceeds thereof released. (RCW 6.25.190).

Sale.

If property is perishable or subject to immediate and serious waste or decay, sheriff may sell it. Court may order sale of attached property before judgment if it appears that interests of parties will be served thereby, but only after notice to adverse party. (RCW 6.25.220). Sheriff shall satisfy any judgment obtained by plaintiff out of proceeds of sale of attached property. (RCW 6.25.240).

Third Party Claims.

If a person other than defendant claims attached property, he has right to demand and receive it from attaching officer on making affidavit that property is his or that he has right to immediate possession, and posting bond in twice value of property conditioned on his appearance in court within ten days to make good his title. (RCW 6.18.030).

Vacation or Modification.

Attachment may be discharged upon motion of defendant before bond for release of property if shown to have been irregularly or improperly issued. (RCW 6.25.180).

8.03 [RESERVED]

8.04 CREDITORS' SUITS:

Creditors' suits generally rendered obsolete by provisions for supplementary proceedings. See topic 8.05 Executions, subhead Supplemental Proceedings.

8.05 EXECUTIONS:

Any judgment of court of this state that requires payment of money or delivery of real or personal property is enforceable by execution. (RCW 6.17.070).

Kinds of Execution.

Executions are of three kinds: (1) Against property of judgment debtor; (2) for delivery of possession of real or personal property, or such delivery with damages for withholding same; (3) commanding enforcement of or obedience to any special order of court. Costs awarded in all cases. (RCW 6.17.060).

Exemptions.

See topic 8.06 Exemptions.

Time for Issuance.

Execution may issue from court of record or justice court at any time after entry of judgment. Executions must be issued within ten years in court of record or in district court. (RCW 6.17.020). Execution may be issued for accrued child support at any time within ten years of 18th birthday of youngest child named in support order. (RCW 6.17.020). Ten-year period may be extended for additional ten years upon application and payment of fee within 90 days of expiration of original ten-year period. (RCW 6.17.020).

Stay.

Except as to judgment of district court filed with Superior Court pursuant to RCW 4.56.200, no execution shall issue upon Superior Court judgment until five days after its entry. (CR 62[a]). Defendant must give bond for double amount to opposite party, with surety to satisfaction of clerk. (RCW 6.17.040; RCW 10.19.100). See category 5 Civil Actions and Procedure, topic 5.03 Appeal and Error, subhead Stay of Proceedings, for rules applicable to stay pending appellate review.

Levy.

Execution against property is first levied upon personal property; and, if sufficient personal property cannot be found, then upon real property of judgment debtor upon which judgment is lien. Creditor must file “due diligence” affidavit indicating steps taken to locate personal property which must include personal visit to premises. (RCW 6.17.100). If execution is for delivery of real or personal property, possession of such property must be delivered to party entitled thereto. (RCW 6.17.110). Execution is levied first upon attached property. Monies collected to be paid to clerk of court within 20 days. All property, real and personal, of judgment debtor, not exempt by law, is liable to execution. (RCW 6.17.090).

Return.

Execution on judgment of court of record is returnable in 60 days. (RCW 6.17.120).

Claims of Third Persons.

Third person claiming property may have possession of same upon making affidavit that property is his or he has right to possession, and giving to sheriff bond in double value of property conditioned that he will appear in superior court within ten days and make good his title to same, or return property or pay its value to said sheriff. Sheriff recovers costs. Alternatively, without giving bond, claimant can appear and set hearing for adjudication of probable validity of claim; if claim is found probably valid, sheriff directed to release claimed property to claimant. (RCW 6.19.030).

Sale.

Before sale, notice shall be given by personal service, regular and certified mail, or by publication, in accordance with statute. (RCW 6.17.130). In case of real property by posting in two public places in county (one of which must be on property if same is improved) for not less than four weeks prior to sale, and by publishing once a week for same period. Notice must particularly describe property and provide other information specified by statute. Notice also must be personally served on debtor, and mailed by regular and certified mail to debtor, and his attorney, if any. Creditor must file affidavit of compliance.

Sales are by public auction, between 9 A.M. and 4 P.M. (RCW 6.21.050). Only sufficient property to satisfy judgment is sold. Personal property capable of manual delivery must be in view of persons attending sale, and be sold in such parcels as will bring highest price. (RCW 6.21.070).

Real estate consisting of several lots or parcels is sold separately, or otherwise, so as to bring highest price. Where portion is claimed by third person and he requires it to be sold separately, such portion must be sold separately. (RCW 6.21.090). Sales of real property conducted at court house door on Fri. (RCW 6.21.020). Sale may be postponed from week to week by sheriff by proclamation and posting written notice, and, with consent of plaintiff indorsed upon writ, sheriff may adjourn sale from time to time, not exceeding 30 days beyond return day of writ. (RCW 6.21.050).

If purchaser desires, bill of sale of personal property is given upon payment of purchase price. (RCW 6.21.070). Sale of real property may be confirmed by order of court 20 days after mailing notice of sale to all parties. (RCW 6.21.110). If property is not redeemed within statutory redemption period or if redemption rights are precluded, sheriff executes and delivers his deed to purchaser. (RCW 6.21.020; .120).

Redemption.

Real property may be redeemed from execution sale within one year by: (1) The judgment debtor or his successor in interest, in the whole or any part of the property separately sold; (2) by a creditor having a lien by judgment, decree, mortgage, or deed of trust on any portion of property, or any portion of any part thereof, separately sold, subsequent in time to that on which property was sold. (RCW 6.23.010). Where execution is pursuant to decree of foreclosure on mortgage executed after June 30, 1961, which mortgage states that property is not used for agriculture or farming, and if creditor's complaint waives right to deficiency judgment, period of redemption is eight months after sale; otherwise, redemption period is one year after date of sale. (RCW 6.23.020). No redemption right where improved nonagricultural land is abandoned six months at time of foreclosure. (RCW 61.12.093; .095). No redemption rights if estate is less than leasehold with two years unexpired term or is sale of vendor's interest in real property being sold under real estate contract. (RCW 6.21.080).

Person seeking to redeem must give sheriff five days written notice of intention to apply to sheriff for such purpose, and may redeem by paying to sheriff amount bid at sale with 8% interest thereon, all assessments and taxes which have been paid by purchaser, with interest thereon at rate provided in judgment; and if purchaser is lien creditor by judgment, mortgage or decree, redemptioners must pay amount of such lien, except where lien is judgment under which purchase was made. (RCW 6.23.020; .080). If property redeemed from purchaser under RCW 6.23.020, another redemptioner may redeem from first redemptioner within 60 days after first redemption, and may again be redeemed within 60 days from last redemption. (RCW 6.23.040). Purchaser must send notice to debtor at least 40 but not more than 60 days before expiration of judgment debtor's redemption period, reminding of running of period, if property is subject to homestead. Failure to comply extends redemption period for six months. (RCW 6.23.030).

Possession During Redemption.

Purchaser at execution sale from day of sale until resale or redemption, and redemptioner from date of redemption until subsequent redemption, entitled to possession during redemption period, unless property is in possession of tenant having paramount right under unexpired lease. Purchaser in such case is entitled to rents during period of redemption. Purchaser's right to possession subject to three exceptions: (1) Where mortgagor is in possession, and mortgage gives him right of possession during redemption period; (2) judgment debtor entitled to possession of farm lands during redemption period but purchaser has lien on crops for taxes becoming delinquent during redemption period plus interest thereon at 6% per annum, which lien includes interest on purchase price at 6% per annum; (3) where homestead is elected, and occupied for that purpose at time of sale, judgment debtor has right of possession without accounting for use or value of occupation. (RCW 6.23.110).

Supplemental Proceedings.

At any time within ten years after entry of judgment for $25 or more, unless time is extended, judgment creditor may upon application to court obtain order for judgment debtor to appear for examination (RCW 6.32.010) or to answer written interrogatories (RCW 6.32.015). Any person may be made party to supplemental proceedings if judgment creditor obtains court order upon proof that execution has been issued and returned unsatisfied and that person or corporation sought to be called has property of judgment debtor worth $25 or more, is indebted to judgment debtor for $25 or more or has knowledge concerning judgment debtor's property. (RCW

6.32.030). If judgment debtor fails to respond to supplemental proceedings, plaintiff entitled to costs and attorney fees. (RCW 6.32.010).

Any person who fails to obey any order of judge may be punished for contempt. (RCW 6.32.180). Superior court may appoint receiver to give effect to judgment. (RCW 7.60.025).

Body Execution.

If it appears by affidavit that creditor has reasonable ground for anticipating that defendant will abscond, court may issue order of arrest, and require that he give bond that he will attend examination and while proceedings are pending, will not dispose of any property which is not exempt. (RCW 6.32.010).

8.06 EXEMPTIONS:

Debtor is entitled to hold exempt from attachment or execution for collection of debts: (1) All wearing apparel including ornaments, but not to exceed $1,000 in value of furs, jewelry and personal items; (2) all private libraries not to exceed $1,500 in value, and all family pictures and keepsakes; (3) household goods, furniture, appliances and equipment not to exceed $2,700 for individual or $5,400 for community, amount to include provisions and fuel for comfortable maintenance of individual or community, and other property not to exceed $2,000 of which not more than $200 may consist of cash, bank accounts or securities; one personal motor vehicle for individual, value not to exceed $2,500, and two personal vehicles for community, aggregate value not to exceed $5,000; child support; health aids; up to $16,500 of personal bodily injury payment; (4) $5,000 equipment, tools and vehicle for farmer; $5,000 professional books and equipment for physician, surgeon, attorney, or other professional, $5,000 in tools of trade for other individuals; and certain tuition units. (RCW 6.15.010).

Debts Against Which Exemptions Not Allowed.

None of such property is exempt from execution for its purchase price, taxes and other specified claims. (RCW 6.15.050[2]).

Nonresidents or absconding debtors are not entitled to exemptions. (RCW 6.15.050[5]).

Pensions.

U.S. pensions are exempt from seizure under any legal process, whether said money is in possession or on deposit or loan except in child support actions if permitted by federal law. (RCW 6.15.020[1]). Pension, annuity or retirement allowance accruing under employee benefit plan is exempt from all legal process other than that served by spouse, former spouse, child, or other dependent, to extent required in qualified domestic relations orders. (RCW 6.15.020[2]). Statutory protection of pension plans does not affect spouse's community property interest. (RCW 6.15.020[3]).

Insurance.

Proceeds of life insurance, disability insurance and annuities are exempt as follows: (1) Lawful beneficiary, assignee or payee of life insurance policy, other than insured, is entitled to proceeds against creditors of insured; such proceeds also exempt against claims of creditors of beneficiary existing when proceeds become available; such exemptions not available against any claim to or interest of insured or personal representatives in such proceeds nor where proceeds transferred in fraud of creditors nor to so much of proceeds as equals amount of premiums paid in fraud of creditors (RCW 48.18.410); (2) group life policies or proceeds exempt from claim of creditors of any person entitled to receive proceeds (RCW 48.18.420); (3) benefit of annuity contract exempt against creditors of annuitant to extent of $2,500 per month; excess subject to garnishment; no exemption to extent of annuity premium amounts paid in fraud of creditors (RCW

48.18.430); and (4) proceeds of disability policies exempt from all debts of insured; such proceeds also exempt from claims of creditors of beneficiary existing when proceeds become available (RCW 48.18.400).

Fire insurance money is exempt to extent of exemption of property lost, stolen or destroyed. (RCW 6.15.030).

Industrial insurance awards are exempt from execution, attachment or garnishment unless assignment made in favor of financial institution at request of worker (RCW 51.32.040) or lien for child support debt due to state (RCW 74.20A.260) and lien for reimbursement of public assistance paid (RCW 43.20B.720).

A married person's separate estate is exempt from execution or attachment on a liability or judgment against spouse, so long as he or she or any minor heir of his or her body is living. (RCW 6.15.040). Noncustodial stepparent's earnings not available to satisfy parent's support obligation. (95 Wn.2d 726, 630 P.2d 420).

Earnings.

See topic 8.09 Garnishment, subhead Earnings.

Waiver.

Nothing in exemption provisions prevents mortgaging of personalty which might be claimed as exempt, or enforcement of such mortgage, or waiver of right of exemption by failure to claim same prior to sale under execution. (RCW 6.15.050[4], [6]).

Necessity of Claiming Exemption.

At any time before sale, debtor must deliver verified list of property claimed exempt to officer making levy. (RCW 6.15.060[3][a]). Creditor may demand appraisement within seven days of receiving notice of claim. (RCW 6.15.060[4]).

Homestead Exemption.

See topic 8.10 Homesteads.

Securities Exemptions.

See category 3 Business Regulation and Commerce, topic 3.24 Securities.

Exemptions from Taxation.

See category 22 Taxation, topic 22.15 Property Taxes, subhead Exemptions.

8.07 FORECLOSURE:

See topic 8.13 Liens; categories 20 Mortgages, topic Mortgages of Real Property; Taxation, topic Property Tax, subhead Sale, catchline Real Property upon which Property Taxes are Delinquent Subject to Foreclosure and Sale.

8.08 FRAUDULENT SALES AND CONVEYANCES:

Uniform Commercial Code adopted. (Title 62A). See category 3 Business Regulation and Commerce, topic 3.09 Commercial Code.

Uniform Fraudulent Transfer Act adopted with some variations effective July 1, 1988. (19.40). Uniform Fraudulent Conveyance Act repealed effective July 1, 1988.

Remedies.

See Washington's Fraudulent Transfer Act (19.40), based on Uniform Fraudulent Transfer Act.

Successor Corporation Liability.

Corporation purchasing assets of another corporation does not, by reason of purchase of assets, become liable for debts and liabilities of selling corporation, except where: (1) Purchaser expressly or impliedly agrees to assume liability; (2) purchase is de facto merger or consolidation; (3) purchaser is mere continuation of seller; or (4) transfer of assets is for fraudulent purpose of escaping liability. (103 Wn.2d 258, 692 P.2d 787). Product-line “exception” or “rule” adopted in 102 Wn.2d 581, 689 P.2d 368. Product liability plaintiff not limited to product line exception, which supplements traditional four bases for holding successor business liable. (107 Wn.2d 584, 733 P.2d 507).

Additional Statutory Provisions.

All deeds of gift, all conveyances, and all transfers or assignments, verbal or written, of goods, chattels, or things in action, made in trust, except lapse of power of withdrawal, for use of person making same, are void as against existing or subsequent creditors of such person. (RCW 19.36.020).

Where there is deficiency of assets in hands of personal representative, and decedent has conveyed any of his interest in realty with intent to defraud creditors or to avoid duty or debt of any person, personal representative has duty to bring action to recover decedent's interest for benefit of creditors; personal representative also may bring action to recover chattels, rights or credits which may have been fraudulently conveyed by decedent. (RCW 11.48.140).

When consideration for deed executed and delivered by public assistance recipient is not paid, or when consideration does not approximate fair cash market value of property, such deed shall be prima facie fraudulent as to state. Attorney general authorized to file suit to rescind such transaction except as to subsequent bona fide purchasers for value. If judicial proceedings establish that fraudulent conveyance occurred, value of any public assistance which may have been furnished may be recovered in any proceedings from recipient or his estate. (RCW 74.08.338; RCW 43.20B.660).

8.09 GARNISHMENT:

In view of decisions of U.S. Supreme Court (e.g., 395 U.S. 337, 89 S. Ct. 1820, 23 L.Ed.2d 349; 407 U.S. 67, 92 S. Ct. 1983, 32 L.Ed.2d 556; 419 U.S. 601, 95 S. Ct. 719, 42 L.Ed.2d 751; but see 416 U.S. 600, 94 S. Ct. 1895, 40 L.Ed.2d 406) and Washington courts (e.g., 82 Wn.2d 418, 511 P.2d 1002; 6 Wn. App. 971, 497 P.2d 250; 7 Wn. App. 219, 499 P.2d 92), constitutional status of prejudgment attachment and garnishment statutes is in doubt. Trend of decisions is to require, at minimum, notice and show cause hearing before writ of attachment or garnishment against personal property will be issued. (9 Wn. App. 500, 513 P.2d 285).

Money or property of debtor in possession of third person may be subjected to claims against debtor by garnishment. (RCW 6.27.120).

Property which may be reached is any nonexempt debt owing to defendant by third persons or any personal property or effects of defendant in third person's possession or control. (RCW 6.27.120). Funds held in custodial legis by court clerk not subject to garnishment until court orders clerk to disburse funds to particular litigant. (110 Wn.2d 902, 757 P.2d 967).

Jurisdiction.

Clerks of superior courts and district courts may issue writs of garnishment returnable to their respective courts. (RCW 6.27.120). Attorney of record for judgment creditor in district court may issue writ. (RCW 6.27.020). Form of writ at RCW 6.27.100. Form of notice to federal garnishee at RCW 6.27.370. Prejudgment issuance of writs upon affidavit of plaintiff unconstitutional without notice and hearing. (82 Wn.2d 418, 511 P.2d 1002).

Grounds.

Writs may be issued where plaintiff has judgment wholly or partially unsatisfied in court from which garnishment is sought. (RCW 6.27.020). Grounds for prejudgment writ depend on whether writ is directed to employer. If writ directed to other than employer, writ may be issued on ground that plaintiff sues on unpaid debt or that attachment has or could issue under 6.25. (RCW 6.26.010). Wage garnishment writ directed to employer of defendant may be issued on grounds that defendant: (a) Is nonresident of state or about to move from state; (b) has concealed himself so legal process cannot be served on him; or (c) has removed or is about to remove property from state in order to delay or defraud creditors. (RCW 6.27.010).

Proceedings to Obtain.

Judgment creditor or representative must make affidavit stating facts authorizing issuance of writ, including amount due, and that he believes garnishee is indebted to defendant or has personal property of same in his possession in amounts exceeding those exempted from garnishment. Affidavit must state name and residence or place of business of garnishee and whether he is employer of defendant. (RCW 6.27.060).

To obtain superior court writ before a judgment has been entered, plaintiff must execute and file with clerk bond, with sufficient sureties, for double amount claimed. (RCW 6.27.020). Statute allows action on bond for wrongful garnishment, and allows defendant action against plaintiff for wrongful garnishment in all prejudgment garnishment cases where judgment is not entered for plaintiff. (RCW 6.27.020-.040). Notice and opportunity for hearing must be provided. (RCW 6.27.060).

Answer of garnishee must be made within 20 days after service of writ on forms served with writ. (RCW 6.27.070). Original answer must be delivered to issuing court and one copy each to plaintiff and defendant. Garnishee must set forth, as of time writ was served, amount of indebtedness due defendant and any personal property of defendant in his possession or control. Amount, if any, which garnishee has deducted from indebtedness due as defendant's exemption, less any processing fee, must be stated. (RCW 6.27.190). If judgment debtor wishes to contest amount of post judgment writ of garnishment, he must do so prior to expiration of time within which garnishment should have been answered. (SPR 91.04W[c]; see 25 Wn. App. 541, 612 P.2d 382).

Practice.

After issuance, writ may be served upon garnishee by sheriff of county in which garnishee lives or by person qualified to serve process in civil action, or it may be mailed to garnishee certified mail, return receipt requested, addressed in same manner as summons in civil action. (RCW 6.27.110). Service of writ is invalid unless it is accompanied by: (1) Four answer forms prescribed in RCW 6.27.190, and three stamped envelopes addressed respectively to issuing court, plaintiff's attorney, and defendant and (2) $20 check or money order payable to garnishee. If writ is mailed to garnishee it is binding on day set forth on return receipt. (RCW 6.27.110). If garnishee is bank or savings institution, writ must be directed to and served at office or branch where defendant's account or property is located. (RCW 6.27.110). For such garnishee, plaintiff must, as part of service of writ, deliver to institution signed written statement giving residence of defendant and business, occupation, trade, profession or account number, otherwise service ineffective. (RCW 6.27.110). Copy of writ and judgment or complaint must be mailed to defendant or judgment debtor by certified mail on or before day of service on garnishee, or alternatively, copy of writ must be served on defendant or judgment debtor within two days thereafter. If judgment from district court, only copy of judgment creditor's affidavit in support of writ must be sent or served. Notice and claim form also must be sent or served. (RCW 6.27.130; SPR 91.04W). Upon service of writ, garnishee must hold: (1) Nonexempt debts owed defendant at time of writ's service, and (2) personal property of defendant in possession or control of garnishee at time of service. Garnishee may release funds or property of defendant which are in excess of amount sought in writ. (RCW 6.27.120). Garnishee may deduct processing fee from remainder of obligor's earnings. (RCW 6.27.095).

Continuing Lien.

Wage garnishment marked “continuing lien” and served along with prescribed answer forms will catch nonexempt wages owed at time of service and nonexempt portion of all wages earned through end of last pay period ending on or before 60 days after service of writ. Within 20 days of receipt of second answer form, garnishee must answer second set of answer forms provided by plaintiff. (RCW 6.27.330; .350).

Lien obtained by garnishment is prior to subsequent garnishment lien or wage assignment, except service of writ not effective to create continuing lien with such priority if writ in same case pending when new writ served. This priority does not apply over notice of payroll deduction or over wage assignment or garnishment for child support. Nonexempt wages remaining after garnishment, payroll deduction or child support shall be withheld by garnishee under garnishment for continuing lien. (RCW 6.27.360).

Judgment.

Default.

If garnishee fails to answer writ within time allowed, default judgment may be taken against it for amount of plaintiff's claim against defendant after providing notice to garnishee at least ten calendar days before entry of judgment. Such judgment may upon motion prior to execution be reduced to amount of nonexempt funds or property actually in possession of garnishee at time of writ's service plus nonexempt earnings subject to continuing lien or $100, whichever is more. (RCW 6.27.200).

Answer of No Indebtedness.

If garnishee answers it was not indebted to defendant at time of writ's service and affidavit controverting garnishee's answer is not filed within 20 days, garnishee is discharged. (RCW 6.27.240).

Answer of Indebtedness.

If garnishee answers it was indebted to defendant at time of writ's service and if required return showing service on or mailing to defendant is on file, judgment may be rendered against it for amount of indebtedness not exceeding plaintiff's claim against defendant with interest and costs. Judgment shall have same force and effect as other judgments. (RCW 6.27.250). Execution may be made likewise. (RCW 6.27.260). Should it appear from answer that garnishee had in possession or control property of defendant when writ was served, and if required return showing service on or mailing to defendant is on file, decree may be rendered requiring delivery of enough such property to sheriff to satisfy plaintiff's claim. (RCW 6.27.270). Form of judgment on garnishee's answer or tendered funds at RCW 6.27.265.

Controversion and Trial.

Either plaintiff or defendant, if not satisfied with garnishee's answer, may controvert it within 20 days by affidavit stating in what particulars he believes answer is incorrect. (RCW

6.27.210). Affidavit may be by controverting party or attorney or agent. (RCW 6.27.210). Copies of affidavit must be served on or mailed to other parties. (RCW 6.27.210). Issue may be tried as in other cases, but no other pleadings are necessary unless ordered by court. Garnishee may respond to controversion by affidavit. (RCW 6.27.220). If defendant successfully controverts answer he is entitled to recover costs, including reasonable attorney fees at trial and on appeal. (RCW 6.27.230).

Earnings.

Greater of: (1) 30 times federal hourly minimum wage or (2) 75% of defendant's weekly disposable earnings is exempt from garnishment. Garnishee must determine and pay exempt earnings to defendant, and file garnishment answer for remainder. In case of garnishment for child support or spousal maintenance if based on judgment or court order other than mandatory wage assignment order, exemption shall be 50% of disposable earnings of defendant if defendant is supporting spouse or dependent child (other than spouse or child on whose behalf garnishment is brought) or 40% of disposable earnings of defendant if individual is not supporting such spouse or dependent child. (RCW 6.27.150). See category 11 Employment, topic 11.02 Labor Relations, subhead Wages.

Garnishment Against Public Corporations.

State of Washington, counties, cities, towns, school districts and municipal corporations are subject to garnishment in same manner as other garnishees. Venue same as in original action. (RCW 6.27.040).

Immunity.

Federally recognized Indian tribes are immune from garnishment actions. (92 Wn.2d 236, 595 P.2d 938).

Intervention.

Creditor with prior perfected security interest in property being garnished may intervene as matter of right (95 Wn.2d 600, 627 P.2d 1321); if intervenor prevails in controverting answer, he is entitled to costs and reasonable attorney fees (28 Wn. App. 180, 622 P.2d 408).

8.10 HOMESTEADS:

Homesteads to be held exempt from execution or forced sale may be selected and claimed in lands and tenements. (RCW 6.13.010).

The homestead must consist of the dwelling house or mobile home in which claimant resides or intends to reside as principal home with appurtenant buildings and land on which same are situated, or it may consist of land purchased with intention of placing thereon house or mobile home and residing thereon. (RCW 6.13.010). Every homestead is presumed valid to extent of all lands claimed exempt until validity is contested in court of general jurisdiction in county wherein homestead is situated. (RCW 6.13.070).

Limitation of value of property which may be held exempt as homestead is $125,000 in case of lands, mobile homes and improvements or $15,000 in case of other personal property, except no limit on exemption when homestead subject to execution for any state's income tax claim against pension or retirement benefits received while Washington resident. (RCW 6.13.030).

Limitation of Area.

None. (RCW 6.13.030).

Exemption not available against debts secured by: (1) Mechanics', laborers', construction, maritime, automobile repair, materialmen's or vendors' liens arising out of particular property claimed as homestead; (2) debts secured by security agreement securing property claimed as homestead; (3) judgments on separate or community debts of spouse or domestic partner filing bankruptcy where both spouses or domestic partners file within six-month period (other than joint case or where accounts jointly administered) and other spouse or domestic partner exempts property under 11 U.S.C. §522(d); or (4) debts arising from court or administrative decree or order establishing child support or maintenance obligation; (5) debts to state for recovery of medical assistance; (6) certain debts secured by condominium or homeowners association's lien; or (7) specified tax debts. (RCW 6.13.080, am'd 2008, c. 6, §635).

Selection and Declaration of Homestead.

If owner is married, homestead may consist of community property, jointly owned property or separate property of one spouse. To select homestead from land not yet occupied as homestead claimant must execute and acknowledge declaration of homestead, in same manner as grant of real property is acknowledged, in form provided by statute, and declaration must be recorded in office of auditor of county in which land is situated. (RCW 6.13.040). Homestead declaration must contain statement claimant resides or intends to reside on premises as homestead, legal description, and estimate of cash value. (RCW 6.13.040[3]).

Claim of exemption applies automatically from time occupied as principal residence by owner, or if not yet occupied as homestead, from date required declaration filed, or if mobile home not yet occupied as homestead and located on land of another person, from delivery of declaration under RCW 6.15.060(3)(c).

Alienation or Encumbrance.

Conveyance or encumbrance of homestead of married person must be executed and acknowledged by both husband and wife, except that husband or wife or both may execute powers of attorney for conveyance or encumbrance of homestead. (RCW 6.13.060).

Proceeds of voluntary sale of homestead in good faith for purpose of acquiring new homestead and proceeds from insurance covering destruction of homestead used to restore or replace homestead are exempt for one year. (RCW 6.13.070).

Rights of Creditors.

Homestead not exempt from nonjudicial trustee sale under power of sale in deed of trust because such sale not forced sale nor execution under RCW 6.13.070. (101 Wn.2d 416, 679 P.2d 928). Judgment does not create lien on value in excess of homestead amount. (compare 99 Wn.2d 30, 659 P.2d 502, *overruled on other grounds*, 101 Wn.2d 416, 679 P.2d 928, with 67 Wn. App. 61, 834 P.2d 33). Homestead may be subject to equitable lien if funds used to acquire homestead were obtained from judgment creditor by debtor's fraud or theft. (64 Wn.2d 814, 394 P.2d 689). Purchaser's homestead, bought from judgment debtor, exempt from judgment lien even though purchaser had constructive notice of judgment lien at time of purchase and property was not exempt in hands of judgment debtor. (111 Wn.2d 219, 758 P.2d 494).

Rights of Surviving Spouse or Domestic Partner.

Upon the death of either spouse or domestic partner, upon application by surviving spouse or domestic partner, or, if none, by surviving children, award may be made from decedent's property. (RCW 11.54.010-.100, am'd 2008, c. 6, §§916-921). See also category 13 Estates and Trusts, topic 13.08 Executors and Administrators, subhead Allowances.

Abandonment or Waiver.

Homestead may be abandoned by declaration of abandonment, or grant thereof, executed and acknowledged by husband and wife, if claimant is married, or by claimant if unmarried, and is presumed abandoned if vacated for six months unless nonabandonment declaration is filed. (RCW 6.13.050). Homestead right is extinguished by conveyance of all rights in property. (84 Wn.2d 52, 523 P.2d 1188). Declaration of non-abandonment must be filed in office in which homestead is recorded. (RCW 6.12.120).

See also categories 5 Civil Actions and Procedure, topic Judgments; Family, topic Spouse and Domestic Partner; Property, topics Deeds, Real Property.

8.11 [RESERVED]

8.12 LEVY:

See topics 8.02 Attachment, 8.05 Executions.

8.13 LIENS:

Uniform Commercial Code adopted. (Title 62A). See category 3 Business Regulation and Commerce, topic 3.09 Commercial Code.

Steamers and vessels are subject to lien for service rendered on board; for work or material furnished for construction, repair, equipment or alteration; for wharfage and anchorage; for nonperformance or malperformance of contract for transportation within the state; for injuries committed within the state. Priorities are in the order named, and the lien is enforceable for only three years after cause of action accrued. (RCW 60.36.010). Where lien is for maritime contracts or services, enforcement is by suit in admiralty, in rem. For contracts and services not maritime, foreclosure is in manner provided for non-UCC personal property. (RCW 60.36.020; RCW 61.12.162).

Crop Liens.

Person furnishing supplies or services entitled to lien on crop and identifiable cash proceeds. (RCW 60.11.020). Lienholder must provide statement to lien debtor or person authorized by lien debtor within 14 days of request. Cost and attorney fees allowed if statement not provided. Landlord may obtain lien for rent in same manner; lien effective during term of lease for up to five years. Landlord with claim to crop must file in same manner. (RCW 60.11.040).

Priorities: (1) Lien for work or labor furnished upon land of grower; (2) lien in favor of handler (certain persons preparing orchard crop for marketing); (3) landlord's lien; (4) lien incurred to produce crop; (5) other, in accordance with time of filing. (RCW 60.11.050).

Judicial foreclosure available by action in superior court in county where crop grown. (RCW 60.11.070). Sheriff may levy and sell other nonexempt property if sale of lien property insufficient. Summary foreclosure by public or private sale, in units or parcels, so long as every aspect commercially reasonable. (RCW 60.11.080). Unless perishable collateral, reasonable notice must be sent to debtor, other lienholders or properly secured parties and anyone known to have security interest. Proceeds applied to reasonable expenses of sale, reasonable attorney fees and costs, satisfaction of indebtedness, and subordinate security interest. Lienholder must account to debtor for surplus; debtor not liable for deficiency. (RCW 60.11.080). Sale at judicial foreclosure transfers all lien debtor's rights and discharges lien and subordinate liens. (RCW 60.11.090). Purchaser, acting in good faith without knowledge of defects in sale or not in collusion at public sale, takes free of debtor's rights even if lienholder fails to comply with legal requirements. Judicial or summary foreclosure must occur within 24 months of filing financing statement; landlord foreclosure within 24 months of default. (RCW 60.11.130).

Right of redemption governed by RCW 62A.9A-623. (RCW 60.11.100). If lienholder fails to proceed properly, disposition may be ordered or restrained. If disposition has occurred, debtor or person entitled to notification can recover from lienholder loss caused by failure to comply. (RCW 60.11.110). Lienholder must send to debtor or file termination statement within 20 days of receipt of authenticated demand following full payment; failure to file causes lienholder or assignee to be liable to debtor for attorney fees and damages. (RCW 60.11.140).

Innkeepers, Hotels, Etc.

See category 21 Property, topic 21.10 Landlord and Tenant.

Labor Liens on Franchises, Earnings, and Property.

Person performing labor in operation of railway, canal, transportation, water, mining, manufacturing, sawmill, lumber, or timber company has lien on franchise, earnings and real and personal property of said companies for labor performed during six months prior to filing. (RCW 60.32.010). Claimant must file within 90 days after cessation of labor. (RCW 60.32.020). More than one claimant may join in same notice but amount claimed by each must be stated. (RCW 60.32.020). Foreclosure is in same manner and within same time as mechanics' liens. (RCW 60.32.040).

Livestock.

Persons entrusted with livestock for feeding, herding, ranching, pasturing, caring or training, have liens on such livestock and proceeds and accounts receivable therefrom for amounts due for such activities and may retain livestock until amount is paid or lien expires. (RCW 60.56.010-.015). Lien attaches on date amount is due and unpaid. (RCW 60.56.010). Notice of lien to buyer or commissioned seller perfects lien. (RCW 60.56.015). Lien expires 180 days after attachment unless action to enforce is commenced. (RCW 60.56.035). Enforcement of lien is in court of competent jurisdiction. (RCW 60.56.021; .050). Perfected lienholder may collect from buyer, seller or person selling on commissioned basis.

Logs, Lumber, Timber, Etc.

Persons performing labor upon, or assisting in obtaining logs, spars, piles, cord wood, shingle bolts or other timber, including towboats and railroads hauling same, have lien on such wood products (RCW 60.24.020) and persons performing work in manufacturing timber into lumber have lien on lumber while it remains in their possession or under their control (RCW 60.24.030). Owner of land from which timber is taken has lien on timber. (RCW 60.24.035). Aforesaid liens secure work performed within eight months prior to filing lien. (RCW 60.24.040; .070). Notice of claim must be filed with county auditor where timber cut or lumber manufactured within 60 days after rendition of services or labor. (RCW 60.24.075). Suit to foreclose must be commenced within eight months after filing lien. (RCW 60.24.110). Such liens are preferred and prior to any others. (RCW 60.24.038).

Warehouseman Liens.

Warehouseman has lien for storage, transportation or labor against bailor of goods or proceeds covered by warehouse receipt. Warehouseman's lien takes priority over all other liens and perfected or unperfected security interests. (RCW 62A.7-209).

Orchards.

Person performing work upon orchard has lien on such orchard and orchard lands. (RCW 60.16.010). Claimant must file within 40 days after close of work for each season. Foreclosure is by civil action in same manner as mechanics' liens (RCW 60.16.020) and must be commenced within eight months after filing lien (RCW 60.16.030).

Agricultural Commodities.

Producer or commercial fisherman who delivers agricultural or fish products to processor or conditioner has first priority lien on agricultural or fish products delivered, on processor's or conditioner's inventory and on processor's or conditioner's accounts receivable—processor liens. (RCW 60.13.020). Producer who delivers grain, hay, or straw to livestock product preparer has first priority lien on agricultural products delivered and on preparer's accounts receivable—preparer liens. (RCW 60.13.040). Lien continues for 20 days after payment due and unpaid, without filing notice of lien, for contract price or fair market value of products. (RCW 60.13.020; .030). Claimant may file notice of lien to continue lien beyond period of automatic lien, which runs from delivery date to 20 days after payment due and unpaid. (RCW 60.13.040). Processor lien terminates six months after, and preparer lien terminates 50 days after, later of attachment or filing, unless suit to foreclose filed. (RCW 60.13.060). Producer must file statement of discharge with department of licensing upon receipt or be liable to processor, conditioner or preparer for $100 plus actual damages. Foreclosure is by civil action in superior court. (RCW 60.13.070). Prevailing party allowed costs and fees. Person who deposits commodity with warehouseman or sells commodity to grain dealer has first priority lien on commodity or proceeds therefrom or on commodities owned by warehouseman or grain dealer if depositor has written evidence of ownership or sale. (RCW 22.09.371). Lien terminates when liability to depositor terminated or if commodity sold to warehouseman or grain dealer, then 30 days after date title passes, or 40 days if depositor is paid by check or draft; lien discharged as to commodities sold to buyer in ordinary course of business. (RCW 22.09.371).

Stallions.

Owners of stallions who provide services have lien upon female served or upon foal for 18 months after service or after birth as case may be, provided owner has received certificate from county auditor relating to stallion and lien is filed within ten months after service or birth. (RCW 60.52.030). Foreclosure is in same manner as other personal property. (60.10; RCW 60.52.040; RCW 61.12.162).

Freight, Transportation, Wharfage, Storage, Advancements, Etc.

Commission merchants, carriers, wharfingers, and warehousemen transporting or making advances for freight, transportation, wharfage, or storage on personal property have lien thereon for such services, so long as same remain in their possession. (RCW 60.60.010). Livestock and perishable property may be sold after giving ten days notice. (RCW 60.60.020). All other goods may be sold 30 days after charges are due and unpaid upon ten days notice. (RCW 60.60.030).

Hospitals, Physicians, Etc.

Hospitals, ambulance service operators, and licensed nurses, practitioners, physicians and surgeons rendering service or transportation or care to any person who has received traumatic injury have lien on any claim, right of action, and/or money to which such person is entitled against any tortfeasor and/or his insurer, for value of services, together with costs and reasonable attorney fees incurred in enforcing such lien. Said lien limited to 25% of any award or settlement. (RCW 60.44.010). Claimant must file within 20 days after injury or receipt of transportation or care, or prior to payment or settlement, whichever is longer. (RCW 60.44.020). Enforcement is by civil action and must be commenced within one year after filing lien. (RCW 60.44.060).

Chattels.

Person furnishing labor or material in construction or repair of chattel has lien thereon. Lien continues after delivery of chattel to owner if claimant files lien notice within 90 days after such delivery. (RCW 60.08.010; .020). Lien void against purchaser in good faith for value without notice whose right accrues after delivery to owner and before filing. (RCW 60.08.010-.020). Foreclosure is by civil action in same manner as non-UCC personal property and must be commenced within nine months after lien filed. (RCW 60.08.040; 60.10; RCW 61.12.162).

Hotel, restaurant, tavern and bar employees have lien on earnings and all property of employer for moneys due for labor performed within three months prior to filing of claim, which must be filed within 30 days after labor has ceased. (RCW 60.34.010-.020). Enforcement is in same manner as mechanics' liens with real property and chattel liens with personal property. (RCW 60.34.040).

Towing and Storage of Motor Vehicles.

Those in business of towing motor vehicles have possessory lien for towing, transportation or storage charges. (RCW 46.52.111-.114). If charges not paid within 15 days when due, vehicle may be sold upon giving three days notice prior to sale. (RCW 46.52.112).

Benefit Plans for Employees.

If employer fails to pay contributions to any employee benefit plan when due, employees have lien on employer's earnings and on all property used in business to extent of moneys and penalties due to be paid on his behalf and moneys expended or obligations incurred to which employee would have been entitled had contributions been paid. (RCW 60.76.010). Claimant must file within 60 days after employer's contributions were due. (RCW 60.76.020). Enforcement is in same manner as mechanics' liens with real property and chattel liens with personal property. (RCW 60.76.040). Recovery of costs and fees discretionary.

Federal Tax Liens.

Notices and certificates of federal tax liens upon real property recorded in county where real property situated. (RCW 60.68.015). Notices of federal liens upon personal property filed with Department of Licensing for corporations or partnerships, or in county where person resides. (RCW 60.68.015).

Self-Storage Facility.

Owner of self-storage facility has lien upon personal property located in facility for rent, labor, late fees or charges incurred pursuant to agreement and for expenses for preservation, sale or disposition of personal property. (RCW 19.150.020, am'd 2008, c. 61, §3). If rent unpaid for six days, owner may deny access. (RCW 19.150.030). When rent unpaid for 14 days, owner may terminate right to use space by sending notice. (RCW 19.150.040). Subsequent sale of personal property must comply with strict notice requirements. (RCW 19.150.060).

Operators of logging roads, ways, chutes, flumes or artificial water courses have lien upon logs or other timber products for tolls and charges for transporting same. Filing of lien and foreclosure are in manner provided for non-UCC personal property. (RCW 76.24.030; 60.10; RCW 61.12.162).

Corporation which catches, holds, assorts, booms and rafts logs and timber products shall have a lien upon such products. Foreclosure is in manner provided for non-UCC personal property. (RCW 76.28.040; 60.10; RCW 61.12.162).

Mechanics' and Materialmen's Liens.

(New terminology: “construction liens” under 1991 legislation.) Person furnishing labor, professional services, materials, or equipment for improvement of real property has lien on improvement for contract price of labor, professional services, materials, or equipment furnished at instance of owner, agent or construction agent of owner. (RCW 60.04.021). Lien not discharged by taking of promissory note or other evidence of indebtedness, unless expressly received as payment and so specified in instrument. (RCW 60.04.191). Material furnished for improvement of property subject to lien under 60.04 not subject to attachment or execution or other legal process to enforce debt of purchaser unrelated to purchase of material. (RCW 60.04.201). Registered or licensed contractor or subcontractor deemed construction agent of owner for purposes of establishing lien. (RCW 60.04.041). If interest in land cannot be subjected to lien, court may order improvement sold and removed from land. (RCW 60.04.051).

Notice of Lien.

Notice in writing, served personally, or by certified or registered mail, of right to claim lien must be given to owner, reputed owner, or in certain cases to prime contractor. Notice effective for professional services, materials, or equipment supplied within 60 days of such notice (within 10 days, for new construction of single-family residences). (RCW 60.04.031[1]). Notice not required of persons contracting directly with owner or owner's common law agent, certain laborers, certain subcontractors who contract directly with prime contractor, and certain persons who contract directly with owner-occupier with respect to existing single-family residence or appurtenant garage. (RCW 60.04.031[2],[3]). Following form, in 10-point type, authorized by statute. (RCW 60.04.031).

Form

NOTICE TO OWNERIMPORTANT: READ BOTH SIDES OF THIS NOTICE CAREFULLY.PROTECT YOURSELF FROM PAYING TWICE

To: . . . . .Date: . . . .

From: . . . .

AT THE REQUEST OF: (Name of person placing the order)

THIS IS NOT A LIEN: This notice is sent to you to tell you who is providing professional services, materials, or equipment for the improvement of your property and to advise you of the rights of these persons and your responsibility. Also take note that laborers on your project may claim a lien without sending you a notice.

OWNER/OCCUPIER OF EXISTING RESIDENTIAL PROPERTY

Under Washington law, those who work on or provide materials for the repaid, remodel, or alteration of your owner-occupied principal residence and who are not paid, have a right to enforce their claim for payment against your property. This claim is known as a construction lien.

The law limits the amount that a lien claimant can claim against your property. Claims may only be made against that portion of the contract you have not yet paid to your prime contractor as of the time you received this notice. Review the back of this notice for more information and ways to avoid lien claims.

COMMERCIAL AND/OR NEW RESIDENTIAL PROPERTY

We have or will be providing labor, materials, professional services, or equipment for the improvement of your commercial or new residential project. In the event you or your contractor fail to pay us, we may file a lien against your property. A lien may be claimed for all materials, equipment, and professional services furnished after a date that is sixty days before this notice was mailed to you, unless the improvement to your property is the construction of a new single-family residence, then ten days before this notice was mailed to you.

Sender: . . . .

Address: . . . .

Telephone: . . . .

Brief description of professional services, materials, or equipment provided or to be provided: . . . .

IMPORTANT INFORMATION ON REVERSE SIDEIMPORTANT INFORMATION FOR YOUR PROTECTION

This notice is sent to inform you that we have or will provide materials, professional services, or equipment for the repair, remodel, or alteration of your property. We expect to be paid by the person who ordered our services, but if we are not paid, we have the right to enforce our claim by filing a construction lien against your property.

LEARN more about the lien laws and the meaning of this notice by discussing [them] with your contractor, suppliers, department of labor and industries, the firm sending you this notice, your lender, or your attorney.

COMMON METHODS TO AVOID CONSTRUCTION LIENS: There are several methods available to protect your property from construction liens. The following are two of the more commonly used methods.

DUAL PAYCHECKS (Joint Checks): When paying your contractor for services or materials, you may make checks payable jointly to the contractor and the firms furnishing you this notice.

LIEN RELEASES: You may require your contractor to provide lien releases signed by all the suppliers and subcontractors from whom you have received this notice. If they cannot obtain lien releases because you have not paid them, you may use the dual payee check method to protect yourself.

YOU SHOULD TAKE WHATEVER STEPS YOU BELIEVE NECESSARY TO PROTECT YOUR PROPERTY FROM LIENS.

YOUR PRIME CONTRACTOR AND YOUR CONSTRUCTION LENDER ARE REQUIRED BY LAW TO GIVE YOU WRITTEN INFORMATION ABOUT LIEN CLAIMS. IF YOU HAVE NOT RECEIVED IT, ASK THEM FOR IT.

* * * * * * * * * * * * *

Potential lien claimant providing professional services, where no improvement has commenced and professional services not visible from inspection of property, shall record notice, including provider's name, address, telephone number, legal description of property, property owner, or reputed owner's name, and nature of services provided. (RCW 60.04.031[5]).

Priority of Lien.

Lien is prior to other lien, mortgage, deed of trust or other encumbrance, which attached to land after, or was unrecorded at time of commencement of labor or professional services or first delivery of materials or equipment by lien claimant. (RCW 60.04.061).

Recording of Lien.

Notice of claim of lien must be recorded in county where property located within 90 days after claimant ceased furnishing labor, professional services, materials or equipment or last date on which employee benefit contributions due. Notice must contain: Name, phone number, and address of claimant; first and last dates on which services, materials or equipment furnished or employee benefits due; name of persons indebted to claimant; street address, legal description or other identification of location of property subject to lien, and name of property owner or reputed owner, or fact that name not known; and principal amount of lien. Notice must be signed by claimant or authorized agent, must state that they have read notice and believe it to be true and correct under penalty of perjury, and must be acknowledged. Any assignee of claim must be identified. Action to foreclose lien barred unless notice recorded within 90-day period. Lien claimant must give notice of lien to owner by certified or registered mail within 14 days of recording or forfeit right to attorney fees and costs. (RCW 60.04.091). Filing of lien is notice to spouse or domestic partner of record owner and subjects entire community interest of both to lien. (RCW 60.04.211, am'd 2008, c. 6, §641). If labor, professional services, materials or equipment, furnished for two or more separate residential units, time for filing claim commences upon cessation of furnishing labor, professional services, materials, or equipment to each unit. (RCW 60.04.101). Where notice recorded against two or more properties owned by same person or by two or more persons, notice shall designate amount due on each property. (RCW 60.04.131). Following form authorized by statute (RCW 60.04.091):

Form

. . . ., claimant, vs. . . . ., owner or reputed owner

Notice is hereby given that on the . . . . day of . . . . (date of commencement of furnishing labor, professional services, materials, or equipment and the last date contributions to any type of employee benefit plan became due), ... at the request of . . . ., ... commenced to (perform labor, furnish professional services, materials, or equipment) upon . . . . (here describe property subject to the lien) of which property the owner, or reputed owner, is . . . . (or if the owner or reputed owner is not known, insert the word "unknown"), the (furnishing of labor, professional services, materials, or equipment) ceased on the . . . . day of . . . .; that said (labor, professional services, material, or equipment) was of the value of . . . . dollars, for which the undersigned claims a lien upon the property herein described for the sum of . . . . dollars. (In case the claim has been assigned, add the words "and . . . . is assignee of said claim", or claims, if several are united.)

. . . ., Claimant.

. . . .

. . . .

(Phone number, address, city, and state of claimant)

STATE OF WASHINGTON, COUNTY OF

. . . ., ss.

. . . ., being sworn, says: I am the claimant (or attorney of the claimant, or administrator, representative, or agent of the trustees of an employee benefit plan) above named; I have read or heard the foregoing claim, read and know the contents thereof, and believe the same to be true and correct under penalty of perjury.

. . . .

Subscribed and sworn to before me this . . . . day of . . . .

. . . .

Duration of Lien and Procedural Limitations.

Lien may not bind property longer than eight calendar months after recording of notice of claim of lien unless action to enforce lien filed in superior court in county where property located, and owner served within 90 days of filing action; or unless credit given and terms stated in notice of lien, in which case lien expires eight months after expiration of credit. Failure to prosecute action to foreclose lien within two years may result in dismissal of action and cancellation of lien. (RCW 60.04.141).

Rights of Owner.

Owner may contest claim of lien on grounds of frivolousness or excessiveness in show cause hearing in superior court for county where property located. Owner pays statutory fee if no foreclosure action filed or, if foreclosure action filed, makes application part of action. Lien claimant then has from six to 15 days from service of application and order to show cause to appear. (RCW 60.04.081). During pendency of foreclosure action, owner may withhold from prime contractor amounts for which lien claims are recorded by subcontractor, supplier, or laborer, and in case of judgment against owner, owner may deduct principal amount of judgment, plus costs, including interest and attorney fees as court awards. (RCW 60.04.151). Court may order damages and attorney fees when release of lien unjustifiably delayed. (RCW 60.04.071). Owner, or contractor or subcontractor who disputes correctness or validity of notice of claim of lien, may record bond in county in which notice recorded. Bond must contain description of notice of claim of lien and of property, and must be equal to greater of $5,000 or twice amount of lien if lien is $10,000 or less, and 150% of lien if greater than $10,000. Effect of recording bond is to release property from lien. (RCW 60.04.161).

Foreclosure of lien is by action in superior court of county where property located. (RCW 60.04.171; RCW 61.12.040). Lien claimant entitled to contract price less claims of other lien claimants to whom claimant is liable. (RCW 60.04.151). Owner is necessary party. Pending lien foreclosure action affecting same property normally bars commencement of separate action but claimant normally entitled to join as party plaintiff. Filing of joinder application tolls limitation period until disposition of application. Claimants who record claims of lien prior to foreclosure action not affected unless joined as party. (RCW 60.04.171). Foreclosure procedure does not impair right of claimant to recover underlying debt. (RCW 60.04.191).

Rank of Liens and Application of Proceeds.

Liens ranked as follows: Labor; contributions owed to employee benefit plans; material, supplies or equipment; subcontractors' liens; prime contractors' liens and liens for professional services. Proceeds distributed pro rata among each claimant in priority class. Any unsatisfied deficiency stands as personal judgment. Court may allow costs, including attorney fees. (RCW 60.04.181).

Notice to Lender.

Following rules apply to lender providing interim or construction financing, if no payment bond of at least 50% of construction financing: If payment not received within five days after date required by contract, invoice, or employee benefits plan, potential claimant may file notice of potential lien claim to lender. Notice signed under penalty of perjury and filed within 35 days of date required for payment at office administering financing, with copy to owner and prime contractor. Notice must state: Person filing notice entitled to lien for labor, professional services, materials or equipment; name of prime contractor agent ordering same; address or legal description of property being improved; and name, business address, and telephone number of lien claimant. Lender withholds amounts claimed or secures payment bond. Failure of lender to conform to statute results in lender being subordinated to lien of potential lien claimant. Procedures and remedies available to contest certain unjust, excessive, premature or frivolous notices. Following form authorized by statute (RCW 60.04.221):

Form

NOTICE TO REAL PROPERTY LENDER

(Authorized by RCW. . . . .)

TO: . . . .

(Name of Lender)

. . . .

(Administrative Office—Street Address)

. . . .

(City)(State)(Zip)

AND TO: . . . .

(Owner)

AND TO: . . . .

(Prime Contractor—If Different Than Owner)

. . . .

(Name of Laborer, Professional, Materials, or Equipment Supplier)

whose business address is . . . ., did at the property located at . . . . (Check appropriate box) ( ) perform labor ( ) furnish professional services ( ) provide materials ( ) supply equipment as follows:

. . . .

. . . .

. . . .

which was ordered by

. . . .

(Name of Person)

whose address was stated to be

. . . .

The amount owing to the undersigned according to contract or purchase order for labor, supplies, or equipment (as above mentioned) is the sum of . . . . Dollars ($. . . . .).

Said sums became due and owing as of

. . . .

(State Date)

. . . .

. . . .

You are hereby required to withhold from any future draws on existing construction financing which has been made on the subject property (to the extent there remain undisbursed funds) the sum of . . . . Dollars ($. . . . .).

IMPORTANT

Failure to comply with the requirements of this notice may subject the lender to a whole or partial compromise of any priority lien interest it may have pursuant to RCW 60.04.226.

DATE: . . . .

By: . . . .

Its: . . . .

Posted Notice by Prime Contractor.

Following information must be posted by prime contractor at construction sites of projects in excess of $5,000: Legal description or tax parcel number, and street address if available, of construction site; prime contractor's business name, address, phone number, current state contractor registration number and identification; and either name, address and phone number of interim finance lender, if any, or name and address of surety issuing payment bond, if any, for prime contractor if bond is for not less than 50% of total amount of construction project. Posting under RCW 19.27.095 is compliance for projects requiring building permits under local ordinance. Noncompliance subjects prime contractor to civil penalty up to $5,000. (RCW 60.04.230). Prime contractor required to supply information to persons having contracted to supply materials, equipment and professional services and to subcontractors. (RCW 60.04.261).

Public Works.

Contractor on public work must give bond, with surety company as surety, conditioned for faithful performance of contract and payment of all laborers, mechanics, subcontractors and material suppliers. Such bond protects persons performing services for or furnishing material to any subcontractor. Not applicable to money loaned or advanced to contractor or subcontractor. On contracts of $35,000 or less, public entity may, in lieu of bond, retain 50% of contract amount until 30 days after final acceptance or until receipt of necessary releases from departments of revenue and labor and industries and settlement of any liens filed under 60.28, for labor, materials or taxes on public works, whichever is later. (RCW 39.08.010). On contracts of $100,000 or less, public entity may accept full payment and performance bond from individual surety or sureties. (RCW 39.08.010). On contracts for construction, maintenance or repair of marine vessel, department of transportation may, in lieu of bond, accept certified check, cashier's check, treasury bills, irrevocable letter of credit, assignment of savings or other liquid asset approved by secretary of transportation. (RCW 39.08.100). To bring action on bond, claimant must file notice of claim within 30 days after acceptance of work; said notice must be filed with board, council, commission, trustees, officer or body acting for state, county or municipality. (RCW 39.08.030). Conditions for hospital improvement zones are provided. (39.100).

Public improvement contracts shall require retainage of up to 5% of contract sum for protection and payment of claims of any person arising under contract and state for taxes due from contractor. Persons claiming lien on retainage must give public body written notice within 45 days of completion of project. (RCW 60.28.011). Claimant who furnishes materials, supplies or equipment must also give written notice to contractor. Notice covers materials, supplies and equipment furnished within 60 days of notice together with subsequent deliveries. (RCW 60.28.015). Foreclosure action against retained fund must be commenced in superior court within four months of filing written notice with public body. (RCW 60.28.030). Retainage must be released to contractor 60 days after final acceptance of contract work if any lien claims against retainage satisfied and department of revenue certifies payment of taxes. (RCW 60.28.021). If tax or lien claims exist, public body retains amount sufficient to satisfy same plus costs and attorney fees. (RCW 60.28.021).

Utility Liens.

Seller of fee interest in real property is responsible for satisfying unrecorded utility lien unless purchaser agrees to contrary. (RCW 60.80.010).

Enforcement of Statutory, Landlord Liens.

RCW 61.12 governs all non-UCC judicial foreclosures for liens upon personal property. Lienholder may proceed upon lien or separate obligation or promise securing lien. If lienholder proceeds upon separate promise or if there is agreement to pay deficiency, court will order sale of collateral plus judgment for any deficiency and other nonexempt property may be levied upon to satisfy deficiency. (RCW 61.12.162).

Any lien upon personal property excluded from UCC may be foreclosed by civil action in district where property is situated or, if claim exceeds jurisdictional limits of district court, in county where property is situated or by summary procedure below. (RCW 60.10.020).

Foreclosure by summary procedure is by sale, public or private, in units or parcels, at any time or any place and in any manner which is commercially reasonable. Unless collateral is perishable or is of type sold in a recognized market, reasonable notice of time and place of sale or other disposition must be given to debtor and except with consumer goods, to any other person who has security interest and filed a financing statement or of whom lienholder has knowledge. (RCW 60.10.030).

Bidder must be notified of prior liens or lienholder's lack of knowledge of same. Lienholder may sell collateral in its then condition or following any reasonable preparation or processing. (RCW 60.10.030).

Proceeds will be applied in following order to: (1) Reasonable expenses of retaking and preparing for sale, selling expenses and, if agreed to, legal expenses of lienholder; (2) satisfaction of indebtedness secured by collateral; (3) satisfaction of other security interests. (RCW 60.10.030).

Enforcement.

Such liens for which claims have been filed bind property for eight months after filing, or if credit given and terms thereof stated in claim, for eight months after expiration of such credit. To enforce such liens, summons and complaint must be filed with court having jurisdiction prior to expiration of such period and all necessary parties served within 90 days after filing. (RCW

60.04.141). All other persons who have filed claims of liens against same property prior to commencement of action must be joined as parties. If another action to foreclose lien on same property pending, new action may not be started but lien claimant, upon application to court, made party thereto and his lien foreclosed therein. (RCW 60.04.171).

Foreclosure.

Such liens enforced upon property as with foreclosures of mortgages. See category 20 Mortgages, topic 20.04 Mortgages of Real Property, subhead Foreclosure.

Liens Discussed in Other Topics.

See topics 8.02 Attachment, Executions, Homesteads; categories 3 Business Regulation and Commerce, topic Commercial Code; Civil Actions and Procedure, topic Judgments; Legal Profession, topic Attorneys and Counselors; Mortgages, topic Mortgages of Real Property; Property, topic Landlord and Tenant; Taxation, topics Estate and Generation Skipping Taxes, subhead Estate Tax, catchline Sale of Property to Pay Tax, Property Tax, subheads Lien, Sale, catchline Personal Property; Transportation, topic Motor Vehicles.

8.14 MECHANICS' LIENS:

See topic 8.13 Liens.

8.15 PLEDGES:

Common law rules apply, except as modified by Uniform Commercial Code. See category 3 Business Regulation and Commerce, topic 3.09 Commercial Code.

Pledge of Corporate Stock.

Stockholders in corporations who have pledged their certificates of stock may, nevertheless, represent same at corporate meetings and vote as stockholders until shares are transferred into name of pledgee. (RCW 23B.07.240). Pledgee of corporate stock has standing to assert claim on pledgee's own behalf or in derivative action. (47 Wn. App. 272, 734 P.2d 949).

Remedies of Pledgee.

See category 3 Business Regulation and Commerce, topic 3.09 Commercial Code.

8.16 RECEIVERS:

See generally 7.60. See also Civil Rules for Superior Court 43(e); Special Proceedings Rules, SPR 98.08W, 98.10W, 98.12W.

Insolvency and Receivers.

For receivers appointed upon dissolution of corporation, see RCW 23B.14.320; RCW 7.60.025. See also category 2 Business Organizations, topic 2.03 Corporations.

Jurisdiction.

Receivers may be appointed by superior court. (RCW 7.60.025). Appointment of receiver operates as stay of proceedings. (RCW 7.60.110).

When Appointment Proper.

Receiver may be appointed, inter alia, upon application by party with probable right to, or interest in, property in danger of being lost or impaired; or which property is subject of action and in possession of adverse party; in action to foreclose lien; following judgment; before or after issuance of execution; to preserve property pending appeal; upon attachment of property; in action to rescind transfer based on fraud; upon dissolution of person, who not individual; in case of general assignment for creditors; and in quo warranto proceedings. (RCW 7.60.025).

Eligibility and Bond.

Person convicted of certain crimes, attorney for one interested in action; one interested in action and one related to one, who is interested in action, creditors and lienors, and sheriff of any county may not be receiver. (RCW 7.60.035). Receiver required to execute bond as required by court. (RCW 7.60.045).

Powers and Duties of Receiver.

Among receiver's powers are: power of payment of specified expenses; performance of transactions in ordinary course of trade or business; assertion of rights, claims or choses in action; intervening in actions; and obtaining appraisals. (RCW 7.60.060). Among receiver's enumerated duties are: in case of real property, filings with auditor or registrar; and compliance with court directives. (RCW 7.60.060). In addition, receiver may assume or reject executory contracts or unexpired leases (RCW 7.60.140); abandon property (RCW 7.60.150); and sue and be sued (RCW 7.60.160). Receiver will be personally liable for loss or diminution in value if due to failure to comply with court order or act for which members of corporate board liable. (RCW 7.60.170). Notice to creditors required. (RCW 7.60.190, .210). Form provided at RCW 7.60.200. Claims of creditors and objections may be filed and priorities for distributions provided. (RCW 7.60.220).

Discharge or Termination.

Receiver may be removed by court (RCW 7.60.280); or discharged upon distribution of all property and completion of duties (RCW 7.60.290).

8.17 REDEMPTION:

See topics 8.05 Executions, Liens; categories 20 Mortgages, topic Mortgages of Real Property; Taxation, topic Property Tax, subhead Redemption.

8.18 SUPPLEMENTARY PROCEEDINGS:

See topic 8.05 Executions.

8.19 TRUSTEE PROCESS:

See topic 8.09 Garnishment.

8.20 USURY:

See category 3 Business Regulation and Commerce, topic 3.17 Interest.

9 DISPUTE RESOLUTION

9.01 ALTERNATIVE DISPUTE RESOLUTION:

Dispute resolution centers established and governed by 7.75. Services to be provided either free or based on participant's ability to pay. (RCW 7.75.030). County may impose $10 surcharge on civil district court filings and $15 on small claims filings to be used for dispute resolution centers. (RCW 7.75.035). Written agreement entered into by parties with assistance of dispute resolution center admissible as evidence in judicial or administrative proceeding. (RCW 7.75.040). Memoranda, work notes, work products, or case files of dispute resolution centers established under 7.75 are confidential and privileged. (RCW 7.75.050). Person may withdraw from dispute resolution process without penalty. (RCW 7.75.060). Statute of limitations tolled during process at dispute resolution center established under 7.75. (RCW 7.75.090). Members of board of dispute resolution center, employees, and center, itself, enjoy varying forms of immunity from civil suit. (RCW 7.75.100).

Alternative dispute resolution procedures to be included in public works contracting procedures (RCW 39.10.070); procedures for determining disputes between state agencies (RCW 43.17.320-.340); between landlord and mobile home park tenants (59.30); and procedures for implementing growth management act (RCW 43.330.120).

Mediation.

With respect to mediations pursuant to pre-Jan. 1, 2006 referral or agreement, communications and materials, prepared or submitted in connection with voluntary or mandated mediation generally privileged, with specified exceptions. (RCW 5.60.070). Marital dissolution proceedings may be referred for mediation. (RCW 26.09.015). Medical malpractice claims subject to mandatory mediation. (RCW 7.70.100).

Mandatory Arbitration.

See topic 9.02 Arbitration and Award, subhead Mandatory Arbitration.

Trusts and Estates.

Nonjudicial methods for resolution of disputes provided. (11.96A).

9.02 ARBITRATION AND AWARD:

Uniform Arbitration Act adopted, effective Jan. 1, 2006. (7.04A).

Uniform Mediation Act adopted, effective Jan. 1, 2006. (7.07).

Mandatory Arbitration.

Arbitration required by statute for various types of proceedings, including: Public works contract disputes over prevailing rates of wages for work of similar nature (RCW 39.12.060); labor disputes between certain uniformed public employees and their public employers, where negotiation and mediation have failed (RCW 41.56.450; .495; 107 Wn.2d 338, 728 P.2d 1044); disputes between health care facilities and employees' bargaining unit, where impasse has been reached (RCW 49.66.090). Superior court of county or county legislative authority in second class and larger counties may authorize mandatory arbitration of disputes where sole relief sought is money judgment and no party asserts claim in excess of $15,000, or if approved by court, up to $50,000, or, if approved by court, where sole relief sought is establishment, termination or modification of maintenance or child support payments. (RCW 7.06.020; MAR 1.2). Mandatory arbitration authorized in Chelan, Clark, Douglas, King, Kitsap, Mason, Pierce, Snohomish, Spokane, Thurston, Whatcom and Yakima Counties.

10 DOCUMENTS AND RECORDS

10.01 ACKNOWLEDGMENTS:

Within State.

Acknowledgments may be taken by any judge or qualified court commissioner of Supreme Court, courts of appeals, or superior courts, or clerk thereof, or their deputies, justice of the peace, county auditor or his deputy, notary public, or U.S. commissioner for State of Washington. (RCW 64.08.010 et seq.). Certain officials of state correctional institutions have limited powers though they may not charge fees. (RCW 64.08.090).

See topic 10.03 Notaries Public.

Outside State but Within United States.

Deeds or conveyances of land situated in this state, and other instruments in writing required to be acknowledged, may be acknowledged in any other state, District of Columbia or territory or possession of U.S. before any person authorized to take acknowledgments of deeds by laws of such state, district, territory or possession, or before any commissioner appointed by Governor of this state for such purpose. Unless such acknowledgment is taken before officer having seal of office, instrument must have attached thereto certificate of clerk of court of record, under seal of such court of district or county in which acknowledgment is taken, that person taking acknowledgment had authority to do so. (RCW 64.08.020).

Outside United States.

Acknowledgments taken in foreign countries may be taken by any minister, plenipotentiary, secretary of legation, chargé d'affaires, consul general, consul, vice consul, consular agent, or commercial agent appointed by Government of U.S., or any notary public, or proper officer of any court of such country, or mayor or other chief magistrate of any city, town or other municipal corporation. (RCW 64.08.040). No authentication of officer's certificate is necessary.

Person in U. S. Armed Forces or Merchant Marine.

Acknowledgment of such person may be performed by officer with rank of at least second lieutenant or ensign. (RCW 73.20.010).

General Requirements as to Taking.

Officer taking acknowledgment must know or determine by satisfactory evidence identity of person executing instrument. (RCW 42.44.080; RCW 64.08.050).

General Requirements of Certificate.

Officer taking acknowledgment must attach certificate to instrument, including signature of officer and official seal or stamp. (RCW 64.08.050). If acknowledgment is taken by notary public he must add his place of residence. (RCW 64.08.060). Seal or stamp required in all cases of acknowledgments except in certifying oath to be used in state courts. (RCW 42.44.090). Notary is required to state date of expiration of commission. (RCW 42.44.090). If taken by institutional officer, seal of institution must be affixed, except in certifying oath to be used in state courts. (RCW 64.08.090). Use of individual form for corporate acknowledgment renders acknowledgment invalid. (Compare 36 Wn. App. 468, 675 P.2d 1256, with 128 Wn. App. 1014). Person who is physically unable to sign but is otherwise competent may authorize signature by officer taking acknowledgment, and officer must recite statutory authority in certificate. (RCW 64.08.100). See topic 10.03 Notaries Public.

Married women acknowledge like other persons; no special requirements.

Attorneys in Fact.

No special statutory requirements. See category 21 Property, topic 21.15 Powers of Attorney.

Foreign Acknowledgments.

See subhead Outside United States, supra.

Corporations.

No special requirements in case of acknowledgments by corporations except as to form. Corporate seal not required. See subhead Forms, infra.

Effect of Acknowledgment.

Certificate of officer taking acknowledgment is prima facie evidence of facts therein recited. (RCW 64.08.050).

Proof by subscribing witness does not constitute substitute for acknowledgment.

Authentication of seal and signature of notary public may be evidenced by certificate from director of licensing or secretary of state, or apostille in form prescribed by Hague Convention Abolishing the Requirement of Legalisation for Foreign Public Documents of Oct. 5, 1961. (RCW 42.44.180).

Forms of Acknowledgment.

Forms

Individual (RCW 64.08.060):

State of . . . . . ., County of . . . . . ., ss.

On this day personally appeared before me (here insert name of grantor or grantors) to me known to be the individual, or individuals described in and who executed the within and foregoing instrument, and acknowledged that he (she or they) signed the same as his (her or their) free and voluntary act and deed, for the uses and purposes therein mentioned. Given under my hand and official seal this . . . . . . day of . . . . . . 20. . . . .

(Signature, official description and seal of officer).

(If taken before a notary, signature must be followed by words: “Notary Public in and for the State of Washington, residing at . . . . .”).

Notary is required to state date of expiration of commission. (RCW 42.44.090).

Corporation (RCW 64.08.070):

State of . . . . . ., County of . . . . . ., ss.

On this . . . . . . day of . . . . . ., 20. . . ., before me personally appeared . . . . . ., to me known to be the . . . . . . of the corporation that executed the within and foregoing instrument, and acknowledged the said instrument to be the free and voluntary act and deed of said corporation, for the uses and purposes therein mentioned, and on oath stated that he was authorized to execute said instrument and that the seal affixed is the corporate seal of said corporation.

In witness whereof, I have hereunto set my hand and affixed my official seal the day and year first above written.

(Signature, official description and seal of officer).

(If taken before a notary, signature must be followed by words: “Notary Public in and for the State of Washington, residing at . . . . .”).

Notary is required to state date of expiration of commission. (RCW 42.44.090).

Validating Acts.

All instruments previously executed and acknowledged according to provisions of RCW 64.08.010 are legal and valid. (RCW 64.08.010).

Alternative to Acknowledgment.

See topic 10.02 Affidavits, subhead Alternative to Affidavit.

10.02 AFFIDAVITS:

See topic 10.01 Acknowledgments.

By Whom Taken.

Within State.

Affidavits expressly authorized to be taken by judges of supreme and superior courts (RCW 2.28.080); commissioners of superior courts (RCW 2.24.040); mayors of third-class cities (RCW 35.23.191) and towns (RCW 35.27.160); notaries and notaries public (RCW 42.44.010); federal judges, court clerks and deputy court clerks; commissioned U.S. military officers; U.S. foreign service or consular agents; and any other persons authorized by federal law to perform notarial acts (RCW 42.44.140). For proof of wills, attesting witnesses may make affidavit before any person authorized to administer oaths. (RCW 11.20.020). Oaths may be taken in this state before every court, judge, clerk of court and notary public. (RCW 5.28.010; RCW 42.44.010). Oaths required by law may be taken before county auditors and their deputies. (RCW 36.22.030).

Various other public officers are empowered to administer oaths and take affidavits required by law in the performance of their duties.

Outside of State.

Affidavits outside of state have same effect as if administered in state, if administered: (1) In another state, commonwealth, territory or possession of U.S. by notary public of that jurisdiction, judge, clerk or deputy clerk of court of that jurisdiction, or any other person authorized by that jurisdiction to perform notarial acts (RCW 42.44.130); (2) by federal judge, court clerk or deputy court clerk, commissioned U.S. military officer, U.S. foreign service officer or consular agent, or any other person authorized by federal law to perform notarial acts (RCW 42.44.140); (3) in foreign country by notary public or notary, judge, clerk or deputy clerk of court of record, or any other person authorized by that jurisdiction to perform notarial acts (RCW 42.44.150).

General Requirements as to Administration.

Administering officer must know or determine identity of affiant. (RCW 42.44.080).

General Requirement of Jurat.

Seal or stamp of notarial officer must be affixed to all affidavits excepting those used in connection with pending court proceeding. Notarial officer's certification must include jurisdiction where affidavit is made, date of affidavit, and title of notarial officer. If notarial officer is notary public, certificate also must include date appointment expires. (RCW 42.44.090).

Use of Affidavit.

Generally used for evidentiary purposes in preliminary and ex parte proceedings.

Form of Jurat.

STATE OF__________________)

) ss.

COUNTY OF________________)

Signed and sworn to (or affirmed) before me on ________[date]________

by________[name of affiant]________

(Signed)______________________

(Title of Notarial Officer)

My appointment expires________[date]________

Alternative to Affidavit.

Unsworn written statement will have force of sworn statement if it: (1) Recites that statement is certified or declared to be true under penalty of perjury, (2) is subscribed, (3) states date and place of its execution, and (4) states that statement is certified or declared under laws of State of Washington. (RCW 9A.72.085).

10.03 NOTARIES PUBLIC:

Regulated by statute. (42.44).

Qualification.

Any person who is at least 18 years of age, is resident of Washington (or who resides in adjoining state and is regularly employed or carries on business in Washington), can read and write English and is endorsed by three residents of state who are age 18 or older (and not relatives) may be appointed notary public. (RCW 42.44.020).

Bond is given for $10,000. (RCW 42.44.020).

Powers and Duties.

Notary is authorized to take acknowledgments, administer oaths or affirmations, take verifications upon oath or affirmation, witness or attest signatures, certify or attest copy, receive protest of negotiable instrument, certify that event has occurred or act has been performed and other acts that notary public of Washington is authorized to perform. (RCW 42.44.010).

Notary public is disqualified from performing notarial act when notary is signer of document which is to be notarized. (RCW 42.44.080[10]).

Certification.

Notarial act by notary public must be evidenced by certificate signed and dated by notary public. Certificate must include name of jurisdiction in which notarial act is performed, title of notary and impression of official seal or stamp of notary. Certificate must also indicate date of expiration of notary public's appointment. (RCW 42.44.090).

Short forms for certain certificates (acknowledgment by individual, acknowledgment in representative capacity, verification upon oath or affirmation, witnessing or attesting signature, attesting copy of document and certifying occurrence of event) are specified by statute. (RCW 42.44.100). Short form of notarial certificate does not supersede any other form of certificate specifically required by statute. (RCW 42.44.090).

Fees.

Notary need not charge fee. Maximum fees set by director of licensing. (RCW 42.44.120). See WAC 308-30-020.

Officers of U.S. Armed Forces with certain rank given general notarial powers. (RCW 73.20.010).

Certificate of Authority.

See topic 10.01 Acknowledgments, subhead Authentication.

Unsworn Statements.

Unsworn written statement will have force of affidavit sworn to before notary if it: (1) Recites that it is certified to be true under penalty of perjury; (2) is subscribed; (3) states date and place of its execution; and (4) states that statement is certified or declared under laws of Washington. (RCW 9A.72.085).

10.04 RECORDS:

Uniform Commercial Code adopted. (Title 62A). See category 3 Business Regulation and Commerce, topic 3.09 Commercial Code.

Recordable Instruments, Requisites, Place of Recording.

Deeds, grants and transfers of real property, mortgages, releases or assignments of mortgages, leases when acknowledged, instruments or agreements relating to community or separate property, powers of attorney to convey real estate, patents to land, receiver's receipts, and all papers required by law to be recorded. (RCW 65.04.030; RCW 65.08.060-.070). *For list of Counties and County Seats see first page for this state in Volume containing Practice Profiles Section.*

Uniform Real Property Electronic Recording Act adopted. (2008, c. 57).

See also categories 3 Business Regulation and Commerce, topic Sales; Estates and Trusts, topic Trusts; Mortgages, topics Chattel Mortgages, Mortgages of Real Property; Property, topics Deeds, Landlord and Tenant, Powers of Attorney.

Foreign Conveyances or Encumbrances.

See topic 10.01 Acknowledgments.

Effect of Record.

Every written instrument conveying or encumbering real estate affords constructive notice to third persons from moment of recording in office of auditor of county where such real estate located. (RCW 65.08.070). Irregular instrument imparts notice. (RCW 65.08.030).

Torrens Act for registering title to real estate is in effect. (65.12). Property can be withdrawn from registration. (RCW 65.12.225).

Transfer of Decedent's Title.

Real estate vests in heirs and devisees at death; no person deemed devisee until will probated. (RCW 11.04.250). All wills recorded by clerk after filing in record of wills. (RCW 11.20.050; RCW 36.23.030).

Filing Under Commercial Code.

Proper place of filing to perfect security interest is as follows: (a) Security interest in fixtures, standing timber, minerals and the like (including oil and gas) attaching upon extraction and accounts from sale of minerals and the like at wellhead or minehead to be filed where mortgage on real property filed; (b) all others with State Department of Licensing. Fees established by WAC 308-390-105. Effective period is five years from filing date. (RCW 62A.9A-525, am'd 2008, c. 290, §2). See category 3 Business Regulation and Commerce, topic 3.09 Commercial Code.

Vital Statistics.

(70.58). Certificates of birth and death are filed with local registrar. Each first-class city is registration district (RCW 70.58.010) and health officer is registrar (RCW 70.58.020). Balance of state divided into registration areas. (RCW 70.58.010). Local registrars transmit originals of certificates to State Registrar of Vital Statistics, Olympia, Washington. (RCW 70.58.030). Copies of birth, death, marriage, divorce or domestic partnership record can be obtained for fee of $20 per copy from Center for Health Statistics, P.O. Box 9709, Olympia, Washington 98504-9709, or (360) 236-4300.

10.05 SEALS:

Use of private seals is abolished but addition of private seal to written instrument does not affect its validity or legality. (RCW 64.04.090).

Corporate Seals.

Absence of corporate seal on any written instrument does not affect its validity or legality. (RCW 64.04.105).

Uniform Commercial Code adopted. (Title 62A). See category 3 Business Regulation and Commerce, topic 3.09 Commercial Code.

10.06 TORRENS ACT:

See topic 10.04 Records.

10.07 VITAL STATISTICS:

See topic 10.04 Records.

11 EMPLOYMENT

11.01 EMPLOYER AND EMPLOYEE:

See topic 11.02 Labor Relations.

11.02 LABOR RELATIONS:

Washington has no comprehensive labor relations act similar to National Labor Relations Act; however, Washington Supreme Court held that policy statement of Anti-Injunction Act (RCW 49.32.020) confers actionable rights on employees, including right of employee to be free from coercion, and interference and restraint from and by their employers in organizing and joining labor unions (65 Wn.2d 827, 400 P.2d 72).

Employers are obligated to act in accordance with policies announced in handbooks unless specific reservations of right are announced and employers are liable in tort for discharging employee for reason that contravenes clear mandate of public policy. (102 Wn.2d 219, 685 P.2d 1081). Tort of wrongful discharge is narrow exception to employment-at-will doctrine. (145 Wn.2d 379, 36 P.3d 1014).

Child Labor.

Children under age of 14 cannot be employed in any labor whatever, in or in connection with any factory, mill, shop, store or any inside employment not connected with farm or housework, performers or youth soccer referees, except upon written permit of superior court judge. (RCW 26.28.060). Industrial Welfare Committee of Department of Labor and Industries empowered to establish prevailing wages, hours and conditions of employment for employees, including minors, in various occupations, trades and industries in which they are employed. (49.12). Rules are subject to public employees collective bargaining contracts. (RCW 49.12.187). Committee may issue special certificate or permit for employee who is physically or mentally handicapped to such extent employee cannot obtain employment, or for trainee or learner, authorizing employment for less than minimum wage. (RCW 49.12.110). Work permits are required for minors. (RCW 49.12.123). Numerous orders have been issued by Committee and violations are deemed misdemeanors punishable by fine. (RCW 49.12.170).

Female Labor.

Discrimination between male and female employees in payment of wages is a misdemeanor and female discriminated against may recover additional amount of compensation she would have earned but for such discrimination in a civil action. (RCW 49.12.175).

Hours of Labor.

On all public work a day's labor is limited to eight hours, except that, subject to approval of affected employees, contractor or subcontractor in any public works contract may enter into agreement with its employees under which employees work up to ten hours in calendar day. Such agreements may not provide for more than four calendar days of such ten-hour days in any given week. Overtime provisions of RCW 49.28.020 do not apply to hours, up to 40 hours per week, worked pursuant to such agreements. (RCW 49.28.010; .065). No domestic employee may be employed more than 60 hours a week. (RCW 49.28.080). Health care workers may not be required to work overtime. (RCW 49.28.140).

Employee Leaves.

Employers required to allow employees to use accrued sick leave to care for child, spouse, parent, parent-in-law, or grandparent of such employee with health condition that requires treatment or supervision. (RCW 49.12.270). Employers with 100 or more employees at worksite (or 100 employees within 20-mile radius with central hiring and customary transfer of workers between worksites) must provide 12 weeks unpaid leave to full-time employees upon birth, adoption or terminal illness of their child. Employer may exclude any 10% of work force from this entitlement; employees who take leave may continue medical and dental benefits at own expense; guaranteed same or equivalent job upon return. (RCW 48.44.360). Employer who provides any parental leave to employees must grant same leave to adoptive parents and stepparents as to biological parents, and must grant same leave to men as to women. (RCW 53.31.040). Employee with sensory disabilities needing to attend training to attain new service animal to be granted certain allowances. (RCW 49.90.010).

Family Leave Program. (49.86).

Family leave program, beginning Oct. 1, 2012. (RCW 49.86.030-.040). Maximum benefit, $250 per week (RCW 49.86.060), payable to qualified individuals (RCW 49.86.040), for maximum of five weeks (RCW 49.86.050).

Law Against Discrimination (49.60) makes it unfair employment practice for: (1) Employer to refuse to hire person or to discharge person or to discriminate between employees in compensation or conditions of employment on account of such person's age, sex, marital status, sexual orientation, race, creed, color, national origin or presence of sensory, mental, or physical handicap, including actual or perceived HIV infection, unless based upon bona fide occupational qualification; (2) labor organization to deny full membership rights and privileges or to expel from membership or to discriminate against member, employer or employee or other person to whom duty of fair representation is owed, because of age, sex, marital status, sexual orientation, race, creed, color, national origin or presence of sensory, mental, or physical handicap, including actual or perceived HIV infection; (3) employment agency to fail or refuse to properly classify or refer for employment person because of age, sex, marital status, race, color, creed, national origin or presence of sensory, mental, or physical handicap, including actual or perceived HIV infection; and (4) employer, employment agency, labor union or other person to discriminate against person opposing unfair employment practices, or filing charge, testifying or assisting in proceedings under 49.60. Act also prohibits retaliation against whistleblower. (RCW 49.60.210). Military personnel and honorably discharged veterans also protected. (RCW 49.60.010). “Whistleblower” defined as state employee who reports alleged improper governmental action to auditor. (RCW 42.40.020). Act also bars requiring any individual to take HIV or hepatitis C test as condition of hiring, promotion or continued employment unless absence of HIV or hepatitis C infection bona fide occupational qualification. It also prohibits discharge of or discrimination against individual in terms and conditions of employment on basis of HIV or hepatitis C test results unless absence of HIV or hepatitis C infection bona fide occupational qualification. State marriage laws not affected. (RCW 49.60.020; .172-.210). Misclassification of employees to avoid employment-based benefits is prohibited. (RCW 49.44.160; .170). Hostile work environment consisting of sexual harassment constitutes sex discrimination. (103 Wn.2d 401, 693 P.2d 708). Administration of act vested in Washington State Human Rights Commission with power to require offenders to cease and desist unfair employment practice. Wilful violation of Commission order or interference with performance of Commission duty is misdemeanor. (RCW 49.60.310). Prohibition on age discrimination covers ages 40 years of age or older. (RCW 49.44.090; RCW 49.60.205).

Separate from charges filed with Commission, individuals may bring civil action for violation of 49.60 to recover actual damages and attorney fees. (RCW 49.60.030[2]). Actions must be commenced within three years under RCW 4.16.080(2). (36 Wn. App. 607, 676 P.2d 545). Settlement agreement of discrimination claim enforceable if future discrimination claims not waived and agreement applied fairly. (100 Wn.2d 221, 667 P.2d 1104).

Bids for public works contracts under RCW 36.32.250 may be rejected based on noncompliance with affirmative action goals. (100 Wn.2d 109, 667 P.2d 1092). Racial and sexual affirmative action plans of governmental bodies are constitutional if: (1) Governmental body has authority to alleviate effects of past discrimination, (2) plan is supported by findings that present practices could perpetuate past discrimination, and (3) plan provides flexibility for appropriate waiver of requirements. (100 Wn.2d 109, 667 P.2d 1092). State prohibited from giving preferences based on race, sex, color, ethnicity or national origin in public employment, public education or public contracting. (49.60). See subhead Apprenticeship Agreements, infra.

Access to Personnel Files.

Employee allowed to inspect at least annually personnel files maintained by employer as part of business records or to which employer refers for information given to persons outside company. Employer may remove irrelevant or erroneous information from files but employee has right to challenge determination that information is erroneous or irrelevant and has right to request that statement of employee's rebuttal or correction be placed in file. Former employee retains right of rebuttal or correction for period not to exceed two years. Act inapplicable to records of employee relating to criminal investigation or records compiled for lawsuit that would not otherwise be discoverable. (RCW 49.12.240; .260).

Industrial Safety and Health.

Rules and regulations regarding machinery safeguards and safe working conditions adopted and promulgated by Director of Department of Labor and Industries. (49.17). Agricultural safety standards prescribed. (RCW 49.17.04).

Worker and Community Right to Know Act establishes right-to-know advisory council, authorizes imposition of 75¢ per employee assessment on employers after July 1, 1985, and creates compliance provisions relating to hazardous substances information and employee instruction. (49.70).

Apprenticeship agreements authorized subject to regulation and supervision of Department of Labor and Industries. Apprenticeship council establishes standards for apprenticeship agreements, issues all necessary rulings and regulations and performs other duties. State assisted apprenticeship programs must advance nondiscrimination principles of state civil rights act. (49.04).

Rights to Inventions.

Provision in employment contract that employee will assign rights in invention developed on own time is void as against public policy, unless employer supplied equipment, facilities, trade secret information or supplies, and invention relates directly to business or research and development of employer or results from work performed for employer. (RCW 49.44.140).

Wages.

Industrial Welfare Committee may set minimum wages for minors and occupations not otherwise governed by federal and state minimum wage requirements. (49.12). Wages of discharged employees must be paid at end of established pay period, unless a labor-management agreement provides otherwise, either in cash or by order redeemable in cash and failure to do so is a misdemeanor. (RCW 49.48.010). It is misdemeanor to wilfully refuse to pay wages due and payable when demanded with intent to secure any discount upon such indebtedness or to annoy or harass employee, and Director of Department of Labor and Industries authorized to order payment of wages owed and to take assignments for such claims, to prosecute actions for collection of wages for persons financially unable to employ attorney, and to require employer to provide bond. (RCW 49.48.040; .060). Director, or designee, is authorized to enter reciprocal agreement with corresponding agencies of other states and maintain court actions for collection in those states for collection of claims or judgments for wages; and to maintain actions in Washington courts for agencies of other states. (RCW 49.48.075). Procedures and penalties are provided for violation of wage payment requirements. (RCW 49.48.082-.087).

Wage deductions under state or federal law, or when deduction has been expressly authorized in writing in advance by employee for lawful purpose accruing to employee's benefit, are lawful provided employer derives no financial benefit from such deduction. (RCW 49.48.090). Wage assignment must also be signed by spouse. (RCW 49.48.100). All other deductions or rebates and wilful or intentional payment of lower wage than rate fixed by statute, ordinance or contract are misdemeanors and employer who collects such rebate or who pays such lower wage is liable in civil action for twice amount of wages unlawfully rebated or withheld, together with court costs and reasonable attorney fees, except where employee knowingly submitted to such violations. (RCW 49.52.050-.070).

Promoters of theatrical enterprises, seven days before commencement of production, must deposit cash or bond with Department of Labor and Industries sufficient to cover wages of production employees for at least one week. (RCW 49.38.020). Claims for such wages may be pursued against deposit in district or superior court. (RCW 49.38.040).

Agreement between wholesale sales representative and principal must be in writing and provide for method of compensating representative pursuant to statutory standards. (49.48).

Minimum Wages and Hours Act adopted. (49.46). Comprehensive act setting minimum wage at $5.70 per hour, increasing for those over 18 years to $6.50 Jan. 1, 2000, and adjusted annually by C.P.I. beginning Jan. 1, 2001 for all employment (except domestic, executive, professional, federal government, employees, and newspaper vendors and carriers and certain other employees). (RCW 49.46.010; .020). Department of Labor and Industries set 2007 minimum wage at $7.93. Exceptions narrowly construed. (46 Wn. App. 163, 730 P.2d 691). Federal Fair Labor Standards Act factors relevant under 49.46 to issue of compensating “on-call” employees. (109 Wn.2d 282, 745 P.2d 1). Overtime provided for labor in excess of 40 hours per week at 1½ times wage; employee may request compensatory time in lieu thereof. Excepted from overtime provisions are all employees exempted from minimum wage requirements, seamen, and certain other employees. (RCW 49.46.130).

Assignments.

See category 8 Debtor and Creditor, topic 8.01 Assignments.

Priority of Claims for Wages.

In all assignments of property made by any person to trustees or assignees on account of the inability of the person at the time of the assignment to pay his debts, or in proceedings in insolvency, up to $100 of wages of employees of such persons for services rendered within 60 days previously, are preferred claims, and must be paid by such trustees or assignees before any other creditor or creditors of assignor. (RCW 49.56.010). Claims for wages up to $600 preferred to any claim by state agency. (RCW 49.56.040). Unlawful for employer to take unauthorized deductions of portions of employee's final wages. (RCW 49.48.010).

Labor Unions.

Organization of labor unions for purpose of bettering wages, hours and working conditions is legalized. (RCW 49.36.010). No “right to work” laws. “Yellow dog” contracts are unenforceable. (RCW 49.32.030). Labor relations in health care activities governed by comprehensive statute. (49.66).

Public Employees' Collective Bargaining Act (41.56, am'd 2008, c. 203, §2) gives most public employees right to organize and designate representatives of their own choosing; protects them against discrimination for exercising such rights; sets forth procedures for determining appropriate bargaining units and holding of representation elections by Public Employment Relations Commission; provides for certification of majority representatives; authorizes public employers to engage in collective bargaining. Act does not give public employees right to strike. Most uniformed personnel can resolve negotiation disputes through interest arbitration. (RCW 41.56.450). Duty of fair representation applies to unions under Public Employment Relations Act. (100 Wn.2d 361, 670 P.2d 246).

Similar rights given to employees of school districts (RCW 41.59.020), public utility districts (RCW 54.04.170-.180), port districts (53.18), Washington Public Power Supply System (101 Wn.2d 24, 677 P.2d 108), and state ferry system employees (47.64).

Labor Disputes.

Except for governmental employer, court does not have jurisdiction to issue temporary or permanent injunction in any case growing out of labor dispute (RCW 49.32.011), except to enforce no strike clause (59 Wn.2d 90, 366 P.2d 16), or to enjoin violence, mass picketing and certain types of “stranger” picketing (49 Wn.2d 145, 298 P.2d 1112). Sit-down strikers and persons who commit industrial sabotage can be prosecuted for commission of felony. (RCW 9.05.060). It is gross misdemeanor for person not directly involved in labor dispute to recruit or import from out of state persons for purpose of: (1) Replacing strikers or locked out employees or (2) picketing an employer involved in a labor dispute. (RCW 49.44.100). With some limited exceptions related to particular types of employment, it is misdemeanor to require any employee or prospective employee to take or be subjected to lie detector tests as condition of employment or continued employment (RCW 49.44.120), or to cause employee or prospective employee to be discharged or blacklisted by wilfully and maliciously making or issuing any statement or paper that will tend to influence or prejudice mind of an employer against an employee or prospective employee (RCW 49.44.010). Civil action to enforce RCW 49.44.120 may result in award of actual damages, civil penalty of $500, and reasonable attorney fees and costs. (RCW 49.44.135).

Laborers' Liens.

See category 8 Debtor and Creditor, topic 8.13 Liens.

Workers' Compensation.

See subhead Industrial Insurance, infra.

Industrial Insurance.

Employments Included.

(51.12). All except most domestic service, gardening, repair, etc., in private home, work for sustenance for religious or charitable organizations, most sole proprietorships or partnerships, except some contractors, work outside trade or business of employer and not in home of employer, jockeys in licensed race meets, children under 18 on family farm, corporate officer who is director and shareholder, musicians or entertainers employed on casual basis or booth renter (RCW 51.12.020) and certain commuter ride-sharing drivers (RCW 51.08.180). Employers with exempt employees may elect coverage. (RCW 51.12.110). Special provisions relate to volunteers, certain juveniles, federal projects, railway employees, interstate and intrastate commerce, maritime work, certain contractors and electrical contractors, certain common or contract carriers, certain trainees, volunteer law enforcement officers, certain musicians and entertainers and extraterritorial coverage. (RCW 51.12.035-.150).

Funding.

All employers insure with state fund unless self-insured; pay premiums quarterly based on risk class (WAC 296-17) subject to individual employer experience modification. Group and retroactive rating plans available. (51.16). No private carriers but employers may qualify to self-insure and use claims service companies. (51.14). Ombudsman provided for employees of self-insured. (51.14). Limited group self-insurance. (RCW 51.14.150-.160). Qualifications include minimum $100,000 in money, securities, bond or letter of credit. Letter of credit acceptable only if self-insured has net worth not less than $500,000,000. Up to 80% reinsurance permitted. (RCW 51.14.020). Termination of self-insurer status by election or for cause. (RCW 51.14.050; .080).

Exclusivity.

All employee civil actions for covered injuries or diseases abolished, regardless of negligence or fault, except for deliberately intentional injury by fellow employee (38 Wn. App. 812, 690 P.2d 603) or employer, and third-party actions (51.04). “Dual capacity” doctrine not adopted. Immunity of employer from suit not applicable to employment discrimination of handicapped injured workers or bad faith claims administration if conduct constitutes tort of outrage. (107 Wn.2d 563, 731 P.2d 497, *overruled on other grounds*, 111 Wn.2d 903, 766 P.2d 1099; 50 Wn. App. 67, 747 P.2d 1103). Common-law action permitted for “work-related” disease not otherwise included under act. (110 Wn.2d 812, 759 P.2d 351).

Third-Party Action.

(51.24). Injured worker may elect to sue third party (one “not in same employ”), except certain design professionals (RCW 51.24.035), for negligence or wrong including strict liability.

(51.24). Third party not entitled to contribution from employer nor to indemnity from employer absent separate indemnity contract. (102 Wn.2d 235, 684 P.2d 73). Comparative negligence may reduce worker recovery. (90 Wn.2d 323, 582 P.2d 500). Worker may obtain full industrial insurance benefits whether or not electing to sue third party. (RCW 51.24.040). Worker to notify Department/self-insurer of third-party action so notice of interest can be filed. (RCW 51.24.030). If worker does not elect to sue third party within 60 days of election request, claim deemed assigned to state (Department of Labor and Industries) or self-insurer. Special assistant attorneys general, which may be private attorneys, litigate third-party actions assigned to Department. (RCW 51.24.110).

Worker's recovery subject to qualified Department/self-insurer lien; worker must notify Department of recovery and apply allocation formula (RCW 51.24.060) to distribute funds as follows: (1) Costs and fees; (2) one-fourth of balance to worker; (3) balance up to amount of worker's compensation paid (less Department/self-insured employer share of costs and fees where worker sues) to Department/self-insured employer except that in actions filed after July 31, 1986, employer or co-employee fault eliminates Department/employer recovery and lien; (4) remainder to worker. Where no employer or co-employee fault, future compensation offset by amount of remainder to worker. (RCW 51.24.050-.060). Settlements resulting in lien deficiency void without prior written approval of Department/self-insurer. (RCW 51.24.090; 44 Wn. App. 174, 721 P.2d 981).

Second Injury.

Where combined effects of prior disability whether known or unknown and subsequent industrial injury or occupational disease render worker totally permanently disabled or cause death, employer charged only for disability which would have resulted from second injury had there been no previous disability. (RCW 51.16.120). Not available to self-insurers where second injury occurred before July 1, 1977. (46 Wn. App. 252, 731 P.2d 1).

Covered Injury/Disease.

“Injury” (RCW 51.08.100) includes those occurring “in the course of” employment; includes injury resulting from ordinary movement in job (95 Wn.2d 583, 628 P.2d 456). Heart attack, stroke covered only when product of “unusually strenuous” exertion. (52 Wn.2d 33, 323 P.2d 241; 1 Wn. App. 730, 463 P.2d 256). “Repetitive trauma” may be covered as occupational disease, otherwise uncertain. (Compare 63 Wn.2d 456, 387 P.2d 760 and 49 Wn.2d 826, 307 P.2d 272 and 54 Wn.2d 428, 342 P.2d 218.) “Course of employment” includes acting at employer's direction or in furtherance of employer's business regardless of stated job or hours; includes lunch hour on premises or away by employer's direction; excludes injuries in parking lot before/after work, injuries while going to and from work, and injuries while participating in social, recreational, or athletic activities. (RCW 51.08.013; RCW 51.32.015; RCW 51.36.040). “Occupational diseases” are those diseases or infections arising naturally and proximately out of employment. (RCW 51.08.140). Condition must arise as matter of course and natural consequence from distinctive conditions of worker's job and meet “but for” test of causation. Conditions of disease and disease-based disability covered including aggravation of preexisting condition and most conditions from repetitive trauma. “Increased risk” and “logical relationship” tests discarded. (109 Wn.2d 467, 745 P.2d 1295; 32 Wn.2d 472, 202 P.2d 448). Mental stress claims not covered as occupational disease. (RCW 51.08.142; WAC 296-14-300). Presumptive compensability of respiratory disease in certain firefighters. (RCW 51.32.185). Provisional benefits paid to maritime-related asbestos claims pending identification of responsible employer/insurer. (51.12).

Benefits include treatment from physician or licensed advanced nurse practitioner of choice (RCW 51.36.010), temporary total disability (time loss) payments (RCW 51.32.090), temporary loss of earning power payments (RCW 51.32.090[3]), qualified vocational services (RCW 51.32.095), permanent partial disability awards (RCW 51.32.080), permanent total disability (pension) benefits (RCW 51.32.060). Surviving spouse and dependents (payable to legal custodian) may be entitled to death and pension benefits. (RCW 51.32.050-.072). For disease claims filed after June 30, 1988, benefits to correspond to schedules in effect when disability first occurred or treatment needed regardless of date of contraction or time of filing. (RCW 51.32.180).

Monthly benefits for temporary or permanent total disability based on percentage of earnings, marital status and number of dependents (RCW 51.32.050; .060); special provisions for seasonal/part-time workers and those receiving “tips” income; benefits paid under federal OASDI reduce monthly workers' compensation entitlement subject to limitations in federal act (RCW 51.32.220); may be curtailed for workers voluntarily retired (RCW 51.32.060[6]; .090[8]). Permanent partial disability awards based on comparison to statutory amputation and other values (RCW 51.32.080), and administrative categories of impairment (WAC 296-20-200 et seq.) related to total bodily impairment.

Vocational Rehabilitation.

Department may, in its sole discretion, authorize vocational services where necessary and likely to restore employability. Services may include placement, retraining, temporary total disability payments during vocational service period. Benefits limited to two years. (RCW 51.32.095).

Claims Procedure.

Application for compensation with physician's certificate must be filed by worker with self-insured employer or Department within one year after injury (RCW 51.28.050); or two years after date worker had written notice from physician or licensed advanced nurse practitioner of occupational disease and of two-year limitation period for filing (RCW 51.28.055). Condition must become “disabling” before occupational disease limitations period begins to run. (45 Wn.2d 574, 277 P.2d 338; 51 Wn.2d 659, 321 P.2d 257). Administration determinations made by Department of Labor and Industries. Limited authority of self-insurers to allow and close claims. (RCW 51.32.055).

Aggravation.

Within seven years (ten years for eye injuries) upon workers' application (or at any time by Department's discretion) after medically based first closure order becomes “final”, claim may be reopened for all benefits upon showing of objective worsening related to industrial injury or disease. (RCW 51.32.160; RCW 51.28.040). Reopening period not tolled by intervening appeal. (compare 44 Wn. App. 571, 723 P.2d 18 with 64 Wn. App. 165, 822 P.2d 1264). Claim deemed reopened if not denied within 90 days (150 days if delayed for good cause). First closure date for some older claims deemed to be July 7, 1985. Discretionary to reopen only for medical benefits upon worker's request even after seven years. Diminution of condition need not be medically shown where permanently, totally disabled worker returns to work. (RCW 51.32.160).

Appeals.

Most claims are determined and orders issued by Department. Aggrieved worker, beneficiary or employer may protest to Department, within 60 days of communication of adverse order (if order allows this), or appeal, within 60 days of communication of order, to Board of Industrial Insurance Appeals for de novo hearing under superior court trial rules before industrial appeals judge. (51.52). Appellant carries burden of going forward with evidence except in wilful misrepresentation cases. (RCW 51.52.050, am'd 2008, c. 280, §1). Party aggrieved by Board decision may appeal within 30 days of communication of final Board decision to superior court for de novo court or jury trial on Board record (RCW 51.52.110); failure to also timely serve Board and Director of Department may defeat jurisdiction (compare 24 Wn. App. 591, 602 P.2d 724 and 25 Wn. App. 214, 607 P.2d 316 with 94 Wn.2d 889, 621 P.2d 716 and 115 Wn.2d 194, 796 P.2d

412); except upon allegation of irregularities at Board, no new evidence or testimony allowed in superior court appeal (RCW 51.52.115). Unless time extended for good cause, Department must pay within 60 days after compensation order becomes final and not subject to review or appeal. In addition to other remedies, court may order up to $1,000 penalty for failure to comply. (RCW 51.32.215).

Settlement.

Worker may not waive rights under statute. (RCW 51.04.060). This and aggravation reopening right restrict finality of settlements. Agreements between employer and worker at Board level must be approved by Board.

Unemployment Compensation.

(Title 50). All employed persons (not limited to common law relationship of master and servant) involving rendition of personal service are entitled to participate, including persons employed in domestic service after Dec. 31, 1977 by persons who paid domestic service personnel $1,000 or more, in total, in any calendar quarter in current or preceding calendar year, but excluding all other persons employed in domestic service. (RCW 50.04.160). Employees in shared work compensation plan entitled to participate. (50.60). Temporary services agency deemed to be employer (RCW 50.04.245), as are Indian tribes (RCW 50.04.090). Professional employer organizations that provide contract (not temporary) services, are co-employers with client. (RCW 50.04.298; RCW 50.12.300; .310; RCW 50.24.220; and RCW 50.29.090). Services performed as corporate officers included unless corporation elects otherwise under RCW 50.24.160. (RCW 50.04.165). Excluded are independent contractors, family employment, crew members of foreign vessels, federal or foreign government employees, insurance agents or solicitors, real estate brokers or salesmen, investment company agents or solicitors to extent that they are compensated by commission, outside salesmen paid solely by commission, newsboys, musicians or entertainers under written contract with purchaser for specific engagement or engagements and for whom no other duties are performed, together with number of specially exempted services as set forth in RCW 50.04.232; RCW 50.44.040; .270. Dislocated workers—individuals who receive notice of employment termination, are eligible for benefits, and are unlikely to return to occupation or industry because of diminishing demand for skills—are eligible while in approved training programs. (RCW 50.04.075; RCW 50.20.043). Also excluded are educational employees unemployed between academic years who have written, verbal or implied agreement that they will perform services in same capacity in second academic year. (RCW 50.44.050; .052). As of Jan., 1, 1990, agricultural workers on small farms no longer excluded. (RCW 50.04.150). In general, state unemployment statute has been amended so as to meet requirements of Federal Unemployment Tax Act. (50.98). Individual is not eligible for benefits during any week or portion thereof for which Commissioner finds that individual's unemployment is due to strike at employee's factory, establishment or other premises, or lockout by employer who is member of multiemployer bargaining unit, unless claimant or recipient is not participating in, financing, or directly interested in strike or lockout, and is not member of class of workers employed at premises where strike or lockout occurred or which participates in, is directly interested in, or finances, strike or lockout. (RCW 50.20.090). Individual is disqualified from benefits for discharge for misconduct connected with work (RCW 50.20.060), leaving work voluntarily without good cause (RCW 50.20.050, am'd 2008, c. 323, §1), misrepresentation regarding claim (RCW 50.20.070), refusal to apply for or accept suitable work (RCW 50.20.080), and attending school or college for 12 or more hours per week (RCW 50.20.095). Persons otherwise eligible for benefits, who are enrolled in approved self-employment training program, may qualify. (RCW 50.20.250).

Benefits and Rates.

Formulas for determination of benefits are provided. Benefits may differ depending on date claim arose. (RCW 50.20.120). Special rules apply for claims dated between May 3, 2009 and January 2, 2010. (RCW 50.20.1201). Extended benefits may be payable for lesser of 13 weeks or ½ previous entitlement. (RCW 50.22.050). Training benefits may be paid. (RCW 50.22.150). "Base year" defined as first four of last five completed calendar quarters immediately preceding first day of benefit year. (RCW 50.04.020). Certain persons under temporary total disability through industrial insurance or crime victims compensation also eligible for unemployment compensation. (50.06; RCW 50.06.900).

Contribution rates for employers are based on formula provided in RCW 50.29.025. Employer may make voluntary contributions to reduce contribution rate. (RCW 50.29.026). Contribution-paying employers may request relief in writing from charges for benefits paid to employees discharged for misconduct or reasons not attributable to employer. (RCW 50.29.020). Certain employers, such as nonprofit organizations and local governments, may elect to make payments in lieu of contributions. (50.44). Penalties and adjustments are imposed if business transferred to reduce rates. (RCW 50.29.063).

11.03 WORKERS' COMPENSATION LAW:

See topic 11.02 Labor Relations.

12 ENVIRONMENT

12.01 ENVIRONMENTAL REGULATION:

General Supervision.

Department of Ecology (Olympia, Wash. 98504) supervises air, water, solid waste, hazardous substances and other environmental matters. (43.21A; 70.105). State Board of Health and Department of Health establishes and enforces drinking water quality standards. (70.142). Energy Facility Site Evaluation Council promulgates siting guidelines, evaluates proposed site of construction or expansion of energy facilities. (80.50 and 80.80). State Energy Office (43.21F) develops conservation guidelines and contingency plans for energy shortage alerts and emergencies (43.21G). Forest Practices Board regulates forestry. (76.09). Environmental Hearings Office (RCW 43.21B.005) consists of Pollution Control Hearings Board (RCW 43.21B.010), Forest Practices Appeals Board (RCW 76.09.210) and Shorelines Hearings Board (RCW 90.58.170). Director of State Department of Agriculture regulates pesticide use (RCW 17.21.030; RCW 15.58.040) and horticultural inspections (15.17). Department of Health investigates pesticide poisoning cases. (70.104). Department of Health, in consultation with Department of Ecology and local health departments, supervises biomedical waste treatment. (70.95K). Washington State Patrol enforces Federal D.O.T. regulations on transportation of hazardous substances. (46.48). Department of Labor and Industries regulates indoor air quality (RCW 70.162.005-.050), including asbestos (49.26).

Environmental Impact Statement required for proposed actions having probable, significant, adverse environmental impact. (RCW 43.21C.031). Lead agencies may use existing documents under certain circumstances. (RCW 43.21C.034). Agencies are to process applications implementing renewable fuel standards to minimize processing and review times. (RCW 43.21C.232).

Environmental Excellence Programs (43.21K).

Must achieve better environmental results than would otherwise be achieved. (RCW 43.21K.020). May be entered into even though inconsistent with other legal requirements. (RCW 43.21K.030). Requirements for environmental excellence program agreement. (RCW 43.21K.166). Thirty-day notice required. (RCW 43.21K.070). Other environmental laws superseded.

Prohibited Acts of Pollution.

Water (Generally).

Discharge of any matter that tends to cause pollution of surface or groundwater is unlawful (RCW 90.48.080; see catchline Solid Waste, infra). Pollution defined by statute (RCW 90.48.020) and regulated by Department of Ecology rules, regulations (RCW 90.48.035). Wetlands and aquatic habitat mitigation plans authorized (75.20; 77.55; 79.90; 90.48; 90.74), as are watershed resource inventory area plans (RCW 90.82.010-.050).

Water (Oil).

Unlawful for oil to enter water, regardless of cause or fault, unless authorized or caused by war, sabotage, or negligence of U.S. or state. (RCW 90.48.320). Compensation for oil spilled may not exceed $100 per gallon. (RCW 90.48.366).

Water (Drinking).

Public water supply systems must comply with drinking water quality standards. (RCW 70.142.050). Voluntary water transfers between water users supervised by water conservancy board. (RCW 90.80.005-.150).

Solid Waste.

Dumping of solid waste on or under ground or water except at site with permit issued under local health regulations is class 3 civil infraction. (RCW 70.95.140; .240). Statute provides statewide planning and guidelines for handling waste. (70.95). Leaving unwholesome substance on land or water highway or depositing offal into lake, creek or river is gross misdemeanor. (RCW 9.66.050). Befouling or obstructing waters, streets or parks is public nuisance. (RCW 9.66.010). Littering prohibited and penalties provided. (RCW 70.93.060). Unlawful to operate landfill or incinerator without certified operator. (RCW 70.95D.010-.110).

Hazardous Waste.

Unlawful to dispose of hazardous wastes except at designated disposal sites. (RCW 70.105.050). Department of Ecology administers Federal Resource Conservation and Recovery Act which regulates treatment, storage and disposal of hazardous waste (RCW 70.105.145) except for provisions added by federal Hazardous and Solid Waste Amendments of 1984.

Air.

Except as specified in variance permit, unlawful to knowingly cause air pollution (RCW 70.94.040; .335) defined as contaminants sufficient to injure health, plants, animals, property or enjoyment of life (RCW 70.94.030). Statute provides program of control via regional and county Air Pollution Control Authorities. (RCW 70.94.053; .141). Woodburning standards are established. (RCW 70.94.473, am'd 2008, c. 40, §1).

Noise.

Department of Ecology authorized to adopt noise level standards, including performance standards for products. (RCW 70.107.030).

Enforcement.

Water.

Department of Ecology notifies of violation and makes appropriate order, may impose civil penalty, may sue to enjoin and otherwise enforce. (RCW 90.48.120-.144). Administrative Procedure Act applies. (RCW 90.48.230). Compliance with drinking water quality standards enforced by Department of Health. (RCW 70.142.050).

Solid Waste.

Local health department. Criminal provisions enforced by law enforcement agencies. (RCW 9A.04.090).

Hazardous Waste.

Department of Ecology investigates releases, conducts remedial action, issues compliance orders; civil penalties for noncompliance. (RCW 70.105.095; 70.105D). Private right of action established under Model Toxics Control Act. (RCW 70.105D.080).

Air.

Control officer appointed by local air pollution control authority. (RCW 70.94.170). Local board or Department of Ecology can give notice of violation or order corrective action (RCW 70.94.211; .331; .332) with appeal to Pollution Control Hearings Board (RCW 70.94.221) and to Superior Court (RCW 43.21B.190).

Noise.

Department of Ecology pursuant to Administrative Procedure Act and local government. (RCW 70.107.030; .060). Port district is to monitor aircraft noises surrounding airports. (53.54).

Shoreline.

Local government given primary responsibility to administer regulatory program. (RCW 90.58.050). Shoreline Hearing Board reviews local government permit decisions. Appeals governed generally by Administrative Procedure Act. Department of Ecology or attorney general may obtain review of final order granting permit or denying application by filing request within 21 days of such action. (RCW 90.58.180).

Penalties.

Water (Generally).

Civil penalty up to $10,000/day (RCW 90.48.144); liability for damage to resource unless operating in compliance with water discharge permit (RCW 90.48.142). Criminal penalty for wilful violation of statute or order, $10,000 plus costs of prosecution, and/or one year imprisonment. Each day of wilful violation may constitute separate additional violation. (RCW 90.48.140).

Water (oil).

Person owning or controlling oil must clean up (RCW 90.48.325); owner and person causing spill liable for costs if state cleans up (RCW 90.48.335). Strict liability for damages. (RCW 90.48.336). Civil penalty up to $20,000 for each negligent discharge, and up to $100,000 for each intentional or reckless discharge. (RCW 90.48.350).

Solid Waste.

Misdemeanors punished by 90 days imprisonment or $1,000 fine or both (RCW 9.92.030); gross misdemeanor one year and/or $5,000 or both (RCW 9.92.020). Depositor of debris may additionally have to remove all debris in area. (RCW 70.93.060; .070; RCW 70.95.240).

Hazardous Waste.

Civil penalties of $25,000 per day per violation, also treble damages; $5,000 per day civil penalty for failure to notify of release or for providing false information. (RCW 70.105D.050). Criminal penalty of $10,000 and/or one year imprisonment per violation. (RCW 70.105.090).

Third-party right of action against violator. (RCW 70.105.097; RCW 70.105D.050, .080). Provision made for reduction or removal of lien based on remediation costs. (RCW 70.105D.050).

Pesticides.

Pesticide dealers, users, inspectors and registrants regulated. (15.58; 17.21). Violation of pesticide laws a misdemeanor. (RCW 15.58.330; RCW 17.21.310). Civil penalty up to $7,500 per violation. (RCW 15.58.335; RCW 17.21.315).

Air.

Washington Clean Air Act. (70.94, am'd 2008, c. 14, §§35 and 36; c. 40, §1). Knowing violation of statute or regulation or negligent unauthorized release of pollutant into ambient air punishable by fine up to $10,000 and/or imprisonment up to one year. (RCW 70.94.430). Knowing unauthorized release of pollutant into ambient air with knowledge that release places another in imminent danger crime punishable by fine not less than $50,000 and/or imprisonment up to five years. (RCW 70.94.430). Additional or alternate consequence of violation of statute or rule: Civil penalty up to $10,000 per day subject to increase for inflation. (RCW 70.94.431).

Noise.

Violation of Department of Ecology rule subjects one to civil penalty not to exceed $100. (RCW 70.107.050).

Shoreline.

Injunctive or declaratory relief; wilful violation is gross misdemeanor; $25-$1,000 fine and/or 90 days; third or subsequent violation in five-year period, $500-$10,000. (RCW 90.58.220). Failure to comply with permit or failure to obtain permit is subject to civil penalty of up to $1,000 for each violation and for each day. (RCW 90.58.210). Liability for all damages to public or private property and costs of restoration; court may award attorney fees and costs. (RCW 90.58.230). Appeal process provided in case involving single-family residence or appurtenance, or appeal of penalty of $15,000 or less. (RCW 90.58.185). Project completion times as per statute. (RCW 90.58.143).

Permits.

Water.

Permits required for all commercial discharges. (RCW 90.48.160). Permit shall be issued unless discharge found to be pollution, but may be conditioned (RCW 90.48.180), and is subject to revocation (RCW 90.48.190). All discharge of oil requires a permit. (RCW 90.48.343). Annual reports of discharges describing amounts and materials. (RCW 90.52.010). All known, available and reasonable treatment required. (RCW 90.52.040).

Solid Waste.

Local health departments issue permits for disposal sites (RCW 70.95.170) following plan pursuant to standards (RCW 70.95.090) reviewed by Department of Ecology (RCW 70.95.185).

Hazardous Waste.

Model Toxics Control Act adopted. (70.105D). Permits required for treatment, storage or disposal of dangerous and extremely hazardous wastes. Disposal must be at established and approved site. (RCW 70.105.050). Documentation required for extremely hazardous waste disposal. (RCW 70.105.030).

Air.

Washington Clean Air Act (70.94, am'd 2008, c. 14, §§35 and 36; c. 40, §1). Variance may be granted by Department of Ecology or local board. (RCW 70.94.154; .162; .181; .422). Annual reports of discharges into air and water describing amounts and materials required to be filed. (RCW 90.52.010). Episode avoidance plan can be established by Department of Ecology to reduce normal emissions when certain meteorological conditions occur. (RCW 70.94.715). Permits required from Department of Ecology or Air Pollution Control Authority for burning in weed abatement, firefighting instruction, agricultural activities (RCW 70.94.6528) and from Department of Natural Resources for burning in abatement of forest fire hazard, prevention of fire hazard, instruction in forest fire fighting, silviculture to improve forest lands (RCW 70.94.6534) and for burning on land under protection of Department of Natural Resources (RCW 76.04.205). Fossil-fueled electric facilities must file mitigation plans. (RCW 70.94.892).

Shoreline.

Permits must be obtained from local government for shoreline developments. (RCW 90.58.140). Exemptions are set forth and include construction of residences, private docks and community docks. Variance or conditional use requires approval of Department of Ecology. (RCW 90.58.030; RCW 90.58.140). Activities which do not constitute “developments” may also require permits. (109 Wn.2d 91, 743 P.2d 265).

Energy Facility.

(80.50). Certification required for construction or expansion of energy plants, transmission facilities and corridors. (RCW 80.50.060). Energy Facility Site Evaluation Council receives application, evaluates site, holds public hearings, prepares EIS, sets conditions, and makes recommendation to governor, who approves or denies certification. (RCW 80.50.071-.100). Voter approval required for bond financing of major public energy projects. (RCW 80.52.040). Public agency priority for bond sales to finance energy expenditures for conservation, renewable resources, co-generation and projects with high fuel-conservation efficiency. (RCW 80.52.080). Provision is made for net metering systems for renewable energy systems. (RCW 80.60.005-.040). Carbon dioxide credits authorized. (RCW 80.70.010-.070).

Environmental Coordination Procedures Act.

One who undertakes any project (except power plants, subject to 80.50) requiring permits from Department of Ecology and one or more other state agencies may submit one master application to Department of Ecology for expedited processing. (90.62).

Uniform Environmental Covenants Act adopted. (64.70).

13 ESTATES AND TRUSTS

13.01 ADMINISTRATION:

See topic 13.08 Executors and Administrators.

13.02 ADVANCEMENTS:

See topic 13.07 Descent and Distribution.

13.03 ALLOWANCES:

See topic 13.08 Executors and Administrators.

13.04 CLAIMS:

See topic 13.08 Executors and Administrators; category 5 Civil Actions and Procedure, topic 5.17 Pleading.

13.05 DEATH:

Presumption of death arises where person absent seven years without tidings of his existence. (184 Wash. 1, 49 P.2d 469). Written finding of presumed death made by authorized officer pursuant to federal missing persons act is received by court as prima facie evidence of death (RCW 5.40.020) as, for purposes of issuing letters of administration in probate, is fact that absentee distributee has not claimed property within seven years of court's appointment of agent for absentee distributee (RCW 11.76.200; .220; .240; .243).

Survivorship.

Uniform Simultaneous Death Act adopted. (11.05).

Actions for Death.

Wrongful Death Statute.

If death of decedent caused by wrongful act, neglect or default of another, his personal representative may sue person causing death for damages (RCW 4.20.010) for benefit of wife, husband, state registered domestic partner, child or children, including stepchildren, of decedent, but if there be no wife, husband, child or children, including stepchildren, action may be maintained for benefit of parents, sisters or brothers who may be dependent upon decedent for support and who are resident within U.S. at time of his or her death (RCW 4.20.020). Damages shall be such as may to jury seem just. (RCW 4.20.020). Action must be commenced within three years of decedent's death (RCW 4.16.080[2]) and it survives death of tortfeasor (RCW 4.20.046, am'd 2008, c. 6, §409).

Survival Statute.

If personal injury of decedent occasions his death, his executor or administrator may sue for personal injuries for benefit of spouse, state registered domestic partner, child or children, including stepchildren, of decedent, but if there be no spouse, state registered domestic partner or such children, then action may be maintained for decedent's parents, sisters, or brothers who may be dependent upon decedent for support and who are resident within U.S. at time of his or her death. (RCW 4.20.060). Note that this action is distinct from suit for wrongful death (181 Wash. 576, 44 P.2d 193), decedent's death is not an element of damage (60 Wash. 87, 110 P. 795), and there can be no double recovery (82 Wn.2d 68, 507 P.2d 149).

Child Injury or Death Statute.

Father and/or mother may sue for injury or death of minor child, or child on whom either or both are dependent for support; in case of illegitimate child, father may not sue unless paternity established and support has been regularly contributed. Damages, in addition to medical, hospital, medication expenses and loss of services and support, may be recovered for loss of love and companionship of child and for injury or destruction of child-parent relationship in amount as may be just. (RCW 4.24.010). Parents dependent upon deceased child over age of majority may recover even though executor of child's estate had already settled wrongful death action against tortfeasor and settlement proceeds passed to child's minor daughter. (52 Wn. App. 61, 757 P.2d 550).

Death Certificate.

See category 10 Documents and Records, topic 10.04 Records, subhead Vital Statistics.

Uniform Anatomical Gift Act.

See topic 13.16 Wills.

Living Wills.

See topic 13.16 Wills, subhead Living Wills.

13.06 DECEDENTS' ESTATES:

See topics 13.07 Descent and Distribution, Executors and Administrators, Wills; category 8 Debtor and Creditor, topic 8.10 Homesteads.

13.07 DESCENT AND DISTRIBUTION:

Upon death of decedent, one-half share of community property and of quasi-community property is confirmed to surviving spouse or state registered domestic partner and other one-half share, if not subject of testamentary disposition, shall descend and be distributed as provided in following subhead as shall all other property with respect to which decedent died intestate. (RCW 11.04.015; RCW 11.02.070; 26.16). See category 14 Family, topic 14.09 Spouse and Domestic Partner, subhead Quasi-Community Property.

Descent and Distribution of Real and Personal Property.

Surviving Spouse or State Registered Domestic Partner: (a) All of decedent's share of net community and quasi-community estate; and (b) ½ of net separate estate if intestate is survived by issue; or (c) ¾ of net separate estate if there is no surviving issue, but intestate is survived by one or more of his parents, or by one or more of issue of one or more of his parents; or (d) all of net estate, if there is no surviving issue nor parent nor issue of parent. (RCW 11.04.015[1]).

Shares of Others Than Surviving Spouse or State Registered Domestic Partner: Share of net estate not distributable to surviving spouse, or entire net estate if there is no surviving spouse, as follows: (a) To issue of intestate; if in same degree of kinship to intestate they take equally; if of unequal degree those of more remote degree take by representation; (b) if intestate not survived by issue then to parents who survive; (c) if intestate not survived by issue or parent then to those issue of parents who survive; if all in same degree of kinship to intestate they take equally; if of unequal degree those of more remote degree take by representation; (d) if intestate not survived by issue or by parent, or by any issue of parents, then to grandparent(s) who survive; if both maternal and paternal grandparents survive, maternal grandparent(s) take ½ and paternal grandparent(s) take ½; (e) if intestate not survived by issue, parent(s), by any issue of parent(s), or by grandparent(s) then to issue of grandparent(s) who survive; taken as groups issue of maternal grandparent(s) share equally with issue of paternal grandparent(s); within each group all members share equally if in same degree of kinship to intestate, or if of unequal degree then issue of more remote degree take by representation. (RCW 11.04.015[2]).

Half Blood.

Kindred of half blood inherit same share they would have inherited if they had been of whole blood unless inheritance comes to intestate by descent, devise or gift from one of his ancestors, or “kindred of such ancestor's blood,” in which case all those not of “blood of such ancestors” are excluded from inheritance. Note, words enclosed in quotation marks include child lawfully adopted by one who is in fact of blood of such ancestors. (RCW 11.04.035).

Illegitimates.

For purpose of inheritance to, from or through any child, effects and treatment of parent-child relationship not dependent upon whether parents have been married. (RCW 11.04.081).

Adopted Children.

See category 14 Family, topic 14.01 Adoption, subhead Effect of Adoption.

Determination of Heirship.

At hearing on final report of personal representative, court may take testimony to determine who are heirs or legatees or persons entitled to have property distributed to them and court shall enter decree adjudging same. (RCW 11.76.050). See also topic 13.08 Executors and Administrators, subhead Special Kinds of Administration, catchline Adjudication of Testacy or of Intestacy and Heirship.

Nonintervention Powers.

See topic 13.08 Executors and Administrators, subhead Special Kinds of Administration.

Powers, Appointment and Procedure Regarding Personal Representative.

See topic 13.08 Executors and Administrators.

Adjudication of Testacy or Intestacy.

See topic 13.08 Executors and Administrators.

Advancements.

If person dies intestate, property given in his lifetime as advancement to any person who, if intestate had died at time of making advancement, would be entitled to inherit part of estate, is counted toward advancee's intestate share, and to extent it does not exceed such intestate share is taken into account in computing estate to be distributed. Every gratuitous inter vivos transfer is deemed to be absolute gift and not advancement unless shown to be advancement. Advancement is considered as of its value at time advancee came into possession or enjoyment or at time of death of intestate, whichever first occurs. If advancee dies before intestate leaving lineal heir who takes from intestate, advancement taken into account in same manner as if made directly to such heir. If heir is entitled to lesser share in estate than advancee would have been entitled had he survived intestate, heir is charged only with proportion of advancement as amount he would have inherited, had there been no advancement, bears to amount which advancee would have inherited, had there been no advancement. (RCW 11.04.041).

Election.

Tenancy in dower and by curtesy abolished. (RCW 11.04.060).

Escheat.

Whenever any person dies, whether resident or not, leaving property subject to jurisdiction of this state and without being survived by person entitled to same under laws of this state, such property is escheat property (RCW 11.08.140) title to which vests in state as of death of owner (RCW 11.08.150). However, if a person dies leaving surviving spouse or surviving domestic partner and issue by former spouse or domestic partner and leaving a will whereby all or substantially all of deceased's property passes to surviving spouse or surviving domestic partner or having before death conveyed all or substantially all his or her property to such survivor, and afterwards latter dies without heirs and without disposing of his or her property by will so that except for this section same would all escheat, issue of spouse or domestic partner first deceased who survive spouse or domestic partner last deceased take and inherit from spouse or domestic partner last deceased property so acquired by will or conveyance or equivalent thereof in money or other property; if such issue are same degree of kinship to spouse or domestic partner first deceased they take equally, or, if of unequal degree, those of more remote degree take by representation with respect to such first deceased. (RCW 11.04.095, am'd 2008, c. 6, §905).

13.07A ESTATES: (in property)

See categories 21 Property, topics Real Property, Absentees, subhead Care of Property; Taxation, topic Inheritance Tax.

13.0813.09

13.10 EXECUTORS AND ADMINISTRATORS:

Probate proceedings commenced in any county, but must be moved on request by party to proceedings, made within four months of mailing notice of appointment. If decedent was resident at death, proceedings are moved to county of residence, otherwise to county in which probate property may be found, or, if no probate property, to county where nonprobate property may be found, or to county in which decedent died. (RCW 11.96A.050[3]). Once letters testamentary, or of administration, granted, proceedings must be held in county where letters granted unless venue is moved. (RCW 11.96A.050[4]).

Preferences in Right to Administer.

After entry of order admitting will to probate and appointing personal representatives, letters testamentary shall be granted to persons therein appointed executors. If some refuse to act, or are disqualified, letters are granted to other persons appointed therein. If all such persons refuse to act, letters of administration with will annexed are granted to person to whom administration would have been granted if there had been no will. (RCW 11.28.010; .120). Surviving spouse or domestic partner, if otherwise qualified, has prior right to administer upon community property notwithstanding different provision in will. Must exercise this right within 40 days following date of death. (RCW 11.28.030, am'd 2008, c. 6, §913).

Following persons are entitled to letters of administration, in order named: (1) Surviving spouse, state registered domestic partner, or such person as he or she may request to have appointed; (2) next of kin, in following order, child or children, father or mother, brothers or sisters, grandchildren, nephews or nieces; (3) inter vivos or testamentary trustee, guardian or attorney-in-fact, if any such fiduciary controlled substantially all of decedent's assets; (4) one or more of beneficiaries or transferees of decedent's assets; (5) director of revenue for estates having property subject to 11.08 (director may waive this right); (6) one or more of principal creditors; (7) if persons so entitled neglect for more than 40 days after death of intestate to petition for letters, or if there be no relatives, state registered domestic partner, next of kin or principal creditors, or they waive their right, court may appoint any suitable person. (RCW 11.28.120).

Eligibility and Competency.

Following may not act as personal representatives: Corporations, except domestic trust companies or national banks when authorized to do so and except professional service corporations whose shareholders are exclusively attorneys; nonresidents, unless file bond if not waived and appoint agent who is resident of county of probate or attorney of record of estate, upon whom service of all papers may be made; minors, persons of unsound mind; persons who have been convicted of felony or of misdemeanor involving moral turpitude. Trust company or national bank may not act as executor or guardian under a will drawn by it or its agents or employees, and no salaried attorney of such company will be allowed an attorney fee for probate of such a will or in relation to administration or settlement of such estate. (RCW 11.36.010).

Qualification.

Executor or administrator must take oath. (RCW 11.28.170). Nonresident executor must give bond unless will directs otherwise. (RCW 11.36.010).

Exemption from Bond.

Personal representatives are not required to post bonds as condition of appointment: (1) When will manifests contrary intent; (2) if personal representative is surviving spouse or domestic partner and estate is distributable to surviving spouse or domestic partner; or (3) if personal representative is authorized bank or trust company. Court may also waive bond in other cases. (RCW 11.28.185, am'd 2008, c. 6, §915).

Issuance of Letters.

Letters are issued (1) to executor, after will is admitted to probate (RCW 11.28.010), and (2) to administrator, after hearing on petition (RCW 11.28.110).

Removal.

Upon notice and hearing court may revoke letters whenever court has reason to believe personal representative has wasted, embezzled, or mismanaged, or is about to waste, or embezzle property of estate committed to his charge, or has committed, or is about to commit a fraud upon estate, or is incompetent to act, or has permanently removed from state, or has wrongfully neglected estate, or has neglected to perform any acts as such personal representative, or for any other cause or reason which to court appears necessary. (RCW 11.28.250). Personal representative who violates fiduciary duties can be refused compensation (RCW 11.48.210), and can be removed and successor will be appointed (RCW 11.68.070).

Special Kinds of Administration.

Without Intervention of Court.

If estate of decedent solvent, taking into account probate and nonprobate assets, personal representative named in will that does not preclude nonintervention powers, or surviving spouse or domestic partner, if decedent died intestate, estate comprised solely of community property, and no issue of decedent, living or in gestation, may petition for nonintervention powers. Nonintervention powers presumed to be in best interests of beneficiaries and creditors until one entitled to notice under RCW 11.68.041 rebuts presumption. (RCW 11.68.011, am'd 2008, c. 6, §925). Notice requirements set out, but notice not necessary if court required to grant nonintervention powers. (RCW 11.68.041[1]). Co-personal representatives with nonintervention powers subject to standard of care applicable to co-trustees. (RCW 11.68.090; .095). Beneficiary whose interest has not been fully paid or distributed may petition for report by personal representative. (RCW 11.68.065). Court has discretion to restrict powers under specified circumstances. (RCW 11.68.050). Personal representative in receipt of claims, which, together with taxes, would render estate insolvent, must notify court to determine whether nonintervention powers should be altered. (RCW 11.68.080). Contents of final declaration and notice by personal representative provided at RCW 11.68.110.

De Bonis Non and De Bonis Non Cum Testamento Annexo.

If personal representative of estate dies, resigns, or letters are revoked before settlement of estate, letters of administration of estate remaining unadministered are granted to those to whom administration would have been granted if original letters had not been obtained, or person obtaining them had renounced administration, and successor personal representative performs like duties and incurs like liabilities as former personal representative, unless decedent by proper will provides otherwise. Succeeding personal representative may administer estate of decedent without intervention of court pursuant to 11.68. (RCW 11.28.280). If original personal representative published notice of appointment, successor personal representative must publish notice of vacancy and succession and may be required to give actual notice to creditors who had filed claims. (RCW 11.40.150).

Cum Testamento Annexo.

If executor is minor, or absent from state, letters with will annexed are granted during such minority or absence, to other person or other executor. Upon reaching age or returning to state named executor will be made co-executor. Nonresident may qualify for letters. (RCW 11.28.040; RCW 11.36.010).

Durante Absentia.

See catchline Cum Testamento Annexo, supra.

Durante Minori Aetate.

See catchline Cum Testamento Annexo, supra.

Ad Colligendum.

In Washington referred to as “special administrator.” Where there is delay in granting letters, judge may appoint special administrator to collect and preserve effects of deceased. (RCW 11.32.010). Appointment may be limited as to time, property and acts to be performed. (RCW 11.32.030). Special administrator must give bond and render accounting. (RCW 11.32.020; .060).

Special Administration.

See catchline Ad Colligendum, supra.

Ancillary Administration.

No special provisions.

Adjudication of Testacy or of Intestacy and Heirship.

Upon application for probate of will or upon application for adjudication of intestacy and heirship, if appointment of personal representative is not requested, court may enter adjudication of testacy (RCW 11.20.020) or adjudication of intestacy and heirship (RCW 11.28.110), respectively. Person obtaining adjudication personally serves or mails notice to heirs, legatees and devisees of decedent that adjudication will become final in four months unless contested. (RCW 11.28.330). After four months, order adjudicating testacy or intestacy and heirship without appointment of personal representative deemed equivalent of entry of final decree of distribution for purpose of establishing persons to receive decedent's estate. (RCW 11.28.340).

Veterans' Estates.

Director of Department of Veterans' Affairs may petition court to act as administrator or federal fiduciary of incapacitated veteran's estate or incapacitated veteran's dependent's estate, or executor of deceased veteran's estate. (RCW 73.04.050-.140, am'd 2008, c. 6, §§508 and 511; c. 183, §4).

Public Administrators.

None.

Inventory and Appraisal.

Inventory must be filed within three months after appointment or longer time granted by court. (RCW 11.44.015). Personal representative must determine fair net value of each item in inventory after appointment and may employ appraisers to assist in task. Appraisal and inventory may, but need not, be filed with court. True and correct copy must be provided within ten days of request from heir, legatee, devisee, unpaid creditor who has filed claim, beneficiary of nonprobate asset from whom contribution sought, or Department of Revenue. (RCW 11.44.015).

General Powers and Duties.

Executor or administrator must settle estate as quickly as possible, collect all debts due, and pay all debts as provided by law. He may prosecute, in his own name, such actions as pertain to management and settlement of estate, and sue to collect debts, recover property, or for trespass. (RCW 11.48.010). Financial institutions will pay personal representative funds from decedent's account: (1) If account is in decedent's name alone; (2) joint account without right of survivorship or joint account with right of survivorship where decedent is last survivor; (3) decedent was beneficiary of P.O.D. or trust account; (4) where all depositors and beneficiaries of account consent in writing; or (5) upon court order. (RCW 30.22.180). Actions upon contracts or for recovery of or possession of property, may be maintained by and against executors and administrators in all cases where they might have been maintained by and against their testators or intestates. (RCW 11.48.090). Any personal representative may maintain action on bond of former personal representative of same estate. (RCW 11.48.120). Court may authorize personal representative to compromise any claim owing to estate (RCW 11.48.130; RCW 11.40.020) and to continue any business of decedent other than partnership (RCW 11.48.025). Partnership business may be continued under nonintervention will if estate solvent. (RCW 11.48.025). Where there is deficiency of assets, representative may, and with regard to real estate must, sue to set aside decedent's fraudulent conveyances. (RCW 11.48.140).

Court may authorize exchange of real or personal property (RCW 11.56.005), as well as sale, lease or mortgage of same (RCW 11.56.010).

See also subhead Special Kinds of Administration, catchline Without Intervention of Court, supra.

Performance of Decedent's Contracts.

Upon application of personal representative, court may authorize and direct personal representative to perform any written contract to which decedent was bound. (RCW 11.60.010). Such application may also be made by person claiming to be entitled to performance under contract (RCW 11.60.020) or his heirs, etc. (RCW 11.60.060).

Notice of Appointment.

Within 20 days of appointment, personal representative must personally serve or mail notice to each heir, legatee and devisee of estate and each beneficiary or transferee of nonprobate asset of decedent, whose names and addresses are known to him. Proof by affidavit of such service or mailing must be filed. (RCW 11.28.237).

Notice to Creditors.

Personal representative may give notice of appointment to creditors requiring that claims be presented or barred. Statute provides method of publication and filing of proof with court. (RCW 11.40.020). Form of notice set out at RCW 11.40.030. Appointment of personal representative after notice agent had begun nonprobate notice to creditors does not affect notice to creditors. Personal representative deemed to have ratified acts of notice agent unless notice to contrary provided to claimants within 30 days of appointment. (RCW 11.40.160). Claims not otherwise barred by applicable statute of limitations must be presented as follows: If notice agent published notice of appointment and creditor received actual notice, within later of 30 days after actual notice or four months after first publication; if notice was published, but actual notice was not given: (i) If creditor not reasonably ascertainable, within four months of publication, or (ii) if creditor was reasonably ascertainable, within 24 months of decedent's death. If no actual notice or notice by publication provided, claim must be presented within 24 months of decedent's death. Shorter otherwise applicable statute of limitations will apply without regard to tolling provision. Bar of creditors' claims effective as to claims against probate and nonprobate assets. (RCW 11.42.050). Time limitations on presentation of claims do not accrue to benefit of liability or casualty insurer. (RCW 11.42.060). If personal representative does not otherwise give notice to creditors within 30 days, notice must be given to department of social and health services, office of financial recovery. (RCW 11.28.237).

Nonprobate Notice.

If no personal representative appointed, state, or beneficiary or trustee entitled to all probate and nonprobate assets may give nonprobate notice to creditors. If no one beneficiary or trustee qualifies, persons who in aggregate are to receive substantially all assets may appoint qualified person to give nonprobate notice. Upon payment of fee and filing declaration and oath, qualified person becomes “notice agent”. Certain persons may not serve as notice agent. Nonresident may serve if resident agent appointed. (RCW 11.42.010). Notice agent may give notice to creditors if notice agent has no knowledge of other person acting as notice agent or of personal representative. Time and form of publication and actual notice provided in statute. (RCW 11.42.020; .030). Appointment of personal representative causes powers and office of notice agent to terminate. Prior actions of notice agent may be given effect. (RCW 11.42.150). Successor notice agent or personal representative must give notice as provided by statute. (RCW 11.42.140).

Presentation of Claims.

Claims not otherwise barred by applicable statute of limitations must be presented as follows: If personal representative published notice of appointment and creditor received actual notice, within later of 30 days after actual notice or four months after first publication; if notice published, but actual notice given: (i) if creditor not reasonably ascertainable, within four months of publication, or (ii) if creditor reasonably ascertainable, within 24 months of decedent's death. If no actual notice or notice by publication, claim must be presented within 24 months of decedent's death. Shorter otherwise applicable statute of limitations will apply without regard to tolling provision. Bar of creditors' claims is effective as to claims against probate and nonprobate assets. (RCW 11.40.051). Time limitations on presentation of claims do not accrue to benefit of liability or casualty insurer. (RCW 11.40.060). Similar rules and time limits apply with respect to notice by notice agent in nonprobate proceedings. (RCW 11.42.040; .070).

Proof of Claims.

Every claim must be signed by claimant, or his attorney, or any person who is authorized to sign claims on claimant's behalf, and contain following: (1) Name and address of claimant; (2) name, business address (if different from that of claimant), and nature of authority of any person signing claim on behalf of claimant; (3) written statement of facts constituting basis upon which claim is submitted; (4) amount of claim; (5) if claim is secured, unliquidated or contingent, or not yet due, nature of security, nature of uncertainty, and due date of claim. Failure to describe correctly security, nature of any uncertainty, or due date of claim not yet due, if not substantially misleading, does not invalidate presentation. Claims need not be supported by affidavit. Less formal written demand for payment may be accepted by personal representative. (RCW 11.40.070).

Approval or Rejection of Claims.

Personal representative must allow or reject claim within later of four months from first publication of notice to creditors or 30 days from presentation of claim. If claim neither accepted nor rejected, claimant may notify personal representative of intent to petition court for allowance of claim and may do so if personal representative fails to notify claimant of allowance or rejection of claim within 20 days. Claimant may be entitled to reasonable attorney fees chargeable against estate. (RCW 11.40.080). Properly presented claim for $1,000 or less deemed accepted unless claimant notified of rejection within later of six months from date of publication of notice to creditors or two months from receipt of claim. Claims are to be ranked among estate's debts to be paid expeditiously. Claim barred by statute of limitations may not be allowed. (RCW 11.40.090).

Claimant must bring suit on rejected claim within 30 days of notification of rejection. If in best interests of estate, personal representative may compromise claim. (RCW 11.40.100). Plaintiff, in action pending against decedent at time of death, must serve petition to substitute personal representative as defendant within four months of appointment of personal representative. (RCW 11.40.100). Any judgment against personal representative merely establishes amount of judgment as allowed claim. (RCW 11.40.120). No execution may issue on judgment against decedent. Judgment must be presented as with other claims against estate. However, if judgment is lien against any property, property may be sold in satisfaction of judgment. (RCW 11.40.130). Instant chapter does not affect creditor's right to realize on any property securing claim. (RCW 11.40.135). Personal representative with claim against decedent must present claim and petition court for allowance, regardless of whether or not personal representative has nonintervention powers. (RCW 11.40.140). Similar rules and time limits apply with respect to approval or rejection of claims by notice agent in nonprobate proceeding. (RCW 11.42.080-.13).

Payment of Claims.

Claims are paid in course of administration. (RCW 11.40.040). If claim not yet due, court may accelerate it and order paid in due course of administration. (RCW 11.76.180). If contingent or disputed, amount claimant would be entitled to, if claim absolute, is paid into court. (RCW 11.76.190). Both probate and nonprobate assets subject to decedent's general liabilities liable for claims. Probate assets may be liable in nonprobate proceedings. (RCW 11.42.085). Surviving spouse's community property may be charged with portion of community claims. (7 Wn. App. 897, 503 P.2d 767).

Priorities.

After payment of costs of administration, debts of estate are paid in following order: (1) Funeral expenses, in such amount as court shall fix; (2) expenses of last illness, fixed by court; (3) wages due for labor performed within 60 days prior to death of decedent; (4) debts having preference by laws of U.S.; (5) taxes, or any debts or dues owing to state; (6) judgments rendered against deceased in his lifetime which are liens upon real estate and on which executions might have been issued at time of his death, and debts secured by mortgages in order of priority; (7) all other demands against estate. (RCW 11.76.110). If estate insufficient to pay debts of any class, each creditor paid in proportion to claim, and no creditor of lower class paid until all in preceding class fully paid. (RCW 11.76.150). Similar rules apply in case of nonprobate proceedings. Notice agent's own claims subordinated. (RCW 11.42.090).

Sales.

Any personal representative with nonintervention powers (see subhead Special Kinds of Administration, supra), may sell, and otherwise act as trustee with regard to real and personal assets of estate of decedent without order of court and without notice, approval or confirmation. Conclusive presumption of necessity of sale for administration of estate. (RCW 11.68.090). If will directs property be sold or gives authority to sell, no notice, order or confirmation required. (RCW 11.56.250). Unless otherwise provided by law, no sale, lease or mortgage of real or personal property may be had except under court order. (RCW 11.56.010). Court may determine whether such sales will be public, private or by negotiation, whether petition required, and whether notice (other than special notice requested under RCW 11.28.240) of any petition need be given (RCW 11.56.020, personal; RCW 11.56.030, real). Order directing mortgage (RCW 11.56.040), lease (RCW 11.56.045) and sale (RCW 11.56.050) must contain terms. Different notice requirements for public (RCW 11.56.060) and private (RCW 11.56.080) sales and no private or negotiated sale of real estate may be confirmed unless gross sum offered is at least 90% of appraisal made within one year immediately prior to sale (RCW 11.56.090). Sale, whether public, private or by negotiation must be confirmed upon return of sale and, in case of sales by negotiation, publication of notice. (RCW 11.56.100). Confirmation by court conclusive of regularity of sale except against claim of fraud. (RCW 11.56.115).

Actions by Representatives.

See subhead General Powers and Duties, supra.

Actions Against Representative.

See subheads General Powers and Duties, Presentation of Claims, and Approval or Rejection of Claims, supra.

Allowances.

Surviving spouse or domestic partner or, if none, minor child of decedent may petition for award. Child of decedent not also child of surviving spouse or domestic partner may petition for share of award. Petition for award must be filed at earliest of three dates: (1) If personal representative appointed or notice agent qualified within 12 months of decedent's death, petition for award must be filed within 18 months of decedent's death; (2) termination of probate in Washington; or (3) six years from decedent's death. (RCW 11.54.010, am'd 2008, c. 6, §916). Amount of award relates to statutory amount with respect to lands and may be increased or decreased by court. (RCW 11.54.020-.050, am'd 2008, c. 6, §§917-920). Petition filed in county in which decedent was domiciled at death. If decedent was not domiciled in Washington, to any county in which estate could be administered. (RCW 11.54.090). No award may be made unless funeral expenses, expenses of last sickness and administration expenses have been provided for. Award may not be made to one who has participated in wilful and unlawful killing of decedent. (RCW 11.54.030, am'd 2008, c. 6, §918). Award has priority over other claims. (RCW 11.54.060). Property and cash awarded, including surviving spouse's or domestic partner's interest in community property, immune from debts of decedent and of surviving spouse or domestic partner existing at time of death. (RCW 11.54.070, am'd 2008, c. 6, §921). Exempt property held by petitioner may affect granting of award. (RCW 11.54.080). If award will exhaust estate, court shall order estate closed and discharge personal representative. (RCW 11.54.100).

Intermediate Accountings.

Personal representative who has not acquired nonintervention powers must file verified report of affairs of estate not less frequently than annually from date of qualification until final report rendered. (RCW 11.76.010). Resigning personal representative must make accounting before being released by probate court. (RCW 11.28.290; 25 Wn. App. 259, 606 P.2d 706).

Final Accounting and Settlement.

Final report must be filed by personal representative who has not acquired nonintervention powers, when estate is ready to be closed. (RCW 11.76.030). May be filed by personal representative with nonintervention powers. (RCW 11.68.100).

Distribution.

Petition for distribution must be filed with final report by personal representative without nonintervention powers. (RCW 11.76.030). Petition for distribution, with or without final report, may be filed by personal representative with nonintervention powers. (RCW 11.68.100). Upon notice (RCW 11.76.040) and hearing, court may enter decree of distribution assigning estate to persons entitled thereto (RCW 11.76.050; RCW 11.68.100). Failure to raise existence of community property agreement in probate makes probate decree res judicata and bars later reliance on agreement. (95 Wn.2d 124, 622 P.2d 816).

Personal representative with nonintervention powers may alternatively close and distribute estate by filing declaration of completion which shall be effective 30 days after filing thereof unless contested. Copy of declaration and notice thereof must be mailed to heirs, legatees and devisees within five days of filing. Declaration deemed equivalent of decree of distribution. (RCW 11.68.110). Personal representative who complies with statute discharged from claims other than those relating to distribution of reserve. (RCW 11.68.112). Personal representative retains power to deal with taxing authorities and to retain and use reserve of not more than $3,000. Procedure and notice of filing of completion of probate provided. (RCW 11.68.114).

See also topic 13.16 Wills, subhead Legacies.

Distribution If Distributee Unlocated.

If distributee has not been located, court appoints agent for purpose of representing interests of absentee person and taking possession and charge of estate for benefit of absentee. (RCW 11.76.200).

Liabilities.

When creditors ordered paid, personal representative personally liable to each for claim except when inability to pay is without fault. (RCW 11.76.160). He is not responsible for loss or decrease or destruction of property or effects of estate without his fault (RCW 11.48.030) nor on special promise to pay decedent's debts, unless in writing (RCW 11.48.040) nor for debts due estate if they remain uncollected without his fault (RCW 11.48.080).

Compensation of Representatives.

Unless fixed by will and not renounced, standard is what court deems just and reasonable. (RCW 11.48.210).

When Administration Unnecessary.

(1) Procedure available for settlement of estates without formal administration. See subhead Special Kinds of Administration, supra. (2) Estates may be exhausted by awards in lieu of and in addition to homestead together with allowances for certain expenses and liens, thereby making administration unnecessary. See subhead Allowances, supra. (3) Administration unnecessary where assets consist only of sums receivable as social security benefits in an amount not to exceed $1,000. (RCW 11.66.010). Where personal representative would be entitled to receive payments of funds from financial institutions, institutions may instead: (1) Pay surviving spouse under community property agreement covering funds upon receipt of certified copy of agreement and affidavit stating agreement was in full force and effect at decedent's death (see category 14 Family, topic 14.09 Spouse and Domestic Partner); or (2) pay surviving spouse, next of kin, funeral director, or other creditor entitled to funds where funds less than $2,500, proof of death and affidavit indicating no personal representative appointed. (RCW 30.22.190). See subhead Small Estates, infra.

See also category 3 Business Regulation and Commerce, topic 3.01 Banks and Banking, subhead Deposits.

Small Estates.

After 40 days from decedent's death, person indebted to decedent or possessing any of decedent's personal property must pay or deliver same to decedent's successor upon receipt of proof of death and of affidavit by successor stating: (1) Name and address of claiming successor and that claimant is “successor” as defined in RCW 11.62.005, amended 2008, c. 6, §922; (2) decedent resided in Washington; (3) value of estate subject to probate, not including surviving spouse's or domestic partner's community property interest therein, less liens and encumbrances, does not exceed $100,000; (4) 40 days have elapsed since death; (5) no personal representative has applied or been appointed; (6) all debts of decedent including funeral expenses have been paid or provided for; (7) description of personal property and portion thereof claimed, with statement that such property subject to probate; (8) affiant has notified by personal service or mail all other successors at least ten days previously; (9) affiant is entitled to full payment or property on own behalf or on behalf and with written authority of all successors with interest therein; (10) affiant has notified state department of revenue at least ten days previously in prescribed form. Upon receipt of proof of death and affidavit just described, transfer agent of any security must change registered ownership to successor and appropriate governmental agency must issue certificate of ownership or of license registration to successor. (RCW 11.62.010, am'd 2008, c. 6, §923).

Successor means person entitled to property of decedent under will or intestate succession and/or decedent's surviving spouse or domestic partner to extent entitled to property as community property interest; excluding person claiming to be successor solely because creditor of decedent or of estate. (RCW 11.62.005, am'd 2008, c. 6, §922).

Person paying or delivering property is discharged to same extent as if dealing with personal representative unless actual knowledge of falsity of affidavit statement; not required to inquire beyond affidavit. Persons given right to possession may compel payment or delivery. If more than one affidavit applies to same property, holder may respond to first affiant, provided proof of death also received, or implead property into court. Person receiving property is answerable to personal representative or person with superior right. (RCW 11.62.020).

On death of member of credit union, credit union may pay deposits to surviving spouse or domestic partner when provided with spouse's or domestic partner's affidavit that: (1) Member died, (2) no executor or administrator appointed, (3) deposit in credit union less than $1,000. Good faith payment to spouse or domestic partner making affidavit is full release of credit union for amount of deposit. Spouse or domestic partner must account for funds to any subsequent personal representative. (RCW 11.62.030, am'd 2008, c. 6, §924).

See subhead When Administration Unnecessary, supra. See also subhead Inventory and Appraisal, supra.

Foreign Executors or Administrators.

No special provisions exempting them from local rules regarding qualification. Financial institutions may pay over balance of decedent's funds to foreign executor or administrator not qualified under laws of Washington if: (1) 60 days have passed since depositor died; (2) personal representative provides proof of appointment and affidavit that there is no personal representative in Washington; and (3) receipt of either estate tax release or affidavit by personal representative, or its agent, that estate not subject to Washington estate tax. (RCW 30.22.200).

Uniform Anatomical Gift Act adopted. (RCW 68.08.500-.610).

Uniform Fiduciaries Act not adopted.

Uniform Principal and Income Act not adopted. See topic 13.15 Trusts, subhead Revised Uniform Principal and Income Act.

Uniform Act for Simplification of Fiduciary Security Transfers (21.17) repealed effective July 1, 1995 (1995, c. 48, §52).

13.11 [RESERVED]

13.12 INTESTACY:

See topics 13.07 Descent and Distribution and 13.08 Executors and Administrators.

13.13 [RESERVED]

13.14 PROOF OF CLAIMS:

See topic 13.08 Executors and Administrators; category Civil Actions and Procedures, topic Pleading.

13.15 TRUSTS:

Kinds.

Express trusts, to which Washington Trust Act applies, are discussed in this topic. Excluded from consideration are: resulting trusts; constructive trusts; business trusts where certificates of beneficial interest are issued to beneficiary; investment trusts; voting trusts; trusts in nature of mortgages or pledges; trusts created by judgment or decree of court not sitting in probate; liquidation trusts; trusts for sole purpose of paying dividends, interest, interest coupons, salaries, wages, pensions or profits; and trusts created in deposits in any financial institution pursuant to 30.22. (RCW 11.98.009).

Creation.

Express trust in land can be created only by instrument in writing. (RCW 64.04.010-.020). Oral express trust in personalty is valid if established by clear, cogent and convincing evidence. (45 Wn.2d 829, 278 P.2d 367).

Eligibility and Competency.

No corporation or bank shall engage in trust business except as authorized under Title 30. (RCW 30.04.280). Trust companies who have been issued a certificate of authority may engage in trust business. (RCW 30.08.150). Trust company may have powers of federal chartered trust company doing business in Washington. (RCW 30.08.155). Foreign corporation generally cannot conduct trust business in Washington (RCW 30.04.290); however, foreign bank or trust company, authorized to act as fiduciary in another state, may act as fiduciary in Washington if affiliated with Washington bank or trust company (RCW 11.102.010).

General Powers and Duties of Trustee.

While Washington Trust Act contains a broad enumeration of powers (RCW 11.98.070), it also provides that trust may impose added powers and duties and that if provisions of trust are inconsistent with Act, provisions of trust shall control (RCW 11.97.010). Trustee not relieved of duty to act in good faith and with honest judgment. Absent compelling circumstances, trustee may not enter into significant nonroutine transactions without: (1) Written notice to certain beneficiaries at least 20 days prior to trustee entering into transaction and (2) obtaining independent appraisal or selling in open-market transaction where transaction involves certain sales, and other binding agreements, dealing with real or personal property constituting 25% or more of net fair market value of trust principal and certain other stock sales. (RCW 11.100.140).

Action against trustee of express trust for breach of fiduciary duty must be brought within three years of earliest of (1) date breach was, or should have been, discovered; (2) discharge of trustee; or (3) termination of, or trustee repudiation of, trust. (RCW 11.96.060).

Sales.

Trustee may sell trust property in accordance with standards provided by law. (RCW 11.98.070).

Investments.

(11.100; 39.60). Trustee to apply total asset management approach; factors to be considered are listed. (RCW 11.100.020). Investments in new, unproven, untried enterprises authorized, but aggregate amount of such investments limited to 10% of net fair market value of trust corpus. (RCW 11.100.023). Trustee has duty of impartiality (RCW 11.100.045) and duty to diversify (RCW 11.100.047).

Securities in Name of Nominee.

Trustees, including certain trust companies and national banking associations (RCW 30.08.170), may hold securities in name of nominee (RCW 11.98.070).

Bequests and Devises to Inter Vivos Trusts.

See topic 13.16 Wills.

Accounting.

Washington's Trustees' Accounting Act (11.106) is declared to be of similar import to Uniform Trustees' Accounting Act (RCW 11.106.110).

Compensation.

Increase of between 50 and 60% over amount corporate trustee would receive is most Supreme Court justify as “just and reasonable” compensation for individual trustee. (68 Wn.2d 38, 411 P.2d 162). Total fee of multiple trustees not to exceed what one trustee would have charged. (107 Wn.2d 693, 732 P.2d 974).

Uniform Common Trust Fund Act substantially adopted. (11.102).

Washington Principal and Income Act adopted. (11.104A). Act made applicable to receipts or expenses received or incurred at or after Jan. 1, 2003 regardless of when trust established or when asset acquired by fiduciary. (RCW 11.104A.905). Act includes: Definitions; fiduciary duties and powers; remedies (RCW 11.104A.001-.040); decedent's estate or terminating income interest (RCW 11.104A.050; .060); apportionment at beginning and end of income interest (RCW 11.104A.070-.090); allocation of receipts during administration of trust (receipts from entities) (RCW 11.104A.100; .120); allocation of receipts during administration of trust (receipts not normally apportioned) (RCW 11.104A.130-.160); allocation of receipts during administration of trust (receipts normally apportioned) (RCW 11.104A.170-.240); allocation of disbursements during administration of trust (RCW 11.104A.300).

Gifts to Minors.

See category 14 Family, topic 14.10 Infants.

Disclaimer of Interest by Beneficiary.

See topic 13.16 Wills, subhead Disclaimer of Interest.

Uniform Fiduciaries Act not adopted.

Uniform Act for Simplification of Fiduciary Security Transfers (21.17) repealed effective July 1, 1995 (1995, c. 48, §52).

Accumulations.

See category 21 Property, topic 21.12 Perpetuities.

Perpetuities.

See category 21 Property, topic 21.12 Perpetuities.

Pour Over Trusts.

See topic 13.16 Wills, subhead Gifts by Will to Inter Vivos Trusts.

Spendthrift Trusts.

In Washington active trusts are clothed with statutory spendthrift provision. (RCW 6.32.250). Trust for benefit of grantor void as to his existing and subsequent creditors. (RCW 19.36.020).

Express spendthrift trusts recognized; creditor furnishing necessities of life may execute on trust income. (97 Wn.2d 246, 643 P.2d 670).

13.16 WILLS:

Person of sound mind and 18 years of age or older may by last will devise estate. (RCW 11.12.010). Will may be delivered to court for filing by one without knowledge of testator's death. Testator may withdraw such will from court. (RCW 11.12.265).

Testamentary Disposition.

Either spouse or domestic partner may dispose of separately owned property by will (RCW 26.16.010-.020, am'd 2008, c. 6, §§602 and 603); upon death of decedent spouse or domestic partner, one-half community and quasi-community property confirmed to surviving spouse or domestic partner and other half subject to testamentary disposition by decedent (RCW 11.02.070, am'd 2008, c. 6, §902; 26.16, am'd 2008, c. 6, §§602-628). See category 14 Family, topic 14.09 Spouses and Domestic Partners, subhead Quasi-Community Property. Spouses and Domestic Partners may jointly enter into written agreement witnessed, acknowledged and certified in same manner as deeds to real estate, concerning disposition of any portion of community property then owned or after acquired, to take effect on death of either. (RCW 26.16.120, am'd 2008, c. 6, §612). No limitations on testamentary disposition to charitable and religious institutions. Rule in Shelley's case abrogated as to wills. (RCW 11.12.180, am'd 2008, c. 6, §912). Nonprobate instrument of transfer, otherwise effective, may transfer interest at death even though not in conformity with wills statute. (RCW 11.02.091[3]).

Testamentary Disposition of Non-probate Assets.

Subject to community property rights, testamentary beneficiary named in will to receive specific non-probate asset takes owner's interest in asset over beneficiary designated before date of will. General residuary provision or general bequest is not deemed disposition of non-probate assets. Disposition in will of “non-probate assets”, or of category of non-probate assets, is not testamentary disposition of such assets. (RCW 11.11.020). Waiver, by owner, of right to dispose of non-probate asset, with or without consideration, is revocable unless owner has stated to contrary. Waiver is effected by delivery of written instrument, signed by owner, to financial institution or other third party; revocation of waiver is effected by same method. (RCW 11.11.030). Financial institution or other third party may rely conclusively on form of non-probate asset and terms of non-probate asset arrangement in effect at owner's death, unless financial institution or other third party has actual notice of existence of claim by testamentary beneficiary. (RCW 11.11.040). Form and method of effecting notice of testamentary disposition of non-probate asset to financial institution or to other affected parties is set out in RCW 11.11.050. Statute affords protection to financial institutions and other third parties and does not bear upon actual rights of ownership in such assets as between others. (RCW 11.11.070).

Execution.

Every will (except noncupative [11.12.025]) shall be in writing signed by testator or by some other person by testator's direction and in testator's presence, and must be attested by two or more competent witnesses who must subscribe their names to will or sign affidavit in presence of and at direction or request of testator. (RCW 11.12.020). If some other person signed testator's name to will under testator's direction and in his presence, such other person must subscribe his own name to will stating he subscribed testator's name at his request, unless testator approves signature made at his request by making his mark on will. (RCW 11.12.030).

Attestation Clause.

No statutory form. Following form in common use:

Form

The foregoing instrument, consisting of . . . . . . pages of which this is the last, was, on the . . . . . . day of . . . . . .signed and published by . . . . . ., and declared by him to be his Last Will and Testament in the presence of each of us who, at his request and in his presence, now subscribe our names as witnesses.

. . . . . . residing at . . . . . .

. . . . . . residing at . . . . . .

In addition to attestation, witnesses may be asked by testator to make affidavit stating facts necessary to prove will, in order to obviate their testimony at time of probate. (RCW 11.20.020[2]). See subhead Probate, catchline Self-proving Wills, infra.

Holographic Wills.

Holographic wills executed without statutory formalities not recognized as valid wills. (101 Wash. 314, 172 P. 247). Separate writing, referred to in will, may dispose of tangible personal property. (RCW 11.12.060). However, see subhead Foreign Executed Wills, infra.

Nuncupative Wills.

No real estate shall be devised by nuncupative wills. Any competent person may so dispose of personal property of value not to exceed $1,000; members of U.S. armed forces and persons employed on U.S. Merchant Marine vessels may so dispose of unlimited wages and personal property. Proof of such will received only if: (1) Substance of words committed to writing, (2) proof offered within six months of speaking of testamentary words, and (3) citation issued to widow and/or heirs at law that they may contest will. Proof must include: (1) Testimony of two witnesses present at making of will that (2) testator at time of pronouncement bid person present to bear witness such was his will and (3) such will was made at time of last sickness of testator. (RCW 11.12.025).

Revocation.

Will or any part thereof, can be revoked by written will or being burnt, torn, cancelled, obliterated, or destroyed with intent and for purpose of revoking same, by testator or another in his presence and by his direction. If act done by person other than testator, direction of testator and facts of injury or destruction must be proved by two witnesses. (RCW 11.12.040).

Will made before marriage deemed revoked as to surviving spouse unless such survivor provided for in marriage settlement or provided for in will or mentioned in will in way showing intention not to make provision. No other evidence to rebut presumption of revocation received. Divorce or termination of domestic partnership subsequent to will revokes will as to divorced spouse or domestic partner; similar with respect to nonprobate assets. (RCW 11.12.050-.051, am'd 2008, c. 6, §910).

See subheads Children, Legacies, and Lapse, infra.

Revival.

Destruction, cancellation or revocation of second will does not revive first will unless it was testator's intent to revive it. (RCW 11.12.080-.095, am'd 2008, c. 6, §911).

Testamentary Gifts to Subscribing Witnesses.

Rebuttable presumption of fraud or undue influence, unless there are two other competent witnesses to will. However, such witness entitled to take share to which he would have been entitled to in case of intestacy, but in amount not exceeding devise or bequest made to him in will. Creditors of testator may be competent witnesses. (RCW 11.12.160).

Gifts by Will to Inter Vivos Trusts.

Pour-over trusts valid if: (1) Trust is identified in testator's will and (2) terms are evidenced in instrument executed prior to or concurrently with execution of will or in will of person who predeceased testator. Trust may be amended after execution of will. Express revocation of trust required to invalidate gift. (RCW 11.12.250).

Testamentary Guardians.

See category 14 Family, topic 14.08 Guardian and Ward.

Probate.

Jurisdiction.

Superior courts. (RCW 11.96A.040).

Venue.

Probate proceedings commenced in any county but must be moved on request by party to proceedings, made within four months of mailing notice of appointment. If decedent was resident at death, proceedings are moved to county of residence, otherwise to county in which probate property may be found, or, if no probate property, to county where nonprobate property may be found, or to county in which decedent died. (RCW 11.96A.050[3]). Once letters testamentary, or of administration, granted, proceedings must be held in county where letters granted unless venue is moved. (RCW 11.96A.050[4]). Discovery is available upon court order or in proceeding under RCW 11.96A.100. (RCW 11.96A.115).

Procedure.

Person having custody or control of will must within 30 days from time he learned of death deliver will to court or executor; executor having custody or control of will must within 40 days from time he learned of death deliver will to court. (RCW 11.20.010).

Application for probate may be made to judge of court having jurisdiction. (RCW 11.20.020). Court may immediately hear proofs and thereupon must enter formal order probating, or refusing to probate, will. Order conclusive except in event of contest. Testimony of witnesses must be reduced to writing, signed by witnesses and certified by judge. (RCW 11.20.020).

If witness prevented by sickness from attending at time will produced for probate, or if resides out of state or more than 30 miles from place where will proven, court may issue commission annexed to will, to any person authorized to administer oaths, empowering him to take and certify attestation of witness. (RCW 11.20.030). If witness has become incompetent or unable to testify in open court or by commission, or is absent from state, court shall admit will upon satisfactory proof of testator's and witness's handwriting, together with any other material facts. (RCW 11.20.040).

Self-proving Wills.

Witness may at testator's request, or after his death upon executor's or other interested person's request, make affidavit before person authorized to administer oaths stating facts necessary to prove will and court shall accept statements as if taken before court. (RCW 11.20.020[2]).

If will lost or destroyed, court may take proof of execution and validity of such will, and establish it, after notice to all interested persons. Proof must be made of its provisions by clear, cogent and convincing evidence, consisting in part of witness to either its contents or authenticity of copy. (RCW 11.20.070). If before or during pendency of application to prove will, letters are granted, court may restrain personal representative from acts injurious to claimants under lost or destroyed will. (RCW 11.20.080).

Wills Providing for Settlement of Estates Without Administration.

See topic 13.08 Executors and Administrators, subhead Special Kinds of Administration.

Contest.

Within four months of probate or rejection thereof, interested person may by petition and notice as required by RCW 11.24.020, in court having jurisdiction, contest validity of will probated or seek to prove will rejected; if no one appears, probate or rejection is binding and final. (RCW 11.24.010). Court's order probating (or refusing to probate) will is prima facie evidence of its legality (or illegality) and burden is on contestant. (RCW 11.24.030). If on trial of issue, will is held invalid, or insufficiently proved, will and probate are annulled and revoked. In this event, executor or administrator not liable for acts previously done with good faith. (RCW 11.24.040). Costs may in discretion of court be assessed against a losing party. Attorney fees may only be assessed against unsuccessful contestant, but not if contestant acted with probable cause and in good faith. (RCW 11.24.050).

Legacies.

Abatement.

If no other abatement scheme provided, property abates without preference between real and personal property, as follows: (a) Intestate property; (b) residuary gifts; (c) general gifts; and (d) specific gifts. (RCW 11.10.010, am'd 2008, c. 6, §908). Gift to be satisfied out of separate and community property presumed to be from each in proportion to their relative values. (RCW 11.10.020). Community debt charged equally against decedent's half and surviving spouse's or domestic partner's half. (RCW 11.10.030, am'd 2008, c. 6, §931). Abatement of non-probate assets is in same order as probate assets. (RCW 11.10.040).

Ademption.

Agreement for valuable consideration by testator to convey property previously devised or bequeathed does not revoke such devise or bequest. But property passes subject to same remedies against devisees or legatees as might be had by law against testator's heirs or next of kin if property had descended to him. (RCW 11.12.060). Devisee takes mortgaged property subject to such mortgage unless will provides mortgage be otherwise paid. Charge or encumbrance on property to secure payment of money or performance of agreement does not revoke previously executed will relating to same; legacies or devises pass subject to charge or encumbrance. (RCW 11.12.070).

Interest.

No interest calculated on any devise unless will so provides. (RCW 11.12.220).

Time for Payment.

Personal representative petitions for distribution “when the estate shall be ready to be closed” (RCW 11.76.030; RCW 11.68.100), except personal representative with nonintervention powers may instead file declaration of completion (RCW 11.68.110). It is duty of every personal representative to settle estate as promptly as possible without waste. (RCW 11.48.010).

Unclaimed Legacies.

Within two years after will admitted to probate, personal representative must file sworn petition detailing items set forth in statute and any other facts which may aid court in determining best way to attempt to locate legatee or devisee. After hearing court may direct notice most likely to come to attention of legatee or devisee. (RCW 11.12.150).

For disposition or escheat of unclaimed legacies, see category 21 Property, topic 21.01 Absentees.

Lapse.

Where legatee or devisee, related by consanguinity to testator, dies before testator leaving lineal descendants who survive testator, such descendants shall take such legatee's or devisee's share, equally if all in same degree, but if of unequal degree those of more remote degree take by representation. Spouse is not relative. (RCW 11.12.110). Lapsed legacy or devise falls into residue of estate to be distributed by residuary clause, if any; if no residuary clause, distribution occurs under laws of descent. (RCW 11.12.120).

Disclaimer of Interest.

Beneficiary may disclaim part or all of any interest within nine months after date of transfer creating interest or within nine months from date beneficiary finally ascertained and beneficiary's interest indefeasibly vested or within nine months after attaining age 21, whichever occurrence is later. (RCW 11.86.031). Disclaimer must be in writing, signed by disclaimant, identify interest to be disclaimed and state disclaimer and extent thereof. (RCW 11.86.031). Disclaimer must be mailed or otherwise delivered to creator of interest, his legal representative or holder of legal title to property. Copy of disclaimer may be filed with clerk of probate court if date of transfer is date of creator's death, and disclaimer of interest in real property may be recorded. (RCW 11.86.031). Unless instrument creating interest directs to contrary, disclaimed interest will be distributed as if disclaimant died immediately prior to date of transfer. (RCW 11.86.041). Disclaimant may receive benefit from property if beneficiary previously owned joint tenancy, community property or similar interest. (RCW 11.86.051).

Omitted Spouse or Domestic Partner.

Spouse or domestic partner not named or provided for in will entitled to intestate share unless court determines otherwise. (RCW 11.12.095, am'd 2008, c. 6, §911).

Children.

If person dies leaving children not named or provided for in will (although born after will or death of testator) he shall be deemed as to such children to have died intestate. (RCW 11.12.090-.091).

Election.

No statute giving surviving spouse right to elect against will. Note, however, if deceased spouse has attempted to dispose of surviving spouse's share of community property, surviving spouse may take under will or, renouncing it, take his or her one-half community interest. (152 Wash. 499, 278 P. 186).

Contribution.

Court may order and enforce proportionate contribution from devisees, legatees and heirs to make up shares of pretermitted children (RCW 11.12.090); certain subscribing witnesses (RCW 11.12.160); those whose devise or bequest was taken in execution for payment of testator's debts (RCW 11.12.200); and other devisees, legatees and heirs so entitled (RCW 11.12.210).

Foreign Executed Wills.

Will executed without state deemed legally executed and of same force and effect as if executed in mode prescribed by laws of this state, if executed in mode prescribed by law either of place where executed or of testator's domicile either at time of will's execution or testator's death. (RCW 11.12.020).

Foreign Probated Wills.

Wills probated in any other state or territory of U.S. or any foreign country or state are admitted to probate on production of a copy of such will and of original record of probate thereof certified by attestation of clerk of court in which such probate was made; if no clerk, certified by attestation of judge of such court and by seal of officers, if they have seal. (RCW 11.20.090).

Simultaneous Death.

See topic 13.05 Death, subhead Survivorship.

Testamentary Trusts.

See topic 13.15 Trusts.

Uniform Anatomical Gift Act adopted. (RCW 68.08.500-.610).

Living Wills.

Any adult may execute document essentially in statutory form directing that life-sustaining procedures be withheld where effect would be to artificially prolong imminent death. (RCW 70.122.010-.915). Destruction, falsification or disregarding directive, or revocation of directive, is crime. (RCW 70.122.090). Health care declaration registry established. (RCW 70.122.130, .140).

14 FAMILY

14.01 ADOPTION:

(Title 26).

Any legally competent person, 18 years of age or over, may adopt. (RCW 26.33.140). Preplacement report may be requested. (RCW 26.33.190).

Jurisdiction.

Petitions filed in superior court. (RCW 26.33.030[1]). Court commissioner may hear and determine petition. (RCW 2.24.040).

Venue.

County in which petitioner resides or in which adoptee domiciled. (RCW 26.33.030[1]).

Other States' Decrees.

Consent, relinquishment or order of termination, valid in jurisdiction where executed or obtained and comporting with due process, is valid in Washington State; burden on petitioner. (RCW 26.33.050).

Indian Adoptees.

Procedure, notice and time limits differ for Indian adoptees. (26.33).

Guardian Ad Litem.

Appointed in any proceeding in this chapter for parent or alleged father under 18 years of age; appointment discretionary with respect to child adoptee or incompetent. Guardian ad litem to determine best interest of party and to investigate and report to court regarding voluntariness and understanding of party to written consent to adoption or petition for relinquishment. Fees for appointment paid by county where petition is filed. (RCW 26.33.070). Rules adopted governing guardian ad litem roles (GALR 3); responsibilities (GALR 2, 3[b]); authority (GALR 4); appointments (GALR 5); limited appointments (GALR 6); and grievance procedures (GALR 7).

Consent Required.

Written consent to adoption required: (1) By adoptee, if 14 years of age or older; (2) by parents and alleged father, if adoptee under 18 years of age; (3) by agency or department to whom adoptee is relinquished; and (4) by legal guardian of adoptee. (RCW 26.33.160). Consent cannot be presented to court until 48 hours after signed or 48 hours after birth of child, whichever is later, and is not effective until court-approved. (RCW 26.33.160). Consent and petition for relinquishment may be filed before child's birth. (RCW 26.33.080). After approval by court, consent revocable for one year upon showing of fraud, duress or lack of mental competency. (RCW 26.33.160). See also subhead Setting Aside Adoption, infra. Agency's, department's or legal guardian's consent not required if in best interest of child and withholding of consent is arbitrary and capricious. (RCW 26.33.170).

Relinquishment of Child.

Petitions, together with parent's written consent to adoption or department's or agency's written consent to assume custody, to be filed (RCW 26.33.080[1], [2]); petition may be filed before child's birth (RCW 26.33.080[3]). Identity of prospective parent need not be disclosed. (RCW 26.33.080[2]). Requirements for service of petition set forth at RCW 26.33.310. Personal service on non-consenting parent or alleged father 20 days before hearing if served within state, 30 days otherwise. (RCW 26.33.310[2]). If personal service not possible, notice given by registered mail and publication. (RCW 26.33.310[3]). Notice and appearance may be waived. (RCW 26.33.310[4]; .060). Hearing on petition no sooner than 48 hours after child's birth. (RCW 26.33.090[1]). Notice to parent, any alleged father, and department, agency or prospective adoptive parent. (RCW 26.33.090[2]). No jury at hearing; contested proceedings recorded unless parties and court agree otherwise; child excluded from hearing if in child's best interest. (RCW 26.33.060). Court approval of petition for relinquishment based on best interest of child. (RCW 26.33.090[3]). Award of custody to legal guardian follows approval of petition for relinquishment; guardian responsible for financial responsibilities of child. Order of relinquishment to agency or department must include order terminating parent-child relationship and authorizing placement of child. (RCW 26.33.090[4], [5]). Unless authorized by court order or statute, it is gross misdemeanor for any entity or person other than parents to assume permanent care and custody of child. (RCW 26.33.370).

Termination of Parent-Child Relationship.

Petition may be filed by department, agency or prospective adoptive parent to whom child has been or may be relinquished to terminate parent-child relationship of parent or alleged father. (RCW 26.33.100[1]). Matters required in notice and petition set forth at RCW 26.33.100(2); .110; petition may be filed before child's birth. (RCW 26.33.100[3]). Requirements for service of petition set forth at RCW 26.33.310. Personal service on non-consenting parent or alleged father 20 days before hearing if served within state, 30 days otherwise. If personal service not possible, notice given by registered mail and publication. (RCW 26.33.310[3]). Notice and appearance may be waived. (RCW 26.33.310[4]; .060). Hearing on petition not sooner than 48 hours after child's birth. (RCW 26.33.110[1]). Notice of hearing to petitioner, parents, any alleged father, any legal guardian of party and guardian ad litem. (RCW 26.33.110[2]). No jury at hearing; contested proceedings recorded unless parties and court agree otherwise; child excluded from hearing if in child's best interest. (RCW 26.33.060).

Termination granted upon clear, cogent and convincing showing: (1) Termination in best interest of child, failure to perform parental duties and withholding of consent contrary to child's best interest or (2) alleged father not the father (RCW 26.33.120[1], [2]) or (3) upon failure to respond to petition or to appear (RCW 26.33.120[3]). Order terminating parent-child relationship divests parent and child of all respective duties and rights except past-due child support obligations owed by parent. (RCW 26.33.130[2]). See also subhead Decree, infra. Order does not disentitle child to any benefits due from third person, agency, state, U.S., or by virtue of being of native American descent. (RCW 26.33.270).

Petition.

Matters required in petition set forth at RCW 26.33.150(2); written consent to adoption, if required, filed therewith. (RCW 26.33.150[3]). If petitioner is married, spouse must join in petition. (RCW 26.33.150[4]). Requirements for service of petition set forth at RCW 26.33.310. If personal service not possible, notice given by registered mail and publication. (RCW 26.33.310[2]). Notice and appearance may be waived. (RCW 26.33.310[3]; .060). Pre- and post-placement reports, if required, must be filed before hearing on petition for adoption. (RCW 26.33.240). Notice provisions for hearing on preplacement report set forth at RCW 26.33.230. Medical reports to be made available. (RCW 26.33.340-.350). Notice of hearing to petitioner, and any person or agency whose consent to adoption is required (unless waived in writing) or which has prepared preplacement report. (RCW 26.33.240; .160). No jury at hearing(s); contested proceedings recorded unless parties and court agree otherwise; child excluded from hearing(s) if in child's best interest. (RCW 26.33.060). Court's determination based on best interest of child. (RCW 26.33.240). Adoption not to be delayed or denied on account of race, color or national origin, except as to adoptive parents' ability to meet child's needs. (RCW 26.33.045).

Decree.

Contents of decree specified in RCW 26.33.250.

Effect of Adoption.

Decree divests parent and child of all respective rights and duties except past-due child support owed by parent. Child is legal heir and lawful issue of adopters. (RCW 26.33.260; RCW 11.02.005[4]). Lawfully adopted child not heir of natural parents. (RCW 11.04.085). Decree does not disentitle child to any benefits due from third person, agency, state, U.S., or by virtue of being of native American descent. (RCW 26.33.270).

Setting Aside Adoption.

Natural parent who executed written consent to adoption may bring action to set aside adoption within one year from date court approved consent. (RCW 26.33.360). Consent revocable only upon showing of fraud, duress or lack of mental competency. (RCW 26.33.160[2]). If action is unsuccessful, court awards costs, including attorney fees, to adoptive parent. (RCW

26.33.360[1]). If action is successful, natural parent liable for actual expenditures and value of services rendered by adoptive parents. (RCW 26.33.360[2]). Appeal to be on accelerated review basis. (RCW 26.33.260[2]). Adoption, generally, may not be challenged on grounds of lack of notice to person who subsequently appears and claims paternity or that proceedings were defective. (RCW 26.33.260).

Vital Statistics.

Requirements of compliance with state registrar of vital statistics set forth at RCW 26.33.280-.300.

Confidentiality.

Court records sealed; files confidential except for certain nonidentifying information. (RCW 26.33.330; .340). Persons admitted to hearings include only those entitled to notice, those with direct interest in case or court work, and necessary witnesses; identification of adoptee and parent confidential. (RCW 26.33.060). Adopted person over 21 may petition court to appoint confidential intermediary to seek birth parents and ask their consent for disclosure of their identities to petitioner. (RCW 26.33.343). Adopted person over 18 may file certified statement with department of health reflecting desire that no identifying information be released; consenting to release of such information; or reflecting desire for contact by biological relatives. (RCW 26.33.347).

14.02 ALIMONY:

See topic 14.05 Dissolution of Marriage or Domestic Partnership.

14.02A CIVIL UNION:

(State Registered Domestic Partnership) (26.60, am'd 2008, c. 6).

Note: 2008, c. 6 substantially extended rights of state registered domestic partners to more closely approximate spousal rights.

State Registered Domestic Partnership.

Persons must: share common residence; be age 18 or older; not be married to person other than other party to domestic partnership or in another domestic partnership with another person; capable of consent; and members of same sex, or one is at least 62 years old. (RCW 26.60.030). Persons may not be closer than second cousins or within specified relationships. (RCW 26.60.040). Establishment of state registered domestic partnership requires filing declaration with secretary of state and payment of fee (not to exceed $50). (RCW 26.60.040 and RCW 46.07.400). Provision adopted that construction of statutes broadened to include domestic partnerships within meanings of certain terms. (RCW 1.12.080, 1.16.100).

Rights Acquired by State Registered Domestic Partners.

Among rights acquired by domestic partners are: community property rights (RCW 26.16.030, am'd 2008, c. 6, §604); health care facility visitation (RCW 26.60.070); specified employment benefits (RCW 41.05.066); rendering of informed consent for health care equal to right of spouse and to receipt of health information (RCW 7.70.065 and RCW 70.02.050); right to dispose of partner's remains in absence of prearrangement (RCW 68.50.160); right to take by intestacy, to administer estate, maintain action as would surviving spouse (RCW 4.20.020; RCW 11.04.015; and RCW 11.28.120); and right to act as attorney in fact (RCW 11.94.010).

Termination of State Registered Domestic Partnership.

Relationship may be terminated by either party or both, filing notice and paying fee or by one or both partners entering into marriage recognized as valid in Washington. (RCW 26.20.050, am'd 2008, c. 6, §1002 and RCW 43.07.400). If notice is not signed by both parties, reasonable effort must be made to serve other party. (RCW 26.60.050, am'd 2008, c. 6, §1002). In absence of court order or express agreement to contrary, agreement relating to transfer at death of nonprobate assets is revoked upon termination of domestic partnership as is appointment of domestic partnership as attorney in fact. (RCW 11.07.010 and RCW 11.94.080). Termination, without petition, may occur if statutory conditions met (2008, c. 6, §1001) and notice under RCW 26.60.050, amended 2008, c. 6, §1002, is filed.

14.03 COMMUNITY PROPERTY:

See topic 14.09 Spouse and Domestic Partner.

14.04 DESERTION:

See topics 14.05 Dissolution of Marriage or Domestic Partnership, 14.09 Spouse and Domestic Partner.

14.05 DISSOLUTION OF MARRIAGE OR DOMESTIC PARTNERSHIP:

Grounds for Dissolution.

Petition filed by either or both parties alleging marriage is irretrievably broken. Party's pregnancy may not be sole basis for denial or delay of dissolution. (RCW 26.09.030, am'd 2008, c. 6, §1006).

Grounds for legal separation are same as for dissolution. (RCW 26.09.030, am'd 2008, c. 6, §1006).

Grounds for declaration of invalidity are: (1) Insufficient age of one or both parties, lack of required parental or court approval, prior undissolved marriage of one or both parties, consanguinity, lack of capacity to consent or consent obtained by force, duress or fraud involving essentials of marriage; and (2) no voluntary cohabitation after attaining age of consent, capacity to consent, or after cessation of force or duress or discovery of fraud. (RCW 26.09.040, am'd 2008, c. 6, §1007).

Residence Requirement.

Party petitioning for dissolution must be a resident of state, member of armed forces stationed in Washington, or married to, or in domestic partnership with, resident of state or member of armed forces stationed in Washington. (RCW 26.09.030, am'd 2008, c. 6, §1006). No specific duration of residence required.

Jurisdiction of matrimonial and domestic partnership actions is in superior court. (RCW 26.09.010, am'd 2008, c. 6, §1004).

Family court is established as department of superior court. (RCW 26.12.010). Family court has jurisdiction to make, modify and enforce orders regarding parenting plans, child support, custody, visitation, possession of property, maintenance, contempt and custodial interference. Family court may use investigation, mediation, treatment and reconciliation services to preserve marriage and domestic partnership, implement amicable settlement and resolve issues. (RCW 26.12.172; .190, am'd 2008, c. 6, §1025). Therapeutic court authorized. (RCW 26.12.250).

Venue lies in county where petitioner resides. (RCW 26.09.010, am'd 2008, c. 6, §1004). Venue for modification or enforcement of decree, judgment, or order regarding parenting plan or child support lies in county where child resides, where person having care, custody, or control of child resides, or in court which entered decree, judgment or order. (RCW 26.09.280, am'd 2008, c. 6, §1020).

Date of Trial.

No decree can be entered until 90 days after petition filed and summons served on respondent. Where summons is served by publication, date of first publication deemed date of service. (RCW 26.09.030, am'd 2008, c. 6, §1006).

Process.

Special form of summons provided in CR 4.1.

Pleading.

Initial pleading is petition. Requirements are set out at RCW 26.09.020 amended 2008, c. 6, §1005. Responsive pleading is response. Other pleadings in accord with superior court civil rules. (RCW 26.09.010, am'd 2008, c. 6, §1004).

Decree of dissolution will be entered on finding marriage or domestic partnership irretrievably broken. (RCW 26.09.030, am'd 2008, c. 6, §1004). Upon entry, decree determines status of parties, provides for parenting plan and support, provides for maintenance and disposition of property and liabilities, allocates minor children for federal tax-exemption purposes, provides for continuing restraining orders and for name changes; is final, subject to right of appeal or subsequent modification. (RCW 26.09.050, am'd 2008, c. 6, §1008; .150, am'd 2008, c. 6, §1016; .170, am'd 2008, c. 6, §1017).

Dispositions Pendente Lite.

Pending decree, court may order temporary maintenance and support of children and may issue temporary restraining order, preliminary injunction or other relief proper in circumstances. Restraining orders are enforceable statewide, may be entered into law enforcement information system, and must state that knowing violation subjects violator to arrest for criminal offense. (RCW 26.09.060, am'd 2008, c. 6, §1009).

Alimony.

Court may grant maintenance order for either spouse or partner without regard to marital misconduct. Relevant factors: Financial resources of parties; time necessary for spouse or partner seeking maintenance to gain training for appropriate employment; standard of living during marriage; duration of marriage or partnership; age, physical and emotional condition and financial obligations of spouse or partner seeking maintenance; ability of spouse or partner from whom maintenance is sought to meet own needs and financial obligations while meeting those of spouse or partner seeking maintenance. (RCW 26.09.090).

Division of Property of Spouses and Domestic Partners.

Court may make disposition of property as just and equitable without regard to misconduct. Relevant factors: Nature and extent of community and separate property; duration of marriage or partnership; economic circumstances of each spouse or partner at time division of property is effective. (RCW 26.09.080). Decree of divorce or invalidity of marriage or partnership revokes prior provision relating to post-death transfer of nonprobate asset to former spouse or partner, except if (1) expressly provided to contrary; (2) decree requires transfer; or (3) decedent could not have unilaterally revoked. (RCW 11.07.010, am'd 2008, c. 6, §908).

Change of Name.

Upon request of party whose marriage or partnership is dissolved, court must order former name restored or, in its discretion, may order change to another name. (RCW 26.09.150, am'd 2008, c. 6, §1016).

Custody of Children.

Court has authority to provide for temporary or permanent parenting plan for any minor child of parties. (RCW 26.09.050, am'd 2008, c. 6, §1008). Objectives of parenting plan are: Provide for child's physical care, emotional stability and changing needs; set forth authority and responsibility of each parent; minimize child's exposure to harmful parental conflict; encourage parents to meet their responsibilities; protect best interests of child; allocate decision-making authority regarding child's education, health care and religious upbringing; designate residential schedule. (RCW 26.09.184; .187; .197). Court may order visitation rights for any person other than parent when it serves best interests of child. (RCW 26.09.240).

Expedited hearings to be held for custody and visitation matters where military duties affect parent's ability to attend hearing. (RCW 26.09.010).

Custodial Interference.

Relative may bring civil action for custodial interference against any other relative who, with intent to deny access to child by relative who has right to physical custody or visitation or parent with whom child resides pursuant to parenting plan, takes, entices or conceals child from that relative. Court may award damages and reasonable expenses incurred in locating child, including investigative services and reasonable attorney fees. (RCW 26.09.255, am'd 2008, c. 6, §1019).

Allowance for Support of Children.

Court may order either or both spouses or domestic partners to provide child support without regard to marital misconduct. (RCW 26.09.100, am'd 2008, c. 6, §1013). Amount of support determined according to uniform child support schedule based on combined net income of both parents; support determination must be based on written findings and may not deviate from standard calculation unless specific reasons are set forth and supported by evidence. (RCW 26.19.020). Court may require periodic adjustments of support which may be automatic if in conformity with 26.19 including standards for determination of income. (RCW 26.09.100, am'd 2008, c. 6, §1013). Order must state: (1) Address where support payment to be sent; (2) that notice of payroll deduction may be issued or other income withholding action (26.18, am'd 2008, c. 6, §§1026-1037 and 1048; 74.20A) taken without notice to responsible parent at any time after entry of court order, unless court finds good cause not to require income withholding; (3) income of parties, or that income is unknown and income upon which support award is based; (4) support award as sum certain amount; (5) specific day or date support payment is due and ages, of dependent children; (6) that parties must notify Washington State support registry of any change in residence address; (7) that parent owing duty of child support must provide health insurance coverage for child if coverage is or becomes available through parent's employment or union; (8) that state may seek direct enforcement of health insurance coverage if proof of coverage is not provided in 20 days; and (9) reasons for not ordering health insurance coverage if order fails to require such. (RCW 26.23.050). Child support debts become liens by operation of law, with priority of secured creditor. Foreign liens, which comply with procedural rules, accorded full faith and credit. (RCW 26.18.055).

In entering or modifying decree, court must require either or both parents to maintain or provide health insurance coverage if coverage is or becomes available through parent's employment or union and cost of coverage does not exceed 25% of obligated parent's basic child support obligation. If cost of coverage exceeds 25% of basic support obligation, court must consider best interests of child and have discretion to order health insurance coverage. (RCW 26.09.105). Change of insurance policy beneficiary invalid if it violates decree requiring that policy be maintained as security for child support obligation. (110 Wn.2d 368, 754 P.2d 993).

Remarriage and New Domestic Partnership.

No restrictions on remarriage of either party after entry of decree, unless either party by appeal challenges finding that marriage or domestic partnership irretrievably broken or invalid. (RCW 26.09.150, am'd 2008, c. 6, §1016).

Foreign Divorce.

Uniform Divorce Recognition Act not adopted.

Separation Agreements.

Parties to marriage or domestic partnership may enter into written separation contract providing for maintenance, disposition of property, and parenting plan and support for their children. Such contract may be recorded and notice of it published. Such contract is binding on court, except for terms relating to parenting plan unless unfair. Child support may be included in separation contract and must be reviewed in subsequent proceedings for compliance with RCW 26.19.020. (RCW 26.09.070, am'd 2008, c. 6, §1010).

Military Spouses

Expedited hearings to be held for custody and visitation matters where military duties affect parent's ability to attend hearing. (RCW 26.09.010).

14.06 DIVORCE:

See topic 14.05 Dissolution of Marriage or Domestic Partnership.

14.07 DOMESTIC PARTNERS:

See topic 14.02A Civil Union.

14.08 GUARDIAN AND WARD:

Superior court of each county has power to appoint guardian for person or estate of “incapacitated” persons and guardian for estate of nonresident who has property in county needing care and attention. Person deemed incapacitated as to person if court determines individual risks personal harm based on inability to provide for nutrition, health, housing or physical safety. Person deemed incapacitated as to estate if court determines individual at risk of financial harm based upon inability to adequately manage property or financial affairs. Age, eccentricity, poverty or medical diagnosis alone not sufficient to justify incapacity. Person may be incapacitated if under age of majority. (RCW 11.88.010[1], am'd 2008, c. 6, §802). Court may appoint limited guardians for persons and/or estates of incapacitated persons who, although capable of managing some personal and financial affairs, need protection and assistance. Person not presumed to be incapacitated except as specifically set forth in court order. Court order for limited guardian must set forth time period for which it is applicable. (RCW 11.88.010[2], am'd 2008, c. 6, §802). Venue for petitions for guardianship or limited guardianship lies where incapacitated person domiciled or, if such person resides in state or federally funded facility, in county where facility located, county of prior domicile or county where parent or spouse domiciled. If incapacitated person's residency has changed within one year of filing petition, court may grant motion by any interested person who moves for change of venue to last county of incapacitated person's residence when it is in best interest of such person. (RCW 11.88.010[3], am'd 2008, c. 6, §802).

Imposition of full guardianship for incapacitated person shall result in loss of right to vote, unless court specifically finds person rationally capable of exercising right. Imposition of limited guardianship shall not result in loss of right to vote unless court determines person incompetent for purposes of exercising right. (RCW 11.88.010[5], am'd 2008, c. 6, §802).

Uniform Adult Guardianship and Protective Proceedings Jurisdiction Act in effect. (RCW 11.90).

Selection of Guardian.

No person qualified to serve as guardian who court finds unsuitable. (RCW 11.88.020).

Eligibility and Competency.

Any suitable person 18 or over, including nonresident, or any parent under 18 or certain guardian services or financial institutions may be guardian of estate, except no person is qualified to serve as guardian who is (1) under 18 and not parent; (2) of unsound mind; (3) convicted of felony or misdemeanor involving moral turpitude; (4) nonresident who has not executed and filed with court appointment of resident agent for service of process in proceeding with respect to estate; (5) corporation not authorized to act as fiduciary in state; (6) person whom court finds unsuitable. (RCW 11.88.020; RCW 11.36.010). Washington trust companies or authorized national banks must be appointed upon petition of person having right to make such appointment. If appointed by will, no trust company or national bank can qualify as guardian under will drawn by it, its agents or employees. (RCW 11.36.010).

Appointment of Guardian.

Last surviving or sole parent of minor child may appoint guardian of estate or person, or both, by last will; court will confirm appointment unless it finds that individual appointed not qualified to serve. (RCW 11.88.080). Petition for appointment of qualified person as guardian of incapacitated person may be filed by any interested person or entity without liability attaching to petitioner acting in good faith and upon reasonable basis. (RCW 11.88.030). If no private party petitions, attorney general may petition for appointment of guardian or limited guardian. Notice of guardianship proceeding in form prescribed by statute together with copy of petition for appointment of guardian must be personally served upon alleged incapacitated person and guardian ad litem not more than five court days after petition filed. (RCW 11.88.030). Notice of hearing must be personally served not less than ten days before hearing upon alleged incapacitated person over 14 and guardian ad litem. Notice of hearing must be served by certified or registered mail or by personal service upon alleged incapacitated person if: (1) Under 14; (2) parent, spouse or all known children not residing with alleged incapacitated person; (3) any person already appointed guardian or residing with alleged incapacitated person; except no notice need be given to those named in (2) and (3) if they have signed petition or waived notice. (RCW 11.88.040, am'd 2008, c. 6, §803). In addition, court may appoint guardian without notice if petition is: (1) By parent seeking appointment as guardian for minor under 14; (2) accompanied by consent of minor 14 or over to guardian asked for; (3) or made by nonresident guardian of minor or alleged incapacitated person. (RCW 11.88.040, am'd 2008, c. 6, §803). Alleged incapacitated person must be present at final hearing unless waived by court for good cause other than mere inconvenience. (RCW 11.88.040, am'd 2008, c. 6, §803). Alleged incapacitated person entitled to independent legal counsel at any stage during guardianship proceedings at own expense or provided by county if unable to pay. Counsel shall be advocate for alleged incapacitated individual without substituting counsel's judgment as to what is in client's best interests. Jury trial available. Standard of proof is clear, cogent, convincing evidence. (RCW 11.88.045). Written report from licensed physician or psychologist, selected by guardian ad litem, must be presented to court in proceedings for appointment. Physician or psychologist must have examined alleged incapacitated person within 30 days of preparation of report and have expertise in incapacity. Guardian ad litem appointed for these proceedings, except where parent petitions on sole grounds of child's minority. (RCW 11.88.045). Court shall choose as guardian ad litem only persons whose names appear on registry of qualified and willing persons, except in extraordinary circumstances. Duties of guardian ad litem include: Consult with alleged incapacitated person to explain petition and rights; meet with person whose appointment sought as guardian or limited guardian; consult with known relatives, friends and other persons who have significant, continuing interest in welfare of alleged incapacitated person; provide court with detailed written report; advise court of need for appointment of counsel for alleged incapacitated person. Court may order mediation in proper circumstances. (RCW 11.88.090, am'd 2008, c. 6, §804).

Disposition of Petition.

Court order disposing of petition for guardianship must be based on findings as to capacities, conditions and needs of alleged incapacitated person, and must not solely be based upon agreement of parties. Court order will specifically set forth authority of guardian and must consider whether incapacitated person capable of giving informed medical consent or making other personal decisions and, if not, whether guardian should be appointed for that purpose. Existing powers of attorney will be revoked upon appointment, unless otherwise ordered. (RCW 11.88.095).

Qualification.

Before letters of guardianship issue, guardian takes oath and files approved bond unless court orders otherwise. (RCW 11.88.100). No bond required where bank or trust company appointed as guardian or, upon court approval, where qualified nonprofit corporation appointed as guardian. (RCW 11.88.107). Bond may be reduced or dispensed with to extent assets consisting of cash or securities deposited in approved accounts from which withdrawal restricted as evidenced by verified receipt signed by custodian of funds. (RCW 11.88.105). Bond may also be dispensed with where assets of disabled person total less than $3,000. (RCW 11.88.100). Although bond requirements specifically apply to testamentary guardians (RCW 11.88.080), all provisions relative to bonds of executors and administrators apply to bonds of guardians (RCW 11.88.110).

Inventory.

Guardian must file verified inventory within three months after guardian's appointment. (RCW 11.92.040).

Powers and Duties.

To pay claims against estate (RCW 11.92.035), file annual reports, preserve, protect and invest estate (RCW 11.92.040), perform incapacitated person's contracts (RCW 11.92.130), sue and be sued (RCW 11.92.060) and file with court document designating standby limited guardian or guardian to serve at death or legal incapacity of court-appointed guardian or limited guardian or to consent to necessary medical procedures if guardian or limited guardian not located four hours after need arises (RCW 11.88.125, am'd 2008, c. 6, §805). Duty to care for and maintain incapacitated person in setting least restrictive to incapacitated person's freedom and to assert incapacitated person's rights and best interests and, if appropriate, to see that incapacitated person receives appropriate training and education in order to learn trade, occupation or profession. (RCW 11.92.043). Relative, interested person or agency of U.S. may serve and file request for special written notice of certain proceedings. (RCW 11.92.150). In cases of limited guardianship, these functions and duties exist only to extent specified in order of appointment. (RCW 11.88.010, am'd 2008, c. 6, §802; RCW 11.92.040; .060). Financial institutions may pay funds to minor or incapacitated person unless branch of deposit receives timely written notice from guardian to withhold payment. (RCW 30.22.150). Guardian of person or family members, including state registered domestic partners, familiar with patient may consent to health care decisions (RCW 7.70.065) and may terminate life-sustaining medical treatment (102 Wn.2d 810, 689 P.2d 1372).

Investments.

Except as otherwise ordered by court, investments restricted to State of Washington or U.S. obligations or obligations guaranteed by federal agency. (RCW 11.92.040[5]).

Securities in Name of Nominee.

See category 13 Estates and Trusts, topic 13.15 Trusts, subhead Securities in Name of Nominee.

Real Estate.

Court may direct conveyance of real property or interest therein upon showing of necessity to pay debts, provide care, support and education, redeem property, make investments or for any other proper purpose. (RCW 11.92.090). Sales of real estate may be public, private or by negotiation. (RCW 11.92.110). Within ten days of selling real estate, guardian must file verified return of sale. Court may, without notice, confirm sale ten days after filing of return. If sale is by negotiation, guardian must publish notice at least ten days before confirmation. (RCW 11.92.115). Confirmation conclusive as to regularity and legality of sale, and instrument of transfer may not be attacked except for fraud. (RCW 11.92.120).

Liabilities of Guardian.

Guardian must report to court any action commenced against incapacitated person and secure court approval prior to initiating legal action for incapacitated person. (RCW 11.92.060). At any time court may modify or terminate guardianship. Disobedience of court order to deliver property and records of incapacitated person punishable as contempt of court. (RCW 11.88.120).

Reports.

Guardian has duty to: File within three months after appointment personal care plan for incapacitated person; file annually report on status of incapacitated person; report to court within 30 days change of residence or substantial change of incapacitated person's condition (RCW 11.92.043); file within three months after appointment verified property inventory; file annually and within 30 days after termination of guardian's appointment verified account relating to assets and expenditures (RCW 11.92.040). Guardian may petition for order settling any intermediate account upon which hearing and notice are discretionary with court. (RCW 11.92.050). Within 90 days after termination of guardianship for any reason other than death of incapacitated intestate, guardian or limited guardian must petition for order settling guardian's account already filed. (RCW 11.92.053).

Termination of Guardianship.

Guardianship terminates without court order upon attainment of age 18 by one defined as incapacitated solely by reason of youth; upon adjudication of capacity or other termination of disability; upon death of incapacitated; by expiration of terms of limited guardianship (unless extended under RCW 11.88.040). Guardianship for benefit of minor terminated upon minor's attainment of legal age by guardian filing declaration. Upon termination other than by death of incapacitated, powers of guardian cease, except power to make disbursements for claims allowed by court, liabilities already properly incurred and expenses of administration. (RCW 11.88.140, am'd 2008, c. 6, §803). Upon death of incapacitated, guardian has authority to prudently disburse funds within means of estate for disposition of deceased incapacitated person's remains. Upon death intestate of incapacitated, guardian may administer estate in probate. (RCW 11.88.150). Court may, upon death of guardian or for good reason, modify or terminate guardianship or replace guardian. (RCW 11.88.120).

Insane Persons.

Guardians of insane persons governed by law discussed under this topic.

Foreign Guardians.

Court may order transfer of property in this state to guardian of estate of incapacitated person appointed in another jurisdiction. (RCW 11.92.170). No statute provides for ancillary letters of guardianship.

Gifts to Minors.

See topic 14.10 Infants.

Veterans.

For guardianships involving veterans see 73.36. (RCW 11.88.160). Director of department of veterans affairs authorized to manage estate of any deceased veteran who has not designated executor of estate and of any incapacitated veteran or incapacitated veteran's dependent who is bona fide Washington resident for whom appointment of fiduciary of representative is necessary to receive veteran's benefits or entitlements and who does not have available responsible family member. (RCW 73.04.130).

14.09 SPOUSES AND DOMESTIC PARTNERS:

Governing law is RCW 26.16.010 et seq., am'd 2008, c. 6, §§602-623.

Disabilities of Married Women.

All disabilities have been abolished. (RCW 26.16.160).

Separate Property.

All property, both real and personal, owned by spouse or domestic partner before marriage or registration of domestic partnership, or afterwards acquired by gift, bequest, devise, or descent, or from the issues and profits of such, is their separate property. Separate property is not subject to separate debts of other party. (RCW 26.16.010-.020, am'd 2008, c. 6, §§602 and 603). See subhead Property of Cohabitants, infra. Damages may not be recovered from separate property of one party for torts of other party, unless other party would be jointly responsible where marriage or partnership did not exist. (RCW 26.16.190, am'd 2008, c. 6, §616). Damages recovered in personal injury suit are separate property of injured spouse except to extent of community interest, e.g., lost wages. (100 Wn.2d 729, 675 P.2d 1207).

Contracts.

Every spouse or domestic partner has same right to acquire and dispose of every species of property as if unmarried or not in domestic partnership. (RCW 26.16.150, am'd 2008, c. 6, §614). Spouses and domestic partners may contract with each other but in every such transaction, burden of proving good faith shall be upon party asserting good faith. (RCW 26.16.210, am'd 2008, c. 6, §619).

Actions.

When married person or domestic partner is party, spouse or domestic partner must be joined, except: (1) When action concerns separate property, or claim to homestead property; (2) when action is between spouses or domestic partners; and (3) when parties are living separate and apart. Spouses and domestic partners may sue each other for rights of ownership in property possessed or controlled by other. (RCW 26.16.180, am'd 2008, c. 6, §615).

Doctrine of interspousal tort immunity has been abrogated retroactively. (85 Wn.2d 290, 534 P.2d 571).

Spouse may sue third party for loss of consortium (94 Wn.2d 91, 614 P.2d 1272); action for alienation of affections abolished (94 Wn.2d 99, 615 P.2d 452).

Agency.

Either spouse or domestic partner may constitute other as his or her attorney-in-fact. (RCW 26.16.060, am'd 2008, c. 6, §605; .090, am'd 2008, c. 6, §609).

Conveyance or Encumbrance of Separate Property.

Either spouse or domestic partner may convey, transfer or encumber his or her separate real or personal property, other than homestead, without consent or joinder of other spouse. (RCW 26.16.010-.020, am'd 2008, c. 6, §§602 and 603). See also subhead Community Property.

Community Property.

The community property law is in effect in this state. Property acquired after marriage by either spouse or domestic partner, or both, is community property, except such as may be acquired by gift, bequest, devise, or descent, or from the sale, rents, issues, or profits of separate property. (RCW 26.16.030, am'd 2008, c. 6, §604). See subhead Property of Cohabitants, infra.

Each spouse owns undivided one-half interest in community property. (95 Wn.2d 237, 622 P.2d 835). However, either spouse or domestic partner acting alone, may manage and control all community property, with like power of disposition as acting spouse or domestic partner has over his separate property, except: (1) Neither may devise or bequeath by will more than one-half of community property; (2) neither may give community property without consent of other; (3) neither may sell, convey or encumber community real property without other joining in execution of deed; such deed must be acknowledged by both; (4) neither may purchase or contract to purchase community real property without other joining in transaction of purchase or in execution of contract to purchase; (5) neither may create security interest other than purchase money security interest in, or sell, community household goods, furnishings or appliances or community mobile home unless other spouse joins in executing security agreement or bill of sale, if any; and (6) neither shall acquire, purchase, sell, convey, or encumber assets, including real estate, or good will of business where both participate in its management, without consent of other, except that where only one participates in management, that spouse may, in ordinary course of such business, acquire, purchase, sell, convey, or encumber assets, including real estate or good will, without consent of nonparticipating party. (RCW 26.16.030, am'd 2008, c. 6, §621).

On death of one spouse or state registered domestic partner, surviving spouse or state registered domestic partner is entitled to all of decedent's share of net community property (RCW 11.04.015); one-half of quasi-community property belongs to surviving spouse or domestic partner, and other half of such property shall be subject to disposition at death by decedent and, in absence thereof, shall descend under laws of intestate succession (11.04, am'd 2008, c. 6, §§905 and 930) as if it were community property (RCW 26.16.230, am'd 2008, c. 6, §621). See subhead Quasi-Community Property, infra. See also category 13 Estates and Trusts, topic 13.07 Descent and Distribution.

When judgment for separate tort cannot be satisfied out of tortfeasor's separate property, tortfeasor's half interest in community property becomes liable. (95 Wn.2d 237, 622 P.2d 835).

Husband and wife may make any agreement concerning status and disposition of their community property to take effect on death of either or at time of adoption of agreement. (8 Wn. App. 894, 509 P.2d 765). (See RCW 26.16.120, am'd 2008, c. 6, §612).

Quasi-Community Property.

Personal property, and real property located in Washington, or in another state if law of decedent's domicile governs surviving spouse's or domestic partner's right to share of property, acquired by decedent while domiciled elsewhere, which would have been community property of decedent and of decedent's surviving spouse or domestic partner had decedent been domiciled in Washington at time of acquisition is quasi-community property. (RCW 26.16.220, am'd 2008, c. 6, §620). See category 13 Estates and Trusts, topic 13.07 Descent and Distribution.

Joint Tenancy.

Either spouse or domestic partner may sever. Property or proceeds presumed community property. (RCW 64.28.040, am'd 2008, c. 6, §620).

Property of Cohabitants.

Property accumulated by unmarried persons living together not community property. (101 Wn.2d 299, 678 P.2d 328). In dividing property of cohabitants, court must examine relationship and property accumulations and, by analogy to community property laws, divide property justly and equitably. (101 Wn.2d 299, 678 P.2d 328; 127 Wn.2d 339, 898 P.2d 831; 142 Wn.2d 592, 14 P.3d 764).

Desertion and Nonsupport.

Any person who deserts dependent child with intent to abandon it is guilty of class C felony of family abandonment. (RCW 26.20.030).

Any person who is able to earn means to provide support and wilfully omits to provide necessary food, clothing, shelter, or medical attendance for spouse or dependent child is guilty of gross misdemeanor of family nonsupport. (RCW 26.20.035, am'd 2008, c. 6, §1040). See topic 14.05 Dissolution of Marriage or Domestic Partnership, subhead Allowance for Support of Children.

Domestic Violence Prevention Act adopted. (26.50). Pertains to physical harm, assault or stalking or fear of same between family or household members. (RCW 26.50.010, am'd 2008, c. 6, §406). Victim may petition for relief in superior, district or municipal court in county or municipality of permanent residence or of new residence acquired to avoid abuse. (RCW 26.50.020). No filing fee required. (RCW 26.50.030). Remedies include restraint, exclusion from residence, treatment, counseling, etc. (RCW 26.50.060). Violation of restraining order is misdemeanor. Peace officer may take violator into custody without warrant. (RCW 26.26.138). Provision made for enforcement of foreign protection orders. (26.52).

Revised Uniform Reciprocal Enforcement of Support Act adopted. (26.21). Court referred to in Act is superior court.

Antenuptial Contracts.

Antenuptial agreement not valid unless either (1) it reasonably and fairly provides for party not seeking its enforcement or (2) there was full disclosure of amount, character and value of property involved and agreement was entered into voluntarily upon advice of independent counsel with full awareness of economic and legal ramifications of agreement. No absolute requirement of independent counsel; court looks at circumstances surrounding execution of agreement. (107 Wn.2d 493, 730 P.2d 675; 107 Wn.2d 479, 730 P.2d 668).

Statute of limitations is six years from time spouse asserts rights under antenuptial contract during dissolution action, and statute of limitations is tolled during lifetime of decedent while married to surviving party when agreement is claimed to control rights of surviving spouse. (107 Wn.2d 493, 730 P.2d 675).

14.10 INFANTS:

Except as otherwise provided, age of majority is 18. (RCW 26.28.010). Age of majority is 18 to marry, execute will, vote, enter into contract, make decisions regarding own body and sue and be sued. (RCW 26.28.015). Any minor married to person of full age is deemed to be of full age. (RCW 26.28.020).

Ratification of Contracts.

Minors are bound not only for contracts for necessities, but also by their other contracts unless they disaffirm them within reasonable time after attaining majority, and restore to other party all money and property received by them by virtue of such contract and remaining within their control at any time after attaining their majority. (RCW 26.28.030). No contract can be disaffirmed where, by reason of minor's misrepresentations as to his age, or from his having engaged in business as adult, other party had good reason to believe minor capable of contracting. (RCW 26.28.040).

Bank Deposits.

Minor's contract of deposit with financial institution is enforceable. Bank account in minor's name is under his exclusive control absent clear and convincing evidence of different intent on creation (RCW 30.22.070) and absent written notice from guardian of minor's estate to withhold payment (RCW 30.22.150).

Actions.

Infant must appear by guardian. If no proper guardian, court must appoint guardian (1) if infant is plaintiff and over 14, upon his application; if under 14, upon application of relative or friend; (2) if infant is defendant and over 14, upon his application if made within 30 days of service of summons; if under 14 or infant neglects to apply, upon application of any other party or relative or friend. (RCW 4.08.050).

Suit Against Parent.

Generally parental immunity precludes parental liability unless conduct rises to level of wilful or wanton misconduct. (105 Wn.2d 99, 713 P.2d 79). Minor child has limited right to sue parent for negligence. (93 Wn.2d 411, 610 P.2d 891).

Adoption.

See topic 14.01 Adoption.

Parental Responsibilities.

Parents of child under age 18 liable for wilful or malicious destruction or defacing of property or infliction of personal injury to another person by child living with parent in amount not exceeding $5,000. (RCW 4.24.190).

Support of Minor.

Expenses of family and education of children, including stepchildren, are chargeable upon property of both spouses or domestic partners, or either of them. Obligation to support stepchildren ceases upon entry of decree of dissolution, decree of legal separation, or death. (RCW 26.16.205, am'd 2008, c. 6, §618). Notice of payroll deduction may be issued or other income withholding action taken (26.18, am'd 2008, c. 6, §§1026-1037; 74.20A) without notice to responsible parent at any time after entry of court order unless court approves alternate payment plan (RCW 26.23.050). Court must require either or both parents to maintain or provide health insurance coverage if coverage is or becomes available to parent's employment or union and cost of coverage does not exceed 25% of obligated parent's basic child support obligation. If cost of coverage exceeds 25% of basic support obligation, court shall consider best interests of child and have discretion to order health insurance coverage. (RCW 26.09.105). Support debt becomes lien by operation of law with priority of secured creditor. (RCW 26.18.055).

Interstate compact on placement of children entered into. (RCW 26.34.010). Appropriate public authority is Department of Social and Health Services (RCW 26.34.030; .040); executive head means governor (RCW 26.34.070); additional provisions (RCW 26.34.020; .050; .080).

Uniform Transfers to Minors Act adopted in substance. (11.114, am'd 2008, c. 6, §934).

Termination of Parental Rights.

Parent and child relationship may be terminated by juvenile court on petition of party to dependency proceedings concerning child if location of child's parents unknown or after finding of dependency and entry of dispositional order and other conditions established by clear evidence or beyond reasonable doubt. Notice of petition for termination of rights, substantially complying with notice requirement (RCW 13.34.062), must be served on parent, guardian or legal custodian with petition. (RCW 13.34.180; .190). Termination order severs all rights and duties, but does not terminate preexisting support obligation and does not disentitle child to other rights and benefits. (RCW 13.34.200). Child may petition juvenile court for reinstatement of parental rights. (RCW 13.34.215).

Uniform Child Custody Jurisdiction Act.

Uniform act adopted in substance. (21.20).

Uniform Interstate Family Support Act adopted. (26.21A).

Uniform Minor Student Capacity to Borrow Act adopted. (26.30).

Uniform Parentage Act adopted. (26.26). Washington adopted major provisions of Uniform Act but departs from official text in various instances. See subhead Support of Minor, supra.

Uniform Securities Ownership by Minors Act not adopted.

Motor Vehicle Driver's License.

Licensee must be at least 16 years of age. (RCW 46.20.031). Agricultural driving permits may be issued to minors. (RCW 46.20.070). Department of Motor Vehicles will not issue license to minor under age of 18 unless: (1) Application signed by parent, guardian or, if none, by employer and (2) minor has satisfactorily completed recognized Traffic Safety Education course conducted by either recognized secondary school, or driver training school. Director may waive second requirement under proper showing. (RCW 46.20.100). Instruction permit is available to person at least 15½ years of age (or 15 years old if issued for restricted period). (RCW 46.20.055). Department of Motor Vehicles may provide method to distinguish between driver's licenses of persons under 21 years of age and persons who are 21 years of age or older. (RCW 46.20.105). Persons under age 21 may not drive with alcohol level of 0.02 or greater. License may be suspended for violation. (RCW 46.20.309; .3101). Ignition interlock devices are authorized. (RCW 46.20.311, am'd 2008, c. 282, §§9 and 10). Provisions made for intermediate licenses (RCW 46.20.075) and penalties for infractions by license holders (RCW 46.20.267).

Motor Vehicles Ownership.

Person under age of 18 may not be registered or legal owner of motor vehicle unless on active duty in armed forces, or emancipated. It is misdemeanor for any person to convey ownership of motor vehicle to person under 18 in violation of this law. Law does not apply to transfers before Aug. 11, 1969 or while transferee was nonresident. (RCW 46.12.250).

14.11 MARRIAGE:

Minimum age of 17 years for each party is prerequisite to valid marriage. Court may waive minimum requirement upon showing of necessity. (RCW 26.04.010).

Consent Required.

Consent of parent or guardian by affidavit filed with county auditor is necessary where either party is under age of 18 (RCW 26.04.210), and no consent may be given or license issued if either party is under age of 17, except as above (RCW 26.04.010).

Medical Examination.

Not required. However, there must be filed with county auditor affidavit of each applicant showing that applicant is not afflicted with contagious sexually transmitted disease. (RCW 26.04.210).

Marriage licenses are issued by county auditor of any county. (RCW 26.04.140). Application must be filed with auditor (who furnishes blanks). (RCW 26.04.160). Affidavit of each applicant certifying qualifications of parties must also be filed. (RCW 26.04.210).

Applications permitted by mail. (RCW 26.04.150).

License becomes void unless used within 60 days after issuance. (RCW 26.04.180).

Waiting Period.

County auditor must issue license no later than third day following filing of application but license may not be used until three days after application. (RCW 26.04.180).

Ceremonial marriages may be performed by active or retired judges of supreme court, court of appeals, superior courts, and courts of limited jurisdiction, court commissioners, and by regularly licensed or ordained ministers or priests of any church or religious denomination. (RCW 26.04.050).

Marriage ceremony performed by unauthorized person is not invalid if consummated with belief by parties, or either of them, that they have been lawfully married. (RCW 26.04.060).

No particular form of ceremony is necessary, except that the parties shall declare in the presence of the officiating person and at least two witnesses that they take each other to be husband and wife. (RCW 26.04.070).

Reports of Marriage.

Person officiating must, within 30 days, deliver certificate thereof to county auditor, who must file and record same. (RCW 26.04.090-.100).

Record.

See category 10 Documents and Records, topic 10.04 Records, subhead Vital Statistics.

Common law marriages contracted and consummated in this state are not recognized, but common law marriages are held valid if they are contracted and consummated in state where such marriages are recognized. (35 Wn.2d 512, 213 P.2d 621).

Proxy Marriages.

Not authorized.

Marriages by Written Contract.

Not authorized.

Prohibited Marriages.

Marriage is prohibited where either party has living husband or wife, or between persons of nearer kin than second cousins, whether of whole or half blood, computing by rules of civil law. (RCW 26.04.020). Marriage between persons of same sex is prohibited. (RCW 26.04.020).

Marriage is voidable because of force or fraud or incapability of consent, only at suit of party laboring under disability or upon whom force or fraud is imposed. (RCW 26.04.130).

Foreign Marriages.

Recognized as valid if valid in state where solemnized, unless entered into in other state by residents of this state for purpose of evading restrictions imposed by laws of this state (47 Wash. 561, 92 P. 417), or made unlawful under RCW 26.04.020.

Annulment provisions have been repealed; however in certain instances declaration that marriage is invalid may be obtained. See topic 14.05 Dissolution of Marriage or Domestic Partnership.

14.12 MARRIED WOMEN:

See topics 14.09 Spouses and Domestic Partners, Marriage; categories 5 Civil Actions and Procedure, topic Evidence, subhead Witnesses; Debtor and Creditor, topics Acknowledgments, Homesteads; Estates and Trusts, topic Executors and Administrators.

15 HEALTH

15.0115.04

15.05 FOOD, DRUGS, DEVICES AND COSMETICS:

Food, drugs and cosmetics are regulated under 69.04. Chapter regulates packaging, labeling, misbranding, adulteration and manufacturing.

15.05A HEALTH CARE PROFESSIONALS:

Health care professionals regulated: Uniform disciplinary procedures established. (18.235). Licensing requirements are provided for physicians (18.71); physicians' assistants (18.71A); dentists (18.32, am'd 2008, c. 147, §§1 and 2); dental assistants (18.260); psychologists (18.83); chiropractors (18.25); opticians (18.34); naturopaths (18.36); midwives (18.50); ocularists (18.55); massage operators and businesses (18.108, am'd 2008, c. 25, §§1 and 2); animal massage therapists (18.240); athletic trainers (18.250); dental hygienists (18.29); acupuncturists (18.06); radiologic and x-ray technicians (18.84, am'd 2008, c. 246, §§1-6; c. 285, §14); respiratory care practitioners (18.89); mental health counselors, therapists and social workers (RCW 18.225.020, am'd 2008, c. 135, §§11-14; c. 141, §1); nursing pool operators (18.52C); nursing assistants (18.88A, am'd 2008, c. 146, §12); health care assistants (18.135); dieticians and nutritionists (18.138); chemical dependency professionals (18.205); sex offender treatment providers and certified affiliate sex offender treatment providers (18.155); emergency medical personnel (18.73; RCW 18.71.205); adult family home providers (70.148) and resident managers (RCW 18.48.020); denturists (18.30); orthotists and prosthetists (18.200); surgical technologists (18.215); and veterinarians (18.92). Pharmacists are regulated (RCW 18.64.080), as are pharmacies (RCW 18.64.043); out-of-state and Canadian pharmacies (RCW 18.64.350; .

360); recreational therapists (18.230); boarding homes (RCW 84.20.020); speech language pathologists and audiologists (RCW 18.35.010-.060; RCW 18.35.195); and genetic counselors (RCW 18.290).

15.05B HEALTH MAINTENANCE ORGANIZATIONS:

(48.46).

Holding companies are regulated. (48.31C). Agreements between managed care, Medicare/Medicaid and state agency providing for public assistance care for elderly are authorized. (74.09, am'd 2008, c. 146, §13; c. 245, §1; c. 317, §§1 and 2).

15.05C HOSPITALS:

Hospitals are required to be licensed (RCW 70.41.090) and are inspected at least every 18 months (RCW 70.41.120). Hospitals must maintain quality improvement and medical malpractice prevention programs. (RCW 70.41.200[1]). Documents in hands of quality improvement committee are subject to limited discovery and use at trial. (RCW 70.41.200[3]). Hospitals treating sexual assault victims are to provide emergency contraception. (RCW 70.41.350). Hospitals must provide charity health care (RCW 70.170.060) and satisfy nurse staffing level requirements (2008, c. 47).

15.05D INSURANCE:

Health plan must allow care provider to provide health services contained in basic plan under 70.47. (RCW 48.43.045). Portability of insurance is required and waiting periods are waived if similar health coverage was in force for three months prior to instant plan. (RCW 48.43.015). Carrier may require three-month waiting period for preexisting conditions. (RCW 48.43.025). Except in specified circumstances, issuance of health insurance and continuity of coverage is guaranteed. (RCW 48.43.035). Carrier has 24 months to request refund from provider except in case of fraud, and 30 months if related to coordination of benefits with other carrier or entity. (RCW 48.43.600). Medicare supplemental policies must conform to federal law. (RCW 41.05.195; .197). Affordable housing entities permitted to participate in joint self-insurance programs. (RCW 48.64).

15.05E MEDICAL MALPRACTICE:

Statute of Limitations.

Maximum is later of three years from negligent act or one year from actual or constructive discovery of injury. Maximum period is eight years. (RCW 4.16.350).

Voluntary arbitration is provided (RCW 7.70A.010-.090), as is mandatory mediation (RCW 7.70A.100). Penalties are provided for frivolous suits. (RCW 7.70A.160).

15.0615.12

15.13 SMOKING REGULATIONS:

Washington Clean Indoor Air Act prohibits smoking in public areas, except as designated. (RCW 70.160.030). Violations are punished by fines up to $100. (RCW 70.160.070). Smoking in private workplaces (even if accessible to public) is not regulated. (RCW 70.160.060).

16 INSURANCE

16.01 INSURANCE COMPANIES:

Regulated by Title 48.

Supervision by state insurance commissioner unless subject to regulation by another state or federal agency. (RCW 48.02.010-.190).

Rates regulated by RCW 48.19.010-.490.

Annual statements must be filed with state insurance commissioner. (RCW 48.05.250).

Policies.

Statutes regulating in general are: contract (48.18, am'd 2008, c. 217, §§12-18; c. 303, §1); unfair practices (48.30, am'd 2008, c. 217, §§34-42); and use of credit history (RCW 48.18.545). Statutes regulating specific policies are: variable (48.18A, am'd 2008, c. 217, §§19 and 20); disability (48.20, am'd 2008, c. 217, §§21-24; c. 303, §4); group disability (48.21, am'd 2008, c. 143, §6); disability-extended health (48.21A, am'd 2008, c. 217, §25); casualty-assigned risk and uninsured motorist (48.22); life and annuities (48.23, am'd 2008, c. 217, §§26 and 27); group life and annuities (48.24, am'd 2008, c. 217, §32; c. 310, §1); industrial life (48.25, am'd 2008, c. 217, §33); property (48.27); domestic reciprocal insurers (48.10); surplus line insurance (48.15, am'd 2008, c. 217, §§9-11); surety (48.28); title (48.29, am'd 2008, c. 110, §§1-9 and 13); credit life, accident, and health (48.34); rental car insurance (48.115, am'd 2008, c. 217, §§85-93); and insurance covering communications equipment (48.120, am'd 2008, c. 217, §§94 and 95). Portability of health insurance, required under federal law, is extended to small employers and small groups. (RCW 48.43.028). Long-term care policies are also regulated. (2008, c. 145, §§1-18).

Direct Patient-Provider Relationships.

Arrangements whereby patient pays fixed amount to health care provider for primary care services, are regulated. (48.150).

HIV Testing.

Consent and counseling required for HIV testing administered as part of application for coverage. (RCW 70.24.325).

Health Coverage.

Optional coverage required in group health plans for treatment of temporomandibular joint disorders (RCW 48.21.320); coverage required in group health plans for mammograms (RCW 48.21.225); coverage required in employer-sponsored group contracts for neurodevelopmental therapies (RCW 48.21.310); optional coverage required by insurers entering into or renewing extended health insurance for home health care and hospice care. Hospitals are required to provide charity health care. (RCW 70.170.060). Long-term care carrier required to reinstate insured after hospitalization. (RCW 48.43.125). Medicare supplemental insurance must conform to federal law. Health care discount plan organizations regulated by RCW 48.155.

Marketing. (48.38).

Insurance Commissioner to establish market oversight procedures. Information to be reported to National Association of Insurance Commissioners. (RCW 48.37.040).

Discrimination prohibited. (RCW 48.18.480).

Consumer Protection.

Insurers charged with duty of good faith, honesty, and equity. (RCW 48.01.030). Breach may violate Consumer Protection Act (19.86) triggering statutory penalties (105 Wn.2d 778, 719 P.2d 531). Guaranteed asset protection waivers regulated by RCW 48.160. Self-service storage insurance producers regulated by RCW 48.170.

Right to Return Policy.

Purchasers of individual life insurance policies may return policy without obligation within ten days of receipt. Ten percent penalty added to any refund not made within 30 days of return of policy. (RCW 48.23.380).

Rebates generally prohibited. (RCW 48.30.140).

Liens.

A mutual insurer may, upon approval of insurance commissioner, secure an unpaid assessment of contingent liability upon a life insurance policyholder by placing a lien on reserves held for such policyholder. (RCW 48.09.260).

Producers and Adjusters.

No persons may act or hold themselves out to be producers, title insurance agents or adjusters unless so licensed. (RCW 48.17.060). Each applicant for a license must pass an examination given by insurance commissioner except that such examination is not required of applicants for license as nonresident producer or adjuster who are licensed in their state of residence. (RCW 48.17.110; .130). Insurance education providers regulated. (RCW 48.17.563-.568). License fees set by statute. (RCW 48.14.010). Each applicant for producer's license must file corporate surety bond in varying amount depending on premiums brokered, but not more than $100,000. (RCW 48.17.250).

Process Agent.

Foreign or alien insurer must appoint insurance commissioner as its attorney to receive service of process issued in actions arising within state, except actions on contractors' bonds where service may be upon department of labor and industries. This appointment is irrevocable and remains in effect as long as any contract of insurer is in force in state. (RCW 48.05.200). Insurers transacting business without authority are deemed to have submitted to jurisdiction and consented to service on insurance commissioner. (RCW 48.05.215).

Investments are regulated by 48.13, amended 2008, c. 237, §§1-7.

Foreign Insurance Companies.

Certificate of Authority.

Each foreign insurer, except a government owned insurer (RCW 48.05.045), must obtain certificate of authority (RCW 48.05.030) to be issued on application to insurance commissioner (RCW 48.05.070). Application must set forth name, home office location, type of insurer, organization date, state of domicile, kinds of insurance proposed to transact and be accompanied by certified copy of charter and by-laws, statement of financial condition, appointment of commissioner as attorney to receive process, and certificate from proper public official of state of domicile showing insurer is duly organized and authorized to transact kind of insurance proposed to be transacted. (RCW 48.05.070).

Fees.

Fee of $250 must accompany application for certificate of authority for filing of charter documents and additional $25 for issuance of certificate. (RCW 48.05.070; RCW 48.14.010).

Qualifications.

To qualify for certificate of authority foreign insurer must: (1) Be stock, mutual or reciprocal insurer of same general type as may be formed as domestic insurer (RCW 48.05.040), (2) have actively transacted for three years classes of insurance it proposes to transact in state unless it is subsidiary of insurer which has held certificate of authority in state for three years (RCW 48.05.105), and (3) possess paid-in capital stock or unimpaired basic surplus and additional surplus funds in such amounts as are required by RCW 48.05.340-.350, based upon kinds of insurance proposed to be transacted (RCW 48.05.040).

Deposit Requirement.

Foreign insurer prior to issuance of certificate of authority must deposit with insurance commissioner assets in same amount and kind as required of a like domestic insurer transacting like kinds of insurance. Commissioner may accept in lieu of such deposit a certificate of official having supervision over insurer in any other state to effect that a like deposit of such insurer is held in public custody in such state. (RCW 48.05.080).

Annual statement of financial condition, transactions and affairs as of Dec. 31 of preceding year must be filed with insurance commissioner on forms approved for that purpose by National Association of Insurance Commissioners before first day of Mar. Failure to file when due may result in suspension or revocation of certificate of authority. (RCW 48.05.250). Actuarial and other reports must be filed. (RCW 48.05.383, .385).

Withdrawal.

Insurer may withdraw from state only after its direct liability under all its insurance contracts in force in state has been assumed by another authorized insurer under agreement approved by insurance commissioner except where commissioner finds insurer is solvent and policy holders' interests not impaired by waiver of this requirement. (RCW 48.05.290).

Unauthorized insurers that solicit or transact insurance business in state are subject to fines of not more than $25,000 for each solicitation or transaction and replacement of improper policy. (RCW 48.15.020). Contracts entered into by such insurers are voidable except at their instance. (RCW 48.15.030). By such solicitation or transaction unauthorized foreign insurers submit to jurisdiction of state courts in actions by insured, beneficiary or commissioner arising out of such solicitations or transactions. (RCW 48.05.215).

Retaliatory Laws.

If laws of another state impose on Washington insurers taxes, fines, fees, deposits, obligations, or prohibitions in excess of those imposed by Washington law on like insurers of such other state, insurance commissioner may impose a like rate, obligation, or prohibition on insurers of such other state. (RCW 48.14.040).

Premium Tax.

All foreign or alien insurers, except title insurers, are required to pay by Mar. 1 of each year a premium tax amounting to 2% of all premiums collected or received during preceding calendar year from business within state. (RCW 48.14.020[1]). However, with respect to all ocean marine and foreign trade insurance contracts written within state, tax is .95% of each authorized insurer's gross underwriting profit. (RCW 48.14.020[3]). In cases of policies written for an indefinite term and requiring payment of premiums at inception of policy, tax is 2% of gross amount of such premiums on policies in force on Dec. 31 of year preceding, less that portion of such premiums credited to policyholders on one-year policies expiring during that year. (RCW 48.14.020[2]). Title insurers are exempt from foregoing premium taxes. These taxes are exclusive in that no governmental unit subordinate to state may impose such taxes upon insurers or their agents. (RCW 48.14.020). No tax imposed on policies issued in connection with certain exempt or qualified pension, annuity or profit-sharing plans (RCW 48.14.021) or on consideration received on sale of annuities (RCW 48.14.020). Additional tax is imposed equal to amount of tax payable under RCW 48.14.020 (1), (2) and (4) multiplied by rate specified in RCW 82.02.030.

Uniform Insurers Liquidation Act adopted. (RCW 48.31.110-.180; 48.99).

Direct Actions Against Insurer.

See category 23 Transportation, topic 23.01 Motor Vehicles, subhead Direct Actions.

Reports by Malpractice Insurers.

Insurers who are authorized to write property and casualty insurance in State of Washington are required to record and report their Washington state loss and expense experiences and other data, as required by RCW 48.05.390. (RCW 48.05.380).

Service Contracts.

See category 3 Business Regulation and Commerce, topic 3.10 Consumer Protection, subhead Service Contracts.

Life Settlements

Former viatical settlements act, replaced by Life Settlements Act (RCW 48.102).

Unauthorized Insurers

Regulated by RCW 48.15.

16.02 SURETY AND GUARANTY COMPANIES:

Organization of surety and guaranty companies is governed by Business Corporation Act (Title 23B) and Insurance Code (RCW 48.07.030).

Rights and Powers.

See topic 16.01 Insurance Companies; category 2 Business Organizations, topic 2.03 Corporations.

Foreign Companies.

See topic 16.01 Insurance Companies, subhead Foreign Insurance Companies; category 2 Business Organizations, topic 2.03 Corporations, subhead Foreign Corporations.

Taxation.

No special taxes imposed on surety and guaranty companies as such. See topic 16.01 Insurance Companies; categories 2 Business Organizations, topic Corporations; and Taxation, topic Business and Occupation Tax.

17 INTELLECTUAL PROPERTY

17.00A PERSONALITY RIGHTS:

(63.60).

Property right in individual's name, voice, signature, photograph, or likeness is transferable and survives death of individual. (RCW 63.60.010, am'd 2008, c. 62, §1). Rights are generally protected for ten years after death of individual and 75 years after death of personality. (RCW 63.60.040). Rights not dependent on domicile, residence, or citizenship at death. (RCW 63.60.020, am'd 2008, c. 62, §2). Rights survive to specified successors. (RCW 63.60.030, am'd 2008, c. 62, §3). Remedies and penalties are provided for infringement of rights. (RCW 63.60.050-.060). Certain uses exempted from statute. (RCW 63.60.070). Act applies to causes of action commenced after June 10, 1998. (2008, c. 62, §4).

17.01 TRADEMARKS AND TRADENAMES:

Comprehensive trademark act adopted (19.77) and substantially revised in 1989 (19.77) permitting, but not requiring, registration of any name, symbol, words or device used to identify goods or services of registrant and to distinguish them from goods or services of others (RCW 19.77.010-.040). Statute not preempted by federal law; construction of statute to be guided by federal courts' interpretation of federal trademark act. (RCW 19.77.930).

Restrictions on Registration.

Trademark may not be registered if consists of immoral, deceptive or scandalous matters; if disparages or falsely suggests connection with persons living or dead, institutions, beliefs or national symbols; if consists of flags or insignia of U.S., any state or municipality, or any foreign nation; if consists of any name, portrait or signature of living person, except with written consent; if merely descriptive or deceptively misdescriptive of goods or services of applicants; if primarily geographically descriptive; if primarily surname; or if resembles trademark or trade name previously used in state so as to result in likelihood of confusion. (RCW 19.77.020). These restrictions do not prohibit registration if mark has become distinctive; five years of substantially exclusive and continuous use anywhere in U.S. is prima facie evidence of distinctiveness. (RCW 19.77.020).

Availability of Mark for Registration.

Secretary of State will not conduct trademark search in advance of registration, but will advise if specific mark is registered, upon written request.

Registration.

Requires application on form furnished by secretary of state, three specimens or facsimiles of mark as used, and filing fee in amount set by secretary. (RCW 19.77.030). Registration effective five years and renewable for successive five-year periods during continued use of trademark. Renewal fee is amount set by secretary. (RCW 19.77.050). Registration may be cancelled by secretary upon request by registrant, expiration of registration, filing of judicial decree finding abandonment (two consecutive years of nonuse prima facie evidence of abandonment), nonownership, improper registration of trademark or finding of similar and previously registered trademark in U.S. Patent and Trademark Office, or upon application of any person who establishes, after statutory hearing procedure, that registration improper or violates common law rights of petitioner. (RCW 19.77.010; .030; .080; .100). Damages for fraudulent registration may be recovered by injured party. (RCW 19.77.130).

Assignment.

Trademarks, registrations, and applications for registration are assignable with good will of business or portion thereof in which trademarks used. Assignment may be recorded with secretary of state if in writing and acknowledged, upon payment of fee in amount set by secretary. New certificate for remainder of term issued to assignee on request after filing of assignment and payment of additional $5 fee. (RCW 19.77.060). Use of trademark or trade name under franchise agreement governed by 19.100. (100 Wn.2d 147, 667 P.2d 619).

Protection Afforded.

Certificate of registration prima facie evidence of validity of registration, registrant's ownership of trademark and registrant's exclusive rights of use in Washington. (RCW 19.77.040). Registration is constructive notice throughout state of registrant's claim of trademark ownership. (Id.). Registrant may bring civil action against subsequent user of confusingly similar trademark. (RCW 19.77.140).

Dilution.

Ownership of mark, famous in Washington, entitled to injunction against mark which dilutes distinctive quality of mark even if no competition or likelihood of confusion. (RCW 19.77.160). Wilful intent to trade on registrant's reputation or dilute mark entitles owner to damages.

Counterfeits or colorable imitations of registered trademark entitle owner to injunctive relief, profits earned by defendant and amount not to exceed three times such profits, damages, costs and attorney fees. (RCW 19.77.150).

Infringement.

Registrant may enjoin infringement and may recover profits of infringer and/or damages suffered by reason of infringement. (RCW 19.77.150). Innocent reproduction or imitation of trademark without knowledge that such use is intended to cause confusion may be defense against award of profits and/or damages. (RCW 19.77.140[2]). Right to prosecute under penal statute and common law trademark rights expressly preserved. (RCW 19.77.150; .900).

Trade Names.

Distinguished from trademarks and not registerable under trademark statute unless it also functions as trademark. (RCW 19.77.020; 7 Wn. App. 424, 500 P.2d 1290). Trade name infringement is unfair or deceptive practice subject to statutory penalties (RCW 19.86.020) and may be violation of state consumer protection statute (107 Wn.2d 735, 733 P.2d 208). Family trade name may be entitled to injunctive relief from infringement. (43 Wn. App. 370, 717 P.2d 293, rev'd in part, 107 Wn.2d 735, 733 P.2d 208). Trade name which is assumed name or designation not disclosing true names of parties must be filed with Department of Licensing on acknowledged certificate setting forth true name or names of party or parties conducting or having interest in business. (RCW 19.80.005-.010). Failure to file precludes maintaining suit within state. Failure to file does not impair validity of contract or act and does not prevent defense of suit within state. (RCW 19.80.040). Agent's disclosure of trade name not sufficient disclosure of principal. (47 Wn. App. 832, 737 P.2d 709, aff'd, 110 Wn.2d 695, 756 P.2d 717). Notice of cancellation must be filed upon discontinuance. Filing fee is $5. (WAC 308-300-280).

17.02 TRADE SECRETS:

Uniform Trade Secrets Act adopted in substance, effective Jan. 1, 1982. (19.108). 1985 amendments not adopted. Protection provided for manufacturing processes involved in pollution disclosures (RCW 90.52.020); egg production disclosures made to government officials (RCW 69.25.110[7]); filings made with department of ecology (RCW 43.21A.160); filings under hazardous substance rules (RCW 49.70.165); results of industrial safety inspections (RCW 49.17.200); and assignment of employees' rights to inventions (RCW 49.44.140-.150).

18 LEGAL PROFESSION

18.01 ATTORNEYS AND COUNSELORS:

State Bar Act creates the Washington State Bar Association. (2.48). No person may practice law unless he is an active member of State Bar. (RCW 2.48.170).

State bar is governed by Board of Governors which is charged with enforcement of Act and of rules adopted pursuant thereto. (RCW 2.48.050).

Jurisdiction Over Admissions.

Board of Governors has power to adopt rules, subject to approval of Supreme Court, fixing qualifications, requirements and procedure for admission to practice and to appoint boards or committees to examine applicants for admission. (RCW 2.48.060; APR 2).

Eligibility.

Every person desiring to be admitted to State Bar must be of good moral character and pass bar examination. (APR 3[a]). To qualify to take bar examination, person must: (1) Either be U.S. citizen or alien lawfully admitted for permanent residence and (2) present satisfactory proof either of graduation from approved law school, completion of law clerk program or admission in good standing in another bar in U.S., or any jurisdiction where common law of England is basis of its jurisprudence, and practice as lawyer, judge or law professor for three of last five prior years. (APR 3[b]).

Application for bar must be filed not less than 40 days prior to bar examination date (60 days if admitted to another bar and applying for first time). Fee of $10 for Application Packet. Exam fee of $350 for applicants not admitted to another bar and $580 for applicants admitted to another bar. (APR 3[d]).

Law clerk must be of good moral character, must hold undergraduate bachelor's degree, must be full time employee as such in office of judge of court of record or lawyer or firm of lawyers licensed to practice law in state and actively engaged in practice of law and be tutored by active lawyer in good standing with at least ten years of practice. Prior to commencement of course of study, law clerk is required to file with state bar association application to register as such and to furnish information required by application form. Application must be accompanied by statement under oath of lawyer employing him as specified by rules. Law clerk must pursue course for four calendar years of at least 48 weeks each year with minimum of 30 hours of study per week. Time spent in performance of duties as law clerk is considered time spent in study. (APR 6).

Residence Requirement.

There is no requirement that applicant or member of Bar Association be resident of Washington. (APR 5[f]).

Registration as law student not required.

Educational Requirements.

See subhead Eligibility, supra.

Petition for Admission.

Application for bar examination serves as application for admission. (APR 5[a]).

Examination conducted by Committee of Law Examiners appointed by Board of Governors. (APR 4).

Exam held in Feb. and July (usually last Mon., Tues. and Wed.) each year or on such other date as Board of Governors designates at such location (usually Seattle-Tacoma area) as Board of Governors designates. (APR 4[a]).

Multi-State Bar Examination is not used.

Clerkship.

No requirement of serving clerkship before admission. Law clerkship is alternative to graduation from law school for purposes of qualification for bar exam; see subhead Eligibility, supra.

Admission without Examination.

Member of bar of other jurisdiction that grants reciprocity to Washington attorneys, admitted without examination upon payment of fee and satisfaction of other requirements. (APR 18). Inquiries should be directed to Washington State Bar Association, Admissions Dept., 1325 Fourth Ave., Suite 600, Seattle, WA 98101-2539.

Admission Pro Hac Vice.

Member in good standing of bar of another state, District of Columbia, or foreign country, may appear as counsel in trial of action with permission of court if in association with active member of state bar who is attorney of record and who is present at all proceedings and is responsible for conduct thereof. (APR 8[a]).

Licenses.

Membership in Washington State Bar Association required. (RCW 2.48.170). Annual membership fee, set by Board of Governors, is $407 for those active attorneys admitted before 2004; $331 for those admitted in 2004 or 2005; and $203 for those admitted in 2006 or 2007.

Privileges.

Certain law office equipment not to exceed $5,000 in value exempt from execution and attachment. (RCW 6.15.010[4][b]).

Disabilities.

Attorneys are disqualified as sureties on bonds or recognizances. (RCW 19.72.020).

Liabilities.

See category 5 Civil Actions and Procedure, topic 5.08 Costs.

Compensation.

Fees must be reasonable. (Rules of Professional Conduct [RPC] 1.5[a]). Contingent fee agreement must be in writing. (RPC 1.5[c]). Contingent fee agreements not permitted for certain specified matters. (RPC 1.5[c]; RPC 1.5[d]). Contingent fee, consisting of percentage of monetary amount recovered by claimant in which all or part of recovery to be paid in future, must be paid only by applying percentage to amounts received by client as recovered or by applying percentage to actual cost of settlement or award to defendant. (RPC 1.5[c]). When lawyer has not regularly represented client, if fee arrangement is substantially different than that previously used by parties, or upon request of client, lawyer must communicate, preferably in writing, basis or rate of fee or factors involved in determining charges for legal services and billing practices before, or within reasonable time after, commencing representation. (RPC 1.5[b]). In tort action, named party may petition court to determine reasonableness of that party's attorney fees. (RCW 4.24.005).

Lien.

An attorney has a lien for his compensation upon money or papers in his possession, upon money in the hands of the adverse party in an action or proceeding in which the attorney was employed, from the time of giving notice of the lien to that party, and upon a judgment for services performed in the action from time of filing notice of lien with the clerk of the court. (RCW 60.40.010).

Disbarment or Suspension.

Complete rules have been adopted for discipline of attorneys. (RCW 2.48.060; Rules of Professional Conduct [RPC]; Rules for Lawyer Discipline [RLD]). Attorney may be reprimanded, censured, suspended, or disbarred on several grounds. (RCW 2.48.220; RPC; RLD).

Unauthorized Practice.

Corporations, associations, or individuals not admitted as active members of Bar may not, directly or indirectly, engage in practice of law. (RCW 2.48.170; .180). For examples of unauthorized practice, see RCW 2.48.180.

Mandatory Continuing Legal Education.

Every active member of Bar Association must complete minimum of 45 credit hours of approved or accredited legal education every three years, except for newly admitted members who are allowed four years. Minimum of six credit hours in legal ethics, professionalism, or professional responsibility required. Provision made for carryover of up to 15 unused credits. Board of Continuing Legal Education approves and accredits courses. (APR 11).

Specialty Certification Requirements.

No provision for specialty certification.

Professional Association (or Corporation).

See category 2 Business Organizations, topic 2.03 Corporations, subhead Professional Corporations.

Attorney Ethics.

Professional conduct governed by Rules of Professional Conduct (RPC 1.1-8.5) drawn from American Bar Association Model Rules with modifications.

Procedures for disciplinary sanctions and violations of Rules of Professional Conduct are governed by ELC (Rules for Enforcement of Lawyer Conduct) 1.1-15.6.

19 MINERAL, WATER AND FISHING RIGHTS

19.01 MINES AND MINERALS:

Mining operations supervised by Department of Natural Resources and Department of Labor and Industries. (RCW 43.30.125; .130; Title 78).

Comprehensive Coal Mining Code adopted. (78.40). Surface mining. (78.44).

Oil and Gas.

Leases of state lands authorized in accordance with regulations of Department of Natural Resources (79.14); moratorium on leasing Washington's tidal and submerged lands through July 1, 1995 (RCW 82.21.020). Leases of county lands authorized for exploration of oil, gas and minerals. (78.16). Oil and gas conservation regulations. (78.52).

Taxes.

Legislature may tax mines and minerals using either ad valorem or yield tax, or both.

(Const. Art. VII, §1—Amendment 14).

20 MORTGAGES

20.01 CHATTEL MORTGAGES:

Uniform Commercial Code adopted. (Title 62A). See category 3 Business Regulation and Commerce, topic 3.09 Commercial Code.

What May Be Mortgaged.

See category 3 Business Regulation and Commerce, topic 3.09 Commercial Code.

After Acquired Property.

See category 3 Business Regulation and Commerce, topic 3.09 Commercial Code.

Future Advances.

See category 3 Business Regulation and Commerce, topic 3.09 Commercial Code.

Floating Stock.

See category 3 Business Regulation and Commerce, topic 3.09 Commercial Code.

Requisites of Instrument.

See category 3 Business Regulation and Commerce, topic 3.09 Commercial Code.

Execution of Instrument.

See category 3 Business Regulation and Commerce, topic 3.09 Commercial Code.

Filing and Recording.

See category 3 Business Regulation and Commerce, topic 3.09 Commercial Code.

Recording.

See category 3 Business Regulation and Commerce, topic 3.09 Commercial Code.

Filing Fee.

County auditor's fee for filing chattel mortgage is $5 for first page, $1 for each additional page and surcharges. (RCW 36.18.010). Filing fee for multiple transactions in one instrument calculated individually if separate indexing required per RCW 65.04.050. (RCW 36.18.010). State Department of Licensing fee is $4 if standard financing statement used and $7 for any nonstandard filings and filings with additional sheets. See category 3 Business Regulation and Commerce, topic 3.09 Commercial Code.

Refiling or Extension.

See category 3 Business Regulation and Commerce, topic 3.09 Commercial Code.

Removal of Property by Mortgagor.

See category 3 Business Regulation and Commerce, topic 3.09 Commercial Code.

Satisfaction.

See category 3 Business Regulation and Commerce, topic 3.09 Commercial Code.

Taking of Possession by Mortgagee.

See category 3 Business Regulation and Commerce, topic 3.09 Commercial Code.

Motor Vehicles.

See category 23 Transportation, topic 23.01 Motor Vehicles.

Foreclosure.

See category 3 Business Regulation and Commerce, topic 3.09 Commercial Code.

Redemption.

See category 3 Business Regulation and Commerce, topic 3.09 Commercial Code.

Foreign Mortgages.

See category 3 Business Regulation and Commerce, topic 3.09 Commercial Code.

Forms.

For use under Uniform Commercial Code. For UCC-1, UCC-2, UCC-3 and UCC-11R forms, see end of this Digest. *Note:* Effective July 1, 2001, Uniform Form of Written Financing Statement, set out at §9A-521, in effect.

Form

Security Agreement.

Following form of security agreement would fulfill statutory requirements other than for inventory and retail sales of consumer goods:

SECURITY AGREEMENT

THE UNDERSIGNED . . . . (hereinafter called "Debtor") hereby grants to . . . . (hereinafter called "Secured Party"), a security interest in the following-described property; together with all increases therein, all added and substituted parts and equipment, tools, parts, accessories, supplies and improvements therefor, together with all proceeds of all such property, to-wit:

[Insert full description of property, including identifying data such as year, make, model, serial and identification numbers.]

All of said property is hereinafter referred to as the "property" and is located in . . . . County, Washington.

This Security Agreement is given to secure the payment and performance of all indebtedness and obligations of Debtor to Secured Party presently existing and hereafter arising, direct or indirect, and interest thereon. Regardless of the adequacy of any security which Secured Party may at any time hold hereunder, and regardless of the adequacy of any other security which Secured Party may obtain at any of its offices from Debtor in connection with any other transactions, any deposits or other moneys owing from Secured Party at any of its offices to Debtor shall (as collateral in the possession of Secured Party) constitute additional security for, and may be set off against, obligations secured hereby even though said obligations may not then be due. When more than one person is the Debtor they shall be jointly and severally liable.

DEBTOR HEREBY REPRESENTS, COVENANTS AND AGREES WITH SECURED

PARTY AS FOLLOWS: (1) *Use of Property—Residence of Debtor.* Debtor agrees to comply with any governmental regulation affecting the use of the property and will not waste, injure nor destroy the property, nor use nor permit the use of the property in any unlawful manner. Debtor represents and agrees that the primary use of the property is and will be as checked here: [ ] Personal, family or household purposes; [ ] Business Use; [ ] Farming Use. Debtor resides in the county set forth below, unless some other county is indicated here: . . . . County, Washington. (2) *Fixtures.* If any of the property is to be or has been attached to real estate, the legal description of the real estate is as follows: . . . . If Debtor does not have a record interest in the above real property, the record owner is: . . . . (3) *Ownership and Liens.* Debtor is over 21 years of age and owns the property and the same is free and clear of all security interests and encumbrances of every nature. Debtor will not create nor permit the existence of any lien or security interest other than that created hereby on the property without the written consent of Secured Party. Any certificate of title now or hereafter existing on any of the property will be delivered to Secured Party and will recite the interest of Secured Party. (4) *Taxes.* Debtor will pay before delinquency all taxes and other governmental charges that are or may become a lien or charge on the property and will pay any tax which may be levied on any obligation secured hereby. (5) *Repairs and Inspection.* Debtor will keep the property in good repair. Secured Party may inspect the property at reasonable times and intervals and may for this purpose enter the premises upon which the property is located. (6) *Insurance.* Debtor will keep the property continuously insured by an insurer approved by Secured Party against fire, theft and other hazards designated at any time by Secured Party, in an amount equal to the full insurable value thereof or to all sums secured hereby, with such form of loss payable clause as designated by and in favor of Secured Party, and will deliver the policies and receipts showing payment of premiums to Secured Party. In the event of loss, Secured Party shall have full power to collect any and all insurance upon the property and to apply the same at its option to any obligation secured hereby, whether or not matured, or to the restoration or repair of the property. Secured Party shall have no liability whatsoever for any loss that may occur by reason of the omission or lack of coverage of any such insurance. (7) *Removal or Sale.* Without the prior written consent of Secured Party, Debtor will not remove the property from the State of Washington, and Debtor will not sell nor lease the property or any interest therein. (8) *Expenses Incurred by Secured Party.* Secured Party is not required to, but may at its option, pay any tax, assessment, insurance premium, expense, repair or other charges payable by Debtor, and any filing or recording fees, and any amount so paid, with interest thereon at the maximum rate permitted by law from date of payment until repaid shall be secured hereby and shall be repayable by Debtor on demand. The rights granted by this paragraph are not a waiver of any other rights of Secured Party arising from breach of any of the covenants hereof by Debtor. (9) *Waivers.* This Security Agreement shall not be qualified or supplemented by course of dealing. No waiver or modification by Secured Party of any of the terms or conditions hereof shall be effective unless in writing signed by Secured Party. No waiver nor indulgence by Secured Party as to any required performance by Debtor shall constitute a waiver as to any subsequent required performance or other obligations of Debtor hereunder. Debtor hereby waives any counterclaims or defense hereunder against any assignee for value. (10) *Default.* Time is of the essence of this Security Agreement, and in any of the following events, hereinafter called “Events of Default,” to-wit: (a) Any failure to pay when due the full amount of any payment of principal, interest, taxes, insurance premiums or other charges which are or may be secured hereby; or (b) Any failure to perform as required by any covenant or agreement herein; or (c) The falsity of any representation by Debtor herein or in any credit application or financial statement given by Debtor to Secured Party as a basis for any extension of credit secured hereby; or (d) If the property should be seized or levied upon under any legal or governmental process against Debtor or against the property; or (e) If Debtor becomes insolvent or is the subject of a petition in bankruptcy, either voluntary or involuntary, or in any other proceeding under the federal bankruptcy laws; or makes an assignment for the benefit of creditors; or if Debtor is named in or the property is subjected to a suit for the appointment of a receiver; or (f) Loss, substantial damage to, or destruction of any portion of the property; or (g) Entry of any judgment against Debtor; or (h) Dissolution or liquidation of Debtor; or (i) Secured Party deems itself insecure, then and in any of such events of default, the entire amount of indebtedness secured hereby shall then or at any time thereafter, at the option of Secured Party, become immediately due and payable without notice or demand, and Secured Party shall have an immediate right to pursue the remedies set forth in this Security Agreement. (11) *Remedies.* In the event of a default hereunder, Secured Party shall have all remedies provided by law; and without limiting the generality of the foregoing, shall be entitled as follows: (a) Debtor agrees to put Secured Party in possession of the property on demand; and (b) Secured Party is authorized to enter any premises where the property is situated and take possession of said property without notice or demand and without legal proceedings; and (c) at the request of Secured Party, Debtor will assemble the property and make it available to Secured Party at a place designated by Secured Party which is reasonably convenient to both parties; and (d) Debtor agrees that a period of fifteen (15) days from the time notice is sent, by first class mail or otherwise, shall be a reasonable period of notification of a sale or other disposition of the property; and (e) Debtor agrees that any notice or other communication by Secured Party to Debtor shall be sent to the address of the Debtor stated herein; and (f) Debtor agrees to pay on demand the amount of all expenses reasonably incurred by Secured Party in protecting or realizing on the property. In the event that this Security Agreement or any obligation secured by it is referred to an attorney for protecting or defending the priority of Secured Party's interest or for collection or realization procedures, Debtor agrees to pay a reasonable attorney fee, including fees incurred in both trial and appellate courts, or fees incurred without suit, and expenses of title search and all court costs and costs of public officials. The sums agreed to be paid in this subparagraph shall be secured hereby; and (g) If Secured Party disposes of the property, Debtor agrees to pay any deficiency remaining after application of the net proceeds to any indebtedness secured hereby. (12) *Applicable Law.* This Security Agreement and the indebtedness hereby secured are subject to the laws of the State of Washington and are to be construed in accordance therewith.

Signed this . . . . day of . . . . . ., 20 . . . . (Address) . . . . County, Washington (Debtor).

Sale of Property by Mortgagor.

See category 3 Business Regulation and Commerce, topic 3.09 Commercial Code.

Concealment or Destruction of Property by Mortgagor.

See category 3 Business Regulation and Commerce, topic 3.09 Commercial Code.

Release.

See category 3 Business Regulation and Commerce, topic 3.09 Commercial Code.

Satisfaction or Discharge.

See category 3 Business Regulation and Commerce, topic 3.09 Commercial Code.

Taxation.

No existing tax on chattel mortgages.

Retail Installment Sales.

See category 3 Business Regulation and Commerce, topic 3.23 Sales.

20.02 COLLATERAL SECURITY:

See category 8 Debtor and Creditor, topic 8.15 Pledges.

20.03 MORTGAGES OF PERSONAL PROPERTY:

See category 3 Business Regulation and Commerce, topic 3.09 Commercial Code.

20.04 MORTGAGES OF REAL PROPERTY:

Washington is a lien theory state.

Execution.

A mortgage must be executed like a deed (RCW 64.04.010), in writing signed by party bound thereby, and acknowledged (RCW 64.04.020). Acknowledgment is not necessary to validity of a mortgage as between parties (124 Wash. 403, 214 P. 820), but is necessary in order that mortgage be eligible for recording (RCW 65.08.070).

Mortgages are usually accompanied by promissory notes. They may be in form of trust deeds securing bond issues.

Disclosures.

Lender on residential mortgage loan required to provide copies of appraisals and other documents. (RCW 19.149.010; .020).

Recording.

To be effective against persons other than parties thereto, mortgage must be recorded in office of county auditor of county in which property is located. (RCW 65.08.070). See category 10 Documents and Records, topic 10.04 Records.

For use of master form, see category 21 Property, topic 21.06 Deeds, subhead Recording.

Recording Fees.

For recording first page (8½ x 14 inches or less) $5; each additional page, $1; and surcharges per instrument surcharge. (RCW 36.18.010).

Taxes.

Mortgages are exempt from taxation. (RCW 84.36.070).

Future Advances.

Mortgage given to secure advances is valid and if secures construction or interim loan may have priority over intervening liens whether or not mortgagee is obligated to make advances. (RCW 60.04.226).

For special duties of interim or construction lenders, see category 8 Debtor and Creditor, topic 8.13 Liens, subhead Mechanics' and Materialmen's Liens.

Priorities.

Common law rules prevail, except that properly recorded mortgage has priority over mortgages subsequently recorded. (RCW 65.08.070).

Subordination Agreements.

Mortgagees may agree as to priority of mortgages. (81 Wn.2d 886, 506 P.2d 20).

Assignment is by written instrument, executed and acknowledged in same manner as deeds and mortgages. Mortgage may be satisfied of record by assignee after assignment has been recorded in county auditor's office. (RCW 61.16.010).

Recording assignment of mortgage is not of itself notice to mortgagor, his heirs, assigns or personal representatives, so as to invalidate payment made by any of them to prior holder of mortgage. (RCW 65.08.120).

Satisfaction may be by written instrument executed, acknowledged and recorded by mortgagee, his assigns, or personal representatives. (RCW 61.16.020).

Quieting Title.

Where action to foreclose is barred by limitations, owner of property may sue to quiet title against lien of mortgage or deed of trust. (RCW 7.28.300).

Foreclosure is by action in superior court of county where land or portion thereof located, and not otherwise. (RCW 61.12.040). Decree of foreclosure is enforced by execution in same manner as ordinary money judgment, with order of sale of mortgaged property, and sale is made by sheriff in same manner as all sales of real property upon execution. (RCW 61.12.090). Court may fix minimum price below which sale may not be made or confirmed. (RCW 61.12.060).

Mortgages may be foreclosed upon failure to pay any installment of interest or principal (RCW 61.12.040), but payment of such installment before decree, with accrued costs, suspends further proceedings until default again occurs (RCW 61.12.130). However acceleration right exercised before tender of payment is enforceable. (50 Wn.2d 799, 314 P.2d 935).

There is no moratorium on mortgage foreclosures.

Deficiency Judgments.

Remedy is confined to property mortgaged in absence of express agreement in mortgage or otherwise. (RCW 61.12.050). But when there is agreement for payment of sum of money secured contained in mortgage or otherwise, court will direct that amount remaining unsatisfied after sale of mortgaged property will be satisfied from other property of debtor. (RCW 61.12.070). Deficiency judgments are enforced in same manner as other judgments for money. (RCW 61.12.080). See also category 8 Debtor and Creditor, topic 8.05 Executions, subhead Redemption.

Redemption is same as in sales of real property under execution (see category 8 Debtor and Creditor, topic 8.05 Executions), except that in foreclosure of mortgages upon property with structures, if court finds that mortgagor has abandoned property for six months or more prior to decree of foreclosure and that property is not used primarily for agricultural purposes, purchaser at sheriff's sale takes title free of all redemption rights but in such case no deficiency judgment is allowed. (RCW 61.12.093-.094).

Forms.

Following form is authorized by statute, which provides that such mortgage shall be deemed and held good and sufficient conveyance and mortgage to secure payment of money therein specified, but that parties may insert any lawful agreement or condition. (RCW 61.12.020):

Form

Mortgage.

The mortgagor (here insert name or names) mortgages to (here insert name or names), to secure the payment of (here insert nature and amount of indebtedness, showing when due, rate of interest, and whether or not evidenced by note, bond or other instrument) the following described real estate: (here insert description) situated in the county of . . . ., State of Washington.

Dated this . . . . . . day of . . . . . ., 20. . . . . . .

. . . .

(Acknowledgment required).

The following forms are in common use:

Form

Assignment of Mortgage:

KNOW ALL MEN BY THESE PRESENTS: That . . . . (insert name of mortgagee) . . . ., a corporation, for value received does hereby grant, bargain, sell, assign, transfer and set over unto . . . . (insert name of assignee) . . . . that certain mortgage bearing date the . . . . . day of . . . ., 20. . . ., made and executed by . . . . (insert name of mortgagor) . . . . as mortgagor to . . . . (insert name of mortgagee) . . . . to secure payment of the sum of . . . . Dollars ($) and interest, and recorded in the office of the County Auditor of . . . . County, State of Washington, on the . . . . . day of . . . ., 20. . . ., in Volume . . . . . . of Mortgages, at page . . . ., being Auditor's File No. . . . . together with the note thereby secured and the money due and to grow due thereon, with the interest.

IN WITNESS WHEREOF, said corporation has caused this instrument to be executed by its proper officers and its corporate seal to be hereunto affixed this . . . . . . day of . . . ., 20. . . . .

. . . .

Assignor

(Acknowledgment required)

Satisfaction of Mortgage:

Know All Men By These Presents, That . . . . . . of . . . . . . Mortgagee. . . ., do. . . . hereby certify that the mortgage made and executed by . . . . . . of . . . . . . County, Washington, as mortgagor. . . . to . . . . . . as mortgagee. . . . on . . . . . . to secure the payment of . . . . . . Dollars, and of record in the office of the Auditor of . . . . . . County, Washington, in Volume . . . . . . of Mortgages, on Page . . . . . . with the note secured thereby, is fully paid and satisfied and . . . . . . do hereby consent that the same be fully discharged of record.

Witness . . . . . . hand. . . . this . . . . . . day of . . . . . ., 20. . . . .

. . . .

. . . .

(Acknowledgment required).

Release of Part of Mortgaged Property:

Know All Men By These Presents. That I, ..., of the . . . . . . of . . . . . . county and State of . . . . . ., for and in consideration of the sum of . . . . . . dollars, and for other good and valuable considerations, the receipt whereof is hereby confessed, do hereby remise, release and discharge the premises hereinafter particularly described from the lien of a certain mortgage executed by . . . . . . to . . . . . ., dated . . . . . ., 20. . . ., recorded . . . . . ., 20. . . ., in book . . . . . ., on page . . . . . . of the records of . . . . . . county, state of . . . .

Said above mentioned premises being situated in the . . . . . . of . . . . . . county of . . . . . . in the state of . . . . . . and particularly described as follows:

. . . .

It is hereby expressly understood that this release shall not affect or impair the security of said mortgage upon any portion of any premises, except the premises hereinabove particularly described.

Witness my hand and seal this . . . . . . day of . . . . . ., 20. . . . .

. . . .(Seal).

(Acknowledgment required).

Trust Deeds (61.24).

Deed of trust may be given conveying real property to trustee to secure performance of obligation to beneficiary. Trustee must be: (a) Corporation incorporated in Washington; or (b) title insurance company authorized to insure title in Washington; or (c) any attorney who is active member of Washington State Bar Association; or (d) any Washington professional entity whose principals are licensed attorneys; or (e) any agency of U.S. government; or (f) national bank, savings bank or savings and loan association chartered under laws of U.S. (RCW 61.24.010, am'd 2008, c. 153, §1). Such deeds shall be recorded as mortgages and indexed with grantor as mortgagor and trustee and beneficiary as mortgagee. (RCW 61.24.020). Deeds of trust may be foreclosed judicially as mortgage or by following procedure. (RCW 61.24.100). Any party desiring notice of sale must record acknowledged request for copy thereof.. (RCW 61.24.045, am'd 2008, c. 153, §4).

Nonjudicial Foreclosure Proceedings.

Requisites to trustee's sale under statute are: (a) Power of sale contained in trust deed; (b) provision in trust deed that real property not used principally for agricultural purposes; (c) default which by terms of trust deed makes power to sell operative; (d) absence of any pending action on obligation secured by trust deed other than seeking appointment of receiver; (e) recording of trust deed in each county where property located; (f) trustee must have in-state address for service of process, physical presence and telephone service; and (g) trustee must have proof that beneficiary is owner of any obligation secured by deed of trust. (RCW 61.24.030).

At least 30 days prior to recording notice of sale, written notice of default must be served upon grantor or any successor in interest at his last known address by both first class and certified mail, return receipt requested, and notice posted on premises, or personally served upon grantor or successor in interest. Notice must contain: (a) Description of property; (b) county(ies) and document number(s) of deed of trust; (c) statement that beneficiary has declared borrower or grantor in default; (d) itemized account of amount in arrears; (e) itemized account of all other specific charges; (f) total of all amounts due by grantor to cure default; (g) statement that failure to cure default within 30 days may lead to recordation, transmittal and publication of notice of sale and that property may be sold at public auction no less than 120 days in future; (h) statement that effect of such recordation, transmittal and publication will be to increase costs and fees and to publicize default and advertise property for sale; (i) statement that effect of sale will be to deprive grantor of all interest in property; (j) statement that grantor has recourse to courts to contest alleged default on any proper ground; and (k) where residential real property is involved, name and address of owner of obligations secured by deed of trust. (RCW 61.24.030). Notice of default not to be issued until 30 days after initial contact is made with the borrower or 30 days after satisfying due diligence requirements. (RCW 61.24.031). Notice of foreclosure of tenant-occupied property, upon posting notice of trustee's sale, to be mailed to tenant. (RCW 61.24.143, 61.24.146).

At least 90 days before sale, trustee must: (a) Record notice of sale with county auditor; (b) if trustee elects to foreclose lien or interest or beneficiary elects to preserve right to deficiency judgment, transmit by both first class and either registered or certified mail, return receipt requested, copy of notice of sale to borrower and grantor, beneficiary or mortgagee, or any person with lien or claim against property, and to any vendee under real estate contract, or any lessee or any holder of any transfer of any interest in property, last holder of any lien or judgment against or any interest in property subordinate to interest being foreclosed, to occupants of dwelling unit, and to plaintiff or his attorney of record in any pending action to foreclose lien or other encumbrance on property, and to any property and to any person who shall have recorded request for such notice in writing (sale of property will not affect interest or lien of any person entitled to notice if trustee fails to give such person required notice [4.16.020]); and (c) cause notice to be posted on property or delivered to occupant thereof. Trustee must also cause copy of notice of sale to be published in legal newspaper in each county in which property is situated, once between 32nd and 28th day before date of sale, and once between 11th and 7th day before date of sale. Sale must not take place less than 190 days from date of default in obligation secured. Trustee may continue sale for period or periods not exceeding total of 120 days by public proclamation. Notice of foreclosure must also be provided, substantially in statutory form, to borrower and grantor, and must include payoff amount. (RCW 61.24.040, am'd 2008, c. 153, §3). Beneficiary may give notices to guarantors of commercial loan. (RCW 61.24.042). Grantor has no redemption rights. (RCW 61.24.050).

Proceeds of sale applied to: (1) Expenses of sale, including reasonable charge by trustee and his attorney, aggregate of which shall not exceed amount which would be allowed as reasonable attorney's fee in non-contested foreclosure proceeding in court; (2) obligation secured by deed of trust; and (3) any surplus to persons entitled thereto. Surplus must be paid into court. (RCW 61.24.080).

Curing Default.

Up to 11 days prior to sale grantor or successors may cure default and cause discontinuance of proceeding by paying trustee sum sufficient to cure all defaults other than such portion of principal as would not then be due had no default occurred, plus incurred expenses, including reasonable trustee's fee plus trustee's reasonable attorney fees. (RCW 61.24.090).

Deficiency.

Except in case of certain commercial loans, foreclosure under statute satisfies obligation secured by trust deed regardless of sale price or fair value thereof. No deficiency judgment may thereafter be obtained if property is occupied as borrower's principal residence at time of foreclosure. (RCW 61.24.100).

Reconveyances shall be made by trustee on written request of beneficiary, or upon satisfaction of obligation secured and written request for reconveyance made by beneficiary or person entitled thereto. (RCW 61.24.110).

Restraint of sale may be sought by borrower or guarantor. Payment into court of sums otherwise due on secured obligation, security for payment of costs and damages or satisfaction of other conditions may be required, and five days notice to trustee and beneficiary required. Trustee may continue sale despite injunction. (RCW 61.24.130, am'd 2008, c. 153, §5).

Form

The following form is in common use:

Deed of Trust:

THIS DEED OF TRUST, made this . . . . . . day of . . . ., 20. . . . . ., between . . . . (insert name of grantor) . . . ., Grantor, whose address is . . . ., ... (insert name of beneficiary) . . . . . ., Beneficiary whose address is . . . ., and . . . . (insert name of Trustee) . . . ., Trustee, whose address is . . . .

WITNESSETH: Grantor hereby bargains, sells and conveys to Trustee in Trust, with power of sale, the following described real property in . . . . (insert name of county) . . . ., Washington:

(insert description of property)

which real property is not used principally for agricultural or farming purposes, together with all tenements, hereditaments, and appurtenances now or hereafter thereunto belonging or in any wise appertaining, and the rents, issues and profits thereof.

This deed is for the purpose of securing performance of each agreement of grantor herein contained, and payment of the sum of . . . . Dollars ($) with interest, in accordance with the terms of a promissory note of even date herewith payable to Beneficiary or order, and made by Grantor, and all renewals, modifications and extensions thereof, and also such further sums as may be advanced or loaned by Beneficiary to Grantor, or any of their successors or assigns together with interest thereon at such rate as shall be agreed upon.

To protect the security of this Deed of Trust, Grantor covenants and agrees:

1. To keep the property in good condition and repair; to permit no waste thereof; to complete any building, structure or improvement being built or about to be built thereon; to restore promptly any building, structure or improvements thereon which may be damaged or destroyed; and to comply with all laws, ordinances, regulations, covenants, conditions and restrictions affecting the property.

2. To pay before delinquent all lawful taxes and assessments upon the property; to keep the property free and clear of all other charges, liens or encumbrances impairing the security of this Deed of Trust.

3. To keep all buildings now or hereafter erected on the property described herein continuously insured against loss by fire or other hazards in an amount not less than the total debt secured by this Deed of Trust. All policies shall be held by Beneficiary, and be in such companies as Beneficiary may approve and have loss payable first to Beneficiary as its interest may appear and then to Grantor. The amount collected under any insurance policy may be applied upon any indebtedness hereby secured in such order as Beneficiary shall determine. Such application by Beneficiary shall not cause discontinuance of any proceedings to foreclose this Deed of Trust. In the event of foreclosure, all rights of Grantor in insurance policies then in force shall pass to the purchaser at the foreclosure sale.

4. To defend any action or proceeding purporting to affect the security hereof or the rights or powers of Beneficiary or Trustee, and to pay all costs and expenses, including cost of title search and attorney fees in a reasonable amount, in any such action or proceeding, and in any suit brought by Beneficiary to foreclose this Deed of Trust.

5. To pay all costs, fees and expenses in connection with this Deed of Trust, including the expenses of the Trustee incurred in enforcing the obligation secured hereby and Trustee's and attorney fees actually incurred, as provided by statute.

6. Should Grantor fail to pay when due any taxes, assessments, insurance premiums, liens, encumbrances or other charges against the property hereinabove described, Beneficiary may pay the same, and the amount so paid, with interest at the rate set forth in the note secured hereby, shall be added to and become a part of the debt secured in this Deed of Trust.

IT IS MUTUALLY AGREED THAT:

1. In the event any portion of the property is taken or damaged in an eminent domain proceeding, the entire amount of the award or such portion as may be necessary to fully satisfy the obligation secured hereby, shall be paid to Beneficiary to be applied to said obligation.

2. By accepting payment of any sum secured hereby after its due date, Beneficiary does not waive its right to require prompt payment when due of all other sums so secured or to declare default for failure to so pay.

3. Trustee shall reconvey all or any part of the property covered by this Deed of Trust to the person entitled thereto on written request of Grantor and Beneficiary, or upon satisfaction of the obligation secured and written request for reconveyance made by Beneficiary or the person entitled thereto.

4. Upon default by Grantor in the payment of any indebtedness secured hereby or in the performance of any agreement contained herein, all sums secured hereby shall immediately become due and payable at the option of Beneficiary. In such event and upon written request of Beneficiary, Trustee shall sell the trust property, in accordance with the Deed of Trust Act of the State of Washington, at public auction to the highest bidder. Any person except Trustee may bid at Trustee's sale. Trustee shall apply the proceeds of the sale as follows: (1) to the expense of sale, including a reasonable Trustee fee and attorney fee; (2) to the obligation secured by this Deed of Trust; (3) the surplus, if any, shall be distributed to the persons entitled thereto.

5. Trustee shall deliver to the purchaser at the sale its deed, without warranty, which shall convey to the purchaser the interest in the property which Grantor had or had the power to convey at the time of his execution of this Deed of Trust, and such as he may have acquired thereafter. Trustee's deed shall recite the facts showing that the sale was conducted in compliance with all the requirements of law and of this Deed of Trust, which recital shall be prima facie evidence of such compliance and conclusive evidence thereof in favor of bona fide purchasers and encumbrancers for value.

6. The power of sale conferred by this Deed of Trust and by the Deed of Trust Act of the State of Washington is not an exclusive remedy; Beneficiary may cause this Deed of Trust to be foreclosed as a mortgage.

7. In the event of the death, incapacity or disability or resignation of Trustee, Beneficiary may appoint in writing a successor trustee, and upon the recording of such appointment in the mortgage records of the county in which this Deed of Trust is recorded, the successor trustee shall be vested with all powers of the original trustee. Trustee is not obligated to notify any party hereto of pending sale under any other Deed of Trust or of any action or

proceeding in which Grantor, Trustee or Beneficiary shall be a party unless such action or proceeding is brought by Trustee.

8. This Deed of Trust applies to, inures to the benefit of, and is binding not only on the parties hereto, but on their heirs, devisees, legatees, administrators, executors, successors and assigns. The term Beneficiary shall mean the holder and owner of the note secured hereby, whether or not named as Beneficiary herein.

. . . .

. . . .

. . . .

(Acknowledgment required)

Real Estate Contracts.

In Washington, real estate contracts have been traditionally utilized to secure payment of purchase price. They operate as conditional sale, with title reserved until full payment is made. Upon default, forfeiture may be effected pursuant to Real Estate Contract Forfeiture Act. (61.30). Forfeiture remedy not exclusive. (RCW 61.30.020). Real estate contract may also be foreclosed as mortgage. (61.12). Commencement of action to foreclose as mortgage does not bar forfeiture; commencement of forfeiture does not bar foreclosure as mortgage. (61.12).

Forfeiture proceedings governed by statute. (61.30). Required notice of intent to forfeit affords opportunity to cure and reinstate contract. (RCW 61.30.070). Payment may not be accelerated during cure period except for transfer or conveyance where contract contains enforceable provision accelerating balance on such event. (RCW 61.30.090). Where time for cure expires without default having been cured, required declaration of forfeiture has following effects: (a) Purchaser and those claiming through purchaser or whose interests are otherwise subordinate to seller's interest in property shall have no further rights in property and no right to redeem; (b) sums paid under contract belong to person to whom paid; (c) rights of purchaser to improvements, timber and unharvested crops forfeited to seller; (d) seller entitled to possession ten days after declaration of forfeiture recorded or any longer period in contract or any other agreement with seller. Seller has no claim against purchaser for unpaid purchase price or any other breach after declaration of forfeiture recorded, except for waste damages under some limited circumstances. (RCW 61.30.100).

Forfeiture may be permanently enjoined where: (a) There is no default; (b) purchaser has claim against seller which releases, discharges or excuses default; or (c) there is material noncompliance with statute. (RCW 61.30.110). Except for sale ordered incident to foreclosure of contract as mortgage, public sale in lieu of forfeiture may be ordered by court if fair market value of property substantially exceeds unpaid and unperformed obligations secured by contract and other liens having priority over seller's interest in property. No right to redeem following public sale. No deficiency decree may be obtained. (RCW 61.30.120).

Reverse Mortgages

Washington State Reverse Mortgage Act in effect. (RCW 31.04.500–.540).

Chattel Mortgages.

See topic 20.01 Chattel Mortgages.

21 PROPERTY

21.01 ABSENTEES:

Care of Property.

Absent Owners.

Where property in county is owned by one whose whereabouts are unknown, or by person captured or missing in action in period of hostilities (RCW 11.80.120), Superior Court may appoint trustee who must post bond (RCW 11.80.020) and render account (RCW 11.80.030; .060). Property may be sold for preservation of estate (RCW 11.80.040) or support of dependents (RCW 11.80.050, am'd 2008, c. 6, §933). Spouse, domestic partner or next of kin may sell or transfer property of value under $5,000 without appointment of trustee with approval of Superior Court. (RCW 11.80.130, am'd 2008, c. 6, §926). Provisional distribution to presumptive heirs possible after five years (RCW 11.80.080) if bonds are given (RCW 11.80.090). Final distribution may be had seven years after disappearance. (RCW 11.80.100). If no presumptive heirs appear and no will of absentee proven during seven years, property escheats. (RCW 11.80.110). As for nonresident owners who are incompetent, see category 14 Family, topic 14.08 Guardian and Ward.

Absent Distributees.

Where any estate is about to be distributed to any person not located, court shall appoint agent to hold property for his benefit. (RCW 11.76.200). Bond is required. (RCW 11.76.210). If unclaimed by absentee or his representative for three years, property is sold and proceeds deposited in county treasury. (RCW 11.76.220; .240). If proceeds unclaimed by absentee or his representative for four years thereafter, heirs then have 90 days to commence probate. (RCW 11.76.243). If proceeds unclaimed at end of 90 days, they escheat. (RCW 11.76.220). However, absentee thereafter appearing may claim assets from state. (RCW 11.76.245).

Absent Executors.

Executor disqualified while absent from state. (RCW 11.28.040).

Process Agent.

No general statutory authority for appointment of agent by absentee for service of process.

Escheat.

Property subject to jurisdiction of this state, left by decedent who is unsurvived by persons entitled to it under laws of this state, escheats. (RCW 11.08.140). Department of Revenue has jurisdiction over escheat property. (RCW 11.08.160). Uniform Unclaimed Property Act enacted. (63.29). Unclaimed property in hands of bailee. (63.24). Unclaimed property in hands of sheriff. (63.40). Unclaimed property, generally. (63.21). Unclaimed property in hands of state patrol. (RCW 63.35.010-.060; .900; RCW 9.41.098). Unclaimed intangibles issued by state, political subdivision or domestic corporation presumed abandoned three years after time for payment or delivery if address of owner unknown. (RCW 62.29.020). See category 13 Estates and Trusts, topics 13.07 Descent and Distribution, 13.16 Wills, subhead Unclaimed Legacies.

21.02 ADVERSE POSSESSION:

Adverse possession will not affect title of public lands held in governmental capacity. (RCW 7.28.090). Land held by counties and municipalities in proprietary capacity is subject to adverse possession. (83 Wash. 303, 145 P. 458).

Character and Duration of Possession.

Person in actual, open, and notorious possession of lands or tenements continuously for seven years, in good faith and under connected title deducible from state or U.S. or any person authorized to make tax or execution sale, under claim and color of title, and paying all taxes, is deemed legal owner to extent of his paper title. (RCW 7.28.050; .070). Heirs and assigns who complete such possession and payment of taxes take same right. (RCW 7.28.060). Any person, his heirs or assigns, having color of title to vacant and unoccupied lands, who pays all taxes for seven successive years, is deemed owner to extent of his paper title. (RCW 7.28.080).

Exclusive, actual, uninterrupted, open, notorious and hostile possession under claim of right made in good faith for ten years is sufficient to defeat any claim other than that of occupant. (RCW 4.16.020; 100 Wn.2d 853, 676 P.2d 431). Tacking is permitted to achieve ten-year period. (53 Wn.2d 611, 335 P.2d 600; 46 Wn. App. 409, 731 P.2d 526).

Adverse possession in “forest lands” requires evidence of substantial improvements (greater than $50,000) which have remained for ten years. (RCW 7.28.085).

Easements.

Adverse, open, notorious, continuous, uninterrupted use with owner's knowledge for ten years establishes prescriptive easement. (95 Wn.2d 20, 622 P.2d 812).

Disabilities.

Persons under 18 and persons incompetent under RCW 11.88.010 may bring actions to recover lands adversely possessed under RCW 7.28.070 and RCW 7.28.080 within three years after removal of disability, but in case of vacant lands must repay expenditures made in good faith for improvements and taxes. (RCW 7.28.090).

21.03 [RESERVED]

21.04 CONVEYANCES:

See topic 21.06 Deeds.

21.05 CURTESY:

Curtesy has been abolished. (RCW 11.04.060). Property rights of husband and wife are fixed by community property law. See category 14 Family, topic 14.09 Spouse and Domestic Partner.

21.06 DEEDS:

See topic Real Property for types of estates.

Requisites.

Deed must be in writing, signed by party bound thereby, and acknowledged. (RCW 64.04.020). See category 10 Documents and Records, topic 10.01 Acknowledgments.

Execution.

Witnesses and seals are not necessary. See category 10 Documents and Records, topic 10.05 Seals.

Acknowledgment is not necessary to validity of deed as between parties (124 Wash. 403, 214 P. 820), but is necessary to render deed eligible for recording (RCW 65.08.070).

Deeds of community property must be executed by both spouses and domestic partners. (RCW 26.16.030, am'd 2008, c. 6, §604). Separate property may be conveyed without spouse or domestic partner joining in deed (RCW 26.16.010; .020, am'd 2008, c. 6, §§602 and 603), but it is practice to have both execute instrument unless record shows conclusively separate character of property. See also topic 21.16 Real Property; categories 8 Debtor and Creditor, topic Homesteads, subhead Alienation or Encumbrance; Family, topic Spouse and Domestic Partner, subhead Conveyance or Encumbrance of Separate Property.

Recording.

Unless acknowledged by proper party and recorded in office of county auditor of county in which property is located, a deed is void as against any subsequent purchaser or mortgagee in good faith and for valuable consideration from same vendor, his heirs, or devisees, whose conveyance is first duly recorded. Deed is deemed recorded minute it is filed for record. (RCW 65.08.070). Recording not permitted until real estate excise tax paid if tax required. (RCW 82.45.090). Instrument not accepted for recordation until recording fees paid. (RCW 65.04.030). Provision is made for electronic filing. (RCW 65.04.015). See category 22 Taxation, topic 22.15 Property Taxes, subhead Real Estate Conveyance Tax. See also category 10 Documents and Records, topic 10.04 Records.

Master form of mortgage or deed of trust may be recorded and provisions thereof incorporated by reference into any subsequently recorded mortgage or deed of trust. (RCW 65.08.160).

Recording Fees.

Filing and recording, for first page (8½ x 14 inches or less) $5; for each additional page, $1, plus $2 surcharge on some instruments. Multiple transactions in one instrument calculated individually. (RCW 36.18.010). $10 per instrument surcharge may be imposed. (RCW 36.22.178).

Tax on Conveyances.

See category 22 Taxation, topic 22.15 Property Taxes, subhead Real Estate Conveyance Tax.

Operation and Effect.

Words of Inheritance.

Term “heirs,” or other technical words of inheritance, are not necessary to create and convey an estate in fee simple. (RCW 64.04.060).

Warranty Deed, Effect of—Covenants.

Every deed in substance in below form will convey fee simple with covenants that: (1) Grantor was lawfully seized in fee simple and had power to convey; (2) property was free from all encumbrances; (3) Grantor warrants to grantee peaceable possession of property and will defend title against anyone claiming same. (RCW 64.04.030).

Bargain and Sale Deed, Effect of—Covenants.

Every deed in substance in below form conveys fee simple with covenants that: (1) Grantor was seized in fee simple; (2) property is free from encumbrances done by grantor; (3) grantee has right to quiet enjoyment as against grantor. (RCW 64.04.040).

Quitclaim Deed, Effect of—Covenants.

Every deed in substance in below form will convey and release all of grantor's rights and interest to grantee. After acquired property will not be conveyed unless expressly stated. (RCW 64.04.050).

Conveyance Taking Effect at Death.

Document, otherwise valid, may be effective even though not in conformity with wills statute. (RCW 11.02.130).

Power of Attorney to Convey.

See topic 21.15 Powers of Attorney, subhead Formalities.

Forms.

Statutory forms for deeds are as follows. All forms must include grantor's place of residence.

Forms

Warranty Deed (RCW 64.04.030): The grantor . . . . . . for and in consideration of . . . . . . in hand paid, conveys and warrants to . . . . . . the following described real estate (insert property description) situated in the county of . . . . . ., State of Washington.

Dated this . . . . . . day of . . . . . ., 20. . . . .

. . . .

(Acknowledgment).

Bargain and Sale Deed (RCW 64.04.040): The grantor . . . . . . for and in consideration of . . . . . . in hand paid, bargains, sells and conveys to . . . . . . the following described real estate (insert property description) situated in the county of . . . . . ., State of Washington.

Dated this . . . . . . day of . . . . . ., 20. . . . .

. . . .

(Acknowledgment).

Quitclaim Deed (RCW 64.04.050): The grantor . . . . . . for and in consideration of . . . . . . conveys and quitclaims to . . . . . . all interest in the following described real estate (insert property description) situated in the county of . . . . . ., State of Washington.

Dated this . . . . . . day of . . . . . ., 20. . . . .

. . . .

(Acknowledgment).

Trust Deeds.

See category 20 Mortgages, topic 20.04 Mortgages of Real Property.

21.07 [RESERVED]

21.08 DOWER:

Dower has been abolished. (RCW 11.04.060).

21.09 ESCHEAT:

See topic 21.01 Absentees, subhead Escheat; categories 3 Business Regulation and Commerce, topic Banks and Banking, subhead Unclaimed Deposits; Estates and Trusts, topics Descent and Distribution, subhead Escheat, Wills, subhead Unclaimed Legacies.

21.10 LANDLORD AND TENANT:

General Provisions.

Tenancies. (59.04). Default in rent of $40 or less. (59.08). Forcible entry and forcible and unlawful detainer. (59.12). Unlawful entry and detainer. (59.16). Residential Landlord-Tenant Act. (59.18, am'd 2008, c. 43, §1; c. 75, §§1, 2; c. 113, §4; c. 256, §3; and c. 278, §§12 and 13). Mobile Home Landlord-Tenant Act. (59.20, am'd 2008, c. 116, §§2, 4, and 5). If tenancy is residential tenancy covered by 59.18, then 59.04, 59.08, RCW 59.12.090, RCW 59.12.100, RCW 59.12.121 and RCW 59.12.170 do not apply. (RCW 59.04.900; RCW 59.08.900; RCW 59.18.420). Landlord and tenant may agree in writing to submit any dispute to mediation. (RCW 59.18.315). Dispute resolution process provided for mobile home community landlord and tenants. (59.30).

When dwelling unit tenant under rental agreement fails to comply with statutory or contractual obligations and restrictions, and landlord gives specific written notice of deficiency, tenant must correct deficiency within reasonable time or be subject to: (1) action in court, or arbitration if so agreed, for any remedy provided by law (RCW 59.18.160); (2) after 30 days (or immediately if gang or drug-related activity is basis for termination of tenancy), entry by landlord and actual and reasonable cost of repair if tenant's breach substantially affects health and safety of tenants or substantially increases hazards of fire or accident; (3) action in unlawful detainer (RCW 59.18.180), but unlawful detainer action not exclusive remedy for landlord to obtain unpaid rent (34 Wn. App. 483, 663 P.2d 141). In other types of tenancies, if tenant fails to remit rent due and landlord notifies tenant to pay rent or vacate premises within ten days, and if tenant does not comply, tenancy is forfeited. (RCW 59.04.040). Tenant subject to criminal prosecution if maliciously and intentionally destroys rental unit or enters premises unlawfully and refuses to remove therefrom. (RCW 59.12.030[6]; RCW 59.18.130). Landlord may commence action in unlawful detainer against tenant if tenant holds over after expiration of tenancy for specified term, fails to pay rent after three-day notice, fails to perform other terms of lease after ten-day notice, remains as periodic tenant after notice to terminate given 20 days before end of period, enters and stays without permission after three-day notice, commits waste after three-day notice, or engages in certain gang or drug-related activities or certain activities hazardous to others on premises. (RCW 59.12.030; RCW 59.18.130). Landlord not liable for criminal conduct of tenant if statutory conditions are followed. (RCW 59.18.600). In action for unlawful detainer based on nonpayment of rent, residential tenant must pay into court amount alleged due, and amount thereafter becoming due, unless tenant submits signed and sworn statement denying rent is due on grounds of legal or equitable defense or setoff. (RCW 59.18.375[2], am'd 2008, c. 75, §2[2]). Tenant must comply on or before notice deadline, or landlord may obtain writ of restitution without notice or bond directing sheriff to evict tenant. (RCW 59.18.375[3], am'd 2008, c. 75, §2[3]). For residential tenancy, implied warranty of habitability recognized in Washington, breach of which is defense in action for unlawful detainer. (83 Wn.2d 22, 515 P.2d 160).

Kinds of Tenancy.

Tenancies from year to year are abolished, except when created by express written contract. (RCW 59.04.010; RCW 59.18.210). When premises are rented for an indefinite time with monthly or other periodic rent reserved, such tenancy will be construed as periodic or from month to month. (RCW 59.04.020; RCW 59.18.200, am'd 2008, c. 113, §4). Persons in possession of non-dwelling units without consent are merely tenants by sufferance, and are liable for reasonable rent for time of occupancy. (RCW 59.04.050).

Leases longer than one year must be acknowledged. (RCW 59.04.010; RCW 59.18.210). Unacknowledged or improperly acknowledged lease for more than one year is void. (36 Wn. App. 468, 675 P.2d 1256). However, such lease will be construed as month-to-month or periodic tenancy if rent is accepted by landlord. (59 Wash. 86, 109 P. 312). Part performance may validate written but unacknowledged lease and permit it to be construed and enforced according to its terms. (25 Wn. App. 639, 608 P.2d 1263). Seals are not required. (RCW 64.04.090).

Oral lease can only be sustained as a lease from month-to-month. (104 Wash. 476, 177 P. 333).

Security Deposits.

Terms and conditions for withholding residential tenant's deposit upon termination of residential tenancy must be specified in written rental agreement. (RCW 59.18.260). Written checklist of premises' condition must be provided tenant at outset. (RCW 59.18.260). Nonrefundable moneys paid to landlord may not be designated as deposits. (RCW 59.18.285). Deposit held in trust account, and tenant's claim is prior to that of creditor of landlord, receiver or trustee in bankruptcy. (RCW 59.18.270). Deposit must be returned to tenant together with full statement of basis for retaining any of deposit within 14 days of termination or landlord's notice of tenant's abandonment. Failure to provide statement renders landlord liable for full amount of deposit. Court has discretion to award up to twice deposit amount for intentional refusal of landlord to provide statement or refund due. (RCW 59.18.280). Upon tenant's request, landlord must provide written receipt. (RCW 59.18.063). Victim of domestic violence may terminate lease if report made. (RCW 59.18.570-.585).

Recording.

Lease for term exceeding two years void as against subsequent mortgagees and purchasers for value in good faith from same vendor, heirs or devisees, unless recorded with county auditor. (RCW 65.08.060-.070). Possession of tenant under unrecorded lease is, however, sufficient notice to put third persons on inquiry. (123 Wash. 333, 212 P. 153). See category 10 Documents and Records, topic 10.04 Records.

Rent.

Tenant must pay all rents at such times and in such amounts as provided in rental agreement or as provided by law. (RCW 59.04.040; RCW 59.18.130).

If residential tenant defaults in payment of rent and reasonably indicates by words or actions intention not to resume tenancy, tenant liable for following damages for abandonment: If month-to-month tenancy, liability for rent for 30 days following next due date or landlord's knowledge, whichever first; if greater term, liability for lesser of (1) rent due for remainder of term or (2) rent during period necessary to rerent at fair rental plus difference between fair rental and prior agreed rental plus actual costs incurred by landlord in rerenting premises, statutory court costs and reasonable attorney fees. Landlord must make reasonable effort to mitigate damages resulting from abandonment. (RCW 59.18.310).

Lien.

Landlord has lien on personal property which tenant has used or kept on premises, except: (1) property of third persons left with tenant for storage, repair, manufacture or sale, or under conditional bills of sale duly filed; (2) property of tenants in dwelling units; (3) property exempt from execution by law. Such lien is superior to all other liens except liens for taxes, general and special liens of labor, and liens of mortgages duly recorded prior to tenancy. Such lien must not be for more than two months' rent or four months' rent for certain mobile home park tenants. No lien may be enforced for any rent which has been due for more than two months when action is brought to foreclose lien, except that lien may be enforced for rent due up to four months for certain mobile home park tenants. (RCW 60.72.010). If property removed from premises and not returned to owner, agent, executor, administrator or assign, lien will continue and remain superior to subsequent liens for period of ten days after removal; lien may be enforced wherever property found. If property destroyed by fire or other elements, lien extends to money which tenant receives as indemnity for loss. Sale of property will not defeat lien except in case of merchandise sold in usual course of business or to purchasers without notice of tenancy. (RCW 60.72.010). Lien may be foreclosed by judicial action or by summary procedure in manner provided for non-UCC personal property. (RCW 60.10.020; .023; RCW 60.72.040; RCW 61.12.162). See category 8 Debtor and Creditor, topic 8.13 Liens, subhead Enforcement of Statutory, Landlord Liens.

Landlord of hotel, boarding house or lodging house has lien on all baggage and other property lawfully in possession of tenant and brought upon premises by tenant for charges due for food, rent or lodging and extras furnished at tenant's request, together with costs of enforcing lien. Landlord may hold baggage and property until charges paid. (RCW 60.64.010). If charges are 60 days past due, landlord may sell property at public auction after ten days notice of time and place of sale, as specified by RCW 60.64.040. But if landlord knows property does not belong to tenant who incurred charges, then property can be sold only under writ of execution to satisfy judgment obtained to recover charges. (RCW 60.64.010). See category 8 Debtor and Creditor, topic 8.05 Executions.

In residential tenancies, if tenant abandons premises and fails to pay rent, landlord may take possession of property left on premises and store in secure place. Landlord must mail prompt written notice to tenant's last known address of whereabouts of landlord and tenant's property. Landlord may sell tenant's property, excluding personal papers, family pictures and keepsakes, after 60 days after default in rent, and after prior written notice (or after seven days from date notice is mailed to tenant if such property has value of $50 or less). Any excess income from sale after payment of amount due landlord, including storage costs, must be held by landlord for tenant's account for one year from sale. (RCW 59.18.310).

Landlord of self-service storage facility has lien on all personal property located at facility for rent, labor and other charges, including late fees and costs of sale incurred pursuant to rental agreement and for expenses necessary for presentation, sale or disposition of such property. (RCW 19.150.020, am'd 2008, c. 61, §3). Landlord may deny tenant access to facility if rent unpaid for six consecutive days. (RCW 19.150.030). If rent unpaid for 14 consecutive days, landlord may terminate right of tenant to use facility by sending statutory notice. (RCW 19.150.040). After additional statutory notice, landlord may sell property other than personal papers and effects. (RCW 19.150.060-.070).

Crop Lien.

Landlord whose lease provides for cash rental payment has lien on crops for no more than one year's rent due or to become due within six months after harvest. (RCW 60.11.020; RCW 62A.9A-825). Lien attaches as provided in statute. (RCW 60.11.030; RCW 62A.9A-826). Filing effective for five years. (RCW 60.11.040; RCW 62A.9A-827). Landlord liens prior to all but liens for labor and liens in favor of handlers. (RCW 60.11.050; RCW 62A.9A-828). Landlord lien foreclosed judicially, by summary procedure, or procedures in Part 6 of 62A.9A. (RCW 60.11.060; RCW 62A.9A-826). Right of redemption is provided in RCW 62A.9A-633. (RCW 60.11.100; RCW 62A.9A-831). Statute of limitations is 24 months from specified event. (RCW 60.11.130; RCW 62A.9A-833). Liens filed under former statute (60.12) remain in effect for eight months after such lien was filed (RCW 60.11.900). See category 8 Debtor and Creditor, topic 8.13 Liens, subhead Crop Liens.

Termination of Tenancy.

Periodic or month to month tenancies for dwelling units are terminated by written notice given by either party 20 days or more prior to end of period. (RCW 59.18.200). Landlords must give tenants 120 days written notice of termination of tenancy to change from apartment rental to condominium form of ownership or to change to policy of excluding children. 120-day notice is in lieu of 20-day notice of termination unless change is delayed beyond 120 days, in which case 20-day notice is again required unless waived by tenant. (RCW 59.18.200[2] , am'd 2008, c. 113, §4[2]). Other periodic or month-to-month tenancies terminated by written notice given by either party 30 days or more prior to end of period (RCW 59.04.020), unless landlord gives notice as described in RCW 59.12.040 in which case 20 days notice prior to end of period is sufficient (RCW 59.12.030[2]). Notice period required for termination may be increased by terms of lease. (36 Wn. App. 34, 671 P.2d 289). Tenancies for specified time terminate at end of such term without notice. (RCW 59.04.030; RCW 59.18.220). Tenancies by sufferance are terminable immediately upon demand unless landlord accepts rent from tenant who holds over and thereby converts tenancy by sufferance to month-to-month or periodic tenancy. (RCW 59.04.050). Tenancy at will is terminable only upon demand for possession, allowing tenant reasonable time to vacate; unlawful detainer action is not applicable to tenant at will. (20 Wn. App. 290, 579 P.2d 410). Where rent is current and landlord has failed to correct defective condition following adequate notice and after lapse of certain time period, dwelling-unit tenant may terminate immediately upon written notice without further obligation. (RCW 59.18.090). Victim of domestic violence may terminate lease if report made. (RCW 59.18.570-.585).

Rights and Remedies of Dwelling-Unit Tenants.

Tenant entitled to occupy dwelling unit under rental agreement (RCW 59.18.030[13], am'd 2008, c. 278, §12) and current in payment of rent and utilities (RCW 59.18.080) may seek following remedies for failure of landlord to correct defects after written notice: (1) Termination of rental agreement upon written notice and return of prepaid rent and any refund of deposit due under rental agreement (RCW 59.18.090[1]); (2) action at law or arbitration, if so agreed, for any statutory remedy (RCW 59.18.090[2]); (3) self-help in form of submitting good faith estimate to landlord and, if defective condition not corrected by landlord within certain applicable time periods, contracting for repair of defective condition, and deducting cost of repairs not exceeding one month's rent per repair or two month's rent in 12-month period (RCW 59.18.100[1], [2]); (4) self-help in form of repairing defective condition in workmanlike manner and deducting cost of labor and materials not exceeding one-half month's rent per repair or one month's rent in 12-month period (RCW 59.18.100[3]). Court or arbitrator may determine diminution in rental value due to defective condition and render judgment against landlord for excess rent paid or authorize tenant to make or contract to make further corrective repairs not to exceed one month's rental in any one calendar year, provided that court specifies period in which landlord may make such repairs before tenant may do so. (RCW 59.18.110[1]). Tenant's remedies under 59.18 generally are limited and do not include monetary damages for landlord's breach. (104 Wn. App. 464, 17 P.3d 641). But see 118 Wn. App. 246, 75 P.3d 980, involving contaminated well water on leased premises. Landlord not liable for injuries from obvious dangers in premises. (46 Wn. App. 784, 732 P.2d 1008). Tenant may give landlord notice of threat from gang-related activity of other tenant. (RCW 59.18.510). Tenant may not unreasonably withhold from landlord consent to enter premises for inspection or repair, but landlord must normally give two days notice of intent to enter. (RCW 59.18.150). Following good faith and lawful act by tenant, landlord may not retaliate, e.g., by increase of rent, reduction of services, increase in tenant's obligations, or eviction of tenant. (RCW 59.18.240). Presumption of nonretaliation if, when landlord gives notice of termination, tenant in arrears in rent or in breach of any other lease or rental obligation. (RCW 59.18.250).

Landlord liable for actual damages and up to $100 for each day plus reasonable attorney fee for intentional termination of utilities except for reasonable time to make repairs. (RCW 59.18.300).

59.18 not applicable to: (1) Lease of single family dwelling for period of one year or more or with option to purchase, provided tenant's attorney approves lease in writing on its face; (2) lease executed before July 16, 1973; (3) industrial or commercial leases; (4) residences for detention or provision of medical, religious or other services; (5) occupancy incidental to purchase or contract of sale; (6) residence in hotel, motel, etc.; (7) certain agricultural arrangements, including seasonal employment; (8) occupancy by employee of landlord where occupancy is conditioned upon employment on premises; (9) certain agreements certified by consumer protection division of attorney general's office; and (10) leases with State of Washington Department of Natural Resources on public lands governed by Title 79. (RCW 59.18.040;.415; .430).

Holding Over on Agricultural Land.

Where tenant of agricultural lands has retained possession more than 60 days after expiration of term and landlord has given no notice to vacate, tenant deemed to hold by landlord's permission and entitled to hold for another full year. (RCW 59.12.035).

Dispossession.

Tenant of any real property subject to action for unlawful detainer when tenant: (1) continues in possession after expiration of term; (2) having leased real property for indefinite time, with monthly or other periodic rent reserved, continues in possession after end of any such month or period, after landlord has given 20 days notice to quit premises at end of month or period; (3) continues in possession after default in payment of rent, and written notice requiring payment of rent or surrender of premises served after default uncomplied with for three days after service; (4) continues in possession after failure to perform condition of lease other than rental payment, and after written notice requiring performance of condition or surrender of property uncomplied with for ten days after service; (5) commits or permits waste, or carries on unlawful business, or maintains or permits nuisance; (6) remains in possession after service of three days written notice to quit; or (7) permits gang-related activity. (RCW 59.12.030).

Trespasser also subject to unlawful detainer action after service of three days written notice. Such person also subject to criminal trespass provisions of 9A.52. (RCW 59.12.030).

Tenant of dwelling unit also subject to unlawful detainer action when fails to comply with statutory duties including keeping premises clean and sanitary, properly disposing of garbage and rubbish, properly using fixtures and appliances supplied by landlord, not permitting nuisance or waste, not allowing anyone to engage in gang or drug-related activity on premises, not intentionally or negligently destroying, damaging or removing structure, appurtenances or furnishings or engaging in certain activities hazardous to others on premises (RCW 59.18.130), and complying with reasonable landlord rules and regulations (RCW 59.18.140).

Tenant failing to give timely notice of exercise of option for renewal may retain premises pursuant to option rights only under limited circumstances where landlord incurs no harm thereby, and equity requires that tenant be given relief from own negligence. (24 Wn. App. 601, 605 P.2d 334).

Unlawful detainer complaint and summons returnable not less than seven nor more than 30 days after service. (RCW 59.12.070). If tenancy not covered by 59.18, summary proceedings afford immediate issuance of writ of restitution, provided bond is filed in sum ordered by court. (RCW 59.12.090). If tenancy covered by 59.18, landlord may, without bond, obtain issuance of writ of restitution seven days after service of filed summons and complaint or after landlord delivers to tenant notice of filing of complaint if action is based on nonpayment of rent and tenant fails to pay rent to court registry or submit to court sworn statement denying rent due (RCW 59.18.375, am'd 2008, c. 75, §2); otherwise “show cause” hearing required prior to issuance of writ of restitution. If writ denied, trial proceeds within 30 days. (RCW 59.18.380).

If tenancy not covered by 59.18, landlord may receive restitution of premises, and double amount of damages assessed and rent due but not double attorney fees. (RCW 59.12.170; 35 Wn. App. 697, 669 P.2d 495). Counterclaims not allowed. (59 Wn.2d 50, 365 P.2d 769). Tenant may assert affirmative defenses. (108 Wash. 373, 184 P. 327). If tenant vacates premises and relinquishes right to possession before trial, unlawful detainer action converted into ordinary civil suit for damages in which tenant may assert counterclaims. (105 Wn.2d 39, 711 P.2d 295).

If tenancy covered by 59.18, tenant may assert any defense, legal or equitable, and any setoff arising out of tenancy. (RCW 59.18.380). If unlawful detainer action commenced because of tenant's failure to comply with duties specified in RCW 59.18.130 and RCW 59.18.140, tenant may assert substantial compliance as defense. However, if unlawful detainer action commenced during period that tenant not in compliance with statutory duties, tenant liable for statutory costs and reasonable attorney fees. (RCW 59.18.180). Generally, landlord may receive restitution of premises, damages, costs and reasonable attorney fees. (RCW 59.18.310; .410).

Double damages not allowed residential tenancy under 59.18. (RCW 59.18.420). Any residential tenant removed or excluded except under court order may recover possession of premises or terminate lease and recover actual damages sustained, costs of suit or arbitration and reasonable attorney fees. (RCW 59.18.290). Attorney fees for prevailing party are included in most remedies under 59.18 in addition to costs and damages. (RCW 59.18.230; .250; .280; .390; .410).

If writ of restitution issued pursuant to unlawful detainer action, tenant may stay execution by filing bond in amount fixed by court. (RCW 59.18.390). In addition, if unlawful detainer action is commenced for nonpayment of rent, tenant of residential property may stay execution of writ by paying rent due and costs into court or to plaintiff, as court directs. (RCW 59.18.380).

Distress.

Landlord's common law right of distress for rent abolished with regard to personal property belonging to tenant under residential rental agreement, and contrary provision in agreement is void. Landlord who detains personal property of tenant liable for actual damages and, if landlord intentionally refuses to return personal property, liable for damages of $100 for each day tenant deprived of property up to $1,000. (RCW 59.18.230[4]). However, following abandonment of tenancy and default in payment of rent, landlord may enter and take possession of property of tenant on premises. Landlord shall make reasonable efforts to notify tenant regarding storage, sale or disposition of property, and tenant's right to have property returned prior to sale or disposal. Landlord may sell tenant's property after 45 days from date notice is mailed or personally delivered (or, excluding personal papers, family pictures and keepsakes, after seven days from date notice is mailed or personally delivered to tenant if such property has value of $50 or less). Any excess income after payment of amount due landlord, including storage costs, is held one year and, if no claim is made by tenant during such time, becomes property of landlord. (RCW 59.18.310).

Uniform Residential Landlord and Tenant Act.

Not adopted.

21.11 LEASES:

See topic 21.10 Landlord and Tenant.

21.12 [RESERVED]

21.13 PERPETUITIES:

Accumulations.

No statute.

Restraints on Alienation.

Generally void as being repugnant to nature of estate in fee. (44 Wn.2d 760, 270 P.2d 802).

Vesting of Estates.

Common law rule against perpetuities affected by statute in following cases: Trusts: If provision in instrument creating trust, including provisions of further trust created, or other disposition made by exercise of power of appointment authorized in such instrument violates rule, that provision, or such further trust or other disposition, should not be rendered invalid during 150 years following effective date of instrument or during period of any lives or portion thereof in being or conceived at effective date of instrument plus 21 years (if trust is to continue for such lives or for such portion of such lives) (RCW 11.98.130), and if at expiration of such period assets are not by terms of trust distributable or vested they shall then be distributed in way giving effect to general intent of creator or person exercising power of appointment (RCW 11.98.150). Exemptions from rule: Employee benefit plan (RCW 49.64.010); dedication of property to cemetery purposes (RCW 68.24.080); endowment care funds (RCW 68.44.070).

21.14 PERSONAL PROPERTY:

Tenancy by entireties may be permitted, but there is no right of survivorship. See RCW 11.04.071.

21.15 POWERS OF ATTORNEY:

Attorneys in Fact.

Instrument granting power to convey real property as agent or attorney for owner is “conveyance” which, when acknowledged and certified, may be recorded in county where property is situated. (RCW 65.08.060[3]; 070).

Revocation.

Constructive notice of revocation of power to convey realty is given by recording revocation in same county. (RCW 65.08.130; 88 Wn.2d 883, 567 P.2d 233).

Durable Power of Attorney.

Whenever principal designates another as attorney in fact or agent by written power of attorney using words “This power of attorney shall not be affected by disability of the principal,” or “This power of attorney shall become effective upon the disability of the principal,” or similar words showing intent, authority conferred is exercisable notwithstanding later disability or incapacity of principal or uncertainty as to whether principal is alive or dead. If guardian appointed for principal, attorney in fact or agent accounts to guardian rather than principal, and guardian has same power as would principal if he were not disabled or incompetent to revoke, suspend, or terminate power of attorney or agency. (RCW 11.94.010).

Death, disability or incompetence of principal who executed written power of attorney other than one described in RCW 11.94.010, does not revoke or terminate agency as to attorney in fact or agent who, without actual knowledge of death, disability, or incompetence of principal, acts in good faith under power of attorney or agency. Affidavit executed by attorney in fact or agent stating he did not have actual knowledge of death, disability, or incompetence at time of act is, in absence of showing of fraud or bad faith, conclusive proof of nonrevocation or nontermination. (RCW 11.94.020). Appointment of spouse, or state registered domestic partner, as attorney in fact is revoked upon dissolution or legal separation unless instrument provides otherwise. (RCW 11.94.080). Third person's reliance upon power of attorney and contemporaneous affidavit raises rebuttable presumption that third person acted in good faith and without negligence. (RCW 11.94.040). Proceedings pertaining to powers of attorney brought under RCW 11.94.100, am'd 2008, c. 6, §809, may be filed in superior court of principal's residence, except for good cause. (RCW 11.96A.050).

Formalities.

Power to convey realty recorded pursuant to RCW 65.08.070 not revoked until revocation recorded in same office where power to convey was recorded. (RCW 65.08.130).

Members of Armed Forces.

Power of attorney given to agent of principal who is member of armed forces, merchant seaman outside U.S. or person outside U.S. by permission, assignment or direction of federal government in connection with war in which U.S. is engaged will not be revoked upon principal's death unless agent has actual knowledge of death. (RCW 73.20.050).

21.16 REAL PROPERTY:

Washington has “community property” system of property. (26.16, am'd 2008, c. 6, §§602-623).

Estates are recognized substantially as at common law, except that: (1) Tenancy from year to year is abolished unless created by express written contract (RCW 59.04.010; RCW 59.18.210); (2) tenancy in dower and curtesy are abolished (RCW 11.04.060); (3) right of survivorship as incident of tenancy by entireties is abolished (RCW 11.04.071).

Joint tenancies with incidents of survivorship and severability as at common law may be created only by express provision in a written instrument. Either party may sever unilaterally. Conveyance through third party not required. (RCW 64.28.010, am'd 2008, c. 6, §625). Either spouse or domestic partner may sever; property or proceeds presumed community property. (RCW 64.28.040, am'd 2008, c. 6, §628).

Rule in Shelley's Case as applied to wills is abrogated. Rule is still effective as to non testamentary transfers. (RCW 11.12.180, am'd 2008, c. 6, §912; 193 Wash. 308, 75 P.2d 132; 58 Wn.2d 862, 365 P.2d 320).

Foreign Conveyances and Encumbrances.

No authority as to whether a conveyance of land in Washington executed in accordance with law of state where executed is valid.

Liquidated damages or earnest money forfeiture provision in agreement for sale of real estate enforceable if amount not more than 5% of purchase price and specified language advises purchaser that such damages are seller's exclusive remedy for purchaser's failure to complete purchase without legal excuse. (RCW 64.04.005).

Condominium interests and apartments regulated by Horizontal Property Regimes Act (64.32) and Washington Condominium Act (64.55). Horizontal Property Regimes Act is applicable to property, sole owners, part owners, lessees or possessors of which submit property to provisions of Act before July 1, 1990. Washington Condominium Act applicable to all condominiums created after July 1, 1990. Both Acts regulate creation, alteration and termination of condominiums and ownership and possession rights, recording of liens and encumbrances, conveyance of interest, assessments, mortgages, insurance, and maintenance of legal actions. Public offerings must contain notice of rights against seller or builder. (RCW 64.34.410).

Residential Real Estate.

In sales of real property, consisting of one to four dwelling units, residential condominium, residential time-share, and mobile or manufactured home, seller must complete statutory disclosure form regarding condition of property. Form must be provided to buyer within five business days of mutual acceptance of purchase and sale agreement. Buyer may accept or rescind purchase and sale agreement within three days of receiving seller's disclosure statement. (RCW 64.06.005; .020-.070). Not applicable to: (1) Foreclosure acquisitions; (2) gifts to certain relatives; (3) marital dissolution transfers; (4) certain transfers involving entities in which buyer had interest; (5) less than fee simple transfers; (6) transfers from estate or from bankruptcy trustee; or (7) where buyer has waived disclosure. (RCW 64.06.010, am'd 2008, c. 6, §632). Procedures for disputes arising out of residential construction or remodeling defects, are provided. (64.50). Construction professional must be notified 45 days before action is filed. (RCW 64.50.020). Six year statute of limitation is tolled or extended if written notice is given to construction professional. (RCW 4.16.310). Seller not under duty to determine whether sex offender in area. (RCW 64.06.021).

Timeshare offerings and sales regulated by Timeshare Act. (64.36). Act requires registration of offering, written disclosures to prospective purchasers, registration of salespersons, and approval to publish advertisements of timeshares.

See topics 21.05 Curtesy, Deeds, Dower, Landlord and Tenant; categories 5 Civil Actions and Procedure, topic Partition; Debtor and Creditor, topic Homesteads; Family, topic Spouse and Domestic Partner; Mortgages, topic Mortgages of Real Property.

21.17 TRUST DEEDS:

See category 20 Mortgages, topic 20.04 Mortgages of Real Property.

22 TAXATION

22.01 ADMINISTRATION:

Director of Revenue, through Department of Revenue, Olympia, Washington 98504, has general supervision over administration of tax laws. (RCW 82.01.060).

Multistate Tax Compact in force. (RCW 82.56.010).

22.02 ALCOHOL, BEVERAGES AND TOBACCO TAXES:

Alcoholic Beverage Tax (66.24; 82.08).

State sales tax rates applicable only to spirits are: 15% of selling price on each retail sale in original package, including sales by state liquor stores to licensees other than spirits, beer and wine restaurants (liquor by drink); 10% of selling price on each sale of spirits in original package by state liquor stores to spirits, beer and wine restaurants; additional $1.72 per liter, and additional 7¢ per liter through July 1, 1995, on spirits only on each retail sale in original package, including sales by state liquor stores to consumers and spirits, beer and wine restaurants. Additional taxes may apply. (RCW 82.08.150). License fee for microbreweries (less than 60,000 barrels) is $100. (RCW 66.24.244, am'd 2008, c. 248, §§1 and 2). Tax on brewers and beer, including strong beer, wholesalers of $1.30 per 31-gallon barrel sold; additional tax of $2 per 31-gallon barrel sold and additional temporary taxes. (RCW 66.24.290). Tax on wine is 20¼¢ per liter sold to wholesalers; additional tax at rate of ¼¢ per liter through June 30, 2001, and additional 2324/100¢ per liter on wine with alcohol content greater than 14% and 1¢ per liter on all other wine. Additional tax imposed on alcoholic beverages. (RCW 66.24.210, am'd 2008, c. 94, §8; .290).

Tobacco Products Tax (82.26).

On sale, handling or distribution in state, 75% of taxable sales price of tobacco products (not to exceed $.50 per cigar). (RCW 82.24.300; RCW 82.26.020). Taxes do not apply to Indian retailer under cigarette tax agreement. (RCW 82.26.040).

Cigarette Tax (82.24).

11.5 mills per cigarette; additional tax of 5.25 mills per cigarette; and further additional tax of 20.5 mills after June 30, 1996 to be deposited in state general fund. (RCW 82.24.020, am'd 2008, c. 226, §3). Additional tax of four-tenths of cent per cigarette (RCW 82.24.027, am'd 2008, c. 86, §303) and 3¢ per cigarette (RCW 82.24.028, am'd 2008, c. 86, §304).

22.03 BUSINESS TAXES:

Business and Occupation Tax.

(82.04). Gross receipts tax imposed for act or privilege of engaging in business activities in state, unless business specifically exempted. (RCW 82.04.220). Rates depend on nature of business activity. (RCW 82.04.230-.290, am'd 2008, c. 81, §§4-6; c. 217, §100; and c. 296, §1). Tax measured by application of appropriate rate to value of products, gross proceeds of sales, or gross income of business, as case may be. (RCW 82.04.220). Business whose value of products, gross proceeds of sales, or gross income is less than $1,000 per month, is exempt from tax. (RCW 82.04.300). Certain categories of business activities exempted from tax. (RCW 82.04.310-.4289). Many deductions are established. (RCW 82.04.4271-.4331). Credit available, inter alia, for eligible business projects in distressed areas. (82.62); for alternate power generation (2008, c. 223, §1); for polysilicon manufacture (2008, c. 283, §1); and for energy efficient items (2008, c. 284, §§1 and 2). Payments due monthly unless Department of Revenue allows longer period. (RCW 82.32.045).

Bank holding company engaged in “financial business” when loaning subsidiaries money not exclusively from surplus funds and income derived from such investments not deductible from gross profits in computing business and occupation tax liability. (96 Wn.2d 669, 638 P.2d 575).

Multiple activities exemption granting local manufacturers selling in-state exemption from manufacturing tax for portion of output subject to wholesale tax (RCW 82.04.440[2]) found to discriminate unconstitutionally against interstate commerce (107 S. Ct. 2810). No retroactive effect given to decision. (109 Wn.2d 878, 749 P.2d 1286, cert. denied, 108 S. Ct. 2030). To cure constitutional defect, legislature enacted credit for gross receipts taxes paid on same products to other states and political subdivisions. (RCW 82.04.440). Credits and tax deferrals allowed for certain research development and other activities of high-technology businesses. (RCW 82.63.005-.900, am'd 2008, c. 15, §4).

Insurance Company Tax.

See category 16 Insurance, topic 16.01 Insurance Companies.

22.04 CORPORATE TAXES:

Corporate Franchise Tax.

See category 2 Business Organizations, topic 2.03 Corporations, subhead Franchise Tax.

22.05 EMPLOYMENT TAXES:

Unemployment Compensation Tax (50.04).

Tax imposed on employers at rates determined according to balance of state unemployment compensation fund and individual employer's experience rating. (RCW 50.24.010). “Wages” generally mean specified percentage of remuneration paid by one employer during any calendar year to individual in its employment. (RCW 50.24.010; RCW 50.04.320). Exempt from definition of employment are specified categories of personal services. (RCW 50.04.140-.270, am'd 2008, c. 102, §1). Employee stock option income not included in wages. (RCW 50.04.335).

No part of tax may be deducted from employee's wages, nor may employee otherwise pay contributions or waive, release, or commute his rights to benefits. (RCW 50.40.010).

22.06 ENVIRONMENTAL TAXES:

Hazardous Substance Tax (82.21).

Tax imposed on first possession of hazardous substance in Washington at rate of .7% of wholesale value of substance. (RCW 82.21.010-.030). Certain exemptions and credits available. (RCW 82.21.040-.050).

Litter Assessment Tax (82.19).

Imposed for privilege of engaging in business of manufacturing, wholesaling and retailing certain products in amount equal to .015% of value of products manufactured or gross proceeds of sales. (RCW 70.93.120-.130; RCW 82.19.010, am'd 2008, c. 86, §201).

Solid Waste Collection Tax (82.18).

Tax imposed on each person using solid waste collection services equal to 3.6% of consideration charged for services. (RCW 82.18.020). Tax collected by person collecting charges for solid waste collection. (RCW 82.18.030). Exemption for agency, division, or branch of federal government. (RCW 82.18.050).

22.06A ESTATE AND GENERATION SKIPPING TAXES:

Estate Tax (83.100).

Effective May 17, 2005, Washington created following stand-alone estate tax to replace previous tax, which had been held to be tied to federal Internal Revenue Code. (RCW 83.100.040).

Transfers Subject to Tax.

Defined by §2001 of Internal Revenue Code. (RCW 83.100.120). Washington taxable estate is equal to federal taxable estate less $1,500,000 for decedents dying before Jan. 1, 2006 and less $2,000,000 for decedents dying thereafter. (RCW 83.100.040-.120, am'd 2008, c. 181, §504). Additional deductions allowed under RCW 83.100.046. Marital deduction (including domestic partnerships) election provided. (RCW 83.100.047).

Tax Rates.

Graduated rates from 10% on first $1,000,000 to 19% on amounts in excess of $9,000,000. Adjustments to rates provided for extraterritorial property. Intangibles owned by Washington residents deemed to be located in state. (RCW 83.100.040).

Filing of Return.

Return must be filed if federal return required or if gross estate exceeds $1,500,000 in case of decedents dying before Jan. 1, 2006 and $2,000,000 for decedents dying thereafter. Return to be filed on or before due date for federal return, including extensions. (RCW 83.100.050, am'd 2008, c. 181, §504). Amended returns may be filed within times and upon circumstances provided in statute. (RCW 83.100.90).

Statutes of Limitations.

Set out at RCW 83.100.095, .130, and extend additional three years beyond last installment payment. (RCW 83.100.60). Additional period for assessment allowed in event of amended return. (RCW 83.100.090).

Final Settlement of Account.

Department of Revenue issues release when tax due under 83.100 has been paid. Upon issuance of release, property subject to tax becomes free of state tax claim. (RCW 83.100.080).

Penalties.

5% tax due per month to maximum of 25% imposed on person required to file. Penalty may be waived upon showing of circumstances beyond control of responsible person. (RCW 83.100.070). Willful failure to file gross misdemeanor. (RCW 83.100.140).

Sale of Property to Pay Tax.

Unpaid tax is lien on property subject to tax for ten years from date of transfer, except property sold to pay court-allowed claims against property or expenses of administration. Tax lien shall be extended prior to 12 months following conclusion of litigation affecting amount of tax due if lis pendens has been filed with auditor of county where property is located. Tax lien to be extended prior to 12 months following expiration of any extension of time for payment or any installment payments. If property sold to bona fide purchaser, property divested of lien and lien attaches to proceeds of sale. Tax lien subordinate to any mortgage or deed of trust and expenses of sale including fees and costs. (RCW 83.100.110).

Liability for Failure to Pay Tax Before Distribution or Delivery.

Distribution of property without first securing payment of, or security for payment of, taxes due results in individual liability of personal representative to extent of estate's property which came into possession of personal representative. Person who delivers property to personal representative or legal representative outside Washington without paying taxes or furnishing security shall be liable for tax due to extent of value of property delivered. Entities such as mortgage companies and individuals not responsible for paying taxes, not considered to have possession of decedent's property. Those in possession of decedent's property may rely on release certificate furnished by Department of Revenue under RCW 83.100.080 as evidence of compliance with 83.100 and may make deliveries and transfers as personal representative directs without being liable for estate taxes due. (RCW 83.100.120).

Refund for Overpayment.

Overpayments bear interest at existing statutory rate. Interest paid to date refund is mailed if application for refund filed within 120 days after adjustment or final determination of federal tax liability, otherwise interest paid until end of 120-day period. (RCW 83.100.130).

Jurisdiction.

Superior Court with jurisdiction for general probate matters has jurisdiction to determine tax matters. If estate not probated, Superior Court in decedent's place of residence in Washington may assume jurisdiction, or if decedent was not Washington domiciliary, any Superior Court with jurisdiction over property has jurisdiction. (RCW 83.100.150).

Tax on Generation Skipping Transfers.

Repealed effective May 17, 2005. (2005, c. 516, §17[2]).

22.06B EXCISE TAXES:

Miscellaneous Excise Taxes.

License fees and taxes on financial institutions may be imposed by cities and towns and may be measured by gross income of financial business at rates not to exceed rate for other service activities. (RCW 82.14A.010).

Tax on use of telephone access lines may be imposed by counties in amount not exceeding statutory amount for each switched access line, plus added 911 excise tax. (RCW 82.14B.030).

Watercraft Excise Tax (82.49).

Annual excise tax imposed for privilege of using vessel on state waters. Rate is greater of $5 or ½% of fair market value. (RCW 82.49.010). Exemption for vessels not required to be registered; commercial fishing vessels; vessels under 16 feet in length; vessels owned and operated by U.S., any state or subdivision; vessels owned by nonprofit character-building associations; vessels held for sale by dealer. (RCW 82.49.020). Excise tax replaces property tax on watercraft. (RCW 84.36.080; .090).

Penalty provided for registering elsewhere to avoid Washington tax. (RCW 82.49.010).

22.06C GAMBLING AND ENTERTAINMENT TAXES:

Admissions Tax.

Counties and cities may impose tax of not more than 5% on admission charges except those relating to any activity of any elementary or secondary school. (RCW 35.21.280; RCW 36.38.010). County tax inapplicable within city which imposes admissions tax. (RCW 36.38.010).

22.07 [RESERVED]

22.08 GASOLINE AND SPECIAL FUELS TAXES:

Gasoline Tax (82.36).

Motor vehicle fuel (82.36, am'd 2008, c. 181, §505) and special fuel (82.38, am'd 2008, c. 181, §506 and c. 237, §1) taxed at base rate of 23¢ per gallon plus additional tax at rate set forth in RCW 82.36.025. Alcohol used as motor vehicle fuel is exempt from fuel tax. Tax credit may be available. Other exemptions applicable to motor vehicle and special fuel taxes and compressed natural gas. (RCW 82.36.230; .245; RCW 82.38.030; .080; .082-.085). Seizure and forfeiture of unlicensed motor fuel provided. (82.36).

Petroleum Products Tax.

Tax imposed on first possession of petroleum products in Washington at rate of .05% of wholesale value of products. (RCW 82.23A.020). Certain exemptions and credits available. (RCW 82.23A.030-.040). *Note:* 82.23A expires June 1, 2013. (RCW 82.23A.902).

22.09 GIFT TAX:

Repealed.

22.10 HOTEL AND RESTAURANT TAXES:

Hotel Room Tax.

Counties and cities may impose tax of not more than 2% on charge for furnishing lodging subject to tax under 82.08; unless specifically exempted, counties must allow credit against such tax for any city tax on same taxable event. (RCW 67.28.180-.1817, am'd 2008, c. 264, §§2 and 3).

22.11 INCOME TAX:

Personal Income Tax.

None. Statute imposing tax held unconstitutional. (185 Wash. 209, 53 P.2d 607).

Corporate Income Tax.

None. Statute imposing tax held unconstitutional. (185 Wash. 495, 55 P.2d 1056).

22.12 INHERITANCE TAX:

Repealed. See topic 22.06A Estate and Generation Skipping Taxes.

22.13 [RESERVED]

22.14 MOTOR VEHICLE TAXES:

See category 23 Transportation, topic 23.01 Motor Vehicles.

22.14A PRODUCE AND FOOD TAXES:

Enhanced Food Fish Tax (82.27).

Tax on commercial possession of enhanced food fish levied on owner who has first possession in State of Washington. Measure of tax is value of enhanced food fish at point of landing and is subject to rates according to statutory schedule. (RCW 50.65.320; RCW 82.27.020). Additional tax based on rates set forth in RCW 82.02.030. (RCW 82.27.020[5]).

22.15 [RESERVED]

22.16 PROPERTY TAXES:

Real and Personal Property Taxable.

All property not exempt is subject to ad valorem taxes. (RCW 84.36.005).

Exemptions.

Following property among that exempt from taxation: Vehicles (RCW 84.36.610); property of Indian tribes, used for essential governmental services, and property of foreign national government used exclusively as office or residence of official representative who is citizen of that nation (RCW 84.36.010); cemeteries, churches, parsonages, and convents (RCW 84.36.020); property owned by nonprofit organizations or associations organized and conducted for nonsectarian purposes used for character building, benevolent, protective or rehabilitative social services for persons of all ages; property owned by any nonprofit church or group of churches utilized as camp facility; property owned by nonprofit organizations engaged in character building of boys and girls under 18 years of age; property of nationally chartered veterans organizations used to carry out purposes of such organizations, except certain profit-seeking activities; property of congressionally incorporated corporations assisting members of U.S. armed forces and performing relief work; property owned by IRC §501(c)(3) tax-exempt nonprofit organizations guaranteeing or issuing debt for student loans (RCW 84.36.030); administrative offices of nonprofit religious organizations (RCW 84.36.032); nonprofit blood banks (RCW 84.36.035); public halls owned by nonprofit corporations (RCW 84.36.037); property used by nonprofit day care centers, free public libraries, orphanages and orphan asylums, homes for sick or infirm, hospitals, outpatient dialysis facilities (RCW 84.36.040); property used by nonprofit homes for aging (RCW 84.36.041, am'd 2008, c. 6, §707); property used by nonprofit corporations for emergency or transitional housing of indigents or victims of domestic violence (RCW 84.36.043), or for developmentally disabled (RCW 84.36.042); property of nonprofit organizations used without charge for medical research or training (RCW 84.36.045); property owned or leased to nonprofit organization when used to facilitate transmission of broadcast signals of foreign or domestic governments (RCW 84.36.047); personal property and 400 acres of real property used by nonprofit schools, colleges and supporting foundations (RCW 84.36.050); art, scientific, or historical collections of associations not exhibited for profit; firefighting equipment owned by city, town or fire company; property of performing arts associations used for performances; and property of humane societies (RCW 84.36.060); personalty of soil and water conservation districts not used for private contracting (RCW 84.36.240); water distribution property owned by nonprofit corporation or cooperative association (RCW 84.36.250); property used exclusively for conservation of ecological systems or natural resources owned by nonprofit corporations or associations (RCW 84.36.260-.264); property used for demonstration farm, agricultural museum or like purpose (RCW 84.36.570); personal property used in farming operations (RCW 84.36.630); certain improvements that benefit fish, wildlife or water (RCW 84.36.255); property (including materials and inventory) of nonprofit corporations operating sheltered workshops for handicapped (RCW 84.36.350); property of nonprofit fair associations (RCW 84.36.480); and military housing (2008, c. 84, §1). Entitlement to above exemptions determined by Department of Revenue and certain additional conditions apply. (RCW 84.36.800-.905). Recapture of taxes on exempt property may occur upon discontinuance of use exempted by RCW 84.36.030; .037; .040; .050; and .060. (RCW 84.36.810).

Following property also among that exempt from taxation, and initial determination as to exempt status made by county assessor: Property of U.S., state, or any municipality, property under certain state facilities financing contracts (RCW 84.36.010); intangible personalty (RCW 84.36.070); certain large vessels under construction (RCW 84.36.079); partial exemption for ships and vessels exempt from watercraft excise tax (RCW 84.36.080) and exemption for other ships and vessels (RCW 84.36.090); provision is made for apportionment to State of Washington of value of vessel in interstate or foreign commerce (RCW 84.40.036); cargo containers used in ocean commerce (RCW 84.36.105); household goods in actual use by owner, personal effects held for one's own use, and $15,000 (RCW 84.36.110) of other personalty (except private motor vehicle or motor home), owned by head of family or owned by surviving spouse or domestic partner, not remarried or in new domestic partnership, beneficiary of state old age pension, or citizen over 65 who has resided in state for ten years (RCW 84.36.110-.120, am'd 2008, c. 6, §708); airport property of 500 acres or less, in Washington belonging to municipalities of adjoining states (RCW 84.36.130); real and personal property of state housing finance commission (RCW 84.36.135); merchandise acquired out of state and shipped out of state in substantially same form as acquired (exemption computed by formula) and certain aircraft parts (RCW 84.36.300-.320); real property owned for at least two years by disabled person or person over 61 or 100% disabled veteran, exempt from certain portions of tax (RCW 84.36.381, am'd 2008, c. 6, §706); physical improvement to single family dwellings exempt from taxation for three years subsequent to improvement if improvement represents less than 30% of value of original structure (RCW 84.36.400); agricultural and horticultural products (other than forest products, livestock and fowl) ownership of which remains in original producer on Jan. 1 next succeeding date of harvesting (RCW 84.44.060); certain conservation futures (RCW 84.36.500) and mobile homes part of dealer's inventory (RCW 84.36.510). Tax on business inventories, certain agricultural produce and crops, timber, lumber products and minerals, eliminated as of 1984. (RCW 84.36.470; .477). All tax relief available to owners of conventional housing also applies to owners of mobile homes. (RCW 84.36.383, am'd 2008, c. 6, §709).

Tax Rate.

Aggregate of levies of all taxing districts (except port and public utility districts) on real and personal property may not exceed 1% of value of said property. (RCW 84.52.050). This limitation does not apply to any taxing district except school districts in which larger levy necessary to prevent impairment of obligation of contracts. (RCW 84.52.052). Limitation also does not apply to additional levy for school construction (RCW 84.52.050); counties of 90,000 or less (RCW 84.52.135); or certain fire districts (RCW 84.52.044). County with population of 1,500,000 or more may impose additional property tax at rate of 7.5 cents per thousand dollars of the assessed value. Three-fifths majority (at least equal in number to 24% of that district's voters who voted at last general state election) of electors may at special or general election vote to authorize rate in excess of limit. (Wash. Const. amend. 55, 59, 64, 79; RCW 84.52.052-.056).

Assessment.

Realty and personalty assessed at true and fair value by county assessor. (RCW 84.40.040). Property assessed annually with reference to value on Jan. 1 of year of assessment. (RCW 84.40.020). Choice of method of appraisal within discretion of party responsible for establishing value of property. Method chosen not subject to challenge if it yields true and fair value as required by statute. (32 Wn. App. 617, 649 P.2d 126).

Review of Assessment.

Assessments may be appealed to county board of equalization or, under certain circumstances, directly to state board of tax appeals. (RCW 84.40.038). Decision of board of equalization may be appealed to state board of tax appeals. (RCW 82.03.130; RCW 84.08.130).

Payment.

All property taxes payable to county treasurer. If tax on any parcel of realty or on all personalty is less than $50, tax must be paid by Apr. 30 of year following date of levy. If tax on any parcel of realty or on all personalty is $50 or more, half payable by Apr. 30 and half by Oct. 31. Delinquencies bear interest at 12% per annum from date of delinquency and carry add-on penalties of 3% as of May 31 and 8% as of Nov. 30. (RCW 84.56.020).

Collection.

County treasurer notifies each taxpayer of amount of tax due. (RCW 84.56.050). Upon receiving tax, treasurer must issue receipt specifying realty or personalty upon which tax was paid. Owner of property against which delinquent taxes are due may specify that payment is for current taxes only. (RCW 84.56.060).

Lien.

Real Property and Mobile Homes.

Taxes and levies on each parcel or mobile home are lien prior to any mortgage, judgment, debt, etc. (RCW 84.60.010). Lien dates from Jan. 1 in year of levy; but, in absence of express agreement, liability for tax is apportioned between vendor and purchaser according to time of purchase. (RCW 84.60.020).

Personal Property Except Mobile Homes.

Taxes and levies on each item of personalty are liens prior to any judgment, debt, etc. (RCW 84.60.010). Tax on each item of personalty except mobile homes is lien on said item from date of listing and valuation; tax is lien on other personalty of taxpayer from and after date of distraint. (RCW 84.60.020). Personal property taxes are lien on real property when so charged by county treasurer against selected parcels of realty. (RCW 84.60.020-.040).

Sale.

Real Property upon which Property Taxes are Delinquent Subject to Foreclosure and Sale.

After three years from date of delinquency, if no certificate of delinquency has been issued, county treasurer must issue certificate of delinquency to county and must proceed to foreclose tax lien contained therein. (RCW 84.64.050). Court hearing application for foreclosure may follow summary proceeding. After judgment county treasurer must proceed to sell property to highest and best cash bidder, after giving ten days public notice of sale. Amount bid in excess of minimum bid is refunded after payment of water and sewer district liens, upon application, within three years of sale, to record owner of property. Successful bidder takes title by tax deed. (RCW 84.64.080).

Personal property upon which property taxes are delinquent and uncollectible is subject to distraint and sale. County treasurer must prepare papers in distraint and without notice or demand distrain sufficient goods to pay delinquent taxes, interest, and costs of distraint and sale. Public advertisement of distraint and notice of sale must be given. Sale must not occur until at least ten days after taking of property and must be by public auction. Provision is made for distraint of property incapable or reasonably impracticable of manual delivery, but 30 days must elapse between date of taking and date of sale of such property. (RCW 84.56.070).

Redemption.

Real property upon which certificate of delinquency has been issued may be redeemed at any time before close of business day before sale by paying to county treasurer amount, interest thereon at statutory rate, amount of all taxes, interest, and costs accruing after issuance of certificate, and interest thereon at statutory rate for delinquency from date of payment by certificate holder. See subhead Sale, supra.

Real property of minor or insane person may be redeemed within three years after issuance of tax deed as provided by statute. (RCW 84.64.070). See subhead Sale, supra.

Personal property upon which papers in distraint have been issued may be redeemed ten days before sale by paying to county treasurer amount of taxes for which property is distrained, interest at statutory rate, and costs of distraint. (RCW 84.56.070). See subhead Sale, supra.

Miscellaneous Property Tax Provisions.

Tax on Certain Sales of Corporate Stock if Corporate Assets Predominately Real Property.

Excise tax equivalent to tax under 82.45, amended 2008, c. 296, §1, imposed on value of corporate real property located in state upon sale of more than 50% of voting shares of stock in corporation unless any of following apply: (a) Corporation demonstrates primary purpose of transfer not to avoid excise tax; (b) value of corporate real property less than 50% of total corporate assets; (c) registration with federal securities and exchange commission required; (d) transfer by gift, devise or inheritance; (e) transfer to certain family members under some circumstances; or (f) transfer to secure debt or in satisfaction of judgment. (RCW 82.45.030).

Forest lands are taxed under 84.33, amended 2008, c. 181, §509. Credit against tax available for certain harvest under forest practices notification. (RCW 84.33.0775).

Reforestation lands are reclassified as of July 1, 1984, as forest lands and subject to additional excise tax. (RCW 84.33.055-.067).

Public utility company's operating property is assessed annually by Department of Revenue at assessed value of all operating property of each company as of Jan. 1 of year of assessment. (RCW 84.12.270). Provision is made for apportionment to State of Washington of value of operating property of interstate public utility company. (RCW 84.12.300). Operating property is classified as real or personal property by statute. (RCW 84.12.280). Department of Revenue apportions value of operating property to counties and taxing districts therein. (RCW 84.12.350-.360).

Private railroad car company's operating property is assessed annually by Department of Revenue at true and fair value of all operating property as of Jan. 1 of year of assessment. (RCW 84.16.040). Provision is made for apportionment to State of Washington of value of operating property of interstate private railroad car company. (RCW 84.16.050). Value of operating property apportioned to counties (RCW 84.16.110-.120) and taxing districts therein (RCW 84.16.130).

Special valuation for rehabilitated historic property is available to owners of property if application is made before 1992. (RCW 84.26.040). Special valuation based on cost of rehabilitation (RCW 84.26.020[2], [3]) and applies for ten consecutive qualified assessment years (RCW 84.26.070).

Tax relief is available to owners of destroyed property or property located in declared disaster area. (RCW 84.70.010).

Real Estate Conveyance Tax.

Excise tax on sale of real estate or used mobile home is 1.28% of selling price. (RCW 82.45.060). Tax is seller's obligation. (RCW 82.45.080). Tax and special fee on mobile home, if relevant, must be paid to county treasurer who affixes stamp therefor to instrument of sale or conveyance; such instrument must have tax paid and stamp affixed before recording or must contain notation by county treasurer that tax is not due on transfer. (RCW 82.45.090). Interest at rate of 1% per month assessed one month after date of sale. (RCW 82.45.100). Term “sale of real estate” has usual and ordinary meaning. (RCW 82.45.010, am'd 2008, c. 116, §3). Conditions for exemption on inherited property provided at 2008, c. 269, §1.

Leasehold Excise Tax.

Lessees of publicly owned real or personal property subject to excise tax on “taxable rent” at rate of 12% plus additional tax based on rates set forth in RCW 82.02.030. (RCW 82.29A.030). Credit allowed for amount by which tax exceeds property tax that would apply if property were privately owned. (RCW 82.29A.120). Tax generally payable by lessee to lessor with rent, then remitted by lessor to Department of Revenue. (RCW 82.29A.050). Leaseholds of 3,000 or more residential or recreational lots to be subleased are exempt. (RCW 82.29A.136). Other credits and numerous exemptions applicable in specified circumstances. (RCW 82.29A.030-.138).

22.17 SALES AND USE TAXES:

Sales Tax (82.08).

State tax of 6.5% of selling price on each retail sale in state, including successive retail sales of same articles. (RCW 82.08.020). .3% additional tax on retail sale of motor vehicle, beginning July 1, 2003. (RCW 82.08.020[3]). Selling price is reduced, inter alia, by value of traded-in property of like kind to property sold. (RCW 82.08.010). Delivery charges, included in price, may be subject to tax. (RCW 82.08.145 and RCW 82.12.145). Tax is paid by buyer and collected by seller at time of sale but seller may advertise price as “including tax”. Tax need not be separately stated or collected from buyer on retail sales through vending machines. (RCW 82.08.050-.055). Retail sale includes, unless exempted, sales of tangible personal property and consumer services, and renting or leasing of tangible personal property to consumers. (RCW 82.08.010[4]; RCW 82.04.050). Many classes of exempt sales exist. (RCW 82.08.0203-.036). Sales and use tax deferrals available for eligible investment projects in distressed areas (82.60) and manufacturing, research and development projects (82.61). Payments due monthly unless Department of Revenue allows longer period. (RCW 82.32.045). Provision made for electronic funds transfer. (RCW 82.32.085). Rental cars subject to additional sales and use taxes at rate of 5.9% of selling price. Sale of nonrental vehicles subject to additional .3% tax beginning July 1, 2003. (RCW 82.08.020). Separately stated delivery charges for direct mail not subject to tax. (RCW 82.08.807).

Other rates apply to sales of alcoholic beverages by private retailers. (RCW 82.08.150). See topic 22.02 Alcohol, Beverages and Tobacco Taxes.

Use Tax. (82.12, am'd 2008, c. 81, §§3, 16; c. 92, §2; c. 237, §3; and c. 314, §5).

State retail sales tax is complemented by tax at same rate on use of tangible personal property or certain taxable services, measured by value of article used. (RCW 82.12.020). Excluded from application of use tax are many categories of tangible personalty, most of which are taxed elsewhere. (RCW 82.12.0204-.038). Credit against use tax is allowed for retail sales or use tax paid to other state, its political subdivision, District of Columbia or foreign country or its political subdivision, prior to use of property in Washington. (RCW 82.12.035). Persons maintaining place of business or stock of goods in this state, or engaging in business activities within this state must obtain certificate of registration from Department of Revenue and must collect use tax from retail purchasers or transferees at time of making sale or transfer of possession or title; maintaining place of business includes solicitation of sales or taking of orders by sales agents or traveling representatives. (RCW 82.12.040). Sales activities of foreign sellers, not subject to tax, are enumerated. (RCW 82.12.040). Payments due monthly unless Department of Revenue allows longer period. (RCW 82.32.045). Tax imposed on use of natural or manufactured gas delivered through pipeline, at rate in effect under RCW 82.16.020(1)(b). (RCW 82.12.022). See subhead Sales Tax, supra for available sales and use tax deferrals and for authority of counties and cities to impose sales and use tax.

Local Sales and Use Taxes (82.14, am'd 2008, c. 86, §§103 and 104; c. 157, §2; and c. 264, §4).

Counties and cities may each impose sales and use tax not to exceed .5% of selling price, but if county imposes sales and use tax, rate of such tax by any city therein must not exceed .425%. (RCW 82.14.030, am'd 2008, c. 86, §101). Subject to voter approval, counties or certain cities and other districts, may impose additional sales tax up to .9% to fund public transportation. (RCW 82.14.045, am'd 2008, c. 86, §102). Cities authorized to impose tax on use of natural or manufactured gas at rate in effect under RCW 35.21.870. (RCW 82.14.230).

Interstate Transactions.

Simplified Sales and Use Tax Administration Act adopted. (82.58).

22.18 STAMP AND SEAL TAXES:

Stamp Tax.

No documentary stamp tax. See topic 22.15 Property Taxes, subhead Real Estate Conveyance Tax.

22.18A TAX LIENS:

Revised Uniform Federal Tax Lien Registration Act.

Not adopted.

22.18B TRANSPORTATION TAXES:

Aircraft Excise Tax (82.48).

Annual excise tax imposed for privilege of using aircraft in state. (RCW 82.48.020). Rates: single engine aircraft, $50; multi-engine aircraft, $65-$125; helicopter, $75; glider, $20. (RCW 82.48.030). $1,000 to $10,000 penalty for registering elsewhere to avoid Washington tax. (RCW 82.48.020). Exempt aircraft are those: owned by and used exclusively in service of any government or political subdivision thereof; registered under laws of foreign country; owned by nonresident and registered in another state unless within state more than 90 days; engaged principally in commercial flying in interstate or foreign commerce; owned by manufacturer thereof and used for test, experimental, or crew-training purposes; held for sale by licensed aircraft dealer. (RCW 82.48.100). Aircraft excise tax replaces property tax on aircraft (RCW 82.48.110), but does not replace other applicable taxes (RCW 82.48.060).

Aircraft Fuel Tax (82.42).

Tax of 11¢ per gallon. (RCW 82.42.020; .025). Fuel sold for export and fuel used for following purposes is exempt from tax: Operation of aircraft from private, non-state-funded airfield and used for application of agricultural chemicals; operation of aircraft by air carrier or supplemental air carrier under FAA certificate of public convenience and necessity; operation of aircraft for testing or experimental purposes; operation of aircraft for training crews for purchasers of aircraft; and operation of aircraft as local service commuter. (RCW 82.42.020; .030).

22.19 [RESERVED]

22.20 UTILITIES TAX:

Public Utility Tax (82.16, am'd 2008, c. 131, §4).

Tax, based on gross income of business, is imposed at following rates: Railroad, express, railroad car, sewage collection, telephone, telegraph businesses and gas distribution business, 3.6%; light and power business, 3.62%; urban transportation business and small vessels (except tugboats) operating on state waters, 0.6%; water distribution business, 4.7%; motor transport and tugboat businesses and all other public service businesses not mentioned above, 1.8%. Additional tax based on rates set forth in RCW 82.02.030. (RCW 82.16.020). Payments due monthly unless Department of Revenue allows longer period. (RCW 82.32.045).

23 TRANSPORTATION

23.01 MOTOR VEHICLES:

(Title 46).

Department of Licensing has general jurisdiction. (46.01). Address: Highways-Licenses Bldg., Olympia, Washington 98504.

Model Traffic Ordinances.

Guide for local authorities. (46.90).

Vehicle licenses (46.16) issued by Department of Licensing required annually. (RCW 46.16.006; .010). Fee for motor vehicle license tabs set at $30. (RCW 46.16.021; .062). Certain types of motor vehicles registered in designated areas are required to be tested and receive certificate of compliance with state emission standards prior to renewing vehicle licenses. Department of Licensing shall send notice to all registered motor vehicle owners residing within emission area that emission test required to renew registration. (RCW 46.16.015). Special license plates in lieu of regular personalized plates may be created by department to denote age or type of vehicle, special activities or interests, status or contribution or sacrifice for U.S. or State of Washington. (RCW 46.16.301; .305, am'd 2008, c. 72, §1). Person issued special license plate who releases ownership of vehicle upon which special plates have been displayed must report transfer of plates or must surrender plates to department as required by department rule. (RCW 46.16.316). License plate emblem may be issued by department for veterans (RCW 46.16.319) or any institution of higher learning (RCW 46.16.327). Certificate of license registration signed by registered owner must be carried in vehicle at all times. (RCW 46.16.260). Number plates must be displayed in front and rear, except if only one plate issued, it must be displayed on rear of vehicle. (RCW 46.16.240).

Comprehensive statute authorizes making and execution of motor vehicle reciprocal or proportional registration agreements, arrangements and declarations with other states and provides automatic reciprocity in absence of agreements as to vehicle licensed in another jurisdiction so that such vehicle receives same exemptions, benefits and privileges granted by such other jurisdiction to vehicles properly registered in this state. (RCW 46.16.030; 46.85).

State and Publicly Owned Vehicles.

Vehicles owned, leased or rented by federal, state, county, municipal or foreign governments exempt from payment of license fee. Such vehicles must have license plates. (RCW 46.16.020).

Operator's License Required.

(RCW 46.20.021). Penalties provided for driving without valid license. (RCW 46.20.005; .015). No license issued to person under age 16, habitual user of narcotics or drugs to degree impairing safety, person habitually lacking self-control in use of alcohol, person adjudged insane, person mentally or physically unable to use ordinary care or person not successfully completing examination. (RCW 46.20.031). Provision made for intermediate license and penalties for infractions. (RCW 46.20.075; .267). Authority provided to require installation of ignition interlock breath alcohol device for those convicted of offense involving use, consumption or possession of alcohol while operating vehicle. (RCW 46.20.710-.750, am'd 2008, c. 282, §§12 and 13). License may be revoked for habitual traffic offenses (46.65) including defective equipment convictions (34 Wn. App. 521, 662 P.2d 70). Forty-five days notice must be given prior to withholding or suspending driver's license. (RCW 46.20.245). Instruction permit may be issued to person who is at least 15½ years old. (RCW 46.20.055). Periodic examination may be required. (RCW 46.20.305). License must be renewed quadrennially on or before licensee's birthdate. (RCW 46.20.181). No operator's license required of members of armed forces when operating in official motor vehicle in service of military unit with license issued by such unit, nonresidents 16 or older licensed in state of residence or persons operating farm equipment. (RCW 46.20.025). Licenses must be in possession of driver. (RCW 46.20.017). Applicant for license renewal must satisfy all standing, stopping and parking violations listed with Department of Licensing for vehicle incurred while vehicle registered in applicant's name. (RCW 46.16.216). Department of Licensing may distinguish license of persons under 21 years of age from persons 21 or older. (RCW 46.20.105). License may be suspended, inter alia, for failure to pay child support. (RCW 46.20.291). License must be suspended, denied or revoked for refusal of alcohol or drug tests; for blood alcohol concentration of 0.10 or more; and in case of person under age 21, concentration in excess of 0.02. (RCW 46.20.3101). Criminal sanctions for alcohol and drug motor vehicle violations established for violators with no prior offense within seven years; with one prior offense within seven years; and two or more prior offenses within seven years. (RCW 46.61.5055, am'd 2008, c. 282, §14). “Negligent driving” defined and made misdemeanor. (RCW 46.61.5429). Enhanced license may be issued. (RCW 46.20.202).

Dealer's License Required.

Motor vehicle dealers and salespersons must be licensed and bonded and are prohibited from committing unfair business practices. (46.70). Sports motor vehicle dealers are regulated. (46.93).

Titles and Sales.

Certificate of ownership or, if unavailable at time security interest is created, transitional ownership record, must be obtained from Department of Licensing. (46.12; 62A. §§9A-822, -823). Physical examination of vehicle mandatory if previously registered out of state or country or if rebuilt after surrender of certificate of ownership due to vehicle damage. (RCW 46.12.030). No vehicle license plates or certificate of license registration may be issued unless owner's certificate has been applied for or previously issued.

If sale or transfer of vehicle, holder of certificate of license registration and certificate of ownership must at time of delivery endorse and deliver such certificates to purchaser or transferee, who must within 15 days thereafter surrender same to Department of Licensing and apply for reissuance thereof. (RCW 46.12.010). Within five days after sale, excluding Sats., Suns. and state and federal holidays, transferring owner must notify Department of Licensing of sale or transfer, giving date of sale or transfer, name and address of owner and transferee, description of vehicle and odometer disclosure statement and pay statutory fee. (RCW 46.12.101, am'd 2008, c. 316, §1; .124).

Department of Licensing retains and indexes all returned certificates. (RCW 46.12.070-.080). Name or address of individual vehicle owner shall not be released by Department of Licensing, county auditor or agency or firm authorized by department except on written request signed by requester and which states requester's full name, address and specific purpose for which information will be used, and requester enters into disclosure agreement with department in which requester promises to use information only for purpose specified. (RCW 46.12.380). Department shall suspend or revoke for up to five years privilege of obtaining vehicle record information of requester in violation of disclosure agreement. Unauthorized disclosure of information from department vehicle record; use of false information to obtain information from department's vehicle records; use of information obtained from department vehicle records for purpose other than that stated in request for information or disclosure agreement; or distribution of any vehicle owner name or address not disclosed in request or disclosure agreement is gross misdemeanor punishable by fine not to exceed $10,000, imprisonment not to exceed one year, or both. (RCW 46.12.390). Whenever disclosing entity grants request for information by attorney or private investigator, disclosing entity shall provide notice of granted request to owner, containing name and address of requester. (RCW 46.12.380). Department of Licensing may disclose lists of registered and legal owners of motor vehicles only for certain specified purposes. (RCW 46.12.370).

Within five days of destruction of vehicle, or installation of new motor, certificates of license registration and ownership must be surrendered to director of Department of Licensing. Failure to comply is gross misdemeanor. (RCW 46.12.070-.080). Insurance company settling claim on vehicle as total loss less salvage must notify director within five days. (RCW 46.12.070).

Persons Under Age 18.

Ownership prohibited under most circumstances. (RCW 46.12.250). See category 14 Family, topic 14.10 Infants.

Liens and Encumbrances.

When vehicle is subjected to security interest subsequent to issuance of certificate of ownership, registered owner must deliver certificate of ownership within ten days to Department of Licensing together with his application for reissuance signed by secured party. New certificate of license registration is then issued to owner and certificate of ownership is then issued to secured party. (RCW 46.12.170).

After satisfaction of secured obligation, within ten days of demand, secured party assigns certificate of ownership to owner and transmits same to Department of Licensing. Department issues new certificate and transmits to owner. Failure by secured party to assign or transmit certificate of Department of Licensing results in liability of secured party to debtor for $100 and for any loss caused to debtor by such failure. (RCW 46.12.170). Obligation and liability not imposed upon secured party when other secured interest exists. (RCW 46.12.101[4]; 12 Wn. App. 698, 531 P.2d 514).

Forms for certificate of registration and certificate of ownership and reissue thereof may be procured from Department of Licensing. Highways-Licenses Building, Olympia, Washington 98504. Fee for reissue of certificates after satisfaction of security interest is $5. (RCW 46.12.170).

Identification Marks.

Where motor number or serial numbers are obliterated, Department of Licensing, upon payment of $5 filing fee and satisfactory proof that owner is so entitled, will designate special number to be used. (RCW 46.12.060). Knowledge, possession, purchase, sale, or concealment of vehicle whose identifying number has been altered or destroyed for purposes of concealing or misrepresenting identity of said vehicle is gross misdemeanor. (RCW 46.12.300).

Operation Prohibited.

By unlicensed persons. See subhead Operator's License Required, supra.

Size and Weight Limits.

Regulated by 46.44, amended 2008, c. 76, §1 and c. 89, §1. See also infra, subhead Motor Vehicle Carriers.

Equipment Required.

Regulated generally by 46.37. Driver required to use approved restraint system for child under age three. For child between three and 16 years, either approved restraint system or safety belt permissible. Noncompliance with statute not admissible as evidence in civil action. (RCW 46.61.687). Required equipment for street rods and kit vehicles is specified. (RCW 46.04.251; .571).

Lights Required.

Regulated by 46.37.

Motor Vehicle Warranties.

See category 3 Business Regulation and Commerce, topic 3.10 Consumer Protection.

Accidents.

In case of injury, death, striking body of deceased person, or damage to attended vehicle, driver must stop, give assistance if necessary exhibit driver's license and give to injured party or occupant of other vehicle name, address, insurance company, insurance policy number and vehicle license number. Failure to comply is Class C felony. (RCW 46.52.020). In case of damage to unattended vehicle, or to property on or upon any public highway, driver must stop and notify driver or owner or leave written notice including name and address of operator and owner of vehicle causing damage. Failure to comply is misdemeanor. (RCW 46.52.010). Where accident causing injury or death to any person or causing property damage of $500 or more is not investigated by law enforcement officer, driver must within four days make written report to police department if accident occurs within city and to sheriff or state patrol if outside city. (RCW 46.52.030). Vehicles may be equipped with recording devices (”black boxes”) but it must be disclosed in owners manual or service agreement. (RCW 46.35).

Owner's Liability.

No statutory provisions with respect to liability of owner for negligence of others operating vehicle. Family car doctrine recognized. (56 Wn.2d 769, 355 P.2d 544).

Financial Responsibility.

Act patterned after, and in general similar to, Uniform Automobile Liability Security Act, has been adopted. (46.29). Minimum coverage $25,000 and $50,000 for bodily injury and $10,000 property damage. (RCW 46.29.260). Proof of financial responsibility may be required of driver and owner of vehicle involved in accident resulting in injury or damages of $500 or more. (RCW 46.29.060). Proof may be given by certificate of insurance, bond, certificate of deposit of money, or certificate of self-insurance. (RCW 46.29.450). Owner may give proof on behalf of employee or member of his family. (RCW 46.29.570).

Insurance not compulsory except as provided by Financial Responsibility Act (supra).

No-Fault Insurance.

Not adopted.

Foreign vehicle registered in home state or country and displaying license plates required by laws of home state exempt from registration requirements to same extent that home state exempts Washington vehicles. (RCW 46.16.030).

Nonresident operator over 16 years of age, who is duly licensed by his home state, or over 15 years with valid instruction permit, accompanied by licensed driver with at least five years experience, may operate a vehicle in this state without local license. (RCW 46.20.025).

Actions Against Nonresidents.

Nonresident owners and operators of motor vehicles operated in this state are deemed to have appointed Secretary of State as attorney upon whom may be served summons and process in any action arising out of operation of vehicle in state provided that plaintiff sends copy of summons or process by registered mail to defendant, return receipt requested, at last known address, or personally serves defendant outside Washington. (RCW 43.07.120; RCW 46.64.040). Nonresident arrested, cited or issued notice of infraction for traffic offense may be required to post bond or cash security in amount of infraction, or post bail. (RCW 46.64.035).

Direct actions against insurer not allowed. Insurer subject to garnishment after judgment.

Motor vehicle carriers are regulated by Utilities and Transportation Commission. (RCW Title 81). Rates must be just, fair, reasonable and sufficient (RCW 81.28.010), and filed with Commission (RCW 81.28.040). It is unlawful to operate as a motor freight carrier, including household goods carriers, without a permit from Commission. (RCW 81.80.070). Auto transportation company must obtain certificate of public convenience and necessity. (RCW 81.68.040). Operator of for-hire vehicle, other than certain operators regulated by cities or counties, must obtain permit from Director of Licensing. (RCW 46.72.020).

Gasoline Tax.

See category 22 Taxation, topic 22.07 Gasoline and Special Fuels Taxes.

All-Terrain Vehicles.

All-terrain vehicles required to be registered annually; strict regulations promulgated governing use. (46.09). Snowmobiles must be registered annually; special rules promulgated governing operation. (46.10, am'd 2008, c. 52, §1).

Mobile Homes.

All titling functions pertaining to motor homes transferred to housing division of department of community trade and economic development. (RCW 46.12.295).

23.02 RAILROADS:

See category 3 Business Regulation and Commerce, topic 3.08 Carriers.

24 FORMS

Commercial Code Forms

(Click here to view)

1
WEST VIRGINIA LAW DIGEST

—Scope —

Revised for 2010 edition by

JACKSON KELLY PLLC, of Charleston.

(Citations refer to Michie's West Virginia Code and its supplements, unless otherwise indicated. Statutes are available at http://www.legis.state.wv.us/WVCODE/code.cfm. W.Va.Rer.Civ.P. or R.C.P. refers to West Virginia Rules of Civil Procedure. Parallel citations to the South Eastern Reporter are cited as SE 2d W. Va.C.R.S. refers to the Code of State Rules, which is available at http://www.wvsos.com/csr.)

This revision covers 2009 Regular Session and subsequent three Special Sessions, incorporating legislation through Oct. 26, 2009. Legislature meets annually in Jan.

1 INTRODUCTION

1.01 GOVERNMENT AND LEGAL SYSTEM:

The State of West Virginia is a constituent state of the United States of America. For further discussion of the U.S. federal system, see Introduction to the Federal Government of the United States at the beginning of this volume. Great many laws are promulgated by federal government of United States and are not reflected in topics below. See Introduction to this volume for references to federal law topics covered.

Like all but one of the United States, West Virginia has a common law legal system, with roots in English common law. For information on the courts and legislature of West Virginia, see category 6 Courts and Legislature.

1.02 [RESERVED]

1.03 HOLIDAYS:

Jan. 1; 3d Mon. of Jan.; 3d Mon. of Feb.; last Mon. of May; June 20; July 4; first Mon. of Sept.; 2d Mon. of Oct.; Nov. 11; 4th Thurs. and Fri. of Nov.; Dec. 25; any national, state or other election day in district or incorporated municipality where held; and any day proclaimed or ordered by governor or president. (WV Code 2-2-1-[a]). If governor intends to appoint or recommend additional legal holiday, he/she must make intent clear by citing directly to WV Code 2-2-1 or applicable language thereto (176 W.Va. 198, 342 S.E.2d 164) and be directed to all citizens (180 W.Va. 159, 375 S.E.2d 791). Except as to national, state or other election days or specially proclaimed or ordered holiday, when holiday falls on Sun., following Mon. observed, and when holiday falls on Sat., preceding Fri. observed. (WV Code 2-2-1-[b]). Entire or part statewide day off designated by governor may, for all courts, be treated as legal holiday. (WV Code 2-2-1[c]). As to courts of state, relationship of computed time periods and specific dates to legal holidays are governed by rules promulgated by Supreme Court of Appeals. (WV Code 2-2-1[f]). Provisions of WV Code 2-2-1 do not increase or diminish legal school holidays provided for in WV Code 18A-5-2 (i.e., Independence Day, Labor Day, Veterans Day, Thanksgiving Day, Christmas Day, New Year's Day, Martin Luther King's Birthday, Memorial Day, West Virginia Day, and statewide or school district primary, general or special election day, and any day designated as holiday of special observance by president or governor). (WV Code 2-2-1[g]). Improper closing of county courthouse cannot be likened to holiday so as to authorize late filing of legal document. (177 W.Va. 97, 350 S.E.2d 724; but see, 288 F.Supp.2d, which declined to follow). When proceeding is directed to take place or any act to be done on any particular day of month or within any period of time prescribed or allowed, if that day or if last day is Sat., Sun., legal holiday, weather or other emergency day, it is excluded, and next day that is not Sat., Sun., legal holiday, or weather or other emergency day shall be deemed to be one intended. (WV Code 2-2-2). Appeal postmarked on first day after legal holiday on which appeal period would have ended is timely filed. (171 W.Va. 7, 297 S.E.2d 206). Banking transaction not void or voidable because done on Sun. or legal holiday. (WV Code 31A-4-39). Any fixed weekday and/or portion of one or more weekdays on which any banking institution shall elect to close and any period during which Commissioner of Banking may permit it to close shall constitute legal holiday and not business or banking day for purposes of law relating to negotiable instruments. (WV Code 31A-4-40[c]). Not every holiday is nonjudicial day which invalidates any proceeding conducted on that day. (166 W. Va. 211, 273 S.E.2d 379). Attachment may be issued or executed on holiday, if oath be made that defendant is removing his effects on that day. (WV Code 38-7-18).

1.04 OFFICE HOURS AND TIME ZONE:

West Virginia is in the Eastern (GMT -05:00) time zone. Office hours are generally from 9 a.m. to 5 p.m. Daylight saving time is official statewide time, commencing at two o'clock antemeridian on last Sun. of Apr. and terminating at two o'clock antemeridian on last Sun. of Oct. (WV Code 5-1-25).

2 BUSINESS ORGANIZATIONS

2.01 AGENCY:

Common law rules apply. Applicability of law of principal and agent (WV Code 46-1-103), employment agencies (WV Code 21-2-15), insurance products and solicitors (c. 33, art. 12).

2.02 ASSOCIATIONS:

No general statutory provisions regarding unincorporated associations. There are specific statutory provisions covering voluntary associations and business trusts (c. 47, art. 9A); cooperative agricultural associations (c. 19, art. 4); federal savings and loan associations (c. 31, art. 12); religious organizations (c. 35, art. 1); educational, fraternal and charitable organizations (c. 35, art. 2); homes and asylums of fraternal orders (c. 35, art. 3); voluntary fire companies (WV Code 8-15-4); county fire associations (c. 7, art. 17); business improvement districts (c. 8, art. 13A); unincorporated nonprofit associations (c. 36, art. 11); neighborhood investment organizations (c. 11, art. 13J); maintenance associations (c. 7, art. 12A); condominium associations (c. 36B, art. 3); and fraternal benefit societies (c. 33, art. 23).

Name, badge, motto, emblem or other insignia of associations, lodges, etc., may be registered in office of secretary of state. (c. 35A, art. 1).

Churches and religious denominations are prohibited from incorporating. Const., art. VI, § 47. Nonprofit corporations may be organized under Nonprofit Corporation Act for religious purposes. (WV Code 31E-3-301; but see 45 W.Va. 780, 32 S.E. 214).

Formation.

No statutory provisions regarding formation of associations in general.

Registration.

Voluntary association organized for purpose of conducting business in state, except unincorporated nonprofit association (c. 36, art. 11), shall file with secretary of state executed copy of application for registration along with executed original copy of agreement of association creating voluntary association, if any. Voluntary association organized outside state and operating within state must file with secretary of state, in addition to documents described above, statement or certificate from proper officer of state or country of origin that voluntary association is in good standing. (WV Code 47-9A-3).

Rights and Powers.

There are no statutory provisions regarding rights and powers of associations in general.

Liabilities.

No statutory provisions regarding liabilities of associations in general.

Actions.

In absence of statute, West Virginia follows common law rule that unincorporated associations may not sue or be sued in their own names. State of West Virginia, as representative of unincorporated association, may sue for use and benefit of association. (151 W. Va. 749, 155 S.E.2d 564). See R.C.P. 9(a) for provisions applicable when substantive right to sue associations is given by statute. See also R.C.P. 23 for provisions regarding suit against members of association as class action. Labor organization may, in certain instances, sue and be sued as entity and on behalf of employees whom it represents. (WV Code 21-1A-7).

Dissolution.

No statutory provisions regarding dissolution of associations in general.

Professional Associations.

No statutory provisions authorizing professional associations. It is specifically unlawful for association to practice optometry (WV Code 30-8-10). One or more individuals who are licensed to practice law may organize and become shareholder or shareholders of legal corporation. (WV Code 30-2-5a). Professional corporations and limited liability companies are permitted. See topics 2.03 Corporations, subhead Professional Corporations; 2.06 Limited Liability Companies, subhead Professional Limited Liability Companies.

Charitable organizations. Solicitations for charitable contributions which solicit funds from those other than members must register annually with secretary of state and submit applicable filing fee. Financial information on organization must be included. Also, copies of any contracts with professional or paid fund-raisers must be filed. Any charitable organization failing to comply with registration will be enjoined from solicitation activities. Solicitation of funds in violation of article (c. 29, art. 19) is misdemeanor punishable by fine and imprisonment.

Governing Statutes.

Generally voluntary associations and business trusts are, upon qualification and authorization to do business in state, subject to all of statutes of state relating to corporations generally. (WV Code 47-9A-4). Voluntary associations must file with secretary of state and receive certification. (WV Code 47-9A-3).

Pyramiding Schemes.

Associations or groups are prohibited from operating or functioning under any type of “pyramid promotional scheme,” defined in statute. (c. 47, art. 15). Violation of statute is misdemeanor. (c. 47, art. 15. § 5).

Name of Business.

Name of any voluntary association applying for registration shall meet requirements for corporate names (WV Code 31D-4-401; WV Code 31E-4-401), except that name shall not contain words “incorporated,” “corporation,” “limited” or any abbreviation of those words.

Voluntary association may use trade name by filing application for registration of trade name containing name under which association is organized, trade name, address of principal place of business and name, title and signature of person having authority to make application with secretary of state. Violation is misdemeanor. (WV Code 47-9A-4, 5).

Neighborhood Organization.

Any organization performing community services as defined by this section, which is exempt from income taxation under § 501(c)(3) of Internal Revenue Code. (c. 11, art. 13J).

Maintenance Association.

Unincorporated area may form association for protection of health, safety and welfare of persons and general public within designated maintenance association area by filing petition with county commission that duly verifies that 60% of persons owning property request approval of maintenance association. (WV Code 7-12A-2, 3). Association's objective must be to establish and maintain improvements for area, which may include constructing and maintaining shared streets, drainage facilities, sidewalks, water and sewer systems, signs, street lights and other improvements necessary for protection of health, safety and welfare of general public. Improvements to state road system shall be made only as specified and approved by commissioner of highways. Maintenance association providing essential services may impose reasonable fee. Failure of member to comply with assessed fee may result in lien on member's property. (c. 7, art. 12A).

2.03 CORPORATIONS:

"West Virginia Business Corporation Act" governs business corporations. Special statutory provisions as to objects, purposes and powers of railroad companies, boom companies, building and loan associations, industrial banks, industrial loan companies, credit unions and business development corporations are located in separate articles of c. 31. General corporation law applies to banking institutions, except as provided in c. 31A, and professional corporations, except as provided in c. 33. Any conflicts between c. 31D and c. 31, 31A or 33 are resolved in favor of c. 31, 31A or 33.

Incorporation of church or religious denomination is forbidden. (Const., art. VI, § 47). Nonprofit corporations may be organized under Nonprofit Corporation Act for religious purposes. (WV Code 31E-3-301; but see 45 W.Va. 780, 32 S.E. 214).

General Supervision.

Secretary of state administers act. (WV Code 31D-1-130).

Purposes.

Corporation may be organized for any lawful purpose or purposes. (WV Code 31D-3-301).

Name.

Shall contain "corporation," "company," "incorporated" or "limited," or abbreviation of one of such words; shall not contain any word or phrase indicating organization for any purpose other than one or more of purposes contained in articles of incorporation; shall not be the same as, and shall be distinguishable from, (i) name of any corporation organized or authorized to transact business in West Virginia or (ii) name of any nonprofit corporation incorporated or authorized to transact business in this state or (iii) name which is reserved in manner provided by law or (iv) name of any other entity whose name is carried in records of secretary of state. Corporation may apply to use name that is not distinguishable if other corporation or entity consents in writing and submits written undertaking to change name to one distinguishable or applicant delivers certified copy of final court order establishing applicant's right to use name applied for is submitted. Corporation may use name of another corporation used in state if proposed user corporation has merged with other corporation, has been formed by reorganization of other corporation, or has acquired all or substantially all of assets, including corporate name, of other corporation. (WV Code 31D-4-401).

Except as provided in c. 47, 31E, 31D, or 31B, no person may use word "corporation," "incorporated," "limited," or abbreviation of any such word, in any trade name, business or other organization name unless same is used by domestic or foreign corporation authorized by secretary of state to transact business in state. Any person who violates word use restriction shall be deemed to be acting as corporation without authority of law and subject to action in quo warranto as provided in c. 53, art. 2. Violation also constitutes misdemeanor punishable by fine not less than $500 nor more than $1,000 or imprisonment not more than 30 days or both. (WV Code 31D-4-402).

Reservation of corporate name made by filing application with secretary of state. If name is available and fee is submitted, it is reserved for nonrenewable 120-day period. (WV Code 31D-4-403). Owner of reserved corporate name may transfer reservation to another person by delivering signed notice to secretary of state. (WV Code 31D-4-403).

Foreign corporation may register corporate name if name would otherwise be available. Registration is effective until close of calendar year in which registration application is filed but may be renewed yearly. (WV Code 31D-4-404).

Any corporation which operates under assumed name or trade name different from that set forth in its articles of incorporation or articles of association must file application for registration of trade name, setting forth name under which business entity is organized and registered, name under which business entity is or is to be conducted or transacted upon approval, address of principal office within state or, if no office is maintained within state, address of principal office in state in which business entity is established, and name, title, and signature of person having authority to make application. Executed original of application for trade name registration shall be delivered to secretary of state. New certificate of registration shall be filed if corporation desires to conduct or transact any business in state under any other assumed name not on file with secretary of state. Upon discontinuing use of registered trade name, certificate of registration of trade name shall be withdrawn by filing certificate of withdrawal with secretary of state setting forth name to be discontinued, real name, address of party transacting business and date upon which original certificate of registration of trade name was filed. Any corporation authorized to transact business in state must procure amended certificate of incorporation if it changes its corporate name by filing articles of amendment with secretary of state as provided in c. 31, art. 1. (WV Code 47-8-4). Failure to comply with WV Code 47-8-4, is misdemeanor, punishable by fine of not less than $25, nor more than $100, or imprisonment in county jail for term not exceeding 30 days, or both. (WV Code 47-8-5).

Term of Corporate Existence.

Perpetual, unless limited period of duration is stated in articles of incorporation may act as on incorporator. (WV Code 31D-3-302).

Incorporators.

One or more persons or domestic or foreign corporation. No requirement as to citizenship or residence. (WV Code 31D-2-201).

Articles of Incorporation.

Articles must be filed with secretary of state, together with prescribed fees. (WV Code 31D-2-201).

Articles must state: (1) Corporate name for corporation that satisfies requirements of WV Code 31D-4-401; (2) number of shares corporation is authorized to issue, par value of each of shares or statement that all shares are without par value; (3) street address of corporation's initial registered office, if any, and name of its initial registered agent at that office, if any; (4) name and address of each incorporator; (5) purpose or purposes for which corporation is organized; and (6) mailing address of corporation's principal office.

Articles may state: (1) Names and addresses of individuals who are to serve as initial directors; (2) provisions not inconsistent with law regarding: (A) managing business and regulating affairs of corporation, (B) defining, limiting and regulating powers of corporation, its board of directors and shareholders, or (C) imposition of personal liability on shareholders for debts of corporation to specified extent and upon specified conditions; (3) any provision that under chapter is required or permitted to be set forth in bylaws; (4) provision eliminating or limiting personal liability of director to corporation or its stockholders for monetary damages for breach of fiduciary duty as director: Provided, that provision may not eliminate or limit liability of director: (A) for any breach of director's duty of loyalty to corporation or its stockholders, (B) for acts or omissions not in good faith or which involve intentional misconduct or knowing violation of law, (C) under WV Code 31D-8-833 for unlawful distributions, or (D) for any transaction from which director derived improper personal benefit: Provided, no provision may eliminate or limit liability of director for any act or omission occurring prior to date when that provision becomes effective; and (5) provision permitting or making obligatory indemnification of director for liability as that term is defined in WV Code 31D-8-850, to any person for any action taken, or any failure to take any action, as director, except liability for: (A) receipt of financial benefit to which he or she is not entitled, (B) intentional infliction of harm on corporation or its shareholders, (C) violation of WV Code 31D-8-833, for unlawful distributions, or (D) intentional violation of criminal law. Articles of incorporation need not set forth any of corporate powers enumerated in chapter. (WV Code 31D-2-202).

Articles of incorporation for railways must state principal towns and cities to be reached and served. (WV Code 31-2-6).

Filing of Articles.

Unless delayed effective date is specified, corporate existence begins when articles are filed. (WV Code 31D-2-203).

Electronic Transmissions.

Secretary of state may provide for electronic filings, provided that document is in format that can be retrieved or reproduced in typewritten or printed form. (WV Code 31D-1-120). Notice by electronic transmission is considered written notice. (WV Code 31D-1-151).

Incorporation Tax.

Fees are as follows: Secretary of state: Articles of Incorporation of Domestic For-Profit Corporation, $50; Articles of Incorporation of Domestic Nonprofit Corporation, $25; Certificate of Authority of For-Profit Corporation, $100; Certificate of Authority of Nonprofit Corporation, $50; certified copy of corporate charter or comparable organizing documents, $15, plus $5 for each amendment or other document; certificate of change of name, of increase or decrease of authorized capital stock, $25; recording power of attorney and certificate thereof, $10. (WV Code 59-1-2).

Organization.

Following issuance of certificate of incorporation, organizational meeting of board of directors, if initial directors were named in articles, shall be held upon call of majority of directors to complete organization of corporation by adopting bylaws, appointing officers and carrying on any other business brought before meeting. If initial directors are not named in articles, incorporator or incorporators shall hold organizational meeting at call of majority of incorporators to elect directors and complete organization of corporation or to elect board of directors to complete organization. (WV Code 31D-2-204).

Amendment of Articles of Incorporation.

If no shares have been issued, amendment shall be adopted by resolution of board of directors. If shares have been issued, amendment shall be adopted by resolution of board setting out proposed amendment and directing that it be submitted to vote at annual or special meeting of shareholders, along with recommendation that shareholders approve amendment. Written notice setting forth proposed amendment or summary thereof shall be given to each shareholder of record entitled to vote thereon in same manner as for giving notice of meeting of shareholders. If meeting is annual meeting, such notice may be included in notice of annual meeting. Proposed amendment must be adopted by shareholders at meeting at which quorum, consisting of at least majority of shares entitled to vote thereon, exists, and, if any class is entitled to vote thereon as class, proposed amendment shall be adopted by each separate voting group at meeting at which quorum of voting group, consisting of at least majority of shares of each class entitled to vote thereon as class, exists. (WV Code 31D-10-1003).

Bylaws.

Initial bylaws adopted by incorporators or directors. Bylaws may contain any provisions for regulation and management of corporation not inconsistent with law or articles of incorporation. (WV Code 31D-2-205). Unless articles provide otherwise, directors may adopt bylaws to be effective only in event of emergency. (WV Code 31D-2-206). Bylaws may be amended by either shareholders or directors unless otherwise provided in bylaws.

Stock.

Corporations have power to issue number and classes of shares stated in articles of incorporation, with or without par value as therein provided, and with such designations, preferences, limitations and relative rights as therein stated; provided, that articles must authorize one or more classes of shares that together have unlimited voting rights and one or more classes of shares (which may be same as those with voting rights) that together are entitled to receive net assets of corporation upon dissolution. Articles may limit or deny voting rights or provide special voting or distribution rights for shares of any class to extent not inconsistent with act. (WV Code 31D-6-601).

If articles so provide, corporation may issue any class of preferred or special shares in series. If issued in series, then each series of class must be given distinguishing designation. Shares of same series must be identical, except to extent otherwise provided in description of series, with those of other series of same class. (WV Code 31D-6-602).

Stock Certificates.

Shares may but need not be represented by certificates, and, unless act or another provision of Code expressly provides otherwise, rights and obligations of shareholders are identical whether or not their shares are represented by certificates. At minimum, each share certificate must state on its face: (1) Name of issuing corporation and that it is organized under laws of state, (2) name of person to whom issued, and (3) number and class of shares and designation of series, if any, certificate represents. If issuing corporation is authorized to issue different classes of shares or different series within class, designations, relative rights, preferences, and limitations applicable to each class and variations in rights, preferences and limitations determined for each series, and authority of board of directors to determine variations for future series, must be summarized on front or back of each certificate. Alternatively, each certificate may state conspicuously on its front or back that corporation will furnish shareholder this information on request in writing and without charge. Each share certificate: (1) Must be signed, either manually or in facsimile, by two officers designated in bylaws or by board of directors, and (2) may bear corporate seal or its facsimile. If person who signed, either manually or in facsimile, share certificate no longer holds office when certificate is issued, certificate remains valid. (WV Code 31D-6-625).

Issuance of Shares.

Unless otherwise provided in subscription agreement or all subscribers agree to revocation, subscription for shares entered into before incorporation is irrevocable for six months, and board may determine payment terms, which must be uniform so far as practicable as to all shares of same class or series. Shares issued pursuant to subscriptions entered into before incorporation are fully paid and nonassessable when corporation receives consideration specified in subscription agreement. (WV Code 31D-6-620). After incorporation, when corporation receives consideration for which board of directors authorized issuance of shares, shares issued are fully paid and nonassessable. (WV Code 31D-6-621).

Consideration for shares may be in any tangible or intangible property or benefit to the corporation, including cash, promissory notes, services performed, contracts for services to be performed or other securities of corporation. In absence of fraud in transaction, judgment of board as to value of consideration received for shares is conclusive. Shares may be placed in escrow in exchange for promissory notes or future services. Issuance of shares that will comprise more than 20% of voting power outstanding immediately before transaction for consideration other than cash or cash equivalents requires approval of shareholders. (Frye v. Frye, 217 W. Va. 674; 619 S.E.2d 187) regarding validity of issuance of shares.

Transfer of Stock.

Uniform Commercial Code governs. (c. 46). See category 3 Business Regulation and Commerce, topic 3.09 Commercial Code.

Uniform Simplification of Fiduciary Security Transfers Act adopted. (c. 31, art. 4D).

Uniform Commercial Code adopted. (c. 46). See category 3 Business Regulation and Commerce, topic 3.09 Commercial Code.

Stock Transfer Tax.

None.

Shareholders.

See subheads Shareholders’ Meetings, Liability of Subscribers and Shareholders, Voting Trusts, Books and Records, Appraisal Rights, infra, and Stock Certificates, Issuance of Shares, supra, for voting rights, rights to shareholders’ list, rights to examine books and records, appraisal rights, and other rights of shareholders.

Liability of Subscribers and Shareholders.

Holder of or subscriber for shares not liable to corporation or to creditors except for obligation to pay full consideration for shares. Unless otherwise provided in articles, shareholder is not personally liable for debts or acts of corporation, except that he may become personally liable by reason of his own conduct. (WV Code 31D-6-622).

Shareholders’ Meetings.

Meetings of shareholders may be held at place in or out of state as provided in bylaws.

Absent such provision, meetings held in principal office of corporation. (WV Code 31D-7-701). Quorum consists of majority of shares entitled to vote, unless otherwise provided in articles. (WV Code 31D-7-725). Unless otherwise provided in bylaws, written notice of place, date and time and, if special meeting, purpose of meeting, shall be delivered not less than ten nor more than 60 days before date of meeting. (WV Code 31D-7-705). After fixing record date, corporation must make and certify complete list of shareholders entitled to vote at shareholders' meeting, which must be available for inspection by any shareholder, beginning two days after notice of meeting is given for which list was prepared and continuing through meeting, at principal office or place at which meeting will be held. (WV Code 31D-7-720).

Any action which may be taken by shareholders at meeting thereof may be taken by unanimous written agreement of all shareholders in lieu of meeting. (WV Code 31D-7-704).

Except as stated in articles, each share outstanding, regardless of class, entitled to one vote on each matter submitted to vote. Treasury shares and shares held by another corporation if majority of shares entitled to vote for election of directors of such other corporation is held by corporation are not voted nor counted in determining total number of shares entitled to vote. Voting for directors is cumulative. Shares held by fiduciary, except trustee, may be voted by him without transfer of shares into his name. Trustee may not vote shares until transferred into his name. Pledgee may not vote shares until transferred into his name. (WV Code 31D-7-721, 728).

Voting by proxy authorized. Proxy valid only for 11 months, unless otherwise provided in proxy. (WV Code 31D-7-722).

If bylaws do not fix or provide for fixing record date for one or more voting groups in order to determine shareholders entitled to notice of shareholders' meeting, to demand special meeting, to vote or to take other action, board of directors may fix future date as record date. Record date may not be more than 70 days before meeting or action requiring determination of shareholders. If record date is not set by board of directors, date on which notice is mailed is record date. For purposes of determining shareholders entitled to notice of or to vote at meeting, record date is effective for any adjournment of meeting unless new record date is fixed or meeting is adjourned to date more than 120 days after date fixed for original meeting. (WV Code 31-7-707). If not otherwise fixed under WV Code 31D-7-703 or 707, record date for determining shareholders entitled to take action without meeting under WV Code 31D-7-704 is date first shareholder signs written agreement or consents to action. (WV Code 31D-7-704).

Voting trusts by written agreement for periods up to ten years are authorized unless extended. (WV Code 31D-7-730).

Derivative Actions.

Derivative actions not covered by act. Common law governs.

Directors.

Board shall consist of one or more members, number to be fixed by, or in manner provided in, articles of incorporation or bylaws. (WV Code 31D-8-803). Directors need not be resident of state or shareholder of corporation unless articles or bylaws so require. (WV Code 31D-8-802). Directors elected annually, unless provision in articles or bylaws permits staggered terms under WV Code 31D-8-806. (WV Code 31D-8-803). Directors elected by cumulative voting. (WV Code 31D-7-728). Vacancies in board filled by affirmative vote of shareholders, board or majority of remaining directors, unless articles or bylaws provide otherwise. (WV Code 31D-8-810).

Directors Meetings.

May be held within or without state. (WV Code 31D-8-820). Regular meetings may be held without notice of date, time, place or purpose unless otherwise provided in articles or bylaws. Special meeting held upon two days notice unless otherwise provided in articles or bylaws. Notice need not describe purpose of special meeting unless required by articles or bylaws. Attendance of director at meeting constitutes waiver of notice thereof, unless attendance is for express purpose of objecting to manner in which meeting has been called. (WV Code 31D-8-822, 823). Majority of board members constitutes quorum unless articles or bylaws provide otherwise. Articles or bylaws may authorize quorum of board to consist of no less than one-third of total directors. Vote of majority of board members present at meeting at which quorum present constitutes act of board, unless greater number required by articles or bylaws. (WV Code 31D-8-824).

Unless otherwise provided in articles or bylaws, any action which may be taken at director's meeting may be taken by unanimous written agreement of all directors in lieu of meeting. (WV Code 31D-8-821).

Powers and Duties of Directors.

Business and affairs of corporation are managed by board, except as otherwise provided in articles of incorporation. (WV Code 31D-8-801). Unless articles or bylaws provide otherwise, board may create one or more committees and appoint members of board to serve on them. Each committee must have two or more members who serve at pleasure of board. (WV Code 31D-8-825). Directors required to act in good faith and in manner director reasonably believes to be in best interests of corporation. (WV Code 31D-8-830).

Liabilities of Directors.

Director is not liable to corporation or its shareholders for any decision to take or not to take action, or any failure to take any action, as director, unless party asserting liability in proceeding establishes that any provision in articles does not preclude liability and challenged conduct consisted or was result of: (A) Action not in good faith; (B) decision: (i) which director did not reasonably believe to be in best interests of corporation, or (ii) as to which director was not informed to extent director reasonably believed appropriate in circumstances; (C) lack of objectivity; (D) sustained failure of director to devote attention to ongoing oversight of business and affairs of corporation, or failure to devote timely attention, by making or causing to be made appropriate inquiry, when particular facts and circumstances of significant concern materialize that would alert reasonably attentive director to need for inquiry; (E) receipt of financial benefit to which director was not entitled or any other breach of director's duties to deal fairly with corporation and its shareholders that is actionable under applicable law. (WV Code 31D-8-831).

Indemnification of Officers and Directors.

Officers and directors may be indemnified against expenses (including attorney's fees) reasonably incurred, by reason of their position, if they acted in good faith, in manner they reasonably believed to be in or not opposed to best interests of corporation and, with respect to criminal proceeding, had no reasonable cause to believe their conduct was unlawful. Exceptions where action or proceeding by or in right of corporation. If successful on merits or otherwise, said officers and directors must be indemnified. (WV Code 31D-8-851, 852).

Corporations may purchase insurance against liability incurred by officers and directors in such capacity or arising out of their status as such. (WV Code 31D-8-857).

Officers.

Corporation has officers described in its bylaws or appointed by board of directors in accordance with bylaws. Duly appointed officer may appoint one or more officers or assistant officers if authorized by bylaws or board of directors. Bylaws or board of directors must delegate to one of officers responsibility for preparing minutes of directors' and shareholders' meetings and for authenticating records of corporation. (WV Code 31D-8-840). Same individual may simultaneously hold more than one office in corporation. Officers may be removed by board of directors with or without cause. (WV Code 31D-8-843).

Registered office is not required but may be stated in articles and may be within or outside state. (WV Code 31D-5-501).

Resident Agent.

Each corporation may maintain in state registered office and registered agent, who may be individual residing in state, domestic corporation or foreign corporation authorized to transact business in state, in each case with business office identical to corporation's registered office. (WV Code 31D-5-501). Corporation may change its registered office or registered agent by filing statement of change with secretary of state. (WV Code 31D-5-502). Registered agent may resign by delivering to secretary of state for filing signed statement of resignation. (WV Code 31D-5-503). Service may be made on corporation by serving registered agent; if there is no registered agent or registered agent cannot with reasonable diligence be served, by registered or certified mail to secretary of corporation at its principal office; or by serving secretary of state, who transmits copy to registered agent or, if there is no registered agent, to individual whose name and address were last given as person to serve, or, if no person, to principal office of corporation. (WV Code 31D-5-504).

General Powers of Corporation.

Corporations have power: (1) To sue and be sued, complain and defend in its corporate name; (2) to have corporate seal, which may be altered at will, and to use it, or facsimile of it, by impressing or affixing it or in any other manner reproducing it; (3) to make and amend bylaws, not inconsistent with its articles of incorporation or with laws of state, for managing business and regulating affairs of corporation; (4) to purchase, receive, lease or otherwise acquire, and own, hold, improve, use and otherwise deal with, real or personal property, or any legal or equitable interest in property, wherever located; (5) to sell, convey, mortgage, pledge, lease, exchange and otherwise dispose of all or any part of its property; (6) to purchase, receive, subscribe for or otherwise acquire; own, hold, vote, use, sell, mortgage, lend, pledge or otherwise dispose of; and deal in and with shares or other interests in, or obligations of, any other entity; (7) to make contracts and guarantees; incur liabilities; borrow money; issue its notes, bonds, and other obligations, which may be convertible into or include option to purchase other securities of corporation; and secure any of its obligations by mortgage, deed of trust or pledge of any of its property, franchises or income; (8) to lend money, invest and reinvest its funds and receive and hold real and personal property as security for repayment; (9) to be promoter, partner, member, associate or manager of any partnership, joint venture, trust or other entity; (10) to conduct its business, locate offices and exercise powers granted by act within or without state; (11) to elect directors and appoint officers, employees and agents of corporation, define their duties, fix their compensation and lend them money and credit; (12) to pay pensions and establish pension plans, pension trusts, profit sharing plans, share bonus plans, share option plans and benefit or incentive plans for any or all of its current or former directors, officers, employees and agents; (13) to make donations for public welfare or for charitable, scientific or educational purposes, and for other purposes that further corporate interests; (14) to transact any lawful business that will aid governmental policy; and (15) to make payments or donations, or do any other act, not inconsistent with law, that furthers business and affairs of corporation. (WV Code 31D-3-302).

Distributions.

Board may authorize and corporation may pay distributions in cash or other property, including shares of corporation. Unless articles provide otherwise, shares may be issued pro rata and without consideration to shareholders as share dividend. (WV Code 31D-6-623, 640).

No distribution may be made if, after giving it effect, corporation would not be able to pay its debts as they become due in usual course of business or corporation's total assets would be less than sum of its total liabilities plus amount that would be needed, if corporation were to be dissolved at time of distribution, to satisfy preferential rights upon dissolution of shareholders whose preferential rights are superior to those receiving distribution unless articles permit otherwise. (WV Code 31D-6-640).

Unclaimed Dividends.

See category 21 Property, topic 21.01 Absentees, subhead Escheat.

Sale or Transfer of Corporate Assets.

Sale, lease, exchange or other disposition of any or all corporate assets in usual and regular course of business as conducted by corporation, mortgage or pledge of any or all corporate property and assets, whether or not in usual and regular course of business, transfer of any or all corporate assets to one or more corporations or other entities of which all shares or interests are owned by corporation, or distribution of corporate assets pro rata to shareholders, may be made upon such terms and conditions and for such consideration as authorized by board. Approval of shareholders is not required. (WV Code 31D-12-1201). Sale, lease, exchange or other disposition of assets, other than described above, requires approval of shareholders if disposition would leave corporation without significant continuing business activity. Corporation is deemed to have retained significant continuing business activity if it retains business activity that represents at least 25% of total assets at end of most recent fiscal year and 25% of either income from continuing operations before taxes or revenues from continuing operations for fiscal year. If shareholder approval is required, board must approve proposal for sale, lease, exchange or other disposition and submit proposal for approval at meeting of shareholders. Board must also transmit to shareholders recommendation that shareholders approve proposed disposition, unless it determines because of conflicts or other special circumstances it should not make recommendation, in which case it transmits to shareholders its basis for that determination. Notice to all shareholders, whether or not entitled to vote, of meeting must include terms, conditions and consideration to be received for disposition. Unless articles require greater vote or quorum, disposition requires approval of shareholders at meeting at which quorum consisting of at least majority of votes entitled to be cast on disposition exists. (WV Code 31D-12-1202). Notwithstanding authorization by shareholders, board may abandon transaction subject to the contractual rights of other parties to disposition, without further action or approval by shareholders. (WV Code 31D-12-1202).

Books and Records.

Corporation must keep complete books and records of account and minutes of proceedings of shareholders and board. Corporation must keep at its principal office, or at office of its transfer agent, records containing names and addresses of all shareholders, number, and class of shares held by each. (WV Code 31D-16-1601). Any books, records, or minutes may be in written form or in any other form capable of being converted into written form within reasonable time. Shareholder, upon five days' written demand, has right to inspect relevant books and records. (WV Code 31D-16-1602). Unless unanimously waived, corporation must mail most recent financial statements to shareholders within 120 days of end of fiscal year. (WV Code 31D-16-1620).

Reports.

Domestic and foreign corporations are required to file annual report with secretary of state and state tax commissioner on forms prescribed and furnished by secretary of state. Report is required to be filed by July 1 of each year. *Note:* Substantially similar information still required to be provided on annual license tax return. (WV Code 11-12C-3).

Merger, Consolidation, and Conversion.

One or more domestic corporations may merge with domestic or foreign corporation or other entity pursuant to plan of merger. (WV Code 31D-11-1102). Through share exchange, domestic corporation may acquire all of shares of one or more classes or series of shares or interests of another corporation or entity, or all of shares of one or more classes or series of shares of domestic corporation may be acquired by another corporation or other entity, in either case in exchange for shares or other securities, interests, obligations, rights to acquire shares or other securities, cash, other property or any combination of foregoing pursuant to plan of share exchange. (WV Code 31D-11-1103). Board of corporation shall adopt plan of merger or share exchange setting forth information specified. (WV Code 31D-11-1102–1104). Plan adopted by board must be submitted for approval at meeting of shareholders unless shareholder approval not required under WV Code 31D-11-1104-(7). Notice of meeting must be given to each shareholder of record, whether or not entitled to vote at meeting, and must include copy or summary of plan and copy or summary of articles or organizational documents of corporation or entity into which corporation is being merged or of any new corporation or entity created as result of merger. At meeting, vote of shareholders must be taken on proposed plan, and plan shall be adopted upon approval of shareholders at meeting at which quorum consisting of at least majority of outstanding shares entitled to vote thereon is present, and, if class of shares is entitled to vote thereon as class, approval of each such voting group at meeting at which quorum of voting group consisting of at least majority of votes entitled to be cast by that voting group is present. Class of shares is entitled to vote as class if would be converted under plan or plan contains provision which, if contained in proposed amendment to articles, would entitle class or series of shares to vote as class. (WV Code 31D-11-1104). Shareholders dissenting from plan of merger or consolidation have right to be paid fair value of their shares. (WV Code 31D-13-1302).

Domestic corporation owning at least 90% of outstanding shares of each class of another corporation may merge such corporation into itself, or into another subsidiary, or may merge itself into subsidiary, without approval of directors or shareholders of subsidiary unless otherwise required by articles. Parent corporation must notify each shareholder of subsidiary within ten days after effective date of merger. (WV Code 31D-11-1105).

After approval of plan of merger or share exchange, articles of merger or share exchange, in specified form, are filed with secretary of state. (WV Code 31D-11-1106).

Secretary of state is required to withhold certificate of merger if new or surviving corporation will be foreign corporation that has not qualified to do business in state until receipt of notice from state tax commissioner and bureau of employment programs to effect that taxes due from that corporation and from corporation seeking to dissolve have been paid or provided for. (WV Code 31D-11-1106).

In any merger, any constituent corporation owning or holding real estate in West Virginia must evidence title thereto in new or surviving corporation by executing and recording confirmatory deed. (WV Code 31D-11-1107).

Domestic corporation may convert to limited liability company. Board of Directors must adopt plan of conversion, which must be approved by unanimous vote of all shareholders, whether or not entitled to vote. Conversion is effective upon filing of articles of conversion (or later date specified in articles) with secretary of state. (WV Code 31D-11-1109).

Dissolution.

By Incorporators.

Corporation which has not issued shares or commenced business may be voluntarily dissolved by majority of its incorporators or initial directors by execution of articles of dissolution, in form specified, with secretary of state. (WV Code 31D-14-1401).

By Act of Corporation.

Corporation may be dissolved on resolution of board and submission of proposal to shareholders. Board must also transmit to shareholders recommendation that shareholders approve proposed dissolution, unless it determines because of conflicts or other special circumstances it should not make recommendation, in which case it transmits to shareholders its basis for that determination. Notice of shareholders' meeting must be given to all shareholders and must state purpose. Unless articles require greater vote or quorum, dissolution requires approval of shareholders at meeting at which quorum consisting of at least majority of votes entitled to be cast on dissolution. (WV Code 31D-14-1402). At any time after dissolution is authorized, corporation may dissolve by filing articles of dissolution, with prescribed information, to secretary of state. (WV Code 31D-14-1403). Secretary of state shall issue certificate of dissolution upon receipt of notice from state tax commissioner and bureau of employment programs to effect that taxes due from corporation seeking to dissolve have been paid or provided for. (WV Code 31D-14-1403).

By Administrative Action.

Secretary of state may commence proceeding to administratively dissolve corporation if it does not pay franchise taxes within 60 days after due or does not notify secretary of state within 60 days that its registered agent or registered office have changed or if corporation's period of duration, if any, expires. (WV Code 31D-14-1420).

By Judicial Action.

Circuit court has jurisdiction to dissolve corporation in action by shareholder when established that: (a) Directors are deadlocked and irreparable injury to corporation being suffered or threatened; or (b) acts of directors or those in control are illegal, fraudulent or oppressive; or (c) shareholders are deadlocked in voting power and have failed to elect successor directors for at least two consecutive annual meeting dates; or (d) corporate assets are being misapplied or wasted. Circuit court also has jurisdiction to dissolve corporation in action by creditor when it is established that: (a) Claim reduced to judgment, execution thereon is returned unsatisfied, and corporation is insolvent; or (b) corporation has admitted in writing that claim of creditor is due and owing, and corporation is insolvent. Circuit court may dissolve corporation in proceeding by state attorney general if corporation obtained its articles through fraud or has continued to exceed or abuse authority conferred upon it by law. Circuit court may appoint receiver to wind up or custodian to manage business of corporation. In suit brought by shareholder against corporation that has no shares listed on stock exchange, corporation may elect or, if it fails to elect, one or more shareholders may elect, to purchase all shares owned by petitioning shareholder at fair value of shares. (WV Code 13D-14-1430–1434). (217 W. Va. 674; 619 S.E.2d 187) regarding grounds for judicial dissolution.

Close Corporations.

No specific statutory recognition.

Appraisal Rights.

Shareholder is entitled to appraisal rights and to obtain payment of fair value of shareholder's shares, in event of merger requiring shareholder's approval, short-form merger, share exchange if shareholder's approval is required and shareholder's shares will be exchanged, disposition of assets requiring shareholder's approval, amendment of articles that reduces number of shares to fraction if corporation has obligation or right to repurchase fractional share and any other amendment to articles, merger, share exchange or disposition of assets to extent provided by articles, bylaws or board resolution. Appraisal rights may not be available for shares listed on stock exchange or if there are at least 2,000 shareholders and outstanding shares have market value of at least $20,000,000, unless shareholder is required by terms of corporate action requiring appraisal rights to accept for shares anything other than cash, shares or proprietary interest or acquirer owns or recently owned 20% or more of voting power of corporation. (WV Code 31D-13-1302). Record shareholder may assert appraisal rights to fewer than all shares registered to it but owned by beneficial shareholder only if shareholder objects with respect to all shares of class or series owned by beneficial shareholder and notifies corporation of each beneficial shareholder on whose behalf appraisal rights are being asserted. (WV Code 31D-13-1303). To assert appraisal rights, shareholder must deliver to corporation before vote is taken written notice of shareholder's intent to demand payment and must not vote. (WV Code 31D-13-1321). If proposed corporate action requiring appraisal rights becomes effective, corporation must deliver written appraisal notice and form to shareholders no earlier than date corporate action became effective and not later than ten days after such date, which form must be executed and returned by shareholder. (WV Code 31D-13-1322, 1323). Within 30 days after form is due, corporation must pay shareholder amount corporation estimates to be fair value of shares, plus interest. (WV Code 31D-13-1324). If shareholder is dissatisfied with payment, he must notify corporation in writing of shareholder's estimate of fair value of shares and demand payment of that estimate plus interest and less payment of corporation's estimate. (WV Code 31D-13-1326). Judicial process for continuing disagreement over payment. (WV Code 31D-13-1330, 1331).

Foreign Corporations.

Right to Transact Business.

Foreign corporation must procure certificate of authority from secretary of state before it may transact business in state. Although list not exclusive, foreign corporation not considered transacting business in this state, for purposes of act, by reason of carrying on in this state one or more of following activities: (1) Maintaining, defending, or settling any proceeding; (2) holding meetings of board of directors or shareholders or carrying on other activities concerning internal corporate affairs; (3) maintaining bank accounts; (4) selling through independent contractors; (5) soliciting or obtaining orders, whether by mail or through employees or agents or otherwise, if orders require acceptance outside state before they become contracts; (6) creating or acquiring indebtedness, mortgages and security interests in real or personal property; (7) securing or collecting debts or enforcing mortgages and security interests in property securing debts; (8) owning, without more, real or personal property; (9) conducting isolated transaction that is completed within 30 days and that is not one in course of repeated transactions of like nature; (10) conducting affairs in interstate commerce; (11) granting funds or other gifts; (12) distributing information to its shareholders or members; (13) effecting sales through independent contractors; (14) acquisition by purchase of lands secured by mortgage or deeds; (15) physical inspection and appraisal of property in West Virginia as security for deeds of trust or mortgages and negotiations for purchase of loans secured by property in West Virginia; and (16) management, rental, maintenance and sale; or operating, maintaining, renting or otherwise dealing with, selling or disposing of property acquired under foreclosure sale or by agreement in lieu of foreclosure sale. (WV Code 31D-15-1501).

Powers.

Foreign corporation receiving certificate of authority to transact business in state enjoys same rights and privileges and is subject to same duties, penalties, restrictions and liabilities as domestic corporation. (WV Code 31D-15-1505).

Name.

Foreign corporation name must conform to same general requirements for domestic corporations. Foreign corporation may use fictitious name in state upon resolution by its board of directors. (WV Code 31D-15-1506). Any corporation which operates under assumed name or trade name different from that set forth in its articles of incorporation or articles of association must file originally executed certificate of trade name, setting forth name or names to be used, address of principal office of corporation in West Virginia, or, if no office is maintained within state, address of principal office in state in which corporation is established, and name, title and signature of person having authority to make application. Failure to file certificate of trade name when necessary is misdemeanor, punishable by fine of not less than $25, nor more than $100, or imprisonment in county jail for term not exceeding 30 days, or both. (WV Code 47-8-5).

Application for Certificate of Authority.

Foreign corporation may apply for certificate of authority to transact business in state by delivering application to secretary of state for filing. Application must set forth: (1) Name of foreign corporation or, if its name is unavailable for use in this state, corporate name that satisfies requirements of § 1506 of article; (2) name of state or country under whose law it is incorporated; (3) its date of incorporation and period of duration; (4) mailing address of its principal office; (5) address of its registered office in this state, if any, and name of its registered agent at that office, if any; (6) names and usual business addresses of its current directors and officers; and (7) purpose or purposes for transaction of business in West Virginia. Foreign corporation shall deliver with completed application certificate of existence, or document of similar import, duly authenticated by secretary of state or other official having custody of corporate records in state or country under whose law it is incorporated. (WV Code 31D-15-1503).

Foreign corporation shall obtain amended certificate of authority if it changes corporate name, period of duration or state or country of incorporation. (WV Code 31D-15-1504).

Registered agent of foreign corporation authorized to transact business in state is corporation’s agent for service of process, notice or demand required or permitted by law to be served on foreign corporations. This is not only means for serving foreign corporation. (WV Code 31D-15-1510, 304 F. Supp. 2d 851).

Taxation of Corporate Property.

See category 22 Taxation.

License Tax.

See category 22 Taxation.

Amount of License Tax on Corporations.

Annual license tax on corporate charters for domestic and foreign corporations was repealed effective July 1, 2008. (WV Code 11-12C-13).

Annual Report Fee of Secretary of State as Attorney-in-Fact.

Every domestic and foreign corporation must pay annual report fee that also covers services of secretary of state as attorney-in-fact. Fee due and payable on July 1, beginning July 1, 2009. (WV Code 59-12a).

See also category 22 Taxation, topic 22.03 Business Taxes, subhead Business Franchise Tax.

Corporate Net Income Tax.

See category 22 Taxation.

Professional Corporations.

Members of following professions may form professional corporations (for details, see respective statutes): Physicians (WV Code 30-3-15); dentists (WV Code 30-4-28); attorneys (WV Code 30-2-5a); osteopathic physicians (WV Code 30-14-9); veterinarians (WV Code 30-10-18); optometrists (WV Code 30-8-3b); chiropractors (WV Code 30-16-21); architects (WV Code 30-12-12); accountants (WV Code 30-9-17); engineers (WV Code 30-13-17).

No other professional corporations have been authorized.

Deeds.

See category 21 Property, topic 21.06 Deeds.

Limited Liability Companies.

See topic 2.06 Limited Liability Companies.

West Virginia Nonprofit Corporation Act.

As noted above, discussion confined to business corporations. West Virginia Nonprofit Corporation Act, c. 31E, was also enacted in 2002.

See also categories 3 Business Regulation and Commerce, topic Commercial Code; Taxation.

2.04 [RESERVED]

2.05 JOINT STOCK COMPANIES:

No statutory authorization or recognition of joint stock companies. See topic 2.02 Associations.

Massachusetts Trusts.

Subject to general corporation law and must qualify to do business and record, in county clerk's office in each county where transacting business, copy of trust agreement. Former transactions are validated upon compliance with statute. (WV Code 47-9A-1–6).

Professional Associations or Corporations.

See topic 2.03 Corporations, subhead Professional Corporations.

2.06 LIMITED LIABILITY COMPANIES:

General Supervision.

Secretary of state.

Purposes.

May be organized for any lawful purpose. (WV Code 31B-1-112). Banking institutions may organize as limited liability companies. (WV Code 31A-1-2).

Powers.

Has same powers as individual to do all things necessary or convenient to carry on its business or affairs, unless articles of organization provide otherwise. (WV Code 31B-1-112[b]).

Name.

Must contain words “limited liability company” or “limited company” or abbreviations “L.L.C.,” “LLC,” “L.C.” or “LC.” “Limited” may be abbreviated as “Ltd.” and “company” may be abbreviated as “Co.” (31B-1-105[b]). Name of limited liability company must be distinguishable from: (1) Name of any corporation, limited partnership, limited liability partnership or limited liability company incorporated, organized or authorized to transact business in state, (2) name reserved or registered with secretary of state, and (3) fictitious name approved by secretary of state for foreign company authorized to transact business in state because its real name is unavailable. (WV Code 31B-1-105[b]).

Limited liability company may apply to secretary of state for authorization to use name that is not distinguishable upon records of secretary of state, and secretary of state shall authorize use of name applied for if: (1) Present user, registrant or owner of reserved name consents to use in record and submits proper form to secretary of state to change name to name that is distinguishable upon records of secretary of state from name applied for, or (2) applicant delivers certified court order establishing applicant’s right to use name applied for in state. (WV Code 31B-1-105[c]).

Limited liability company may use name, including fictitious name, of another domestic or foreign company used in state if other company is organized or authorized to transact business and company proposing to use name has: (1) Merged with other company, (2) been formed by reorganization with other company, or (3) acquired substantially all assets, including name, of other company. (WV Code 31B-1-105[d]).

Names may be reserved for 120-day period by delivering application to secretary of state. Reservation may be renewed for additional 120-days, but not reserved again within one calendar year. Owner of reserved name may transfer reservation to another person by notice of transfer delivered to secretary of state. (WV Code 31B-1-106).

Trade Name.

Limited liability company may not transact business under any assumed name or any designation, name or style other than that established by certificate of existence, unless it files with secretary of state application for trade name setting forth those matters and otherwise following procedures enumerated in WV Code 47-8-4.

Organization.

One or more persons may organize limited liability company, consisting of one or more members, by filing articles of organization with secretary of state. Limited liability company begins when articles of organization are filed unless delayed effective date is specified. Filing of articles of organization by secretary of state is conclusive proof that organizers satisfied all conditions precedent to creation of limited liability company. (WV Code 31B-2-202).

Articles of Organization.

Must provide: (1) Name of company, (2) address of initial designated office in West Virginia, if any, and mailing address of principal office, (3) name and address of initial agent for service of process, (4) name and address of each organizer and each member authorized to execute instruments on behalf of limited liability company, (5) whether company is to be term company and, if so, term specified, (6) whether company is to be manager-managed, and, if so, name and address of each initial manager, (7) whether one or more of members of company are to be liable for its debts and obligations if same is contained in articles of organization and if member has consented in writing to such provision, and (8) purpose or purposes for which company is organized. (WV Code 31B-2-203[a]).

Articles of organization may provide for: (1) Provisions permitted to be set forth in operating agreement, or (2) other matters not inconsistent with law. (WV Code 31B-2-203[b]).

Articles may not vary non-waivable provisions of chapter, and, if any provision of operating agreement is inconsistent with articles of organization, operating agreement: (1) Controls as to managers, members and members' transferees, and (2) articles control as to persons other than managers, members and their transferees who reasonably rely on articles to detriment. (WV Code 31B-2-203[c]).

Amendment to Articles of Organization.

May be amended at any time by filing with secretary of state and setting forth: (1) Name of limited liability company, (2) date of filing of articles of organization, and (3) amendment to articles. (WV Code 31B-2-204).

Agency of Members and Managers.

Each member is agent of limited liability company for purpose of its business, and act of member, including signing of instrument in company's name, for apparently carrying on in ordinary course of company's business or business of kind carried on by company binds company, unless member had no authority to act for company in particular matter and person with whom member was dealing knew or had notice that member lacked authority. Act of member who is not apparently for carrying on in ordinary course of company's business or business of kind carried on by company binds company only if act was authorized by other members. (WV Code 31B-3-301).

In manager-managed company, member is not agent of company for purpose of its business solely by reason of being member. Manager is agent of company for purpose of its business and act of manager, including signing of instrument in company's name, for apparently carrying on in ordinary course of company's business or business of kind carried on by company, binds company unless manager had no authority to act for company in particular matter and person with whom manager was dealing, knew or had notice that manager lacked authority. Unless articles limit their authority, any member of member-managed company may sign and deliver any instrument transferring or affecting company's interest in real property. (WV Code 31B-3-301).

Limited Liability.

Debts, obligations and liabilities of limited liability company arising in contract, tort or otherwise, are solely debts, obligations and liabilities of company unless provision in articles states otherwise and member so liable consents in writing. Member or manager not personally liable for debt, obligation or liability of company solely by reason of being or acting as member or manager. (WV Code 31B-3-303).

Management.

Each member has equal rights in management and conduct of company's business in member-managed company. Any matter relating to business of company may be decided by majority of members except in circumstances that require consent of all members. In manager-managed company, each manager has equal rights in management and conduct of company's business, and, unless provided otherwise or by statute, any matter relating to business of company may be exclusively decided by manager or, if there is more than one manager, by majority of managers. Manager must be designated, appointed, elected, removed or replaced by vote, approval or consent of majority of members and holds office until successor has been elected and qualified unless manager sooner resigns or is removed. (WV Code 31B-4-404).

Consent of all members of member or manager-managed company is required for: (1) Amendment of operating agreement, (2) authorization or ratification of acts or transactions which would otherwise violate duty of loyalty, (3) amendment to articles of organization, (4) compromise of obligation to make contribution, (5) compromise, as among members, of obligation of member to make contribution or return money or other property paid or distributed in violation of chapter, (6) making of interim distributions, including redemption of interest, (7) admission of new member, (8) use of company's property to redeem interest subject to charging order, (9) consent to dissolve company, (10) waiver of right to have company's business wound up and company terminated, (11) consent of members to merge with another entity, and (12) sale, lease, exchange or other disposal of all or substantially all of company's property with or without goodwill. (WV Code 31B-4-404).

Action requiring consent of members or managers may be taken without meeting and member or manager may appoint proxy to vote or otherwise act for member or manager by signing appointment instrument either personally or by member's or manager's attorney. (WV Code 31B-4-404).

Contributions of Capital.

May be tangible or intangible property or other benefit to company, including money, promissory notes, services performed or other agreements to contribute cash or property, or contracts for services to be performed. (WV Code 31B-4-401).

Member's obligation to contribute money, property or other benefits or to perform services is not excused by member's death, disability or other inability to perform personally, and member who does not make required contribution of property or services is still obligated at option of company to contribute money equal to value of that portion of stated contribution which has not been made. Creditor of limited liability company who extends credit or acts in reliance on obligation of member and without notice of any compromise may enforce original obligation. (WV Code 31B-4-402).

Reimbursement.

Member or manager shall be reimbursed and indemnified by limited liability company for liabilities incurred in ordinary course of business or for preservation of business or property. Members shall be reimbursed for advance to company beyond amount of contribution. Payment or advance made by member is loan to limited liability company and gives rise to obligation upon which interest accrues from date of payment or advance. Member may not receive remuneration for services performed except for reasonable compensation for services rendered in winding up business of company. (WV Code 31B-4-403).

Distributions.

Must be made in equal shares before dissolution of limited liability company, and no member has right to receive nor may be required to accept distribution in kind. If member becomes entitled to receive distribution, member has status of and is entitled to all remedies available to creditor of limited liability company with respect to distribution. (WV Code 31B-4-405).

Distributions may not be made if: (1) Limited liability company would not be able to pay its debts as they become due in ordinary course of business, or (2) Company's total assets would be less than sum of its total liabilities plus amount that would be needed, if company were to be dissolved, wound up and terminated at time of distribution tosatisfy preferential rights upon dissolution, winding up and termination of members whose preferential rights are superior to those receiving distribution. Company may base determination that distribution is not prohibited based on financial statements prepared on accounting practices and principles that are reasonable or on fair evaluation or other method that is reasonable. (WV Code 31B-4-406).

Member of member-managed company or member or manager of manager-managed company who votes for or agrees to distribution that violates chapter, articles of organization or operating agreement is personally liable to company for amount of distribution which exceeds amount that could have been distributed without violating chapter, articles or operating agreement if established that member or manager did not perform member's or manager's duties in compliance with general standards of member's and manager's conduct. (WV Code 31B-4-407).

Transfers.

Member is not co-owner of and has no transferable interests in property of limited liability company. Distributional interest in limited liability company is personal property and may be transferred in whole or in part. Operating agreement may provide that distributional interest may be evidenced by certificate of interest issued by limited liability company and may also provide for transfer of any interest represented by certificate. (WV Code 31B-5-501).

Transfer of distributional interest does not entitle transferee to become or to exercise any rights of member and transfer entitles transferee to receive to extent transferred only distributions to which transferor would be entitled. (WV Code 31B-5-502).

Transferee of distributional interest may become member of limited liability company to extent transferor gives transferee right in accordance with authority described in operating agreement or all other members' consent. Transferee who has become member has same rights and powers and is subject to same restrictions and liabilities to extent transferred and is also liable for transferor member's obligations to make contributions and for obligations to return unlawful distributions but is not obligated for transferor member's liabilities unknown to transferee at time transferee becomes member. (WV Code 31B-5-503).

Standards of Conduct.

Member owes member-managed company and its other members duty of loyalty and duty of care. Member who is not also manager owes no duties to manager-managed company or to other members solely by reason of being member. Manager owes manager-managed company and its members duty of loyalty and duty of care. See WV Code 31B-4-409 for enumeration.

Dissociation.

Member is dissociated from limited liability company upon events including: (1) Company's having notice of member's express will to withdraw, (2) event agreed to in operating agreement as causing member's disassociation, (3) transfer of all of member's distributional interests other than transfer for security purposes or court order charging member's distributional interests which has not been foreclosed, (4) member's expulsion under operating agreement, (5) member's expulsion by unanimous vote of other members under certain specific circumstances as outlined in section, (6) on application by company or another member following member's expulsion by judicial determination resulting from certain specified wrongful conduct, (7) member's becoming debtor in bankruptcy or executing assignment for benefit of creditors, and (8) member's death. See WV Code 31B-6-601 for enumeration of events causing dissociation.

Merger.

Limited liability company may be merged with or into one or more limited liability companies, foreign limited liability companies, corporations, foreign corporations, partnerships, foreign partnerships, limited partnerships, foreign limited partnerships or other domestic or foreign entities. (WV Code 31B-9-904). After approval of plan of merger, articles of merger must be prepared and signed on behalf of each party to merger and delivered to secretary of state for filing. (WV Code 31B-9-905). Merger becomes effective upon filing articles of merger by secretary of state or at later date specified in articles of merger. (WV Code 31B-9-904).

On effect of merger: (1) Separate existence of each limited liability company and other entity other than surviving entity terminates, (2) property owned by each limited liability company and other entities vests in surviving entity, (3) all debts, liabilities and other obligations of each limited liability company and other entity become obligations of surviving entity, (4) action or proceeding pending by or against limited liability company or other party may be continued and surviving entity may be substituted as party to action or proceeding, and (5) all rights, privileges, immunities, powers and purposes of every limited liability company and other entity that is party to merger, become vested in surviving entity except as prohibited by law. (WV Code 31B-9-906).

For conversion of corporation to limited liability company, see WV Code 31D-11-1109.

Office and Agent for Service of Process.

Limited liability companies authorized to do business may continuously maintain in state: (1) Office, which need not be place of business, and (2) agent with designated address for service of process on company. Agent must be individual resident of state, domestic corporation, another limited liability company or foreign corporation or foreign company authorized to do business in state. All limited liability companies shall pay $25 annual report fee, and fee shall be due each year after initial registration when annual report is due. (WV Code 31B-1-108).

Secretary of state is agent of limited liability company or foreign limited liability company that fails to appoint or maintain agent for service of process in state or whose agent for service of process cannot with reasonable diligence be found at agent’s address. (WV Code 31B-1-111).

Annual Report.

Limited liability companies shall file with secretary of state annual report setting forth: Name, address of office and designated agent for service of process, address of principal office and names and addresses of managers and persons authorized to execute instruments on behalf of limited liability company. All information must be current as of date of annual report which must be filed between Jan. 1 and Apr. 1 of each year. (WV Code 31B-2-211).

Foreign Limited Liability Companies.

Upon application to secretary of state, foreign limited liability company may apply for certificate of authority to do business in state. Filing fee is $150. See WV Code 31B-10-1002 for information to be included in application. Application must be accompanied by certificate of existence or similar record authenticated by proper official of state where foreign limited liability company is organized. (WV Code 31B-10-1002).

Professional Limited Liability Companies.

Authorized for attorneys (c. 30, art. 2), physicians and podiatrists (c. 30, art. 3), dentists (c. 30, art. 4), optometrists (c. 30, art. 8), accountants (c. 30, art. 9), veterinarians (c. 30, art. 10), architects (c. 30, art. 12), engineers (c. 30, art. 13), osteopathic physicians and surgeons (c. 30, art. 14), chiropractors (c. 30, art. 16), psychologists (c. 30, art. 21), social workers (c. 30, art. 30), acupuncturists (c. 30, art. 36), and land surveyors (c. 30, art. 13A).

2.07 [RESERVED]

2.08 PARTNERSHIPS:

Uniform Partnership Act adopted. (c. 47B, art. 1). Uniform Partnership Act amended, to add terms “limited liability company” and “professional limited liability company” to definition of “person.” Uniform Partnership Act amended, with numerous changes including addition of section providing for registered limited liability partnerships. (WV Code 47B-10-1). Uniform Limited Partnership Act adopted in 1981 (c. 47, art. 9) with several variations including provision making secretary of state attorney-in-fact for all domestic and foreign limited partnerships, upon whom notice and process may be served. (WV Code 47-9-4). Uniform Limited Partnership Act amended in 1984 to provide limitations on liability of persons who erroneously and in good faith believe themselves to be limited partners; 1986 Amendments to Uniform Act adopted. (WV Code 47-9-20). Uniform Limited Partnership Act amended, effective July 11, 2001, to add terms "limited liability company," "professional limited liability company" and "any other legal or commercial entity" to definition of "person." (WV Code 47-1-1).

Registered Limited Liability Partnerships.

Partner in registered limited liability partnership is not personally liable for debts, obligations, and liabilities of partnership arising from omissions, negligence, wrongful acts, misconduct or malpractice of another partner while partnership is registered limited liability partnership and in course of partnership business. (WV Code 47B-3-6[c]).

Name of Business.

No general partnership may do business in state under any assumed name other than real names of individuals conducting business unless certificate indicating real full names of persons conducting business, along with home and post office addresses, is filed in office of clerk of county commission of county in which principal place of business is maintained. (WV Code 47-8-2). Any limited partnership that is required to register with secretary of state and conducts business under name other than one established on its certificate of authority to do business must file certificate of registration of true name with secretary of state's office setting forth name under which such business is, or is to be, conducted, with addresses of its principal office within state or principal office in state in which limited partnership was established. New certificate of registration must be filed if limited partnership desires to conduct business in state under any other assumed name not on file with secretary of state. (WV Code 47-8-4).

See also topics 2.03 Corporations, 2.04 Joint Stock Companies.

Partnership assets may be transferred to limited liability company upon conversion of partnership to limited liability company. (WV Code 47B-9-4). See topic 2.06 Limited Liability Companies.

3 BUSINESS REGULATION AND COMMERCE

3.01 BANKS AND BANKING:

Uniform Commercial Code has been enacted. (c. 46). See topic 3.09 Commercial Code.

Regulated by State Banking Code of West Virginia. (c. 31A).

Banks are subject to general corporation laws of state insofar as same are not inconsistent with particular laws governing them. (WV Code 31A-4-1). Banks are also subject to West Virginia Consumer Credit and Protection Act, which is similar to Uniform Consumer Credit Code. (c. 46A). See topic 3.12 Consumer Protection.

Branch Banks and Multi-Bank Holding Companies.

Bank may construct, lease or acquire branch banks in any county in state. In addition, bank may establish branch banks by purchase of business assets, assumption of liabilities of or merger or consolidation with another bank. Branch banks may not be established until State Board of Banking and Financial Institutions approves application following examination, investigation and notice and hearing. Application must be accompanied by $500 fee. Payment of additional $500 fee required if merger or consolidation between existing banking institution and newly formed bank if bank created solely for purpose of acquisition. (WV Code 31A-8-12). Expedited procedure is available, with application to Commissioner of Banking and fee of $250.

(WV Code 31A-8-12d). Any authorized off-premises walk-in or drive-in facility operated as of Jan. 1, 1984, may be operated as branch bank without additional approval as of June 7, 1984. (WV Code 31A-8-12). Acceptance of deposits or allowing withdrawal at bank office of any subsidiary affiliate for credit or debit to account at affiliate of same bank holding company is permissible and does not constitute branch banking. In addition, conduct of activity at bank offices as agent for any bank subsidiary of same bank permitted to same extent allowed by federal law for national banks and does not constitute branch banking, so long as agency relationship is not used to evade state consumer protection laws, including usury laws or any other applicable law of state or conduct activities not financially related. (WV Code 31A-8-12). Banking institution located in county containing higher educational institution may open office on campus for up to four days per semester, trimester or quarter; provided, however, that banking institution first obtains written permission from educational institution. Banking institution located in county containing higher educational institution may open temporary business office in such county for limited purpose of opening accounts and accepting deposits for period not in excess of four business days per semester, trimester or quarter. Prior to opening temporary office banking institution must obtain permission from institution of higher education. (WV Code 31A-8-12).

Unless order approving such action has been entered by State Board of Banking and Financial Institutions, it is unlawful, prior to 120 days following submission to board of complete and accurate copies of reports required under federal laws or regulations and payment of examination and investigation fee to Board of $4,500 (WV Code 31A-8A-4[a]) for any bank holding company to acquire direct or indirect ownership or control of any shares of any bank if, after such acquisition, such company will directly or indirectly own or control more than 5% of voting shares of such bank. (WV Code 31A-8A-4[a]). Full application not required for formation of bank holding company by national bank or out-of-state bank if ownership rights of shareholders of holding company are substantially similar to those of former shareholders of bank. (WV Code 31A-8A-3). If State Board of Banking and Financial Institutions finds that financial condition of bank or bank holding company constitutes imminent peril to its depositors, customers and creditors, it may enter order, without hearing, to approve or disapprove acquisition of such bank or bank holding company by another bank holding company. (WV Code 31A-3-3). Bank holding companies and subsidiaries or affiliates thereof regulated, controlled and examined by Commissioner of Banking. (WV Code 31A-2-4). Control of more than 25% of deposits of all depository institutions in state is declared anticompetitive and unlawful. (WV Code 31A-2-12a).

West Virginia bank holding companies may, with prior approval of State Board of Banking and Financial Institutions, acquire banks or bank holding companies with principal offices in other states. Foreign banks and bank holding companies may acquire West Virginia banks and bank holding companies, with prior approval of State Board of Banking and Financial Institutions, or, if approval is not required, notice and $250 filing fee to Commissioner of Banking. (WV Code 31A-8A-3).

West Virginia state banks may establish, maintain or operate branches in other states, pursuant to interstate merger transaction in which West Virginia state bank is resulting bank. Prior approval of State Board of Banking and Financial Institutions required, along with application fee of $3,000. (c. 31A art. 8D, § 3). Similarly, banks from other states may acquire banks by merger and operate them as branch offices in West Virginia. (WV Code 31A-8D-4). If out-of-state bank will be survivor, notice must be given, together with filing fee of $250. (WV Code 31A-8D-5). Once out-of-state bank has established or acquired West Virginia branch, bank may establish or acquire additional branches to same extent as any West Virginia state bank under applicable federal and state law. (WV Code 31A-8D-6). These provisions are applicable to savings banks, savings and loan associations or other federally-insured thrift institutions, where non-thrift bank is surviving entity. (WV Code 31A-8D-11).

In addition to interstate branching by acquisition, West Virginia state banks may also establish and maintain de novo branches or acquire branches in any other state upon approval of board. (WV Code 31A-8E-3). Application and payment of fee are required. Similarly, out-of-state banks may establish and maintain, either de novo or through acquisition, branches in West Virginia only where such branching is available to West Virginia banks on reciprocal basis. (WV Code 31A-8E-4). Out-of-state banks must provide written notice to commissioner and pay filing fee of $250. (WV Code 31A-8E-5). As with branches acquired by merger, out-of-state banks may conduct activities which would be allowable for West Virginia state bank. (WV Code 31A-8E-7). Additional branches may be established or acquired by out-of-state bank. Any activity which will result in change of control must be reported to commissioner within at least 45 days prior to such change of control. (WV Code 31A-8E-11).

Loan Production Offices.

Origination of loans by bank employees or agents at locations other than on bank or branch bank premises is permitted, if loans are approved and made at bank or branch bank. Origination of loans by employees or agents of federally-insured depository institution of banking chartered in state at non-branch offices within this state is permitted, if license is obtained outside state of West Virginia and loans are approved and made at bank or branch bank so long as they conform with consumer protection laws. (WV Code 31A-8-12c). No person shall operate office in West Virginia that regularly makes consumer loans other than first mortgage loans unless it is financial institution, licensed pawnbroker or federally-insured depository institution authorized and qualified to do business in West Virginia. (WV Code 31A-2-5).

Customer Bank Communication Terminals.

Permitted for banking institutions having their principal offices in state and are not considered to be branch or off-premise facilities. Unless located on premises of principal office or branch of banking institution, customer bank communication terminal must be available for use by other banking institutions and may be made available for use by other federally insured financial institutions in accordance with regulations of Commissioner of Banking; provided, ATM terminals of out-of-state state banks not having branches in state shall be allowed to operate as West Virginia bank if national bank from that state not having branches in West Virginia could operate through federal preemption of state law. Personal computers, telephones and associated equipment which allow bank customers to link to bank's computer network from home or office do not constitute customer bank communication terminal. Point of sale terminals may be owned, leased or operated by nonbanking entities, provided that such entities do not engage in business of banking by using point of sale devices. (WV Code 31A-8-12b).

Powers.

Banking institutions have general banking powers including power to buy or discount promissory notes and bonds, negotiate drafts, bills of exchange, borrow money, receive deposits, buy and sell exchange, bank notes, bullion or coin, loan money on personal or other security, rent safe deposit boxes, receive personal property for safekeeping, issue and service credit cards, accept drafts drawn by customers and issue letters of credit with specified expiration date or definite term. May organize, acquire, own, operate, dispose of and manage wholly owned subsidiary corporations for purposes incidental to banking powers and services authorized by chapter. State chartered banking institutions may act as agent for any fire, life, casualty, liability or other authorized insurance company from office or branch in town with population of 5,000 or less, subject to some criteria set forth in subparagraph (f) of the statute. (WV Code 31A-4-13). Under certain conditions, banks may sell machine operations and services (WV Code 31A-4-37) and acquire and lease personal property (WV Code 31A-4-38). Certain financial institutions may be granted license as regulated consumer lenders. (WV Code 46A-4-102).

West Virginia state-chartered banks or bank holding companies conducting business in state may, upon application to Commissioner of Banking, either through equity investment in other entities or through wholly owned subsidiary or subsidiaries, or by contract or agreement with others, engage in "financially related" services such as: (a) Product services and activities offered or engaged in by national banks or by West Virginia state or federally chartered thrift institutions or credit unions or bank chartered in any other state, (b) equity investments in real estate development activities, products and services, (c) securities underwriting and brokerage activities, products, and services unless specifically excluded, (d) financial consulting activities, products and services, (e) other activities, products and services offered by other providers deemed by Commissioner of Banking to be financially-related. “Financially-related” activities do not include products, services or activities offered or engaged in by insurer or by any underwriter, agent, solicitor or broker of insurance, which products, services or activities are regulated by West Virginia Department of Insurance. “Financially-related” products also exclude products, services or activities offered or engaged in by any real estate agent, agency or broker, which products, services or activities are regulated by State Real Estate Commission. No West Virginia state-chartered banking institution or bank holding company may invest or otherwise expend in excess of amount permitted for national bank. See WV Code 31A-8C-1 - 3.

West Virginia banks may apply to Commissioner of Banking for any power available to bank organized in another state or to national bank. Commissioner must act within 60 days on application, unless additional information is required. (WV Code 31A-8C-2). Banks may engage in trust business if report of trust assets filed annually with Commissioner of Banking. (WV Code 31A-4-15). Transfers of trust accounts or fiduciary accounts between subsidiaries of same holding company permitted, unless instrument creating trust or fiduciary account specifically provides otherwise. (WV Code 31A-4-14a).

Banks may not act as surety or guarantor or pledge assets to indemnify surety for bank or any other person. May pledge securities to guarantee deposits of state and United States and agencies or instrumentalities thereof and local governmental agencies. (WV Code 31A-8-13). Trust funds and investments must be segregated and books of account must be kept separate from those owned by corporation. (WV Code 31A-4-16). Capital and other assets constitute security for faithful performance of trusts. (WV Code 31A-4-18).

See also subhead Trust Companies, infra.

Supervision.

State Board of Banking and Financial Institutions consists of six members, and Commissioner of Banking serves as chairman. (WV Code 31A-3-1). Commissioner shall have supervision and jurisdiction over state banks, regulated consumer lenders, second mortgage lenders and brokers, credit unions and all other persons made subject to his supervision or jurisdiction. All powers, duties, rights and privileges vested in department are vested in commissioner. (WV Code 31A-2-4).

State Board of Banking and Financial Institutions must approve applications for state bank charters and has authority to revoke certificate of authority of any state bank, suspend or remove director, officer or employee of any financial institution (banks and other financial institutions) and to restrict withdrawal of deposits from any financial institution. (WV Code 31A-3-2). Board may not approve application to charter any banking institution unless proposed institution does business within state and is subject to supervision of commissioner. (WV Code 31A-4-1).

Commissioner of Banking has broad powers to make examinations of bank holding companies, banks and branches established and maintained in West Virginia and to enter into cooperative, coordinating and information-sharing agreements with other agencies. Commissioner also has authority to issue rules and orders for supervision and regulation of interstate banks and to accept examinations or investigations by other bank supervisory agencies. (WV Code 31A-7-8).

Employment Information.

Any officer of financial institution may provide employment information about employee or former employee to another financial institution when that information is limited to employee's active participation in violation of any state or federal statute, rule or regulation related to financial institutions and which has been duly reported to proper state or federal prosecutorial authorities. (WV Code 31A-4-44).

Deposits.

Deposits in trust and joint deposits permitted by statute. If deposit made by person describing himself as trustee for another, on death of trustee, bank may pay funds on deposit including interest to stated beneficiary. If deposit made in name of depositor and another or others, in form to be paid to any depositor or survivor(s), joint tenancy is created and funds on deposit including interest may be paid to any one of them during their lifetime, or to survivor or survivors on death of any of them. One depositor may pledge or encumber entire account unless another depositor has notified bank in writing that account is not to be pledged or encumbered. Bank may pay entire joint account to judgment creditor of one depositor. (WV Code 31A-4-33). After July 1, 1994, joint owners shall be given written notice either on signature card, in connection with execution of signature card, or on form to be approved by Commissioner of Banking that entire account balance may be paid to creditor or claimant of any of joint owners pursuant to legal process. Notice is sufficient to all joint account owners if given to one account owner. (WV Code 31A-4-33). Deposits in name of minor may be paid out in same manner as for adult unless parent or guardian requests bank not to make such payment. (WV Code 31A-4-34). Uniform Commercial Code (c. 46, art. 4) governs stop payment orders, forged or altered instruments, delay in presentment and bank deposits and collections generally.

Stockholders.

Stockholders of bank are liable to bank creditors on debts accruing while they are stockholders to amount equal to par value of their shares of stock. Such liability does not apply if bank's deposits insured by FDIC or similar agency or if Commissioner of Banking has certified that bank has unimpaired surplus equal to at least 50% of its authorized capital. (WV Code 31A-4-11). Majority of new bank's issued stock must be sold prior to that bank conducting business except such business as is incidental and necessarily preliminary to its organization. (WV Code 31A-4-4).

Change in voting stock which results in control or change in control must be reported to Commissioner of Banking by president or other chief executive officer. (WV Code 31A-8-4).

Whenever capital of banking institution becomes impaired, it is duty of officers and directors to cause impairment to be made good by assessing amount of deficiency pro rata on outstanding shares of capital stock. If any stockholder fails to pay assessment within 30 days, board of directors shall cause sufficient number of his shares to be sold for cash at public sale to pay assessment at banking room of banking institution. (WV Code 31A-4-12).

Unclaimed Deposits.

Only applicable legislation is Uniform Disposition of Unclaimed Property Act with variations, including periods of time required for property to be presumed abandoned. (c. 36, art. 8).

Collections.

Uniform Commercial Code has been enacted. (c. 46). See topic 3.09 Commercial Code. Collections may be subject to West Virginia Consumer Credit and Protection Act. (c46A). See topic 3.12 Consumer Protection.

Trust Companies are incorporated under banking statutes and are subject to same supervision and control as banks. (WV Code 31A-1-2).

Their general powers are: (1) All those of banking institutions; (2) to act as trustee, assignee, special commissioner, general or special receiver, guardian, executor, administrator, committee, agent, curator, or in any other fiduciary capacity, to take, assume, accept and execute all lawful trusts, and to receive, hold, manage and apply sinking funds on terms and purposes specified in instrument; (3) to act as registrar or transfer agent, or dividend or coupon paying agent; (4) to make, hold and dispose of investments and establish common trust funds and account therefor; (5) to purchase, sell and take charge of and receive rents, issues and profits of any real estate for other persons or corporations; (6) to act as trustee or agent in any collateral trust with right to receive and hold in trust personal property with right in case of default to sell and dispose of same and do other things necessary after default; (7) to do all things necessary or incidental to exercise general powers as set forth. (WV Code 31A-4-14).

Report of trust assets must be filed annually with Commissioner of Banking. (WV Code 31A-4-15). Capital and other assets constitute security required by law for faithful performance of any trust, except that if liability equals or exceeds capital and surplus of corporation, court may require additional security. (WV Code 31A-4-18).

National banks permitted to act as trustees or in other fiduciary capacity, have all rights, powers, privileges and immunities of state banks provided certain requirements are complied with. (WV Code 31A-4-14).

West Virginia has adopted Uniform Prudent Management of Institutional Funds Act. (c. 44, art. 6B).

Registration of Securities.

Trust institutions may cause fully paid and nonassessable securities, held in fiduciary capacity, to be registered and held in name of nominee or nominees, or in institution’s own name, without disclosing fiduciary relationship. (WV Code 31A-6-1).

Uniform Common Trust Fund Act adopted with minor changes. (WV Code 44-6-6 to 8). See category 13 Estates and Trusts, topic 13.15 Trusts.

Regulated Consumer Lenders.

Regulated consumer lender license will be issued to those organizations primarily engaged in business of making consumer loans through offices located in West Virginia or to one licensed under provisions of West Virginia Residential Mortgage Lender, Broker and Servicer Act. (c. 31, art. 17). Regulated consumer licensee must be domestic corporation. (WV Code 46A-4-102). Regulated consumer lender may contract for and receive loan finance charges on non-revolving consumer loans, as well as consumer loans made pursuant to revolving accounts. (WV Code 46A-1-102). Regulated consumer lender’s powers are strictly limited by statute. (c. 46A, art. 4).

Industrial Loan Companies.

Statutes regarding formation and regulation of industrial banks repealed. (WV Code 31-7-5 8, 10, 12, 15, 17, 20, 25, 28). Statute regarding formation and regulation of industrial loan companies also repealed. (c. 31, art. 7). Statute replaced with one combining former supervised lenders and industrial loan companies under one license as regulated consumer lenders. (c. 46A, arts. 3, 4). See subhead Regulated Consumer Lenders, supra.

Residential Mortgage Lenders, Brokers and Services.

Act does not apply to banks and certain other lenders, but most non-bank lenders for loans secured by residential real estate are subject to licensure and substantive restrictions under Residential Mortgage Lenders, Brokers and Services Act. (c. 31, art. 17). West Virginia has adopted legislation providing for licensure of loan originators and others and participation in Nationwide Mortgage Licensing System and Registry. See West Virginia SAFE Mortgage Licensing Act. (c. 31, art. 17A).

Credit Unions.

Credit Unions are governed by WV Code c. 31C, arts. 1-12.

Credit unions may be formed by not less than eight residents of state, sharing common bond, such as similar occupation, employer, association or interest. (WV Code 31C-2-1). Credit unions must obtain charter after approval by Commissioner of Banking. (WV Code 31C-2-2). Credit unions must also obtain certificate of authority to commence business. (WV Code 31C-2-2). Credit unions subject to special statutory regulation, as well as general banking laws. Credit unions organized under laws of another state may conduct business through branch or service facility in West Virginia, subject to approval of Commissioner of Banking. (WV Code 31C-2-6). Credit unions may join with other credit unions to operate customer bank communication terminals and other service facilities. (WV Code 31C-2-5).

Building and Loan Associations.

Statutes regarding organization and regulation of building and loan associations repealed by 1991 Legislature. (WV Code 31-6-1–44).

Foreign Banks.

West Virginia law authorizes banking activities and operations in West Virginia by foreign banks under certain limited circumstances. There are three ways in which foreign bank can do business in West Virginia: (i) Through agency office; (ii) through representative office; and (iii) through separately capitalized and domestically chartered bank. (WV Code 31A-8F-1).

Any foreign bank wishing to establish and maintain West Virginia state agency office must apply to State Board of Banking and Financial Institutions, together with application fee of $1,000 and other required documentation. (WV Code 31A-8F-8, 9). Commissioner of Banking is authorized to apply any standards of West Virginia law governing ownership, control and operations of West Virginia banks, including residency requirements for directors of West Virginia state chartered banks, as long as those standards and requirements are substantially equivalent to, or consistent with, standards or requirements governing ownership, control or operations of state or national banks in West Virginia by foreign banks or foreign persons under applicable United States law including international agreements governing financial services. (WV Code 31A-8F-4). Any out-of-state bank which is domestic subsidiary of or controlled by foreign bank may establish branches through mergers, de novo entry, or acquisitions in West Virginia on same terms and conditions as any other bank in that same home state. (WV Code 31A-8F-5).

West Virginia banks or branches of out-of-state banks which are owned or controlled by foreign bank may receive deposits, renew time deposits, close loans, service loans, and receive payment on loans and other obligations as agent for any depository institution affiliate of foreign bank, including branch, agency or office of foreign bank located in other states. However, foreign controlled bank, branch or agency office may not accept retail deposits on behalf of foreign bank or branch which is not authorized to take federally insured deposits. No foreign controlled bank or branch may act as agent for any affiliated foreign bank other than controlling foreign bank or one which has been licensed to transact business in West Virginia. (WV Code 31A-8F-6).

West Virginia state agency office of foreign bank may make and guarantee loans and obligations for financing of international movement of goods and services and for working capital and short-term operating needs and for acquisition of fixed assets, borrow funds from banks and other financial institutions, buy and sell foreign exchange, act as paying agent for securities issued by foreign governments, issue and accept letters of credit, among other powers. (WV Code 31A-8F-7, 11). Foreign bank agency office may not take retail deposits, either on behalf of itself or of any affiliated bank or other depository institution. (WV Code 31A-8F-6).

Foreign banks may also establish representative offices in West Virginia, if license is issued by commissioner for that purpose. (WV Code 31A-8F-12). Permissible activities for representative office include solicitation of loans, solicitation of new business, and administrative functions. (WV Code 31A-8F-15). Application fee for representative office is $250. (WV Code 31A-8F-13).

Bank Shares Tax.

Statute assessing tax on bank shares expired Jan. 1, 2003. (WV Code 11-3-14). See category 22 Taxation, topics 22.03 Business Taxes, subhead Business Franchise Tax and 22.11 Income Tax, subhead Income Tax—Corporations—Corporate Net Income Tax.

Federal Savings and Loan Associations.

Tax levied on capital paid by associations expired on Jan. 1, 2003.

3.02 BILLS AND NOTES:

Uniform Commercial Code adopted. (c. 46). See topic 3.09 Commercial Code. Electronic records and signatures may also be controlled by Uniform Electronic Transactions Act. (WV Code 39A-1-1–39A-3-7; WV Code 46A-6I-1–7; WV Code 55-8-15).

Judgment notes are not recognized and provision for confession in note is unenforceable. (70 W. Va. 738, 75 S.E. 65). Consumer may not authorize any person to confess judgment on claim arising out of consumer credit sale, consumer lease or consumer loan. (WV Code 46A-2-117).

Attorney Fees.

Cost of collection and/or attorney fee clauses are not enforceable. (106 W. Va. 247, 145 S.E. 381).

Bankruptcy.

Purchase of notes from bankruptcy trustee does not itself accord purchaser status of holder in due course. (181 W. Va. 320, 382 S.E.2d 514).

Special Defenses.

Negotiable instrument, other than currently dated check, may not be taken as evidence of obligation under consumer credit sale or consumer lease, and holder takes subject to certain claims and defenses. (WV Code 46A-2-101). See topic 3.12 Consumer Protection.

Writing Required.

Credit agreements or loan agreements for business loans in excess of $50,000 must be in writing to be enforced. (WV Code 55-1-1[g]).

3.03 BILLS OF LADING:

See topic 3.09 Commercial Code.

3.04 BILLS OF SALE:

See topic 3.23 Sales.

3.05 BLUE SKY LAW:

See topic 3.24 Securities.

3.06 BROKERS:

Uniform Commercial Code has been enacted. (c. 46).

Automobiles.

Criminal offense (punishable by up to 60 days in jail or up to $1,000 fine) to broker more than two motor vehicles per calendar year, except where broker is: Agent of automobile dealer, agent of authorized distributor, licensed auctioneer holding authorized automobile auction, person selling motor vehicles pursuant to pledges of security and lien, or individual or corporation owning motor vehicles for sale. (WV Code 17A-6-1a).

Insurance Brokers.

Must be at least 18 years of age, be “trustworthy and competent,” complete program of insurance education, pay required fees and pass commissioner’s exam ($25). (WV Code 33-12-6). Any licensed insurance agent determined to be “competent and trustworthy,” may be licensed as excess line broker if license fee ($200) is paid and application requirements are met. (WV Code 33-12C-8). Broker cannot intend to use his license principally for purpose of procuring insurance on himself, his relatives, or his corporation or upon his, his family’s or his employer’s property or insurable interests. (WV Code 33-12-6). Nonresidents may receive nonresident producer license if person is licensed and in good standing in home state and has submitted proper request for licensure and paid required fees. (WV Code 33-12-12). Brokers must continue to provide insurance commissioner with current address within 30 days of change. (WV Code 33-12-9, 12).

Licenses.

Written examinations and licenses are required for real estate brokers and salesmen and insurance brokers. Licenses are required for auctioneers ($50) (WV Code 19-2C-2) and residential mortgage brokers (WV Code 31-17-4). Revocation: see topic 3.18 Licenses, Business and Professional.

Bond.

Required of auctioneers (WV Code 19-2C-4), excess line brokers (WV Code 33-12C-4), and residential mortgage brokers (WV Code 31-17-4).

Real Estate Brokers.

West Virginia Real Estate Commission has jurisdiction over regulating licensees (brokers, associate brokers or salespersons) and granting licenses to applicants. (WV Code 30-40-7). To become licensed, applicant must submit application providing all requested information and two recommendations, be at least 18 years of age, have high school diploma or equivalency, be “trustworthy,” of “good moral character,” “competent,” and pay all appropriate fees. (WV Code 30-40-11). All applicants must have completed prelicense training and passed written examination. (WV Code 30-40-12, 13). Applicant for broker’s license must also complete two-year apprenticeship with licensed salesperson. (WV Code 30-40-12). Nonresidents may obtain licenses. (WV Code 30-40-15). All licensees are required annually to complete seven hours of continuing education. (WV Code 30-40-16). Brokers must furnish description and estimated value, whether real or personal property, of all property held for tax assessments. (WV Code 11-3-2). Real estate brokers and salespersons may advertise and show property on Sun. (WV Code

61-10-26).

Residential Mortgage Brokers.

Application shall be submitted annually in form prescribed by commissioner, with license fee ($350). (WV Code 31-17-4).

3.07 BULK SALES:

Art. 6 of Uniform Commercial Code repealed effective June 8, 1992.

See topic 3.09 Commercial Code; category 8 Debtor and Creditor, topic 8.08 Fraudulent Sales and Conveyances.

3.08 CARRIERS:

Regulations and Rates.

Public Service Commission of West Virginia, appointed by Governor with advice and consent of Senate, regulates, supervises and controls common and contract carriers and fixes rates, charges and classifications. (WV Code 24-1-3; WV Code 24-2-1–3; WV Code 24A-2-1–5; WV Code 24A-3-1–6). Exemptions for certain carriers. (WV Code 24A-1-3; see also, WV Code 17C-22-2). Reciprocal proportional registration of commercial motor vehicles. (WV Code 17A-2-10a). Elevator safety regulations. (WV Code 21-3C-1, et seq.). Size, weight and load regulations. (c. 17C, art. 17). Regulation of commercial transportation of coal. (c. 17C, art. 17A). Driving time regulations. (WV Code 24A-2-6).

Uniform Commercial Code has been adopted. (c. 46).

Limiting Liability.

Contractual limitation of liability in bill of lading permitted under certain circumstances. (WV Code 46-7-309). Where common carriers are not incorporated, any one or more of them may be sued by his or their name or names only, to recover damages for loss of, or injury to, any parcel, package, or person; and such suit shall not abate for want of joining any coproprietor or copartner. (WV Code 55-7-11). Agreement contained in, collateral to or affecting motor carrier transportation contract entered on or after July 1, 2006, purporting to indemnify, defend or hold harmless one from liability for negligent or intentional acts or omissions, or has same effect thereof, is void and unenforceable as matter of public policy. (WV Code 24A-6-7).

Discrimination.

Carriers may not charge, demand, collect or receive any different rates from or to different customers for like and contemporaneous service under same or substantially similar circumstances nor make or give undue or unreasonable preference or advantage to any character of traffic or service. (WV Code 24-3-2, 3; WV Code 24A-2-4).

Bills of Lading.

Uniform Commercial Code governs. (c. 46, art. 7).

Liens.

Uniform Commercial Code governs. (WV Code 46-7-307; see also, WV Code 46-9-301 et seq.).

Motor Vehicle Carriers.

See category 23 Transportation, topic 23.01 Motor Vehicles. See also, topic Commercial Code.

3.09 COMMERCIAL CODE:

The 1963 West Virginia Legislature enacted Uniform Commercial Code in its entirety, including all 1962 amendments, effective July 1, 1964. The 1974 Legislature enacted 1972 Amendments effective July 1, 1975.

The Apr. 1, 1977, proposed revision of art. 8 and related changes in other arts. recommended by Permanent Editorial Board for Uniform Commercial Code was enacted effective May 23, 1979, with following changes: proposed recommendation for § 8-407(4) was not enacted; §§ 8-102, 8-106, 8-207, 8-304, 8-306, 8-314, 8-316, 8-320, 8-403, and 8-408 were restructured; §§ 8-202, 8-204, 8-207, 8-304, 8-306, 8-313, 8-320 and 8-407 contain additional language. Other stylistic changes too numerous to mention were made throughout.

Oct. 1, 1987, proposed art. 2A with amendments to arts. 1, 2 and 9, as well as all proposed 1990 revisions to art. 2A, as recommended by Permanent Editorial Board for Uniform Commercial Code, enacted effective June 9, 1996, with following changes: §§ 1-201(37) and 2A-103 were restructured or modified and § 2A-407 contains additional language. Other stylistic changes too numerous to mention were made throughout.

Bulk Transfers Section of Uniform Commercial Code (c. 46, art. 6) repealed effective June 8, 1992.

Apr. 12, 1990 proposed revision of arts. 3 and 4 and related changes in other arts. recommended by Permanent Editorial Board for Uniform Commercial Code enacted effective July 10, 1993, with following changes: proposed recommendations for §§ 3-602 (renumbering proposed §§ 3-603 through 3-606) and 4-304 (see new § 4-208) were not enacted; §§ 3-102, 3-104, 3-118, 3-201, 3-203, 3-206, 3-307, 3-311, 3-404, 3-406, 3-407, 3-414, 3-415, 3-416, 3-418, 3-501, 3-504, 3-603, 3-605, 4-110, 4-212, 4-215, and 4-406 were restructured or modified; §§ 3-106, 3-108, 3-116, 3-301, 3-302, 3-414, 3-418, 3-420, 3-501, 3-603, 3-605, 4-104, 4-110, 4-205, 4-401 and 4-406 contain additional language; new sections not part of proposed revision include § 3-312 (relating to rights of claimants of lost, destroyed, or stolen cashier’s checks, teller’s checks or certified checks) and § 4-208 (see proposed § 4-304; inclusion renumbers proposed §§ 4-208 through 4-215). Other stylistic changes too numerous to mention were made throughout.

Apr. 5, 1994, proposed revision of art. 8 with amendments to art. 9 recommended by Permanent Editorial Board for Uniform Commercial Code enacted effective June 11, 1995, with following changes: §§ 8-102, 8-105, 8-402, 8-403, 8-510, and 9-115 were restructured or modified; §§ 8-103, 8-117, 8-115, 8-210, 8-503, 8-504, 8-509, 9-105, 9-302 and 9-312 contain additional language; § 8-601 is new section not part of proposed revision; and related non-substantive changes not part of proposed revision include §§ 1-105, 1-706, 4-104, 5-114, 9-305, and 9-309. Other stylistic changes too numerous to mention were made throughout.

Effective June 7, 1996, § 9-105 was amended to clarify that all certificated certificates of deposit qualify as instruments under UCC.

1995 proposed revisions to art. 5 as recommended by Permanent Editorial Board for Uniform Commercial Code enacted effective June 9, 1996, with additions of §§ 5-118, 5-119, and 5-120, transition provisions not officially part of proposed revisions.

Effective June 11, 1999, § 9-302 was amended, creating exception for filing financing statement to perfect security interest in case of investment property “which perfected without filing pursuant to § 9-115 or § 9-116.”

2000 proposed revisions to art. 9 as recommended by Permanent Editorial Board for Uniform Commercial Code enacted effective July 1, 2001, with following changes: §§ 9-334, 9-336, 9-525, 9-705 contain additional language; § 9-331 was modified to include all claims under art. 8; § 9-109 was modified to broaden scope of art. 9, and to make art. 9 inapplicable to transfers by government or governmental unit; §§ 9-703 and 9-704 were modified to grant two year grace periods; §§ 9-406 and 9-408 were modified to determine inapplicability when certain statutes conflict with those sections.

Effective June 6, 2002, § 9-525 was amended to change procedure for deposit of funds.

Options and Alternatives.

Section	Action Taken
2A-303	Conforming amendments to §§ 2A-303 (deleting subsection [3]), 8-110(e)(5), and 8-106(f) not adopted.
2-318	Alternative A adopted.
2A-216	Alternative A adopted.
3-121	Alternative B adopted.
4-106(2)	Alternative B adopted.
4-202(1)(b)	Optional language adopted.
4-212(2)	Optional subsection adopted.
5-112(1)	Optional language adopted.
5-114(4)	Optional subsection adopted.
5-114(5)	Optional subsection adopted.

5-119 and -120

Transition provisions adopted, making reenacted articles applicable July 1, 1996.

7-403(1)(b)

Optional language not adopted.

9-401(1)

Second alternative adopted.

9-401(3)

Alternative subsection not adopted.

9-401(6)

Optional subsection adopted.

9-402

Optional language adopted.

9-403(7)

Optional language adopted.

9-407

Optional section adopted.

10-104(2)

Optional subsection adopted.

Blanks Filled In.

Section

Action Taken

7-204(4)

Subsection omitted in its entirety.

9-203(4)

"Article 7A of Chapter 47 relating to small loans"; sentence subsequently refers to "Article 7A or any other such statute."

9-302(3)(b)

Chapter 17A

9-401(1)(a)

Secretary of state and county clerk.

9-401(1)(c)

Secretary of state.

9-401(5)

Secretary of state.

9-403(5)

$1, secretary of state, $1, $5, $1, $1, $1.

9-404(1)

First day of July, 1975.

9-404(3)

Secretary of state, $1, $5, $1.

9-405(1)

$1, secretary of state, $5, $1.

9-405(2)

$1, secretary of state, $5, $1.

9-406

$1, secretary of state, $5, $1.

9-407

$3, secretary of state, $5, fifty cents.

11-101

First day of July, 1975.

Modifications.

3-106(1)(f)

“with variable interest rate; or”

3-106(1)(g)

“with current interest rate or”

3-106(1)(h)

"with bank interest rate: Provided that name and location of bank are stated on instrument."

9-301(2)

Substituted "twenty" for "ten" days.

9-307(4)

Requires that statement be filed with secretary of state in order for secured party to enforce security interest in farming products against buyer in ordinary course of business who purchasesfrom person engaged in farming operations or against commission merchant or selling agent who in ordinary course of business sells farm products for such persons.

9-307(5)

Requires amendment of statement filed pursuant to § 9-307(4) in writing within three months to reflect any material changes.

9-307(6)

Provision added to define "buyer in the ordinary course of business," "commission merchant," "person" and "selling agent" for purposes of §§ 9-307 (4)-(6) and 9-407(3)-(6).

9-312(4)

Substituted "twenty" for "ten" days.

9-401(1)(a)

Omits following language: "equipment used in farming operations, or farm products, or accounts or general intangibles arising from or relating to sale of farm products by farmer, or. . . andin addition when collateral is crops growing or to be grown in office of the _____ in the county where the land is located."

9-401(3)

Change in location of collateral does not impair effectiveness of original filing.

9-403(8)

Provision added that filed financing statement on public bond issues of counties, municipalities, or public service districts of this state shall be effective for life of such bond.

9-407(1)

Financing statements for collateral, except for consumer goods, now to be filed in only one place, typically secretary of state's office unless fixtures involved.

9-407(2)

First sentence amended to read "secretary of state" instead of "filing officer," following $5 add "plus fifty cents for each financing statement and for each statement of assignment reported therein."

9-407(3)-(8)

Added to correspond with adoption of §§ 9-307(4)-(6); includes directive to secretary of state (i) to develop central index filing system and master list containing information filed withsecretary of state pursuant to § 9-307(4), (ii) to maintain list of all buyers of farm products, commission merchants and selling agents who register with secretary of state indicating interestin receiving portions of master list, (iii) to distribute on regular basis to each buyer, commission merchant or selling agent who has indicated interest in receiving portions of master list, thoseportions of master list which such person has indicated interest in receiving, (iv) to provide when requested oral confirmation of filing of statement required by § 9-307(4), (v) to deposit fundscollected pursuant to provisions of section into separate fund used solely for purposes of article, and (vi) to promulgate rules and set fees, not otherwise provided for by general law to carryout duties associated with article.

11-103

Sentence added regarding continuation of security interests perfected by transmitting utilities under prior UCC provision.

Permanent Editorial Board’s Recommendations for Amendments.

Section

Action Taken

2-702

1966 Official Amendment not adopted.

3-501

1966 Official Amendment not adopted.

7-209

1966 Official Amendment not adopted.

Permanent Editorial Board’s Recommendations for Optional Amendments.

Section

Action Taken

1-209

1966 Official Optional Amendment not adopted.

2-318

1966 Official Optional Amendment not adopted.

9-105

1966 Official Optional Amendment not adopted.

9-106

1966 Official Optional Amendment not adopted.

1972 Official Amendments.

Adopted 1974, effective July 1, 1975.

1977 Official Amendments.

See introductory paragraphs, supra.

1989 Official Amendments.

Art. 4A regarding funds transfers adopted. (c. 46, art. 4A). Art. 4A covers rights and obligations of banks and their commercial customers in funds transfers.

1990 Official Revision and Amendments.

See introductory paragraphs, supra.

1994 Official Revision.

See introductory paragraphs, supra.

1995 Official Revision.

See introductory paragraphs, supra.

2000 Official Revision.

See introductory paragraphs, supra.

See also topics 3.01 Banks and Banking, Bills and Notes, Brokers, Carriers, Factors, Frauds, Statute of, Sales, Securities, and Warehousemen; and categories 2 Business Organizations, topic Corporations; Civil Actions and Procedure, topic Limitation of Actions; Debtor and Creditor, topics Assignments, Fraudulent Sales and Conveyances, Liens, Pledges; Documents and Records, topics Records, Seals; and Mortgages, topic Chattel Mortgages.

3.10 CONDITIONAL SALES:

See topic 3.23 Sales.

3.11 CONSIGNMENTS:

See topics 3.09 Commercial Code; 3.14 Factors.

3.12 CONSUMER PROTECTION:

West Virginia Consumer Credit and Protection Act has been adopted and contains comprehensive consumer protection provisions. (cc. 46A-46B).

Scope.

Act applies primarily to consumer credit sales, consumer leases and consumer loans and consumer goods under rent-to-own agreements. (WV Code 46A-1-104). Consumer goods under rent-to-own agreements relate to goods rented to resident of state under rent-to-own agreements. (WV Code 46B-1-1, 5[3], 5[17]). Consumer credit sale is sale of goods, services or interest in land in which credit is granted either by seller regularly engaged in such business or pursuant to seller credit card, buyer is person other than organization, purchase is made primarily for personal, family, household or agricultural purpose, either debt is payable in installments or sales finance charge is made and with respect to sale of goods or services, amount financed does not exceed $45,000, or sale is of modular home, mobile home, house trailer or other manufactured home. (WV Code 46A-1-102[13]). Consumer credit sale does not include sale in which seller allows buyer to purchase goods or services pursuant to lender credit card or similar arrangements. (WV Code 46A-1-102[13][b]). Consumer lease is lease of goods in which lessor is regularly engaged in such business, to person other than organization, primarily for personal, family, household or agricultural purpose, in which amount payable under lease does not exceed $45,000 and for term exceeding four months. (WV Code 46A-1-102[14]). Consumer loan is loan made by person regularly engaged in such business in which debtor is person other than organization, debt is incurred primarily for personal, family, household or agricultural purpose, debt is either payable in installments or loan finance charge is made and either principal does not exceed $45,000 or debt is secured by interest in land. (WV Code 46A-1-102[15]).

Application.

If consumer, who is resident of this state, is induced to enter into credit sale made pursuant to revolving charge account, to enter into consumer loan made pursuant to revolving loan account, or to enter into consumer lease, by personal or mail solicitation, and goods and services, or proceeds, are delivered to consumer in this state and payment on such account is to be made from this state, then West Virginia Consumer Credit and Protection Act applies. With respect to consumer credit sales or consumer loans consummated in another state, creditor shall not collect, in action brought in this state, sales finance charge or loan finance charge in excess of that permitted by chapter. (WV Code 46A-1-104[2]). Consumer loans originated in state by employees or agents of federally insured banks chartered outside state are subject to West Virginia consumer protection laws. (WV Code 31A-8-12c[b]). Parties to nonconsumer credit sale or loan may, by written agreement, subject transaction to act. (WV Code 46A-1-106).

Nonresident Creditors.

Any nonresident person, except domesticated foreign corporation, who takes or holds any instrument, contract or other writing arising from consumer credit sale or consumer lease subject to article, with certain exceptions, or who is lender subject to art. 2, § 103, is presumed to have appointed secretary of state as his attorney in fact with authority to accept service of notice and process in action arising out of such consumer credit sale, consumer lease or consumer loan. (WV Code 46A-2-137).

Notification.

Every person engaged in state in making consumer credit sales or consumer loans and every person having office or place of business in state who takes assignments of and enforces direct collection of payments from or enforcement of rights against debtors arising from such sales or loans shall file notification with state tax department within 30 days after commencing business in state and thereafter, on or before Jan. 31 of each year. Such notification must contain information specified in statute. (WV Code 46A-7-115).

Consumer Frauds.

Certain prescribed unfair methods of competition and unfair or deceptive acts or practices in conduct of any trade or commerce are declared unlawful, and penalties are provided. (c. 46A, art. 6).

Unsolicited Merchandise.

Seller may not offer goods for sale whereby offer includes voluntary and unsolicited sending of goods not requested either orally or in writing by recipient. Receipt of unsolicited goods is deemed unsolicited gift and recipient may use or dispose of goods without obligation. (WV Code 47-11A-12a).

Debt Collection Practices.

Certain specified conduct by debt collectors is prohibited, including use of threats, coercion, oppression or abuse in debt collection; use of fraudulent, deceptive, or misleading representations or means; and use of unfair or unconscionable means (WV Code 46A-2-124, 125, 127, 128, 129a), and unreasonable publication of information relating to any alleged indebtedness of consumer subject to certain exemptions (WV Code 46A-2-126). Creditor collecting its own debts is “debt collector.” (WV Code 46A-2-122[d]; 164 W. Va. 763, 266 S.E.2d 905).

Acceleration and Defaults.

No acceleration of maturity date of consumer’s installment obligation or other secured obligation until ten days after notice to consumer of right to cure default, which default must have existed for at least five days before notice. Only three such notices during term of obligation are required, and no statutory right to cure will thereafter exist. Form of notice of right to cure default prescribed. (WV Code 46A-2-106).

Advertising.

Use of false or misleading advertising is included under definition of unfair method of competition and unfair or deceptive act or practice. (WV Code 46A-6-102[f]).

Assignment of Earnings.

No more than 25% of consumer’s disposable earnings may be assigned for payment of debt or debts arising from consumer obligations, and assignment of earnings is revocable at consumer’s will notwithstanding contrary written provisions. (WV Code 46A-2-116).

Balloon Payments.

Consumer may have right to refinance scheduled installment payment on consumer credit sale, or consumer loan sale, of less than $1,500 if scheduled installment payment is more than twice amount of average of earlier scheduled payments unless consumer credit sale or loan is primarily for agricultural purpose or one pursuant to revolving charge account or revolving loan account. Writing containing agreement of parties must recite certain statutory language if balloon payment is required. (WV Code 46A-2-105; 67 F. Supp.2d 601 [S.D.W.Va. 1999]).

General Protections.

Prohibition against confession of judgment. (WV Code 46A-2-117). Prohibition of garnishment of wages before judgment on debt arising from consumer credit sale or consumer loan. (WV Code 46A-2-118). Unconscionable agreements or provisions unenforceable. (WV Code 46A-2-121). Limitations on post-judgment garnishment, and prohibitions of reprisal by employer as result of garnishment. (WV Code 46A-2-130, 131). Personal property exemptions from execution or other judicial process resulting from consumer credit transactions. (WV Code 46A-2-136).

Home Solicitation Sales.

Home solicitation sale is defined as consumer credit sale in excess of $25 in which buyer receives solicitation of sale at place other than seller’s business establishment and buyer’s agreement or offer to purchase is there given. Home solicitation sale does not include sale made pursuant to pre-existing open-ended credit account with seller in existence for at least three months, sale made pursuant to prior negotiation at seller’s business establishment, sale of motor vehicles, mobile homes, or farm equipment, or sale which may be rescinded under federal Truth in Lending Act. It may also include sale where goods and services are paid for in whole or in part by consumer loan if specified close relationships exist between seller and lender. (WV Code 46A-

1-102[22]). Buyer has right to cancel home solicitation sale until midnight of third business day after he signed agreement or offer to purchase. If buyer cancels, seller must within ten days return any payment made by buyer and any note or other evidence of indebtedness. (WV Code 46A-2-132, 134).

Facsimile Solicitations.

No person or organization may initiate unsolicited commercial facsimile transmission from within state to another person within state if person initiating transmission has been given notice that recipient does not wish to receive unsolicited facsimile transmissions. (WV Code 46A-2-139).

Telemarketing.

Act requires telemarketer defined in WV Code 46A-6F-113, to first register with secretary of department of tax and revenue before conducting telemarketing solicitations. (WV Code 46A-6F-301). Exempted person or entities are identified in Part II. (WV Code 46A-6F-201–220). Application for registration requires continuing surety bond of $100,000 for each telemarketing location or $500,000 for all locations of telemarketer. (WV Code 46A-6F-302). Failure to register or meet security requirement may result in penalty of not more than $5,000. (WV Code 46A-6F-303). Telemarketer must keep records of telemarketing activities for period of four years. (WV Code 46A-6F-304).

“Telemarketing solicitation” includes any written or oral notification, advertisement or unsolicited telephone call with intent to sell consumer goods or services to consumer. (WV Code 46A-6F-112).

Telemarketer must promptly disclose its identity, purpose of solicitation, and nature of goods or service. (WV Code 46A-6F-401). Before consumer pays for goods or services offered, telemarketer must disclose total cost, quantity, material restrictions as to purchase, material aspects of performance, quality, or basic characteristics of goods, material aspects of refund, cancellation, exchange or repurchase policies, material aspects of prize promotion, and material aspects of any investment opportunity being offered. (WV Code 46A-6F-401).

Every telemarketer must accept returns or cancellation of services for period of not less than seven days after date of delivery. (WV Code 46A-6F-402). In event of unfair or deceptive acts or practices (WV Code 46A-6F-501) or abusive acts or practices by telemarketer (WV Code 46A-6F-601), consumer may recover actual damages plus penalty between $100 and $3,000 within two years after date of violation or due date of last scheduled payment, whichever is later (WV Code 46A-6F-502, 701).

Operation of recovery service for consideration paid by consumer in response to telemarketing solicitation is felony. (WV Code 46A-6F-503).

Electronic Mail.

Prohibition against transmission of unauthorized electronic mail with intent to deceive and defraud or bulk electronic mail message that misrepresents point of origin or transmission path of commercial message; that contains false or misleading information in subject line; that fails to identify sender, date and time sent and return electronic address; or that contains sexually explicit materials. (WV Code 46A-6G-2). Sale or distribution of software to falsify electronic mail transmission or other routing information is prohibited. (WV Code 46A-6G-4).

Holders In Due Course.

Negotiable instruments, other than currently dated checks, may not be taken as evidence of obligation of buyer or lessee. (WV Code 46A-2-101). If negotiable instrument is taken in violation of this section, holder of such instrument shall take subject to all claims and defenses which buyer or lessee has against seller or lessor.

Assignee of consumer credit sale or consumer lease takes subject to all claims and defenses which buyer or lessee has against seller or lessor, regardless of whether assignee is holder in due course (189 W.Va. 90, 428 S.E.2d 313), but liability of assignee is limited to amount owing at time of assignment, subject to certain exceptions (WV Code 46A-2-102).

If specified close relationships exist between lender and seller who received proceeds of consumer loan, lender is subject to all claims and defenses which consumer would have against seller, but liability of lender shall not exceed that portion of loan used for that sale, with certain exceptions. (WV Code 46A-2-103).

Insurance Sales by Lenders.

In 1997, “Insurance Sales Consumer Protection Act” (c. 33, art. 11A) was enacted to protect interests of consumers in sale of insurance in West Virginia by financial institutions. Such sales are subject to regulation by insurance commissioner (WV Code 33-11A-4), and must be made pursuant to appropriate license (WV Code 33-11A-5). Except for certain credit life, health and accident, loss of income or property insurance (WV Code 33-11A-3[d][1]), sales of insurance by financial institutions must be conducted by someone other than loan officer, unless waiver is granted by commissioner (WV Code 33-11A-6), and purchase of insurance products may not be required as condition to lending of money or extension of credit (WV Code 33-11A-8). Definitional and risk disclosures are required. (WV Code 33-11A-9). Regulated institutions may not solicit insurance sales before customer receives response to loan application (WV Code 33-11A-10), and sale of any insurance that is required as condition on loan must be separately conducted (WV Code 33-11A-11). Financial institutions may not engage in certain acts designed to discriminate against outside agents and brokers or engage in unfair competition. (WV Code 33-11A-12). Article also regulates use of confidential borrower information (WV Code 33-11A-13), identification of physical location within financial institutions where insurance sales are made (WV Code 33-11A-14), and maintenance of related records (WV Code 33-11A-15).

Lessee’s Claims and Defenses.

Except for claims and defenses arising from personal injury, death resulting from personal injury, damage to property, as well as lessee’s rights of action, claims and defenses which are otherwise provided in code or common law, lessors are subject to all claims and defenses of lessees arising from finance leases which are consumer leases, or arising from sale and lease back agreements which include consumer leases. (WV Code 46A-2-103a).

Consumer Leases.

Act provides information which must be given to lessee (WV Code 46A-2-111), and that obligation of lessee upon expiration of lease, other than one primarily for agricultural purpose, may not exceed twice average monthly payment. This limitation does not apply to charges for damages to leased property or for other default. (WV Code 46A-2-112).

Subscriptions.

Buyer may cancel correspondence courses, contracts entered after May 28, 1987, for truck driver, modeling or any other occupation or business course with private proprietary school, or multiple magazine subscriptions contract, other than for single subscriptions direct with publisher, by mailing notice of cancellation and may be entitled to claim refund. (WV Code 46A-2-138).

Payments on Account.

Act provides how payments on consumer credit sales or consumer loans are to be applied and for rebate under Rule of 78 in event of prepayment in full of precomputed transaction.

(WV Code 46A-3-111). If original term of transaction entered into after Apr. 9, 1981, is greater than 36 months, rebate in event of prepayment must be made using actuarial method. (WV Code 47-6-5d). Act also prescribes maximum delinquency and deferral charges. (WV Code 46A-3-112–114).

Preneed Burial Contracts.

Persons may not sell preneed burial contracts except upon obtaining certificate of authority from office of attorney general. (WV Code 47-14-3). Procedures are provided as to how funds collected on such contracts must be handled (WV Code 47-14-5), and other limitations are imposed on performance and enforcement thereof, including licensing of agents and employees of contract sellers (WV Code 47-14-4). Civil remedies and criminal penalties are provided for violations. (WV Code 47-14-12–13).

Revolving Charge and Loan Accounts.

Changes in terms of revolving charge and loan accounts may only be made after 15 days' written notice unless notice excused under exceptions specified. Creditor may apply higher sales finance charge or loan finance charge to balance unpaid as of date change becomes effective. (WV Code 46A-3-116).

Referral Sales or Leases.

Seller or lessor may not give or offer to give rebate or discount or other value to buyer or lessee as inducement for sale or lease in consideration of buyer's or lessee's giving names of prospective customers, or otherwise aiding seller or lessor in making sale or lease to another person, if earning of such rebate or discount is contingent upon occurrence of subsequent event. (WV Code 46A-2-110).

Restrictions on Deficiency Judgments.

If seller or lender repossesses or voluntarily accepts surrender of goods which secure consumer credit sale or consumer credit loan and balance owing on debt at time of such repossession or surrender is $1,000 or less, deficiency judgment may not be taken against consumer. (WV Code 46A-2-119).

Licenses.

Certain individuals or organizations engaged in making certain consumer loans or taking assignments of and undertaking direct payments or enforcement of rights against consumers must obtain license from commissioner and comply with applicable provisions. (c. 46A, art. 4).

Warranties.

No merchant shall exclude, modify or otherwise attempt to limit any warranty, express or implied, including warranties of merchantability (as defined) and fitness for particular purpose; or exclude, modify or attempt to limit any remedy provided by law, including measure of damages available for breach of warranty, express or implied. (cc. 46A, art. 6, § 107; 46A, art. 6E, § 2). Duration of express warranty for assistive devices shall not be less than one year. (WV Code 46A-6E-2[a]). Warranty remedies for assistive devices include repair, replace, refund or reimbursement. (WV Code 46A-6E-3). No action by consumer for breach of warranty or for negligence with respect to goods or for costs of repair by merchant shall fail because of lack of privity between consumer and party against whom claim is made, and no manufacturer may fail to honor manufacturer's warranty if consumer has complied with applicable registration provisions but merchant has not. (WV Code 46A-6-108).

Interest and Finance Charges.

See topic 3.19 Interest.

In addition to sales and loan finance charges, creditor may contract for following additional charges in connection with consumer credit sale or consumer loan, with exceptions: (1) Official fees and taxes; (2) charges for insurance; (3) annual charges for privilege of using lender credit card; (4) charges for other benefits; (5) reasonable closing costs; (6) documentary charges; and (7) reasonable insurance costs. (WV Code 46A-3-109).

Warranties for New Motor Vehicles.

Act provides that manufacturers of new motor vehicles bear duty to comply with express warranties given consumers in state. (WV Code 46A-6A-1[1]). Manufacturer must bear all costs, and any agreement attempting to transfer costs or obligations to dealer is void. (WV Code 46A-6A-1[2]). "Consumer" includes original purchaser of new motor vehicle used primarily for personal, family or household purposes and person to whom new motor vehicle is transferred for same purpose for duration of express warranty, and any other person entitled to enforce obligations of warranty. (WV Code 46A-6A-2[1]).

Manufacturer, its agents or authorized dealers must repair or replace new motor vehicles which fail to conform to terms of express warranties, upon notice by consumer prior to later of expiration of warranty term or one year after original delivery. (WV Code 46A-6A-3). If motor vehicle cannot be repaired to conform to express warranties and nonconformity substantially impairs use or market value, manufacturer shall replace with comparable, conforming new vehicle after reasonable number of attempts. (WV Code 46A-6A-3[b]).

All authorized dealers of new motor vehicles must provide purchaser written disclosure of any repairs to new vehicle which has retail value of five percent of manufacturer's suggested retail price and were performed after shipment from manufacturer to dealer. (WV Code 46A-6A-3a).

Consumer may institute civil action against manufacturer and revoke acceptance and/or recover damages if nonconformity results in substantial impairment of use or market value of new vehicle or if nonconformity exists after reasonable number of attempts to conform. (WV Code 46A-6A-4[a]). Action must be brought within one year of expiration of express warranty. Act provides affirmative defenses. (WV Code 46A-6A-4[c]-[d]). Consumer must exhaust attorney general dispute resolution processes, before filing civil action. (WV Code 46A-6A-8).

Automobile Crash Parts.

Motor vehicle body shops must provide consumer with list of crash parts to be used in vehicle repair and whether crash parts were manufactured or approved by manufacturer of automobile. (WV Code 46A-6B-4[a][1-3]). Body shop repairs made during year of manufacture or two succeeding years must use genuine crash parts sufficient to maintain manufacturer's warranty for fit, finish, structural integrity, corrosion resistance, dent resistance and crash performance, unless owner consents in writing at time of repair, after disclosure. If crash parts manufactured by person other than automobile manufacturer and not approved, statutory notice of use must be given to consumer and must include possible effects on vehicle warranty. (WV Code 46A-6B-2, 3, 4).

Credit Service Organization.

Credit services organizations, as defined in WV Code 46A-6C-2, are prohibited from charging or receiving consideration from consumer before complete performance of all services agreed upon without first posting bond under WV Code 46A-6C-4; from charging or receiving consideration from consumer for certain types of referrals; from making false or misleading representations; and from engaging in unfair or deceptive acts. (WV Code 46A-6C-3). Credit services organizations must register with secretary of state's office. (WV Code 46A-6C-5). Credit services organizations must provide consumers with disclosure statement and contracts with consumers are required to include certain terms and cannot include waivers of rights. (WV Code 46A-6C-6, 7, 8). Violations can lead to both civil and criminal penalties. (WV Code 46A-6C-9, 10, 12).

Prizes and Gifts.

In connection with sale or lease or solicitation for sale or lease of goods, property, or services, no person can represent, unless they have complied with c. 46A, art. 6D, that person: has won prize, gift or item of value (WV Code 46A-6D-3); is eligible to win prize, gift or item of value (WV Code 46A-6D-4); or has been specially selected in connection with sale, lease, or solicitation (WV Code 46A-6D-5). Person cannot send confusing simulations of checks or invoices and must disclose its true value. (WV Code 46A-6D-6). Shipping and handling charges are also regulated. (WV Code 46A-6D-7).

Transfer of Right to Future Payments.

Rights of consumer to future payments (e.g., structured settlements) are ineffective unless certain disclosures are made, and court approval is obtained under certain circumstances. (WV Code 46A-6H-2–3). Any transfer agreement is subject to five-day right of rescission following closing or until guardian ad litem is appointed. (WV Code 46A-6H-5). Agreements to transfer rights to future worker's compensation claims are prohibited. (WV Code 46A-6H-4).

Electronic Transactions.

Consumer can respond to notice to exercise or preserve rights in same manner in which notice was provided. (WV Code 46A-6I-2). Sender with actual knowledge that party in consumer transaction did not actually receive electronic record must take reasonable steps to attempt redelivery. (WV Code 46A-6I-3). Payments made to person indicated to be in control of "transferable record" in consumer transaction may discharge obligor to extent of payment. (WV Code 46A-6I-4).

Price Gouging.

Price gouging as defined for certain items during emergencies and natural disasters is unfair and deceptive act and also misdemeanor. (WV Code 46A-6J-1–3).

Good Funds Settlement.

Lenders must disburse "good funds" loan proceeds for owner-occupied residential dwellings to settlement agent at or before loan closing, or, if there is right of rescission, within one business day after right of rescission expires; lender cannot receive or charge interest on loan until disbursement and loan closing. (WV Code 46A-6K-3).

Identity Theft Protection.

Consumers are permitted to place security freeze (WV Code 46A-6L-101[5]) on his or her credit report and timing, effect, and cost of doing so is set forth in WV Code 46A-6L-102. Whenever consumer requests information on security freeze or is required to receive summary of rights required under § 609 of federal Fair Credit Reporting Act, they must receive notice set forth in WV Code 46A-6L-103. Violation of security freeze constitutes unlawful act or practice and penalties for violation include injunctive relief, actual damages, and reasonable expenses. (WV Code 46A-6L-104–105). Any entity that owns or licenses computerized data that includes consumer's personal information must give notice to consumer of any breach of security of system. (WV Code 46A-6L-102). Financial institutions complying with Federal Interagency Guidance on Response Programs for Unauthorized Access to Customer Information and Customer Notice is deemed in compliance with this article. (WV Code 46A-6L-103). Failure to comply with notice provisions constitutes unlawful act or practice. No civil penalty may be assessed unless court finds repeated and willful violations. No civil penalty may exceed $150,000 per breach. (WV Code 46A-6L-105).

Unlicensed Health Care Facilities.

State director of health registers and inspects providers of services to consumers in unlicensed facilities, including nursing care and personal assistance. (WV Code 16-5E-3, 5). Director shall provide annual public list of all providers. (WV Code 16-5E-4). Enforcement and criminal penalties provided. (WV Code 16-5E-6).

Sales.

See topic 3.23 Sales.

Security Interests.

Seller or issuer of consumer credit card may take security only in property sold or on which services are performed or goods installed if debt secured is $300 or more, or in land on which goods are affixed or improvement services are performed if debt secured is $1,500 or more. (WV Code 46A-2-107[1]). Seller or issuer of seller credit card may also take security interest in any property to secure debt arising from consumer credit sale primarily for agricultural purpose. (Id.). Lessor under consumer lease may not take any security interest in lessee’s property. (WV Code 46A-2-107[2]). Security interest must contain description of security interest retained and clearly identify each item of collateral, including if appropriate, manufacturer’s name, make, model and serial number, and including identification of used or rebuilt collateral. Security interest taken in violation of this section is void. (WV Code 46A-2-107[4]).

Penalties and Enforcement.

Civil and criminal penalties are provided for violation of chapter. (WV Code 46A-5-101, 103). Generally, consumer proving violation is entitled to actual damages and at discretion of court penalty of $100 to $1,000 adjusted according to consumer price index. (WV Code 46A-5-101, 106). Reasonable attorney fees may also be awarded at discretion of court. (WV Code 46A-5-104). If plaintiff proves willful violation, court may cancel consumer’s debt altogether, except with regard to debts secured by security instrument. (WV Code 46A-5-105). Each violation constitutes single cause of action. (242 Bankr. 599 [S.D.W.Va. 1999]).

Attorney General.

Pursuant to enforcement provisions (WV Code 46A-7-111[1]), attorney general has standing to bring civil action against assignee to collect refund of excess charge imposed upon consumer, regardless of whether assignee committed any wrongdoing. (194 W. Va. 770, 461 S.E.2d 516). No civil penalty may be imposed if lender, as assignee, can establish unintentional violation, or bona fide error, on part of assignor, as alleged wrongdoer. (Id.).

Attorney general need not prove respondent has in fact violated Prizes and Gifts Act (WV Code 46A-6D-1–10), but only needs to make minimal evidentiary showing of good reason to believe that essential elements of violation are in view in order to obtain injunctive relief (196 W. Va. 346, 472 S.E.2d 792; 203 W. Va. 203, 506 S.E.2d 799).

Uniform Deceptive Trade Practices Act not adopted.

Plain Language.

Every written agreement entered into after Apr. 1, 1982, for purchase or lease of goods or services in consumer transactions must be written clearly and in everyday language, use type of easily readable size, and be appropriately organized and captioned to be easily understood. (WV Code 46A-6-109[a]). Insurance policy forms must meet specific statutory requirements for ease of reading. (WV Code 33-29-1–9). See also category 16 Insurance, topic 16.01 Insurance Companies, subhead Plain Language.

Consumer Goods Rental Protection Act.

Act prescribes criteria with respect to goods rented to resident under rent-to-own agreement, including establishing statute of frauds applicable to rental agreements (WV Code 46B-2-1) and requiring specific disclosure requirements for rent-to-own transactions (WV Code 46B-3-7).

3.13 CONTRACTS:

Common law generally applies. Statute of frauds requires that certain contracts be written and signed. (WV Code 55-1-1). Persons must be age 18 in order to have legal capacity to contract. (WV Code 2-3-1).

Uniform Commercial Code adopted. (c. 46).

Covenants, agreements, etc., in contracts relative to construction, alteration, repair, demolition of buildings, roads, railroads, utility systems and all other structures, projects, developments or improvements attached to real estate, purporting to indemnify against liability for damages from bodily injury or property damage caused by or resulting from sole negligence of indemnitee, his agents, or employees, are against public policy and void and unenforceable. Does not apply to construction bonds or insurance contracts (WV Code 55-8-14), except statutory provision has been judicially limited where agreement may be construed as obligation to purchase insurance for all concerned. (189 W. Va. 428, 432 S.E.2d 98).

Uniform Electronic Transactions Act adopted. (c. 39A, art. 1). Consumer protections and responsibilities specified for electronic transactions. (c. 39A, art. 2). Choice of law provisions in computer information agreement is avoidable if it provides that contract is to be interpreted pursuant to laws of state that has enacted uniform Computer Information Transactions Act, or substantially similar law. (WV Code 55-8-15). Agreement shall be interpreted under laws of this state if party against whom enforcement is sought is resident of, or has its principal place of business in this state. (Id.).

Certain contracts involving real estate or goods and chattels in consideration of marriage; or any contract in writing made for conveyance or sale of real estate, or interest or term therein of more than five years, or any other interest or term therein, of any duration, under which whole or any part of corpus of estate may be taken, destroyed, or consumed, except for domestic use, must be recorded to be valid against purchasers and creditors. In lieu of recording of lease, there may be recorded with like effect memorandum of such lease, duly executed and acknowledged by parties to lease and containing certain required information regarding parties to, and terms of, lease. (WV Code 40-1-8).

Contracts in violation of prohibitions on unfair trade practices are illegal and unenforceable. (WV Code 47-11A-12).

Certain contracts are governed by statute, including contracts for compensation of attorneys (WV Code 30-2-15); contracts between auctioneers and sellers of real or personal property (WV Code 19-2C-9); state contracts (seriatim); contracts between charitable organizations and suppliers of goods and services used in connection with charitable bingo and raffles (WV Code 47-20-15; 47-21-15); preneed funeral contracts (WV Code c.47, art. 14) and preneed cemetery company contracts (WV Code c. 35, art.5B); contracts between farm equipment suppliers and dealers (WV Code c.47, art. 11F); gaming contracts (WV Code 55-9-1); contracts concerning condominiums and unit property (WV Code 36A-2-3) and real estate time shares (WV Code 36-9-5); contracts between hospital, medical, dental, and health service corporations and their subscribers (WV Code 33-24-6); contracts between health maintenance organizations and providers of health care services (WV Code 33-25A-7, 7a); contracts between prepaid limited health service organizations and providers of limited health services (WV Code 33-25D-10); contracts between limited health service organizations and their enrollees (WV Code 33-25D-11); contracts to implement professional health care, managed care, actuarial and health care-related monitoring, quality review/utilization, claims processing and independent professional consultant contracts for Medicaid program (WV Code 9-2-9b); contracts in consideration of marriage (WV Code 55-1-1; 40-1-8); contracts for rental and occupancy of factory built homes (WV Code 37-15-3); contracts between cooperative associations (WV Code 19-4-23); marketing contracts between cooperative associations and their members (WV Code 19-4-16, 17); franchises and agreements between manufacturers, distributors and dealers of new motor vehicles (WV Code c.17A, art. 6A); contracts for sale of natural gas to utility (WV Code 24-2-16); parenting agreements (WV Code 48-9-201); contracts between student-athletes and agents (WV Code c. 30, art. 39); and agreements arising from telemarketing solicitations (WV Code c. 46A, art. 6F).

See topics 3.09 Commercial Code, Consumer Protection, Sales, Frauds, Statute of; category 14 Family, topic 14.10 Infants.

3.14 FACTORS:

Uniform Commercial Code adopted. (c. 46).

Improver's lien against motor vehicle may be maintained for vehicles that have been towed and stored only where voluntary consent, express or implied, has been given to tow and store motor vehicle. (220 W. Va. 425, 647 S.E.2d 861). Consent obtained by fraud, deceit, or other improper or unconscionable means is not voluntary and therefore will not form basis of improver's lien under W.Va. Code 38-11-3 (2001). Id. Unreasonable storage fees demanded by improver as precondition for release of stored motor vehicle does not create improver's lien. Id. Fabricator is "subcontractor" for purposes of public construction bond statute (W.Va Code 38-2-39 [2004]), though fabricator performed all of its work off-site, and supplier can recover on bond posted by general contractor. (221 W. Va. 472, 655 S.E.2d 494).

Commission merchant must procure license (which must be renewed annually) from commissioner of agriculture and furnish bond conditioned as commissioner may require. Persons injured by fraudulent practice of commission merchant may recover on bond. (WV Code 19-3-1–2).

Annual registration fee for manufacturers, renovators and upholsterers of articles of bedding is payable on first day of fiscal year. (WV Code 47-1A-14).

Motor vehicle dealer must be compensated by motor vehicle manufacturer, distributor or wholesaler, factory branch or distributor branch, or officer, agent or representative thereof for service rendered on warranty and factory recall work. (WV Code 17A-6A-8a). Compensation from manufacturer distributor, wholesaler or representative thereof, to dealer for warranty and recall work may not be less than amount charged by dealer for nonwarranty and nonrecall work, and may not be based on flat rate figure that is less than amount dealer charges for retail work. (WV Code 17A-6A-8a). Except in specific instances dealer's delivery, preparation, warranty and recall obligations shall constitute dealer's sole responsibility for product liability as between dealer and manufacturer (WV Code 17A-6A-8a).

Sale of liquor by retail licensees permitted (retail liquor sales by state discontinued). Retailer must meet specific licensing requirements and furnish bond. (WV Code 60-3A-8–12). See topic 3.18 Licenses, Business and Professional.

Person or business entity is prohibited from selling or offering for sale cigarettes in any form other than original factory-wrapped package which must contain at least 20 cigarettes. (WV Code 16-9A-10). Person or business entity is prohibited from selling or offering for sale cigarettes that do not display health warnings as required by provisions of 15 U.S.C. § 1333(b)(3), as amended. Id.

License and bond required for retail sale of nonintoxicating beer. (WV Code 11-16-8).

See also topic 3.09 Commercial Code.

3.15 FRANCHISES:

West Virginia has no special legislation pertaining to control of sales of franchise, with following exceptions:

Wine.

Manufacturers are prohibited from entering into exclusive franchise agreements with any distributor whereby such distributor is given exclusive rights to state or territories of state in which to distribute products of manufacturer. (WV Code 60-8-30).

Beer, Ale, Malt Beverages.

Brewers of beer, ale or other malt beverages are required to have franchise agreement with their West Virginia distributors, which provides exclusive territories of distribution in exchange for reasonable effort by distributor to maintain satisfactory sales level. (WV Code 11-16-21).

Liquor.

Retailers of liquor must obtain license from alcohol beverage control commissioner; must purchase liquor, other than wine, for resale from commissioner; and must not violate any requirement of statute and certain prohibited acts are outlined in statute. (WV Code 60-3A-17; WV Code 60-6-7).

License also must be obtained to sell liquor and beer in private clubs. (WV Code 60-7-3).

Petroleum Products.

Franchise agreements between producer and dealer of petroleum products are governed by statute as to term of such agreement; hours which dealer can be required to be open for business; sales price of products; participation in premiums, coupons, giveaways or rebates; unsold products in event of termination of such agreement; liabilities; legal remedies; transfers or assignments by dealers; and dealer’s right to sell any non-petroleum products, without restriction. (WV Code 47-11C-3).

Motor Vehicle Dealers Distributors Wholesalers and Manufacturers.

West Virginia automobile dealers are protected by franchise act found at c. 17A, art. 6A, which limits cancellation of dealer contracts and provides for notification periods and requires showing of good cause and defines such (WV Code 17A-6A-4); places burden of proof for each termination, cancellation or nonrenewal on manufacturer or distributor (WV Code 17A-6A-6); provides for payment of reasonable compensation and prohibits certain practices by manufacturers (WV Code 17A-6A-9, 10).

Farm Equipment Dealer Contract Act.

Franchise agreements between farm equipment manufacturers and dealers are subject to Farm Equipment Dealer Contract Act, WV Code 47-11F-1. Act governs terminations of agreements or contracts between manufacturers and dealers. (WV Code 47-11F-3). Also requires repurchase of dealer inventory and parts. (WV Code 47-11F-4).

West Virginia has not adopted Uniform Franchise and Business Opportunities Act.

See topics 3.20 Monopolies, 3.22 Restraint of Trade and Competition, 3.24 Securities.

3.16 FRAUDS, STATUTE OF:

Uniform Commercial Code has been enacted. (c. 46).

No action may be brought in any of following cases: (a) To charge any person upon or by reason of representation or assurance concerning character, conduct, credit, ability, trade, or dealings of another, to intent or purpose that such other may obtain thereby credit, money or goods; (b) to charge any person upon promise made, after full age, to pay debt contracted during infancy; or upon ratification after full age, of promise or simple contract made during infancy; (c) to charge personal representative upon promise to answer any debt or damages out of his own estate; (d) to charge any person upon promise to answer for debt, default, or misdoings of another; (e) upon any agreement made upon consideration of marriage; (f) upon any agreement that is not to be performed within year; or (g) upon offer or agreement of bank or similar institution to extend credit or make loan in excess of $50,000, primarily for nonagricultural, business or commercial purposes, not including charge or credit card accounts, personal lines of credit, overdrafts, or any other consumer account, but subsection (g) inapplicable to any offer, agreement, etc., with financial institution in which transaction is completed as evidenced by fund transfer; unless promise, contract, agreement, representation, assurance, or ratification, or some memorandum or note thereof, is in writing and signed by party to be charged thereby or his agent. But consideration need not be set forth or expressed in writing and it may be proved (where consideration is necessary) by other evidence. (WV Code 55-1-1).

No estate of inheritance or freehold, or for a term of more than five years, in lands, or any other interest or term therein of any duration under which whole or part of corpus of estate may be taken, destroyed or consumed except for domestic use, may be conveyed unless by deed or will. (WV Code 36-1-1). Declarations of trust involving land, and contracts for sale of land or lease thereof for more than one year, must be in writing, signed by party to be charged. (WV Code 36-1-3, -4). No gift of personalty except wife’s paraphernalia is valid unless in writing or unless actual possession is in donee or someone holding for or under him. When donor or donee reside together, possession at their place of residence is not sufficient. No seal necessary. (WV Code 36-1-5).

Part performance avoids effect of statute, where: (1) Certain and definite agreement is proved, (2) part performance is made pursuant to such agreement, (3) such part performance has been so substantial that refusal of full performance would operate as noncompensable fraud upon party. (94 W. Va. 364, 118 S.E. 517).

Equitable exception to bar of statute must be based upon clear evidence, such as evidence that plaintiff was “deliberately misled”. (183 W. Va. 66, 394 S.E.2d 50; 174 W. Va. 35, 321 S.E.2d 685; and 222 W. Va. 112, 662 S.E.2d 711). Such oral promise also must be sufficiently specific in its essential terms in order to be binding and enforceable. (183 W. Va. 66, 394 S.E.2d 50).

See also topic 3.09 Commercial Code.

3.17 [RESERVED]

3.18 INFORMATION TECHNOLOGY, INTERNET AND NEW MEDIA:

Digital Signature.

Secretary of state is designated certification authority and repository for all governmental agencies and regulates transactions and digital signature verifications. (WV Code 39A-3-3). Any governmental agency may (but is not required to) authorize acceptance of electronic signatures in lieu of original signatures on messages or filings requiring one or more original signatures and may elect to participate and utilize secretary of state's digital signature authority and registry. (WV Code 39A-3-2). Secretary of state has promulgated rules establishing requirements for state agencies intending to use or accept electronic signatures on filings and other messages in electronic form which require signature of an authorized person. (153 C.S.R. 30).

Electronic mail (Email) is regulated to some extent by Electronic Mail Protection Act. (c. 46A, art. 6G). Under act, no person may transmit unauthorized electronic mail message with intent to deceive or defraud. (WV Code 46A-6G-2). No bulk electronic mail message may be sent from computer located within state or to electronic mail address that sender knows, or has reason to know, is held by West Virginia resident that: uses third party's domain name without permission, misrepresents any information identifying its point of origin or transmission path; contains false or misleading information in subject line; does not clearly provide date, time, identity of sender, and return electronic mail address of that person; or contains "sexually explicit materials" as defined by statute. (WV Code 46A-6G-2).

If service provider reasonably believes that bulk electronic mail is being sent or will be sent in violation of Electronic Mail Protection Act, service provider may block receipt or transmission of such mail or disconnect or terminate service of any person that is in violation of act. (WV Code 46-6G-3).

Anyone who receives bulk electronic mail in violation of act may bring action to enjoin unlawful activity and/or recover actual damages or minimum damage assessment of $1,000. (WV Code 46A-6G-5). Additionally, attorney fees, court costs, and punitive damages may be awarded. (WV Code 46A-6G-5). However, no service provider may be held liable for blocking or merely transmitting bulk electronic mail message on its network. (WV Code 46A-6G-3).

Service providers and public utilities may recover actual damages, including lost profits, as well as attorney fees and court costs or, in lieu of actual damages, they can receive greater of $10 per violation or $25,000 per day. (WV Code 46A-6G-5).

Electronic Funds Transfers.

Uniform Commercial Code provisions on funds transfers have been enacted. (c. 46, art. 4A).

Electronic Records and Electronic Signatures.

Uniform Electronic Transactions Act (UETA) adopted with some modifications. (c. 39A, art. 1). Government agencies' use of electronic transactions optional; West Virginia secretary of state maintains records of digital signatures (c. 39A, art. 3). West Virginia also enacted certain consumer protections regarding consumer's consent to receipt of electronic records. (WV Code 39A-2-1). In order to validly consent, consumer must be provided clear and conspicuous statement regarding availability of paper forms, the right to withdraw consent, the procedures to withdraw consent and to update information, and means to obtain copy of electronic record and applicable fees therefor. Consumer must also be provided with hardware and software requirements to access and retain electronic records and must consent electronically in manner that reasonably demonstrates that consumer can access information in electronic forum that will be provided. (WV Code 39A-2-1). Legal effectiveness, validity or enforceability of contract executed by consumer will not be denied solely because of failure to obtain electronic consent or confirmation of consent. (WV Code 39A-2-3).

West Virginia has excluded oral communications or recordings of oral communications from qualifying as electronic records in consumer transactions. (WV Code 39A-2-6). Additional rules regarding retention of contracts and records in consumer transactions set forth in c. 39A, art. 2.

West Virginia has excepted out applicability of uniform act from court orders and related documents; notice of cancellation or termination of utility service; default, acceleration, repossession, foreclosure, eviction or the right to cure under credit agreement secured by, or rental agreement for, primary residence of individual; cancellation or termination of health insurance or benefits or life insurance benefits (excluding annuities); recall of product or material failure of product that risks endangering health or safety; and any document required in transporting hazardous materials, pesticides or other toxic and dangerous materials. (WV Code 39A-2-11).

C. 46A, art. 6I, sets forth additional laws relating to consumer protection in electronic transactions. Electronic record is not sent to or received by consumer if sender has actual knowledge that consumer did not actually receive record; in such case, sender's sole obligation is to take reasonable steps to attempt redelivery using information in sender's files, which obligation is satisfied if sender sends record to different e-mail address or to postal address sender has on file. (WV Code 46A-6I-3). This presumption and obligation may not be modified by agreement of parties. (WV Code 46A-6I-6).

Software.

Sale or distribution of software that is primarily designed to facilitate falsification of electronic mail transmission or other routing information is prohibited under Electronic Mail Protection Act. (WV Code 46A-6G-4).

West Virginia has not adopted Uniform Computer Information Transactions Act.

3.19–3.16 [RESERVED]

3.17 INTEREST:

Legal rate of interest is 6% per annum in absence of written agreement fixing rate, with minimum charge of $1. (WV Code 47-6-5).

Maximum Rates.

Maximum contract rate of interest is 8% per annum (WV Code 47-6-5), but 6% add on or discount interest may be charged on installment loans, with maximum annual percentage rate of 15% on discount loans (WV Code 47-6-5a). On revolving loan accounts for consumer loans, subject to provisions as to method of charging, certain financial institutions may charge 18% per annum on first $750 and 12% per annum on balances in excess of $750. (WV Code 46A-3-106). Commissioner of banking is authorized to prescribe maximum interest rate on loans secured by mortgages or deeds of trust on real property. Commissioner must prescribe interest rate each month, which rate may not exceed annual rate which is 1½% above monthly index of long-term U.S. government bonds. (WV Code 47-6-5b). As alternative to any other rate permitted by law, lenders may also charge interest on all loans at rate set by commissioner of banking, which rate may not be greater than 1% above federal discount rate on 90-day commercial paper. (WV Code 31A-4-30a).

Life insurer may alternatively establish adjustable maximum interest rate, adjusted in minimum ½% increments at least once yearly but not more often than quarterly, which rate shall not exceed higher of published monthly average for third calendar month preceding establishment of rate, or cash surrender value rate during period plus 1% per annum. (WV Code 33-13-8a).

Life insurance companies may charge policyholders 8% per annum for loan on policy if issued after June 28, 1977. (WV Code 33-13-8).

Subject to provisions as to method of charging, retail credit rate limits are: On consumer credit sales of other than real estate secured by purchase money lien, 18% per annum on first $1,500 and 12% per annum on balances in excess of $1,500 (WV Code 46A-3-101); on consumer credit sales of real estate, secured by purchase money lien, 8% per annum (WV Code 46A-3-102); on revolving charge accounts for consumer credit sales, 18% per annum on first $750 and 12% per annum on balances in excess of $750 (WV Code 46A-3-103).

Lending and Credit Rate Board must semiannually prescribe maximum rate of interest and finance charge for next succeeding six months on loans, credit sales or transactions, forbearances or similar transactions. Certain criteria are to be considered by board in fixing such rate. Rate so prescribed is alternative to any other rate permitted creditor by statute. (WV Code 47A-1-1).

Any consumer loan or credit sale other than pursuant to revolving loan account may be made at highest of specific rate permitted by statute for such transaction, rate set under WV Code 31A-4-30a, or rate set under WV Code 47-6-5, 5a, 5b (WV Code 46A-3-104).

No state law limiting interest rates shall apply to loans or credit sales insured or guaranteed by federal agencies or instrumentalities. (WV Code 31A-4-29; WV Code 46A-3-105). Maximum rate of finance charges on subordinate mortgage loans may not exceed 18% per year on unpaid balance of amount financed. (WV Code 31-17-8).

Judgments.

Every judgment or decree for payment of money, except where it is otherwise provided by law, shall bear interest from date thereof. Amount of judgment that is for special or liquidated damage bears interest from date of right to bring same accrued. Rate of interest on judgments and decrees is 3% above Fifth Federal Reserve discount rate provided that calculation is no lower than 7% and no greater than 11%. (WV Code 56-6-31). Judgment on precomputed consumer credit sale or consumer loan (defined in WV Code 46A-1-102) shall bear interest until paid at 10% per annum (WV Code 46A-3-111).

Open Accounts.

Bear interest from time when work done or materials furnished or from time when payment should have been made according to terms of agreement. (70 W.Va. 456, 74 S.E. 418).

Small Loans.

Small loan companies such as supervised lenders and industrial loan companies are now classified as regulated consumer lenders (RCL). “Regulated consumer loan” is defined as consumer loan, including one made pursuant to revolving account, in which loan finance charge exceeds 18% per year, except where loan is preempted from state regulation by federal law. (§ 46A-1-102). See also topic 3.01 Banks and Banking, subhead Regulated Consumer Lenders.

Maximum rate schedule for consumer loans is: (a) On loan of $2,000 or less which is unsecured by real property, loan finance charge may not exceed 31% per year; (b) on loan greater than $2,000 or which is secured by real property, finance charge may not exceed 27% per year; or (c) on loan for greater than $10,000, finance charge may not exceed 18% per year. (WV Code 46A-4-107[2], [3]). On loans of $2,000 or less not secured by real estate, RCL may contract for 31% per year and nonrefundable 2% processing fee. (WV Code 46A-4-107[7]).

Usury.

If loan or forbearance of money provides for greater rate than permitted by law, it is void as to all interest, and in addition debtor may recover from original creditor or other holder not in due course four times all interest agreed to be paid, with minimum of $100. (WV Code 47-6-6). If creditor makes excess charge on consumer loan or consumer credit sale, consumer may recover actual damages and also recover from creditor penalty of $100 to $1,000. (WV Code 46A-5-101). If supervised lender willfully makes excess charge he is guilty of misdemeanor. (WV Code 46A-5-103). Corporations, partnerships and limited partnerships may not plead usury. (WV Code 47-6-10). Loans to natural persons in principal amount of $20,000 or more are not subject to usury if made primarily for business purpose. (WV Code 47-6-11).

Innocent, bona fide error by creditor or lender constitutes defense, if rectified within 15 days after receipt by creditor or lender of notice of usurious contract. (WV Code 47-6-6).

3.18 [RESERVED]

3.19 LICENSES, BUSINESS AND PROFESSIONAL:

Practically all professions must be licensed. (c. 30). In addition to statutory provisions governing licensing of most professions, Code of State Rules contains further regulatory requirements arising from those statutes.

Businesses of every kind except sales of farm, garden or dairy products by producer or grower, certain foreign retailers, organizations exempt from federal income tax, or any business gross income of which is less than $4,000 per license year are subject to annual business franchise registration tax of $30 per business location. (c. 11, art. 12).

Professional boards may not discriminate against any license applicant based on any protected group status. (WV Code 30-1-6).

Upon revocation, suspension or non-renewal, every board is authorized to consider reinstatement of any license, upon showing that applicant can resume practicing with reasonable skill and safety. (WV Code 30-1-8a).

See also category 22 Taxation, topic 22.03 Business Taxes, subheads Business Franchise Tax and Business Registration Tax.

Local municipal licenses in addition to state licenses are generally required.

Transient Vendors.

“Transient vendors” must obtain business registration certification from tax commissioner. (WV Code 11-12-20). “Transient vendor” includes any person who brings into or purchases in West Virginia tangible personal property, sale or use of which is subject to one or more taxes administered by tax commissioner under c. 11, art. 10, offers or intends to offer such tangible personal property for sale to consumers in this state and does not maintain established office, distribution house, sales house, warehouse, service enterprise, residence from which business is conducted, or other place of business within state. “Transient vendor” does not include commercial travelers or selling agents who sell to others for purposes of resale, sellers by sample catalog or brochure for future delivery, sellers of crafts or other items handmade by seller, or sellers of agricultural and farming products, except nursery products and foliage plants. (WV Code 11-12-20). Applicant must post $500 bond. (WV Code 11-12-21). Violators are subject to seizure of property. (WV Code 11-12-24).

Intoxicating Liquors.

Sale of alcoholic liquors may be made by licensees. Licensees may be either “private club” or “retail licensee.”

Private club is defined as any corporation or unincorporated association which owns or leases building or other premises, to which club are admitted only duly-elected or approved dues-paying members in good standing of such corporation or association and their guests while in company of member and to which club general public is not admitted, and which club maintains in said building or on said premises suitable kitchen and dining facility with related equipment and employs sufficient number of persons for serving food and meals to members and their guests and either: (1) Belongs to or is affiliated with nationally recognized fraternal or veterans organization, which is operated exclusively for benefit of its members and which pays no part of its income to its shareholders or individual members, or (2) is nonprofit social club, which is operated exclusively for benefit of its members, which pays no part of its income to its shareholders or individual members, or (3) is organized and operated for legitimate purposes, which has at least 100 duly elected or approved dues-paying members in good standing, or (4) is organized for legitimate purposes and owns or leases building or limited premises in any state, county or municipal park or any airport. (WV Code 60-7-2). License is not transferable. Retail licensee is defined as holder of Class A or Class B retail license. (WV Code 60-3A-4). Retail licenses are issued for specific geographic areas by Retail Liquor Licensing Board which determines number of Class A and Class B licenses for each marketing zone. (WV Code 60-3A-6–7). Issuance of retail licenses based on sealed competitive bid procedure or through purchase options for current licenses. (WV Code 60-3A-10b). Board has authority to approve or disapprove specific applications. (WV Code 60-3A-8–9). Applicants for retail licenses required to furnish bond at time of bidding to guarantee 25% of bid price. (WV Code 60-3A-11). Five-percent preference exists for West Virginia residents. (W. Va. Code 60-3A-10a). State retains control of wholesale sales. (WV Code 60-3A-17). Annual license fee for private clubs is: (1) Fraternal or veterans organization or nonprofit social club, $750; (2) licensee having less than 1,000 members, $1,000; (3) licensee having more than 1,000 members, $2,500. (WV Code 60-7-6). Annual license fee for retail licensee is: (1) Class A license, $2,000 for each retail outlet; (2) Class B license, $2,000. (WV Code 60-3A-612).

Local municipal licenses in addition to state licenses of private clubs may be imposed, such fee not to exceed one half amount of license fee levied by state. (WV Code 60-7-7). State license applications for private club within municipality are subject to comment of municipality and may not be granted if contrary to reasonable municipal zoning and alternative location is provided. (WV Code 60-7-4a).

Sale and distribution of nonintoxicating beer licensed by Alcohol Beverage Control Commissioner. (c. 11, art. 16).

Sale of wine at retail permitted by private licensees. Annual fee for wine license is $150 for supplier, $2,500 for distributor, $150 for retailer, $250 for wine specialty shop, $150 for taster, $150 for private wine, bed and breakfast, $250 for private wine restaurant, $150 for private wine spa, $150 for wine sampling, and $150 for direct shipper. Multi-capacity winery or farm winery license is $350 and enables licensee to operate as retailer, wine specialty shop, supplier and direct shipper without obtaining individual license for each capacity. Licensing by West Virginia Alcohol Beverage Control Commissioner. (WV Code 60-8-3).

Manufacture of alcoholic liquors also must be licensed. (WV Code 60-4-2).

Foreign Insurers.

Foreign insurer that obtains license from insurance commissioner to operate in state may do so without obtaining certificate of authority from secretary of state. (WV Code 33-3-7).

Collection Agencies.

Detailed regulation provided. (c. 47, art. 16). See topics 3.12 Consumer Protection, subhead Debt Collection Practices; 3.24 Securities, subhead Sale of Checks, Drafts and Money Orders.

3.20 MONOPOLIES, RESTRAINT OF TRADE AND COMPETITION:

“Fair Trade Act” repealed, 1976. (c. 47, art. 11).

Motion Picture Fair Competition Act was enacted in 1979. (c. 47, art. 11D).

Antitrust.

West Virginia Antitrust Act enacted in 1978 (c. 47, art. 18) makes unlawful all contracts, combinations or conspiracies in restraint of trade and all monopolies, with specified exemptions. Statute is broad and modeled on federal statute. West Virginia Attorney General given broad enforcement and rule-making powers. Private actions and actions by attorney general as parens patriae for treble damages authorized.

Penalties.

In addition to any injunctive relief authorized by court, any person who violates this statute faces liability of fine up to $100,000 or $500 per day for each violation. (WV Code 47-18-8).

Damages.

Persons injured in his business or property by reason of violation of this article may bring action and recover threefold damages sustained by him, together with other reasonable costs of action. (WV Code 47-18-9).

Exemptions.

This article does not forbid operation of labor, agricultural or horticultural organizations, lawfully performing its legitimate objectives; individuals whose activities are regulated by regulatory agency of state of West Virginia or United States; or bona fide religious and charitable activities of any nonprofit organization established solely for religious or charitable purposes. (WV Code 47-18-5).

Statute of Limitations.

Any action brought to enforce statute must be brought within four years after cause of action arose. (WV Code 47-18-11).

Exclusive Contracts.

Public or quasi-public hospital may not enter into exclusive contract with medical service provider that has effect of completely excluding physicians who have staff privileges at hospital from use of hospital’s medical facilities. (215 W. Va. 609, 600 S.E.2d 321).

Resale Price Agreements.

See category 17 Intellectual Property, topic 17.01 Trademarks and Tradenames.

3.21 NEGOTIABLE INSTRUMENTS:

See topic 3.02 Bills and Notes.

3.22 RESTRAINT OF TRADE:

See category 17 Intellectual Property, topic 17.01 Trademarks and Tradenames.

3.23 SALES:

Uniform Commercial Code adopted. (c. 46).

Contracts of Sale.

See topics 3.09 Commercial Code; 3.16 Frauds, Statute of. With reference to size of type, see Uniform Commercial Code. (c. 46).

Bills of Sale.

See topic 3.09 Commercial Code.

Product Liability.

Comparative negligence is available as affirmative defense in cause of action founded upon strict liability. (See 171 W. Va. 79, 297 S.E.2d 854). Doctrine of implied indemnity available to seller against manufacturer of defective goods. (165 W. Va. 22, 268 S.E.2d 296). Doctrine of strict liability in tort adopted (162 W. Va. 857, 253 S.E.2d 666), also subject to applicable warranty provisions of Uniform Commercial Code. Requirement of privity of contract in actions grounded in breach of express or implied warranty is abolished. (158 W. Va. 516, 212 S.E.2d 82).

Retail Credit Sales.

See topics 3.09 Commercial Code; 3.19 Interest.

Consumer Protection.

See topic 3.12 Consumer Protection.

Bulk Sales.

See topic 3.09 Commercial Code; category 8 Debtor and Creditor, topic 8.08 Fraudulent Sales and Conveyances.

Sale of Motor Vehicles.

See category 23 Transportation, topic 23.01 Motor Vehicles.

3.24 SECURITIES:

Uniform Commercial Code has been adopted. (c. 46).

Bulk transfers provisions repealed effective June 8, 1992.

Uniform Securities Act.

1956 Act. (c. 32, arts. 1-4). For text of Uniform Securities Act, see Uniform and Model Acts section.

Supervision.

State auditor is designated commissioner of securities and is charged with administering Uniform Securities Act. (WV Code 32-4-406).

Variations from Uniform Act are as follows, references being to sections and subsections of Uniform Act:

§ 201(c)(2) Struck authority to transact business as investment advisor if registered as broker-dealer without imposition of certain restrictions and added authority of federal-covered advisors.

§ 201(c)(3) Additional requirements for investment advisors who conduct business only with investment or insurance companies and certain other institutions as specified, including no place of business in state.

§ 201(e)(1) Unlawful for any person registered as investment adviser to employ investment adviser representative unless representative is registered. Registration of investment advisor representative not effective during any period he or she is not employed by investment advisor registered in state.

§ 201(e)(2) Unlawful for any federal covered adviser to employ, supervise, or associate with investment adviser representative having place of business in this state, unless representative is registered or is exempt from registration.

§ 201(g) Added requiring applicants for registration as broker-dealer or agent to be registered in securities business in state where principal place of business is located. This section also provides for waiver in certain instances upon written application to commissioner.

§ 202(a) Publication of announcement of application for registration as broker-dealer, agent or investment adviser requires Class I legal advertisement (published one time); in addition, registration of broker-dealer or investment adviser automatically constitutes registration of any agent who is partner, officer, director or person occupying similar status or performing similar functions as designated by broker-dealer or investment adviser in writing to commissioner and approved in writing by commissioner.

§ 202(b) Except where provided in art. and except for certain investment advisers, federal covered adviser shall file with commissioner such documents as have been filed with Securities and Exchange Commission along with fees.

§ 202(c) Established filing fees: $250 for broker-dealer; $55 for agent; $200 for investment adviser; $75 for each investment adviser representative. If application withdrawn, commissioner retains fees.

§ 202(d) Established filing fee of $20 for application for registration of successor to broker-dealer or investment adviser.

§ 202(e) Commissioner may establish minimum financial requirements for investment advisers.

§ 202(f) Commissioner may require registered broker-dealers, agents and investment advisers who have custody of or discretionary authority over client funds or securities to post surety bonds in amounts up to $25,000; any appropriate deposit of cash or securities shall be accepted in lieu of any bond so required. No bond may be required where net capital exceeds amount required by commissioner. Clarifies time limitations on filing certain civil action on any bond posted.

§ 202(g) Amended to provide that every applicant must pay $50 fee for each address or name change.

§ 202(h) Amended to provide that every broker-dealer and investment adviser registered under chapter shall pay $50 annual fee for each West Virginia branch office.

§ 202(i) Each agent, representative and associated person of broker-dealer or investment advisor when applying for initial license shall pay compliance assessment of $25. Each agent, representative and associated person when applying for renewal license shall pay compliance assessment of $10.

§ 203(b) With respect to investment advisers, commissioner may require that certain information be furnished or disseminated as necessary or appropriate in public interest or for protection of investors and advisory clients.

§ 203(c) of W. Va. Uniform Securities Act is § 203(b) of Uniform Securities Act.

§ 203(d) of W. Va. Uniform Securities Act is § 203(c) of Uniform Securities Act.

§ 203(e) of W. Va. Uniform Securities Act is § 202(d) of Uniform Securities Act.

§ 204(b) Sets forth certain acts which constitute dishonest or unethical practices of broker-dealers and agents.

§ 204(c) Sets forth further acts which constitute dishonest or unethical practices of agents.

§ 204(d)-(i) Changed to define and expand authority of commissioner over applicants or registrants who have engaged in certain conduct.

§ 301 adds federal covered security concept.

§ 302(a)(1) Amended to provide registration by notification of any security, other than security with fixed maturity or fixed interest or dividend provision, whose issuer and any predecessor otherwise meets requirements of § 302(a)(1).

§ 302(c) If no stop order and no proceeding pending, registration statement automatically becomes effective at 3:00 p.m. of full business day after filing of registration statement or last amendment or earlier if commissioner determines.

§ 304a(a) Federal covered securities for which registration statement has been filed may be offered for sale or sold to residents of state upon commissioner's receipt of: (1) Notice or copy of issuer's federal registration statement as filed with Securities and Exchange Commission; (2) consent to service of process signed by issuer; and (3) payment of fee as provided for in § 305(b).

§ 304a(b) Commissioner may require filing of any or all of following documents with respect to federal covered security:

(1) Prior to initial offer, all documents that are part of current federal registration statement; and

(2) after initial offer, all documents that are part of amendment to current federal registration statement.

§ 304a(c) With respect to any security that is federal covered security, commissioner may require issuer to file notice on SEC Form D and consent to service of process signed by issuer no later than 15 days after first sale of such federal covered security in state, together with fee as established by rule by commissioner.

§ 304a(d) Commissioner may require filing of any document filed with Securities and

Exchange Commission with respect to federal covered security together with filing fee for such document as appropriate under §§ 305(m) and (n).

§ 304a(e) Commissioner may issue stop order suspending offer and sale of federal covered security, if commissioner finds that: (1) Order is in public interest; and (2) there is failure to comply with any condition established under this section.

§ 304a(f) Commissioner may waive any or all provisions of this section.

§ 305(a) Registration or notice filing statement filed under chapter shall cover only one class, series or portfolio of investment company shares.

§ 305(b) Established filing fee of 1/20 of 1% of maximum aggregate offering price at which securities are to be offered in state, with minimum of $50 and maximum of $1,500. If withdrawn before effective date or pre-effective stop order is entered, all of fee is retained by commissioner.

§ 305(d) In any case where securities sold in state are in excess of aggregate amount of securities specified under subsection (c) of section, commissioner may require payment of oversale assessment no less than $350 and no more than $1,500.

§ 305(e) of W. Va. Uniform Securities Act is § 305(d) of Uniform Securities Act.

§ 305(f) of W. Va. Uniform Securities Act is § 305(e) of Uniform Securities Act.

§ 305(g) of W. Va. Uniform Securities Act is § 305(f) of Uniform Securities Act.

§ 305(h) of W. Va. Uniform Securities Act is § 305(g) of Uniform Securities Act.

§ 305(i) of W. Va. Uniform Securities Act is § 305(h) of Uniform Securities Act.

§ 305(j) of W. Va. Uniform Securities Act is § 305(i) of Uniform Securities Act.

§ 305(k) of W. Va. Uniform Securities Act is § 305(j) of Uniform Securities Act.

§ 305(l) of W. Va. Uniform Securities Act is § 305(k) of Uniform Securities Act.

§ 305(m) Every person changing name or address of securities registration or notice filing shall pay $50 fee.

§ 305(n) Amendment of registration statement or offering document without increase in amount registered requires $50 fee for amended document.

§ 305(o) Every registered issuer or notice filer shall annually file sales report and pay filing fee for report of 0.10% of maximum offering price at which registered or noticed securities are offered in state, but fee shall in no case be less than $200 or more than $1,500.

§ 401(f) "Federal covered adviser" means person who is: (1) Registered under § 203 of Investment Advisers Act of 1940; or (2) is excluded from definition of "investment advisor" under § 202(a)(11) of Investment Advisers Act of 1940.

§ 401(g) "Investment adviser" also includes financial planners and other persons who provide investment advisory services to others for compensation and as part of business or who hold themselves out as providing foregoing investment advisory services to others for compensation. "Investment adviser" does not include: (1) Bank, savings institution or trust company; (2) lawyer, accountant, engineer or teacher whose performance of those services is solely incidental to practice of profession; (3) broker-dealer whose performance is solely incidental to conduct of business and receives no special compensation; (4) publisher, employee or columnist of newspaper, news magazine or financial publication, or owner, operator, producer, or employee of television or radio facility if financial or business news disseminated is made available to general public and content does not consist of rendering specific advice; (5) person whose advice, analyses or reports relate only to securities exempted by § 402(a)(1); (6) person with no place of business in this state if: (A) Only clients in state are other investment advisers, broker-dealers, banks, insurance companies, etc., or (B) during period of 12 consecutive months he does not have more than five clients who are residents of state; (7) investment adviser representative; (8) federal covered adviser; or (9) such other persons not within intent of paragraph as commissioner may designate.

§ 401(h) "Investment adviser representative" means any partner, officer or director of or any person occupying similar status or performing similar functions or other individual, except clerical or ministerial personnel, who is employed by or associated with investment adviser that is registered or required to be registered under chapter or who has place of business located in state and is employed by or associated with federal-covered adviser, and including clerical or ministerial personnel, who does any of following: (1) Makes any recommendation or otherwise renders advice regarding securities; (2) manages accounts or portfolios of clients; (3) determines which recommendation or advice regarding securities should be given; (4) solicits, offers or negotiates for sale of or sells investment advisory services unless such person is registered agent; or (5) supervises employees who perform any of foregoing unless such person is registered as agent.

§ 401(i) of W. Va. Uniform Securities Act is § 401(g) of Uniform Securities Act.

§ 401(j) of W. Va. Uniform Securities Act is § 401(h) of Uniform Securities Act.

§ 401(k) of W. Va. Uniform Securities Act is § 401(i) of Uniform Securities Act.

§ 401(l) of W. Va. Uniform Securities Act is § 401(j) of Uniform Securities Act.

§ 401(m) of W. Va. Uniform Securities Act is § 401(k) of Uniform Securities Act.

§ 401(n) of W. Va. Uniform Securities Act is § 401(l) of Uniform Securities Act. Definition of security includes viatical settlement contract. "Security" does not include any insurance or endowment policy or annuity contract under which insurance company promises to pay money either in lump sum or periodically for life or some other specified period; provided, that "security" does not include insurance or endowment policies or annuity contracts that are viatical settlement contracts for purchase, sale, assignment, transfer, devise or bequest of any portion of death benefit ownership of life insurance policy or certificate that is less than expected death benefit of life insurance policy or certificate.

§ 401(o) "Federal covered security" means any security that is covered security under § 18(b) of Securities Act of 1933.

§ 401(p) of W. Va. Uniform Securities Act is § 401(m) of Uniform Securities Act.

§ 401(q) Added definition to define "branch office" as any location other than main office, identified to public, customers or clients as location where broker-dealer or investment adviser or federal-covered adviser conducts securities or investment advisor business. Definition further explains what is not considered branch office.

§ 402(a)(8) Also exempted any security listed on any regional stock exchange, any other stock exchange approved by commissioner, National Association of Securities Dealers Automated Quotation System, or any other market system approved by commissioner. Commissioner may remove any exchange or market system from § 402(a)(8) exemption.

§ 402(a)(9) Added requirement that no part of net earnings inure to benefit of any person, private stockholder or individual.

§ 402(a)(12) Added as exempt security any security issued by agricultural cooperative association operating in and organized in state or issued by foreign cooperative association organized under laws of another state and qualified in state.

§ 402(b)(6) Amended to add transaction by constable and any transaction constituting judicial sale.

§ 403 Sales and advertising literature must be filed with commissioner before it is used, disseminated or distributed, unless security or transaction is exempted by § 402.

§ 406(b) of W. Va. Uniform Securities Act is § 406(c) of Uniform Securities Act and provides that auditor shall set up special operating fund for securities division in his office and that all fees shall be deposited in state treasury and credited to general revenue fund to extent balance in operating fund exceeds one-half of prior year’s appropriation. Twenty percent of all fees collected is to be deposited in operating fund before transfer to general revenue fund.

§ 406(c) Monies payable for assessments established by § 407(a) shall be collected by commissioner and deposited in general revenue fund.

§ 406(d) of W. Va. Uniform Securities Act is § 406(b) of Uniform Securities Act.

§ 407(a)(1) Commissioner may appoint special investigators to aid in investigations conducted pursuant to cc. 32, 32A or 33B.

§ 407(a)(2) Commissioner, deputy commissioners, and each investigator, prior to entering upon discharge of duties shall take specified oath before any justice of West Virginia supreme court of appeals.

§ 407(a)(3) Oaths of commissioner, deputy commissioner, and investigators of West Virginia securities commission are to be filed and preserved in office of state auditor. Any agent or employee of Commissioner also may administer oaths, subpoena witnesses, etc.

§ 407(b)(1) of W. Va. Uniform Securities Act is § 407(a) of Uniform Securities Act.

§ 407(b)(2) of W. Va. Uniform Securities Act is § 407(b) of Uniform Securities Act and gives powers to commissioner, deputy commissioner or commissioners, and special investigators appointed pursuant to this section, including power to take and store evidence in compliance with policies and procedures of West Virginia state police. Any agent or employee of commissioner also may administer oaths, subpoena witnesses, etc.

§ 407(b)(3) of W. Va. Uniform Securities Act is § 407(c) of Uniform Securities Act and was amended to broaden power of circuit court of Kanawha County to compel production or giving evidence beyond proceeding before commissioner or designee.

§ 407(b)(4) of W. Va. Uniform Securities Act is § 407(d) of Uniform Securities Act.

§ 407(b)(5) Exempts civil and criminal investigations by West Virginia securities commission from requirements of c. 6, art. 9A, and c. 29B.

§ 407(b)(6) Commissioner, deputy commissioner, special investigator or other employee of state auditor not authorized to carry or use firearms in discharge of duties.

§ 407(b)(7) Chapter does not limit power of state to punish any person for conduct which constitutes crime.

§ 407a(a) Person who has violated article shall pay for all costs incurred in conduct of examination, audit, investigation or prosecution.

§ 407a(b) Commissioner may impose administrative assessment against person registered under WV Code 32-2-201.

§ 407a(b) After giving notice and opportunity for hearing, commissioner may issue order which imposes administrative assessment in amount provided in paragraph (1) against broker-dealer, agent, investment adviser or investment adviser representative or affiliate where commissioner finds that person either willfully violated act or rule or order of commissioner or has engaged in dishonest or unethical practice or has taken unfair advantage of customer.

§ 407a(b)(1) Commissioner may impose administrative assessment up to $10,000 for single violation or up to $50,000 for multiple violations in single proceeding or series of related proceedings.

§ 407a(b)(2) Commissioner shall consider in determining amount of administrative assessment: (i) Circumstances, nature, frequency, seriousness, magnitude, persistence and willfulness of conduct constituting violation; (ii) scope of violation; (iii) amount of restitution or compensation that violator has made and number of persons in state to whom restitution or compensation has been made; (iv) past and concurrent conduct of violator; (v) any other factor that commissioner finds appropriate in public interest or for protection of investors and consistent with purposes of act.

§ 407a(b)(3) Administrative assessment is not mutually exclusive of any other remedy available under act.

§ 407a(b)(4) Commissioner shall not impose administrative assessment with respect to any public proceeding which was instituted prior to date of enactment of this section.

§ 408 Circuit court of Kanawha County or court of competent jurisdiction in county where one or more of defendants reside or have place of business may enjoin acts or practices or enforce compliance.

§ 409(a) Willful violation is felony with criminal penalties of fine up to $50,000 or imprisonment not less than one nor more than three years, or both.

§ 409(b) Proper prosecuting attorney may institute criminal proceedings.

§ 410(a)(2) Amended to provide for interest at rate of 9%.

§ 410(e) Amended to provide only that no person may sue more than three years after sale. All other portions of § 410(e) deleted from W. Va. Uniform Securities Act.

§ 411(a) Circuit court of Kanawha County provides judicial review of final orders of commissioner with review by supreme court of appeals.

§ 412(f) Amended to provide that every hearing in administrative proceeding shall be public.

§ 413(e) Amended to provide that commissioner's opinions required to be filed in special file and available for public inspection. $100 fee for each interpretive opinion.

§ 414(g) and (h) Amended to provide that service may be made by certified as well as registered mail.

Uniform Act for Simplification of Fiduciary Security Transfers has been adopted. (c. 31, art. 4D).

Uniform Common Interest Ownership Act.

(WV Code 36B-2-103). Amended effective June 6, 2003, limiting application to restrictive covenants.

Uniform Securities Ownership by Minors Act has not been adopted.

Sale of Undeveloped or Unimproved Lands.

Requires filing with commissioner of securities detailed description of property and such information as to its value as commissioner may require and registration of property and person selling such property in same manner as provided under Uniform Securities Act. (c. 32A, art. 1).

Sale of Checks, Drafts and Money Orders.

Sales of checks, drafts and money orders, including internet providers require licensure by, and surety bond filed with state commissioner of banking. Licensees are subject to examination by commissioner of banking. Banks and governmental agencies, among others, are exempt from licensure and examination. Records must be maintained at principal place of business, unless commissioner of banking is notified. Checks must bear name and unique number of licensee, among other things. (c. 32A, art. 2).

Uniform Common Interest Ownership Act has been adopted. (c. 36B).

See also category 2 Business Organizations, topic 2.02 Associations.

3.25 STATUTE OF FRAUDS:

See topic 3.16 Frauds, Statute of.

3.26 TRUST RECEIPT SECURITY:

See topic 3.09 Commercial Code.

3.27 WAREHOUSEMEN:

Uniform Commercial Code has been adopted. (c. 46).

See also topic 3.09 Commercial Code. (WV Code 46-7-102, 209, 210). One engaged in business of storing goods for hire.

4 CITIZENSHIP

4.01 ALIENS:

Actions.

Alien may maintain suit including actions for personal injury (64 W. Va. 337; 62 S.E. 446), and wrongful death, regardless of whether beneficiaries are nonresident aliens. (123 W. Va. 727; 17 S.E. 2d 804.

Criminal.

Under certain circumstances, illegal alien may not possess awareness of his right to refrain from making statement to law enforcement sufficient to waive that right. (197 W. Va. 556; 476 S.E. 2d 227).

Driver's License.

Driver's license issued to person who is not citizen of United States may only be issued for time person is legally authorized to be in United States, not to exceed five years. (WV Code 17B-2-12[e]).

Property.

Aliens may take, by inheritance or otherwise, hold, and dispose of property like citizens, and property owned by alien passes by inheritance as if he were citizen. (Const., art. 2, § 5; WV Code 36-1-21; WV Code 42-1-4).

Occupational Restrictions.

Aliens may not obtain certificates to teach, though foreign exchange teachers and aliens who meet teaching requirements may be granted permit to teach. (WV Code 18A-3-1). Aliens may be licensed by endorsement as registered professional nurses if duly licensed elsewhere and upon meeting qualification required of registered professional nurses at time of graduation or passing comparable licensure examination, in English. (WV Code 30-7-6,7).

Employer must verify prospective employee's legal status or authorization to work and must maintain and make available to state labor commissioner records of proof. (WV Code 21-1B-3, 4).

Taxation.

Estate of alien located in West Virginia is subject to state transfer tax. (WV Code 11-11-6).

Miscellaneous.

Illegal aliens may not possess any firearm. (WV Code 61-7-7). Nonresident alien beneficiaries are entitled to workers' compensation benefits. (WV Code 23-4-15a). Aliens not entitled to hold government office. (Const., art. 4, § 4).

5 CIVIL ACTIONS AND PROCEDURE

5.01 ACCORD AND SATISFACTION:

Compromise.

In general, rules of common law govern. (520 F.Supp. 1093). To show accord and satisfaction, person asserting defense must prove three elements: Consideration; offer of partial payment in full satisfaction of disputed claim; acceptance on condition of full satisfaction of disputed claim. (176 W. Va. 591, 346 S.E.2d 740). Accord and satisfaction with one joint tortfeasor does not inure to benefit of, or bar action against, others. (WV Code 55-7-12). After joint judgment is final, joint tortfeasor may ordinarily require contribution from another except where act is malum in se. (WV Code 55-7-13; 161 W. Va. 230, 240 S.E.2d 544). Courts have recognized both inchoate right of contribution as well as statutory right of contribution. (186 W. Va. 221, 412 S.E.2d 219). As between joint tortfeasors right of comparative contribution exists based upon relative degrees of negligence. If no allocation of degrees of negligence is requested, all share in total judgment on pro rata basis. (169 W. Va. 698, 289 S.E.2d 679). Where relative fault of non-settling defendants has been determined, they may seek contribution among themselves after judgment if forced to pay more than their allocated share of verdict. (182 W. Va. 597, 390 S.E.2d 796). Non-settling tortfeasor entitled to dollar-for-dollar credit in any verdict rendered for partial settlements made with plaintiffs by other jointly liable parties. (Id.). “Mary Carter” agreements are not per se contrary to public policy, but prompt disclosure of agreement to court and opposing counsel is required. (173 W. Va. 770, 320 S.E.2d 345). Settlement between nonparties and claimant before instigation of suit or between parties before judicial determination of liability relieves persons from any liability for contribution if entered in good faith and amount of settlement is disclosed to court. (183 W. Va. 43, 393 S.E.2d 923). Settlements presumptively made in good faith and must be rebutted by clear and convincing evidence. (189 W. Va. 237, 429 S.E.2d 643). Factors relevant in determining whether settlement lacks good faith: amount of settlement in comparison to potential liability of tortfeasor at time of settlement; consideration, motivation of wrongful tactical gain, and existence of relationship conducive to collusion. (Id.). Test of good faith is whether non-settling tortfeasor substantially deprived of fair trial because of corrupt behavior by plaintiff and settling tortfeasors. (Id.). Defendant who settles pursuant to “Mary Carter” agreement and remains in case through jury verdict remains liable for contribution. (179 W. Va. 691, 371 S.E.2d 619). See also category 3 Business Regulation and Commerce, topic 3.09 Commercial Code.

Pleading.

Accord and satisfaction must be affirmatively pleaded. (R.C.P. 8[c]). Right of contribution from joint tortfeasor is not mandatory but must be invoked by filing third party claim. (R.C.P. 14; 205 W.Va. 445, 518 S.E.2d 873). Failure of joint tortfeasor to bring another into case precludes separate action against non-named tortfeasors after judgment has been rendered. Right of comparative contribution can be invoked by one of named joint tortfeasors and method for invoking comparative contribution is by requesting that special interrogatories be submitted to jury. (R.C.P. 14; 205 W.Va. 445, 518 S.E.2d 873).

5.02 ACTIONS:

In 1960 West Virginia Supreme Court of Appeals adopted state “Rules of Civil Procedure for Trial Courts of Record” and amended same in 1978 and 1988 (hereinafter referred to as R.C.P., followed by number of pertinent rule), which closely follow Federal Rules of Civil Procedure. (164 W. Va. 488, 264 S.E.2d 450).

Equity.

Procedural distinction between law and equity is abolished. (R.C.P. 2).

Forms of Action.

There is only one form of action. (R.C.P. 2).

Conditions Precedent.

None.

Commencement.

Action is commenced by filing complaint with court. (R.C.P. 3). See topics 5.20 Process; 5.17 Pleading.

Parties.

Necessary and proper parties (R.C.P. 17); joinder of parties (R.C.P. 19, 20).

Class Actions.

Permitted. (R.C.P. 23). Order awarding class action standing is reviewable only by writ of prohibition. (170 W.Va. 526, 295 S.E.2d 16).

Intervention.

Permitted. (R.C.P. 24).

Third Party Practice.

Permitted. (R.C.P. 14). Impleader of joint tortfeasor permitted. (161 W. Va. 230, 240 S.E.2d 544).

Joinder of Causes of Action.

Permitted. (R.C.P. 18).

Splitting Causes of Action.

Not permitted. (143 W. Va. 75, 101 S.E.2d 273).

Consolidation of Actions.

Permitted at court's discretion. (R.C.P. 42). Order granting consolidation of civil actions will not be reversed in absence of clear showing of abuse of discretion by trial court. (155 W. Va. 535, 185 S.E.2d 505).

Severance of Actions.

Court may separate issues and claims. (R.C.P. 42).

Stay of Proceedings.

Court has discretion to stay action pending and before judgment. Motion for stay is pleading, and shall be made pursuant to R.C.P. 7. (156 W. Va. 52, 190 S.E.2d 779).

Abatement and Revival.

See category 13 Estates and Trusts, topic 13.08 Executors and Administrators.

Limitation of.

See topic 5.16 Limitation of Actions.

Small Claims.

See category 6 Courts and Legislature, topic 6.01 Courts.

Termination of Actions.

Action may be dismissed by plaintiff without order of court; dismissal is without prejudice unless otherwise stated. (R.C.P. 41). Court may also dismiss for failure to prosecute in which action is considered adjudicated on its merits, unless otherwise specified. (R.C.P. 41). Court may dismiss any case wherein for more than one year there has been no order of proceeding but to continue it, or wherein plaintiff is delinquent in payment of accrued court costs. (WV Code 56-8-9). Court upon motion may reinstate any case dismissed, or set aside any nonsuit entered by reason of nonappearance of plaintiff, within three terms after entry of dismissal/nonsuit order, except that order of reinstatement shall not be entered until accrued costs in case have been paid. (WV Code 56-8-12).

Administration.

See category 13 Estates and Trusts, topic 13.08 Executors and Administrators.

Direct Actions against Insurers.

See category 23 Transportation, topic 23.01 Motor Vehicles, subhead Direct Actions.

Defenses.

Same generally as Federal Rule 12. (R.C.P. 12).

Extension of Period for New Action.

For period of one year from date of order dismissing action, party may refile action if initial pleading was timely filed and dismissal was not based on merits of action. Effective July 13, 2001. (WV Code 55-2-18).

5.03 APPEAL AND ERROR:

Appellate review is statutory in nature but see also R.C.P. and Rules of Appellate Procedure, West Virginia Supreme Court of Appeals, effective Jan. 1, 1980.

From Circuit Courts.

Party to civil action may appeal to Supreme Court of Appeals from final judgment of any circuit court. Party to civil action may appeal from circuit court order constituting final judgment as to one or more but fewer than all claims or parties only upon express determination by circuit court that there is no just reason for delay and upon express direction for entry of judgment as to such claims or parties. Defendant in criminal action may appeal from final judgment of any circuit court in which there has been conviction or which affirms conviction obtained in inferior court. (WV Code 58-5-1).

Petition must be filed with clerk of court where judgment, decree or order being appealed was entered within four months after rendition of judgment, decree or order complained of: Provided, that judge of circuit court may, prior to expiration of four months, by order entered of record extend and re-extend such period not to exceed total extension of two months, for good cause shown, if party seeking review requested transcript within 30 days of entry of such judgment, decree or order. No petition for appeal or writ of error shall be filed in criminal cases unless written notice of intent to file such petition has been filed with clerk of court in which judgment or order was entered within 30 days after judgment or order was entered. Notice of intent to appeal must concisely state grounds for appeal. In appeals from administrative agencies, petition for appeal must be filed within applicable time provided by statute. (WV Code 58-5-4; Rules of Appellate Procedure 3, 3[a], 3[b], 4[a]). Supreme Court of Appeals has authority pursuant to Rules 2, 3 and 16 of Rules of Appellate Procedure to suspend or enlarge time for appeal for good cause shown. (181 W. Va. 494, 383 S.E.2d 298). Appellate court may, at its discretion, allow oral presentation of petition unless such right to orally present petition is otherwise provided by law. (Rules of Appellate Procedure 5). Petitioner must designate by itemization to clerk of circuit court where petition is filed those pleadings, orders and exhibits necessary to enable Supreme Court to decide matters arising in petition. (Rules of Appellate Procedure 4[c]). If petition is granted, appellant may file with circuit court designation of additional parts of record. Clerk of court shall give notice thereof to other parties who may then also designate additional portions. In lieu of designated record, parties may prepare written stipulation jointly designating portions of record to be prepared for appeal or may submit agreed statement of case. (Rules of Appellate Procedure 8).

Upon allowance, case is docketed and clerk of appellate court shall send copy of order granting appeal and any supersedeas awarded to all parties of record. Upon receipt of designations of record or agreed record, circuit clerk shall prepare record. Parties may elect to reproduce record or may file motions for leave to move to reverse or affirm upon original record without its reproduction. (Rules of Appellate Procedure 7[c], 9[a], [b], [f]).

When required by court, appeal shall not take effect until bond, in penalty to be fixed by court, is given. (WV Code 58-5-14). On motion and on such conditions for security of adverse party as are proper, court may stay issuance of execution upon judgment and any other proceedings for its enforcement for such reasonable time to be specified by court in stay order, as will enable moving party to present petition for appeal to judgment to appellate court. (WV Code 58-5-5; Rules of Appellate Procedure 6; R.C.P. 62[i]).

Certified Questions.

Any question of law, including, but not limited to, questions arising upon sufficiency of summons or return of service, upon challenge of sufficiency of pleading, or venue, upon sufficiency of motion for summary judgment which was denied, or motion for judgment on pleadings, upon jurisdiction of circuit court of person or subject matter, or failure to join indispensable party, may in discretion of circuit court be certified to Supreme Court of Appeals and further proceedings below stayed until questions decided and decisions certified back. (WV Code 58-5-2). State may not obtain review of ruling made in circuit court in criminal case by certified question; question certification statute is designed for civil cases. (188 W. Va. 85, 422 S.E.2d 807).

From Magistrate Courts.

Any person may appeal, as matter of right, from judgment of magistrate court to circuit court by requesting appeal not later than 20 days after judgment is rendered or decision is rendered upon motion to set aside judgment. Person taking appeal will be required to post bond with good security in reasonable amount not less than reasonable court costs of appeal, nor more than sum of judgment and reasonable court costs of appeal. If appeal is not perfected within 20 days, circuit court upon showing of good cause may still grant appeal but in no case shall appeal be allowed after 90 days from date of judgment. Filing or granting of appeal shall automatically stay further proceedings to enforce judgment. In case of civil action tried before jury, hearing on appeal to circuit court shall be on record as designated by parties. Circuit court must determine whether judgment or order of magistrate is arbitrary, capricious, or abuse of discretion; contrary to constitutional right; in excess of statutory jurisdiction; without observation of legal procedure; unsupported by substantial evidence; or, unwarranted by facts. Circuit court may retry factual issues or take evidence and make independent factual findings to extent questions of fact and law merge. Circuit court's review and decision on appeal shall be completed within 90 days after appeal docketed. In case of civil action tried before magistrate without jury, hearing on appeal may be de novo, triable to circuit court without jury. Appeal shall be dismissed at cost of appellant if neither party brings matter to hearing before end of second term after being docketed unless good cause is shown. No dismissal may be reinstated after close of next regular term after dismissal. (WV Code 50-5-12).

From Public Service Commission.

Any party aggrieved by any final order of commission may, within 30 days, present to Supreme Court of Appeals, or judge thereof in vacation, written petition for appeal from and suspension of order. After hearing, court may suspend such order upon giving of bond, and on such terms as it may impose. (WV Code 24-5-1).

From County Commission.

Appeals lie from county commission to circuit court in following cases: (1) Contested election; (2) contempt; (3) establishment and regulation of road, way, bridge, public landing, ferry or mill; (4) probate of will; (5) appointment of personal representative or guardian, and settlement of their accounts; (6) disposition of elective share dispute arising from provisions of WV Code 44-2-19 et seq., WV Code 3-7-7; WV Code 3-2-17; and (7) other cases specially provided for. (WV Code 58-3-1). Request for appeal must be filed within four months after final order rendered. Appeal shall be determined by trial de novo. No bond may be required. (WV Code 58-3-1a).

Appeals in Workmen's Compensation Cases.

See category 11 Employment, topic 11.02 Labor Relations.

5.04 BONDS:

General Provisions Respecting Government Officers.

Every official bond, and every bond required by law to be taken or approved by, or given before, any court, board or officer, must, unless otherwise provided, be made payable to State of West Virginia, signed by one or more sureties deemed sufficient by such court, board or officer, and proved or acknowledged before, or approved by, such court, board or officer. (WV Code 6-2-2). Bond required of appointed or elected officials must be given within 60 days of election or appointment. (WV Code 6-2-1).

Appeal Bonds.

See topic 5.03 Appeal and Error.

Enforcement.

Suits upon any bond payable to state are prosecuted in name of state or for benefit of state or of party injured (state, county, district, corporation or person) by breach of condition of bond until damages are recovered in aggregate equal to penalty thereof. (WV Code 6-2-17).

Sureties.

Fiduciary commissioner may include reasonable expenses and compensation as part of expenses of settling estate, and party who furnished bond is entitled to recover costs (WV Code 59-1-g), including sum paid surety company for bond, not exceeding one-third of 1% per annum on amount of bond. (WV Code 59-2-19). Court may assess reasonableness of executor's or administrator's fee. (WV Code 44-4-14; 176 W. Va. 267, 342 S.E.2d 234).

Release of Surety.

Generally, surety in official bond may be released from liability upon verified petition before court, board or officer by whom such bond was approved, and with ten days' notice to principal in such bond. (WV Code 6-2-15).

Additional Bonds.

Any court, board or officer authorized to approve any official bond may at any time require, after notice to officer, new or additional bond. (WV Code 6-2-14).

Subrogation.

Person liable as surety or guarantor who pays judgment or any part thereof awarded on account of such liability becomes owner of all rights and remedies of, and subject to certain defenses against, original creditor and may, by motion in court in which judgment was awarded, obtain judgment against person primarily liable. (WV Code 45-1-4, 5; 170 W. Va. 174, 291 S.E.2d

670).

5.05 CERTIORARI:

Generally.

Writ of certiorari to circuit court is proper remedy in: (1) All cases in which it was proper at common law, and (2) cases where appeal, writ of error, supersedeas, or other process is not otherwise provided. (WV Code 53-3-2). No certiorari shall be issued in civil cases where amount in controversy is less than $15. (WV Code 53-3-2). Within counties writ is mode of reviewing proceedings before county commission, municipal council, magistrate or other inferior tribunal, where other mode of review is not provided. (WV Code 53-3-2). School personnel may seek review of school board actions in circuit court. (210 W. Va. 105, 556 S.E.2d 72). Writ also lies from circuit courts to West Virginia Supreme Court of Appeals. (W. Va. Const. art. VIII, § 3).

Jurisdiction.

In circuit court of county where record or proceeding is, to which writ relates. (WV Code 53-3-1). In matters before circuit courts, jurisdiction lies with West Virginia Supreme Court of Appeals. (W. Va. Const., art. VIII, § 3; Rules of Appellate Procedure 14).

Grounds.

As at common law (no other available remedy) except that judgment or order of inferior tribunal must be final and judicial or quasi-judicial in nature. (WV Code 53-3-2; 150 W. Va. 498, 147 S.E.2d 397; 637 F.2d 246). Final actions of planning commission adopting comprehensive plan or amendments to it, approving or rejecting plats or plans of subdivisions, and adopting final report with respect to zoning ordinance, regardless of whether that report is initial report or revised and resubmitted report, are subject to review by writ of certiorari regardless of whether final action of planning commission is dispositive of matter or is followed by legislative action of governing body. (212 W. Va. 623, 575 S.E.2d 233).

Proceedings.

Inferior tribunal certifies evidence in proceedings to circuit court which determines matter upon record. (WV Code 53-3-3). Petition must disclose proper case upon its face. (32 W. Va. 637, 9 S.E. 867). Circuit court must make independent review of law and fact, and make findings of fact and conclusions of law on all pertinent issues. (WV Code 53-3-3; 169 W. Va. 162, 286 S.E.2d 276).

5.06 CHARITABLE IMMUNITY:

See topic 5.09 Damages.

5.07 COMMISSIONS TO TAKE TESTIMONY:

See topic 5.11 Depositions and Discovery.

5.08 COSTS:

Costs are taxed by clerk (WV Code 59-2-13) and are recovered by party for whom final judgment is given in action (WV Code 59-2-8) and on appeal are recovered by parties substantially prevailing (WV Code 59-2-11). Defendant is entitled to costs for any action discontinued by opposing party. (WV Code 59-2-8). Clerk must include in costs to prevailing party statutory fee of $10 in any civil action. (WV Code 59-2-14). Ordinarily, attorney’s fees in excess of normal statutory amount are not “costs” recoverable by prevailing party. (206 W. Va. 114, 522 S.E.2d 208). Parties may contract to allocate responsibility for costs and attorney’s fees. (158 W. Va. 808, 219 S.E.2d 315). Persons proceeding in forma pauperis must file affidavit with court stating inability to pay fees or costs. (WV Code 59-2-1). There may be no inquiry behind forma pauperis affidavit; courts have nondiscretionary duty to permit one who files qualifying affidavit to proceed without payment of costs. (155 W. Va. 89, 181 S.E.2d 329; WV Code 59-2-1).

Security for Costs.

WV Code 59-2-2 repealed by Acts 2006, c. 36, eff. Mar. 9, 2006.

Worthless Check Cases.

Payee or holder of any dishonored check may impose fee of up to twenty-five dollars worthless check. This fee may not be imposed or cancelled after complaint for warrant has been delivered to magistrate court. Once payee or holder of dishonored check, draft, or order presents complaint of warrant to magistrate court, payment is only lawful when made through court. Any payee or holder who unlawfully accepts payment after initiating such proceedings will be liable for all costs imposed by magistrate court, including those which may have accrued by time magistrate is notified of payment. (WV Code 61-3-39[e]).

Liability of Attorney.

Attorney may be liable for prevailing party’s attorney’s fees and costs incurred as result of attorney’s assertion of frivolous claim or defense. (175 W. Va. 249, 332 S.E.2d 262).

Magistrate Courts.

Costs in civil actions are taxed by schedule based upon amount of damages sought and are collected in advance. (WV Code 50-3-1). Where action is for $500.00 or less, fee is $30.00; where action is for more than $500.00 but not more than $1,000.00, fee is $35.00; where action is for more than $1,000.00 but not more than $2,000.00, fee is $40.00; where action is for more than $2,000.00, fee is $50.00; and where action seeks relief other than money damage, fee is $30.00. (WV Code 50-3-1). Costs are assessed against losing party or parties. (WV Code 50-3-1a). Provisions of WV Code 59-2-1, relating to payment of costs by persons proceeding in forma pauperis apply. (WV Code 50-3-1). Magistrate courts may accept credit cards in payment of all costs, fines, fees, forfeitures, restitution or penalties in accordance with rules promulgated by Supreme Court of Appeals. (WV Code 50-3-2a).

5.09 DAMAGES:

Common law generally prevails as to compensatory damages. Damages for noneconomic loss in medical malpractice cases limited to $250,000 for most cases. However, noneconomic damages cap is $500,000 for actions for wrongful death; permanent and substantial physical deformity; loss of use of limb or loss of bodily organ system; or permanent physical or mental function injury that permanently prevents injured person from being able to independently care for himself and perform life sustaining activities. (WV Code 55-7B-8; 213 W. Va. 457, 583 S.E.2d 80). Maximum amount recoverable as damages for noneconomic loss in professional liability action brought against health care provider shall not exceed $1,000,000. (WV Code 55-7B-8[c]). Punitive damages are allowed where injury is inflicted intentionally or with malice, willfulness or in wanton disregard of plaintiff’s rights. (184 W. Va. 611, 403 S.E.2d 13). Punitive damages based upon gross, reckless or wanton negligence are insurable. (168 W. Va. 172, 283 S.E.2d 227). Finding of compensatory damages is indispensable predicate to finding of punitive damages, and punitive damages must bear reasonable proportion to compensatory damages. (186 W. Va. 656, 413 S.E.2d 897). But, see 187 W. Va. 457, 419 S.E.2d 870 (substantially disproportionate awards are not per se unconstitutional). Prejudgment interest is proper in respect to damages in both contract and tort actions for pecuniary losses, subject to reasonable calculation at time of trial. (WV Code 56-6-27, 29, 31).

Contribution among joint tortfeasors permitted except where act is malum in se. (161 W. Va. 230, 240 S.E.2d 544). Right of contribution is extinguished upon good faith settlement and joint tortfeasor given credit for payments made by another joint tortfeasor in satisfaction of wrong, if payment made and release obtained. (182 W. Va. 597, 390 S.E.2d 796). But, see 195 W. Va. 51, 464 S.E.2d 570 (broad principles of contribution are completely different from and should not be confused with statutory subrogation right of injured party’s UIM carrier). Tortfeasor who negotiates settlement with injured party before lawsuit is filed may not subsequently seek contribution from joint tortfeasor who was not party to settlement. (217 W. Va. 15, 614 S.E.2d 15).

Comparative Negligence Rule.

In 163 W. Va. 332, 256 S.E.2d 879, West Virginia Supreme Court of Appeals adopted form of comparative negligence whereby party is not barred from recovering damages in tort action so long as his negligence or fault does not equal or exceed combined negligence or fault of other parties involved. Jury determines gross damages and degree of fault and court calculates damages recoverable by deducting party’s percentage of fault from his gross award. (163 W. Va. 332, 256 S.E.2d 879). Strict liability in tort applies in product liability cases. (162 W. Va. 857, 253 S.E.2d 666).

Charitable Immunity.

Specifically abolished as to charitable hospitals, and probably generally. (149 W. Va. 705, 143 S.E.2d 154).

Sovereign immunity is granted to state of West Virginia by Constitution. (Art. VI, § 35). However, it would appear that to extent state of West Virginia has obtained liability insurance coverage, civil action may be maintained up to limit of that coverage. (172 W. Va. 743, 310 S.E.2d 675). Sovereign immunity is inapplicable to municipalities, counties and boards of education. (WV Code 29-12A-1–4). Sovereign immunity is also inapplicable to West Virginia Turnpike Commission. (143 W. Va. 913, 105 S.E.2d 630). However, limited immunity for political subdivisions of state has been restored by statute. (WV Code 29-12A-1–16).

No-Fault Insurance.

See category 23 Transportation, topic 23.01 Motor Vehicles, subhead No-Fault Insurance.

See also category 13 Estates and Trusts, topic 13.05 Death, subhead Action for Death.

5.10 DECLARATORY JUDGMENTS:

See topic 5.15 Judgments.

5.11 DEPOSITIONS AND DISCOVERY:

R.C.P. are substantially same as FRCP including numbering scheme.

Outside of State for Use within State.

R.C.P. 28 is, for all practical purposes, same as Rule 28 of FRCP. It also provides for taking of depositions in West Virginia for use in other states.

After Judgment.

R.C.P. 27 is, for all practical purposes, same as Rule 27 of FRCP.

Probate Proceedings.

In proceedings for probate of a will, or an authenticated copy of a will probated in another jurisdiction, where there is no contest, the deposition of an attesting witness or other person may be taken as in other cases, without notice and in the form of an affidavit, any time after will is offered for probate. If there is a contest, deposition is taken as in action at law, any time after service of process upon notice of contest. The clerk is required to send the will to officer taking deposition, after making copy and filing same, or, by agreement, photostatic copy may be sent. Compulsory process may be had as in other cases. (WV Code 41-5-14).

Within State for Use Elsewhere.

Deposition may be taken in this state pursuant to laws of another state or of any other country to be used in proceedings there. It may be taken where witness resides, transacts his business or is employed. Court of general jurisdiction (civil) may, upon petition, by order direct issuance of subpoena pursuant to R.C.P. 45. See R.C.P. 28(d).

Compelling Attendance of Witnesses.

See R.C.P. 26, 27, 28 and 45.

Form.

Following forms may be used as is applicable:

Forms

(Formal Opening) The (designate type) deposition of. . . . ., taken under Rule. . . . . . of the West Virginia Rules of Civil Procedure in the above-entitled suit now pending in the. . . . . Court of. . . . . County, West Virginia, pursuant to agreement of the parties (or notice, etc.) before. . . . . (designate officer) at (location) on the. . . . . day of. . . . . ., 20. . . . ., at. . . . . .m.

Appearances:

. . . . having been first duly sworn as a witness, deposes as follows:

(Return)

State of. . . . .,

County of. . . . ., to wit:

I,. . . . . within and for the County and State aforesaid, do hereby certify that the foregoing deposition of. . . . . was duly taken by and before me at the time and place and for the purpose specified in the caption hereof, the said witness having been by me first duly sworn to testify the whole truth and nothing but the truth concerning the matters in controversy. I do further certify that said deposition was correctly taken in (designate method) and afterwards reduced to typewriting, and that the examination, reading and signing of said deposition were waived by the witness and by agreement by and between counsel for the parties present at the taking of said deposition. I do further certify that notice of filing of this deposition was waived by counsel for the parties. I do further certify that I am not related to any of the parties to this action or to any of their attorneys or counsel, that I am not employed by any of the parties or by any of their attorneys or counsel, and that I have no financial interest in this action.

My commission expires. . . . .

Given under my hand this. . . . . . day of. . . . . ., 20. . . . .

. . . .

(Designate title of officer)

Also see topic 5.19 Practice.

5.12 EQUITY:

See topic 5.02 Actions.

5.13 EVIDENCE:

State has adopted, in large part, Federal Rules of Evidence.

Witnesses.

No person is incompetent as a witness because a party to or interested in the action (with specific exceptions) (WV Code 57-3-1) or because convicted of felony or perjury and convict at time of questioning, although fact of conviction may be shown to affect credibility (123 W. Va. 36, 13 S.E.2d 757; WV Code 57-3-5). Infants under age of 14 years are rebuttably presumed to be incompetent to testify (37 W. Va. 565, 16 S.E. 803; 165 W. Va. 522, 270 S.E.2d 156) but question of child's competency is addressed to sound discretion of trial judge, and ruling allowing testimony will not be disturbed unless it was flagrantly wrong (167 W. Va. 411, 280 S.E.2d 545; 173 W. Va. 553, 318 S.E.2d 603). Upon findings of competency and necessity, the court may require a child under 14 to testify outside the presence of a criminal defendant via closed circuit television. (WV Code 62-6B-1 et seq.).

Privileged Communications.

Confidential communications between attorney and client are privileged. (104 W. Va. 382, 140 S.E. 346; 116 W. Va. 564, 182 S.E. 582; 163 W. Va. 40, 254 S.E.2d 129). Priests, ministers, clergymen, etc. may not be compelled to testify in divorce, annulment or separate maintenance proceeding relative to private communications with party to such proceeding, provided certain enumerated requirements are met. (WV Code 48-1-301). In addition, no priest, minister, clergyman, etc. shall be compelled to testify in any criminal or grand jury proceeding or in any domestic relations action, provided certain requirements are met. (WV Code 57-3-9).

Husband and Wife.

No husband or wife may, without consent of other, disclose any confidential communication made by one to other during marriage. (WV Code 57-3-4). This privilege survives dissolution of marriage. (WV Code 57-3-4; 182 W. Va. 664, 391 S.E.2d 354). Physical actions or conduct of spouse may constitute communication. (180 W. Va. 400, 376 S.E.2d 606). In criminal cases, they shall not be compelled or allowed to testify against each other, except in case of offense by one against other or against child, father, mother, sister or brother of either, but shall be allowed and may be compelled to testify on behalf of each other. (WV Code 57-3-3). However, when substance of privileged communication is communicated to third party, third party may testify as to communication so long as testimony is otherwise admissible. (211 W. Va. 277, 565 S.E.2d 399). Husband or wife of accused is competent and compellable in cases of procuring for prostitution. (WV Code 61-8-7). Immunity does not apply to disbarment proceedings (157 W. Va. 167, 200 S.E.2d 353), to persons who are divorced for other than confidential communications (172 W. Va. 810, 310 S.E.2d 877) or to statements to police (179 W. Va. 1, 365 S.E.2d 46) or privilege does not apply in cases of adult neglect or abuse (WV Code 9-6-13). Statute precludes all adverse testimony by spouse of criminal defendant, not merely disclosure of confidential communications. (193 W. Va. 519, 457 S.E.2d 456).

Communications or Transactions with Persons Since Deceased or Incompetent.

Usual rule forbidding such testimony if party has interest in event or transaction. (WV Code 57-3-1). Party in wrongful death, medical malpractice action not barred from testifying about conversation with deceased patient. (212 W. Va. 327, 571 S.E.2d 317).

Self-incrimination.

Testimony of witness may be compelled, but he may not be prosecuted for the offense in regard to which he is compelled to testify. (WV Code 57-5-2). Accused may not be compelled to testify but is competent if voluntarily chooses to do so; however, privilege against self-incrimination is thereby waived as to all matters relevant to issue in question. (WV Code 57-3-6). Witness can be called solely to invoke Fifth Amendment privilege. (220 W. Va. 685, 649 S.E.2d 258).

Compelling Attendance.

Summons or subpoena may be issued compelling any person to attend and give evidence within his county before court, grand jury, arbitrator, umpire, magistrate, etc. (WV Code 57-5-1; R.C.P. 45). See topic 5.11 Depositions and Discovery.

5.14 INJUNCTIONS:

Injunctions are governed by and available under common law, statutory law and rules of civil procedure. West Virginia has adopted rule similar to Rule 65, FRCP. (R.C.P. 65). Further, temporary restraining orders may be obtained under Rule 65 of West Virginia Rules of Civil Procedure under certain conditions.

Jurisdiction is in circuit court of county where enjoined act will occur. (WV Code 53-5-3).

Prerequisites are required by common law, constitutional, statutory law and rules of civil procedure before injuction can be obtained. (200 W. Va. 289, WV Code 53-5-2; R.C.P. 65).

Procedure.

Plaintiff files verified complaint or complaint with supporting affidavits sufficient to establish his equity. Court reviews pleadings, and in its discretion may, and in all but extraordinary cases should, require notice to party to be enjoined and conduct hearing. Preliminary injunctions may not be issued without notice to adverse party; however temporary restraining orders may be granted without notice under certain circumstances as stated in R.C.P. 65. If temporary restraining order is granted without notice, it shall by its terms expire within ten days, subject to certain extensions as specified in Rule. Adverse party may appear and move for dissolution or modification of temporary restraining order. (WV Code 53-5-8; R.C.P. 65). Four factors are weighed by Court when deciding to grant or deny preliminary injunction: (1) Likelihood of irreparable harm to plaintiff without injunction; (2) likelihood of harm to defendant with injunction; (3) plaintiff’s likelihood of success on merits; and (4) public interest. (212 W. Va. 752, 575 S.E.2d 362).

Security/Bond is required to support injunction or restraining order for payment of costs and damages as may be incurred or suffered by any party who is found to have been wrongfully enjoined or restrained, subject to certain exceptions. (WV Code 53-5-9; R.C.P. 65; R.C.P. 65.1).

Expedited appeal procedure exists when injunction is awarded or denied, at any time prior to final adjudication. (WV Code 53-5-8).

5.15 JUDGMENTS:

West Virginia Rules of Civil Procedure (R.C.P.) are generally based upon Federal Rules of Civil Procedure and do not substantially differ therefrom. “Judgment” includes decree and any order from which appeal lies. (R.C.P. 54). See topic 5.19 Practice.

Judgment by Confession.

Permissible at any time more than ten days prior to trial. (R.C.P. 68). Judgment may be confessed by attorney-in-fact though he is not lawyer, but only after service of process. (70 W. Va. 738, 75 S.E. 65). See subhead Offer of Judgment, infra.

Judgment on Actions on Contracts.

In action at law on note or contract for payment of money, if plaintiff files affidavit stating amount of claim and serves upon defendant copy of affidavit along with copy of any account filed, plaintiff is entitled to judgment on affidavit without further evidence unless defendant files answer denying claim or otherwise makes appearance before court. (WV Code 55-8-7).

Judgments by Consent.

Provided for. (WV Code 56-4-48). See subhead Judgment by Confession, supra.

Judgments on Pleadings.

Provided for. (R.C.P. 12[c]).

Summary Judgments.

Provided for. (R.C.P. 56).

Declaratory Judgments.

Uniform Act adopted. (c. 55, art. 13; 210 W. Va. 536, 558 S.E.2d 336).

Default Judgments.

Provided for, but must be entered by court, not clerk, in certain situations. (R.C.P. 55). May be set aside for specified reasons. (R.C.P. 60).

Offer of Judgment.

At any time more than ten days before trial party defending against claim may serve upon adverse party offer to allow judgment to be taken against him for money or property or to effect specified in his offer, with costs then accrued. If within ten days after service offer is accepted by written notice, either party may then file offer and notice of acceptance and thereupon court shall direct entry of judgment by clerk. Party defending against claim may, alternatively, pay into court such sum as he feels is owed and plead that he is not indebted in any greater amount to party making claim. If offer is not accepted it is deemed withdrawn, shall not be disclosed to jury, and evidence thereof is not admissible except in proceeding to determine costs. If judgment finally obtained by offeree is not more favorable than offer, offeree must pay costs incurred after making of offer. (R.C.P. 68).

Docketing.

Judgments are docketed and indexed by clerk of county commission. Any clerk failing to perform such duties is liable together with sureties in his official bond to any person injured for amount of his injury sustained by reason thereof. Judgments of any other state court may be docketed. Judgments and decrees rendered in district court of U.S. within state must be docketed and indexed in said clerk’s office in state. (WV Code 38-3-4, 5).

Vacation or Modification.

No error in either admission or exclusion of evidence and no error or defect in any ruling or order or in anything done or omitted by court or by any of parties is ground for granting new trial or for setting aside verdict or for vacating, modifying or otherwise disturbing judgment or order, unless refusal to take such action appears to court inconsistent with substantial justice. (R.C.P. 61). See R.C.P. 60 for specific reasons for relief from judgment order.

Lien.

Real estate of defendant is subject to lien by virtue of entry of record of judgment in court by which rendered and extends to property not bound by original entry or record; however, lien is not good against bona fide purchasers unless docketed by clerk of county commission in county wherein real estate is located. Duration of judgment lien is ten years, but may be extended thereafter for ten-year periods by issuance and docketing of executions. (WV Code 38-3-6, 7, 8).

Revival.

Judgment which has become dormant through failure to issue execution within proper time (see supra, subhead Liens) cannot be revived. (30 W. Va. 195, 3 S.E. 604). Writs of scire facias abolished. (WV Code 56-8-5).

Assignment.

Common law governs.

Satisfaction.

When execution issued upon judgment or decree, and entered in judgment lien docket, is returned satisfied, clerk to whose office return is made certifies same to clerk of county commission and such return is entered in margin of docket of such judgment or decree. (WV Code 38-12-12).

Actions.

Action on judgment is brought as is action upon contract. (WV Code 38-3-9 to 15).

Foreign Judgments.

Recognized, except where court lacked jurisdiction or judgment was obtained by fraud. Authentication by attestation required. Full faith and credit for child support orders is accorded. (WV Code 57-1-12; 151 W. Va. 900, 158 S.E.2d 359; 190 W. Va. 49, 435 S.E.2d 664).

Uniform Enforcement of Foreign Judgments Act has been enacted. (c. 55, art. 14). Act (WV Code 55-14-2) entitles state citizens same exemptions afforded to citizens of foreign state in which judgment was given, and requires debt collector to ensure that any exemptions provided for in foreign state are specified on face of petition for enforcement. Violation of said requirement subjects collector to liability for actual damages and penalty, as well as misdemeanor conviction and punishment.

Interest.

See category 3 Business Regulation and Commerce, topic 3.19 Interest, subhead Judgments.

Dismissal or Reversal of Judgment.

For period of one year from date of order dismissing action or reversing judgment, party may refile action if initial pleading was timely filed and action was involuntarily dismissed for any reason not based upon merits or reversal does not preclude filing of new action for same cause. (WV Code 55-2-18).

Judgments Against Medical Professionals.

Statutory limits imposed on amount of noneconomic damages recoverable (WV Code 55-7B-8); several liability superseding joint and several liability in this area (c. 55, 7B, § 9).

5.16 LIMITATION OF ACTIONS:

Uniform Commercial Code has been enacted. (c. 46).

Legal proceedings must be brought within the following periods of time:

Ten Years: Recovery of lands. (WV Code 55-2-1). Recovery of money upon indemnifying bond taken under any statute or upon bond of any fiduciary or public officer, or upon award or any note or other contract in writing, sealed or unsealed, signed by party or agent (WV Code 55-2-6); declaratory judgment action for breach of written employment contract (178 W.Va. 53, 357 S.E.2d 246); bills to repeal land grant (WV Code 55-2-14); action or scire facias upon recognizance, if not recognizance of bail (WV Code 55-2-11); sister state or foreign judgment, unless sooner barred by law of state or country where rendered (WV Code 55-2-13); actions against fiduciary for account (WV Code 55-2-7); actions for injuries resulting from planning, design, or supervision of construction (WV Code 55-2-6a).

Five Years: Contracts, including implied contracts, other than those mentioned above, except in case of action by one party against his copartner for settlement of partnership accounts or between merchants, their factors or servants, concerning trade of merchandise where action of account would lie, in either of which cases action may be brought within five years from cessation of dealings in which parties are interested together, but not there after. (WV Code 55-2-6).

If a person dies before the time at which any right would have accrued to him if he had continued alive and there is an interval of more than five years between the death of such person and the qualification of his personal representative, such personal representative is deemed to have qualified on the last day of the five years. (WV Code 55-2-16).

Four Years: Breach of contract for sale of goods (WV Code 46-2-725); fraudulent conveyance (WV Code 40-1A-9); violation of antitrust law (WV Code 47-18-11).

Three Years: Recognizance of bail (WV Code 55-2-11); misappropriation of trade secret (WV Code 47-22-6).

Two Years: Action for wrongful death (WV Code 55-7-6d); action for personal injuries; action for injury to real or personal property or to recover possession of personal property; for personal actions if right of action would survive death of the party at common law (WV Code 55-2-12); state action brought pursuant to 42 U.S.C. § 1983 (179 W.Va. 637, 371 S.E.2d 358); action for damages by Korean or Vietnam Veterans exposed to chemical hazards, including agent orange (WV Code 16-28-10); action by insurance agent against insurance company for wrongful termination of contractual relationship (WV Code 33-12A-5); claims against local government (WV Code 29-12A-6); retaliatory discharge (WV Code 55-2-12); actions under W. Va. Human Rights Act (WV Code 5-11-1, 13; WV Code 55-2-12; 188 W. Va. 647, 425 S.E.2d 602); legal malpractice (184 W. Va. 466, 400 S.E.2d 901). Action for medical malpractice must be commenced within two years of date of injury, or within two years of when injury should have been discovered, with outside limit of ten years. (WV Code 55-7B-4). However, before medical professional liability action may be filed against health care provider, notice of claim must be served on provider at least 30 days before filing. Each notice of claim must be accompanied by screening certificate of merit, signed under oath by expert health care provider. (WV Code 55-7B-6). Products liability action must be commenced within two years of date of injury, or within two years of date when party should have known of: (1) Injury, (2) manufacturer of product, and (3) causal relationship between product and injury. (178 W. Va. 249, 358 S.E.2d 810).

One Year: Action by consumer of new motor vehicle against manufacturer for nonconformity of express warranty after termination of warranty (WV Code 46A-6A-4); personal actions if right of action would not survive death of party at common law (WV Code 55-2-12). Discovery rule applicable to defamation actions. (186 W. Va. 102, 411 S.E.2d 245).

180 Days: Actions for Whistle Blower Discharge. (WV Code 6C-1-4).

State.

Claims against state governed by applicable period. (WV Code 14-2-21). Action by state to collect tax must be brought within ten years from date statute imposing such tax requires return to be made and tax paid. (WV Code 11-10-16). Limitation on enforcement of inheritance tax is ten years from filing notice of property owner's death or estate tax return, whichever is earlier, but not more than 20 years after death. (WV Code 11-11-18). Statutes of limitation, unless otherwise expressly provided, apply to state. (WV Code 55-2-19).

Time runs as follows: On bond of guardians or curators, from maturity of ward or end of trust, whichever is first; upon bonds of personal representatives or committees of insane persons, from the return day of execution against representative or committee, or from the time of acquiring right to require payment or delivery under order of court; to recover money paid under fraud or mistake, from time fraud or mistake is or ought to have been discovered. (WV Code 55-2-7). Medical malpractice action brought on behalf of minor under age of ten must be commenced within two years of date of injury, or prior to minor's 12th birthday, whichever period is longer. (WV Code 55-7B-4). Where tort involves continuing or repeated injury, cause of action accrues at, and limitations period begins to run from, date of last injury or when tortious overt acts cease. (211 W. Va. 466, 566 S.E.2d 603).

New Proceedings.

If any action or suit, including action for wrongful death, duly commenced in time, abates or judgment or decree is arrested or reversed on grounds not precluding further proceedings, or if made necessary by loss of papers or records, new proceedings may be commenced within one year from such event. (WV Code 55-2-18).

Effect of Bankruptcy.

Running of any statute of limitation shall be tolled for any claim for which prosecution of same within period of limitation has been stayed by provisions of U.S. bankruptcy code or by order entered in bankruptcy proceeding pending duration of stay or effective period of order and for period thereafter of remaining period of limitation or for one year, whichever is longer. (WV Code 55-2-22).

Disabilities.

If person is under disability when right to recover land first accrues, action therefor may be brought, notwithstanding expiration of ten years, within five years of removal of disability or death, whichever first occurs (WV Code 55-2-3), but time may not extend beyond 20 years in any event (WV Code 55-2-4). Any person being under disability when right of personal action accrues may bring action within like number of years after removal of disability as he might have done but for disability, except that in no case may action be brought after 20 years from time when right first accrues. (WV Code 55-2-15). When any person under disability dies before disability has been removed, no time to bring action beyond ten years after right first accrued or five years after his death is allowed by reason of disability of any other person. (WV Code 55-2-4).

Absence or Concealment of Defendant.

Statute does not run during absence of defendant from state, nor if he conceals himself or obstructs prosecution of action. (WV Code 55-2-17).

Foreign Causes of Action.

No action may be brought on judgment or decree rendered outside state if same is barred where rendered, and whether so barred or not, no such action against person residing in this state during ten years next preceding such action may be brought on any such judgment or decree rendered more than ten years before commencement of such action. (WV Code 55-2-13). Period of limitations applicable to claim accruing outside of West Virginia shall be either that prescribed by law of place where claim accrued or by law of this state, whichever bars claim. (WV Code 55-2A-2).

Contractual limitations are permissible (6 W. Va. 425), but no limitation for period less than one year may be placed by insurance companies on any suits brought on marine insurance policies (WV Code 33-6-14). No limitation for period less than two years may be placed on suits brought on all other insurance policies. (WV Code 33-6-14).

New Promise.

On new promise in writing, there is same limitation as on original cause of action, and suit may be brought on either. Acknowledgment in writing, from which promise of payment may be implied, is deemed new promise. (WV Code 55-2-8). New promise by personal representative does not bind estate of his decedent, nor does new promise by joint contractor bind other joint contractors. (WV Code 55-2-9).

Part payment tolls running of statute. (175 W. Va. 289, 332 S.E.2d 589).

Third Party Complaints, Counterclaims or Cross-Claims.

Statute tolled only during pendency of civil action for filing of these claims. However, this tolling provision is inapplicable to permissive counterclaims unless they are filed in civil action tolling statute of limitations. (WV Code 55-2-21).

Mechanics' Liens.

Applicable time frames found in mechanics' lien statutes. (c. 38, art. 2). See category 8 Debtor and Creditor, topic 8.14 Mechanics' Liens.

Pleading.

Statute of limitations defense must be pled affirmatively. (R.C.P. 8-c).

See also category 3 Business Regulation and Commerce, topic 3.09 Commercial Code.

Discovery Rule.

Unless otherwise provided by statute, discovery rule applies to all torts in West Virginia. (188 W. Va. 241, 423 S.E.2d 644). Under discovery rule, statute of limitations begins to run when plaintiff knows, or by exercise of reasonable diligence should know: (1) That plaintiff has been injured; (2) identity of entity who owed plaintiff duty to act with due care and who may have engaged in conduct that breached that duty; and (3) that conduct of entity has causal relation to injury. (210 W. Va. 682, 558 S.E.2d 681).

Clerical Errors.

When clerical errors have occurred which would delay otherwise timely filed complaint, courts may read statute of limitations loosely and decide whether, in fact, plaintiff's failure to timely file was caused by alleged clerical error. (R.C.P. 60[a]; 215 W. Va. 162, 597 S.E.2d 295).

Concept of "Continuing Violation".

Where tort involves continuing or repeated injury, cause of action accrues at, and limitations period begins to run from, date of last injury or when tortious overt acts cease. (211 W.

Va. 466, 566 S.E.2d 603; 188 W. Va. 674, 425 S.E.2d 629; 169 W. Va. 617, 289 S.E.2d 201).

Series of Separate Injuries.

When, in course of employment person receives number of similar, but separate, injuries, each injury gives rise to separate and distinct cause of action. Further, statute of limitations for each cause of action begins to run from date of injury giving rise thereto, without regard to any previous injury or injuries. (194 W. Va. 417, 460 S.E.2d 663).

Continuous Representation Doctrine.

In attorney malpractice action, statute of limitations is tolled until professional relationship terminates with respect to matter underlying malpractice action. However, when victim of legal malpractice terminates attorney-client relationship, subsequent efforts by new counsel to mitigate harm will not toll statute of limitations. (215 W. Va. 433, 599 S.E.2d 856; 198 W. Va. 498, 482 S.E.2d 115).

5.16A PARTITION:

Tenants in common, joint tenants and coparceners of real property, including minerals, and lessees of mineral rights other than lessees of oil and gas minerals, and not including stockholders of closely held corporation where there are no more than five stockholders and only substantial asset of corporation is real estate, shall be compelled to make partition. (WV Code 37-4-1). When partition by sale is opposed, evidence of long-standing ownership and sentimental or emotional interest in property by advocate of petition in kind may be considered in deciding whether interests of party opposing sale will be prejudiced by sale. (215 W. Va. 331, 599 S.E.2d 754).

Jurisdiction and Venue.

Circuit court of county wherein land or estate, or any part thereof, may be, shall have jurisdiction and may take cognizance of all questions of law affecting legal title that may arise in any proceedings. (WV Code 37-4-1).

Proceedings.

When partition cannot conveniently be made, entire subject may be allotted to any party who will accept it and pay other parties such sums as their interests may entitle them to, or sale of entire subject, or allotment of part and sale of residue, may be decreed notwithstanding those entitled may be under disability. In event allotment shall be made and person or persons entitled to proceeds cannot agree upon value of subject, court shall appoint three disinterested and qualified persons to fix value. (WV Code 37-4-3). If name or share of any person interested in subject is unknown, so much as is known in relation thereto must be stated in bill. (WV Code 37-4-6). Any two or more of the parties, if they so elect, may have their shares laid off together, if partition can be conveniently made in that way. (WV Code 37-4-2).

Liens.

Where there are liens by judgment or otherwise, on interest of any party to partition suit, court may, on petition of any person holding lien ascertain lien and apply dividend of such party applied in discharge thereof. (WV Code 37-4-4).

Personal Property.

When equal division of goods or chattels cannot be made in kind, among those entitled, court of equity may direct sale and distribution of proceeds of same. (WV Code 56-10-5).

Recording.

Clerk of county court in which land is located records in deed books orders for partition, description of land and report of partition, and recordation thereof is as effectual to convey legal title of such lands to person to whom same is assigned by decree of court as deeds of partition would be if duly made by parties. (WV Code 51-4-7).

5.17 [RESERVED]

5.18 PLEADING:

Governed by R.C.P. which are based upon Federal Rules of Civil Procedure. Procedural distinction between law and equity abolished. See R.C.P. 2.

Pleadings Permitted.

Complaint; answer; reply to counterclaim; answer to cross-claim, if answer contains cross-claim; third-party complaint; third-party answer; and court may order reply to answer or third-party answer. (R.C.P. 7).

Complaint.

Any pleading that sets forth claim for relief shall contain short statement of claim and demand for judgment for relief sought. (R.C.P. 8).

Answer.

Shall state defenses and shall admit or deny averments of complaint. (R.C.P. 8).

Counterclaim or Set-off.

Mandatory to assert counterclaim growing out of same transaction or occurrence and permissive with reference to counterclaim not so arising. (R.C.P. 13).

Reply.

See subhead Answer, supra.

Demurrer.

Abolished. (R.C.P. 7).

Amended or Supplemental Pleadings.

Permitted under certain conditions. See R.C.P. 15.

Affidavits.

Used frequently. See R.C.P. 4, 6, 43, 55, 56, 59, 65.

Bills of Particulars.

Superseded by Motion for More Definite Statement. (R.C.P. 12).

Verification.

Required in support of complaint in certain class actions (R.C.P. 23.1) and complaint seeking temporary restraining order if supporting affidavit is not used (R.C.P. 65).

Screening Certificate of Merit.

Required before medical profession liability action may be filed. (WV Code 55-7B-6).

Service.

Generally, all pleadings except complaint must be served on opposing counsel unless court orders otherwise. May be made by delivery, by mail, by leaving it with clerk of court and by facsimile transmission under conditions set forth in R.C.P. 5. (R.C.P. 5).

Filing.

All pleadings must be filed with either court or court's clerk. (R.C.P. 3, 5).

Time.

Varies. See specific R.C.P. 6

Proof of Claims.

No legislation; common law governs.

Form 3

See, e.g., form of complaint on promissory note:

1. Defendant on or about. . . . ., executed and delivered to plaintiff a promissory note [in the following words and figures: (here set out the note verbatim)]; [a copy of which is hereto annexed as Exhibit A]; [whereby defendant promised to pay to plaintiff or order on. . . . . the sum of. . . . . with interest thereon at the rate of. . . . . . percent per annum].

2. Defendant owes to plaintiff the amount of said note and interest.

Wherefore plaintiff demands judgment against defendant for the sum of. . . . . dollars, interest, and costs.

Small Claims.

See category 6 Courts and Legislature, topic 6.01 Courts.

5.19 PRACTICE:

Former Federal Rules of Civil Procedure form basis of state's practice and procedure, and state has adopted, in large part, Federal Rules of Evidence.

Discovery.

Rules provide discovery procedures. (R.C.P. 26-37).

Demand for Admission of Facts.

May be made on plaintiff after commencement of action and on any other party with or after service of summons and complaint on that party. (R.C.P. 36[a]). Facts are admitted unless answered within 30 days. (R.C.P. 36[a]).

Direct Actions Against Insurer.

See category 23 Transportation, topic 23.01 Motor Vehicles, subhead Direct Actions.

Domestic Violence.

West Virginia Supreme Court of Appeals has adopted Rules of Practice and Procedure for Domestic Violence Civil Proceedings effective Sept. 1, 2001.

Small Claims.

See category 6 Courts and Legislature, topic 6.01 Courts.

See also topics 5.02 Actions, Appeal and Error, Depositions and Discovery, Injunctions, Judgments, Pleading, Process; category 8 Debtor and Creditor, topics 8.02 Attachment, 8.05 Executions, 8.09 Garnishment.

5.20 PROCESS:

Who May Serve.

Any non-party who is at least 18 years of age or clerk of court through sheriff, mail, or secretary of state. (R.C.P. 4[c]).

Time Limit for Service.

To avoid dismissal, service of summons and complaint must be made within 120 days after filing of complaint unless party on whose behalf service was required can show good cause why such service was not made within that period. (R.C.P. 4[k]).

Return of Executed Process.

Officer required to make service must make return of manner and time of service. (WV Code 56-3-19).

Answer.

Answers are to be filed within 20 days of service. When process is served upon agent of defendant or when defendant serves notice of bona fide defense within 20 days, defendant has 30 days to file answer. Answer to cross-claim or counterclaim must be served within 20 days of service of pleading asserting such claim. (R.C.P. 12[a]).

Supreme Court of Appeals.

When it appears that appellee in case of appeal is nonresident or that name or residence of such party is unknown, order of publication is taken and issued by clerk. (WV Code 56-3-27). Publication must be class II legal advertisement in compliance with WV Code 59-3-1. Order of publication must be executed at least ten days before hearing. (WV Code 56-3-28).

Magistrates.

For details concerning issuance and return of process, see WV Code 50-1-8, 9, 14(b); 50-3-1.

Service on Individuals.

Notice or summons may be served by delivering written copy to party, or, if not found, by delivering copy at his usual place of abode to party’s spouse or to any person at abode above 16 years of age and member of party’s family. When delivering copy at place of abode, person receiving copy must be given information about copy’s purpose. Service may also be made by clerk by sending copy of summons and complaint by certified mail, return receipt requested and delivery restricted to addressee or by first class mail, postage prepaid, with Notice and Acknowledgment. If return receipt or acknowledgment is not received, other service must be made. If mailed service is refused or ignored, clerk may notify party that case will proceed and that judgment by default will be rendered. Service by posting has been declared unconstitutional. (WV Code 56-2-1; 56-3-12; R.C.P. 4[d][1]; 171 W. Va. 412, 299 S.E.2d 23).

Personal Service on Infants and Incompetents.

See R.C.P. 4(d)(2), (3).

Personal Service on Partnership.

Partnership formed after July 1, 1995, or otherwise electing to be governed by Uniform Partnership Act of 1995 may be sued in name of partnership and served as one would serve corporation. (WV Code 47B-3-7). For common law partnership, partner must be served as individual, adding “a member of the partnership of. . .” or words of like import. (144 W.Va. 92, 107 S.E.2d 57). For service on domestic and foreign limited partnerships see WV Code 56-3-13a; WV Code 47-9-4. See also category 2 Business Organizations, topic 2.07 Partnerships.

Service on Corporations.

Process against domestic corporation may be served: (a) If city, town or village, on its mayor, city manager, recorder, clerk, treasurer, or any member of its council or board of commissioners; (b) if county commission, on any commissioner or clerk, or, if they be absent, on prosecuting attorney of county; (c) if board of education, on president or any member thereof, or, if they are absent, on prosecuting attorney of county; (d) if any other corporation, on secretary of state as statutory attorney, or on any person appointed by it to accept service, or on its president or other chief officer, or its vice-president, cashier, assistant cashier, treasurer, assistant treasurer, secretary or any member of its board of directors, or, if no such officer or director is found, on any agent of such corporation, including in case of railroad company, depot or station agent in its actual employ. (WV Code 56-3-13; R.C.P. 4[d][5], [6]).

Process against foreign corporation qualified to and doing business under laws of this state may be served in accordance with the provisions of WV Code 56-3-13(d) and R.C.P. 4(d)(5), above. If such corporation has not qualified to do business under laws of state, service may be had by delivering within state copy of process to any officer, director or agent of such corporation transacting business for it in state, or, if there be none upon whom service may be so served, then on affidavit of that fact, order of publication may be awarded. (WV Code 56-3-14). Specific statute allows service of process to be made upon certain unlicensed insurers by serving secretary of state. (WV Code 33-4-13).

Service by Publication.

Service of notice or summons and complaint on nonresidents may be by publication. Order of publication is granted on affidavit showing that defendant is nonresident, or that diligent search has failed to locate defendant, or that process was twice delivered to officer in county in which he resides more than ten days before return day and has been returned unexecuted, or that defendant is corporation and no person can be found within state on whom process may be legally served. If complaint shows unknown persons interested, order of publication is granted on affidavit that such persons are unknown. (WV Code 56-2-2; 56-3-23; R.C.P. 4[e]). Every order of publication must be in accordance with WV Code 59-3-1 et seq. (WV Code 56-2-2).

Service Outside State or County.

Personal service may be made on nonresident defendant out of state with same effect as service by publication. (R.C.P. 4[f]; 333 F. Supp. 1001).

Long Arm Statutes.

Secretary of state is attorney-in-fact for any nonresident person, firm, corporation, or partnership for purposes of accepting service of process if such nonresident transacts any business in state; contracts to supply services or things in state, causes tortious injury in state; causes tortious injury in state by act outside of state if regularly solicits business or derives substantial revenue from goods used or consumed or services rendered in state; breaches warranty outside state if goods expected to be consumed or used in state provided does business or derives revenue from goods or services in state; uses, possesses, or has interest in real property in state; or contracts to insure in state. (WV Code 56-3-33). Special, cumulative long arm statute provides for appointment of secretary of state as attorney-in-fact to receive service of process on behalf of any nonresident that operates or permits agent to operate motor vehicle in state with regard to any action or proceeding growing out of accident involving such operation. (WV Code 56-3-31). Similar long arm statute appoints secretary of state as attorney-in-fact to receive service of process on behalf of all domestic limited partnerships, all foreign limited partnerships authorized to do business in West Virginia and all unauthorized foreign limited partnerships actually doing business in state. (WV Code 47-9-4).

Nonresident Motorist.

See category 23 Transportation, topic 23.01 Motor Vehicles. See also WV Code 56-3-31.

5.21 REPLEVIN:

Action of replevin is specifically abolished but action of detinue includes many principles of replevin. (WV Code 55-7-4; WV Code 55-6-1). All existing common law forms of action have been abolished but civil action may be brought for recovery of specific personal property and plaintiff can obtain prejudgment hearing. (R.C.P. 2, WV Code 55-6-1). If defendant intends to remove, is removing, or has removed specific property claimed, attachment lies. See category 8 Debtor and Creditor, topic 8.02 Attachment.

Proceedings.

If immediate possession is desired, prejudgment hearing shall be held in not less than five nor more than ten days after proper service upon defendant. (WV Code 55-6-1). If court or magistrate shall conclude after hearing that there is substantial probability that plaintiff will prevail upon trial of action upon merits, it may order that, upon plaintiff's execution of bond in amount of at least double value of property claimed, property claimed can be seized by designated officer. (WV Code 55-6-2). Designated officer may, if necessary, break open and enter any house in order to seize such property. (WV Code 55-6-3). To prevent unconstitutional application of statute, order should state place which may be broken into, with demonstration of probable cause that item is there. (163 W. Va. 222, 256 S.E.2d 751; 423 F.Supp. 1033).

Repossession.

Defendant may retain possession of property or may regain possession of property within three days after such taking upon giving forthcoming bond for at least double value of property. (WV Code 55-6-4).

Judgment or Order.

Judgment may be for possession of property, or, if it cannot be recovered, for value thereof, and in either event, for damages for its detention and costs. (WV Code 55-6-6).

5.22 SEQUESTRATION:

No statutes. General equity principles apply. See R.C.P. 64, 70.

See category 8 Debtor and Creditor, topics 8.02 Attachment, 8.05 Executions, 8.09 Garnishment and 8.16 Receivers.

5.23 SERVICE:

See topic 5.20 Process.

5.24 STAY OF EXECUTION:

See topic 5.03 Appeal and Error; category 8 Debtor and Creditor, topic 8.05 Executions.

5.25 SUBMISSION OF CONTROVERSY:

No statutory provisions.

5.26 VENUE:

Except in cases covered by special provisions, venue is in county: (1) Wherein any defendant resides or cause of action arose, except that action of ejectment or unlawful detainer must be brought in county wherein land sought to be recovered, or some part thereof, is located, and if proceeding is brought in county wherein cause of action arose, if no defendants reside in such county, defendant may move for change of venue to county wherein defendant resides, and upon showing that such proposed change of venue would better afford convenience to parties and witnesses, and if ends of justice would be better served, court may grant such motion; (2) wherein corporation has its principal office or its chief officer resides, or such office not being in state and no officer residing therein, then wherein it does business, or if it be corporation organized under laws of this state, which has its principal office located outside of this state, and has no office or place of business within state, circuit court of county in which plaintiff resides or circuit court of county in which seat of state government is located, has jurisdiction of all actions against such corporation where cause of action arises in this state or grows out of rights of stockholders with respect to corporate management; (3) for recovery of land or to subject land to debt, wherein land or part thereof is; (4) where nonresident may be found and served with process or has property or debts due him; (5) for recovery of loss under policy of insurance, wherein insured property was situated or, in case of life, health or accident insurance, wherein insured person resided at date of his death or at time right of action accrued; (6) on behalf of state, wherein seat of government is. (WV Code 56-1-1). Venue of action against corporation may lie in county where cause of action arose. (182 W.Va. 488, 388 S.E.2d 844).

If judge of circuit court is interested, then action or suit may be brought in any county in adjoining circuit. (WV Code 56-1-1[a][7]). Once venue is proper for one defendant, it is proper for all other defendants subject to process. (179 W.Va. 230, 366 S.E.2d 738).

Forum Non Conveniens.

In 2007, West Virginia Legislature amended and enacted WV Code 56-1-1a, repealing unconstitutional venue provision and codifying doctrine of forum non conveniens. H.B. 2956, Reg. Sess. (W.Va. 2007). In any civil action, if court finds that in interest of justice and convenience of parties, claim or action would be more properly heard in forum outside this state, court shall decline to exercise jurisdiction and stay or dismiss claim or action under doctrine of forum non conveniens. In ruling on motion to stay or dismiss action, court shall consider factors provided in this section and plaintiff’s choice is entitled to great deference with less preference given when cause of action did not arise in this state and plaintiff is nonresident. (WV Code 56-1-1a).

Claims for and Against State and Its Officials.

Recovery of claims due state is in any court which would have jurisdiction if proceeding were brought by individual or if property or debt be attached in circuit court of county where such property may be found or person owing such debt may reside, or in circuit court of county in which seat of government is. (WV Code 14-1-2). Cases against principal state officers or state agencies, or affecting judgments or decrees on behalf of state, are prosecuted in circuit court of Kanawha County, West Virginia (WV Code 14-2-2[a]), but if action is proceeding for injunctive or mandamus relief involving taking, title, or collection for or prevention of damage to real property, suit may be brought in county wherein land is situated (WV Code 14-2-2[b]).

Magistrate Courts.

Provisions for venue in circuit courts apply to actions in magistrate courts. (WV Code 50-2-2; WV Code 56-1-1).

Real Property Actions.

Action of ejectment or of unlawful detainer must be brought in circuit court or other court given jurisdiction by law of county wherein land sought to be recovered, or some part thereof, is. (WV Code 55-3-1; 55-4-2; WV Code 56-1-1).

Eminent Domain.

In eminent domain, application by petition may be made to circuit court of county or to judge thereof in vacation in which land is situated, and if land lies in two counties, application in either county is proper. (WV Code 54-2-1).

Change of Venue.

Civil case may be removed from circuit court to any other circuit court or from court of limited jurisdiction to circuit court of same county, for good cause which would deprive party of fair trial. (WV Code 56-9-1–2; WV Code 56-1-1, 195 W. Va. 121, 464 S.E.2d 763). Trial Court Rule promulgated by Supreme Court of Appeals controls selection of temporary judge where disqualification exists as to circuit judge. (Trial Court Rule No. 17.01). Unless more specific statutes apply, discretionary change of venue within West Virginia may only be granted if proceeding is brought in county wherein cause of action arose, no defendant resides in such county, and may only be transferred to county in which defendant resides. (195 W. Va. 121, 464 S.E.2d 763). Common law doctrine of forum non conveniens has been abandoned in all areas of intrastate transfer. (195 W. Va. 121, 464 S.E.2d 763).

Criminal Venue.

Prosecutions for offenses committed, wholly or in part, without and made punishable within state may be in county in which offender is found or to which he is sent by any judge, justice or court. Circuit court may, on petition of accused and for good cause shown, order venue of trial of criminal case in magistrate court to be removed to some other county. (WV Code 50-2-2[b]).

Criminal Change of Venue.

Court may, on petition of accused and for good cause shown, order venue of trial of criminal case to be removed to some other county. (WV Code 62-3-13).

6 COURTS AND LEGISLATURE

6.01 COURTS:

United States District Courts.

Southern District.

Clerk's office: Charleston 300 Virginia Street East, Room 2400, P.O. Box 2546, zip code 25329.

Counties composing district are: Boone, Cabell, Clay, Fayette, Greenbrier, Jackson, Kanawha, Lincoln, Logan, Mason, McDowell, Mercer, Mingo, Monroe, Nicholas, Putnam, Raleigh, Roane, Summers, Wayne, Wirt, Wood and Wyoming.

Court sits at Huntington, Bluefield, Charleston, Parkersburg and Beckley.

Filing Fee.

Civil action, $350.

Northern District.

Clerk's office: Clarksburg, 500 West Pike Street, Room 301, P.O. Box 2857, zip code 26302.

Counties composing district are: Barbour, Berkeley, Braxton, Brooke, Calhoun, Doddridge, Gilmer, Grant, Hampshire, Hancock, Hardy, Harrison, Jefferson (with waters thereof), Lewis, Marion, Marshall, Mineral, Monongalia, Morgan, Ohio, Pendleton, Pleasants, Pocahontas, Preston, Randolph, Ritchie, Taylor, Tucker, Tyler, Upshur, Webster and Wetzel.

Court sits at Elkins, Wheeling, Clarksburg, and Martinsburg.

Filing Fee.

Civil action, $350.

Supreme Court of Appeals.

Jurisdiction.

Supreme Court of Appeals has original jurisdiction in cases of habeas corpus, mandamus, and prohibition. It has appellate jurisdiction in civil cases where matter in controversy, exclusive of costs, amounts to more than $100; in controversies concerning title or boundaries of land, probate of wills, appointment or qualification of personal representatives, guardians, committees or curators; or concerning mill, road, way, ferry, or landing; or right of corporation or county to levy tolls or taxes; also in cases of quo warranto, habeas corpus, mandamus, certiorari and prohibition; and in cases involving freedom, or constitutionality of law. It has appellate jurisdiction in criminal cases where there has been conviction for felony or misdemeanor in circuit court, and where conviction has been had in any inferior court and has been affirmed in circuit court and in cases relating to public revenue right of appeal shall belong to state, as well as to defendant in such other appellate jurisdiction in both civil and criminal cases as may be prescribed by law. (WV Code 51-1-3).

Supreme Court of Appeals consists of five justices, any three of whom constitute a quorum. (c. 51; art. 1, § 1). Justices designate one justice chief justice of court. (WV Code 51-1-2). Chambers for justices are located at Charleston.

Court sits at Charleston or in such other place within state as it may designate.

Circuit Courts.

There are 31 judicial circuits, each presided over by judge or judges elected for eight years. (WV Code 51-2-1). They have supervision and control of all proceedings before magistrates and other inferior tribunals, by mandamus, prohibition, and certiorari, and, except where restricted by constitution to some other court, they have original and general jurisdiction of all matters at law where amount in controversy, exclusive of interest, exceeds $3,000 § 51-2-2 amended; of all cases of habeas corpus, mandamus, quo warranto, and prohibition; of all cases in equity, of all crimes and misdemeanors (WV Code 51-2-2); and of all cases proceeding against juveniles (WV Code 49-5-2). They have appellate jurisdiction in all cases, civil and criminal, where appeal, writ of error, or supersedeas may be allowed to judgment or proceedings of any inferior tribunal. They also have such other jurisdiction as may be prescribed by law. (WV Code 51-2-2).

Place of Sitting.

Barbour County: Nineteenth Circuit; court sits at Philippi.

Berkeley County: Twenty-third Circuit; court sits at Martinsburg.

Boone County: Twenty-fifth Circuit; court sits at Madison.

Braxton County: Fourteenth Circuit; court sits at Sutton.

Brooke County: First Circuit; court sits at Wellsburg.

Cabell County: Sixth Circuit; court sits at Huntington.

Calhoun County: Fifth Circuit; court sits at Grantsville.

Clay County: Fourteenth Circuit; court sits at Clay.

Doddridge County: Third Circuit; court sits at West Union.

Fayette County: Twelfth Circuit; court sits at Fayetteville.

Gilmer County: Fourteenth Circuit; court sits at Glenville.

Grant County: Twenty-first Circuit; court sits at Petersburg.

Greenbrier County: Eleventh Circuit; court sits at Lewisburg.

Hampshire County: Twenty-second Circuit; court sits at Romney.

Hancock County: First Circuit; court sits at New Cumberland.

Hardy County: Twenty-second Circuit; court sits at Moorefield.

Harrison County: Fifteenth Circuit; court sits at Clarksburg.

Jackson County: Fifth Circuit; court sits at Ripley.

Jefferson County: Twenty-third Circuit; court sits at Charles Town.

Kanawha County: Thirteenth Circuit; court sits at Charleston.

Lewis County: Twenty-sixth Circuit; court sits at Weston.

Lincoln County: Twenty-fifth Circuit; court sits at Hamlin.

Logan County: Seventh Circuit; court sits at Logan.

Marion County: Sixteenth Circuit; court sits at Fairmont.

Marshall County: Second Circuit; court sits at Moundsville.

Mason County: Fifth Circuit; court sits at Point Pleasant.

McDowell County: Eighth Circuit; court sits at Welch.

Mercer County: Ninth Circuit; court sits at Princeton.

Mineral County: Twenty-first Circuit; court sits at Keyser.

Mingo County: Thirtieth Circuit; court sits at Williamson.

Monongalia County: Seventeenth Circuit; court sits at Morgantown.

Monroe County: Thirty-first Circuit; court sits at Union.

Morgan County: Twenty-third; court sits at Berkeley Springs.

Nicholas County: Twenty-eighth Circuit; court sits at Summersville.

Ohio County: First Circuit; court sits at Wheeling.

Pendleton County: Twenty-second Circuit; court sits at Franklin.

Pleasants County: Third Circuit; court sits at St. Marys.

Pocahontas County: Eleventh Circuit; court sits at Marlinton.

Preston County: Eighteenth Circuit; court sits at Kingwood.

Putnam County: Twenty-ninth Circuit; court sits at Winfield.

Raleigh County: Tenth Circuit; court sits at Beckley.

Randolph County: Twentieth Circuit; court sits at Elkins.

Ritchie County: Third Circuit; court sits at Harrisville.

Roane County: Fifth Circuit; court sits at Spencer.

Summers County: Thirty-first Circuit; court sits at Hinton.

Taylor County: Nineteenth Circuit; court sits at Grafton.

Tucker County: Twenty-first Circuit; court sits at Parsons.

Tyler County: Second Circuit; court sits at Middlebourne.

Upshur County: Twenty-sixth Circuit; court sits at Buckhannon.

Wayne County: Twenty-fourth Circuit; court sits at Wayne.

Webster County: Fourteenth Circuit; court sits at Webster Springs.

Wetzel County: Second Circuit; court sits at New Martinsville.

Wirt County: Fourth Circuit; court sits at Elizabeth.

Wood County: Fourth Circuit; court sits at Parkersburg.

Wyoming County: Twenty-seventh Circuit; court sits at Pineville.

Filing Fee.

Civil action, $145, except that fee for instituting action for medical professional liability is $260, and fee for instituting divorce action is $135. (WV Code 59-1-11).

County Commissions.

County commissions have jurisdiction in matters of probate, appointment and qualification of personal representatives, guardians, committees, curators, and settlement of their accounts, and in all matters relating to apprentices. Through their clerks they have custody of all deeds and other papers presented for record in their counties, and same shall be preserved or disposed of as prescribed by law. They also have superintendence and administration of internal police and fiscal affairs of their counties, including establishment and regulation of streets and the like (and naming or renaming thereof in cooperation with local postal authorities, division of highways, and directors of county emergency communications centers, to assure uniform, non-duplicative conversion of all rural routes to city-type addressing on permanent basis), bridges, public landings, ferries and mills, with authority to lay and disburse county levies. They are judges of election, of qualification and returns of their own members, and of all county and district officers. (WV Code 7-1-3).

They consist of three commissioners, any two of whom constitute quorum for transaction of business, except in case of any county which applied to state legislature and received assent of voters to alter or modify its county commission into tribunal, then provisions of that legislative act apply concerning number of commissioners and quorum. (WV Code 7-1-1).

Probate Courts.

Probate jurisdiction is exercised by county commission (WV Code 7-1-3), except in Ohio County where county clerk has jurisdiction. (125 W. Va. 545, 25 S.E.2d 497; WV Code 44-3-1).

County Magistrate Courts.

Civil jurisdiction of county magistrate courts extends throughout county, subject to certain limitations in following cases:

(1) Civil actions wherein value of amount in controversy or value of property sought does not exceed $5,000, exclusive of interest and costs. (WV Code 50-2-1).

(2) Unlawful entry or detainer of real property or involving wrongful occupation of residential rental property, so long as title to such property is not in dispute. (WV Code 50-2-1).

(3) Actions on bonds given under county magistrate statutes. (WV Code 50-2-1).

(4) Continuing jurisdiction concerning post-judgment process issued from magistrate court. (WV Code 50-2-1).

(5) Criminal jurisdiction of all misdemeanors committed in county and of preliminary examinations on warrants charging felonies committed in county; with authority to issue arrest warrants in all criminal matters, to issue warrants for search and seizure and to set and admit to bail except in capital cases. (WV Code 50-2-3).

(6) Concurrent jurisdiction of juvenile proceedings with circuit court for violations of West Virginia traffic laws or for violations of WV Code 60-6-9; WV Code 11-16-19; WV Code 20-1-1 et seq. (WV Code 49-5-2).

Do not have jurisdiction of actions in equity, of matters in eminent domain, of matters in which title to real estate is in issue, of proceedings seeking satisfaction of liens through sale of real estate, of actions for false imprisonment, malicious prosecution, slander or libel or any of extraordinary remedies. (WV Code 50-2-1). Magistrate courts may accept credit cards in payment of all costs, fines, fees, forfeitures, restitution or penalties in accordance with rules promulgated by Supreme Court of Appeals. (WV Code 50-3-2a).

Small Claims Courts.

None, but see subhead County Magistrates' Courts, supra.

Court of Claims.

Three judge court appointed by president of senate and speaker of house of delegates, by and with advice and consent of senate, with jurisdiction over following matters: (1) Claims and demands against state or its agencies which state in equity and good conscience should pay; (2) claims and demands in nature of setoff or counterclaim on part of state or any state agency; (3) advisory determinations on legal or equitable status of claims referred by state agencies. (WV Code 14-2-4, 13). Administers Crime Victims' Compensation Fund established under WV Code 14-2A-1 et seq.

Special provision has been made for claims against state by innocent persons who have been wrongly arrested, charged with crime and imprisoned or wrongly convicted and imprisoned. (WV Code 14-2-13a).

Jurisdiction does not extend to claims incurred by member of militia or national guard while in service of state, disability or death benefits, unemployment compensation, claims for relief or public assistance, or where claim could be maintained against state in courts of state. (WV Code 14-2-14).

Court regularly sits at state capitol, Charleston. Court may also convene at any county seat or any other location in state, including correctional institution, provided building is in keeping with dignity and decorum of state. (WV Code 14-2-7).

6.02 LEGISLATURE:

Regular 60 calendar day sessions held annually, beginning the second Wed. of Jan. (Feb. in 2005 and every 4th year). Governor may call special sessions. (Const., art. VI, §§ 18-19, 22). No initiative or referendum. Members and designated legislative employees may not be required to attend any court or administrative proceeding as party, witness or attorney from ten days before through 30 days after regular or extraordinary sessions, or from four days before through four days after interim meetings or party caucuses, and any action taken contrary to these provisions without consent of member involved shall be set aside if proper and timely notice is made as described. (WV Code 4-1-17).

Sunshine Law.

Applicability.

WV Code 6-9A applies to all "public agencies," defined as any administrative or legislative unit of state, county or municipal government, including any department, division, bureau, office, commission, authority, board, public corporation, section, committee, subcommittee or any other agency or subunit of foregoing, authorized by law to exercise some portion of executive or legislative power. “Public agency” does not include courts created by Const., art. VIII or system of family law masters created by c. 48A-4-1, et seq. (WV Code 6-9A-2). Applies to public service commission hearings when two or more commissioners convene for hearing. (162 W. Va. 839, 253 S.E.2d 377).

Requirements.

All decision-making meetings of all governing bodies shall be open to public. (WV Code 6-9A-3). “Meeting” means convening of governing body of public agency for which quorum is required to make or deliberate toward decision which results in official action. (WV Code 6-9A-2; 162 W. Va. 839, 253 S.E.2d 377). Such bodies shall promulgate rules by which date, time, place and agenda of all regularly scheduled meetings and date, time, place and purpose of all special meetings are made available, in advance, to public and news media, except in event of emergency requiring immediate official action. (WV Code 6-9A-3). Each governing body of executive branch of state shall file notice of any meeting with Secretary of State for publication in state register. Each notice shall state time, place and purpose of meeting. Each notice shall be filed in manner to allow each notice to appear in state register at least five days prior to date of meeting. However, emergency action can be taken by emergency meeting. Notice of such meeting shall state time, place and purpose of meeting and facts and circumstances of emergency. (WV Code 6-9A-3). Upon petition by adversely affected party any court of competent jurisdiction may invalidate any action taken at any meeting for which notice did not comply with requirements of this section. (WV Code 6-9A-3). Written minutes of all meetings must be made available to public within reasonable time after each meeting. (WV Code 6-9A-5). Closed sessions are allowed in certain enumerated circumstances but no decisions may be made therein. (WV Code 6-9A-4).

Penalties.

Circuit court may issue injunction to enforce purposes of art. Any actions taken or decisions made in violation of art. are voidable. No bond issue may be held void under art., however, if notice of meeting at which it was finally considered was given at least ten days prior by Class I advertisement published as specified. (WV Code 6-9A-6). Any person who is member of public body who willfully and knowingly violates provisions of art. shall be guilty of misdemeanor. (WV Code 6-9A-7).

Sunset Law.

(c. 4, art. 10).

Law schedules various “agencies” and “regulatory boards” (as defined in WV Code 4-10-3) for review. (WV Code 4-10-6, 7, 8, 10). Continues joint committee on government operations (WV Code 4-10-4, 5) with access to all records of every state agency. Committee is given power to hold public hearings, administer oaths, and subpoena witnesses and tangible evidence. (WV Code 4-10-5). Committee shall conduct performance and fiscal audit of each agency and regulatory board scheduled for review. (WV Code 4-10-7, 9). Joint committee may vote as to recommend whether agency or regulatory board should be continued, consolidated, or terminated. (WV Code 4-10-7, 9). If joint committee finds that further review is needed, then compliance review must be requested in writing with specific reasons for request and expected date of completion. (WV Code 4-10-11).

Any agency or board terminated by Legislature, shall continue in existence until first day of July of next succeeding year. (WV Code 4-10-12). If agency or board is re-established during this winding up period then agency or board is considered to continue. (WV Code 4-10-12). Agency must file report on or before June 30 of wind-up year of entity or program detailing disposition of assets and records. (WV Code 4-10-13).

6.03 REPORTS:

Supreme Court decisions are reported in W. Va. 1, 1863 to date. (WV Code 5A-3-23). Decisions since 1886 are also reported in Southeastern Reporter.

Digests are: Encyclopedic Digest of Virginia and West Virginia Reports, 13 vols., and supplement, 4 vols., W. Va. Reports 1-79; Cumulative Supplement to Encyclopedic Digest, 6 vols., W. Va. Reports 56-87; Supplement to Encyclopedic Digest, 2 vols., W. Va. Reports 88-94; Judicial Dictionary-Digest (Words and Phrases), 6 vols., 1863-1921, West Virginia Reports 1-214; Michie's Digest of Virginia and West Virginia Reports and supplements; West Pub. Co. Virginia and West Virginia Digest and Southeastern Digest, covering all West Virginia cases.

6.04 STATUTES:

The code of West Virginia revising, arranging and consolidating the general statutes of the state was adopted by the legislature in extraordinary session 1929, to take effect Jan. 1, 1931. It includes all of the general statutes in effect on the 1st day of Jan., 1931, as revised by the act adopting the code. Unofficial compilation in Michie's West Virginia Code, Annotated, which contains official code and amendments, additions and deletions since 1931. It is supplemented annually following regular session of legislature.

Uniform Acts (of the National Conference of Commissioners on Uniform State Laws) adopted include: Certification of Questions of Law (1996); Child Custody Jurisdiction (1981); Code of Military Justice (1982); † Commercial Code (1963); Common Interest Ownership (1986); Common Trust Fund (1945); Conservation Easement (1995); Controlled Substances (1971); Criminal Extradition (1937); Declaratory Judgments (1941); Determination of Death (1989); Disclaimer of Property Interests (2002); Disposition of Unclaimed Property (1997); Durable Power of Attorney (1986); Electronic Transactions (2001); Enforcement of Foreign Judgments (1989); Facsimile Signatures of Public Officials (1965); Federal Lien Registration (1989); Fraudulent Transfer (1986); Insurers Liquidation (1957); Interstate Arbitration of Inheritance and Death Taxes (1959); Interstate Compromise of Inheritance and Death Taxes (1959); Interstate Family Support (2002); Limited Liability Company (1996); Limited Partnership, 1976 Act (1981); Management of Institutional Funds (1979); Partnership (1953); Prudent Investor (1996); Prudent Management of Institutional Funds (2008); Reciprocal Enforcement of Support (2002); Recognition of Acknowledgments (1971); Revised Anatomical Gift Act (2008); Securities (1974); Simplification of Fiduciary Security Transfers (1961); Simultaneous Death (1953); State Administrative Procedure (1964); Statute of Limitations on Foreign Claims (1959); Statutory Rule Against Perpetuities (1992); TOD Security Registration (1994); Testamentary Additions to Trusts (1961); To Secure Attendance of Witnesses From Without a State in Criminal Proceedings (1937); Trade Secrets (1986); Transfers to Minors (1986); Unclaimed Property (1997); Unincorporated Nonprofit Association (1995).

†Uniform Commercial Code has been enacted. (c. 46).

†Adopted with significant variations, omissions and additions. For Uniform Commercial Code, see category 3 Business Regulation and Commerce, topics 3.09 Commercial Code, 3.12 Consumer Protection.

Other Uniform Acts adopted are: Commercial Driver's License (1989); Motor Vehicles Records Disclosure (1996).

For text of Uniform Acts falling within the scope of the Martindale-Hubbell Law Digests see Uniform and Model Acts section.

6.05 UNIFORM LAWS:

For list of Uniform Acts in force in this state see topic 6.04 Statutes. For text of Uniform Acts within the scope of the Martindale-Hubbell Law Digests see Uniform and Model Acts section.

7 CRIMINAL LAW

7.00A BAIL:

See topic 7.01 Criminal Law.

7.01 CRIMINAL LAW:

Common law, extensively modified by statute, governs substantive questions. West Virginia Rules of Criminal Procedure, based upon but in some respects different from Federal Rules, govern procedural questions. All offenses, except misdemeanors which may be heard in magistrate's courts and violations of municipal ordinances, are initiated by presentment or indictment of grand jury. (Const. art. III, § 4). However, Rule 7 of West Virginia Rules of Criminal Procedure provides for prosecution by information for any offense not punishable by life imprisonment where prosecution by indictment is waived by defendant. Defendant charged with offense in magistrate court has statutory right under WV Code 50-5-7 to have offenses tried in magistrate court. See 211 W. Va. 371, 566 S.E.2d 258. Bail prior to conviction must be set for all charges except those punishable by life imprisonment, where court has discretion to refuse bail. Post-conviction bail may, in discretion of court, be granted for all offenses not punishable by life imprisonment, or not involving use of firearm, other deadly weapon, or violence to person. (WV Code 62-1C-1). Supreme Court may review such denial of bail upon summary petition. (Id.). West Virginia is party to interstate compacts known as "Agreement on Detainers" (WV Code 62-14-1–7) and Uniform Criminal Extradition Act (WV Code 5-1-7–13). $75 shall be assessed upon each felony conviction in circuit court, $50 of it to be deposited in "Crime Victims Compensation Fund", and $25 of it to be deposited to West Virginia corrections fund. (WV Code 62-5-10). Furthermore, in West Virginia, new felony conviction will result in automatic revocation of parole without requiring any further hearing by parole board. See WV Code 62-12-19(h).

Criminal Venue.

See category 5 Civil Actions and Procedure, topic 5.26 Venue.

8 DEBTOR AND CREDITOR

8.01 ASSIGNMENTS:

Rights, debts and choses in action may be assigned, and no particular form is required. (46 W. Va. 473, 33 S.E. 279).

Uniform Commercial Code has been adopted. (c. 46). See category 3 Business Regulation and Commerce, topic 3.09 Commercial Code.

Instrument Transferring Title.

Any language which shows intention to assign is sufficient (95 F. Supp. 276), and assignment may be in oral or written form (64 W. Va. 172, 61 S.E. 40). For assignments of instruments and creation of security interests, see category 3 Business Regulation and Commerce, topic 3.09 Commercial Code.

Filing.

For provisions as to filing for perfection of security interest, see category 3 Business Regulation and Commerce, topic 3.09 Commercial Code.

Notice must be given to debtor by assignee to prevent him from making payment to assignor. Until debtor receives notice of assignment, debtor may safely make payment to original creditor. (12 W. Va. 772; WV Code 46-9-406). See category 3 Business Regulation and

Commerce, topic 3.09 Commercial Code.

Effect.

Generally, assignee of chose in action acquires all rights and remedies possessed by assignor. (129 W. Va. 146, 39 S.E.2d 321).

Assignment of Wages.

Assignments of future wages may be valid for up to one year and must be in writing, be notarized, be accepted by assignor's employer in writing, and contain certain provisions. (172 W.Va. 375, 305 S.E.2d 332; WV Code 21-5-3). 75% of periodical earnings or wages exempt. (WV Code 21-5-3). As to assignments for payment of consumer loan or consumer credit sale (see category 3 Business Regulation and Commerce, topic 3.12 Consumer Protection), assignment may not exceed 25% of weekly disposable earnings of assignor, and all assignments are revocable by employee at will. (WV Code 46A-2-116). Priority of assignments shall be made according to date and time of assignment. (WV Code 46A-2-116).

8.02 ATTACHMENT:

Actions in Which Allowed.

Attachment may issue in any civil action for recovery of any claim or debt in contract or tort. (WV Code 38-7-1).

Courts Which May Issue Writ.

No restrictions.

In Whose Favor Writ May Issue.

Any plaintiff, resident or nonresident.

Against Whom Writ May Issue.

Against any defendant, whether resident or nonresident.

Claims on Which Writ May Issue.

Statute does not require that claim sued on be payable within state. For debt arising from consumer credit sale, consumer lease or consumer loan, creditor may not attach wages or earnings prior to judgment. (WV Code 46A-2-118).

Notice and Hearing.

Prejudgment attachment allowed only upon notice to defendant and hearing to ascertain nature of obligation and facts justifying seizure. (WV Code 38-7-1).

Grounds.

Grounds for attachment are that defendant, or one of defendants: (1) Is foreign corporation or nonresident of state; (2) has left, or is about to leave, state with intent to defraud creditors; (3) so conceals himself that summons cannot be served upon him; (4) is removing or is about to remove property or proceeds of sale of property, or material part of such property or proceeds, out of State, so that process of execution on judgment or decree in such action or suit, when it is obtained, will be unavailing; or (5) is converting, or is about to convert, his property or material part thereof into money or securities, with intent to defraud creditors; or (6) has assigned or disposed of property or material part thereof, or is about to do so, with intent to defraud creditors; or (7) has property or rights in action which he conceals; or (8) fraudulently contracted debt or incurred liability for which action or suit is about to be or is brought. (WV Code 38-7-2).

Attachment may be sued out for debt or claim whether same is due or not, upon any of grounds aforesaid, but if debt or claim is not due, affidavit must show when it will become due; provided, that attachment for debt not due may not issue in case of foreign corporation upon ground of nonresidence alone or in case of nonresident, unless affidavit shows that defendant was resident of state when debt was contracted, and plaintiff believed he would remain resident of State at time he gave defendant credit. (WV Code 38-7-5).

Proceedings to Obtain.

Proceeding is commenced by filing in clerk's office affidavit of plaintiff or of some credible person, stating nature of claim, amount which affiant believes plaintiff is entitled to recover, and that affiant believes that one or more grounds for attachment exist. (WV Code 38-7-1). Plaintiff may designate person as being indebted or liable to, or having in his possession, effects of defendant. (WV Code 38-7-15).

Attachment Bond.

Plaintiff must, at time of suing out attachment, or afterwards, give bond with good security, approved by clerk issuing attachment, for at least double estimated value of property to be attached, and not less than $500 before officer may take possession of personal property levied upon. (WV Code 38-7-8).

Property Subject to Attachment.

Real or personal estate may be levied on except funds on deposit in IRA, including simplified employee pension (SEP), are exempt from attachment unless subject to excise or other tax on excess contributions under Internal Revenue Code (WV Code 38-7-7), and if bond be given property is seized (WV Code 38-7-8, 12). See WV Code 50-2-1 regarding extent to which magistrate court has jurisdiction.

Estate Tax.

Special lien created. (WV Code 11-11-17).

Indemnity.

Except as hereinbefore indicated (see supra, subhead Attachment Bond), officer executing writ has no right to demand indemnity before making levy. (WV Code 38-7-8–9).

Lien on realty exists from issuance of writ, but lien may be defeated by sale of such real estate to purchaser for value without notice before notice of lis pendens is filed. Lien on personalty dates from levy or service on garnishee but if no seizure is made lien does not attach to personalty sold for valuable consideration. (WV Code 38-7-19).

Priorities between attachments are determined according to dates of levies. (WV Code 38-7-19, 42). Support-related assignments are exception. Prior attachment is entitled to prior satisfaction, and subsequent attachments do not prorate.

Release of Property.

Defendant may secure release of property levied on by giving forthcoming bond in amount of claim and costs. (WV Code 38-7-20). Plaintiff, within 30 days after return thereof, may file exceptions to forthcoming bond given by defendant to attaching officer. If exceptions are sustained, court directs officer to file good bond. If officer fails to do so, plaintiff has remedy against attaching officer on official bond. (WV Code 38-7-21).

Sale.

Perishable property or property expensive to keep may be sold by order of court or judge in vacation. (WV Code 38-7-23).

Third Party Claims.

Any person claiming interest in property attached may file petition before sale of property or within one year from sale and before delivery of proceeds to plaintiff, and, on giving security for costs, may without other pleading have jury trial of his claim. (WV Code 38-7-41).

Vacation or Modification.

Attachment may be quashed for insufficiency of affidavit. (WV Code 38-7-32).

8.03 [RESERVED]

8.04 CREDITORS' SUITS:

Uniform Fraudulent Transfer Act adopted (c. 40, art. 1A) with modification to § 6.

Judgment liens may be enforced in equity court after execution has been returned showing no property found subject to such execution, or after two years from judgment where no execution has been issued. If rents and profits of real estate subject to judgment lien will not satisfy same in five years, sale may be decreed. (WV Code 38-3-9).

Parties.

If the number of lien holders is ten or less, then all must be made parties plaintiff or defendant; if over ten then suit may be brought by anyone for benefit of himself and such others as will come in. (WV Code 38-3-10).

Who May Prove Claims.

Any lien holder, whether a party to the suit or not, may prove and have allowed any claim constituting a lien against the real estate. (WV Code 38-3-10). All lien holders are entitled to notice by publication (WV Code 38-3-11), although parties in creditor's suit must still personally serve summons on all recorded lienholders as required by WV Code 38-3-11; 176 W. Va. 749, 349 S.E.2d 915.

Additional Suits.

Lien holders on real estate may not commence other suits after commencement of first suit but must join in original suit. (WV Code 38-3-15).

Judgments obtained during pendency of creditors' suit may be proved and allowed as if obtained before suit. Claims may be adjudicated by court even after commissioner's report is made but before decree of distribution of proceeds from sale of real estate and, if allowed, claimant may share in proceeds from sale of real estate. (WV Code 38-3-14).

Mechanics' Liens.

Subcontractors, workmen, artisans, mechanics, laborers, architects, surveyors and engineers enjoy express lien for compensation similar to that provided contractors in § 1. (WV Code 38-2-2, 5, 6, 6a). All materials, work and services rendered upon any one building or real property considered one contract, regardless of different performance dates and existence of several contracts. (WV Code 38-2-16).

Lienholders not proving claims before decree of court ordering sale or rental of real estate are barred from participation in proceeds of realty as against lienholders who proved claims, except as to surplus. (WV Code 38-3-13).

Future Advances.

Deed of trust or other lien of encumbrance duly recorded and perfected after recording of credit line deed of trust has priority over non-obligatory advances secured by credit line deed of trust if made after receipt of notice of such lien by secured party. (WV Code 38-1-14). However, any obligatory advances secured by credit line deed of trust or other related agreement enjoys priority under subsection (d) over other liens and encumbrances. (WV Code 38-1-14).

Notice of lis pendens is filed in office of clerk county commission of each county wherein real estate sought to be subjected to lien is situate, in order to protect liens against pendente lite purchaser or encumbrancer for valuable consideration and without notice. (WV Code 55-11-2).

Consumer Credit Protection.

All claims and defenses asserted against assignee under subsections (1), (3) and (4) may not exceed amount owing to assignee at time of assignment. (WV Code 46A-2-102). Where claim or defense grounded in fraud arises on or after July 1, 1990, "total sought" shall not exceed original obligation and provision for excess charges and penalties recoverable under WV Code 46A-5-101. (189 W. Va. 90, 428 S.E.2d 313; WV Code 46A-2-102). Borrower no longer required to give written notice to lender of claims and defenses within 180 day period to preserve same. (WV Code 46A-2-103). Amendments do not abrogate buyer's or lessee's common law rights. (WV Code 46A-2-103). Creditor is now required to send notice of consumer default to cosigner unless right to notice is waived. (WV Code 46A-2-106).

Consumer Credit Sale or Loan.

No surety, cosignor or endorser liability in creditor suit unless statutory notice of such liability is given in writing. (WV Code 46A-2-104).

Credit Service Organizations.

Statute prescribes certain prohibited conduct by credit services organizations and independent contractors thereof. (WV Code 46A-6C-3).

8.05 EXECUTIONS:

Fieri facias issues on money judgments (WV Code 38-4-5; R.C.P. 69[a]), against personal property (WV Code 38-4-6; R.C.P. 69[b]). For recovery of specific property, real or personal, writ of possession issues, and also fieri facias for damages or profits and costs. (WV Code 38-4-4).

Real estate is subjected to payment of judgment by action to enforce lien. See category 5 Civil Actions and Procedure, topic 5.15 Judgments.

Time of Issuance.

Courts may by general order, after fifteenth day of term, allow execution to issue ten days after judgment, and, for special cause, may allow issuance at earlier date. (WV Code 56-6-34). Execution may issue within ten years after judgment and, if so issued, other executions may issue within ten years from return day of last execution. (WV Code 38-3-18).

Exemptions.

See category 5 Civil Actions and Procedure, topic Exemptions.

Stays.

Execution may be stayed in discretion of courts of record pending motion to alter or amend judgment, motion for relief from judgment or order and motion to amend findings or for additional findings. (R.C.P. 62[b]). (See category 5 Civil Actions and Procedure, topic 5.03 Appeal and Error.)

Subsequent Writs.

Subject to limitations prescribed by law, subsequent executions may be issued at cost of judgment creditor, though prior writ is not yet returnable, and, if return has been made on former writ showing no execution, or that all or part of amount is not levied, or that levy was discharged by legal process not preventing new execution, a subsequent execution may issue at cost of judgment debtor. (WV Code 38-4-29). Subsequent executions do not impair liens under prior writs. (WV Code 38-5-23). When property sold under execution, or its value, is recovered from obligor in indemnifying bond given before sale, or from purchaser having right of action on such bond, after reasonable notice to debtor, subsequent execution for amount for which property sold will issue on scire facias or motion made within five years. (WV Code 38-4-30; substitution of parties, see R.C.P. 25; abolition of writ, see R.C.P. 60[b]).

A writ of venditioni exponas will issue in case a return shows property levied on to be unsold. Proceedings are as might have been on first execution, but if failure to sell on first writ was for want of bidders or insufficient bid, the notice of sale must so state, and must also state that sale will be peremptorily made. (WV Code 38-4-18).

Venditioni exponas may issue where levying officer dies before sale and leaves no deputy to act, in which case officer to whom writ is directed takes possession of property and proceeds as if he had levied thereon. (WV Code 38-4-19).

Liens.

Personal property possessed by judgment debtor at time of issuance of execution, or acquired on or before return day, is bound from time of delivery of execution to officer whether or not property is leviable (WV Code 38-4-8) except in case of exempt property (WV Code 38-4-12) and where property is assigned for valuable consideration or payment is made to judgment debtor, if assignee or person making payment is without notice (WV Code 38-4-9). The lien continues after the return day but is binding, in case of purchasers for value and without notice, only if docketed. Negotiable instruments, payments to judgment debtor by third persons without actual notice, and property sold in regular course of business are excepted from effect of docketed lien. (WV Code 38-4-10). Such lien ceases to exist only when right to levy under old or new writ ceases or is suspended. (WV Code 38-4-8).

Enforcement may be by action by the judgment creditor. (WV Code 38-5-20). Subsequent writs do not impair liens under previous writs. (WV Code 38-5-23).

Levy.

Levy may be made under fieri facias on goods and chattels, current money and bank notes, stamps, certificates of stock, negotiable warehouse receipts, negotiable evidences of indebtedness calling for liquidated sum of money (WV Code 38-4-6), excepting unripe crops and exempt property. See topic 8.06 Exemptions. No unreasonable levy may be made, and live animals must be fed while in possession of officer. (WV Code 38-4-15).

Return.

If execution is levied, return must be made immediately. If property levied on is sold, return must be made within not less than 30 days nor more than 90 days thereafter. If execution is not levied, return must be made within two months after its date. (WV Code 56-3-19; R.C.P., 69).

Priority.

Executions have priority in order received by officer. If delivered at same time, they are satisfied ratably. (WV Code 38-4-14).

Forthcoming Bonds.

Bonds, conditioned that property will be forthcoming at day and place of sale, may be given by debtor or claimant of property to officer levying under fieri facias, payable to creditors, to retain possession until sale (WV Code 38-6-7; regarding release of attachment by officer taking bond, see WV Code 38-7-20) unless writ is on forthcoming bond or on judgment against public officer for money received or in favor of surety of such officer or judgment rendered for default in office, or against overseer of poor, magistrate or constable for money received by him in official capacity, or upon execution endorsed “no forthcoming bond is to be taken.” (WV Code 38-6-14).

Sale.

Notice of sale of personal property under fieri facias must be posted at least ten days before sale, at door of court house and at some conspicuous place near residence of owner if he resides in county. If property is worth $500 or more, sale must also be advertised two weeks. Sale is for cash to highest bidder, unless otherwise provided. (WV Code 38-4-20). Perishable property or property expensive to keep may be sold in less than ten days by order of court. (WV Code 38-4-20).

Sales may be adjourned if there is not sufficient time to finish selling. (WV Code 38-4-21). Judgment debtor may demand appraisement (WV Code 38-4-22), and articles of property must be sold separately or as a whole, whichever way brings the highest price. If two-thirds of appraised value is bid, sale is for cash; otherwise upon credit, 50% in four months, and 50% in eight months, if bid on credit exceeds cash bid. (WV Code 38-4-23). If notes are not paid, clerk of court enters judgment thereon summarily. (WV Code 38-4-25). On failure of bidder to comply with terms, the officer may resell, either forthwith or under new advertisement, and bidder is liable for damages. (WV Code 38-4-17).

Redemption.

There is no redemption of property sold under execution.

Third Party Claims.

When there is doubt whether property is liable to levy, the officer may refuse to levy, or may restore possession after levy, unless indemnifying bond is given. (WV Code 38-6-1–2). Claimants to property levied on may suspend sale by furnishing a suspending bond. On such bond suit may be prosecuted in name of officer by the party for whose benefit the bond was given. (WV Code 38-6-3). The claimant may retain possession on giving a forthcoming bond. (WV Code 38-6-7).

Trial of title is on such issues as court may direct, and determination of claims may be had summarily if trial by jury is waived. (WV Code 56-10-1; WV Code 38-6-4).

Supplementary Proceedings.

After issuance of execution, clerk of court from which execution issued, or if it was issued by a county magistrate, clerk of circuit court of county in which such magistrate resides, upon application of execution creditor, issues summons to execution debtor, or to officer of debtor corporation, or to any debtor or bailee of either, to appear at time and place to be designated, before commissioner, to answer interrogatories. Questions and answers under oath must be reduced to writing, upon demand of any party, and certified by commissioner. Commissioner, in case of failure to appear and answer, or if answers are deemed evasive by him, may issue rule against debtor to show cause against attachment of his person for failure to answer. Objections to answers must be entered in proceedings and reported to court. (WV Code 38-5-1–3, 5).

Judgment creditor may suggest upon person indebted to judgment debtor for personal property belonging to judgment debtor and subject to writ or fieri facias. Summons issued by circuit clerk is returnable next term of court. (WV Code 38-5-10; R.C.P. 69; reaching investment securities owned by debtor, see § 46-8-112). Person suggested must file verified answer, disclosing nature and amount of indebtedness to judgment debtor and description of property held. (WV Code 38-5-13; verified pleadings, see R.C.P. 11). Person will be discharged from all liability under execution and to judgment debtor by delivering property or paying money upon service of summons, except where liability is evidenced by negotiable instrument. (WV Code 38-5-14–15). Court may order person suggested to answer and may empanel jury, unless waived by parties, to determine issues of liability, property, payment or delivery. (WV Code 38-5-17–18).

Real estate, out of the state, may be ordered forthwith conveyed to the officer to whom fieri facias was delivered. Personal property, tangible and intangible, and choses in action may be ordered delivered or assigned to officer. If conveyance, delivery or assignment be not made, debtor may be imprisoned until made. (WV Code 38-5-4–5).

Interrogatories and answers and report of proceedings are returned to court. (WV Code 38-5-6).

Property conveyed and delivered may be sold by order of court as may be deemed right. (WV Code 38-5-7). Real estate may be sold only after advertisement unless court directs otherwise, and personal property must be sold as if levied upon. (WV Code 38-5-8–9).

County Magistrate.

Execution issued by magistrate court treated as any other execution, except magistrate courts have no jurisdiction to satisfy judgment by sale of real estate or for matters wherein amount of controversy exceeds $5,000. (WV Code 50-2-1).

Writ of possession for specific personal property may issue on judgment therefor, as well as fieri facias for damages. (WV Code 38-4-4).

Body Execution.

Abolished. (WV Code 56-3-2).

8.06 EXEMPTIONS:

Exempt from execution and other process are individual’s interest: (i) Not to exceed $5,000 in value, in one motor vehicle; (ii) not to exceed $8,000 per aggregate value, in household goods, furniture, toys, animals, appliances, books and wearing apparel held primarily for personnel or household use; (iii) not to exceed $3,000, in any implements, professional books or tools of individual’s trade; (iv) not to exceed greater of $1,000 or 125% of applicable federal poverty level, in deposits in federally insured deposit institution, wages or salary; and (v) in funds on deposit in individual retirement accounts (IRA), including simplified employee pension (SEP); provided, however, that aggregate exemption for first four categories may not exceed $15,000. (WV Code 38-8-1). Cash surrender value and policy proceeds of life insurance policies are exempt from process to satisfy debts of insured. (WV Code 33-6-27). Proceeds of group life insurance policies and benefits of fraternal benefit societies are similarly exempt. (WV Code 33-6-28; WV Code 33-23-21). In addition, wrongful death benefits or payments (140 W. Va. 357, 84

S.E.2d 137), and workers' compensation payments (WV Code 23-4-18), and certain public pension payments and benefits are exempt from process to collect debts of deceased or employee covered.

Substitution.

Whether substitution is allowed is open question in West Virginia.

Waiver of Exemption.

Exemptions provided in c. 38, art. 8 may not be waived. (WV Code 38-8-15). Other exemptions may be waived by failure to assert them.

Notice of Exemption.

Notice of availability of exemption rights must be sent to judgment debtor upon suggestion of wages or property of judgment debtor in possession of third party. (174 W. Va. 53, 322 S.E.2d 37).

Debts Against Which Exemptions Not Allowed.

Exemptions provided in c. 38, art. 8 are not available against claims for child or spousal support, purchase money obligations in respect to which exemption is claimed, or against collection of taxes or levies. (WV Code 38-8-11).

Necessity of Claiming Exemption.

All exemptions, except as provided in c. 38, art. 8, are waived unless asserted. (70 W. Va. 484, 74 S.E. 517).

Earnings.

See topic 8.09 Garnishment.

Real Property.

See topic 8.10 Homesteads.

Bankruptcy.

Debtors domiciled in West Virginia are required to use state bankruptcy exemptions, which are identical to federal exemptions. (WV Code 38-10-4).

8.07 FORECLOSURE:

See topic 8.13 Liens; category 20 Mortgages, topic 20.04 Mortgages of Real Property.

8.08 FRAUDULENT SALES AND CONVEYANCES:

Uniform Commercial Code has been enacted. (c. 46).

Uniform Fraudulent Transfer Act enacted in 1986. (c. 40).

Property transfers made with intent to defraud present and future creditors void against all creditors of debtor. (c. 40, art. 1a, § 4).

Bulk Transfers.

Art. 6 of Uniform Commercial Code repealed effective June 8, 1992. See category 3 Business Regulation and Commerce, topic 3.09 Commercial Code.

8.09 GARNISHMENT:

Garnishment is available in aid of attachment, executions, and collection of taxes. State and its agencies and political subdivisions are subject to garnishment. (Const., art. 6, § 35; c. 38, art. 5B). Garnishment prior in time or filing will not take priority over voluntary assignment of wages to fulfill support obligation, or garnishment of wages to collect arrears in support, or notice of withholding from wages of amounts payable as support. (WV Code 38-7-42).

Child and Spousal Support.

See category 14 Family, topic 14.09 Husband and Wife, subhead Enforcement of Support Obligations.

Property Which May Be Reached.

Debt or liability owed to judgment debtor by third party or personal property of judgment debtor in possession or control of third party. (WV Code 38-5-10). Salary or wages payable to any person engaged in private employment, whether due and owing or to become due and owing. (WV Code 38-5A-2). Money due or to become due, within one year after issuance of suggestee execution, to judgment debtor from state, state agency, or any political subdivision of state. (WV Code 38-5B-2).

Jurisdiction.

Upon suggestion by judgment creditor that person is indebted or liable to judgment debtor or has in his possession or control personal property belonging to judgment debtor, summons against such person may be issued out of office of clerk of circuit court or magistrate court of county in which judgment creditor obtained writ of fieri facias, requiring such person to answer. (WV Code 38-5-10). Judgment creditor may apply to court in which judgment recovered, or court having jurisdiction of same, for suggestee execution to be issued against salary or wages of judgment debtor. (WV Code 38-5A-3).

Proceedings To Obtain.

Summons sued out, upon attested copy of writ of fieri facias being filed with clerk, requiring answer be filed in writing and under oath. (WV Code 38-5-10). Plaintiff may obtain order of attachment, after institution of civil action and service of summons upon defendant. (WV Code 38-7-1). Order of attachment may issue after prejudgment hearing upon notice. (WV Code 38-7-1). Plaintiff may designate person as being indebted or liable to, or having in his possession, effects of defendant. (WV Code 38-7-15). Creditor may not attach wages or earnings prior to judgment. (WV Code 46A-2-118). If satisfactory proof is made, by affidavit or otherwise, that amount due or to become due as salary or wages after deduction of all state and federal taxes exceeds in any week 30 times federal minimum hourly wage then in effect, court, if not court of record, or if court of record, clerk thereof, shall issue suggestee execution. (WV Code 38-5A-3; WV Code 38-5B-2). Notice of suggestee execution and copy of summons issued is required to be served upon person indebted or liable to judgment debtor or possessing personal property of judgment debtor in same manner as is required by Rule 4 of state Rules of Civil Procedure for trial courts of record. (WV Code 38-5-10). Execution may not be served upon employer for five days after notice has been given to judgment debtor. (WV Code 38-5A-4).

Answer of Garnishee.

Answer shall state, in addition to matters required to be disclosed by summons, whether liability of such person, or any part thereof, is represented by negotiable instrument, and, in case of bailee, whether there is outstanding any negotiable warehouse receipt, bill of lading, or other negotiable instrument for any of personal property in his possession or under his control. Such answer shall be verified in manner prescribed for verification of other pleadings. (WV Code 38-5-13; WV Code 38-7-24). On failure to answer, court may either compel person to answer or hear proof of matter in issue. (WV Code 38-5-17; WV Code 38-7-27). On suggestion of failure to fully disclose, court must impanel jury to inquire or if trial by jury waived by parties, court must proceed to hear and determine questions. (WV Code 38-5-18; WV Code 38-7-28).

Practice.

Person suggested answers. (WV Code 38-5-13). Person suggested, before return date of summons, may deliver property or pay money for which he is liable and he shall be discharged. (WV Code 38-5-14). If person suggested does not timely relinquish property, etc., court may order him to do so. (WV Code 38-5-15). When judgment creditor disputes fact that person suggested has not fully disclosed property, debts, etc., judgment creditor is entitled to impanelment of jury or if trial by jury waived by parties, judge to hear and determine questions. (WV Code 38-5-18). Suggestee execution issues against debtor's wages then due or to become due within one year from issuance of execution. At end of year unsatisfied execution may be renewed with same priority as original, if served within 30 days before expiration of original or last previous renewal. (WV Code 38-5A-3–7). At any time after execution under c. 38, art. 5A or c. 38, art. 5B on consumer earnings by creditor resulting from consumer credit sale or consumer loan, court may remove or reduce execution for undue hardship. (WV Code 46A-2-130). Suggestee execution also issues against money due or to become due from state, its agencies or political subdivisions. Such execution, where against payment by warrant of state auditor, is served on auditor; where against payment by agency, on auditor of such agency; if no auditor, then on officer making payment. Service on political subdivision is on its auditor or other person charged with duty of auditing or making payment. (Const., art. 6, § 35; WV Code 38-5B-2–5). Notice to judgment debtor that wages or accounts are being suggested must include clear statement that exemptions exist under state and federal law which may be applicable and statement of proper office in which to and method by which exemptions may be claimed. This notice must be sent certified mail return receipt requested to judgment debtor's last known address. (174 W. Va. 53, 322 S.E.2d 37).

Adverse Claims.

Any person suggested holding property under pledge or lien shall not be required to deliver up such property except upon payment to him of debt secured by pledge or lien. (WV Code 38-5-15).

Judgment.

Order of court against person suggested has effect of judgment and may be enforced in same manner as any other judgment. (WV Code 38-5-16).

Earnings.

Maximum of 20% of earnings, but shall in no event reduce amount payable per week to judgment debtor to less than 30 times federal minimum hourly wage then in effect. (WV Code 38-5A-3; WV Code 38-5B-2; WV Code 46A-2-130). Judgment debtors may exempt part of their wages. See topic 8.06 Exemptions.

8.10 HOMESTEADS:

Spouses, parents, and heads of households residing in state, or infant children of deceased or insane parents, owning homestead have homestead exemption from all debts and liabilities. (WV Code 38-9-1).

Limitation of Value.

$5,000. (WV Code 38-9-1, 3). In addition, homestead is exempt to value of $7,500 from debts and liabilities for hospital and medical expenses incurred from catastrophic illness or injury, exemption expires upon latest of death of debtor, debtor's spouse or debtor's disabled dependent who uses homestead as principal home. (WV Code 38-9-3).

Limitation of Area.

None.

Debts or Liabilities Against Which Exemption Not Available.

Claims for purchase money, permanent improvements, taxes or local levies due thereon. (WV Code 38-9-3).

Designation of Homestead.

Real property, chattel real, fixture or personal property owned and used as principal home of debtor and/or spouse and/or dependent. (WV Code 38-9-2[1]).

Claim of Exemption.

No formal procedure.

Waiver of Exemption.

Waiver void and unenforceable unless accompanied by consensual security interest in property covered, and security interest cannot be satisfied without recourse to sale of homestead. (WV Code 38-9-6).

Loss of Exemption.

No provision.

Alienation or Encumbrance.

No provision.

Proceeds of Sale.

Any creditor may assert claim in civil action alleging that value of homestead is greater than $5,000, and if court shall be satisfied that such allegation is true, it shall make such order or decree as may be necessary to subject such excess of value to payment of debt or demand of such creditor. If more than one creditor shall join in proceeding, and creditors' debts or claims be of equal priority, any excess over $5,000 shall be paid pro rata upon debt or claim of each. (WV Code 38-9-4).

Rights of Surviving Spouse and Family.

Minor children of decedent who had homestead may hold and enjoy same until all minor children attain age of 21, unless they die sooner. (WV Code 38-9-5).

See categories 14 Family, topic Husband and Wife; Property, topics Curtesy, Dower, Real Property; and Taxation.

Personal Income Tax Credit.

Low income person who is allowed $20,000 homestead exemption from assessed value of homestead for ad valorem property tax purposes shall be allowed refundable credit against taxes imposed equal to amount of ad valorem property taxes paid on up to first $10,000 taxable assessed value of homestead for property tax years that begin on or after first day of Jan. 2003. This credit is not available and person who is required and pay federal alternative minimum income tax. (WV Code 11-21-21).

Senior Citizens Property Tax Deferment.

Persons who have attained age 65 and who own homesteads, which are used and occupied by owner exclusively for residential purposes, are entitled to defer, without interest, payment of that portion of ad valorem property taxes assessed on homestead in excess of ad valorem taxes assessed for tax year immediately preceding tax year for which taxpayers application for deferment was filed. Deferment must terminate upon owner's death, sale of property or determination that property no longer qualifies for deferment. (W. Va. Code § 11-25-1 et seq.).

8.11 JUDGMENT NOTES:

Not recognized.

8.12 LEVY:

See topics 8.02 Attachment, 8.05 Executions.

8.13 LIENS:

Uniform Commercial Code has been enacted. (c. 46).

Credit Line Deed of Trust.

Deed of trust otherwise complying with provisions of c. 38, art. 1, and either clearly entitled at beginning thereof "A CREDIT LINE DEED OF TRUST," or stating conspicuously either immediately above or beneath caption of Credit Line Deed of Trust words "this instrument secures an obligation that may increase and decrease from time to time," is security for all indebtedness or other obligations secured thereby at time of recording and for all future advances secured thereby in aggregate principal amount outstanding at any time not to exceed maximum amount stated in credit line deed of trust. (WV Code 38-1-14[b]).

However, credit line deed of trust must specify whether future advances are intended to be obligatory. (WV Code 38-1-14[c]). Obligatory advances secured by credit line deed of trust will have same priority as advances made when credit line deed of trust is first recorded. (WV Code 38-1-14[e]). Advances that are not obligatory will be subject to intervening liens if lender has received written notice of intervening lien. (WV Code 38-1-14[e]).

Condominiums.

Liens in favor of association for any assessment levied against unit or fines imposed against unit owner (WV Code 36B-3-116); other liens affecting condominiums (WV Code 36B-3-117).

Federal Tax Liens.

Place of filing and related notice of lien and filing requirements. (WV Code 38-10-1).

Federal Lien Registration.

Applies to federal lien notices which under any act of Congress or any regulations adopted pursuant thereto are required or permitted to be filed in same manner as notices of federal tax liens. (c. 38, art 10A, § 1). Place of filing. (WV Code 38-10A-2). Execution of notices and certificates. (WV Code 38-10A-3). Duties of clerk of county commission. (WV Code 38-10A-4). Fees. (WV Code 38-10A-5).

Federal Superfund Liens.

Notices of liens for costs and damages under Superfund Liens Act are filed in office of clerk of county commission for county in which real property is located. (WV Code 38-10D-1[a]). If real property lies in more than one county, notice shall be filed in all counties where real property is situated. (WV Code 38-10D-1[c]).

Innkeepers, owners of hotels, lodging houses or restaurants, have a lien on the baggage, or other personal property of any kind, of guests or boarders on the premises for charges for board and lodging. (WV Code 38-11-5).

Judgment Liens.

Judgment for money rendered in state (except confession in vacation) shall be lien on all real estate of or to which defendant is or becomes possessed or entitled at or after date of such judgment or date on which such judgment could have been rendered, or on first day of term. (WV Code 38-3-6). Execution known as writ of fieri facias may be issued on judgment for money and shall create lien from time it is delivered to sheriff or other officer to be executed upon all personal property, or estate or interest therein, owned by judgment debtor at time of delivery of such writ, or which he may acquire on or before return date thereof, and such lien shall continue beyond return day of execution whether or not writ was levied, but shall cease when right of judgment creditor to levy writ ceases. (WV Code 38-4-5, 8).

Livestock or Vehicle Liens.

In favor of: Persons keeping live stock for hire, for their charges (WV Code 38-11-4); persons keeping garage or storage place for automobiles or other vehicles (WV Code 38-11-4); humane officers taking charge of animals, for expenses of care (WV Code 7-10-3); owners of stallions, jacks or bulls, on foals or calves (WV Code 38-11-8); person impounding trespassing animal, for damages and cost of keeping (WV Code 19-18-1); persons whose name and address are endorsed on certificate of title showing lien or encumbrance upon vehicle, trailer, semi-trailer, pole trailer or recreational vehicle, subsequent to owner or lienholder filing application with division of motor vehicles or issuance of same (WV Code 17A-4A-1).

Delivery of certificate of title showing lien or encumbrance permitted by electronic means. (WV Code 17A-4A-2).

If person possessing improver’s lien on motor vehicle releases that vehicle to secured party taking possession after default, secured party must, upon redemption of the vehicle by the debtor, resale, or other disposition by secured party, pay to improver lesser of: (i) The actual cost of improvements as measured by cost of inventory and labor; or (ii) $1,500. Improvements do not include nonstock changes in the appearance or performance of vehicle. If, after satisfaction of any prior perfected lien, proceeds remain from sale, redemption or other disposition of the vehicle by the secured party, proceeds must be used to satisfy any balance remaining on the improver’s lien. (WV Code 38-11-3).

Vendor’s lien on real estate exists only when expressly reserved on face of conveyance. (WV Code 38-1-1).

State Tax Liens.

Notice and recordation requirements for priority of state tax liens. (WV Code 38-10C-1). Written notice to be filed in office of clerk of county commission of county in which property is situate. (WV Code 38-10C-2). In addition to other statutory methods for collection of taxes, tax liens on real estate may be sold for taxes assessed thereon after owners of such real estate have been provided adequate notice and opportunity for redemption. (WV Code 11A-2-10).

Mechanics’ Liens.

Persons, firms and corporations which erect, build, construct, alter, remove, or repair buildings or other structures have lien on such buildings or other structures and on interest of owner thereof on lot of land whereon same stands or to which it may have been removed. Subcontractors or materialmen and persons who supply owner, contractor or subcontractor with materials, machinery, equipment, or other supplies or who perform any work in construction of building or other structure likewise have lien on building or other structure and on interest of owner in land on which it stands or to which it may have been removed. (WV Code 38-2-1–6a). Architects, surveyors, engineers and landscape architects have lien for all materials furnished and all work done as contractor, subcontractor, materialman, mechanic or laborer. (173 W.Va. 423, 317 S.E.2d 508; WV Code 38-2-6a).

Also, every workman, laborer or other person who performs work or labor for incorporated company or with its general contractor or with any subcontractor shall have lien for value of such work or labor upon all real estate and personal property of such company. (WV Code 38-2-31). “Value of such work or labor” includes fringe benefits contracted to be paid by employer for employee’s services. (167 W.Va. 630, 281 S.E.2d 238).

Notice of Lien.

When contractor, subcontractor, materialmen or laborers have contracts directly with owner, lien will be discharged from and after 100 days from completion of their part of contract unless notice of lien is recorded within such 100 days. (WV Code 38-2-7–14).

Recording Notice of Lien.

Clerk of county commission records notice of such liens in mechanic’s lien record. (WV Code 38-2-33).

Release and Assignment of Deed.

Lienholder of lien on any estate or money secured thereby must furnish to debtor proper, written release acknowledged by clerk of county commission in whose office lien is recorded after debt has been satisfied. Where lienholder fails to furnish proper release upon debtor’s request, circuit court may, on motion, after reasonable notice, and no good cause shown, direct clerk of county commission to execute such release, expenses of which shall be at cost of lienholder. Court shall also award reasonable attorney fees and court costs to person entitled to release. (WV Code 38-12-10).

Publication and Posting of Notice.

If owner on whose real estate improvements are made is nonresident, or if return is made “not found” on any notice of mechanic’s lien, then it is sufficient service to publish copy of such notice as Class II newspaper advertisement (WV Code 59-3-1 et seq.) in county where real estate lies and to post copy of said notice on property sought to be charged thereby, if done timely (WV Code 38-2-15).

Priorities.

Mechanics’ liens attach as of date such labor, materials, machinery or other equipment have begun to be furnished and have priority over any other lien secured by deed of trust or otherwise which is created subsequent to such date, except certain tax liens. Liens of laborers and materialmen, when perfected and preserved, take precedence over any lien taken by contractor or subcontractor indebted to them for labor or materials, and lien of subcontractor shall take precedence over any lien by contractor indebted to subcontractor, but all perfected liens of such laborers and materialmen and of such contractors and subcontractors respectfully are of equal dignity without priority among themselves. (WV Code 38-2-17–18).

Requiring Account.

Owner may, by written notice, require subcontractor, laborer or materialmen to file with owner an itemized account of work done and materials furnished, and failure of such person so to file same with owner within ten days after receipt of written notice from owner to do so, releases owner from all liens of such persons. Any person employed to do any work or furnish any materials to another who may have contracted with owner may notify owner that if they are not paid they will look to him for payment, and it is unnecessary for them to file account and notice with owner within 60 days of the completion of work unless owner requires in writing them to do so. (WV Code 38-2-19–20).

Limiting Liability of Owner.

If owner records his contract with general contractor in office of clerk of county commission, together with surety bond in penalty equal to contract price conditioned to pay mechanics' liens, his liability is limited to amount stipulated in contract (WV Code 38-2-22), but no payment by owner to contractor or subcontractor of any part of contract price may affect or limit lien of subcontractor, laborer or materialman (WV Code 38-2-21).

Public Works.

There can be no mechanic's lien on a public building or structure. (89 W. Va. 367, 109 S.E. 343). Contractor must give bond equal to cost of materials, machinery, equipment and labor going into such building or structure, conditioned for payment for such material, etc. (WV Code 38-2-39).

Self-Service Storage Liens.

This subject is governed by c. 38, art. 14, effective July 1, 2001.

Definition.

Self-service storage lien is lien imposed on personal property of occupant by owner of self-service storage facility. (WV Code 38-14-2[11]).

Duration.

Self-service storage lien attaches as of date personal property is stored within each leased space and remains lien until occupant has satisfied terms of rental agreement. (WV Code 38-14-3[a]).

Motor Vehicle or Watercraft.

In case of any motor vehicle or watercraft which is subject to lien previously recorded on certificate of title, owner has self-service storage lien on vehicle or watercraft so long as motor vehicle or watercraft remains stored within leased space. (WV Code 38-14-3[b]).

Rental agreement must contain statement, in bold type, advising occupant of existence of self-service storage lien and that property may be sold or destroyed (if value of property would not reasonably discharge costs of sale or lien) to satisfy lien. Rental agreement must also provide space for primary and secondary address as well as provision banning storage of hazardous waste or contraband in leased space. (WV Code 38-14-3[c]).

Late Fees.

Owner of space may charge late fee not in excess of greater of $10 or 10% of monthly rental fee. Fee may be charged for each month occupant defaults for period of 15 days or more. (WV Code 38-14-4).

Enforcement.

Before selling or destroying occupant's property, owner must provide requisite notice. (WV Code 38-14-5[c]). If default is not cured within 60 days after service of notice, owner may proceed to satisfy lien in accordance with provisions of statute. (WV Code 38-14-5[a-h]).

Availability of Other Legal Remedies.

Provisions of this article do not preempt or limit owner's use of any additional remedy otherwise allowed by law. (WV Code 38-14-6).

Duties, Care, Custody, and Control of Property.

Owner must use reasonable care in maintaining facility and may not offer to sell insurance to occupant to cover owner's risk or lack of care. (WV Code 38-14-7).

Inventory.

Prior to sale or destruction of property, owner must prepare detailed inventory of all personal property to be sold or destroyed and shall maintain inventory listing for period of two years from date of sale or destruction of property. Occupant is entitled to access to inventory list during period it is maintained by owner. (WV Code 38-14-7[b]).

Care, Custody and Control.

Unless rental agreement specifically provides otherwise, exclusive care, custody and control of all personal property stored in leased space remains vested in occupant. However, occupant may not use self-service storage facility for residential purposes. (WV Code 38-14-7[c-d]).

Hazardous Waste and Contraband.

Occupant may not store hazardous waste or contraband in leased space. Owner who discovers hazardous waste or contraband in leased space shall promptly notify appropriate law-enforcement agency and is authorized to deliver hazardous waste or contraband to appropriate law-enforcement agency. (WV Code 38-14-7[e]).

Savings Clause.

All rental agreements entered into prior to July 1, 2001, which have not been extended or renewed after that date remain valid and may be enforced or terminated in accordance with their terms or as permitted by any other state law. (WV Code 38-14-8).

For other liens mentioned or discussed in various topics of this digest, see topics 8.02 Attachment, Executions, Exemptions, Homesteads, Pledges; categories 3 Business Regulation and Commerce, topics Carriers, Commercial Code, Factors; Civil Actions and Procedure, topic Judgments; Legal Profession, topic Attorneys and Counselors; Mortgages, topic Mortgages of Real Property; Property, topic Landlord and Tenant; Taxation; Transportation, topic Motor Vehicles.

Enforcement.

In suits to enforce mechanic's liens, where claims are presented and lien is established, court shall order sale of property to satisfy such claims. (WV Code 38-2-35). At any time after a mechanics' lien creditor has given notice and filed notice of lien, owner or other person against whom lien is claimed may make application to circuit court having jurisdiction to allow owner or other person to deposit in escrow with court amount equal to sum set out in notice and to direct that lien be released. (WV Code 38-2-36). Persons desiring to avail themselves of mechanics' liens must commence suit within six months after notice of lien has been filed, or lien is discharged; but suit commenced by any person having such lien for purpose of preserving same, inures to benefit of all other persons having liens on same property and such persons may intervene. (WV Code 38-2-34). To enforce miscellaneous liens, such as, e.g., liens for lodging and board and certain livestock liens, lienor must give notice to individuals having interest in property subject to lien and sue upon debt within 30 days after delivery of notice. (WV Code 38-11-14).

Redemption.

There is no right to redeem property sold in enforcement of a statutory lien.

See also category 3 Business Regulation and Commerce, topic 3.09 Commercial Code.

8.14 MECHANICS' LIENS:

See topic 8.13 Liens.

8.15 PLEDGES:

Uniform Commercial Code has been enacted. (c. 46).

Remedies of Pledgee.

See category 3 Business Regulation and Commerce, topic 3.09 Commercial Code.

Personal property pledged is, for purpose of taxation, deemed property of party who has it in possession. (WV Code 11-3-8).

See also category 3 Business Regulation and Commerce, topic 3.09 Commercial Code.

8.16 RECEIVERS:

Circuit courts have general power to appoint general and special receivers with power of appointment largely in discretion of court. (WV Code 51-6-1; WV Code 53-6-1–2). There are also statutory provisions for receivers of insolvent state-regulated financial institutions. (WV Code 31A-7-4). Bonds are required for faithful performance of duties by special receiver. (WV Code 53-6-1).

General Receivers.

Circuit courts may appoint general receiver to receive and invest, in such manner and in such securities as court may order, all moneys paid into court, and also to pay out and dispose of same as court may direct. (WV Code 51-6-1).

Accounts.

Accounts of all general receivers are settled and examined annually by commissioners. (WV Code 51-6-10).

8.17 REDEMPTION:

See topics 8.05 Executions, Liens; categories 20 Mortgages, topic Mortgages of Real Property; Taxation.

8.18 SUPPLEMENTARY PROCEEDINGS:

See topic 8.05 Executions.

8.19 TRUSTEE PROCESS:

See topic 8.09 Garnishment.

8.20 USURY:

See category 3 Business Regulation and Commerce, topic 3.19 Interest.

9 DISPUTE RESOLUTION

9.01 ALTERNATIVE DISPUTE RESOLUTION:

Both state and federal court rules provide for opportunity of alternative dispute resolution.

Mandatory Dispute Resolution.

Federal Courts.

Selection of Cases for Mediation.

Mediation program mandatory involving those cases selected by assigned judicial officer. Any party may suggest mediation confidentially to judicial officer. (U.S. District Court Rules, S.D. W.Va. LR Civ. P. 5.01[a]; N.D. W.Va. LR Civ. P. 16.6[a]).

Motion for Exception to Mandatory Mediation.

Attorney or pro se party may file motion for leave not to engage in mediation. Presiding judicial officer may grant motion for good cause shown. (U.S. District Court Rules, S.D. W.Va. LR Civ. P. 16.6[b]).

Selection of Mediator.

Parties are expected to agree upon mediator, amount of mediator's fee, and responsibility for payment. If parties are unable to agree on mediator, then parties shall promptly notify presiding judicial officer, who shall without delay appoint mediator, set amount of mediator's fee, and assign responsibility for payment. Parties may request that judicial officer (who is not presiding judicial officer) conduct mediation. (U.S. District Court Rules, S.D. W.Va. LR Civ. P. 16.6.2).

Voluntary Dispute Resolution.

Federal Courts.

Other Alternative Dispute Resolution Programs.

Court may, from time to time, experiment with other forms of alternative dispute resolution including, but not limited to, early neutral evaluation, summary jury trials, mini-trials, arbitration and other types of mediation programs. (U.S. District Court Rules, N.D. W.Va. LR Civ. P. 16.07). Southern District of West Virginia also supports voluntary use of alternative dispute resolution and will endeavor to facilitate mediation or similar proceedings when presiding judicial officer finds request to do so appropriate and timely. Parties are free to engage in mediation without court involvement so long as it does not interfere with court-ordered deadlines. (U.S. District Court Rules, S.D. W.Va. LR Civ. P. 16.6[a]).

State Circuit Courts.

Scheduling Orders.

Judge shall enter scheduling order, to include possibility of extrajudicial procedures to resolve dispute. Schedule shall not be modified except by leave of Judge. (W.Va. R. Civ. P. 16[b]). Court may in its discretion direct attorneys for parties and any unrepresented parties to appear before it for conference or conferences before trial for purpose of facilitating settlement of case. (W.Va. R. Civ. P. 16[a]).

Selection of Cases for Mediation.

Court may on its own motion, upon motion by either party, or upon stipulation of parties, refer case to mediation. (Rule 25.03, Trial Court Rules for Trial Courts of Record).

Objection to Mediation Referral.

Parties have 15 days to object to referral order. Order may be modified for good cause shown. (Rule 25.03, Trial Court Rules for Trial Courts of Record; 218 W. Va. 239, 624 S.E.2d 586).

Selection of Mediator.

Parties, upon approval of court, may choose their own mediator, who may or may not be person listed on State Bar listing. In absence of such agreement, court shall designate mediator from State Bar listing, either by rotation or by some other neutral administrative procedure established by administrative order of chief judge of circuit court. (Rule 25.05, Trial Court Rules for Trial Courts of Record).

Participation.

No party may be compelled to settle case involuntarily or against party's judgment. (Rule 25.11, Trial Court Rules for Trial Courts of Record).

Scope.

Rules govern mediation in judicial system in West Virginia. Rules are to be read in pari materia with Rules 31 through 39 of West Virginia Rules of Practice and Procedure for Family Court. (Amended by order effective Mar. 8, 2004). (Rule 25.01, Trial Court Rules for Trial Courts of Record).

Pre-Suit Mediation.

West Virginia Code WV Code 55-7B-6 provides that health care provider has right to invoke pre-suit mediation to resolve claim before medical malpractice suit can be filed. (220 W. Va. 154, 640 S.E.2d 217).

Alternative Dispute Resolution Jurisdictional Bodies/Commissions.

Purpose of this article is to create commission to study various facets of alternative dispute resolutions. (c. 55, art. 15).

Alternative Dispute Resolution Acts.

Commission.

(c. 55, art. 15).

Arbitration.

(c. 55, art. 10).

Alternative Dispute Resolution (Mediation Program).

(U.S. District Court Rules, S.D. W.Va. LR Civ. P. 16.6; N.D. W.Va. LR Civ. P. 16.06).

Mediation.

Trial Court Rules for Trial Courts of Record, art. 25.

9.02 ARBITRATION AND AWARD:

Forms and Requisites of Submission.

Persons desiring to end controversy, whether there is suit pending or not, may submit to arbitration and agree submission may be entered of record in any court. (WV Code 55-10-1). Submission entered or agreed to be entered of record is irrevocable except by leave of court. (WV Code 55-10-2). Defenses may be made and set-offs allowed. Court may extend time for award. On return, award is entered as judgment or decree of court unless good cause to contrary shown. Court may tax allowance for service of arbitrators if not provided for. (WV Code 55-10-3).

Fiduciary, personal representative, guardian or committee may submit dispute to arbitration on obtaining leave of circuit court of county where appointed. (WV Code 55-10-7). If award is vacated, court may order resubmission if time within which award is to be made has not expired. Any party may have award corrected: (a) Where there is evident miscalculation of figures or evident mistake in description of any person, thing or property referred to in award; (b) where award is made upon matter not submitted or affecting merits of decision; (c) where award is imperfect in form not affecting merits. (WV Code 55-10-6). By contract, parties may make decision of third person or arbitrator condition precedent to right of action upon contract. (204 W. Va. 23, 511 S.E.2d 134).

Courts will seek to uphold submission despite defect in formality, according to obvious intent of parties. (101 W. Va. 683, 133 S.E. 381).

Judgment and Award.

Circuit court has jurisdiction to enforce arbitration award. Enforcement of arbitration award may be accomplished by entry of summary judgment upon complaint setting forth contract, arbitration provision and award of arbitrator(s). (172 W. Va. 199, 304 S.E.2d 353).

Arbitration award under proper commercial contract between parties who knowingly bargained for arbitration clause enforced except upon showing of actual fraud. (Id.).

Awards to be favorably and liberally construed and not to be set aside unless appear to be founded on grounds clearly illegal. (121 W. Va. 392, 3 S.E.2d 621). (§§ 55-10-2; 55-10-3; and 55-10-4).

Unless arbitration clause of contract specifically provides that time is of essence, reasonable delay beyond time established in contract for rendering of award will not invalidate award. Absent overt corruption or misconduct in arbitration itself, no arbitrator appointed by party may be challenged on ground of relationship to that party. All considerations relating to time value of money up to point when arbitration award is entered should be taken into consideration by arbitrator(s). Thereafter, however, if losing party to arbitration proceeding declines to pay award and elects to litigate matter in court, losing party must pay prejudgment interest until judgment is entered in court and must then pay post-judgment interest until award is actually tendered. (178 W. Va. 284, 359 S.E.2d 117).

Majority award is sufficient in arbitration proceeding unless agreement directing arbitration expressly requires that award be unanimous. (163 W. Va. 85, 254 S.E.2d 692). Arbitration awards cannot be attacked on grounds that were not raised before arbitrator, i.e. settlement was outside scope of agreement. (97 F. Appx. 400).

Enforcement.

Arbitrator's legal interpretation may only be overturned if it is in manifest disregard of law. Arbitration award is unenforceable when arbitrator understood and correctly stated law but proceeded to disregard same. (973 F.2d 276). Despite narrow lens through which courts review arbitration awards, those awards may be overturned if award violates well-settled and prevailing public policy, fails to draw its essence from contracts or reflects arbitrator's own notions of right and wrong. (471 F. Supp.2d 667).

Where, in absence of fraud, arbitration award has been made by arbitrator pursuant to arbitration provision, award is enforceable by motion for summary judgment upon complaint setting forth contract, arbitration provision and award of arbitrators. (172 W. Va. 199, 304 S.E.2d 353).

Automobile buyers are entitled to abandon manufacturer's "arbitration" remedy for allegedly defective vehicle and pursue other legal remedies under Lemon Law where agreement signed by buyers permitted such action if buyers were dissatisfied with dealer's or manufacturer's eventual performances or with decision of manufacturer's "customer arbitration board." (WV Code 46A-6A-1, et seq.; 184 W. Va. 149, 399 S.E.2d 860).

Mandatory Arbitration.

Former principle of West Virginia law invalidating arbitration clauses unless there was meaningful bargaining between parties invalidated by Federal Arbitration Act. (376 F. Supp.2d 685). Arbitration provision bargained for and not unconscionable or contract of adhesion is binding and specifically enforceable and may be condition precedent to litigation. (208 W. Va. 163, 539 S.E.2d 106; 165 W. Va. 98, 267 S.E.2d 435; and 215 W. Va. 132, 595 S.E.2d 289).

Generally, duty to arbitrate under arbitration clause in contract survives termination of contract. (171 W. Va. 770, 301 S.E.2d 860 and 179 W. Va. 31, 365 S.E.2d 76).

Powers of Arbitration.

Arbitrators may issue summons to compel attendance of witnesses at arbitration hearing. (WV Code 57-5-1).

Findings of fact and conclusions of law by arbitrator in employment dispute matter not binding upon West Virginia Department of Employment Security or courts of state. (166 W. Va. 675, 276 S.E.2d 821).

Arbitration award entered in favor of owner in dispute with general contractor had collateral estoppel effect and was binding on surety under performance bond where contract between contractor and owner contained arbitration agreement incorporated by reference into bond. Courts will not impose upon arbitrators concepts of due process developed in courts in face of explicit contractual provisions that provide other less time consuming and less expensive methods of dispute resolution. (9 U.S.C. § 1, et seq.; 190 W. Va. 363, 438 S.E.2d 543).

Rescission.

Coal miner against whom arbitration decision rendered under collective bargaining agreement, where issue involved safety claim, is not foreclosed from pursuing discrimination remedy under antidiscrimination provision contained in West Virginia Mine Safety Act or instituting common law retaliatory discharge action. (179 W. Va. 37, 365 S.E.2d 82; 179 W. Va.

549, 371 S.E.2d 46).

Language in collective bargaining agreement grievance procedure that union “may” submit grievance to arbitration meant union had to arbitrate or abandon grievance. Failure to exhaust remedies outlined in collective bargaining agreement’s grievance procedure, including failure to seek arbitration, precludes aggrieved employee from bringing civil action to challenge discharge from employment. (181 W. Va. 755, 384 S.E.2d 366).

Presumption in favor of arbitrability in construing arbitration clauses of contracts. (924 F.2d 550, cert. denied, 502 U.S. 818, 112 S.Ct. 74, 116 L.Ed.2d 48).

Uniform Arbitration Act Adoption/Deviation.

Uniform Arbitration Act not adopted.

Jurisdictional Arbitration Acts.

(WV Code 55-10-1, et seq.).

Federal Arbitration Act preempts state law where state rules of contract formation single out arbitration clauses and unreasonably burden ability to form arbitration agreements. (376 F. Supp.2d 685).

9.02A MEDIATION:

Jurisdictional Mediation Acts.

Rules of Procedure for Mediation of civil cases in circuit courts of West Virginia. (W. Va. Trial Court Rules, Rule 25, Mediation).

Alternative dispute resolution (Mediation Program). (U.S. District Court Rules, S.D. W.Va. LR Civ. P. 16.6; N.D. W.Va. LR Civ. P. 16.06).

Credentials of/Qualifications of/Standards for Mediators.

West Virginia State Bar shall maintain and make available to circuit courts, interested parties and public, list of persons willing and qualified to serve as mediators in circuit courts. State Bar shall establish minimum qualifications for training and experience, application procedure and fees, and other appropriate requirements for persons interested in being listed. (Rule 25.04, Trial Court Rules for Trial Courts of Record).

Mediator shall be disqualified in mediation in which mediator’s impartiality might reasonably be questioned. Any party may move court to disqualify mediator for good cause. (Rule 25.07, Trial Court Rules for Trial Courts of Record; U.S. District Court Rules S.D., Civ. P. 16.6.6).

10 DOCUMENTS AND RECORDS

10.01 ACKNOWLEDGMENTS:

Uniform Recognition of Acknowledgments Act has been adopted (c. 39, art. 1A); but it is only additional method of proving notarial acts and does not supersede prior state statutes regarding acknowledgments set forth below. (WV Code 39-1A-7).

Although not an act promulgated by Commissioners on Uniform State Laws, state statute characterized as “Uniform Notary Act” has also been adopted. (c. 29C, art. 1, et seq.). Although state Uniform Notary Act is to apply prospectively and to provide comprehensive and unified coverage of subject matter, it specifically provides that forms of acknowledgment set forth in Uniform Recognition of Acknowledgments Act (WV Code 39-1A-6) may be used and are sufficient under laws of state, whether acknowledgment was taken within or without state. (WV Code 29C-5-101).

Documents may be recorded in office of clerk of county commission if acknowledged by following officers:

Within State.

Clerk or president of county commission, magistrate, magistrate court clerk, magistrate court deputy clerk and magistrate assistant, notary public, commissioner appointed by governor, recorder or clerk of any court. (WV Code 29-4-12; WV Code 29C-3-101; WV Code 39-1-2, 3; WV Code 50-2-1).

Outside State but Within United States.

Clerk or president of county commission, magistrate, notary public, recorder, prothonotary, judge, clerk or deputy clerk of any court, commissioner appointed by governor of West Virginia or any other person authorized to perform notarial acts in place in which act is performed. (WV Code 39-2-3; 39-1A-1).

Outside United States.

Ambassador, minister plenipotentiary, minister resident chargé d'affaires, consul general, consul, deputy consul, vice consul, consular agent, officer of U.S. foreign service, vice consular agent, commercial agent or vice commercial agent of U.S.; proper officer of any court of record in country where taken; mayor or chief magistrate of any city, town or corporation in country where taken or any other person authorized by regulation of U.S. Department of State. (WV Code 39-1-3; 39-1A-1).

Persons in Military Service.

Acknowledgment of any person in U. S. military service, or the spouse of such person, including women's auxiliary units officially connected therewith, may be taken by commissioned officer of any branch of military service or auxiliary unit thereof, without stating place where same is taken and shall require no seal. Certifying officer must state his rank, branch and identification number. (WV Code 39-1-4a). See topic 10.03 Notaries Public.

General Requirements as to Taking.

Person acknowledging instrument must appear before and be personally known to official taking acknowledgment. Official taking acknowledgment may not have disqualifying interest. (WV Code 29C-3-102; WV Code 39-1A-3).

General Requirements of Certificate.

Should state date notary's commission expires (c. 29, art, 4, § 8) and, if taken by notary without state but within United States or its possessions, must be under his official seal (WV Code 39-1-3, 10). Under state Uniform Notary Act, as amended, notary commissioned after July 1, 1984, must at time of all notarial acts performed after Apr. 10, 1985, sign his official signature and rubber stamp "official seal" in manner capable of photographic reproduction near his signature. (WV Code 29C-4-101, 102). If taken without United States and its possessions, must be under official seal of officer taking the acknowledgment. (WV Code 39-1-3).

Married Women.

No special requirements.

Effect of Acknowledgment.

Makes instrument recordable in office of clerk of county commission. (WV Code 39-1-2).

Proof by Subscribing Witnesses.

Writings may be admitted to record upon proof of signature thereto by two witnesses before clerk of county commission of county wherein writing is to be recorded (WV Code 39-1-2), or, if executed without United States, by proof of signature thereto by two witnesses before any person having power to take acknowledgments without United States. (WV Code 39-1-3).

Authentication.

Upon written request and fee of $2, secretary of state shall provide certificate of authority, which shall certify that acknowledgment was taken by notary public authorized by state law, that signature is genuine and that acknowledgment was taken in accordance with state law. (WV Code 29C-8-101).

Forms.

Certificate of acknowledgment should be in effect as follows:

Forms

For individuals within the state:

State (territory or district) of. . . . . ., county of. . . . . ., to-wit: I,. . . . . . ., a commissioner appointed by the governor of the State of West Virginia, for the said State (or territory or district) of. . . . . .; (or I, a notary of said county; or as the case may be)* do certify that. . . . . ., whose name (names) is (are) signed to the writing above (hereto annexed) bearing date on the. . . . . . day of. . . . . . has (have) this day acknowledged the same before me, in my said. . . . . . . Given under my hand this. . . . . . day of. . . . . . . My commission expires the. . . . . . day of. . . . . ., 20. . . . . (c. 39, art. 1, § 4).

For husband and wife jointly:

As in first form to the *, and thereafter as follows:

Do certify. . . . . . and. . . . . ., his wife, whose names are signed to the writing above (or hereto annexed) bearing date the. . . . . . day of. . . . . ., 20. . . ., have this day acknowledged the same before me in my said. . . . . . . Given under my hand this. . . . . . day of. . . . . ., 20. . . . . My commission expires the. . . . . . day of. . . . . ., 20. . . . . (WV Code 39-1-5).

For husband or wife acknowledging separate from the other:

As in first form to the *, and thereafter as follows:

Do certify that. . . . . ., the wife of. . . . . ., (or the husband of. . . . . .), whose name is signed to the writing above (or hereto annexed) bearing date the. . . . . . day of. . . . . ., 20. . . ., has this day acknowledged the same before me in my said. . . . . . . Given under my hand this. . . . . . day of. . . . . ., 20. . . . . My commission expires the. . . . . . day of. . . . . ., 20. . . . . (WV Code 39-1-5).

For attorney in fact:

As in the first form to the *, and thereafter as follows:

Do certify that. . . . . ., whose name (names) is (are) signed to the writing above (or hereto annexed) bearing date the. . . . . . day of. . . . . ., 20. . . ., as attorney in fact for. . . . . ., has (have) this day acknowledged the same before me in my said. . . . . . Given under my hand this. . . . . . day of. . . . . ., 20. . . . . My commission expires the. . . . . . day of. . . . . ., 20. . . . . (WV Code 39-1-8)

For corporations:

As in first form to the *, and thereafter as follows:

Do certify that. . . . . . who signed the writing above (or hereto annexed) bearing date the. . . . . . day of. . . . . ., 20. . . ., for (name of corporation), has this day in my said county, before me, acknowledged the said writing to be the act and deed of said corporation.

Given under my hand this. . . . . . day of. . . . . ., 20. . . . .

My commission expires the. . . . . . day of. . . . . ., 20. . . . . (WV Code 39-1-9).

The above forms may be used for acknowledgments without the state by changing the attesting clause to read as follows:

Given under my hand and official seal this. . . . . . day of. . . . . ., 20. . . . . (WV Code 39-1-10).

For United States citizens outside of the United States: (description or location of place where acknowledgment is taken). On this. . . . . . day of. . . . . ., in the year. . . . . ., before me. . . . . (name and title of person acting as a notary and refer to law or authority granting power to act as a notary), personally appeared. . . . . . (name of citizen), known to me to be the person who executed the within. . . . . . (type of document) and acknowledged to me that. . . . . . (he) executed the same for the purposes therein stated.

....

(official signature and official seal ofperson acting as a notary and referenceto law or authority granting power toact as a notary)

(WV Code 29C-5-101).

By an individual who cannot write his name:

State of. . . . . ., County of. . . . .

On this. . . . . . day of. . . . . ., in the year. . . . . ., before me. . . . . . (name of notary), a notary public in and for said State, personally appeared. . . . . . (name of individual), known to me to be the person who, being unable to write his name, made his mark in my presence. I signed his name at his request and in his presence on the within. . . . . . (type of document) and he acknowledged to me and the two witnesses who have signed and printed their names and addresses hereto, that he made his mark on the same for the purposes therein stated.

....

(official signature and official seal ofnotary)

....

....

(signatures of two witnesses and theiraddresses)

(WV Code 29C-5-101).

For persons in military service: In The Military Service of The United States: I,. . . . ., a commissioned officer in the military service of the United States, do certify that. . . . ., who is a member of the military service of the United States (or of. . . . ., an auxiliary to the military forces of the United States), and/or. . . . . ., husband (or wife) of. . . . . ., a member of the military service of the United States (or of. . . . . ., an auxiliary to the military forces of the United States), whose name(s) is (are) signed to the foregoing writing bearing date on the. . . . day of. . . . . ., 20. . . ., has (have) this day acknowledged the same before me; and I further certify that I am a (state rank) in the. . . . . . of the United States and my identification number is. . . . . . . Given under my hand this. . . . day of. . . . . ., 20. . . . . (Signature and official title). (WV Code 39-1-4a).

No particular form for a certificate of proof by witnesses is authorized by statute.

Validating Acts.

General statutes validate defective acknowledgments made prior to their enactment within certain limitations. (WV Code 37-11-2).

Alternative to Acknowledgment or Proof.

Clerk of county commission in which writing is to be recorded shall admit same to record in his office as to any person whose name is signed thereto when it shall have been acknowledged by him, or proved by two witnesses. (WV Code 39-1-2).

10.02 AFFIDAVITS:

Within State.

Notary public, commissioners appointed by governor, magistrates, magistrate court clerks, magistrate court deputy clerks and magistrate assistants, any judge, county commissioner, clerk of any court. (WV Code 29-4-13; WV Code 50-2-1; WV Code 57-5-9; WV Code 29C-3-101).

Outside State, but Within United States.

Commissioner appointed by governor of West Virginia, notary, judge, clerk or deputy clerk of any court of record or any officer authorized to take oaths in that state. (WV Code 29-4-13; WV Code 39-1A-1; WV Code 57-5-9).

Outside United States.

Officer of U.S. foreign service, consular agent or any other person authorized by regulation of U.S. Department of State, any officer authorized by laws of that county. (WV Code 39-1A-1; WV Code 57-5-9).

Persons in or with U.S. Armed Forces.

Affidavit of person in U.S. military service, or spouse of such person, may be taken by commissioned officer of any branch of military service, without stating place where same is taken, and shall require no seal. Certifying officer must state rank, branch and identification number. (WV Code 39-1-4a; WV Code 57-5-9).

General Requirements as to Administration.

Varies according to type of affidavit, but see topic 10.01 Acknowledgments.

General Requirements of Jurat.

Seal is required if affidavit is taken out of state. Statement of date of expiration of notary's commission required if available. (WV Code 29C-4-102).

Form.

Notary public should write or print under text of oath the following:

"Subscribed and sworn before me this. . . day of. . . . . . ., 20. . .

....

(Official Signature and Official Seal of Notary)"

(WV Code 29C-5-102; WV Code 57-5-9).

Use of Affidavit.

Varies according to type of proceeding.

Alternative to Affidavit.

No statutory provision.

Miscellaneous.

State statute, "Uniform Notary Act" adopted, but not promulgated by Commissioners on Uniform State Laws. (c. 29C, art. 1, et seq.).

10.03 NOTARIES PUBLIC:

Qualification.

Applicant files application with secretary of state stating that he is American citizen or citizen of country that permits American citizens to serve as notaries therein, he is qualified elector of state if he is American citizen, he reads and writes English, and his commission has not been revoked during past ten years, and listing his West Virginia business or residential address and social security numbers. Oath and endorsement required. Qualifying fee of $50. Must provide handwritten specimen of official signature, along with fee of $2. Appointment is made by governor. Special provision for state and local government employees. (WV Code 29C-2-101, 201-204, 207, 301).

Seal.

Signature and seal generally required on notarial certificates, with specified exceptions. (WV Code 29C-4-101–104). Electronic signature sufficient. (WV Code 39A-1-11).

Powers and Duties.

Notary has power to take acknowledgments, administer oaths and affirmations, certify that copy of document is true copy of another document, and perform any other act permitted by law. (WV Code 29C-3-101, 102).

Territorial Extent of Powers and Term.

Entire state for ten year term. (WV Code 29C-2-102).

Expiration of Commission.

Seal must state expiration date of commission. (WV Code 29C-4-102).

Commissioners of Deeds.

Do not exist.

Fees.

Maximum fee of $2 for each notarial act. (WV Code 29C-4-301).

Officers of U.S. Armed Forces.

Have general notarial powers. (WV Code 39-1A-1).

10.04 RECORDS:

Clerk of county commission of each county is officer in charge of records relating to property located in that county. (WV Code 39-1-2).

Uniform Commercial Code has been enacted. (c. 46). See also category 3 Business Regulation and Commerce, topic 3.09 Commercial Code.

Recordable Instruments.

Clerks of county commissions admit deeds, contracts, powers of attorney, deeds of trust and mortgages of record in their offices. (WV Code 39-1-2).

Every such contract, every deed conveying any such estate or term, and every deed of gift or trust deed or mortgage conveying real estate shall be void, as to creditors, and subsequent purchasers for valuable consideration without notice, until and except from time that it is recorded. (WV Code 40-1-9).

Clerks of county commissions shall also admit of record notices of mechanic’s lien, judgment liens, adjudications of bankruptcy, leases or memoranda of lease, wills, affidavits of heirs, notices of lis pendens. (WV Code 38-2-13; 38-3-77; 38-10-2, 3; WV Code 41-5-3; WV Code 40-1-8; WV Code 44-1-13; WV Code 55-11-2).

Place of Recording.

Clerk of county commission is located at county seat. *For list of counties and county seats, see first page for this state in Volume containing Practice Profiles section.*

Requisites for Recording.

Clerks of county commissions admit deeds, contracts, powers of attorney or other writings to record in their respective offices, but only if they bear proper certificates of acknowledgment or are proved by two witnesses as required by West Virginia law, except as to instruments recorded pursuant to Uniform Commercial Code. (WV Code 39-1-2). See topic 10.01 Acknowledgments. Such writings, with all certificates of acknowledgment and plats, schedules and other papers annexed, are recorded by clerk in book indexed in names of grantors and grantees. (WV Code 39-1-11). Such writings may be photographically recorded. (WV Code 39-1-

11a). Clerks of county commissions shall admit to record in their respective offices, copy of any contract, deed of trust, mortgage, lease, memorandum of lease, release, assignment, power of attorney or any other instrument or writing certified by clerk of county commission of any other county of state as being true and correct copy from records of said county. (WV Code 39-1-2b). This section does not apply to deeds, wills or any instrument filed in accordance with Uniform Commercial Code (c. 46) (WV Code 39-1-2b).

Instruments securing payment of debt, acknowledged before clerk of county commission or proved by witnesses before clerk, must state name and residence of beneficial owner of debt, except that in case of mortgage or deed of trust securing more than five negotiable notes or bonds, payable to bearer, name and address of party with or by whom first negotiated must be shown. (WV Code 39-1-2).

Clerks may refuse to record instruments printed on both sides of paper or in smaller than ten-point type except upon payment of one and one-half times legal fee. (WV Code 39-1-11).

Instrument affecting title to real estate or personal property, including creation of lien thereon, shall not be recorded unless name of person who, and governmental agency, if any, which, prepared same appears at its conclusion. (WV Code 39-1-2a).

Recording Fees.

Clerk of county commission shall collect $15 for each deed of conveyance (with or without plat), trust deed, fixture filing or security agreement concerning real estate, lease, financing, continuation, termination or other statement under Uniform Commercial Code, plat or map (with no deed). Any other document $10. If any document contains more than five pages, there is charge of $1 for each additional page. (WV Code 59-1-10).

Recording pursuant to Uniform Commercial Code is $10 per instrument. (WV Code 46-9-525). See also category 21 Property, topic 21.06 Deeds, subhead Recording Fees.

Recording Taxes.

See category 22 Taxation.

Filing under Commercial Code.

See subhead Recording Fees, infra.

Foreign Conveyances or Encumbrances.

To be admitted to record writing must be executed and acknowledged in conformity with West Virginia law. (WV Code 39-1-2, 2a).

Indexes.

All deeds and other writings except wills, admitted to record in office of clerk of county commission of any county, must be indexed in name of grantor and grantee. (WV Code 39-2-2). Instruments recorded pursuant to Uniform Commercial Code indexed only as to debtor. (WV Code 46-9-519).

Effect of Recordation.

Writings which should be recorded are valid as against creditors and purchasers only from the time of recordation, and failure to so record in the county where property affected thereby is situate makes them void as to creditors and subsequent purchasers. Executed and acknowledged memorandum of lease may also be so recorded. (WV Code 40-1-8, 9, 10, 16). Copy of any record or paper in clerk's office of any county commission or in office of secretary of state, state treasurer or auditor, or in office of surveyor of lands of any county or of any other public officer, attested by officer in whose office same is, may be admitted as evidence in lieu of original. (WV Code 57-1-7). Where two or more writings embracing same property are admitted to record in same county on same day, that which was first admitted to record has priority, unless otherwise provided (WV Code 40-1-13), but certain categories of mechanics' liens are of equal dignity (WV Code 38-2-18). Where two or more judgments are rendered against same person and lien thereof on his real estate commences on same day, creditors having such judgment are entitled to share ratably. (WV Code 38-3-17). Where instrument affects property situated in more than one county, recording in one such county is ineffective with respect to property situated in another county. (WV Code 40-1-9, 10, 16). Purchasers are not affected by records of deeds or contracts made by persons under whom their titles are not derived nor by those made before grantor acquired legal title. (WV Code 40-1-15). Also, see category 3 Business Regulation and Commerce, topic 3.09 Commercial Code.

Lis Pendens.

When commencing suit or action to enforce lien on real estate or right or interest therein notice of suit should be recorded in county where such real estate is situated. Such notice is recorded in lis pendens record. (WV Code 55-11-1–2).

Lost Records.

If a writing is lost after being admitted to record in any county of state, or any other state, copy thereof from such record may be admitted to record in any other county. (WV Code 39-3-1).

Torrens system of land registration has not been adopted.

Transfer of Decedent's Title.

In case of devise, probate record is sufficient as to resident decedent. In case of nonresident decedent, authenticated copy of will and certificate of probate thereof is probated before county commission or clerk thereof in vacation if it appear from such copy that will is a valid will of land under laws of West Virginia. (WV Code 41-5-13). In case of intestacy, list of known heirs and distributees, verified by affidavit, which is prima facie correct, is recorded in fiduciary record in county clerk's office. (WV Code 44-1-13).

Vital Statistics.

Reports of births, deaths and marriages are filed with State Registrar of Vital Statistics, Room 165, 350 Capitol Street, Charleston, W. Va. 25301-3701, and also with clerk of applicable county commission. (WV Code 16-5-10, 19, 35).

Fees for Copies and Searches.

Fee charged by state registrar for any certified copy of certificates or searching of records is $10 for each copy or $10 for each three year period searched. State registrar must furnish, without fee, copies of birth or death certificates to state department of health and human resources when needed to present claims to federal government or state department of health and human resources. Accurate record must be kept of all furnished certificates. (WV Code 16-5-28; 16-5-29; 64 C.S.R. 32-11).

Establishing Birth Records.

When certificate of birth of person born in West Virginia has not been filed within one year, birth certificate may thereafter be issued at any time on proof of birth by other records prescribed by Division of Vital Statistics, State Health Department. (WV Code 16-5-28).

See category 3 Business Regulation and Commerce, topic 3.09 Commercial Code.

10.05 SEALS:

Uniform Commercial Code has been enacted. (c. 46).

Common law rules as to necessity of seals and distinction between sealed and unsealed instruments are in force, except where statutes otherwise provide, including Uniform Commercial Code. (c. 46).

Conveyance of Estate in Land.

Affixing of a seal is not necessary to give validity to any deed, trust deed, mortgage or other conveyance of estate in land. (WV Code 36-3-1). Affixing same gives instrument no additional force or effect. (WV Code 36-3-3).

Form.

Seal of the state or of a court, officer, or corporation affixed to any paper by impression of such seal is sufficient. For natural person, scroll by way of seal is sufficient, and such person may adopt as his seal any scroll made by another. (WV Code 2-2-6).

See also category 3 Business Regulation and Commerce, topic 3.09 Commercial Code.

10.06 TORRENS ACT:

Not adopted.

10.07 VITAL STATISTICS:

See topic 10.04 Records.

11 EMPLOYMENT

11.01 EMPLOYER AND EMPLOYEE:

See topic 11.02 Labor Relations.

11.02 LABOR RELATIONS:

State Commissioner of Labor, controls and manages division of labor (WV Code 21-1-1), supervises enforcement of labor laws, inspects factories and workshops and collects labor statistics (WV Code 21-1-3–4). He is also authorized, subject to consent of parties, to investigate and mediate labor disputes under State Labor-Management Relations Act, which is modeled after National Labor Relations Act and covers private employees not subject to National Labor Relations Board jurisdiction. (WV Code 21-1A-1).

Hours of Labor.

Covered employers must pay overtime after 40 hours a week. (WV Code 21-5C-3). During course of workday of six hours or more, all employers shall make available for each of their employees at least 20 minutes for meal breaks. (WV Code 21-3-10a). Nurse Overtime and Patient Safety Act prohibits hospital, with certain exceptions enumerated by statute, from mandating nurse, directly or through coercion, to accept assignment of overtime if doing so may, in nurse’s judgment, jeopardize patient or employee safety. In addition, hospital is prohibited from taking action against nurse for refusing overtime assignment, if nurse’s decision was based solely on patient or employee safety. Nurse who works 12 or more consecutive hours shall be allowed at least eight consecutive hours off-duty time. No nurse shall work more than 16 hours in 24-hour period. (WV Code 21-5F-3).

Wages.

Must be paid every two weeks. (WV Code 21-5-3). Owners and contractors may be liable for unpaid wages of their contractors and subcontractors. (WV Code 21-5-7; 209 W. Va. 32, 543 S.E.2d 313). If 8% of persons employed by employer are subject to any federal act relating to minimum wage, maximum hours and overtime compensation, present minimum wage is $5.15 per hour. (WV Code 21-5C-1). For all other employers who employ in any calendar week six or more employees, including state of West Virginia, its agencies, departments and all its political subdivisions, present minimum wage is $7.25 per hour. (WV Code 21-5C-2). Employee who is discharged must be paid within 72 hours. Employee who is laid off, quits or resigns must be paid by next regular payday. Individual corporate officers may be held liable for knowing violations. Failure to pay wages as required carries penalty of three times unpaid amount as liquidated damages, in addition to amount owed to employee. (WV Code 21-5-4; 200 W. Va. 352, 489 S.E.2d 734).

Disclosure of Job-Related Information.

Any employer or his or her designated agent who discloses job-related information that may be reasonably considered adverse about former or current employee to prospective employer of former or current employee is presumed to be acting in good faith and is immune from civil liability for disclosure or its consequences, provided that disclosure of such information shall be in writing and copy of any such disclosure shall be provided to former or current employee at time of disclosure. (WV Code 55-7-18a). Presumption of good faith is rebutted upon showing, by preponderance of evidence, that information disclosed was knowingly false; disclosed with reckless disregard for truth; deliberately misleading; rendered with malicious purpose toward former or current employee; or disclosed in violation of nondisclosure agreement or applicable law. (WV Code 55-7-18a).

Child Labor.

Employment of children under 14 is prohibited except in agriculture, horticulture, domestic services, work for parent or guardian’s business, work as radio or television actor and newspaper delivery. (WV Code 21-6-1). Employment of children under 18 is prohibited in certain occupations enumerated in statute. (WV Code 21-6-2). Child 14 or 15 years of age may be employed in any gainful occupation, except those enumerated in § 2, if he obtains special work permit from school authorities. School authorities may issue work permit by following procedures set forth in statute. (WV Code 21-6-3).

Equal Pay.

Discrimination between sexes in payment of wages for comparable work is prohibited. (WV Code 21-5B-3).

Discrimination on basis of race, religion, color, age (40 or above), blindness, place of national origin, ancestry, handicap, disability or sex is prohibited by employer of 12 or more persons. (WV Code 5-11-3, 9). Law is administered by West Virginia Human Rights Commission. (c. 5, art. 11).

Labor Unions.

West Virginia regulates activities of labor unions as they relate to private employers not subject to jurisdiction of National Labor Relations Board. (c. 21, art. 1A). West Virginia has no “right to work” law. Unions are not suable entities under West Virginia law, but must sue or be sued as classes, except that unions may seek declaratory relief in their own names. (170 W.Va. 294, 294 S.E.2d 96). Circuit courts have jurisdiction under Uniform Declaratory Judgments Act (WV Code 55-13-1–16) to protect rights afforded by West Virginia Labor Management Relations Act for Private Sector (c. 21, art. 1A), granted status of West Virginia Labor-Management

Relations Board as nonentity (178 W.Va. 729, 364 S.E.2d 257).

Workers' Compensation Act.

Employers' mutual insurance company was created effective Jan. 1, 2006, to insure employers against liability for occupational injuries and occupational diseases. Mutual company holds primary responsibility for administering and/or insuring workers' compensation claims. Mutual company is responsible for all claims occurring after July 1, 2005. All prior claims are paid from residual fund administered by West Virginia Insurance Commission. (WV Code 23-2C-3). *Note:* Beginning July 1, 2008, additional private carriers have been authorized to provide coverage. (WV Code 23-2C-15).

Employers and Employees Subject to Act.

All persons, firms, associations and corporations regularly employing any person in any form of industry or business in state, and state agencies or departments thereof, are subject to Act. Following employers are not required to obtain coverage, but may elect to do so: Employers of employees in domestic service, employers of five or fewer full time employees in agricultural service, employers of employees while employees are employed out of state except in cases of temporary employment out of state, casual employers as defined in statute, churches, employers engaged in organized professional sports activities or any volunteer rescue squad or police unit organized under government entity that also has paid employees. Political subdivisions may elect not to provide coverage for elected officials. (WV Code 23-2-1). Benefits are payable to employees or employers subject to Act, for personal injuries, including occupational pneumoconiosis and other occupational diseases, sustained in course of and resulting from their employment, or to their dependents where death ensues, on application to commissioner. (WV Code 23-4-1).

Agreements to Waive Act.

Employers and employees may not by contract, rule, or regulation, exempt themselves from or waive benefits of Act. (WV Code 23-2-7).

Remedy Under Act Exclusive.

Employers with appropriate coverage and self-insured employers complying with provisions of Act are not liable for damages as at common law for injuries or death sustained by employees unless such injuries or death are due to employer's deliberate intention or unless five very specific sets of factual circumstances are proved. (WV Code 23-4-2; see also, 172 W.Va. 769, 310 S.E.2d 835; 161 W. Va. 695, 246 S.E.2d 907).

Noncompliance by Employers.

Employers subject to Act, but who do not comply with provisions thereof (state and its political subdivisions as well as certain other governmental bodies excepted) are deprived of common law defenses of fellow servant rule, assumption of risk and contributory negligence, and also of defense that negligence was that of someone whose duties are prescribed by statute. (WV Code 23-2-8). Act sets forth provisions regarding payment of premiums, default thereof, and liability procedures for reinstatement after default for claims of uninsured subcontractor. (WV Code § 23-2-1d). (See WV Code 23-2-5 et seq.)

Time for Filing Claims.

Injury and death claims must be filed within six months after employee's injury or death. Fatality claims for occupational pneumoconiosis and occupational disease must be filed within six months of death. Proof of dependency must be filed within six months after death. Occupational pneumoconiosis claims must be filed within three years after: (1) Date that employee was last exposed to hazards of occupational pneumoconiosis for period of at least 60 days, or (2) earlier of date that physician told employee that he had occupational pneumoconiosis. Occupational disease claims must be filed within three years after: (1) Date that employee was last exposed to source of injury, or (2) earlier of date that physician told employee that he had occupational disease or date that employee should have known that he had occupational disease. (WV Code 23-4-15; 181 W.Va. 337, 382 S.E.2d 531). These time limits are jurisdictional, and claims are barred unless filed within statutory time limits. (WV Code 23-4-15). Carrier or self-insured employer retains continuous jurisdiction over all claims. Claimant may petition to reopen claim for further temporary total disability or permanent partial disability benefits upon showing of aggravation or progression of his injury or of facts not previously considered. Carrier or self-insured employer's authority to reopen claims is substantially limited, according to type of request. (WV Code 23-4-16).

Awards, Hearings and Appeals.

If employee was injured in course of or resulting from his employment, workers' compensation will pay for all injury-related medical expenses. If injury causes employee to miss more than three days of work, claimant may receive temporary total disability benefits during his recovery period. Carrier or self-insured employer will not pay more than 104 weeks of temporary total disability benefits. If injury causes permanent disability less than total disability, carrier or self-insured employer will make permanent partial disability award based on medical evidence or statutory schedule for severance. On and after Feb. 2, 1995, employee must have been awarded sum of 50% in prior permanent partial disability awards or have sustained occupational injury or disease which results in finding that employee has sustained medical impairment of 50% before pursuing permanent total disability award. Employee will be evaluated by permanent total disability reviewing board ("review board") to determine if he has 50% or more whole body impairment from either single occupational injury or occupational disease or combination thereof. If employee has less than 50% impairment, his request for permanent total disability benefits shall be denied. Review board may make permanent total disability award with benefits payable during remainder of employee's life under these circumstances: (1) If one or more work-related injuries totaling permanent partial disability of 85% or more render claimant unable to return to suitable employment; (2) if claimant is unable to work in field to which he is suited due to injury combined with other forces such as age, education and intelligence; or (3) if claimant is unemployable due to combined effects of multiple work-related injuries. (WV Code 23-4-6). To determine whether employee cannot work, review board will apply certain vocational standards. If employee has at least 50% whole body medical impairment but permanent total disability is denied and if employee accepts and continues to work at lesser paying job than he previously held, employee shall be eligible to receive temporary partial rehabilitation benefits for four years at rate specified in statute. (WV Code 23-4-6). *Note:* On and after July 1, 2003, all claims for permanent total disability benefits must be initiated by filing properly completed and substantiated application for benefits. Threshold requirements for permanent total disability consideration on and after that date include either sum total of 50% permanent partial disability in prior awards; single injury or disease that results in medical impairment of 50%; or 35% statutory disability. (WV Code 23-4-6[f]). After threshold has been met, review board will evaluate claim and consider whether injured employee is able to engage in substantial gainful activity requiring skills previously acquired or which can be acquired through training. Comparability of pre-injury to post-injury income will not be considered. Geographic availability of gainful employment within 75 miles will be considered. Permanent total disability benefits granted on and after July 1, 2003, will terminate when injured employee reaches 70 years of age. To confirm ongoing permanent total disability status of injured employee, commission or carrier (if employer is self-insured) may elect to have employee undergo one independent examination during each of the first five years afterwards, and then one each three year period until age 70. Claimant who voluntarily retires and receives old-age Social Security retirement benefits may not receive permanent total disability award. (WV Code 23-4-24). Upon making ruling on merits of claimant's right to or amount of compensation, office of administrative law judges has power to hear and determine all disputed claims. (WV Code 23-5-8). Employer, claimant, or Office of Insurance Commission (OIC) may appeal to Board of Review within 30 days of receipt of administrative law judge's order, but no later than 60 days after date of order. (WV Code 23-5-10). Three-member board of review hears claims during regular session as often as necessary at such times and places as chairman determines. (WV Code 23-5-11). After hearing, board of review must review record and enter final order affirming, reversing, modifying or remanding administrative law judge's final decision. (WV Code 23-5-12). Beginning Feb. 1, 2004, appeal board was replaced by board of review made up of three full-time members, each appointed by governor for staggered six-year terms. Party may petition state supreme court for review within 30 days of appeal board's or board of review's final decision. In reviewing matters appealed from board of review, court must give deference to findings, reasoning and conclusions of board, and court may not conduct de novo re-weighing of evidence. Where board's decision represents affirmation of prior rulings, such decision may only be reversed or modified if found to be based upon material misstatement or mischaracterization of evidence. For other cases, "clearly wrong" standard of review applies. (WV Code 23-5-15).

Rates of Compensation.

Rate of compensation for temporary total and permanent total disability is computed on basis of 662/3% of average weekly earnings, wherever earned, of injured employee, at date of injury, not to exceed 100% nor to fall below 331/3% of average weekly wage in state. Compensation for permanent partial disability is computed on basis of 662/3% of average weekly earnings, wherever earned, of injured employee, at date of injury, not to exceed 70% nor to fall below 331/3% of average weekly wage in state. Award for permanent partial disability is paid on basis of four weeks compensation for each percent of disability determined. (WV Code 23-4-6). Payments under self-insurance plans, pension plans and disability insurance policies will offset payments for permanent total disability awards granted after Apr. 8, 1993. (WV Code 23-4-23).

Death Benefits.

In cases where personal injury suffered by employee in course of and resulting from his employment causes death, and disability is continuous from date of such injury until date of death, or death results from occupational pneumoconiosis or from any other occupational disease, dependents of deceased employee are entitled, except as hereinafter stated, to receive compensation at same rate as for permanent total disability. Dependents in order of preference include widow or widower until death or remarriage; any child or children under 18 years of age or under 25 years of age when full-time student and any invalid child; wholly dependent father or mother; any other wholly dependent person for period of six years; and where no wholly dependent persons, $50 per month for period not to exceed six years for partially dependent persons. Benefits shall be paid to one or more of such dependents, or to such other person, as may be determined by commissioner, for benefit of all of dependents. If person securing permanent total disability benefits dies from cause other than disabling injury, his dependents are to be paid lump sum award equaling 104 times amount of weekly benefits which worker was receiving at time of his death. (WV Code 23-4-10, 11).

Direct Payments by Employer.

Compensation awards may be paid directly by employers who elect to do so, if such employers are of sufficient financial responsibility to pay compensation provided by act, or are of such financial responsibility and maintain their own benefit funds, unsupported by employees, or who furnish bond or other security to insure payments. (WV Code 23-2-9). Beginning July 1, 2004, all self-insured employers are responsible for administering workers' compensation claims. (WV Code 23-2-9).

Exemption and Assignability of Payments.

Payments are exempt from attachment or execution, and may not be assigned, but are subject to counsel fees not in excess of prescribed schedule. (WV Code 23-4-18).

Discriminatory Practices.

No employer may discriminate against present or former employee because such employee is receiving or has received or attempted to receive benefits. (WV Code 23-5A-1). Medical insurance provided by employer to employee or his dependents may not be cancelled or decreased while employee is temporarily disabled, and employer-employee relationship exists unless insurance of other similarly classified employees is also cancelled or decreased. (WV Code 23-5A-2). This latter section is preempted by 29 U.S.C. § 1144(a). (645 F. Supp. 352). No employer shall terminate injured employee off work due to compensable injury, except where injured employee committed separate dischargeable offense. No employer shall fail to reinstate employee who has sustained compensable injury to employee's former position if available and employee is not disabled. (WV Code 23-5A-3).

Unemployment compensation available to persons who are totally or partially unemployed. Person is eligible if he: (1) Has registered for work and continues to report to commissioner; (2) has made claim for benefits and has furnished his Social Security Number; (3) is able to work and is available for full-time work for which he is fitted by prior training or experience and is doing whatever reasonably prudent person in his circumstances would do to seek work; (4) has been totally or partially unemployed during his benefit year for waiting period of one week before week he claims benefits; (5) has within his base period been paid wages of at least $2,200 during more than one quarter of his base period or alternative base period; (6) participates in reemployment services, if commissioner requires. (WV Code 21A-6-1).

Claimant is disqualified for six weeks if he is discharged for simple misconduct and is disqualified indefinitely if he is discharged for gross misconduct or quit voluntarily without good cause involving fault on part of his employer. Gross misconduct includes willful destruction of his employer's property; assault on his employer or any fellow employee at place of employment or in course of employment; reporting to work in intoxicated condition or being intoxicated while at work; reporting to work under influence of any controlled substance or being under influence of any controlled substance while at work; adulterating or otherwise manipulating sample or specimen in order to thwart drug or alcohol test lawfully required of employee; refusal to submit to random testing for alcohol or illegal controlled substances for employees in safety sensitive positions; arson, theft, larceny or embezzlement in connection with work; or any act of misconduct where employee has received prior written warning that termination of employment would result from that act. (WV Code 21A-6-3; WV Code 21-10-2[m]; 214 W. Va. 419, 589 S.E.2d 797).

Claimants are disqualified indefinitely if they voluntarily quit without good cause involving fault on part of their employer. Claimants are further disqualified for periods during which they fail to apply for or accept suitable work; engage voluntarily in strike which causes their employers' operation to be substantially curtailed; receive severance pay, workers' compensation, unemployment compensation under laws of United States or any other state and/or remuneration in form of annuity, pension or other retirement pay from employer or from any trust fund contributed to by employer. (WV Code 21A-6-3).

Voluntary strikers are generally disqualified from receipt of unemployment benefits because they are neither totally nor partially unemployed; however, such disqualification does not attach where strikers are: (1) Denied rights of collective bargaining, (2) locked out by their employer in effort to effect either wage reduction or changes in hours or working conditions, or (3) if their employer requires strikers to accept wages, etc., "substantially less favorable" than those prevailing for similar work in locality. (WV Code 21A-6-3; 172 W. Va. 383, 305 S.E.2d 340).

Amount of compensation employee receives is dependent upon his rate of earning in past employment. Maximum benefit is based upon 662/3% of state's average weekly wage. (WV Code 21A-6-10).

Conviction for making false statements or failing to disclose material facts to obtain or increase benefits is punishable by fine of not less than $100 nor more than $1,000, or by imprisonment not to exceed 30 days, or both. (WV Code 21A-10-7). Repayment of benefits fraudulently obtained may be effected by institution of civil action and collection in same manner as collection of past-due payments from employers. (WV Code 21A-10-8).

Discharged employee receiving backpay award at customary wage rate after reinstatement shall be liable to repay benefits received during time he was unemployed. Employer required to make backpay award to individual receiving benefits shall withhold amount equal to benefits received and repay amount withheld to unemployment compensation trust fund. (WV Code 21A-7-11).

11.03 WORKERS' COMPENSATION LAW:

See topic 11.02 Labor Relations.

12 ENVIRONMENT

12.01 ENVIRONMENTAL REGULATION:

General Supervision.

Department of Environmental Protection (DEP) (c. 22, art. 1), is primary administrative agency with jurisdiction and control of water pollution (c. 22, art. 11), solid waste management and waste tire management (c. 22, art. 15), hazardous waste management (c. 22, art. 18), underground storage tanks (c. 22, art. 17), surface coal mining and reclamation (c. 22, art. 3), quarry mining (c. 22, art. 4), air quality (c. 22, art. 5), oil and gas (c. 22, art. 6) and carbon capture and storage (c. 22, art. 11A). Commercial solid waste facilities accepting more than 30,000 tons per year are required to obtain county or regional approval. (WV Code 22C-4-25; WV Code 22-15-8). Additionally, county or regional authorities are required to develop commercial solid waste siting plans. (WV Code 22C-4-8). Environmental Quality Board acts as an administrative appellate review board. Its rulemaking authority to establish water quality standards was transferred to DEP in 2005 which now has that responsibility. (c. 22B, art. 3). DEP has authority over air for permitting and enforcement. Air Quality Board has appellate authority. (c. 22B, art. 2). DEP has complete authority over surface mining and surface effects of underground mining. (c. 22, art. 3). Surface Mine Board has appellate authority. (c. 22B, art. 4). Releases of reportable quantity or hazardous substance that are emergency events harmful to public may require reporting to WV Department of Homeland Security. (c. 15, art. 5B). With reference to sanitary condition of streams, water supply sources, sanitation and sewage facilities, State Bureau of Public Health has complete authority. (c. 16, art. 13). With reference to providing access to information regarding hazardous substances, State Emergency Response Commission has complete authority. (c. 15, art. 5A). With reference to application of pesticides, Commissioner of Agriculture has complete authority. (WV Code 19-16A-1). With reference to litter control, Department of Natural Resources has complete authority. (c. 20, art. 7). Municipal governments may have authority to declare hazardous waste disposal a nuisance under their broad plenary powers. (175 W.Va. 479, 334 S.E.2d 616).

Prohibited Acts of Pollution.

Permit is required in order to engage in following activities: Allowing sewage, industrial wastes or other wastes to flow into waters of state, operating waste disposal system, injection well, to include carbon capture and storage, or operating mine or quarry expected to cause discharge, or operating any preparation plant (c. 22, art. 11 and 11A); constructing or operating any facility for storage, treatment or disposal of hazardous waste (c. 22, art. 18); constructing or operating any facility for processing, recycling or disposal of solid waste (c. 22, art. 15); constructing or modifying stationary source of air pollutants (c. 22, art. 10); engaging in surface-mining operations (c. 22, art. 3); and commencing work on any oil and gas well (c. 22, art. 6).

Municipal corporations are empowered to own, construct sewage collection systems and treatment plants under supervision and control of sanitary board. (c. 16, art. 13). Any person who places litter on public or private roadway or upon private property without consent of owner is guilty of misdemeanor. (WV Code 20-7-26).

Enforcement.

DEP authorized to recover through civil action or cooperative agreements, actual, reasonable and necessary amounts expended by agency or third party authorized by agency in responding to, evaluating or overseeing response to spill or accidental discharge of any pollutant that enters waters of state (WV Code 22-11-29); for water pollution, by administrative orders and injunctive proceedings and by administrative, civil and criminal proceedings, all instituted by DEP (WV Code 22-11-15, 16, 17, 19); for causing hazardous conditions, or violating Hazardous Waste Management Act by injunctive proceedings and by administrative, civil and criminal proceedings, instituted by DEP or by attorney general or prosecuting attorney for county in which hazard exists, cease and desist orders issued by DEP and citizen suits (WV Code 22-18-13, 15–19); for air pollution, by civil penalty brought by director of DEP and by criminal penalty by prosecuting attorney (WV Code 22-5-6). For damages from surface mining effects injunctive relief, treble damages. (WV Code 22-4-26). For damages caused by oil and gas drilling by administrative, injunctive, civil and criminal proceedings instituted by DEP. (WV Code 22-6-3, 34, 35, 39). For failure to report emergency release to Homeland Security that may harm to public by civil penalties. (WV Code 15-5b-3a). State Bureau of Public Health may hold investigations, inquiries and hearings pertaining to public health. (WV Code 16-1-16). For violations of Pesticide Use and Application Act, by civil or criminal proceedings instituted by Commissioner of Agriculture. (WV Code 19-16A-22). For unlawful disposal of litter by criminal or administrative proceedings. (WV Code 20-7-26).

Penalties.

Civil and criminal penalties for violation of Solid Waste Management Act range from fines of $100 to $50,000 per day and imprisonment of less than six months to up to five years. Injunctive relief is also available to state, as well as award of costs and attorney's fees. (WV Code 22-15-15). For water pollution and violation of Water Pollution Control Act, administrative penalties, civil penalties, injunctive relief and criminal penalties up to maximum of $25,000 per day of violation (WV Code 22-11-22, 24); for air pollution, civil penalty of $10,000 and criminal penalty of $25,000 per day for each day of failure or refusal to comply with any final order of Division of Air Quality; for misrepresentation of any material fact, fine up to $25,000 or six months imprisonment, or both (WV Code 22-5-6). For knowing violations of Hazardous Waste Management Act criminal fines up to $50,000 per day and criminal penalties of imprisonment of up to four years. Each day of willful violation constitutes separate offense with maximum fine of $50,000 per day and maximum term of imprisonment of two years. For other violations of Hazardous Waste Management Act, civil penalties with maximum of $25,000 for each day of violation. (WV Code 22-18-16, 17). For misrepresentation of material fact, fine up to $25,000 or imprisonment up to one year, or both. (WV Code 22-18-17). For violation of Surface Mining Act, civil or criminal penalties and imprisonment. Each day of continuing violation may be deemed separate violation with civil penalties up to $5,000 for each violation. Criminal penalties include fines up to $10,000 and imprisonment up to one year. (WV Code 22-3-17). For violations of oil and gas drilling requirements, civil or criminal penalties and imprisonment. Each day of continuing violation constitutes separate offense with civil penalties up to $2,500 for each violation. Criminal penalties include fines up to $5,000 and imprisonment up to one year. (WV Code 22-6-34). For violations of Pesticide Use and Application Act, fines up to $1,000 and imprisonment up to six months. (WV Code 19-16A-22). For unlawful disposal of litter, civil and criminal penalties, sentencing to include litter pick-up. (WV Code 20-7-26). For failure to report emergency release that may harm public penalties up to $100,000 and failure to provide access to emergency responders penalty up to $100,000. (WV Code 15-5b-3a[e]).

Permits.

Issued by DEP with reference to solid waste (c. 22, art. 15), hazardous waste (c. 20, art. 18), and for discharges into waters of state. (c. 22, art. 11). Air emissions permits are issued by director of DEP, pursuant to EPA approved state implementation plan. State has primacy and is authorized to administer NPDES permitting program and most of federal programs governing solid and hazardous wastes with reference to surface mining and surface effects of underground mining (WV Code 22-3-9, 10, 11), for oil and gas drilling (c. 22, art. 6), and air (c. 22, art. 5), for injection and storage of carbon dioxide (c. 22, art. 11A).

13 ESTATES AND TRUSTS

13.01 ADMINISTRATION:

See topic 13.10 Executors and Administrators.

13.02 ADVANCEMENTS:

See topic 13.07 Descent and Distribution.

13.03 ALLOWANCES:

See topic 13.10 Executors and Administrators.

13.04 CLAIMS:

See topic 13.10 Executors and Administrators; category 5 Civil Actions and Procedure, topic 5.17 Pleading.

13.05 DEATH:

Uniform Determination of Death Act adopted (c. 16, art. 10); bases determination of death upon irreversible cessation of circulatory and respiratory functions, or irreversible cessation of all functions of entire brain; civil and criminal immunity granted for persons making determination of death in accordance with act and for persons acting in reliance on such determination (WV Code 16-10-3).

Death presumed from absence unheard from for seven years. (WV Code 44-9-1). If person was last seen at any site within area proclaimed by governor to be in state of emergency on Nov. 5, 1985, due to flooding, person presumed dead if not found or identified within six months from date last seen at such site and who has not been heard from by those who would have heard from him if person was alive. (WV Code 44-9-1b). Administration of estate of absentee may be granted. (WV Code 44-9-3).

Presumptive finding of death of any person engaged in any service or employment of United States in connection with any hostilities, whether war be formally declared or not, by official of United States authorized by act of Congress to make such presumptive finding, creates presumption of death, and decedent’s estate may be administered forthwith, except that no final distribution may be made until three years after date of making of such presumptive findings. However, pending final distribution and upon order of court having probate jurisdiction, assets exempt from decedent’s debts may be used to support decedent’s dependents. After three years from termination of present war by presidential proclamation, estate may be fully administered. (WV Code 44-9-1a). Surviving spouse may not remarry before two years after presumptive finding, unless divorce proceeding was instituted prior to presumptive finding, or after spouse is heard from. (WV Code 44-9-1a).

Survivorship.

Uniform Simultaneous Death Act adopted. (c. 42, art. 5).

Action for death may be maintained by personal representative if brought within two years after death. Jury may award damages as it deems fair and just; and jury after providing for expenses for care, treatment and hospitalization of decedent incident to injury relating to death, shall direct in what proportions damages shall be distributed to persons who were financially dependent upon decedent or would otherwise be equitably entitled to share in such distribution. If no survivors, damages distributed in accordance with decedent's will, or, if none, between persons entitled to inherit under West Virginia's general law of descent. (WV Code 55-7-6). Damages may be awarded for sorrow, mental anguish, solace (including society and companionship), lost income and services and assistance from decedent, in addition to decedent's medical and funeral expenses. Cause of action does not abate upon death of wrongdoer. (WV Code 55-7-5, 6).

Actions surviving death are actions which survive at common law, causes of action for injuries to property, real or personal, for injuries to person not resulting in death, and for deceit and fraud. Such actions may be brought notwithstanding death of person entitled to recover or death of person liable. (WV Code 55-7-8a).

Actions for Tortious Death of Unborn Child.

Tortious injury and subsequent death of viable or nonviable unborn child is actionable under West Virginia's wrongful death statute by deceased child's personal representative. (WV Code 55-7-5, 155 W. Va. 431; 195 W. Va. 671, 466 S.E.2d 522).

Death Certificate.

See category 10 Documents and Records, topic 10.04 Records, subhead Vital Statistics.

Anatomical Gift Act adopted. (c. 16, art. 19). Authorizes individuals 18 and older to make anatomical gift in writing, which gift does not require concurrence of any other person after death of donor. Donor may amend or revoke anatomical gift in writing or by oral statement made in presence of two witnesses. Individual may also refuse to make gift, but in absence of refusal, surrogate may make gift on behalf of decedent. Hospitals required to make information available regarding donation process. Unlawful to transfer any human organ for valuable consideration. (WV Code 16-19-4). Unlawful to use body of newborn fetus for any medical experimentation or scientific investigation. (WV Code 16-19-3b).

West Virginia Health Care Decisions Act.

See topic 13.16 Wills, subhead West Virginia Health Care Decisions Act; category 15 Health, topic Health Care Decision Act. WV Code 16-30-4 revised to provide for Combined Medical Power of Attorney and Living Will.

Do Not Resuscitate Act.

(c. 16, art. 30C). All persons have right to make health care decisions including right to refuse cardiopulmonary resuscitation. (WV Code 16-30C-2).

West Virginia Natural Death Act.

See topic 13.16 Wills, subhead Living Will.

Uniform TOD Security Registration Act adopted. (c. 36, art. 10).

13.06 DECEDENTS' ESTATES:

See topics 13.07 Descent and Distribution, 13.10 Executors and Administrators, Wills; category 8 Debtor and Creditor, topic 8.10 Homesteads.

13.07 DESCENT AND DISTRIBUTION:

Descent.

Any part of decedent's estate not effectively disposed of by will passes by intestate succession to decedent's heirs in following course, except, as modified by decedent's will (WV Code 42-1-2[a]): (1) Entire estate to surviving spouse if decedent has no surviving descendant, or surviving descendants of decedent are also descendants of surviving spouse and there is no other descendant of surviving spouse who survives decedent; (2) three-fifths of estate to surviving spouse if decedent left descendants only by surviving spouse, but surviving spouse also has one or more surviving descendants by different partner; (3) one-half of estate to surviving spouse if decedent has one or more surviving descendants by different partner. (WV Code 42-1-3).

Any part of intestate estate not passing to surviving spouse, or entire estate if no surviving spouse, passes to surviving individuals in following course: (1) To decedent's descendants by representation; (2) to surviving parents equally, or to surviving parent; (3) to descendants of decedent's parents by representation; (4) half of estate to surviving paternal grandparents equally, or to surviving paternal grandparent, or to their descendants by representation if both deceased; and other half to decedent's maternal relatives in same matter; but if no surviving grandparent or descendant of grandparent on either paternal or maternal side, entire estate passes to decedent's relatives on other side in same manner as the half. (WV Code 42-1-3a).

Individual who does not survive decedent for 120 hours is deemed to predecease decedent. (WV Code 42-1-3b). This section not applicable if it would result in taking of intestate estate by state under WV Code 42-1-3c (escheat). (Id.).

Distribution is per capita at each generational level. (WV Code 42-1-3d).

"Slayer Rule" clarified to bar grandchild of testator from inheriting through her father who killed testator and committed suicide because unlawful killing was proved in civil action. (WV Code 42-4-2216 W. Va. 735, 613 S.E.2d 102).

Distribution of personalty is according to same rules as descent of realty. (WV Code 42-1-1[32]). But see topic 13.05 Death, subhead Action for Death.

Surviving Spouse.

For inheritance rights, see subhead Descent, supra. Rights of surviving spouse are barred upon conviction of felonious killing of, or conspiracy to kill, spouse. (WV Code 42-4-2). Surviving spouse may elect to take elective share against will or intestate share. (WV Code 42-3-1). See topic 13.16 Wills, subhead Election.

Half Blood.

Relatives of half blood inherit same share as if they were of whole blood. (WV Code 42-1-3e).

Posthumous Children or Other Issue.

Child in womb of mother at, and which may be born after, death of intestate, shall be capable of taking by inheritance as if child in being at such death. (WV Code 42-1-8). Individual in gestation at particular time is treated as living at that time if individual lives 120 hours or more after birth. (WV Code 42-1-3f).

Illegitimates inherit and transmit inheritance on part of their mother and father. (WV Code 42-1-5). Intermarriage of parents legitimatizes child born out of wedlock. (WV Code 42-1-6). Issue of marriage deemed null or dissolved are legitimate. (WV Code 42-1-7).

See category 14 Family, topic 14.01 Adoption.

Determination of Heirship.

Within 20 years after death of person dying intestate or failing to devise his real property, heirship may be determined by filing in the circuit court of the county where the land or any part thereof is situate, a petition against all interested parties. (WV Code 42-1-9).

Advancements are recognized as such if an individual dies intestate, only if: (1) Gift was declared advancement in contemporaneous writing by decedent, or acknowledged as advancement in writing by heir; or (2) either writing indicates that gift to be taken into account in computing division and distribution decedent's intestate estate. (WV Code 42-1-3g[a]).

Said property valued as of time heir came into possession or enjoyment of property or as of time of decedent's death, whichever first occurs. (WV Code 42-1-3g[b]).

Escheat.

If no taker under c. 42, art. 1, intestate estate passes to state. (WV Code 42-1-3c). County assessor is escheator. (WV Code 37-2-4). He furnishes list of such lands to commissioner of school lands, who proceeds against same as forfeited lands. (WV Code 37-2-5).

Uniform Unclaimed Property Act (1995 Act) adopted. (c. 36, art. 8). (36-8-13 changed, but this cite generally to c. 36, art. 8 is still accurate).

Uniform Disclaimer of Property Interests Act (1999 Act) adopted. (c. 42, art. 6).

Executors and Administrators.

See topic 13.10 Executors and Administrators.

13.07A ESTATES: (in property)

See category 21 Property, topic 21.16 Real Property.

13.08–13.09 [RESERVED]

13.10 EXECUTORS AND ADMINISTRATORS:

Probate jurisdiction is in county commissions. (WV Code 41-5-4; WV Code 44-1-4). During recess of county commissions, county clerk may act if there is no contest. (WV Code 41-5-10).

County commission may by proper process compel production of wills. (WV Code 41-5-3).

Notice of Administration.

Clerk of county commission shall publish within 30 days of filing of appraisement of any estate notice of administration including, but not limited to, name of decedent, and names and addresses of personal representative and fiduciary commissioner. (WV Code 44-1-14a). Within 90 days of first publication of notice of administration, personal representative shall serve copy of notice on: (1) Decedent's spouse; (2) if there is will, any beneficiaries; (3) if there is not will, any heirs; (4) trustees of any trust decedent had granted; and (5) any reasonably ascertainable creditors of decedent. (WV Code 44-1-14a).

Venue.

Venue is: (1) In county where decedent had mansion house or known residence; (2) if none, in county where any real estate is situated; (3) if none, in county where decedent died or had property at time of death; or (4) if decedent died out of state, in any county wherein there is property devised or bequeathed. (WV Code 41-5-4).

Objections to Qualifications of Personal Representative or Venue.

Any person with interest in estate who objects to qualifications of personal representative or venue or jurisdiction of court must file notice of objection with county commission within 90 days of date of first publication of notice of administration or within 30 days of notice sent by representative, whichever is later. (WV Code 44-1-14a).

Preference in right to administer is first in surviving spouse and then in distributees. If these do not apply within 30 days creditor or other person may be appointed. (WV Code 44-1-4).

Eligibility and Competency.

Resident banking institution may be executor or administrator (WV Code 31A-4-14), but nonresident individual, bank or corporation may not, except: (1) Nonresident individual as ancillary administrator of nonresident decedent's assets in this state if also executor or administrator in state of domicile; (2) nonresident individual as testamentary guardian of nonresident infant's assets if also guardian in state of domicile; (3) nonresident individual named in resident decedent's will as executor; and (4) nonresident individual who otherwise qualifies as administrator of resident decedent's assets (WV Code 44-5-3).

Curator, who must post bond, may be appointed pending will contest, during infancy or absence of executor, or until administration granted. He may sue for and receive debts due estate and rents and profits of and lease real estate and must account to executor or administrator. (WV Code 44-1-5).

Sheriff may be appointed without additional oath or security, where two months have elapsed without appointment, except in case of will contest or infancy, or absence of executor. Appointment may be revoked at any time. (WV Code 44-1-11).

Administrator C. T. A. is appointed where will names no executor or those named fail, refuse, have died or are unable to serve. (WV Code 44-1-2). Executor of executor has no authority over estate of first testator. (WV Code 44-1-9).

Administrators D. B. N.

After date of order revoking and annulling powers of personal representative, an administrator de bonis non may be appointed. (WV Code 44-5-6).

Qualification.

Executors (WV Code 44-1-1) and administrators must qualify by taking oath and giving bond (WV Code 44-1-6), except that commercial banks with trust powers are not required to give bond (WV Code 31A-4-18), and if will so directs, no bond is required of executor unless he is nonresident of state and bond is required under WV Code 44-5-3, or it is deemed proper for bond to be given (WV Code 44-1-8). Additional bond may be required. (WV Code 44-5-5).

Executors may not act until qualified except to provide for burial, pay reasonable funeral expenses and prevent waste. (WV Code 44-1-1).

Marriage.

Marriage of female personal representative does not affect her position, nor does it give her husband any right to be personal representative. (WV Code 44-1-10).

Accounting.

Personal representative must file accounting within 14 months after date of order qualifying him and within two months after any succeeding 12-month period during which he acquired any additional property of decedent. (WV Code 44-4-2).

Appraisement and Nonprobate Inventory.

Every estate must be appraised by decedent's personal representative. Appraisement form and nonprobate inventory form must be filed within 90 days of personal representative's qualification. Appraisement shall include questionnaire formulated by state tax commissioner. Property's appraisal is prima facie evidence of its value. (WV Code 44-1-14; WV Code 11-11-7). Personal representation in wrongful death action under WV Code 55-7-1 et seq. is not required to file appraisement. (WV Code 44-1-14).

Sales.

Personal representatives may not sell estate contrary to provisions of will except to pay funeral expenses, charges of administration or debts. (WV Code 44-1-18). Assets that are likely to be impaired in value, except exempt estate, must be sold at public auction. Credit may be given with good security (except for small sums). (WV Code 44-1-19). Other goods may be sold to make necessary payments, with due regard to specific legacies. (WV Code 44-1-20).

Easements.

Personal representatives have authority to conserve and preserve easements. (WV Code 44-1-29).

Taxes.

Personal representatives must list all real and personal property held by them as personal representatives. (WV Code 11-3-2). Taxes paid by personal representatives personally must be repaid out of estate. (WV Code 11A-1-11). In absence of contrary directions from decedent, federal estate taxes are paid proportionately by persons interested in gross estate, and such persons shall have benefit of any exemptions, deductions, and exclusions allowed by law in respect of such person. (WV Code 44-2-16a; WV Code 44-3A-18).

County Option.

Optional procedure for proof and allowance of claims against estates of decedents may be established at county's option. (c. 44, art. 3A).

Reference to Fiduciary Commissioner.

All estates appraised at more than $100,000 (exclusive of real estate specifically devised) must be referred to fiduciary commissioner for proof of debts and determination of priority of claims. In addition, special procedures are provided for estates with only single beneficiary. (WV Code 44-2-1; WV Code 44-3A-5).

Where estate is less than $100,000, unpaid creditors must file claim to cause estate referred to fiduciary commissioner. If unpaid creditor files claim against estate, and personal representative approves all such claims filed, no reference to fiduciary commissioner may be made.

Presentation of Claims.

Each month fiduciary commissioner must publish notice designating convenient time and place where claims against estates referred to him may be presented. Time so designated shall be 90 days from date of first publication of notice. Notice must be published as Class II legal advertisement. (WV Code 44-2-2; WV Code 44-3A-4).

Unmatured claims (WV Code 44-2-17; WV Code 44-3A-20), secured claims (WV Code 44-2-1, 5, 26, 28; 44-3A-32, 34) and claims on which actions were pending at time of decedent's death (WV Code 44-2-1, 5) must be presented like other claims.

Claims not presented (or not sued on, see infra subhead Actions) within time limited therefor are barred from participation in assets, except that claimant who had no actual knowledge of notice to creditors or of proceedings before fiduciary commissioner may prove his claim by action or suit after such time and participate in surplus, if any, remaining after payment of claims presented in time. (WV Code 44-2-26; WV Code 44-3A-32). Claimant who did not present his claim may, however, have a remedy against legatees or distributees. See infra, subhead Actions.

Disputed claim may be filed with fiduciary commissioner, who takes evidence and allows or rejects same, his action being subject to exception before county commission, from which appeal lies to circuit court. (WV Code 44-2-6, 18, 19; 44-3A-21, 22, 23).

Proof of Claims.

No particular form of proof is prescribed except that claims must be itemized, verified by affidavit, accompanied by vouchers and shall state character of claim, amount thereof, items on which and date from which interest runs and percent per annum, that claim is just and true and that creditor or any prior owner of claim has not received any part of claim stated to be owed or any security or satisfaction for same except as credited. Section does not apply to taxes. (WV Code 44-2-5; WV Code 44-3A-6).

Form.

Proof of claim may be in the following form:

Form

State of. . . . . ., County of. . . . . ., to-wit: This day personally appeared before the undersigned authority, a notary public within and for the county and state aforesaid,. . . . . ., who being first duly sworn deposes and says that he is. . . . . . (describe affiant), that he is duly authorized to make this affidavit, and that there is, as affiant verily believes, due and unpaid to said. . . . . . from. . . . . ., including principal and interest, after deducting all payments, credits and counterclaims made by said. . . . . . and to which said. . . . . . is entitled, the sum of $. . . . . .; that the foregoing account is just and true, and is for (here insert description of claim—open account, contract, note, bond judgment or decree, and whether secured by lien, together with statement showing payments, credits and counter claims) in the sum of $. . . . . . and that interest is due on said account as follows: (here insert items on which interest is due, rate of interest, and date or dates from which it runs); and that. . . . . . (or any prior owner of the claim, if such there was) has not received any part of said sum of $. . . . . . stated to be due, or any security or satisfaction for the same except as herein stated.

....

Taken, sworn to and subscribed before me this. . . . . . day of. . . . . ., 20. . . . .

Witness my hand and official seal.. . . . ., Notary Public.

My commission expires. . . . . ., 20. . . . .

Counter affidavit denying the claim may be filed by any interested party and the claim may be then tried before the commissioner. (WV Code 44-2-6; WV Code 44-3A-7).

Allowance or Rejection of Claims.

Claim presented must be allowed or rejected within five months after qualification of personal representative. (WV Code 44-2-16; WV Code 44-3A-17). Failure to act within such time does not adversely affect claim but merely entitles claimant to institute proceedings to compel action.

Payment of Claims.

After report of fiduciary commissioner on claims against decedent's estate has been confirmed or after six months from time of qualification of first executor or administrator, personal representative may pay claims allowed by fiduciary commissioner against decedent's estate or certified to him by courts wherein judgments or decrees have been rendered according to order of payment set forth in fiduciary commissioner's report or as directed by him. (WV Code 44-2-24; WV Code 44-3A-29). Where claim is unmatured, assets are reserved to provide for payment at maturity. (WV Code 44-2-17; WV Code 44-3A-20).

Actions.

There is no suspension of the right to sue on a claim against decedent. (WV Code 44-1-22). Executor or administrator may be sued for own acts or omissions. (WV Code 44-1-23). Action pending against decedent at time of death may be continued against personal representative if cause of action survives. (WV Code 56-8-5).

Creditor who did not present claim against estate may institute action thereon against legatees or distributees within two years after distribution of estate, but cannot recover costs of such action, and right to enforce such claim against real estate is barred to extent such claim could have been collected from decedent's personal assets. (WV Code 44-2-27–28; WV Code 44-3A-33, 34).

Personal Liability.

Personal representative who after six months from qualification, after confirmation of report, after withholding funds as directed by commissioner and no claim being made within time prescribed, distributes assets of estate in accordance with report is not personally liable for such distribution. (WV Code 44-2-23; WV Code 44-3A-28).

Personal representative not liable for omissions or mistakes in pleading or false pleading in excess of assets of decedent. (WV Code 44-1-27). Personal representative who loses any debt or other money, by negligence or improper conduct, is charged with amount that is lost and interest thereon. Personal representative who pays any debt on which recovery could be prevented by due diligence or actual knowledge shall not be allowed credit for such debt. (WV Code 44-4-11).

Personal representative may be held personally liable to extent of value of property in his possession for taxes due if he distributes any property before paying, securing payment or furnishing security for payment of those taxes. (WV Code 11-11-20).

Legatees and Distributees.

Personal representatives may not be compelled within six months of date of order conferring authority to pay legacies or distributive shares and not then until report of claims has been confirmed and no appeal taken. (WV Code 44-2-25; WV Code 44-3A-31). Legatees and distributees, after confirmation of report of account and lapse of six months from qualification of personal representative, may, by civil action after further lapse of one month, if no appeal be taken from order of confirmation, compel distribution. (WV Code 44-2-24; WV Code 44-3A-29; 44-4-20). Court on hearing may order payment or distribution in compliance with said order of confirmation and such order will be prima facie correct except as it appears upon pleadings and proof to be erroneous. (WV Code 44-4-20).

Final Settlement; Accounts.

County commissions appoint fiduciary commissioners who have general supervision of all fiduciary matters. All estates are referred to commissioners for settlement of fiduciaries' accounts, except that if estate is less than $100,000 or has only one beneficiary, personal representative may settle account directly with county commission. (WV Code 44-2-1; WV Code 44-3-1–2). Account must be filed within two months after termination of each 12 month period. (WV Code 44-4-2). Some counties have adopted optional procedure in c. 44, art. 3A, which creates office of fiduciary supervisor with general supervision over all fiduciary matters.

Personal representative may file either estate accounting, including affidavit as to payment of decedent's claims, debts and taxes, or waiver of final settlement where more than 90 days has elapsed since filing of notice of estate and notice to estate's creditors and beneficiaries. Waiver of final settlement includes affidavit by personal representative and must be signed by each beneficiary, except those who receive only bequest of cash or tangible personal property (for deaths after July 13, 2001). (WV Code 44-2-1, 29). (Short form settlement WV Code 44-3A-4a).

Lists of fiduciaries whose accounts are before fiduciary commissioner for settlement must be published as Class II legal advertisement, first publication being on first Mon. of every month or during same week. No account may be completed until completion of publication. (WV Code 44-4-9). Exceptions may be made to report within ten days after completion. (WV Code 44-4-15). Fiduciary commissioner must file report with evidence taken in office of county commission as soon as practicable after expiration of such ten days. (WV Code 44-4-16). County commission must examine each account, with all exceptions thereto, at first regular term occurring not less than ten days after report has been filed, and may recommit same to commissioner, or may confirm account in whole or in qualified manner. (WV Code 44-4-17). All estates referred to fiduciary must be settled within five years of fiduciary's appointment. (WV Code 44-4-14a).

Distribution is made in accordance with, and after confirmation by county commission of, report of commissioner to whom estate has been referred, who determines claims and assets remaining for distribution. (WV Code 44-2-24; WV Code 44-3A-29).

Distribution if Abroad.

No legislation.

Insolvent Estates.

Assets, when insufficient to meet claims, are applied in following order: (1) Costs and expenses of administration; (2) reasonable funeral expenses; (3) debts and taxes with preference under federal law; (4) unpaid child support which is due and owing at time of decedent's death; (5) debts and taxes with preference under other laws of West Virginia; (6) reasonable and necessary medical and hospital expenses of last illness of decedent, including compensation for persons attending decedent during illness; and (7) all other claims. If payment of all funeral expenses is provided for by irrevocable pre-need funeral contract or trust, neither decedent's estate nor surviving spouse has any obligation for payment of funeral expenses. (WV Code 44-2-21). Debts in same class must be paid pro rata, and each class must be paid in full before subsequent classes. Personal representatives are not liable to claimants of equal or superior dignity, for payments to other claimants, when made without notice after six months from qualification. (WV Code 44-2-22; WV Code 44-3A-27).

Allowances.

Upon death of either spouse or parent residing in state, surviving spouse or minor children may select and hold personal estate not over $1,000 in value, exempt from debts and liabilities of decedent. (WV Code 38-8-10). Exemption does not apply to claims for child or spousal support, for purchase money of personal estate, or for taxes or levies. (WV Code 38-8-11).

Although estates of dower and curtesy are abolished (WV Code 43-1-1), surviving spouse may exercise right to elective share or supplemental elective share (WV Code 42-3-1). See topic 13.16 Wills.

Provisions and fuel laid in for family use before death of decedent and live stock killed for food of family before sale or distribution need not be accounted for. (WV Code 44-1-17).

Compensation.

Compensation and expenses of personal representatives. (WV Code 44-4-12a).

When Administration Unnecessary.

Government or employer of decedent may pay not exceeding $5,000 due decedent to surviving spouse, if any, and, if not, then to distributees, after lapse of 120 days from death, if there has been no appointment of personal representative. (WV Code 44-1-28).

Foreign and Ancillary Administration.

Personal estate of nonresident decedent in hands of resident personal representative may be ordered paid to nonresident personal representative upon petition to, and order by, circuit court, if legatees or distributees are nonresident. (WV Code 44-11-6).

Stocks, bonds and certificates of debt may be transferred to foreign representative if transfer officer has no knowledge of representative within the state (WV Code 44-11-1), upon filing with transfer officer affidavit showing that notice of proposed transfer was published as Class II legal advertisement. If notice forbidding transfer is served, then transfer may only be made if otherwise lawful. (WV Code 44-11-2). Property or money in state belonging to resident infant, incompetent or insane person may be removed by nonresident guardian or committee only upon filing of petition in circuit court of county where guardian or committee was qualified or appointed, naming infant, incompetent or insane person as defendant and following hearing and public notice by Class II legal advertisement. Failure to follow these procedures causes forfeiture of guardian’s or committee’s bond for which such guardian or committee shall be jointly and severally liable with his or its surety. (WV Code 44-11-8a). See also Wills, subhead Foreign Probated Wills.

Uniform Fiduciaries Act not adopted.

Powers of Fiduciaries.

Incorporated reference of powers in will or trust. (WV Code 44-5A-2, 3).

Investments by Fiduciaries.

(c. 44, art. 6).

Uniform Principal and Income Act (1997 Act) adopted. (c. 44B). Revised 2007 to provide total return unitrusts. Revised 2009 WV Code 44B-4-409, 44B-5-505 and 44B-6-606 to comply with IRS comments regarding allocation of IRA distribution, to clarify formula for calculating how much trustee needs to distribute and how much to use to pay taxes, and to establish effective dates of foregoing amendments.

Uniform Simplification of Fiduciary Security Transfers Act adopted. (c. 31, art. 4D).

Uniform Transfers to Minors Act adopted. (c. 36, art. 7).

Uniform Prudent Investor Act adopted. (c. 44, art. 6C).

13.11 [RESERVED]

13.12 INTESTACY:

See topic 13.07 Descent and Distribution.

13.13 [RESERVED]

13.14 PROOF OF CLAIMS:

See topic 13.08 Executors and Administrators; category 5 Civil Actions and Procedure, topic 5.17 Pleading.

13.15 TRUSTS:

Rules of the common law and equity apply generally to trusts.

Eligibility and Competency.

Nonresident individual, foreign corporation or domestic corporation whose principal office is without state may not act as trustee in deed of trust, mortgage, bond or other instrument under which title to either real or personal property situate wholly in West Virginia is conveyed, transferred, encumbered or pledged to secure payment of money or performance of obligation. (WV Code 38-1A-1, 2).

Parol Trusts.

Declaration of trust of land must be in writing, except that if non-fraudulent conveyance of land is made in trust such trust may be enforced even though trust is not disclosed on face of conveyance. (WV Code 36-1-4). Declaration of trust of personal property without consideration must be in writing. (WV Code 36-1-6). Sections have no application to conveyances of personal or real property to another in trust for grantor or third party (WV Code 36-1-4, 6).

Trust estates are subject to debts of the cestui que trust as though their title was legal, except in case of spendthrift trusts for beneficiaries other than grantor, which are valid and enforceable. (WV Code 36-1-18; 71 W. Va. 72, 76 S.E. 968).

Nonresident Beneficiaries.

See category 21 Property, topic 21.01 Absentees.

Investments by fiduciaries regulated by c. 44, art. 6. Uniform Prudent Investor Act adopted effective July 1, 1996. (c. 44, art. 6C).

Gifts to Minors.

Uniform Transfers to Minors Act adopted. (c. 36, art. 7).

Uniform Fiduciaries Act not adopted.

Accounting.

No legislation.

Uniform Testamentary Additions to Trusts Act (1991) adopted. (WV Code 41-3-8–11).

Uniform Common Trust Fund Act (1938 Act) adopted, subject to proviso that trustee funds shall be invested only in securities legal for all types of fiduciary investments, except where trust instrument provides otherwise. (WV Code 44-6-6–8).

Eminent Scholars Endowment Trust Funds Act adopted. See c. 18B, art. 18.

Uniform Principal and Income Act (1997 Act) adopted. (c. 44B).

Uniform Management of Institutional Funds Act (1972 Act) adopted. (WV Code 44-6A-1–8).

Massachusetts Trusts.

See category 2 Business Organizations, topic 2.04 Joint Stock Companies.

Securities in Name of Nominee.

Any bank or trust company authorized to exercise trust powers under laws of state, which holds securities in a fiduciary capacity, may register and hold same in the name of a nominee. (WV Code 31A-6-1).

Uniform Act for Simplification of Fiduciary Security Transfers adopted. (WV Code 31-4D-1–11).

Accumulations.

No legislation.

Perpetuities.

See category 21 Property, topic 21.12 Perpetuities.

Pour Over Trusts.

See topic 13.16 Wills, subhead Bequests and Devises to Inter Vivos Trusts.

Uniform Disclaimer of Property Interests Act (1999 Act) adopted. (c. 42, art. 6).

Restrictions on Exercise of Power for Fiduciary’s Benefit.

See WV Code 44-5-13.

Powers of Fiduciaries.

Fiduciary powers enumerated by statute may be incorporated by reference into testamentary or inter vivos trust instruments. See c. 44, art. 5A for enumeration.

Powers of Fiduciaries Regarding Environmental Laws.

In addition to powers, rights and remedies granted in trust instrument, fiduciaries can take certain actions and refuse certain property without liability if actual or potential environmental law violation exists. (WV Code 44-5-14).

13.16 WILLS:

Any person, except persons under age of 18 years and persons of unsound mind, may dispose by will of any estate capable of succession, to which he or she is entitled at death, whether so entitled prior or subsequent to execution of will. (WV Code 41-1-1–2).

Form.

No particular language or form is required, but testamentary intent and written instrument executed in statutory manner are essential. (WV Code 41-1-3).

Will, unless nuncupative, must be in writing signed by testator or by some other person in testator’s presence and by his direction, in such manner as to make it manifest that name was intended as signature. (WV Code 41-1-3).

Attestation.

Two competent witnesses present at same time when will is signed or acknowledged by testator must sign in presence of testator and of each other, but no form of attestation necessary. (WV Code 41-1-3).

Witnesses.

Any person to whom, or to whose spouse, any devise or bequest would pass under will is competent witness, if will may not be otherwise proved, but devise or bequest is void, except if entitled to intestate share if will is not established. Intestate share saved cannot exceed value of devise or bequest. If will can be proved independently of attesting witness to whom interest is devised or bequeathed, then devise or bequest is not void. (WV Code 41-2-1). Creditors, their spouses (WV Code 41-2-2), and executors (WV Code 41-2-3) are competent.

Holographic Wills.

Recognized. Writing must be wholly in handwriting of testator and signed. Writing must evidence testamentary intent and signature must be intended as such. Acknowledgment and witnesses not needed. (WV Code 41-1-3; 171 W. Va. 226, 298 S.E.2d 456; 203 W. Va. 345, 507 S.E.2d 708).

Nuncupative Wills.

Soldiers in actual military service, and mariners or seamen at sea, may dispose of personal estates as at common law. (WV Code 41-1-5).

Revocation.

Unless will expressly provides otherwise, divorce or annulment after execution of will revokes as to former spouse: Any disposition or appointment of property made by will; any provision conferring general or special power of appointment; any nomination as executor, trustee, conservator, or guardian. Provisions as to former spouse interpreted as if former spouse failed to survive decedent, except that WV Code 41-3-3 anti-lapse statute provisions do not apply to property. Provisions revived by testator’s marriage to former spouse. Section applies to divorces, annulments or remarriages effective after June 5, 1992. (WV Code 41-1-6). Excepting provisions by divorce or annulment, revocation must be by subsequent will or codicil or writing declaring intent to revoke, executed as required for will, or by mutilation, cancellation or destruction of will or signature thereto by testator, or by another in his presence and by his direction, with intent to revoke. (WV Code 41-1-7).

Revival.

Revoked will or codicil may be revived only by re-execution or by codicil executed as will, and then only to extent to which intention is shown. (WV Code 41-1-8).

Bequests and Devises to Inter Vivos Trusts.

Pour over trusts are valid and trust instrument may be amended subsequent to execution of will. (WV Code 41-3-8).

Uniform Testamentary Additions to Trusts Act (1991).—Adopted. (WV Code 41-3-8–11).

Probate Proceedings are in County Commissions.

(WV Code 41-5-4). Custodian of will required to deliver same to county commission or executor within 30 days after knowledge of testator's death or be guilty of misdemeanor and liable for damages. (WV Code 41-5-1). County commission can compel production of will. (WV Code 41-5-3). Clerk may admit will to probate in vacation, but may not determine contest. Clerk reports probate to commission, which confirms or rejects same. (WV Code 41-5-10). Any person aggrieved may appeal to circuit court from order admitting or refusing to admit will to probate. (WV Code 41-5-7). Trial in circuit court is as if application for probate had been originally made to such court. (Id.). Trial by jury is had only on request of party. (WV Code 41-5-8). Persons in interest, not parties to probate proceedings, may proceed by bill in equity to impeach or establish will within six months from ruling of county commission or court on appeal, in which case trial is by jury if demanded. (WV Code 41-5-11). Infants, convicts and mentally incapacitated persons may file bill within one year after disability ceases and persons interested who are nonresidents or have only been served by publication may file bill within one year. (WV Code 41-5-12).

Self-proved Wills.

In uncontested wills cases, affidavits made at request of testator and subscribed before any officer authorized to administer oaths that are preserved with will and state facts as would be required of attesting witness in testimony in court to establish and prove will are admissible and have same probative value as if affiants appeared in person. (WV Code 41-5-15).

Records.

When admitted to probate, wills, or authenticated copies, must be recorded by clerk of county commission and retained in clerk's office, except when removed under order of court or subpoena duces tecum. (WV Code 41-5-17). Bona fide purchasers from heir(s) are protected unless will, or authenticated copy of foreign will, is admitted to probate and recorded as will of real estate, within one year of death, except as to persons under disability who have one year from removal of disability. (WV Code 41-5-19). Bona fide purchaser from heir(s) is protected against devisee(s) in subsequent will recorded after expiration of such one year period except as to such devisees as are under disability, whose rights are protected for one year after removal of disability. (WV Code 41-5-20).

Legacies.

Legacies and interest thereon payable upon expiration of six months from date of order conferring authority on first personal representative only if report of claims by fiduciary commissioner confirmed and no appeal taken from order of confirmation. (WV Code 44-2-25; 127 W. Va. 795, 34 S.E.2d 742). As to payment of legacies, see topic 13.08 Executors and Administrators, subhead Legatees and Distributees.

Unclaimed Legacies.

Uniform Unclaimed Property Act (1995 Act) adopted. (c. 36, art. 8). If estate otherwise ready for final settlement, and personal representative holds sum(s) of money for payment or distribution of any contingent, unliquidated, unmatured or disputed bequest or claim which cannot be paid because whereabouts of claimant or distributee are unknown, or cannot be paid or distributed for any other reason, then with consent of fiduciary commissioner, personal representative may pay such sum(s) to general receiver of circuit court in county where estate being administered. If payment and receipt shown in fiduciary commissioner's final order and after report confirmed by county commission, personal representative not personally liable for any such bequest or claim. (WV Code 44-2-24a).

Ademption.

No conveyance or other act subsequent to execution, except revocation, prevents operation of will as to such interest as testator might dispose of at his death. (WV Code 41-1-9).

Advancement.

Provision for or advancement to any person is deemed satisfaction in whole or part of any devise or bequest in previous will, if it would be so deemed as to child, and in all cases, whether in case of child or not, where such intention appears from parol or other evidence. (WV Code 41-3-2).

Anti-Lapse.

Unless different disposition is made by will, if any beneficiary dies before testator (or is dead when the will is made), leaving issue who survive testator, such issue shall take estate devised or bequeathed as deceased beneficiary would have done. (WV Code 41-3-3). Exclusionary phrase, absent clear and unequivocal expression of intent for alternate distribution, is insufficient to negate operation of anti-lapse statute. (208 W.Va. 456, 541 S.E.2d 334; see also 214 W. Va. 633, 591 S.E.2d 191).

Void Gifts.

Unless contrary intention appears in will, non-residuary devise or bequest that fails or is void shall be included in residuary devise or bequest, if any; if none, it passes by intestacy. (WV Code 41-3-4). However, failed or void residuary devise or bequest passes, not by intestacy, but to any remaining residuary devisees or legatees in proportion to their respective shares in the residue. (Id.).

Disclaimer.

Uniform Disclaimer of Property Interests Act (1999 Act) adopted. (c. 42, art. 6).

Election.

In 1992, West Virginia became first state to enact intestacy and elective share provisions, with some minor variations, of Revised Uniform Probate Code (1990 U.P.C.). Surviving spouse has right of election against will or intestate share to take elective-share percentage of augmented estate based upon length of marriage. Elective-share percentage calculated under incremental vesting table starting at 3% for one year but less than two years and up to 50% for 15 years or more of marriage. (WV Code 42-3-1[a]). If elective share amount is less than $25,000, surviving spouse entitled to supplemental elective share amount of up to $25,000. (WV Code 42-3-1[b]). Augmented estate consists of couple's combined assets and includes: Decedent's net probate and reclaimable estates, and value of surviving spouse's estate, including value of surviving spouse's reclaimable estate. (WV Code 42-3-2). Right of election can be exercised only by surviving spouse living when petition filed. Election may be exercised on surviving spouse's behalf by conservator, guardian or agent under power of attorney. (WV Code 42-3-3). Election petition must be filed in court and mailed or delivered to personal representative, if any, by later of nine months after decedent's death, or six months after probate of decedent's will. (WV Code 42-3-4). Right of election may be waived, wholly or partially, before or after marriage. (WV Code 42-3-3a). Dower and curtesy abolished. (WV Code 43-1-1).

Children.

There is no statute conferring any rights on children living when will is executed but not mentioned therein. If issue of testator is born subsequent to execution, and will makes no provision for or mention of possible children or if issue is living at time of execution and other issue is subsequently born, afterborn issue or their descendants, if not provided for by settlement or will or expressly excluded by will, but only pretermitted, take estate as in case of intestacy, beneficiaries contributing ratably. On death of such issue under age 18, unmarried and without issue, their portion, so far as unexpended, reverts to persons to whom given by will. (WV Code 41-4-1–2).

Testamentary Guardians.

See category 14 Family, topic 14.07 Guardian and Ward, subheads Eligibility and Competency, and Qualification.

Living Will.

Any person 18 years or older may execute revocable declaration directing withdrawal or withholding of life-sustaining procedures should such person become terminally ill. Declaration must follow formalities set out by statute, including that declaration be in writing; signed by declarant or by person at declarant's express direction in declarant's presence; dated; and signed in presence of and by two attesting witnesses whose signatures are notarized. (WV Code 16-30-4). Act also places certain restrictions on who may act as witness. (WV Code 16-30-4). Persons participating in withholding or withdrawing life-sustaining procedures in accordance with Act are granted civil and criminal immunity. (WV Code 16-30-10). No action taken in accordance with Act shall affect, impair or invalidate procurement, issuance or terms of any life insurance policy. (WV Code 16-30-14).

West Virginia Health Care Decisions Act.

West Virginia Health Care Decisions Act adopted 2000 (c. 16, art. 30), replacing West Virginia Natural Death Act, Medical Power of Attorney Act and Health Care Surrogate Act (c. 16, arts. 30, 30A, 30B). Individuals may designate medical representative through medical power of attorney executed in same manner as living will. (WV Code 16-30-4). Restrictions apply as to who may serve as medical representative. (WV Code 16-30-4). Conflicts between medical representative's decisions and living will directives are resolved in favor of living will directives. (WV Code 16-30-5). Surrogate decision maker is authorized to make health care decisions on behalf of incapacitated person in absence of medical power of attorney. (WV Code 16-30-8).

Medical Power of Attorney Act.

Repealed Acts 2000 c. 132. See subhead West Virginia Health Care Decisions Act, supra.

Do Not Resuscitate Act.

Adopted. (c. 16, art. 30C). Every person presumed to consent to administration of cardiopulmonary resuscitation unless one of following, of which health care provider has actual knowledge, applies: Do not resuscitate order issued; living will in effect and person in terminal condition or persistent vegetative state; medical power of attorney in effect with indication person does not wish cardiopulmonary resuscitation or personal representative determines same;

qualified physician has ordered do not resuscitate in physician orders for scope of treatment form. (WV Code 16-30C-5). Do not resuscitate orders may only be issued by physicians, in accordance with WV Code 16-30C-6.

Health Care Surrogate Act.

Repealed Acts 2000 c. 132. See subhead West Virginia Health Care Decisions Act, supra.

Foreign Probated Wills.

Wills of persons domiciled out of state at time of death are valid as to personal property if executed according to law of domicile. (WV Code 41-1-5). Authenticated copy of will proved out of state, with certificate of probate, may be offered for probate within state if it relates to property therein. In absence of evidence to contrary, it will be presumed to have been duly executed and probated at domicile of testator, and will be admitted to probate as will of personalty. If it appears from such copy that it was proved in foreign probate court to have been so executed as to be valid will of land in West Virginia, it may be admitted to probate as will of real estate. Such probate may be set aside within one year on proper proof. (WV Code 41-5-13). See also topic 13.08 Executors and Administrators, subhead Foreign and Ancillary Administration.

Simultaneous Death.

Uniform Simultaneous Death Act (1940 Act) adopted. (c. 42, art. 5).

Testamentary Trusts.

See topic 13.15 Trusts.

Anatomical Gift Act.

Uniform Anatomical Gift Act repealed Acts 2000 c. 9. Replaced by substantially similar provisions of Anatomical Gift Act. (c. 16, art. 19).

Powers of Fiduciaries.

Fiduciary powers enumerated by statute may be incorporated by reference into wills. See c. 44, art. 5A for enumeration.

14 FAMILY

14.01 ADOPTION:

Any person not married or any person with his or her spouse’s consent or any husband and wife jointly may adopt any minor child. (WV Code 48-22-201). There is no statutory preference between these three classifications, including adoption by homosexual couples. (679 S.E. 2d 310).

Consent.

Voluntary surrender of minor child to individual, not agency, for adoption. (WV Code 48-22-108).

Relinquishment.

Voluntary surrender of minor child to agency for adoption. (WV Code 48-22-115).

(*Note*: “Consent” refers to both “consent” and “relinquishment” for purposes of this summary, unless otherwise noted.)

Consent Required.

For marital child, parent(s), outsider father if adjudicated to be father or has filed pending paternity suit; for nonmarital child, birth mother and determined father—unless, parental rights had been previously terminated, abandoned or relinquished; person is incurably insane; or under disability because of age and otherwise valid consent or relinquishment given legal guardian or court-appointed next friend. (WV Code 48-22-301).

Consent Not Required.

Parent or other custodian whose rights were terminated; abandonment; birth or adoptive parent married to petitioner in stepparent adoption. (WV Code 48-22-301).

Consent by Infant.

For infant to consent, consent must be executed in presence of court, or guardian ad litem may be appointed and written consent reviewed by court. (WV Code 48-22-304).

Consent by Adoptee.

In any case where child sought to be adopted is 12 years of age or older, consent of such child must be in presence of judge, unless waived by court. (WV Code 48-22-301).

Counseling.

Department of Health and Human Resources must provide, upon request, pre- and post-placement counseling services to any person whose consent is required. (WV Code 49-3-1[a][4]).

Consent—Timing.

May not be executed until 72 hours after birth. (WV Code 48-22-302[a]).

Consent—Before Whom Executed.

Judge; person designated by judge; notary public; commissioned military officer on active duty if consenting person is in military; U.S. foreign service or consular officer if consenting person is foreign country. (WV Code 48-22-302[b]).

Content of Consent.

Besides identifying information, must include statement that more than 72 hours after birth; consent is voluntary, unequivocal; relinquishment is voluntary; medical treatment; final, unless revoked; no fraud, duress; etc. Must also include specific instructions on how to revoke. (WV Code 48-22-303).

Medical Treatment.

Consent or relinquishment authorizes prospective adoptive parents or agency to consent to medical treatment for child. (WV Code 48-22-301[g]).

Presumption of Abandonment.

For child over six months, when birth parent fails to financially support, visit, communicate with child for uninterrupted six-month period immediately preceding petition. (WV Code 48-22-306[a]). For child under six months, when birth father denounces paternity, fails to visit or contribute financial support to mother, child, from time told of conception until petition filed. (WV Code 48-22-306[b]). By unknown father, when fails to make reasonable effort to discover pregnancy, birth. (WV Code 48-22-306[c]). Exception for birth parents who can demonstrate compelling circumstances that prevented support, visitation, communication. (WV Code 48-22-306[d]).

Revocation of Consent.

Consent which meets requirements of statute is irrevocable unless court finds that consent was obtained by fraud or duress, or other exceptions to irrevocability are proven. (WV Code 48-22-305). During pendency of petition for revocation, court may award custody based on best interests of child. (WV Code 48-22-305[b]).

Foreign Adoption.

Where foreign adoption by West Virginia resident has been invalidated by foreign state, West Virginia trial courts have authority to determine what custody is in best interests of child where child has been in custody of adopted parents for extended period. (Lemley v. Barr, 176 W.Va. 378, 343 S.E.2d 101).

Payments.

Reasonable and customary legal, medical, hospital expenses related to pregnancy, birth or adoption permitted. Fees and expenses of surrogate mother permitted. (WV Code 48-22-803).

Venue.

Circuit court of county wherein adopter resides. (WV Code 48-22-201).

Written Information about Child Required.

Person first receiving adopted child and adopting parent or parents shall receive written recital of all known circumstances surrounding birth, medical and family medical history of child and itemization of any facts or circumstances unknown or requiring further development. (WV Code 48-22-502).

Filing of Petition.

May be filed after child born, placement determined, all consents that can be obtained are executed. (WV Code 48-22-501).

Hearing on Petition.

No sooner than 45 days after petition filed; child must have lived with adoptive parent(s) six months, proper notice given, no person retains parental rights. (WV Code 48-22-501).

Petition.

Petition shall set forth name, age, place of residence of petitioner or petitioners and of child and name by which child shall be known, whether child is possessed of any property and full description of same, and identity of person(s) entitled to parental rights if known or that same are unknown to petitioner(s); basis for terminating parental rights of any birth parents; affidavit by birth mother, if living, with information on potential biological father and acknowledgment of advice on limited use of information and protection against domestic violence. If person petitioning for adoption is less than 15 years older than child sought to be adopted, such facts shall be set forth in petition. Such finding is not required when petitioner seeks to adopt child of his or her spouse. (WV Code 48-22-501, 502).

Notice of adoption shall be filed, within 20 days after petition is filed, on: Each person with parental rights, claiming to be father or whose paternity established, with legal or physical custody, or court-ordered visitation rights; petitioner's spouse if not joined in petition; grandparent (if parent did not terminate rights prior to death). Court may require notice be served on person revoking consent or any person who can provide relevant information that court wants to hear. (WV Code 48-22-601).

Service of Notice.

Notice shall state that parental rights may be terminated and person who fails to respond may not appear or receive further notice. Service to accord with R.C.P. 4 and may be by personal service, registered or certified mail, return receipt requested or publication. (WV Code 48-22-602).

Notice to Unknown Father.

No later than 60 days before final hearing, court may consider additional evidence based on birth mother's affidavit. If court identified father, notice to be served as in WV Code 48-22-602. If unable to identify father, may dispense with publication or posting of notice. (WV Code 48-22-603).

Proceedings.

After child has resided continuously in home of petitioner(s) for six months, court may decree adoption if it determines that no person retains parental rights; that provisions of article have been complied with; that petitioner(s) are fit persons to adopt child; and that it is in best interest of child to order such adoption. (WV Code 48-22-701). At final hearing, affidavit of fees, expenses paid or promised by adoptive parents must be submitted. (WV Code 48-22-803).

Challenges to Order of Adoption.

Petition challenging adoption must be filed within six months of final order. Challenge based on lack of notice will be denied unless clear and convincing evidence establishes adoption in best interests of child. (WV Code 48-22-704).

Termination as to Rights of Inheritance.

Adoption of child terminates his or her rights of inheritance from party relinquishing parental rights and terminates rights of party relinquishing parental rights to inherit from child. (WV Code 48-22-703). Once order of adoption becomes final, child becomes child of person adopting him or her to same extent as if child had been born to adopting parent in lawful wedlock. (WV Code 48-22-701[d], 703).

Sibling Visitation.

Right to sibling visitation does not apply in adoption cases. (Lindsie D.L. v. Richard W. S., 214 W. Va. 750, 591 S.E.2d 308).

Adoption of Adults.

Any adult person who is resident of West Virginia may adopt another who has reached age of 18 years or over and may change name of such person with only consent of person to be adopted required. (WV Code 48-22-801).

Child Support.

Decretal child support obligation may not be modified, suspended or terminated in exchange for execution of formal consent to adoption. (Kimble v. Kimble, 176 W.Va. 45, 341 S.E.2d 420).

Contracts Limiting or Restraining Adoptions.

Right to petition for adoption of any person may not be limited by contract, agreement or stipulation. (WV Code 48-22-802).

Recognition of Foreign Adoption Decrees.

Abbreviated petition must be filed and final order may be entered without hearing. (WV Code 48-22-902, 903).

14.02 ALIMONY:

See topic 14.06 Divorce.

14.03 COMMUNITY PROPERTY:

System not in force.

14.04 DESERTION:

See topic 14.09 Husband and Wife.

14.05 DISSOLUTION OF MARRIAGE:

See topic 14.06 Divorce.

14.06 DIVORCE:

Jurisdiction.

Circuit court and family courts vested with concurrent jurisdiction over subject matter of divorce. Generally, family court has authority to adjudicate actions for divorce and carry its order into execution. (WV Code 48-5-102). Effective Jan. 1, 2002, all family court cases pending before circuit court transferred to family court. Where circuit court conducted evidentiary proceedings in case prior to Jan. 1, 2002, pursuant to WV Code 51-2A-19(b), and circumstances of case, circuit court judge may be appointed as family court judge. (West Virginia Rules of Practice and Procedure for Family Court, R. 3).

Jurisdiction of Parties.

If one or both of parties is domiciled in state at time action is commenced, circuit courts and family courts of West Virginia have jurisdiction to grant divorce for any grounds fixed by law in West Virginia without any reference to law of place where marriage occurred or where marital offense was committed. (WV Code 48-5-103).

Procedure.

West Virginia Rules of Practice and Procedure for Family Court govern all family court proceedings, which include domestic violence, domestic relations, and child abuse and neglect. (WV Rules of Practice and Procedure for Family Court, R.1).

Pleadings.

All pleadings in divorce action must be verified by party in whose name they are filed. (WV Code 48-5-402). Style and caption for all pleadings is "In Re the marriage of [name of petitioner] and [name of respondent]." Parties are identified as "petitioner" and "respondent." Petition must set forth grounds for divorce. Petition or counter-petition is sufficient if ground for divorce is alleged in language of statute. Judge has authority to grant motion to require more definite statement, alleging facts and not conclusions of law. Petition must allege facts establishing domicile. Whether respondent answers or not, case heard independently of admissions of either party. Except for proceeding for irreconcilable differences, no judgment order shall be granted on uncorroborated testimony of parties. West Virginia Supreme Court of Appeals shall provide forms for petitions and answers, available for distribution from offices of clerks of circuit court and from offices of family court judges. (WV Code 48-5-402). Requisites for answer to petition for divorce governed by rules of civil procedure. Affirmative defenses must be pled and proven and include condonation, connivance, collusion, recrimination, insanity and lapse of time. Affirmative defenses shall not be raised when allegation as grounds for divorce is that the parties have lived separately for one year. (WV Code 48-5-403).

Spousal Support, Child Support or Separate Maintenance.

In absence of adequate agreement between parties, court shall consider following issues to resolve issues between parties to determine spousal support, child support or separate maintenance: length of marriage; length of time living together as husband and wife; income and earnings of each party; income-earning abilities of each party; distribution of marital property; ages and physical, mental and emotional condition of each party; education of each party; whether each party has forgone or postponed economic, education or employment opportunities during course of marriage; standard of living during marriage; likelihood that party seeking spousal support can increase his or her income-earning potential after acquiring additional training; cost of such training; any contribution made by either party to education of other; cost of educating minor children; cost of health care for parties and children; tax consequences to each party; ability of custodian of minor children to seek employment outside home; financial need of each party; legal obligations of each party to support others and self; costs associated with care of disabled persons; other factors that court deems necessary to arrive at fair and equitable spousal support, child support or separate maintenance. (WV Code 48-6-301).

Custody of Children.

Primary objective in determining child custody is child's best interest by facilitating: stability of child; parental planning and agreement about child's custodial arrangements and upbringing; continuity of existing parent-child attachments; meaningful contact between child and each parent; caretaking relationships by adults who love child, know how to provide for child's needs, and who place high priority on doing so; security from exposure to physical or emotional harm; and expeditious, predictable decision-making and avoidance of prolonged uncertainty respecting arrangements for child's care and control. Secondary objective is to achieve fairness between parents. (WV Code 48-9-102). Family court shall designate organization to operate parent education programs designed for parents who have filed action for divorce, paternity, support, separate maintenance or other custody proceeding and who have minor children. Education programs shall be designed to instruct and educate parents about effects of divorce and custody disputes on children and teach parents to help their children and minimize their trauma. Parent education classes required for parties to divorce action who have minor children unless family court determines it is not appropriate or necessary based on conduct of parties. Court may impose sanctions for failure to attend. Family court may require each person to pay $25 to circuit court to defray costs of classes, unless court waives fee for indigent parties. (WV Code 48-9-104).

Parenting Plans.

Family court requires each party to divorce where there are minor children to submit to court parenting plan to address child custody and parenting time. (WV Code 48-9-205). If parents are unable to agree upon parenting plan, family court shall require mediation if court determines mediation is appropriate in particular case. Pre-mediation screening procedures shall be in place to provide judge with information to consider alternatives to mediation, if necessary. Mediators do not make recommendations to court, but assist parties in preparation of parenting plan. Mediator may reveal to court information received concerning domestic violence or child abuse. Cost of mediation is paid by parties. (WV Code 48-9-202). Parenting plans may be agreed upon by parties and ordered by court. Court may conduct hearing on parenting plan to determine if agreement is not voluntary or would be harmful to child. (WV Code 48-9-201). Statute sets forth minimum requirements for parenting plans. (WV Code 48-9-203). Family court shall inform parents of impact of domestic abuse on children and resources for addressing domestic abuse. (WV Code 48-9-202). Upon complaint, if court finds parent violated parenting plan without good cause, it can order appropriate remedy, including make-up time for parent harmed, modification of plan, civil penalty, counseling for offending parent, and court costs. (WV Code 48-9-501).

If court finds, upon parental complaint, that parenting plan has been violated intentionally and without good cause, it shall enforce remedy specified in plan. If no remedies are specified, or are inadequate, it shall order appropriate remedy. Fact that one parent violated parenting is not defense to other parent's violation of parenting plan. (WV Code 48-9-501).

Custodial Responsibility.

Unless harmful to child, family court shall allocate custodial responsibility so that proportion of custodial time child spends with each parent approximates proportion of time each parent spent performing caretaking functions for child prior to parties' separation, or necessary to achieve any of following objectives: (1) To permit child to have relationship with each parent who has performed reasonable share of parenting functions; (2) to accommodate reasonable preferences of child over 14; (3) to keep siblings together; (4) to protect child's welfare considering emotional attachments; (5) to consider reasonable agreements between parents; (6) child's stability; (7) to apply principles of WV Code 48-9-403 (if parent relocates); and (8) child's stage of development. (WV Code 48-9-206).

Unless agreed upon by parents, family court shall allocate responsibility for making significant life decisions for child in accordance with child's best interest in light of custodial responsibility, ability of parents and limiting factors. (WV Code 48-9-207). If either of parents requests, or upon receipt of credible information, family court shall determine whether there are certain circumstances that would limit custodial responsibility under parenting plan, in which case court may impose certain limitations. (WV Code 48-9-301).

Court-ordered Investigations.

Family court may order written investigation and report to assist it in determining any issue relevant to family court proceedings. Guardian ad litems, staff of court or any professional organization may conduct investigation. Investigator may consult any person with information about child or parents. Investigation report may be received in evidence. (WV Code 48-9-301).

Appointment of Guardian.

Family court may appoint guardian ad litem to represent child's best interest in family court proceedings. (WV Code 48-9-302).

Appointment of Lawyer by Court.

Family court judge may appoint lawyer to represent child and specify terms of appointment. (WV Code 48-9-302[b]).

Interview of Child by Court.

Family court judge may interview child of parties to divorce following Rule 16 of Rules of Practice and Procedure for Family Court. (WV Rules of Practice and Procedure for Family Court, R. 16).

Modification of Parenting Plan.

Family court may modify parenting plan if it finds substantial change in circumstances of child or parents, and modification is in the best interests of child. (WV Code 48-9-401). Family court may modify parenting plan without change in circumstances in certain instances if court finds modification in child's best interests. (WV Code 48-9-401).

Relocation of Parent.

Relocation of parent is substantial change in circumstances under WV Code 48-9-401 when it interferes with either parent's ability to exercise parental responsibilities that parent has been exercising. Parent who relocates must give at least 60 days advance notice, or most notice practicable under circumstances. Notice shall include: relocation date; new address; reasons for relocation; proposal for modification of custodial responsibility. (WV Code 48-9-403). Failure to comply with notice requirements without good cause may lead to determination that relocation is not in good faith and may be basis for award of fees and expenses to other parent. Circuit clerks shall make available form notices. Parenting plan shall be revised if practicable to accommodate relocation and maintain same proportion of custodial responsibility being exercised by each parent. Court may impose costs for transportation and communication. When parenting plan cannot be revised to maintain same proportion of custodial responsibility as that being exercised by each parent, court shall modify parenting plan in accordance with child's best interests. Relocating parent must show that relocation is for legitimate purpose. Legitimate purpose is one that is close to family or support networks, for health reasons, to protect child or member of child's household, employment or educational opportunity or to be with one's spouse who is pursuing same. Court may consider reallocation of primary custodial responsibility if best interests of child would be served. Any interview of child conducted according to Rule 17 of Rules of Practice and Procedure for Family Law. (WV Code 48-9-403).

Access to Child's Records.

Each parent has equal access to child's educational records. The nonresidential parent or noncustodial parent has right to participate in parent advisory committees or any other organization in school that child attends. Each parent has right to child's medical records. Custodial parent required to inform other parent of any illness requiring medical attention. Each parent has equal access to child's juvenile court records. Parent with whom child is scheduled to reside majority of time is deemed to be custodian of child for purposes of other state and federal statutes. (WV Code 49-9-601).

Grandparent Visitation.

Grandparents of minor children may exercise visitation with their grandchildren. Best interests of child are paramount in these situations. (WV Code 48-10-101). "Grandparent" means biological grandparent, person married or previously married to biological grandparent, or person who has previously been granted custody of parent of minor child with whom visitation is sought. (WV Code 48-10-203). Grandparent may make motion or petition for order granting visitation. (WV Code 48-10-301, 401). Court may grant visitation to grandparent if it is in best interest of child and would not interfere with parent-child relationship. (WV Code 48-10-501). Grandparent visitation may not be ordered without affirmative findings that visitation will not cause substantial interference in parent-child relationship and serves best interests of child. (209 W. Va. 752, 551 S.E.2d 674). In making determination, court shall consider several listed factors and any other factors relevant to best interests of child. (WV Code 48-10-502). Court may interview child in chambers regarding child's wishes or concerns. (WV Code 48-10-601). However, child shall not be called as witness in any grandparent visitation proceeding; neither shall court accept statement or affidavit of child. (WV Code 48-10-602). Proof that visitation is in best interest of child and that parent of child to whom grandparent is related has failed to answer or appear or whereabouts of parent is unknown required to grant visitation. (WV Code 48-10-701, 702). Court may grant supervised visitation to grandparents or may refuse visitation. (WV Code 48-10-801, 802). Remarriage of custodial parent does not affect authority of circuit court to grant reasonable visitation to grandparent. (WV Code 48-10-901). If child who is subject to grandparent visitation order is adopted, order for grandparent visitation is automatically vacated upon entry of adoption order, unless adopting parent is stepparent, grandparent or relative of child. (WV Code 48-10-902). Court that grants visitation retains jurisdiction throughout minority of child. (WV Code 48-10-1001). Attorneys' fees and costs may be ordered paid based upon equities of positions of parties. (WV Code 48-10-1101). Any grandparent who allows contact between child and person who has been precluded visitation rights is guilty of misdemeanor and faces up to 30 days jail time or fine from $100 to $1,000. (WV Code 48-10-1201).

Support of Children.

Laws of state encourage and require child's parents to meet obligation of providing child with adequate food, shelter, clothing, education and health and child care. (WV Code 48-11-101). Child support shall be paid in periodic installments in accordance with support guidelines. Child support orders provide for custody and support of minor child and include: name of custodial parent, amount of payments, date first payment is due, frequency of payments, event that triggers termination of support; provision regarding wage withholding; address of payee; provision for medical support; specific written finding if and when child support guidelines are not followed. Both parties are required to report any change in income or employer. If change in income is less than 15%, no report must be given. Child support orders must contain certain language. (WV Code 48-11-102). Child support may continue beyond age of 18 if child is unmarried, residing with parent, and enrolled as full-time student. However, payment shall not extend past child's 20th birthday. (WV Code 48-11-103). Child support orders may be modified by court upon motion by parent or guardian if there is substantial change in circumstances. Substantial change in circumstances means application of child support guidelines would result in 15% difference in amount paid. (WV Code 48-11-105). Expedited process for modification may be used if parent loses income, experiences increase in income; or other such change in employment. (WV Code 48-11-106).

Bureau for Child Support Enforcement.

The Bureau for Child Support Enforcement ("Bureau") enforces support orders and establishes paternity, collects and disburses support payments, locates parents who owe duty to pay child support. (WV Code 48-18-105). Monthly collection fee may be imposed upon obligor. (WV Code 48-18-108). Bureau shall cooperate with any other state in establishing paternity, locating obligors, securing compliance with order and any other function of child support enforcement. (WV Code 48-12-112). Amounts collected by Bureau must be distributed to custodial parent within two business days after receipt. (WV Code 48-12-113). Employers must report to Bureau hiring of any person employer anticipates pays support. (WV Code 48-18-125). Either parent or Bureau may request review of child support award 36 months after order for child support is entered to determine if amount of child support is correct, or when there is alleged change of circumstances, or once every three years as matter of right. Order may then be modified if appropriate. (WV Code 48-18-126). Bureau may obtain payment from federal and state tax refunds and from unemployment compensation benefits for past due child support. (WV Code 48-18-117, 118, 119).

Determining Basic Child Support Obligation.

Child support will be related, to extent practicable, to standard of living that children would enjoy if they were living in household with both parents present. (WV Code 48-13-102). Amount of basic child support is computed via formula. Worksheet for computing amount of child support for basic shared parenting (WV Code 48-13-403); for extended shared parenting (WV Code 48-13-502); and table of monthly child support obligations (WV Code 48-13-301). Rebuttable presumption that amount of award resulting from application of guidelines is correct. (WV Code 48-13-101, 701).

Extended Shared Parenting Adjustment.

Where each parent has child for more than 127 days. (WV Code 48-13-501).

Split Custody Adjustment.

Adjustment in child support shall be made in cases of split physical custody. (WV Code 48-13-503).

Tax Exemption for Child Due Support.

Parties may agree, or court shall allocate, right to claim deduction for dependent children for income tax purposes. In extended shared parenting cases, rights are allocated between parties in proportion to their adjusted gross income. (WV Code 48-13-801).

Investment of Child Support.

Court may order portion of child support be placed in trust and invested for future educational needs when day-to-day needs of child are being met and child is living as well as his parents; and especially if amount of child support per child is over $2,000. Court may appoint trustee and prescribe powers of trustee for management and control of trust. (WV Code 48-13-802).

Medical Support.

In every action where order requires child support, court will ascertain ability of parties to provide medical support to children. Court shall order either or both parents to provide insurance coverage for child, if such coverage is available through employer or through other groups, or court may order either parent to obtain insurance coverage. Court then will order uninsured costs paid by parents based on ability to pay. Cost of insurance coverage is considered by court in applying child support guidelines. Health coverage for child enforceable where appropriate through National Medical Support Notice, 42 U.S.C. § 666. (WV Code 48-12-102, 110). Where parent is required by court order to provide health coverage, employer is required to permit enrollment of child. Child of obligated parent is eligible until emancipation or until child is terminated by terms of policy, whichever is later. (WV Code 48-12-112, 116). Notice requirements for or to employers of obligor parents. (WV Code 48-12-114, 115).

Guidelines for Child Support Awards.

Children have right to share in parents' level of living. Child support related to standard of living that children would enjoy if both parents were present in household. Guidelines consider financial contributions of both parents in relationship to total income. (WV Code 48-13-102–403).

Adjustment for Child Care Tax Credit.

For custodial parents with incomes above statutory minimum, amount of federal tax credit for child care expenses that may be realized by custodial parent is approximated by deducting 25% from work-related child care costs. (WV Code 48-13-601).

Disregard for Child Support Formula.

Court may disregard child support guidelines or adjust them to accommodate needs of child or circumstances of parents. Reason for deviation must be stated on record and in order to clarify the basis of order if appealed or modified in the future. (WV Code 48-13-702).

Arrearages.

When obligor is required to pay arrearages, payments shall not exceed amount that may be withheld from earnings pursuant to restrictions set out in statute. (WV Code 48-13-803; WV Code 48-14-408.)

Remedies for Enforcement of Support Obligations.

Action by custodial parent, primary caretaker or guardian of child in county where obligee, obligor or child resides may be brought to obtain child support order. Action for child support may be brought when child has parent-child relationship with obligor; when obligor is not supporting child; when there is no pending action for divorce, separate maintenance or annulment. Every order shall include provision for income withholding from obligor's source of income. Notice to obligor is required. Any arrearage is judgment against obligor. Obligee or bureau may file abstract of child support order giving rise to support obligation and affidavit of accrued support, setting forth particulars of such arrearage and requesting writ of execution, suggestion or suggestee execution. Provisions apply to support orders issued by court of competent jurisdiction of any state. (WV Code 48-14-101, 102, 103, 104, 105, 201, 203, 204, 205, 209, 401, 402, 405). Bureau may review child support order, and if appropriate, file motion with court for modification of child support order. (WV Code 48-5-705).

Exception to Requirement for Automatic Withholding from Income.

If court finds good cause to not require income withholding, or if written agreement between parties provides for alternative arrangement, support order may not provide for income withholding to begin immediately. When immediate income withholding not required, Bureau shall mail notice to obligor. (WV Code 48-14-403).

Enforcement of Withholding by Bureau.

Withholding from obligor’s income for spousal or child support enforced by Bureau. Notice of withholding be sent to source of income when support order provides for immediate withholding or when support payments are in arrears. Amount withheld is binding on source of income until further notice by Bureau or until source of income notifies Bureau of termination of obligor’s employment. Misdemeanor to conceal payments of income to obligor. Bureau may take action against obligor’s license for failure to comply with subpoenas or warrants relating to child support proceeding. Licenses subject to such action are driver’s license, hunting license and professional or occupational. (WV Code 48-14-404, 406, 407, 410, 411, 412; WV Code 48-15-102, 105, 201, 202, 205, 206, 207, 208, 209).

Contempt.

Bureau may commence civil or criminal contempt proceeding against obligor alleged to have willfully failed to comply with support order. (WV Code 48-14-501).

Equitable Distribution.

Court shall determine net value of all marital property as of date of separation or later date determined by court to equitably distribute marital property. Entitlement to future payments shall be considered. Forms for disclosure of assets are available with clerk of circuit court and secretary-clerk of family court. Forms shall be submitted to family court within 40 days after service of summons in order that judge may value marital property and designate separate property. (WV Code 48-7-201). Effective July 1, 2007, Rule 9 of Rules of Practice and Family Court requires parties to file completed financial disclosure with petition or answer. Assets that must be disclosed include but are not limited to: Real property, savings accounts, stocks and bonds, mortgages and notes, life insurance, health insurance coverage, interest in partnership or corporation, tangible personal property, future interests whether vested or nonvested and any other financial interest or source. Court may consider efforts expended during marriage by party that limited party’s income earning ability or increased income earning ability of other party or if party dissipated or depreciated martial assets. Court shall also designate separate property, if any, or separate property of children. Where marital property not susceptible to division, court may ascertain projected results of sale, direct either party to transfer interest in specific property to other, or permit either party to purchase from other interest in specific property. Should order require transfer of title to property and party fails to execute instrument necessary to convey title, instrument shall be executed by special commissioner appointed by court. No equitable distribution of property between individuals not married to one another. Failure to disclose required financial information may result in court’s accepting statement of other party as accurate. Person who knowingly provides incorrect information or deliberately fails to disclose information is guilty of false swearing. Any encumbrance or disposition of property to third persons, except to bona fide purchasers, may be set aside by court. (WV Code 48-7-101–112; 48-7-201–304).

Spousal Support.

Obligation that compels person to pay spousal support may arise from terms of court order, antenuptial agreement or separation agreement. Spousal support may be paid as lump sum or periodic installments without affecting character as spousal support. Four classes of spousal support: (1) Permanent spousal support; (2) temporary spousal support, otherwise known as spousal support pendente lite; (3) rehabilitative spousal support; and (4) spousal support in gross. Family courts and circuit courts have jurisdiction to award. Payments are to be ordinarily made from party's income, but, when income is not sufficient to adequately provide for payments, court may, upon specific findings set forth in the order, order party required to make payments from corpus of his separate estate. Award shall not be disproportionate to party's ability to pay. After entry of order, either party may move court to revise or alter order. (WV Code 48-8-101, 103). Court may award rehabilitative spousal support for limited period of time to allow recipient spouse to become gainfully employed. Court may modify such award if substantial change in circumstance under which support was granted occurs. (WV Code 48-8-105).

Effect of Fault on Award of Spousal Support.

In determining spousal support, court shall consider and compare fault of either or both of parties and effect of fault as contributing factor to the deterioration of marital relationship. (WV Code 48-8-104).

Separate Maintenance.

Action for separate maintenance may be brought in family court of any county where action for divorce between parties could be brought. Action for separate maintenance may be brought whether or not divorce is sought. Separate maintenance may be ordered if parties seeking separate maintenance have grounds for divorce; or if party for whom separate maintenance is sought, without good and sufficient cause, has failed to provide suitable support for other spouse; or has abandoned or deserted other spouse. Court may order all or any portion of temporary or final relief that court may order in action for divorce. Upon petition of either party, court may revise order or make further orders concerning: (1) Support and maintenance of either spouse; (2) interest of one spouse in property of other spouse; (3) allocation of responsibility for children of parties; and (4) support of children of parties. (WV Code 48-4-101–104).

Minor Settlement Proceedings.

If minor suffers injury to person or property, parent, guardian or next friend of minor may negotiate settlement of minor's claim for damages prior to or subsequent to filing of action for damages. To secure release of party allegedly responsible for injury, parent, next friend or guardian of minor shall file verified petition in circuit court of county in which minor resides or in which action may be filed in accordance with provisions of WV Code 56-1-1. Court shall appoint guardian ad litem to confirm facts set forth in petition, to file answer to petition on behalf of minor, stating opinion of guardian ad litem as to whether or not proposed settlement and release and proposed distribution of proceeds are in best interest of minor. Hearing shall be conducted, at which time court shall take testimony and consider arguments regarding alleged injuries and proposals for settlement. (WV Code 44-10-14).

Husband and Wife Contracts, Gifts.

Contract between husband and wife not enforceable unless writing sufficient to indicate that contract has been made and signed by spouse against whom enforcement is sought or by his or her authorized agent. Where one spouse purchases property and pays but takes title in name of other spouse, transaction in absence of evidence of contrary intention is presumed to be gift by spouse so purchasing to spouse in whose name title is taken. (WV Code 48-29-301, 202).

Domestic Violence.

Domestic violence or abuse means occurrence of one or more of following between family or household members: (1) Attempting to cause or intentionally, knowingly or recklessly causing physical harm to another with or without dangerous or deadly weapons; (2) placing another in reasonable apprehension of physical harm; (3) creating fear of physical harm by harassment, psychological abuse or threatening acts; (4) committing either sexual assault or sexual abuse as those terms are defined; and (5) holding, confining, detaining or abducting another person against that person's will. Certain types of parental discipline not domestic violence. (John P.W. ex rel. Adam W. v. Dawn D.O., #214 W. Va. 702, 591 S.E.2d 260). Family or household members means persons who are or were married to each other; are or were living together as spouses; are or were sexual or intimate partners; are or were dating (provided, casual acquaintance or ordinary fraternization between persons in business or social context does not establish dating relationship); are or were residing together in same household; have child in common, regardless of whether they have ever married or lived together; have following relationship to another person: parent, stepparent, brother or sister, half brother or half sister, stepbrother or stepsister, father-in-law or mother-in-law, stepfather-in-law or stepmother-in-law, child or stepchild, daughter-in-law or son-in-law, stepdaughter-in-law or stepson-in-law, grandparent, step grandparent, aunt, aunt-in-law, or step aunt, uncle, uncle-in-law, or step uncle, niece or nephew, first or second cousin, or any of these relationships to family or household member. Verified petition for domestic violence is filed in magistrate court; final hearing held before family court judge following entry of order by magistrate as result of emergency hearing. Family court judge may issue protective order. Proceedings may be held in magistrate court when temporary divorce, annulment or separate maintenance order is in effect by family court judge. Protective court order entered by family court is effective for either 90 or 180 days. Costs assessed for family court fund against any person against whom protective order is issued. Any petitioner denied emergency protective order by magistrate court may file petition for appeal of denial within five days to family court. Protective order orders respondent to refrain from abusing, harassing, stalking, threatening or otherwise intimidating petitioner or minor children, or engaging in other conduct that would place petitioner or minor children in reasonable fear of bodily injury. Possession of firearm or ammunition while subject to court's protective order is criminal offense under federal law. The terms of protective order may include: (1) Granting possession to petitioner of residence or household jointly resided in at time the abuse occurred; (2) awarding temporary custody of or establishing temporary visitation rights with regard to minor children named in order; (3) establishing terms of temporary visitation with regard to minor children named in order; (4) ordering non-custodial parent to pay to caretaker parent sum for temporary support and maintenance of petitioner and children, if any; (5) ordering respondent to pay petitioner sum for temporary support and maintenance of petitioner; (6) ordering respondent to refrain from entering school, business or place of employment of petitioner, or household or family members, for purpose of violating protective order; (7) ordering respondent to participate in intervention program for perpetrators; (8) ordering respondent to refrain from contacting, telephoning, communicating, harassing or verbally abusing petitioner; (9) providing for either party to obtain personal property or other items from location, including granting temporary possession of motor vehicles owned by either or both of parties, and providing for safety of parties while this occurs, including ordering law enforcement officer to accompany one or both of parties; (10) ordering respondent to reimburse petitioner for expenses incurred as result of domestic violence; and (11) ordering petitioner and respondent to refrain from transferring, conveying, alienating, encumbering, or otherwise dealing with property which could otherwise be subject to jurisdiction of court or another court in action for divorce or support. Court may additionally award visitation of child by parent who has committed domestic violence only if court finds that adequate provision for safety of child and petitioner can be made. Two years after entry of final protective order, circuit court may upon motion order that protective order be purged from file maintained by any law enforcement agency and may further order that file maintained by court be sealed. Orders entered pursuant to section shall be transmitted by court or clerk of court to local offices of municipal police, county sheriff, and West Virginia state police. Any law enforcement officer responding to alleged incident of domestic violence shall inform parties of availability of possible remedies provided by this art. and possible applicability of criminal laws of state and of availability of family protection shelters. In addition, law enforcement officer may provide transportation for domestic violence victim to shelter or appropriate court. West Virginia state police shall maintain registry in which it shall enter certified copies of all orders entered by courts in state. When respondent abuses petitioner or minor children or is physically present at any location in knowing and willful violation of terms of emergency or final protective order, any person authorized may file petition for civil contempt. If court finds probable cause upon complaint, court shall issue warrant for arrest of person charged. Law enforcement officer shall immediately arrest respondent when observes respondent abuse petitioner or minor children or respondent's physical presence at any location in violation of protective order. (WV Code 48-27-101–1105).

14.07 [RESERVED]

14.08 GUARDIAN AND WARD:

Circuit courts have jurisdiction. (WV Code 44-10-13).

Selection and Qualification of Guardian.

Parent may appoint testamentary guardian for his or her child, born or to be born. (WV Code 44-10-1). If no parental appointment is made, circuit court or family court in which minor resides, or if nonresident, where minor has property, appoints guardian. (WV Code 44-10-3). Minor over 14 may nominate guardian subject to court approval (WV Code 44-10-4), . Every guardian, unless testamentary and court deems it unnecessary, shall post bond. (WV Code 44-10-5; 88 F.Supp. 2d 604, aff'd 238F.3d 414). Curator may be appointed until guardian gives bond. (WV Code 44-10-6). S.H. v. R.L.H./Busch v. Busch/Alireza D. v. Kim Elaine W.

Eligibility and Competency.

Guardian must be suitable person as determined by court. (WV Code 44-10-3). Guardian may not be nonresident, except that for nonresident infant there may be appointed same person theretofore appointed guardian at infant's domicile. (WV Code 44-5-3). Trust company may act as guardian. (WV Code 31A-4-14).

Appointment of Guardian.

See subhead Selection and Qualification of Guardian, supra. (WV Code 44-10-3).

Qualification.

See subhead Selection and Qualification of Guardian, supra. (WV Code 44-10-3)

Inventory.

Guardian must file inventory within two months after end of each year from date of qualification. (WV Code 44-4-1, 2).

Powers and Duties.

Guardian has possession, care and management of his ward's estate, real and personal, and out of proceeds thereof shall provide for ward's maintenance and education, and, except for some exceptions as to parents, has custody of ward. (WV Code 44-10-7; 170 W. Va. 238, 293 S.E.2d 316). Guardian shall not make disbursements over annual income of ward's estate where deed or will does not authorize it, except upon permission of circuit court. (WV Code 44-10-8; 88 F. Supp. 2d 604, aff'd, 238 F.3d 414). If personal estate does not exceed sum of $3,000 disbursement may be made by guardian from corpus upon written approval from commissioner of accounts to whom settlement of estate was referred. (WV Code 44-10-8).

Investments.

(WV Code 44-10-12).

Securities in Name of Nominee.

See category 13 Estates and Trusts, topic 13.15 Trusts, subhead Securities in Name of Nominee.

Real Estate.

Guardian has power to sell or mortgage ward's real estate with approval of court. (WV Code 44-10-13).

Liabilities of Guardian.

Guardian is liable for negligence in possession, care and management of ward's estate. (65 W. Va. 752, 65 S.E. 168).

Accounts.

Guardian must account like other fiduciaries. (WV Code 44-3-5, 6 and WV Code 44-4-4).

Termination of Guardianship.

Guardianship terminates when ward attains age of 18, or when will directs. Marriage of ward does not terminate guardianship. Upon termination, guardian must pay over and deliver estate. (WV Code 44-10-7).

Mentally Incompetent, Mentally Retarded and Mentally Handicapped Persons.

Appointment of guardian and settlement of account under exclusive jurisdiction of circuit court. (c. 44A, art. 1).

Foreign Guardians.

See subhead Eligibility and Competency, supra.

Transfers to Minors.

See topic 14.10 Infants.

Uniform Fiduciaries Act not adopted.

Uniform Simplification of Fiduciary Security Transfers Act adopted. (c. 31, art. 4D).

14.09 HUSBAND AND WIFE:

There is no general statute with respect to rights, duties and powers of married persons as between themselves and with respect to other persons.

Disabilities of Married Women.

All disabilities to which married women were formerly subject under common law removed. (c. 48, art. 29).

Separate Property.

Married woman's rights with respect to property are same as if she were single. Her separate property is not subject to control or disposal by her husband, nor liable for his debts.

(WV Code 48-29-103, 105).

Contracts.

Married person may make contracts with any person, including his or her spouse, and is liable thereon, and also for his or her debts contracted during coverture, as if unmarried, except that contract between husband and wife is not enforceable unless it, or some memorandum or note thereof, be in writing and signed by party to be charged thereby. (WV Code 48-29-301). Prenuptial agreements covering property distributions upon divorce are specifically recognized by state statute (WV Code 48-6-101), are valid and enforceable where valid under laws of state of inception, and are not invalid because prospective wife was unrepresented by counsel at signing of agreement (174 W. Va. 740, 329 S.E.2d 106). State v. Price

Actions.

Married woman may sue or be sued as if single woman. She is liable for her torts as though unmarried, and husband is not liable unless wife acted as his agent or by his coercion or instigation. (WV Code 48-29-104, 105). Any judgment against married woman is lien upon her real estate and execution may issue against her and her real and personal property as if she were unmarried. Married woman may recover for loss of consortium. (WV Code 48-29-302). One spouse may sue other on written contract (WV Code 48-29-301) doctrine of interspousal immunity is abolished (161 W. Va. 557, 244 S.E.2d 338). (Note: Supreme Court of Appeals of West Virginia ruled in 1976 that infant could sue parent for personal injuries [159 W. Va. 585, 224 S.E.2d 721]). Spouse may seek protective order from either circuit or magistrate court prohibiting another household member from continuing to physically abuse complaining spouse. See West Virginia Domestic Violence Act. (c. 48, arts. 26 and 27). Such order may also award temporary support and maintenance, custody and visitation of minor children. (WV Code 48-27-503). Abused spouse may charge other spouse with criminal conduct. (178 W. Va. 415, 359 S.E.2d 853). Each law enforcement agency must maintain records on incidents of family abuse. Proper procedures for temporary and protective orders must be followed by law enforcement agency. Violations of protective orders may result in civil and criminal penalties. (WV Code 48-27-901, 902).

Conveyance or Encumbrance of Property.

Dower (and curtesy) are abolished. (WV Code 43-1-1). It is not necessary that either spouse consent to or join in conveyance or encumbrance by other of his or her own real estate. (WV Code 48-29-103). “Marital property” and “separate property” defined by statute. (WV Code 48-1-233, 237). Husband or wife may convey real estate by deed directly to other, but where one spouse purchases real or personal property but takes title in name of other spouse, such transaction shall, in absence of evidence of contrary intention, be presumed to be gift by purchasing spouse. (WV Code 48-29-202). However, presumption does not apply when determining marital property and equitable distribution; gifts between spouses must be affirmatively proved. (WV Code 48-29-202). Husband or wife may transfer or alienate property at any time prior to entry of domestic relations order or recordation of notice of lis pendens, provided transfer was to bona fide purchaser and was not intended to avoid equitable distribution. (WV Code 48-7-108; 178 W. Va. 781, 364 S.E.2d 794).

Enforcement of Support Obligations.

If at any time party is in arrears on support obligations, obligee may file with clerk of circuit court “affidavit of Accrued Support” setting forth particulars of such arrearage, that payments have been delinquent for 14 days, and requesting writ of execution, suggestion or suggestee execution. Affidavit shall in addition to listing other information, identify obligor by name, address and social security number. Clerk shall then issue writ of execution and notice of right to obligor to contest affidavit within 14 days of date of notice. Obligor is required to give security, post bond or give some other guarantee. (WV Code 48-14-201, 204,). West Virginia

Child Support Enforcement Commission established to enforce support obligations, locate parents or spouses, establish paternity, and obtain court orders for child and spousal support. (c. 48, art. 17). Bureau for Child Support Enforcement has authority to collect delinquent accounts through federal tax refunds; state income tax refunds; unemployment compensation benefits (WV Code 48-18-117, 119); and state lottery prizes (WV Code 29-22-27a). Bureau for Child Support Enforcement is to provide information to credit reporting agencies on overdue support (WV Code 48-18-121) and publicize child support enforcement services (WV Code 48-18-130).

Revised Uniform Reciprocal Enforcement of Support Act repealed. Uniform Interstate Family Support Act adopted in its place. (c. 48, art. 16).

Community Property.

System does not exist.

14.10 INFANTS:

Age of majority for each sex is 18. (WV Code 2-3-1). Alcoholic liquors shall not be sold to any person who is less than 21 years of age. (WV Code 60-3-22). It is misdemeanor for persons under age of 21 to operate motor vehicle with blood alcohol content of 0.02 or greater. (WV Code 17-5-2[h]).

Child Custody.

Jurisdiction of West Virginia courts to rule on custody of unemancipated children under 18 determined by Uniform Child Custody Jurisdiction Act. (c. 48, art. 20). Allocation for custodial and decision making responsibility for children when parents do not live together is set forth in statute. See topic 14.06 Divorce, subhead Custody of Children.

It is felony to conceal minor or to remove minor from state with intent to deprive another of lawful custody or visitation rights; person accused of violating this provision may assert as defense that action was necessary to preserve minor’s welfare. (WV Code 61-2-14d).

Emancipation.

Child over age of 16 may petition court to be declared emancipated. Upon showing that such child can provide for his own physical and financial well being and has ability to make decisions for himself, court may declare child emancipated. (WV Code 49-7-27). Child over 16 who marries is emancipated by operation of law. Emancipated child shall have all of privileges, etc. of adult, except that such child remains child as defined for purposes of c. 49, arts. 5, and 5A. (WV Code 49-7-27).

Disabilities.

“Under disability” defined. (WV Code 2-2-10). Otherwise common law governs. Handicapped and disabled children are eligible for child support beyond age 18. (WV Code 48-11-103).

Ratifications of Contracts.

Common law governs except that ratification must be in writing and signed by party to be charged thereby. (WV Code 55-1-1).

Actions.

Minor sues in his own name and by next friend or guardian (WV Code 56-4-9; 123 W. Va. 690, 17 S.E.2d 787), and infant defends by guardian ad litem (WV Code 56-4-10).

Support of Minor.

Common law governs duty of support. State has specific guidelines and rules for child support obligations for divorced or separated parents. Enforcement of duty aided by statutory remedies for enforcement of support obligations, enforcement of support orders through actions against license, and Uniform Interstate Family Support Act. (c. 48, arts. 14-16). See topic 14.06 Divorce.

Termination of Parental Rights.

Parental rights may be terminated when necessary for welfare of child, where child is abused or neglected (as defined in WV Code 49-1-3) and court finds no reasonable likelihood that conditions of neglect or abuse can be substantially corrected. Such conditions include alcoholism, drug abuse or mental illness of parent and abandonment, physical or emotional abuse of child. (WV Code 49-6-5). Child shall not be removed from family functioning in abnormal manner unless Department of Health and Human Resources has made reasonable effort to stabilize family situation. (WV Code 49-2D-3). However, parental rights shall not be terminated if child, age 14 or older, objects to termination. (WV Code 49-6-5; 216 W. Va. 266, 607 S.E.2d 372). In re Amber Leigh J.

Parental Responsibility.

Parents are liable for infant's malicious or wilful destruction of property, but not to exceed $5,000 and costs. (WV Code 55-7A-2).

Adoption.

See topic 14.01 Adoption.

Uniform Transfers to Minors Act adopted. (WV Code 36-7-1 et seq.). Age of majority under act is 21. (WV Code 36-7-1).

Missing Children.

Enacted Missing Children Information Act. (c. 49, art. 9). Missing Children Information Clearinghouse established. (c. 49, art. 9. § 3).

14.11 MARRIAGE:

Age of consent: 18 for both sexes. (WV Code 48-2-301).

Licenses are required, otherwise attempted marriage is void. (WV Code 48-2-101). Licenses are issued by clerk of county commission of county in which one of applicants usually resides, or if both parties are nonresidents of this state, by clerk of county commission of any county of state. (WV Code 48-2-102). Both parties are required to sign application under oath before clerk of county commission or another person authorized to administer oaths under laws of state. (WV Code 48-2-105). If either or both of applicants are under 18 years of age, clerk of county commission may not issue marriage license until two full days after application has been filed. Emergency circumstances may support waiver of waiting period. (WV Code 48-2-103). Application for marriage license shall affirm that marriage is to be free from violence and abuse and, effective Sept. 1, 2001, must contain statement: "Marriage is designed to be a loving and lifelong union between a woman and a man." Application must contain full names of female and male parties, social security numbers, dates and places of birth and residence addresses. (WV Code 48-2-104). Effective Sept. 1, 2001, clerk of county commission or person administering oath shall require evidence of age of each of applicants. (WV Code 48-2-106). Effective Sept. 1, 2001, clerk of county commission who knowingly issues marriage license contrary to law is guilty of misdemeanor and shall be fined no more than $500, or by confinement for not more than one year, or by both. (WV Code 48-2-502).

Ceremony.

Every marriage must be solemnized under marriage license issued by clerk of county commission in accordance with law. Ceremony of marriage performed without license is void. (WV Code 48-2-101). If marriage is solemnized by person professing to be authorized, but actually unauthorized, marriage is lawful if in all other respects it is lawful and consummated with belief of legality. (WV Code 48-2-601). Authorized religious representative (WV Code 48-2-402) or judge of any court of record in state is permitted to celebrate rites of marriage in any county of state. (WV Code 48-2-401).

Reports of Marriage.

See category 10 Documents and Records, topic 10.04 Records, subhead Vital Statistics.

Record.

Clerk of county commission is required to maintain suitable book to be used as register of marriages. (WV Code 48-2-203). Abstract of record of marriage celebrated outside state, in which either or both of parties thereto is resident of state, shall be recorded by clerk in register of marriages. (WV Code 48-2-204). See category 10 Documents and Records, topic 10.04 Records, subhead Vital Statistics.

Common law marriage contracted in state is not valid (183 W. Va. 468, 396 S.E.2d 430), but children of such marriage are legitimate (106 W. Va. 615, 146 S.E. 625). Common law marriage contracted in a state where it is valid, will be recognized in this state. (152 W. Va. 372, 163 S.E.2d 685).

Proxy Marriages.

Not authorized.

Marriages by Written Contract.

Not authorized.

Remarriage After Presumptive Finding of Death of Spouse.

See category 13 Estates and Trusts, topic 13.05 Death.

Prohibited Marriages.

Man is prohibited from marrying his mother, grandmother, sister, daughter, granddaughter, half sister, aunt, brother's daughter, sister's daughter, first cousin or double cousin. Woman is prohibited from marrying her father, grandfather, brother, son, grandson, half brother, uncle, brother's son, sister's son, first cousin or double cousin. Prohibition continues in force even though marriage is terminated by death or divorce. (WV Code 48-2-302). Terms "cousin" and "double cousin" do not include persons whose relationship is created solely by adoption. Statute creates procedure by which nature of that relationship will be ascertained. (WV Code 48-2-303). Those parties marrying within degrees of relationship described in WV Code 48-2-302, where relationship is founded on consanguinity, are guilty of misdemeanor. If residents of state, within prohibited degrees of relationship, go out of state for purpose of being married, with intention of returning, and afterwards return and live together as man and wife in this state, they are punishable as if marriage had been in this state. (WV Code 48-2-503).

Foreign Marriages.

Recognized if not against public policy of state. (106 W. Va. 374, 145 S.E. 753).

Annulment.

Following marriages are voidable and shall be void from time they are so declared by judgment order: (1) Marriages which are prohibited by law on account of either of parties having husband or wife of prior marriage, which prior marriage has not been terminated; (2) marriages which are prohibited by law on account of consanguinity or affinity between parties; (3) marriages solemnized when either of parties: was insane person, idiot, or imbecile; was afflicted with venereal disease; was incapable because of impotency to enter into marriage state; was under age of consent; or had been convicted of infamous offense without knowledge of other party; (4) marriages solemnized when, at time of marriage, wife, without knowledge of husband: was with child with some other person; or had been notoriously prostitute; and (5) marriages solemnized when, prior to marriage, husband, without knowledge of wife, had been notoriously licentious person. (WV Code 48-2-103). Certain persons may not institute annulment action. (WV Code 48-2-105).

In annulment action, petitioner may bring action in county in which parties last resided or where respondent resides, whether respondent is or is not resident of this state. If neither party is resident of this state, action must be brought in county where marriage was performed. (WV Code 48-2-102).

Upon petition of either party, court may revise or alter order entered in action for annulment or make further orders concerning: support and maintenance of either spouse; interest of one spouse in property of other spouse; allocation of responsibility for children of parties; and support of children of parties. (WV Code 48-2-107).

Affirmance.

Either party may institute action for annulling or affirming marriage if marriage is supposed to be void, or voidable, or any doubt exists as to its validity. In every action marriage will be presumed to be valid. (WV Code 48-2-104).

Prenuptial Agreement.

Defined, effective Sept. 1, 2001. (WV Code 48-1-203).

14.12 MARRIED WOMEN:

See topics 14.09 Husband and Wife, Marriage; categories 5 Civil Actions and Procedure, topic Evidence, subhead Witnesses; Debtor and Creditor, topic Homesteads; Documents and Records, topic Acknowledgments; Estates and Trusts, topics Executors and Administrators, Wills; Property, topic Dower.

15 HEALTH

15.00A HEALTH CARE DECISIONS ACT:

West Virginia Health Care Decisions Act regulates living wills, powers of attorney, determinations of capacity, selection of surrogates and other matters relating to medical decision making. (c. 16, art. 30).

15.00B HEALTH CARE PROVIDER TAX:

West Virginia imposes excise tax on gross receipts of various classes of health care providers, including, but not limited to, physicians, dentists, ambulances, hospitals and nursing homes. Rate of taxation varies by provider class. Purpose of tax is to assist in funding of West Virginia Medicaid Program. (c. 11, art. 27). Provider tax on individual practitioners is being phased out and will be eliminated as of July 1, 2010. (WV Code 11-27-36).

15.00C HEALTH INSURANCE:

West Virginia regulates several aspects of health insurance industry, such as accident and sickness insurance (c. 33, art. 15); long-term care insurance (c. 33, art. 15A); group accident and sickness insurance (c. 33, art. 16); hospital, medical and dental service corporations (c. 33, art. 24); health care corporations (c. 33, art. 25); and health maintenance organizations (c. 33, art. 25A). Health Maintenance Organization Patient Bill of Rights provides limited right to patient to sue his HMO on coverage issues. (c. 33, art. 25C).

15.00D HEALTH PLANNING—CERTIFICATE OF NEED:

West Virginia Health Care Authority controls levels and types of capital expenditures undertaken and new services provided by all health care facilities in West Virginia; certificate of need must be obtained from West Virginia Health Care Authority before initiating certain new services; developing new health care facility; acquiring health care facility; expanding certain services; closing certain services or facilities; or undertaking capital expenditures in excess of $2,700. Services that are expressly exempt from certificate of need review include, but are not limited to, private office practice of health professionals; creation of new primary care services in medically underserved communities; certified electronic health records or electronic medical record systems; and certain non-health related projects. (c. 16, art. 2D).

15.00E HOSPITAL RATE REGULATION:

West Virginia Health Care Authority is responsible for reviewing and approving gross charge rates of West Virginia hospitals applicable to their nongovernmental payors, and approving discount contracts between West Virginia hospitals and managed care organizations and other nongovernmental payors. (c. 16, art. 29B).

15.00F INSTITUTIONAL LICENSURE:

License must be obtained from State Department of Health and Human Resources in order to operate health care facilities including, but not limited to, hospitals (c. 16, art. 5B), nursing homes (c. 16, art. 5C), assisted living residences (c. 16, art. 5D), hospice (c. 16, art. 5I), residential care communities (c. 16, art. 5N), and behavioral health facilities (c. 27, art. 9). Board of directors or other governing body of any hospital owned or operated by nonprofit corporation, nonprofit association, or local government must have open meetings. (c. 16, art. 5G; c. 6, art. 9A). All nonprofit hospitals and all hospitals owned by county, city or other political subdivisions of state must have consumer representatives who comprise at least 40% of hospital boards of directors. (WV Code 16-5B-6a).

15.00G PROFESSIONAL LICENSURE:

Semi-autonomous licensure boards operating under State Department of Health and Human Resources regulate licensure of various classes of health professionals. Classes of professionals regulated by such boards include, but are not limited to, medicine, surgery and podiatry (c. 30, art. 3); dentists and dental hygienists (c. 30, art. 4); pharmacists, pharmacy technicians, pharmacy interns and pharmacies (c. 30, art. 5); registered professional nurses (c. 30, art. 7); practical nurses (c. 30, art. 7A); optometrists (c. 30, art. 8); osteopathic physicians and surgeons (c. 30, art. 14); nurse-midwives (c. 30, art. 15); chiropractors (c. 30, art. 16); physical therapists (c. 30, art. 20); psychologists and school psychologists (c. 30, art. 21); radiologic technologists (c. 30, art. 23); nursing home administrators (c. 30, art. 25); occupational therapists, occupational therapist assistants, (c. 30, art. 28); professional counselors (c. 30, art. 31); speech-language pathologists and audiologists (c. 30, art. 32); respiratory care practitioners (c. 30, art. 34); dietitians (c. 30, art. 35); acupuncturists (c. 30, art. 36); and massage therapists (c. 30, art. 37).

16 INSURANCE

16.01 INSURANCE COMPANIES:

Regulated by c. 33. Regulation of hospital, medical, dental and health service corporations (c. 33, art. 24); regulation of reinsurance intermediaries (c. 33, art. 38).

Unauthorized Insurers Act.

c. 33, art. 44.

Third Party Administrator Act.

c. 33, art. 46.

Supervision by Insurance Commissioner. (c. 33, art. 2).

Licensing of insurers. (c. 33, art. 3).

Rates.

C. 33, art. 20; malpractice policies, c. 33, art. 20B; cancellation and nonrenewal of malpractice policies, c. 33, art. 20C; accident and sickness, c. 33, art. 16B.

Annual Audited Financial Reports.

Must be filed by all insurers with Insurance Commissioner on or before June 1, unless time extended for good cause shown. (WV Code 33-33-3).

Annual Statements.

Must be filed with Insurance Commissioner before Mar. 1, unless time extended by commissioner for good cause shown, showing condition as of preceding Dec. 31. (WV Code 33-4-14).

Criminal Sanctions For Failure To Report Impairment.

Whenever insurer is impaired, its chief executive officer must immediately notify Insurance Commissioner. (WV Code 33-35-2). Impaired means financial situation in which insurer's assets are less than insurer's liabilities. (WV Code 33-35-1). Violation of statute may result in fine of not more than $50,000 or imprisonment for not more than one year or both. (WV Code 33-35-3).

Policies.

Generally (WV Code 33-6-31); life (c. 33, art. 13); underinsured motorist and uninsured motorist (WV Code 33-6-31); group life (c. 33, art. 14); accident and sickness (c. 33, art. 15); group accident and sickness (c. 33, art. 16); fire and marine (c. 33, art. 17); conversion of hospital, surgical or major medical group coverage to individual coverage (c. 33, art. 16A); mine subsidence (c. 33, art. 30); credit life and loss of income (WV Code 46A-3-109); captive insurance (c. 33, art. 31); individual medical savings accounts (WV Code 33-15-20; 33-16-15); motor vehicle insurance (WV Code 33-6-31, 29); c. 33, arts. 6A, 6B); patient costs for clinical trials, covered (c. 33, art. 25F); contraceptive coverage (WV Code 33-16E-1). Policy forms must be in simplified language. (c. 33, art. 29). Individual and group accident and sickness insurance policies may not exclude children of insured from coverage, regardless of whether insured has custody of child or makes support payments. (WV Code 33-15-16, 33-16-11). Life and health insurance may not be denied or canceled and no additional surcharge may be added to such policies because insured is, has been or may be victim of abuse. (WV Code 33-4-20). Standard Valuation Law. (WV Code 33-7-9).

Cancellation of automobile policy prohibited except for specified reasons. (WV Code 33-6A-1). Advance notice of non-renewal of automobile policy required. (WV Code 33-6A-4, 4a).

Advance notice of non-renewal of property insurance required. (WV Code 33-17A-4a, 4b). Treatment of cancellation of part of combined home and auto policies at WV Code 33-6-37.

Malpractice.

Medical Malpractice c. 33, art. 20B-20F.

Plain Language.

Life and Accident and Sickness Insurance Policy Language Simplification Act requires policies of life insurance, accident and sickness, credit life insurance and credit accident insurance and sickness insurance to be written to facilitate ease of reading by insureds. (c. 33, art. 29).

Reasonable Expectations.

Objectively reasonable expectations of applicants and intended beneficiaries regarding terms of insurance contracts will be honored even though painstaking study of policy provisions would have negated those expectations. (177 W. Va. 734, 356 S.E.2d 488; but see overruled on other grounds by 202 W. Va. 308, 504 S.E.2d 135).

Discrimination.

There must be no distinction or discrimination between individuals of same class and equal expectation. (WV Code 33-11-4[7]). Discrimination in declining to issue automobile insurance is prohibited. (WV Code 33-6B-3). Advance notice of nonrenewal required; reasons for nonrenewal (WV Code 33-6A-4); substandard risk motor vehicle insurance; warning required (WV Code 33-6-31[c]).

Ethics and Fairness.

Ethics and Fairness in Insurer Business Practices Act. (c. 33, art. 45).

Rebates prohibited. (WV Code 33-11-4[8]).

Liens.

No statutory provision.

Producers, Solicitors and Brokers.

Regulated by Insurance Commissioner. (c. 33, art. 12). Contractual relationship with insurance company regulated by c. 33, art. 12A. Agents must be appointed before accepting any application for insurance. (WV Code 33-12A-2). Commissioner may issue limited licenses for sale of automobile rental coverage. (WV Code 33-12-32). Surplus lines regulated. (c. 33, art. 12C).

License Requirements.

Applicant must be 18 years old or over; resident of West Virginia, except that license may be issued to nonresidents in certain instances; in case of agent applicant, appointed as agent by licensed insurer for kind or kinds of insurance for which application is made, subject to issuance of license; applicant must not intend to use license principally for purpose of procuring insurance on himself and certain other firms, persons and corporations and applicant must satisfy commissioner that he is trustworthy and competent. (WV Code 33-12-6). Commissioner shall require testing. (WV Code 33-12-5). Continuing education required. (WV Code 33-12-8). Waiver from education requirements may be granted by Commissioner to persons who have been licensed as agents in good standing in another state with application. (WV Code 33-12-14). Unauthorized Insurers Act. (c. 33, art. 44).

Capital Requirements.

Regulated by WV Code 33-3-5b.

Retained Risk Limits.

Regulated by WV Code 33-4-16.

Process Agent.

Service may be made on secretary of state with respect to licensed insurers ($25 annual fee required) and upon secretary of state with respect to certain unlicensed insurers. (WV Code 33-4-12, 13).

Adjusters.

Regulated by Insurance Commissioner. (c. 33, art. 12B).

License Requirements.

Applicant must be 18 years old or over; resident of West Virginia, except that adjuster's license may be issued to nonresidents in certain instances; and applicant must satisfy commissioner that he is trustworthy and competent. Commissioner may require testing. (WV Code 33-12B-5). Fee for adjuster's license is $25. (WV Code 33-12B-8).

Insurers may not invest in favor of officers or directors or in business entities of which 10% or more is owned by officers or directors or invest as general partner, with certain limited exceptions. (WV Code 33-8-5). Use of clearing corporations and federal reserve book-entry system permissible. (c. 33, art. 8A).

Investments.

Regulated by c. 33, art. 8.

Foreign Insurance Companies.

Foreign or alien insurer seeking license in West Virginia must file certificate of public official having supervision of insurance in state or county of domicile of such insurer showing that it is authorized to transact kinds of insurance proposed to be transacted in West Virginia; foreign insurers are generally regulated as are domestic insurers. (WV Code 33-3-4).

Tail Insurance.

Medical malpractice insurance providers must offer tail insurance to professionals once professional's "claims made" insurance policy is cancelled, not renewed or terminated. (c. 33, art. 20D).

Retaliatory Laws.

Discrimination by another state or foreign company against West Virginia insurer results in application by West Virginia of like discriminatory statutes against insurers of such foreign states or countries operating in or seeking admission to this state. (WV Code 33-3-16).

Premium Tax.

Annual tax of 2% on gross premiums collected is imposed on both foreign and domestic insurance companies. There is imposed in addition annual tax equal to 1% of taxable premiums. Quarterly estimated returns and payments required, followed by annual return. Also annual tax of 1% of gross amount of annuity considerations collected on life insurance and on fire and casualty premiums. (WV Code 33-3-14, 14a, 14c, 14d, 15). Insurance Tax Procedures Act. (c. 33, art. 43).

Also special “flood insurance tax fund.” All taxes collected from federal insurance policy premium taxes are deposited into fund. (WV Code 33-43-14[d], [e]). Surcharge on fire and casualty policies. (WV Code 33-3-33).

Privilege Tax.

Insurance companies being taxed on premiums are exempt except for that part of gross income received for use of real property other than property in which company keeps its offices in this state. (WV Code 11-13-3).

Direct Actions Against Insurer.

See category 23 Transportation, topic 23.01 Motor Vehicles, subhead Direct Actions.

Privacy Rules.

Consistent with federal Gramm-Leach-Bliley Act of 1999. (WV Code 33-6F-1).

Compulsory Automobile Liability Insurance.

See category 23 Transportation, topic 23.01 Motor Vehicles, subhead Insurance.

No-Fault Insurance.

See category 23 Transportation, topic 23.01 Motor Vehicles, subhead No-Fault Insurance.

Renewal.

See category 23 Transportation, topic 23.01 Motor Vehicles.

Reinsurance.

WV Code 33-4-15–15b.

West Virginia Health Maintenance Organization Guaranty Association.

C. 33, art. 26B.

West Virginia Medical Professional Liability Insurance Joint Underwriting Association Act.

C. 33, art. 20E.

Physicians Mutual Insurance Company Act.

C. 33, art. 20F.

Health Maintenance Organization Patient Bill of Rights.

C. 33, art. 25C.

Prepaid Limited Health Service Organization Act.

C. 33, art. 25D.

State Insurance.

C. 29, art. 12.

West Virginina Public Employees Insurance Act.

C. 5, art. 16.

Property Insurance Declinations, Cancellations and Refusals to Renew.

Regulated by c. 33, art. 17A.

Substandard Risk Motor Vehicle Policies.

WV Code 33-6-31c.

Motor Vehicle Insurance Declinations.

Form of making offer prescribed by insurance commissioner; making offer that is unreturned or not answered creates presumption of effective offer of optional coverages and exercised knowing and intelligent rejection of such offer. (WV Code 33-6-31d).

Periodic Use of Seasonal Vehicle.

Requirement of insurance during portion of year vehicle is in actual use. (WV Code 17A-3-3).

Insurance Fraud Prevention Act.

C. 33, art. 41.

Interstate Insurance Product Regulation Compact.

C. 33, art. 47.

16.02 SURETY AND GUARANTY COMPANIES:

Organization.

While surety and guaranty companies are not governed by special corporate laws, they are under supervision of insurance commissioner (c. 33, arts. 1-4) and are subject to general corporate laws of state (c. 31). See topic 16.01 Insurance Companies; category 2 Business Organizations, topic 2.03 Corporations.

Rights and Powers.

Subject to statutory and regulatory authority of insurance commissioner. (c. 33, arts. 1-4).

Foreign Companies.

Must be licensed by insurance commissioner to transact insurance in West Virginia and must meet provisions of c. 33 before license will be issued. (c. 33, art. 3). Surety companies must have specified capital or surplus and maintain specified deposits to qualify for license to transact insurance. (WV Code 33-3-5b, 6).

Taxation.

Annual license fees and charges; premium tax of 3% of taxable premiums less credits against premium tax for investment in West Virginia securities. (WV Code 33-3-14, 14a, 14b, 14c). Insurance companies are generally exempt from other state taxes, except gross receipts tax on that part of gross income received for use of real property in state, other than property used for maintaining company offices. (WV Code 11-13-3).

17 INTELLECTUAL PROPERTY

17.01 TRADEMARKS AND TRADENAMES:

West Virginia Legislature enacted International Trademark Association Model State Trademark Bill, Sept. 1992 version, with minor modifications. (c. 47, art. 2). Registration of mark is effective for ten years. Upon application to secretary of state within six months of its expiration, registration may be renewed for successive ten-year terms. (WV Code 47-2-6). Application and renewal fees are $50 for 1-2 classifications; $50 for each additional classification; recordation of assignments and other instruments are $25. (WV Code 47-2-17).

Trade Names.

Registration of trade names with secretary of state required by all business entities otherwise required to register with secretary of state in order to conduct business within state. (WV Code 47-8-4). Filing fee $25 (WV Code 59-1-2). Individuals, sole proprietorships, and general partnerships conducting business under assumed name must file with office of clerk of county commission certificate stating true names and other particulars. (WV Code 47-8-2). Filing fee $25. (WV Code 59-1-10). Willful failure to file is criminal misdemeanor subject to fine of $25-$100 or up to 30 days' imprisonment, or both. (WV Code 47-8-5).

17.02 TRADE SECRETS:

Uniform Trade Secrets Act adopted (c. 47, art. 22), 1986, except for severability provisions of Uniform Act.

18 LEGAL PROFESSION

18.01 ATTORNEYS AND COUNSELORS:

State Bar is integrated. (W. Va. Code § 51-1-4a).

Jurisdiction Over Admissions.

West Virginia Supreme Court of Appeals, which has promulgated Rules for Admission to Practice of Law. (170 W. Va. 583, 295 S.E.2d 670).

Eligibility.

Applicant must be 18 years of age and of good moral character. ("Rules for Admission to the Practice of Law," R. 2.0). Requirement that applicant for admission be West Virginia resident for more than 30 days prior to taking bar examination was held in violation of U.S. Constitution. (170 W. Va. 453, 294 S.E.2d 440).

Applicant for admission to bar, by examination or on motion without examination, must file application (including $40 Application Packet Fee) with Board of Law Examiners (910 Quarrier St., Ste. 212, Charleston, WV 25301) no later than Nov. 1 preceding Feb. examination (after Nov. 1 with late filing fee of $150 until final deadline of Dec. 1) or Apr. 1 preceding July examination (after Apr. 1 with late filing fee of $150 until final deadline of May 1) or approximately six months prior to date of admission on motion. Application fee for admission by examination is $375 for applicants not admitted in another state or admitted less than one year; however, if applicant has been admitted in another state for more than one year, fee is $500. Application fee for admission by motion is $1,000. NCBE Character Report ($75-$500) required for all applicants. District Character Committees interview applicants and make eligibility recommendation to Board. If Board concludes grounds exist for disapproval of application, administrative hearing may be held at applicant's request. Administrative hearing findings may be appealed to Supreme Court of Appeals. For further details, see Rules for Admission to the Practice of Law and West Virginia Board of Law Examiners Fee Schedule.

Criminal Conviction.

Applicant for admission to practice of law who has prior felony conviction carries heavy burden of persuading Supreme Court of Appeals that he presently possesses good moral character. Numerous factors are considered when assessing moral character of applicant for admission to practice of law whose background includes criminal conviction. (199 W. Va. 571, 486 S.E.2d 311; 185 W. Va. 725, 408 S.E.2d 675).

Registration as Law Student.

No requirement. However, in order to make appearance, student must meet rule requirements. ("Rules for the Admission to the Practice of Law," R. 10.1).

Educational Requirements.

AB or BS or higher degree, from accredited college or university, or its equivalent, and LLB or JD or their equivalents from law school accredited by ABA, or its equivalent. ("Rules for the Admission to the Practice of Law," R. 3.0).

Examination.

Conducted by Board of Law Examiners in Charleston twice annually at times Board determines—presently last Tues. and Wed. in Feb. and July. Applicant must also achieve passing score on Multistate Professional Responsibility Examination. ("Rules for the Admission to the Practice of Law," R. 4.4). On Dec. 19, 1985, Supreme Court of Appeals entered order requiring graduates from WVU College of Law after July 1, 1988, to pass bar examination prior to being admitted to practice law. ("Rules for the Admission to the Practice of Law," R. 3.3).

Clerkship.

All circuit judge law clerks must sit for West Virginia State Bar Examination each time it is offered during their term until it is passed. Failure to pass within two attempts will result in loss of employment (prior unsuccessful attempts count toward two attempts). West Virginia Circuit Court Law Clerk Job Announcements.

Admission Without Examination.

Attorneys from other jurisdictions with reciprocity agreements with West Virginia, subject to rules and regulations prescribed by Supreme Court of Appeals. (W. Va. Code § 30-2-2). Applicant must have engaged in active legal practice of law for five of seven years immediately preceding application. ("Rules for the Admission to the Practice of Law," R. 4.0). Applicant must show good standing in every state where admitted to practice, good moral character, mental and emotional stability and compliance with code of professional responsibility as adopted in West Virginia. ("Rules for the Admission to the Practice of Law," Rs. 2.0, 4.0-4.4, 5.0-5.1). Applicant who is member of bar of sister state bears burden of showing that standards for admission in at least one of states where he was previously admitted were, at time of applicant's admission in that state, and are now "substantially equivalent" to standards for admissions to West Virginia bar. ("Rules for the Admission to the Practice of Law," R. 4.0). West Virginia resident currently holding position as full-time faculty member at WVU College of Law may be admitted to practice without examination if admitted to practice in another state. ("Rules for the Admission to the Practice of Law," R. 4.6). Attorneys associated with organized defender or legal services programs may receive certificate of limited permission to practice, which shall not remain in effect longer than 36 months. ("Rules for the Admission to the Practice of Law," R. 9.0).

Admission Pro Hac Vice.

Permitted only if local attorney is associated and like courtesy or privilege is extended to members of West Virginia State Bar in jurisdiction where attorney seeking admission is licensed.

Except in conformity with Rule 8.0, members of bar of any jurisdiction other than West Virginia may not do any act, or hold themselves out as entitled to do any act, within definition of practice of law. Applicant shall provide judge with: (1) Statement listing action, suit or matter that is main subject of application; (2) applicant's state's bar name and information; (3) name of local West Virginia attorney who will be responsible; (4) all matters before West Virginia bodies which such person has been involved in preceding 24 months; (5) all matters before West Virginia tribunal bodies which any members of petitioner's firm, partnership, corporation or other entity has been involved in preceding 24 months; (6) representation by applicant for any jurisdiction other than West Virginia where applicant has been admitted to practice, stating whether applicant is in good standing with bar of every such jurisdiction and that he has not been disciplined in any such jurisdiction within preceding 24 months; and (7) agreement to comply with laws, rules and regulations of West Virginia state and local governments. Fee of $250. Application required in every case in which pro hac vice admission is sought. Applicant must be associated with local West Virginia attorney, in good standing, who practices law on daily basis in West Virginia and who signs and attends all proceedings, including those not before judge, such as depositions. If applicant's appearances in West Virginia within past 24 months have become so numerous or frequent or involve improper conduct, court shall deny such person continuing privilege of appearance. ("Rules for the Admission to the Practice of Law," R. 8.0).

Licenses.

License required; annual fee is paid to state bar. See Rules for Admission to the Practice of Law in West Virginia and West Virginia State Bar By-laws.

Disabilities.

Acting as surety on any bond required to be given by any fiduciary is prohibited. (W. Va. Code § 44-5-4).

Liabilities.

Misdemeanor for any attorney to fail to pay over any moneys received for clients on demand or within six months after receipt, without good and sufficient reason for such failure. Damages in lieu of interest not exceeding 15% per annum until paid may be recovered against him. (W. Va. Code § 30-2-13; W. Va. Code § 30-2-14 [providing for disbarment upon conviction under W. Va. Code § 30-2-13] [189 W. Va. 84, 428 S.E.2d 65]). Attorneys are liable to clients for neglect of duty. (W. Va. Code § 30-2-11). See also, W. Va. Code § 30-2-12 (negligent loss of money) (176 W. Va. 753, 349 S.E.2d 919).

Malpractice.

May sound in tort or contract. (165 W. Va. 787, 271 S.E.2d 774).

Compensation.

Attorney is entitled to such sums as he may contract for in payment of services, and, in absence of such contract, may recover reasonable value of services. (W. Va. Code § 30-2-15). However, where attorney's fees are sought against third party, test of what should be considered reasonable fee is determined not solely by fee arrangement between attorney and his client, but by 12 factor test. (176 W. Va. 190, 342 S.E.2d 156; 202 W. Va. 137, 502 S.E.2d 712).

Lien.

No general statutory provisions. Attorney may have common law charging and/or possessory lien. (121 W. Va. 280, 3 S.E.2d 219).

Disbarment or Suspension.

License of any attorney may be annulled or suspended for ethical misconduct, conviction of felony or other crime adversely reflecting on lawyer's honesty, trust-worthiness or fitness to practice law in other respects. See subhead Liabilities, supra.

Reinstatement.

General rule for reinstatement to practice law is that disbarred attorney bears burden of showing that he possesses integrity, moral character and legal competence to resume law practice. To overcome adverse effect of prior disbarment, he must demonstrate record of rehabilitation. In addition, Supreme Court of Appeals must conclude that such reinstatement will not have justifiable and substantial adverse effect on public confidence in administration of justice, and in this regard seriousness of conduct leading to disbarment is important consideration. ("Rules of Lawyer Disciplinary Procedure," R. 3.33; 199 W. Va. 571, 486 S.E.2d 311; 185 W. Va. 725, 408 S.E.2d 675; 166 W. Va. 226, 273 S.E.2d 567).

Unauthorized Practice.

Misdemeanor to practice law without license. (W. Va. Code § 30-2-4). Practice of law by corporations (except legal corporations and limited liability companies) and voluntary associations is prohibited except that they may engage in examination and insuring of titles to real property and hire attorneys in their own immediate affairs. Prohibition does not apply to charitable or benevolent organizations. (W. Va. Code § 30-2-5).

Collection agencies engage in unauthorized practice of law if their agents or employees appear in court on behalf of creditors, prepare and file complaints to institute legal proceedings, take judgments on claims, and render such legal services to creditors for pay as part of their regular collection business. Collection agencies may not escape statutory prohibition against unauthorized practice of law by employing licensed attorneys to appear in court and prepare legal documents relating to suits brought by agencies as representatives of their clients. (168 W. Va. 758, 285 S.E.2d 641; see also W. Va. Code § 46A-2-123).

Title search is practice of law and may not be conducted by layperson. Further, layperson may not prepare any documents or make oral report that explains legal status of title to real estate, legal effect of anything found in chain of title or legal effects of other matters found on record that could affect marketability of title, unless under direct supervision by attorney. Real estate closings are also practice of law and may not be done by laypersons. (West Virginia State Bar Committee on Unauthorized Practice of Law, Op. No. 2003-01).

Attorney Ethics.

On June 30, 1988, West Virginia Supreme Court of Appeals adopted American Bar Association Rules of Professional Conduct with modifications, effective Jan. 1, 1989 and amended June 26, 1990, effective July 1, 1990. (W.Va. Rules of Professional Conduct).

Professional Corporation.

See category 2 Business Organizations, topic 2.03 Corporations, subhead Professional Corporations; see also W. Va. Code § 30-2-5a. See category 2 Business Organizations, topic 2.06 Limited Liability Companies; see also, W. Va. Code §§ 31B-13-1301 to 1306.

19 MINERAL, WATER AND FISHING RIGHTS

19.01 MINES AND MINERALS:

Inspection of Mines.

Director of West Virginia Office of Miners Health Safety and Training or his representatives have authority to enter any mine. If they have reasonable belief that dangerous condition exists or there is violation of law, immediate investigation may ensue. Director may institute civil action in circuit court when operator fails to comply with order or interferes with inspection. Civil penalties for violations of regulations promulgated by Director are mandatory, and special assessments for violations of orders issued in course of mine inspections may be imposed. (WV Code 22A-1-14, 15, 21).

Use of Diesel-Powered Equipment Authorized.

In order to eliminate or reduce inherent hazards associated when using diesel-powered equipment, there are requirements for emissions control, ventilation, fire suppression, fuel storage, training maintenance, testing and record keeping. (WV Code 22A-2A-101–901).

Self-Contained Self-Rescuers and Wireless Emergency Communication and Tracking Devices.

Each miner is required to wear protective clothing and to carry self-contained self-rescuer while underground. Underground miners are required to be trained to use and wear wireless emergency communications and tracking devices while underground. (WV Code 22A-2-55).

Surface Mining.

In order to balance protection of environment and economical mining of coal, and to assume primary jurisdiction under federal Surface Mining Control and Reclamation Act to regulate surface and underground coal mining in West Virginia, West Virginia has adopted Surface Coal Mining and Reclamation Act. Surface mining reclamation inspectors shall make all necessary surveys and inspections of surface mining operations and enforce all surface mining laws and rules, such as ensuring complete compliance with permits. No person may engage in surface mining operations without first obtaining surface mining permit. (WV Code 22-3-8). Permits may be issued for term not to exceed five years and shall terminate if permittee has not commenced surface mining operations covered by permit within three years of date of permit. Each application for surface mining permit must be accompanied by permit fee of $1,000. Requirements of surface mining permit are provided in WV Code 22-3-9. Each surface mining permit must include reclamation plan. Any permit issued requires that surface mining operations meet all applicable performance standards and other requirements set forth in WV Code 22-3-13. (WV Code 22-3-1–13). Authority to regulate surface mining in state arises under either state or federal law, but not both simultaneously. (248 F.3d 275 [4th Cir. 2001]).

Pre-blast survey requirements include notifications in writing to nearby owners and occupants of dwellings or structures. (WV Code 22-3-13a). When blasting within 1,000 feet of protected structure, operator must have site-specific blast design. (WV Code 22-3-22a). Special office of blasting and explosives established within DEP to regulate blasting at surface mines, to examine and certify blasters and to resolve claims arising between property owners and mine operators. (WV Code 22-3A-1–11).

If Department of Environmental Protection (DEP) establishes that blast at surface coal mine operation was not in compliance with regulations governing blasting and resulted in property damage to protected structure, operator may be subject to penalty of not less than $1,000 nor more than $5,000 for first offense. For second offense penalties may be assessed not less than $5,000 nor more than $10,000. Third offense, and subsequent offense within one year of first offense, will result in cessation order. (WV Code 22-3-30a).

Each operator of underground coal mine must adopt measures to prevent, to extent technologically and economically feasible, subsidence causing material damage to overlying surface lands, except where subsidence is planned in predictable and controlled manner; seal unneeded portals, stabilize waste piles, and design waste piles in accordance with criteria in WV

Code 22-3-13(f), establish vegetation cover on re-graded areas, protect off-site areas, eliminate fire hazards, minimize disturbance of prevailing hydrologic balances, and, to extent possible, use best technology to minimize disturbances to environment. (WV Code 22-3-14).

Surface mines are subject to inspections every 30 days by DEP without notice and upon presentation of appropriate credentials. Inspectors have right to enter surface mine and have access to any records required under art. (WV Code 22-3-15). Inspector has authority to issue notice of violation for any violation of requirements of act. Inspector may issue cessation order for conditions which pose imminent danger to public health and safety or of significant environmental harm. Informal conference shall be held within 24 hours after order is issued, whereupon surface-mining supervisor shall determine when operation may resume. Cessation order remains in effect until condition is abated. (WV Code 22-13-16). If operator of surface mine fails to comply with permit or rules promulgated by DEP, operator may have permit revoked or civil penalty assessed. Informal conferences and hearings are available to operator. When any agent of corporate operator knowingly and willfully violates provision of art., fines and imprisonment may be imposed. (WV Code 22-3-17).

Approval, Denial, Revision and Prohibition of Permit.

Upon receipt of surface mining application, director shall notify applicant of decision regarding application within 60 days. No permit shall be issued when DEP determines that applicant is currently in violation of Act, other environmental laws or rules. No permit will be issued when operator has engaged in pattern of willful violations of Act or other state or federal programs implementing federal Surface Mining Control And Reclamation Act of 1977. If area to be mined contains prime farmland, director may grant permit if operator demonstrates that it has technological capability to restore mined area. Director may delete parts of land described in any application described in WV Code 22-3-18(e). (WV Code 22-3-13[b][7], 18).

In addition to mining permit required by WV Code 22-3-8, filling or mining through channel that constitutes “navigable water” within meaning of Federal Water Pollution Control Act requires separate permit issued by U.S. Army Corps of Engineers under that statute as required by 33 USC § 1344.

Permits May be Renewed and Revised Pursuant to Requirements.

Applicant for revision of permit must advertise notice of application in local newspaper. Any interested person or person who may be adversely affected by permit may file objections. (WV Code 22-3-19, 20). Director may designate certain areas unsuitable for surface mining pursuant to criteria in WV Code 22-3-22(a)(2). Any person adversely affected by determination has right to petition director for termination of the designation. No surface mining operations will be permitted on any land within national park system, national wildlife refuge systems, national system of trails, national wilderness preservation system, wild and scenic river system, and national recreation areas designated by acts of Congress. No surface mining operations will be permitted in publicly owned parks or places included in National Register of Historic Sites or National Register of Natural Landmarks, within 100 feet of any public road, within 300 feet from any occupied dwelling unless waived by the owner, within 300 feet of any public building, school, church, community or institutional building or public park or within 100 feet of cemetery, or within boundaries of any national forest. However, there are exceptions if Secretary of Interior finds that there are no significant recreational, timber, economic or other values that may be incompatible with surface mining operations. Coal underlying any lands designated unsuitable for surface mining operations will be assessed at no value for taxation purposes for duration of designation. (WV Code 22-3-22).

Requirements for requests for release of a bond or deposit are found in WV Code 22-3-23.

Water Rights and Replacement.

If surface mining operation contaminates, diminishes, or interrupts legitimate use water supply of owner of such interest, operator must replace water supply. Any person whose interests are adversely affected by surface mining operation may sue, in circuit court of county where surface mining operation is located, state of West Virginia or any other governmental agency thereof which is alleged to be in violation of art. to compel compliance with art. Once supply of water to residence is commenced, it may not be discontinued without authorization of DEP. (WV Code 22-3-24, 25).

Waste Piles.

Provisions for permits authorizing reclamation of existing abandoned coal processing waste piles found in WV Code 22-3-28.

Tax on Coal Production.

Special tax of $.14 per ton is imposed and deposited into state's Special Reclamation Fund for purposes described in WV Code 22-3-17. State imposes annual tax of $0.02 per ton of coal produced. Special tax is in addition to other severance taxes, and is not subject to exemptions of c. 11, arts. 12b, 13a or 13v. (WV Code 22-3-32 and 32a).

Oil and Gas.

Permit is required for well work. Director may issue separate permit for discharge of any pollutant or combination of pollutants into waters of state when water quality standards are met. (WV Code 22-6-6, 7). Permits will not be issued for wells under leases that provide flat well royalty to owner. (WV Code 22-6-8). Liquid pressure may be introduced into producing strata to recover oil. (WV Code 22-6-25). Bonds or corporate surety may be required for issuance of permit. (WV Code 22-6-26).

Recovery of coalbed methane from coal seam or mined out area of coal seam is authorized but subject to separate statute including requirement to obtain permit to drill well, notifications to property owners and owners of coal seams, spacing of wells, right to pool interests and to create drilling units, and opportunity to contest agency decisions before administrative board. (WV Code 22-21-1–29). Lease of conventional natural gas does not convey to lessee right to develop coalbed methane. (214 W. Va. 577, 591 S.E.2d 135 [2003]).

Taxes.

See category 22 Taxation.

20 MORTGAGES

20.01 CHATTEL MORTGAGES:

Uniform Commercial Code adopted. (c. 46). See category 3 Business Regulation and Commerce, topic 3.09 Commercial Code.

Filing.

See category 3 Business Regulation and Commerce, topic Commercial Code for places and fees.

Forms.

See Part III, Uniform and Model Acts, Commercial Code Amendments for National Forms.

20.02 COLLATERAL SECURITY:

See category 8 Debtor and Creditor, topic 8.15 Pledges.

20.03 MORTGAGES OF PERSONAL PROPERTY:

See topic 20.01 Chattel Mortgages; and category 3 Business Regulation and Commerce, topic 3.09 Commercial Code.

20.04 MORTGAGES OF REAL PROPERTY:

See category 21 Property, topic 21.07 Deeds of Trust.

21 PROPERTY

21.01 ABSENTEES:

Personal property or money belonging to or held for nonresident infants, insane persons, heirs, cestui que trust, etc., may be ordered paid over to foreign guardian, committee, executor, administrator or trustee, who may also be authorized by court to sue for, receive and remove personal property and money, including rents of realty. Realty of such nonresidents may be ordered sold and proceeds paid over to foreign fiduciary, but where such proceeds are required to be invested under direction of court, they may not be removed without consent of residents who would be heirs of nonresident owner in case of death, and then only if removal does not defeat or conflict with provisions of instrument creating trust. (WV Code 44-11-3–8).

Property or money in state belonging to resident infant, incompetent or insane person may be removed from state by nonresident testamentary guardian or nonresident committee upon satisfaction of certain conditions listed in WV Code 44-11-8a.

Escheat.

Applicable legislation is Uniform Disposition of Unclaimed Property Act. (c. 36, art. 8; see also c. 11A, arts. 3-4 for information regarding sale of property for non-payment of taxes).

See also category 13 Estates and Trusts, topic 13.07 Descent and Distribution, subhead Escheat.

21.02 ADVERSE POSSESSION:

Character of Possession.

Possession must be adverse or hostile, actual, open and notorious, exclusive, continuous and under claim of title (claim of right) or color of title for requisite statutory period. (160 W. Va. 84, 232 S.E.2d 524; 196 W. Va. 660, 474 S.E.2d 590). Claim of title and color of title distinguished. (160 W. Va. 84, 232 S.E.2d 524). Person claiming adverse possession must show that his possession of property was against right of and inconsistent with title of true owner. Word “hostile” is synonymous with word “adverse” and need not and does not import that disseisor must show ill will or malevolence to true owner. (179 W. Va. 476, 370 S.E.2d 132; 196 W. Va. 660, 474 S.E.2d 590). Actual possession of part of land, with claim of title to whole, under color of title, constitutes adverse possession of whole, unless some part of whole is held adversely. (WV Code 55-4-16). Continual claim, or other claim upon or near any land, does not preserve any right of making entry or bringing action. (WV Code 55-2-2). However, mistaken belief that one occupies land beyond actual property line does not defeat claim that he holds land adversely or hostilely. (160 W. Va. 84, 232 S.E.2d 524; 196 W. Va. 660, 474 S.E.2d 590).

Duration of Possession.

Entry on or action to recover any land must be made or brought within ten years next after time at which right to make such entry or bring such action shall have first accrued to one or to some person through whom he claims. (WV Code 55-2-1). “Tacking” of different adverse possessions to meet statutory period dependent upon privity of title or claim. (36 W. Va. 445, 15 S.E. 177). Privity means privity of possession. It is transfer of possession, not title, which is essential element. (196 W. Va. 559, 474 S.E.2d 489).

Adverse possession is founded upon legislative desire to settle land titles and is made manifest by statute of limitations which bars right to recover real property. (160 W. Va. 84, 232 S.E.2d 524; 99 W. Va. 91, 127 S.E. 911; 67 W. Va. 75, 67 S.E. 1075).

Effect of Possession.

Adverse possession enables one who has been in possession of piece of real property for more than statutory period of time to bring action asserting that he is now owner of that piece of property even when title rests in another. (179 W. Va. 476, 370 S.E.2d 132). Burden is upon party who claims title by adverse possession to prove by clear and convincing evidence all elements essential to such title. (196 W. Va. 559, 474 S.E.2d 489).

Easements.

Burden of proof falls on party asserting easement and must be established by clear and convincing evidence. (159 W. Va. 844, 229 S.E.2d 732; 180 W. Va. 581, 378 S.E.2d 446; 191 W. Va. 288, 445 S.E.2d 229). To establish easement by prescription there must be continued and uninterrupted use or enjoyment for at least ten years, identity of thing enjoyed, and claim of right adverse to owner of land, known to and acquiesced in by him; but if use is by permission of owner, easement is not created by such use. (136 W. Va. 127, 66 S.E.2d 280; 175 W.Va. 418, 333 S.E.2d 89; 191 W. Va. 288, 445 S.E.2d 229). Private easement may be extinguished by adverse possession wholly inconsistent with use of easement. (180 W. Va. 581, 378 S.E.2d 446; 193 W. Va. 285, 456 S.E.2d 12). Easement by necessity, however, cannot be extinguished so long as necessity continues to exist. (193 W. Va. 285, 456 S.E.2d 12; 159 W. Va. 844, 229 S.E.2d 732).

Disabilities.

Person who is infant or insane at time right to make entry on or bring action to recover land accrues, or person claiming through such person, may make entry or bring action within five years after removal of disability or death of person under disability, whichever occurs first (WV Code 55-2-3), but in either event, entry must be made or action brought within 20 years from time right first accrued (WV Code 55-2-4).

Surface and Mining Rights.

Severance of title to any minerals in land and rights appurtenant thereto from title to surface does not break continuity of possession of such minerals and appurtenant rights and ownership or possession of surface after severance is not adverse to interests of owner of minerals and appurtenant rights. (WV Code 55-2-1a).

Public Lands.

No title by adverse possession can be acquired of land owned by government and used for governmental purposes. (46 W. Va. 544, 33 S.E. 326; 54 W. Va. 16, 46 S.E. 246). Failure of public authority to accept dedicated land does not bar public’s right therein. (173 W. Va. 438, 317 S.E.2d 798).

Public Roads.

Any road shall be conclusively presumed to have been established when it has been used by public for ten years or more, and public moneys or labor have been expended thereon, whether there be any record of its conveyance, dedication or appropriation to public use or not. (WV Code 17-1-3; 154 W. Va. 722, 179 S.E.2d 10).

21.03 [RESERVED]

21.04 CONVEYANCES:

See topic 21.06 Deeds.

21.05 CURTESY:

Tenancy by curtesy abolished (WV Code 43-1-1) and right of dower abolished (WV Code 43-1-1). See topic 21.08 Dower.

21.06 DEEDS:

Deeds are necessary for conveyance of estates of inheritance or freehold, or for term of more than five years, in lands. (WV Code 36-1-1). Distinctions in legal effect between following deeds are abolished: Grant; bargain and sale; lease and release; and to stand seized. Instruments showing intent to pass title to or present or future interest in real estate, if properly executed and delivered must be given effect according to intent and will not fail for lack of conformity with language of WV Code 36-3-5–9. (WV Code 36-3-4).

Execution.

Deed need not be under seal (WV Code 36-3-1), but must be acknowledged as to any person signing, or proved by two witnesses as to such person, in order to be recordable (WV Code 39-1-2). (See category 10 Documents and Records, topic 10.01 Acknowledgments.) Witnesses are not ordinarily used. Concerning deeds between husbands and wives, see category 14 Family, topic 14.09 Husband and Wife, subhead Conveyance or Encumbrance of Property.

See also topic 21.16 Real Property; category 8 Debtor and Creditor, topic 8.10 Homesteads, subhead Alienation or Encumbrance.

Corporations.

Certificate of acknowledgment of corporation should include that person signing deed or instrument for corporation has done so in certain capacity and said writing is act or deed of corporation. (WV Code 39-1-9).

Recording.

Deeds, to be valid against creditors and subsequent purchasers for valuable consideration without notice, must be recorded in office of clerk of county commission of county wherein land may be. (WV Code 40-1-9). See also category 10 Documents and Records, topic 10.04 Records.

Recording Fees.

Clerk of county commission shall charge $10 for recording deed. If deed contains more than five pages, $1 for each additional page. (WV Code 59-1-10).

Excise Tax on Transfer of Real Property.

See category 22 Taxation, topic 22.18 Stamp and Seal Taxes, subhead Stamp Tax.

Sales Listing Form.

Clerk shall not record any document with stamps affixed unless there is tendered with document completed and verified sales listing form for benefit and use of state tax commissioner. Forms require specific information called for in statute. (WV Code 11-22-6).

Declaration of Consideration.

When offered for recording each deed subject to excise tax on transfer of real property shall have appended on face or at end thereof, statement or declaration signed by grantor, grantee or other responsible party familiar with transaction declaring consideration paid for or value of property thereby conveyed. (WV Code 11-22-6).

Identity of Draftsman.

No deed shall be recorded or admitted to record or filed by county clerk unless name of person who, and governmental agency, if any, which prepared instrument appears at conclusion of such instrument and such name is either printed, typewritten, stamped or signed in legible manner. (WV Code 39-1-2A).

Covenants.

Covenants by grantor have same effect as if expressed to be also for his heirs, personal representatives and assigns, and are deemed to be also with covenantee, his heirs, personal representatives and assigns. (WV Code 36-4-1). Short forms of covenants have same effect as though common law form or covenant of like import were used, as follows: “that he will warrant generally the property hereby conveyed” or “with general warranty” (WV Code 36-4-2); “that he will warrant specially the property hereby conveyed,” or “with special warranty” (WV Code 36-4-3); “that he has the right to convey the said land to the grantee” (WV Code 36-4-4); “that the grantee shall have quiet possession of the said land” (WV Code 36-4-5); “free from all encumbrances” (WV Code 36-4-6); “that he will execute such further assurances of the said lands as may be requisite” (WV Code 36-4-8); “that he has done no act to encumber the said lands” (WV Code 36-4-7).

Construction.

Every deed is construed to include all buildings, privileges, and appurtenances of every kind belonging to lands therein embraced. (WV Code 36-3-10).

Form.

Deed may be made in following form, or to same effect. “This deed made the. . . . . . day of. . . . . ., in the year. . . . . ., between (here insert names of parties), witnesseth: That in consideration of (here state the consideration), the said. . . . . grants unto the said. . . . . all, etc. (Here describe the property, and insert covenants or any other provisions.) Witness the following signature.” (WV Code 36-3-5).

Effect.

Deed in statutory form or to same effect and in absence of words of limitation passes fee simple or whole estate or interest which grantor had power to dispose of, unless contrary intention appears by deed. (WV Code 36-1-11). See topic Real Property for types of estates.

Effect of words of release: “The said grantor releases to the said grantee all his claims upon the said lands” is construed fully to remise, release and forever quitclaim all right, title and interest, both at law and in equity, of grantor as against grantee, his heirs and assigns. (WV Code 36-3-7).

21.07 DEEDS OF TRUST:

Mortgages have been almost entirely superseded by deeds of trust. Lien theory obtains with reference to mortgages. (129 W. Va. 851, 42 S.E.2d 185).

Execution.

Same requirements as for deeds. See topic 21.06 Deeds.

Trustee.

Nonresident of West Virginia may not act as trustee. (WV Code 38-1A-2). Bond may be required of trustee under deed of trust. (WV Code 38-1-10). Trust does not fail for want of trustee. Circuit court of county in which property situate will appoint another trustee to fill vacancy or to act for non-qualified foreign corporate trustee. (WV Code 44-14-1–2, 4; WV Code 38-1A-11). See also category 13 Estates and Trusts, topic 13.15 Trusts, subhead Eligibility and Competency.

Recordation.

Mortgages and trust deeds are void as to creditors and subsequent purchasers for valuable consideration without notice, until and except from time they are duly admitted to record. (WV Code 40-1-9). Instrument is not recordable unless it states residence address of trustee or trustees (WV Code 38-1A-6); name and residential address of beneficial owner of debt secured (WV Code 39-1-2); and identity of draftsman (WV Code 39-1-2A). See category 10 Documents and Records, topic 10.04 Records. Certified copies of original contracts, deeds of trust, mortgages, leases, memoranda of lease, releases, assignments, powers of attorney or any other instrument or writing except deeds, wills or Uniform Commercial Code financing statements are recordable, in lieu of originals thereof, in office of clerk of county commission of any county of state. (WV Code 39-1-2b).

Statute of Limitations.

As to deed of trust executed after 1921 enactment of statute, lien is not valid or binding after expiration of five years from instrument’s maturity date, or 35 years from instrument’s date if no maturity date is ascertainable. Secured party, grantor, or mortgagor may file affidavit or extension agreement with county clerk extending lien by five years from instrument’s maturity date, as extended, or 35 years from instrument’s date if no maturity date is ascertainable. Lien created prior to July 1, 1998, is valid for 20 years after maturity date or, if no maturity date is stated, for 35 years from instrument date. (WV Code 55-2-5). Rebuttable presumption of payment exists after expiration of 20 years from date when debt secured by deed of trust or mortgage became due for deeds of trust executed prior to 1921. (28 W. Va. 388).

Future Advances.

Priority of lien for future advances under deed of trust designated on its face as “a credit line deed of trust” is established by statute. Obligatory future advances and any taxes, insurance premiums and obligations which secured party has agreed to pay or which under deed of trust or otherwise secured party has right to pay in connection with such deed of trust have priority over subsequent liens; any optional or nonobligatory advances, unless made after receipt by secured party of written notice of mechanic’s lien, abstract of judgment, notice of lis pendens, other deed of trust or other lien of encumbrance, have priority over such liens. Credit line deed of trust shall contain specific provisions permitting or requiring future advances and stating whether future advances are intended to be obligatory or non-obligatory. (WV Code 38-1-14).

Priorities.

See category 10 Documents and Records, topic 10.04 Records, subhead Effect of Recordation.

Subordination Agreements.

No general statutory provisions.

Assignment.

Benefit of lien follows debt, upon assignment of debt. (104 W. Va. 502, 140 S.E. 482).

Release.

See infra, subhead Forms.

Satisfaction.

If obligation secured by deed of trust has been fully paid and satisfied, any person entitled to benefit of any lien shall provide written release to debtor, signed and duly acknowledged by him, and admitted to record within 30 days after debt has been satisfied. (WV Code 38-12-1). Lien is discharged when release has been recorded. (WV Code 38-12-8).

Sales.

On default under deed of trust, trustee, when required by creditor, sells property. (WV Code 38-1-3). Unless deed of trust executed and delivered prior to July 1, 1980, contains waiver of published notice requirement, trustee shall publish Class II legal advertisement in county where property is located with copy of notice served by certified mail, return receipt requested, on: (a) Grantor at least 20 days prior to sale, and (b) subordinate lienholders under circumstances prescribed by statute. Notice must contain certain information. (WV Code 38-1-4). No general statutory provisions regarding mortgages. Sale under deed of trust may be made according to terms thereof subject to statutes. (WV Code 38-1-5). Report of sale must be made to clerk of county commission and recorded. (WV Code 38-1-8–9).

Redemptions.

No right to redeem after foreclosure sale under deed of trust. However, debtor may recover certain costs and fees if he reinstates prior to sale. (WV Code 46A-2-115).

Forms.

Following forms may be used:

Deed of trust: This deed, made the. . . day of. . . in the year. . . . . between. . . . . (the grantor) of the first part, and. . . . . (the trustee) of the second part, witnesseth: That the said. . . . . (the grantor) doth grant to the said. . . . . (the trustee) the following property (here describe it) in trust to secure (here describe the debts to be secured or the sureties to be indemnified and insert covenants or any other provisions the parties may agree upon). Witness the following signatures. (WV Code 38-1-2).

In case of instrument securing payment of debt, insert name and address of beneficial owner of debt. Address of grantor and trustee should also be included. (WV Code 38-1-4, 14).

Release of mortgage or deed of trust: I. . . . . hereby release a mortgage (or deed of trust) made by. . . . . to me (or to. . . . ., my trustee, or to. . . . . and assigned to me), dated the. . . day. . . . .,. . . . ., recorded in the office of the clerk of the county commission of. . . . . county, West Virginia, in trust deed book. . ., page. . . Signatures and acknowledgments. (WV Code 38-12-4).

Chattel Mortgages.

See category 20 Mortgages, topic 20.01 Chattel Mortgages.

21.08 DOWER:

Right of dower has been abolished. (WV Code 43-1-1). See topic 21.05 Curtesy.

21.09 ESCHEAT:

See topics 21.01 Absentees, subhead Escheat, Personal Property; categories 3 Business Regulation and Commerce, topic Banks and Banking, subhead Unclaimed Deposits; Estates and Trusts, topics Descent and Distribution, subhead Escheat, Wills, subhead Unclaimed Legacies.

21.10 LANDLORD AND TENANT:

In general, rights and liabilities arising out of relationship between landlord and tenant are those governed by common law; however, some modifications as well as codification are made by statute. (c. 37, art. 6). Common law with respect to residential leases has been significantly modified. (162 W. Va. 367, 253 S.E.2d 114).

Kinds of Tenancy.

For life; for years; at will or by sufferance and periodic (from year to year, etc.).

Leases.

Leases for over one year must be in writing and signed by party to be charged or by his agent. (WV Code 36-1-3). Estate in lands for term of more than five years must be conveyed by deed or will. (WV Code 36-1-1). Omission of seal does not detract from legal effect of lease. (WV Code 36-3-1, 3). Acknowledgment necessary only to entitle lease to be recorded. (WV Code 39-1-2). Requisites, other than stated above, are consideration (52 W. Va. 88, 43 S.E. 101); description of land (68 W. Va. 604, 70 S.E. 371); term or terms of lease (59 W. Va. 605, 53 S.E. 928). Lease of residential dwelling treated as contract; covenants are mutually dependent. (162 W. Va. 367, 253 S.E.2d 114).

Recording.

Lease, if in proper form, may be recorded by clerk of county commission of county in which property is located. Acknowledgment is necessary for recording. (WV Code 39-1-2). Name of person who, or governmental agency, if any, which prepared lease must appear at conclusion of lease for recording. (WV Code 39-1-2a). No limitation of time for recording. Actual possession of tenant puts purchaser on notice of unrecorded lease. (76 W. Va. 469, 85 S.E. 652). Memorandum of lease, if in proper form, may be recorded. (WV Code 40-1-8).

Warranties.

In written or oral lease of residential premises, there is implied warranty that landlord shall deliver dwelling unit and surrounding premises in fit and habitable condition and maintain leased property in such condition. (WV Code 37-6-30; 162 W. Va. 367, 253 S.E.2d 114; 200 W. Va. 209, 488 S.E.2d 484). Waiver of implied warranty of habitability prohibited as against public policy. Breach of implied warranty of habitability constitutes defense to action for unlawful detainer or action for rent or damages brought by landlord. On breach of warranty, tenant may rescind lease, vacate premises and thus terminate obligation to pay rent or may continue to pay rent and bring own action or counterclaim to recover damages caused by breach. When warranty of habitability is breached, tenant's damages measured by difference between fair market value of premises if they had been as warranted and fair rental value of premises as they were during occupancy by tenant in unsafe and unsanitary condition; tenant may recover damages for annoyance and inconvenience resulting from breach. (162 W. Va. 367, 253 S.E.2d 114).

Smoke Detectors and Carbon Monoxide Detectors.

Smoke detector capable of providing alarm suitable to warn occupants of fire must be installed in immediate vicinity of each sleeping area in all one-and two-family residential dwellings. (WV Code 29-3-16a[a]). Owner of dwelling is required to provide, install and replace smoke detectors, and tenant is responsible for performing routine maintenance. (WV Code 29-3-16a[b]). Automatic fire sprinkler system may be installed in lieu of smoke detectors. (WV Code 29-3-16a[d]). Upon written request deaf tenant may request owner to install smoke detector with light signal sufficient to warn of danger of fire. (WV Code 29-3-16a[c]). Effective July 1, 1998, operational carbon monoxide detector with suitable alarm is required to be installed in any newly constructed residential unit which has fuel-burning heating or cooking source or in any residential unit which is connected to newly constructed building which has fuel-burning heating or cooking source. (WV Code 29-3-16a[f]). Any person installing carbon monoxide detector in residential unit shall inform owner, lessor or occupant of dangers of carbon monoxide poisoning and operation of detector. (WV Code 29-3-16a[g]). When repair or maintenance work is undertaken on fuel-burning heating or cooking source or venting system in existing residential unit, person making repair or performing maintenance shall inform owner or lessor of unit of dangers of carbon monoxide poisoning and recommend installation of carbon monoxide detector. (WV Code 29-3-16a[h]). Violations constitute misdemeanor with penalty of fine of not less than $50 nor more than $100. (WV Code 29-3-16a[i]). Violation not considered as evidence of negligence or contributory or comparative negligence in any civil action for damages, nor may violation constitute defense in any civil action involving any insurance policy. (WV Code 29-3-16a[j], [k]). Failure to comply with fire codes or similar regulations and absence of smoke detector in one- or two-family dwelling constitutes prima facie evidence of negligence if injury proximately flows from noncompliance. (192 W. Va. 392, 452 S.E.2d 708).

Rent of every kind may be recovered by distress or action. Landlord may also recover by action reasonable satisfaction for use and occupation of land. Parol demise or agreement will not defeat such action but may be used as evidence of amount of damages. (WV Code 37-6-9). Person to whom rent is due, or his successor in right, may recover as landlord might. (WV Code 37-6-10). Rent may be recovered from lessee or other person owing it, or from heir, personal representative, devisee or assignee succeeding to lessee’s estate, but no assignee is liable for rent which became due before his interest began. (WV Code 37-6-11). When rents are inherited, conveyed or devised, all rights to distress and reentry shall pass to heir, grantee or devisee without express words. (WV Code 37-6-3). Covenant to pay rent in lease of residential premises dependent upon premises being habitable. If premises are not habitable, tenant may rescind lease, vacate premises and terminate obligation to pay, or pay rent and bring action or counterclaim to recover damages caused by uninhabitability. (162 W. Va. 367, 253 S.E.2d 114).

Lien.

Statutory distress warrant procedure which permits property of tenant to be levied upon and seized by levying officer without prior notice and opportunity for hearing deprives owner of his property without due process in contravention of state and federal constitutions. Landlord has other adequate statutory remedies and statutory distress is unwarranted in that tenant is denied his basic right of protest or defense before his property is taken. To extent distress for rent procedure deprives tenant of his property without hearing on notice, it is unconstitutional. (156 W. Va. 60, 190 S.E.2d 770).

Termination of Tenancy.

Tenancy from year to year may be terminated by either party giving notice in writing three months prior to end of year. Periodic tenancy, less than one year, may terminate by like notice, or by notice for one full period. This, however, does not apply where by special agreement no notice is to be given. (WV Code 37-6-5). If landlord is tenant for life or holds other uncertain interest in land which is let to another and landlord’s estate terminates during tenancy, lessee may hold land until end of current year of tenancy, paying rent therefor. (WV Code 37-8-1).

Holding Over.

Tenant who continues in possession after expiration of term of lease and pays rent according to old lease, which landlord accepts, becomes tenant from month to month or year to year depending on terms of old lease as to rent or rental periods. (68 W. Va. 328, 69 S.E. 843).

Desertion of Leased Property, Remedies of Landlord.

If any tenant from whom rent is in arrears abandons leased property, landlord shall post notice in writing in conspicuous part of property requiring tenant to pay rent within one month. If rent is not paid within that time, landlord entitled to possession and may enter property and right of tenant to property shall end. Landlord may recover rent owed up to time when he became entitled to possession. (WV Code 37-6-6[a]). If any tenant of housing development operated by housing authority abandons leased property when rent is not condition of lease agreement, housing authority shall post notice in writing in conspicuous part of property, requiring tenant to respond in writing within one month stating that he or she has not abandoned leased property. If no response within one month, housing authority shall be entitled to possession of property and right of tenant shall end. (WV Code 37-6-6[b]). Upon regaining possession of property, landlord or housing authority may take, dispose of or otherwise remove tenant's personal property without incurring any liability to tenant or any other person. To dispose of tenant's property under this section, landlord or housing authority shall give written notice to tenant that shall be posted in conspicuous place on property, and sent by first class mail to tenant at leased property, any post office box held by tenant, most recent forwarding address if provided by tenant or known by landlord or housing authority. (WV Code 37-6-6[c]). Notice shall state that leased property is considered abandoned, any personal property left by tenant must be removed by date specified in notice. Date specified in notice must not be less than 30 days after written notice was mailed or not less than 60 days after date written notice was mailed if tenant is on active duty in armed forces. (WV Code 37-6-6[d][1], [2]). If personal property is not removed within time provided, then tenant forfeits ownership rights to personal property. (WV Code 37-6-6[d][3]). If abandoned property is worth more than $300 and was not removed within time specified, landlord shall store property for up to 30 additional days if tenant or any person holding security interest in property informs landlord of his intent to remove property and provided tenant or person holding security interest in property pays landlord reasonable costs of storage and removal. (WV Code 37-6-6[e]).

Dispossession.

Various alternatives (right of reentry; ejectment; unlawful detainer; judgment by default) are detailed in statute. (WV Code 37-6-19). Breach of implied warranty of habitability constitutes defense to action for unlawful detainer of residential premises. (162 W. Va. 367, 253 S.E.2d 114). Where actual reentry shall be made, written act of reentry, sworn to by sheriff or other officer acting therein, must be returned to clerk of county commission of county where lands or tenements are, who shall record same and shall prepare certificate reporting same to be published as Class II legal advertisement in compliance with c. 59, art. 3 and publication areas for such publication shall be such county. Publication shall be proved by affidavit to satisfaction of clerk of county commission. (WV Code 37-6-24).

Remedies.

Person desiring to remove tenant from residential rental property may apply for such relief to magistrate court or circuit court of county in which such property is located, by verified petition. Such petition must set forth that person submitting such petition is owner or agent of owner and has right to recover possession of property. (WV Code 55-3A-1[a] [1]; 196 W. Va. 35, 468 S.E.2d 167; 200 W. Va. 49, 488 S.E.2d 49). Petition must also contain brief description of property sufficient to identify it, must allege that tenant is wrongfully occupying property and that tenant is in arrears in payment of rent, has breached warranty or leasehold covenant, or has deliberately or negligently damaged property or knowingly permitted another person to do so. (WV Code 55-3A-1[a] [2], [3]). Petition must describe such arrearage, breach, or act or omission and must contain prayer for possession of property. (WV Code 55-3A-1[a] [3], [4]). Prior to filing petition, petitioner shall request from court time and place at which petitioner shall be heard. Court shall fix time for such hearing not less than five nor more than ten judicial days following such request. (WV Code 55-3A-1[b]).

Petitioner shall immediately notify tenant of time and place for hearing pursuant to R.C.P. 4 or by certified mail, return receipt requested. Such notice shall inform tenant that any defense to petition must be submitted in writing to petitioner within five days of receipt by tenant of notice, and in no case later than fifth day next preceding date of hearing. Upon either receipt of return of service or return mail receipt evidencing service upon tenant, petitioner shall file with court his petition and such proof of service. (WV Code 55-3A-1[c]).

In proceeding for summary relief for wrongful occupation of residential rental property, tenant against whom petition has been brought may assert any and all defenses which might be raised in action for ejectment or action for unlawful detainer. (WV Code 55-3A-2).

If there is no appearance, answer or other responsive pleading filed by tenant at time of hearing, court shall make and enter order granting immediate possession of property to landlord. (c. 55, art. 3A § 3 [a]). In case of petition alleging breach by tenant, damage to property or arrearage in rent, if tenant files answer raising defenses to claim or claims set forth in petition, court shall proceed to hearing on such issues. (WV Code 55-3A-3[b], [c]). If court finds that tenant is in wrongful occupation of rental property after hearing court shall grant immediate possession of property to landlord. Additionally, if court finds in favor of petitioner on issue of arrearage in payment of rent, court may also make written finding and include in its order such relief as required. (WV Code 55-3A-3[e]). Court shall in its order specify time by which tenant must remove himself from property and in that order shall provide that if tenant remains in wrongful occupation of property beyond time specified in order, sheriff shall remove him. (WV Code 55-3A-3[f]). Absent issue of title, retaliation, or breach of warranty, and in event of appeal wherein tenant prevails, if term of lease has expired relief ordered by appellate court shall be for monetary damages only and shall not restore tenant to possession. No tenant shall be entitled to remain in possession of leased premises if period of tenancy has expired during pendency of any such appeal. (WV Code 55-3A-3[g]).

Continuances of hearing shall be granted only for cause within discretion of judge or magistrate, and if such continuance is granted upon request by tenant, tenant shall be required to pay into court any periodic rent becoming due during period of such continuance. (WV Code 55-3A-3[d]).

Distress.

Lessee’s goods may be distrained up to one year after time rent becomes due, and not afterwards, regardless of whether lease has terminated. (WV Code 37-6-12). Distress is made by sheriff or constable under warrant from magistrate founded upon affidavit made by person claiming rent. (WV Code 37-6-12). It may be levied upon any goods of lessee or his assignees, found on premises or which may have been removed therefrom not more than 30 days. (WV Code 37-6-13). Officer having such distress warrant, or order of attachment, based upon rent, if there be need for it, may, in daytime break open and enter into any house or close in which there may be goods liable to distress or order, and may, either in day or night time break open and enter into any house or close where there may be goods so liable, which have been fraudulently or clandestinely removed from demised premises. (WV Code 37-6-14). To extent distress for rent procedure deprives tenant of property without hearing or notice, it is unconstitutional. (156 W. Va. 60, 190 S.E.2d 770).

21.11 LEASES:

See topic 21.10 Landlord and Tenant.

21.12 [RESERVED]

21.13 PERPETUITIES:

In 1992, common law rule against perpetuities was repealed and superseded by adoption of Uniform Statutory Rule against Perpetuities. (c. 36, art. 1A). Additional statutory exceptions to rule against perpetuities have been created for common interest ownership (WV Code 36B-2-103[b]); options in leases (WV Code 36-1-24); and certain employee trusts (WV Code 36-1-23; WV Code 12-6-9a[i]).

21.14 PERSONAL PROPERTY:

Tenancy in personal property is presumed to be tenancy in common unless there are words indicating survivorship was intended (WV Code 36-1-19–20; 151 W. Va. 499, 153 S.E.2d 403) or unless instrument joins multiple owners with disjunctive “or” and does not specifically create tenancy in common.

Derelict property escheats to state with remission to treasurer and public sale. (WV Code 34-2-3). Uniform Unclaimed Property Act. (c. 36, art. 8). Unclaimed stolen property held by law enforcement. (c. 36, art. 8A). No taker, escheats to state. (WV Code 42-1-3c).

See WV Code 11-1C-1–11 and associated 110 C.S.R. § 1P for valuation of commercial and industrial personal property.

21.15 POWERS OF ATTORNEY:

Attorney in fact may execute conveyance of personal property in writing or deed of land. (WV Code 36-1-8).

No specific form prescribed by statute for instrument creating power of attorney. Power of attorney to execute deed of land for another is invalid, unless it is in writing and signed by person on whose behalf deed is to be executed. (WV Code 36-1-2). Power of attorney may be recorded in any county. (WV Code 36-1-1). Clerk of county commission shall accept same to be recorded, if it is acknowledged or proven by two witnesses before clerk. (WV Code 39-1-2). Form of acknowledgment for power is general form of acknowledgment set out supra in category Documents and Records, topic Acknowledgments. For acknowledgment on instrument executed by attorney in fact, see special form in category Documents and Records, topic Acknowledgments.

Uniform Durable Power of Attorney Act.

Adopted. Defines durable power of attorney and states same is not affected by disability of principal. Written power of attorney, durable or otherwise, is not revoked until attorney-in-fact receives notice. (WV Code 39-4-1 et seq.).

Medical Power of Attorney Act.

Adopted, entitled “West Virginia Health Care Decisions Act.” (c. 16, art. 30). Permits individual to convey power of attorney for medical decisions to another in event of incompetency.

21.16 REAL PROPERTY:

Common law estates are generally recognized except as modified by statute. Joint tenancies and estates by entirety are abolished, except where tenor of instrument manifests intention of surviving ownership. There is strong statutory presumption in favor of construing tenancies in common without right of survivorship; however, that presumption can be overcome by clear and convincing showing that intention of parties was to create joint tenancy with right of survivorship. (WV Code 36-1-10–20). Future estates may be created by deed. (WV Code 36-1-9). Conveyance of greater estate than grantor possesses passes such estate as grantor actually possesses. (WV Code 36-1-10). Estates tail and Rule in Shelley's case abolished. (WV Code 36-1-12, 14). Common law doctrine of destructibility of contingent remainders abolished. (WV Code 36-1-15). Doctrine of worthier title and rule that grantor may not create limitation in favor of his own heirs or next of kin abolished as of May 15, 1969. (WV Code 36-1-14a). Need for straw party in creating joint tenancy with right of survivorship eliminated. (WV Code 36-1-20a). For statutory law concerning estates in property, see c. 36, and for statutory law concerning real property, see c. 37.

Uniform Statutory Rule Against Perpetuities adopted. (WV Code 36-1A-1 et seq.).

Foreign Conveyance or Encumbrance.

See category 10 Documents and Records, topic 10.04 Records.

Condominiums.

Uniform Common Interest Ownership Act enacted, effective July 1, 1986 (c. 36B), and Condominium and Unit Property Act (c. 36A) provide for and regulate condominiums. West Virginia Real Estate Time-Sharing Act, effective June 6, 1984 (WV Code 36-9-1 et seq.), regulates creation, sale and operation of time-sharing plans.

See also topics: Curtesy, Deeds, Dower, Landlord and Tenant; categories Civil Actions and Procedure, topic Partition; Debtor and Creditor, topic Homesteads; Family, topic Husband and Wife; Mortgages, topic Mortgages of Real Property.

21.17 TRUST DEEDS:

See category 20 Mortgages, topic 20.04 Mortgages of Real Property.

22 TAXATION

22.01 ADMINISTRATION:

State Taxes.

State tax commissioner supervises assessment and collection of all taxes, whether state, county, district or municipal. (WV Code 11-1-2).

Procedure and Administration.

West Virginia Tax Procedure and Administration Act (c. 11, art. 10) provides uniform procedures for assessment and collection of taxes administered by state tax commissioner, except ad valorem taxes on real and personal property (see topic 22.15 Property Taxes). Provision is made for assessment of deficiencies by tax commissioner within three years after due date of returns unless fraudulent return or no return was filed in which case assessment may be made any time. (WV Code 11-10-7, 15). For electronic funds transfer, see, WV Code 11-10-5t. Special rules for assessment in effect when extension by agreement, deficiency in federal return, amended return filed or taxpayer has net operating loss, capital loss carrybacks, credit carrybacks, overpayment of one tax credited against another tax or cases under bankruptcy code. (WV Code 11-10-15).

West Virginia Office of Tax Appeals.

Taxpayer may petition office of tax appeals for reassessment within 60 days of receipt of notice of assessment, denial of refund or credit, or other decision of tax commissioner. (WV Code 11-10-8; 11-10A-9). After receipt of petition, office of tax appeals has five days to notify tax commissioner, who has 40 days to file answer to petition. (WV Code 11-10A-9). Office is required to hold hearing on petition within 45 days of due date of tax commissioner's answer. (WV Code 11-10A-10). Office is independent office with appointed administrative law judges to resolve tax disputes between tax commissioner and taxpayers. (See WV Code 11-10A-1 et seq.). Office has exclusive and original jurisdiction to hear and determine all: (1) Appeals from tax assessments issued by tax commissioner; (2) appeals from decisions or orders of tax commissioner denying refunds or credits; (3) appeals from orders of tax commissioner denying, suspending, revoking, refusing to renew any license or imposing any civil money penalty for violating provisions of any licensing law administered by tax commissioner; (4) questions presented when hearing is requested pursuant to provisions of c. 11, art. 10; (5) matters which tax division is required by statute or legislatively approved rules to hear, except employee grievances; and (6) other matters which may be conferred on office by statute or legislatively approved rules. (WV Code 11-10A-8). Taxpayer appeals of decision of administrative law judge of office of tax appeals may be taken to circuit court of county in which activity to be taxed was engaged, where taxpayer resides, where will of decedent was probated or letters of administration granted, or to circuit court of Kanawha County, and appeals by tax commissioner may be taken in Kanawha County provided taxpayer has right to remove appeal to county in which taxpayer could have brought appeal. (WV Code 11-10A-19). Appeal lies from circuit court to supreme court of appeals. (WV Code 11-10A-19). Tax commissioner may file acquiescence or non-acquiescence in decision of office of tax appeals or circuit court. (WV Code 11-10-10a). For small claims procedures, see WV Code 11-10A-11.

For West Virginia procedure concerning refund of overpayment and prompt payment of refund, see WV Code 11-10-14, 14c, 14d. Tax commissioner may receive as payment for any tax collected under art. 10 any commercially acceptable means of payment that tax commissioner deems appropriate, and specific provision is made for payment by credit cards. (WV Code 11-10-5n).

Collection.

If any tax administered under Tax Procedure and Administration Act is not paid when due, tax commissioner may, in addition to other remedies available for collection of debts due state, proceed to foreclose lien by civil action or by levy and distraint. (WV Code 11-10-11–13k). Except as to inheritance tax liens, every proceeding for collection must be brought within ten years after date assessment became final or return filed. (WV Code 11-10-16; WV Code 55-2-19). As to property taxes, see topic 22.15 Property Taxes, subhead Collection of Ad Valorem Tax.

Tax commissioner may enter into agreements with IRS to offset state tax refunds against federal tax liabilities and vice versa. (WV Code 11-10-11).

Penalties.

State Administered Taxes.

Uniform provisions apply to taxes subject to Tax Procedure and Administration Act (see subhead Procedure and Administration, supra). If tax is not paid when due, interest 1½% plus greater of 8% or adjusted prime rate applies until paid. (WV Code 11-10-17, 17a). For special procedures for abatement of interest, see WV Code 11-10-7a, 7c. Five types of additions to tax are provided unless failure was due to reasonable cause and not due to willful neglect. In case of failure to make or file return, addition to tax is imposed of 5% per month to maximum addition of 25% of amount of tax due. Where taxpayer fails to pay amount shown on return or any tax required to be shown on return which it failed to file and such tax is not paid within 15 days of notice and demand therefor, addition to tax imposed of one-half of 1% per month to maximum addition of 25% of amount of tax due. Penalty for negligence or intentional disregard of rules is 5% per month to maximum of 25% of net tax due and fraud penalty of 50% are also provided, which are applied in lieu of failure to file or pay penalties. Burden of proving fraud is upon tax commissioner. (WV Code 11-10-18). Penalties are imposed also: (a) For willfully failing to collect, account for and pay over any tax, (b) for willfully attempting to evade or defeat collection of any tax, (c) for willfully furnishing false withholding statement or for willfully failing to furnish withholding statement, (d) filing false and fraudulent claim for refund or credit, (e) failure to pay estimated income or business franchise tax or failure to file correct information returns. (WV Code 11-10-18a, 18b, 19, 19a).

Property Taxes.

Interest at 9% is charged beginning first of month following due date (Sept. 1 is due date for first half of year, Mar. 1 is due date for second half of year). (WV Code 11A-1-3). Failure to furnish property tax return, subject to fine of not less than $25 nor more than $100 and forfeiture of remedies provided to correct assessment. (WV Code 11-3-10).

As to real property taxes, see also topic 22.15 Property Taxes, subhead Sales.

Criminal Penalties.

West Virginia Tax Crimes and Penalties Act imposed by c. 11, art. 9. Act applies to inheritance and transfer taxes and estate taxes (c. 11, art. 11); business registration tax (c. 11, art. 12); minimum severance tax on coal (c. 11, art. 12B); repealed; business and occupation tax (c. 11, art. 13); severance tax (c. 11, art. 13A); telecommunications tax (c. 11, art. 13B); repealed; motor carrier road tax (c. 11, art. 14A); interstate fuel tax (c. 11, art. 14B); motor fuel excise tax (c. 11, art. 14C); consumer sales and service tax (c. 11, art. 15); use tax (c. 11, art. 15A); tobacco products excise tax (c. 11, art. 17); soft drinks tax (c. 11, art. 19); personal income tax (c. 11, art. 21); business franchise tax (c. 11, art. 23); corporate net income tax (c. 11, art. 24); health care provider tax (c. 11, art. 27); West Virginia Tax Procedures and Administration Act (c. 11, art. 10); municipal sales and use taxes (c. 11, art. 13C) that cite is “WV Business Investment & Job Expansion Tax Credit Act”; charitable bingo fee (c. 47, art. 20); charitable raffle fee (c. 47, art. 21); and charitable raffle boards and games fee (c. 47, art. 23).

Act also establishes criminal investigation section within state tax division to assure compliance with tax laws. (WV Code 11-9-2a).

Interstate Co-Operation.

Uniform Interstate Arbitration of Inheritance and Death Taxes Act (c. 11, art. 11B) and Uniform Interstate Compromise of Inheritance and Death Taxes Act (c. 11, art. 11A) adopted. West Virginia is also signatory to Uniform Exchange of Information Agreement.

Taxpayer Bill of Rights.

Confidentiality and Disclosure of Returns and Return Information.

Except when required in official investigation by tax commissioner or in any proceeding to collect or ascertain tax in which tax commissioner is party, no officer, employee or agent of state or of any county, municipality or governmental subdivision may divulge or make known in any manner information concerning personal affairs or disclose amount of income or any particulars contained in any report, declaration or return required to be filed with tax commissioner. See WV Code 11-10-5d. Tax commissioner may disclose to state treasurer certain information on taxpayer to whom refund check has been issued and is unclaimed or uncashed for more than six months. (WV Code 11-10-5v). For confidentiality of property tax information, see WV Code 11-1A-23; 11-1C-14.

Exceptions.

Tax commissioner shall: (1) Publish in state register name and address of every taxpayer, and amount by category of certain credits asserted on tax return, and (2) publish in state register information concerning compromise of pending civil tax case in which attorney general does not recommend acceptance or when compromise is for amount that is more than $250,000 or less than assessment of tax owned. For more exceptions, see WV Code 11-10-5s. See also, WV Code 11-10-5w, concerning disclosure of certain oil and gas tax information. Tax Commissioner shall disclose tax return information to Consolidated Public Retirement Board to assist in ascertaining whether individuals receiving disability retirement benefits continue to be eligible to receive such benefits. (WV Code 11-10-5y).

Alternative Dispute Resolution.

On or before Dec. 31, 2002, tax commissioner is required to propose rules which adopt and implement alternative dispute resolution mechanisms which offer taxpayers voluntary and cost-effective methods of resolving tax disputes. See WV Code 11-10-23. *Note:* Similarly, on or before Oct. 1, 2004, tax commissioner shall report findings of review of procedures utilized to resolve taxpayer complaints and problems to determine whether taxpayer complaints and problems are being remedied promptly and to assure that taxpayer rights are safeguarded and protected during tax determination and collection processes. See WV Code 11-10-24.

Waiver of Derivative Tax, Interest, and Penalties on Tax-Exempt Board Members.

Tax commissioner may waive imposition of derivative tax liabilities (i.e. trust fund taxes) and associated interest and penalties on one or more uncompensated board members of certain federally tax-exempt organizations. (WV Code 11-10-5x).

22.02 ALCOHOL, BEVERAGES AND TOBACCO TAXES:

Alcoholic Beverage Taxes.

All sales of liquor by “retail licensees” are subject to 5% sales tax based upon purchase price in addition to regular consumer sales tax. (WV Code 60-3A-21). All sales, outside of corporate limits of any municipality, of liquor by state stores or other agencies of alcoholic beverage control commission, of wine by retailers, and of wine from distributors are subject to 5% sales tax in addition to regular consumer sales tax. (WV Code 60-3-9d). Municipalities are authorized to levy tax on sales of liquor by alcoholic beverage control commission or its agencies, of wine by retailers, and of wine from distributors licensed to sell or distribute wine, up to maximum of 5%, in addition to regular consumer sales tax. (WV Code 8-13-7). Sales of nonintoxicating beer, defined as beer not exceeding 9.6% alcohol by weight or 12% by volume, by manufacturers or distributors for resale within state are subject to excise tax of $5.50 per barrel and in like ratio on each part of barrel. (WV Code 11-16-13). Wine sold by suppliers to distributors is taxed at 26.406¢ per liter. (WV Code 60-8-4).

Tobacco Products Excise Tax.

Tax of 55¢ on each 20 cigarettes and 7% of wholesale price on other tobacco products. (c. 11, art. 17).

Soft Drink Tax.

Imposed by c. 11, art. 19.

22.03 BUSINESS TAXES:

Business Franchise Tax.

Business franchise tax imposed on domestic corporations, corporations having commercial domicile in West Virginia, foreign or domestic corporations doing business or leasing property located in state, and on partnerships doing business or owning or leasing property in state. (WV Code 11-23-6). Effective for tax periods beginning on or after Jan. 1, 2009, any taxpayer engaged in unitary business with one or more other affiliated corporations or partnerships is required to file its business franchise tax return on unitary or combined basis. (W. Va. Code § 11-24-13a). Any business conducted by partnership shall be treated as conducted by its partners. (W. Va. Code § 11-24-3a).

Amount of tax for tax years beginning in 2009 is greater of $50 or 0.48% of value of taxpayer's "capital". (WV Code 11-23-4, 6). Tax is being phased out over period of years. Rate of tax is scheduled to reduce to greater of $50 or 0.41% in 2010, 0.34 % in 2011, 0.27% in 2012, and 0.21% in 2013, 0.10% in 2014, and tax will be eliminated thereafter. (WV Code 11-23-6). In case of corporations, term "capital" means average of beginning and ending year balances of corporation's common and preferred stock; amount of paid-in or capital surplus; retained earnings; less cost of treasury stock, as these amounts appear in Schedule L of corporation's federal income tax return. In case of S corporation, "capital" means average of beginning and ending balances of corporation's stock, amount of paid-in capital or surplus, retained earnings, amount of shareholders' undistributed taxable income, amount of accumulated adjustments account, amount of other adjustments account, less cost of treasury stock, as these amounts appear in Schedule L of corporation's Form 1120S. In case of partnerships, term "capital" means average of beginning and ending year balances of value of partners' capital accounts as appears in Schedule L of partnership's federal income tax returns. Adjustment lowering capital is provided to taxpayer's holding certain preferred governmental obligations or securities or investments or loans secured by mortgages or deeds of trust on residential property located in West Virginia and occupied by nontransients. (WV Code 11-23-3). Taxpayer subject to business franchise tax and also taxable in another state shall apportion its capital to West Virginia based upon four-factor formula consisting of property factor, payroll factor and doubly-weighted sales factor. (WV Code 11-23-5).

Financial Institutions State Franchise Tax.

For apportionment by financial organizations, see WV Code 11-23-5a. Financial organization with commercial domicile in West Virginia may not apportion tax but is permitted credit against tax for amounts paid to another state. (WV Code 11-23-27).

Exemptions.

Following are exempt from business franchise tax: Individuals doing business in state who are not doing business in form of partnership or corporation; corporations and organizations exempt from federal income tax, except, such corporations are not exempt as to that portion of their capital used in generation of unrelated business income subject to federal income tax; insurance companies which pay state tax on premiums; production credit associations organized under Federal Farm Credit Act of 1933; any trust established pursuant to 29 U.S.C. § 186 or instrumentalities of political subdivision of state; credit unions, with exceptions; political subdivisions of state; certain farming and agricultural activities; entities licensed to conduct horse or dog racing meeting or pari-mutuel system of wagering; certain hunting clubs; and certified West Virginia capital company. (WV Code 11-23-7).

Credits.

Certain credits are allowed against business franchise tax: Credit equal to that percentage of taxpayer's business gross income which is subject to business and occupation tax; credit for parent taxpayers with subsidiaries subject to business franchise tax; and credit equal to taxpayer's liability for certain ad valorem taxes of banks, building and loan associations and savings and loan associations. (WV Code 11-23-17). Credit for taxes paid to another state by financial organization with its commercial domicile in this state. (WV Code 11-23-27). Credit for certain consumers' sales and use taxes paid. (WV Code 11-23-25). See topic 22.04A Credits and

Tax Incentives, subhead Credit for Industrial Expansion and Revitalization, for Research and Development Projects and for Housing Development Projects.

Payment of Estimated Taxes.

Taxpayers whose liability for business franchise tax can reasonably be expected to exceed $12,000 for taxable year shall pay quarterly estimated taxes. (WV Code 11-23-13). Annual return must be filed by 15th day of third month following close of tax year if taxpayer is corporation; by 15th day of fourth month following close of tax year, if taxpayer is partnership; for corporations and organizations which by reason of their purposes are exempt from federal income tax except for unrelated business income, by 15th day of fifth month following close of tax year. (WV Code 11-23-9). For special rules concerning consolidated or combined returns, see WV Code 11-23-9a.

Business and Occupation Tax.

Business and occupation tax applied to public service or utility business (WV Code 11-13-2d), business of generating or producing or selling electric power (WV Code 11-13-2m, 2n) and business of storing natural gas (WV Code 11-13-2e). For municipally levied business and occupation tax, see WV Code 8-13-5. Municipal business and occupation tax can apply to unrelated business taxable income of tax exempt organizations. Annual privilege tax is levied on those engaged in following occupations, at following percentages of gross income or gross value of products (c. 11, art. 13):

Gas storage: 5¢ per net dekatherm injected or removed from reservoir during month, capped by “storage utilization index.” (WV Code 11-13-2e).

Public Service or Utility Business: Electric railways, 1.4%; water companies (except municipally owned), 4.4%; electric companies (except municipally owned), 4.0% on sales and demand charges; electric companies which supply but do not generate or produce power, 3.0% on sale and demand charges; natural gas companies, 4.29%; toll bridges, 4.29%; all others, 2.86%. (WV Code 11-13-2d). Credit for utility companies providing reduced electric and natural gas utility rates to low income residential customers, see c. 11, art. 13F.

Tax on electric utilities and producers of electric power is greater of percentage rate imposed under WV Code 11-13-2d or $22.78 multiplied by “taxable generating capacity” with credit for generating unit which has flue gas disulfurization system installed. (WV Code 11-13-2o). For transition rules, see WV Code 11-13-2d. For special rules applicable to wind power projects, see WV Code 11-13-2o.

Manufacturing or producing synthetic fuel from coal is subject to tax of 50¢ per ton. (WV Code 11-13-2f).

There is fixed exemption of $41.67 per month in amount of tax to one taxpayer, regardless of number of businesses engaged in, which is prorated if tax is imposed for less than a year. (WV Code 11-13-3, 3b).

Tax is payable in monthly installments by last day of month following if estimated tax exceeds $1,000 per month, and is payable in quarterly installments within one month after end of quarter if estimated tax is $1,000 or less. Annual return must be filed within one month of close of tax year. (WV Code 11-13-4–5).

For special rules relating to taxation of wind turbines and applicable credits, see WV Code 11-13-2p.

Business Registration Tax.

Business registration tax is $30 for each location of any individual, firm, copartnership, joint venture, association, corporation, estate, trust, business trust, receiver, syndicate, club, society, limited liability company or any other group or combination acting as unit, or body, politic or political subdivision (whether public or private, or quasi-public), in plural as well as singular, and engaging in purposeful revenue-generating activity for economic gain or benefit. (WV Code 11-12-2, 3). Business registration certificate shall be valid for two fiscal years. (WV Code 11-12-5). Following are required to obtain business registration certificate but are exempt from payment of business registration tax: Any business with gross income less than $4,000 per year; any organization exempt from federal income tax under Internal Revenue Code § 501; any political subdivision of state selling tangible personal property, admissions or services, when those activities compete with or may compete with activities of another person; agency or instrumentality of United States exempt from tax by states; certain persons engaged in business of agriculture and farming; and any foreign retailer who is not “retailer engaging in business in this state” as defined in WV Code 11-15A-1. No business activity may be conducted until license is secured from state tax commissioner. (WV Code 11-12-3). For penalty provisions, see WV Code 11-12-9. Special registration provisions applicable to contractors and transient vendors. (WV Code 11-12-19–24).

Insurance Premium Tax.

Tax equal to 2% of premiums, generally. (WV Code 33-3-14). Tax equal to 1% annuity premiums, generally. (WV Code 33-3-15). For return procedure and estimated tax payments, see WV Code 33-43-1 et seq.

Health Care Provider Tax.

For Health Care Provider Tax, see c. 11, art. 27. Provider tax on services performed by certain practitioners will be phased out through 2010 subject to executive order otherwise. (WV Code 11-27-36, 37). Credit against provider tax for medical liability insurance premium paid. (WV Code 11-13T-6).

For nursing facilities provider tax, see WV Code 11-27-11.

Telecommunications Tax.

Tax is levied on every telecommunications business selling or furnishing telegraph, telephone or other telecommunications service within state. (WV Code 11-13B-3).

Liability of taxpayer for telecommunications tax shall be 4% of sum of its gross income from all telecommunications business beginning and ending within state (two point business) and its gross income apportioned to state from all telecommunications business that either begins or ends within state (one point business). (WV Code 11-13B-3).

Gross revenues of telecommunications companies derived from one point business in state shall be apportioned to state in same proportion that length of such company’s communications pathways, weighted by number of channels such pathways are capable of carrying, in West Virginia bears to total length of such company’s communication’s pathways, weighted by number of channels such pathways are capable of carrying, located everywhere in United States. (WV Code 11-13B-3).

Tax is payable in monthly installments by last day of month following if estimated tax exceeds $1,000 per month and is payable in quarterly installments within one month after end of quarter if estimated tax is $1,000 or less per month. Annual return must be filed within one month of close of year. (WV Code 11-13B-5–6). Credit for investments and job expansion (c. 11, art. 13C); eligible research and development projects (c. 11, art. 13D); coal-loading facilities (c. 11, art. 13E); and reducing telephone utility rates for low-income residential customers (WV Code 11-13B-10a; c. 11, art. 13G). Credit for certain sales and use taxes paid. (WV Code 11-13B-18). See also topic 22.04A Credits and Tax Incentives.

22.04 CORPORATE TAXES:

Corporate license tax repealed for tax years beginning on or after July 1, 2008. (c. 11, art. 12C). Tax enforced for tax years ending before that date. (WV Code 11-12C-13). Annual reports and $25 fee must now be filed with Secretary of State.

Corporate Net Income Tax.

See topic 22.11 Income Tax, subhead Corporate Net Income Tax.

Corporate Stock Tax.

See topic 22.03 Business Taxes, subhead Business Franchise Tax.

22.04A CREDITS AND TAX INCENTIVES:

Personal Income Tax Credits.

Credit against personal income tax liability of employer hiring under Military Incentive Program Act. (WV Code 11-21-42). Credit for qualified rehabilitated buildings investment. (WV Code 11-21-8a). Credit for qualified rehabilitation residential buildings investment for residential certified historic structures. (WV Code 11-21-8g). Taxpayers may transfer, sell, or assign any unused credit under § 8a or § 8g. (WV Code 11-21-8h). Credit against personal income tax for business and occupation tax, and certain sales and use taxes. (WV Code 11-21-8, 43). Credit against personal income tax for solar energy system installed on residential property after July 1, 2009 and before July 2, 2013. (WV Code 11-13Z-1 et seq.). For tax credits of S corporations and partnerships, see WV Code 11-24-23g. For refundable tax credit for senior, low-income individuals for property taxes paid on homestead, see WV Code 11-21-21. For low income family tax credit, see WV Code 11-212-22 et seq. For certain property tax credits, see WV Code 11-21-23, 24.

Personal Income Tax Incentives.

Modification reducing taxable income for any payment made under prepaid tuition contract or other college savings plan pursuant to WV Code 18-30-9; WV Code 11-21-12a. Deduction for long-term care insurance premiums, see WV Code 11-21-12c.

Corporate Net Income Tax Credits.

Credit for reducing electric and natural gas utility rates for low income residential customers. (WV Code 11-24-11). Credit for reducing telephone utility rates for low-income residential customers. (WV Code 11-24-11a). Credit for employer hiring under Military Incentive Program Act. (WV Code 11-24-12). Credit for certain sales and use taxes paid. (WV Code 11-24-23). Credit for certain research and development projects. (WV Code 11-24-9c). Credit for qualified rehabilitation buildings investment for certified historic structures. (WV Code 11-24-23a).

For credits for utility taxpayers who incurred net operating loss carryovers before Dec. 31, 2006, see WV Code 11-24-11b.

Economic Opportunity Tax Credit.

Replaced business investment jobs expansion tax credit in c. 11, art. 13C.

Provides credit against various taxes for qualified investment in new or expanded business in state which results in creation of new jobs. See WV Code 11-13Q-1 et seq. Credit allowed for locating corporate headquarters in state and certain certified projects.

Credit for specified high technology manufacturers, see WV Code 11-13Q-10a.

Credit Against Health Care Provider Tax.

Taxpayers may claim credit for certain medical malpractice liability insurance premiums paid against health care provider tax. (WV Code 11-13T-4).

Note: This credit replaced business investment and jobs expansion tax credit provided in c. 11, art. 13C.

Certain Other Credits.

Tax credit available against various taxes, generally designated to encourage economic development, include following:

Alternative-fuel motor vehicle tax credit provides credit against personal income tax or corporate net income tax for taxpayer who invests in alternative-fuel motor vehicle. (c. 11, art. 6D).

Tax credit for agriculture equipment provides credit against personal income tax and corporate net income tax for amounts expended for purchase and installation of agricultural equipment and structures for agricultural operations within state which serve to protect environment. (c. 11, art. 13K).

Neighborhood investment program provides credit against business franchise tax, personal income tax and corporate net income tax for taxpayers contributing to qualifying charitable projects managed by community-based organizations which assist neighborhoods and local communities. (WV Code 11-13J-5).

High-Tech Research Zones and Parks.

See WV Code 18B-13-4,-11 for various tax incentives relating to higher education - industry partnerships.

Strategic Research & Development Tax Credit.

See WV Code 11-13R-1 et seq.

Manufacturing Investment Tax Credit.

See WV Code 11-13S-1 et seq.

Film Industry Investment Tax Credit.

See WV Code 11-13x-1 et seq.

High-Growth Business Investment Tax Credit.

See WV Code 11-13U-1 et seq. Effective from July 1, 2005 to July 1, 2008. (WV Code 11-13U-10).

Tourism Development Project Tax Credit.

Tax credit allowed to offset consumer sales and service tax for operation of approved tourism development project, as defined in WV Code 5B-2E-3. (WV Code 11-15-34).

Tax credits for apprenticeship training in construction trades. (WV Code 11-13W-1).

Credit for Industrial Expansion and Revitalization, for Research and Development Projects and for Housing Development Projects.

Credits available against tax for industrial taxpayers (persons subject to severance tax or persons engaging in manufacturing or manufacturing services and subject to business franchise tax). Credit is equal to 10% of "eligible investment." Eligible investment for industrial expansion or industrial revitalization and eligible investment for research and development projects or qualified housing development projects is cost of property or property and services purchased, multiplied by applicable percentage based on useful life. Credit may be taken at rate of 1/10 per year against business and occupational tax, severance tax, consumer sales and use taxes or business franchise tax but may not reduce any tax to less than 50% of what tax would have been without credit. Credit may also be taken at rate of 1/10 per year against consumer sales and use taxes, but only with respect to qualified housing development projects existing on or before July 1, 1992. (c. 11, art. 13D). Note: Credit expired Dec. 31, 2002 for all taxpayers except electricity producers. (WV Code 11-13D-10).

Any person who purchases property for investment in new or expanded coal loading facility entitled to similar credit against business and occupational tax, severance tax or business franchise tax. (c. 11, art. 13E).

Credit available to utilities reducing electric and natural gas rates to low income residential customers. (c. 11, art. 13F). Credit for certain sales and use taxes paid. (WV Code 11-13-31). Financial organization goodwill tax credit relating to acquisitions. (WV Code 11-23-5a[g]).

22.05 EMPLOYMENT TAXES:

Unemployment compensation tax is imposed on same classes of taxpayers as under federal law up to maximum rate of 2.7% of threshold wage paid to each employee during calendar year, such rate to be based upon experience rating of each employer. Tax must be reported and paid monthly to West Virginia unemployment compensation fund. (c. 21A, arts. 1-2, 5-7, 9, 10). Since July 1, 1981, employers who maintain "debit balance" in fund (benefits charged exceed credited payments into fund) required to pay tax rate of 5.5% of wages if debit balance is 5% or less, and required to pay tax rate of 6.5% of wages if debit balance is in excess of 5% but less than 10%, and 7.5% of wages if debit balance is more than 10%. (c. 21A, arts. 1-2, 5-7, 9, 10). Any foreign business entity engaged in construction trades shall pay contribution of 7.5% of wages for first 36 months. (WV Code 21A-5-5).

As of Apr. 11, 2009, threshold wage for unemployment compensation tax increased from $8,000 to $12,000 for each employee, to be reduced to $9,000 when state unemployment fund reaches certain level, and thereafter to be increased or decreased annually by same percentage as state's average wage increases or decreases. (WV Code 21A-1A-28).

Military Incentive Program Act of 1991 provides tax credits to private sector employers to encourage employment of veterans and members of guard and reserve forces. (c. 21A, art. 2C).

22.06 ENVIRONMENTAL TAXES:

Three West Virginia statutes impose tax on disposal of solid waste: WV Code 22-15-11, 22-16-4, and WV Code 22C-4-30, each imposes "solid waste assessment fee" upon "the disposal of solid waste at all solid waste disposal facilities in [West Virginia]."

Rate of tax differs under each statute, with total tax when fees under all statutes are added totaling $6.25 per ton of solid waste. Certain enumerated transactions are exempted.

"[P]erson disposing of solid waste at the solid waste facility" is responsible for paying fee, and "operator of the solid waste facility" is responsible for collecting and remitting fee to state tax commissioner. (WV Code 20-11-5a[b]; 20-15-11[b]; WV Code 22-16-4[b]; WV Code 22C-4-30[b]). Fee "accrues at the time the solid waste is delivered to the solid waste disposal facility." If operator fails to collect fee, operator is "personally liable" for amount he failed to collect, plus applicable additions to tax, penalties and interest.

If owner of solid waste disposal facility leases facility to operator, operator becomes primarily liable for collection and remittance of fees and owner is secondarily liable for remittance of fee. However, if operator fails to collect and remit fees, then owner and operator are jointly and severally liable. Further, if operator or owner responsible for collecting the recycling assessment fee is association or corporation, officers of association or corporation are also jointly and severally liable. (WV Code 20-11-5a[b]; WV Code 22-15-11[b]; 22-16-4[b]; WV Code 22C-4-30[b]). See above for articles.

In addition to statutes, there are two regulations: (1) "Solid Waste Assessment Fee Exemptions," 33 C.S.R. § 6, promulgated by West Virginia department of environmental protection; and (2) "Solid Waste Assessment Fee," 110 C.S.R. § 6A, promulgated by West Virginia tax department.

West Virginia tax department regulation imposes solid waste assessment fee at rates different from the rate in WV Code 22-15-11, depending upon point of origin of solid waste relative to solid waste disposal shed containing solid waste facility. (110 C.S.R. § 6A).

22.07 ESTATE TAX:

Whenever federal estate tax is payable to United States, there is imposed state estate tax equal to portion, if any, of maximum allowable amount of federal credit for state death taxes, allowable by I.R.C. § 2011 or I.R.C. § 2602, attributable to property located in state. (WV Code 11-11-3). As federal credit for state death taxes has been phased out under federal law, West Virginia currently does not have any state estate tax. No state estate tax returns are required to be filed while state estate tax does not exist. (WV Code 11-11-8[a]).

Apportionment provisions are provided for nonresident and alien decedents and resident decedents owning property outside of West Virginia. (WV Code 11-11-4–6).

Returns and Payment.

If state estate tax exists, personal representative must file returns with tax commissioner on or before date on which federal estate tax return is required to be filed, which date includes any extension of time granted for filing federal estate tax return. Upon obtaining extension of time for filing federal estate tax return, personal representative shall provide true copy to tax commissioner within 30 days after receipt. (WV Code 11-11-8, 9). Regardless of estate tax return requirement, personal representative must file list and appraisal of all non-probate assets within 90 days of qualification. See WV Code 11-11-7.

Estate tax shall be paid by personal representative to tax commissioner. Estate tax is due and payable at date of decedent's death and becomes delinquent nine months after date upon which it becomes due and payable. (WV Code 11-11-13). Extension of time for filing estate tax returns shall not operate to extend time for payment of tax. (WV Code 11-11-9).

If personal representative files amended federal estate tax return, he must also file amended state estate tax return and pay any additional tax due. (WV Code 11-11-10). If amount of federal taxable estate reported on federal estate tax return is changed or corrected, personal representative shall report such change or correction to tax commissioner and pay any additional estate tax which may be due within 90 days after final determination of change. (WV Code 11-11-12).

Lien.

Unless estate tax is sooner paid in full or becomes unenforceable by reason of lapse of time, there is lien for ten years after decedent's death upon all property, real or personal, of decedent located in state. Tax commissioner shall issue certificate releasing all property from lien when tax liability, together with all interest and applicable penalties in addition to tax, has been fully satisfied or has become legally unenforceable. Persons receiving property, either directly or indirectly, from decedent may be liable for tax if not paid when due by personal representative. (WV Code 11-11-17). For liability of personal representative, see WV Code 11-11-20.

Apportionment.

Where fiduciary has paid federal estate tax, amount of tax so paid is prorated among beneficiaries of estate, unless decedent's will directs otherwise. Apportionment is made in proportion that value of property of such beneficiary bears to total value of benefits received by all beneficiaries of estate. But beneficiary has benefit of any exemptions, deductions and exclusions allowed by law. And where trust is created or other provision made by which any person is given interest in income, or estate for years, or for life, or other temporary interest, tax on both temporary interest and remainder is charged against and paid out of corpus of such property or fund without apportionment between remainders and temporary estates. (WV Code 44-2-16a).

22.07A GAMBLING AND ENTERTAINMENT TAXES:

Horse and Dog Racing Taxes.

Any racing association conducting racing in West Virginia must pay daily license tax of $250 for thoroughbred racing and $150 for harness or dog races. (WV Code 19-23-10). Any racing association must also pay percentage tax on any pari-mutuel pools, including pari-mutuel pools from televised racing. (WV Code 19-23-10, 12b).

Dog Head Tax.

See WV Code 19-20-2.

Video Lottery.

Generally, 30% tax on gross profit of video lottery terminal. See WV Code 29-22B-1408.

22.08 GASOLINE AND SPECIAL FUELS TAXES:

Motor Fuel Excise Tax.

Effective Jan. 1, 2004, all sales of motor fuel subject to flat rate of tax under motor fuel excise tax (WV Code 11-14C-5) may be subject to sales tax or use tax, which comprises variable component of motor fuel excise tax (WV Code 11-15-18b; WV Code 11-15A-13a). For exemptions from flat rate and variable rate of tax, see WV Code 11-14C-9. Flat rate of tax is 20½ ¢ per invoiced gallon. (WV Code 11-14C-5). Variable rate of tax is determined under WV Code 11-15-18b and WV Code 11-15A-13. *Note:* Rates are subject to change Aug. 1, 2013. (WV Code 11-14C-5). West Virginia has enacted legislation to conform state's laws relating to registration of motor carriers and reporting and payment of motor fuel use taxes with requirements of federal Intermodel Surface Transportation and Efficiency Act of 1991, P.L. 102-240. See c. 11, art. 14B.

Gasoline and Special Fuel Excise Tax.

Imposed by c. 11, art. 14. Repealed effective Jan. 1, 2004, and replaced with motor fuel excise tax. (c. 11, art. 14C).

Motor Carrier Road Tax.

Companion to gasoline tax as to motor carriers. (c. 11, art. 14A). On and after Jan. 1, 2004, tax rate will be set by WV Code 11-14C-5, in conjunction with motor fuel excise tax.

22.08A GENERATION SKIPPING TAX:

None.

22.09 GIFT TAX:

None.

22.10 HOTEL AND RESTAURANT TAXES:

Hotel Occupancy Tax.

Counties and municipalities may impose hotel occupancy tax of 3% of consideration paid for use of hotel room. On and after July 1, 2005, certain municipalities may, by ordinance, increase the tax to 6% on or after July 1, 2007, countries may, by ordinance, increase tax to 6%. (WV Code 7-18-1, 2).

22.11 INCOME TAX:

Income Tax—Individuals.

Primary income tax levied in progressively increasing percentages (3% to 6.5%) on federal adjusted gross income with certain modifications. (WV Code 11-21-3-4e, 11 and 12-i). Deduction is allowed against adjusted gross income for amounts contributed to and earned by medical savings account. (WV Code 11-21-12; WV Code 33-15-20, 33-16-15). Nonresidents and part-year residents pay on income from sources within state. (WV Code 11-21-30). Special computations necessary for increases in tax rates effective after Dec. 31 of calendar year. (WV Code 11-21-4f). Certain exemptions and special provisions for nonresidents and part-year residents; for details see WV Code 11-21-30–44. Tax commissioner shall determine amount necessary for refunds, and state treasurer shall set aside in “Special Income Tax Refund Reserve Fund.” (WV Code 11-21-93). For credits, see topic 22.04A Credits and Tax Incentives, subhead Personal Income Tax Credits.

Low Income Exclusion.

Deduction in determining West Virginia personal income tax of up to $10,000 ($5,000 for any married individual filing separately) from federal adjusted gross income for any earned income of any eligible person. Eligible person includes any unmarried individual and any husband and wife filing joint return who has or have federal adjusted gross income of $10,000 or less ($5,000 or less for husband and wife filing separately). (WV Code 11-21-10). Tax commissioner shall specify circumstances when individual is not required to file return because of low income exclusion. (WV Code 11-21-51[a][1]). Tax commissioner shall prescribe method for determining amount to be withheld from gross income by employer with due regard given to low income exclusion. (WV Code 11-21-71).

Military Retirement Income Exclusion.

After Dec. 31, 2002, exclusion for first $20,000 of military retirement income. (WV Code 11-21-12[7][B]).

Minimum Tax.

Minimum tax imposed equal to excess by which amount equal to 25% of federal minimum tax or alternative minimum tax exceeds primary state income tax. However, minimum tax will expire for tax years beginning on or after Jan. 1, 2010. (WV Code 11-21-3).

Filing & Payment Provisions.

Payment made to and return filed with tax commissioner on or before 15th day of fourth month following close of taxable year. (WV Code 11-21-51). Tax commissioner may extend time in which individual must file tax return. (WV Code 11-21-57).

Estimated tax return is due on or before Apr. 15 of tax year if West Virginia adjusted gross income, other than from wages on which taxes withheld, can reasonably be expected to exceed sum of $400 and West Virginia personal exemptions to which taxpayer is entitled. (WV Code 11-21-55). If such expectation does not occur until after Apr. 1 of tax year, then declaration must be filed at later time. Estimated tax payments must be made in installments, number of which to be determined by when declaration of estimated tax is made. (WV Code 11-21-56).

Employers are required to file annual reconciliation of personal income tax withheld on or before Feb. 28 of each year. (WV Code 11-21-74).

Any tax preparer who prepares more than 100 personal income tax returns must file all personal income tax returns he or she prepares for tax years beginning after Jan. 1, 2006 electronically unless he or she has reasonable cause for not filing. Reasonable cause includes documented election by client not to file electronically. (WV Code 11-21-54).

Composite returns permitted for nonresident partners, S corporation shareholders, and beneficiaries with WV source income. (WV Code 11-21-51a).

Income Tax—Corporations—Corporate Net Income Tax.

For tax years beginning on or after Jan. 1, 2009, corporations are taxed at 8.5% of West Virginia taxable income with certain adjustments. (WV Code 11-24-4). West Virginia taxable income is taxable income as defined for federal income tax purposes with certain adjustments. (WV Code 11-24-6). Effective for tax periods beginning on or after Jan. 1, 2009, any taxpayer engaged in unitary business with one or more affiliated corporations is required to file its net income tax return on unitary or combined basis. (W. Va. Code § 11-24-13a). Any business conducted by partnership shall be treated as conducted by its partners. (W. Va. Code § 11-24-3a). No more than $300,000 of net operating loss from any tax year may be carried back to any previous tax year. (WV Code 11-24-6). Allocation of income of interstate businesses is made upon four-factor formula consisting of property factor, payroll factor and doubly-weighted sales factor (WV Code 11-24-7), except in case of certain motor carriers where apportionment computed using one factor formula of vehicle miles within and without state (WV Code 11-24-7a), and financial organizations with their commercial domicile in another state, where apportionment computed using one factor formula based on gross receipts (WV Code 11-24-7b). Credit for tax paid to another state by financial organizations commercially domiciled in West Virginia. (WV Code 11-24-7, 24). For other credits, see topic 22.04A Credits and Tax Incentives, subhead Corporate Net Income Tax Credits.

Exempt Corporations.

Following corporations are exempt from tax: Corporations which by reason of their purposes or activities are exempt from federal income tax except for unrelated business income; insurance companies paying tax to state on premiums; production credit association organized under Federal Farm Credit Act of 1933; corporations taxed under subchapter S of Internal Revenue Code; trusts established pursuant to § 302(c) of Labor Management Relations Act of

1947 prior to Jan. 1, 1967. (WV Code 11-24-5).

Payment made to and return filed with tax commissioner on or before 15th day of third month following close of taxable year, except for corporations which by reason of their purposes or activities are generally exempt from federal income tax but have unrelated business income must file annual return, on or before 15th day of fifth month following close of taxable year. (WV Code 11-24-13). S corporations must file information return with tax commissioner on or before 15th day of third month following close of taxable year. (WV Code 11-24-13b). After Jan. 2009, penalty for failure to file return determined under 11-10-19(a). (WV Code 11-24-13a). For tax years beginning on or after Jan. 2009, taxpayer engaged in unitary business with one or more other corporations must file combined report. (§ 11-24-13a). Extension of time may be granted by tax commissioner upon such terms and conditions as he requires. (WV Code 11-24-18).

Estimated tax return is due within four months and 15 days after beginning of income year if West Virginia taxable income can be reasonably expected to exceed $10,000 before end of taxable year. If expectation of taxable income exceeding $10,000 does not occur until later period, declaration must be filed at later time in year. (WV Code 11-24-16). Estimated tax payments must be made in installments, number of installments to be determined by when declaration of estimated tax is made. (WV Code 11-24-17).

Income Tax—Partnerships.

Partnerships are not subject to West Virginia income tax. (WV Code 11-21-3). But see topic 22.03 Business Taxes, subheads Business Franchise Tax and Business Registration Tax. Every partnership having resident partner or having West Virginia source income must (WV Code 11-21-32) file information return (Form IT-165) on or before 15th day of fourth month following close of taxable year (WV Code 11-21-52, 58).

Income Tax—Limited Liability Companies.

If limited liability company is treated as partnership for federal income tax, it is treated that way for West Virginia tax purposes; must file partnership information return; and must withhold West Virginia income tax from distribution of West Virginia source income to nonresident members. If limited liability company is treated as corporation for federal income tax purposes, it is treated that way for West Virginia income tax purposes as well and must file West Virginia corporate income tax return. (Administrative Notice 92-15).

Withholding Tax on West Virginia Source Income of Nonresident Partners, Nonresident S Corporation Shareholders, Nonresident Beneficiaries of Trusts and Estates and Nonresident sellers of Real Property.

Partnership, S corporation, estate or trust, which is treated as pass-through entity for federal income tax purposes and which has taxable income for taxable year derived from or connected with West Virginia sources any portion of which is allocable to nonresident partner, nonresident shareholder or nonresident beneficiary, must generally pay withholding tax equal to 4% of effectively connected taxable income of entity which is allocable to nonresident partner, nonresident shareholder, nonresident beneficiary or trust or estate. (WV Code 11-21-71a). For exceptions, see WV Code 11-21-71a(c). Flow-through entity must furnish nonresident partner, nonresident shareholder or nonresident beneficiary with information statement. (WV Code 11-21-71a[h]). See WV Code 11-21-71b for rules requiring tax withholding on sales of real property and associated tangible personal property by nonresident person or entity beginning Jan. 1, 2008.

22.12 INHERITANCE TAX:

Repealed, for persons dying after June 30, 1985. (WV Code 11-11-38).

22.12A MINES, MINERALS AND FISHERIES TAXES:

Severance and Privilege Tax.

Severance tax is imposed upon every person engaging or continuing within state in severing, extracting, reducing to possession, and producing for sale or use any natural resource product or in business of certain health care services (limited to behavioral health services). Amount of tax is determined by application of rates against gross value of natural resource products produced or health care service provided.

Rates on each respective classification are as follows (WV Code 11-13A-3–3e):

On coal, limestone, sandstone, or health care services, 5%. (WV Code 11-13A-3). This 5% rate of tax includes 35% additional severance tax on coal imposed by state under WV Code 11-13A-6 for benefit of counties and municipalities. For coal, certain reductions in tax rate are available for new underground mines producing coal from seams of less than 45 inches in average thickness or for any existing mine that has not produced coal from seams 45 inches or less in thickness in the 180 days immediately preceding Apr. 11, 1997. (WV Code 11-13A-3[f]). For rate of tax on extracting and recovering material from refuse, gob piles or other sources of waste coal, to produce coal, see WV Code 11-13A-3.

On natural gas or oil, 5%. (WV Code 11-13A-3a). For special exemptions from severance tax for natural gas and oil producers which are effective on or after Jan. 1, 2000, see WV Code 11-13A-3a.

On timber, 3.22% until Dec. 31, 2006. Beginning Jan. 1, 2007, rate will be 1.22%. (WV Code 11-13A-3b). Tax eliminated for tax years 2010 through 2012. (WV Code 11-13A-3b[d]). However, additional privilege tax on severing timber will continue during this elimination period. (WV Code 11-13V-4[c]).

On other natural resources, 5%. (WV Code 11-13A-3c).

Gross value in case of natural resources means market value of natural resource product, in immediate vicinity where severed, after application of post-production processing generally applied by industry to obtain commercially marketable or usable natural resource products. For natural resources severed and/or processed and sold during reporting period, gross value is gross proceeds received or receivable. For natural resource severed and processed but not sold during reporting period, gross value is fair market value for natural resource of similar grade and quality. In related party transactions, gross value shall not be less than fair market value. For severed natural resources purchased for processing and resale or for processing and consumption, gross value is amount received or receivable (or fair market value, if for consumption) during reporting period reduced by amount paid or payable to person actually severing natural resources. If natural resources are severed outside state and brought into state for purposes of processing and resale or processing and consumption, gross value is amount received or receivable during reporting period (or fair market value, if for consumption) reduced by fair market value of natural resources of similar grade and quality immediately preceding processing of natural resources. Gross value is to be reduced by amount of any federal energy tax imposed on taxpayer after June 1, 1993. (WV Code 11-13A-2). For details concerning which treatment processes, when applied by producer of natural resource product, are considered as included in production see WV Code 11-13A-4. In case of natural gas gross value is its value at wellhead. (WV Code 11-13A-2[b][6][G]). For limestone or sandstone quarried or mined, gross value is value of stone immediately upon severance from earth. (WV Code 11-13A-2[c][4], [H]).

There is annual credit of $500 against severance tax. (WV Code 11-13A-10). See topics 22.04A Credits and Tax Incentives; 22.03 Business Taxes, subhead Business and Occupation Tax, catchline Credit for Industrial Expansion and Revitalization, for Research and Development Projects and for Housing Development Projects.

Minimum severance tax on coal equal to 75¢ per ton. Minimum severance tax on coal is imposed by WV Code 11-13A-3(f). May be used as credit against severance tax on coal not including portion for benefit of counties and municipalities. (WV Code 11-12B-3). Tax on manufacturing or producing synthetic fuel from coal equal to 50¢ per ton. (WV Code 11-13-2f). *Note:* Tax imposed on manufacturing or producing synthetic fuel from coal shall expire and be of no effect for synthetic fuels produced after June 13, 2007.

There is annual privilege tax on extracting and recovering material from refuse, gob piles or other sources of waste coal to produce coal equal to 2½% of value of coal so produced. (WV Code 11-13A-3c). Tax in lieu of severance tax.

Tax commissioner is charged with developing uniform reporting method for all agencies regarding production that are required to be filed by oil and gas producers. (WV Code 11-13A-3a).

Special incentive severance tax on refining waste coal to useable coal. (WV Code 11-13A-3e).

Effective Nov. 13, 2005, additional privilege tax on severing or producing natural resources. (WV Code 11-13V-2, 4). For coal, tax is $0.56 per ton of clean coal severed or produced in state. For natural gas, tax is $0.047 per mcf or natural gas produced in state. For timber, tax is 2.78% of gross value of timber produced. (WV Code 11-13V-4). Periodic installments and annual returns are required. (WV Code 11-13V-6, 7).

Special reclamation tax on every person conducting coal surface mining. For tax periods beginning on or after July 1, 2009, tax is 14.4 cents per ton of clean coal mined, for deposit into two Special Reclamation Funds. Tax to be reviewed by Legislature every two years for necessity of continuing. (WV Code 22-3-11[h]).

22.13 [RESERVED]

22.14 MOTOR VEHICLE TAXES:

Motor Vehicle Privilege Tax.

Tax is imposed upon privilege of effecting certification of title to vehicle with division of motor vehicles equal to 5% of purchase price or value of vehicle at time of certification, or, in case of lease, 5% of monthly lease payments. Tax does not apply to titling of motor vehicle rented on daily or monthly basis by West Virginia business. Tax of 25¢ per day is imposed on rental of any motor vehicle in West Virginia. (WV Code 17A-3-4).

Law provides exemption for persons moving to this state who desire to register their automobiles. (WV Code 17A-3-4). Beginning July 1, 2008, this tax is abolished and replaced with consumer sales tax equal to 5%. (WV Code 11-19-3b).

22.15 [RESERVED]

22.16 PROPERTY TAXES:

Appraisal.

County assessors are required to appraise all real and personal property in their jurisdiction at fair market value except for property appraised by tax commissioner and board of public works. (WV Code 11-1C-7). Appraisal rate on assessed property is uniformly 60% throughout state. (WV Code 11-1C-12). Tax commissioner is responsible for valuing all industrial property and natural resources throughout state. (WV Code 11-1C-10). Special methods exist for appraising certain manufacturing production property and qualified capital additions to manufacturing facilities. (c. 11, art. 6E; c. 11, art. 6F).

Real and Personal Property Taxable.

All property is subject to state, county and municipal taxation (WV Code 11-8-4), and is classified as follows: (1) Tangible personal property employed exclusively in agriculture, horticulture and grazing; agricultural products and livestock while owned by producer; notes, bonds, bills and accounts receivable, stocks, and any other intangible personal property; (2) property owned and occupied by owner exclusively for residential purposes including farms, which includes land used for horticulture and grazing, occupied and cultivated by owners or tenants; (3) other real and personal property outside municipalities; (4) other real and personal property within municipalities (Const., Art. X, § 1, am'd 1932; WV Code 11-8-5) with maximum rates prescribed for each class (Const., Art. X, § 1, am'd 1932; WV Code 11-8-6). For special rules concerning "used and occupied by the owner thereof exclusively for residential purposes," including classification for infirmity of taxpayer requiring residing in nursing home, see WV Code 11-4-3. For special rules concerning classification of mobile homes situate upon property owned by person other than owner of mobile home, see WV Code 11-5-12.

For special rules concerning classification of "qualified continuing care retirement community," see WV Code 11-4-3.

Exemptions.

Generally, property owned by United States, West Virginia, other states and subdivisions of this state and other states, and property used for educational (including property owned by fraternity or sorority), religious and charitable purposes or for public purpose of distributing water or providing sewer service by nonprofit corporation, and bank deposits, money and household goods are exempt from general taxation. For complete list of exemptions, see WV Code 11-3-9, 10b; WV Code 11-1A-5. First $20,000 of assessed value of owner occupied real property used as primary residence by persons 65 or over or certified as being permanently and totally disabled is exempt, provided owner has legally resided in West Virginia for two consecutive calendar years to which homestead exemption relates. (WV Code 11-6B-3). For exemption related to finished goods held in warehouse facilities in state waiting shipment to destination outside state, see WV Code 11-5-13a.

Tax Returns.

All persons are required to furnish to assessor lists of all taxable real and personal property. (WV Code 11-3-2–3; WV Code 11-1A-4–7). Corporations must file reports with assessor and tax commissioner describing their property and providing certain information. (WV Code 11-3-12; WV Code 11-1A-26). Supplemental information regarding depreciation required for certain taxpayers. (WV Code 11-1A-6). Real estate is listed in land books (c. 11, art. 4), and personal property is listed in personal property books (c. 11, art. 5). Statewide data bank is to be established by tax commissioner in conjunction with first statewide reappraisal. (WV Code 11-1A-8). Parents, guardians and spouses, as to separate property of spouse who is out of state, trustees, personal representatives, and others are required to report for taxation all property held or controlled in representative capacity. (WV Code 11-3-3; WV Code 11-1A-4). Bank officials are required to report for taxation shares in banking institution. (WV Code 11-3-3, 14). Public utilities make returns of all property to board of public works. (WV Code 11-6-1). For special rules relating to assessment of interstate corporation motor vehicle business registered under proportional registration agreement, see WV Code 11-6G-2 et seq. Penalty and forfeiture provisions provided for failure to list property. (WV Code 11-3-10; WV Code 11-9-4, 8). Provision is made for confidentiality of returns. (WV Code 11-1A-23; WV Code 11-1C-14 relating to natural resource property). Note that tax commissioner may disclose return information to state geological and economic survey. For definition of return, see WV Code 11-10-4.

Valuation of property must be at true and actual value, except that, in case of property occupied by owner exclusively as residence, primary consideration is given to amount of income which might be earned if rented; and for farms cultivated by owners or tenants, value shall be ascertained according to its value for purpose actually used, giving consideration to income expected to be earned if rented; and except that pollution control facilities placed in operation subsequent to July 1, 1973, shall be taxed at salvage value. (WV Code 11-3-1; WV Code 11-6A-3). For details concerning method for appraising dealer vehicle inventory, see c. 11, art. 6C. For special rules concerning valuation of coal waste disposal projects and wind power projects, see c. 11, art. 6A.

Tax commissioner has promulgated legislative rules describing in detail methods for determining market value of certain mineral, commercial and intangible property. Any rule promulgated by tax commissioner regarding valuation of real or personal property within state is subject to review by legislative rule-making review committee. (WV Code 11-1C-5a).

Assessment.

All property, real and personal, except that of utilities, is assessed annually for all purposes as of July 1. (WV Code 11-3-1). Such assessment shall be at 60% of market value. (Const., Art. X, § 1b; WV Code 11-1A-3). Undivided interests in land may, and undivided interests in minerals, timber and surface must, be assessed separately. Prior assessments of undivided interests are validated so far as state is concerned. (WV Code 11-4-9).

Each county constitutes assessment district for which assessor is elected every four years. (WV Code 11-2-1).

If county assessor determines that assessed valuation of any item of real property is more than 10% greater than valuation assessed for that item in preceding tax year, assessor must give notice of increase to property owner at least 15 days prior to initial meeting in Feb. of county commission sitting as board of equalization and review for that tax year. (WV Code 11-3-2a).

Review of Assessments.

County commissions, sitting as local boards of review and equalization, meet not later than Feb. 1 to review and equalize assessments of county, make additions to land and personal property lists, correct errors, and do other necessary things. Assessments may be increased by county commission only after notice. (WV Code 11-3-24a). Prior to adjournment of county commission, objection to taxability or classification of property is filed with assessor or certified to state tax commissioner. (WV Code 11-3-24). Decision may be appealed to circuit court, within 30 days after adjournment, by any person on ten days notice to prosecuting attorney, or by state, and court has power to make necessary corrections. Appeal to supreme court may be taken by state or taxpayer on question of valuation if value of property is $50,000 or more, and on question of classification or taxability. (WV Code 11-3-25).

Any taxpayer has standing to insure full and proper assessment of all county's land by appeal. (WV Code 11-3-25; 164 W.Va. 94, 261 S.E.2d 165).

Appeals may be taken by owners or operators of public utility property from assessments of tax commissioner to circuit court as to property within county, provided proper administrative steps are followed. For particulars, see WV Code 11-6-12. Any taxpayer, or prosecuting attorney or tax commissioner on behalf of state, county and districts claiming to be aggrieved by entry in property books resulting from clerical error or mistake, may within one year from time property books are delivered to sheriff or within one year from time such error or mistake is discovered or reasonably could have been discovered, apply for relief to county commission. (WV Code 11-3-27). For particulars of administrative and judicial review under statutory provisions for statewide appraisals, see WV Code 11-1A-15–18.

Forfeiture of Unassessed Property.

Every owner of land must have same entered on land books for taxation. When land, for any five successive years, is not charged on such books, land, by operation of law, and without any proceedings thereof, shall be subject to authority and control of state auditor and shall thereafter be sold under provisions relating to disposition of certified property. (WV Code 11A-3-37). See subhead Sales, infra.

Liens.

State, county and city taxes are payable in two installments, Sept. 1 and Mar. 1, with interest beginning Oct. 1 as to tax for first half of year and Apr. 1 following as to tax for second half of year (WV Code 11A-1-3), and, if not paid, liens arise on real estate, from July 1 in each year preceding assessment. Estate taxes are liens on all property of decedent located in state for ten years after date of death unless sooner paid. (WV Code 11-11-17). Lien is prior lien on property and may be enforced by suit in equity. (c. 11, art. 8, c. 11A, art. 2). See also infra, subhead Collection of Ad Valorem Tax.

Federal Tax Liens.

Provision is made for filing notice of lien in county wherein property subject to lien is situated. (WV Code 38-10-1).

Collection of Ad Valorem Tax.

State, county and city taxes are payable to sheriff semiannually, on Sept. 1 of current year and Mar. 1 of succeeding year. 2½% discount is allowed if paid on or before due date. Interest at 9% with respect to personal property and 12% with respect to real property is charged beginning on first of month following due date. (c. 11A, art. 1). Collection may be by distress after taxes became delinquent, or earlier if goods or chattels are about to be removed from county. (WV Code 11A-2-3).

On or before June 15 of succeeding tax year, delinquent list of real and personal property is made out by sheriff and is presented to said commission, which may correct same, and which then certifies list to state auditor not later than July 1, after which delinquent taxes with interest at 9% or 12% are payable to sheriff any time before sale of tax lien by state. (c. 11A, art. 2).

Refunds.

Circuit courts may order refund of excess taxes in case of appeals from boards of review and equalization. (WV Code 11-3-25, 26). Appeals from assessments of board of public works shall also be to circuit court. (WV Code 11A-6-12). Excess taxes, collected by mistake or clerical error, may be refunded. (WV Code 11A-3-27). As to taxes subject to West Virginia Tax Procedure and Administration Act (see topic 22.01 Administration, subhead Procedure and 22.01 Administration), claim for refund or credit must be filed within three years after date tax return was due or two years from date tax was paid, whichever is later. (WV Code 11-10-4). Hearing and appeal of refund claims generally follow assessment procedure for taxes subject to act. But no refund is allowable on claim involving assessed valuation or appraisement of property fixed at time tax was originally paid. (WV Code 11-1-2a). Partial refund is accorded low income citizens over 65 who maintain homestead. (c. 11, art. 25).

Credits.

See topic 22.04A Credits and Tax Incentives.

Sales.

Following delinquency notices by publication and certified mail, sheriff posts list and publishes on or before tenth day of Sept. of year in which real estate is returned delinquent, and then sells tax lien at public auction for taxes, interest, charges and commissions, on any working day after Oct. 14 and before Nov. 23. (WV Code 11A-3-2, 5). If no person presents bids on property, sheriff shall “certify” property to state auditor for disposition. (WV Code 11A-3-8). State auditor shall appoint deputy commissioner in each county to act as auditor’s agent. (WV Code 11A-3-34). Auditor shall certify lands to deputy commissioner who shall sell each tract or lot at public auction within 120 days after such certification. (WV Code 11A-3-44, 45). For method of obtaining deed to property, see subhead Tax Deeds, infra.

Redemption.

For details, see c. 11A, arts. 3 and 4.

Tax Deeds.

Purchaser at delinquent sale by either sheriff or deputy commissioner is entitled to deed from clerk of county commission upon complying with provisions as to application and notice to interested parties at WV Code 11A-3-19, 52, respectively, as long as there is no redemption within date specified in such notice. See subhead Sales, supra. Recorded tax deed vests in purchaser right, title and interest, in and to real estate, that was, at time of execution and delivery of deed, vested in or held by any person who was entitled to redeem. (WV Code 11A-3-30, 62). It may be defeated only where: (1) Sheriff, clerk of county commission or circuit court, assessor (and in case of sale by deputy commissioner, owner) or deputy of any of them, was purchaser or interested in purchase; (2) taxes were actually paid prior to sale; (3) deed was executed and delivered by clerk more than six months after purchaser was entitled to it; or (4) no notice was given to interested parties of right to redeem. (c. 11A, art. 3). Suit to set aside tax deed must be brought before expiration of three years following delivery of deed. (WV Code 11A-4-2).

Intangible Personal Property.

Ad valorem tax on intangible personal property phased out as follows: 2000—tax on 30% of assessed value; 2001—tax on 20% of assessed value; 2002—tax on 10% of assessed value; 2003 and thereafter—exempt. (WV Code 11-1C-1b).

Real Estate Conveyance Tax. (c. 11, art. 22).

See topic 22.18 Stamp and Seal Taxes, subhead Stamp Tax.

Tax Shelters.

State has imposed voluntary tax shelter compliance program enforcing penalties on failure to register and maintain investor lists (WV Code 11-10E-6), and requiring registration and maintenance of investor lists based upon federal tax shelter rules. (WV Code 11-10E-8, 9).

22.17 SALES AND USE TAXES:

General Consumers’ Sales Tax. (c.11, art. 15).

6% tax to be added to sale price and collected from purchaser and not absorbed by dealer, is imposed on privilege of engaging in business of selling tangible personal property at retail and of furnishing all services except professional and personal services and services furnished by businesses subject to control of public service commission when service or manner in which it is delivered is subject to regulation by public service commission. (WV Code 11-15-3, 4, 8, 10). 3% tax rate on food. (WV Code 11-15-3a, 3b). For certain other exemptions from tax, see WV Code 11-15-9. Purchaser exempt from tax may execute certificate of exemption in such form as tax commissioner may require. (WV Code 11-15-9). Exemption is available for contractors purchasing services, machinery, supplies, or materials to be directly used in construction, repair, or improvement of new or existing structure if purchaser of contracting services would be entitled to claim refundable exemption. (WV Code 11-15-8d). Other exemptions must be claimed by either paying tax and subsequently filing claim for refund or claim for credit (WV Code 11-15-9b) or by applying for "direct pay permit," thus assuming liability to remit directly any tax due (WV Code 11-15-9d). Special exemption is available for sales of tangible personal property or services used in research and development. (WV Code 11-15-9b). Special exemptions for services and materials regarding technical evaluations for compliance with federal and state environmental standards provided by environmental and industrial consultants. (WV Code 11-15-9, 9c). Any sale of property subject to special district excise tax is exempt. (WV Code 11-15-9f). Special exemptions for certain computer hardware and software, electronic data processing services, Internet advertising and high-technology business services. (WV Code 11-15-9h). For special rules regarding consumer sales tax on manufacture, sale and installation of modular dwellings, see WV Code 11-15-7a. Special exemptions for purchases by health care provider "including veterinarians", of drugs, durable medical goods, mobility enhancing equipment, and prosthetics. (WV Code 11-15-9i). Special exemption for sales of donated clothing and accessories by certain tax-exempt organizations. (WV Code 11-15-9l).

3% taxe rate on food. (WV Code 11-15-3a, 3b).

Return of tax for each month and payment of tax must be made to state tax commissioner on or before 20th day of succeeding month. (WV Code 11-15-16). Annual return showing amount due for preceding year, and payment of any balance due, must be made within 30 days after close of year. (WV Code 11-15-21). Nonresident contractors required to register and post bond prior to engaging in business in state. (WV Code 11-15-8b). When average monthly amount of total consumer sales and use tax remittance does not exceed $250, quarterly return may be made. See WV Code 11-15-16, 19, 20. See also, topic Credits and Tax Incentives.

Motor Vehicle Sales Tax.

Beginning July 1, 2008, tax is imposed on all motor vehicle purchases by residents of this state equal to 5% of purchase price of value of vehicle. Vehicles that are owned and titled to resident who was not resident at time of purchase is exempt from this tax. (WV Code 11-15-3c). Other exemptions listed in WV Code 11-15-3c(f).

Streamlined Sales and Use Tax.

Tax commissioner is authorized to negotiate and enter into, subject to legislative review, streamlined sales and use tax agreement. (WV Code 11-15B-1 et seq.). State continues to move toward streamlined sales and use tax and has refined certain statutory definitions and further authorized tax commissioner to enter into tax agreements to implement streamlined tax.

Tax on Motor Fuel.

See WV Code 11-15-18b; c. 11, art. 14C.

Use Tax.

6% tax is imposed on use in state of tangible personal property or taxable services upon which West Virginia consumers sales tax has not been paid because purchased outside state. (WV Code 11-15A-2). Property or taxable services used by nonresidents while in state, and property or taxable services receipts from sale of which are exempt from or not subject to sales tax or which are required to be included in measure of sales tax, are exempt. (WV Code 11-15A-3). Receipts which are derived from sale of machinery, supplies and materials to persons engaged in activity of manufacturing, transportation, transmission, communication or in production of natural resources in state are exempt. Tax is imposed on user but must be collected by retailer, including nonresidents who have constitutional nexus with state, and may not be absorbed. For certain other exemptions from tax, see WV Code 11-15A-3. Method by which these exemptions can be claimed are same as under sales tax. (WV Code 11-15A-3d). Returns due and payment of tax made quarterly on 15th day of month following end of quarter. (c. 11, art. 15A). See also topic 22.04A Credits and Tax Incentives. See WV Code 11-15A-2b for special rules regarding manufacture, sale and installation of modular dwellings.

22.18 STAMP AND SEAL TAXES:

Seal Tax.

Tax of $1 is payable to secretary of state, whenever state seal is used, except in case of requisitions for fugitives or where otherwise provided. (WV Code 59-1-1).

Stamp Tax. (Excise Tax on Real Property Transfers).

Excise tax is imposed on privilege of transferring real property. (c. 11, art. 22). Tax is levied by state at rate of $1.10 for each $500 or fraction thereof of value of real estate transferred; in addition, county excise tax may be levied at rate of $1.10 for each $500 or fraction thereof. (WV Code 11-22-2). For exemptions, see definition of document, WV Code 11-22-1(4). Countries adopting farmland protection program may impose additional excise tax of $1.10 for each $500 or fraction thereof. (WV Code 8A-12-21). Therefore, total excise tax imposed on real estate transfer is generally $4.40 for each $1,000 or fraction thereof of value, or $6.60 in those counties with farmland protection program.

22.18A TAX INCENTIVES AND EXEMPTIONS:

See topic 22.04A Credits and Tax Incentives.

22.19 USE TAXES:

See topic 22.17 Sales and 22.19 Use Taxes.

23 TRANSPORTATION

23.01 MOTOR VEHICLES:

Division of Motor Vehicles, State Capitol Bldg., Charleston, 25305, directed by Commissioner of Motor Vehicles, administers motor vehicle laws.

Vehicle license required annually for year on staggered basis. Now can do for two years. See Title, Sales & Liens. Number plate must be displayed in rear. Issued by Division of Motor Vehicles. (WV Code 17A-3-14–16). No exemption for members of armed forces; but see WV Code 17A-10-8 (vehicles exempt from payment of registration fee) applicable to certain disabled veterans and/or prisoners of war if vehicle is not used for commercial purposes. Temporary registration available. (WV Code 17A-6-15). But see WV Code 17A-4-5 (transfer by operation of law). Registration of plates to state, county, municipal and other governmental vehicles includes conservation officers. (WV Code 17A-3-23). Fees for registration and licensing. (WV Code 17A-10-1–15).

Handicapped License Plates and Window Placards.

Application procedures, program requirements and law enforcement. (WV Code 17C-13-6).

Operator's license required, good for five years. (WV Code 17B-2-12). Chauffeur must have special license and display same upon demand. Separate license or endorsement required for motorcycle operation. (WV Code 17B-2-7b). Person under 16 may not be licensed. (WV Code 17B-2-3a; WV Code 18-8-11). No exemption for members of armed forces except while on official duty; but existing operator's license is extended without fee for six months after honorable discharge. (WV Code 17B-2-12). Operator's license may be suspended for failure to pay fines or penalties imposed by magistrate or municipal court (WV Code 17B-3-3a–9) and driving under influence of drugs or alcohol (WV Code 17C-5A-1–3). Mandatory suspension of driver's license for fraudulent use of driver's license. (WV Code 17B-3-12). Officers and employees of division authorized to administer oaths and certify copies of records. (WV Code 17A-2-13). Commissioner may destroy any division records on file for three years or deemed obsolete. (WV Code 17A-2-14). Division shall not require license to be surrendered upon its suspension or revocation. (WV Code 17B-3-9). *Note:* Reestablishment of driver's licensing board is extended to continue until July 1, 2009. (WV Code 17B-2-7a).

Owner, holder or other person in possession of evidence of registration, title, permit or license shall immediately return same to division upon cancellation, suspension or revocation. (WV Code 17A-9-7).

Titles, Sales and Liens.

Certificate of title must be obtained from commissioner of motor vehicles on satisfactory proof of ownership and statement of liens before license granted. Certificate good for life of car while owned by original holder. (WV Code 17A-3-3, 4). Payment of personal property taxes is prerequisite to registration or renewal of registration. (WV Code 17A-3-3a). *Note:* After July 1, 1997, commissioner shall also offer optional two-year registration system. (WV Code 17A-3-3, 16). On sale, seller must endorse assignment with warranty of title on certificate, which purchaser must exchange for new certificate. (WV Code 17A-4-2). Purchaser may operate vehicle for ten days under seller's registration. (WV Code 17A-4-3). Separate "salvage certificates" required for wrecked and damaged vehicles determined to be total loss by insurance company or insurer. Salvage certificates are valid for one successive assignment before new certificates at additional fee are required. (WV Code 17A-4-10). Liens are not filed or recorded with county clerk, but must be shown on certificate of title of vehicle when same is issued by commissioner of motor vehicles, and liens subsequently created must also be shown on such title. (WV Code 17A-4A-1–2). Certificate of title issued by division showing lien or encumbrance is adequate notice to state and federal governments, creditors and purchasers. (WV Code 17A-4A-3). Liens are valid for ten years; 33 years for mobile homes. Thereafter, liens may be refiled for successive periods of two years. (WV Code 17A-4A-15). Execution liens must be filed with commissioner. These provisions not applicable to mechanic's, repairman's or improver's liens. (WV Code 17A-4A-12).

Tax equal to 5% of value of car, less value of any trade-in, is imposed on privilege of effecting certification of title. (WV Code 17A-3-4).

Purchase money lien or encumbrance upon any vehicle shall be perfected on date and at time of delivery to division of either application for certificate of title with all supporting documents or completed notice of lien form in format determined by division. (WV Code 17A-4A-4). Notice of lien form may be submitted to division in paper format, facsimile or in any other electronic format approved by division. (WV Code 17A-4A-4). If perfection occurs through notice of lien form, application for certificate of title must be received by division within 60 days after date of purchase of vehicle or refinancing of such purchase in order to maintain perfected status of such lien or encumbrance. (WV Code 17A-4A-4). When application is not filed within time prescribed, lien or encumbrance shall become unperfected on 61st day following date of purchase or refinancing of vehicle. (WV Code 17A-4A-4).

Identification Marks.

Felony to alter or remove serial numbers or other identification marks of maker. (WV Code 17A-8-8).

Stolen Vehicles.

Felony to knowingly transfer or possess stolen vehicle. (WV Code 17A-8-5).

Operation Prohibited.

By person under influence of drugs or intoxicated person. (WV Code 17C-5-2). It is misdemeanor for persons under age of 21 to operate motor vehicle with blood alcohol content of 0.02 or greater. (WV Code 17C-5-2[h]). Operation of motor vehicle in center lane upon roadway clearly marked as left turn lane is prohibited except in preparation for left turn. (WV Code 17C-7-9).

Size and Weight Limits.

Regulated by c. 17C, art. 17.

Equipment Required.

Regulated by c. 17C, art. 15.

Mandatory Seatbelts.

Regulated by c. 17C, art. 15.

Lights Required.

Regulated by c. 17C, art. 15.

Fees and Dealer Special Plates.

Regulated by c. 17A, art. 6.

Registration Plates.

Fees, descriptions and special plates regulated by WV Code 17A-3-14.

Inspection.

Required annually. (WV Code 17C-16-4). Failure to display on vehicle valid and current inspection certificate, or to produce such certificate upon demand of authorized person, is misdemeanor punishable by fine of up to $100. Not guilty if within five days obtains inspection and provides receipt of inspection and makes vehicle available for inspection by court of competent jurisdiction. (WV Code 17C-16-9).

Accidents.

Driver must stop, give assistance if necessary, give name, address, and registration number of vehicle he is driving, and exhibit driver's license if requested, and must report accident to police if death or injury, and also to division of motor vehicles if death, injury, or property damage exceeding $500. (WV Code 17C-4-1–3, 6, 7). Accident reports not confidential. (WV Code 17C-4-13 repealed). It is misdemeanor not to obey traffic signals of emergency personnel using retro reflective hand signaling devices. (WV Code 16-4C-19).

Owner's liability is not extended by statute; but driver is prima facie agent of owner and owner of car kept for family use is liable for negligence of any member of family. (90 W. Va. 710, 111 S.E. 828; 92 W. Va. 138, 114 S.E. 454).

Guests.

No restriction of liability for injury to gratuitous guest. (WV Code 33-6-29).

Financial Responsibility.

Failure to satisfy judgment arising from operation of motor vehicle within statutorily prescribed minimum amounts may result in suspension of license and registration. (c. 17D, art. 4).

Insurance.

Owner or registrant must maintain and have proof of security in amount of $20,000 - $40,000 - $10,000 by insurance policy, or any other method affording security equivalent to insurance policy, or by deposit of cash or securities with state treasurer. (WV Code 17D-2A-3, 6; WV Code 17D-4-2; WV Code 17D-4-16). Insurance must provide uninsured motorist coverage within limits which shall be no less than requirements of WV Code 17D-4-2. No insurer may fail to renew insurance policy prior to 45 days advance notice and may only cancel policy for reasons specified in statute. (WV Code 33-6A-1, 4). Insurer may not fail to renew two-year-old automobile liability policy except for reasons specified by statute and failure to renew is subject to hearing and review. (WV Code 33-6A-4, 5). Insurer must notify division of motor vehicles within ten days after cancellation or termination of policy. (WV Code 17D-2A-5). Random sample verification of current insurance coverage shall be conducted on monthly basis. (WV Code 17A-3-3). Insurer must provide insured 30 days' notice, by registered or certified mail, of its intention to cancel. (WV Code 33-6A-1). Cancellation notice may include amount of premium due. (WV Code 33-6A-3).

Motor Vehicle Insurance Declinations.

Form of making offer prescribed by insurance commissioner; making offer that is unreturned or not answered creates presumption of effective offer of optional coverages and exercised knowing and intelligent rejection of such offer. (WV Code 33-6-31d).

Reinsurance General Provisions.

(WV Code 33-4-15a).

Finance Charges and Related Provisions.

(WV Code 46A-3-109).

Requirement of Certificate of Insurance for Motor Vehicles.

(WV Code 17D-2A-4).

Uninsured/Underinsured Carriers and Subrogation.

Insured may sue uninsured/underinsured insurance carrier if insured has settled with tortfeasor's liability carrier for full amount of his policy and obtained from uninsured/underinsured carrier waiver of its right of subrogation. (189 W. Va. 532, 432 S.E.2d 802). Established procedure for written notification of offer to settle for policy limits to underinsured motorist coverage carrier; notice requirements; requirements for preservation of rights by underinsured motorist coverage carrier. (WV Code 33-6-31e).

Underinsured Carrier's Right to Defend.

Underinsured motorist carrier does not have independent right to participate in tortfeasor's defense unless primary liability carrier refuses to defend or underinsured carrier can show that liability carrier is defending in bad faith. (190 W. Va. 176, 437 S.E.2d 749).

No-Fault Insurance.

Not adopted.

Foreign vehicle must be registered within 30 days, and a nonresident owner regularly operating a motor vehicle in business in state must register same and pay same fees as resident owner, in absence of reciprocal agreement to contrary with foreign state; but such vehicle whose owner engages in temporary employment in state may obtain special permit in lieu of registration. (c. 17a, art. 5, § 1).

Nonresident operator licensed in home state has same privileges as resident driver for period of 90 days. (WV Code 17B-2-2).

Action against nonresident, or against his personal representative arising out of operation of motor vehicle in state by him or his agent, may be commenced by delivering original and two copies of both summons and complaint to secretary of state, with $5 fee. Secretary of state forwards summons and complaint to defendant or to his personal representative by registered or certified mail and return receipt is attached to process and filed. If service of process cannot be effected through secretary of state's office, then nonresident's insurance company may be served. Court may order reasonable continuances to afford defendant opportunity to defend. Requirement of $100 bond deleted effective Mar. 8, 2003. (WV Code 56-3-31).

Direct Actions.

Not allowed.

Federal Clean Air Standards and Vehicle Safety.

(WV Code 17A-3A-1). Repealed effective June 6, 2003, Amendments concerning consumer disclosure and certificate of title. See WV Code 17A-3A-2–3.

Motor Homes.

Motor homes are vehicles subject to Class A and B motor vehicle registration. (240 F. Supp.2d 582).

Motorcycle Safety Fee.

Motorcycle Safety Fund created. (WV Code 17B-1D-7–10). Annual fee of $6.50. See WV Code 17A-10-3b.

Waste Tire Redemption.

Establishment of A. James Manchin fund. See WV Code 17A-10-16.

Motor Vehicle Dealers.

All dealers in motor vehicles, trailers and used parts and wreckers and dismantlers must obtain an annual license. (c. 17A, art. 6). Misdemeanor to sell motor vehicles without license. (WV Code 17A-6-1a). Law governing agreements between dealers and manufacturers or distributors. (WV Code 17A-6A-3). Motor vehicle dealers advisory board created. (WV Code 17A-6-18a). Motor Vehicles Advisory Board continued and reestablished. (WV Code 17A-6-18b).

Motor Vehicle Auction Business.

Person, partnership or corporation may not engage in business of conducting automobile auctions without first obtaining license certificate from office of commissioner. (c. 17A, art. 6c, § 1).

Motor vehicle carriers are regulated by Public Service Commission. Common carrier must obtain certificate of convenience and necessity (WV Code 24A-2-5); contract or private carrier, a permit (WV Code 24A-3-3). Limitations on driving times for common carriers. (WV Code 24A-2-6). Common and contract carriers must furnish security or insurance for liability and property damage. (WV Code 24A-5-5). Commission must cooperate with federal government and Interstate Commerce Commission for regulation of interstate commerce and cooperative enforcement and administration of federal and state laws. (c. 24A, arts. 5, 6A). Private commercial carriers of property subject to rules and regulations promulgated by Public Service Commission. (WV Code 24A-4-1). Operators of motor vehicles transporting hazardous materials must comply with registration and permitting program requirements established by Public Service Commission. (WV Code 24A-6B-1). Reciprocal agreements with other states. (WV Code 17A-2-10–10a).

On all common and contract carriers there are imposed special fees, based on capacity limits. For schedule, see WV Code 24A-6-6.

Special permit required for excess size and weight issued at discretion of Public Service Commission. (WV Code 17C-17-11). There are also additional tonnage fees based upon declared gross weight of vehicle, and additional fees based on seating capacity of vehicle. (WV Code 24A-6-6). Seat fees payable to Public Service Commission. (WV Code 17A-10-5).

Gasoline Tax.

See category 22 Taxation, topic 22.08 Gasoline and Special Fuels Taxes.

Uniform Commercial Driver’s License Act.

Adopted. (WV Code 17E-1-1–25). Commercial drivers prohibited from operating with any alcohol in system or with alcohol concentration of four hundredths of 1% or more, and are subject to criminal penalties. (WV Code 17E-1-15). Refusal to take preliminary breath test to determine blood alcohol content results in vehicle placed out of service for 24 hours. (WV Code 17E-1-14). Commercial drivers are exempt from point assessment exemptions while operating commercial vehicles. (WV Code 17C-6-1).

Commercial Motor Vehicles.

Regulation of commercial vehicle weights. (WV Code 24A-1A-1). Effective Mar. 8, 2003. Employees of Public Service Commission may enforce speed restrictions on commercial motor vehicles. See WV Code 17C-6-10.

Transportation of Coal.

See generally WV Code 17C-17A. Effective Mar. 8, 2003. Triple fines for violation of speed restrictions for commercial motor vehicles engaged in transportation of coal. See WV Code 17C-6-1.

Uniform Motor Vehicles Records Disclosure Act.

Adopted. (WV Code 17A-2A-1 14).

23.02 RAILROADS:

See category 3 Business Regulation and Commerce, topic 3.08 Carriers.

23.02A COMMERCIAL CODE FORMS:

See Part III, Uniform and Model Acts, Commercial Code Amendments for National Forms.

1
WISCONSIN LAW DIGEST

—Scope —

Revised for 2010 edition by

QUARLES & BRADY LLP, of Chicago, Madison, Milwaukee, Naples, Phoenix and Tucson.

(Citations, unless otherwise indicated, are to Wisconsin Statutes, 2007-2008. The statutes are numbered according to a decimal system, where figures preceding decimal point indicate chapters and those following indicate sections. Parallel citations to the North Western Reporter begin with 46 Wis.)

Note: This revision covers session laws enacted through 2009 Wisconsin Act 39, published Aug. 27, 2009. Legislature meets annually in Jan.

1 INTRODUCTION

1.01 GOVERNMENT AND LEGAL SYSTEM:

The State of Wisconsin is a constituent state of the United States of America. For further discussion of the U.S. federal system, see Introduction to the Federal Government of the United States at the beginning of this volume. A great many laws are promulgated by the federal government of the United States and are not reflected in the topics below. See the Introduction to this volume for references to the federal law topics covered. See also http://www.wisconsin.gov/.

Like all but one of the United States, Wisconsin has a common law legal system, with roots in English common law. For information on the courts and legislature of Wisconsin, see category 6 Courts and Legislature.

New legislature is sworn into office in Jan. of each odd-numbered year. Regular session of legislature commences on first Tues. after eighth day of Jan. in each year. (Wis. Stat. § 13.02).

If following enactment of biennial budget act in any biennium secretary determines that previously authorized expenditures will exceed revenues in current or forthcoming fiscal year by more than one-half of 1% of estimated general purpose revenue appropriations for that fiscal year, he or she may not take any action under sub. (2) and shall immediately notify governor, presiding officers of each house of legislature and joint committee on finance. (Wis. Stat. § 16.50[7][a]).

Following such notification, governor shall submit bill containing his or her recommendations for correcting imbalance between projected revenues and authorized expenditures, including recommendation as to whether moneys should be transferred from budget stabilization fund to general fund. (Wis. Stat. § 16.50[7][b]).

If legislature is not in floor period at time of secretary's notification, governor shall call special session of legislature to take up matter of projected revenue shortfall and governor shall submit his or her bill for consideration at that session. (Wis. Stat. § 16.50[7][b]).

1.02 [RESERVED]

1.03 HOLIDAYS:

Legal holidays are: Jan. 1; Jan. 15; 3rd Mon. in Feb. (which shall be day of celebration for Feb. 12 and 22); last Mon. in May (which shall be day of celebration for May 30); June 19; July 4; 1st Mon. in Sept.; primary election day in Sept.; 2nd Mon. in Oct.; Nov. 11; general election day in Nov.; 4th Thurs. in Nov.; Dec. 25. In First Class Cities (population 150,000 or greater (Wis. Stat. § 62.05[1][a]), day of holding any municipal election is legal holiday and afternoon of day on which primary election for city office candidates is held is half holiday. (Wis. Stat. § 995.20).

Good Friday.

Period from 11 a.m. to 3 p.m. on Good Friday must uniformly be observed for purpose of worship. (Wis. Stat. § 995.20).

Holiday Falling on Sunday.

When any holiday falls on Sun., following Mon. is legal holiday. (Wis. Stat. § 995.20).

1.04 OFFICE HOURS AND TIME ZONE:

Wisconsin is in the Central (GMT -06:00) time zone. Office hours are generally from 9 a.m. to 5 p.m.

2 BUSINESS ORGANIZATIONS

2.01 AGENCY:

Common law in respect to principal and agent applies. See category 21 Property, topic 21.15 Powers of Attorney.

2.02 ASSOCIATIONS:

Ordinary unincorporated associations are not governed by special legislation. Specific forms of unincorporated associations are regulated by statute. Business trusts are contemplated by statute, but not widely used. See subhead Special legislation, infra; also topic Joint Stock Companies.

Rights and Powers.

Unincorporated association has no entity or existence apart from that of its members. (238 Wis. 204, 298 N.W. 587).

Actions.

In general, action against unincorporated association must be brought against individual members (153 Wis. 13, 139 N.W. 734), but amenability to suit of certain associations may be implied from statutory provisions (8 Wis. 2d 373, 99 N.W.2d 100; 105 Wis. 2d 543, 314 N.W.2d 120), or permitted on ground of convenience (9 Wis. 2d 631, 101 N.W.2d 782).

Liabilities.

Members are jointly and severally liable for contractual obligations incurred during their membership. (105 Wis. 2d 543, 314 N.W.2d 120; 151 Wis. 577, 139 N.W. 413).

Special legislation deals with organization of, and holding of property by cooperatives (c. 185), credit unions (c. 186), fraternal societies (Wis. Stat. §§ 188.01-06), veterans' organizations (Wis. Stat. §§ 188.08-26), religious societies (c. 187), fire fighters' associations (Wis. Stat. §§ 213.01-07), fire fighters' relief associations (Wis. Stat. § 213.10), police relief associations (Wis. Stat. § 213.11), savings and loan associations (c. 215), and investment associations (c. 216). Uniform Unincorporated Nonprofit Association Act adopted with modifications. (c. 184). Non-stock corporations are addressed in c. 181.

Cooperative associations may be incorporated under c. 185.

Professional Corporations.

See topic 2.03 Corporations, subhead Professional Corporations.

2.03 CORPORATIONS:

Uniform Commercial Code has been adopted. See category 3 Business Regulation and Commerce, topic 3.09 Commercial Code.

Governing Act is Wisconsin Business Corporation Law. (c. 180). Law is based in part on 1984 revised model business corporation act adopted by committee on corporate laws of section of corporation, banking and business law of American Bar Association. (Model act is reproduced in Uniform and Model Acts section.)

C. 180 contains special provisions applicable to foreign corporations, statutory close corporations and service corporations. Nonstock corporations are governed by c. 181. See subheads Close Corporations, Foreign Corporations, Professional Corporations, Model Non-Profit Corporation Act, infra.

General Supervision; Forms.

General supervision of corporations is by Department of Financial Institutions, 345 West Washington Avenue, Madison, Wisconsin 53703. Department must prescribe and furnish on request forms for following documents, use of which is mandatory: Foreign corporation's application for certificate of authority to transact business in Wisconsin; foreign corporation's application for certificate of withdrawal; annual report to be filed with Department of Financial Institutions by domestic, foreign, or service corporation; application for certificate of conversion. Department of Financial Institutions may prescribe and furnish on request forms for other documents required or permitted to be filed by c. 180, but use of such forms is not mandatory. (Wis. Stat. § 180.0121).

Confirmation of Status.

Any person may request from Department of Financial Institutions certificate of status for domestic corporation or foreign corporation which will include following information: (1) Domestic corporation's corporate name or foreign corporation's corporate name and fictitious name, if any, used in Wisconsin; (2) domestic corporation's date of incorporation and period of duration if less than perpetual; and (3) whether each of following is true: domestic corporation is incorporated under laws of Wisconsin, or foreign corporation is authorized to transact business in Wisconsin; domestic, foreign, or service corporation has, during its most recently completed report year, filed with Department of Financial Institutions annual report; domestic corporation has not filed articles of dissolution; foreign corporation has not applied for certificate of withdrawal and is not subject of proceeding to revoke its certificate of authority. Certificate of status may include other facts of record in office of Department of Financial Institutions if requested. Upon request, Department of Financial Institutions will issue, by telegraph, teletype, facsimile or other form of wire or wireless communication, statement of status, which must contain information required and may contain any other information permitted in certificate of status. Subject to any qualification stated in certificate or statement of status, certificate or statement is conclusive evidence that domestic corporation is in existence or foreign corporation is authorized to transact business in Wisconsin. Upon request by telephone or otherwise, Department of Financial Institutions will confirm, by telephone, any of information required and may confirm any other information permitted in certificate of status. (Wis. Stat. § 180.0128). There is no fee for providing confirmation of status by telephone. (Wis. Stat. § 180.0122[3][b]). See subhead Filing Fees, infra.

Purposes.

Corporation incorporated under c. 180 has purpose of engaging in any lawful business unless more limited purpose set forth in articles of incorporation. (Wis. Stat. § 180.0301[1]). Corporation engaging in business regulated under another Wisconsin statute may incorporate under c. 180 only if not prohibited by, and subject to all limitations of, other statute. (Wis. Stat. § 180.0301[2]).

Name.

Corporate Name.

Must include “corporation”, “incorporated”, “company” or “limited” or abbreviation “corp.”, “inc.”, “co.” or “ltd.” or words or abbreviations of like import in another language except that name of service corporation must end with word “chartered” or “limited”, or words “service corporation”, or abbreviation “ltd.” or “S.C.” (but corporation in existence on Jan. 1, 1991 need not change name to comply); must not contain language stating or implying that corporation is organized for any purpose other than authorized purpose; and, except as otherwise authorized by § 180.0401, must be distinguishable upon records of Department of Financial Institutions from corporate name of any domestic corporation or foreign corporation authorized to transact business in Wisconsin, reserved or registered corporate name, name of dissolved corporation that has retained exclusive use of its name under c. 180, fictitious name adopted by foreign corporation authorized to transact business in Wisconsin, corporate name of Wisconsin nonstock corporation, name of any limited partnership formed under laws of or registered in Wisconsin, name of any cooperative association incorporated or authorized to transact business in Wisconsin, name of any limited liability company organized under laws of or registered in Wisconsin, and name of any limited liability partnership formed under laws of or registered in Wisconsin. (Wis. Stat. § 180.0401). Corporation may apply for authorization to use indistinguishable name and Department of Financial Institutions will authorize use if other entity consents to use in writing and submits satisfactory undertaking to change its name to name distinguishable from name of applicant or applicant delivers to department certified copy of final judgment of court of competent jurisdiction establishing applicant’s right to use name applied for in Wisconsin; filing fee is $10. (Wis. Stat. §§ 180.0401[3]; 180.0122[1][b]). Corporation may use name, including fictitious name, used in Wisconsin by other domestic corporation or foreign corporation authorized to transact business in Wisconsin if corporation proposing to use name has merged with, been formed by reorganization of, or acquired all or substantially all assets, including corporate name, of other domestic or foreign corporation. (Wis. Stat. § 180.0401[4]). Informal name clearance may be available by telephone call to Department of Financial Institutions.

Reserved Name.

Available name may be reserved for 120 days by delivering written application for filing or making telephone application to department. Name reservations may be renewed. Fee for written application and renewal application is $15; fee for telephone application and renewal application is $30. Reservation or renewal cancelled if department does not receive proper fee within 15 business days after telephone application. (Wis. Stat. §§ 180.0402[1]; 180.0122[1][c]-[f]). Reserved name may be transferred by delivering written and signed notice specifying name and address of transferee and $10 fee to Department of Financial Institutions. (Wis. Stat. §§ 180.0402[2]; 180.0122[1][g]).

Registered Name.

Foreign corporation not authorized to transact business in Wisconsin may register corporate name if distinguishable upon records of Department of Financial Institutions by delivering written application for filing and $50 fee to department and may apply for certificate of authority thereafter under registered name. Registration expires Dec. 31 but may be renewed on annual basis by delivering renewal application for filing and $50 fee to Department of Financial Institutions between Oct. 1 and Dec. 31. (Wis. Stat. §§ 180.0403[1],[4]; 180.0122[1][h],[i]). Domestic corporation or foreign corporation authorized to transact business in Wisconsin may register corporate name for up to ten years after merger, name change or dissolution by delivering application for filing and $50 fee to Department of Financial Institutions simultaneously with documents for merger, name change, dissolution or application for amended certificate for name change. (Wis. Stat. §§ 180.0403[2]; 180.0122[1][h]). Registered name may be transferred by delivering written and signed notice specifying name and address of transferee and $10 fee to Department of Financial Institutions. (Wis. Stat. §§ 180.0403[3m]; 180.0122[1][g]).

Term of Corporate Existence.

Perpetual unless articles of incorporation limit duration. (Wis. Stat. § 180.0302).

Incorporators.

One or more persons may act as incorporators; need not be residents of Wisconsin or subscribers for shares. Following incorporation, majority of incorporators may take any action permitted by c. 180 to be taken by incorporators. (Wis. Stat. § 180.0201).

Articles of Incorporation.

Must be executed by incorporator and must include: (a) Statement that corporation is incorporated under c. 180; (b) corporate name that satisfies § 180.0401; (c) number of authorized shares; (d) if more than one class of shares is authorized, distinguishing designation of each class, number of authorized shares of each class and, before issuance of shares of class, description of preferences, limitations and relative rights of that class; (e) if one or more series of shares are created within class of shares, then before issuance of shares of series, distinguishing designation of each series, number of authorized shares of each series, and preferences, limitations and relative rights of that series; (f) any provision authorizing board of directors to act under § 180.0602(1) (to determine terms of class or series of shares before issuance); (g) any provision granting or limiting preemptive rights; (h) street address of initial registered office and name of initial registered agent at that office; (i) name and address of each incorporator. Investment company may declare that it has indefinite number of authorized shares and that each class or series has indefinite number of authorized shares. (Wis. Stat. § 180.0202[1]). Articles may set forth other information, including names and addresses of initial directors, any provision required or permitted in bylaws, and provisions not inconsistent with law regarding: Purpose(s) for which corporation is organized; managing business and regulating affairs of corporation; defining, limiting and regulating powers of corporation, board of directors and shareholders; and par value for authorized shares or classes or series of shares. (Wis. Stat. § 180.0202[2]). Articles need not set forth any corporate powers enumerated in c. 180. (Wis. Stat. § 180.0202[3]). If provision of articles is inconsistent with bylaw, provision of articles controls. (Wis. Stat. § 180.0202[4]).

Filing of Articles and Other Documents.

Filing Requirements and Procedures.

Properly executed articles of incorporation and other corporate documents must be delivered to Department of Financial Institutions for filing accompanied by one exact or conformed copy and required filing fee. (Wis. Stat. § 180.0120[1]). Department of Financial Institutions will stamp or endorse date of receipt on original, document copy and, on request, any additional copy received. (Wis. Stat. § 180.0125[1]). Articles and other documents (except for annual reports) accepted for filing by Department of Financial Institutions are deemed effective at close of business on date of receipt (or at another specified time on date of receipt) unless they specify delayed effective date and time not more than 90 days after date of receipt. Annual reports of domestic, foreign or service corporations are deemed effective on date filed by

Department of Financial Institutions. (Wis. Stat. §§ 180.0123; 180.1622[5]). Department of Financial Institutions will stamp or endorse “Filed” on original and document copy of document accepted for filing and will deliver document copy to corporation or its representative after filing. (Wis. Stat. § 180.0125[2]). Document not accepted for filing must be returned to corporation or its representative within five business days after receipt by Department of Financial Institutions, together with brief written explanation of reason for refusal. (Wis. Stat. § 180.0125[3][a]). Department of Financial Institutions’ failure to either file or return document within five business days constitutes refusal to file document and may be appealed. (Wis. Stat. §§ 180.0125[3][b]; 180.0126). Name of person or governmental agency drafting specified corporate documents must appear on documents filed by Department of Financial Institutions except those executed or acknowledged outside of Wisconsin. Requirement applies to: Articles of incorporation; articles of amendment; articles of merger, consolidation or share exchange; articles of dissolution; restated articles of incorporation; certificate of abandonment; and statement or articles of revocation of voluntary dissolution. Statement in following form complies: “This document was drafted by. . . . . (Name).” (Wis. Stat. §§ 182.01[3]; 180.0120[1][d]).

Correcting Filed Document.

Corporation may correct document filed by Department of Financial Institutions, before, on or after Jan. 1, 1991, if document contains statement that was incorrect at time of filing or was defectively executed, by delivering to Department of Financial Institutions for filing articles of correction; articles of correction are effective on effective date of document they correct, except with respect to persons relying on uncorrected document and adversely affected by correction, as to which articles of correction are effective when filed. (Wis. Stat. § 180.0124).

Penalty for False Document.

Person signing document with intent that it be delivered to Department of Financial Institutions for filing, or delivering document to Department of Financial Institutions for filing is guilty of Class I felony if such person knows document is false in any material respect at time of delivery. (Wis. Stat. § 180.0129).

See subhead Filing Fees, infra.

Incorporation Tax or Fee.

None, except filing fees.

Filing Fees.

Payable to Department of Financial Institutions as follows: Articles of incorporation, $100; domestic or foreign corporation’s statement of change of registered office, $10 (no fee for change of registered office if change is to address and is necessitated solely by change in way municipality or U.S. postal service describes physical location of registered office); agent’s statement of change of registered office, $10 for each affected domestic or foreign corporation, except if simultaneous filings are made fee is reduced to $1 for each affected corporation in excess of 200; agent’s statement of resignation, $10; director or principal officer statement, $3; director or principal officer resignation notice, $3; amendment of articles of incorporation, $40; restatement of articles of incorporation with or without amendment of articles, $40; articles of merger, $150; articles of share exchange, $50 for each domestic corporation and each foreign corporation authorized to transact business in Wisconsin party to share exchange; articles of dissolution, $20; articles of revocation of dissolution, $10; application for reinstatement following administrative dissolution, $90; certificate of reinstatement, $10; certificate of judicial dissolution, $10; application for certificate of authority, $100 (possibly plus additional fees depending upon amount of capital employed in state); application for amended certificate of authority, $40; application for certificate of withdrawal, $40 (possibly plus additional fees depending upon amount of capital employed in state); annual report of domestic corporation, $25; annual report of foreign corporation, $65 (possibly plus additional fees depending upon amount of capital employed in state); articles of correction, $40; certificate of conversion, $150; request for certificate or statement of status, fee established under § 182.01(4)(b); service of process on Department of Financial Institutions, fee established under § 182.01(4)(c) (fee is recoverable as costs if serving party prevails in proceeding); processing document for filing in expeditious manner or preparing certificate of status or statement of status in expeditious manner, fee established under §§ 182.01(4)(d) and (f) in addition to other fees imposed by c. 180. (Wis. Stat. § 180.0122). See subheads Name, supra, Foreign Corporations, infra, for related filing fees.

License to Do Business.

Corporate existence begins when articles of incorporation become effective. (Wis. Stat. § 180.0203[1]). Department of Financial Institution's filing of articles of incorporation is conclusive proof that corporation is incorporated under c. 180, except in proceeding by State to cancel or revoke incorporation or involuntarily dissolve corporation. (Wis. Stat. § 180.0203[2]).

Organization.

After incorporation, if initial directors are named in articles of incorporation, initial directors must hold organizational meeting, at call of majority of directors, to complete organization of corporation by appointing officers and carrying on any other business brought before meeting. (Wis. Stat. § 180.0205[1]). After incorporation, if initial directors are not named in articles of incorporation, incorporator(s) must hold organizational meeting, at call of majority of incorporators, to elect directors and complete organization of corporation or to elect directors who will complete organization of corporation. Action required or permitted by c. 180 by incorporators at organizational meeting may be taken without meeting if action taken is described in written consent(s) signed by each incorporator. (Wis. Stat. § 180.0205[2]). Organizational meeting may be held in or outside Wisconsin. (Wis. Stat. § 180.0205[3]).

Paid-in Capital Requirements.

None.

Required Vote.

Voting Requirements for Voting Groups.

If quorum exists, action on matter, other than election of directors (under § 180.0728), by voting group is approved if votes cast within voting group favoring action exceed votes cast opposing action, unless articles of incorporation, bylaws adopted under authority granted in articles of incorporation, or c. 180 requires greater number of affirmative votes. (Wis. Stat. § 180.0725[3]). "Voting group" means: (a) All shares of one or more classes or series that under articles of incorporation or c. 180 are entitled to vote and be counted together collectively on matter at meeting of shareholders; (b) all shares that under articles of incorporation or c. 180 are entitled to vote generally on matter. (Wis. Stat. § 180.0103[19]). Articles of incorporation may provide, or authorize bylaws under § 180.1021 to provide, for greater or lower quorum requirement or greater voting requirement for shareholders or voting groups of shareholders than provided by c. 180. (Wis. Stat. § 180.0727). For shareholder vote required to approve amendment of articles of incorporation, sale of corporate assets, plan of merger or share exchange, and dissolution or revocation of dissolution, see subheads Amendment of Articles, Sale or Transfer of Corporate Assets, Merger and Share Exchange, Dissolution, infra.

Certain Voting Requirements Preserved.

With respect to corporations organized before Jan. 1, 1973 that have neither (1) amended their articles of incorporation to provide that voting requirements of §§ 180.1003, 180.1103, 180.1202, 180.1402 or 180.1404 apply nor (2) expressly elected, before Jan. 1, 1991, majority or greater affirmative voting requirements under § 180.25(2)(a), 1987 Stats., shareholder vote required to approve amendment of articles of incorporation, merger or share exchange, certain asset sales, and dissolution or revocation of dissolution is affirmative vote of holders of two-thirds of shares entitled to vote on proposal (unless any class or series of shares is entitled to vote on proposal as class, in which event proposal is adopted upon receiving affirmative vote of holders of two-thirds of shares of each class and series of shares entitled to vote as class and of holders of two-thirds of total shares entitled to vote) or such greater proportion of shares, or of any class or series of shares, as articles of incorporation may require. If corporation had bylaw in effect on Dec. 31, 1990 that established greater shareholder voting requirement than one required under c. 180, that voting requirement applies until bylaw is amended or repealed. (Wis. Stat. § 180.1706).

Other Voting Requirements and Restrictions.

Additional voting requirements may apply to certain "business combinations" involving major shareholders and control share voting restrictions may apply to "resident domestic corporations"; special shareholder vote provisions may apply to acquisition of shares or sale or optioning of assets of resident domestic corporation during pendency of take-over offer. See subheads Resident Domestic Corporations, Business Combinations, infra.

Amendment of Articles.

Authority to Amend.

Corporation may amend articles of incorporation to add or change provision required or permitted to be included in articles or to delete provision not required to be included (determined as of effective date of amendment). (Wis. Stat. § 180.1001[1]). Shareholder has no vested property right resulting from any provision in articles, including provisions relating to management, voting, control, capital structure, dividend entitlement or purpose or duration of corporation. (Wis. Stat. § 180.1001[2]).

Amendment by Board of Directors.

Unless articles provide otherwise, certain enumerated routine amendments may be made by board of directors without shareholder action. (Wis. Stat. § 180.1002).

Amendment by Board of Directors and Shareholders.

Board of directors may propose one or more amendments to articles for submission to shareholders, which submission may be conditioned on any basis. (Wis. Stat. § 180.1003[1]). Corporation must notify each shareholder, whether or not entitled to vote, of shareholders' meeting to vote on amendment and notice must contain or be accompanied by copy or summary of proposed amendment and state that purpose, or one of purposes, of meeting is to consider and act upon proposed amendment. (Wis. Stat. § 180.1003[2]). Unless c. 180, articles of incorporation, bylaws adopted under authority granted in articles of incorporation or board of directors (as condition of proposed amendment) requires greater vote or vote by voting groups, amendment is adopted if approved by majority of votes entitled to be cast on amendment by each voting group with respect to which amendment would create dissenters' rights under § 180.1302 (see subhead Appraisal, catchline Right to Dissent, infra), and majority of votes actually cast by every other voting group entitled to vote on amendment. (Wis. Stat. §§ 180.1003[3]; 180.1302[2]).

Voting by Voting Groups.

Holders of shares of class or series of shares are entitled to vote as separate voting group on certain enumerated proposed amendments even though articles provide that such shares are nonvoting shares. (Wis. Stat. § 180.1004). Corporation in existence on Jan. 1, 1991 may preserve prior class voting rights on amendments or plan of merger for shares of class authorized before Jan. 1, 1991 if so provides in articles of incorporation. (Wis. Stat. § 180.1707).

Amendment Before Issuance of Shares.

If corporation has not yet issued shares, incorporators or board of directors may amend articles, but unless amendment is approved by at least two-thirds of shares subscribed for, any shareholder or subscriber who has not approved amendment is released from subscription and entitled to repayment of any consideration paid for shares upon application to corporation within ten days after notice of amendment. (Wis. Stat. § 180.1005).

Articles of Amendment.

Must be delivered to Department of Financial Institutions for filing and must include: Name of corporation; text of each amendment adopted; if amendment provides for exchange, reclassification or cancellation of issued shares, provisions for implementing amendment if not contained in amendment itself; date on which each amendment was adopted; and statement that amendment was adopted in accordance with § 180.1002 (amendment by board of directors without shareholder action), § 180.1003 (amendment by board of directors and shareholders) or § 180.1005 (amendment before issuance of shares), whichever is case. (Wis. Stat. § 180.1006). See subhead Filing Fees, supra.

Restated Articles of Incorporation.

Articles of incorporation may be restated by board of directors or, if corporation has not yet issued shares, by incorporators, at any time and without shareholder approval, unless shareholder approval is required for amendment included in restatement. (Wis. Stat. § 180.1007). See subhead Filing Fees, supra.

Amendment Pursuant to Reorganization.

Prior to entry of final decree in reorganization proceeding, corporation’s articles may be amended without action by board of directors or shareholders to carry out plan of reorganization ordered or decreed by court having jurisdiction under federal statute. (Wis. Stat. § 180.1008).

Effect of Amendment.

Amendment to corporation’s articles does not affect: Cause of action existing against or in favor of corporation; civil, criminal, administrative or investigatory proceeding to which corporation is party (and amendment changing corporation’s name does not abate such proceeding by or against corporation in its former name); or existing rights of persons other than shareholders of corporation. (Wis. Stat. § 180.1009).

Amendments In Connection With Merger.

Amendments to articles or other similar governing documents of surviving business entity may be adopted in connection with merger. (Wis. Stat. §§ 180.1101[3][a]; 180.1104[5]). See subhead Merger and Share Exchange, infra.

Increase or Decrease of Authorized Capital Stock.

Aggregate number of authorized shares, or number of shares of any class or series, may be increased or decreased by amendment to articles. (Wis. Stat. §§ 180.0601; 180.1001). To extent provided in articles, board of directors may create one or more series within class of shares, and, with respect to any series, determine number of shares of series. (Wis. Stat. § 180.0602). Corporation may acquire its own shares and all shares so acquired after Dec. 31, 1990 constitute treasury shares unless board of directors, by resolution, cancels acquired shares (in which event shares are restored to status of authorized but unissued shares) or articles of incorporation prohibit treasury shares or reissuance of acquired shares. If articles of incorporation prohibit treasury shares but do not prohibit reissuance of acquired shares, all acquired shares are restored to status of authorized but unissued shares. If articles of incorporation prohibit reissuance of acquired shares, number of authorized shares is reduced by number of shares acquired, effective upon amendment of articles of incorporation reflecting reduction adopted by board of directors without shareholder action. Treasury shares existing on Dec. 31, 1990, remain treasury shares until disposed of, cancelled or restored to status of authorized but unissued shares by action of board of directors or shareholders. Treasury shares are considered issued shares but not outstanding shares. (Wis. Stat. § 180.0631). See subheads Articles of Incorporation, Amendment of Articles, supra, Shares, catchline Authorized Shares, infra.

Bylaws.

Regular Bylaws.

Incorporators, board of directors or shareholders may adopt initial bylaws for corporation. Bylaws may contain any provision for managing business and regulating affairs of corporation not inconsistent with articles of incorporation or Wisconsin law. (Wis. Stat. §§ 180.0206; 180.0302[3]). Board of directors may amend or repeal bylaws or adopt new bylaws unless (1) articles of incorporation, § 180.1021(2) or § 180.1022(1)(a) (regarding bylaws fixing quorum or voting requirements for shareholders and directors, respectively) or other provisions of c. 180 reserve that power exclusively to shareholders or (2) shareholders, in adopting, amending or repealing particular bylaw, provide within bylaws that board of directors may not amend, repeal or readopt that bylaw. Shareholders may amend or repeal bylaws or adopt new bylaws even though board of directors has same power. (Wis. Stat. § 180.1020).

Emergency Bylaws.

Unless articles of incorporation provide otherwise, board of directors may adopt bylaws that are effective only in emergency (defined as catastrophic event that prevents quorum of directors from being readily assembled). Emergency bylaws may make all provisions necessary for managing corporation during emergency, including but not limited to procedures for calling meeting of board of directors, quorum requirements for meeting, and designation of additional or substitute directors. Provisions of regular bylaws consistent with emergency bylaws remain effective during emergency; emergency bylaws not effective after emergency ends. Notwithstanding provisions of c. 180 regarding limited liability of directors, director conflict of interest and director liability for unlawful distributions, corporate action taken in good faith in accordance with emergency bylaws binds corporation and may not be used to impose liability on director, officer, employee or agent. (Wis. Stat. § 180.0207).

Shares.

Authorized Shares.

Corporation may have one or more classes of authorized shares. Articles of incorporation must prescribe classes of shares and number of shares of each class corporation is authorized to issue, except that investment company may prescribe that each class has indefinite number of authorized shares. If more than one class is authorized, articles must prescribe distinguishing designation for each class as well as, before issuance, describe preferences, limitations and relative rights of that class. Unless class is divided into series, all shares of class must have identical preferences, limitations and relative rights. (Wis. Stat. § 180.0601[1]). Articles may create series of shares within class of shares. Before issuance of shares of series, corporation must describe in articles number of shares of each series corporation is authorized to issue (except that investment company may prescribe that each series has indefinite number of authorized shares), distinguishing designation for each series within class, and preferences, limitations and relative rights of that series. All shares of series must have preferences, limitations and relative rights identical with other shares of same series and, except to extent otherwise provided in description of series, with those of other series of same class. (Wis. Stat. § 180.0601[2]). Articles must authorize one or more classes of shares that together have unlimited voting rights and one or more classes of shares (which may be same class[es] as those with unlimited voting rights) that together are entitled to receive net assets of corporation upon dissolution. (Wis. Stat. § 180.0601[3]). Articles may authorize one or more classes of shares having designations, preferences, limitations and relative rights that may include (but are not limited to) any of following: Special, conditional or limited voting rights, or no right to vote, except to extent prohibited by c. 180; provisions for redemption or conversion of shares under any of following terms specified by articles: (1) At option of corporation, shareholder or another person, or upon occurrence of designated event, (2) for cash, indebtedness, securities or other property, (3) in designated amount or in amount determined in accordance with designated formula or by reference to extrinsic data or events; provisions entitling holders to distributions calculated in any manner, including dividends that may be cumulative, noncumulative or partially cumulative; preference over any other class of shares with respect to distributions, including dividends and distributions upon dissolution of corporation. (Wis. Stat. § 180.0601[4]).

Terms of Class or Series Determined by Board of Directors.

To extent provided in articles of incorporation and within limits of § 180.0601, board of directors may: Determine with respect to any wholly unissued class of shares preferences, limitations and relative rights of that class; create one or more series within class, and, with respect to any wholly unissued series, determine number of shares (except that investment company may prescribe that each series has indefinite number of shares), distinguishing designation and preferences, limitations and relative rights of that series. Before issuing any shares of class or series whose terms are determined by board of directors, corporation must deliver to Department of Financial Institutions for filing articles of amendment, which are effective without shareholder action, that include specified information with respect to class or series of shares involved. After such articles of amendment have been filed and before any shares of class or series involved have been issued, board of directors may, by resolution, alter or revoke any distinguishing designation and preferences, limitations or relative rights described in articles of amendment by filing revised articles of amendment with Department of Financial Institutions. Distinguishing designation, preference, limitation or relative right may not be altered or revoked after any shares of class or series subject thereto have been issued, except by amendment of articles of incorporation by board of directors and shareholders under § 180.1003. (Wis. Stat. § 180.0602). After articles of amendment are filed, board of directors may, by resolution: (1) Decrease number of shares of class or series that are subject of articles of amendment but not below number of such shares that are outstanding, and such shares shall resume status applicable to them immediately before their inclusion in class or series; (2) if no shares of class or series subject to articles of amendment are outstanding, eliminate from articles of incorporation such class or series by preparing, signing and filing with Department of Financial Institutions certificate stating that no such shares will be issued under articles of amendment; and (3) increase number of shares of class or series that are subject of articles of amendment but not beyond total number of authorized shares of class or series as specified in articles of incorporation. (Wis. Stat. § 180.0602[3]).

Issued and Outstanding Shares.

Corporation may issue number of shares of each class or series authorized by articles. If investment company has authorized indefinite number of shares, there is no limit on number of shares it may issue. Issued shares are outstanding shares until reacquired, redeemed, converted or cancelled. Reacquisition, redemption or conversion of outstanding shares is subject to provisions regarding distributions to shareholders in § 180.0640 and to limitations that, at all times shares of corporation are outstanding, there must be outstanding one or more shares that together have unlimited voting rights and one or more shares (which may be same share[s] as those with unlimited voting rights) that together are entitled to receive net assets of corporation upon dissolution. (Wis. Stat. § 180.0603).

Fractional Shares.

Corporation may issue fractions of shares or pay in money value of such fractions, arrange for disposition of fractional shares by shareholders, or issue scrip in registered or bearer form entitling holder to receive full share on surrender of sufficient scrip to equal full share. Holder of fractional share may exercise rights of shareholder, including right to vote, to receive dividends and to participate in assets of corporation upon liquidation. Holder of scrip not entitled to such rights unless scrip provides for them. (Wis. Stat. § 180.0604).

Subscriptions for Shares.

Subscription for shares entered into before incorporation is irrevocable for six months unless subscription agreement provides longer or shorter period or all subscribers agree to revocation. Unless subscription agreement provides otherwise, filing of articles of incorporation constitutes acceptance by corporation of all existing subscriptions to its shares. Board of directors may determine payment terms of subscriptions entered into before incorporation, unless subscription agreement specifies payment terms. Call for payment by board of directors shall be uniform so far as practicable as to all shares of same class or series, unless subscription agreement specifies otherwise. Shares issued under subscriptions entered into before incorporation are fully paid and nonassessable when corporation receives consideration specified in subscription agreement. If subscriber defaults in payment under subscription agreement entered into before incorporation, corporation may collect amount owed as any other debt. Alternatively, unless subscription agreement provides otherwise, corporation may rescind agreement and sell shares if debt remains unpaid for more than 20 days after corporation sends written demand for payment to subscriber. (Wis. Stat. § 180.0620).

Share Rights, Options and Warrants.

Corporation may issue rights, options or warrants for purchase of its shares unless articles of incorporation provide otherwise before issuance thereof. Rights, options or warrants may contain provisions that adjust them in event of acquisition of shares or reorganization, merger, share exchange, sale of assets or other occurrence. Subject to articles of incorporation, board of directors will determine terms on which rights, options or warrants are issued, their form and content, and consideration for which shares subject thereto are to be issued. Notwithstanding any other provision of c. 180, and unless otherwise provided in articles of incorporation before issuance of rights, options or warrants, corporation may issue rights, options or warrants that include conditions preventing holder of specified percentage of outstanding shares (and any transferee) from exercising such rights, options or warrants. (Wis. Stat. § 180.0624).

Share Certificates.

Form and Content.

Share certificate must state on its face: Name of issuing corporation and that corporation is organized under laws of Wisconsin; name of person to whom issued; number and class of shares and designation of series, if any, that certificate represents. If issuing corporation is authorized to issue different classes of shares or different series within class, front or back of each certificate must contain either (1) summary of designations, relative rights, preferences and limitations applicable to each class, and variations in rights, preferences and limitations determined for each series and authority of board of directors to determine variations for future series or (2) conspicuous statement that corporation will furnish above information on request, in writing and without charge. Each share certificate must be signed either manually or in facsimile by officer(s) designated in bylaws or by board of directors. Validity of share certificate not affected if person who signed certificate no longer holds office when certificate issued. (Wis. Stat. § 180.0625).

Uncertificated Shares.

Unless articles of incorporation or bylaws provide otherwise, board of directors may authorize issuance of any shares of any classes or series without certificates. Such authorization does not affect shares already represented by certificates until certificates are surrendered to corporation. Within reasonable time after issuance or transfer of shares without certificates, corporation must send shareholder written statement of same information required on share certificates. Unless c. 180 or c. 408 (Uniform Commercial Code—Investment Securities) expressly provides otherwise, rights and obligations of shareholders are identical whether or not their shares are represented by certificates. (Wis. Stat. § 180.0626).

Issuance of Shares.

Board of directors may authorize shares to be issued for consideration consisting of any tangible or intangible property or benefit to corporation, including cash, promissory notes, services performed, contracts for services to be performed or other securities of corporation. Before shares are issued, board of directors must determine that consideration received or to be received is adequate. Board of directors' determination is conclusive insofar as adequacy of consideration for issuance of shares relates to whether shares are validly issued, fully paid and nonassessable. When corporation receives consideration for which board of directors authorized issuance of shares, shares issued for that consideration are fully paid and nonassessable. Corporation may place in escrow shares issued for contract for future services or benefits or promissory note, or make other arrangements to restrict transfer of such shares, and may credit distributions in respect of such shares against their purchase price, until services are performed, benefits are received or note is paid. If services are not performed, benefits are not received or note is not paid, corporation may cancel, in whole or in part, shares escrowed or restricted and distributions credited. Foregoing powers granted to board of directors in connection with issuance of shares may be reserved to shareholders by articles of incorporation. (Wis. Stat. § 180.0621). Corporation may pay expense of selling or underwriting its shares, and of organizing or reorganizing corporation, from consideration received for shares. (Wis. Stat. § 180.0628).

Share Dividends.

Unless articles of incorporation provide otherwise, corporation may issue share dividends. "Share dividend" means shares issued proportionally and without consideration to corporation's shareholders or to shareholders of one or more classes or series. Corporation may not issue shares of one class or series as share dividend in respect of shares of another class or series unless articles of incorporation authorize issuance, majority of votes entitled to be cast by class or series to be issued approve issuance, or there are no outstanding shares of class or series to be issued (and no securities outstanding that are convertible into or carry right to subscribe for or acquire shares of class or series to be issued). If board of directors does not fix record date for determining shareholders entitled to share dividend, record date is date on which board of directors authorizes share dividend. (Wis. Stat. § 180.0623).

Transfer of Shares.

Uniform Commercial Code adopted. (c. 408). See category 3 Business Regulation and Commerce, topic 3.09 Commercial Code. Uniform Act for Simplification of Fiduciary Security Transfers repealed by 1997 Wisconsin Act 297, effective July 1, 1998. Uniform Securities Ownership by Minors Act adopted. (Wis. Stat. § 54.92).

Transfer Restrictions.

Articles of incorporation, bylaws, agreement among shareholders and holders of other securities, or agreement between shareholders and holders of other securities and corporation may impose transfer restriction on shares and other securities of corporation for any reasonable purpose, including but not limited to, maintaining corporation's status when it is dependent on number or identity of shareholders, and preserving exemptions under federal or state securities law. "Other securities" include securities that are convertible into or carry right to subscribe for or acquire shares. “Transfer restriction” means restriction on transfer or registration of transfer of shares and other securities of corporation. Transfer restriction may not affect shares and other securities issued before restriction is adopted unless holders of shares and other securities are parties to transfer restriction agreement or vote in favor of transfer restriction. Transfer restriction is valid and enforceable against holder or transferee of holder if transfer restriction is authorized as provided above and its existence is noted conspicuously on front or back of share certificate or contained in information statement required with respect to shares without certificates. Unless so noted, transfer restriction is not enforceable against person who does not know of it. Transfer restrictions permitted include (but are not limited to) those that do any of following: Obligate shareholder or holder of other securities first to offer corporation or other persons opportunity to acquire restricted shares or other securities; obligate corporation or other persons to acquire restricted shares or other securities; require corporation, holders of any class of its shares or other securities or another person to approve transfer of restricted shares or other securities, if requirement is not manifestly unreasonable; prohibit transfer of restricted shares or other securities to designated persons or classes of persons, if prohibition is not manifestly unreasonable. (Wis. Stat. § 180.0627).

Stock Transfer Tax.

None.

Record Date.

Bylaws may fix or provide manner of fixing future date as record date for one or more voting groups in order to determine shareholders entitled to notice of shareholders’ meeting, to demand special meeting, to vote or to take any other action. If bylaws do not fix or provide for fixing record date, board of directors may fix future date as record date. Record date may not be more than 70 days before meeting or action requiring determination of shareholders. Except as provided below, determination of shareholders entitled to notice of or to vote at shareholders’ meeting is effective for any adjournment of meeting unless board of directors fixes new record date, which it must do if meeting is adjourned to date more than 120 days after date fixed for original meeting. If court orders meeting adjourned to date more than 120 days after date fixed for original meeting, court may preserve original record date or fix new record date. (Wis. Stat. § 180.0707). No statutory provision for closing transfer books. See subheads Issuance of Shares, catchline Share Dividends, supra, Shareholders’ Meetings, Dividends and Other Distributions, infra.

Shareholders.

Voting Entitlement of Shares.

Except as voting rights of shares are modified by § 180.1150 (see subhead Resident Domestic Corporations, infra) or unless articles of incorporation provide otherwise, each outstanding share, regardless of class, is entitled to one vote on each matter voted on at meeting of shareholders. Only shares are entitled to vote. (Wis. Stat. § 180.0721[1]). Unless held in fiduciary capacity, shares of domestic corporation are not entitled to vote if owned, directly or indirectly, by second domestic or foreign corporation and first domestic corporation owns, directly or indirectly, sufficient number of shares entitled to elect majority of directors of second domestic or foreign corporation. (Wis. Stat. §§ 180.0721[2],[3]). Redeemable shares not entitled to vote after written notice of redemption that complies with § 180.0141 is mailed to holders and sum sufficient to redeem shares is deposited with financial institution under irrevocable obligation to pay holders redemption price on surrender of shares. (Wis. Stat. § 180.0721[4]). Shareholder may vote shares in person or by proxy. (Wis. Stat. § 180.0722).

Shares Held by Nominees.

Corporation may establish procedure by which beneficial owner of shares registered in name of nominee is recognized by corporation as shareholder. Extent of recognition may be determined in procedure. Procedure may set forth all of following: Types of nominees to which it applies; rights or privileges corporation recognizes in beneficial owner; manner in which nominee selects procedure; information that must be provided when procedure selected; period for which selection of procedure is effective; and other aspects of rights and duties created. (Wis. Stat. § 180.0723). As used in c. 180, except as otherwise provided, "shareholder" means person in whose name shares are registered in records of corporation or beneficial owner of shares to extent of rights granted by nominee certificate on file with corporation. (Wis. Stat. § 180.0103[14]).

Cumulative Voting.

Shareholders do not have right to cumulate votes for election of directors unless articles of incorporation provide for cumulative voting. (Wis. Stat. § 180.0728).

See subhead Required Vote, supra, for information regarding shareholder voting requirements.

Preemptive Rights.

Except as to "shares of a preexisting class" as discussed below, shareholders or holders of other securities (securities convertible into or carrying right to subscribe for or acquire shares) of corporation have no preemptive right to acquire corporation's unissued shares or other securities except to extent provided in articles of incorporation. If articles state that "the corporation elects to have preemptive rights", or words of similar meaning, preemptive rights exist, except to extent articles expressly provide otherwise, as follows:

Shareholders or holders of other securities of corporation have preemptive right, granted on uniform terms and conditions prescribed by board of directors to provide fair and reasonable opportunity to exercise right, to acquire proportional amounts of corporation's unissued shares or other securities upon decision of board of directors to issue shares or other securities, subject to conditions that: Holders of shares or other securities with general voting rights have preemptive rights with respect to shares and other securities of any class with general voting rights; holders of shares or other securities without preferential rights to distributions or assets have preemptive rights with respect to shares and other securities of any class without preferential rights to distributions or assets, except that holders of shares or other securities without general voting rights have no preemptive rights with respect to shares or other securities of any class with general voting rights. Shareholder or holder of other security may waive preemptive right. Written waiver is irrevocable even if not supported by consideration. No preemptive right exists with respect to treasury shares, or shares or other securities: (1) Issued as compensation to, or issued to satisfy conversion or option rights created to provide compensation to, directors, officers or employees of corporation or its affiliates, (2) authorized in articles of incorporation that are issued within six months from effective date of incorporation, or (3) sold for other than money or obligation to pay money. If shares or other securities subject to preemptive rights are not acquired by shareholders or holders of other securities, corporation may issue such shares or other securities to any person for one year after being offered to shareholders or holders of other securities, at consideration set by board of directors not lower than consideration set for exercise of preemptive rights. Offer at lower consideration or after expiration of one year is subject to preemptive rights. (Wis. Stat. § 180.0630).

Shares of Preexisting Class.

§ 180.0630 does not apply to "shares of a preexisting class", defined in § 180.1701 to mean shares of class for which shares were authorized before Jan. 1, 1991, whether shares were issued before, on or after that date. Except to extent limited or denied by articles of incorporation, shareholders of shares of preexisting class have preemptive right to acquire unissued shares or securities convertible into unissued shares or carrying right to subscribe to or acquire shares.

Unless otherwise provided in articles of incorporation, all of following apply to shareholders of shares of preexisting class: (1) No preemptive rights exist to acquire: (a) Shares issued to directors, officers or employees pursuant to shareholder approval or plan approved by shareholders, (b) shares, convertible securities or rights issued for consideration other than cash, or (c) treasury shares; (2) holders of shares of any class that is preferred or limited as to dividends or assets are not entitled to any preemptive right; (3) common stockholders not entitled to any preemptive right to shares of any class that is preferred or limited as to dividends or assets or to any obligations, unless convertible into shares of common stock or carrying right to subscribe to or acquire shares of common stock; (4) holders of common stock without voting power have no preemptive right to shares of common stock with voting power; and (5) preemptive right is only opportunity to acquire shares or other securities under such terms and conditions as board of directors may fix for purpose of providing fair and reasonable opportunity for exercise of right. (Wis. Stat. § 180.1705).

Shareholders' Actions.

Derivative proceeding (civil suit in right of corporation) permitted where: Plaintiff was shareholder or beneficial owner (person whose shares are held in voting trust or by nominee) of corporation at time of act or omission complained of or became shareholder or beneficial owner through transfer by operation of law from person who was shareholder or beneficial owner at that time; plaintiff fairly and adequately represents interests of corporation in enforcing right of corporation; plaintiff made written demand upon corporation and 90 days expired since demand (unless plaintiff is notified of corporation's rejection of demand prior to expiration of 90-day period or waiting for expiration of 90-day period would cause irreparable injury to corporation). (Wis. Stat. §§ 180.0740-180.0742). In derivative proceeding involving foreign corporation, matters of standing and demand governed by laws of state of its incorporation. (Wis. Stat. § 180.0747). Derivative proceeding may be stayed for period that court considers appropriate if defending domestic or foreign corporation commences inquiry into allegations made in demand or complaint. (Wis. Stat. § 180.0743). Derivative proceeding may not be discontinued or settled without court's approval. (Wis. Stat. § 180.0745). Court must dismiss derivative proceeding on motion by corporation if court-appointed panel of independent persons, majority of independent directors at board of directors meeting (if such independent directors constitute quorum), or majority of committee of two or more independent directors appointed by majority vote of independent directors present at board of directors meeting determine, acting in good faith after conducting reasonable inquiry, that maintenance of derivative proceeding is not in best interests of corporation. (Wis. Stat. § 180.0744). On termination of derivative proceeding, court may (1) order defending domestic or foreign corporation to pay plaintiff's reasonable expenses, including attorney fees, if court finds derivative proceeding resulted in substantial benefit to corporation or (2) order shareholder or beneficial owner who commenced or maintained derivative proceeding to pay any defendant's reasonable expenses, including attorney fees, if court finds derivative proceeding was commenced or maintained without reasonable cause or for improper purpose. (Wis. Stat. § 180.0746).

Shareholders' Liabilities.

When corporation receives consideration specified in subscription agreement entered into before incorporation or for which board of directors authorized issuance of shares, shares issued for that consideration are fully paid and nonassessable. (Wis. Stat. §§ 180.0620[3]; 180.0621[4]). Purchaser from corporation of corporation's shares is not liable to corporation or its creditors with respect to such shares except to pay consideration for which such shares were authorized to be issued or specified in subscription agreement. (Wis. Stat. § 180.0622[1]). Unless otherwise provided in articles of incorporation, shareholder is not personally liable for acts or debts of corporation, but may become personally liable by acts or conduct other than as shareholder. (Wis. Stat. § 180.0622[2]). Former provision imposing personal liability on shareholders for debts owing to employees of corporation for services performed for corporation, but not exceeding six months service in any one case, § 180.0622(2)(b), was repealed, effective

June 14, 2006, for debts incurred on or after that date. (2005 Wisconsin Act 474). Person who becomes transferee of shares in good faith and without knowledge that consideration determined for shares or specified in subscription agreement entered into before incorporation has not been paid is not personally liable for any unpaid portion of consideration. (Wis. Stat. § 180.0622[3]). Fiduciary (personal representative, conservator, guardian, trustee, assignee for benefit of creditors, or receiver) is not personally liable as holder of or subscriber to shares of corporation, but estate and funds in fiduciary's hands are so liable. Pledgee or other holder of shares as collateral security is not personally liable as shareholder. (Wis. Stat. § 180.0622[4]). Director who is liable for unlawful distribution is entitled to contribution from each shareholder for amount shareholder accepted knowing that distribution was made in violation of § 180.0640 or articles of incorporation. (Wis. Stat. § 180.0833[2][b]).

Shareholders' Meetings.

Annual and Special Meetings.

Meetings may be held in or outside Wisconsin at place stated in or fixed in accordance with bylaws; if no place so stated or fixed, must be held at corporation's principal office. (Wis. Stat. §§ 180.0701[2]; 180.0702[3]). Annual meeting to be held at time stated in or fixed in accordance with bylaws, but failure to hold in one or more years does not affect validity of any corporate action. (Wis. Stat. § 180.0701[3]). If so provided in its articles or bylaws, investment company is not required to hold annual meeting in any year in which none of following matters is required to be acted on by shareholders under 15 USC 80a-1 to 80a-64: Election of directors; approval of investment advisory agreement; ratification of selection of independent public accountants; approval of distribution agreement. (Wis. Stat. § 180.0701[4]). Special meeting of shareholders must be held if called by board of directors or any person authorized by articles or bylaws to call special meeting, or if holders of at least 10% of all votes entitled to be cast on any issue proposed to be considered at such meeting make written demand describing one or more purposes for which meeting is to be held. If not otherwise fixed, record date for determining shareholders entitled to demand special meeting is date first shareholder signs demand. Only business within purpose described in required meeting notice may be conducted at special shareholders' meeting. (Wis. Stat. § 180.0702). Circuit court may order meeting to be held on petition of shareholder under certain enumerated circumstances if corporation does not hold annual meeting or special meeting as required. (Wis. Stat. § 180.0703).

Notice.

Corporation must notify shareholders of date, time and place of each annual and special shareholders' meeting not less than ten nor more than 60 days before meeting date, unless different time provided by c. 180, articles of incorporation or bylaws. Unless c. 180 or articles require otherwise, notice is required only to shareholders entitled to vote at meeting. Notice of special meeting must include description of each purpose for which meeting is called; notice of annual meeting need not describe purpose unless c. 180 or articles require otherwise. If not otherwise fixed, record date for determining shareholders entitled to notice of and to vote at annual or special meeting is close of business on day before first notice is given to shareholders. (Wis. Stat. § 180.0705). Notice must be written (notice by electronic transmission considered written notice) unless oral notice is permitted by articles or bylaws and not otherwise prohibited by c. 180. (Wis. Stat. § 180.0141[2]). Notice by corporation to shareholder is effective when mailed to shareholder's address shown in corporation's current record of shareholders or when electronically transmitted to shareholder in manner authorized by shareholder. (Wis. Stat. § 180.0141[5][b]). Shareholder may waive any required notice by written waiver of notice containing same information required in notice (except time and place of meeting); shareholder's attendance at meeting, in person or by proxy, waives objection to lack of notice or defective notice, unless shareholder objects at meeting and to consideration of matter at meeting not within purpose described in notice, unless shareholder objects when matter is presented. (Wis. Stat. § 180.0706). Corporation is exempt from providing notice to shareholder if: (1) Notice of two consecutive annual meetings, and all notices of meetings during period between annual meetings; or (2) all (but not less than two) payments of dividends during one-year period or two consecutive payments of dividends during period of more than one year have been sent to shareholder at shareholder's address as shown on corporation's records and have been returned as undeliverable. Shareholder can reinstate notice requirements by delivering to corporation written notice containing shareholder's current address. (Wis. Stat. § 180.0706[3]).

Shareholders' List for Meeting.

After fixing record date for meeting, corporation must prepare list of names of all shareholders entitled to notice of meeting, arranged by class or series of shares and showing address of and number of shares held by each shareholder. Corporation must make shareholders' list available for inspection by any shareholder, from two business days after notice of meeting is given to meeting date, at corporation's principal office, or at place identified in meeting notice in city where meeting will be held. Shareholder or shareholder's agent or attorney may, on written demand, inspect and, subject to satisfying proper purpose requirement, copy list. List must also be available for inspection at meeting. Refusal or failure to prepare or make available shareholders' list does not affect validity of action taken at meeting. Shareholder may petition circuit court for order if corporation denies shareholder's right to inspect or copy list. (Wis. Stat. § 180.0720).

Proxies.

Shareholder may vote shares in person or by proxy. Shareholder may appoint proxy to vote or otherwise act for shareholder by signing appointment form or electronically transmitting authorization of appointment, either personally or by attorney-in-fact. Appointment is effective when received by inspector of election of corporation authorized to tabulate votes, is valid for 11 months, unless it states otherwise, and is revocable by shareholder unless appointment form or electronic transmission states it is irrevocable and appointment is coupled with interest. Proxy in connection with shareholder vote under § 180.1150(5) may be revoked at any time, must be solicited and appointed apart from sale of or offer to purchase shares of resident domestic corporation, and may not be solicited sooner than 30 days before meeting called under § 180.1150(5) unless otherwise agreed in writing by person acting under § 180.1150 and directors of resident domestic corporation. (Wis. Stat. § 180.0722). See subhead Resident Domestic Corporations, catchline Control Share Voting Restrictions, infra. § 180.0724 contains provisions regarding acceptance by corporation of proxy appointments and other instruments showing shareholder action.

Quorum and Voting Requirements for Voting Groups.

Shares entitled to vote as separate voting group may take action on matter at meeting only if quorum of such shares exists with respect to such matter. Unless articles of incorporation, bylaws adopted under authority granted in articles of incorporation or c. 180 provides otherwise, majority of votes entitled to be cast on matter by voting group constitutes quorum of voting group for action on that matter. If quorum exists, action on matter, other than election of directors, by voting group is approved by favorable vote of majority of votes cast within voting group, unless greater affirmative vote required by articles, bylaws adopted under authority granted in articles of incorporation or c. 180. (Wis. Stat. § 180.0725). If articles or c. 180 provides for voting by two or more voting groups on matter, action on such matter is taken only when voted upon by each of those voting groups counted separately as provided in § 180.0725. (Wis. Stat. § 180.0726[2]). Articles of incorporation may provide, or authorize bylaws under § 180.1021 to provide, for greater or lower quorum requirement or greater voting requirement for shareholders or voting groups of shareholders than provided by c. 180; amendment to articles or bylaws altering quorum requirement or fixing greater voting requirement must be adopted in accordance with quorum and voting requirements then in effect; bylaw altering quorum requirement or greater voting requirement may not be adopted, amended or repealed by board of directors. (Wis. Stat. §§ 180.0727; 180.1021).

Voting for Directors; Cumulative Voting.

Unless otherwise provided in articles, directors are elected by plurality of votes cast by shares entitled to vote in election at meeting at which quorum is present. “Plurality” means that individuals with largest number of votes are elected as directors up to maximum number of directors to be chosen at election. Shareholders do not have right to cumulate votes for directors unless articles provide for cumulative voting by all or designated voting group of shareholders. Shares entitled to cumulative voting may not be voted cumulatively at particular meeting unless certain notice requirements are satisfied or, in case of statutory close corporation only, shares were voted cumulatively in last election of directors. Votes cast against candidate are not given legal effect and are not counted as votes cast in election of directors. (Wis. Stat. § 180.0728).

Action Without Meeting.

Shareholder action may be taken without meeting by written consent as follows: (a) Without action by board of directors, by all shareholders entitled to vote on action; (b) if articles of incorporation so provide, by shareholders entitled to cast not less than minimum number or, in case of voting by voting groups, numbers of votes necessary to authorize or take action involved at meeting at which all shares entitled to vote were present and voted (not applicable to election of directors for which shareholders may vote cumulatively). (Wis. Stat. § 180.0704[1]). Action without meeting is effective when consents representing required number of shares are delivered to corporation, unless consent specifies different effective date. Within ten days after action taken by less than unanimous written consent is effective, corporation must give notice of action to shareholders entitled to vote whose shares were not represented on written consent. (Wis. Stat. § 180.0704[3]). If not otherwise fixed, record date for determining shareholders entitled to take action without meeting is date first shareholder signs consent. (Wis. Stat. § 180.0704[4]). If c. 180 requires notice of proposed action to be given to shareholders not entitled to vote on action and action is to be taken without meeting, corporation must give such nonvoting shareholders written notice of proposed action at least ten days before action becomes effective; notice must contain or be accompanied by same material as would have been required to be sent to nonvoting shareholders in notice of meeting. (Wis. Stat. § 180.0704[6]).

Conduct of Meeting.

Unless articles of incorporation or bylaws provide otherwise, chairperson appointed by board of directors must preside over every meeting of shareholders, must determine order of business and time of adjournment and may establish rules for conduct of meeting, and must determine and announce time at which polls will close for each matter voted upon at meeting. (Wis. Stat. § 180.0708).

Voting Trusts.

One or more shareholders may create voting trust by signing agreement setting out provisions of trust and transferring shares to trustee. Trustee must prepare list of names and addresses of all owners of beneficial interests in trust, together with number and class of shares each transferred to trust, and deliver copies of list and agreement to corporation’s principal office. Voting trust becomes effective on date first shares subject to trust are registered in trustee’s name. (Wis. Stat. § 180.0730). Two or more shareholders may provide for manner in which they will vote their shares by signing agreement for that purpose; such voting agreement is not subject to § 180.0730 voting trust provisions but is specifically enforceable. (Wis. Stat. § 180.0731).

Directors.

Requirement for Board; Duties; Qualifications.

Corporation must have board of directors (except statutory close corporation that elects to operate without board of directors—see subhead Close Corporations, infra). All corporate powers must be exercised by or under authority of, and business and affairs of corporation managed under direction of, its board of directors, subject to any limitation set forth in articles of incorporation. (Wis. Stat. § 180.0801). Articles or bylaws may prescribe qualifications for directors; director need not be resident of Wisconsin or shareholder of corporation unless articles or bylaws so prescribe. (Wis. Stat. § 180.0802).

Number; Elections; Terms.

Board must consist of one or more natural persons, with number specified in or fixed in accordance with articles or bylaws. Number of directors may be increased or decreased (but decrease may not shorten incumbent director's term) from time to time by amendment to, or in manner provided in, articles or bylaws. Directors must be elected at first annual meeting of shareholders and at each annual meeting thereafter unless terms are staggered. (Wis. Stat. § 180.0803). Articles may authorize election of all or specified number of directors by holders of one or more authorized classes of shares; class(es) of shares entitled to elect one or more directors shall be separate voting group for purposes of election of directors. (Wis. Stat. § 180.0804). Terms of directors expire at next annual shareholders' meeting unless terms are staggered, but director continues to serve (unless removed or resigns), despite expiration of term, until successor elected and, if necessary, qualifies or until number of directors is decreased. (Wis. Stat. § 180.0805). Articles or bylaws, if articles so provide, may provide for staggered terms of directors by dividing total number of directors into two or three groups to serve for two or three year terms. (Wis. Stat. § 180.0806). Director may resign by delivering written notice to board of directors, chairperson of board or corporation. (Wis. Stat. § 180.0807).

Removal of Directors.

Shareholders may remove one or more directors with or without cause unless articles or bylaws require cause. Only shareholders of voting group may vote to remove director if director was elected by that voting group. If cumulative voting is authorized, shareholders may not remove director if number of votes sufficient to elect director under cumulative voting is voted against director's removal. Otherwise, shareholders may remove director only if number of votes cast to remove director exceeds number of votes cast not to remove director, unless articles or bylaws adopted under authority granted in articles of incorporation provide for greater voting requirement. Removal must occur at meeting called for that purpose and meeting notice must state that one of its purposes is removal of director. (Wis. Stat. § 180.0808). Directors may be removed by judicial proceeding brought by corporation or shareholders holding at least 10% of outstanding shares of any class if court finds director engaged in fraudulent or dishonest conduct, or gross abuse of authority or discretion, with respect to corporation and that removal is in best interest of corporation. Removed director may be barred from reelection for period prescribed by court. (Wis. Stat. § 180.0809).

Vacancies.

Unless articles provide otherwise, vacancy (including vacancy resulting from increase in number of directors) may be filled by shareholders, board of directors or, if directors remaining in office constitute fewer than quorum, affirmative vote of majority of all directors remaining in office. If vacant office was held by director elected by voting group of shareholders, only that voting group may vote to fill vacancy if filled by shareholders, and only remaining directors elected by that voting group may vote to fill vacancy if filled by directors. (Wis. Stat. § 180.0810).

Compensation of Directors.

Unless articles or bylaws provide otherwise, board of directors, irrespective of any personal interest of members, may fix compensation of directors. (Wis. Stat. § 180.0811).

Committees.

Unless otherwise provided in articles or bylaws, board of directors may create one or more committees of at least one member, appoint directors to serve on committees and designate other directors to serve as alternates. To extent specified by board or in articles or bylaws, each committee may exercise authority of board, except that committee may not: (a) Approve or recommend to shareholders for approval action that c. 180 requires to be approved by shareholders; or (b) adopt, amend or repeal bylaw. (Wis. Stat. § 180.0825).

Conflict of Interest.

Transaction with corporation in which director has direct or indirect interest is not voidable by corporation solely because of director's interest if: (a) Material facts and director's interest were disclosed or known to board of directors or committee and board or committee authorized, approved or specifically ratified transaction by majority vote of directors who have no direct or indirect interest in transaction; (b) material facts and director's interest were disclosed or known to shareholders entitled to vote and they authorized, approved or specifically ratified transaction by majority vote of disinterested shares; or (c) transaction was fair to corporation. (Wis. Stat. § 180.0831).

Distributions.

Board of directors may authorize distributions to shareholders subject to statutory limitations and any restriction in articles of incorporation. (Wis. Stat. § 180.0640). See subheads Directors' Meetings, Liabilities of Directors, Indemnification of Directors and Officers, Dividends and Other Distributions, infra.

Directors' Meetings.

Regular or Special Meetings.

Board of directors may hold meetings in or outside state. Unless articles of incorporation or bylaws provide otherwise, board of directors may permit any or all directors to participate in regular or special meeting of board by, or conduct meeting through use of, any means of communication by which (1) all participating directors may simultaneously hear each other during meeting, or (2) all communication during meeting is immediately transmitted to each participating director, and each participating director is able to immediately send messages to all other participating directors. If requested by director, minutes of any regular or special meeting must be prepared and distributed to each director. (Wis. Stat. § 180.0820).

Notice.

Unless articles or bylaws provide otherwise, regular meetings of board may be held without notice. At least 48 hours notice must be given of special meetings, unless articles or bylaws provide for longer or shorter period; notice need not describe purpose unless required by articles or bylaws. Notice requirement is modified during "emergency". (Wis. Stat. §§ 180.0822; 180.0303[3][a]). Director's attendance at or participation in meeting waives any required notice unless director objects to holding or transacting business at meeting and does not vote for or assent to action taken; director may waive any required notice by signed writing. (Wis. Stat. § 180.0823).

Action Without Meeting.

Unless articles or bylaws provide otherwise, action may be taken without meeting by unanimous written consent of all directors, which is effective when last director signs unless consent specifies different effective date. (Wis. Stat. § 180.0821).

Committees.

§ 180.0820 through § 180.0823 also apply to board committees. (Wis. Stat. §

180.0825[4]).

Quorum and Voting.

Unless articles or bylaws require greater or lesser number (and except in emergency or conflict of interest situations, where quorum requirement is modified), majority of number of directors specified in or fixed in accordance with articles or bylaws constitutes quorum of board and majority of number of directors appointed to serve on committee constitutes quorum of committee of board. Articles or bylaws may reduce majority quorum requirement for board or committee to no fewer than one-third. With certain statutory exceptions, if quorum is present when vote is taken, affirmative vote of majority of directors present is act of board or committee unless articles or bylaws require vote of greater number. Director who is present at board or committee meeting when corporate action taken deemed to assent to such action unless director objects, dissents or abstains as provided in statute. (Wis. Stat. § 180.0824). Bylaw that fixes greater or lower quorum requirement or greater voting requirement for board of directors may be amended or repealed: (a) Only by shareholders, if originally adopted by shareholders, unless bylaw provides otherwise; (b) either by shareholders or board of directors, if originally adopted by board of directors. (Wis. Stat. § 180.1022).

Powers and Duties of Directors.

See subhead Directors, supra.

Liabilities of Directors.

Reliance on Others.

Unless has knowledge that makes reliance unwarranted, director or officer, in discharging duties to corporation, may rely on information, opinions, reports or statements, written or oral, formal or informal, including financial statements, valuation reports and other financial data, if prepared or presented by: (1) Officer or employee of corporation whom director or officer believes in good faith to be reliable and competent in matters presented; (2) legal counsel, certified public accountants licensed or certified under c. 442, or other persons as to matters that director or officer believes in good faith are within person's professional or expert competence; or (3) in case of reliance by director, board committee of which director is not member if director believes in good faith that committee merits confidence. (Wis. Stat. § 180.0826).

Consideration of Other Interests.

In discharging duties to corporation and determining what is in best interests of corporation, director or officer may, in addition to considering effects of any action on shareholders, consider: (1) Effects of action on employees, suppliers and customers of corporation; (2) effects of action on communities in which corporation operates; and (3) any other factors that director or officer considers pertinent. (Wis. Stat. § 180.0827).

Limited Liability of Directors.

Except as such immunity may be limited by corporation's articles of incorporation, director is not liable to corporation, its shareholders, or any person asserting rights on behalf of corporation or shareholders, for damages, settlements, fees, fines, penalties or other monetary liabilities arising from breach of, or failure to perform, any duty resulting solely from status as director, unless person asserting liability proves breach or failure to perform constitutes: (1) Willful failure to deal fairly with corporation or shareholders in connection with matter in which director has material conflict of interest; (2) violation of criminal law, unless director had reasonable cause to believe his or her conduct was lawful or no reasonable cause to believe conduct was unlawful; (3) transaction from which director derived improper personal profit; or (4) willful misconduct. (Wis. Stat. § 180.0828).

Liability for Unlawful Distributions.

Director who votes for or assents to distribution made in violation of § 180.0640 or articles of incorporation is personally liable to corporation for amount of distribution in excess of amount which could have been distributed properly, if established that director's vote or assent constitutes conduct falling within exceptions to statutory limitation of liability under § 180.0828 described above. Director liable for unlawful distribution is entitled to contribution from (1) every other director who could be held liable for such unlawful distribution and (2) each shareholder for amount that such shareholder accepted knowing that distribution was improper. Two-year statute of limitations applies to proceedings for unlawful distributions. (Wis. Stat. § 180.0833).

Loans to Directors.

Except for advances to director permitted under indemnification statutes or made to defray expenses incurred in ordinary course of corporation's business, corporation may not lend money to or guarantee obligation of director unless (1) loan or guarantee is approved by majority vote of outstanding disinterested voting shares or (2) board of directors determines loan or guarantee benefits corporation and either approves specific loan or guarantee or general plan authorizing loans and guarantees. Borrower's liability is not affected by fact that loan or guarantee is made in violation of this provision. (Wis. Stat. § 180.0832).

Officers.

Officers.

Corporation must have officers described in bylaws or appointed by board of directors by resolution not inconsistent with bylaws. Duly appointed officer may appoint one or more officers or assistant officers if authorized by bylaws or board of directors. Same natural person may simultaneously hold more than one office in corporation. (Wis. Stat. § 180.0840).

Duties.

Each officer has authority and must perform duties set forth in bylaws or, to extent not inconsistent with bylaws, duties prescribed by board of directors or by direction of officer authorized by bylaws or by board of directors to prescribe duties of other officers. (Wis. Stat. § 180.0841).

Resignation and Removal.

Officer may resign at any time by delivering notice properly to corporation. Board of directors may remove any officer and, unless restricted by bylaws or by board of directors, officer may remove any officer or assistant officer appointed by that officer, with or without cause and notwithstanding contract rights of officer removed. (Wis. Stat. § 180.0843). Appointment of officer does not itself create contract rights. Officer's resignation or removal is subject to any remedies provided by any contract between officer and corporation or otherwise provided by law. (Wis. Stat. § 180.0844).

Liabilities of Officers.

No general statutory provision. Statutes permitting reliance upon information prepared by others and consideration of interests in addition to shareholders' interests in discharging duties to corporation apply to officers as well as directors. (Wis. Stat. §§ 180.0826; 180.0827). Statute limiting liability of directors does not apply to director-officers acting in their capacity as officers. (Wis. Stat. § 180.0828). See subheads Liabilities of Directors, supra, Indemnification of Directors and Officers, infra.

Statements of Changes in Directors or Principal Officers.

Whenever initial directors and principal officers are selected or changed, corporation may file statement with Department of Financial Institutions indicating current names and addresses of all directors or principal officers, or both. Director or principal officer who resigns may file copy of resignation notice with Department of Financial Institutions. (Wis. Stat. § 180.0860).

Indemnification of Directors and Officers.

Mandatory Indemnification.

Except as limited by provision included in articles of incorporation after June 13, 1987 (Wis. Stat. § 180.0852), corporation must indemnify director or officer, if proper written request is made to corporation and director or officer has not previously received indemnification or allowance of expenses from any person, including corporation, in connection with same proceeding: (1) To extent successful on merits or otherwise in defense of proceeding, for all reasonable expenses incurred in proceeding if director or officer was party because of status as such (Wis. Stat. § 180.0851[1]); (2) otherwise, against liability incurred in proceeding to which director or officer was party because of status as such, unless liability incurred because director or officer breached or failed to perform duty owed to corporation and breach or failure to perform constitutes: (a) Willful failure to deal fairly with corporation or shareholders in connection with matter in which director or officer has material conflict of interest; (b) violation of criminal law, unless director or officer had reasonable cause to believe his or her conduct was lawful or no reasonable cause to believe conduct was unlawful; (c) transaction from which director or officer derived improper personal profit; or (d) willful misconduct (Wis. Stat. § 180.0851[2][a]). Termination of proceeding by judgment, order, settlement or conviction, or upon plea of no contest or equivalent, does not, by itself, create presumption that indemnification is not required under § 180.0851(2). (Wis. Stat. § 180.0851[2][c]). “Proceeding” means any threatened, pending or completed civil, criminal, administrative or investigative proceeding brought by or in right of corporation or by any other person. (Wis. Stat. § 180.0850[6]). § 180.0850 defines other terms for purposes of indemnification and insurance provisions, including expansive definition of “director or officer”.

Determination of Right to Indemnification.

Unless otherwise provided by articles of incorporation, bylaws or written agreement between director or officer and corporation, director or officer seeking indemnification under § 180.0851(2) must select one of following means for determining right to indemnification: (1) Majority vote of quorum of board of directors consisting of disinterested directors or, if such quorum cannot be obtained, majority vote of committee appointed by board and consisting solely of two or more disinterested directors; (2) independent legal counsel selected in accordance with prescribed procedure; (3) panel of three arbitrators selected in accordance with prescribed procedure; (4) affirmative vote of shares as provided in § 180.0725, excluding shares owned or controlled by persons parties to same or related proceedings; (5) court order; or (6) any other method provided for in any additional right to indemnification permitted under § 180.0858. (Wis. Stat. § 180.0855).

Allowance of Expenses.

Upon written request by director or officer who is party to proceeding, corporation may pay or reimburse reasonable expenses incurred if director or officer provides corporation with: (1) Written affirmation of good faith belief that has not breached or failed to perform duties to corporation; and (2) written undertaking to repay such allowance and, if required by corporation, pay reasonable interest thereon, to extent ultimately determined under § 180.0855 that indemnification under § 180.0851(2) is not required and that indemnification is not ordered by court under § 180.0854(2)(b). (Wis. Stat. § 180.0853).

Additional Rights Permitted.

§ 180.0851 and § 180.0853 do not preclude any additional right to indemnification or allowance of expenses under: (1) Articles of incorporation or bylaws; (2) written agreement between director or officer and corporation; (3) resolution of board of directors; or (4) resolution, after notice, adopted by majority vote of corporation's outstanding voting shares. (Wis. Stat. § 180.0858[1]). However, corporation may not indemnify, or permit director or officer to retain any allowance of expenses, unless corporation determines that director or officer did not breach or fail to perform duty owed to corporation which constitutes conduct excluded from mandatory indemnification under § 180.0851(2)(a) described above. (Wis. Stat. § 180.0858[2]).

Court-Ordered Indemnification.

Except as provided otherwise by written agreement between director or officer and corporation, director or officer who is party to proceeding may apply to court for initial determination of right to indemnification under § 180.0855(5) or for review of adverse determination under other subsections of § 180.0855. Court must order indemnification if determines that director or officer entitled to indemnification under § 180.0851(1) or (2) or that director or officer fairly and reasonably entitled to indemnification in view of all relevant circumstances, regardless of whether indemnification is required under § 180.0851(2). (Wis. Stat. § 180.0854).

Employees and Agents.

Corporation must indemnify employee who is not director or officer of corporation, to extent successful on merits or otherwise in defense of proceeding, for all reasonable expenses incurred, if employee was party because of status as such. (Wis. Stat. § 180.0856[1]). Corporation may indemnify and allow reasonable expenses of employee or agent who is not director or officer to extent provided by articles or bylaws, by general or specific action of board of directors or by contract. (Wis. Stat. § 180.0856[2]).

Insurance.

Corporation may purchase and maintain insurance on behalf of individual who is employee, agent, director or officer of corporation against liability asserted against or incurred by individual in capacity or arising from status as such, regardless of whether corporation is required or authorized to indemnify or allow expenses to individual against same liability under §§ 180.0851, 180.0853, 180.0856 and 180.0858. (Wis. Stat. § 180.0857).

Securities Law Claims.

It is public policy of state to require or permit indemnification, allowance of expenses and insurance, to extent required or permitted in case of any other proceeding, for any liability incurred in connection with securities regulation proceeding involving federal or state statute, rule or regulation regulating offer, sale or purchase of securities, securities brokers or dealers, or investment companies or investment advisors. (Wis. Stat. § 180.0859).

Principal Office.

Office, whether in or outside state, of domestic corporation or foreign corporation is where principal executive offices located and, if corporation has filed annual report under § 180.1622, designated as principal office in most recent annual report. (Wis. Stat. § 180.0103[12]). See subhead Registered Office and Registered Agent, infra.

Registered Office and Registered Agent.

Requirement to Maintain.

Corporation must maintain registered office and registered agent in state. Registered office may, but need not, be same as any of corporation's places of business. Registered agent must be any of following whose business office is identical with registered office: (1) Natural person who resides in state; (2) domestic corporation, nonstock corporation, registered limited partnership, registered limited liability partnership or limited liability company incorporated, registered or organized in state; (3) foreign corporation, nonstock corporation, limited partnership, registered limited liability partnership or limited liability company authorized to transact business in state. (Wis. Stat. § 180.0501). Being without registered agent or registered office in state for one year, or not notifying Department of Financial Institutions within one year that registered agent has changed or resigned or that registered office has changed or been discontinued, are grounds for administrative dissolution of corporation. (Wis. Stat. §§ 180.1420[3],[4]).

Change of Registered Office or Agent.

Corporation may change registered office or registered agent, or both, by delivering to Department of Financial Institutions for filing statement of change or including name of registered agent and street address of registered office, as changed, in articles of amendment, restatement of articles of incorporation or articles of merger, or, if domestic corporation, in annual report filed with Department of Financial Institutions. If name of registered agent changes or agent changes address of business office, agent may change agent's name or street address of registered office of any corporation for which registered agent serves as such by notifying corporation in writing of change and delivering to Department of Financial Institutions for filing statement of change including specified information which recites that corporation has been notified of change. (Wis. Stat. § 180.0502). Registered agent may resign by signing and delivering to Department of Financial Institutions for filing statement of resignation that includes specified information; Department of Financial Institutions will mail copy to corporation at principal office. (Wis. Stat. § 180.0503).

Service on Corporation.

Registered agent is corporation's agent for service of process, notice or demand required or permitted by law to be served on corporation. If corporation has no registered agent or registered agent cannot with reasonable diligence be served, corporation may be served by registered or certified mail, return receipt requested, addressed to corporation at principal office. If address of corporation's principal office cannot be determined from records of Department of Financial Institutions, corporation may be served by publication. Corporation may also be served in any other manner permitted by law. (Wis. Stat. § 180.0504).

See subhead Filing Fees, supra.

General Powers of Corporations.

Certain Enumerated Powers.

Unless articles of incorporation provide otherwise, corporation has perpetual duration and succession in its corporate name and has same powers as natural person to do all things necessary or convenient to carry out its business and affairs, including but not limited to power to: (1) Sue and be sued, complain and defend in its corporate name; (2) have corporate seal and use it or facsimile thereof; (3) make and amend bylaws, not inconsistent with articles of incorporation or state law, for managing business and regulating affairs of corporation; (4) purchase, receive, lease or otherwise acquire and own, hold, improve, use and otherwise deal with, property or any legal or equitable interest in property, wherever located; (5) sell, convey, mortgage, pledge, lease, exchange or otherwise dispose of all or any part of its property; (6) purchase, receive, subscribe for or otherwise acquire, and own, hold, vote, use, sell, mortgage, lend, pledge or otherwise dispose of and deal in and with shares or other interests in, or obligations of, any other entity; (7) make contracts and guarantees; incur liabilities; borrow money; issue its notes, bonds and other obligations, which may be convertible into or include option to purchase other securities of corporation; and secure any of its obligations by mortgage or pledge of any of its property, franchises or income; (8) lend money, invest and reinvest its funds and receive and hold property as security for repayment; (9) be promoter, partner, member, associate or manager of entity; (10) conduct its business, locate offices and exercise powers granted by c. 180 in or outside state; (11) elect directors and appoint officers, employees and agents of corporation, define their duties, fix their compensation and, subject to § 180.0832 (regarding loans to directors), lend them money and credit; (12) pay pensions and establish pension plans, pension trusts, profit-sharing plans, share bonus plans, share option plans and benefit or incentive plans for current or former directors, officers, employees and agents of corporation and its subsidiaries; (13) make donations and otherwise devote its resources for public welfare or for charitable, scientific, educational, humanitarian, philanthropic or religious purposes; (14) transact any lawful business that will aid governmental policy; (15) make payments or donations, or do any other act, not prohibited by law, that furthers business and affairs of corporation; (16) provide benefits or payments to directors, officers and employees of corporation or its subsidiaries, and to their estates, families, dependents or beneficiaries, in recognition of past services. (Wis. Stat. § 180.0302).

Lack of Corporate Power.

Validity of any corporate action or any conveyance or transfer of property to or by corporation may not be challenged on ground that corporation lacks or lacked power to act except: (a) In proceeding by shareholder against corporation to enjoin act; (b) in proceeding by corporation, directly, derivatively or through receiver, trustee or other legal representative, against incumbent or former director, officer, employee or agent; or (c) in proceeding by attorney general for judicial dissolution. (Wis. Stat. § 180.0304).

Emergency Powers.

Board of directors may exercise emergency powers to keep corporation functioning in anticipation of or during catastrophic event that prevents quorum of corporation’s directors from being readily assembled. Exercise of emergency powers may occur with liberal notice of meetings and officers present at meeting may be counted as directors to achieve quorum. (Wis. Stat. § 180.0303).

Dividends and Other Distributions.

Board of directors may authorize and corporation may make distributions to shareholders. (Wis. Stat. § 180.0640[1]). “Distribution” means direct or indirect transfer by corporation of money or other property, other than its shares, or incurrence of indebtedness by corporation, to or for benefit of shareholders in respect to any shares, including but not limited to (1) declaration or payment of dividend, (2) purchase, redemption or other acquisition of shares or (3) distribution of evidences of indebtedness. (Wis. Stat. § 180.0103[7]). No distribution may be made if contrary to restriction in articles of incorporation or if, after giving distribution effect: (a) Corporation would not be able to pay debts as due in usual course of business; or (b) corporation’s total assets would be less than sum of total liabilities (except indebtedness, terms of which provide that payment of principal and interest are made only if and to extent payment of distribution to shareholders could then be made under § 180.0640) plus, unless articles of incorporation permit otherwise, amount that would be needed, if corporation were to be dissolved at time of distribution, to satisfy preferential rights upon dissolution of shareholders whose preferential rights are superior to those receiving distribution. (Wis. Stat. §§ 180.0640[3],[7]). Board of directors’ determination that § 180.0640(3) does not prohibit distribution may be based on financial statements and other financial data prepared on basis of accounting practices and principles reasonable in circumstances or on fair valuation or other method reasonable in circumstances. (Wis. Stat. § 180.0640[4]). Effect of distribution is measured as of specified dates. (Wis. Stat. § 180.0640[5]). If board of directors does not fix different date, record date for determining shareholders entitled to distribution (other than distribution involving purchase, redemption or other acquisition of corporation’s shares) is date on which board of directors authorizes distribution. (Wis. Stat. § 180.0640[2]). See subhead Issuance of Shares, catchline

Share Dividends, supra.

Unclaimed Dividends.

Uniform Unclaimed Property Act applies. (c. 177).

Books and Records.

Corporate Records.

Corporation must maintain appropriate accounting records; corporation or agent must maintain record of shareholders which permits preparation of list of names, addresses and number and class or series of shares held by each; and corporation must keep as permanent records any of following that has been prepared: (a) Minutes of meetings of shareholders and board of directors; (b) records of actions taken by shareholders or board of directors without meeting; (c) records of actions taken by board committee. Records must be maintained in written form or form convertible to written form within reasonable time. (Wis. Stat. § 180.1601).

Inspection by Shareholders.

Shareholder may inspect and copy corporation’s bylaws at corporation’s principal office upon at least five business days prior written notice to corporation of demand. (Wis. Stat. § 180.1602[1m]). Shareholder that has been shareholder for at least six months or holds at least 5% of outstanding shares may inspect and copy, at reasonable location specified by corporation, corporate records required by § 180.1601 if shareholder gives corporation five business days prior written notice of demand, demand is made in good faith and for proper purpose, shareholder describes with reasonable particularity purpose and records desired to be inspected, and records are directly connected with such purpose. Person who delivers resolution under § 180.1150(4) (see subhead Resident Domestic Corporations, infra) may, by giving written notice to resident domestic corporation, inspect and copy record of shareholders for purpose of communicating with shareholders in connection with special shareholders’ meeting under § 180.1150(5). (Wis. Stat. § 180.1602[2]). Shareholders’ rights under § 180.1602 may not be abolished or limited by domestic corporation’s articles of incorporation or bylaws. (Wis. Stat. § 180.1602[3]). § 180.1602 does not affect right of shareholder to inspect shareholder list in connection with shareholder meeting or right of shareholder, in litigation with corporation, to inspect corporate records as litigant or power of court, independent of c. 180, to compel production of corporate records. (Wis. Stat. § 180.1602[4]). Shareholder’s agent or attorney has same inspection and copying rights as shareholder represented; corporation may impose reasonable charge for copies of documents provided. (Wis. Stat. § 180.1603).

Court-Ordered Inspection.

If corporation denies inspection rights of shareholder who complies with § 180.1602(1m) or (2), shareholder may apply to circuit court for order to permit inspection and copying of records demanded. In its discretion, court may order corporation to permit shareholder to inspect and copy records irrespective of six months/5% ownership requirement if shareholder satisfies good faith and proper purpose requirements. (Wis. Stat. § 180.1604).

Financial Statements for Shareholders.

Corporation must prepare annual financial statements within 120 days after close of fiscal year and mail latest financial statements to any shareholder upon written request. (Wis. Stat. § 180.1620).

Reports.

Domestic corporation (except service corporation which files annual report under §

180.1921) and foreign corporation authorized to transact business in state must file annual report with Department of Financial Institutions on form furnished by department (Wis. Stat. § 180.0120[1]) that includes specified information; such report to be filed by domestic corporation during calendar year quarter in which anniversary date of incorporation occurs and by foreign corporation during first calendar quarter of each year (Wis. Stat. §§ 180.1622[1],[3]). Annual report is effective on date filed by department. (Wis. Stat. § 180.1622[5]). If report does not contain required information, department will notify corporation and return for correction; if corrected report is filed within 30 days, annual report is timely filed. (Wis. Stat. § 180.1622[4]). Failure to have annual report on file with Department of Financial Institutions within one year after due date is grounds for administrative dissolution of domestic corporation. (Wis. Stat. § 180.1420[2]).

Corporate Bonds or Mortgages.

No special statutory provision aside from mortgages of certain utilities. (Wis. Stat. § 182.025).

Facsimile Signatures on Corporation Obligations.

Signatures of officers and corporate seal may be facsimiles on bond, note or debenture issued by corporation if countersigned or otherwise authenticated by signature of trustee acting in connection with issuance. If officer who has signed or whose facsimile signature is used ceases to be such officer before issuance, corporation may nevertheless issue with same effect as if were still such officer. (Wis. Stat. § 182.23). See also subhead Share Certificates, supra.

Resident Domestic Corporations.

1997 Wis. Act 27 amended c. 180 to eliminate definition of “issuing public corporation” by replacing with “resident domestic corporation”.

Control Share Voting Restrictions.

“Resident domestic corporation” means domestic corporation if: (1) Its principal offices are in Wisconsin; (2) it has significant business operations in Wisconsin; (3) more than 10% of holders of record of its shares are Wisconsin residents; or (4) more than 10% of its shares are held of record by Wisconsin residents (Wis. Stat. § 180.1140[9]); and such corporation has class of voting stock registered or traded on national securities exchange or registered under § 12(g) of Securities Exchange Act of 1934 (Wis. Stat. § 180.1130[10m]). Voting power of shares of resident domestic corporation is subject to § 180.1150.

Unless otherwise provided in articles of incorporation or specified by board of directors of resident domestic corporation and except as provided in following paragraph, voting power of shares of resident domestic corporation held by any person, including shares issuable upon conversion of convertible securities or upon exercise of options or warrants, in excess of 20% of voting power in election of directors will be limited to 10% of full voting power of such shares. (Wis. Stat. § 180.1150[2]). “Person” includes two or more individuals acting as group for purpose of acquiring or holding securities of resident domestic corporation, but does not include bank, broker, nominee, trustee or other person that acquires or holds shares in ordinary course of business for others in good faith and not for purpose of avoiding § 180.1150 unless such person may exercise or direct exercise of votes with respect to shares at shareholders’ meeting without further instruction from another. (Wis. Stat. § 180.1150[1][b]).

Shares of resident domestic corporation held, acquired or to be acquired in any of following circumstances are excluded from application of § 180.1150: (1) Shares acquired before Apr. 22, 1986; (2) shares acquired under agreement entered into before Apr. 22, 1986; (3) shares acquired by donee under inter vivos gift not made to avoid § 180.1150 or by distributee of decedent; (4) shares acquired under certain security agreements not created to avoid §

180.1150; (5) shares acquired by merger or share exchange to which resident domestic corporation is party; (6) shares acquired from resident domestic corporation; (7) shares acquired under agreement entered into at time when resident domestic corporation was not resident domestic corporation or issuing public corporation; and (8) shares acquired in transaction incident to which shareholders of resident domestic corporation voted under § 180.1150(5) to approve person's resolution delivered under § 180.1150(4) to restore full voting power of that person's shares. (Wis. Stat. § 180.1150[3]). Regular voting power is restored if at meeting called under § 180.1150(5)(a), with quorum present, majority of voting power of shares represented at meeting and entitled to vote on subject matter approve resolution. (Wis. Stat. § 180.1150[5][c]).

Person desiring shareholder vote to restore full voting power must deliver to resident domestic corporation at corporation's principal office form of shareholder resolution with notice containing specified information, including economic impact statement if control of corporation is sought. (Wis. Stat. § 180.1150[4]). Within ten days after receipt of notice, directors of resident domestic corporation must call special meeting of shareholders to vote on resolution, to be held no later than 50 days after receipt of resolution and notice, unless otherwise agreed, and no sooner than 30 days after such receipt if person so requests in writing when delivering resolution and notice. Notice of meeting must include copy of resolution and notice, and statement by directors of their position or lack of position on resolution. (Wis. Stat. § 180.1150[5]).

Any sale or other disposition of shares by person holding both shares having full voting power and shares having voting power limited under § 180.1150(2) will be deemed to reduce number of shares having limited voting power until such shares are exhausted. (Wis. Stat. § 180.1150[6]).

Corporation that is not resident domestic corporation may elect, by express provision in articles of incorporation, to be subject to § 180.1150 as if it were resident domestic corporation unless its articles of incorporation contain provision stating that corporation is close corporation under § 180.1801 to § 180.1837. (Wis. Stat. § 180.1150[7]).

Actions During Take-Over Offer.

During pendency of "take-over offer", in addition to vote otherwise required by law or articles of incorporation, approval by vote of majority of shares entitled to vote is required at shareholders' meeting before resident domestic corporation may: (1) Acquire more than 5% of its voting shares at above-market price from any person who holds more than 3% of voting shares and has held them for less than two years, unless corporation extends at least equal offer to acquire all voting shares and securities convertible into voting shares; (2) sell or option assets which amount to 10% or more of corporation's market value, except where corporation has at least three directors who are not either officers or employees and majority thereof vote not to be governed by such requirement. (Wis. Stat. § 180.1134). "Take-over offer" means offer to acquire or acquisition of any equity security of resident domestic corporation pursuant to tender offer, if after acquisition offeror would directly or indirectly own beneficially more than 5% of any class of corporation's outstanding equity securities; certain transactions excluded from definition, including brokers' transactions, certain exchange offers, certain limited offers and offers by resident domestic corporation for its own equity securities. (Wis. Stat. § 180.1130[13]).

Sale or Transfer of Corporate Assets.

In Regular Course of Business; Mortgage of Assets; Transfer of Assets to Subsidiary.

Corporation may, on terms and conditions and for consideration determined by board of directors: (a) Sell, lease, exchange or otherwise dispose of all, or substantially all, of its property in usual and regular course of business, or less than substantially all of its property whether or not in usual and regular course of business; (b) mortgage, pledge, dedicate to repayment of indebtedness, whether with or without recourse, or otherwise encumber any or all of its property whether or not in usual and regular course of business; or (c) transfer any or all of its assets to one or more wholly owned subsidiaries, unless transfer is in connection with sale, exchange or disposal of all or substantially all of corporation's assets and requires shareholder approval under § 180.1202. Shareholder approval is not required unless required by articles of incorporation. (Wis. Stat. § 180.1201).

Other than in Regular Course of Business.

Corporation may sell, lease, exchange or otherwise dispose of all, or substantially all, of its property, with or without goodwill, otherwise than in usual and regular course of business, on terms and conditions and for consideration determined by board of directors, upon adoption of resolution by board of directors approving proposed transaction and approval by shareholders of proposed transaction. Corporation must notify each shareholder, whether or not entitled to vote, of proposed shareholders' meeting in accordance with normal notice requirement, except notice must be given at least 20 days before meeting date and must state that purpose of meeting is to consider proposed transaction and contain or be accompanied by description of transaction. (Wis. Stat. §§ 180.1202[1],[2]). If applicable, meeting notice must also state that shareholders and beneficial shareholders are or may be entitled to assert dissenters' rights under § 180.1301 to § 180.1331 and be accompanied by copy of those sections. (Wis. Stat. § 180.1320[1]). Unless c. 180, articles of incorporation or bylaws adopted under authority granted in articles of incorporation require greater vote or vote by voting groups, proposed transaction is authorized if approved by majority of all votes entitled to be cast on transaction. (Wis. Stat. § 180.1202[3]). After authorized, transaction may be abandoned, subject to any contractual rights, without further shareholder action. (Wis. Stat. § 180.1202[4]). Transaction that constitutes distribution is governed by § 180.0640 and not by § 180.1202. (Wis. Stat. § 180.1202[5]).

See subheads Required Vote, Dividends and Other Distributions, Resident Domestic Corporations, supra, Business Combinations, Appraisal, infra.

Merger and Share Exchange.

One or more corporations may merge into one or more business entities (which includes domestic or foreign limited liability company, limited partnership, or corporation) if: (1) Board of directors of each corporation, by resolution adopted by each board, approves plan of merger and, if required by § 180.1103, its shareholders also approve plan; (2) merger is permitted under law of jurisdiction of each other business entity party to merger; and (3) each business entity approves plan of merger as required by laws applicable to each business entity. Plan of merger must set forth names, form of business entity and governing jurisdiction of merging and surviving business entities, terms and conditions of merger, and manner and basis of converting shares or other interests of each business entity into securities of surviving business entity or any other business entity or into cash or other property in whole or part, and may set forth amendments to surviving business entity's articles of incorporation or other similar governing document and other provisions relating to merger. (Wis. Stat. §§ 180.1101 and 180.1100). Corporation may acquire all outstanding shares of one or more classes or series of another business entity if: (1) Board of directors of each corporation, by resolution adopted by each board, approves plan of share exchange; (2) if required by § 180.1103, shareholders of corporation whose shares are being acquired also approve plan; and (3) share exchange is permitted by law of jurisdiction governing business entity and business entity approves share exchange in manner required by that law. Plan of share exchange must set forth name, form of business entity and jurisdiction governing each business entity whose shares will be acquired and name of acquiring business entity, terms and conditions of exchange, and manner and basis of exchanging shares or other ownership interests to be acquired for securities of acquiring or any other business entity or for cash or other property in whole or part, and may set forth other provisions relating to exchange. (Wis. Stat. § 180.1102). § 180.1102 does not limit power of corporation to acquire shares of another corporation through voluntary exchange or otherwise. (Wis. Stat. § 180.1102[4]). C. 180 no longer provides for consolidation of corporations.

Action on Plan of Merger or Share Exchange.

After adopting and approving plan of merger or share exchange, board of directors of each corporation party to merger, and board of directors of corporation whose shares will be acquired in share exchange, must submit plan of merger (unless surviving corporation and approval by its shareholders is not required) or share exchange for approval by its shareholders. Corporation must notify each shareholder, whether or not entitled to vote, of proposed shareholders' meeting in accordance with normal notice requirement, except notice must be given at least 20 days before meeting date and must state that purpose of meeting is to consider plan of merger or share exchange and contain or be accompanied by copy or summary of plan. (Wis. Stat. §§ 180.1103[1],[2]). If applicable, notice must also state that shareholders and beneficial shareholders are or may be entitled to assert dissenters' rights under § 180.1301 to § 180.1331 and be accompanied by copy of those sections. (Wis. Stat. § 180.1320[1]). Unless c. 180, articles of incorporation or bylaws adopted under authority granted in articles of incorporation require greater vote or vote by voting groups, plan of merger or share exchange must be approved by each voting group entitled to vote separately on plan by majority of all votes entitled to be cast on plan by that voting group. (Wis. Stat. § 180.1103[3]). Separate voting by voting groups is required on: (1) Plan of merger if plan contains provision that, if contained in proposed amendment to articles of incorporation, would require action by one or more separate voting groups under c. 180; and (2) plan of share exchange by each class or series of shares included in exchange, with each class or series constituting separate voting group. (Wis. Stat. § 180.1103[4]). Shareholder approval of merger by shareholders of surviving corporation is not required if: (a) Its articles of incorporation are not amended, except for amendments directors could adopt without shareholder approval; (b) its shareholders before merger will hold same number of shares after merger, with same rights; (c) number of its voting shares (shares entitled to vote unconditionally in elections of directors) outstanding will not be increased by more than 20% as result of merger; and (d) number of its participating shares (shares entitled to participate, without limitation, in distributions) outstanding will not be increased by more than 20% as result of merger. (Wis. Stat. § 180.1103[5]). Also, approval of merger involving indirect wholly owned subsidiary is not required by shareholders of parent corporation or shareholders or members of indirect wholly owned subsidiary if certain specified conditions are satisfied. (Wis. Stat. §§ 180.1103[1], 180.11045[2]). See catchline Merger of Indirect Wholly Owned Subsidiary, infra. After authorized, before articles of merger or share exchange are filed, merger or share exchange may be abandoned, subject to any contractual rights, without further action by shareholders or other owners, in accordance with procedure set forth in plan or, if none included, in manner determined by board of directors or similar governing body of other business entity party to merger. (Wis. Stat. § 180.1103[6]).

Articles of Merger or Share Exchange.

After required approval obtained, surviving or acquiring business entity must deliver articles of merger or share exchange containing certain required information to Department of Financial Institutions for filing; merger or share exchange takes effect, as provided in § 180.1106, upon effective date of articles of merger or share exchange. (Wis. Stat. § 180.1105). Articles of merger must include certain specified information. (Wis. Stat. § 180.1105[1] and; § 180.11045[3]).

Merger of Subsidiary.

Parent corporation owning at least 90% of outstanding shares of each class of subsidiary corporation or outstanding interests of each class of any other subsidiary business entity may merge subsidiary into itself or itself into subsidiary without approval of shareholders or other owners of subsidiary and without approval of shareholders of parent if: (1) Articles of incorporation of surviving corporation are same as parent's articles before merger, except for certain amendments board can make without shareholder approval; (2) each shareholder of parent immediately before merger holds same number of shares with identical designations, preferences, limitations, and relative rights, immediately after merger; (3) number of voting shares (shares entitled to vote unconditionally in elections of directors) outstanding immediately after merger will not be increased by more than 20% as result of merger; and (4) number of participating shares (shares entitled to participate, without limitation, in distributions) outstanding immediately after merger will not be increased by more than 20% as result of merger. Board of parent must adopt plan of merger. Parent must mail copy or summary of plan of merger to each shareholder or other owner of merging business entity who does not waive mailing requirement in writing, and may not file articles of merger until at least ten days later. Articles of merger may not contain amendments to articles of incorporation of surviving business entity except for amendments board can adopt without approval of shareholders or other owners of entity. (Wis. Stat. § 180.1104). If applicable, notice of dissenters' rights must be given. (Wis. Stat. § 180.1320[2]).

Merger of Indirect Wholly Owned Subsidiary.

Parent corporation can reorganize into holding company structure through merger with indirect wholly owned subsidiary without approval of parent corporation's shareholders if certain conditions are met. (Wis. Stat. § 180.11045). Effects of such merger are specified in § 180.11045(4). (Wis. Stat. § 180.11045[4]).

Unless articles of incorporation of parent corporation specifically provide otherwise or parent corporation is statutory close corporation under § 180.1801 to § 180.1837, parent corporation may merge with or into one of its indirect wholly owned subsidiaries (pursuant to § 180.1101) without approval of shareholders of parent corporation or shareholders or members of indirect wholly owned subsidiary if all of following conditions are satisfied: (a) Parent corporation and indirect wholly owned subsidiary are only parties to merger; (b) each outstanding share or other interest of parent corporation immediately prior to merger is converted into share or equal interest of holding company having same designation, preferences, limitations, and relative rights as before merger; (c) articles of incorporation and bylaws of resulting holding company must contain (with certain specified exceptions) provisions identical to articles of incorporation and bylaws of parent corporation as existed immediately prior to merger; (d) immediately following merger, entity surviving merger is wholly owned subsidiary of resulting holding company; (e) directors of parent corporation immediately prior to merger become directors of holding company immediately following merger; (f) articles of incorporation and bylaws of entity surviving merger must contain (with certain specified exceptions) provisions identical to articles of incorporation and bylaws of parent corporation immediately prior to merger, must refer to § 180.11045(2)(f) and must contain specified provisions regarding approval by shareholders of holding company of certain matters related to entity surviving merger (Wis. Stat. §§ 180.11045[2][f]1-4); and (g) board of directors of parent corporation makes determination that shareholders of parent corporation do not have gain or loss under Internal Revenue Code as result of merger (Wis. Stat. § 180.11045[2]).

"Holding company" means corporation that, during period beginning with its incorporation and ending with merger under § 180.11045, was at all times wholly owned subsidiary of parent corporation that is party to merger and that issues shares pursuant to merger under § 180.11045(2)(b). (Wis. Stat. § 180.11045[1][a]). "Indirect wholly owned subsidiary" means corporation or limited liability company, which prior to merger under § 180.11045, has all of its outstanding shares or interests owned indirectly by parent corporation through one or more business entities. (Wis. Stat. § 180.11045[1][b]). "Parent corporation" means corporation, which prior to merger under § 180.11045, owns all of outstanding shares or interests of another corporation or other business entity. (Wis. Stat. § 180.11045[1][d]). "Surviving entity" means corporation or limited liability company, other than holding company, surviving merger under § 180.11045(2). (Wis. Stat. § 180.11045[1][e]). "Wholly owned subsidiary" means corporation or limited liability company that has all of its outstanding shares owned by corporation directly or indirectly through one or more business entities. (Wis. Stat. § 180.11045[1][f]).

Business Combinations.

Supermajority Vote/Fair Price Requirement.

Special voting requirements for “resident domestic corporations” (as defined in § 180.1130[10m]—see subhead Resident Domestic Corporations, supra) are contained in § 180.1131. In addition to vote otherwise required by law or articles of incorporation, “business combination” must be approved by affirmative vote of at least: (1) 80% of votes entitled to be cast by outstanding voting shares of corporation; (2) two-thirds of votes entitled to be cast by holders of voting shares not beneficially owned by significant shareholder who is party to business combination or affiliate or associate thereof; in each case voting together as single voting group. (Wis. Stat. § 180.1131).

“Business combination” means: (1) Merger or share exchange of resident domestic corporation or subsidiary thereof with significant shareholder or with any other corporation that is, or would be after transaction, affiliate of significant shareholder that was significant shareholder before transaction, unless merger or share exchange does not alter contract rights of shares set forth in articles of incorporation, does not convert outstanding shares of resident domestic corporation, or is merger of subsidiary subject to § 180.1104 or merger of indirect wholly owned subsidiary subject to § 180.11045; or (2) sale, lease, exchange or other disposition (other than mortgage or pledge not made to avoid requirements of § 180.1130 to § 180.1134) to significant shareholder (other than resident domestic corporation or subsidiary) or to affiliate of significant shareholder, of all or substantially all property and assets of resident domestic corporation, if not made in usual and regular course of its business. (Wis. Stat. § 180.1130[3]). “Significant shareholder”, with respect to resident domestic corporation, means person (including two or more acting as group) that is: (1) Beneficial owner, directly or indirectly, of 10% or more of voting power of outstanding voting shares of resident domestic corporation; or (2) affiliate of resident domestic corporation and at any time within prior two years was beneficial owner, directly or indirectly, of 10% or more of voting power of then outstanding voting shares. (Wis. Stat. § 180.1130[11]). Other significant definitions are contained in statute. (Wis. Stat. § 180.1130).

Additional vote required by § 180.1131 does not apply if: (1) Aggregate amount of cash and market value of consideration other than cash to be received per share by shareholders of resident domestic corporation meet certain detailed requirements that establish minimum fair price and form of payment provisions; (2) business combination is governed by specified statutes relating to financial institutions; (3) original articles of incorporation expressly elect not to be governed by § 180.1130 to § 180.1134; or (4) articles of resident domestic corporation are amended on or after Apr. 24, 1984 expressly to elect not to be governed by § 180.1130 to § 180.1134 by vote which meets both 80% and two-thirds shareholder vote requirements of statute. (Wis. Stat. § 180.1132).

Corporation that is not resident domestic corporation may elect, by express provision in articles of incorporation, to be subject to § 180.1130 to § 180.1134 as if it were resident domestic corporation unless articles state that it is close corporation under § 180.1801 to § 180.1837. (Wis. Stat. § 180.1132[3]).

Restrictions on Business Combinations.

Except as provided in § 180.1143, resident domestic corporation may not engage in “business combination” with “interested stockholder” for three years after interested stockholder’s “stock acquisition date” unless, before stock acquisition date, board of directors approved business combination or purchase of stock on such stock acquisition date. Thereafter, corporation may engage in business combination with interested stockholder only if: (1) Board of directors approved interested stockholder’s purchase of stock before stock acquisition date; (2) business combination is approved by holders of majority of voting stock not beneficially owned by interested stockholder at meeting called for that purpose; (3) certain fair price and form of payment provisions are satisfied; or (4) business combination is excluded under § 180.1143 from business combination restrictions. (Wis. Stat. § 180.1141).

For purposes of § 180.1140 to § 180.1144 “resident domestic corporation” means domestic corporation if, as of stock acquisition date in question: (1) Its principal offices are in Wisconsin; (2) it has significant business operations in Wisconsin; (3) more than 10% of holders of record of its shares are Wisconsin residents; or (4) more than 10% of its shares are held of record by Wisconsin residents. (Wis. Stat. § 180.1140[9]). “Business combination” is defined broadly to include transactions that would give interested stockholder access to corporation’s assets or credit, as well as merger, sale of assets, issuance of stock or liquidation involving interested stockholder. (Wis. Stat. § 180.1140[4]). “Interested stockholder”, with respect to resident domestic corporation, means person other than resident domestic corporation or subsidiary that is: (1) Beneficial owner of at least 10% of voting power of outstanding voting stock of corporation; or (2) affiliate or associate of corporation and at any time within three years immediately before date in question was beneficial owner of at least 10% of voting power of then outstanding voting stock of resident domestic corporation. (Wis. Stat. § 180.1140[8]). “Stock acquisition date”, with respect to any person, means time when such person first becomes interested stockholder of resident domestic corporation. (Wis. Stat. § 180.1140[11]). Other significant definitions are contained in statute. (Wis. Stat. § 180.1140).

Unless otherwise provided in articles of incorporation, § 180.1140 to § 180.1144 do not apply to business combination with interested stockholder if resident domestic corporation did not have class of voting stock registered or traded on national securities exchange or registered under section 12(g) of exchange act on interested stockholder’s stock acquisition date. (Wis. Stat. § 180.1143[1]). In addition, § 180.1140 to § 180.1144 do not apply to business combination with interested stockholder who was interested stockholder immediately before Sept. 10, 1987, but will become applicable if such interested stockholder effects net increase in beneficial ownership without prior approval of corporation’s board of directors. (Wis. Stat. § 180.1143[2]). Also § 180.1140 to § 180.1144 do not apply to: Interested stockholders which: (a) Become interested stockholder inadvertently; or (b) inadvertently effected net increase in beneficial ownership after Sept. 9, 1987, if make appropriate divestitures. (Wis. Stat. §§ 180.1143[3]-[4]).

Requirements of § 180.1140 to § 180.1144 are in addition to other applicable legal requirements, including other provisions of c. 180 (Wis. Stat. §§ 180.1140 to 180.1144 control in event of conflict), and any additional requirements contained in resident domestic corporation’s articles or bylaws with respect to business combinations. (Wis. Stat. § 180.1144). Constitutionality of substantially identical predecessor statute to § 180.1140 to § 180.1144 in effect prior to Jan. 1, 1991 (Wis. Stat. § 180.726) upheld (877 F.2d 496, *cert. denied*, 493 U.S. 955).

Tender Offers.

See category 3 Business Regulation and Commerce, topic 3.24 Securities, subhead Tender Offers, and c. 552.

Conversion.

Domestic corporation may convert into another form of business entity (which includes domestic or foreign limited liability company, limited partnership, or corporation), if conversion is permitted under law of jurisdiction governing organization of business entity into which corporation is converting and plan of conversion is submitted to and approved by shareholders under § 180.1103. (Wis. Stat. §§ 180.1161[1] and 180.1100). Other business entity may also convert into domestic corporation if conversion is permitted under law governing business entity and plan of conversion is approved in compliance with those laws. (Wis. Stat. § 180.1161[2]). Plan of conversion must set forth: (1) Name, form of business entity and jurisdiction governing business entity before and after conversion; (2) terms and conditions of conversion; (3) manner and basis on converting shares or other ownership interests of business entity being converted into shares or other interests of new form of business entity; (4) effective date of conversion if other than date of filing certificate of conversion; (5) copy of articles of incorporation, articles of organization, certificate of limited partnership or other similar governing document of business entity after conversion; and (6) other provisions related to conversion. (Wis. Stat. § 180.1161[3]). After submittal and approval of conversion, converted business entity must file certificate of conversion containing certain specified information with Department of Financial Institutions. (Wis. Stat. § 180.1161[5]).

Dissolution.

Voluntary Dissolution.

Corporation may voluntarily dissolve before issuance of shares upon authorization of incorporators or board of directors by filing articles of dissolution with Department of Financial Institutions. (Wis. Stat. § 180.1401). Corporation may also voluntarily dissolve upon proposal by board of directors for submission to shareholders, which may be conditioned on any basis. Corporation must notify each shareholder, whether or not entitled to vote, of proposed shareholders' meeting in accordance with normal notice requirement, except notice must state that purpose of meeting is to consider and act upon dissolving corporation. Unless c. 180, articles of incorporation, bylaws adopted under authority granted in articles of incorporation or board of directors (as condition of proposal) require greater vote or vote by voting groups, dissolution (or revocation of dissolution) is authorized if approved by majority of all votes entitled to be cast on proposal. (Wis. Stat. § 180.1402). Articles of dissolution must be filed with Department of Financial Institutions. (Wis. Stat. § 180.1403). Voluntary dissolution may be revoked by corporation within 120 days after effective date of articles of dissolution on proper authorization (in same manner that dissolution was authorized) and delivery to Department of Financial Institutions for filing of articles of revocation of dissolution. Revocation of dissolution is retroactive to effective date of dissolution as if dissolution had never occurred. (Wis. Stat. § 180.1404). See subhead Filing Fees, supra.

Administrative Dissolution.

Department of Financial Institutions may administratively dissolve corporation that: (1) Does not pay any fees or penalties due Department of Financial Institutions within one year after due date, (2) does not have annual report on file with Department of Financial Institutions within one year after due date, (3) is without registered agent or registered office in state for one year, (4) does not notify Department of Financial Institutions within one year that its registered agent or office has been changed, registered agent has resigned or registered office has been discontinued, (5) has period of duration stated in its articles of incorporation which expires; or (6) violates § 940.302(2) or § 948.051(2) (regarding human trafficking); unless in any case, corporation corrects each ground for dissolution or demonstrates that each ground for dissolution does not exist within 60 days of written notice addressed to registered office of corporation. (Wis. Stat. §§ 180.1420; 180.1421). Corporation that is administratively dissolved may apply to Department of Financial Institutions for reinstatement, and if reinstatement is granted it relates back to and is effective as of date of administrative dissolution. (Wis. Stat. § 180.1422). Process for appealing denial of reinstatement is established. (Wis. Stat. § 180.1423).

Judicial Dissolution.

Dissolution may be decreed by circuit court: (1) In action by attorney general if (a) corporation obtained its articles of incorporation through fraud or (b) corporation has continued to exceed or abuse authority conferred upon it by law; (2) in action by shareholder if (a) directors are deadlocked in management of corporate affairs, shareholders are unable to break deadlock and either (i) irreparable injury to corporation is threatened or being suffered or (ii) business and affairs can no longer be conducted to advantage of shareholders generally, (b) directors or those in control of corporation have acted, are acting or will act in illegal, oppressive or fraudulent manner, (c) shareholders are deadlocked in voting power and have failed for period including two consecutive annual meeting dates to elect successors to directors, or (d) corporate assets are being misapplied or wasted; (3) in action by creditor when (a) claim has been reduced to judgment, execution has been returned unsatisfied and it is established that corporation is insolvent, or (b) corporation has admitted in writing that creditor's claim is due and owing and corporation is insolvent; (4) in action by corporation to have its voluntary dissolution continued under court supervision; or (5) in action under Wisconsin Organized Crime Control Act (Wis. Stat. § 946.87[1]). (Wis. Stat. §§ 180.1430; 180.1433).

Effect of Dissolution; Disposition of Claims.

Dissolved corporation continues its corporate existence but may not carry on any business except as appropriate to wind up and liquidate its business and affairs. (Wis. Stat. § 180.1405). Procedure for disposal of known claims against corporation is established; claims of claimants notified in accordance with procedure are barred, subject to certain exceptions, if claimant fails to make claim by deadline specified or if dissolved corporation rejects claim and claimant does not bring proceeding to enforce claim within 90 days after written notice of rejection is effective. (Wis. Stat. § 180.1406). Dissolved corporation may also publish newspaper notice of dissolution, requesting claims to be presented, and claims not filed within two years after publication are barred, with certain exceptions. (Wis. Stat. § 180.1407). Claim not barred under § 180.1406 or § 180.1407 may be enforced against dissolved corporation to extent of its undistributed assets and, if assets have been distributed in liquidation, against shareholder to extent of lesser of shareholder's proportionate share of claim or assets distributed to shareholder, but total liability for all claims may not exceed total amount of assets distributed to shareholder. (Wis. Stat. § 180.1408). Assets of dissolved corporation that should be transferred to creditor, claimant or shareholder of corporation and are unclaimed must be reduced to cash and reported and delivered to state treasurer as provided under c. 177. (Wis. Stat. § 180.1440).

Insolvency and Receivers.

Court in judicial proceeding to dissolve corporation may appoint receiver pendente lite and may appoint one or more receivers to wind up and liquidate business and affairs of corporation. (Wis. Stat. §§ 180.1431[2]; 180.1432[1]). Receiver may be natural person, domestic corporation or foreign corporation authorized to transact business in state; may be required to post bond as court directs. (Wis. Stat. § 180.1432[2]).

Close Corporations.

Election to be Statutory Close Corporation.

Corporation may elect to be statutory close corporation if, at time of election, has 50 or fewer shareholders. Election made by inserting in original or amended articles of incorporation statement that corporation is close corporation under § 180.1801 to § 180.1837. Election by amendment to articles of incorporation requires approval by two-thirds of votes of each class or series of shares, voting as separate voting groups, whether or not otherwise entitled to vote on amendments. (Wis. Stat. § 180.1803). Corporation may amend articles to terminate statutory close corporation status by same vote. (Wis. Stat. § 180.1815). Shareholders objecting to amendment effecting election or termination entitled to assert dissenters' rights under § 180.1301 to § 180.1331. (Wis. Stat. §§ 180.1803; 180.1815).

Share Transfer Restrictions.

Except as otherwise provided in articles of incorporation or applicable agreement among shareholders, no interest in shares of statutory close corporation may be transferred without written consent of all holders of voting stock, unless transfer is exempt from restriction by statute. (Wis. Stat. § 180.1805). Nonexempt transfers are subject to corporation's right of first refusal and, if corporation does not purchase such shares, subject to shareholders' right of refusal. (Wis. Stat.

§ 180.1807). Notice of statutory close corporation status must be conspicuously noted on each share certificate and delivered in writing to shareholders of uncertificated shares. (Wis. Stat. § 180.1809). Corporation has option to purchase shares attempted to be transferred in violation of transfer restrictions. (Wis. Stat. § 180.1811).

Merger, Share Exchange and Sale of Assets.

Notwithstanding other provisions of c. 180 regarding shareholder approval requirements for merger, share exchange or merger of subsidiary: (1) Plan of merger or share exchange that will terminate statutory close corporation status, (2) plan of merger under which surviving corporation will become statutory close corporation, or (3) plan of share exchange under which corporation whose shares will be acquired will become statutory close corporation, requires approval by two-thirds of votes of each class or series of shares, voting as separate voting groups (whether or not otherwise entitled to vote on plan), of: (1) Statutory close corporation, (2) surviving corporation, or (3) corporation whose shares will be acquired, respectively. Sale, lease, exchange or other disposition of all, or substantially all, property and assets not in usual and regular course of business requires approval by two-thirds of votes of each class or series of shares, voting as separate voting groups, whether or not otherwise entitled to vote on transaction. (Wis. Stat. § 180.1813). Objecting shareholders are entitled to assert dissenters’ rights under § 180.1301 to § 180.1331. (Wis. Stat. § 180.1813).

Officers; Election Not to Have Board of Directors; Shareholder Agreements.

Statutory close corporation may operate and conduct business with one or more officers (Wis. Stat. § 180.1837); may elect to operate without board of directors if so stated in articles of incorporation (Wis. Stat. § 180.1821). Shareholders, by unanimous action, may enter into agreement(s) regulating exercise of corporate powers and management of corporation or relations among shareholders. (Wis. Stat. § 180.1823).

Shareholder Option to Dissolve; Judicial Relief.

Articles of incorporation or shareholders’ agreement may grant shareholder(s) option to have corporation dissolved at will or upon occurrence of specified contingency or event. (Wis. Stat. § 180.1831). Shareholder of record, beneficial owner of shares held by nominee, or holder of voting trust certificate of statutory close corporation may petition court for appropriate relief for certain improper actions or deadlock of directors or those in control of corporation, or if grounds exist for judicial dissolution. (Wis. Stat. § 180.1833).

Corporate Formalities; Other Matters.

Nonobservance of corporate formalities are not grounds to impose personal liability on shareholders for corporate obligations. (Wis. Stat. § 180.1835). Articles of incorporation may impose greater quorum or voting requirements for shareholders than required by c. 180. (Wis. Stat. § 180.1834). Irrevocable proxies are permitted under certain limited conditions. (Wis. Stat. § 180.1824). Bylaws need not be adopted if provisions required by law to be contained in corporate bylaws are contained in articles of incorporation or agreement among shareholders. (Wis. Stat. § 180.1825). Annual meeting date for statutory close corporation is first business day after May 31, unless articles of incorporation, bylaws or agreement among shareholders fixes different date. Annual meeting is not required unless articles of incorporation provide otherwise or shareholder delivers written request for meeting to corporation at least 30 days prior to established date for meeting. (Wis. Stat. § 180.1827). Statute contains optional provisions for buy-out at death of shareholder which apply only if and to extent so provided in articles of incorporation. (Wis. Stat. § 180.1829).

Appraisal.

Right to Dissent.

Shareholder or beneficial shareholder (beneficial owner of shares held by nominee) may dissent from, and obtain payment of fair value of shares in event of, any of following corporate actions: (a) Merger to which issuer corporation (domestic corporation that is issuer of shares held by dissenter before corporate action) is party if: (i) Shareholder approval is required for merger by § 180.1103 or articles of incorporation, (ii) issuer corporation is subsidiary that is merged with parent under § 180.1104, or (iii) issuer corporation is parent that is merged with subsidiary under § 180.1104 except that clause (iii) does not create dissenters' rights if: (1) Articles of incorporation of surviving corporation are same as parent's articles before merger, except for certain amendments board can make without shareholder approval; (2) each shareholder of parent immediately before merger holds same number of shares with identical designations, preferences, limitations, and relative rights, immediately after merger; (3) number of voting shares (shares entitled to vote unconditionally in elections of directors) outstanding immediately after merger will not be increased by more than 20% as result of merger; and (4) number of participating shares (shares entitled to participate, without limitation, in distributions) outstanding immediately after merger will not be increased by more than 20% as result of merger; (b) share exchange if issuer corporation's shares will be acquired and shareholder (or shareholder holding shares on behalf of beneficial shareholder) is entitled to vote on plan; (c) sale or exchange of all, or substantially all, of property of issuer corporation other than in usual and regular course of business, including sale in dissolution, except sale pursuant to court order or sale for cash pursuant to plan by which all or substantially all net proceeds of sale will be distributed to shareholders within one year; (d) conversion; or (e) any other corporate action taken pursuant to shareholder vote to extent dissenters' rights are provided by articles of incorporation, bylaws or resolution of board of directors. (Wis. Stat. § 180.1302[1]). Articles of incorporation may provide dissenters' rights with respect to amendment of articles of incorporation if amendment materially and adversely affects rights of shareholder's shares by: (a) Altering or abolishing preferential or preemptive right; (b) creating, altering or abolishing redemption right; (c) altering or abolishing preemptive rights of shareholders to acquire shares or other securities; (d) excluding or limiting right to vote on any matter or to cumulate votes; or (e) reducing number of shares owned to fractional share to be acquired for cash. (Wis. Stat. § 180.1302[2]). Shareholder of statutory close corporation is entitled to assert dissenters' rights with respect to other corporate actions as provided in § 180.1801 to § 180.1837. (Wis. Stat. § 180.1302[3]).

Exceptions; Exclusivity.

Unless articles of incorporation provide otherwise, §§ 180.1302(1) and (2) do not apply to holders of shares of any class or series registered on national securities exchange or quoted on NASDAQ. (Wis. Stat. § 180.1302[4]). Shareholder or beneficial shareholder entitled to dissenters' rights may not challenge corporate action creating such entitlement unless action is unlawful or fraudulent with respect to such shareholder or issuer corporation (except shareholder of statutory close corporation may commence proceeding for court relief under § 180.1833). (Wis. Stat. § 180.1302[5]).

Fair Value.

"Fair value", with respect to dissenter's shares other than in business combination, means value of shares immediately before effectuation of corporate action to which dissenter objects, excluding any appreciation or depreciation in anticipation of such corporate action unless exclusion would be inequitable. "Fair value", with respect to dissenter's shares in business combination, means market value as defined in § 180.1130(9)(a). (Wis. Stat. § 180.1301[4]).

Other Provisions.

§ 180.1320 through § 180.1328 set forth rights and obligations of corporation and dissenters, and statutory procedures with which they must comply; § 180.1330 and § 180.1331 deal with court action to determine fair value of shares and accrued interest if dissenter's demand for payment remains unsettled.

Foreign Corporations.

Certificate of Authority Required.

Foreign corporation may not transact business in state until it obtains certificate of authority from Department of Financial Institutions. Following do not constitute transacting business: (1) Maintaining, defending or settling any civil, criminal, administrative or investigatory proceeding; (2) holding meetings of board of directors or shareholders or carrying on other activities concerning internal corporate affairs; (3) maintaining bank accounts; (4) maintaining offices for transfer, exchange and registration of its securities or maintaining trustees or depositaries with respect to its securities; (5) selling through independent contractors; (6) soliciting or obtaining orders by mail, through employees, agents or otherwise requiring acceptance outside state; (7) lending money or creating or acquiring indebtedness, mortgages, and security interests in property; (8) securing or collecting debts or enforcing mortgages and security interests in property securing debts; (9) owning property; (10) conducting isolated transaction completed within 30 days and not one in course of repeated transactions of like nature and (11) transacting business in interstate commerce. (Wis. Stat. § 180.1501).

Effect of Certificate.

Foreign corporation with valid certificate of authority is authorized to transact business in state and has same but no greater rights and privileges as, and, except as otherwise provided by c.180, is subject to same duties, restrictions, penalties and liabilities imposed on, similar domestic corporation but is not subject to regulation as to its organization or internal affairs. (Wis. Stat. § 180.1505).

Corporate Name.

If corporate name of foreign corporation is not available because not distinguishable from other names upon records of Department of Financial Institutions (see subhead Name, supra), foreign corporation may use fictitious name to transact business in state. Foreign corporation may obtain authorization to use nondistinguishable name if organization with like name consents to use of name by foreign corporation and undertakes to change its name to be distinguishable from foreign corporation, or foreign corporation delivers to Department of Financial Institutions final judgment of court of competent jurisdiction establishing foreign corporation’s right to use name. (Wis. Stat. § 180.1506).

Shareholders’ Liabilities.

Substantially identical predecessor of statute imposing personal liability on shareholders for debts owing to employees of corporation for services performed was held to apply to shareholders of foreign corporation authorized to transact business in Wisconsin. (61 Wis. 2d 529, 213 N.W.2d 1). However, shareholder liability statute, § 180.0622(2)(b), has been repealed. See subhead Shareholders’ Liabilities, supra.

Transacting Business Without Certificate of Authority.

Neither foreign corporation transacting business in state without certificate of authority, if certificate of authority required, nor its successor or assignee of cause of action arising out of that business, may maintain proceeding in any state court until certificate is obtained. Failure to obtain certificate of authority does not impair validity of corporate acts, title to property in state, or prevent corporation from defending any civil, criminal, administrative or investigative proceeding in state. Foreign corporation transacting business without certificate of authority, where required, is liable to state for amount of all fees and other charges that would have been imposed if it had received certificate of authority, plus lesser of 50% of such amount or $5,000. (Wis. Stat. § 180.1502).

Restrictions on Right to Hold Real Property.

See category 4 Citizenship, topic Aliens regarding limitation on land ownership in state by non-U.S. corporation, nonresident alien or corporation in which over 20% of stock is owned by nonresident alien or non-U.S. corporation. (Wis. Stat. § 710.02). No corporation or trust may own land upon which to carry on certain farming operations, or carry on such farming operations, unless corporation or trust meets certain standards or certain exceptions apply. (Wis. Stat. § 182.001).

Filing Requirements.

Certificate of authority is obtained by application to Department of Financial Institutions on form furnished by Department of Financial Institutions (Wis. Stat. § 180.0121[1]), setting forth: (a) Corporate name or, if name unavailable for use in state, available fictitious name; (b) state or country where incorporated; (c) date of incorporation and period of duration; (d) address of principal office; (e) address of registered office in state and name of registered agent at such office; (f) names and business addresses of current directors and officers; (g) aggregate number of authorized shares, itemized by classes, par value of shares, shares without par value, and series, if any, within class; (h) aggregate number of issued shares, itemized in same manner; (i) amount of paid-in capital and number and value of shares issued without par value (value of no par stock determined as amount by which entire property exceeds liabilities other than no par stock, but each share deemed to be of value not less than $10); (j) proportion of capital represented in state by its property to be located and business to be transacted in state (computed as prescribed); and any additional information demanded by Department of Financial Institutions to determine accuracy of application. Corporation must also deliver certificate of status duly authenticated by official having custody of corporate records in state or country under whose law it is incorporated, and dated no earlier than 60 days before its delivery. (Wis. Stat. § 180.1503). Foreign corporation must obtain amended certificate of authority from Department of Financial Institutions if it changes: (1) Corporate name or fictitious name under which it has been issued certificate of authority; (2) date of incorporation or period of duration; or (3) state or country of incorporation. (Wis. Stat. § 180.1504).

Filing Fees.

Application for certificate of authority, $100, plus $3 for each $1,000 of capital exceeding $60,000 employed or to be employed in Wisconsin; application for amended certificate of authority, $40; application for certificate of withdrawal, $40, and if application shows capital employed in state in excess of amount on which fee has previously been paid, additional fee which, with previous payments made on account of capital employed in state, will amount to $3 for each $1,000 of excess; annual report, $65, plus, if report shows foreign corporation employs in state capital in excess of amount on which fee has previously been paid, additional fee which, with previous payments made on account of capital employed in state, will amount to $3 for each $1,000 of excess. (Wis. Stat. § 180.0122). Other applicable fees are same as for domestic corporation. See subhead Filing Fees, supra.

Annual Report.

See subhead Reports, supra.

Registered Office and Agent.

Foreign corporation authorized to transact business in state must maintain in state registered office and registered agent. Registered office may, but need not, be same as any of foreign corporation's places of business. Registered agent may be resident individual, domestic corporation, nonstock corporation, limited partnership, registered limited liability partnership or limited liability company incorporated, registered or organized in state, or foreign corporation, nonstock corporation, limited partnership, registered limited liability partnership or limited liability company authorized to transact business in state, whose business office is identical with registered office. (Wis. Stat. § 180.1507). Foreign corporation may change registered office or agent by filing statement of change with Department of Financial Institutions. (Wis. Stat. § 180.1508). Registered agent can resign by filing statement of resignation with Department of Financial Institutions, and resignation is effective on earlier of 60 days after Department of Financial Institutions receives statement or date on which appointment of successor registered agent is effective. (Wis. Stat. § 180.1509). Generally, registered agent is foreign corporation's agent for service of process, notice or demand required or permitted by law to be served on foreign corporation. If foreign corporation has no registered agent or registered agent cannot be served, or foreign corporation is no longer authorized to transact business in state, it may be served by registered or certified mail, return receipt requested, addressed to its principal office as shown on records of Department of Financial Institutions, or if address of principal office cannot be determined from records, by publishing class 3 notice in community where foreign corporation's principal or registered office, as most recently designated in records of Department of Financial Institutions, is located. (Wis. Stat. § 180.1510).

Method of Withdrawal.

Foreign corporation authorized to transact business in state may not withdraw from state until it obtains certificate of withdrawal from Department of Financial Institutions, which may be obtained by filing application on prescribed form (Wis. Stat. § 180.0121[1]) containing designated information with Department of Financial Institutions (Wis. Stat. § 180.1520).

Revocation of Certificate of Authority.

Unless foreign corporation corrects each ground for revocation within 60 days after notice of same, Department of Financial Institutions may revoke foreign corporation's certificate of authority if any of following applies: (1) Foreign corporation fails to file annual report with Department of Financial Institutions within four months after due; (2) foreign corporation does not pay, within four months after due, any fees or penalties due to Department of Financial Institutions; (3) foreign corporation is without registered agent or registered office in state for at least six months; (4) foreign corporation does not inform Department of Financial Institutions that registered agent has changed or resigned or registered office has changed or been discontinued within six months of such occurrence; (5) foreign corporation obtained its certificate of authority through fraud; (6) Department of Financial Institutions receives duly authenticated certificate from official having custody of corporate records in state or country under whose law foreign corporation is incorporated stating that it has been dissolved or disappeared as result of merger; or (7) foreign corporation violates § 940.302(2) or § 948.051(2) (regarding human trafficking). (Wis. Stat. §§ 180.1530; 180.1531). If Department of Financial Institutions receives certificate referred to in (6) above and statement by foreign corporation that certificate is submitted to terminate its authority to transact business in state, notice requirement and 60-day waiting period is inapplicable. (Wis. Stat. § 180.1530[Im]). If foreign corporation's certificate of authority is revoked after Dec. 31, 1991, Department of Financial Institutions must retroactively reinstate certificate of authority if foreign corporation, within six months after effective date of certificate of revocation, corrects each ground for revocation and pays any fees or penalties due, or $5,000, whichever is less. (Wis. Stat. § 180.1531[2][c]). Foreign corporation may appeal Department of Financial Institutions' revocation of its certificate within 30 days after notice of revocation becomes effective. (Wis. Stat. § 180.1532). Court may revoke certificate of authority of foreign corporation as civil remedy under Wisconsin Organized Crime Control Act (Wis. Stat. § 946.87[1]). (Wis. Stat. § 180.1530).

Taxation of Corporate Property.

Corporate real and personal property is taxed same as property of individual. See category 22 Taxation, topic 22.16 Property Taxes.

Taxation of Corporate Stock.

No special statutory provision.

Franchise Tax.

See category 22 Taxation, topic 22.10 Income Tax.

Professional Corporations.

One or more natural persons licensed, certified or registered pursuant to any provisions of Wisconsin statutes, provided all have same license, certificate or registration or all are health care professionals, may organize and own shares in service corporation. (Wis. Stat. § 180.1903[1]). If service corporation is for carrying on profession of certified public accounting, more than 50% of shareholders must be certified public accountants. (Wis. Stat. § 180.1903[1m]). Corporate name must end with “chartered”, “limited”, “service corporation”, “ltd.” or “S.C.” (Wis. Stat. § 180.1907). Professional or other personal services, consultation or advice may be rendered only by directors, officers, agents or employees of service corporation who are licensed, certified or registered pursuant to statute in field of endeavor designated in articles of incorporation. (Wis. Stat. § 180.1903[2]). Liability may not accrue to service corporation or shareholders solely because of decision to organize as service corporation or to include or exclude category of health care professionals as eligible shareholders. (Wis. Stat. § 180.1903[3]). Other provisions of c. 180 apply to service corporations, and service corporations have powers and privileges and are subject to duties, restrictions and liabilities of other stock corporations, except as provided in § 180.1901 to § 180.1921. Service corporation may not engage in any business other than that for which specifically organized and for which its charter was granted. (Wis. Stat. § 180.1905[1]). § 180.1901 to § 180.1921 control in event of conflicts with any other provision of c. 180, including § 180.1801 to § 180.1837, if service corporation elects to be statutory close corporation. (Wis. Stat. §§ 180.1801[3]; 180.1905[2]). See subhead Close Corporations, supra.

Deeds.

See category 21 Property, topic 21.06 Deeds.

Model Nonprofit Corporation Act.

Wisconsin Nonstock Corporation Law (c. 181) is based in part on Revised Nonprofit Corporation Act. St. 1995, c. 181, consisting of § 181.01 to § 181.79, was repealed and recreated by 1997 Act 79, § 48, effective Jan. 1, 1999 to consist of § 181.0103 to § 181.1703.

Limited Liability Companies.

See topic 2.06 Limited Liability Companies.

2.04 [RESERVED]

2.05 JOINT STOCK COMPANIES:

No statutory provisions for organization in Wisconsin.

Common law business trusts regulated by § 226.14. Original or true copy of declaration of trust, including all amendments, must be filed with Department of Financial Institutions before trust may transact business or acquire, hold or dispose of property in state. (Wis. Stat. § 226.14[1][a]). Verified copy with certificate of Department of Financial Institutions before trust may transact business or acquire, hold or dispose of property in state must be recorded in county in state where trust has principal office or place of business before trust may transact business in Wisconsin. (Wis. Stat. § 226.14[1][b]). Trust must also file and record statement of its name and address, signed by all trustees. (Wis. Stat. § 226.14[11]). Trust must file names and addresses of resident trustees upon whom process against trust may be served and if trust has no resident trustees, it must appoint Department of Financial Institutions as its agent to accept service. (Wis. Stat. § 226.14[5]). Trust organized in Wisconsin must maintain principal office or place of business in state. (Wis. Stat. § 226.14[2]). Foreign trust must qualify and comply in same manner as foreign corporation. (Wis. Stat. § 226.14[12][a]).

Name of trust must be distinguishable from name of any other trust, company or corporation organized or licensed in state. (Wis. Stat. § 226.14[11]).

Filing fees payable to Department of Financial Institutions are $50 for declaration of trust, $15 for each amendment, plus $1 per $1,000 of beneficial certificates sold or offered in state. (Wis. Stat. § 226.14[3]).

Annual statement, which includes financial information, with a $5 filing fee, must be filed by Mar. 31 of each year. Failure to file by deadline results in $10 late fee if filed prior to May 1, $15 late fee if filed thereafter, and loss of good standing if not filed by Dec. 31. (Wis. Stat. § 226.14[4]). Restoration to good standing requires delivery of current conforming annual report and $10 fee for each calendar year or part thereof during which trust had not been in good standing, not to exceed $105. (Wis. Stat. § 226.14[4]). Unless trust is in good standing, Department of Financial Institutions will not accept trust filings except with respect to dissolution. (Wis. Stat. § 226.14[4][c]).

Taxation of trust is same as if it were domestic or foreign corporation, as case may be. (Wis. Stat. § 226.14[10]).

Doing business without authority renders contracts of trust void on its behalf, but enforceable against it, and trustees become individually liable therefor. (Wis. Stat. § 226.14[9]). This provision does not apply to common law trusts organized under laws of any other state or foreign jurisdiction. (Wis. Stat. § 226.14[12][c]).

Beneficial or participating certificates may be issued only to extent of fair net value of property and assets, and only in consideration of money, labor or property actually received equal to par value thereof; bonds or other evidences of indebtedness may only be issued for money, labor or property actually received. (Wis. Stat. § 226.14[6]). Trust may designate beneficial interests as beneficial certificates or shares of beneficial interest or equivalent designation. (Wis. Stat. § 226.14[7]). Trusts issuing, selling or offering beneficial certificates in Wisconsin are subject to any applicable restrictions and limitations in c. 551. (Wis. Stat. § 226.14[8]).

Actions by or against trust are permitted to same extent as if it were a corporation. Service upon one or more trustees designated under § 226.14(5) or upon duly authorized agent is sufficient to bind trust. (Wis. Stat. § 226.14[11]).

Professional Corporations.

See topic 2.03 Corporations, subhead Professional Corporations.

2.06 LIMITED LIABILITY COMPANIES:

Wisconsin Limited Liability Company Act (c. 183) became effective Jan. 1, 1994. Act contains certain sections similar to sections of Wisconsin business corporation law. Certain significant distinctions summarized as follows:

Purpose.

Limited liability company (LLC) may be organized for any lawful purpose; LLC engaging in business that is subject to provisions of another chapter may organize under c. 183 only if not prohibited by, and subject to all limitations of, other statute. (Wis. Stat. § 183.0106[1]). Unless otherwise provided in operating agreement, LLC has same powers as individual to do all things necessary and convenient to carry out its business. (Wis. Stat. § 183.0106[2]).

Name of LLC as set forth in articles of organization must contain words "limited liability company" or "limited liability co." or end with abbreviation "L.L.C." or "LLC". (Wis. Stat. § 183.0103[1]). Name may not contain language stating or implying that LLC is organized for any purpose other than permitted purpose. (Wis. Stat. § 183.0103[1]). Except as otherwise authorized upon application to Department of Financial Institutions, name of domestic LLC must be distinguishable upon records of Department of Financial Institutions from: (a) Name of any other LLC, corporation, nonstock corporation, limited partnership, limited liability partnership or cooperative association existing under laws of Wisconsin; (b) name of any foreign LLC, foreign corporation, foreign nonstock corporation, foreign limited partnership, foreign limited liability partnership or foreign cooperative association, or designated, registered or fictitious name under which any such entity is licensed to transact business in Wisconsin; and (c) any name reserved or registered under statutes governing limited partnerships, business corporations, nonstock corporations or cooperative associations. (Wis. Stat. § 183.0103[2]). Exclusive use of LLC name, including fictitious name for foreign LLC whose name not available, may be reserved by applying to Department of Financial Institutions. (Wis. Stat. § 183.0104).

Filing Fees.

If Filed Electronically.

Payable to Department of Financial Institutions as follows: Articles of organization, $130; application for use of indistinguishable name, $10; written application for reserved name or renewal of reserved name, $15; telephone application for reserved name or renewal of reserved name, $30; notice of transfer of reserved name, $10; application for registered name or renewal of registered name, $50; domestic or foreign LLC's statement of change of registered agent or registered office or both, $10 (except no fee for change of address of registered office under certain circumstances); agent's statement of change of registered office, $10 for each affected domestic or foreign LLC; agent's statement of resignation, $10; amendment to articles of organization, $40; certificate of conversion, $150; articles of merger, $150; articles of dissolution, $20; foreign LLC's application for certificate of registration, $100; foreign LLC's application for amended certificate of registration, $40; foreign LLC's application for certificate of withdrawal, $40; articles of correction, $40; domestic LLC's annual report, $25; and foreign LLC's annual report, $65. (Wis. Stat. § 183.0114[1]).

If filed by paper, Department of Financial Institutions may specify larger fee for such filings. (Wis. Stat. § 183.0114[3]).

Organization.

LLC organized by filing articles of organization with Department of Financial Institutions and paying filing fee. Organizer(s) need not be LLC member(s). (Wis. Stat. § 183.0201). Statute lists required and exclusive contents of articles. (Wis. Stat. § 183.0202). Articles of organization may be amended by filing articles of amendment with Department of Financial Institutions. (Wis. Stat. § 183.0203[2]). LLC may adopt written operating agreement among all members as to conduct of business of LLC and its relationships with its members, setting forth rights and duties of members and managers. (Wis. Stat. §§ 183.0102[16]; 183.0401). In absence of operating agreement, controlling statutory provisions govern. (Wis. Stat. §§ 183.0401; 183.0402). LLC must file annual report with Department of Financial Institutions. (Wis. Stat. § 183.0120).

Management.

Unless articles of organization vest management in one or more managers, management of LLC is vested in members (member-managed LLC), subject to any provisions in operating agreement or c. 183 restricting or enlarging management rights and duties of any member or group of members. (Wis. Stat. § 183.0401[1]). Management of business or affairs of LLC is vested in manager or managers if articles of organization so provide (manager-managed LLC), subject to any provisions in operating agreement or c. 183 restricting or enlarging management rights and duties of any manager or group of managers. Unless otherwise provided in operating agreement, manager or managers: (a) Are elected, designated, appointed, replaced or removed by vote of members; (b) need not be members of LLC or individuals; and (c) hold office until successor elected and qualified, unless earlier removed or resigned. (Wis. Stat. § 183.0401[2]). Certain duties of members and managers prescribed by statute; but operating agreement may impose additional duties. (Wis. Stat. § 183.0402). Statutory provisions regarding limitation of liability and indemnification of members and managers may be altered or expanded by operating agreement in certain respects. (Wis. Stat. § 183.0403). Unless otherwise provided in operating agreement or c. 183, vote required to decide any matter connected with business of LLC is, in member-managed LLC, vote of members whose interests in LLC represent contributions to LLC of more than 50% of value, as reflected in LLC's records, of total contributions made to LLC, and, in manager-managed LLC, vote of more than 50% of managers. (Wis. Stat. § 183.0404[1]). Unless otherwise provided in operating agreement or c. 183, affirmative vote of all members is required to: (a) Amend articles of organization; (b) issue interest in LLC to any person; (c) adopt, amend or revoke operating agreement; (d) allow LLC to accept any additional contribution from member; (e) allow partial redemption of interest in LLC; (f) value contributions of members; (g) convert to new business entity under § 183.1207; (h) authorize manager, member or other person to act on behalf of LLC in contravention of operating agreement, including any provision of operating agreement that expressly limits purpose or business of LLC or conduct of business of LLC. (Wis. Stat. § 183.0404[2]). Special rules apply in determining 50% voting threshold for member-managed LLC if any member is precluded from voting with respect to given matter or if LLC interest is assigned by member. (Wis. Stat. §§ 183.0404[3]-[4]). LLC required to keep certain records and information at its principal place of business (including list of members, copy of articles of organization and all amendments, copies of LLC's tax returns and financial statements, copies of all operating agreements and amendments thereto, and information as to value of each member's contribution to LLC); members have specified rights to inspect and copy records and to receive other information upon reasonable request. (Wis. Stat. § 183.0405).

Relations with and Liability to Third Parties.

In member-managed LLC, act of any member binding on LLC unless member lacks authority for act and person dealing with member has knowledge of such lack of authority. (Wis. Stat. § 183.0301[1]). In manager-managed LLC, only manager can bind LLC. (Wis. Stat. § 183.0301[2]). LLC members or managers, as such, not personally liable for LLC liabilities; such liabilities solely liabilities of LLC. (Wis. Stat. § 183.0304[1]). Notwithstanding § 183.0304(1), court not precluded from ignoring LLC entity under principles of common law similar to those applicable to business corporations and shareholders in Wisconsin and under circumstances not inconsistent with purposes of c. 183. (Wis. Stat. § 183.0304[2]).

Finance; Nonliquidating Distributions.

Member contributions may consist of cash, property, services rendered, or promissory notes or other written obligations to provide cash or property or perform services. (Wis. Stat. § 183.0501[1]). Value of member's contribution determined in manner provided in operating agreement; in absence of operating agreement or applicable provision therein, value of contribution must be approved by members. Value so determined or approved must be reflected in LLC's records and is binding on LLC and members. (Wis. Stat. § 183.0501[2]). Profits and losses of LLC allocated among members in manner provided in operating agreement; in absence of operating agreement or applicable provision therein, profits and losses allocated on basis of value of members' contributions as reflected in LLC's records. (Wis. Stat. § 183.0503).

Distributions of cash or other assets of LLC allocated among members in similar manner. (Wis. Stat. § 183.0602). Member entitled to receive distributions from LLC, prior to member's dissociation from LLC and before its dissolution, as specified in operating agreement or as determined by vote of members or managers. (Wis. Stat. § 183.0601). Member entitled to receive distribution has status of and is entitled to all remedies available to creditor of LLC with respect to such distribution. (Wis. Stat. § 183.0606). Other provisions establish limitations on distributions and liability for wrongful distributions. (Wis. Stat. §§ 183.0607; 183.0608).

Ownership and Transfer of Property.

All property acquired by LLC is property of LLC and not of members individually; real and personal property may be acquired, held and conveyed in name of LLC. (Wis. Stat. § 183.0701). Specific provisions govern assignment of LLC interest and right of assignee to become member, subject to variation in operating agreement (Wis. Stat. §§ 183.0704; 183.0706), and rights of judgment creditor of member (Wis. Stat. § 183.0705).

Admission and Dissociation of Members.

Person may be admitted at formation of LLC by acquiring LLC interest or after formation by acquiring LLC interest and with consent of all members, unless otherwise provided for in operating agreement. (Wis. Stat. § 183.0801). Voluntary withdrawal, assignment of full LLC interest, removal, bankruptcy, death or similar event causes person to cease to be member of (dissociate from) LLC; operating agreement also may provide for other events of dissociation and may limit or condition power of member to voluntarily withdraw; if withdrawal occurs due to wrongful conduct of member, LLC may recover damages from withdrawing member and may offset damages against amount otherwise distributable to member, in addition to pursuing any remedies provided for in operating agreement or otherwise available. (Wis. Stat. § 183.0802).

Dissolution.

LLC may be dissolved (i) By event(s) specified in operating agreement; (ii) by written consent of all members; (iii) by administrative act; (iv) for limited liability company organized prior to Oct. 1, 2002, upon event of dissociation of member, unless otherwise provided in operating agreement or business of LLC continued by consent of all remaining members within 90 days after date on which event occurs; or (v) by judicial act. (Wis. Stat. § 183.0901). Winding up of LLC upon dissolution, agency powers of managers or members after dissolution, distribution of assets, and claims against dissolved LLC addressed. (Wis. Stat. §§ 183.0903; 183.0904; 183.0905; 183.0907; 183.0908). After dissolution, LLC may file articles of dissolution with Department of Financial Institutions that include specified information. (Wis. Stat. § 183.0906[1m]). LLC may revoke dissolution within 120 days after effective date of dissolution. Revocation of dissolution must be authorized in same manner that dissolution was authorized. After revocation is authorized, LLC may revoke dissolution by filing copy of LLC's articles of dissolution and articles of revocation of dissolution with Department of Financial Institutions, which must include specified information. (Wis. Stat. § 183.0906[2m]). On effective date of articles of revocation of dissolution, revocation of dissolution must relate back to, and take effect as of, effective date of dissolution, and LLC may resume carrying on its business as if dissolution never occurred. (Wis. Stat. § 183.0906[3m]).

Foreign LLCs.

Foreign LLC must register with Department of Financial Institutions before transacting business in Wisconsin; statute sets forth nonexclusive list of activities and relationships that do not constitute transacting business in state. (Wis. Stat. § 183.1002). Consequences of not registering, and rights and privileges of registered foreign LLC addressed. (Wis. Stat. §§ 183.1003; 183.1001[2]). Foreign LLC registered in Wisconsin must file annual report with Department of Financial Institutions. (Wis. Stat. § 183.0120). Laws of state or other jurisdiction under which foreign LLC is organized govern its organization and internal affairs and liability and authority of its managers and members. (Wis. Stat. § 183.1001). Foreign LLC may not be denied certificate of registration because of difference between laws of state or other jurisdiction under which it is organized and laws of Wisconsin. (Wis. Stat. § 183.1001[1m]). Department of Financial Institutions may bring proceeding to revoke registration of foreign LLC under certain circumstances. (Wis. Stat. §§ 183.1020-183.1022). Procedure for registration, withdrawal of registration and related matters addressed. (Wis. Stat. §§ 183.1004-183.1011).

Suits By and Against LLC.

Authority to sue on behalf of LLC addressed. (Wis. Stat. § 183.1101).

Merger.

LLC may merge with one or more Wisconsin or foreign business entities (which includes corporation, limited partnership, or LLC) if merger permitted under law of jurisdiction governing each such other business entity; interests in LLC that is merged may be exchanged for or converted into cash, property, obligations or interests in surviving business entity or any other business entity. (Wis. Stat. §§ 183.1201; 183.1200). Approval requirements of merger, requisite plan of merger and articles of merger, effects of merger, and member's right to object and receive fair value of interest addressed. (Wis. Stat. §§ 183.1202-183.1206).

Conversion.

Domestic LLC may convert into another form of business entity (which includes corporation, limited partnership, or LLC) if conversion is permitted under law of jurisdiction that governs organization of business entity into which LLC is converting and plan of conversion is submitted to and approved in same manner as procedures that govern merger under § 183.1202. (Wis. Stat. §§ 183.1207; 183.1200). Other business entity may also convert into domestic LLC if conversion is permitted under law governing business entity and other requirements are met. (Wis. Stat. § 183.1207). Requirements for plan of conversion and effects of conversion addressed. (Wis. Stat. § 183.1207).

Securities Law Status of LLC Interests.

Interest in LLC may be security. (Wis. Stat. § 183.1303). Wisconsin Uniform Securities Law (see category 3 Business Regulation and Commerce, topic 3.24 Securities) definition of "security" does not include LLC interest if: (1) Each interest holder is actively engaged in management of LLC or (2) each holder is authorized to act for and bind LLC and total number of holders of all interests does not exceed 15. (Wis. Stat. § 551.102[28][e]).

2.07 LIMITED PARTNERSHIP:

See topic 2.08 Partnerships.

2.08 PARTNERSHIPS:

Uniform Partnership Act adopted in modified form and further revised. (c. 178).

Limited Liability Partnerships.

Wisconsin Limited Liability Partnership Act became effective Dec. 11, 1995. Wisconsin limited liability partnership (WLLP) is type of general partnership in which partners are generally not personally liable directly or indirectly, or by way of indemnification, contribution, assessment or otherwise for debt, obligation or liability of partnership, whether in tort, contract or otherwise, including debt, obligation or liability arising from omission, negligence, wrongful act, misconduct or malpractice, arising while partnership is registered WLLP. (Wis. Stat. § 178.12[2]). Partner remains liable for partner's own omission, negligence, wrongful act, misconduct or malpractice; omission, negligence, wrongful act, misconduct or malpractice of any person acting under partner's actual supervision and control in specific activity in which omission, negligence, wrongful act, misconduct or malpractice occurred; any other debt, obligation and liability resulting from partner's acts or conduct other than as partner; or any liability that partner may have under Wisconsin's lobbying laws. (Wis. Stat. §§ 13.69[1]; 178.12[3]).

In order to become registered WLLP or foreign limited liability partnership, partnership must file registration statement with Wisconsin Department of Financial Institutions. (Wis. Stat. § 178.40). Registration statement and other documents accepted by Department of Financial Institutions are deemed effective at close of business on date of receipt (or at another specified time on date of receipt) unless they specify delayed effective date and time not more than 90 days after date of receipt. (Wis. Stat. § 178.49). Registration as foreign limited liability partnership constitutes certificate of authority to transact business in Wisconsin. (Wis. Stat. § 178.41[1][b]). Name of WLLP must contain words "registered limited liability partnership" or "limited liability partnership", or abbreviation "L.L.P." or "LLP". (Wis. Stat. § 178.42). Foreign limited liability partnership may not transact business in Wisconsin without filing registration statement. (Wis. Stat. § 178.45[1][b]).

WLLP and foreign limited liability partnership must continuously maintain registered office and registered agent in Wisconsin. (Wis. Stat. § 178.43). Registered agent is agent for service of process, notice or demand required or permitted by law to be served on partnership. (Wis. Stat. § 178.44[1]). If WLLP or foreign limited liability partnership has no registered agent or registered agent cannot be served with reasonable diligence, partnership may be served by registered or certified mail, return receipt requested, addressed to partnership at its principal office. (Wis. Stat. § 178.44[2]).

Fees.—

Payable to Department of Financial Institutions as follows: Registration statement $100 (Wis. Stat. § 178.48[1][a]); amendment to registration statement, $40 (Wis. Stat. 178.48[1][b]); termination of registration, $40 (Wis. Stat. § 178.48[1][c]); and articles of correction, $40 (Wis. Stat. § 178.48[1][d]). Department of Financial Institutions may specify greater fee for filing such documents in paper format. In addition, fees established under § 182.01(4)(c) and (d) apply to service of process on Department of Financial Institutions and for expedited processing, respectively. (Wis. Stat. §§ 178.48[2], 178.48[3], 178.48[4]).

Limited Partnerships.

Revised Uniform Limited Partnership Act (1976) adopted in modified form. (c. 179). This Act provides that certificate of limited partnership shall be filed in office of Department of Financial Institutions. (Wis. Stat. § 179.11[1]). Limited partnership may conduct any business which partnership without limited partners may conduct (Wis. Stat. § 179.06). Certificate may be amended by filing certificate of amendment or restated certificate along with fee of $25 or as specified by Department of Financial Institutions. (Wis. Stat. §§ 179.12; 179.185). If limited partnership fails to maintain agent for service of process in Wisconsin or such agent cannot be found, substituted service of process permitted on Department of Financial Institutions. (Wis. Stat. §§ 179.04[2], 179.88).

Offer and sale of limited partnership interests subject to securities law. (Wis. Stat. § 179.08). See topic Securities.

Liabilities as to Third Parties.

Except as provided by § 179.23, limited partner is generally not liable for limited partnership obligations unless also general partner or participates in control of business and person transacting business with limited partnership reasonably believes that limited partner is general partner based upon limited partner's conduct. (Wis. Stat. § 179.23[1]).

Merger.

One or more domestic limited partnerships may merge with one or more other business entities if certain requirements satisfied. (Wis. Stat. § 179.77). Approval requirements of merger, requisite plan of merger, and effects of merger addressed. (Wis. Stat. § 179.77).

Conversion.

Conversion from domestic limited partnership into another form of business entity and from other business entity into domestic limited partnership is permitted if certain requirements satisfied. (Wis. Stat. § 179.76).

Dissolution.

Nonjudicial dissolution, § 179.71; judicial dissolution, § 179.72; winding up, § 179.73; distribution of assets, § 179.74.

Out-of-State Partnerships.

No special rules as to out-of-state partnerships. Out-of-state limited partnerships must register with Department of Financial Institutions before transacting business in state with filing fee of $75. (Wis. Stat. § 179.82).

Fees.

Reservation of name by electronic application, $10, and by telephone, $20 (reserves name for 60 days); transfer of reserved name to third party, $10. (Wis. Stat. § 179.03[2]). Department of Financial Institutions may specify greater fee for filing such documents in paper format. (Wis. Stat. § 179.03[2]).

Service of Process.

If substituted on Department of Financial Institutions, fee is $10 for domestic limited partnership and as determined by rule of Department of Financial Institutions pursuant to § 182.01(4)(c) for foreign limited partnership. (Wis. Stat. §§ 179.04; 179.88).

Filing of Certificate.

Filing fee for domestic limited partnership is $70 (Wis. Stat. § 179.11[1]) and $25 for any amendment (Wis. Stat. § 179.12[1]); certificate of cancellation, $10 (Wis. Stat. § 179.13); restated certificate, $25 (Wis. Stat. § 179.185[1]); withdrawal certificate, $15 (Wis. Stat. § 179.24[1][b]). Department of Financial Institutions may specify greater fee for filing such documents in paper format.

Foreign Limited Partnership.

Registration fee, $75 (Wis. Stat. § 179.82); filing fee for correcting registration application, $15 (Wis. Stat. § 179.85); certificate of cancellation, $15 (Wis. Stat. § 179.86). Department of Financial Institutions may specify greater fee for filing such documentation in paper format.

3 BUSINESS REGULATION AND COMMERCE

3.01 BANKS AND BANKING:

Regulated by cc. 186, 214, 215, 220, 221, 223, 224.

Uniform Commercial Code has been adopted. (cc. 401-11). See topic 3.09 Commercial Code.

Supervision of state banks, savings banks, savings and loan associations, and trust company banks is by state division of banking of Department of Financial Institutions, Madison, Wisconsin. (Wis. Stat. § 220.02). Division also supervises certain lending transactions (Wis. Stat. § 138.09), finance companies, auto dealers, adjustment companies, community currency exchanges and collection agencies (c. 218), sellers of checks (c. 217), mortgage bankers, loan originators, and mortgage brokers (c. 224), nondepository small business lenders (c. 224), and insurance premium finance companies (c. 138.13).

Formation of.

Bank may be formed as public depository to receive and hold public deposits and engage in general banking business. (Wis. Stat. §§ 34.09, 221.0301). Application for organization filed with division. (Wis. Stat. §§ 221.0201 to 221.0210).

Bank shall make two reports to division during calendar year. (Wis. Stat. § 221.1002).

Stockholder Liability.

When capital is impaired, bank may assess stockholders pro rata. If a stockholder fails to pay, his stock may be sold. (Wis. Stat. § 220.07).

Director and Officer Liability.

Reliance on Others. Unless has knowledge that makes reliance unwarranted, director or officer, in discharging duties to bank, may rely on information, opinions, reports or statements, written or oral, formal or informal, including financial statements, valuation reports and other financial data, if prepared or presented by: (1) Officer or employee of bank whom director or officer believes in good faith to be reliable and competent in matters presented; (2) legal counsel, public accountants or other persons as to matters that director or officer believes in good faith are within person's professional or expert competence; or (3) in case of reliance by director, board committee of which director is not member if director believes in good faith that committee merits confidence. (Wis. Stat. § 221.0616).

Consideration of Other Interests. In discharging duties to bank and determining what is in best interests of bank, director or officer may, in addition to considering effects of any action on shareholders, consider: (1) Effects of action on employees, suppliers and customers of bank; (2) effects of action on communities in which bank operates; and (3) other factors that director or officer considers pertinent. (Wis. Stat. § 221.0617).

Limited Liability of Directors.

Except as such immunity may be limited by bank's articles of incorporation, director is not liable to bank, its shareholders, or any person asserting rights on behalf of bank or shareholders, for damages, settlements, fees, fines, penalties or other monetary liabilities arising from breach of, or failure to perform, any duty resulting solely from status as directors, unless person asserting liability proves breach or failure to perform constitutes: (1) Willful failure to deal fairly with bank or shareholders in connection with matter in which director has material conflict of interest; (2) violation of criminal law, unless director had reasonable cause to believe his or her conduct was lawful or no reasonable cause to believe conduct was unlawful; (3) transaction from which director derived improper personal profit; or (4) willful misconduct. (Wis. Stat. § 221.0618).

Liability of Officers. No general statutory provision. Statutes permitting reliance upon information prepared by others and consideration of interests in addition to shareholders' interests in discharging duties to bank apply to officers as well as directors. (Wis. Stat. §§ 221.0616; 221.0617).

Liability of Officers and Directors for Loans to Bank Officials in Excess of Limits.

Criminal liability of officer or director who, directly or indirectly, (1) borrows or otherwise procures for personal use money, funds or property of bank; (2) procures money, funds or property of bank through use of personal credit or accommodation of another person; (3) procures money, funds or property of bank by acceptance for discount at bank of any note, bond or evidence of debt that he or she knows or has reason to know is worth less than price at which it is accepted as asset. (Wis. Stat. § 221.0625[2]).

Deposits.

At death of party to joint account, deposits belong to surviving party as against estate of decedent unless clear and convincing evidence to contrary. (Wis. Stat. § 705.04[1]). Joint deposits may be paid to either, without regard to whether other is dead or incompetent, subject to special provisions for marital accounts. (Wis. Stat. § 705.06). Contrary provision in will does not affect right of bank to pay proceeds of joint deposit to survivor. (Wis. Stat. § 705.04[3]).

Unclaimed Deposits.

Uniform Unclaimed Property Act in effect. (Wis. Stat. § 177.01-41). Bank deposits generally presumed abandoned if account dormant for five years. (Wis. Stat. § 177.06).

Collections.

Uniform Commercial Code applies. (c. 404).

Bank Holding Companies and Financial Holding Companies.

Bank Service Corporation performs bank services for two or more banks, each of which owns part of capital stock of such bank. (Wis. Stat. § 221.1101[1]). Two or more banks may invest not more than 10% of capital of each of banks in bank service corporation. (Wis. Stat. § 221.1101[2]). Bank service corporation may engage in no activity other than performance of bank services for banks. (Wis. Stat. § 221.1101[4]).

Credit Unions are nonprofit corporations organized under c. 186 and supervised by Office of Credit Unions, including whether and where foreign credit union may operate branch office in this state. (Wis. Stat. § 186.235).

Savings banks regulated under c. 214 and supervised by division of banking of Dept. of Financial Institutions. (Wis. Stat. § 214.715). Savings banks may be organized in mutual or stock form. (Wis. Stat. § 214.24).

Savings and loan associations regulated under c. 215 are supervised by division of banking of Dept. of Financial Institutions. (Wis. Stat. § 215.03). Savings and loan associations may be organized in mutual (Wis. Stat. § 215.40) or stock (Wis. Stat. § 215.60) form. Words “savings and loan association” or “savings association” must form part of name of every mutual association organized under statute. (Wis. Stat. § 215.40[1][a]).

Geographic Expansion.

Branch Banks. Out-of-state banks prohibited from placing branch banks within 1.5 mile radius of property used by affiliate of that bank that engages in commercial activities. (Wis. Stats. §§ 221.0302 and 221.0904).

Trust Companies.

Trust company banks may act as trustee, personal representative, registrar of stocks and bonds, custodian, agent, guardian of estates, guardian of any person subject to guardianship, assignee, receiver and in other fiduciary capacity authorized by division. (Wis. Stat. § 223.03[6]).

Uniform Common Trust Fund Act

Uniform Common Trust Fund Act (including official amendment) in effect. Adopted 1987 with variations. (Wis. Stat. § 223.055). Wisconsin amendments thereto provide that while normal statutory restrictions on trust investments do not apply, fiduciary accounts cannot be invested in common trust fund unless all of fund's investments would be permissible for such fiduciary accounts. (Wis. Stat. § 223.055[3]). Multi-institutional common trust funds are also permitted. (Wis. Stat. § 223.056). For tax purposes, all income or losses realized are attributable pro rata to participating fiduciary accounts. (Wis. Stat. § 223.057).

Foreign Banks.

Foreign trust companies may be personal representatives or trustees. (Wis. Stat. § 223.12). Foreign Trust Companies must comply with Wisconsin law relating to qualification of corporations organized under Wisconsin law if certain requirements are met. See category 13 Estates and Trusts, topic 13.09 Executors and Administrators; also category 13 Estates and Trusts, topic 13.15 Trusts.

Interstate Acquisitions.

Banks (Wis. Stat. §§ 221.0901; 221.0903), credit unions (Wis. Stat. § 186.41), savings banks (Wis. Stat. §§ 214.155; 214.165) and savings and loan associations (Wis. Stat. § 215.36) may acquire or be acquired interstate within certain conditions.

3.02 BILLS AND NOTES:

Uniform Commercial Code has been adopted. (c. 403). See topic 3.09 Commercial Code.

Special Requirements.

Consumer Act governs issuance of certain negotiable instruments in consumer transactions. (cc. 421-27). See topic 3.10 Consumer Protection.

Judgment Notes.

Not permitted or enforced as to confession of judgment portion of note. (Wis. Stat. § 806.25). Not permitted in consumer credit transactions subject to Consumer Act (Wis. Stat. § 422.405) and violation permits customer to retain goods, services, or money received without obligation to pay and to recover any sums paid pursuant to transaction. (Wis. Stat. § 425.305).

Attorney's Fees.

Stipulation in note providing for specified amount of attorney's fees, other than usual taxable costs, in addition to principal and interest, is enforceable if amount is reasonable (97 Wis. 150, 72 N.W. 370), except for transactions subject to Consumer Act (Wis. Stat. § 422.411[1]) unless credit extended to acquire or refinance residential real property which is secured by first lien or purchase money mortgage or equivalent security interest on such property and on which annual percentage rate disclosed is 12% or less (Wis. Stat. § 422.411[2]) or in event of foreclosure if contracted for by lender licensed under § 138.09 (Wis. Stat. § 422.411[2m]).

Special Defenses.

See topic 3.10 Consumer Protection, subhead Creditors Remedies.

3.03–3.05 [RESERVED]

3.06 BROKERS:

Uniform Commercial Code has been adopted and is applicable to brokers of investment securities. (c. 408; c. 551, subc. II). See topic 3.09 Commercial Code.

Licenses.

Real estate brokers and salespersons, time-share salespersons and business brokers are required to be licensed by Department of Regulation and Licensing. (Wis. Stat. §§ 452.05[1][a], 452.01[2], [6,7]; 452.03; 52 Wis. 2d 32, 187 N.W. 2d 794). Business entities with at least one licensed representative may be licensed as broker, which then entitles each business representative of business entity to act as broker on behalf of business entity. (Wis. Stat. § 452.12[2][a]). Licenses may be available to brokers or salespersons licensed in other states and territories under reciprocal agreements. (Wis. Stat. § 452.05[3]). Renewal dates vary depending on type of license, but license may be revoked, suspended, or limited by department board prior to renewal date. (Wis. Stat. § 452.12[5]; 440.08[2]; 452.14[3][a-n]). Educational requirements apply for initial licenses and renewals. (Wis. Stat. §§ 452.09[2]; 452.12[5]). Use of state courts to collect commission without proof of valid license is prohibited and prohibition against paying unlicensed broker is absolute, without regard to level of sophistication of contracting parties. (Wis. Stat. § 452.20; 553 N.W.2d 257). Real estate broker’s license not needed for mortgage bankers, loan originators and mortgage brokers who do not negotiate sale, exchange or lease of business, real estate or time shares for commission. (Wis. Stat. §§ 452.01[3] [c], [d], and [g]).

Mortgage banker or mortgage broker license from Division of Banking of Wisconsin Department of Financial Institutions required for mortgage bankers and mortgage brokers before person may act as one or advertise or otherwise portray himself as such. (Wis. Stat. § 224.72[1m]). Mortgage loan originator license from Division of Banking of Wisconsin Department of Financial Institutions required for mortgage loan originator before person may act as one with respect to residential mortgage, advertise or otherwise portray himself as such, or use title “mortgage loan originator”. (Wis. Stat. § 224.725). Written examination and educational requirements apply for mortgage loan originator licenses. (Wis. Stat. §§ 224.725[3]; 224.755[4]).

Nonresident real estate and business brokers must file consent stipulating that service of process on Department or its employees is binding on broker. (Wis. Stat. § 452.11[3]). No licensed broker may pay fee or commission to any person who is not licensed. (Wis. Stat. §§ 452.19; 224.77[1][jm]).

Bonds.

Not required for real estate brokers. Required for mortgage bankers and mortgage brokers. (Wis. Stat. § 224.72[4][a][2]). Required for mortgage loan originators provided that bond for mortgage broker or mortgage banker may cover mortgage loan originator if mortgage loan originator identifies himself as employed by mortgage banker or mortgage broker. (Wis. Stat. § 224.725[4]).

Real Estate Brokers.

Contracts to pay commissions to real estate agents or brokers for selling or buying real estate or negotiating leases of more than three years are void unless in writing, indicating price or rent, describing subject real estate, stating amount of commission, stating period during which commission may be earned, and signed by person agreeing to pay commission, except that contract to pay commission for locating type of property does not need to describe subject real estate. (Wis. Stat. § 240.10). Licensed real estate brokers earning commission under written commercial real estate listing contracts, have lien for any unpaid amount of commission against real estate for which services were rendered if broker complies with notice and perfection requirements. (Wis. Stat. § 779.32[2]). Duties of brokers to parties and clients, and prohibited conduct, are defined and supersede inconsistent common law agency principles. (Wis. Stat. §§

452.133; 452.139). Brokers must disclose agency relationship to all parties. (Wis. Stat. § 452.135). Special rules apply to sales of cemetery lots. (Wis. Stat. § 440.91).

Mortgage Brokers.

Mortgage banker or mortgage broker is responsible for, and shall supervise acts of, mortgage loan originator or any other person who otherwise acts on behalf of mortgage banker or mortgage broker. (Wis. Stat. § 224.73[1]). Mortgage bankers and mortgage brokers are required to retain records about loan applicants and fees they charge their customers in connection with residential mortgage loan. (Wis. Stat. § 224.75). Every contract between mortgage broker and individual under which mortgage broker agrees to provide brokerage services to individual relating to residential mortgage loan shall be in writing, in form prescribed by rule of Division of Banking and must contain all information required by rule of Division of Banking. (Wis. Stat. § 224.79[1]). Before entering into contract with individual to provide brokerage services relating to residential mortgage loan, mortgage broker shall give individual copy of disclosure statement, which shall contain brief explanation of relationship between individual and mortgage broker under proposed contract, brief explanation of manner in which mortgage broker may be compensated under proposed contract, and any additional information required by rule of Division of Banking and must ensure that individual signs or initials such statement. (Wis. Stat. § 224.79[2]). Person who is aggrieved by act which is committed by mortgage banker, mortgage loan originator or mortgage broker may file private right of action. (Wis. Stat. § 229.80[2]). Person who is engaged in business or acting in capacity of mortgage banker, mortgage loan originator or mortgage broker may not bring or maintain action to collect commission for performing act as mortgage banker, mortgage loan originator or mortgage broker without alleging and proving that person was licensed as mortgage banker, mortgage loan originator or mortgage broker when alleged cause of action arose. (Wis. Stat. § 224.81).

3.07 [RESERVED]

3.08 CARRIERS:

Uniform Commercial Code has been adopted. (cc. 407-411). See topic 3.09 Commercial Code.

Regulation.

Motor carriers, railroads and water carriers are regulated by Department of Transportation. (cc. 194-195).

Rates.

Statutorily recited intent is to not fix motor carrier rates, but to maintain safety regulations. (Wis. Stat. § 194.02). Water carrier rates must not be unreasonable or unjustly discriminatory and service must be adequate. (Wis. Stat. §§ 195.05, 195.08). Appeal from department's orders may be taken to circuit court within 30 days if administrative remedies are exhausted. (Wis. Stat. §§ 194.145, 195.055, 227.53[1]).

Discrimination.

Motor carrier is prohibited from engaging in any practice, act or omission that results in discrimination on basis of race, creed, sex or national origin. (Wis. Stat. § 194.025). Discrimination in service or rates by water carriers is prohibited. (Wis. Stat. §§ 195.11, 195.12).

Limiting Liability.

Corporation or person engaged in transporting persons for hire, within Wisconsin, will not be exempt from liability of common carrier, or carrier of passengers by virtue of contract, receipt, rule or regulation, which purports to exempt such liability. (Wis. Stat. § 192.43). Railroad owner or operator is liable to owner of property injured or destroyed by fire communicated directly or indirectly by locomotives in use upon that railroad, or by burning of grass, weeds or rubbish on right of way by employees of that railroad owner or operator; railroad owner or operator can obtain insurance in its own behalf for its protection against such liability. (Wis. Stat. § 192.44). Motor carriers registered in Wisconsin are required to carry minimum insurance unless carrier establishes ability to pay any and all damages. (Wis. Stat. §§ 194.41-.42).

Bills of Lading.

Uniform Commercial Code governs.

Lien.

If property transported, stored or left with any common carrier, lien will be granted to common carrier for lawful charges related to transportation and storage of such property. If property is transported, stored or left with common carrier in nonperishable and left unclaimed for 60 days, then common carrier may sell it at public auction upon ten days notice by mail to consignor, consignee or owner, if known, and on posting of public notice for ten days, if unknown. Perishable property may be sold at public or private sale 24 hours after notice to consignee, if known. Surplus (after deducting charges for common carrier’s transportation and storage for period of compulsory retention) from such sale must be held for owner for 12 months and paid to owner upon demand. (Wis. Stat. § 171.07).

Motor Vehicle Carriers.

See category 23 Transportation, topic 23.01 Motor Vehicles.

3.09 COMMERCIAL CODE:

Uniform Commercial Code has been adopted but 2003 amendments to Art. 2 and Art. 2A, 2002 amendments to Art. 3 and Art. 4, 1999 revisions to Art. 6 and 2003 revisions to Art. 7 have not been adopted. Adopted 2000 revisions to Art. 9, effective July 1, 2001. Adopted 1994 amendments to Art. 8, effective July 1, 1998. Adopted 1990 amendments to Art. 2A, effective July 1, 1992, and Art. 4A, effective Aug. 1, 1992. Adopted 1995 amendments to Art. 5, effective Apr. 10, 2006. Also adopted 1990 revisions to Art. 3 and Art. 4 effective Aug. 1, 1996. Code section numbers are preceded by 40 and dash is changed to decimal point. Thus Code § 1-101 becomes Wis. Stat. § 401.101. However, Art. 2A has been relabeled c. 411 and Art. 4A has been relabeled c. 410.

See topic Consumer Protection for special rules in consumer transactions.

See subhead Filing Fees, infra.

Variations from 1972 official text and adopted amendments and treatment of optional provisions are as follows:

Articles are designated “Chapter” and renumbered by adding 40. Thus, Art. 1 becomes c. 401, except for Art. 2A which is c. 411 and Art. 4A which is c. 410. Term “code” is substituted for “Act” throughout.

Gender neutral words substituted for personal pronouns, or “he” or “she” substituted for “he” throughout. Most Art. provisions renumbered to make sections consistent. Thus, generally non-numbered paragraphs are numbered (a), (b), (c), etc.; (a), (b), (c), etc. become (1), (2), (3), etc.; (1), (2), (3), etc. become (a), (b), (c); phrases are generally converted into sentences with (i), (ii), etc. becoming 1., 2., etc. or (i), (ii), etc. are deleted and replaced with commas. Installment replaced with “instalment”, payor replaced with “payer” and indorsement replaced with “endorsement”.

2001 amendments to Art. 1 not adopted. Follows preceeding UCC Art. 1 format and amendments, subject to following changes:

§ 1-105(2), following language appears after specified: “(a) Section 402.402 on rights of creditors against sold goods. (b) Section 404.102 on applicability of ch. 404. (bm) Section 405.116 on letters of credit. (c) Section 406.102 on bulk transfers subject to ch. 406. (d) Section 408.110 on applicability of ch. 408. (e) Sections 409.301 to 409.307 on law governing perfection, the effect of perfection or nonperfection, and the priority of security interests and agricultural liens. (f) Section 410.507 on the governing law on funds transfers. (g) Sections 411.105 and 411.106 on the applicability of ch. 411.”

§ 1-109, add “, notwithstanding § 990.001(6)” after Act.

§ 1-201, subsec. (9) is amended to change definition of “buyer in ordinary course of business” so that “buyer in ordinary course of business” means person who buys goods in good faith, without knowing that purchase violates rights of another person. Buyer in ordinary course buys goods from a person other than pawnbroker who is in business of selling goods of type buyer has purchased. Buyer in ordinary course may buy goods for cash, by exchange of property, or on secured or unsecured credit, and may acquire goods or documents of title under preexisting contract for sale. Buyer in ordinary course must take possession of goods or products or must have right to recover goods from seller under c. 402. Buyer in ordinary course of business is not person that acquires goods in transfer in bulk or as security for or in total or partial satisfaction of money debt; in subsec. (12), substitutes “and a personal representative” for “and an executor or administrator.”; in subsec. (25), second, third and fourth sentences redesignated (23m); subsec. (27) renumbered (26)(b); in subsec. (32), words “security interest” are added after word “lien” and before words “issue or reissue”; in subsec. (35), substitutes “or personal representative” for “, executor or administrator”; in subsec. (37), each paragraph is numbered (a)-(d), subparagraphs numbered (1)-(5), in subsec. (37)(a), definition of “security interest” is amended so as to mean interest in personal property or fixtures which secures payment or performance of obligation. Term also includes any interest of consignor and buyer of accounts, chattel paper, payment intangible, or promissory note in transaction that is subject to c. 409. Special property interest of buyer of goods on identification of those goods to contract for sale under § 402.401 is not ‘security interest’, but buyer may also acquire ‘security interest’ by complying with c. 409. Except as otherwise provided in § 402.505, right of seller or lessor of goods under cc. 402 or 411 to retain or acquire possession of goods is not security interest, but seller or lessor may also acquire security interest by complying with c. 409. Retention or reservation of title by seller of goods notwithstanding shipment or delivery to buyer under § 402.401 is limited in effect to reservation of security interest.”, delete 37(z).

§ 1-206, “for the price of $5,000 or more” is added after “personal property” in subsec. (1) and “beyond $5,000 in amount of value of remedy” is omitted after “defense.”

§ 1-206(2), substitute “408.113” for “408.319.”

§ 1-206(3) is added as follows: “A contract which, but for sub. (1) would be enforceable, is enforceable: (a) if the party against whom enforcement is sought admits in that party’s pleading, testimony or otherwise in court that a contract for sale was made, but the contract is not enforceable under sub. (1) beyond the quantity or extent of personal property admitted; or (b) with respect to personal property for which payment has been made and accepted or which has been received and accepted.”

§ 1-207, insert comma after “who” and first listed “rights.”

§ 1-208, word “may” substituted for “shall have power to” in first sentence.

Optional § 1-209 adopted as follows: “An obligation may be issued as subordinated to payment of another obligation of the person obligated, or a creditor may subordinate the creditor’s right to payment of an obligation by agreement with either the person obligated or another creditor of the person obligated. Such a subordination does not create a security interest as against either the common debtor or a subordinated creditor. This section shall be construed as declaring the law as it existed prior to the enactment of this section and not as modifying it.”

2003 amendments to Art. 2 not adopted. Follows preceding UCC Art. 2 format and amendments, subject to the following changes:

§ 2-103(2), listed items numbered as subsections (a) — (y).

§ 2-103(3), listed items numbered as subsections (a) — (f).

§ 2-104, subsections are re-ordered (3), (2), (1).

§ 2-105, subsections are re-ordered (6), (2), (1), (5), (3), (4).

§ 2-106, is replaced as follows: “In this chapter unless the context otherwise requires:

(1) ‘Cancellation’ occurs when either party puts an end to the contract for breach by the other and its effect is the same as that of ‘termination’ except that the canceling party also retains any remedy for breach of the whole contract or any unperformed balance.

(2) Goods or conduct including any part of a performance are ‘conforming’ or conform to the contract when they are in accordance with the obligations under the contract.

(3) ‘Contract’ and ‘agreement’ are limited to those relating to the present or future sale of goods.

(4) ‘Contract for sale’ includes both a present sale of goods and a contract to sell goods at a future time.

(5) A ‘present sale’ means a sale which is accomplished by the making of the contract.

(6) A ‘sale’ consists in the passing of title from the seller to the buyer for a price (Wis. Stat. § 402.401).

(7) ‘Termination’ occurs when either party pursuant to a power created by agreement or law puts an end to the contract otherwise than for its breach. On ‘termination’ all obligations which are still executory on both sides are discharged but any right based on prior breach or performance survives.”

§ 2-210(3) is renumbered § 402.210(4); § 402.210(3) is created to read as follows: “The creation, attachment, perfection, or enforcement of a security interest in the seller’s interest under a contract is not a transfer that materially changes the duty of or increases materially the burden or risk imposed on the buyer or impairs materially the buyer’s chance of obtaining return performance within the purview of sub. (2) unless, and then only to the extent that, enforcement actually results in a delegation of material performance of the seller. Even in that event, the creation, attachment, perfection, and enforcement of the security interest remain effective, but: (a) The seller is liable to the buyer for damages caused by the delegation to the extent that the damages could not reasonably be prevented by the buyer; and (b) A court having jurisdiction may grant other appropriate relief, including cancellation of the contract for sale or an injunction against enforcement of the security interest or consummation of the enforcement."; § 402.210(4) is renumbered § 402.210(5); § 402.210(5) is renumbered § 402.210(6).

§ 2-316(3)(c), subsec. (c) redesignated (d) and new (c) added, asserting that there is no implied warranty that farm animals are free from disease unless seller had foreknowledge of such disease or failed to comply with animal health regulations.

§ 2-318, Alternative A in effect. § 2-403(4), Alternative B in effect.

§ 2-326, delete words "consignment sales and" from title; in § 402.326(2) replace words "Except as provided in sub. (3), goods" with word "Goods"; § 402.326(3) of statutes is repealed.

§ 2-326, new section § 402.326(5) added, stating that consignees and deliverees only have property rights in sale of goods they deliver or consign unless they purchase and fully pay for such goods; provided, however, that deliverees and consignees may act as agents of their respective deliverers or consignors by transferring title to goods to buyers who pay full purchase price for such goods. Nevertheless, any payment so received by particular deliveree or consignee from such buyer minus previously agreed-upon fee deliverer or consignor expressly agreed could be deducted from payment, is property of deliverer or consignor and is not subject to claims of deliveree's or consignee's creditors.

§ 2-502, title of § 402.502 changed to read "Buyer's right to goods on seller's repudiation, failure to deliver, or insolvency."; § 402.502(1) is renumbered § 402.502(1) (intro.) and has further been changed by replacing "Subject to sub. (2)" with "Subject to subs. (2) and (3)", and after word "if" add ": (b) In all cases, the seller becomes insolvent within 10 days after receipt of the first installment on their price."; § 402.502(1)(a) is created to read "In the case of goods bought for personal, family, or household purposes, the seller repudiates or fails to deliver as required by the contract; or"; § 402.502(2) of statutes is renumbered § 402.502(3); § 402.502(2) of statutes is created to read "The buyer's right to recover the goods under sub. (1)(a) vests upon acquisition of a special property, even if the seller had not then repudiated or failed to deliver."

§ 2-513, "Unless otherwise agreed" is added at beginning of subsec. (2).

§ 2-616, subsec. (3) is omitted.

§ 2-716, in subsec. (3), after last sentence add "In the case of goods bought for personal, family, or household purposes, the buyer's right of replevin vests upon acquisition of a special property, even if the seller had not then repudiated or failed to deliver."

§ 2-725, subsec. (1) is replaced so as to create six-year statute of limitations on breach of sale contract claims. § 402.725(1) specifies that merchants may agree in writing to reduce period to not less than one year.

2003 amendments to Art. 2A not adopted. Follows preceding UCC Art. 2A format and amendments, subject to the following changes:

§ 2A.101, delete "shall be known as and".

§ 2A.103, in subsec. (1)(e) add optional last sentences, and insert $25,000 in blank; in subsec. (1)(g) insert "all of the following occur" after intro; in subsec. (1)(h) insert "as defined in 411.309(1)(d)" after "fixtures", insert last sentence as second sentence; in subsec. (1)(r) delete 'but the term' and start new sentence with "Lien after the perfection of an obligation"; in subsec. (2), reference to "Construction Mortgage" changed from "(1)(d)" to "(1)(a)", reference to

“Encumbrance” changed from “(1)(e)” to “(1)(b)”, reference to “Fixtures” changed from “(1)(a)” to “(1)(d)”, reference to “Fixtures filing” changed from “(1)(b)” to “(1)(c)”, reference to “Purchase Money Lease” changed from “(1)(c)” to “(1)(e)”; in subsec. (3), reference to “Between Merchants” changed from “2-104(3)” to “402.104(1)”, reference to “Merchant” changed from “2-104(1)”, to “402.104(3)”, reference to “sale” changed from “112-106(1)” to “402.106(6)”, reference to “sale on approval” changed from “2-326” to “402.326(1)(a)”; reference to “Sale or Return” changed from “2-326” to “402.326(1)(b)”; in subsec. (3)(h) “intangibles” changed to “intangible.”

§ 2A-104, in subsec. (1)(a), insert “§§ 30.531, 101.9203 and 342.05” following “lessee”.

§ 2A-108, in subsec. (4)(a), add “notwithstanding § 814.04 (1)” at end of sentence; in subsec. (4)(b), add “notwithstanding § 814.04(1)” after “attorney fees”.

§ 2A-109, in subsec. (2), insert period after “power”, insert “with respect to a lease other than a consumer lease” instead of “otherwise”, and insert “under sub. (1)” after “faith” in last sentence.

§ 2A-201, in subsec. (1), add “any of the following occurs” at end of intro; in subsec. (4), add “if any of the following occurs” at end of intro; delete subsec. (4)(c) and replace with “Goods have been received and accepted by the lessee, except that the lease contract is not enforceable under this paragraph beyond the quantity of goods received and accepted.”; in subsec. (5), insert “one of the following” to end of intro; in subsec. (5)(b), add “paragraph (a) does not apply” after “If”; in subsection (5)(c), insert “If paragraph (a) or (b) does not apply” to front of first sentence.

§ 2A-202, in first sentence, insert “in the writing” after “included” and delete “therein”, and add “by all of the following” at end of intro.

§ 2A-209, in subsec. (2), delete subheadings “(i)” and “(ii)” and delete “(section 2A-209[1])”.

§ 2A-212, replace first sentence of subsec. (2) with “To be merchantable, goods shall meet all of the following minimum standards:”.

§ 2A-214, replace “must” with “shall” throughout; in subsec. (3), add “all of the following apply:” at end of first intro; in subsec. (4), replace “it” with “that warranty” and delete “(section 2A-211)”.

§ 2A-216, Alternative A adopted.

§ 2A-217, add “when any of the following occurs” at end of introduction.

§ 2A-219, in subsec. (2), delete first sentence before first comma, and replace with “subject to § 411.220”, insert “all” after “stated”, delete subheadings “(i)” and “(ii)”, and replace “it” with “the lease contract”.

§ 2A-220, add “all of the following apply:” at end of intro.

§ 2A-221, add “all of the following apply:” after “then” at end of intro.

§ 2A-303, delete subheadings “(i)”, and “(ii)” throughout; in subsec. (1), delete “as used” and delete “Secured Transactions, by reason of” and insert “under”; in subsec. (2), replace reference to “subs. (3) and (4)” with “sub. (3) and s. 409.407” and replace reference to “sub. (5)” with “sub. (4)”; subsec. (3) is repealed; subsec. (4) is renumbered to subsec. (3) and reference therein to sub. (5) is changed to sub. (4); subsec. (5) is renumbered to subsec. (4) and subsec.

(4) (intro.) as renumbered is amended to read “Subject to sub. (3) and s. 409.407”; in subsection (4)(b), insert “all of the following apply” at end of intro and replace subheadings “(i)”, and “(ii)” with “1.” and “2.”; subsecs. (6), (7) and (8) are renumbered to (5), (6) and (7).

§ 2A-304, subsec. (1) is split by sentence into (1)(a), (1)(b), and 1(c); in subsec. (1)(b), replace “the preceding sentence” with “par. (a)”; in subsec. (1)(c), replace “though” with “if any of the following occurs”, replace subheadings “(a)” “(b)” “(c)” and “(d)” with “1.” “2.” “3.” and “4.”, and delete “the criminal law” and replace with “§ 943.20 or 943.34”.

§ 2A-305, subsec. (1) is split up by sentence into (1)(a), (1)(b) and (1)(c); in subsec. (1)(b) delete “the preceding sentence” and replace with “par. (a)”; in subsec. (1)(c), replace “though” with “if any of the following occurs:”, replace subheadings “(a)”, “(b)” and “(c)”, with “1.” “2.” “3.”, and replace “the criminal law” with “§ 943.20 or 943.34”.

§ 2A-307, delete “(section 9-303)” twice; and subsection (2) is consolidated, renumbered 411.307(2) and amended to read: “411.307(2) Except as provided in sub. (3) and ss. 411.306 and 411.308, a creditor of a lessor takes subject to the lease contract unless the creditor holds a lien that attached to the goods before the lease contract became enforceable.”; subsec. (3) of statutes is repealed and recreated to read: “Except as otherwise provided in ss. 409.317, 409.321, and 409.323, a lessee takes a leasehold interest subject to a security interest held by a creditor of the lessor.”

§ 2A-308, in subsec. (2), insert “all of the following occur” after “if”; in subsec. (2)(b), insert “the lease contract” at beginning of sentence and delete “and”.

§ 2A-309, in subsec. (1)(a), insert “(1)(a)—’Construction Mortgage’ means a mortgage that secures an obligation incurred for the construction of an improvement on land including the acquisition cost of the land, if the recorded writing so indicates,” and delete subsec. (1)(d); renumber (1)(e) as (1)(b); renumber (1)(c) as (1)(e); replace “a lease is a purchase money lease” with “Purchase money lease means a lease”; renumber (1)(a) as (1)(d); renumber (1)(b) as (1)(c); in new subsec. (1)(c) add words “record of a” before word “mortgage”; in subsec. (4) add “any of the following occurs” to end of intro; in subsec. (5) add “any of the following applies” to end of intro; in subsec. (7) delete “the preceding subsections” and replace with “subs. (2) to (6)”; in subsec. (8), delete subheadings “(i)” “(ii)” and delete “but” and start new sentence; in subsec. (9), delete “in accordance with the relevant provision of the Article on Secured Transactions (Article 9)” and replace with “under ch. 409.”

§ 2A-310, in subsec. (1), add “In this section, ‘accessions’ means goods that” after “(1)”, and delete “Goods are accessions when they”; in subsec. (4), add “any of the following” to end of intro; in subsec. (5), delete subheadings “(a)” and “(b)”.

§ 411.311, new section added. Priority subject to subordination. Nothing in this chapter prevents subordination by agreement by any person entitled to priority.

§ 2A-402, insert “do any of the following:” at end of intro; in subsec. (3), delete sentence after “in accordance” and insert “with § 411.524”.

§ 2A-403, in subsec. (1), replace “can” with “may”.

§ 2A-404, in subsec. (2), add “all of the following apply:” after “regulation.”

§ 2A-405, in first sentence delete “rules”; renumber “(a)” “(b)” and “(c)”, as “(1)”, “(2)” and “(3)”.

§ 2A-406, delete “(section 2A-510)” and “(section 2A-505[2])”.

§ 2A-407, in subsec. (2), delete subheadings “(a)” and “(b)”.

§ 2A-501, in subsec. (5), replace “Part”, with “subchapter”.

§ 2A-503, in subsec. (3), add “prima facie unconscionable” after “is not” at end of sentence.

§ 2A-504, delete “(section 2A-525 or 2A-526)”; in subsec. (3), add “liquidating the lessor’s damages in accordance with subsec. (1)” after “in absence of those terms”.

§ 2A-505, in subsection (1), replace “prior” with “earlier”; in subsec. (3), replace “antecedent” with “earlier”; in subsec. (5), replace “deemed” with “considered”.

§ 2A-506, in subsection (4) replace “have accrued before this Article becomes effective” with “accrues before July 1, 1992”.

§ 2A-507, delete “(section 2A-519 or 2A-528)”.

§ 2A-508, delete all Article references in parenthesis; in subsec. (1), add “do any of the following” at end of intro; in subsec. (2), delete “the lessee may also” and insert “in addition to the remedies under sub. (1), the lessee may do any of the following.”

§ 2A-511, delete all Article references in parenthesis; in subsec. (2), replace “subsection (1)” with “disposes of goods under sub. (1)”, and insert “disposes of goods under § 411.512(1)(b)” after “other lessee”.

§ 2A-512, delete all Article references in parenthesis; in subsec. (1), insert “all of the following apply:” at end of intro; in subsec. (1)(b), replace “in the manner provided in § 2A-511; but” with “as provided in sec. 411-511(2)”; in subsec. (1)(c), insert “Except as provided in pars. (a) and (b)”, at beginning of sentence.

§ 2A-514, in subsec. (1), insert “if any of the following circumstances exist:” at end of intro; replace subsec. (1)(a) with “The lessor or the supplier could have cured the defect if the defect had been seasonably stated.”

§ 2A-515, delete all Article references in parenthesis; in subsec. (1) insert “any of the following occurs:” at end of intro.

§ 2A-516, delete all Article references in parenthesis and replace “must” with “shall” throughout; in subsec. (3), insert “all of the following apply:” after “accepted”; in subsec. (4), insert “all of” before “the following”.

§ 2A-517, in subsec. (1), insert “if any of the following occurs:” at end of intro; in subsec. (1)(a), delete “the lessee has accepted it”, and insert “the lessee accepted the lot or commercial unit”; in subsec. (1)(b), insert at beginning of sentence “the lessee accepted the lot or commercial unit”.

§ 2A-518, delete all Article references in parenthesis.

§ 2A-520, in subsec. (2), insert “all of the following” after “include”.

§ 2A-522, delete all Article references in parenthesis.

§ 2A-523, delete all Article references in parenthesis, in subsec. (1), insert “do any of the following” at end of intro; in subsec. (3), insert “the lessor may do any of the following:” at end of intro.

§ 2A-524, in subsec. (1), insert “may do any of the following” at end of intro; in subsec. (1)(b), delete “(Section 2A-527[1])”.

§ 2A-525, delete (“Section 2A-527)”.

§ 2A-526, in subsec. (2), insert “any of the following occurs:” after “until”; in subsec. (2)(c) replace “warehouse man” with “warehouse keeper that the carrier holds the goods for the lessee” and delete “such an”.

§ 2A-527, delete all Article references in parenthesis; in subsec. (2) delete subheadings “(i)” “(ii)” and “(iii)”.

§ 2A-528, delete all Article references in parenthesis; in subsec. (1), replace subheadings “(i)”, “(ii)” and “(iii)” with “(a)”, “(b)” and “(c)”.

§ 2A-529, delete all Article references in parenthesis and delete subheadings “(i)” “(ii)” and “(iii)” throughout; in subsec. (1), delete “the lessor may recover from the lessee as damages” and insert “all of the following apply:”; in subsec. (1)(b), insert “the lessor may recover from the lessee as damages” after “unavailing”.

§ 2A-531, in subsec. (1), delete headings “(a)” and “(b)” and insert “all of the following apply” at end of intro; in subsec. (1)(b), insert “any of the following occurs” after “if” and replace subheading “(i)” “(ii)” “(iii)” with “1.” “2.” and “3”.

§ 411.901 new section added: **“411.901. Applicability; written request to modify.** (1) This chapter applies to a lease contract that is entered into on or after July 1, 1992. (2) This chapter applies to a lease contract that is entered into before July 1, 1992, or to a modification, extension, or renewal of such a lease contract, if the parties agree in writing that the lease contract shall be governed by this chapter.”

2002 amendments to Art. 3 not adopted. Follows preceding UCC Art. 3 format and amendments, subject to the following changes:

§ 3-103(2), add “(hr) ‘Demand draft’—s. 403.104(11).”

§ 3-104(6) revised to read: “ ‘Check’ means a draft, other than a documentary draft, payable on demand and drawn on a bank or means a cashier’s check, teller’s check, or demand draft. An instrument may be a check even though it is described on its face by another term, such as money order.”

§ 3-104(11), new section added: “403.104(11)(a) Except as provided under par. (b), ‘demand draft’ means a writing that is not signed by a customer, as defined in s. 404.104(1)(e), that is created by a 3rd party under the purported authority of the customer for the purpose of charging the customer’s account with a bank, that contains the account number of that account, and that contains at least one of the following: 1. The customer’s name. 2. A notation that the customer authorized the demand draft. 3. The statement ‘No signature required,’ ‘Authorization on file,’ or ‘Signature on file,’ or words to that effect.

(b) ‘Demand draft’ does not include a check drawn by a fiduciary, as defined in s. 403.307(1)(a).”

§ 3-203(b) substitutes “transferee may not” for “transferee cannot”.

§ 3-307(b)(2) omits clause (iii).

§ 3-307(b)(4) omits clause (iii).

§ 3-308(1) adds “adjudicated” before “incompetent.”

§ 3-311(a) is replaced with “(1) Subsections (2) to (4) apply if a person against whom a claim is asserted proves that all of the following conditions have been met: (a) That person in good faith tendered an instrument to the claimant as full satisfaction of the claim. (b) The amount of the claim was unliquidated or subject to a bona fide dispute. (c) The claimant obtained payment of the instrument.”

§ 3-312(a)(2) is replaced with “ ‘Claimant’ means a person who claims the right to receive the amount of a check that was lost, destroyed or stolen.”

§ 3-312(d) is replaced with “If claimant has the right to assert a claim under sub. (2) and is also a person entitled to enforce a check which is lost, destroyed or stolen, the claimant may assert rights with respect to the check either under this section or s. 403.309.”

§ 3-405(a)(3)(vi) is replaced with “Act otherwise in a responsible capacity with respect to instruments.”

§ 3-411(c)(ii), add “, including a claim or defense that arises from accepting, in good faith and exercising ordinary care, an instrument as payment for a cashier’s check or teller’s check, where the instrument accepted as payment for the cashier’s check or teller’s check was, and the obligated bank was without notice that the instrument was, stolen, forged, drawn on a fictitious account, drawn on an account with insufficient funds, or otherwise fraudulent or worthless” after “instrument”.

§ 3-414, new subsection added stating that “A person who issues a check or other draft that is not honored upon presentment, because the drawer does not have an account with the drawee or because the drawer does not have sufficient funds in his or her account or sufficient credit with the drawee, is liable for all reasonable costs and expenses in connection with the collection of the amount for which the draft was written, except recovery is not permitted under this section if a person is licensed under s. 138.09 or any other person collected or could have collected a charge for that check or other draft under 422.202(1)(d) or (2m)”.

§ 3-416(1)(f), new subsection added stating that a person who transfers a demand draft must warrant that the drawer authorized the creation of the demand draft according to the terms on its face.

§ 3-417(1)(d), new subsection added stating that a person who presents an unaccepted demand draft for payment must warrant that the drawer authorized the creation of the demand draft according to the terms on its face.

§ 3-603(c), substitutes “considered” for “deemed” in second sentence.

§ 3-605(f), substitutes “considered” for “deemed” in second sentence.

2002 amendments to Art. 4 not adopted. Follows preceding UCC Art. 4 format and amendments, subject to the following changes:

§ 4-101, section omitted.

§ 4-104(3)(fe), new subsection added: "Demand draft"— s. 403.104(11)."

§ 4-106, alternative B adopted.

§ 4-207(1)(f), new subsection added stating that a customer or collecting bank who presents a demand draft for transfer must warrant that the drawer authorized the creation of the demand draft according to the terms on its face.

§ 4-208(1)(d), new subsection added stating that a customer or collecting bank who presents an unaccepted demand draft for transfer must warrant that the drawer authorized the creation of the demand draft according to the terms on its face.

§ 4A—In c. 410, numbering is reversed from Art. 4A's; thus, (a), (b), (c), etc. is changed to (1), (2), (3), etc.; (1), (2), (3), etc. is changed to (a), (b), (c), etc.; and (i), (ii), (iii), etc. is changed to 1., 2., 3., etc. Numbering changes make c. 410 consistent with other UCC Chapters.

§ 4A-103, definition of "sender" includes customer described in § 410.202(4).

§ 4A-103, "payment order" renumbered (c), placed in alphabetical order, and "All of the following apply" added to end of first sentence.

§ 5-108(5), "issuer's observance of the" omitted from second sentence.

§ 5-108(7), "under § 5-102(a)(10)" omitted.

§ 5-115, both instances of "[claim of relief] [cause of action]" substituted with "cause of action."

1999 revisions to Art. 6 not adopted. Follows preceding UCC Art. 6 format and amendments, subject to following changes:

§ 6-102, "in value" is added after "major part" and "materials, supplies, merchandise or other" is omitted in subsec. (1); in subsec. (1), reference to "s. 409.109" is changed to ", as defined in s. 409.102(1)(Ls),"; in subsec. (2), reference to "s. 409.109" is changed to ", as defined in s. 409.102(1)(i),".

§ 6-102(3m), added making chapter applicable to transfer in bulk of goods or fixtures of retailers of alcoholic beverages.

§ 6-103, first part of text designated (1) and subsecs. (1)-(8) designated (a)-(h); last paragraph designated (2) and am'd to refer to general statutory notice provision, c. 985.

§ 6-104, the office is the Department of Financial Institutions inserted in subsec. (1)(c) and a new sentence is added to subsec. (2) as follows: "The list of creditors shall include the name and address of the clerk of the municipality in which the property was last assessed."

§ 6-105, "for them" is replaced by "the major part of the purchase price".

Optional § 6-106 and related portions of § 6-107, § 6-108, and § 6-109 omitted.

2003 revisions to Art. 7 not adopted. Follows preceding UCC Art. 7 format and amendments, except that "warehouse keeper" is substituted for "warehouseman" throughout, with following changes:

§ 7-102(3m) added which provides " 'Lessor' — s. 411.103(1)(p)."

§ 7-103, designates official text as subsec. (1) and adds subsec. (2) which provides "This chapter does not repeal or modify any laws prescribing the form or contents of documents of title or the services or facilities to be afforded by bailees, or otherwise regulating bailees' businesses in respects not specifically dealt with herein; but the fact that such laws are violated does not affect the status of a document of title which otherwise complies with the definition of a document of title in s. 401.201."

§ 7-204, in subsec. (2), "conspicuous" is inserted preceding "term"; subsec. (4) is deleted.

§ 7-206, in subsec. (3), replaced "after a single advertisement or posting" with "after publication of a class 1 notice, under ch. 985."

§ 7-209, delete subsec. (3)(b) and renumber subsec. (3)(a) as subsec. (3).

§ 7-210, replace entire subsec. (2) with "A warehouse keeper's lien on goods, other than goods stored by a merchant in the course of his or her business, may be enforced as provided in sub. (1) if all of the following are satisfied: (a) The warehouse keeper notifies all persons known to claim an interest in the goods by delivering in person or sending by registered or certified mail to the last-known address of persons known to claim an interest in the goods the notice specified in par. (b). (b) The notice includes an itemized statement of the claim, a description of the goods subject to the lien, a demand for payment within a specified time not less than 30 days after receipt of the notification, and a conspicuous statement that unless the claim is paid within that time the goods will be sold by public or private sale."

§ 7-210, in subsec. (1)(b), omit bracketed material.

1994 revisions to Art. 8 adopted; follows amended UCC Art. 8 except that numbering is reversed from Art. 8; thus, (a), (b), (c), etc. is changed to (1), (2), (3), etc.; (1), (2), (3), etc. is changed to (a), (b), (c), etc.; and (i), (ii), (iii), etc. is changed to 1., 2., 3., etc.

§ 8-101, omits upper case letters.

§ 8-102(a), subsec. (11) designated (fm) in Wisconsin Act, changed spelling from "indorsement" to "endorsement."

§ 8-103(b), "In this chapter," added to beginning of second sentence.

§ 8-107(a), "In this chapter," added to beginning of first sentence.

§ 8-110(d), "In this section," added to beginning of first sentence.

§ 8-301, subsec. (a)(3) (designated [1][c] by Wisconsin Act) is renumbered to (1)(c) (intro.) and subsec. (i) and (ii) are broken out as (1)(c) 1. and 2.

§ 8-303(a), "In this chapter," added to beginning of first sentence.

§ 8-304(b), add "an endorsement" between "only" and "of."

§ 8-401(a)(3), add "under" before "908.402."

§ 8-403(b), does not divide into subsecs. (i) and (ii).

§ 8-501(a), "In this chapter," added to beginning of first sentence.

§ 8-503(b), “prorated” substituted for “pro rata.”

§ 8-503(d), subsec. (d)(1)-(4) further subdivided and redesignated (4)(a)1.-4.; final paragraph designated (b).

§ 8-509(a), “through” substituted for “to;” add “any” between “of” and “other statute.”

§ 8-509(c), “through” substituted for “to.”

§ 8-509(d), “through” substituted for “to.”

§ 8-603, “provision” substituted for “clause” in title; omits subsec. (a); subsec. (b) renumbered (1); final paragraph numbered subsec. (2).

§ 8-603(b) and final paragraph, “on or before July 1, 1998” substituted for “at the date this [Act] takes effect;” in final paragraph, substitute “July 1, 1998” for “after the effective date.”

Wisconsin codifies its secured transactions law in c. 409. Wisconsin adopted 2000 revised Article 9 and restructured c. 409 subsections consistent with provisions of revised Article 9 subject to following additions and modifications:

§ 9-102(a) (designated [1] by Wisconsin Act), added following definitions:

(bcm) “Applicant” means person at whose request or for whose account letter of credit is issued. Term includes person who requests issuer to issue letter of credit on behalf of another if person making request undertakes obligation to reimburse issuer.

(btm) “Beneficiary” means person who under terms of letter of credit is entitled to have its complying presentation honored. Term includes person to whom drawing rights have been transferred under transferable letter of credit.

(mcm) “Issuer” means bank or other person that issues letter of credit, but does not include individual who makes engagement for personal, family, or household purposes.

(mkm) “Letter of credit” means definite undertaking that satisfies requirements of § 405.104 by issuer to beneficiary at request or for account of applicant or, in case of financial institution, to itself or for its own account, to honor documentary presentation by payment or delivery of item of value.

(odm) “Nominated person” means person whom issuer:

1. Designates or authorizes to pay, accept, negotiate, or otherwise give value under letter of credit; and

2. Undertakes by agreement or custom and practice to reimburse.

(ptm) “Proceeds of a letter of credit” means cash, check, accepted draft, or other item of value paid or delivered upon honor or giving of value by issuer or any nominated person under letter of credit. Term does not include beneficiary’s drawing rights or documents presented by beneficiary.

(pu) “Production-money crops” means crops that secure production-money obligation incurred with respect to production of those crops.

(pv) “Production-money obligation” means obligation of obligor incurred for new value given to enable debtor to produce crops if value is in fact used for production of crops.

(pw) “Production of crops” means use of seed, fertilizer, or chemicals for growing crops or protecting them from damage and disease.

§ 9-102(b) (designated [2] by Wisconsin Act), deleted definitions for “Applicant”, “Beneficiary”, “Issuer (with respect to a letter of credit or letter-of-credit right)”, “Letter of credit”, “Nominated person”, and “Proceeds of a letter of credit.”

Section added: § 409.1035 “Production-money crops; production-money obligation; production-money security interest; burden of establishing. (1) A security interest in crops is a production-money security interest to the extent that the crops are production-money crops.

(2) If the extent to which a security interest is a production-money security interest depends on the application of a payment to a particular obligation, the payment must be applied in the following order until fully applied:

(a) First, to all production-money obligations secured by production-money crops, in the order in which those obligations were incurred;

(b) Second, to all obligations secured by conflicting security interests in the production-money crops referred to in par. (a), in the order in which those obligations were incurred; and

(c) Third, to all unsecured obligations of the debtor making the payment, in the order in which those obligations were incurred.

(3) A production-money security interest does not lose its status as such, even if:

(a) The production-money crops also secure an obligation that is not a production-money obligation;

(b) Collateral that is not production-money crops also secures the production-money obligation; or

(c) The production-money obligation has been renewed, refinanced, or restructured.

(4) A secured party claiming a production-money security interest has the burden of establishing the extent to which the security interest is a production-money security interest.

(5) This section does not affect any right to proceeds under § 409.315.

(6) A person may not claim a purchase-money security interest in crops grown, growing, or to be grown.”

§ 9-109(d) inserts subsection which states “(cm) An assignment of a claim or right to receive compensation for injuries or sickness under a worker’s compensation or worker’s disability statute of any state;”

§ 9-203(d) designated (4), section (4)(b) is created to read as follows: “a security agreement authenticated by one spouse is authenticated by the debtor under this section if that spouse acting alone has the right under s. 766.51 to manage and control the collateral, unless a marital property agreement or court decree that is binding on the secured party under § 766.55(4m) or 766.56(2)(c) provides otherwise.”

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§ 9-207(d)(2) reads as follows: “Subsections (1) and (2) do not apply.”

§ 9-311(a), subsection (2) designated subsection (b) and (bm) reads as follows: “(b) The following vehicle title statutes: ss. 342.19 and 342.20, (bm) The following boat title statutes: ss. 30.57, 30.572, and 30.573; subsection (d) through (f) read as follows: (d) Sections 182.025 and 190.11 and other statutes providing for central filing. (e) A master lease entered into by the state under s. 16.76(4). (f) The manufactured home security interest provision under subch. V. of ch. 101.”

Section added: § 409.3245 Governs the priority of production-money security interests and agricultural liens. A perfected production-money security interest in production-money crops has priority over a conflicting security interest in such crops to the extent of the production-money obligation secured by the production-money security interest and, unless otherwise provided in § 409.37, also has priority in their identifiable proceeds. Production-money security interest has such priority if such interest is perfected by filing when the production-money secured party first gives new value to enable the debtor to produce the crops; production-money secured party sends an authenticated notification by certified mail to the holder of the conflicting security interest between 20 and 30 days before the production-money secured party first gives new value to enable the debtor to produce the crops if the holder had filed a financing statement covering the crops before the date of the filing made by the production-money secured party; and such notification states that the production-money secured party has or expects to acquire a production-money security interest in the debtor’s crops and provides a description of the crops, the name and the mailing address of the production-money secured party giving the notice, the name and mailing address of the debtor, the name and mailing address of the lender to whom notice is being sent, the date on which the transaction would take place, and the maximum amount of new value to be provided. If more than one security interest qualifies for priority in the same collateral, such security interests rank according to priority in time of filing. To the extent that a person holding a perfected security interest in production-money crops that are the subject of a production-money security interest gives new value to enable the debtor to produce the production-money crops and the value is in fact used for the production of the production-money crops, the security interests rank according to priority in time of filing. By contrast to the extent that a person holds both an agricultural lien and a production-money security interest in the same collateral securing the same obligations, the rules of priority applicable to agricultural liens govern priority.

§ 9-334(j) omitted in Wisconsin Act.

§ 9-335(f) (designated [6] in Wisconsin Act) adds “an accession” preceding “until the secured party gives” to third sentence.

§ 9-406(j) omitted in Wisconsin Act.

§ 9-408(e) omitted in Wisconsin Act.

§ 9-501(d)(2) substitutes “the office of the department of financial institutions or any office duly authorized by the department”.

§ 9-502 uses bracketed material in (b)(2), (b)(3) and (c)(4).

§ 9-512(a) selects Alternative B; in (a)(2), uses bracketed language [or recorded] but omits bracketed language [and time].

§ 9-516(b)(3)(D), uses bracketed language [or recorded].

§ 9-518(b) selects Alternative B; subsection (b)(1)(B) uses bracketed language [filed or recorded] and substitutes “the date on which” for “the date [and time] that”.

§ 9-519(b) and (d) uses bracketed language.

§ 9-519(f) selected Alternative B; subsection (f)(1)(A) substitutes “the date on which” for “the date [and time] that” and uses bracketed language [filed and recorded].

§ 9-519(b) and (d) uses bracketed language.

§ 9-519; created subsection (8) which reads “Timeliness of Filing-Office Performance. The filing office shall perform the acts required by subs. (1) to (5) at the time and in the manner prescribed by filing-office rule, but not later than:”

(a) Five business days after the filing office receives the record in question for acts performed before July 1, 2003; and

(b) Two business days after the filing office receives the record in question for acts performed on or after July 1, 2003.”

§ 9-520(a) and (b), filing office may refuse to accept a record only for a reason set forth in § 409.516(2). The absence of a social security number on a form of record providing for the insertion of a social security number as such is not a valid reason for refusal to accept a record for filing. If a filing office refuses to accept a record for filing, the filing office shall so notify the person that presented the record of the fact. Such notification must be made consistent with the filing office’s procedures but in no event more than two business days for each filing received on or after July 1, 2003.

§ 9-521 states that written financial statements need not include social security or employer identification number under Wisconsin law. Additionally, a filing office that accepts written records may not refuse to accept a written initial financing statement except for a reason set forth in § 409.516(2).

§ 9-522(a) selects Alternative B and uses bracketed materials.

§ 9-523(c)(1)(A) uses bracketed material; subsection (d) selects language that states “a record that can be admitted into evidence in the courts of this state without extrinsic evidence of its authenticity”; subsection (e) states “Timeliness of Filing-Office Performance. The filing office shall perform the acts required by subs, (1) to (4) at the time and in the manner prescribed by filing-office rule, but not later than:

(a) Five business days after the filing office receives the request for requests received before July 1, 2003; and

(b) Two business days after the filing office receives the request for requests received on or after July 1, 2003.”

New subsection: § 409.523(7) “Liability of Filing Officer. No filing officer nor any of the filing officer’s employees or agents shall be subject to personal liability by reason of any error or omission in the performance of any duty under this chapter except in the case of misconduct as defined in § 946.12.”

§ 9-525(a) and (b) governs fees for filing of financing statements. Generally, fees are set by filing office procedures; however, § 409.525 states that filing offices may not charge a fee for the filing of a termination statement.

Moreover, if the record presented for filing consists of more than 2 written pages, the filing fee must be at least twice the amount of the fee for a written record communicated that consists of 1 or 2 pages. Furthermore, if the record is communicated by another medium authorized by filing-office rule, the filing fee for the record must be no more than 50% of the amount of the fee for a written record of 1 or 2 pages.

§ 9-525(d) governs fees in response to information request. Such fees are prescribed by filing office rules, but the fee for responding to a written request must not be less than twice the amount of the fee for responding to a non-written request. A filing office need not charge any fee for remote access searching of its database.

§ 9-526(a) and (b) describes procedure governing promulgation of filing office rules. Filing-office rules are promulgated by the Secretary of Financial Institutions in accordance with Chapters 227 and 409 of the Wisconsin Statutes.

§ 9-527 “Duty to Report. The Department of Financial Institutions shall include in its report under sec. 15.04 (1)(d) a report on the operation of the filing office ... .”

New Section: § 409.528 “Statewide Lien System. The department shall establish and maintain a state-wide lien system out of this subchapter.”

§ 9-617(a)(e) reads as follows: “Discharges any subordinate security interest or other subordinate lien.”

§ 9-625(e) and (f), omits language providing statutory damages for noncompliance with certain Art. 9 provisions.

§ 9-701, omitted by Wisconsin Act.

New Section: § 409.710 “Special transitional provision for maintaining and searching local filing office records. (1) Definitions. In this section:

(a) “Former-ch.-409 records”:

1. Means:

(a) Financing statements and other records that have been filed in a local filing office before July 1, 2001, and that are, or upon processing and indexing will be, reflected in the index maintained, as of June 30, 2001, by the local filing office for financing statements and other records filed in the local filing office before July 1, 2001; and

b. The index as of June 30, 2001.

2. Does not include records presented to a local filing office for filing after June 30, 2001, whether or not the records relate to financing statements filed in the local filing office before July 1, 2001.

(b) “Local filing office” means a filing office, other than the Department of Financial Institutions, that is designated as the proper place to file a financing statement under s. 409.401(1), 1999 stats, with respect to a record that covers a type of collateral as to which the filing office is designated in that subsection as the proper place to file.

(2) Prohibition of Filing after June 30, 2001. A local filing office shall not accept for filing a record presented after June 30, 2001, whether or not the record relates to a financing statement filed in the local filing office before July 1, 2001.

(3) Maintenance of Records. Until July 1, 2008, each local filing office must maintain all former-ch.-409 records in accordance with ch. 409, 1999 stats. A former-ch.-409 record that is not reflected on the index maintained at June 30, 2001, by the local filing office must be processed and indexed, and reflected on the index as of June 30, 2001, as soon as practicable but in any event no later than July 30, 2001.

(4) Information requests. Until at least June 30, 2008, each local filing office must respond to requests for information with respect to former-ch.-409 records relating to a debtor and issue certificates, in accordance with ch. 409, 1999 stats.

The fees charged for responding to requests for information relating to a debtor and issuing certificates with respect to former-ch.-409 records must be the fees in effect under ch. 409, 1999 stats., on June 30, 2001, unless a different fee is later set by the local filing office. However, the different fee must not exceed the amount set by filing-office rule for responding to a request for information relating to a debtor or for issuing a certificate. This subsection does not require that a fee be charged for remote access searching of the filing-office data base. The rule promulgated pursuant to this subsection need not specify a fee for remote access searching of the filing-office data base.

(5) Destruction of Records. After June 30, 2008, each local filing office may remove and destroy, in accordance with any then-applicable record retention law of this state, all former-ch.-409 records, including the related index.

(6) Exclusion. This section does not apply, with respect to financing statements and other records, to a filing office in which mortgages or records of mortgages on real property are required to be filed or recorded, if:

(a) The collateral is timber to be cut or as-extracted collateral; or

(b) The record is or relates to a financing statement filed as a fixture filing and the collateral is goods that are or are to become fixtures."

§ 10-101 and § 10-102(2) were combined in § 401.110, but this statute was repealed effective July 1, 1992.

§ 10-102(1) and § 10-103 omitted but separate specific repeal provisions added.

§ 10-104(1) renumbered § 407.103(2).

Filing Fees.

Effective Mar. 1, 1994, Uniform Commercial Code filing fees in offices of Department of Financial Institutions and Register of Deeds in Wisconsin are as follows:

1.(a)	Financing statements submitted on standard (official) UCC-1 form..........	$ 8.00
1.(b)	UCC-3 form (if subject to 409.402(5))..........	$ 10.00
2.(a)	Financing statements submitted on non-standard forms.......... (attaching additional pages to standard form renders form non-standard)	$ 16.00
2.(b)	UCC-3 form (subject to 409.402[5])..........	$ 20.00
3.	Continuations and amendments submitted on standard (official) forms..........	$ 5.00
4.	Continuations and amendments submitted on non-standard forms..........	$ 10.00
5.	Assignments or releases submitted on standard (official) forms	$ 5.00
6.	Assignments or releases submitted on non-standard forms..........	$ 10.00
7.	Terminations on standard (official) forms..........	no fee

	Each termination filed subject to 409.402(5)..........	no fee
8.	Terminations on non-standard forms..........	no fee
9.	Record searches (per debtor name)..........	$ 10.00
	Certificate..........	$ 10.00
	Each page copied..........	$ 1.00

Forms.

See Part III, Uniform and Model Acts, Commercial Code Amendments for National Forms.

See also topics: Banks and Banking, Bills and Notes, Brokers, Carriers, Consumer Protection, Contracts, Factors, Frauds, Statute of, Sales, Securities, Warehousemen; categories Business Organizations, topic Corporations; Civil Actions and Procedure, topic Limitation of Actions; Debtor and Creditor, topics Assignments, Fraudulent Sales and Conveyances, Liens, Pledges; Documents and Records, topics Records, Seals; Mortgages, topic Chattel Mortgages.

3.10–3.11 [RESERVED]

3.12 CONSUMER PROTECTION:

Primarily governed by Wisconsin Consumer Act. (cc. 421-427 and 429).

Applicability.

Unless otherwise provided, act applies to all consumer transactions, including consumer credit transactions and modifications including refinancings, consolidations and deferrals, made in Wisconsin. (Wis. Stat. § 421.201). Consumer credit transaction is transaction where one or more of parties is customer (defined as person other than organization, which are corporations, governments or government subdivision or agencies, trusts, estates, limited liability companies, partnerships, cooperatives or associations) involving acquisition of real or personal property, services or money on credit for personal, family or household purposes, or, for purposes of c. 427 only, for agricultural purposes. (Wis. Stat. § 421.301[10], [13], [17] and [28]). Transactions excluded from application of act are: (1) Extensions of credit to organizations (Wis. Stat. § 421.301[28]; § 421.202[1]); (2) transactions in which all parties are organizations (Wis. Stat. § 421.301[28]; § 421.202[2]); (3) certain delayed payment charges and early payment discounts by public utilities or common carriers (Wis. Stat. § 421.202[3]); (4) certain transactions involving licensed pawnbroker (Wis. Stat. § 421.202[4]); (5) sale of insurance by insurer, except consumer credit insurance (Wis. Stat. § 421.202[5]); (6) consumer credit transactions or motor vehicle consumer leases in which amount financed or cash price exceeds $25,000 (Wis. Stat. § 421.202[6]); (7) transactions secured by first lien real estate mortgage or equivalent security interest (Wis. Stat. § 421.202[7]); (8) transactions in securities by or with broker-dealer (Wis. Stat. § 421.202[8]); (9) leases of motor vehicles that are not motor vehicle consumer leases (Wis. Stat. § 421.202[9]); and (10) transactions that are primarily for agricultural purpose other than transactions primarily for agricultural purposes under c. 427 and § 422.210 (Wis. Stat. § 421.202[10]).

General Supervision.

Administrative enforcement and possessing rule-making power is handled by Secretary of Financial Institutions. Secretary has broad power to promulgate rules to carry out policies and purposes of consumer act and to specify unconscionable conduct, investigate and act on complaints, counsel groups and persons on rights and duties under consumer act, conduct broad investigations, commence civil actions seeking injunctions against violations of consumer act and commence class actions. Administrative Procedure and Review Act, c. 227, applies to administrative actions of Secretary. (c. 426). Persons soliciting consumer credit transactions or collecting payments from or enforcing rights against customers arising from such transactions, except those engaged in consumer credit transaction solely through honoring credit cards issued by unrelated third parties, must file registration statement with Secretary and pay registration fee (if applicable). (Wis. Stat. §§ 426.201-.202).

Contract Terms.

Unless superseded by specific provision in consumer act, provisions of Uniform Commercial Code as to contractual rights and duties apply. (Wis. Stat. § 421.103[3]). Every contract within scope of Consumer Act imposes an obligation of good faith, which means honesty in fact and observance of reasonable commercial standards of fair dealing. (Wis. Stat. § 421.108). Contract terms in transactions subject to consumer act which provide that law of another state applies, that customer consents to jurisdiction of another state or that fixes venue are invalid. (Wis. Stat. § 421.201[10]). Statements or certificates of performance by merchant signed by customer stating compliance with consumer act create no presumption that stated facts are true. (Wis. Stat. § 422.410).

Charges.

Finance Charges.

Special rules apply for licensees under Precomputed Loan Law (Wis. Stat. § 138.09[7]) and motor vehicle finance companies under § 218.0101. No maximum finance charge limits on open-end credit transactions (Wis. Stat. § 422.201[10S]) and non-open-end consumer credit transactions entered into after Oct. 31, 1984 (Wis. Stat. § 422.201[2][bn]). In non-open-end transactions, merchant may receive minimum finance charge of not more than $5 when amount does not exceed $75 or $7.50 when amount exceeds $75. (Wis. Stat. § 422.201[9]).

Additional Charges.

In addition to finance charges, in connection with consumer credit transactions, merchant may bargain for and receive: (1) Official fees and taxes; (2) premiums for insurance against loss of property in which creditor has security interest, if appropriate disclosures and notice are given; (3) in non-open-end transaction entered into as of May 17, 1988, charge for returned checks not to exceed $15; (4) in transactions where credit is secured by manufactured home or interest in real property, reasonable title examination or title insurance fees, notarization fees, fees for preparation of documents, and appraisal and survey fees if paid to person unrelated to merchant; and (5) premiums for consumer credit insurance. (Wis. Stat. §§ 422.202[1]-[2]). Further additional charges available for open-end credit transactions if mutually agreed upon. (Wis. Stat. § 422.202[2m]).

Delinquency Charges.

In transactions other than open-end credit transactions, parties may agree that a delinquency charge of lesser of $10 or 5% of installment may be imposed on any installment not paid on or before tenth day after due date. (Wis. Stat. §§ 422.203[1]-[2]).

Other Charges.

Subject to appropriate disclosures and requirements, parties may agree in writing to payment of charges by customer for deferral (Wis. Stat. § 422.204), refinancing (Wis. Stat. § 422.205), consolidations (Wis. Stat. § 422.206) and advances by merchant to preserve collateral (Wis. Stat. § 422.207). Interest after scheduled maturity for consumer credit transactions may not exceed greater of 12% per year or annual rate of finance charge on transactions entered into on or after Nov. 1, 1981. (Wis. Stat. § 422.203[4][c]).

Prepayment.

Customer may prepay all or any part of amount owing at any time without penalty, except a prepayment fee may be charged in transactions where security is first lien on real estate with original term of ten years or more and interest rate of 10% or less. (Wis. Stat. § 422.208). Upon prepayment, merchant must rebate unearned portion of finance charge. (Wis. Stat. § 422.209[1]). The “rule of 78” may be used to calculate amount of rebate for consumer credit transactions of less than $5,000 if term less than 37 months. (Wis. Stat. § 422.209[2][a]). For all other transactions, rebate amount must be calculated as provided by statute. (Wis. Stat. § 422.209). For agricultural credit transactions, creditor may not charge, collect or receive any finance charge or fee unless clearly disclosed in writing to customer and by mutual agreement. (Wis. Stat. § 422.210).

Right to Cancel.

Customer has right to cancel, until midnight of third business day after notice, in any consumer approval transaction initiated by merchant by mail, telephone or face-to-face solicitation away from merchant’s regular place of business and consummated or accepted away from merchant’s regular place of business and involving extension of credit or which is cash transaction in excess of $25, but excluding catalog sales. (Wis. Stat. §§ 423.201-202). Merchant must give two written copies of notice to customer informing of cancellation rights, and customer must give written notice of cancellation. (Wis. Stat. §§ 423.202[3]-203).

Writings.

In addition to disclosures under federal Consumer Credit Protection Act, merchant or creditor must, before consummation of non-open-end transaction or transaction in which only finance charge is prompt payment discount, give customer a written document, in clear and conspicuous writing and in not less than eight-point standard type (except as noted), which contains: (1) Signatures of all parties and date; (2) description of any trade-ins; (3) all terms of transaction; (4) notice concerning any terms on reverse side, customer’s right to a copy of document and customer’s right of prepayment; (5) notice concerning duties of any cosigner or guarantor, in no less than 10-point type (Wis. Stat. §§ 422.302-.305); and (6) notice of right to cancel, if applicable in no less than 12-point type (Wis. Stat. § 423.203). Merchant or creditor must retain copy of each document for period of one year after last payment. (Wis. Stat. § 422.303[5]). Merchant or creditor must furnish receipt for each cash payment, and, upon written request at any time, statement of amount owing and payments made. (Wis. Stat. § 422.306[1]). Blank writings prohibited. (Wis. Stat. § 422.304).

Prohibited Practices.

Limitations on consumer credit transactions exist with regard to: (1) Balloon payments (Wis. Stat. § 422.402); (2) maximum periods of repayment (Wis. Stat. § 422.403); (3) authority to confess judgment against the consumer (Wis. Stat. § 422.405); (4) irrevocable assignments of earnings (Wis. Stat. § 422.404); (5) requirements that customer pay attorneys’ fees, (Wis. Stat. § 422.411); (6) changes in open-end credit plans adverse to customer interests (Wis. Stat. § 422.415[2]); (7) default charges (Wis. Stat. § 477.413); (8) security interests in property other than property sold or leased in transaction (Wis. Stat. §§ 422.417-.418); (9) acceptance of negotiable instruments as evidence of customer’s obligation (Wis. Stat. § 422.406[1]); (10) requirements that customer grant merchant or merchant’s agent right to enter customer’s dwelling to take possession of collateral (Wis. Stat. § 422.419[1]); (11) requirement that co-signer pay fees or relinquish rights which could not be required of customer; and (12) debt collection practices (Wis. Stat. § 427.104). Remedies for violation of these limitations include: (1) Monetary awards; (2) actual damages; (3) unenforceability of obligations; (4) reasonable attorneys’ fees; (5) class actions; and (6) recovery of damages or penalties from corporate officers. (Wis. Stat. §§ 425.301-311). Intentional violators of Wisconsin Consumer Act may be fined up to $2,000. (Wis. Stat. § 425.401). If merchant: (1) Divides or encourages customers to become obligated on multiple agreements to obtain a higher finance charge (Wis. Stat. § 422.414), (2) gives rebate or discount for referral of other customers (Wis. Stat. § 422.416), (3) publishes false, deceptive or misleading advertising or fails to state material information necessary to make statements not false, deceptive or misleading (Wis. Stat. § 423.301), (4) accepts authorization to confess judgment (Wis. Stat. § 422.405), or (5) violates c. 425's provisions on replevining collateral, then customer may retain goods, services or money received in transaction without obligation to pay any amount to merchant and may recover amount previously paid (Wis. Stat. § 425.305). Credit card issuer may not prohibit merchants' offering cash discounts. (Wis. Stat. § 422.422).

Uniform Deceptive Trade Practices Act not adopted.

Insurance.

Creditor may agree to provide consumer credit insurance which provides satisfaction of debt as a benefit, in amount not greater than total amount owed to creditor, if certificate of such insurance or application is delivered to customer at time of incurring of indebtedness, and policy is delivered to customer within 30 days from date upon which indebtedness incurred and charge by creditor is limited to amount of premium charged by insurer. Customer may cancel insurance within ten days of date debt incurred. Creditor may require satisfactory evidence of insurability by customer. (Wis. Stat. §§ 424.201-.209). Creditor may not contract for damages insurance for property in which creditor holds security interest unless insurance covers substantial risk of loss to permitted collateral and amount of insurance does not exceed value of property, amount of creditor's commitment, or in transaction with term less than 49 months, total payments, or for open-end plans, amount of credit line, and insurance is reasonable in relation to terms of credit. (Wis. Stat. §§ 424.301-.303).

Settlement of Claims.

Customer may settle claim against merchant for less than full value if claim is disputed in good faith. Claim against customer may be settled for less than amount claimed, whether or not disputed. Settlements subject to court review to determine if unconscionable. (Wis. Stat. § 421.106).

Creditors Remedies.

Cause of action for creditor does not accrue until default, defined as: (1) For installment credit plans, if payment is two months or less, to have outstanding more than one full payment for ten days after due date, or failure to pay first or last payment 40 days after due date; or if payment interval is more than two months, to have outstanding one installment for more than 60 days; (2) for single payment transaction, failure to make payment for more than 40 days after due date; (3) failure to pay when due on two occasions during 12-month period on open-end credit plan; (4) material false statement in customers' credit application that precedes consumer credit transaction relating to motor vehicle consumer lease or credit sale; or (5) failure to perform any other covenant, breach of which materially impairs collateral or customer's ability to pay. (Wis. Stat. § 425.103[2]). Merchant may not accelerate maturity, take possession of collateral, or commence any action, except in accordance with § 425.205, unless he believes customer to be in default and gives customer 15-day notice of default, subject to certain inclusions, and of customer's right to cure default. (Wis. Stat. §§ 425.104-.105). Defenses available to customer include unconscionability (Wis. Stat. § 425.107) and extortionate extension of credit (Wis. Stat. § 425.108). Except for voluntary surrender of collateral (Wis. Stat. § 425.204), creditor must commence action of replevin to enforce security interest in collateral (Wis. Stat. § 425.205) and cannot otherwise recover possession of collateral unless he reasonably believes customer has abandoned it (Wis. Stat. § 425.206). Customer has right to redeem collateral for 15 days after surrender or issuance of process. (Wis. Stat. § 425.208). Deficiency judgments restricted. (Wis. Stat. §§ 425.209-.210).

Creditor cannot include unpaid amount covered by disability insurance for purposes of establishing default. (209 Wis. 2d 412, 563 N.W.2d 543).

"Unsolicited goods" statute adopted. (Wis. Stat. § 241.28).

Plain Language.

Consumer insurance policies required to be written in commonly understood language. (Wis. Stat. § 631.22[2]).

Safe Harbor.

Any act, practice or procedure formally submitted to Secretary of Financial Institutions and either approved or not disapproved within 60 days of submission will not be in violation of Consumer Act, regardless of subsequent judicial or other invalidation. (Wis. Stat. § 426.104[4][b]).

Lemon Laws.

Consumer who reports to manufacturer, authorized dealer, or motor vehicle lessor, condition or defect covered by express warranty which substantially impairs use, value, or safety of motor vehicle is entitled to have nonconformity repaired if nonconformity is reported before earlier of one year after delivery of motor vehicle to consumer or expiration of warranty. (Wis. Stat. § 218.0171[2][a]). If during term of express warranty or within one year after delivery of motor vehicle to consumer, nonconformity continues after manufacturer or authorized dealer made four attempts at repair or if motor vehicle is out of service for at least 30 days because of warranty nonconformities, consumer may: (1) Direct manufacturer to accept motor vehicle's return and either replace motor vehicle with comparable new motor vehicle and refund any collateral costs; (2) refund full purchase price plus sales taxes and finance charges less reasonable allowance for use; or (3) in case of lease, refund current value of written lease, amount consumer paid under lease, sales taxes and collateral costs, less reasonable allowance for use. (Wis. Stat. § 218.0171[2][b]). Any waiver by consumer of rights is void. (Wis. Stat. § 218.0171[6]). Repair of reported nonconformities does not defeat purchaser's right to recover under Wisconsin's lemon law where it is otherwise established that vehicle has been out of service for at least 30 days because of warranty nonconformities. (143 Wis. 2d 791, 422 N.W.2d 869).

3.13 CONTRACTS:

Common law rules not modified by any statutes of general applicability.

Uniform Commercial Code has been adopted. (cc. 401-11). See topic 3.09 Commercial Code.

Consumer Act governs consumer transactions. See topic 3.10 Consumer Protection.

Contracts of Infants.

See category 14 Family, topic 14.10 Infants.

See category 10 Documents and Records, topic 10.05 Seals.

Statute of Frauds.

See topic 3.16 Frauds, Statute of.

Statute of Usury.

See topic 3.19 Interest, subhead Usury.

3.14 FACTORS:

License Requirements.

No special license requirements as such.

Liens.

Factor, broker, or other agent entrusted by owner with possession of bill of lading, customhouse permit, warehouse receipt or other evidence of title to personal property, or with possession of personal property for sale or as security has a lien thereon for advances made or liability incurred in reference to such property, or commissions, or other moneys due him for services as such factor, broker or agent, and may retain possession of such property until paid or liability discharged. (Wis. Stat. § 779.45).

Consignee of property has lien thereon for money advanced or negotiable security given by consignee to or for use of person in whose name shipment of such property is made, and for any money or negotiable security received by such person for his or her personal use, unless consignee, before advancing money or giving security, or before it is so received for personal use, has notice that person is not actual owner thereof. (Wis. Stat. § 779.44).

Consignment Agreements.

No statutory requirements. C. 171 governs unclaimed property.

Uniform Commercial Code applies. See topic 3.09 Commercial Code.

3.15 FRANCHISES:

Uniform Franchise and Business Opportunities Act has not been adopted.

Registration.

No person may sell in Wisconsin any franchise unless franchise has been registered under c. 553 with division of securities or is exempt under § 553.22 (sophisticated franchisee with sufficient sales revenue; agricultural products; certain cooperatives of retailers), § 553.23 (private franchisee and subfranchisor sales), § 553.235 (experienced franchisees) or § 553.25 (not required to protect investors or public interest). Registration requires filing and approval by division of securities (Wis. Stat. § 553.26) and requires generally use of Uniform Franchise Registration Offering Circular (Wis. Stat. § 553.27; Admin. Code c. DFI-SEC 32). Division may issue order suspending or revoking effectiveness registration under grounds specified at § 553.28.

Supervision.

Act is administered by division of securities, 345 W. Washington Ave., Madison, WI 53703.

Definitions.

“Franchise” means contract or agreement: (1) Granting franchisee right to offer, sell, or distribute goods or services under marketing plan prescribed or suggested in substantial part by franchisor; (2) involving operation of franchisee’s business pursuant to plan substantially associated with franchisor’s trademark, trade name or other commercial symbol; and (3) requiring payment, directly or indirectly, of franchise fee. (Wis. Stat. § 553.03[4]). “Franchise fee” does not include: (1) Purchase or agreement to purchase goods at bona fide wholesale price; (2) reasonable service charges of credit card; or (3) amounts paid in connection with trading stamp promotions. (Wis. Stat. § 553.03[5m]). Other exclusions from definition of franchise fee contained in rules and orders adopted by division of securities. (Wis. Stat. § 553.03[5m]; Admin. Code c. DFI-SEC 31).

Exempt Franchisees and Transactions.

Certain transactions are exempt from registration. Certain defined franchisees are excluded. (Wis. Stat. § 553.22). Some exemptions adopted by rule, and certain private and subfranchisor sales are exempted. (Wis. Stat. § 553.23). Certain sales to experienced franchisees are also exempt. (Wis. Stat. § 553.235). Division of securities has power to exempt from registration any franchise (Wis. Stat. § 553.25), and division may deny or revoke any exemption by order (Wis. Stat. § 553.24).

Fraudulent Practices.

No person may: make or cause to be made, in any document filed with division or in any proceeding under c. 553, any statement which is, at time and in light of circumstances under which it is made, false or misleading in any material respect; omit to state material fact necessary to make statement made, in light of circumstances under which they are made, not misleading; violate order, or condition in such order, of division of which person has notice; offer or sell franchise by means of any written or oral communication which includes untrue statement of material fact; or omits to state material fact necessary to make statement made, in light of circumstances under which they are made, not misleading; or willfully represent to prospective franchisee that division of securities has passed on merits of franchise or untruthfully represent that franchise is registered or exempted. (Wis. Stat. § 553.41).

Waivers Void.

Any condition, stipulation or provision purporting to bind person acquiring any franchise to waive compliance with any provision of c. 553 or any rule or order thereunder is void. Section does not affect settlement of disputes or lawsuits under chapter. (Wis. Stat. § 553.76).

Civil and Criminal Penalties.

Penalties for violations include civil liability such as rescission (Wis. Stat. § 553.51[1]) and other damages (Wis. Stat. § 553.51[2]), as well as criminal penalties for knowing violation of § 553.41(1) for willful violation of any other provision of c. 553, or for engaging in fraud or deceit in connection with sale of franchise. (Wis. Stat. §§ 553.51, 553.52). Criminal penalty constitutes Class G felony. (Wis. Stat. § 553.52). Department of Justice or district attorney may bring action for temporary or permanent injunction for violation of c. 553. (Wis. Stat. § 553.54).

Scope.

C. 553 provisions regarding sale and offer to sell apply when sale made in Wisconsin or when offer to sell is made or accepted in Wisconsin, except registration requirements inapplicable to offer to sell not directed to, or received by offeree in Wisconsin. (Wis. Stat. § 553.59).

Dealership Practices.

Cancellation or Alteration of Dealership.

Grantor or dealership cannot, directly or through any officer, agent or employee, terminate, cancel, fail to renew or substantially change competitive circumstances of dealership without good cause. Burden of proving good cause is on grantor. (Wis. Stat. § 135.03). C. 135 is not applicable: to motor vehicle dealer, distributor or wholesaler; to insurance business; or where goods or services marketed by dealership on door-to-door basis. (Wis. Stat. § 135.07). Federal law preempts c. 135 in petroleum franchise cases. (761 F. Supp. 1386, aff'd. 956 F.2d 639).

Definitions.

"Dealer" means person who is grantee of dealership situated in Wisconsin. (Wis. Stat. § 135.02[2]). "Dealership" means contract or agreement, either expressed or implied, whether oral or written, between two or more persons, by which: (1) Person is granted right to sell or distribute goods or services, or use trade name, trademark, service mark, logotype, advertising or other commercial symbol, in which there is community of interest in business of offering, selling or distributing goods or services at wholesale, retail, by lease, agreement or otherwise, or (2) wholesaler is granted right to sell or distribute intoxicating liquor or use trade name, trademark, service mark, logotype, advertising or other commercial symbol related to intoxicating liquor. (Wis. Stat. § 135.02[3]). "Community of interest" means continuing financial interest between grantor and grantee in either operation of dealership business or marketing of such goods or services. (Wis. Stat. § 135.02[1]). "Good cause" means: (1) Failure by dealer to comply substantially with essential and reasonable requirements imposed or sought to be imposed by grantor, which requirements are not discriminatory as compared with requirements imposed on other similarly situated dealers either by their terms or in manner of their enforcement; or (2) bad faith by dealer in carrying out terms of dealership. (Wis. Stat. § 135.02[4]).

Intoxicating Liquor Wholesalers.

"Dealership" includes contract granting wholesaler right to sell or distribute, or use commercial symbol related to intoxicating liquor unless: (1) Grantor has never produced more than 200,000 gallons of intoxicating liquor in any year; or (2) net revenues from sale of grantor's brands of intoxicating liquor constitute less than 5% of dealer's net revenues from sales of intoxicating liquor during dealer's most recent fiscal year preceding grantor's cancellation or alteration of dealership. (Wis. Stat. § 135.066[5]).

Notice of Termination or Changes of Dealership.

Generally, if good cause exists, 90 days prior written notice must be given before grantor may terminate, cancel, fail to renew or substantially change dealer's competitive circumstances. (Wis. Stat. §§ 135.03; 135.04). Notice shall state all reasons for action and shall provide dealer with 60 days to rectify any claimed deficiency. If deficiency is rectified within 60 days, notice shall be deemed void. Shorter rectification (ten days) is applicable for nonpayment of sums due under dealership. Notice not required if reason is occurrence of any assignment for benefit of creditors, insolvency or bankruptcy of dealer. (Wis. Stat. § 135.04).

Repurchase of Inventory.

If dealership is terminated by grantor, at dealer's option, grantor shall repurchase at fair wholesale market value, all inventories sold to dealer by grantor for resale under dealership agreement, provided inventories have name, trademark, label or other mark on them which identifies grantor. (Wis. Stat. § 135.045).

Violation.

Dealer may bring action for injunctive relief (irreparable injury presumed for purposes of determining whether to grant injunction if violation of c. 135 has occurred [§ 135.065]) and damages sustained as consequence of grantor's violation of c. 135, together with actual costs of action, including reasonable actual attorneys' fees (Wis. Stat. § 135.06).

Statute of Limitations.

Action must be commenced within one year after cause of action accrues or be barred. (Wis. Stat. § 893.93[3][b]).

3.16 FRAUDS, STATUTE OF:

Contracts Generally.

Following agreements are void unless agreement, or some note or memorandum thereof, is in writing, expresses consideration, and is signed by party to be charged: agreements not to be performed within one year from making thereof; every special promise to answer for debt, default or miscarriage of another; every agreement, promise or undertaking made upon consideration of marriage, except mutual promise to marry. (Wis. Stat. § 241.02[1]). This provision does not apply to marital property agreements that comply with c. 766. (Wis. Stat. 241.02[2]).

Contracts Affecting Interests In Land.

Transactions by which any interest in land is created, aliened, mortgaged, assigned or otherwise affected in law or equity (other than transactions where such interest is affected by operation of law, by will, by nonprobate transfer on death, or by lease for one year or less) are invalid unless evidenced by written instrument which identifies parties, land, and interest conveyed, is signed by or on behalf of each grantor, and is delivered. Leases for more than one year must be signed by all parties. Conveyances which alienate any interest of married person in homestead under § 706.01(7) (except conveyances between spouses and certain purchase money mortgages) must be signed, or joined in by separate conveyance, by or on behalf of each spouse. Foregoing requirements can be satisfied by separate writing if incorporated by reference or annexed, or by several writings which show expressly on their faces that they were intended to refer to same transaction and which parties have mutually acknowledged by conduct or agreement as evidences of transaction. (Wis. Stat. §§ 706.001-.02).

Equitable Relief.

Even where transaction affecting interest in land does not meet formal requirements of statute of frauds, it may be enforceable, in whole or in part, under principles of equity, if: (1) Deficiency can be supplied by reformation in equity; (2) other party would be unjustly enriched; or (3) other party is equitably estopped from asserting deficiency. (Wis. Stat. § 706.04).

Contracts to Pay Commission.

Every contract to pay commission to real estate agent or broker or any other person for selling or buying real estate is void unless contract, or note or memorandum thereof, is in writing, is subscribed by person agreeing to pay commission, and describes real estate, price for same, commission to be paid, and period during which agent or broker shall procure seller, except that contracts to pay commission for locating type of property need not describe property. (Wis. Stat. § 240.10[1]). Leases: See § 240.10(2) for similar provision regarding contracts to pay commissions for leases.

Contracts of Sale Under UCC.

Uniform Commercial Code adopted. Code section numbers are preceded by 40 and dash is changed to decimal point. Thus Code § 1-101 becomes Wis. Stat. § 401.101. However, Art. 2A has been relabeled c. 411 and Art. 4A has been relabeled c. 410.

(Goods). Contracts for sale of goods for price of $500 or more are not enforceable by way of action or defense unless there is some writing sufficient to indicate that contract for sale has been made between parties and signed by party against whom enforcement is sought or by party’s agent or broker. (Wis. Stat. § 402.201[1]). Written confirmation can bind merchants if no objection. (Wis. Stat. § 402.201[2]). Personal Property: Contracts for sale of personal property for price of $5,000 or more are not enforceable by way of action or defense unless there is some writing which indicates that contract for sale has been made between parties at defined or stated price, reasonably identifies subject matter, and is signed by party against whom enforcement is sought or by party’s authorized agent. (Wis. Stat. § 401.206).

Enforcing Deficient Contracts of Sale.

Contracts for sale of goods and for sale of personal property that do not meet formal requirements are enforceable, in whole or in part: (1) Where party against whom enforcement is sought admits contract for sale was made; or (2) with respect to goods or property for which payment has been made and accepted or which have been received and accepted. Contracts for sale of goods are also enforceable where goods are specially manufactured for buyer. (Wis. Stat. §§ 402.201[3] [goods]; 401.206[3] [personal property]).

Uniform Commercial Code applies. See topic 3.09 Commercial Code.

Miscellaneous Statutes of Frauds.

Some other types of contracts governed by statutes of frauds include marital property agreements (Wis. Stat. §§ 241.02[1][c], [2]; 766.58), grants and assignments of trusts in lands, goods or things in action (Wis. Stat. § 243.01), assignments of wages or salary (Wis. Stat. § 241.09), powers of attorney (Wis. Stat. §§ 243.07 [durable]; 243.10 [financial]; and 155.10 [health care]), and arbitration agreements (Wis. Stat. § 788.01).

Use of Electronic Writings and Signatures.

Uniform Electronic Transactions Act adopted. Section numbers from Act are preceded by 137 and decimal point. Numbering begins with 137.11 and § 1 of Act has been omitted. Thus, § 2 of Act is Wis. Stat. § 137.11. §§ 3, 17, 20, and 21 of Act also omitted in Wisconsin version. § 18 of Act (regarding submission of electronic records and signatures to governmental units) has been heavily revised as Wis. Stat. § 137.25.

In some cases, signed writing requirement of statute of frauds may be satisfied by using electronic documents and signatures. (Wis. Stat. §§ 137.15[3] and 137.15[4]). Federal law may similarly apply if transaction involves interstate commerce. See Electronic Signatures in Global and National Commerce Act, 15 U.S.C. § 7001 et seq.

3.17 [RESERVED]

3.18 INFORMATION TECHNOLOGY, INTERNET AND NEW MEDIA:

Access and Connectivity.

Telecommunications utilities must file tariffs with Public Service Commission for all rates, tolls and charges. (Wis. Stat. § 196.19[1]).

If alternate sources of telecommunications services exist, telecommunications service provider may negotiate price for any service directly with customer. (Wis. Stat. § 196.194[1]).

Public Service Commission may not regulate prices and conditions of “new services” offered by price-regulated telecommunications service provider. (Wis. Stat. § 196.196[3]).

Public Service Commission sets privacy guidelines applicable to provision of telecommunications services. (Wis. Stat. § 196.209[1]).

Telecommunications service providers must address privacy considerations when proposing new telecommunications services. (Wis. Stat. § 196.209[3]).

Public Service Commission charged with defining “basic set of essential telecommunications services” to be considered “necessary component of universal service” and “advanced service capabilities” to be made available throughout state as necessary components of universal service. Public Service Commission authorized to allocate monies from federally-mandated Universal Service Fund to subsidize necessary services. (Wis. Stat. §§ 196.218[4], [5]).

Advertising.

Dept. of Agriculture, Trade, and Consumer Protection required to maintain non-solicitation list for telephone customers. Unsolicited and unauthorized prerecorded telephone solicitations prohibited. (Wis. Stat. § 100.52)

Telephone records; obtaining, selling, or receiving without consent. (Wis. Stat. § 100.525).

Unsolicited facsimile solicitations generally prohibited. (Wis. Stat. § 134.72).

Timing of deliveries in mail order sales regulated. (Wis. Stat. § 100.174)

See also topic Monopolies, Restraint of Trade, and Competition for false advertising and unfair competition.

Computer Crime.

Unauthorized modification, destruction, access, possession, and/or copying of computer data and programs prohibited. (Wis. Stat. § 943.70[2][a]). Unauthorized causation of service interruption (i.e. denial of service attacks) prohibited. (Wis. Stat. § 943.70[2][am]). Unauthorized distribution of restricted access codes or information prohibited. (Wis. Stat. § 943.70[2][a][6]). Unauthorized modification or destruction of computer hardware, network, equipment, and/or supplies prohibited. (Wis. Stat. § 943.70[3]). Criminal penalties enhanced if offender disguises identity or location of computer used in committing offense. (Wis. Stat. § 943.70[2][c]). Aggrieved parties may seek injunction against offender regardless of filing of criminal charges. (Wis. Stat. § 943.70[5]).

Digitization and transfer of sound recordings made prior to Feb. 15, 1972 prohibited. (Wis. Stat. § 943.207).

Criminal penalties apply for exposing child to harmful material or harmful descriptions or narrations where scienter exists or face-to-face contact occurs. (Wis. Stat. § 948.11). Exposure via Internet without scienter does not violate law if face-to-face contact is absent. (235 Wis.2d 306 and 611 N.W.2d 684).

Sending of unsolicited electronic mail message containing obscene or sexually explicit material prohibited unless subject line bears words ADULT ADVERTISEMENT. (Wis. Stat. § 944.25).

Digital Signatures.

Wisconsin enacted Uniform Electronic Transactions Act (UETA), (1999, enacted 2004). Electronic documents and signatures permitted upon parties' agreement. (Wis. Stat. § 137.13).

Electronic records, signatures and contracts recognized and have legal effect. (Wis. Stat. § 137.15).

Electronic record must be retainable and printable by recipient to be enforceable. Parties prohibited from agreeing otherwise, unless law allows or provides other requirements. (Wis. Stat. § 137.16).

Electronic signatures and records attributed to person acting to create same, such as by security procedures. Effect determined in context of surrounding circumstances. (Wis. Stat. § 137.17).

Required notarization or other acknowledgment or verification for signature or record permitted to be made electronically if all required information is attached to or logically associated with signature or record. (Wis. Stat. § 137.19).

Electronic records satisfy retention requirements as original records if they accurately record information as first set forth in final electronic or other form and remain accessible for later reference. Electronic transmittal messages for records need not be retained. (Wis. Stat. §§ 137.20[1], [2], [4]). Backs and fronts of checks must be retained. (Wis. Stat. § 137.20[5]). Unless prohibited by law after May 5, 2004, properly retained electronic records satisfy evidentiary, audit or similar purposes. (Wis. Stat. § 137.20[6][a]). Government's electronic records are subject to additional requirements. (Wis. Stat. §§ 137.20[6], [7], [8]). Use of retention service providers permitted. (Wis. Stat. § 137.20[3]).

Electronic records and signatures admissible as evidence. (Wis. Stat. § 137.21).

Unless otherwise agreed, electronic records are deemed "sent" from sender's place of business if: properly addressed as recipient directs for electronic records, retrievable from recipient's system in processable form, and transmitted so that they leave sender's system and enter recipient's. (Wis. Stat. §§ 137.23[1], [4]). Unless otherwise agreed, electronic records are deemed "received" at recipient's place of business when entering recipient's designated system in processable form. (Wis. Stat. § 137.23[2]). Recipient's system need not be located at recipient's place of business. (Wis. Stat. §§ 137.23[3], [4]). If multiple places of business exist, operative one bears closest relationship to transaction; if no place of business exists, one's residence controls. (Wis. Stat. § 137.23[4]). Electronic acknowledgment of receipt by recipient establishes receipt record, but not content. (Wis. Stat. § 137.23[6]). If one knows of electronic records not actually sent or received, other laws apply. (Wis. Stat. § 137.23[7]). Knowledge of receipt is unnecessary. (Wis. Stat. § 137.23[5]). Transferable records (electronic notes [c. 403] or records [c. 407]) permitted if issuer agrees to electronic form. (Wis. Stat. §§ 137.24[1], [1m]). Delivery, possession and endorsement are not required to exercise rights under subsec. 137.24. (Wis. Stat. § 137.24[4]). Chain of title is required and deemed to exist if transferable record is created, stored and assigned as single, unalterable, unique, identifiable, authoritative copy identifying person with control (by issue or transfer), and if maintained by such person/designee. (Wis. Stat. §§ 137.24[3][a]-[c]). Only controlling person may alter assignees on authoritative copies. Identify copies of authoritative copies as such. Controlling person must mark revisions made to authoritative copy as authorized or unauthorized. (Wis. Stat. §§ 137.24[3][d]-[f]). Person with control is holder (Wis. Stat. § 401.201[20]) of transferable record (Wis. Stat. § 137.24[4]). Holder or obligor has available all rights and defenses under c. 401 and c. 411. (Wis. Stat. §§ 137.24[4], [5]). Person seeking to enforce transferable records may be required to prove control. (Wis. Stat. § 137.24[6]). Documents requiring signature may be submitted electronically to governmental units with prior consent of receiver. (Wis. Stat. § 137.25[1]). Department of Administration promulgates rules regarding governmental units' use of electronic records and signatures, to promote consistency and interoperability in receipt by governmental and nongovernmental persons. (Wis. Stat. §§ 137.25[2]; 137.26).

Electronic signatures authorized for general purposes under Business Corporations Act. (Wis. Stat. § 180.0103[16]).

Electronic signatures authorized for proxies under Business Corporations Act. (Wis. Stat. § 180.0722[2][b][2]).

Electronic Transactions.

Wisconsin enacted Uniform Electronic Transactions Act (UETA). (1999, enacted 2004).

Electronic transactions permitted upon parties' agreement on per transaction basis. (Wis. Stat. § 137.13).

Automated transactions permitted. Contract formed by interacting electronic agents, even if no individual reviews electronic agent's actions or resultant contract. Contract formed by electronic agent individual acting freely on own behalf or another's with knowledge or reason to know that agent will complete transaction. (Wis. Stat. § 137.22).

Electronic records are enforceable and satisfy writing requirements regarding transaction if recipient capable of retaining electronic record at time sent, and printing and storing of record unimpeded by sender or information processing system. (Wis. Stat. §§ 137.16[1], [3]). Record must continue to meet requirements of other laws. (Wis. Stat. § 137.16[2]). Limited ability to vary by agreement. (Wis. Stat. § 137.16[4]).

Changes or errors in electronic record avoidable by party conforming to agreed security procedures, if other party nonconforming. Changes or errors by electronic agent in automated transactions avoided if agent fails to provide opportunity to prevent or correct. Individual also must promptly notify other party of error and intent not to be bound, and take reasonable steps to return or destroy received erroneous consideration from which no use was made or value or benefit received. In all other circumstances, effect of change or error governed by other law. (Wis. Stat. § 137.18).

Wisconsin has not enacted Uniform Computer Information Transactions Act (UCITA).

See generally topics Commercial Code; Contracts; Frauds, Statute of; Monopolies, Restraint of Trade and Competition.

Gaming and gambling generally prohibited by c. 945. Specific exemptions granted for activities otherwise regulated by state (pari-mutuel betting, bingo and raffles, lotteries, crane games, Indian gaming). (Wis. Stat. § 945.01).

Governmental Agencies.

Department of Administration administers networking and computer usage in state and local government. (Wis. Stat. § 15.105[28]). Department responsibilities include state government use of and access to information technology and providing telecommunications services to agencies Department considers appropriate, including governmental units, broadcasting corporations, qualified private schools, postsecondary institutions, museums and zoos. (Wis. Stat. §§ 16.70[1e]; 16.97-16.979). Agencies prohibited from offering, reselling or providing telecommunications services (including data and voice over Internet services) available from private telecommunications carrier to general public or other public or private entities. (Wis. Stat. § 16.972[2][a]).

Department of Administration responsible for providing telecommunications services to educational facilities. (Wis. Stat. §§ 16.99-16.997). Educational agency eligible for telecommunications rate discounts under 47 U.S.C. 254 also may request data lines, video links and bandwidth access with Department applying for aid under 47 U.S.C. 254 for such services and crediting aid received to appropriation account under § 20.505(4)(mp). If aid does not cover fully, Department requires educational agency to pay sufficient monthly fee covering difference to Department, to be credited to appropriation account under § 20.505(4)(Lm). (Wis. Stat. §§ 16.995[3m]; 16.997[2]; 16.998).

Legislative Joint Committee on Information Policy and Technology exists to review and recommend new policies and expenditures on information technology resources, in conjunction with Department of Administration. (Wis. Stat. § 13.58).

Licensing.

For trademark and trade secrets laws generally, see category 17 Intellectual Property.

No specific provisions offering sui generis database protection.

Digitization and transfer of sound recordings made prior to Feb. 15, 1972 prohibited. (Wis. Stat. § 943.207).

On-line Publishing.

Right of privacy recognized in Wisconsin. (Wis. Stat. § 995.50[1]). Causes of action can be invasion of privacy, unauthorized use of name or likeness for advertising purposes, or unprivileged publicity given to private matters. (Wis. Stat. § 995.50[2]).

Computer bulletin boards not considered “print publication” for purposes of statute requiring aggrieved party to give notice and opportunity for correction prior to filing defamation action. (193 Wis.2d 429; 535 N.W.2d 11; 895.05[2]).

Privacy and Data Collection.

Data Security Breach Laws. Companies that conduct business in Wisconsin or maintain or license personal information pertaining to Wisconsin residents must notify individuals of certain unauthorized disclosures. (Wis. Stat. § 134.98).

Identity Theft. Unauthorized use of personal identifying information prohibited. Criminal penalties apply. (Wis. Stat. § 943.201).

Unauthorized use of business’ identifying information prohibited. (Wis. Stat. § 943.203).

Health records. All patient health care records confidential unless there is explicit informed consent or specific exception. Civil penalties apply. (Wis. Stat. § 146.82).

Access to health records kept under Mental Health Act limited regardless of form of records. (Wis. Stat. § 51.30[4]).

Access to health records of minors and incompetents limited regardless of form of records. (Wis. Stat. § 51.30[5]).

Access to general patient health records limited regardless of form of records. (Wis. Stat. § 146.836).

Social service recipients—protection of personal information. (Wis. Stat. c. 46).

Nursing home facilities—rights of residents. (Wis. Stat. § 50.09).

Alcoholism treatment programs—records of patients. (Wis. Stat. § 51.45[14]).

Mental health patient rights. (Wis. Stat. § 51.61[1][n]).

Health care services review; confidentiality of information. (Wis. Stat. § 146.38).

Emergency medical services—confidentiality of information. (Wis. Stat. § 146.50 [12]).

Confidentiality of patient health care records. (Wis. Stat. §§ 146.81-84).

HIV tests—confidentiality of test results. (Wis. Stat. §§ 252.12[3] and 252.15[5]).

Insurers—nondisclosure of personal medical information and other personal information.

(Wis. Stat. §§ 604.08[8] and 610.70).

Consumer Protections. Certain consumer loan information is prohibited from being furnished or used to make solicitations. Civil and monetary remedies apply. (Wis. Stat. § 100.55).

Tax preparers prohibited from disclosing information obtained in course of preparing client's tax return without proper authorization. Civil and monetary remedies apply. (Wis. Stat. § 100.57).

Nondisclosure of information on receipts. (Wis. Stat. § 134.74).

Notaries; confidentiality. (Wis. Stat. § 137.01[5m]).

Contracts requiring prisoner access to personal information. (Wis. Stat. § 301.029).

Notice of unauthorized acquisition of personal information. (Wis. Stat. § 134.98).

Social Security numbers may not be recorded on certain documents recorded by Register of Deeds. Civil damages apply. (Wis. Stat. § 59.43).

Individuals may place "security freeze" on their credit reports for small fee. Credit reporting agencies are then prohibited from releasing credit report to potential creditors. (Wis. Stat. § 100.54).

Disposal of Records Containing Personal Information. Financial institutions, medical businesses, and tax preparation businesses prohibited from disposing of records containing personal information unless personal information is first rendered undiscoverable. Civil damages apply. (Wis. Stat. § 134.97).

Telecommunications. Public Service Commission sets privacy guidelines applicable to provision of telecommunications services. (Wis. Stat. § 196.209[1]).

Telecommunications service providers must address privacy considerations when proposing new telecommunications services. (Wis. Stat. § 196.209[3]).

Taxation.

Department of revenue may authorize alternate forms of authentication for tax returns. (Wis. Stat. §§ 71.01[9c]; 71.738[4]; 77.51[17r]; 78.005[13r]; 78.55[6]; 139.01[9m]; 139.30[12m]).

Computer equipment and off-the-shelf software exempt from personal property tax; custom software not exempt. (Wis. Stat. § 70.11[39]).

Telecommunications services originating or terminating in Wisconsin subject to sales tax. (Wis. Stat. § 77.52[2][a][5]).

Use tax charged to Wisconsin purchasers of goods and services obtained from out-of-state. (Wis. Stat. § 77.53[1]).

3.16

3.17 INTEREST:

Legal rate of interest is 5% per annum, unless parties agree otherwise in writing. (Wis. Stat. § 138.04). For liquidated claim, interest begins to accrue on date payment is due according to parties' contract, or, if no such time is specified, then from time demand is made or action commenced. (79 Wis. 2d 142, 255 N.W.2d 473).

Maximum rate is governed by c. 138. Applicable rate ceilings differ, depending on identity of borrower, purpose of loan, security taken by lender, and date on which loan is originated or refinanced.

State-chartered banks, credit unions, savings and loan associations, and savings banks may charge at least same rates that federally-chartered financial institutions may charge. (Wis. Stat. § 138.041).

For forbearances occurring primarily for personal, family, or household purposes which are not consumer credit transactions and for which only charge is penalty or late charge for nonpayment when due, maximum penalty or late charge may not exceed 12% per annum computed upon declining principal balance. (Wis. Stat. § 138.05[1][a]). This limitation does not apply to forbearance in amount of $150,000 or more unless forbearance is secured by encumbrance on borrower's personal residence. (Wis. Stat. § 138.05[7]).

For residential mortgage loans, there is no interest ceiling. (Wis. Stat. § 138.051[8]). Interest imposed on amount due after maturity or acceleration may not exceed contract rate. (Wis. Stat. § 138.052[7]). For purpose of calculating interest, parties may agree that any payment made within 30 days before or after scheduled due date is deemed paid on due date. (Wis. Stat. § 138.052[4]). For consumer credit mortgage loans, prepayment penalties are limited to 60 days' worth of interest at contract rate on amount by which aggregate principal prepayments for 12 month period exceed 20% of original principal balance; except that there can be no prepayment penalty after five years from date loan is originated and there can be no prepayment penalty unless parties agree to it. (Wis. Stat. § 138.052[2][a]). Upon prepayment of loan in full by cash, renewal, or refinancing, borrower is entitled to refund of unearned interest paid, if any. (Wis. Stat. § 138.052[2][b]). Late payment charge may be imposed once on each late installment, if parties agree to such charge and installment is at least 15 days late. (Wis. Stat. § 138.052[6]). Late payment charge may not exceed 5% of unpaid amount of installment. (Wis. Stat. § 138.052[6]). Variable interest rate generally must be paid on escrow accounts required to assure payment of taxes or insurance. (Wis. Stat. § 138.052[5][am]).

Residential mortgage loans may include variable rates, if initial interest rate is: (a) Tied to index approved by statute or by regulatory agency with jurisdiction over lender, or (b) adjustable by increments not to exceed 1% every six months, provided that lender can forego increases when first available, accumulate them, and implement them at any time thereafter. (Wis. Stat. § 138.056[2]). Indexed variable rate loans and loans on mobile home transactions may be prepaid at any time without penalty. Adjustable rate loans may be prepaid without penalty within 30 days after receiving notice of impending rate increase; otherwise, prepayments of adjustable rate loans are subject to general prepayment limits (Wis. Stat. § 138.056[3][a]). Notices of rate changes must be given to borrower at least 15 days before effective date of increase if increase in periodic payments other than final payment (or not later than 30 days after any other change), specifying effective date of rate change, amount of rate change, changes in any index which caused rate change, amount of new monthly payment required as result of rate change, and borrower's prepayment rights. (Wis. Stat. § 138.056[4]). Changes may result in negative amortization only under limited circumstances. (Wis. Stat. § 138.056[5]). Before making variable rate loan, lender must: (a) disclose to borrower that contract contains variable rate provision; (b) identify approved index and current index base, if applicable; (c) describe borrower's prepayment rights on receiving notice of rate change; and (d) provide borrower with notice of any rate increase. (Wis. Stat. § 138.056[6]). Any interest accruing as result of interest rate change is secured by and retains priority of original mortgage or equivalent security interest. (Wis. Stat. § 138.056[7]).

Limitations on mortgage loans, including interest rate limitations, do not apply to loans to corporations or limited liability companies. (Wis. Stat. §§ 138.05[5], 138.052[10], and 138.056[8]).

Certain types of lending activities, such as those traditionally conducted by finance companies or discount lenders, may be subject to licensing requirements. (Wis. Stat. § 138.09). Such licensed lenders may make precomputed loans, discount loans, and other types of loans. There are limitations on permitted terms, delinquency charges, prepayment penalties, and refunds of unearned interest for such loans. (Wis. Stat. § 138.09[7]). Such licensed lenders must make certain disclosures to borrowers at time loan is made, including terms of note and its maturity, nature of security interest if any, names and addresses of borrowers and lenders, amount of interest, proceeds of loan after deducting such interest, description of payment schedule and default charge. (Wis. Stat. § 138.09[8]). Such licensed lender must provide receipts for all cash payments; permit payments of loan in whole or in part prior to its maturity; upon repayment of loan, mark every obligation, other than security interest, “paid” and cancel note; and take no note, promise to pay, security nor any other instrument in which blanks are left to be filled in except that detailed description of collateral may be filled in within ten days with written consent of borrower. (Wis. Stat. § 138.09[8]).

See topic Consumer Protection for limitations on interest rates in consumer credit transactions.

Retail installment sales of automobiles are not subject to maximum finance charge limits unless automobile is used primarily for business or commercial purposes. (Wis. Stat. § 218.0142[3]; and Wis. Stat. § 218.0142[11]).

Judgment bears interest at 12% per annum from date of entry until paid. (Wis. Stat. § 815.05[8]). Foreclosure judgments bear interest at mortgage note rate which was in effect immediately prior to default. (Wis. Stat. § 846.12).

Open Accounts.

Interest runs from date of demand. (178 Wis. 180, 188 N.W. 481).

Small Loans.

See subhead Maximum Rate, supra.

Usury.

Lender who intentionally violates restrictions on variable rate residential mortgage lending is liable to borrower for actual damages, including incidental and consequential damages, sustained by reason of violation, for all excess interest collected, and for interest at rate of 5% per annum on excess interest collected. (Wis. Stat. § 138.057). Violation of limitations imposed by §§ 138.05, 138.051, and 138.052 (unless due to unintentional mistake) may result in lender being liable to borrower for refund of all principal (up to maximum of $2,000), interest, and charges paid on loan by borrower. (Wis. Stat. § 138.06[3]). In addition, lender or agent of lender who violates those sections may be fined between $25 and $500, or imprisoned up to six months, or both. (Wis. Stat. § 138.06[2]). Actions by borrower to recover from lender under § 138.06 must be commenced within two years after payment of usurious interest or charges. (Wis. Stat. § 893.62). Violation of interest rate limitations on retail installment sales of automobiles bars seller (or any assignee of seller with knowledge of violation at time of assignment) from recovering any finance charge in suit upon sales contract. (Wis. Stat. § 218.0142[5]). Remedies and penalties for violation of interest rate limitations in consumer credit transactions are governed by c. 425. Any licensed lender or its officers or employees who violate limitations on discount or precomputed loans may be convicted of misdemeanor, punishable by fine of up to $500 or by imprisonment for up to six months, or both. (Wis. Stat. § 138.09[10]).

3.18 [RESERVED]

3.19 LICENSES, BUSINESS AND PROFESSIONAL:

Following persons must obtain licenses, permits, or certification or register with proper state authority before engaging in their respective business or professions: manufactured home manufacturers, dealers and salesmen (Wis. Stat. §§ 101.95; 101.951; 101.952); broker-dealers, agents, investment advisors and investment advisor representatives (Wis. Stat. § 551.31); mortgage bankers and mortgage brokers (Wis. Stat. § 224.72[lm]); operators of community care and service residential facilities, hospitals, rural medical centers and hospices (c. 50); hotels, persons operating, maintaining or managing hotels, restaurants and vending machines (Wis. Stat. § 254.64); peddlers (Wis. Stat. § 440.51); auctioneers (c. 480); cigarette and tobacco product retailers (Wis. Stat. § 134.65); malt beverage, cigarette and tobacco product manufacturers or distributors (Wis. Stat. §§ 139.05; 139.34; 139.79); recreational vehicle manufacturers, distributors, dealers and salesmen, sales finance companies, salvage dealers and auction dealers (c. 218); collection agencies (Wis. Stat. § 218.04[2]); nurses and nurse-midwives (c. 441; 441.06; 441.15); certified public accountants (c. 442); architects, landscape architects, engineers, designers and land surveyors (c. 443); chiropractors (c. 446); dentists (c. 447); medical doctors (c. 448); physician assistants and respiratory care practitioners (Wis. Stat. §§ 448.02; 448.03; 448.04; 448.05); occupational therapists and occupational therapy assistants (Wis. Stat. § 448.961); migrant labor contractors (Wis. Stat. § 103.91); optometrists (c. 449); pharmacists (c. 450); real estate brokers or salespersons (Wis. Stat. §§ 452.03; 452.12); veterinarians (c. 453); psychologists (c. 455); nursing home administrators (c. 456); social workers, marriage and family therapists and professional counselors (c. 457); hearing instrument specialists (including businesses engaged in selling and fitting of hearing aids) and speech-language pathologists and audiologists (c. 459); private detectives, investigators and security personnel (Wis. Stat. § 440.26); professional fund raisers (Wis. Stat. § 440.44); funeral directors (c. 445); teachers (Wis. Stat. § 115.28[7]); sellers of intoxicating beverages (c. 125); barbers, cosmetologists, aestheticians, electrologists and manicurists (c. 454); barbering or cosmetology, aesthetic, electrology or manicuring schools (Wis. Stat. § 440.62); home inspectors (Wis. Stat. § 440.972); among others.

Collection agencies must be licensed and file bond in form and amount acceptable to Division of Banking of Wisconsin Department of Financial Institutions. This does not apply to resident lawyers, banks or trust companies, express companies, Wisconsin savings and loan associations, insurance companies and their agents or real estate brokers and salesmen. (Wis. Stat. § 218.04).

See also topics 3.03 Brokers, 3.24 Securities; Insurance, topic Insurance Companies; Transportation, topic Motor Vehicles.

3.20 MONOPOLIES, RESTRAINT OF TRADE AND COMPETITION:

Contracts, combinations in nature of trust or conspiracies in restraint of trade or commerce, and monopolization, attempts to monopolize and combinations or conspiracies to monopolize are declared illegal; violation subjects to fine or civil forfeiture of not more than $100,000 if corporation, or $50,000 if any other person, or imprisonment of not more than six years, or both. (Wis. Stat. § 133.03). Only unreasonable restraints on trade are prohibited. (102 Wis. 2d 1, 298 N.W.2d 102). Any person injured by reason of anything prohibited by c. 133 may sue and recover treble damages and costs, including reasonable attorneys' fees; no damages or costs recoverable from local governmental unit or official or employee thereof who acted in official capacity. (Wis. Stat. § 133.18). Domestic or foreign corporations or limited liability companies entering into contract, combination or conspiracy are subject to revocation of charter or authority to transact business from Department of Financial Institutions. (Wis. Stat. § 133.12). In injunctive action brought by state department of justice, costs of investigation and amount necessary to remedy effects of violation may be recovered. (Wis. Stat. § 133.16).

Exception from c. 133 (trusts and monopolies) provided for certain cooperative agreements between health care providers. (Wis. Stat. § 150.84-.86). Health care providers which are parties to health care cooperative agreement may apply to department of health services for certificate of public advantage governing cooperative agreement and providing exemption from state antitrust law. (Wis. Stat. § 150.85).

Price discrimination between different purchasers of commodities of like grade and quality for purpose or intent to injure or destroy competition prohibited; violations subject to fine of up to $25,000 or imprisonment of one year or both. (Wis. Stat. § 133.04). Secret rebates, refunds, commissions or unearned discounts, or secret extension to certain purchasers of special services or privileges not extended to all purchasers purchasing upon like terms and conditions, are declared unfair trade practice if they tend to injure competitor or tend to destroy competition; violations subject to fines of up to $25,000 or one year imprisonment or both. (Wis. Stat. § 133.05). Contracts made while member of and growing out of or connected with illegal combination or conspiracy are void. (Wis. Stat. § 133.14).

Unfair Trade Practices.

Practice of selling certain items of merchandise below cost in order to attract patronage declared generally to be form of deceptive advertising and unfair competition; any sale of any such items of merchandise by retailer or wholesaler at less than cost with intent or effect of inducing purchase of other merchandise or unfairly diverting trade of competitor is declared unfair competition. Any retailer or wholesaler selling any such item at less than cost is subject to fine of not less than $50 nor more than $500 for first violation, and not less than $200 nor more than $2,500 for each subsequent violation. (Wis. Stat. § 100.30).

Fraudulent advertising is prohibited. (Wis. Stat. § 100.18). Civil action for damages together with costs for violation of statutory section and double damages for violation of injunction together with costs, including reasonable attorneys' fees. (Wis. Stat. § 100.18[11][b]2). Unfair methods of competition in business and unfair trade practices in business prohibited. (Wis. Stat. § 100.20[1]). Double damages for violation of any order issued under statutory section together with costs, including reasonable attorneys' fees. (Wis. Stat. § 100.20[5]). Many specific trade practice provisions in c. 100.

Resale Price Agreements.

Fair Trade Act has been repealed.

3.21–3.22 [RESERVED]

3.23 SALES:

Uniform Commercial Code has been adopted. (cc. 401-411). See topic 3.09 Commercial Code.

Produce dealer is deemed to have accepted produce as in accordance with contract unless he notifies seller within 24 hours after receiving notice of arrival. (Wis. Stat. § 100.01[3]).

"Closing out" or "Selling out" sales (Wis. Stat. §§ 100.18[3m], 100.20[1m]) subject to extensive regulation.

Contracts of Sale.

Type size not regulated other than under Consumer Act. See topic 3.10 Consumer

Protection.

Bills of Sale.

No statute as to form or execution. (See 889.23, Acknowledged Writings, Evidence.) (If recorded with Register of Deeds, see 59.43[2] and 59.43[2m] for filing fee and document size requirements.)

Product Liability.

Doctrine of strict liability adopted without requirement of privity of contract. (37 Wis 2d 443, 155 N.W. 2d 55).

Conditional Sales.

Uniform Commercial Code applies.

Retail Credit Sales.

See topics 3.10 Consumer Protection, 3.19 Interest.

Consumer Protection.

See topic 3.10 Consumer Protection.

Unfair Sales Act.

See topic 3.20 Monopolies, Restraint of Trade and Competition.

Resale Price Agreements.

See category 17 Intellectual Property, topic 17.01 Trademarks and Tradenames.

Bulk Sales.

Uniform Commercial Code applies. See topic 3.09 Commercial Code.

Sales of Motor Vehicles.

See category 23 Transportation, topic 23.01 Motor Vehicles.

Consumer Sales.

See topic 3.10 Consumer Protection.

International Sales of Goods.

United States is contracting state to United Nations Convention on the International Sale of Goods. Therefore, CISG applies as law of contract in contracts for sales of goods between parties whose places of business are in different contracting states. See Selected International Conventions in Law Digest.

3.24 SECURITIES:

Uniform Commercial Code adopted. (cc. 401-411). See topic 3.09 Commercial Code.

Uniform Securities Act of 2002, as amended, adopted, effective Jan. 1, 2009, as Wisconsin Uniform Securities Law. (c. 551). See Uniform and Model Acts section. Certain statutory sections are affected in practice by rules adopted or orders issued by division of securities. Space does not permit showing all variations. Act itself should be consulted. Substantial deviations from Uniform Act follow.

Supervision.

Administered by Department of Financial Institutions, 345 West Washington Avenue, 4th Floor, Madison, WI 53703.

Regulatory Powers of Supervising Authority.

Registration required for sale of securities unless security is federal covered security or otherwise exempted. (Wis. Stat. § 551.301). Registration by coordination under 551.303 or qualification under 551.304 according to 551.305. Registration effective for one-year period from date of effectiveness. (Wis. Stat. § 551.305[8]). Notice filings required for federal covered securities. (Wis. Stat. § 551.302).

Except for federal covered securities under § 18(b)(1) of Securities Act of 1933, administrator may issue stop orders for incomplete or incorrect registration statement (Wis. Stat. § 551.306[1][a]), violation of securities law (Wis. Stat. § 551.306[1][b]), and other failures (Wis. Stat. § 551.306[1] and Wis. Stat. § 551.302[4]).

Prerequisites to Sales or Offerings.

Registration, except for federal covered securities or exempt securities, required prior to sale or offer. (Wis. Stat. § 551.301). Registration by coordination requires prospectus, organizing documents, documents filed with Securities and Exchange Commission under Securities Act of 1933, and other records and documents. (Wis. Stat. § 551.303). Registration by qualification requires extensive information, including prospectus. (Wis. Stat. § 551.304). Registration must be accompanied by consent to service of process complying with § 551.611. (Wis. Stat. §§ 551.303[2] and § 551.304[2]).

Notice filing required for federal covered securities. (Wis. Stat. § 511.302). Must file copy of registration statement prior to offer, except for federal covered securities under § 18(b)(1) of Securities Act of 1933, which must be filed no later than 15 days after first sale. Notice fillings must be accompanied by fees listed in § 551.614. (Wis. Stat. §§ 511.302[1][a] and [3]).

Securities to Which Act Applicable.

Security means note; stock; treasury stock; security future; bond; debenture; evidence of indebtedness; limited partnership interest; viatical settlement investment or similar agreement; certificate of interest or participation in profit-sharing agreement; collateral trust certificate; preorganization certificate or subscription; transferable share; investment contract (including interest in limited liability partnership and in limited liability company in some circumstances); voting trust certificate; certificate of deposit for security; fractional undivided interest in oil, gas, or other mineral rights; put, call, straddle, option, or privilege on security, certificate of deposit, or group or index of securities, including interest therein or based on value thereof; put, call, straddle, option, or privilege entered into on national securities exchange relating to foreign currency; or, in general, interest or instrument commonly known as “security”; or certificate of interest or participation in, temporary or interim certificate for, receipt for, guarantee of, or warrant or right to subscribe to or purchase, any of foregoing. Includes investment in common enterprise, where profits derived through managerial efforts third party. Does not include interest in contributory or noncontributory pension or welfare plan subject to Employee Retirement Income Security Act of 1974; governmental benefit plan qualified for federal income tax purposes under Internal Revenue Code; trust or fund managed by investment board or insurance or endowment policy or annuity contract under which insurance company promises to pay fixed or variable sum of money either in lump sum or periodically for life or other specified period; time share under c. 707; and membership interest in domestic mutual holding company. (Wis. Stat. § 551.102[28]).

Exempt Securities.

Securities listed in § 551.201 exempt from requirements of §§ 551.301 to 551.306 and § 551.504. Provisions of § 551.201 similar to Uniform Act § 201, except §§ 551.201(1)(a) and (b) rules for revenue obligations payable from payments to be made in respect of property or money used under lease, sale, or loan arrangement by or for nongovernmental industrial or commercial enterprise.

Exempt Transactions.

Transactions listed in § 551.202 are exempt from registration requirements but not from requirements for certain filings. Although some exemptions provided in § 551.202 modify certain provisions of Uniform Act § 202, exemptions provided in §§ 551.202(1) to (5), (7) to (12), (16) to (23) are substantially same as those provided in Uniform Act § 202. § 551.202(6) exempts nonissuer transactions through broker-dealer effecting unsolicited order and provides that administrator may require broker-dealers to confirm order is unsolicited. § 551.202(13) modifies Uniform Act § 202(13) by exempting sale to accredited investors defined in Rule 501 (a) of Securities Act of 1933 if prior to sale, seller files consent to service of process, issuer has principal place of business in Wisconsin, or seller is broker-dealer registered in Wisconsin. Although numbering is different, § 551.202(14) (a) is substantively same as Uniform Act § 202(14). § 551.202(14)(b), not found in Uniform Act, allows administrator to withdraw or condition exemption by rule or order. § 551.202(15) modifies Uniform Act § 202(15) by requiring filing to terms and approval by administrator where exemption for sale to existing security holders of issuer is sought. § 551.202(24), not found in Uniform Act, exempts offers or sales by issuers having principal office in Wisconsin, if aggregate number of persons holding securities after sale does not exceed 25, if no commission paid other than to broker-dealer, and if no advertising is published without permission of division of securities. § 551.202(25), not in Uniform Act, exempts offer or sale of preorganization subscription if no remuneration paid, no advertising published without permission of division of securities, and subscription not binding until securities legally sold.

Registration of Securities.

Under c. 551, it is unlawful to offer or sell securities unless security is federal covered security, security, transaction or offer is exempted from registration, or security is registered. (Wis. Stat. § 551.301). Registration under c. 551 substantially same as registration in Uniform Act, except as described herein. § 551.302 (1)(a), not in Uniform Act, requires notice filing for federal covered security prior to offer including copy of registration statement filed with Securities and Exchange Commission, consent to service of process, and notice filing fee. § 551.302(1)(b) requires filing after offer of each amendment filed with Securities and Exchange Commission. § 551.302(1)(c) requires annual filing for unit trust or investment copies offering beyond one-year period. § 551.302(5) allows administrator to alter requirements Uniform Act § 305(f) allowing administrator to require payment into escrow and impoundment in certain circumstances not available in Wisconsin, although § 551.305(11) allows administrator to require by rule that securities issue under trust indenture. Uniform Act § 306(a)(7)(B) and (C), which allow denial for excessive compensation to underwriters or promoters or for offers made on terms that are unjust not included in c. 551. Uniform Act § 306(b) not adopted in Wisconsin, so administrator need not provide notice of conduct that violating § 551.306. § 551.306(4), describing summary process of denial or revocation of registration, provides hearing must be held within ten days.

Registration of Broker-Dealers, Agents, and Investment Advisors.

It is unlawful for person to transact business as broker-dealer, agent, or investment advisor in Wisconsin unless registered under § 551.406 or exempt from registration. Exemptions for broker-dealers listed in § 551.401(2) which is substantially same as Uniform Act § 401(b), except as discussed herein. § 551.401(2)(cm), Wisconsin specific, provides exemption for transactions with accredited investors defined in Rule 501 of Securities Act of 1933. § 551.401(2)(f), in Uniform Act § 401(B)(1)(F), exempts transactions with preexisting customers if: (i) Broker-dealer is registered or exempt from registration under Securities Exchange Act of 1934 and (ii) within 45 days of transaction, broker-dealer applies for registration and does not transact business for additional period of time. § 551.401(2)(f)(2) modifies latter requirement allowing that broker-dealer may effect unsolicited orders to liquidate open positions in existing customer accounts if no remuneration paid. C. 551 does not include Uniform Act § 401(b)(1)(G), exempting transactions with not more than three customers in Wisconsin in 12 months, and Uniform Act § 401(b)(2), exempting persons who deal solely in U.S. government securities.

Exemptions from registration for agents, found in § 551.402(2) follows Uniform Act § 402 except as described herein. § 551.402(2)(hm) exempts individual who represents broker-dealer and effects certain transactions in state for which broker-dealer is exempt from registration. § 551.402(6) allows dual representation for offers and sales of securities for more than one issuer that is limited partnership or investment company without obtaining separate registration for each if: (a) Limited partnerships have same general partner or investment companies have same investment adviser and (b) application to amend agent's registration to name each entity as agent's employer is approved before agent makes offer or sale in state for additional entity.

Exemptions from registration for investment advisers, found in § 551.403(2), follow Uniform Act § 403 except that § 551.403(2)(a)(2m), not in Uniform Act, exempts person whose only clients in Wisconsin are accredited investors defined in Rule 501 of the Securities Act of 1933. Exemptions from registration for investment adviser representatives, found in § 551.404(2), follow Uniform Act § 403 except that § 551.404(2)(am) exempts individual associated with investment adviser or federal covered investment adviser and whose clients in state are exclusively those listed in §§ 551.403(2)(a)(1) to (2m) and (4).

Registration for broker-dealers, agents, investment advisers, and investment adviser representatives governed by § 551.406, which requires filing uniform application, consent to service of process, fee specified in § 551.614, and social security number or employer identification number as specified in § 551.406(6). § 551.406(6), specific to Wisconsin, limits disclosure and use of social security number or employer identification number by administrator. Registration effective 30 days from filing or at earliest of: (1) Date administrator issues registration; (2) date approval transmitted through central registration depository of National Association of Securities Dealers, Inc.; or (3) Jan. 1 for renewal application filed during Dec. of preceding year.

It is unlawful for federal covered investment advisor to transact business in state unless individual files notice filing under § 551.405(3), or exempt under § 551.405(2). Exemptions and requirements follow Uniform Act § 405except that notice filing not required under § 551.405(2)(a)(2m) for accredited investors defined as listed in 17 CFR 230.501 (a) (1), (2), (3), (7), or (8) under Regulation D under Securities Act of 1933. § 551.405(4) modifies Uniform Act § 405(d) by providing that notice filings expire on Dec. 31 each year unless renewed.

§ 551.412, modeled after Uniform Act § 412, contains grounds for denial, revocation, etc. of registration. Disciplinary penalties are capped at $10,000 for single violation and $100,000 for more than one. (Wis. Stat. § 551.412[3]). § 551.412 contains all those grounds for disciple included in Uniform Act plus additional Wisconsin specific grounds, including disciplinary action of administrator, failure to comply with securities laws, failure to provide information requested, tax delinquency, failure to pay child support, and other violations of Wisconsin statutes (Wis. Stat. § 551.412).

Bonds.

Under § 551.411(5), modeled after Uniform Act § 411(e), administrator may require broker-dealers or investment advisors who have discretionary authority over funds to obtain insurance or post bond in amount proscribed by administrator.

Advertisements.

§ 551.613(5) governs whether offer made in Wisconsin and subject to requirements of c. 551. Advertisements made in bona fide newspaper or other publication of general circulation not published in Wisconsin and television and radio not originating in state are not offers in Wisconsin. Even if television or radio program originates in state, if created outside for general consumption, then not offer to sell in Wisconsin.

Liabilities.

§§ 551.508, 551.509, 551.603, and 551.604 list penalties for violating c. 511. § 551.508 governing criminal penalty substantially same as Uniform Act § 508. Person who willfully violates chapter guilty of Class H felony. Each act specified separate offense. § 551.509 governing civil penalty substantially same as Uniform Act § 509. § 551.603 governs civil enforcement by administrator substantially same Uniform Act 603. Court under § 551.603(2) may order civil penalty up to $5,000 for single violation and $250,000 for more than one. § 551.604 governing administrative enforcement by administrator substantially same as Uniform Act § 604. Civil penalty for administrative assessment up to $5,000 for single violation and $250,000 for multiple violations. If person does not comply after administrative enforcement, administrator may seek civil enforcement with additional civil penalty of not less than $5,000 or more than $100,000.

Tender Offers.

No person may make take-over offer unless offer is registered with division or is exempt from registration. (Wis. Stat. § 552.05). “Take-over offer” defined as offer to acquire or acquisition of any equity security of “target company” if thereafter offeror would be beneficial owner of more than 5% of any class of equity securities of issuer. (Wis. Stat. § 552.01[5]). “Target company” defined as issuer: (a) Organized or having principal office in Wisconsin; (b) having substantial assets in Wisconsin; (c) having equity securities (1) registered under § 12 of Securities Exchange Act of 1934 or Wisconsin securities laws or (2) exempt from registration under state laws because it is bank, savings and loan association, or credit union; and (d) which has (1) at least 100 record holders of such securities who are Wisconsin residents or (2) at least 5% of such securities held by Wisconsin residents. (Wis. Stat. § 552.01[6]). Definition of “target company” is further limited for purpose of take-over registration provisions to companies that, as of earlier of initial public disclosure of take-over offer or distribution of solicitation materials relating to offer, meet any of following: (a) Do not have any securities registered under § 12 of Securities Exchange Act of 1934; (b) have 51% of specified securities held by Wisconsin residents; or (c) have 33% of specified securities held by Wisconsin residents, have their principal office in state and have substantial economic effect on state. (Wis. Stat. § 552.05[7]). Take-over offer does not include: (a) Offers or acquisitions pursuant to broker’s transactions in ordinary course; (b) exchange offers that do not involve any public offering under Securities Act of 1933 and are exempt under c. 551; (c) offers made to less than ten persons in one year; (d) offers to all stockholders if number of stockholders does not exceed 100; (e) acquisitions constituting less than 2% of any class of equity securities in one year; or (f) offers by target company to acquire its own securities. (Wis. Stat. § 552.01[5]). Provisions of c. 552 do not apply to certain transactions subject to prior regulatory approval or involving class vote of target company stockholders. (Wis. Stat. § 552.23). Both civil liability and criminal penalties are imposed for nonregistration and fraudulent practices. (Wis. Stat. §§ 552.19; 552.21). Person who, after acquiring beneficial ownership of equity security of target company, is beneficial owner of more than 5% of class must, within ten days of such acquisition, file ownership information with division on Schedule 13D or prescribed state form and send signed copy by certified mail to target company at principal office not later than date of filing. (Wis. Stat. § 552.03). Filing fee of $100 per registration statement filed by offeror and $100 for request for hearing by target company. (Wis. Stat. § 552.15).

Wisconsin business corporation law (c. 180) contains provisions affecting ability to obtain control of or exert control over certain Wisconsin corporations. See category 2 Business Organizations, topic 2.03 Corporations, subheads Resident Domestic Corporations and Business Combinations.

Franchising.

No person may sell franchise in Wisconsin unless registered under c. 553 or exempted under §§ 553.23, 553.235, or 553.25. Excluded under § 553.22 if franchisee operating for two or more years and franchise does not account for more than 20% of gross revenue of franchisee, if it is association of producers of agricultural products authorized by 7 USC 29, or if it is cooperative. § 553.23 exempts private franchisee and subfranchisor sales, § 553.235 exempts “franchisee exempt transactions” where immediate cash payment required by franchisee upon purchase of franchise is at least $100,000 and does not exceed 20% of franchisee’s net worth, and franchisor reasonably believes franchisee has sufficient knowledge to evaluate merits of franchise investment. This exemption not permitted for motor vehicle dealer or motor vehicle distributor or wholesaler. (§ 553.235[2][a]).

Registration by notification to division accompanied by copy of offering circular required under § 553.27(4), consent to service of process required by § 553.27 (10) if not already on file, and registration fee required under § 553.72 (1). C. 553 also provides for enforcement (Wis. Stat. §§ 553.51 to 553.605) and administration (§§ 553.71 to 553.78).

Uniform Simplification of Fiduciary Security Transfers Act daopted.

Uniform Simplification of Fiduciary Security Transfers Act not adopted. See c. 408, “Uniform Commercial Code—Investment Securities”.

Uniform Securities Ownership by Minors Act adopted in slightly modified form (Wis. Stat. § 54.92); and similar provisions covering incompetents and spendthrifts (Wis. Stat. § 54.93).

3.25 STATUTE OF FRAUDS:

See topic 3.16 Frauds, Statute of.

3.26 [RESERVED]

3.27 WAREHOUSEMEN:

Licenses and Bonds.

Every warehouse keeper must secure license from Department of Agriculture, Trade and Consumer Protection (excluding municipal corporations, certain co-operatives storing products and merchandise for their members, those storing only grain defined in § 126.01[13], manufacturers of dairy products, and common carriers who transport and store property for not more than 30 days), agricultural societies, associations or boards that conduct county or district fair and receive aid under § 93.23, and certain persons storing property received under writ of restitution under § 799.44(42). (Wis. Stat. § 99.02). Security for each warehouse keeper must be filed with Department of Agriculture, Trade and Consumer Protection in form of: (1) Commercial surety bond; (2) original or certified copy of legal liability insurance policy; (3) personal bond; (4) third party guarantee; or (5) if warehouse keeper exclusively engaged in storing wearing apparel, original or certified copy of bailee’s customers’ insurance policy, must be filed with department of agriculture, trade and consumer protection. (Wis. Stat. §§ 99.02, 99.03). Party holding license under federal bonded warehouse act may be exempted from licensing and security requirements. (Wis. Stat. § 99.02). Grain warehouse keeper (person who operates grain warehouses in Wisconsin to receive, store, condition, or ship more than 50,000 bushels of grain for others, but excluding licensees under United States Warehouse Act), with certain exceptions, must obtain license from Department of Agriculture, Trade and Consumer Protection. (Wis. Stat. §§ 126.25, 126.26).

Warehouse storing and warehousing alcoholic beverages or tobacco products must have permit issued by Department of Revenue.

Uniform Commercial Code has been adopted. See topic 3.09 Commercial Code.

Occupation Tax.

Every operator of grain elevators or warehouses in Wisconsin, except elevators and warehouses on farms for storage of grain raised by owner thereof, shall pay on or before Jan. 31, annual occupation tax of sum equal to one-half of one mill per bushel on all wheat and flax and one-fourth of one mill per bushel on all other grain received in or handled by such elevator or warehouse during year ending on Dec. 31, which is two years prior to payment due date, and such grain shall be exempt from all state and local taxation. (Wis. Stat. § 70.41).

4 CITIZENSHIP

4.01 ALIENS:

Property.

May acquire, transfer, and inherit property like citizens (Wis. Stat. § 710.01), except that aliens not residents of state of U.S., corporations created out of U.S. or corporations or other associations in which over 20% of stock is owned by any person who is such nonresident alien or trusts having more than 20% of value of their assets held for benefit of such nonresident aliens or corporations, cannot acquire more than 640 acres of Wisconsin land, except by devise, inheritance, collection of debts or interest used to secure repayment of debt incurred in good faith. (Wis. Stat. § 710.02). Subject to certain restrictions, prohibitions do not apply to railroad or pipeline corporations, rights secured by treaty, exploration mining leases and land used for mining, certain manufacturing activities, certain mercantile activities, and leases for exploration or production of oil, gas, etc. Reporting required to secretary of agriculture, trade and consumer protection. (Wis. Stat. § 710.02). Land acquired or held after July 1, 1982, in violation of these statutes may be subject to forfeiture or divestiture. (Wis. Stat. § 710.02).

5 CIVIL ACTIONS AND PROCEDURE

5.01 ACCORD AND SATISFACTION:

Uniform Commercial Code adopted.

No statutory provisions. Common law rules apply. (See 186 Wis. 358, 202 N.W. 795; 106 Wis. 595, 82 N.W. 555; 92 Wis. 286, 66 N.W. 606; 116 Wis. 2d 95, 341 N.W.2d 655; 136 Wis. 2d 434, 402 N.W.2d 361).

Pleading.

Accord and satisfaction (Wis. Stat. § 802.02[3]) or compromise (97 Wis. 53, 72 N.W. 222) must be pleaded specifically.

See category 3 Business Regulation and Commerce, topic 3.09 Commercial Code.

Compromise.

No statutory provision.

5.02 ACTIONS:

New rules of civil procedure adopted effective July 1, 1983, amended in part, effective July 1, 1991, Aug. 1, 1995, and Aug. 1, 1997. (cc. 801-807).

Equity.

No distinction observed. Legal and equitable causes of action may be joined. (Wis. Stat. § 803.02[1]). Suit in equity available in transactions in which interest in land is affected. (Wis. Stat. § 706.04).

Forms of Action.

Distinctions between actions at law and suits in equity abolished. Proceedings in courts are divided into actions and special proceedings. “Action” includes “special proceeding” unless specific provision of procedure in special proceedings exists. (Wis. Stat. § 801.01).

Conditions Precedent.

Notice of Claim Against State or Governmental Subdivision. To maintain action against political corporation, government subdivision, or officer or employee thereof acting in official capacity (Wis. Stat. § 893.80), or against state or state officer, employee, or agent (Wis. Stat. § 893.82), written notice of circumstances of injury or damage must be presented to appropriate body within 120 days of events giving rise to claim.

Commencement.

See topic 5.20 Process; also topic 5.17 Pleading.

Parties.

No action may be dismissed on ground that it is not prosecuted in name of real party in interest until reasonable time has been allowed after objection for ratification of commencement of action by, or joinder or substitution of, real party in interest. (Wis. Stat. § 803.01[1]). Personal representative, guardian, bailee, or trustee of express trust, party with whom or in whose name contract has been made for benefit of another, or party authorized by statute may sue in own name without joining person for whose benefit action is brought. (Wis. Stat. § 803.01[2]). Partner asserting partnership claim may sue in own name without joining other members of partnership but must indicate in pleading that claim asserted belongs to partnership. (Wis. Stat. § 803.01[2]). Infant or incompetent must appear by attorney, by guardian of estate of party who may appear by attorney, or by guardian ad litem who may appear by attorney. (Wis. Stat. § 803.01[3]). Person subject to process shall be joined as party in action if: (1) In person’s absence complete relief cannot be accorded among those already parties, or (2) person claims interest relating to subject of action and his or her absence would impair his or her ability to protect that interest or leave other parties subject to substantial risk of incurring multiple obligations by reason of his or her claimed interest. (Wis. Stat. § 803.03[1]). Persons may join as parties if asserted right to relief arises out of same transaction, occurrence, or series thereof and if common question of law or fact arises. (Wis. Stat. § 803.04[1]). Special provisions for actions affecting marital property. (Wis. Stat. § 803.04[3]).

Class Actions.

When question before court is one of common or general interest of many persons or when parties are very numerous and it is impracticable to bring them before court, one or more can sue or defend for benefit of whole. (Wis. Stat. § 803.08). Special provision for class actions in consumer matters. (Wis. Stat. § 426.110).

Intervention.

Permissive intervention of interested person. (Wis. Stat. § 803.09[2]). Unless person adequately represented by existing parties, intervention of right for person claiming interest in subject of action if disposition of action would impair or impede ability to protect his interest. (Wis. Stat. § 803.09[1]).

Interpleader.

Persons having claims against plaintiff may be joined as defendants when their claims are such that plaintiff is or may be exposed to double or multiple liability. (Wis. Stat. § 803.07).

Third Party Practice.

Liberal joinder of parties permitted. (Wis. Stat. § 803.05).

Joinder of Causes of Action.

Claim joinder is unlimited. (Wis. Stat. § 803.02). See also subhead Parties, supra.

Splitting Causes of Action.

Prohibited. (122 Wis. 2d 673, 364 N.W. 2d 164).

Consolidation.

Statute based on Rule 42(a) of Federal Rules of Civil Procedure. (Wis. Stat. § 805.05[1]). Actions which might have been brought as single action under permissive joinder section (Wis. Stat. § 803.04) may be consolidated (Wis. Stat. § 805.05[1]).

Severance of Actions.

Statute based on Rule 42(b) of Federal Rules of Civil Procedure, except bifurcation of issues not permitted. (Wis. Stat. § 805.05[2]).

Stay of Proceedings.

Permitted in discretion of court. No stay for more than 20 days except after notice to adverse party. (Wis. Stat. § 807.02).

Abatement.

Statute based on Rule 25 of Federal Rules of Civil Procedure. (Wis. Stat. § 803.10). Action does not abate by occurrence of any event if it survives or continues. (Wis. Stat. § 895.01[2]).

Causes of action which survive, in addition to those which survive at common law are actions for: paternity; recovery of personal property or for unlawful withholding or conversion thereof; recovery of possession of real estate or unlawful withholding of possession thereof; assault and battery, false imprisonment, invasion of privacy, interception and disclosure of wire, electronic or oral communications, or other damage to the person; damage to property rights or interests; goods taken and carried away; damages to real or personal estate; and equitable actions to set aside conveyances or to compel reconveyances of real estate, or to quiet title thereto, or for specific performance of contracts relating to real estate. Cause of action for wrongful death survives death of wrongdoer, whether this occurred before or after death of injured person. (Wis. Stat. § 895.01).

Revival.

Statute based on Rule 25 of Federal Rules of Civil Procedure. (Wis. Stat. § 803.10).

Settlement of Actions.

No settlement of any action for personal injury or death which was commenced to recover damages in which attorney has appeared for party claiming right of action may be settled without written consent of attorney or order of court. (Wis. Stat. § 757.38).

Limitation of.

See topic 5.16 Limitation of Actions.

Small Claims.

See category 6 Courts and Legislature, topic 6.01 Courts.

Prohibited Actions.

Breach of contract to marry, alienation of affections and criminal conversation. (Wis. Stat. §§ 768.01; 768.03).

Administration.

See category 13 Estates and Trusts, topic 13.09 Executors and Administrators.

Direct Actions Against Insurer.

See category 23 Transportation, topic 23.01 Motor Vehicles, subhead Direct Actions.

Rules of evidence codified in cc. 901-911. Commentaries in Supreme Court order, 59 Wis. 2d R1-R377.

5.03 APPEAL AND ERROR:

Two appellate courts are supreme court and court of appeals.

Appeals to Supreme Court.

Decisions of court of appeals are reviewable by petition for review granted by supreme court. (Wis. Stat. § 808.10). Supreme court may also take jurisdiction of appeal pending in court of appeals on its own motion or by granting direct review upon either petition to bypass filed by party or certification from court of appeals prior to court of appeals hearing matter. (Wis. Stat. § 808.05).

Appeals to Court of Appeals.

Final judgment or final order of circuit court is appealable to court of appeals as matter of right unless otherwise expressly provided by law. (Wis. Stat. § 808.03[1]). Judgment or order not appealable as matter of right may be appealed to court of appeals upon leave granted if appeal will: (1) Materially advance termination of litigation or clarify further proceedings; (2) protect petitioner from substantial or irreparable injury; or (3) clarify issue of general importance in administration of justice. (Wis. Stat. § 808.03[2]).

Appeal from Municipal Court.

Appeals from judgments of municipal courts are made to circuit court by giving municipal judge and other party written notice of appeal within 20 days after judgment. If defendant appeals, defendant must execute bond, approved by municipal judge, that if judgment affirmed defendant will pay judgment and all costs; execution of judgment must then be stayed. Appeal must be tried on review of transcript and tape of proceeding, unless court or party requests new trial. New trial is without jury unless either party requests jury trial within ten days after order for new trial. (Wis. Stat. § 800.14).

Time for Appeal.

Petition for review to supreme court must be filed within 30 days of date of decision of court of appeals. (Wis. Stat. § 808.10). Generally, appeal to court of appeals must be initiated within 45 days of entry of final judgment or order if written notice of entry is given within 21 days of final judgment or within 90 days of entry of final judgment or order if notice is not given. Time limits for seeking review of nonfinal judgment or order are established in § 809.50. (Wis. Stat. § 808.04[1]). If party dies during appeal period, appeal must be initiated during later of appeal period or 120 days after death. (Wis. Stat. § 808.04[6]). Appeal by party other than state from judgment or order granting adoption must be initiated by filing notice within 40 days after entry of judgment or order. (Wis. Stat. § 808.04[7]). Appeal from judgment or order terminating or denying termination of parental rights must be initiated by filing notice within 30 days of entry of judgment or order. (Wis. Stat. § 808.04[7m]). Times may not be enlarged unless judgment or order was entered as result of petition under § 48.415 filed by representative of public under § 48.09. (Wis. Stat. §§ 808.04[7]; 808.04[7m]). Appeal of eviction action shall be initiated within 15 days of entry of judgment or order. (Wis. Stat. § 799.445).

Appeal from agency or commission must be taken to circuit court within 30 days after service of decision, service of order concerning rehearing, or disposition by operation of law of application for rehearing. (Wis. Stat. § 227.53[1]). Appeal from circuit court review of administrative agency must be taken within time specified in § 808.04(1). (Wis. Stat. § 227.58). Appeal from state court decision to enforce suit or order when challenged in federal court shall be initiated within 15 days after entry of judgment or order appealed from § 227.60. (Wis. Stat. § 808.04[2]). Appeal by record subject under § 19.356 shall be initiated within 20 days after date of entry of judgment or order appealed from. (Wis. Stat. § 808.04[1]).

Appeal Bond.

Undertaking for costs is not required unless specifically required by statute or by trial court. (Wis. Stat. § 808.07[3]).

Stay of Proceedings.

Appeal does not stay execution or enforcement of judgment or order unless trial or appellate court so orders. Trial or appellate court may suspend, modify, restore or grant injunction, and make any order appropriate to preserve status quo or effectiveness of judgment subsequently to be entered. Court shall set amount of undertaking to be furnished by appellant no more than $100,000,000. (Wis. Stat. §§ 808.07[1], [2], [2m], [3]). Provisions exist for relieving party from judgment order, or stipulation. (Wis. Stat. § 808.07). Certain court actions are permitted pending appeal. (Wis. Stat. § 808.075).

Extent of Review.

Appellate court reviews questions of fact as well as questions of law but without retrial.

Character of Hearing.

Hearing is a review.

Judgment or Order on Appeal.

Appellate court may affirm, reverse or modify any judgment or order appealed from, or part thereof appealed from, or order a new trial. (Wis. Stat. § 808.09).

5.04 BONDS:

Sureties.

When bonds or undertakings in excess of $1,000 are required in civil cases and real property is offered as security, individual sureties must attach sworn statement indicating Wisconsin residency, that sureties' equity in realty (not homestead) is equal to double amount of bond and certain other information. (Wis. Stat. § 895.345). Inapplicable to bonds of personal representatives. Any requirement for surety bond, undertaking or similar obligation may be met by insurer authorized to do surety business. (Wis. Stat. § 632.17[2]). In any action or special proceeding, any party entitled to recover disbursements therein may take and recover actual sum paid surety company for executing bond (Wis. Stat. § 814.05), but in case of fiduciary bond, lesser of 2% per year on amount secured or actual amount paid. (Wis. Stat. § 814.14).

Limitation of Liability of Sureties.

Sureties on bonds may limit the amount of liability by a recital in the body of the bond, or in the justification of the surety thereto, and on an action brought upon such bond, no judgment may be recovered against such surety larger than the amount of liability stated together with pro rata share of costs of said action, and in such action surety may deposit in court amount of liability, whereupon surety shall be duly discharged and released from any further liability under bond. (Wis. Stat. § 895.33).

Trust company bank appointed by court need not furnish bond as fiduciary, unless so required in discretion of court. (Wis. Stat. § 223.03[6]).

5.05 CERTIORARI:

Supreme Court, appeals court and circuit court can issue all writs necessary in aid of their jurisdiction. (Const., Art. VII, §§ 3, 5 & 8). In accordance with supreme court rules and internal procedures, one or more justices can issue any writ necessary to enforce administration of justice. (Wis. Stat. § 751.07). Common-law writ reaches only jurisdictional matters. (228 Wis. 34, 279 N.W. 659).

5.06 CHARITABLE IMMUNITY:

See topic 5.09 Damages.

5.07 [RESERVED]

5.08 COSTS:

In equitable actions and special proceedings costs are allowed to prevailing party in discretion of court, not exceeding $100 exclusive of disbursements (Wis. Stat. § 814.01-.02), and in any other action are allowed as matter of course upon recovery (Wis. Stat. § 814.01, .03). Trial court has discretion to award costs on motion not to exceed $300. (Wis. Stat. § 814.07). Items of costs, fees and disbursements are set forth at § 814.04. Reasonable attorney fees and other expenses incurred as result of frivolous pleadings or motions may be assessed against attorneys, law firms or parties. (Wis. Stat. § 802.05). In actions involving consumer transactions, if customer is successful, he shall recover reasonable costs, expenses and attorney fees. (Wis. Stat. § 425.308). On dismissal for lack of jurisdiction over person, defendant may recover reasonable costs, disbursements and expenses not to exceed $500. (Wis. Stat. § 814.49[1]).

Security for Costs.

Where it appears reasonable and proper to the court, plaintiff may be required to give security for costs. (Wis. Stat. § 814.27). Nonresident plaintiff, foreign corporation, nonresident personal representatives, guardians, trustees, receivers, or trustee or assignee of any debtor, or plaintiff imprisoned for term less than life, or plaintiff who takes issue upon answer of garnishee, can be required to file security for costs in sum not less than $250, in cash or undertaking of surety, within 20 days after service of order requiring same, and all proceedings on part of such plaintiffs are stayed until such security is filed. (Wis. Stat. § 814.28). If surety subsequently removes from Wisconsin or security given be deemed insufficient, court may require new undertaking effective from commencement of action. (Wis. Stat. § 814.33).

Liability of Attorney.

Where defendant is entitled to require security for costs, attorney for plaintiff is liable for costs up to $100 until security is given, whether or not defendant has required security. (Wis. Stat. § 814.34).

5.09 DAMAGES:

Common law generally prevails as to compensatory damages. Punitive damages may be imposed in case of malice or intentional disregard for plaintiff's rights (Wis. Stat. § 895.043), including products liability actions (97 Wis. 2d 260, 294 N.W.2d 437). Public policy does not preclude insurance coverage for punitive damages. Negligent conduct does not preclude punitive damages if plaintiff proves requisite outrageous conduct by clear and convincing evidence. (124 Wis. 2d 426, 369 N.W.2d 677). If plaintiff establishes prima facie case for punitive damages, evidence of defendant's wealth can be introduced. (Wis. Stat. § 895.043). However, punitive damages not available where there has been no award of actual damages. (142 Wis. 2d 425, 418 N.W.2d 818). Joint and several liability does not apply to punitive damages. (Wis. Stat. § 895.043). Contribution between joint tortfeasors sustaining common liability by reason of casual negligence determined in proportion to percentage of causal negligence and doctrine of gross negligence abolished. (16 Wis. 2d 1, 114 N.W.2d 105, overruled in part, 97 Wis. 2d 260, 294 N.W.2d 437 [affirming that concept of gross negligence is abolished but holding that punitive damages may be awarded in appropriate negligence cases]).

Charitable Immunity.

Doctrine of charitable immunity abrogated. (12 Wis. 2d 367, 107 N.W.2d 292).

Sovereign Immunity.

State retains sovereign immunity except as legislature directs by law. (Art. IV, § 27). Upon refusal of legislature to allow claim, claimant may commence action upon filing bond with sureties to indemnify state against costs of action (Wis. Stat. § 775.01), although bond requirements may be waived upon filing affidavit of indigency (101 Wis. 2d 566, 305 N.W.2d 133; 814.29). No execution may issue against state, but department of administration audits damages and costs awarded against state and pays them from treasury. (Wis. Stat. § 775.04). State may be defendant in actions to declare interests in real property. (Wis. Stat. § 775.10). Claims against governmental bodies, officers, employees, etc., governed by certain conditions precedent and limitations. (Wis. Stat. §§ 893.80; 893.82; 895.46). Municipalities may be found liable for injuries caused by negligent operation of motor vehicles subject to certain conditions precedent and limitations. (Wis. Stat. § 345.05). In any claim against governmental body or officer, employee, etc., written notice of claim must be served on governmental body and employee within 120 days after event which gives rise to claim. (Wis. Stat. § 893.80).

Comparative Negligence Rule.

Contributory negligence a complete bar when plaintiff more negligent than defendant; damages proportionately reduced if person partially negligent. (Wis. Stat. § 895.045). Plaintiff's negligence measured separately against each defendant's negligence; liability of defendant whose percentage of causal negligence less than 51% limited to causal negligence attributed to that defendant; defendant whose percentage of causal negligence is 51% or more jointly and severally liable. (Wis. Stat. § 895.045). Uniform Comparative Fault Act not adopted.

No-Fault Insurance.—

See category 23 Transportation, topic 23.01 Motor Vehicles, subhead No-Fault Insurance.

Uniform Contribution Among Tortfeasors Act not adopted.

Model Joint Obligations Act in effect under title Uniform Joint Obligations Act. (c. 113).

See also topic 5.02 Actions, subhead Conditions Precedent; category 13 Estates and Trusts, topic 13.05 Death, subhead Actions for Wrongful Death.

5.10 [RESERVED]

5.11 DEPOSITIONS AND DISCOVERY:

Parties to civil actions may obtain discovery by one or more of following methods: Depositions, interrogatories, production of documents or things, permission to enter on land or other property for inspection, physical and mental examinations and requests for admissions. Discovery may be had of any unprivileged matter if relevant to subject matter involved in action. (Wis. Stat. § 804.01[2]). Discovery provisions (c. 804) are generally based on discovery rules in Federal Rules of Civil Procedure.

Within State for Use Within State.

After commencement of action, party may take testimony of any person by deposition upon either oral examination or written questions. (Wis. Stat. §§ 804.05[1]; 804.06[1]). Deposition testimony shall be taken stenographically or by videotape. (Wis. Stat. § 804.05[4]). Upon notice by any party, deponent, reporter, or any other person participating may do so by telephone. (Wis. Stat. § 804.05[8]). Court may order that testimony at deposition be recorded other than by stenographic or videotape means. (Wis. Stat. § 804.05[2]). Any party or proposed deponent may move court for entry of protective order. (Wis. Stat. §§ 804.01[3]; 804.05[5]). Deponent may request that deposition be submitted to him for reading. (Wis. Stat. § 804.05[6]).

Use of Depositions.

Provided party against whom deposition is used was present, represented at or given due notice of taking of deposition, and so far as admissible under rules of evidence, depositions may be used as follows: depositions may be used by any party for impeaching testimony of deponent as witness; deposition of party or designee of corporation, unincorporated association or governmental agency which is party may be used by adverse party for any purpose; court may allow use of deposition of witness other than medical expert for any purpose if court finds witness is dead, is more than 30 miles from place of trial or hearing, is out of state, is unable to attend or testify because of age, illness, infirmity, or imprisonment, cannot be produced by subpoena by party offering deposition, or upon other exceptional circumstances. Deposition of medical expert can be used without limitations as to age, residence, etc. If part of deposition is offered in evidence by party, adverse party may require introduction of other parts if fairness requires, and any party may introduce any other parts. (Wis. Stat. § 804.07[1]).

Within State for Use Elsewhere.

Witness may be subpoenaed and compelled to give deposition in state for use in action pending outside state on reciprocity basis. (Wis. Stat. § 887.24).

Outside of State for Use Within State.

See subheads Before Whom Taken and Commissions, infra.

Perpetuating Testimony.

Depositions to perpetuate testimony of witnesses within or without the state may be taken on application to a court of record. (Wis. Stat. § 804.02).

Before Whom Taken.

Depositions in U.S. may be taken before officer authorized to administer oaths by laws of U.S. or this state or place where examination is held, or before person appointed by court in which action is pending. Depositions in foreign countries may be taken: (1) On notice before person authorized to administer oaths in place in which examination is held; (2) before person commissioned by court; (3) pursuant to letter rogatory. Deposition cannot be taken before party to action, relative or employee or attorney or counsel of a party, relative or employee of such attorney or counsel, or financially interested person. Deposition cannot be taken before person who has entered into contract for court reporting services unless contract is limited to particular action. (Wis. Stat. § 804.03).

Commissions may issue from a court of record for taking deposition of any witness without the state when: court deems cause sufficient; or when required for use on any hearing. Commission must be signed and sealed by clerk. (Wis. Stat. § 887.26).

Compelling Attendance of Witnesses.

Nonparty deponent served by subpoena within state and party served with notice may be compelled to give deposition within 100 miles of residence, place of employment, or where nonparty deponent or party transacts business or at any other place fixed by court order. Plaintiff may also be compelled to give deposition in county of state where action is commenced or is pending. Nonresident defendant may be compelled by subpoena to give deposition at any place within 100 miles from place where he is personally served. (Wis. Stat. § 804.05[3]). Witness fees: $5 per day before municipal judge, arbitrator, or any officer, board or committee, $16 per day before circuit court, court of appeals or supreme court and 20¢ per mile travel expense. (Wis. Stat. § 814.67).

Examination of Witnesses.

Examination and cross-examination of deponents proceeds as permitted at trial. (Wis. Stat. § 804.05[4]). However, it is not grounds for objection that testimony will be inadmissible at trial if testimony appears reasonably calculated to lead to discovery of admissible evidence. (Wis. Stat. § 804.01[2]).

Errors in notice for taking of deposition are waived unless written objection promptly served upon party giving notice. Objection to taking of deposition because of disqualification of officer before whom it is to be taken is waived unless made before taking of deposition begins or as soon thereafter as disqualification becomes known or could be discovered through reasonable diligence. (Wis. Stat. § 804.07[3]). Objections to competency of witness or to competency, relevancy or materiality of testimony are not waived by failure to make them before or during taking of deposition, unless ground of objection might have been obviated or removed if presented at that time. Errors or irregularities occurring in manner of taking deposition, in form of questions or answers, in oath or affirmation, or in conduct of parties and errors of any kind which might be cured if promptly presented are waived unless seasonable objection is made during taking of deposition. Errors and irregularities as to completion and return of deposition are waived unless motion to suppress is made with reasonable promptness. (Wis. Stat. § 804.07[3]).

Return.

Person recording testimony must certify on deposition that witness was duly sworn by him and that deposition is true record of testimony given by deponent, must then securely seal deposition in envelope endorsed with title of action and marked "Deposition of (here insert name of deponent)" and must promptly serve it upon attorney requesting deposition or send it by registered or certified mail to attorney requesting deposition and give notice of service to all parties and court. (Wis. Stat. § 804.05[7]).

Production of Documents and Things.

Any party may serve on any other party request to produce any designated documents for inspection and copying or to inspect any tangible things or to enter land or other property for inspection, provided matter sought to be inspected is within scope of § 804.01(2). Party upon whom request is served must respond within 30 days of service. (Wis. Stat. § 804.09).

Interrogatories.

Any party can serve on any other party written interrogatories, which, unless objected to, must be answered fully under oath within 30 days. Interrogatories may relate to any matter within scope of § 804.01(2). When answer to interrogatory can be ascertained from business records and burden of ascertaining answer is same for either party, it is sufficient to specify appropriate records and provide opportunity for inspection and copying. (Wis. Stat. § 804.08).

Physical and Mental Examination.

Upon motion by party court can order party whose physical or mental condition or ability to work is at issue to undergo physical or mental examination. (Wis. Stat. § 804.10[1]). In personal injury actions, court shall also order claimant to permit any party to inspect X-rays taken in course of treatment or diagnosis and any hospital, medical or other records of claimant within scope of § 804.01(2). (Wis. Stat. § 804.10[2]). Evidence obtained pursuant to § 804.10 is only admissible if copies of reports of examination are provided to other party within ten days of receipt. (Wis. Stat. § 804.10[3]).

Admissions.

Party may serve on any other party written request for admission of truth of any discoverable matter. Matter is admitted unless answer or objection is served within 30 days of service of request. Matter admitted is conclusively established unless court permits withdrawal or amendment. (Wis. Stat. § 804.11). If party fails to admit matter which is subsequently established, requesting party may recover reasonable cost of establishing matter, including attorneys' fees. (Wis. Stat. § 804.12[3]).

Discovery Sanctions.

Variety of sanctions, including order compelling discovery, order deeming certain factual matters established, striking claim for defenses, dismissal of action, and default judgment, are available under certain conditions for failure to comply with discovery rule. (Wis. Stat. § 804.12).

5.12 [RESERVED]

5.13 EVIDENCE:

Witnesses.

Every person is competent to be witness except as otherwise provided. (Wis. Stat. § 906.01). No person may testify, nor may any person from whom a party derives his interest or title testify, with respect to any transaction or communication with deceased or insane person unless matter has been brought out by adverse party. Similar testimony of conversations or transactions with agent, when such agent is deceased, mentally ill or adjudicated incompetent as witness is prohibited. (Wis. Stat. § 885.16-17).

A convicted person is a competent witness but the conviction may be proved to affect his credibility. (Wis. Stat. § 906.09).

See also topic 5.10 Depositions and Discovery.

Privileged Communications.

Privilege exists for confidential communications to clergyman acting as spiritual advisor with exceptions. (Wis. Stat. § 905.06). Privileges also exist as to political vote, trade secrets, law enforcement records, identity of informers, and federal tax return information (Wis. Stat. §§ 905.07-.10, .15), and following:

Client may refuse to disclose and prevent others from disclosing confidential communications made for purpose of rendition of legal services to client: (1) Between client or representative, and lawyer or representative, or (2) between lawyer and lawyer's representative or, (3) by client or lawyer to lawyer representing another with common interest, or (4) between representatives of client, or (5) between lawyers representing client. Exceptions exist for communications: (1) In furtherance of crime, or (2) between claimants through same deceased client, or (3) as to issue of breach of duty by lawyer, or (4) relevant to document attested by lawyer, or (5) certain communications between joint clients. (Wis. Stat. § 905.03). Patient may refuse to disclose and prevent others from disclosing communications made to his or her physician, chiropractor, psychologist, registered nurse, social worker, marriage and family therapist, professional counselor, or persons, including family members, participating in diagnosis or treatment under direction of his or her physician, chiropractor, psychologist, registered nurse, social worker, marriage and family therapist, or professional counselor. (Wis. Stat. § 905.04[2]). Exceptions exist for communications: (1) In proceedings for hospitalization due to mental illness, or proceeding for guardianship or protective services or placement, or (2) if judge orders examination, or (3) communications relevant to condition of patient in proceeding in which he relies upon condition as element of claim or defense, or (4) in homicide trials, or (5) in cases involving abused or neglected child, or (6) concerning testimony about medical circumstances of pregnancy or condition and characteristics of child in proceeding to determine paternity of child, or (7) concerning tests for intoxication, or (8) concerning wound and burn injuries, or (9) concerning information given to court in juvenile matters or (10) concerning control, care or treatment of sexually violent person. (Wis. Stat. § 905.04[4]).

Husband and Wife.

Person has privilege to prevent spouse from testifying against him as to private communications by one to other made during marriage except: (1) If both spouses or former spouses are parties to action, or (2) in proceedings in which one spouse is charged with crime against person or property of other or of child of either or with crime against person or property of third person committed in course of crime against other, or (3) if spouse is charged with pandering or prostitution, or (4) if communication relates to matters within scope of agency of one spouse for other. (Wis. Stat. § 905.05).

Communications or Transactions with Persons Since Deceased or Incompetent.

Claimant is not competent as witness in respect to any transaction or communication by him personally with person, since deceased or insane, unless opposite party shall first be examined or some other witness in his behalf, concerning claim, or unless testimony of deceased person given in his lifetime, respecting claim, be first put in evidence by opposite party. (Wis. Stat. § 885.16).

Self-incrimination.

A witness cannot be forced to testify when his answer would tend to incriminate him (Const., Art. I. § 8), except where immunity is granted. There are immunity provisions regarding passes, franks, and privileges (XIII, § 11), unfair labor practice hearings (Wis. Stat. § 111.07), agent bribery (Wis. Stat. § 885.15), public monies (Wis. Stat. § 885.24), corporation agents (Wis. Stat. § 885.25), and limited liability company agents (Wis. Stat. § 885.25).

No corporation or limited liability company may be excused from producing books, papers, tariffs, contracts, records, etc., in its possession or under its control in obedience to subpoena in action by state against it to recover license fees, taxes, penalties or forfeitures, on ground that testimony or evidence may subject it to penalty or forfeiture, and no officer, clerk, agent, employee or servant of any corporation or limited liability company in any such action may be excused from testifying or from producing such books, etc., in his possession or under his control in obedience to subpoena, on ground that same may incriminate him or subject him to penalty or forfeiture. (Wis. Stat. § 885.25).

Compelling Testimony.

Upon proper application to any judge of a court of record of this state the judge will issue a subpoena requiring a witness to show cause why he should not be required to testify in a pending action outside the state. This provision only applies to actions in states which have similar provisions. (Wis. Stat. § 887.25). The requirement is similar in the case of depositions. (Wis. Stat. § 887.24).

5.14 INJUNCTIONS:

Jurisdiction.

An injunction may be granted either as a provisional remedy or as a final judgment (Wis. Stat. § 813.01) by court.

Prerequisites.

Injunction as equitable remedy is available in many classes of cases. Generally injunction will be granted only to prevent irreparable injury where remedies at law are inadequate. Plaintiff must show sufficient probability that defendant's future conduct will violate right of and injure plaintiff. Relief is within court's discretion; competing interests must be reconciled and plaintiff must show equity favors injunction. (90 Wis. 2d 781, 280 N.W.2d 691).

Procedure.

Temporary injunction based on sufficient pleading or affidavit may be issued ex parte (Wis. Stat. § 813.02) unless court directs otherwise (Wis. Stat. § 813.08) but, after answer by defendant, must be upon notice or order to show cause (Wis. Stat. § 813.05). Restraining order may be granted pending decision of court granting or refusing injunction. (Wis. Stat. §§ 813.05[1]; 813.025).

Bond.

Party to obtain temporary injunction must file undertaking in a sum fixed by court to effect that he will pay damages sustained by reason of injunction, if court finally determines he was not entitled thereto; however, such undertaking is not jurisdictional and other party may waive requirement, and bond not required for restraining order pending decision on request for temporary injunction. (Wis. Stat. § 813.06; 4 Wis. 2d 542, 91 N.W.2d 320; 16 Wis. 2d 288, 114 N.W.2d 408).

Temporary Injunction.

A temporary injunction may be granted when: (1) Complaint shows that plaintiff is entitled to judgment restraining commission of act which during litigation would produce injury; (2) defendant is about to do some act which would render judgment ineffectual; or (3) any party commits or threatens to commit waste. (Wis. Stat. § 813.02). Such an injunction may be granted to defendant on first two grounds. (Wis. Stat. § 813.03).

No temporary restraining order or injunction may be issued by any judge or court where it does not appear that application is made within judicial circuit in which is located the county that is the proper place of trial, and no temporary restraining order or injunction may issue unless residence of each defendant is stated, if known. (Wis. Stat. § 813.02[4]).

Special Provisions.

There are special provisions regulating issuance of injunctions suspending enforcement or execution of statutes and orders of certain state agencies (Wis. Stat. §§ 196.43; 551.62; 813.025), injunctions in labor disputes (Wis. Stat. § 103.56), injunctions brought by commissioner of insurance regarding employee welfare funds and plans (Wis. Stat. § 641.20), injunctions in situations including domestic abuse (Wis. Stat. § 813.12), individuals at risk (Wis. Stat. § 813.123), and child abuse (Wis. Stat. § 813.122), and injunctions prohibiting physical or mental harassment (Wis. Stat. § 813.125) and injunctions for abatement of drug houses as public nuisances (Wis. Stat. § 823.113). Special combined actions for domestic abuse, child abuse and harassment are also provided. (Wis. Stat. § 813.127).

5.15 JUDGMENTS:

Judgment is determination of action. Judgment may be final or interlocutory. (Wis. Stat. § 806.01[1]). If partial judgment proper in action with several parties, court may render judgment against one or more defendants and dismiss or permit action to proceed against others. Where finding substantially disposes of claim on merits, but leaves account to be taken or condition to be performed in order to determine rights of parties, interlocutory judgment may be rendered disposing of all issues covered by finding and reserving final judgment. (Wis. Stat. § 806.01[2]).

Judgment shall specify relief granted or other determination of action, and name, and place of residence of each party. (Wis. Stat. § 806.01[1]).

Judgment by confession not permitted after June 18, 1972. (Wis. Stat. § 806.25).

Judgment by Consent.

Parties may stipulate that court may enter judgment (176 Wis. 88, 186 N.W. 149), but stipulation must be made in open court, or by telephone or live audio-visual means, and entered in minutes, or recorded by reporter or must be in writing, signed by each party to be bound or his attorney (Wis. Stat. § 807.05).

Judgment on Pleadings.

After issue is joined between all parties but within such time as not to delay trial, any party may move for judgment on pleadings. (Wis. Stat. § 802.06[3]).

Summary Judgment.

Party may, within eight months of filing summons and complaint or within time set in scheduling order move for summary judgment. (Wis. Stat. § 802.08[1]). Court may order summary judgment even though party has not so moved, if it appears that party is so entitled. (Wis. Stat. § 802.08[6]).

Declaratory Judgments.

Uniform Declaratory Judgment Act (1922) adopted 1927, with variations. (Wis. Stat. § 806.04).

Judgment by Default.

After filing complaint, proof of service of summons and affidavit that defendant is in default for failure to join issue, plaintiff may move for judgment. Defendant appearing in action must be given notice of motion. (Wis. Stat. § 806.02[2]). If defendant fails to appear in action and personal claim is made against him, court must require proof by affidavit or other evidence of existence of any fact not shown by complaint which is needed to establish grounds for personal jurisdiction over defendant. If defendant fails to appear in action and no personal claim is made against him, court must require proof necessary to show court's jurisdiction over status, property or thing which is subject of action. (Wis. Stat. § 806.02[3]). In action on express contract for recovery of liquidated amount, plaintiff may file proof of personal service of summons and affidavit that defendant is in default. Clerk then enters judgment for amount demanded in complaint. (Wis. Stat. § 806.02[4]). Default judgment may be rendered against defendant who has appeared in action but who fails to appear at trial. If proof of any fact is necessary for court to render judgment, court shall receive proof. (Wis. Stat. § 806.02[5]).

Judgment on Admitted Claim.

In action on express contract for recovery of liquidated sum of money only, if answer admits part of plaintiff's claim for recovery of money or if answer sets up counterclaim for amount less than plaintiff's claim and contains no other defense, clerk on motion of plaintiff shall render and enter judgment for amount so admitted. (Wis. Stat. § 806.03).

Offer of judgment may be made by defendant after issue is joined but at least 20 days before trial by service of offer in writing, stating that judgment may be taken against him for the sum, property or to the effect therein specified, with costs. If plaintiff accepts offer and serves written notice before trial and within ten days after receipt of offer, he may file offer with proof of service of notice of acceptance, and clerk must enter judgment. If offer is not accepted, it is withdrawn and cannot be used at trial, and if plaintiff fails to recover a more favorable judgment defendant shall recover full costs. (Wis. Stat. § 807.01[1]). Offer of settlement may also be made by plaintiff who can recover double costs if offer is rejected and plaintiff recovers more favorable judgment. (Wis. Stat. § 807.01[3]). After issue is joined but at least 20 days before trial, defendant may also serve upon plaintiff written offer that if defendant fails in defense, damages be assessed at specified sum. If offer is not accepted and damages assessed in favor of plaintiff do not exceed damages offered, neither party shall recover costs. (Wis. Stat. § 807.01[2]). If there is offer to settle which is rejected and party making offer recovers judgment greater than or equal to offered settlement, party is entitled to interest at 12% per annum on amount recovered from date of offered settlement to date paid. (Wis. Stat. § 807.01[4]).

Docketing.

At time of entry of judgment, in whole or part for money, clerk dockets same in book showing: Full name and place of residence of judgment debtor and of debtor's spouse or former spouse if spouse is named in judgment, name of judgment creditor and his attorney, date of judgment, day and time of entry, and amount. (Wis. Stat. § 806.10). Judgments entered in other counties may be entered by filing certified transcript of original judgment and lien docket. (Wis. Stat. § 806.13). Certified copies of supreme court or court of appeals judgments, procured from clerk of court on payment of $1, may be filed and entered in judgment and lien docket in circuit court and shall become lien on real property as other judgments in county where entered. (Wis. Stat. § 806.16). Federal judgments may be similarly entered. (Wis. Stat. § 806.17). Municipal judge's judgment for more than $10 may be entered in judgment and lien docket by filing certified transcript thereof with clerk of circuit court with same effect as if judgment of circuit court, except that no action can be brought or execution issued thereon after ten years. (Wis. Stat. § 806.12).

Vacation or Modification.

Statute based on Rule 60(b) of Federal Rules of Civil Procedure. (Wis. Stat. § 806.07).

Lien.

Judgment of a court of record is a lien on real estate (except homestead) situated in county where judgment is entered in judgment and lien docket for ten years from date of rendition if properly entered and shows debtor's place of residence. (Wis. Stat. § 806.15[1]). Judgment based upon claim discharged in bankruptcy ceases to be lien after entry of order of satisfaction. (Wis. Stat. § 806.19[4]). Lien attaches to property held by spouse of judgment debtor in certain circumstances. (Wis. Stat. § 806.15[4]). Procedure available for lifting judgment lien attached to certain real property of non-obligated spouse. (Wis. Stat. § 806.15[5]).

Action on Judgment.

No action may be brought upon a judgment rendered in any court of this state between same parties, without leave of court, for good cause shown, on notice to adverse party. (Wis. Stat. § 806.23).

Assignments of judgment when duly acknowledged shall be filed with clerk, who shall enter assignment on judgment and lien docket. Assignment may be entered on judgment and lien docket, signed by owner with date affixed and witnessed by clerk. (Wis. Stat. § 806.18).

Satisfaction.

Judgment may be satisfied in whole or in part by an instrument in writing, signed and acknowledged by the owner, or, if no assignment has been filed, by attorney of record. Satisfaction by attorney not conclusive as to person having timely notice of revocation of attorney's authority. Such satisfaction must be filed with clerk of court. Brief acknowledgment of satisfaction may be made on judgment and lien docket and witnessed by clerk. (Wis. Stat. § 806.19[1]).

Form of Satisfaction

State of Wisconsin,. . . . . . court,. . . . . . county.. . . . . ., plaintiff, vs.. . . . . ., defendant. Whereas, judgment was rendered in the above entitled action, in favor of the above named. . . . . . and against the above named. . . . . . and was entered and docketed in the office of the clerk of the above named court, on the. . . . . . day of. . . . . .,. . . ., for. . . . . . dollars, damages and costs; now, therefore,. . . . . . the owner of said judgment, do hereby acknowledge full payment and satisfaction of said judgment and do hereby release and discharge the same.

Witness my hand and seal this. . . . . day of. . . . ., A. D.,. . . . .

(Seal).

In presence of

. . . .

. . . .

(Acknowledgment).

Foreign judgments may be sued on. When certified or authenticated, they are admissible in evidence. Judgments of courts not of record must have certificate of magistracy affixed, signed and sealed by clerk of court of record. (Wis. Stat. §§ 889.15-16). Indian tribal judgments accorded full faith and credit in certain circumstances. (Wis. Stat. § 806.245).

Revised Uniform Enforcement of Foreign Judgments Act (1964) adopted 1965. (Wis. Stat. § 806.24). Also Uniform Foreign-Money Claims Act (1989) adopted 1991. (Wis. Stat. §§ 806.30-44).

5.16 LIMITATION OF ACTIONS:

Uniform Commercial Code limitations apply. See category 3 Business Regulation and Commerce, topic 3.09 Commercial Code.

For limitations of actions concerning real estate see category 21 Property, topic Adverse Possession; see also categories 3 Business Regulation and Commerce, topics Banks and Banking, Consumer Protection; Employment, topic Labor Relations; Property, topic Absentees.

Other civil actions, excluding special proceedings such as certiorari and mandamus (265 Wis. 119, 60 N.W.2d 708), must be brought within following periods after accrual of cause of action:

Twenty Years.

On entry of judgment or decree of any court of record of any state or of U.S. (Wis. Stat. § 893.40).

Ten Years.

Actions to collect old age assistance liens (Wis. Stat. § 893.85); actions by counties to recover for legal representation of indigent (Wis. Stat. § 893.86); actions in favor of state (Wis. Stat. § 893.87); actions for contribution or indemnity against owner, occupier, or other person involved in improvements to real property, but time for commencing such actions extended for three years if damage sustained between first day of eighth year and last day of tenth year after substantial completion of improvements (Wis. Stat. § 893.89); all other personal actions on any contract, where not otherwise limited (Wis. Stat. § 893.50).

Six Years.

(1) On judgment of court not of record (Wis. Stat. § 893.42); (2) on any bond, coupon, interest warrant or other contract for payment of money, whether sealed or otherwise, made or issued by any town, county, city, village, school district or technical college district in this state (Wis. Stat. § 893.61); (3) on any contract, obligation or liability, express or implied, including action to recover fees for professional services, except those mentioned in § 893.40; (Wis. Stat. § 893.43); (4) on liability created by statute, when different limitation is not prescribed by law (Wis. Stat. § 893.93); (5) to recover damages not arising on contract, for injury to property, real or personal, or for injury to character or rights of another except where different period is expressly prescribed (Wis. Stat. §§ 893.52;.53); (6) to recover personal property or damages for wrongful taking, conversion or detention thereof; cause of action accrues at time wrongful taking or conversion occurs, or wrongful detention begins (Wis. Stat. §§ 893.35;.51); (7) for relief on ground of fraud, with cause of action not accruing until discovery of facts constituting fraud (Wis. Stat. § 893.93[1][b]); (8) on claim against decedent or decedent's estate unless probate of estate in this state is commenced within six years after decedent's death (Wis. Stat. § 893.93[1][c]); (9) for injury caused by criminal gang activity (Wis. Stat. §§ 893.93[1][e]; 895.444); (10) for breach of contract for sale of goods under Uniform Commercial Code (Wis. Stat. § 402.725); (11) against stockholders or directors of moneyed corporation, banking association or limited liability company to recover forfeiture or enforce liability created by law (Wis. Stat. § 893.60); (12) civil racketeering action brought under §§ 946.80-88 (Wis. Stat. § 946.88[1]).

Four Years.

(1) Against dissolved corporation for actions in respect to sales and use tax liability (Wis. Stat. § 77.59[3]); (2) action for fraudulent conveyance under § 242.04(1)(a) or within one year of discovery, if later (Wis. Stat. § 893.425[1]); (3) action for fraudulent conveyance under § 242.04(1)(b) or § 242.05(1) (Wis. Stat. § 893.425[2]).

Three Years.

(1) Against sheriff, coroner, medical examiner, town clerk, or constable on liability incurred by act in official capacity or omission of official duty, including nonpayment of money collected on execution, but this does not apply to action for escape (Wis. Stat. § 893.70); (2) by state or any of its departments or agencies or by any county, town, village, city, school district, technical college district, or other municipal unit to recover money by reason of breach of official or other bond given by public officer or any agent or employee of governmental unit; period to commence running when governmental unit receives knowledge of default and that it was damaged as result thereof (Wis. Stat. § 893.90); (3) to contest validity of change in county seat; period to commence running on date of publication of governor's proclamation of such change (Wis. Stat. § 893.71); (4) to recover damages for injuries to person or wrongful death (Wis. Stat. § 893.54); (5) from date of injury in actions for medical malpractice, or one year after discovery, whichever is later except that no action may be commenced more than five years from date of act or omission (Wis. Stat. § 893.55); (6) minors must sue for personal injuries by health care providers within three years of date of injury or one year from discovery, or by age of ten years, whichever is later (Wis. § Stat. 893.56), but 1977 statute not retroactive (172 Wis. 2d 141, 493 N.W.2d 40); (7) from time written proof of loss is required to be furnished on action to recover under disability insurance policy (Wis. Stat. § 631.83[1][b]); (8) action for damages against therapist for sexual exploitation, unless unable to bring action due to effects of sexual contact or threats, instructions or statements in which case time limitation shall not be extended more than 15 years (Wis. Stat. § 893.585); (9) action by drainage board for damages under § 88.92(2) (Wis. Stat. § 893.93[4]); (10) claim to recover for mining related injuries shall be brought within three years of date on which injury occurs or should have been known (Wis. Stat. § 893.925).

Two Years.

(1) By private party on statute penalty or forfeiture when action is given to party prosecuting and state, except when statute imposing it provides different limitation (Wis. Stat. § 893.93[2][a]); (2) for libel, slander, assault, battery, invasion of privacy, false imprisonment or other intentional tort (Wis. Stat. § 893.57); (3) for state or town expenses to suppress forest fire (Wis. Stat. § 893.91); (4) to recover forfeiture or penalty imposed by bylaw, ordinance or regulation of any town, county, city or village or domestic corporation when no other limitation is prescribed (Wis. Stat. § 893.93[2][b]); (5) to recover unpaid salary, wages or other compensation for personal services, except fees for professional services (Wis. Stat. § 893.44); exception of professional fees may be invalid (259 Wis. 619, 49 N.W.2d 924); (6) action by holder to enforce payment of cashier's check, certified check or bank money orders (Wis. Stat. § 893.63); (7) actions against dissolved business (Wis. Stat. § 180.1407[1][c]) or nonprofit (Wis. Stat. § 181.1407) corporations, their directors, officers or members, after dissolution; (8) to enforce construction lien after filing notice of lien with clerk of court (Wis. Stat. § 779.06[1]); (9) by secured party for damages or property from sale of livestock in violation of security agreement (Wis. Stat. § 893.36); (10) for usury (Wis. Stat. §§ 138.06; 893.62); (11) action to recover wages under § 109.09 within two years after claim is filed with department of industry, labor and human relations (Wis. Stat. § 893.44[2]).

One Year.

(1) Against sheriff or other officer for escape (Wis. Stat. § 893.93[3][a]); (2) for seduction (Wis. Stat. § 893.58); (3) for contribution based on tort if right of contribution does not arise out of prior judgment allocating comparative negligence between parties (Wis. Stat. § 893.92); (4) to

avoid special assessment, or taxes levied pursuant to same, or to restrain levy of such taxes or sale of lands for nonpayment of such taxes (Wis. Stat. § 893.72); (5) malpractice action after patient is aware of or should have been aware of presence of foreign object left in patient's body except no more than five years from date of act or omission or within three years of injury, whichever is later (Wis. Stat. § 893.55[3]); (6) action brought under c. 135 for violation of Fair Dealership Law (Wis. Stat. § 893.93[3][b]); (7) action for fraudulent conveyance under § 242.05(2) (Wis. Stat. § 893.425[3]); (8) against political corporation, governmental subdivision or agency for negligent inspection, after discovery of negligent act, or date should have discovered with reasonable diligence (Wis. Stat. § 893.80[1p]); (9) action under business closing or mass layoff statute (Wis. Stat. §§ 109.07; 893.97).

Six Months.

(1) Under bulk sales provisions (Wis. Stat. § 406.111) of Uniform Commercial Code; (2) in civil action or civil proceeding brought against any volunteer fire company, political corporation, governmental subdivision, agency thereof, or state officer, employee, or agent for act committed in course of employment, if notice given within 120 days of event giving rise to claim (Wis. Stat. § 893.80[1]); (3) in civil action or civil proceeding for malpractice brought against state officer, employee or agent, or volunteer fire company, political corporation, governmental subdivision or agency thereof, if notice is given within 180 days after discovery of injury, or date on which, in exercise of reasonable diligence, injury should have been discovered (Wis. Stat. §§ 893.80[1m], 893.80[1][b], 893.82[5m]).

One Hundred Eighty Days.

(1) Action to contest validity of county zoning ordinance or amendment under § 59.69(14) (Wis. Stat. § 893.73); (2) action to review validity of proceedings for division or dissolution of town under § 66.0235 (Wis. Stat. § 893.73).

Ninety Days.

To contest act of town board or department of natural resources in establishing town sanitary district; to contest validity of annexation; to contest order regarding highway records. (Wis. Stat. § 893.73[2]).

Thirty Days.

To contest validity of state or municipal bond on ground other than unconstitutionality (Wis. Stat. § 893.77[2]); contest order to raze building (Wis. Stat. § 893.76).

Special.

(1) For sexual assault of child, before injured party reaches age 35 (Wis. Stat. § 893.587).

Miscellaneous claims against state, county or municipality are governed by special statutes.

Notice of Claim.

See topic 5.02 Actions, subhead Conditions Precedent.

Action on bond of fiduciary must be brought within six years after discharge of fiduciary. (Wis. Stat. § 878.07[3]).

Actions Not Specifically Provided For.

No general limitation; as to contracts, see subhead Ten Years, supra; as to contests of wills, see category 13 Estates and Trusts, topic 13.16 Wills, subhead Contest.

Disability or Death.

Where person entitled to bring action is, when cause of action accrues, infant (except for actions against health care providers), insane or imprisoned for crime for term less than life, statutory period does not run while such disability continues; except, however, foregoing does not apply to actions to recover property procured by fraudulent representation of intent to marry; to recover damages to highway or railroad grade; for usury; contesting government decision; against governmental body, officer or employee; to repair or remove building or restore site; to contest bonds of municipal power district for other than constitutional reasons; to recover legal fees paid for indigents; or for expenses related to forest fire. (Wis. Stat. § 893.18). Except for causes of action accruing before July 1, 1980, no disability except infancy can extend period more than five years and no disability can extend period more than one year after disability ceases. (Wis. Stat. § 893.18). Causes of action accruing after July 1, 1980, may be commenced within two years after disability ceases, except that where disability is due to mental illness, period of limitation may not be extended more than five years. (Wis. Stat. § 893.16).

In case of death of the person in whose favor or against whom a cause of action exists before the statutory period has run, such action may be commenced (although the statutory period may have expired) within one year after the death of the person entitled to sue or after the issuance of letters testamentary or of administration in the estate of the person liable to be sued. (Wis. Stat. § 893.22).

A person may not rely on disability unless it was in existence when cause of action accrued. (Wis. Stat. § 893.18[3]). If entitled to bring action against therapist for sexual exploitation, but unable due to effects of sexual contact or threats or statements by therapist, period of inability tolls limitations period up to 15 years. (Wis. Stat. § 893.585).

Absence or Concealment of Defendant.

If when cause of action accrues against any person, such person is out of state, action may be brought within period limited, after such person’s return. But this is not applicable where neither person against nor person in whose favor action accrues resides in state at time action accrues. If person against whom action accrues departs after cause of action has accrued, time of absence is not deemed part of time limited. Foreign corporation having appointed registered agent or attorney in state to accept service, is not deemed person out of state while appointment is effective, except for period when such agent or attorney has departed from and resided outside of state. (Wis. Stat. § 893.19[1]). These provisions do not apply to certain persons subject to jurisdiction while outside state. (Wis. Stat. §§ 893.19[2]; 801.05).

Foreign Causes of Action.

No action may be maintained on foreign cause of action if foreign period of limitation has expired or applicable Wisconsin period of limitation has expired. (Wis. Stat. § 893.07).

Interruption of Statutory Period.

Part payment of principal or interest, or a written acknowledgment of debt or promise to pay, signed by party to be charged, fixes new date from which full statutory period must run before action will be barred, regardless of whether or not debt had become barred at time of such payment or acknowledgment. (Wis. Stat. §§ 893.45-.49).

The time during which commencement of an action is stayed by injunction or prohibition is not a part of the time limited. (Wis. Stat. § 893.23). Where defendant has interposed a defense, setoff or counterclaim and complaint is dismissed, time between commencement and dismissal thereof is not part of time limited as to cause of action so interposed. (Wis. Stat. § 893.14).

Limitation period extension, where no person able to sue exists when cause of action accrues, cannot exceed double original period. (Wis. Stat. § 893.11).

Any period is extended one year if person originally served knowingly gives officer false information with intent to mislead him in accomplishing service of any summons or civil process. (Wis. Stat. § 893.10). Any limitations applicable to action to enforce marital property agreement executed pursuant to § 766.58 is tolled as provided under § 766.58(13). (Wis. Stat. § 893.135).

Pleading.

Objection that action was not commenced within time limited can be taken only by answer or motion to dismiss in proper cases. (Wis. Stat. § 893.01).

5.16A PARTITION:

Partition of personal property may be had by action in circuit court without jury. Where sale is necessary, it is held on ten days' notice by sheriff or other person appointed by court. (c. 820).

Partition of real estate may be had in civil action unless prohibited elsewhere in statutes or by agreement of parties. (Wis. Stat. § 842.02). Complaint must set out interests of all parties, including lienholders, and contain description of property. (Wis. Stat. § 842.05). Where basis for partition is not clear, referee is appointed by court to report whether partition is practical, and, if not, sale may be had. (Wis. Stat. §§ 842.07;.17).

Water Powers and Riparian Rights.

Partition of water powers and riparian rights governed by normal rules of partition except that water power referee may be appointed and exercise control over property. (Wis. Stat. §§ 842.01;.06).

Dower or Curtesy.

Partition may be had to set off any interest in real property as defined in §§ 840.01 and 842.01, including marital property and homestead.

Property passing by descent or will to persons as joint tenants or tenants-in-common may be partitioned by agreement providing petition therefor is filed with court prior to judgment, is signed by all parties interested, and sets out manner in which property is to be divided. (Wis. Stat. § 863.17).

5.17 [RESERVED]

5.18 PLEADING:

Wisconsin pleadings governed by statute. Effective Jan. 1, 1993, §§ 767.813, 799.05(1), 799.05(6), 799.05(7), 799.06(3), 801.09(1), 801.09(3), 801.095(1), 801.095(2), 801.095(3), 801.095(4), 802.04(1), and 802.05(1), relating to information required in summons, complaint or petition and pleadings, and §§ 802.01(2) and 971.30(2), relating to motion captions, amended by supreme court order, 171 Wis. 2d xix (Oct. 28, 1992). References herein to any of these sections reflect amendments enacted by 1992 order.

Distinctions between actions at law and suits in equity have been abolished. Proceedings in courts are divided into actions and special proceedings. "Action" includes "special proceeding" unless a specific provision of procedure in special proceeding exists. (Wis. Stat. §

801.01). Civil actions commenced when summons and complaint filed in court, provided defendant is served with authenticated copy of summons and complaint within 90 days after filing. (Wis. Stat. § 801.02). Summons must contain title of action, venue and names of parties. (Wis. Stat. §§ 801.09; 801.095).

Pleadings Permitted.

Complaint and answer; reply to counterclaim denominated as such; answer to cross-claim, if answer contains cross-claim; third-party complaint and third-party answer are permitted in case involving contribution or indemnification or both. (Wis. Stat. § 802.01).

General Form of Pleadings.

Standard court forms adopted and required. (Wis. Stat. § 807.001). Every pleading must contain caption setting forth name of court, venue, title of action, file number and designation of pleading. Designation in caption must state whether pleading contains motions or whether answer or reply contains cross-claims or counterclaims. In complaint, caption must include case classification code, and in title of action in complaint must include names and addresses of all parties, indicating representative capacity, if any, in which they sue or are sued and, in actions by or against corporation, corporate existence and domestic or foreign status must be indicated. (Wis. Stat. § 802.04[1]). Averments of claim or defense must be made in numbered paragraphs. (Wis. Stat. § 802.04[2]).

Complaint.

Pleading which sets forth claim for relief, including original claim, counterclaim, cross-claim or third-party claim, must contain short and plain statement of claim identifying transaction, occurrence or event or series of transactions, occurrences or events out of which claim arises and showing that pleader is entitled to relief and must contain demand for judgment for relief to which pleader deems self entitled. (Wis. Stat. § 802.02). Caption of action must include standardized description of case classification type and associated code number as approved by director of state courts. (Wis. Stat. § 801.09[1]). In tort claim seeking monetary recovery, demand for judgment may not specify amount of money sought. (Wis. Stat. § 802.02[lm]). Prohibition applies to counterclaim (Wis. Stat. § 802.07[l]), and cross-claim (Wis. Stat. § 802.07[3]). Amount sought must be specified to court and other parties before hearings on motion for judgment on pleadings (Wis. Stat. § 802.06[3]), summary judgment (Wis. Stat. § 802.08[2]), rendering of final judgment (Wis. Stat. § 806.01[1][c]), and before issuing writ of attachment (Wis. Stat. § 811.02).

Answer.

Except when court dismisses action or special proceeding under § 802.05(3), defendant shall serve answer within 20 days after service of complaint. If guardian ad litem is appointed, guardian ad litem shall have 20 days after appointment to serve answer. If defendant is State or state agency, answer must be served within 45 days of service of pleading. If defendant is insurance company or if any cause of action raised in original pleading is founded in tort, answer must be served within 45 days of service of complaint. (Wis. Stat. § 802.06[1]). Defendant must state in short and plain terms defendant's defenses to each claim asserted and must admit or deny averments upon which plaintiff relies. If defendant is without knowledge or information sufficient to form belief as to truth of averment, defendant must so state and this has effect of denial. (Wis. Stat. § 802.02[2]).

Counterclaim may include any claim defendant has against plaintiff upon which judgment may be had in action. (Wis. Stat. § 802.07).

Reply.

Reply to counterclaim must be served within 20 days after service of answer. (Wis. Stat. § 802.06). However, if defendant in action is insurance company, or if any cause of action raised in original pleading, cross-claim, or counterclaim is founded in tort, reply shall be served within 45 days. (Wis. Stat. § 802.06[1]).

Demurrer abolished. (Wis. Stat. § 802.01[3]). Functional equivalents of demurrer are motion to dismiss (Wis. Stat. § 802.06[2]), motion to strike inadequate defense (Wis. Stat. § 802.06[6]), and motion for judgment on pleadings (Wis. Stat. § 802.06[3]).

Waiver By Not Replying.

Many defenses must be raised in responsive pleading if responsive pleading is required. (Wis. Stat. § 802.06[2]).

Bill of Particulars.

In action involving sale and delivery of goods or performance of labor or services, or furnishing of materials, if plaintiff does not set forth particulars in his pleading, plaintiff must deliver same to defendant within ten days after service of written demand. (Wis. Stat. § 802.03[7]).

Verification; Sanctions For Frivolous Action.

Fed. R. Civ. P. 11 standard adopted by Supreme Court Rule 03-06. (Wis. Stat. § 802.05). Each pleading must be signed by attorney or party if not represented, and submission of signed pleading to court certifies that to best of signor's knowledge, information and belief after reasonable inquiry; pleading is not being presented for any improper purpose; claims, defenses and legal contentions are warranted by existing law; allegations and contentions have evidentiary support; and denials of contentions are warranted. (Wis. Stat. § 802.05). By motion, after notice, or on court's initiative, court may impose sanctions upon attorneys, law firms or parties. (Wis. Stat. § 802.05[3]). Monetary sanctions may not be awarded against represented party for frivolous legal argument. (Wis. Stat. § 802.05[3][b][1]).

Supplemental Pleadings.

Supplemental pleadings allowed by court on motion on such terms as may be just. Matters of which pleader was ignorant at time of original pleading should be alleged by amended pleading rather than by supplemental pleading. (Wis. Stat. § 802.09[4]).

Amended Pleading.

Any pleading may be amended once as matter of course at any time within six months after summons and complaint are filed or within time set in scheduling order. Other amendments permitted only by leave of court or with consent of adverse party. (Wis. Stat. § 802.09[1]).

Service.

Every order required by its terms to be served, every pleading and every paper relating to discovery unless court orders otherwise, every written motion other than ex parte, and every written notice, appearance, demand, offer of judgment, undertaking, and similar paper must be served. No service need be made on parties in default for failure to appear except pleadings asserting new or additional claims for relief against them. Service on adverse counsel accomplished by delivering copy to him or by mailing it to him at his last known address, or, if no address known, by leaving it with clerk of courts. Service by mail is complete upon mailing. Delivery of copy to attorney means: Handing it to attorney; sending via facsimile; or leaving it at attorney's office with attorney's clerk or other person in charge thereof; or if no one in charge, leaving it in conspicuous place therein; or if office closed or attorney has no office, leaving it at attorney's dwelling house or usual place of abode with some person of suitable age and discretion then residing therein. (Wis. Stat. § 801.14).

Summary judgment may be sought on any claim, counterclaim, cross-claim, or third party claim, within eight months of filing summons and complaint or within time set by scheduling order under § 802.10. Unless earlier times specified in scheduling order, motion must be served at least 20 days before time fixed for hearing. Summary judgment will be rendered if pleadings, depositions, answers to interrogatories and admissions on file, together with any affidavits show that no genuine issue of material fact exists and that moving party is entitled to judgment as matter of law. (Wis. Stat. § 802.08).

Filing.

All papers after summons required to be served upon party, except as provided in § 804.01(6), must be filed with court within reasonable time after service. (Wis. Stat. § 801.14[4]). Discovery documents not to be filed with court but retained by party initiating discovery or party's attorney. (Wis. Stat. § 804.01[6]).

Proof of Claims.

No special requirements with respect to proof of claims sent from other jurisdictions for collection. (See § 802.03[5].)

Small Claims.

See category 6 Courts and Legislature, topic 6.01 Courts. (Wis. Stat. §§ 799.01-.45).

5.19 PRACTICE:

Note: Rules of civil procedure adopted by Supreme Court order effective Jan. 1, 1976. (cc. 801-807).

Civil procedure is under a code. (Title XLII-A, cc. 801-807). Rules of videotape procedure exist. (Wis. Stat. §§ 885.40-47). Special proceedings may be conducted by telephone or live audio-visual means. (cc. 801-808).

Only five-sixths of jury need agree on verdict in civil action. (Wis. Stat. § 805.09[2]).

Discovery examination of any person may be had. (Wis. Stat. §§ 804.05-06).

Demand for Admission of Facts.

Demand to admit or deny truth of any matters or genuineness of any documents that are relevant may be served in writing on party. If party receiving notice fails to comply within 30 days (except defendant has 45 days after service of complaint), or object, facts stated shall be taken to be admitted. (Wis. Stat. § 804.11). In case of refusal to make such admission reasonable expenses of proving fact or document shall be taxed as costs unless court is satisfied refusal was reasonable, or there was other good reason for failure to admit. (Wis. Stat. § 804.12[3]).

Interrogatories to parties allowed. (Wis. Stat. § 804.08).

Direct Actions Against Insurer.

See category 23 Transportation, topic 23.01 Motor Vehicles. (Wis. Stat. § 803.04[2]).

Small Claims.

See topic Courts. (Wis. Stat. §§ 799.01-.45).

See also topics 5.02 Actions, Appeal and Error, Depositions and Discovery, Injunctions, Judgments, Pleading, Process; category 8 Debtor and Creditor, topics 8.02 Attachment, 8.05

Executions, 8.09 Garnishment.

5.20 PROCESS:

Civil action in which personal judgment is sought, other than certiorari, quo warranto, habeas corpus, mandamus or prohibition, is commenced when summons and complaint naming defendant are filed with court, provided service of authenticated copy of summons and of complaint is made upon him within 90 days after filing. Civil action in which only an in rem or quasi in rem judgment is sought is commenced when summons and complaint are filed with court, provided service of authenticated copy of summons and of either complaint or notice of object of action is made upon defendant within 90 days after filing. (Wis. Stat. § 801.02).

General Requisites.

Summons must contain following: names and addresses of parties, title of cause, name of court and county, case classification type and associated code number; notice that judgment will be rendered if defendant fails to serve answer or demand within time fixed; direction that defendant is to answer within time specified in § 801.09(2); handwritten signature of plaintiff or his attorney and address at which papers may be served upon him by mail; and authentication. Authentication is accomplished by clerk file-stamping case number on each copy of summons and complaint. (Wis. Stat. § 801.09). Forms of summons codified. (Wis. Stat. § 801.095).

By Whom Issued.

Plaintiff or his attorney. (Wis. Stat. § 801.09[3]).

Who May Serve.

Any adult resident of state where service is made who is not party to action may serve summons. (Wis. Stat. § 801.10[1]).

Service on Individual.

Service may be made personally upon defendant either within or without state or if with reasonable diligence defendant cannot be so served, then by leaving copy of summons at defendant’s usual place of abode in presence of competent member of family at least 14 years old who must be informed of contents of summons; in presence of competent adult, currently residing in abode of defendant, who must be informed of contents of summons; or pursuant to law for substituted service of summons or like process upon defendants in actions brought in courts of general jurisdiction of state in which service is made. (Wis. Stat. § 801.11[1]). See also subhead Service by Publication, infra.

Service on Infant.

Same as on individual and where minor is under age of 14, service also must be made upon parent or guardian having custody of child or if there is none upon any other person having care and control of child. If there is no parent, guardian or other person having care and control of child when service is made upon child, service must also be made upon guardian ad litem after appointment. (Wis. Stat. § 801.11[2]).

Service on Incompetent Person.

Same as on individual and where person under disability is known by plaintiff to be under guardianship, service must also be made upon guardian, and if no guardian has been appointed, then service must be made upon guardian ad litem. (Wis. Stat. § 801.11[2]).

Service on Partnership.

Summons must be served individually upon each general partner known to plaintiff where claim sued upon arises out of or relates to partnership activities within Wisconsin sufficient to subject defendant to personal jurisdiction. (Wis. Stat. § 801.11[6]).

Service on Domestic Corporation.

Personal service must be made upon officer, director or managing agent of corporation either within or without state. In lieu of delivering copy of summons to officer specified, copy may be left in office of such officer, director or managing agent with person who is apparently in charge of office. (Wis. Stat. § 801.11[5]). See also subhead Service by Publication, infra.

Service on Foreign Corporation.

Same as domestic corporation. (Wis. Stat. § 801.11[5]).

Service on Domestic or Foreign Insurance Corporations.

Service may be made on any agent as defined by § 628.02, but service on such agent is invalid unless copy of summons and proof of service is sent by registered mail to principal place of business of corporation within five days. (Wis. Stat. § 801.11[5]).

Corporation.

In addition to regular mode of service of process on corporations, various special types of service are permitted:

Domestic corporation may be served by serving registered agent; where corporation has no registered agent or agent cannot be served with reasonable diligence, corporation may be served by registered or certified mail, return receipt requested, addressed to corporation at its principal office. (Wis. Stat. § 180.0504).

Foreign corporation may be served by serving registered agent; where foreign corporation has no registered agent or agent cannot be served with reasonable diligence, corporation may be served by registered or certified mail, return receipt requested, addressed to foreign corporation at its principal office as shown in records of Department of Financial Institutions. (Wis. Stat. § 180.1510). If foreign corporation's address cannot be determined from records of Department of Financial Institutions, service may be made by publication of notice in newspaper published in state likely to give notice to corporation. (c. 985).

State may be served by delivering copy of summons and complaint to attorney general or leaving them at attorney general's office in capital with assistant or clerk. (Wis. Stat. § 801.11[3]).

Political corporations may be served by personally serving chairperson of county board or county clerk; chairperson or clerk of town; mayor, city manager or clerk of city; president or clerk of village; district board chairperson or secretary of any technical college district; president or clerk of school district or school board; or officer, director or managing agent of any other body politic. In lieu of delivering copy to person specified, copy may be left in office of such person with person who is apparently in charge of office. (Wis. Stat. § 801.11[4]).

Foreign insurance companies admitted to state may be served by delivering duplicate copies to commissioner of insurance or Department of Financial Institutions, if insurer fails to maintain agent in this state, or if agent cannot be found. (Wis. Stat. §§ 601.72-.73).

Service Outside the State.

Personal service may be made outside state but personal judgment against any party may be rendered only if jurisdictional grounds exist. (Wis. Stat. § 801.04[2]). Grounds for personal jurisdiction are stated very broadly. (Wis. Stat. § 801.05).

Service by Mail.

See subhead Service by Publication, infra.

Service by Publication.

If personal service cannot be made with reasonable diligence, summons may be served by publication and mailing. (Wis. Stat. § 801.11[1]). Copy must be published in newspaper published in state likely to give notice to defendant. (c. 985). If defendant's post office address is known or can be ascertained with reasonable diligence, copy of summons and copy of verified complaint must be mailed to defendant at or immediately prior to first publication, but mailing may be omitted if post office address cannot be ascertained with reasonable diligence. (Wis. Stat. § 801.11[1]). Service of papers other than summons or process of court made by delivering or mailing to party or his attorney and service is complete upon mailing. Service via facsimile is complete upon transmission. (Wis. Stat. § 801.14).

Long Arm Statute.

See subhead Service Outside the State, supra.

Proof of Service.

If served by sheriff, proof of service is made by sheriff's certificate showing time and date, place and manner of service. If served by any other person, proof of service is made by affidavit showing time and date, place and manner of service, that server is adult resident of state of service or of Illinois, Iowa, Michigan, or Minnesota and is not party to action, and knew person served to be defendant mentioned in summons, and that server delivered to and left with defendant copy of summons. If defendant not personally served, such affidavit or certificate must state when, where and with whom authenticated copy was left and facts which show reasonable diligence in attempting to effect personal service. If service is by publication, proof of service is made by affidavit of publisher or printer or foreman or principal clerk stating summons was published and specifying date of each insertion and affidavit of person who mailed same showing mailing of copy of summons with complaint or notice of object of action as required. (Wis. Stat. § 801.10[4]). Copy of summons served or mailed must be authenticated by clerk of court. (Wis. Stat. §§ 801.02[1]; 801.09[4]).

Nonresident Motorist.

See category 23 Transportation, topic 23.01 Motor Vehicles.

5.21 REPLEVIN:

Old replevin and detinue combined in action of replevin maintainable by person having right of present possession against one who wrongfully retains or took and converted personalty (Wis. Stat. § 810.02), including building removed from mortgaged realty (Wis. Stat. § 708.04), or between co-tenants of divisible personalty (Wis. Stat. § 895.06).

Proceedings.

(c. 810). Action commenced by complaint after unsatisfied demand. Plaintiff may claim immediate possession before answer by requisition endorsed on submitting affidavit containing statutory averments (no writ necessary) and obtaining order issued by judge or other judicial officer. (Wis. Stat. §§ 810.01-.02). Upon issuance of order and execution of bond by plaintiff in amount set by judge or other officer, sheriff seizes property and delivers it to plaintiff. (Wis. Stat. § 810.03). Defendant can move court to modify or vacate order. (Wis. Stat. § 810.05).

Repossession.

Defendant may have repossession at any time before final judgment by executing and delivering to sheriff bond of such sum as plaintiff may recover. (Wis. Stat. § 810.06).

Claims of Third Persons.

Third party may claim property by following procedures of §§ 810.02-.03. (Wis. Stat. § 810.11).

Judgment may be rendered against both unsuccessful claimant and his sureties (Wis. Stat. § 810.15) for damages and possession if in favor of party in possession; for damages for detention and possession or value if against party in possession; for damages and value only, at option of successful party out of possession when unsuccessful party has possession by reason of seizure and delivery or repossession on bond as described above. (Wis. Stat. § 810.14).

In Small Claims Court.

(c. 799). Small claims procedure governs where value of property not over $5,000. (Wis. Stat. § 799.01[1][c]).

5.22 SEQUESTRATION:

The court within proper county may sequestrate property of debtor and appoint receiver therefor: (a) When execution against judgment debtor is returned unsatisfied in whole or in part; (b) when corporation has been dissolved or is insolvent or is in imminent danger of insolvency or has forfeited its corporate rights. (Wis. Stat. § 128.08). See category 8 Debtor and Creditor, topics 8.02 Attachment, 8.05 Executions, 8.09 Garnishment and 8.16 Receivers.

5.23–5.24 [RESERVED]

5.25 SUBMISSION OF CONTROVERSY:

No statutory vehicle for submitting controversy to court on agreed statement of facts.

5.26 VENUE:

Except as otherwise provided by statute, proper venue is as follows in civil actions or special proceedings: (1) In county where claim arose; (2) in county where real or tangible personal property which is subject of claim is situated; or (3) in county where defendant resides or does substantial business. If 1-3 do not apply, venue shall be in any county designated by plaintiff. (Wis. Stat. § 801.50[2]).

Where sole defendant is state or any person, board or commission acting in official capacity, venue shall be in Dane County unless otherwise specifically authorized by law. (Wis. Stat. § 801.50[3]).

Venue of action seeking remedy available by habeas corpus shall be: (1) Where plaintiff was convicted or sentenced if action seeks relief from judgment under which plaintiff's liberty is restrained; (2) where plaintiff's liberty is restrained if action seeks relief concerning any other matter relating to restraint on plaintiff's liberty. (Wis. Stat. § 801.50[4]).

Defect in venue does not affect validity of any order or judgment. (Wis. Stat. § 801.50[1]).

Venue of action growing out of domestic abuse is in county in which cause of action arose, where petitioner or respondent resides, or where petitioner is temporarily living. (Wis. Stat. § 801.50[5r]).

Venue of action seeking child abuse restraining order and/or injunction shall be in county in which cause of action arose or where petitioner or respondent resides. (Wis. Stat. § 801.50[5s]).

Venue of action arising from consumer credit transaction shall be in any county specified in § 421.401(1). (Wis. Stat. § 801.50[5m]).

Venue of environmental pollution action brought by out-of-state plaintiff against metropolitan sewerage commission shall be in county which contains first class city located in metropolitan sewerage district. (Wis. Stat. § 801.50[5p]).

Venue of forfeiture action arising out of violation of cc. 5-12, sub. c. III of c. 13, sub. c. III of c. 19, or elections, ethics, or lobbying regulations shall be in county where defendant resides. (Wis. Stat. § 801.50[5t]).

Court may, sua sponte, or by motion of any party change venue in interest of justice or for convenience of parties or witnesses. (Wis. Stat. § 801.52). Except for actions that are governed by § 801.50(5t), venue can only be changed as provided in § 971.223(1), (2) or in same manner as criminal trial under § 971.22. (Wis. Stat. § 801.52).

6 COURTS AND LEGISLATURE

6.01 COURTS:

United States District Courts.

Eastern District.

Clerk's office, 517 East Wisconsin Ave., Milwaukee 53202; 125 South Jefferson Street, PO Box 22490, Green Bay, WI 54305-2490.

Counties included: Brown, Calumet, Dodge, Door, Florence, Fond du Lac, Forest, Green Lake, Kenosha, Kewaunee, Langlade, Manitowoc, Marinette, Marquette, Menominee, Milwaukee, Oconto, Outagamie, Ozaukee, Racine, Shawano, Sheboygan, Walworth, Washington, Waukesha, Waupaca, Waushara and Winnebago.

Court sits at Milwaukee and Green Bay.

Fees.

$350 on institution of any suit or proceeding, except bankruptcy wherein fee is $274 for c. 13 proceeding, $299 for c. 7 proceeding, $1,039 for c. 11 proceeding, and $239 for c. 12 proceeding.

Western District.

Clerk's office: 120 North Henry St., Rm 320, P.O. Box 432, Madison 53701-0432.

Counties included: Adams, Ashland, Barron, Bayfield, Buffalo, Burnett, Chippewa, Clark, Columbia, Crawford, Dane, Douglas, Dunn, Eau Claire, Grant, Green, Iowa, Iron, Jackson, Jefferson, Juneau, La Crosse, Lafayette, Lincoln, Marathon, Monroe, Oneida, Pepin, Pierce, Polk, Portage, Price, Richland, Rock, Rusk, St. Croix, Sauk, Sawyer, Taylor, Trempealeau, Vernon, Vilas, Washburn and Wood.

Court sits at Madison.

Fees.

$350 on institution of any suit or proceeding, except bankruptcy wherein fee is $274 for c. 13 proceeding, $299 for c. 7 proceeding, $1,039 for c. 11 proceeding, and $239 for c. 12 proceeding.

Supreme Court.

Clerk's office: 110 East Main St., Suite 215, P.O. Box 1688, Madison 53701-1688. Wisconsin Supreme Court is state's highest court. Court is composed of seven justices who are elected to ten-year terms in statewide, non-partisan April elections. Supreme Court, except in special cases, has appellate jurisdiction only. (Wis. Stat. § 751.05). It may take jurisdiction of appeal pending in court of appeals on its own motion or by granting direct review upon either petition to bypass filed by party or certification from court of appeals prior to court of appeals hearing and deciding matter. (Wis. Stat. § 808.05). Decision of court of appeals is reviewable by supreme court only by petition to appeal granted by supreme court. (Wis. Stat. § 808.10). It has power to issue all writs necessary in aid of its jurisdiction or necessary to enforce administration of justice. (art. VII, § 3, Const. of Wis.; § 751.07).

Court of Appeals.

Clerk's office: 110 East Main St., Suite 215, P.O. Box 1688, Madison, 53701-1688. Wisconsin Court of Appeals is state's intermediate appellate court. Court of Appeals has appellate jurisdiction, has original jurisdiction only to issue prerogative writs, and may issue all writs necessary in aid of its jurisdiction. (Wis. Stat. § 752.01). It has supervisory authority over all actions and proceedings in all courts except supreme court. (Wis. Stat. § 752.02). It has 16 judges, five from district IV, four from districts I and II, and three from district III. (Wis. Stat. § 752.03). Decision of court of appeals is reviewable by supreme court only upon petition to appeal granted by supreme court. (Wis. Stat. § 808.10).

Appeals in habitual traffic offender cases, small claims, minors, municipal ordinance violations, misdemeanors, or cases involving civil forfeitures and contempt of court may be decided by one state court of appeals judge. (Wis. Stat. § 752.31).

Place of Sitting.

District I—consists of circuit for Milwaukee County; court located in Milwaukee. (Wis. Stat. §§ 752.11[a]; 752.13).

District II—consists of circuits for Calumet, Fond du Lac, Green Lake, Kenosha, Manitowoc, Ozaukee, Racine, Sheboygan, Walworth, Washington, Waukesha, and Winnebago counties; court located in Waukesha and also sits in Fond du Lac and Racine for oral arguments. (Wis. Stat. §§ 752.11[b]; 752.15).

District III—consists of circuits for Ashland, Barron, Bayfield, Brown, Buffalo and Pepin (combined 2-county circuit), Burnett, Chippewa, Door, Douglas, Dunn, Eau Claire, Florence and Forest (combined 2-county circuit), Iron, Kewaunee, Langlade, Lincoln, Marathon, Marinette, Menominee and Shawano (combined 2-county circuit), Oconto, Oneida, Outagamie, Pierce, Polk, Price, Rusk, St. Croix, Sawyer, Taylor, Trempealeau, Vilas, Washburn counties; court located in Wausau and also sits in Eau Claire, Superior and Green Bay. (Wis. Stat. §§ 752.11[c]; 752.17).

District IV—consists of circuits for Adams, Clark, Columbia, Crawford, Dane, Dodge, Grant, Green, Iowa, Jackson, Jefferson, Juneau, La Crosse, Lafayette, Marquette, Monroe, Portage, Richland, Rock, Sauk, Vernon, Waupaca, Waushara, and Wood counties; court located in Madison and also sits in La Crosse and Stevens Point. (Wis. Stat. §§ 752.11[d]; 752.19).

Circuit Courts.

Wisconsin circuit courts are state's trial courts. They have original jurisdiction in all civil and criminal matters within state. (art. VII, § 8, Const. of Wis.; § 753.03). Each circuit consists of one county except for three two-county circuits consisting of Buffalo and Pepin, Florence and Forest, and Menominee and Shawano. Menominee County is federal reservation and both judges for this circuit are located in Shawano. Each circuit has one branch except Milwaukee (47), Dane (17), Waukesha (12), Racine (10), Brown and Kenosha (8), Rock, Outagamie, and Kenosha (7), Winnebago (6), Sheboygan, and Eau Claire (5), Marathon (5), Fond du Lac (5), La Crosse (5), Dodge, St. Croix, Walworth and Washington (4), Jefferson (4), Barron, Chippewa, Columbia, Manitowoc, Monroe, Ozaukee, Portage, Sauk, Waupaca and Wood (3), Douglas, Grant, Green, Marinette, Menominee and Shawano (combined), Polk, Door, Dunn, Oconto (2), Juneau (2), Lincoln (2), and Oneida (2). (Wis. Stat. § 753.06). County courts abolished.

Violent Crime Cases.

Chief judge in Milwaukee County authorized to designate four circuit court branches to primarily handle violent crimes. (Wis. Stat. § 753.061[2m]).

Place of Sitting.

Selected individual county court rules can be found on Internet at http://www.wisbar.org/rules.

Adams County: Court sits at Friendship.

Ashland County: Court sits at Ashland.

Barron County: Court sits at Barron.

Bayfield County: Court sits at Washburn.

Brown County: Court sits at Green Bay.

Buffalo County: Court sits at Alma.

Burnett County: Court sits at Siren.

Calumet County: Court sits at Chilton.

Chippewa County: Court sits at Chippewa Falls.

Clark County: Court sits at Neillsville.

Columbia County: Court sits at Portage.

Crawford County: Court sits at Prairie du Chien.

Dane County: Court sits at Madison.

Dodge County: Court sits at Juneau.

Door County: Court sits at Sturgeon Bay.

Douglas County: Court sits at Superior.

Dunn County: Court sits at Menomonie.

Eau Claire County: Court sits at Eau Claire.

Florence County: Court sits at Florence.

Fond du Lac County: Court sits at Fond du Lac.

Forest County: Court sits at Crandon.

Grant County: Court sits at Lancaster.

Green County: Court sits at Monroe.

Green Lake County: Court sits at Green Lake.

Iowa County: Court sits at Dodgeville.

Iron County: Court sits at Hurley.

Jackson County: Court sits at Black River Falls.

Jefferson County: Court sits at Jefferson.

Juneau County: Court sits at Mauston.

Kenosha County: Court sits at Kenosha.

Kewaunee County: Court sits at Kewaunee.

La Crosse County: Court sits at La Crosse.

Lafayette County: Court sits at Darlington.

Langlade County: Court sits at Antigo.

Lincoln County: Court sits at Merrill.

Manitowoc County: Court sits at Manitowoc.

Marathon County: Court sits at Wausau.

Marinette County: Court sits at Marinette.

Marquette County: Court sits at Montello.

Menominee County: Court sits at Keshena.

Milwaukee County: Court sits at Milwaukee.

Monroe County: Court sits at Sparta.

Oconto County: Court sits at Oconto.

Oneida County: Court sits at Rhinelander.

Outagamie County: Court sits at Appleton.

Ozaukee County: Court sits at Port Washington.

Pepin County: Court sits at Durand.

Pierce County: Court sits at Ellsworth.

Polk County: Court sits at Balsam Lake.

Portage County: Court sits at Stevens Point.

Price County: Court sits at Phillips.

Racine County: Court sits at Racine.

Richland County: Court sits at Richland Center.

Rock County: Court sits at Janesville.

Rusk County: Court sits at Ladysmith.

St. Croix County: Court sits at Hudson.

Sauk County: Court sits at Baraboo.

Sawyer County: Court sits at Hayward.

Shawano County: Court sits at Shawano.

Sheboygan County: Court sits at Sheboygan.

Taylor County: Court sits at Medford.

Trempealeau County: Court sits at Whitehall.

Vernon County: Court sits at Viroqua.

Vilas County: Court sits at Eagle River.

Walworth County: Court sits at Elkhorn.

Washburn County: Court sits at Shell Lake.

Washington County: Court sits at West Bend.

Waukesha County: Court sits at Waukesha.

Waupaca County: Court sits at Waupaca.

Waushara County: Court sits at Wautoma.

Winnebago County: Court sits at Oshkosh.

Wood County: Court sits at Wisconsin Rapids.

Fees.

Established by c. 814, sub. II. Effective to Dec. 31, 1995, following fees apply to following basic actions and services: commencing civil action, $75*; change of venue, $75; action affecting family under § 767.02, $95 ($20 plus $75 for commencing civil action); third party complaint, $45*; jury fee (per juror), $6; issuing executions, certificates, exemplifications, commissions to take depositions, transcripts from judgment and lien docket and any writs not commencing action, filing and entering judgments, transcripts of judgments, liens, warrants and awards, satisfactions of judgments, liens or warrants or releases, $5; filing foreign judgments, $15; revision of judgment affecting family, $30; appeal or review by certiorari or on record, $40* (if on new record, $55*); transmittal of documents, $15 plus postage; copies (per page), $1.25; searches, $5; garnishment action, $20*; petition requesting child support, maintenance or family support, $10 in addition to any other fee; forfeiture action, $25*; municipal court costs, $40. (Wis. Stat. §§ 814.61; 814.62; 814.63). For mediation, no fee for first session, but single fee of $200 for any subsequent mediation regardless of number of sessions. (Wis. Stat. §§ 814.615[1][a]1-2). No fee charged to petitioner under § 813.12 (domestic abuse, restraining orders and injunctions), with respondent to be charged filing and granting fees if respondent is convicted of violating temporary restraining order, injunction or tribal order under § 813.12. (Wis. Stat. § 814.61[1][d]).

* Fees marked with asterisk have additional $12 justice information system fee, $3.50 special court clerks fee (Wis. Stat. § 814.86[1]) and/or $68 court support services fee if paying fee under § 814.61(1)(a)(3) or (8)(am) or 814.63(1); $169 court support services fee if party paying fee seeks recovery of money and amount claimed exceeds amount under § 799.01(1)(d); $51 court support services fee if party paying fee seeks recovery of money and amount claimed is equal to or less than amount under § 799.01(1)(d). (Wis. Stat. § 814.85[1]).

Probate Courts.

Probate jurisdiction is exercised by circuit courts.

Municipal Judges.

Constitutional office of justice of peace has been abolished. Municipal court for each city, town and village is statutorily provided for which becomes operative upon adoption of ordinance or bylaw providing for election of judge and operation and maintenance of court. (Wis. Stat. § 755.01).

Court has exclusive jurisdiction of offenses against ordinances of city, village or town which operates court and when only legal relief is sought unless municipal court of 1st class city in any county with population over 500,000 is not in session, then circuit court has concurrent jurisdiction. (Wis. Stat. § 755.045). Procedure is governed by c. 800. Process may be served on countywide basis. (Wis. Stat. § 755.09). Appeal is to circuit court. (Wis. Stat. § 800.14).

Small Claims Courts.

There are no small claims courts. (Wis. Stat. § 799). Circuit courts follow small claims procedures in following actions: (1) Evictions; (2) with certain exceptions, actions to recover forfeiture for state, county or municipality; (3) actions for replevin where value of property claimed does not exceed $5,000; (4) other civil actions where amount claimed is $5,000 or less, if actions are for money judgment (excluding cognovit judgments), or for attachment or garnishment, or to enforce lien upon personalty; (5) actions for return of earnest money tendered pursuant to contract for purchase of real property; (6) actions relating to arbitration award related to purchase of real property. (Wis. Stat. § 799.01).

Process.

Action is commenced by summons, signed by clerk of court or licensed attorney. Except in eviction actions, summons served upon resident is returnable not less than eight days nor more than 30 days from date of issue, and service must be made not less than eight days prior to return date set by clerk. In eviction actions, summons served upon resident is returnable not less than five days nor more than 30 days from date of issue, and service must be made not less than five days prior to return date. Summons must state nature of demand substantially in terms of one or more of provisions governing small claims jurisdiction (Wis. Stat. § 799.05) and dollar amount of damages and last known address of parties as well as name and address of plaintiff's attorney, if any. Special procedures which utilize court commissioners exist for Milwaukee County and counties with population in excess of 100,000 that use court commissioners. (Wis. Stat. §§ 799.206-.207; 757.68). Summons form is prescribed (Wis. Stat. § 799.05) and must be in English and Spanish in Milwaukee County (Wis. Stat. § 799.04[2]). All pleadings, except initial complaint, may be oral, except court may require otherwise. (Wis. Stat. § 799.06[1]). If authorized by court rule, summons may be served by mailing. (Wis. Stat. § 799.12). When action is to obtain judgment against party personally, service by mail is limited to territorial limits of county in which action is brought. (Wis. Stat. § 799.12[3]). When service is made by mail, party may within 15 days of actual notice of pendency of action or entry of judgment, but not more than one year after judgment is entered, petition to be heard on merits and set aside judgment, if one has been entered. (Wis. Stat. § 799.14[1]).

Pleadings.

Responding party may answer, move to dismiss, or otherwise plead to complaint on return day or any adjournment thereof (Wis. Stat. § 799.20[1]), and right to trial by jury exists only if demand therefor is made at time of joining issue or within 20 days thereafter. Such demand requires payment of additional fees. Trial is to jury of six. (Wis. Stat. § 799.21).

Judgment may be docketed upon payment of fee of $5. (Wis. Stat. §§ 799.24; 814.62[3][c]; 814.61[5][b]).

Appeal.

Appeal of judgment or order is to court of appeals. (Wis. Stat. § 799.30).

Fees.

In small claims actions fees are same as in 814.62 (Wis. Stat. § 799.255), with additional $12 justice information system fee (Wis. Stat. § 814.635[1]), $3.50 special prosecution clerks fee in Milwaukee County (Wis. Stat. § 814.635[1m]) and $68 court support services fee if paying fee under § 814.61(1)(a)(3) or (8)(am) or 814.63(1); $169 court support services fee if party paying fee seeks recovery of money and amount claimed exceeds amount under § 799.01(1)(d); $51 court support services fee if party paying fee seeks recovery of money and amount claimed is equal to or less than amount under § 799.01(1)(d). (Wis. Stat. § 814.85[1]).

6.02 LEGISLATURE:

See http://www.legis.state.wi.us/.

Regular sessions convene in odd-numbered years on first Mon. of Jan. (Wis. Stat. § 13.02). Governor may call special sessions. (Art. IV, § 11).

Initiative and Referendum.

No statewide initiative; direct legislation procedure established for cities and villages (Wis. Stat. § 9.20); referendum provided for constitutional amendments (Art. XII, § 1) and various special matters.

Lobbyists.

Regulated by §§ 13.61-.75; 946.17.

6.03 REPORTS:

Wisconsin Supreme Court decisions are published in Pinney's Wisconsin Reports volumes 1-3, covering period from organization of court (July 1839) to 1852, Wisconsin Reports volumes 1-275, covering 1853-1957, and Callaghan's Official Wisconsin Reports, 2d, covering 1957 to date, published by West Group. Northwestern Reporter, published by West Group, covers 1879 to date. West's Wisconsin Reporter, also published by West Group, covers only reported Wisconsin cases from 1941 to date. Internet access to full text of Wisconsin Supreme Court and Court of Appeals cases can be found at http://www.wisbar.org/Wis/ (1995-present).

Unofficial Reporter.

"Wisconsin Law Journal" (formerly "Wisconsin Opinions"), weekly newspaper published by Daily Reporter Publishing Co., provides digest and full text copy of all Wisconsin Supreme Court and appellate decisions and selected U.S. district and bankruptcy court, U.S. Seventh Circuit, and Wisconsin trial court decisions.

Digests.

A digest annotated to the statutes is published by the state as "Wisconsin Annotations" with coverage ending in 1970. West Group publishes West's Wisconsin Statutes Annotated. Reported Wisconsin supreme court and appellate decisions are digested in West's Wisconsin Key Number Digest, West's Northwestern Digest, and Callaghan's Wisconsin Digest published by West Group. Wisconsin Law Reporter, published semi-monthly by Law Reporter Company, digests decisions of Wisconsin supreme court, court of appeals, seventh circuit, eastern and western districts of Wisconsin, eastern and western bankruptcy courts of Wisconsin, and U.S. Supreme Court.

6.04 STATUTES:

See http://www.legis.state.wi.us/rsb/Statutes.html or http://nxt.legis.state.wi.us/.

Statutes revised and published after each session of legislature; laws of each session published separately. Wisconsin Statutes (2007-2008) is most recent publication of statutes.

Uniform Acts of the National Conference of Commissioners on Uniform State Laws.—Uniform Acts that have been adopted are: +Absence as Evidence of Death and Absentee's Property (1941, 1979); Alcoholism and Intoxication Treatment (1974, 1992); +Anatomical Gift (1969, 1991, and 2008); Ancillary Administration of Estates (1951, 1977); Attendance of Witnesses from Without a State in Criminal Proceedings (1970, 1975); Certification of Questions of Law (1982); Child Custody Jurisdiction (1976, 1988—repealed in 2006); +Commercial Code (1952, 1963, 1965, 1992, 1996, 2000); +Common Trust Fund (1943, 1979); Conservation Easement (1981, 1985); +Consumer Credit Code, 1968 Act (1972, 1992); +Controlled Substances (1971, 1992); Criminal Extradition (1971); Custodial Trust (1992); Declaratory Judgments (1927, 1985); +Divorce Recognition (1941, 1979); +Durable Power of Attorney (1981, 1992); Enforcement of Foreign Judgments, Revised 1964 Act (1965, 1975); Evidence, Rules of (1974, 1992); +Federal Lien Registration (1977, 1992); +Fiduciaries (1925, 1983); Foreign-Money Claims (1989, 1991); Fraudulent Transfer (1988, 1990); Insurers Liquidation enacted under title "Insurers Rehabilitation and Liquidation" (1965, 1989); +Interstate Arbitration of Death Taxes (1971, 1987); Interstate Family Support (1996, 1997); +Joint Obligations (1927, 1983); +Limited Partnership, 1976 (1983, 1991); Management of Institutional Funds (1975, 1983); +Marital Property (1985, 1992); Military Justice, Code of (1969); +Nonprobate Transfers on Death (1990); Notarial Acts (1983, 1991); Partnership (1915, 1985); Photographic Copies of Business and Public Records as Evidence (1951, 1985); Principal and Income (Revised 1962 Act, 1991); Probate of Foreign Wills (1952); Prudent Management of Institutional Funds Act (2009); Real Estate Time-Share (1987); Reciprocal Enforcement of Support (1996); Rendition of Prisoners as Witnesses in Criminal Proceedings (1969, 1979); +Securities (1956, 1969, 1992, and 2008);

Simplification of Fiduciary Security Transfers (1959, 1987); Simultaneous Death (1941, 1983); +State Administrative Procedure (1955, 1992); Statutory Construction (1951, 1991); +Statutory Form Power of Attorney (1991, 1994); TOD Security Registration (1990); Trade Secrets (1986); Transboundary Pollution Reciprocal Access (1987); Transfers to Minors (1988, 1992); Unclaimed Property (1987, 1992); Unincorporated Nonprofit Association (1998); Vendor and Purchaser Risk (1941, 1975); +Veterans' Guardianship (1947, 1989).

†Adopted with significant variations or modifications. See appropriate topics.

Uniform Commercial Code has been adopted. See category 3 Business Regulation and Commerce, topic 3.09 Commercial Code.

For text of Uniform Acts falling within the scope of the Martindale-Hubbell Law Digests see Uniform and Model Acts section.

Other Uniform Acts that have been adopted are: Child Custody Jurisdiction and Enforcement Act (1997); Close Pursuits; (1969); Extradition of Persons of Unsound Mind (1971); Extradition of Prisoners as Witnesses (1979); Extradition of Witnesses (1975); Judicial Notice of Foreign Laws Act (1974, 1979); Out-of-State Parolee Supervision (1939, 1979); Real Property Electronic Recording Act (2004, 2005); Secured Creditor's Dividends in Liquidation Proceedings (1941, 1983); Securities Ownership by Minors (1971).

6.05 UNIFORM LAWS:

For list of Uniform Acts in force in this state see topic 6.04 Statutes. For text of Uniform Acts within the scope of the Martindale-Hubbell Law Digests see Uniform and Model Acts section.

7 CRIMINAL LAW

7.01 CRIMINAL LAW:

Criminal Code is contained in cc. 939-951. Crimes are divided into nine classes of felonies and three classes of misdemeanors. (Wis. Stat. §§ 939.50-.51). Maximum sentence is determined by class. (Wis. Stat. §§ 939.50-.51). C. 949 provides awards for victims of crimes. C. 950 outlines rights of victims and witnesses of crime. Restitution for victim generally required for sentencing including probationary sentence. (Wis. Stat. §§ 973.09[1][b], 973.20). Procedure in criminal matters is governed generally by cc. 967, 968, 970, 971, 972, 974. Mandatory for trial court to ascertain through colloquy defendant's understanding of nature of charge and any waiver of constitutional rights at plea hearing. (Wis. Stat. § 971.08; 131 Wis. 2d 246, 389 N.W.2d 12; 2009 WI 41, 317 Wis. 2d 161, 765 N.W.2d 794).

Indictment or Information.

Indictments are framed by grand jury. (Wis. Stat. § 968.50). Informations are filed by district attorney. (Wis. Stat. § 971.01).

Bail.

Before conviction, defendant arrested for criminal offense is eligible for release under conditions designed to assure defendant's appearance, protect members of community from bodily harm or prevent intimidation of witnesses. (Wis. Stat. § 969.01[1]). Pretrial detention authorized where defendant previously convicted of committing or attempting to commit violent crime is accused of committing or attempting to commit violent crime or where defendant is charged with 1st degree sexual assault, sexual assault of child, or 1st degree intentional homicide. (Wis. Stat. § 969.035). After conviction, and prior to sentencing, trial court may in its discretion release defendant upon various enumerated conditions. (Wis. Stat. § 969.01[2]).

Interstate Compact for Supervision of Parolees and Probationers.

Act in effect under title “Uniform Act for Out-of-State Parolee Supervision”. (Wis. Stat. § 304.13). (1939, adopted 1979).

Uniform Act for the Rendition of Prisoners as Witnesses in Criminal Proceedings.

Act in effect under title “Uniform Act for the Extradition of Prisoners as Witnesses”. (Wis. Stat. § 976.01) (1957, adopted 1979).

Uniform Act to Secure Attendance of Witnesses from Without the State in Criminal Proceedings.

Act in effect under title “Uniform Act for the Extradition of Witnesses in Criminal Actions”. (Wis. Stat. § 976.02) (1936, adopted 1975).

Uniform Criminal Extradition Act.

In effect. (Wis. Stat. § 976.03) (1926, adopted 1971). Uniform Act on Close Pursuit (Wis. Stat. § 976.04) and Interstate “Agreement on Detainers” (Wis. Stat. § 976.05) in effect.

Uniform Controlled Substances Act.

In effect. (Wis. Stat. §§ 961.001-.67) (1970, adopted 1971).

8 DEBTOR AND CREDITOR

8.01 ASSIGNMENTS:

Uniform Commercial Code has been adopted. See category 3 Business Regulation and Commerce, topic 3.09 Commercial Code.

In general, rights, debts and/or choses in action are assignable. The principles which govern assignability of causes of action are the same as those which govern survival of actions. (236 Wis. 122, 294 N.W. 503). Enforcement of assignment controlled by equitable principles. (158 Wis. 2d 559, 463 N.W.2d 853).

Instrument Transferring Title.

No special requirements.

Filing.

No requirement, except for matters covered by Uniform Commercial Code.

Recording.

No requirements.

Notice.

No assignment of a chose in action can have any effect upon the debtor or fund holder until brought to his notice, and such notice must be exact and specific. (102 Wis. 122, 78 N.W. 426).

Partial Assignments.

The creditor cannot piecemeal his claim against the debtor by assigning parts of his claim to other persons without the consent of the debtor. (102 Wis. 122, 78 N.W. 426).

Judgments are assignable and written assignment may be entered on judgment and lien docket by clerk of circuit court. (Wis. Stat. § 806.18).

Transfer of Bank Book.

No assignment of any saving fund bank account is valid unless in writing and assignment or copy be delivered to bank. (Wis. Stat. § 241.25).

Compensation Claims.

A claim for compensation under workers' compensation act (Wis. Stat. § 102.27) or for unemployment compensation (Wis. Stat. § 108.13) generally is not assignable.

Accounts Receivable.

Uniform Commercial Code applies.

Assignment of salary or wages is not valid as to salary or wages accruing more than six months after date of its making. Assignment by married person of salary or wages is not valid unless in writing signed by spouse, if then member of his or her family, witnessed by two disinterested witnesses. (Wis. Stat. § 241.09). No assignment of wages valid, and penalty imposed, in consumer transaction unless assignment revocable by consumer. (Wis. Stat. § 422.404).

Assignments by Fiduciaries.

Uniform Fiduciaries Act is in effect. (Wis. Stat. § 112.01[6]). Uniform Commercial Code applies but is subordinate. (Wis. Stat. § 408.109).

8.02 ATTACHMENT:

Actions in Which Allowed.

Attachment may be had in actions based on contract, judgment or tort where amount of indebtedness exceeds $50 (Wis. Stat. § 811.03), except no writ shall issue against municipal corporation nor in any action for price of liquor sold at retail (Wis. Stat. § 811.01).

Courts Which May Issue Writ.

Courts of record. (Wis. Stat. § 811.02).

Property Subject to Attachment.

All property in state not exempt from execution is subject to attachment. (Wis. Stat. § 811.12).

In Whose Favor Writ May Issue.

Any creditor-plaintiff may obtain attachment in proper case. (Wis. Stat. § 811.01).

Against Whom Writ May Issue.

Writ may issue against any debtor except municipal corporation. (Wis. Stat. § 811.01).

Claims on Which Writ May Issue.

Attachment on certain specified grounds may issue on unmatured debt. (Wis. Stat. § 811.03[3]).

Grounds.

In actions on contract or judgment, attachment is permitted where defendant: (1) Is absent from, or concealed within, state; (2) is domestic corporation no officer of which can be found; (3) has disposed of or concealed property or some part thereof, or is about to do so, with intent to defraud creditors; (4) has removed some property from state, or is about to do so, with like intent; (5) fraudulently incurred obligation sued on; (6) is nonresident; (7) is foreign corporation; or (8) has defaulted as public officer or as principal on official bond. Attachment may issue on unmatured debt on grounds 1-5 above. (Wis. Stat. § 811.03[1]).

In tort actions, attachment is permitted where defendant: (1) Is nonresident or of unknown residence; or (2) is foreign corporation. (Wis. Stat. § 811.03[2]).

Proceedings to Obtain.

Writ may issue at any time before final judgment and after summons and complaint are filed (Wis. Stat. § 811.02); it must be based on affidavit of plaintiff or someone in plaintiff's behalf, alleging specific factual allegations of indebtedness or liability in tort, and specifying amount claimed above all setoffs (which must exceed $50), and affirming affiant's knowledge or belief of existence of one or more of grounds for attachment above specified. (Wis. Stat. § 811.03[1]).

Attachment Bond.

Affidavit must be accompanied by undertaking to pay defendant's damages by attachment in case defendant recovers judgment; and larger undertaking can be required by court afterwards, on motion. (Wis. Stat. §§ 811.06-07). Where action is on unmatured claim, bond must be for three times amount demanded. (Wis. Stat. § 811.03[3]).

Attack by Defendant.

Defendant may move to vacate or modify writ of attachment. If defendant has made assignment for benefit of creditors assignee may move to vacate or modify. (Wis. Stat. § 811.19).

Levy.

Personal property is attached as upon execution (Wis. Stat. § 811.12) and attaching officer causes appraisal to be made (Wis. Stat. § 811.10). To attach real estate officer files with register of deeds copy of writ with certificate that officer has attached such real estate. (Wis. Stat. § 811.11).

Indemnity.

Levying officer may demand sufficient security to indemnify officer for attaching such property. (Wis. Stat. § 811.13).

Priorities.

Priorities between attachments are determined by order in which issued. (54 Wis. 2d 146, 194 N.W.2d 822).

Release of Property.

At any time before judgment, defendant may deliver to attaching officer bond executed by two sureties in amount of complaint, or appraisal value, or for real estate sum fixed by court; plaintiff may except to sureties; when sureties justify to officer's satisfaction, property is returned. (Wis. Stat. §§ 811.16-17).

Sale.

Depreciable or perishable property, or property entailing expense in its keeping, may be sold on court order. (Wis. Stat. § 811.14).

Third Party Claims.

Any person not party whose property is attached may be made party and summary relief may be granted party. (Wis. Stat. § 811.26).

Vacation or Modification.

Court may vacate or modify writ. (Wis. Stat. § 811.18).

Consumer Transactions.

No attachment of property purchased in consumer transaction until after entry of judgment. (Wis. Stat. § 425.111).

8.03 [RESERVED]

8.04 CREDITORS' SUITS:

When it appears that party is entitled to judgment and any part thereof consists in restraining some act, commission or continuance of which during litigation would injure him, or when during litigation it appears that party is doing or threatens to do act which will tend to render judgment ineffectual, temporary injunction may be granted to restrain such act. (Wis. Stat. § 813.02[1][a]). Prior to granting temporary injunction or restraining order, court may call by telephone party sought to be restrained and allow all parties to be heard on equities of case availability of other remedies, damages which may be sustained if temporary injunction is granted, or other relevant matters. (Wis. Stat. § 813.02[1][b]).

Writ of ne exeat to prevent defendant from going out of state until security is given may be granted if it appears by complaint or affidavit that grounds exist therefor, in which event court endorses on writ penalty of bond or security to be given by defendant, and writ must be discharged if defendant shows court there is no reason for restraint or gives security for performance of judgment. (Wis. Stat. §§ 813.13-15).

When litigant establishes apparent right to or interest in property subject of action, which is in possession of adverse party, and property or its rents and profits are in danger of being lost or materially impaired, court may appoint receiver to preserve same pending determination of litigation. (Wis. Stat. § 813.16).

Chapter 128 authorizes a proceeding for marshalling, liquidation and ratable distribution of debtor's assets in manner not inconsistent with Federal Bankruptcy Act but debtor cannot receive discharge of debts. (77 Wis. 2d 578, 254 N.W. 2d 171).

Additional provisions relate to marital property (c. 766); application as to permissive joinder of parties (Wis. Stat. § 803.04); definitions and basis for attachment (Wis. Stat. §§ 811.001; 811.03); garnishment (Wis. Stat. §§ 812.01; 812.02); and executions (Wis. Stat. §§ 815.01-.04).

Uniform Act Governing Secured Creditors' Dividends in Liquidation Proceedings enacted. (Wis. Stat. § 128.25).

8.05 EXECUTIONS:

Kinds of execution are: (1) Against property of debtor; (2) for delivery of property itself; (3) against debtor's person. (Wis. Stat. § 815.03).

Exemptions.

See topic 8.06 Exemptions.

Time for Issuance.

Judgments for payment of money or delivery of property may be enforced by executions against property (Wis. Stat. § 815.02) issued by court in prescribed manner (Wis. Stat. § 815.05), which may be had at any time within five years after judgment rendered and, if so issued, successive executions may be had without leave of court (Wis. Stat. § 815.04[1][a]). Leave of court required in other cases, and after 20 years from rendition execution or other proceedings forbidden. (Wis. Stat. §§ 815.04[1][b], [c]).

After expiration of one year from death of judgment debtor, and by court order only upon cause shown, execution may issue against property upon which judgment was lien at time of debtor's death. (Wis. Stat. § 815.14).

Execution against state prohibited (Wis. Stat. § 775.04), and permitted against municipality only after compliance with special procedure (Wis. Stat. § 67.24[1][3]).

Stay.

Temporary stay of execution may be granted by court that rendered judgment. (Wis. Stat. § 806.08). Appeal does not operate as stay but trial or appeal court may grant relief pending appeal. (Wis. Stat. § 808.07). See category 5 Civil Actions and Procedure, topic 5.03 Appeal and Error.

If all requirements for appeal are met, execution on municipal court judgment is stayed until final disposition of appeal. (Wis. Stat. § 800.14[3]).

Lien.

None before levy.

Levy is made by the sheriff seizing personal property of judgment debtor and appraisal is made by two disinterested persons if part of the property is claimed to be exempt. Personal property is bound from the time it is seized in execution. (Wis. Stat. § 815.19). The sheriff may require sufficient security to indemnify him for levying on property where there is any reasonable doubt as to the ownership. (Wis. Stat. § 815.24).

Levy on real estate made by endorsing description of property on execution and recording with Register of Deeds. (Wis. Stat. § 815.195). If homestead is claimed, provision is made for determining homestead exemption. (Wis. Stat. § 815.21).

Return.

Execution from court of record is returnable within 60 days after its receipt by officer. (Wis. Stat. § 815.06).

Priorities.

Upon receipt of any execution, officer is required to endorse on execution year, month, day and hour of day when officer received it (Wis. Stat. § 815.08) to fix its priority as senior execution for order of levy (55 Wis. 205, 12 N.W. 429), but lien acquired by actual levy is prior to senior execution subsequently levied (78 Wis. 351, 47 N.W. 618; 18 Wis. 406).

Claims of Third Persons.

Officer is subject to suit for trespass if he levies upon property which does not belong to the judgment debtor (143 Wis. 343, 127 N.W. 955), and he is liable for conversion if he sells such property (133 Wis. 391, 113 N.W. 680). The judgment creditor is not liable to the real owner where he does not instigate such levy or ratify it with knowledge (107 Wis. 109, 82 N.W. 703).

Sale of real estate is made by the sheriff after six weeks notice by publication and posting for at least three weeks prior to date of sale in three public places. (Wis. Stat. § 815.31). One year is allowed for redemption (Wis. Stat. § 815.39) and three months more for acquisitions from purchaser by certain creditors if debtor does not redeem (Wis. Stat. § 815.44), after which a sheriff's deed issues (Wis. Stat. § 815.55).

Sale of personalty may be made after 20 days notice by posting in three public places. (Wis. Stat. § 815.29).

Redemption.

Real estate may be redeemed within one year after the execution sale by payment to the purchaser, his personal representatives or assigns, or to the then sheriff of the county where the real estate is situated, the sum paid on the sale and interest from the time of sale. (Wis. Stat. § 815.39). Redemption allowed by person whose title was sold or, in case of his death, by his devisee, heir or grantee. (Wis. Stat. § 815.40).

Supplementary Proceedings.

If an execution has, within five years, been returned unsatisfied in whole or in part, the judgment creditor is entitled to an order from the court or a judge or court commissioner of the county to which the execution was issued requiring such judgment debtor to appear before him and answer concerning his property, at any time and place specified in the order, within said county. Remedy is available against individual, firm, corporation, or other association. (Wis. Stat. § 816.03). If issued by court commissioner, such order must be served under 801.11 and returned to commissioner who must file order and return with court. (Wis. Stat. § 816.035).

Upon showing that there is danger of a judgment debtor leaving the state or concealing himself and there is reason to believe that he has property which he unjustly refuses to apply to the judgment, he may be arrested upon warrant and brought before judge to answer concerning his property. (Wis. Stat. § 816.05). This procedure may not be used by merchant in connection with claim arising out of consumer credit transaction. (Wis. Stat. § 425.113).

The judge may order any property of the debtor or due to him, not exempt, to be applied toward the satisfaction of the judgment. (Wis. Stat. § 816.08). Where necessary, a receiver is appointed to receive and collect and to apply such property or proceeds and to bring necessary actions in respect thereto. (Wis. Stat. §§ 816.04-08).

Body Execution.

May be obtained against judgment debtor in cases wherein debtor was subject to civil arrest, but generally only after return of execution against his property unsatisfied in whole or part. (Wis. Stat. § 815.09). No further body execution on same judgment unless prisoner escapes, and no further execution against property on same judgment unless prisoner escapes (Wis. Stat. § 815.10) or is discharged because without property to apply to debt (Wis. Stat. § 898.10). There are detailed statutes governing custody, discharge, rights and liabilities of persons jailed on body execution. (c. 898).

8.06 EXEMPTIONS:

Exemptions and Debts Against Which Not Allowed.

Exemption exists with respect to: Tangible personal property not exceeding $5,000 in aggregate value; business and farm property not exceeding $7,500 in aggregate value; child support, family support or maintenance payments; municipal fire equipment; certain fire and casualty insurance proceeds on exempt property; certain proceeds of life insurance, motor vehicles not exceeding $1,200 in aggregate value; 75% of debtor's net income for one week pay period; personal injury and wrongful death claims; certain federal disability benefits; cemetery lots, tombstones and monuments; certain employee retirement benefits; certain state aid to county fairs and agricultural societies; private property from execution against municipalities; certain fire and police pensions; pensions, government insurance, adjusted compensation and other money received from U.S. Government on account of military or naval services; prepaid college tuition units; and certain depository accounts and college savings accounts. (Wis. Stat. § 815.18).

Other exemptions not listed in general statute are: state and municipal employee retirement benefits (Wis. Stat. §§ 62.63[4]; 40.08); old age and other public assistance benefits (Wis. Stat. § 49.96); school aids (Wis. Stat. § 121.007); public employee benefits (Wis. Stat. § 40.08); unemployment compensation (Wis. Stat. § 108.13) and worker's compensation payments (Wis. Stat. § 102.27); certain insurance company deposits with state (Wis. Stat. § 601.13[7]); clothing, furniture, certain earnings and real property in connection with satisfaction of obligation arising in consumer credit transaction (Wis. Stat. § 425.106) which may be claimed in lieu of exemptions under § 815.18 for consumer credit transactions (Wis. Stat. § 815.18[11]).

Value of exempt property is determined by agreement or commercially reasonable manner (Wis. Stat. § 815.18[7]), except personal property may be appraised in certain circumstances (Wis. Stat. § 815.19). Exemptions apply to residents only. (Wis. Stat. § 815.18[5]). Proceeds of exempt property not necessarily exempt. (Wis. Stat. § 815.18[4]).

Each spouse entitled to exemptions which can be taken on separate property or combined except that earnings exemptions may not be combined and applied to same property. (Wis. Stat. § 815.18[8]). No property is exempt as against debt for purchase price thereof (Wis. Stat. § 815.18[12]), or personal property taxes (Wis. Stat. § 74.55[2]).

Earnings.

Exemption exists on net income (defined as gross receipts paid or payable for personal services or derived from rents, dividends or interest, less federal and state tax deductions) of 75% for each one-week pay period or, if less, what court determines is reasonably necessary for support of debtor and debtor's dependents, but not less than 30 times greater of state or federal minimum wage. (Wis. Stat. §§ 815.18[2][n], [t]; [3][h]).

Waiver of Exemption.

Debtor not affirmatively claiming exemption rights in manner provided by statute waives exemption rights. Contractual waiver of exemption rights before judgment on claim is void. (Wis. Stat. § 815.18[6][a]).

8.07 FORECLOSURE:

See category 20 Mortgages, topic 20.04 Mortgages of Real Property.

8.08 FRAUDULENT SALES AND CONVEYANCES:

Uniform Fraudulent Transfer Act has been adopted effective Apr. 8, 1988. (c. 242). Various other statutory provisions. (cc. 241, 243).

Transfer for Use of Transferor.

To extent settlor of trust has right to receive income or principal, court may order trustee to pay debt to judgment creditor. (Wis. Stat. § 701.06[6]).

No Change of Possession.

Every sale and assignment of goods not accompanied by delivery and change of possession is presumed fraudulent and void against creditors. (Wis. Stat. § 241.05).

Bulk Sales.

Uniform Commercial Code applies. See category 3 Business Regulation and Commerce, topic 3.09 Commercial Code.

8.09 GARNISHMENT:

Any creditor may proceed in garnishment against any person indebted to such creditor or who possesses or has under his or her control property belonging to such creditor's debtor or marital property subject to satisfaction of obligation under § 766.55(2). (Wis. Stat. § 812.01). Earnings garnishment and nonearnings garnishment controlled by separate subchapters within statute. (c. 812).

Nonearnings Garnishment.

In General.

Nonearnings garnishment permitted: (1) At any time after summons and complaint filed: (a) in action commenced for damages founded on contract, (b) in action upon judgment, (c) in tort action where writ of attachment could issue; or (2) after execution upon in personam judgment issuable. (Wis. Stat. § 812.02).

Plaintiff may not commence garnishment action affecting property of spouse who is not defendant to principal action unless spouse is defendant in garnishment action. (Wis. Stat. § 812.02[2e]). Garnishments based upon judgment of cognovit prohibited. (Wis. Stat. §§ 806.25; 812.02[2m]).

Garnishment action cannot be brought to recover price or value of intoxicating liquors sold at retail. (Wis. Stat. § 812.01[4]).

Jurisdiction.

Circuit court has jurisdiction.

Proceedings to Obtain—Small Claims.

If nonearnings garnishment judgment under $5,000, then small claims procedure applies. (Wis. Stat. § 799.01[1][d]).

Proceedings to Obtain—Large Claims—Service.

For large nonearnings garnishment claims, action commenced by filing summons and complaint provided authenticated copies served on defendant within 60 days after filing. (Wis. Stat. § 812.04[3]). Authenticated copies must be served on garnishee and copies or notice of such service in statutory form must be served on principal defendant within ten days after service on garnishee, along with copy of summons in original action. (Wis. Stat. § 812.07). Under prescribed conditions, substituted service on defendant's employer may be made when defendant cannot be served. (Wis. Stat. § 812.02[2][b]). Summons must be in statutory form. (Wis. Stat. § 812.04). Summons must contain statement that first $1,000 in garnishee defendant's account(s) in financial institutions must be treated by financial institutions as subsistence allowance for defendant. (Brown v. Barczak, 1988WL 285577, unpub. op. [E.D. Wis. June 24, 1988]).

Proceedings to Obtain—Large Claims—Complaint.

Garnishee complaint in action before judgment must allege existence of one of grounds for garnishment, amount of plaintiff's claim against defendant and disbursements above all offsets, and that plaintiff believes that named garnishee is indebted to or has property in his or her possession or under his or her control, other than earnings defined in § 812.30(7), belonging to defendant, and that such indebtedness or property is to best of plaintiff's knowledge and belief not exempt from execution. (Wis. Stat. § 812.05[1]). Complaint in action after judgment must in addition allege name and location of court, case number, date of entry and amount of judgment. (Wis. Stat. § 812.05[2]). Any number of garnishees may be embraced in one garnishment, but they will be deemed severally proceeded against unless joint liability claimed. (Wis. Stat. § 812.05[3]).

Proceedings to Obtain—Large Claims—Bond & Fees.

No bond is required of garnishee plaintiff. Nonearnings garnishee must receive $3 as garnishee fee and is not required to answer unless fee paid or otherwise by court order. (Wis. Stat. § 812.06).

Effect of Service on Garnishee.

Nonearnings garnishee liable to plaintiff from time of service for property then in garnishee's possession, or under his or her control, belonging to defendant or in which defendant is interested, to extent of his or her right or interest therein, and for all garnishee's debts due or to become due, to defendant, except such as are exempt from execution, but not in excess of amount of plaintiff's claim. (Wis. Stat. § 812.18[1]).

Answer of Garnishee.

Garnishee must answer nonearnings garnishment within 20 days from service of garnishee summons and complaint, stating extent of indebtedness or liability to principal defendant, whether he held any property of such defendant, and any setoff or defense claimed against such indebtedness or liability, and may also state any known claim of exemption of property garnisheed and any known claims of third parties. Any subsistence allowance to principal defendant out of earnings must also be stated. (Wis. Stat. § 812.11). In small claims action, answer due by return date specified in summons between eight and 30 days after issue date. (Wis. Stat. § 799.05).

Practice.

Nonearnings garnishee's answer conclusive unless plaintiff replies within 20 days of answer. (Wis. Stat. § 812.14). Either garnishee or principal defendant may defend garnishment action or principal action. (Wis. Stat. § 812.15).

Adverse Claims.

When nonearnings garnishee answer discloses any third party claim, court may order claimant impleaded as defendant. (Wis. Stat. § 812.17).

Judgment may be rendered against nonearnings garnishee only if plaintiff recovers in principal action. (Wis. Stat. § 812.16).

Nonearnings garnishee not liable by reason of: (1) Garnishee having drawn, accepted, made, endorsed or guaranteed any negotiable instrument; (2) anything received or collected by him or her by execution or other process; (3) money in his or her hands as public officer; (4)

anything owing by him or her on contingency. Debt owing by owner of property subject to construction lien may not be deemed absolutely due until claims of subcontractors and employees have matured or expired. Except as aforesaid, judgment may be given for anything owing although it has not become due, in which case garnishee may not be required to pay or deliver it before time appointed by contract. (Wis. Stat. § 812.19).

Earnings.

See subhead Earnings Garnishment, infra.

Earnings Garnishment.

In General.

Earnings garnishment is action to collect unsatisfied civil judgment for money damages plus statutory interest and costs, from earnings payable by garnishee to debtor. (Wis. Stat. § 812.32).

Jurisdiction.

Earnings garnishment action may not be commenced in county other than county where judgment is entered unless judgment docketed in that county. (Wis. Stat. § 812.31[3]).

Proceedings to Obtain.

Earnings garnishment commenced by filing garnishment notice with clerk of courts. (Wis. Stat. §§ 812.35[1]; 812.44[2]). Upon receiving notice and fee under § 814.62(1), clerk of courts must issue two earnings garnishment forms under § 812.44(3) for each garnishee. (Wis. Stat. § 812.35[2]). Within 60 days after filing notice, creditor must serve one earnings garnishment form upon debtor and one upon garnishee by first class mail, certified mail return receipt requested or by means permissible for service of summons in civil action. (Wis. Stat. §§ 812.35[3][a], [b]). Creditor must pay $15 garnishee fee to garnishee (Wis. Stat. § 812.33) with earnings garnishment form (Wis. Stat. § 812.35[4][a]). Statutory forms provided. (Wis. Stat. § 812.44). Creditor must serve exemption notice under § 812.44(4), answer form under § 812.44(5), and schedules and worksheets under § 812.34(3) on debtor when earnings garnishment form served. (Wis. Stat. § 812.35[4][b]). Garnishee determines whether it may be obligated to debtor for earnings from any pay periods within 13 weeks after service of earnings garnishment form. (Wis. Stat. § 812.35[5]). If earnings garnishee receives multiple garnishments, garnishee must stack and complete garnishments in order received. (Wis. Stat. § 812.35[6]). Parties can stipulate to 13-week extension unless different judgment garnishment commenced. (Wis. Stat. § 812.40). Garnishment of public employees continuous until debt paid. (Wis. Stat. § 812.42).

Property Which May Be Reached.

In earnings garnishment, unless court grants additional relief, 80% of debtor’s disposable earnings (gross wages less taxes and FICA) exempt from garnishment. (Wis. Stat. § 812.34[2][a]). Debtor’s earnings exempt from garnishment if (1) Debtor’s household income is below poverty or garnishment would cause that result; (2) debtor receives or is eligible for need-based public assistance or has received such assistance within six months prior to garnishment. (Wis. Stat. § 812.34[2][b]).

Child support/maintenance orders receive priority but then subsistence allowance reduced to 75%. (Wis. Stat. § 812.39[2]).

Effect of Service on Garnishee.

If earnings garnishee fails to pay, creditor may move court for judgment against garnishee in amount of unsatisfied judgment, interests and costs. (Wis. Stat. § 812.41[1]).

Answer of Garnishee.

Earnings garnishee must notify creditor within seven business days after receipt of garnishment if money not likely to be withheld. (Wis. Stat. § 812.35[5]). Otherwise, garnishee must pay creditor nonexempt earnings between five and ten business days after each affected pay day. (Wis. Stat. § 812.39[1]).

Practice.

Earnings garnishment debtor may claim exemption or assert any defense to earnings garnishment by completing answer form and delivering or mailing it to garnishee. Debtor may file answer or amended answer at any time before or during earnings garnishment period. (Wis. Stat. § 812.37[1]). When garnishee receives debtor’s answer or amended answer, garnishee must make copy of same, write date of receipt on that copy, and mail copy to creditor by end of third business day after garnishee’s receipt of debtor’s answer. (Wis. Stat. § 812.37[2]). Garnishee must accept exemptions claimed in debtor’s answer or amended answer received before payment made to creditor unless court order directs otherwise. (Wis. Stat. § 812.37[3]).

Judgment.

For earnings garnishment, court must make findings of fact, conclusions of law and necessary orders to motions or petitions by creditor, debtor or any party to earnings garnishment. (Wis. Stat. § 812.38). Creditor may, upon notice to all parties, move court for judgment against garnishee in amount of unsatisfied judgment plus interest and costs if garnishee fails to pay funds to which creditor entitled. Garnishee may assert affirmative defense that amount of debtor’s nonexempt disposable earnings are less than judgment balance or affirmative defense that wrongful conduct of garnishee was not intentional and resulted from bona fide error notwithstanding maintenance of procedures reasonably adapted to avoid error in which case garnishee’s liability limited. (Wis. Stat. § 812.41).

No Discharge.

Garnishee may not impose fee or take adverse action against debtor by reason of garnishment of debtor’s earnings. Debtor may bring action for reinstatement, back wages and benefits, restoration of seniority, other relief allowed by law and reasonable attorneys’ fees incurred in bringing action against garnishee violating this section. (Wis. Stat. § 812.43).

8.10 HOMESTEADS:

Every resident is entitled to hold homestead, owned and occupied by him or her, exempt from execution and from lien of any judgment and from liability for debts of owner, except as hereinafter stated. (Wis. Stat. § 815.20).

Limitation of value of homestead which may be held exempt is $40,000. (Wis. Stat. § 815.20).

Limitation of Area.

Homestead includes dwelling and so much of surrounding land as is necessary for home, not to exceed 40 acres and not less than one-quarter acre (if available). (Wis. Stat. § 990.01[13][a]).

Interest of Homestead Claimant.

The exemption extends to land, not exceeding altogether the amount and value aforesaid, owned by husband and wife jointly or in common or as marital property, and when they reside in same household may be claimed by either husband or wife, or divided in any proportion between them, but exemption may not exceed $40,000 for household, and such exemption extends to interest of tenants in common having homestead on property with consent of co-tenants living thereon, and to any estate less than fee. (Wis. Stat. § 815.20).

Temporary removal from premises with intention to reoccupy premises as homestead does not impair the exemption. (Wis. Stat. § 815.20[1]).

Debts or Liabilities Against Which Exemption Not Available.

The exemption is not available as against laborers', mechanics' and purchase money liens, mortgages, or taxes. (Wis. Stat. § 815.20).

Designation of Homestead.

None required before levy. Assertion of homestead rights can be as late as time surplus is distributed. (131 Wis. 2d 459, 389 N.W.2d 359).

Claim of Exemption.

Whenever levy made upon lands of any person, such person may notify officer making such levy, at any time before sale, that such person claims exempt homestead, giving description and estimate of value thereof. (Wis. Stat. § 815.21[1]).

Waiver of Exemption.

Exemption may be waived from failure to claim same after levy. (Wis. Stat. § 815.21[3]).

Alienation or Encumbrance.

Conveyance of interest in homestead, except for conveyance between spouses, must be signed or joined in by separate conveyance by both spouses. In purchase money mortgage pledging homestead as security only purchaser need sign mortgage. (Wis. Stat. § 706.02[1][f]).

Proceeds of sale of homestead, up to $40,000, are exempt for two years after sale, while held with intention to procure another homestead therewith. (Wis. Stat. § 815.20).

Rights of Surviving Spouse and Family.

Home passes as part of intestate share of surviving spouse. (Wis. Stat. § 852.09). Court may include home as part of $10,000 exemption of surviving spouse. (Wis. Stat. § 861.41).

8.11 JUDGMENT NOTES:

See category 3 Business Regulation and Commerce, topic 3.02 Bills and Notes.

8.12 LEVY:

See topics 8.02 Attachment; 8.05 Executions.

8.13 LIENS:

Uniform Commercial Code has been adopted. See category 3 Business Regulation and Commerce, topic 3.09 Commercial Code.

Statutory liens are given (among others): (1) For wages and services in the lumbering, mining and quarrying industries (Wis. Stat. § 779.18-40): (2) to mechanics and jewelers for repairs to personal property (Wis. Stat. §§ 779.41-42, .46); (3) for vehicle towing services (Wis. Stat. § 779.415); (4) to garage and hotel keepers for amounts due (Wis. Stat. § 779.43); (5) to consignee for advances and negotiable securities given to his consignor (Wis. Stat. § 779.44) and to certain factors, brokers and agents in possession for commissions or other money due (Wis. Stat. § 779.45); (6) to nonprofit corporation maintaining, improving, policing or preserving property and facilities commonly used by its members, upon the real estate of members (Wis. Stat. § 779.70); (7) upon ships and other vessels for services on or to them or expenses or liabilities of almost any kind incurred in connection with or by reason of their operation (c. 780); (8) to hospitals for services rendered to persons injured through negligence, wrongful act or any torts of others (Wis. Stat. § 779.80); (9) to persons who use or provide toolings to fabricate or manufacture plastics products (Wis. Stat. § 779.47). Statutes provide various means of perfecting and enforcing all of above liens.

Mechanics' Liens.

Mechanics who alter or repair personal property at request of owner or legal possessor have liens for reasonable charges for services and materials. Lien is generally prior to perfected security interests for first $1,500. (Wis. Stat. § 779.41[1]).

Employee Wage Liens.

Employee has lien upon all real and personal property of employer for unpaid wages. Lien upon real property takes effect when employee files notice of lien with clerk of circuit court of county in which some part of services were performed, pays fee, and serves copy of petition on employer by personal service or certified mail. Clerk of circuit court enters notice of lien on judgment and lien docket. Lien upon personal property takes effect when employee files notice of lien with Department of Financial Institutions, pays fee, and serves copy of notice on employer by personal service or certified mail. Department files notice of lien in same place as financing statements under Subch. V of c. 409. Notice of lien must be filed within two years after date wages are due. Notice must specify nature and amount of claim, describe property on which claim made, and state person filing notice claims lien. Lien takes precedence over all other debts, judgments, decrees, liens or mortgages against employer that originate after lien takes effect. After Dec. 1, 2003, liens held by commercial lending institutions originated before wage lien takes effect have priority over subsequent wage lien except for limited priority of up to first $3,000 of unpaid wages earned by employee within six-month period prior to date of filing for wage claim. Lien ceases to exist if employee fails to bring action to enforce lien within two years after claim filed. (Wis. Stat. §§ 109.09; 893.44).

Wages defined to include salaries, commissions, holiday and vacation pay, overtime pay, severance pay or dismissal pay, supplemental unemployment compensation benefits when required under binding collective bargaining agreement and bonuses. (Wis. Stat. § 109.01[3]).

Construction Liens.

Person entering into contract, express or implied, with owner of any interest in land to perform any work or furnish any labor or materials or plans or specifications for improvement of land has lien therefor on all interests in land belonging to its owners, providing notice requirements met. In defining "owner," agency presumed between employer and employee, spouses, joint tenants, and among tenants in common. (Wis. Stat. § 779.01[2][c]). Lien reaches all contiguous land in which owner has interest or, if platted, all lots on which improvement located. (Wis. Stat. § 779.01[3]). Lien priority dates from visible commencement in place of work of improvement, but where new construction is involved, no earlier than beginning of substantial excavation for foundations, footing or base of new construction, except where new construction is to be added to substantial existing structure. Absent notice, lien is also prior to unrecorded mortgage. Owner need not pay assignee or creditor of certain lienors while claims of subcontractors, materialmen or laborers exist. (Wis. Stat. § 779.01[4]). Claim for lien in prescribed form must be filed with clerk or circuit court of county where lands lie within six months after furnishing last labor, services, materials, plans, or specifications and action started by filing summons and complaint within two years after claim. Lien claimant shall serve copy of claim for lien on owner of property on which lien is placed within 30 days after filing claim. (Wis. Stat. §§ 779.06[1], [2]).

Persons other than laborers who enter into contracts with owner of land not acting as his own general contractor are "prime contractors" (Wis. Stat. § 779.01[2][d]), and as such generally must, within ten days after first labor, services, materials, plans, or specifications are performed, furnished, or procured give written notice to owner that persons or companies performing, furnishing or procuring labor, services, materials, plans, or specifications for construction on owner's land may have lien rights on such land and buildings if not paid (Wis. Stat. § 779.02[2][a]). Other lien claimants who perform, furnish or procure labor, services, materials, plans, or specifications, but who are not prime contractors must furnish two signed copies of written notice to owner or authorized agent at last known post office address within 60 days after performing, furnishing or procuring first labor, services, materials, plans, or specifications. (Wis. Stat. § 779.02[2]). Failure of any lien claimant to comply with notice provisions deprives such claimant of his lien and remedy. Service of late but otherwise proper notice preserves lien as to all labor, services, materials, plans, or specifications performed, furnished, or procured after late notice is actually received by owner. (Wis. Stat. § 779.02[3]). Where lien filed by any person other than prime contractor, prime contractor must defend any action thereon at his own expense. (Wis. Stat. § 779.02[6]). Liens may be eliminated if prime contractor furnishes payment bond. (Wis. Stat. § 779.03[2]).

Such liens are foreclosed in generally the same manner as real estate mortgages, but there is no equity of redemption. (Wis. Stat. §§ 779.09, 779.12). There is no priority between lien claimants in a foreclosure judgment. (Wis. Stat. § 779.11).

Any person who performs, furnishes, procures, manages, supervises, or administers any labor services, materials, plans, or specifications used or consumed in making public improvements or performing public work shall have lien on moneys due prime contractor provided written notice is given state or municipal debtor before payment. (Wis. Stat. § 779.15).

Equitable liens arise, independent of statute, from written contract (68 Wis. 2d 597, 229 N.W.2d 613), or oral agreement (67 F.2d 852) showing intention to charge some particular property with payment of a debt. Equitable lien may also arise as result of property division divorce decree under certain circumstances. (83 B.R. 564, aff'd 500 U.S. 291, 111 S.Ct. 1825). It is unclear whether anticipated proceeds of tort claims may constitute res to which equitable lien may fasten. (715 N.W.2d 160).

Satisfaction.

On demand after satisfaction of claim, satisfaction must be executed by lien claimant or attorney who executed and filed claim on his behalf and filed with clerk of court with whom lien claim is docketed. Failure to furnish satisfaction subjects party to a penalty equal to one-half of the sum claimed, to be recovered by action. (Wis. Stat. § 779.13[1]).

Assignment.

All claims for liens and rights of recovery therefor are assignable but assignment is ineffective as to payments made by owner before being served with written notice thereof. (Wis. Stat. § 779.04).

Attachment Lien.

See topic 8.02 Attachment.

Attorney's Lien.

See category 18 Legal Profession, topic 18.01 Attorneys and Counselors.

Collateral Security.

See topic 8.15 Pledges.

Execution Lien.

See topic 8.05 Executions.

Judgment Lien.

See category 5 Civil Actions and Procedure, topic 5.15 Judgments.

Landlord's Lien.

See category 21 Property, topic 21.10 Landlord and Tenant.

Liens on Exempt Property.

See topic 8.06 Exemptions.

Liens on Homestead.

See topic 8.10 Homesteads.

Real Estate Mortgage Lien.

See category 20 Mortgages, topic 20.04 Mortgages of Real Property.

Tax Lien.

See category 22 Taxation, topic 22.16 Property Taxes.

8.14 MECHANICS' LIENS:

See topic 8.13 Liens.

8.15 PLEDGES:

Pledges in the main are subject to common law excepting chattel mortgages and other special liens. Personal representative may pay encumbrance of pledge on any property in estate. (Wis. Stat. § 859.43[2]).

Remedies of Pledgee.

Pledgee has right in case of default to sell pledged property in suitable public manner. (9 Wis. 348 overruled in part 12 Wis. 413). Pledgee may not purchase without pledgor's consent. (244 Wis. 459, 12 N.W.2d 721).

Pawnbrokers, consignees, factors, brokers and certain others have a lien which may be satisfied if debt is unpaid for three months and value does not exceed $100, by sale of property at public auction after notice to owner. If value exceeds $100, foreclosure action must be brought. (Wis. Stat. § 779.48).

Uniform Commercial Code has been adopted. See category 3 Business Regulation and Commerce, topic 3.09 Commercial Code. See Secured Transactions which includes security interests created by pledge. (Wis. Stat. § 409.109[2]).

8.16 RECEIVERS:

When Appointed.

Receiver may be appointed: (1) On application of either party when party establishes an apparent right or interest in property which is the subject of the action and which is in possession of adverse party, and the property or its rents and profits are in danger of being lost or materially impaired; (2) by judgment or after judgment to carry it into effect or to dispose of the property according to the judgment; (3) to preserve the property during appeal or when an execution has been returned unsatisfied and judgment debtor refuses to apply property to the satisfaction of the judgment, or in an action by a creditor in supplementary proceedings; (4) when a corporation has been dissolved or is insolvent or in imminent danger of insolvency or has forfeited its corporate rights; (5) in accordance with a practice which obtained when the code of 1856 took effect, except as otherwise provided (Wis. Stat. § 813.16); (6) when an execution against a judgment debtor is returned unsatisfied (Wis. Stat. § 128.08[1][a]).

A receiver may also be appointed to take possession of property of an absentee or person in military service. (Wis. Stat. § 813.23). In proceedings to liquidate corporation, court has power to appoint receiver or receivers. (Wis. Stat. §§ 180.1431-1432; 181.1431-1432).

Court may appoint receiver when execution against property was returned unsatisfied within five years. (Wis. Stat. § 816.03). There shall be only one receivership at any time. (Wis. Stat. § 816.04).

Jurisdiction of proceedings in creditors' actions is in circuit courts (Wis. Stat. § 128.01); otherwise general jurisdictional standards apply.

Eligibility and Competency.

No court or probate registrar may appoint as receiver any corporation (except nonprofit corporation), limited liability company, association, partnership or business trust unless corporation, limited liability company, association, partnership or business trust is subject to regulations governing fiduciaries or is national bank, state or federal savings and loan association or savings bank, or federal credit union with authority to exercise such power, or is foreign corporation acting under § 223.12. (Wis. Stat. §§ 223.10; 223.105).

Qualification.

Receiver must file bond. (Wis. Stat. §§ 128.09; 813.16[6]).

Powers.

Receiver, under direction of court, holds property as equity receivership with powers to: (a) Take possession of all property of absentee wherever situated; (b) collect all debts due absentee; (c) bring and defend suits; (d) pay insurance premiums; (e) with approval of court, pay all debts due by absentee; (f) pay over proceeds of such part or all of said property, or income thereof necessary to maintain absentee's dependents. (Wis. Stat. § 813.23[2]).

Duties.

Whenever receiver is appointed by court to manage or close up any business, receiver must immediately report to court amount due employees in such business and court must order receiver to pay out of first receipts of business, after paying costs, debts due U.S. or this state, taxes and assessments and current expenses of carrying on or closing said business, wages, including pension, welfare and vacation benefits of such employees earned during last three months of employment and within one year prior to his appointment. (Wis. Stat. § 813.17).

Compensation.

"Reasonable," as set by court. (Wis. Stat. § 813.26[3]).

Discharge.

By court after approval of accounts or for malfeasance or incompetence. (Wis. Stat. §§ 813.28[1]; 128.10[2]).

8.17 REDEMPTION:

See category 20 Mortgages, topic 20.01 Chattel Mortgages.

8.18 SUPPLEMENTARY PROCEEDINGS:

See topic 8.05 Executions.

8.19 [RESERVED]

8.20 USURY:

See category 3 Business Regulation and Commerce, topic 3.19 Interest.

9 DISPUTE RESOLUTION

9.01 ALTERNATIVE DISPUTE RESOLUTION:

Both mandatory and voluntary dispute resolution provided for in civil cases. (Wis. Stat. § 802.12). Except for binding arbitration, all settlement alternatives are confidential compromise negotiations, inadmissible under §§ 904.08 and .085. (Wis. Stat. § 802.12[4]). Arbitration procedures of c. 788 not applicable to agreements to arbitrate under § 101.143(6s) or § 230.44(4)(bm). Provision in any other written contract, including sales of real estate, to settle by arbitration any question arising therefrom or out of refusal to perform contract, or agreement in writing between two or more persons to submit to arbitration any controversy existing between them is valid, irrevocable and enforceable, save upon grounds existing at law or equity for revocation of any contract. (Wis. Stat. §§ 788.01; 788.015). If action is commenced upon any issue referable to arbitration under such agreement, court must, on application of party, stay trial until such arbitration has been had under such agreement, provided applicant for stay is not in default in proceeding with such arbitration. (Wis. Stat. § 788.02).

Party aggrieved by failure of another to arbitrate may apply to any court of record having jurisdiction of parties or property for order directing parties to proceed to arbitration in accordance with terms of agreement. (Wis. Stat. § 788.03).

Parties to labor dispute may agree to have arbitrators appointed to act in all or part of dispute, and may agree to allow arbitrators to decide disputes over meaning or application of terms of collective bargaining agreement. (Wis. Stat. § 111.10). Arbitration procedures of c. 788 not applicable to other employment contract disputes. (Wis. Stat. § 788.01). Agreements to arbitrate future disputes contained in collective bargaining agreements between employers and employees or associations of employees are enforceable by Wisconsin employment relations commission. (Wis. Stat. § 111.06[1][f]; 267 Wis. 316, 64 N.W.2d 866).

Mandatory Alternative Dispute Resolution.

Claims against health care providers must first be submitted to medical mediation system within 15 days of date of filing action in court. (Wis. Stat. § 655.445[1]). Alternative dispute resolution also required in disputes between motor vehicle dealer licensees, distributors and manufacturers. (Wis. Stat. § 218.0136[1]). Court may order parties to select settlement alternative from different alternatives provided for in statute. (Wis. Stat. § 802.12[2][a]). This will not delay trial date or discovery proceedings, unless parties consent to delay. (Wis. Stat. § 802.12[2][a]). Party aggrieved by order to select settlement alternative will be afforded hearing to argue that order should be vacated or modified. (Wis. Stat. § 802.12[2][a]).

If parties cannot agree on settlement alternative, judge will select least costly effective settlement alternative that judge believes will be effective, and may order parties to participate in one of following settlement alternatives: (1) Direct negotiation: exchange of offers and counter-offers with discussion of merits of parties' positions, without use of third person (Wis. Stat. § 802.12[1][b]); (2) early neutral evaluation: evaluation by neutral third party based on briefs and oral presentations, focusing on appraisal of merits, suggestions for efficient handling of case, and, if parties agree, assisting in settlement negotiations (Wis. Stat. § 802.12[1][c]); (3) focus group: abbreviated presentations by parties to panel of citizens selected in mutually agreed-upon manner, with panel rendering advisory opinion about how dispute should be resolved and discussing its opinion with parties (Wis. Stat. § 802.12[1][d]); (4) mediation: dispute resolution before neutral third person with no power to impose decision, but who helps parties try to reach settlement (Wis. Stat. § 802.12[1][e]); (5) mini-trial: presentations by parties to panel of persons selected and authorized by parties to consider legal and factual issues and attempt to negotiate settlement of dispute. Mini-trials may include neutral advisor with expertise to facilitate process (Wis. Stat. § 802.12[1][f]); or (6) moderated settlement conference: settlement conference conducted by one or more neutral third persons who receive brief presentations in order to facilitate negotiation and who may render advisory opinion to aid negotiation (Wis. Stat. § 802.12[1][g]). Unless all parties consent, judge may not order parties to participate in other recognized forms of dispute resolution: binding arbitration, nonbinding arbitration, or summary jury trial. Unless all parties consent, judge also may not order parties to go through more than one of following: binding arbitration, early neutral evaluation, focus group, mediation, mini-trial, moderated settlement conference, nonbinding arbitration, or summary jury trial. (Wis. Stat. § 802.12[2][b]). Judge may order parties to go through more than one round of direct negotiation. (Wis. Stat. § 802.12[2][b]). Judge may not order parties to resolve their dispute. (248 Wis.2d 99, 635 N.W.2d 667).

Voluntary Alternative Dispute Resolution.

Three other forms of dispute resolution may be ordered by court, but only with parties' consent: (1) Binding arbitration: resolution before neutral third person given authority to render decision that is legally binding, where parties present evidence and examine witnesses under rules of evidence provided by contract or neutral third person, award subject to judicial review under § 788.10 and § 788.11 (Wis. Stat. § 802.12[1][a]); (2) nonbinding arbitration: presentations of evidence and examination of witnesses under rules of evidence agreed to by parties, or determined by neutral third person, before neutral third person who is given authority to render nonbinding decision as basis for subsequent negotiation (Wis. Stat. § 802.12[1][h]); or (3) summary jury trial: abbreviated presentations to small jury selected from regular jury panel, with judge presiding and determining applicability of rules of evidence, and jury rendering advisory verdict, which parties may discuss with jury (Wis. Stat. §§ 802.12[1][i]; 802.12[2][b]). Provision in written contract to settle by arbitration controversy thereafter arising out of such contract is enforceable. (Wis. Stat. § 788.01). Agreement in writing between two or more persons to submit to arbitration any controversy existing between them at time of agreement to submit is enforceable. (Wis. Stat. § 788.01). In actions affecting family under c. 767, all settlement alternatives available except focus group, mini-trial, and summary jury trial. (Wis. Stat. § 802.12[3][a]). Parties may agree to arbitrate following issues: (1) Custody and physical placement, under § 767.41; (2) visitation rights, under § 767.43; (3) child support, under § 767.511 or § 767.89; (4) modification of any of above three under § 767.41 or § 767.59. (Wis. Stat. § 802.12[3][d]).

If parties agree to arbitration of certain matters affecting family, court must confirm arbitration award, subject to § 788.10 and § 788.11, and incorporate arbitration award into judgment or post-judgment modification order. (Wis. Stat. § 802.12[3][c]).

Alternative Dispute Resolution Acts.

c. 788; 802.12.

9.02 ARBITRATION AND AWARD:

Form and Requisites of Submission.

If a provision in a written contract for arbitration is valid, the arbitration must be had in accordance with the terms of the agreement. (Wis. Stat. § 788.01).

Judgment on Award.

Awards must be in writing and signed by majority of arbitrators. (Wis. Stat. § 788.07). Upon the granting of an order confirming, modifying or correcting arbitration award, judgment may be entered in conformity therewith. (Wis. Stat. § 788.12). Court will uphold arbitration award if there is some reasonable foundation for interpretation of contract offered in decision. (2009 WI 51, 766 N.W.2d 591). Judgment may be enforced as if it had been rendered in action before court. (Wis. Stat. § 788.14[3]).

Enforcement.

At any time within one year after award is made any party to arbitration may apply to court in county within which such award was made for order confirming award. (Wis. Stat. § 788.09). If award is not vacated under § 788.10 or modified under § 788.11 for causes specified in statute, court must grant such order (Wis. Stat. § 788.09).

Mandatory Arbitration.

In medical malpractice claims court must appoint three member panel of arbitrators. (Wis. Stat. § 788.04[2]).

Powers of Arbitrators.

Arbitrators have power to furnish blank subpoena forms to party representatives or issue subpoenas which are enforceable in circuit court. (Wis. Stat. § 788.06[2]).

Rescission.

A contract or agreement to submit controversy to arbitration revocable upon such grounds as exist at law or in equity for revocation of any contract. (Wis. Stat. § 788.01).

Uniform Arbitration Act Adoption/Deviation.

Uniform Arbitration Act adopted. (Wis. Stat. § 788.01 et seq.). This act, however, is the 1925 Act, withdrawn by commissioners in 1955, and not 1956 Act printed in Part VI of this volume.

Jurisdictional Arbitration Acts.

Jurisdiction exists for judges to submit disputes to arbitration, provided all parties to dispute consent to arbitration. (Wis. Stat. § 802.12[2]).

Credentials of/Qualifications of/Standards for Arbitrators.

Method for appointment of arbitrator specified in agreement will be followed. (Wis. Stat. § 788.04[1]). Unless parties expressly designate their appointed arbitrators to function in advocacy capacity, party-appointed arbitrators should be presumed to function as true neutrals. (291 Wis. 2d 361, 717 N.W.2d 42). If no method provided in agreement for naming arbitrator, or if arbitrator not appointed in accordance with agreement, or if for any other reason there is lapse in naming of arbitrator or in filling vacancy, then upon application of either party, court will designate arbitrator.

(Wis. Stat. § 788.04[1]). Medical malpractice claims require three person panel of attorney with trial experience, health professional, and one other person. (Wis. Stat. § 788.04[2]). Disputes over damage caused by dams, drains or ditches require each party to name impartial arbitrator; these two then select a third impartial arbitrator. (Wis. Stat. § 94.28).

9.02A MEDIATION:

Jurisdictional Mediation Acts.

Jurisdiction exists for judges to submit disputes to mediation. (Wis. Stat. § 802.12[2]).

Credentials of/Qualifications of/Standards for Mediators.

If parties unable to select mediator, court may appoint any person with skills and abilities necessary to promote settlement. (Wis. Stat. § 802.12[2][c]).

10 DOCUMENTS AND RECORDS

10.01 ACKNOWLEDGMENTS:

Uniform Law on Notarial Acts (1982) adopted in 1983 (recreating sections that substantially conformed to Uniform Acknowledgment Act [1939, amended 1960] and Uniform Recognition of Acknowledgments Act [1968]) with following minor variation: court commissioner, register of deeds, deputy register of deeds, municipal judge and county clerk or deputy county clerk added to list of persons authorized to perform notarial act. (Wis. Stat. § 706.07[3]).

Within State.

Acknowledgment may be taken by notary public, judge, clerk or deputy clerk of record, court commissioner, register of deeds or deputy register of deeds, municipal judge, or county clerk or deputy court clerk and under federal authority by judge, clerk or deputy clerk of court, commissioned officer on active duty in military service of U.S., officer of foreign service or consular officer of U.S., or by any other person authorized by federal law to perform notarial acts. (Wis. Stat. §§ 706.07[3]; 706.07[5]).

Outside State but within U.S.

Acknowledgment may be taken in any other state, commonwealth, territory, district, or possession of U.S. by notary public of that jurisdiction, judge, clerk or deputy clerk of court of that jurisdiction, or any other person authorized by law of that jurisdiction to perform notarial acts and under federal authority by judge, clerk or deputy clerk of court, commissioned officer on active duty in military service of U.S., officer of foreign service or consular officer of U.S., or by any other person authorized by federal law to perform notarial acts. (Wis. Stat. §§ 706.07[4]; 706.07[5]).

Outside U.S.

Acknowledgment may be taken within jurisdiction of any foreign nation by notary public or notary, judge, clerk or deputy clerk of court of record, or any other person authorized by law of that jurisdiction to perform notarial acts. (Wis. Stat. § 706.07[6]).

Persons in or with U.S. Armed Forces.

See topic 10.03 Notaries Public.

General Requirements as to Taking.

Officer must determine, either from personal knowledge or satisfactory evidence, identification based upon oath or affirmation of credible witness personally known to officer, or on identification documents, that person making acknowledgment is person whose signature is on document. (Wis. Stat. § 706.07[2]).

General Requirements of Certificate.

Acknowledgments must be evidenced by certificate signed and dated by notarial officer. See subhead Authentication, infra. Certificate must include jurisdiction in which act is performed and title of officer, and may include official stamp or seal of office. (Wis. Stat. § 706.07[7][a]). If officer is notary, certificate must indicate date, if any, commission expires. (Wis. Stat. § 706.07[7][a]).

Married Women.

No special requirements.

Attorneys in Fact.

Attorney in fact for principal may execute instrument on behalf of principal. (Wis. Stat. § 706.07[1][b][3]).

Corporations.

Authorized officer, agent, partner, trustee or other representative may execute instrument on behalf of corporation, partnership, trust or other entity. (Wis. Stat. § 706.07[1][b][1]).

Foreign Acknowledgments.

Acknowledgments performed within jurisdiction of and under authority of foreign nation, its constituent units, or multinational or international organization have same effect under law as acknowledgments performed in state, if performed by notary, judge, clerk or deputy clerk of court of record or any other person authorized by law of jurisdiction to perform notarial acts. (Wis. Stat. § 706.07[6]).

Effect of Acknowledgment.

Acknowledged written instruments, except promissory notes and bills of exchange and wills, are competent evidence if relevant. (Wis. Stat. § 889.23). Acknowledgment does not provide admission of hearsay statements except in limited category of instruments that are acknowledged by signors of instruments themselves. (51 Wis. 2d 635, 187 N.W.2d 820).

Proof by Subscribing Witness.

Testimony of subscribing witness not necessary to authenticate writing unless required by laws of jurisdiction whose laws govern validity of writing. (Wis. Stat. § 909.03).

Authentication.

Instruments may be authenticated as provided under Uniform Law on Notarial Acts (1982, adopted 1983; §§ 706.07; 706.06[1]), or if relating to land, by any public officer entitled to administer oaths or member of state bar in good standing by endorsing instrument “acknowledged”, “authenticated”, “signatures guaranteed”, or other words to similar effect, adding date of authentication, own signature and official or professional title. (Wis. Stat. § 706.06[2]).

Forms.

Following forms are used (Wis. Stat. §§ 706.07[7]; 706.07[8]);

Form for acknowledgment in individual capacity:

State of. . . . . .: County of. . . . . .:

This instrument was acknowledged before me on (date) by (names(s) of person(s)).

. . . .

(Signature of notarial officer)

(Seal, if any)

. . . .

Title (and Rank)

[My Commission expires:. . . . . . .]

Form for acknowledgment in representative capacity:

State of. . . . . .: County of. . . . . .:

This instrument was acknowledged before me on (date) by (name(s) of person(s)) as (type of authority, e.g. officer, trustee, etc.) of (name of party on behalf of whom instrument was executed).

. . . .

(Signature of notarial officer)

(Seal, if any)

. . . .

Title (and Rank)

[My Commission expires:. . . . . . .]

Form for acknowledgment for verification upon oath or affirmation:

State of . . . . . . : County of. . . . . . :

Signed and sworn to (or affirmed) before me on (date) by (name(s) of person(s) making statement).

. . . .

(Signature of notarial officer)

(Seal, if any)

. . . .

. Title (and Rank)

[My commission expires: . . . .]

Form for witnessing or attesting signature:

State of . . . . . . : County of. . . . . . :

Singed or attested before me on (date) by (name(s) of person(s)).

. . . .

(Signature of notarial officer)

(Seal, if any)

. . . .

. Title (and Rank)

[My commission expires: . . . .]

Form for attestation of copy of document:

State of . . . . . . : County of. . . . . . :

I certify that this is a true and correct copy of a document in the possession of . . . . . .

Dated: . . . .

(Signature of notarial officer)

(Seal, if any)

. . . .

. Title (and Rank)

[My commission expires: . . . .]

Validating Acts.

No statutory provision.

Alternative to Acknowledgment or Proof.

No statutory provision.

10.02 AFFIDAVITS:

Within State.

Affidavits not required to be taken before particular officer may be taken before any judge, court commissioner, resident U.S. court commissioner, clerk, deputy clerk or calendar clerk of court of record, court reporter, notary public, town clerk, village clerk, city clerk, municipal judge, county clerk or his deputy within territory in which such officer is authorized to act, or school district clerk with respect to any oath required by elections laws; affidavits certified by such officer to have been taken before him may be used in any court and before any officer, board or commission. (Wis. Stat. § 887.01[1]).

Outside State but Within U.S.

Affidavits may be taken in any other state, territory or district of U.S., before any judge or commissioner of court of record, master in chancery, notary public, justice of the peace or other officer authorized by the laws of such state, territory or district to administer oaths, and may be used as specified above if properly certified by such officer and officer's certificate authenticated by clerk of court of record of county or district within which such affidavit was taken, under seal of his office. (Wis. Stat. § 887.01[2]).

Certification by a notary public or clerk of a court of record, with his official seal affixed thereto, is sufficient attestation. (Wis. Stat. § 887.01[2]).

Outside U.S.

Affidavits may be taken within jurisdiction of any foreign nation by notary public or notary, judge, clerk or deputy clerk of court of record, or any other person authorized by law of that jurisdiction to perform notarial acts. (Wis. Stat. §§ 706.07[1]; 706.07[6]). Affidavits taken within jurisdiction of and under authority of foreign nation, its constituent units, or multinational or international organization have same effect under law as affidavits taken in state. (Wis. Stat. §§ 706.07[1]; 706.07[6]).

Persons in or with U.S. Armed Forces.

Commissioned officers on active duty in U.S. military authorized to take acknowledgment may administer oath. (Wis. Stat. §§ 887.01[3]; 706.07[5]). Officer's certificate must include rank. (Wis. Stat. § 706.07[7]).

Witnesses.

Affidavits must be authenticated by certificate executed by person entitled to administer oaths. (Wis. Stat. § 706.06[3]).

General Requirements as to Administration.

In witnessing or attesting signature, notarial officer must determine, either from personal knowledge or from satisfactory evidence, that signature is that of person appearing before officer and named therein. (Wis. Stat. § 706.07[2]).

General Requirements of Jurat.

Notarial acts must be evidenced by certificate signed and dated by notarial officer. See topic 10.01 Acknowledgments, subhead Authentication. Certificate must include jurisdiction in which act is performed and title of officer, and may include official stamp or seal of office. (Wis. Stat. § 706.07[7]). If officer is notary, certificate must indicate date, if any, commission expires. (Wis. Stat. § 706.07[7]). If officer is commissioned officer on active duty in U.S. military, certificate must include rank. (Wis. Stat. § 706.07[7]).

Use of Affidavit.

Affidavit is presumptive proof of service (Wis. Stat. § 891.18) and may be used for various purposes such as support for motion for summary judgment (Wis. Stat. § 802.08[3]).

Form.

Following form is used though any usual form is accepted (Wis. Stat. §§ 887.03; 706.07[8]):

Form

State of. . . . . .: County of. . . . . .:

. . . . . ., being first duly sworn, on oath says:

. . . . (Signature).

Signed and sworn to (or affirmed) before me on (date) by (name(s) of person(s) making statement).

. . . . (Signature of officer).

(Title of officer).

(If a notary) My commission expires on. . . . . .

Alternative to Affidavit.

No statutory provision.

10.03 NOTARIES PUBLIC:

Uniform Law on Notarial Acts (1982, adopted in 1983). (Wis. Stat. § 706.07). See topic 10.01 Acknowledgments.

Qualification.

Every notary must be U.S. resident, 18 years of age, with equivalent of eighth grade education. (Wis. Stat. § 137.01[1]). Every notary must take an official oath and file a bond for $500 (Wis. Stat. § 137.01[1]) except permanently commissioned attorneys (Wis. Stat. § 137.01[2]).

Authentication.

See topic 10.01 Acknowledgments, subhead Authentication.

Seal.

Acknowledgments must be attested by notary's written signature and official seal and must show date of expiration of his commission or that it is permanent. (Wis. Stat. § 137.01[4]). Notary may acknowledge electronic documents using electronic signature, as defined in § 137.11(8). (Wis. Stat. § 137.01[4]).

Powers and Duties.

Notary may demand acceptance of foreign and inland bills of exchange and payment thereof, and payment of promissory notes, and may protest the same for nonacceptance or nonpayment, may administer oaths, take depositions and acknowledgments of deeds, and perform such other duties as by the law of nations, or according to commercial usage, may be exercised and performed by notaries public (Wis. Stat. § 137.01[5]).

Territorial Extent of Powers.

Notary may act throughout the state. (Wis. Stat. § 137.01[5]).

Expiration of Commission.

Commissions expire four years from date of appointment (Wis. Stat. § 137.01[1]) except permanent attorney's commissions (Wis. Stat. § 137.01[2]).

Fees.

For drawing and copy of protest of nonpayment of promissory note or bill of exchange, or nonacceptance of bill, where by law protest is necessary, $1; for drawing and copy of every other protest, 50¢; for drawing, copying, and serving every notice of nonpayment of note or bill, or nonacceptance of bill, 50¢; for drawing any affidavit, or other paper or proceeding not otherwise mentioned, 50¢ per folio plus 12¢ per folio for copying; for taking acknowledgment of deeds and other services, same fee allowed other officers but no more than 50¢ per document. (Wis. Stat. § 137.01[9]).

Certificate of Authority.

See topic 10.01 Acknowledgments, subhead Authentication.

Commissioners of Deeds.

Authorized to take acknowledgments of deeds, conveyances and leases of lands, or of any contract or other writing to be used or recorded in this state, to administer oaths, to take and certify depositions, and to do and certify other acts. (Wis. Stat. § 137.02[2]).

Officers of U.S. Armed Forces.

Commissioned officers on active duty in U.S. military authorized to perform notarial acts. (Wis. Stat. § 706.07[5]).

10.04 RECORDS:

Registers of Deeds are the recording officers. (Wis. Stat. § 59.43).

Uniform Commercial Code (1952, adopted 1963; including Rev. Art. 9 [2000, adopted 2001]); (Wis. Stat. §§ 409.01-409.710). See category 3 Business Regulation and Commerce, topic 3.09 Commercial Code.

Recordable Instruments.

Any deeds or other conveyances of real estate within this state, or of any interest therein, which are not recorded are void as against any subsequent purchaser in good faith and for valuable consideration, whose conveyance is recorded first. (Wis. Stat. § 706.08[1]). Recording is not necessary to protect rights inter se of parties to any instrument.

Place of Recording.

Deeds, mortgages, assignments, releases and other instruments affecting realty may all be recorded with register of deeds office for county where land lies provided same are executed in accordance with rules prescribed. (Wis. Stat. § 706.05). For list of Counties and County Seats, see first page for this state in Volume containing Practice Profiles Section.

Requisites for Recording.

Conveyances, mortgages, or any instrument purporting to give notice on interest in land which is included in assessor's plat shall describe land by reference to name of assessor's plat, lot, block, or outlot. (Wis. Stat. § 70.27[3]). All documents to be recorded must have plainly printed or type-written thereon names of grantor, grantee, witnesses and notary and statement of name of draftsman (Wis. Stat. §§ 59.43[1], 59.43[5]), but effect of record not impaired by omission (Wis. Stat. § 59.43[6]). Parcel identification number, where in use, required for recording conveyance of real estate in counties with population of 500,000 or more; parcel identification numbers required in counties with population of less than 500,000 if mandated by ordinance. (Wis. Stat. § 59.43[7]).

Recording Fees.

Fees for recording instruments are $11 for first page and $2 for each additional page. (Wis. Stat. §§ 59.43[2]; 59.72[5]). Instruments submitted for recording must comply with detailed standardization requirements of § 59.43(2m). Each side of page and any attached rider are counted as separate pages. (Wis. Stat. § 59.43[2]).

Recording Taxes.

See category 22 Taxation.

Foreign Conveyances or Encumbrances.

See topic 10.01 Acknowledgments.

Effect of Record.

Certified copies of records filed in register of deeds office are admissible in evidence without further proof. (Wis. Stat. § 889.17).

Torrens Act.

Torrens system of land registration has not been adopted.

Transfer of Decedent’s Title.

Whenever final judgment affects real property, certified copy of final judgment closing estate, or abridgement or abstract of such judgment, must be filed with register of deeds of county where real estate is located. (Wis. Stat. § 863.29). Will of nondomiciled decedent may either have ancillary or original probate (Wis. Stat. § 868.01) or if admitted to probate in any state, and six years have passed since death of decedent, court may upon petition accompanied by authenticated copy of will and its probate, issue certificate showing description, devisees and interest of each. (Wis. Stat. § 868.05). Certificate may be recorded as prima facie evidence of facts recited. (Wis. Stat. § 868.05).

Filing Under Commercial Code.

§ 9-501 adopted (Wis. Stat. § 409.501) requiring filing with office of Department of Financial Institutions or any office duly authorized by department. Fee for filing original or amended Financing Statement with department is $20 if standard form is used, $40 filing UCC non-standard form, or $80 if forms otherwise do not conform to standards set in c. 409.521. (DFI-CCS 1.01[20]; 1.10). Mail forms to: Department of Financial Institutions, Uniform Commercial Code Section, 3rd Floor P.O. Box 7847, Madison, Wisconsin 53707-7847. (DFI-CSS 1.03; http://www.wdfi.org/ucc/forms.htm). Fee for filing original financing statement with register of deeds covering fixtures, timber to be cut or covering minerals or like (including oil and gas) to be extracted, or accounts resulting from sale thereof at point of extraction, is $11 for first page and $2 for each additional page. (Wis. Stat. §§ 409.501[1]; 59.43[2]; DFI-CCS 1.10). See also category 3 Business Regulation and Commerce, topic 3.09 Commercial Code.

Vital Statistics.

(c. 69 generally). State registrar (Dept. Health and Family Services, State Registrar of Vital Statistics, Wisconsin Vital Records Office, P.O. Box 309, Madison, Wisconsin 53701-0309), city health officer and registers of deeds keep records of births, marriages and deaths; state registrar also collects other statistics including divorce. Evidence required by State registrar for issuance of delayed birth certificate depends on whether registration is made within 365 days after birth. (Wis. Stat. § 69.14[2]). State registrar, city health officer or register of deeds charges $7 for first certified copy of any record previously filed; fee for each additional certified copy of same record is $3. (Wis. Stat. § 69.22[1]). Fee for copy of birth certificate is $12; $3 for additional certificates requested at same time. (Wis. Stat. § 69.22[1]).

Lis Pendens.

Provision is made for the giving of constructive notice of the pendency of suits relating to real estate, of attachments on real estate, and sales upon execution, by filing notice thereof in the office of the register of deeds. (Wis. Stat. §§ 840.10; 59.43[11]).

Correction of Record.

The circuit court of any county where conveyance of real estate has been recorded may make order correcting description in conveyance which is ambiguous, erroneous or not intended by parties; if grantor is dead, nonresident, corporation which has ceased to exist, or is administrator or other person authorized to convey who has been discharged from his trust and grantee or assigns have been in quiet, undisturbed possession of premises intended to be conveyed from date of such conveyance. (Wis. Stat. § 847.07). Every instrument affecting title to land accepted for record shall be deemed duly recorded, despite its failure to conform to requirements for recordability, provided instrument was properly indexed. (Wis. Stat. § 706.05[7]). Provision is made for obtaining declaration of interest in real property, and correcting records to conform to judgment in such action. (Wis. Stat. §§ 841.01; 841.10).

Slander of Title.

Person who submits for filing, or entering in judgment and lien docket or recording, false instrument affecting title to land or personal property knowing it to be false is liable to injured party for penalty of $1,000 and actual damages. (Wis. Stat. § 706.13).

Circuit court may, on application and satisfactory proof, make certificate determining age, place of birth and parentage of any resident of, or person born in, the county. Such certificate or duplicate, or certified copy thereof, when recorded with register of deeds, is prima facie evidence of the facts stated therein. (Wis. Stat. § 889.28).

10.05 SEALS:

Seals not required on conveyances affecting title to land. (Wis. Stat. § 706.02).

Uniform Commercial Code (1952, adopted 1979).—See category 3 Business Regulation and Commerce, topic 3.09 Commercial Code.

Corporate Seals.

No special form required. Instrument executed in corporate name by proper officers under any seal is sealed, even though corporate seal not used. (Wis. Stat. § 990.01[37]). Absence of corporate seal does not invalidate any corporate conveyance of land. (Wis. Stat. § 706.03[2]).

Effect of Seal.

Seals are presumptive evidence of sufficient consideration. (Wis. Stat. § 891.27).

Seal may consist of word “seal”, letters “L S” and scroll or other device intended to represent seal, or impression of seal on instrument, except where seal of office is required. (Wis. Stat. § 990.01[37]).

10.06 TORRENS ACT:

Not adopted. See topic 10.04 Records.

10.07 VITAL STATISTICS:

See topic 10.04 Records.

11 EMPLOYMENT

11.01 [RESERVED]

11.02 LABOR RELATIONS:

Jurisdiction in general is in Department of Workforce Development; employment relations and labor disputes are under Wisconsin Employment Relations Commission. (c. 111).

Hours of Labor.

Eight hours constitute one day's work where there is no express agreement to contrary; but this does not apply to any contract for labor by week, month or year. (Wis. Stat. § 103.38). Except as provided in departmental regulations, no minor may work other than in domestic service, farm labor, or perform service as election inspector for more than eight hours per day, 40 hours per week, six days per week, or during such hours as minor is required to attend school. No one under 16 years of age may be employed except as above for more than 24 hours in any week in any gainful occupation except in domestic service, farm labor or public exhibitions or street trades, before 7 A. M. or after 6 P. M. (Wis. Stat. § 103.68). Hours of labor are regulated by department. (Wis. Stat. § 103.02).

Every operator of a factory or mercantile establishment must allow every person except those specified below at least 24 consecutive hours of rest in every seven consecutive days and must not permit any such employee to work for such employer during such 24-hour period except in breakdown of machinery or equipment or other emergency. This section does not apply to janitors; security personnel; persons employed in manufacture or distribution of milk, butter and the like; persons employed in bakeries, feed or flour mills, hotels or restaurants; and persons whose work on Sun. consists of no more than caring for animals or maintaining fires. (Wis. Stat. § 103.85).

Wages.

Employers must pay to employees living wage (Wis. Stat. § 104.02), to be fixed by order of department (Wis. Stat. § 104.04), which may make special rules for employees unable to earn living wage, student learners, and sheltered workshops (Wis. Stat. § 104.07). Wage payments governed by department. (Wis. Stat. § 109.03). Wages of farm and logging employees must be paid at least quarterly and other employees' wages must be paid at least as often as monthly and not more than 31 days after earned. Frequency of payment provisions do not apply if collective bargaining agreement or request of school employee provides otherwise for unclassified employees of University of Wisconsin system or for employees who receive compensatory time in lieu of overtime compensation under § 103.025. Wages of part-time fire fighters or part-time emergency medical technicians who are members of volunteer fire departments or emergency medical services programs maintained by municipality or of volunteer fire companies organized under c. 181 or c. 213, may by agreement pay at less frequent intervals, which must be at least annual. (Wis. Stat. § 109.03[1]). Wages unpaid on termination of employment of employee with no written contract for definite period by voluntary quit or discharge shall be paid in full no later than date on which employee regularly would have been paid under employer's established payroll schedule or date of payment required under § 109.03(1), whichever is earlier, except in case of sales agent employed on commission basis. (Wis. Stat. § 109.03[2]). Department or employee shall have lien upon all property of employer, real or personal, located in this state for full amount of any wage claim or wage deficiency. (Wis. Stat. § 109.09[2][a]). This lien takes precedence over all other debts, judgments, decrees, liens, or mortgages against employer, except lien of commercial lending institution as provided in subd. 2 and 3 or lien under § 292.31

(8)(i) or § 292.81, regardless of whether those other debts, judgments, decrees, liens, or mortgages originate before or after lien under par. (a) takes effect. (Wis. Stat. § 109.09[2][c]). Lien takes precedence over lien of commercial lending institution against employer that originates before lien takes effect only as to first $3,000 of unpaid wages earned by employee within six months preceding date on which employee files wage claim or brings action under § 109.03(5). (Wis. Stat. § 109.09[2][c]). Wages have priority after costs of preserving estates and costs of administration in creditors' actions (Wis. Stat. § 128.17). In receiverships, wages have priority after costs, debts due U.S. and Wisconsin, and taxes and current expenses of carrying on or closing business. Employees entitled to their last three months of wages earned within one year of receiver's appointment. (Wis. Stat. § 813.17). Provision is made for deductions from wages for faulty workmanship, but only under certain limited conditions. (Wis. Stat. § 103.455). Migrant labor contracts are regulated. (Wis. Stat. §§ 103.90-945, §§ 103.96-968). Prevailing wage rates and hours of employment compliance are prerequisite to approval of bids for public work projects. (Wis. Stat. § 66.0903[3]; § 66.0904[2]; § 103.49[2]; and § 103.50[2]).

Plant Closing and Layoff Notifications.

Employers of 50 or more in state must notify in writing highest official of municipality, affected employee, affected employee's collective bargaining representative, and department's dislocated worker unit 60 days before business closing or mass layoff. Business closing is permanent or temporary shutdown of employment site or of one or more facilities or operating units at employment site or within single municipality which affects 25 or more employees. Mass layoff is reduction in force that is not result of business closing and that affects greater of 25% of workforce or 25 employees, or affects 500 employees at employment site or within single municipality. Employees who worked fewer than six of 12 months preceding date on which notice is required or who averaged fewer than 20 hours of work per week are not counted in making calculations. Employees not given notice may recover backpay and value of benefits for each day notice was required, but not given. Employees may file claims with department within 300 days after closing or mass layoff. If employer is directed to pay claims and fails to pay, and department of justice does not bring enforcement action, employee may bring suit in circuit court and if employee prevails, can recover costs and attorneys' fees. Employers may be fined $500 per day for failure to give requisite notice to highest official of municipality. Covered employers must post notice of this law at sites normally used for required postings. (Wis. Stat. § 109.07).

When employer that employs 50 or more persons in Wisconsin plans to cease health benefit coverage for employees, retirees, or their dependents, employer must provide 60 days' advance notice in writing to all persons affected by cessation, including to any affected employee's collective bargaining representative. Covered employers must post notice of this law at sites normally used for required employee postings. (Wis. Stat. § 109.075).

Wage Assignments.

See category 8 Debtor and Creditor, topic 8.01 Assignments.

Female and Child Labor.

Department empowered to promulgate rules regarding employment of minors. (Wis. Stat. § 103.66). Minimum ages for various employments for minors established by schedule in § 103.67. Permits for employment of minors from department or designated permit officer are necessary, with certain exceptions. (Wis. Stat. § 103.25; §§ 103.70-74). Minors precluded from hazardous employment. (Wis. Stat. § 103.65). Minor cannot maintain absolute liability action unless engaged in prohibited employment. (239 Wis. 2d 26, 619 N.W.2d 123).

Labor Unions.

Public policy is established favoring collective bargaining. (Wis. Stat. § 103.51). "Yellow dog" contracts prohibited. (Wis. Stat. § 103.46; § 103.52). Wisconsin has no form of right to work law. Referendum conducted by WERC required for all-union agreements in voluntarily recognized unit. (Wis. Stat. § 111.06[1][c][1]). Labor organizations also permitted for public employees. (Wis. Stat. § 111.70; § 111.80).

Labor Disputes.

Lawful conduct in labor disputes includes ceasing to perform work, becoming member of labor organization, paying strike or unemployment benefits, lawfully aiding person defending against or prosecuting action or suit in any U.S. or state court publicizing existence of or facts of dispute by any method not involving or threatening fraud, violence, or breach of peace, ceasing to patronize (except for secondary boycotts) and peaceful picketing. (Wis. Stat. § 103.53). It is unlawful to picket when no labor dispute exists (Wis. Stat. § 103.535) although right of free speech limits application of this statute (270 Wis. 322, 71 N.W. 2d 416).

Injunctions may be granted only where necessary to prevent irreparable injury to property or property right. (Wis. Stat. § 133.08). Issuance of injunctions in labor disputes is subject to rigid procedures including prior notice of hearing. (Wis. Stat. § 103.56).

Unfair labor practices are similar to federal law but include violations of terms of collective bargaining agreements. (Wis. Stat. § 111.06[1][f]). Similar but less comprehensive prohibited practices are proscribed in public employment. (Wis. Stat. § 111.84). Recruitment and employment of strikebreakers prohibited. (Wis. Stat. § 103.545).

Discrimination in employment by reason of age, race, creed, color, disability, marital status, sex, national origin, ancestry, sexual orientation, arrest or conviction record, military service, or use or nonuse of lawful products off employer’s premises during nonworking hours is unlawful. (Wis. Stat. § 111.321; § 111.36). Enforcement is by department. (Wis. Stat. § 111.375). Use of honesty testing devices limited. (Wis. Stat. § 111.37). Use of genetic testing in employment situations is limited. (Wis. Stat. § 111.372).

Discrimination is defined as either discharge or refusal to hire, or discrimination in promotion, compensation or in terms, conditions, or privileges of employment; or use of forms or inquiry which imply discrimination against individuals; or discrimination against person because person has attempted to enforce statutory right, opposed discriminatory practices, made complaint, or testified or assisted in proceeding. (Wis. Stat. § 111.322). Age discrimination provision applies to individuals age 40 and over, but does not apply to age distinction in hiring persons for positions in which knowledge or experience is required for advancement to managerial or executive positions nor does it apply to employment where employee is exposed to physical danger or hazards, such as certain employment in law enforcement or fire fighting. (Wis. Stat. § 111.33).

Miscellaneous Provisions.

Apprenticeship is regulated. (Wis. Stat. §§ 106.01-.03).

Employers shall provide department information about each newly hired employee as specified by department’s hiring reporting system. (Wis. Stat. § 103.05).

Any employer engaged in manufacturing that requires its employees, under penalty of forfeiture of part of wages, to give notification of intention to leave, is liable for payment of like forfeiture if it discharges employee without similar notice, except for incapacity or misconduct, unless there is general suspension of labor in such shop or factory or department thereof. (Wis. Stat. § 103.17).

Any two or more persons, whether members of partnership or company or stockholders in corporation, who are employers of labor who shall combine or agree to combine for any of following purposes shall be fined not less than $100 nor more than $500, which fine shall be paid into state treasury for benefit of school fund: (a) Preventing any person seeking employment from obtaining employment; (b) causing discharge of an employee by threats, promises, blacklists or causing blacklists to be circulated; (c) after having discharged any employee, preventing or attempting to prevent employee from obtaining other employment by means described in (a) or (b); (d) authorizing, permitting or allowing any of their agents to blacklist any discharged employee or any employee who has voluntarily left service of his or her employer; (e) circulating blacklist of employee who has voluntarily left service of employer to prevent employee from obtaining employment; (f) coercing or compelling any person to enter into agreement not to unite with or become member of any labor organization as condition of securing employment. (Wis. Stat. § 134.02[1]; § 111.06[1][k]). No person may by threat, intimidation, force or coercion hinder another person from engaging or continuing in lawful work. (Wis. Stat. § 134.03).

Employee has right to inspect and copy employee's personnel records at least two times in calendar year. (Wis. Stat. § 103.13). Employer must notify employee at date of hire of any grooming standards. (Wis. Stat. § 103.14).

Employers prohibited from requiring employee or prospective employee to submit to test for HIV virus ("AIDS" Testing) or to affect employee's terms, conditions or privileges of employment on basis of HIV test result. (Wis. Stat. §§ 103.15[2][a], [b]).

† Except where specifically authorized by person in charge of facility, no person may smoke in enclosed, indoor areas of public conveyances, educational facilities, inpatient health care facilities, indoor movie theaters, offices, passenger elevators, restaurants, retail establishments, public waiting rooms, or any enclosed, indoor area of state, county, city, village or town building. Smoking is not permitted in or around state capitol nor in or near dormitories operated by University of Wisconsin System. Smoking is permitted in designated smoking areas, rooms in which main occupants are smokers, rooms or halls used for private functions, restaurants holding "Class B" liquor licenses, if sale of liquor accounts for 50% of restaurant's receipts, manufacturing or assembly facilities and secured correctional facilities. No designated smoking areas allowed in buses, hospitals, physician offices, day care centers and Type 1 juvenile correctional facilities. Smoking in private offices where principal activities consist of professional, clerical or administrative services is prohibited except in offices occupied mainly by smokers or in areas properly designated as smoking areas. If nonsmokers are adjacent to smoking areas, seating must be arranged to accommodate nonsmokers. Any person who willfully fails to post signs, accommodate nonsmokers, or who smokes other than in designated area is subject to fine of not more than $10. Any person who willfully violates prohibition against smoking in or around state capitol, after being advised by employee of facility that smoking is prohibited, is subject to fine of not more than $50; other willful violations, $10. (Wis. Stat. § 101.123).

* No person may smoke in enclosed, indoor areas of state capitol, residence halls or dormitories owned or operated by college or university, day care centers, educational facilities, inpatient health care facilities, theaters, correctional facilities, state institutions, restaurants, taverns, private clubs, retail establishments, common areas of multiple-unit residential properties, lodging establishments, state, county, city, village, or town buildings, or other enclosed places that are public places and places of employment. No person may smoke in immediate vicinity of state capitol, anywhere on premises of day care center when children receiving day care services are present, anywhere on grounds of Type 1 juvenile correctional facility, or in location that is 25 feet or less from residence hall or dormitory operated by University of Wisconsin. No person may smoke in sports arena, bus shelter, or public conveyance. Smoking is permitted in private residences, rooms used by only one person in assisted living facility as that person's residence, rooms in assisted living facility in which two or more persons reside if every person who lives in that room smokes and each of those persons has made written request to person in charge of assisted living facility to be placed in room where smoking is allowed, retail tobacco stores in existence on June 3, 2009, and in which only smoking of cigars and pipes is allowed, and

tobacco bars in existence on June 3, 2009, in which only smoking of cigars and pipes is allowed. Any person who smokes in prohibited areas is subject to forfeiture of not less than $100 nor more than $250 for each violation. Any person in charge who provides matches, ashtrays and other smoking material, who fails to make reasonable efforts to ensure that smoking does not occur on prohibited premises, or who fails to notify law enforcement about person smoking in prohibited areas who refuses to leave after being asked to do so, is subject to forfeiture of not more than $100 for each violation. (Wis. Stat. § 101.123).

Family and Medical Leave.

Employers with at least 50 permanent employees are required to provide unpaid family and medical leave to employees who worked at least 1,000 hours during preceding 52-week period. (Wis. Stat. §§ 103.10[1], [2]). Employer must provide family leave of up to six weeks in 12-month period for birth, adoption or pre-adoption placement of child, provided leave begins within 16 weeks of child’s birth or placement, and leave of up to two weeks in 12-month period to care for employee’s child, spouse, domestic partner, parent or domestic partner’s parent, if serious health condition is involved. (Wis. Stat. § 103.10[3]). Family leaves may not exceed eight weeks in 12-month period and may be scheduled by employee as partial absence. (Wis. Stat. § 103.10[3]). Employer must provide at least two weeks of medical leave during 12-month period for employee with serious health condition which makes employee unable to perform duties. (Wis. Stat. § 103.10[4]). Leave is unpaid, but employee may substitute other paid (if accrued) or unpaid leave provided by employer, including substitution of paid leave under collective bargaining agreement even though employee does not meet all conditions for leave eligibility thereunder. (174 Wis. 2d 878, 498 N.W.2d 826 and Wis. Stat. § 103.10[5][b]). Employer must continue same group health insurance coverage during leave that existed immediately prior to leave. (Wis. Stat. § 103.10[9]). Employee must be reinstated to former job if vacant, and, if not, to equivalent position. (Wis. Stat. § 103.10[8]). Equivalent position encompasses compensation, benefits, working shift, hours of employment, and other terms and conditions of employment including job status, responsibility and authority. (172 Wis. 2d 234, 493 N.W.2d 68). Act contains provisions prohibiting discipline, retaliation or discrimination for exercising rights under Act. (Wis. Stat. § 103.10[11]). Enforcement is through Department of Workforce Development and right to bring civil action for damages also exists. (Wis. Stat. §§ 103.10[12], [13]).

Restrictive Covenants in Employment Contracts.

A covenant by agent or servant not to compete with employer or principal during term of employment or thereafter within specified territory and time is lawful and enforceable only if restrictions are reasonably necessary for protection of employer. Any such restrictive covenant imposing an unreasonable restraint is illegal, void and unenforceable even as to so much of the covenant or performance as would be a reasonable restraint. (Wis. Stat. § 103.465). This statute may also apply to nondisclosure provisions in employment contracts. (219 Wis. 2d 99, 579 N.W.2d 217).

Employee Welfare Funds.

Employee welfare funds must be registered with commissioner of insurance and are subject to examination and, if they cover more than 25 persons employed in Wisconsin, annual reporting requirements. “Employee welfare fund” is any fund established or maintained to provide employee benefits and to which is paid anything by or on behalf of any employer doing business in Wisconsin or for the benefit of any persons employed in Wisconsin. (c. 641).

Workers’ Compensation Act (c. 102) covers all employers (including state and municipal employers), except farmers, who customarily employ three or more employees (Wis. Stat. § 102.04), or employers employing fewer than three employees, but paying wages of $500 or more in any calendar quarter, including persons engaged in farming who on 20 days during calendar year employ six or more employees (Wis. Stat. § 102.04[1]). Act also covers other employers who elect to accept it. (Wis. Stat. §§ 102.04[1]-[1][e]). Department of Workforce

Development responsible for enforcing Act. (Wis. Stat. § 102.14).

Taking out insurance for compensation is deemed an election to become subject to the Act and such election covers otherwise exempt employees if such intent appears from policy. (Wis. Stat. § 102.05[2]). Employer jointly liable with contractor or subcontractor for injuries to latter's employee if subcontractor is not subject to Act or has not complied with Act. (Wis. Stat. § 102.06).

The Act does not apply to domestic servants, unless employer expressly includes them. (Wis. Stat. § 102.07[4]).

Liability for compensation exists, and is exclusive remedy against employer, fellow employee and insurance carrier (including its agents and representatives) where following conditions occur: (a) where employee sustains injury; (b) where at time of injury both employer and employee are subject to Act; (c) where at time of injury employee is performing service growing out of and incidental to his or her employment; (d) where injury is not intentionally self-inflicted; (e) where accident or disease causing injury arises out of employment (Wis. Stat. § 102.03[1]); provided, however, employee can sue co-employee for assault intended to cause bodily harm, negligent operation of automobile other than employer's, or where governmental employer would be liable. (Wis. Stat. § 102.03[2]; 239 Wis. 2d 473, 620 N.W.2d 223; 260 Wis. 2d 523, 659 N.W.2d 906). Mental harm or emotional distress without physical trauma is covered injury if arising from conditions beyond those common to occupational or nonoccupational life. (72 Wis. 2d 46, 240 N.W.2d 128; 62 Wis. 2d 370, 215 N.W.2d 373). Agreement by employee to waive right to compensation is invalid. (Wis. Stat. § 102.16[5]).

Right of employee, his legal representative or dependent to sue for compensation does not extend beyond 12 years from date of injury or death or from date that compensation (other than treatment or burial expenses) was last paid, or would have been payable if no advancement were made, whichever date is latest. Right to proceed in case of occupational disease, loss or total impairment of hand, arm proximal to hand, foot, leg proximal to foot, loss of vision, permanent brain injury, or traumatic injury causing need for artificial spinal disc or total or partial knee or hip replacement, has no time limit. Benefits and treatment for occupational disease becoming due after 12 years paid by work injury supplement benefit fund; for traumatic injury, paid for by employer or insurer. (Wis. Stat. § 102.17[4]).

Actual notice of injury must be received by employer within 30 days of injury (or date when employee ought to have known of disability and relation to employment), but failure to give notice does not bar claim unless employer is misled. Regardless of whether notice was received, if no payment of compensation (other than medical treatment or burial expense) is made, and no application filed with department, within two years from date of injury or death (or from date employee or his dependent knew or ought to have known nature of disability and its relation to employment), right to compensation therefore is barred except if employer knew or should have known, within the two-year period, that employee sustained injury on which claim is based. (Wis. Stat. § 102.12).

Indemnity equals ? of employee's average weekly earnings if injury causes total disability or, in case of partial disability, such proportion of weekly indemnity rate for total disability as actual wage loss of injured employee bears to his or her average weekly rate at time of injury (Wis. Stat. § 102.43), with maximum limits for each type of injury (Wis. Stat. § 102.44). "Average weekly earnings" in case of temporary disability, permanent total disability, or death, are limited for injuries occurring on or after Jan. 1, 1982, to 110% of state's average weekly earnings as of June 30, of previous year. (Wis. Stat. § 102.11). Average weekly earnings in case of permanent partial disability are limited for injuries occurring on or after Apr. 1, 2009, and before Jan. 1, 2009, to $408 with maximum weekly benefit of $272; or injuries occurring on or after Jan. 1, 2009, to $423 with maximum weekly benefit of $282. (Wis. Stat. § 102.11). Where death results, benefit equals four times average annual earnings with maximum limits. (Wis. Stat. § 102.46). Benefits vary where death is not proximate result of injury (Wis. Stat. § 102.47) or where there is no total dependent (Wis. Stat. § 102.48) and there is added benefit where decedent leaves spouse or domestic partner plus children (Wis. Stat. § 102.49). In case of death proximately caused by injury, employer or insurer pays reasonable expense of burial not exceeding $6,000. (Wis. Stat. § 102.50). Increased liability is provided for injuries to minors illegally employed. (Wis. Stat. § 102.60). In case of wage loss or termination of employment due to disability caused by toxic or hazardous exposure in course of employment, there is special benefit up to $13,000. (Wis. Stat. § 102.565). Maximum compensation for wage loss from transfer due to occupational deafness is $7,000. (Wis. Stat. § 102.555[3]). Department may order employer or insurer to pay for future treatment necessary to cure and relieve employee from effects of injury. (Wis. Stat. § 102.18[1][b]). If employer's failure to comply with safety statute, rules, or order causes injury, benefits are increased 15% (but not more than $15,000) (Wis. Stat. § 102.57); if employee's failure to use safety devices or intoxication from alcohol or drugs causes injury, benefits are reduced 15% (but not more than $15,000) (Wis. Stat. § 102.58). In addition to increased payment for late or overdue payment, department may award employee amount not to exceed lesser of 200% of total compensation due or $30,000 per event or occurrence if department determines that employer's or insurance carrier's suspension of, termination of, or failure to make payments or to report injury resulted from malice or bad faith. (Wis. Stat. § 102.18[1][bp]; 267 Wis. 2d 31, 671 N.W.2d 279).

Employer who without reasonable cause refuses to rehire employee injured in course of employment, where suitable employment is available within employee's physical and mental limitations, is liable for up to one year's lost wages of employee. In determining availability of suitable employment, employer's written rules and provisions of collective bargaining agreements on seniority govern. (Wis. Stat. § 102.35[3]).

Department determines liability after hearing. (Wis. Stat. §§ 102.16-18). Party must pay award within 21 days after date on which order is mailed, unless party files petition for review regarding liability. Questions of apportionment of liability do not relieve party from order to timely pay. (Wis. Stat. § 102.18[1][e]; § 102.23[5]). Judicial appeal provided, in which findings of fact of department, acting within its powers in absence of fraud, are conclusive if supported by credible and substantial evidence. (Wis. Stat. §§ 102.23[1], [6]). Judgment may be rendered without notice upon presentation of award to any circuit court. (Wis. Stat. § 102.20).

Claim for compensation is not assignable and may not be taken for debts of person entitled thereto, with limited exceptions. (Wis. Stat. § 102.27).

Occupational Diseases.

Workers' Compensation Act covers injury from disease as well as accident. (Wis. Stat. § 102.01[2][c]).

Unemployment Insurance.

Unemployed persons entitled to benefits except in special cases. (c. 108). Misconduct and existence of labor dispute are among reasons benefits may be denied. (Wis. Stat. §§ 108.04[5], [10]). Employees locked out are eligible. (Wis. Stat. § 108.04[10[a]). Lockout defined as barring one or more employees from employment as part of labor dispute which is not directly subsequent to strike or other job action. (Wis. Stat. § 108.04[10][d]). Employee's base period for computing benefits is first four of last five quarters of work or, if unqualified using that period, last four quarters of work. (Wis. Stat. §§ 108.02[4][a], [b]). To qualify for benefits, employee must earn 35 times weekly benefit rate during base period and must earn four times weekly benefit rate outside of quarter within claimant's base period in which claimant has highest base period wages. (Wis. Stat. § 108.04[4][a]). Each eligible employee must be paid benefits for each week of total unemployment that commences on or after Jan. 4, 2009, at weekly benefit rate of 4% (unless subsection [lm] applies) of employee's base period wages paid during quarter of base period with highest wages. (Wis. Stat. § 108.05[1][q]). If employee has base period wages from more than one employer, each employer's account is charged for benefits paid in proportion that wages paid by each employer bear to employee's total base period wages. (Wis. Stat. § 108.07[2]). If employee has base period wages with employer that constitute less than 5% of total base period wages, employer's account is not charged for benefits. Instead, benefits chargeable to such employer's account are divided proportionally among other employers' accounts in base period. (Wis. Stat. § 108.07[3m]).

† Effective until July 5, 2010.

* Effective on July 5, 2010.

11.03 WORKERS' COMPENSATION LAW:

See topic 11.01 Labor Relations.

12 ENVIRONMENT

12.01 ENVIRONMENTAL REGULATION:

General Supervision.

State agency charged with protecting, maintaining and improving environment is Department of Natural Resources, P.O. Box 7921, Madison, WI 53707. (Wis. Stat. §§ 285.11; 289.06; 291.05). Department has broad power to enact comprehensive plan to protect and enhance water and air resources. (Wis. Stat. §§ 281.12; 285.11). Department has power to issue orders and substantive rules on water quality standards and air quality standards. (Wis. Stat. §§ 281.15-.20; 285.11; 285.13). Department has power to issue orders and substantive rules on solid waste and hazardous waste disposal. (Wis. Stat. §§ 289.06-.07; 289.93; 291.05; 291.07; 291.93; 291.95). Department has power to adopt minimum standards, adopt rules, and issue orders for mining and reclamation. (Wis. Stat. §§ 293.13; 293.15; 293.83). Department has responsibility to implement comprehensive recycling law. (Wis. Stat. § 287.03). Department has power to adopt substantive rules and issue orders on oil and gas exploration. (Wis. Stat. § 295.35). Department has jurisdiction over nonfederal wetlands. (Wis. Stat. § 281.36). Department has power with department of health services to issue substantive rules and standards on groundwater protection. (Wis. Stat. §§ 160.07-.15). Department has adopted detailed rules on ambient air quality standards; air pollution control rules; and water quality standards, which can be found within Department of Natural Resources section of Wisconsin Administrative Code. Department may authorize counties to regulate air pollution, but typically does not exercise this power. (Wis. Stat. §§ 285.73; 285.75). Counties may establish solid waste management plan (Wis. Stat. §§ 59.70[2]; 289.10) and regulate private sewage systems (Wis. Stat. § 59.70[5]). If authorized by department, counties may regulate existing private wells, well contamination and pump installation. (Wis. Stat. § 280.21). Environmental impact statement required for certain actions of state agencies. (Wis. Stat. §§ 1.11; 23.40). Public service commission has certain responsibilities relating to long-term disposal of radioactive and transuranic waste. (Wis. Stat. § 196.497). Local agencies authorized to respond to releases of hazardous substances and recover costs from responsible parties. (Wis. Stat. § 166.22).

Prohibited Acts.

Following acts are prohibited: Violation of rules, general or special orders of department of natural resources (Wis. Stat. § 299.97); violation of any provision regulating air pollution or any rule, permit or special order issued thereunder (Wis. Stat. §§ 285.83; 285.87); violation of any provision regulating waters of state or any rule, permit, or special order issued thereunder (Wis.

Stat. § 281.98); violation of any provision regulating solid waste or any rule, special order, plan approval or license issued thereunder (Wis. Stat. §§ 289.96; 289.97); violation of provisions relating to exemption from licensing and regulation of solid waste (Wis. Stat. §§ 289.96; 289.97); violation of any provision regulating hazardous waste or any rule, special order, plan approval, or license or variance issued thereunder (Wis. Stat. §§ 291.95; 291.97); violation of provisions regulating mining (Wis. Stat. §§ 293.83; 293.87); violation of provisions regulating oil and gas exploration (Wis. Stat. § 295.37); violation of any provision regulating discharge of pollutants into waters of state or any rule or permits issued thereunder (Wis. Stat. §§ 283.89; 283.91); landfilling or burning of certain wastes (Wis. Stat. § 287.07); dumping any deleterious substance in waters (Wis. Stat. § 29.601[3]), damage to natural resources (Wis. Stat. § 23.095[1g]); unlawful obstruction or deposit of any substance on bed of navigable water (Wis. Stat. §§ 30.12, .13[4],.15); use of daminozide on food producing plants (Wis. Stat. § 94.707[1m]); discharge of mercury over specified limit (Wis. Stat. § 281.17[7]); release of genetically-engineered organisms into outside environment without prior notice to regulatory authorities (Wis. Stat. § 146.60).

Review of Orders.

Any person in interest may secure a review of reasonableness of and necessity for order issued under §§ 281.19-281.20 by petitioning department within 60 days of issuance of order. Department shall hold a public hearing, and affirm, repeal or change order within 60 days of hearing. Judicial review of department action is permitted under c. 227. (Wis. Stat. § 281.19[8]).

Enforcement.

All orders of department, and specific prohibitions listed above, are enforced by attorney general in circuit court for Dane County or county where violation occurred. (Wis. Stat. § 299.95). Citizen of any state, District of Columbia, Commonwealth of Puerto Rico, territory or possession of U.S. or province or territory of Canada has same rights of relief with respect to injuries arising from environmental pollution. (Wis. Stat. § 299.33).

Penalties.

Any person who violates air pollution statutes may be penalized $10 to $25,000 for each day of violation, or imprisoned for up to six months for intentional violations, or both, for first conviction under this subsection. (Wis. Stat. § 285.87). Any person who violates statutes regulating waters of state may be penalized $10 to $5,000 for each day of violation. (Wis. Stat. § 281.98). Any person who violates conditions for solid waste exemption or testing requirement under § 289.43(7)(d) or § 289.43(8)(c) may be penalized $10 to $25,000 for each day of violation. (Wis. Stat. § 289.96). Any person who violates any other provision of c. 289 or any approval, license, or order issued thereunder may be penalized $10 to $5,000 for each day of violation. (Wis. Stat. § 289.96). Any person who violates certain reporting requirements may be penalized for each offense from $200 to greater of $10,000 or double applicable discharge environmental fee. (Wis. Stat. § 299.15). Any person who violates c. 29 is liable for natural resources assessments and restitution payments. (Wis. Stat. §§ 29.987; 29.989). Any person fined for violating provision, rule or order of cc. 280 to 285, 289 to 295 is also liable for environmental surcharge equal to 10% of amount of fine or forfeiture if violation occurred prior to July 1, 2009, or 20% if violation occurred on or after July 1, 2009. (Wis. Stat. § 299.93). Any person who violates water pollutant discharge rules may be penalized not less than $10 nor more than $25,000. (Wis. Stat. § 283.91[2]). Any person who willfully or negligently violates water pollutant discharge rules may be penalized not less than $10 nor more than $25,000, or imprisoned for not more than six months, or both, for each day of violation, for first conviction under this subsection. (Wis. Stat. § 283.91[3]). Any person who violates rules regarding release of genetically-engineered organisms may be penalized not less than $100 nor more than $25,000 for each day of violation, or, if violation is intentional, imprisoned for not more than one year, or both, for first conviction under this subsection. (Wis. Stat. § 146.60[9]).

Permits.

Permits and approvals from department required for: Construction of wells if rate of withdrawal is greater than 100,000 gallons a day (Wis. Stat. § 281.34); major withdrawals from any state waters (Wis. Stat. § 281.35); construction of water or sewage system (Wis. Stat. § 281.41); construction and operation of sources of air pollution (Wis. Stat. § 285.60); operation of solid waste or hazardous waste disposal sites (Wis. Stat. § 289.31); transportation, treatment, storage or disposal of hazardous waste (Wis. Stat. §§ 291.23; 291.25); deposit any material or place any structure in navigable water (Wis. Stat. § 30.12); withdrawal of waters from lakes and streams (Wis. Stat. § 30.18); enlargement of waterways or alteration of banks (Wis. Stat. § 30.19); changing course of stream (Wis. Stat. § 30.195); removing materials from navigable waters (Wis. Stat. § 30.20); construction or operation of dam (Wis. Stat. § 31.04); discharge of any pollutant into waters of state (Wis. Stat. § 283.31); prospecting or mining (Wis. Stat. §§ 293.35; 293.37); oil and gas exploration (Wis. Stat. § 295.33); discharge of dredged or fill material into nonfederal wetlands (Wis. Stat. § 281.36).

Citizen Action.

Complaint by six or more citizens of alleged or potential environmental pollution may be filed with department. Department must hold public hearing and issue order within 90 days of hearing. (Wis. Stat. § 299.91). Judicial review of order is permitted. Six or more citizens may also petition for investigation of alleged water withdrawal violations under c. 281 or rules and permits issued thereunder. Department may then issue order or conduct contested case hearing. (Wis. Stat. § 281.94). Any person adversely affected by water withdrawal violations is entitled to damages or may sue to restrain or enjoin withdrawal. (Wis. Stat. § 281.95). Six or more citizens may petition for review of alleged violations of Wisconsin’s Hazardous Waste Management Act (c. 291) or rule adopted thereunder. Department may then initiate enforcement action, conduct contested case hearing, or dismiss petition. (Wis. Stat. § 291.89). Judicial review of order or decision is permitted. Six or more citizens may request contested case or informational hearing on Department decisions regarding feasibility and environmental impact of construction of solid waste or hazardous waste facility. (Wis. Stat. §§ 289.26[1]; 289.27[1]). Department may then conduct contested case or informational hearing. (Wis. Stat. §§ 289.26[4]; 289.27[1]). Five or more citizens may petition for review of permit allowing discharges to waters of state. (Wis. Stat. § 283.63[1]). Department shall hold hearing which may be treated as contested case. (Wis. Stat. § 283.63[1][b]). Judicial review of decision is permitted. (Wis. Stat. §§ 283.63[1][b]; 63[2]). Any person may comment on air pollution permit application. (Wis. Stat. §§ 285.61[6]; 285.62[4]). Department may hold informational hearing. (Wis. Stat. §§ 285.61[7]; 285.62[5]).

Hazardous Materials.

Statutes impose liability upon: Generators, transporters, and owners or operators of facility that treats, stores, and disposes of hazardous materials. (Wis. Stat. §§ 291.21; 291.25). Environmental impact statement required for any new hazardous waste disposal facility greater than 80 acres or when intended disposal capacity exceeds one million cubic yards. (Wis. Stat. § 291.27). Any unlicensed facility is required to close and submit long term care plan. (Wis. Stat. § 291.29). Department may grant variance if compliance with license would cause undue or unreasonable hardship. (Wis. Stat. § 291.31). If department determines that hazardous waste at facility may present imminent and substantial danger, department may post notice of danger, order facility to take corrective action or revoke licensure of facility. (Wis. Stat. §§ 291.85; 291.87). Group of six or more citizens may pursue action for review of alleged violation of hazardous material statutes. (Wis. Stat. § 291.89). Department has right of entry onto any hazardous waste facility and right to inspect such facility. (Wis. Stat. § 291.91). Department of Justice and local district attorney may prosecute violations. (Wis. Stat. § 291.95). Penalties for violating statutes are forfeiture of not less than $100 and not more than $25,000 per violation per day, while criminal penalties for anyone who willfully violates statutes are fine of not less than $100 or more than $25,000, or not more than one year in county jail, or both. (Wis. Stat. § 291.97).

Land Use Planning.

Land use planning is primarily carried out at county level and operative agency in charge of planning is planning and zoning committee appointed by county board. (Wis. Stat. §§ 59.69[1]; 59.69[2]). County zoning committee oversees preparation of county development plan for physical development of unincorporated territory within county and those areas within incorporated jurisdictions who agree to be part of plan, including master development plan created by city or village. (Wis. Stat. § 59.69[3]). Such committee has authority to establish ordinances determining areas where agriculture, forestry, industry, mining, trades, business, and recreation may be conducted, areas where residential uses may be allowed or prohibited, areas along water courses where construction or any modification may be prohibited, areas where trailer parks, mobile homes, or tourist camps may be located, regulations regarding building design, regulations regarding size and design of certain types of buildings, location of roads and schools, set back lines, density, and distribution of population, percentage of lots that may be occupied, and places with special character. (Wis. Stat. § 59.69[4]). Land use ordinances may also address nonconforming use of property (Wis. Stat. § 59.69[10]), or may also govern site erosion control and storm water management zoning (Wis. Stat. § 59.693). In addition, board may enact ordinances specifically related to environmental protection and land use, including codes relating to solid waste management, recycling or resource recovery facilities, private sewage systems, private wells, soil conservation, inland lake protection and rehabilitation, harbor improvement, improvement of artificial lakes, acquisition of recycling or resource recovery facilities and mosquito control districts. (Wis. Stat. § 59.70). County board for Milwaukee County is vested with additional authority specifically relating to disposal of sewage, waste, and refuse. (Wis. Stat. § 59.792). In addition, county boards are charged with responsibility to plan expressway and mass transit facilities. (Wis. Stat. § 59.84[2]). Towns located in county which has not enacted county zoning ordinance are given same general zoning authority as counties, and may exercise village powers if authorized by town meeting. (Wis. Stat. §§ 60.61-.62). Towns may also enact construction site erosion control and storm water management zoning. (Wis. Stat. § 60.627). Town may regulate location of community living arrangements such as foster homes, treatment homes, and adult family homes (Wis. Stat. § 60.63); may enact ordinances regarding historic preservation (Wis. Stat. § 60.64); may establish park commissions (Wis. Stat. § 60.66); and may establish town sanitary districts (Wis. Stat. § 60.71). Such sanitary districts may have power to act as public inland lake protection rehabilitation district. (Wis. Stat. § 60.782). Villages and cities have similar authority to plan. (Wis. Stat. §§ 61.35; 62.23). Villages have discretionary authority to establish zoning of wetlands in shorelands, except where required by statute (Wis. Stat. § 61.351) and may establish recycling or resource recovery facilities (Wis. Stat. § 61.345). Villages may also regulate construction site erosion control and storm water management zoning. (Wis. Stat. § 61.354).

Recycling.

Legislature has established seven-member council on recycling. (Wis. Stat. § 15.347[17]). Department of Administration is charged with establishing recycling program to promote reduction of solid waste by agencies. (Wis. Stat. § 16.15[2]). This recycling program includes requirements for recycling all lead acid batteries, waste oil and major appliances, as well as recycling 50% of yard waste and other recyclables. (Wis. Stat. § 16.15[3]). State of Wisconsin imposes recycling surcharge on numerous entities, known as Recycling Surcharge, which is deposited in State Recycling Fund. (Wis. Stat. §§ 77.93-.94; 77.96-.97). Department, along with Department of Administration, administers land recycling loan program that provides financial assistance for projects to remedy environmental contamination of sites or facilities where contamination affects groundwater or surface water. (Wis. Stat. § 281.60). Department is in charge of reviewing whether recycling programs are “effective,” although variance may be granted under certain circumstances. (Wis. Stat. § 287.11). Municipality may require use of facility for recycling of solid waste or for recovery of resources from solid waste generated within municipality, and two or more municipalities may enter into agreement concerning such facilities. (Wis. Stat. § 287.13). Proposed usage must be determined to be within best public interest. (Wis. Stat. § 287.13[2][c]). Specific provisions cover waste oil collection recycling, lead acid and mercuric oxide battery disposal. (Wis. Stat. §§ 287.15; 287.18; 287.185). Enforcement is provided by Attorney General by means of injunction or fiscal penalties ranging between $10 and $2,000 per violation. (Wis. Stat. §§ 287.91-.97).

Remediation.

Tax incremental financing is available for environmental remediation. (Wis. Stat. § 66.1106). Such financing is available to any political subdivision that develops and approves written proposal to remediate environmental pollution. Development zones eligible for environmental remediation credits are also available. (Wis. Stat. § 71.07[2de]). Any party who voluntarily completes remediation may receive certificate of completion from department and is exempt from further liability for contamination of property. (Wis. Stat. § 292.15). Any person who possesses or controls hazardous substance or causes discharge of hazardous substance must notify department of nonexempt discharge. (Wis. Stat. § 292.11). Any person who possesses or controls that substance that is discharged must take action necessary to restore environment to extent practicable, and department may require preventive measures be taken by any such person. (Wis. Stat. §§ 292.11[3]-292.11[4]). Department may upon notice to occupant enter any property, premises or any place if necessary to prevent increased damage to air, land or waters of state. (Wis. Stat. § 292.11[8]).

Solid Waste Management.

Department of Natural Resources is agency charged with overseeing solid waste management standards. (Wis. Stat. § 289.06). Department has authority to hold hearings, secure necessary facilities, consult with other agencies in state and conduct all necessary experiments, investigations and research. (Wis. Stat. § 289.07). Each county may prepare solid waste management plan which is submitted to department for review. (Wis. Stat. § 289.10). All officers, officials, and agents engaged in planning, management, operation, and approvals of such facilities are subject to liability unless actions are taken in good faith and are performed within scope of their official duties. (Wis. Stat. § 289.12). For creating new landfill, initial site report must be drafted and local approval must be obtained. (Wis. Stat. §§ 289.21-.22). In addition to initial site report, feasibility report must be prepared, distributed and subjected to public notice. (Wis. Stat. §§ 289.23; 289.25). After feasibility report is submitted and determined to be complete, preliminary determination is made whether environmental impact statement is warranted. (Wis. Stat. § 289.25). Groups of six citizens or any county, village, or town may request informational hearing or contested case on need for additional solid waste facility. (Wis. Stat. §§ 289.26-.28). In order for new proposed facility to be approved, applicant's other facilities must be in compliance with plans or orders. (Wis. Stat. § 289.34).

Underground Storage Tanks.

Department of Commerce, not Natural Resources, is charged with management of underground storage tanks. (Wis. Stat. §§ 101.142-101.144). Department of Commerce is charged with taking inventory of all above-ground storage tanks and underground storage tanks greater than certain capacity. (Wis. Stat. § 101.142[2]). Department of Commerce runs program for removal of underground storage tanks and awards grants to businesses to cover costs of remediating leaking underground storage tanks. (Wis. Stat. § 101.143). Department of Commerce promulgates rules governing dispersal of grants under this program. (Wis. Stat. § 101.143). Individual parties may submit claims for petroleum products investigation, remedial action planning, and remedial action activities. (Wis. Stat. § 101.143[3]). To be eligible for such funds, owner must be able to document that source of discharge is from petroleum storage system, and owner must notify department before conducting site investigation. (Wis. Stat. § 101.143[3]). Owner must register tank and must report any discharge in timely manner to department along with other requirements. (Wis. Stat. § 101.143[3]). Department of Commerce is charged with administrating programs for remediation of discharges of petroleum products from certain petroleum storage tanks. (Wis. Stat. § 101.144[2]). Department of Natural Resources administers dry cleaner environmental response program and awards grants to dry cleaners to cover eligible costs associated with responding to, investigating and cleaning up contamination caused by releases of dry cleaning solvents. (Wis. Stat. § 292.65).

12.02 WATER LAW:

General regulations cover navigable waters, harbors and navigations. (c. 30). All lakes and streams that are navigable in fact are declared to be navigable public waters, although farm drainage ditches are not navigable. (Wis. Stat. § 30.10). Town sanitary districts may identify ordinary high water mark of lakes wholly within unincorporated territory and wholly within town sanitary district, while municipalities may by ordinance establish bulkhead lines. (Wis. Stat. §§ 30.103; 30.11). Any bulkhead line does not extinguish riparian rights of owners and must be made after finding that such bulkhead line is in public interest. (Wis. Stat. §§ 30.11[4], [5]). General prohibition on structures and deposits in navigable waters unless permit is obtained. (Wis. Stat. § 30.12). Construction of piers, wharves, and swimming rafts allowed if do not obstruct navigation, and obstructions to navigation generally prohibited. (Wis. Stat. §§ 30.13-.16). Withdrawal of water from lake or stream, or enlargement of waterway prohibited unless permit is issued by department. (Wis. Stat. § 30.18). Penalty for violating provisions of c. 30 is fine of not less than $100 and no more than $10,000 for first offense. (Wis. Stat. § 30.298). Every municipality with municipal waters within or adjoining its boundaries has authority to make harbor improvements. (Wis. Stat. § 30.30). No dam may be constructed without permit and operation or abandonment of existing dams and dams generating power also require permit. (Wis. Stat. §§ 31.04-.185). Any dam, bridge or other obstruction that lacks such permit is public nuisance and department may take public action against such nuisance. (Wis. Stat. § 31.25). Department has authority to prescribe and enforce standards for pure drinking water. (Wis. Stat. § 280.11). Department has additional powers to require any well driller or person responsible for water supply to analyze water, to prepare codes on safety of public water, and furnish recommendations regarding safe drinking water. (Wis. Stat. § 280.13). Department may authorize counties to establish ordinances regarding standards for water purity. (Wis. Stat. § 280.21). Department has general supervision and control over waters of state. (Wis. Stat. § 281.12). Department has authority to promulgate standards for water quality for waters of state and may establish water quality protection standards for nonpoint sources. (Wis. Stat. §§ 281.15-.16). Department alone has jurisdiction over chemical treatment of waters of state to suppress aquatic nuisances. (Wis. Stat. § 281.17). Department may regulate groundwater withdrawals under certain circumstances. (Wis. Stat. § 281.34). Legislature has enacted Great Lakes—St. Lawrence River Basin Water Resources Compact, and special rules apply to use, diversion, and withdrawal of those waters. (Wis. Stat. §§ 281.343-281.346). Large scale withdrawals may not be made without permit from department. (Wis. Stat. § 281.35). Department has authority to issue water quality certifications for non-federal wetlands. (Wis. Stat. § 281.36). Department also manages compensatory mitigation programs for wetlands. (Wis. Stat. § 281.37). All discharges of effluent into waters of state are subject to state effluent standards which may not exceed federal standards. (Wis. Stat. § 283.11). Department may establish standards for certain components in effluent in absence of federal standards. (Wis. Stat. §§ 283.11[3]-[4]). Department may establish thermal effluent limitations (Wis. Stat. § 283.17) as well as standards for toxics and pretreatment (Wis. Stat. § 283.21). Wisconsin has adopted permit system similar to federal national pollution discharge elimination system (NPDES) permits. (Wis. Stat. § 283.31). Wisconsin authorizes storm water discharge permits. (Wis. Stat. § 283.33). Permits are subject to public notice, public access to information, public hearings and possible modification revocation and reissuance by department after hearing. (Wis. Stat. §§ 283.39; 283.41; 283.43; 283.49; 283.53).

12.03 WILDLIFE AND ENDANGERED SPECIES:

Legislature has created general obligation to engage in conservation along with general prohibition on damage or attempt to damage any natural resource within state. (Wis. Stat. § 23.095). Title to wild animals rests in state and hunting and trapping are prohibited without permit. (Wis. Stat. §§ 29.011-.024). Application for permit to hunt, trap, or fish may be denied based on child support delinquency. (Wis. Stat. § 29.024[2g]). Department is charged with performing any acts necessary to establish wildlife restoration projects and fish restoration. (Wis. Stat. § 29.037).

Local governments may regulate access to hunting, fishing or trapping on land that it owns or leases, or may establish ordinances or regulations that have incidental effect on hunting, fishing and trapping if they further public health and safety. (Wis. Stat. § 29.038). Department may conduct investigations of non-game species and to develop conservation programs to ensure perpetuation of non-game species. (Wis. Stat. § 29.039). Department regulates hunting and fishing in interstate waters. (Wis. Stat. § 29.041). State may enter into reciprocal agreements with other states for protection of wild animals. (Wis. Stat. § 29.043). Possession of wild animals prohibited in closed season in excess of bag limit or in open season where evidence shows that it was taken during closed season. (Wis. Stat. §§ 29.055-.057). Department charged with management of chronic wasting disease. (Wis. Stat. § 29.063). Department is authorized to issue various types of hunting licenses including licenses for small game, turkey, and deer. (Wis. Stat. §§ 29.161-.173).

13 ESTATES AND TRUSTS

13.01 ADMINISTRATION:

See topic 13.10 Executors and Administrators.

13.02 ADVANCEMENTS:

See topic 13.07 Descent and Distribution.

13.03 ALLOWANCES:

See topic 13.10 Executors and Administrators.

13.04 CLAIMS:

See topic 13.10 Executors and Administrators.

13.05 DEATH:

Uniform Absence as Evidence of Death and Absentee's Property Act (adopted 1941) with variations. (Wis. Stat. §§ 813.22-34). See also category 21 Property, topic 21.01 Absentees.

Requirement of Survival by 120 Hours.

Transferee of property under statute or by will, trust or other governing instrument that requires transferee survive event must survive such event by 120 hours for transfer to be effective unless statute or governing instrument provides otherwise. (Wis. Stat. § 854.03).

Actions Surviving Death.

All actions which survive at common law and all causes of action; to determine paternity; for recovery of personal property or unlawful withholding or conversion of personal property; for recovery of possession and for unlawful withholding of possession of real estate; for assault and battery; for false imprisonment; for invasion of privacy; for interception, disclosure or wrongful use of wire, electronic or oral communication, or other damage to person; for all damage done to property rights or interests of another; for goods taken and carried away; for damages done to real or personal estate; for equitable actions to set aside conveyance of real estate; to compel reconveyance of real estate or to quiet title to real estate; for specific performance of contracts relating to real estate; for wrongful death whether or not death of wrongdoer occurred before or after death of injured person: all such actions survive death of wrongdoer. Action does not abate by occurrence of any event if cause of action survives or continues. (Wis. Stat. § 895.01).

Actions for Wrongful Death.

Where death is caused in state by wrongful act, neglect, or default which would have entitled injured party to action for damages if he survived, then party who would have been liable for such injury is liable to action for damages, brought by decedent's personal representative or person entitled to amount recovered. (Wis. Stat. §§ 895.03, 895.04). Amount recovered belongs to spouse or domestic partner of deceased except if minor children whom deceased was legally liable to support also survive, court may set aside up to 50% of net amount received for their benefit. If no spouse or domestic partner survives recovery goes to lineal heirs, or if none survives to brothers and sisters. If deceased leaves children under 18, any settlement requires court approval. (Wis. Stat. § 895.04[2]). No limitation on amount of damages for pecuniary loss. Additional damages not to exceed $500,000 for deceased minor and $350,000 for deceased adult for loss of society may be awarded to spouse, children, parents or minor siblings. (Wis. Stat. § 895.04[4]). Reasonable cost of funeral, burial and medical expenses may be recovered. (Wis. Stat. § 895.04[5]). Action must be brought within three years. (Wis. Stat. § 893.54). Cause of action survives death of wrongdoer whether death of wrongdoer occurred before or after death of injured person. (Wis. Stat. §§ 895.01; 895.031).

Death certificate may be obtained from local Register of Deeds or Dept. Health and Social Services, State Registrar of Vital Statistics, Wilson Street State Office Building, One West Wilson Street, Madison, Wisconsin 53701, fee $20 for first copy and $3 fee for each additional copy requested at same time. (Wis. Stat. § 69.22). See also category 10 Documents and Records, topic 10.04 Records, subhead Vital Statistics.

Uniform Anatomical Gift Act (1987) adopted 1989 with variations. (Wis. Stat. § 157.06). Health care agent may make anatomical gifts before or after principal's death unless health care power of attorney document specifically denies such power. (Wis. Stat. §§ 155.20[8]; 157.06[4]; and 157.06[9]). See also topic 13.16 Wills.

Living Wills.

See topic 13.16 Wills.

13.06 DECEDENTS' ESTATES:

See topics 13.10 Executors and Administrators, 13.07 Descent and Distribution, and 13.16 Wills.

13.07 DESCENT AND DISTRIBUTION:

See topic 13.10 Executors and Administrators.

Uniform Probate Code adopted 1998 with considerable revisions. (1997 Wisconsin Act 188; revised 2005 Wisconsin Act 216). (c. 851 et seq.).

Intestate Succession.

All property descends as follows: (1) Spouse or domestic partner takes entire estate if no surviving issue, or if surviving issue are all issue of surviving spouse or surviving domestic partner and decedent; if there are surviving issue who are not issue of surviving spouse or surviving domestic partner, spouse or domestic partner takes one-half of decedent's estate not disposed of by will consisting of decedent's property other than marital property and property held with surviving spouse or surviving domestic partner as tenants in common; (2) issue take share of estate not passing to spouse or domestic partner or entire estate if there is no surviving spouse or surviving domestic partner; if there are issue other than children, those of more remote degrees take per stirpes; (3) if there is no surviving spouse or surviving domestic partner or issue, property descends as follows: (a) Parents or surviving parent; (b) brothers and sisters, descendants of deceased brothers and sisters taking per stirpes; (c) grandparents; one-half to maternal grandparents or to surviving maternal grandparent, descendants of deceased maternal grandparents if both deceased taking per stirpes; one-half to paternal grandparents or to surviving paternal grandparent, descendants of deceased paternal grandparents if both deceased taking per stirpes; shares of maternal and paternal grandparents combined if one side has no surviving grandparent or issue of grandparent; (d) if no descendants of grandparents intestate estate escheats to state. (Wis. Stat. § 852.01). If intestate estate includes interest in home, surviving spouse or surviving domestic partner may petition court for assignment of home. (Wis. Stat. § 861.21). (See topic 13.10 Executors and Administrators, subhead Homestead Rights.) Person to whom property would otherwise pass may disclaim all or part of property by filing signed declaration of disclaimer with court and serving copy on personal representative or holder of legal title to property within nine months after date of decedent's death. (Wis. Stat. §§ 701.26; 852.13; 853.40; 854.13).

Degrees of kindred are computed according to strict per stirpes provisions. (Wis. Stat. §§ 852.01[1]; 852.03; 854.04). See subhead Intestate Succession, supra.

Surviving spouse and surviving domestic partner take as indicated in subhead Intestate Succession, supra. Surviving domestic partner is defined as person who was in domestic partnership under c. 770 with decedent, at time of decedent's death. (Wis. Stat. § 851.295).

Half Blood.

Kindred of half blood inherit equally with whole blood. (Wis. Stat. §§ 852.03[3]; 854.21[4]).

Posthumous persons may be heirs if conceived before decedent's death. (Wis. Stat. §§ 852.03[4]; 854.21[5]).

Nonmarital child inherits from and through mother and from person who has been adjudged to be father or has admitted in open court or in writing signed by him that he is father. (Wis. Stat. § 852.05[1]). If nonmarital child dies intestate without surviving spouse or issue, estate descends as provided in § 852.01 (see subhead Intestate Succession, supra) except that father and his kindred can inherit only if father has been adjudicated to be father. (Wis. Stat. § 852.05[2]).

Adopted Children.

See category 14 Family, topic 14.01 Adoption, subhead Effect of Adoption.

Determination of Heirship.

Descent of property may be determined upon petition to probate court six years or more after death of intestate. (Wis. Stat. § 867.05).

Advancements.

Lifetime gift by decedent treated as full or partial satisfaction of transfer at death to heir of intestate estate or transferee under governing instrument executed by decedent only if governing instrument or other writing by decedent either expressly or as construed from extrinsic evidence provides that gift was advance or transferee acknowledges in writing either expressly or as construed from extrinsic evidence that gift was advance. (Wis. Stat. § 854.09).

Election.

See topic 13.16 Wills.

Renunciation.

Heir can disclaim in writing within nine months after decedent's death. (Wis. Stat. §§ 701.26[1]; 852.13; 853.40; 854.13).

Escheat.

See topic 13.16 Wills, subhead Unclaimed Legacies; categories 3 Business Regulation and Commerce, topic Banks and Banking, subhead Unclaimed Deposits; Property, topic Absentees, subhead Escheat.

Transfers at Death.

All probate and non-probate transfers at death are governed by c. 854, whether in intestacy or under governing instrument such as will, trust, joint tenancy with survivorship or POD bank account, etc. (See also Wis. Stat. §§ 701.25; 705.10; 705.15; 705.31; 706.105).

13.08 ELECTION:

See topic 13.16 Wills.

13.08A ESTATES: (in property)

See category 21 Property, topic 21.16 Real Property.

13.09 [RESERVED]

13.10 EXECUTORS AND ADMINISTRATORS:

Jurisdiction and Venue.

Jurisdiction of probate and administration is vested in circuit court of county of decedent's domicile or, if nonresident, in any county in which his property is located. (Wis. Stat. § 856.01).

Uniform Probate Code adopted 1998 with considerable revisions. (1997 Wisconsin Act 188; revised 2005 Wisconsin Act 216). (cc. 851 et seq.).

Uniform Ancillary Administration of Estates Act adopted 1951. (Wis. Stat. § 868.03).

Uniform Fiduciaries Act adopted 1925 with certain amendments. (Wis. Stat. § 112.01).

Preferences in Right to Administer.

For 30 days after death of decedent, petition for administration may be made by executor named in will or by any person interested. (Wis. Stat. § 856.07[1]). Persons interested are defined as heir, beneficiary named in will, beneficiary of trust created under will, person named as personal representative in will, and any other denominated by court order. (Wis. Stat. § 851.21). After 30 days petition may be made by guardian, creditor, anyone with cause of action or right of appeal which requires appointment of personal representative or anyone who has interest in property which is part of estate. (Wis. Stat. § 856.07[2]). See subhead Issuance of Letters, infra.

Eligibility and Competency.

Person is not entitled to receive letters if: (1) Under 18 years of age; (2) of unsound mind; (3) corporation not authorized to act as fiduciary in state; (4) nonresident who has not appointed resident agent to accept service of process; or (5) person whom court considers unsuitable for good cause. Nonresidency may be sufficient cause for nonappointment or removal in court's discretion. (Wis. Stat. § 856.23).

Qualification.

Person may not act as personal representative until bond is given unless court permits appointment without bond. Amount of bond is within discretion of court. (Wis. Stat. § 856.25[1]).

Exemption from Bond.

No bond is required of trust company bank, state bank or national banking association which is authorized to exercise trust powers and has complied with indemnity deposit requirements. Direction in will that personal representative serve without bond is not binding on court. (Wis. Stat. § 856.25[4]).

Issuance of Letters.

Court grants letters to persons who are not disqualified in following order: (1) Executor named in will; (2) person interested in estate or person's nominee within discretion of court; (3) any other person whom court selects. (Wis. Stat. § 856.21).

Removal.

Personal representative must be removed when incompetent, disqualified, unsuitable, incapable of discharging duties or nonresident of state who has not appointed resident agent to accept service of process. Court may remove representative who has failed to perform any duty imposed by law or by any lawful order of court or has ceased to be resident of state. (Wis. Stat. § 857.15).

Special administrator may be appointed where necessary to conserve or administer estate before letters can be issued, after final judgment where act remains unperformed or unadministered assets are found, and in certain other cases. (Wis. Stat. §§ 856.27; 867.07).

Inventory and Appraisal.

Within six months after appointment, personal representative must file inventory of all property owned by decedent. Inventory must show its classification under c. 766 (marital or non-marital) and type and amount of any existing obligation relating to any item of property, value of property as of date of death. (Wis. Stat. § 858.01). Upon filing inventory, fee of 0.2% of value of property subject to administration, less encumbrances, liens or charges, but not less than $20, shall be paid to register in probate. (Wis. Stat. § 814.66[1][a]).

Assets whose value is readily ascertainable without exercise of judgment on part of appraiser need not be appraised. (Wis. Stat. § 858.15). Other assets are appraised by appraiser appointed by court. (Wis. Stat. § 858.13).

General Powers and Duties.

Personal representative must collect, inventory and possess decedent's estate, collect income and rent, manage estate, maintain or purchase insurance when reasonable, contest all claims except those believed valid, pay expenses, taxes, charges and allowed claims, render accounts, make distribution and do other things required by court or law. (Wis. Stat. § 857.03[1]).

Notice of Appointment.

None required except in case of appointment of ancillary administrator other than foreign representative. (Wis. Stat. § 868.03[2]).

Notice to Creditors.

Upon filing of application for administration court by order fixes time for presentation of claims, which time is not less than three nor more than four months from date of order. (Wis. Stat.

§ 859.01). Notice of time must be published three times commencing within 15 days of order. (Wis. Stat. § 859.07[1]).

Presentation of Claims.

All claims must be presented within time for filing claims whether due or to become due, absolute or contingent, liquidated or unliquidated, except claims based on tort, marital property agreement subject to time limitations (generally, six months after inventory is filed), for Wisconsin income, franchise, sales, withholding, gift or death taxes, unemployment insurance contributions due or benefits paid, funeral expenses or administration expenses, claims of state under § 46.27(7g), § 49.496, § 49.682 or rules promulgated under § 46.286(7), or claims of U.S. (Wis. Stat. §§ 859.02, 766.58[13][b]). If personal representative knew or should have known of existence of potential claim, such claim is not barred even though filed after deadline if at least 30 days prior to deadline claimant did not have actual knowledge of estate proceeding and had not received timely notice from personal representative of final day for filing. (Wis. Stat. § 859.02[2]). Failure to file claim does not bar claimant from satisfying claim from property other than decedent's estate that but for decedent's death would have been available. (Wis. Stat. § 859.02[3]). Availability of such property is governed by two rules: (1) If obligation was incurred as result of extension of credit by person who regularly extends credit (or as result of Wisconsin tax obligation), property that would have been available during marriage for satisfaction of obligation (including income of surviving spouse) generally continues to be available for satisfaction; (2) for other types of obligations, incurred by decedent's spouse, rule (1) also applies except that no income of surviving spouse is available to satisfy obligation and marital property of surviving spouse is available only to extent of its value at death of decedent's spouse. Exceptions to property availability rules are joint tenancy property, survivorship marital property, deferred employment benefits arising from employment of decedent's spouse and insurance on decedent's life not payable to estate, creditor or assigned to creditor as security. (Wis. Stat. § 859.18).

Proof of Claims.

Claim must be in writing, describe nature and amount thereof if ascertained, be sworn to and, if founded on written instrument, original or copy must be attached to claim. (Wis. Stat. § 859.13). Claimant, in addition to filing claim with court, may within time for filing claims, serve copy of claim upon personal representative or attorney for estate to limit time within which objection to claim may be asserted. (Wis. Stat. § 859.33). If claim is one for property available under § 859.18, claim must describe classification of obligation under § 766.55(2) (e.g., obligation for support, obligation incurred in interest of marriage, etc.). (Wis. Stat. § 859.13). When creditor holds security, security must be described in claim. (Wis. Stat. § 859.19). Tort claim is not barred by failure to file but may be filed and, if timely filed, claimant receives same protection as other claimants. (Wis. Stat. § 859.45). Legislation enacted to implement Tulsa Professional Collection Services v. Pope. (485 U.S. 478).

Form.

Printed form for proof of claim available from court or http://www.wicourts.gov/forms1/index.htm. Mandatory use of standard court forms in circuit court cases effective as of July 1, 2000. (Supreme Court Order 98-01; Wis. Stat. §§ 758.18; 807.001[1]).

Approval or Rejection of Claims.

Objection to claim may be served at any time prior to entry of judgment on claim, but if copy of claim was served upon personal representative or attorney for estate, objection must be filed within 60 days after copy of claim was mailed to or served upon personal representative or attorney for estate. (Wis. Stat. § 859.33). Court enters judgment on claims. (Wis. Stat. § 859.37).

Payment of Claims.

Judgment of court sets date for payment of claims. (Wis. Stat. § 859.37). Contingent claims may be paid, if parties agree, on basis of probable present worth, or personal representative may retain funds to pay claims for two years after distribution or court may order distribution of estate as if contingent claims did not exist and may require distributees to give bond. (Wis. Stat. § 859.21). If contingent claim is allowed and funds set aside for paying it were distributed, creditor may recover against distributees after claim becomes absolute. (Wis. Stat. § 859.23).

Priorities.

If assets are insufficient to pay all claims, order of payment is: (a) Administration expenses; (b) reasonable funeral and burial expenses; (c) statutory provisions for family; (d) reasonable and necessary expenses of last sickness; (e) amounts owing to U.S., state or governmental subdivision or municipality; (f) wages due to employees earned within three months before death not exceeding $300 to each; (g) property assigned to surviving spouse or surviving domestic partner up to $10,000 as determined by court; and (h) all other claims. (Wis. Stat. § 859.25[1]).

Sales.

Personal representative may sell, mortgage or lease any property without notice, hearing or court order. Right and title of purchaser, mortgagee or lessee is not affected by any provision in will of decedent or any procedural irregularity or jurisdictional defect in administration of estate. (Wis. Stat. § 860.01). If will restricts power of personal representative to sell, mortgage or lease property, court may order sale, mortgage or lease to pay allowances, expenses of administration and claims. (Wis. Stat. § 860.11).

Actions by Representative.

Personal representative may commence and prosecute action, and may prosecute action commenced by decedent for recovery of any claim or cause of action that survived and may have execution on any judgment. (Wis. Stat. § 877.06).

Actions Against Representative.

No attachment or execution allowed against estate or personal representative until expiration of time limited for payment of debts. (Wis. Stat. § 877.17). If property was attached prior to decedent’s death, property is applied to payment of judgment and execution may be issued on such judgment in same manner as if decedent were living. (Wis. Stat. § 811.25). After one year from death, execution may be issued against any property upon which there was adjudged lien at time of debtor’s death, and may be executed in same manner and same effect as if debtor were alive but no execution shall issue without order. (Wis. Stat. § 815.14).

Family Exemption.

Surviving spouse or surviving domestic partner may select wearing apparel, jewelry, one automobile, household furnishings and up to $3,000 in value of other tangible nonbusiness property. (Wis. Stat. § 861.33[1]). If claims may not be paid in full, court may limit such transfers to $5,000 aggregate value. (Wis. Stat. § 861.33[2]). Surviving spouse or surviving domestic partner may also petition court to set aside as exempt from claims of creditors property reasonably necessary for support up to $10,000 value. (Wis. Stat. § 861.41). Rights of surviving spouse and surviving domestic partner are in addition to any right to take under will, intestacy or deferred marital property election.

Allowances.

Court may order allowance necessary or appropriate for support of surviving spouse or surviving domestic partner and minor children during administration of estate. (Wis. Stat. § 861.31[1m]). Court may also order ongoing allowance for support and education of minor children, until age 18, and for support of spouse or domestic partner after administration of estate is completed. (Wis. Stat. § 861.35).

Homestead Rights.

Surviving spouse or surviving domestic partner may petition court for assignment of decedent's property interest in home if included in intestate estate or if decedent's interest in home is not specifically transferred under will or nonprobate instrument. Petition must be filed within six months after decedent's death unless court extends time for filing. Surviving spouse or surviving domestic partner must pay for assigned interest in home within one year from decedent's death unless court extends payment period. Home includes any dwelling in which decedent had interest and that surviving spouse or surviving domestic partner occupied or intended to occupy at time of decedent's death. If there are several such dwellings, any one may be designated for assignment by surviving spouse or surviving domestic partner. (Wis. Stat. § 861.21).

Intermediate Accountings.

Court may require accounts from time to time. (Wis. Stat. § 862.01[4]).

Final Accounting and Settlement.

Estates must be completed as soon as reasonably possible and without unnecessary delay. (Wis. Stat. § 863.33). If estate has not been closed within 18 months after filing petition for administration, and is not open pursuant to order extending time, attorney and personal representative must show cause why estate cannot be closed. (Wis. Stat. § 863.35). Verified final account must be filed with petition for final settlement. (Wis. Stat. § 862.01[1]).

Consent Settlement.

Controversies between different claimants to estate may be adjusted by compromise agreement approved by court. (Wis. Stat. § 879.59).

Distribution.

Final judgment assigns residue of estate. (Wis. Stat. § 863.31).

Distribution If Abroad.

Where laws of the U.S. or executive orders prohibit payment, conveyance, transfer or delivery of property to legatee, devisee, ward or beneficiary of estate, probate court having jurisdiction thereof, after due notice to such person, may by judgment or decree authorize such disposition of such property as is or may be permissible under laws or executive orders of U.S. (Wis. Stat. § 863.37[1]).

Whenever payment of legacy or distributive share cannot be made to person entitled thereto or it appears that such person may not receive or have opportunity to obtain payment, court may on petition of interested party or in its discretion order money to be deposited in State School Fund until such time as court may determine, upon claim of person asserting a right to such funds that person is entitled thereto. Claims on deposited funds may be made within ten years after date of publication under § 177.18 of list of abandoned property as provided in § 177.23. (Wis. Stat. § 863.37[2]).

Liabilities.

Personal representative incurs no liability for giving or not giving notice to any potential claimant against estate that proceedings to administer estate are pending, even if personal representative knew or should have known about existence of claim, or for not informing distributees of potential liability for claims not barred. (Wis. Stat. § 857.31).

Compensation of Representatives.

Personal representative is allowed all necessary expenses plus commissions at 2% rate of inventory value of property for which personal representative is accountable less mortgages or liens plus net corpus gains or rate agreed on by personal representative and decedent or persons who receive majority of estate. Court may allow further sums in cases of unusual difficulty or extraordinary services. If personal representative is derelict in duty, compensation may be reduced or denied. If personal representative or law firm with which same is associated also serves as attorney for estate, court may allow either commissions or attorneys' fees or may allow both if will authorizes payment. (Wis. Stat. § 857.05).

When Administration Unnecessary.

See subhead Small Estates, infra.

Small Estates.

Summary settlement without appointment of personal representative is permitted when value of estate, less amount of debts for which property in estate is security, does not exceed expenses, allowances and claims having priority over general claims or where value of estate less amount of debts for which any property in estate is security does not exceed $50,000 and decedent is survived by spouse or domestic partner or one or more minor children or both. (Wis. Stat. § 867.01[1]). Petition must be filed stating pertinent facts. (Wis. Stat. § 867.01[3]). Court may, if necessary, appoint special administrator, order bond and hear matter with or without notice. (Wis. Stat. § 867.01[3]). Where foregoing procedure is not available but value of estate less amount of debts for which any property in estate is security does not exceed $50,000, summary procedure may be followed but assignees are then subject to claims of creditors for three months after publication of notice of filing of petition. (Wis. Stat. § 867.02). When decedent leaves solely-owned property not exceeding $50,000, any heir, trustee of revocable trust created by decedent or person who was guardian of decedent at time of death may receive property by affidavit procedure. (Wis. Stat. § 867.03[1g]). Affidavit must be recorded for interests in real property. (Wis. Stat. § 867.03[2m]). Life estate or joint tenancy may be terminated by court upon petition. (Wis. Stat. § 867.04). Summary procedure exists for administrative joint tenancy termination for real property, vendor's interest in land contracts, and mortgagee's interest in mortgages. (Wis. Stat. § 867.045).

When decedent spouse leaves property, including survivorship marital property, surviving spouse or beneficiary of marital property agreement or TOD beneficiary or beneficiary of transfer under § 705.10(1) may petition court to obtain certificate which is prima facie evidence of petitioner's rights in property. (Wis. Stat. § 867.046[1m]). Surviving spouse or beneficiary of marital property agreement or TOD beneficiary or beneficiary of transfer under § 705.10(1) may, however, make application to register of deeds of county in which real property, vendor's interest in land contracts and mortgagee's interest in mortgages are located, and upon recording, application is prima facie evidence of survivor's interest. Required recording of property tax bill may be waived by agreement of register of deeds and county real property lister. (Wis. Stat. § 867.046[2][b][i]).

Informal administration of estates permitted by c. 865, in which court does not exercise continuous jurisdiction. Probate registrar, an administrative official, exercises authority over informal administration.

Foreign Representatives.

When no personal representative has been appointed in this state for estate of nonresident, foreign administrator, after first filing original letters of appointment or certified copy with any circuit court in this state, may exercise any power over estate, including sales and assignments and prosecution or defense of any action. Foreign administrator generally has same rights and remedies as personal representative appointed in this state. (Wis. Stat. §§ 877.16; 868.03). See also topic 13.16 Wills, subhead Foreign Probated Wills.

Uniform Fiduciaries Act adopted 1925. (Wis. Stat. § 112.01).

Revised Uniform Principal and Income Act (1997) adopted 2005 with variations. (2005 Wisconsin Act 10). (Wis. Stat. § 701.20).

Revised Uniform Prudent Investor Act adopted 2004 with variation. (Wis. Stat. § 881.01).

Uniform Simplification of Fiduciary Security Transfers Act has been repealed. (1997 Wisconsin Act 297). Uniform Commercial Code applies.

Uniform Anatomical Gift Act (1987) adopted 1989 with variations. (Wis. Stat. § 157.06).

Uniform Ancillary Administration of Estates Act adopted 1951. (Wis. Stat. § 868.03).

13.11 FIDUCIARIES:

See topics 13.10 Executors and Administrators, and 13.15 Trusts; also category 14 Family, topic 14.07 Guardian and Ward.

13.12 INTESTACY:

See topic 13.07 Descent and Distribution.

13.13 LIVING WILLS:

See topic 13.16 Wills.

13.14 PROOF OF CLAIMS:

See topic 13.10 Executors and Administrators; also category 5 Civil Actions and Procedure, topic 5.17 Pleading.

13.15 TRUSTS:

Trust means an express living, testamentary, private or charitable trust in property arising as a result of a manifestation of intention to create it. (Wis. Stat. § 701.01[7]). Trust may be created for any lawful purpose. (Wis. Stat. § 701.02). Unless otherwise limited, trustee takes all title of settlor or other transferor; beneficiary has both right to have trustee perform his fiduciary duties and an equitable interest in trust property. (Wis. Stat. § 701.05).

Uniform Probate Code adopted 1998 with considerable revisions. (1997 Wisconsin Act 188; revised 2005 Wisconsin Act 216). (c. 851 et seq.).

Kinds.

Testamentary trust is trust subject to continuing jurisdiction of court assigned to exercise probate jurisdiction. (Wis. Stat. § 701.01[6]).

Living trust is any trust other than testamentary trust, including testamentary trust removed to this state. (Wis. Stat. § 701.01[6]).

Charitable trust is any trust to extent income or principal must be used by trustee exclusively for charitable purpose. (Wis. Stat. §§ 701.01[2], 701.10).

Private trust is any trust other than charitable trust, provided it is for benefit of person sufficiently identifiable to enforce trust. (Wis. Stat. § 701.01[2]).

Cemetery trust is valid to maintain and preserve any grave lot, tomb, monument, gravestone or cemetery and any cemetery company, association or corporation may act as trustee. (Wis. Stat. § 701.11[2]).

Passive trust, to extent trust is private trust, vests no title in trustee, but beneficiary takes title equal to beneficial interest given him, is abolished. Trust is passive when trustee's title merely nominal and trustee has no duty to actively manage property. (Wis. Stat. § 701.03).

Honorary trust, created when testamentary transfer in trust is for a specific noncharitable purpose and there is no definitely ascertainable human beneficiary, is unenforceable. If purpose is not capricious, transferee has power to apply property to designated purpose. (Wis. Stat. § 701.11[1]).

Resulting trust in favor of payor, where property is transferred to another person, is not enforceable except by creditors of payor if intent to defraud creditors present. (Wis. Stat. §§ 701.04[1]-[2]).

Constructive trust, as distinguished from resulting trust, is enforceable. (Wis. Stat. § 701.04[3]; 268 Wis. 101, 66 N.W.2d 740).

Creation.

Trusts may be created in parol or in writing (260 Wis. 365, 51 N.W.2d 38) but trust affecting title to land, unless created by will or operation of law, is considered conveyance and all provisions relating thereto apply to trusts (Wis. Stat. § 706.001). (See category 21 Property, topic 21.06 Deeds). Where trustee obtains interest in land by conveyance or devise, it is conclusively presumed that he is trustee of valid express trust and has full power to convey to good faith purchaser as defined in 401.201(33), if no instrument showing trustee's authority and power is recorded. (Wis. Stat. § 706.08[4]). Title of trustee is deemed absolute against subsequent creditors of trustee not having notice of trust and against purchasers from trustee without notice and for valuable consideration if existence of trust not disclosed by recorded conveyance to trustee. (Wis. Stat. § 706.08[3]).

Removal of Trust.

Unless creating instrument forbids removal or provides a method of removal, Wisconsin testamentary trust may be removed to another state upon court order, after notice and hearing, if court finds that removal in accord with intent of settlor, would aid efficient administration or is in best interests of beneficiaries. (Wis. Stat. § 701.23[1]). Department of Revenue must receive written notice of hearing on removal under § 879.05. (Wis. Stat. § 71.14[2]). For trusts created by contract, declaration of trust or implication of law that were made irrevocable prior to Oct. 29, 1999, residency of trust is determined by place of administration. (Wis. Stat. § 71.14[3]). For such trusts that became irrevocable on or after Oct. 29, 1999, or that became irrevocable before Oct. 29, 1999, and are first administered in Wisconsin on or after Oct. 29, 1999, residency of trust determined by residency of settlor (or person funding such trust) on date trust is or becomes irrevocable. (Wis. Stat. § 71.14[3m]). (See also category 22 Taxation, topic 22.10 Income Tax.) Unless creating instrument forbids removal or provides method of removal, court may appoint local trustee to receive and administer trust property presently being administered in another state. (Wis. Stat. § 701.23[2]).

Termination.

Trust may be modified, revoked or terminated by written consent of settlor and all beneficiaries. (Wis. Stat. § 701.12). Except for charitable trusts, court may terminate or modify testamentary trust or living trust when settlor is deceased if trustee consents and continuation of trust is impracticable due to any substantial reason. (Wis. Stat. § 701.13). Court has general equitable power to modify or terminate. (Wis. Stat. § 701.13[6]). Court has authority to modify or terminate charitable trusts when purpose impossible, impractical or unlawful or administration becomes uneconomic. (Wis. Stat. § 701.10[2]). Attorney general is interested person entitled to notice in proceeding to modify or terminate charitable trust. (Wis. Stat. § 701.10[3]).

Charitable trust may be created for following purposes: Relief of poverty; advancement of education; advancement of religion; promotion of health; promotion of governmental or municipal purposes; or any purpose accomplishment of which is beneficial to community. No gift to charity, in trust or otherwise, is invalid because of indefiniteness. If no specific charitable purpose named, and trustee not expressly authorized to select purpose, trustee has implied power to select one or more charitable purposes. (Wis. Stat. § 701.10[1]).

Living Trusts.

Living trust, otherwise valid, will not be held invalid as attempted testamentary transfer or passive trust because it contains any of following powers (exercisable by settlor or another or both): To revoke, modify or terminate in whole or in part; to exercise any power or option over property in trust or over life insurance policy or employee benefits plan, proceeds of which are payable to trust; to direct, during lifetime of settlor or another, person to whom principal or income is to be paid; to control administration of trust; to add property. Living trust shall not be held invalid as lacking sufficient principal because its only corpus is designation of trustee as beneficiary of will, life insurance policy or employee benefit plan, or because assets are of nominal value. Living trust may receive assets from any source. Creditors of settlor may reach trust property to extent it is subject to power in settlor to revoke, modify or terminate in his own favor. (Wis. Stat. § 701.07).

Transfers to Testamentary Trusts.

Transfer to trust created or to be created under will of another is valid if will of other person executed, or last modified as to trust terms, prior to death of person making transfer and other person’s will admitted to probate prior to, or within two years after, death of person making transfer. If transfer ineffective, will construed as creating trust upon same terms as trust of other person unless will provides otherwise. Life insurance proceeds and employee death benefits may be made payable to testamentary trust. (Wis. Stat. § 701.09).

Alienation.

Settlor may provide that interest of beneficiary (other than settlor) in income or principal is not subject to either voluntary or involuntary alienation. Income subject to such provision is unassignable and exempt from creditors until paid to beneficiary pursuant to trust terms. If beneficiary’s principal interest made unassignable, judgment creditor of beneficiary may secure court order directing trustee to satisfy such judgment if amount then due or payable to beneficiary out of principal. Notwithstanding spendthrift provision, court may order payment if claim for child support or public support. Court may also order payment to judgment creditor of settlor if settlor is beneficiary and trustee authorized to distribute income or principal to settlor. (Wis. Stat. § 701.06).

Appointment of Trustee.

Testamentary trustee derives authority from will, but letters of trust are issued after will admitted to probate. (Wis. Stat. §§ 701.16[1]; 856.29). If testamentary trust fails to name trustee or named trustee predeceases settlor or refuses appointment court shall appoint trustee after will admitted to probate, unless will provides otherwise. Court may appoint special testamentary trustee until time regular trustee appointed. (Wis. Stat. § 701.16[1]).

Upon death, resignation or removal of trustee, court may appoint successor trustee unless creating instrument names alternate. Court may order appointment of additional trustee if circumstances warrant and not prohibited by creating instrument. (Wis. Stat. § 701.17[1]). Court may appoint special trustee to act until successor trustee appointed or to distribute assets after termination of trust. (Wis. Stat. § 701.17[2]).

Eligibility, Competency and Qualification.

Common law generally governs. Corporation may not act as trustee or fiduciary unless it is national bank, state or federal savings and loan association, state or federal savings bank, or federal credit union with authority to act as trustee or fiduciary or is subject to regulation under § 223.105. (Wis. Stat. § 223.10). Foreign trust companies may be testamentary trustees if reciprocal rights afforded Wisconsin trust companies and if required filings made with state division of banking. (Wis. Stat. § 223.12). If trustee is authorized to administer trust under will admitted to probate outside this state, foreign trustee may record authenticated copy of letters of trust, together with statement appointing register of probate as trustee's resident agent, with register of deeds of appropriate county and thereafter trustee has same powers and rights he would have if he received letters of trust from court of this state. (Wis. Stat. § 701.16[1][d]).

No general statutory bond requirement for trustee of living trust. Special trustee shall give bond as court requires. (Wis. Stat. § 701.17[2]). Court may require testamentary trustee to give bond, but direction of settlor that no bond required is to be followed unless trustee's personal circumstances changed from time of execution of will. If trustee fails to provide required bond, court may remove and appoint successor trustee. No bond required of trust company bank, state bank, national bank or religious, charitable or educational corporation or society. (Wis. Stat. § 701.16[2]; c. 878).

Resignation and Removal of Trustee.

Trustee may resign in accordance with terms of creating instrument or petition court to accept resignation and court may discharge trustee upon appropriate terms and conditions, following notice and hearing. Trustee may be removed in accordance with terms of creating instrument or court may upon its own motion or upon petition by beneficiary or co-trustee, after notice and hearing, remove trustee after finding of failure to comply with statutory requirements, court order or if trustee found unsuitable. (Wis. Stat. § 701.18).

General Powers and Duties of Trustee.

Absent of contrary provision in trust instrument, court may order trustee: To continue an existing business (Wis. Stat. § 701.19[4]); to organize a business or charitable corporation or to become a partner in partnership or member of limited liability company (Wis. Stat. § 701.19[5]); to plat land which is part of trust property (Wis. Stat. § 701.19[8]). Unless trust instrument provides otherwise, trustee may vote stock by general or limited proxy with or without power of substitution. (Wis. Stat. §§ 701.19[7]; 112.03). Unless trust instrument provides otherwise, any power is exercised by majority of joint trustees and any dissenting trustee is not liable for consequences of act if he dissents in writing. (Wis. Stat. § 701.19[9]). Unless trustee is settler of trust, distributions are limited to ascertainable standard, marital deduction allowed with respect to trust property, or unless trust instrument provides otherwise, power in trustee to confer income or principal to himself or to allocate receipts and expenses in his own favor cannot be exercised by him. (Wis. Stat. § 701.19[10]). Surviving, special or added trustee has same powers and duties as regular trustee. (Wis. Stat. §§ 701.17[3]-[4]). Powers of testamentary trustee engaged in war service may be suspended by court on notice and hearing. (Wis. Stat. § 112.02). Trustee of express trust may sue without joining beneficiary. (Wis. Stat. § 803.01[2]).

Sales.

Unless trust instrument or court order provides otherwise, trustee has complete power to sell, mortgage or lease trust property, but may not give personal warranties. (Wis. Stat. § 701.19[1]). Trustee or other interested person may secure court order, if in best interests of trust, for sale, mortgage or lease or property. (Wis. Stat. § 701.19[2][a]). Unless trust instrument provides otherwise, trustee may not be personally interested in a purchase, mortgage or lease of trust property unless all beneficiaries consent or court, upon notice and hearing, approves. (Wis. Stat. § 701.19[2][c]).

Investments.

C. 881 governs trust fund investments in absence of specific provisions. Trustee or other interested person may apply to court for order directing retention, investment, reinvestment or other disposition of trust property. (Wis. Stat. § 701.19[2][b]).

Securities in Name of Nominee.

Unless trust instrument provides otherwise, trustee may register securities in name of nominee. (Wis. Stat. § 701.19[6]).

Bequests and Devises to Living Trusts.

See topic 13.16 Wills, subhead Bequests and Devises to Living Trusts.

Accounting.

No general statutory provision for accounting by trustees. Testamentary trustee must file: verified inventory of property received (Wis. Stat. § 701.16[3]); verified annual accounting unless court orders otherwise (Wis. Stat. § 701.16[4]); verified final accounting upon termination of trust (Wis. Stat. § 701.16[5]); and court may order final accounting upon death, resignation or removal of trustee (Wis. Stat. § 701.16[5]).

Compensation.

Amount of compensation is not established by statute.

Discharge.

Testamentary trustee may not be discharged until court, upon notice and hearing, is satisfied all statutory requirements met and all trust property has been either distributed to beneficiaries or turned over to successor trustee. (Wis. Stat. § 701.16[6]).

Uniform Common Trust Fund Act, adopted 1943 as amended in effect. (Wis. Stat. § 223.055). Wisconsin amendments thereto provide that while normal statutory restrictions on trust investments do not apply, fiduciary accounts cannot be invested in common trust fund unless all of fund's investments would be permissible for such fiduciary accounts. (Wis. Stat. § 223.055[3]). Multi-institutional common trust funds are permitted. (Wis. Stat. § 223.056). For tax purposes, all income and capital losses realized are attributable pro rata to participating fiduciary accounts. (Wis. Stat. § 223.057).

Uniform Custodial Trust Act adopted 1991. (Wis. Stat. §§ 54.950-54.988).

Revised Uniform Principal and Income Act (1997) adopted 2005 with variations. (2005 Wisconsin Act 10). (Wis. Stat. § 701.20).

Gifts to Minors.

See category 14 Family, topic 14.10 Infants, subhead Uniform Transfers to Minors Act.

Uniform Fiduciaries Act adopted 1925. (Wis. Stat. § 112.01).

Uniform Simplification of Fiduciary Security Transfers Act has been repealed. (1997 Wisconsin Act 297). Uniform Commercial Code applies. (1994 revision). (Wis. Stat. § 408.109).

Accumulations.

Provision directing or authorizing accumulation of income valid. (Wis. Stat. § 701.21[2]). If creating instrument fails to specify frequency of distributions to which beneficiary entitled, trustee must distribute at least annually. (Wis. Stat. § 701.21[1]). If income not required to be distributed, trustee has discretion as to whether such income held for future distribution as income or added to principal. (Wis. Stat. § 701.21[4]).

Perpetuities.

See category 21 Property, topic 21.13 Perpetuities.

Pour Over Trusts.

See topic 13.16 Wills, subhead Bequests and Devises to Living Trusts.

Renunciation.

Beneficiary under nontestamentary instrument can disclaim within nine months after date of instrument for present interests and within nine months after future interest ascertained and fixed. For cause shown court can extend period, either within or without nine month period. (Wis. Stat. §§ 701.26[1]; 854.13). Future income interest can be disclaimed any time. (Wis. Stat. § 854.13[4][c]). Statute does not abridge rights under other statutes, common law or creating instrument. (Wis. Stat. § 854.13[12]).

13.16 WILLS:

Any person of sound mind 18 years or older may make and revoke will. (Wis. Stat. § 853.01).

Uniform Probate Code adopted 1998 with considerable revisions. (1997 Wisconsin Act 188; revised 2005 Wisconsin Act 216). (c. 851 et seq.).

Basic Will.

Statutory form provided for basic will with or without trust to enable layperson to draft own will without assistance of attorney. (Wis. Stat. §§ 853.50-853.62).

Testamentary Disposition.

Married person may will nonmarital property and his or her one-half interest in marital property. (See category 14 Family, topic 14.09 Husband and Wife, subhead Marital Property.) Spouses may provide by marital property agreement upon death of either spouse any of either or both spouses' property, including after-acquired property, passes without probate to designated person, trust or other entity by non-testamentary disposition. (Wis. Stat. § 766.58[3][f]). No law limiting amount of property which testator may leave to charity. Lawyer may draft will in which he benefits only where he is natural object of testator's bounty and where he receives no more under will than in absence thereof. (39 Wis. 2d 325, 159 N.W.2d 50).

Execution.

Wills must be in writing and signed by the testator, by testator with assistance of another person with testator's consent or may be signed in testator's name by another person at testator's direction in his or her conscious presence. (Wis. Stat. § 853.03[1]). Two witnesses must sign within reasonable time after witnessing signing of will, testator's implicit or explicit acknowledgment of his or her signature on will within conscious presence of each witness, or testator's implicit or explicit acknowledgment of will within conscious presence of each witness. (Wis. Stat. § 853.03[2]). Witnesses may observe signing or acknowledgment at different times. (Wis. Stat. § 853.03[2]). If witnesses are competent when they act, their subsequent incompetency does not prevent admission of will if otherwise satisfactorily proved. (Wis. Stat. § 853.07[1]). Rebuttable presumption that beneficial provision for interested witness or witness's spouse invalid to extent provision exceeds what would be received under intestacy. (Wis. Stat. § 853.07[2]).

Attestation Clause.

No statutory form, but see subhead Self-proved Wills, infra.

Holographic wills, without witnesses, are not recognized under Wisconsin law unless executed in accordance with law of place where executed or law of state of domicile at time of execution. (Wis. Stat. § 853.05).

Nuncupative Wills.

Nuncupative will not valid. (Wis. Stat. §§ 853.03; 853.05).

Revocation.

Wills may be revoked in whole or in part by burning, tearing, canceling, obliterating or destroying will or part thereof, with intent to revoke, by testator, someone in his conscious presence and at his direction, or by new will that is validly executed and revokes prior will in whole or part expressly or by inconsistency. (Wis. Stat. §§ 853.11[1], [1m]). Pretermitted surviving spouse or surviving domestic partner entitled to amount he or she would have received under intestacy excluding devises to decedent's children and issue, unless will or extrinsic evidence indicates contrary intention, was drafted under circumstances indicating it was in contemplation of marriage or domestic partnership, makes provision for issue of decedent, testator and spouse have entered into contract which complies with c. 766 providing for spouse or excluding spouse from rights in estate of testator. (Wis. Stat. §§ 853.12; 861.02). Annulment of marriage or absolute divorce or termination of domestic partnership revokes any provision in favor of spouse and spouse's relatives. (Wis. Stat. §§ 853.11[3]; 854.15).

Revival.

If subsequent will that partly revoked previous will is revoked by physical act, revoked part of previous will is revived unless evident that testator did not intend revival. (Wis. Stat. § 853.11[6(a)]). If subsequent will that wholly revoked previous will is revoked by physical act, previous will remains revoked unless evident that testator intended previous will be revived. (Wis. Stat. § 853.11[6(b)]). Evidence of testator's intent determined from circumstances of revocation and testator's contemporaneous or subsequent declarations. In absence of original valid will, content, execution and validity of revived will can be proven under lost wills statute. (Wis. Stat. §§ 853.11[6(d)]; 856.17).

Testamentary Gifts to Subscribing Witnesses.

Any devise or bequest to witness or spouse is presumed invalid to extent it exceeds what would be received under intestacy. Presumption does not apply if will signed by two disinterested witnesses or rebutted by sufficient evidence that testator intended full transfer to interested witness to take effect. (Wis. Stat. § 853.07[2]).

Bequests and Devises to Inter Vivos or Living Trusts.

Living trust must be eligible to receive property from any source. (Wis. Stat. § 701.07[2]). Living trust treated as independent existing entity and reference to trust in will does not cause trust assets to be included in estate or trust to be treated as testamentary trust. Exercise of power to modify trust terms by settlor is effective to change provisions as to property passing under or appointed by will even though will not reexecuted or republished after modification. Exercise of power to modify trust terms by person other than settlor not effective to change provisions as to property passing under or appointed by will and such property administered according to terms of trust at execution of will unless will provides to contrary. If living trust not in existence at death of testator whose will transfers property to such trust: (1) If testator was party necessary to termination or revocation, transfer invalid and (2) if testator was not party necessary to termination or revocation, testamentary trust created upon same terms as living trust. (Wis. Stat. § 701.08).

Testamentary Guardian.

See category 14 Family, topic 14.07 Guardian and Ward, subhead Selection and Appointment of Guardian.

Separate Writing.

Any writing in existence when will is executed may be incorporated by reference if sufficiently identified even if not executed in compliance with statutory execution requirements. (Wis. Stat. §§ 853.32[1][am] and 853.32[1][bm]). Will may refer to written statement or list to dispose of items of tangible personal property not otherwise specifically disposed of by will. Separate statement must be referred to in will but may be prepared or altered after execution of will. Separate statement must be signed but court may enforce statement that is not dated. (Wis. Stat. § 853.32[2]).

Probate.

Jurisdiction to probate will lies in circuit court of county where decedent had domicile at time of his death, or if not resident of state, in court of any county where property of decedent is located. (Wis. Stat. § 856.01). No will can pass property unless it has been admitted to probate. (Wis. Stat. § 856.13). Informal administration, without court supervision, permitted in certain cases. (c. 865).

Self-proved Wills.

Will may be simultaneously executed, attested and made self proving by affidavit of testator and witnesses before officer authorized to administer oaths under laws of state where execution occurs, and evidence by officers certificate under official seal in either one step or two step form, as follows:

One Step Procedure for simultaneous execution, attestation and self proving by affidavit of testator and witness:

STATE OF. . . .

COUNTY OF. . . .

I,. . . ., THE TESTATOR, SIGN MY NAME TO THIS INSTRUMENT THIS. . . . DAY OF. . . ., AND BEING FIRST DULY SWORN, DECLARE TO THE UNDERSIGNED AUTHORITY ALL OF THE FOLLOWING:

1. I EXECUTE THIS INSTRUMENT AS MY WILL.

2. I SIGN THIS WILL WILLINGLY, OR WILLINGLY DIRECT ANOTHER TO SIGN FOR ME.

3. I EXECUTE THIS WILL AS MY FREE AND VOLUNTARY ACT FOR THE PURPOSES EXPRESSED THEREIN.

4. I AM 18 YEARS OF AGE OR OLDER, OF SOUND MIND AND UNDER NO CONSTRAINT OR UNDUE INFLUENCE.

TESTATOR:

WE,. . . .,. . . ., THE WITNESSES, BEING FIRST DULY SWORN, SIGN OUR NAMES TO THIS INSTRUMENT AND DECLARE TO THE UNDERSIGNED AUTHORITY ALL OF THE FOLLOWING:

1. THE TESTATOR EXECUTES THIS INSTRUMENT AS HIS OR HER WILL.

2. THE TESTATOR SIGNS IT WILLINGLY, OR WILLINGLY DIRECTS ANOTHER TO SIGN FOR HIM OR HER.

3. EACH OF US, IN THE CONSCIOUS PRESENCE OF THE TESTATOR, SIGNS THIS WILL AS A WITNESS.

4. TO THE BEST OF OUR KNOWLEDGE, THE TESTATOR IS 18 YEARS OF AGE OR OLDER, OF SOUND MIND AND UNDER NO CONSTRAINT OR UNDUE INFLUENCE.

WITNESS:. . . .

WITNESS:. . . .

SUBSCRIBED AND SWORN TO BEFORE ME BY. . . ., THE TESTATOR, AND BY. . . ., AND. . . ., WITNESSES, THIS. . . . DAY OF. . . .,. . . .

(SEAL). . . .

(SIGNED):. . . .

(OFFICIAL CAPACITY OF OFFICER):. . . .

Two Step Procedure for use after will execution and attestation to make will self proving by affidavit of testator and witnesses:

STATE OF. . . .

COUNTY OF. . . .

WE,. . . .,. . . ., AND. . . ., THE TESTATOR AND THE WITNESSES WHOSE NAMES ARE SIGNED TO THE FOREGOING INSTRUMENT, BEING FIRST DULY SWORN, DO DECLARE TO THE UNDERSIGNED AUTHORITY ALL OF THE FOLLOWING:

1. THE TESTATOR EXECUTED THE INSTRUMENT AS HIS OR HER WILL.

2. THE TESTATOR SIGNED WILLINGLY, OR WILLINGLY DIRECTED ANOTHER TO

SIGN FOR HIM OR HER.

3. THE TESTATOR EXECUTED THE WILL AS A FREE AND VOLUNTARY ACT.

4. EACH OF THE WITNESSES, IN THE CONSCIOUS PRESENCE OF THE TESTATOR, SIGNED THE WILL AS WITNESS.

5. TO THE BEST OF THE KNOWLEDGE OF EACH WITNESS, THE TESTATOR WAS, AT THE TIME OF EXECUTION, 18 YEARS OF AGE OR OLDER, OF SOUND MIND AND UNDER NO CONSTRAINT OR UNDUE INFLUENCE.

TESTATOR:. . . .

WITNESS:. . . .

WITNESS:. . . .

SUBSCRIBED AND SWORN TO BEFORE ME BY. . . ., THE TESTATOR, AND BY. . . ., AND. . . ., WITNESSES, THIS. . . . DAY OF. . . .,. . . .

(SEAL). . . .

(SIGNED):. . . .

(OFFICIAL CAPACITY OF OFFICER):. . . .

Inclusion in will of affidavit in substantially either of above forms is conclusive evidence that will was executed in compliance with § 853.03 execution requirements. (Wis. Stat. §§ 853.04, 856.16).

Construction.

Will presumed to pass all property that testator owns at death and that he has power to transmit by will including property acquired after execution of will or by testator's estate. (Wis. Stat. § 853.29).

Living Will.

Person of sound mind and 18 years of age may execute declaration authorizing withholding or withdrawal of life-sustaining procedures or feeding tubes when person is in terminal condition or persistent vegetative state. (Wis. Stat. § 154.03[1]). Terminal condition means incurable condition caused by injury or illness that reasonable medical judgment finds would cause death imminently, so that application of life-sustaining procedures serves only to postpone moment of death. (Wis. Stat. § 154.01[8]). Persistent vegetative state means condition that reasonable medical judgment finds constitutes complete and irreversible loss of all functions of cerebral cortex and results in complete, chronic and irreversible cessation of all cognitive functioning and consciousness and complete lack of behavioral responses that indicate cognitive functioning, although autonomic functions continue. (Wis. Stat. § 154.01[5m]). Qualified patient means declarant who has been diagnosed and certified in writing to be afflicted with terminal condition or to be in persistent vegetative state by two physicians, one of whom is attending physician, who have personally examined declarant. (Wis. Stat. § 154.02[3]). Statutory form Declaration to Physicians provided. (Wis. Stat. § 154.03[2]).

Declaration must be signed by declarant in presence of two witnesses who are not: (1) Related to declarant by blood, marriage or adoption; (2) entitled to or with claim against any portion of declarant's estate; (3) financially responsible for declarant's health care; or (4) declarant’s health care providers at time of execution and employees of health care providers or inpatient health care facilities, other than chaplain or social worker. (Wis. Stat. § 154.03[1]). Declaration may be revoked any time by declarant by destroying declaration, by written revocation, or by verbal expression. (Wis. Stat. § 154.05[1]). Dept. of Health and Social Services provides copies of declaration form contained in c. 154. Statute allows terminal patient to wear do-not-resuscitate bracelet. (Wis. Stat. §§ 154.17-154.29).

Power of Attorney for Health Care authorized under c. 155. See category 21 Property, topic 21.15 Powers of Attorney.

Contest.

After petition for administration is filed, court sets time for proving will. (Wis. Stat. § 856.11). Will can be contested at hearing. Final judgment in estate is conclusive determination of persons who are successors in interest to estate of decedent and of extent and character of their interests subject only to right of appeal and right to reopen judgment. (Wis. Stat. § 863.31[1]). Appeal period is generally 45 days from entry of judgment if proper notice given, otherwise 90 days. (Wis. Stat. § 808.04[1]).

Legacies must be paid at end of one year, unless will provides otherwise and court extends time, and bear interest after one year. Payment may be enforced by petition to circuit court. (233 Wis. 645, 290 N.W. 137).

Unclaimed Legacies.

Real and personal property of persons dying intestate without heirs escheats to state for use of school fund. (Wis. Stat. § 852.01[3]). Legacy or intestate property not claimed within 120 days after entry of final judgment or within time designated therein escheats to state for use of school fund. (Wis. Stat. § 863.39[1]). Refund made to proper owner on petition to circuit court at any time within ten years of date of publication of notice that money has been received by state. Real property transferred to proper owners by circuit court on petition at any time before conveyance by state. (Wis. Stat. § 863.39[3]).

Lapse.

Unless evidence of contrary intent, if revocable provision in will or other governing instrument is made for decedent’s stepchild, grandparent, or issue of grandparent and transferee does not survive decedent, but has surviving issue, issue of transferee take transfer per stirpes. (Wis. Stat. §§ 854.04[1] and 854.06). If no such surviving issue, attempted transfer becomes part of residue. (Wis. Stat. § 854.07).

Children.

If will fails to provide for child born or adopted after making of will, child is entitled to share of estate unless: (a) It appears from will or outside evidence omission was intentional; or (b) testator provided for omitted child by transfers outside will intended to be in lieu of testamentary gift. (Wis. Stat. § 853.25[1][a]). If testator had no living children when will was executed, omitted after born or after adopted child may receive share of testator’s estate equal to what child would have received under intestacy unless will devised all or substantially all of property to other parent of omitted child and parent is entitled to and does take under will. (Wis. Stat. § 853.25[1][b]). If testator had living children when will was executed, omitted after born or after adopted child may receive proportionate share of property left to other children. Interests of other children abate pro rata to fund omitted child’s share, subject to equitable considerations. (Wis. Stat. § 853.25[1][c]). Issue of predeceased omitted child take deceased child’s share. (Wis. Stat. § 853.25[1][d]). Court retains equitable power to adjust share of omitted child to accord with intent of testator. (Wis. Stat. § 853.25[5]). Claims of omitted children or issue must be presented to court in writing not later than earlier of entry of final judgment or six months after allowance of will. (Wis. Stat. § 853.25[3]).

Election.

At death of spouse whose marital domicile is Wisconsin, surviving spouse may elect pecuniary amount equal to no more than 50% of total value of deferred marital property of both spouses including both probate and non-probate transfers of decedent and gifts made by decedent within two years of death. (Wis. Stat. §§ 861.02; 861.04). Deferred marital property is property: acquired while spouses were married, that would have been classified as marital property under c. 766 if property had been acquired when c. 766 applied that is not classified as marital property under c. 766 and is not classified as individual property or marital property under valid marital property agreement. (Wis. Stat. § 851.055). Surviving spouse who wishes to elect must file petition with court in which deceased spouse's estate is being administered or court that has probate jurisdiction in county of decedent's residence within six months after decedent's death unless extended by court. Surviving spouse must also mail copy of petition to personal representative of decedent's estate (Wis. Stat. § 861.08[1]) and give notice to interested parties of hearing for election (Wis. Stat. §§ 861.08[2]; 861.11[3]).

Surviving spouse has no elective right against decedent spouse's individual property or one-half interest in marital property.

After notice and hearing, court determines deferred marital property elective share amount and property that satisfies that amount under § 861.06 and § 861.07 and liability of any person or entity having interest in property. (Wis. Stat. § 861.08[5]). Court order may be enforced in suit for contribution in any jurisdiction. (Wis. Stat. § 861.08[6]).

Contribution.

Where child or issue may claim share, court assigns share first from intestate property and balance from each devise to beneficiary under will in proportion to value each would have received under will as written unless intention of testator, as shown by clear and convincing evidence, would be defeated. (Wis. Stat. § 853.25[4]). Court retains discretionary power to assign different share. (Wis. Stat. § 853.25[5]).

Renunciation.

Beneficiary under will or other governing instrument can disclaim in writing within nine months after effective date of transfer of present interest. For cause shown court can extend period, either within or without nine month period. Future interests can be disclaimed within nine months after interest is ascertained and fixed. Future income interests can be disclaimed at any time. Statute does not abridge rights under other statutes, common law, or as provided in creating instrument. (Wis. Stat. §§ 853.40; 854.13).

Foreign Executed Wills.

Will executed outside state or by nonresident within state valid if in writing and executed according to Wisconsin law or law of place where will executed or law of place of domicile of testator at time of execution. (Wis. Stat. § 853.05).

Foreign Probated Wills.

Uniform Probate of Foreign Wills Act adopted 1951. (Wis. Stat. § 868.01). See category 10 Documents and Records, topic 10.04 Records, subhead Transfer of Decedent's Title.

See also topic 13.10 Executors and Administrators, subhead Foreign Representatives.

Simultaneous Death.

See topic 13.05 Death, subhead Requirement of Survival by 120 Hours.

Testamentary Trusts.

See topic 13.15 Trusts.

Uniform Anatomical Gift Act (1987) adopted 1989 with variations. (Wis. Stat. § 157.06). Authorization form appears on back of driver's license. (Wis. Stat. § 343.17[3][b]).

14 FAMILY

14.01 ADOPTION:

Adult may be adopted by any resident adult. (Wis. Stat. § 882.01). Minor in state when adoption petition is filed (Wis. Stat. § 48.81) may be adopted if (1) both parents are deceased or (2) parental rights have been terminated under § 48.40 et seq. or in another jurisdiction or (3) one parent is deceased and other parent's rights have been terminated or (4) spouse of child's parent is petitioner and spouse resides with parent and child and child's other parent is deceased or his/her rights are terminated. Such child may be adopted by following Wisconsin residents: Husband and wife jointly, unmarried adult, spouse of minor's parent. If practicable and if requested by birth parent adoptive parent(s) shall be of same religion as adoptee's natural parents. (Wis. Stat. § 48.82[3]). No otherwise qualified person may be denied right to adopt or receive child in adoptive placement because of physical handicap, race, color, ancestry or national origin or certain religious beliefs. (Wis. Stat. § 48.82[5-6]).

Consent Required.

Adult: Consent of adult to be adopted must be filed in writing with court, and petitioner's spouse must join in petition or file written consent. (Wis. Stat. § 882.02).

Conditions Precedent.

Adults: None. Minors: No petition may be filed unless child has lived in home of petitioner at least six months, and petitioners have complied with provisions of c. 48, unless one of petitioners is related by blood and petitioner's parental rights have not previously been terminated, or petitioner is stepparent, or written approval of guardian is filed, or petitioner is proposed adoptive parent with whom child has been placed pursuant to § 48.839 (relating to adoption of children brought into state from foreign jurisdictions). (Wis. Stat. § 48.90). Written recommendation of guardian required whether favorable or unfavorable. (Wis. Stat. § 48.841[1]). Court may treat failure to file written recommendation as favorable recommendation. (Wis. Stat. § 48.841.[2]). Guardian must file evidence of authority with recommendation. (Wis. Stat. § 48.871).

Jurisdiction and Venue.

Adults: County where petitioner resides. (Wis. Stat. § 882.03). Minors: County where proposed adoptive parent or child resides upon filing of petition. (Wis. Stat. § 48.83).

Petition.

Adults: No statutory requirements. Minors: Petition for adoptive placement must be verified and state name, address and age of child, or expected birth date, name, address and age of birth parents and proposed adoptive parents, identity of any person or agency which solicited, negotiated or arranged placement and that adoptive parents have completed preadoptive preparation pursuant to § 48.84(1) or are not required to do so. (Wis. Stat. § 48.837[2]). Itemized report of all transfers of anything of value made or agreed to be made in connection with birth of child or placement shall be made containing items specified in § 48.913(7) at time of hearing for adoptive placement or upon court order. (Wis. Stat. § 48.913[6]). Petition for termination of parental rights is required. (Wis. Stat. § 48.837[3]). Within 60 days of arrival of child brought to this state from foreign jurisdiction for purposes of adoption, petition for adoption or petition to terminate parental rights or both shall be filed. (Wis. Stat. § 48.839[3]). No petition for adoption may be filed without compliance with applicable provisions relating to adoptive placement. (Wis. Stat. § 48.90[3]).

Proceedings.

Adult: Hearing must be attended by petitioner and adult to be adopted and may be in chambers. After court makes such investigation as it deems advisable, if it finds that adoption is to best interests of persons involved, the order may be granted. (Wis. Stat. § 882.04). Minor: Within 90 days after petition is filed, court sets time and place for hearing, allowing time for investigation or screening and report by agency. (Wis. Stat. § 48.88[1m]). Court orders agency to make investigation of person to be adopted and of petitioner's home. (Wis. Stat. § 48.88[2][a]). Agency makes report at least ten days before hearing unless petitioner shows good cause to reduce time. (Wis. Stat. § 48.88[2][b]). Recommendation of department of health & social services required where adopted minor has no living parents, or parental rights are terminated if not under guardianship of agency. (Wis. Stat. § 48.89[1]). No recommendation required if petitioner is relative of child. (Wis. Stat. § 48.89[3]). Hearing may be in chambers. Petitioner, and person to be adopted, if 14 or older, must attend unless court orders otherwise. (Wis. Stat. § 48.91[1]).

Decree.

Court may grant order of adoption (after hearing and studying agency report and hearing Department of Health and Social Services in case of child), if proper recommendations have been filed, and adoption is in best interests of child (Wis. Stat. § 48.91[3]) or best interest of persons involved for adoption of adult (Wis. Stat. § 882.04).

Name.

The adoption order may change name of child to that requested by petitioner. (Wis. Stat. § 48.91[3]). Copy of order is mailed to Bureau of Vital Statistics for issuance of new birth certificate, unless parties otherwise request and court so orders. (Wis. Stat. § 48.94).

Effect of Adoption.

Adult: Same as minor. Minor: Same relationship as natural child to parent, including full rights to inherit from each other. (Wis. Stat. §§ 851.50; 854.20; 854.21[1]). Relationship between person adopted and natural parents ceases to exist, unless natural parent is spouse of adoptive parent or unless relationship between child and one birth parent is replaced by adoption, but relationship to other birth parent is not replaced. (Wis. Stat. §§ 48.92[2], 854.20[2][am][1]). Adopted persons may be subsequently adopted. (Wis. Stat. § 48.96).

Setting Aside Adoption.

Adoption orders appealable within 40 days after entry of judgment or order. (Wis. Stat. § 808.04[7]). Orders terminating or denying termination of parental rights appealable within 30 days after entry of judgment or order. (Wis. Stat. § 808.04[7m]).

14.02 ALIMONY:

See topic 14.06 Divorce.

14.03 COMMUNITY PROPERTY:

See topic 14.06 Divorce.

14.04 DESERTION:

See topic 14.09 Husband and Wife.

14.05 DISSOLUTION OF MARRIAGE:

See topic 14.06 Divorce.

14.06 DIVORCE:

Grounds for Absolute Divorce.

Subject governed by § 767.001 et seq. Grounds for divorce exist if marriage is irretrievably broken. Marriage is irretrievably broken if: (1) Both parties by petition or otherwise under oath or affirmation so state; (2) one party so states and parties have voluntarily lived apart continuously for at least one year prior to commencement of action; or (3) if only one party so states and parties have not voluntarily lived apart one year, court either finds no prospect of reconciliation or, after court finds prospect of reconciliation and adjourns hearing, at adjourned hearing either party states under oath or affirmation that marriage is irretrievably broken. (Wis. Stat. §§ 767.35; 767.315[1]).

Grounds for Legal Separation.

Grounds for legal separation exist if marriage is irretrievably broken (Wis. Stat. §§ 767.35; 767.315[1]), or if both parties by petition or otherwise state under oath or affirmation that marital relationship is broken (Wis. Stat. § 767.315[2]).

Grounds for Annulment.

Grounds for annulment exist if: (a) Party lacked capacity to consent because of age, mental incapacity or infirmity or because of influence of alcohol, drugs or other incapacitating substances; or if party was induced to marry through force or duress or fraud involving essentials of marriage; or (b) if party lacks capacity to consummate marriage and at time of marriage other party did not know of incapacity; or (c) party was 16 or 17 and did not have parental permission; or (d) marriage is prohibited by laws of this state. (Wis. Stat. § 767.313[1]).

Citizenship Requirements.

None.

Residence Requirements.

In cases of divorce and legal separation, either party must have been bona fide resident of county in which action is brought for at least 30 days prior to commencement of action. In actions to affirm marriage or annulment, either party must have been bona fide resident of county for at least 30 days unless marriage was contracted within state within prior year. Additionally, in cases of divorce, either party must have been bona fide resident of state for at least six months prior to commencement of action. (Wis. Stat. § 767.301).

Jurisdiction.

Circuit Courts have jurisdiction. (Wis. Stat. § 767.01).

Venue.

See category 5 Civil Actions and Procedure, topic 5.26 Venue.

Process.

If one party initiates action, service of summons accomplished as in civil actions. If both parties initiate action, service of summons not required. (Wis. Stat. § 767.215[3]). See category 5

Civil Actions and Procedure, topic 5.20 Process. One 60-day extension for service may be made upon demonstration of good cause is motion made within 90 days after filing initial papers. (Wis. Stat. § 767.215[4]).

Pleading.

Action is initiated by petitioner or joint petitioners. Responding party is respondent. (Wis. Stat. § 767.205[1]). Petition is entitled "In re the marriage of A.B. and C.D." (Wis. Stat. § 767.205[3]). Petition must state names, birthdates, and social security numbers of parties, occupations, date and place of marriage, facts relating to residence of parties, names, birthdates, and social security number of minor children of parties and other children born to wife during marriage, whether wife is pregnant, if petition not filed under § 767.315(2), that marriage is irretrievably broken, or, alternatively, that both parties agree it is irretrievably broken, whether action for divorce or legal separation was ever commenced by either party or is pending, whether either party was previously married, manner in which prior marriage terminated, and if terminated by court judgment, name of court and date and place of judgment, whether parties have entered into written agreement as to support, custody, visitation of children, maintenance or property division (attach copy of agreement to petition). (Wis. Stat. § 767.215[2]). If legal separation requested, petition must state specific reason for request (Wis. Stat. § 767.215[2][f]), and if petition filed under § 767.315(2), petition must state that both parties agree marital relationship is broken (Wis. Stat. § 767.215[2][cm]). Party filing petition shall file confidential addendum containing names, dates of birth and social security numbers of parties and children. (Wis. Stat. § 767.215[5]).

Practice.

All hearings and trials to determine whether judgment shall be granted are before court, except may be before court commissioner when both parties state that marriage is irretrievably broken and that all material issues are resolved or when one party does not participate. (Wis. Stat. §§ 757.69[1]; 767.235[1]). Unless nonresidence in state shown by competent evidence, or service is by publication, or court otherwise orders, both parties must appear at trial. Order to that effect must be procured and served by moving party on nonmoving party before trial, except in case of joint petition. (Wis. Stat. § 767.235[2]). Each party must, within 20 days after service on other party of petition or pleading or before filing same in court, serve copy on family court commissioner. Commissioner must inform parties of availability of counseling services. (Wis. Stat. § 767.105). If both parties agree, court may suspend action for 90 days for reconciliation. (Wis. Stat. § 767.323).

Judgment.

Judgment of divorce is effective immediately. Neither party may remarry for six months. (Wis. Stat. §§ 765.03[2]; 767.35[3]).

Temporary Maintenance and Support.

Court or family court commissioner may order either party to pay for support of other party during pendency of action. Support for minor children must be expressed as fixed sum unless parties have stipulated to expressing amount as percentage of payer's income and requirements under § 767.34(2)(am) 1. to 3. are satisfied, but use of regulatory percentage mandatory unless unfair to child or party (Wis. Stat. §§ 767.511[1j] and [1m]).

Maintenance.

Court may grant either party maintenance payments. (Wis. Stat. § 767.56). But maintenance payment is not legal entitlement. (224 Wis. 2d 235, 590 N.W.2d 480). Judgment regarding such payments may be revised except for judgment waiving maintenance payments (Wis. Stat. § 767.59[1c][b]) and judgment incorporating parties' stipulation that maintenance payments may not be modified (162 Wis. 2d 96, 469 N.W.2d 619). If party receiving maintenance payments remarries, even if subsequent marriage is void or voidable under state law, court must, on application of payer and proof of remarriage, vacate order requiring such payments. (Wis. Stat. § 767.59[3]; 158 Wis. 2d 184, 462 N.W.2d 547). Court may make financial order designating “family support” as substitute for child support and maintenance. (Wis. Stat. § 767.531). Orders for child support, maintenance and family support constitute assignments of all money due, with priority over any other assignment, garnishment, or similar legal process under state law. (Wis. Stat. § 767.75[1][b][4]).

Division of Property of Spouses.

Wisconsin is equitable distribution jurisdiction. Property shown to have been acquired by either party by gift from person other than spouse, by reason of death of another, or from bequest, devise or inheritance or from funds so acquired, remains property of such party unless court finds that would create hardship. (Wis. Stat. § 767.61[2][a]). Other property presumed to be divided equally, but court may alter this distribution after considering various specified factors, not including marital misconduct. (Wis. Stat. § 767.61[3]).

Change of Name.

On granting divorce, court must allow either spouse, upon request, to resume former legal surname unless such spouse is “sex offender” under § 301.47. (Wis. Stat. § 767.395).

Custody of Children.

Court presumes that joint legal custody is in best interest of child. (Wis. Stat. § 767.41[2][am]). During pendency of action, court may make orders concerning care, custody, placement, and maintenance of minor children. (Wis. Stat. §§ 767.225[1][a], [am], [b], [c]). In rendering judgment court shall make further provisions concerning care, custody and education of minor children. (Wis. Stat. § 767.41). If custody or placement is contested, each party shall file parenting plan. (Wis. Stat. § 767.41[1m]). Court can deny physical placement if party killed other parent. (Wis. Stat. § 767.451[4m]). Court must appoint guardian ad litem for minor child if court has special concern for welfare of child or custody or placement is contested. (Wis. Stat. § 767.407[1][a]). Court need not appoint guardian ad litem when revision of custody or placement under § 767.451 or § 767.481 is contested or appointment would not be in best interest of child. (Wis. Stat. § 767.407[1][am]). Court must maximize time spent with each parent within placement schedule, but equal time not required. (Wis. Stat. § 767.41[4][a]2; 279 Wis. 2d 516, 693 N.W.2d 146). Orders regarding care and custody may be modified upon showing cause. (Wis. Stat. § 767.451). In modification actions court must consider all factors set forth in § 767.41(5)(am). (Wis. Stat. § 767.451[5m]). If modification is sought within two years of prior order, higher showing is required. (Wis. Stat. § 767.451[1][a]). Parent may petition for enforcement of physical placement order. (Wis. Stat. § 767.471). Certain persons other than parents may, upon proper showing, obtain visitation rights. (Wis. Stat. § 767.43).

Relocation of Children.

Parent seeking to establish legal residence of child out of state or more than 150 miles from other parent shall give 60 days advance written notice of intent to move, allowing other parent time to object. (Wis. Stat. § 767.481[1]). Court may grant or deny permission to relocate or modify custody/placement order after considering various factors. (Wis. Stat. §§ 767.481[3], [5], [5m]). Unless parties agree otherwise, parent with legal custody and placement must notify other parent before removing child from primary residence for 14 days or more. (Wis. Stat. § 767.481[6]).

Child Support.

Court or family court commissioner may make orders requiring either or both parties to pay for support of minor children during pendency of proceeding (Wis. Stat. § 767.225[1][c]) and court shall do so upon judgment (Wis. Stat. § 767.511[1]). Support must be expressed as fixed sum unless parties have stipulated to expressing amount as percentage of payer's income and requirements under § 767.34(2)(am) 1. to 3. are satisfied. (Wis. Stat. §§ 767.225[1][c]; 767.511[1][a]). Stipulation capping child support, even if entered into knowingly and voluntarily, is unenforceable. (304 Wis. 2d 1, 736 N.W.2d 85). Court shall determine child support payments by using percentage standard established by department. (Wis. Stat. § 767.511[1j]). Court may modify support payments upon request by party if court finds by greater weight of credible evidence that percentage standard is unfair to child or to any party, after considering specified factors. (Wis. Stat. § 767.511[1m]). Judgment may provide for adjustment in child support based on obligor's income. (Wis. Stat. § 767.553[1]). Court may make financial order designating "family support" as substitute for child support and maintenance. (Wis. Stat. § 767.531). Orders for child support, maintenance and family support constitute assignments of all money due, with priority over any other assignment, garnishment, or similar legal process under state law. (Wis. Stat. §§ 767.75[1][b], [4]). Court has discretion to grant payer credit for support paid directly to payee as part of action for revision of judgment under limited circumstances. (Wis. Stat. § 767.59[1r]).

Uniform Interstate Family Support Act in effect. (c. 769).

Remarriage.

Person who is or has been party to action for divorce in Wisconsin or elsewhere, may not remarry until six months after judgment of divorce is granted, and any marriage before expiration of six months is void. (Wis. Stat. § 765.21). Marriage within six months of divorce may be legitimized by again intermarrying after expiration of six month period. (Wis. Stat. §§ 765.21; 765.24).

Foreign Divorces.

Judgments of states, territories and possessions of U.S. by courts of competent jurisdiction are recognized, except in actions relating to child custody. (Wis. Stat. § 767.041[l][a]). Judgments of courts of competent jurisdiction of foreign country may be recognized, except in actions relating to child custody, in accordance with principles of international comity. (Wis. Stat. § 767.041[2]).

Uniform Divorce Recognition Act adopted. (Wis. Stat. § 767.055).

Uniform Child Custody Jurisdiction Act.

Matters relating to effect of judgment of another court concerning child custody are governed by Uniform Child Custody Jurisdiction Act. (c. 822). When parents of child reside in different states, Wisconsin court has jurisdiction to make child custody determination by initial modification or decree if one of four tests is satisfied. (Wis. Stat. §§ 822.21[1][1a] — [d]). First of these tests is satisfied if Wisconsin is home state of child at time of commencement of proceeding or was home state of child within six months of commencement of proceeding and child is absent but parent still lives in Wisconsin. (Wis. Stat. § 822.21[1][a]).

Separation Agreements.

Parties to action for annulment, divorce or legal separation may stipulate, subject to court approval, as to division of property, maintenance payments, child or family support, custody and visitation. (Wis. Stat. § 767.34[1]).

Marital Property Agreements.

See topic 14.09 Husband and Wife. Property division agreement is binding on court if equitable, and it is presumed equitable. (Wis. Stat. § 767.61[3][L]). Premarital property agreement intended to apply at death, not applicable to divorce unless it so expressly provides. (130 Wis. 2d 523, 388 N.W.2d 170). Court bound by written property distribution agreement unless terms inequitable to either party. (Wis. Stat. § 767.61[3]). Agreement must be equitable at time of execution and if there has been unforeseeable change of circumstances affecting fairness of agreement, also at time of divorce for court to be bound by terms. (131 Wis. 2d 84, 388 N.W.2d 546). Court not bound, but shall consider along with other factors, written maintenance agreement. (Wis. Stat. § 767.56[8]).

Uniform Interstate Family Support Act adopted (c. 769), and amended under Personal Responsibility and Work Opportunity Act of 1996 to establish statewide system of child support enforcement, collection, disbursement, and paternity determination.

Revocation of Provisions for Former Spouse Upon Divorce.

Unless judgment provides otherwise, judgment of divorce, legal separation or annulment revokes all "at death" provisions of marital property agreement (Wis. Stat. § 767.375) and all provisions in favor of former spouse in any governing instrument executed prior to divorce, annulment or similar event including right of survivorship in joint tenancy or marital property (Wis. Stat. § 854.15).

14.07 [RESERVED]

14.08 GUARDIAN AND WARD:

Jurisdiction.

Circuit courts have jurisdiction over petitions for guardianship. (Wis. Stat. § 54.30[1]). Guardianship of estate of any person, once granted, extends to entire estate in Wisconsin, and excludes jurisdiction of every other circuit court, except as provided in c. 786 (relating to disposition of lands of wards, specific performance, change of names, establishment of heirship). (Wis. Stat. § 54.30[1]).

Venue.

Venue for guardianship of residents is in circuit court of county of residence of person subject to guardianship or county in which person is physically present. Venue for guardianship of person or estate of nonresident is in circuit court of any county where person or property may be found. (Wis. Stat. § 54.30[2]). Venue is determined by court wherein petition is first filed and if that court determines that venue lies in another county, the court certifies record to proper court. (Wis. Stat. § 54.30[3]).

Selection and Appointment of Guardian.

Court shall consider nominations made by any interested person. Minor over 14 may nominate own guardian, but whenever minor is in U.S. armed service, or outside state, or other good reason exists, the court may dispense with right of nomination. If one or both parents of minor are suitable and willing, the court shall appoint one or both of them as guardian unless proposed ward objects. Subject to rights of surviving parent, parent may by will nominate guardian of person of minor child. Parent may by will nominate guardian of estate of minor child and may waive requirement of bond as to such estate passing by will. Adult may make anticipatory nomination of own guardian by written instrument executed in same manner as will. (Wis. Stat. § 54.15). Where immediate appointment of guardian is necessary, court may appoint temporary guardian, with or without notice, for period not to exceed 60 days unless further extended for 60 days by order of court upon showing of good cause. (Wis. Stat. § 54.50[2]).

Qualification.

When a guardian of estate has given bond if required, and bond has been approved by judge, letters under seal of court shall be issued to guardian. (Wis. Stat. § 54.46[5]). Bond is discretionary with court unless required by § 54.852(9) (relating to guardians of veterans). If guardian has, or will have possession of, $100,000 or less, court can direct deposit of funds in insured bank or savings and loan account payable only on further order of court and waive bond. Bond is conditioned upon faithful performance of guardian's duties. (Wis. Stat. § 54.46[4][a]).

Inventory.

Inventory must be made in same manner and subject to same requirements as are provided for inventory of decedent's estate. Appraisal is made when ordered by court. (Wis. Stat. § 54.60[1]).

Powers and Duties.

Guardian must take possession of all of ward's property and prepare inventory. Subject to such possession, title to all of estate and increment and proceeds thereof is in ward. (Wis. Stat. § 54.19[1]). Guardian may not make permanent protective placement of ward unless ordered by court under § 55.06 but may admit ward to certain residential facilities under § 55.05 or make emergency protective placement under § 55.06. Guardian shall secure necessary care and services for ward and shall file in court annual report on condition of ward. (Wis. Stat. § 54.25). Guardian of estate of married person, with court approval, may exercise any management and control right and any right in business affairs which spouse could exercise if spouse were not subject to guardianship, except right to make, amend or revoke will. (Wis. Stat. § 54.20[2][h]).

Investments.

Investments by guardians are covered by c. 881 regulating investments by trustees generally. With court approval, guardian may invest proceeds of sale of ward's assets, and any other moneys in guardian's possession, in such real or personal property as court deems to be in best interest of guardianship estate. (Wis. Stat. § 54.20[3][i]).

Securities in Name of Nominee.

No specific statute.

Real Estate.

Real estate is generally covered by c. 786. No lease, mortgage or sale may be made until agreement is made, subject to court approval. (Wis. Stat. § 786.11). Court may order sale, lease or mortgage (Wis. Stat. §§ 786.06; 786.07), or any other disposition or acquisition (Wis. Stat. § 786.12), or platting before sale (Wis. Stat. § 786.13), unless contrary provision is contained in will or conveyance by which property was transferred to ward (Wis. Stat. § 786.14).

Liabilities of Guardian.

Guardian is subject to citation and contempt. (Wis. Stat. §§ 54.60[8]; 54.62[8]).

Accounts.

Every guardian, except corporate guardian, prior to Apr. 15 of each year must file annual report, under oath, specifying amount of property received and remaining or invested, and nature and manner of investment, and receipts and expenditures during preceding calendar year. If court so orders, like account for any shorter term must be filed within 30 days. In lieu of filing before Apr. 15 of each year, on motion of guardian, court may direct annual filing to be within 60 days after anniversary date of qualification of guardian, accounting period being from one such anniversary date to ensuing anniversary date. If guardian has custody of ward and care of ward's education, guardian shall state in account time that ward attended school (naming school) and shall also report any change in status of surety upon bond. (Wis. Stat. § 54.62[1]). Upon rendering account, guardian shall produce for prompt examination all securities, depository accounts, and other investments reported. (Wis. Stat. § 56.62[2]). When ward's estate does not exceed $50,000, guardian shall file list of ward's assets remaining when guardianship terminates. (Wis. Stat. § 54.66[2]). Account shall be examined. (Wis. Stat. § 54.62[5]). No action by court upon account is final until guardian gives notice. (Wis. Stat. § 54.62[7]). Upon termination of guardianship, or upon resignation, removal or death of guardian, final accounting must be rendered. (Wis. Stat. § 54.66[1]).

Termination of Guardianship.

Guardianship of the person shall terminate if court adjudicates ward no longer incompetent, if ward changes residence to another state and new guardian is appointed, if formerly minor ward attains age 18 unless guardianship was ordered on grounds of incompetency, if minor ward whose guardianship was not ordered on grounds of incompetency marries, or if ward dies. (Wis. Stat. § 54.64[3]). Guardianship of estate shall terminate if formerly incompetent ward found to be competent, if formerly spendthrift ward found to be capable of handling own income and assets, if ward changes residence from state and new guardian is appointed, if formerly minor ward attains age 18, if minor ward whose guardianship was not ordered on grounds of incompetency marries and court approves termination, or if ward dies except when summary settlement of estate is possible. (Wis. Stat. § 56.64[4]). If court determines income and assets of ward do not exceed $50,000 and are reduced to point where it is advantageous to ward to dispense with guardianship, court may terminate guardianship and order disposition of remaining assets. (Wis. Stat. § 54.64[5]).

Insane Persons.

Condition of incompetence must be certified by physician or psychologist or both and determined at hearing. Statutory patient/physician privilege under § 905.04 is inapplicable to certification. (Wis. Stat. § 54.36[1]). C. 55 governs procedures for protective placement.

Foreign Guardians.

When resident guardian or personal representative possesses property of nonresident ward, court may order it delivered to foreign guardian upon petition accompanied by authenticated copies of appointment and bond. (Wis. Stat. § 54.64[6]). Guardian appointed by state of residence of nonresident ward may be licensed by circuit court of county where real estate lies to sell ward's Wisconsin real estate and may petition for appointment of Wisconsin resident as special guardian. (Wis. Stat. §§ 786.25[1], [2]).

Gifts to Minors.

Uniform Transfers to Minors Act adopted with minor variations. Age of majority under Act is 21. (Wis. Stat. §§ 54.854-54.898).

Veterans.

Uniform Veterans' Guardianship Act has been adopted. (Wis. Stat. § 54.852).

Conservator may be appointed on voluntary application of person unable to manage his or her own property. Conservator has all powers and duties of guardian of estate. Appointment of conservator is not evidence of competency or incompetency. (Wis. Stat. §§ 54.76[1], [3], [5]).

Uniform Custodial Trust Act has been adopted. (Wis. Stat. §§ 54.950-54.984).

Uniform Fiduciaries Act (excluding § 3) has been adopted. (Wis. Stat. § 112.01).

Uniform Simplification of Fiduciary Security Transfers Act has been repealed.

Uniform Securities Ownership by Minors Act adopted (Wis. Stat. § 54.92), and similar provisions added covering incompetents and spendthrifts (Wis. Stat. § 54.93).

14.09 HUSBAND AND WIFE:

Marital Property.

Effective Jan. 1, 1986, Wisconsin adopted community property system based upon Uniform Marital Property Act with variations. All property of spouses is marital (community) property except that which is classified otherwise by statute. (Wis. Stat. § 766.31[1]). See subhead Separate Property. All property of spouses is presumed to be marital property. (Wis. Stat. § 766.31[2]). Each spouse has present undivided one-half interest in marital property, but marital property interest of non-employee spouse in deferred employment benefit plan or individual retirement account traceable to rollover of deferred employment benefit plan terminates at death of non-employee spouse if he or she predeceases employee spouse. (Wis. Stat. § 766.31[3]). Income earned or accrued by spouse or attributable to property of spouse, whether individual or marital during marriage is marital property (Wis. Stat. § 766.31[4]), except income distributed to one spouse by trust created by third party (Wis. Stat. § 766.31[7][a]), income attributable to specific non-marital property subject to statement unilaterally designating income from such property as individual property of one spouse (Wis. Stat. § 766.31[7p]), and income from property given to one spouse by other spouse with intent that property become individual property of donee spouse (Wis. Stat. § 766.31[10]). Substantial appreciation of property other than marital creates marital property if appreciation results from substantial efforts of either spouse for which reasonable compensation was not received. (Wis. Stat. § 766.63[2]). Mixing marital property with property other than marital property reclassifies other property to marital unless other property can be traced. (Wis. Stat. § 766.63[1]).

Wisconsin marital property system includes concept of deferred marital property. Deferred marital property is property acquired during marriage while c. 766 did not apply, which would have been marital property under c. 766 if it had been acquired when c. 766 applied. (Wis. Stat. § 851.055). At death of spouse whose marital domicile is Wisconsin, surviving spouse may elect pecuniary amount equal to no more than 50% of total value of both spouse's deferred marital property. (Wis. Stat. §§ 861.02; 861.04). See category 13 Estates and Trusts, topic 13.16 Wills, subhead Election.

Spouse acting alone may manage and control: (1) That spouse's non-marital property; (2) marital property titled in that spouse's name alone; (3) untitled marital property; (4) marital property titled in names of both spouses in alternative; (5) policy of insurance if that spouse is policy's designated owner; (6) deferred employment benefits accruing as result of that spouse's employment; (7) claim for relief vested in that spouse by other law. (Wis. Stat. § 766.51[1]).

Spouses may manage and control marital property titled in names of both spouses other than in alternative only if they act together. (Wis. Stat. § 766.51[2]). Right to manage and control marital property does not determine classification of property and does not rebut presumption that all property of spouse is marital. (Wis. Stat. § 766.51[5]). For purposes of obtaining credit only, either spouse may manage and control all marital property except for certain business property. (Wis. Stat. § 766.51[lm]). Right to manage and control marital property permits gifts to third parties only up to $1,000 limit per donee/per year or whatever additional amount is reasonable considering financial circumstances of family. (Wis. Stat. §§ 766.51[4]; 766.53). Upon death of either spouse, surviving spouse retains his or her undivided one-half interest in each item of marital property. (Wis. Stat. § 861.01[1]).

Separate Property.

Property owned at marriage after Jan. 1, 1986 when both spouses are domiciled in

Wisconsin is individual property of owning spouse. (Wis. Stat. § 766.31[6][a]). Property acquired by spouse during marriage and after determination date (last to occur of marriage, establishment of marital domicile in Wisconsin, or 12:01 a.m. on Jan. 1, 1986) is individual if acquired: (1) By gift or inheritance or distribution from trust created by third party; (2) in exchange for or with proceeds of individual property; (3) from appreciation to spouse's individual property except to extent that appreciation is due to substantial uncompensated efforts of either spouse; (4) by decree, marital property agreement or reclassification; (5) as recovery for damage to spouse's property by other spouse; (6) as recovery for personal injury except for loss of earnings and expenses paid from marital property. (Wis. Stat. § 766.31[7]).

Liabilities.

Obligation incurred by spouse during marriage, including ones attributable to act or omission during marriage, is presumed to be incurred in interest of marriage or family. (Wis. Stat. § 766.55[1]). Spouse's obligation to satisfy duty of support owed to other spouse or to their child may be satisfied from all marital property and all other property of obligated spouse. (Wis. Stat. § 766.55[2][a]). Obligation incurred in interest of family may be satisfied from all marital property and all other property of incurring spouse. (Wis. Stat. § 766.55[2][b]). Obligation incurred by spouse before or during marriage attributable to obligation arising before marriage or to act or omission occurring before marriage may be satisfied only from property of that spouse that is not marital property and from that part of marital property which would have been property of that spouse but for marriage. (Wis. Stat. § 766.55[2][c][1]). Obligation incurred by spouse before, on or after Jan. 1, 1986 attributable to obligation arising before Jan. 1, 1986, may be satisfied only from property of that spouse that is not marital property and from that part of marital property which would have been property of that spouse but for enactment of c. 766. (Wis. Stat. § 766.55[2][c][2]). Obligation incurred by spouse during marriage resulting from tort committed by spouse during marriage may be satisfied from property of that spouse which is not marital property and from that spouse's interest in marital property. (Wis. Stat. § 766.55[2][cm]). Any other obligation incurred by spouse during marriage, including one attributable to act or omission during marriage, may be satisfied only from property of that spouse that is not marital property and from that spouse's interest in marital property, in that order. (Wis. Stat. § 766.55[2][d]). Chapter does not alter relationship between spouses an creditors. (Wis. Stat. § 766.55[3]).

Antenuptial Contracts.

See subhead Marital Property Agreements, infra.

Marital Property Agreements.

Spouses and persons intending to marry may enter into written marital property agreements regarding any matter affecting either or both spouses' property. (Wis. Stat. § 766.58). If executed before marriage, marital property agreement becomes effective upon marriage. (Wis. Stat. § 766.58[5]). Marital property agreement may not adversely affect right of child to support nor rights of creditor unless creditor has actual knowledge of agreement at time credit is extended. (Wis. Stat. §§ 766.55[4m]; 766.58[2]). Marital property agreement is not enforceable if spouse against whom enforcement is sought proves any of following: (a) Agreement was unconscionable when made; (b) spouse did not execute agreement voluntarily; or (c) before execution of agreement, spouse did not receive fair and reasonable disclosure, under circumstances, of other spouse's property or financial obligations and did not have notice of other spouse's property or financial obligations. (Wis. Stat. § 766.58[6]). Unconscionability is matter of law for court. Representation of both spouses by one attorney or failure of one spouse to obtain representation are not sufficient grounds alone to establish unconscionability. (Wis. Stat. § 766.58[8]). Marital property agreement may not result in spouse having less than necessary support or make spouse eligible for public assistance. (Wis. Stat. §§ 766.58[9][a], [b]). Marital property agreement is effective for income tax purposes if certain requirements are met. (Wis. Stat. § 71.10[6][c]). Property settlement agreement is binding upon court at divorce only if equitable at time of execution and, if circumstances have significantly changed since execution, also at time of divorce. (Wis. Stat. § 767.61[3][L]; 131 Wis. 2d 84, 388 N.W.2d 546).

Disabilities of married women removed. (Wis. Stat. § 766.97).

Contracts.

Women and men have same rights and privileges under law in exercise of freedom of contract. (Wis. Stat. § 766.97[1]).

Actions.

Either spouse has right to institute and defend civil actions in his or her name and to maintain action against his or her spouse for damages resulting from that spouse's intentional act or negligence. (Wis. Stat. § 766.97[2]). One spouse has statutory claim against other for breach of duty of good faith in management and control of marital property and nonmarital property of first spouse. (Wis. Stat. §§ 766.15[1]; 766.70[1]).

Agency.

Either spouse may act as agent for other but powers are no greater than if acting as agent of any other person. (28 Wis. 38[1871]; 45 Wis. 523[1878]).

Conveyance or Encumbrance of Property.

Joinder of spouse in deed, mortgage (except money purchase mortgage), or other conveyance, or execution of separate conveyance or mortgage of same nature, is required only for homestead. (Wis. Stat. § 706.02[1][f]).

Support.

Either spouse must maintain other if other is unable to maintain himself or herself and corporation counsel may make application to court to compel same. (Wis. Stat. § 49.90). Spouse may compel support and maintenance by action in any court having jurisdiction of divorce. (Wis. Stat. § 767.501).

Desertion and Nonsupport.

Any person who intentionally fails for 120 or more consecutive days to provide spousal support which person knows or reasonably should know he or she is legally obligated to provide is guilty of Class I felony. (Wis. Stat. § 948.22[2]). Failure to support for less than 120 days is Class A misdemeanor. (Wis. Stat. § 948.22[3]).

Revised Uniform Reciprocal Enforcement of Support Act.

Wisconsin has enacted Uniform Interstate Family Support Act ("UIFSA"). (c. 769).

14.10 INFANTS:

Both males and females become of age at 18 except for purposes of investigating or prosecuting crime when persons become of age at 17. (Wis. Stat. § 990.01[3]). Neglected infants have a right to their own wages. (Wis. Stat. § 48.987).

Paternity.

Procedures for determination of paternity governed by §§ 767.80-767.895. Paternity judgment or order may contain other provisions directed at appropriate party concerning child support, legal custody and guardianship, periods of physical placement, birth expenses and child's health care expenses. (Wis. Stat. § 767.89).

Emancipation.

Marriage of minor emancipates minor. (Wis. Stat. § 54.46[6]).

Ratification of Contracts.

Contract made by infant may be ratified by acts or words after infant reaches majority. (38 Wis. 643; 168 Wis. 1, 168 N.W. 402).

Actions.

When infant is party to action infant must appear by attorney or guardian or guardian ad litem who may be appointed by court in which action is presented. (Wis. Stat. § 803.01[3]). Court may order sale or conveyance and assurance if land in which infants have interest is seized. (Wis. Stat. § 786.01).

Support of Minor.

Parent is responsible for support of child under 18 who cannot support himself. (Wis. Stat. §§ 49.90[1], [1m].

Parental Responsibility.

With exception of graffiti damage (Wis. Stat. §§ 895.035[2], [2g]), retail theft (Wis. Stat. § 895.035[4]), damages from use of fireworks (Wis. Stat. § 167.10[7]), or operation of motor vehicle (Wis. Stat. § 343.15[2][b]), parents with custody of minor child, in any circumstances in which parents might not otherwise be liable under common law, are liable up to $5,000 per occurrence for damage to property, value of unrecovered stolen property, or personal injury attributable to willful, malicious or wanton act of child, plus costs and reasonable attorneys' fees. (Wis. Stat. § 895.035). Parents jointly and severally liable with child for damages from retail theft by child. (Wis. Stat. §§ 895.035[2]; 943.51).

Contracts.

Contract by minor for items which are not necessities is void or voidable at minor's option. (99 Wis. 2d 241, 298 N.W.2d 562). Minor not liable for necessaries if no express or implied contract for payment exists or if necessaries are furnished pursuant to adult's credit. (124 Wis. 2d 398, 369 N.W.2d 663).

Conveyances by minors effective only if executed by authorized guardian. (Wis. Stat. § 706.03[4]).

Adoption.

See topic 14.01 Adoption.

Uniform Transfers to Minors Act adopted with minor variations. Age of majority under Act is 21. (Wis. Stat. §§ 54.854-54.898).

Uniform Securities Ownership by Minors Act adopted. (Wis. Stat. § 54.92).

Termination of Parental Rights.

Voluntary Termination.

Court may terminate rights of parent who gives consent. (Wis. Stat. § 48.41[1]). Except as noted in following paragraph, parent must appear personally in court to give consent, parent must be questioned, and judge must be satisfied that consent is informed and voluntary. (Wis. Stat. §§ 48.41[1], [2][a], [2][b]). Alleged but unadjudicated father of nonmarital child may consent in court or in written, notarized statement. (Wis. Stat. § 48.41[2][c]). If hearing is held prior to stepparent adoption or foreign adoption, parent may consent in court or in affidavit witnessed by two persons. (Wis. Stat. § 48.41[2][d]). In all cases, written statement must recite that party has been informed of and understands effect of order terminating parental rights and disclaims rights to child. (Wis. Stat. §§ 48.41[2][c], [2][d]).

Involuntary or Jury Termination.

Parental rights involuntarily terminated upon court finding of abandonment, relinquishment, continuing need of protection or services, continuing parental disability, continuing court denial of periods of physical placement or visitation, child abuse, failure to assume parental responsibility, incestuous parenthood, parenthood as result of sexual assault, intentional or reckless homicide of parent, solicitation to commit homicide of parent, commission of serious felony by person against person's child, or involuntary termination of parental rights to another child. (Wis. Stat. § 48.415).

Procedure.

Proceeding for termination of parental rights initiated by petition filed by child's parent, agency, stepparent, counsel or guardian ad litem for parent, relative, guardian or child, district attorney, corporation counsel, or other appropriate person designated by court. (Wis. Stat. § 48.42). Jurisdiction and venue in voluntary termination in circuit court of county where birth parent or child resides at time petition is filed. Jurisdiction and venue in all other proceedings in circuit court of county where original order issued unless child's county of residence changed or parent resided in different county for six months. (Wis. Stat. § 48.185[2]). Adoption orders appealable within 40 days of order. (Wis. Stat. § 808.04[7]). Orders terminating or denying termination of parental rights appealable within 30 days of order. (Wis. Stat. § 808.04[7m]).

See topic 14.01 Adoption.

14.10A MARITAL PROPERTY ACT:

Effective Jan. 1, 1986, 1983 Wisconsin Act 186, known as Marital Property Act, as am'd by 1985 Wis. Act 37, made Wisconsin community property state. Act repealed and recreated c. 766 and had significant impact on other chapters. See topic 14.09 Husband and Wife.

Uniform Marital Property Act adopted with variations. (c. 766).

14.11 MARRIAGE:

Any person who has attained age of 18 may marry if otherwise competent. (Wis. Stat. § 765.02[1]).

Consent Required.

If person is between 16 and 18, written consent is required from parents or guardian or parent having actual care, custody and control. Consent must be given before county clerk under oath or certified under signature of such person and properly verified by affidavit or affirmation before notary public or other official authorized to take affidavits. Consent must be filed in office of county clerk at time of application for license. If no guardian or parent has actual care, custody and control, probate judge may, after hearing upon proper cause shown, allow marriage. (Wis. Stat. § 765.02[2]).

Medical Examination.

None required.

Application for Marriage License.

Application for marriage license shall contain such informational items as Department of Health and Family Services directs. (Wis. Stat. § 765.09).

License.

License must be obtained from county clerk of county in which one party has resided for at least 30 days immediately prior to making application therefor, but if both parties are nonresidents of state license may be obtained from county clerk of county where marriage ceremony is to be performed. (Wis. Stat. § 765.05). Both parties must sign application. Satisfactory documentary proof of identification and residence must be presented and application must be sworn to or affirmed before clerk who is to issue license or clerk of county where party resides. (Wis. Stat. § 765.09). If person is nonresident of county where license is to issue, his or her part of application may be sworn to or affirmed before person authorized to accept such application in county and state in which person resides. (Wis. Stat. § 765.05). Copies of birth certificates (of applicants under 30 years) and all judgments and death certificates affecting marital status must be exhibited to clerk, or if such certificate or judgment is unobtainable, other satisfactory documentary proof. (Wis. Stat. § 765.09). Application must be made at least five days before license is issued, except that county clerk may authorize prior issuance upon payment of additional fee of not more than $25 to cover any increased processing cost incurred. (Wis. Stat. § 765.08).

Waiting Period.

License is valid when issued and for 30 days thereafter. (Wis. Stat. § 765.12[2]).

Marriage.

Marriage may be validly solemnized and contracted only after license issued and only by mutual declarations of parties made before duly authorized officiating person and in presence of at least two competent adult witnesses. Authorized officiating persons are any ordained clergymen of any religious denomination or society; any licentiate of denominational body or appointee of any bishop serving as regular clergymen of any church of denomination to which licentiate or appointee belongs if not restrained by discipline of church or denomination; parties themselves in accordance with customs, rules and regulations of any religious society, denomination or sect to which either of them belongs; any judge of court of record, some court commissioners; and any municipal judge. (Wis. Stat. § 765.16).

Reports of Marriages.

Officiating person must return marriage certificate substantially in statutory form to register of deeds of county in which marriage performed within three days after date of marriage. (Wis. Stat. § 765.19).

Record.

See category 10 Documents and Records, topic 10.04 Records, subhead Vital Statistics.

Common Law Marriages.

Not recognized. (256 Wis. 214, 40 N.W.2d 588; 59 Wis. 2d 451, 208 N.W.2d 423).

Proxy Marriages.

Not authorized.

Marriages by Written Contract.

Not authorized.

Prohibited Marriages.

No marriage shall be contracted while either of parties has husband or wife living. Marriages prohibited between persons who are nearer of kin than second cousins, except that marriage may be contracted between first cousins where female has attained 55 or where either party at time of application for license submits affidavit of physician that either party is permanently sterile. Marriage may not be contracted if either party has such want of understanding as renders party incapable of assenting to marriage. Any party to actions for divorce in state or any resident who is party to action for divorce elsewhere is prohibited from marrying again until six months after judgment of divorce is granted. (Wis. Stat. § 765.03). Prohibited marriages are void unless validated by procedures set out in §§ 765.02-.24. (Wis. Stat. § 765.21). Children of marriages declared void under law are nevertheless legitimate. (Wis. Stat. § 767.803).

Foreign Marriages.

If person residing and intending to continue to reside in state who is disabled or prohibited from contracting marriage under laws of Wisconsin goes into another state or country and contracts marriage prohibited or declared void under Wisconsin law, marriage is void in Wisconsin. (Wis. Stat. § 765.04[1]).

Annulment.

See topic 14.06 Divorce.

Antenuptial Contracts.

See topic 14.09 Husband and Wife.

Marital Property Agreements.

See topic 14.09 Husband and Wife.

14.12 MARRIED WOMEN:

Disabilities, see topic 14.09 Husband and Wife.

15 HEALTH

ABORTIONS:

Voluntary and informed consent for abortions (including 24-hour waiting period) addressed by § 253.10.

Parental consent required prior to minor's abortion; judicial waiver procedure established by § 48.375.

ADMINISTRATION:

Department of Health Services powers and duties established by § 250.04.

DISEASES: Environmental health, including lead poisoning and animal-borne diseases; and lodging and food protection addressed in § 254.01 et seq.

Immunizations against, testing for, reporting of and response to communicable diseases, including HIV in § 252.01 et seq.

Chronic disease and injuries, including cancer, addressed under § 255.01 et seq.

Tattooists and body piercing establishments regulated by § 252.01 et seq.

Occupational Diseases.—See category Employment, topics Occupational Diseases, Workers' Compensation Law.

DURABLE POWER OF ATTORNEY:

See also "Category Property, topic Powers of Attorney".

Competent adult may designate agent to make health care decisions on his or her behalf. (§ 155.01 et seq.). c. 155 provides standards and limitations regarding agency, responsibilities, and duties of health care providers and agents and form for power of attorney for health care.

If no power of attorney for health care or living will, guardianship may be necessary. Definitions, appointment, nomination, powers, duties and limitations of guardian regulated under § 54.01 et seq.

FOOD, DRUGS, DEVICES AND COSMETICS:

Prescription drugs and devices regulated under § 450.01 et seq. and by Pharmacy Examining Board.

Food safety laws codified at § 97.01 et seq. and § 98.01 et seq.

FRAUD AND ABUSE:

Penalty for false claims for medical assistance (Title XIX) under § 49.485 and § 20.931.

Prohibition against fraud in connection with medical assistance program under § 49.49(1). Prohibition against certain facility charges in connection with medical assistance program under § 49.49(4).

Prohibition of kickbacks, bribes and rebates in connection with medical assistance program under § 49.49(2).

Fee splitting prohibited and separate billing required by § 448.08 and § 448.67.

Whistleblower protections for health care workers under § 46.90(4) (elder abuse reporting), § 50.07 (long-term care settings), § 146.997 (health care workers generally). Additional protections for government employees in § 230.83(1) and § 230.90.

HEALTH INSURANCE BENEFITS:

See also category 16 Insurance, topic 16.01 Insurance Companies.

Badger Care.

Program of family health insurance established under § 49.665 for low-income families lacking employer-sponsored medical insurance. BadgerCare Plus provides additional health insurance for: (i) All uninsured children; (ii) pregnant women; (iii) parents and caretaker relatives; (iv) parents with children in foster care who are working to reunify their families; and (v) young adults exiting out-of-home care, such as foster care, because they have turned 18 years of age.

Demonstration program authorized under § 49.45(23)(a) for health care coverage of non-disabled childless adults with incomes below 200% of federal poverty level, who have no dependent minor children, are not pregnant, disabled, or qualified for Medicaid, Medicare, or State Children's Health Insurance Program.

Defined Network Plans.

Regulated by § 609.001 et seq.

Health Care Liability and Injured Patients and Families Compensation.

Regulated by § 655.001 et seq.

Medicaid.

Regulated by §§ 49.43-49.499.

Small Employer Health Insurance.

Regulated by § 635.01 et seq.

LICENSURE AND CERTIFICATION:

Health Care Facilities.

See generally c. 50.

Hospices.

Regulated by §§ 50.90-50.981.

Hospitals.

Regulated by §§ 50.32-50.498.

Care and Service Residential Facilities.

Regulated by §§ 50.01-50.14.

Rural Medical Centers.

Regulated by §§ 50.50-50.57.

Assisted Living.

Adult family homes, community-based residential facilities, and residential care apartment complexes regulated by §§ 50.01-50.14. Home health care agencies regulated by §§ 50.49-50.498.

Emergency Medical Services.

Regulated by § 256.01 et seq.

Managed Care Organizations.

Defined network plans regulated by § 609.001 et seq. and by c. 185 (if offered by cooperative), c. 611 (if offered by domestic stock or mutual insurance corporation), c. 613 (if offered by service insurance corporation), c. 614 (if offered by fraternal benefit society) or c. 618 (if offered by nondomestic insurer).

Professionals.

Acupuncture.

Definitions, certification, practice, training and discipline of acupuncturists regulated under § 451.01 et seq.

Chiropractic.

Definitions, licensing, practice, training and discipline of chiropractors regulated by § 446.01 et seq. and Chiropractic Examining Board.

Dance Therapists, Music Therapists and Art Therapists.

Definitions, certification, practice, training and discipline of dance therapists, music therapists and art therapists regulated under § 440.03.

Dentistry.

Definitions, licensing, training, practice, indemnification, insurance and discipline of dentists regulated by § 447.01 et seq. and Dentistry Examining Board.

Hearing and Speech Professionals.

Definitions, licensing, training, practice, and discipline of hearing instrument specialists, audiologists and speech-language pathologists regulated by § 459.01 et seq. and Hearing and Speech Examining Board.

Massage Therapy.

Definitions, certification, practice, training and discipline of massage therapists and bodyworkers regulated by § 460.01 et seq.

Medical Practices.

Definitions, licensing or certification, practice of medicine, training and discipline of physicians, physician assistants, perfusionists, physical therapists, podiatrists, respiratory care practitioners, dietitians, athletic trainers and occupational therapists regulated by § 448.01 et seq., Medical Examining Board (for physicians, physician assistants, perfusionists and respiratory care practitioners), Athletic Trainers Affiliated Credentialing Board (for athletic trainers), Dietitians Affiliated Credentialing Board (for dietitians), Occupational Therapists Affiliated Credentialing Board (for occupational therapists), Physical Therapists Affiliated Credentialing Board (for physical therapists) and Podiatrists Affiliated Credentialing Board (for podiatrists). Peer review participant immunity and confidentiality of information is regulated under §§ 146.37-146.38. Peer review statutory protections apply to third party. (2008 WI 97, 753 N.W.2d 496).

Midwives.

Definitions, licensing, practice, discipline, vicarious liability and requirement to obtain informed consent regulated by §§ 440.9805-440.998 and Board of Nursing.

Nursing.

Definitions, licensing, practice, training and discipline of registered nurses and licensed practical nurses is regulated by § 441.001 et seq. and Board of Nursing. Wisconsin has joined Nurse Licensure Compact, participating in mutual recognition of nursing licenses issued by participating states. (§ 441.50).

Nursing Home Administrators.

Definitions, licensing, practice, training and discipline of nursing home administrators addressed by § 456.01 et seq. and Nursing Home Administrator Examining Board.

Optometry.

Definitions, licensing, practice, training and discipline of optometrists regulated by § 449.01 et seq. and Optometry Examining Board.

Pharmacy.

Definitions, licensing, practice, training, discipline of pharmacists; pharmacies (including out-of-state pharmacies), manufacturers and distributors licensure regulated by § 450.01 et seq. and Pharmacy Examining Board.

Psychology.

Definitions, licensing, training, code of ethics and discipline of psychologists regulated by § 455.01 et. seq. and Psychology Examining Board.

Sanitation.

Definitions, qualifications, duties, registration and discipline of registered sanitarians regulated under § 440.98.

Social Workers, Therapists, and Other Counselors.

Definitions, licensing, practice, training and discipline of social workers, marriage and family therapists and professional counselors regulated by § 457.01 et seq. and Marriage and Family Therapy, Professional Counseling, and Social Work Examining Board.

Substance Abuse Professionals.

Definitions, certification, practice, training and discipline of substance abuse counselors, clinical supervisors and prevention specialists regulated under § 440.88.

LIVING WILLS:

See also "Category Estates and Trusts, Topic Wills, subhead Living Wills".

Declarations to physicians and orders not to resuscitate are governed by § 154.01 et seq.

Uniform Health Care Decisions Act has not been adopted for advanced health care directives.

ORGAN DONATIONS:

Revised Uniform Anatomical Gift Act (2006, 2008) adopted and codified at § 157.06.

PATIENTS' BILL OF RIGHTS:

Rights of hospital patients addressed in Wis. Admin. Code c. DHS 124.

Rights of individuals receiving services for mental illness, developmental disabilities, alcoholism or drug dependency set forth in § 51.61. Under § 55.23 rights extend to those in protective services system.

Confidentiality of general patient health care records addressed by §§ 146.81-146.83. Uniform Health-Care Information Act has not been adopted.

Patient Grievance Procedures.—

Grievance procedure for individuals receiving services for mental illness, developmental disabilities, alcoholism or drug dependency addressed by § 51.61(5).

PUBLIC HEALTH:

Medical assistance (Title XIX) regulated by §§ 49.43-49.499; other medical programs regulated by §§ 49.66-49.797.

Assistance and health services pertaining to maternal and child health regulated under § 253.01 et seq.

SMOKING REGULATIONS:

Designation of Smoking Areas.

Regulated by § 101.123(4). Covers private and state government work sites and other regulated areas. †

Sale of Tobacco.

Possession and commercial use of cigarette vending machines; and marketing and retail of cigarette and tobacco products regulated by § 134.66.

Smoking in Public Places.

Smoking prohibited in certain enumerated private and public facilities and areas as stated in § 101.123(2). Exceptions stated in § 101.123(3).

Tobacco Control.

Youth tobacco prevention and education regulated by § 255.10. Tobacco Control Program established and regulated by § 255.15.

† Effective until repealed on July 5, 2010.

16 INSURANCE

16.01 INSURANCE COMPANIES:

Regulated by cc. 600-655. In addition to provisions described below, applicable chapters include c. 600 (applicability and definitions), c. 601 (commissioner), c. 609 (defined network health plans), c. 610 (insurers in general), cc. 611-614 (domestic insurers), c. 615 (gift annuities), c. 616 (school plans and motor clubs), c. 617 (holding companies), c. 619 (risk sharing plans), c. 623 (accounting and reserves), c. 627 (underwriting restrictions), c. 630 (public policy), c. 633 (employee benefit plan administrators), c. 635 (small employer health insurance), c. 644 (mutual holding companies), c. 645 (delinquency proceedings), c. 646 (security fund), c. 647 (continuing care contracts), and c. 655 (health care provider liability).

Stock and mutual insurance companies organized under § 611.10-.29, and all corporate filings are made with commissioner of insurance.

Supervision by commissioner of insurance. (Wis. Stat. § 601.41). Mailing address is P.O. Box 7873, Madison, Wisconsin 53707-7873. Street address is 125 S. Webster St., Madison, Wisconsin 53702. http://www.oci.wi.gov/.

Rates. Regulated by 623.15 (fraternals), c. 625 (general), and c. 626 (worker's compensation).

Annual statements must be filed with commissioner of insurance. (Wis. Stat. §

601.42).

Policies.

Except for surplus lines, reinsurance, and group policies and annuities for eleemosynary institutions (Wis. Stat. § 631.01), no form may be used in state unless exempted by rule or filed with commissioner (Wis. Stat. § 631.20). Wisconsin has adopted Interstate Insurance Product Regulation Compact. (Wis. Stat. § 601.58). Insurance contracts regulated generally by c. 631, with special provisions for insurance in consumer credit transactions (c. 424), see category 3 Business Regulation and Commerce, topic 3.10 Consumer Protection, subhead Insurance; health care liability (Wis. Stat. § 655.24); and all other lines (c. 632). Additionally, applications for individual health insurance are regulated under Wis. Stat. § 601.41(10).

Discrimination. Unfair discrimination prohibited. (Wis. Stat. §§ 625.11, 628.34[3]; 631.20[2][a]).

Rebates.

May not offer benefits unless specified in policy; does not preclude reduction of premiums by reason of expense savings resulting from mass marketing. (Wis. Stat. § 628.34[2]). Policy dividends authorized when schedule thereof filed with commissioner. (Wis. Stat. § 631.51).

Liens.

No special statutory provisions.

Agent and Broker Licensing.

Agents and Brokers— Regulated by c. 628. Generally intermediaries (including agents, managing general agents, reinsurance brokers, and surplus lines agents) must be licensed. (Wis. Stat. §§ 628.02-.03). Residency not required for licensing. Nonresident must agree to be subject to jurisdiction in state. (Wis. Stat. § 628.04[1][c]). Not all business from state need be written by licensed intermediaries, but unlicensed intermediaries must do all their acts as agents outside state. (Wis. Stat. §§ 618.42; 628.03[1]). Intermediary cannot act as both agent and broker. (Wis. Stat. §§ 628.02[3] and [4]). Marketing practices regulated by §§ 628.31-.49; fees § 601.31.

Process Agent.—

Insurer required to maintain registered agent for service of process in state. (Wis. Stat. § 601.715[1]). Service made by personally serving process, notice or demand on registered agent of insurer. (Wis. Stat. § 601.715[4m]). In absence of registered agent, service can be made on commissioner. (Wis. Stat. § 601.715[5]). Process also may be served upon either domestic or foreign insurance corporation by serving copy of summons on officer, director or managing agent either within or without state, or by personal service upon agent as defined by § 628.02. If served on agent, service not valid unless copy of summons and complaint is sent by registered mail to insurer’s principal place of business within five days of service upon agent. (Wis. Stat. § 801.11[5]).

Investments.— Regulated by c. 620.

Foreign Insurance Companies.—

Generally regulated by c. 618.

Certificate of Authority Required.

No person may do insurance business in state without certificate of authority, except for surplus lines. (Wis. Stat. § 610.11).

Effect of Certificate.

Insurer may do insurance business within limits of certificate of authority. (Wis. Stat. § 610.11[1]). Certain domestic corporate and other restrictions specifically apply to authorized nondomestic insurers. (Wis. Stat. §§ 618.21-.22; 618.31). Certain restrictions are specific to other nondomestic insurers, including, reciprocals (Wis. Stat. § 618.23), incorporated alien insurers (Wis. Stat. § 618.24), unincorporated insurers (Wis. Stat. § 618.25), fraternals (Wis. Stat. § 618.26), and mutuals (Wis. Stat. § 618.34).

Corporate Name.

Insurer must comply with same rules as other foreign corporations. (Wis. Stat. § 618.21[1][b]). See category 2 Business Organizations, topic 2.03 Corporations, subhead Foreign Corporations; catchline Corporate Name.

Shareholders' Liabilities.

Shareholder generally not personally liable as such for acts or debts of corporation; however, substantially identical predecessor of statute imposing personal liability on shareholders for debts owing to employees of corporation for services performed (Wis. Stat. § 611.33[1][d])—which was repealed effective June 14, 2006—was held to apply to shareholders of foreign corporation—though not foreign insurance corporation—authorized to transact business in Wisconsin (61 Wis.2d 529). See category 2 Business Organizations, topic 2.03 Corporations, subhead Foreign Corporations; catchline Shareholders' Liabilities.

Transacting Business Without Certificate of Authority.

Subjects foreign insurer to potential injunction, restraining order, forfeiture, and criminal penalty. (Wis. Stat. § 601.64).

Restrictions on Right to Hold Real Property.

See category 4 Citizenship, topic 4.01 Aliens.

Filing Requirements.

Certificate of authority obtained by application to commissioner (Wis. Stat. § 618.11), which must be issued unless commissioner makes specified findings (Wis. Stat. § 618.12[1]). Fraternals have special application rules. (Wis. Stat. § 618.14).

Filing Fees.

Application for certificate of authority, $400, and issuance of certificate of authority, $400. (Wis. Stat. §§ 601.31[1][a]1. and [b]1.). Annual continuation of certificate of authority, $100. (Wis. Stat. § 601.31[1][c]1.).

Annual Statement.

See subhead Annual Statements, supra.

Registered Office and Agent.

No statutory provision for registered office. See subhead Process Agent, supra.

Method of Withdrawal.

Release from regulation obtained by application to commissioner showing release would not prejudice insureds, creditors or public. (Wis. Stat. § 618.36).

Revocation of Certificate of Authority.

Commissioner may, after hearing, revoke, suspend or limit certificate of authority if there are grounds for delinquency proceedings, but no such action shall affect insurance already issued and insurer remains subject to regulation until released. (Wis. Stat. § 618.37).

Retaliatory Laws.—

Wisconsin has retaliatory statute for insurance companies from other states or foreign countries with respect to security requirements, fees, taxes, fines, penalties, obligations, prohibitions, and restrictions. (Wis. Stat. §§ 76.66; 601.55). Conversely, taxes required of insurance companies from other states may be reduced under reciprocity statute, subject to specified exceptions. (Wis. Stat. § 76.67).

Premium Tax.

Premium taxes apply to nondomestic insurers and domestic life and mortgage guaranty insurers as described below. Other domestic insurers pay franchise tax which may not exceed percentage of premiums. See subhead Privilege Tax, infra. See also subhead Retaliatory Laws, supra. Town mutuals and fraternals are not subject to premium tax. (Wis. Stat. §§ 76.61; 76.65).

Life.—

Nondomestic insurers, annual license fee of 2% of gross premiums from policies on residents, less distributions. (Wis. Stat. § 76.65[2]). Domestic insurers having $750 million or less insurance in force, annual license fee of 3.5% of portion of gross investment income, but not more than it would pay as nondomestic. (Wis. Stat. § 76.65[1]). Domestic insurers having more than $750 million insurance in force, annual license fee of 3.5% of portion of gross investment income, but not less than it would pay as nondomestic. (Wis. Stat. § 76.65[1]).

Accident and Health.—

Nondomestic insurers, 2% of gross premiums from policies on residents less return premiums, cancellations, and returns. (Wis. Stat. § 76.63[1]).

Mortgage Guaranty.—

Domestic and nondomestic insurers, 2% of gross premiums from policies on residents or property in state less return premiums, cancellations, and returns. (Wis. Stat. § 76.63).

Fire Insurance.—

Nondomestic insurers, 2.375% of gross premiums from policies in state less return premiums, cancellations, and returns. (Wis. Stat. § 76.60). All insurers pay fire department dues equal to 2% of premiums. (Wis. Stat. § 601.93).

Ocean Marine.—

Nondomestic insurers, 0.5% of gross premiums from policies in state less return premiums, cancellations, and returns. (Wis. Stat. § 76.60).

Other Property and Casualty.

Nondomestic insurers, 2% of gross premiums from policies on residents or property in state less return premiums, cancellations, and returns. (Wis. Stat. § 76.63[1]).

Privilege Tax.—

As summarized below, insurers doing business in state are subject to franchise tax, except town mutuals, nondomestic insurers, domestic insurers writing only life insurance, domestic mortgage guaranty insurers, and nonprofit cooperatives (Wis. Stat. §§ 71.43[2]; 71.45[1]

[a]); however, tax on domestic insurers may not exceed 2% of premiums (Wis. Stat. § 71.46[3]). See also subheads Premium Tax and Retaliatory Laws, supra.

Accident and Health.—

Domestic insurers, corporate franchise tax of 7.9% of Wisconsin net income, not to exceed 2% of gross premiums from policies on residents less return premiums, cancellations, and returns. (Wis. Stat. §§ 71.43[2]; 71.46[2] and [3]).

Fire Insurance.—

Domestic insurers, corporate franchise tax of 7.9% of Wisconsin net income, not to exceed 2% of gross premiums from policies on residents less return premiums, cancellations, and returns. (Wis. Stat. §§ 71.43[2]; 71.46[2] and [3]). All insurers pay fire department dues equal to 2% of premiums. (Wis. Stat. § 601.93).

Ocean Marine.—

Domestic insurers, corporate franchise tax of 7.9% of Wisconsin net income, not to exceed 2% of gross premiums from policies on residents less return premiums, cancellations, and returns. (Wis. Stat. §§ 71.43[2]; 71.46[2] and [3]).

Other Property and Casualty other than Mortgage Guaranty.

Domestic insurers, corporate franchise tax of 7.9% of Wisconsin net income, not to exceed 2% of gross premiums from policies on residents less return premiums, cancellations, and returns. (Wis. Stat. §§ 71.43[2]; 71.46[2] and [3]).

No-Fault Insurance.—

Not adopted. See category 23 Transportation, topic 23.01 Motor Vehicles, subhead No-Fault Insurance.

Plain Language.—

Consumer insurance policies must be legible, coherent and written in commonly understood language. (Wis. Stat. § 631.22).

16.02 SURETY AND GUARANTY COMPANIES:

Contracts of guaranty or suretyship entered into as business, and not as merely incidental to business transaction, are insurance. (Wis. Stat. § 600.03[25][a]2). See topic 16.01 Insurance Companies.

Surety Insurance.—

Insurer writing surety or fidelity insurance may contract for indemnity or security for such insurance and, if such practice is systematic, commissioner shall take it into account in evaluating insurer. (Wis. Stat. § 627.15).

17 INTELLECTUAL PROPERTY

17.01 TRADEMARKS AND TRADENAMES:

What May Be Used.

Labels, trademarks, trade names, terms, designs, patterns, models, devices, shopmarks, drawings, specifications, designations or forms of advertisement that designate, make known or distinguish services or goods, may be registered by any person, firm, partnership, corporation, association, or union that is U.S. resident or a foreign corporation duly licensed to do business in Wisconsin. (Wis. Stat. §§ 132.001[2]; 132.01[1]).

Registration.

Right is founded on adoption or use. (Wis. Stat. § 132.01[1]). Registration is cancellable upon judgment of abandonment or conflict, or upon consent of registrant. (Wis. Stat. § 132.01[7]). Registration certificate is prima facie evidence of adoption. (Wis. Stat. § 132.031). Sworn application is required on form prescribed (and furnished) by Secretary of State, calling for specification or description of mark, date of first use in Wisconsin, class and description of goods to which appropriated, two specimens or facsimiles of mark, and allegation of right to use. (Wis. Stat. § 132.01[1]). Registration obtained after May 1, 1990 is effective for ten years, renewable for like terms. (Wis. Stat. § 132.01[6]). For original or renewal, registration fee is $15. (Wis. Stat. § 132.01[3]). Similar provisions are also made for registration of ownership marks for containers. (Wis. Stat. §§ 132.04-.08).

Assignment.

Title to registration may pass to any person, firm, or corporation succeeding to registrant’s business to which such registration pertains. (Wis. Stat. § 132.01[9]). Written assignments of any such registration from registrant to such successor may be filed with and can be recorded by Secretary of State upon payment of $15. (Wis. Stat. §§ 132.01[3], [9]).

Infringement.

Infringement is enjoinable. Main infringement remedies limited to “counterfeits”. (Wis. Stat. §§ 132.001[1]; 132.02; 132.033). Court may award damages in addition to or in lieu of injunctive relief. (Wis. Stat. §§ 132.02[3]; 132.03; 132.033[2]). If violation willful, court may award treble damages. (Wis. Stat. § 132.033[2][c]).

Resale Price Agreements.

Fair Trade Act repealed.

Trade Names.

Engaging in mercantile or commission business under name, not including real individual name(s) of person(s) engaged therein, with intent to obtain credit, unless incorporated, without first filing statement of persons using the name with Register of Deeds of county where principal place of business is located, is misdemeanor subject to fine or imprisonment. (Wis. Stat. § 134.17). Adoption and advertising under such name is legal evidence of purpose to obtain credit. (Wis. Stat. § 134.18). For registration fees see subhead Registration, supra. For recording fees, see Wis. Stat. § 59.43(2).

17.02 TRADE SECRETS:

Uniform Trade Secrets Act adopted in Wisconsin with modifications. (Wis. Stat. § 134.90).

Definitions.

Trade secret is information that derives independent economic value from not being generally known and is subject of reasonable efforts to maintain its secrecy. (Wis. Stat. § 134.90[1][c]). Person misappropriates trade secret by acquiring it through improper means, or by disclosing it or using it without consent if person knew at time of disclosure or use that trade secret was obtained by mistake or under circumstances giving rise to duty to maintain its secrecy, or was obtained from person who acquired it by improper means or under circumstances giving rise to duty to maintain secrecy. (Wis. Stat. § 134.90[2]). "Improper means" includes espionage, theft, bribery, misrepresentation, and breach of duty to maintain secrecy. (Wis. Stat. § 134.90[1][a]).

Relief.

Court may grant injunction against person who misappropriates or threatens to misappropriate trade secret. No court may issue injunction unless complainant makes application that includes sufficiently-detailed description of each trade secret to inform party to be enjoined of nature of complaint. (Wis. Stat. § 134.90[3][a][1]). Court may continue injunction for reasonable period of time to eliminate commercial advantage to person who misappropriated trade secret. (Wis. Stat. § 134.90[3][a][3]). If § 134.90(3)(a)(3) does not apply, court will terminate injunction when trade secret ceases to exist. (Wis. Stat. § 134.90[3][a][2]). Court may award damages in addition to or in lieu of injunctive relief. (Wis. Stat. § 134.90[4][a]). If violation is willful and malicious, court may award punitive damages. (Wis. Stat. § 134.90[4][b]).

Exceptions.

Statutory law displaces conflicting tort law, restitutionary law, and other Wisconsin law providing civil remedy for misappropriation of trade secret. § 134.90 does not affect contractual or criminal remedies whether or not based upon misappropriation of trade secret, or civil remedies not based upon misappropriation of trade secret. (Wis. Stat. § 134.90[6]).

18 LEGAL PROFESSION

18.01 ATTORNEYS AND COUNSELORS:

Wisconsin Bar is integrated.

Jurisdiction over Admissions.

Supreme court controls.

Eligibility.

Age of majority, good moral character, and (1) graduate of fully, not provisionally, ABA approved Wisconsin law school, or (2) graduate of ABA fully or provisionally approved law school and pass examination, or (3) admission and practice in any other state or territory with reciprocal admission by practice. (SCR 40.02; SCR 40.03; SCR 40.04; SCR 40.05; SCR 40.06). See subheads Admission Without Examination and Admission on Proof of Practice Elsewhere, infra. Administration of oath or affirmation, and subscription to roll of attorneys also required. (SCR 40.02).

Registration as Law Student.

No requirement.

Educational Requirements.

See subhead Eligibility, supra.

Petition for Admission.

Application required. (SCR 40.14).

Examination.

Conducted by Board of Bar Examiners semiannually in Feb. and July in Madison. (SCR 40.04).

Multi-State Bar Examination is used and scores may be transferred from other jurisdictions. (SCR 40.04[1]). Essay examination is developed by Board. (SCR 40.04[2]). Application materials are due Dec. 1 preceding Feb. examination date, or May 1 preceding July examination date. (SCR 40.04[3]). Examination fee is $450. (SCR 40.14). With payment of $200 late fee in addition to examination fee, application materials may be submitted by Jan. 1 preceding Feb. examination date, and June 1 preceding July examination date. (SCR 40.04[3]; SCR 40.14[3][b]). Applicants who fail Wisconsin Bar exam three times are ineligible to write examination unless granted special permission by Board of Bar Examiners. (SCR 40.04[5]).

Clerkship.

Not required.

Admission Without Examination.

Graduates of any law school in Wisconsin that is fully, not provisionally, approved by ABA may be admitted to practice upon certification by law school of satisfactory completion of degree and of courses in certain mandatory and elective subject matter areas. (SCR 40.03). Applicant must file application for character and fitness certification with Board of Bar Examiners plus $210 investigation fee. (SCR 40.06[3m]; SCR 40.14[g]).

Admission Pro Hac Vice.

Permitted for particular action or proceeding in discretion of judge, provided active member of state bar of Wisconsin appears and participates in association. (SCR 10.03[4]). As of Jan. 1, 2009, counsel seeking pro hac vice admission must pay $50 non-refundable fee for each application; fee is waived if application certifies attorney is employed by agency serving indigent clients, and attorney appears on behalf of indigent client. (SCR 10.03[4][b][2]).

Admission on Proof of Practice Elsewhere.

Persons admitted to practice law by court of last resort in any state, territory, or District of Columbia, may be admitted to practice upon filing application, and upon proof of admission to practice elsewhere, proof that applicant has been primarily engaged in active practice of law for three years within last five years prior to application, and proof of good moral character. (SCR 40.02; SCR 40.05). Active practice of law includes service as corporate counsel or trust officer in state where applicant was admitted to practice law; service as judge of court of record of U.S., any state or territory or District of Columbia; legal service with any local or state government or with federal government; legal service in U.S. armed forces; teaching in any A.B.A.-approved law school. (SCR 40.05[2]; SCR 40.05[3]). Application, supporting documents and fee of $850 must be filed with Board of Bar Examiners. (SCR 40.14[c]). Applicants who have failed Wisconsin bar examination are ineligible for admission on proof of practice elsewhere. (SCR 40.05[4]). Applicants from jurisdictions that do not grant admission upon proof of practice in Wisconsin are ineligible. (SCR 40.05[1m][a]).

Proof of Qualifications.

Burden of proof is on bar applicant to establish qualifications and refusal to furnish information or answer questions relating to qualifications is sufficient basis for denial of application. (SCR 40.07).

In-House Counsel Registration.

Effective Jan. 1, 2009, counsel not licensed in Wisconsin, but licensed elsewhere and employed in Wisconsin as in-house counsel for corporation, association, or nongovernmental entity, must register as in-house counsel within 60 days after commencement of employment. (SCR 10.03[4][f]). To register, attorneys must file application, $250 fee, proof of admission to practice in other jurisdiction, and affidavit from officer, director, or general counsel of employee entity attesting to lawyer's employment by entity, and capacity in which lawyer is employed. (SCR 10.03 [4][f][1-4]).

Licenses.

None.

Disabilities.

Attorney may not act as bail or security on any bond in court proceedings. (Wis. Stat. § 757.34).

Settlement of Personal Injury Actions.

No action for personal injuries or death may be settled without order of court or written consent of attorney who has appeared before court. (Wis. Stat. § 757.38).

Liabilities.

As to attorneys' fees allowable as costs and liability of attorney for costs, see category 5 Civil Actions and Procedure, topic 5.07 Costs.

Compensation.

Lawyer's fee shall be reasonable. (SCR 20:1.5). Contingent fee agreements shall be in writing and signed by client. (SCR 20:1.5[c]). No contingency fees in actions affecting family or in cases where client's liberty is at stake. (SCR 20:1.5[d]). In cases where statutes fix fee and provide for expenses of court appointed attorney, court appointing such attorney must fix amount of compensation and provide for repayment of disbursements. (SCR 81.01; SCR 81.02). Attorneys at different firms may divide fees only under limited circumstances. (SCR 20:1.5[e]).

Lien.

Attorney may obtain lien upon cause of action and proceeds or damages as security for fees when contract with client so provides, and no settlement is valid against lien after notice to opposing party. (Wis. Stat. § 757.36). Retainer agreement is insufficient to imply lien; separate proof of lien agreement must exist. (173 Wis. 2d 263, 496 N.W.2d 206).

Disbarment or Suspension.

Supreme court imposes revocation and suspension of license to practice law which may be imposed as discipline for misconduct. (SCR 21.09). Summary suspension may be ordered upon conviction of serious crime. (SCR 21.16; SCR 22.20). See subhead Discipline, infra.

Unauthorized Practice.

Practicing law without license is punishable by fine of not less than $50 nor more than $500 and imprisonment of not more than one year. May also be punished as for contempt. (Wis. Stat. § 757.30).

Discipline.

Office of Lawyer Regulation investigates possible misconduct or medical incapacity of attorneys and reports results and recommendations to committees appointed by Supreme Court which may dismiss matter, issue private or informal reprimand with attorney's consent, or file complaint with supreme court seeking reprimand, suspension, disbarment or monetary payment. Hearing to referee appointed by court. Board or attorney may appeal referee's findings within 20 days; if no appeal is filed, Supreme Court adopts, rejects, or modifies referee's findings and imposes discipline. Attorney may consent to revocation of license. Person whose license is revoked or suspended may petition supreme court for reinstatement. (SCR cc. 21, 22).

Attorney Ethics.

Attorneys admitted to practice in Wisconsin governed by Rules of Professional Conduct for Attorneys (SCR c. 20), based on ABA Model Rules of Professional Conduct with modifications.

Mandatory Continuing Legal Education.

Lawyer required to attend minimum of 30 hours of approved continuing legal education every two calendar years. At least three of the 30 hours must be on subject of legal ethics and professional responsibility. (SCR 31.01; SCR 31.02). Failure to comply may result in suspension. (SCR 31.10).

Professional Corporations.

Subject to requirements that they register with State Bar of Wisconsin, pay filing fee and maintain required professional liability insurance, lawyers may be member of law firm that is organized as limited liability organization solely to render professional legal services under laws of state of Wisconsin. (SCR 20:5.7). See category 2 Business Organizations, topic 2.03 Corporations, subhead Professional Corporations.

19 MINERAL, WATER AND FISHING RIGHTS

19.01 MINES AND MINERALS:

Department of Natural Resources has primary supervision of mines and mining. (Wis. Stat. § 293.11).

Operations of Mines.

Licenses for exploration and permits for prospecting and mining must be obtained from department. (Wis. Stat. §§ 293.21;.35;.37). Any person intending to submit application for prospecting or mining must notify department prior to collection of data intended to support application and provide certain information and pay fee. (Wis. Stat. §§ 293.31-.32). Reclamation plan is also required. (Wis. Stat. §§ 293.35;.37). Notice of intent to apply is subject to 45-day notice and comment period. (Wis. Stat. § 293.31). Prior to issuing mining permit under § 293.49, department is required to prepare environmental impact statement. (Wis. Stat. § 293.39).

Permit must be obtained from department for withdrawal of surface water or groundwater for prospecting or mining. (Wis. Stat. § 293.65). Permits authorizing mining of sulfide ore bodies are subject to special statute requiring determination by department that operating mines and reclaimed mining sites involving ore with acid generating potential elsewhere in U.S. or Canada have not resulted in pollution of ground or surface water from acid draining. (Wis. Stat. § 293.50). Special provisions relate to radioactive waste site exploration. (Wis. Stat. § 293.25).

If no contrary terms are agreed to between parties, following terms are applied to mining contracts and leases: (1) No lease or license is revocable after valuable discovery is struck unless miner forfeits miner's right by negligence according to mining usage; (2) discovery of crevice or range entitles discoverer to ore contained therein before as well as after separation from freehold subject to lessor's rent, but miner cannot recover from person digging on his range in good faith and known to be mining there until notice is given; (3) mining usages and customs may be proved in explanation of contracts to same extent that usage may be proved in other businesses. (Wis. Stat. § 107.01).

Where there is no agreement regulating the method of reporting the ore removed and sales of ore, miner must make such report by 15th day of each month, and keep books of record, subject to criminal penalty. (Wis. Stat. § 107.02).

When there are conflicting claims to crevice or range, court may appoint receiver to work mine pending determination of rights of parties. (Wis. Stat. § 107.03).

If lessee fails to work mine, fraudulently conceals or disposes of ores, minerals, mines or diggings for purpose of defrauding lessor of rent, or fails to pay rent for three days after rent is claimed by lessor, lessee forfeits all rights and landlord may regain possession. (Wis. Stat. § 107.04).

Safeguarding of Employees.

Department of Commerce administers occupational health and safety laws that apply to mining. (Wis. Stat. § 293.11). Damage claims for mining-related injuries are supervised by department of Commerce. (Wis. Stat. §§ 107.30-.35).

Inspection of Mines.

Department of Natural Resources may inspect any property, premise or place where any prospecting or metallic mining operation is located or being constructed at any reasonable time to determine compliance with c. 293 and rules adopted thereunder. Entry may not be prevented. (Wis. Admin. Code NR §§ 131.14; 132.14).

Oil and Gas.

No person may perform exploration for, or production of, oil or gas without obtaining license or permit from department. (Wis. Stat. § 295.33). No exploration permitted if drilling extends beneath bed of Great Lakes. (Wis. Stat. § 295.33). Licensing procedure and minimum standards for exploration are set forth in Wis. Admin. Code NR c. 134. There is severance tax on oil and gas producers. (Wis. Stat. § 70.397).

Record of Conveyance.

In addition to requirements of § 706.05(2), every conveyance of mineral rights for recording must fully disclose terms and conditions of agreement, including financial arrangements, exploration rights and any person with economic interest in transaction. (Wis. Stat. § 706.05[3]). Conveyance of mineral interests is void if not recorded in register of deeds office in county where land is located within 30 days after it is signed by lessor. (Wis. Stat. § 706.08[1][b]).

Exploration.

Mineral explorer has protectable property right in core samples and information it obtains. Mineral exploration requirements are detailed in § 107.15, but portions of that statute providing disclosure to public of confidential mining exploration data and core samples are unconstitutional. (Noranda Exploration, Inc. v. Ostrom, 113 Wis. 2d 612, 335 N.W.2d 596 [1983]).

Exploration Mining Leases.

If entered into after Apr. 25, 1978, maximum term of lease for right to determine presence, location, quality or quantity of minerals is limited to ten years from recorded lease date, except leases granting right to determine quality and quantity of minerals under prospecting permit shall not exceed term of ten years from date lessee applies for prospecting permit if prospecting permit is applied for within ten years from date prospecting lease was recorded. (Wis. Stat. § 107.20). Mining lease entered into after Apr. 25, 1978 granting right to extract minerals limited to term of 50 years. (Wis. Stat. § 107.20). Lessor’s right to cancel exploration mining lease is governed by § 107.25. May cancel within ten days after lease is recorded if lessor is not public body; may cancel within 90 days after lease is recorded if lessor is public body; may cancel if ten years has elapsed and lessee has not formally applied for prospecting or mining permit; right to cancel revived if lessee does not receive mining permit within ten years of application for permit. Method for notification of cancellation is registered mail addressed to lessee. Mining lease must contain statement of lessor's right to cancel. Exploration mining lease is void if not recorded in Register of Deeds Office of county in which land is located within 30 days after it is signed by lessor. (Wis. Stat. § 107.25).

Preservation of Interest in Minerals.

Where owner of fee interest in mineral rights is different person than owner of fee simple interest in surface of land, such interest in mineral rights may lapse if not used during previous 20 years. (Wis. Stat. § 706.057). Use is defined as mining, recording of conveyance, recording of statement of claim, or paying property taxes on mineral interests. (Wis. Stat. § 706.057). Lapse may be cured by recording statement of claim before owner of surface interest in land. (Wis. Stat. § 706.057[5]). Statutory provisions for lapse cannot be waived. (Wis. Stat. § 706.057[10]).

Taxes.

Net proceeds occupation tax is imposed on persons mining metalliferous minerals. (Wis. Stat. §§ 70.37-395). Taxes for mining metalliferous minerals at rates up to 15% established by § 70.375(5).

Nonmetallic Mining Reclamation.

Department of Natural Resources has promulgated rules creating uniform statewide requirements and procedures for nonmetallic mining reclamation program. (Wis. Stat. § 295.12; NR 135). Within six months after such promulgation of rules by department, each county must adopt and begin to administer ordinance that complies with rules established by department, unless department determines that county has existing ordinance that is at least as restrictive as rules. (Wis. Stat. § 295.13). Ordinance will apply throughout county, except within cities, villages or towns that opt to adopt and administer their own equivalent nonmetallic mining reclamation ordinance. (Wis. Stat. §§ 295.13-.14). Exempt activities specified. (Wis. Stat. § 295.16). Permits will be required for nonmetallic mining or nonmetallic mining reclamation. (Wis. Stat. § 295.12).

20 MORTGAGES

20.01 CHATTEL MORTGAGES:

Uniform Commercial Code has been adopted. (c. 409). For variations from Code see category 3 Business Regulation and Commerce, topic 3.09 Commercial Code.

Filing.

Uniform Commercial Code. See category 10 Documents and Records, topic 10.04 Records.

Removal, Concealment, Destruction or Sale of Property.

Whoever, with intent to defraud, conceals, removes or transfers property in which person knows another has security interest or, in violation of security agreement, fails or refuses to pay over secured party proceeds from sale of property subject to security interest is guilty of misdemeanor or felony depending on value of property, punishable by fine, imprisonment, or both. (Wis. Stat. §§ 939.50[3]; 939.51[3]; 943.84; 943.91). Penalties increase for multiple financial crimes. (Wis. Stat. § 943.92).

Taxation.

No special provisions.

Forms.

A five-part snapout form has been approved by secretary of state (now Department of Financial Institutions) for Uniform Commercial Code financing statement and continuation statement.

Wisconsin Bankers Association has approved various forms of security agreements for specific types of financing and security transactions. These forms are widely available in Wisconsin.

For forms of financing statement, etc., see Part VI, Uniform and Model Acts, Commercial Code Amendments for National Forms.

20.02 COLLATERAL SECURITY:

See category 8 Debtor and Creditor, topic 8.15 Pledges.

20.03 MORTGAGES OF PERSONAL PROPERTY:

See topic Chattel Mortgages and/or category 3 Business Regulation and Commerce, topic 3.09 Commercial Code.

20.04 MORTGAGES OF REAL PROPERTY:

Lien theory of mortgages prevails in this state. (Wis. Stat. § 708.01).

Execution of real estate mortgages must be with same formality as deeds and all provisions relating thereto apply to mortgages. (Wis. Stat. §§ 706.001[1];.02[1]). See category 21 Property, topic 21.06 Deeds.

Mortgages given for gambling debts, except as permitted by statute or under state or federal laws relating to gaming on Indian lands, are void. (Wis. Stat. § 895.055).

Recording is necessary to validity of a mortgage as against subsequent good faith purchasers for value. (Wis. Stat. § 706.08[1]). Purchasers for value without notice of adverse claims take free of certain claims. (Wis. Stat. § 706.09). Name of person or governmental agency drafting any instrument in any way affecting title to real estate must appear thereon in order to be recorded. (Wis. Stat. § 59.43[5]). Parcel identification number required for recording of conveyance of real estate interest in counties with population of 500,000 or more, and in counties with population of less than 500,000 if county has enacted ordinance requiring use of parcel identification number. (Wis. Stat. § 59.43[7]). See category 10 Documents and Records, topic 10.04 Records.

Recording Fees.

Recording fees for mortgages on standard forms are $11 for first page, plus $2 for each additional page. (Wis. Stat. § 59.43[2]). All instruments submitted for recording must have blank space at least 2.5 inches by 2.5 inches. (Wis. Stat. § 59.43[2]).

Taxes.

No special statutory provision. See category 22 Taxation, topic 22.16 Property Taxes.

Trust Deeds.

No statutory provision for trust deeds as in some states. Such instruments, when executed, are essentially mortgages although duties and obligations may vary under the circumstances. (215 Wis. 359, 254 N.W. 537). The term is used frequently in designation of large mortgages or indentures given to a trustee or mortgagee as security for bond issues, stock issues, or note issues generally of public utilities or large manufacturing concerns.

Future advances made after recording of mortgage executed to certain types of mortgagees have same priority as mortgage if made before mortgagee has actual knowledge of intervening lien, or if advance is made pursuant to commitment entered into before mortgagee has actual knowledge of intervening lien, advance is made for protection of mortgagee's interest, or mortgage is construction mortgage and so states on its first page, and advance is made to enable completion of improvements. (Wis. Stat. § 706.11).

Priorities.

When levied, real estate taxes, personal property taxes and special assessments for local improvements have priority over mortgages. Real estate and personal property taxes deemed levied as of date tax roll delivered to local treasurer; special assessment liens are in force as provided by charter or general laws applicable to cities specially assessing. (Wis. Stat. § 70.01).

Contractors', subcontractors' and employees' liens for labor, services, and materials to improve land, which liens are filed within time limitations (see category 8 Debtor and Creditor, topic 8.13 Liens), are prior to mortgages on that land given subsequent to commencement of improvement and to unrecorded mortgages given before commencement of improvement of which lienor has no notice; lien claimant must serve claim on property owner within 30 days of filing claim. (Wis. Stat. §§ 779.01[4];.02;.06). However, mortgages to federal government, Wisconsin state government and authorities, local governments, trustees in connection with issuance of industrial revenue bonds, licensees under precomputed loan law, mortgage bankers, licensed insurers, federally chartered and state savings and loan associations or savings banks, state or national banks, state or federally chartered credit unions, or Wisconsin department of veterans affairs have priority over all liens, except tax and special assessment liens and government liens securing environmental remediation expenditures made pursuant to statute filed subsequent to mortgage recordation. (Wis. Stat. §§ 215.21[4]; 706.11; 292.31[8]; 292.81).

Subordination Agreements.

Subordination agreement must include legal description of land subject to mortgage. (Wis. Stat. § 706.05[2m]).

Assignment of mortgage must be with same formalities as deeds and all provisions relating thereto apply to assignments of mortgages. (Wis. Stat. § 706.001[1]). Assignment must include legal description of land subject to mortgage. (Wis. Stat. § 706.05[2m]). Recordation of assignment does not of itself give notice to mortgagor so as to invalidate subsequent payments made to mortgagee without actual notice of assignment. (Wis. Stat. § 706.08[6]).

Release.

Mortgage may be satisfied to the extent of any payment thereon by presentation to register of deeds where recorded of a certificate executed by mortgagee, his representative or assignee, and acknowledged or proved and certified so as to be entitled to be recorded, specifying the extent of such discharge and identifying loan and legal description of property to which instrument relates. (Wis. Stat. § 706.05[8]).

Satisfaction.

Mortgage may be completely discharged by recording release so stating as set forth under subhead Release above. (Wis. Stat. § 706.05[8]). Unreasonable failure of mortgagee to execute and record proper satisfaction after partial performance of conditions of mortgage within seven days after demand and tender of filing fee renders mortgagee liable to mortgagor in sum of $100 penalty damages plus actual damages. Mortgagee must execute and record full satisfaction within 30 days after full performance. Mortgagee's failure to execute and record full satisfaction within seven days after written request renders him liable to mortgagor for $100 penalty damages for each day failure continues up to total of $2,000, plus actual damages. Mortgage-holder can charge mortgagor for filing fees and is not liable for actual damages unless mortgagor paid costs to be compensated. (Wis. Stat. § 706.05[9][10]). Circuit courts may order mortgages discharged on proof that mortgage has been fully paid or satisfied, and that mortgagee is deceased or nonresident of county where mortgage is recorded, or is corporation which has ceased to exist or has no officer or agent in this state competent to discharge mortgage. (Wis. Stat. § 847.09). See category 10 Documents and Records, topic 10.04 Records.

Foreclosure.

In actions for foreclosure of mortgages on real estate, if plaintiff recovers court shall render judgment of foreclosure and sale, but judgment may not be entered until 20 days after lis pendens was filed. (Wis. Stat. § 846.01). Sale involving one- to four- family residence that is owner-occupied at commencement of action, farm, church, or tax-exempt nonprofit charitable organization cannot be held until 12 months from entry of judgment. (Wis. Stat. § 846.10[2]). Waiting period for other properties is six months; provided, however if mortgagor has agreed in writing at time of mortgage execution to provisions of § 846.103, plaintiff may elect by allegation in its complaint to waive claim for deficiency after sale and consent that mortgagor, excepting in event of abandonment, may remain in possession and collect rents, issues and profits therefrom until court confirmation of sale; and in that event, sale may be upon expiration of three months after judgment; and notice of sale may be published not less than one month after judgment. (Wis. Stat. § 846.103[2]). Similar provision for foreclosure without deficiency reduces waiting period from 12 months to six months if mortgaged parcel is 20 acres or less and foreclosure action involves one-to-four family residence that is owner-occupied at commencement of action, church, farm, or tax-exempt charitable organization; provided that notice cannot be published less than four months after judgment. (Wis. Stat. § 846.101).

Sales.

Notice of the time and place of holding any sale of real estate on foreclosure must be given by publication once a week for six successive weeks in newspaper of county where property is situated (or if no newspaper exists and mortgagor or its tenant is not in possession of property, then in paper printed in Madison) and by posting copy of said notice in three public places three weeks prior to sale in municipality where real estate is to be sold and where situated, if different from sale location (Wis. Stat. § 815.31) unless otherwise directed by court (Wis. Stat. § 846.16). Wis. Dept. of Veterans Affairs, if party, must be given three weeks notice, registered mail, return receipt. (Wis. Stat. § 846.16[1]). Sale must be by auction between 9 a.m. and 5 p.m. (Wis. Stat. § 815.31[6]).

Five days' notice of application for confirmation of sale must be given to all parties who have appeared in the action or their attorneys, stating in addition to other matters required by law, the amount of the judgment, the amount realized upon the sale, the amount for which personal judgment will be sought against the several parties naming them, and the time and place of hearing. (Wis. Stat. § 846.165[1]). Such notice shall be given either personally or by registered mail directed to last-known post-office address. (Wis. Stat. § 846.165[1]).

Deficiency Judgments.

No deficiency judgment allowed unless five-day notice of application for confirmation contains statement that such will be demanded. (Wis. Stat. § 846.165). Such deficiency judgments may be demanded in the complaint on foreclosure against every party personally liable for the debt secured by the mortgage. (Wis. Stat. § 846.04). Such deficiency judgment is ordered in the original judgment and separately rendered on or after confirmation of sale. (Wis. Stat. § 846.04).

Redemption.

Property may be redeemed at any time before sale by payment to clerk of court in which judgment was rendered or to plaintiff: Amount of judgment, interest, costs, any costs subsequent to judgment, and taxes paid by plaintiff subsequent to judgment with interest thereon at same rate. (Wis. Stat. § 846.13). General rule is that after foreclosure sale has been duly confirmed sheriff's or referee's deed passes title of mortgagor to purchaser without any right of redemption. (Wis. Stat. § 846.17).

Marital Property Law.

See generally c. 766. See category 14 Family, topic 14.09 Husband and Wife. Spouse exercising "management and control" over property has right to mortgage property as if it were property of unmarried person. (Wis. Stat. § 766.01[11]). Management and control of property determined by title—i.e., how property is "held". (Wis. Stat. § 766.01[9]). Title does not determine ownership/classification. (Wis. Stat. § 766.51[5]). Spouse acting alone may manage and control property that is: (1) That spouse's individual property (Wis. Stat. § 766.51[1][a]); (2) marital property held in that spouse's name alone or not held in either spouse's name, subject to certain exceptions (Wis. Stat. § 766.51[1][am]); or (3) marital property held in names of both spouses in alternative (Wis. Stat. § 766.51[1][b]). Spouses may manage and control marital property held in names of both spouses other than in alternative only if they act together. (Wis. Stat. § 766.51[2]). Right to manage and control marital property transferred to trust is determined by terms of trust. (Wis. Stat. § 766.51[3]). Requirement that both spouses join in conveyance of any interest of married person in homestead except in purchase money mortgage is not affected by management and control provisions of marital property law. (Wis. Stat. § 766.51[8]). At death of spouse, marital property not in names of both spouses may be subject to management and control of holding spouse. (Wis. Stat. § 766.51[10]). These provisions can be varied by marital property agreement, which need not be recorded to be effective. (Wis. Stat. § 766.58).

Forms

Note: Various real estate forms have been approved by state bar of Wisconsin and are widely available in Wisconsin.

Substantially the following may be used:

Mortgage: A. B., mortgagor, of. . . . . . County, Wisconsin, hereby mortgages to C. D., mortgagee, of. . . . . . County, Wisconsin, for the sum of. . . . . . dollars, the following tract of land in. . . . . . County, State of Wisconsin: (Describe the premises). This mortgage is given to secure the following indebtedness: (Here state amount or amounts, form of indebtedness, whether on note, bond, or otherwise, time or times when due, rate of interest, by and to whom payable, etc.). The mortgagor agrees to pay all taxes and assessments on said premises, and the sum of. . . . dollars, attorneys' fees, in cases of foreclosure hereof.

This. . . . . . homestead property. This. . . . . . a purchase money mortgage.

(is)(is not) (is)(is not)

Witness the hand and seal of said mortgagor this. . . . . . . day of. . . . . . .,. . . . . .

. . . . (Seal).

(Acknowledgment) or (Authentication).

This instrument was drafted by. . . . . . (name).

Satisfaction: The undersigned certifies that it is the present owner of a mortgage executed by. . . . . . to. . . . . . to secure payment of $. . . . ., dated. . . . ., recorded in the office of the Register of Deeds of. . . . . County, Wisconsin, on. . . . .,. . . . ., as Document Number. . . . ., in (Reel). . . . . (Images). . . . . (Vol.). . . . . (Records). . . . . of (Mortg's) on (Page). . . . ., has right to satisfy the same, and hereby satisfies the above described mortgage. The real estate which is subject to the mortgage is described as follows (if more space is needed, please attach addendum):. . . . . Date this. . . . . day of. . . . .

(Acknowledgment) or (Authentication) (Signatures may be authenticated or acknowledged. Both are not necessary.)

This instrument was drafted by. . . . . . (name).

Assignment:

For value received, I, A. B., of. . . . . ., Wisconsin, hereby assign to C. D., of. . . . . ., Wisconsin, the within mortgage (or a certain mortgage executed to. . . . . . by E. F. and wife, of. . . . . . County, Wisconsin, the. . . . . . day of. . . . . .,. . . ., and recorded in the office of the register of deeds of. . . . . . County, Wisconsin, in Volume. . . . . . of Mortgages, on page. . . . . ., Document No.. . . . . ., which mortgage covers the property hereinafter described. . . .), together with the. . . . . . and indebtedness therein mentioned.

Witness my hand and seal this. . . . . . day of. . . . . .,. . . . .

A. B. (Seal)

(Acknowledgment) or (Authentication)

This instrument was drafted by. . . . . . (name).

Partial Release:

WHEREAS, on the. . . . . . day of. . . . . ., A.D.. . . .,. . . . . . duly executed to. . . . . . a mortgage to secure the payment of the sum of. . . . . . Dollars, which mortgage was on the. . . . . . day of. . . . . . A.D.. . . ., duly recorded in the office of the Register of Deeds, in and for. . . . . . County, in the State of Wisconsin, in Volume. . . . . . of Mortgages, on page. . . . . ., Document No.. . . . . ., and which mortgage covered, with other property, the premises hereinafter described; and, whereas. . . . . ., the present owner. . . . . . and holder. . . . . . of said mortgage, has. . . . . . been requested to release from the lien of said mortgage, the property hereinafter described;

Now, therefore, in consideration of the sum of. . . . . . Dollars, to. . . . . . in hand paid by. . . . . ., the said. . . . . . hereby release. . . . from the lien and the operation of said mortgage the following portion of said mortgaged premises, to-wit: the. . . . . . certain piece. . . . or parcel. . . . of land lying and being in the County of. . . . . . and State of Wisconsin, known and described as follows:. . . . . .

The said. . . . . . retain. . . . lien upon the balance (not heretofore released) described in said mortgage to secure the principal sum unpaid, to-wit:. . . . . . Dollars, with all interest on the same remaining unpaid, according to the terms and conditions of said mortgage.

In witness whereof, the said. . . . . . ha. . . . hereunto set. . . . . . hand. . . . and seal. . . . this. . . . . . day of. . . . . ., A.D.. . . . .

. . . . (Seal)

(Acknowledgment) or (Authentication).

This instrument was drafted by. . . . . . (name).

21 PROPERTY

21.01 ABSENTEES:

Care of Property.

Uniform Absence as Evidence of Death and Absentee's Property Act has been adopted (adopted 1941). (Wis. Stat. §§ 813.22-34). Act amended to: omit § 1; provide for appointment of receiver for property of persons in U. S. military service or engaged in war activities for U. S. and for termination of receivership for same persons if power of attorney recorded; set time for final hearing at five years; discharge insurer upon payment of life insurance policy proceeds as directed by court.

Moneys or property in custody or control of any fiduciary or officer of court, when person entitled thereto is in armed services or available evidence fails to show such person to be alive, may be deposited in trust account to be distributed only with court order. (Wis. Stat. § 895.42).

Process Agent.

No statutory provision.

Escheat.

Uniform Unclaimed Property Act is in effect (1981, adopted 1983, last am'd in Wisconsin in 2008). (c. 177). See also category 13 Estates and Trusts, topic Wills, subhead Unclaimed Legacies; category 3 Business Regulation and Commerce, topic 3.01 Banks and Banking, subhead Unclaimed Deposits.

Moneys, securities or funds in the hands of clerks of courts in connection with any court proceeding are turned over to county treasurer after five years and irrevocably become property of county if no valid claim is made for them within 90 days following notice by publication. (Wis. Stat. § 59.66[1]).

Public officers, including clerks of courts of record, pay to the county treasurer bi-annually all funds held by them for others and unclaimed for one year. Money will be repaid on proper showing within ten years or thereafter upon court action. (Wis. Stat. § 59.66[2]).

21.02 ADVERSE POSSESSION:

Presumption is that possession by another is under and in subordination to the legal title unless it appears that there was adverse possession. (Wis. Stat. § 893.30).

Character of Possession.

Where occupant (including predecessors) enters premises under claim of title founded upon recorded written instrument claimed to be conveyance, or upon judgment, and possession of all or material portion of such premises has been continuous for ten years, premises included in such instrument or judgment are deemed held adversely. (Wis. Stat. §§ 893.26-.27). Facts that constitute possession and occupancy include showing that premises have been: (1) usually cultivated or improved; (2) substantially enclosed; (3) though not enclosed, used to supply fuel or fencing timber, or for ordinary use of occupant. If farm or lot has been improved, but part not cleared or enclosed according to custom of adjoining country, such part is nevertheless deemed occupied. (Wis. Stat. § 893.26). Period is seven years if person in possession has recorded chain of title and pays all real estate taxes due for such period. (Wis. Stat. § 893.27).

Where claim not based on written instrument or judgment, premises are deemed held adversely only if occupant (including predecessors) is in actual continued occupation for 20 years under claim of title and only to extent premises actually occupied and either substantially enclosed or usually cultivated or improved. (Wis. Stat. § 893.25).

If landlord/tenant relationship exists, tenant's possession deemed that of landlord until ten years from expiration of tenancy, or ten years from last payment of rent if no written lease. (Wis. Stat. § 893.31).

Interruption.

No entry upon real estate is valid as interruption of adverse possession unless action is commenced against adverse possessor within one year after making entry and before applicable adverse possession period of limitation has run, or unless entry in fact terminates adverse possession and is followed by possession by person making entry. (Wis. Stat. § 893.32).

No action affecting title or possession of real estate may be commenced founded on instrument recorded more than 30 years prior to commencement, on unrecorded instrument executed more than 30 years prior to commencement, or on any other event occurring more than 30 years prior to commencement, unless instrument or notice of claim is recorded within that period. (Wis. Stat. § 893.33). Actions to enforce easements or restrictive covenants set forth in any recorded instrument not barred for 40 years after recording (Wis. Stat. § 893.33[6]), except for conservation easement, which is unlimited in duration unless stated otherwise (Wis. Stat. §§ 893.33[6m]; 700.40[2][c]).

Adverse Possession against State or Political Subdivision.

Title to real property belonging to state or other political subdivision may be obtained by adverse possession pursuant to these sections only if adverse possession uninterruptedly continues for more than 20 years and is based upon continuously maintained fence line which has been mutually agreed upon by current landowners. (Wis. Stat. § 893.29[1]).

Easements.

Continuous use of rights in real estate of another for 20 years establishes prescriptive right to continue use, except where title to certain real estate is held by state or political subdivision. (Wis. Stat. §§ 893.28; 893.29[1]). Right of domestic corporation or cooperative to maintain wire or cable for telegraph, telecommunications, telephone, electric light, etc., gained by continuous use for ten years. (Wis. Stat. § 893.28[2]). Mere use of way over unenclosed land presumed to be permissive. (Wis. Stat. § 893.28[3]).

Disabilities.

If cause of action accrues before July 1980 and person entitled to commence action for recovery of real estate or to make entry or defense founded on title thereto is minor, insane or imprisoned for less than life when cause of action accrues, time of disability is not deemed part of time limited for commencement of action, which may be commenced within five years after disability shall cease or death of person under disability. (Wis. Stat. § 893.17). If cause of action accrues after June 1980, action may be commenced within two years after disability ceases, and limitation due to mental illness may not be extended more than five years. (Wis. Stat. § 893.16).

This section does not operate to extend time provided in § 893.33.

Claims Barred.

Claims of adverse possession to property subject to tax sale are barred once city, village or county obtains survey, sends notice of transfer to potential claimants, and receives no indication of commencement of adverse possession action concerning property within specified period of time. (Wis. Stat. § 75.144).

21.03 CONDOMINIUMS:

See topic 21.16 Real Property.

21.04 CONVEYANCES:

See topic 21.06 Deeds.

21.05 CURTESY:

No curtesy rights. See category 13 Estates and Trusts, topic 13.16 Wills, subhead Election, for spousal elective rights.

21.06 DEEDS:

See topic Real Property for types of estates.

Execution.

Deeds must be signed by or on behalf of each grantor, must identify parties, land, and interest conveyed, and must be delivered to be valid. (Wis. Stat. § 706.02). Conveyances by private corporation may be signed by any one officer, unless corporation's governing board authorizes one or more persons by name or title to execute conveyances, generally or with specified limitation, and authorization is certified and recorded or unless articles of incorporation contain different authorization. (Wis. Stat. § 706.03[2]). Absence of corporate seal shall not invalidate any corporate conveyance. (Wis. Stat. § 706.03). See also topic 21.15 Powers of Attorney, subhead Attorneys in Fact; categories 8 Debtor and Creditor, topic Homesteads, subhead Alienation or Encumbrance; Family, topic Husband and Wife, subhead Conveyance or Encumbrance of Property.

Recording not necessary to validity of deed as between parties; but unrecorded deed is void as against any subsequent purchaser in good faith and for valuable consideration whose conveyance is first recorded. (Wis. Stat. § 706.08[1]). Deeds should be recorded in office of register of deeds of each county in which land affected may lie. (Wis. Stat. § 706.05[1]). Register of deeds may not record conveyances of interests in certain rental properties without evidence of compliance with energy standards. (Wis. Stat. § 101.122[6]).

Recordation requires that deeds identify parties whose interest in land is affected and subject land in manner that permits entry in publicly maintained books and indices, be signed, and be acknowledged or authenticated. (Wis. Stat. § 706.05[2]). To be recorded, deeds and other recorded documents must comply with standard format requirements, which include name of instrument, recording area, parcel identification number, paper type, and ink color. (Wis. Stat. § 59.43[2m]). Unless executed or acknowledged outside Wisconsin, deeds executed after May 8, 1957, must identify person who drafted same in substantially following form: This instrument was drafted by. . . . . . (name). (Wis. Stat. § 59.43[5]). Every instrument accepted for record shall be deemed duly recorded despite nonconformity with any requirement. (Wis. Stat. § 706.05[7]). Every instrument submitted for record must include parcel identification number in counties with population of 500,000 or more and in counties of less than 500,000 where municipality enacts ordinance to that effect. (Wis. Stat. § 59.43[7]).

Uniform Real Property Electronic Recording Act has been adopted. (2004, adopted 2005, last am'd in Wisconsin in 2006, § 706.25).

Recording fees for all deeds are $11 for one page, plus $2 for each additional page. Each side of page and any attached rider are counted as separate pages. (Wis. Stat. § 59.43[2]). See also category 10 Documents and Records, topic 10.04 Records.

Deeds given for gambling debts are void. (Wis. Stat. § 895.055).

Operation and Effect.

No warranty or covenant implied whether or not deed contains special warranty or covenant. (Wis. Stat. § 706.10[6]). Unless deed provides otherwise, warranty of land or title runs to grantee, his heirs, successors and assigns and is construed to mean that grantor warrants that he is lawfully seized, that he has right to convey the land, that land is free of all encumbrances, and that he will forever guarantee and defend title and quiet possession of premises against all lawful claims originating prior to conveyance, except claims arising out of open and notorious rights of easement or public building, zoning or use restrictions. (Wis. Stat. § 706.10[5]). Words of inheritance not necessary to create or convey fee, and all estate of grantor passes unless different intent appears by express terms or necessary implication. (Wis. Stat. § 706.10[3]).

Taxes.

State transfer fee imposed. See category 22 Taxation, topic 22.16 Property Taxes, subhead Real Estate Conveyance Tax.

Forms.

See forms of Warranty Deed and Quit Claim Deed at end of this Digest. (Wis. Stat. § 706.10[1]).

21.07 DEEDS OF TRUST:

See category 20 Mortgages, topic 20.04 Mortgages of Real Property.

21.08 DOWER:

No dower right. See category 13 Estates and Trusts, topic 13.16 Wills, subhead Election, for spousal elective rights.

21.09 ESCHEAT:

See topic 21.01 Absentees, subhead Escheat; categories 3 Business Regulation and Commerce, topic Banks and Banking, subhead Unclaimed Deposits; Estates and Trusts, topic Wills, subhead Unclaimed Legacies.

21.10 LANDLORD AND TENANT:

Uniform Commercial Code Art. 2A adopted, effective July 1, 1992. (c. 411).

Kinds of Tenancy.

Periodic tenancy, tenancy at will, tenancy under lease. (Wis. Stat. § 704.01[4]).

Leases.

Contracts for leasing and leases for longer period than one year are treated as conveyances for all purposes and must meet same formal requisites as deed to be enforceable, must also be signed by all parties, set forth amount of rent, time of commencement and expiration, and description of premises. (Wis. Stat. §§ 706.001[2]; 704.03[1]). See topic 21.06 Deeds. If tenant enters into possession under a lease unenforceable due to lack of formal requisites and tenant pays rent on periodic basis, periodic tenancy created. (Wis. Stat. § 704.03[2]). Unless written lease provision contrary, rights and duties of party governed by statute. (Wis. Stat. § 704.05).

Recording.

Lease for more than one year must be recorded in same manner as deed in order to be valid against third persons without notice. (Wis. Stat. §§ 706.001; 706.08[1]). Leases for one year or less may be recorded if in proper form. (Wis. Stat. §§ 706.001[2]; 706.05).

Tenant's possession is deemed possession of landlord until expiration of ten years after termination of tenancy or ten years after last payment of rent when there has been no written lease, notwithstanding tenant may have acquired another title or claimed to hold adversely to landlord. (Wis. Stat. § 893.31).

Attornment of tenant to stranger does not affect possession of landlord. (Wis. Stat. § 704.13).

Security Deposits.

For residential rentals, landlord must provide written receipt for security deposit. If deposit is required, landlord must allow tenant at least seven days after entry to inspect premises and submit list of damages or defects which existed prior to beginning of tenancy. Upon request of tenant, landlord also must give tenant itemized list of all damages or defects for which amounts were withheld from security deposit of previous tenant. Amounts may be withheld only for tenant damage, waste or neglect, nonpayment of rent, utility charges for service provided by landlord or provided by government-owned utility to extent landlord becomes liable for tenant's nonpayment, or monthly municipal permit fees for manufactured and mobile home communities assessed against tenant by local unit of government under § 66.0435 to extent that landlord becomes liable for tenant's nonpayment. Landlord has 21 days after surrender of premises to deliver itemized list of amounts being withheld and reasons for doing so, or entire deposit must be refunded. (See Wis. Admin. Code, c. ATCP 134.06.) Violation of landlord's duties may lead to liability for double amount of tenant's actual damages resulting from violation, plus attorneys' fees. (Wis. Stat. § 100.20[5]).

Rent.

If tenant remains in possession after end of tenancy without consent, landlord may recover damages of at least double daily rental value for subsequent possession (Wis. Stat. § 704.27), and may remove tenant (Wis. Stat. § 704.23). If tenant removes before end of tenancy without paying rent, landlord may recover rent and damages. Landlord has duty to mitigate damages. (Wis. Stat. § 704.29). Any person remaining in possession as tenant of owner of life estate is liable to owner of remainder or reversion for rent at end of life estate for any period tenant remains in possession after termination of life estate. (Wis. Stat. § 704.40).

Tenant cannot withhold full rent while maintaining occupancy to force landlord to comply with housing code. (Wis. Stat. § 704.07[4]). Partial rent may be withheld while maintaining occupancy to extent that tenant is deprived of full normal use of premises. (Wis. Stat. § 704.07[4]). Certain municipal codes (e.g. Milwaukee) permit rent to be paid to municipality which will hold in escrow until premises are brought into compliance with housing code.

Lien.

None for failure to pay rent, except by express agreement of parties. (Wis. Stat. §

704.11). If tenant leaves personal property on premises, landlord has right to remove, store or dispose of property, and landlord has lien on property and proceeds for reasonable costs of removal, storage and disposal. (Wis. Stat. § 704.05[5]). Landlord must give tenant proper notice when exercising rights of removal, storage or disposal. (Wis. Stat. § 704.05[5]).

Termination of Tenancy.

Periodic tenancy and tenancy at will may be terminated by at least 28 days written notice; except if rent payable less than monthly, notice equal to rent paying period is sufficient, but periodic tenancy only terminable at end of a rental period, except for terminations because of imminent threat of serious bodily harm pursuant to § 704.16. (Wis. Stat. § 704.19). Agreement to terminate prior to specified date or without statutory notice may be oral or written, but writing must be signed by both parties if termination more than one year before specified date. (Wis. Stat. § 704.03[4]). Residential tenant may terminate early without further rent liability if tenant or tenant's child facing imminent threat of serious bodily harm. (Wis. Stat. §§ 704.16[1]-[2]). Similar early termination right for owner of residential housing if tenant threatening others. (Wis. Stat. § 704.16[3]).

If month-to-month or week-to-week tenant fails to pay rent, landlord may give five days pay or vacate notice or may give month-to-month tenant 14 day vacate notice. (Wis. Stat. § 704.17[1]). If tenant under lease of one year or less, or year-to-year tenant, fails to pay rent, landlord may give five day pay or vacate notice and, on second default within one year, landlord may give 14 day vacate notice (with no right to cure). (Wis. Stat. § 704.17[2]). If tenant commits waste, material violation of his duty to maintain premises, or breaches any covenant other than payment of rent, landlord may give 14 day vacate notice to month-to-month tenant (Wis. Stat. § 704.17[1]), or five day fix or vacate notice to year-to-year tenant or a tenant under lease for one year or less, and 14 day vacate notice on second violation (Wis. Stat. § 704.17[2]). If tenant under lease for more than one year breaches any covenant or commits waste, landlord may give 30 day compliance or vacate notice. (Wis. Stat. § 704.17[3]). Parties may alter these rules only in leases for period longer than one year. (Wis. Stat. § 704.17[5]). Landlord may terminate tenancy by five day vacate notice if owner receives written notification from law enforcement agency that nuisance or criminal gang house exists at premises. (Wis. Stat. §§ 704.17[2][c]; 704.17[3][b]).

Notice may be given personally, or with competent family member at least 14 years of age at tenant's usual place of abode, who is informed of contents of notice, or by leaving with competent person apparently in charge of premises and mailing copy by regular or other mail to tenant's last-known address, or by certified or registered mail to tenant's last known address, or by service in same manner as summons. (Wis. Stat. § 704.21). Landlord may affix notice in conspicuous place on premises and mail if personal service or service on competent person is unavailable. Actual notice prevents objection as to improper service. (Wis. Stat. § 704.21).

Landlord may not increase rent, decrease services, bring action for possession of premises (other than for failure to pay rent which has not improperly been increased), refuse to renew lease or threaten any of foregoing in retaliation for residential tenant complaint of defects in premises or failures to repair or if residential tenant exercises legal right relating to tenancy. (Wis. Stat. § 704.45).

Repairs.

Except as nonresidential lease provides otherwise (Wis. Stat. § 704.07[1]), and unless caused by tenant, landlord must repair those parts of premises that landlord controls, keep equipment necessary to supply promised services in state of repair, make structural repairs, and, unless residential housing code provides otherwise, repair or replace plumbing, wiring or other equipment not in reasonable working condition. In case of residential tenancy, landlord must comply with applicable housing code. (Wis. Stat. § 704.07[2][a]). Except as nonresidential lease provides otherwise (Wis. Stat. § 704.07[1]), tenant must repair all damage caused by him or pay reasonable cost thereof. Residential tenant must also comply with applicable housing code. (Wis. Stat. § 704.07[3]).

Except if caused by tenant, when leased premises are destroyed or injured by casualty, elements or any condition hazardous to health so as to be untenantable, or in case of substantial violation of landlord's duties materially affecting health or safety of tenant, tenant may remove from premises if not promptly repaired, or if inconvenience of repair an undue hardship, and not be liable for rent after premises become untenantable. If tenant remains, rent abated to extent tenant denied full use of premises. (Wis. Stat. § 704.07[4]).

Long Term Leases.

In case of leases for term exceeding 30 years, requiring tenant to make improvements or erect buildings exceeding $50,000 in value, if landlord desires to terminate lease on tenant's breach and recover possession after improvements made, landlord may upon default bring action in nature of foreclosure without sale. Judgment determines default and amount due landlord and allows tenant one year to make default good, landlord being entitled to writ of assistance or execution in case default not made good and possession not given in year. (Wis. Stat. § 704.31).

Holding Over.

Except as lease provides otherwise, hold-over tenant may, at election of landlord, be held to month-to-month tenancy, but if rent payable on more frequent basis, landlord may only hold for rental period. Tenant of nonresidential premises holding over on lease for one year or more may, at election of landlord, be held on year-to-year basis unless lease provides otherwise. (Wis. Stat. §§ 704.25[2]; [4]). If landlord elects to allow tenant to hold over, periodic tenancy is upon same terms as original lease except right to renew or extend, option to purchase and right of first refusal do not carry over. (Wis. Stat. § 704.25[3]).

Distress.

Common-law right to distrain for rent is abolished. (Wis. Stat. § 704.11).

Automatic renewal or extension clause in lease of residential premises is unenforceable against tenant unless landlord gives notice to tenant of clause's existence at least 15 but not more than 30 days prior to date on which tenant must elect to not extend. (Wis. Stat. § 704.15).

Assignment.

Party may transfer interest without consent of other party unless lease provides otherwise, but tenant at will or under periodic tenancy less than year-to-year must have consent of landlord. Lease restriction on transfer applies only to voluntary transfer unless there is express restriction on transfer by operation of law. (Wis. Stat. § 704.09[1]). Unless expressly waived, and except in case of holdover by assignee, transferor still liable under lease, and all remedies still available to other party. Other than personal covenants, all provisions in lease applicable to transferee. (Wis. Stat. §§ 704.09[2-3]; 704.25[5]). Assignment by tenant of lease with more than one year to run is unenforceable against assignor unless in writing signed by assignor. Agreement to assume obligations under lease with more than one year to run is unenforceable against assignee unless in writing signed by assignee. (Wis. Stat. § 704.03[3]).

Eviction actions and actions for possession are provided for removal of any person not entitled to premises. (Wis. Stat. § 799.40; c. 843). Tenant may be removed after expiration of term by lapse of time or after termination by notice as above provided. Tenant at sufferance holding without permission, possessor of property after sale on foreclosure of mortgage if possessor's rights extinguished and also one in possession of land under agreement for share of crops after term of occupancy expired may be removed in such proceedings. (Wis. Stat. §

710.10).

Such proceedings are instituted by serving and filing summons and written complaint in circuit court, and rules of pleading and practice for such courts apply. (Wis. Stat. §§ 799.41-.43). Proceedings are actions in which judgment of restitution is entered, and upon which writ of restitution is issued. (Wis. Stat. §§ 799.44-.45). Plaintiff may join any claim against defendant arising out of defendant's possession or occupancy of premises. (Wis. Stat. § 799.40[2]). Retaliatory eviction or nonrenewal of residential tenancy prohibited (Wis. Stat. § 704.45) and may be asserted as defense in eviction proceeding (45 Wis. 2d 389, 173 N.W.2d 297). If tenant applies for emergency assistance, eviction proceeding stayed until tenant's emergency assistance eligibility is determined, or if eligible, until tenant receives emergency assistance. (Wis. Stat. §§ 799.40[4]; 49.138).

Rental Unit Energy Efficiency Code.

Residential rental buildings must, with limited exceptions, be inspected and comply with prescribed energy efficiency standards prior to transfer of ownership of building. (See Wis. Admin. Code, c. COMM 67.) Landlord of premises subject to residential tenancy and served by water heater serving only that premises shall set thermostat at no higher than 125 degrees Fahrenheit or minimum setting if higher prior to occupancy by new tenant. (Wis. Stat. § 704.06). Certain sites (e.g., Milwaukee) require landlord to register with city.

Uniform Residential Landlord and Tenant Act not adopted.

Administrative Regulations Applicable to Residential Tenancies.

Wisconsin Administrative Code, c. ATCP 134, contains rules and regulations on written rental agreements, tenant deposit receipts, earnest money and security deposits, promises to repair, disclosure requirements and prohibited practices.

21.11 LEASES:

See topic 21.10 Landlord and Tenant.

21.12 PARTITION:

Partition of Real Property.

Person having interest in real property jointly or in common with others may sue for judgment partitioning such interest unless prohibited by statute or by agreement between parties. (Wis. Stat. § 842.02[1]). Plaintiff may demand judgment of partition in kind or may seek judicial sale of land or interest and division of proceeds. (Wis. Stat. § 842.02[2]). If court finds that land or any portion thereof is so situated that partition cannot be made without prejudice to owners, and there are no tenants or lienholders, it may order sheriff to sell premises so situated at public auction. (Wis. Stat. § 842.17[1]).

Partition of Personal Property.

Owners of personal property in common may commence action to effect division of property. (Wis. Stat. § 820.01). Such action shall be tried by court and if in its opinion division of property can be had without sale thereof, judgment shall be given and property shall be divided. (Wis. Stat. § 820.01). If court determines that division cannot be made without injury to interested parties, court may order sale of property by sheriff, and proceeds shall be divided. (Wis. Stat. § 820.02).

21.13 PERPETUITIES:

Common law rule not in effect. (Wis. Stat. § 700.16[5]).

Suspension of Power of Alienation.

Every future interest or trust is void if it suspends power of alienation for period longer than life or lives in being plus 30 years. Power is suspended when there are no persons in being who, alone or with others, can convey an absolute fee in possession of land or full ownership of personalty. Period computed from creation of estate or trust, but: (1) If settlor has power to revoke trust, period computed from termination of power to revoke; (2) if created by exercise of power of appointment, from date of exercise. If trustee has power to sell, or if an unlimited power to terminate in some person, there is no suspension of power of alienation and trust may be perpetual. (258 Wis. 65, 45 N.W. 2d 94). No application to transfers for charitable purposes, to literary or charitable corporations, to veteran’s memorial organization, to cemetery corporations, to state society of physicians and surgeons, to employees’ trusts, to transfers under c. 703 (condominium act). (Wis. Stat. § 700.16[4]).

21.14 PERSONAL PROPERTY:

Personal property defined as money, goods, chattels, things in action, evidences of debt and energy. (Wis. Stat. § 990.01[27]). General rules as to types of estates and suspension of power of alienation are same as rules for real property. (Wis. Stat. § 700.01[5]). Personal property owned by married persons is subject to Wisconsin’s modified form of community property known as marital property. See category 14 Family, topic 14.09 Husband and Wife. Tenancy by entirety is not recognized. (197 Wis. 56, 221 N.W. 417). See topics 21.13 Perpetuities, 21.16 Real Property. Provision is made for partition of personal property owned in common by c. 820.

21.15 POWERS OF ATTORNEY:

Attorneys in Fact.

Conveyance of real property signed by one purporting to act as agent is invalid against purported principal unless agent is expressly authorized and authorizing principal is identified in conveyance. (Wis. Stat. § 706.03[1m]). Power of attorney may be recorded and must meet all requirements as to formalities of execution as deeds. (Wis. Stat. §§ 706.001[1]; 706.05[1], [2]). See topic 21.06 Deeds. Revocation of recorded authority to convey lands ineffective until also recorded or until agent has notice of death of principal. (Wis. Stat. § 706.08[7]).

Death of principal revokes agent’s authority when agent has notice of death, except as to one dealing with agent in good faith without notice of principal’s death. (Wis. Stat. §§ 706.08[7]; 243.06).

Form.

See form of Wisconsin Basic Power of Attorney for Finances and Property at end of this digest. (Wis. Stat. § 243.10[1]).

Members of Armed Forces.

Commissioned officer on active duty in military service of U.S., under authority granted by law of U.S., is competent under Wisconsin law to perform notarial acts. (Wis. Stat. § 706.07[5]).

Uniform Durable Power of Attorney Act has been adopted (1979, adopted 1981, last am’d by Wisconsin in 2006). Applicable to powers of attorney created on or after May 1, 1982. (Wis. Stat. § 243.07).

Health Care Power of Attorney.

Adult may designate another individual as health care agent to make health care decisions if principal lacks capacity to make decisions. (Wis. Stat. §§ 155.01; 155.05). To be valid, designation must be: (1) In writing; (2) dated and signed by principal or by individual at least 18 years old at direction and in presence of principal; (3) witnessed by at least two persons; and (4) voluntarily executed. (Wis. Stat. § 155.10[1]). Witnesses to execution of document must be at least 18 years of age and may not, at time document is executed, be any of following: (1) Related to principal by blood, adoption, or marriage; (2) have knowledge of entitlement to any portion of principal's estate; (3) financially responsible for principal's health care; (4) principal's health care provider at time of execution; (5) principal's health care agent. (Wis. Stat. § 155.10[2]). Health care power of attorney instrument must include either notice set forth in § 155.30(1) or certificate signed by principal's lawyer stating "I am a lawyer authorized to practice law in Wisconsin. I have advised my client concerning his or her rights in connection with this power of attorney for health care and the applicable law." (Wis. Stat. § 155.30[2]). Statutory form of power of attorney for health care instrument is set forth in § 155.30.

No health care facility or provider may be criminally charged, held civilly liable, or charged with unprofessional conduct for complying with terms of power of attorney for health care instrument which complies with c. 155 or decision of health care agent made under power of attorney which complies with c. 155. (Wis. Stat. § 155.50[1][c]). No health care agent may be criminally charged or held civilly liable for making good faith decision under power of attorney for health care instrument which complies with c. 155. (Wis. Stat. § 155.50[3]).

21.16 REAL PROPERTY:

Interests in property are classified by duration as either fee simple absolute, defeasible fee simple, interest for life, interest for years, periodic interest or interest at will. (Wis. Stat. § 700.02). Interests are classified by entitlement to time of enjoyment of benefits of property as either present interest or future interest, future interest being either reversion, possibility of reverter, power of reacquisition, or remainder. (Wis. Stat. §§ 700.03-.04). Future interests are transferable, descendible and devisable in same manner as present interests. (Wis. Stat. § 700.07).

General rule is that all transfers to two or more persons are construed to create tenancy in common and not joint tenancy unless document expresses intent to create joint tenancy. (Wis. Stat. §§ 700.17-.19). Transfer to married person is governed by marital property system. Husband and wife take homestead as survivorship marital property unless document or marital property agreement expresses different intent. (Wis. Stat. § 766.605). See category 14 Family, topic 14.09 Husband and Wife. If joint tenant unlawfully and intentionally kills another joint tenant of same property, killer has no right of survivorship. (Wis. Stat. § 700.17[2][b]). Estates by entirety are abolished. (229 Wis. 426, 282 N.W. 585). See topics 21.05 Curtesy, Deeds, Dower, Landlord and Tenant; categories 5 Civil Actions and Procedure, topic Partition; Debtor and Creditor, topic Homesteads; Family, topic Husband and Wife; Mortgages, topic Mortgages of Real Property.

Actions concerning real property are governed by cc. 840-844, 846-847.

Rule in Shelley's Case is abolished. (Wis. Stat. § 700.10).

Uniform Vendor and Purchaser Risk Act has been adopted (1935, adopted 1941). (Wis. Stat. § 706.12).

Foreign Conveyances or Encumbrances.

See category 10 Documents and Records, topics 10.01 Acknowledgments, 10.04 Records.

Condominiums.

Condominium Ownership Act, not Uniform Act, adopted. (c. 703).

Uniform Conservation Easement Act has been adopted (adopted 1982, last am'd in Wisconsin in 2006). (c. 700.40).

See topics 21.05 Curtesy, Deeds, Dower, Landlord and Tenant, Partition; see categories 8 Debtor and Creditor, topic Homesteads; Family, topic Husband and Wife; Mortgages, topic Mortgages of Real Property; and Business Regulation and Commerce, topic Securities.

21.17 TRUST DEEDS:

See category 20 Mortgages, topic 20.04 Mortgages of Real Property.

22 TAXATION

22.01 ADMINISTRATION:

STATE TAXES.

WISCONSIN DEPARTMENT OF REVENUE, HEADED BY SECRETARY OF REVENUE, HAS GENERAL SUPERVISION OF ADMINISTRATION OF TAX LAWS.

PENALTIES.

PROPERTY TAXES.

INTEREST IS CHARGED ON DELINQUENT PROPERTY TAXES AT 1% PER MONTH. (WIS. STAT. § 74.47[1]). IN ADDITION, PENALTY OF UP TO 0.5% PER MONTH MAY BE IMPOSED BY COUNTY OR CITY ORDINANCE. (WIS. STAT. § 74.47[2]). INTENTIONAL FALSE STATEMENT OR OMISSION OF PERSONAL PROPERTY FROM RETURN IS SUBJECT TO FORFEITURE OF $10 FOR EVERY $100 SO WITHHELD FROM KNOWLEDGE OF ASSESSOR. (WIS. STAT. § 70.36). ABSENT SHOWING OF REASONABLE CAUSE, FAILURE TO SUBMIT ANNUAL MANUFACTURING PROPERTY TAX REPORTS RESULTS IN PENALTY. (WIS. STAT. § 70.995[12][C]).

INCOME AND FRANCHISE TAXES.

INTEREST CHARGED ON UNPAID INCOME TAXES AT 12% PER YEAR AND REFUNDED INCOME TAXES BEAR INTEREST AT 9% PER YEAR. DELINQUENT INCOME AND FRANCHISE TAXES BEAR INTEREST AT 1.5% PER MONTH UNTIL PAID. (WIS. STAT. § 71.82). VARIOUS INCOME TAX PENALTIES ARE PROVIDED, INCLUDING CRIMINAL PENALTIES FOR CORPORATE OFFICERS MAKING FALSE RETURNS AND FOR OTHER PERSONS WHO FAIL OR REFUSE TO MAKE REQUIRED RETURN (WIS. STAT. § 71.83), AS WELL AS MONEY PENALTIES FOR INCOMPLETE RECORDS, DELINQUENT PAYMENTS, LATE FILING OF RETURNS, FALSE OR FRAUDULENT RETURNS, NEGLIGENCE, FAILING TO FILE CORPORATE RETURNS AND VARIOUS MATTERS RELATING TO TAXES WITHHELD FROM EMPLOYEES.

SALES AND USE TAXES.

SALES AND USE TAX PENALTIES ARE PROVIDED FOR DELINQUENT PAYMENTS, NEGLIGENCE, AND FAILURE TO FILE OR FILING OF FALSE OR FRAUDULENT RETURNS, PLUS CRIMINAL PENALTIES FOR FALSE OR FRAUDULENT RETURNS, ENGAGING IN BUSINESS AS SELLER WITHOUT PERMIT, MISUSING RESALE PERMIT AND FAILING TO COLLECT USE TAX. (WIS. STAT. §§ 77.52[12], [16]; 77.53[8]; 77.60). INTEREST IS CHARGED

ON UNPAID SALES AND USE TAXES AT 12% PER YEAR AND ALL REFUNDED TAXES BEAR INTEREST AT 9% PER YEAR. (WIS. STAT. § 77.60[1]). DELINQUENT SALES AND USE TAXES BEAR INTEREST AT 1.5% PER MONTH UNTIL PAID. (WIS. STAT. § 77.60[2]).

INTERSTATE COOPERATION.

COLLECTION.

RECIPROCITY WITH STATES THAT WILL ENFORCE WISCONSIN TAX LIABILITIES IS PROVIDED FOR COLLECTION OF ALL TAXES, INCLUDING PENALTIES AND INTEREST. (WIS. STAT. § 757.47).

UNIFORM ACT ON INTERSTATE ARBITRATION OF DEATH TAXES, AS AMENDED, HAS BEEN ADOPTED. (WIS. STAT. § 72.35). §§ 7, 10, 12, 13 AND 14 OF UNIFORM ACT NOT ADOPTED AND OTHER MINOR WORDING CHANGES MADE.

WITHHOLDING.

WISCONSIN HAS WITHHOLDING RECIPROCITY AGREEMENTS WITH ILLINOIS, INDIANA, KENTUCKY, MICHIGAN AND MINNESOTA TO EFFECT THAT PERSONAL SERVICE INCOME SHALL BE TAXED BY EMPLOYEE'S STATE OF RESIDENCE RATHER THAN STATE OF EMPLOYMENT. (TAX RULE 2.02).

22.02 ALCOHOL, BEVERAGES AND TOBACCO TAXES:

ALCOHOLIC BEVERAGES TAXED UNDER CC. 125 AND 139.

CIGARETTE AND TOBACCO TAXES.

CIGARETTES AND OTHER TOBACCO PRODUCTS SUBJECT TO EXCISE TAXES. (WIS. STAT. §§ 139.31, .76). THERE ARE TAXES ON USE OF CIGARETTES AND OTHER TOBACCO PRODUCTS IF EXCISE TAXES ARE NOT PAID, UNLESS EXEMPT. (WIS. STAT. §§ 139.33, .78).

22.03 BUSINESS TAXES:

OCCUPATIONAL TAXES ARE IMPOSED ON CERTAIN OCCUPATIONS: MINING METALLIFEROUS MINERALS (WIS. STAT. §§ 70.37-.395); IRON ORE CONCENTRATE DOCKS (WIS. STAT. § 70.40); GRAIN STORAGE (WIS. STAT. § 70.41); COAL DOCKS (WIS. STAT. § 70.42); OIL REFINERY (WIS. STAT. § 70.421); FERMENTED MALT BEVERAGES (WIS. STAT. § 139.02); INTOXICATING LIQUORS (WIS. STAT. § 139.03). SEVERANCE TAX IS IMPOSED ON PRODUCERS WHO SEVER OIL OR GAS FROM SOIL OR WATER OF STATE. (WIS. STAT. § 70.397).

SEE ALSO CATEGORIES 3 BUSINESS REGULATION AND COMMERCE, TOPIC WAREHOUSEMEN; INSURANCE, TOPIC INSURANCE COMPANIES.

22.03A CONTROLLED DANGEROUS SUBSTANCES TAX:

MARIJUANA AND CONTROLLED SUBSTANCES TAX.

DEALERS IN CONTROLLED SUBSTANCES REQUIRED TO PAY OCCUPATIONAL TAX BY PURCHASING STAMPS AND AFFIXING THEM TO SUCH SUBSTANCES ACCORDING TO STATUTORY SCHEDULES. (WIS. STAT. §§ 139.87-.96; 961.14-.16).

22.04 [RESERVED]

22.05 EMPLOYMENT TAXES:

UNEMPLOYMENT COMPENSATION TAX.

EMPLOYER MUST “CONTRIBUTE” TO UNEMPLOYMENT RESERVE FUND AT INITIAL RATE OF PAYROLL FOR EACH OF FIRST THREE YEARS THAT CONTRIBUTIONS ARE CREDITED TO EMPLOYER’S ACCOUNT AND THEREAFTER AT RATE BASED ON HIS ACTUAL CONTRIBUTION AND BENEFIT EXPERIENCE. FOR 2010, NEW EMPLOYERS CONTRIBUTE AT INITIAL RATE OF 3.6% AND, IF PAYROLL EXCEEDS $500,000, AT RATE OF 4.1%. CONSTRUCTION EMPLOYERS CONTRIBUTE AT INITIAL RATE BASED UPON AVERAGE RATE FOR CONSTRUCTION INDUSTRY EMPLOYERS AS DETERMINED BY DEPARTMENT WHICH IS RECALCULATED EACH YEAR. FOR 2010, NEW EMPLOYER RATE FOR CONSTRUCTION COMPANIES IS 6.6%. (WIS. STAT. § 108.18). “PAYROLL” INCLUDES ALL WAGES PAID FOR GIVEN PERIOD, EXCEPT THAT IT DOES NOT INCLUDE MORE THAN FIRST $10,500 PAID TO ANY EMPLOYEE DURING ANY CALENDAR YEAR PRIOR TO 2009. FOR 2009 AND 2010, “PAYROLL” INCLUDES ONLY FIRST $12,000 OF WAGES; FOR 2011 AND 2012, ONLY FIRST $13,000; FOR YEARS AFTER 2012, ONLY FIRST $14,000. (WIS. STAT. § 108.02[21][B]). EMPLOYER MUST ALSO CONTRIBUTE TO ADMINISTRATION FUND 0.55% OF HIS ANNUAL PAYROLL, BUT THIS RATE MAY BE LOWERED IF SUM SO SECURED IS IN EXCESS OF REQUIREMENTS. (WIS. STAT. § 108.19). REPORTS AND PAYMENTS MUST BE MADE TO DEPARTMENT OF WORKFORCE DEVELOPMENT AS IT PRESCRIBES. (WIS. STAT. §§ 108.14 AND.17).

22.06 ENVIRONMENTAL TAXES:

RECYCLING SURCHARGE.

CORPORATIONS, PARTNERSHIPS, LIMITED LIABILITY COMPANIES, SOLE PROPRIETORSHIPS AND CERTAIN INDIVIDUALS, ESTATES AND TRUSTS SUBJECT TO RECYCLING SURCHARGE FOR PRIVILEGE OF DOING BUSINESS IN WISCONSIN. (WIS. STAT. § 77.93). FOR TAX YEARS BEGINNING AFTER DEC. 31, 1999, SURCHARGE IMPOSED AT 3% ON “GROSS TAX LIABILITY” OF CORPORATION, 0.2% ON “NET INCOME” OF TAX-OPTION CORPORATION (“S-CORPORATION”), AND 0.2% ON “NET BUSINESS INCOME” OF INDIVIDUAL, PARTNERSHIP, LIMITED LIABILITY COMPANY, ESTATE OR TRUST WITH MINIMUM SURCHARGE OF $25 AND MAXIMUM SURCHARGE OF $9,800. (WIS. STAT. § 77.94). SURCHARGE DOES NOT APPLY TO CORPORATIONS, TAX-OPTION CORPORATIONS, INSURANCE COMPANIES AND NATURAL PERSONS AND ENTITIES ENGAGED IN FARMING WITH $4,000,000 OR LESS OF GROSS RECEIPTS. (WIS. STAT. § 77.94). SURCHARGE IMPOSED UPON TAX-OPTION CORPORATION, PARTNERSHIP AND LIMITED LIABILITY COMPANY, NOT THEIR RESPECTIVE SHAREHOLDERS, PARTNERS OR MEMBERS, THOUGH SHAREHOLDERS, PARTNERS AND MEMBERS ARE JOINTLY AND SEVERALLY LIABLE FOR PAYMENT. (WIS. STAT. § 77.93). SURCHARGE REPORTED ON TAXPAYER’S WISCONSIN INCOME OR FRANCHISE TAX RETURN, AND SURCHARGE GENERALLY ADMINISTERED IN SAME WAY AS INCOME AND FRANCHISE TAXES. (WIS. STAT. § 77.96). SPECIAL ESTIMATED PAYMENT PROVISIONS APPLY. (WIS. STAT. § 77.947).

OTHER ENVIRONMENTAL FEES AND TAXES.

SOLID OR HAZARDOUS WASTE LICENSE AND REVIEW FEES (WIS. STAT. §§ 289.61; 291.05[7]); WASTE TONNAGE FEES (WIS. STAT. § 289.62); GROUND WATER AND WELL COMPENSATION FEES (WIS. STAT. § 289.63); SOLID WASTE FACILITY SITING BOARD FEES (WIS. STAT. § 289.64); ENVIRONMENTAL REPAIR FEES (WIS. STAT. § 289.67); RECYCLING FEES (WIS. STAT. § 289.645); AIR POLLUTION FEES (WIS. STAT. § 285.69); WATER LOSS AND WETLANDS FEES (WIS. STAT. § 281.22); WATER POLLUTION

FEES (WIS. STAT. §§ 281.48[4S][D]; 283.31[7]); SEPTIC TANK SERVICING LICENSE FEES (WIS. STAT. § 281.48[4S][A]); NEWSPAPER RECYCLING FEES (WIS. STAT. § 287.31).

22.07 ESTATE TAX:

FOR DEATHS OCCURRING FROM OCT. 1, 2002 THROUGH DEC. 31, 2007, MAXIMUM THAT COULD PASS FREE OF WISCONSIN ESTATE TAX WAS $675,000, REGARDLESS OF INCREASE IN FEDERAL ESTATE TAX EXEMPTION AMOUNTS. THIS TEMPORARY LAW EXPIRED ON DEC. 31, 2007. AS RESULT, DEATHS OCCURRING AFTER DEC. 31, 2007 WILL NOT BE SUBJECT TO WISCONSIN ESTATE TAX. THIS RESULT SUBJECT TO AMENDMENT BY WISCONSIN LEGISLATURE. (WIS. STAT. §§ 72.01; 72.02).

APPORTIONMENT AGAINST INTER VIVOS DISPOSITIONS.

NO STATUTES ON APPORTIONMENT OF EITHER STATE OR FEDERAL ESTATE TAX.

22.08 GASOLINE AND SPECIAL FUELS TAXES:

GASOLINE AND OTHER MOTOR VEHICLE AND AVIATION FUEL TAXED UNDER C. 78.

22.09 GIFT TAX:

GIFT TAX REPEALED FOR 1992 AND THEREAFTER.

22.10 [RESERVED]

22.11 INCOME TAX:

INCOME AND FRANCHISE TAXES ARE ADMINISTERED BY WISCONSIN DEPARTMENT OF REVENUE, P.O. BOX 8903, MADISON, WISCONSIN 53708.

LIMITATIONS ON ASSESSMENT.

NONE IF FRAUD OR NO RETURN FILED; SIX YEARS FROM LATER OF FILING OR DUE DATE OF RETURN IF MORE THAN 25% NET INCOME OMITTED AND TAX DEFICIENCY EXCEEDS $100; OTHERWISE, FOUR YEARS FROM LATER OF FILING OR DUE DATE OF RETURN; FOUR YEARS AFTER DISCOVERY BY DEPARTMENT IF FEDERAL ADJUSTMENT IS NOT REPORTED BY TAXPAYER TO DEPARTMENT WITHIN 90 DAYS. (WIS. STAT. §§ 71.76; 71.77).

APPEAL AND REFUND.

PETITION FOR REDETERMINATION MUST BE FILED WITH DEPARTMENT WITHIN 60 DAYS AFTER NOTICE OF ADDITIONAL ASSESSMENT, REFUND, OR DENIAL OF REFUND CLAIM. (WIS. STAT. § 71.88[1]). IF DENIED, PETITION FOR REVIEW MUST BE FILED WITH TAX APPEALS COMMISSION WITHIN 60 DAYS. (WIS. STAT. §§ 71.88[2]; 73.01[5]). CLAIM FOR REFUND OF AMOUNT PAID ON ORIGINAL RETURN MUST BE FILED WITH DEPARTMENT WITHIN FOUR YEARS OF DATE ON WHICH TAX RETURN WAS DUE, OR WITHIN TWO YEARS OF ASSESSMENT IF TAX ASSESSED BY OFFICE OR FIELD AUDIT AND ASSESSMENT NOT PROHIBITED. CLAIM FOR REFUND MUST BE FILED ON FORM PRESCRIBED OR APPROVED BY DEPARTMENT. (WIS. STAT. § 71.75).

INCOME TAXED—INDIVIDUALS AND FIDUCIARIES.

WISCONSIN GROSS INCOME.

INCOME TAX IMPOSED ON ENTIRE NET INCOME OF RESIDENT INDIVIDUALS, RESIDENT ESTATES, AND RESIDENT TRUSTS, AND ON INCOME DERIVED FROM WISCONSIN FOR NONRESIDENT INDIVIDUALS AND TRUSTS. (WIS. STAT. § 71.02[1]). WISCONSIN INCOME INCLUDES INCOME DERIVED FROM COVENANT NOT TO COMPETE TO EXTENT SUCH COVENANT IS ATTRIBUTABLE TO WISCONSIN-BASED ACTIVITY. (WIS. STAT. § 71.02[1]). WISCONSIN TAXABLE INCOME IS BASED ON FEDERAL ADJUSTED GROSS INCOME AS DETERMINED UNDER INTERNAL REVENUE CODE. (WIS. STAT. §§ 71.01[13], [16]). WISCONSIN ADJUSTED GROSS INCOME IS FEDERAL ADJUSTED GROSS INCOME WITH CERTAIN ADDITION AND SUBTRACTION MODIFICATIONS. (WIS. STAT. §§ 71.01[13], [16]). SUBTRACTION FROM FEDERAL ADJUSTED GROSS INCOME UP TO $10,000 OF UNREIMBURSED TRAVEL EXPENSES, LODGING EXPENSES AND LOST WAGES IF TAXPAYER OR DEPENDENT, WHILE LIVING, DONATES ONE OR MORE ORGANS TO ANOTHER HUMAN BEING. (WIS. STAT. § 71.05[10][I]). SUBJECT TO NUMEROUS SPECIFIED EXCEPTIONS, “INTERNAL REVENUE CODE” FOR TAX YEARS BEGINNING AFTER DEC. 31, 2008 MEANS CODE AS AMENDED TO DEC. 31, 2008. (WIS. STAT. § 71.01[6][UM]). THIS DEFINITION GENERALLY IS UPDATED EACH YEAR, BUT ALWAYS WITH ADDITIONAL SPECIFIED EXCEPTIONS. ANY OTHER FEDERAL LAWS ENACTED AFTER DEC. 31, 2008, DO NOT APPLY FOR WISCONSIN TAX PURPOSES.

WISCONSIN STANDARD DEDUCTION.

FOR NATURAL PERSONS WHO HAVE NOT ELECTED FEDERAL STANDARD DEDUCTION OR FEDERAL TAX TABLES BASED ON ADJUSTED GROSS INCOME, WISCONSIN TAXABLE INCOME IS WISCONSIN ADJUSTED GROSS INCOME LESS WISCONSIN STANDARD DEDUCTION. (WIS. STAT. § 71.05[22]).

FOR 2009 AND THEREAFTER, SUBJECT TO LIMITATIONS FOR DEPENDENTS WHO FILE RETURNS, STANDARD DEDUCTION IS AS FOLLOWS:

WISCONSIN AGI	*AMOUNT*
SINGLE	
$0-$13,609	$9,440
$13,610-$92,277	$9,440 LESS 12% OF AGI OVER $13,610
$92,278 OR OVER	$0
HEAD OF HOUSEHOLD	
$0-$13,609	$12,190
$13,610-39,763	$12,190 LESS 22.515% OF AGI OVER $13,610
$39,764-92,277	$9,440 LESS 12% OF AGI OVER $13,610
$92,278 OR OVER	$0
MARRIED FILING JOINTLY	
$0-$19,099	$17,010
$19,100-105,105	$17,010 LESS 19.778% OF AGI OVER $19,100
$105,106 OR OVER	$0
MARRIED FILING SEPARATELY	
$0-9,069	$8,080
$9,070-49,923	$8,080 LESS 19.778% OF AGI OVER $9,070
$49,924 OR OVER	$0

(WIS. STAT. §§ 71.05[22][DP], [DT]); WISCONSIN DEPT. OF REVENUE 2009 TAX TABLES.

STANDARD DEDUCTION AMOUNTS ARE INCREASED ANNUALLY ACCORDING TO FEDERAL CONSUMER PRICE INDEX. (WIS. STAT. § 71.05[22][DT]).

PERSONAL EXEMPTIONS.

IN COMPUTING WISCONSIN TAXABLE INCOME, TAXPAYERS MAY SUBTRACT FOLLOWING AMOUNTS FROM WISCONSIN AGI:

FOR 2001 AND THEREAFTER: $700 FOR TAXPAYER PLUS $250 IF 65 OR OLDER; $700 FOR SPOUSE PLUS $250 IF SPOUSE IS 65 OR OLDER (BUT NO SPOUSAL EXEMPTION IF SPOUSE IS FILING SEPARATELY OR AS HEAD OF HOUSEHOLD); AND $700 FOR EACH ADDITIONAL DEPENDENT PROPERLY CLAIMED FOR FEDERAL TAX PURPOSES. (WIS. STAT. § 71.05[23][B]).

TAX RATES.

TAX RATES FOR 2009 ARE AS FOLLOWS:

TAXABLE INCOME			
SINGLE, HEAD OF HOUSEHOLD, ESTATES AND TRUSTS	*MARRIED FILING JOINTLY*	*MARRIED FILING SEPARATELY*	*RATE OF TAX*
$0-$10,220	$0-13,620	$0-$6,810	4.60%
$10,221-20,440	$13,621-27,250	$6,811-13,620	6.15%
$20,441-153,280	$27,251-204,370	$13,620-102,190	6.50%
$153,281-225,000	$204,371-300,000	$102,191-150,000	6.75%
225,001 OR OVER	300,001 OR OVER	150,001 OR OVER	7.75%

(WIS. STAT. §§ 71.06[1P], [2][G], [2][H]); WISCONSIN DEPT. OF REVENUE 2009 TAX TABLES.

FOR 2010 AND THEREAFTER, DOLLAR AMOUNTS DEFINING TAX BRACKETS WILL BE INCREASED ANNUALLY ACCORDING TO FEDERAL CONSUMER PRICE INDEX. (WIS. STAT. § 71.06[2E][B]).

RETURNS FOR INDIVIDUALS ARE SAME AS REQUIRED UNDER FEDERAL LAW. (WIS. STAT. § 71.03). INDIVIDUAL RETURNS ARE FILED WITH AND TAXES PAID TO DEPARTMENT OF REVENUE, P.O. BOX 268, MADISON, WISCONSIN 53790-0001 (IF TAX DUE), OR TO P.O. BOX 59, MADISON, WISCONSIN 53785-0001 (IF REFUND OR NO TAX DUE), OR TO P.O. BOX 34, MADISON, WISCONSIN 53786-0001 (IF HOMESTEAD CREDIT CLAIMED). RETURNS FILED USING IRS-APPROVED PRIVATE DELIVERY SERVICE MUST BE DELIVERED TO 2135 RIMROCK ROAD, MADISON, WISCONSIN 53713.

ESTIMATED TAX PAYMENTS.

ESTIMATED TAX PAYMENT PROVISIONS CONFORM CLOSELY TO FEDERAL PROVISIONS. (WIS. STAT. § 71.09). SUBJECT TO SPECIFIED EXCEPTIONS, EVERY INDIVIDUAL DERIVING TAXABLE INCOME OTHER THAN WAGES AND ALL TRUSTS AND ESTATES MUST FILE DECLARATION OF ESTIMATED TAX. (WIS. STAT. § 71.09).

ALTERNATIVE MINIMUM TAX.

INDIVIDUALS, ESTATES AND TRUSTS MAY BE SUBJECT TO ALTERNATIVE MINIMUM TAX ON PREFERENCE ITEMS WHICH IS EQUAL TO 6.5% OF FEDERAL ALTERNATIVE MINIMUM TAXABLE INCOME WITH CERTAIN MODIFICATIONS. (WIS. STAT. § 71.08).

CREDITS.

SUBJECT TO SPECIFIED LIMITATIONS, TAX CREDITS AVAILABLE TO INDIVIDUALS AND FIDUCIARIES INCLUDE: CLAIM OF RIGHT (WIS. STAT. § 71.07[1]); COMMUNITY DEVELOPMENT FINANCE AUTHORITY (WIS. STAT. § 71.07[2]); DEVELOPMENT ZONES DAY CARE (WIS. STAT. § 71.07[2DD]); DEVELOPMENT ZONES ENVIRONMENTAL REMEDIATION (WIS. STAT. § 71.07[2DE]); DEVELOPMENT ZONES INVESTMENT (WIS. STAT. § 71.07[2DI]); DEVELOPMENT ZONES JOBS (WIS. STAT. § 71.07[2DJ]); DEVELOPMENT ZONES LOCATION (WIS. STAT. § 71.07[2DL]); DEVELOPMENT ZONES CAPITAL INVESTMENT (WIS. STAT. § 71.07[2DM]); DEVELOPMENT ZONES RESEARCH (WIS. STAT. § 71.07[2DR]); DEVELOPMENT ZONES SALES TAX (WIS. STAT. § 71.07[2DS]); DEVELOPMENT ZONES (WIS. STAT. § 71.07[2DX]); ECONOMIC DEVELOPMENT (WIS. STAT. § 71.07[2DY]; FARMLAND PRESERVATION (WIS. STAT. § 71.07[3]); TECHNOLOGY ZONES (WIS. STAT. § 71.07[3G]); BIODIESEL FUEL PRODUCTION (WIS. STAT. § 71.07[3H]); FARMLAND TAX RELIEF (WIS. STAT. § 71.07[3M]); DAIRY AND LIVESTOCK FARM INVESTMENT (WIS. STAT. § 71.07[3N]); DAIRY MANUFACTURING FACILITY INVESTMENT (WIS. STAT. § 71.07[3P]); JOBS (WIS. STAT. § 71.07[3Q]); MEAT PROCESSING FACILITY INVESTMENT (WIS. STAT. § 71.07[3R]); MANUFACTURING SALES TAX AND INVESTMENT (WIS. STAT. §§ 71.07[3S], [3T]); ENTERPRISE ZONE JOBS (WIS. STAT. § 71.07[3W]); HOMESTEAD (WIS. STAT. § 71.07[4]); ITEMIZED DEDUCTIONS (WIS. STAT. § 71.07[5]); EARLY STAGE SEED INVESTMENT (WIS. STAT. § 71.07[5B]); ANGEL INVESTMENT (WIS. STAT. § 71.07[5D]); INTERNET EQUIPMENT (WIS. STAT. § 71.07[5E]); FILM PRODUCTION SERVICES (WIS. STAT. § 71.07[5F]); HEALTH INSURANCE RISK-SHARING PLAN ASSESSMENTS (WIS. STAT. § 71.07[5G]); FILM PRODUCTION COMPANY INVESTMENT (WIS. STAT. § 71.07[5H]); ELECTRONIC MEDICAL RECORDS (WIS. STAT. § 71.07[5I]); ETHANOL AND BIODIESEL FUEL PUMP (WIS. STAT. § 71.07[5J]); COMMUNITY REHABILITATION PROGRAM (WIS. STAT. § 71.07[5K]); WORKING FAMILIES (WIS. STAT. § 71.07[5M]); MARRIED PERSONS (WIS. STAT. § 71.07[6]); VETERANS AND SURVIVING SPOUSES PROPERTY TAX (WIS. STAT. § 71.07[6E]); ARMED FORCES MEMBER (WIS. STAT. § 71.07[6M]); TAXES PAID TO OTHER STATES (WIS. STAT. § 71.07[7]); PERSONAL EXEMPTIONS CREDIT FOR NATURAL PERSONS (WIS. STAT. § 71.07[8]); BEGINNING FARMER AND FARM ASSET OWNER (WIS. STAT. § 71.07[8R]); SCHOOL PROPERTY TAX (WIS. STAT. § 71.07[9]); EARNED INCOME (WIS. STAT. § 71.07[9E]); AND HISTORIC REHABILITATION (WIS. STAT. §§ 71.07[9M] AND [9R]). “ITEMIZED DEDUCTIONS CREDIT” EQUAL TO 5% OF EXCESS OVER STANDARD DEDUCTION OF FOLLOWING FEDERAL ITEMIZED DEDUCTIONS: INTEREST ON PERSONAL RESIDENCE; CHARITABLE CONTRIBUTIONS; CERTAIN MEDICAL EXPENSES; CERTAIN MOVING EXPENSES; CERTAIN JOB EXPENSES AND MISCELLANEOUS DEDUCTIONS. (WIS. STAT. § 71.07[5]).

NONRESIDENTS.

ALL INCOME AND LOSS FOLLOWS RESIDENCE. FOR NONRESIDENT INDIVIDUALS, ESTATES AND TRUSTS, INCOME FROM PERSONAL SERVICES AND PROFESSIONS FOLLOWS SITUS OF SERVICES, INCOME FROM SALE OR RENTAL OF REAL ESTATE OR TANGIBLE PERSONAL PROPERTY OR OPERATION OF FARM, MINE OR QUARRY FOLLOWS SITUS OF PROPERTY, AND INCOME FROM INTANGIBLES FOLLOWS RESIDENCE. WISCONSIN INCOME INCLUDES INCOME DERIVED FROM COVENANT NOT TO COMPETE TO EXTENT SUCH COVENANT IS ATTRIBUTABLE TO WISCONSIN-BASED ACTIVITY. (WIS. STAT. § 71.04[1]).

NONRESIDENT WITHHOLDING.

ESTATES AND TRUSTS THAT ARE TREATED AS PASS-THROUGH ENTITIES REQUIRED TO WITHHOLD TAX ON INCOME OF NONRESIDENT BENEFICIARIES THAT IS ATTRIBUTABLE TO WISCONSIN. (WIS. STAT. § 71.775).

PAYMENT.

REQUIRED IN FULL WITH RETURN, EXCEPT THAT CERTAIN NATURAL PERSONS WITH INCOME OF $10,000 OR LESS AND PRINCIPALLY SUBJECT TO WITHHOLDING MAY FILE RETURN WITHOUT COMPUTING TAX AND DEPARTMENT OF REVENUE WILL BILL FOR ANY TAX DUE. (WIS. STAT. § 71.03[4]).

INCOME TAXED—PARTNERSHIPS.

PARTNERSHIPS, EXCEPT FOR PUBLICLY TRADED PARTNERSHIPS, ARE NOT SUBJECT TO INCOME TAX, BUT PARTNERS ARE TAXED ON THEIR SHARE OF PARTNERSHIP INCOME, WHETHER OR NOT DISTRIBUTED. NONRESIDENT GENERAL AND LIMITED PARTNERS ARE SUBJECT TO TAX ON PROPORTIONATE SHARE OF PARTNERSHIP INCOME, SUBJECT TO APPORTIONMENT AT PARTNERSHIP LEVEL. (WIS. STAT. §§ 71.04[1], [3]; 71.05[9]; 71.19; 71.195; 71.20; 71.21). RETURNS FOR PARTNERSHIPS ARE SAME AS REQUIRED UNDER FEDERAL LAW. (WIS. STAT. § 71.20). PARTNERSHIPS REQUIRED TO WITHHOLD TAX ON INCOME OF NONRESIDENT PARTNERS THAT IS ATTRIBUTABLE TO WISCONSIN. (WIS. STAT. § 71.775).

INCOME TAXED—LIMITED LIABILITY COMPANIES.

LIMITED LIABILITY COMPANIES (BOTH DOMESTIC AND FOREIGN) TAXED AS CORPORATIONS UNDER INTERNAL REVENUE CODE ARE TAXED AS CORPORATIONS IN WISCONSIN. (WIS. STAT. § 71.22[1]). LIMITED LIABILITY COMPANIES (BOTH DOMESTIC AND FOREIGN) NOT TAXED AS CORPORATIONS UNDER INTERNAL REVENUE CODE, AND THEIR MEMBERS, GENERALLY SUBJECT TO SAME WISCONSIN TAX PROVISIONS AS THOSE APPLICABLE TO PARTNERSHIPS AND THEIR PARTNERS. (WIS. STAT. §§ 71.04[1], [3]; 71.05[9]; 71.19; 71.195; 71.20; 71.21; 71.775).

INCOME TAXED—CORPORATIONS.

CORPORATE INCOME AND FRANCHISE TAXES.

FOREIGN AND DOMESTIC CORPORATIONS DOING BUSINESS IN WISCONSIN ARE SUBJECT TO FRANCHISE TAX MEASURED BY ENTIRE WISCONSIN NET INCOME FOR PRECEDING TAX YEAR. (WIS. STAT. § 71.23[2]). CORPORATIONS NOT SUBJECT TO FRANCHISE TAX WHO OWN PROPERTY IN STATE OR WHOSE BUSINESS IN STATE CONSISTS EXCLUSIVELY OF FOREIGN COMMERCE OR INTERSTATE COMMERCE, ARE SUBJECT TO INCOME TAX, WHICH EXCLUDES INCOME TAXATION ON FEDERAL INTEREST AND CERTAIN STATE INTEREST. (WIS. STAT. §§ 71.23[1]; 71.26[3][B]). CORPORATION ENGAGED IN UNITARY BUSINESS WITH ONE OR MORE OTHER CORPORATIONS IN SAME COMMONLY CONTROLLED GROUP MUST REPORT ITS SHARE OF INCOME FROM UNITARY BUSINESS ON COMBINED REPORT FILED BY DESIGNATED AGENT OF GROUP. (WIS. STAT. § 71.255[2][A]).

FOR 1987 AND THEREAFTER, CORPORATE INCOME TAX HAS BEEN "FEDERALIZED" (WIS. STAT. § 71.22) SO THAT WISCONSIN NET INCOME OF CORPORATION MEANS GROSS INCOME COMPUTED UNDER INTERNAL REVENUE CODE: (1) PLUS AMOUNT OF WISCONSIN CREDITS; (2) PLUS LOSSES FROM ASSETS WHICH WOULD HAVE GENERATED EXEMPT GAIN; (3) MINUS DEDUCTIONS COMPUTED UNDER INTERNAL REVENUE CODE (WITH MANY PROVISIONS EXCLUDED OR MODIFIED); AND (4) PLUS OR MINUS DIFFERENCES IN WISCONSIN AND FEDERAL BASIS OF ASSETS SOLD. (WIS. STAT. § 71.26[2][A]). ADDITIONAL ADJUSTMENTS AND MODIFICATIONS MAY APPLY TO CORPORATIONS SUBJECT TO COMBINED REPORTING. (WIS. STAT. § 71.255).

SUBJECT TO NUMEROUS SPECIFIED EXCEPTIONS, "INTERNAL REVENUE CODE" FOR TAX YEARS BEGINNING AFTER DEC. 31, 2008 MEANS CODE AS AMENDED TO DEC. 31, 2008. (WIS. STAT. §§ 71.22[4][UM]; 71.22[4M][SM]; 71.26[2][B][22]). THIS

DEFINITION GENERALLY IS UPDATED EACH YEAR, BUT ALWAYS WITH ADDITIONAL SPECIFIC EXCEPTIONS. ANY OTHER FEDERAL LAWS ENACTED AFTER DEC. 31, 2008, DO NOT APPLY FOR WISCONSIN TAX PURPOSES.

ESTIMATED TAX PAYMENTS.

ESTIMATED TAX PAYMENT PROVISIONS CONFORM CLOSELY TO FEDERAL PROVISIONS. (WIS. STAT. § 71.29).

S CORPORATIONS.

FEDERAL SUBCHAPTER S CORPORATION NET INCOME IS TAXED TO SHAREHOLDERS ON PRO RATA BASIS UNLESS SHAREHOLDERS ELECT OTHERWISE. (WIS. STAT. §§ 71.04[1]; 71.36[1]). S CORPORATION REQUIRED TO WITHHOLD TAX ON INCOME OF NONRESIDENT SHAREHOLDERS THAT IS ATTRIBUTABLE TO WISCONSIN. (WIS. STAT. § 71.775).

TAX RATES.

INCOME AND FRANCHISE TAX RATE FOR CORPORATIONS IS 7.9% OF CORPORATE TAXABLE INCOME. (WIS. STAT. § 71.27).

CREDITS.

SUBJECT TO SPECIFIED LIMITATIONS, CREDITS TO CORPORATIONS INCLUDE: COMMUNITY DEVELOPMENT FINANCE (WIS. STAT. § 71.28[1]); DEVELOPMENT ZONES DAY CARE (WIS. STAT. § 71.28[1DD]); DEVELOPMENT ZONES ENVIRONMENTAL REMEDIATION (WIS. STAT. § 71.28[1DE]); DEVELOPMENT ZONES INVESTMENT (WIS. STAT. § 71.28[1DI]); DEVELOPMENT ZONES JOBS (WIS. STAT. § 71.28[1DJ]); DEVELOPMENT ZONES LOCATION (WIS. STAT. § 71.28[1DL]); DEVELOPMENT ZONE CAPITAL INVESTMENT (WIS. STAT. § 71.28[1DM]); DEVELOPMENT ZONES SALES TAX (WIS. STAT. § 71.28[1DS]); DEVELOPMENT ZONES (WIS. STAT. § 71.28[1DX]); ECONOMIC DEVELOPMENT (WIS. STAT. § 71.28[1DY]); FARMLAND PRESERVATION (WIS. STAT. § 71.28[2]); FARMLAND TAX RELIEF (WIS. STAT. § 71.28[2M]); MANUFACTURING SALES TAX (WIS. STAT. § 71.28[3]) TECHNOLOGY ZONES (WIS. STAT. § 71.28[3G]); BIODIESEL FUEL PRODUCTION (WIS. STAT. § 71.28[3H]); DAIRY AND LIVESTOCK FARM INVESTMENT(WIS. STAT. § 71.28[3N]); DAIRY MANUFACTURING FACILITY INVESTMENT (WIS. STAT. § 71.28[3P]); JOBS (WIS. STAT. § 71.28[3Q]); MEAT PROCESSING FACILITY INVESTMENT (WIS. STAT. § 71.28[3R]); MANUFACTURING INVESTMENT (WIS. STAT. § 71.28[3T]); ENTERPRISE ZONE JOBS (WIS. STAT. § 71.28[3W]); RESEARCH (WIS. STAT. § 71.28[4]); SUPER RESEARCH AND DEVELOPMENT (WIS. STAT. § 71.28[4M]); RESEARCH FACILITIES (WIS. STAT. § 71.28[5]); EARLY STAGE SEED INVESTMENT (WIS. STAT. § 71.28[5B]); INTERNET EQUIPMENT (WIS. STAT. § 71.28[5E]); FILM PRODUCTION SERVICES (WIS. STAT. § 71.28[5F]); HEALTH INSURANCE RISK-SHARING PLAN ASSESSMENTS (WIS. STAT. § 71.28[5G]); FILM PRODUCTION COMPANY INVESTMENT (WIS. STAT. § 71.28[5H]); ELECTRONIC MEDICAL RECORDS (WIS. STAT. § 71.28[5I]); ETHANOL AND BIODIESEL FUEL PUMP (WIS. STAT. § 71.28[5J]); COMMUNITY REHABILITATION PROGRAM (WIS. STAT. § 71.28[5K]); SUPPLEMENT TO FEDERAL HISTORIC REHABILITATION (WIS. STAT. § 71.28[6]); AND BEGINNING FARMER AND FARM ASSET OWNER (WIS. STAT. § 71.28[8R]).

EXEMPTIONS.

EXEMPTION FROM INCOME TAX PROVIDED TO NONPROFIT CORPORATIONS, VETERANS SERVICE ORGANIZATIONS, U.S. AND WISCONSIN POLITICAL UNITS, CERTAIN LOCAL DISTRICTS, CERTAIN AUTHORITIES, SPECIFIED INSURANCE COMPANIES, CREDIT UNIONS, CERTAIN COOPERATIVE ASSOCIATIONS OR CORPORATIONS, BANKS IN LIQUIDATION MENOMINEE INDIAN TRIBE, AND REAL ESTATE MORTGAGE INVESTMENTS CONDUITS THAT ARE EXEMPT UNDER FEDERAL LAW. (WIS. STAT. §§

71.26[1]; 71.45[1]).

APPORTIONMENT.

INCOME, GAIN OR LOSS FROM SALE OF NONBUSINESS REAL PROPERTY OR NONBUSINESS TANGIBLE PERSONAL PROPERTY, RENTAL OF NONBUSINESS REAL PROPERTY OR NONBUSINESS TANGIBLE PERSONAL PROPERTY AND ROYALTIES FROM NONBUSINESS REAL PROPERTY OR NONBUSINESS TANGIBLE PERSONAL PROPERTY ARE NONAPPORTIONABLE AND ARE ALLOCATED TO SITUS OF PROPERTY. (WIS. STAT. § 71.25[5][B]). ALL OTHER CORPORATE INCOME FOLLOWS BUSINESS INCOME RULES, WHICH PROVIDE THAT BUSINESS INCOME EXCEPT FROM UNITARY INTERSTATE BUSINESS FOLLOWS BUSINESS SITUS. THERE ARE SPECIAL RULES FOR FINANCIAL ORGANIZATIONS, AIR CARRIERS, TELECOMMUNICATIONS COMPANIES, PIPELINE COMPANIES, PUBLIC UTILITIES, RAILROADS, SLEEPING CAR COMPANIES, CARLINE COMPANIES, AND CORPORATIONS OR ASSOCIATIONS THAT ARE SUBJECT TO TAX ON UNRELATED BUSINESS INCOME UNDER § 71.26(1)(A). FOR TAXABLE YEARS BEGINNING AFTER DEC. 31, 2007, SINGLE SALES FACTOR APPORTIONMENT WILL BE USED. (WIS. STAT. § 71.25[6]). NUMERATOR OF SALES FACTOR IS SALES TO WISCONSIN DESTINATIONS PLUS 100% OF SALES SHIPPED FROM WISCONSIN TO DESTINATION WHICH DOES NOT HAVE TAX JURISDICTION. (WIS. STAT. § 71.25[9]).

RETURNS FOR CORPORATIONS ARE GENERALLY SAME AS REQUIRED UNDER FEDERAL LAW. (WIS. STAT. §§ 71.24-.25). CORPORATION ENGAGED IN UNITARY BUSINESS WITH ONE OR MORE OTHER CORPORATIONS IN SAME COMMONLY CONTROLLED GROUP MUST REPORT ITS SHARE OF INCOME FROM UNITARY BUSINESS ON COMBINED REPORT FILED BY DESIGNATED AGENT OF GROUP. (WIS. STAT. § 71.255[2][A]). CORPORATE RETURNS ARE FILED WITH AND TAXES PAID TO DEPARTMENT OF REVENUE, P.O. BOX 8908, MADISON, WISCONSIN 53708-8908.

ESTIMATED TAX PAYMENTS.

CORPORATIONS AND TAXABLE INSURANCE COMPANIES MUST FILE DECLARATION OF ESTIMATED TAX. (WIS. STAT. §§ 71.29, 71.48).

WITHHOLDING.

EMPLOYERS ARE REQUIRED TO WITHHOLD INCOME TAX FROM SALARIES AND WAGES OF EMPLOYEES IN FULL (WIS. STAT. § 71.64[1]) BASED UPON WITHHOLDING TABLES PUBLISHED BY DEPARTMENT OF REVENUE (NO FLAT RATE), OR IN ACCORDANCE WITH AGREEMENT WITH EMPLOYEE WHERE LESSER AMOUNT APPROXIMATES ANTICIPATED TAX LIABILITY (WIS. STAT. § 71.64[2]). UNLESS WRITTEN NOTICE IS RECEIVED FROM DEPARTMENT OF REVENUE REQUIRING ALTERNATIVE DEPOSIT SCHEDULE, DEPOSIT REQUIRED BY LAST DAY OF MONTH FOLLOWING CALENDAR QUARTER AND FINAL REPORT BY JAN. 31. (WIS. STAT. § 71.65[3]). DEFINITIONS OF EMPLOYEE, EMPLOYER AND WAGES ARE CONTAINED IN § 71.63. NO WITHHOLDING FROM WAGES OF NONRESIDENT EMPLOYEE IF EMPLOYER REASONABLY ESTIMATES THAT EMPLOYEE WILL EARN LESS THAN $1,500 IN STATE DURING YEAR. (WIS. STAT. § 71.64[6][B]). SPECIAL RULES APPLY FOR WITHHOLDING OF PAYMENTS TO NONRESIDENT ENTERTAINERS. (WIS. STAT. § 71.64[4], [5]). EMPLOYER OF ANY EMPLOYEE DOMICILED IN STATE WITH WHICH WISCONSIN HAS RECIPROCITY UNDER WIS. STAT. § 71.05(2) (AS OF JAN. 1, 2010: ILLINOIS, INDIANA, KENTUCKY AND MICHIGAN) IS NOT REQUIRED TO WITHHOLD FROM WAGES EARNED BY EMPLOYEE IN WISCONSIN. (WIS. STAT. § 71.64[8][A]).

INFORMATIONAL RETURNS.

EMPLOYERS MUST FILE WITHHOLDING REPORTS AND REPORT OF

REMUNERATION EXCLUDED FROM WITHHOLDING BY JAN. 31. (WIS. STAT. § 71.65[2]). BY MAR. 15, CORPORATIONS MUST FILE REPORT ON PAYMENTS FOR SERVICES PERFORMED IN WISCONSIN AND MUST FILE REPORT ON PAYMENTS, INTERESTS, RENTS, ROYALTIES AND DIVIDENDS OF $600 OR MORE TO RESIDENTS, AND ON ALL STOCK TRANSFERS BY RESIDENTS. (WIS. STAT. §§ 71.26[3]; 71.65; 71.69; 71.70[2]; 71.71; 71.72; TAX RULES 2.04, 2.05).

22.12 INHERITANCE TAX:

INHERITANCE TAX REPEALED FOR DEATHS OCCURRING IN 1992 AND THEREAFTER.

22.13 [RESERVED]

22.14 MOTOR VEHICLE TAXES:

ANNUAL AUTO FEE IS $75. (WIS. STAT. § 341.25[1][A]). FOR TAXATION AND REGULATION OF TRUCKS, BUSES, TRAILERS AND AIRCRAFT, SEE CC. 114, 194, 341-349.

22.15 PREMIUM AND PRIVILEGE TAXES:

NONDOMESTIC FIRE, MARINE, CASUALTY, AND SURETY INSURERS ARE LIABLE FOR TAXES BASED ON GROSS PREMIUMS (WIS. STAT. §§ 76.60, 76.63), DOMESTIC LIFE INSURERS LIABLE FOR ANNUAL TAXES BASED ON GROSS INCOME FROM ALL SOURCES, EXCEPT INTEREST ON RESERVES AND PREMIUMS ON ANNUITIES (WIS. STAT. § 76.65[1][A]).

22.16 PROPERTY TAXES:

PROPERTY TAX.

ALL REAL AND PERSONAL PROPERTY IS SUBJECT TO TAX EXCEPT AS IS SPECIFICALLY EXEMPTED. (WIS. STAT. § 70.01).

EXEMPTIONS ARE NUMEROUS, PRINCIPAL ONES BEING EXEMPTION OF GOVERNMENTAL, EDUCATIONAL, RELIGIOUS, AND BENEVOLENT INSTITUTIONS; NONPROFIT HOSPITALS; MOST FARM AND HOUSEHOLD PERSONALTY; WASTE TREATMENT PLANTS AND POLLUTION ABATEMENT EQUIPMENT; INTANGIBLE PERSONALTY; MOTOR VEHICLES; MANUFACTURING MACHINERY AND SPECIFIC PROCESSING EQUIPMENT EXCLUSIVELY AND DIRECTLY USED IN MANUFACTURING TANGIBLE PERSONAL PROPERTY; COMPUTERS AND RELATED PERIPHERAL EQUIPMENT; MERCHANTS’ STOCK-IN-TRADE, MANUFACTURERS’ MATERIALS AND FINISHED PRODUCTS; CERTAIN HISTORIC PROPERTIES; VENDING MACHINES; LIVESTOCK; MOTION PICTURE EQUIPMENT AND NON-CABLE-TELEVISION DIGITAL BROADCASTING EQUIPMENT. (WIS. STAT. §§ 70.11; 70.111; 70.112).

PERSON CLAIMING REAL PROPERTY EXEMPTION MUST SUBMIT REPORT, ON PRESCRIBED FORM, ON OR BEFORE MAR. 31 OF EACH EVEN NUMBERED YEAR. (WIS. STAT. § 70.337). NO EXEMPTION FOR MEMBERS OF ARMED FORCES BUT EXTENDED PAYMENT PRIVILEGES AND OTHER RELIEF PERMITTED. (WIS. STAT. § 321.61).

ASSESSMENT.

TIMING.

ALL NONMANUFACTURING REAL AND PERSONAL PROPERTY IS ASSESSED AS OF JAN. 1 IN EACH YEAR BY LOCALLY APPOINTED OR ELECTED ASSESSOR FOR EACH CITY, TOWN OR VILLAGE. ASSESSMENT MUST BE COMPLETED BY 1ST MON. IN APR. (WIS. STAT. § 70.10), EXCEPT IN MILWAUKEE WHERE ASSESSMENT MUST BE COMPLETED BY 2D MON. IN OCT. AND IN SECOND CLASS CITIES ADOPTING BOARD OF ASSESSORS SYSTEM WHERE ASSESSMENT MUST BE COMPLETED BY LAST MON. IN JULY (WIS. STAT. §§ 70.07; 70.075). COUNTY ASSESSOR SYSTEM MAY BE ESTABLISHED FOR ANY COUNTY. (WIS. STAT. § 70.99). MANUFACTURING PROPERTY ASSESSED AS OF JAN. 1 IN EACH YEAR BY DEPARTMENT OF REVENUE UNDER SPECIAL RULES. (WIS. STAT. § 70.995). MANUFACTURERS MUST SUBMIT ANNUAL REPORT OF PROPERTY ON OR BEFORE MAR. 1. FAILURE TO SUBMIT ANNUAL REPORT RESULTS IN DENIAL OF ANY RIGHT OF REDETERMINATION AND, ABSENT SHOWING OF REASONABLE CAUSE, PENALTIES. (WIS. STAT. § 70.995[12]).

ASSESSED VALUE.

BASIS FOR ASSESSMENT IS “FULL VALUE” FOR REAL PROPERTY AND “TRUE CASH VALUE” FOR PERSONAL PROPERTY, BOTH OF WHICH ARE EQUIVALENT TO FAIR MARKET VALUE. (WIS. STAT. §§ 70.32; 70.34; 184 WIS.2D 203, 516 N.W.2D 383). IN MANY TAXATION DISTRICTS ACTUAL ASSESSMENT IS AT PERCENTAGE OF FULL VALUE WHICH CAN ONLY BE DETERMINED BY ANNUAL INQUIRY TO LOCAL ASSESSING AUTHORITY. FOR COUNTY, SCHOOL, SPECIAL DISTRICT, AND STATE PROPERTY TAX AND OTHER PURPOSES, TOTAL LOCAL ASSESSMENT, WHEN IT VARIES FROM FAIR MARKET VALUE, IS “EQUALIZED” TO FAIR MARKET VALUE UNDER SUPERVISION OF DEPARTMENT OF REVENUE. (WIS. STAT. § 70.57).

SITUS.

REAL PROPERTY IS ASSESSED WHERE IT LIES. (WIS. STAT. § 70.12). PERSONAL PROPERTY IS ASSESSED WHERE LOCATED OR CUSTOMARILY KEPT. PERSONALTY IN TRANSIT WITHIN STATE ON JAN. 1 MUST BE ASSESSED IN DISTRICT WHERE INTENDED TO BE KEPT OR LOCATED OR, IF THERE BE NO FIXED LOCATION, IN DISTRICT WHERE OWNER OR PERSON IN POSSESSION RESIDES. (WIS. STAT. § 70.13). RESIDENCE OF CORPORATION FOR TAX PURPOSES IS ITS PRINCIPAL OFFICE OR PLACE OF BUSINESS. (WIS. STAT. § 70.14). NO CHANGE IN LOCATION NOR SALE OF PERSONAL PROPERTY AFTER JAN. 1 CAN AFFECT ASSESSMENT MADE IN SUCH YEAR. (WIS. STAT. § 70.13[6]).

EXCEPTIONS.

SPECIAL RULES ARE PROVIDED FOR ASSESSMENT OF VESSELS EMPLOYED REGULARLY IN INTERSTATE TRAFFIC. (WIS. STAT. § 70.15). RAILROAD COMPANIES, PIPELINE COMPANIES, CONSERVATION AND REGULATION COMPANIES, SLEEPING CAR COMPANIES, AIR CARRIERS, AND MOST OTHER TRANSPORTATION COMPANIES HAVE THEIR PROPERTY ASSESSED BY DEPARTMENT OF REVENUE UNDER SEPARATE PROVISIONS OF LAW ON AD VALOREM BASIS. (C. 76). CAR LINE COMPANIES AND ELECTRIC COOPERATIVE ASSOCIATIONS ARE SUBJECT TO LICENSE FEE BASED ON GROSS RECEIPTS. (C. 76). SPECIAL PROVISIONS APPLICABLE TO TELEPHONE COMPANIES. (WIS. STAT. §§ 76.80-.84).

PARTY ASSESSED.

REALTY IS ENTERED IN NAME OF OWNER IF KNOWN TO ASSESSOR; OTHERWISE, IN NAME OF OCCUPANT IF KNOWN; AND OTHERWISE WITHOUT ANY NAME. IMPROVEMENTS ON LEASED LANDS MAY BE ASSESSED AS EITHER REAL OR PERSONAL PROPERTY. (WIS. STAT. § 70.17). PERSONAL PROPERTY IS ASSESSED TO OWNER, EXCEPT IT MAY BE ASSESSED TO PARTY IN CHARGE OR POSSESSION. (WIS. STAT. § 70.18[1]). IF ASSESSED, PARTY IN CHARGE HAS PERSONAL RIGHT OF ACTION

AGAINST OWNER FOR TAX AMOUNT AND LIEN ON PROPERTY TAXED UNTIL OWNER PAYS TAXES OR REIMBURSES HIM. (WIS. STAT. § 70.19[2]). PERSONAL PROPERTY TAXES MAY BE ENFORCED BY PERSONAL ACTION AS FOR DEBT AGAINST PERSON IN CHARGE AS WELL AS OWNER. ATTACHMENT MAY ALSO BE ALLOWED IN PROPER CASE. (WIS. STAT. § 70.20). GOODS IN COMMERCIAL WAREHOUSE ARE ASSESSED TO OWNER THEREOF AND NOT TO WAREHOUSE IF OPERATOR OF WAREHOUSE FURNISHES PROPER INFORMATION DIRECTED BY STATUTE. (WIS. STAT. § 70.18[2]). PERSONAL PROPERTY OF PARTNERSHIP MAY BE ASSESSED IN NAME OF PARTNERSHIP OR IN NAMES OF PARTIES COMPOSING PARTNERSHIP, AND EACH PARTNER IS LIABLE FOR TAXES LEVIED THEREON; PERSONAL PROPERTY OF LIMITED LIABILITY PARTNERSHIP IS ASSESSED IN NAME OF PARTNERSHIP AND EACH PARTNER IS JOINTLY LIABLE FOR TAXES LEVIED THEREON; UNDISTRIBUTED PERSONAL PROPERTY OF ESTATE ASSESSED TO PERSONAL REPRESENTATIVE IF DULY APPOINTED AND QUALIFIED AS OF JAN. 1. (WIS. STAT. § 70.21).

POWERS OF ASSESSOR.

TO DETERMINE AMOUNT OF PERSONAL PROPERTY ASSESSABLE, ASSESSOR MAY EXAMINE ANY PERSON OR MANAGING AGENT OR OFFICER OF CORPORATION UNDER OATH AS TO TAXABLE ITEMS OF PERSONAL PROPERTY AND MAY REQUIRE RETURN THEREOF. (WIS. STAT. § 70.35). APPEAL RIGHTS AS TO AMOUNT OF ANY REAL OR PERSONAL PROPERTY ASSESSMENT DENIED IF ASSESSOR'S REASONABLE WRITTEN REQUEST BY CERTIFIED MAIL TO VIEW SUCH PROPERTY REFUSED. (WIS. STAT. § 70.47[7][AA]).

NOTICE.

IF ASSESSMENT OF REAL PROPERTY OR IMPROVEMENTS TAXED AS PERSONAL PROPERTY DIFFERS FROM ASSESSMENT FOR PRIOR YEAR, ASSESSOR MUST NOTIFY PERSON ASSESSED, IF KNOWN, OR OCCUPANT OF PROPERTY IN WRITING AND BY ORDINARY MAIL AT LEAST 15 DAYS BEFORE MEETING OF BOARD OF REVIEW OR 15 DAYS BEFORE MEETING OF BOARD OF ASSESSORS IN 1ST CLASS CITIES AND IN 2D CLASS CITIES THAT HAVE BOARD OF ASSESSORS, OR IF ASSESSMENT ROLL IS NOT COMPLETE AT LEAST 15 DAYS BEFORE ADJOURNMENT OF BOARD. FAILURE TO RECEIVE NOTICE DOES NOT AFFECT VALIDITY OF INCREASED ASSESSMENT, RESULTING PROPERTY TAX INCREASE, REVIEW PROCEDURES, OR ENFORCEMENT OF DELINQUENT TAXES. (WIS. STAT. § 70.365).

OMITTED PROPERTY.

NONMANUFACTURING PROPERTY OMITTED FROM ASSESSMENT MAY BE PLACED ON TAX ROLL AT ANY TIME WITHIN TWO YEARS FROM OMISSION, AS MAY BE ANY PROPERTY ASSESSMENT INCREASED BY LOCAL BOARD OF REVIEW. (WIS. STAT. § 70.44).

APPEAL OF ASSESSMENT.

NONMANUFACTURING PROPERTY.

APPEAL OF ASSESSMENT OF NONMANUFACTURING PROPERTY IS MADE TO BOARD OF REVIEW WHICH MEETS ANNUALLY AT ANY TIME DURING 30-DAY PERIOD BEGINNING ON 2D MON. IN MAY IN TOWN OR VILLAGE HALL OR PLACE DESIGNATED BY TOWN OR VILLAGE BOARD; IN CITIES IN COUNCIL CHAMBER OR PLACE DESIGNATED BY COUNCIL, EXCEPT IN MILWAUKEE IN PLACE DESIGNATED BY ITS COMMISSIONER OF ASSESSMENTS. (WIS. STAT. § 70.47[1]). IN MILWAUKEE, WRITTEN OBJECTION TO AMOUNT OR VALUATION OF PROPERTY MUST BE FILED WITH COMMISSIONER OF ASSESSMENTS (PRESCRIBED FORM MAY BE REQUIRED) BY 3D MON. IN MAY. (WIS.

STAT. § 70.47[16]). ELSEWHERE, OBJECTOR MUST PROVIDE ORAL OR WRITTEN NOTICE OF INTENT TO FILE OBJECTION TO BOARD'S CLERK AT LEAST 48 HOURS BEFORE BOARD'S FIRST SCHEDULED MEETING AND WRITTEN OBJECTION MUST BE FILED WITH BOARD'S CLERK WITHIN TWO HOURS OF COMMENCEMENT OF SUCH MEETING, ALTHOUGH BOARD MAY EXTEND DEADLINES UNDER CERTAIN CIRCUMSTANCES. (WIS. STAT. §§ 70.47[7][A], [16]). HEARING IS ON 48 HOURS NOTICE UNLESS WAIVED. (WIS. STAT. §§ 70.47[7], [16][A]). EVIDENCE MUST BE BY SWORN TESTIMONY. (WIS. STAT. § 70.47[8]). APPEAL FROM BOARD OF REVIEW IS EITHER BY: (1) ACTION FOR CERTIORARI, TO BE COMMENCED WITHIN 90 DAYS AFTER TAXPAYER RECEIVES NOTICE OF BOARD OF REVIEW DECISION; (2) COMPLAINT TO DEPARTMENT OF REVENUE THAT ASSESSMENT OF PROPERTY IS RADICALLY OUT OF PROPORTION TO AVERAGE ASSESSMENT IN DISTRICT, TO BE FILED WITHIN 20 DAYS AFTER RECEIPT OF DETERMINATION BY BOARD; OR (3) CLAIM FOR RECOVERY OF EXCESSIVE ASSESSMENT, TO BE FILED BY JAN. 31ST OF YEAR IN WHICH TAX BASED ON CONTESTED ASSESSMENT IS PAYABLE. (WIS. STAT. §§ 70.47[13]; 70.511[2][B]; 70.85[1], [7][B]; 74.37; 81 WIS.2D 612, 260 N.W.2D 773). TAXPAYER ACTION FOR RECOVERY OF UNLAWFUL TAXES PAID LIMITED TO CERTAIN ENUMERATED CASES OF ERROR. (WIS. STAT. §§ 74.33; 74.35).

MANUFACTURING PROPERTY.

APPEAL OF AMOUNT OF ASSESSMENT OR VALUATION OR TAXABILITY OF PROPERTY IN MANUFACTURING PROPERTY CASE BY PERSON ASSESSED, AGENT, OR MUNICIPALITY WHERE PROPERTY IS LOCATED IS TO STATE BOARD OF ASSESSORS, THEN TAX APPEALS COMMISSION, THEN DANE COUNTY CIRCUIT COURT. (WIS. STAT. §§ 70.995[8], [9]). $45 FILING FEE IS REQUIRED TO APPEAL MANUFACTURING PROPERTY CASE UNLESS FEE HAS BEEN PAID IN RESPECT TO SAME PIECE OF PROPERTY AND THAT APPEAL HAS NOT BEEN FINALLY ADJUDICATED AND OBJECTION IS NOT DEEMED FILED UNTIL FEE IS PAID. (WIS. STAT. § 70.995[8]).

PAYMENT.

PERSONAL PROPERTY TAXES ARE PAYABLE ON OR BEFORE FIVE WORKING DAYS AFTER JAN. 31. (WIS. STAT. § 74.11[4]). REAL ESTATE TAXES GENERALLY MAY BE PAID EITHER IN FULL ON OR BEFORE FIVE WORKING DAYS AFTER JAN. 31 OR, IF TOTAL EXCEEDS $99.99, IN TWO EQUAL INSTALLMENTS, FIRST ON OR BEFORE FIVE WORKING DAYS AFTER JAN. 31 AND SECOND ON OR BEFORE FIVE WORKING DAYS AFTER JULY 31, BUT IF FIRST INSTALLMENT IS NOT PAID ON OR BEFORE FIVE WORKING DAYS AFTER JAN. 31 WHOLE AMOUNT BECOMES DELINQUENT OF FEB. 1. (WIS. STAT. §§ 74.11[2], [7]). LOCAL OPTION MAY ALLOW PAYMENT OF REAL PROPERTY TAXES IN THREE OR MORE INSTALLMENTS, PROVIDED THAT FIRST INSTALLMENT IS PAID ON OR BEFORE FIVE WORKING DAYS AFTER JAN. 31, AT LEAST 50% OF TAXES ARE PAID BEFORE FIVE WORKING DAYS AFTER APR. 30, AND ALL TAXES PAID ON OR BEFORE FIVE WORKING DAYS AFTER JULY 31 (WIS. STAT. § 74.12), EXCEPT THAT MILWAUKEE MAY PERMIT PAYMENT IN TEN EQUAL INSTALLMENTS ON LAST DAY OF EACH MONTH FROM JAN. THROUGH OCT. (WIS. STAT. § 74.87). NO DISCOUNT FOR PREPAYMENT.

PENALTIES.

DELINQUENT INSTALLMENTS DRAW INTEREST AT 1% PER MONTH OR FRACTION THEREOF FROM FEB. 1 OF YEAR AFTER TAX LEVY. (WIS. STAT. § 74.47[1]). IN ADDITION, PENALTY OF UP TO 0.5% PER MONTH MAY BE IMPOSED BY COUNTY ORDINANCE OR, IN MILWAUKEE, BY CITY ORDINANCE. (WIS. STAT. § 74.47[2]).

COLLECTION.

LOCAL DISTRICT TREASURER COLLECTS ALL PAYMENTS MADE BEFORE JAN.

31; COUNTY TREASURER COLLECTS ALL OTHER PAYMENTS. (WIS. STAT. § 74.11[6]). ON SEPT. 1, COUNTY TREASURER ISSUES TAX CERTIFICATE TO COUNTY FOR ALL REAL PROPERTY ON WHICH TAXES REMAIN UNPAID AT CLOSE OF BUSINESS ON AUG. 31, AND WITHIN 90 DAYS THEREAFTER MUST MAIL NOTICE TO EACH OWNER OF RECORD OF PROPERTY INCLUDED IN CERTIFICATE. IF PROPERTY NOT REDEEMED TWO YEARS AFTER ISSUANCE OF TAX CERTIFICATE, COUNTY MAY EITHER TAKE TAX DEED, COMMENCE ACTION TO FORECLOSE CERTIFICATE OR COMMENCE ACTION TO FORECLOSE LIEN REPRESENTED BY CERTIFICATE. (WIS. STAT. §§ 74.57[1], [2]; 74.59[1]), BUT NO TAX DEED ISSUED UNTIL COUNTY FIRST SERVES WRITTEN NOTICE OF APPLICATION TO OWNER (WIS. STAT. § 75.12).

LIEN.

REAL ESTATE AND PERSONAL PROPERTY TAXES LEVIED ARE LIEN ON PROPERTY AGAINST WHICH THEY ARE CHARGED (EFFECTIVE AS OF JAN. 1 IN YEAR LEVIED), WITH LIEN SUPERIOR TO ALL OTHER LIENS (EXCEPT CERTAIN ENVIRONMENTAL LIENS OF DEPARTMENT OF NATURAL RESOURCES). (WIS. STAT. § 70.01).

REDEMPTION.

OWNER HAS FINAL OPPORTUNITY TO REDEEM PROPERTY, PRIOR TO RECORDING OF TAX DEED, FOR AMOUNT EQUAL TO UNPAID TAXES PLUS INTEREST AND PENALTIES PLUS ANY OTHER CHARGES AUTHORIZED BY LAW. (WIS. STAT. § 75.01).

SALE.

COUNTY HAS POWER TO SELL TAX-DEEDED LANDS IN SUCH MANNER AND UPON SUCH TERMS AS COUNTY BOARD MAY BY ORDINANCE OR RESOLUTION DETERMINE. (WIS. STAT. § 75.35[2]). REMAINDER OF PROCEEDS FROM SALE DISTRIBUTED TO FORMER OWNER ONLY IF FORMER OWNER SO REQUESTS OR IF PROPERTY USED AS FORMER OWNER’S HOMESTEAD AT ANY TIME DURING FIVE YEARS PRECEDING COUNTY’S ACQUISITION. (WIS. STAT. §§ 75.36[2M], [4]).

PERSONAL LIABILITY.

COUNTY OR MUNICIPALITY MAY BRING CIVIL ACTION AGAINST PERSON TO RECOVER REAL PROPERTY TAXES AND SPECIAL CHARGES, ASSESSMENTS AND TAXES, DELINQUENT DURING PERIOD PERSON OWNED PROPERTY, PLUS COST OF RAZING PROPERTY AND COST OF ABATING PUBLIC NUISANCE, AND, AS TO A COUNTY OR MILWAUKEE, PROVIDED THAT PROPERTY IS INCLUDED IN TAX CERTIFICATE. (WIS. STAT. § 74.53). DELINQUENT PERSONAL PROPERTY TAX TOGETHER WITH INTEREST AND PENALTIES MAY BE COLLECTED BY CIVIL ACTION BROUGHT WITHIN SIX YEARS OF JAN. 1 OF YEAR IN WHICH TAXES WERE REQUIRED TO BE PAID AND IF JUDGMENT IS RENDERED, PROPERTY SUBJECT TO DELINQUENT TAX NOT EXEMPT FROM LEVY AND SALE ON EXECUTION. (WIS. STAT. § 74.55).

REAL ESTATE CONVEYANCE TAX.

SUBMISSION OF COMPLETED REAL ESTATE TRANSFER RETURN AND COLLECTION OF FEE BY REGISTER OF DEEDS IS PREREQUISITE FOR RECORDING. (WIS. STAT. § 77.22). FORMS FILED ON OR AFTER JULY 1, 2009 MUST BE FILED ELECTRONICALLY. ELECTRONIC FILING REQUIREMENT MAY BE WAIVED IF TAXPAYER FILES WRITTEN APPLICATION SHOWING UNDUE HARDSHIP. (WIS. STAT. § 77.22[2]).

RATE.

REAL ESTATE TRANSFER FEE IS IMPOSED ON GRANTOR OF REAL ESTATE AT RATE OF 30¢ PER $100 OF VALUE. (WIS. STAT. § 77.22).

EXEMPTIONS.

NUMEROUS EXEMPTIONS, INCLUDING: CORRECTING DEEDS; DEEDS PURSUANT TO CORPORATE MERGERS AND CONVERSIONS OF BUSINESS ENTITY TO ANOTHER FORM OF ENTITY; DEEDS BY SUBSIDIARY CORPORATION TO ITS PARENT FOR NO OR NOMINAL CONSIDERATION OR IN CANCELLATION OR TRANSFER OF STOCK BETWEEN PARENT AND SUBSIDIARY; DEEDS BETWEEN SPOUSE, PARENT OR CHILD (INCLUDING STEPCHILDREN AND SPOUSES OF CHILDREN) FOR NO OR NOMINAL CONSIDERATION; DEEDS UNDER, OR IN LIEU OF FORECLOSURE; CERTAIN DEEDS BETWEEN CORPORATIONS, PARTNERSHIPS, OR LIMITED LIABILITY COMPANIES AND THEIR SHAREHOLDERS, PARTNERS, OR MEMBERS; CERTAIN DEEDS TO OR FROM TRUSTEES AND CONVEYANCES BY WILL, DESCENT OR SURVIVORSHIP. (WIS. STAT. § 77.25). CERTAIN EXEMPT CONVEYANCES ALSO EXEMPT FROM RETURN REQUIREMENT. (WIS. STAT. § 77.255).

PENALTIES.

WISCONSIN DEPARTMENT OF REVENUE HAS POWERS TO INVESTIGATE CONVEYANCES, ASSESS ADDITIONAL FEES OR DETERMINE OVERPAYMENT, AND ASSESS PENALTIES IF EXEMPTION IMPROPERLY CLAIMED OR VALUE UNDERSTATED BY 25% OR MORE. (WIS. STAT. § 77.26). ANY PERSON WHO INTENTIONALLY FALSIFIES VALUE ON RETURN MAY BE FINED UP TO $1,000, IMPRISONED UP TO ONE YEAR OR BOTH. (WIS. STAT. § 77.27).

22.17 SALES AND USE TAXES:

GENERAL SALES AND USE TAXES ARE IMPOSED. (WIS. STAT. §§ 77.52-.53).

RATES.

RATE IS 5% OF GROSS RECEIPTS OF TAXABLE SALES, GROSS RECEIPTS FROM TAXABLE SERVICES, AND SALES PRICE OF TAXABLE STORAGE, USE OR OTHER CONSUMPTION. (WIS. STAT. §§ 77.52[1], [2]; 77.53[1]). ANY COUNTY CAN ADOPT ADDITIONAL .5% SALES TAX BY ORDINANCE. (WIS. STAT. §§ 77.70-.71). ANY MUNICIPALITY OR COUNTY WITHIN PREMIER RESORT AREA MAY IMPOSE ADDITIONAL TAX OF .5%. (WIS. STAT. § 77.994). ADDITIONAL .1% PROFESSIONAL BASEBALL PARK DISTRICT SALES AND USE TAX IS IMPOSED IN MILWAUKEE, RACINE, WAUKESHA, OZAUKEE AND WASHINGTON COUNTIES. (WIS. STAT. §§ 77.705; 77.71). ADDITIONAL .5% FOOTBALL STADIUM DISTRICT TAX IN BROWN COUNTY. (WIS. STAT. § 77.706). MILWAUKEE EXPOSITION CENTER DISTRICT, MADE UP OF ALL MUNICIPALITIES LOCATED WHOLLY OR PARTIALLY IN MILWAUKEE COUNTY, IMPOSES FOOD AND BEVERAGE TAX (.25%), ROOM TAX (2% AND ADDITIONAL 7% ON ROOM RENTALS WITHIN CITY OF MILWAUKEE), RENTAL CAR TAX (3%), AND STATE RENTAL FEE FOR LIMOUSINES, MOBILE HOMES, RECREATIONAL VEHICLES, MOTOR HOMES, AND CAMPING TRAILERS (5%). (WIS. STAT. §§ 66.0615; 77.981; 77.99; 77.995). DRY CLEANING FEE OF 2.8%. (WIS. STAT. § 77.9961).

CREDITS.

CREDIT AGAINST USE TAX FOR SALES TAX PAID OTHER STATES ON SAME TRANSACTION. (WIS. STAT. §§ 77.525; 77.53[16]).

TAXABLE TRANSACTIONS.

SALES OF PERSONAL PROPERTY.

ALL RETAIL SALES, LICENSES, LEASES, AND RENTALS OF TANGIBLE PERSONAL PROPERTY IN STATE ARE TAXABLE, EXCEPT THOSE SPECIFICALLY EXEMPT. (WIS. STAT. §§ 77.52[1] AND [1B]).

TAXABLE SERVICES.

SELLING, PERFORMING, OR FURNISHING OF SERVICES DESCRIBED IN STATUTE IMPOSING SALES TAX IS SUBJECT TO TAX UNLESS SPECIFICALLY EXEMPT. (WIS. STAT. § 77.52[2N]). FOLLOWING SERVICES ARE TAXABLE: TRANSIENT LODGING; ADMISSIONS, BINGO AND DUES; TIME-SHARES; MEMBERSHIPS; VACATION SERVICES; TELEGRAPH SERVICE; TELECOMMUNICATIONS SERVICES; INTERNET ACCESS SERVICE; LAUNDRY, DRY CLEANING, ETC.; PHOTOGRAPHIC SERVICES; TOWING OF MOTOR VEHICLES; REPAIR, SERVICE AND MAINTENANCE OF TAXABLE ITEMS, EXCEPT IF TANGIBLE PERSONAL PROPERTY BECOMES ADDITION TO OR CAPITAL IMPROVEMENT OF REAL PROPERTY WHEN INSTALLED; PARKING FOR MOTOR VEHICLES, AIRPLANES AND BOATS; CERTAIN PRINTING, IMPRINTING, FABRICATING AND PROCESSING; CABLE TELEVISION SYSTEMS OR VIDEO SERVICES; SALE OF CONTRACTS, INCLUDING SERVICE CONTRACTS, MAINTENANCE AGREEMENTS, COMPUTER SOFTWARE MAINTENANCE CONTRACTS FOR PREWRITTEN COMPUTER SOFTWARE, AND WARRANTIES, THAT PROVIDE FOR FUTURE PERFORMANCE OF OR PAYMENT FOR REPAIR, SERVICE, ALTERATION, ETC. OF TANGIBLE PERSONAL PROPERTY; LANDSCAPING AND LAWN MAINTENANCE. (WIS. STAT. § 77.52[2][A]).

TAXABLE STORAGE, USE OR OTHER CONSUMPTION.

STORAGE, USE OR OTHER CONSUMPTION OF TANGIBLE PERSONAL PROPERTY AND SERVICES DESCRIBED IN STATUTE IMPOSING SALES TAX IS SUBJECT TO USE TAX UNLESS GROSS RECEIPTS FROM SALE OF SUCH PROPERTY AND SERVICES ARE REPORTED IN MEASURE OF SALES TAX. (WIS. STAT. §§ 77.53[1], [1M]; 77.56[1]).

EXEMPTIONS.

SPECIFIC EXEMPTIONS INCLUDE OUTGOING SALES IN INTERSTATE COMMERCE (WIS. STAT. §§ 77.54[1]; 77.55[2]); INGREDIENTS AND COMPONENT PARTS OF TAXABLE ARTICLES AND SERVICES THEREON AND INGREDIENTS AND COMPONENT PARTS CONSUMED OR DESTROYED OR WHICH LOSE THEIR IDENTITY IN MANUFACTURING (WIS. STAT. § 77.54[2]); INGREDIENTS OF SHOPPERS GUIDES, NEWSPAPERS OR PERIODICALS (WIS. STAT. § 77.54[2M]); TRACTORS AND MACHINES, INCLUDING ACCESSORIES, FOR EXCLUSIVE USE IN FARMING BUSINESS (WIS. STAT. § 77.54[3][A]); SEEDS, PLANTS, LIVESTOCK, ETC. USED EXCLUSIVELY IN FARMING (WIS. STAT. § 77.54[3M]); SALE OR USE OF TANGIBLE PERSONAL PROPERTY BY ELEMENTARY OR SECONDARY SCHOOLS (WIS. STAT. § 77.54[4]); AIRCRAFT AND MOTOR VEHICLES SOLD TO OR USED BY CARRIERS, OR SOLD TO NONRESIDENTS WHOSE ONLY USE IN WISCONSIN IS REMOVAL FROM STATE; MOTOR TRUCKS, TRUCK TRACTORS, ROAD TRACTORS, BUSES, TRAILERS AND SEMITRAILERS SOLD TO AND USED EXCLUSIVELY BY COMMON CARRIERS; MOTOR VEHICLES NOT REQUIRED TO BE LICENSED FOR HIGHWAY USE USED IN CONJUNCTION WITH WASTE REDUCTION OR RECYCLING ACTIVITIES; AND MOBILE UNITS USED FOR MIXING AND PROCESSING AND MOTOR VEHICLE OR TRAILER ON WHICH UNIT IS MOUNTED, INCLUDING ACCESSORIES (WIS. STAT. § 77.54[5]); MACHINERY, EQUIPMENT AND PARTS USED EXCLUSIVELY AND DIRECTLY IN MANUFACTURING; PACKAGING AND SHIPPING MATERIALS, AND FUEL CONVERTED TO ELECTRIC ENERGY, GAS OR STEAM (WIS. STAT. § 77.54[6]); OCCASIONAL SALES, UNLESS SELLER IS REQUIRED TO HOLD SELLER'S PERMIT AND EXCEPTING MOST AUTOMOBILE, BOAT AND AIRCRAFT SALES AND SALES OF BINGO CARDS AND BINGO SUPPLIES (WIS. STAT. §§ 77.51[9]; 77.54[7]); OCCASIONAL SALES BY

NONPROFIT ORGANIZATIONS (WIS. STAT. § 77.54[7M]); SEPARATELY STATED CHARGES FOR INSURANCE (WIS. STAT. § 77.54[8]); TICKETS OR ADMISSIONS TO ELEMENTARY AND SECONDARY SCHOOL ACTIVITIES WHERE ENTIRE PROCEEDS USED FOR EDUCATIONAL, RELIGIOUS OR CHARITABLE PURPOSES (WIS. STAT. § 77.54[9]); SALES TO AND USE BY U.S. GOVERNMENT AND AGENCIES, WISCONSIN GOVERNMENT, AGENCIES AND POLITICAL SUBDIVISIONS, LOCAL EXPOSITION AND CULTURAL ARTS DISTRICTS, RELIGIOUS, CHARITABLE, SCIENTIFIC OR EDUCATIONAL ORGANIZATIONS EXCEPT HOSPITAL SERVICE INSURANCE CORPORATIONS, ANY FEDERALLY RECOGNIZED AMERICAN INDIAN TRIBE OR BAND IN STATE, AND CERTAIN CEMETERY COMPANIES OR CORPORATIONS (WIS. STAT. §§ 77.54[9A]; 77.55[1]); ADMISSION FEES, STICKERS OR CAMPING FEES UNDER §§ 27.01(7)-(11) AND ADMISSION FEES TO CERTAIN MUSEUMS OPERATED UNDER LEASE WITH STATE HISTORICAL SOCIETY (WIS. STAT. § 77.54[10]); FUELS SUBJECT TO TAX UNDER C. 78 UNLESS FUEL OR SPECIAL FUEL TAX IS REFUNDED UNDER § 78.75 (WIS. STAT. § 77.54[11]); SALES TO REGISTERED SELLER FOR RESALE (WIS. STAT. §§ 77.51[14]; 77.53[10]-[13]); SALES OF RAILROAD CARS (WIS. STAT. § 77.54[12]); COMMERCIAL VESSELS AND BARGES § 77.54[13]); MEDICINES (WIS. STAT. §§ 77.54[14], [14G]); INSULIN (WIS. STAT. § 77.54[14M]); EQUIPMENT USED TO ADMINISTER OXYGEN PRESCRIBED FOR MEDICAL PURPOSES (WIS. STAT. § 77.54[14S]); NEWSPAPERS AND SUBSCRIPTION PERIODICALS (WIS. STAT. § 77.54[15]); FIRE TRUCKS AND EQUIPMENT (WIS. STAT. § 77.54[16]); WATER DELIVERED THROUGH MAINS (WIS. STAT. § 77.54[17]); SALES OF GOODS OR SERVICES THAT WERE PREVIOUSLY EXEMPT OR NONTAXABLE, PROVIDED GOODS OR SERVICES ARE PROVIDED AT PRICE FIXED UNDER ORIGINAL CONTRACT (WIS. STAT. § 77.54[18]; FOOD, FOOD PRODUCTS AND BEVERAGES, WITH CERTAIN EXCEPTIONS (WIS. STAT. §§ 77.54[20]-[20R]); CASKETS AND BURIAL VAULTS (WIS. STAT. § 77.54[21]); ARTIFICIAL BRACES, LIMBS, EYES, TEETH, CRUTCHES, WHEELCHAIRS, ANTIEMBOLISM HOSIERY, HEARING AIDS, EYE GLASSES, AND EQUIPMENT TO ALLOW HANDICAPPED PERSONS TO OPERATE, ENTER OR LEAVE VEHICLES (WIS. STAT. § 77.54[22]); DURABLE MEDICAL EQUIPMENT FOR HOME, MOBILITY-ENHANCING EQUIPMENT, PROSTHETIC DEVICES, AND RELATED EQUIPMENT, FOR HUMANS (WIS. STAT. § 77.54[22B]); MOTION PICTURE FILM AND MOTION PICTURES OR RADIO OR TELEVISION PROGRAMS (WIS. STAT. § 77.54[23M]); PRINTED ADVERTISING MATERIAL SUBSEQUENTLY TRANSPORTED AND USED OUT OF STATE (WIS. STAT. § 77.54[25]); CATALOGS AND ENVELOPES DESIGNED TO ADVERTISE AND PROMOTE SALE OF MERCHANDISE OR SERVICES (WIS. STAT. § 77.54[25M]); WASTE TREATMENT FACILITY SUPPLIES AND EQUIPMENT (WIS. STAT. § 77.54[26]); WASTE REDUCTION OR RECYCLING MACHINERY AND EQUIPMENT (WIS. STAT. § 77.54[26M]); LIVESTOCK SEMEN (WIS. STAT. § 77.54[27]); SUPPLIES TO DETERMINE BLOOD SUGAR LEVEL (WIS. STAT. § 77.54[28]); MAPLE SYRUP PRODUCTION EQUIPMENT (WIS. STAT. § 77.54[29]); RESIDENTIAL HEATING FUELS, INCLUDING ELECTRICITY AND NATURAL GAS FROM NOV. THROUGH APR. (WIS. STAT. § 77.54[30]); BIOMASS USED FOR FUELS SOLD FOR RESIDENTIAL USE (WIS. STAT. § 77.54[30]); FUEL AND ELECTRICITY SOLD FOR FARMING USE (WIS. STAT. § 77.54[30]); RESIDUE USED AS FUEL IN BUSINESS THAT RESULTS FROM HARVESTING OF TIMBER OR PRODUCTION OF WOOD PRODUCTS (WIS. STAT. § 77.54[30]); FUEL AND ELECTRICITY CONSUMED IN MANUFACTURING TANGIBLE PERSONAL PROPERTY (WIS. STAT. § 77.54[30]); FUEL SOLD FOR USE IN MOTORBOATS USED IN SPORT FISHING CHARTERS (WIS. STAT. § 77.54[30]); SALE AND USE BUT NOT LEASE OR RENTAL OF USED MOBILE HOMES AND USED MANUFACTURED HOMES (WIS. STAT. § 77.54[31]); CHARGES FOR COPIES OF PUBLIC RECORDS (WIS. STAT. § 77.54[32]); MEDICINES USED ON CERTAIN FARM LIVESTOCK (WIS. STAT. § 77.54[33]); SALES OF TANGIBLE PERSONAL PROPERTY, TICKETS, ETC. BY ANY WIS. DEPT. OF AMERICAN LEGION BASEBALL TEAM (WIS. STAT. § 77.54[35]); RENTALS OF RESIDENTIAL MOBILE HOMES AND MANUFACTURED HOMES FOR ONE MONTH OR MORE (WIS. STAT. § 77.54[36]); EMERGENCY RESPONSE SYSTEM CHARGES AND SURCHARGE FOR CUSTOMERS OF WIRELESS PROVIDERS (WIS. STAT. § 77.54[37]); SNOWMOBILE TRAIL GROOMERS AND ATTACHMENTS OF CERTAIN SNOWMOBILE CLUBS (WIS. STAT. §

77.54[38]); HEAVY MECHANICAL EQUIPMENT USED IN LOGGING BUSINESS (WIS. STAT. § 77.54[39]); CLOTH DIAPERS (WIS. STAT. § 77.54[40]); BUILDING MATERIALS, SUPPLIES AND EQUIPMENT USED SOLELY IN CONSTRUCTION, RENOVATION OR DEVELOPMENT OF CERTAIN PROFESSIONAL SPORTS AND ENTERTAINMENT HOME STADIUMS (WIS. STAT. § 77.54[41]); ANIMAL IDENTIFICATION TAGS AND STANDARD SAMPLES (WIS. STAT. § 77.54[42]); RAW MATERIALS FOR MANUFACTURING PRINTED MATERIALS THAT ARE SHIPPED OUT OF STATE (WIS. STAT. § 77.54[43]); CERTAIN LOW-INCOME ASSISTANCE FEES (WIS. STAT. § 77.54[44]); CERTAIN PROFESSIONAL FOOTBALL STADIUM SEAT LICENSES (WIS. STAT. § 77.54[45]); U.S. FLAG OR STATE FLAG (WIS. STAT. § 77.54[46]); CERTAIN PREPAID TELECOMMUNICATIONS SERVICES (WIS. STAT. § 77.54[46M]); LIVE GAME BIRDS, AND CLAY PIGEONS SOLD TO LICENSED BIRD HUNTING PRESERVES (WIS. STAT. § 77.54[47][A]); CLAY PIGEONS SOLD TO CERTAIN SHOOTING FACILITIES (WIS. STAT. § 77.54[47][B]); DONATIONS OF PROPERTY PURCHASED WITHOUT TAX TO NONPROFIT ORGANIZATIONS (WIS. STAT. § 77.56[3]); INTERNET EQUIPMENT USED IN BROADBAND MARKET (WIS. STAT. § 77.54[48]); TAXABLE SERVICES, INCLUDING PERSONAL PROPERTY THAT IS PHYSICALLY TRANSFERRED AS NECESSARY PART OF CERTAIN TAXABLE SERVICES, WHERE SELLER AND PURCHASER ARE MEMBERS OF SAME AFFILIATED GROUP FOR FEDERAL INCOME TAX PURPOSES AND ARE ELIGIBLE TO FILE FEDERAL CONSOLIDATED INCOME TAX RETURN (WIS. STAT. § 77.54[49]); SPECIFIED DIGITAL GOODS OR ADDITIONAL DIGITAL GOODS IF SUCH GOODS IN TANGIBLE FORM ARE EXEMPT OR NONTAXABLE (WIS. STAT. § 77.54[50]); PRODUCTS SOLD IN CERTAIN TRANSACTIONS THAT WOULD OTHERWISE BE BUNDLED TRANSACTION (WIS. STAT. §§ 77.54[51], [52]); TANGIBLE PERSONAL PROPERTY AND SERVICES SOLD BY HOME EXCHANGE SERVICE OPERATED BY DEPARTMENT OF VETERANS AFFAIRS (WIS. STAT. § 77.54[54]); FIRE AND PROTECTION FEE (WIS. STAT. § 77.54[55]); CERTAIN PRODUCTS WHOSE POWER SOURCE IS WIND ENERGY, DIRECT RADIANT ENERGY RECEIVED FROM SUN, OR GAS GENERATED FROM ANAEROBIC DIGESTION OF AGRICULTURAL WASTE AND ENERGY PRODUCED BY SUCH PRODUCTS (WIS. STAT. § 77.54[56]); AND MACHINERY, EQUIPMENT AND OTHER RELATED ITEMS SOLD TO PERSONS PRIMARILY ENGAGED IN MANUFACTURING OR BIOTECHNOLOGY IN STATE IF USED EXCLUSIVELY AND DIRECTLY IN QUALIFIED RESEARCH, INCLUDING TANGIBLE PERSONAL PROPERTY CONSUMED, DESTROYED OR THAT LOSES ITS IDENTITY IN SUCH PROCESS; MACHINES AND EQUIPMENT USED EXCLUSIVELY AND DIRECTLY IN RAISING ANIMALS SOLD TO CERTAIN ENTITIES TO BE USED EXCLUSIVELY AND DIRECTLY IN QUALIFIED RESEARCH OR MANUFACTURING (WIS. STAT. § 77.54[57]).

REGISTRATION.

PERSONS ENGAGING IN BUSINESS IN STATE SHALL OBTAIN BUSINESS TAX REGISTRATION CERTIFICATE AND APPLY FOR AND DISPLAY SALES TAX PERMIT AT EACH SEPARATE PLACE OF BUSINESS. (WIS. STAT. §§ 73.03[50]; 77.52[9]). SELLERS REQUIRED TO COLLECT USE TAX MUST REGISTER; NO FEE. (WIS. STAT. § 77.53[9]).

RETURNS AND PAYMENTS.

RETURN AND PAYMENT GENERALLY DUE LAST DAY OF MONTH AFTER CALENDAR QUARTER. (WIS. STAT. § 77.58). RETAILER MAY RETAIN 0.5% OF TAX COLLECTED AS ADMINISTRATIVE EXPENSES IF PAYMENT IS TIMELY. (WIS. STAT. § 77.61[4]). IN TAX YEAR 1995 AND THEREAFTER, PURCHASERS WHO QUALIFY MAY OBTAIN DIRECT PAY PERMITS THAT ALLOW THEM TO PURCHASE PROPERTY WITHOUT TAX AND REMIT APPLICABLE SALES AND USE TAX DIRECTLY TO DEPARTMENT. (WIS. STAT. § 77.52[17M]). RETURNS ARE FILED AND PAYMENTS MADE TO WISCONSIN DEPARTMENT OF REVENUE, BOX 930389, MILWAUKEE, WISCONSIN 53293-0389, UNLESS RETURNS FILED ELECTRONICALLY UNDER ONE OF THREE AVAILABLE METHODS.

COLLECTION OF USE TAX BY OUT-OF-STATE SELLERS IS REQUIRED. (WIS.

STAT. § 77.53[3]). BROAD DEFINITION OF “ENGAGED IN BUSINESS IN THIS STATE” FOR THIS PURPOSE. (WIS. STAT. § 77.51[13G]).

ASSESSMENT LIMITATIONS.

NOTICE OF DETERMINATION OF DEFICIENCY MAY BE GIVEN WITHIN FOUR YEARS OF FILING OF RETURN. (WIS. STAT. § 77.59[3]). DETERMINATION BASED ON FIELD AUDIT IS FINAL UNLESS APPEALED (WIS. STAT. § 77.59[2]), WITH LIMITED EXCEPTIONS (WIS. STAT. §§ 77.59[4][B], [8], [8M]). DETERMINATION BASED ON OFFICE AUDIT PRESUMPTIVELY CORRECT, BUT ADDITIONAL OFFICE AUDITS AND FIELD AUDIT DETERMINATION MAY BE MADE. (WIS. STAT. § 77.59[1]). FIELD AUDIT DETERMINATION MAY BE MADE BY SAMPLING. (WIS. STAT. § 77.59[2]).

APPEAL AND REFUND.

CLAIM FOR REFUND MAY BE FILED WITHIN FOUR YEARS OF DUE DATE OF CORRESPONDING WISCONSIN INCOME OR FRANCHISE TAX RETURN OR WITHIN TWO YEARS OF DETERMINATION IF TAX ASSESSED BY OFFICE OR FIELD AUDIT AND PAID IF ASSESSMENT NOT PROTESTED. CLAIM FOR REFUND MUST BE FILED ON FORM PRESCRIBED OR APPROVED BY DEPARTMENT. (WIS. STAT. § 77.59[4][A]). DETERMINATION OF DEFICIENCY OR DENIAL OF CLAIM FOR REFUND MAY BE APPEALED BY PETITION FOR REDETERMINATION FILED WITH DEPARTMENT OF REVENUE WITHIN 60 DAYS. (WIS. STAT. § 77.59[6]). APPEAL FROM DECISION THEREON MUST BE FILED WITH WISCONSIN TAX APPEALS COMMISSION WITHIN 60 DAYS WITH FURTHER APPEAL TO COURTS. (WIS. STAT. § 77.59[6]).

22.18 STAMP AND SEAL TAXES:

STAMP TAX.

NO DOCUMENTARY STAMP TAX. SEE TOPIC 22.16 PROPERTY TAXES, SUBHEAD REAL ESTATE CONVEYANCE TAX.

22.18A TAX LIENS:

UNIFORM FEDERAL LIEN REGISTRATION ACT AMENDED.

UNIFORM FEDERAL LIEN REGISTRATION ACT ADOPTED WITH SOME VARIATIONS, OMISSIONS AND ADDITIONAL MATTER. (WIS. STAT. § 779.97).

22.19 USE TAXES:

SEE TOPIC 22.17 SALES AND 22.19 USE TAXES.

22.20 UTILITIES TAX:

UTILITIES TAXES.

CERTAIN PUBLIC UTILITIES ARE SUBJECT TO SPECIAL EXCISE TAX OR LICENSE FEE IN LIEU OF PROPERTY TAX ON OPERATING PROPERTY, INCLUDING LIGHT, HEAT, AND POWER COMPANIES (WIS. STAT. § 76.28); ELECTRIC COOPERATIVES (WIS. STAT. § 76.48[1R]); TELEPHONE COMPANIES (WIS. STAT. § 196.858); CAR LINE COMPANIES (WIS. STAT. § 76.39). NON-OPERATING PROPERTY SUBJECT TO LOCAL PROPERTY TAXATION. (WIS. STAT. § 70.112[4]).

23 TRANSPORTATION

23.01 MOTOR VEHICLES:

Department of Transportation, Division of Motor Vehicles (Hill Farms State Office Building, 4802 Sheboygan Avenue, Madison, Wis. 53702; http://www.dot.wisconsin.gov/) has general supervision over registration of licensing, inspection and enforcement, highway safety, promotion and driver control.

Operator's License.

Obtainable by anyone 18 years or over upon examination, with photograph (Wis. Stat. §§ 343.14; 343.16); obtainable between ages 16 and 18 by verified application of parent or adult sponsor and examination (Wis. Stat. §§ 343.06[c]; 343.15; 343.16); permit to drive at age 15 years and six months while learning obtainable for 12 months (Wis. Stat. § 343.07[3]). During first nine months after obtaining license, licensees under age 18 may only carry one passenger other than immediate family members or qualified instructors and may not operate vehicle between hours of midnight and 5 a.m. unless with parent, guardian or qualified instructor or unless traveling between residence, school and place of employment. (Wis. Stat. § 343.085[2m]). License fee, $18. (Wis. Stat. § 343.21[1][a]). Males between ages of 18 and 26 who apply for license or renewal are registered with selective service system. (Wis. Stat. § 343.14). License must be renewed every eight years (Wis. Stat. § 343.20[2][em]) at $24 fee (Wis. Stat. § 343.21[1][am]). Exemption for members of armed forces operating vehicle owned or leased by U.S. government. (Wis. Stat. § 343.05[4][a][1]).

Vehicle License.

Registration required annually, except biennially for motorcycles. (Wis. Stat. § 341.25). Department issues plates. (Wis. Stat. § 341.12). If two issued, they must be displayed front and rear. (Wis. Stat. § 341.15). Applicant under 18 years of age must have consent of person having custody of applicant. (Wis. Stat. § 341.08[6]). No exemption for members of armed forces except for certain limited refund and apportionment privileges. (Wis. Stat. §§ 341.28[4][c]; 341.33[2]).

Titles.

When motor vehicle is first licensed, department issues certificate of title which may be required with application for annual registration. (Wis. Stat. §§ 342.05; 341.08[4]). Title fee is $53, plus $9 environmental impact fee, $7.50 supplemental fee, $4 fee for notation and subsequent release of security interest and $5 transaction fee. (Wis. Stat. §§ 341.255; 342.14). Certificate must show names of owner and lienholder, title number and vehicle description. (Wis. Stat. § 342.10).

Sales.

On sale of vehicle, certificate must be forwarded to department with fee of $53, plus $9 environmental impact fee, $7.50 supplemental fee and $5 transaction fee and new certificate will be issued to new owner. (Wis. Stat. §§ 341.255; 342.14; 342.18). Must disclose odometer reading to purchaser in writing signed by prior owner. (Wis. Stat. § 342.155[1]).

Liens.

Certificate of title must show names of any lienholders, including notation of state lien for unpaid child support. (Wis. Stat. § 342.10[1]). Security interests are effective against creditors or subsequent transferees or secured parties only if perfected by application to department for notation on certificate of title. (Wis. Stat. § 342.19). Release of lien on motor vehicle written on Department form must be mailed to debtor within one month after payment or within ten days if debtor demands release in writing. (Wis. Stat. § 342.22[1]). Lien will be removed from state records unless renewed after eight years for truck tractors, 20 years for recreational vehicles and ten years for any other vehicle. (Wis. Stat. § 342.22[3]). Removal under this section does not affect security agreement between parties. (Wis. Stat. § 342.22[4]).

Identification Marks.

Department assigns new identification numbers for each vehicle not numbered by manufacturer or when original obliterated or altered or on which original casting has been replaced or on which new identification number is required under § 342.06(1)(f). (Wis. Stat. § 342.30[1m]). Penalty for intentionally altering is conviction of Class H felony (Wis. Stat. § 342.30[3][a]), including up to $10,000 fine or six years in prison or both (Wis. Stat. § 939.50[3][h]). Failure to properly affix issued number subject to forfeiture of not more than $200. (Wis. Stat. § 342.30[3][b]). Failure to properly affix with intent to defraud subject to forfeiture of not more than $1,000.

Operation prohibited by person without operator's license (Wis. Stat. § 343.05), by person under influence of any combination of intoxicant, controlled substance or controlled substance analog (Wis. Stat. § 346.63[1][a]), by person having detectable amount of restricted controlled substance in blood (Wis. Stat. § 346.63[1][am]), or by person having prohibited alcohol concentration under § 340.01(46m) (Wis. Stat. § 346.63[1][b]). Person dependent on alcohol or drugs cannot obtain license except under special circumstances. (Wis. Stat. § 343.06[1][d]). Any operator is deemed to have given consent to chemical tests for alcoholic and drug content of blood if requested to submit to test by law enforcement officer who has probable cause to believe operator has driven under influence of intoxicant or drug or combination of both. (Wis. Stat. § 343.305[2]). Persons convicted of certain offenses cannot obtain licenses. (Wis. Stat. § 343.06[1][i]). Court may revoke or suspend person's operating privilege upon conviction of certain offenses (Wis. Stat. § 343.30) or upon refusal to submit to breathalizer test under § 343.305 (Wis. Stat. §§ 343.305[10]; 346.63[2m]). Conviction, suspension or refusal under § 346.63(1), local ordinance conforming with § 346.63(1) or similar foreign statute counts as prior conviction or refusal under §§ 343.30, 343.305 and 346.65. (Wis. Stat. § 343.307). Occupational license available under certain circumstances. (Wis. Stat. § 343.10). Habitual traffic offenders law is c. 351.

Weight and Load Limits.

Regulated by c. 348.

Equipment Required.

Regulated by c. 347.

Lights Required.

Regulated by §§ 347.06-.30.

Inspection.

Motor vehicles may be inspected to ensure compliance with equipment requirements. (Wis. Stat. § 110.075). Emission inspection and maintenance required under certain circumstances. (Wis. Stat. §§ 110.20-.21; 285.30).

Traffic Regulations.

Comply with traffic officers' directions and official traffic signals. (Wis. Stat. § 346.04). Generally overtaking and passing only on left. (Wis. Stat. § 346.07). Yield right of way to emergency vehicles, funeral processions, livestock, pedestrians, riders of electric personal assistive motoring devices and bicyclists at crosswalks and where yield right of way signs so indicate. (Wis. Stat. §§ 346.18-24). Turns to be made from lane nearest to indicated turn. (Wis. Stat. §§ 346.31-35). Right turn on red after full stop allowed except at marked intersections. (Wis. Stat. § 346.37[1][c][3]).

Accidents.

In case of injury to person or property damage, driver must stop, give assistance, give name and address of driver, give registration number of vehicle involved and exhibit operator's license upon request. (Wis. Stat. § 346.67). Where accidents result in personal injury, death or $200 damage to property owned by any one person or $1,000 to government-owned property, driver must report same to local authorities immediately and forward written report to department within ten days. If driver physically incapable of making report, owner of vehicle must make report, and if owner incapable of making report, occupant, if any, of vehicle at time of accident, must make report. (Wis. Stat. § 346.70). Failure to comply with any of these laws is punishable by suspension of license, fine or imprisonment. (Wis. Stat. §§ 344.08; 346.74). Accident reports not admissible in court. (Wis. Stat. § 346.73).

As to joinder of successor or insurer in action for damages, see category 5 Civil Actions and Procedure, topic 5.02 Actions.

Liability of Owner.

Mere ownership of a vehicle will not render a person liable for damages caused by its negligent operation. (177 Wis. 455, 188 N.W. 627). Owner, however, presumed liable for specified violations: fleeing traffic officer (Wis. Stat. § 346.175); failing to stop after signal from officer or marked police vehicle (Wis. Stat. § 346.04[2t]); failing to yield right of way to emergency vehicle (Wis. Stat. § 346.195) or funeral procession (Wis. Stat. § 346.205); illegally crossing at railroad crossing (Wis. Stat. § 346.452); illegally passing fire truck (Wis. Stat. § 346.457) or school bus (Wis. Stat. § 346.485); failure to obey school crossing guard (Wis. Stat. § 346.465); illegally parking in spots reserved for vehicles displaying special plates or identification cards (Wis. Stat. § 346.505[3]); and illegally loud sound amplification devices (Wis. Stat. § 346.945). "Family purpose doctrine" not recognized. (234 Wis. 385, 291 N.W. 390). However, negligence or willful misconduct of minor when operating motor vehicle upon highways is imputed to parents where both have custody and either signed as sponsor for child's license, otherwise it is imputed to adult sponsor who signed application (Wis. Stat. § 343.15[2][b]).

Guests.

No statutory restriction of liability for injury to gratuitous guest.

Proof of Financial Responsibility.

License of driver and all registrations of owner of vehicle involved in an accident causing personal injury, death or $1,000 property damage is suspended on ten days notice after such accidents, and any vehicles owned by driver or owner of vehicle involved in such accidents may be impounded, unless sufficient security to satisfy any judgment is deposited; or operator or owner at time of accident has automobile liability policy or bond which qualifies under law or person is certified self-insurer. (Wis. Stat. §§ 344.12-14). After notice of deposit requirement, person may demand hearing. (Wis. Stat. § 344.02). Certification of self-insurance may be obtained from secretary by owner of more than 25 vehicles. (Wis. Stat. § 344.16). Insurance policy or bond must be issued by insurer authorized to do business in Wisconsin and limits of liability must be equal to or greater than minimum limits of liability found in Wis. Stat. § 344.01(2)(am), except that bond or policy which complies with similar restrictions of State where issued sufficient where company issuing it consents to service of process in any action arising from accident and secretary deems policy limits adequate. (Wis. Stat. § 344.15).

Insurance.

No requirements except for school bus. (Wis. Stat. § 121.53). See subhead Proof of Financial Responsibility, supra.

No-Fault Insurance.

Not adopted.

Reinstatement of License.

Licenses revoked or suspended for failure of financial responsibility are reinstated when fee is paid and either security is deposited, one year has elapsed without suit arising out of accident, evidence of release of liability is filed or evidence of duly acknowledged written agreement providing for payment of all claims for injuries or damages is filed. (Wis. Stat. § 344.18).

Future Financial Responsibility.

Operating privilege and all registrations will remain suspended until judgment for damages exceeding $500 arising out of automobile accident is stayed, satisfied or discharged and (a) proof of future financial responsibility is provided or (b) three years have elapsed since judgment for damages was stayed, satisfied or discharged. (Wis. Stat. §§ 344.24-27). Exceptions where accident caused by vehicle owned by certain governmental entities or with consent of judgment creditor. (Wis. Stat. § 344.25). See subhead Proof of Financial Responsibility, supra.

Foreign Vehicles.

Under 8,000 lbs., nonresident owner of which has complied with registration laws of home state or country and on which home registration number is displayed may operate without local registration, provided home state grants similar privileges to residents of Wisconsin, unless owner has moved to Wisconsin or auto is purchased or leased by Wisconsin resident. (Wis. Stat. § 341.40).

Nonresident Operators.

Nonresident operator, at least 16 years of age, having in his immediate possession a valid license issued in another jurisdiction is exempt from license requirement. (Wis. Stat. § 343.05[4][b]).

Actions Against Nonresidents.

Arising out of operation of car in this state may be commenced by service of process on secretary. (Wis. Stat. § 345.09).

Direct Actions.

Right of direct action against insurer exists. (Wis. Stat. § 632.24). In action for damages caused by negligence, where accident or injury occurred in Wisconsin or policy of insurance was issued in Wisconsin, insurance company which issued liability policy may be joined as defendant. (Wis. Stat. § 803.04[2]).

Motor vehicle carriers of passengers and property for hire except taxis and car pool or van pool vehicles are regulated by department of transportation and must be licensed. (c. 194). Motor vehicle carriers must also obtain certificate to conduct interstate or foreign commerce (Wis. Stat. §§ 194.04; 194.20; 194.23; 194.34), or permit to conduct intrastate commerce (Wis. Stat. § 194.04).

Motor Vehicle Taxes.

Each automobile, $75 annually. (Wis. Stat. § 341.25). Certain specially designed vehicles, $5 annually. (Wis. Stat. § 341.25[1][bn]). Each recreational vehicle and camping trailer, $15 annually. (Wis. Stat. § 341.25[1][i]). Annual fees for other motor vehicles vary by weight of vehicle. (Wis. Stat. § 341.25).

Gasoline Tax.

See category 22 Taxation, topic 22.08 Gasoline and Special Fuels Taxes.

Lemon Law.

See category 3 Business Regulation and Commerce, topic 3.10 Consumer Protection.

Seat Belts.

Use required (Wis. Stat. § 347.48[2m]), with certain exceptions (Wis. Stat. §§ 347.48[2m][e], [dr], [f]). Failure to use will not reduce damages more than 15%. Limitation on reduction does not affect determination of causal negligence in action. (Wis. Stat. § 347.48[2m][g]). Children under age of eight must be restrained in either child safety restraint system or child booster seat. (Wis. Stat. § 347.48[4]).

23.01A COMMERCIAL CODE FORMS:

See Part III, Uniform and Model Acts, Commercial Code Amendments for National Forms.

24 FORMS

Miscellaneous Forms

1
WYOMING LAW DIGEST

—Scope —

Revised for 2010 edition by

BROWN, DREW & MASSEY, LLP of Casper.

(Citations, unless otherwise indicated, are to titles, chapters, and sections of Wyoming Statutes Annotated in its most recently published form including amendments to original enactments. Wyoming Statutes Annotated is updated and replaced every two years and supplemented annually. Session laws are cited by year, chapter number and where relevant, section number. "W.R.C.P." refers to Wyoming Rules of Civil Procedure. "W.R.Cr.P." refers to Wyoming Rules of Criminal Procedure. "W.R.A.P." refers to Wyoming Rules of Appellate Procedure. Parallel citations to the Pacific Reporter begin with 3 Wyo. and end with 80 Wyo. Decisions subsequent to 80 Wyo. are officially reported in Wyoming Reporter, which simply collects Wyoming decisions from Pacific Reporter, and has no page numbers, and such decisions are cited herein as follows: Wyo., . . . P.2d . . . . between Jan. 1, 2001 and Dec. 31, 2003, proper citation of Wyoming decisions shall include both public domain, neutral format citation and volume and initial page number of West Pacific Reporter in which opinion is published; e.g. 2001 WY 1, 15 P.3d 728 (Wyo. 2001). For cases decided after Dec. 31, 2003, citation to volume and initial page of West Pacific Reporter in which opinion is published shall be optional; e.g. 2001 WY 1, or 2001 WY 1, 15 P.3d 728 (Wyo. 2001).)

Note: 2007 legislation includes all 2007 session laws through Dec. 31, 2007. Legislature: Meets in January of odd-numbered years for general and budget session, and meets in February of even-numbered years for budget session.

1 INTRODUCTION

1.01 GOVERNMENT AND LEGAL SYSTEM:

The State of Wyoming is a constituent state of the United States of America. For further discussion of the U.S. federal system, see Introduction to the Federal Government of the United States at the beginning of this volume. A great many laws are promulgated by the federal government of the United States and are not reflected in the topics below. See the Introduction to this volume for references to the federal law topics covered.

Like all but one of the United States, Wyoming has a common law legal system, with roots in English common law. For information on the courts and legislature of Wyoming, see category 6 Courts and Legislature.

1.02 [RESERVED]

1.03 HOLIDAYS:

Jan. 1, 3d Mon. in Jan., 3d Mon. in Feb., last Mon. in May, July 4, 1st Mon. in Sept., Nov. 11, 4th Thurs. in Nov., Dec. 25, and upon declaration of governor on dates appointed or declared by president as occasion of national mourning, rejoicing or observance of national emergency. (W.S. 8-4-101[a]).

Holiday Falling on Sunday.

If Jan. 1, July 4, Nov. 11, or Dec. 25 fall on Sun. following Mon. is legal holiday. (W.S. 8-4-101[b]).

Legality of Transactions on a Holiday.

No statutory provisions.

Pearl Harbor Remembrance Day.

Dec. 7 of each year.

1.04 OFFICE HOURS AND TIME ZONE:

Wyoming is in the Mountain (GMT -07:00) time zone. Office hours are generally from 8 a.m. to 5 p.m.

2 BUSINESS ORGANIZATIONS

2.01 AGENCY:

Common law rules govern.

2.02 ASSOCIATIONS:

Formation.

No statutory provisions except for unincorporated nonprofit association. (W.S. 17-22-101, et seq.). Previously, any secret or benevolent society, defined in W.S. 17-9-101, et seq., that desired to become incorporated would file with Secretary of State and county clerk certificate in writing setting forth, among other things, name and location. These sections were repealed effective Jan. 1, 1993, and now Wyoming Non-profit Corporation Act applies to these entities by virtue of W.S. 17-19-1801.

Liabilities.

No statutory provisions except under unincorporated nonprofit association. (W.S. 17-22-106).

Actions.

Any such society may sue or be sued in its own name. (W.S. 17-22-106, 107).

Dissolution.

No statutory provisions.

Professional Associations.

See topic 2.03 Corporations, subhead Professional Corporations.

Limited Liability Companies.

See topic 2.06 Limited Liability Companies.

2.03 CORPORATIONS:

Corporations are generally governed by Wyoming Business Corporation Act (W.S. 17-16-101 to W.S. 17-16-1803), which is based on Revised Model Business Corporation Act (1984, adopted 1989) ("Model Act"). Wyoming Business Corporation Act, as amended, applies to all domestic corporations incorporated in Wyoming prior to effective date of Act. However, for corporations incorporated in Wyoming prior to effective date of amended Act (i.e., Jan. 1, 1990), cumulative voting and shareholder preemptive rights provisions contained in previous Act (W.S. 17-1-123 and W.S. 17-1-130) continued until Jan. 1, 1994, unless corporation amended its Articles of Incorporation to provide otherwise. Wyoming Business Corporation Act, as amended, applies to all foreign corporations authorized to transact business in state as of effective date of Act, but such foreign corporations are not required to obtain new certificate of authority to transact business under Act, as amended.

Some variations have been made in text of Model Act, and certain options and alternatives contained in text of Model Act have been exercised. These variations, options and alternatives are as follows (references to section numbers are to Model Act section numbers, and references to numbers in parenthesis refer to Wyoming statute numbers):

§§ 1.01 and 1.02 have been adopted. (W.S. 17-16-101 and 102). Subparagraph (g) of § 1.2 has been amended to provide that person executing document shall sign it "manually". (W.S. 17-16-120). § 1.21(a) has been expanded to include following forms: Foreign Corporation's Application for Certificate of Continuance, Application for Certificate of Transfer, Foreign Corporation's Application for Certificate of Domestication, and Consent of Registered Agent to Appointment. (W.S. 17-16-121). § 1.22 has been rewritten as follows: "The Secretary of State shall set and collect filing, service and copying fees to cover his costs to administer this Act. These shall not exceed the costs of providing the services." (W.S. 17-16-122). See subhead Filing Fees, infra for applicable tax schedule. §§ 1.23 and 1.24 are same. (W.S. 17-16-123 and 124). Following sentence has been added to end of part (b) of § 1.25: "The Secretary of State, in his discretion, may issue a certificate evidencing the filing of a document upon the payment of the requisite fee." (W.S. 17-16-125).

§ 1.26(a) has been amended by providing that corporation may appeal refusal to following courts: "The district court of the county where the corporation's principal office is located in the State or, if the corporation does not have a principal office in the State, the district court of the county where its registered office is or will be located, or the district court of the county of residence of an incorporator for a domestic corporation, or in the district court of Laramie County." (W.S. 17-16-126). §§ 1.27, 1.28 and 1.29 are same. (W.S. 17-16-127, 128 and 129). Additional sentence has been added to § 1.30 which provides: "The Secretary of State shall promulgate reasonable rules and regulations necessary to carry out the purposes of this Act." (W.S. 17-16-130). Secretary of State has adopted Rules and Regulations addressing filing requirements, fees, forms, corporate names, foreign corporations, dissolutions, domestication, continuance and transfer to another jurisdiction. Copy of regulations available from Wyoming Secretary of State's office. Definitions contained in § 1.04 are expanded as follows: "Governmental subdivision" is added to definition of "political subdivision"; definition of "person" is expanded to include "entity" as defined in Model Act; optional language for defining "record data" is adopted; and following definitions are added: "Net assets" means amount by which total assets of corporation exceed total debts of corporation; "this Act" means W.S. 17-16-101 through W.S. 17-16-1803. (W.S. 17-16-140). § 1.41(e)(3) is expanded to allow notice to be sent by registered or certified mail, "or comparable private carrier." (W.S. 17-16-141). § 1.42 is same. (W.S. 17-16-142).

§ 2.01 is same. (W.S. 17-16-201). § 2.02(a)(2) is expanded to provide that corporation may designate its number of authorized shares as "unlimited." In subsection (b)(2) "regarding" is changed to "including." New subsection (d) has been added providing: "The Articles of Incorporation shall be accompanied by a written consent to appointment manually signed by the registered agent." (W.S. 17-16-202). §§ 2.03, 2.04, and 2.05 are same. (W.S. 17-16-203, 204, and 205). New subparagraph (c) is added to § 2.06 which provides that if bylaws are not adopted, annual meeting for corporation shall be held within three months after close of corporation's fiscal year; required officer shall be president, secretary, and treasurer; and bylaws may be adopted at any director or shareholder meeting. (W.S. 17-16-206). § 2.07 is adopted and term "catastrophic event" has been changed to "extraordinary event." (W.S. 17-16-207).

§ 3.01 is same. (W.S. 17-16-301). § 3.02 has been amended by removing phrase "that will aid governmental policy" from subsection (a)(14). (W.S. 17-16-302). Subsection (d) of § 13.03, has been amended by replacing "catastrophic" with "extraordinary." (W.S. 17-16-303). § 3.04 is same. (W.S. 17-16-304).

Subsection (b) of § 4.01 has been rewritten as follows: "Except as authorized in subsections (c) and (d) of this section, a corporate name shall not be the same as, or deceptively similar to any trademark or service mark registered in this state and shall be distinguishable upon the records of the Secretary of State from the name of any profit or nonprofit corporation, trade name, trademark, limited liability company, statutory trust, limited partnership or other business entity organized, continued or domesticated under the laws of this state or licensed or registered as a foreign profit or nonprofit corporation, foreign limited partnership, foreign joint stock company, foreign statutory trust, foreign limited liability company or other foreign business entity in this state or any fictitious or reserved name." New subparagraph (f) has been added defining how corporate names may be distinguishable and new subparagraph (g) has been added giving Secretary of State authority to interpret and administer the section. (W.S. 17-16-401). § 4.02 is same. (W.S. 17-16-402). § 4.03 has not been adopted, and there is no equivalent.

§§ 5.01, 5.02, 5.03, and 5.04 are same. (W.S. 17-16-501, 502, 503, and 504).

Subsection (a) of § 6.01 has been amended to provide that number of shares prescribed in Articles of Incorporation may be "unlimited." (W.S. 17-16-601). New subsection (f) has been added to § 6.02 prohibiting issuance of shares in bearer form. (W.S. 17-16-625[f]). §§ 6.02, 6.03, 6.04, 6.20, 6.21, 6.22, 6.23, 6.24, 6.26, 6.27, 6.28, 6.30, and 6.31 are same. (W.S. 17-16-602, 603, 604, 620, 621, 622, 623, 624, 626, 627, 628, 630, and 631). § 6.04 is same, and subsection (g) is adopted. (W.S. 17-16-640).

§ 7.01 is modified to grant board of directors discretion to hold annual meeting of shareholders by means of remote communication. New provision is added at end and as part of subsection as follows: "The board of directors may, in its sole discretion, determine that the meeting shall not be held at any place, but may instead be held by means of remote communication. The board shall take into consideration stockholders' ability to participate by remote communication and provide any alternative means of participation for those stockholders unable to participate by remote communication. If authorized by the board of directors in its sole discretion, and subject to guidelines and procedures the board of directors may adopt, stockholders and proxies not physically present at a meeting of stockholders may, by means of remote communication: (i) Participate in a meeting of stockholders; and (ii) Be deemed present in person and vote at a meeting of stockholders, whether the meeting is held at a designated place or solely by means of remote communication, provided that the corporation shall implement reasonable measures to verify that each person deemed present and permitted to vote at the meeting by means of remote communication is a stockholder or proxy. The corporation shall implement reasonable measures to provide stockholders and proxies a reasonable opportunity to participate in the meeting and to vote on matters submitted to the stockholders, including an opportunity to read or hear the proceedings of the meeting substantially concurrently with the proceeding. If any stockholder or proxy votes or takes other action at the meeting by means of remote communication, a record of the vote or other action shall be maintained by the corporation." (W.S. 17-16-701[b]). § 7.02 is same. (W.S. 17-16-702). § 7.03 is same, except, under subsection (a)(2)(i) notice period is 60 days rather than 30 days. (W.S. 17-16-703). Subsection (a) of § 7.04, which authorizes shareholder action by unanimous written consent, has been substantially rewritten as follows: "Action required by this act to be taken at a shareholders' meeting may be taken without a meeting if notice of the proposed action is given to all voting shareholders and the action is taken by the holders of all shares entitled to vote on the action. The action shall be evidenced by one (1) or more written consents bearing the date of signature and describing the action taken, signed, either manually, by electronic transmittal or in facsimile, by the holders of the requisite number of shares entitled to vote on the action, and delivered to the corporation for inclusion in the minutes or filing with the corporate records." (W.S. 17-16-704[a]). § 7.05(a) is same, except that corporation's notice to shareholders of each annual and special shareholder's meeting must include the place and means of communication. (W.S. 17-16-705[a]). Subsection (e) is modified to provide for adjournment of shareholders' meeting without additional notice to shareholders (unless bylaws require otherwise) if new date, time, place "or means of communication" is announced before adjournment. (W.S. 17-16-705[e]). § 7.06(a) is same, except waiver of notice must be in writing and signed "either manually, or in facsimile, or shall be sent by electronic transmission" by shareholder entitled to notice. (W.S. 17-16-706[a]). Subsection (d) of § 7.20 is expanded to provide that court may also "order payment by the corporation of the shareholder's cost of suit including reasonable attorneys' fees." (W.S. 17-16-720). § 7.21 is same, except that phrase "Absent special circumstances" is removed from subsection (b). (W.S. 17-16-721). §§ 7.22, 7.23, and 7.24 are same. (W.S. 17-16-722, 723, and 724). § 7.25 is same, except subsection (d) is reserved in Act, and Model Act's subsection (d) is deleted. (W.S. 17-16-725). § 7.26 is same. (W.S. 17-16-726). § 7.27 is not adopted, but Act has reserved W.S. 17-16-727. §§ 7.28 and 7.3 are same. (W.S. 17-16-728 and 730). § 7.31 is same, except that subsection (a) is expanded to provide that corporation may be party to voting agreement. (W.S. 17-16-731). § 7.40 is same. (W.S. 17-16-740).

§§ 8.01, 8.02, 8.03, 8.04, and 8.05 are same. (W.S. 17-16-801, 802, 803, 804, and 805). § 8.06 is same, except that number of directors required for staggering is reduced from nine to three (W.S. 17-16-806), and corporation does not have option to eliminate need for directors (W.S. 17-16-801). Subsection (a) of § 8.07 is modified to also allow director to resign by delivery of electronic transmission to board of directors. (W.S. 17-16-807[a]). §§ 8.08, 8.09, 8.10, 8.11, 8.22, 8.23, and 8.24 are same. (W.S. 17-16-807, 808, 809, 810, 811, 820, 821, 822, 823, and 824). Subsection (b) of § 8.20 is modified to authorize board of directors to permit any director to participate in meeting by use of any means of communication, including electronic transmission, if all directors can communicate with each other during meeting. (W.S. 17-16-820[b]). § 8.21(a) is same, except that written consents describing action taken without meeting of board of directors may be signed "either manually or in facsimile, by each director, or shall be sent by electronic transmission by each director." (W.S. 17-16-821[a]). Subsection (a) of § 8.25 is modified to allow one individual to make up committee. Subsection (e) adds phrase "unless specifically authorized by the Board of Directors" after word "not" and deletes word "however." (W.S. 17-16-825). Subsection (a)(3) of § 8.30 is modified by adding phrase "or at least not opposed" after phrase "to be in." New subsection (b) is added and provides, in effect: "For a director to make a determination as to what he reasonably believes in or not opposed to the best interests of the corporation, he shall consider the interests of the corporation's shareholders and, in his discretion, may consider the following: (i) The interests of the corporation's employees, supplies, creditors and customers; (ii) the economy of the state and nation; (iii) the impact of the action upon the communities in or near which the corporation's facilities or operations are located; (iv) the long-term interests of the corporation and its shareholders, including the possibility that those interests may be best served by the continued independence of the corporation; and (v) any other factors relevant to promoting or preserving public or community interests." (W.S. 17-16-830). §§ 8.31 and 8.32 are same. (W.S. 17-16-831 and 832). § 8.33 is adopted along with subsection (c) which provides two year statute of limitations. (W.S. 17-16-833). New provision is set out at W.S. 17-16-834 for which there is no counterpart in Model Act. New provision provides that corporation's Articles of Incorporation may contain provisions eliminating or limiting personal liability of director to corporation or shareholder's for breach of fiduciary duty as director, except for liability which results from: (i) Breach of director's duty of loyalty to corporation or its shareholders as defined by Act; (ii) acts or omissions not in good faith or which involve intentional misconduct or known violation of law; (iii) violations of W.S. 17-16-833 (i.e. § 8.33 of Model Act); or (iv) any transaction from which director derived improper personal benefit. Such provision in corporation's articles shall not eliminate or limit liability of director for any act or omission occurring prior to May 22, 1987. (W.S. 17-16-834). §§ 8.40 and 8.41 are same. (W.S. 17-16-840 and 841). Subsection (a)(3) of § 8.42 adds phrase "or at least not to" after phrase "believes to be in." New subsection (e) is added to define what officer shall and may consider in determining best interests of corporation. Considerations are same as those listed for directors in connection with § 8.03 above. (W.S. 17-16-842). §§ 8.43, 8.44, 8.50, 8.51, 8.52, 8.53, 8.54, 8.55, 8.56, and 8.57 are same (W.S. 17-16-843, 844, 850, 851, 852, 853, 854, 855, 856, and 857), except definitions of "office" and "disinterested director" are added (W.S. 17-16-850), authority is given for corporation to broaden indemnity requirements (W.S. 17-16-851), and corporation can limit mandatory indemnity requirement in its Articles of Incorporation. (W.S. 17-16-852). Subsection (a) of § 8.58 is rewritten and allows corporation to obligate itself to provide indemnification under certain circumstances. (W.S. 17-16-858).

§§ 10.01, 10.02, 10.03, 10.04, 10.05, 10.06, 10.07, 10.08, 10.09, and 10.20 are same. (W.S. 17-16-1001, 1002, 1003, 1004, 1005, 1006, 1007, 1008, 1009, and 1020). Subsection (a) of § 10.21 has been amended by deleting phrase "or proposed to be adopted, whichever is greater." (W.S. 17-16-1021). Subsection (c) of § 10.22 is amended by deleting phrase "or proposed to be adopted, whichever is greater." (W.S. 17-16-1022).

§§ 11.01, 11.02, and 11.03 are same. (W.S. 17-16-1101, 1102, and 1103). § 11.04 is same except "80%" has been substituted for "90%." §§ 11.05, 11.06, and 11.07 are same. (W.S. 17-16-1105, 1106, and 1107).

17-16-1110 through 1114 set forth provisions for "consolidation" of two or more corporations. Consolidation under Act differs from merger in that, under consolidation, two or more corporations consolidate "into a new corporation" (W.S. 17-16-1110), whereas, in merger, one or more corporations is merged "into another corporation" (W.S. 17-16-1101). New corporation which results from consolidation has all rights, privileges, immunities and franchises, public or private, property, liabilities and obligations of each corporation which is party to consolidation. (W.S. 17-16-1113). Consolidation may involve domestic as well as foreign corporations if consolidation is permitted by laws of state under which foreign corporation is organized. (W.S. 17-16-1110 and 1114).

§§ 12.01 and 12.02 are same. (W.S. 17-16-1201 and 1202).

§ 13.01 is same, except phrase “in a voting trust or” is included as part of definition of “Beneficial shareholder.” Also, definition of “corporation” is expanded by adding word “consolidation” after word “merger.” (W.S. 17-16-1301). Subsection (a)(1) of § 13.02 is modified by adding “a consolidation” as corporate action to which shareholder may dissent. (W.S. 17-16-1302). §§ 13.03, 13.20, 13.21, 13.22, 13.23, 13.24, 13.25, 13.26, 13.27, 13.28, 13.30, and 13.31 are same. (W.S. 17-16-1303, 1320, 1321, 1322, 1323, 1324, 1325, 1326, 1327, 1328, 1330, and 1331).

§§ 14.01, 14.02, and 14.03 are same. (W.S. 17-16-1401, 1402, and 1403). § 14.04 is same, except following language is added to end of subsection (e): “Except the corporation may be required to adopt some other name by amending its Articles of Incorporation in the manner provided by this Act so its name satisfies the requirements of W.S. 17-16-401.” (W.S. 17-16-1404). § 14.05 is same. (W.S. 17-16-1405). § 14.06 is same, except subsection (b) is modified by addition of following language “by mail or private carrier or by personal delivery” after phrase “in writing.” (W.S. 17-16-1406). § 14.07 is same, except period for notice set out in subsection (b)(3) is reduced from five years to four years or applicable statute of limitations, whichever is less. (W.S. 17-16-1407). Subsections (3), (4), and (5) of § 14.02 are adopted, except, in each of those subsections, “60” days is reduced to “30” days. Subsections (1) and (2) of § 14.02 are deleted. (W.S. 17-16-1420). Subsection (a) of § 14.21 is modified by addition of following language at end of that subsection: “Except for W.S. 17-16-1402(a)(iii) in which case dissolution is by choice and therefore automatic” Secretary of State does not have to give written notice to corporation whose period of duration is about to expire. (W.S. 17-16-1421). § 14.22 is adopted, except subsection (4) is not adopted. (W.S. 17-16-1422). §§ 14.23, 14.30, 14.31, 14.32, and 14.33 are same. (W.S. 17-16-1423, 1430, 1431, 1432, and 1433). § 14.40 is adopted, except language “or other appropriate official” is deleted. (W.S. 17-16-1440).

§ 15.01 is same except new subsection (d) is added providing that foreign corporation, limited partnership or limited liability company need not qualify in state if only activity is being organizer, manager or member of company organized or qualified in state. (W.S. 17-16-1501). § 15.02 is adopted, and subpart (d) imposes penalty of $5,000 for transacting business in State without certificate of authority. Also, foreign corporation will be required to pay all fees and license taxes which accrued during time transacted business, plus 18% interest. (W.S. 17-16-1502). § 15.03 is same, except subparts (vii), (viii), and (ix) are added to subsection (a) which require that application include estimate, expressed in dollars, of value of property of corporation located and employed in State of Wyoming, statement by corporation that it accepts constitution of State of Wyoming, and any additional information as Secretary of State may determine to be necessary or appropriate in order to determine whether corporation is entitled to certificate of authority. Also, subsection (b) adds 60 day time limit for delivering certificate of existence, and subsection (c) requires written consent of appointment by registered agent. (W.S. 17-16-1503). §§ 15.04 and 15.05 are same. (W.S. 17-16-1504 and 1505). § 15.06 is same except subsection (a)(i) and subsection (d)(iv) are deleted; subsection (b) adds that name of foreign corporation cannot be same as or deceptively similar in name to any trademark or service mark registered in state and must be distinguishable as defined in W.S. 17-16-401; subsection (c) permits foreign corporation to register under fictitious name. (W.S. 17-16-1506). §§ 15.07, 15.08, 15.09, and 15.10 are same. (W.S. 17-16-1507, 1508, 1509, and 1510). New provision is set out at W.S. 17-16-1511 which requires foreign corporations to inform Secretary of State of mergers in which corporation is involved. (W.S. 17-16-1511). § 15.20 is same. (W.S. 17-16-1520). § 15.30 is same, except subsection (a)(i) reduces deadline for revocation proceedings from 60 days to 30 days. Subsection (g) is deleted. (W.S. 17-16-1530). §§ 15.31 and 15.32 are same. (W.S. 17-16-1531 and 1532).

§ 16.01 is same. (W.S. 17-16-1601). § 16.02 is same, except subsection (b) limits right of inspection to shareholders who have "been of record for at least six months immediately preceding his demand and who shall be the holder of record of at least 5% of the outstanding shares of the corporation." Subsection (c) adds additional provision (iv) providing "the records are not subject to inspection and discovery under W.S. 17-16-826." However, there is no W.S. 17-16-826. Subsection (d) allows corporation to expand access rights of shareholders in its Articles of Incorporation or By-Laws. (W.S. 17-16-1602). §§ 16.03 and 16.04 are same. (W.S. 17-16-1603 and 1604). § 16.20 is same, except that corporation's obligation to furnish financial statements does not arise until request by shareholders. Also, if detailed financial statements are not prepared by corporation on annual basis, copy of corporation's federal income tax return will satisfy requirements of section. (W.S. 17-16-1620). § 16.21 is same. (W.S. 17-16-1621). § 16.22 is not adopted.

If subject matter of any subhead, infra, is covered by provisions of Wyoming Business Corporation Act, supra, the only statement given for this subhead is a cross reference, as follows: See preliminary statement, this topic.

General Supervision.

Secretary of State, State Capitol Building, Cheyenne.

Purposes.

See preliminary statement, this topic.

Name.

See preliminary statement, this topic. Also, Secretary of State's Office will, upon inquiry, state whether given corporate name available for use. No fee charged.

Term of Corporate Existence.

See preliminary statement, this topic.

Incorporators.

See preliminary statement, this topic.

Certificate or Articles of Incorporation.

See preliminary statement, this topic.

Filing of Certificate or Articles.

See preliminary statement, this topic.

Incorporation Tax or Fee.

See infra, subhead Filing Fees.

Filing Fees.

Fee for filing articles of incorporation of domestic corporation and for filing application of foreign corporation for certificate of authority is $100. (W.S. 17-16-1630[f]). Secretary of State granted authority to set and collect remaining fees. (W.S. 17-16-122). Following fees have been established for all profit corporations, domestic or foreign, by rule adopted by Secretary of State; certificate of existence or evidence, $10; initial registration or annual renewal of registered agent, $25; resignation of registered agent, $10; statement of change of registered agent or registered office, $20 each (up to five documents) and $10 each (more than five documents); any other filing, other than annual license tax, $50. (Rules and Regulations of Secretary of State). See subhead Franchise Tax, infra.

Fees peculiar to nonprofit corporations, domestic or foreign, generally prescribed by W.S. 17-19-122(a) as follows: articles of incorporation, $25; amendment of articles of incorporation, $3; certificate of authority for foreign nonprofit corporation, $10; certificate of existence or authorization, $3; corporation's statement of change of registered agent or registered office, $3; agent's statement of change of registered office for each affected corporation, $3. By rule of Secretary of State, fee for any other filing, other than fees prescribed by W.S. 17-19-122(a) or annual report fee, $10. See subhead Franchise Tax, infra.

Schedule of filing fees for profit and nonprofit corporations can be accessed at: http://soswy.state.wy.us/corporat/fee.htm.

License to Do Business.

See preliminary statement, this topic.

Organization.

See preliminary statement, this topic.

Paid in Capital Requirements.

See preliminary statement, this topic.

Amendment of Certificate or Articles.

See preliminary statement, this topic.

Increase or Decrease of Authorized Capital Stock.

See preliminary statement, this topic.

By-laws.

See preliminary statement, this topic.

Stock.

See preliminary statement, this topic.

Stock Certificates.

See preliminary statement, this topic.

Issuance of Stock.

See preliminary statement, this topic.

Transfer of Stock.

See preliminary statement, this topic.

Uniform Securities Ownership by Minors Act not adopted.

Uniform Simplification of Fiduciary Security Transfers Act.

Repealed with adoption of Art. 8 of Uniform Commercial Code. 1996 Wyo. Sess. Laws, c. 65, § 4.

Uniform Commercial Code adopted. (W.S. 34.1-1-101 to W.S. 34.1-10-104). Art. 8 adopted without change. (W.S. 34.1-8-101 to W.S. 34.1-8-408). See also category 3 Business Regulation and Commerce, topic 3.09 Commercial Code.

Stock Transfer Tax.

None.

Stockholders.

See preliminary statement, this topic.

Stockholders' Liabilities.

See preliminary statement, this topic.

Stockholders' Meetings.

See preliminary statement, this topic.

Voting Trusts.

See preliminary statement, this topic.

Directors.

See preliminary statement, this topic.

Directors' Meetings.

See preliminary statement, this topic.

Powers and Duties of Directors.

See preliminary statement, this topic.

Liabilities of Directors.

See preliminary statement, this topic.

Officers.

See preliminary statement, this topic.

Liabilities of Officers.

See preliminary statement, this topic.

Principal Office.

See preliminary statement, this topic.

Registered Agent.

Any person who serves as registered agent for five or more corporations prohibited from transacting business in Wyoming as registered agent unless that person is registered with Secretary of State. (W.S. 17-16-505[a], [b]). Any registered agent serving in such capacity for five or more corporations must register annually with Secretary of State by completing initial or renewal application that contains following information: (a) Legal name of applicant; (b) applicant's physical address where service can be made during regular business hours; (c) applicant's mailing address; (d) whether applicant, or in case of corporation or other business entity, any of its officers or directors, members, partners or persons serving in similar capacity has ever been convicted of felony; and (e) any other information Secretary of State deems appropriate in registration or identification of registered agents. (W.S. 17-16-506[a]). Initial registration of registered agent is valid for calendar year of registration, and thereafter must be renewed by Jan. 31 of each year. (W.S. 17-16-506[c]). Registered agent who does not file application for renewal of registration with Secretary of State by Jan. 31 of each year will lose registered agent status. (W.S. 17-16-506[c]). Duties of registered agent are prescribed in W.S. 17-16-507(a) and by rule promulgated by Secretary of State. Some duties also apply to registered agents who are not required to be registered under W.S. 17-16-505. (Rules and Regulations of Secretary of State). Secretary of State may deny or revoke registration of registered agent, require enhanced record keeping or refuse to accept filings for corporations served by him if registered agent: (a) Has failed to make payment for application or renewal fee on or before 15 days after receipt of notice of deficiency; (b) has failed to maintain certain records as required by W.S. 17-16-507; (c) cannot be served during regular business hours at address of registered office; (d) has willfully violated or willfully failed to comply with any provision of Act (W.S. 17-16-501 to W.S. 17-16-509) applying to registered agents and registered offices; and (e) cannot be located at address listed on application of registration or renewal (W.S. 17-16-509[a]). Secretary of State may also impose civil penalty not to exceed $500 for each violation of W.S. 17-16-509 for which no other specific penalty is provided. (W.S. 17-16-509[a]). Secretary of State may also revoke registration of registered agent who has been convicted of any felony regarding securities laws, tax evasion or for other fraudulent acts concerning financial activities, or in case of corporation or other business entity, any of its officers, directors, members, partners or persons serving in similar capacity has been convicted of any such felony in violation of laws of any state, country or province. (W.S. 17-16-509[c]).

General Powers of Corporations.

See preliminary statement, this topic.

Dividends.

See preliminary statement, this topic.

Unclaimed Dividends.

See category 21 Property, topic 21.01 Absentees, subhead Escheat.

Sale or Transfer of Corporate Assets.

See preliminary statement, this topic.

Books and Records.

See preliminary statement, this topic.

Reports.

None required other than annual report filed with payment of annual license tax. See infra, subhead Franchise Tax.

Corporate Bonds or Mortgages.

See preliminary statement, this topic.

Merger and Consolidation.

See preliminary statement, this topic.

Dissolution.

See preliminary statement, this topic.

Insolvency and Receivers.

Governed by Wyoming Business Corporation Act. (W.S. 17-16-101 to W.S. 17-16-1803). See preliminary statement, this topic. See also category 8 Debtor and Creditor, topic 8.16 Receivers.

Close Corporations.

Close corporations are generally governed by Wyoming Close Corporation Act (W.S. 17-17-101 to W.S. 17-17-1517), which is based on Model Statutory Close Corporation Supplement (1984, adopted 1989) ("Model Act"). Wyoming Close Corporation Act, as amended, applies to all domestic corporations organized under Wyoming Close Corporation Act. Some variations have been made in text of Model Act, and certain options and alternatives contained in text of Model Act have been exercised. These variations, options, and alternatives are as follows (references to section numbers are to Model Act section numbers, and references to numbers in parentheses refer to Wyoming Statute numbers):

§§ 1 and 2 are same. (W.S. 17-17-101 and 102). § 3 has been adopted, and subsection (b) has been modified to reduce number of shareholders that may be involved in close corporation from 50 to 35. Subsection (b) also requires that corporations formed before Jan. 1, 1990 have unanimous approval of all shareholders, regardless of class or voting rights, to become close corporation. (W.S. 17-17-103).

§ 10 is same. (W.S. 17-17-110). § 11 has been adopted, and subsection (a) modified by addition of language "more pursuant to a buy-sell agreement entered into by all the shareholders." Subsection (b)(v) adds "consolidation." (W.S. 17-17-111). §§ 12 and 13 are same. (W.S. 17-17-112 and 113). § 14 is adopted, and subsection (a) is modified by addition of language "surviving joint tenants" (W.S. 17-17-114). §§ 15 and 16 are same. (W.S. 17-17-115 and 116). § 17 is adopted, with subsections (b)(i) and (ii) being amended by deletion of word "vexatious." (W.S. 17-17-117). §§ 20, 21, and 22 are same. (W.S. 17-17-120, 121 and 122). § 23 is adopted, except that annual meeting date is changed to "the last business day of the third month following the close of the business year" unless corporation's articles or by-laws, or in shareholder agreement fixes different date. (W.S. 17-17-123). §§ 24 and 25 are same. (W.S. 17-17-124 and 125). § 30 is adopted, with subsection (b) being amended by addition of word "mortgage." (W.S. 17-17-130). § 31 is same. (W.S. 17-17-131). § 32 is adopted with subsection (a) amended by changing "or" to "and." (W.S. 17-17-132). § 33 is adopted, and subsection (a) changes time from 31 days to 60 days. (W.S. 17-17-133). § 40 is same. (W.S. 17-17-140). § 41 is adopted and subsection (a) adds "such relief as it deems appropriate." Subsection (b) deletes word "vexatiously." (W.S. 17-17-141). §§ 42 and 43 are same. (W.S. 17-17-142 and 143). § 50 is adopted, but subsection (b) is deleted. (W.S. 17-17-150). § 51 is same. (W.S. 17-17-151). §§ 52, 53, and 54 are not specifically adopted as part of close corporation supplement. However, severability is handled elsewhere in Wyoming statutes.

See, however, topic Limited Liability Companies, subhead Wyoming Limited Liability Company Act, infra.

Appraisal.

See preliminary statement, this topic.

Foreign Corporations.

See preliminary statement, this topic.

Continuance of foreign corporation permitted, and any corporation, except financial institutions and insurance companies, incorporated under laws of any jurisdiction other than Wyoming may, if foreign jurisdiction will acknowledge corporation's termination of domicile in foreign jurisdiction, continue as domestic corporation by filing with Secretary of State articles of continuance. Secretary of State then issues certificate of registration, thus continuing foreign corporation in Wyoming as if it had been incorporated in Wyoming. Articles of continuance constitute articles of continued foreign corporation and foreign corporation so continued has all powers and privileges, and is subject to all duties and limitations, granted and imposed upon domestic corporations by provisions of Wyoming Business Corporation Act. (W.S. 17-16-1710).

Articles of continuance must include and set forth certified copy of original articles of incorporation and all amendments thereto or equivalent basic corporate charter or other authorization; name of corporation and laws under which incorporated; date of incorporation and period of duration; address of principal office of corporation and jurisdiction under laws of incorporation; address of proposed registered office in Wyoming and name of proposed registered agent at office; purpose or purposes which corporation proposes to pursue in transaction of business in this state; names and addresses of directors and officers; statement of aggregate number of shares corporation authorized to issue, itemized by classes, par value of shares, shares without par value and series, if any, within a class; statement, expressed in dollars, of amount of stated capital of corporation, as defined in Wyoming Business Corporation Act; statement corporation accepts constitution of Wyoming in compliance Art. 10 § 5, of constitution; and such additional information as Secretary of State shall request to determine whether corporation entitled to certificate of registration. (W.S. 17-16-1710).

Prescribed forms for articles of continuance obtained from Secretary of State. Executed by president or vice president and secretary or assistant secretary and verified by one of said officers. (W.S. 17-16-1710).

Filing fees are indicated in subhead, Filing Fees, supra.

Transfer of Wyoming corporation to another jurisdiction for continuance as if incorporated under laws of other jurisdiction authorized. (W.S. 17-16-1620). Toll charge based on net actual value of corporate assets wherever located is payable. (W.S. 17-16-1720[e]).

Domestication of foreign corporation permitted, and any corporation, except banks and insurance companies, incorporated under laws of any of several states may become domestic corporation of Wyoming by filing articles of domestication with Secretary of State. (W.S. 17-16-1701). Articles of domestication then constitute articles of domesticated foreign corporation and, upon filing such articles, Secretary of State issues certificate of domestication which continues corporation as if it had been incorporated as Wyoming corporation. (Id.) Articles of domestication must include and set forth certified copy of its original articles of incorporation and all amendments thereto, and certificate of good standing not more than 30 days old; name of corporation and jurisdiction under which it was incorporated; date of incorporation and period of duration; address of principal office of corporation and jurisdiction under laws of which it is incorporated; address and proposed registered office of corporation in Wyoming, name of its proposed registered agent in Wyoming at that address; purpose or purposes of corporation which it proposes to pursue in transaction of business in Wyoming; names and addresses of directors and officers of corporation; statement of aggregate number of shares which corporation has authorized to issue, itemized by class, par value, and series, if any, within class; statement of aggregate number of issued shares itemized by class, par value, and series, if any, within class; statement, expressed in dollars, of amount of stated capital of corporation, as defined in Wyoming Business Corporation Act; statement that corporation accepts Constitution of Wyoming in compliance with requirement of Art. 10, § 5 of Wyoming Constitution; and any additional information as may be necessary or appropriate to enable Secretary of State to determine whether corporation is entitled to certificate of domestication evidencing its authority to transact business in this state, and to determine and assess fees and license taxes under laws of this state. (W.S. 17-16-1702). Filing fees are indicated in subhead Filing Fees, supra.

Taxation of Corporate Property.

Rules are same as for taxation of individual property. See category 22 Taxation.

Taxation of Corporate Stock.

Stock of corporations is not subject to personal property ad valorem tax. (W.S. 39-1-101[a][v][E]; W.S. 39-1-201[a][xxix]).

Franchise Tax.

On or before first day of month of anniversary of its registration in Wyoming (initial organization or qualification to do business), every profit corporation, domestic or foreign, must file annual report with Secretary of State setting forth capital, property and assets located and employed in Wyoming, and must pay annual license tax, based upon sum of such capital, property and assets, in amount that is greater of $50 or two-tenths of one mill on dollar ($.0002). (W.S. 17-16-1630[a]). Any corporation engaged in public calling of carrying goods, passengers or information interstate must file annual report disclosing capital, property and assets used in interstate commerce in Wyoming and must pay annual license tax based upon sum of such capital, property and assets. (W.S. 17-16-1630[b][ii]). Value of all mines and mining claims from which gold, silver and other precious metals, soda, saline, coal, mineral, oil or other valuable deposit is or will be produced, is deemed equivalent to assessed value of gross product thereof for previous year. (W.S. 17-16-1630[b][iii]). Assessed value of any property is its actual value. (W.S. 17-16-1630[b][iv]). Failure to file annual report with, or pay annual license tax when due to, Secretary of State is ground for administrative dissolution of domestic corporation and for revocation of certificate of authority of foreign corporation. (W.S. 17-16-1420[a][iv]; W.S. 17-16-1530[a][iv]). See also category 22 Taxation.

On or before first of month of anniversary of its registration in Wyoming (initial organization or qualification to do business), every nonprofit corporation, domestic or foreign, must file annual report with Secretary of State setting forth names and addresses of officers and directors, address of principal office, and any compensation, profit or pecuniary advantage paid directly or indirectly to any officer or director. (W.S. 17-19-1630[a]). Annual report must be accompanied by payment of annual license tax of $25. (W.S. 17-19-1630[d]). Failure to file annual report with, or pay annual license tax when due to, Secretary of State is ground for administrative dissolution of domestic corporation and for revocation of certificate of authority of foreign corporation. (W.S. 17-19-1420[a][iv]; W.S. 17-19-1530[a][v]).

Income Tax.

None in Wyoming.

Professional Corporations.

Corporation organized under Wyoming Business Corporation Act, whose capital stock is owned exclusively by person or persons licensed to practice profession by State of Wyoming or by agency, office or instrumentality authorized by laws of Wyoming to license individuals for practice of profession, may, by and through person or persons of such licensed stockholder or stockholders, or licensed employees, practice or offer professional services in such profession. (W.S. 17-3-101). Corporation may not offer professional services or practice profession except by and through its licensed stockholders and employees, each of whom must retain professional license in good standing. (W.S. 17-3-102).

Deeds.

See category 21 Property, topic 21.06 Deeds.

Revised Model Nonprofit Corporation Act (1987) adopted.

Limited Liability Companies.

See topic 2.06 Limited Liability Companies.

2.04 [RESERVED]

2.05 JOINT STOCK COMPANIES:

Common law governs.

Purposes.

No statutory provisions.

Formation.

No statutory provisions.

Rights, Powers and Liabilities.

No statutory provisions.

Actions.

May sue or be sued in own name. (R.17[b]).

Dissolution.

No statutory provisions.

Massachusetts Trusts.

No statutory provisions. So-called common law trusts are recognized and rights of persons interested are protected as far as possible by courts.

Professional Associations or Corporations.

See topic 2.03 Corporations, subhead Professional Corporations.

2.06 LIMITED LIABILITY COMPANIES:

Wyoming Limited Liability Company Act adopted. (W.S. 17-15-101—17-15-144).

General supervision is in Secretary of State.

Purposes.

May be formed for any lawful purpose, except for purposes of banking or insurance. (W.S. 17-15-103).

Name.

Must contain “limited liability company”. “LLC”, “L.L.C.”, “limited company”, “LC”, “L.C.”, “ltd. liability company”, “ltd. liability co.” or “limited liability co.” must appear as part of company name. Name may not contain word or phrase indicating or implying it is organized for purpose other than purpose or purposes stated in articles of organization, or be same as, or deceptively similar to any trademark or service mark registered with state and distinguishable from other names under standards of W.S. 17-16-401. Omission of required word from name makes person who participates in omission, or knowingly acquiesces in it, liable for indebtedness, damage or liability occasioned by omission. Company can reserve name prior to organization. (W.S. 17-15-105).

Term of company existence may be any designated term. If no term designated in Articles of Organization, term is 30 years from date of filing articles of organization with Secretary of State. (W.S. 17-15-107[a][ii]). Compare close limited liability company. (W.S. 17-25-101). See subhead Close Limited Liability Company, infra.

Formation of limited liability company may be by one or more persons who need not be members. Company may have one member if flexible limited company option is chosen (W.S. 17-15-144) or if formed as close limited liability company (W.S. 17-25-101). See subhead Flexible Limited Liability Companies, or Close Limited Liability Company, infra.

Powers are enumerated in W.S. 17-15-104 and are as follows: (i) Sue and be sued, complain and defend, in its name; (ii) purchase, take, receive, lease or otherwise acquire, own, hold, improve, use and otherwise deal in and with real or personal property, or an interest in it, wherever situated; (iii) sell, convey, mortgage, pledge, lease, exchange, transfer and otherwise dispose of all or any part of its property and assets; (iv) lend money or otherwise assist its members, managers and employees; (v) purchase, take, receive, subscribe for or otherwise acquire, own, hold, vote, use, employ, sell, mortgage, lend, pledge or otherwise dispose of, and otherwise use and deal in and with shares or other interests in or obligations of other limited liability companies, domestic or foreign corporations, associations, general or limited partnerships or individuals, or direct or indirect obligations of U.S. or of any government, state, territory, governmental district or municipality or any instrumentality of it; (vi) make contracts and guarantees and incur liabilities, borrow money at such rates of interest as limited liability company may determine, issue its notes, bonds, and other obligations and secure any of its obligations by mortgage or pledge of all or any part of its property, franchises and income; (vii) lend money for its proper purposes, invest and reinvest its funds and take and hold real property and personal property for payment of funds so loaned or invested; (viii) conduct its own business, carry on its operations and have and exercise powers granted by this Act in any state, territory, district or possession of U.S. or any foreign country; (ix) elect or appoint managers, officers, employees and agents of limited liability company, and define their duties and authority, which may include authority delegated to members and managers under Act, and fix their compensation; (x) make and alter operating agreements, not inconsistent with articles of organization or with laws of this state, for administration and regulation of affairs of limited liability company; (xi) indemnify member or manager or former member or manager of limited liability company against expenses actually and reasonably incurred by him or it in connection with defense of action, suit or proceeding, civil or criminal, in which he or it is made party by reason of being or having been such member or manager, except in relation to matters as to which he or it shall be adjudged in action, suit or proceeding to be liable to company for negligence or misconduct in performance of duty or to have received improper personal benefit on account thereof; and to make any other indemnification that is authorized by articles of organization or by article of operating agreements or resolution adopted by members after notice; (xii) cease its activities and surrender its certificate of organization; (xiii) have and exercise all powers necessary or convenient to effect any or all of purposes for which limited liability company is organized; (xiv) become member of general partnership, limited partnership, joint venture or similar association, or any other limited liability company, (xv) pay pensions and establish pension plans, pension trusts, profit sharing plans, ownership interest bonus plans and option plans and benefit or incentive plans for any or all of its current or former managers, officers, employees and agents; and (xvi) make donations for public welfare or charitable, scientific or educational purposes.

Content of articles of organization is prescribed by W.S. 17-15-107 and include name; duration; purpose; name and address of registered agent; total amount of cash and description and agreed value of property other than cash contributed; total additional contributions which will be made by members, if any, and times at which or events upon happening of which they will be made; right, if given, of members to admit additional members, and terms and conditions of admission; right, if given, of members to continue business on death, retirement, resignation, expulsion, bankruptcy or dissolution of member or occurrence of any other event which terminates continued membership of member in limited liability company (compare close limited liability company, see discussion infra) if company to be managed by manager or managers, articles must so state and must set out names and addresses of such manager or managers who are to serve as managers until first annual meeting of members or until their successors are elected and qualify, and if management of company reserved to members, names and addresses of members must be set out in articles; if company desires to elect status as flexible limited liability company it must so state in its articles; if company desires to elect status as close limited liability company it must so state; and any other provision not inconsistent with law, which members elect to set out in articles for regulation of internal affairs of company, including provisions which under Act are required to be set out in operating agreement of company. (W.S. 17-15-107[a]). Not necessary to set out in articles any of powers enumerated in Act. (W.S. 17-15-107[b]).

Articles of organization filed with Secretary of State. One original and one conformed copy filed. If Secretary of State finds articles conform with law and all fees paid, files original in office and issues certificate of organization, which is affixed to conformed copy and returned to principal office of company or its representative. (W.S. 17-15-108). Original consent to appointment signed by registered agent must also accompany articles. (W.S. 17-15-107[c]). Upon issuance of certificate of organization company deemed organized and such certificate conclusive evidence that members have performed all conditions precedent required to be performed by members have been complied with and that company legally organized except against state in proceeding to cancel or revoke certificate of organization or for involuntary dissolution of company. (W.S. 17-15-109).

Articles of organization may be amended. (W.S. 17-15-129).

Filing fees and annual license tax are as follows: Filing articles of organization, plus certificate of organization, $100; amendment of articles of organization, $50; certificate of authority for foreign limited liability company, $100; certificate of existence or evidence, $10; initial registration or annual renewal of registered agent, $25; resignation of registered agent, $10; statement of change of registered agent or registered office, $20 each (up to five documents) and $10 each (more than five documents); any other filing, other than annual license tax, $50. (W.S. 17-15-132[a][i], [a][ii], and [a][vii]; Rules and Regulations of Secretary of State). On or before first day of month of anniversary of its registration in Wyoming (initial organization or qualification to do business), every limited liability company, domestic or foreign, must file annual report with Secretary of State setting forth capital, property and assets located and employed in Wyoming, and must pay annual license tax as if company is corporation, based upon sum of each capital, property and assets, in amount that is greater of $50 or two-tenths of one mill on dollar ($.0002). (W.S. 17-15-132[a][vi]; W.S. 17-16-1630[a]). Schedule of filing fees and annual license tax can be accessed at: http://soswy.state.wy.us./corporat/fee.htm.

License to do business is in form of certificate of organization. (W.S. 17-15-109[a]). Limited liability company must not transact business or incur indebtedness, except which is incidental to its organization or obtaining subscriptions for payment of contributions, until Secretary of State has issued certificate of organization. (W.S. 17-15-109[b]). See subhead Articles of Organization Filed, supra.

Contributions to capital of member consist of cash or other property, services rendered or to be rendered and promissory notes. (W.S. 17-15-115). Withdrawal or reduction of member's contributions is regulated in detail. (W.S. 17-15-120). Member liable to company: (i) For difference between his or its contributions to capital as actually made and that stated in articles of organization, operating agreement, subscription agreement or other document executed by member as having been made; and (ii) for any unpaid contribution to capital which he or it agreed to make in future at time and on conditions stated in articles, operating agreement, subscription agreement or other document executed by member. (W.S. 17-15-121).

Interest of all members transferable in accordance with provisions in operating agreement, but if all of other members of company, other than member proposing to dispose of his or its interest, do not approve of transfer by unanimous written consent, then transferee has no right to participate in management of business and affairs of company, or to become member, but only entitled to receive share of profits or other compensation by way income or return of contributions, to which member would have been entitled. (W.S. 17-15-122). Compare flexible limited liability companies. (W.S. 17-15-144) (See subhead Flexible Limited Liability Companies, infra.) Compare close limited liability companies. (W.S. 17-25-101). (See subhead Close Limited Liability Company, infra.)

Registered office and registered agent for limited liability company must be maintained in state (W.S. 17-15-110) and may be changed (W.S. 17-15-111). Failure to maintain either or both for 30 days deemed transacting business in state without authority and to have forfeited franchises, rights or privileges acquired under laws of state. Procedures whereby Secretary of State makes forfeiture effective are prescribed. (W.S. 17-15-112).

Management of limited liability company vested in members and unless otherwise provided in operating agreement, is in proportion to their contributions to capital of company, as adjusted from time to time to properly reflect any additional contributions or withdrawal by members. If provision made for it in articles of organization, management may be vested in manager or managers who are elected by members as prescribed by operating agreement of company. If articles provide for management of company by manager or managers, they shall be elected annually unless operating agreement provides otherwise. Manager or managers or persons appointed by manager(s) hold offices and have responsibilities accorded them by members and set out in operating agreement of company. (W.S. 17-15-116). Limited liability companies have power to make and alter operating agreements, not inconsistent with articles of organization or with laws of state, for administration and regulation of affairs of company. (W.S. 17-15-107[a][x]).

Written waiver of required notice to member or manager provided for in W.S. 17-15-131.

Debts of limited liability company, unless otherwise provided by Act must be contracted by one or more managers, if company has managers, or by one or more members, if company does not have managers. (W.S. 17-15-117). Act also allows appointment of officers and agents who may carry out authority of managers and members. (W.S. 17-15-104[a][ix]).

Real and personal property of company owned and purchased, conveyed in company name and instruments providing for acquisition, mortgage or conveyance valid and binding on company if executed by one or more managers of company having managers or one or more members of company not having managers. (W.S. 17-15-118). Act also allows appointment of officers and agents who may carry out authority of managers and members. (W.S. 17-15-104[a] [ix]).

Profits of limited liability company divided and distributed from time to time to members upon basis stipulated in operating agreement. Distribution of profits must not reduce assets of company below liabilities. Unless operating agreement provides otherwise, profits and losses are allocated according to capital contributions actually made. Unless operating agreement provides otherwise, distributions allocated same way. Allocation of losses does not affect limitation on liability of members and managers provided for in Act. (W.S. 17-15-119).

Limited liability is prescribed for members and managers of limited liability company. Neither members nor managers of company liable under judgment, decree or order of court, or in any other manner for debt, obligation or liability of company. (W.S. 17-15-113). But all persons who assume to act as limited liability company without authority to do so jointly and severally liable for all debts and liabilities (W.S. 17-15-133) and provisions of Act apply to commerce with foreign nations and among several states only as provided by law (W.S. 17-15-135).

Dissolution and distribution of assets upon dissolution regulated in detail. (W.S. 17-15-123-129).

Judgment creditors of member may seek charging order from court to charge member's distributional interest in company with payment of unsatisfied judgment. (W.S. 17-15-145).

Conversion of limited liability company to corporation is statutorily provided for. (W.S. 17-15-146).

Close limited liability company may be formed by stating desire in articles of organization. Company may have one member and existence does not end on death, withdrawal, bankruptcy, etc. of member unless articles or operating agreement say so. Members can only withdraw according to provisions of articles, operating agreement or unanimous consent of members. Operating agreement must include statutory disclosure that rights in close limited liability company may be different than other forms of limited liability companies. (W.S. 17-25-101 to W.S. 17-25-108).

Flexible limited liability companies may be formed allowing more freely transferable interests and more easily continued business following withdrawal, death, bankruptcy or expulsion of member. Also permit one member LLC. (W.S. 17-15-144).

Foreign limited liability companies may qualify to do business in state in same fashion and under same circumstances as foreign corporation. (W.S. 17-16-1533). Fees to be paid same as those owed on creation of domestic company. (Rules and Regulations, c. 1, § 5). Continuance of foreign LLC permitted if foreign jurisdiction confirms in writing that foreign LLC foreign domicile is terminated. Procedures are governed by statute. (W.S. 17-15-143). Mergers of LLC with corporations, other LLCs, partnerships and limited partnerships permitted. (W.S. 17-15-139-140).

Attorney General opinions have been issued and are available from Secretary of State on many points.

2.07 [RESERVED]

2.08 PARTNERSHIPS:

Uniform Partnership Act has been adopted. (W.S. 17-21-101 to W.S. 17-21-1003).

Formation.

Governed by Uniform Partnership Act.

Name.

Governed by Uniform Partnership Act.

Rights and Liabilities of Partners Inter Se.

Governed by Uniform Partnership Act.

Rights and Liabilities of Partners as to Third Persons.

Governed by Uniform Partnership Act.

Dissolution.

Governed by Uniform Partnership Act.

Administration of Partnership Property.

Governed by Uniform Partnership Act. In case of death of partner, surviving partners may continue in possession of partnership and settle its business, but interest of decedent in partnership must be included in inventory and appraised as other property includible in decedent's estate. Surviving partners must settle affairs of partnership without delay, account to personal representative and pay such funds as from time to time are payable to him in right of decedent. (W.S. 2-7-107).

Limited Partnership.

1976 version of Uniform Limited Partnership Act, with 1985 amendments, adopted. (W.S. 17-14-201 to W.S. 17-14-1104). Office designated in § 2(a) for filing certificate for record is office of Secretary of State. (W.S. 17-14-306).

3 BUSINESS REGULATION AND COMMERCE

3.01 BANKS AND BANKING:

Permissible Activities.

In Wyoming, bank may: (i) make contracts in its corporate name; (ii) sue and be sued; (iii) lend money on real and personal securities; (iv) buy, sell and discount bills of exchange, notes and all other written evidence of debt except as otherwise provided; (v) receive notes, buy and sell gold and silver coins and bullion where permitted by federal law; (vi) collect and pay over money; (vii) transact all of business pertaining to banking subject to provisions and restrictions of Wyoming Banking Act; (viii) operate savings department; (ix) operate trust department; (x) act as executor, administrator, trustee, receiver, assignee or guardian of any estate, minor, incompetent or other persons subject to guardianship and accept appointments by any court in connection with any of foregoing; (xi) sell insurance or annuities, provided however all bank related sales of insurance and annuities shall be in accordance with Wyoming Insurance Code and subject to all of their applicable state and federal laws; (xii) engage in any activity that is usual or incidental with business of banking subject to prior written approval of State Banking Commissioner; (xiii) engage in any activity in which federally chartered insured depository institution operating within Wyoming is authorized to engage as approved by Commissioner. (W.S. 13-2-101). Insurance underwriting shall not be approved as usual or incidental to business of banking under Wyoming Banking Act unless permitted for federally chartered insured depository institution. (W.S. 13-2-101).

Uniform Commercial Code adopted. (W.S. 34.1-1-101 to W.S. 34.1-10-104). See topic 3.09 Commercial Code. Uniform Consumer Credit Code also adopted. (W.S. 40-14-101 to W.S. 40-14-702). See topic 3.11A Consumer Credit.

Regulated by.

Banks are regulated by Title 13.

Stockholders subject to assessment to make good impairment of capital or to bring capital up to amount required by law. Stock can be sold to satisfy assessment. (W.S. 13-4-203).

Deposits.

Any portion of deposit by any person in trust for another, together with interest or dividends thereon, may, in absence of other written notice to financial institution of existence and of terms of legal and valid trust, be paid to persons for whom deposit was made. (W.S. 2-1-203[c]). Also, when minor or other person under legal disability makes deposit in his name, such person's checks may be paid on his order and payments are legally valid. (W.S. 2-1-203[a]). If deposit made in name of two or more persons payable to either or any depositor, or to survivor of such depositors, then such deposit, and interest or dividends thereon, may be paid in accordance with contract of deposit. Receipt of payment by person paid is valid and sufficient release and discharge to financial institution for any payment made. (W.S. 2-1-203[b]). Otherwise, deposits are governed by Uniform Commercial Code. (W.S. 34.1-1-101 to W.S. 34.1-10-104). See topic 3.09 Commercial Code.

Payable Death Accounts.

Any payable on death (P.O.D.) account may be paid, on request, to any original party to account. Payment may be made, on request, to P.O.D. payee or in equal proportions to multiple P.O.D. payees upon presentation to financial institution of proof of death showing P.O.D. payee or payees survived all persons named as original payees. Payment may be made to personal representative or heirs of deceased original payee if proof of death is presented to financial institution showing his descendant was survivor of all other persons named on account either as original payee or as P.O.D. payee. Receipt of payment by person paid is valid and sufficient release and discharge to financial institution for any payment made. Person named as payee in P.O.D. account has no enforceable rights therein during lifetime of person or persons creating account. (W.S. 2-1-203[d]).

See also category 13 Estates and Trusts, topic 13.09 Executors and Administrators, subhead Administration is Unnecessary.

Unclaimed Deposits.

Whenever title to deposit fails for want of legal heirs, deposit escheats to state. (W.S. 9-5-202). Fact that deposit has been unclaimed for period of five years prior to time state files information for forfeiture of such property to state and that name or whereabouts of owner is unknown is deemed prima facie evidence of failure or want of legal heirs. (W.S. 9-5-203). Escheat statute (W.S. 9-5-203) does not apply to abandoned property which is subject to Uniform Unclaimed Property Act (W.S. 34-24-101 to W.S. 34-24-140). (W.S. 9-5-203[f]). Upon liquidation of bank by state banking commissioner, dividends and deposits remaining in his hands six months after order of final distribution shall be deposited with state treasurer who holds dividends in account within trust and agency fund. State examiner may order money paid to persons entitled thereto upon satisfactory evidence of their right. In case of doubt, state banking commissioner may apply to court for order directing payment. He may apply interest earned toward expenses of distribution of unclaimed deposits or dividends to persons entitled thereto. (W.S. 13-4-703). See also category 21 Property, topic 21.01 Absentees, subhead Escheat.

Abandoned Deposits, Instruments and Other Property.

Uniform Unclaimed Property Act has been adopted. (W.S. 34-24-101 to W.S. 34-24-140). Under Wyoming law, when owners of stock in business association do not claim amounts payable to them during a three-year period, stock is subject to abandonment. (W.S. 34-24-111).

Collections.

Uniform Commercial Code has been adopted. (W.S. 34.1-1-101 to W.S. 34.1-10-104). See topic 3.09 Commercial Code.

Trust companies may be organized under Wyoming Banking Act (W.S. 13-1-101 to W.S. 13-11-101) to exercise following powers: (i) act or be appointed by any court to act in like manner as individual, as executor, administrator, guardian or conservator of estates, assignee, receiver, depositary, trustee, custodian or in any other fiduciary or representative capacity for any purpose permitted by law; (ii) act as transfer agent or registrar of corporate bonds and stocks; (iii) purchase, invest in and sell stocks, bonds, mutual funds, mortgages and other securities for account of trusts; (iv) accept and execute any trust business permitted by law of Wyoming or any other state of U.S. to be taken, accepted or executed by individual; (v) take oaths and execute affidavits by oath or affidavit of its president, vice-president, manager, trust officer or assistant trust officer; (vi) make any lawful fiduciary investment as permitted by W.S. 2-3-301; and (vii) do and perform all acts necessary to exercise powers enumerated in W.S. 13-5-101(b). (W.S. 13-5-101[b]). Such trust companies may also exercise all of powers and rights granted to other corporations under general law except as provided by W.S. 13-1-101 to W.S. 13-11-101. (W.S. 13-5-101[a]). Trust company organized under Wyoming Banking Act (W.S. 13-1-101 to W.S. 13-10-209) shall not engage in any banking business by accepting deposits or issuing demand instruments (W.S. 13-5-101[c]). Trust companies organized under Wyoming Banking Act not permitted to open branch offices. (694 P.2d 106). “Banking business” means opening credits by deposit or collection of money or negotiable paper subject to be paid upon draft, receipt, check or order. (W.S. 13-1-101[a][ii]).

Uniform Common Trust Fund Act adopted, with amendments. (W.S. 2-3-401 to W.S. 2-3-406). Act permits any bank or trust company qualified to act as fiduciary in Wyoming to establish and administer common trust funds for investment to itself or to any “affiliated” bank or trust company as fiduciary or co-fiduciary, if not prohibited by instrument, judgment, decree, or statute governing fiduciary relationship. (W.S. 2-3-402). “Affiliated” given same definition as I.R.C. § 1504. (W.S. 2-3-405). Common trust funds under Act exempted from state securities laws. (W.S. 2-3-406).

Industrial Banks.

No statutory provisions.

Nonbank Banks.

No statutory provisions.

Private Banking.

No statutory provisions.

Foreign Banks.

Wyoming Banking Act (W.S. 13-1-101 to W.S. 13-11-101) applies to all banks organized under Wyoming Banking Act and to national banks where specifically provided for by Act (W.S. 13-1-201). Out-of-state national, state, or foreign bank may acquire Wyoming bank subject to compliance with applicable laws of Wyoming and U.S. (W.S. 13-2-801). It is express intent of Wyoming Banking Act to permit interstate branching by merger under § 102 of Riegle-Neal Interstate Banking and Branching Efficiency Act of 1994 (Public Law No. 103-328) in accordance with provisions set forth in W.S. 13-2-801 to W.S. 13-2-810. Foreign corporation cannot transact business in Wyoming without certificate of authority from Secretary of State. (W.S. 17-16-1501). Foreign corporation does not transact banking business in Wyoming by reason of following activities: (i) Purchasing evidences of debt, mortgages or liens on property; or (ii) securing or collecting debts or enforcing any rights in property securing debts. (W.S. 13-1-202; W.S. 17-16-1501[b]). No person or entity shall carry on banking business in Wyoming except in compliance with Wyoming Banking Act. (W.S. 13-1-203). See also categories 13 Estates and Trusts, topics Executors and Administrators, subhead Eligibility and Competency, Trusts; Family, topic Guardian and Ward.

Foreign Branch Banking.

(W.S. 13-2-901 to W.S. 13-2-904). Interstate branches of out-of-state foreign banks may be established to operate in Wyoming to extent consistent with provisions of 12 U.S.C. § 3103 and under terms and conditions that are comparable to and no less favorable than those applicable to establishment of interstate federal branches in this state by out-of-state foreign banks. (W.S. 13-2-901[a]). Out-of-state foreign bank may establish interstate Wyoming state branch in same manner as and subject to same criteria which are applicable to establishment to interstate branches in Wyoming by out-of-state bank having same home state in U.S. (W.S. 13-2-903). Out-of-state domestic bank owned and controlled by foreign bank or other foreign person may establish interstate Wyoming state branch in same manner as and subject to same criteria and requirements applicable to establishment of interstate branches in Wyoming by out-of-state bank having same home state in U.S. (W.S. 13-2-904). Except as otherwise expressly permitted by federal law, no company may acquire Wyoming bank holding company or Wyoming bank without prior approval of Wyoming Banking Commissioner. (W.S. 13-9-308). This prohibition does not apply where acquisition is made: (i) Solely for purpose of facilitating acquisition otherwise permitted under Wyoming Banking Act; (ii) in transaction arranged by commissioner or another bank supervisory agency to prevent insolvency or closing of acquired bank; or (iii) in transaction in which bank forms its own bank holding company, if ownership rights of former bank shareholders are substantially similar to those of shareholders of new bank holding company. (W.S. 13-9-308[b]). Fee to make acquisition under this article is $4,500. (W.S. 13-9-309[a]). Applicant must file with commissioner copy of application that company has filed with responsible federal bank supervisory agency. (W.S. 13-9-309[a][ii]). Application to commissioner must also include: (a) Name and address of applicant; (b) name of chief executive officer and officer designated by applicant as being responsible for application; (c) sworn statement by chief executive officer that all information furnished to commissioner is truthful; (d) names and addresses of directors of applicant; (e) names and addresses of executive officers of applicant not to exceed 20 in number and percent of outstanding shares of applicant owned directly or beneficially by each officer; (f) most recent official statement of condition of applicant; (g) copy of most recent federal income tax return of applicant together with all pertinent schedules and addendums; (h) copy of most recent directors' audit of applicant; (j) copy of two most recent reports of examination as performed by all regulatory authorities, including record of compliance and rating under Community Reinvestment Act; (k) historical compilation of loan loss reserve account for applicant for previous five-year period; and (l) other information as commissioner may require. (W.S. 13-9-309). When deciding whether to approve application for proposed acquisition, commissioner must consider whether: (1) There is or recently has been evidence of criminal activity on part of applicant or any of its officers or directors; (2) acquisition may be detrimental to safety and soundness of Wyoming bank holding company to be acquired; (3) acquisition may result in substantial reduction of competition; and (4) acquisition may have significantly adverse effect on convenience and needs of community or communities in Wyoming. (W.S. 13-9-310). Commissioner shall not approve acquisition if applicant would control 30% or more of total amount of deposits held by insured depository institutions in Wyoming. (W.S. 13-9-310). Commissioner shall not approve application by out-of-state bank holding company for acquisition unless Wyoming bank to be acquired or all Wyoming bank subsidiaries of bank holding company to be acquired have as of proposed date of acquisition been in existence and continuous operation for at least three years. State bank resulting from conversion of federally-chartered savings and loan, federally-chartered savings bank or state savings and loan pursuant to W.S. 13-4-109 or national bank resulting from conversion of federally-chartered savings and loan or federally-chartered savings bank pursuant to procedures prescribed by laws of U.S. shall be deemed to have been in existence for same period of time as converting federally-chartered savings and loan, federally-chartered savings bank or state savings and loan or other predecessor. (W.S. 13-9-310). Commissioner shall decide whether or not to approve acquisition within 90 days. (W.S. 13-9-311).

Automatic Teller Machines.

Any Wyoming financial institution, out of state financial institution, or person may operate remote electronic terminals in Wyoming without geographic restriction, subject to requirements and limitations set forth in W.S. 13-1-502. (W.S. 13-1-502[a]). "Wyoming financial institution" defined as any bank, savings and loan association or trust company chartered or organized under laws of Wyoming. (W.S. 13-1-501[a][i]). Out of state "financial institution" defined as any bank, savings and loan association, trust company or credit union chartered or organized under laws of any state other than Wyoming or of U.S. (W.S. 13-1-501[a][ii]). "Person" defined as any individual, partnership, corporation, or other entity other than Wyoming or out of state financial institution. (W.S. 13-1-502[a][iv]). Each Wyoming or out of state financial institution or person operating remote electronic terminal in conduct of its business shall register remote electronic terminal with banking commissioner. (W.S. 13-1-502[m]). Commissioner may also impose annual fee of $25 for registration of each remote electronic terminal. (W.S. 13-1-502[m]). Any Wyoming financial institution or person operating remote electronic terminal in Wyoming who fails to comply with provisions of W.S. 13-1-502 or rules and regulations adopted pursuant to this section is guilty of misdemeanor punishable by fine of not less than $100 nor more than $5,000, imprisonment for not more than one year, or both. (W.S. 13-1-502[n]).

Statewide Branch Banking.

With prior approval of State Banking Commissioner bank may establish and operate one or more branches at any location in state. (W.S. 13-2-702). Before opening branch, applicant bank shall deliver amendment to its articles of incorporation reflecting branch to Commissioner. (W.S. 13-2-703). Out of state bank that has established or acquired branch in Wyoming may establish or acquire other branches in Wyoming to same extent that Wyoming bank may establish or acquire branch in Wyoming under applicable federal and state law. (W.S. 13-2-806).

Loan Production Office.

After notifying Commissioner, bank may establish and operate one or more loan production offices which may conduct any of following activities: (i) solicit loans on behalf of bank or branch of bank; (ii) assemble credit information; (iii) make property inspections and appraisals; (iv) secure title information; (v) prepare applications for loans; (vi) solicit investors to purchase loans from bank and to contract with bank for servicing such loans; and (vii) any other activity that federal authorities have approved for loan production office operated by national bank. (W.S. 13-2-709). Bank shall not accept deposits, originate deposits or savings or checking accounts, approve loans or disburse loan funds at loan production office. (W.S. 13-2-709).

3.02 BILLS AND NOTES:

Uniform Commercial Code adopted. (W.S. 34.1-1-101 to W.S. 34.1-10-104; 1991 official text of Revised Article 3—Negotiable Instruments, with conforming and miscellaneous amendments to Arts. 1 and 4, adopted effective July 1, 1991). Uniform Consumer Credit Code also adopted. (W.S. 40-14-101 to W.S. 40-14-702). See topics 3.09 Commercial Code, 3.11A Consumer Credit.

Special Requirements.

None.

Judgment notes are authorized by implication. (W.S. 34.1-3-104[a][iii][2]). See also topic 3.11A Consumer Credit; category 5 Civil Actions and Procedure, topic 5.15 Judgments, subhead Judgment by Confession.

Attorney fee clauses are enforceable.

Special Defenses.

See topic 3.11A Consumer Credit. (W.S. 40-14-101 to W.S. 40-14-702).

3.03 BILLS OF LADING:

See topic 3.08 Carriers.

3.04 BILLS OF SALE:

See topic 3.23 Sales; category 23 Transportation, topic 23.01 Motor Vehicles.

3.05 BLUE SKY LAW:

See topic 3.24 Securities.

3.06 BROKERS:

There are no statutory provisions with respect to brokers generally. Uniform Commercial Code adopted. (W.S. 34.1-1-101 to W.S. 34.1-10-104). See also topics 3.09 Commercial Code, Securities, subheads Registration of Securities, Licenses; category 16 Insurance, topic 16.01 Insurance Companies, subhead Agents and Brokers.

Licenses.

No statutory provisions of general application. See also subhead Real Estate Brokers, infra.

Bond.

No statutory provisions of general application. See also subhead Real Estate Brokers, infra.

Real Estate Brokers.

Unlawful for any person to engage in or conduct, directly or indirectly, or advertise or hold himself out as engaging in or conducting business, or acting in capacity of real estate broker, associate broker or real estate salesman within state without first obtaining license. (W.S. 33-28-101). No violation of Act if nonresident broker assists resident broker, as long as nonresident broker conducts no negotiations in Wyoming. (Wyo., 752 P.2d 1377). Term associate broker means individual who has broker's license and is employed by, or is associated with, another broker as independent contractor and participates in same activities as broker. (W.S. 33-28-102[a][i]). Term broker means individual, other than salesman or associate broker, who for another and for compensation: (a) Sells, exchanges, purchases, rents, manages or leases real estate; (b) offers to sell, exchange, purchase, rent, manage or lease real estate; (c) negotiates, offers, attempts or agrees to negotiate sale, exchange, purchase, rental or leasing of real estate; (d) lists, offers, attempts or agrees to list real estate for sale, lease or exchange; (e) auctions, offers, attempts or agrees to auction real estate; (f) collects, offers, attempts or agrees to collect rent for use of real estate; (g) advertises or holds himself out as being engaged in business of buying, selling, exchanging, renting or leasing real estate; (h) engages in business of charging advance fee in connection with any contract undertaken to promote sale or lease of real estate either through its listing in publication issued for that purpose or for referral of information concerning real estate to brokers, or both; (i) buys, sells, offers to buy or sell or otherwise deals in options on real estate or improvements thereon; (j) assists or directs in procurement of prospects calculated to result in sale, exchange, lease or rental of real estate; or (k) assists or directs in negotiation of any transaction calculated or intended to result in sale, exchange, lease or rental of real estate. (W.S. 33-28-102[a][iii]). Term salesman means any person associated or engaged under contract by or on behalf of licensed broker to participate in any activity included in definition of broker for compensation or otherwise. (W.S. 33-28-102[a][xvi]). Any person who, for another, with intention or upon promise of receiving any valuable consideration offers, attempts or agrees to perform, or performs any single act included in definition of broker, whether as part of transaction or as entire transaction, deemed to be acting as broker, associate broker or salesman within meaning of Act. (W.S. 33-28-104). Term real estate means leaseholds, as well as any other interest or estate in land, whether corporeal, incorporeal, freehold or nonfreehold, and whether real estate is situated in Wyoming or elsewhere, but does not include mineral lands, rights or leases. (W.S. 33-28-102[a][xiv]).

Licensing provisions concerning real estate brokers, associate brokers and salesmen do not apply to: (a) Owner of real estate, member of owner's immediate family or owner's regular employees with respect to property owned by him; (b) attorney in fact acting under duly executed and recorded power of attorney to convey real estate from owner or lessor or services rendered by attorney at law in performance of duties as attorney; (c) any individual acting as receiver, trustee in bankruptcy, administrator, executor or guardian, or while acting under court order or under authority of will or trust instrument or as witness in any judicial proceeding or other proceeding conducted by state or any governmental subdivision or agency; (d) any officer or employee of federal agency in conduct of official duties; (e) any officer or employee of state government or any political subdivision thereof performing official duties; (f) any person or employee acting as resident manager for owner or employee acting as resident manager for broker managing apartment building, duplex, apartment complex or court, when resident manager resides on premises and is engaged in leasing of property in connection with employment; or (g) homeowner's association formed and acting pursuant to declaration and bylaws or resort association formed and acting pursuant to association agreement and bylaws. (W.S. 33-28-103[a]).

Wyoming Real Estate Commission, through its duly appointed director, issues real estate broker and/or salesman licenses to qualified applicants. (W.S. 33-28-105[c]). Broker must have reached age of majority, and must have been actively engaged as licensed real estate salesman for at least two years or hold degree in real estate from accredited college or university. (W.S. 33-28-106[c][i], [c][ii]). Salesman must have reached age of majority and must have written recommendation of broker with whom he will be associated setting forth certain specified information. (W.S. 33-28-106[f]). All applicants must have good reputation for honesty, trustworthiness, integrity and competence. (W.S. 33-28-106[b]). All applicants must pass written examination (W.S. 33-28-107[a]) and pay fee to take examination (W.S. 33-28-108).

Before license is issued, applicant for broker's or salesman's license must pay fee established by Commission, and all licensed brokers and salesmen must pay fee for renewal of license in amount established by Commission. (W.S. 33-28-108; W.S. 33-28-118[c]). Licenses may be renewed for successive three year periods subject to grace period and late fees established by Commission. (W.S. 33-28-118[a]). All resident brokers must have fixed office in state. (W.S. 33-28-109). All real estate licensees must secure errors and omissions insurance. (W.S. 33-28-401). All salesmen must be associated with broker. (W.S. 33-28-106[f]; W.S. 33-28-109[c]).

Nonresident of state who is licensed broker in another state, who is actively engaged in real estate business in other state and maintains place of business there, may obtain broker's license in this state if he complies with all requirements pertaining to resident brokers and his home state has made agreement with Wyoming for issuance of reciprocal licenses. (W.S. 33-28-110[b]). Nonresident licensee must file with Commission designation in writing appointing director of Commission to act as his licensed agent upon whom all judicial and other process or legal notice directed to nonresident licensee may be served. (W.S. 33-28-110[f]).

Commission, upon written sworn complaint or its own motion, authorized to investigate actions of any broker, associate broker or salesman, and, after hearing, any censure licensee, place licensee on probation and set terms of probation, suspend or revoke any license issued under Act and impose administrative fines for any of offenses enumerated in W.S. 33-28-111(a).

3.07 BULK SALES:

No provisions.

3.08 CARRIERS:

Public Service Commission has general and exclusive power to regulate and supervise public utilities, and to prosecute violations. (W.S. 37-2-112; W.S. 37-2-215). Also, Uniform Commercial Code (W.S. 34.1-1-101 to W.S. 34.1-10-104) adopted. See topic 3.09 Commercial Code. Person adversely affected or aggrieved by any action, findings, or conclusions or decision of Public Service Commission is entitled to judicial review thereof according to procedures established by Wyoming Administrative Procedure Act and W.R.A.P.; standards applied in judicial review proceedings, including scope of review, must be those established in Wyoming Administrative Procedure Act. (W.S. 37-2-130).

Rates.

Commission has power upon investigation and hearing to order rates so adjusted as to be reasonable, and not unjustly discriminatory or unduly preferential. (W.S. 37-2-121).

Discrimination.

Public utility must charge customer for services rendered or to be rendered at rate prescribed in schedules filed with Public Utility Commission. (W.S. 37-3-102). Free transportation, or reduced rates, may be granted to certain classes of persons. (W.S. 37-3-105). Person accepting rebate forfeits three times amount to state. (W.S. 37-12-209).

Limiting Liability.

Uniform Commercial Code (W.S. 34.1-1-101 to W.S. 34.1-10-104) governs. See topic 3.09 Commercial Code.

Bills of lading are either order (W.S. 34-16-101) or straight (W.S. 34-16-102) bills, and Uniform Commercial Code has been adopted (W.S. 34.1-1-101 to W.S. 34.1-10-104) and applies to them. See topic 3.09 Commercial Code.

Lien.

Uniform Commercial Code (W.S. 34.1-1-101 to W.S. 34.1-10-104) governs. See topic 3.09 Commercial Code and category 8 Debtor and Creditor, topic 8.13 Liens, subhead Lien on Goods, Chattels and Animals.

Motor Vehicle Carriers.

See category 23 Transportation, topic 23.01 Motor Vehicles.

3.09 COMMERCIAL CODE:

Uniform Commercial Code adopted, effective Jan. 1, 1962. (W.S. 34.1-1-101 to W.S. 34.1-10-104). Section numbers of Wyoming Statutes correspond with those of adopted official texts printed in Uniform and Model Acts section. There are certain variations from official text, and certain of Permanent Editorial Board's 1966 recommended optional amendments and alternatives have been adopted. These variations, options, and alternatives are as follows (citations are to

U.C.C. official text and, where applicable, to sections of W.S. 34.1-1-101 to W.S. 34.1-1-104); W.S. 34.1-1-209 adopts Permanent Editorial Board's 1966 recommended optional amendment; W.S. 34.1-2-318 adopts Alternative C of Permanent Editorial Board's 1966 recommended optional amendment; W.S. 34.1-2-403(d) omits reference to “bulk transfers (Article 6)”; W.S. 34.1-2-702(c) adopts Permanent Editorial Board's 1966 recommended amendment; W.S. 34.1-7-204 omits 7-204(4); W.S. 34.1-7-209 adopts Permanent Editorial Board's 1966 recommended amendment; W.S. 34.1-7-210(b)(ii) omits reference to certified letter; W.S. 34.1-7-403(a)(ii) adopts optional provisions; 1987 official text of Article 2A—Leases, with conforming amendments to Articles 1 and 9, adopted effective July 1, 1991. (1991 Wyo. Sess. Laws, c. 14). 1991 official text of Revised Article 3—Negotiable Instruments, with conforming and miscellaneous amendments to Articles 1 and 4, adopted effective July 1, 1991 (1991 Wyo. Sess. Laws, c. 160); Alternative A of 4-106(b) adopted (W.S. 34.1-4-106[b]). 1989 official text of Article 4A—Funds Transfers, with technical amendment to Article 1, adopted effective July 1, 1991. (1991 Wyo. Sess. Laws, c. 15). 1995 official text of Revised Article 5—Letters of Credit, with conforming and miscellaneous amendments to Articles 1, 2, and 9, adopted effective July 1, 1997. (1997 Wyo. Sess. Laws, c. 89). Article 6—Bulk Transfers, repealed effective July 1, 1991. (1991 Wyo. Sess. Laws, c. 177). 1994 official text of Revised Article 8—Investment Securities, with conforming and miscellaneous amendments to Articles 1, 4, 5, 9, and 10, adopted effective July 1, 1996 (1996 Wyo. Sess. Laws, c. 65); 1998 official text of Revised Article 9—Secured Transactions, with conforming amendments to Articles 1, 2, 2A, 4, 5, 7, and 8, adopted effective July 1, 2001 (2001 Wyo. Sess. Laws, c. 137). There are certain variations from 1998 official text of Revised Article 9, and optional model provisions for production-money security interest in crops and 1999 amendments and 2000 technical amendments have been adopted. Variations, optional model provisions, and amendments are as follows: W.S. 34.1-9-102(a)(xi) adopts 1999 amendment and 2000 technical amendment; W.S. 34.1-9-102(a)(lx) and W.S. 34.1-9-102(a)(lxiv) adopt 2000 technical amendments; W.S. 34.1-9-102(a)(lxv) adopts model definition of “production-money crops”; W.S. 34.1-9-102(a)(lxvi) adopts model definition of “production-money obligation”; W.S. 34.1-9-102(a)(lxvii) adopts model definition of “production of crops”; W.S. 34.1-9-103A adopts model UCC 9-103A providing for creation of production-money security interest in crops; W.S. 34.1-9-324A adopts model 9-324A relating to priority of production-money security interests and agricultural liens; W.S. 34.1-9-109(d) adds subsection (xiv) providing that Article 9 does not apply to transfers by State of Wyoming or governmental unit of State of Wyoming; W.S. 34.1-9-210(d)(ii) adopts 1999 amendment; W.S. 34.1-9-311(d) adopts 2000 technical amendment; W.S. 34.1-9-317(a) adopts 1999 amendment; W.S. 34.1-9-317(a)(ii) adopts 2000 technical amendment; W.S. 34.1-9-923(b) adopts 1999 amendment; W.S. 34.1-9-406(b)(iii)(A) adopts 2000 technical amendment; W.S. 34.1-9-406(d)(ii) and W.S. 34.1-9-406(f)(ii) adopt 1999 amendments; W.S. 34.1-9-406(i)[9-406(i)] omitted; first sentence of W.S. 34.1-9-406(j) modifies UCC 9-406(j) to provide that free assignability provisions of W.S. 34.1-9-406 prevail over inconsistent provisions of existing or future Wyoming statute, rule, or regulation prohibiting, restricting, or impairing assignment unless anti-assignment provision of state statute refers expressly to W.S. 34.1-9-406 and states that anti-assignment provision prevails over W.S. 34.1-9-406; adds second sentence to subsection (j) providing that subsection (f) does not apply to override anti-assignment provisions of W.S. 1-40-113 (prohibiting assignment, pledge, or encumbrance of compensation under Wyoming Crime Victim Compensation Act), W.S. 26-115-132 (prohibiting transfer of benefits accruing under annuity contract), and W.S. 27-14-702 (prohibiting assignment of future worker's compensation payments and awards); W.S. 34.1-9-406 adds subsection (k) essentially restating first sentence of subsection (j); W.S. 34.1-9-407(a)(i) and W.S. 34.1-9-407(a)(ii) adopt 1999 amendments; W.S. 34.1-9-408(a)(ii) and W.S. 34.1-9-408(c)(ii) adopt 1999 amendments; W.S. 34.1-9-408(e) modifies UCC 9-408(e) to provide that except to extent otherwise provided in subsection (f), free assignability provisions of W.S. 34.1-9-408 prevail over inconsistent provisions of existing or future Wyoming statute, rule, or regulation prohibiting, restricting, or impairing assignment unless anti-assignment provision of state statute refers expressly to W.S. 34.1-9-408 and states that anti-assignment provision prevails over W.S. 34.1-9-408; W.S. 34.1-9-408 adds subsection (f) providing that subsection (c) does not apply to override anti-assignment provisions of W.S. 1-40-113, W.S. 26-15-132, and W.S. 27-14-702; W.S. 34.1-9-501(a) adds subsection (iii) providing that financing statement must be filed in office of county clerk to perfect security in vehicles or motor vehicles; W.S. 31-2-801 states requirements for perfection of security interest in vehicle or motor vehicle required to be licensed in Wyoming; W.S. 34.1-9-504(a) adopts 1999 amendment; W.S. 34.1-9-509(a)(i) adopts 2000 technical amendment; W.S. 34.1-9-513(d) adopts 2000 technical amendment; W.S. 34.1-9-608(a)(i) and W.S. 34.1-9-608(a)(iii) adopt 2000 technical amendments; W.S. 34.1-9-613(a)(i)(E) adopts 2000 technical amendments; W.S. 34.1-9-615(a) and W.S. 34.1-9-615(c) adopt 2000 technical amendments; W.S. 34.1-9-625(b) and W.S. 34.1-9-625(g) adopt 2000 technical amendments; W.S. 34.1-9-702(b) adopts 2000 technical amendment; W.S. 34.1-9-707 adopts 2000 technical amendment adding new UCC 9-707 relating to post-effective date amendments of pre-effective date financing statements; W.S. 34.1-9-708 adopts 2000 technical amendment renumbering UCC 9-707 as UCC 9-708; W.S. 34.1-9-709 adopts 2000 technical amendment renumbering UCC 9-708 as UCC 9-709. W.S. 34.1-10-102 does not adopt subsection (1); UCC 10-103 is not adopted. UCC 11-101 to 11-108 are not adopted. W.S. 34-21-1101 to W.S. 34-21-1107 establish central filing system for effective financing statement to comply with Food Security Act of 1985 requirements relating to “farm products”.

Wyoming Transmitting Utility Act (W.S. 37-4-101 to W.S. 37-4-104) provides that security interest in personal property or fixtures of business entity primarily engaged in railroad or street railway business, telephone or telegraph business, transmission of oil, gas or petroleum products by pipeline, or transmission or production and transmission of electricity, steam, gas or water by pipeline, pursuant to authority granted by state or federal regulatory body is filed in office of secretary of state; and security interest in rolling stock may be filed in either office of secretary of state or pursuant to § 20(c) of Interstate Commerce Act (W.S. 37-4-103[a][c]). When financing statement covers goods of transmitting utility which are or are to become fixtures, no description of real estate concerned is required. (W.S. 37-4-103[b]). Definition of “transmitting utility” whose assets may be subject to Article 9 security interest is broader than definition of “transmitting utility” that is subject to Wyoming Transmitting Utility Act. (Compare W.S. 34.1-9-102[a][lxxxiii] with W.S. 37-4-102[a][i]).

Filing Fees.

Fees for services rendered by Secretary of State as filing office set by rule adopted by Secretary of State. (W.S. 34.1-9-525). Filing and registration fees applicable to farm products that are collateral and subject to central filing system established for effective financing statement required by Food Security Act of 1985, also set by rule adopted by Secretary of State. (W.S. 34-21-1107). Recording and satisfaction fees for mortgage recorded under real estate law apply to record of mortgage that is effective as fixture filing or as financing statement covering as-extracted collateral or timber to be cut. (W.S. 34.1-9-525[e]). Fees for services rendered by county clerk as filing office prescribed by W.S. 18-3-402. See category 10 Documents and Records, topic 10.04 Records, subheads Recording Fees and Filing Under Uniform Commercial Code.

1987 Official Text of Article 2A—Leases.

Official Text, with conforming amendments to Articles 1 and 9, adopted effective as of July 1, 1991.

1991 Official Text of Revised Article 3—Negotiable Instruments.

Official Text, with conforming and miscellaneous amendments to Articles 1 and 4, adopted effective as of July 1, 1991.

1989 Official Text of Article 4A—Funds Transfers.

Official Text, with technical amendment to Article 1, adopted effective as of July 1, 1991.

1995 Official Text of Revised Article 5—Letters of Credit.

Official Text, with conforming and miscellaneous amendments to Articles 1, 2, and 9, adopted effective July 1, 1997.

Article 6—Bulk Sales.

Repealed as of July 1, 1991.

1994 Official Text of Revised Article 8—Investment Securities.

Official Text, with conforming and miscellaneous amendments to Articles 1, 4, 5, 9, and 10, adopted effective as of July 1, 1996.

1998 Official Text of Revised Article 9—Secured Transactions.

Official Text, with conforming amendments to Articles 1, 2, 2A, 4, 5, 7, and 8, 1999 amendments, and 2000 technical amendments adopted effective as of July 1, 2001. Model provisions for production-money priority security interests in crops adopted.

See also topics 3.01 Banks and Banking, Bills and Notes, Brokers, Carriers, Consumer Credit, Contracts, Factors, Frauds, Statute of, Information Technology, Internet and New Media, subhead Uniform Commercial Code, Sales, Securities, Warehousemen; categories 2 Business Organizations, topics Corporations; Civil Actions and Procedure, topic Limitation of Actions; Debtor and Creditor, topics Assignments, Fraudulent Sales and Conveyances, Liens, Pledges; Documents and Records, topics Records, Seals; Mortgages, topic Chattel Mortgages.

3.10 CONDITIONAL SALES:

See topic 3.23 Sales.

3.11 CONSIGNMENTS:

See topic 3.14 Factors.

3.11A CONSUMER CREDIT:

Uniform Consumer Credit Code adopted. (W.S. 40-14-101 to W.S. 40-14-702). Code is administered by Department of Audit, Division of Banking, 122 W. 25th Street, Herschler Building, Cheyenne, Wyoming 82002. Code became effective July 1, 1971. Provisions of UCCC dealing with supervised loans and with administration are effective from Feb. 28, 1971 to extent necessary for administrator to prepare for operation of code and to act on applications for licenses to make supervised loans. In 1982, Wyoming received exemption from disclosure requirements of Federal Truth in Lending Act and of Regulation Z for all credit transactions within state that are subject to Wyoming Uniform Consumer Credit Code. Regulation is basically same as Federal Reserve Board Regulation Z has been adopted to bring Wyoming UCCC into compliance with Federal Truth in Lending Act. Consumers in Wyoming retain right to file civil actions in either Federal or State courts notwithstanding exemption. (538 F.2d 295 [10th Cir.]). Wyoming's Regulation Z applies to anyone who offers credit when four conditions are met: (1) Credit offered to consumers; (2) offering extension of credit done regularly; (3) credit subject to finance charge; and (4) credit primarily for personal family or household purposes. Wyoming UCCC does not apply to following: (i) Extensions of credit to governmental agencies or instrumentalities; (ii) sales of insurance if premium is not financed, except as otherwise provided by article on insurance; (iii) transactions under public utility or common carrier tariffs if subdivision or agency of this state or of U.S. regulates charges for services involved, charges for delayed payment and any discount allowed for early payment; (iv) ceilings on rates and charges or limits on loan maturities of credit union organized under laws of this state or of U.S. if these ceilings or limits are established by these laws; (v) credit sales, loans or leases primarily for agricultural purpose except for provided in Art. 2, Part 6 and Art. 3, Part 6 of Wyoming UCCC. (W.S. 40-14-121).

Wyoming UCCC differs substantially in certain areas from provisions of Uniform Consumer Credit Code. Some of those areas are highlighted below; however, reference should be made directly to Wyoming UCCC for specifics. (W.S. 40-14-101 to W.S. 40-14-702).

Maximum Charges.

Wyoming UCCC allows any credit service charges specified in buyers sales agreement for consumer credit sales other than revolving charge accounts for amounts financed exceeding $50,000. (W.S. 40-14-212[b][ii]).

Adjustment of Dollar Amounts.

UCCC for periodic adjustment for dollar amounts is omitted from Wyoming UCCC.

Disclosure and advertising provisions in Wyoming UCCC relating to consumer credit sales apply to sales to interest in land without regard to rate of credit service charge if sale is otherwise consumer credit sale. (W.S. 40-14-222[a]). Disclosure and advertising of consumer credit shall be made pursuant to rules and regulations of administrator not inconsistent with Consumer Credit Protective Act, § 1601, et seq. (W.S. 40-14-222[f] and W.S. 40-14-320[e]).

Home Solicitation Sales.

Home solicitation sale is consumer credit sale of goods or services with purchase price of $25 or more written under single or multiple contracts in which seller or person acting for him engages in personal solicitation of sale including face to face confrontation or telephone solicitation out of place other than place of business of seller and buyers agreement to offer or purchase is there given to seller or person acting for him. (W.S. 40-14-251[a]). Home solicitation sales are also governed by provisions of Wyoming Consumer Protection Act. (W.S. 40-12-101 to W.S. 40-12-114). Wyoming Consumer Protection Act includes provision that imposes civil penalty for victimizing elderly or disabled in violation of act. (W.S. 40-12-111). Penalty under W.S. 40-12-111 is in excess of penalties set out in W.S. 40-12-113, which lists maximum civil penalty of $10,000. (W.S. 40-12-113[b]). Investigators designated by Wyoming Attorney General have special investigative powers under act. (W.S. 40-12-112). Home solicitation sale does not include sale consummated entirely by telephone or mail if initiated by buyer, sale pursuant to preexisting revolving charge account, or sale made pursuant to prior negotiations between parties at business establishment with fixed location where goods and services are offered or exhibited for sale. (W.S. 40-14-251[b]). Buyer has right to revoke home solicitation sales until midnight of third business day after date of which he signs agreement or offer to purchase pursuant to this sale. (W.S. 40-14-252). In home solicitation sale, unless buyer requests seller to provide goods or services without delay in emergency, seller shall present to buyer statement of buyer's right to cancel that appears on agreement or offer to purchase. Agreement or offer to purchase must also designate as date of transaction date on which buyer actually signs. Written agreement or offer to purchase must be in same language as principally used in oral sales presentation, contain name and address of seller and in immediate proximity to space reserved for buyer's signature contain statement of buyer's rights which substantially complies with those rights as designated in Wyoming UCCC. (W.S. 40-14-253). Statement of buyer's rights must appear under conspicuous caption, “Buyer's right to cancel”, be printed in boldface type of minimum size of ten points, and read as follows: “You, the buyer, may cancel this transaction at any time prior to 12:00 midnight of the third business day after the date of this transaction. See the attached notice of cancellation form for an explanation of this right.” Notice of cancellation form shall be completed in duplicate, appear under conspicuous caption, “Notice of Cancellation”, be printed in boldface type of minimum size of ten points, be printed in same language used in written agreement or offer to purchase, be attached to written agreement or offer to purchase and be easily detachable, and read as follows: “You may cancel this transaction without any penalty or obligation within three (3) business days from . . . . (enter date of transaction). If you cancel, any property traded in, any payments made by you under the contract of sale and any negotiable instrument executed by you will be returned within ten (10) business days following receipt by the seller of your cancellation notice. Any security interest arising out of the transaction will be cancelled. If you cancel, you must make available to the seller at your residence, in substantially as good condition as when received, any goods delivered to you under this contract of sale, or you may if you wish comply with the instructions of the seller regarding the return shipment of the goods at the seller's expense and risk. If you do make the goods available to the seller and the seller does not pick them up within twenty (20) days of the date of your notice of cancellation, you may retain or dispose of the goods without any further obligation. If you fail to make the goods available to the seller, or if you agree to return the goods to the seller and fail to do so, then you remain liable for performance of all obligations under the contract. To cancel this transaction, mail or deliver a signed and dated copy of this cancellation notice or any other written notice, or send a telegram to . . . . . . (name of seller), at . . . . (address of seller's place of business) not later than 12:00 midnight of . . . . (date). I hereby cancel this transaction.

. . . .

(Date)

. . . .

(Buyer's signature)”

Until seller has complied with this section, buyer may cancel home solicitation sale by notifying seller of his intention to cancel. (W.S. 40-14-253[d]).

Insurance.

With some exceptions, Wyoming UCCC provisions relating to insurance, apply to insurance in relation to consumer credit sale, consumer lease or consumer loan. (W.S. 40-14-402[a]). Provisions on cancellation by creditor (W.S. 40-14-453) apply to loans, primary purpose which is financing of insurance. No other provision of Wyoming UCCC Article on insurance applies to insurance so financed. (W.S. 40-14-402[b]).

Administrative Enforcement.

Administrator may receive and act on complaints, take action designed to obtain voluntary compliance, or commence proceedings on his own initiative, counsel persons and groups regarding their rights and duties under this act, establish education programs, effectuate studies, adopt or amend appeals subsequent to rules when specifically authorized by act and adopt or amend procedural rules to carry out provisions of act, and appoint necessary hearing examiners or other employees necessary to represent administrator and enforcement of act. (W.S. 40-14-604[a]). Everything administrator does must be consistent with federal Consumer Credit Protection Act and rules and regulations adopted under it. (W.S. 40-14-604[b]). Except as otherwise provided, Wyoming Administrative Procedures Act (W.S. 16-3-101 to W.S. 16-3-115) applies to administrative action pursuant to Wyoming UCCC (W.S. 40-14-607). Grant of powers to administrator under Wyoming UCCC does not affect remedies available to debtors under that act or under other principles of law or equity. (W.S. 40-14-615).

See, also, topics Banks and Banking, Bills and Notes, Contracts, Interest, Sales; categories Civil Actions and Procedure, topics Judgments, subhead Judgment by Confession, Limitation of Actions; Courts and Legislature, topic Statutes; Debtor and Creditor, topics Assignments, subhead Assignments of Wages, Exemptions, Garnishment; Insurance, topic Insurance Companies; Mortgages, topic Chattel Mortgages.

3.11B CONSUMER FREEZE REPORTS:

Notice of Security Breach.

Entity conducting business in Wyoming that holds computerized data including certain personal information, must provide notice to resident if data is compromised and misuse is likely. (W.S. 40-12-502).

Security Freeze.

Upon proper notice by consumer, credit reporting agency must put freeze on consumer's credit report, holding report until prior authorization is given by consumer. (W.S. 40-12-503). Consumer reporting agency may disregard freeze in certain limited circumstances. (W.S. 40-12-505).

3.12 CONSUMER PROTECTION:

Wyoming Consumer Protection Act adopted. (W.S. 40-12-101 to W.S. 40-12-114). Enforcing authority Attorney General. (W.S. 40-12-102). Uniform Consumer Credit Code also adopted. (W.S. 40-14-101 to W.S. 40-14-702). See topic 3.11A Consumer Credit.

Unsolicited merchandise, unless otherwise agreed, deemed unsolicited, unconditional gift which recipient may use as he pleases without obligation to sender. Buyer can refuse receipt of merchandise and not obligated to return to sender. Not applicable if merchandise misdelivered or good faith substitute for solicited merchandise. (W.S. 40-12-103).

Home solicitation sale, means sale or lease of merchandise, not farm equipment, when cash sales price, either single or multiple sales, exceeds $25. Sale consummated at residence of buyer either in person or by telephone. Does not include: (i) Sale made pursuant to preexisting revolving charge account; (ii) sale made subsequent to personal contact or telephone contact at residence of buyer but pursuant to negotiations between parties at business establishment at fixed location where goods or services are offered or exhibited for sale; or (iii) sale made pursuant to telephone solicitation when seller offers full refund and right of cancellation for at least ten days after receipt of merchandise and right of refund and cancellation is communicated during initial telephone solicitation and is conspicuously displayed with merchandise; or (iv) sale under rental-purchase agreement, with initial period of one week or less, or telephone call to merchant requesting delivery to consumer's residence or other place consumer directs and rental-purchase agreement is consummated at consumer's residence. (W.S. 40-12-104[a]). Except as otherwise provided, such sales may be cancelled up until midnight of third business day after buyer signs agreement or offer to purchase. Cancellation must be in writing, given to seller at address shown in agreement, or offer to purchase. Notice by mail given when deposited in mailbox, properly addressed, postage prepaid. (W.S. 40-12-104[b]). There are special conditions under which cancellation not allowed (W.S. 40-12-104[c]); provisions governing commencement of cancellation period (W.S. 40-12-104[d]); rights and duties of buyer and seller regarding return of goods in cancelled sale; provisions governing seller's cancellation fee (W.S. 40-12-104[e]-[h]).

Unlawful Practices.

Person engages in deceptive trade practices, when in course of business in connection with consumer transaction, he engages in certain forbidden activities, which are defined. (W.S. 40-12-105). Person engages in deceptive trade practice unlawful under act when, in course of his business and in connection with consumer transaction, he knowingly: (i) Represents merchandise has source, origin, sponsorship, approval, accessories or uses it does not have; (ii) represents he has sponsorship, approval or affiliation he does not have; (iii) represents merchandise is of particular standard, grade, style or model, if it is not; (iv) represents merchandise is available to consumer for reason that does not exist; (v) represents merchandise has been supplied in accordance with previous representation, if not; except these provisions do not apply to merchandise supplied to recipient by mistake or merchandise of equal or greater value supplied as reasonably equivalent substitute for unavailable merchandise previously ordered by recipient; (vi) represents replacement or repair is needed, if it is not; (vii) makes false or misleading statements of fact concerning price of merchandise or reason for, existence of, or amounts of price reduction; (viii) represents that consumer transaction involves warranty, disclaimer of warranties, particular warranty terms, or other rights, remedies or obligations if representation is false; (ix) represents that consumer will receive rebate, discount or other benefit as inducement for entering into consumer transaction in return for giving supplier names of prospective consumers or otherwise helping supplier to enter into other consumer transactions, if receipt of benefit is contingent upon event occurring after consumer enters into transaction; (x) advertises merchandise with intent not to sell as advertised; (xi) advertises merchandise with intent not to supply reasonably expectable public demand, unless advertisement discloses limitation; (xii) represents merchandise is original or new if he knows it is deteriorated, damaged, altered, reconditioned, reclaimed, used or second hand, and relative to these provisions, terms “original” or “new” include merchandise previously sold but returned within reasonable time by consumer for full credit if such merchandise is not damaged or deteriorated; (xiii) advertises under guise of obtaining sales personnel when in fact purpose of advertisement is to sell merchandise to sales personnel applicants; (xiv) employ “bait and switch” advertising which consists of offer to sell merchandise which seller does not intend to sell, which advertising is accompanied by one or more of following practices: (A) refusal to show merchandise advertised, (B) false disparagement in any respect of advertised merchandise or terms of sale, (C) requiring undisclosed tie-in sales or other undisclosed conditions to be met prior to selling advertised merchandise, (D) knowingly showing or demonstrating defective merchandise which is unusable or practicable (sic) for purpose set forth in advertisement, (E) accepting deposit for merchandise and subsequently charging buyer for higher priced item without his consent, or (F) willful failure to either make deliveries of merchandise or make refund therefor; (xv) engages in unfair or deceptive acts or practices. (W.S. 40-12-105).

Credit Cards.

Person is guilty of unlawful use of credit card if, with intent to obtain property or services by fraud, he: (i) Uses credit card, or number or description of credit card, issued to another person without that person's consent; (ii) uses credit card which he knows has been revoked, cancelled or expired; or (iii) knowingly uses falsified, mutilated or altered credit card or number or description thereof. (W.S. 6-3-801, W.S. 6-3-802[a]). Unlawful use of credit card is misdemeanor if value of property or services purchased or obtained is less than $1,000 and is felony if value of property or services purchased or obtained within 60-day period in Wyoming totals $1,000 or more in aggregate. (W.S. 6-3-802[b]). Use of scanning device to capture electronic information encoded on magnetic strip of credit card with intent to defraud or re-encoding that information on different credit card without permission of authorized user with intent to defraud is felony. (W.S. 6-3-803).

Restraining Unlawful Practices.

Attorney General may seek temporary restraining order, or preliminary or permanent injunction, restraining unlawful practices. (W.S. 40-12-106). Attorney General may accept written assurance of voluntary compliance with respect to any unlawful practice from any person about to engage, or engaging in, such practice. (W.S. 40-12-107).

Private Remedies.

Action may be brought by person, or persons, for damages actually suffered by consumer, or consumers, as result of unlawful deceptive trade practices. This includes class actions. (W.S. 40-12-108). Older persons and persons with disabilities entitled to restitution or reimbursement, including reasonable attorney fees and costs against violator who knew or should have known conduct unfair or deceptive. (W.S. 40-12-106). Statutory and common law remedies available. (W.S. 40-12-114).

Limitation of Actions.

No action may be brought unless within one year after initial discovery of unlawful deceptive trade practice, or within two years after such consumer transaction, whichever first occurs; consumer gives notice of nature of unlawful deceptive trade practice and actual damages suffered therefrom. Action must be brought within one year of giving notice.

Exemptions.

Act (W.S. 40-12-101 to W.S. 40-12-114) does not apply to acts or practices required or permitted by state or federal law, rule, regulation, judicial or administrative decision, or acts or practices by publisher, owner, agent or employee of newspaper, periodical, radio or television station or other person without knowledge of deceptive character of advertisement in publication or dissemination of advertisement supplied by another. (W.S. 40-12-110).

Civil penalty not to exceed $5,000 may be obtained by Attorney General for violation of permanent injunction. (W.S. 40-12-113). Any person who willfully violates act that victimizes older or disabled person must make restitution, pay attorney's fees, and is liable for civil penalty of up to $15,000 per occurrence. (W.S. 40-12-111).

Other common law and statutory remedies not prohibited, but Act (W.S. 40-12-101-114) provides exclusive remedies for actions brought thereunder (W.S. 40-12-114).

Mobile Home Warranty Act requires written warranty for every new mobile home sold or leased by mobile home manufacturer, dealer or salesperson in state, and for new mobile home sold by any person who induces resident of this state to enter into transaction by personal solicitation in state or by mail or telephone solicitation directed to particular customer in state. Mobile home warranty from manufacturer or dealer to buyer must be set forth in separate written document entitled “mobile home warranty”, must be delivered to buyer by dealer or manufacturer before time contract for sale signed, and must contain, but is not limited to, certain specified terms, and mobile home manufacturer and dealer jointly and severally liable for breach of warranty, and buyer may give notice to either one or both of defect. Transfer from one owner or lessee to another during effective period of warranty does not terminate warranty. (W.S. 35-18-103). Implied warranty containing same terms as written warranty exists in absence of delivery of written warranty to buyer. (W.S. 35-18-104). Remedies under Act re warranty for new mobile home cumulative, and waiver, exclusion, modification or limitation of any warranty, express or implied, including implied warranty of merchantability and fitness for particular purpose, is expressly prohibited, contrary to public policy and unenforceable and void unless permitted by Act. (W.S. 35-18-105). Sale or lease of used mobile homes also regulated (W.S. 35-18-106), injunctive relief in event of persistent violations of Act authorized (W.S. 35-18-108), criminal penalties for violations provided (W.S. 35-18-109) and long arm statute in civil actions provided by appointment of Secretary of State for nonresident manufacturer or dealer (W.S. 35-18-110).

Telephone Solicitation.

Telephone sales calls made by telephone solicitor to consumer, for purposes of soliciting sale of consumer goods or services, soliciting extension of credit for consumer goods or services, or obtaining information that will or may be used for direct solicitation of sale of consumer goods or services or extension of credit for such purposes, and automated sales calls are regulated and restricted. (W.S. 40-12-301 to W.S. 40-12-305). No telephone solicitor or merchant shall willfully make any unsolicited call more than 60 days after that number appears on national do-not-call list. (W.S. 40-12-302[b]). No telephone solicitor may circumvent or block subscriber's caller identification service. (W.S. 40-12-302[c]). No solicitations allowed between 8:00 p.m. and 8:00 a.m. local time at consumer's location. (W.S. 40-12-302[d]). Wyoming attorney general is granted investigatory powers and is authorized to commence action to impose civil penalties and to seek injunctive and other relief against telephone solicitors and merchants for violations of Act. (W.S. 40-12-304).

Deceptive Commercial Electronic Mail.

No person may initiate transmission, conspire with another to initiate transmission or assist transmission of commercial electronic mail message from computer located in Wyoming or to electronic mail address that sender knows or has reason to know is held by Wyoming resident, or to address that sender knows or has reason to know is located in state or other jurisdiction with laws similar to Wyoming's law regarding electronic mail, that: (i) Uses third party's Internet domain name without permission of third party, or otherwise misrepresents or obscures any information in identifying point of origin or transmission path of commercial electronic mail message; or (ii) contains false or misleading information in subject line. (W.S. 40-12-402[a]). Person knows that intended recipient of commercial electronic message is Wyoming resident if that information is available, upon request, from registrant of Internet domain name contained in recipient's electronic mail address. (W.S. 40-12-402[b]). "Commercial electronic mail message" means electronic mail message sent for purpose of promoting real property, goods or services for sale or lease, but does not mean electronic mail message to which interactive computer service provider has attached advertisement in exchange for free use of electronic mail account, when sender has agreed to such arrangement. (W.S. 40-12-401[a][ii]). "Initiate transmission" refers to action by original sender of electronic mail message, not to action by intervening interactive computer service that may handle or retransmit message, unless such intervening interactive computer service assists in transmission of electronic mail message when it knows or consciously avoids knowing that person initiating transmission is engaged or intends to engage in act or practice that violates Act. (W.S. 40-12-401[a][v]). "Assist transmission" means actions taken by person to provide substantial assistance or support which enables any person to formulate, compose, send, originate, initiate or transmit commercial electronic mail message when person providing assistance knows or consciously avoids knowing that initiator of commercial electronic mail message is engaged or intends to engage in any practice that violates Act. (W.S. 40-12-401[a][i]). Service provider, however, does not assist in transmission of commercial electronic mail message in violation of Act if: (i) Activity which violates Act was not directed by service provider or its agent; (ii) service provider does not receive financial benefit directly attributable to violation of Act by one of its customers; and (iii) service provider does not provide equipment or complete management of systems found to have open mail relay. (W.S. 40-12-402[c]). Interactive computer service may, upon own initiative, block receipt or transmission through its service of any commercial electronic mail that it reasonably believes is, or will be, sent in violation of Act, and will not be held liable for any action voluntarily taken in good faith to block receipt or transmission through its service of any commercial electronic mail which it so reasonably believes is, or will be, sent in violation of Act. (W.S. 40-12-404[a], [b]). Wyoming attorney general is granted investigatory powers and is authorized to commence action to impose civil penalties and to seek injunctive and other relief against any person for violations of Act. (W.S. 40-12-403).

Plain Language.

No "Plain Language" statute.

3.13 CONTRACTS:

Common law rules govern, except as modified by Uniform Commercial Code. (W.S. 34.1-1-101 to W.S. 34.1-10-104). Uniform Consumer Credit Code also adopted. (W.S. 40-14-101 to W.S. 40-14-702). Any competent adult may enter into a binding contract and shall be legally responsible therefor. (W.S. 14-1-101). Individual reaches age of majority upon becoming 18 years of age. See topics 3.09 Commercial Code, Consumer Credit; categories 10 Documents and Records, topic Seals; Family, topic Infants.

3.14 FACTORS:

Except for provisions of Uniform Commercial Code (W.S. 34.1-1-101 to W.S. 34.1-10-104) there are no statutory provisions. See topic 3.09 Commercial Code.

License Requirements.

See preliminary statement, this topic.

Liens.

See preliminary statement, this topic.

Consignment Agreements.

See preliminary statement, this topic.

3.15 [RESERVED]

3.16 FRAUDS, STATUTE OF:

Unless some note or memorandum thereof be in writing signed by party to be charged, or duly authorized agent, no action may be maintained: (1) On agreement not to be performed within one year; (2) or special promise to answer for debt, default, or miscarriage of another; (3) or agreement on consideration of marriage, excepting mutual promise to marry; (4) or special promise by executor or administrator to answer any demand out of his own estate; (5) or contract for sale of real property or lease thereof for more than one year; (6) or to charge any person by reason of representation concerning character, conduct, credit, ability, trade, or dealings of another made to intent or purpose that such other may thereby obtain credit money, or goods. (W.S. 1-23-105). Also, Uniform Commercial Code adopted. (W.S. 34.1-1-101 to W.S. 34.1-10-104). See topic 3.09 Commercial Code.

Contracts of Sale.

Statutory provisions with reference to sales of real estate are set out completely immediately above. Those with respect to sales of personal property are a part of the Uniform Commercial Code. (W.S. 34.1-1-206; W.S. 34.1-2-201; W.S. 34.1-9-203). See topic 3.09 Commercial Code.

Part Performance.

There is no statutory provision that part performance validates otherwise invalid transaction, except W.S. 34.1-2-201(c)(iii), Uniform Commercial Code. See topic 3.09 Commercial Code. However, sufficient part performance permits specific performance of oral contract that would otherwise be invalid. (Wyo., 933 P.2d 502).

3.17 [RESERVED]

3.18 INFORMATION TECHNOLOGY, INTERNET AND NEW MEDIA:

Uniform Electronic Transactions Act adopted. (W.S. 40-21-101 to W.S. 40-21-119). Optional provisions of §§ 17, 18 and 19 of Uniform Electronic Transactions Act, authorizing each governmental agency of state to create and retain electronic records, convert written records to electronic records, send and accept electronic records and electronic signatures to and from other persons, and encourage and promote consistency and interoperability with similar requirements adopted by other state and federal governmental agencies and nongovernmental persons interacting with governmental agencies of state, adopted. (W.S. 40-21-117; W.S. 40-21-118; W.S. 40-21-119). To extent that state governmental agency determines to use electronic records and electronic signatures, Wyoming chief information officer employed by governor (W.S. 9-1-222), must promulgate rules in accordance with Wyoming Administrative Procedure Act to specify for state agencies: (i) Manner and format in which electronic records must be created, generated, sent, communicated, received and stored and systems established for those purposes; (ii) if electronic records must be signed by electronic means, type of electronic signature required, manner and format in which electronic signature must be affixed to electronic record and identity of, or criteria that must be met by, any third party used by person filing document to facilitate process; (iii) control processes and procedures as appropriate to ensure adequate preservation, disposition, integrity, security, confidentiality and auditability of electronic records; and (iv) any other required attributes for electronic records which are specified for corresponding nonelectronic records or reasonably necessary under circumstances (W.S. 40-21-118[b]).

Governmental Electronic Transactions.

Wyoming on-line government commission abolished, and duties transferred to chief information officer employed by governor. (2005 Wyo. Sess. Laws, c. 174). Chief information officer may provide for any state agency business to be conducted electronically in accordance with rules adopted under W.S. 9-2-2501 and in conformity with provisions of Uniform Electronic Transactions Act; no state agency shall be required by chief information officer to conduct business electronically; and any state agency desiring to conduct business electronically must adopt procedures contained in rules of commission. (W.S. 9-2-2501[b]).

Chief information officer may promulgate rules he deems necessary to implement W.S. 9-2-2501 subject to provisions of Uniform Electronic Transactions Act but such rules at minimum shall: (i) Establish standards for all state agencies conducting business electronically; (ii) establish parameters for ensuring security in conducting state agency business electronically; (iii) establish authorized methods and requirements for conducting business electronically and authenticating identifications, including requirement that each individual required by applicable statute or rule to sign any document be specifically identified as acknowledging document and giving assent to electronic transmission through key encryption or other identification procedure unique to that individual; (iv) prescribe procedure for certification by state agency of information transmitted electronically; and (v) prescribe procedure for converting information transmitted electronically to paper and certifying paper copy for persons requiring paper copies. (W.S. 9-2-2501[c]). Notwithstanding any other provision of law requiring manual or facsimile signature on information filed with state agency, any information filed electronically which meets requirements of rules adopted by chief information officer shall be considered to be lawfully filed with state agency for all legal purposes if that agency has authorized electronic filing. (W.S. 9-2-2501[e]). Nothing in W.S. 9-2-2501 shall be construed to affect any requirement of statute or rule that particular individual or officer of organization acknowledge document, and any person using key encryption or other identification procedure in place of manual or facsimile signature for any filing under W.S. 9-2-2501 shall be subject to same civil and criminal penalties applicable to persons providing manual or facsimile signature. (W.S. 9-2-2501[f]). No statutory provision authorizing facsimile or electronic filing with any state agency shall be superseded by W.S. 9-2-2501 or by any rule of chief information officer adopted pursuant thereto. (W.S. 9-2-2501[h]). Act provides no state agency shall be liable for any loss or damage arising from errors in or omissions from information filed electronically. (W.S. 9-2-2501[g]).

Computer Crimes.

Offenses against property under criminal code includes crimes involving computers. Computer crimes include crimes against intellectual property, crimes against computer users and crimes against computer equipment or supplies. (W.S. 6-3-501 to W.S. 6-3-505).

Person commits crime against intellectual property if knowingly and without authorization modifies or destroys data, programs or supporting documentation residing or existing internal or external to computer, computer system or computer network, or discloses or takes data, programs or supporting documentation having value of more than $750 and

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constituting trade secret or confidential information, as provided by law, residing or existing internal or external to computer, computer system or computer network. (W.S. 6-3-502[a]). Person commits crime against computer users if knowingly and without authorization accesses computer, computer system or computer network, or denies computer system services to authorized user of such services that in whole or in part owned by, under contract to or operated for, on behalf of or in conjunction with, another. (W.S. 6-3-504[a]). Crime against intellectual property or against computer users committed with intention of devising or executing scheme or artifice to defraud or obtain property is felony punishable by imprisonment for not more than ten years or fine of not more than $10,000, or both; otherwise, either crime committed without existence of such intent is felony punishable by imprisonment of not more than three years or fine of not more than $3,000, or both. (W.S. 6-3-502[b]; W.S. 6-3-504[b]).

Person commits crime against computer equipment or supplies if knowingly and without authorization modifies equipment or supplies used or intended to be used in computer, computer system or computer network. (W.S. 6-3-503[a]). Crime against computer equipment or supplies committed with intention of devising or executing scheme or artifice to defraud or to obtain property is felony punishable by imprisonment of more than ten years or fine of not more than $10,000, or both (W.S. 6-3-503[a][ii]); otherwise, crime committed without existence of such intent is misdemeanor punishable by imprisonment for not more than six months or fine of not more than $750, or both (W.S. 6-3-503[a][i]). Person who knowingly and without authorization destroys, injures or damages computer, computer system or computer network and thereby interrupts or impairs governmental operations or public communication, transportation or supplies of water, gas or other public service is guilty of felony punishable by imprisonment for not more than three years or fine of not more than $3,000, or both. (W.S. 6-3-503[b]).

Statutes prescribing specific penalties for computer crimes do not preclude application of other provisions of criminal code that apply or may apply to computer crime unless such other provision inconsistent with computer crime statutes. (W.S. 6-3-505).

Deceptive Electronic Mail.

See topic 3.12 Consumer Protection.

Uniform Commercial Code.

With adoption of Revised Article 9 and its medium neutral definitions of terms “record”, “authenticate”, “communicate” and “send”, parties may enter into electronic transactions to create and perfect security interests in collateral, including electronic chattel paper. (W.S. 34.1-9-102). Secretary of State has created electronic filing system, called Wyoming UCC E-system, for UCC1 financing statements, UCC3 amendments and search requests submitted to it. Wyoming UCC E-system accessed at: http://soswy.state.wy.us/uniform/e-sys.htm. See topic 3.09 Commercial Code.

Uniform Computer Information Transactions Act not adopted.

3.193.16

3.17 INTEREST:

Uniform Consumer Credit Code adopted. (W.S. 40-14-101 to W.S. 40-14-702). Legal rate, in absence of agreement fixing rate or of provision of law for different rate, is 7% per annum. (W.S. 40-14-106). Agreement to pay interest can be express or implied. But mere appearance of provision imposing interest on invoice or billing statement is insufficient to establish implied agreement for payment of interest. (Wyo., 753 P.2d 1021). See topic 3.11A Consumer Credit.

Maximum Rate Permitted.

Uniform Consumer Credit Code governs in consumer transactions. See topic 3.11A Consumer Credit.

Uniform Commercial Code adopted. (W.S. 34.1-1-101 to W.S. 34.1-10-104). If instrument provides for interest, but amount of interest payable cannot be ascertained from description, interest is payable at judgment rate in effect at place of payment as of time interest first accrues. (W.S. 34.1-3-112). See topic 3.09 Commercial Code.

Judgments and decrees bear interest at 10% in absence of agreement fixing rate. (W.S. 1-16-102[a]). If decree or judgment founded upon contract which prescribes interest, judgment applies contract rate of interest. (W.S. 1-16-102[b]).

Open Accounts.

Uniform Consumer Credit Code governs. See topic 3.11A Consumer Credit.

Small Loans.

Uniform Consumer Credit Code governs. See topic 3.11A Consumer Credit.

Usury.

Uniform Consumer Credit Code governs. See topic 3.11A Consumer Credit.

3.18 [RESERVED]

3.19 LICENSES, BUSINESS AND PROFESSIONAL:

Licenses required for many businesses, professions and occupations. Individual professions and occupations governed by W.S. 33-2-101 to W.S. 33-44-114.

Collection agencies must be licensed annually upon application to Collection Agency Board (care State Examiner, Cheyenne). Examination fee of $100; all other fees set by board. Penalty for doing business without license, fine of not less than $50 nor more than $750 or imprisonment for six months, or both. Agency must post $10,000 bond with one surety company or $10,000 cash for payment of proceeds of claims entrusted to it. License may be revoked for violation of act or unworthy conduct. Agencies may not render, or advertise to render legal services. (W.S. 33-11-101 to W.S. 33-11-116).

Mortgage Lenders and Brokers.

Wyoming Residential Mortgage Practices Act, W.S. 40-23-101 to W.S. 40-23-123, enacted effective July 1, 2005. (2005 Wyo. Sess. Laws, c. 117). Act requires that on and after July 1, 2005, any mortgage lender or broker who is engaged in mortgage lending or mortgage brokering activities and who advertises, offers or provides services to Wyoming residents through any medium, including Internet or other electronic means, must obtain license from Banking Commissioner. (W.S. 40-23-104). Any person conducting mortgage lending or mortgage brokering activities in state, as of July 1, 2005, given until Sept. 30, 2005 to apply to Banking Commissioner for license. (W.S. 40-23-106). Provisions of Act do not apply to, among other persons and entities, any entity licensed or chartered under laws of any state or U.S. as bank, savings and loan association, credit union or trust company or any operating subsidiary of which any state or U.S. chartered bank, savings and loan association, credit union or trust company owns or controls 80% or more of voting stock. (W.S. 40-23-105[a][iii]).

For purposes of Act, “mortgage lending activities” means accepting or offering to accept, for direct or indirect compensation, applications for making residential mortgage loans. (W.S. 40-23-102[a][x]). “Mortgage lender” means any person who makes residential mortgage loans to borrowers or holds himself out as able to make mortgage loans. (W.S. 40-23-102[a][ix]). “Residential mortgage loan” means first mortgage loan made primarily for personal, family or household use and primarily secured by security interest on residential real property improved by one to four unit family dwelling. (W.S. 40-23-102[a][xv], [a][xvi]). “Mortgage brokering activities” means assisting or offering to assist, for direct or indirect compensation, in preparation of application for residential mortgage loan on behalf of borrower or negotiating or offering to negotiate, for direct or indirect compensation, terms or conditions of residential mortgage loan with any person making residential mortgage loans. (W.S. 40-23-102[a][viii]). “Mortgage broker” means any person who for compensation, or in expectation of compensation, assists person in obtaining or applying to obtain residential mortgage loan or holds himself out as being able to assist person in obtaining or applying for residential mortgage loan. (W.S. 40-23-102[a][vi]).

Each license issued by Banking Commissioner under Act expires on Dec. 31 of each year. (W.S. 40-23-109[a]). Every licensee required to license and maintain home office as principal location for transaction of mortgage business and to separately license each place of business in state from which mortgage lending or mortgage brokering activities directly or indirectly conducted. (W.S. 40-23-107[f]). Every issued license under Act must be renewed annually not less than 30 days before stated expiration date. (W.S. 40-23-109[a]).

3.20 MONOPOLIES, RESTRAINT OF TRADE AND COMPETITION:

Perpetuities and monopolies not allowed; consolidations or combinations to prevent competition, to control or influence production or prices or to interfere with public good or general welfare prohibited. (Const., Art. 1, § 30, Art. 10, § 8).

Unfair Trade Practices.

It is unlawful to sell for less than cost, or to sell a commodity for general use at a lower rate in one community or part thereof than in another, after making allowance for difference in grade, quality or quantity and actual cost of transportation, when this is done with intent to destroy competition or to discriminate between different communities or parts thereof; but such prohibition does not extend to closing out sales, sales of damaged goods, sales made under order of court or sales made to meet legal prices of competitors in same locality. It is also unlawful to give rebates where this tends to destroy competition or to give away goods for purpose of destroying competition. Violating contracts are illegal and unenforceable and violators are subject to fine or imprisonment or both. Charter, or right to do business, of corporate violator may be forfeited. (W.S. 40-4-106 to W.S. 40-4-121). See also category 16 Insurance, topic 16.01 Insurance Companies, subhead Trade Practices.

Resale Price Agreements.

See category 17 Intellectual Property, topic 17.01 Trademarks and Tradenames.

3.21 NEGOTIABLE INSTRUMENTS:

See topic 3.02 Bills and Notes.

3.22 RESTRAINT OF TRADE:

See topic 3.20 Monopolies, 3.22 Restraint of Trade and Competition.

3.23 SALES:

Uniform Commercial Code adopted effective Jan. 1, 1962. (W.S. 34.1-1-101 to W.S. 34.1-10-104). W.S. 34.1-1-209 adopts Permanent Editorial Board's 1966 recommended optional amendment; W.S. 34.1-2-318 adopts Alternative C of Permanent Editorial Board's 1966 recommended optional amendment; W.S. 34.1-2-402(d) omits reference to bulk transfers (Article 6); W.S. 34.1-2-702(c) adopts Permanent Editorial Board's 1966 recommended amendment. Uniform Consumer Credit Code also adopted. (W.S. 40-14-101 to W.S. 40-14-702). See topics 3.09 Commercial Code, 3.11A Consumer Credit.

Contracts of Sale.

Governed by Uniform Commercial Code. See topic 3.09 Commercial Code.

Bills of Sale.

No statutory provisions, except as to motor vehicles. See category 23 Transportation, topic 23.01 Motor Vehicles.

Conditions or Warranties.

Governed by Uniform Commercial Code. See topic 3.09 Commercial Code.

Product Liability.

Uniform Commercial Code adopted. (W.S. 34.1-1-101 to W.S. 34.1-1-10-104). See topic 3.09 Commercial Code.

Retail Credit Sales.

Uniform Consumer Credit Code governs. See topic 3.11A Consumer Credit. See also topics 3.09 Commercial Code, 3.19 Interest.

Consumer Protection.

Uniform Consumer Credit Code governs. See topic 3.11A Consumer Credit. See also, topic Consumer Protection.

Bulk Sales.

See category 8 Debtor and Creditor, topic 8.08 Fraudulent Sales and Conveyances.

Sales of Motor Vehicles.

See category 23 Transportation, topic 23.01 Motor Vehicles.

3.24 SECURITIES:

Uniform Securities Act adopted. (W.S. 17-4-101 to W.S. 17-4-132). Text of this Act can be found in Uniform and Model Acts section. Wyoming adopted Uniform Securities Act by deleting certain references to investment advisers. These deletions are shown in Appendix C-1 and Appendix C-2, which immediately follow text of Act. Other Wyoming variations in text are as follows: § 204(b)(6) adds at end: “and provide for a reasonable fee to be paid before the examination is taken” (W.S. 17-4-106[d][iv]); § 302(a)(2) omits “other than a certificate of interest or participation in an oil, gas or mining title or lease or in payments out of production under such title or lease” (W.S. 17-4-108[a][ii]); § 303(a) adds following after “1933”: “or for which a filing has been made pursuant to Section 3(b) or 3(c) of that Act” (W.S. 17-4-109[a]); § 303(b)(1) substitutes “two” for “three” (W.S. 17-4-109[b][i]); § 401(b)(1) omits reference to § 402(a)(11) (W.S. 17-4-113[a][ii]); § 401(f)(2) omitted; § 401(1) omits “certificate of interest or participation in an oil, gas or mining title or lease” (W.S. 17-4-113[a][xi]); § 402(a)(3) rewritten to read as follows: “any security issued by a state or national bank authorized to do business in the state” (W.S. 17-4-114[a][iii]); exemptions added for securities registered for at least three years under § 12 of Securities Exchange Act of 1934 which meet certain historical earnings criteria and other conditions (W.S. 17-4-114[a][vii]); § 402(a)(5) omitted; 402(a)(8) adds National Association of Securities Dealers Automated Quotation National Market System (W.S. 17-4-114[a][vii]); and § 409(a) does not adopt five year statute of limitations. Also, Wyoming filled in blanks in official text as follows: § 202(b) provides filing fee of $200 for broker-dealer and $35 for agent, and entire fee retained if application denied or withdrawn (W.S. 17-4-104); § 302(c) provides for "one o'clock standard time" (W.S. 17-4-108[c]); § 305(b) provides filing fee of .0002 of total dollar amount to be offered in state, but no less than $200 nor more than $600, and if registration statement withdrawn before effective date $100 retained (W.S. 17-4-111[b]); §§ 407(c), 408 and 411(a) provide "Wyoming District Court" is appropriate court (W.S. 17-4-119; W.S. 17-4-120; W.S. 17-4-123); and 411(a) provides for appeal from Wyoming District Court to Wyoming Supreme Court (W.S. 17-4-123[a]).

Uniform Commercial Code also adopted. (W.S. 34.1-1-101 to W.S. 34.1-10-104). See topic 3.09 Commercial Code.

Supervision.

Secretary of State has general charge of administration of Uniform Securities Act. (W.S. 17-4-118[a]).

Regulatory Powers of Supervising Authority.

Governed by Uniform Securities Act. See preliminary statement, this topic.

Prerequisites to Sales or Offerings.

Governed by Uniform Securities Act. See preliminary statement, this topic.

Securities to Which Act Applicable.

Governed by Uniform Securities Act. See preliminary statement, this topic.

Exempt Securities.

Governed by Uniform Securities Act. See preliminary statement, this topic.

Exempt Transactions.

Governed by Uniform Securities Act. See preliminary statement, this topic.

Registration of Offerers.

Governed by Uniform Securities Act. See preliminary statement, this topic.

Registration of Securities.

Governed by Uniform Securities Act. See preliminary statement, this topic.

Registration of Dealers.

See subhead Registration of Offerers, supra.

Brokers and Agents.

See subhead Registration of Offerers, supra.

Licenses.

Governed by Uniform Securities Act. See preliminary statement, this topic.

Bonds.

Governed by Uniform Securities Act. See preliminary statement, this topic.

Advertisements.

Governed by Uniform Securities Act. See preliminary statement, this topic.

Liabilities.

Governed by Uniform Securities Act. See preliminary statement, this topic.

Subdivision Offerings.

See topic 3.06 Brokers, subhead Real Estate Brokers.

Uniform Securities Ownership by Minors Act not adopted.

Uniform Commercial Code adopted. (W.S. 34.1-1-101 to W.S. 34.1-10-104). See topic 3.09 Commercial Code.

3.25 STATUTE OF FRAUDS:

See topic 3.15 Frauds, Statute of.

3.26 TRUST RECEIPT SECURITY:

See category 8 Debtor and Creditor, topic 8.15 Pledges.

3.27 WAREHOUSEMEN:

The Uniform Commercial Code has been adopted. (W.S. 34.1-1-101 to W.S. 34.1-10-104). See topic 3.09 Commercial Code.

Bonded Warehousemen.

Warehouseman may become bonded warehouseman by filing annually with county clerk bond of not less than $2,000 with corporate surety. (W.S. 33-31-101; W.S. 33-31-102).

Licenses.

No statutory provisions.

Warehouse Receipts.

Uniform Commercial Code (W.S. 34.1-1-101 to W.S. 34.1-10-104) governs. W.S. 34.1-7-204 omits 7-204(4); W.S. 34.1-7-209 adopts Permanent Editorial Board's 1966 recommended amendment; W.S. 34.1-7-210(b)(ii) omits reference to certified letter; W.S. 34.1-7-403(a)(ii) adopts optional provisions. See topic 3.09 Commercial Code.

Lien.

Warehousemen have lien enforceable under Uniform Commercial Code. (W.S. 34.1-7-209; W.S. 34.1-7-210). See topic 3.09 Commercial Code.

4 CITIZENSHIP

4.01 ALIENS:

Except as hereinafter stated, resident aliens have same rights as citizens as to the possession, taxation, enjoyment and descent of property. (Const., Art. 1, § 29).

Property.

Aliens may acquire by succession or testamentary disposition real property in Wyoming unless they are nonresident citizens of country which does not permit U.S. citizens reciprocal rights. (W.S. 2-4-105[a]). Burden of proof is on nonresident alien to establish reciprocal rights asserted by him. (W.S. 2-4-105[c]). Statute generally prohibiting acquisition or possession of interest in real property by nonresident aliens ineligible for citizenship repealed as of Feb. 22, 2001. (2001 Wyo. Sess. Laws, c. 93).

Contract with an alien for labor previous to time when the alien comes into state can be enforced for a period of six months from date of contract, after which it becomes void. (W.S. 27-4-113).

5 CIVIL ACTIONS AND PROCEDURE

5.01 ACCORD AND SATISFACTION:

Common law rules generally prevail, but Uniform Commercial Code adopted. (W.S. 34.1-1-101 to W.S. 34.1-10-104). See W.S. 34.1-3-311 relating to accord and satisfaction by use of instrument. Under W.S. 34.1-3-311, claim is discharged if person in good faith tenders instrument as full satisfaction of claim subject to bona fide dispute, and instrument contains conspicuous statement to effect that instrument was tendered as full satisfaction of claim and other conditions are satisfied. See category 3 Business Regulation and Commerce, topic 3.09 Commercial Code.

Pleading.

Accord and satisfaction is affirmative defense which is waived if not pleaded. (Rule 8[c]).

5.02 ACTIONS:

Actions are governed by Wyoming Rules of Civil Procedure and statutory provisions. Rules of Civil Procedure were adopted, with some modifications from Federal Rules of Civil Procedure. See, also, topic Practice.

Equity.

Distinction between actions at law and suits in equity abolished. (Rule 2).

Forms of Action.

There is one form of action, styled a civil action. (Rule 2).

Conditions Precedent.

Federal Rule 9(c) adopted. (Rule 9[c]).

Commencement.

See topics 5.20 Process, 5.17 Pleading.

Parties.

Federal Rules 17, 19, 20 and 21 adopted with exception of Federal Rule 17(d). (Rules 17, 19, 20, 21).

Class Actions.

Federal Rules 23 and 23.2 adopted. (Rules 23 and 23.2). Federal Rule 23.1 adopted. (Rule 23.1).

Interpleader.

Federal Rule 22(1) adopted. (Rule 22).

Intervention.

Similar to Federal Rule 24, except for Rule 24(d). (Rule 24).

Third Party Practice.

Federal Rule 14 adopted, except for maritime provisions and except that last sentence omitted from 14(a). (Rule 14).

Joinder of Causes of Action.

Federal Rules 13(h) and 18 adopted with exception of “maritime” provisions. (Rules 13[h], 18).

Splitting Causes of Action.

No statutory provisions.

Consolidation of Actions.

Actions involving common questions of law or fact pending in same court may be consolidated by order of court. Federal Rule 42(a) adopted. (Rule 42).

Severance of Actions.

Court in furtherance of convenience or to avoid prejudice, may order separate trial of any claim, cross claim, counterclaim, or third party claim, or of any separate issue or of any number of claims, cross claims, counterclaims, third party claims or issues. Federal Rule 42(b) adopted except reference to right of jury trial. (Rule 42).

Stay of Proceedings.

Continuance granted for good cause shown. (W.S. 1-9-102).

Abatement and Revival.

In addition to actions which survived death at common law, following survive: for mesne profits; for injuries to person; for injury to real or personal estate; and for deceit or fraud. Actions may be brought notwithstanding death of person liable, but in actions for personal injuries, if person entitled thereto dies from those injuries, damages are limited to those recoverable for wrongful death. (W.S. 1-4-101; W.S. 1-38-101 [Wyo., 565 P.2d 479]). Loss of chance doctrine actionable in medical malpractice action brought under wrongful death statute. (2003 WY 91, 73 P.3d 1094, aff'd and augmented on reh'g, 2004 WY 44, 88 P.3d 491). No pending action abates by death of either or both parties, except actions for libel, slander, malicious prosecution, assault, assault and battery, nuisance and against justice of peace for misconduct in office shall abate by death of either party. (W.S. 1-4-102). Where party dies while an action by or against him is pending, and cause of action survives, action may be revived in name of his personal representative on motion made by personal representative or by any other party within 90 days after death of deceased is suggested upon record by service of statement of fact of death. If motion not so made, action must be dismissed as to deceased party. (Rule 25[a]). If public officer who is party to action in official capacity dies, resigns or otherwise ceases to hold office during pendency of action, successor to office is automatically substituted as party. (Rule 25[d]). See also category 13 Estates and Trusts, topic 13.09 Executors and Administrators.

Limitation of.

See topic 5.16 Limitation of Actions.

Small Claims.

See category 6 Courts and Legislature, topic 6.01 Courts.

Termination of Actions.

A judgment is final determination of rights of parties to action. (Rule 54[a]).

Prohibited Actions.

Rights of action for alienation of affections, criminal conversation, seduction or breach of contract to marry are abolished. (W.S. 1-23-101).

Administration.

See category 13 Estates and Trusts, topic 13.09 Executors and Administrators.

Direct Actions Against Insurer.

See category 23 Transportation, topic 23.01 Motor Vehicles, subhead Direct Actions.

5.03 APPEAL AND ERROR:

Appeals to district court and Wyoming Supreme Court are governed by Wyoming Rules of Appellate Procedure (W.R.A.P.).

Appeals from District Courts.

Appeal to Wyoming Supreme Court is allowed from judgment rendered or final order made by district court. Judgment rendered or appealable order made by district court may be reversed in whole or in part, vacated or modified by Supreme Court for errors appearing on record. (Rule 1.04 W.R.A.P.). Appealable order is: Order affecting substantial right in action, when such order in effect determines action and prevents judgment; order affecting substantial right, made in special proceeding, or upon summary application in action after judgment; order, including conditional order, granting new trial on grounds of excessive damages appearing to have been given under influence of passion or prejudice or on grounds of error in assessment of amount of recovery, whether too large or too small. (Rule 1.05 W.R.A.P.). Appeal of any judgment or appealable order, judicial review of any administration action, answer of any question of law certified by federal or inferior state court and petition for writ of review of any interlocutory order governed by Wyoming Rules of Appellate Procedure. (Rule 1.02 W.R.A.P.).

Appeal is taken by filing notice of appeal with clerk of district court within 30 days from entry of appealable order and serving notice on counsel for all other parties to appeal. (Rule 2.01 W.R.A.P. and Rule 5 W.R.C.P.). Within five days after clerk of appellate court requests record and notes reply brief has been filed, or time for filing reply brief has expired, trial court clerk to transmit record on appeal to clerk of supreme court. (Rule 3.05 W.R.A.P.).

Appellant's brief is to be filed with Court and served on opposing counsel within 45 days after service of notice that case is docketed in appellate court. Appellee's brief is to be filed and served within 45 days after service of appellant's brief, and any reply brief of appellant is to be filed and served within 15 days after service of appellee's brief. (Rule 7.06 W.R.A.P.). Briefs must meet requirements set forth in Rule 7.01 W.R.A.P.

Bond for Costs on Appeal.

Whenever bond for costs on appeal is required by law, bond or equivalent security shall be filed with notice of appeal. (Rule 4.01 W.R.A.P.).

Supersedeas Bond.

Whenever appellant desires stay on appeal, he may present to court at or before time of filing his notice of appeal, supersedeas bond in such amount as shall be fixed by district court and with surety approved by court or by clerk. Bond shall be conditioned for satisfaction of judgment in full together with costs, interest, and damages for delay. (Rule 4.02 W.R.A.P.).

Writ of Review.

Review on writ of review (formerly writ of certiorari) is matter of judicial discretion, and is sought by filing and serving petition for writ of review within 15 days after entry of order from which relief sought. (Rule 13.03 W.R.A.P.; Rule 5 W.R.C.P.). Responses are to be filed within 15 days from service of petition for writ of review. (Rule 13.03 W.R.A.P.). Contents of petition for writ of review must meet requirements set forth in Rule 13.04.

Appeals from Minor Courts.

Judgment rendered on appealable order made by any court inferior in jurisdiction to district court may be reversed, vacated, remanded, or modified upon appeal taken to district court for errors appearing on record. (Rule 1.04[b] W.R.A.P.). Appeals to district court from county courts, justice of peace courts and municipal courts are governed by Wyoming Rules of Appellate Procedure.

Judicial Review of Administrative Action.

Appealable order made by administrative agency may be reversed, vacated, remanded or modified upon appeal to district court for errors appearing in record. (Rule 1.04 W.R.A.P., W.S. 16-3-114). Subject to requirement that administrative remedies be exhausted and in absence of any statutory or common-law provision precluding or limiting judicial review, and to extent that judicial review of administrative action by district court is available, any person who is aggrieved or adversely affected by final decision of administrative agency in contested case, or who is aggrieved or adversely affected by any other agency action or inaction, or who is adversely affected in fact by rule adopted by agency, may obtain judicial review of agency action in district court. (W.S. 16-3-114, Rule 12.01 W.R.A.P.). Proceedings for judicial review are instituted by filing and serving petition for review in district court. No summons shall be necessary. No other pleadings shall be necessary. (Rule 12.03 W.R.A.P.). Petition for review shall be filed within 30 days after service upon all parties of final decision of agency. (Rule 12.04 W.R.A.P.). Within 60 days after service of petition for review, agency shall transmit to reviewing court record of proceedings under review. Record in contested case shall consist of matter required by W.S. 16-3-107(o). (Rule 12.07 W.R.A.P.). Reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine meaning or applicability of terms of agency action. Reviewing court shall: (1) Compel agency action unlawfully withheld or unreasonably delayed; (2) hold unlawful and set aside agency action, findings, and conclusions found to be: (a) arbitrary, capricious, abuse of discretion, or otherwise not in accordance with law, (b) contrary to constitutional rights, power, privilege, or immunity, (c) in excess of statutory jurisdiction, authority or limitations, or lacking statutory right, (d) without observance of procedure required by law, or (e) unsupported by substantial evidence in case reviewed on record of agency hearing provided by statute. (W.S. 16-3-114[c], Rule 12.09 W.R.A.P.).

5.04 BONDS:

Any bond required in a court action may be executed by a qualified surety company. Where one or more bondsmen are required by law one qualified surety company is sufficient.

(W.S. 38-3-101).

Sureties, except duly qualified surety companies (W.S. 38-3-101), must be residents of state, worth in aggregate beyond their debts double the sum to be secured, and having property in state liable to execution equal to such sum. Every person acting as surety must file with court affidavit showing he meets requirements. (W.S. 1-1-104; W.S. 1-1-105).

Enforcement.

When bond forfeited, any person injured or entitled to benefit of bond may sue principal and sureties thereon in his own name. (Rule 17[a]).

5.05 CERTIORARI:

Jurisdiction to issue writ is given to Supreme Court and district courts. (Wyo. Const., Art. 5, §§ 3, 10; Writ of Review).

Certiorari now "writ of review" is discretionary writ available for interlocutory or extraordinary relief from orders of lower court or administrative agency. (Rule 13.01 W.R.A.P.). Writ of review may be granted to review interlocutory order of trial court or administrative agency not otherwise appealable, but involves controlling question of law as to which substantive basis for difference of opinion exists and in which immediate appeal from order may materially advance resolution of litigation. (Rule 13.02 W.R.A.P.).

5.06 CHARITABLE IMMUNITY:

See topic 5.09 Damages.

5.07 COMMISSIONS TO TAKE TESTIMONY:

See topic 5.11 Depositions and Discovery.

5.08 COSTS:

Costs are allowed plaintiffs upon judgments for money or property. (W.S. 1-14-124). On recovery of judgment for less that $100, each party pays own costs, and in actions for libel, slander, assault, assault and battery, malicious prosecution, false imprisonment, nuisance or against justice of peace for misconduct in office when damage is under $5, plaintiff does not recover costs. (W.S. 1-14-125). In other actions, court may award and tax costs or apportion them. If civil case settles too late for clerk to notify jurors, court may order parties to reimburse fund for juror fees and costs. In civil actions in which award of attorney's fees is authorized, court in its discretion may award reasonable attorney's fees to prevailing party without expert testimony. Court may consider: (i) its time and labor required, novelty and difficulty of questions and skill necessary; (ii) loss of other employment by lawyer's acceptance of this employment; (iii) customary fee in locality; (iv) amount involved and results obtained; (v) time limitations; (vi) nature and length of relationship between client and lawyer; (vii) experience, reputation and ability of lawyer; and (viii) whether fee is fixed or contingent. (W.S. 1-14-126).

Security for Costs.

Nonresident plaintiff or partnership plaintiff suing in its company name must furnish security for costs, approved by clerk of court. Court may increase amount on motion. (W.S. 1-14-119).

Liability of Attorney.

In any civil action, signature of attorney or party constitutes certification by him that he has read pleading, motion, or other paper, that to best of his knowledge, it is well grounded in fact and is warranted by existing law or good faith argument for modification or reversal of existing law, and is not interposed for any improper purpose, such as to harass or cause unnecessary delay, etc. If pleading not signed, it shall be stricken, unless promptly signed after called to attention of pleader or movant. (W.S. 1-14-128). If pleading, motion or other paper is signed in violation of W.S. 1-14-128, Court authorized to impose sanctions up to double amount of reasonable costs, including attorneys' fees, incurred upon person who signed pleading or represented party, or both. See also W.R.C.P. 11.

5.09 DAMAGES:

Common law generally prevails as to compensatory damages. Exemplary or punitive damages are recoverable where tort has been committed willfully and wantonly (Wyo., 715 P.2d 1361) but generally plaintiff must first prove actual damages (Wyo., 650 P.2d 1159).

Comparative Fault Rule adopted. (W.S. 1-1-109). Negligence, strict tort and products liability, breach of warranty all compared. (W.S. 1-1-109[a][iv]). Recovery barred if claimant's fault is more than 50% of total fault of all actors. (W.S. 1-1-109[b]). Each defendant liable only to extent of that defendant's proportion of total fault. (W.S. 1-1-109[e]).

Doctrine of charitable immunity abrogated. (Wyo., 469 P.2d 409).

Doctrine of Sovereign Immunity.

Wyoming Governmental Claims Act, W.S. 1-39-101 et seq. grants governmental entities and its public employees immunity from liability for any tort except liability for wrongful death, personal or property injury resulting from negligent operation of motor vehicle, aircraft or watercraft (W.S. 1-39-105); negligent operation or maintenance of any building, recreation area or public park (W.S. 1-39-106); negligent operation of airports, except damages resulting from compliance with any federal or state law governing use and operation of airports (W.S. 1-39-107); negligent operation of public utilities and services including gas, electricity, water, solid or liquid waste collection or disposal, heating and ground transportation except damages resulting from failure to provide adequate supply of gas, water, electricity or other services (W.S. 1-39-108); negligent operation of public hospital or public outpatient care facility (W.S. 1-39-109), including negligence of health care provider employed by governmental entity or contract physicians providing service for state institutions; and tortious conduct of law enforcement officers (W.S. 1-39-112).

Special statute of limitations requires that action against governmental entity may not be brought unless written itemized statement is presented to governmental entity within two years of date of alleged act, error or omission. Exception to two year limitation where alleged negligence is not reasonably discoverable within two-year period, or claimant failed to discover alleged negligence despite due diligence, then it must be brought within two years of discovery. (W.S. 1-39-113). Itemized statement shall state time, place and circumstances of injury; name, address and residence of claimant; and, compensation or other relief demanded. (W.S. 1-39-113[b]). Claims against state shall be presented to procurement services division of Department of Administration and Information. Claims against other entities to be presented to their business office. Where claim is against local government, claim need not be acted upon prior to filing suit. (W.S. 1-39-113[c]). Must file suit within one year after filing claim with governmental entity, except where claimant is seven years old or younger, then statute is two years or until claimant's eighth birthday whichever is greater but in no case will it be longer than any other statute of limitations. (W.S. 1-39-114).

There is no governmental immunity for actions based on contracts of governmental entity except to extent provided for in contract if contract was within powers granted to entity and properly executed. (W.S. 1-39-104). Where government employee is sued and government entity determines employee was acting within scope of his duty, whether or not he is accused of malicious or fraudulent conduct, governmental entity must provide defense at its expense. Governmental entity shall assume and pay judgment entered against employee if (a) act or omission upon which claim is based is determined by court or jury to be within scope of employee's duties, (b) payment shall not exceed limits set forth in W.S. 1-39-118, and (c) all appeals have been exhausted and time for appeals has expired. (W.S. 1-39-104[b]).

Governmental Claims Act provides exclusive remedy against governmental entity but does not prohibit any proceedings for mandamus, prohibition, habeas corpus, injunction, or quo warranto. (W.S. 1-39-116). Liability of governmental entity is limited to $250,000 per claimant, but not more than $500,000 for all claims arising out of single occurrence per occurrence. If entity has insurance for more than $500,000 or if it has insurance covering liability not authorized by Act, entity's liability shall be extended to extent of such insurance coverage. (W.S. 1-39-118). Judgment against a governmental entity may not include punitive damages, prejudgment interest or attorney's fees. (W.S. 1-39-118[d]). Liability of governmental entity for health care limited to $1,000,000 for all claims arising out of single occurrences. (W.S. 1-39-110).

Contribution among joint tortfeasors repealed effective June 11, 1986. Each defendant liable only for proportion of total dollar amount of damages in percentage of fault attributed to him. (W.S. 1-1-109, effective June 11, 1986). (Comparative “fault” adopted July 1, 1994. Negligence, strict tort/products liability and breach of warranty all compared. See subhead Comparative Fault Rule, supra.)

See also category 13 Estates and Trusts, topic 13.05 Death, subhead Actions for Death.

5.10 DECLARATORY JUDGMENTS:

See topic 5.15 Judgments.

5.11 DEPOSITIONS AND DISCOVERY:

Federal Rules of Civil Procedure form basis for Wyoming Rules of Civil Procedure. See topic 5.19 Practice.

Uniform Foreign Depositions Act adopted in 1927. (W.S. 1-12-115).

Within State for Use Within State.

Similar to federal rule, with additional provision in Rule 30(b)(4) that any deposition may be recorded by audiovisual means, that stenographic record shall also be made, and that deposition notice and any subpoena shall state that deposition shall be recorded by audiovisual means. Similar to Federal Rule 31, except that cross questions must be served within 14 days and redirect questions and recross questions must be served within seven days. (Rules 30, 31). Deposition may be taken by telephone or other remote electronic means with stipulation of parties on order of court. (Rule 30[b]7).

Within State for Use Elsewhere.

Uniform Foreign Depositions Act adopted. (W.S. 1-12-115). See subhead Uniform Foreign Depositions Act, supra.

Outside of State for Use Within State.

Same as Within State for Use Within State.

De Bene Esse.

See subhead Perpetuation of Testimony, infra.

Perpetuation of Testimony.

Similar to Federal Rule 27. Verified petition must be filed in district court of district of residence of any expected adverse party and expected action must be cognizable in a state court. (Rule 27[a][1]).

Before Whom Taken.

Similar to Federal Rule 28.

Commissions.

See subhead Before Whom Taken, supra.

Time When Taken.

Time limits similar to Federal Rules 30 and 31.

Notice.

Similar to Federal Rules 30, 31.

Compelling Attendance of Witnesses.

Similar to Federal Rule 45 prior to 1991 amendment, and provisions regarding issuance of subpoena and taking of deposition within 100 miles of place of service omitted.

Examination of Witnesses.

Similar to Federal Rules 30 and 31; and examination and cross-examination may proceed as permitted at trial under Wyoming Rules of Evidence (Rule 30[c]).

Return.

Similar to Federal Rules 30 and 31.

Certificate.

Federal Rules 30(f)(1) and 31(b) adopted. (Rules 30[f]; 31[b]).

Use of Depositions.

Similar to Federal Rule 32(a), except that 32(a)(3)(B) modified to read “that the witness is absent from the state, unless it appears that the absence of the witness was procured by the party offering the deposition.”

Effect of Taking or Using Depositions.

Similar to Federal Rule 32. Rule 32(c) abrogated by Wyoming Rules of Evidence, effective Jan. 1, 1978.

5.12 EQUITY:

See topic 5.02 Actions.

5.13 EVIDENCE:

See topic 5.11 Depositions and Discovery; Wyoming Rules of Evidence apply.

Witnesses.

Every person is competent to be witness except as otherwise provided in Wyoming Rules of Evidence. (Rule 601, Wyoming Rules of Evidence).

Husband and Wife.

No husband or wife shall be witness against other except in criminal proceedings for crime committed by one against other, or in civil action or proceeding by one against other. They may in all civil and criminal cases be witnesses for each other same as though marital relationship did not exist. (W.S. 1-12-104).

Privileged Communications.

Following persons must not testify in following respects: (i) Attorney or physician concerning communications made to him by client or patient in that relation or his advice to client or patient. Attorney or physician may testify by express consent of client or patient, and if client or patient voluntarily testifies, attorney or physician may be compelled to testify on same subject (W.S. 1-12-101[a][i]); (ii) clergyman or priest concerning confession made to him in his professional character if enjoined by church to which he belongs (W.S. 1-12-101[a][ii]); (iii) husband or wife except as provided under catchline Husband and Wife, supra (W.S. 1-12-101[a][iii]); (iv) person who assigns his claim or interest concerning any matter in respect to which he would not be permitted to testify if party (W.S. 1-12-101[a][iv]); (v) person who, if party, would be restricted in his evidence under W.S. 1-12-102 (see catchline Communications or Transactions With Incompetent or Person Since Deceased, infra) shall, where property is sold or transferred by executor, administrator, guardian, trustee, heir, devisee or legatee, be restricted in same manner in any action or proceeding concerning property (W.S. 1-12-101[a][v]); and (vi) confidential intermediary, as defined in W.S. 1-22-201(a)(viii), concerning communications made to him or information obtained by him during course of investigation pursuant to W.S. 1-22-203, when public interests, in judgment of court, would suffer by disclosure.

Communications or Transactions With Incompetent or Person Since Deceased.

In action or suit by or against person who from any cause is incapable of testifying, or by or against trustee, executor, administrator, heir or other representative of person incapable of testifying, no judgment or decree founded on uncorroborated testimony shall be rendered in favor of party whose interests are adverse to person incapable of testifying or his trustee, executor, heir or other representative. In any such action or suit, if adverse party testifies, all entries, memorandum [sic] and declarations of party incapable of testifying made while he was capable, relevant to matter in issue may be received in evidence. (W.S. 1-12-102).

Adverse Party.

Party may compel adverse party to testify orally or by deposition as any other witness, and no person disqualified as witness in action, civil or criminal, because of his interest in same or otherwise. Every person competent witness except as provided by law, but interest in action may be shown to affect credibility of witness. Any party of record in civil action, or any person for whose immediate benefit action prosecuted or defended, or his assignor, officer, agent or employee, or if county or city party any officer of county or city, may be examined upon trial of action as if under cross examination at instance of adverse party and may be compelled to testify subject to same rules for examination as any other witness. Party calling for examination is not concluded thereby and may rebut evidence given by counter or impeaching testimony. (W.S. 1-12-103).

Self-incrimination.

No person shall be compelled to testify against himself in any criminal case. (Const., Art. I, § 11).

Compelling Attendance.

See topic 5.11 Depositions and Discovery.

5.14 INJUNCTIONS:

Federal Rules of Civil Procedure form basis for Wyoming Rules of Civil Procedure. See topic 5.19 Practice. Rule 65, relating to injunctions, is consistent with Federal Rule 65.

Injunctions may issue in any case to restrain great or irreparable injury either pending cause or as part of final judgment. Injunction may also be issued where specially authorized by statute and by certain municipal ordinances. (W.S. 1-28-102).

Jurisdiction.

The district courts and the Supreme Court have jurisdiction to issue injunctions. (W.S. 1-28-103).

Prerequisites.

Injunction may be granted at any time before judgment if it appears by affidavit of plaintiff or his agent that plaintiff is entitled thereto (W.S. 1-28-103), and plaintiff gives security in amount fixed by court to secure party enjoined (Rule 65[c]).

Procedure.

Federal Rule 65(a)-(d) adopted. (Rule 65[a]-[d]). Rule 65 does not apply to suits for divorce, alimony, separate maintenance, or custody of minors. (Rule 65[e]).

Bond.

See subhead Prerequisites, supra.

Temporary injunctions authorized. (Rule 65[b]).

5.15 JUDGMENTS:

Judgment is final determination of rights of parties. (Rule 54[a]). Interlocutory judgments are not provided for. Federal Rules of Civil Procedure form basis for Wyoming Rules of Civil Procedure with significant changes to certain rules. See topic 5.19 Practice.

Judgment by confession may be made in open court with assent of party having cause of action. (W.S. 1-16-201). Where confession is upon warrant of attorney, warrant must be produced and filed with clerk of court. (W.S. 1-16-202). Cognovit judgment not per se unconstitutional. (Wyo., 618 P.2d 547). See also W.S. 34.1-3-104(a)(iii)(2).

Uniform Consumer Credit Code adopted. (W.S. 40-14-101 to W.S. 40-14-702). See category 3 Business Regulation and Commerce, topic 3.11A Consumer Credit.

Consent judgments as distinguished from judgments by confession are not provided for.

Judgment on Pleadings.

Federal Rule 12(c) adopted. (Rule 12[c]).

Summary Judgments.

Federal Rule 56 adopted. (Rule 56).

Declaratory Judgments.

Uniform Declaratory Judgments Act adopted. (W.S. 1-37-101 to W.S. 1-37-115).

Default Judgments.

Federal Rule 55 adopted except that “guardian ad litem, trustee” substituted for “committee conservator” in 55(b)-(2), and subsection (e) omitted. (Rule 55).

Offer of Settlement.

Differs from Federal rule. (Rule 68).

Docketing.

All judgments except judgments arising by operation of law must be entered on journal of court and certified copy of judgments affecting title to real estate must be recorded in office of county clerk in county where property located. (W.S. 1-16-301). Divorce decree incorporating lien must be so recorded. (Wyo., 724 P.2d 1141). Clerk of court also keeps index to judgments. (W.S. 1-16-307).

Vacation or Modification.

District court may vacate or modify own judgment or order after term at which made: (i) by granting new trial when grounds for new trial could not with reasonable diligence have been discovered before, but are discovered after original motion for new trial has been passed upon by district court; (ii) by new trial granted in proceedings against defendants constructively summoned; (iii) for mistake, neglect or omission of clerk or irregularity in obtaining judgment or order; (iv) for fraud practiced by successful party in obtaining judgment or order; (v) for erroneous proceedings against minor or person of unsound mind, when condition of defendant does not appear in record nor error in proceedings; (vi) for death of parties before judgment in action; (vii) for unavoidable casualty or misfortune preventing party from prosecuting or defending; (viii) for errors in judgment shown by minor within 12 months after age of majority; (ix) for taking judgments upon warrants of attorney for more than was due plaintiff, when defendant not summoned or otherwise legally notified of time and place of taking judgment; and (x) when judgment was obtained in whole or in material part by false testimony on part of successful party or any witness in his behalf which ordinary prudence could not have anticipated or guarded against and guilty party has been convicted. (W.S. 1-16-401[a]). Proceedings to vacate or modify judgment or order for grounds (iv), (v) and (vii) must be commenced within two years after judgment made, unless party entitled thereto is minor or person of unsound mind, in which cases two years after disability removed. Proceedings to vacate or modify for grounds (iii) and (vi) must be commenced within three years, and for ground (ix) within two years, after defendant has notice of judgment. Proceedings to vacate or modify for ground (x) may be commenced after guilty party is convicted, if conviction within two years of rendition of judgment. (W.S. 1-16-408). Party against whom judgment or order rendered without service other than by publication in newspaper may have same opened and be allowed to defend within six months after date of judgment or order. Before judgment or order can be opened applicant gives notice to adverse party of intended application, files answer to petition, pays costs required by court and satisfies court that during pendency of action he had no actual notice thereof in time to appear in court and make his defense. (W.S. 1-16-402). Court first decides whether to vacate or modify judgment or order before deciding validity of defense or cause of action (W.S. 1-16-404), and judgment must not be vacated unless court decides defendant has valid defense, or if plaintiff seeks vacation or modification, that there is valid cause of action (W.S. 1-16-405). Rule 60 does not limit power of court to entertain independent action under W.S. 1-16-402. (Wyo., 618 P.2d 547).

Also, Federal Rule 60b adopted except that motion for any grounds within (b) must be made within one year after judgment, order or proceeding entered or taken. (Rule 60[b]).

Lien.

Lands and tenements within county in which judgment entered are bound for satisfaction of judgment from day judgment is filed with county clerk. Whenever judgment is required to be filed with county clerk, it shall be recorded in real estate records. Goods and chattels of debtor are bound from time they are seized in execution. (W.S. 1-17-302). Judgments and decrees entered in U.S. district court or circuit courts are similarly liens against lands and tenements of person against whom judgment or decree entered. (W.S. 1-17-305[a]). Judgment of Supreme Court for money binds lands and tenements of debtor within county in which suit originated from day judgment is filed with county clerk. All other lands and goods and chattels are bound from time seized in execution. Lien of judgment of district court which is appealed to Supreme Court not divested or vacated, but shall continue until final determination of action in Supreme Court. (W.S. 1-17-303). Judgment on which execution not levied before expiration of one year after rendition shall not operate as lien on estate of debtor. (W.S. 1-17-336). In computing one-year period, time covered by appeal or injunction against execution is not counted.

Extension of Lien.

Judgment creditor may file transcript of judgment of district court or circuit court with clerk of district court and county clerk in any other counties in state where judgment debtor owns real estate, and judgment thereupon becomes lien on all debtor's real estate in such county from date of filing. (W.S. 1-17-304). Transcript of judgment of federal court within state may be filed in office of clerk of any Wyoming district court and county clerk in any counties where debtor owns real estate, with same effect. (W.S. 1-17-305[b], [d]).

Dormancy.

If execution is not sued out within five years from date of judgment, it becomes dormant, or if five years intervene between date of execution issued on such judgment and time of suing out another execution thereon, such judgment shall become dormant and cease to be a lien on estate of judgment debtor. (W.S. 1-17-307).

Revival.

No action may be brought to revive judgment after ten years after it becomes dormant, unless party entitled to bring such action was, at time judgment became dormant, was either: (a) Minor, insane, or imprisoned, in which case action may be brought within 15 years after disability has ceased; or (b) party in child support proceeding, in which case action must be brought within 21 years after judgment became dormant. (W.S. 1-16-503). Judgments are revived in same manner as prescribed for reviving actions before judgment (see topic 5.02 Actions) or by separate action. (W.S. 1-16-502).

Assignment.

No legislation.

Satisfaction.

Every suit settled and judgment satisfied must be dismissed or released in writing upon face of docket by attorney of record or judgment creditor. (W.S. 1-16-308). If no release within 15 days of settlement or satisfaction, person in whose favor judgment was rendered is liable for damages sustained. (W.S. 1-16-309). Payments on and satisfaction of judgment in circuit court must be endorsed on index to judgments. (W.S. 1-21-401).

The following form may be used:

Form

"Judgment herein having been fully paid and satisfied same is hereby released of record. Dated . . . . Plaintiff."

Proceedings in Aid of Execution.

Equitable assets are subject to payment of judgment by action where personal and real property are insufficient to pay action. (W.S. 1-17-401). After entry of judgment, judgment creditor may obtain discovery from any person, including debtor, as provided in Wyoming Rules of Civil Procedure. Person served with notice of discovery shall hold for benefit of judgment creditor all property in his hands belonging to judgment debtor. (W.S. 1-17-402).

Actions on domestic and foreign judgments are recognized on common law principles.

Foreign Judgments.

May be enforced by action. (W.S. 1-17-707).

Uniform Enforcement of Foreign Judgments Act (Revised) adopted. (W.S. 1-17-701 to W.S. 1-17-707).

5.16 LIMITATION OF ACTIONS:

Uniform Commercial Code adopted. (W.S. 34.1-1-101 to W.S. 34.1-10-104). Uniform Consumer Credit Code also adopted. (W.S. 40-14-101 to W.S. 40-14-702). For special periods of limitations see topic 5.15 Judgments; categories 3 Business Regulation and Commerce, topics Commercial Code, Consumer Credit, Consumer Protection; Documents and Records, topic Records, subheads Marketable Title Act and Tax Title Limitations Act; Employment, topic Labor Relations, subhead Workmen's Compensation Act; Mineral, Water and Fishing Rights, topic Mines and Minerals.

Actions must be commenced within following periods:

Ten years: For recovery of title or possession of lands, tenements or hereditaments (W.S. 1-3-103); on specialty or any agreement, contract or promise in writing (W.S. 1-3-105[a][i]); on official bond or undertaking of officer, assignee, trustee, executor, administrator or guardian, or upon bond given pursuant to statute (W.S. 1-3-108); any action for which no other limitation is fixed (W.S. 1-3-109). Power of sale remedy provided in mortgage recorded on Wyoming real property must be exercised within ten years of maturity date of loan indebtedness secured thereby, or, if no maturity date is ascertainable, within ten years of date of recording of mortgage. (W.S. 34-4-102[a]). Unless parties to contract agree otherwise, actions in tort or contract or otherwise to recover damages must be brought within ten years of “substantial completion” of improvement to real property against person constructing, altering or repairing improvement, manufacturing or furnishing materials incorporated in improvement, or performing or furnishing services in design, planning, surveying, supervision, observation or management of construction, or administration of construction contracts for: (i) Any deficiency in design, planning, supervision, construction, surveying, manufacturing, or supplying of materials or observation or management of construction; (ii) injury to property; or (iii) injury to person or wrongful death arising out of such deficiency. (W.S. 1-3-111[a]). If injury to property or person or wrongful death occurs during ninth year following “substantial completion”, then action may be brought within one year of date of injury or death. (W.S. 1-3-111[b]). Preceding limitations regarding improvements to real property shall not be asserted as defense by person in actual possession or control, as owner tenant or otherwise, of improvement at time deficiency in improvement proximately causes injury or death for which it is proposed to bring action. (W.S. 1-3-112). Preceding limitation shall not be construed to extend period for bringing action allowed by other laws. (W.S. 1-3-111[c]). “Substantial completion” means degree of completion at which owner can utilize improvement for purpose for which intended. (W.S. 1-3-110).

Eight years: On contract not in writing either express or implied; on liability created by statute other than penalty or forfeiture. (W.S. 1-3-105[a][ii]). See subhead Ten Years, supra. Civil action for sexual assault against minor may be brought within eight years after minor's 18th birthday or within three years after discovery. (W.S. 1-3-105[b]).

Six years: For recovery of real property sold for nonpayment of taxes, period of limitations commencing with date of sale for taxes. (W.S. 39-13-108[e][vii][D]).

Five years: On foreign judgment, claim or contract, express or implied, incurred or contracted and accrued before debtor becomes resident of state, time running from date when debtor becomes resident (W.S. 1-3-105[a][iii]); against corporation for forfeiture of charter, time running from date when act complained of was committed (W.S. 1-31-127).

Four years: For trespass upon real property; for taking, detaining or injuring personal property, including actions for recovery of personal property; for injury to rights of plaintiff not arising on contract, including property damage; personal injury and injury to rights of plaintiff not enumerated in W.S. 1-3-105(a)(iv); and for relief on ground of fraud. (W.S. 1-3-105[a][iv]). Action for misappropriation of trade secrets must be brought within four years after discovery or with reasonable diligence should have been discovered. (W.S. 40-24-106). Contracts of sale under Art. 2 of Wyoming Uniform Commercial Code; U.C.C. 2-725 adopted. (W.S. 34.1-2-725). See subheads Ten Years, supra, and Medical Malpractice, infra. Action for fraudulent transfer extinguished unless brought: (i) Under W.S. 34-14-205(a)(i) within four years after transfer made or obligation incurred or, if later, within one year after transfer or obligation was or could reasonably have been discovered by claimant; (ii) under W.S. 34-14-205(a)(ii) or W.S. 34-14-206(a) within four years after transfer made or obligation incurred; or (iii) under W.S. 34-14-206(b) within one year after transfer made or obligation incurred. (W.S. 34-14-210[a]).

Three years: Action to oust officer of corporation from his office. (W.S. 1-31-127).

Two years: For wrongful death of decedent (W.S. 1-38-102[d]); on liability created by federal statute, other than forfeiture or penalty, which prescribes no limitation (W.S. 1-3-115); after contract of sale, for securities fraud. (W.S. 17-4-122[e]). See subheads Ten Years, supra, and Medical Malpractice, infra. See also category 10 Documents and Records, topic 10.04 Records, subhead Tax Title Limitations Act.

Two Years: Professional Malpractice.

Cause of action arising from act, error or omission in rendering of licensed or certified professional or health care services must be brought within greater of following times: (i) Within two years of date of alleged act, error or omission; except that cause of action may be instituted not more than two years after discovery of alleged act, error or omission, if claimant can establish that alleged act, error or omission was not reasonably discoverable within two year period or claimant failed to discover alleged act, error or omission within two year period despite exercise of due diligence; (ii) for injury to rights of minor, by his eighth birthday or within two years of date of alleged act, error or omission, whichever period is greater, except that cause of action may be instituted not more than two years after discovery of alleged act, error or omission, if claimant can establish that alleged act, error or omission was not reasonably discoverable within two year period or claimant failed to discover alleged act, error or omission within two year period despite exercise of due diligence; and (iii) for injury to rights of plaintiff suffering from legal disability other than minority, within one year of removal of disability. If under (i) or (ii) alleged act, error or omission is discovered during second year of two year period from date of act, error or omission, period for commencing lawsuit is extended six months. (W.S. 1-3-107).

One year: For libel, slander, assault or battery not including sexual assault, malicious prosecution or false imprisonment; for statutory penalty or forfeiture, except as otherwise provided by statute. (W.S. 1-3-105[a][v]).

Three Months: Proceeding to contest probate of will must be commenced within three months following dates of first publication of notice provided for in W.S. 2-6-122 or W.S. 2-7-201.

(W.S. 2-6-301).

Uniform Commercial Code provisions imposing limitations on actions commenced on sales contracts (W.S. 34.1-2-725) and on instruments (W.S. 34.1-3-118) adopted.

Actions Not Specifically Provided For.

The limitation is ten years. (W.S. 1-3-109).

New Action.

If, in action commenced in due time, judgment for plaintiff is reversed, or if plaintiff fails otherwise than upon merits, and time limit for commencement of action has expired at date of reversal or failure, plaintiff, or his representative if he dies and if cause of action survives, may commence new action within one year after date of failure or reversal. These provisions also apply to any claim asserted in any pleading of defendant. (W.S. 1-3-118). This savings statute applies where plaintiff unable to make service within 60-day period of Rule 3(b) through no fault of plaintiff. (705 F.2d 1208 [10th Cir. 1982]).

Foreign Causes of Action.

If by laws of state or country where cause of action arose action is barred, it is also barred in this state. (W.S. 1-3-117). Foreign limitation of action statute is applied regardless of whether “procedural” or “substantive”. (Wyo., 589 P.2d 334).

Disabilities of Plaintiff.

If person entitled to bring any action, except for action arising from error or omission in rendering of licensed or certified professional health care services or for penalty or forfeiture, is, at time cause of action accrues, minor or subject to any other legal disability, person may bring action within three years after disability is removed or within any other statutory period of limitation, whichever is greater. (W.S. 1-3-114). See subhead Medical Malpractice, supra.

Absence or Concealment of Defendant.

If when cause of action accrues against a person, he is out of state or has absconded or concealed himself, period limited for commencement of action does not begin to run until he comes into state, or while he is absconded or concealed. If after cause of action accrues he departs from state, or absconds or conceals himself, time of such absence or concealment cannot be computed as any part of period within which action must be brought. (W.S. 1-3-116). Burden is on plaintiff to prove defendant was absent or had absconded. (705 F.2d 1208 [10th Cir.]).

Interruption of Statutory Period.

When payment made upon any demand founded on contract or written acknowledgment thereof, or promise to pay same has been made and signed by party to be charged, time for commencing action runs from date of such payment, acknowledgment or promise. (W.S. 1-3-119).

Revival of Barred Claims.

In any case founded on contract, part payment of principal or interest or an acknowledgment of existing debt, liability or claim in writing signed by party to be charged, or promise to pay same has been made and signed by party to be charged, revives barred claim, and action may be brought within time limited, after such part payment or acknowledgment or promise. (W.S. 1-3-119; 56 Wyo. 28, 103 P.2d 164; 39 Wyo. 107, 270 P. 174).

Contractual Limitations.

Uniform Commercial Code adopted. (W.S. 34.1-1-101 to W.S. 34.1-10-104). See category 3 Business Regulation and Commerce, topic 3.09 Commercial Code.

Pleading.

The defense of limitations must be raised by motion to dismiss or answer or it is waived. (Rule 8[c]). But see subhead Ten Years, supra.

5.16A PARTITION:

Tenants in common and coparceners of any estate of lands, tenements or hereditaments within state may be compelled to make partition thereof. (W.S. 1-32-101).

Jurisdiction is in district courts. (W.S. 1-32-103).

Venue is in county in which property or any part thereof is located. (W.S. 1-32-102).

Proceedings.

A person entitled to partition may file his petition therefor in district court, setting forth nature of his title and description of lands, and naming each tenant in common, coparcener, or other interested person as defendant. (W.S. 1-32-103). If court finds that plaintiff has legal right to any part of such estate, it orders partition thereof in favor of plaintiff, or all parties in interest; appoints three disinterested persons of vicinity to be commissioners to make partition, and orders writ of execution to issue, which is directed to sheriff of either of counties in which any part of estate lies, commanding him that he cause to be set off and divided to plaintiff or each party in interest such part and proportion of estate as court shall order. (W.S. 1-32-104; W.S. 1-32-105).

When the estate cannot be divided without manifest injury to value thereof, commissioners must return that fact to court, with a just valuation of estate; and, if court approves of return, and one or more of parties elect to take estate at such appraised value, it shall be adjudged to him or them upon paying to other parties their proportion of appraised value thereof. (W.S. 1-32-109). If no election to take at estimate made, court may order sale of property at public auction, by sheriff who executed writ of partition, or his successor. (W.S. 1-32-111).

Partition in Kind or Sale.

See subhead Proceedings, supra.

Partition by consent of party against whom same is sought, made by appearance prior to issuance of writ, is valid and binding when recorded. (W.S. 1-32-108).

5.17 [RESERVED]

5.18 PLEADING:

Pleading system based on Wyoming Rules of Civil Procedure, and these Rules are based on Federal Rules of Civil Procedure with significant changes to certain rules. See topic 5.19 Practice.

Pleadings permitted are same as under Federal Rule 7(a). (Rule 7[a]).

Pleadings setting forth claim for relief is same as Federal Rule 8(a). (Rule 8[a]).

Answer.

Federal Rules 8(b), (c), (d) and 12(b) adopted. (Rules 8, 12).

Counterclaim or Cross Claim.

Federal Rule 13 adopted, and modified as follows: 13(a) adopted in substance, but does not contain clause excusing filing of compulsory counterclaim in suit commenced by attachment or other process in which court has no jurisdiction to render personal judgment; “state, or against a county, municipal corporation or other political subdivision, public corporation” substituted for words “United States” in 13(d); and 13(i) provides judgment may be rendered on counterclaims or cross claim even if claims of opposing party have been dismissed or otherwise disposed of. (Rule 13).

Replies allowed in accordance with Federal Rule 7(a). (Rule 7[a]).

Demurrers are abolished. (Rule 7[c]).

Amended or Supplemental Pleadings.

Federal Rule 15 adopted, except that part of 15(c) omitted. (Rule 15).

Affidavits of Merits.

No statutory provisions.

Affidavits of Defense.

No statutory provisions.

Bill of Particulars.

Federal Rule 12(e) adopted. (Rule 12[e]).

Verification.

Federal Rule 11. (Rule 11).

Service.

Federal Rule 5 adopted with changes. (Rule 5).

Filing.

Federal Rules 3 and 5(d) adopted with changes. (Rules 3[a], 5[d]).

Time.

Federal Rule 12(a) adopted with changes. (Rule 12[a]).

Proof of Claim.

No statutory provisions.

Small Claims.

See category 6 Courts and Legislature, topic 6.01 Courts.

5.19 PRACTICE:

Wyoming Rules of Civil Procedure adopted. These rules are based on Federal Rules of Civil Procedure, and are supplemented by statutory provisions. Wyoming Rules of Civil Procedure are numbered from 1 to 86, and subject matter of any Wyoming Rule corresponds with subject matter of similarly numbered Federal Rule. Thus Federal Rule 52 and Wyoming Rule 52 both cover Findings by the court. Material variations of Wyoming Rules from Federal Rules are indicated in subheads under this topic as well as in subheads under topics Actions, Appeal and Error, Depositions and Discovery, Injunctions, Judgments, Pleading, Process; category Debtor and Creditor, topics Attachment, Executions, Garnishment.

Discovery.

Federal Rules 26-37 adopted (Rules 26-37) with following exceptions: For Rules 30-32, see topic 5.11 Depositions and Discovery.

Demand for Admission of Facts.

Federal Rule 36 adopted. (Rule 36).

Direct Actions Against Insurer.

See category 23 Transportation, topic 23.01 Motor Vehicles, subhead Direct Actions.

Small Claims.

See category 6 Courts and Legislature, topic 6.01 Courts.

5.20 PROCESS:

Federal Rules of Civil Procedure form basis for Wyoming Rules of Civil Procedure. See topic 5.19 Practice.

The writ by which a civil action is commenced is called a summons. (Rule 4[a]).

General Requisites.

Similar to Federal Rule 4.

By Whom Issued.

Federal Rule 4(a) adopted except that upon issuance of summons by clerk it is delivered for service to sheriff or to person specially appointed to serve it. (Rule 4[a]).

Who May Serve.

Process may be served by the following: (1) Within state by sheriff of county where service is made, or by his undersheriff or deputy, or at request of a party, by any other person of age of majority, not party to action; (2) in another state or U.S. Territory, by sheriff of county where service is made, or by his undersheriff or deputy, or by U.S. marshal, or his deputy, or any other person of age of majority, not party to action; and (3) in foreign country, by any citizen of U.S. of age of majority. (Rule 4[c] am'd 2003, effective 5/1/03).

Return.

Person serving process must make proof of service to court promptly and in any event within time during which person served must respond to process. Failure to make proof of services does not affect validity of service. (Rule 4[m]).

Personal Service on Individual.

Upon individual other than person under 14 years of age or incompetent person, by delivery of copy of summons together with copy of complaint, to defendant personally, or by leaving copy of summons and complaint at his dwelling house or usual place of abode with some member of his family or other person in his employ over age of 14 years, or at defendant's usual place of business with any employee then in charge of such place of business, or by delivery to an agent authorized by appointment or by law to receive service of process. (Rule 4[d][1]). Voluntary waiver, acceptance or acknowledgment of service, or voluntary appearance of defendant is equivalent to service. (Rule 3[b]).

Personal Service on Person Under 14 Years of Age.

Upon person under 14 years of age or incompetent person, by service upon his guardian or, if no guardian has been appointed in this state, then upon person having his legal custody and control or upon guardian ad litem. (Rule 4[d][2]).

Personal Service on Incompetent Person.

See subhead Personal Service on Person Under 14 Years of Age, supra.

Personal Service on Partnership.

Upon a partnership, or other unincorporated association, by delivery of copies of complaint and summons to one or more of partners or associates, or a managing or general agent thereof, or agent for process, or by leaving copies at usual place of business of such defendant with any employee then in charge thereof. (Rule 4[d][3]).

Personal Service on Domestic Corporation.

Upon corporation, by delivery of copies of complaint and summons to any officer, manager, general agent, or agent for process. If no such officer, manager or agent can be found in county in which action is brought such copies may be delivered to any agent or employee found in such county. If such delivery be to a person other than an officer, manager, general agent or agent for process clerk, at least 20 days before default is entered, must mail copies of complaint and summons to corporation by registered or certified mail, with return receipt requested, at its last known address. (Rule 4[d][4]).

Service may also be upon its statutory agent appointed as one of requirements of incorporation. If corporation has no registered agent, or agent cannot with reasonable diligence be served, corporation may be served by registered or certified mail, return receipt requested, addressed to Secretary of corporation at its principal office. Service is perfected at earliest of: (i) date corporation receives mail; (ii) date shown on return receipt, if signed, either manually or in facsimile, on behalf of corporation; or (iii) five days after its deposit in U.S. mail, as evidenced by postmark, if mailed postpaid and correctly addressed. (17–16–504).

Personal Service on Limited Liability Company.

Made on registered agent appointed by company. (W.S. 17-15-114). If company fails to appoint or maintain registered agent in state, or whenever registered agent cannot with reasonable diligence be found at registered office, then Secretary of State designated as agent upon whom service of process, notice or demand may be served. Duplicate copies served on Secretary by delivering to him or to any clerk having charge of corporation department in his office process, notice or demand being served. In event of such service Secretary immediate-immediately causes one of said copies to be forwarded by registered mail addressed to corporation at its registered office. Any service so had is returnable in not less than 30 days. (W.S. 17-15-114).

Personal Service on Association.

See subhead Personal Service on Partnership, supra.

Personal Service on Joint Stock Companies.

No provisions.

Personal Service on Foreign Corporation.

As far as Wyoming Rules of Civil Procedure are concerned service is same on foreign corporation as domestic corporation. (Rule 4[d][4]). See subhead Personal Service on Domestic Corporation, supra, first paragraph.

Service may also be upon foreign corporation's statutory agent appointed as one of requirements of obtaining certificate of authority to transact business. Foreign corporation may be served by registered or certified mail, return receipt requested, addressed to Secretary of foreign corporation at its principal office shown in its application for certificate of authority or in its most recent annual report if corporation: (i) has no registered agent or its registered agent cannot with reasonable diligence be served; (ii) has withdrawn from transacting business in this state under W.S. 17-16-1520; or (iii) has had its certificate of authority revoked under W.S. 17-16-1531 or W.S. 17-16-1631. Service is perfected at earliest of: (i) date foreign corporation receives mail; (ii) date shown on return receipt, is signed, either manually or in facsimile, on behalf of foreign corporation; or (iii) five days after its deposit in U.S. mail as evidenced by postmark, if mailed postpaid and correctly addressed. (W.S. 17-16-1510).

Personal Service Outside the State.

Wyoming Court may exercise jurisdiction on any basis not inconsistent with Wyoming or U.S. Constitution. When exercise of personal jurisdiction is authorized by this section (W.S. 5-1-107), service may be made outside of this state and proved according to Wyoming Rules of Civil Procedure or any order of court (W.S. 5-1-107). Under Wyoming Rules of Civil Procedure personal service may be made outside of state in same manner as service is made in lieu of service by publication. (Rule 4[1]). See subhead Service in Lieu of Service by Publication, infra.

Service by Mail.

See subhead, Service in Lieu of Service by Publication, infra.

Substituted Service.

See subheads Personal Service Outside the State, supra and Service in Lieu of Service by Publication, infra.

Service by Publication.

Before service by publication may be made, an affidavit of party must be filed showing that service of summons cannot be made within state on defendant, and stating his address, if known, or that his address is unknown and cannot with reasonable diligence be ascertained, and that the case is one of those in which such service by publication is authorized. (Rule 4[f]). Publication must be made by clerk for four consecutive weeks in newspaper published in county where complaint is filed. (Rule 4[g]). Service by publication will be deemed complete at last publication. (Rule 4[h]). Immediately after first publication party making service must deliver to clerk copies of publication, and clerk must send copy by registered mail, return receipt requested, to each defendant whose address is known. In all cases where there are defendants who have received no such notice from clerk, party making service must, at time of hearing and prior to entry of judgment, make and file affidavit stating address of each defendant as then known to him, or if unknown, that he has been unable to ascertain same with exercise of reasonable diligence. Such additional notice, if any, must then be given as may be directed by court. (Rule 4[f]).

Actions in which service by publication is authorized are: where defendant resides out of state or his residence cannot be ascertained and action is for recovery of or partition of real property or for sale thereof under mortgage lien, or to compel specific performance of a contract to sell real estate, or to establish or set aside a will; actions in which it is sought by a provisional remedy to take or appropriate the property of defendant where defendant is foreign corporation or nonresident or place of residence cannot be ascertained, actions against corporation which has failed to elect officers or appoint statutory agent; actions which relate to, or subject of which is real or personal property located in state, when defendant claims lien thereon, or actual or contingent interest therein or relief demanded seeks partly or wholly to exclude defendant from interest in real or personal property located within state where such defendant is one of following: nonresident of state, dissolved domestic corporation which has no trustee for creditors who resides in state, domestic corporation which has failed to elect officers or appoint other representatives upon whom service can be had or appoint statutory agent for service and which has no place of doing business in state, domestic corporation which has had certificate of incorporation forfeited and which has no trustee for creditors and stockholders resident in state, a foreign corporation, or defendant's residence cannot be ascertained; actions against resident who has departed from his county of residence with intent to delay or defraud his creditors, or to avoid service, or keeps himself concealed with like intent; actions to modify or vacate judgment or impeach judgment or order for fraud, or to obtain order of satisfaction thereof where defendant is nonresident or his residence cannot be ascertained; actions for divorce, for alimony, to affirm or avoid a marriage, or to modify any decree therefor, when defendant is nonresident or his residence cannot be ascertained or he conceals himself to avoid service; actions for adoption or for termination of parental rights; actions involving water rights within this state when any defendant is nonresident or his or their residence cannot be ascertained; actions against executors, administrators or guardians, when defendant has given bond as such in this state, but at time of commencement of action is nonresident or his place of residence cannot be ascertained; and when appellee has no attorney of record in this state, and is nonresident, or has left state to avoid service of notice or process, or so conceals himself that notice or process cannot be served upon him. (Rule 4[e]).

Service in lieu of service by publication may be made by mail or by personal service.

Service by mail is made upon request of any party by clerk who sends by registered or certified mail, return receipt requested, signed by addressee or addressee's agent who has been specifically authorized in writing by form acceptable to, and deposited with, postal authorities, copies of complaint and summons addressed to party to be served at address given in affidavit for service by publication. (Rule 4[1][2]).

Personal service outside state is made by delivering copies of summons and complaint to defendant. (Rule 4[1][1]).

Proof of service may be made as follows: (1) Process served by Wyoming sheriff, undersheriff or deputy by his certificate stating the date, place and manner of service, except that special deputy appointed for sole purpose of making service must make proof by special deputy's affidavit containing such statement; (2) process served by any other person, by his affidavit stating date, place and manner of service; (3) service by registered or certified mail, by certificate of the clerk showing date of mailing and date he received return receipt; (4) service by publication, by affidavit of publication together with certificate of clerk as to mailing of copies where required; and (5) by written admission, acceptance or waiver of service by person to be served, duly acknowledged. (Rule 4[m][2]).

Waiver of service by defendant does not waive objection to venue or in personam jurisdiction. Notice to most defendants by first class mail or other approved means creates duty to avoid unnecessary costs of service. Defendant timely returning waiver has 60 days to answer (90 days out of state). (Rule 4[o]).

Nonresident Motorist.

See category 23 Transportation, topic 23.01 Motor Vehicles.

Long Arm Statute.

See subhead Personal Service Outside the State, supra.

5.21 REPLEVIN:

Actions for recovery of personal property (replevin) can be brought in any district court or circuit court of this state and are governed by W.S. 1-15-101 to W.S. 1-15-108 and W.S. 1-15-301 to W.S. 1-15-306.

Proceedings.

Writ of replevin will be issued by clerk if authorized by written order of court after hearing pursuant to W.S. 1-15-103(a)(i), and filing of bond required by W.S. 1-15-104; plaintiff shall file affidavit showing: (i) description of property claimed; (ii) plaintiff is owner of property or has special ownership or interest therein, stating facts in relation to it and his entitlement to possession of such property; (iii) property is wrongfully detained by adverse party; (iv) alleged cause of detention of property; (v) property not taken for tax, assessment, or fine pursuant to statute or seized upon execution or attachment, or if so seized it is exempt from seizure by statute; and (vi) actual value of property. (W.S. 1-15-302).

Amount of surety bond is fixed by court for payment of all costs and damages which may be incurred or suffered by any party as result of wrongful issuance of writ, not exceeding sum specified in bond. (W.S. 1-15-104[a]). Writ shall issue only upon written motion and order of court unless it clearly appears from specific facts in verified complaint or affidavit that immediate and irreparable injury will result before notice can be served and hearing held. (W.S. 1-15-103[a][ii]). Order and writ without notice expire in no more than ten days after issuance. (W.S. 1-15-103[a][iii]). Property seized by sheriff is delivered to plaintiff unless it is seized without notice (W.S. 1-15-103[a][viii]), unless property is claimed by third party other than defendant (W.S. 1-15-306); or unless returned to defendant pursuant to W.S. 1-15-104(c) or W.S. 1-15-105. Sheriff will return writ within 20 days of its receipt. (W.S. 1-15-305).

Repossession.

At any time defendant may obtain release of property by furnishing bond, with sufficient sureties, in sum not less than value of property. (W.S. 1-15-105).

Claim of Third Persons.

Third persons can claim property taken under writ, and if claimant serves affidavit on sheriff stating grounds of claimant's title or right to possession, sheriff can release property unless plaintiff files with sheriff surety bond in acceptable amount. (W.S. 1-15-306).

5.22 SEQUESTRATION:

No statutory provisions. See category 8 Debtor and Creditor, topics 8.02 Attachment, 8.05 Executions, 8.09 Garnishment, 8.16 Receivers.

5.23 SERVICE:

See topic 5.20 Process.

5.24 STAY OF EXECUTION:

See topic 5.03 Appeal and Error; category 8 Debtor and Creditor, topic 8.05 Executions.

5.25 SUBMISSION OF CONTROVERSY:

Rule 87 is now abrogated.

5.26 VENUE:

Actions must be brought in county where cause of action arose in the following cases: (1) For recovery of fine, forfeiture, or penalty imposed by statute; (2) against public officer for act done by virtue or under color of office or for neglect of official duty; (3) on official bond or undertaking of public officer. (W.S. 1-5-104).

Actions must be brought in county in which subject of action is situated in following cases: (1) For recovery of real property; (2) for partition of real property; and (3) for sale of real property under mortgage, lien or other encumbrance or charge. (W.S. 1-5-101).

Action to compel specific performance of contract for sale of real estate may be brought in county where any defendant resides. (W.S. 1-5-103).

Action against corporation created under laws of state may be brought in county in which corporation is situate or has principal office or place of business. (W.S. 1-5-105).

Action against foreign corporation or nonresident, other than action affecting real property, may be brought where cause of action arose or where plaintiff resides, whether or not codefendants reside in Wyoming. (W.S. 1-5-107).

General Rule as to Venue.

Every other action must be brought in county in which defendant resides or may be summoned, except actions against executor, administrator, guardian or trustee, which may be brought in county wherein he was appointed or resides. If action involves two or more defendants, action may be brought against all defendants in any county in which one of defendants resides or may be summoned. (W.S. 1-5-108).

Change of venue may be secured for following causes: Court satisfied there exists in county where action pending such prejudice against party or cause that he cannot obtain fair trial, or convenience of witnesses would be promoted thereby. After first motion ruled upon no party may move for transfer without permission of court. (Rule 40.1[a][1]).

Contract Provisions.

No statutory provisions.

6 COURTS AND LEGISLATURE

6.01 COURTS:

United States District Court.

Clerk of Court's office: 2120 Capitol Avenue, Room 2141, Cheyenne 82001, and 111 South Wolcott Street, Casper 82601.

Court sits at Cheyenne, Casper, Sheridan, Lander, Yellowstone Park, Green River and Jackson.

Docket fee, beginning of suit, $350.

Supreme Court of Wyoming has general appellate jurisdiction, co-extensive with state, in both civil and criminal matters and has general superintending control over all inferior courts, under such rules and regulations as may be prescribed by law. (Wyo. Const., Art. 5, § 2). Court has original jurisdiction in quo warranto and mandamus to all state officers, and in habeas corpus. It also has power to issue writs of mandamus, review, prohibition, habeas corpus, certiorari and other writs in connection with its appellate and revisory jurisdiction. (Wyo. Const., Art. 5, § 3). Each Supreme Court justice has power to issue writs of habeas corpus to any part of state upon petition by or on behalf of person holding actual custody and may make such writs returnable before himself, Supreme Court or any district court of state or any judge thereof. (Wyo. Const., Art. 5, § 3).

Supreme Court has power to adopt, modify and repeal general rules and forms governing pleading, practice and procedure in all courts of state. (W.S. 5-2-114 to W.S. 5-2-117). Court has adopted: Wyoming Rules of Civil Procedure, effective Dec. 1, 1957; Wyoming Rules of Evidence, effective Jan. 1, 1978; Wyoming Rules of Appellate Procedure, effective Aug. 1, 1978.

Filing fee for record on appeal or when commencing original action in Supreme Court of Wyoming is $25, plus court automation fee of $10. (W.S. 5-2-202).

This court sits at Cheyenne.

District Courts.

State divided into nine judicial districts, with fourth judicial district having one judge of district court, second, fifth and eighth judicial districts having two judges of district court, and first, third, sixth, seventh and ninth judicial district courts having three judges of district court. (W.S. 5-3-102[a]). All district judges in state have concurrent jurisdiction throughout state and for purposes of assignment, have concurrent jurisdiction throughout state with all circuit court judges. (W.S. 5-3-102[a]).

District courts are courts of general jurisdiction and have original jurisdiction of all causes of action both at law and in equity, all criminal cases, all probate and insolvency matters and any special cases and proceedings not otherwise provided for. (Wyo. Const., Art. 5, § 10). District courts also have original jurisdiction in all cases and of all proceedings in which jurisdiction has not been by law vested exclusively in some other court and have power of naturalization and to issue all papers therefor. (Wyo. Const., Art. 5, § 10). District courts and judges of district courts have power to issue writs of mandamus, quo warranto, review, certiorari, prohibition and injunction and to issue writs of habeas corpus on petition by or on behalf of any person in actual custody in their respective districts. (Wyo. Const., Art. 5, § 10). District courts also have general appellate jurisdiction of cases in which original jurisdiction vested in municipal courts and circuit courts, and decisions in such appeals reviewable only if Supreme Court issues writ of certiorari agreeing to hear appeal. (Wyo. Const., Art. 5, § 10; W.S. 5-3-119). To extent judicial review of administrative action by district court is available, proceedings for judicial review instituted by filing of petition for review in district court having venue. (W.S. 16-3-114[a]). Supreme Court has jurisdiction to hear appeal by aggrieved party from final judgment of district court. (W.S. 16-3-115).

Original filing fee for district court action is $60 inclusive of court automation fee. (W.S. 5-3-206[a][i]).

Fee payable to district court for transcripts in cases appealed to supreme court is $60 inclusive of court automation fee. (W.S. 5-3-206[a][vii]).

Judicial Districts.

First District: County of Laramie.

Second District: Counties of Albany and Carbon.

Third District: Counties of Sweetwater, Lincoln and Uinta.

Fourth District: Counties of Johnson and Sheridan.

Fifth District: Counties of Big Horn, Hot Springs, Park and Washakie.

Sixth District: Counties of Campbell, Crook and Weston.

Seventh District: County of Natrona.

Eighth District: Counties of Converse, Platte, Goshen and Niobrara.

Ninth District: Counties of Fremont, Teton and Sublette.

Place of Sitting.

Albany County: Second District; court sits at Laramie.

Big Horn County: Fifth District; court sits at Basin.

Campbell County: Sixth District; court sits at Gillette.

Carbon County: Second District; court sits at Rawlins.

Converse County: Eighth District; court sits at Douglas.

Crook County: Sixth District; court sits at Sundance.

Fremont County: Ninth District; court sits at Lander.

Goshen County: Eighth District; court sits at Torrington.

Hot Springs County: Fifth District; court sits at Thermopolis.

Johnson County: Fourth District; court sits at Buffalo.

Laramie County: First District; court sits at Cheyenne.

Lincoln County: Third District; court sits at Kemmerer.

Natrona County: Seventh District; court sits at Casper.

Niobrara County: Eighth District; court sits at Lusk.

Park County: Fifth District; court sits at Cody.

Platte County: Eighth District; court sits at Wheatland.

Sheridan County: Fourth District; court sits at Sheridan.

Sublette County: Ninth District; court sits at Pinedale.

Sweetwater County: Third District; court sits at Green River.

Teton County: Ninth District; court sits at Jackson.

Uinta County: Third District; court sits at Evanston.

Washakie County: Fifth District; court sits at Worland.

Weston County: Sixth District; court sits at Newcastle.

Probate Courts.

District courts exercise probate jurisdiction.

Juvenile Courts.

District court judges act as judges of juvenile courts in counties of their respective districts. (W.S. 5-8-101).

Teen Court Program.

Authorizes creation of teen court programs as sentencing alternative in certain cases involving youthful offenders. (W.S. 7-13-1201-1205).

Drug Courts.

Authorizes creation and funding of drug court to address cycle of drug abuse and addiction. (W.S. 5-10-101 to W.S. 5-10-107). Persons convicted of felony or of third conviction of driving under influence of intoxicating liquor, alcohol, controlled substances or drugs must undergo substance abuse assessment. (W.S. 7-13-1302). Person convicted of felony whom court finds has need for alcohol or other drug treatment may be placed on probation or receive suspended sentence if court finds adequate treatment alternative exists, and sentence or probation order must set forth terms of treatment program based upon substance abuse assessment and any other terms and conditions as court may deem appropriate under circumstances, and require offender to satisfactorily complete treatment program. (W.S. 7-13-1303).

Justices' Court.

Effective Mar. 3, 2004, justice of peace courts abolished and supplanted and replaced by circuit court which exercises jurisdiction previously exercised by justice of peace courts. (2004 Wyo. Sess. Laws, c. 42; W.S. 5-9-104).

Small Claims Courts.

Circuit courts have special jurisdiction in cases not involving more than $5,000. (W.S. 1-21-201). Action commenced by depositing appearance fee of $4 with court and at same time preparing, executing and swearing to before court affidavit reciting nature of claim, amount due, that demand for amount has been made and payment refused and giving address of defendant. (W.S. 1-21-202). Affidavit prepared by claimant. (W.S. 1-21-203). Court then files affidavit, issues summons, and summons served at any location in county either by certified mail, return receipt requested, or by serving summons on defendant personally or leaving summons at defendant's usual place of residence or business with some person over 14 years of age residing or staying thereat and at same time explaining contents of summons to said person. (W.S. 1-21-203). Defendant is required by summons to appear in court not less than three, nor more than 12, days after service of summons. (W.S. 1-21-204). Informal hearing is held on date defendant appears in court; judgment is entered; and appeal is allowed from this judgment to district court. (W.S. 1-21-205; W.S. 5-2-119). Attachment or garnishment is not allowed, but execution issues as prescribed by law for issuance of executions in justice court. (W.S. 1-21-205). See, also category Debtor and Creditor, topic Executions.

Circuit Courts.

Circuit court is established for each of nine judicial districts in state, and boundaries of each circuit court shall be same as those of each judicial district enumerated in W.S. 5-3-101. (W.S. 5-9-102). Circuit court also supplants and replaces justice of peace courts of county and exercises jurisdiction previously exercised by justice of peace courts. (W.S. 5-9-104). Circuit courts have exclusive original civil jurisdiction of: (1) Actions in which prayer for recovery is amount not exceeding $7,000, exclusive of court costs; (2) actions to recover specific personal property value of which does not exceed $7,000, exclusive of court costs; (3) actions to foreclose or enforce lien on or security interest in personal property perfected under Uniform Commercial Code, when amount claimed does not exceed $7,000, exclusive of court costs; (4) actions for small claims; (5) actions for forcible entry or detainer; (6) actions to foreclose or enforce statutory liens (construction, labor, materials, services, and taxes), when amount claimed on lien does not exceed $7,000; and (7) actions to dispose of abandoned vehicles regardless of value. (W.S. 5-9-128). District court judge may assign to circuit court judge any case or proceeding within jurisdiction of district court subject to: (1) Rules promulgated by supreme court; (2) acceptance by circuit court judge to whom assignment is made; (3) consent of parties in civil action when amount in controversy is $20,000 or greater; and (4) consent of both prosecutor and defendant in criminal case in which defendant is charged with any crime for which aggregate sentences for all crimes exceed five years in prison. (W.S. 5-3-112). Circuit court judge may assign to district court judge any case or proceeding within jurisdiction of circuit court subject to: (1) Rules promulgated by supreme court; and (2) acceptance by district court judge to whom assignment is made. (W.S. 5-9-131). Circuit courts may issue writs of attachment or garnishment and may issue judgment, execution and stay of execution, and order sale of property seized under execution. (W.S. 5-9-128). Circuit court judge also may submit to arbitration any civil matter pending in circuit court upon agreement of parties or upon application of either party showing arbitration agreement and refusal of opposing party to arbitrate. (W.S. 5-9-128). Circuit courts have original jurisdiction in all misdemeanor criminal cases. (W.S. 5-9-129). Circuit courts have power to set bail before trial and have jurisdiction to conduct preliminary examination for persons charged with felony. (W.S. 5-9-132). Magistrates of circuit court provided for. (W.S. 5-9-201-214). Executions may issue on transcript filed with clerk of district court, and transcript of judgment, when filed within both clerk of district court and county clerk of county in which judgment was rendered, becomes lien against real estate of judgment debtor in such county from day transcript filed with county clerk. (W.S. 1-17-306). Appeals may be taken to district court. (W.S. 5-2-119).

6.02 LEGISLATURE:

Regular session meets biennially in Jan. of odd years, and meets in Feb. of even numbered years for budget session. (W.S. 28-1-102). By statute regular session lasts 40 days; budget session, continues for length of time agreed to by both houses. (W.S. 28-1-102).

Special or Extraordinary Sessions.

Governor may call extra sessions. (Wyo. Const., Art. 3, § 7).

Initiative and referendum provided for. Initiative must not be used to dedicate revenues, make or repeal appropriations, create courts, define jurisdiction of courts, prescribe court rules, enact local or special legislation, or enact unconstitutional laws. Referendum must not be applied to dedication of revenues, appropriations, local or special legislation, or to laws necessary for preservation of public peace, health or safety. (Wyo. Const., Art. 3, § 52). Procedures for initiative and referendum established. (W.S. 22-24-101 to 125). Also, in addition to prohibitions mentioned in constitution, initiative may not be used to enact law defeated in initiative election within five years preceding time of filing petition for initiative. (W.S. 22-24-101).

Paid Advertising.

Procedures established for paid advertising in any communication medium or printed literature to support, oppose or influence legislation. (W.S. 22-24-201).

Privileged Communications.

Unless waived, following communications by legislator deemed confidential and privileged: (i) Those between legislator and legislative staff concerning (A) request for research or advice on legislative issue, (B) request for drafting of legislation or amendments, (C) matters under consideration by legislative committee unless communication made publicly to legislative staff in public meeting of committee, or (D) development of legislator's position on legislation or discussion of matters arising out of or relating to deliberative process of legislature; (ii) documents and electronic records received by legislator or legislative staff or prepared or assembled by legislator or legislative staff in regard to any communication of nature described in (i) (A)-(D) above, other than version of bill or amendment approved for introduction; and (iii) communications between legislator and contractor or consultant retained by legislature other than communications made publicly in public meeting. (W.S. 28-8-116). Private communications including those with constituents confidential unless disclosed by legislator or constituent. (W.S. 28-8-116[b]).

6.03 REPORTS:

Decisions of Supreme Court are officially reported in Wyoming Reports, volume 1 to volume 80, and in Wyoming Reporter. Wyoming Reporter simply collects all Wyoming decisions from Pacific Reporter, 2d and Pacific Reporter, 3d, which are subsequent in time to those found in 80 Wyo. For instance, one of the volumes in Wyoming Reporter series contains all Wyoming decisions reported in 357 P.2d thru 364 P.2d. Volumes of Wyoming Reporter have no consecutive page numbers. Decisions of Supreme Court are also reported in Pacific Reporter, Pacific Reporter, 2d and Pacific Reporter, 3d. Decisions reported in Wyoming Reports are cited herein as . . . Wyo. . . ., . . . P. or P.2d . . . and decisions reported in Wyoming Reporter are cited herein as Wyo., . . . P.2d . . . or P.3d.

Effective Jan. 1, 2001, Supreme Court adopted public domain, neutral format citation for all opinions and substantive orders designated by it for publication. Public domain, neutral format citation includes calendar year in which opinion or substantive order is issued followed by Wyoming U.S. Postal Code (WY) followed by consecutive number beginning each year with “1”, e.g. 2001 WY 1. Wyoming Reporter remains official reporter of Supreme Court's opinions, and where West Pacific Reporter citations are available at time opinion is issued, Supreme Court will continue to cite to West Pacific Reporter in addition to public domain, neutral-format citation in all of its opinions. For cases decided between Jan. 1, 2001 and Dec. 31, 2003, proper citation shall also include volume and initial page number of West Pacific Reporter in which opinion is published; e.g. 2001 WY 1, 15 P.3d 728 (Wyo. 2001). For cases decided after Dec. 31, 2003, citation to volume and initial page of West Pacific Reporter in which opinion is published shall be optional; e.g. 2001 WY 1, or 2001 WY 1, 15 P.3d 728 (Wyo. 2001).

Digests.

West's Wyoming Digest covers all Wyoming cases.

6.04 STATUTES:

2007 edition is current compilation of Wyoming Statutes Annotated. Volumes are updated and replaced in odd-numbered years and updated by bound supplement in even-numbered years. Citations to statutory provisions are to numbered title, chapter, and section of

Wyoming Statutes Annotated, which means Wyoming Statutes Annotated in its most recently published form, including amendments to original enactments. Unannotated version of Wyoming Statutes can be accessed at http://legisweb.state.wy.us/titles/statutes.htm.

Uniform Acts adopted are: †Aeronautics (1922, adopted 1931); †Anatomical Gift Act (1968, adopted 1969); Arbitration (1956, adopted 1959); Athlete Agents (2000, adopted 2005); Business Corporation (Revised 1984, adopted 1989); Child Custody Jurisdiction and Enforcement Act (1997, adopted 2005); Close Corporation Supplement (1984, adopted 1989); †Commercial Code (1961, adopted 1962); †Common Trust Fund (1952, adopted 1955); †Conservation Easement (1981, adopted 2005); †Consumer Credit Code (1968, adopted 1971); Controlled Substances (1970, adopted 1971); Declaratory Judgments (1922, adopted 1923); Determination of Death (1980, adopted 1985); Electronic Transactions (1999, adopted 2001); Enforcement of Foreign Judgments (Revised 1964, adopted 1965); Estate Tax Apportionment Act (1958, adopted 1959); Federal Tax Lien Registration (1978; 1982 Amendments, adopted 1988); †Fiduciaries (1922, adopted 1929); Foreign Depositions (adopted 1927); Foreign Probate Act (Wills) (adopted 1921); Fraudulent Transfer (1984, adopted 2006); Health-Care Decisions (1993, adopted 2005); Interstate Family Support (1996, adopted 1995); Judicial Notice of Foreign Law (1936, adopted 1941); Limited Partnership (1976, adopted 1979; 1985 Amendments, adopted 1995); Management of Public Employee Retirement Systems (1997, adopted 2005, effective 2006); Nonprofit Corporation (Revised 1987, adopted 1992); Notarial Acts (1982, adopted 2008); Parentage (1977; 2000, including 2002 Amendments, adopted 2003); †Partnership (1992, adopted 1993; 1997 Amendments, adopted 1998); Principal and Income (1997, adopted 2001); Model Rule Against Perpetuities (adopted 1949); †Securities Act (1956, adopted 1965); Simultaneous Death (1940, adopted 1941); TOD Security Registration (1989, adopted 1993); To Secure Attendance of Witnesses from Without a State in Criminal Proceedings (1931, adopted 1935); Trade Secrets (1979, adopted 2006); Transfers to Minors (Revised 1986, adopted 1987); Trust Code (2000, adopted 2003; 2003 Amendments, adopted 2005; 2005 Amendments, adopted 2007); †Unclaimed Property (1981, adopted 1993); Veterans' Guardianship (1928, adopted 1929); Unincorporated Nonprofit Association (1992, adopted 1993).

† Adopted with significant variations or modifications. See appropriate topics.

Uniform Commercial Code adopted, effective Jan. 1, 1962; Certain of Permanent Editorial Board's 1966 recommended optional amendments to Articles 2 and 7 adopted. 1987 Official Text of Article 2A—Leases (with conforming amendments to Articles 1 and 9), 1991 Official Text of Revised Article 3—Negotiable Instruments (with conforming and miscellaneous amendments to Articles 1 and 4), 1989 Official Text of Revised Article 4A—Funds Transfers (with technical amendment), 1995 Official Text of Revised Article 5—Letters of Credit (with conforming and miscellaneous amendments to Articles 1, 2, and 9), 1994 Official Text of Revised Article 8—Investment Securities (with conforming and miscellaneous amendments to Articles 1, 4, 5, 9, and 10), and 1998 Official Text of Revised Article 9—Secured Transactions (with conforming amendments to Articles 1, 2, 2A, 4, 5, 7, and 8, model provisions for production-money priority security interests in crops and 1999 amendments and 2000 technical amendments) adopted. Article 6—Bulk Sales repealed. (W.S. 34.1-1-101 to W.S. 34.1-10-104; W.S. 34-21-1101 to W.S. 34-21-1107).

Uniform Consumer Credit Code adopted, effective July 1, 1971. (W.S. 40-14-101 to W.S. 40-14-702).

For text of Uniform Acts falling within scope of Martindale-Hubbell Law Digests see Uniform and Model Acts section.

6.05 UNIFORM LAWS:

For list of Uniform Acts in force in this state see topic 6.04 Statutes. For text of Uniform Acts within the scope of Martindale-Hubbell Law Digests see Uniform and Model Acts section.

7 CRIMINAL LAW

7.00A BAIL:

See topic 7.01 Criminal Law.

7.01 CRIMINAL LAW:

Crimes are defined by Title 6 and criminal procedure is regulated by Wyoming Rules of Criminal Procedure (W.R.Cr.P.), which are based on Federal Rules of Criminal Procedure.

Indictment, Information or Citation.

Crimes may be prosecuted on indictment, information or by citation when citation is authorized by law. (Rule 3 W.R.Cr.P.). In practice, proceedings by information are generally, though not exclusively, used.

Bail.

All crimes are bailable except capital offenses when proof is evident or presumption is great. (Wyo. Const. Art. 1, § 14). Rule 46.1 W.R.Cr.P. defines circumstances under which bail may be denied.

Interstate Compact for Supervision of Parolees and Probationers adopted. (W.S. 7-13-412 to W.S. 7-13-424).

Uniform Controlled Substances Act adopted. (W.S. 35-7-1001 to W.S. 35-7-1060).

Uniform Act to Secure Attendance of Witnesses from Without a State in Criminal Proceedings adopted. (W.S. 7-11-404 to W.S. 7-11-405).

8 DEBTOR AND CREDITOR

8.01 ASSIGNMENTS:

Common law rules apply except where Uniform Commercial Code (W.S. 34.1-1-101 to W.S. 34.1-10-104) applicable. See category 3 Business Regulation and Commerce, topic 3.09 Commercial Code. Assignee may sue in his own name. (W.R.C.P. Rule 17[a]; Wyo. 394 P.2d 905).

Instrument Transferring Title.

See category 3 Business Regulation and Commerce, topic 3.15 Frauds, Statute of, subhead Contracts of Sale.

Filing.

See subhead Assignments of Accounts Receivable, infra.

Recording.

No statutory provision specifically requiring recording, except that to foreclose mortgage by power of advertisement and sale, mortgage containing power of sale, and all assignments thereof, must be recorded. (W.S. 34-4-103[a][iii]).

Effect.

Assignee generally obtains rights, remedies and burdens of assignor. (8 Wyo. 476, 58 P.

755; 32 Wyo. 377, 233 P. 137). Holder in due course takes instrument free of certain defenses. (W.S. 34.1-3-305[b]). Assignee of instrument takes free of certain defenses if agreement between account debtor and assigner so provides and other requirements met. (W.S. 34.1-9-403[b]).

Assignments of Chose in Action.

Assignee of chose in action takes subject to all defenses, including setoffs, existing at time of assignment. (610 P.2d 397).

Assignments of wages to be earned in future to secure loans of less than $200 are invalid, so far as employer or person making assignment is concerned, unless assignment is accepted in writing by employer and assignment and such acceptance filed and recorded with clerk of city or town where party making assignment resides or is employed if nonresident. (W.S. 27-4-110). Assignments when made by married individual must also have written consent of spouse. (W.S. 27-4-111). Provisions in regard to wage assignments not applicable to banking institutions. (W.S. 27-4-112).

Uniform Consumer Credit Code also adopted. (W.S. 40-14-101 to W.S. 40-14-702). See topic Consumer Credit.

Assignments of Accounts Receivable.

Uniform Commercial Code governs. (W.S. 34.1-1-101 to W.S. 34.1-10-104). W.S. 34.1-9-501(a)(ii) provides that when collateral is accounts, security interest or agricultural lien is perfected by filing financing statement in office of Secretary of State. Article 9 of Uniform Commercial Code, however, not applicable to sale of accounts as part of sale of business out of which they arose, assignment of accounts for purpose of collection only, or assignment of single account to assignee in full or partial satisfaction of preexisting indebtedness. (W.S. 34.1-9-109[d][iv], [d][v], [d][vii]). See category 3 Business Regulation and Commerce, topic 3.09 Commercial Code.

8.02 ATTACHMENT:

Actions in Which Allowed.

Attachment may issue in civil action for recovery of money at any time after filing of complaint. (W.S. 1-15-201).

Courts Which May Issue Writ.

District Court and Circuit Court. (W.S. 1-15-101).

In Whose Favor Writ May Issue.

Any plaintiff may obtain attachment (W.S. 1-15-201); no provision discriminating against nonresident plaintiffs.

Claims on Which Writ May Issue.

After filing complaint in civil action for recovery of money, plaintiff may have property of defendant not exempt from execution attached as security for satisfaction of any judgment that may be recovered. (W.S. 1-15-201).

Grounds.

Before writ of attachment is issued plaintiff must file with court in which action is pending affidavit stating: (i) That defendant is indebted to plaintiff, specifying amount of indebtedness above all legal set offs and nature of indebtedness; (ii) that attachment is not sought to hinder, delay or defraud any creditor of defendants; (iii) that payment of indebtedness has not been secured by any mortgage or lien upon real or personal property in this state, or, if originally so secured, that security has, without any act of plaintiff or person to whom security was given, become impaired; and (iv) any one or more of following grounds for attachment: (A) Defendant is not resident of state, (B) defendant is foreign corporation, not qualified to do business in state, (C) defendant stands in defiance of officer, or conceals himself so that process cannot be served upon him, (D) defendant has assigned, removed, disposed of or concealed, or is about to assign, remove, dispose of or conceal, any of his property with intent to defraud creditors, (E) defendant has departed or is about to depart from state to injury of his creditors, (F) defendant fraudulently or criminally contracted debt or incurred obligation respecting which action is brought. (W.S. 1-15-201).

Attachment Bond.

No prejudgment writ of attachment, replevin or garnishment may issue unless plaintiff files with clerk surety bond in amount fixed by court for payment of all costs and damages which may be incurred or suffered by any party as result of wrongful issuance of writ, not exceeding sum specified in bond. (W.S. 1-15-104[a]). If party for whose benefit bond is given is not satisfied with amount of bond or sufficiency of sureties, he may, within five days, excluding Sats., Suns. and legal holidays, after receipt of copy of bond, served upon party giving bond notice that party for whose benefit bond is given objects to amount of bond or sufficiency of sureties. If party for whose benefit bond is given fails to object within time allowed he is deemed to have waived all objections to amount of bond and sufficiency of sureties. (W.S. 1-15-104[b]).

Notice of objections to amount of bond and sufficiency of sureties shall be filed in form of motion for hearing on objections to bond. Upon demand of objecting party, each surety shall appear at hearing of motion and be subject to examination as to surety's pecuniary responsibility or to validity of execution of bond.

If, after hearing, court rejects bond or if plaintiff fails within time allowed to file any amended substitute or additional bond required by court, any property seized under writ shall be returned to defendant. (W.S. 1-15-104[c]).

Defendant may obtain discharge of attachment or garnishment by furnishing bond, with sufficient sureties, in accordance with provisions of W.S. 1-15-105.

Manner of Executing Writ.

If undertaking provided for in W.S. 1-15-105(a) is not given by defendant at or before time writ is executed, sheriff to whom writ is directed must execute writ without delay in following manner: (i) Real property owned in name of defendant shall be attached by filing with county clerk copy of writ together with description of property attached, and notice that it is attached, and by leaving copy of writ, description and notice with occupant of property, or if there is no occupant, by posting copy of writ, description and notice in conspicuous place on attached property; (ii) growing crops which until severed shall be deemed to be personal property not capable of manual delivery, growing upon real property owned in name of defendant shall be attached by filing with county clerk copy of writ, together with description of growing crops to be attached, and real property upon which crops are growing and notice that growing crops are attached in pursuance of writ, and by leaving copy of writ, description and notice with occupant of real property, or if there is no occupant, by posting copy of writ, description and notice in conspicuous place on real property; (iii) real property or interest thereon belonging to defendant and held in name of any other person, shall be attached by filing with county clerk copy of writ, together with description of property and notice that real property and any interests of defendant therein held in name of other person, naming him, are attached, and by leaving with occupant, if any, and with named person or his agent, if known and within county, or at residence of either, if within county, copy of writ, with similar description and notice and, if there is no occupant of property, copy of writ, together with description and notice shall be posted in conspicuous place upon property; (iv) growing crops, which until severed, shall be deemed personal property not capable of manual delivery, or interests therein belonging to defendant, and growing upon real property held in name of any other person, shall be attached in same manner as crops growing upon real property held in name of defendant are attached under paragraph (ii) above. Notice of attachment shall state that crops therein described or any interests of defendant therein, held by, or standing upon records of county in name of such other person, naming him, are attached pursuant to writ. In addition, copy of writ, description and notice shall be delivered to such other person, or his agent, if known and within county, or left at residence of either, if known and within county; (v) personal property capable of manual delivery shall be attached by taking it into custody; (vi) stocks or shares, or interest in stocks or shares, of any corporation or company shall be attached as provided for by W.S. 1-19-101 through W.S. 1-19-108; (vii) personal property not capable of manual delivery shall be attached by leaving copy of writ with person having property in his possession if he can be found, and by placing conspicuous notice of levy on property; (viii) personal property, other than earnings from personal services as defined in W.S. 1-15-102(a)(vi), in possession of another person shall be attached by service of writ of garnishment as provided by W.S. 1-15-401 through W.S. 1-15-425; (ix) if there are several attachments against same defendant in different actions, they shall be executed in order in which they are received by sheriff. (W.S. 1-15-203).

Indemnity to Sheriff.

If sheriff executing writ has actual notice of any third party claim to personal property to be levied on or is in doubt as to ownership of property, or of encumbrances thereon, or damage to property held that may result by reason of its perishable character, he may require plaintiff to file with sheriff surety bond, indemnifying sheriff against any loss or damage by reason of illegality of any holding or sale on execution, or by reason of damage to any property held under attachment. Unless lesser amount is acceptable to sheriff, bond shall be in double amount of estimated value of property to be seized. (W.S. 1-15-204[a]).

Property Bound.

Order of attachment binds property attached from time writ is executed. (W.S. 1-15-212).

8.03 [RESERVED]

8.04 CREDITORS' SUITS:

If judgment debtor does not have personal or real property sufficient to satisfy judgment, any equitable interest he has as mortgagor, mortgagee or otherwise, or any interest he has in any joint stock company, money contract, claim or chose in action due or to become due to him, or in any judgment or order, or any money, goods or effects which he has in possession of any person, is subject to payment of judgment by action. (W.S. 1-17-401).

8.05 EXECUTIONS:

Execution may issue from any district court on its own judgment, or on judgment of circuit court, transcript of which has been filed in office of clerk of district court. (W.S. 1-17-101; W.S. 1-17-306; see generally W.S. 1-17-301 to W.S. 1-17-345). Execution may also issue from circuit court. (W.S. 5-9-128; see generally W.S. 1-21-501 to W.S. 1-21-517). Also, Federal Rules of Civil Procedure form basis for Wyoming Rules of Civil Procedure. See category 5 Civil Actions and Procedure, topic 5.19 Practice.

Kinds of Execution.

In district court execution is process of court issued by clerk and directed to sheriff of county. (W.S. 1-17-101; W.S. 1-17-308). Executions are of two kinds: (i) Against property of judgment debtor, including orders of sale; and (ii) for delivery of possession of real property in which case writ contains specific description of property and command to officer to deliver property to person entitled, and writ may require sheriff to recover damages for withholding possession and costs, or costs alone, out of property of person who withholds possession. (W.S. 1-17-101[b]).

Exemptions.

See topic 8.06 Exemptions.

Time for Issuance.

There is no provision for any delay after rendition of judgment before issuing execution thereon. Judgment becomes dormant unless execution is issued within five years after rendition or within same time after last preceding execution. (W.S. 1-17-307, W.S. 1-21-501).

Stay of execution provided in Wyoming Rules of Civil Procedure. (W.S. 1-17-201). In its discretion and on such conditions for security of adverse party as are proper, court may stay execution of any proceeding to enforce judgment pending disposition of motion for new trial or to alter or amend judgment, or of motion for relief from judgment or order or of motion for judgment in accordance with motion for directed verdict or of motion for amendment to findings or additional findings. (Rule 62[b]). When court has ordered final judgment where there multiple claims and/or multiple parties as to one or more but fewer than all claims or parties court may stay enforcement of that judgment until entering of subsequent judgment or judgments and may prescribe conditions as are necessary to secure benefit thereof to party in whose favor judgment is entered. (Rule 54[b], 62[b]).

In circuit court judgment debtor may have stay of execution by entering into bond with adverse party within ten days after rendition of judgment, with good and sufficient surety, resident property holder of county, approved by justice, conditioned on payment of amount of judgment, interest and costs that may accrue. (W.S. 1-21-511). Stay then granted as follows: (i) For 30 days on any judgment not exceeding $50, excluding costs; (ii) for four months on any judgment over $50 and not exceeding $100, excluding costs; (iii) for six months on any judgment in excess of $100, excluding costs. (W.S. 1-21-512).

See category 5 Civil Actions and Procedure, topic 5.03 Appeal and Error.

Lien.

No provision for lien of execution before levy as distinct from lien of judgment. See category 5 Civil Actions and Procedure, topic 5.15 Judgments, subhead Lien.

Levy.

All property, not exempt by law, is subject to payment of debts and is liable to be taken on execution and sold, including any interest in mortgaged property or property being sold under executory land contract. (W.S. 1-17-301). District court writ of execution commands officer to whom directed that officer must collect money specified in writ from real and personal property of debtor. Amount of debt, damages and costs for which judgment entered endorsed on execution. (W.S. 1-17-308[c]). In circuit court execution issued by judge (W.S. 1-21-501) directed to sheriff of county, refers to judgment by stating names of parties, name of judge, time when and county where rendered and true amount of unsatisfied judgment due, and directs sheriff: (i) To collect amount of judgment out of personal property of debtor and pay same to judgment creditor, and (ii) make return within 30 days after receipt. (W.S. 1-21-502[a][i], [a][ii]). In circuit court form of execution is as provided in W.S. 1-17-308. (W.S. 5-9-128[b]).

In district court officer to whom execution delivered proceeds immediately to levy writ upon real and personal property of debtor. (W.S. 1-17-310). When two or more executions having different preferences are to be satisfied by levying upon real estate, either judgment creditor may require officer to make separate levy for his execution. Officer levying execution may choose such part of debtor's real property as is sufficient at two-thirds appraised value, to satisfy executions. (W.S. 1-17-328[a]). When two or more executions that have no preference as to each other are to be satisfied by levying upon real property, either judgment creditor may require officer to levy upon separate parcels if appraisers determine property may be divided without material injury. (W.S. 1-17-328[b]). If real property of debtor not sufficient at two-thirds appraised value of judgment debtor's interest to satisfy all executions chargeable thereon, such part of property must be levied on to satisfy each execution as will bear same proportion in value to whole amount as amount due on execution bears to amount of all executions chargeable thereon. (W.S. 1-17-328[c]). If lands and tenements levied on or ordered sold are not sold upon one execution, other executions may be issued. (W.S. 1-17-327). Shares of stock in corporation held by judgment debtor or in trust for him may be levied upon under execution (W.S. 1-19-101) by serving writ on any officer of corporation, or if no such officer, on resident manager or agent, together with officer's certificate stating he levied upon and takes in execution shares of stock (W.S. 1-19-103).

Return.

In district court sheriff endorses his actions on writ and returns writ within 60 days to clerk of court, who records endorsement at length in execution docket. (W.S. 1-17-318, 339). In circuit court execution showing manner of execution returned within 30 days (W.S. 1-21-502[a][ii]) and writ, if remaining unsatisfied, may be renewed for additional periods of 30 days (W.S. 1-21-504).

Priorities.

In district court officer endorses on every writ of execution time he receives it. When two or more writs of execution against same debtor sued out during same term in which judgment rendered or within ten days thereafter, or when two or more writs of execution against same debtor delivered to officer on same day, no preference given to either of writs. If sufficient sum of money is not made to satisfy all executions, amount made must be distributed to several creditors in proportion to amount of their respective demands. In all other cases execution first delivered to officer must be first satisfied, but this section (W.S. 1-17-309) shall not affect any preferable lien which judgment on which execution issued has in lands of judgment debtor (W.S. 1-17-309). See category 5 Civil Actions and Procedure, topic 5.15 Judgments, subhead Lien. No statutory provisions for justice court or circuit court.

Claims of Third Persons.

No statutory provisions in district court. In circuit court, third party claimants give plaintiff three days written notice of time of trial in circuit court at which time judge determines ownership of property. (W.S. 1-21-701 to W.S. 1-21-703).

Satisfaction.

No provision distinct from satisfaction of judgment.

Sales of personal property in district court must be at public auction except when private sale ordered for good cause, and unless private sale ordered, officer who levies execution upon goods and chattels must cause public notice to be given of time and place of sale at least ten days before day of sale. Notice given by advertisement in newspaper published in county, or if none, then in newspaper of general circulation in county. (W.S. 1-17-312, W.S. 1-17-314). Court, after prescribed application and notice, may order goods and chattels sold at private sale for cash specifying time during which sale will continue but not beyond return day of execution. If private sale ordered, personal property must not be sold for less than two-thirds of appraised value appraised by three disinterested persons. (W.S. 1-17-314). When goods and personal property levied upon by execution cannot be sold for want of bidders or want of time, officer who makes return annexes to execution true inventory of personal property not sold, and plaintiff may have another execution issued, directing sale of property levied upon, but sales at public auction must be readvertised. (W.S. 1-17-313). Shares of stock sold in same manner as other personal property. (W.S. 1-19-104).

In circuit court, officer having levied on personal property by virtue of execution gives public notice by advertisement in newspaper published or widely circulated in county where property is sold. Notice states time and place of sale, describes property, and must be published at least ten days before date of sale. (W.S. 1-21-601). At time of sale, officer sells property to highest bidders. If no bidders or only single bid, sale adjourned from time to time until fair sale had. Officer makes return of execution together with money to circuit court. (W.S. 1-21-602).

Sales of Real Property.

Officer who levies execution issued by district court upon lands and tenements must designate qualified appraiser or three disinterested property owners who are residents of county where lands taken in execution are situate and administer them oath to view and impartially appraise property levied upon. (W.S. 1-17-316[a]). Officer files return of appraisal with clerk of court and advertises sale of real property according to law. (W.S. 1-17-316[b]). Sale is by public auction between hours of 10:00 a.m. and 5:00 p.m. of same day, after advertisement of time and place of execution sale and description of property to be sold (W.S. 1-18-101[a][i]), appears for four consecutive weeks in legal newspaper of general circulation in county where lands and tenements are situated (W.S. 1-18-101[a][ii]). Published advertisement of sale must contain following statement: “The property being foreclosed upon may be subject to other liens and encumbrances that will not be extinguished at the sale and any prospective purchaser should research the status of title before submitting a bid.” (W.S. 1-18-101[b]). Judgment creditor must appear at execution sale or, prior to execution sale, deliver to sheriff conducting sale written waiver of right to appear at sale. (W.S. 1-18-101[a][iii]). Sheriff conducting execution sale not considered authorized agent of judgment creditor unless latter has given sheriff specified opening bid to be presented by sheriff on behalf of judgment creditor, and sheriff actually presents opening bid. (W.S. 1-18-101[a][iii]). Any execution sale conducted in violation of requirements of W.S. 1-18-101 is void, in which case judgment lien subject of voided sale is not extinguished or exhausted, but may be properly foreclosed in subsequent execution sale conducted in compliance with applicable law. (W.S. 1-18-101[a][iii]). Sales of lands and tenements take place at courthouse of county in which lands and tenements situated unless otherwise ordered by court. (W.S. 1-17-326). Upon return of writ of execution for satisfaction of which lands and tenements sold, if it is found by court sale made in all respects in conformity with code of civil procedure, clerk directed to make entry in journal that court satisfied with legality of sale and that officer, upon expiration of period of redemption, must make deed to purchaser of lands and tenements. (W.S. 1-17-321). Successor to officer may also make deed. (W.S. 1-17-329). Deed is prima facie evidence of legality and regularity of sale and entire estate and interest of person whose property officer sells and conveys shall thereby rest in purchaser, whether interest existed at time property became liable to satisfy judgment, or was acquired subsequently. (W.S. 1-17-324, W.S. 1-18-110). When real property sold on execution officer gives purchaser of lands certificate in writing describing property and amount of purchaser's bid; and stating purchaser entitled to deed at expiration of period of redemption unless redeemed prior to date. (W.S. 1-18-102). When sale of premises twice advertised for sale and remain unsold for lack of bidders, court on motion of either plaintiff or defendant must order reappraisal and may order sale on time as follows: one-third, cash in hand; one-third in nine months, one-third in 18 months, deferred payments to draw interest and be secured by mortgage. (W.S. 1-17-337, 338). When real estate three times reappraised, thereafter twice advertised, offered for sale and remains unsold, court directs amount for which sold. (W.S. 1-17-337).

Redemption.

In district court, except as to mortgages on agricultural real estate, execution debtor or mortgagor may redeem real property at any time within three months of sale by payment either to purchaser, his heirs, executors, administrators, or assigns, or to sheriff or other officer who sold property, for benefit of purchaser, of amount paid at sale, or by payment of amount bid to execution creditor or mortgagee or to sheriff, with interest at 10% per annum from date of sale, plus amount of any assessments or taxes and amount due on any prior lien which purchaser paid after purchase, with interest. (W.S. 1-18-103). On payment of this amount sale and certificate granted are void. (W.S. 1-18-103[a]). With respect to agricultural real estate period of redemption for mortgagor with respect to mortgage upon one or more parcels of real estate any or all of which were agricultural real estate on date of mortgage is 12 months from date of sale. (W.S. 1-18-103[b]). Term agricultural real estate means any parcel of land in excess of 80 acres lying outside exterior boundary lines of incorporated city, town or recorded subdivision. If mortgage recites real estate involved agricultural real estate it is presumed 12 month period of redemption applies. (W.S. 1-18-103[c]). After expiration of period of redemption by execution debtor or mortgagor, judgment creditors, grantees, mortgagees and lienholders have 30 days in which to redeem by payment either to purchaser or to sheriff of amount paid at sale, or by payment of amount bid to execution creditor or mortgagee or to sheriff, with interest at 10% plus amount of any taxes and prior liens paid by purchaser since purchase and amount of purchaser's lien if prior to that of redemptioner with interest at 10%. If property redeemed during 30 day period, any number of additional redemptions may occur providing each redemption occurs within 30 days of last redemption. If more than 30 days elapse since last redemption there can be no more redemptions and last redemptioner entitled to sheriff's deed. (W.S. 1-18-104). Person redeeming entitled to certificate of redemption. (W.S. 1-18-106).

Supplementary Proceedings.

In district court judgment creditor may obtain discovery in accordance with Wyoming Rules of Civil Procedure. (W.S. 1-17-402). (See also Rule 69.) Following examination as provided by W.S. 1-17-402, court may order property of judgment debtor or money due him not exempt by law, to be applied toward satisfaction of judgment. (W.S. 1-17-411). Upon seizure of his property or money, judgment debtor may request hearing pursuant to W.S. 1-17-102 on judgment debtor's right to claim exemption of property or money from attachment, execution or garnishment. (W.S. 1-17-411).

Court may appoint sheriff or other suitable person as receiver of property of judgment debtor and may forbid transfer or other disposition of property of judgment debtor, not exempt by law. (W.S. 1-17-412, 413). If judgment debtor has interest in real estate in county where proceedings had as mortgagor, mortgagee or otherwise, and his interest can be ascertained as between himself and person holding legal estate or having lien or interest therein, without controversy, receiver may be ordered to sell and convey debtor's interest. Sale must be made as provided for sale of real property on execution. (W.S. 1-17-414). Judgment creditor of judgment debtor vendee in sale, contract or lease wherein transfer of title or ownership of personal property contingent upon condition, has lien on interest of vendee, which interest is amount personal property would bring at judicial sale over sums then unpaid to vendor (W.S. 1-17-417), and if such interest levied upon in execution, creditor pays vendor or assigns amount then due, and property sold on execution for creditor's benefit (W.S. 1-17-418).

Creditors' Suits.

See topic 8.03 Creditors' Suits.

Garnishment is available. See topic 8.09 Garnishment.

8.06 EXEMPTIONS:

Every person is entitled to following exemptions from levy or sale upon execution, attachment or process issuing out of any court in state: (1) Family Bible, pictures and school books; (2) lot in any cemetery or burial ground; (3) furniture, bedding, provisions and such other household articles as debtor may select, not exceeding in all value of $2,000 and where two or more persons occupy same residence each shall be entitled to separate exemption; and (4) motor vehicle not exceeding in value $2,400. (W.S. 1-20-106[a]). Wearing apparel not exceeding in value $1,000 of every person also exempt; this apparel shall not include jewelry, except for wedding rings. (W.S. 1-20-105).

Retirement pension and annuity funds are exempt to employees of private employers or public employees not covered by state retirement if plan provides pension or annuity is not assignable. (W.S. 1-20-110[a][i]). Retirement or annuity funds of self-employed person are exempt to amount actually deducted for retirement funding on federal tax return. (W.S. 1-20-110[a] [ii]).

All property of judgment debtor in Wyoming is exempt from judgment in favor of any state or state political subdivision for failure to pay such state's income tax on benefits from pension or retirement plan; exemption applies only to judgments obtained after debtor establishes residency and is domiciled in Wyoming for 180 days. (W.S. 1-20-110[a][iii]).

All married persons are entitled to all exemptions as heads of families. (W.S. 20-1-202[c]).

Tools, team, implements, or stock in trade of any person, used in his trade or business or library, instruments or implements of any professional man, not exceeding in value $2,000, are also exempt. (W.S. 1-20-106[b]).

Value of property selected by debtor appraised by three disinterested appraisers selected by levying officer. (W.S. 1-20-106[c]).

Insurance and Annuity Exemptions.

Proceeds of life insurance policy may be paid to lawful beneficiary or to assignee (if no intent to defraud creditors) free from creditors and representatives of insured and of person executing policy regardless of reservation of right to change beneficiary. (W.S. 26-15-129[a]). Creditors may recover from proceeds amount of premiums, plus interest, transferred with intent to defraud creditors; however, insurer is discharged of liability by payment in accordance with terms of policy unless creditor files claim in insurer's home office. (W.S. 26-15-129[b]).

Proceeds of disability insurance providing benefits because of insured's disability and which are supplemental to any life insurance or annuity contracts executed are exempt from all liability for any debt of insured and from any debt of beneficiary existing at time proceeds are made available to beneficiary's use. (W.S. 26-15-130).

Proceeds of group life insurance or group disability insurance payable to individual insured or named beneficiary are not liable to be applied by any legal or equitable process to pay any debt or liability of individual insured or beneficiary. (W.S. 26-15-131[a]).

Benefits payable to annuitant under annuity contract are 100% exempt if no intent to defraud creditor. Periodic payments are exempt up to $350 per month. Amounts in excess of $350 per month are subject to garnishment to same extent as wages. If contract restricts transfer and if benefits are payable periodically or at stated times, exemptions extend to beneficiary or assignee. (W.S. 26-15-132).

Other Miscellaneous Exemptions.

Burial lot (W.S. 1-20-106[a][ii]); unemployment compensation—100% (W.S. 27-3-116); worker's compensation—100% (W.S. 27-14-702); public assistance—100% (W.S. 42-1-114);

state retirement—100% (W.S. 9-3-426 and W.S. 9-3-620). Assistance or relief granted under public welfare act is exempt from legal process. (W.S. 42-2-113). Portion of wages. (W.S. 1-15-408).

Condition Precedent.

Person claiming exemption must be bona fide resident of Wyoming. (W.S. 1-20-108[b]).

Substitution.

There is no statutory provision for substitution of other property or money in lieu of exempt property.

Debts against which Exemptions not Allowed.

No property described as exempt in W.S. 1-20-101 through W.S. 1-20-106 is exempt from attachment or sale upon execution for purchase money of property. (W.S. 1-20-108[a]).

Waiver of Exemption.

There are no statutory provisions as to waiver of exemptions. Anticipatory waiver of exemptions, either express or implied, is violative of public policy and, therefore, ineffective. (Wyo., 740 P.2d 392). However, consensual lien on exempt property may still be enforced. (128 B.R. 579 [Bankr. D. Wyo.]).

Homestead Exemption.

See topic 8.10 Homesteads.

Tenancy by Entirety.

Property, both real and personal, owned by husband and wife, and correctly titled, is considered to be owned by them as tenants by entirety. (49 Wyo. 306, 54 P.2d 817). Conveyance of real property to husband and wife, without more, creates presumption of tenancy by entirety. (Wyo., 386 P.2d 103). To create tenancy by entirety in personal property, either unities of time, title, interest, person and possession must exist, or it must be evident from instrument that parties intended to create survivorship right. Since choses in action, such as stock certificates and contracts, are not capable of unity of possession, survivorship intent must appear on face of document. (52 B.R. 479 [Bankr. D. Wyo.]). Tenancy by entirety property is exempt against creditors holding claim against only one spouse. (49 Wyo. 306, 54 P.2d 817; 75 Wyo. 444, 297 P.2d 213).

Exemption Claim Procedure.

Court shall attach to every money judgment against individual notice of right to claim exemptions in statutory form. (W.S. 1-17-102[b]). Individual judgment debtor whose property is seized on execution is entitled to hearing within five court days after court receives written request for hearing to determine if seized property is exempt. Request for hearing must be filed within ten days of seizure. (W.S. 1-17-102[a]).

Uniform Consumer Credit Code adopted. (W.S. 40-14-101 to W.S. 40-14-702). See category 3 Business Regulation and Commerce, topic 3.11A Consumer Credit.

Bankruptcy Exemption.

Exemptions from property of estate in bankruptcy provided in 11 U.S.C. § 522(d) are not authorized where Wyoming law is applicable on date of filing petition and debtor's domicile has been located in Wyoming 180 days prior to filing petition, or for longer portion of 180 day period than in any other place. (W.S. 1-20-109). *Note:* W.S. 1-20-109 has not been amended to reflect amendment of domiciliary provisions of 11 U.S.C. § 522(b) under recently enacted Bankruptcy Abuse Prevention and Consumer Protection Act of 2005.

8.07 FORECLOSURE:

See topic 8.13 Liens; category 20 Mortgages, topic 20.04 Mortgages of Real Property.

8.08 FRAUDULENT SALES AND CONVEYANCES:

Uniform Fraudulent Transfer Act (1984) adopted July 1, 2006. (W.S. 34-14-201 to W.S. 34-14-212). Act as adopted includes additional definitions of "insider." (W.S. 34-14-202[a][vii][A], [F]). Uniform Commercial code adopted. (W.S. 34.1-1-101 to W.S. 34.1-10-104). See category 3 Business Regulation and Commerce, topic 3.09 Commercial Code.

Uniform Fraudulent Conveyance Act repealed. (2006 Wyo. Sess. Laws, c. 55, § 1).

Remedies.

See subhead Uniform Fraudulent Transfer Act, supra. (W.S. 34-14-208).

Bulk Sales.

Uniform Commercial Code bulk sales provisions repealed.

8.09 GARNISHMENT:

Property or credits of debtor in possession of, or due from third persons may be subjected to claims against debtor by garnishment process. Uniform Consumer Credit Code adopted. (W.S. 40-14-101 to W.S. 40-14-702). See category 3 Business Regulation and Commerce, topic 3.11A Consumer Credit.

Property Which May Be Reached.

Statute refers to property and indebtedness. (W.S. 1-15-402). Earnings in excess of amount exempt (see topic 8.06 Exemptions) are subject to post-judgment garnishment.

Jurisdiction.

District courts and circuit courts have jurisdiction to issue writ of garnishment. (W.S. 1-15-101[a]). *Note:* All statutes containing "county court" have been amended to read "circuit court".

Proceedings to obtain are different with respect to garnishment in aid of attachment (prejudgment garnishment) and that in aid of execution (post-judgment garnishment).

In Aid of Attachment.

Plaintiff must file with court affidavit stating: (1) Facts showing that his claim is one upon which attachment is authorized by W.S. 1-15-201; (2) grounds and cause for garnishment; (3) that he has good reason to believe that defendant has non-exempt property, debts, etc. in possession of garnishee or that garnishee is indebted to defendant; and (4) that property or debts are not earnings from personal services or otherwise exempt from garnishment. (W.S. 1-15-403). Prejudgment writ of attachment is subject to provisions of W.S. 1-15-103 relating to issuance of prejudgment writs generally and prejudgment writ of attachment shall not issue unless plaintiff files with clerk bond in amount fixed by court. (W.S. 1-15-104). If authorized by order of court, pursuant to W.S. 1-15-103, clerk may issue one or more prejudgment garnishments upon filing of bond.

In Aid of Execution.

After entry of judgment, clerk, upon application of plaintiff may issue writs of garnishment without bond. (W.S. 1-15-405).

Answer of Garnishee.

Garnishee shall file verified answer with court, within ten days, excluding Sats., Suns., and legal holidays, from date of service. (W.S. 1-15-407).

Practice.

Garnishee may deliver to officer serving writ property or money due defendant. Officer shall return property and/or money and writ to court which shall relieve garnishee from further liability unless his answer is successfully controverted. (W.S. 1-15-411). After garnishee answers, plaintiff or defendant may, within ten days, file with court and serve upon garnishee and other party reply to garnishee's answer. Any matters in issue shall be tried to court as in other civil matters and judgment shall be entered. (W.S. 1-15-412). Garnishee shall be released from writ of garnishment not later than 30 days after service of writ on garnishee, provided that garnishee has filed verified answer and delivered to court all of defendant's credits, chattels, goods, effects, debts, choses in action, money and property not otherwise exempt within 30 days after service of writ. (W.S. 1-15-407[c]). If garnishee fails to answer, plaintiff may enter default of garnishee and proceed to prove liability of garnishee. Judgment may be entered upon evidence same as if garnishee had answered. (W.S. 1-15-414). Garnishee served with writ shall hold, for benefit of plaintiff, all property of defendant in his possession or money and credits due from him to defendant from time he is served with writ until writ is discharged. (W.S. 1-15-425).

Adverse Claims.

See subhead Practice, supra.

Release of Garnishee.

Garnishee shall be discharged if he delivers or accounts for goods, credits, etc. according to judgment entered. (W.S. 1-15-415). Garnishee may retain or deduct out of property, credit, etc. of defendant amounts due garnishee and judgment should reflect this. (W.S. 1-15-417).

Earnings in excess of amount exempt are subject to post-judgment garnishment. (W.S. 1-15-408). See topic 8.06 Exemptions; category 3 Business Regulation and Commerce, topic 3.11A Consumer Credit.

8.10 HOMESTEADS:

Every resident of state is entitled to homestead, exempt from execution and attachment arising from debt, contract or civil obligation entered into or incurred. (W.S. 1-20-101). When person dies seized of homestead leaving as survivor widow, husband or minor children, survivor entitled to homestead. If there is no survivor homestead liable for debts of deceased. (W.S. 1-20-103). Whenever head of family dies, deserts, or ceases to reside with family, family is entitled to benefits and privileges conferred on head of family residing with family. (W.S. 1-20-107). Homestead is exempt only while occupied as such by owner or person entitled thereto or his or her family. (W.S. 1-20-102[a]).

Limitation of Value.

Limited to $10,000. (W.S. 1-20-101). When two or more persons jointly own and occupy same residence, each shall be entitled to homestead exemption. (W.S. 1-20-102[b]).

Limitation of Area.

None; may consist of house and lot or of farm of any size or house trailer or other movable home, whether or not equipped with wheels resting upon immovable support. (W.S. 1-20-104).

Debts or Liabilities against which Exemption not Available.

Not available with respect to taxes or to purchase money obligation incurred in purchase of homestead property, or obligation incurred in making improvements thereon. (Wyo. Const. Art. 19, § 9; W.S. 1-20-108[a]). Consensual, but non-purchase money, lien does not attach to first $10,000 in value of homestead unless accompanied by informed, voluntary, specific waiver of homestead. (Wyo., 829 P.2d 1173). See category 22 Taxation, topic 22.15 Property Taxes, subhead Exemptions.

Designation of Homestead.

No requirement of filing or recording homestead.

Claim of Exemption.

No statutory provision for making claim of exemption either before or after levy.

Waiver of Exemption.

Can be waived or released only by acknowledged instrument specifically releasing homestead and executed by owner and spouse of owner. (W.S. 34-2-121).

Loss of Exemption.

Exemption available only while homestead property actually occupied by person entitled to exemption or his family (W.S. 1-20-102), and person claiming exemption must be bona fide resident of state (W.S. 1-20-108[b]).

Alienation or encumbrance of homestead must be joined in by husband and wife and must contain clause expressly releasing or waiving homestead right, except where one spouse conveys to the other, thereby releasing and waiving all rights under and by virtue of homestead exemption laws of state. (W.S. 34-2-121).

Proceeds of Sale.

No statutory provisions. If property in which homestead exemption is claimed is owned by husband and wife as tenants by entirety, proceeds from sale of property remains entirety property. (Wyo., 628 P.2d 862).

Rights of Surviving Spouse and Family.

In case of death of homestead owner, surviving spouse has absolute right to have homestead set over to such spouse free from debts of decedent or decedent's estate except expenses of administration or funeral expenses of decedent in case where no other property to pay expenses. If no surviving spouse, homestead set over to minor children. (W.S. 2-7-504).

See, also, topic Exemptions, subhead Tenancy by Entirety; categories Family, topic Husband and Wife, subhead Conveyance or Encumbrance of Property; Mortgages, topic Mortgages of Real Property, subhead Execution; Property, topic Deeds, subhead Execution.

8.11 JUDGMENT NOTES:

See category 3 Business Regulation and Commerce, topic 3.02 Bills and Notes.

8.12 LEVY:

See topics 8.02 Attachment, 8.05 Executions.

8.13 LIENS:

Uniform Commercial Code adopted. (W.S. 34.1-1-101 to W.S. 34.1-10-104). See category 3 Business Regulation and Commerce, topic 3.09 Commercial Code.

Hotel keepers have a lien upon personal property and baggage of guests and may retain possession until same is paid. If not paid in 60 days a notice may be posted in hotel office and at two other public places for ten days and copy sent by registered mail to address of owner if known, whereupon property may be sold at auction. (W.S. 33-17-103).

Threshermen, etc.

Threshermen, hay-balers and combiners owning or operating threshing, hay-bailing or combining machines have lien on grain or other crops threshed, etc., for services rendered and labor performed. Lien claim must be filed with county clerk of county in which crops were grown, within 30 days after last work performed under contract in harvesting of crops or date work was substantially completed. Lien is then enforceable by action commenced within 60 days from filing of lien. (W.S. 29-5-101 to W.S. 29-5-106).

Motor Vehicle Repairers.

See subhead Lien on Goods, Chattels and Animals, infra.

Redemption.

No right of redemption exists when property is sold by virtue of any of above liens.

Lien on goods, chattels and animals granted to any person, firm or corporation who (a) makes, alters, repairs, bestows labor upon, transports, stores or keeps any goods or chattels, or (b) feeds, herds, pastures or cares for any domestic or wild animal, at request of owner or any person in possession thereof, for reasonable charges for labor, services, materials and feed performed or provided. (W.S. 29-7-101).

Lien obtained by retaining possession of property subject to lien until lienor paid (W.S. 29-7-102[a]); or by, before releasing possession of property, filing lien statement with county clerk of county where property located or in case of feeder's lien, granted for feeding, herding, pasturing or caring for any domestic or wild animal, office of Secretary of State. (W.S. 29-7-102[c]). Lien statement can be filed only when lien claimant is in possession of property at time of filing of lien statement or when owner consented to filing of lien. (W.S. 29-7-103). Right of possession terminates 180 days after date charges become due and payable, unless lien statement previously filed or action to enforce and foreclose lien commenced; or 180 days after lien statement filed, unless action to enforce and foreclose lien commenced. (W.S. 29-7-104).

Lien statement verified under oath by lienor or agent or attorney and contains name and address of lienor and property owner, description of property, amount of lien, nature of labor, services, materials and feeds giving rise to lien, and statement lienor in possession of property when lien statement filed or that owner consented to filing. (W.S. 29-7-103[a]). Filing fee $5. If lien pertains to motor vehicle, county clerk, at time of filing, must place on certificate of title date and amount of lien and name of lienor, and shall place same data on copy of certificate of title on file in clerk's office, or transmit said data to official who has custody of said copy for notation of said data on said copy. (W.S. 29-7-103[b]).

Lien enforced by public or private sale of property, en block or in parcels, at any time or place and on any terms which are commercially reasonable, after mailing by first class mail notice to all persons known to claim interest in property. Notice mailed to last known address, and must include statement of amount due, nature of proposed sale and time and place of public sale. (W.S. 29-7-105[b]). Lienor may repossess property subject to lien, but not in lienor's possession. (W.S. 29-7-105[a]). Lienor may buy at public sale (W.S. 29-7-105[d]); is liable in damages for failure to comply with requirements of sale (W.S. 29-7-105[j]); and good faith purchaser takes property free of all claims to property despite noncompliance by lienor with requirements of sale (W.S. 29-7-105[e]). Lien may also be enforced in accordance with procedure established by Uniform Commercial Code W.S. 34.1-7-210(b). See category 3 Business Regulation and Commerce, topic 3.09 Commercial Code.

Redemption of property from lien may be had before sale by any person claiming right to property who pays amount of lien and reasonable expenses of sale already incurred. (W.S. 29-7-105[c]).

Lien has priority over all other liens, encumbrances and security interests of any nature whatsoever, except when lienor not in possession lien is not prior to subsequent lienor in possession having lien granted by this subhead. (W.S. 29-7-106).

Agricultural Producer's Liens.

"Producer" defined as owner, tenant or operator of land located in state who has interest in or receives all or part of proceeds from assignment, sale, transfer, exchange or production of farm products grown or produced on that land. (W.S. 29-8-101[a][vi]). "Farm products" defined as all crops, crop products, plants or portions thereof, whether or not they are cleaned, processed, treated, reconditioned, rolled, mixed or combined in any fashion. Does not include livestock. (W.S. 29-8-101[a][iii]). "Processor" defined as any person engaged in business of processing or manufacturing any farm product and who takes possession or control of any farm product for purposes of processing, cleaning, selling or storing it. (W.S. 29-8-101[a][v]). "Contractor" defined as person who owns farm product that is produced by producer according to contract. (W.S. 29-8-101[a][ii]). "Public warehouse" or "warehouse" defined as elevator, mill, warehouse, subterminal grain warehouse, public warehouse or other structure or facility in which, for compensation, farm products are received for storage, handling, processing or shipment and includes facilities that commingle different lots of farm products. (W.S. 29-8-101[a][vii]). "Commodity dealer" defined as person who engages in business involving or, as part of business, participates in buying, exchanging, negotiating or soliciting sale, resale, exchange, production or transfer of any farm product in state. Commodity dealer does not include any person: (i) Engaged solely in storing, shipping or handling farm products for hire; (ii) who buys farm products from licensed commodity dealer; (iii) who does not purchase more than $30,000 worth of farm products from producers during licensing year; (iv) who is producer of farm products that person actually plants, nurtures and harvests; (v) whose trading in farm products is limited to trading in commodity futures on recognized futures exchange; or (vi) who buys farm products used exclusively for feeding of livestock and not for resale. (W.S. 29-8-101[a][i]).

Every producer has lien on all farm products grown or produced by it and on all proceeds from assignment, sale, transfer, exchange or other disposition thereof until producer is paid in full all amounts due producer for its assignment, sale, transfer, exchange, other disposition or production of farm products. (W.S. 29-8-102[b]). Lien attaches when farm product is delivered from producer to processor, contractor, warehouse operator or commodity dealer. (W.S. 29-8-103[a]).

Lien is claimed by filing written notice of claim of lien with office of Secretary of State not later than 180 days after lien attaches. (W.S. 29-8-103[b]). Notice of claim of lien must be in form of financing statement acceptable for filing by Secretary of State except that signature of processor, contractor, warehouse operator or commodity dealer shall not be required. (W.S. 29-8-103[c]). Written notice of lien claim must contain true statement of lienholder's claim, description of farm product delivered sufficient for identification, lienholder's name, address and phone number, establishing it as secured party, and name and address of processor, contractor, warehouse operator or commodity dealer, establishing them as debtor. (W.S. 29-8-103[c][i], [c][iv]). After filing notice of lien claim, lienholder must send copy of notice to processor, contractor, warehouse operator or commodity dealer by registered or certified mail and to all holders of security interests in farm product described in notice of lien claim who duly perfected such security interests by filing notice thereof with Secretary of State. (W.S. 29-8-103[f], [g]). Notice must be mailed to holders of perfected security interests within 30 days after date of filing of notice of lien claim. (W.S. 29-8-103[g]). Lien perfected upon properly filing notice of lien claim with Secretary of State and properly sending copies of notice of lien claim to processor, contractor, warehouse operator or commodity dealer and to all holders of security interests within times required by W.S. 29-8-103; failure to comply with requirements of W.S. 29-8-103 will result in waiver of right to lien. (W.S. 29-8-103[h]).

Lien shall be to extent of: (i) Agreed price, if any, pursuant to terms of any contract or for market value at time of transfer of ownership if not agreed; (ii) farm product only if farm product has not been sold or processed by processor, contractor, warehouse operator or commodity dealer; (iii) cash proceeds from sale, regardless of whether such are identifiable cash proceeds, if farm product is sold or processed by processor, contractor, warehouse operator or commodity dealer; and (iv) any property of processor, contractor, warehouse operator or commodity dealer that may be subject to security interest as provided by W.S. 34.1-9-109 if farm product is processed by processor, contractor, warehouse operator or commodity dealer and if there is no farm product or cash proceeds to which lien can attach. (W.S. 29-8-104[a]). Perfected lien remains in effect until either lienholder receives full amount due it for farm products, including reasonable costs and attorneys' fees incurred in enforcing lien, or for period of 210 days from date lien becomes perfected as provided in W.S. 29-8-103. (W.S. 29-8-105[a]).

Perfected lien on farm products and cash proceeds from sale of farm products shall be preferred to, and have priority over, lien or security interest in favor of creditor of processor, contractor, warehouse operator or commodity dealer regardless of time when creditor's lien or security interest attached to farm products or proceeds thereof or therefrom. (W.S. 29-8-104[b]). Priority of perfected lien on other property of processor, contractor, warehouse operator or commodity dealer determined by date on which lien is filed with Secretary of State and is junior in priority to other perfected liens on same property that have been perfected prior to filing date. (W.S. 29-8-104[b]).

Lien enforced by action to foreclose or enforce lien, which must be commenced within 240 days after filing of lien statement (notice of lien claim). (W.S. 29-8-105[b]). Producer who suffers damages may obtain appropriate legal and equitable relief, including damages, as suit in common law pursuant to Wyoming Rules of Civil Procedure; and in any action by producer to enforce perfected lien, court shall award producer who is prevailing party reasonable attorneys' fees and other litigation costs and expenses. (W.S. 29-8-108[a], [b]). Payment of any award of attorneys' fees and litigation costs shall be secured in same manner as lien created and perfected under act. (W.S. 29-8-108[b]). In order to obtain injunctive relief, producer not required to post bond, prove absence of adequate remedy at law, or show existence of special circumstances unless court for good cause otherwise orders. Court may order any form of prohibitory or mandatory relief that is appropriate under principles of equity, including but not limited to, issuing temporary or permanent restraining order. (W.S. 29-8-108[c]).

Satisfaction of Lien.

Whenever any debt which is agricultural producer's lien is paid and satisfied, lien clamant must file notice of satisfaction of lien in office of Secretary of State. (W.S. 29-8-105[c]). In addition to actual damages, any creditor refusing or neglecting to enter satisfaction within 30 days after payment of agricultural producer's lien and after having received by certified or registered mail request in writing for entering of satisfaction is liable for damages of not less than .10% of original principal amount of debt per day until such time as lienholder enters satisfaction, provided such additional damages shall not exceed $100 per day. (W.S. 29-8-105[d]).

Any provision of contract that waives producer's right or obligation of party established by act is void and unenforceable. (W.S. 29-8-106). Any condition, stipulation or provision requiring application of law of another state in lieu of act also is void and unenforceable. (W.S. 29-8-107).

Act applies to contracts executed, entered into, renewed or substantively amended on or after July 1, 2001.

Contractors', Materialmens' Liens.

Every person performing any work on or furnishing any materials or plans for any building or any improvement upon land shall have lien upon building or improvements, and upon land of owner on which they are situated to extent of one acre or if improvements cover more than one acre to all additional land covered thereby or if land subject to lien is located in any city, town or subdivision to entire lot upon which building or improvement is located. (W.S. 29-2-101). To have lien, work or materials shall be furnished under contract. (W.S. 29-2-101[b]). Such liens are on equal footing, without regard to dates of filing, and when proceeds of sale are not sufficient to discharge them in full they are prorated among claimants according to amount of their respective claims. (W.S. 29-1-305). In order to claim lien, prime contractor or subcontractor shall give to owner or his agent within 30 days of providing any materials or services written notice which must be receipted by owner or his agent and must be in form specified in statute. (W.S. 29-2-110). This requirement apparently applies only to rights to obtain lien against existing single family dwelling unit, residence constructed by owner or under contract entered into by owner prior to its occupancy as his primary residence, or property is single family, owner occupied dwelling unit including residence constructed and sold for occupancy as primary residence. (W.S. 29-2-110). Statute is sufficiently ambiguous that until such time as judicial determination has been made it would be advisable for every prime contractor or subcontractor to give notice required by § 29-2-110 on every project. Notice by any contractor or subcontractor which complies with section relieves any remaining contractors or subcontractors under same contract of requirement of giving notice. (W.S. 29-2-110).

Every contractor shall file his lien statement within 120 days and every other person shall file within 90 days: (a) After last day when work was performed or materials furnished under contract; or (b) from date work was substantially completed or substantial completion of contract to furnish materials, whichever is earlier; or (c) with respect to employee or subcontractor, after last day he performed work at direction of his employer or contractor. (W.S. 29-2-106). Any subcontractor or materialman who wishes to claim contractor's or materialman's lien must give notice of his right to claim lien to prime contractor no later than 60 days after date on which services or materials are first furnished. Notice must be sent to prime contractor by certified mail or delivered to and receipted by prime contractor or his agent. Notice must be in writing and must state that it is notice of right to claim lien against buildings or improvements or upon real estate for services or materials furnished. Notice must be signed by subcontractor or materialman and shall include following information: (1) Subcontractor's or materialman's name, address, and telephone number, and name of contact person; (2) name and address of subcontractor's or materialman's vendor; and (3) type or description of materials or services to be provided. This requirement only applies where prime contractor's contract is for $50,000 or more. (W.S. 29-2-111). Prime contractor shall post on construction sight sign citing section and stating that any subcontractor or materialman shall give notice to prime contractor of right to claim lien and failure to provide notice shall waive subcontractor's or materialman's right to lien. Owner or his agent shall provide notification of information required by this section in project specifications. (W.S. 29-2-111). Lien claimant shall file with county clerk lien statement sworn to before notary public stating name and address of person seeking to enforce lien, amount claimed to be due and owing, name and address of person against whose property lien is filed, itemized list of materials delivered and work performed, name of person against whom lien claim is made, date when labor was last performed or services were last rendered or date when project was substantially completed, legal description of premises, and copy of contract, if available. (W.S. 29-1-301). Before filing lien ten days written notice must be given to owner or his agent stating amount of claim and from whom it is due. (W.S. 29-2-107). All actions to foreclose or enforce lien shall be commenced within 180 days after filing of lien statement. (W.S. 29-2-109).

Public Works.

Except as provided in W.S. 9-2-1016(a)(xviii) governing bid bonds and bid guarantees in procurement of construction services to state agency, contractor for public building or other public work exceeding $7,500 in price must execute bond or other guarantee to state or other subdivision involved for use of same and for use and benefit of laborers and materialmen, conditioned for completion of contract, to comply with all requirements of law and to pay all just claims for labor performed and materials furnished. Amount must be not less than one-half of contract price, except that where price exceeds $100,000 board or officer letting contract may fix amount deemed sufficient. (W.S. 16-6-112). Any subcontractor or materialman entitled to protection of bond shall give notice of his right to prime contractor. Failure to give notice to contractor who has posted prominent sign on construction site citing W.S. 16-6-121 waives subcontractor's or materialman's right to protection under bond. Notice shall be given no later than 60 days after date on which services or materials are first furnished. Notice shall be sent to prime contractor by certified mail or delivered to or receipted by prime contractor or his agent. Notice must be in writing and must state that it is notice of right to protection under bond, be signed by subcontractor or materialman, and include following information: (1) Subcontractor's or materialman's name, address, telephone number, and name of contact person; (2) name and address of subcontractor's or materialman's vendor; and (3) type of description of materials and services provided. (W.S. 16-6-121).

9-2-1016 refers to public works procured by state Department of Administration and Information. Any public work procured under W.S. 9-2-1016 where contract exceeds $25,000 requires payment and performance bond equal to 100% of contract price.

Mechanics' Liens.

See subhead Lien on Goods, Chattels and Animals, and subhead Contractors', Materialmens' Liens, supra.

Merchandise Liens.

Uniform Commercial Code applies. (W.S. 34.1-9-101 to W.S. 34.1-9-709). See category 3 Business Regulation and Commerce, topic 3.09 Commercial Code.

Attachment Lien.

See topic 8.02 Attachment.

Attorney's Lien.

See category 18 Legal Profession, topic 18.01 Attorneys and Counselors.

Carrier's Lien.

See subhead Lien on Goods, Chattels and Animals, supra, and see category 3 Business Regulation and Commerce, topic 3.08 Carriers.

Chattel Mortgage Lien.

See category 20 Mortgages, topic 20.01 Chattel Mortgages.

Collateral Security.

See category 3 Business Regulation and Commerce, topic 3.09 Commercial Code.

Execution Lien.

See topic 8.05 Executions.

Factor's Lien.

See category 3 Business Regulation and Commerce, topic 3.09 Commercial Code.

Judgment Lien.

See category 5 Civil Actions and Procedure, topic 5.15 Judgments.

Landlord's Lien.

See category 21 Property, topic 21.10 Landlord and Tenant.

Liens on Exempt Property.

See topic 8.06 Exemptions.

Lien on Homesteads.

See topic 8.10 Homesteads.

Real Estate Mortgage Lien.

See category 20 Mortgages, topic 20.04 Mortgages of Real Property.

Tax Lien.

See category 22 Taxation, topic 22.15 Property Taxes, subhead Lien.

Motor Vehicles.

See subhead Lien on Goods, Chattels and Animals, supra; and category Transportation, topic Motor Vehicles, subhead Liens.

Mines and Oil Wells.

See category 19 Mineral, Water and Fishing Rights, topic 19.01 Mines and Minerals.

8.14 MECHANICS' LIENS:

See topic 8.13 Liens.

8.15 PLEDGES:

Governed by Uniform Commercial Code. (W.S. 34.1-1-101 to W.S. 34.1-10-104). See category 3 Business Regulation and Commerce, topic 3.09 Commercial Code.

Remedies of Pledgee.

Governed by Uniform Commercial Code. See category 3 Business Regulation and Commerce, topic 3.09 Commercial Code.

8.16 RECEIVERS:

May be appointed by district court in following actions or cases: (i) By vendor to vacate fraudulent purchase of property; (ii) by creditor to subject any property or fund to his claim; (iii) by partner or other person jointly owning or interested in any property or fund, whose right to or interest in property or fund or proceeds thereof is probable and where it is shown that property or fund in danger of being lost, removed or materially injured; (iv) by mortgagee for foreclosure of mortgage and sale of mortgaged property where it appears that mortgaged property in danger of being lost, removed or materially injured, or that condition of mortgage has not been performed and property is probably insufficient to discharge mortgage debt; (v) after judgment to carry judgment into effect; (vi) after judgment to dispose of property according to judgment or preserve it during pendency of appeal, or when execution has been returned unsatisfied and judgment debtor refuses to apply property in satisfaction of judgment; (vii) when corporation has been dissolved or is insolvent or in imminent danger of insolvency or has forfeited corporate rights; and (viii) in all other cases where receivers have been appointed by courts of equity. (W.S. 1-33-101[a]).

Jurisdiction.

Appointed by district court. (W.S. 1-33-101).

Proceedings.

Appointed on motion showing grounds for appointment. (W.S. 1-33-101).

Eligibility and Competency.

No person interested in action shall be appointed receiver or be representative of receiver except by consent of parties. (W.S. 1-33-102).

Qualification.

Before he enters upon his duties, receiver must be sworn to perform faithfully and must give surety approved by court, or by clerk on order of court, in such sum as court directs not to exceed double amount of any property involved, conditioned that he will faithfully discharge duties of receiver and obey orders of court. (W.S. 1-33-103).

Powers and Duties.

Receiver, under control of court, may bring and defend actions in own name as receiver, take and keep possession of property, receive rents, collect, compound for and compromise demands, make transfers and generally do acts respecting property as court may authorize. (W.S. 1-33-104). Receiver's duties require that he keep separate, accurate records of receipts and disbursements and all business of receivership, that he take possession of and keep and preserve receivership property, and that he report to court, account, and obey orders of court. (Wyo. 667 P.2d 665).

Compensation.

No statutory provisions.

Discharge.

No statutory provisions.

8.17 REDEMPTION:

See topics 8.05 Executions, Liens; categories 20 Mortgages, topic Mortgages of Real Property; Taxation, topic Property Taxes, subhead Redemption.

8.18 SUPPLEMENTARY PROCEEDINGS:

See topic 8.05 Executions.

8.19 TRUSTEE PROCESS:

See topic 8.09 Garnishment.

8.20 USURY:

See category 3 Business Regulation and Commerce, topic 3.19 Interest.

9 DISPUTE RESOLUTION

9.01 [RESERVED]

9.02 ARBITRATION AND AWARD:

Uniform Arbitration Act adopted in substance. (W.S. 1-36-101 to W.S. 1-36-119).

Forms and Requisites of Submission.

On application of party showing arbitration agreement and opposing party's refusal to arbitrate, district court orders parties to proceed with arbitration. If opposing party denies existence of agreement to arbitrate, district court must proceed summarily to determine issue raised and must order or deny arbitration accordingly. (W.S. 1-36-104[a]).

Contracts to Arbitrate Future Disputes.

Written agreement to submit existing or future controversy to arbitration is valid, enforceable and irrevocable, save upon such grounds as exist at law or in equity for revocation of contract. This includes arbitration agreements between employers and employees or between their respective representatives unless otherwise provided in agreement. (W.S. 1-36-103).

Rescission.

No statutory provisions relating to rescission, but see subhead, Contracts to Arbitrate Future Disputes, supra.

Powers of Arbitrators.

Powers may be exercised by majority unless otherwise provided by agreement or by law. (W.S. 1-36-106, 107[c]).

Award and Enforcement Thereof.

Award must be in writing and signed by arbitrators joining in decision, copy must be delivered to each party personally, or by registered mail or as provided in agreement (W.S. 1-36-110[a]), and award must be made within time fixed by agreement, or if not so fixed, within such time which court orders upon application of party. Parties may extend time in writing either before or after expiration thereof. Party waives objection to award not made within time required unless he notifies arbitrators of objection prior to delivery of award to him. (W.S. 1-36-110[b]). On application of party or order of court arbitrators may modify award: (i) When there is evident miscalculation of figures or description of person or property referred to in award; (ii) when award is imperfect as to form not affecting merits to controversy; or (iii) for purposes of clarifying award. (W.S. 1-36-111[a]). Application must be made within 20 days of delivery of award to applicant. Opposing party must serve objections within ten days after written notice promptly given. (W.S. 1-36-111[b]). See subhead Judgment on Award, infra.

Judgment on Award.

Upon application of party district court shall confirm award unless within time limits allowed grounds are urged for vacating or modifying award. (W.S. 1-36-113). Upon application of party district court shall vacate award where: (i) Award procured by corruption, fraud or other undue means; (ii) there was evident partiality by arbitrator appointed as neutral, corruption of any of arbitrators or misconduct prejudicing rights of party; (iii) arbitrators exceeded powers; (iv) arbitrators refused to postpone hearing upon sufficient cause being shown, refused to hear evidence material to controversy or otherwise conducted hearing as to prejudice substantially rights of party; or (v) there was no arbitration agreement, issue was not adversely determined by court as provided by law and applicant did not participate in arbitration hearing without raising objection, but fact that relief was such it would not be granted by court of law or equity is not ground for vacating or refusing to confirm award. (W.S. 1-36-114[a]). Application for vacating award shall be made within 90 days after delivery of copy of award to applicant, or if predicated upon corruption, fraud or other undue means it shall be made within 90 days after grounds are known or should have been known. (W.S. 1-36-114[b]). In vacating award on grounds other than item (v) supra, district court may order rehearing before new arbitrators chosen in accordance with agreement or by court. If award vacated on grounds set forth in items (iii) and (iv) supra, court may order rehearing before arbitrators who made award or their successors appointed by court. (W.S. 1-36-114[c]). Upon application made within 90 days after delivery of copy of award to applicant, district court shall modify or correct award where: (i) There was evident miscalculation of figures or evident mistake in description of any property or person referred to in award; (ii) arbitrators awarded upon matter not submitted to them and award may be corrected without affecting merits of decision upon issues submitted; or (iii) award is imperfect as to matter of form, not affecting merits of controversy. (W.S. 1-36-115[a]). If application granted, court shall modify and correct award as to intent and shall confirm award as so modified and corrected. (W.S. 1-36-115[b]). Application to modify or correct award may be joined in alternative with application to vacate award. (W.S. 1-36-115[c]). If application to vacate award or application to modify or correct award, or both such applications filed in alternative are denied, district court shall confirm award as made. (W.S. 1-36-114[d]; W.S. 1-36-115[b]). Upon granting of order confirming, modifying or correcting award, judgment shall be enforced as any other judgment. (W.S. 1-36-116).

See also subhead Award and Enforcement Thereof, supra.

10 DOCUMENTS AND RECORDS

10.01 ACKNOWLEDGMENTS:

Wyoming has adopted uniform law on notarial acts, known as “Wyoming Uniform Law on Notarials Acts” codified at W.S. 34-26-101-34-26-109. This act applies to notarial acts performed on or after its effective date (July 1, 2008). Any instrument acknowledged in this state prior to effective date must continue to be valid instruments. All instruments deemed to be properly acknowledged under W.S. 34-2-118 prior to its repeal by this enactment must continue to be deemed and regarded to be properly acknowledged after effective date. (W.S. 34-26-109).

May be taken by following officers:

Notarial acts in Wyoming: Notary public; judge, clerk, or deputy clerk of any court of this state; clerk or deputy clerk of a county; district court commissioner; full-time magistrate; part-time magistrate; or any other officer authorized under laws of this state. (W.S. 34-1-113; W.S. 34-26-103).

Notarial acts in other jurisdictions of United States: Notary public; judge, clerk, or deputy clerk of court of jurisdiction; or any other person authorized by law of jurisdiction to perform notarial acts. (W.S. 34-26-104).

Notarial acts under federal authority: Judge, clerk, or deputy clerk of court; commissioned officer on active duty in military service of United States; officer of foreign service or consular officer of United States; or any other person authorized by federal law to perform notarial acts. (W.S. 34-26-105).

Foreign notarial acts: Notary public or notary; judge, clerk, or deputy clerk of court of record; or any person authorized by law of jurisdiction to perform notarial acts. (W.S. 34-26-106).

Persons in or with U.S. Armed Forces: In addition to acknowledgment of instruments in manner and form otherwise authorized by law, persons serving in armed forces or their dependents, wherever located, may acknowledge instruments before any commissioned officer in active service of armed forces of U.S. with rank of second lieutenant or higher in army, air force or marine corps, or ensign or higher in navy or coast guard. Instrument not invalid for failure to state therein place of execution or acknowledgment. No authentication of officer's certificate of acknowledgment is required, but officer taking acknowledgment must endorse thereon or attach thereto certificate substantially in form shown in subhead Forms, catchline Person in or With Armed Forces, infra. (W.S. 19-11-202).

General Requirements as to Taking.

In taking acknowledgment, notarial officer must determine from personal knowledge or satisfactory evidence, person appearing before officer and making acknowledgment is person whose true signature is on instrument. (W.S. 34-26-102[a]).

In taking verification upon oath or affirmation, notarial officer must determine from personal knowledge or satisfactory evidence, person appearing before officer and making verification is person who true signature is on statement verified. (W.S. 34-26-102[b]).

In witnessing or attesting signature, notarial officer shall determine from personal knowledge or satisfactory evidence, signature is that of person appearing before officer and named therein. (W.S. 34-26-102[c]).

In certifying or attesting copy of document or other item, notarial officer must determine that proffered copy is full, true, and accurate transcription or reproduction of what was copied. (W.S. 34-26-102[d]).

In certifying instrument executed by business entity, notarial officer must determine person who signed on behalf of business entity appearing before him was personally known to notarial officer making certification, was by him duly sworn and upon oath represented that he was president or other officer or agent of business entity, that he had authority to so sign and acknowledged instrument to be free act and deed of business entity. “Business entity” means corporation, limited liability company, partnership, or other entity authorized under tit. 17 of Wyoming statutes or laws of another state that are functional equivalent. (W.S. 34-26-102[e]).

In certifying instrument executed by trustee of testamentary trust or express trust created by written trust instrument, notarial officer must determine trustee who signed instrument appeared before and was personally known to him, was by him duly sworn and upon oath represented he was trustee of trust, instrument was signed and sealed on behalf of trust, trustee had authority to execute instrument on behalf of trust, and trustee acknowledged instrument to be free act and deed of trust. (W.S. 34-26-102[f]).

In making or noting protest of negotiable instrument, notarial officer must determine matters set forth in W.S. 34.1-3-505 (W.S. 34-26-102[g]).

Notarial officer has satisfactory evidence person is person whose true signature is on document if person: is personally known to notarial officer; is identified by credible witness personally known to notarial officer; or identified on basis of identification documents. (W.S. 34-26-102[h][i-iii]).

General Requirements of Certificate.

Notarial act must be evidenced by certificate signed and dated by notarial officer. Certificate must include identification of jurisdiction in which notarial act is performed and title of office of notarial officer and may include official stamp or seal of office. If officer is notary public, certificate must indicate date of expiration of commission of office, but omission of information may subsequently be corrected. If officer is commissioned officer on active duty in military service of United States, it must also include officer's rank. (W.S. 34-26-107[a]).

Certificate of notarial act is sufficient if it meets requirements of subsection (a) of this section and it: is in short form set forth in W.S. 34-26-108; is in form otherwise prescribed by law of this state; is in form prescribed by laws or regulations applicable in place in which notarial act was performed; or sets forth actions of notarial officer and those are sufficient to meet requirements of designated notarial act (W.S. 34-26-107[b][i-iv]).

By executing certificate of notarial act, notarial officer certifies that officer has made determinations required by W.S. 34-26-102 (W.S. 34-26-107[c]).

Married Women.

See subhead Forms, infra.

Attorneys in Fact.

See subhead Forms, infra.

Corporations.

See subhead Forms, infra.

Forms.

Following short form certificates of notarial acts are sufficient for purposes indicated, if completed with information required by W.S. 34-26-107(a):

(i) For acknowledge for all instruments conveying, mortgaging or otherwise disposing of or encumbering real estate, including homestead property, and for all other instruments affecting title to real estate and all other instruments required by laws of this state to be acknowledged in an individual capacity:

State of

County of

This instrument was acknowledged before me on (date) by (name(s) of person(s)).

(Signature of notarial officer)

(Seal, if any)

Title (and Rank)

[My commission expires :]

(ii) For acknowledge of all instruments conveying, mortgaging or otherwise disposing of or encumbering real estate, including homestead property, and other instruments affecting title to real estate and all other instruments to be acknowledged in a representative capacity:

State of

County of

This instrument was acknowledged before me on (date) by (name(s) of person(s)) as (type of authority, e.g., officer, trustee, etc.) of (name of party on behalf of whom instrument was executed).

(Signature of notarial officer)

(Seal, if any)

Title (and Rank)

[My commission expires :]

(iii) For verification upon oath or affirmation:

State of

County of

Signed and sworn to (or affirmed) before me on (date) by (name(s) of person(s) making statement).

(Signature of notarial officer)

(Seal, if any)

Title (and Rank)

[My commission expires :]

(iv) For witnessing or attesting signature:

State of

County of

Signed or attested before me on (date) by (name(s) of person(s) making statement).

(Signature of notarial officer)

(Seal, if any)

Title (and Rank)

[My commission expires :]

(v) For attestation of copy of document:

State of

County of

I certify that this is a true and correct copy of a document in possession of ____________________.

Dated ____________________.

(Signature of notarial officer)

(Seal, if any)

Title (and Rank)

[My commission expires :]

(W.S. 34-26-108)

Alternative to Acknowledgment or Proof.

No statutory provision.

Validating Act.

Comprehensive curative Act validates defectively acknowledged instruments which have been recorded for ten years or longer. (W.S. 34-8-101 to W.S. 34-8-105). Also, all acknowledgments executed prior to Jan. 1, 1966 which contain language to general effect that instrument was acknowledged by parties signatory thereto are conclusively regarded as being proper acknowledgments.

10.02 AFFIDAVITS:

Only statutory provisions relate to use of affidavits.

General Requirements as to Administration.

No statutory provisions.

General Requirements of Jurat.

No statutory provisions.

Use of Affidavit.

May be used to verify a pleading (Rule 11b); to prove service of summons, notice, or other process (Rule 4m); upon motion (Rule 43e); to support or counter motion for summary judgment (Rule 56); to terminate life estate (W.S. 2-9-102); to distribute tangible personal property or stocks, choses in action and instruments evidencing debt or obligation where value of entire estate of deceased, wherever located, less liens and encumbrances, does not exceed $150,000 (W.S. 2-1-201). Also, see topic 10.04 Records, subheads Recordable Instruments and

Tax Title Limitations Act.

Affidavits affecting title to real estate may be recorded. (W.S. 34-11-101).

Form.

No statutory form. The following may be used:

Form

State of . . . .

County of . . . . } ss.

A. B., being first duly sworn upon his oath according to law, deposes and says: * * * * * *

. . . .

Notary Public.

Subscribed in my presence and sworn to before me this . . . . . . day of . . . . . ., A.D. (year)

Witness my hand and official seal.

My commission expires . . . .

Alternative to Affidavit.

No statutory provision.

10.03 NOTARIES PUBLIC:

Qualification.

Secretary of State shall commission as notary any qualified person who submits application in form prescribed by Secretary of State. To be qualified for notarial commission person shall: (i) be at least 18 years of age; (ii) be resident of State of Wyoming and county from which making application; (iii) be able to read and write English language; and (iv) submit application certifying compliance with requirements of this subsection, accompanied by fee of $30. (W.S. 32-1-101).

No notarial commission becomes effective until applicant files with county clerk within 60 days after issuance of commission oath and surety bond in amount of $500 conditioned on faithful performance of duties of office. Applicant shall swear or affirm under oath to support Constitution of U.S. and Constitution of Wyoming. Bond shall be executed by applicant and sureties, or by surety company licensed in this state. Upon filing of oath and bond county clerk shall transmit notarial commission to notary and county clerk shall send written notice of qualification to Secretary of State. (W.S. 32-1-104).

Authentication.

See topic 10.01 Acknowledgments, subhead Authentication.

Seal.

Each notary public must provide himself with official seal to authenticate his official acts, with his name, words “Notary Public”, name of county wherein he resides, and word “Wyoming” clearly shown thereon. (W.S. 32-1-106).

Powers and Duties.

Every notary may administer oaths and affirmations, take depositions, receive acknowledgments of deeds, mortgages and powers of attorney and other instruments in writing. (W.S. 32-1-105).

A notary public who is a stockholder or official of a bank or other corporation may take acknowledgment of any party to any written instrument executed to or by said corporation and may administer oaths to any other stockholder or official of such corporation and may protest for non-acceptance, or nonpayment, bills of exchange, drafts, checks, notes, and other negotiable instruments which may be owned or held for collection by such bank or corporation. (W.S. 32-1-113).

Liabilities.

Any person damaged or injured by unlawful act, negligence, or misconduct of notary public, may maintain a civil action on his bond against him and his sureties. (W.S. 32-1-108).

Expiration of Commission.

Notary must add to his certificate date on which commission expires. (W.S. 34-26-107[a]).

Fees.

Notary is entitled to receive fee of $2 for each oath or affirmation administered or for each signature notarized. (W.S. 32-1-112).

Certificate of Authority.

See topic 10.01 Acknowledgments, subhead Authentication.

Officers of U.S. Armed Forces have not been given general notarial powers.

10.04 RECORDS:

County clerks have custody of records relating to property. (W.S. 18-3-402). All abstract books and public records of clerk's office are open to inspection during office hours; no fee for inspection. Uniform Commercial Code adopted. Title 34.1. See category 3 Business Regulation and Commerce, topic 3.09 Commercial Code.

Recordable Instruments.

Properly executed and acknowledged deeds, mortgages, conveyances, patents, certificates and instruments affecting title to real estate, including powers of attorney and contracts of sale, are recordable. (W.S. 34-1-104; W.S. 34-1-118; W.S. 34-1-119). In 1995, Wyoming Legislature amended Wyoming Acknowledgment Act to overrule long-standing Attorney General's Opinion (Atty. Gen. Op. No. 81-016) advising county clerks in Wyoming that instrument affecting title to real estate, which is executed by corporation or association, is not recordable unless seal of corporation or association is impressed upon instrument or recital is inserted at end of certificate of acknowledgment to effect that corporation or association has no corporate seal. (1995 Wyo. Sess. Laws, 158). See Wyo. Stat. Ann. W.S. 34-2-116(a)(iii). Affidavit stating facts relating to matters which may affect title to real estate in state, made by person having knowledge of facts and competent to testify to them in open court may be recorded. Affidavit may relate to age, sex, birth, death, relationship, family history, names, identity of parties, marital status, homestead status, possession, occupancy possession, residence, service in armed forces, conflicts and ambiguities in descriptions of land in recorded instruments, and happening of any event which may terminate estate or interest. (W.S. 34-11-101). Affidavit must contain description of land, title to which may be affected, and must state name of person appearing by record to be owner of land at time of recording affidavit. (W.S. 34-11-101). See categories 20 Mortgages, topic Mortgages of Real Property, subhead Recording; Property, topic Deeds, subheads Execution, Recording; and subheads, Effect of Record, and Marketable Title Act, this topic, infra.

Place of recording is office of county clerk of county where land lies. (W.S. 34-1-118; W.S. 34-11-101). See also, subhead Filing Under Uniform Commercial Code, infra. *For list of Counties and County Seats see first page for this state in Volume containing Practice Profiles Section.*

Requisites for Recording.

Instrument must be signed and acknowledged. (W.S. 34-1-118). Affidavits must be notarized. (W.S. 34-11-101). County clerk must not receive for recording any deed, mortgage or assignment of mortgage until address of grantee, mortgagee or assignee of mortgagee furnished to county clerk; but this requirement does not affect validity of recording of any instrument. (W.S. 34-1-119). Document transferring legal or equitable title to real property must be accompanied by sworn statement of grantee or his agent setting forth name of grantor and grantee, date of transfer, date of sale, legal description of real property, actual amount paid or to be paid for property, terms of sale and estimate of value of any nonreal property included in sale. (W.S. 34-1-142). Exceptions for which sworn statement are not necessary are: (a) Instrument which merely corrects, confirms or supplements previously recorded instrument, (b) transfer pursuant to merger, consolidation or reorganization of business, (c) transfer from subsidiary corporation to its parent corporation without actual consideration or in sole consideration of cancellation or surrender of its subsidiary stock, (d) transfer which constitutes gift of more than ½ of value of property, (e) transfer between husband and wife or parent and child for nominal consideration, (f) instrument which conveys property to same party, (g) sale for delinquent taxes or assessments or sale or transfer pursuant to foreclosure, and (h) any other transfer which board of equalization may exempt upon finding that information is not useful or relevant in determining sales-price ratios. (W.S. 34-1-142). Statement is not public record and shall be held confidential by county clerk, county assessor, and state board of equalization. (W.S. 34-1-142).

Recording fees are $8 for first page; $3 for each additional page; $1 for each entry on index in excess of five entries and additional $1 for more than one grantor or grantee of different surname; and additional $1 for each section, block, lot, or tract description in excess of ten. (W.S. 18-3-402). Fees for services rendered by county clerk as filing office for financing statements and other filings under Uniform Commercial Code are prescribed by W.S. 18-3-402. Recording and satisfaction fees applicable to record of mortgage recorded under real estate mortgage law apply to record of mortgage effective as financing statement filed as fixture filing or as financing statement covering as extracted collateral or timber to be cut under W.S. 34.1-9-502(c). (W.S. 34.1-9-525[e]). See also, subhead Filing Under Uniform Commercial Code, infra.

Filing Under Uniform Commercial Code.

1998 official text of Revised Article 9—Secured Transactions adopted effective July 1, 2001. (2001 Wyo. Sess. Laws, c. 137). If Wyoming law governs perfection of security interest or agricultural lien, office in which to file financing statement to perfect security interest or agricultural lien is office where record of mortgage on real property concerned would be recorded if collateral is goods that are or are to become fixtures, timber to be cut, or as-extracted collateral (oil, gas, or other minerals in which debtor has interest before extraction, and accounts arising out of sale at wellhead or minehead of oil, gas, or other minerals in which debtor had interest before extraction). (W.S. 34.1-9-501[a][i]). See subheads Recordable Instruments and Place of

Recording, supra; and category Mortgages, topic Mortgages of Real Property, subhead Recording. If collateral is vehicle or motor vehicle required to be licensed in Wyoming, financing statement or security agreement must be filed in office of county clerk of county in which vehicle or motor vehicle is located, and notation of security interest (showing date and amount of security interest and name of secured party) must be concurrently endorsed by county clerk on certificate of title to vehicle or motor vehicle. (W.S. 34.1-9-501[a][iii]; W.S. 31-2-801[a]). See category 23 Transportation, topic 23.01 Motor Vehicles, subhead Liens. In all other cases, including case in which collateral is goods that are or are to become fixtures and financing statement is not filed as fixture filing, financing statement must be filed in office of Wyoming Secretary of State. (W.S. 34.1-9-501[a][ii]). If collateral is personal property or fixtures of person primarily engaged in business of operating railroad, subway, street railway or trolley bus, transmitting communications electrically, electromagnetically, or by light, transmitting goods by pipeline or sewer, or transmitting or producing and transmitting electricity, steam, gas, or water, financing statement must be filed in office of Secretary of State. (W.S. 34.1-9-501[b]). Security interest in rolling stock of corporate or other business entity primarily engaged, pursuant to authority granted by state or federal regulatory body, in railroad or street railway business, telephone or telegram business, transmission of oil, gas, or petroleum products by pipeline, or transmission or production and transmission of electricity, steam, gas, or water, security interest may be perfected either as provided in § 20(c) of Interstate Commerce Act or by filing financing statement in office of Secretary of State. (W.S. 37-4-101 to W.S. 37-4-104). Secured party holding security interest in farm products must file effective financing statement with office of Secretary of State to obtain priority over buyers in ordinary course of business, commission merchants, or selling agents. (W.S. 34-21-1101 to W.S. 34-21-1107).

34.1-9-301 to W.S. 34.1-9-307 enumerate choice of law rules for determining law governing perfection and priority of security interests and agricultural liens. Following choice of rules apply: (a) For most types of collateral, local law of jurisdiction where debtor is located; (b) for collateral in which security interest is perfected by possession, local law of jurisdiction where collateral is located; (c) for fixtures, timber to be cut, and as-extracted collateral, such as oil, gas, and other minerals, local law of jurisdiction where real estate concerned is located; (d) for goods covered by certificate of title, local law of jurisdiction that issued certificate of title; (e) for deposit accounts, local law of depositary bank's jurisdiction; (f) for letter-of-credit rights, local law of jurisdiction of issuer or nominated person; and (g) for investment property claimed by control, local law of jurisdiction where securities intermediary or commodity intermediary is located. (W.S. 34.1-9-301, -303[c], -304[a], -305[a], -306[a]). When farm products are located in jurisdiction, local law of that jurisdiction governs perfection and priority of agricultural lien on farm products. (W.S. 34.1-9-302). If debtor is registered organization, such as corporation, limited liability company, limited partnership, or limited liability partnership, debtor will be deemed to be located in state under whose laws it is organized (W.S. 34.1-9-307[e], -102[a][lxxiii]); if debtor is not registered organization, such as general partnership, debtor will be deemed to be located in jurisdiction where it has place of business if only one, or chief executive office if debtor has more than one place of business (W.S. 34.1-9-307[b][ii], -[b][iii]); and if debtor is individual, debtor will be deemed to be located in jurisdiction of personal residence (W.S. 34.1-9-307[b][i]).

Filing Fees.

Fees for services rendered by Secretary of State as filing office set by rule adopted by Secretary of State. (W.S. 34.1-9-525[a]). Under rules adopted by Secretary of State, filing fees for paper filings are as follows: Termination statement for initial financing statement filed before July 1, 2001, $5; initial financing statement and termination statement filed on or after July 1, 2001, $20, if more than two pages, $35; amendment, continuation, assignment, or correction statement of one or two pages, $15, if more than two pages, $30; UCC search, $10 per debtor name; and copy of UCC record, 50¢ per page. (Secretary of State R. & Reg. [Article 9 Secured Transactions], c. 1, § 4). For electronic (ESF) filings, following fees apply: Initial financing statement and termination statement, $10; amendment, continuation and assignment, $7.50 (other than one debtor or one secured party change per filing per electronic filing session, multiple amendments may be made); termination statement on filing filed prior to July 1, 2001, no fee; UCC search, no fee and unlimited number of debtor names; Internet Filing Service, $150 annual fee (up to ten users); and Internet Download Service, $2,000 annual fee. (Secretary of State R. & Reg. [Article 9 Secured Transactions], c. 1, § 5). Filing and registration fees applicable to farm products that are collateral and subject to central filing system established for effective financing statement required by Food Security Act of 1985, also set by Secretary of State. (W.S. 34-21-1107). Comprehensive list of filing and registration fees are set forth in rules adopted by Secretary of State for central filing system. (Secretary of State R. & Reg. [Central Filing System], c. 1, § 3). Address of Secretary of State of State of Wyoming is: Office of the Secretary of State, Capitol Building, Cheyenne, Wyoming 82002; (307) 777-7311. Schedule of fees for UCC paper filings and EFS filings can be accessed at: http://soswy.state.wy.us/Rule_Search_Main.asp.

Fees for services rendered by county clerk as filing office are prescribed by statute. (W.S. 18-3-402, W.S. 34.1-9-525[e]). Fees for UCC filings are as follows: Original financing statement and termination statement, $10; notation of lien for perfection on each additional certificate of title, $1; statements of amendment, continuation or assignment, $5; lien search and certification of filings of record and affixing seal, $10; and termination statement filed before July 1, 1993, $5. (W.S. 18-3-402[a][xvi]). No fee required with respect to record of mortgage effective as financing statement filed as fixture filing or as financing statement covering as-extracted collateral or timber to be cut under W.S. 34.1-9-502(c); however, recording and satisfaction fees otherwise applicable to record of mortgage apply. (W.S. 34.1-9-525[e]).

For list of Counties and County Seats see first page for this state in Geographical Section for this State.

Foreign Conveyances or Encumbrances.

See category 21 Property, topic 21.16 Real Property, subhead Foreign Conveyances or Encumbrances.

Effect of Record.

Unrecorded conveyances are void as against subsequent purchasers or purchaser(s) in good faith for valuable consideration. (W.S. 34-1-120). Also, recorded but unacknowledged conveyance does not give constructive notice of its existence or contents. (Wyo., 348 P.2d 63). Recorded deed may be read in evidence in first instance without additional proof of execution. (W.S. 34-1-123). When notarized and recorded affidavit or certified copy thereof, prima facie evidence of facts therein stated insofar as facts affect title to real estate. (W.S. 34-11-101).

Marketable Title Act provides any person having legal capacity to own land in state who has unbroken chain of title of record to any interest in land for 40 years or more deemed to have marketable record title to such interest. Person deemed to have such unbroken chain of title when official public records disclose conveyance or other title transaction of record not less than 40 years at time marketability is to be determined, which conveyance or other title transaction purports to create interest, either in person claiming interest, or some other person from whom, by one or more conveyances or other title transactions of record, purported interest has become vested in person claiming interest, so long as nothing appears of record purporting to divest claimant of his purported interest. (W.S. 34-10-103). Recorded conveyance or other title transaction recorded as of date 40 years prior to time when marketability is being determined and which purports to create interest claimed by person, upon which he relies as basis for marketability of his title, is called “root of title.” (W.S. 34-10-101). Marketable title subject to all interests and defects inherent in chain of title, but general reference in chain to easements, use restrictions or other interests created prior to root of title not sufficient to preserve them, unless specific identification is made therein of recorded title transaction which creates easement, use restriction or other interest. Marketable title also subject to all interests preserved by filing of proper notice or by possession by same owner continuously for 40 years or more, in accordance with W.S. 34-10-106; to rights of any person arising from prescriptive use or adverse possession which was in whole or part subsequent to effective date of root of title; to any interest arising out of title transaction which has been recorded subsequent to effective date of root of title from which unbroken chain of title of record is started, but recording does not revive or give validity to any interest which has been extinguished prior to time of recording by operation of W.S. 34-10-105; and to exceptions stated in W.S. 34-10-108 as to rights of reversioners in leases; as to apparent easements and interests in nature of easements, as to water rights, as to mineral interests and as to interests of state of Wyoming and of U.S. (W.S. 34-10-104). Subject to these matters which marketable title is subject to, marketable title held by its owner and shall be taken by any person dealing with land free and clear of all interests, claims or charges whatsoever, existence of which depends upon any act, transaction, event or omission that occurred prior to effective date of root of title. All such interests, claims or charges, however denominated, whether legal or equitable, present or future, whether asserted by a person sui juris or under disability, whether such person is within or without state, whether such person is natural, corporate, private or governmental, are null and void. (W.S. 34-10-105). Person claiming interest in land may preserve and keep effective his interest by filing of record during 40 year period immediately following effective date of root of title of person whose record title would otherwise be marketable, notice in writing, duly verified by oath, setting forth nature of claim. No disability or lack of knowledge of any kind on part of anyone suspends running of 40 year period. If same record owner of any possessory interest in land has been in possession of land continuously for period of 40 years or more, during which period no title transaction with respect to interest appears of record in his chain of title and no notice preserving said interest has been filed by him or on his behalf, and his possession continues to time when marketability being determined, period of possession equivalent to filing of such notice immediately preceding termination of 40 year period. (W.S. 34-10-106). Notice must contain accurate and full description of all lands affected by notice which must be set forth in particular terms and not by general inclusions. If claim founded upon recorded instrument, then description in notice may be same as that contained in recorded instrument. Notice filed for record with county clerk of county or counties where land described situated; and county clerk must accept for recording all such notices which describe land located in county in which he serves. (W.S. 34-10-107). Privilege of filing notice must not be used to slander title to land. (W.S. 34-10-109). Notwithstanding failure to file notice of claim preserving interest, Act not applicable to bar any lessor or his successor as reversioner of his right to possession on expiration of any lease; to bar or extinguish title to any railroad right-of-way or station grounds or to any easement created or held for any pipeline, highway, railroad or public utility purpose existence of which is clearly observable by physical evidence of its use; to bar or extinguish any water rights, whether evidenced by decrees or certificates of appropriation; to bar or extinguish any title, estate or interest in and to any timber or any minerals (including without limiting generality of that term, oil, gas and other hydrocarbons) and any development, mining production or other rights or easements related thereto or exercisable in connection therewith; or to bar any right, title or interest of state of Wyoming or U.S. (W.S. 34-10-108). If 40 year period specified in Act expires less than two years after effective date of Act, period shall be extended two years after effective date of Act. (W.S. 34-10-108). Effective date of Act is May 30, 1975.

Tax Title Limitations Act.

No action, suit or other proceeding shall be commenced by former owner to set aside, declare invalid or redeem from tax deed or sale, forfeiture, foreclosure or other proceeding upon which it is based or to recover possession, quiet title or otherwise litigate or contest title to grantee if (i) two years or more have elapsed after recording of deed in office of county clerk for county in which real estate described in deed situated, and (ii) grantee has been in possession of real estate continuously for period of at least six months at any time after one year and six months have elapsed since recording of tax deed. (W.S. 34-2-132). Limitation applies regardless of whether tax deed or any of proceedings upon which based are void or voidable for any reason, jurisdictional or otherwise. If deed executed substantially in form prescribed for execution of tax deeds, limitation applies regardless of whether deed is deemed void upon its face. Limitation period not extended by reason of minority, insanity, imprisonment, nonresidence, or death of any person, or by reason of any other fact or circumstance. (W.S. 34-2-132). Possession by grantee for continuous period of not less than six months at any time after one year and six months have elapsed since date of recording tax deed extinguishes forever all claims, right, title and interest, including right of possession, of former owner, and vests in grantee any title conveyed or purportedly conveyed by tax deed. Proof of possession by grantee and record of tax deed constitutes conclusive evidence of legality and effectiveness of deed and any proceedings upon which deed is based, and of title of grantee. As means of proving possession and preserving evidence of possession under tax deed, then owner or holder of title conveyed or purportedly conveyed by tax deed may at any time after two years from date of recording of tax deed, file for record in office of county clerk of deeds in which real estate is located affidavit in prescribed form. (W.S. 34-2-133). In any action, suit or proceeding in which tax deed, any proceedings upon which it is based, or title of grantee is contested or drawn in question, certified copy of recorded affidavit prima facie evidence of facts recited in affidavit. (W.S. 34-2-133). Act must be liberally construed to effectuate legislative purpose of giving stability and effect to record titles, of confirming and clarifying title of persons in possession, of providing means of correcting procedural and jurisdictional defects without necessity of resort to further proceedings, and of rendering tax titles marketable and protecting purchasers from remote claims. (W.S. 34-2-134). Act declared retroactive in effect. Act does not apply to tax deeds issued only covering severed oil, gas, hydrocarbons and other minerals and estates therein. (W.S. 34-2-135).

Torrens System of land registration has not been adopted in state.

Transfer of decedent's title to real estate is evidenced by recording, in office of county clerk of county in which such real estate is situated, a certified copy of decree of distribution. (W.S. 2-2-201).

Vital Statistics.

Statistics of birth, stillbirth, marriage, divorce or annulment, and death are recorded with State Registrar, Office of Vital Records Services, Division of Health and Medical Services, Department of Health and Social Services, Hathaway Building, Cheyenne, Wyoming 82001. (W.S. 35-1-401 to W.S. 35-1-431). Certified copies of birth, death, marriage and divorce records can be obtained from State Registrar for $12, $9, $12 and $12, respectively.

Establishing Birth Record.

Office of Vital Services, from which forms and instructions may be obtained, has authority to provide for, and file, delayed birth certificates. (W.S. 35-1-413). If application by applicant for delayed birth certificate rejected, petition may be filed with court of competent jurisdiction for order establishing record of date and place of birth and parentage. Form of petition prescribed by State Registrar. (W.S. 35-1-415). Order establishing such birth filed with State Registrar. (W.S. 35-1-415).

10.05 SEALS:

The use of private seals in written contracts, except those of corporations, is abolished, and the addition of a private seal to an instrument does not affect its character. (W.S. 34-2-125; W.S. 34-2-126). Uniform Commercial Code (W.S. 34.1-1-101 to W.S. 34.1-10-104), including § 2-203 adopted. See category 3 Business Regulation and Commerce, topic 3.09 Commercial Code.

Corporate Seals.

Wyoming corporations have power to adopt, use and alter a corporate seal (W.S. 17-16-302) but there are no special provisions with respect to such seals and seals are not mandatory. See, also, topic Records, subhead Recordable Instruments.

Effect of Seal.

There is no difference between sealed and unsealed instruments. (W.S. 34-2-126; W.S. 34-2-127).

10.06 TORRENS ACT:

Not adopted.

10.07 VITAL STATISTICS:

See topic 10.04 Records.

11 EMPLOYMENT

11.01 EMPLOYER AND EMPLOYEE:

See topic 11.02 Labor Relations.

11.02 LABOR RELATIONS:

Relation between master and servant is largely controlled by common law rules. Commissioner of Labor has jurisdiction over most labor matters. Occupational Health and Safety Commission has extensive regulatory authority over all aspects of occupational health and safety. (W.S. 27-11-101 to W.S. 27-11-114).

Child Labor.

It is unlawful to employ, permit or suffer any child under age of 14 to work at any gainful occupation (except farm, domestic or lawn and yard service). Proof of age is required in order to employ child under age of 16. (W.S. 27-6-107). In no event shall any child under age of 16 be employed in any occupation listed in W.S. 27-6-112 (operation of or work on heavy construction equipment or employment requiring contact with or exposure to explosives or dangerous chemicals) or in any occupation declared by department of employment to be dangerous, injurious, hazardous or prejudicial to safety, welfare or morals of children under 16. (W.S. 27-6-107).

Children under 16 may not be employed during school sessions (W.S. 27-6-111); nor may they be employed excepting in farm or domestic service, for more than eight hours in any 12 hour period or before hour of 5 A.M. or after hour of 10 P.M. except may work until 12 midnight on days not followed by school day if enrolled in school, and until 12 midnight of any day, if between ages of 14 and 16 and not enrolled in school (W.S. 27-6-110).

Hours of Labor.

Standard work day is eight hours in underground mines but may be up to 16 hours by agreement. (W.S. 27-5-102).

Wages.

Minimum wage $5.15 per hour (W.S. 27-4-202) and it is unlawful for employer to pay employee lower wage than provided for in collective bargaining agreement or contract between employer and employee and such collective bargaining agreement or contract may not prescribe wage which is below minimum wage (W.S. 27-4-507). Tips and gratuities received by employees are sole property of employees and cannot be payable in whole or in part to employer or any other person. (W.S. 27-4-507). In determining wage rate of tipped employee there is added to wage rate paid tips received by employee. Minimum wage paid shall not be less than $2.13 per hour. Tipped employee is one who receives more than $30 per month in tips. (W.S. 27-4-202). Except as provided by statute, not less than prevailing hourly rate of wages for work of similar character in locality in which work is performed, shall be paid to all workmen employed by or on behalf of any public body engaged in construction of public works. (W.S. 27-4-403). Agency awarding contract obtains prevailing hourly rate from department of employment before any contract is awarded. (W.S. 27-4-405). Employers of labor in mines, railroads, oil refineries, oil and gas prospecting or production, factories, mills and workshops must pay wages of employees semimonthly, under penalty of fine and imprisonment. Employer at time of payment of wages must furnish employees with detachable part of check, draft or voucher paying wages showing all deductions made from wages. If wages not paid by check, draft or voucher deductions made from wages must be shown on itemized statement. (W.S. 27-4-101). Employer may not discriminate on basis of gender by paying wages at rate less than rate paid to employees of opposite gender for equal work except where payment is made pursuant to seniority system or merit system. (W.S. 27-4-302).

Employees who quit or are discharged must be paid within five working days. Employer may offset any sums due employer from employee which have been incurred by employee during his employment. (W.S. 27-4-104).

Assignment of wages, see category 8 Debtor and Creditor, topic 8.01 Assignments.

Discrimination.

See subhead, Discriminatory and Unfair Employment Practices, infra.

Labor unions are permitted as a matter of public policy for collective bargaining free from interference by employers. (W.S. 27-7-101).

No officer or member of a union may be held liable for the unlawful acts of individual officers or members except upon clear proof of participation, authorization or ratification. (W.S. 27-7-107).

Membership or nonmembership in labor organization, or payment or nonpayment of dues to labor organization, cannot be required as condition of employment. (W.S. 27-7-109, 110, 111). Action seeking to impose such conditions may be enjoined. (W.S. 27-7-114).

Labor Disputes.

Injunctions may not be issued contrary to public policy declared in sections covered by this paragraph. (W.S. 27-7-102). Injunctions against following are specifically prohibited: (1) Refusing to work; (2) joining union; (3) paying or withholding strike benefits; (4) lawfully aiding any striker who is being proceeded against by court action; (5) giving publicity to strike; (6) assembling peacefully in promotion of strike; (7) advising another of intention to do any of foregoing; (8) agreeing with others to do or not to do any of foregoing; (9) inducing otherwise than by fraud or violence any of foregoing. (W.S. 27-7-103). Injunctions against conspiracies in labor disputes are prohibited. (W.S. 27-7-104). Injunctions may be granted only against specific acts complained of. (W.S. 27-7-106). See, also, subhead Labor Unions, supra.

Workmen's Compensation Act.

Rights and remedies provided by act for employee, including any joint employee, and dependents for injuries incurred in extra hazardous employments are in lieu of all other rights and remedies against employer and any joint employer making contributions required by Act, or employer's employees acting within scope of their employment unless employees intentionally act to cause physical harm or injury to injured employee, but do not supersede rights and remedies available to employee and his dependents against any other person. Act does not limit or affect any right or action by any employee and his dependents against employer for injuries received while employed by employer when employer at time of injuries has not qualified under act for coverage of his eligible employees, or having qualified, has not paid required premium on injured employee's earnings within 30 days of date due. When employee's employment starts within same month as injury, status of delinquency or not contributing shall not apply until after regular payroll reporting date. (W.S. 27-14-104).

Third Party Liability.

If employee covered by this act receives injury under circumstances creating legal liability in some person other than employer to pay damages, employee if engaged in work for his employer at time of injury is not deprived of any compensation to which he is entitled under this act. He may also pursue his remedy at law against third party or coemployee to extent permitted by statute. Except as provided by statute if employee recovers from third party or coemployee in any manner including judgment, compromise, settlement or release, state is entitled to be reimbursed for all payments made, or to be made, to or on behalf of employee under this act but not to exceed one-third of total proceeds of recovery without regard to types of damages alleged in third-party action. All money received by state shall be credited to workers' compensation account and considered in computing employer's experience rating. Director and attorney general shall be served by certified mail return receipt requested with copy of complaint filed in any suit initiated as described above. Service of complaint on director and attorney general is jurisdictional requirement in order to maintain suit. Director and attorney general shall be notified in writing by certified mail return receipt requested of any judgment, compromise, settlement or release entered into by employee. Before offering settlement to employee, third party or its insurer shall notify state of proposed settlement and give state 15 days after receipt of such notice in which to object. If notice of proposed settlement is not provided, state is entitled to initiate independent action against third party or its insurer for all payments made to and any amount reserved for or on behalf of employee under this act. If there is settlement, compromise or release entered into by parties in claims against person other than employer, attorney general representing director shall be made party in all negotiations for settlement, compromise or release. Attorney general and director, for purposes of facilitating compromise and settlement, may in proper case authorize acceptance by state of less than state's claim for reimbursement. Proceeds of any judgment, settlement, compromise or release are encumbered by continuing lien in favor of state to extent of total amount of state's claim for reimbursement under this section and for all current and future benefits under this act. Lien shall remain in effect until state is paid amount authorized. In addition person paying settlement remains liable to state for state's claim unless state through attorney general signs release prior to payment of agreed settlement. If injury causes death of employee, rights and remedies inure to and obligations are binding upon personal representative of deceased employee for benefit of his dependents. Any attorney who fails to notify director and attorney general of any settlement or fails to ensure state receives its share of proceeds of any settlement or judgment as described above shall be reported to grievance committee of Wyoming State Bar. At any time before statute of limitation bars employee or his estate from commencing claim for personal injury or wrongful death, and upon unsolicited written request of employee or estate, department may commence action on behalf of employee or his estate. From any amounts recovered, state is entitled to amount equal to all sums awarded as benefits to employee or his estate and all anticipated future medical costs. Any excess recovery shall be paid to injured employee or his estate. Department or employer shall have additional six month limitation period beyond date on which employee or his estate is barred under statute of limitations from commencing claim for personal injury or wrongful death, in which to commence such action on behalf of employee or his estate. From any amounts recovered, state is entitled to amount equal to all sums awarded as benefits to employee or his estate, all anticipated future medical costs and all costs of litigation. Any excess recovered shall be paid to injured employee or his estate. (W.S. 27-14-105). Minor employees are deemed free of any legal disability for purposes of act. (W.S. 27-14-106).

Extra hazardous employments defined in detail. (W.S. 27-14-108).

"Injury" means any harmful change in human organism other than normal aging, and includes damage to or loss of any artificial replacement and death arising out of and in course of employment while at work in or about premises occupied, used or controlled by employer,

incurred while at work in places where employer's business requires employee's presence and which subjects employee to extra hazardous duties incident to business. Term does not include: any communicable disease unless risk of contracting disease is increased by nature of employment; injury caused by employee's intoxication or being under influence of controlled substance not prescribed by health care provider; injury caused by employee's willful intention to kill himself or another; injury due solely to culpable negligence of injured employee; injury sustained during travel to or from employment, unless travel is reimbursed or in employer's vehicle; any injury sustained by prisoner during or any harm resulting from any illegal activity engaged in by prisoners held under custody; injury or condition preexisting time of employment; any injury resulting primarily from natural aging process or from normal activities of day-to-day living, as established by medical evidence supported by objective findings; any injury sustained while engaged in recreational or social events under circumstances where employee was under no duty to attend and where injury did not result from performance of tasks related to employee's normal job duties or as specifically instructed to be performed by employer; any mental injury unless it is caused by compensable physical injury, it occurs subsequent to or simultaneously with physical injury and it is established by clear and convincing evidence, which shall include diagnosis by licensed psychiatrist or licensed clinical psychologist meeting criteria established in most recent edition of diagnostic and statistical manual of mental disorders published by American Psychiatric Association, in no event shall benefits for compensable mental injury be paid for more than six months after injured employee's physical injury has healed to point that it is not reasonably expected to substantially improve. (W.S. 27-14-102).

“Employee”.

Act is applicable to all employees engaged in extra hazardous occupations as enumerated and to all employees whose employer elects to be covered under act. (W.S. 27-14-102). “Employee” means person entering into service of or working under contract of services or apprenticeship with, employer engaged in extra hazardous occupation, for which compensation is paid except as provided. “Employee” includes aliens authorized to work in U.S., aliens employer reasonably believes, at date of hire and date of injury based upon documentation in employer's possession, authorized to work in U.S. and legally employed minors. (W.S. 27-14-102[a][vii]). Specifically enumerated volunteers to whom this act applies are firefighters, search and rescue personnel, law enforcement personnel, search pilots, mine rescue workers, ambulance personnel, hazardous substance workers, emergency management agency personnel, elected county or local officials (with some restrictions) and volunteers working on projects approved by Wyoming Game and Fish Commission. (W.S. 27-14-108[e]). Employee does not include any individual whose employment is determined to be casual labor, or sole proprietor or partner of business partnership, officer of corporation unless coverage is elected under statute, independent contractor, spouse or dependent of employer living in employer's household, employee of private household, private duty nurse engaged by private party, employee of federal government, prisoner or probationer (adult or juvenile) unless covered under statute, elected public official (except for sheriff), individual providing day care paid in part or in whole by Wyoming Department of Family Services, individuals providing foster care, or member of LLC unless coverage is elected under statute. (W.S. 27-14-102). In case of individual who is owner and operator of motor vehicle which is leased or contracted with driver to for-hire common or contract carrier, owner-operator shall not be employee for purposes of this act if owner-operator performs service pursuant to contract which provides that owner-operator shall not be treated as employee for purposes of Federal Insurance Contributions Act, Social Security Act, Federal Unemployment Tax Act and income tax withholding at source. (W.S. 27-14-102).

“Employer” means any person employing employee engaged in any extrahazardous occupation or electing coverage for his employees under act and qualified by division as resident employer or nonresident employer.

Premiums and Rates.

(W.S. 27-14-201 to W.S. 27-14-207).

Nonresident Employers.

(W.S. 27-14-301 to W.S. 27-14-307).

Claim Procedure.

In determining any period of time prescribed by this act for filing of any notice, complaint, claim or other paper with division. Wyoming Rules of Civil Procedure apply. Employee must make report of occurrence and general nature of injury to employer in writing, or by other means approved by workers compensation department, within 72 hours after injury becomes apparent and file injury report with employer and workers' compensation division in manner and containing information prescribed by division rule and regulation. If injured employee is physically unable to comply, personal representative of employee, his dependents or personal representative of dependents in case of death shall, following notification by employer or department of reporting requirements, make and file report for injured employee. If injured employee, any dependent or personal representative makes written report of injury to employer or his representative, employer shall acknowledge receipt of report in writing either upon report or copy of report. Failure of injured employee, any dependent or personal representative to report accident or injury to employer and to file injury report is presumption that claim shall be denied. Presumption may be rebutted if employee establishes by clear and convincing evidence lack of prejudice to employer or division in investigating injury and in monitoring medical treatment. Filing of employee's injury report under this section is release of information for duration of benefit period and upon request and upon notice to employee, any medical care provider, physician or hospital treating employee for injury shall release medical records pertaining to injury to division or employer. (W.S. 27-14-502). When injury is reported by any employee, employer shall file employer's injury report with division within ten days after date on which employer is notified of injury and he shall mail or deliver copy of report to employee. Employer's injury report shall be certified and shall contain any information provided by rules and regulations. Employer shall state on injury report that either injury is compensable and under jurisdiction of workers' compensation act or not compensable under act and reasons therefor. Willful failure or gross negligence to report occurrences causing injury to any of his employees by employer is misdemeanor, punishable by fine of not more than $750, imprisonment for not more than six months, or both. (W.S. 27-14-506). Statutory provisions also provide for reporting by doctors and hospitals accepting cases. (W.S. 27-14-501). No order or award for compensation involving injury which is result of single brief occurrence rather than over substantial period of time shall be made unless in addition to reports of injury, application of claim for award filed within one year of date on which injury occurred or for injuries not readily apparent, within one year after discovery of injury by employee. Report of accident is not claim for benefits. Application or claim for award for injury which occurs over substantial period of time must be filed within one year after diagnosis of injury first communicated to employee, or within three years after last injurious workplace exposure to condition causing injury, whichever occurs last, but excluding injury caused by ionizing radiation to which three year limitation does not apply. If death results from ionizing radiation within one year after diagnosis of medical condition is first communicated to employee or if death occurs without communication of diagnosis to employee claim must be filed with clerk of court within one year after date of death. (W.S. 27-14-503). Employee's injury report may be amended at any time before initial award is made in order that employee may correctly set out nature of his injury. Any amendment may be approved, disapproved or contested as if original injury report. (W.S. 27-14-504). Limitations as to time suspended as long as mentally incompetent or minor employee does not have guardian if employee injured, and if death results from injury, if any of dependents mentally incompetent or minors, at time when any right or privilege accrues under Act, limitations as to time so suspended as long as incompetent or minor dependents have no guardian. (W.S. 27-14-505). Each employer shall keep posted in conspicuous place for employees notice which shall be furnished by division and which shall contain brief summary of this act and procedures for filing claims. Each employer shall also keep copy of this act and have it available for all employees. (W.S. 27-14-507). Director shall prepare, print and supply free of charge any blank forms necessary in administering workers' compensation act to be used insofar as possible in all procedures under act. Director shall prepare and print instructions for making correct claims for information and use of employees. Director shall prepare and print instructions for proper claim procedures for information and use of health care providers and providers of medical and hospital care, and finally, director shall prepare and print instructions for proper claim procedures including approving or objecting to claims for information and use of employers. (W.S. 27-14-508). Upon filing of claim for compensation for death for which autopsy is necessary to accurately and scientifically ascertain and determine cause of death, hearing examiner may order autopsy. Hearing examiner may designate licensed physician who is specialist in autopsies to perform or attend autopsy and to certify findings. Autopsy findings are public record and shall be filed with division. Hearing examiner may exercise authority on his own motion or on application made to him at any time by any party in interest upon presentation of facts showing that controversy may exist in regard to cause of death or existence of any compensable injury. All proceedings for compensation shall be suspended upon refusal of claimant or representative to permit autopsy when ordered and no compensation shall be payable during continuance of refusal. (W.S. 27-14-509). Any person who knowingly makes, authorizes or permits any misrepresentation or false statement to be made for purpose of person or another receiving payment of any kind under this act is guilty of misdemeanor punishable by fine of not more than $750, imprisonment for not more than six months, or both, if value of payment is less than $500, or felony punishable by fine of not more than $10,000, imprisonment of not more than ten years, or both, if value of payment is $500 or more. Any employer who knowingly makes false statement in payroll report or reports resulting in avoidance of or reduction in employer's premium obligation within one year period is guilty of misdemeanor punishable by fine of not more than $750, imprisonment for not more than six months, or both, if avoided premium or reduction in premium is less than $500, or felony punishable by fine of not more than $10,000, imprisonment for not more than ten years, or both, if avoided premium or reduction in premium is $500 or more. Any employer who knowingly makes false statement in injury report with intention of denying worker benefits under this act is guilty of misdemeanor punishable by fine of not more than $750, imprisonment for not more than six months, or both, if value of benefits is less than $500, or felony punishable by fine of not more than $10,000, imprisonment for not more than ten years, or both, if value of benefits is $500 or more. Any employer who knowingly fails to establish account or knowingly fails to furnish payroll report as required by workers' compensation act is guilty of misdemeanor punishable by fine of not more than $750, imprisonment for not more than six months, or both, for first conviction, or felony punishable by fine of not more than $10,000, imprisonment for not more than ten years, or both, for second or subsequent conviction. (W.S. 27-14-510). Attorney general may bring civil action to recover value of any benefits or other monies paid under workers' compensation act due to mistake, misrepresentation or fraud. Nothing in this section shall prohibit criminal prosecution where appropriate. (W.S. 27-14-511).

Contested Cases.

Worker's Compensation Division shall review initial reports of injury to determine if injury or death is compensable and within jurisdiction of act. No subsequent claim for compensation shall be approved if Division determines injury or death is not compensable and under jurisdiction of act or if employer states on his report of accident that injury is not compensable until determination is rendered by Division. Division shall provide notice of determination to employee, employer, and claimant. (W.S. 27-14-601). Upon receipt of request for hearing from Division, case shall be determined by hearing examiner. Hearing will be conducted according to procedures of Wyoming Administrative Procedure Act. Upon certain conditions, case shall be determined by hearing examiner in accordance with law in effect at time of injury as small claims hearings. Appeals may be taken from decision of hearing examiner by any party to District Court as provided in Wyoming Administrative Procedure Act. (W.S. 27-14-602). All written reports, claims and other writings filed with division by parties considered pleadings in claim. Upon request, hearing examiner may appoint attorney to represent employee or claimants and may allow appointed attorney reasonable fee for services at conclusion of proceeding. (W.S. 27-14-

602). Except as otherwise provided, all documents filed with Division may be maintained by Division on computer and hearing examiner or court may admit into evidence any documents resident in computer imaging file. If genuine issue as to authenticity of document is raised by party, by hearing examiner or by court, hearing examiner or court may, before admitting document into evidence, require Division to certify that record is true and correct copy or transcript of records on file in Division. (W.S. 27-14-602). Special provisions enacted relating to employee's burden of proof where injuries occur over substantial period of time (W.S. 27-14-603[a]), where injury alleged to be coronary or cardiac condition (W.S. 27-14-603[b]), and where injury is hernia (W.S. 27-14-603[c]). Hearing examiner will have authority to appoint duly qualified impartial health care provider to examine employee and to give testimony. Employer and employee may stipulate to examination of employee by nonresident qualified health care provider designated by hearing examiner. (W.S. 27-14-604). Where award of compensation made in favor of or on behalf of employee for benefits under Act, application may be made to Division by any party within four years from date of last payment for additional benefits, or for modification of amount of award on ground of increase or decrease of incapacity due solely to injury, or upon grounds of mistake or fraud. Division may, upon same grounds and within same time period, apply for modification of medical and disability benefits to hearing examiner or medical commission as appropriate. (W.S. 27-14-605). Every award within meaning of act is administrative determination of rights of employer, employee and disposition of money within Workers' Compensation account as to all matters involved. (W.S. 27-14-606). Any administrative determination for compensation to injured employee or his dependents shall be transmitted by division to employer. Division shall transmit certified copy to state auditor for filing. Certified copy is direction to state auditor to issue warrants for payment in accordance with this act. (W.S. 27-14-611). If appeal to district court is prosecuted on behalf of employee, employee or attorney representing employee shall order record of proceedings at hearing to be supplied by hearing examiner without cost to employee. Electronic recording of proceedings may serve as official transcript but upon appeal, district court may request written transcript of proceedings or any portion of proceedings. Employee or attorney shall also order papers on file with division to be prepared, transcribed, certified and forwarded to district court without cost to employee. Docket fees in district court shall be paid for directly out of workers' compensation account. (W.S. 27-14-612). Appeal by employer. (W.S. 27-14-613). Director may appeal to district court from any order of hearing examiner even though not party to proceedings before hearing examiner. Attorney general shall represent director. (W.S. 27-14-614). Medical commission and hearing panels created to promulgate rules and regulations to advise division and to determine certain medical issues in contested cases. (W.S. 27-14-616).

Employee benefits encompass medical, hospital and ambulance expenses (W.S. 27-14-401), payment for artificial replacement (W.S. 27-14-402), awards generally, method of payment, payments to dependants (W.S. 27-14-403), benefits for temporary total disability (W.S. 27-14-404), benefits for permanent partial disability (W.S. 27-14-405), benefits for permanent total disability (W.S. 27-14-406), forfeiture of benefits due to unsanitary or injurious practice (W.S. 27-14-407), and vocational rehabilitation (W.S. 27-14-408). Temporary total disability means period of time employee is temporarily and totally incapacitated from performing employment at any gainful employment or occupation for which he is reasonably suited by experience or training. Period of temporary total disability terminates at time employee completely recovers or qualifies for benefits under W.S. 27-14-405, permanent partial disability, or W.S. 27-14-406, permanent total disability. (W.S. 27-14-102 [a] [xviii]). Permanent partial disability means economic loss to injured employee, measure pursuant to statute, resulting from permanent physical impairment. Permanent total disability means loss of use of body as whole or any permanent injury certified pursuant to statute which permanently incapacitates employee from performing work at any gainful occupation for which he is reasonably suited by experience or training. (W.S. 27-14-102[xvi]. In case of necessity court may grant lump sum. (W.S. 27-14-403[f]).

Rates of Compensation for Death.

(W.S. 27-14-403[e]).

Fiscal Provisions.

(W.S. 27-14-701 to W.S. 27-14-704).

Administrative Provisions.

(W.S. 27-14-801 to W.S. 27-14-806).

Contracts exempting employers from liability for personal injuries to employees are void. (W.S. 27-1-105).

Employers' Liability.

Railroads are subject to an employers' liability act similar in general terms to Federal Employers' Liability Act. (W.S. 37-9-501 to W.S. 37-9-504).

Unemployment compensation governed by W.S. 27-3-101 et seq. Unless excepted from coverage of Wyoming Employment Security Act (W.S. 27-3-101) et seq., all employers employing one or more individuals in state are subject to Act (W.S. 27-3-102[a][vii]; W.S. 27-3-502[b]). Certain employments are excepted from coverage of Act. (W.S. 27-3-105, W.S. 27-3-107, W.S. 27-3-108). Employment includes services performed by individual in employ of religious, charitable, educational or other organization if service is excluded from "employment" as defined in Federal Unemployment Tax Act solely by reason of § 3306(c)(8) of Act and organization had four or more individuals in employment for part of one day for 20 weeks within either current or preceding calendar year. (W.S. 27-3-105[a][ii]). Also excepted from coverage of Act are following: Employment by church or convention or association of churches or by organization operated primarily for religious purposes and operated, supervised, controlled or principally supported by church or convention or association of churches or services performed by duly ordained, commissioned or licensed minister of church in exercise of ministry or services performed by member of religious order in exercise of required duties; service performed by individual in exercise of duties as elected official, or member of legislative body, or member of judiciary, of state or political subdivision, or as member of state or air national guard, or as employee serving on temporary basis in case of fire, storm, snow, earthquake, flood or similar emergency or in position which, under laws of state, is designated major nontenured or advisory position or in policy making or advisory position, duties of which do not ordinarily require more then eight hours a week, or employment in facility conducted for purpose of rehabilitation of individuals whose earning capacity is impaired by age or physical or mental deficiency or injury or providing remunerative work for individuals who because of impaired physical or mental capacity cannot be readily absorbed in competitive labor market, by individual receiving this rehabilitation or remunerative work, or by individual receiving work-relief or work-training in program financed by federal agency, state or political subdivision thereof (W.S. 27-3-105[b]); certain agricultural employment (W.S. 27-3-107); domestic service, except that domestic service in private home, local college club or local chapter of college fraternity or sorority performed for person who paid cash remuneration of $1,000 or more in current or preceding calendar year to individuals employed in domestic service is subject to Act (W.S. 27-3-107[g]); service performed by individual for spouse or child or by person under 21 years of age for parent or for partnership consisting only of parents; employment by U.S. Government or instrumentality of U.S. constitutionally exempt from making contributions under Act except to extent permitted by congress; employment covered by Railroad Unemployment Insurance Act; employment by individual under age of 18 in delivery or distribution of newspapers, not including delivery to any point for subsequent delivery or distribution; services performed by licensed real estate brokers and salesmen compensated by commissions resulting from sale or rental of real estate; service performed in employ of school, college or university by enrolled student regularly attending classes, by spouse of student if spouse advised before commencing work that employment provided under program to provide financial assistance to student spouse and employment not covered by unemployment insurance; service performed by individual which is part of full time program of combined academic instruction and work experience educational activities carried on at educational institution; and service performed by patient at certain designated hospitals in employ of hospital; service performed in barber shop licensed under statute or beauty shop licensed under statute if: individual performing services receives no compensation from shop owner for services performed; services performed by individual who is owner and operator of motor vehicle which is leased or contracted with driver to for-hire common or contract carrier. Owner-operator shall not be employee for purposes of this act if he performs service pursuant to contract which provides that owner-operator shall not be treated as employee for purposes of Federal Insurance Contributions Act, Social Security Act, Federal Unemployment Tax Act and income tax withholding at source; services performed as casual labor; and services performed by private duty nurse employed by private party. (W.S. 27-3-108).

For rates of tax under Wyoming Employment Security Law, see category 22 Taxation, topic 22.04 Employment Taxes, subhead Unemployment Compensation Tax.

Discriminatory and Unfair Employment Practices.

It is discriminatory or unfair employment practice for employer to refuse to hire, discharge, promote or demote, or discriminate in matters of compensation against qualified handicapped person or any person otherwise qualified because of age, sex, race, creed, color, national origin or ancestry. It is also discriminatory for person, employment agency, labor organization, or employees or members thereof, to discriminate in matters of employment or membership against any person, otherwise qualified, because of age, sex, race, creed, color, national origin or ancestry, or pregnancy, or qualified handicapped person. Age discrimination applies to persons at least 40 but less than 70 years of age. It is also discriminatory or unfair employment practice for employer to require as condition of employment that any employee or prospective employee use or refrain from using tobacco products outside course of his employment, or otherwise to discriminate against any person in matters of compensation or terms, conditions or privileges of employment on basis of use or nonuse of tobacco products outside course of his employment unless it is bona fide occupational qualification that person not use tobacco products outside workplace. (W.S. 27-9-105). These rules are administered by Department of Employment. (W.S. 27-9-104).

11.03 WORKERS' COMPENSATION LAW:

See topic 11.02 Labor Relations.

12 ENVIRONMENT

12.01 ENVIRONMENTAL REGULATION:

General Supervision.

Environmental Quality Council given general supervision over air, water and land quality. (W.S. 35-11-102, -104, -105, -109, -110, -112, -113). Administrative system is set up under Council consisting of Department of Environmental Quality, with an Air Quality Division, Water Quality Division, Land Quality Division, Solid and Hazardous Waste Management Division, Abandoned Mine Land Division, and Industrial Siting Division, and advisory boards. (W.S. 35-11-104, -105, -106, -109, -110, -113, -114). Department of Health also has certain powers relative to investigation of water pollution. (W.S. 35-1-225).

Prohibited Acts of Pollution.

Air.

"Air contaminant" means odorous material, dust, fumes, mist, smoke, other particulate matter, vapor, gas or any combination of foregoing, but does not include steam or water vapor. “Emission” means release into outdoor atmosphere of air contaminants. “Air pollution” means presence in outdoor atmosphere of one or more air contaminants in such quantities and duration as may be injurious to human health or welfare, animal or plant life, or property, or which unreasonably interferes with enjoyment of life or property. (W.S. 35-11-103[b]). No person shall cause, threaten or allow discharge or emission of any air contaminant in any form so as to cause pollution which violates rules, regulations and standards adopted by Environmental Quality Council. (W.S. 35-11-201). Nonmajor sources exempted from permitting requirements until EPA requires such permits under Clean Air Act. (W.S. 35-11-203[c]). Council adopts such rules, regulations and standards after recommendation from Director, Department of Environmental Quality, who in turn receives recommendations from Administrator, Air Quality Division, who in turn consults with advisory board. Environmental Quality Counsel empowered to adopt, and when applicable, enforce provisions of Rule 11 of Wyoming Rules of Civil Procedure in contested hearings conducted by Council. (W.S. 35-11-112[a][vi]). In recommending rules, regulations and standards, Administrator required to take into consideration specified factors. (W.S. 35-11-112, 202). By rule, department may participate in intrastate, interstate, or intrafacility emissions trading programs consistent with Clean Air Act. (W.S. 35-11-214).

Water.

No person, except when authorized by permit, shall cause, threaten or allow discharge of any pollution or wastes into waters of state; alter physical, chemical, radiological, biological or bacteriological properties of any waters of state; construct, install, modify or operate any sewerage system, treatment works, disposal system or other facility, excluding uranium mill tailing facilities, capable of causing or contributing to pollution (except that no permit to operate shall be required for any publicly owned or controlled sewerage system, treatment works or disposal system); increase quantity or strength of any discharge; or construct, install, modify or operate any public water supply or subdivision water supply except that no permit to operate shall be required for any publicly owned or controlled public water supply and permit under this section shall not be required for subdivision water supplies consisting of individual wells serving individual lots of subdivision. (W.S. 35-11-301). “Pollution” means contamination or alteration of physical, chemical or biological properties of waters of state, including change in temperature, taste, color, turbidity or odor or discharge of any acid or toxic material, chemical or chemical compound, whether liquid, gaseous, solid, radioactive or substance, including wastes, which creates nuisance or renders waters harmful, detrimental or injurious to public health, safety or welfare, to domestic, commercial, industrial, agricultural, recreational or other legitimate beneficial uses, or to livestock, wildlife or aquatic life, or which degrades water for intended use or adversely affects environment. “Pollution” does not mean water, gas or other material injected into well to facilitate production of oil or gas or water, derived in association with oil or gas production and disposed of in well if well used to facilitate production or for disposal purposes and if approved by state after determination injection or disposal will not result in degradation of ground or surface water resources. (W.S. 35-11-103[c][i]). “Wastes” means sewage, industrial waste and all other liquid, gaseous, solid, radioactive and other substances which may pollute any waters of state. (W.S. 35-11-103[c][ii]). “Discharge” means any addition of pollution or wastes to waters of state. (W.S. 35-11-103[c][vii]). Administrator has power, after consultation with advisory board, to recommend rules, regulations, standards and permit systems to Director, for adoption by Environmental Quality Council. (W.S. 35-11-112[a][i], 302). Rules, regulations, standards and permit systems must prescribe water quality standards, effluent standards, standards for issuance of permit for construction, installation, modification or operation of a public water supply or sewerage system, treatment works, disposal system or other facility capable of causing or contributing to pollution, standards defining technical competency and certification requirements for operating personnel of public water supply and sewerage systems, treatment works and disposal systems and standards for issuance of permits authorized by 402(b) of Federal Water Pollution Control Act. (W.S. 35-11-302). In recommending standards, rules, regulations and permit systems Administrator must consider certain factors. (W.S. 35-11-302[a][vi]). Administrator can delegate to municipalities, counties, and water and sewer districts authority to issue permits for small wastewater facilities, as defined, and certain publicly owned sewage and water facilities. (W.S. 35-11-304). No commercial oil field waste disposal facilities permitted within one mile of any occupied dwelling house, public or private school, without written consent of owner. No permit without correct bonding requirements for permit specified. (W.S. 35-11-306). Administrator given authority to prescribe financial assurance requirements for hazardous waste underground injection wells. (W.S. 35-11-302[a][viii]).

Land.

No mining operation or operation by which solid minerals are intended to be extracted from earth shall be commenced after July 1, 1973, or continued after July 1, 1974 unless in compliance with Environmental Quality Act, or unless excepted from coverage by Act; provided nothing in Act gives department authority over oil mining operations, as defined. (W.S. 35-11-401). Mining operation does not include building or expansion of utilities, soil conservation conveyances and foundation excavations for purpose of constructing buildings and other structures; excavation by agency of federal, state or local government or its authorized contractors for highway or railroad cuts and for purpose of providing fill, sand, gravel, and other materials for use in connection with public project if federal, state or local government requires reclamation of area; extraction of sand, gravel or dirt by land-owner for own noncommercial use from land owned or leased by him; archaeological excavations; such other surface mining operations Administrator determines to be of infrequent nature and which involve only minor surface disturbances; and surface mining operations, whether commercial or noncommercial, for removal of sand and gravel from area of ten acres or less if operator has written permission from owner or lessee if any of surface provided that operator has complied with notification requirements provided for in statute before commencing operations. (W.S. 35-11-401[e]). “Minerals” means coal, clay, stone, sand, gravel, bentonite, scoria, rock pumice, limestone, ballast rock, uranium, gypsum, feldspar, copper ore, iron ore, oil shale, trona and any other material removed from earth for further processing. (W.S. 35-11-103[e][ii]). “Affected land” means area of land from which overburden is removed, or upon which overburden, development waste rock or refuse is deposited, or both, access roads, haul roads, mineral stock piles, mill tailings, excluding uranium mill tailings and mill facilities, within Nuclear Regulatory Commission license area, impoundment basins, excluding uranium mill tailings impoundments, and all other land whose natural state has been or will be disturbed as result of operations. (W.S. 35-11-103[e][xvi]). Environmental Quality Council has power to establish rules and regulations for reclamation of affected areas according to standards, including but not limited to highest previous use of affected lands, surrounding terrain and natural vegetation, surface and subsurface flowing or stationary water bodies, wildlife and aquatic habitat and resources, and acceptable uses after reclamation including utility and capacity of reclaimed lands to support such uses; backfilling, regrading or recontouring to assure reclamation of land to use at least equal to its highest previous use; time schedules encouraging earliest possible reclamation program consistent with orderly and economic development of mining property; revegetation of affected lands, including species to be used, methods of planting and other details necessary to assure development of vegetative cover consistent with surrounding terrain and established highest prior use standards; stockpiling, preservation and reuse of top soil for revegetation, unless demonstrated to Administrator other methods of reclamation or types of soil are superior; prevention of pollution of waters of state from mining operations, substantial erosion, sedimentation, landslides, accumulation and discharge of acid water, and flooding, both during and after mining and reclamation; establishing methods of estimating cost of reclamation which must be compiled according to established engineering methods; establishing procedures for exploring by dozing; and such other rules and regulations necessary to ensure full compliance with all requirements relating to reclamation and attainment of those objectives directed to public health, safety and welfare. (W.S. 35-11-402). No steep slope surface coal mining operation shall be commenced until Environmental Quality Council has promulgated rules and regulations establishing steep slope mining performance standards. (W.S. 35-11-401[m]). “Steep slope surface coal mining operation” is defined in W.S. 35-11-103(e)(xxi). “Reclamation” means process of reclaiming area of land affected by mining to use for grazing, agricultural, recreational, wildlife purposes, or any other purpose of equal or greater value. Process may require contouring, terracing, grading, resoiling, revegetation, compaction and stabilization, settling ponds, water impoundments, diversion ditches and other water treatment facilities in order to eliminate water diminution to extent that existing water resources are adversely affected, pollution, soil and wind erosion, or flooding resulting from mining or any other activity to accomplish reclamation of affected land to useful purpose. (W.S. 35-11-103[e][i]).

In Situ Mining.

In situ mineral mining or research and development testing is governed by W.S. 35-11-426 through W.S. 35-11-436. “In situ mining” is defined as method of in-place surface mining in which limited quantities of overburden are disturbed to install conduit or well and mineral is mined by injecting or recovering liquid, solid, sludge, or gas that causes leading, dissolution, gasification, liquefaction, or extraction of mineral. (W.S. 35-11-103[f][iv]).

Application for in situ mining permit shall be made to Director of Department of Environmental Quality. No in situ mining operation shall be commenced or conducted unless valid mining permit has been issued to operator. (W.S. 35-11-427). Application for in situ mining permit shall include information relating to soils, vegetation, wildlife, and surface hydrologic information, vegetative cover, meteorological information, and description of any surface water and adjudicated water rights; geologic and groundwater hydrologic information; mine plan and reclamation plan. (W.S. 35-11-428). Every in situ mineral mining permit shall require operator to give to Administrator of Division of Land Quality verbal notice of any excursion. (W.S. 35-11-429). “Excursion” is defined as any unwanted and unauthorized movement of recovery fluid out of production zone as result of in situ mining activities. (W.S. 35-11-103[f][ii]). Every permit shall authorize Administrator to terminate or modify mining operation if excursion cannot be controlled or mitigated. (W.S. 35-11-429[a][ii]). Every permit shall contain other conditions and requirements established by Director of Department of Environmental Quality to employ best practicable technology in carrying out Act. (W.S. 35-11-429[a][v]). Operator shall submit annual report containing general categories of environmental protection and reclamation information, and shall maintain records at mine site of all information resulting from monitoring activities required. (W.S. 35-11-430). Special license to conduct research and development testing may be issued by administrator of land quality for one year period and may be renewed annually. (W.S. 35-11-431). Application for research and development testing license shall include description of nature and scope of testing activity, of general groundwater hydrology and general geology; statement of present and proposed post-reclamation use of land; reclamation plan which includes method for groundwater restoration; manner of proposed revegetation, or other surface treatment, and estimate of costs of reclamation; timetable for accomplishment of reclamation plan; compliance with extensive notice and public participation requirements. (W.S. 35-11-431). If license to conduct research and development testing is granted, administrator shall require licensee to provide bond in amount necessary to ensure complete reclamation. (W.S. 35-11-433). Initial bond shall be in amount equal to estimated cost of reclaiming affected land and restoring any groundwater disturbed by in situ mining during first year of operation under each permit. Renewal bonds shall be in amount equal to estimated cost of reclaiming land to be disturbed during that renewal period. (W.S. 35-11-417).

Solid Waste Management.

Director, through Administrator of Solid Waste Management Division, coordinates activities of all state agencies concerned with solid waste management and disposal. (W.S. 35-11-501). “Solid waste” means garbage, and other discarded solid materials, including solid waste materials resulting from industrial, commercial and agricultural operations, and from community activities, but, unless disposed of at solid waste management facility, does not include solids or dissolved material in domestic sewerage or other significant pollutants in water resources, such as silt, dissolved or suspended solids in industrial waste water effluents, dissolved materials in irrigation return flows; liquids, solids, sludges or dissolved constituents which are collected or separated in process units for recycling, recovery or reuse including recovery of energy, within continuous or batch manufacturing or refining process; or agricultural materials which are recycled in production of agricultural commodities. (W.S. 35-11-103[d][i]). Rules and regulations for solid waste management facilities govern management of any waste which is managed within boundary of any solid waste management facility, and provide requirements as to facility location, design, construction, operation; for bonding and financial assurance; establish categories of solid waste management facilities based on type, volume, facility ownership and operation; and provide for consistency with rules and regulations of U.S. Environmental Protection Agency under Subtitle C of Resource Conservation and Recovery Act. (W.S. 35-11-503). Solid Waste Management Division has bonding or financial assurance requirements for solid waste management facilities as well as forfeiture provisions for such bond. (See W.S. 35-11-504 to W.S. 35-11-507.) “Solid waste management facility” defined as any facility for transfer, treatment, processing, storage or disposal of solid wastes, but does not include certain prescribed facilities otherwise permitted under act. (W.S. 35-11-103[d][ii]). Permit required for any solid waste management facility and requirements for issuance of permit prescribed. (W.S. 35-11-502). No disposal of used lead acid batteries in mixed municipal solid waste or other disposal of lead acid battery except by delivery to automotive battery retailer or wholesaler, or to collection and recycling facility permitted or to secondary lead smelter permitted by EPA. Penalties and other requirements specified. (W.S. 35-11-509). Commercial solid waste management facilities to be permitted under W.S. 35-11-307 and rules promulgated by Environmental Quality Council. (W.S. 35-11-508). Commercial solid waste facility defined as any facility receiving monthly average greater than 500 short tons per day of unprocessed household refuse or mixed household and industrial refuse for management or disposal. (W.S. 35-11-103[d][iv]).

Hazardous Waste Management.

Wyoming Department of Environmental Quality, Solid and Hazardous Waste Management Division, has primacy over enforcement of subtitle (c) of Resource Conservation and Recovery Act. (W.S. 35-11-503[d]). “Hazardous waste” is defined as any liquid, solid, semi-solid or contained gaseous waste or combination of those wastes which, because of quantity, concentration or physical, chemical or infectious characteristics may cause or significantly contribute to detrimental human health effects, or pose substantial present or potential hazard to human health or environment. Only those materials listed as hazardous wastes by EPA's hazardous waste management regulations or which exhibit hazardous waste characteristic specified by EPA shall be considered hazardous waste. Hazardous waste does not include those hazardous wastes exempted under Resource Conservation and Recovery Act or under EPA's hazardous waste management regulations for period that they remain exempted by congressional or administrative action. (W.S. 35-11-103[d][vii]). Transporters and generators of hazardous waste must comply with labeling, handling, manifesting and transporting requirements. (W.S. 35-11-516). Hazardous waste treatment, storage and disposal facilities must obtain permits and pay fees. (W.S. 35-11-517). Department of Environmental Quality may become party to, or may assume EPA's role in federal court order issued under Resource Conservation and Recovery Act prior to date state hazardous waste program authorized. (W.S. 35-11-518). Corrective action requirements applicable to hazardous waste management facility to be consistent with EPA regulations. (W.S. 35-11-519). State hazardous waste management program may terminate if federal funding becomes inadequate. (W.S. 35-11-520). Grants for municipal solid waster landfill monitoring available to local governmental entities. (W.S. 35-11-521). Grants possible for surface or subsurface geophysical studies, preparation of plan for installation of monitoring system, installation of monitoring system, and collection and analysis of samples from monitoring system. (W.S. 35-11-521[b]). Following public notice and hearing, Department of Environmental Quality to adopt criteria for awarding grants. (W.S. 35-11-522[a]). By June 30, 2010, Department of Environmental Quality must evaluate and provide report of groundwater monitoring data describing extent solid waste landfill facilities cause or contribute to pollution of groundwater. (W.S. 35-11-522[e]). Local government must prepare and maintain integrated solid waste management plan by July 1, 2009. (W.S. 35-11-1902). Planning requirement contingent upon legislative funding. (W.S. 35-11-1902[d]). Plan must address minimum 20-year period and include: description of planning area; evaluation of current and projected volumes; evaluation of alternate solid waste management services; indicate how plan to be implemented; objectives including waste diversion, waste collecting and household hazardous waste management; and economic analysis of cost of alternatives. (W.S. 35-11-1904). Carbon Capture and Sequestration prohibited unless permit issued by DEQ. (Regulated at W.S. 35-11-313 et seq).

High-Level Radioactive Waste Storage Facilities.

Any person undertaking to site high-level radioactive waste storage facility in Wyoming must submit application to Director of Wyoming Department of Environmental Quality. (W.S. 35-11-1502). Application shall be accompanied by initial deposit of $500,000 plus any additional amount reverted pursuant to W.S. 35-11-1506(c), purposes of initial deposit and additional payments enumerated, provisions made for return of unused fees, deposit to be held in interest bearing account, billing of additional costs to state and appeal procedures. (W.S. 35-11-1502[c]). Upon receipt of application, Department of Environmental Quality prepares report on environmental, social and economic impacts of facility. (W.S. 35-11-1503). Department of Environmental Quality must then issue report for public review and comment, and submit report with recommendations to Wyoming Legislature. (W.S. 35-11-1504). Specific legislative approval required for siting of any high-level radioactive waste storage facility in Wyoming. (W.S. 35-11-1506). Siting of monitored retrievable storage facility or independent spent fuel storage facility is governed by W.S. 35-11-1506(c).

Low-Level Radioactive Waste Management Compact.

Wyoming is party to Northwest Interstate Compact on Low-Level Radioactive Waste Management. (W.S. 9-6-206—210).

Abandoned Mine Reclamation Program.

Governor, through Administrator of Land Quality Division to perform all acts necessary to implement and administer abandoned mine reclamation program under § 405 of P.L. 95-87 in accord with approved state reclamation plan. (W.S. 35-11-1201). Administrator has right of entry upon and access to property adversely affected by past coal mining practices to restore, reclaim and abate adverse effects if makes certain findings. (W.S. 35-11-1204). State may acquire any land by purchase, donation, or condemnation which is adversely affected by past coal mining practices if acquisition of land necessary for successful reclamation and certain findings are made. (W.S. 35-11-1205). Within six months after completing project to reclaim and restore adverse effects of past coal mining activities on private land Administrator may file lien not to exceed increase in fair market value of land as result of restoration and reclamation. No lien may be filed against property of person who owned surface prior to May 2, 1977 and neither consented, participated nor controlled mining operation which necessitated reclamation project. (W.S. 35-11-1206). Governor, through administration, may establish coal mine subsidence mitigation program to assist affected property owners, which program may include insurance program to cover mine subsidence losses. (W.S. 35-11-1208; W.S. 35-11-1301 to W.S. 35-11-1304).

Underground and Aboveground Storage Tank.

Storage Tank Act of 2007 adopted. (W.S. 35-11-1414 to W.S. 35-11-1428). Underground storage tank includes any one or combination of underground storage tanks, including underground pipes connected thereto used to contain accumulation of regulated substances, and volume of which, including volume of underground pipes connected thereto, is 10% or more beneath surface of ground, but does not include: Farm and residential underground storage tank of 1,100 gallons or less capacity used for storing motor vehicle fuel for noncommercial or agricultural purposes; underground storage tank for heating oil storage for consumption use on premises where stored; septic tanks; pipeline facility, including gathering lines regulated under Pipeline Safety Improvement Act of 2002, Hazardous Liquid Pipeline Safety Act of 1995 or otherwise regulated pipelines under certain acts; surface impoundments, pits, ponds or lagoons; storm water or wastewater collection systems, including oil/water separators at oil and gas production sites; flow-through process tanks; liquid traps and associated gathering lines related to oil and gas production and gathering operations; storage tanks situated in underground area, if storage tank is upon or above surface of floor; underground tanks of 110 gallons or less holding capacity; underground tanks holding very low concentrations of regulated substances; emergency or overflow underground storage tanks; hazardous wastes, as defined, wastewater treatment tank systems, as defined, equipment or machinery holding regulated substances, as defined. (W.S. 35-11-1415[a][ix]). “Aboveground storage tank” means any one or combination of containers, vessels and enclosures, including structures and appurtenances connected to them, constructed of non-earthen materials including concrete, steel or plastic which provide structural support, volume of which including pipes connected thereto is more than 90% above surface of ground, which is used by dealer to dispense gasoline or diesel fuels. (W.S. 35-11-1415[a][xi]). Regulated substance defined as any substance defined in § 101(14) of Comprehensive Environmental Response, Compensation and Liability Act of 1980, but not including any substance regulated as hazardous waste under subtitle C of Resource Conservation and Recovery Act; and petroleum, including crude oil or any faction thereof, which is liquid at standard conditions of temperature and pressure (60 degrees Fahrenheit and 14.7 pounds per square inch absolute). (W.S. 35-11-1415[a][vii]). Each owner or operator of aboveground or underground storage tank must pay annual fee to Department, for deposit in corrective action account, of $200 per tank owned or operated; except if aboveground storage tank holds 5,000 gallons or less, then annual fee only $50 per tank owned or operated; late payment fee of $100 per tank or contaminated site. (W.S. 35-11-1425). Owner/operator shall report known or suspected release to department. (W.S. 35-11-1421). Upon request of State, owner/operator shall provide information and access to any site or premises where aboveground or underground storage tank located; allow State to inspect and obtain samples, make assessments and allow corrective actions. (W.S. 35-11-1422). Corrective action account created to provide financial assurance coverage required by federal law and must be used by Department to take corrective action in response to release (W.S. 35-11-1424); corrective action account, however, not subject to state laws regulating insurance companies (W.S. 35-11-1417). Department required to establish lists of sites contaminated by aboveground or underground tanks; prioritize these sites based on public health, welfare and environmental concerns; and use corrective action account monies to take corrective action. (W.S. 35-11-1424). Environmental pollution financial responsibility account created to provide for financial assurance coverage required by federal law and to compensate third parties for damage caused by releases from aboveground and underground storage tanks. (W.S. 35-11-1427). Application and disbursement of such funds governed by W.S. 35-11-1428. Financial assurance or insurance and notification requirements for new tanks. (W.S. 35-11-1419). Notification of transfer of ownership. (W.S. 35-11-142). Aboveground assessment requirements. (W.S. 35-11-1429).

Variances from rule, regulation, standard or permit promulgated under Environmental Quality Act may be obtained after notice and hearing, with exception that water variance may not be obtained, except pursuant to water quality rules, regulations and standards. (W.S. 35-11-601). No variance permitted which would result in less stringent controls or requirements for surface coal mining and reclamation then those authorized in P.L. 95-87. (W.S. 35-11-601[p]). Application for variance made to Administrator of appropriate division. (W.S. 35-11-601[a]). Administrator, with approval of Director, makes decision on application for variance within 60 days after hearing. Any decision granting variance final unless within 30 days after notice of decision aggrieved party requests hearing before Environmental Quality Council. (W.S. 35-11-601[a], [g], [h]). If variance granted because no practicable means known or available for adequate prevention, abatement or control of pollution, or mining operation, variance continues only until necessary means for prevention, abatement or control become known and available, and subject to taking any substitute or alternate measures Director may prescribe. (W.S. 35-11-601[b]). If variance granted because compliance with particular requirement or requirements from which variance sought will necessitate taking of measures which because of extent or cost must be spread over a considerable period of time, variance must be for period not to exceed such reasonable time as in view of Director is requisite for taking necessary measures, and any variance so granted contains timetable for taking necessary action in an expeditious manner. (W.S. 35-11-601[c]). If variance granted for any other reason and on ground it is justified to relieve or prevent hardship, variance must be for not more than one year. (W.S. 35-11-601[e]). Any variance granted is renewable on terms and conditions which would be appropriate for granting of initial variance, and application for renewal must be made at least 60 days prior to expiration of variance. If complaint filed with Director re: variance, renewal can only be allowed after notice and hearing before Environmental Quality Council. (W.S. 35-11-601[f]). Renewal of variance granted by Director final unless within 30 days of notice of decision aggrieved party requests hearing before council. (W.S. 35-11-601[g], [h]).

Wyoming Wetlands Act.

It is policy of state that water management and development and wetland preservation activities should be balanced to protect and accommodate private property, industry, water and wetland interests and objectives. (W.S. 35-11-309[e]). After July 1, 1996, no persons shall drain water from naturally occurring or man-made wetland, comprising five acres or more, without first notifying Department of Environmental Quality that water to be drained will not flood or adversely affect downstream lands. (W.S. 35-11-310[a]). Failure to notify department of wetland drainage does not constitute violation of Environmental Quality Act (W.S. 35-11-901), but precludes participation in mitigation credit banking system as provided by W.S. 35-11-311 (W.S. 35-11-310[c]). No notice to department required for disturbances of wetlands resulting from mining operations conducted pursuant to mining permits issued by department. (W.S. 35-11-310[b]). Department must implement surface water point source discharge permit fee system for each national pollutant discharge elimination system permit. (W.S. 35-11-312[a]). On July 1 of each year, annual permit fee of $100 will be assessable for each national pollutant discharge elimination system permit and for each permit authorization held by any person under W.S. 35-11-301 during any portion of preceding 12 month period. (W.S. 35-11-312[a]).

Enforcement.

Administrators of air quality, land quality, and water quality divisions, under control and supervision of director, enforce and administer Environmental Quality Act and rules, regulations and standards promulgated thereunder. (W.S. 35-11-110[a]). Administrators have power to make recommendations to director regarding issuance, denial, amendment, suspension or revocation of permits and licenses and to determine amount of bond to be posted to ensure reclamation of lands; to determine degrees of air, water or land pollution throughout state; to administer permit or certification systems; to require owners and operators of any point source of pollution to complete plans and specifications for any application for permit, and to require submission of reports regarding actual or potential violations of Act or regulations thereunder; to require owner and operator of any point source of pollution to establish and maintain records, install, use and maintain monitoring equipment or methods, sample effluents, discharges or emissions; and provide other information as may be reasonably required and specified; and to possess such further powers as are reasonably necessary and incidental to proper performance of duties imposed upon air, water quality and land divisions. (W.S. 35-11-110[a]). Director designates persons authorized to enter and inspect sources of air, water and land pollution and to copy records required to be maintained and to investigate actual or potential sources of air, water or land pollution and for determining compliance or noncompliance with Act and any rules, regulations, standards, permits or orders issued thereunder. (W.S. 35-11-109[a][vi]). Director also has power to investigate violations of Act and rules and regulations adopted thereunder and to prepare and present enforcement cases before Environmental Quality Council. (W.S. 35-11-109[a][vii]). Environmental Quality Council conducts hearings in any case contesting administration or enforcement of any law, rule, regulation, standard or order issued or administered by Director or Administrators and conducts hearings in any case contesting grant, denial, suspension, revocation or renewal of any permit, license, certification or variance authorized or required. (W.S. 35-11-112[a][iii],[v]). Director may allow electronic permitting and reporting as provided by Uniform Electronic Transaction Act (W.S. 40-21-101 to W.S. 40-21-119) and any applicable federal electronic requirements (W.S. 35-11-109[b]). Forms can be accessed at http://deq.state.wy.us/departmentdivisionforms.htm.

Complaints.

If Director or Administrators have any cause to believe any persons are violating any provision of Environmental Quality Act or any rule, regulation, standard, permit, license, or variance issued pursuant to Act, or in case written complaint filed with Department of Environmental Quality alleging such violation. Director, through appropriate Administrator, must promptly initiate investigation. (W.S. 35-11-701[a]). For other than surface coal mining operations, if violation found, proper Administrator attempts to eliminate violation by conference, conciliation and persuasion. (W.S. 35-11-701[c]). If this fails, Director serves written notice of violation requiring person complained against to cease and desist from violation in such reasonable time as Director may determine. (W.S. 35-11-701[c][i]). Any such cease and desist order becomes final unless within ten days of service thereof hearing before Environmental Quality Council requested by person served, in which event order stayed until Council makes final determination. (W.S. 35-11-701[c][ii]). After hearing, Council affirms, modifies or rescinds cease and desist order; if violation found, Council also may issue appropriate order or orders for prevention, abatement or control of violation or for taking of corrective action, which may include timetable for compliance therewith. (W.S. 35-11-701[c][iii]).

Judicial Review.

Any aggrieved party, any person whose complaint upon hearing denied, and any person denied variance or permit may obtain judicial review pursuant to provisions of Wyoming Administrative Procedure Act filed within 30 days of order or final action. (W.S. 35-11-1001[a]).

Penalties.

Generally.

Any person who violates, or any director, officer or agent of corporate permittee who willfully and knowingly authorizes, orders or carries out violation of any provision of Environmental Quality Act, or any rule, regulation, standard, permit, license or variance adopted thereunder or who violates any determination or order of Environmental Quality Council is liable for penalty not to exceed $10,000 for each day during which violation continues and other penalties. (W.S. 35-11-901[a]). Separate penalty provisions apply to violations by surface coal mining operations. (W.S. 35-11-902). Person violating Act, rule, regulation or causing death of fish, aquatic life or game or bird life liable to pay to state additional sum for reasonable value of fish, aquatic life, game or bird life destroyed. (W.S. 35-11-903). Any person willfully or knowingly violating or any director, officer or agent of corporate permittee willfully and knowingly authorizing, ordering or carrying out violation of Act or rule, regulation, standard, permit, license, variance or limitation adopted thereunder shall be fined not more than $25,000 per day, or imprisoned not more than one year, or both. If conviction for violation committed after first conviction, punishment shall be fine of not more than $50,000 per day of violation, or by imprisonment for not more than two years, or both. For multiple violations, penalties may be assessed up to maximum amount specified for each day of each separate violation. (W.S. 35-11-901[j]). Person knowingly making false statement, representation or certification in any application, record, report, plan or other document filed or required to be maintained under Act, or who falsifies, tampers with, or knowingly renders inaccurate any monitoring device or method required to be maintained under Act shall upon conviction be fined not more than $10,000, or imprisoned for not more than one year or both. (W.S. 35-11-901[k]). Failure to cap, seal or plug drill holes sunk in exploration for locatable or leasable minerals except coal in state in compliance with law subjects person so failing to comply with fine of not more than $5,000 or imprisonment in county jail for not more than 90 days. (W.S. 35-11-404[a], [k]). Violations of Wyoming's Radioactive Waste Storage Facilities

Act may be enjoined, and violators subjected to one year in prison and $5,000 fine. (W.S. 35-11-1507).

Limitation on Civil Penalties.

If owner or operator of facility regulated under Wyoming Environmental Quality Act voluntarily reports to Department of Environmental Quality violation disclosed by environmental audit conducted under W.S. 35-11-1105, Department of Environmental Quality is prohibited from seeking civil penalties or injunctive relief for violation unless: (i) Facility under investigation for any violation at time violation reported; (ii) owner or operator does not take action to eliminate violation; (iii) violation result of gross negligence or recklessness; or (iv) Department of Environmental Quality assumed primacy over federally-delegated environmental law and waiver of penalty authority would result in state program less stringent than federal program. Nonetheless, where federally-delegated program requires imposition of penalty for violation, voluntary disclosure of violation shall be considered mitigating factor in determining penalty, to extent allowed by federal law. (W.S. 35-11-1106[a]). If reporting violation mandatory under applicable law, rule or regulation, then report not voluntary under this section. (W.S. 35-11-1106[b]). Elimination of administrative or civil penalties does not apply if entity has been found by court to have committed serious violations that constitute pattern of continuous or repeated violations of environmental laws, requirements or orders. (W.S. 35-11-1106[d]). Environmental audit report prepared by owner or operator under W.S. 35-11-1105 privileged and not admissible in any civil, criminal or administrative proceedings, with some exceptions. (W.S. 35-11-1105[c]).

Permits.

Generally.

When Department has, by rule or regulation, required permit to be obtained, it is duty of Director to issue such permits upon proof by applicant procedures of Environmental Quality Act and rules and regulations promulgated thereunder have been complied with. In granting permits Director may impose such conditions as may be necessary to accomplish purposes of Act which are not inconsistent with existing rules, regulations and standards. Administrator shall not issue permits and may issue license under Act only as authorized by Act. (W.S. 35-11-801[a]). Director shall take final action on application for permit or extension thereof within 60 days after receipt of same unless public notice or hearing required by state or federal statute. (W.S. 35-11-801[b]). If Director refuses to grant permit, applicant may petition for hearing before Environmental Quality Council and Council must take final action within 30 days from date of hearing. (W.S. 35-11-802).

Land.

No mining may be commenced or conducted on land for which there is not in effect a valid mining permit, and operator conducting actual mining operations must be licensed to do so in conformance with approved reclamation plan. (W.S. 35-11-401[a], W.S. 35-11-405[a]). Mining permit once granted remains in force until termination of all mining and reclamation operations, except surface coal mining permits issued subsequent to approval of state program under P.L. 95-87, which permits, unless longer term authorized, shall be issued for term of five years. (W.S. 35-11-405[b]). Within two months following final approval of state program under § 503 of P.L. 95-87 (30 U.S.C. § 1253), all operators of surface coal mines operating under Act must apply for new permit covering those lands expected to be mined or reclaimed after eight months from state program approval (W.S. 35-11-401[d]). Act contains detailed statutory provisions re applications for permits to mine (W.S. 35-11-406); when applications are complete or deficient (W.S. 35-11-103[e][xxii], [e][xxiv], W.S. 35-11-406[e]); applications for license to mine (W.S. 35-11-410); filing of annual reports by operators (W.S. 35-11-411); applications for mineral exploration by dozing (W.S. 35-11-414); duties of operators (W.S. 35-11-415); protection of surface owners (W.S. 35-11-406 to W.S. 35-11-416); and bonding of operators (W.S. 35-11-417). “Operator” means person engaged in mining either as principal who is or becomes owner of minerals as result of mining or who acts as agent or independent contractor on behalf of principal in conduct of mining operations. (W.S. 35-11-103[e][ix]).

Land Use Planning.

Note: Land Use Planning Act has not been funded by legislature since 1982, and its provisions are deemed inoperative. Under Wyoming's Land Use Planning Act, W.S. 9-8-101 to W.S. 9-8-302, Wyoming land use commission must adopt, within 12 months following first meeting of commission and after holding public hearings, statewide land use goals, policies, and guidelines, in accordance with best interests of state, counties, cities, towns and regions. Guidelines must include definitions of land uses such as, but not limited to, agricultural, residential, commercial, industrial, open space, transportation, utilities, recreational, historic, scenic and water storage. (W.S. 9-8-202[a][vi]). All local governments must then develop local land use plans within their jurisdictions which must be consistent with established state guidelines. All local land use plans subject to review and approval by commission. (W.S. 9-8-301[a]). Cities and towns (W.S. 15-1-601 to W.S. 15-1-611) and counties (W.S. 18-5-201 to W.S. 18-5-208) can separately develop own land use plans (W.S. 9-8-302[a]), or they may jointly establish land use plan (W.S. 9-8-302[b]; W.S. 16-1-101 to W.S. 16-1-110). All counties must develop county wide land use plan which must incorporate land use plans of all incorporated cities and towns within county. (W.S. 9-8-301[c]).

Brownfields.

35-11-1601 to W.S. 35-11-1613 sets forth requirements and procedures necessary for voluntary remediation of eligible sites while prohibiting unpermitted releases of contaminants into environment, and establishes criteria for application of site-specific, risk-based remediation. Remediation not voluntary if required by order of Department of Environmental Quality, Environmental Quality Council, federal Environmental Protection Agency, or court having jurisdiction, or if person failed or refused to enter into remediation agreement or breached such agreement. (W.S. 35-11-1601[b]). For eligible sites meeting specific conditions set forth in Environmental Quality Act, after application to Department of Environmental Quality, notice must be given to all surface owners contiguous and adjacent to site with opportunity for public participation. (W.S. 35-11-1602 to W.S. 35-11-1604). Long term land use restrictions may be established. (W.S. 35-11-1607; W.S. 35-11-1609). Upon satisfaction of statutory requirements, owner or prospective purchaser can receive covenant not to sue or no further action letter. (W.S. 35-11-1607; W.S. 35-11-1608). Reopening or termination of remedy agreements, covenants not to sue, certificates of completion, or no further action letters governed by W.S. 35-11-1610.

Orphan Site Remediation.

Director of Department of Environmental Quality authorized to expend funds for remediation of qualifying orphan sites. (W.S. 35-11-1701).

Immunity for Innocent Owners.

For person defined as innocent owner under Environmental Quality Act, immunity is extended for investigation, monitoring, remediation, or other response action regarding contamination attributable to release, discharge, or migration of contaminates on his property. (W.S. 35-11-1802). “Innocent owner” is defined under act as person who did not cause or contribute to source of contamination and who is: (i) Owner of real property that has become contaminated as result of release or migration of contaminates from source not located on or at such real property, (ii) owner of real property who can show with respect to such property that he has no liability for contamination under federal Comprehensive Environmental Response, Compensation and Liability Act, (iii) owner of real property who at time of becoming owner of such property did not know or should have not reasonably known about presence of contamination on such property, (iv) lender or fiduciary who owns or holds security interest in land, unless such lender or fiduciary participated in management of site at time that owner or operator thereof caused release or migration of contaminates, or (v) unit of state or local government which acquired ownership or control through bankruptcy, tax delinquency, abandonment, or other circumstances in which government acquires title by virtue of its function as sovereign, unless state or local government contributed to such contamination. (W.S. 35-11-1801[a]). No person who owns or operates lands or facilities subject to permitting or corrective action requirements or hazardous waste rules and regulations promulgated under Environmental Quality Act or who is hazardous waste generator subject to corrective action requirements of such rules and regulations shall be considered innocent owner. (W.S. 35-11-1801[b]). To be eligible for immunity as innocent owner, person shall grant to Department of Environmental Quality or to person designated by Department reasonable access to land for purposes of investigation, monitoring, or remediation, comply with any requirements established by Department of Environmental Quality that are necessary to maintain state authorization to implement federal regulatory programs, not use real property in manner that causes exposure of public to harmful environmental conditions, and comply with any engineering or institutional controls applicable to real property. (W.S. 35-11-1802[b]). Any person knowingly transferring, conveying, or obtaining interest in land to avoid liability for contamination, remediation, or compliance with any provision of Environmental Quality Act shall not be innocent owner. (W.S. 35-11-1803[a]). Notwithstanding eligibility for immunity, innocent owner who undertakes cleanup of property must comply with all applicable provisions of Environmental Quality Act. (W.S. 35-11-1803[b]).

Real Estate Subdivisions.

Boards of County Commissioners given broad powers to regulate formation of subdivisions in unincorporated areas of counties. (W.S. 18-5-301 to W.S. 18-5-317).

Industrial Development and Siting Act.

No person shall commence construction of facility as defined in act, without first having obtained permit issued with respect to such facility by industrial siting council. Any such facility shall be constructed, operated and maintained in conformity with permit and any terms, conditions and modification contained therein. (W.S. 35-12-106[a]). Council may allow electronic permitting and reporting requirements to be conducted electronically as provided by Uniform Electronic Transactions Act (W.S. 40-21-101 to W.S. 40-21-119). (W.S. 35-12-106[f]). Civil and criminal penalties are provided. (W.S. 35-12-118). “Industrial facility” or “facility” means any industrial facility with estimated construction cost of $96,900,000 as of May 30, 1987; also includes, regardless of construction cost, any commercial waste incineration or disposal facility capable of receiving more than 500 short tons per day of household refuse or mixed household and industrial refuse, any commercial facility which incinerates or disposes of any regulated quantity of hazardous wastes which are subject to hazardous waste shipping manifest requirements under Subtitle C of Resource Conservation and Recovery Act, any commercial radioactive waste management facility defined by W.S. 35-11-103(d)(v), or certain facilities constructed solely for disposal of overburden, development waste rock or refuse from mining. (W.S. 35-12-102[a][vii]). Council adjusts this amount, up or down, each year using recognized construction cost indices as determined by council to be relevant to actual change in construction cost applicable to general type of construction covered by Act. (W.S. 35-12-102[a][vii]). Act contains detailed provisions relative to applications for permit, applications for waiver of permit, studies of permit, notices of filing permit, hearings on permit, additional investigation and study re permits, additional notices of hearing, additional hearing, considerations and criteria for council re decision of council, actual decision of council, judicial review of council's decisions, annual long range planning and supervision of granted permits. (W.S. 35-12-106 to W.S. 35-12-119). Non-mineral processing facilities to be constructed in existing industrial parks, as designated by local governments, are exempt from payment of fees and certification procedures, and state and local governmental units and agencies are exempt from application and permit procedures, but are subject to informational requirements of W.S. 35-12-119(a)(iii), (iv), (v). (W.S. 35-12-119[a], [b]). Electric transmission lines not exceeding 500,000 volts, oil and gas drilling facilities, all pipelines, except coal slurry pipelines, oil and gas producing facilities and oil and gas well field activities are exempt from permit procedure but are subject to informational requirements of W.S. 35-12-109(a)(iii), (iv), (v), (viii). (W.S. 35-12-119[c], [d]). High-level radioactive waste storage facilities are exempt from jurisdiction of Industrial Development Information and Siting Act. (W.S. 35-11-1502[a]).

13 ESTATES AND TRUSTS

13.01 ADMINISTRATION:

See topic 13.09 Executors and Administrators.

13.02 ADVANCEMENTS:

See topic 13.07 Descent and Distribution.

13.03 ALLOWANCES:

See topic 13.09 Executors and Administrators.

13.04 CLAIMS:

See topic 13.09 Executors and Administrators; category 5 Civil Actions and Procedure, topic 5.17 Pleading.

13.05 DEATH:

Any person who leaves his usual place of abode, and who has not been seen or heard from by his relatives or other persons reasonably expected to hear from him, for seven years, is presumed to be dead, and administration may be had on his or her property. (W.S. 2-7-101). Findings of death made pursuant to Federal Missing Persons Act (37 U.S.C. § 551 et seq.) must be received in evidence in courts of state as evidence of such death (W.S. 1-12-401).

Survivorship.

Uniform Simultaneous Death Act has been adopted. (W.S. 2-13-101 to W.S. 2-13-107). When two persons perish in same calamity and it is not shown who died first and there are no particular circumstances from which it can be inferred, survivorship is presumed from probabilities resulting from strength, age and sex, according to following rules: (i) If both who perished under age of 15 years, older is presumed to have survived; (ii) if both were of ages of 60 years or older, younger is presumed to have survived; (iii) if one under 15 years of age and other 60 years of age or older, former presumed to have survived; (iv) if both are 15 years of age or older or under 60 years of age, and sexes are different, male presumed to have survived; if sexes are same, older presumed to have survived; (v) or if one is under age of 15 years or is 60 years of age or older, and other between those ages, latter presumed to survive. (W.S. 1-12-501).

Actions for Death.

Actions for wrongful death must be maintained by personal representative of deceased. (W.S. 1-38-102[a]). Must be commenced within two years after death. (W.S. 1-38-102[d]). Court or jury awards such damages, pecuniary and exemplary, as shall be deemed fair and just. Every person for whose benefit action brought proves his or her respective damages, and court or jury awards each such person that amount of damages to which it considers such person entitled, including damages for loss of probable future companionship, society and comfort. (W.S. 1-38-102[c]). Intestacy provisions of Wyoming Probate Code (W.S. 2-4-101) govern identity of persons for whose benefit action can be brought in particular case. (Wyo., 770 P.2d 698). If deceased leaves husband, wife, child, father or mother, no debt of deceased may be satisfied out of proceeds of any judgment obtained. (W.S. 1-38-102[b]).

Death Certificate.

See category 10 Documents and Records, topic 10.04 Records, subhead Vital Statistics.

Uniform Anatomical Gift Act adopted. (W.S. 35-5-101 to W.S. 35-5-109).

13.06 DECEDENTS' ESTATES:

See topics 13.07 Descent and Distribution, Executors and Administrators, Wills; category 8 Debtor and Creditor, topic 8.10 Homesteads.

13.07 DESCENT AND DISTRIBUTION:

All property of intestate shall descend and be distributed in parcenary to intestate's kindred, male and female, subject to payment of debts, as follows: (1) If intestate leaves husband or wife and children, or descendants of children surviving, then one-half to surviving husband or wife, and residue to surviving children or descendants of children; (2) if descendant leaves husband or wife and no child nor descendants of child, then all to surviving husband or wife; (3) if intestate leaves no husband or wife, then to intestate's children surviving, and descendants of his children who are dead, descendants collectively taking share which their parents would have taken if living; (4) if intestate leaves no husband or wife, nor any child or descendants of any child, then to intestate's father, mother, brothers, sisters, and to descendants of brothers and sisters who are dead, descendants collectively taking share which their parents would have taken if living, in equal parts; and (5) if intestate leaves none of above, then to intestate's grandfather, grandmother, uncles, aunts and their descendants, descendants taking collectively, share of their immediate ancestors, in equal parts. (W.S. 2-4-101). See also topic 13.09 Executors and Administrators.

Half Blood.

Persons of half blood inherit same share they would inherit if they were of whole blood, but stepchildren and foster children and their descendants do not inherit. (W.S. 2-4-104).

Posthumous Children or Other Issue.

Persons conceived before decedent's death but born thereafter inherit as if they had been born in decedent's lifetime. (W.S. 2-4-103).

Illegitimates inherit from mother; and from father, if relationship of parent and child has been established under Uniform Parentage Act, W.S. 14-2-401 to W.S. 14-2-907. (W.S. 2-4-107). When illegitimate leaves surviving spouse and issue they take as in other cases; if no issue surviving spouse takes all; if neither surviving spouse nor issue estate goes one-half to mother and one-half to mother's children and their issue; if none of these survive, to mother's next of kin. (W.S. 2-4-102).

Adopted Children.

See category 14 Family, topic 14.01 Adoption, subhead Effect of Adoption.

Adopted person is child of adopting parent and of natural parents for inheritance purposes. (W.S. 2-4-107[a][i]). Adopted person shall inherit from all other relatives of adoptive parent and such relatives shall inherit from adoptive person as though he were natural child. (W.S. 2-4-107[a][ii]).

Determination of Heirship.

Proceeding is available in favor of heir or one deriving title to real property from decedent, when decedent has been dead more than two years, intestate. Proceedings are as follows:

petition to district court; order fixing time of hearing not less than 30 days from filing of petition; published notice for four weeks; order determining heirship. (W.S. 2-9-201 to W.S. 2-9-203).

Advancements.

When person dies intestate, property which he gave in his lifetime is treated as advancement only if declared in contemporaneous writing by decedent or acknowledged in writing by heir. Property is valued as of time heir came into possession or enjoyment of it. If heir dies before decedent property is not advancement to heir's issue unless declaration or acknowledgment provides otherwise. (W.S. 2-4-108[a]). Money supplied to minor without view to apportion or settlement in life is not advancement. (W.S. 2-4-108[b]). If other heirs desire property received by heir during decedent's lifetime to be charged as advancement, judge shall cite parties to appear, shall hear proof upon subject and shall determine amount of such advancement to be charged. (W.S. 2-4-108[c]).

Election.

Surviving spouse of married decedent, domiciled in state has right to take against net estate as follows: One-half if there are no surviving issue of previous marriage; or if surviving spouse is parent of any surviving issue of decedent; or one-fourth if surviving spouse is not parent of any surviving issue of decedent. (W.S. 2-5-101[a]). If married decedent is not domiciled in state surviving spouse's right to election is governed by state of decedent's domicile. (W.S. 2-5-101[b]). Court shall advise surviving spouse of this election within three months (W.S. 2-5-104), and election must be made within three months after will is admitted to probate or 30 days after being notified by court, whichever is later (W.S. 2-5-105).

Escheat.

On failure of legal heirs, property escheats to state. (W.S. 9-5-203). See also topic 13.16 Wills, subhead Unclaimed Legacies; categories 3 Business Regulation and Commerce, topic Banks and Banking, subhead Unclaimed Deposits; Property, topic Absentees, subhead Escheat.

13.08 ELECTION:

See topic 13.16 Wills.

13.08A ESTATES: (in property)

See category 21 Property, topic 21.16 Real Property.

13.09 [RESERVED]

13.10 EXECUTORS AND ADMINISTRATORS:

Jurisdiction over administration of estates of decedents is exclusively in district courts. (W.S. 2-2-101).

Venue is: (1) In county where decedent resided at time of death; (2) in county in which decedent may have died leaving property therein; (3) in county in which any part of the estate may be if decedent died out of the state and was not a resident therein at time of death; (4) in county in which any part of estate may be, if decedent was not a resident of state and died within state but did not leave any estate in county in which he died; (5) in any other case in county in which decedent died if application be made for letters in that county. (W.S. 2-2-102).

Preferences in Right to Administer.

Letters of administration issue in following order: (1) Surviving spouse or his or her nominee; (2) children; (3) parents; (4) brothers or sisters; (5) grandchildren; (6) next of kin; (7) creditors; (8) any competent person. (W.S. 2-4-201). If person named in will as executor fails to petition for 30 days after he has knowledge of death of testator, court may appoint other competent person unless good cause shown. (W.S. 2-6-202). Letters testamentary issue in following order: (1) Person designated in will; (2) any beneficiary named in will, or person nominated by beneficiaries; (3) any creditor of deceased or his nominee; (4) such other person as court may find qualified. (W.S. 2-6-208).

Eligibility and Competency.

Minor or person adjudged incompetent to execute duties of trust may not be appointed administrator. (W.S. 2-4-203). Married woman may act. (W.S. 2-4-204).

Nonresident may not act as administrator unless he is coadministrator with resident (W.S. 2-4-201) but may act as executor provided he appoints resident agent for service of process (W.S. 2-11-301).

Bank or trust company organized under laws of U.S. or of Wyoming may act as executor or trustee, but if not authorized to do business in Wyoming must appoint resident agent for service of process. (W.S. 2-11-301).

Qualification.

Must take and subscribe oath that he will perform his duties according to law. Oath must be attached to letters. (W.S. 2-3-101). All personal representatives must file bonds to be fixed by court (W.S. 2-3-102), excepting that if bond requirement is expressly waived by will, statute, or written waiver of distributees, personal representative may qualify without bond (W.S. 2-3-111).

Exemption from Bond.

See subhead Qualification, supra.

Issuance of Letters.

Letters testamentary or of administration are issued upon proof of will or upon granting of application for administration (W.S. 2-6-203, W.S. 2-4-209), and after qualification (W.S. 2-3-101).

May be removed by order of District Court for failure to post additional bond. (W.S. 2-3-116). After verified petition has been filed by person interested in estate that executor or administrator has or is about to become insolvent or has removed or is about to remove from state, or that for some other cause bond is insufficient (W.S. 2-3-113), court if satisfied that matter requires investigation shall issue citation (W.S. 2-3-114) and hearing shall be held (W.S. 2-3-115).

May be removed by order of court after hearing for default or removal from state. (W.S. 2-3-138).

Special Kinds of Administration.

Following is provided for: Special administrators. (W.S. 2-7-301).

Public Administrators.

No provisions for.

Inventory and Appraisement.

Executor or administrator must file inventory within 120 days after appointment. (W.S. 2-

7-403). Executor or administrator must file appraisal of values of estate assets within 120 days after filing of inventory. (W.S. 2-7-404). All assets with readily determinable value may be appraised by one disinterested person; all assets without readily determinable value shall be appraised by disinterested persons as to fair market value as of date of death; and different persons may be employed to appraise different assets. (W.S. 2-7-404).

General Powers and Duties.

Must take possession of estate and collect all debts due it. (W.S. 2-7-103). May sue and be sued in that connection. (W.S. 2-7-104). May compromise claims with court approval. (W.S. 2-7-109). May sell or mortgage real or personal property or lease real property with court approval. (W.S. 2-7-612). Such approval is obtained by filing petition; having hearing upon such notice as court prescribes; and obtaining order authorizing sale, lease or mortgage in such amount, upon such terms and for such period as fixed by court. (W.S. 2-7-614 to W.S. 2-7-615).

Notice of Appointment.

Combined with notice to creditors. (W.S. 2-7-201).

Notice to creditors to present their claims within three months after first publication of notice, or have their claims barred, must be published for three consecutive weeks in daily or weekly newspaper of general circulation in county where probate is pending. (W.S. 2-7-201). Notice shall also be mailed to each creditor of decedent whose identity is reasonably ascertainable 30 days prior to expiration of three month period. (W.S. 2-7-205).

Presentation of Claims.

Claims whether due, not due or contingent, are barred if not filed in duplicate with clerk of court within three months after first publication, or before expiration of 30 days after mailing of notice, whichever date is later; however, that claimant may be entitled to equitable relief due to peculiar circumstances. (W.S. 2-7-703).

Claim on which action was pending at time of decedent's death must be presented in same manner as other claims; otherwise there can be no recovery. (W.S. 2-7-709).

All claims are barred unless letters are issued within two years after decedent's death. (W.S. 2-4-211; W.S. 2-4-212).

Proof of Claims.

All claims must be supported by affidavit by claimant or by someone in his behalf. (W.S. 2-7-704).

The following is an approved, though not required, form of affidavit of claim:

Form

State of Wyoming, County of . . . . ss. District Court, ... Judicial District. In the matter of the estate of . . . ., deceased.

The undersigned, creditor of . . . ., deceased hereby presents his claim against the Estate of said deceased, with necessary vouchers for approval as follows, to wit:

Estate of . . . ., deceased. TO . . . . DR. (Describe claim in detail).

State of Wyoming, County of . . . . ss. I . . . . whose foregoing claim is herewith presented to . . . . the . . . . of said deceased, being duly sworn, state that the sum of $. . . .

is justly due me thereon, that no payments have been made thereon which are not credited, and that there are no offsets to the said claim to my knowledge. (Signature and jurat).

Approval or Rejection of Claims.

Must be allowed or rejected by executor or administrator within 30 days after expiration of time for filing claims in writing filed with clerk. Administrator or executor must immediately notify claimant of his rejection by certified mail. (W.S. 2-7-712).

Suit must be brought in proper court against personal representative within 30 days after date of mailing of notice of rejection. (W.S. 2-7-718). If personal representative is creditor of decedent, he must file claim, and court shall appoint temporary administrator to handle claim. Temporary administrator shall investigate and file report recommending allowance or disallowance of claim. Unless court allows claim it shall be disposed of as contested claim. (W.S. 2-7-708).

Every claim allowed shall be ranked among acknowledged debts of estate to be paid in due course of administration. (W.S. 2-7-712).

If claim is not due or contingent personal representative may pay present value of claim if claimant consents or may arrange for future payment by creating trust, giving mortgage, obtaining bond or otherwise. (W.S. 2-7-705).

Priorities.

Claims are to be paid in following order of preference: (i) Court costs; (ii) other costs of administration; (iii) reasonable funeral and burial expenses; (iv) allowances for surviving spouse and minor children payable under W.S. 2-7-503 and W.S. 2-7-504; (v) all debts and taxes having preference under laws of U.S.; (vi) reasonable and necessary medical and hospital expenses of last illness of decedent, including compensation of persons attending him at his last illness; (vii) all taxes having preferences under laws of this state; (viii) all debts owing to employees for labor performed during 90 days next preceding death of decedent; (ix) all claims allowed under W.S. 2-7-707; (x) all other claims allowed. (W.S. 2-7-701).

Sales.

Real or personal property may be sold for payment of debts, distribution of estate, or for other purposes in best interest of estate. (W.S. 2-7-612, 615). Order of court is necessary (W.S. 2-7-615), except for personal property of perishable nature or personal property for which there is regularly established market (W.S. 2-7-613). Sales require: Petition, notice, except court may waive notice of sale of personal property. (W.S. 2-7-615). Sale may be at such price and upon such terms as court may authorize. (W.S. 2-7-615). Terms of sale shall be as court may authorize except credit for more than 12 months shall be extended only after hearing and notice to interested parties. (W.S. 2-7-617). Any person interested in estate may give bond conditioned to pay such demands against estate as court may require not to exceed value of property, in order to prevent sale. (W.S. 2-7-619).

After making any sale of real property, personal representative shall make verified report to court. Court if satisfied that sale is advantageous to estate and made in conformity with law shall confirm sale. If real property has been sold without appraisal or at private sale for less than appraised value court may set time and place for hearing and may prescribe notice to be served on interested persons. Prior to such hearing interested persons may file written objections to entry of order approving sale. Court may approve or reject sale in best interests of estate. (W.S. 2-7-624).

Actions by Representative.

Representative may bring actions in general for recovery and protection of assets. (W.S. 2-7-104; W.S. 2-7-105). Pending actions by decedent may be revived in representative's name if right of action survives. (W.R.C.P. 25[a]). All pending actions survive except actions for: libel, slander, malicious prosecution, assault or assault and battery, nuisance or against justice of peace for misconduct in office. (W.S. 1-4-102).

Actions Against Representative.

Claims (including pending actions) must first be presented and rejected, except that lien or mortgage may be foreclosed without claim being rejected, where recourse against property of estate other than that subject to mortgage or lien is waived. (W.S. 2-7-717). See subhead Approval or Rejection of Claims, supra, as to time within which action must be commenced. Same actions may be revived against representative as may be revived by him. (W.R.C.P. 25[a]). See subhead, Actions by Representative, supra.

Allowances.

Widow and children of decedent are entitled to a reasonable provision for their support, to be allowed by court. (W.S. 2-7-501). All such allowances are paid in preference to other charges except funeral charges and expenses of administration. (W.S. 2-7-503).

Widow's Quarantine.

This term is not used in the statutes but surviving husband, widow or minor children may remain in possession of homestead, family wearing apparel and the furniture of decedent until letters are granted and inventory is returned. (W.S. 2-7-501).

Intermediate Accountings.

In event that final accounting has not been filed within one year, personal representative must file interim accounting at end of one year and annually thereafter. Court on application of any creditor or any distributee or on its own motion may order interim accounting at any time. (W.S. 2-7-806).

Final Accounting and Settlement.

Administration of estates shall be completed within one year except for good cause demonstrated to court. (W.S. 2-7-801). When estate is ready to be closed personal representative shall file final accounting and petition with clerk of court under oath. (W.S. 2-7-811).

Consent Settlement.

No statutory provisions.

Distribution.

When estate is in condition for final settlement, but not less than three months after date of first publication of notice of opening probate, personal representative must give notice to all heirs of intestate decedent or to all beneficiaries named in will of decedent dying testate that he will on or before day certain file in office of clerk of court final account and petition where anyone interested may examine same and file objections thereto in writing within ten days after day mentioned in said notice, naming last day on which objections may be filed. If no objections are filed within said time he will make final settlement on day following last day for filing objections or as soon thereafter as matter may be heard. (W.S. 2-7-204).

Personal representative or any distributee may petition court for partial or complete distribution of any share at any time after 30 days from expiration of time for filing claims. (W.S. 2-7-807).

Distribution If Abroad.

When any estate is assigned or distributed by judgment or decree to nonresident having no agent in state, court or judge may appoint agent to act for such absent person in the distribution. (W.S. 2-15-101). Such agent must execute bond to state approved by court and is allowed reasonable compensation from estate. (W.S. 2-15-102). Unclaimed real and personal property remaining in hands of agent unclaimed for one year is sold and proceeds held by agent in fiduciary capacity subject to Uniform Unclaimed Property Act, W.S. 34-24-101 to W.S. 34-24-140. (W.S. 2-15-104).

Compensation of Representatives.

Statutory fees are computed on basis of amount of decedent's probate estate accounted for as follows: On first $1,000, 10%; from $1,000 to $5,000, 5%; between $5,000 and $20,000, 3%; for amounts over $20,000, 2%. In case of extraordinary services extra allowance may be made by court. (W.S. 2-7-803). Contracts between beneficiaries and personal representatives for fees larger than those provided by statute are void. (W.S. 2-7-805).

Administration is unnecessary when value of entire estate, less liens and encumbrances, does not exceed $150,000. When 30 days have elapsed since death of decedent and no application for appointment of personal representative is pending or has been granted, person or persons claiming to be distributees of personal property may file with county clerk and present affidavit setting forth foregoing jurisdictional matters and stating that claiming distributees are entitled to payment or delivery of property, facts concerning distributees' relationship to decedent and that there are no other distributees of decedent having applied to succeed to property under probate proceedings. Transfer of registered ownership of securities and transfer of title to motor vehicles may be accomplished by affidavit. Banks and other financial institutions are required to pay any deposits in sole name of decedent, together with interest and dividends thereon, to person or persons making and filing affidavit. Statute does not prevent creditor or other interested parties from starting probate proceedings and person receiving personal property is answerable and accountable to personal representative of estate or other person having superior right. (W.S. 2-1-201; W.S. 2-1-202).

Summary procedure for distribution of real property is available if person dies whose entire estate including personal property does not exceed $150,000. Upon petition to district court of claiming distributees with appraisal attached and publication of notice, decree shall be entered establishing right and title to real property. (W.S. 2-1-205).

Foreign Executors or Administrators.

May release mortgages covering real estate in Wyoming provided there is attached a full transcript, showing appointment and qualification to act at date of release, certified by presiding judge of appointing court. (W.S. 34-1-133).

Foreign and Ancillary Administration.

See topic 13.16 Wills, subhead Foreign Probated Wills.

Uniform Fiduciaries Act partially adopted. (W.S. 2-3-201 to W.S. 2-3-211). §§ 3, 4, 5 and 6 of Uniform Act have been repealed.

1997 Revised Uniform Principal and Income Act adopted. (W.S. 2-3-801 to W.S. 2-3-834).

Uniform Anatomical Gift Act adopted. (W.S. 35-5-101 to W.S. 35-5-109).

13.11 FIDUCIARIES:

Uniform Fiduciaries Act adopted with significant variations. (W.S. 2-3-201 to W.S. 2-3-211).

See topics 13.09 Executors and Administrators, Trusts; category 14 Family, topic 14.07 Guardian and Ward.

13.12 INTESTACY:

See topic 13.07 Descent and Distribution.

13.13 [RESERVED]

13.14 PROOF OF CLAIMS:

See topic 13.09 Executors and Administrators.

13.15 TRUSTS:

Uniform Trust Code adopted. (W.S. 4-10-101 to W.S. 4-10-1103).

Kinds.

Trust must be lawful, not contrary to public purpose and possible to achieve. (W.S. 4-10-405). Common trust funds provided for and securities law exemption granted. (W.S. 2-3-404 to W.S. 2-3-406, and W.S. 2-3-402).

Removal of Trustee.

Trustee may be removed by court for failure to render accounts in manner prescribed by law or order of court, or for having removed from state. (W.S. 2-3-136 to W.S. 2-3-138).

General Powers and Duties of Trustees.

Uniform Trust Code governs. (W.S. 4-10-801 to W.S. 4-10-817).

Sales.

Trustees have power to sell assets for cash or on credit, at public or private sale. (W.S. 4-10-816). No statutory provisions relative to procedure to be followed.

Investments.

Governed by Wyo. Const., Art. 3, § 38; W.S. 2-3-301 to W.S. 2-3-305; W.S. 4-10-901 to W.S. 4-10-913.

Securities in Name of Nominee.

Uniform Trust Code governs. (W.S. 4-10-901 to W.S. 4-10-913).

Bequests and Devises to Inter Vivos Trusts.

See topic 13.16 Wills.

Accounting.

No statutory provisions prescribing when and how trustee shall account to beneficiaries. See, however, subhead Removal of Trustee, supra.

Compensation.

Specifically authorized (W.S. 4-10-708), but there are no statutory provisions as to amount.

Discharge.

No statutory provisions.

Uniform Common Trust Fund Act adopted. (W.S. 2-3-401 to W.S. 2-3-406).

1997 Revised Uniform Principal and Income Act adopted. (W.S. 2-3-801 to W.S. 2-3-834).

Uniform Fiduciaries Act partially adopted. (W.S. 2-3-201 to W.S. 2-3-211). §§ 3, 4, 5 and 6 of Uniform Act repealed.

Gifts to Minors.

See category 14 Family, topic 14.10 Infants.

Accumulations.

No statutory provisions.

Perpetuities.

See category 21 Property, topic 21.12 Perpetuities.

Pour Over Trusts.

See topic 13.16 Wills, subhead Bequests and Devises to Inter Vivos Trusts.

13.16 WILLS:

Any person of legal age and testamentary capacity may make will. (W.S. 2-6-101).

Testamentary Disposition.

There is no restriction upon extent to which testator may dispose of his property other than rights of surviving spouse and minor children and creditor's rights. (W.S. 2-6-101). See infra, subheads Election; Family Allowance.

Execution.

All wills must be in writing and, except holographic wills, must be witnessed by two competent witnesses and signed by testator or by some person in his presence and by his express direction. (W.S. 2-6-112).

Testamentary Gifts to Subscribing Witnesses.

No subscribing witness may derive benefit from will unless there be two other witnesses who are disinterested and competent, except such portion of estate as such witness would be entitled to in case of intestacy. (W.S. 2-6-112).

Attestation Clause.

No form of attestation clause is prescribed by statute except for self-proving wills. See infra, subhead Self-proving Wills.

Holographic wills are recognized. (W.S. 2-6-113).

Self-proving Wills.

Will may be simultaneously executed, attested and made self-proven by acknowledgment thereof by testator and affidavits of witnesses, each made before officer authorized to administer oaths and evidenced by officer's certificate under official seal. Statutory form prescribed is as follows:

I, ..., the testator, sign my name to this instrument this . . . . . day of . . . . ., 20. . . ., and being first duly sworn, do hereby declare to the undersigned authority that I sign and execute this instrument as my last will and that I sign it willingly (or willingly direct another to sign for me), that I execute it as my free and voluntary act for the purposes therein expressed, and that I am an adult person, of sound mind, and under no constraint or undue influence.

Testator. . . . .

We, the witnesses, sign our names to this instrument, being first duly sworn, and do hereby declare to the undersigned authority that the testator signs and executes this instrument as his last will and that he signs it willingly (or willingly directs another to sign for him), and that he executes it as his free and voluntary act for the purposes therein expressed, and that each of us, in the presence and hearing of the testator, hereby signs this will as witnesses to the testator's signature and that to the best of our knowledge the testator is an adult person, of sound mind, and under no constraint or undue influence.

Witness. . . . . .

Witness. . . . . .

STATE OF WYOMING)

) ss.

COUNTY OF)

Subscribed, sworn to and acknowledged before me by . . . . ., the testator, and subscribed and sworn to before me by . . . . ., and . . . . ., witnesses, this . . . . . day of . . . . ., 20. . . . . .

Signed . . . . .

(S E A L) (Official Capacity of Officer)

(W.S. 2-6-114[a]).

Attested will may subsequently be made self-proven by testator's acknowledgment and affidavits of witnesses, each made before officer authorized to administer oaths under Wyoming law or under laws of the state where execution occurs. (W.S. 2-6-114[c]).

Nuncupative wills not recognized. (W.S. 2-6-112; Wyo., 366 P.2d 336).

Advance Health Care Directive.

Any adult may execute declaration directing withholding or withdrawal of life-sustaining procedures in terminal condition. Such declaration must be in writing, dated and signed by person making declaration, or by another person in declarant's presence and by declarant's express direction. Signature must be notarized or witnessed by two witnesses. (W.S. 35-22-403[b]). Declaration may be revoked at any time by declarant with capacity. Revocation must be signed writing. (W.S. 35-22-404).

Cardiopulmonary Resuscitation Directives.

(W.S. 35-22-201 to W.S. 35-22-208.)

Revocation.

Will may be revoked by subsequent will which revokes prior will or part thereof expressly or by inconsistency or by being burned, torn, cancelled, obliterated or destroyed, with intent to revoke such will by testator or by another person in his presence and by his direction. (W.S. 2-6-117). Subsequent divorce or annulment revokes any disposition of property to former spouse and nomination of former spouse as executor, etc., unless will expressly provides otherwise. No change of circumstances other than divorce or annulment revokes will. (W.S. 2-6-118).

Revival.

Revoked will is not revived by revocation of subsequent will. (80 Wyo. 389, 343 P.2d 508; Wyo., 345 P.2d 786). Remarriage to former spouse revives will revoked solely by W.S. 2-6-118. (W.S. 2-6-118).

Bequests and Devises to Inter Vivos Trusts.

Property may be devised and bequeathed to trustee of trust evidenced by written instrument in existence when will is made and which is identified in will. Trust may be amended in writing subsequent to execution of will and prior to testator's death. (W.S. 2-6-103).

Probate.

District court has exclusive jurisdiction of all matters relating to probate and contest of wills, granting of letters testamentary and of administration, and settlement of any distribution of decedents' estates. (W.S. 2-2-101).

Venue of probate proceedings, see topic 13.09 Executors and Administrators.

Procedure.

Petition for probate shall show: (1) jurisdictional facts; (2) consent of executor to act, or the contrary; (3) names, ages and residences of heirs (legatees) and devisees; (4) probable value and character of property of estate; (5) name of person for whom letters are prayed. (W.S. 2-6-201).

Upon filing of petition for probate, court or clerk may hear it forthwith, or at such time and place as court or clerk may direct, with or without requiring notice, which shall not be required except for good cause shown, and upon proof of due execution of will, admit same to probate. (W.S. 2-6-203). Self-proving will executed in compliance with W.S. 2-6-114 shall be probated without further proof. (W.S. 2-6-204). Wills not complying with W.S. 2-6-114 shall be proved by oral or written testimony of one or more of subscribing witnesses to will. If all witnesses are unavailable then will shall be proved by sworn testimony of two credible, disinterested witnesses that signature on will is in handwriting of testator and that signatures of witnesses are in handwriting of witnesses, or by other sufficient evidence of its execution. (W.S. 2-6-205). Order admitting will to probate and copy of will must be transmitted by certified mail to each named beneficiary and each of decedent's heirs. (W.S. 2-6-209). Notice of admission of will to probate shall be published once a week for three consecutive weeks in newspaper of general circulation in county in which probate is pending. (W.S. 2-7-201). Notice must also be mailed to surviving spouse, if any, all heirs at law, all beneficiaries named in will, and all reasonably ascertainable creditors. (W.S. 2-7-205).

Wills may also be filed with court without probate or without administration. (W.S. 2-6-121; W.S. 2-6-122).

Holographic wills may be proved in same manner as other private writings. (W.S. 2-6-206).

Contest.

Any interested person may within three months from date of first publication of notice provided for in W.S. 2-6-122 or W.S. 2-7-201 contest will or validity of will. Contestant must file written petition in court where will was admitted to probate. (W.S. 2-6-301). Upon filing of petition summons shall be served upon executor, and clerk shall send notice by certified mail with copy of petition attached to all legatees and devisees, and all heirs so far as known to petitioner, or to their guardians if minors, or to their personal representatives, if any are deceased. Further proceedings in said cause shall be governed by Wyoming Rules of Civil Procedure. (W.S. 2-6-302). If court or jury shall find that will is invalid or not sufficiently proved probate shall be annulled and revoked. (W.S. 2-6-303).

If no person contests will within three months after first publication of notice probate of will is conclusive. (W.S. 2-6-306).

Legacies.

There is no statute prescribing time within which legacies must be paid. As to right of legatees to petition for distribution, see topic 13.09 Executors and Administrators, subhead Distribution.

Unclaimed Legacies.

Whenever title to property fails for want of legal heirs property escheats to state. (W.S. 9-5-202). All property in estates of persons without known heirs is distributed to state, and such property is held by state subject to claim of heirs for five years, after which time property transferred to state. (W.S. 9-5-203).

Court may appoint agent to act for nonresident distributee of decedent's estate. (W.S. 2-15-101). Such agent must execute bond to state approved by court and is allowed reasonable compensation from estate. (W.S. 2-15-102). Real and personal property remaining in hands of agent unclaimed for one year is sold and proceeds paid to State Treasurer. (W.S. 2-15-103, W.S. 2-15-104).

Lapse.

If devisee who is grandparent or lineal descendant of grandparent of testator is dead at time of execution of will, fails to survive testator, or is treated as if he predeceased testator, then issue of deceased devisee take in place of deceased devisee, and if all of same degree of kinship to devisee they take equally, but if of unequal degree then those of more remote degree take per stirpes. One who would have been devisee under class gift if he had survived testator is treated as devisee for purposes of this section whether his death occurred before or after execution of will. (W.S. 2-6-106). Except for foregoing exception if devise, other than residuary devise fails it becomes part of residue. (W.S. 2-6-107).

Children.

Testator may disinherit children without mentioning them in will and alleged rights of pretermitted children to take share in estate have been denied. (67 Wyo. 314, 224 P.2d 178; 74 Wyo. 317, 287 P.2d 629).

Testamentary Guardian.

See category 14 Family, topic 14.07 Guardian and Ward.

Election.

Surviving spouse of married decedent, domiciled in state has right to take against net estate as follows: One-half if there are no surviving issue of previous marriage; or if surviving spouse is parent of any surviving issue of decedent; one-fourth if surviving spouse is not parent of any surviving issue of decedent. (W.S. 2-5-101[a]). If married decedent is not domiciled in state surviving spouse's right to election is governed by state of decedent's domicile. (W.S. 2-5-101[b]). Court shall advise surviving spouse of this election within three months (W.S. 2-5-104), and election must be made within three months after will is admitted to probate or 30 days after being notified by court, whichever is later (W.S. 2-5-105).

When surviving spouse elects against will, shares of distributees abate according to statutory priority. (W.S. 2-7-808).

Family Allowance.

When decedent leaves spouse or minor children, they are entitled to remain in possession of homestead, wearing apparel and furniture of decedent, until inventory is returned (W.S. 2-7-501) to family allowance during estate settlement if amount set apart for support of widow or children is insufficient (W.S. 2-7-502), and to have all property exempt from execution under laws of state, including homestead (W.S. 2-7-504). If decedent does not have all of property specified in exemption laws, spouse or minor children are entitled to have value of exempt property either in money or other property. (W.S. 2-7-504).

Foreign Executed Wills.

Written will is valid if executed in compliance with law at time of execution of place where executed or in compliance with law of place where at time of execution or at time of death testator is domiciled, has place of abode or is national. (W.S. 2-6-116).

Foreign Probated Wills.

Uniform Foreign Probate Act has been adopted. (W.S. 2-11-101 to W.S. 2-11-105).

Also, foreign probated estate may be adopted in Wyoming by petition accompanied by certified copies of Petition, Order of Appointment of Executor, Inventory, and Decree of Distribution from state of probate, together with full showing that debts have been paid, and further administration dispensed with, where property of estate in Wyoming does not exceed $150,000 in value. (W.S. 2-11-201).

Title to real property in Wyoming devised by will probated in foreign state (or title passing under law of descent) cannot be established here without issuance of ancillary letters, except by proceedings to adopt administration applicable to estates having property in Wyoming not exceeding $150,000 in value. (W.S. 2-11-201).

Simultaneous Death.

See topic 13.05 Death, subhead Survivorship.

Testamentary Trusts.

See topic 13.15 Trusts.

Uniform Anatomical Gift Act adopted. (W.S. 35-5-101 to W.S. 35-5-109).

Uniform Unclaimed Property Act adopted. (W.S. 34-24-101 to W.S. 34-24-140).

Uniform TOD Security Registration adopted. (W.S. 2-16-101 to W.S. 2-6-112).

14 FAMILY

14.01 ADOPTION:

Any person may be adopted who is within state when petition for adoption filed. (W.S. 1-22-102). Any adult person (age 18) who has resided in state during 60 days immediately preceding filing of petition for adoption and who is determined by court to be fit and competent to be parent may adopt in accordance with Act. (W.S. 1-22-103).

Consent Required.

Written relinquishment of custody of child to be adopted and written consent to adoption must be filed with petition to adopt and shall be signed by: (i) Both parents, if living; or (ii) surviving parent; or (iii) mother and putative father of child if name of putative father known; or (iv) mother alone if she does not know name of putative father, in which case she shall sign and file affidavit so stating; or (v) legal guardian of person of child if neither parent is living or if parental rights have been judicially terminated; or (vi) executive head of agency to whom child relinquished for adoption; or (vii) person having exclusive legal custody of child by Court order; or (viii) legally appointed guardian of any parent or putative father adjudged mentally incompetent. (W.S. 1-22-109[a]). Willfully allowing child to remain in custody of Department of Family Services for year preceding adoption petition without substantially contributing support constitutes consent. (2005 WY 118, 120 P.3d 992). If child to be adopted is over age of 14 years his written consent to adoption must also be filed with petition. (W.S. 1-22-109[b]). Consent may be signed at any time after birth of child and must be acknowledged before notary public, officer authorized to take acknowledgments or by representative of Department of Family Services within Department of Health or of certified agency to whom child being relinquished for adoption, or consent may be approved by court after person giving his consent has appeared before court in informal hearing in court chambers and if court finds consent knowingly and voluntarily given. (W.S. 1-22-109[c]). Consent to adoption and relinquishment of child for adoption are irrevocable unless obtained by fraud or duress, except that if court should deny adoption on account of claim or objection by putative father, court may allow mother to withdraw her consent and relinquishment. (W.S. 1-22-109[d]). Undue influence is not separate ground for revocation of consent. (Wyo., 777 P.2d 1106). To find fraud as to consent, representations must relate to past or existing fact, may not be based upon representations relating to future; and must be established by clear and convincing evidence. (Wyo., 583 P.2d 706). Consent or relinquishment by parent who is minor is valid and may not be revoked solely because of minority. (W.S. 1-22-109[d]). Consent to adoption and relinquishment of child for adoption may be contained in single instrument. (W.S. 1-22-109[e]).

Adoption may be ordered without written consent of parents or putative father if court finds nonconsenting parent or putative father is unknown and putative father has not registered under W.S. 1-22-117 (see subhead Putative Father, infra), affidavit that putative father is unknown is filed with petition or court finds nonconsenting parent or putative father has: (i) Been given notice of hearing provided for and has failed to answer or appear at hearing; (ii) been judicially deprived of parental rights of child for any reason; (iii) willfully abandoned or deserted child; (iv) willfully failed to contribute to support of child for one year immediately prior to filing of petition and failed to bring support obligation current within 60 days after service of petition to adopt; (v) willfully permitted child to be maintained in or by public or private institution or by Department of Family Services within Department of Health and Social Services for one year immediately prior to filing petition without substantially contributing to support of child; (vi) failed, within 30 days after receiving notice of pending birth or birth of child, to advise or notify agency which gave putative father notice of pending birth or birth of his interest in or responsibility for child or his declaration of paternity; (vii) been adjudged by court to be guilty of cruelty, abuse, neglect or mistreatment of child; (viii) caused conception of child born out of wedlock as result of sexual assault or incest for which he was convicted; or (ix) willfully failed to pay total dollar amount equal to at least 70% of court ordered support for two years or more and failed to bring support 100% current within 60 days after service of petition to adopt. Petitions under (iv) or (ix) must clearly state consequences of failure to bring support obligations current. (W.S. 1-22-110). Contributions necessary by nonconsenting parent to prevent adoption without his consent must be substantial or regular or constitute material factor in child's support. (Wyo., 640 P.2d 73).

Putative Father.

Term “putative father” means alleged or reputed father of child born out of wedlock, whether or not paternity rights and obligations of father have been judicially determined. (W.S. 1-22-101[a][iv]; Wyo., 716 P.2d 984). Putative father has standing to contest adoption without first establishing paternity. If natural mother signs affidavit that she does not know identity of putative father, court must determine whether putative father has registered with Putative Father Registry established by State Department of Family Services under W.S. 1-22-117. (W.S. 1-22-109[a][iv]). If putative father is registered, notice of petition to adopt must be given to him. (W.S. 1-22-109[a][iv]). Notice of intent to claim paternity is revocable at any time. (W.S. 1-22-117[c]). Unrevoked notice may be used as evidence in any relevant proceeding. (W.S. 1-22-117[d]). Registry information may not be disclosed to anyone, without court order, except court or agency. (W.S. 1-22-117[e]).

Conditions Precedent.

Child must be living in home of adoptive parent at time petition for adoption filed. (W.S. 1-22-106). Adult must consent to his adoption or adoption denied. (W.S. 1-22-113). See also, subhead Proceedings, infra.

Confidential Intermediaries.

Any adult adoptee, adoptive parent, biological parent, biological sibling or biological grandparent who is 18 years old may petition adopting court (or court in which parental rights of biological parents were terminated) for appointment of qualified confidential intermediary, who may locate adult biological relatives of adopted person. (W.S. 1-22-203[b]). Upon written consent from adopted person and biological relative, confidential intermediary shall arrange for meeting between or among them. (W.S. 1-22-203[d]). Absent written consent, all records remain sealed. (W.S. 1-22-203[d]). Intermediaries violating confidentiality and consent requirements may be punished for contempt. (W.S. 1-22-203[e]).

Jurisdiction.

District courts have jurisdiction over adoption proceedings. (W.S. 1-22-104[a]).

Venue of adoption proceedings is in any District Court. (W.S. 1-22-104).

Proceedings.

Petition may be filed by any single adult or jointly by husband and wife who maintain home together, or by either husband or wife if other spouse is parent of child (W.S. 1-22-104[b]), and following documents must be filed with every petition to adopt child: (i) Appropriate consent to adoption; (ii) relinquishment necessary to show court that person or agency legally authorized to have custody and control of child prior to adoption, has duly relinquished child to petitioners for adoption; (iii) report of medical examination of child made by licensed Wyoming physician within 30 days immediately preceding filing of petition to adopt on forms provided by Department of Family Services. Medical report not required when parent of child joins in petition to adopt or when child has resided with adoptive parents for more than six months prior to filing petition; (iv) affidavit from each petitioner setting forth any previous or current diagnosed psychiatric disorders of petitioner, all felony convictions of petitioner within preceding ten years, all misdemeanor convictions of petitioner within preceding five years, current parole or probation status of petitioner, if any (W.S. 1-22-104[c]); and (v) affidavit stating persons awarded visitation rights, if any, or stating no visitation has been awarded.

Petition to adopt must be filed upon entry of child into adoptive home or as soon thereafter as is reasonably convenient. When petition filed and presented to judge he must set petition for hearing. Person whose consent to adoption required and whose consent has not been filed must be ordered to appear on day set and show cause why petition to adopt should not be granted and decree of adoption entered. (W.S. 1-22-106).

Prior to hearing, copy of petition and all orders to show cause must be served on any person whose consent to adoption is required and whose consent has not been filed. Service must be made in same manner as provided for by W.R.C.P. Rule 4 and must be accomplished so that default judgment could be rendered at hearing against person served. Service by publication is specifically allowed where defendant resides out of state, or his residence cannot, with reasonable diligence, be ascertained. W.R.C.P. 4(1) also permits service in this circumstance by certified mail marked restricted delivery. (W.S. 1-22-107[a]). Petition and orders to show cause need not be served upon parents or other persons whose rights to child have been terminated in prior judicial proceeding. (W.S. 1-22-107[b]). If persons required to be served have been served personally, by publication or certified mail, and do not appear at hearing, default may be entered against them and they are bound by findings and judgment of court. (W.S. 1-22-108[a]).

If person whose consent is required objects to petition to adopt, he must at least five days prior to hearing file and serve objections on all parties to proceedings, including any person whose consent has been filed. (W.S. 1-22-108[b]). If putative father files and serves objections to petition and appears at hearing to acknowledge his paternity of child, court must hear evidence in support of petition and in support of objection and must then determine whether: (i) Putative father's claim to paternity of child is established; (ii) putative father, having knowledge of birth or pending birth of child, evidenced interest in and responsibility for child within 30 days after receiving notice of pending birth or birth (test is not what putative father could have done, but what he did. (Wyo., 831 P.2d 197); (iii) putative father's objections to petition are valid; and (iv) best interests and welfare of child will be served by granting putative father's claim to paternity or by allowing petition to adopt. (W.S. 1-22-108[c]). Putative father has no right to assert paternity in adoption proceedings unless he is known and identified by mother or agency, or unless he has lived with or married mother after birth of child and prior to filing petition, and unless prior to interlocutory hearing of adoption proceedings, he has acknowledged child as his own by affirmatively asserting paternity or registered as putative father. (W.S. 1-22-108[d]).

Unless court orders hearing in open court, hearing must be confidential and held in closed court or court chambers. No person shall be admitted except court officials, parties to proceeding, counsel, nonconsenting parents, nonconsenting putative father of child and witnesses. (W.S. 1-22-105[a]). Petitioners and child must appear unless excused by court. (W.S. 1-22-105[b]).

When petition to adopt adult filed, copy of petition together with summons issued as in other civil actions must be served on adult. If adult objects to adoption by petitioner, petition must be dismissed. When consent of adult given, petition shall be granted. (W.S. 1-22-113).

Decree.

After petition to adopt filed and hearing held, court acting in best interest and welfare of child may make any of following orders: (i) Enter interlocutory decree of adoption giving care and custody of child to petitioners pending further order of court; (ii) defer entry of interlocutory decree of adoption and order Department of Family Services within Department of Health and Social Services or private licensed agency to investigate and report to court background of child and of petitioners, and medical, social and psychological background of consenting parent and putative father. After written report of investigation filed, court must determine if adoption by petitioners is in best interest and welfare of child and enter appropriate order or decree; (iii) enter final decree of adoption if child has resided in home of petitioner for six months; or (iv) deny adoption if court finds that best interests and welfare of child will be served by such denial. (W.S. 1-22-111[a]). If court denies adoption court must make order for proper custody consistent with best interests and welfare of child. (W.S. 1-22-111[b]).

If interlocutory decree entered petitioners may apply for final decree of adoption after child has resided in home of petitioners for six months and hearing on petition may be required. (W.S. 1-22-112[a]). If interlocutory decree not entered hearing on petition for final decree must be set as provided for hearing on interlocutory decree, notice thereof given and final hearing had on petition. (W.S. 1-22-112[b]). When consent of adult to petition for adoption is given, petition granted and final decree of adoption entered. (W.S. 1-22-113).

Name.

Adopted persons may assume surname of adoptive parent (W.S. 1-22-114[b]), and decree may change name of adopted adult (W.S. 1-22-113). Court may change name of adopted person. (W.S. 1-25-104).

Effect of Adoption.

Upon entry of final decree of adoption former parent, guardian or putative father of child shall have no right to control or custody of child. Adopting persons have all rights and obligations respecting child as if they were natural parents. (W.S. 1-22-114[a]). Adoption terminates visitation rights of natural parents and all persons claiming rights of visitation through them. Agreements to contrary, whether written or oral, whether or not included in decree are void as against public policy. (Wyo., 787 P.2d 968). Adopted persons entitled to same rights of person and property as children and heirs at law of persons who adopted them. (W.S. 1-22-114[b]).

Medical History.

To extent available, medical history of child subject to adoption and child's natural parents, with information identifying natural parents eliminated, shall be provided by authorized agency or may be provided by order of court to child's adoptive parent any time after adoption decree entered or to child after he obtains age of majority. Medical history shall include all available information regarding conditions or diseases believed to be hereditary, any drugs or medication taken during pregnancy by child's natural mother and any other information that may be influencing factor on child's present or future health. Release of medical records shall be subject to rules promulgated by Department of Health. (W.S. 1-22-116).

Secrecy of Records.

See subhead Confidential Intermediaries, supra. Upon entry of final decree, all records shall be sealed and may be inspected only by court order for good cause shown if it appears that welfare and best interests of child will be served by inspection. (W.S. 1-22-104[d]).

Setting Aside Adoption.

See category 5 Civil Actions and Procedure, topic 5.15 Judgments, subhead Vacation or Modification.

14.02 ALIMONY:

See topic 14.06 Divorce.

14.03 COMMUNITY PROPERTY:

System not in force.

14.04 DESERTION:

See topics 14.06 Divorce, 14.09 Husband and Wife.

14.05 DISSOLUTION OF MARRIAGE:

See topic 14.06 Divorce.

14.06 DIVORCE:

Divorce is statutory proceeding. (W.S. 20-2-101 to W.S. 20-2-116).

Grounds for absolute divorce are: irreconcilable differences in marital relationship (W.S. 20-2-104), and when either party has become incurably insane and insane person has been confined in mental hospital of state or another state or territory for at least two years immediately preceding commencement of action for divorce. Special procedural safeguards are prescribed relative to divorce on grounds of insanity. (W.S. 20-2-105).

Grounds for legal separation are same as grounds for divorce. (W.S. 20-2-106).

Procedure for obtaining legal separation is similar to procedure for obtaining divorce, except that court may grant perpetual separation or impose time limitation on order relating to separation. (W.S. 20-2-106).

Citizenship Requirements.

None.

Residence Requirements.

Plaintiff must have resided in state for 60 days immediately preceding time of filing petition, unless marriage was solemnized in this state and petitioner resided therein from time of marriage until filing of petition. Married person may obtain necessary residence although his spouse resides in another state. (W.S. 20-2-107).

Jurisdiction of divorce proceedings is in district court. (W.S. 20-2-104).

Venue is in county in which either party resides on complaint of aggrieved party. (W.S. 20-2-104).

Process.

Service is in accordance with Wyoming Rules of Civil Procedure. (Rule 4).

Pleading.

Same as in civil actions. (W.S. 20-2-108). Practice of filing counterclaim is thoroughly recognized.

Practice.

Same as in civil actions. (W.S. 20-2-108).

Judgment or Decree.

Final decree is entered on determination of issues; except decree shall not be entered less than 20 days from date complaint filed. (W.S. 20-2-108). There are no provisions authorizing interlocutory decree.

Temporary alimony and support for children may be granted by court. (W.S. 20-2-111; W.S. 20-2-112[b]).

Allowance for prosecution and defense of suit may be granted by court. (W.S. 20-2-111).

Division of Property of Spouses.

In granting divorce court shall make such disposition of property of parties as appears just and equitable, having regard for respective merits of parties and condition in which they will be left by divorce, party through whom property was acquired, and burdens imposed on property for benefit of either party or children. Broad authority has been afforded divorce court in determining “just and equitable” disposition of property; “just and equitable” disposition is not always equated with quantitative equality. (Wyo., 577 P.2d 172). Court may decree to either party reasonable alimony out of estate of other having regard for other's ability, and may order so much of other's real estate or rents and profits thereof as is necessary be assigned and set out to either party for life, or may decree specific sum to be paid by either party. (W.S. 20-2-114). Court may on petition of either party revise decree with respect to amount of alimony. (W.S. 20-2-116).

Permanent Alimony.

See subhead Division of Property of Spouses, supra.

Change of Wife's Name.

No statutory provisions. Changed in practice if pleaded and prayed for in complaint.

Custody of Children.

In granting divorce court makes such disposition of children as appears most expedient and beneficial for well being of children. Court must consider relative competency and fitness of both parents and no award of custody shall be made on basis of gender of parent. If court finds that both parents have shown ability to act in best interest of child, court may order any arrangement that encourages parents to share in rights and responsibilities of rearing their children after parents have separated or dissolved their marriage. Court shall order custody in well defined terms to promote understanding and compliance by parties. Custody shall be crafted to promote best interests of child, and may include any combination of joint, shared or sole custody as consequences require. (W.S. 20-2-201[d]). In determining best interests of child, court must consider nonexclusive factors listed in W.S. 20-2-201(a). Court must also consider evidence of spousal or child abuse as being contrary to best interest of children, and if court finds that family violence has occurred, court must make arrangements for visitation that best protects children and abused spouse from further harm. (W.S. 20-2-201[c]). Court ordered visitations are based on best interests of child. Visitation order must include sufficient detail, allocation of costs for transporting child, and notice requirement if parent changes residence. (W.S. 20-2-202). Court that enters custody order retains jurisdiction subject to Uniform Child Custody Jurisdiction and Enforcement Act. (W.S. 20-2-203[a]). Court with jurisdiction may modify or enforce any court order regarding custody and visitation. (W.S. 20-2-204[c]). Order of enforcement and compliance may include finding of contempt, W.S. 20-2-204(c) award of attorney's fees, costs, and other relief. (W.S. 20-2-204[b]). For modification, proof of repeated, unreasonable failure of parent to allow visitation to other parent may be considered material change of circumstances. (W.S. 20-2-204[c]). Uniform Child Custody Jurisdiction and Enforcement Act adopted. (W.S. 20-5-201 to W.S. 20-5-502).

Court shall enter orders for support of children in divorce, annulment, paternity, support, out of home placement, and any other action for maintenance or support of children. (W.S. 20-2-301). Presumptive child support obligation established which provides for rebuttable presumptions for correct amount to be awarded. (W.S. 20-2-301 to W.S. 20-2-315). Court also shall order either or both parents to provide medical support which may include dental, optical, or other health needs for their dependent children. (W.S. 20-2-401). Where parent required by court or administrative order to provide health coverage for child which, at time of order, is offered by and available through parent's employer doing business in Wyoming, employer will be subject to certain requirements. (W.S. 20-2-402). Child support will abate by ½ of daily support obligation for each day noncustodial parent has physical custody so long as that parent has child 15 or more consecutive days. Abatement claims must be filed within 30 days after end of custodial period for which abatement is claimed. Clerk of court must mail copies of abatement claims to custodial parent who then has 30 days to object. (W.S. 20-2-305). For any order to establish or modify child support, approved financial affidavits with supporting documentation, including most recent tax return, must be filed. (W.S. 20-2-308). All orders relating to child support must include names, addresses, dates of birth and places of birth of parties and all children to whom order relates; names and addresses of each party's employer; right of either party or, when appropriate, Department of Family Services, to petition to enforce order pursuant to statute. (W.S. 20-2-309[a]). All child support orders must be accompanied by confidential statement that contains social security number of each party and each child. (W.S. 20-2-309[b], [c], [e] and W.S. 20-6-204). All child support payments ordered by court must be paid to clerk of court. (W.S. 20-2-309[f]). Further, for good cause shown, court may require obligor to provide security of nonexempt property to secure payment of child support. (W.S. 20-2-315). In child support enforcement proceeding, court may order parent to appear before court and show just cause to avoid contempt holding. (W.S. 20-2-310[b]). Able-bodied, unemployed obligors may be ordered by court to participate in personal opportunities with employment responsibilities (POWER) work program administered by Department of Workforce Services. (W.S. 20-2-310[d]). In event child falls under custody of party other than obligee under child support order, child support will be redirected to person or agency having care and control of child. (W.S. 20-2-312). Child support terminates when parents marry or remarry each other or child dies, is emancipated, or reaches age of majority. (W.S. 20-2-313). Uniform Interstate Family Support Act adopted. (W.S. 20-4-139 to W.S. 20-4-197).

Grandparent's Visitation.

Grandparent may bring original action against any person having custody of grandparent's minor grandchild to establish reasonable visitation rights to child if court finds, after hearing, that visitation would be in best interest of child and that rights of child's parents are not substantially impaired. In any action under this section for which court appoints guardian ad litem, grandparent shall be responsible for all fees and expenses associated with appointment. No action to establish visitation rights may be brought by grandparent if minor grandchild has been adopted and neither adopting parent is natural parent of child. In any action or proceeding in which visitation rights have been granted to grandparent under this section, court may for good cause upon petition of person having custody or who is guardian of child, revoke or amend visitation rights granted to grandparent. (W.S. 20-7-101).

Allowance for Support of Children.

See subhead Custody of Children, supra.

Remarriage.

No restrictions on remarriage of either party after decree of divorce.

Foreign Divorces.

No statutory provisions.

Judicial Separation.

When circumstances are such that grounds for divorce exist, aggrieved party may institute proceeding by complaint in same manner as if petitioner were seeking decree of divorce, but praying instead to be allowed to live separate and apart from offending party. No separation by order entered hereunder shall be grounds for divorce on grounds of desertion or two year separation unless those grounds existed at time of petitioning for judicial separation. Decree of divorce may be granted after decree of judicial separation is entered upon proper grounds arising thereafter. Court may make such orders as appear just, including custody of children, provision for support, disposition of properties of parties, alimony, restraint of one or both spouses during litigation, and restraint of disposition of property. Court may impose time limitation on order or render perpetual separation. Parties may at any time move court to be discharged from order of separation. All defenses available in action for divorce are available in action for judicial separation. (W.S. 20-2-106).

Settlement Agreements.

No statutory provisions, but they are recognized and are enforced if incorporated in divorce decree.

Uniform Child Custody Jurisdiction and Enforcement Act adopted effective July 1, 2005. (W.S. 20-4-201 to W.S. 20-5-502). (See 2005 Wyo. Sess. Laws, c. 11.)

Uniform Interstate Family Support Act adopted. (W.S. 20-4-139 to W.S. 20-4-197).

Annulment of Marriage.

See topic 14.11 Marriage.

14.07 [RESERVED]

14.08 GUARDIAN AND WARD:

"Guardian" defined as person who has qualified as guardian of minor or incompetent person pursuant to appointment by court to exercise powers granted by court; term includes plenary, limited, emergency and standby guardian, but does not include guardian ad litem; "conservator" is person appointed by court to have custody and control of property of ward; "fiduciary" means guardian or conservator. "Incompetent person" means individual who is unable unassisted to properly manage himself or his property as result of infirmities of age, physical disability, disease, or use of alcohol or controlled substances; "mentally incompetent person" means individual who is unable unassisted to properly manage himself or his property as result of mental illness, mental deficiency or mental retardation. (W.S. 3-1-101).

Petition for Appointment.

Any person may file with clerk of district court petition for appointment of guardian. (W.S. 3-2-101). Notice of filing of petition for appointment for involuntary guardianship must be served upon proposed ward and his custodian and proposed guardian. Notice of filing of petition for appointment of involuntary guardianship shall be served on parents, spouse and adult children of proposed ward who are known or who can be discovered with due diligence, except when petition is filed under W.S. 3-2-108, or when for good cause court determines that no notice is necessary if proposed ward is under age of 18 years. In addition, notice shall be served on any other person as ordered by court and notice shall be given in accordance with Wyoming Rules of Civil Procedure and as ordered by court. (W.S. 3-2-102). Proceedings on petition governed by Wyoming Rules of Civil Procedure and Wyoming Rules of Evidence and jury trial may be demanded by petitioner, proposed ward and his custodian. (W.S. 3-2-103). For minors, order of preference for appointment of guardian of minor is as follows: (1) Parent or parents; (2) person nominated as guardian in will of custodial parent; (3) person requested by minor who has reached age of 14 years; and (4) any other person whose appointment would be in best interests of minor. (W.S. 3-2-107[d]). Guardian shall present to court and file in guardianship proceedings signed, written report on physical condition of ward, including level of disability or functional incapacity, principal residence, treatment, care and activities, as well as for providing description of those actions guardian has taken on behalf of ward within six months of guardian's appointment, every six months following initial report and within 30 days of his removal or resignation from, or termination of, guardianship. Court shall also maintain calendar for filing of guardianship reports, and if guardian's report is not timely filed, court shall enter order for guardian to show cause why guardian should not be held in contempt. (W.S. 3-2-109).

Powers and Duties of Guardian.

Guardian shall determine and facilitate least restrictive and most appropriate and available residence for ward; facilitate ward's education, social and other activities; subject to restrictions of W.S. 3-2-202, authorize or expressly withhold authorization of medical or professional care, treatment or advice; take reasonable care of ward's personal property; commence protective proceedings if necessary to protect property of ward; apply to ward's current needs for support, care and education as much money or property paid or delivered to guardian pursuant to W.S. 3-3-108 as may be appropriate; exercise due care to conserve excess funds for ward's future needs; pay to conservator excess funds at least annually; request court to modify guardian's range of duties if changed circumstances of ward require such modification; and following death of ward, arrange for final disposition of ward's remains according to ward's expressed wishes if known, if immediate family is unavailable or unwilling to assume responsibility. “Immediate family” is defined as parents, spouse, grandparents, siblings and adult children. (W.S. 3-2-201[a]). Guardian may receive money payable from any conservatorship or other sources, institute proceedings to compel performance of duties to support or contribute to support ward, facilitate ward's education, social or other activities, authorize medical or professional care and consent to marriage or adoption of ward. (W.S. 3-2-201[b]). Guardian is not liable for negligence of third parties in rendering of medical care authorized by guardian unless it would have been negligent for parent to have given that authority. (W.S. 3-2-201[c]). Guardian of minor has powers and responsibilities of parent. Guardian who is not parent is not obligated to expend his own funds for support of ward. Guardian who is not parent is not liable to third persons for acts of ward by reason of relationship of guardian and ward. (W.S. 3-2-201[e]).

Temporary Guardianship for Educational, Medical Care and Dental Care Purposes.

Person, other than natural parent or legal guardian, who is at least 18 years old and is primary physical custodian and relative of minor child may petition court for appointment as temporary guardian of that minor child for educational, medical care and dental care purposes. (W.S. 3-2-301 to W.S. 3-2-303).

Petition for Involuntary Appointment of Conservator.

Same general procedure as for appointment of guardian including availability of jury trial. (W.S. 3-3-101 to W.S. 3-3-108).

Payment or Delivery of Property in Lieu of Conservatorship.

Any person under duty to deliver money or personal property to minor for whom no conservator appointed may pay or deliver property of value not more than $5,000 per annum to: (1) Minor who is married or is emancipated; (2) any person having care and custody of minor with whom minor resides; (3) guardian of minor; or (4) financial institution for deposit in federally insured interest-bearing account in sole name of minor with notice of its existence given to minor. (W.S. 3-3-108[a]). No such payment shall be made if actual knowledge of conservator or pending proceedings to appoint conservator. (W.S. 3-3-108[b]).

Conservatorships for Absentees.

Same general procedure as for appointment of guardian (W.S. 3-3-201 et seq.) applies to situations where owner of property cannot be located and property is likely to be lost or damaged because of absence of owner.

Duties and Powers of Conservator.

Generally, conservator must protect and preserve ward's estate, invest it prudently, account for it, expend it for benefit of ward, and perform all other duties required by law. (W.S. 3-3-601). Within 90 days after appointment, conservator must file verified inventory of ward's property with court. (W.S. 3-3-602). Without prior order of court, conservator may collect income, enforce or defend claims, sell property of perishable nature or for which there is regularly established market, vote at corporate meetings, hold investment or other property, apply principal and income to comfort and maintenance, education, support and care of ward, invest funds, and pay funds to ward, any provider for maintenance, support, education and care of ward, legal guardian of ward, or to anyone who at time has custody and care of ward and request court to modify conservator's range of duties if changed circumstances of ward require such modification. (W.S. 3-3-606). With court's order, conservator may: (1) Apply estate of ward to support of any person for whose support ward is legally liable; (2) compromise or settle any claim by or against ward; (3) apply estate of minor ward to his maintenance, care, support and education if court finds that parent should be relieved of obligation of parental support; (4) sell, mortgage, exchange, pledge or lease personal and real property belonging to ward; (5) create written revocable inter vivos trust, with corporate trustee whose principal place of business is in Wyoming and which has trust powers under Wyoming law, and transfer to trust any part or all of assets belonging to ward; and (6) do any other thing court determines to be in best interest of ward and estate. (W.S. 3-3-607). Except as expressly modified herein, conservator has powers relating to all fiduciaries as provided in Uniform Fiduciaries Act. (W.S. 2-3-201 to W.S. 2-3-211).

Claims.

All claims against ward accruing before or after appointment of conservator shall be filed in duplicate with clerk of court; claim must be supported by satisfactory vouchers and by affidavit of claimant. Clerk transmits to conservator copy of each claim filed. Conservator must allow or reject claim in writing filed with clerk within 60 days after filing of claim. Pro rata payment of claims provided for insolvent conservatorship. (W.S. 3-3-701 to W.S. 3-3-711).

Conservator's Report.

Conservator must file annual report accounting for all assets of ward including explanation of balance of funds and funds received, itemized account of disbursements, changes in investments, amount of conservator's bond and name of surety, residence or physical location of ward; general physical and mental condition of ward; description of those duties conservator is exercising; and other information necessary to show condition of affairs of conservatorship. (W.S. 3-3-901; W.S. 3-3-902).

Termination of Guardianship and Conservatorships.

(1) Upon obtaining age of majority when ward is minor; (2) death of ward; (3) determination of ward's competency by court; (4) determination by court that guardian or conservator is not acting in best interest of ward, in which case court shall appoint another guardian or conservator; and (5) determination by court that conservatorship or guardianship is no longer necessary for any other reason. (W.S. 3-3-1101). Upon termination of conservatorship, conservator shall deliver assets of ward to person entitled to receive them. (W.S. 3-3-1104).

Limited Guardians.

3-4-101 to W.S. 3-4-109, authorizing creation of limited guardian or limited conservator, repealed as of July 1, 1998. (1998 Wyo. Sess. Laws, c. 114). Transitional provisions apply to orders in effect under prior law.

Tort Liability.

Fact person is guardian or conservator does not in itself make him liable for acts of ward. (W.S. 3-3-611).

Veteran's Guardianship.

Uniform Veterans' Guardianship Act adopted. (W.S. 3-6-101 et seq.).

14.09 HUSBAND AND WIFE:

Husband and wife may own property, contract, and sue or be sued in general as though they were unmarried.

Disabilities of Married Women.

All disabilities have been removed. (W.S. 20-1-201, 202).

Separate Property.

All property belonging to married person as his separate property which he owns at time of his marriage or which during marriage he acquires in good faith from any person by descent or otherwise, together with all rents, issues, increase and profits thereof is during marriage his sole and separate property under his sole control and may be held, owned, possessed and enjoyed by him as though he were single. Such property is not subject to disposal, control or interference of his spouse and is exempt from execution or attachment for debts of his spouse if property not conveyed to him by his spouse in fraud of his creditors. Necessary expenses of family and education of children are chargeable upon property of both husband and wife, or either of them, for which they may be sued jointly and separately. (W.S. 20-1-201). Any married person may transfer his separate property in same manner and to same extent as if he were unmarried. (W.S. 20-1-202[a]).

Contracts.

Any married person may make contracts and incur obligations and liabilities, and all of them may be enforced against him to same extent and in same manner as if he were unmarried. (W.S. 20-1-202[a]). Person is not liable for debts and liabilities of his spouse contracted before marriage without assumption thereof in writing. (W.S. 20-1-202[e]). When person against whom liabilities exist marries and has or acquires lands, judgments on liability may be rendered against her [sic], to be levied on lands only. (W.S. 20-1-202[d]).

Antenuptial Contracts.

No statutory provision.

Actions.

Any person may, while married, sue and be sued in all matters having relation to his property, person or reputation in same manner as if he were single. (W.S. 20-1-202[b]). When married person sues or is sued alone, proceedings shall be had and judgment rendered and enforced as if he were unmarried. His separate property and estate is liable for any judgment against him but he is entitled to benefit of all exemptions for heads of families. (W.S. 20-1-202[c]). See also, subheads Separate Property, and Contracts, supra.

Interspousal tort immunity has been abrogated in Wyoming by judicial decision. (Wyo., 737 P.2d 1065).

Agency.

No specific statutory provisions. See subhead Contracts, supra.

Conveyance or Encumbrance of Property.

Either spouse may convey or encumber his or her property (except homestead) without consent or joinder of other. (W.S. 20-1-201, 202[a]). It is not necessary for one spouse to join in instrument of conveyance or encumbrance by other except to release interest in homestead. See W.S. 34-2-121. See also categories 8 Debtor and Creditor, topic Homesteads; Mortgages, topic Mortgages of Real Property; Property, topic Deeds.

Desertion and Nonsupport.

Any spouse who without just cause or lawful excuse deserts other spouse or fails or refuses to provide adequately for support and maintenance of other spouse and who at time of leaving, failure or refusal is or thereafter becomes in necessitous circumstances, is guilty of crime punishable by fine not exceeding $750, imprisonment of no more than six months, or both. (W.S. 20-3-101[a]). Support of spouse or child by public welfare funds or other source is not lawful excuse for nonsupport of spouse or child. (W.S. 20-3-101[d]). Any person who, without just cause or legal excuse intentionally fails, refuses or neglects to provide adequate support, which person knows or reasonably should know that he or she is legally obligated to provide to child under 18 is guilty of misdemeanor. (W.S. 20-3-101[b]).

At any time before trial in criminal proceeding, upon petition of complainant and upon notice to defendant, court may enter temporary order providing for support of deserted wife or children or both, pendente lite, and may punish violation of order as for contempt. (W.S. 20-3-101[g]). Also before trial, with consent of defendant, or entry of plea of guilty or after conviction, instead of criminal penalties or in addition thereto, court, having regard to circumstances and financial ability or earning capacity of defendant, may enter order directing defendant to pay certain sum for not more than two years to parent or guardian or custodian of minor child or children or organization or person approved by court as trustee. Court may release defendant on probation for period so fixed, upon recognizance with or without surety, conditioned that if defendant appear in court whenever ordered and comply with terms of order of support or modification thereof, recognizance shall be void. (W.S. 20-3-102). If court finds during period of probation defendant has violated terms of order, court may proceed to trial of defendant on original charge, or sentence him or her, or enforce suspended sentence under original plea or conviction. In case of forfeiture of recognizance, or enforcement thereof by execution, sum recovered may be paid in whole or in part to wife or to guardian, custodian or trustee of minor children. (W.S. 20-3-103).

Other nonsupporting spouse or department of family services may bring action for support of self and minor children. (W.S. 20-2-102). Child support orders may be enforced through income withholding order. (W.S. 20-6-201 to W.S. 20-6-222).

Community property system not recognized in Wyoming.

Uniform Interstate Family Support Act adopted. (W.S. 20-4-139 to W.S. 20-4-197).

Child Support Enforcement Act in effect. (W.S. 20-6-101 to W.S. 20-6-222).

See also category 21 Property, topic 21.14 Personal Property.

14.10 INFANTS:

Age of majority is 18 for both sexes. (W.S. 14-1-101).

Emancipation.

Minor becomes emancipated when he or she: (i) Is married; (ii) is in military service of U.S.; or (iii) has received decree of emancipation pursuant to W.S. 14-1-203. (W.S. 14-1-201).

Upon application to district court minor may, upon decree of court, become emancipated and recognized as adult only for purposes of entering into contract; suing or being sued; buying or selling real property; establishing residence; or for purposes of criminal laws. Minor may also be declared emancipated to terminate parental support and control of child and their rights to child's income and to terminate parental tort liability for minor. (W.S. 14-1-202).

Upon verified application of minor child, court may issue decree of emancipation if child at least 17 years of age and court finds emancipation in best interest of child. (W.S. 24-1-203[a]). Before entering decree of emancipation, court must consider if: (i) Child's parents consent to proposed emancipation; (ii) child living or willing to live apart from parents and substantially able to provide self-maintenance and support without parental guidance and supervision; (iii) child demonstrates sufficient maturity and ability to manage personal affairs without parental assistance; and (iv) child's income derived from lawful means. (W.S. 14-1-203[d][i]-[iv]). Hearing on application must be held and notice must be given to minor and parents by certified mail at least ten days before hearing. (W.S. 14-1-203). Third parties dealing with apparently emancipated minor may apply for decree of emancipation. (W.S. 14-1-204). Emancipated minors are subject to adult criminal jurisdiction. (W.S. 14-1-206).

Disabilities.

Common law governs.

Ratification of Contracts.

Common law rules apply.

Actions.

Action by or against an infant may be brought or defended by a general guardian, conservator, or other like fiduciary if such fiduciary has been appointed. Otherwise infant may sue or defend by his next friend or by guardian ad litem. (Rule 17[c]).

Parental Responsibility.

Parents of child under 17 and over age of 10 liable to property owner for property damage maliciously and willfully caused by such child in an amount not to exceed $2,000. (W.S. 14-2-203).

Adoption.

See topic 14.01 Adoption.

Health Care.

Minor may consent to health care treatment to same extent as if adult when legally married, in active military service of U.S., when parents or guardian of minor child cannot with reasonable diligence be located and minor's need for health care treatment is sufficiently urgent to require immediate attention, or minor is living apart from his parents or guardian and is managing his own affairs regardless of his source of income or minor has been emancipated under Wyoming law. (W.S. 14-1-101[b]).

Necessaries.

Common law rules govern.

Veterans.

Age of majority of honorably discharged veterans governing property and contractual rights and liabilities under the G.I. Bill of Rights is 18 years. (W.S. 19-14-103).

Estates.

If no guardian appointed, money or property of minor not exceeding $3,000 may be paid to parent on his written verified assurance that total estate of minor does not exceed $3,000 and written receipt shall be acquittance of person making payment. (W.S. 14-2-202). It is duty of parent to apply funds received to use and benefit of minor. (W.S. 14-2-202[b]).

Revised Uniform Transfers to Minors Act adopted. (W.S. 34-13-114 to W.S. 34-13-137). Person may make transfer by irrevocable gift to, or irrevocable exercise of power of appointment in favor of, custodian for benefit of minor pursuant to W.S. 34-13-122. (W.S. 34-13-117).

Uniform Securities Ownership by Minors Act not adopted.

Termination of Parental Rights.

Parent-child legal relationship may be terminated if any one or more of following facts is established by clear and convincing evidence: (i) Child has been left in care of another person without provision for child's support and without communication from absent parent for period of at least one year. In making above determination, court may disregard occasional contributions, or incidental contacts in communication; (ii) child has been abandoned with no means of identification for at least three months and efforts to locate parent have been unsuccessful; (iii) child has been abused and neglected by parent and reasonable efforts by authorized agency or mental health professional having been unsuccessful in rehabilitating family or family has refused rehabilitation, and it is shown that child's health and safety would be seriously jeopardized by remaining with or returning to parent; (iv) parent is incarcerated due to felony conviction and showing that parent is unfit to have custody and control of child; (v) child has been in foster care under responsibility of State of Wyoming for 15 of the most recent 22 months, and showing that parent is unfit to have custody and control of child; or (vi) child is abandoned at less than one year of age and has been abandoned for at least six months. Standard of proof is clear and convincing evidence, determination that parent unfit may be proved by clear and convincing evidence parent convicted of certain enumerated crimes. (W.S. 14-2-309).

14.11 MARRIAGE:

Marriageable age for male and female is 16. (W.S. 20-1-102). But see subhead Prohibited Marriages, infra.

Consent Required.

Marriage is civil contract between male and female person to which consent of parties capable of contracting is essential. (W.S. 20-1-101). At time of marriage parties must be at least 16 years of age except as otherwise provided. (W.S. 20-1-102). When either party is minor, no license shall be granted without verbal, if present, and written consent, if absent, of father, mother, guardian, or person having care and control of minor. Written consent must be proved by testimony of at least one competent witness. (W.S. 20-1-102[c]).

Medical Examination.

See subhead License, infra.

License is required; may be obtained from county clerk of any county. (W.S. 20-1-103[a]). Application for license must be made by one of parties before license is issued. Upon receipt of application clerk must ascertain by testimony of competent witnesses and applicant, names, residences, social security numbers and ages of parties and whether there is any legal impediment to parties entering into marriage contract according to laws of state of residence. Clerk must enter facts ascertained in book kept for purpose, except for social security numbers which shall be provided to state office of vital records and not made part of county public record. Clerk may issue license to marry and must date license on date of issue unless otherwise provided. (W.S. 20-1-103[b]). Unless there is order by judge of court of record in county, clerk must refuse to issue license if: (i) either of parties is legally incompetent to enter into marriage contract according to law of state; (ii) there is any legal impediment; or (iii) either party is minor and consent of parent or guardian has not been given. (W.S. 20-1-103[c]).

If any county clerk refuses to issue license to marry, or in case any person proposing to be married is under 16 years of age; or upon application for marriage license county clerk is unable to ascertain by testimony of competent witnesses names, residences or ages of parties or legal impediment exists according to laws of state of their residence, or either of parties is legally incompetent to enter into marriage contract according to law of this state; or there is any legal impediment, or either party is minor and consent of parent or guardian has not been given, and in case of circumstances arising which would necessitate waiver of any one or more of these requirements for issuance of license, either applicant for license may apply to district court of county for issuance of license without compliance with one or more of these requirements. If judge finds that license should be issued or such circumstances exist that it is proper that one or more of requirements should be waived, judge may order in writing issuance of license. Upon order of judge being filed with county clerk, clerk must issue license at time stated in order. (W.S. 20-1-105[a]).

Waiting Period.

None.

Ceremony is required. Every district or circuit court judge, district court commissioner, supreme court justice, justice of peace, magistrate and every licensed minister of gospel, bishop, priest or rabbi, or other qualified person acting in accordance with traditions or rites for solemnization of marriage of any religion, denomination or religious society may perform ceremony of marriage in this state. (W.S. 20-1-106[a]). No marriage solemnized in any manner authorized by W.S. 20-1-106 shall be deemed or adjudged void, nor is validity of marriage in any way affected because of lack of jurisdiction or authority of person performing ceremony of marriage if marriage is consummated with full belief on part of persons so married, or either of them, that person performing ceremony was lawfully authorized to do so. (W.S. 20-1-109). In solemnization of marriage no particular form is required, except that parties must solemnly declare in presence of person performing ceremony and at least two attending witnesses that they take each other as husband and wife. (W.S. 20-1-106[b]). Any religious society or religious assembly may perform ceremony of marriage in this state according to rites and customs of society or assembly. (W.S. 20-1-110). Also, see subhead, Prohibited Marriages, infra.

Reports of Marriages.

When marriage solemnized person performing ceremony must give one of parties certificate under his hand and signed by witnesses to marriage, specifying names, ages and place of residence of parties married, names and residences of at least two witnesses who were present at marriage and time and place thereof. (W.S. 20-1-107[a]). County clerk of each county in state must record all returns of marriage in book kept for that purpose within one month after receipt. (W.S. 20-1-107[b]). Clerk or keeper of minutes, proceedings or other book of religious society or assembly wherein marriage occurs, or if none then moderator or person presiding in society or assembly shall take out and transmit to county clerk of county certificate of marriage. (W.S. 20-1-110). Original certificate and record of marriage made by person performing ceremony and record thereof or certified copy of certificate of record is admissible in all courts and places as presumptive evidence of fact of marriage. (W.S. 20-1-107[c]).

Record.

See subhead Reports of Marriages, supra, and category Documents and Records, topic

Records, subhead Vital Statistics.

Common law marriages entered into in Wyoming are invalid. (58 Wyo. 438, 133 P.2d 492). See also subhead Foreign Marriages, infra.

Proxy marriages are not authorized.

Marriages by written contract are not authorized.

Prohibited Marriages.

Following marriages are void without any decree of divorce: (i) When either party has husband or wife living at time of contracting marriage; (ii) when either party is mentally incompetent at time of contracting marriage; (iii) when parties stand in relation to each other of parent and child, grandparent and grandchild, brother and sister of half or whole blood, uncle and niece, aunt and nephew or first cousins, whether or not either party is illegitimate, but prohibition does not apply to persons not related by consanguinity. (W.S. 20-2-101[a]). Also, all marriages involving person under 16 years of age are prohibited and voidable unless prior to marriage judge of court of record in state approves marriage and authorizes county clerk to issue license. (W.S. 20-1-102[b]). If either party is under 16 years of age, parents or guardians may apply to any judge of court of record in county of residence of minor for order authorizing marriage and directing issuance of marriage license. If judge believes it advisable he shall enter order authorizing marriage and directing county clerk to issue license. Upon filing of certified copy of order with county clerk, county clerk must issue license and endorse thereon fact of issuance of order. No person authorized to perform marriage ceremonies in Wyoming shall perform any marriage ceremony if either party is under age of 16 unless license contains this endorsement. (W.S. 20-1-105[b]).

Marriage is voidable if solemnized when either party under age of legal consent (16 years of age) unless judge gave consent, if they separated during nonage and did not cohabit together afterwards, or if consent of one of parties was obtained by force or fraud and there was no subsequent voluntary cohabitation of parties. (W.S. 20-2-101[b]).

For legitimacy of children of void and voidable marriages see subhead Annulment, infra.

Foreign Marriages.

All marriages which are valid by laws of country in which contracted are valid in this state. (W.S. 20-1-111).

Annulment.

All void and voidable marriages listed under subhead, Prohibited Marriages, supra, subject to annulment. (W.S. 20-2-101[c]).

Either party may file petition in district court of county where parties or one of them reside to annul marriage which is void or voidable and proceedings are held as in case of petition for divorce, except as otherwise provided. Upon due proof marriage shall be declared void by decree of nullity. (W.S. 20-2-101[c]). Action to annul marriage on ground that one of parties was under age of legal consent (16 years of age) may be filed by parent or guardian entitled to custody of minor. Marriage may not be annulled on application of party who was of age of legal consent at time of marriage nor when it appears that parties after they had obtained age of consent had freely cohabited as man and wife. (W.S. 20-2-101[d]). Action to annul marriage on grounds of mental incompetency may be commenced on behalf of mentally incompetent person by his guardian or next friend. Mentally incompetent person restored to competency may maintain action of annulment, but no decree may be granted if parties freely cohabited as husband and wife after restoration of competency. (W.S. 20-2-101[e]). It is also provided that action to annul marriage on grounds of physical incapacity may only be maintained by injured party against party whose incapacity is alleged and may only be commenced within two years from solemnization of marriage. (W.S. 20-2-101[f]). All decrees of annulment may include provisions for custody and support of children pursuant to W.S. 20-2-101 through W.S. 20-2-116, W.S. 20-2-201 through W.S. 20-2-204 and W.S. 20-2-301 through W.S. 20-2-315, and for division of property pursuant to W.S. 20-2-114. (W.S. 20-2-101[g]).

Dissolution of marriage shall not affect legitimacy of issue of marriage. In every case legitimacy of all children conceived or born during marriage is rebuttably presumed pursuant to W.S. 14-2-504. (W.S. 20-1-113).

When validity of any marriage is denied by either party, other party may file petition to affirm marriage. Upon due proof of validity thereof, it shall be declared valid by decree of court which is conclusive upon all persons concerned. (W.S. 20-2-103).

14.12 MARRIED WOMEN:

See topics 14.07 Guardian and Ward, Husband and Wife, Marriage; categories 5 Civil Actions and Procedure, topic Evidence, subhead Witnesses; Debtor and Creditor, topic Homesteads; Documents and Records, topic Acknowledgments; Estates and Trusts, topics Executors and Administrators, Wills; Property, topic Dower.

15 HEALTH

15.0115.04

15.05 FOOD, DRUGS, DEVICES AND COSMETICS:

Governed by Wyoming Food, Drug and Cosmetic Safety Act. (W.S. 35-7-109 to W.S. 35-7-127).

15.06 [RESERVED]

15.07 HEALTH INSURANCE BENEFITS:

Medicare.

Wyoming Medical Assistance and Services Act adopted. (W.S. 42-4-101 to W.S. 42-4-208). Department of Health is responsible for administering program, development of state plan for medical assistance and services provided to qualified recipients, maintaining records on administration of act, reporting to federal government as required by federal law and regulation, and adopting, amending and rescinding rules and regulations on administration of Act. (W.S. 42-4-104[a]). 2001 Legislature authorized joint labor, health and social services interim committee to continue study of long-term health-care in Wyoming as required under 1999 Wyo. Sess. Laws, c. 20, § 2 and additionally to review continuum of care including: (1) Review of existing Wyoming long-term health care programs; (2) review of all relevant Medicaid optional programs; (3) consideration of possible inclusion of additional Medicaid optional programs to Wyoming's continuum of long-term care; (4) consideration of possible implications of U.S. Supreme Court decision in Olmstead v. L.C., 527 U.S. 581 (1999), for long-term care market in Wyoming; (5) consideration of support for development of one-point entry into long-term care system; and (6) study of appropriate staffing levels and funding for appropriate staffing levels at long-term health care facilities. (2001 Wyo. Sess. Laws, c. 184, § 3).

Medicaid Pharmacy Plus Program.

Department of Health authorized to apply for federal Medicaid demonstration waiver under § 1115 of federal Social Security Act to allow individuals with income or assets in excess of limits generally established in state plan to receive services under Pharmacy Plus Program provided that: (i) Individual is beneficiary under federal Medicare program who has not been determined to be eligible for full Medicaid benefits under state plan; (ii) total family income of individual does not exceed 175% of federal poverty level in effect on Apr. 1 of that calendar year; (iii) total family net assets of individual do not exceed $350,000; and (iv) individual determined eligible to receive services under Medicaid Pharmacy Plus Program shall not be eligible for medical assistance services under W.S. 42-4-103, unless individual otherwise qualifies for such services; provided, however, eligibility for assistance under Medicaid Pharmacy Plus Program shall not constitute entitlement and services shall be provided under program only to extent funds are available. (W.S. 42-4-119[a][i]-[a][iv]). Department of Health directed to negotiate terms and conditions of federal Medicaid waiver with U.S. Secretary of Health and Human Services as necessary to implement Medicaid Pharmacy Plus Program. (W.S. 42-4-119[b]).

Medicaid Related Mandates.

Regulated by W.S. 42-4-201 to W.S. 42-4-208. Provides for subrogation and reimbursement of Department of Health for Medicaid payments made on behalf of recipient who recovers payments from liable third party; Department of Health granted lien for cost of medical assistance provided upon any and all causes of action which accrue to person to whom medical care was furnished, or to person's legal representatives, as result of injuries which necessitated medical care. (W.S. 42-4-201; W.S. 42-4-202). Specifies that no individual or group accident, health or accident and health policy or medical expense policy or medical services plan contract, delivered, issued for delivery or renewed in state on or after July 1, 1995, and no self-insured plan, managed care policy or plan, pharmacy benefit management plan or policy or other policy or plan issued by any other party that is by statute, contract or agreement legally responsible for payment of claim for items or services, delivered, issued for delivery or renewed in this state on or after July 1, 2007, shall contain any provision denying or limiting insurance benefits because services are rendered to insured who is eligible for or who received medical assistance under Wyoming Medical Assistance and Services Act; and no such policy, plan or contract, when enrolling individual, shall take into account individual's eligibility for medical assistance under Act. (W.S. 42-4-204[c]). Medicaid will not pay for any services provided under Wyoming Medical Assistance and Services Act if individual eligible for medical assistance has coverage for services under accident or health insurance policy or other source. (W.S. 42-4-204[d]).

Child Health Insurance Program.

State child health insurance program is provided for families with child who is not eligible under Wyoming Medical Assistance and Services Act, or who has not been covered by minimum of one month under another health insurance plan purchased by individual or by private or public employer, or who would not otherwise be covered by public or private health insurance plan upon birth. (W.S. 35-25-101 to W.S. 35-25-108). Eligibility limited to families whose maximum gross monthly income is at or below 200% of federal poverty level. (W.S. 35-25-103).

Health Insurance Pool Act.

Act codified at W.S. 26-43-101 to W.S. 26-43-113. Establishes program under administration of nonprofit entity known as Wyoming Health Insurance Pool, to ensure basic health insurance coverage to Wyoming residents who are medically uninsurable, are insurable at rates exceeding applicable pool rates for coverage under Wyoming Health Insurance Pool, or have been denied or reduced coverage for preexisting health condition. (W.S. 26-43-103[a]). Act amended in 1997 to provide alternative mechanism meeting requirements of § 2744 of federal

Public Health Service Act and requirements of federal Health Insurance Portability Act of 1996. (1997 Wyo. Sess. Laws, c. 120, § 3). *Note:* Act is not effective after June 30, 2011. (W.S. 26-43-113).

Small Employee Health Insurance Availability Act.

(W.S. 26-19-301 to W.S. 26-19-310).

Health Maintenance Organizations.

(W.S. 26-34-101 to W.S. 26-34-134).

15.0815.11

15.12 PUBLIC HEALTH:

Durable Power of Attorney for Health Care Act repealed effective July 1, 2005. (2005 Wyo. Sess. Laws, c. 161, §§ 3, 4).

Uniform Health-Care Decisions Act (W.S. 35-22-401 to W.S. 35-22-416) adopted effective July 1, 2005. (2005 Wyo. Sess. Laws, c. 161, §§ 1, 4).

State Hospital and Medical Facilities Survey and Construction Act, codified at W.S. 35-2-301 to W.S. 35-2-345. Department of Health constitutes sole agency of state for purpose of making inventory of existing hospitals and medical facilities, surveying need for construction of hospitals and medical facilities, developing program of hospital construction, and developing and administering state plan for construction of public and other nonprofit hospitals and medical facilities. (W.S. 35-2-303[a]).

16 INSURANCE

16.01 INSURANCE COMPANIES:

Regulated by Tit. 26 Wyoming Statutes 2001. Also, Wyoming Business Corporation Act (W.S. 17-16-101 to W.S. 17-16-1803) applies to domestic stock and mutual insurers, except when in conflict with express provisions of insurance code or reasonable implications thereof. Uniform Consumer Credit Code also adopted. (W.S. 40-14-101 to W.S. 40-14-702). See categories 2 Business Organizations, topic Corporations; Business Regulation and Commerce, topic Consumer Credit.

Supervision by State Insurance Commissioner.

Rates are regulated generally by W.S. 26-14-101 to W.S. 26-14-119 and by following statutes:

Property by W.S. 26-23-101 to W.S. 26-23-105.

Casualty and surety insurance by W.S. 26-23-201.

Disability insurance by W.S. 26-18-101 to W.S. 26-18-136.

Credit life and disability insurance by W.S. 26-21-101 to W.S. 26-21-114.

Health insurance pool rates by W.S. 26-43-107. Repealed effective June 30, 2011. (2005 Wyo. Sess. Laws, c. 57).

Policies are regulated by following statutory provisions:

Life insurance by W.S. 26-5-102, 111, 119; W.S. 26-15-101—103, 105—118; 121—130, 133, 134; W.S. 26-16-101—116, 118—120, 201—212, 301; W.S. 26-17-102; W.S. 26-18-102; W.S. 26-29-216—217, W.S. 26-32-201.

Annuity contracts by W.S. 26-5-102, 111; W.S. 26-15-101, 105—118, 121—130, 132—133; W.S. 26-16-101, 111, 116—118, 401—411, 501—502.

Casualty insurance by W.S. 26-5-106, 110, 111; W.S. 26-15-101, 102, 104, 105, 108—122, 124, 126, 128, 134; W.S. 26-18-102; W.S. 26-23-101—336; W.S. 26-24-132, 138.

Credit life and disability insurance by W.S. 26-5-102, 103; W.S. 26-15-101, 102; W.S. 26-15-105—118; W.S. 26-15-121—131, 134; W.S. 26-17-104, 110—115; W.S. 26-17-121, 123; W.S. 26-20-101—104; W.S. 26-21-101—114; W.S. 26-24-132, 138.

Disability insurance by W.S. 26-5-103; W.S. 26-18-101 to W.S. 26-18-136.

Group life insurance by W.S. 26-15-101—103, 105—118, 121—130, 133, 134; W.S. 26-17-101—130.

Group or blanket disability insurance by W.S. 26-5-103; W.S. 26-15-101, 102; W.S. 26-15-105—118; W.S. 26-15-121—123; W.S. 26-15-126, 128, 130, 134; W.S. 26-18-102; W.S. 26-19-101—113; W.S. 26-19-201—204; W.S. 26-21-103.

Successor group carriers by W.S. 26-19-101 to W.S. 26-19-204.

Closed blocks of business (closed-end groups) by W.S. 26-39-101 to W.S. 26-39-104.

Claim settlement procedures by W.S. 26-40-101 to W.S. 26-40-104.

Marine transportation insurance by W.S. 26-5-107, 110; W.S. 26-15-101, 104, 105, 108—122, 126, 128, 134.

Medical malpractice insurance, including medical liability compensation fund, governed by W.S. 26-33-101 to W.S. 26-33-111.

Property insurance by W.S. 26-5-104, 110, 111; W.S. 26-14-101—128; W.S. 26-15-104, 105, 108—122, 124, 126, 128, 134; W.S. 26-23-101—105.

Surety insurance by W.S. 26-5-105, 110, 111; W.S. 26-15-101, 104, 105, 108—116, 118, 119, 121, 122, 126, 128, 134; W.S. 26-23-101—336.

Title insurance contracts by W.S. 26-5-109—111; W.S. 26-15-101, 104, 105, 108—119, 121, 122, 126, 128, 134; W.S. 26-23-101—336.

Wet marine and transportation insurance by W.S. 26-5-107, 110.

Health maintenance organizations by W.S. 26-34-101 through W.S. 26-34-134.

Hospital or medical service insurance and prepaid health service plans by W.S. 26-22-101 through W.S. 26-22-503.

Long term care insurance by W.S. 26-38-101 to W.S. 26-38-111.

Private health benefit plan by W.S. 26-15-121.

Reinsurance by W.S. 26-5-111 to 119; W.S. 26-19-307.

Small employer health insurance availability by W.S. 26-19-301 to W.S. 26-19-310.

Wyoming health insurance pool by W.S. 26-43-101 to W.S. 26-43-113 (act is not effective after June 30, 2011). (2005 Wyo. Sess. Laws, c. 57).

Service contracts by W.S. 26-49-101 to W.S. 26-49-111.

Annual statements of domestic and foreign companies must be filed with Insurance Commissioner. (W.S. 26-3-123).

Unfair discrimination prohibited with respect to life, annuity, disability, property, casualty and surety insurance. (W.S. 26-13-109, 112). Special incentives allowed in health care reimbursement policies. (W.S. 26-22-503).

Trade Practices.

Unfair methods of competition or unfair or deceptive acts or practices by Insurance Companies are investigated and regulated by Insurance Commissioner. (W.S. 26-13-101 to W.S. 26-13-124).

Rebates of premiums and other special advantages and favors not stated in contract or policy specifically forbidden with respect to life, annuity, disability, property, casualty and surety insurance. (W.S. 26-13-110; W.S. 26-13-112).

Agents and Brokers.

Insurance Producer Licensing Model Act, W.S. 26-9-201 to W.S. 26-9-218, adopted effective Jan. 1, 2002. (2001 Wyo. Sess. Laws, c. 201). Agent: individual, firm or corporation appointed by insurer to solicit applications for insurance or annuities or to negotiate insurance or annuities on its behalf. (W.S. 26-1-102[a][ii]). Broker: resident individual, firm or corporation organized under laws of State of Wyoming acting not as agent of insurer but as independent contractor who, for compensation, solicits, negotiates, or procures insurance or renewal or continuance thereof for insureds or prospective insureds, other than himself. (W.S. 26-1-102[a][vi]). Insurance producer: Person required to be licensed under laws of state to sell, solicit or negotiate insurance, including, but not limited to, agents and brokers. (W.S. 26-1-102[a][xxxv]). License: Document issued by insurance commissioner authorizing person to act as insurance producer for lines of authority specified in such document. (W.S. 26-9-202[a][iii]). Agents and brokers must be licensed by insurance commissioner and cannot sell, solicit or negotiate insurance in Wyoming for any class or classes of insurance unless licensed for that line of authority by commissioner. (W.S. 26-9-203). Person applying for resident insurance producer license must make application to insurance commissioner on current version of National Association of Insurance Commissioner's uniform application for resident producer license (W.S. 26-9-206, W.S. 26-9-202[a][xii]); and, unless eligible for exemption under W.S. 26-9-209, must pass written examination testing applicant's knowledge concerning lines of authority for which application is made, duties and responsibilities of insurance producer, and Wyoming insurance laws and regulations. (W.S. 26-9-205). Unless denied licensure for one or more causes specified in W.S. 26-9-211, resident insurance producer license shall be issued to applicant for one or more of following lines of authority for which he receives qualification: (a) Life; (b) accident and health or sickness or disability; (c) property; (d) casualty; (e) variable life and variable annuity products; (f) personal lines; (g) credit; or (h) any other line of insurance permitted by Wyoming laws and regulations. (W.S. 26-9-207[a]). Resident insurance producer license remains in effect unless revoked or suspended by insurance commissioner for specified causes as long as, on or before Mar. 31, annual continuation fee prescribed by W.S. 26-4-101(a) is paid, continuing education requirements for resident insurance producers are met by due date, and written request for continuation of license is made to insurance commissioner on forms prescribed by commissioner. (W.S. 26-9-207[b]; W.S. 26-9-211). License shall contain licensee's name, address, personal identification number, date of issuance, lines of authority, expiration date, and any other information insurance commissioner deems necessary. (W.S. 26-9-207[e]). Business entity acting as insurance producer must obtain insurance producer license; application must be made using uniform business entity application; and insurance commissioner must find that business entity has designated licensed producer responsible for business entity's compliance with Wyoming insurance laws, rules and regulations before application can be approved. (W.S. 26-9-206[b]).

Each licensed resident insurance producer must have and maintain place of business in Wyoming accessible to public and in which licensee principally conducts business under his license, must conspicuously display at place of business license showing address, must keep at place of business complete record of transactions under his license, and must promptly notify insurance commissioner in writing of any change of address of place of business within 30 days of such change. (W.S. 26-9-228). Person licensed as insurance producer in another state who moves to Wyoming must make application within 90 days of establishing legal residence to become resident licensee pursuant to W.S. 26-9-206, and, except as insurance commissioner determines otherwise by regulation, no examination shall be required by such person to obtain any line of authority previously held in prior state. (W.S. 26-9-209[b]). Resident insurance producers, title agents licensed pursuant to W.S. 26-23-318, service representatives, adjusters not exempted under W.S. 26-9-231(f), and other resident persons required to be licensed under Wyoming act, must annually complete 24 classroom hours of continuing legal education within each two year licensing period. Of 24 hours, at least three hours shall relate to ethical requirements. (W.S. 26-9-231[a]).

Resident insurance producers must be at least 18 years of age. (W.S. 26-9-206[a][i]). Insurance producers shall not act as agent of insurer unless insurer appoints insurance producer its agent by filing notice of appointment with insurance commissioner within 15 days from date agency contract is executed or first insurance application is filed. (W.S. 26-9-213[b]). Insurance producer acting in capacity of broker is not agent or other representative of insurer and does not have power by his own acts to obligate insurer upon any risk or by any insurance transaction. (W.S. 26-9-224[a]). Sole relationship between insurance producer acting in capacity of broker and insurer as to which broker is then appointed agent, as to transactions arising during existence of that agency appointment, is that of insurer and agent and not that of insurer and broker. (W.S. 26-9-225).

Unless denied licensure for one or more causes specified in W.S. 26-9-211, nonresident agent or broker shall receive nonresident producer license from insurance commissioner if person is currently licensed as resident and is in good standing in his home state; has submitted proper request for licensure to commissioner and has paid fees required by W.S. 26-4-101(a); has submitted or transmitted to commissioner application for licensure in his home state, or in lieu of same, completed current version of National Association of Insurance Commissioners' uniform application for nonresident insurance producer license; and his home state awards nonresident producer licenses to Wyoming residents on same basis. (W.S. 26-9-208[a]). Insurance commissioner authorized to negotiate and enter in reciprocity arrangements with insurance supervisory official of any other state or province waiving any requirements for nonresident license applicant with valid license from home state, except requirements imposed by W.S. 26-9-208, if applicant's home state awards nonresident licenses to Wyoming residents on same basis. (W.S. 26-9-215). Individual who applies for insurance producer license in Wyoming and who was previously licensed for same lines of authority in another state, shall not be required to complete examination if individual is currently licensed in that state or if application is received by insurance commissioner within 90 days of cancellation of applicant's previous license and if prior state issues certification that, at time of cancellation, application was in good standing in that state or state's producer database records, maintained by National Association of Insurance Commissioners, its affiliates or subsidiaries, indicate that producer is or was licensed in good standing for line of authority requested. (W.S. 26-9-209[a]). Nonresident producer who moves from one state to another or resident producer who moves from Wyoming to another state must file change of address and provide certification from new resident state within 30 days of change of legal residence. (W.S. 26-9-208[c]).

Insurance which cannot be procured from authorized insurers may be placed with unauthorized insurers by licensed surplus line brokers subject to conditions prescribed in W.S. 26-11-104(a)(i)-(a)(iii). (W.S. 26-11-101 to W.S. 26-11-122).

No one in this state shall directly or indirectly act as agent for, or otherwise represent or aid on behalf of another, any insurer not authorized to transact business in this state, in solicitation, negotiation, procurement or effectuation of insurance or annuity contracts, or forwarding of applications for insurance, or dissemination of information as to coverage or rates or inspection of risks, or fixing of rates, or investigation or adjustment of claims or losses, or collection or forwarding of premiums, or in any other manner represent or assist such insurer in transaction of insurance with respect to subjects of insurance resident, located or to be performed in this state. (W.S. 26-12-102[a]). These provisions not applicable to surplus lines insurance and other transactions for which insurer is not required to have certificate of authority pursuant to W.S. 26-3-102; licensed adjuster or attorney at law representing unauthorized insurer in his professional capacity; persons in state compensated solely by salary who assist in administering group life, group or blanket disability or annuity contracts lawfully solicited, etc., pursuant to laws of state in which insurer is authorized to transact business; and transactions in state involving contracts of insurance issued to one or more industrial insureds. (W.S. 26-12-102[b]).

Process Agent.

Insurance Commissioner is attorney in fact of every qualified foreign and alien insurance company and of every domestic reciprocal insurer for service of process. (W.S. 26-3-112, 121). Insurance commissioner also agent for service of process for nonresident agent or broker licensed under reciprocity arrangements before Jan. 1, 2001 (W.S. 26-9-134) and licensed as nonresident insurance producer after Jan. 1, 2002 (W.S. 26-9-230). Solicitation, effectuation or delivery of any insurance contract, by mail or otherwise, within state by unauthorized insurer, or performance within state of any other service or transaction connected with such insurance by or on behalf of such insurer, constitutes appointment by such insurer of insurance commissioner as its attorney upon whom may be served all lawful process issued within this state in any action or proceeding against such insurer arising out of any such contract or transaction. (W.S. 26-12-202). Insurance commissioner also deemed attorney-in-fact for service of process for unauthorized insurer issuing surplus lines policy of insurance for Wyoming risk. (W.S. 26-11-120). Powers of attorney of foreign and domestic reciprocal insurers must designate attorney-in-fact as agent for service of process. (W.S. 26-27-109).

Investments are regulated. (W.S. 26-7-101 to W.S. 26-7-116).

Fraternal benefit societies and policies regulated by special statutory provisions. (W.S. 26-29-201 to W.S. 26-29-238).

Foreign insurance company can qualify to do business in state by filing with insurance commissioner its application for certificate of authority to do business stating under oath of president or vice-president or other chief officer and secretary of insurer, or of attorney-in-fact if reciprocal insurer, insurer's name, location of home office or principal office in U.S. (if alien insurer), kinds of insurance to be transacted, date of organization or incorporation, form of organization, state or country of domicile and such additional information as commissioner may reasonably require, together with following documents: (a) If corporation, copy of charter or articles of incorporation together with all amendments thereto, or as restated and amended under laws of state or country of domicile, currently certified by public official with whom originals are on file, and if reciprocal insurer, copy of power of attorney of his attorney-in-fact, certified by attorney-in-fact; (b) complete copy of financial statement as of not earlier than Dec. 31, next preceding in "convention" form as customarily used in U.S. by like insurers, sworn to by at least two executive officers of insurer or certified by public insurance supervisory official of insurer's state of domicile or of entry into U.S. (if alien insurer); (c) copy of report of last examination, if any, made of insurer within not more than 36 months next preceding certified by public insurance supervisory official of insurer's state of domicile or of entry into U.S. (if alien insurer); (d) acceptance of constitution of State of Wyoming on form furnished by commissioner; (e) appointment of commissioner as its attorney to receive service of legal process; (f) certificate of public insurance supervisory official of its state or country of domicile showing that it is authorized to transact in such state or country kind or kinds of insurance proposed to be transacted in state; (g) if alien insurer, copy of appointment and authority of its U.S. manager, certified by its officer having custody of records; (h) if life or disability insurer, copy of insurer's rate book and of each form of policy currently proposed to be issued in state; (i) designation by insurer of its officer or representative authorized to appoint and remove agents in state. (W.S. 26-3-112). Insurer must also maintain in trust in state through commissioner for protection of all its policyholders and creditors in U.S., or wherever located, deposit of cash and securities eligible for such deposit of value not less than amount applicable to kind or kinds of insurance transacted or to be transacted by insurer as follows: Life, $200,000; disability, $100,000; life and disability, $200,000; property, $100,000; casualty, excluding surety, $100,000, and including surety, $150,000; multiple line, $200,000; hail crop, $100,000; title domestic insurers, $50,000; title foreign insurers, $100,000. In lieu of such deposit, or part thereof, foreign insurer can file with commissioner certificate of public official having supervision of insurer in any other state to effect that like deposit or part thereof by such insurer is being maintained in public custody or control pursuant to law of such state. (W.S. 26-3-111, 112; W.S. 26-7-106, -108, -109; W.S. 26-8-103). In addition to statutorily prescribed deposit, insurance commissioner may require any foreign insurer to make and maintain in trust in Wyoming, through commissioner, deposit of cash and securities eligible for such deposit of value not less than amount which commissioner specifies for sole protection of insurer's policyholders located in Wyoming. (W.S. 26-3-111[e]).

Before doing business in state, domestic stock insurer applying for its original certificate of authority must possess and thereafter maintain prescribed minimum financial requirements. Life insurers must have capital of $1,000,000 and surplus of $500,000; disability insurers, capital of $1,000,000, and surplus of $500,000; life and disability insurers, capital of $1,000,000 and surplus of $1,000,000; property and casualty insurers (excluding surety), capital of $1,000,000 and surplus of $1,000,000; property and casualty insurers (including surety), capital stock of $1,000,000 and surplus of $1,500,000; marine and transportation, capital of $1,000,000 and surplus of $1,000,000; multiple line insurers (property and any additional kind), capital of $2,000,000 and surplus of $2,000,000; and title insurers, capital of $500,000 and surplus of $250,000. (W.S. 26-3-108[a]). Foreign mutual insurers, before doing business in state, must have unimpaired basic surplus, as follows: Life insurers, $1,500,000; disability insurers, $1,500,000; life and disability, $2,000,000; property and casualty insurers (excluding surety), $2,000,000; property and casualty insurers (including surety), $2,500,000; marine and transportation insurers, $2,000,000; and multiple line insurers (property and any additional kind), $4,000,000. (W.S. 26-3-108[a]). Foreign reciprocal insurers, before doing business in state, must have unimpaired basic surplus, as follows: Disability insurers, $1,500,000; property and casualty insurers (excluding surety), $2,000,000; property and casualty insurers (including surety), $2,500,000; marine and transportation insurers, $2,000,000; and multiple line insurers (property and any additional kind), $4,000,000. (W.S. 26-3-108[a]). Commissioner may require additional capital and surplus based upon type, volume and nature of insurance transacted. (W.S. 26-3-108[d]). Foreign insurer holding valid certificate of authority to transact business in state as of Apr. 1, 1985 may transact same kinds of insurance as permitted by certificate of authority by complying with insurance code and by maintaining unimpaired thereafter not less than same amount of paid in capital stock or paid in capital stock and surplus (if stock insurer) or not less than same amount of surplus (if mutual insurer) as required under laws of state immediately prior to such date, and as if such laws had continued in force. (W.S. 26-3-109[a]). Insurer shall maintain not less than same capital stock and surplus as is required by domestic stock insurers newly formed. (W.S. 26-3-109[b]).

No foreign insurer will be authorized to do business unless it has been issuing its own policies as an authorized insurer for at least two years in its state or country of domicile, unless said insurer is otherwise qualified for a certificate of authority, and is: (a) wholly owned subsidiary of already authorized insurer in Wyoming; or (b) successor in interest through statutory merger or statutory consolidation, or through bulk reinsurance of substantially all of insurance risks in Wyoming, of authorized Wyoming insurer; or (c) insurer organized solely for purpose of insuring against earthquake, flood, nuclear radiation, war or other special hazards to property or liability for which, in opinion of commissioner, adequate provision is not made by insurers already authorized in Wyoming. (W.S. 26-3-105[a]). No foreign insurer shall continue to hold certificate of authority if insurance company has reinsured substantially all of its insurance risks either prior to, contemporaneously with or after being acquired by another insurer not holding subsisting certificate of authority. (W.S. 26-3-105[b]). No foreign insurer directly or indirectly owned or controlled in whole or substantial part by any government or governmental agency will be authorized to transact business in Wyoming. (W.S. 26-3-104[a]).

If foreign insurer found qualified to do business in Wyoming, insurance commissioner issues certificate of authority to do business in state (W.S. 26-3-113) and certificate must be renewed annually (W.S. 26-3-114). Fee for filing application for original certificate of authority is $750, and fee for annual continuation, including filing of annual statement, $500. (W.S. 26-4-101).

After July 1, 1996, every foreign insurer must report material acquisitions to commissioner, unless subject to substantially similar provision in its domicile. (W.S. 26-3-401 to W.S. 26-3-403).

No person shall act as an insurer relative to subject of insurance resident, located or to be performed in Wyoming, and no insurer shall transact insurance in Wyoming except as authorized by a subsisting certificate of authority granted to it by commissioner. (W.S. 26-1-103; W.S. 26-3-101). Transact with respect to a business of insurance includes any of following: (a) solicitation or inducement; (b) negotiations; (c) carrying out of contract of insurance; (d) transaction of matters subsequent to carrying out and arising out of such contract of insurance; and (e) any other aspects of insurance operations to which title 26 of Wyoming Statutes (insurance) apply. (W.S. 26-1-102[a][xxx]).

Foreign insurer is one formed under laws of any jurisdiction other than Wyoming. (W.S. 26-1-102[a][xii]). Alien insurer is one formed under laws of country other than U.S. or any of its states. (W.S. 26-1-102[a][iii]). Any of its states includes state, district, territory, commonwealth or possession of U.S. and Panama Canal Zone. (W.S. 26-1-102[a][xxvii]). Foreign insurers include alien insurers. (W.S. 26-1-102[a][xii]).

See also, subheads Annual Statements; Process Agent; Investments, supra; and Premium Tax, infra.

Guaranty Associations.

Wyoming Insurance Guaranty Association governed by statute. (W.S. 26-31-101 to W.S. 26-31-117). Wyoming Health and Life Insurance Guaranty Association governed by separate statute. (W.S. 26-42-101 to W.S. 26-42-118).

Retaliatory Laws.

When by laws of any state, or any political subdivision thereof, or any foreign country, or any province or other political subdivision thereof, taxes, licenses and other fees, in aggregate, and any fines, penalties, deposit requirements or other material requirements, obligations, prohibitions or restrictions are or would be imposed on Wyoming insurers, or on their agents or representatives, in excess of taxes, licenses and other fees, in aggregate, or in excess of fines, penalties, deposit requirements or other requirements, obligations, prohibitions, or restrictions imposed on similar insurers, or on their agents or representatives, of such other state or country under statutes of this state, then so long as such laws of such other state or country continue in force, same taxes, licenses and other fees, in aggregate, or fines, penalties or deposit requirements or other material requirements, obligations, prohibitions, or restrictions of whatever kind must be imposed on insurers of such other state or country doing or seeking to do business in Wyoming. (W.S. 26-3-130[a]). Taxes, licenses or other fees or obligations imposed by city, county, or political subdivision or agency of other state or country deemed imposed by such state or country. (W.S. 26-3-130[a]). Taxes do not include personal income taxes, ad valorem taxes on property, or special purpose obligations or assessments imposed by another state in connection with particular kinds of insurance other than property insurance. (W.S. 26-3-130[b][ii]). Notwithstanding any other law, if any domestic insurer is required to pay additional taxes or fees to some other jurisdiction because of additional fee assessed by insurance commissioner against insurers authorized to transact insurance in Wyoming for share of authorized expenditures of department of insurance for any biennial appropriation period pursuant to W.S. 26-2-204, under color of retaliatory statute or other similar law, insurer may deduct additional taxes or fees from premium taxes otherwise payable under W.S. 26-4-103. (W.S. 26-2-209).

Premium Tax.

In lieu of all taxes imposed by state on premiums or on income, and of franchise privilege or other taxes measured by income of insurer, insurance companies doing business in state pay annual tax for privilege of doing business in state equal to stated per centum of net premiums and net consideration received for insurance during next preceding calendar year on account of policies and contracts covering property, subjects or risks located, resident or to be performed in state. (W.S. 26-4-103[a], [b]). Reports must be filed with commissioner on or before Mar. 1 of each year. (W.S. 26-4-103[a]). Tax paid to insurance commissioner quarterly commencing Jan. 1, 1991 in amount not less than 25% of total premium tax paid during precedent calendar year except that payment for calendar quarter ending Dec. 31 shall also include any adjustments and shall be paid on or before Mar. 1 of immediately succeeding calendar year. (W.S. 26-4-103[k]). No tax due or payable on account of premiums or considerations received from policies or contracts issued in connection with pension annuity or profit sharing plan exempt or qualified under §§ 401, 403, 404, 408, 457 or 501 of U.S. Internal Revenue Code of 1954, as amended or renumbered from time to time, with respect to tax payable in 1968 or thereafter. (W.S. 26-4-103[j]). Tax not paid by Mar. 31 becomes delinquent; may be enforced by seizure, distraint and sale of property of insurer located in state; and insurer's certificate of authority must be revoked. (W.S. 26-4-105). Rates are as follows: (i) 2.1% for premium income received in 1991; (ii) 1.6% for premium income received in 1992; (iii) 1.2% for premium income received in 1993; and (iv) 0.75% for premium income received in 1994, except that consideration received from annuity contracts is taxed at rate of 1% and gross underwriting profit from wet and marine transportation insurance written in Wyoming is taxed at rate of ¾ of 1%. (W.S. 26-4-103[b], [c]). *Note:* W.S. 26-4-103, which provided that insurers having over 2% of assets invested in Wyoming investments were entitled to receive credit against premium tax on sliding scale ranging from credit of 3% up to credit of 80%, was repealed effective Apr. 1, 1994. (1991 Wyo. Sess. Laws, c. 149, §§ 2[b], 4). Tax on surplus lines is 3% of premiums, less amount of return premium on cancelled policies, including sums collected to cover federal and state taxes on surplus line insurance subject to tax transacted by broker with unauthorized insurers during preceding calendar year. Tax due from broker on or before Mar. 1. (W.S. 26-11-118).

Privilege Tax.

See subhead Premium Tax.

No-Fault Insurance.

See category 23 Transportation, topic 23.01 Motor Vehicles, subhead No-Fault Insurance.

Direct Actions Against Insurer.

See category 23 Transportation, topic 23.01 Motor Vehicles, subhead Direct Actions.

See category 21 Property, topic 21.01 Absentees, subhead Escheat.

16.02 SURETY AND GUARANTY COMPANIES:

Organization.

Surety and guaranty companies may be organized under laws applicable to insurance companies. (Tit. 26).

Rights and Powers.

No special provisions peculiar to this class of corporations.

Foreign surety and guaranty companies may qualify to do business in Wyoming as foreign insurance companies (W.S. 26-3-112). See topic 16.01 Insurance Companies, subhead Foreign Insurance Company.

Powers.

When qualified, such foreign company may become surety on all bonds, undertakings, recognizances or other obligations required under law of state, or charter, ordinance, rules or regulations of any municipality, board, organization, court or public officer. (W.S. 38-3-101).

Requiring Bond of Unauthorized Company.

It is unlawful for any person or association to require any person in his or its employ to give bond from any foreign corporation unless said corporation shall first have complied with laws of state authorizing it to transact business therein. (W.S. 38-3-102). Violation of this provision is misdemeanor and such bonds are void. (W.S. 38-3-103; W.S. 38-3-104).

Taxation.

There are no special taxes imposed on surety and guaranty companies as such.

17 INTELLECTUAL PROPERTY

17.01 TRADEMARKS AND TRADENAMES:

Any individual, firm, partnership, corporation, association, union or other organization may adopt and use and register a trademark or service mark. (W.S. 40-1-101). Brands, marks or tags on livestock are not considered trademarks or service marks. (W.S. 40-1-114).

What May Be Used.

Any word, name, symbol, or device or any combination thereof may be adopted and used as a trademark to identify goods made or sold by one person and to distinguish them from goods made or sold by others, or may be adopted or used as service mark in sale or advertising of services to identify services of one person and distinguish them from services of others. (W.S. 40-1-101). Trademark or service mark may not contain any of following: Immoral, deceptive or scandalous matter; matter which may disparage or falsely suggest connection with persons, living or dead, institutions, beliefs, or national symbols, or bring them into contempt, or disrepute; flag, coat of arms, or other insignia of U.S., state, municipality or foreign nation; name, signature or portrait of living individual without his consent; matter which is merely descriptive, primarily geographically descriptive, or deceptively misdescriptive of goods or services; is primarily merely surname unless it is distinctive of applicant's services or goods; or consists of or comprises mark which is same as, or deceptively similar to, mark registered in this state, tradename or corporate name, or mark or tradename previously used in state by another and not abandoned, as to be likely, when applied to goods and services of applicant, to cause confusion or mistake or to deceive. (W.S. 40-1-102).

Registration of trademarks and service marks regulated by Trademark and Service Mark Act. (W.S. 40-1-101 to W.S. 40-1-116). Applications to register trademark or service mark filed in office of Secretary of State. (W.S. 40-1-103). Filing fee is $100. (W.S. 40-1-116[b]; Rules and Regulations of Secretary of State) http://soswy.state.wy.us/corporat/tm.htm. Registrations expire five years from date of registration, but may be successively renewed for periods of five years. (W.S. 40-1-105[a], [b]). Application for renewal must be filed with Secretary of State within six months prior to expiration date. (W.S. 40-1-105[a]). Filing fee is $50. (W.S. 40-1-116[b]; Rules and Regulations of Secretary of State). Act does not apply to brands, marks or tags on livestock. (W.S. 40-1-114).

Assignment.

Trademark or service mark may be assigned with goodwill of business in which mark is used, or with that part of goodwill of business connected with use of and symbolized by mark, by recording assignment with Secretary of State. (W.S. 40-1-106[a]). Upon recording of assignment, Secretary of State must issue new certificate in name of assignee for remainder of term of registration or last renewal thereof. (W.S. 40-1-106[a]). Assignment of registration will be valid as against subsequent purchaser for valuable consideration without notice if recorded with Secretary of State within three months after date of assignment or prior to such subsequent purchase. (W.S. 40-1-106[a]). Any registrant effecting change of name of person to whom trademark or service mark was issued or for whom application has been filed, may record certificate of name change of registrant or applicant with Secretary of State upon payment of recording fee, and Secretary of State may issue in name of assignee, certificate of registration of assigned application or new certificate of registration for remainder of term of registration or last renewal thereof. (W.S. 40-1-106[b]). Filing fee for assignment of marks is $25. (W.S. 40-1-116[b]; Rules and Regulations of Secretary of State).

Public Record of Marks.

Secretary of State shall keep for public examination record of all marks registered or renewed under this Act. (W.S. 40-1-107).

Protection Afforded.

Holder of registered trademark or service mark has exclusive right to its use. (W.S. 40-1-105; W.S. 40-1-111; W.S. 40-1-112).

Infringement.

Any person who either: (a) Uses, without consent of registrant, any reproduction, counterfeit, copy or colorable imitation of registered trademark or service mark in connection with sale, distribution, offering for sale or advertising of any goods or services when such use is likely to cause confusion or mistake or to deceive as to source of origin of such goods or services, or (b) places, with intent to cause confusion or mistake or to deceive, reproductions, counterfeits, copies or colorable imitations of registered trademark or service mark on labels, signs, prints, packages, wrappers, receptacles or advertisements, which are intended to be used upon or in conjunction with sale or other distribution of goods or services in Wyoming, is subject to civil action brought by owner of such registered mark for any or all of remedies prescribed in W.S. 40-1-112. (W.S. 40-1-111). In addition, owner of registered trademark or service mark has right to file suit to enjoin manufacture, use, display or sale of any counterfeits or imitations of registered mark, and any court of competent jurisdiction is empowered to restrain such manufacture, use, display or sale as court may deem just and reasonable. (W.S. 40-1-112[a]). Court also may require defendant(s) to pay to registered owner all profits derived from, and/or damages suffered by reason of, such wrongful manufacture, use, display or sale and may order destruction of any such counterfeits or imitations in possession or under control of any defendant. (W.S. 40-1-112[a]). Court granted discretion to enter judgment for amount not to exceed three times sum of profits and damages awarded and for reasonable attorneys' fees of prevailing party in such case upon finding other party committed such wrongful acts with knowledge or in bad faith or otherwise as according to circumstances of case. (W.S. 40-1-112[a]). Enumeration of any right or remedy under W.S. 40-1-111 or W.S. 40-1-112(a) does adversely affect registrant's right to prosecution under any penal law of Wyoming (W.S. 40-1-112[b]), or rights in trademarks or service marks, or enforcement of rights in such marks, acquired in good faith at any time at common law (W.S. 40-1-113).

Resale Price Agreements.

No statutory provisions. Former Fair Trade Act authorizing such agreements was declared unconstitutional. (Wyo. 371 P.2d 409).

Trade Names.

Registration of trade names regulated by Trade Names Registration Act. (W.S. 40-2-101 to W.S. 40-2-109). Trade name means word, name or any combination of foregoing in any form or arrangement used by person to identify business, vocation or occupation and distinguish it from business, vocation or occupation of others. (W.S. 40-2-101[a][iv]). Applications for registration of trade name filed with Secretary of State. Filing fee is $100. (W.S. 40-2-104[a]). Upon compliance by applicant with requirements of Act, Secretary of State shall return duplicate copy of application for registration of trade name to applicant, stamped with date of filing. (W.S. 40-2-104[b]). Any person intending to adopt trade name for use and intending to apply for registration of trade name may reserved trade name for 120 days by filing application with Secretary of State and payment of fee of $30. (W.S. 40-2-103[a]). Registration effective for term of ten years and may be renewed for additional ten years by filing application for renewal within six months period preceding expiration of original ten year term and payment of fee of $50. (W.S. 40-2-105[a]). Act shall not adversely affect rights in trade names or enforcement of rights in trade names, acquired at any time in good faith at common law. (W.S. 40-2-109). Trade name will not be registered by Secretary of State if it: (i) Is same as, or deceptively similar to, any trademark or service mark registered in Wyoming, or is not distinguishable from names of other business entities as required by W.S. 17-16-401; or (ii) contains any word or phrase which indicates that it is engaged in business of banking or insurance, except as provided in W.S. 40-2-102(c) and (b) with respect to registration of bank trade name for any proposed national banking association or any proposed Wyoming state chartered bank. (W.S. 40-2-102[a]). Registered trade name may be assigned with goodwill of business in which trade name is used by recording assignment with Secretary of State and payment of fee of $25. (W.S. 40-2-106). Upon recording assignment, Secretary of State must issue new certificate in name of assignee for remainder of term of registration. (W.S. 40-2-106). (W.S. 40-2-102). Assignment or sale of tradename as asset of business does not implicitly transfer trademarks. (Wyo., 705 P.2d 853).

17.02 TRADE SECRETS:

Uniform Trade Secrets Act adopted effective July 1, 2006. (W.S. 40-24-101 to W.S. 40-24-110; 2006 Wyo. Sess. Laws, c. 63). Act not applicable to misappropriation occurring prior to

July 1, 2006 or to continuing misappropriation started before and continuing to occur after July 1, 2006. (W.S. 40-24-110).

18 LEGAL PROFESSION

18.01 ATTORNEYS AND COUNSELORS:

The state bar is integrated.

Supreme Court, under authority of statute (W.S. 5-2-118), has adopted rules providing for State Bar, Board of Commissioners, annual dues of active members, etc. Under these rules no resident may practice law except as active member of State Bar and no nonresident attorney may appear in any action unless he has associated with his active member of State Bar. (See bylaws of Wyoming State Bar and Disciplinary Code of Wyoming State Bar.)

Jurisdiction over admission is vested in State Board of Law Examiners, and examinations are under direct supervision of such Board. (W.S. 33-5-101 to W.S. 33-5-117).

Eligibility.

Every applicant must produce satisfactory evidence of good moral character and adequate knowledge of standards and ideals of profession and that such person is otherwise fit to practice law in State of Wyoming. (Rules Governing Admission, 401[a]). Requirement that applicant must be adult citizen of U.S. declared unconstitutional. (Wyo., 601 P.2d 174).

Preregistration as Law Student.

Every person intending to apply for admission to Wyoming State Bar by examination encouraged to register with National Conference of Bar Examiners during first year in which person commences legal studies. Board must review such registration at such time and in such manner as it may elect. Board may inquire and investigate as to applicant's moral character and fitness to be member of Wyoming State Bar. Board shall report to Wyoming Supreme Court results of its findings, and copy of Board's report must be provided to law student. Such recommendations preliminary and not deemed commitment of permission to take bar exam. (See Rules Governing Admission, 501).

Educational Requirements.

Must have studied law for three years in law school, approved by State Board of Law Examiners, or two years in law school and one year in office of judge or member of bar of state, or one year in law school and two years in office of judge or member of bar of state. (W.S. 33-5-105).

Petition for admission must be made in writing to Supreme Court and is referred by court to State Board of Law Examiners. (W.S. 33-5-104).

Examinations conducted by State Board of Law Examiners. (W.S. 33-5-104). Bar examination given twice a year in Feb. and July and coincides with administration of Multistate Bar Examination prepared by National Conference of Bar Examiners. (Rules Governing Admission, 201[a], 204[a]).

Applicants taking July Wyoming bar examination must file applications on or before Apr. 15 in office of clerk of Wyoming Supreme Court. Applicants taking Feb. examination must file applications with clerk of Supreme Court before Nov. 15. (Rules Governing Admission, 201[a]).

Wyoming requires Multistate Bar Examination and Multistate Professional Responsibility Examination as well as Wyoming Essay given by State Board of Law Examiners.

(Rules Governing Admission, 211[a]). Board will accept transfer of Multistate Bar Examination scale score of 130 or greater from another jurisdiction for three year period. (Rules Governing Admission, 211[e]). Wyoming Essay consists of essay questions prepared or approved by State Board of Law Examiners, and subjects from which questions may be drawn will be announced to applicants upon approval of their application. (Rules Governing Admission, 204[b]). Wyoming examination tests any and all areas of law which could be encountered in general practice of law in state.

Clerkship.

No such requirement.

Admission Without Examination.

Attorneys from another state may be admitted by motion. (W.S. 33-5-110; Rules Governing Admission, 301 to 305).

Admission Pro Hac Vice.

Foreign attorney may be admitted for purposes of a particular case provided active member of Wyoming State Bar associated with foreign attorney. (W.S. 33-5-111; Bar Ass'n Organ. & Gov't Rules, 11).

Licenses.

Must be licensed and pay annual fee set by Board of Commissioners of Wyoming State Bar pursuant to W.S. 33-1-201. (W.S. 33-5-116[a]).

Privileges.

No statutory provisions.

Disabilities.

Practicing attorney may not be surety on official bond or bond in legal proceedings in district where he resides. (W.S. 33-5-112).

Liabilities.

May be disbarred and forfeit treble damages to injured party for deceiving court or party or commencing action without authority. (W.S. 33-5-114). See also category 5 Civil Actions and Procedure, topic 5.08 Costs, subhead Liability of Attorney.

Compensation.

Fixed by law in probate matters unless parties negotiate lower fee or court approves higher fee due to unusual circumstances (W.S. 2-7-804); limited in worker's compensation case, when representing employee or his beneficiaries to amount awarded by court (W.S. 27-14-608; W.S. 27-14-615). Contingent fees are governed by Rules Governing Contingent Fees for Members of Wyoming State Bar. In civil actions where award of attorney's fees to prevailing party is authorized, court may award reasonable fees without requiring expert testimony. (W.S. 1-14-126[b]).

Lien.

Attorney has lien for services on client's papers or money in his possession, or on money due client and in hands of adverse party in action or proceeding in which employed. (W.S. 29-1-102).

Disbarment or Suspension.

Revised Disciplinary Code for Wyoming State Bar was adopted by order of Supreme Court on July 10, 2003, effective Nov. 1, 2003. Investigative and prosecutorial functions of disciplinary proceeding initiated for attorney misconduct directed by Bar Counsel. (Disciplinary Code, Rule 6[a]). Board of Professional Responsibility holds all necessary hearings upon formal charges and petitions filed with respect to attorney misconduct; and when misconduct proven by clear and convincing evidence at hearing, Board of Professional Responsibility determines appropriate private discipline to be imposed or recommends appropriate public discipline to Supreme Court. (Disciplinary Code, Rule 9[b][i], [b][v]). Public censure, suspension or disbarment is imposed by Wyoming Supreme Court. (Disciplinary Code, Rule 4[a]).

Unauthorized Practice.

Rules of procedure governing unauthorized practice of law adopted by Wyoming Supreme Court on Oct. 28, 1986. Unlawful and punishable as contempt of court for any person not member of Wyoming state bar to hold himself out or advertise by whatsoever means as attorney or counselor-at-law. (W.S. 33-5-117).

Professional Association or Corporation.

See category 2 Business Organizations, topic 2.03 Corporations, subhead Professional Corporations.

19 MINERAL, WATER AND FISHING RIGHTS

19.01 MINES AND MINERALS:

State Inspector of Mines has supervision of all coal, metallic and nonmetallic mines.

Operation of Mines.

See category 12 Environment, topic 12.01 Environmental Regulation. Also see subhead Safeguarding of Employees, infra.

Safeguarding of Employees.

There are extensive provisions for safety of coal miners and for safety of miners other than coal miners (W.S. 30-3-101 to W.S. 30-3-509) and Occupational Health and Safety Commission has extensive power to promulgate safety regulations for miners other than coal miners (W.S. 27-11-101 to W.S. 27-11-114).

Inspection of Mines.

Mines are inspected by State Inspector of Mines or his deputies. (W.S. 30-2-201).

Oil and Gas.

Wyoming Oil and Gas Conservation Commission (W.S. 30-5-104) has jurisdiction over oil and gas operations, including oil mining operations, pursuant to Oil and Gas Conservation Act. (W.S. 30-5-101 to W.S. 30-5-119). State Oil and Gas Supervisor acts as chief administrator under act, subject to supervising control of commission. (W.S. 30-5-108). Oil and gas leases covering state lands are issued by Board of Land Commissioners for primary term of up to ten years and as long as oil and gas can be produced in paying quantities. (W.S. 36-6-101). Provision requiring payment of proceeds from production of oil and gas to all persons entitled thereto within six months after first day of month following date of first sale, escrow of proceeds and interest penalty for failure to pay within times specified. (W.S. 30-5-301 to W.S. 30-5-303). Uniform Unclaimed Property Act adopted. (W.S. 34-24-101 to W.S. 34-24-140). Specified information required to be provided royalty and other nonworking interest owners with such payment of proceeds and effect of division orders limited. (W.S. 30-5-301 to W.S. 30-5-305).

Taxes.

Department of Revenue shall annually value and assess gross products of all mines and mining claims at its fair market value for taxation. (W.S. 39-14-202). There is levied severance tax on value of gross product for privilege of severing or extracting underground coal in state. Severance tax may be in addition to other taxes including ad valorem taxes imposed by W.S. 39-13-104. (W.S. 39-14-103). Valuation is as follows: value of gross product shall be fair market value of product at mouth of mine where produced after mining or production process is completed. (W.S. 39-14-103[b]). Total severance tax rate for surface coal is 7%. (W.S. 39-14-104[a]). Total severance tax rate for underground coal is 3.75%. (W.S. 39-14-104[b]). Coal has no value and is exempt from taxation if it is consumed prior to sale for purpose of treating or processing coal produced from same mine. (W.S. 39-14-105). Annually, on or before Feb. 25th of year following year of production, any person whose property is subject to W.S. 39-14-102(a) shall sign under oath and submit statement listing information relative to property and affairs of company as Department may require to assess property. (W.S. 39-14-107[a]). Annually, on or before Oct. 10th, county treasurer shall send written statement in sealed envelope of total tax due itemized as to property description, assessed value and mill levy to each taxpayer at his last known address. (W.S. 39-14-107[b]). Severance taxes due together with interest, penalties and costs shall be collectible by Department by appropriate judicial proceedings. (W.S. 39-14-108[a][iii]). Effective Jan. 1, 1994, interest at annual rate equal to average prime rate as determined by State Treasurer, plus 4%, shall be added to all delinquent taxes on any mineral produced on or after Jan. 1, 1994. In no instance shall delinquent tax rate be less than 12% nor greater than 18% from any mineral produced on or after Jan. 1, 1994. Interest rate of any delinquent mineral tax from any mineral produced before Jan. 1, 1994 shall be 18% per annum. (W.S. 39-14-108[c][iv]). There is no general statute of limitations for mineral taxation statute. (W.S. 39-14-110). Taxpayers have various remedies as detailed at W.S. 39-14-109. Oil and gas taxation is provided for W.S. 39-14-201 through W.S. 39-14-211. Trona taxation is set forth at W.S. 39-14-301 through W.S. 39-14-311. Bentonite taxation is set forth at W.S. 39-14-401 through W.S. 39-14-411. Uranium taxation is set forth in W.S. 39-14-501 through W.S. 39-14-511. Sand and gravel taxation is set forth at W.S. 39-14-601 through W.S. 39-14-611. Other valuable deposits taxation is set forth in W.S. 39-14-701 through W.S. 39-14-711.

Liens.

There are elaborate provisions for liens upon mines and oil wells in favor of persons performing labor or furnishing materials therefor and enforcement thereof. (W.S. 29-3-101 to W.S. 29-3-111).

20 MORTGAGES

20.01 CHATTEL MORTGAGES:

Covered by Uniform Commercial Code. (W.S. 34.1-1-101 to W.S. 34.1-10-104; W.S. 34-21-1101 to W.S. 34-21-1107). 1998 official text of Revised Article 9—Secured Transactions adopted effective July 1, 2001. (2001 Wyo. Sess. Laws, c. 137). W.S. 34.1-9-501(a) adds subsection (iii) providing that financing statement must be filed in office of county clerk to perfect security interest in vehicle or motor vehicle; W.S. 31-2-801 states requirements for perfection of security interest in vehicle or motor vehicle required to be licensed in Wyoming. See category Business Regulations and Commerce, topic Commercial Code. Uniform Consumer Credit Code also adopted. (1971 Wyo. Sess. Laws, c. 191, W.S. 40-14-101 to W.S. 40-14-702). See category 3 Business Regulation and Commerce, topic 3.11A Consumer Credit.

Filing.

34.1-9-301 through W.S. 34.1-9-307 enumerate which jurisdiction governs perfection of security interest. Except as otherwise provided in W.S. 34.1-9-501(b) with respect to transmitting utilities, if Wyoming law governs perfection of security interest or agricultural lien, office in which to file financing statement to perfect security interest or agricultural lien is office where record of mortgage on real property concerned would be recorded if collateral is as-extracted collateral or timber to be cut or financing statement is filed as fixture filing and collateral is goods that are or are to become fixtures. (W.S. 34.1-9-501[a][i]). If collateral is vehicle or motor vehicle required to be licensed in Wyoming, financing statement or security agreement must be filed in office of county clerk of county in which vehicle is located, and notation of security interest must be concurrently endorsed on certificate of title to vehicle or motor vehicle. (W.S. 34.1-9-501[a][iii]; W.S. 31-2-801[a]). See category 23 Transportation, topic 23.01 Motor Vehicles, subhead Liens. In all other cases, including case in which collateral is goods that are or are to become fixtures and financing statement is not filed as fixture filing, financing statement must be filed in office of Wyoming Secretary of State. (W.S. 34.1-9-501[a][ii]).

Filing Fees.

Fees for services rendered by Secretary of State as filing office set by rule adopted by Secretary of State. (W.S. 34.1-9-525). Fees for services rendered by county clerk as filing office prescribed by W.S. 18-3-402. See category 10 Documents and Records, topic 10.04 Records, subhead Filing Under Uniform Commercial Code.

Motor Vehicles.

See category 23 Transportation, topic 23.01 Motor Vehicles, subhead Liens, for requirements of perfection of security interest in motor vehicle.

Manufactured Homes.

Manufactured home included in definition of goods in which Art. 9 security interest may be created. (W.S. 34.1-9-102[a][xliv]). Security interest in manufactured home held for sale or lease as inventory as defined in W.S. 34.1-9-102(a)(xlviii) governed by provisions of Art. 9 of Uniform Commercial Code. (W.S. 34.1-9-109[a]). Security interest in manufactured home not constituting inventory governed by W.S. 31-2-801, which sets forth requirements for perfection of security interest in “vehicle or motor vehicle required to be licensed.” Term “vehicle or motor vehicle required to be licensed” defined to include mobile home, which under Wyoming motor vehicle laws must have certificate of title. (W.S. 31-2-801[d] and W.S. 31-2-501[b]. Mobile home expressly defined as manufactured home, which in turn defined as residential dwelling unit built in accordance with Federal Manufactured Home Construction and Safety Standards which is one unit more than eight and one-half feet in width and designed, constructed and equipped as dwelling place, living abode or place of business to which wheels may be attached for movement upon streets and highways except unit used primarily as mobile laboratory or mobile office. (W.S. 31-2-501[a][ii] and W.S. 31-1-101[a][xxiv][C]). To be effective as valid, perfected security interest against third persons, financing statement or security agreement covering manufactured home must be filed in office of clerk of county in which manufactured home located, and county clerk must concurrently make notation (showing date and amount of security interest and name of secured party) and endorsement of security interest on face of certificate of title to such manufactured home. (W.S. 31-2-801[a]). *Cf.* W.S. 34.1-9-501(a)(iii) (proper office in which to file financing statement to perfect security interest in vehicles or motor vehicles is office of county clerk). If manufactured home installed on permanent foundation and taxable as real property, manufactured home will be real property and lien will be perfected by recording mortgage covering such manufactured home in office of clerk of county in which located provided that all liens on manufactured home are released and certificate of title or manufacturer's statement of origin, if any, for manufactured home is surrendered to and cancelled by county clerk. (W.S. 31-2-502[b]).

Recording.

Uniform Commercial Code governs personal property. Real property is governed by rules for real property. See category 3 Business Regulation and Commerce, topic 3.09 Commercial Code.

Refiling or Extension.

Uniform Commercial Code governs. See category 3 Business Regulation and Commerce, topic 3.09 Commercial Code.

Removal of Property by Mortgagor.

Any mortgagor removing or attempting to remove mortgaged property out of jurisdiction of district court of county where such property was at time mortgage, security agreement or financing statement given, with intent to deprive mortgagee or secured party of his security, without first obtaining consent in writing from mortgagee or secured party to such removal must, upon conviction, be imprisoned for not more than ten years and fined not more than $10,000 if interest of mortgagee in property is of value of $1,000 or more. (W.S. 6-3-607). See also, category Business Regulation and Commerce, topic Commercial Code.

Sale of Property by Mortgagor.

Any mortgagor who transfers or conceals with intent to deprive mortgagee of interest in mortgaged property, rights or privileges to any person or corporation without first procuring written consent of mortgagee or secured party to such sale, must, upon conviction, be imprisoned for not more than ten years and fined not more than $10,000 if interest of mortgagee in property is of value of $1,000 or more. (W.S. 6-3-607). See also, category Business Regulation and Commerce, topic Commercial Code.

Concealment or Destruction of Property by Mortgagor.

Mortgagor who changes, alters, removes, substitutes, mutilates, covers up or defaces any brand, mark, number, name, letter, character, color or other characteristic used to identify such mortgaged property, with intent to deprive mortgagee of interest in property must, upon conviction, be imprisoned for not more than ten years and find not more than $10,000 if interest of mortgagee in property is of value of $1,000 or more. (W.S. 6-3-607). See, also, category Business Regulation and Commerce, topic Commercial Code.

Taxation.

Chattel mortgages exempt from property tax. (W.S. 39-11-101[a][vii]; W.S. 39-11-105[a][xxix]; W.S. 39-13-105[j][vi]).

Forms.

Financing Statement.

Secretary of State has approved following forms for acceptance by Wyoming filing offices: National UCC Financing Statement (Form UCC1) and Addendum (Form 1Ad), National UCC Financing Statement Amendment (Form UCC3) and Addendum (Form UCC3A, National Information Request (Form UCC11), and National Correction Statement (Form UCC5). Forms can be accessed at: http://soswy.state.wy.us/uniform/forms.htm.

Security Agreement.

There is no general security agreement form in use as each security agreement is unique. Forms of security agreements used in other states will be adequate for use in Wyoming provided they satisfy requisites of Uniform Commercial Code.

20.02 [RESERVED]

20.03 MORTGAGES OF PERSONAL PROPERTY:

See topic 20.01 Chattel Mortgages; categories 3 Business Regulation and Commerce, topic Commercial Code, and Documents and Records, topic Records, subhead Filing Under Uniform Commercial Code.

20.04 MORTGAGES OF REAL PROPERTY:

A mortgage merely creates a lien and does not pass title. (26 Wyo. 484, 187 P. 931).

Covenant to Pay Not Implied.

No mortgage may be construed as implying a covenant for payment of sum thereby intended to be secured, where there is no express covenant for such payment contained in mortgage, and, if no bond or other separate instrument to secure such payment is given, remedies of mortgagee are confined to lands mentioned in mortgage. (W.S. 34-1-136).

Execution.

A mortgage must be executed and acknowledged by mortgagor but requires no witness and no seal by mortgagor. (W.S. 34-1-106; W.S. 34-1-113; and W.S. 34-26-107). Spouse need not join except to release interest in homestead. See categories 8 Debtor and Creditor, topic Homesteads; Family, topic Husband and Wife; Property, topic Deeds, subheads Execution, Recording.

Recording.

Mortgage must be recorded in office of county clerk of county in which property is located in order to be effective against subsequent bona fide purchasers or encumbrancers for value. (W.S. 34-1-120). It must be acknowledged in order to be recorded. (W.S. 34-1-118). Instrument containing form or forms of covenants, conditions, obligations, powers and other mortgage clauses may also be recorded (W.S. 34-2-109), and provisions of instrument incorporated by reference in any mortgage, if such reference in mortgage states master form instrument recorded in county in which mortgage offered for record, date when, and book, and page or pages where master form instrument recorded, and that copy of master form instrument furnished to person executing mortgage. Provisions of master form instrument are incorporated in such mortgage as if fully set forth therein. (W.S. 34-2-111). Every master form instrument shall be entitled on face thereof as a “Master form recorded by . . . . . (name of person causing instrument to be recorded),” and need not be acknowledged to be entitled to record. (W.S. 34-2-109). See category 21 Property, topic 21.06 Deeds, subheads Execution, Recording.

Recording fees are $6 for first page and $2 for each additional page, and 50¢ for each entry on index in excess of five entries, and additional 50¢ for more than one grantor or grantee of different surname. (W.S. 18-3-402).

Deeds of trust to secure debts or indemnify sureties are provided for by statute. In case of default trustees may sell land at public auction, after providing requisite notice by certified mail and by publication. (W.S. 34-3-101 to W.S. 34-3-103; W.S. 34-4-104).

Future Advances.

No statutory provisions.

Priorities.

A mortgage takes priority over taxes levied against any other property. (W.S. 34-2-124).

Subordination Agreements.

No provision for, but they are recognized and used in practice.

Assignment.

The recording of an assignment of a mortgage is not deemed notice to mortgagor so as to invalidate any payment made by him to mortgagee. (W.S. 34-1-128).

Release of a part of property covered is not provided for but is recognized and used in practice.

Satisfaction.

Mortgage or deed of trust shall be discharged by certificate of release duly executed and acknowledged, and recorded with county clerk who also makes reference to release upon margin of record of mortgage or deed of trust. (W.S. 34-1-130). Certificate of discharge is provided for in W.S. 34-2-113. Mortgagee liable for actual and special damages as set forth by statute for failure to discharge or release. (W.S. 34-1-132).

Foreclosure.

Mortgages may be foreclosed by action in which district court enters decree of foreclosure ordering sale of mortgaged property, or, if authorized by adequate power of sale provision in mortgage, by advertisement and sale of mortgaged property in manner provided in Wyoming statutes governing power of sale foreclosures. (W.S. 34-4-101 to W.S. 34-4-113).

Sales under either foreclosure by action or foreclosure by power of sale must be advertised. (W.S. 34-4-104; W.S. 34-4-105; W.S. 1-18-101). In power of sale foreclosures, mortgagee must first serve written notice of intent to foreclose mortgage upon record owner, and person in possession of mortgaged property if different than record owner, by certified mail with return receipt, mailed to last known address of record owner and person in possession at least ten days before commencement of publication of notice of sale. (W.S. 34-4-103[a][iv]). After giving required ten-day notice of intent to foreclose, foreclosing mortgagee must publish notice that mortgage will be foreclosed by sale of mortgaged property, or some part thereof, for four consecutive weeks, at least once each week, in newspaper printed in county where mortgaged premises situated, or if no newspaper published in county, then in newspaper printed in state and of general circulation in county. (W.S. 34-4-104[a]). Prior to first date of publication of notice of foreclosure sale in newspaper, foreclosing mortgagee must serve copy of notice, by certified mail with return receipt, upon record owner, person in possession of mortgaged property, if different than record owner, and all holders of recorded mortgages and liens subordinate to mortgage being foreclosed that appear of record at least 25 days before date of scheduled foreclosure sale. (W.S. 34-4-104[a]). Foreclosing mortgagee must also send 25-day notice to Internal Revenue Service if any federal tax liens have been filed against mortgaged property more than 30 days prior to date of scheduled foreclosure sale. (26 U.S.C. § 7425[b]). Published notice of foreclosure sale must include, among other prescribed information, following statement: “The property being foreclosed upon may be subject to other liens and encumbrances that will not be extinguished at the sale and any prospective purchaser should research the status of title before submitting a bid.” (W.S. 34-4-105[a]).

In power of sale foreclosures, foreclosure sale must be at public vendue, between hours of 10:00 a.m. and 5:00 p.m., at front door of courthouse, or place of holding district court of county in which mortgaged premises to be sold, or some part of it, situated, and must be made by person appointed for that purpose in mortgage or by sheriff or deputy sheriff of county to highest bidder. (W.S. 34-4-106). Foreclosing mortgagee, or authorized agent, must be present at sale or, prior to foreclosure sale, must deliver to sheriff conducting sale written waiver of right to appear at sale. (W.S. 34-4-106; W.S. 34-4-108). Sheriff conducting sale not considered authorized agent of foreclosing mortgagee unless latter has given sheriff specified opening bid to be presented by sheriff on mortgagee's behalf, and sheriff actually presents opening bid. (W.S. 34-4-106). Any foreclosure sale conducted in violation of requirements of W.S. 34-4-106 is void, in which case power of sale contained in mortgage that is subject of voided sale not extinguished or exhausted, but may be properly foreclosed in subsequent foreclosure sale conducted in compliance with applicable law. (W.S. 34-4-106). Foreclosing mortgagee, or legal representative, entitled to purchase mortgaged premises at foreclosure sale as long as acting in good faith (W.S. 34-4-108), and may credit bid amount of mortgage debt at sale. (W.S. 1-18-103[a]). Upon completion of foreclosure sale, sheriff or other officer conducting sale must sign, issue and record certificate of sale to purchaser of property, which must describe property purchased and sum paid for property, or if purchased by foreclosing mortgagee, amount of mortgagee's bid. (W.S. 1-18-102). Certificate must also state that purchaser entitled to sheriff's deed for property at expiration of applicable period of redemption unless property redeemed prior to that date as provided by law. (W.S. 1-18-102). If there are sale proceeds in excess of amount required to pay debt in full, foreclosing mortgagee, within ten days following foreclosure sale, must serve copy of sale results, by certified mail with return receipt, to record owner of mortgaged premises and all holders of recorded mortgages and liens subordinate to foreclosed mortgage. (W.S. 34-4-104[b]). Statutes prescribe procedure for holder of junior mortgage or other lien to make demand upon foreclosing mortgagee for excess sale proceeds and for distribution of excess sale proceeds, either upon agreement of all parties in interest or by court order, to subordinate mortgagees or lienholders in accordance with respective priorities and to extent of respective interests. (W.S. 34-4-113[b]).

If foreclosing mortgagee fails to join person who has interest in mortgaged property that is junior or subject to mortgage being foreclosed as party defendant in judicial foreclosure action or, in case of power of sale foreclosure, fails to serve omitted party with copy of published notice of foreclosure sale within time and in manner prescribed by W.S. 34-4-104(a), interest of omitted party not terminated by foreclosure. (W.S. 1-18-114). “Omitted party” means any person who: (a) Either has acquired subordinate, record interest in real property subject to mortgage foreclosure proceeding or has obtained valid possessory interest in, and is in actual possession of, property; and (b) is not joined as party defendant in judicial foreclosure action (or if joined, is entitled to notice but not served with process) or is not notified of mortgage foreclosure in power of sale foreclosure as required by W.S. 34-4-104(a). (W.S. 1-18-114[a][i]). Interest of omitted party in foreclosed property may be terminated in civil action commenced by interested person if omitted party afforded rights of redemption upon such terms as district court for district in which property located may deem just under circumstances but which must not be more favorable than omitted party's statutory rights had he been provided notice of sale. (W.S. 1-18-114[b]). “Interested person” means any holder of certificate of sale or certificate of redemption pursuant to W.S. 1-18-102 and W.S. 1-18-106 or any owner of property by virtue of sheriff's deed or person claiming through such owner. (W.S. 1-18-114[a][ii]). Any mortgage foreclosed without proper joinder or notice to omitted party not extinguished by merger with title to foreclosed property acquired upon issuance and delivery of sheriff's deed until interest of such omitted party terminated as provided by W.S. 1-18-114(b) or by operation of law. (W.S. 1-18-114[c]).

Deficiency Judgment.

Mortgagee has right to sue for deficiency remaining after foreclosure of mortgage or deed of trust, whether by judicial action or under power of sale, provided foreclosure and sale proper and equitable. (Wyo., 751 P.2d 1309). In case of power of sale foreclosure, mortgagor remains liable for any deficiency. (W.S. 34-4-113[c]).

Moratorium.

There is no statutory moratorium on mortgage foreclosures.

Redemption is permitted as in case of execution sales. See category 8 Debtor and Creditor, topic 8.05 Executions.

Form of Mortgage.

Following form of mortgage may be used in conjunction with acknowledgment requirements discussed supra. (W.S. 34-2-107).

Form

A. B., mortgagor, ... (here insert the name or names and place of residence), to secure the payment of . . . ., (here insert the amount of the indebtedness, when due, rate of interest and whether secured by note or otherwise) do hereby mortgage the following described real estate (here insert description thereof) situate in . . . . county, State of Wyoming.

The mortgagor agrees to pay all taxes and assessment on said premises and to keep the buildings thereon insured in a sum not less than $. . . . during the life of this mortgage, payable to the mortgagee; and in case he does not the mortgagee may insure said buildings and pay said taxes and assessments, and all sums so paid shall be added to and considered as a part of the above indebtedness hereby secured.

In case of default of payment of either interest or principal then the whole indebtedness herein secured shall become due and payable, and the mortgagee may proceed, pursuant to law, to foreclose on said property by judicial action or by advertisement and sale and in case of foreclosure the mortgagor hereby agrees to pay all costs of the same, including an attorney's fee of $. . . .

Dated this . . . . day of . . . ., A.D., ...

. . . . A.B.

Form of Deed of Trust.

Following is statutory form of deed of trust and may be used in conjunction with acknowledgment requirements discussed supra. (W.S. 34-3-101).

Form

This deed, made the . . . . . . day of . . . . in the year of . . . ., between . . . . (the grantor) of the one part, and . . . . (the trustee) of the other part; witnesseth: That the said . . . . (the grantor) doth (or do) grant unto the said . . . . (the trustee) the following property (here describe it), in trust to secure (here describe the debts to be secured or the sureties to be indemnified, and insert covenants or any other provisions the parties may agree upon); witness the following signatures and seals (or signature and seal).

Forms of Assignment and Partial Release.

Following forms of assignment and partial release of mortgage may be used in conjunction with acknowledgment requirements discussed supra:

Forms

Assignment of Mortgage:

Know all men by these presents: That . . . . . party of the first part in consideration of the sum of . . . . Dollars to him in hand paid by . . . . party of the second part, the receipt whereof is hereby acknowledged, has sold, and by these presents does sell, assign and transfer unto the said party of the second part a certain Indenture of Mortgage bearing date the . . . . day of . . . ., ... and made by . . . . in favor of . . . . and conveying the (describe property) in . . . . County, State of Wyoming and which said Mortgage was recorded in the office of the County Clerk of said County of . . . . on the . . . . day of . . . ., ..., in Book . . . ., at Page . . . ., together with notes and obligations therein described, without recourse on me in any event for any cause.

To have and to hold the same unto the said party of the second part, his executors, administrators, successors or assigns, subject only to the provisos in the said Indenture of Mortgage contained.

In witness whereof I hereunto set my hand this . . . . day of . . . ., ... (signature).

Partial Release of Mortgage:

The undersigned hereby releases to . . . . all interest which he has acquired in the following described property under a mortgage from . . . . to . . . . dated . . . .: (describe property). Said mortgage is recorded in Book . . . ., at Page . . . . of the records of the County Clerk of . . . . County, State of Wyoming. (signature).

Form of Satisfaction.

A cancellation or discharge of mortgage or deed of trust may be in the following form (W.S. 34-2-113):

Form

Certificate of Discharge.

This certifies that a mortgage or deed of trust (as the case may be) from . . . . to . . . . dated . . . ., A. D., ... and recorded in book . . . . of . . . ., on page . . . ., has been fully satisfied by the payment of the debt secured thereby and is hereby cancelled and discharged.

. . . .

Signed in the presence of . . . ., county clerk of . . . . county.

Filed and recorded . . . ., A. D., ..., at . . . . M.

. . . .

Chattel Mortgages.

See topic 20.01 Chattel Mortgages.

21 PROPERTY

21.01 ABSENTEES:

Process Agent.

See categories 3 Business Regulation and Commerce, topic Brokers, subhead Real Estate Brokers; Estates and Trusts, topic Executors and Administrators, subhead Eligibility and Competency.

Care of Property.

Where resident is missing for 90 days trustee may be appointed to care for his property in state, upon petition to district court (W.S. 2-12-101), and notice by publication made twice during ten days prior to hearing, and personal notice to persons who would be heirs of missing person if such person were deceased (W.S. 2-12-102). Wife or husband has preferential right to appointment. (W.S. 2-12-104). Trustee must give bond to be approved by court in amount not less than value of personal property and probable income from real property. (W.S. 2-12-105). Allowance may be made from such property for support of family of missing person. Estate property may be sold on good cause shown to court. (W.S. 2-12-106). See also category 14 Family, topic 14.07 Guardian and Ward.

Escheat.

Uniform Unclaimed Property Act adopted. (W.S. 34-24-101 to W.S. 34-24-140). All property in state which does not belong to any person belongs to state (W.S. 9-5-202); may be recovered by state upon filing of information in district court against person in possession; and proof that real or personal property, or any funds, stocks, bonds, dividends, or property of whatsoever character, has been unclaimed for five years prior to filing of information and that name or whereabouts of owner is unknown is deemed prima facie evidence of failure of title (W.S. 9-5-203). Also, when property, real or personal, or any refunds, dividends or other payments are ordered conveyed or paid to persons within state by decree, judgment or order of court or governmental agency and are not claimed by such persons within time fixed by such order, such unclaimed property, refunds, dividends or other payments escheat to state and are distributed by court to state. (W.S. 9-5-203). All such property is held by state subject to claim of rightful owner for five years, after which time property transferred to state. (W.S. 9-5-203). Foregoing do not apply to property subject to Uniform Unclaimed Property Act. (W.S. 9-5-203).

See also categories 3 Business Regulation and Commerce, topic Banks and Banking, subhead Unclaimed Deposits; Estates and Trusts, topics Descent and Distribution, subhead Escheat, Executors and Administrators, subhead Distribution if Abroad, and Wills, subheads Unclaimed Legacies, Uniform Unclaimed Property Act.

21.02 ADVERSE POSSESSION:

Character of Possession.

Possession must be actual, open, notorious, exclusive, continuous, hostile and under color of title or claim of right. (18 Wyo. 64, 104 P. 23; 39 Wyo., 494, 273 P. 908). Successive adverse holdings, when there is privity between successive holders, may be united. (18 Wyo. 64, 104 P. 23).

Duration of Possession.

Action for recovery of real estate must be brought within ten years after cause of action arises. (W.S. 1-3-103).

Easements.

Public highways can be established by public user for ten year period. (W.S. 24-1-101). Prescriptive easement requires proof of adverse use, claim of right under color of title, open, continuous, adverse, uninterrupted use for ten years. (Wyo., 768 P.2d 586). Civil action for common law way of necessity abolished because of existence of statutory procedure under W.S. 24-9-101 for obtaining access to land locked property. (Wyo., 811 P.2d 287 overruling several prior cases on this issue).

Disabilities.

Any person under legal disability when cause of action accrues, may bring his action within three years after disability is removed or within any other statutory period of limitations, whichever is greater. (W.S. 1-3-114).

See also category 10 Documents and Records, topic 10.04 Records, subhead Marketable Title Act.

21.03 [RESERVED]

21.04 CONVEYANCES:

See categories 8 Debtor and Creditor, topic Homesteads; Family, topic Husband and Wife; Mortgages, topic Mortgages of Real Property; Property, topic Deeds.

21.05 CURTESY:

Abolished. (W.S. 2-4-101).

21.06 DEEDS:

Conveyance of land, or of any estate or interest therein, may be made by instrument executed and acknowledged by the party from whom or which the estate or interest is intended to pass. (W.S. 34-1-106). See topic Real Property for types of estates. See also, category Documents and Records, topic Records, subhead Tax Title Limitations Act.

Execution.

Must be signed and acknowledged. (W.S. 34-1-106, 113). Unacknowledged deeds are sufficient to pass title as between parties (11 Wyo. 313, 71 P. 995), but are not entitled to be recorded (W.S. 34-1-118). No witness necessary. (W.S. 34-1-113). Private seals are abolished. (W.S. 34-2-125). It is not necessary for spouse to join in execution of deed except to relinquish interest in homestead. (W.S. 34-2-121). See also topic 21.16 Real Property; categories 8 Debtor and Creditor, topic Homesteads, subhead Alienation or Encumbrance; Family, topic Husband and Wife, subhead Conveyance or Encumbrance of Property.

Recording.

Unrecorded conveyances of real estate are sufficient to pass title as between parties thereto (11 Wyo. 313, 71 P. 995), but void as against subsequent bona fide purchasers in good faith for value whose conveyance is first duly recorded (W.S. 34-1-120). Subsequent purchasers can avoid being put on inquiry notice by diligently searching records. (Wyo., 942 P.2d 398). Conveyances of real estate recorded in office of county clerk of county where lands lie (W.S. 34-1-118), and recorded unacknowledged deed does not give constructive notice of its existence or contents (Wyo., 348 P.2d 63). See also category 10 Documents and Records, topic 10.04 Records.

34-1-121(a)(ii) Mineral leases issued by U.S. or State of Wyoming and assignments thereof entitled to be recorded without acknowledgment.

County Clerk is directed not to record deed, mortgage or assignment of mortgage without address of grantee, mortgagee or assignee, though does not affect validity of recording. (W.S. 34-1-119). When deed, contract or other document transferring legal or equitable title to real property is presented to county clerk for recording, instrument shall be accompanied by statement under oath by grantee or his agent setting forth certain information required in any conveyance plus actual full amount paid or to be paid for property, terms of sale and estimate of value of any nonreal property included in sale. (W.S. 34-1-142).

Recording fees are $8 for first page and $3 for each additional page, $1 for each entry on index in excess of ten entries, and additional $1 per name for any instrument with more than five grantors or grantees of different surname. (W.S. 18-3-402).

Operation and Effect.

Except as noted infra, subhead Form, no covenant shall be implied in any conveyance of real estate, other than a conveyance of oil, gas or other minerals, whether such conveyance contains special covenants or not. (W.S. 34-1-135).

Taxes.

There are no taxes on deeds or the recording thereof.

Short Form of Warranty Deed is as follows (W.S. 34-2-102):

Form

. . . ., grantor (insert the name or names of grantor and address), for and in consideration of (here insert consideration), in hand paid, conveys and warrants to . . . ., grantee (here insert grantee's name or names and place of residence), the following described real estate (here insert description), situate in the County of . . . ., State of Wyoming. (When homestead right is involved, add the following). Hereby releasing and waiving all rights under and by virtue of the homestead exemption laws of said state.

Dated this . . . . day of . . . ., A.D. 20. . .

. . . .

Every deed in substance in the above form is deemed and held a conveyance in fee simple, to the grantee, his heirs and assigns, with covenants on the part of the grantor: (1) That at the time of the making and delivery of such deed he was lawfully seized of an indefeasible estate in fee simple in and to the premises therein described, and had good right and power to convey the same; (2) that the same were then free from all encumbrances; and (3) that the grantor warrants to the grantee, his heirs, and assigns, the quiet and peaceable possession of such premises, and will defend the title thereto against all persons who may lawfully claim the same. Such covenants are obligatory upon the grantor, his heirs and personal representatives, as fully, and with like effect as if written at length in such deed. (W.S. 34-2-103).

Quitclaim deed may be substantially in the following form (W.S. 34-2-104): . . . ., grantor (here insert grantor's name or names, and address) for the consideration of (here insert the consideration) conveys and quitclaims to (here insert grantee's name or names and address) all interest in the following described real estate (here insert description), situate in the county of (here insert name of county) in the State of Wyoming. (Where the right of homestead is released add: Hereby relinquishing and waiving all rights under and by virtue of the homestead exemption laws of this state). Dated, this . . . . day of . . . ., A.D. 20 . . .

Every deed in substance in the above form is a sufficient conveyance, release and quitclaim to the grantee, his heirs and assigns, in fee of all legal and equitable rights of the grantor at the time of the execution and delivery of such deed, in the premises therein described, but does not extend to after acquired title unless words are added expressing such intention. (W.S. 34-2-105).

21.07 DEEDS OF TRUST:

See category 20 Mortgages, topic 20.04 Mortgages of Real Property.

21.08 DOWER:

Abolished. (W.S. 2-4-101[b]).

21.09 ESCHEAT:

See topic 21.01 Absentees, subhead Escheat; categories 3 Business Regulation and Commerce, topic Banks and Banking, subhead Unclaimed Deposits; Estates and Trusts, topics Descent and Distribution, subhead Escheat, Wills, subhead Unclaimed Legacies; Property, topic Absentees, subhead Escheat.

21.10 LANDLORD AND TENANT:

General rights and liabilities of residential landlords and tenants governed by Wyoming Residential Rental Property Act. (W.S. 1-21-1201 to W.S. 1-21-1211). All other landlord and tenant relationships governed by common law.

Kinds of Tenancy.

Tenancies by sufferance can exist by implication or operation of law. Otherwise relationship of landlord and tenant must be based on express agreement. (W.S. 34-2-128).

Leases for one year or less may be verbal, but leases of more than one year must be in writing. (W.S. 1-23-105). Renewals of all expired leases must be in writing. (W.S. 34-2-129). Leases for three years or more are defined as conveyances (W.S. 34-1-102) and must be executed and acknowledged in same manner as deeds (W.S. 34-1-106; W.S. 34-1-113). See topic 21.06 Deeds, subheads Execution, Recording.

Recording.

Leases for three years or more are governed by the same rules as deeds. (W.S. 34-1-102; W.S. 34-1-106). See topic 21.06 Deeds, subhead Recording.

Rent.

No statutory provisions.

Lien.

No statutory provisions.

Termination of Tenancy.

Tenants holding over after their terms expire require only a written notice to quit naming a definite day or date at least three days after notice served. (W.S. 1-21-1002[a][i]; W.S. 1-21-1003).

Holding Over.

The only relation of landlord and tenant which can exist upon expiration of a term created by lease, either verbal or written, is a tenancy by sufferance. (W.S. 34-2-128). There can be no implied renewal of expired lease (W.S. 34-2-128), and no expired lease may be renewed except in writing (W.S. 34-2-129).

Dispossession.

Proceedings for forcible entry and detainer may be had in any circuit court against tenants holding over their terms or after failure to pay rent for three days after it is due. (W.S. 1-21-1002[a][i]).

Distress.

There are no statutory provisions relating to distress. Common law remedies are available.

21.11 LEASES:

See topic 21.10 Landlord and Tenant. Uniform Commercial Code adopted (W.S. 34.1-1-101 to W.S. 34.1-10-104; 1987 official text, including certain 1990 Amendments of Article 2A—Leases—Uniform Commercial Code, adopted effective as of July 1, 1991). Uniform Consumer Credit Code also adopted. (W.S. 40-14-101 to W.S. 40-14-702). See category 3 Business Regulation and Commerce, topics 3.09 Commercial Code, 3.11A Consumer Credit.

21.12 [RESERVED]

21.13 PERPETUITIES:

The American common law rule has been made effective by adopting the “Model Rule Against Perpetuities Act.” Interests in real or personal property must vest not later than 21 years after some life in being at the creation of the interest plus possible period of gestation. Lives selected to govern shall not be so numerous nor so situated that evidence of death is unreasonably difficult to obtain. (W.S. 34-1-138; W.S. 34-1-139). Exception to law against perpetuities applies to trusts created after July 1, 2003 and meeting certain requirements. (W.S. 34-1-139).

Accumulations.

Common law rules prevail. See also category 13 Estates and Trusts, topic 13.15 Trusts.

21.14 PERSONAL PROPERTY:

Tenancy by entirety in personal property is recognized and may be established without necessity of transfer to or through third person. (W.S. 34-1-140).

21.15 POWERS OF ATTORNEY:

Power of attorney not affected by disability (Durable Power of Attorney) can be created by addition of statutory language: “This power of attorney shall not become ineffective by my disability” or “This power of attorney shall become effective upon my disability.” (W.S. 3-5-101).

With respect to letters of attorney executed in accordance with common law, there is no special form, but they must be acknowledged like deeds in order to be recorded (W.S. 34-1-104), and they must be in writing if they authorize sale or encumbrance of real property (70 Wyo. 129, 246 P.2d 771).

Members of Armed Forces.

No statutory provisions.

21.16 REAL PROPERTY:

Fee simple estates, life estates, tenancies by entirety, joint tenancies and tenancies in common recognized. Joint tenancy or tenancy by entirety may be created by owner of property simply by designating in instrument of conveyance or transfer names of such tenants, including his own, without necessity of conveyance to or through third person. (W.S. 34-1-140).

See also, topics Curtesy, Deeds, Dower, Landlord and Tenant; categories Civil Actions and Procedure, topic Partition; Debtor and Creditor, topic Homesteads; Documents and Records, topic Records, subheads Marketable Title Act and Tax Title Limitations Act; Environment, topic Environmental Regulation; Family, topic Husband and Wife; Mortgages, topic Mortgages of Real Property.

Joint tenancies are not abolished nor is any presumption established by statute or decision in favor of tenancy in common where intent to create joint tenancy is not clear. Joint tenancies, however, are not favored as common law relative to presumption favoring joint tenancies has been statutorily modified. (Wyo., 592 P.2d 714). Joint tenancy can be created in husband and wife (Wyo., 386 P.2d 103) and may be terminated by one joint tenant's conveyance of his interest.

Tenancies by entirety recognized. (75 Wyo. 444, 297 P.2d 213; W.S. 34-1-140).

Estates in tail are abolished by statute. (W.S. 34-1-137).

Termination of Estates.

Life estates, tenancies by the entireties, and joint tenancies may be terminated on death of life tenant, joint tenant or of one spouse by court procedure (W.S. 2-9-101), or by simplified procedure by affidavit (W.S. 2-9-102).

Rule in Shelley's Case is recognized (60 Wyo. 26, 144 P.2d 138), but courts will refuse to apply rule unless “heirs” used in technical sense so that remainder limited to heirs in indefinite line of inheritable succession from generation to generation (Wyo., 385 P.2d 655).

Foreign Conveyances or Encumbrances.

Instruments of conveyance covering lands in Wyoming executed in another state may be acknowledged by notary, judge, clerk of record, or any person authorized by law of jurisdiction to perform notarial acts there, with same effect as if performed by notarial officer of this state. (W.S. 34-26-106). See also category 10 Documents and Records, topic 10.01 Acknowledgments.

Condominiums.

Condominium ownership of real property is permitted. (W.S. 34-20-101 to W.S. 34-20-104).

21.17 TRUST DEEDS:

See category 20 Mortgages, topic 20.04 Mortgages of Real Property.

22 TAXATION

22.01 ADMINISTRATION:

County Board of Equalization (Board of County Commissioners) has general supervision of administration of tax laws in counties, and Department of Revenue and State Board of Equalization, have similar supervision over taxes collected on statewide basis. (W.S. 39-11-102.1 to W.S. 39-11-111).

Multistate Sellers.

Wyoming has adopted Uniform Sales and Use Tax Administration Act (W.S. 39-15-401 to W.S. 39-15-408) effective Mar. 1, 2001. Act authorizes and directs Department of Revenue to enter into streamlined sales and use tax agreement with one or more states to simplify and modernize sales and use tax administration in order to substantially reduce burden of tax compliance for multistate seller and for all types of commerce. (W.S. 39-15-403[a]). Agreement authorized by Act intended to provide mechanism among member states to establish and maintain cooperative, simplified system for application of sales and use taxes under duly adopted law of each member state. (W.S. 39-15-406). Act requires that agreement shall, among other things: (a) Set restrictions to achieve over time more uniform state rates through limiting number of state rates, limiting application of maximums on amount of state tax due on each transaction, and limiting application of thresholds on application of state tax; (b) establish uniform standards for sourcing of transactions to taxing jurisdictions, administration of exempt sales, allowances seller can tax for bad debts, and sales and use tax remittances; (c) require states to develop and adopt uniform definition of sales and use tax terms; (d) provide central, electronic registration system that allows sellers to register to collect and remit sales and use taxes for all signatory states; (e) provide for reduction of burdens of complying with local sales and use taxes; and (f) outline any monetary allowances to be provided by states to sellers or certified service providers. (W.S. 39-15-405). In furtherance of agreement, Department of Revenue to act jointly with other member states to establish standards for certification of certified service provider authorized to perform all of seller's sales tax functions and certified automated system and to establish standards for multistate sellers. (W.S. 39-15-403[a]).

Special Note re Motor Vehicles and Certain Intangible Personal Property.

Vehicles subject to registration as provided by W.S. 31-4-101 and W.S. 31-18-201 and registered as provided are exempt from property taxation. (W.S. 39-11-105[a][xiii]). However, all vehicles registered under W.S. 31-4-101 pay county and state fee at time of registration (W.S. 31-3-101) and these fees are in lieu of all other taxes (W.S. 31-3-101[d]), except fees as may be imposed by municipalities under regulatory ordinances, and W.S. 31-3-101(d) not to be so construed as to exempt from ad valorem taxes any such motor vehicles or trailers in process of manufacture or held in storage or any transportable home. Vehicles registered under W.S. 31-18-201 are commercial vehicles registered with Motor Vehicle Division, and every owner of commercial vehicle or fleet of commercial vehicles shall comply with titling, registering and licensing requirements as set forth in W.S. 31-2-101 to W.S. 31-2-105, W.S. 31-2-201, and W.S. 31-18-201. (W.S. 31-18-201).

Penalties.

Interest due, additional amounts assessed and criminal penalties imposed are as follows:

Real and personal property taxes not paid by last day for payment bear interest at rate of 18% per annum. (W.S. 39-13-108[b][ii]). See also topic 22.15 Property Taxes, subheads Payment and Tax Sales.

Penalty for Disclosure of Inheritance Tax Information.

Violators are guilty of misdemeanor and upon conviction shall be fined not more than $1,000, imprisoned for not more than one year, or both. (W.S. 39-19-102[e]).

Penalty for failure to pay sales or use tax on vehicle, including local option sales or use tax, must be paid within 50 days after date of sale or interest and civil penalty is assessed by county treasurer. (W.S. 39-15-108[b][ii]).

Sales Tax.

As soon as practical after return filed Department examines return and if amount paid is less than amount due, difference together with interest thereon at rate of 1% per month from time return was due must be paid by vendor or any person liable for payment of sales tax under this article within ten days after notice and demand by Department. Effective July 1, 1994, interest at annual rate equal to average prime interest rate as determined by state treasurer during preceding fiscal year plus 4% shall be added to delinquent tax. (W.S. 39-15-108[b][i]). If any part of deficiency due to negligence or intentional disregard of rules and regulations but without intent to defraud penalty must be added equal to 10% of amount of deficiency plus interest at rate of 1% per month from time return due. (W.S. 39-15-108[c][i]). If any part of deficiency due to fraud with intent to evade there must be added penalty equal to 25% of amount of deficiency plus interest at rate of 1% per month from time return due. (W.S. 39-15-108[c][ii]). Any vendor who under pretense of collecting sales taxes collects or returns excessive amount or who intentionally fails to remit to Department full amount of taxes when due is guilty of (a) misdemeanor if amount of taxes collected is $500 or less punishable by fine of not more than $750, or imprisonment in county jail for not more than six months, or both, or (b) felony if amount of taxes collected exceeds $500 punishable by fine of not more than $5,000, or imprisonment for not more than three years, or both. (W.S. 39-15-108[c][iv][A], [B]). Any person who files false or fraudulent return is guilty of felony and upon conviction is subject to W.S. 6-5-303. (W.S. 39-15-108[c][vi]; W.S. 6-5-303). Any person who violates any provision of sales tax provisions (W.S. 39-15-101 to W.S. 39-15-311) for which there are no specific penalties is guilty of misdemeanor; each violation is separate offense (W.S. 39-15-108[c][vii]). Automatic and continuing tax lien created. (W.S. 39-14-108[e][iv]-[xvi]).

Use Tax.

If Department believes that return and taxes paid are incorrect it must recompute return and tax based upon best information available. (W.S. 39-16-107[a][iv]). Interest on amounts due shall be at 1% per month or fraction thereof from date return was due until paid. Effective July 1, 1994, interest at annual rate equal to average prime interest rate as determined by state treasurer during preceding fiscal year plus 4% shall be added to delinquent tax. If any part of deficiency due to negligence or intentional disregard of use tax statutory provisions or rules and regulations penalty equal to 10% of deficiency must be added in addition to interest. If any part of deficiency is due to fraud or intent to evade use tax statutory provisions or authorized rules and regulations penalty equal to 25% of deficiency must be added in addition to interest. (W.S. 39-16-108[c]). If person liable for tax imposed by use tax statutory provisions neglects or fails to file return Department must make estimate of total taxable sales and taxes due from best information available, adding penalty of 10% and interest from date taxes due until paid. If neglect or refusal due to fraud or intent to evade use tax statutory provisions penalty of 25% must be added in addition to interest. (W.S. 39-16-108[c][ii]). If person neglects or refuses to pay tax imposed by use tax statutory provisions Department must compute tax amount due from best information available, adding penalty of 10% and interest from date taxes due until paid. Payment of tax, penalty and interest so imposed relieves vendor from payment. (W.S. 39-16-108[c][iii]). If taxes, penalty and interest due hereunder not paid within ten days following service of notice, additional penalty of 10% and interest must be added by Department. (W.S. 39-16-108[c][v]). Any vendor who fails to collect use tax (W.S. 39-16-107[a][i]) or advertises or states directly to public that vendor will assume use tax or states that use tax will not be added to sales price or, if added, will be refunded (W.S. 39-16-107[b][vi]), is guilty of misdemeanor (W.S. 39-16-108[c][viii]). Any person who fails to file any return required by use tax statutory provisions, refuses to provide information requested by Department or violates any provision of use tax statutory provisions for which there is no specific penalty is guilty of misdemeanor. (W.S. 39-16-108[c][x]). Vendor who fails to register with Department (W.S. 39-16-107[a][vi]) is guilty of misdemeanor and upon conviction must be fined not more than $300 or imprisoned for not more than 90 days (W.S. 39-16-108[c][xi]). Any person who makes false or fraudulent return is guilty of felony and is subject to W.S. 6-5-303. (W.S. 39-16-108[c][xii]; W.S. 6-5-303). Vendor who under pretense of collecting use taxes collects and retains excessive amount or who intentionally fails to remit to Department full amount of use taxes when due is guilty of either misdemeanor or felony as prescribed in W.S. 39-15-103(c)(iv). (W.S. 39-16-108[c][xiv]).

Mileage Tax on Motor Vehicles.

See category 23 Transportation, topic 23.01 Motor Vehicles, subhead Motor Vehicle Taxes.

Unemployment Compensation Tax.

Contributing employer who fails to pay all contributions, interest and penalties or submits quarterly contribution reports shall be assigned delinquent rate which shall include 2% tax rate increase in his base rate. (W.S. 27-3-503[b]). Special provisions exist for delinquent employers whose delinquency and interest due total less than $200. (W.S. 27-3-503[c]).

Mines and Minerals.

See category 19 Mineral, Water and Fishing Rights, topic 19.01 Mines and Minerals, subhead Taxes.

22.02 ALCOHOL, BEVERAGES AND TOBACCO TAXES:

Cigarette Tax.

Imposed by W.S. 39-18-101 to W.S. 39-18-111.

22.03 BUSINESS TAXES:

License Tax on Corporations.

See category 2 Business Organizations, topic 2.03 Corporations, subheads Filing Fees, Franchise Tax.

Taxation of Insurance Companies.

See category 16 Insurance, topic 16.01 Insurance Companies, subhead Premium Tax.

Coal Transportation Tax.

Repealed. (2004 Wyo. Sess. Laws, c. 5, § 1).

Registration Requirement.

Nonresident prime contractor and resident prime contractor who hires nonresident subcontractor must register projects with Department for purposes of enforcement of sales and use taxes imposed upon subcontractor pursuant to W.S. 39-15-303(b)(ii) and W.S. 39-16-303(b)(ii) and comply with other requirements within 15 days of commencement of project. (W.S. 39-15-303[b][iv]; W.S. 39-16-303[b][iv]).

22.04 [RESERVED]

22.05 EMPLOYMENT TAXES:

Unemployment compensation tax (termed “employment wage contributions”) is imposed on all employers of one or more individuals with respect to employments covered by Unemployment Compensation Act. (W.S. 27-3-503[a]). Standard rate is 8.5% of wages payable. Rate varies. (W.S. 27-3-503[b]). Excepted employments are shown under category Employment, topic Labor Relations, subhead Unemployment Compensation. Employment wage contributions for each month are payable to Employment Security Commission, Casper, Wyo. on 30th of following month. No tax is imposed on employees.

22.06 [RESERVED]

22.07 ESTATE TAX:

See topic 22.12 Inheritance Tax.

Apportionment Against Inter Vivos Dispositions.

Uniform Estate Tax Apportionment Act adopted. (W.S. 2-10-101 to W.S. 2-10-110).

Interstate Cooperation.

No statutory procedure available for compromise of death taxes where decedent's domicile disputed.

22.07A EXCISE TAXES:

Wyo. Const. Art. 15, § 19 mandates Wyoming Legislature to provide by law for excise tax on privilege of severing or extracting coal, petroleum, natural gas, oil shale, and such other minerals as may be designated by Legislature, equal to 1.5% of value of gross product extracted and to deposit proceeds from such excise tax into permanent Wyoming mineral trust fund. Constitutionally mandated excise tax shall be in addition to any other excise, severance, or ad valorem taxes that Legislature may statutorily impose on minerals. (Wyo. Const. Art. 15, § 19).

There is levied total severance tax of 7% of value of gross product for privilege of severing or extracting surface coal in state, of which 1.5% is imposed under authority of Wyo. Const. Art. 15, § 19 and 5.5% is imposed by statute. (W.S. 39-14-103[a][i]; W.S. 39-14-104[a][i]-[vi]). 1.5% severance tax imposed under W.S. 39-14-104(a)(i) shall be deposited into permanent Wyoming mineral trust fund, and remaining 5.5% severance tax imposed under W.S. 39-14-104(a)(ii)-(vi) shall be deposited into severance tax distribution account. (W.S. 39-14-111[a]).

There is levied total severance tax of 3.75% of value of gross product for privilege of severing or extracting underground coal in state. (W.S. 39-14-103[a][i]; W.S. 39-14-104[b][i]-[b][iii]). 1.5% severance tax imposed under W.S. 39-14-104(b)(i) shall be deposited into permanent Wyoming mineral trust fund, and remaining 2.25% severance tax imposed under W.S. 39-14-104(b)(ii), (iii) shall be deposited into severance tax distribution account. (W.S. 39-14-111[a]).

There is levied total severance tax of 6% of value of gross product for privilege of severing or extracting crude oil, lease condensate, and natural gas in state, of which 1.5% is imposed under authority of Wyo. Const. Art. 15, § 19 and 4.5% is imposed by statute. (W.S. 39-14-203[a][i]; W.S. 39-14-204[a][i]-[iv]). 1.5% severance tax imposed under W.S. 39-14-204(a)(i) shall be deposited into permanent Wyoming mineral trust fund, and remaining 4.5% remaining severance tax imposed under W.S. 39-14-104(a)(ii)-(a)(iv) shall be deposited into severance tax distribution account. (W.S. 39-14-211[a]). Total severance tax imposed on stripper production of crude petroleum from wells reported as oil wells to Wyoming Oil and Gas Conservation Commission is limited to 4% of value of gross product extracted. (W.S. 39-14-204[a][i], [ii], [iv]; W.S. 39-14-205[a]).

There is levied by statute total severance tax of 4% of value of gross product for privilege of severing or extracting trona and uranium in state. (W.S. 39-14-303[a][i], 304[a], 503[a][i], 504[a]). 4% severance tax imposed under W.S. 39-14-304(a) and W.S. 39-14-504(a) for trona and uranium shall be deposited into severance tax distribution account. (W.S. 39-14-311[a]; W.S. 39-14-511[a]).

There is levied by statute total severance tax of 2% of value of gross product for privilege of severing or extracting bentonite, sand and gravel, other valuable deposits, and oil shale or any other fossil fuel in state. (W.S. 39-14-403[a][i], 404, 603[a][i], 604, 703[a][i], and 704). 2% severance tax imposed under W.S. 39-14-404, W.S. 39-14-604, and W.S. 39-14-704 for bentonite, sand and gravel, other valuable deposits, and oil shale or any other fossil fuel shall be deposited into severance tax distribution account. (W.S. 39-14-411[a], 611[a], and 711[a]).

There is qualified and limited exception from severance tax on surface and underground coal produced and sold pursuant to certain contracts or agreements (including any extensions) executed prior to Dec. 31, 2003, in which application of surface and underground coal severance taxes imposed under W.S. 39-14-104 results in tax on ton of surface mined coal in excess of 60¢ or tax on ton of underground mined coal in excess of 30¢. (W.S. 39-14-105[b], [c]).

Tertiary production of crude oil resulting from projects certified by Wyoming Oil and Gas Conservation Commission after Mar. 31, 2003 and before Mar. 31, 2008, is exempt from 2% of excise tax imposed by W.S. 39-14-204(a)(iii) for period of five years from date of first tertiary production, provided no exemption shall be allowed when price received by producer on tertiary production exceeds $27.50 per barrel. (W.S. 39-14-205[c]). Taxpayer claiming tax reduction under W.S. 39-14-203(c), however, cannot claim tax reduction applicable to crude oil and natural gas wells drilled between July 1, 1993 and Mar. 31, 2003 as provided in W.S. 39-14-205(f). (W.S. 39-14-203[c]).

In case of tertiary production of oil resulting from injection of carbon dioxide gas, all Wyoming severance taxes paid on carbon dioxide gas injected shall be deducted from and allowed as credit against severance taxes imposed on oil produced by injection. (W.S. 39-14-205[d]).

Crude oil and natural gas produced from wells drilled between July 1, 1993 and Mar. 31, 2003, except production from collection wells, is exempt from excise taxes imposed by W.S. 39-14-204(a)(iii) and (iv) for first 24 months of production on oil production up to 60 barrels per day or its equivalency in gas production (6 MCF gas production for one barrel oil production), or until price received by producer for new production is equal to or exceeds $22 per barrel of oil or $2.75 per MCF of natural gas for preceding six month period of time, whichever shall first occur. (W.S. 39-14-205[f]). Taxpayer claiming tax reduction under W.S. 39-14-205(f), however, cannot claim tax reduction applicable to tertiary production of crude oil resulting from certain qualifying projects authorized under W.S. 39-14-205(c). (W.S. 39-14-205[f]).

Crude oil produced from previously shut-in wells is exempt from 4.5% of excise tax imposed by W.S. 39-14-204(a)(ii), (iii), and (iv) for first 60 months of renewed production or until average price received by producer for renewed production is equal to or exceeds $25 per barrel of oil for preceding six month period of time, whichever shall first occur. (W.S. 39-14-205[h]).

With exception of two-thirds of total amount collected from severance taxes imposed on surface and underground coal, crude oil, lease condensate, and natural gas earmarked for deposit into permanent Wyoming mineral trust fund (W.S. 39-14-801[a]), credited revenues deposited in severance tax distribution account from severance taxes imposed on surface and underground coal, crude oil, lease condensate, natural gas, stripper production, trona, uranium, bentonite, sand and gravel, other valuable deposits, and oil shale or any other fossil fuel shall be distributed as follows: (a) Interest on earnings from funds in severance tax distribution account shall be credited to general fund (W.S. 39-14-801[a]); (b) amount equal to total amount of 1¢ per gallon license tax collected under W.S. 39-17-104(c) and W.S. 39-17-204(b) on all gasoline and diesel fuels used, sold, or distributed for sale in state for same period of time shall be distributed to corrective action account and financial responsibility account created under Water Pollution from Underground Storage Tanks Corrective Action Act of 1990 in inverse proportion to amount in such accounts (W.S. 39-14-801[c]); (c) amount not to exceed $155,000,000 in any fiscal year shall be distributed (i) 62.26% to general fund, (ii) 15.05% to water development accounts created under W.S. 42-2-124(a)(i), and (ii), (iii) 4.33% to highway fund, (iv) 3.49% to Wyoming counties in same proportion that population of each county bears to total population of Wyoming, (v) 0.39% to Wyoming counties based upon inverse of assessed valuation of each county as computed by W.S. 39-14-801(e)(v)(B), (vi) 2.9% to road construction funds of various counties as provided in W.S. 24-2-110 based on formulas set forth in W.S. 39-14-801(e)(vii), (vii) 9.25% to cities and towns in same proportion that population of each city or town bears to total population of all cities and towns in Wyoming, and (viii) 2.33% to capital construction account created for state matching of federal capitalization grants to drinking water state revolving fund program (W.S. 39-14-801[d], [e]); and (d) for any deposits in any fiscal year in excess of $155,000,000 earmarked for distribution in accordance with W.S. 39-14-801(e), amount of such excess shall be credited one-third to general fund and two-thirds to budget reserve account (W.S. 39-14-801[d]).

Resort District Excise Taxing Authority created effective July 1, 2003. (W.S. 39-15-203, W.S. 39-16-202).

Automatic and continuing lien created to enforce collection of mineral severance and ad valorem taxes. (W.S. 39-13-108[d]; W.S. 39-14-208[e], 308[e], 408[e], 508[e], 608[e], and 708[e]).

22.08 GASOLINE AND SPECIAL FUELS TAXES:

Gasoline tax imposed by W.S. 39-17-101 to W.S. 39-17-111. Gasohol defined. (W.S. 39-17-101[a][xi]). Subject to certain exempt sales and credits specified in W.S. 39-17-105, total license tax levied and collected on all gasoline used, sold or distributed for sale or use in Wyoming is $.14 per gallon. (W.S. 39-17-104[a][i], [iii]).

Diesel fuel tax imposed by W.S. 39-17-201 through W.S. 39-17-211 on diesel fuel and on kerosene and any type of additive blended into diesel fuel. (W.S. 39-17-201[a][xxi]).

22.09 GIFT TAX:

None.

22.10 HOTEL AND RESTAURANT TAXES:

Lodging Tax.

Counties and cities may impose excise tax not to exceed 4% upon sales price paid for lodging services. (W.S. 39-15-204[a][ii]). Sales of lodging services provided by known guide or outfitter are exempt from local government excise taxes on lodging services. (W.S. 39-15-105[a][viii][G]).

22.11 INCOME TAX:

None.

22.12 INHERITANCE TAX:

For decedents dying before Jan. 1, 2005, W.S. 39-19-101 through W.S. 39-19-111 are intended to take full advantage for Wyoming of credit, which is allowed as deduction from federal estate tax liability of estates of decedents, for state taxes upon property or transfer thereof by reason of death, without increasing aggregate of federal and state death, transfer or succession taxes upon any estate. (W.S. 39-19-103[b]). State death tax credit expired for decedents dying after Dec. 31, 2004. As to imposition of tax see W.S. 39-19-103 to W.S. 39-19-104.

Filing Returns.

Personal representative of estate, portion of which constitutes Wyoming gross estate, shall file with Department of Revenue duplicate of all federal estate tax returns and notices required to be made to federal authorities and pay Wyoming estate tax to Department. As to additional requirements see W.S. 39-19-107.

Definitions.

For purposes of this act ‘Wyoming gross estate” means value of federal gross estate of decedent excluding value of real or tangible personal property which has actual situs outside Wyoming at time of death of decedent, and excluding value of intangible personal property owned by decedent not domiciled in Wyoming. (W.S. 39-19-101). As to additional definitions see W.S. 39-19-111.

Disclosure of Information Prohibited.

No state employee who by virtue of his employment has knowledge of business affairs of any person filing or required to file any tax returns under this article shall make known their contents in any manner or permit any person to have access to any returns or information contained therein except as provided by law. Some exceptions include: (1) Delivery of information to taxpayer or his legal representative upon written request; (2) publication of statistics which do not identify particular returns; (3) furnishing any information to U.S. and its territories, District of Columbia or to states granting similar privileges or to multistate tax commissions; (4) inspection of tax returns and records by office of state department of audit. (W.S. 39-19-102[d]).

22.12A MINES, MINERALS AND FISHERIES TAXES:

Mines and Minerals.

See category 19 Mineral, Water and Fishing Rights, topic 19.01 Mines and Minerals. Mine Products Tax imposed by W.S. 39-14-101 through W.S. 39-14-711 for specific mine products by separate Article.

22.13 [RESERVED]

22.14 MOTOR VEHICLE TAXES:

Mileage tax on motor vehicle carriers, see category 23 Transportation, topic 23.01 Motor Vehicles, subhead Motor Vehicle Taxes.

22.15 [RESERVED]

22.16 PROPERTY TAXES:

Real and Personal Property Taxable.

All property within Wyoming is subject to taxation except as prohibited by U.S. or Wyoming constitutions or expressly exempted by W.S. 39-11-105. (W.S. 39-11-101). By amendment to Wyoming State Constitution (Art. 15, § 11) effective Nov. 21, 1988, Wyoming Legislature was enabled to divide property into three classes—minerals and mine products, industrial property, and all other real and personal property—for uniform full valuation, and to assign different percent of value for taxation purposes for each class of property. Agricultural and grazing lands are to be valued according to capability of land to produce agricultural products under normal conditions. This constitutional change was legislatively effected to so amend Title 39 (Taxation and Revenue) of Wyoming Statutes throughout, effective Mar. 11, 1989. For property specifically exempted see subhead Exemptions, infra.

Exemptions.

Following property is exempt from property taxation (W.S. 39-11-105[a]): (i) Property owned by U.S., majority of which is used primarily for governmental purpose. Following property is not owned and used for governmental purpose: (A) improvements placed on federal lands by persons for private or commercial use, (B) improvements furnished by federal government to employees other than enlisted and officer personnel of armed forces as place of residence, (C) improvements and equipment rendered, leased, loaned or furnished by federal government to employees or groups of employees for purpose of operating enterprises for which there is service or admission charge, (D) equity or interest of purchaser, his heirs, executors or assigns, in any real property being purchased from U.S. government under contract of sale, value thereof being determined by taking market value of real property and deducting amount of principal and interest owing U.S. on Jan. 1 of year for each year property assessed, (E) lands entered under any act of congress when final proof of ownership issued prior to Feb. 1 whether or not patent has been issued; (ii) property of state of Wyoming owned and used primarily for governmental purpose. Following property is not owned and used primarily for governmental purpose: (A) improvements placed on state lands by lessees for private or commercial use, (B) improvements furnished by state to employees as place of residence, (C) improvements and equipment rented, leased, loaned and furnished by state to employees or groups of employees for purpose of operating enterprises for which there is service or admission charge, (D) equity or interest of purchaser, his heirs, executors or assigns in any land being purchased from state of Wyoming under contract of sale, value to be determined by taking market value of lands and deducting amount of principal and accrued interest owing to state of Wyoming on Jan. 1 of year for which property assessed; (iii) property owned and used by counties primarily for governmental purpose; (iv) property of Wyoming school district owned and used primarily for governmental purpose excluding teacherages; (v) property of Wyoming cities and towns owned and used primarily for governmental purpose, including (A) streets and alleys and property used for construction, reconstruction, maintenance and repair of streets and alleys, (B) property used to furnish sewer and water services, (C) city or town halls, police stations and equipment, traffic control equipment, garbage collection and disposal equipment and lands and buildings used to service and repair halls, stations or equipment, (D) parks, airports, auditoriums, cemeteries, golf courses, playgrounds and recreation facilities. Any charge for use of facilities must not exceed cost of operations and maintenance to qualify for exemption, (E) personal property used exclusively for care, preservation and administration of city or town property, (F) parking lots operated on nonprofit basis; (vi) property of public library used for library purposes; (vii) real property used exclusively for religious worship, church schools and church parsonages; (viii) property of cemetery used for cemetery purposes; (ix) (A) property of nonprofit organization, cooperative or association, which is exclusively water utility engaged in production, gathering, transmission, distribution or sale of water for domestic use in Wyoming; (B) any other organization, corporation, cooperative or association which is water utility, if property is used in production, gathering, transmission, distribution or sale of water for domestic use in Wyoming; (x) fire engines, stations, including land upon which located, and equipment used to extinguish fires; (xi) personal property held for personal or family use excluding mobile homes required to be titled under W.S. 31-2-501 through W.S. 31-2-508; (xii) inventories, defined as personal property held for resale consisting of goods, wares or merchandise including stocks of raw or finished material, unassembled parts, work in progress or finished products constituting inventory of merchant or manufacturer (W.S. 39-1-101[a][ix]); (xiii) vehicles subject to registration as defined by W.S. 31-4-101(a)(i) and W.S. 31-18-201 and registered as provided by law ("vehicle" means device in, upon or by which any person or property may be transported or drawn upon highway, excluding devices moved by human power or used exclusively upon rails or tracks, implements of husbandry, machinery used in construction work not mainly used for transportation of property over highways and pedestrian vehicles while operated by person who by reason of physical disability is otherwise unable to move about as pedestrian [31-1-101(a)(xxvi)]); (xiv) vehicles owned by U.S., state of Wyoming, counties, cities, towns, school districts and municipal corporations when used primarily for governmental purpose; (xv) snowmobiles; (xvi) property of museum or hospital district; (xvii) in transit property, defined as manufactured goods, wares, seed, fertilizer, tools, supplies and merchandise which is in interstate commerce, or Wyoming assembled, or manufactured products being held for out-of-state sale, which are consigned or placed in storage area in Wyoming for storage, repackaging, processing, fabricating, milling, disassembly or assembly in transit to final destination outside Wyoming whether destination is specified before or after transportation begins (W.S. 39-11-101[a][viii]); (xviii) property owned by Wyoming Community Development Authority excluding assessments for local improvements; (xix) property of charitable trusts; (xx) facilities, installations, machinery or equipment attached or unattached to real property and designed, installed and utilized primarily for elimination, control or prevention of air, water or land pollution, or in event such facility, installation, equipment or machinery also serves other beneficial purposes and use, such portion of assessed valuation thereof, as determined by department of revenue, as may be reasonably calculated to be necessary for and devoted to elimination, control or prevention of air, water and land pollution (W.S. 35-11-1103); (xxi) property owned by Black Hills Joint Power Commission; (xxii) property owned by water and sewer district; (xxiii) property of water conservancy district; (xxiv) property of veterans, to this extent: following persons who are bona fide residents of Wyoming for at least three years at time of claiming exemption are entitled thereto: (a) Honorably discharged veteran of Indian Wars, Spanish American War, Filipino insurrection, Boxer rebellion, Puerto Rico campaign or First World War; (b) honorably discharged veteran of Second World War, who served in military service of U.S. between Dec. 8, 1941 and Aug. 14, 1945; (c) honorably discharged veteran of Korean War emergency who served in military service of U.S. between June 27, 1950 and July 28, 1953; (d) honorably discharged veteran of Vietnam War emergency who served in military service of U.S. between Feb. 28, 1961 and Aug. 15, 1973; (e) widow, during her widowhood, of any person qualifying hereunder (W.S. 39-13-105[a][v]) (tax exemption is applied to property, title to which is held by widow or to property which is subject of trust created by or for benefit of widow); and (f) honorably discharged veteran who was awarded armed forces expeditionary medal or other authorized service or campaign medal indicating service for U.S. in any armed conflict in foreign country (W.S. 39-13-105[a][i]-[vi]). Veterans exemption limited to annual exemption of $2,000 of assessed value not to exceed total tax benefit of $800, except that $800 tax benefit limitation does not apply to qualified veterans or widows of Spanish American War; and veterans who have received entire $800 tax benefit exemption and who have service connected disability certified by Veterans Administration or branch of armed forces of U.S.; or who have been granted individual unemployability status certified by Veterans Administration, entitled to additional annual tax exemptions not to exceed $2,000 of assessed value times ratio which percent of disability certified bears to 100%. Disability certified less than 10% treated as 10% disability (W.S. 39-13-105[b]); (xxv) property used for schools, orphan asylums or hospitals to extent they are not used for private profit; (xxvi) property used by secret, benevolent and charitable society or association including any fraternal organization officially recognized by University of Wyoming or any community college, and senior citizens centers to extent not used for private profit nor primarily for commercial purposes by society, association or center, or lessee thereof; (xxvii) property owned by nonprofit society, foundation or association and used primarily as community area center in which presentations in music, arts and related fields are made in order to foster public interest and education therein, to extent and in proportion that receipts and revenues attributable to above specified presentations bear to total receipts and revenues from use and operation of center including rentals and revenues received for commercial use of center not attributable to above specified presentations; (xxviii) lands for mines or mining claims from which gold, silver and other precious metals, soda, saline, coal, mineral oil or other valuable deposit, is or may be produced shall be taxed in addition to surface improvements and in lieu of taxes on lands, on gross product thereof, as may be prescribed by law; provided that product of mines shall be taxed in proportion to value thereof, said value to be determined by Department of Revenue in accordance with W.S. 39-11-102(c)(viii) (Wyo. Const., Art. 15, § 3); (xxix) intangible personal property listed in W.S. 39-13-105(j) (except water rights and reservoir rights originating in Wyoming and appurtenant to and beneficially used in connection with lands in state) ("intangible personal property" means personal property that lacks mass and cannot be seen, felt, weighed, measured or otherwise perceived by senses and existence may be evidenced by document [39-11-101(a)(vii)]); (xxx) other property as provided by law; (xxxi) all livestock including livestock in feed lots being fed for slaughter ("livestock" means horses, cattle, mules and asses, sheep, swine, goats and all other animals commonly thought of as livestock [39-11-101(a)(x)]). Livestock exemption applies only to ad valorem taxation. Any other special tax which is levied on livestock for particular purpose based on assessment value established by Department of Revenue is not affected by this exemption; (xxxii) any improvement to residential property making entrance to or common facilities within property accessible to handicapped person; (xxxiii) real and personal property owned by statutorily created irrigation districts (W.S. 41-7-201 to W.S. 41-7-210) essential to operation and maintenance of district and which is used for no business or commercial activity unrelated to operation and maintenance of district; (xxxiv) mobile machinery (defined under W.S. 31-18-203 as heavy equipment, except shop or hand tools or attachments, which is self-propelled, towed or hauled and used primarily in construction and maintenance of roads, bridges, ditches, buildings or land reclamation) registered under W.S. 31-18-203 through W.S. 31-18-208; (xxxv) property owned and used by nonprofit corporation serving persons with disabilities, mental illnesses or substance abuse problems, or operating family violence project to extent it is not used for private profit nor primarily for commercial purposes; (xxxvi) real property owned by Wyoming Game and Fish Commission (however, see special tax imposed on real property owned by Wyoming Game and Fish Commission) (W.S. 39-13-103[b][xii]); and (xxxvii) effective Jan. 1, 2005, property owned by conservation district formed pursuant to conservation district law (W.S. 11-16-101 to W.S. 11-16-134).

There are no statutory exemptions for members of armed services, except as provided under Veterans Exemptions in W.S. 39-13-105.

As to exemption of capital stock of corporations when owned by residents of state, see category 2 Business Organizations, topic 2.03 Corporations, subhead Taxation of Corporate Stock. Homesteads not exempted from real property taxes on homestead property.

Home owner's tax credit authorized and allowed during any fiscal year to extent legislature has appropriated funds that Department of Revenue determines to be necessary to reimburse all local governments for tax losses created by tax credit for that fiscal year. (W.S. 39-13-109[d][i][H]). Persons eligible for tax credit include: (a) Person who occupies and owns homestead either solely or jointly with spouse; (b) person who occupies homestead as vendee in possession under contract for sale; (c) person who occupies homestead owned by corporation primarily formed for purpose of farming or ranching if person is shareholder or is related to shareholder of corporation; (d) person who occupies homestead owned by partnership primarily formed for purpose of farming or ranching if person is partner or related to partner in partnership. (W.S. 39-13-109[d][i][F]). Person who wishes to claim home owner's tax credit must file claim under penalty of perjury with county assessor on or before fourth Mon. in May on forms provided by Department of Revenue. (W.S. 39-13-109[d][i][B]). On or before Sept. 1, county assessor of each county required to certify to Department of Revenue amount of home owner's tax credits granted, and state treasurer, on or before Oct. 1, must reimburse each county treasurer, out of funds appropriated for that purpose, amount of taxes that would have been collected if property tax credits had not been granted. (W.S. 39-13-109[d][i][C]). Methods of calculating home owner's tax credit are provided in W.S. 39-13-109[d][i][D] and (d)(i)(E). No more than one home owner's tax credit is allowed on same piece of property during any year. (W.S. 39-13-109[d][i][A]).

Tax Refunds for Eligible Taxpayers.

Property Tax Refund authorized and allowed for qualifying applicants whose total household assets are less than $50,000.00 and gross incomes are less than 2/3 of median gross household income of county of residence. (W.S. 39-13-109[c][iv]).

Ad Valorem Refund.—Any person who meets income and household asset requirements prescribed by W.S. 39-13-109(c)(iii)(B) and who has been Wyoming resident for not less than five years prior to applying for refund, is qualified for refund of ad valorem taxes timely paid for preceding calendar year upon that person's principal residence, including land upon which residence is located, in amount provided in W.S. 39-13-109(c)(iii)(C). (W.S. 39-13-109[c][iii][A]). Qualified person must apply for refund to county treasurer or Department of Revenue on or before first Mon. in June of year following calendar year for which property taxes were paid. (W.S.

39-13-109[c][iii][A]). Department of Revenue required to issue all refunds due on or before Sept. 30 of year in which application for refund is made. (W.S. 39-13-109[c][iii][B]). Amount of refund shall not exceed one-half of prior year's property tax paid by applicant, but in no event shall such refund exceed one-half of median residential property tax liability for applicant's county of residence as determined annually by Department of Revenue. (W.S. 39-13-109[c][iii][C]). Any refund for paid property taxes will be reduced by amount that applicant has received with respect to any exemption provided for veterans under W.S. 39-13-105, any home owner's tax credit provided to eligible home owners under W.S. 39-13-109(d)(i), or any property tax deferral granted to eligible property owner under W.S. 39-13-107(b)(iii). (W.S. 39-13-109[c][iii][F]). Property tax relief available under W.S. 39-13-109(c)(iii) will expire on Jan. 1, 2008. (W.S. 39-13-109[c][iii][G]).

Tax and Utility Cost Refunds for Elderly and Disabled Residents.

Any Wyoming resident who meets resource eligibility requirements prescribed by W.S. 39-11-109(c)(vii) and who is either: (a) 65 years of age and older, or (b) 18 years of age and older and totally disabled during one period immediately preceding date of application and not resident of any state funded institution, is qualified for exemption and refund of certain state taxes and for utility or energy cost relief. (W.S. 39-11-109[c][ii]). Qualified residents must apply to Department of Health, or designee, in county of residence on or before last working day in Aug. of each year for refund of exempted sales and use taxes. (W.S. 39-11-109[c][ii]). Application must provide and attach information specified in W.S. 39-11-109(c)(iii). On or before Dec. 20 following application date, Department of Health will issue warrants to qualified senior citizens and disabled persons as refund and partial exemption of taxes paid under sale and use taxes, property tax relief, and utility and energy cost relief. (W.S. 39-11-109[c][v]). Qualified single person, whose actual annual income is less than $13,500, is entitled to receive $800 reduced by percentage that actual income exceeds $8,000 per year, and qualified married persons, at least one of whom is 65 years of age or totally disabled, whose actual annual income is less than $22,000, are entitled to receive $900 reduced by percentage that actual income exceeds $12,000 per year. (W.S. 39-11-109[c][ii]).

Assessment.

Taxable property is assessed by county assessor. (W.S. 39-13-103[b]).

Mine production is assessed and valued by Department of Revenue and certified to respective counties where the production occurs. (W.S. 39-14-102[a]; W.S. 39-14-107[vi]). See also category 19 Mineral, Water and Fishing Rights, topic 19.01 Mines and Minerals, subhead Taxes.

Oil and gas, assessed and valued by Department of Revenue based on fair market value of product after mining or production process is complete. (W.S. 39-14-202[a]).

Public Utilities.

Properties of following are assessed and valued by Department of Revenue: Property of pipeline companies (W.S. 39-13-102[m][ii]); property of electric utilities (W.S. 39-13-102[m][iii]); property of railroad companies (W.S. 39-13-102[m][iv]); property of rail car companies (W.S. 39-13-102[m][v]); property of telephone and telegraph companies having assessed value of more than $2,000 (W.S. 39-13-102[m][vi]); property of cable or satellite television companies (W.S. 39-13-102[m][ix]); property of other public utilities; and leased property consisting of warehouse storage facilities and office structures and any other property that is in support of or which is used or held for use for activities listed in this subsection, if leased property is assessed to lessee it shall not be assessed to property owner. (W.S. 39-13-102[m]).

All taxable property shall be annually listed, valued and assessed for taxation in county in which located and in name of owner on Jan. 1. (W.S. 39-13-103[b][i][A]).

All taxable personal property brought, driven or coming into Wyoming, or acquired after assessment date and prior to Dec. 31 which remains in Wyoming at least 30 days and has not been regularly assessed for taxation in any other Wyoming county is subject to and shall be assessed for all taxes levied in county in which property is located for that calendar year, except for property brought, driven or coming into Wyoming or acquired after Mar. 1 is subject to taxes only for proportionate part of year remaining, computed to closest full month. (W.S. 39-13-103[b][i][B]).

There are detailed provisions relative to assessment of machinery and equipment located in two or more counties during calendar year. (W.S. 39-13-103[b][ix]). Assessment procedure by county assessors prescribed. (W.S. 39-13-103[b][v]). All taxable property annually valued at its fair market value; except as otherwise provided by law for specific property, Department of Revenue prescribes appraisal methods and systems for determining fair market value using generally accepted appraisal standards (W.S. 39-13-103[b][ii]), and agricultural lands employed as such for previous two years and presently being used and employed for primary purpose of obtaining monetary profit as agricultural or horticultural use or any combination thereof is assessed as agricultural land unless legally zoned otherwise (W.S. 39-13-103[b][x]).

In determining fair market value of such land for assessment purposes, value must be based on current use of land, and capacity of land to produce agricultural products, including grazing and forage based upon average yield of lands of same classification under normal conditions. (W.S. 39-13-103[b][x]).

At state level, mining companies and public utilities assessed by Department file returns on or before specified dates (W.S. 39-14-107[a][i]; W.S. 39-14-207[a][i]; W.S. 39-14-307[a][i]; W.S. 39-14-407[a][i]; W.S. 39-14-507[a][i]; W.S. 39-14-607[a][i]; W.S. 39-14-707[a][i]), and Department then values property so returned pursuant to prescribed methods of valuation. Assessment values so determined are then certified by Department to county assessors of counties where properties are located on or before specified dates. (W.S. 39-14-102[d]; W.S. 39-14-302[d]; W.S. 39-14-402[e]; W.S. 39-14-502[c]; W.S. 39-14-602[c]; W.S. 39-14-702[d]).

On or before specified dates, boards of county commissioners, Board of Equalization and governing bodies of other governmental entities certify various tax levies for prescribed purposes within statutory and constitutional limitations to boards of county commissioners. (W.S. 39-13-104[k]).

As to authorized mill levies assessed upon taxable value of property within Wyoming see W.S. 39-13-104.

Review of Assessment.

Board of county commissioners of each county constitutes county board of equalization, sitting at such times as necessary, commencing no earlier than on fourth Tues. in Apr. to consider current year assessments. (W.S. 39-13-102[c]). County board of equalization, however, cannot set tax policy nor engage in any administrative duties concerning assessments which are delegated to State Board of Equalization, Department of Revenue and Taxation or county assessor. (W.S. 39-13-102[d]).

State Board of Equalization has appellate jurisdiction by statute over county boards of equalization. (W.S. 39-11-102.1[c]). County assessor may appeal any decision or order of county board of equalization to State Board of Equalization. (W.S. 39-13-102[b][ii]). Decision of State Board subject to review by District Court, and decision of District Court subject to review by Supreme Court. Decisions of Board regarding state assessments also subject to review. Appellate standing is prescribed in taxpayer remedies provisions. (W.S. 39-14-109[b][v]; W.S. 39-14-209[b][iii]; W.S. 39-14-309[b][v]; W.S. 39-14-409[b][v]; W.S. 39-14-509[b][v]; W.S. 39-14-609[b][v]; W.S. 39-14-709[b][v]). County assessor may lack standing to appeal State Board of Equalization's decision to District Court. (Wyo., 873 P.2d 595).

Payment.

On or before first Mon. of Aug., board of county commissioners levies taxes. On or before third Mon. in Aug. county assessor computes taxes. (W.S. 39-13-107[b][i][A]). County treasurer then collects taxes. (W.S. 39-13-107[b][i][B]). 50% of taxes due on or after Sept. 1 and payable on or after Nov. 10 of each year and remaining 50% of taxes due on or after Mar. 1 and payable on or after May 10 of succeeding calendar year. If entire tax paid on or before Dec. 31 no interest or penalty charged. (W.S. 39-13-107[b][i][D]). Balance of tax not paid is delinquent after day on which payable and bears interest at rate of 18% per annum until collected. (W.S. 39-14-208[c][iii]).

Collection.

Property taxes collected by county treasurer. (W.S. 39-13-107[b][i][B]). Annually, on or before Oct. 10, treasurer sends written statement to each taxpayer at last known address in sealed envelope showing total tax due, itemized as to property description, assessed value and mill levies. Failure to send notice, or to demand payment of taxes, does not invalidate any taxes due. (W.S. 39-14-207[b][i]). Treasurer has power to collect delinquent taxes by distraint and sale of personal property (W.S. 39-13-107[b][ii][B][III]; W.S. 39-13-108[e][i][A]) and by advertisement and sale of real property (W.S. 39-13-107[b][ii][B][III]; W.S. 39-13-108[e][ii]). Annually, on May 11 treasurer declares unpaid taxes delinquent and certifies list of delinquent taxes and taxpayers indicating years for which payment delinquent, which constitutes delinquent tax roll or list of county for years covered thereby. (W.S. 39-13-107[b][ii][B][I]). Following certification of delinquent tax roll or list, treasurer demands payment of all delinquent taxes plus interest from taxpayers listed thereon. (W.S. 39-13-107[b][ii][B][II]). In event of nonpayment of delinquent taxes and interest following demand treasurer proceeds to collect delinquent taxes, interest and costs. (W.S. 39-13-107[b][ii][B][III]). All personal property taxes not collected within ten years from time taxes levied must be cancelled and are thereafter uncollectible. (W.S. 39-13-110[a]). See also, subheads Payment, supra; Lien, and Tax Sales, infra.

Lien.

Taxes upon real property are perpetual lien thereon against all persons excluding U.S. and State of Wyoming. Taxes upon personal property are lien upon all real property owned by person against whom tax assessed subject to all prior existing valid liens. Taxes upon personal property are lien upon personal property until paid but if personal property transferred before payment, tax must be collected from other real or personal property of transferor but if transferor has no other property from which taxes can be collected then payment enforced from transferred property. (W.S. 39-13-108[d][i]).

Tax Sales.

If county treasurer proceeds to collect delinquent taxes by distraint and sale of personal property treasurer: (i) May keep property at expense of owner; (ii) must give notice of time and place of sale within five days after distraint in manner required for notice of sale of personal property under execution, and these provisions provide notice must be given by advertisement in newspaper published in county or, if no newspaper is published therein, then in newspaper of general circulation in county (W.S. 1-17-312); (iii) must commence sale within ten days after distraint; (iv) may adjourn sale from time to time, not exceeding three days, must adjourn sale when there are no bidders, and must put notice of adjournment at place of sale in case of adjournment; and (v) must return to owner any surplus proceeds of sale after payment of taxes, interest, costs of keeping and transporting property and fees of sale and render account in writing of sale and charges upon demand by owner (W.S. 39-13-108[e][i][A]).

If county treasurer proceeds to collect delinquent taxes by sale of real property, he must advertise notice of all such sales of real property by publication thereof once a week for three weeks in legal newspaper in county, first publication to be at least four weeks prior to day of sale and prior to first week in Sept. If no legal newspaper published in county, then treasurer must post written notice of sale at least 30 days prior to date of sale within and near front door of courthouse and in three public places in county in which major portion of real property to be sold is situated. (W.S. 39-13-108[e][ii][A]). Notice specifies, among other things, date, time of opening and place of sale. (W.S. 39-13-108[e][ii][B]). Notice must substantially follow form set forth in W.S. 39-13-108(e)(ii)(C). Sales of real property must be held at county courthouse or county building between 9 a.m. and 5 p.m., Sundays excluded, and may be adjourned from day to day until all lands are sold. (W.S. 39-13-108[e][iii][A]). Person who offers to pay amount of taxes, interest, penalties and costs due on real property considered purchaser. Purchaser must immediately pay treasurer all amounts due on real property. Any real property which cannot be sold for amount of taxes, interest, penalties and costs must be bid in for county by county treasurer. (W.S. 39-13-108[e][iii][B]). Following completion of sale and payment of all amounts due on real property including fee of $20, treasurer makes out, signs and delivers certificate of purchase to purchaser, or to county, without payment of fee. (W.S. 39-13-108[e][iii][C], W.S. 39-13-108[e][ix]).

Certificates of purchase may be assigned by endorsement and assignment vests all right and title of original purchaser in assignee. (W.S. 39-13-108[e][iii][C]). County Commissioners may also sell and assign certificates of purchase for real property bid in for county at public or private sale. (W.S. 39-13-108[e][iii][D]). Not less than four years nor more than six years from date of sale for taxes, holder of certificates of purchase for unredeemed real estate may upon proper application to county treasurer, return of certificate of purchase, payment of fees and proof of compliance with notice requirements to persons in possession or occupancy of real property, person in whose name property was taxed or assessed, record owner and mortgagees, if any, obtain tax deed, and mortgagees of real property and purchasers of real property at mortgage foreclosure sale have right under same procedure to partially redeem certificate of purchase as to that portion of real property in which they hold interest. Deed is prima facie evidence of title to property described. Burden of proof is upon party seeking to invalidate title conveyed by action in any court in Wyoming. (W.S. 39-13-108[e][vii][B]). See also category 10 Documents and Records, topic 10.04 Records, subhead Tax Title Limitations Act.

Redemption.

Real property sold for delinquent taxes may be redeemed by legal owner after date of sale but before valid tax deed application has been filed and accepted by county treasurer pursuant to W.S. 39-13-108(e)(v)(A) by paying to county treasurer to be held subject to order of holder of certificate of purchase following amounts, excluding attorney's fees: If person holds certificate of purchase, person redeeming: (i) Pays amount for which property sold at tax sale, including taxes, interest, penalties and costs, plus 3%, plus 15% per annum since date of sale; (ii) pays amount of taxes accruing since date of sale plus 15% per annum if subsequent taxes paid by holder of certificate of purchase; and (iii) pays actual expenses, excluding attorney's fees incurred by holder of certificate of purchase if redemption occurs after holder has given notice of his intent to apply for treasurer's deed, upon filing sworn statement with treasurer. If county holds certificate of purchase, person redeeming pays following amounts, excluding attorney's fees: (i) Pays amount for which property sold at tax sale, including taxes, interest, penalties and costs, plus 15% per annum since date of sale; (ii) amount of taxes accruing since date of sale plus 15% per annum; and (iii) actual expenses not to exceed $250 incurred by holder of certificate if redemption occurs after holder has given notice of intent to apply for treasurer deed. (W.S. 39-13-109[e][i]; W.S. 39-13-109[e][iv]; W.S. 39-13-109[e][v]). Person so redeeming real property from tax sale entitled to certificate of redemption. (W.S. 39-13-109[e][i]).

Tax Lien Foreclosures.

Holder of certificate of purchase or tax deed has lien which he may foreclose by procedure similar to mortgage foreclosure by action in equity at any time after four years from date of tax sale but not later than ten years from such date. (W.S. 39-13-108[d][iv]).

Real Estate Conveyance Tax.

None.

22.17 SALES AND USE TAXES:

Sales Tax.

Except as provided by W.S. 39-15-105 (exemptions), excise tax at rate of 4% levied upon, and must be paid by, purchaser on all sales upon: (i) Sales price of every retail sale of tangible personal property within state; retail sale being sale of tangible personal property to person for use and not subsequent resale; (ii) gross rental paid for lease or contract transferring possession of tangible personal property if transfer would be taxable if sale occurred; (iii) sales prices paid for intrastate telephone and telegraph services including consideration paid for rental or leasing of any equipment or services incidental thereto, and sales price paid for intrastate calls which originate and terminate in single state and are billed to customer with place of primary use in Wyoming from mobile telecommunications services as provided by Mobile Telecommunications Sourcing Act, 4 U.S.C. §§ 116 through 126 (definitions and provisions of Mobile Telecommunications Sourcing Act apply); (iv) sales price paid to carriers for intrastate transportation of passengers; (v) sales price paid to public utilities and to persons furnishing gas, electricity or heat for domestic, industrial or commercial consumption; (vi) sales price paid for meals and cover charges at any place where meals regularly served to public; (vii) sales price paid for living quarters in hotels, motels, tourist courts and similar establishments providing lodging service for transient guests; (viii) sales price paid for admission to any place of amusement, entertainment, recreation, games or athletic event and if any person other than employees, officers of law on official business or children under 12 years of age admitted free or at reduced rates to any such place when admission charge is made to other persons, equivalent tax must be paid by these persons based on price charged to other persons; (ix) sales price paid for services performed for repair, alteration or improvement of tangible personal property; (x) sales price paid for all services rendered to real or tangible personal property within oil or gas well site beginning with and including setting and cementing of production casing, or if production casing is not set as in case of open hole completion, after completion of underreaming or attainment of total depth of oil or gas well and continuing with all activities sequentially required for production of any oil or gas well regardless of chronological occurrence of activity and all other services required during entire productive life of such oil or gas well, including recompletion, all the way through abandonment; (xi) sales price paid for motor vehicles, house trailers, trailer coaches, trailers or semitrailers, including manufacturer's rebates; (xii) sales price for alcoholic beverages; (xiii) sales price paid for computer hardware including basic set of operating instructions called system software which is necessary to basic operation of computer hardware and sales price paid for hardware media used to transfer computer software programs. (W.S. 39-15-103[a], W.S. 39-15-104[b]). Additional 1% sales tax (included within 4%) levied effective July 1, 1993. (W.S. 39-15-104[b]). Except as otherwise provided, every vendor must collect sales tax and is liable for entire amount of taxes imposed. (W.S. 39-15-103[c][i]). Every person purchasing goods or services subject to sales tax is liable for such taxes and must pay any sales tax owned to Department unless taxes paid to vendor. (W.S. 39-15-103[c][ii]). Any sales tax due constitutes debt of state from persons who are parties to transaction, other than any vendor or other seller prohibited or not authorized by law to collect any sales tax, and is lien from date tax is due on all real and personal property of such persons. (W.S. 39-15-103[c][iii]). Until Jan. 1, 2008, tax rate imposed upon transaction subject to Uniform Sales and Use Tax Administration Act (W.S. 39-15-401 to W.S. 39-15-408) must be consistent with uniform sourcing rule provided in streamlined sales and use tax agreement adopted pursuant to Act and must be consistent with Wyoming law. (W.S. 39-15-104[f]). Effective Jan. 1, 2008, tax rate imposed upon transaction must be sourced as provided in W.S. 39-15-104(f), as amended by 2006 Wyo. Sess. Laws, c. 10, § 1. Any vendor or certified service provider relying on incorrect rate, boundary or jurisdictional information provided by Department in its tax rate database required under streamlined sales and use tax agreement not liable for any under collection of tax caused by Department's error. (W.S. 39-15-

104[g]). No vendor shall advertise or state directly or indirectly to public that sales tax will be assumed by vendor or that it will be considered in price, or if added, will be refunded. (W.S. 39-15-108[c][iii]).

Local Sales Tax.

State has preempted field of imposing sales tax (W.S. 39-15-202[a]), but any county, city, town, resort district or other political subdivision may impose, levy or collect taxes upon retail sales, admissions and services as provided in W.S. 39-15-201 to W.S. 39-15-211 (W.S. 39-15-202[a], [b]). In addition to 4% sales tax, any county of state may impose excise tax at rate in increments of ½ of 1% upon retail sales of tangible personal property, admissions and services made within county for general revenue purposes (W.S. 39-15-204[a][i]), except that portion of proceeds from tax may be used for economic development if authorized upon vote of qualified electors of county as provided in W.S. 39-15-203(a)(i)(C). General revenue purpose local sales tax must first be approved by vote of qualified electors of county in election held on date authorized under W.S. 22-21-103. (W.S. 39-15-203[a][i][C]). Revenue from tax distributed monthly to county imposing tax and its cities and towns in amount equal to total tax collected in county less 1% earmarked for deposit in state general fund to defray costs of collecting tax and administration expenses incident thereto; and distribution must be allocated to county in proportion population of county situated outside corporate limits of its cities and towns bears to total population of county and to incorporated cities and towns within county in proportion population of each city or town bears to total population of county. (W.S. 39-15-211[a][i][A], [B]). County and its cities and towns receiving distributions for general operations may expend up to 25% of amount of revenue received for purpose of economic development provided: (a) Intent to use portion of amount distributed for economic development was indicated by specific language on ballot at election of qualified electors of county as provided in W.S. 39-15-204(a)(i)(C) or enactment of resolution or ordinance stating that portion of proceeds will be used for economic development, and (b) county has not imposed local sales tax for purpose of economic development under W.S. 39-15-204(a)(vi). (W.S. 39-15-211[a][i][C]).

County may also impose excise tax not to exceed 2% upon retail sales of tangible personal property, admissions and services made within county for use in specified amount for specific purposes approved by vote of qualified electors of county in election held in accordance with W.S. 22-21-101 to W.S. 22-21-112. (W.S. 39-15-204[a][iii]; W.S. 39-15-203[a][iii][C]). Any debt created may also be repaid, in whole or in part, by property tax levy if general obligation bonds authorized by electors. (W.S. 39-15-203[a][i][C]). Specific purposes cannot include ordinary operations of local government except those operations related to specific project approved by election. (W.S. 39-15-204[a][iii]; W.S. 39-15-203[a][iii][B]). Revenue from tax, after deduction of 1% earmarked for deposit into state general fund to defray costs of collecting tax and administration expenses incident thereto, distributed monthly to county treasurer of county in which tax has been imposed for immediate distribution to sponsoring entity for specific purposes identified on ballot. (W.S. 39-15-211[b]).

Effective July 1, 2005, county may impose excise tax at rate in increments of .25% not to exceed rate of 1% upon retail sales of tangible personal property, admissions and services made within county for economic development approved by vote of qualified electors of county in election held on date authorized under W.S. 22-21-103. (2005 Wyo. Sess. Laws, c. 239; W.S. 39-15-204[a][vi]; W.S. 39-15-203[a][v][C]). Revenue collected from local economic development sales tax may not be expended, either directly or indirectly, to finance or involuntarily acquire any public utility as defined in W.S. 37-1-101(a)(vi) or any telecommunications system by condemnation or other legal process. (W.S. 39-15-203[a][v][G]). Revenue from tax distributed monthly to county imposing tax and its cities and towns in amount equal to total tax collected in county less 1% earmarked for deposit in state general fund to defray costs of collecting tax and administrative expenses incident thereto; and distribution must be allocated to county in proportion population of county situated outside corporate limits of its cities and towns bears to total population of county and to incorporated cities and towns within county in proportion population of each city or town bears to total population of county. (W.S. 39-15-211[a][iv]).

In no event may total local sales tax imposed within any county for general revenue, specific purposes and economic development under W.S. 39-15-204(a)(i), W.S. 39-15-204(a)(iii) and W.S. 39-15-204(a)(vi), respectively, exceed 2%. (W.S. 39-15-204[a][iv]). Exemptions applicable to state sales tax under W.S. 39-15-105 also apply to local sales tax imposed by counties under W.S. 39-15-204. (W.S. 39-15-205). Any local sale tax initially authorized by county electorate for general revenue or economic development must be submitted for reauthorization at every other subsequent general election until proposition is defeated. (W.S. 39-15-203[a][i][C]; W.S. 39-15-203[a][v][C]).

Any city or town may impose excise tax at rate in increments of 1% not to exceed rate of 4% upon sales price paid for lodging services as defined in W.S. 39-15-101(a)(i) for local travel and tourism promotion approved by vote of qualified electors of such city or town in election held on date authorized by W.S. 22-21-103. (W.S. 39-15-204[a][ii]; W.S. 39-15-203[a][ii][A], [a][ii][C]). Lodging tax in addition to and not in lieu of county sales tax for general revenue and specific purposes under W.S. 39-15-204(a)(i) and W.S. 39-15-204(a)(iii) if both taxes are imposed by county. (W.S. 39-15-203[a][ii][A]). If proposition to impose tax on lodging services within county is approved by vote of qualified electors of county in accordance with W.S. 39-15-203(a)(ii)(B), city or town may not impose lodging tax in addition to county wide tax even though additional tax does not exceed limitation imposed under W.S. 39-15-204(a)(ii). (W.S. 39-15-203[a][i][A]). For provisions related voter authorization, see W.S. 39-15-203(a)(ii). For provisions related to collection, administration and distribution, see W.S. 39-15-211(a)(ii).

Any resort district may impose excise tax at rate in increments of .50% not to exceed rate of 1% upon retail sales of tangible personal property, admissions and services made within district by vendors physically situated within district for general revenue of resort district. (W.S. 39-15-204[a][v]). Resort district excise tax will be imposed if favorably supported by resolution of board of resort district and approved by majority of district voters under W.S. 18-16-119. (W.S. 39-15-203[a][iv]). Revenue from tax distributed monthly to resort district imposing tax after deduction of 1% earmarked for deposit in state general fund to defray costs of collecting tax and administrative expenses incident thereto. (W.S. 39-15-211[a][iii]). Exemptions applicable to state sales tax under W.S. 39-15-105 also apply to sales tax imposed by resort districts under W.S. 39-15-204(a)(v). (W.S. 39-15-205).

“Vendor” means any person engaged in business of selling at retail or wholesale tangible personal property, admissions or services subject to imposition of sales tax. “Vendor” also includes vehicle dealer as defined in W.S. 31-16-101(a)(xviii). (W.S. 39-15-101[a][xv]). “Certified service provider” means agent certified under streamlined sales and use tax agreement to perform all of seller's sales and use tax functions, other than seller's obligation to remit tax on its own purchases. (W.S. 39-15-101[a][xxiv]). “Tangible personal property” means all personal property that can be seen, weighed, measured, felt or touched or that is in any manner perceptible to senses, and includes electricity, water, gas, steam and prewritten computer software and any controlled substances as defined by W.S. 35-7-1002(a)(iv) not sold pursuant to written prescription of or through licensed practitioner as defined by W.S. 35-7-1002(a)(xx). (W.S. 39-15-101[a][ix]). “Sale” means any transfer of possession in Wyoming for consideration, including fabrication of tangible personal property when materials are furnished by purchaser, but excluding certain enumerated exchanges or transfers of tangible personal property upon which seller directly or indirectly paid sales or use tax incidental thereto. (W.S. 39-15-101[a][vii]). “Lease” or “rental” means any transfer of possession or control of tangible personal property for consideration for fixed or indeterminate period of time, and includes any agreement covering motor vehicle or trailer where amount of consideration may be increased or decreased by reference to amount realized upon sale or disposition of property as defined in 26 U.S.C. § 7701(h)(1). (W.S. 39-15-101[a][xxxii]). Definitions of “lease” and “rental” used for sales and use tax purposes regardless of whether transaction characterized as lease or rental under generally accepted accounting principles, Internal Revenue Code, Uniform Commercial Code or other applicable provisions of federal, state or local law; however, definitions of terms do not include: (a) Transfer of possession or control of property under security agreement or deferred payment plan that requires transfer of title upon completion of required payments, (b) transfer of possession or control of property under agreement requiring transfer of title upon completion of required payments and payment of option price not exceeding $100 or 1% of total required payments, or (c) providing tangible personal property along with operator for fixed or indeterminate period of time, with condition that operator necessary for equipment to perform as designed, provided operator must do more than maintain, inspect or set up tangible personal property. (W.S. 39-15-101[a][xxxii]).

Sales or leases exempt from sales tax are as follows (W.S. 39-15-105[a]): (i) Sales of services and tangible personal property which state is prohibited from taxing under laws or constitutions of U.S. or Wyoming; (ii) sales of services and tangible personal property protected by federal law: (A) interstate transportation of freight or passengers, (B) sales of railroad rolling stock including locomotives purchased by interstate railroads, aircraft purchased by interstate air carriers which are holders of valid U.S. Civil Aeronautics Board permits or authorities in trucks, truck-tractors, trailers, semitrailers and passenger buses which are purchased by common or contract interstate carriers or which are operating in interstate commerce under exemption clauses in federal law if they are to be substantially used in interstate commerce, (C) leases of motor vehicles with or without trailers when lease rental is computed from gross receipts of operation, if operator is operating under valid interstate authority or permit, (D) sales to Wyoming joint apprenticeship and training programs approved by U.S. Department of Labor, and (E) to comply with Food Security Act of 1985, sales of food purchased with food stamps; (iii) sales of services and tangible personal property consumed in production: (A) sales of tangible personal property to person engaged in business of manufacturing, processing or compounding when tangible personal property purchased becomes ingredient or component of tangible personal property manufactured, processed or compounded for sale or use in sales of containers, labels or shipping cases used for tangible personal property so manufactured, processed or compounded, (B) sales of livestock, feeds for use in feeding livestock or poultry for marketing purposes and seeds, roots, bulbs, small plants and fertilizer planted or applied to land, products of which are to be sold. This exemption applies to but is not limited to sales of seeds, roots, bulbs, small plants and fertilizer planted or applied to land subject to state or federal crop set aside program, (C) intrastate transportation by public utility or others of raw farm products to processing or manufacturing plant, (D) sales of power or fuel to person engaged in business of manufacturing, processing or agriculture when same is consumed directly in manufacturing, processing or agriculture, (E) sales of power or fuel to person engaged in transportation business when same is consumed directly in generating motive power for actual transportation purposes, except power or fuel which is not taxed as gasoline or gasohol under W.S. 39-17-101 through W.S. 39-17-111 or is special fuel under W.S. 39-17-201 through W.S. 39-17-211 and which is used to propel motor vehicle upon highway as defined in W.S. 39-17-201(a)(xiii), (F) wholesale sales excluding sales of controlled substances as defined by W.S. 35-7-1002(a)(iv) which are not sold pursuant to written prescription of or through licensed practitioner as defined by W.S. 35-7-1002(a)(xx), (G) sales of fuel for use as boiler fuel in production of electricity, (H) for period beginning Jan. 1, 1999, and concluding Dec. 31, 2000, sales of power to person engaged in business of extracting crude oil when same is consumed directly in extraction of crude oil, and (I) cost of food or meals furnished by food establishment licensed under W.S. 35-7-124 without charge to employee for consumption on premises not taxable either to establishment or employee; (iv) sales of services and tangible personal property sold to government, charitable and nonprofit organizations, and irrigation districts: (A) sales to state or its political subdivisions, (B) sales made to religious or charitable organizations including nonprofit organizations providing meals or services to senior citizens as certified to Department of Revenue by Department of Health in or for conduct of regular religious, charitable or senior citizen functions and activities and sales of meals made to persons in regular conduct of senior citizen center functions and activities, (C) occasional sales made by religious or charitable organizations for fund raising purposes for conduct of regular religious or charitable functions and activities ("regular business" means habitual or regular activity of organization excluding any incidental or occasional operation), (D) sales to joint powers boards organized under Joint Powers Act, (E) sales price of admissions to and user fees for county or municipal-owned recreational facilities such as swimming pools, athletic facilities and recreation centers, and (F) labor or service charges, including transportation and travel, for repair, alteration or improvement of real property or tangible personal property owned by or incorporated in projects under contract to state of Wyoming or any of its political subdivisions, including irrigation district created under W.S. 41-7-201 through W.S. 41-7-210 and weed and pest control district created under W.S. 11-5-101 through W.S. 11-5-119, (G) sales to irrigation district created under W.S. 41-7-201 through W.S. 41-7-210, and (H) sales to weed and pest control district created under W.S. 11-5-101 through W.S. 11-5-119; (v) sales of services and tangible personal property which are alternatively taxed: (A) sales of transportable homes after tax has been once paid, and (B) sales of gasoline or gasohol taxed under W.S. 39-17-101 through W.S. 39-17-111, and of diesel fuels taxed under W.S. 39-17-201 through W.S. 39-17-211, provided exemption shall not apply to gasoline or gasohol taxed under W.S. 39-17-104(a)(iii) or to diesel fuel taxed under W.S. 39-17-204(a)(ii); (vi) sales of services and tangible personal property which are essential human goods and services: (A) intrastate transportation by public utility or others of sick, injured or diseased persons by ambulance or hearse, (B) sales of prescription drugs for human relief, excluding over-the-counter drugs, insulin for human relief and any syringe, needle or other device necessary for administration thereof, oxygen for medical use, blood plasma, prosthetic devices, hearing aids, eyeglasses, contact lenses, mobility enhancing equipment, durable medical equipment and any assistive device (defined as any item, piece of equipment or product system, as defined by rule of Department of Revenue, which is used to increase, maintain or improve functional capabilities of individual with permanent disability, excluding any medical device, surgical device or organ implanted or transplanted into or attached directly to individual), (C) sales of all noncapitalized equipment and disposable supplies which are used in direct medical or dental care of patient. Exemption in this subparagraph shall not include capitalized equipment or office supplies used in normal course of business; (vii) sales of services provided primarily to businesses: interstate or intrastate transportation of drilling rigs, including charges for movement or conveyance of drilling rig to or away from well cite and loading, unloading, assembly or disassembly of drilling rig; (viii) sales of services and tangible personal property as economic incentive: (A) intrastate transportation of employees to or from work when paid or contracted for by employee or employer; freight and property including oil and gas by pipeline, (B) sales of services of professional engineers, geologists or members of similar professions, including sales price paid for all services to real or tangible personal property leading to building location, drilling and all related activities that must be completed prior to setting production casing, including coring, logging and testing done prior to setting of production casing for drilling of any oil or gas well or for deepening or extending of any well previously drilled for oil or gas beyond maximum point to which such well initially drilled. Exemption also applies to any and all seismographic and geophysical surveying, stratigraphic testing, coring, logging and testing calculated to reveal existence of geologic conditions favorable to accumulation of oil or gas, (C) sales of school annuals, (D) sales of newspapers, (E) sales of tangible personal property or services performed for repair, assembly, alteration or improvement of railroad rolling stock (repealed effective July 1, 2001), (F) sales of carbon dioxide and other gases used in tertiary production, (G) sales of lodging services provided by person known to trade and public as guide or outfitter, (H) sale of farm implements defined as any tractor or other machinery designed or adapted and used exclusively for agricultural operations but specifically excludes any vehicle titled under c. 2 of title 31 of Wyoming statutes, snowmobiles, lawn tractors, all-terrain vehicles and repair or replacement parts, (I) sale of aircraft repair, remodeling or maintenance services at Federal Aviation Administration certified station, including, but not limited to, repair or replacement materials or parts, (J) sale of service of transmitting radio waves in one-way paging unit owned or rented by service subscriber where messages received are displayed or played on paging unit as voice, tone and voice, numeric or alphanumeric, including mail services purchased with pager, (K) sales of goods or services for purpose of raising money or charges for admission to any amusement, entertainment, recreation, game or athletic event for any kindergarten through grade 12 public school located in state, (L) sales of equipment used to generate electricity from renewable resources, including wind generation, solar biomass, landfill gas, hydro, hydrogen and geothermal energy, provided such exemption shall be limited to acquisition of equipment used in project to make it operational up to point of interconnection with existing transmission grid including wind turbines, generating equipment, control and monitoring systems, power lines, substation equipment, lighting, fencing, pipes and other equipment for locating power lines and poles, provided further exemption shall not apply to tools and other equipment used in construction of new facility, contracted services required for construction and routine maintenance activities and equipment utilized or acquired after project is operational (subparagraph is repealed effective June 30, 2008), (M) until Dec. 31, 2010, sale or lease of machinery to be used in Wyoming directly and predominantly in manufacture of tangible personal property, if sale or lease: (I) Is to manufacturer classified by Department of Revenue under NAICS code manufacturing sector 31-33, (II) does not include noncapitalized machinery except machinery expensed in accordance with § 179 of Internal Revenue Code, and (III) is completed in case of sale or executed in case of lease on or after July 1, 2004, (N) sale or lease of any aircraft used in Federal Aviation Administration Commercial operation, including sale of all: (I) Tangible personal property permanently affixed or attached as component part of aircraft, including, but not limited to, repair or replacement materials or parts, and (II) aircraft repair, remodeling and maintenance services performed on aircraft, its engine or component materials or parts, (O) sales of tangible personal property or services performed for repair, assembly or improvement of railroad rolling stock (subparagraph repealed effective July 1, 2015); and (P) sale of equipment used to construct new coal gasification or liquefaction facility (exemption limited to acquisition of equipment used in project to make it operational; not applicable to tools and other equipment used in construction of new facility, contracted services required for construction and routine maintenance activities or to equipment utilized or acquired after facility operational); and (ix) (effective July 1, 2002) for purpose of avoiding application of sales tax more than once on same article of tangible property for same taxpayer, trade-in value of tangible personal property shall be excluded from sales price of new tangible personal property when trade-in and purchase occur in one transaction. (W.S. 39-15-105[a]).

Collection and payment of sales tax is as follows: Sales tax imposed upon sale of motor vehicles, house trailers, trailer coaches, trailers or semitrailers collected by county treasurer prior to first registration. (W.S. 39-15-108[d][ii]). Upon failure to pay tax due upon any vehicle, county treasurer shall notify county clerk, and county clerk shall notify Department of Revenue. Department of Revenue may file lien against vehicle and shall note lien on title of vehicle. (W.S. 39-15-108[d][ii]). Sales price declared by purchaser and tax collected based on declaration. (W.S. 39-15-103[b][ii]). No sales tax payable if registered in name of vendor. (W.S. 39-15-107[b][iii]). If motor vehicle, house trailer, trailer coach trailer or semitrailer purchased as gift, tax collected from donee. (W.S. 39-15-107[b][ii]). In all other instances except transportable homes, including sale of mopeds, motorcycles, and off-road recreational vehicles, vendor must collect tax and is liable for entire amount of taxes imposed. (W.S. 39-15-107[b][viii]; W.S. 39-15-103[c][i]). If sales or use tax on vehicle, including local option sales or use tax, is not paid within 45 days after date of sale, or in case of motor vehicle brought into state, 45 days after vehicle is brought into state, interest and civil penalty will be assessed by county treasurer. (W.S. 39-15-108[b][ii]). Person regularly engaged in business of making loans or supervised financial institution as defined in W.S. 40-14-140(a)(xix), that forecloses lien or repossesses motor vehicle on which it has filed lien, or insurance company that acquires ownership of motor vehicle pursuant to damage settlement, shall not be liable for payment of sales or use tax, penalties or interest for that vehicle. (W.S. 39-15-107[b][iv]). Taxes are due and payable on last day of month following month in which they are collected or as required by Department of Revenue and each vendor on or before last day of each month must file return showing preceding months gross sales and remit all taxes to Department of Revenue. Vendor shall report whether vendor sells cigarettes, cigars, snuff or other tobacco products in state. Department of Revenue may reject any report of any vendor who does not comply with tobacco sales reporting requirements. Department of Revenue may allow extensions for filing returns not to exceed 90 days. (W.S. 39-15-107[a][i]). If sale made on credit, contract or conditional basis and title does not pass until future date, that portion of total tax is paid on each payment in amount which payment made bears to total purchase price. (W.S. 39-15-107[b][vi]). Every person purchasing goods or services taxed by this article is liable for taxes and shall pay any tax owed to department unless taxes have been paid to vendor. (W.S. 39-15-107[c][ii]). If vendor collects tax in excess of that imposed it must be remitted to Department. (W.S. 39-15-107[b][vii]). Taxes collected by county treasurers on sales price of motor vehicles, house trailers, trailer coaches, trailers or semitrailers remitted to Department by treasurers monthly. (W.S. 39-15-107[a][vii]). When applying for registration, every new owner of motorcycle must produce either receipt from Department of Revenue and Taxation showing that sales or use tax has been paid, receipt on forms provided by Department showing that motorcycle was purchased from Wyoming licensed dealer and that dealer has collected sales tax, or certificate from Department that no sales or use tax is due. (W.S. 39-15-107[a][viii]).

Distribution of Sales Tax.

Revenues collected by Department under W.S. 39-15-103 shall be transferred to state treasurer and distributed in accordance with W.S. 39-15-111. Vendors must annually provide Department of Revenue information indicating amount of tax collected from sales of propane, butane, liquefied gas and compressed natural gas. (W.S. 39-15-111[e]).

Refund of sales and use tax granted to Wyoming residents meeting resource eligibility requirements under W.S. 39-11-109(c)(ii) who are 65 years of age and older or who are 18 years of age or older and are totally disabled. Application must indicate whether applicant applied for or received any refund under W.S. 39-11-109(c)(ii), property tax exemption under W.S. 39-13-105, property tax refund under W.S. 39-13-109(c)(iii) or property tax credit under W.S. 39-13-109(d) for same calendar year. Qualified single person whose actual income less than $17,500 receives $800 reduced by percentage that actual income exceeds $10,000; and qualified married persons, at least one of whom is 65 years of age or totally disabled, whose actual income less than $28,500, receive $900 reduced by percentage that actual income exceeds $16,000. Until remarriage, person 60 years or older once qualified through marriage remains eligible individually for single person benefits, subject to income limitations, after death of spouse. (W.S. 39-11-109[c][ii]). Qualified residents must apply to Department of county of their residence on or before last working day in Aug. of each year for refund of exempted sales and use tax under oath on form prescribed by Department. (W.S. 39-11-109[c][iii]). Warrants for refunds shall be mailed by Department to qualified recipients by Dec. 20 following Aug. application date. Department shall enclose transmittal letter with each warrant showing how refund was computed. (W.S. 39-11-109[c][iv]).

Use Tax.

Except as otherwise provided by W.S. 39-16-105 (exemptions), excise tax at rate of 4% levied upon, and must be paid by, any person purchasing tangible personal property outside Wyoming for storage, use or consumption in Wyoming. (W.S. 39-16-104[a]; W.S. 39-16-103[a][i], [a][iii]). Additional 1% use tax (included within 4%) levied effective July 1, 1993. (W.S. 39-16-104[b]). Tangible personal property sold by any person for delivery in this state deemed sold for storage, use or consumption in Wyoming and subject to tax imposed by use tax statutory provisions unless person selling property has received from purchaser signed certificate stating property purchased for resale and showing purchaser's name and address. (W.S. 39-16-103[a][ii]). Vendor must collect use tax and give purchaser receipt therefor displaying tax paid separately. (W.S. 39-16-103[c][i]). Liability of purchaser not extinguished until use tax paid to state, but receipt given to purchaser by registered vendor sufficient to relieve purchaser from further liability. (W.S. 39-16-103[a][i], [c][i]). Until Jan. 1, 2008, tax rate imposed upon transaction subject to Uniform Sales and Use Tax Administration Act (W.S. 39-15-401 to W.S. 39-15-408) must be consistent with uniform sourcing rule provided in streamlined sales and use tax agreement adopted pursuant to Act and must be consistent with Wyoming law (W.S. 39-16-104[e]). Effective Jan. 1, 2008, tax rate imposed upon transaction must be sourced as provided in

W.S. 39-16-104(e), as amended by 2006 Wyo. Sess. Laws, c. 10, § 1. Any vendor or certified service provider relying on incorrect rate, boundary or jurisdictional information provided by Department in its tax rate database required under streamlined sales and use tax agreement not liable for any under collection of tax caused by Department. (W.S. 39-16-104[f]). No vendor shall advertise or state directly to public that taxes imposed by use tax provisions will be assumed by vendor or will not be added to selling price or, if added, will be refunded. (W.S. 39-16-107[b][vi]).

"Vendor" means any person engaged in business of selling at retail or wholesale tangible personal property, having or maintaining within Wyoming, directly or by any subsidiary, office, distribution house, sales house, warehouse or other place of business, or any agents operating or soliciting sales or advertising within Wyoming under authority of subsidiary, regardless of whether place of business or agent located in Wyoming permanently or temporarily or whether vendor or subsidiary qualified to do business within Wyoming. Agents acting under authority of vendor include but are not limited to truckers, peddlers, canvassers, salespersons, representatives, employees, supervisors, distributors, delivery persons or any other persons performing services in Wyoming. "Vendor" also includes every person who engages in regular or systematic solicitation by three or more separate transmittances of advertisement or advertisements in any 12 month period in consumer market in Wyoming by distribution of catalogs, periodicals, advertising flyers, or other advertising, or by means of print, radio, television or other electronic media, by mail, telegraph, telephone, computer data base, cable, optic, microwave, satellite or other communication system for purpose of effecting retail sales of tangible personal property. (W.S. 39-16-101[a][x]). "Certified service provider" means agent certified under streamlined sales and use tax agreement to perform all of seller's sales and use tax functions, other than seller's obligation to remit tax on its own purchases. (W.S. 39-16-101[b]; W.S. 39-15-101[a][xxiv]). "Tangible personal property" means all personal property that can be seen, weighed, measured, felt or touched or that is in any manner perceptible to senses, and includes electricity, water, gas, steam and prewritten computer software and any controlled substance as defined by W.S. 35-7-1002(a)(iv) not sold pursuant to written prescription of or through licensed practitioner as defined by W.S. 35-7-1002(a)(xx). (W.S. 39-16-101[a][vi]). "Sale" means any transfer of possession of tangible personal property from vendor for consideration for storage, use or consumption in Wyoming, excluding certain statutorily enumerated exchanges or transfers of tangible personal property upon which seller directly or indirectly paid sales or use tax incidental thereto. (W.S. 39-16-101[a][iii]). "Storage" means keeping or retention in this state of tangible personal property purchased from vendor for any purpose except sale in course of business or subsequent use outside of state. (W.S. 39-16-101[a][v]). "Use" means exercise of any right or power over tangible personal property incident to ownership or by any contract where possession is given by lease or contract. (W.S. 39-16-101[a][ix]).

Local Use Tax.

State has preempted field of imposing use tax (W.S. 39-16-202[a]), but any county, city, town, resort district or other political subdivision may impose, levy or collect taxes upon sales or storage, use or consumption of tangible personal property as provided in W.S. 39-16-201 to W.S. 39-16-211 (W.S. 39-16-202[a], [b]). Whenever county or resort district imposes sales tax on retail sales of tangible personal property, admissions and services made within county or resort district pursuant to W.S. 39-15-201 to W.S. 39-15-211, county or resort district must also impose use tax at same rate on sales made in county or resort district and on storage, use and consumption of tangible personal property in county or resort district for general revenue purposes subject to satisfaction of electoral and other requirements prescribed in W.S. 39-16-203 for imposition of local use taxes by county or resort district. (W.S. 39-16-202[c], [d]). Any county imposing sales tax for specific purposes pursuant to W.S. 39-15-203(a)(ii) or any resort district imposing sales tax for general revenue of district pursuant to W.S. 39-15-203(a)(iv) authorized and required to impose corresponding use tax at same rate and for same period of time as for sales tax. (W.S. 39-16-202[e]). Effective July 1, 2005, county may also impose excise tax at rate in increments of .25% not to exceed rate of 1% upon sales and storage, use and consumption of tangible personal property made within county for economic development approved by vote of qualified electors of county in election held on date authorized under W.S. 22-21-103. (2005 Wyo. Sess. Laws, c. 239; W.S. 39-16-204[a][v]; W.S. 39-16-203[a][iv][C]). In no event may total local use tax imposed within any county for general revenue, specific purposes and economic development under W.S. 39-16-204(a)(i), W.S. 39-16-204(a)(ii) and W.S. 39-16-204(a)(v), respectively, exceed 2%. (W.S. 39-16-204[a][iii]). Provisions governing imposition, rate, administration, collection and distribution of all local use taxes essentially mirror corresponding provisions applicable to local sales taxes imposed under W.S. 39-15-201 to W.S. 39-15-211, (W.S. 39-16-201 to W.S. 39-16-211).

Purchases or leases exempt from use tax are as follows (W.S. 39-16-105[a]): (i) Purchases of services and tangible personal property which state is prohibited from taxing under laws or constitutions of U.S. or Wyoming; (ii) sales of following services and tangible personal property protected by federal law: (A) railroad rolling stock including locomotives purchased by interstate railroads, aircraft purchased by interstate air carriers which are holders of valid U.S. Civil Aeronautics Board permits or authorities in trucks, truck-tractors, trailers, semitrailers and passenger buses in excess of 10,000 pounds gross vehicle weight which are purchased by common or contract interstate carriers or which are operating in interstate commerce under exemption clauses in federal law if they are to be substantially used in interstate commerce, and (B) purchases by Wyoming joint apprenticeship and training programs approved by Department of Labor; (iii) sales of following services and tangible personal property consumed in production: (A) purchases of tangible personal property by person engaged in business of manufacturing, processing or compounding when tangible personal property purchased becomes ingredient or component of tangible personal property manufactured, processed or compounded for sale or use in purchases of containers, labels or shipping cases used for tangible personal property so manufactured, processed or compounded, and (B) purchases of livestock, feeds for use in feeding livestock or poultry for marketing purposes and seeds, roots, bulbs, small plants and fertilizer planted or applied to land, products of which are to be sold. This exemption applies to, but is not limited to sales of seeds, roots, bulbs, small plants and fertilizer planted or applied to land subject to state or federal crop set aside program; (iv) sales of following services and tangible personal property sold to government, charitable and nonprofit organizations, and irrigation districts: (A) purchases made by state or its political subdivisions, (B) purchases by religious or charitable organizations in conduct of their regular religious or charitable functions, (C) purchases by joint powers board organized under Wyoming Joint Powers Act, (D) labor or service charges including transportation and travel, for repair, alteration or improvement of real property or tangible personal property owned by or incorporated in projects under contract to state or any of its political subdivisions, including irrigation district created under W.S. 41-7-201 through W.S. 41-7-210 and weed and pest control district created under W.S. 11-5-101 through W.S. 11-5-119, (E) sales to irrigation district created under W.S. 41-7-201 through W.S. 41-7-210, and (F) sales to weed and pest control district created under W.S. 11-5-101 to W.S. 11-5-119; (v) sales of following services and tangible personal property which are alternatively taxed: (A) purchases which are taxable under provisions of Selective Sales Tax Act of 1937, and purchases for which sales tax has been previously paid, and (B) motor vehicle fuel which is subject to taxation under W.S. 39-17-101 through W.S. 39-17-111 or W.S. 39-17-201 through W.S. 39-17-211, provided exemption shall not apply to gasoline or gasohol taxed under W.S. 39-17-104(a)(iii) or to diesel fuel taxed under W.S. 39-17-204(a)(ii); (vi) sales of following services and tangible personal property which are essential human goods and services: (A) purchases of prescription drugs for human relief, excluding over-the-counter drugs, insulin for human relief and any syringe, needle or other device necessary for administration thereof, oxygen for medical use, blood plasma, prosthetic devices, hearing aids, eyeglasses, contact lenses, mobility enhancing equipment, durable medical equipment, and any assistive device (defined as any item, piece of equipment or product system, as defined by Department of Revenue rule, used to increase, maintain or improve functional capabilities of individual with permanent disability, excluding any medical device, surgical device or organ implanted or transplanted into or attached directly to individual), (B) purchases of all noncapitalized equipment and disposable supplies which are used in direct medical or dental care of patient; provided, however, exemption in this subparagraph will not include capitalized equipment or office supplies used in normal course of business, and (C) sales of water delivered by pipeline or truck; (vii) sales of services provided primarily to businesses as specified by legislature; (viii) sales of following services and tangible personal property exempt as economic incentive: (A) sales of carbon dioxide and other gases used in tertiary production, (B) purchase of aircraft repair, remodeling or maintenance services at Federal Aviation Administration certified repair station, including, but not limited to, repair or replacement materials or parts, (C) sales of equipment used to generate electricity from renewable resources, including wind generation, solar, biomass, landfill gas, hydro, hydrogen and geothermal energy, provided such exemption shall be limited to acquisition of equipment used in project to make it operational up to point of interconnection with existing transmission grid including wind turbines, generating equipment, control and monitoring systems, power lines, substation equipment, lighting, fencing, pipes and other equipment used in construction and routine maintenance activities and equipment utilized or acquired after project is operational (subparagraph is repealed effective June 30, 2008), (D) until Dec. 31, 2010, purchase of machinery to be used in Wyoming directly and predominantly in manufacturing tangible personal property, if sale or lease: (I) Is to manufacturer classified by Department of Revenue under NAICS code manufacturing sector 31-33, (II) does not include noncapitalized machinery expensed in accordance with § 179 of Internal Revenue Code, and (III) is completed in case of sale, or executed in case of lease, on or after July 1, 2004, (E) purchase or lease of aircraft used in Federal Aviation Administration air carrier operation, including purchase of all: (I) Tangible personal property permanently affixed or attached as component part of aircraft, including, but not limited to, repair or replacement materials or parts, and (II) aircraft repair, remodeling and maintenance services performed on aircraft, its engine or its component materials or parts, and (F) purchases of tangible personal property or services performed for repair, assembly, alteration or improvement of railroad rolling stock (subparagraph is repealed effective July 1, 2015), and (G) purchase equipment used to construct new coal gasification or liquefaction facility (exemption limited to acquisition of equipment used to make project operational; not applicable to tools and other equipment used in construction of new facility, contracted services required for construction and routine maintenance activities or to equipment utilized or acquired after facility operational); and (ix) (effective July 1, 2002) for purpose of avoiding application of use tax more than once on same article of tangible property for same taxpayer: trade-in value of tangible personal property shall be excluded from sales price of new tangible personal property when trade-in and purchase occur in one transaction. (W.S. 39-16-105[a]).

Collection and Payment of Use Tax.

County treasurers collect use taxes imposed on sales of motor vehicles, house trailers, trailer coaches, trailers and semitrailers at time of first registration and not upon subsequent registration by same owner, and tax shall not be collected if previously registered by same nonresident owner in another state. (W.S. 39-16-107[b][ii]). Upon failure to pay tax due upon any vehicle, county treasurer shall notify Department of Revenue which may file lien against vehicle and shall note lien on title of vehicle. Sales price declared by purchaser and tax based on declaration collected. (W.S. 39-16-108[d][iii]). If purchased outside state as gift, tax collected from donee at time of first registration based on fair market value at time of gift. (W.S. 39-16-107[b][iii]). Otherwise, and including sale of mopeds, motorcycles, and off-road recreational vehicles, use tax is collected by vendor and vendor is liable for entire amount of taxes imposed. (W.S. 39-16-103[c][v]; W.S. 39-16-107[b][iv]). Tax on vehicle, including local use tax, must be paid within 50 days after date of sale, or in case of motor vehicle brought into state, 50 days after vehicle is brought into state if owner submits to county treasurer affidavit and any other satisfactory proof as necessary to verify date vehicle was brought into state, or interest and penalties will be assessed by county treasurer. (W.S. 39-15-108[b][ii]). Person regularly engaged in business of making loans or supervised financial institution as defined in W.S. 40-14-140(a)(xix), that forecloses lien or repossesses motor vehicle will not be liable for payment of sales or use tax, penalties or interest due under W.S. 39-16-108(b) and (c). Taxes due and payable on last day of month following month in which collected or as required by Department of Revenue, and each vendor must file on or before last day of each month return showing total sales of tangible personal property subject to use tax sold during preceding month and remit all taxes due to Department of

Revenue. Vendor shall report whether vendor sells cigarettes, cigars, snuff or other tobacco products in state. Department of Revenue may reject any report of any vendor who does not comply with tobacco sales reporting requirements. (W.S. 39-16-107[a][i]). Every person storing, using or consuming tangible personal property purchased from vendor who does not maintain place of business in state liable for use tax and must on or before last day of each month file return showing total sales price of tangible personal property purchased and subject to use tax during preceding month and remit all taxes due to Department. If total tax to be remitted by person during any month is less than $150, quarterly or annual return as authorized by department, and remittance in lieu of monthly return may be made on or before last day of month following end of quarter or year for which tax is collected. (W.S. 39-16-107[a][ii]). Department may allow extensions for filing returns, but no extension may be for more than 90 days. (W.S. 39-16-107[a][iii]). However, every vendor must register with Department of Revenue, giving name and address of all agents operating in state and location of places of business together with other information required by Department of Revenue. (W.S. 39-16-106[a]). Revenues collected by Department of Revenue from taxes imposed by this article shall be transferred to treasurer who shall: (i) Credit 69% to general fund; (ii) deduct from remaining share, 1% to cover all administrative costs attributable to remaining share and credit general fund for that amount; and (iii) from remaining share, deduct 1% of use taxes collected and distribute deducted amounts to counties, cities and towns for payment to their respective general funds as provided in W.S. 39-16-111(b)(iii). (W.S. 39-16-111[b]). Additionally, 31% of use taxes accruing from out-of-state vendors distributed to counties, cities and towns in same percentage as determined in W.S. 39-15-111(b)(iii). (W.S. 39-16-111[c]).

Refund.

See subhead Sales Tax, catchline Refund, supra.

22.18 STAMP AND SEAL TAXES:

Stamp Tax.

No general documentary stamp tax.

23 TRANSPORTATION

23.01 MOTOR VEHICLES:

Uniform Act Regulating Traffic on Highways has been adopted with numerous changes. (W.S. 31-5-101). Copies of code may be obtained from Director, Wyoming Department of Transportation, 5300 Bishop Boulevard, Cheyenne, Wyoming 82009-3340. Director, Wyoming Department of Transportation, responsible for administration and enforcement of Driver's License Act and Motor Vehicle Safety-Responsibility Act. State Highway Patrol under direction of Director, Wyoming Department of Transportation, enforces motor vehicle laws.

Vehicle registration and license required annually with various exemptions. (W.S. 31-2-201). No vehicle will be registered and licensed unless verified that vehicle is covered by liability policy of insurance in full force and effect in amounts provided by W.S. 31-9-405(b) or bond on file with Department of Transportation in amounts provided by W.S. 31-9-102(a)(xi). (W.S. 31-2-201[h]). Form and number plates or validating stickers as required by Department of Transportation. (W.S. 31-2-204). Number plates must be displayed front and rear. (W.S. 31-2-205). Issued by County Treasurer. There are no exemptions for members of Armed Forces but they need not have Wyoming license plates if registration from other state maintained in accordance with state law. (W.S. 31-2-201[d][iii]).

Registration of any motor vehicle used for transportation of persons for hire, compensation or profit, or designed or used primarily for transportation of property for gain or profit governed by W.S. 31-18-201.

Operator's License.

No person can drive, steer or exercise any degree of physical control of any motor vehicle, or vehicle being towed by motor vehicle, on highway of state unless such person has valid Wyoming driver's license for type or class of vehicle being driven or towed and no person is permitted to have more than one driver's license in his possession. (W.S. 31-7-106[a], [c]). Persons exempted from licensing requirement are employee of U.S. operating motor vehicle owned or leased by federal government, unless required by government to have state driver's license; nonresident who possesses valid license issued by licensing authority of his place of residence; nonresident on active duty in armed forces of U.S. having valid license issued by state of residence, and said person's spouse or dependent child who has valid license issued by state of residence; nonresident on active duty in armed forces of U.S. having valid license issued in foreign country by armed forces of U.S., but only for period of 45 days from date of return to U.S.; nonresident, full time student at University of Wyoming, Wyoming community college or licensed school in state offering post-secondary education or at parochial, church or religious school as defined by W.S. 21-4-101(a)(iv) offering post-secondary education who has valid license from place of residence; and resident possessing valid driver's license issued by member state of Drivers License Compact, W.S. 31-7-201 and W.S. 31-7-202, except resident possessing commercial driver's license is only exempt from licensing requirements for 30 days and resident possessing any other drivers license shall only be exempt from licensing requirement under act for one year. (W.S. 31-7-107). Licenses issued by motor vehicle division under Department of Transportation. (W.S. 31-7-106[e]). Driver's license will not be issued to any person under age of 17 unless person is at least 16 years old and has held intermediate permit or similar permit from another jurisdiction for at least six months and has completed drivers education course approved by appropriate school district, or taught by person qualified to teach drivers education in Wyoming public school, as evidenced by passing grade or certificate. (W.S. 31-7-108[a]). Instruction permits for vehicles and motorcycles issued to persons 15 years of age (W.S. 31-7-110); and restricted class C or M licenses issued upon showing to and finding by highway patrol of extreme inconvenience to persons between ages 14 and 16, in which case licensee may operate vehicle between 5:00 a.m. and 8:00 p.m. within 50 mile radius of domicile and only at direction of parent or guardian. (W.S. 31-7-117[c]). Person who is at least 15 years of age and who holds restricted class C license may drive beyond hours and radius limitations of W.S. 31-7-117(c) if accompanied by person who is at least 18 years of age, licensed to drive class of vehicle being used, fit and capable of exercising control over vehicle, and occupies seat beside driver. (W.S. 31-7-117[f]). Intermediate permit available to person who is at least 16 years of age and has held instruction permit, or similar permit from another jurisdiction, and has completed practice driving at least 50 actual driving hours, including at least ten hours of night driving, provided parent or guardian certifies that such person has completed practice driving requirements. (W.S. 31-7-110[g]). Person with intermediate permit may only transport one other passenger under 18 who is not member of permittee's immediate family unless accompanied by person at least 18 years of age who holds valid driver's license for class of vehicle being operated and only if all occupants of vehicle are in seats equipped with proper safety belts; such person may operate vehicle between 5:00 a.m. and 11:00 p.m., but time can be extended if certain statutory exceptions apply. (W.S. 31-7-110[h]). Violation of intermediate permit restrictions punishable by 30-day suspension of intermediate permit. (W.S. 31-7-110[k]). License classification plan includes class C (any single vehicle or combination of vehicles, except motorcycles, not in excess of 26,001 pounds and either not designed to transport 16 or more passengers including driver or not placarded for hazardous materials); class B (all class C vehicles and all single vehicles, except motorcycles, with gross vehicle weight rating of 26,001 pounds or more or any such vehicle towing vehicle which does not have gross rating in excess of 10,000 pounds); class A (any vehicle combination, except motorcycles, including all class B and C vehicles with gross combination weight rate of 26,001 pounds or more, provided gross vehicle weight rating of vehicle or vehicles being towed is in excess of 10,000 pounds); class I (instruction permits for vehicles and motorcycles); and class M (motorcycles which may be added to license valid for any other class or may be issued as only class on license if applicant not licensed for any other classification). (W.S. 31-7-109). Duplicates obtainable if license lost, destroyed, or if licensee wants to withdraw notice of his previously given desire of anatomical organ donation. (W.S. 31-7-118). Licenses issued for period of four years. Every license expires on licensee's birthday in fourth year following issuance of license. (W.S. 31-7-119). Commercial drivers disqualified for one year if convicted of driving commercial vehicle while under influence of alcohol (0.04%) or controlled substances, knowingly and willfully leaving scene of accident involving commercial motor vehicle, use of such vehicle in commission of felony, refusal to submit to alcohol concentration test, driving on cancelled, suspended or revoked license as result of prior convictions, or causing fatality through negligent operation of commercial vehicle. (W.S. 31-7-305[a]). Other penalties for violations also provided. (W.S. 31-7-305). Hazardous material endorsement for commercial driver's license must not be renewed, upgraded or transferred unless Transportation Safety Administration of U.S. Dept. of Homeland Security has completed security threat assessment of person seeking endorsement. (W.S. 31-7-108[e]).

Titles and Sales.

No motor vehicle license may be issued except on certificate of title issued by any county clerk on written verified application. (W.S. 31-2-201[e]). Certificate must be indorsed and transfer thereof made and recorded on transfer of motor vehicle. (W.S. 31-2-104). County clerks keep records of such certificates and transfers. (W.S. 31-2-101).

Certificate of registration expires upon transfer of ownership of motor vehicle, and original owner must immediately remove license plates from vehicle. (W.S. 31-2-214[a]). If original owner purchases new vehicle, he may apply for transfer of old registration and plates to new vehicle within ten days after purchase. (W.S. 31-2-214[a]). Owner of vehicle who sells or transfers his interest in vehicle for which certificate of title has been issued must endorse assignment and warranty of title upon certificate for vehicle with statement of all liens and encumbrances thereon, which assignment, warranty and statement must be subscribed by owner before notary public and acknowledged thereby in manner provided by law, to be dated and delivered by transferee at time of delivering vehicle. (W.S. 31-2-104[a]). Transferee must then present certificate to county clerk and apply for new certificate of title within (i) 45 days if transferred and temporary license permit issued by licensed dealer, (ii) 45 days if transferred by out-of-state dealer, or (iii) ten days for other transfer. (W.S. 31-2-104[a]; W.S. 31-2-201[a][ii]). Comprehensive provisions apply to transfer by operation of law of interest in vehicle as upon order in bankruptcy or insolvency, execution sale, repossession upon default in performance of terms of lease or sale contract or otherwise than by voluntary act of person whose title or interest is transferred. (W.S. 31-2-104[c]). Duplicate certificate of title obtainable if original lost. (W.S. 31-2-105).

There is a simplified procedure for transfer of title of deceased owner having no other property requiring administration. (W.S. 2-1-101). See category 13 Estates and Trusts, topic 13.09 Executors and Administrators, subhead Administration Is Unnecessary.

Salvage Vehicles.

When motor vehicle is declared total loss by insurance company or, in event insurance company is not involved in settlement of claim, sustains damage in amount exceeding 75% of its actual retail cash value, as set forth in any current edition of nationally recognized automotive appraisal guide or other source approved by Wyoming insurance department, owner or insurance company, if it obtains ownership of vehicle to transfer title as result of settlement of insurance claim, must forward properly endorsed certificate of title to office of county clerk that issued certificate of title together with application for certificate of title branded “salvage” and required fee to obtain properly branded certificate of title. (W.S. 31-2-107[a]). If damaged vehicle is rebuilt and owner is issued certificate of title branded “rebuilt”, owner must register vehicle, unless owner is licensed vehicle dealer and vehicle was rebuilt for resale to public; and if person registering rebuilt vehicle is person under whose name vehicle is previously registered and annual registration year for vehicle prior to being damaged has not expired at time of application for registration, credit shall be issued for remainder of current annual registration year for vehicle to be applied against any registration fees due for registration of vehicle for same period. (W.S. 31-2-107[c]). Requirements of W.S. 31-2-107 do not apply to motor vehicles with more than eight years of service. (W.S. 31-2-107[d]). If owner of motor vehicle retains vehicle upon settlement with insurance company, and vehicle has incurred damage requiring vehicle to be issued certificate of title branded “nonrepairable” or “salvage”, owner shall apply for certificate of title in own name with applicable brand displayed on certificate of title before vehicle is commercially repaired or ownership of vehicle is transferred. (W.S. 31-2-107[f]). If insurance company is not involved in damage settlement involving salvage vehicle, motor vehicle owner shall apply for certificate of title branded “salvage”, before vehicle is commercially repaired or ownership of vehicle is transferred. (W.S. 31-2-107[g]). If leased motor vehicle incurs damage requiring vehicle to be issued certificate of title branded “salvage”, lessor shall apply for properly branded certificate of title after being notified by lessee that vehicle has been damaged. Lessee of vehicle shall inform lessor that leased vehicle has been damaged within 30 days after occurrence of damage. (W.S. 31-2-107[h]). Any person acquiring ownership of damaged motor vehicle that meets definition of salvage vehicle for which certificate of title branded “salvage” has not been issued shall apply for certificate of title before vehicle is further transferred. (W.S. 31-2-107[j]). Seller of motor vehicle that becomes flood vehicle shall, at or prior to time of transfer of ownership, give buyer written notice that vehicle is flood vehicle. At time of next application for certificate of title for vehicle, disclosure of flood status shall be provided to county clerk with properly assigned title and word “flood” shall be conspicuously branded across front of new title. (W.S. 31-2-107[k]). In case of leased motor vehicle, lessee, within 30 days of occurrence of event that caused vehicle to become flood vehicle, shall give lessor written disclosure that vehicle is flood vehicle. (W.S. 31-2-107[m]).

For any motor vehicle, ownership of which is transferred on or after Dec. 31, 2001, certificate of title must contain appropriate notice whenever records readily accessible to state indicate that motor vehicle was previously issued title that bore any word or symbol signifying that vehicle was “salvage”, “unrebuildable”, “parts only”, “scrap”, “junk”, “nonrepairable”, “reconstructed”, “rebuilt” or any other symbol or word of like kind, or that has been damaged by flood; and any information concerning motor vehicle's status must also be conveyed on any subsequent title issued for vehicle by state, including duplicate or replacement title. (W.S. 31-2-108[a]). Motor vehicle owner submitting application for rebuilt salvage vehicle decal must provide completed document approved by Department of Transportation identifying vehicle's damage prior to being repaired, copy of original certificate of title branded “salvage”, and name and address of person who repaired or rebuilt vehicle; owner must also include affirmation that information and declaration is complete and accurate and, to knowledge of declarant, no stolen parts were used during rebuilding. (W.S. 31-2-108[c]). After owner of motor vehicle, for which certificate of title branded “salvage” has been issued, provides information required under W.S. 31-2-108(c) to Department of Transportation, department shall provide to owner secure decal which shall comply with permanency requirements of department, stating “rebuilt salvage vehicle”; and owner must apply decal to driver's door jam of vehicle prior to having vehicle inspected by Wyoming law enforcement officer for vehicle identification number and to ensure decal has been properly affixed. On motorcycle, owner shall apply decal opposite vehicle identification number on fork crown in manner that does not obscure vehicle identification number, prior to having motorcycle inspected by Wyoming law enforcement officer for vehicle identification number and to ensure decal has been properly affixed. (W.S. 31-2-108[d]). Owner of motor vehicle for which certificate of title branded “salvage” has been issued may apply for certificate of title branded “rebuilt” by presenting to county clerk certificate of title, properly assigned, if applicable, together with Department of Transportation certificate signed by Wyoming law enforcement officer who has inspected vehicle for vehicle identification number and to ensure decal required under W.S. 31-2-108(d) has been properly affixed; and upon proper application and payment of required fees for certificate of title, certificate of title branded “rebuilt” shall be issued to owner. (W.S. 31-2-108[e]).

When any dealer in Wyoming or motor vehicle owner who is not dealer knowingly offers for sale or trade motor vehicle which carries title branded “salvage”, “rebuilt”, or “flood”, dealer or owner must disclose on form prescribed by Department of Transportation to any prospective purchaser, prior to sale or trade, nature of title brand. (W.S. 31-2-109[a]). Notification form must have statement indicating buyer has been provided notice of brand on title, and seller must require buyer to sign notification form prior to completing sales transaction on motor vehicle that carries branded title. (W.S. 31-2-109[b]). Failure of seller to secure buyer's acknowledgment signature shall render sale voidable at election of buyer, and election to render sale voidable must be in writing and delivered by seller not later than 30 days after certificate of title is issued in buyer's name. (W.S. 31-2-109[c]).

Any dealer or person holding legal certificate of title to motor vehicle who fails to obtain proper certificate of title for salvage vehicle within 30 days of receipt of transfer's correctly endorsed title is guilty of misdemeanor, punishable by fine of not more than $750, imprisonment for not more than six months, or both. (W.S. 31-2-110[a]). Any dealer or person who holds legal certificate of title to nonrepairable, rebuilt salvage or flood vehicle who knowingly fails to disclose to potential buyer that vehicle being sold is nonrepairable, rebuilt salvage or flood vehicle, is guilty of misdemeanor punishable by fine of not more than $750, imprisonment for not more than six months, or both. Second or subsequent violations subject to fine of not more than $1,500, imprisonment for not more than one year, or both. In addition, if dealer is convicted of second or subsequent violation within two years, he may be subject to injunction, and Department of Transportation or district attorney of county in which violation occurred may petition court for injunction to prohibit dealer from selling vehicles in Wyoming for period of not more than one year. (W.S. 31-2-110[b]).

Liens.

Security interest in motor vehicle held for sale or lease as inventory as defined in W.S. 34.1-9-102(a)(xlviii) governed by provisions of Article 9 of Uniform Commercial Code. (W.S. 34.1-9-109[a]). Security interest in motor vehicle not constituting inventory governed by W.S. 31-2-801. To be effective as valid, perfected security against third persons, financing statement or security agreement covering motor vehicle must be filed in office of clerk of county in which motor vehicle located, and county clerk must concurrently make notation (showing date and amount of security interest and name of secured party) and endorsement of security interest on face of certificate of title to such motor vehicle. (W.S. 31-2-801[a]). *Cf.* W.S. 34.1-9-501(a)(iii) (proper office in which to file financing statement to perfect security interest in vehicles or motor vehicles is office of county clerk). Owner who encumbers title to motor vehicle must deliver certificate of title to holder of security interest who within five days must file security agreement or financing statement with county clerk of county where vehicle located, and clerk at time of said filing must endorse, on face of certificate of title and on office copy if issued in such clerk's office, appropriate notation showing date and amount of security interest and name of secured party; or promptly transmit to state or county officer who issued certificate of title same security interest data, and such other officer must promptly endorse same on certificate copy on file in such clerk's office. (W.S. 31-2-801[b]). Upon payment of security interest, holder of security interest must file termination statement with county clerk in whose office security agreement or financing statement was filed, and owner of motor vehicle must then present certificate of title to same county clerk and have termination of security interest endorsed on certificate and upon county clerk's office copy if issued in such clerk's office or send data to office of issue for that purpose. (W.S. 31-2-801[c]).

Lien for Repairs to Motor Vehicle.

See category 8 Debtor and Creditor, topic 8.13 Liens, subhead Liens on Goods, Chattels and Animals.

Size and weight limits regulated by W.S. 31-18-801 to W.S. 31-18-808.

Equipment Required.

Regulated by W.S. 31-5-901 to W.S. 31-5-970. Pedestrian vehicle equipment. (W.S. 31-5-960). Any child in passenger vehicle who has not reached ninth birthday must be properly secured in child safety restraint system in seat of vehicle other than front seat, except if vehicle is only equipped with one row of seats, or if all safety belts in rows of seats behind front seat are in use by other child passengers in vehicle, child may be properly secured in child safety restraint system in front passenger seat, except that rear-facing infant seat shall not be placed in front of active airbag. (W.S. 31-5-1303[a]). Statute does not apply to emergency and law enforcement vehicles, school buses used to transport children to or from school, buses registered to private school or church for use to transport children to or from school or church or in connection with school or church activities, or to passenger vehicles not equipped with safety belts at time of manufacture. (W.S. 31-5-1302[a][v]). Statute also does not apply if licensed physician has determined that weight or physical or medical condition of child requires child not be secured in child safety restraint system; person operating passenger vehicle transporting such child carries in vehicle physician's signed statement certifying child should not be secured in child restraint system; if driver of passenger vehicle is rendering aid or assistance to child or his parent or guardian; or if lap and shoulder belts of vehicle will fit properly across collarbone, chest and hips of child and belts do not pose danger to neck, face or abdominal area of child in event of crash or sudden stop. (W.S. 31-5-1303[b][i], [vi], and [vii]). Fine is $50 for first offense and $100 for each offense thereafter; and fine payable for first offense shall be waived by court upon receipt of proof that offender, after offense occurred, has purchased, leased or otherwise acquired child safety restrain system which meets requirements of statute. (W.S. 31-5-1304[a]). Each driver and passenger of vehicle operated in state is required to wear properly adjusted and fastened safety belt when vehicle is in motion on public streets and highways. (W.S. 31-5-1402[a]). Drivers must also require passengers under 12 years of age to wear seat belts. (W.S. 31-5-1402[a]). Requirement does not apply to person who has written statement from physician that it is not advisable to wear safety belt for physical or medical reasons; passenger vehicle which is not required to have seat belts under federal law; carrier of U.S. postal service performing duties; any person properly secured in child restraint system; person occupying seat in vehicle in which all operable safety restraints are being used by driver or passengers; or person occupying seat in vehicle originally manufactured without safety belt. (W.S. 31-5-1402[b]). Evidence of failure to wear seat belt as required is not admissible in any civil action. (W.S. 31-5-1402[f]). After July 1, 1996, sunscreen devices on windshield or front side windows are prohibited if it blocks more than 28% of light transmission. Certain exceptions available. (W.S. 31-5-962).

Lights Required.

Regulated by W.S. 31-5-910 to W.S. 31-5-940.

Inspection.

None required, but no person permitted to drive or move on highway any vehicle, including vehicles moved solely by human power, motorcycles, motor-driven cycles, mopeds, implements of husbandry, highway construction machinery or farm tractors, unless equipment upon such vehicle is in good working order and adjustment and unless vehicle is in such safe mechanical condition as not to endanger driver or other occupant or any person upon highway. (W.S. 31-5-970).

Traffic regulations governing driving on right side of road, driving on laned and multilaned highways, passing, following, turning, starting, stopping, speeding, approaching intersections, traffic control devices, parking, pedestrians, bicycles and snowmobiles adopted. (W.S. 31-5-201 to W.S. 31-5-801).

Accidents.

Driver involved in accident with vehicle driven or attended by another person resulting in death or injury to person or property damage to another vehicle must stop as close as possible to scene of accident and give driver of other vehicle his name, address and registration number of vehicle he is driving, and, upon request and if available, must exhibit his driver's license to person injured in accident or to driver or occupant of or person attending any vehicle or other property damaged in accident and to any police officer at scene of or who is investigating accident. (W.S. 31-5-1101[a]; W.S. 31-5-1103). Driver must also render necessary assistance, including carrying, or making of arrangements for carrying, of person to physician, surgeon or hospital for medical or surgical treatment if it is apparent that treatment is necessary or if carrying is requested by injured person. (W.S. 31-5-1103). If accident is with any vehicle or other property that is unattended resulting in damage to other vehicle or other property, driver of striking vehicle must immediately stop and immediately either locate and notify operator or owner of vehicle or other property of his name, address and registration of vehicle he is driving or must attach securely in conspicuous place in or on vehicle or other property written notice giving his name, address and registration number of vehicle he is driving. (W.S. 31-5-1104). Accidents involving death, injury or property damage of at least $1,000 must be reported to official authority. (W.S. 31-5-1105).

Owner's Liability.

Statute holding owner liable for damages to streets, highways, bridges or appurtenances thereto caused by driver's negligence. (W.S. 31-12-101 to W.S. 31-12-105). Family car doctrine has been repudiated by Supreme Court. (67 Wyo. 55, 214 P.2d 486). See subhead Guests, infra.

Guests.

Guest statute unconstitutional for all claims for relief. (Wyo., 582 P.2d 67).

Financial Responsibility.

Within 30 days after receipt of investigating officer's report of motor vehicle accident within state as required under W.S. 31-5-1106 to W.S. 31-5-1108, or after demand of additional security under W.S. 31-9-207(b), appropriate division within Department of Transportation must suspend such licenses and privileges of each operator, and registrations of owners of motor vehicles involved, unless such operators or owners deposit security sufficient in judgment of division to satisfy any resulting judgments. (W.S. 31-9-202; W.S. 31-9-207). Notice of such suspension must be given such operators and owners 20 days prior to effective date thereof. (W.S. 31-7-130). Suspension provisions do not apply to: (i) Owner if owner had in effect at time of accident automobile liability policy with respect to motor vehicle involved in accident; (ii) driver, if not owner of motor vehicle and if there was in effect at time of accident automobile liability policy or bond with respect to his operation of motor vehicles not owned by him; (iii) driver or owner whose liability for damages resulting from accident is, in judgment of division, covered by any other form of liability insurance policy or surety bond; (iv) person qualifying as self-insurer under W.S. 31-9-414; or (v) owner or driver, if personal surety bond is filed with division in amount required by division with at least two individual sureties each owning real estate within state, which real estate must be scheduled in bond approved by judge of district court. (W.S. 31-9-202[c]). If resident's operating privilege in another state is suspended by that state under circumstances which would require division to suspend operating privilege of nonresident in this state, then division shall suspend license and registration of resident until resident deposits security and files proof of financial responsibility required by laws of such other state. (W.S. 31-9-204[b]). Also state where nonresident resides is notified of suspension by division of nonresident's operating privilege in this state. (W.S. 31-9-204[a]).

Policies must have following limits with respect to any one accident: (i) $25,000 for personal injuries or death of one person and $50,000 for more than one person; and (ii) $20,000 for property damage. (W.S. 31-9-405[b]).

Suspension provisions do not apply to: (i) Accident where no injury or damage was involved other than to driver or owner; (ii) operator of legally parked vehicle; (iii) owner of vehicle being operated without owner's permission; (iv) where satisfactory evidence has been filed with division showing release of liability, adjudication of no liability; or (v) warrant for confession of judgment or acknowledged agreement for payment of judgment or agreed amount in installments. (W.S. 31-9-203).

Suspension remains in effect: (i) Until proper security has been deposited; (ii) one year has elapsed and no action for damages has been instituted; or (iii) satisfactory evidence of release from liability, or final adjudication of non-liability, or warrant or confession of judgment or agreement for payment in installments, has been filed with division. If there is default in any such payment under confession of judgment, suspension must be renewed until final payment, or, if default is under an agreement, until security is given, or one year has elapsed from date such security was required and no action has been started. (W.S. 31-9-205). Suspension must be put into effect until judgment for damages is paid unless judgment creditor consents in writing to omit such action. (W.S. 31-9-302; W.S. 31-9-303).

Courts may order judgments paid in installments. (W.S. 31-9-305[a]).

Registrants of 25 or more vehicles may qualify as self-insurers by filing bond in amount of $200,000, plus $100 for each vehicle in excess of 25. (W.S. 31-9-414).

Insurance.

Beginning Jan. 1, 1993, insurance or bond effectively required due to licensure requirements including insurance or requisite bond. (W.S. 31-2-201[h]). On-line verification system for motor vehicle insurance or bond established by rule and regulation adopted by Department of Transportation subject to statutory criteria. (W.S. 31-4-103[c]).

No Fault Insurance.

No statutory provisions.

Foreign vehicle must be registered in this state upon owner's becoming resident of this state or employed in this state, except that temporary worker displaying valid registration or license plate from another jurisdiction employed in state for less than 90 days can purchase decal from county treasurer instead. (W.S. 31-2-201[a][iii], [iv]). Owner is resident if owns, leases or rents place of residence in Wyoming, and remains in state for 120 days or more. (W.S. 31-1-101[a][xxi]). Registration laws do not apply to those vehicles owned by nonresident, validly registered in another state or country and displaying registration numbers of plates in accordance with laws of that state or country and (i) operated primarily by full-time student at University of Wyoming, Wyoming community college or school licensed in state offering post-secondary education, (ii) used for transportation of nonresident seasonally employed agricultural workers unless owner of vehicle becomes resident, (iii) operated primarily by student enrolled in post-secondary educational institution accredited by recognized and accepted accrediting agency, or in parochial, church or religious school offering post-secondary education programs, if institution or school owns or operates educational program or facility in state and student is employed on temporary basis in that program or facility as part of his educational curriculum, or (iv) not operated for gain or profit in Wyoming nor used for transportation to and from employment in Wyoming and not owned or operated by person employed in state. (W.S. 31-2-201[d][vi], [vii]). Owners of vehicles registered in state contiguous to Wyoming may not be required to register vehicle if contiguous states grant similar exemptions to Wyoming owners and vehicles fall within certain stated classifications. (W.S. 31-2-201[d][viii]). Registrants must show proof of financial responsibility when obtaining or renewing registration. (W.S. 31-2-201[h]).

Actions Against Nonresidents.

Use and operation of motor vehicle on any street or highway within Wyoming by person upon whom service of process cannot be made within Wyoming or upon duly appointed registered agent deemed appointment of Secretary of State as operator's lawful attorney upon whom may be served all legal process in any proceeding against him or his personal representative, if deceased, due to damage or injury to person or property resulting from operation of motor vehicle on streets or highways of state and such operation constitutes operator's agreement that such service has legal force and validity of personal service on operator or personal representative within state. Service made by serving copy of process on Secretary of State or by filing copy in Secretary's office and payment of fee of $3; within ten days after date of service on Secretary of State, notice of such service and copy of process served on defendant or his personal representative either personally or by certified mail addressed to last known address of defendant or personal representative, and plaintiff files with clerk of court in which action brought affidavit that he has complied with this requirement. (W.S. 1-6-301[a]).

Interstate Driver's License Compact (also commonly referred to as Non-Resident Violator Compact) adopted. (W.S. 31-7-201 to W.S. 31-7-202).

Direct Actions.

No statutory provision permitting action by injured person against insurer.

Motor vehicle carriers are subject to supervision and regulation by Department of Transportation to preserve safety of highways, and are classed as contract and private. (W.S. 31-18-101 to W.S. 31-18-903). Contract and private motor carriers must obtain authority to operate from Department of Transportation. (W.S. 31-18-209[a]). Intrastate contract carriers must deposit with Department of Transportation policies of cargo, public liability and property damage insurance for protection of public generally or equivalent thereof. (W.S. 31-18-209[f]). Act regulating motor carriers does not apply to certain vehicles, such as vehicles operating wholly within confines of municipality, vehicles transporting persons or property from municipality to airport, vehicles working solely within confines of highway construction project, certain farm and ranch vehicles, school buses, hearses, ambulances, government owned or operated vehicles or U.S. mail carriers, and intrastate transportation of livestock for show, performance or competition for noncommercial purposes. (W.S. 31-18-103).

Motor Vehicle Taxes.

Department of Transportation shall supervise and regulate operations of motor carriers, and is authorized to issue or refuse to issue authority to operate as contract or private carrier. (W.S. 31-18-104).

See also category 22 Taxation, topic 22.13 Motor Vehicle Taxes.

Gasoline Tax.

See category 22 Taxation, topic 22.08 Gasoline and Special Fuels Taxes.

23.02 RAILROADS:

See category 3 Business Regulation and Commerce, topic 3.08 Carriers.

1
UNITED STATES FEDERAL LAW DIGEST

—Scope —

Revised for 2010 edition by

LexisNexis(R) Client Development Group.

(Citations, unless otherwise indicated, are to the United States Code “U.S.C.”, the Code of Federal Regulations “C.F.R.”, and to the United States Constitution “U.S. Const.” Case citations are to the United States Reports “U.S.”, which contains decisions from the United States Supreme Court, or to the Federal Reports “F., F.2d, and F.3d”, which contains decisions from the various United States Circuit Courts of Appeals.)

Prefatory Note.—The following is a digest of the federal laws of the United States. In the United States system of government, the individual states retain a great deal of law making authority. Therefore, readers should refer to Martindale-Hubbell's individual state digests to ensure a complete understanding of the law on any topic.

Note: This revision covers U.S. Public Laws of 2009 through November 11, 2009.

1 INTRODUCTION

1.01 ADMINISTRATIVE LAW:

Administrative Procedures Act.

Act governs operation of federal administrative agencies, including requirements for publication of agency decisions and methods for appealing agency rulings. (5 U.S.C. §551).

Administrative agencies play important role in U.S. law. Administrative agencies often serve quasi-executive, quasi-legislative and quasi-judicial roles in implementation and enforcement of agency rules and regulations.

Executive Role of Administrative Agencies.

In many specialized areas of regulation, administrative agencies enforce law.

Legislative Role of Administrative Agencies.

While U.S. legislature is responsible for proposing and adopting statutes on broad range of topics (see topic Government and Legal System, subhead Legislative Branch), legislators have neither time nor expertise to anticipate every need for narrowly tailored legislation that would support their broader enactments. Therefore, legislature has delegated some of its rulemaking authority to various federal administrative agencies. Administrative agencies create very detailed rules that govern day to day operation of legislature's relatively broad statutes. Administrative agency rules, which possess force of law, can be located in two publications. Federal Register publishes administrative agency rules chronologically, and this publication issued every business day. Publication of agency rule in Federal Register deemed to place all affected members of public on notice of rule's existence. Code of Federal Regulations, also contains administrative agency rules. In Code of Federal Regulations, rules are organized under 50 broad subject-matter topics known as titles. Within each title, rules are organized by administrative agency into chapters.

Judicial Role of Administrative Agencies.

Most administrative agencies serve judicial role within their individual areas of expertise. Administrative law judges, in hearings that are similar in many ways to judicial proceedings, find facts and apply them to agency rules and regulations in reaching their decisions. Decisions of administrative law judges typically are not final with final action taken at agency level. Ultimately, federal courts are empowered to review most administrative agency decisions.

1.02 CIVIL RIGHTS:

Note: See http://www.usdoj.gov/pclo/.

Voting Rights.

Voting Rights Act of 1965 bans racial discrimination on voting. All state and local government must use election processes equally open to all minority voters. (42 U.S.C. §§1973 to 1973aa-6). Voting Rights Act ensures that each U.S. citizen's vote is equal. Department of Justice or any citizen may sue in federal court to challenge voting practices deemed racially discriminatory. (42 U.S.C. §1973). U.S. Attorney General has administrative power under §5 of the Voting Rights Act to prevent adoption of discriminatory voting practices in certain areas of U.S. (42 U.S.C. §1973c). In specified areas, state and local government must receive federal approval before implanting changes in voting procedures. (42 U.S.C. §1973c). Under §5 of the Act, specified state, county, or local government entity must demonstrate to federal authorities that voting change in question (1) does not have racially discriminatory purpose; and (2) will not make minority voters worse off than prior to change. (42 U.S.C. §1973c; 28 C.F.R. §51). 42 U.S.C. §1973j provides civil and criminal sanctions for violations of Act, including destroying, defacing, or altering ballots of voting records. (42 U.S.C. §1973j[b]).

Minority Protection.

Voting Rights Act specifically protects persons of Hispanic, Native American, and Alaskan heritage from discrimination in voting based on membership in language minority group. (42 U.S.C. §1973b[f]). Specified jurisdictions must print ballots and other election materials in appropriate minority language as well as English. (42 U.S.C. §1973b[f], aa-la; 28 C.F.R. §55).

National Voter Registration Act of 1993.

“Motor Voter” law, requires states to provide voter registration opportunities at certain government agencies. (42 U.S.C.S §§1973gg to1973gg-10).

Uniformed and Overseas Citizens Absentee Voting Act of 1986.

Allows members of armed forces and citizens living overseas to register and vote absentee in federal elections. (42 U.S.C.S. §§1973ff to 1973ff-6).

Voting Accessibility for Elderly and Handicapped.

All polling places physically accessible to persons with disabilities. (42 U.S.C. §§1973ee to 1973ee-6).

Civil Rights Act of 1964 prohibits discrimination or segregation based on race, color, religion, or national origin in places of public accommodation. (42 U.S.C. §2000a, et seq.). Examples of public accommodation include: hotels, trailer parks, restaurant, gas stations, bars and places of entertainment. (42 U.S.C. §2000a[b][1]-[4]; 452 F.2d 749; 462 F.2d 634; 516 F.2d 64). Act not applicable to private clubs or other establishments not open to public. (42 U.S.C. §2000a[e]). Act prohibits discrimination by employers and labor unions on basis of race, color, religion, sex or national origin. (42 U.S.C. §2000e, et seq.). See category 11 Employment, topic 11.02 Labor Relations, subhead Discrimination.

Title VI of Civil Rights Act prohibits discrimination on basis of race, color or national origin in programs and activities receiving federal financial assistance. (42 U.S.C. §2000d, et seq.; 28 C.F.R. §42; 34 C.F.R. c. I; 45 C.F.R. c. VII). Citizens as well as undocumented aliens considered “person” under equal protection and due process clauses of 5th and 14th Amendments. (See 457 U.S. 202; 426 U.S. 67.) Examples of federal financial assistance under 42 U.S.C.S §2000d et seq., includes (1) federal funds; (2) grant or donation federal property; (3) detail of federal personnel; and (4) federal contracts providing assistance. (28 C.F.R. §42.102[c]).

Under Civil Rights Act of 1964, “program or activity” includes all of operations of department, agency or other instrumentality of state or local government that receives federal assistance (42 U.S.C. §2000d-4a[1]); college, university, or other school system which receives federal assistance (42 U.S.C. §2000d-4a[2]). Title VI claims may be proven under two theories: (1) recipient of federal assistance engages in intentional discrimination based on race, color, or national origin; or (2) recipient uses neutral procedure that lacks substantial legal justification that has disparate impact on individuals of particular race, color or national origin. (28 C.F.R. §42.104[b][2]).

Claims under §1981.

42 U.S.C. §1981 protects individuals from racial discrimination in making and enforcing contracts, participating in lawsuits, and giving evidence. Plaintiffs bringing a §1981 claim of discrimination must prove: (1) plaintiff is member of racial minority; (2) defendant's intent to discriminate on basis of race; and (3) discrimination concerns one or more activities enumerated by statute. (42 U.S.C. §1981[a]; 481 U.S. 615; 923 F.Supp. 882; 869 F.Supp. 409, 413). §1981 prohibits racial discrimination in private employment against white persons as well as nonwhites. (427 U.S. 273). §1981 claims appropriate in employment setting: hiring practices (426 U.S. 229; 440 U.S. 625); tenure decisions (481 U.S. 604); union activities (482 U.S. 656).

Claims under §1983.

42 U.S.C. §1983 provides persons who under color of law, custom or usage, subject other persons to deprivation of rights secured by Constitution and laws, shall be liable to parties injured. Purpose of statute to give remedy to parties deprived of Constitutional rights and privileges by state official's abuse of position. (42 U.S.C. §1983; 404 U.S. 249). Claims under §1983 override certain state laws, provide remedy where state law is inadequate, provide federal remedy where adequate state remedy is unavailable; and provide remedy in federal court supplementary to remedy which state may provide. (42 U.S.C. §1983; 404 U.S. 249). Individual defendants under §1983 liable for compensatory damages as well as punitive damages on showing of recklessness or callous indifference to personal rights. (461 U.S. 30). Local government is “person” under §1983. (436 U.S. 658). Local government may be sued only when execution of government policy or custom causes plaintiff's injury. State and local governments and state agencies have standing to bring §1983 actions for redress of injuries in state interest, as well as under parens patrie theory. (490 F.2d 1285). Prevailing party under §1983 suit generally entitled to lawyer's fees. Under §1983, plaintiff must claim violation of federal right. (85 F.3d 581).

Municipalities.

Municipality liable under 42 U.S.C. §1983 for violation of rights guaranteed by Constitution for failing to adequately train employees, only if that failure reflects deliberate indifference on part of municipality to Constitutional rights of its inhabitants and thus constitutes municipal “policy”. (103 L.Ed. 2d. 412). City may be liable under §1983 for excessive force used by law enforcement based on negligent training of its officers. (783 F.2d 319; 777 F.2d 801).

Immunities.

Public officials protected by either qualified or absolute immunity under 42 U.S.C. §1983. Absolute immunity applies to: legislative activity (341 U.S. 367); judicial activity (386 U.S. 547); prosecutorial activity other than investigative functions (424 U.S. 409). Police have qualified immunity under §1983 lawsuits. (386 U.S. 547).

1.03 CURRENCY:

U.S. Department of Treasury is responsible for producing all U.S. currency and coinage. See www.ustreas.gov. U.S. coins and currency (including Federal reserve notes and circulating notes of Federal reserve banks and national banks) are legal tender for all debts, public charges, taxes, and dues. Foreign gold or silver coins are not legal tender for debts. (31 U.S.C. §5103). Present denominations of U.S. currency in production are $1, $2, $5, $10, $20, $50 and $100. In 1969, Treasury Department stopped distributing currency in denominations of $500, $1,000, $5,000 and $10,000. These notes are legal tender and may still be found in circulation today, but Federal Reserve Banks remove them from circulation and destroy them as they are received. Following coins are in production and circulation: penny or 1¢ coin; nickel or 5¢ coin; dime or 10¢ coin; 25¢ coin; 50¢ coin; and $1 coin.

1.04 EUROPEAN UNION:

In 1995, President of U.S. and President's of EU member countries entered into agreement called Translantic Agenda. Agreement sets out various aspects of relationship between U.S. and EU, and specifically lists four goals: Promoting peace and stability; responding to global challenges; contributing to expansion of world trade and closer economic relations; and building bridges across the Atlantic. Full text of agreement can be found on internet at http://www.eurunion.org/partner/agenda.htm. Address for Delegation of the European Commission to the United States: 2300 M Street, NW Washington, DC 20037. Telephone: (202) 862-9500.

1.05 FEDERAL GOVERNMENT WEBSITES:

Official U.S. Government Web Portal. http://www.firstgov.gov/.

Executive Branch of Government.

Executive Office of the President. http://www.whitehouse.gov/.

Centers for Disease Control and Prevention. http://www.cdc.gov/.

Food and Drug Administration. http://www.fda.gov/.

Dept. of Agriculture. http://www.usda.gov/.

Dept. of Commerce. http://www.commerce.gov/.

International Trade Administration, Dept. of Commerce. http://www.ita.doc.gov/.

Patent and Trademark Office. http://www.uspto.gov/.

Dept. of Defense. http://www.defenselink.mil/.

Dept. of Education. http://www.ed.gov/.

Dept. of Energy. http://www.energy.gov/.

Dept. of Health and Human Services. http://www.os.dhhs.gov/.

Social Security Administration. http://www.ssa.gov/.

Office of the Surgeon General. http://www.surgeongeneral.gov/sgoffice.htm.

Dept. of Housing and Urban Development. http://www.hud.gov/.

Dept. of Justice. http://www.usdoj.gov/.

Executive Office for Immigration Review, Dept. of Justice. http://www.usdoj.gov/eoir/.

Bureau of Citizenship and Immigration Services. http://www.bcis.gov/.

Student and Exchange Visitor Program. http://www.ice.gov/sevis/index.htm.

Office of Attorney General, Dept. of Justice. http://www.usdoj.gov/ag/index.html.

Foreign Claims Settlement Commission, Dept. of Justice. http://www.usdoj.gov/fcsc/.

Dept. of Labor. http://www.dol.gov/.

Bureau of International Labor Affairs, Dept. of Labor. http://www.dol.gov/ilab/welcome.html.

Dept. of State. http://www.state.gov/.

Office of Arms Control and International Security, Dept. of State. http://www.state.gov/t/.

Office of Global Affairs, Dept. of State. http://www.state.gov/g/.

U.S. Embassies and Diplomatic Missions, Dept. of State. http://usembassy.state.gov/.

Bureau of Consular Affairs, Dept. of State. http://www.travel.state.gov/index.html.

Dept. of Transportation. http://www.dot.gov/.

Federal Aviation Administration. http://www.faa.gov/.

Dept. of Veterans Affairs. http://www.va.gov.

Dept. of the Air Force. http://www.af.mil/.

Dept. of the Army. http://www.army.mil/.

Dept. of the Navy. http://www.navy.mil/.

United States Marine Corps. http://www.usmc.mil/.

Dept. of the Interior. http://www.doi.gov/.

Dept. of the Treasury. http://www.ustreas.gov/.

United States Trade Representative. http://www.ustr.gov/.

President's Foreign Intelligence Advisory Board. http://www.whitehouse.gov/pfiab/index.html.

Environmental Protection Agency. http://www.epa.gov/.

Federal Communications Commission. http://www.fcc.gov/.

Federal Trade Commission. http://www.ftc.gov/.

National Science Foundation. http://www.nsf.gov/.

Peace Corps. http://www.peacecorps.gov/indexf.cfm.

U.S. International Trade Commission. http://www.usitc.gov/.

U.S. Postal Service. http://www.usps.com/.

Central Intelligence Agency. http://www.cia.gov/.

Voice of America. http://www.voa.gov/.

National Aeronautics and Space Administration (NASA). http://www.nasa.gov/.

Agency for International Development. http://www.usaid.gov/.

Judicial Branch of Government.

Administrative Office of U.S. Courts. http://www.uscourts.gov/.

Federal Judicial Center. http://www.fjc.gov/.

Court of Federal Claims. http://www.uscfc.uscourts.gov/.

U.S. Supreme Court. http://www.supremecourtus.gov/.

First Circuit Court of Appeals. http://www.ca1.uscourts.gov/.

Second Circuit Court of Appeals. http://www.ca2.uscourts.gov/.

Third Circuit Court of Appeals. http://www.ca3.uscourts.gov/.

Fourth Circuit Court of Appeals. http://www.ca4.uscourts.gov/.

Fifth Circuit Court of Appeals. http://www.ca5.uscourts.gov/.

Sixth Circuit Court of Appeals. http://www.ca6.uscourts.gov/.

Seventh Circuit Court of Appeals. http://www.ca7.uscourts.gov/.

Eighth Circuit Court of Appeals. http://www.ca8.uscourts.gov/.

Ninth Circuit Court of Appeals. http://www.ca9.uscourts.gov/.

Tenth Circuit Court of Appeals. http://www.ca10.uscourts.gov/.

Eleventh Circuit Court of Appeals. http://www.ca11.uscourts.gov/.

D.C. Circuit Court of Appeals. http://www.cadc.uscourts.gov/.

Federal Circuit Court of Appeals. http://www.fedcir.gov/.

Legislative Branch of Government.

Legislative Information. http://thomas.loc.gov/.

Library of Congress. http://lcweb.loc.gov/.

Copyright Office, Library of Congress. http://www.copyright.gov/.

U.S. House of Representatives. http://www.house.gov/.

U.S. Representatives with Web Sites. http://www.house.gov/house/MemberWWW.html.

U.S. Senate. http://www.senate.gov/.

U.S. Senators with Web Sites. http://www.senate.gov/senators/index.cfm.

1.06 GOVERNMENT AND LEGAL SYSTEM:

U.S. Constitution was created in 1787. Sufficient number of states ratified Constitution in 1788, and U.S. began operating as nation in 1789. Constitution established three branches of government. Each branch of government was given distinct powers that were to operate as system of checks and balances over other branches of government. In U.S., three branches of government are legislative, executive, and judicial.

Federalism.

Each of the 50 individual states retains great deal of power in U.S., and Constitution guarantees that "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the States respectively, or to the people." (U.S. Const., amend. X). Under this concept of federalism, state courts, state legislatures, and state executives are final word on law when federal government has not spoken on issue. Therefore, readers are strongly encouraged to consult Martindale-Hubbell's State Digests for more complete picture of U.S. law on any matter.

Supremacy of Federal Law.

State legislatures, agencies, and judges are bound to follow U.S. Constitution, laws passed by federal legislature, and all federal treaties. (U.S. Const., art. VI, cl. 2). While states may not provide individuals with fewer rights than those guaranteed by U.S. Constitution and federal law, states may grant more rights to individuals. (See subhead Federalism, supra.)

Executive Branch.

Constitution vests executive power in President. (U.S. Const., art. II, §1). To be eligible for Presidency, individual must be natural-born U.S. citizen, at least 35 years of age, and resident of U.S. for at least 14 years. (Id). President's term of office is four years, and generally individual may serve no more than two four-year terms as President. (U.S. Const., art II, §1; U.S. Const. amend. XXII, §1).

Presidential Powers.

President is Commander-in-Chief of armed services and has power to pardon individuals for offenses against U.S., except in cases of Impeachment. (U.S. Const., art. II, §2; see also subhead Legislative Branch, catchline Legislative Powers, infra). With "Advice and Consent" of Senate, President may make treaties with foreign countries, provided that two thirds of senate concurs. (U.S. Const., art. II, §2). Also with "Advice and Consent" of Senate, President has power to appoint judges to federal courts, including Supreme Court, to appoint ambassadors, and to appoint all officers who serve in various executive departments. (U.S. Const., art. II, §3). At present, executive departments include Agriculture, Commerce, Education, Energy, Housing and Urban Development, Interior, Labor, State, Defense, Transportation, Treasury, Justice, Veterans Affairs, and Health and Human Services.

Presidential Veto.

Bill passed by Congress must be signed by President to become law. (U.S. Const., art. I, §7, Cl. 3). President, however, may veto bill. Once vetoed by President, bill may still become law if two-thirds of members of both houses of Congress vote for its approval. (Id.).

Legislative Branch.

Constitution vests all legislative power in Congress, and goes on to create bicameral or two chambered Congress: House of Representatives and Senate. (U.S. Const., art. I, §1). With exception of revenue bills, which must originate in House of Representatives, either chamber may propose legislation. (U.S. Const., art I, §7, cl. 1). Both chambers of Congress must pass all legislation, and generally majority vote required for bill to pass. (Id.).

Legislative Powers.

Congress has enumerated power to: Impose and collect taxes; borrow money; regulate commerce between U.S. and foreign countries and between states; create bankruptcy laws; establish naturalization laws; coin money; establish uniform system of weights and measures; establish post offices; pass laws on subjects of patents, copyrights, and trademarks; constitute federal courts; declare war; raise and support all armed services as well as powers that are necessary and proper to implement those powers. (U.S. Const., art. I, §8).

Senate.

Senators must be 30 years of age, U.S. citizen for nine years, and when elected, “inhabit” state from where they were elected. (U.S. Const., art. I, §3, cl. 3). Senators serve six-year terms, and there is no limitation on number of terms that they may serve. (Id.). Two senators represent each state, and at present, Senate consists of 100 senators. Two-thirds majority of Senate required to ratify treaties with foreign countries and Senate's advice and consent required when President appoints federal judges, ambassadors, and executive officers. (See subhead Executive Branch, catchline Presidential Powers, supra.)

House of Representatives.

Members of House of Representatives must be 25 years of age, U.S. citizen for at least seven years, and when elected, “inhabit” state from which they were elected. (U.S. Const., art. I, §2, cl. 2). Members of House serve two-year terms, and there is no limitation on number of terms that they may serve. State representation within House of Representatives based on population with more heavily populated states possessing larger number of representatives. Regardless of population, every state entitled to at least one representative to House. All revenue bills must originate in House of Representatives.

Judicial Branch.

Federal judiciary consists of U.S. Supreme Court, 13 Circuit Courts of Appeals, and federal trial courts in each state. Federal judges are appointed by President and are entitled to serve as judges for life. Federal judges possess power of judicial review, meaning that they rule on constitutionality of actions of, and laws enacted by, other two branches of government (5 U.S. [1 Cranch] 137) and by states (14 U.S. [1 Wheat] 304). In general, jurisdiction of federal courts limited to two categories of cases. First, federal courts may hear diversity case—cases in which litigants are domiciled in different states. (U.S. Const., art. III, §2, cl. 1). Second, federal courts are empowered to hear cases “arising under” Constitution and laws of U.S. (Id.). For additional information, see category 6 Courts and Legislature, topic 6.01 Courts.

Amendments to Constitution.

Constitution may be amended in two ways. First, through two-thirds vote of both chambers of Congress, amendments to Constitution may be proposed and adopted. (U.S. Const., art. V). Second, upon application by two-thirds of legislatures of states, “Constitutional Convention shall be held.” (Id). There is no limit on number of amendments that may be proposed at Constitutional Convention. Under either procedure, proposed amendments become part of Constitution upon ratification by legislatures of three-fourths of states. (Id.). To date, there are 27 amendments to Constitution.

Bill of Rights.

First ten amendments to Constitution are collectively known as “Bill of Rights”. Bill of Rights guarantees following: Government may neither establish religion nor prohibit free exercise of religion. Further, government may not abridge freedom of press or freedom of “people to peaceably assemble”. (U.S. Const. amend. I). Individuals have right to bear arms. (U.S. Const. amend. II). In peacetime, soldiers may not be quartered in any home without consent of owner. (U.S. Const. amend. III). People have right to be free from “unreasonable searches and seizures”. Further, arrest and search warrants may only be issued upon finding of probable cause, and warrant must particularly describe “place to be searched, and the persons or things to be seized”. (U.S. Const. amend. IV). Individuals may not be twice placed in “jeopardy” for same offense. Generally, this means that individual may only be tried once for any criminal offense. Further, no individual may be compelled to incriminate or testify against him or herself or may be deprived of “life, liberty, or property without due process of law”. Government may not take private property without sufficient compensation. (U.S. Const. amend. V). Individuals have right to speedy and public trial, to be notified of charges, to be confronted with witnesses against them, and to receive assistance of legal counsel. (U.S. Const. amend. VI). In certain instances, individuals have right to jury trial in civil cases. (U.S. Const. amend. VII). Excessive bail may not be imposed and individuals have right to be free from cruel and unusual punishment. (U.S. Const., amend. VIII). All these rights apply against federal government; most also apply against state governments.

Fourteenth Amendment to U.S. Constitution.

No state may enforce laws which “abridge the privileges and immunities” of any U.S. citizen. Further, states may neither deprive any U.S. citizen of “life, liberty, or property” without due process of law, nor deny citizens equal protection of law. (U.S. Const., amend. XIV, §1). Due process guarantees citizens fair judicial and administrative proceedings. Equal protection guarantees that citizens will be treated similarly under law.

Impeachment is process by which all federal civil officers, including President, Vice-President and federal judges, may be removed from office. (U.S. Const., art. II, §4). Civil officers may be removed from office upon conviction of “treason, bribery, other high crimes and misdemeanors”. (Id.). Impeachment process begins in House of Representatives. House committee gathers evidence, conducts investigation and eventually presents evidence to entire House of Representatives in form of individual indictments known as articles of impeachment. (U.S. Const., art. I, §2). Each article of impeachment requires majority vote of House of Representatives to pass. Articles of impeachment are then presented to Senate, which has sole authority to try impeachments. (U.S. Const., art. I, §3). Chief Justice of U.S. Supreme Court presides when President tried. (Id.). “No person shall be convicted without the concurrence of two thirds of the [senators] present.” (Id.). Upon conviction, sole punishment is removal from office and disqualification from holding office in future. (Id.). Conviction in impeachment proceeding does not preclude later criminal trial based on same incidents, and jail time is possibility if convicted in later criminal trial. (Id.).

1.07 HOLIDAYS:

Following are federal public holidays: New Year's Day, Jan. 1; birthday of Martin Luther King, Jr., 3rd Mon. in Jan.; Washington's Birthday, 3rd Mon. in Feb.; Memorial Day, last Mon. in May; Independence Day, July 4; Labor Day, first Mon. in Sept.; Columbus Day, 2nd Mon. in Oct.; Veterans Day, Nov. 11; Thanksgiving Day, 4th Thurs. in Nov.; Christmas Day, Dec. 25. (5 U.S.C. §6103[a]). Most federal employees work Mon. through Fri. schedule. For these employees, holiday usually observed on Fri. when it falls on Sat. or observed on Mon. when holiday falls on Sun. (Id.). Please see individual state digests for additional holidays observed within each state.

1.08 OFFICE HOURS AND TIME ZONE:

U.S. in Eastern (GMT -05:00), Central (GMT -06:00), Mountain (GMT -7:00), Pacific (GMT -8:00), Alaska (GMT -9:00), and Hawaii (GMT -10:00) time zones. In most of U.S., Daylight Savings Time observed during summer (Mar.—Oct.). Office hours are generally from 9:00 a.m.—5:00 p.m.

2 BUSINESS ORGANIZATIONS

2.01 AGENCY:

In U.S., laws of the 50 states control all aspects of agency law. Please see individual state digests for relevant information.

2.02 ASSOCIATIONS:

In U.S., laws of the 50 states control all aspects of association law. Please see individual state digests for relevant information.

2.03 CORPORATIONS:

In U.S., laws of the 50 states control all aspects of corporate law. Please see individual state digests for relevant information. There is, however, federal securities law (see category 3 Business Regulation and Commerce, topic 3.18 Securities).

2.04 JOINT STOCK COMPANIES:

In U.S., laws of the 50 states control all aspects of joint stock companies. Please see individual state digests for relevant information.

2.05 LIMITED LIABILITY COMPANIES:

In U.S., laws of the 50 states control all aspects of limited liability companies. Please see individual state digests for relevant information.

2.06 PARTNERSHIPS:

In U.S., laws of the 50 states control all aspects of partnership law. Please see individual state digests for relevant information.

3 BUSINESS REGULATION AND COMMERCE

3.01 BANKS AND BANKING:

Note: Citations are to Title 12 U.S.C. unless otherwise noted.

Control and Regulation of Banking.

Federal banking agencies regulate banks. Their interpretation and adjudication of its regulations get deference. Comptroller of Currency regulates national banks; Board of Governors of Federal Reserve System regulates state chartered Federal Reserve member banks, and regulates state banks seeking FDIC insurance protection for their depositors and supervises national banks. Director of Office of Thrift Supervision regulates savings associations. (12 U.S.C. §§1813, 1-14, 248, 1811, 1815).

International Banking Act gives comptroller authority to license foreign bank branches or agencies in U.S. (12 U.S.C. §3102). International Banking Act requires that foreign banks, authorized to operate federal agencies or branches and accept deposits, be insured members of FDIC. (12 U.S.C. §§3104[b], 3104[c], 3101-3105). European Central Bank receives protection of International Organizations Immunities Act. (22 U.S.C. §288f). Under Act, organizations possess capacity to contract, acquire and dispose of property, and institute legal proceedings. (22 U.S.C. §288a). Also, organizations recognized under Act receive immunity from suit to same extent as enjoyed by foreign governments. (Id.).

Creation and Organization of Banking Institutions.

Applicants for bank charter must submit formal application with supporting information, such as operation plans, earning prospects, management, capitalization, and service to community. Notice of application should be published.

National Bank Associations.

National Bank Act proscribes process for establishing and governing national banks. (12 U.S.C. §21). Chartering process for national banks regulates entry into banking industry and assures competent and honest operation. Associations formed by at least five persons by entering into articles of association. (12 U.S.C. §21). Affairs of each national banking association must be managed by not less than five directors. (12 U.S.C. §71). Articles must state object for which association formed and signature of persons uniting to form association. (12 U.S.C. §21). Copy of articles of association and any amendments thereto filed in Comptroller of Currency's office. (U.S.C. §§21, 21a). Persons forming national banking association must make organization certificate, acknowledged before judge or notary public and be recorded in office of Comptroller of Currency. (U.S.C. §§22, 23). Organization certificate must include: name of association, which shall include word “national”; place of its operations of discount and deposit; amount of capital stock and shares divided; names and residences of shareholders and number of shares they hold; and certificate is made to enable persons to avail themselves of advantages of National Bank. (12 U.S.C. §22). In determining if association can commence business, Comptroller shall cause to be made and attested by oaths of majority of directors and by association's president or cashier, statement of all facts necessary to determine whether association is lawfully entitled to commence business of banking. (12 U.S.C. §26). Any interested party can request hearing; however, Comptroller not required to hold hearings or make formal findings when passing upon application for new national bank. (411 U.S. 138). Comptroller's decision to grant or deny application for national bank charter is subject to judicial review. Standard of review is whether action was arbitrary and capricious or abuse of discretion, or otherwise unlawful. (411 U.S. 138).

Federal Savings Associations.

Director of Office of Thrift Supervision (OTS) issues charters for federal savings associations under rules and procedures similar to those for national banks. (12 U.S.C. §1464). In reviewing branch application no requirement to hold hearings, make formal findings of fact or conclusions of law, or file written opinions. (600 F.2d 681). Court's standard of review of approval decision is abuse of discretion. (Id.).

Federal Credit Unions.

Minimum of seven people interested in forming federal credit union must subscribe organization certificate stating: name of association; location of federal credit union; names and addresses of subscribers and their number of shares; initial par value of shares; field of membership; terms of existence of corporation; and certificate made to take advantage of Federal Credit Union Act. (12 U.S.C. §1753). After investigation, National Credit Union Administrative Board approves organization certificate and proposed by-laws. (12 U.S.C. §1754). Approved organization certificate becomes charter of corporation. (12 U.S.C. §1754). Party whose application was denied has burden to prove denial of certificate of organization was arbitrary and capricious, abuse of discretion, or not pursuant to law. (424 F.Supp. 323). Management of Federal credit unions by board of directors, supervisory committee, and pursuant to by-laws, credit committee. (12 U.S.C. §1761[a]). Board must consist of odd number of directors; minimum of five. (12 U.S.C. §1761[a]).

Federal Reserve Banks.

All national banks in any state must become member bank of Federal Reserve System within 90 days after admission into Union of State or upon starting business. (12 U.S.C. §222). To become member, national bank must subscribe and pay for stock in Federal Reserve Bank of its district and shall thereupon become insured bank under Federal Deposit Insurance Act or be subject to statutory penalty. (12 U.S.C. §222). State bank must apply to Board of Governors of Federal Reserve System to become member of Federal Reserve System. (12 U.S.C. §321). Board must review financial condition of applying bank, character of its management, and whether exercise of corporate powers is consistent with Federal Reserve Act's purposes. (12 U.S.C. §322). Federal district courts have original jurisdiction over civil suits in which Federal Reserve Bank is party, regardless of amount in controversy. (12 U.S.C. §632).

Corporations Doing Foreign Banking.

In order for corporation to be organized to engage in foreign banking or operations, minimum of five natural persons must file their articles of association and organization certificate with Board of Governors of Federal Reserve System. (12 U.S.C. §§611—614). Any national banking association with capital and surplus of at least $1,000,000 may apply with Board of Governors of Federal Reserve System for permission to establish branches in foreign countries; to invest maximum in aggregate of 10% of its paid-in capital stock and surplus in stock of bank or corporation chartered or incorporated pursuant to U.S. laws and engaged in international or foreign banking; or to hold stock in bank organized under laws of foreign country. Federal district courts have original jurisdiction over civil suits to which U.S. corporation is party arising out of transactions involving foreign banking. (12 U.S.C. §632). Generally, foreign bank may only operate or acquire branch or agency in home state of such bank. (12 U.S.C. §3103[a][5]).

Merger, Consolidation, Dissolution, and Insolvency.

Consent of relevant federal supervisory agency is necessary before insured bank can acquire other insured banks or become involved in merger or consolidation with other insured banks.

National Banks.

Upon approval of Comptroller of Currency, any national bank or state bank may consolidate with another or merge into national banking association within same state. (12 U.S.C. §215a[a]).

Two-thirds of stockholders of association may vote to voluntarily liquidate solvent bank. (12 U.S.C. §181). Shareholders must appoint liquidating agent or committee to conduct liquidation under supervision of board of directors. (12 U.S.C. §181). Board of directors must notify Comptroller of Currency and its creditors of intent to dissolve. (12 U.S.C. §182).

Insured depository institution may merge or consolidate with another insured depository institution with prior written approval of responsible agency: Comptroller of Currency for national or District banks; Board of Governors of Federal Reserve System for state member bank; FDIC for state nonmember insured bank; and Director of Office of Thrift Supervision for savings association. (12 U.S.C. §1828[c][1], [2]). Unless approved by FDIC, insured depository institution may not merge or consolidate with, transfer assets to, or assume liability of noninsured bank. (12 U.S.C. §1828[c][1]). Misuse of or false advertising as to FDIC insured status is prohibited. (12 U.S.C. §1828[a]). Sixty days prior written notice of proposed acquisition of insured depository institution must be given to appropriate Federal banking agency. (12 U.S.C. §1817[j][1], [6]). Person whose proposed acquisition is disapproved by appropriate Federal banking agency after investigation and hearing, may appeal to U.S. Court of Appeals. (12 U.S.C. §1817[j][5], [j][2][B], [j][4]). Court will uphold agency's findings unless they violate law or are arbitrary or capricious. (12 U.S.C. §1817[j][5]).

Federal Credit Union.

With approval of National Credit Union Administration Board, insured credit union may merge or consolidate with; assume liability to; transfer assets, or convert into; noninsured credit union. (12 U.S.C. §1785[b][1], [c]).

Foreign bank branch, agency, or commercial lending company may convert into Federal branch, upon approval of Comptroller. (12 U.S.C. §3102[f]). Corporation organized to do foreign banking business may voluntarily liquidate and be closed by two-thirds vote of its shareholders. (12 U.S.C. §623).

Operation of Banking Organizations; Powers, Functions and Dealings.

Capital and Stock, National Banking Association.

Generally, capital stock of each association divided in $100 shares. (12 U.S.C. §52). National banking association may issue preferred stock of one or more classes with Comptroller of Currency's approval and complying with notice requirements. (12 U.S.C. §51a). No issue of preferred stock is valid until obtaining certificate of Comptroller of Currency. (12 U.S.C. §51a). If association voluntarily liquidates or if conservator or receiver is appointed, holders of common stock cannot be paid until preferred stockholders are paid. (12 U.S.C. §51b-1). Determining impairment of capital must be based on par value of its stock if any part of capital of national bank consists of preferred stock. (12 U.S.C. §51b-1). Association which has not paid its capital stock and has become impaired must pay deficiency in capital stock within three months after being notified. (12 U.S.C. §55). Shareholders may vote to reduce or increase capital stock. (12 U.S.C. §§57, 59). Directors of national banking association may quarterly, semiannually or annually declare dividend. (12 U.S.C. §60). National banking associations are prohibited from paying dividends if losses are equal to or exceed its undivided profits or from withdrawing any portion of its capital. (12 U.S.C. §56).

Capital and Stock, Federal Reserve Banks; Member Banks.

Federal reserve bank must have required minimal capital of $4,000,000. (12 U.S.C. §281). Capital stock divided into $100 shares. (12 U.S.C. §287). Outstanding capital stock can be increased and decreased. (12 U.S.C. §287). Member bank must surrender proportionate amount of its holdings in capital stock when it reduces its capital stock or surplus. (12 U.S.C. §287). Member bank must surrender all of its holdings of capital stock when it voluntarily liquidates. (12 U.S.C. §287). National bank within each Federal reserve district must subscribe to capital stock of Federal Reserve Bank for that district. (12 U.S.C. §283). Member bank's shares of capital stock of Federal Reserve Banks cannot be transferred. (12 U.S.C. §287). Stockholders of Federal Reserve Bank may receive annual dividends after all of its necessary expenses have been paid. (12 U.S.C. §289[a][1][A]). Banks insured under Federal Deposit Insurance Act must maintain reserves against its transaction accounts. (12 U.S.C. §§461[b][2][A], [b][2][C], [b][4][A]).

Each Federal credit union member will subscribe to at least one share of its stock. (12

U.S.C. §1759[a]). Shares of Federal credit union may be issued in joint tenancy with right of survivorship, or in name of minor or trust. (12 U.S.C. §§1759[a], 1765).

Capital and Stock, Savings Banks.

All savings banks are required to maintain minimum levels of capital. (12 U.S.C. §1464[s][1]). Savings association must comply with following capital standards: leverage limit; tangible capital requirement; and risk-based capital requirement. (12 U.S.C. §1464[t][1][A]).

Capital and Stock, Credit Union.

Capital stock of National Credit Union Central Liquidity Facility has shares with par value of $50 each. (12 U.S.C. §1795d[b][1]). Capital stock of Facility shares in dividend distributions. (12 U.S.C. §1795d[b][3]).

Rights and Obligations of Stockholders.

National Banking Associations shareholders' voting rights include following. In election of directors, shareholders may vote number of shares they own for as many people as there are directors to be elected, or may cumulate their shares to give one candidate as many votes as number of directors multiplied by number of their shares equal, or may distribute them among as many candidates as they want. For all other questions at shareholder meetings, each shareholder has right to one vote on each share of stock owned. Shareholders may vote by proxy authorized in writing. (12 U.S.C. §61).

Persons holding stock as executors, administrators, guardians, or trustees, are not personally subject to any liabilities as stockholders, but estates and funds they represent are liable. (12 U.S.C. §66). Holders of preferred stock of national bank cannot be held individually responsible for debts, contracts, or engagements of association. (12 U.S.C. §51b[a]). Regardless of number of shares held, no member of federal credit union has more than one vote, and no member is allowed to vote by proxy. (12 U.S.C. §1760).

Officers, Directors, and Agents.

Officers and agents of banks and bank directors have duty to use care and diligence to avoid liability to bank. (12 U.S.C. §417). In some cases, bank directors may be held responsible for acts of subordinates or executive officers. (12 U.S.C. §417). Crime punishable by fine or imprisonment or both, for officer, director, employee, agent, or attorney of any financial institution to corruptly solicit or demand for benefit of any person or corruptly accept anything of value, to be influenced or rewarded regarding any business or transaction of institution. (18 U.S.C. §215[a]). Crime for officer, director, agent, or employee of any Federal Reserve or member bank, national bank, or bank insured with FDIC, to embezzle, abstract, or willfully misapply money, funds, or credits of bank. (18 U.S.C. §656). Officer, director, agent, or employee of any Federal Reserve bank or of any insured bank who wrongfully certifies check guilty of crime punishable by fine or imprisonment or both. (18 U.S.C. §1004). Criminal sanctions of fine or imprisonment or both are imposed for making false entries in reports, statements, or books of bank with intent to defraud or deceive. (18 U.S.C. §1005). Federal offense to make false statements or reports or to overvalue property, to influence federal or federal-affiliated lending institution or agency. (18 U.S.C. §1014). Crime for any national banking association to lend any officer, director, or employee any funds held in trust. (12 U.S.C. §92a[h]).

Powers of Banking Institutions.

National banking associations have specific powers and all powers incidental to banking, including following: use corporate seal, receive deposits, make contracts, elect or appoint officers and directors, sell shares of its own capital stock, make by-laws, make charitable contributions, purchase or invest in personal property, endorse note, loan money and make investments to promote public welfare. (12 U.S.C. §24). National banking association may purchase, hold, and convey real estate for specific purposes. (12 U.S.C. §29). National banking association has power to sue and be sued. (12 U.S.C. §24). Suits against national bank brought only in courts designated by federal statute. (12 U.S.C. §94). Subject to certain exceptions, national banking association subject to limits on lending and interest. (12 U.S.C. §84[a][1], [2], [c][1-10]). National banking association has power to deal in securities and stock by association and may purchase investment securities for its own account. (12 U.S.C. §24). National banking association may be employed as financial agent of government. (12 U.S.C. §90). Comptroller of Currency may grant national banks power to act in fiduciary capacity. (12 U.S.C. §92).

Federal Reserve Banks.

Upon filing its organization certificate with Comptroller of Currency, federal reserve bank has power to make contracts, sue and be sued, to make by-laws, and to appoint officers and directors. (12 U.S.C. §341). Federal reserve bank has powers incidental to banking functions, such as power to obtain circulating notes, receive deposits, and make advances. (12 U.S.C. §§341, 342, 347). Federal reserve bank may buy and sell bonds and notes of national, state, and municipal governments. (12 U.S.C. §355[1]). With consent of Board of Governors of Federal Reserve System, federal reserve bank may establish accounts in foreign countries, and appoint correspondents and agencies in such countries and negotiate with foreign bank. (12 U.S.C. §§348a, 358). Member banks of federal reserve system may not pay interest on any deposit payable on demand. (12 U.S.C. §371a). Member banks have restrictions on transactions with affiliates. (12 U.S.C. §371c[a][1]—[4]). Pursuant to some restrictions, any member bank may purchase or sell securities from its directors or firm of which any of its directors is member. (12 U.S.C. §375). Generally, no member bank can extend credit to executive officers, directors, and principal shareholders, or to its own executive officers. (12 U.S.C. §375b[1]).

Federal Credit Unions.

Federal credit union has power to make contracts (12 U.S.C. §1757[1]), sue and be sued (12 U.S.C.C. §1757[2]), and exercise its incidental powers (12 U.S.C. §1757[17]). Federal credit union has power to make loans (12 U.S.C.S §1757[5]), purchase, hold, and sell property, (12 U.S.C. §1757[4]), make deposits (12 U.S.C. §1757[8]), and borrow (12 U.S.C. §1757[9]), and invest its funds (12 U.S.C. §1757[7]), and securities (12 U.S.C. §1757[15]). Every federal credit union has power to act as fiscal agent and depositary of U.S. (12 U.S.C. §1767).

Federal Savings Associations.

Subject to written authorization of Director of Office of Thrift Supervision, federal savings association may borrow, give security, be surety, and issue such notes, bonds, debentures, or other securities. (12 U.S.C. §1464[b][2]). Subject to limitations, federal savings association may invest in, sell, or deal in loans and investments. (12 U.S.C. §1464[b][3][A], [[b][3][B], [c][1]).

Services Provided by Financial Institutions.

Deposits.

Federal statutory provisions authorize acceptance of deposits by federally regulated banking associations, such as, national banking associations (12 U.S.C. §24), Federal Reserve Banks (U.S.C. §342), and Federal Savings Associations (12 U.S.C. §1464[b][1]). National bank may receive special deposits. (12 U.S.C. §24). Truth In Savings Act (12 U.S.C. §§4301-4313) requires disclosure of interest rates paid on deposit accounts and fees assessed against deposit accounts. (12 U.S.C. §§4301[b], 4302). Art. 4 of U.C.C., uniform law adopted by the states, covers rights between parties regarding bank deposits and collections. (U.C.C. §4-101). Bank must exercise ordinary care in dealing with deposits. (U.C.C. §4-103[a]).

Withdrawals and Fund Transfers.

Expedited Funds Availability Act (EFAA) imposes duty on depository institutions to make funds deposited by their customers available for customers withdrawal based on schedule of availability established by law. (12 U.S.C. §§4001-4010). Art. 4A of U.C.C., uniform law adopted by the states, governs fund transfers and wire transfers. (U.C.C. §§4A-101, 102).

Bank's Lien and Right of Setoff.

Under common law, bank has for balance of general account, general lien, known as banker's lien, upon all securities of customer or depositor. U.C.C sets forth security interest of collecting bank in items, accompanying documents, or proceeds of either. (U.C.C. §4-210[a][1], [3]). Bank has right to set off deposit against note of depositor.

Checks and Checking Accounts.

Uniform Commercial Code, uniform law adopted by the states, governs checks. (U.C.C. §3-404).

Collections.

Art. 4 of U.C.C. governs collection of items. (U.C.C. §4-101). Under U.C.C., collecting bank must exercise ordinary care and good faith. (U.C.C. §4-202[a]). Amount of damages for failure to exercise ordinary care in handling item is amount of item minus amount that could have been realized by exercise of ordinary care. (U.C.C. §4-103[e]).

Loans and Discounts.

National Bank Act gives national banks power to discount and negotiate promissory notes, drafts, bills of exchange, and other debts. (12 U.S.C. §24).

Regulatory and Judicial Intervention.

Insolvency and Liquidation.

Congress passed Financial Institutions Reform, Recovery, and Enforcement Act (FIRREA) that established Resolution Trust Corporation (RTC), and Office of Thrift Supervision, and abolished and transferred into OCC and FDIC following regulatory boards: Federal Home Loan Bank Board (FHLBB) and Federal Savings and Loan Insurance Corporation. (12 U.S.C. §§1441a, 1462a). Receiver may be appointed for insolvent national bank. (12 U.S.C. §191). FDIC may consider requests for financial assistance to savings association insurance fund member before appointing receiver. (12 U.S.C. §1823[k][5]). Comptroller of Currency (OCC) authorized to: place national banks and insured federal depository institutions in receivership or conservatorship. (12 U.S.C. §§191, 203[a], 1813[j]). Comptroller has exclusive jurisdiction and power to appoint conservator for bank. (12 U.S.C. §203[d]). Office of Thrift Supervision (OTS) authorized to place federal savings associations and insured federal depository institutions in conservatorship or receivership and may appoint conservator or receiver. (12 U.S.C. §§1464[d][6A], 1821[c][6]). Board of Governors of Federal Reserve System may place insured federal depository institution in conservatorship or receivership. (12 U.S.C. §1813[j]). Resolution Trust Corporation (RTC) may be appointed receiver of certain savings associations. (12 U.S.C. §1821[c][6]). FDIC has authority to place certain insured federal depository institutions in conservatorship or receivership, such as foreign bank having insured branch. (12 U.S.C. §1813[j]). National Credit Union Administration (NCUA) may appoint itself conservator or receiver for insured credit union. (12 U.S.C. §1786[h]).

Uniform grounds exist for appointment of conservator or receiver of any insured depository institution. (12 U.S.C. §1821[c][5]). Nature and scope of powers and duties of conservator or receiver are defined by federal statutes. (12 U.S.C. §1821[d]). Conservator or receiver for federally chartered association succeeds to all control rights, and title of insured depository institution and its members, stockholders, depositors, officers and directors. (12 U.S.C. §1821[d][2][A][i]). As conservator or receiver, FDIC may take over operation and assets of insured institution. (12 U.S.C. §1821[d][2][B]). Conservator or receiver may sell or pledge assets. (12 U.S.C. §§1823[d][1], 1441a[f]). Conservator or receiver may arrange merger or transfer of assets or liabilities. (12 U.S.C. §1821[d][2][G]). FDIC, as receiver, has right to litigate in federal court. (§1819[b]). Statute of limitation for actions brought by FDIC or RTC as conservator or receiver is generally six years for contract claim and three or five years for tort claim. (12 U.S.C. §1821[d][14][A]). Receiver must determine whether to allow claim and notify department within 180 days of claim's filing. (12 U.S.C. §1821[d][5][A]). Department may request administrative review of claim or file suit. (12 U.S.C. §1821[d][6][B]). Federal statute governs priorities among allowed, unsecured creditors. (12 U.S.C. §1821[d][11]).

Federal Enforcement Powers and Procedures.

Comptroller of Currency (OCC) has primary responsibility for examination of national banks. (12 U.S.C. §§7, 9, 161, 248). Federal Reserve Board (FRB) has authority to examine all member banks. (12 U.S.C. §248[a][1]). FDIC is authorized to examine insured state nonmember bank and insured state branch of foreign bank. (12 U.S.C. §1820[b][2][A]). OTS has supervising authority of insured savings associations and savings and loan companies. (12 U.S.C. §§1464, 1467). Federal banking agencies directed to conduct on-site examination of most depository institutions annually (12 U.S.C. §1820[d][1]), pursuant to uniform standards (12 U.S.C. §§3301, 3305[a]). Assistance of foreign banking authority may be required. (12 U.S.C. §1818[v][1]). Each depository institution must submit annual report on management and financial conditions to relevant federal banking agency. (12 U.S.C. §1831m[d][1]). Federal regulatory agency may issue cease and desist order. (12 U.S.C. §1818[b][1]). Appropriate federal banking agencies may issue suspension or prohibition orders. (12 U.S.C. §1818[e][3]). FDIC may terminate status of insured depository institution when certain conditions exist. (12 U.S.C. §§1818[a][2], [w]). Civil penalties authorized in three tiers (12 U.S.C. §1818[i][2]), and apply to violations involving insured depository institutions (12 U.S.C. §1818[i][2]), insured credit unions (12 U.S.C. §1786[k][2]), nonmember insured banks and savings associations (12 U.S.C. §1828[h]), national banks (12 U.S.C. §§93[b], 481), and member banks (12 U.S.C. §§504, 505). Federal banking agency must give written notice of penalty. (12 U.S.C. §1818[I][2]). Judicial review of agency's order is available in U.S. Court of Appeals. (12 U.S.C. §1818[h][2]).

Federal Reserve is central bank of U.S. Its purpose is to give nation safer, more flexible, and more stable monetary and financial system. Generally, responsibilities of Federal Reserve include following: (1) handling nation's monetary policy; (2) supervising and regulating banking institutions and safeguarding credit rights of consumers; (3) preserving stability of financial system; and (4) providing certain financial services to U.S. government, public, financial institutions and foreign official institutions.

Bank Bailouts

Congress passed the Emergency Economic Stabilization Act of 2008, establishing the Troubled Assets Relief Program (”TARP”) to purchase and insure troubled assets held by banks to provide for stability and liquidity of the financial system (12 U.S.C. §§5201 to 5261). To regulate the uses of these funds, Congress established the Financial Stability Oversight Board to: 1) review exercise of authority under the act, 2) make recommendations regarding use of authority, and 3) report suspected fraud, misrepresentation or malfeasance (12 U.S.C. §5214). Executive compensation limitations apply to entities receiving assistance (12 U.S.C. §5221). Office of Special Inspector General created to conduct audits and investigations of entities (12 U.S.C. §5231). Congressional Oversight Panel established to review and report on state of financial markets and regulatory system (12 U.S.C. §5233). FDIC and Federal Credit Union insurance coverage temporarily increased from $100,000 to $250,000, effective Oct. 3, 2008 and terminating Dec. 31, 2013 (12 U.S.C. §5241).

3.02 BILLS AND NOTES:

In U.S., laws of the 50 States control all aspects of bills and notes. See individual State Digests.

3.03 BILL OF LADING:

U.S. Legislation.

Negotiable and nonnegotiable bills of lading of common carriers are covered by 49 U.S.C. §§80101–80116. Carrier has absolute obligation in absence of specified excuse to deliver to consignee (nonnegotiable bill) or holder of negotiable bill.

See individual State Digests, category Business Regulation and Commerce, topics Bills of Lading; Carriers; Commercial Code.

3.04 BILLS OF SALES:

In U.S., laws of the 50 States control bills of sales. See individual State Digests, category Business Regulation and Commerce, topics Sales; Commercial Code.

3.05 BLUE SKY LAW:

Individual state's securities sales regulations are called “Blue Sky Laws”. See individual State Digests, category Business Regulation and Commerce, topic Securities.

3.06 BONDS:

See topic 3.18 Securities.

3.07 BULK SALES:

In U.S., bulk sales are controlled by laws of the 50 States. See individual State Digests, category Business Regulation and Commerce, topic Commercial Code; category Debtor and Creditor, topic Fraudulent Sales and Conveyances.

3.08 CARRIERS:

Note.

Citations are to Title 49 U.S.C. unless otherwise noted.

Common or private carriers of persons or property subject to exclusive extensive federal regulation and control if in interstate commerce. Surface Transportation Board within Department of Transportation, successor to Interstate Commerce Commission (abolished by statute), has authority over rate making, licensing and mergers involving motor, water, rail and pipeline carriers. (49 U.S.C. §701 et seq.). See http://www.dot.gov. Carrier in interstate commerce must provide transportation or service upon reasonable request and must provide safe and adequate service, equipment and facilities. (49 U.S.C. §14101[a]). Board may impose substantial reporting and record keeping obligations. Charging of rates different than published tariff is liable to U.S. for civil penalty. (49 U.S.C. §14903[a]).

Rail Carriers.

See http://www.fra.dot.gov/. Construction of extension, addition or acquisition of rail line requires certificate of authorization and public necessity from Board. (49 U.S.C. §10901[c]).

Board enforces rail carrier's obligation to publish rates and other service terms. Abandonment of line requires application to Board. (49 U.S.C. §10903[a][1]). Attorney General of U.S. can enforce regulations or orders of Board.

Motor Carriers.

See http://www.fmcsa.dot.gov/. Secretary of Transportation and Board have jurisdiction over transportation by motor carrier between states or U.S. and foreign country or on public highway. Consolidation or merger of motor carriers, acquisition of control and other similar transactions require approval of Board. (49 U.S.C. §14303[a]).

Water Carriers.

Secretary of Transportation and Board have jurisdiction over transportation by water carriers between states or between place in U.S. and place outside U.S.

Pipeline Carriers.

Board jurisdiction under (49 U.S.C. §15301[a]).

Exemption from Regulation.

Secretary of Transportation or Board may exempt from federal statutes and regulations governing motor, water or freight forwarders on finding that application of provision is not necessary to carry out national transportation policy, or to protect shippers from abuse of market power, or in public interest. (49 U.S.C. §10502[b]).

See category 25 Transportation.

3.09 COMMERCIAL CODE:

Versions of Uniform Commercial Code enacted by all U.S. states except Louisiana which has enacted commercial laws incorporating some Articles with material variances. See individual State Digests, category Business Regulation and Commerce, topic Commercial Code.

3.10 COMMERCIAL LAW:

See individual State Digests, category Business Regulation and Commerce, topic Commercial Code.

3.11 CONSUMER PROTECTION:

Note: See http://www.firstgov.gov/Citizen/Topics/Consumer_Safety.shtml.

Note: Citations are to Title 15 U.S.C. unless otherwise noted.

Truth in Lending Act (“Act”) (15 U.S.C. §§1601-1667e) consists of first five chapters of Consumer Credit Protection Act regarding credit transactions (15 U.S.C. §§1631-1645), credit advertising (15 U.S.C. §§1661-1665a), credit billing (15 U.S.C. §§1666-1666j), and consumer leases (15 U.S.C. §§1667-1667e). Purpose of Truth in Lending Act is to assure disclosure of credit terms so consumer can compare credit terms, avoid uniformed use of credit, and protect against inaccurate and unfair credit billing and credit card practices. (15 U.S.C. §1601[a]). Specific disclosures on open-end credit plans, toll-free number for repayment time estimates, credit extensions secured by dwelling exceeding its fair market value and related matters, for introductory rates of interest, late payment deadlines and penalties and Internet-based credit card solicitations mandated by (15 U.S.C. §1637). Federal Reserve Board prescribes regulations to carry out Act's purposes. (15 U.S.C. §1604[a]). Act specifically exempts particular transactions from scope. (15 U.S.C. §1603).

Disclosures.

Key disclosures under Act are finance charge and annual percentage rate. Act requires creditor or lessor disclose clearly and conspicuously to person obligated on consumer lease or consumer credit transaction, information required under Act. (15 U.S.C. §§1631[a], 1632[a]). Terms “finance charge” and “annual percentage rate” must be disclosed more conspicuously than other terms, data, or information, except information pertaining to identity of creditor. (15 U.S.C. §1632[a]). Creditors may use model disclosure forms and clauses provided by Federal Reserve Board to facilitate compliance and aid borrower's understanding. (15 U.S.C. §1604[b]). Creditor who uses model forms or clauses is in compliance with disclosure requirements. (15 U.S.C. §1604[b]). Only one creditor required to make necessary disclosures under Act, when consumer credit transaction involves more than one creditor. (15 U.S.C. §1631[b]). If more than one obligor is involved, creditor only needs to make required disclosures to primary obligor. (15 U.S.C. §1631[a]). Federal Reserve Board may allow disclosures given in estimates where exact information not known. (15 U.S.C. §1631[a]).

Determination of Finance Charge.

Generally, finance charge on consumer credit transaction equals sum of all charges, payable by person to whom credit is extended, and imposed by creditor as incident to extension of credit. (15 U.S.C. §1605[a], 12 C.F.R. §226.4[a]). First type of charge specified by Act as included in finance charge: interest, time price differential, and any amount payable under point, discount, or other system of additional charges. (15 U.S.C. §1605[a][1]). Following charges are also included in finance charge: service or carrying charge (15 U.S.C. §1605[a][2], 12 C.F.R. §226.4[b][2]); loan fee, finder's fee (15 U.S.C. §1605[a][3], 12 C.F.R. §226.4[b][3]); investigation or credit report fee (15 U.S.C. §1605[a][4]; 12 C.F.R. §226.4[b][4]); and charges for guarantee or insurance against default or loss (15 U.S.C. §1605[a][5]; 12 C.F.R. §226.4[b][5]). Charges excluded from finance charge are fees for credit plan participation and charges for unanticipated late payment, for exceeding credit, and for default. (12 C.F.R. §226.4[c][2], [4]). Implementing regulation excludes other charges. (12 C.F.R. §226.4[c]1-8). Itemized and disclosed items not necessary to include in computing finance charge. (15 U.S.C. §1605[d]). Premiums for credit, life, accident, health insurance or loss of or damage to property or liability arising out of property acceptable to exclude from finance charge if certain conditions met. (15 U.S.C. §1605[b], 12 C.F.R. §§226.4[d][1], [2], 15 U.S.C. 1605[c]). Certain items excluded when computing finance charge in transaction including real property. (15 U.S.C. §1605[e], 12 C.F.R. §226.4[c][7]).

Determination of Annual Percentage Rate.

Federal Reserve Board required to publish annual percentage rates charged for representative types of nonsale credit by creditors. (15 U.S.C. §1646[a]). Under open-end credit plan, annual percentage rate determined as quotient (percentage) of total finance charge for relevant period divided by amount upon which finance charge for period based, multiplied by number of such periods in year. (15 U.S.C. §1606[a][2]). Annual percentage rate measure of cost of credit, expressed as yearly rate. (12 C.F.R. §226.14[a]). Implementing regulation provides for determining annual percentage rate according to purpose for which rate disclosed. (12 C.F.R. §226.14[b], [c]). In closed-end consumer credit transaction finance charge expressed as annual percentage rate. (15 U.S.C. §1638[a]). Act and implementory regulation provides method of determining annual percentage rate. (15 U.S.C. §1606[a][1][A]; 12 C.F.R. §226.22[a], [c]). Act and regulation provide specifications regarding tolerance of accuracy of annual percentage rate disclosed. (12 C.F.R. §§226.14[a], 226.22[a][2]; 15 U.S.C. §1606[d], [e]).

Disclosures.

Act requires creditors to make two types of clearly and conspicuous written disclosures in open-end consumer credit plans, credit extended on revolving basis (15 U.S.C. §1637): (1) disclosures when account opened, advising what could happen to account (15 U.S.C. §1637[a]); (2) periodic statement disclosures stating what would happen to account (15 U.S.C.S §1637[b]);

and advance notice of interest rate or other significant changes (15 U.S.C. §1637[i]). Implementing regulation of Act specifies disclosures for open-ended credit transactions. (12 C.F.R. §226.5). When terms or payments disclosed in initial disclosure statement change creditor must notify consumer in writing. (12 C.F.R. §226.9[c][1]). Renewal of credit or charge cards or change in credit requires disclosures. (15 U.S.C.S §1637[d], [g], 12 C.F.R. §226.9). Credit or charge card issuer must provide disclosures with solicitations or applications to open an account. (12 C.F.R. §226.5a[a]; 15 U.S.C. §§1637[e], 1637[c][1]; 1637[c][2], 1632[c][3], 1637[c][4], 1637[c][5]).

Open-end consumer credit plans without extended credit secured by consumer's principal dwelling requires specific disclosure such as specific times, in specific manner regarding annual percentage variable percentage notes, other fees imposed, estimate of fees, risk of loss of dwelling, conditions, rights of creditor, repayment options and minimum periodic payments, balloon payments, negative administration, limitations and minimum amount requirements, and consultation of tax advisor. (15 U.S.C. §§1637a[a], 1637a[b], 1637[d]). Specific disclosures regarding time and form are required in closed-end credit transactions. (15 U.S.C. §§1638[a], [b][1], [c], 1632[a]). Specific disclosures in closed-end credit transactions include identity of creditor, amount financed, itemization, finance charge, annual percentage rate, total sale price, total payments, payment schedule, demands, rebates and penalties, late payments and security interests. (15 U.S.C. §1638[a]).

Noncompliance.

Several remedies exist for noncompliance with Act, such as administrative enforcement (15 U.S.C. §1607), right to rescind transaction (15 U.S.C. §1635), and civil and criminal liability (15 U.S.C. §§1640, 1611, 1601 et seq.)

Credit Advertising.

Act prohibits advertising appealing unavailable financial arrangements and requires disclosure of all terms necessary to give complete picture of overall credit arrangements. (15 U.S.C. §§1661-1665e).

Fair Credit Billing.

Act protects consumers against inaccurate and unfair credit billing and credit card practices (15 U.S.C. §§1601, 1666-1666j), such as providing procedure for correction of billing errors and regulating closing accounts, credit reporting, forfeiture, billing error payments, crediting payments, and credit card transactions (15 U.S.C. §1666).

Consumer Leases.

Act assures meaningful disclosure of terms of leases of personal property to enable lessee to compare lease terms, limit balloon payments on consumer leases, compare lease terms with credit terms, and assure accurate disclosures of lease terms in advertisements. (15 U.S.C. §§1601[b], 1667-1667e).

Equal Credit Opportunity Act.

Act requires that financial institutions and firms who extend credit make that credit equally available to all credit worthy customers and prohibit discrimination against credit applicants on basis of race, color, religion, national origin, sex, or marital status. (15 U.S.C. §§1691-1691f). Noncompliance with Act includes administrative enforcement and available remedies. (15 U.S.C. §§1691c, e).

Fair Credit Collections Practices Act.

Act insures elimination of abusive debt collection practices, and protects debt collectors who refrain from using abusive debt collection practices. (15 U.S.C. §§1692-1692o). Act lists unlawful practices and provides for public and administrative enforcement and private causes of actions.

Electronic Fund Transfer Act.

Act establishes rights, liabilities, and responsibilities of participants in electronic fund transfer systems and provides for individual consumer rights. (15 U.S.C. §§1693-1693r). Specific disclosures of terms and conditions of transfers required. (15 U.S.C. §§1693c, d). Method for resolution of errors provided (15 U.S.C. §1693f), means of access to consumer's account regulated (15 U.S.C. §1693i) and compulsory use and waiver of rights (15 U.S.C.S §§1693k, l). Noncompliance with Act's requirements may result in administrative enforcement and civil liability. (15 U.S.C. §§1693o, m).

Extortionate Credit Transactions.

Act targets loan sharks who extend credit at various rates of interest then use or threat to use violence to collect loans. Anyone who makes or conspires to make extortionate extension of credit subject to fine or imprisonment or both. (18 U.S.C. §§891-894, 896).

National Do Not Call Registry.

Federal Trade Commission maintains do not call registry. (16 C.F.R. §310; 15 U.S.C. §6102). Most telemarketers required to remove registrant from call list within three months of receiving notice. Political organizations, charities, and phone surveyors exempt from registry requirements. Any telemarketer calling U.S. consumer covered under registry, regardless of where calling from. If company within U.S. solicits sales through overseas professional telemarketer, company liable for any violations by telemarketer. Individuals may subscribe to registry by completing questionnaire at https://www.donotcall.gov or by calling 1-888-382-1222.

Real Estate Settlement Procedures Act.

Act's purpose: effectuate changes in settlement process for residential real estate, resulting in more advanced disclosures to home buyers and sellers of settlement costs; eliminate kickbacks or referral fees, increased costs of settlement services; reduce amounts required in escrow accounts for taxes and insurance and modernization of local record keeping of land title information. (12 U.S.C. §§2601-2617). Uniform settlement statements and loan information booklets required. (12 U.S.C. §2603[a]).

Restrictions on Use of Automatic Dialing Systems.

Unlawful for any person to use automatic dialing systems, including facsimile machines and computers, to call residential phone lines or facsimile machines to deliver unsolicited advertisement without prior consent of resident. (47 U.S.C. §227[b][1]). Law includes exception where resident has established business relationship with sender of message. (47 U.S.C. §227[b][1][C]). Even where parties have established business relationship, recipient may request that sender discontinue future solicitations and sender must provide mechanism for recipient to make this request. (47 U.S.C. §227[b][2]). Law allows for private right of action where aggrieved party may receive up to $500 in damages for each violation and treble damages for knowing or willful violations of law. (27 U.S.C. §227[b][3]).

Home Mortgage Disclosure Act.

Purpose of Act provides public with information showing whether depository institutions serve housing credit needs of their neighborhoods and communities and help public officials distribute public-sector investments to attract private investments in neighborhoods. (12 U.S.C. §§2801-2810). Certain depository institutions must maintain records and make available to public, number and total dollar amount of mortgage loans which it originated or purchased during each fiscal year. (12 U.S.C. §2803). See subhead Truth in Lending Act, supra.

3.12 FRANCHISES:

U.S. Legislation.

Under Federal Trade Commission Act (FTCA) (15 U.S.C. §45) FTC has jurisdiction against deceptive acts and practices and other abuses in sale of franchises. Under Magnuson-Moss Federal Trade Commission Improvement Act (15 U.S.C. §2301 et seq.) enacted in 1975 FTC jurisdiction was broadened and rule making authority codified to prescribe and enforce trade regulation rules specifically defining deceptive acts or practices and steps to be taken to prevent such acts or practices. FTC has adopted rules requiring specific disclosures to franchisees before sale of franchise (“disclosure requirements and prohibitions concerning franchising and business opportunity ventures” 16 C.F.R. pt. 436). Purpose of FTC regulation is to provide prospective franchisees with factual information to make meaningful decision on investment opportunities. Rule enumerates disclosures required by franchisor to prospective franchisee at earlier of first personal meeting or ten days prior to signing of franchise agreement or payment of any consideration. Information need not be filed or registered with FTC. For startup of franchises, see http://www.sba.gov/starting_business/startup/franchise.html.

Coordination with State Regulation.

FTC rule expressly foregoes preemption of stricter state regulations. Franchisers may comply by following FTC disclosure requirements or use of Uniform Franchise Offering Circular (UFOC) of North American Securities Administrator's Association, adopted either by statute or regulation in all disclosure law states.

Enforcement.

FTCA does not provide for private enforcement but Commission can issue cease and desist orders or seek injunctive relief against violation of act. FTCA amendments of 1994 expanded Commission's authority to investigate antitrust violations in U.S. and abroad, consistent with International Antitrust Enforcement Assistance Act of 1994 (Pub. L. No. 103-312, 108 Stat. 1691).

Federal Dealer Termination Acts (“Good Cause” Legislation).

Automobile Dealers' Franchise Act (15 U.S.C. §§1221-1225) protects automobile dealers and Federal Petroleum Marketing Practices Act (15 U.S.C. §2801 et seq.) protects gasoline station lessees from unjust termination or nonrenewal for other than good cause as defined therein. See individual State Digests, category Business Regulation and Commerce, topic Franchises for similar state “good cause” statutes.

See individual State Digests, category Business Regulation and Commerce, topic Franchises and Uniform Franchise and Business Opportunities Act for state regulation of franchising.

See category 7 Criminal Law, topic RICO for applicability to this topic.

3.13 FRAUDS, STATUTE OF:

See individual State Digests.

3.14 INFORMATION TECHNOLOGY, INTERNET AND NEW MEDIA:

Introduction.

Federal law of information technology, Internet and new media must be viewed in context of existing federal case law, legislation, and regulations in numerous other legal areas including, without limitation, general commercial and contract law, agency and employment law, tort law, intellectual property law, antitrust law, securities law, consumer protection law, and constitutional law. Such laws often do not make express reference to their applicability to areas of information technology, Internet and new media despite their relevance. This section of U.S. Federal Law Digest highlights recent developments in federal legislation that expressly apply to areas of information technology, Internet and new media.

Electronic Signature Legislation.

E-SIGN.

Electronic Signatures in Global and National Commerce Act was signed into law in 2000. (114 Stat. 467). E-SIGN makes enforceable electronic signature, contract, or other record relating to any transaction in or affecting interstate or foreign commerce. (15 U.S.C. §7001[a]). E-SIGN expressly does not require any person to agree to use or accept electronic records or electronic signatures. (15 U.S.C. §7001[b][2]). E-SIGN further sets out specific requirements for obtaining prior consent of consumers for use of electronic records. (15 U.S.C. §7001[c]).

Retention of Records and Notarization Under E-SIGN.

Where law requires retention of records, checks or notarized record, E-SIGN permits, with limited exceptions, retention of electronic records and notarized signatures. (15 U.S.C. §7001[d], [e]).

Insurance.

E-SIGN expressly applies to insurance business. (15 U.S.C. §7001[i]).

Preemption.

E-SIGN preempts inconsistent state legislation or regulations. Such state legislation and regulations are not preempted if: (1) legislation or regulation constitutes adoption of Uniform Electronic Transactions Act (UETA) in form approved by National Conference of Commissioners on Uniform State Laws in 1999, provided any exceptions to scope of UETA are consistent with E-SIGN; or (2) legislation or regulation enacts certain alternative procedures or requirements for use of electronic records or signatures consistent with E-SIGN. (15 U.S.C. §7002[a]).

Exceptions.

By its terms, E-SIGN provisions do not apply to following: (1) law governing creation and execution of wills, codicils, or testamentary trusts; (2) state law governing adoption, divorce, or other family law matters; (3) Uniform Commercial Code (with limited specified exceptions); (4) court orders or court documents required to be executed in court proceedings; (5) notices of termination of utility services; (6) notices of default, acceleration, repossession, foreclosure, eviction or right to cure under credit agreement secured by, or rental agreement for, primary residence; (7) notices of termination of health benefits; (8) certain recall notices; (9) any document required to accompany handling of dangerous materials; or (10) records required by federal or state agency to be held in paper form. (15 U.S.C. §7003).

Transferable Records, defined as electronic record that would qualify as note relating to loan secured by real property under Art. 3 of Uniform Commercial Code if issuer of electronic record has agreed record is transferable record, may be executed using electronic signature under E-SIGN. (15 U.S.C. §7021).

Definitions.

Terms used under decision deemed in 15 U.S.C. §7006. E-SIGN defines “electronic” as “relating to technology having electrical, digital, magnetic, wireless, optical, electromagnetic, or similar capabilities.” (15 U.S.C. §7006[2]). “Electronic Record” defined as “a contract or other record created, generated, sent, communicated, received or stored by electronic means.” (15 U.S.C. §7006[4]). “Electronic Signature” defined as “an electronic sound, symbol, or process, attached to or logically associated with a contract or other record and executed or adopted by a person with the intent to sign the record.” (15 U.S.C. §7006[5]).

Internet Privacy.

Introduction.

In addition to legislation highlighted below enacted specifically to address privacy issues in electronic commerce, several more general federal statutes may provide privacy protection in new media and Internet context including, among others, Privacy Act of 1974 (5 U.S.C. §552[a]); Video Privacy Protection Act (18 U.S.C. §2710); Right to Financial Privacy Act (12 U.S.C.S §3401, et seq.); act regulating Health Information Technology privacy (42 U.S.C. §§17921 to 17953); and Fair Credit Reporting Act (12 U.S.C. §3401). FTC may also in its rule-making authority enact rules and regulations to regulate privacy online.

Children's Online Privacy Act (COPPA).

COPPA, and Rules issued by Federal Trade Commission pursuant to COPPA, set out required conduct for operators of websites directed to children under 13 or operators of websites with actual knowledge that they are collecting personal information from children under 13. (15 U.S.C. §6501 et seq.). Requirements include providing notice of what information is collected by operator from children and how information is used and disclosed by operator. (15 U.S.C. §6502[b]). Operator must generally obtain “verifiable parental consent” for such collections, use, or disclosure of personal information from children on site. (15 U.S.C. §6502[b]). Operator must provide information to parent upon request, including specific types of information collected from child, and allows parents to refuse to permit further use, maintenance, or collection of information. (15 U.S.C. §6502[b]). Other key provisions prohibit operator from conditioning child's participation in game, offering of prize, or another activity on disclosure of more personal information than is reasonably necessary to participate in activity and require operator to maintain procedures to protect confidentiality, security, and integrity of personal information collected from children. (15 U.S.C. §6502[b]). COPPA is deemed satisfied if operator complies with guidelines issued by industry and approved by Federal Trade Commission (FTC). COPPA violations subject operator to FTC jurisdiction and civil action by state Attorney General on behalf of state residents who have been “threatened or adversely affected” by operator's conduct. (15 U.S.C. §§6502-6504).

Gramm-Leach-Bliley Act.

Enacted in 1999 and implemented by FTC Rule, Act requires entities satisfying definition of “financial institutions” to protect privacy of personal information of customers. (15 U.S.C. §6801, et seq.). Institution must disclose policies and practices concerning disclosure of nonpublic personal information and provide consumers means to “opt out” of disclosure of such information to nonaffiliated third parties. (15 U.S.C. §6802[a], [b][1]).

Electronic Communications Privacy Act (ECPA).

Contains provisions addressing privacy of “electronic communications”. (18 U.S.C. §2701). ECPA includes, among numerous other provisions, prohibition of public disclosure of content of electronic communications in electronic storage by electronic communication service. (18 U.S.C. §2702[a][1]). ECPA also prohibits unauthorized access to electronic communications. (18 U.S.C. §2701).

Health Information Technology

Act of 2009 requires coordination with standards regarding health information technology (42 U.S.C. §17901), requires research and development efforts by National Institute for Standards and Technology (42 U.S.C. §§17911, 17912), and sets out security and privacy provisions to strengthen privacy efforts and enforce noncompliance with privacy requirements. (42. U.S.C. §§17921 to 17953).

Office of National Coordinator for Health Information Technology established to promote standards and policies. (42 U.S.C. §§300jj to 300jj-19) Assistance, grants and incentives established to promote use of health information technology and strengthen infrastructure to support such use. (42 U.S.C. §§300jj-31 to 300jj-38)

Online Obscenity And Defamation.

Obscenity.

Existing federal legislation regulating and relating to obscenity are generally applicable to online context. Communications Decency Act (CDA) prohibits “importation or transportation of obscene materials” and has been amended to expressly include obscenity transported by means of “interactive computer service”. (18 U.S.C. §1465). Other portions of original CDA were struck down as unconstitutional by U.S. Supreme Court. (521 U.S. 844).

Defamation.

Communications Decency Act of 1996 protects providers and users of entities satisfying definition of “interactive computer service” from liability as publisher or speaker of information provided by another information content provider. (47 U.S.C. §230[c]). Act further protects provider or user from liability for good faith restrictions on access to obscene material. (47 U.S.C. §230[c][2]). Review of case law interpreting this statute is necessary to understand all implications of statute.

Trademark Issues.

See category 19 Intellectual Property, topic 19.03 Trademark.

Anticybersquatting Consumer Protection Act.

Registration of domain names on Internet creates new context for trademark disputes, including danger of “cyber-squatting” or registration of domain name identical or confusingly similar to registered trademark. Anticybersquatting Consumer Protection Act (ACPA), enacted in 1999, creates liability for, among other conduct, registration without permission of domain name if done with bad-faith intent to profit from trademark or personal name, if it is identical or confusingly similar to distinctive or famous trademark, or if it dilutes famous trademark. (15 U.S.C. §1125[d]). Complete review of case law interpreting ACPA required to understand Act and its implications.

Uniform Domain Name Dispute Policy (UDNP).

Enacted by Internet Corporation for Assigned Names and Numbers (ICANN) to establish inexpensive administrative dispute resolution procedure for domain name disputes. Text of UDRP policies and rules are found at www.icann.org/udrp. Registration of domain names (.com, .net, or .org) makes party subject to UDRP. UDRP provides for nonbinding arbitration of domain name disputes. Complete review of arbitration decisions under UDRP is necessary to understand UDRP rules and procedures and court interpretation of rules and procedures.

Copyright Issues.

See category 19 Intellectual Property, topic 19.01 Copyright. This section highlights recent changes and additions to copyright law relating specifically to Internet. Complexity of copyright law generally and any of these changes and amendments requires thorough review of all relevant statutes and case law and advice from legal counsel expert in copyright field.

Copyright Act.

Amended in 1995 to include protection for copyright holders of sound recordings, giving them exclusive right to public performance of sound recordings by means of digital audio transmission. (17 U.S.C. §106).

Digital Millennium Copyright Act of 1998 (DMCA).

Further amended Copyright Act to protect sound recording copyright holders from transmittal of sound recordings to customers in non-subscription noninteractive websites; Webcaster Settlement Act of 2009. (17 U.S.C. §114). Such sites may generally obtain license to transmit sound recordings and must pay required royalties. (17 U.S.C. §114). See also category 19 Intellectual Property, topic 19.01 Copyright, subhead Digital Millennium Copyright Act.

§512.

Amended Copyright Act to exempt qualifying Internet and other online service providers from liability for copyright infringement committed by third person if conditions are met by service provider and service provider has designated agent to receive notification of infringement claims. (17 U.S.C. §512).

C. 12.

Addition of Chapter 12 to Copyright Act addresses law against, and penalties for, circumvention of copyright protection systems. (17 U.S.C. §§1201-1205).

3.15 LICENSES, BUSINESS AND PROFESSIONAL:

Licensing of professions and most commercial activities controlled by state laws. See individual State Digests, category Business Regulation and Commerce, topic Licenses, Business and Professional.

Commercial activity subject to federal licensing include: aeronautics and space (49 U.S.C. §70105, 14 C.F.R. §413); agriculture (7 U.S.C. §§51b, 84, 244, 499c, 2133, Title 7, C.F.R.); aircraft pilots (14 C.F.R. §61 et seq., 14 C.F.R. [Federal Aviation Administration]); atomic energy (42 U.S.C. §2131, 10 C.F.R. c. 1 pt. 2); biologic products (9 C.F.R. §102, 21 C.F.R. §510 et seq., 21 C.F.R. §601 et seq.); conservation (16 U.S.C. [several sections]); customs (19 U.S.C. §2581, 19 C.F.R. §111); dumping (33 U.S.C. §1412); export (15 C.F.R. §730 et seq. [Bureau of Export Administration]); firearms (import, sale, manufacture) (18 U.S.C. §923, 27 C.F.R. §178.44); foreign air transportation (49 U.S.C. §41305); hydroelectricity and other water resources development (16 U.S.C. §799, and other sections); interstate motor carriers (49 U.S.C. §13902); investment advisors (15 U.S.C. §80b-3); liquor manufacture (including winemaking and breweries) (27 U.S.C. §204, 27 C.F.R. §1); marine fisheries (16 U.S.C.); merchant seamen (46 U.S.C. §7101 et seq., 46 C.F.R. §10.201 et seq.); military reservations: use of land, buildings (10 U.S.C. §§2670, 4777, 4778, 9777, 9778); mining (30 U.S.C. §§1412, 30 C.F.R. [several sections], 43 C.F.R. §3506); radio broadcasting (47 U.S.C. §307, 47 C.F.R. [Federal Communications Commission]); small business investment companies (15 U.S.C. §687 et seq., 13 C.F.R. §107.300); tax preparation (26 C.F.R. §601.502); telecommunications, including telephone and television (47 U.S.C. [several sections], 47 C.F.R. [FCC]); warehousing, farm (7 U.S.C. §244).

See also topic 3.18 Securities; categories 15 Foreign Trade and Commerce, topic Foreign Trade Regulation; Insurance, topic Insurance Companies.

3.16 MONOPOLIES, RESTRAINT OF TRADE AND COMPETITION:

Note: Citations are to Title 15 U.S.C. unless otherwise noted.

Federal Antitrust Legislation—Sherman and Wilson Acts.

Congress passed Sherman Antitrust Act to prevent practices creating monopolies or restraining trade by restricting competition and obstructing course of trade. (15 U.S.C. §§1-7). No violation of Sherman Act if no restraint of interstate commerce or in District of Columbia. (15 U.S.C. §§1-3). Any contract or conspiracy in unreasonable restraint of trade or commerce in any territory of U.S., between such territory and another, or between any such territory and any state, District of Columbia, or any foreign nation, is illegal under Sherman Act. (15 U.S.C. §§1-7). Felony to monopolize, attempt to monopolize, and conspire to monopolize interstate or foreign trade or commerce. (15 U.S.C. §2). Foreign Trade Antitrust Improvements Act (FTAIA) exempts from Sherman Act export transactions that do not injure U.S.'s economy. (15 U.S.C. §§6a, 3-7). Wilson Act prohibits combinations, conspiracies, trusts, agreements, and contracts intended to operate in restraint of free competition in trade or commerce in imported articles. (15 U.S.C. §8). International cartel arrangement, that provides for worldwide division of market, per se violation of Sherman Act. (15 U.S.C. §7). Sherman's Act forbids trade restraints and monopolizations by individuals or corporations, not state action. (15 U.S.C. §§1-7). Restraint of trade unreasonable and thus violation of Sherman Act either because within class of restraints “per se” unreasonable or because it violates “rule of reason”. (15 U.S.C. §1, 118 S.Ct. 275). Firm with dominant market position that controls essential service cannot deny access of essential service to potential competitors if purpose restrains competition. (708 F.2d 1081).

Price Fixing.

Interference with setting of prices by free market forces unlawful per se under Sherman Act because it eliminates competition. (15 U.S.C. §1). Agreement to pay or charge rigid, uniform prices, or to raise or lower prices or price maintenance is unlawful. (15 U.S.C. §1). Collusive bidding or bid rigging per se violation of Sherman Act. (15 U.S.C. §1).

Tying.

Unlawful tying agreement includes forced purchase of second distinct (tied) product as condition of buying desired purchase of dominant tying product. (504 U.S. 451).

Other Acts.

Generally, other acts may constitute violation of Sherman Act: division of markets, refusals to deal, group boycotts, exclusive dealing, amalgamations and patent misuse. (15 U.S.C. §§1-7).

Clayton Act.

Purpose of Clayton Act protects public against evils resulting from lessening of competition. (15 U.S.C. §12 et seq.). Section 8 of Clayton Act prohibits persons from serving, at same time, as director or officer of any two corporations engaged in commerce and competitors, so elimination of competition by agreement between them would violate antitrust laws, if each of corporations has capital, surplus, and undivided profits aggregating more than amount determined by statute. (15 U.S.C. §19). Section 3 of Clayton Act prohibits specific practices, such as exclusive dealings outside terms of Sherman Act arrangements, tying arrangements, and requirements contracts. (15 U.S.C. §14). Section 7 of Clayton Act prevents economic concentration by keeping large number of small competitors in business, anticipates consequences of intercorporate relationships and business amalgamations and proscribes mergers whose effect may lessen competition or create monopoly. (15 U.S.C. §18). Amalgamation illegal if its effect substantially lessens competition or creates monopoly in any line of commerce in any section of country. Section 7 of Clayton Act also applies to joint ventures. (15 U.S.C. §18).

Robinson-Patman Act includes several purposes: to strengthen Clayton Act provisions regarding price discrimination, to prevent sellers and sellers' brokers from granting unfair preferences in connection with sale of goods, to prohibit techniques that allows large buyers to gain discriminatory preferences over smaller ones because of their purchasing power, to protect small businesses against competing operations, and to insure purchases from single supplier are not injured by supplier's discriminatory practices. (15 U.S.C. §§13, 21). Act deals with discrimination and underselling and cooperatives' liability under statute. (15 U.S.C. §§13a, b). Act inapplicable unless defendant engaged in commerce and one of transactions in interstate commerce. (15 U.S.C. §§13a—c). Nonprofit institutions are exempt from certain provisions of Act. (15 U.S.C. §13c). Unlawful for any person engaged in commerce, to discriminate in price, meaning price difference, between different purchasers of like grade and quality commodities, where any of purchases involved in such discrimination are in commerce, sold for use, consumption, or resale within U.S., territory thereof, or District of Columbia, where discrimination has anticompetitive effect. (15 U.S.C. §13[a]). Unlawful for person engaged in commerce, in course of commerce, to pay, grant, receive, or accept commission, brokerage or other compensation or discount except for services rendered. (15 U.S.C. §13[c]). Alleged discrimination carries burden to prove defense to price discrimination such as: “good faith meeting competition” defense, cost justification defense. (15 U.S.C. §13[a], [b]). Criminal offense to discriminate against competitors of purchaser in that any discount, rebate, allowance, or advertising service charge is granted to purchaser over those available to competitors or to undersell. (15 U.S.C. §13a).

Application to Regulated Industries.

Antitrust laws have limited application to statutorily regulated industries. Antitrust laws not construed to forbid farmers to act together in cooperative associations. (15 U.S.C. §17). Bank Merger Act permits certain bank mergers even though it may lessen competition. (12 U.S.C.. §1828[c]). Federal antitrust laws are applicable to interstate or foreign radio communications. (47 U.S.C. §313[a]).

Enforcement of Federal Antitrust Laws.

Federal antitrust laws, including Sherman, Wilson, Clayton, and Robinson-Patman Acts enforced by private persons and government. (15 U.S.C. §§1-3). U.S. may obtain injunctive relief, damages, and criminal sanctions. (15 U.S.C. §§1-4, 13a, 15a, 24, 25). Under Clayton Act, within four years after cause of action accrued, private persons may seek to secure treble damages or injunctive relief. (15 U.S.C. §§12, 15, 15b, 26).

Agency Review and Enforcement.

Antitrust Improvements Act govern premerger notification requirements regarding acquiring any voting securities or assets of another person engaged in commerce or activity affecting commerce. (15 U.S.C. §18a). Notice of formation of joint development or research venture must be disclosed. (15 U.S.C. §4305[a]). Authority to enforce provisions of Robinson-Patman Act and Clayton Act vested in particular agencies. (15 U.S.C. §§13, 24, 18, 19, 21[a]).

Jurisdiction.

Pursuant to statute, federal district courts have jurisdiction over antitrust claims. (28 U.S.C. §§1337[a], 1331; 18 U.S.C. §3231; 15 U.S.C. §§15, 26).

Venues.

Venue based on general federal venue statute or under Clayton Act, that allows antitrust suit to be brought in any District Court of U.S. in district where defendant resides or is found or has agent; or suit against corporation may be brought not only in judicial district whereof it is inhabitant but also any district where it transacts business or is found. (28 U.S.C. §1391; 15 U.S.C. §§15, 22).

Investigations and Discovery.

Under International Antitrust Enforcement Act, foreign antitrust authority may request assistance from Attorney General of U.S. to conduct investigations to obtain evidence relating to possible violations of antitrust laws. (15 U.S.C. §6202[b]).

Costs and Attorney Fees.

Clayton Act authorizes treble damages and awards costs of suit, including reasonable attorney fees. (15 U.S.C. §15).

Appeal and Reviews.

Judicial review of agency proceedings not available until administrative remedies exhausted.

3.17 SALES:

See individual State Digests.

United Nations Convention on Contracts for International Sale of Goods.

U.S. adopted Convention governing many aspects of international sales contracts (1489 UNTS 3, KAV2420) with "reservation" under which U.S. does not adhere to CISG if contract is between U.S. firm and firm in country that has not ratified convention (public notice 1004, 52 Fed. Reg. 40,6262 [Mar. 2, 1987]).

3.18 SECURITIES:

Note: See http://www.sec.gov/.

Note: Citations are to Title 15 U.S.C. unless otherwise noted.

Securities and Exchange Commission.

Securities Act of 1933 (15 U.S.C. §77a et seq.) ("Securities Act"), governing initial issuance of securities, and Securities Exchange Act of 1934 ("Exchange Act") (15 U.S.C. §78a et seq.) regulating trading in securities subsequent to their initial use, are two principal federal statutes Securities and Exchange Commission (SEC) administers relating to sale and distribution of securities. SEC also administers Trust Indenture Act of 1939 (§77aaa et seq.), Investment Company Act of 1940 (15 U.S.C. §80a-1 et seq.), Investment Advisers Act of 1940 (15 U.S.C. §80b-1 et seq.), and Securities Investor Protection Act of 1970 (15 U.S.C. §78aaa et seq.). Exchange Act established the SEC. (15 U.S.C. §78d). Transactions regulated by federal securities laws must involve interstate commerce.

Registration of Securities under Securities Act of 1933.

Securities Act protects investing public by requiring disclosure, through registration statement and prospectus prior to sale or offer for sale, by persons within Act's scope, of security in interstate commerce falling within scope of act. (15 U.S.C. §77a et seq.). Certain securities and transactions are exempted from disclosure requirements. (15 U.S.C. §§77c, d, 77). It is unlawful for any person to sell or deliver security unless registration statement is filed with SEC and is in effect. (15 U.S.C. §§77e[a], f[a]). Generally effective date of statement is 20th day after its filing. (15 U.S.C. §77h[a]). SEC may prevent, suspend, or accelerate effective date of registration statement. (15 U.S.C. §77h[a], [b]). Act requires inclusion of certain information in registration statement made available to public, regarding security, issuer, and underwriters, including requirements regarding form and contract. (15 U.S.C. §77aa, 17 C.F.R. §§230.400-240.499). Once registration statement is effective, issuer or underwriter may sell or offer to sell security relating to registration statement, through use of statutory prospectus. (15 U.S.C. §77e[b][2], b[10]). Under certain conditions, summary prospectus, summarizing content of statutory prospectus, may be used. (15 U.S.C. §77j[b]). Act requires that buyers be provided with prospectus in particular form containing essential information required to be included in registration statement. (15 U.S.C. §77j[a]).

Regulation of Securities Markets and Market Participants Under Securities Exchange Act of 1934.

Exchange Act governs dealings in securities subsequent to their initial issue, requiring that all stock exchanges register with SEC, unless exempted; and most brokers and dealers unless exempted. (15 U.S.C. §78e). Any exchange may be registered with SEC as national securities exchange by filing registration statement. (15 U.S.C. §78f[a], [b][1]). National securities associations of brokers or dealers as self-regulatory organizations may be formed. (15 U.S.C. §78o-3[a], [b]). SEC may expel or suspend from self-regulatory organizations and members for violation of Exchange Act. (15 U.S.C. §78s[h]). SEC may expel or suspend member broker-dealers from exchanges and revoke or suspend registrations of registered broker-dealers for violations of Exchange Act. (15 U.S.C. §78o[b][4]). Brokers and dealers must maintain certain records and must maintain minimum levels of net capital, that may be liquidated to meet financial commitments to customers. (17 C.F.R. §240.17a-4, 15 U.S.C. §§78q[e][1], o[c][3]). Exchange Act includes several antifraud provisions prohibiting fraud and manipulation in securities markets. (15 U.S.C. §78o-3[e][1], 17 C.F.R. §§240.15c22-11[a], 15 U.S.C. §§78o[c][1], j[a]). Unless it is exempt security, to list security on exchange, issuer must register with exchange and SEC, giving information that is substantially similar to that required for initial issues under Securities Act. (15 U.S.C. §78l[a], 78l). Such registration requirements include securities traded in over-counter market where issuer has gross assets over $1,000,000 and minimum of 500 stockholders of any class of nonexempted equity security. (15 U.S.C. §78l[g][1]). Security may be withdrawn, or stricken from listing and registration, or trading suspended. (15 U.S.C. §78l[d]). Unlisted trading privileges may be extended to security. (15 U.S.C. §78l). SEC requires information provided to be current by filing of regular reports by every issuer having securities registered under Exchange Act and every issuer subject to reporting requirements. (15 U.S.C. §78m[a][1], [2], [b][2]). SEC regulates proxy solicitations and relevant disclosure requirements. (12 C.F.R. §§335.201[a], 240.14a-2). Exchange Act also governs tender offers and issuer repurchases. (15 U.S.C. §78n[d][1], 17 C.F.R. §§240, 14d, 13e). Exchange Act prohibits specific practices that may allow insiders or control persons to profit unfairly at expense of lesser-informed investors. (15 U.S.C. §78n[e], 17 C.F.R. §240.14e-3).

Integrated Disclosure under Federal Securities Laws.

SEC adopted integrated disclosure system to eliminate overlapping of information filed regarding disclosures and dissemination requirements. Integrated disclosure system covers securities act registration forms and some exemption disclosure requirements, Exchange Act registration, reporting, proxy, and tender offer disclosure requirements, through SEC Regulations S-K, S-B, and S-X, to provide current, non-redundant information. (17 C.F.R. §§229.10, 228.10[a], 210.1).

Regulation of Trust Indentures and Trustees Under Trust Indenture Act of 1939.

Purpose of Trust Indenture Act is to insure protection of indenture security holders by services of disinterested trustee qualified to request their interests and that they would receive disclosure regarding securities. (15 U.S.C. §77bbb[b]). Indenture is defined as any mortgage, deed of trust, trust or indenture or similar agreement, under which securities are outstanding or to be issued. (15 U.S.C. §77ccc[7]). Trust indenture is contract between corporation issuing bonds or debentures and trustee for holders of bonds or debentures that describes rights of holders and issuer. (15 U.S.C. §77ccc). Trust Indenture Act provides that it is unlawful for any person, directly or indirectly, to sell any security in interstate commerce; or through mail, unless security is issued under indenture and application for qualification of that indenture is effective. (15 U.S.C. §§77bbb-77ddd). With respect to securities required to be registered under Securities Act, qualification becomes effective when registration of security being offered becomes effective under such Act. (15 U.S.C. §77iii[a][1]). For securities not required to be registered, such qualification requires filing of qualification application and effectiveness pursuant to Trust Indenture Act provisions. (15 U.S.C. §77iii[a][2]). Trust Indenture Act applies to some securities exempt from Security Act in accordance with its terms. (15 U.S.C. §77c[a][9]). Trust Indenture Act exempts from its coverage certain classes of securities not issued pursuant to trust indentures and/or securities. (15 U.S.C. §§77ddd[a], [c], [d], ccc[2]). Transactions exempt from Securities Act and secondary distributions are exempt from Trust Indenture Act requirements. (15 U.S.C. §§77ddd[b], ccc[4]). Trustees must meet minimum qualifications and eligibility standards, capital and surplus requirements and must not have conflicting interest. (15 U.S.C. §77jjj[c], [a][2], [b]). Indenture security holders have right of access and means to communicate with other indenture security holders for purpose of protecting common interests. (15 U.S.C. §§77lll, ppp). Trust Indenture Act requires indenture trustee and obligors to file reports. (15 U.S.C. §§77mmm, nnn). Issuance of securities under trust indenture ordinarily involves disclosure requirements of Securities Act and additional information is required to be provided relating to trustees under indenture under which securities are to be issued and provisions of such indenture. (15 U.S.C. §§77eee-jjj, rrr). Distribution of securities within provisions of Trust Indenture Act is conditioned upon their being issued under such indenture, requirements by indenture, and designation of indenture trustee who meets further requirements. (15 U.S.C. §§77rrr, eee). Trust Indenture Act also contains requirements regarding prospectus relating to registered and unregistered securities. (15 U.S.C. §§77eee-fff).

Liquidation of Broker-Dealers under Securities Investor Protection Act of 1970.

Purpose of Securities Investor Protection Act of 1970 (SIPA) is to protect securities investors from losses resulting from financial failure of brokers or dealers. (15 U.S.C. §78bbb). SIPA authorized creation of Securities Investor Protection Corporation (SIPC), private nonprofit corporation, having as its members all persons registered as brokers or dealers under Exchange Act, and all persons who are members of national securities exchanges. (15 U.S.C. §78ccc). Function of SIPC is to implement purpose of SIPA by accumulating insurance fund and manage fund to identify customers of member broker-dealers for losses suffered upon and by reason of liquidation of such members. (15 U.S.C. §78ccc[e][3]). When SIPC determines brokerage firm has failed or is in danger of failing to meet its obligations to customers and/or statutory criteria are met, SIPC may petition for its liquidations. (15 U.S.C. §78eee[a][3]). SIPA's purpose is also implemented by delivery of identifiable property to customers of members who have been forced to liquidate, distribution of member's assets to satisfy its obligations, and payment of amounts given to customers out of SIPC Fund to extent they can't be satisfied by firm's assets and within limits established by SIPA. (15 U.S.C. §§78fff, ddd). SEC has plenary authority to supervise SIPC. (15 U.S.C. §78ggg[b], [c]). SIPC must submit reports to SEC. (15 U.S.C. §78ggg[c][2]). It is unlawful for any member of SIPC to fail to pay assessment or file report. (15 U.S.C. §§78jjj[a], iii[a]).

Civil Liability.

Federal securities laws provide express and implied causes of action enforceable by private civil actions. Securities Act expressly provides for cause of action for material misstatements or omissions regarding registration statements or prospectus, as well as for selling or offering to sell unregistered security that is required to be registered. (15 U.S.C. §§77[c], 77l). Exchange Act specifically provides cause of action for person who bought or sold security at price affected by illegal price manipulation, relying on misleading or false statements or if insiders were permitted to profit unfairly. (15 U.S.C. §§78l[e], r[a], [b], p[b], t-1). Cause of action if person purchases or sells security in reliance on any statement filed with SEC pursuant to Trust Indenture Act, that was materially false or misleading. (15 U.S.C. §77www[a]). Holder of securities subject to indenture also has cause of action for removal of indenture trustee on grounds of conflict of interest. (15 U.S.C. §77jjj). Implied liability may also arise under certain violations of federal securities acts, such as implied liability for violating Exchange Act's prohibition on brokers and dealers from engaging in certain manipulative, deceptive, and fraudulent activities. (15 U.S.C. §78o[c][1]). Securities and Exchange Act and Trust Indenture Act provide that any waiver or release from compliance with securities laws is void. (15 U.S.C. §§77n, 78cc[a], 77ooo[d], ppp).

Procedural Requirements.

Generally federal securities laws provide federal court jurisdiction over securities cases. (15 U.S.C. §§77v[a], vvv[b], 78aa, bbb, eee[a][3]). Securities Act and Exchange Act give plaintiffs broad choice of venue. (15 U.S.C. §§77v[a], 78aa). These Acts provide that venue is proper wherever defendant is found, resides, or does business. (15 U.S.C. §§77v[a], 78aa). Securities Act provides that venue is proper where securities are offered or sold. (15 U.S.C. §77v). Exchange Act states venue is proper where act or transaction occurred. (15 U.S.C. §78aa). Securities and Exchange Act provide that process may be served in any district in which defendant resides or may be found. (15 U.S.C. §§77v[a], 78aa). Federal securities laws such as Securities Act and Exchange Act provide statute of limitations for actions as one to three years: action must be commenced within one year after discovery or when it should have been discovered, but not later than three years after cause of action occurred. (15 U.S.C. §§77m, 78l[e], r[c], cc[b]). Use of class actions to redress securities fraud is recommended to assure that small investors received compensation. Plaintiff bears burden of proving element of cause of action under express provisions of securities laws by preponderance of evidence. Federal securities laws provide variety of remedies, such as rescission and damages, that are not exclusive, thus allowing for additional remedies such as equitable relief and arbitration. (15 U.S.C. §§77l, p, www[b], 78bb[a]). Several sections of federal securities acts specify elements and measure of recovery of damages. (15 U.S.C. §§77k[e], l, www[a], 78p[b], n, l[e]). Several provisions provide that person cannot recover damages in excess of actual damages. (15 U.S.C. §§78bb[a], 77q[a]). Prejudgment interest, expenses, costs and attorney fees may be included as express remedy provided by securities laws. (15 U.S.C. §§77l, k[e], www[a], 78r[a], i[e]).

Substantive Elements.

It is unlawful for broker or dealer or person selling, purchasing, offering for sale, or offering to purchase, security, within purview of Exchange Act, to induce purchase or sale of any security registered on national securities exchange through circulation of future price predictions of security. (15 U.S.C. §78i[a][3]). Exchange Act makes matched sales and matched orders unlawful. (15 U.S.C. §78i[a][1], [a], [b], [c]). It is unlawful for broker to knowingly send confirmation to customer claiming to pertain to transaction to which customer has not agreed. (15 U.S.C.. §78j[b]). Similarly, it is unlawful for securities salesmen to engage in “switching”, practice of convincing customer to order particular security and send customer confirmation and deliver security other than that ordered. (15 U.S.C. §78j[b]). It is also unlawful for securities broker to make recommendations without sufficient and proper investigation and analysis. (15 U.S.C. §78j[b]). In some situations, brokers mismanagement of its customers account may constitute violation of antifraud provisions of federal securities laws. (15 U.S.C. §78j[b]). If person who is under duty to dissolve material information to investor fails to do so, investor may recover without showing of direct reliance on failure to disclose. (406 U.S. 128). In addition, plaintiffs not required to show that they actually relied on any particular misstatement or omission, if they show they relied on integrity of price of stock established by market, which was influenced by information or lack of it which has been misrepresented or withheld by defendant. (948 F.2d 507).

Person acquiring security issued pursuant to registration statement containing untruth or omission, must be prepared to meet affirmative defense that plaintiff knew of alleged untruth or omission. (15 U.S.C. §77k). Due diligence of plaintiff is required as prerequisite to recovery. (15 U.S.C. §78j[b]). Good faith may be defense to making misleading statements. (15 U.S.C. §78j[b]). Joint and several liability imposed on every person who controls any person liable under certain sections of Securities Act and Exchange Act. (15 U.S.C. §§77k, l, o, 78a). Defenses for liability of controlling person include lack of knowledge and good faith. (15 U.S.C. §§77o, 78t[a]). Person who becomes liable may recover contribution. (15 U.S.C. §§77k, k[f], 78i[e], r[b], 77l). Joint and several liability imposed in connection with false registration statements.

Registration and Qualification Provisions.

Securities Act provides express remedy for buys of securities that are offered or sold in violation of Act, against person selling security to purchasers, who may sue at law or equity, for rescission or damages, if purchaser no longer owns security. (15 U.S.C. §§77l, e). In any action under any section of Securities Act, court has discretion to award costs, including attorneys' fees, where suit or defense was without merit. (15 U.S.C. §77k[e]). Contracts with unregistered broker-dealers are voidable. (15 U.S.C. §§78o[a][1], cc[b]).

Price Manipulation Provisions.

Manipulation of security prices is unlawful, that any person who willfully participates in violation is liable to anyone who buys or sells any security at price that was affected by unlawful manipulation, and may sue in law or equity to recover damages for injuries that resulted from such transaction. (15 U.S.C. §78i, i[e]).

Short-Swing Profits.

Exchange Act states that any profit, realized by beneficial owner of more than 10% of equity security of issuer having securities registered under Act, or by officer or director of issuer thereof, within any period of less than six months, will go to and be recoverable by issuer. (15 U.S.C. §78p[b]). Purpose of short-swing profits provision is prevention of unfair use of information that may have been obtained by such beneficial owner, director, or officer by reason of relationship to issuer. (15 U.S.C. §78p[b]). Act prohibits retention of profits by statutory insider realized by her from any purchase and sale or sale and purchase of any equity security of corporation to which she is insider within any period of less than six months. Disgorgement of short-swing profits is remedy provided by Exchange Act. (15 U.S.C. §78p[b]).

Proxy Provisions.

Lawsuits regarding proxy provisions generally focus on allegations that proxy materials contained false or misleading statements, that are prohibited in proxy materials, or require presentation of shareholders proposal. SEC made rules governing following in regards to proxies: filing of information with SEC, contents of proxy statements distributed to shareholders, and submission of resolutions by shareholders if securities of corporation are registered under Exchange Act. (15 U.S.C. §78).

Tender Offer Provisions.

None of these provisions regarding tender offers explicitly provide for causes of action on behalf of issuer that is target of tender offer for its securities or on any other private party's behalf, although some courts have recognized private rights of action. Several provisions regulate tender offers: regulating tender offers that, when completed, would result in offeror having more than 5% of class of equity securities subject to offer, prohibiting fraudulent, deceptive, or manipulative acts or practices by any person in connection with tender offer, and requiring disclosures concerning election or designation of directors pursuant to any arrangement or understanding with person having more than 5% of issuer's equity securities. (15 U.S.C. §§78n[d], [e], [f]).

General Antifraud Provisions.

Antifraud provisions are stated throughout federal securities laws generally prohibiting: (1) misrepresentations and omissions, and (2) manipulative and deceptive devices. (15 U.S.C. §§78k, 77l, 78j[b]). One or more of these provisions may be used as basis of liability. Securities Act's general antifraud provisions prohibits any person, with respect to sale or offer to sell by interstate commerce, from: using any device, scheme, or article to defraud; get money or property by using untrue statement of material fact or any omission to state material fact necessary to make statements made not misleading; engage in any transaction, practice, or business that operates as fraud upon purchaser. (15 U.S.C. §77q[a]). Securities Act also includes antifraud provisions and private causes of action that apply to more specific situations, such as material misstatements or omissions in effective registration statement or prospectus or oral communication. (15 U.S.C. §§77k, l[2]). Exchange Act's general antifraud provisions prohibit use of manipulative or deceptive devices, by means of interstate commerce or through national securities exchange. (15 U.S.C. §78j[b]). In addition, SEC has promulgated several rules under Exchange Act prohibiting specific fraudulent activities. (17 C.F.R. §§240.10b-7, 8, 9). In addition to prohibiting fraudulent acts, material misstatements or omissions, Exchange Act includes several other antifraud provisions concerning: issuer repurchases of securities, proxy statements and omissions. (15 U.S.C. §§78j[b], m[e][7], n[a], [e], j[a], p[c], j[a][4], r). Foreign Corrupt Practices Act, part of Exchange Act, prohibits issuers of securities from using mail or interstate commerce corruptly regarding offers or payments of money or gifts to influence acts or decisions of foreign officials, foreign political parties and candidates, to assist issuers of securities in obtaining or retaining business. (15 U.S.C. §78dd-1). Trust Indenture Act provides for private right of action for person who, relying on material misstatement or omission in document filed with SEC, bought or sold security issued under indenture to which filed document relates. (15 U.S.C. §77www).

Federal securities laws antifraud provisions require sufficient jurisdictional nexus between fraud alleged and securities transaction. (15 U.S.C. §§77q[a], 78j[b], n[e]). Standing to sue pursuant to artificial provisions of federal securities laws is limited to purchases and sellers of securities, and in some circumstances, only purchases of securities. (15 U.S.C. §§77k, l[2], q[a], 78r[a], 77www[a], 78j[b]). Duty to disclose material, or nonpublic information arises from relationship of trust and confidence between parties. (15 U.S.C. §78j[b]). When registration statement contains untrue statement of material fact or omission, any person acquiring security issued pursuant to registration may sue every person who signed registration statement, every director or partner of issuer at time of filing of registration statement, every person in registration statement with his consent as about to become director or partner of issuer, and every underwriter of securities, as well as experts who consent to being named in registration statement as having prepared or certified any part of it. (15 U.S.C. §77k). Securities Act provides certain defenses to action: plaintiff's knowledge of untruth or omission; due diligence, resignation or attempt to resign or cause to act on capacity described in resignation statement and advising SEC and issuer in writing of his action and stating he would not be responsible for part of registration statement that became effective. (15 U.S.C. §77k). Securities Act expressly provides amount of damages. (15 U.S.C.. §77k[e]). When plaintiff still owns security, Securities Act expressly provides rescission as remedy for civil liability because of sale of unregistered securities or securities accompanied by misleading prospectus or communication. (15 U.S.C. §77l). Damages are remedy if plaintiff has sold security. (15 U.S.C. §77l). Anyone who buys or sells security while possessing material, nonpublic information is liable to all persons who trade contemporaneously in same securities with such person provided that plaintiffs have sold securities while insider purchased securities or plaintiffs have bought securities while insider sold securities. (15 U.S.C. §78i). Exchange Act prohibits price manipulation. (§78I[a][4]). Federal securities laws require disclosures, requiring various documents to be filed with SEC, making it unlawful and providing civil action for material misstatements or omissions. (15 U.S.C. §78r). Exchange Act provides awarding of costs and fees to be within court's discretion. (15 U.S.C. §78r[a]).

SEC Rulemaking and Enforcement Proceedings.

SEC has broad powers to promulgate rules and regulations to implement and clarify various federal securities laws. (15 U.S.C. §§77s, sss, 78w[a], aaa). Any person seeking issuance, amendment, or repeal of rule of general application may file petition with secretary of commission. (17 C.F.R. §201.4[a]). SEC may discipline those practicing before it, such as accountants. (15 U.S.C. §78w[a], 17 C.F.R. §201.2). SEC has power to conduct investigations, issue subpoenas, and conduct hearings; attendance of witnesses at Commission proceedings may be compelled. (15 U.S.C. §§77s, uuu, ttt, 78v, u).

All documents required to be filed with Commission on any proceeding must be filed with secretary within time limit using proper form for such filing, pursuant to SEC's rule of practice. (17 C.F.R. §§201.22, 201.18). Initial decision is rendered by hearing officer, filed and served upon parties and published. (17 C.F.R. §201.16). Initial decision may be reviewed. (17 C.F.R. §201.17). SEC is authorized to impose monetary penalty, enter cease and desist order, seek civil penalties against federal securities violator, and initiate civil proceedings to have person barred from serving as director of public company due to violation of antifraud provisions of federal securities statutes. (15 U.S.C. §§78u-2, u[d][3], u-3, u[d][2], 77t[d], h-1, t[e]). SEC may bring action seeking injunction to prevent violation or continued violation of federal securities laws. (15 U.S.C. §§77t[b], u[c], 78u[d], u[d][1], u[e]). Courts authorized to conduct judicial proceedings regarding enforcement of requirements of securities acts are authorized, upon application of SEC, to issue writs of mandamus ordering compliance with order of SEC. (15 U.S.C. §§77t[c], 78u[e]). Anyone aggrieved by final order of SEC may obtain judicial review. (15 U.S.C. §§77i[a], 78y[a][1]). Petition for review must be filed within 60 days of when commission's order is entered. (15 U.S.C. §§77i, 78y[a][1]). Generally, beginning of judicial review proceedings does not operate as stay of commission's order. (15 U.S.C. §§77i[b], 78y[c][2]). Court of appeals has power to affirm, modify, enforce, or set aside commission's order in whole or part. (15 U.S.C. §§77i[a], 78y[a][3]).

Criminal Actions.

Specific violations of federal security laws are crimes. (15 U.S.C. §§77x, yyy, 78ff, bbb). SEC may transmit evidence of acts and practices that may constitute violations of federal securities laws to Attorney General of U.S., who may, in her discretion, institute criminal proceedings. (15 U.S.C. §§77t[b], 78u[d]). District Courts of U.S. have jurisdiction over criminal proceedings regarding violations of securities laws. (15 U.S.C. §§77v[a], vvv[b], 78aa, bbb). Violations of federal securities laws may be prosecuted in federal district court where prospectus or security was transmitted or where it was received, or where any act or transaction constituting violation occurred. (15 U.S.C. §§77t[b], 78aa).

Securities Act imposes criminal penalty of fine not exceeding $10,000, imprisonment for not more than five years, or both upon conviction for violation under Act. (15 U.S.C. §77x). Exchange Act imposes criminal penalty upon conviction of violation of Act of fine not more than $1 million for natural persons, imprisonment for not more than ten years, or both. (15 U.S.C. §78ff[a], [c]). Exchange Act also imposes criminal penalties on issuers and officers, directors, stockholders, employees, and agents of issuers. Issuer who violates Exchange Act may be subject to fine not more than $2 million; officer or director of issuer, or stockholder acting on issuer's behalf, who willfully violates Exchange Act is subject to fine of not more than $100,000, imprisonment for not more than five years, or both; issuer's employee or agent who willfully violates Exchange Act is subject to fine of not more than $100,000, imprisonment for not more than five years, or both. (15 U.S.C. §§78ff[c], 78dd-1[a]). Imprisonment may be precluded under Exchange Act if defendant proves he was unaware of rule or regulation of which he was convicted of violating. (15 U.S.C. §78ff). Trust Indenture Act imposes fine not more than $10,000, imprisonment of not more than five years, or both upon conviction of violation of Act. (15 U.S.C. §77yyy). SIPA imposes penalty of fine not more than $50,000, imprisonment for not more than five years, or both for person who violates any provision of that Act. (15 U.S.C. §§78bbb, jjj[c]).

Sarbanes-Oxley Act of 2002.

Act establishes oversight board (Board) to: (1) “oversee the audit of public companies that are subject to securities laws; (2) establish audit report standards and rules; and (3) inspect, investigate, and enforce compliance on the part of registered public accounting firms, their associated persons, and certified public accountants.” (15 U.S.C. §7211). Any accounting firm that participates in audit report must register with board, and no more than two certified public accountants allowed on board. (Id.).

Board to enforce auditing standards, which include: (1) seven-year retention period for audit work papers; (2) second partner review and approval by board-prescribed qualified person; (3) evaluation of whether internal control structure and procedures include records that accurately reflect transactions; (4) assurance that transactions recorded to permit preparation of financial statements in accordance with generally accepted accounting principles; and (5) description of weaknesses in internal controls and of material noncompliance. (Id.).

Board may discipline accounting firms, associated persons and accountants. Sanctions limited to intentional conduct or repeated negligent conduct. (Id.). Foreign public accounting firms that perform audits included under Act.

Mandatory Registration.

Unlawful for firm not registered with board to “prepare or issue, or to participate in the preparation of issuance” of any audit report. (15 U.S.C. §7212). Applications for registration must include: (a) names of all issuers for which firm prepared audits during previous year, (b) list of fees received for performing audits, (c) any financial information requested by board, (d) statement of quality control policies, (e) list of accountants with firm, their license numbers, and state license number for firm, (f) information regarding any civil, criminal, or disciplinary proceedings involving firm; and (g) copies of disclosures filed by issuer disclosing accounting disagreements between issuer and firm. (Id.).

Conflicts of Interest.

Unlawful for registered public accounting firm to perform audit if chief executive officer, controller, chief financial officer, chief accounting officer, employed by that registered independent public accounting firm and participated in audit. (15 U.S.C. §78j).

Inspections.

Board to conduct inspections to assure compliance of registered firms with Act. (15 U.S.C. §7214). Inspections conducted annually of firms that provide audits to 100 or more issuers. (Id.). For firms conducting fewer than 100 audits, inspections conducted no less than every three years. (Id.).

Foreign Public Accounting Firms.

Any foreign accounting firm that prepares audit report subject to Act and rules of board. (15 U.S.C. §7216). Foreign accounting firms that do not prepare audit reports may be subject to Act if play “substantial role in preparation and furnishing” reports. (Id.). If foreign accounting firm performs “material services” relied upon by firm registered with board in preparation of audit report, foreign firm deemed to have consented to authority of board. (Id.).

Corporate Responsibility for Financial Reports.

For companies filing reports under Securities and Exchange Act (15 U.S.C. §78m), executive officer of firm must certify that: (a) officer reviewed report, (b) report does not contain misstatement of material fact, (c) internal controls have been reviewed, including conclusion as to effectiveness of controls (15 U.S.C. §7241[a]). Certification required even if issuer transferred corporate domicile outside U.S. (15 U.S.C. §7241[b]).

3.19 WAREHOUSEMEN:

U.S. Warehouse Act (7 U.S.C. §241 et seq.) relates primarily to agricultural warehousing. See (7 U.S.C. §244) for licensing of warehousemen by Secretary of Agriculture. See individual State Digests, category Business Regulation and Commerce, topic

Warehousemen.

4 CITIZENSHIP

—Scope —

Note: See http://uscis.gov/graphics/index.htm.

4.01 CITIZENSHIP:

U.S. citizenship can be acquired either by birth or through naturalization. Person born in U.S. acquires citizenship automatically and immediately gains U.S. nationality. (8 U.S.C. §1401[a]). Persons born outside of U.S. to U.S. citizens can also acquire U.S. citizenship. (8 U.S.C. §1401[g]).

Naturalization.

In order to gain citizenship through naturalization, person must have (1) resided continuously in U.S. for five years as lawful permanent resident; (2) been physically present in U.S. for at least half of five years immediately prior to filing petition for naturalization; and (3) resided within filing district for at least three months prior to filing. (8 U.S.C. §1427[a]). Petitioner also must continuously reside within U.S. from date of petition up to acquiring citizenship. “Residency” defined as person's principal, actual dwelling place in fact. (8 U.S.C. §1101[a][33]). For exceptions to physical residency requirement, see (8 U.S.C. §§1427(b) and 1428).

Qualifications for Naturalization.

Petitioner for naturalization must, in most circumstances, be at least 18 years old. (8 U.S.C. §1445[b]). Parent however, can petition for naturalization of child under age of 18. (8 U.S.C. §§1443, 1445[b]). Furthermore, petitioner for naturalization must be able to speak, understand, read and write simple English. (8 U.S.C. §1423[a][1]). Each person must pass examination demonstrating basic history of U.S. government. (8 U.S.C. §1423[a][2]). Petitioner must show that, during five-year statutory period before filing and up until hearing of petition, s/he is person of good moral character. (8 U.S.C. §1427[a]). Petitioner must also show s/he supports principles of Constitution of U.S. (8 U.S.C. §1427[a]). Finally, petitioner required to take oath of allegiance to U.S. as well as renounce allegiance to any foreign state or sovereignty. (8 U.S.C. §1448[a]). Naturalization process relaxed for certain classes of persons: (1) persons serving in armed forces of U.S., (8 U.S.C. §1439[a]; (2) spouses of U.S. citizens (8 U.S.C. §1429); and (3) children of U.S. citizens (8 U.S.C. §1433[a]).

Procedure for Naturalization.

Attorney General of U.S. has sole authority over naturalization process. (8 U.S.C. §1421[a]). Person seeking naturalization must first file application with Immigration and Naturalization Service (INS), which then conducts investigation of petitioner's qualifications. (8 U.S.C. §1445[a]). Petitioner and supporting witnesses must also testify to petitioner's qualification before naturalization examiner. (8 U.S.C. §1446[b]). If examiner approves naturalization application, petitioner will be granted citizenship at hearing after s/he takes oath of allegiance to U.S. (8 U.S.C. §1448). If INS denies application, petitioner can seek de novo judicial review in federal district court.

Documents Required for Admission.

Alien must possess following documents for entry into U.S.: valid immigrant visa, reentry permit, border crossing identification card, other valid entry document or valid unexpired passport. (8. U.S.C. §1182[a][7]).

5 CIVIL ACTIONS AND PROCEDURE

5.01 ACCORD AND SATISFACTION:

See individual State Digests.

5.02 ACTIONS:

Constitution provides that judicial power of U.S. vests in Supreme Court and in other inferior courts as Congress may establish. (U.S. Const. art III, §1). In addition to Supreme Court, Congress has established federal trial level courts called U.S. District Courts and federal intermediate appellate courts called U.S. Courts of Appeals, along with several specialized courts including Bankruptcy Court, Court of Federal Claims, Court of International Trade and Tax Courts. Federal Rules of Civil Procedure (FRCP) govern procedure in U.S. District Courts in all civil suits whether in cases at law or in equity with limited exceptions for specific admiralty proceedings and any bankruptcy or proceeding in copyright. (FRCP 1). Procedure in U.S. Courts of Appeals governed by FRCP and Federal Rules of Appellate Procedure (FRAP) and practice and rules of individual Courts of Appeals. (FRAP 1). Procedure in U.S. Supreme Court governed by Rules of the Supreme Court of the United States and, when appropriate, Federal Rules of Civil Procedure. See also category 6 Courts and Legislature, topic 6.01 Courts.

Jurisdiction of Federal Courts.

Under U.S. law, actions may be brought only in court vested with subject matter jurisdiction over dispute. Federal courts vested with judicial power over: all actions arising under Constitution or federal law; cases affecting ambassadors or other public ministers and consuls; all maritime and admiralty cases; actions to which U.S. is party; controversies between states, between state and citizen of another state, or between citizens of other states; and actions between state or its citizens and foreign state or citizens. (U.S. Const. art. III, §2; 28 U.S.C. §1331). Federal courts have exclusive jurisdiction over certain actions including, among others, bankruptcy proceedings (28 U.S.C. §1334) and copyright and trademark actions (28 U.S.C. §1338). Individual federal statutes may create causes of action for their violation and grant jurisdiction to federal courts to hear those actions. Actions in which federal jurisdiction is based upon all plaintiffs and all defendants being citizens of different states known as diversity jurisdiction. In such cases, matter in controversy must also exceed $75,000 for diversity jurisdiction to exist. (28 U.S.C. §1332). See also category 6 Courts and Legislature, topic 6.01 Courts.

Personal Jurisdiction.

Under U.S. law, actions may be brought only in court with valid personal jurisdiction over defendants. See topic 5.17 Process; see also category 6 Courts and Legislature, topic 6.01 Courts and individual State Digests.

Forms of Action.

One form of action known as “civil action”. (Fed. R. Civ. P. 2). See http://www.fjc.gov/federal/courts.nsf, link on “How cases move through Federal court.”

Commencement.

Civil action is commenced by filing complaint with court. (Fed. R. Civ. P. 3). For rules relating to service of process see topic 5.17 Process.

Parties.

Governed by Fed. R. Civ. P. 17-25. Actions must be prosecuted in name of real party in interest, however, reasonable time allowed for ratification of commencement of action by, or joiner or substitution of, real party in interest. (Fed. R. Civ. P. 17[a]). Fed. R. Civ. P. 17 addresses rules relating to capacity to sue or be sued and representation in suits for infants or incompetent persons. (Fed. R. Civ. P. 17[b], [c]).

Joinder.

Party asserting claim to relief as original claim, counterclaim, cross-claim, or third-party claim may join as many claims as party has against opposing party. (Fed. R. Civ. P. 18[a]). Claim for fraudulent conveyance and for money may be joined in single action without plaintiff first obtaining judgment establishing claim for money. (Fed. R. Civ. P. 18[b]). Further, all persons may join as plaintiffs in one action if they assert any right to relief jointly, severally, or, in alternative, in respect of or arising out of same transaction or occurrence and if any common question of law or fact will arise in action. (Fed. R. Civ. P. 20.) Rules also set out procedure for joinder of persons needed for just adjudication of action. (Fed. R. Civ. P. 19). Court may drop or add parties and claims. (Fed. R. Civ. P. 21).

Interpleader.

(Fed. R. Civ. P. 22) provides procedure for joining persons having claims against plaintiff as defendants if claims are such that plaintiff may otherwise be subject to multiple liability. Defendant exposed to similar liability may seek interpleader through cross-claim or counterclaim.

Intervention.

(Fed. R. Civ. P. 24) outlines circumstances permitting intervention upon timely application. (Fed. R. Civ. P. 24[a], [b]). Person desiring to intervene serves motion to intervene upon parties as provided in (Fed. R. Civ. P. 5). (Fed. R. Civ. P. 24[c]).

Substitution.

(Fed. R. Civ. P. 25) outlines procedure for substitution of parties due to death or incompetency of party, transfer of interest, or death or separation from office of public officers who are parties. (Fed. R. Civ. P. 25[a]-[d]).

Class Actions.

Class action may be brought if (1) class is so numerous joinder of all members is impracticable; (2) there are questions of law or fact common to class; (3) claims or defenses of representative parties are typical of class; and (4) representative parties will fairly and adequately protect interests of class. (Fed. R. Civ. P. 23[a]). Rule sets out additional findings required to be met for class action to be maintained. (Fed. R. Civ. P. 23[b]). Court determines by order whether class action should be maintained as soon as practicable after commencement of action. (Fed. R. Civ. P. 23[c][1]). For rules relating generally to derivative actions by shareholders and actions relating to unincorporated associations see (Fed. R. Civ. P. 23.1 and 23.2). Class Action Fairness Act of 2005 (28 U.S.C. §1711 et seq.), amends Federal judicial code to specify calculation of contingent and other attorney's fees in proposed class action settlements that provide for award of coupons to class members. Amends procedures that apply to interstate class actions for fairer outcomes for class members and defendants and determines diversity jurisdiction and amounts in controversy. (28 U.S.C. §§1332, 1711 et seq.).

Trials.

Governed generally by (Fed. R. Civ. P. 38-53).

Jury Trials.

Every party is entitled to trial by jury of any issue triable of right by jury by serving demand any time after commencement of action and not later than ten days after service of last pleading directed to triable issue. Seventh amendment to Constitution guarantees jury trial right in suits at common law where value in controversy exceeds $20. (Fed. R. Civ. P. 38). Adverse party may serve demand within ten days after service of first demand or time as court fixes. (Fed. R. Civ. P. 38[c]). Procedure for serving demand for jury trial in removed actions governed by (Fed. R. Civ. P. 81). Issues not demanded for trial by jury are tried by court unless court in its discretion or on motion orders trial by jury. (Fed. R. Civ. P. 39[b]).

Selection of Jurors.

Court or parties at court's discretion may examine prospective jurors and parties allowed preemptory challenges as provided by (28 U.S.C. §1870). (Fed. R. Civ. P. 47[a], [b]). Jury consists of minimum of six and maximum of 12 jurors and jury verdict must be unanimous unless parties stipulate otherwise. (Fed. R. Civ. P. 48).

Consolidation and Separate Trial.

Court may order consolidation or joint hearing or trial of pending actions involving common question of law or fact. (Fed. R. Civ. P. 42[a]). Court may likewise separate by order trial of any claims or issues as necessary for convenience or to avoid prejudice. (Fed. R. Civ. P. 42[b]).

Stay of Proceedings.

Execution or enforcement of judgment automatically stayed until ten days after entry. Unless otherwise ordered by court, interlocutory or final judgment in injunction or receivership action or on judgment or order for accounting in infringement of letters patent not stayed after entry until appeal is taken or during pendency of appeal. (Fed. R. Civ. P. 62[a]). Court may suspend, modify, resume, or grant injunction during pendency of appeal from interlocutory or final judgment granting, dissolving, or denying injunction. (Fed. R. Civ. P. 62[c]). Subject to (Fed. R. Civ. P. 62[a]) party taking appeal obtains stay by giving supersedeas bond. (Fed. R. Civ. P. 62[d]). Appellate court may stay proceedings pending appeal as necessary. (Fed. R. Civ. P. 62[g]). For rules governing stay in favor of U.S. or U.S. agency, stay according to state law, or for stay of judgment as to multiple claims or multiple parties see (Fed. R. Civ. P. 62[b], [e], [f]).

Limitation of Actions.

See topic 5.13 Limitation of Actions.

Termination of Actions.

Actions may be terminated by judgment (Fed. R. Civ. P. 54), stipulation, voluntary or involuntary dismissal (Fed. R. Civ. P. 41), or by court or defendant's motion for lack of prosecution or failure to comply with rules or any order of court (Fed. R. Civ. P. 41[b]).

5.03 APPEAL AND ERROR:

Civil appeals from decisions of U.S. District Courts are governed by Federal Rules of Appellate Procedure (Fed. R. App. P.) and Local Rules of U.S. Court of Appeals. (Fed. R. App. P. 47).

Notice of Appeals.

Appeal taken as of right by filing notice of appeal with district clerk within time allowed and with appropriate fees and copies. (Fed. R. App. P. 3[a]). Notice of appeal must: (1) specify parties taking appeal; (2) designate judgment, order or part being appealed; and (3) name court to which appeal is taken. (Fed. R. App. P. 3[c]). District clerk serves notice of filing of notice of appeal to each counsel of record excluding appellant. (Fed. R. App. P. 3[d]).

Timing of Appeal.

For appeals as of right, 30 days from entry of judgment or order appealed from or 60 days after entry of judgment or order if U.S. or its officer or agency is party. (Fed. R. App. P. 4[a][1][A], [B]). If one party files timely notice of appeal, any other party may file notice of appeal within later of 14 days after first notice or general time under (Fed. R. App. P. 4[a]). (Fed. R. App. P. 4[a][3]). District Court may extend time for taking appeal for excusable neglect or good cause on motion filed within 30 days after expiration of time set in (Fed. R. App. P. 4), however, no extension may exceed later of 30 days after prescribed time or ten days after date when order granting motion is entered. (Fed. R. App. P. 4[a][5][C]). Time to file appeal if party timely files following motions in District Court runs from entry of order disposing of last remaining motion: (1) motion for judgment under (Fed. R. Civ. P. 50[b]); (2) motion to amend or make additional factual findings under (Fed. R. Civ. P. 52[b]); (3) motion for attorneys fees under (Fed. R. Civ. P. 54) if time to appeal is extended under (Fed. R. Civ. P. 58); (4) motion for new trial under (Fed. R. Civ. P. 59); or (5) motion for relief under (Fed. R. Civ. P. 60) if filed within ten days after entry of judgment. (Fed. R. App. P. 4[a][4]).

Appeals by Permission.

If not permitted as of right, appeal may be obtained by permission by filing petition for permission to appeal with circuit clerk with proof of service on other parties within time specified by statute or rule authorizing appeal or, if no time is specified, within time set in (Fed. R. App. P. 4[a]). (Fed. R. App. P. 5[a]). Petition must include question presented, necessary facts, relief sought, and reasons appeal should be allowed and must attach copy of order or judgment complained of, with related memorandum or opinion, and any order stating conditions are met for permission to appeal. (Fed. R. App. P. 5[b]). Answer in opposition to petition or cross-petition may be filed within seven days after service of petition. (Fed. R. App. P. 5[b][2]).

Specialized Appeals.

For timing for appeals in bankruptcy cases see (Fed. R. App. P. 6), for class actions see (Fed. R. Civ. P. 23, 54[b]). For review of decision of U.S. Tax Court see (Fed. R. App. P. 13, 14), for review or enforcement of order of administrative agency, board, commission, or officer see (Fed. R. App. P. 15-20), and for habeas corpus and proceedings in forma pauperis see (Fed. R. App. P. 22-24).

Appeal Bond.

District Courts may requiring appealing party to file bond or provide other security to ensure payment of costs on appeal. (Fed. R. App. P. 7); See also (Fed. R. App. P. 8[b]).

Stay of Proceedings.

Party may move in District Court for stay of District Court judgment or order pending appeal, approval of supersedeas bond, or order suspending, modifying, resolving or granting injunction while appeal is pending. (Fed. R. App. P. 8[a][1]). Same motion may be made to Court of Appeals if motion shows District Court denied requested relief or moving in district court would be impracticable. (Fed. R. App. P. 8[a][2]).

Record on Appeal.

Rules set out items constituting record on appeal, appellant's duties for composing and forwarding record, and reporter, district clerk's and circuit clerk's duties for docketing appeal. (Fed. R. App. P. 10-12).

Extent of Review.

Only rulings objected to by losing party may be appealed. Appeals of matters of law are reviewed de novo except, if ruling was in discretion of trial judge, it is reviewed under abuse of discretion standard. Review of appeals of factual findings are reviewed under clearly erroneous standard. (Fed. R. Civ. P. 52[a]). By order of majority of Circuit Court judges, or upon petition meeting specific requirements, hearing or rehearing en banc may be heard. (Fed. R. App. P. 35).

Judgment on appeal is entered when noted on docket by clerk after receiving court's opinion (or after final settlement) or as court instructs. (Fed. R. App. P. 36[a]).

Costs.

Unless law or court provides otherwise, if appeal is dismissed or judgment is affirmed, appellant is charged costs of appeal. If judgment is reversed, appellee is charged costs and if judgment is affirmed in part, reversed in part; modified, or vacated, costs are charged as court orders. (Fed. R. App. P. 39). Damages and costs may be awarded for appeals determined frivolous by court. (Fed. R. App. P. 38).

Extraordinary Writs.

Petition may be made for writ of mandamus or prohibition or other extraordinary writ to circuit clerk and copied to trial judge. (Fed. R. App. P. 21).

Interlocutory Decisions.

Limited common law and statutory exceptions exist to general rule that appeals may be taken only from final judgment including if nonfinal ruling will have irremediable consequences or may result in irreparable harm and for certain specific orders and decrees as set out by statute. (28 U.S.C. §1292).

5.04 CERTIORARI:

Jurisdiction.

Appeals may be taken by writ of certiorari to U.S. Supreme Court. Appeal heard at discretion of Court. (Sup. Ct. R. 10).

Proceedings.

Any writ of certiorari in civil action for review by U.S. Supreme Court must be applied for within 90 days after entry of judgment or decree. This time may be extended for period not exceeding 60 days. For detailed rules relating to seeking review on certiorari see (Sup. Ct. R. 12-15). (28 U.S.C. §2101).

Grounds.

Petition for writ of certiorari granted only for “compelling reasons”. Court will consider whether conflict exists between decisions of U.S. Courts of Appeals on important matter or between U.S. Court of Appeals and state court of last resort on important federal question; whether Court of Appeals has so far departed from usual judicial proceedings as to warrant U.S. Supreme Court exercise; or whether state court of last resort or U.S. Court of Appeals decided important federal law question that should be decided by, or conflicts with decision by, U.S. Supreme Court. (Sup. Ct. R. 10).

5.05 COSTS:

Costs may be awarded by judge or clerk of any U.S. court. (28 U.S.C. §1920). Costs permitted to be awarded are: clerk and marshal fees, court reporter or transcript fees; printing and witness fees; exemplification and copies of papers; docket fees; and fees for court appointed experts and interpreters. (28 U.S.C. §1920).

Security.

No security for damages or costs required of U.S. or any U.S. department, agency, or party acting under direction of department or agency. (28 U.S.C. §2408).

5.06 DAMAGES:

Damages may be governed by applicable federal statutes which may permit punitive and multiple damages. U.S. Supreme Court and Courts of Appeals may award damages and single or double costs to prevailing party. (28 U.S.C. §1912).

5.07 DECLARATORY JUDGMENTS:

See topic 5.12 Judgments.

5.08 DEPOSITIONS AND DISCOVERY:

Governed by Fed. R. Civ. P. 26-37 . See also topic 5.16 Practice.

Scope of Discovery.

Parties generally may obtain discovery of any nonprivileged matter relevant to subject matter of action including information inadmissible at trial if information is reasonably calculated to lead to discovery of admissible evidence. (Fed. R. Civ. P. 26[b][1]). Federal rules now require mandatory disclosure and exchange of specific information prior to discovery request including as follows: names of individuals likely to have information relevant to facts; information concerning all relevant documents; data compilations and tangible things in parties' custody or control; computation of damages sought by disclosing party; any insurance agreement which may cover portion of judgment; specific information concerning experts to be used at trial; and identification of witnesses, documents and exhibits to be used at trial. (Fed. R. Civ. P. 26[a]). Materials prepared in anticipation of trial may be discovered only on showing of substantial need and undue hardship to obtain equivalent of materials by other means. (Fed. R. Civ. P. 26[b][3]).

Discovery Methods.

Discovery may be obtained by: deposition by oral or written examination (Fed. R. Civ. P. 27-32); written interrogatories to parties (Fed. R. Civ. P. 33); requests for production of documents to parties or inspection of land or real evidence (Fed. R. Civ. P. 34); order for physical or mental examination of party (Fed. R. Civ. P. 35); and requests for admissions (Fed. R. Civ. P. 36). For details concerning content of discovery requests and deadlines for requests and responses see specific rules.

Supplementing Disclosures.

No duty to supplement or correct disclosure or response to discovery unless ordered by court or if party learns material aspect of disclosure, interrogatory, request for production, or request for admission is incorrect or incomplete and correction has not been made known to other parties. (Fed. R. Civ. P. 26[e]).

Discovery Conference.

Rules generally require opposing parties to meet “as soon as practicable” and no later than 21 days before scheduling order is due to discuss claims and settlement possibilities, to make required disclosures, and to develop discovery plan, submitting within 14 days after conference written report outlining plan. (Fed. R. Civ. P. 26[f]).

Sanctions.

Party failing to provide discovery is subject to order compelling discovery and significant sanctions including possible costs and expenses, contempt order, and, ultimately, dismissal and default of disobedient party. (Fed. R. Civ. P. 37).

5.09 EQUITY:

See topics 5.02 Actions, 5.16 Practice.

5.10 EVIDENCE:

See topic 5.08 Depositions and Discovery.

Admission of evidence and testimony of witnesses in federal court governed by Federal Rules of Evidence (Fed. R. Evid.). Rules including general provisions (Fed. R. Evid. 101-106, 1101-1103) and rules relating to following: judicial notice (Fed. R. Evid. 201); presumptions applied in civil proceedings (Fed. R. Evid. 301); relevance (Fed. R. Evid. 401-415); privileges (Fed. R. Evid. 501); witness competency, knowledge, and testimony (Fed. R. Evid. 601-615); opinion and expert testimony (Fed. R. Evid. 701-706); hearsay rule and exceptions (Fed. R. Evid. 801-807); authentication and identification of evidence (Fed. R. Evid. 901-903); and requirements for admissibility of content of writings, recordings and photographs (Fed. R. Evid. 1001-1008).

Witnesses.

(Fed. R. Evid. 601-615) contain rules relating generally to competency and testimony of witnesses.

Privileged Communications.

General rule states privilege of witness governed by common law as interpreted by U.S. courts. (Fed. R. Evid. 501). When civil action involves claim or defense governed by state law privilege is determined by state law.

Attorney-Client Privilege.

Federal common law recognizes privilege for confidential communications, including certain documents, between attorney and client. Such communications may not be disclosed without client's consent.

Husband and Wife.

Federal common law also recognizes privilege of spouse to refuse to testify against other spouse in criminal cases. Privilege for confidential marital communications made during marital relationship also exists in civil and criminal cases applying federal law.

Communications with Persons Since Deceased or Incompetent.

In civil action, declaration of deceased or incompetent person is not inadmissible hearsay if: (1) it is former testimony or deposition given in proceeding where party against whom it is offered or party's predecessor in interest had opportunity to examine witness; (2) persists in refusing to testify concerning subject matter of declarant's statement despite order of court to do so; (3) declaration was, at time made, so far contrary to declarant's pecuniary or proprietary interest; (4) declaration concerned declarant's certain personal or family history where declarant had no means of acquiring personal knowledge of matter stated; or (5) declaration is offered against party who engaged in wrongdoing that was intended to and did procure declarant's unavailability. (Fed. R. Evid. 804[b]).

Self-Incrimination.

Privilege against self-incrimination exists. (U.S. Const. amend. V).

5.11 INJUNCTIONS:

Jurisdiction.

Federal courts may issue restraining orders and preliminary or permanent injunctions. See (Fed. R. Civ. P. 65.) Jurisdiction over appeals from interlocutory orders concerning injunctive relief governed by (28 U.S.C. §1292).

Prerequisites.

Preliminary injunction may not be issued without notice to adverse party. (Fed. R. Civ. P. 65[a][1]). Temporary restraining order (TRO) may be granted without notice to adverse party only if: (1) immediate and irreparable injury will result; and (2) applicant's attorney certifies to any efforts made to give notice and reasons notice should not be required. (Fed. R. Civ. P. 65[b]). TRO granted without notice expires by its terms and may not exceed ten days unless validly extended by court. (Fed. R. Civ. P. 65[b]).

Procedure.

Governed generally by (Fed. R. Civ. P. 65). District Court panel of three judges must be convened when required by federal act or for actions challenging constitutionality of apportionment of congressional districts or statewide legislative body. (28 U.S.C. §2284). TRO in such case may be granted by single judge until hearing and determination by district court of three judges of application for preliminary injunction. (28 U.S.C. §1253). U.S. court may not grant injunction to stay proceedings in state court unless expressly authorized by act of Congress or where necessary in aid of jurisdiction or to effectuate its judgments. (28 U.S.C. §2283). Injunctions in any case removed from state court to U.S. District Court remain in effect until dissolved or modified by district court. (28 U.S.C. §1450).

Contents.

Governed generally by (Fed. R. Civ. P. 65[d]).

Security.

Applicant other than U.S. or U.S. officer or agency must provide security for payment of costs and damages as may be incurred by party found to have been wrongly enjoined. (Fed. R. Civ. P. 65[c]).

5.12 JUDGMENTS:

Governed generally by (Fed. R. Civ. P. 54-63). See topics 5.02 Actions; 5.16 Practice.

Defined.

Any decree or order from which appeal lies. (Fed. R. Civ. P. 54[a]). Entry of judgment governed by (Fed. R. Civ. P. 58).

Summary Judgment.

Governed generally by (Fed. R. Civ. P. 56).

Declaratory Judgments.

With limited exceptions in specific actions U.S. courts may issue declaratory judgments. (28 U.S.C. §2201). Procedure for obtaining declaratory judgment governed generally by (Fed. R. Civ. P. 57).

Default Judgment.

Entry of default judgments governed by (Fed. R. Civ. P. 55).

Offer of Judgment.

Governed generally by (Fed. R. Civ. P. 68). May be made by defending party any time more than ten days before trial. If offer is not accepted and judgment obtained is not more favorable than offer, offeree must pay costs incurred after making of offer.

Docketing.

Governed by (Fed. R. Civ. P. 55).

Vacation or Modification.

New trials and amendment of judgments governed by (Fed. R. Civ. P. 59). Relief from judgment due to clerical or other mistakes, inadvertence, excusable neglect, newly discovered evidence, fraud or other justifiable reasons governed by (Fed. R. Civ. P. 60).

Lien.

Every judgment excluding those in favor of U.S. rendered by district court within state is lien on property located in state to same extent as court of general jurisdiction in state. (28 U.S.C. §1962).

Stay of proceedings to enforce judgment governed by (Fed. R. Civ. P. 62).

Foreign Judgments.

Final judgment in action for recovery of money or property entered in federal court may be registered in any judicial district. (28 U.S.C. §1963). Registered judgment has same effect as judgment of district court of district where registered. U.S. District Court in California has refused to enforce judgment of French court requiring Internet service provider to block access of French citizens to Nazi related materials available over Internet. (169 F. Supp. 2d 1181). French court had right to regulate speech in France, but enforcing judgment in U.S. would violate U.S. Constitution. (Id.).

5.13 LIMITATION OF ACTIONS:

Civil actions arising under Act of Congress enacted after Dec. 1, 1990 generally must be commenced within four years after cause of action accrues. (28 U.S.C. §1658). With limited exceptions, complaints in civil actions against U.S. must be filed within six years after cause of action accrues. (28 U.S.C. §2401[a]). Tort claims against U.S. barred unless presented in writing to appropriate U.S. agency within two years after claim accrues unless action commenced within six months after appropriate notice of final denial of claim by federal agency. (28 U.S.C. §2401[b]). Additional laws may govern limitation of actions in special actions or before specialized courts.

Actions to Enforce Fines.

Proceedings to enforce civil fine, penalty or forfeiture generally must be commenced within five years from date claim first accrued if offender or property is found in U.S. for service. (28 U.S.C. §2462).

Prohibition of Civil Actions Against Firearms Manufacturers, Distributors, and Dealers.

Act prohibits causes of action against manufacturers, distributors, dealers, and importers of firearms for harm caused by criminal or unlawful misuse of firearm by others when product functioned as designed and intended. (15 U.S.C. §7901). Act applies to actions brought in both federal and state courts. (15 U.S.C. §7902). Statute does not prohibit actions based on negligent entrustment of firearm or where party knew or should have known that purchaser was prohibited from possessing or receiving firearm or ammunition. (15 U.S.C. §7903). Also, statute does not apply to actions based on breach of warranty of where plaintiff's injuries or property damage resulted directly from defect in design or manufacture of product. (Id.).

Special Courts and Proceedings.

Additional rules relating to limitations of actions exist for particular categories of claims and in proceedings before specialized U.S. courts such as in actions before U.S. Court of Federal Claims. (28 U.S.C. §2501).

5.14 PARTITION:

U.S. may be named party in civil action to partition real or personal property on which U.S. has mortgage or other lien. (28 U.S.C. §2410). Complaint or pleading and service must meet requirements set forth in this statute.

5.15 PLEADING:

Governed by Fed. R. Civ. P. 7-16 and local rules of individual U.S. courts. See also topics 5.02 Actions and 5.16 Practice.

Pleadings Permitted.

Fed. R. Civ. P. 7[a] permits only complaint, answer, reply to counterclaim, answer to crossclaim, third-party complaint, third party answer, and, with court's permission, reply to answer or third-party answer.

Complaint.

Pleadings setting forth claim for relief must contain: (1) court's jurisdiction; (2) short plain statement of claim for relief; and (3) demand for relief. (Fed. R. Civ. P. 8[a]).

Answer.

Consists of defenses to each claim and denial or admissions of averments or statement party is without knowledge or information to form basis as to truth of averment. (Fed. R. Civ. P. 8[b]). Certain affirmative defenses must be specifically pleaded. (Fed. R. Civ. P. 8[c]). Averments not denied are admitted. (Fed. R. Civ. P. 8[b][6]).

Special Matters.

Special rules exist for pleading certain matters including: raising legal existence of party or capacity to be sued; circumstances constituting fraud or mistake; denial of condition precedent or occurrence; issuance of official document or act; court judgment or decision; averments of time and place; special damage; admiralty and maritime claims. (Fed. R. Civ. P. 9).

Counterclaims and Crossclaims.

Compulsory and permissive counterclaims and permissive crossclaims governed by Fed. R. Civ. P. 13. Counterclaims deemed “compulsory” generally must be pleaded if arose out of transaction or occurrence that is subject matter of opposing party's claim and does not require presence of third parties not subject to court's jurisdiction. (Fed. R. Civ. P. 13[a]). Counterclaims not arising out of transaction and occurrence of opposing claims, and crossclaims arising out of transaction and occurrence of original action or counterclaim, are not compulsory but may be asserted. (Fed. R. Civ. P. 13[b], [g]).

Third-Party Practice.

Permitted and governed by Fed. R. Civ. P. 14.

Amended and Supplemental Pleadings.

Party may amend pleading once before responsive pleading is served or within 20 days after pleading served if no responsive pleading is permitted and action not on trial calendar, or, thereafter, with leave of court or consent of adverse party. (Fed. R. Civ. P. 15[a]). Response to amended pleading due later of time for response to original pleading or ten days after service of amended pleading. Pleadings may be amended to conform to evidence and, under certain conditions, amendment relates back to date of original pleadings. (Fed. R. Civ. P. 15[c]).

Form of Pleadings and Verification.

Form of pleadings governed by Fed. R. Civ. P. 10. All pleadings must contain caption stating court, title of action and file number, and first party on each side or all parties in complaint. (Fed. R. Civ. P. 10[a]). Each pleading must be signed by attorney or party if not represented and submission of signed pleading to court certifies that to best of signor's knowledge, information and belief after reasonable inquiry: pleading is not being presented for any improper purpose; claims, defenses and legal contentions are warranted by existing law; allegations and contentions have evidentiary support; and denials of contentions are warranted. (Fed. R. Civ. P. 11). Sanctions for violation of certification governed by Fed. R. Civ. P. 11[c].

Service and Filing.

All pleadings subsequent to original complaint must be served on attorney for each party unless court orders service on party by delivering or mailing copy to last known address. Service by mail is complete upon mailing. (Fed. R. Civ. P. 5[b]). Pleadings served on party must also be filed with clerk of court within reasonable time after service. (Fed. R. Civ. P. 5[d]). For service of original complaint see topic 5.17 Process. For service in action with unusually large number of defendants, see Fed. R. Civ. P. 5[c].

Time.

Computation of time periods prescribed for service and filing of pleadings governed by Fed. R. Civ. P. 6[a].

5.16 PRACTICE:

See category 6 Courts and Legislature. See also topics 5.02 Actions, Appeals and Error, 5.08 Depositions and Discovery, 5.10 Evidence, 5.11 Injunctions, 5.12 Judgments, 5.15 Pleading and 5.17 Process.

Practice in U.S. courts governed by Federal Rules of Civil Procedure, Federal Rules of Appellate Procedure, Federal Rules of Evidence, and Local Rules of District Courts, Courts of Appeals, and U.S. Supreme Court.

5.17 PROCESS:

General Requisites.

Civil action is commenced by filing complaint with court. (Fed. R. Civ. P. 3). Upon filing, plaintiff presents summons to clerk of court for signature and seal for service by plaintiff on defendant. (Fed. R. Civ. P. 4[b]). Summons directed at defendant must be signed by clerk, bear seal of court, identify court and parties, state name and address of plaintiff or plaintiff's attorney if plaintiff is represented, and state time for defendant to appear and notify defendant that judgment by default will issue for failure to appear and defend. (Fed. R. Civ. P. 4[a]). Defendant may waive service of summons. (Fed. R. Civ. P. 4[d]).

Who May Serve.

Any nonparty who is at least 18 years of age unless otherwise directed by court. (Fed. R. Civ. P. 4[c][2]).

Service on Individual.

Unless federal law provides otherwise, service may be made in any U.S. judicial district pursuant to law of state in which district court is located or in which service is effected in action brought in courts of general jurisdiction of state, or by delivering copy of summons and complaint to individual personally, leaving copies at dwelling or usual place of abode with person of suitable age or discretion residing there, or delivering copy of summons and complaint to authorized agent. (Fed. R. Civ. P. 4[e]).

Service of Individuals in Foreign Country.

Generally made by internationally agreed means or, if no such agreed means, in manner prescribed by law of foreign country for service; as directed by foreign authority in response to letter rogatory or letter of request; or, if not prohibited by foreign country, personal delivery of summons and complaint, or mail requiring receipt or other method as directed by court. (Fed. R. Civ. P. 4[f]).

Service on Infant or Incompetent.

Made in manner prescribed by law of state in which service is made. (Fed. R. Civ. P. 4[g]).

Service on Partnerships, Corporations, and Associations.

Generally made in manner prescribed for individuals or by delivering summons and complaint to authorized agent and mailing copy to defendant or, if outside U.S. judicial district, in manner prescribed for individuals in foreign country. (Fed. R. Civ. P. 4[h]).

Service on U.S.

Made by: (1) delivering copy of summons and complaint to U.S. attorney or other designated person for district in which action is brought or by registered or certified mailing of summons and complaint to civil process clerk at office of U.S. attorney; (2) by sending copy of summons and complaint by registered or certified mail to U.S. Attorney General in Washington, D.C.; and (3) in actions attacking validity of order of officer or agency of U.S. not made party, sending copy of summons and complaint by registered or certified mail to such officer or agency. (Fed. R. Civ. P. 4[i]). Service on U.S. officer, agency, or corporation made in manner set forth above and by sending copy of summons and complaint by registered or certified mail to such officer, agency, or corporation. (Fed. R. Civ. P. 4[i][2]).

Service on Foreign Governments.

Governed by 28 U.S.C. §1608. (Fed. R. Civ. P. 4[j][1]).

Service on State or Local Governments.

Made by delivering copy of summons and complaint to chief executive officer or in manner prescribed by law of that state. (Fed. R. Civ. P. 4[j][2]).

Time for Service.

Within 120 days after filing complaint subject to extension by court for good cause. (Fed. R. Civ. P. 4[m]). Rule does not apply to service in foreign country.

Proof of service is required whenever service is not waived and is generally made by affidavit if service is by person other than U.S. marshal or deputy marshal. (Fed. R. Civ. P. 4[l]).

See rule for proof in service outside U.S. judicial district.

Effective Service.

Service or waiver of service of summons establishes personal jurisdiction over defendant as follows: (1) if defendant could be subject to jurisdiction of court of general jurisdiction in state where district court is located; (2) if defendant was joined under Fed. R. Civ. P. 14 or 19 and service was made within judicial district within 100 miles from where summons issues; (3) if defendant is subject to federal interpleader jurisdiction under 28 U.S.C. §1335; (4) when authorized by U.S. statute; or (5) for claims arising under federal law if exercise of jurisdiction is consistent with U.S. Constitution and laws. (Fed. R. Civ. P. 4[k][2]).

5.18 SERVICE:

See topics 5.17 Process and 5.15 Pleading.

5.19 VENUE:

Venue refers to federal judicial district in which action may be brought. Venue in U.S. district courts governed generally by 28 U.S.C. §§1391-1413.

In Diversity Cases.

Civil actions in which jurisdiction is based on diversity of citizenship of parties generally may be brought only in: (1) judicial district where any defendant resides if all defendants reside in same state; (2) judicial district where substantial part of events or omissions giving rise to claim occurred or where property subject of action is situated; or (3) if there is no other district where action may be brought, judicial district where any defendant is subject to personal jurisdiction when action is commenced. (28 U.S.C. §1391[a]).

Other Cases.

Civil actions in which jurisdiction is not based on diversity of citizenship generally may be brought in: (1) judicial district where any defendant resides if all defendants reside in same state; (2) judicial district in which substantial part of events or omissions giving rise to claim occurred or where property subject of action is situated; or (3) judicial district where any defendant may be found if there is no other district where action may be brought. (28 U.S.C. §1391[b]).

Corporate Defendants.

Defendant corporation resides, for venue purposes, in any judicial district where it is subject to personal jurisdiction when action is commenced. (28 U.S.C. §1391[c]).

Alien Defendant.

Suit may be brought in any district.

U.S. Officer or Agency.

Suit may generally be brought in any judicial district where: (1) defendant resides; (2) substantial part of events or omissions occurred or where property subject of action is situated; or (3) plaintiff resides if action involves no real property. (28 U.S.C. §1391[e]).

Foreign State Defendant.

Governed by 28 U.S.C. §1391[f].

Local Actions.

In civil actions involving property located in different districts in same state may be brought in any such district. (28 U.S.C. §1392).

Forfeiture and Penalty Proceedings.

Venue in actions to recover penalty, fine or for forfeiture governed by 28 U.S.C. §1395.

Interpleader.

Civil action of interpleader may be brought in judicial district where one or more claimants reside.

Actions against U.S.

Venue is governed by 28 U.S.C. §1402.

Change of Venue.

Action may be transferred to any district where it might have been brought for convenience of parties and witnesses in interest of justice. (28 U.S.C. §1404[a]). Action may be transferred on motion, consent, or stipulation from one division in district to another division in same district. (28 U.S.C. §1404[b]).

Special Actions.

For special venue rules for particular actions see generally 28 U.S.C. §§1391-1413.

6 COURTS AND LEGISLATURE

—Scope —

Note: Citations are to Title 28 U.S.C. unless otherwise noted.

6.01 COURTS:

Note: See http://www.uscourts.gov/.

U.S. Supreme Court.

See http://www.supremecourtus.gov/. Constitution provides that judicial power of U.S. vests in one Supreme Court and in such other inferior courts as Congress may establish. (U.S. Const. art. III, §1). Supreme Court consists of Chief Justice and eight Associate Justices. (28 U.S.C. §1). It holds one regular term per year beginning on first Mon. of Oct. (28 U.S.C. §2).

In order for Supreme Court to have jurisdiction, case or controversy must exist within judicial power of federal courts: it must arise under Constitution, laws, or treaties of U.S.; or affect ambassadors, ministers or consuls; or within admiralty and maritime jurisdiction; or involve two or more states, state and citizens of another state, citizens of different states, citizens of same state claiming lands under grants to different states; or states or citizens thereof and foreign states, citizens or subjects. (U.S. Const. art. III, §2, cl. 1).

Supreme Court has original jurisdiction in cases affecting ambassadors, other public ministers and consuls, and in cases in which state is party. (U.S. Const. art. III, §2, cl. 2). In all other cases within judicial power of federal courts, it exercises appellate jurisdiction, both as to law and fact with exceptions and regulations made by Congress. (U.S. Const, art. III, §2, cl. 2).

Procedures in actions within original jurisdiction of Supreme Court governed by Sup. Ct. R. 17 and when appropriate, Federal Rules of Civil Procedure.

See also category 5 Civil Actions and Procedure, topic 5.03 Appeal and Error.

U.S. Court of Appeals.

See http://www.uscourts.gov/courtlinks/index.cfm. Constitution empowered Congress to establish federal district and appellate courts and procedural rules governing litigation in these courts. (28 U.S.C. §2072). Court of Appeals established for each of the 12 geographical circuits in U.S. (28 U.S.C. §§41, 43[a]). Each Court of Appeals holds annual terms or sessions at places designated by statutes. (28 U.S.C. §48[a]). In addition to the 12 geographical circuits, U.S. Court of Appeals for Federal Circuit is headquartered in Washington, D.C. (28 U.S.C. §§41, 48[a]). Federal Circuit exercises nationwide jurisdiction over specific appeals regarding claims against federal government, patents, international trade, civil service, government contracts, and plant variety protection. (28 U.S.C. §1295). Court of Appeals equals court of last resort, unless Supreme Court exercises its jurisdiction to hear case or statute grants appeal as of right. Court of Appeals decides appeals from U.S. District Courts, reviews administrative action and issues supervisory writs to U.S. District Courts. Except for appeals to Court of Appeals from decisions of federal administrative agencies, jurisdiction of Courts of Appeals is similar to district courts. Each Court of Appeals consists of circuit judges of circuit in regular active service. (28 U.S.C. §43[b]). Number of judges assigned each circuit statutorily prescribed. (28 U.S.C. §44[a]). Each circuit has chief judge. (28 U.S.C. §45[a][1]). Procedure is governed by federal court rules and local rules such as Federal Rules of Appellate Procedure.

District Courts.

See http://www.uscourts.gov/districtcourts.html. U.S. divided into approximately 94 judicial districts, with U.S. District Court established in each district. (28 U.S.C. §§81-131, 132[a]). U.S. District Court also located in District of Columbia. (28 U.S.C. §88). Federal district courts, located within states of U.S., and D.C. are trial courts of federal court system, pursuant to Article III of U.S. Constitution. (U.S. Const. art. III, §1). District Courts also located in Puerto Rico pursuant to congress' power to govern territories of U.S. (28 U.S.C. §119; U.S. Const. art. IV, §3, cl. 2). Jurisdiction of district courts is limited to territorial district. District courts have courts of limited jurisdiction. Jurisdiction must be specifically conferred on them. Each district court consists of district judge or judges for district in regular active service. (28 U.S.C. §132[b]). Number of judges assigned to each district specified by statute. (28 U.S.C. §133). Each district has chief judge. (28 U.S.C. §136[a][1]). District court does not hold formal terms and may hold regular sessions at places designated by statutes. (28 U.S.C. §§138, 139; Fed. R. Civ. P. 77[a]), 81-131). Procedure governed by Federal Court Rules and local rules. (Fed. R. Civ. P. 83, 1). Federal district courts have subject matter over civil cases on two bases: federal question and diversity. (U.S. Const. art. III). General original federal question jurisdiction provides that district courts have original jurisdiction of all civil actions arising under constitution, laws, or treaties of United States. (U.S. Const. art. III, §2, cl. 1; 28 U.S.C. §1331). Several statutes also grant jurisdiction to district courts over special kinds of federal question suits such as: patent and copyright (28 U.S.C. §1338[a]), postal service (28 U.S.C. §1339), internal revenue (28 U.S.C. §1340) and civil rights (28 U.S.C. §1343). Generally, statutes confirming federal question jurisdiction on federal courts confer jurisdiction concurrent with state courts. Article III of U.S. Constitution authorizes district court's diversity jurisdiction which is specifically conferred in courts by statute. (U.S. Const. art. III, §2, cl. 1; 28 U.S.C. §1332). $75,000 in controversy must exist for federal district court to have jurisdiction over suit brought under diversity statute. (28 U.S.C. §1332[a]). District court's jurisdiction over civil cases also includes other bases, such as admiralty. (U.S. Const. art. III, §2, cl. 1; 28 U.S.C. §1331).

6.02 LAW REPORTS, CODES:

See topics 6.04 Reports, 6.05 Statutes.

6.03 LEGISLATURE:

See category 1 Introduction, topic 1.06 Government and Legal System.

6.04 REPORTS:

Decisions of U.S. Supreme Court are reported in United States Reports, cited “U.S.” (28 U.S.C. §411[a]). Decisions of Federal Court of Appeals reported in Federal Reporter, cited as “F., F.2d, F.3d”. Selected decisions of district courts are cited in Federal Supplement Reporter, cited as “F. Supp., F. Supp. 2d” . Other publications of federal judicial opinions also located in specialty reporters, such as Federal Rules Decisions (F.R.D.) and Bankruptcy Reporter.

Digests used to access federal decisions in federal reporters. Such digests include: Federal Practice Digest series and United States Supreme Court Digest.

6.05 STATUTES:

Statutes of U.S. compiled and published in United States Code and two unofficial publications: United States Code Service and United States Code Annotated. Regulations made under authority of federal statutes are compiled in Federal Code of Regulations. See also category 1 Introduction, topic 1.06 Government and Legal System.

7 CRIMINAL LAW

7.01 BAIL:

Federal Bail Reform Act gives federal magistrates power to hold defendants without bail when no conditions of release will reasonably assure person will appear as required or when no conditions can assure safety of any other person and community. (18 U.S.C. §3142[b]). See also 18 U.S.C. §§3146-3152.

7.02 FOREIGN CORRUPT PRACTICES ACT:

See category 15 Foreign Trade and Commerce, topic 15.06 Foreign Trade Regulation.

7.03 GENERAL CRIMES:

Criminal law generally jurisdiction of individual states. See individual State Digests. Conviction for conspiracy to commit money laundering does not require proof of overt act under 18 U.S.C. §1956[h]; 543 U.S. 209.

Firearms.

“Convicted in any court” element of federal felon-in-possession of firearm statute excludes convictions based in foreign courts. (18 U.S.C. §922[g][1]; 544 U.S. 385).

7.04 RICO:

Racketeer-Influenced and Corrupt Organizations Act (RICO) imposes civil and criminal liability for certain acts related to enterprise. (18 U.S.C. §§1961-1968). RICO enumerates four illegal actions: (1) investing income derived from pattern of racketeering activity in any enterprise; (2) acquisition or maintenance of any interest in such enterprise through pattern of racketeering activity; (3) participating, directly or indirectly, in conduct of enterprise through pattern of racketeering activity; and (4) conspiring to do any of preceding. (18 U.S.C. §1962). Under RICO, enterprise must affect interstate commerce. “Racketeering activity” defined as commission of or threat to commit certain state crimes enumerated under RICO or any indictable acts specified by numerous federal crimes, including mail and wire fraud, bankruptcy offenses, securities fraud, and drug related offenses. (18 U.S.C. §1961[l]). “Pattern” of racketeering defined as commission of two related and continuous acts within ten years. “Related” offenses are linked by common goal or logical connections. (18 U.S.C. §1961[l], [5]). “Enterprise” includes formal business organizations, or any group of persons associated together for common purpose of engaging in course of conduct. (18 U.S.C. §1961[4]). RICO statute often used to target organized crime groups, political corruption, and white collar crime.

Sanctions.

Up to 20 years imprisonment (or life if violation based on racketeering activity with maximum penalty of life imprisonment) and significant monetary fines for RICO violations or both. (18 U.S.C. §1963[a]). Defendants convicted under RICO must forfeit any interest in and proceeds from criminal enterprise. (18 U.S.C. §1963[a]).

Civil Application of RICO.

Federal court empowered under RICO to grant injunctive relief ordering divestiture or limits on future activities of enterprises. (18 U.S.C. §1964[a]).

7.05 SENTENCING:

Federal Guidelines Sentencing Reform Act provides precise method of calculating sentences of federally convicted criminal defendants. (18 U.S.C. §3551). Guidelines create sentences that are product of two factors: (1) adjusted offense level of particular crime, and (2) defendant's criminal history category. (18 U.S.C. §3551). Guidelines effectively advisory, not mandatory. (125 S.Ct. 738). Guidelines subject to jury trial requirements. (543 U.S. 220).

Executions.

Execution of individuals under 18 years of age at time of crime is unconstitutional. (543 U.S. 551).

7.06 USA PATRIOT ACT:

Note: See http://www.usdoj.gov; http://www.lifeandliberty.gov.

Enhanced Surveillance Procedures.

Amends Federal criminal code to authorize interception of wire, oral, and electronic communications in specific circumstances. (Patriot Act §202; 18 U.S.C. §2516[1][c]).

FISA.

Foreign Intelligence Surveillance Act. (50 U.S.C. §1801 et seq.; 50 U.S.C. §1861). Governs collection of foreign intelligence information through electronic surveillance.

Authority to Share Grand Jury Information.

Permits sharing of grand jury information involving foreign intelligence with Federal law enforcement, intelligence, protective, immigration, national defense, or national security officials subject to specified requirements. (Patriot Act §203; Fed. R. Crim. P. 6).

Searches.

Permits seizure by warrant of voice-mail messages. (Patriot Act §209; 18 U.S.C. §2510). Expands scope of subpoenas for electronic communication records to include length and type of service utilized, temporarily assigned network address, and sources of payment. (Patriot Act §210; 18 U.S.C. §2703[c][2]). Permits interception of wire and electronic communication of computer trespasser. (Patriot Act §217; 18 U.S.C. §2510).

Civil Penalties and Fines.

Patriot Act §361 increases to $1 million maximum civil penalties and criminal fines for money laundering. (31 U.S.C. §5321[a][7]).

7.07 Military Commissions

Chapter 47A, Title 10, creates procedures governing the use of military commissions to try alien unprivileged enemy belligerents, formerly known as enemy combatants. Commission may be convened by Secretary of Defense or official designated by the secretary. Composition of the commissions are detailed in 10 U.S.C. §§948h to 948m. Pre-trial proceedings initiated by charges and specifications. (10 U.S.C. §§948q to 948s). Trial proceedings governed by 10 U.S.C. §§949a to 949o. For proceedings involving classified information, special protections are afforded. (10 U.S.C. §§949p-1 to 949p-7). Sentencing, post-trial procedure and review governed by 10 U.S.C. §§949s to 950j. Offenses set out are triable by military commissions only if committed in context of hostilities. (10 U.S.C. §§950p to 950t).

8 DEBTOR AND CREDITOR

8.01 BANKRUPTCY:

Note: Pub. L. No. 109-8 (H.R. 1134, S.256), The Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (“2005 Abuse Act”), implementing major Bankruptcy Code revisions became effective in 2005.

Note: See http://www.uscourts.gov/bankruptcycourts.html.

Note.

Unless otherwise indicated, § citations are to 11 U.S.C., the Bankruptcy Code. Federal Rules of Bankruptcy Procedure are cited as Fed. R. Bankr. P.

U.S. Constitution art. 1, §8 gives Congress power to enact Uniform Federal Bankruptcy Laws applicable throughout U.S.A. Bankruptcy Reform Act of 1978 creating Bankruptcy Code (11 U.S.C., codification of bankruptcy law; 28 U.S.C., structure and jurisdiction of bankruptcy courts) were substantially revised in 1986. Procedure matters are primarily part of rule-making function of U.S. Supreme Court per 28 U.S.C. §2075. See, 1991 Federal Rules of Bankruptcy Procedure (Fed. R. Bankr. P.), supplemented by local rules adopted by many district and bankruptcy courts, which must also be consulted.

Organization of Bankruptcy Code.

11 U.S.C. (Bankruptcy Code) originally drafted using only odd numbered chapters, with even numbers reserved for later additions. “Universal Chapters” (1, 3 and 5) contain definitional and administrative provisions generally applicable to “Operative Chapters” (7, 9, 11, 13 and 12, the latter added by Family Farmer Bankruptcy Act of 1986). Chapter 1, “General Provisions”, includes extensive definitions applicable to all other Code Chapters. (11 U.S.C. §101). Chapter 3, “Case Administration”, deals with case commencement, officers including trustees, and administrative powers, including automatic stay of actions against debtor. Chapter 5, “Creditors, Debtor and the Estate” deals with creditors and proofs of claim, debtor's duties and choice of exemptions and discharge provisions, and bankrupt estate, including collection by trustee. Operative Chapters include 7 (“Liquidation and Distribution of Debtor's Estates to Creditors”); 9 (“Municipality Debtors”); 11 (“Reorganization of Business Debtors” and “Debtor in Possession”); 12 (“Family Farmer Debtors”); 13 (“Individual Debtors with Regular Income”); and 15 (“Ancillary and Other Cross-Border Cases”).

“Debtor” is “person or municipality concerning which a case under this title has been commenced”. (11 U.S.C. §101[13]). “Person” includes individuals, partnerships and corporations, but not governmental units. (11 U.S.C. §101[41]). Debtor must be person who resides or has domicile, place of business, or property in U.S.A., or a municipality. (11 U.S.C. §109[a]).

Individuals or family farmers may not be debtors protected by bankruptcy law if during preceding 180 days, case was dismissed by court for willful failure of debtor to abide by orders of court, or such person: (1) Failed to appear before court in proper prosecution of case; (2) requested and obtained voluntary dismissal of case following filing of request for relief from automatic stay (11 U.S.C. §109[g]); or (3) received discharge within eight prior years (11 U.S.C. §727[a][8], [9]). (11 U.S.C. §109[b]-[f]) further define who may be debtors under each Operative Chapter of Code, including prerequisite of credit counseling. Debtor cannot receive Chapter 13 discharge if received Chapter 7, 11 or 12 discharge within preceding four years or another Chapter 13 discharge within preceding two years. (11 U.S.C. §1328[f]). Debtor who has received Chapter 13 discharge may file Chapter 11, 12 or 13 case at any time and receive discharge if debtor otherwise eligible to file under those chapters. Small business debtor generally has not more than $2 million aggregate non-contingent, liquidated secured and unsecured debts as of petition or order for relief. (11 U.S.C.. §101[51D]).

Commencement of Case.

Cases commenced by filing of petition in proper form, with proper mandatory fee, in proper district. May be either voluntary (filed by debtor) or involuntary (filed by creditors). Petitions are filed with Bankruptcy Court clerk's office on Official Forms. 2005 Abuse Act §§101-107 creates “need-based” bankruptcy by amending 11 U.S.C. §§704-711 and 109 to limit Chapter 7 filings, forcing individual debtors to file under Chapter 13 (see subheads Chapter 7 Liquidation, catchline Motions; Conversions; Chapter 11 Reorganization, infra), and creating simple (rather than substantial) abuse standard for dismissal or conversion.

Credit Counseling.

11 U.S.C. §342[b] mandates written notice to individual consumer debtor before commencement stating types of credit counseling services available and criminal penalties for fraudulent concealment of assets. Individual debtor prohibited from filing unless received briefing from approved nonprofit budget and credit counseling service within six months of filing unless U.S. Trustee determines service not available to debtor. Clerk of each district required to maintain list of credit counseling agencies and courses. (11 U.S.C. §111). 11 U.S.C. §362 curbs bad faith repeat filings by creating presumption based on history of previous petitions. See subhead Discharge, infra.

Voluntary Cases.

Commenced when debtor files petition with Bankruptcy Court, which constitutes “Order for Relief” (11 U.S.C. §301), and which triggers automatic stay of other proceedings against debtor. See subhead Automatic Stay, infra. Any individual or business entity may be voluntary debtor under Chapter 7 except railroads, most domestic financial institutions, and most foreign financial institutions (11 U.S.C. §109[b]), or under Chapter 11 except stockbrokers or commodity brokers. Chapter 13 eligibility restricted to individuals or individuals and spouses; business entities cannot be debtors under Chapter 13. Chapter 13 debtors (and spouse) may not have non-contingent, liquidated, unsecured debts greater than $336,900, and similar secured debts greater than $1,010,650 (11 U.S.C. §109[e]), and debtor must have regular income “sufficiently stable and regular to enable [debtor] to make payments” under Chapter 13 plan (11 U.S.C. §101[30]). Bankruptcy Rules and Forms require debtor to file specified documents with petition, including, inter alia, schedule of real property interests and encumbrances, schedule of all personal property, all property claimed as exempt and other schedules specified in Fed. R. Bankr. P. §1007[b][1]. Official Form 6 sets out content and form of schedules. (11 U.S.C.. §302[a]) permits joint filing by spouses. See subheads Chapter 7 Liquidation, Chapter 11 Reorganization and Chapter 13, infra.

Involuntary Cases.

Petitions may be filed under Chapter 7 or 11 against debtors who are persons generally eligible for relief under those Chapters. If filed against debtor who has more than 12 creditors, at least three creditors with aggregate unsecured claims not less than $13,475 must jointly petition. (11 U.S.C. §303[b][1]). Such claims must not be contingent or subject to bona fide dispute. If debtor has less than 12 creditors, one or more creditors with aggregate claims of at least $13,475 may file involuntary petition. (11 U.S.C. §303[b][2]). Filing of involuntary petition creates bankrupt estate and automatic stay immediately goes into effect, but filing of petition does not constitute order for relief. (11 U.S.C. §362[a]). Debtor may contest involuntary petition within 20 days after service of summons. If involuntary petition successfully challenged, potential involuntary bankrupt may recover costs and attorney fees, and, if petition filed in "bad faith", damages and possibly punitive damages. (11 U.S.C. §303[i][1] and [2]). Primary grounds for granting involuntary petition is debtor not paying debts as they come due and, thus, equitably insolvent. (11 U.S.C. §303[h][1]). Ordinarily failure to pay single creditor not sufficient.

Filing Fees.

Petitions must be accompanied by mandatory filing fees, paid by cash, check or by money order payable to "United States Bankruptcy Court". See (28 U.S.C. §1930[a][1] for Chapter 7 voluntary petition filing fees and refer to local rules. By application, fees may be paid in installments. See Fed. R. Bankr. P. 1006[b]. Filing fees must be paid in full before debtor can pay attorneys or other persons for services.

Property of Estate.

Filing of bankruptcy petition automatically creates estate, including all legal and equitable interests of debtor, which property is administered in bankruptcy proceedings. Property comprising estate includes: (1) Pre-petition property; (2) community property; (3) property recovered during case; (4) property rights preserved for estate; and (5) certain post-petition "wind-falls" described in 11 U.S.C. §541[a][5], such as property received by bequest or inheritance, received as property settlement or divorce decree, or received as beneficiary of life insurance or death benefit plan. Property claimed by debtor as exempt is removed from estate. (See catchline Exemption, infra.) However, if post-petition property would have been part of estate if debtor owned it prior to petition, property actually acquired within 180 days of petition becomes part of estate. Generally in Chapter 7 case property acquired by debtor post-petition not part of estate. Earnings from services performed by individual debtor after commencement of case excluded from estate. In addition, 11 U.S.C. §541[b] excludes six limited classes of property from estate, including inter alia, spendthrift trust property, property held for persons other than debtor. (11 U.S.C. §541[c]) effectively eliminates contractual provisions limiting transferability of property upon filing of bankruptcy petition and includes such property in estate. 11 U.S.C. §542 authorizes trustee to obtain possession and control of property of estate to properly administer estate in liquidation cases.

Exemption of certain property from property of estate allowed to individual debtors under 11 U.S.C. §522 in order to provide debtor with "fresh start" and to avoid depriving even hopelessly insolvent debtors of basic necessities of life. Debtors may choose between: (1) State exemption laws and federal non-bankruptcy exemption laws, or (2) list of federal bankruptcy exemptions. (11 U.S.C. §522). Individual states may "opt out" of federal bankruptcy exemption alternative of Code; 37 states preclude election of exemptions under Code, forcing debtor to rely on exemptions provided by state of domicile and/or federal non-bankruptcy exemptions. Minimum duration of debtor's domicile for purpose of determining which state law governs is 730 days. (11 U.S.C. §522[b][3]). Generally, security interests and liens have priority over exemptions. However, under Code's federal exemptions and some state laws, some liens on exempt household goods can be avoided by individual debtors through redemption. 11 U.S.C. §522[f] provides limiting definition of household goods. Fed. R. Bankr. P. 4003[b] permits trustee or any creditor to object to debtor's exemption list. Exempt property not protected from tax claims, valid liens, alimony, maintenance or support claims. (11 U.S.C. §522[c]). Value of homestead exemption limited by two year duration domicile requirement and reduced to extent attributable to any portion of property disposed of in ten-year period before filing date with intent to hinder, delay, or defraud creditor (11 U.S.C. §522[o][4]); debtor may not exempt homestead interest (other than principal residence of family farmer) acquired during 1215 day period preceding filing which exceeds $136,875 in value. (11 U.S.C. §522[p][1][D]). Individual debtor may exempt certain tax exempt retirement funds up to established limit. (11 U.S.C. §§522 and 541).

Automatic Stay.

Immediately upon filing of petition, property of estate and debtor come under protection of automatic stay of commencement or continuation of: (1) Any judicial administrative or other proceeding against debtor commenced before petition or to recover claims against debtor arising before commencement of case; (2) enforcement against debtor or property of judgments obtained prior to commencement of case; (3) actions to obtain possession of property of estate or to enforce any lien against such property; (4) perfection or enforcement against property of debtor of any lien securing claims that arose before commencement of case; (5) any action to recover claims against debtor arising before commencement of case; (6) protecting right of set-off of debts owing to debtor arising before commencement of case; and (7) commencement or continuation of proceedings before U.S. Tax Court concerning debtor. (11 U.S.C. §362[a]). Exempted from automatic stay are criminal actions against debtor, domestic support obligations proceedings, including child custody or visitation, dissolution of marriage, domestic violence, paternity claims, order for alimony, maintenance, or support or collection thereof, specified residential real property eviction proceedings by lessor against debtor if lessor obtained judgment for possession prior to filing or lessor certifies specified debtor offenses, and audits by any governmental unit to determine tax liability and assessment of any tax or demand for payment of such assessment. However, commencement or continuation of U.S. Tax Court proceedings is subject to stay. (11 U.S.C. §362[a][8], [b][22-24]). Court may impose discretionary stays to avoid irreparable injury to debtor. (11 U.S.C. §105[a]). Actions violating automatic stay are void even if taken without notice of stay. Knowing violation of automatic stay is contempt punishable by bankruptcy court; debtor may also seek damages and attorneys fees against creditor for such violation. (11 U.S.C. §362[c]) terminates automatic stay 30 days after filing if Chapter 7, 11, or 13 petition was pending or dismissed within preceding year unless subsequent filing in good faith. 11 U.S.C. §362[b] mandates two-year relief from automatic stay upon request of party in interest in connection with real property actions if court finds filing was part of scheme to delay, hinder, and defraud creditors.

Claims and Interests.

Rights of those other than debtor in estate and property of estate divided into two basic classes: claims and interests. Claims include debts owed or potentially owed or rights against debtor to equitable remedy arising from breach of contract. Interests include rights to specific property of estate or to residue of estate (“equity”).

Secured Claims.

See categories 22 Mortgages; Business Regulation and Commerce, topic Securities in individual State Digests. Secured claims, while protected in bankruptcy, are subject to automatic stay of actions against debtor and property; thus lien cannot be foreclosed upon unless court permits. (11 U.S.C. §362[a]). Filing significantly curtails lien creditor's right to after-acquired property. (See 11 U.S.C. §552[b]). Secured claims generally cannot be for more than value of property subject to debt. Under-secured claims are bifurcated, with amount of claim exceeding value of property classified as unsecured. (11 U.S.C. §506[a]). See subhead Chapter 13, catchline Conversions, infra.

Unsecured Claims.

Ranked by priorities established by Code. Highest priority among unsecured claims is administrative expenses arising from expenses involved in bankruptcy proceeding itself, including costs of preserving estate, compensation of professionals, trustee and others providing services and reimbursement of expenses. (11 U.S.C. §503[b]). Other priorities following priority for administrative expenses generally entitled to payment in full before any payment of claims in lower priority classes. (When insufficient funds exist to fully pay every claim in particular class, claims paid pro rata and no payment made to claims in lower priority classes.) Order of priorities following administrative expenses from highest to lowest: (1) Claims arising in ordinary course of involuntary debtor's business or financial affairs after commencement of case but before entry of order for relief or trustee appointment (11 U.S.C. §502[f]); (2) wages earned within 180 days before filing of petition, not to exceed $10,950 per claimant (11 U.S.C. §507[a][4]); (3) certain contributions to employee benefit plans relating to services rendered within 180 days of filing petition or date debtor seized business, not exceeding $10,950 per employee covered by plan (11 U.S.C. §507[a][5]); (4) special priorities of farmers and fisherman against storage facilities, not exceeding $5,400 per claim (11 U.S.C. §507[a][6]); (5) claims of individual buyers who have made down payments or layaway deposits to debtor for goods or services acquired for personal, family, or household use of claimant, not exceeding $2,425 per claimant (11 U.S.C. §507[a][7]); (6) unsecured claims for domestic support obligations if funds received by government unit applied in prescribed order (11 U.S.C. §507[a][1]); (7) various taxes, customs duty and penalties; and (8) and claims for unkept commitments of debtor to maintain capital of insured depository institution ("S&L Priority"), unlimited as to amount. Since 1994 all dollar-capped priorities automatically change every three years to adjust for consumer price index under 11 U.S.C. §104[b].

"General unsecured claims" are claims not otherwise classified, including tort obligations. Claims subordinated by agreement of claim holder rank below general unsecured claims.

Claims are deemed allowed if proof of claim filed, unless party in interest objects, in which case court after notice and hearing determines amount of claim allowed. (11 U.S.C. §502[b]). Value of contingent or unliquidated claims determined by lifting automatic stay to allow trial on merits or binding estimation by bankruptcy court. (11 U.S.C. §502[c][1]). Court may reduce claim by up to 20% if debtor shows creditor unreasonably refused to negotiate reasonable alternative repayment schedule proposed by approved credit counseling agency. (11 U.S.C. §502[k][1]). Only if objection made are there limitations on allowance of claims. Such limitations derived from non-bankruptcy substantive law or Code-imposed caps under 11 U.S.C. §502[b].

Interests refer to co-ownership, liens, or interests in debtor itself if debtor is corporation, partnership, or other entity. Interests allowed upon filing of proof; if no objection is made, deemed allowed. Objection can be made by any party in interest, including creditors. Interests rarely contested. Interests may be prioritized by contract underlying interest (e.g., classes of stock in corporations). In addition to equity security holders, other interests include trustees under indenture, statutory lien holders and lessors. (11 U.S.C. §101[29] and [53]).

Discharge.

Main goal of debtors in bankruptcy is that all obligations not satisfied through bankruptcy proceedings cease to be legally binding on debtor. Discharge individual to particular debtor and does not extinguish debt itself if there is co-obligor or guarantor. Discharge applies to secured debts but not liens or perfected security interests; only right to proceed personally against debtor discharged.

In Chapter 7 proceedings misconduct by debtor can result in denial of discharge. Such misconduct includes fraudulent transfers, destruction or concealment of property, failure to maintain relevant records, misconduct in bankruptcy proceeding itself (such as perjury, bribery, withholding records, failure to account for missing assets, or refusal to obey court orders), and receipt of Chapter 7 discharge in case commenced within eight years of filing date. (11 U.S.C. §727[a]). Trustees, every creditor, and U.S. Trustee have standing to challenge debtor's discharge as parties in interest. (11 U.S.C. §727[c][2]). Under Chapter 11 discharge occurs upon confirmation of plan; debtor misconduct may result in creditors rejecting plan or court refusing confirmation. Under Chapters 12 and 13 discharge granted upon completion of plan payments, after confirmation of plan by court. Chapter 7 and 13 discharge conditioned on debtor completing at debtor's expense approved course on personal financial management. (11 U.S.C. §1328[g]). Court may refuse confirmation based on debtor misconduct.

Non-dischargeable debts include number of tax obligations, debts arising from fraudulent actions by debtor, debts not scheduled by debtor in filing, debts arising from debtor's fraud or defalcation while acting in fiduciary capacity or debtor's embezzlement or larceny, alimony, maintenance and support related obligations, fines, penalties, and forfeitures, educational loans, debts relating to scholarship fraud, and failure to maintain capital requirements. (11 U.S.C. §523[a]). Other non-dischargeable debts include aggregate consumer debts over $550 owed to single creditor on luxury goods incurred within 90 days of relief order and consumer credit cash advances over $825 under open end credit plan acquired within 70 days. Debts incurred in violation of securities fraud law were made non-dischargeable by Sarbanes-Oxley Act of 2002. (11 U.S.C. §523[a][2][C]). See category 3 Business Regulation and Commerce, topic 3.18 Securities, subhead Criminal Actions.

Reaffirmation.

Debtors may exchange right to discharge for right to retain encumbered property by reaffirming debt. Generally no new consideration other than “moral consideration” required to support contract of reaffirmation. Judicial approval of reaffirmation required only in cases where debtor not represented by counsel. (11 U.S.C. §524[c]). Reaffirmation must be made before discharge granted. Debtor has 60 days to rescind reaffirmation agreement, which must contain clear and conspicuous statement of such rescission rights. Agreement must be filed with court which holds hearing only if debtor is individual and not represented by lawyer in negotiation of agreement. (11 U.S.C. §524[c][4]). 11 U.S.C. §524[k] details disclosure and explanation requirements to debtor for wholly unsecured consumer debt reaffirmation, except for Credit Union creditor.

Governmental agencies and private parties in employment or student loan context may not discriminate against bankrupts for discharged obligations. (11 U.S.C. §525[a]). Private employers may not terminate or otherwise discriminate against bankrupts merely because of bankruptcy or nonpayment of discharged debts. (11 U.S.C. §525[b]).

Avoiding Powers.

Trustees and Debtor-in-Possession (DIP) may set aside transactions considered improper. Such transactions not void ab initio and require affirmative action by trustee or DIP. Avoidance powers exercised by trustee in Chapter 7 cases and by DIP in Chapter 11 or 12 cases unless trustee appointed. Trustee prohibited from avoiding transfer if debts primarily consumer debts and aggregate value of transferred property less than $5,475. (11 U.S.C. §547[c][9]).

Strong-Arm Clause is most significant avoidance power, effecting primarily transfers incomplete on date of bankruptcy. 11 U.S.C. §544[a] gives Trustee/DIP status of person who as of commencement of case obtained “a judicial lien on all property on which a creditor on a simple contract could have obtained . . . a judicial lien” (11 U.S.C. §544[a][1]), and right of bona fide purchaser of realty. Trustee/DIP may also avoid any transaction avoidable by actual general unsecured creditors under non-bankruptcy (underlying state or U.S. federal) law, including power to award fraudulent transfer subject to state law rights and limitations period, even if inconsistent with bankruptcy law. (11 U.S.C. §544[b]). In general, Trustee/DIP may avoid transfer of property of estate occurring after commencement of case not authorized by Code or court (11 U.S.C. §549[a][1]), and any transfer made on or within ten years of filing if: (1) Transfer was to self settled debtor trust; and (2) debtor made transfer with actual intent to hinder, delay, or defraud

(11 U.S.C. §548[e][2]). Exceptions to right to avoid post-petition transfers of estate property include transfer to good-faith purchasers without knowledge of commencement of case who pay present fair equivalent value for property. (11 U.S.C. §549[c]). Remote good faith transferees for value without knowledge of avoidability of transfer protected from avoidance, and transferees who have made improvements on transferred property may be entitled to lien on property. (11 U.S.C. §550[b] and [d]). If transfer avoided, Trustee may recover either property transferred, or, if court so orders, value of such property. (11 U.S.C. §550[a]). *Note:* Several different time-based limitations on avoidance of transactions in bankruptcy must be examined.

Preferences.

Preference occurs when debtor favors one creditor over others in paying out of limited resources. Some preferences may be avoided, in which case transferee must return transferred property or its value. (11 U.S.C. §550). (11 U.S.C. §547[b]) sets out elements of preferences: Transfer (1) Of property, (2) to or for benefit of creditor, (3) on antecedent debt, (4) made while debtor insolvent, (5) during preference period (usually 90 days before bankruptcy or one year for debtor insiders), and (6) that enables creditor to receive more than it would in Chapter 7 liquidation.

Exceptions to avoidance of preferences include: (1) Substantially contemporaneous exchange for new value; (2) ordinary course of business transfers; (3) certain purchase money security interests not perfected in timely fashion; (4) set off of post-preference advances of credit against previous preferences; (5) statutory liens, alimony, maintenance and support; and (6) payments under stipulated amount by consumer debtors. See subhead Avoiding Powers, supra.

Fraudulent Transfers and Obligations.

Trustee/DIP may avoid fraudulent transfers made either with intention of defrauding creditors or by insolvent for grossly inadequate consideration. Avoidance power also includes fraudulent obligation or payment of debt that exists without legal basis. Establishment of fraudulent transfer, unlike preferences, requires examination of motivation underlying transaction and commercial legitimacy of debtor's action. Trustee/DIP may avoid fraudulent transfers or obligations under §548, which may reach back two years, or by using applicable state law, which may reach back more than two years. Avoidance under 11 U.S.C. §548 available when transfer was made or obligation incurred with actual intent to “hinder, delay, or defraud” any “entity” to which debtor indebted at time of transfer or subsequently became indebted (actual fraud). Uniform Fraudulent Transfer Act should be consulted for guidance on establishment of such requirements. Second basis for avoidance under 11 U.S.C. §548 requires proving that debtor received, in exchange for transfer or obligation, less than “reasonably equivalent value”, or that due to act(s) of transfer, debtor unable to pay debts (“constructive fraud”); transferor intent generally deemed irrelevant. (11 U.S.C. §548[a][2]).

Trustee/DIP may not recover from remote transferees who are bona fide purchasers. Generally those making valuable improvements to transferred properties given lien on property, in effect, secured claim for improvements made. (11 U.S.C. §548). See 11 U.S.C. §548[c] for limited protection of immediate transferees.

Chapter 7 Liquidation.

Also known as “straight” bankruptcy. Liquidation of debtor primary function of Chapter 7, although liquidation may also occur under Chapter 11 plans. Chapter 7 does not require immediate disposition of debtor's assets; Chapter 7 trustee may liquidate over extended period and even continue to operate debtor's business for limited time. (11 U.S.C. §721).

Petition.

To initiate voluntary Chapter 7 proceeding debtor must file: (1) Filing and administrative fee; (2) voluntary petition on Official Form No. 1; (3) clerk's notice if debtor is individual consumer debtor and if required by court, or corporate resolution authorizing filing if debtor is corporation; (4) disclosure statements relating to attorney's compensation and compensation of non-attorney petition preparer; (5) “matrix” list of creditors containing names and addresses (11 U.S.C. §521[a][1], Fed. R. Bankr. P. 1007[a][1]), refer also to local court rules for district variations on matrix requirements); (6) schedules detailed on Official Form No. 6, including schedules of real and personal property, property claimed as exempt, secured and unsecured creditors, executory contracts and unexpired leases, and current income and expenditures of individual debtor or income and expenditures of partnership or corporate debtor; (7) statement of financial affairs on Official Form No. 7; (8) if debtor is individual debtor with consumer debts, statement of intention on Official Form No. 8; (9) schedule of assets and liabilities; (10) statement of debtor's financial affairs, monthly net income projections and anticipated income and expenditure increases; and (11) federal tax returns. (11 U.S.C. §527). Automatic dismissal of voluntary case if debtor fails to supply mandatory information or timely file required schedules within 45 days of filing petition or five days of request by party in interest. (11 U.S.C. §521[i]). Only individual and spouse may be joint debtors and file single Chapter 7 petition; unmarried couples not eligible. All documents filed with clerk of bankruptcy court printed on one side of paper only, each page prepunched with two holes at top leaving sufficient top margin for caption and text. (Fed. R. Bankr. P. 1002[a]) Petition must be accompanied by filing fee except when payment in installments. Filing fee must be paid in full before debtor can pay attorney or other person for services in connection with case. See 28 U.S.C. §1930[a][1] for filing fee. Filing petition creates bankruptcy estate and constitutes order for relief. See subhead Commencement of Case, supra.

Trustees.

U.S. Trustee must appoint interim trustee from panel promptly after order for relief or serve as interim trustee. In rare instances trustee may be elected by creditors upon request of creditors holding at least 20% in amount of claims. Election is held at creditors (11 U.S.C. §341) meeting. See catchline Creditors' Committee and Meeting, infra. If no trustee elected interim trustee becomes trustee. Duties of trustee include: (1) Collection and liquidation of estate property; (2) accounting for all property as fiduciary; (3) investigation of debtor's financial affairs; (4) monitoring of debtor under 11 U.S.C. §521; (5) review of proofs of claim and objection to allowance of improper claims; (6) opposing debtor's discharge “if advisable” (11 U.S.C. §704[a][6]); (7) if authorized by court, continued operation of debtor's business and filing periodic reports in connection therewith (11 U.S.C. §704[8] and [9]); and (8) making final report and final account of administration to court and U.S. Trustee. Trustee's powers include: (1) Power to abandon property of estate if burdensome or of inconsequential value and benefit (11 U.S.C. §544[a]); (2) assumption or rejection of executory contracts; (3) avoidance of certain transfers or unperfected security interests (see subhead Avoiding Powers, supra.), and avoidance of pre-petition transfers that are voidable preferences or fraudulent (see subheads Preferences and Fraudulent Transfers and Obligations, supra.) Post-petition transfers may be avoided by trustee unless specifically authorized by Code or court. (11 U.S.C. §549[a]).

Proofs of Claim and Interest.

Proofs of claim or interest filed under 11 U.S.C. §501 are deemed allowed unless objected to by party in interest. If creditor fails to file proof of claim before first date set for meeting of creditors, debtor or trustee may file it within subsequent 30 days. (Fed. R. Bankr. P. 3004). Equity security holders file proofs of interest in Chapter 7 cases.

Motions; Conversions.

Chapter 7 debtor may move to convert case to Chapter 11, 12, or 13, to dismiss case or change venue. (11 U.S.C. §§706[a] and 707). Any party in interest may move for relief from automatic stay, to dismiss case, to change venue, for disallowance of claim, or for examination of any entity. Motions to modify automatic stay require hearing on accelerated calendar basis (11 U.S.C. §362[e]) unless interest will suffer irreparable damage before notice and hearing, in which case court may grant modification without hearing (11 U.S.C. §362[f]). 11 U.S.C. §707 creates presumption of abuse if debtor's current monthly income exceeds amount determined by formula set forth and prohibits inclusion of debt payments in calculation of debtor's expenses, with limited listed exceptions. Motions for disallowance of claims granted on nine grounds set forth in 11 U.S.C. §502[b]. U.S. Trustee may move to dismiss case for debtor's failure to file within 15 days all required schedules and statements of financial affairs (11 U.S.C. §707[a][3]) or if debtor is individual debtor whose debts are primarily consumer debts, if granting relief would be substantial abuse of Chapter 7. Court may on its own motion and after notice and hearing dismiss Chapter 7 case for cause, such as debtor's unreasonable delay or nonpayment of fees or charges. (11 U.S.C. §707[b]). See subhead Chapter 13, catchline Conversions, infra for property valuation and treatment of secured claims.

Creditors' Committee and Meeting.

Clerk or person directed by court must give notice to debtor, trustee, all creditors and indenture trustees notice by mail of meeting of creditors at least 20 days before meeting. Creditors may elect creditors' committee at meeting, composed of at least three and not more than 11 creditors. Committee function primarily advisory. Debtor required to appear at creditors' meeting (“the 341 Meeting”) at which debtor sworn and examined by creditors, trustees, and/or U.S. Trustee. Trustee required to examine debtor to determine awareness of potential consequences of seeking discharge, debtor's ability to file petitions under other bankruptcy chapters, effective discharge of debts and reaffirmation of debts. U.S. Trustee may also convene meeting of equity security holders. (11 U.S.C. §341[b]). Court may but not required to hold discharge and reaffirmation hearing, which debtor is required to attend. (11 U.S.C. §524[d]). Creditor holding consumer debt may participate in meeting. (11 U.S.C. §341[c]).

Distribution of Estate and Closing of Case.

After trustee collects and liquidates estate, trustee files final report and proposed distribution, which bankruptcy court clerk mails to all creditors and other parties in interest. See subhead Claims and Interests, supra, for order of distribution. Creditors and parties in interest notified of trustee's final report and proposed distribution and given 30 days to file written objection. After court approval of trustee's final report and proposed and actual distribution of assets, trustee files final account and certifies to court and U.S. Trustee that estate has been fully administered. Court then orders case closed and trustee discharged.

Chapter 11 Reorganization.

Goal of Chapter 11 is to keep debtor intact, retain present assets and pay debts from future revenues. Chapter 11 debtor usually operates as Debtor-in-Possession (“DIP”) to preserve going concern value. “Fast Track” treatment may be elected by “small business” creditors if engaged in commercial or business activities, aggregate non-contingent liquidated secured and unsecured debts less than $2 million as of date of petition. (11 U.S.C. §§1121[e] and 101[51C]). 2005 Abuse Act aimed at forcing more debtors into Chapter 13 by applying two part means test, exempting certain basic expenses to determine if debtor can afford to pay 25% of non-priority unsecured debt such as credit cards and prohibiting filing if debtor income is above debtor's state's median income or if below and court requires Chapter 13 filing to avoid abuse of system. (11 U.S.C. §707).

Petition.

Same documents necessary for Chapter 7 filing also necessary in Chapter 11 cases except for clerk's notice and statement of intention. In addition Chapter 11 filings require list of debtor's 20 largest unsecured creditors, list of equity security holders, Chapter 11 plan and disclosure statement or evidence showing compliance with 11 U.S.C. §1126[[b]. If debtor is corporation Exhibit A to Official Form No. 1 must also be filed. If petition includes list of creditors, debtor has 15 days from date of filing to file schedules, statement of financial affairs, and list of debtor's equity security holders. Filing petition constitutes order for relief, initiates automatic stay and creates estate.

Debtor-in-Possession (“DIP”).

Debtor, not trustee, retains possession of property of estate and exercises rights, powers, and duties of Chapter 11 trustee except right to compensation and duty to investigate conduct, assets, liabilities, and financial condition of debtor. (11 U.S.C. §§1106[a][3], [4], 1107[a]). Unless court orders otherwise, DIP continues operation of debtor's ordinary course of business only; court permission required for non-ordinary course transactions and for incurring secured debt. (11 U.S.C. §1108). Such post-petition creditors have administrative expense priority. (11 U.S.C. §§364, 503[b][1]). With court approval DIP or trustee may assume or reject executory contracts or unexpired leases. (11 U.S.C. §365[a]). 11 U.S.C. §1113[a] gives DIP or trustee (other than in railroad reorganization cases) power to assume or reject (after hearing) collective bargaining agreements. (11 U.S.C. §524[g][2]) creates procedure for dealing with future personal injury claims arising from exposure to asbestos-containing products, including creation of trust and injunction preventing future claims.

Committees of Creditors and Equity Holders.

U.S. Trustee must appoint creditors' committee comprised of holders of unsecured claims and representatives of all unsecured claimants. (11 U.S.C. §1102[a][1]). Ordinarily committee consists of holders of seven largest unsecured claims, although committee may include holders of highest 20 unsecured claims. Creditors' committee acts as advisor to and watchdog of DIP. DIP required to meet with committee as soon as practicable after appointment. Committee may also participate in formulation of plan and request appointment of trustee or examiner. 11 U.S.C. §1103[c] describes other functions and powers of committee. Upon request of party in interest committee of equity security holders comprised of persons holding seven largest amounts of equity securities of debtor selected in similar fashion.

Trustees or Examiners.

Court may displace DIP by appointment of trustee upon motion of any party in interest or U.S. Trustee. (11 U.S.C. §1104[a]). Appointment made after notice and opportunity for hearing either for cause or in interest of creditors and owners. Duties of Chapter 11 trustee are same as Chapter 7 trustee except Chapter 11 trustee has broader duty to investigate debtor and must make written report (11 U.S.C. §1106[a][3], [4]) and prepare and file reorganization plan or recommend either conversion of case to another chapter or dismissal (11 U.S.C. §1106[a][5]). Upon request of party in interest or U.S. Trustee at any time prior to confirmation, court may terminate trustee's appointment and restore debtor to possession. In lieu of appointment of trustee court may appoint examiner to investigate debtor if such appointment in interest of creditors, equity security holders, or others with interest in estate or if debtor's fixed, unliquidated, unsecured debts other than debts for goods, services or taxes and debts owed to insiders exceed $5 million. (11 U.S.C. §1104[c]). Examiner's function is to investigate “fraud, dishonesty, incompetence, misconduct, mismanagement or irregularity” by debtor management and file report to court and creditors' committee. (11 U.S.C. §1106[a][4]).

Meeting of creditors (“The §341 Meeting”) and meeting of equity holders held 20-40 days after order for relief at which debtor examined under oath by U.S. Trustee, trustee, and creditors. If debtor is corporation U.S. Trustee authorized to convene meeting of equity security holders.

Reorganization plan may be filed with petition or at any time during proceeding. Debtor has exclusive right to file plan for 120 days after filing of petition (11 U.S.C. §1121[b]-[d]) and thereafter additional 60 days to obtain acceptance of plan by each class of claims or interests impaired under plan. After exclusivity period any party in interest may file plan if trustee appointed, or if debtor has not filed plan within exclusivity period, or if debtor has not filed plan accepted within 180 day limit or any additional period set by court for plan acceptance. (11 U.S.C. §1121[d][2][A] and [B] limit extension of time permitted for filing Chapter 11 plan. Mandatory provisions of plan set forth in 11 U.S.C. §1123[a], including division of creditors and interest holders into classes. Claims or interests included in particular class must be "substantially similar" to other claims or interest in that class (11 U.S.C. §1122[a]), except plan may designate separate class of small claims for administrative convenience (11 U.S.C. §1122[b]). Plan must specify any class of claims or interests not impaired under plan. Only impaired classes vote on plan. Claim or interest considered impaired if contractual rights are affected by plan unless plan proposes not to alter legal, equitable, or contractual rights to which claim or interest entitles holder, or unless plan proposes to restore such holder to original position by curing effect of default or reinstating original terms of obligation. (11 U.S.C. §1124[2]). Mandatory provisions also include: (1) Specification of treatment of impaired claims and interests; (2) equal treatment of claims and interest within class; (3) provision of adequate means for implementation of plan; (4) provision for including in corporate debtor's charter certain provisions regarding equity securities (11 U.S.C. §1123[a][6]); and (5) any provision dealing with manner of selection of officer, director or trustee must be consistent with interest of creditors, equity security holders, and public policy (11 U.S.C. §1123[a][7]). Permissive or optional provisions of plan include (1) Impairment or non-impairment of any class of secured claims, unsecured claims, or interest; (2) assumption, rejection, or assignment of executory contracts or unexpired leases; (3) settlement or readjustment of any claim or interest; (4) sale of all or substantially all estate property and distribution of proceeds ("a liquidating plan"); and (5) modification of rights of holders of secured and unsecured claims. (11 U.S.C. §1123[b]). Plan proponent may file modification of plan after acceptance but before confirmation.

11 U.S.C. §1126[b] Disclosure Statement providing "adequate information" to enable those voting on plan to make informed judgment must be transmitted to all holders of claims or interests with plan or plan summary before plan acceptance may be sought. 11 U.S.C. §1125 sets forth mandatory factors to determine if plan provides adequate information. Different disclosure statements may be sent to separate classes. Recipient of statement must be able to determine if it will receive "not less" under plan than under Chapter 7 liquidation ("best interest of creditors test"). (11 U.S.C. §1129[a][7]).

Plan Confirmation.

Only impaired classes may vote on plan. Plan must be accepted by majority in number and two-thirds in amount of claims. Classes may receive different distributions, but justification for creating and discrimination between classes of claims other than desire to win creditor approval must exist. Hearing on confirmation of plan held after notice. Trustee, party in interest, or U.S. Trustee may object to confirmation. Plan will be confirmed only if: (1) Plan and proponent comply with all applicable provisions of Code; (2) plan proposed in good faith; (3) court approves as reasonable all payments for services and expenses; (4) identity and affiliation of all individuals who are to serve as director, officer, or voting trustee after confirmation must be disclosed and be consistent with best interest of creditors and equity security holders; (5) plan meets "best interest of creditors" test by demonstrating that creditor or equity security holder will not receive less under plan than under Chapter 7 liquidation; (6) plan does not discriminate unfairly and is fair and equitable to impaired classes that have not accepted plan; and (7) if plan includes tax claims, that debtor make regular installment payments over no more than five years in manner not less favorable than most favored non-priority unsecured claims. (11 U.S.C. §1129[a]). At hearing court determines whether plan can be "crammed down", permitting confirmation if certain standards of fairness are met even if some impaired creditor or equity security holder classes do not accept plan. Plan deemed fair and equitable with respect to each dissenting class if: (1) Holders of secured claims retain liens and receive deferred cash payments at least equal to allowed amount of claims (11 U.S.C. §1129[b][2][A]); (2) holders of unsecured claims receive property of value equal to allowed amount of claims as of effective date of plan, or holders of junior claims or interests receive nothing, ("absolute priority rule") (11 U.S.C. §1129[b][2][B]); or (3) holders of interests receive or attain property of value determined as of effective date of plan equal to greatest of allowed amount of any fixed liquidation preference, any fixed redemption price, or value of such interests (or if not, holders of junior interests receive or retain nothing). Debt repayment plan confirmation conditioned on certification debtor paid all adjudicated domestic support obligations coming due after petition filing. (11 U.S.C. §1129[a][14]).

Upon confirmation of plan property of estate (except as otherwise provided in plan and except for debt of corporate debtor owed to domestic government unit for money or credit obtained by false representation or fraud related tax or custom debt) in confirming order vests in debtor. (11 U.S.C. §1141[b], [d]). Confirmed plan is contract binding debtor, creditors, and interest holders. Confirmation discharges debtor and releases it from all claims and interest of creditors, equity security holders, and general partners, regardless of whether such claims and interests impaired or whether holders have accepted plan. (11 U.S.C. §1141[a]). Discharge includes all debts arising prior to filing of petition and certain debts arising after filing. See subhead Discharge, supra. To avoid Chapter 11 discharge that would not be available under Chapter 7, corporate or partnership debtor not discharged under liquidating plan. If debtor individual, lease not assumed in plan is rejected, thus no longer subject to automatic stay. (11 U.S.C. §1326[a]).

Distribution and Closing of Case.

Upon confirmation distribution customarily made by DIP or Trustee unless court appoints alternate agent. DIP or Trustee required to file reports as necessary or ordered by court. (11 U.S.C. §1106[a][7]). Party in interest may request revocation of confirmation order within 180 days on grounds of fraud. (11 U.S.C. §1144). After full administration court on its own motion or that of party in interest enters final decree closing case.

Chapter 13.

Adjustment of debts of individual(s) with regular income. Chapter 13 may be filed by either individual or individual and spouse with stable and regular income sufficient to make payments under Chapter 13 plan and with unsecured debts of less than $336,900 and secured debts of less than $1,010,650. (11 U.S.C. §109[e]).

Petition.

Same documents necessary for filing Chapter 7 petition are also necessary in Chapter 13 cases. Debtor must file with court statement of income and expenditures in preceding tax year, and monthly net income showing how calculated and plan 15 days after petition. See subhead Chapter 7 Liquidation, catchline Petition, supra for detailed list of required filings. Automatic dismissal of voluntary case if debtor fails to supply mandatory information or timely file required schedules within 45 days of filing petition or five days of request by party in interest. (11 U.S.C. §521). Absent contrary court order, payments begin 30 days after filing of plan. (11 U.S.C. §1326[a][1]). Debtor must supplement petition schedules if within 180 days of filing property acquired by bequest, devise, or inheritance or as result of property settlement agreement with debtor's spouse, divorce decree or as beneficiary of life insurance policy or death benefit plan. (11 U.S.C. §541[a][5]). See subhead Property of Estate, supra. Filing of petition constitutes order for relief, creates estate and initiates automatic stay and “co-debtor stay”, precluding collection of all or any part of consumer debt of debtor from co-debtor. (11 U.S.C. §1301). Creditor with consumer debt may seek relief from co-debtor stay if co-debtor received consideration for claim held by creditor, if plan does not propose to pay creditor, or if creditor's interest would be irreparably harmed by continuation of stay. (11 U.S.C. §1301[c]). See subhead Automatic Stay, supra. Debtor may move at any time to convert case to Chapter 7, 11, or 12 (11 U.S.C. §1307[a], [e]) or to dismiss case (11 U.S.C. §1307[b]).

Possession and Control of Estate Property.

Debtor remains in possession of all property except as specified in confirmed plan, including that acquired after commencement of case. If case is converted, estate will consist only of property at date of filing that remains in possession of debtor on date of conversion. See also §1322 regarding homestead mortgages. Debtor continues to operate any business unless court orders otherwise. (11 U.S.C. §1304[b]).

Trustee.

Standing Chapter 13 trustee or U.S. Trustee serves as trustee and is accountable for all property and for investigation of affairs of debtor, examination of proofs of claim and objection thereto, opposing discharge of debtor if advisable, furnishing of information to parties in interest and submission of final report and final accounting to court and U.S. Trustee. (11 U.S.C. §1302[b][1]). Primary functions of trustee are review of plan, advice to court with respect to plan and service as disbursing agent under confirmed plan.

Meeting of Creditors.

Clerk must give debtor, trustee, all creditors, indentured trustees, and U.S. Trustee at least 20 days notice by mail on Official Form B9I of date, time and place of creditors' meeting (“the §341 Meeting”). Meeting must be held 20-50 days after order for relief and includes examination of debtor under oath. Purpose of meeting to determine if plan feasible and suggest modifications. Creditor holding consumer debt may participate in meeting. (11 U.S.C. §341[c]).

Plan must be filed by debtor within 15 days of petition unless extension granted by court showing how debtor intends to repay part or all of allowed claims from future earnings. Only debtor may file plan. Mandatory provisions include: (1) Provision for trustee supervision and control of that portion of debtor's future income necessary for plan implementation; (2) provision for full payment of all priority claims unless holders agree to different treatment; (3) if plan classifies claims, provision for same treatment for each claim within particular class; and (4) payment period for either three or five years depending on formula set forth in 11 U.S.C. §1322[a]. Permissive provisions of plan include: (1) Division of unsecured non-priority claims into classes; (2) modification of rights of holders of secured and unsecured claims except claims fully secured by real estate mortgages; (3) cure or waiver of any default; (4) payments on unsecured claims concurrently with payments on any secured claim; (5) provision for securing of default on any secured or unsecured claim on which final payment due after proposed final payment under plan; (6) provision for payment of any allowed post petition claim; (7) assumption or rejection of executory contracts including unexpired lease; (8) proposed payment of all or any part of any claim from estate; (9) provision for vesting of property of estate; and (10) any other provision not inconsistent with Code.

Payments under plan must start within 30 days after plan filed unless otherwise ordered by court. Debtor makes payments to trustee who retains payments until confirmation or denial of confirmation of plan. (11 U.S.C. §1326[a]).

Confirmation of Plan.

Confirmation hearing occurs after meeting of creditors. Trustee advises judge. Trustee, any creditor, or U.S. Trustee may file objection to confirmation. Judge may on own initiative determine plan not confirmable. (11 U.S.C. §§1324, 1325). To be confirmed plan must comply with applicable provisions of Code, fees and charges required by Code must be paid, plan must be proposed in good faith, and payments of unsecured claims must satisfy “best interest of creditors test”. Confirmation also conditioned on filing by debtor of prepetition tax returns for four-year period preceding filing. (11 U.S.C. §1308). See subhead Chapter 11 Reorganization, catchline Plan Confirmation, supra. Unsecured creditors do not vote on plan and may object only if holders of unsecured claims will receive reduced amount, or if plan does not provide that all debtor's projected disposable income for three years from date first payment due will be applied to make plan payments, or if it does not meet best interest of creditors test. Unexpired leases not assumed in plan rejected, thus no longer subject to automatic stay. (11 U.S.C. §1326[a]). Secured creditors must agree to accept plan, accept surrender of property or plan will be "crammed down" (11 U.S.C. §1325[a][5]). Under 11 U.S.C. §1325[a][5][B][ii], Chapter 13 cram down occurs when plan provides that holders of secured claims retain lien securing claim and receive not less than allowed amount of secured claim. Chapter 13 cram down does not require application of "fair and equitable doctrine" but must meet best interest of creditors test. Confirmation also requires that debtor able to make all payments under plan, to comply with plan and that plan specific enough to enable trustee to determine to whom payment should be made, how much, and when. Debt repayment plan confirmation conditioned on certification debtor has paid all adjudicated domestic support obligations coming due after petition filing. (11 U.S.C. §1129[a]). Confirmation of plan binds debtor and each creditor to plan and vests all estate property in debtor, except as provided in plan, free and clear of any claim or interest of creditors. If plan not confirmed trustee returns payments to debtor less unpaid administrative expenses and debtor may convert to Chapter 7. Upon consent of court plan may be modified by debtor, trustee or holder of allowed unsecured claim after confirmation but before completion. Within 180 days of confirmation following notice and hearing court may revoke confirmation order if procured by fraud. (11 U.S.C. §1330[a]).

Conversions.

In conversion from Chapter 13 to other chapter, valuation of property and allowed secured claims do not apply in Chapter 7 and claim of secured creditor as of date of petition remains secured unless full claim has been paid. (11 U.S.C. §348[f]).

Discharge and Closing of Case.

After all plan payments are made court grants debtor "full-compliance discharge" of all claims except: (1) Claims not provided for by plan; (2) any debt for curing of any default on any secured or unsecured claim on which final payment is due after proposed final plan payment; and (3) debts specified in 11 U.S.C. §1328[a][2], which include alimony and child support, educational loans owing to governmental unit or nonprofit institution of higher education, debts for death or personal injury caused by debtor's operation of motor vehicle while intoxicated, and restitution included in sentence on debtor's conviction of crime, debt for fraudulent tax payments. Court may grant hardship discharge to debtor who has not completed payments under plan due to circumstances for which debtor should not justly be held responsible, or if plan not practicable, or if value of payments made as of effective date of plan is not less than amount that would have been paid if debtor's estate had been liquidated under Chapter 7. Hardship discharge does not include secured debts or unsecured debts non-dischargeable under Chapter 7. See subhead Debtor, supra for time limitations on Chapter 7, 11, 12 and 13 discharges. Debtor who has received Chapter 13 discharge may file Chapter 11, 12 or 13 case at any time and receive discharge if debtor is otherwise eligible to file under those chapters.

Discharge may be revoked for fraud within one year by party in interest without knowledge of fraud. (11 U.S.C. §1328[e]). Case closed after completion of payments under plan and trustee files final report and account certifying case has been fully administered. Unless U.S. Trustee or party in interest objects within 30 days, court will discharge trustee and close case without review of final report and account. (11 U.S.C. §350[a], Fed. R. Bankr. P. 5009).

Chapter 15 Ancillary and Cross-Border Cases.

2005 Abuse Act inserts new Chapter 15 expanding scope to incorporate Model Law on Cross-Border Insolvency. Prescribes guidelines for: (1) Access of foreign representatives and creditors to Federal and State Courts; (2) recognition of foreign proceeding and relief; (3) direct communication with foreign courts; and (4) coordination between foreign and domestic proceedings.

9 DISPUTE RESOLUTION

—Scope —

Note: Citations are to Title 9 U.S.C. unless otherwise noted.

9.01 ALTERNATIVE DISPUTE RESOLUTION:

Alternative Dispute Resolution (ADR) is increasingly used to adjudicate civil controversies in U.S. Numerous ADR methods are employed, some mandated by U.S. courts or statutes, some voluntary, some binding, others not. ADR methods used in U.S. include arbitration, mediation, minitrials, summary jury trials, conciliation, and negotiation. Arbitration and mediation are most common methods of ADR. Both federal and state laws regulate use of ADR and may mandate ADR for certain types of disputes.

For discussion of particular state arbitration laws see individual State Digests. See also categories 11 Employment, topic Labor Relations, and Intellectual Property.

Several organizations, governmental and private, offer arbitration and mediation services including American Arbitration Association. Recent Alternative Dispute Resolution Act of 1998 requires all U.S. federal district courts to implement ADR programs for resolution of civil actions. (28 U.S.C. §§651-658). Under Act, courts must require parties to consider ADR for resolution of civil disputes. See also, www.dol.gov/asp/programs/adr/main.htm.

Commuter rail trackage use request disagreements are to be mediated by the Surface Transportation Board. (49 U.S.C. §§28501 to 28505).

9.02 ARBITRATION AND AWARD:

Introduction.

Arbitration is one of most commonly used forms of ADR in U.S. and involves submitting dispute to neutral arbitrator(s) selected by parties or selected by method agreed to by parties for binding decision.

Federal Arbitration Act.

Federal Arbitration Act ("FAA") enacted in 1925 significantly altered prior U.S. common law by mandating enforcement of "written provision in any maritime transaction or contract evidencing a transaction involving commerce" to settle disputes by arbitration. (9 U.S.C. §§1-16; 201-208; 301-302).

Application of FAA.

FAA applies only to written agreements to arbitrate whether made before or after dispute arose. Arbitration agreement is enforceable even if not signed under FAA. (9 U.S.C. §2). FAA applies to disputes in federal or state court and preempts state arbitration law. FAA applies only to written agreements in "maritime transaction" or "transaction involving commerce". (9 U.S.C. §2). FAA defines maritime transaction as "charter parties, bills of lading of water carriers, agreements relating to wharfage, supplies furnished vessels or repairs to vessels, collisions, or any other matters in foreign commerce which . . . would be embraced by admiralty jurisdiction." (9 U.S.C. §1). FAA defines commerce as "commerce among the several States or with foreign nations", or in or between any Territory of U.S. and any state or Territory or foreign nation, or in or between District of Columbia and any State or Territory or foreign nations. (9 U.S.C. §1). FAA explicitly does not apply to "contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce". (9 U.S.C. §1). Review of court decision is necessary to determine interpretation of "transaction involving commerce" as used in FAA. U.S. Supreme Court recently defined "involving commerce" broadly as functional equivalent to “affecting commerce.” (513 U.S. 265).

Commencing Arbitration Under FAA.

Arbitration under FAA commenced by voluntary submission of dispute to arbitration or by petition to U.S. District Court for order to arbitrate under written arbitration clause. (9 U.S.C. §4). Upon application of party to agreement to arbitrate, court proceedings must be stayed pending arbitration. (9 U.S.C. §3). Arbitration agreement may set out requirements and procedures for submission and demand. Arbitration agreement may name arbitrator(s) or method for arbitrator(s) selection. (9 U.S.C. §5). Absent agreement provision, court designates arbitrator. (9 U.S.C. §5). Arbitration agreement governs controversies decided by arbitrator, selection of arbitrator, and scope of arbitrator decision. Under present U.S. law, actions to compel arbitration under FAA must be made in state court unless diversity jurisdiction or other independent basis for federal jurisdiction of dispute exists.

Arbitration Award.

Arbitration is concluded by grant of award and arbitration under FAA results in binding decision on parties. Court must grant order confirming arbitration award where agreement provides judgment of court shall be entered upon making of award. (9 U.S.C. §9). Confirmed award has same force and effect as court judgment. (9 U.S.C. §13).

Vacating Award.

Arbitration award may be vacated by U.S. court in district where award was made for following reasons: award procured by corruption, fraud or undue means; evident partiality or corruption in arbitrators; arbitrators guilty of misconduct in refusing to postpone hearing, hearing evidence or other prejudicial conduct; or arbitrators exceeded or imperfectly executed powers. (9 U.S.C. §10).

Modify Award.

Arbitration award may be modified or vacated by U.S. court in district where award was made for following reasons: evident material miscalculation of figures or evident mistake in description of person, thing or property in award; arbitrators awarded on matter not submitted; or award is imperfect in matter of form not affecting merits of controversy. (9 U.S.C. §11). Notice of motion to vacate, modify or correct award must be served within three months after filing of award. (9 U.S.C. §12).

Appeals may be taken from following orders: refusing stay of action; denying petition to order arbitration to proceed; confirming or denying confirmation of award; modifying or correcting or vacation of award. (9 U.S.C. §16). Appeals may also be taken from interlocutory order granting, continuing or modifying injunction against arbitration subject to FAA or final arbitration decision subject to FAA. (9 U.S.C. §16).

Uniform Arbitration Act (Uniform Act) adopted by National Conference of Commissioners on Uniform State Laws in 1955 altered prior U.S. common law by upholding validity of written agreements to arbitrate. Adoption of Uniform Act by individual states is voluntary. Presently, 35 states have adopted Uniform Act, many with modifications. Most remaining states have adopted their own statutes enforcing agreements to arbitrate. Laws of each particular state must be examined to determine specific provisions of state arbitration statute.

International Arbitration.

U.S. is party to numerous multilateral trade agreements providing for binding arbitration of disputes and has ratified conventions relating to enforcement of arbitration agreements in international commercial disputes.

New York Convention.

U.S. has ratified 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("New York Convention"). (9 U.S.C. §§201-208). New York Convention provides for enforcement of written agreements to arbitrate and arbitration awards in foreign commercial disputes. Actions relating to arbitration agreement falling under New York Convention may be removed to federal court. (9 U.S.C. §205).

Inter-American Convention.

U.S. has also ratified Inter-American Convention on International Commercial Arbitration between U.S. and several South American nations ("Inter-American Convention"). (9 U.S.C. §§301-307). Inter-American Convention similarly provides for recognition and enforcement of arbitral decision and awards if foreign state involved ratified or acceded to Inter-American Convention. (9 U.S.C. §304).

Trade Agreements.

U.S. is also party to North American Free Trade Agreement ("NAFTA"). NAFTA establishes detailed dispute resolution procedure culminating, if necessary, in arbitration of disputes. U.S. is party to several other multilateral trade agreements providing for binding arbitration of disputes. Major U.S., Canadian and Mexican associations jointly formed Commercial Arbitration and Mediation Center for the Americas in 1995 to provide arbitration and mediation of NAFTA-related disputes. Several other international and domestic organizations exist providing arbitration services for international disputes.

See also topic Foreign Trade and Commerce.

9.03 MEDIATION:

Many individual U.S. federal and state court rules mandate that parties mediate civil disputes prior to proceeding in court action. Decision reached by mediators is not binding. Several organizations, governmental and private, offer mediation services.

Federal Mediation and Conciliation Service, agency of U.S. federal government, provides mediation of management-labor disputes.

10 DOCUMENTS AND RECORDS

10.01 NOTARIES PUBLIC:

Notary Public Commissions are granted by individual states only, not U.S. See individual State Law Digests.

See also category 3 Business Regulation and Commerce, topic 3.14 Information Technology, Internet and New Media, subhead Electronic Signature Legislation, catchline E-SIGN.

11 EMPLOYMENT

11.01 EMPLOYER AND EMPLOYEE:

See topic 11.02 Labor Relations.

11.02 LABOR RELATIONS:

Note: See http://www.dol.gov/.

Hours of Labor and Wages.

Fair Labor Standards Act (FLSA), (29 U.S.C. §201), establishes minimum wage and 40-hour weekly overtime standard for covered employees. Individual state laws typically regulate when, where and how often employee's wages must be paid. State laws may also impose more stringent wage and overtime standards than 29 U.S.C. §201. FLSA applies only to employer-employee relationships, not independent contractor relationships. See 29 U.S.C. §203[d], [e], to determine when public employer subject to FLSA; (29 U.S.C. §203[j], [s]) to determine when private employer governed by FLSA. Minimum wage in U.S. $5.85/hour as of Aug. 2007; $6.65/hour as of Aug. 2008; and $7.25/hour as of Aug. 2009. (29 U.S.C. §206). Several exemptions exist for employing students and handicapped workers at less than minimum wage. (29 U.S.C. §214[a]-[d]).To take advantage of these exemptions, employer must apply for certificate from Department of Labor. (29 C.F.R. §§519-523). See also 29 C.F.R. §531 to determine what sources of income can be credited toward minimum wage; and 29 U.S.C. §207, to determine employer's overtime obligations. (29 U.S.C. §206[g][1]). During first 90 days of employment, employees under age of 20 may be paid minimum wage of $4.25/hour. (29 U.S.C. 206[g][1]). Employer also has obligation under FLSA to maintain accurate records of employee's work hours and wages. (29 U.S.C. §211; 29 C.F.R. §516). See www.dol.gov.

Child labor provisions of Fair Labor Standards Act designed to protect educational opportunities of youths and prohibit employment in jobs under conditions detrimental to their health and well-being. (29 U.S.C. §201 et seq., 29 C.F.R. §§570-580). Federal child labor laws include restrictions on hours of work and occupations for youths under age 16. (29 C.F.R. §570.2[a][1][i]). Minimum age 16 for most nonfarm work; 14 and 15 year olds may be employed outside of school hours in certain occupations. (29 C.F.R. §570.2[a][2]). Youths of any age may: deliver newspapers, perform in theatrical arts, work for their parents' solely owned nonfarm business. (29 U.S.C. §212). Youths 18 years or older may work in any job for unlimited hours. Youths age 16 and 17 may perform any job for unlimited hours not declared hazardous by Secretary of Labor. (Id.). Youths age 14 and 15 may work outside school hours in various nonmanufacturing, non-mining, nonhazardous jobs under following conditions: no more than three hours on school day, 18 hours in school week, eight hours on nonschool day, or 40 hours in nonschool week. Youths age 14 and 15 may not begin work before 7 a.m. nor work after 7 p.m., except from June 1 through Labor Day, when evening hours extended until 9 p.m. (29 C.F.R. §570.35). Agricultural exemption for children 16 years of age or younger if parent working with child at farm. (29 U.S.C. §213[a][6]; 570 C.F.R. §201[2][b]). Department of Labor regulations require employers to keep records of date of birth of employees under age 19, daily starting and quitting times, daily and weekly hours, and occupation. (29 U.S.C. §201 et seq.).

Federal government employees not subject to reduction in wages while serving in uniformed services or National Guard. (5 U.S.C. §5538).

Female Labor.

Equal Pay Act requires pay for women to be equal to that earned by men who perform “equal work on jobs performance of which requires equal skill, effort and responsibility” within same work environment. (Equal Pay Act, 29 U.S.C. §206[a]). Unequal pay may lawfully occur if based on factors other than sex, such as seniority or merit. (29 U.S.C. §206[d]).

Parental and Family Rights.

Family Leave and Medical Act (FLMA) entitles eligible employees up to 12 weeks of unpaid, job-protected leave in 12-month period for specified family and medical reasons. (29 U.S.C. §§2601-2654; 29 C.F.R. §825). FMLA contains provisions on employer coverage; employee eligibility; entitlement to leave; maintenance of health benefits during leave; job restoration after leave; and employer's duty to maintain specific records. Act requires all public employers in addition to all private employers with 50 or more employees to provide unpaid family/medical leave for minimum of 12 work weeks for either father or mother. (29 U.S.C.

§2601). 29 U.S.C. §2611[2] defines eligible employee as any employee who has been employed for at least 12 months and has worked at least 1,250 hours in past 12 months. Act allows leave for: (1) birth of child; (2) adoption or foster care of child; (3) provide care for child, spouse, or parent with serious health condition; (4) serious health condition of employee; or (5) qualifying exigency arising out of fact that child, spouse or parent is on military active duty. (29 U.S.C. §2612). Employees seeking to use FLMA leave required to provide 30-day advance notice of leave. Upon return from FMLA leave, employee must be restored to employee's original job, or to equivalent job with equivalent pay, benefits, and terms of employment. (29 U.S.C. §§2601-2654). Several states have also enacted domestic partner laws which provide benefits, such as insurance, for unmarried employees who have domestic partners, including same-sex partners.

Discrimination.

Practice of fair and equal employment in workplace regulated by federal law. Title VII of Civil Rights Act, (42 U.S.C. §2000 et seq.), applies to private and public employers with 15 or more employees and prohibits employers from discriminating against employee on basis of race, color, sex, pregnancy-related issues, national origin and religion. Americans with Disability Act (ADA), (42 U.S.C. §12101), prohibits public and private employers from discriminating against persons and employees with physical and/or mental disabilities. ADA applies to all employers with 15 or more employees and forces employers to make accommodations for needs of disabled employees that cause no undue hardship to employer's operations. For protection under ADA, person must first be qualified individual with disability. Person is qualified if, with or without accommodation, person can perform essential features of job. For physical or mental impairment to be defined as disability, impairment must substantially limit one or more major life activities. See 524 U.S. 624; 534 U.S. 184. ADA abrogates state sovereign immunity and creates private cause of action for damages against state for conduct that violates Fourteenth Amendment. (126 S. Ct. 877). Age Discrimination Act, (29 U.S.C. §§621-634), prohibits age discrimination based on employees 40 years old and older. Discrimination based on worker's age unlawful in both private and public sectors. (29 U.S.C. §623 et seq.). Compulsory retirement at age 65 prohibited except for certain executives and persons making upper level policy decisions. (29 U.S.C. §631[c]). Discrimination based on woman's pregnancy regulated by Pregnancy Discrimination Act. (42 U.S.C. §2000[e]). See, http://www.dol.gov/dol/topic/discrimination/disability/disc.

Sexual Harassment.

Unlawful sex discrimination forbidden by Title VII of Civil Rights Act. Equal Employment Opportunity Commission (EEOC) is federal agency responsible for handling complaints of sexual harassment violations and can sue employers for violations under Title VII. (29 C.F.R. §1604.11). EEOC publishes guidelines concerning sexual harassment in workplace. (29 C.F.R. §1604.11; 524 U.S. 775; 524 U.S. 742). Guidelines protect both males and females from sexual harassment. Supreme Court of U.S. holds sexual harassment unlawful under Title VII if victim and employer same gender. (523 U.S. 75). Employer may be liable for conduct of his supervisors, agents, coworkers and nonemployees who sexually harass employees if employer knows or should have known of conduct and fails to take appropriate action. Harassment because of other characteristics, such as race, also prohibited.

11.03 LABOR UNIONS:

National Labor Relations Act (NLRA) regulates labor relations which affect interstate and foreign commerce and embodies national labor police of U.S. (29 U.S.C. §§151-168). Purpose of Act to eliminate obstructions to free flow of commerce by encouraging practice of collective bargaining between employers and employees. Right to join unions and to collectively bargain key rights granted by NLRA. (29 U.S.C. §157). NLRA protects employees' rights of collective action and collective bargaining for economic warfare in securing satisfactory wages, hours of work, and employment conditions. (29 U.S.C. §151 et seq.). Furthermore, NLRA protects exercise of workers of their full freedoms of association, self-organization and designation of representatives of their own choosing, for purpose of negotiation terms and conditions of their employment. NLRA does not regulate content of collective bargaining agreements; it regulates procedure of bargaining agreement. NLRA establishes national labor laws uniformly administered and enforced throughout U.S. NLRA regulates all employers whose activities affect interstate commerce. Most public sector employees not covered by NLRA. Object of NLRA to regulate orderly resolution of labor disputes between workers and employers. (29 U.S.C. §171). For suits by and against labor organizations, see Labor Management Relations Act (LMRA) §301, (29 U.S.C. §185).

National Labor Relations Board.

NLRA created National Labor Relations Board (NLRB), federal agency that supervises and enforces NLRA. (29 U.S.C. §153[a]). NLRB independent administrative agency that consists of five members appointed by President of U.S. NLRB administers and interprets unfair labor practice and representation provision of NLRA. NLRB also has prosecutorial function in charge of investigating claims of unfair labor practice. NLRB has several responsibilities, including determining whether employees should be represented by union; and holding representation election. NLRB ensures fair elections by prohibiting unfair labor. (29 U.S.C. §153[a]). In ensuring fairness, NLRB prohibits employer from conducting surveillance of union activities, questioning employees about union activity, and threats to stop union activity. (29 U.S.C. §158[a]).

Union Organizing.

NLRA regulates right of employees to form and join unions and to collectively bargain through elected union representatives. (29 U.S.C. §157). Employees wishing to form union must seek support from majority of workers in bargaining unit. When 30% of employees within unit have authorized their desire to be in union, NLRB may require that union election be held. (29 U.S.C. §158[a][1]). NLRB will then oversee election to ensure fair election. (29 U.S.C. §§159-160). Once union wins recognition from employer, union becomes exclusive representative of all employees in bargaining unit, regardless of whether employees members of union or not. (29 U.S.C. §159[a]).

Exclusivity.

When union designated by NLRB as representative group of employees, union enjoys exclusive right to represent those employees. All union members will be bound by vote of majority. Employer cannot avoid union and deal directly with employees, even if employees initiate discussion. (29 U.S.C. §159).

Labor Disputes.

Unfair labor practice complaint initiated by union, employee or employer and filed with regional office of NLRB. Regional office then responsible for investigating charge and decides whether to issue complaint. Once complaint issues, case can then be prosecuted by lawyers from General Counsel Office of NLRB. Unfair labor practice case tried before Administrative Law Judge. If judge's decision establishes appropriate remedy and no exceptions filed to judge's order, judicial order becomes final order issued by NLRB. Because Board does not have power to compel adherence to its orders, (29 U.S.C. §160(e), (f)), of NLRA allows Board to petition U.S. Court of Appeals judge for enforcement of Board's order. Respondent may also petition Court of Appeals to review decision of Board.

Organizational Picketing.

29 U.S.C. §158[b][7] declares organizational picketing unfair labor practice in three contexts: (1) where employer has lawfully recognized another union and issue or representation cannot appropriately be raised under 29 U.S.C. §159[c]; (2) if valid election has been held in prior 12 months; and (3) where organizational picketing has been conducted without election petition being filed.

Right to Strike.

Under NLRA, both union and employer obliged to bargain in good faith. Union's right to strike protected by NLRA and employees cannot be disciplined or fired for participating in such strike. (29 U.S.C. §158[a][3]). However, employees have right to replace workers participating in economic strike. (29 U.S.C. §158[a][3]; 350 U.S. 270). Employers cannot replace workers if strike in protest for unfair labor practice. Some strikes illegal under NLRA, such as striking against secondary employer who does business with employee's primary employer. (29 U.S.C. §158[b][4]).

Reduction in Work Force.

Under Worker Adjustment and Retraining Notification Act [WARN], employers with 100 or more employees must give 60 days notice prior to laying off or terminating 50 or more employees. (29 U.S.C. §2101).

Workers Compensation Law.

See http://www.dol.gov/esa/owcp_org.htm. Under Federal Employees' Compensation Act (FECA) overseen by Secretary of Labor, civil employees of U.S. have right to compensation for disability or death resulting from personal injuries sustained in performance of job, and to medical services necessary to treatment of injuries. (5 U.S.C. §8101 et seq.). Act does not cover injuries if caused by employee's willful and intentional conduct, or if proximately caused by employee's intoxication. (5 U.S.C. §8102). FECA administered by Office of Workers' Compensation Programs (OWCP), U.S. Department of Labor, through district offices across U.S. (5 U.S.C. §8145). Injured workers must give notice of injury or death to immediate supervisor within 30 days of injury. (5 U.S.C. §8119). Upon receipt of notice of injury, supervisor must immediately notify Secretary of Labor. (5 U.S.C. §8120). Compensation under Act may be allowed if worker or worker's representative files claim with Secretary of Labor within three years after injury or death. (5 U.S.C. §8122). Claim must be made in writing, be delivered to office of Secretary of Labor or designee by regulation, and be on form approved by Secretary of Labor. (5 U.S.C. §8121). Secretary of Labor makes finding of facts and grants reward for or against payment of compensation. (5 U.S.C. §8124). Longshore and Harbor Workers' Compensation Act provides for compensation to employees for disability or death from injury occurring on navigable waters of U.S. if recovery for disability or death through workers' compensation proceedings not provided by state law. (33 U.S.C. §906). Determination of pay under Longshore and Harbor Workers' Compensation Act falls under 33 U.S.C. §910. For maximum rate of compensation and applicability of determination of pay period, see 33 U.S.C. §906. See 43 U.S.C. §1333[b] for discussion of other federal employees covered under Longshore and Harbor Workers' Compensation Act.

Occupational Diseases.

Employees right to safe and healthy workplace regulated by Occupational Safety and Health Act. (29 U.S.C. §§651-678; 29 C.F.R. §1910). Federal agency charged with overseeing compliance and enforcement of 29 U.S.C. §651 et seq.,, is Occupational Safety Health and Administrative Agency (OSHA). OSHA requires employees to provide workplaces free from recognized hazards, provide training, medical examinations and recordkeeping. (29 U.S.C. §651 et seq.). Allows states to establish their own safety and health programs with OSHA approval. Employees working in private sector covered by OSHA. Public sector workers in states that run their own OSHA programs covered by those states. Employees may file complaints with OSHA at nearest regional office, telephonically, through OSHA government website or in writing. Employees who file OSHA complaints against their employer cannot be transferred, fired or disciplined. (29 U.S.C. §651 et seq.; 29 C.F.R. §1903.11).

Employees' Liability Act.

Federal Employer's Liability Act imposes liability of common carriers by railroad, in interstate or foreign commerce, for injuries to employees from negligence. (45 U.S.C. §§51-60). Protection under Employer's Liability Act also covers merchant seaman. (46 U.S.C. §30104).

Unemployment Compensation.

Unemployment payments provided to workers whose jobs are terminated through no fault of their own. (26 U.S.C. §3301, et seq.). Unemployment program in U.S. based on dual program of state and federal laws. Each individual state administers separate unemployment compensation program, which must be approved by U.S. Secretary of Labor based on federal standards. (26 U.S.C. §3301 et seq.; 42 U.S.C. §1101 et seq.). See individual State Digests regarding unemployment laws for employees eligible for compensation, amount received, and time period of benefits. (26 C.F.R. §31).

11.04 RETIREMENT:

Employee Retirement Income Security Act (ERISA), sets uniform minimum standards mandating employee benefit plans be established and maintained in fair and financially sound manner. (29 U.S.C. §1001 et seq.; 29 C.F.R. §2509 et seq.). Employers have obligation to provide promised benefits and satisfy ERISA's requirements for managing and administering private pension and welfare plans. Generally, ERISA does not cover plans maintained by governmental entities, churches, or plans maintained solely to comply with worker's compensation, unemployment, or disability laws. (29 U.S.C. §1003). ERISA does not cover plans maintained outside U.S. for benefit of nonresident aliens. (29 U.S.C. §1003[b][4]).

11.05 WORKER'S COMPENSATION LAW:

See topic 11.02 Labor Relations.

12 ENVIRONMENT

12.01 ENVIRONMENTAL REGULATION:

General Supervision.

Environmental Protection Agency (EPA) within executive branch of federal government assigned task of promulgating, administering, and enforcing environmental laws.

EPA Office.

Environmental Protection Agency, Ariel Rios Building, 1200 Pennsylvania Ave., N.W., Washington, DC 20460. Telephone: (202) 272-0167.

Internet Address.

EPA maintains website at http://www.epa.gov/.

EPA Region One Office.

Region One covers environmental matters within following states: Connecticut, Massachusetts, Maine, New Hampshire, Rhode Island, and Vermont. Address for Region One office is: Environmental Protection Agency, One Congress St., Suite 1100, Boston, MA 02114-2023. Telephone: (617) 918-1111. Fax: (617) 918-0101. Toll free: (888) 918-7341. Region One website located at http://www.epa.gov/region01/.

EPA Region Two Office.

Region Two covers environmental matters within following states and territories: New

Jersey, New York, Puerto Rico, and U.S. Virgin Islands. Address for Region Two office is: Environmental Protection Agency, 290 Broadway, New York, NY 10007-1866. Telephone: (212) 637-3000. Fax: (212) 637-3526. Region Two website located at http://www.epa.gov/region02/.

EPA Region Three Office.

Region Three covers environmental matters within following areas: District of Columbia, Delaware, Maryland, Pennsylvania, Virginia, and West Virginia. Address for Region Three office is: Environmental Protection Agency, 1650 Arch St., Philadelphia, PA 19103-2029. Telephone: (215) 814-5000. Fax: (215) 814-5103. Toll free: (800) 438-2474. Email: r3public@epa.gov. Region Three maintains website at http://www.epa.gov/region03/.

EPA Region Four Office.

Region Four covers environmental matters within following states: Alabama, Florida, Georgia, Kentucky, Mississippi, North Carolina, South Carolina, and Tennessee. Address for Region Four office is: Environmental Protection Agency, Atlanta Federal Center, 61 Forsyth Street, SW, Atlanta, GA 30303-3104. Telephone: (404) 562-9900. Fax: (404) 562-8174. Toll free: (800) 241-1754. Region Four website located at http://www.epa.gov/region04/.

Region Five Office.

Region Five covers environmental matters within following states: Illinois, Indiana, Michigan, Minnesota, Ohio, and Wisconsin. Address for Region Five office is: Environmental Protection Agency, 77 West Jackson Blvd., Chicago IL 60604-3507. Telephone: (312) 353-2000. Fax: (312) 353-4135. Toll free: (800) 621-8431. Region Five website located at http://www.epa.gov/region05/.

Region Six Office.

Region Six covers environmental matters within following states: Arkansas, Louisiana, New Mexico, Oklahoma, and Texas. Address for Region Six office is: Environmental Protection Agency, Fountain Place 12th Floor, Suite 1200, 1445 Ross Ave., Dallas, TX 75202-2733. Telephone: (214) 665-2200. Fax: (214) 665-7113. Toll free: (800) 887-6063. Region Six website located at http://www.epa.gov/region06/.

Region Seven Office.

Region Seven covers environmental matters in following states: Iowa, Kansas, Missouri, and Nebraska. Address for Region Seven office is: Environmental Protection Agency, 901 North 5th St., Kansas City, KS 66101. Telephone: (913) 551-7003. Toll free: (800) 223-0425. Region Seven website located at http://www.epa.gov/region07/.

Region Eight Office.

Region Eight covers environmental matters in following states: Colorado, Montana, North Dakota, South Dakota, Utah, and Wyoming. Address for Region Eight office is: Environmental Protection Agency, 1595 Wynkoop St., Denver, CO 80202-1129. Telephone: (303) 312-6312. Fax: (303) 312-6339. Toll free: (800) 227-8917. Email: r8eisc@epa.gov. Region Eight website located at http://www.epa.gov/region08/.

Region Nine Office.

Region Nine covers environmental matters in following states: Arizona, California, Hawaii, and Nevada. Address for Region Nine office is: Environmental Protection Agency, 75 Hawthorne St., San Francisco, CA 94105. Telephone: (415) 947-8000. Fax: (415) 947-3553. Toll free: (866) EPA-WEST. Email: r9.info@epa.gov. Region Nine website located at http://www.epa.gov/region09/.

Region Ten Office.

Region Ten covers environmental matters in following states: Arkansas, Idaho, Oregon, and Washington. Address for Region Ten office is: Environmental Protection Agency, 1200 Sixth Ave., Seattle WA 98101. Telephone: (206) 553-1200. Fax: (206) 553-2955. Toll free: (800) 424-4372. Region Ten website located at http://www.epa.gov/region10/.

Freedom of Information Act Requests.

Freedom of Information Act (FOIA) allows individuals to obtain information from federal government agencies, including EPA. (5 U.S.C. §552). Specific requests governed by provisions of FOIA. Questions regarding FOIA requests should be directed to HQ Freedom of Information Operations Staff, 1200 Pennsylvania Ave., N.W. (2822T), Washington, DC 20460. Telephone: (202) 566-1667. Fax: (202) 566-2147. Email: hq.foia@epa.gov. More specific information about making FOIA requests can be found at EPA website—http://www.epa.gov/foia/.

International Requests for Information from EPA.

INFOTERRA is international environmental referral and research network made up of 170 countries coordinated by United Nations Environment Program (UNEP) in Nairobi, Kenya. In U.S., Focal Point for INFOTERRA is EPA. INFOTERRA/USA responds to requests from international community for environmental information through document delivery, database searching, bibliographic products, purchasing information, and referrals to experts.

National Environmental Policy Act.

Act requires government agencies to administer programs in environmentally sound fashion. (42 U.S.C. §§4331-35).

Environmental Impact Statement.

Under certain circumstances, agencies must produce environmental impact statement (EIS), which details expected environmental impact of government action. (42 U.S.C. §4332). EIS required for all “major Federal actions significantly affecting quality of … environment.” (Id.). EIS must review “environmental impact of proposed action”, adverse “environmental effects which cannot be avoided” if proposal implemented, “alternatives to proposed actions”, relationship between “short-term use of environment and maintenance of long-term productivity”, and irreversible and “irretrievable commitments of resources which should be involved in proposed action”. (42 U.S.C. §4332[c]).

Clean Air Act.

Comprehensive federal law regulating air emissions from area, stationary, and mobile sources. (42 U.S.C. §7401). Each state to create state implementation plan that prevents significant deterioration of air quality. (42 U.S.C. §7407). State plans can be enforced as both federal and state law. If state plan inadequate, EPA may amend plan and amendments are binding on state.

National Ambient Air Quality Standards.

Clean Air Act authorizes EPA to establish National Ambient Air Quality Standards (NAAQS). Act intended to set NAAQS for every state. NAAQS sets limit on concentration of pollutants in air, and limits intended to protect public health. (42 U.S.C. §§7408-09).

Civil Actions and Penalties.

If facility or individual in violation of state implementation plan or of certain provisions of Clean Air Act, party may be enjoined from engaging in activities that produced violation. (42 U.S.C. §7413[b]). Party may also be assessed civil penalty of $25,000 per day for each violation.

(Id.).

Criminal Penalties.

Any person who knowingly violates any requirement of state implementation plan or applicable sections of Clean Air Act may be fined and imprisoned for up to five years. (42 U.S.C. §7413[c]). Criminal penalties doubled for subsequent criminal violations of act. (Id.). Any person who makes false statements in any report or application required under act, or who omits material information, may be fined or imprisoned for up to two years. Any person who knowingly releases hazardous substance into air that places others in "imminent danger of death or serious bodily injury", may be fined and receive up to 15 years in prison. (42 U.S.C. §7413[c][5]). If violation committed by organization, fine may be up to $1,000,000. (Id.).

Clean Water Act.

Goal under act is to restore and maintain "chemical, physical, and biological integrity" of nation's waters. (33 U.S.C. §1251).

National Pollutant Discharge Elimination System (NPDES).

Sets numerical limits on pollutant discharge into nation's waters. (33 U.S.C. §1311). Under Act, it is unlawful to discharge any pollutant from point source into navigable waters unless NPDES permit obtained. (33 U.S.C. §1311[a]). Point source defined broadly in Act and includes any discernible, confined and discrete conveyance, such as pipe, ditch, channel, tunnel, conduit, discrete fissure, or container. It also includes vessels or other floating craft from which pollutants are or may be discharged. By law, agricultural storm water discharges and return flows from irrigated agriculture are not point sources. If discharge waste into waters, must use "best practicable control technology currently available" within particular industry. (Id.). In some instances, discharges must use "best available technology economically achievable". (33 U.S.C. §1311[b]). Act authorizes EPA to delegate many administrative functions, including issuing NPDES permits, to individual states. In these states, EPA still maintains oversight responsibilities. NPDES administrative procedures require that public be notified and allowed to comment on permit applications. When EPA authorizes state to issue NPDES permits, state required to provide public with same access.

Citizen Lawsuits.

Clean Water Act authorizes individual citizens to bring lawsuits on own behalf against any person, including U.S. government, based on alleged violation or effluent standard limitations contained within Act. (33 U.S.C. §1365). Citizens may also bring lawsuits where failure to perform any nondiscretionary act or duty under Act alleged. (Id.).

Civil Actions and Penalties.

EPA administrator authorized to bring civil action for violations of Clean Water Act. (33 U.S.C. §1319[b]). Relief sought may include temporary or permanent injunction. (Id.). Any person violating act or any condition of permit issued by EPA or by individual state subject to civil penalty of up to $25,000 per day, per violation. (33 U.S.C. §1319[d]).

Criminal Penalties.

Any person who negligently introduces pollutants into sewer system, which causes system to be in violation of effluent limitations may be fined up to $25,000 per day, per violation or may be imprisoned for up to one year. (33 U.S.C. §1319[c][1][B]). Fines and imprisonment may be doubled for subsequent convictions for negligent violations of act. (Id.). Any person who knowingly introduces pollutants into sewer system, which causes system to be in violation of effluent limitations may be fined up to $50,000 per day, per violation or may be imprisoned for up to three years. (33 U.S.C. §1319[c][2]). If subsequent conviction, fine may be up to $100,000 per day or imprisonment for up to six years or both. (33 U.S.C.§1319[c][2][B]). Any person who knowingly violates act, and who knows that their actions place others in danger of death or serious bodily injury may be fined up to $250,000 and imprisoned for up to 15 years. (33 U.S.C. §1319[c][3][A]). Organizations that commit such violations may be fined up to $1,000,000. (Id.).

Toxic Substances Control Act.

Purpose of Act to acquire data on toxic chemicals manufactured in or imported into U.S. (15 U.S.C. §2601). Under Act, EPA can ban import of chemicals that pose unreasonable health risk.

Testing Requirements.

EPA may require testing of chemicals if it finds that manufacture, distribution, or use of chemical presents “unreasonable risk of injury to health” or to environment and insufficient data are available regarding effects of such chemicals. (15 U.S.C. §2603).

Notice to EPA.

Manufacturer must notify EPA of intent to manufacture new chemical or where existing chemical subject to “significant new use”. (15 U.S.C. §2604[a][1][B]). Manufacturer must provide notice at least 90 days before manufacturing new chemical. (Id.). Manufacturer must supply EPA with data regarding new chemical.

Regulation of Hazardous Chemicals.

Under Act, EPA has power to regulate manufacture and distribution of chemicals. EPA may do so when it finds “reasonable basis to conclude” that manufacture, processing, or distribution of substance presents “unreasonable risk of injury to health” or environment. (15 U.S.C. §2605[a]). When regulating manufacturing and distribution of such chemicals, EPA must use “least burdensome requirements”. (Id.).

Civil Penalties.

Violators of Act subject to civil fine up to $25,000 per violation. (15 U.S.C. §2615[a]).

Criminal Penalties.

Anyone who knowingly or willfully violates Act subject to $25,000 fine for each violation, in addition to any civil fine, and up to one year in prison. (15 U.S.C. §2615[b]).

Preemption of State Law.

In most instances, Act does not prevent states from regulating chemicals and their use or manufacture within state's border. (15 U.S.C. §2617). Please consult individual State Digests for relevant information.

Federal Insecticide, Fungicide, and Rodenticide Act.

All pesticides used in U.S. must be registered by EPA. (7 U.S.C. §136a[a]). Registration intended to ensure that pesticides properly labeled and will not cause unreasonable harm to environment when used in accordance with specifications. EPA approves pesticide for registration if it will not “generally cause unreasonable adverse effects on environment” if used in “accordance with widespread and commonly recognized practice”. (7 U.S.C. §136a[c][5][d]). Act defines unreasonable adverse effects on environment to include unreasonable risks to humans or environment, but taking into account “economic, social, and environmental costs and benefits” of using pesticide. (7 U.S.C. §136[bb]).

Classification of Pesticides.

EPA registers pesticides for general or restricted use. (7 U.S.C. §136a[d]). Pesticide classified for general use if it will not cause unreasonable adverse effects on environment when used according to directions. (7 U.S.C. §136a[d][1][B]). Pesticide classified for restricted use if may cause unreasonable adverse effects on environment or people. (Id.). If pesticide classified as restricted because of dangers to applicator, EPA must restrict for use by certified applicators.

Cancellation of Registration.

If EPA finds that pesticide or its labeling does not comply with provisions of Act, EPA may issue notice indicating intent to cancel registration or to hold hearing to determine whether registration should be cancelled. (7 U.S.C. §136d[b]). EPA may suspend sales of pesticide in advance of sending notice to registrant when it finds that emergency exists. (7 U.S.C. §136d[c]).

Applicator Certification.

EPA must conduct program for certification of applicators of pesticides. (33 U.S.C. §136i). Individual states may certify applicators if certification plan approved by EPA. (Id.).

Endangered Species Act.

Purpose of Act.

Act intended to provide means for protecting endangered and threatened species of plants and animals and to conserve ecosystems upon which these species depend. (16 U.S.C. §1531). All federal agencies must perform functions in such way so as to conserve endangered and threatened species. (Id.). Further, federal agencies must cooperate with state and local authorities to "resolve water resource issues in concert with conservation of endangered species." (Id.).

Lists of Endangered and Threatened Species.

Department of Interior maintains list of 632 endangered species, 326 of which are plants, and 190 threatened species, 78 of which are plants. Anyone can petition Department of Interior to include species on list. Secretary of Interior determines which species to place on list based on best scientific and commercial data available. (16 U.S.C. §1533[b]). Species considered endangered when it is "in danger of extinction throughout all" or significant portion of its range. (16 U.S.C. §1532[6]). Threatened species are likely to become endangered within foreseeable future in all or significant portion of range. (16 U.S.C. §1532[20]). When making determination, secretary must take into consideration whether foreign nations have concluded that species requires protection. (16 U.S.C. §1533).

Prohibited Acts.

Act prohibits any action that results in "taking" of listed species or adversely affects listed species' habitat. (16 U.S.C. §1538). Taking means to "harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage" in any of these acts. (16 U.S.C. §1532[19]). Harm to species includes possession, sale, delivery, or transportation of listed species, and results in violation of Act. (16 U.S.C. §1538). Harm also includes significant habitat modification or degradation that actually kills or endangers wildlife. Import or export of listed species prohibited. (Id.).

Penalties.

Violators of Act subject to civil penalties of up to $25,000 per violation. (16 U.S.C. §1540[a]). Criminal violations of Act can lead to fines of up to $50,000 and imprisonment up to one year. (16 U.S.C. §1540[b]). Any person may commence civil suit to enjoin U.S. from conduct allegedly in violation of statute. (16 U.S.C. §1540[g]).

International Treaties.

U.S. party to migratory bird treaties with Canada and Mexico, Migratory and Endangered Bird Treaty with Japan, Convention on Nature Protection and Wildlife Preservation in the Western Hemisphere, International Convention for Northwest Atlantic Fisheries, International Convention for High Seas Fisheries of North Pacific Ocean, and Convention of International Trade in Endangered Species of Wild Fauna and Flora.

Marine Turtles Conservation Act.

Act establishes conservation fund, and Secretary of Interior empowered to distribute monies from fund to conservation projects intended to protect marine turtles. (16 U.S.C. §6601). Funds available to any country's wildlife management authority or to private organizations with demonstrated expertise for conservation of marine turtles. (16 U.S.C. §6603). Proposals may be submitted to Secretary of Interior and must include statement of purpose, description of project including logistics, personnel, funds required, and name of individual with overall responsibility for project. (Id.).

12.02 STATE ENVIRONMENTAL LAWS:

States may implement and enforce environmental regulations that affect individuals and businesses within their borders. Please see individual State Digests for relevant information.

Federal Preemption of State Laws.

If state and federal environmental laws are in conflict, federal law takes precedence over state law. (U.S. Const. art. VI).

Review of State Environmental Laws by Federal Courts.

Under Commerce Clause to U.S. Constitution, federal courts may review state environmental laws that impact flow of interstate commerce. (U.S. Const. art. I, §8).

13 ESTATES AND TRUSTS

13.01 ESTATES:

Individual state laws regulate law of estates and trusts in that state. State courts likewise retain exclusive jurisdiction over actions involving probate of estates. Jurisdiction of U.S. federal courts limited to matters set out in U.S. Const. art. III, §2 and does not include actions relating to estates and trusts. See individual State Digests for controlling law. For laws relating to federal estate and gift tax see category 24 Taxation, topic 24.06 Estate and 24.11 Gift Tax.

14 FAMILY

14.01 ALIMONY, PENSIONS AND BENEFITS:

5 U.S.C. §8339 (Federal Civil Service Pension and Benefits) and 10 U.S.C. §1072 (Military Pensions and Benefits) contain provisions protecting alimony and survivorship payments to spouses and dependents. See also, 42 U.S.C. §402 (Social Security and Child Welfare).

14.02 CHILD WELFARE AND PARENTAL RIGHTS:

Federal law makes criminal certain failures to pay support obligations to children residing in another state (18 U.S.C. §228) as well as travel in interstate or foreign commerce with intent to evade support obligation. Removal of child from U.S. or retention of child outside U.S. with intent to obstruct lawful exercise of parental rights is made criminal by 18 U.S.C. §228, which supplements The Hague Convention on the Civil Aspects of International Parental Child

Abduction (Oct. 25, 1980), to which U.S. is party. See 42 U.S.C. §11601. U.S. courts have concurrent jurisdiction for actions arising under Hague Convention relating to child abduction. (42 U.S.C. §11603[a]). Under Convention, petitioner must establish by preponderance of evidence that child has been wrongfully retained or removed. (42 U.S.C. §11603[e]). Wrongful removal or retention of child includes removal by parent prior to entry of custody order. (42 U.S.C. §11603[f]). Private entities and organizations carrying out U.S. responsibilities under Convention not liable for civil actions based on negligent discharge of duties. (42 U.S.C. §11606). Immunity from liability not applicable where plaintiff establishes intentional, reckless or malicious conduct on part of organization, or where lawsuit is based on actions unrelated to performance of duties under Convention. (Id.). Also, limitation on liability inapplicable where alleged act or omission related to ordinary business activity including general administration or operations, use of motor vehicles, or personnel management. (Id.). Federal statutes give full faith and credit to protection orders, child support orders, abuse protection orders and interstate domestic violence and stalking. See also 28 U.S.C. §1738A, The Parental Kidnapping Prevention Act (PKPA).

14.03 DOMESTIC RELATIONS EXCEPTION:

U.S. Federal Courts do not exercise traditional domestic relations jurisdiction over actions such as divorce, annulment, legal separation and child custody. See digests of the laws of individual states for these matters and other traditional domestic relations actions such as alimony, child custody, modification of domestic relations judgments, child support, adoption and similar actions. Federal tax and bankruptcy laws are applicable in many family law cases, as well as specific statutes set forth in this category.

14.04 MARRIAGE:

In 1996 Congress enacted Defense of Marriage Act (1 U.S.C. §7) excluding same-sex marriages from definition of marriage. 28 U.S.C. §1738C provides that no state, territory or possession is required to recognize same-sex marriage although accepted as legal marriage under law of another state.

15 FOREIGN TRADE AND COMMERCE

15.01 INTRODUCTION:

U.S. Congress has authority to regulate foreign trade and commerce. Much of authority has been delegated to President and several federal agencies and departments including International Trade Administration, Bureau of Export Administration (both within Department of Commerce), Interagency Trade Organization, International Trade Commission, U.S. Trade Representative and U.S. Customs Service. U.S. Court of International Trade hears civil actions involving international trade disputes with U.S.

U.S. is signatory to Marrakesh Agreement establishing World Trade Organization (WTO) including multilateral Trade Agreements concerning international trade in goods, services and intellectual property rights. U.S. has enacted legislation implementing its WTO Commitments and Uruguay Round of the General Agreement on Tariffs and Trade (GATT) in Uruguay Round Agreements Act. U.S. is also party to numerous international trade agreements including North American Free Trade Agreement (NAFTA), Canada-United States Free Trade Agreement (CFTA) and Israeli-United States Free Trade Agreement (IFTA).

15.02 CUSTOMS DUTIES:

Regulation of Imports.

Goods imported into U.S. must clear U.S. Customs. Customs law is administered by U.S. Customs Service, department of Treasury Department. Regulation of entry of and duties on imports is based on several trade statutes including Trade Act of 1930 and Trade Act of 1979 (including amendments to Acts). Statutes set out U.S. law and often implement rules set out in GATT and international trade agreements.

Entry Requirements.

Proper documentation is required for entry of goods into U.S. Required documentation includes customs entry form, commercial invoice, packing list and evidence of right of entry. Severe penalties are imposed for false statements or omissions in documentation. (19 U.S.C. 1592). Customs Service reviews documentation, examines goods and determines customs duty. Nonresidents generally must post bond by U.S. resident surety. Foreign corporations must have resident agent.

Clean Diamond Trade Act.

Prohibits importation of diamonds into U.S. unless controlled through Kimberly Process Certification Scheme. (19 U.S.C. §3903). Requirement may be waived where country attempting in good faith to implement certification scheme or where in national interest of U.S. to do so. (Id.). For purposes of Act, importing authority U.S. Bureau of Customs and Border Protection and exporting authority Bureau of Census. (19 U.S.C. §3905). Act provides for civil penalty of up to $10,000 and criminal fine of up to $50,000 and ten years in jail. (19 U.S.C. §3907).

Classification of Goods.

Goods imported into U.S. are classified by product and country of origin by customs officials to assess customs tariff. Since 1989, foreign goods entering U.S. are classified according to Harmonized Tariff Schedule (HTS). Country of origin of imported goods determines whether entry of goods is prohibited or limited by quota or voluntary restraint agreement or, where entry is permitted, applicable tariff. Every foreign import must be marked with country of origin. Specific rules apply to marking and consequences for failure to properly mark goods. (19 C.F.R. §§134.13-134.55). Article is considered product of country only if “it is wholly the growth, product, or manufacture of that country . . . or . . . has been substantially transformed into a new and different article” in country. (19 U.S.C. §2518[4][B]). U.S. courts use several tests to apply “substantially transformed” standard. Distinct rules of origin may apply for imports entering under NAFTA or other free trade agreements, entering from certain developing nations, or for specified goods.

Valuation of Goods.

Goods are valued under GATT Customs Valuation Code adopted in Trade Agreement of 1979. (19 U.S.C. §1401a). Customs valuation is generally based on calculation of “transaction value” of import. Transaction value is “price actually paid or payable for merchandise when sold for exportation to the United States” plus additional costs such as commissions, packing costs, royalties, and license fees paid by buyer. (19 U.S.C. §1401a[g][3]). Where conditions for using transaction value are not met, other specified systems of valuation are used including value of similar merchandise, deductive value and computed value. Complex rules and conditions exist for valuation of goods under GATT Customs Valuation Code.

Customs Tariff.

U.S. Congress has authority to levy tariffs on imports. Tariffs are set largely through international trade agreements. U.S. tariffs are set out in Harmonized Tariff Schedule (HTS). Current HTS is published as independent loose-leaf service and is not included in U.S. Code. Generally HTS Column 1 tariffs (also called most-favored-nations [MFN] tariffs) apply. Higher tariffs (Column 2 tariffs) apply to imports from countries not meeting MFN status. MFN status is regulated by Jackson-Vanik Amendment to Trade Act of 1974. (19 U.S.C. §2432[c][1]). Act provides MFN tariff will not apply to goods imported from “nonmarket economy countries” which countries impose restrictions on emigration. President has authority to waive compliance with

MFN provision on annual basis if waiver will promote objectives of freedom of emigration. (19 U.S.C. §2432[c][1]A). Nations not given MFN Column 1 tariff status are set out in HTS General Note 3(b) and presently include Afghanistan, Cuba, Laos, North Korea and Vietnam (as of July 2001). Lower tariffs or duty free entry exists for certain goods through negotiation of international trade agreements including NAFTA, CFTA and IFTA. Selected imports from developing nations enter duty free under Generalized System of Preferences (GSP) or under Caribbean Basin Initiative, Andean Preference Act of 1991 or other international agreement with U.S. Select products qualify for special tariff rate. Advance advisory rulings on tariff status may be obtained from applicable customs district.

Foreign Trade Zones.

Many foreign trade zones exist at ports of entry to U.S. Creation of foreign trade zones is authorized by Foreign Trade Zones Act of 1934 (as amended). (19 U.S.C. §§81a-81u). Foreign trade zones are considered outside U.S. customs territory and goods entering zone may be manufactured or otherwise altered in zone. Qualified “privileged foreign merchandise” is assessed customs tariff upon entering foreign trade zone regardless of changes made to merchandise after entry. Tariffs are not due until goods enter U.S. customs territory. “Nonprivileged foreign merchandise” entering foreign trade zone are assessed tariff upon entry in customs territory but tariff exempts various expenses ordinarily owed. Goods imported into bonded warehouse are likewise duty free until withdrawn.

Appeal of Decisions.

U.S. Court of International Trade reviews tariff classification and valuation decisions. Appeals may be heard by U.S. Court of Appeals for Federal Circuit and, ultimately, U.S. Supreme Court.

15.03 EXCHANGE CONTROL:

Foreign exchange in lawful transactions is largely unrestricted. U.S. has enacted laws limiting currency transactions with specified nations such as Cuba.

15.04 FOREIGN EXCHANGE:

See topic 15.03 Exchange Control.

15.05 FOREIGN INVESTMENT:

Introduction.

U.S. is party to several bilateral investment treaties (BITs) concerning foreign investment. NAFTA provisions include complex coverage of foreign investment including requiring investment rights be given to member nation businesses equivalent to those of domestic businesses and providing for binding arbitration of investment disputes. Less extensive rules concerning foreign investment entitled Trade Related Aspects of Investment Measures arose out of GATT Uruguay Round. U.S. is also member of Organization for Economic Cooperation and Development (OECD) which issued voluntary guidelines some of which relate to foreign investment. Individual states may enact laws attempting to regulate foreign investment as well.

Exon-Flurio Amendment.

In 1988 U.S. enacted Exon-Flurio amendment to Defense Production Act of 1950 authorizing President to prohibit “mergers, acquisitions, and takeovers” that may lead to control by foreign persons to protect national security. (50 U.S.C. App. §2170). Transactions potentially affecting national security are reported to and investigated by Committee on Foreign Investment in United States (CFIUS). CFIUS provides report and recommendation to President who, within

15 days, may suspend, prohibit or nullify transaction after finding action necessary in light of "credible evidence" of control affecting national security. Regulations list certain transactions that are and are not covered by Act. (31 C.F.R. §§800.301-302). Control is defined by regulations as power to determine, direct, take reach or cause certain types of decisions. (31 C.F.R. §800.204). Term "national security" is not defined by Act. CFIUS reports and recommendations are confidential. President must report findings to Congress but findings are not reviewable by courts.

Industry Restrictions.

U.S. law imposes limited prohibitions or restrictions of foreign investment in specific industries including nuclear power industry, merchant marine, air carrier industry, natural resources, banking and communications industry.

See also topic 15.06 Foreign Trade Regulation; categories 3 Business Regulation and Commerce, topic Securities; Taxation.

15.06 FOREIGN TRADE REGULATION:

Introduction.

U.S. is signatory to Marrakesh Agreement establishing World Trade Organization (WTO) including multilateral Trade Agreements. U.S. has enacted legislation implementing its WTO Commitments and Uruguay Round of the General Agreement on Tariffs and Trade (GATT) in Uruguay Round Agreements Act. U.S. is also party to numerous international trade agreements including NAFTA, CFTA and IFTA.

North American Free Trade Agreement.

Effective Jan. 1, 1994, U.S., Canada and Mexico entered into North American Free Trade Agreement (NAFTA). NAFTA was implemented into U.S. law by North American Free Trade Agreement Implementation Act of 1993. (19 U.S.C. §§3301-3473). NAFTA establishes separate trade and investment regime for goods, services and investments originating in U.S., Canada and Mexico. NAFTA creates free trade zone through gradual elimination of tariffs on goods deemed to originate from NAFTA member nations. U.S. continues to apply tariff rates under HTS or other agreements to goods from other countries. Rules of origin under NAFTA are complex and must be reviewed for each product to determine whether product qualifies for NAFTA treatment. Exporters must complete Certificate of Origin stating whether product is originating good. Special rules exist for energy and petrochemical products and agricultural trade. AFTA provisions also address elimination of nontariff trade barriers and grant special benefits and rights to member nations in areas of investment, services and intellectual property. Countries may withdraw from NAFTA with six months notice. U.S., Canada and Mexico may agree to admit other countries to NAFTA.

African Growth and Opportunity Act.

President may provide duty-free treatment for any article that is product of certain sub-Saharan African countries. (19 U.S.C. §2466a). International Trade Commission must first determine that article not "import sensitive". (Id.). To be eligible, country must be making progress toward market based economy and equal protection under law for its citizens. (19 U.S.C. §3703). In addition, country must eliminate barriers to U.S. trade and may not engage in activities that undermine security of U.S. foreign policy.

Australia Free Trade Agreement.

Agreement intended to eliminate trade barriers and to establish free trade between U.S. and Australia. (19 U.S.C. 3805; 118 Stat. 919). U.S. law to prevail if conflict arises between parties, and any provision of agreement inconsistent with U.S. law has no effect. Law creates no private right of action and only U.S. government may bring lawsuit under agreement. Agreement only applies to “originating goods,” which are goods that are obtained or produced entirely in U.S., Australia, or both. If items qualify as “originating goods” tariffs may be lowered or eliminated entirely.

Chile Free Trade Agreement.

Purpose of agreement to establish free trade between Chile and U.S. through reduction and elimination of barriers to trade in goods and services and to investment. (19 U.S.C. 3805; Pub.L. No. 108-77; 117 Stat. 909). Chile no longer designated developing country under Generalized System of Preferences. Secretary of Treasury may assess additional duties on certain agricultural safeguard goods if determined that import price of goods less than trigger price indicated under agreement. Any additional duties applied only to over-quota imports of such goods. Agricultural safeguard goods defined as goods: (1) that originate in Chile; (2) included in agricultural safeguard good product list; and (3) for which claim for preferential tariff treatment made under agreement. Treaty trader or investor who is Chilean alien, including spouse and children, and Chilean professional engaged in specialty occupation allowed to enter or work in U.S. President under obligation to provide import relief if determined that textile or apparel article is being imported into U.S. in such increased quantities that threatens serious damage to domestic industry. U.S. law prevails in conflict. No private right of action created by agreement. Also, individuals may not challenge any action or inaction by U.S. government agency on grounds that action or inaction inconsistent with act.

Dominican Republic/Central America Free Trade Agreement.

Agreement seeks to establish free trade between U.S., Costa Rica, Dominican Republic, El Salvador, Guatemala, Honduras, and Nicaragua through “elimination of barriers to trade in goods and services”. (Pub. L. No. 109-53; 119 Stat. 462). Tariffs reduced or eliminated on certain goods if produced entirely in above listed countries. President under obligation to provide import relief if determined that textile or apparel article is being imported into U.S. in such increased quantities that threatens serious damage to domestic industry. No provision of agreement will have effect if inconsistent with U.S. law. Agreement does not amend or modify U.S. law unless agreement specifically authorizes modification.

Israeli and Canada Free Trade Agreements.

U.S. is also party to reciprocal free trade agreements with Israel (IFTA) and Canada (CFTA). IFTA was implemented into U.S. law in 1985 and grants Israeli imports duty free entry, replacing Israeli duty free entry under GSP program. Implementation of IFTA is gradual. CFTA involves gradual reduction and elimination of tariffs on manufactured and agricultural goods.

Jordan Free Trade Agreement.

Agreement allows for reduction or elimination of duty imposed by U.S. on Jordanian goods. (19 U.S.C. §2112, note). Goods must be imported directly from Jordan and goods must originate, largely, in Jordan. Agreement does not modify other U.S. laws.

Singapore Free Trade Agreement.

Purpose of agreement to establish free trade between Singapore and U.S. through reduction and elimination of barriers to trade in goods and services and to investment. (19 U.S.C. §3805; Pub. L. No. 108-78; 117 Stat. 948). Tariffs reduced or eliminated on certain goods if produced entirely in Singapore. Treaty trader or investor who is Singaporean alien, including spouse and children, and Singaporean professional engaged in specialty occupation allowed to enter or work in U.S. President under obligation to provide import relief if determined that textile or apparel article is being imported into U.S. in such increased quantities that threatens serious damage to domestic industry. U.S. law prevails in conflict and agreement does not modify existing U.S. law unless agreement specifically states that it does so. No private right of action created by agreement. Also, individuals may not challenge any action or inaction by U.S. government agency on grounds that action or inaction inconsistent with act.

Nontariff Trade Barriers.

Imports into U.S. may be subject to various nontariff trade barriers including quotas, federal and state safety, employment, environmental, consumer protection and product standard regulations, antidumping regulations and rules designed to protect domestic products. U.S. imposes quotas on import of certain goods to protect U.S. agricultural programs, to sanction unfair trade practices and to protect national security and foreign policy interests. Quotas may limit total quantity of specific goods or may be tariff-rate quotas limiting quantity of goods imported at low tariff rate. U.S. is also party to several international agreements where signatories voluntarily agree to import quotas and restrictions. U.S. has implemented several provisions to limit affect of nontariff trade barriers and implemented GATT Nontariff Trade Barrier Code under Uruguay Round Agreements Act. NAFTA provisions also address reduction of nontariff trade barriers.

Antidumping Law.

Trade Agreement Act of 1979 codifies U.S. antidumping law. (19 U.S.C. §§1671-1677g). International Trade Administration (ITA) administers antidumping law. Antidumping duty is imposed when foreign good is sold in U.S. for “less than its fair market value” as determined by amount charged for goods in exporter's market (19 U.S.C. §1673[1], [2]) and sale causes or threatens material injury to domestic industry. Calculation of selling price in U.S. and fair market value are complex. Antidumping duty imposed is difference in price sold in U.S. and exporter's market. (19 U.S.C. §1677). ITA makes preliminary and final findings of sale at less than fair market value. Preliminary and final material injury findings are made by International Trade Commission (ITC). Strict time limits apply within which dumping findings must be made. (19 U.S.C. §1673a, b). Duties imposed for dumping are often retroactive to ITA's preliminary finding of dumping. Settlement of antidumping proceedings may be achieved by agreement to stop exporting or eliminate price difference or withdrawal of dumping petition due to international agreement. Appeals from final dumping determinations heard by Court of International Trade with final appeals to Federal Circuit Court of Appeals and, ultimately, U.S. Supreme Court.

Countervailing Duties.

U.S. imposes countervailing duties on products imported into U.S. deemed to receive domestic or export “subsidy” from exporter's country. (19 U.S.C. §1671 et seq.). Imposition of duty for domestic subsidy requires finding of subsidy to specific industry, group or enterprise. Export subsidies may include credits and loans and less obvious incentives. Duties may be imposed on products from nonsignatories to GATT Subsidies Code absent finding of injury to domestic industry. Otherwise, imposition of duty requires finding of material injury, threatened injury or threatened retardation of domestic industry. Finding of subsidy is made by ITA and findings of injury are made by ITC. Appeals are heard by Court of International Trade with final appeals to Federal Circuit Court of Appeals and, ultimately, U.S. Supreme Court.

Escape Clause Proceedings.

Petitions may be brought under §201 of Trade Act of 1974 (“Escape Clause”) for temporary relief to protect domestic businesses from imports of foreign competitors even in absence of unfair trade practices or quotas. (19 U.S.C. §2251). Any interested trade association, union or company may initiate Escape Clause proceedings with ITC. Relief requires finding of increase in imports substantially causing or threatening serious injury to competitive domestic industries. Following investigation, ITC provides report and recommendation to President who may provide relief or take no action. Relief may take variety of forms including international agreement or imposition of quotas or tariffs. Relief has rarely been granted. Special rules and limitations exist for Escape Clause proceedings under NAFTA and other international trade agreements.

Export Regulations.

Laws and rules governing U.S. exports are contained in Export Administration Act and Export Administration Regulations (50 U.S.C. App. §2407). Exportation of goods often requires exporter to obtain appropriate license from U.S. Commerce Department. Thorough review of regulations is necessary to determine if license is required. Additional documentation may also be required. Special regulations apply to export of certain goods or export of goods to certain countries. U.S. provides variety of incentives to promote exports of domestic products including, among others: refunds of tariffs and other duties for imported goods exported within certain time period (19 U.S.C. §1313); credits for military exports; antitrust exemptions for qualified export trade associations; financing and subsidizing of export businesses through United States Export-Import Bank; export subsidies; and administrative and promotional assistance to export businesses.

§301 Proceedings.

§301 of Trade Act of 1974 requires U.S. take retaliatory action in response to finding by U.S. Trade Representative (USTR) that foreign country's practices are resulting in U.S. being denied rights or benefits of any trade agreement. (19 U.S.C. §§2411-2420). §301 further authorizes action against any foreign country if its practices are burdening or restricting U.S. commerce. §301 proceedings may be initiated by USTR or upon petition by any interested person. §301 broadly covers practices affecting goods or services. Remedies for violation may take numerous forms including imposition of tariffs or other restrictions and removal of trade agreement benefits or negotiation of agreements eliminating practices. §182 of Trade Act of 1974 sets out “Special 301” procedures requiring USTR to identify countries failing to provide adequate intellectual property protection to U.S. persons. (19 U.S.C. §2242). USTR must initiate §301 investigation against any designated priority countries for possible retaliation.

Foreign Corrupt Practices Act.

Foreign Corrupt Practices Act (FCPA) was enacted as amendment to Securities Exchange Act of 1934 in 1977. (15 U.S.C. §§78q[b], dd, ff[a]). FCPA was amended in 1988 and again in 1998 with adoption of OECD Convention on Combating Bribery of Foreign Officials in International Business Transactions. FCPA prohibits knowingly making certain payments to specified foreign officials for purpose of influencing any act or decision of foreign official or to gain any improper advantage in obtaining or retaining business. (15 U.S.C. §78dd-1[a][1][A][i], [B]). FCPA also contains detailed rules for reporting payments. FCPA contains rules for determining those covered by Act and defining prohibited payments. FCPA actions are handled by Department of Justice and Securities and Exchange Commission. Severe penalties exist for violations of FCPA reporting requirements and payment prohibitions.

Antiboycott Law.

U.S. boycotting prohibitions are contained in Export Administration Act and prohibit intentional actions furthering or supporting boycott of country friendly to U.S. (50 U.S.C. App. §2407[a][1]). Examples of prohibited conduct are set out in The Export Administration Regulations. (15 C.F.R. §734 et seq.).

16 HEALTH

16.01 BASIC STRUCTURE OF FEDERAL HEALTH LAW:

Note: Citations are to Title 42 U.S.C. unless otherwise noted.

Department of Health and Human Services (HHS).

(www.hhs.gov). Primary executive agency concerned with health of U.S. citizens. (42 U.S.C. §3501 et seq.). Agencies within HHS of primary interest are: Office of Public Health and Science (OPHS), including Office of Surgeon General (www.surgeongeneral.gov); Public Health Service, including National Institutes of Health (NIH), Bureau of Medical Services, and Bureau of State Services; Centers for Disease Control and Prevention (CDC) (www.cdc.gov); and Food and Drug Administration (FDA) (www.fda.gov).

Research and Statistics.

National Institutes of Health (NIH).

(www.nih.gov). Conducts and supports research, training, distribution of information with respect to individual diseases, e.g. National Cancer Institute, National Heart, Lung, and Blood Institute. (42 U.S.C. §281).

National Library of Medicine.

(www.nlm.nih.gov). Advances medicine and related sciences and aids in dissemination and exchange of information regarding progress of medicine. (42 U.S.C. §286).

National Center for Health Statistics.

(www.cdc.gov/nchs). Improves quality of health services in U.S. through statistical and epidemiological activities. (42 U.S.C. §242k). Collects statistics on impact on U.S. economy of births and deaths, illness, disability and environmental, social, and other health hazards.

Public Health Protection.

Communicable Diseases.

Centers for Disease Control and Prevention (www.cdc.gov) is lead agency for protecting health and safety of citizens.

Quarantine and Examination of Persons and Property.

Surgeon General, with approval of HHS Secretary, may make and enforce regulations preventing introduction, transmission, and spread of communicable diseases from foreign countries by inspection, disinfection, and destruction of infected items or prohibition of persons and property from countries with communicable diseases that imperil U.S. (42 U.S.C. §265). Persons detained pursuant to quarantine laws or by Immigration and Naturalization Service (INS) may be treated by Public Health Service. (42 U.S.C. §249).

Quarantine and Inspection of Foreign Vessels.

Vessels at foreign ports departing for U.S. must obtain bill of health in duplicate from consular officer of U.S. or Public Health Service officer, or other medical officer of U.S. designated by Surgeon General, setting forth sanitary history and condition of vessel and compliance with applicable regulations. Must deliver bill to collector of customs at port of entry and to quarantine officer. Unlawful for vessel to enter port of U.S. to discharge cargo or passengers except upon certificate of quarantine officer. Certificate must be delivered to customs with bill of health after going through quarantine station. (42 U.S.C. §§269, 271).

Notice of Exposure to Infectious Diseases

Emergency response workers to be notified when victim assisted is later diagnosed with airborne infectious disease. (42 U.S.C. §§300ff-131 to 300ff-140).

Public Health Emergencies.

HHS Secretary may take appropriate action if disease or disorder presents public health emergency. (42 U.S.C. §247d). HHS's Antimicrobial Resistance Task Force focuses on U.S. preparedness for bioterrorist attack. Task force coordinates development, maintenance and procedures for vaccines needed in case of attack. (42 U.S.C. §§247d-5, -6).

16.02 FOOD, DRUG, AND COSMETICS:

Note: Citations are to Title 21 U.S.C. unless otherwise noted.

Control and Regulation of Food, Drugs, and Cosmetics.

Food and Drug Administration (FDA) (www.fda.gov) regulates food, drug and cosmetic industries and products in interstate and foreign commerce. (21 U.S.C. §321). Primary rule-making and enforcement power comes from Food, Drug, and Cosmetic Act ("Act"). (21 U.S.C. §341 et seq.). Individual state regulations may also apply.

Tobacco products to be regulated by the FDA. (21 U.S.C. §387 et seq.).

Field Structure.

Associate Commissioner for Regulatory Affairs (ACRA) supervises regional employees, selects and manages cases, and coordinates field assignments in FDA's six regions based in San Francisco, Dallas, Chicago, Atlanta, Philadelphia, and New York. Regions headed by District Directors who supervise FDA business. See 21 C.F.R. §5.1100-2.1115.

Rule and Policy Making.

Official policy of FDA developed through rule-making, adjudication, and informal channels using guidelines and advisory letters. Administrative Procedure Act (APA) governs these FDA procedures. (5 U.S.C. §551 et seq.; see category 1 Introduction, topic 1.01 Administrative Law). FDA interpretive rules published in Federal Register. FDA substantive regulations have force of law (5 U.S.C. §551[4]), first published as Regulatory Program of FDA in Federal Register (5 U.S.C. §553; 21 C.F.R. §10.90[a]), with description of proposed regulations and indication that FDA expects to effectuate within certain time. Affected firms and individuals may comment on proposed regulations (21 C.F.R. §§10.30, 10.40[b][2]) and in some cases obtain public hearing. If issued, effective date may not be less than 30 days after date of publication in Federal Register. (5 U.S.C.§553; 21 C.F.R. §10.40[c][4]). Appeals from substantive rules may be taken under APA. (5 U.S.C. §706[2][A]). Any FDA "rule", (including policy statement, guidance, or regulation), must be filed with Congress before it becomes effective. (5 U.S.C. §801[a]). In addition to commenting on proposed regulations, anyone may petition FDA to adopt regulation. (U.S. Const. amend 1, 5 U.S.C. §553[e]). Required contents of petition can be found at 21 C.F.R. §10.30[b].

Judicial Review of FDA Rules.

Primary standard of review for FDA regulations adopted after notice-and-comment process is arbitrary, capricious, or abuse of discretion. (5 U.S.C. §706[2][A]; see 21 C.F.R. §10.45). If formal hearing held prior to enactment, substantial evidence standard applies. (21 U.S.C. §371[e], [f]; 5 U.S.C. §706[2][E]). No judicial review until rules final. District Court reviews rule unless specific statute designates Court of Appeals. (28 U.S.C. §1331).

Right to judicial review of regulations regarding tobacco products granted. (21 U.S.C. §387l).

Advisory Opinions.

Formal FDA pronouncements on specific sets of facts. (21 C.F.R. §10.85). Opinions issued in response to formal request are final actions for purposes of obtaining judicial review, but not printed in Federal Register (21 C.F.R. §§10.45[d], 10.85).

Good Practices Regulations.

FDA may issue regulations on good manufacturing practices (GMP) for foods, drugs, medical devices, and blood-derived products; and good laboratory practices (GLPs) and controls for clinical research. See, e.g., 21 U.S.C. §360j[f].

Hearings.

FDA's procedural regulations on formal evidentiary hearings set out in 21 C.F.R. §12.22. Evidence in FDA hearings admissible unless inauthentic, immaterial, or irrelevant. (21 C.F.R. §§12.85, 12.94[c], [d][1][i]). Types of FDA hearings include enforcement and rule-making hearings. Enforcement hearings fall into two general categories: adjudicative and regulatory (21 C.F.R. pts. 16, 58), and statutory hearings which precede initiation of criminal action, see 21 C.F.R. §§7.84-.85. Formal hearings on proposed regulations are possible, but rules frequently made by written notice-and-comment procedure sometimes supplemented by public meetings. Rule-making hearing can produce substantive rules or policy statement or guideline. Under APA, federal District Court may review normal rule-making decisions using “arbitrary and capricious” standard. (5 U.S.C. §706[2]).

Standing and Intervention in FDA Hearings.

FDA decisions and hearings are public, but participation limited. (21 C.F.R. §12.45). Legal standing alone does not guarantee full participation in all aspects of hearing. Party is person who requested hearing from FDA as matter of right, or petitioned for rule which is subject of hearing, or was specifically granted hearing by FDA. FDA procedures permit intervention in ongoing proceedings only upon motion. (21 C.F.R. §12.45).

FDA Enforcement.

Inspections.

FDA investigations of all regulated products (other than biological and radiological products) governed by §704 of Act, which includes general authority for inspection of facilities and conveyances. (21 U.S.C. §374). Inspections must be preceded by written notice and can be based on statutes requiring inspection on regular basis or complaint letters from consumers, FDA, or state officials. When deficiency or violation found, FDA enforcement process can be brought against firm and persons responsible. Refusal of inspection is punishable by judicial contempt sanctions (if inspection based on search warrant), and as separate violation of Act. (21 U.S.C. §331[e], [f]).

Recalls.

Voluntary recall is removal or correction of problematic marketed product by responsible firm and alternative to formal FDA action. (21 U.S.C. §360h[e]; 21 C.F.R. §§7.3[g], 7.40[a]). Recall occurs when Act violated in some way or risk of hazard or fraud exists. (21 C.F.R. §7.3[g]). If biological or radiological products involved, violation must be of Public Health Services Act. (42 U.S.C. §§262, 263a et seq.). Unlike other products, recalls of medical devices (21 U.S.C. §360h[e], [b][2]) and radiological products (21 U.S.C. §360[l]) are subject to special statutory authority and are mandatory at FDA's discretion (21 U.S.C. §360h[e]). FDA can also order product modifications. See, e.g. (§360h[e], [b][2]). Alternatives to voluntary recall include “market withdrawal”, for minor or technical statutory violations (21 C.F.R. §7.3[j]); and “stock recovery”, where distribution of product beyond manufacturer is limited (21 C.F.R. §7.3[k]).

Debarment.

Occurs when company or person convicted of submitting false research data to FDA, bribing reviewers of submitted data, or other offenses compromising drug approval decision.

Offender can be “debarred” from future FDA product approvals in generic drug program (21 U.S.C. §335a), and be subject to other FDA sanctions (21 U.S.C. §333; 18 U.S.C. §1001). Corporate officials can also be debarred for failure to report misconduct. (21 U.S.C. §335a[b][2][B][iv]). Corporation may request reinstatement after firing offender. (21 U.S.C. §335a[d][4][B][i]).

Disqualification.

Usually initiated by FDA as response to fraud perpetrated against it by offending person or facility. Disqualification results in final order barring individual or facility from conducting FDA-regulated research and/or testing. (21 C.F.R. §§58.202, 58.210). After disqualification, person or firm cannot receive future products covered by FDA experimental permits, or generate data for use in approval process for new products. Disqualification regulations provide opportunity for hearing and FDA must make prima facie case for disqualification. (21 C.F.R. §58.204).

Seizure Authority.

FDA may seek judicial seizure of products within its jurisdiction. (21 U.S.C. §334). Seizure actions brought by U.S. Attorney on behalf of FDA. FDA has detainer power for medical device or tobacco product violations (21 U.S.C. §334[g]), but not yet to detain other products before end of seizure process. Person interested in seized goods may claim goods in court action or allow them to be defaulted into custody of court for disposition.

Injunction Authority.

FDA may seek injunctions against violations of Act. (21 U.S.C. §332). However, not all offenses may be enjoined. (21 U.S.C. §§332[a], 331[h]-[j]).

Criminal Actions.

Any violation of Act can result in criminal prosecution. If violation committed knowingly and with intent to defraud or mislead, greater penalties apply. (21 U.S.C. §333[a][2]). Generally, before violation reported to U.S. Attorney for prosecution, alleged offender provided with notice and opportunity to be heard. (21 U.S.C. §335; see 21 C.F.R. §7.84). Principal penalties faced by defendants are incarceration and large fines. (21 U.S.C. §333).

Food Safety Regulation.

Act's definition of food is broad and includes beverages and foods, as well as additives and components used in food or animal feed. (21 U.S.C. §321[f]; 21 C.F.R. §109.3[e]). Food additives (321 U.S.C. §321[s]) are subset of food category. Dietary supplements have special statutory definition that applies to vitamins, minerals, herbs, botanical substances, amino acids, and other substances used to supplement diet. (21 U.S.C. §321[ff]).

Adulteration.

Act prohibits adulteration, encompassing most safety-related, non-labeling violations. (21 U.S.C. §342). Adulteration concerns issues of deterioration or contamination of food commodity. Food adulteration sections of Act differentiate between ingredients that naturally occur in food and those added. (21 U.S.C. §342[a][1], [a][2]; 21 C.F.R. §109.3). Product also adulterated if “prepared, packed, or held under unsanitary conditions”. (21 U.S.C. §342[a][4]).

Misbranding.

Legal conclusion that encompasses series of independent statutory prohibitions. (21 U.S.C. §343). Unlike adulteration, status of misbranding involves claims or statements, rather than actual physical condition of product, and may include unapproved health claims. (21 U.S.C. §343[r]; see 21 C.F.R. §§101.72-.79).

Labeling and Advertising.

Labels and labeling are specific facets of food's appearance, usually consisting of food's container or wrapper. (21 U.S.C. §321[k], [m]). Label is on immediate container; labeling includes statements “accompanying” food. (21 U.S.C. §321[m]). Food advertising lacks immediate connection with sale of product and is regulated by Federal Trade Commission. (15 U.S.C. §55[a][1]). Nutrition labeling required for nearly all U.S. foods. (See 21 C.F.R. §§101.9, .10, .12, .13, 101.62; 343). Food label must contain designation of country of origin. (19 U.S.C. §1304[a]; 19 C.F.R. §102.13[b]). Rules regarding health-claims on labels created by petitions. (21 C.F.R. §§101.69, .70; see 21 C.F.R. §10.20). FDA given 90 days after filing to consider petition after which petition deemed denied and petitioner can appeal.

Food Additives.

Substances added to finished food product, or as treatment or adjunct of those components. (21 U.S.C. §321[s]). Must be proven safe, with prior FDA approval, for each use. (21 U.S.C. §348[a][1]). Use of unapproved additive in food, or possession of unapproved additive in interstate commerce, violates adulteration provisions of Act. (21 U.S.C. §§342[a][2][A], 348). If substance not generally recognized as safe, authorized by prior sanction, or otherwise covered by exemption under Act, and intended for use as component or food contact article, food additive petition (FAP) may be required. See 21 U.S.C. §348[b], 21 C.F.R. §171.1. No food additive may be approved, or remain approved if FDA finds it causes cancer. (21 U.S.C. §348[c][3][A]).

Drugs, Generally.

Articles “other than food” that affect structure or function of body. (21 U.S.C. §321[g][1][c]). Divided into four categories: new drugs, drugs that are generally recognized as safe and effective (GRASE), prescription drugs, and over-the-counter drugs.

New Drugs.

“New” drugs closely regulated. Include drugs that are not GRASE, and for which no record exists of pre-1938 uses that match uses for which drug is now represented to be useful. (21 U.S.C. §321[p]). FDA must approve through new drug application (NDA) process new drugs, including new uses for old drugs, as safe and effective under conditions stated in labeling. (21 U.S.C. §355; see 21 C.F.R. pts 314 [new drug approval] and 312 [investigations of new drugs]). “Substantial evidence of efficacy” is threshold standard for approval. (21 U.S.C. §355[d]).

New Drug Applications (NDA).

Time allotted in Act for NDA approval process is 180 days from filing to final action, but usually exceeded. (21 U.S.C. §355[c]). Approval process starts with Investigational New Drug (IND) application, filed 30 days before first human experimentation with drug, to give FDA opportunity to examine proposed testing. IND reviews by medical officers and clinical research experts conducted by Center for Drug Evaluation & Research. (21 C.F.R. pt. 312). Reviewing officers can place clinical hold on IND (21 C.F.R. §312.42) and prevent administration of drug to first human subjects until adequate preclinical data provided and sound protocol issued. Use of foreign data as basis for approval permissible if some U.S. research supports approvability conclusion and if foreign data complied with acceptable standards.

Second stage of approval begins with meetings in preparation for filing NDA. (21 C.F.R. §§314.102, 312.82). FDA meets with firm and examines IND evidence to identify problems. Final phase of review process leads to formal acceptance of NDA.

Once satisfied with product's studies on safety and effectiveness, FDA collects other information, including manufacturing, labeling and validation of testing methods. FDA inspects manufacturing facility for compliance with Good Manufacturing Practices and reviews labeling claims.

After reviews, FDA Drug Center endorses recommendation to approve NDA. “Approvable” letter states that NDA can be approved but that label and labeling copies must be submitted. (21 C.F.R. §314.110). Drug firm then prepares for FDA approval “summary of safety and effectiveness” which is publicly disseminated. (21 C.F.R. §314.430). Approval letter then sent and drug may be marketed.

Following approval, first advertisements for prescription drugs must be submitted to FDA. Thereafter FDA can require advertisements be submitted as they appear. (21 C.F.R. §314.81[b][3], .81[b][2][ii]).

Fast-Track Review of New Drugs.

For certain drug products, for treating serious or life-threatening condition and having potential to address unmet medical needs for that condition (21 U.S.C. §356[a][1], [b][2]), FDA will expedite product research, testing and approval (21 C.F.R. §314.500).

Reporting of Adverse New Drug Experiences.

Required of drug's sponsor within 15 days if experience serious. (21 C.F.R. §314.80[c]). Other adverse or unexpected effects must be reported periodically. Must also submit reports of adverse reactions to FDA during approval process and first year after approval. (21 C.F.R. §§314.80, 312.32).

Refusal of New Drug.

When NDA “not approvable” (21 C.F.R. §314.120), can seek internal review before final refusal. (21 C.F.R. §314.103). NDA process includes reconsideration and administrative appeal. See 21 C.F.R. §§314.103, 10.75. Sponsor can also seek formal final refusal. (21 C.F.R. §314.120, .125). Under Act, NDA may be denied after notice and opportunity for hearing for any of six reasons (21 U.S.C. §355[d]). Notice of opportunity for hearing open to any interested person. (21 U.S.C. §355[e]). Disagreements between FDA and sponsor resolved either through process described in FDA regulations or by FDA referral to scientific advisory panel. (21 U.S.C. §360bbb-1).

Withdrawals of New Drug Approval.

NDA approval acts as permanent but revocable private license to market described drug product. Approval can be revoked due to “imminent hazard”. (21 U.S.C. §355[e]). Otherwise, approved drug may be removed from market only after notice and if unsafe, ineffective, or NDA has false statement of material fact. (21 C.F.R. §314.200).

Judicial Review of NDA.

Judicial review after denial or withdrawal of NDA in Court of Appeals, though limited jurisdiction remains in District Court. (21 U.S.C. §355[h]). Final agency action (i.e., refusal of NDA) required for judicial review. (21 C.F.R. §314.125).

Drug Safety and Quality Regulation.

All new drugs must be safe. (21 U.S.C. §355; See 21 C.F.R. §314.125[b][2]). Drug “safe” if low incidence of adverse reactions or significant side effects under adequate directions of use and warnings against unsafe use as well as low potential for harm that may result from abuse. (21 C.F.R. §330.10[a][4][I]). Subject to proof using adequate tests by methods reasonably applicable to show drug safe under prescribed, recommended, or suggested conditions of use. (21 C.F.R. §330.10). All drugs must bear labels describing directions for use (21 U.S.C. §352[f][1]), and adequate warning labels to communicate dangers (§352[f][2]). Only exception is prescription drugs for which physician has given usage directions. (21 U.S.C. §353[b][2]).

Adulteration.

Drug adulteration is criminal offense for which responsible corporation and/or individual can be prosecuted. (21 U.S.C. §§351[a][1], [2], 333[a]). Term encompasses all content-related violations of Act. (21 U.S.C. §§331, 351).

Misbranding.

Drug misbranded if "dangerous to health when used in the dosage, or manner, or with the frequency or duration prescribed, recommended, or suggested in the labeling thereof." (21 U.S.C. §352[f]). Manufacturer or distributor responsible for misbranding subject to prosecution or FDA civil action. (21 U.S.C. §§333[a], 352). FDA misbranding authority can be used to require warning labels on drug products (21 U.S.C. §352[f]; 21 C.F.R. pt. 369) that might be dangerous to health when used in certain manners, dosages, or durations (21 U.S.C. §352[j]).

Good Manufacturing Practices (GMP) for Drugs.

Manufacturers must follow specific current GMP requirements. (21 C.F.R. pt 211). GMPs have force of law; violation can carry criminal sanctions. (21 U.S.C. §§351[a][2][B], 331[b], 333[a]). Passing intense drug GMP inspection prerequisite to approval of NDA.

Removal of Drug from Market.

First administrative step in removal usually Federal Register announcement relating to class of drugs. If firm has approved NDA, first official notice of pending withdrawal is certified letter notice from FDA of opportunity to request hearing. Letter simultaneous with Federal Register notice. (21 C.F.R. §314.200). Letter and notice will state type of evidence FDA demands as prerequisite to hearing. See 21 U.S.C. §§355[e], 360b[m], 360e[e].

Drug Imports.

Drugs imported into U.S. must pass customs inspections. FDA and Customs Service cooperate in sampling and testing of shipments. (21 U.S.C. §381[a]). Must have approved New Drug Applications before entering U.S. commerce. (21 U.S.C. §355). Foreign drug manufacturing firms may voluntarily register with FDA. (21 U.S.C. §381[a]). Drugs made at unregistered establishment subject to sampling may be rejected after FDA tests if product fails U.S. requirements, was made under unsanitary conditions, or was forbidden or restricted from sale in exporting country. (21 U.S.C. §381[a]). No prescription drug exported by U.S. firm can be reimported into U.S. by another firm without consent of exporter. (21 U.S.C. §381[d][1]). If same source imports numerous violative products, FDA can "block list" source, placing automatic detentions upon any incoming shipments. See also category 15 Foreign Trade and Commerce.

Biological Products.

Regulated by FDA's center for Biologic Evaluation & Review, under authority of Public Health Service Act and FDA regulations. (42 U.S.C. §262; 21 C.F.R. §600.3). Approval and licensing requirements more restrictive than for new drugs. (42 U.S.C. §262; see 21 C.F.R. §§310.4[a], 606.171).

Cosmetics.

Article or component, other than soap, intended for use on or in human body for "cleansing, beautifying, promoting attractiveness, or altering the appearance". (21 U.S.C. §321[i]). FDA has no pre-approval power over cosmetics, but product intended or represented for drug use can be drug and cosmetic. (21 U.S.C. §359). Thus, cosmetic firm considering addition of drug-type claim may trigger additional NDA approval requirements, and other drug regulations. See 21 U.S.C. §§351[a][2][B], [b]-[d], 352[n], 355.

Adulteration of Cosmetics.

Adulterated if: (1) bears or contains poisonous or deleterious substance which may render it injurious under usual use, (2) contains or consists of “any filthy, putrid, or decomposed substance”, (3) is prepared, packaged, or held under unsanitary conditions in which it may have become contaminated or injurious to health, (4) its container is composed of poisonous or deleterious substance which may render contents injurious to health, or (5) it contains color additives in violation of Act. (21 U.S.C. §361[a]-[e]).

Cosmetic Labeling.

Retail package must bear designation of ingredients in manner prescribed by regulations. (21 C.F.R. §701.3). Act prohibits false or misleading cosmetic labeling and deceptive or improper containers. (21 U.S.C. §§362[a], 363).

Cosmetic Records and Reports.

FDA gathers cosmetic data through inspections, sampling, voluntary reports programs (21 C.F.R. pts. 710, 720, 730), and consumer and physician complaints. Cosmetic records and reports generally open to public inspection requests under Freedom of Information Act. See 21 C.F.R. pt. 20.

Medical Devices.

Defined generally as items with all characteristics of drug except chemical action. Includes instruments and similar objects recognized in official compendium or: (1) intended for use in diagnosing disease or other condition, (2) intended for use in cure, mitigation, treatment or prevention of disease, (3) intended to affect structure or any function of body, and do not achieve any of its principal intended uses through chemical action within or on body, or (4) can achieve any of principal intended purposes without being metabolized. (21 U.S.C. §321[h]). Sometimes overlap with drugs, cosmetics, and biological products. (21 U.S.C. §§360[j][1], 321[g], [h]). Whether new product is drug or device initially determined by sponsor. FDA must either agree with or reject sponsor's classification within 60 days, or sponsor's choice final, subject to FDA changes only “for public health reasons based on scientific evidence”. (21 U.S.C. §360bbb-2[c]).

Classification.

Medical devices classified by FDA into one of three categories, each with own level of regulation. Class I devices, least regulated class, subject to general controls that FDA applies to all medical devices. (21 U.S.C. §360c[a][1][A]; see 21 C.F.R. pt. 860). Class II devices require special controls, and may be subject to new standards. (21 U.S.C. §360c[a][1][B]; see 21 C.F.R. §§862-892). Class III is for pre-market approval devices, which must receive formal approval before initial sale. (21 U.S.C. §360c[a][1][C]).

Good Manufacturing Practices.

Medical devices failing to meet applicable GMP regulations considered adulterated and subject to enforcement action. (21 U.S.C. §§351[h], 360j[f]). Like drug GMPs, device GMPs govern personnel and organization, facilities and sanitation, equipment, component control, production and process controls, control of packaging and labeling materials, distribution and installation of devices, and records. (21 C.F.R. pt. 820).

Import and Export Issues.

Note: See also category 15 Foreign Trade and Commerce.

Imports.

Do not enjoy same legal protections as products already in interstate commerce. FDA with Customs Service has broad power to inspect, detain and refuse entry to imported products within its regulatory sphere, screen incoming foods, and destroy or reexport those potentially harmful to health or deceptive to consumers. Imports may be seized after release from customs, and may be reexported. (21 U.S.C. §381[a]). Once importation is refused, FDA can set terms for product conditioning to allow entry, and can charge importer for costs of supervising re-labeling or reconditioning. (21 C.F.R. §1.99). FDA Import Alerts are categorical or product-specific warnings to border posts. FDA can also issues automatic detention orders for type of product, or “block list” particular shippers whose past shipments into U.S. have violated Act. Detention of goods followed by hearing (21 C.F.R. §1.94), but is less than full FDA regulatory hearing. (21 C.F.R. §16.5[a][2]). FDA district officials make decisions on refusal of entry or on importer's proposal for reconditioning goods. (21 C.F.R. §1.95). Reexporting within discretion of FDA. (21 U.S.C. §334[d][1]). Standard for exclusion is what “appears” to be adulterated, rather than what actually is.

Exports.

Foods intended for export from U.S. are exempted from compliance with Act. (21 U.S.C. §381[e]). To be export, product must accord with specifications of foreign purchaser, must not conflict with laws of receiving country, must not be sold in U.S., and must be labeled on shipping package that it is intended for export. (21 U.S.C. §381[e][1][c]). New drugs, new animal drugs and medicated feeds, and certain devices, may not be exported. (21 U.S.C. §381[e]).

16.03 HEALTH INSURANCE BENEFITS:

Note: Citations are to Title 42 U.S.C. unless otherwise noted. See also categories 18 Insurance and 11 Employment.

Regulation of Private Insurance.

Health insurers extensively regulated by states. (15 U.S.C. §§1011-1015). If employer offers group health insurance, there are several federal requirements: (1) employer covered by Title VII of Civil Rights Act (42 U.S.C. §2000e[b]) cannot discriminate based on pregnancy or childbirth costs (42 U.S.C. §2000e-2[a]); (2) Age Discrimination in Employment Act (ADEA) (29 U.S.C. §§ 621-624, 630[1]) limits ability of employers to discriminate among employees with respect to provision of health insurance benefits; (3) Americans with Disabilities Act (ADA) (42 U.S.C. §§12101-12117; see also category 11 Employment, topic Discrimination), which applies to employers who employ 15 or more people in 20 or more weeks of year, protects disabled persons against discrimination in provision of health insurance (see also 29 C.F.R. §1630.4[f]); (4) (I.R.C. §105) limits ability of self-insured employer health plans to discriminate in favor of highly-compensated individuals. (26 U.S.C. §105[h]; 26 C.F.R. §§1-105-5-1 to 105-11[c]).

Consolidated Omnibus Budget Reconciliation Act (COBRA).

Mandates continuing opportunity for coverage for persons and their dependents who would otherwise be terminated from coverage under group health insurance plans following loss of employment. (29 U.S.C. §§1161-1168). Coverage lasts for 18 months where qualifying event was termination of work or reduction in hours; until death of retiree or qualified beneficiary where event was bankruptcy; or 36 months for other qualifying events. (42 U.S.C. §300bb-2[2]; 29 U.S.C. §1162[2]). Periods can be extended under certain circumstances. (42 U.S.C. §300bb-2[2][A][ii]; 29 U.S.C. §1162[2][A][ii]).

Americans with Disabilities Act (ADA).

Prohibits discriminatory treatment of persons with disabilities and applies to public accommodations, including private parties that do not receive federal funds. (42 U.S.C. §§12181, 12182[a]). Public accommodations may not deny services or offer unequal or unnecessarily segregated services to disabled persons unless person presents “direct threat” to health and safety of others. (42 U.S.C. §12182[b][1][A][ii], 12182[b][3]; 28 C.F.R. §36.202).

Employee Retirement Income Security Act (ERISA).

Preempts state regulation of self-insured employee benefit plans, including health insurance plans, unless they regulate business of insurance. (29 U.S.C. §§1001-1461; 1144[b][2][A]). Generally covers “employee benefit plans” “established or maintained” by employers, employee organizations, or both. (29 U.S.C. §1003[a]). Excludes plans maintained by government entities, churches and plans maintained solely to comply with state workers' compensation, unemployment compensation, or disability insurance requirements. (29 U.S.C. §§1002[32], [33], 1103[b][3], 1144[b][2][A]). Group insurance offered to employees of particular businesses without contributions from or administrative involvement by employers also not covered by ERISA. (29 C.F.R. §2510.3-1).

Medicare.

(www.medicare.gov). Government health care program administered through Center for Medicare and Medicaid Services (CMS). (42 U.S.C. §§1395-1395ccc; 42 C.F.R. §§405-424, 482-498). Automatically eligible if 65 or older and receiving social security benefits, or if have been receiving disability benefits for more than two years, or have end-stage renal disease. Other must apply for benefits. Medicare consists of three programs: Part A, The Hospital Insurance Program, covers inpatient hospital, skilled nursing, home health, and hospice. (42 U.S.C. §1395d). Part A is funded like Social Security, by payroll taxes assessed against employers, employees, and self-employed (42 U.S.C. §1395i; 26 U.S.C. §§1401[b], 3101[b], 3111[b]) and by interest income on trust fund. Part B, Supplemental Medical Insurance, is voluntary program that helps pay for physician's services, outpatient services, renal dialysis, speech and physical therapy, and the like. (42 U.S.C. §1395k). Must be eligible and pay Part B premium to receive benefits. (42 U.S.C. §1395j). Under Part C, Medicare + Choice Managed Care Program, Medicare contracts with wide variety of prepaid health plans on risk basis to provide care to beneficiaries. Part C funded out of Part A and Part B trust funds.

Eligibility for Medicare.

Person eligible for retirement benefits under Social Security automatically eligible for Part A benefits upon reaching age 65. (42 U.S.C. §1395c). Person working past 65 may still be eligible for Medicare at 65 for expenses not covered by employer's health plan. Spouses and dependants may also begin receiving Part A at 65. Disabled persons eligible for Social Security may receive Part A after they have been eligible for cash benefits for two years. (42 U.S.C. §426[b]). Medicare also available for persons with end-stage renal disease after three-month waiting period. (42 U.S.C. §426-1). U.S. residents not otherwise eligible for Medicare, but over 65 and citizens of U.S. or lawful permanent residents for five years, may enroll in Part A but must pay premium. (42 U.S.C. §1395i-2).

Persons eligible for Part A are automatically enrolled in Part B unless they disenroll. (42 U.S.C.. §1395p). Lawfully admitted permanent resident aliens who have resided in U.S. for five years are eligible for Part B benefits. (42 U.S.C. §1395o). State Medicaid plans must pay Part B premiums and Medicare deductible and coinsurance amounts for person entitled to Part A whose income is less than 100% of federal poverty guidelines and whose resources are less than two times Supplemental Security Income resource eligibility level. (42 U.S.C. §1396d[p]).

Review of Decisions Regarding Benefits.

Decisions regarding benefits made by Social Security Administration (SSA), subject to reconsideration, review by SSA law judge, Appeals Council, and judicial review. (42 U.S.C. §1395ff; 20 C.F.R. §§404.900-404.999[d]). Review available in federal court for specified final administrative decisions involving Medicare, including decisions of Appeals Council regarding eligibility or benefits worth $1,000 or more under Part A or Part B (42 U.S.C. §1395ff[b][1], [2]) and of Provider Reimbursement Review Board (PRRB) or Administrator involving claims to reimbursement valued at $10,000 or more (42 U.S.C. §1395oo[f]). Judicial review usually available after exhaustion of administrative processes with multiple review levels. See 42 U.S.C. §§405[h], 1395ii. Judicial review precluded for certain issues. See 42 U.S.C. §§1395ww[j][7], [d][7], 1395w-4[i][1], 1395ff[b], 1395yy[e][8], 13951[t][9], 1395fff[d]. Limited remedies available to courts reviewing certain decisions. (See, e.g., §1395ff[b][3].)

Medicaid.

(www.hcfa.gov/medicaid). Medical coverage available to financially-disadvantaged persons already receiving Supplemental Security Income Benefits from Social Security Administration. Program finances health care for worthy poor who receive cash assistance through federal assistance programs, provides catastrophic insurance for those whose income and assets have been or would be consumed by extraordinary medical bills, and covers low-income children and pregnant women, regardless of eligibility for cash assistance.

Eligibility is means-tested and governed by regulations. (42 C.F.R. §435). Person must fit into designated eligibility classification and meet financial need requirements. Federal law designates groups included within state programs. Participating states must cover: "categorically needy", i.e., those who traditionally received cash assistance under state and federal Aid to Families with Dependent Children (AFDC) or federal Supplemental Security Income (SSI) program for aged, blind, and disabled (42 U.S.C. §1395z; 42 C.F.R. §§435.4[b], 435.110, 435.401, 436.110, 436.401); pregnant women who would have been eligible for AFDC if child was born, and pregnant women and infants under age of one in families with income not exceeding 133% of poverty level (42 U.S.C. §§1396a[a][10][A][I], [III], [IV], 1396d[n][1]); and children under 19 born after Sept. 30, 1983 eligible for AFDC based on income and resources, though otherwise ineligible. State must also make Medicaid available to eligible homeless persons. (42 U.S.C. §1396a[a][48]). (For additional coverage requirements, see 42 U.S.C. §1396a[a][10][A][i][III], 1396d[n][2], 1396a[a][10[A][i].)

Medicaid programs must cover citizens of U.S. and otherwise eligible legal permanent resident aliens. (42 U.S.C. §§1396a[a], [b], 1396b[v][1]; 42 C.F.R. §§435.406, 436.403). Aliens entering U.S. after Aug. 22, 1996, and those with temporary alien status generally not covered (8 U.S.C. §§1611-1613), but emergency medical treatment for otherwise eligible aliens regardless of these restrictions is available (42 U.S.C. §1396b[v][2], [3]; 42 C.F.R. §§435.350, 440.255[c]). Medicaid also available for refugees (8 U.S.C. §1522[e][4]; 45 C.F.R. §400, subpt G), and on limited basis to certain persons eligible for legal residency under Immigration Reform and Control Act of 1986.

Administration.

State Medicare plan must comply with numerous federal requirements. (See, e.g., 42 U.S.C. §1396a[a][1]-[58]; 42 C.F.R. §430.12.) State plans and plan amendments must be presented to state's governor or designee for review and must be submitted to CMS for review and approval. (42 U.S.C.. §1316; 42 C.F.R. §§430.12-15). HHS may withhold Federal Financial Participation (FFP) if it determines that state plan or administration does not comply with Medicaid Act (42 U.S.C. §1396c; 42 C.F.R. §430.35).

Medicaid Appeals and Judicial Review.

State Medicaid plan must provide opportunity for hearing to individual whose claim for medical assistance is denied or not acted on with reasonable promptness. (42 U.S.C. §1396a[a][3]; 42 C.F.R. §§431.200, .250). When state agency takes any action affecting individual's claim it must state intended action, set out reasons for taking action and applicable regulations or law, and explain individual's right to hearing and circumstances under which assistance will be continued if hearing is requested. (42 C.F.R. §431.210). Hearings conducted at reasonable time, date and place by impartial person who was not involved in initial determination. (42 C.F.R. §431.240).

Judicial review of state appeal procedures may be available under state law to recipients and/or providers. Relief may also be available in state court by direct challenge to state regulations in suit for injunctive and declaratory relief. Recipients and providers may also sue state in federal court pursuant to (42 U.S.C. §1983), for violations of Social Security laws. (448 U.S. 1; 496 U.S. 498).

Benefits.

Medicaid available to pay for various services (42 U.S.C. §1396d[a]; 42 C.F.R. §§440.1-440.180), including, e.g., inpatient hospital services, outpatient hospital services, nursing facility services, physician services, home health services, dental, physical therapy, and prescription drugs. State Medicaid program must provide to categorically needy minimum of these services and home health care. (42 U.S.C. §1396a[a][10][A], [C]; 42 C.F.R. §440.210). State plans must also make available medical assistance to cover Medicare premiums, deductible, coinsurance, and copayments for qualified beneficiaries. (42 U.S.C. §§1396a[10][E][i]; 1396d[p]). Medicaid must pay Part A premiums for qualified disabled and working individuals and Part B premiums for specified low-income Medicare beneficiaries. (42 U.S.C. §§1396a[a][10][E][ii], [iii]; 1396d[p]). States must provide covered services “with reasonable promptness”. (42 U.S.C. §1396a[a][8]). State plan must specify amount, duration, and scope of each service available for categorically needy and each group of medically needy. (42 C.F.R. §440.230[a]). Each service must be of sufficient amount, duration, and scope reasonable to achieve purpose. (42 C.F.R. §440.230[b]). State may place appropriate limits on service based on medical necessity or utilization control criteria. (42 C.F.R. §440.230[d]). These requirements are not absolute: Medicaid statute includes number of specific provisions permitting waiver of requirements to implement specific programs or projects. (42 U.S.C. §1396n; 42 C.F.R. §§431.50[c][2], 435.217, 435.726, 425.735, 440.180, 440.250[k], 441.300-.310).

Medicaid Managed Care (MMC).

Medicaid statute permits states to require recipients to enroll with MMC organization or primary care case manager. (42 U.S.C. §1396u-2; 42 C.F.R. pt. 434). States not permitted to require Medicare beneficiaries, Native Americans, or certain special needs children to enroll in MMCs. (42 U.S.C. §1396u-2[a][2]).

The State Children's Health Insurance Program (SCHIP).

(www.hhs.gov/schip). Grant-in-aid program between states to insure previously uninsured children identified through SCHIP outreach programs. States that wish to participate must submit plan to HHS. (42 U.S.C. §§1397aa, 1397ff).

Emergency Medical Treatment and Labor Act.

Applies to hospitals that participate in Medicare program and have emergency departments. (42 U.S.C. §1395dd[e][2]). Hospitals must provide appropriate medical screening exam within capability of emergency department to any person coming to department. (42 U.S.C. §1395dd[a]). If emergency medical condition present, including imminent childbirth, hospital must stabilize patient prior to transfer unless patient requests transfer in writing knowing of hospital's obligation under Act or physician certifies that benefit to patient of transfer in unstabilized condition outweighs risks. (42 U.S.C. §1395dd[c][1]). Act provides for private cause of action for violation of statute. (42 U.S.C. §1395dd[d][2][A]).

17 IMMIGRATION

—Scope —

Note: See http://www.uscis.gov/portal/site/uscis.

National immigration controlled by federal government through Immigration and Nationality Act (INA). (8 U.S.C. §1101). Immigration and Naturalization Service (INS) has jurisdiction over all aliens entering or presently in U.S. INS handles visa petitions, citizenship adjudications, removes aliens and prevents persons from illegally entering U.S.

17.01 ALIENS:

Aliens admitted into U.S. fit into one of following categories: (1) Aliens who seek admission for limited period of time and for specific purpose; and (2) aliens, called immigrants, who desire to become permanent residents of U.S. All persons arriving at U.S. port-of-entry inspected by U.S. government officials: Public Health, Immigration, Customs, and Agriculture. (INA §235; 8 C.F.R. §235).

Rights of Aliens.

Congress has exclusive power over aliens, including right to discriminate. Congress may discriminate based on political beliefs, moral character, physical and mental disability. (8 U.S.C. §1182[a]). Once admitted to U.S., aliens have all rights afforded to persons under Constitution, including freedoms of speech, association, religion, and press. Aliens have right to be free from unreasonable searches and self-incrimination. (U.S. Constitution, Bill of Rights, U.S. Const. amend. I-X).

Voting Rights.

Presently no state allows aliens to vote in elections. No alien can vote in any federal election.

Ability to Use Court System.

Lawful resident aliens have right to sue and be sued in state courts. (317 U.S. 69). Aliens can sue in federal court if aliens shows federal question jurisdiction. (630 F.2d 876). See also Alien Tort Claims Act, which provides court with subject matter jurisdiction for violations of law of nations. (28 U.S.C. §1350). See also, (542 U.S. 692), limiting rights of aliens to bring damages suits.

Education.

Aliens generally must apply for nonimmigrant visa status to study in U.S. Rights of children to receive elementary education controlled by states. (457 U.S. 202). Supreme Court held any state statute which creates special burdens for undocumented alien children to receive elementary education would be voided unless state showed statute furthered substantial state interest. Supreme Court has not invalidated provisions preventing illegal aliens from receiving public post-secondary education. (908 F. Supp. 755).

Federal Benefit Programs.

Federal law allows two categories of noncitizens to be eligible for federal public benefits. (7 C.F.R. §273.4; 20 C.F.R. §416.202[b]). First category includes lawfully admitted permanent residents who have worked at least 40 “qualifying hours”. (8 U.S.C. §§1612[a], 1645). Second category includes qualified refugee aliens and aliens granted asylum or restriction on removal. (8 U.S.C. §§1612[a], 1613, 1641).

Taxation.

Federal tax liability of alien depends on alien's status as resident or nonresident. (26 U.S.C. §§1 et seq, 7701[b][1][A], 152[b][3], 911, 901, 873; 26 C.F.R. §§1.152-2[a][2], 1.901-1, 1.871-8).

Alien land ownership primarily state concern, with some areas of federal restriction: (1) during time of war, 50 U.S.C. §1701; and (2) safeguarding natural resources for citizens or permanent residents. 7 U.S.C. §3501 requires aliens to notify Department of Agriculture if own agricultural land; 43 U.S.C. §315 restricts grazing rights; and 30 U.S.C.. §181 restricts aliens ownership of mineral rights. U.S. Supreme Court and U.S. Constitution invalidates state laws that forbid aliens from owning or inheriting land. (389 U.S. 429). Some states prohibit nonresident aliens from owning land, some place acreage limits on ownership, and some limit land ownership to those eligible for citizenship. Most states place no restrictions on inheritance. See individual State Digests for law for regulation of alien ownership and transfer of property.

17.02 VISAS:

All aliens wishing to be admitted into U.S. presumed to be immigrants, therefore they must prove they fit into one of classes of immigrants that deserve to be granted visa, or prove nonimmigrant status. (8 U.S.C. §1101[a][15]). INA provides for two types of immigrant visas, numerically limited and not limited by number. Visas not subject to limitation granted to immediate relatives of United States citizens, resident aliens temporarily visiting abroad, and former U.S. citizens. Visas limited numerically granted to persons who qualify for employment-related or family sponsored visas.

Application for Visas.

For following categories, persons should apply directly with Department of State for visas: A-Diplomatic and government officials; B-temporary visitors for business/pleasure; C-aliens in transit; D-crewman; E-international traders/investors; G-representatives to international organizations; I-representatives of foreign media; J-exchange visitors; and R-religious workers. (8 U.S.C. §1181 et seq.). For all other categories, visitor must first apply with INS. Visa authorizes travel to U.S., not entry. To obtain status of case with U.S. Immigration Service see http://egov.uscis.gov/cris/jsps/index.jsp.

Arriving at Port of Entry.

Upon arrival at airport, airline gives all non-U.S. citizens form to complete while still en route to U.S.: either Form I-94, Arrival/Departure Record; or Form I-94W, Nonimmigrant Visa Waiver Departure/Departure. Arrival/Departure Record created by INS when traveler inspected upon arrival in U.S. INS inspector endorses INS Form I-94 with date, place of arrival, visa class, length of time traveler may remain in U.S., and conditions that apply to visit. When traveler leaves U.S., must surrender departure portion of I-94 to airline representative. Upon arrival in U.S., airline personnel shows visitor to inspection area to speak with Immigration Inspector. If alien, Immigration Inspector will determine purpose of visit to U.S. Inspector will determine how long alien allowed to initially stay in U.S. If visitor allowed to stay, Inspector issues completed Form I-94 which indicates what immigration classification alien given and length of stay. (8 U.S.C. §1181 et seq.). Arrival at land and sea border ports-of-entry similar to air entry.

Aliens Not Permitted to Enter U.S.

At port-of-entry, Immigration Officer may refuse alien entry into U.S. (INA §212[a]; 8 U.S.C. §1181[a]).

Documents Needed to Enter U.S.

Alien must present passport and valid visa issued by U.S. Consular Official. (8 C.F.R. §§211.4, 212.1). Under Visa Waiver Program, nationals of participating countries do not require visa to enter U.S. as visitor for business or pleasure, if staying no more than 90 days, and if not otherwise inadmissible. (INA §212[a]; 8 U.S.C. §1181 et seq.).

Immediate Relatives of U.S. Citizens.

Immediate relative of U.S. citizen defined as immigrant who is child, spouse, or parent of citizen. Child defined as one under 21 years of age, unmarried, and either legitimate or illegitimate child, stepchild, adopted child or orphan coming to U.S. for adoption. Adopted alien less than 18 years old may be considered child under INA if adopted with or after sibling who is child under INA. (8 U.S.C. §1101[b][1]). Determination whether unmarried alien child of U.S. citizen is immediate relative child under 21 shall be made at time petition filed under INA §204. (8 U.S.C. §1153; INA §201[f][1]). Visas normally obtained at American consulate outside of U.S. Immigrant visa given to persons who intend to live and work permanently in U.S. Nonimmigrant visas given to persons who live outside country and seek to temporarily visit U.S. for specific purpose, such as tourists, students and diplomats. Additionally, most persons seeking to travel to U.S. as nonimmigrants require visa, unless qualify for Visa Waiver Program. (8 U.S.C. §1187).

Spouse of U.S. Citizen.

In order to receive visa as spouse of U.S. citizen, alien must have “valid and subsisting marriage” with citizen. (8 U.S.C. §1101[a][35]). Country where marriage took place determines validity of marriage. Certain relationships will not qualify as spousal under INA, such as proxy marriages, incestuous or polygamous marriages, same-sex marriages, and fraudulent marriages. (8 U.S.C. §1101[a][35]). In marriages between U.S. citizens and aliens, all alien spouses required to reside together for two years before achieving permanent residency status. Married couple must file petition within final 90 days of two-year conditional period. INS then interviews couple to determine that marriage was not entered into fraudulently. (8 U.S.C. §1188). If INS finds marriage valid, permanent residency status will be granted to alien spouse. If marriage deemed invalid, alien subject to removal unless alien can prove extreme hardship if alien would be removed from country. (56 Fed. Reg. 22635-01).

Family Sponsored Preferences.

Aliens who seek visas for entry into U.S. and sponsored by family members divided into four categories, called “preferences”. First preference designated for unmarried sons and daughters, over age 21, of U.S. citizens. Second preference includes spouses, children and unmarried sons and daughters of lawful permanent resident aliens. Third preference designated for married sons and daughters of U.S. citizens. Fourth preference includes brothers and sisters of U.S. citizens over age of 21. (8 U.S.C. §1101[a][39]).

Employment-Related Preferences.

Aliens seeking entry into U.S. for employment purposes divided into five categories or “preferences”. First preference includes priority workers of extraordinary ability in sciences, arts, education, business or athletics. (8 U.S.C. §1101[a][15]). Second preference includes professional workers holding graduate degrees. Third preference includes skilled workers in short supply and persons holding baccalaureate degrees. Fourth and fifth preferences include religious workers, former U.S. government workers, and investors who create at least ten jobs in U.S. by investing in new industry that will benefit U.S. economy. (8 U.S.C. §1101[a][27][C]-[J]). H-1C visa classification for nonimmigrant nurses in health professional shortage areas. Requirements for nurse: (1) have full foreign nursing license or U.S. nursing education; (2) passed appropriate examination or licensed in State of intended employment; (3) fully eligible to work in petitioning facility. (INA §101[a][1][H][i]; 8 U.S.C. §1101[a][15][H]).

Asylee/Refugee Seeking Lawful Permanent Resident.

Refugee or one holding asylum status for one year may be eligible to change status to lawful permanent resident (lpr). Asylee seeking lpr status must file INS Form I-485, Application to Register Permanent Residence or Adjust Status. Asylee must also file supporting documentation: fingerprint fee; filing fee; Form G-28 if applicable; two photographs; Form G-325 signed; Form I-

693, medical with vaccination supplement; evidence of asylee status in form of Form I-94 and letter granting asylum; evidence of one year's physical presence in U.S.; birth certificate or record. Refugee seeking status change to lpr must file Form I-485 and same documentation as asylee, but no requirement of filing fee. Complete Form I-693 required only if (1) medical grounds of inadmissibility noted at time of initial arrival to U.S., or (2) refugee status granted to alien by Form I-730, Refugee/Asylee Relative Petition. If neither condition applies, refugee applicant may have supplemental form completed at any State or local health department. See www.ins.usdoj.gov/graphics/services/RefAdjust/index.htm.

Change of Address for Refugee/Asylee.

All aliens must notify INS within ten days of changing address. Person should send letter indicating address change to local INS office with jurisdiction over new address. (8 U.S.C. §1305).

Nonimmigrant Visas.

Largest categories of persons issued nonimmigrant visas are tourists and temporary business visitors. Nonimmigrant visas divided into 19 main categories. (8 U.S.C. §1101[a][15]; 8 C.F.R. §214.2). Main categories designated with letters A-R and TN. A, career diplomats, (8 C.F.R. §214.2[a]); B, temporary visitors for business and pleasure, (8 U.S.C. §§1255[c] and 1258[a][4]); C, aliens in transit, (8 C.F.R. §214.2[a][c]); D, crewmembers, (8 C.F.R. §252.1); E, treaty traders and investors, (8 U.S.C. §1101[a][15][E], 8 C.F.R. §214.2[d][e]); F, students, (8 U.S.C. §1101[a][15][F], 8 C.F.R. §214.2[f][5]); G, international organization representatives, (8 U.S.C. §1101[a][15][G], 8 C.F.R. §214.2[g][2]); H, temporary workers, (8 U.S.C. §1101[a][15][H]), 8 C.F.R. §214.2[h]); I, foreign media representatives, (8 U.S.C. §1101[a][15][A][i], 8 C.F.R. §214.2[i]); J, exchange program visitors, (8 C.F.R. §214.2[j]); K, fiancée or children of U.S. citizens, (8 U.S.C. §1184[d], 8 C.F.R. §214.2[k]; L, intracompany transferees, (8 C.F.R. §214.2[l][2]); M, students in nonacademic institutions, (8 C.F.R. §214.2[m]); N, parents and children of special immigrants, (8 U.S.C. §1101[a][15][N]); O, aliens with extraordinary abilities; P, entertainers, (8 U.S.C. §1101[a][15][P]); Q, cultural exchange program participators; R, religious workers; and TN, Nafta professionals. Most aliens who hold nonimmigrant visas may apply for permanent residence status by filing adjustment of status form with INS district office where alien resides. (8 C.F.R. §245.2).

18 INSURANCE

18.01 INSURANCE AGENTS AND PERSONNEL:

The Violent Crime Control and Law Enforcement Act of 1994 (18 U.S.C. §§1033-1034) makes it criminal offense for insurance companies to willfully permit “prohibited person” to engage in “business of insurance”. Prohibited person is individual whose activities effect interstate commerce and has been convicted of any felony involving dishonesty, breach of trust or any offense under Act. Any company conducting insurance activity must notify Commissioner of Insurance of state in question of all employees covered by Act. Application for written exemption may be sought under §1033 of Act.

18.02 INSURANCE COMPANIES:

Regulated by 15 U.S.C. §§1011-15 that declares regulation and taxation of insurance industry rests with states. See individual State Digests for controlling law. State laws require every local or out-of-state insurer to be licensed by that state where insurance company contracts policy. All agents and brokers selling or servicing policies within state must be licensed by that state. See Unfair Insurance Practices Act of each individual state.

Supervision by Insurance Commissioner of each state. See individual State Digests for controlling law. Commissioner charged with regulatory function to ensure rates not excessive or discriminatory. Can approve/disapprove deceptive policy forms.

Rates.

15 U.S.C. §§1011-15 allows individual states to regulate insurance rates. State rate-making legislation ensures rates sufficient to cover payment of proceeds and costs, yet not excessive, discriminatory. Insurers submit rate schedules to state administrative agency, typically Commissioner of Insurance. If Commissioner rejects rate schedules, insurer can appeal decision through court system. See individual State Digests for controlling law.

Annual Statements.

State statutes uniformly require local and out-of-state insurer doing business in state to file annual statement of its financial condition with state regulatory agency. Insurers must also file annually with National Association of Insurance Commissioners (NAIC). NAIC created by members of insurance industry to formulate uniform model statutes widely adopted by all states. State regulators may also require insurers to open company records for examination to ensure compliance with minimum capital and surplus standards.

Policies.

Individual state law prescribes language contained in insurer's policies.

Discrimination.

42 U.S.C. §2000e prohibits gender-based mortality tables in employer-sponsored pension programs funded by insurance annuities.

Agents and Brokers.

State law regulates every agent and broker taking part in sale or servicing of policies within that state. See individual State Digests for controlling law.

Investments.

State laws regulate types of investments permitted by insurers. See individual State Digests for controlling law.

Foreign insurance companies must comply with conditions imposed by individual state before doing business in that state. State law regulates and imposes tax on foreign companies. To do business within state, foreign insurers must (a) secure license; (b) possess sufficient up front capital; (c) possess sufficient assets to offset liabilities; (d) appoint agent to receive service of process. States cannot discriminate against foreign corporations when granting licenses to do business. In determining whether foreign corporation is subject to state regulation, courts will examine foreign insurers contract within state and with state residents.

Uniform Insurers Liquidation Act.

Adopted by individual states. See individual State Digests for law.

Plain Language.

See category 3 Business Regulation and Commerce, topic 3.11 Consumer Protection.

18.03 SURETY AND GUARANTY COMPANIES:

Guaranty Funds.

State guaranty associations protect policyholders and beneficiaries against financial losses due to insurer insolvency. Each state requires licensed insurers within that state to belong to state guaranty association. See individual State Digests for controlling law.

19 INTELLECTUAL PROPERTY

19.01 COPYRIGHT:

Note: See also United States Copyright Law Digest.

Copyright Office.

All correspondence intended for U.S. Copyright Office, including applications and fees, should be sent to: United States Copyright Office, Library of Congress, 101 Independence Ave, S.E., Washington DC 20559-6000. Individuals in need of information may also contact Public Information Office at (202) 707-5959. Information specialists on duty to answer questions from 8:30 a.m.-5:00 p.m. EST, Mon. through Fri. excepting holidays.

TTY.

Hearing impaired individuals may contact U.S. Copyright Office at (202) 707-6737. Messages may be left on TTY line 24 hours a day, and Copyright Office returns calls between 8:30 a.m. and 5:00 p.m. EST, Mon. through Fri.

Internet Address.

Copyright office maintains website at http://www.copyright.gov/. Individuals may obtain copies of various copyright registration forms at website.

Subject Matter of Copyright.

Copyright protection exists for any original work that has been fixed into any medium from which it later can be reproduced or communicated. (17 U.S.C. §102[a]). Copyrightable works include: Literary works; musical works; dramatic works, pantomimes and choreographic works; pictorial, graphic and sculptural works; motion pictures and other audiovisual works; sound recordings; and architectural works. (17 U.S.C. §102[a]).

Compilations and Derivative Works.

Copyright protection exists for compilations and derivative works, but only to any original portion of that work contributed by author. (17 U.S.C. §103). Author's copyright in compilation or derivative works in no way effects any copyright protection in preexisting material. (17 U.S.C.. §103).

U.S. Government Works.

Works of U.S. government may not be copyrighted, but government may hold copyrights transferred to it in any fashion. (17 U.S.C. §105).

Author's National Origin.

While unpublished, works may receive copyright protection regardless of national origin of author. (17 U.S.C. §104[a]). Published works subject to copyright protection under following circumstances: One or more authors is U.S. national, domiciled in U.S., or stateless person; work first published in U.S. or in country with which U.S. has treaty regarding copyright protection; work is sound recording that was first fixed in country with which U.S. has treaty regarding copyright protection; work published by U.N. or Organization of American States; or work falls under scope of Presidential proclamation. (17 U.S.C. §104[b]). By proclamation, President may extend copyright protection to works by authors of countries that extend copyright protection to U.S.

authors. (17 U.S.C. §104[b][6]).

Rights in Copyrighted Works.

Copyright owner has exclusive right to reproduce work, prepare derivative works based on copyrighted work, and to transfer copies of work to public. (17 U.S.C. §106). Copyright owner also has right to publicly perform or display copyrighted work. (Id).

Limitations on Rights in Copyrighted Works.

Fair Use.

Certain fair uses of copyrighted material, including reproduction of that material, do not constitute copyright infringement. (17 U.S.C. §107). Copyrighted works may be reproduced for purposes of “criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship or research”. (Id). Relevant federal statute identifies four factors that should be considered when assessing whether fair use exception applicable. Those factors are: purpose and character of use, including its commercial nature; nature of copyrighted work; portion of work being used as compared to entire work; and economic impact of use on copyright holder. (Id). In addition, courts often consider party's intent and motive in using copyrighted material.

Reproduction By Libraries and Archives.

Employees of libraries and archives may reproduce one copy of copyrighted work so long as they are not doing so for commercial purposes. (17 U.S.C. §108[a]). In addition, library or archive must be open to public or researchers and reproduction must include copyright notice. (17 U.S.C. §208[a]).

Ownership of Copyright.

Copyright in work vests in work's author or authors. (17 U.S.C. §201[a]). When work created for hire, employer for whom work created considered work's author and owns copyright. (17 U.S.C. §201[b]). In collective works, each contribution entitled to separate copyright protection. (17 U.S.C. §201[c]). Unless parties have agreed otherwise, owner of copyright in collected work may only reproduce and distribute contributions as part of collected work. (17 U.S.C. §201[c]).

Transfer of Ownership.

Copyright may be transferred, in whole or in part, by any means or by operation of law. (17 U.S.C. §201[d]). Further, owner may transfer any exclusive right in copyright, and new owner will be afforded same protection as would original owner. (17 U.S.C. §201[d]). Transfer of copyright ownership, other than by operation of law, must be in writing and signed by owner. (17 U.S.C. §204[a]).

Termination of Transfer.

Except in case of work created for hire, author may terminate transfer of copyright or transfer of any of author's exclusive rights. (17 U.S.C. §203). Termination may occur any time during five-year period commencing 35 years after date of author's transfer. (17 U.S.C. §203). In case of transfer of publication rights, five-year period begins 35 years from date of publication or 40 years from date of transfer if that date occurs earlier. (17 U.S.C. §203). For termination of transfer to be effective, author must serve notice on grantee. Notice must include effective date of termination, and must be served on grantee no less than two and no more than ten years before that date. (17 U.S.C. §203). Author may terminate transfer notwithstanding any agreement to contrary. Upon author's death, author's spouse, children, grandchildren, or trustee may exercise termination interest. (17 U.S.C. §203).

Duration of Copyright.

Works Created on or After Jan. 1, 1978.

Copyright protection begins on date of work's creation and lasts for life of author plus 70 years. (17 U.S.C. §302[a]). In case of jointly created work, where work was not created for hire, copyright lasts for life of last surviving author plus 70 years after that author's death. (17 U.S.C. §302[b]).

Copyright in Work Created But Not Published Before Jan. 1, 1978.

Copyright protection exists from Jan. 1, 1978 and lasts for life of author plus 70 years or in case of jointly created work, for life of last surviving author plus 70 years. (17 U.S.C. §303). However, for works protected under this section, copyright protection shall last until at least Dec. 31, 2002. (17 U.S.C. §303). For works published on or before Dec. 31, 2002, copyright protection shall last until at least Dec. 31, 2047. (17 U.S.C. §303).

Copyrights in Existence as of Jan. 1, 1978.

Copyright that existed as of Jan. 1, 1978 shall last for 28 years from date copyright originally obtained. (17 U.S.C. §304[a]). Author entitled to renew copyright for additional term of 67 years. If author no longer living, author's spouse, children, heirs, or next of kin may exercise right to renew copyright. (Id.). Applications for renewal must be made to U.S. Copyright Office.

Copyright Registration.

Registration with U.S. Copyright Office not precondition to copyright protection and protection exists once work “fixed in any tangible medium of expression”. (17 U.S.C. §§102, 408). Except for action brought for violation of author rights under 17 U.S.C. §106A[a], no infringement suit shall be filed until preregistration or registration of copyright claim has been made. (17 U.S.C. §411[a]). Copyright may be registered at any time during copyright's existence. (17 U.S.C. §408). In addition to copyright application, two copies of published work or one copy of unpublished work must be deposited with Copyright Office for possible use by Library of Congress. (17 U.S.C. §§407-408). http://www.copyright.gov/.

Application for Registration.

Applicants for registration may obtain following forms by contacting Register of Copyrights at U.S. Copyright Office, Library of Congress, 101 Independence Ave., Washington D.C. 20559: Form TX—for nondramatic literary works; Form PA—for works of performing arts; Form VA—for works of visual arts; Form SR—for sound recordings; Form RE—for renewal registrations initially registered under 1909 Act; Form SE—for serials such as newspapers, magazines, and journals; Form CA—for supplementary registration to correct or amplify information in earlier registrations. (17 U.S.C. §409).

Fees.

All registration fees should be made payable to Register of Copyrights and should be sent in form of money order, check, bank note, or postal note. Fees sent from foreign countries should be sent in form of international money order or bank draft. All listed fees in U.S. dollars:

(1) Registration of basic claim—$45 (paper); $35 (electronic)

(2) Renewal registrations for works published before Jan. 1, 1978, form RE—$75

(3) Addendum to form RE—$220

(4) Supplementary registration, form CA—$115

(5) Fee for searching copyright records and preparing official report—$150/hour

(6) Fee for locating, retrieving, and reproducing Copyright Office records—$150/hour

(7) Additional certificate of registration—$40

(8) Copying fee—Variable fee depending on format and size of originals

(9) Full-term retention of published copyright deposit—$425

(10) Recording of documents relating to copyrighted works: Document containing one title—$95; Additional titles—$25; Recording of NIE containing one title—$12; Special handling of recordation of documents—$435

(11) Appeal fees: First appeal—$250; Additional claim in related group—$25/each; Second appeal—$500; Additional claim in related group—$50/each.

Preregistration of Copyright.

Preregistration allows infringement action to be brought before authorized commercial distribution and full registration of work, and to make it possible for copyright owner to receive statutory damages and attorney's fees in infringement action. To preserve legal benefits of preregistration, party must register work within one month after copyright owner becomes aware of infringement and no later than three months after first publication. (17 U.S.C. §§408[f], 411 and 412). Party may preregister work only if: work unpublished; creation of work has begun; work being prepared for commercial distribution; and, work is motion picture, musical work, sound recording, computer program, book, or advertising photograph. Nonrefundable filing fee for preregistration is $100.

Copyright Notice.

Notice of copyright on publicly distributed copies of work consists of three elements: (1) Copyright symbol (©), word “Copyright”, or abbreviation “Copr.”; (2) year work was published; and (3) copyright owner's name. (17 U.S.C. §401[b]). Placement of copyright notice on work precludes individual from asserting defense of innocent infringement. (17 U.S.C. §401[d]). Failure to place copyright notice on work will not invalidate copyright if notice was omitted from relatively small number of works, work registered within five years of its publication, and notice was omitted despite owner's express written requirement that distributed copies contain notice. (17 U.S.C. §405[a]).

International Conventions.

U.S. signatory to Berne Convention and Universal Copyright Convention. Works by authors of other Berne member countries entitled to protection of U.S. copyright laws. (17 U.S.C. §104[c]). Protection afforded by U.S. copyright law, however, neither reduced nor expanded based on U.S. adherence to Berne Convention. (17 U.S.C. §104[c]).

Digital Millennium Copyright Act.

Act implements two World Intellectual Property Organization (WIPO) Treaties: WIPO Copyright Treaty and WIPO Performance and Phonograms Treaty. (112 Stat. 2860). Copyright law amended to provide protection of U.S. law to works protected under WIPO Copyright Treaty and WIPO Performance and Phonograms Treaty. (17 U.S.C. §§101, 104). As long as author's work has not entered public domain in country of origin, work protected by U.S. copyright laws. (17 U.S.C. §104A). Foreign authors need not register claim of copyright with U.S. Copyright Office as prerequisite to filing infringement lawsuit. (17 U.S.C. §411[a]).

Circumvention of Technical Protection Measures.

Making or selling devices or services used to circumvent technological measures used to protect copyrighted works prohibited. (17 U.S.C. §1201). Act prohibits use of devices or services that fall within three broad categories: devices designed or produced to circumvent, devices having limited commercial purpose other than to circumvent, devices marketed for use in circumventing copyrighted works. (Id.). Prohibition subject to several exceptions. Law enforcement or government intelligence agencies exempt from operation of entire section. (17 U.S.C. §1201[e]). Nonprofit libraries and educational institutions exempt when attempting to make “good faith determination of whether to acquire copy of work”. (17 U.S.C. §1201[d]). Other exceptions involve encryption research (17 U.S.C. §1201[g]), protection of minors (17 U.S.C. §1201[h]), personal privacy (17 U.S.C. §1201[i]), and security testing. (17 U.S.C. §1201[j]).

Copyright Management Information (CMI).

CMI defined as identifying information about work, author, or copyright owner. (17 U.S.C. §1202[c]). Includes information such as title of work, information set forth in notice of copyright, name of author, and name of copyright owner. (Id.). Knowing distribution of false CMI prohibited when done with intent to facilitate or conceal copyright infringement. (17 U.S.C. §1202[a]). Intentional removal or alteration of CMI also prohibited. (17 U.S.C. §1202[b]).

Civil and Criminal Remedies.

Any person injured as result of violation of §1201 or §1202 of Copyright Act may bring civil action in U.S. District Court. (17 U.S.C. §1203). Party may sue for actual damages or may elect to recover statutory damages. Statutory damages range from $200-$2,500 for each violation of §1201 and $2,500-$25,000 for each violation of §1202. (Id.). Court may choose to reduce damages award in cases of innocent infringement. Any person who “willfully and for purposes of commercial advantage” violates §1201 or §1202 subject to criminal sanctions. (17 U.S.C. §1204[a]). For first offense, person may be fined up to $500,000 and may be imprisoned for not more than five years. (17 U.S.C. §1204[a][l]). Subsequent offense subjects violator to $1,000,000 fine and up to ten years in prison. (17 U.S.C. §1204[a][2]). Unauthorized use of audiovisual device to record motion picture prohibited. (18 U.S.C. §2319B). For first offense, violator may be imprisoned for not more than three years and fined. Violators may be imprisoned for up to six years for subsequent offenses.

Audio Home Recording Act.

Prohibits manufacture, distribution, and importation of any digital audio recording device that does not conform to Serial Copy Management System. (17 U.S.C. §1002[a]). Importers and manufacturers of digital audio recording equipment must file notice with Register of Copyrights. (17 U.S.C. §1003[a]). Royalty payments required under act. (17 U.S.C. §1004).

19.02 PATENT:

Note: See also United States Patent Law Digest.

Patent Office.

All correspondence intended for U.S. Patent Office, including applications and fees, should be sent to: United States Patent Office, Commissioner for Patents, P.O. Box 1450, Alexandria, VA 22313-1450. When filing patent application, envelopes should be marked “New Patent Application”. For 24 hour technical and general support call (800) 786-9159 or (571) 272-1000. Technical support available 24 hours a day, seven days a week. General support available

Mon.-Fri., 8:30 a.m. - 8:00 p.m. Patent central Fax number (571) 273-8300. For patent EBC customer service center call (866) 217-9197 or (571) 272-4100. Patent and Trademark Office maintains website at http://www.uspto.gov/.

Patent Application.

Generally, patent application must include specification, drawing, and oath or affirmation. (35 U.S.C. §111[a][2]).

Who May Apply.

Applications for patent must be made by inventor. (35 U.S.C. §§102[f], 111). When individual erroneously named as inventor, and when there has been no attempt to deceive, application may be amended accordingly. (35 U.S.C. §116). Inventor may assign rights to invention, but in most instances inventor must still file and sign patent application. When inventor who assigns invention cannot be found or reached after diligent efforts, or when inventor refuses to execute patent application, assignee may file application as agent for inventor. (35 U.S.C. §118).

Specification must contain written description of invention and description of how to make and use it. (35 U.S.C. §112). Description must be enabling disclosure meaning that it must be sufficiently clear, concise, and exact so as to enable any person skilled in art to which invention pertains to recreate it. (Id). Specification must provide best mode of which inventor is aware for carrying out invention. (Id).

Claims.

Application must include one or more claims which point out specifically and distinctly aspects of invention which satisfy statutory requirements of novelty, utility, and nonobviousness. (35 U.S.C. §§102-103, 112). Claims may be written in dependent or independent form. (35 U.S.C. §112). Generally, applicants write progressively narrower dependent claims, thus increasing possibility that some claim will satisfy requirements of novelty, utility, and nonobviousness.

Drawing.

When necessary for understanding of subject matter to be patented, applicant must submit drawing of invention. (35 U.S.C. §113). If patent examiner determines that drawing necessary and one has not been provided, applicant shall have not less than two months to provide drawing. (Id.).

Oath.

Applicant must make oath that he or she original and first inventor of process, machine, manufacture, or composition of matter for which patent being sought. (35 U.S.C. §115). Oath shall include applicant's citizenship. (Id.).

Duty of Full Disclosure.

All individuals involved in filing patent application have duty of candor and must fully disclose all information material to application of which applicant is aware. (37 C.F.R. §1.56). Information material if reasonable patent examiner would believe information to be important. (37 C.F.R. §1.56; 653 F.2d 701). Commissioner may refuse to grant application if fraud in application process discovered. (37 C.F.R. §1.56). Courts may grant attorney's fees in cases where duty of candor has been breached. (35 U.S.C. §285).

Allowance of Patent Application.

Once granted, patent presumed valid and presumption of validity may only be rebutted by clear and convincing evidence. (35 U.S.C. §282). Patentee has right to exclude all others from making, using, or selling invention.

Duration of Patent.

Term begins on date patent issued and runs for 20 years from date on which patent application filed for applications filed on or after June 8, 1995. (35 U.S.C. §154[a]). For applications filed prior to June 8, 1995, term 20 years from date applications filed or 17 years from date patent granted. (Id.). Generally, renewal of patent not permitted, but patent term may be extended for certain drugs and products. (35 U.S.C. §156).

Patent Maintenance Fee.

To maintain utility patent in full force, applicant must submit patent maintenance fee 3.5, 7.5, and 11.5 years from date Patent and Trademark Office granted patent. Patent owner may avoid abandonment by submission of fee within six months after above terms, but surcharge will be assessed. Patent Commissioner may accept maintenance fees after expiration of six-month grace period upon showing that late payment was unintentional or unavoidable.

Term for Design Patents.

Design patents last for 14 years from date of grant of patent, and maintenance fees not required. (35 U.S.C. §173).

Rejection of Patent.

Once filed, examiner may reject application, may require additional information, or may object to some aspect of application. (35 U.S.C. §132). Applicant shall then be informed as to reasons for rejection or objection, and applicant may amend application for further review. (Id.).

Appeals.

If rejected twice, applicant may appeal to Patent Office Board of Appeals. From Patent Office Board of Appeals, applicant may appeal to U.S. District Court for District of Columbia or to Court of Appeals for Federal Circuit. Appeals taken to District Court for District of Columbia may still be appealed to Court of Appeals for Federal Circuit. Ultimately, applicants may petition U.S. Supreme Court to hear case by writ of certiorari.

Abandonment of Application.

Applications may be abandoned in writing, signed by applicant, and filed in Patent and Trademark Office. (35 U.S.C. §133). Application may also be abandoned if applicant fails to prosecute application within six months after any action taken on application by Patent and Trademark Office, and of which applicant has been given notice. (Id.). Commissioner may set shorter period than six months, but not less than 30 days. (Id.).

Abandonment of Invention.

Inventor may abandon invention by failing to pursue his rights to invention diligently or by placing invention in public domain. (35 U.S.C. §102).

Fees.

Following fees in effect as of Feb. 2007. Patent fees periodically revised, usually on Oct. 1. Most up to date fee amounts can be found at Patent and Trademark Office website—http://www.uspto.gov/. Checks should be made payable to Assistant Commissioner for Patents. Online and credit card payments accepted. Payments from foreign countries must be payable and immediately negotiable in U.S. for full amount of fee required. WIPO and EPO fees subject to periodic change due to fluctuations in exchange rate. Refer to Official Gazette of United States

Patent and Trademark Office for current amounts.

Patent Filing Fees:

(1) Basic Filing Fee, Utility—$300

(2) Basic Filing Fee, Utility (CPA)—$300

(3) Independent claims in excess of three—$200

(4) Claims in excess of 20—$50

(5) Multiple dependent claim—$360

(6) Surcharge, late filing fee or oath or declaration—$130

(7) Design filing fee—$200

(8) Design filing fee (CPA)—$200

(9) Plant filing fee—$200

(10) Reissue filing fee—$300

(11) Reissue independent claims in excess of three—$200

(12) Reissue claims in excess of 20 and over original patent—$50

(13) Provisional application filing fee—$200

(14) Surcharge, late provisional filing fee or cover sheet—$50

(15) Non-English specification—$130

Patent Post-Allowance Fees:

(1) Utility issue fee—$1,400

(2) Design issue fee—$800

(3) Plant issue fee—$1,100

(4) Reissue issue fee—$1,400

Patent Maintenance Fees:

(1) Due at 3.5 years—$900

(2) Due at 7.5 years—$2,300

(3) Due at 11.5 years—$3,800

(4) Surcharge, late payment within six months—$130

(5) Surcharge after expiration, late payment unavoidable—$700

(6) Surcharge after expiration, late payment unintentional—$1,640

Miscellaneous Patent Fees:

(1) Extension of term of patent—$1,120

(2) Requesting publication of SIR prior to examiner's action—$920

(3) Requesting publication of SIR after examiner's action—$1,840

(4) Request for ex parte reexamination—$2,520

(5) Request for inter partes reexamination—$8,800

(6) Notice of appeal—$500

(7) Filing brief in support of appeal—$500

(8) Request for oral hearing—$1,000

(9) Request for continued examination (RCE) (See 37 C.F.R. §1.114)—$790

Fees to World Intellectual Property Organization (WIPO) or European Patent Office (EPO):

(1) International filing fee (first 30 pages)—PCT Easy—$1,008

(2) International filing fee (first 30 pages)—$1,086

(3) Supplemental international filing fee, each page over 30—$12

(4) International search (EPO)—$2,059

(5) Handling fee—$155

(6) International CD applications—$4,800

PCT Fees—International Stage:

(1) Transmittal fee—$300

(2) PCT search fee—no prior U.S. application filed—$1,000

(3) PCT search fee—prior U.S. application filed—$300

(4) Supplemental search fee per additional invention—$1,000

(5) Preliminary examination fee, U.S. was ISA—$600

(6) Preliminary examination fee, U.S. was not ISA—$750

Patentable Inventions.

Inventor may patent any new, useful, and nonobvious “process, machine, manufacture, or composition of matter”, or any new, useful and nonobvious improvement thereof. (35 U.S.C.

§§101, 103). Ideas, scientific truths, and mathematical expressions of them not patentable. (306 U.S. 86). Similarly, phenomena of nature and abstract intellectual concepts not patentable. (409 U.S. 63).

Process.

"[P]rocess, art or method, and includes new use of known process, machine, manufacture, composition of matter, or material." (35 U.S.C. §100[b]). U.S. Supreme Court has described process as "act, or series of acts, performed upon subject matter to be transformed" thus reducing it to different state or thing. (94 U.S. 780, 787-788; 409 U.S. 63, 70).

Machine.

Every mechanical device, or combination of mechanical devices, used to perform some function and produce certain effect or result. (15 How. 252, 267; 450 U.S. 175, 182-183).

Manufacture.

Production of materials for use from raw or prepared materials by giving to these materials new forms, qualities, properties, or combinations, whether by hand, labor or by machine. (283 U.S. 1 Copyright Cases or Patent Cases; 447 U.S. 303).

Composition of Matter.

All compositions of two or more substances and all composite articles, whether result of chemical union or mechanical mixture and whether result is gas, fluid, powder, or solid. (447 U.S. 303).

Novelty.

To be patentable, invention must be novel or new. (35 U.S.C. §102). Invention satisfies novelty requirement unless: (a) Invention was known or used in U.S., or patented or described in printed publication in U.S. or foreign country before invention thereof by applicant for patent; (b) invention was patented or described in printed publication in U.S. or foreign country or was in public use or on sale in U.S., more than one year prior to date of U.S. patent application; (c) invention has been abandoned; (d) invention was first patented, or was subject of inventor's certificate, by applicant in foreign country prior to date of application for patent in U.S. on application for patent of inventor's certificate filed more than 12 months before filing of application in U.S.; (e) invention was described in application for patent by another filed in U.S. before invention by applicant or application was filed by international applicant under Patent Cooperation Treaty and applicant fulfills all necessary requirements of treaty (see subhead Foreign Patents, catchline Patent Cooperation Treaty (PCT), infra); (f) applicant did not invent subject matter sought to be patented; or (g) before applicant invented item or process for which protection being sought, invention was made by another who did abandon, suppress or conceal it. (35 U.S.C. §102).

Experiments.

Bona fide experimentation with invention for purposes of testing or perfection more than 12 months prior to application not be considered public use of invention that would preclude patentability.

Utility.

Only useful inventions eligible for patent protection. (35 U.S.C. §101). Inventor's application must contain claim or claims as to usefulness of invention. Patent protection not available for dangerous, immoral, and illegal items. Unlikely that item that is mere scientific curiosity or process that produces such curiosity may be patented. (383 U.S. 519).

Nonobviousness.

Patent may not be issued if differences between applicant's invention and prior art are such that it would have been obvious at time invention made to person having ordinary skill in art to which subject matter pertains. (35 U.S.C. §103[a]). Assessment of nonobviousness is three-step process. (383 U.S. 1, 17). First, scope and content of prior art determined. Second, any differences between prior art and claims at issue are ascertained. Finally, level of ordinary skill in pertinent art resolved. (Id.).

Secondary Considerations.

In some instances courts will look to secondary economic considerations in assessing nonobviousness. Secondary considerations include commercial success of item for which patent protections being sought, long felt but unresolved need for item, failure of others to produce such item, and whether or not prior art well established. (383 U.S. 1, 17-18; 740 F.2d 1560).

Interference is proceeding to determine priority as between competing inventors claiming same invention. (35 U.S.C. §135). Patent examiner may initiate interference proceeding when determined that two patent applications from different inventors contain claims for same invention. Examiner may also initiate interference proceeding when patent application and existing unexpired patent contain claims for same invention.

Reduction to Practice.

With two exceptions, priority given to first inventor who reduces invention to practice. (35 U.S.C. §102). One who invents first but reduces to practice last given priority if party exercises due diligence in pursuing their rights measured from date when second party conceives invention. Junior inventor may also be given priority upon establishing that senior inventor abandoned, suppressed, or concealed invention. (35 U.S.C. §102[g]). Invention is reduced to practice once it works for its intended purpose. Invention presumed to be reduced to practice on date that inventor files patent application. (802 F.2d 1367).

Design Patents.

Patent protection available to whoever invents any “new, original and ornamental design for article of manufacture”. (35 U.S.C. §171). In addition, design for which applicant seeks patent must be nonobvious. (35 U.S.C. §§103, 171). Further, while patentable design may have some functional attributes, purely functional design or one dictated by mechanical or functional requirements not patentable. (179 F.2d 416).

Plant Patents.

Patent protection available to anyone who invents or discovers and asexually reproduces any distinct and new variety of plant. (35 U.S.C. §161) This includes cultivated sports, mutants, hybrids, and newly found seedlings, other than tuberpropagated plant or plant found in uncultivated state. (Id.). While most patents require novelty, utility, and nonobviousness, distinctness replaces utility requirement in case of plant patents. (537 F.2d 1347). Additional requirement of asexual reproduction has been introduced by statute. (35 U.S.C. §161).

Double Patenting.

Inventor allowed only one patent for each invention. This doctrine prevents inventor from extending term of patent beyond statutorily prescribed period by seeking subsequent patents over course of years for same invention. Inventor who discovers patentable improvement to invention may seek second patent provided inventor willing to include terminal disclaimer. Through terminal disclaimer, inventor allows patent protection for second patent to end on same day as protection for first invention. (35 U.S.C. §253).

Patent Infringement.

Infringement consists of unauthorized using, making, or selling of product or process that has been patented. (35 U.S.C. §271[a]). Test for infringement is whether product or process works in “substantially same way” as patented product or process. (833 F.2d 931). Whoever supplies all or substantially all of components of patented invention for combination outside of U.S. may be liable as infringer. (35 U.S.C. §271[f]).

Patent Marking.

To obtain damages for patent infringement, infringer must be on notice that item subject to U.S. patent laws. Patentee may place individuals on notice by affixing to patented item word “patent” or abbreviation “pat.”, and patent number, but term “patent pending” insufficient to provide notice. When aspects of article preclude affixing necessary term and number, items packaging or labeling may be marked. Failure to affix above notice will preclude assessment of damages for infringement until infringer placed on notice, but failure does not affect patentee's right to obtain injunction preventing further infringement. Filing of action for patent infringement sufficient to place infringer on notice. (35 U.S.C. §287).

File Wrapper Estoppel.

In infringement action, owner of patent limited to claims and specifications and any amendments thereto, made during application process. Patent owner estopped from claiming that infringement action could be pursued but for amendment required by patent examiner.

Contributory infringement may occur when party sells component of patented product. (35 U.S.C. §271[c]). To be found liable, party must sell component knowing it was substantially suitable only for infringement. (Id.).

International Application.

If an international application does not include applicant who is indicated as being resident or national of the United States of America, and at least one applicant: (1) has indicated residence or nationality in PCT Contracting State, or (2) has no residence or nationality indicated, international application will be forwarded to International Bureau for processing. (37 C.F.R. §1.421). Requirements for international application are found in 37 C.F.R. §1.431.

Foreign Patents.

Effect of Foreign Patent In U.S.

Generally, patents granted in foreign countries confer no rights to patentee in U.S. Similarly, patents granted in U.S. provide patent owner with rights in U.S. and U.S. territories. In some instances, foreign patent, or publication of information about foreign-patented invention, may preclude applicant from obtaining patent in U.S. Basis for denial of U.S. patent would be that invention no longer novel or has become obvious to one reasonably skilled in pertinent art. (35 U.S.C. §§102-103).

Patent Cooperation Treaty (PCT).

U.S. and 90 other countries participants to PCT. Under PCT, filed international application subject to single set of formal requirements. Patent and Trademark Office is Receiving and Examining Office for international applications filed by U.S. nationals or residents and for international applications by residents of foreign countries who are entitled to file such applications. (35 U.S.C. §§351[a], 361). Patent and Trademark Office will also act as International Searching Authority. (35 U.S.C. §§351[g], 361). All applications must be filed in English language. (Id.). Applicants must file in Patent and Trademark Office: All necessary fees; copy of international application, including any translation to English language; amendments, if any, to claims in international application; and oath or declaration by inventor that he or she is original inventor of item or process for which protection sought. (35 U.S.C. §§115, 351, 371).

General Agreement on Tariffs and Trade (GATT).

U.S. member to GATT. Membership had effect of changing term of utility patents. (See subhead Duration of Patent, supra.) Also, U.S. residents may not file provisional patent applications. Provisional application not required to satisfy all formalities of U.S. patent law, however, specifications must still comply with U.S. patent law and applications must name inventor. Filing of provisional application may affect priority as between competing inventors and provides basis for priority claim for foreign filings.

19.03 TRADEMARK:

Note: See also United States Trademark Law Digest.

Trademark Office.

All correspondence intended for U.S. Trademark Office, including applications and fees, should be sent to: Assistant Commissioner for Trademarks, 2900 Crystal Dr., Arlington, Virginia 22202-3513. In addition, statements to allege actual use of trademark and requests for extension of time should be marked “Box ITU”. General Information Services phone numbers for Patent and Trademark Office are (703) 308-4357 and (800) 786-9199. In addition, individuals may contact Trademark Assistance Center via phone at (703) 308-9000. Patent and Trademark Office maintains website at http://www.uspto.gov/.

Fees.

Following fees established by Patent and Trademark Office and are effective through Feb. 2007. Fees revised periodically, usually on Oct. 1. Most up to date fee amounts can be found at Patent and Trademark Office website—http://www.uspto.gov/. Checks should be made payable to Assistant Commissioner for Trademarks. Payments from foreign countries must be payable and immediately negotiable in U.S. for full amount of fee required.

Trademark Processing Fees.

(1) Application for registration, per international class (paper filing)—$375

(2) Application for registration, per international class (electronic filing)—$325

(3) Filing amendment to allege use under §1(c), per class—$100

(4) Filing statement of use under §(d)(1), per class—$100

(5) Filing request for six-month extension of time for filing statement of use under §1(d)(1), per class—$150

(6) Application for renewal, per class—$400

(7) Additional fee for filing renewal application during grace period, per class—$100

(8) Correcting deficiency in renewal application—$100

(9) Publication of mark under §12(c), per class—$100

(10) Issuing new certificate of registration—$100

(11) Certificate of correction, registrant's error—$100

(12) Filing disclaimer to registration—$100

(13) Filing amendment to registration—$100

(14) Filing §8 affidavit, per class—$100

(15) Additional fee for filing §8 affidavit during grace period, per class—$100

(16) Correcting deficiency in §8 affidavit—$100

(17) Filing §15 affidavit, per class—$200

(18) Petition to Director—$100

(19) Petition for cancellation, per class—$300

(20) Notice of opposition, per class—$300

(21) Ex parte appeal, per class—$100

(22) Dividing application, per new application (file wrapper) created—$100

Trademark Service Fees:

(1) Printed copy of each registered mark, delivery by United States Postal Service, electronic means or USPTO Box—$3

(2) Certified copy of registered mark, with title and/or status, regular service—$15

(3) Certified copy of registered mark, with title and/or status, expedited local service—$30

(4) Certified copy of trademark application as filed, regular service—$15

(5) Certified or uncertified copy of trademark-related file wrapper and contents—$50

(6) Certified or uncertified copy of trademark document, unless otherwise provided—$25

(7) For assignment records, abstracts of title and certification per registration—$25

(8) Self-service copy charge, per page—$0.25

(9) Recording trademark assignment, agreement or other paper, first mark per document—$40

(10) For second and subsequent marks in same document—$25

(11) Labor charges for services, per hour or fraction thereof—$40

(12) Unspecified other services, excluding labor—Actual Cost

(13) Recordal application fee—$20

(14) Renewal application fee—$20

(15) Late fee for renewal application—$20

Marks Capable of Registration.

Under Act, any trademark “by which goods and services of applicant may be distinguished from goods of others” may be listed on principal register. (15 U.S.C. §1052). In addition, trademark specifically allows for registration of service marks (15 U.S.C. §1053), collective marks, and certification marks (15 U.S.C. §1054).

Categories of Marks.

In analyzing statutory requirement that all trademarks be distinctive, U.S. courts have created four categories into which all trademarks fall. (15 U.S.C. §1052). From weakest to strongest, marks described as generic, descriptive, suggestive, or arbitrary or fanciful. Generic marks, which are incapable of trademark registration, refer to “genus of which particular mark is species”. (573 F.2d 4, 9). Descriptive marks, which are capable of trademark registration only upon acquiring secondary meaning, “convey immediate idea of ingredients, qualities, or character of goods”. (Id.). Suggestive marks require imagination to reach conclusion as to nature of goods. (295 F. Supp. 479). Arbitrary or fanciful marks convey nothing about nature of product or goods.

Certification Marks.

Mark used with goods or services to show that they originated in certain region, were produced by member of particular organization, or have specific qualities or characteristics. (15 U.S.C. §1127). Mark's owner cannot produce goods, or provide services, associated with mark, and to do so can lead to mark's cancellation. (15 U.S.C. §1064). While mark's owner must maintain control of mark, ensuring that it is not used recklessly, owner may not preclude others from using mark on goods that satisfy whatever qualities mark certifies.

Collective Marks.

Mark used to show that goods or services associated with specific group or to show membership in that group. (15 U.S.C. §1127). There are two types of collective marks. Collective trademarks indicate that producer of goods or provider of services is member of specific group. Collective membership marks merely indicate membership in group. Unlike case with certification marks, owner of collective may use it.

Service marks essentially identical to trademarks with exception that trademarks identify goods while service marks identify services. (15 U.S.C. §1127).

Limitations on Registration.

If Assistant Commissioner of Trademarks concludes that mark is so similar to mark already registered as to cause confusion, mistake, or deception, mark cannot be registered. (15 U.S.C. §1052[d]). However, should Commissioner determine that confusion, mistake, or deceit unlikely to occur, then Commissioner may concurrently register both marks. (15 U.S.C. §1052[d]). Act precludes registration of “immoral, deceptive, or scandalous” marks or marks comprised of flag or insignia of U.S. or any foreign nation. (15 U.S.C. §1052[a]-[b]). In addition, marks that include name, portrait or signature of living person, without that person's permission, or picture of U.S. president during life of president's spouse, cannot be registered. (15 U.S.C. §1052[c]).

Limitations on Registration and Secondary Meaning.

With one important exception, Act also precludes registering of mark that is “merely descriptive”, geographically descriptive, or is primarily surname. (15 U.S.C. §1052[e]). Individuals may register these types of marks, however, if they acquire secondary meaning. (15 U.S.C. §1052[f]). Descriptive mark acquires secondary meaning when public associates mark or term with specific company because it has become “distinctive of applicant's goods in commerce”. (15 U.S.C. §1052[f]; 609 F.2d 655). When mark used in commerce continuously for at least five years, it is prima facie evidence that mark has achieved secondary meaning. (15 U.S.C. §1052[f]). Generic terms cannot acquire secondary meaning and are therefore ineligible for trademark registration. (537 F.2d 4).

Concurrent Registration.

Commissioner may concurrently register similar marks where owners lawfully used marks prior to earliest registration. (15 U.S.C. §1052[d]). Commissioner may only grant concurrent registration when confusion, mistake, or deceit unlikely. (Id.).

Principal Register.

Mark's owner may seek to have it placed on principal register where mark used in interstate commerce or where owner intends to use mark in interstate commerce. (15 U.S.C. §1051). Only “bona fide use” or “bona fide intent to use” mark in ordinary course of business will satisfy statute, and “token use” of mark to reserve applicant's rights insufficient. (15 U.S.C. §1127). Mark's placement on principal register carries several benefits. Placement on register is prima facie evidence that registration valid, registrant owns mark, and that registrant has right to use mark in commerce. In addition, registration allows mark's owner to bring action in U.S. Federal Courts. Once placed on register, mark's owner obtains nationwide rights in mark and all others placed on constructive notice that mark owned by registrant. Mark incontestable after being on register for five years. When submitting application to register mark, registrant must swear under oath that no others entitled to use mark and that mark not confusingly similar to any other mark. Reproduction of mark must be submitted with application.

Intent to Use.

Individual may also obtain mark's placement on principal register where registrant demonstrates “bona fide intent to use” mark in interstate commerce. (15 U.S.C. §1051[b]). Registrant deemed to be in constructive use of mark as of date of filing application. (15 U.S.C. §1057). Registrant has priority over any other person except for those whom, prior to registrant's filing, have used mark or have filed application with trademark office to register mark. (15 U.S.C. §1057).

Supplemental Register.

Certain marks that distinguish applicant's goods or services, but that cannot be registered on principal register, may be placed on supplemental register. (15 U.S.C. §1091). Statute specifically excludes from placement on supplemental register: immoral or scandalous marks; marks made up of flag of U.S. or foreign nation; marks comprised of signature or likeness of living being or of deceased President of U.S.; marks so similar to other registered mark that confusion, mistake, or deception likely; or mark that is “geographically deceptively misdescriptive”. (15 U.S.C. §§1052 [a]-[d], [e][3], 1091). Applicants often seek placement on supplemental register when foreign country requires domestic registration of mark prior to extending trademark protection. Mark on supplemental register may later be placed on primary register once mark deemed distinctive due to acquisition of secondary meaning.

Affidavit of Use.

All registrant's attempting to obtain placement of mark on principal register must file affidavit verifying that mark being used in interstate commerce. (15 U.S.C. §1051[d]). Affidavit must include date when registrant first used mark in commerce and must list all goods or services used in connection with mark. (15 U.S.C. §1051[d]). Applicant must file affidavit of use within six months of filing application, but this term may be extended upon written request of applicant. (15 U.S.C. §1051[d][1]-[2]).

Functional Bar.

To avoid granting patent-like protection to certain marks, any “mark” that is primarily functional may not be registered. Aspects of object may, however, be functional and still receive trademark protection as long as object not solely functional.

Abandonment.

Registrant may lose trademark protection under certain circumstances. Trademark deemed abandoned, and subject to registration by another, when owner fails to use mark and intends to abandon it. (15 U.S.C. §1052[d]). Intent to abandon mark can be inferred from surrounding circumstances. Registrant presumed to have abandoned mark after three years of nonuse. Mark may also be abandoned when owner fails to act or acts in such way as to cause mark to lose its distinctiveness. This may occur where others use mark so persistently that it becomes generic name for goods or services, and mark's owner fails to take action to stop their use.

Renewal of Registration.

To remain valid, trademark registrations must be renewed every ten years. (15 U.S.C. §1059[a]). Renewal applications must be sent to Assistant Commissioner of Trademarks, and fee for renewal is $400. Renewal applications may be submitted within one year before end of each ten-year period. (Id.). Renewal applications may also be submitted within six-months after expiration of each ten-year period, but surcharge will be assessed.

Foreign Applicants.

Application must be written in English language. Application must include statement of applicant's citizenship and drawing of mark for which applicant seeking registration. If applicant seeking registration in U.S. based on foreign registration, applicant must certify that trademark has been registered in foreign country or that application for registration in foreign country has been filed. Also, applicant must include country and filing date of foreign registration. Certified copy of foreign registration must accompany application and must be in English or include English translation.

Designating Local Individual for Service.

When applicant not domiciled in U.S., applicant must designate local individual for receipt of all notices affecting trademark application. (15 U.S.C. §1051[e]). Designation must be made in writing and filed with trademark office. (Id.).

20 LEGAL PROFESSION

20.01 ATTORNEYS AND COUNSELORS:

Admission to Federal Trial Courts.

U.S. district courts for each of the 50 states maintain their own admissions requirements. Generally, attorney can be admitted to practice before district court in one of two ways: through becoming member of state's federal district court bar or by receiving permission to appear in single case pro hac vice.

Admission to Trial Court Bar.

Most federal district courts allow individual to become member of their district court bars once they have been admitted to practice before highest level court in any state. Some federal district courts, however, require that applicant be admitted to practice before highest-level state court in which federal district court located. For example, applicants to Massachusetts Federal District Court Bar must be admitted to practice before Supreme Judicial Court of Massachusetts. Requirements for admission to state court bars vary from state to state. (See Martindale-Hubbell State Law Digests.) In most instances, applicant must have graduated from law school accredited by American Bar Association, be of good moral and professional character, and successfully complete examination which demonstrates individual's understanding of laws of that state.

Admission to Appear in Single Case Pro Hac Vice.

Federal district court judges have discretion to admit attorneys to appear in single trial pro hac vice. Often, attorney must be associated with “local” counsel who is member of that jurisdiction's federal district court bar. In addition, local counsel must file motion on behalf of attorney requesting permission to appear. In addition to motion, attorney seeking admittance must file affidavit certifying that: (1) he is member in good standing in every jurisdiction where he has been admitted to practice; (2) there are no disciplinary proceedings pending against him; and (3) he is familiar with any local rules.

Admission to U.S. Courts of Appeals.

Attorney may be admitted to bar of U.S. court of appeals if attorney admitted to practice before U.S. Supreme Court, another U.S. court of appeals, U.S. district court, or highest court of any state. (Fed. R. App. P. 46[a][1]). Attorney may seek admission by oral or written motion. (Fed. R. App. P. 46[a][3]). Admission fees are set by each individual court of appeals. To obtain application for admission, contact individual Courts of Appeals at below listed telephone numbers or addresses.

First Circuit Court of Appeals: United States Court of Appeals for the First Circuit, John Joseph Moakely Courthouse - Clerk's Office, 1 Courthouse Way, Suite 2500, Boston, MA 02210. Telephone - (617) 748-9057. Admission applications may be obtained through Internet at http://www.ca1.uscourts.gov/forms/forms.htm.

Second Circuit Court of Appeals: United States Court of Appeals for the Second Circuit - Clerk's Office, Daniel Patrick Moynihan United States Courthouse, 500 Pearl Street, Room 370 South, New York, NY 10007. Telephone - (212) 857-8500. Admission applications may be obtained through Internet at http://www.ca2.uscourts.gov/. From web page, click on link Clerk's Office then Attorney Adm.

Third Circuit Court of Appeals: United States Court of Appeals for the Third Circuit - Clerk's Office, 21400 U.S. Courthouse, 601 Market St., Philadelphia, PA 19106-1790. Telephone - (215) 597-2995. Admission applications may be obtained through Internet at http://www.ca3.uscourts.gov/coaforms.htm.

Fourth Circuit Court of Appeals: United States Court of Appeals for the Fourth Circuit - Clerk's Office, 1100 East Main St., Room 501, Richmond, VA 23219. Telephone - (804) 916-2700. Admission applications may be obtained through Internet at http://www.ca4.uscourts.gov/. From web page, click on link Forms and Notices.

Fifth Circuit Court of Appeals: United States Court of Appeals for the Fifth Circuit - Clerk's Office, 600 S. Maestri Place, New Orleans, LA 70130-3408. Telephone - (504) 310-7700. Admissions applications may be obtained through Internet at http://www.ca5.uscourts.gov/. From web page click on link Application and Oath for Admission.

Sixth Circuit Court of Appeals: United States Court of Appeals for the Sixth Circuit -

Clerk's Office, 540 Potter Stewart U.S. Courthouse, 100 E. Fifth Street, Cincinnati, Ohio 45202-3988. Telephone - (513) 564-7000. Admissions applications may be obtained through Internet at http://www.ca6.uscourts.gov/internet/forms/forms.htm.

Seventh Circuit Court of Appeals: United States Court of Appeals for the Seventh Circuit - Clerk's Office, Room 2722, 219 South Dearborn, Chicago, IL 60604. Telephone - (312) 435-5850. Admissions applications may be obtained through Internet at http://www.ca7.uscourts.gov/ftips/filing.htm.

Eighth Circuit Court of Appeals: United States Court of Appeals for the Eighth Circuit - Clerk's Office, Room 24.329, 111 South 10th St., St. Louis, MO 63102. Telephone - (314) 244-2400. Admissions applications may be obtained through Internet at http://www.ca8.uscourts.gov/newcoa/coaFrame.html.

Ninth Circuit Court of Appeals: United States Court of Appeals for the Ninth Circuit - Attn: Attorney Admission Form Request, Office of the Clerk, Post Office Box 193939, San Francisco, CA 94119-3939. Telephone - (415) 556-9373. Admission information may be obtained through Internet at http://www.ca9.uscourts.gov/ca9/Documents.nsf/.

Tenth Circuit Court of Appeals: United States Court of Appeals for the Tenth Circuit, Byron White U.S. Courthouse, 1823 Stout Street Denver, CO 80257. Telephone - (303) 844-3157. Admissions materials may be obtained by emailing clerk's office by accessing following web page: http://www.ca10.uscourts.gov/contact.cfm.

Eleventh Circuit Court of Appeals: United States Court of Appeals for the Eleventh Circuit - Clerk's Office, 56 Forsyth St., NW, Atlanta, GA 30303. Telephone - (404) 335-6100. Admissions information may be viewed through Internet at http://www.ca11.uscourts.gov/offices/attorney.php.

Federal Circuit: U.S. Court of Appeals for the Federal Circuit - Clerk's Office, Room 401, 717 Madison Pl., NW Washington, DC 20439. Telephone - (202) 633-6550. Admissions applications may be obtained through Internet at http://fedcir.gov/contents.html.

District of Columbia Circuit: United States Court of Appeals for District of Columbia Circuit - Clerk's Office, E. Barrett Prettyman U.S. Courthouse, 333 Constitution Avenue, NW Washington, DC 20001-2866. Telephone - (206) 216-7000. Admissions applications may be obtained through Internet at http://www.cadc.uscourts.gov/internet/internet.nsf/content/Attorney+Admissions.

Admission to U.S. Supreme Court.

To be admitted to U.S. Supreme Court Bar, attorneys must file application for admission, certificate of good standing from state in which applicant has been admitted to practice, and statement from two members of Supreme Court Bar (sponsors) who personally know applicant, but to whom applicant is not related by blood or marriage. (Sup. Ct. R. 5). Sponsors must attest to applicant's good moral and professional character. (Sup. Ct. R. 5). Applicants must have been admitted to practice in highest court of state, commonwealth, territory or possession, or District of Columbia for three years before date of application. (Sup. Ct. R. 5). Applicant must be of good moral and professional character and must not have been disciplined by any bar of which he is member during three years prior to application date. (Sup. Ct. R. 5). To obtain admission materials, applicant's should call Supreme Court of United States at (202) 479-3387. Upon completion of application, mail materials to: Clerk, Supreme Court of the United States, Attn: Admissions Office, One First Street, N.E., Washington, DC 20543-0001. Admissions applications and instructions may be obtained through Internet at http://www.supremecourtus.gov/bar/baradmissions.html.

See category 19 Intellectual Property, topic Patents, subhead Attorneys.

21 MINERAL, WATER AND FISHING RIGHTS

21.01 FISHING RIGHTS:

U.S. Fish and Wildlife Service.

Bureau within Department of Interior. Bureau mission is to conserve, protect and enhance fish and wildlife for benefit of American people. Under fisheries program, service operates 66 National Fish Hatcheries, 64 fishery resource offices and 78 ecological services field stations. Service enforces Federal wildlife laws, protects endangered species, manages migratory birds, restores nationally significant fisheries, conserves and restores wildlife habitat, and helps foreign governments with international conservation efforts. Address: United States Fish and Wildlife Service, 1849 C St., NW, Washington D.C. 20240. Internet address: http://www.fws.gov/.

Fish Restoration and Management Projects.

Secretary of Interior must cooperate with individual states in fish restoration and management projects. (16 U.S.C. §777[a]). To qualify for federal government assistance, states must pass laws for fish conservation. (Id.). Laws must include requirement that all fishing license fees be used for administration of state fish and game department. (Id.). Fish restoration and management projects means projects designed for restoration and management of all fish species with material sport or recreation value in waters of U.S. (16 U.S.C. §777a).

Fishing and Whaling Treaties and Acts.

Whaling Convention Act.

U.S. signatory to International Convention for the Regulation of Whaling. (16 U.S.C. §916). Act prohibits shipping, transportation, selling, importing, exporting, or possessing whales or whale products processed in violation of International Convention. (16 U.S.C. §916c[a]). Act requires those engaged in whaling to maintain certain records and to submit those records to Convention representative upon request. (Id.). Failure to maintain adequate records, or falsification of records, may result in fine of $500 and loss of whaling license. (16 U.S.C.S §916e). Those engaged in whaling must obtain license or scientific permit. (16 U.S.C. §916d[a]). To obtain license, applicant must possess sufficient equipment and individuals to engage in whaling in accordance with rules of Convention. (16 U.S.C. §916d[d]). Further, crews must be compensated on basis that does not “primarily depend on number of whales taken”. (Id.). Taking of whales in violation of Convention will result in fine of up to $10,000 and imprisonment for up to one year. (16 U.S.C. §916f).

Great Lakes Fisheries Act.

U.S. and Canada are signatories to Act, which ensures cooperation regarding fishing related issues in Great Lakes. Great Lakes include following bodies of water: Lake Ontario, Lake Erie, Lake Huron, Lake Michigan, and Lake Superior. (16 U.S.C. §931).

Inter-American Tropical Tuna Convention.

Agreement includes Convention for Establishment of International Commission for Scientific Investigation of Tuna signed by U.S. and Mexico and Convention for Establishment of Inter-American Tropical Tuna Commission signed by U.S. and Republic of Costa Rica. (16 U.S.C. §951). Commissioners must appoint scientific advisory subcommittee to provide advice regarding conservation of ecosystem as it relates to maintaining tuna stock. (16 U.S.C. §953[b][2]). Scientific subcommittee also to provide recommendations regarding appropriate fishing practices and development of environmentally safe and cost-effective fishing gear. (16 U.S.C. §953[b][2][B]). Regulations required to carry out recommendations of Commission will be promulgated by Secretary of Interior. (16 U.S.C. §955[c]). Secretary of Interior must publish notice of proposed rules in Federal Register. (Id.). Interested parties must be given opportunity to participate in rulemaking through submission of written data and oral presentations at public hearings. (Id.). After publication, rules applicable to all vessels and persons subject to U.S. jurisdiction. (Id.). Regulations may include limitations on fishing for certain species, closing certain areas of ocean to fishing for certain species, limitation on size and quantities of fish taken within certain areas, and limitation or prohibition of incidental catch of regulated species. (Id.). Secretary of Interior may prohibit importation of fish included within Commission's mandate from countries whose vessels are operating in violation of Commission's regulations. (Id.). Those authorized to enforce Commission rules may, without warrant, inspect “catch returns, statistical records, or other [required] reports”. (16 U.S.C. §956). Under Act, it is unlawful for anyone in charge of fishing vessel to fish in violation of Commission's regulations. (16 U.S.C. §957[a]). Also unlawful to knowingly ship, transport, purchase, or sell fish taken in violation of regulations. (Id.). These violators subject to $25,000 fine for first violation and $50,000 fine for subsequent violations. (16 U.S.C. §957[d]). Failure to maintain and produce records as required by regulations subjects violator to $1,000 fine for first violation and $5,000 fine for subsequent violations. (16 U.S.C. §957[e]). Importation of fish into U.S. taken in violation of regulations subjects violator to fine up to $100,000. (16 U.S.C. §957[f]).

Atlantic Tuna Convention.

Refers to International Convention for Conservation of Atlantic Tunas, signed in Rio de Janeiro in May 1966. (16 U.S.C. §971). Advisory commission to consist of individuals from various groups concerned with Atlantic tuna fisheries and of chairmen of New England, Mid-Atlantic, South Atlantic, Caribbean, and Gulf Fishery Management Counsels. (16 U.S.C. §971b). Secretary of State authorized to receive information from Commission on behalf of U.S. (16 U.S.C. §971c). Secretary of State also empowered to take action on behalf of U.S. regarding Commission recommendations. (Id.). Secretary of Commerce shall publish notice of proposed rules in Federal Register. (16 U.S.C. §971d[c]). Interested parties must be given opportunity to participate in rulemaking through submission of written data and oral presentations at public hearings. (Id.). After publication, rules applicable to all vessels and persons subject to U.S. jurisdiction. (Id.). Commission may regulate take of certain species and may establish open or closed seasons for fishing in certain areas of Atlantic (16 U.S.C. §971d[c][3]). Commission may also limit size and quantity of fish taken during given fishing season and may require records of operation be kept by master of any fishing vessel. (Id.). Yearly, Secretary of Commerce must identify nations whose vessels have fished in Convention regulated area contrary to Convention regulations. (16 U.S.C. §971d[c][6]). Next, Secretary must notify President and nation and publish list of violating nations. (Id.). Within 30 days of notification, President may enter into consultations with offending nation in order to obtain agreement that will immediately terminate conduct contrary to Convention regulations. Agreement may include deduction from subsequent fishing quotas for offending nation's fishing fleet. (16 U.S.C. §971d[c][7]). Commission may adopt regulations necessary to conserve stock of Atlantic Swordfish. (16 U.S.C. §971d[d]).

Eastern Pacific Ocean Tuna Fishing Agreement.

Under Agreement, Secretary of Commerce and Secretary of State must issue rules regulating tuna fishing in Eastern Pacific Ocean. (16 U.S.C. §972e). Regulations applicable to all persons and vessels subject to U.S. jurisdiction. Those engaged in fishing for tuna within agreement area must obtain license. (16 U.S.C. §972f). Under agreement, unlawful to ship, transport, sell, export, or possess any species of tuna designated for conservation under agreement. (Id.). Vessels must maintain records regarding fish caught and must furnish records upon request. (Id.). Violations of agreement's rules or regulations subjects violator to fines ranging from $25,000-$100,000.

South Pacific Tuna Fishing Agreement.

Refers to agreement between U.S. and Pacific Island States, signed in Port Moresby, Papua New Guinea in Apr. of 1987. (16 U.S.C. §973). Agreement makes it unlawful to use vessel for fishing in closed area, to falsify records required under agreement, to fail to submit required information, and to refuse to permit authorized individuals to board vessel to conduct search or inspection. (16 U.S.C. §973c). Also unlawful to ship, transport, sell, export, or possess any species of tuna designated for conservation under agreement. (Id.). Fishing vessels within agreement area must be licensed, and licensees may only fish using purse-seine method. (16 U.S.C. §973c[b]). Licensing requirements of agreement do not apply to trolling or longlining for albacore tuna in high seas areas of Treaty area. (16 U.S.C. §973d[a]). Most violations of act punishable by $50,000 fine and six months in prison. (16 U.S.C. §973e[b]). If violations accompanied by violent acts, fines increase to $100,000 and ten years in prison. (Id.). Licenses may be obtained through Secretary of Commerce or designee. (16 U.S.C. §973g). Application shall designate agent for service of process in Papua New Guinea. (Id.).

Northern Pacific Halibut Act of 1982.

Agreement refers to convention between U.S. and Canada for preservation of halibut fisheries in Northern Pacific Ocean and Bering Sea. (16 U.S.C. §773). Amendment to agreement signed in Washington, D.C. in Mar. of 1979. International Pacific Halibut Commission created under Act, and U.S. represented by three commissioners. (16 U.S.C. §773a). Secretary of State has power to accept or reject recommendations of commission. (16 U.S.C. §773b). Secretary of Commerce has general responsibility to carry out Act, and may cooperate with Canadian government in doing so. (16 U.S.C.. §773c). Those subject to U.S. jurisdiction must allow enforcement officer to board vessel to conduct searches or inspections. (16 U.S.C. §773e). Act prohibits shipping, transportation, sale, purchase, export or import of any fish taken in violation of Convention rules. (Id.). Foreign fishing vessels may not fish for halibut in conservation zone unless authorized to do so. (16 U.S.C. §773e[b]). Violators of Convention subject to civil penalty up to $200,000 for each violation. (16 U.S.C. §773f[a]). Each day of continuing violation viewed as separate offense. Certain offenses subject violator to criminal sanctions. (16 U.S.C. §773g). Violators subject to criminal fine of up to $50,000 and imprisonment for up to six months. Violators who use weapon, injure officer, or place officer in fear of imminent bodily injury subject to $400,000 fine and up to ten years in prison. (Id.). Fishing vessels used in connection with violation of Convention subject to civil forfeiture. (16 U.S.C. §773h).

Additional Fishing Agreements.

Agreement between U.S. and Japan regarding high seas squid and large-mesh driftnet fisheries in North Pacific Ocean. Agreement date, June 16, 1992. Agreement between U.S. and Canada concerning Pacific salmon. Agreement date, Jan. 28, 1985. Amended, June 29, 1990. Agreement between U.S. and Poland concerning fisheries off U.S. coast. Agreement date, Jan. 1, 1986. Agreement between U.S. and European Economic Community concerning fisheries off U.S. coast. Agreement date, Nov. 14, 1984. Agreement between U.S. and China concerning fisheries off U.S. coasts. Signed in Washington, D.C., July 23, 1985. Entered into force Nov. 19, 1985. Agreement between U.S. and Republic of Korea concerning fisheries off U.S. coast. Signed in Washington, D.C., July 26, 1982. Entered into force, Apr. 28, 1983. Agreement between U.S. and Estonia concerning fisheries off U.S. coast. Signed in Washington, D.C., June 1, 1992. Entered into force Dec. 22, 1992.

See also category 23 Property, topic 23.01 Abandoned Shipwreck Act.

21.02 MINERAL RIGHTS:

Department of the Interior.

Federal agency responsible for management of federal lands. Department of the Interior has responsibility for most of nationally owned public lands and natural resources. Department's mission is to protect and provide access to nation's cultural heritage and to honor trust responsibilities to Indian Tribes and commitments to island communities. Goals include protection of natural, cultural and heritage resources and provision of recreational opportunities.

Department collects revenues from leasing of natural gas and oil resources, both offshore and onshore; from coal, timber, and grazing on federal lands, and from numerous other sources, such as recreation fees. Department of Interior comprised of bureaus and offices including Bureau of Land Management, Fish and Wildlife Service, U.S. Geological Survey, Minerals Management Service, and Office of Surface Mining.

Department of Interior Office.

United States Department of the Interior, 1849 C Street, N.W., Washington, D.C. 20240. Telephone: (202) 208-3100.

Internet Address.

http://www.doi.gov/.

Office of Surface Mining.

Department of Interior Bureau with mission to carry out requirements of Surface Mining Control and Reclamation Act. Ensures coal mines operated in safe manner and land restored to beneficial use. Address: Office of Surface Mining, 1951 Constitution Ave. N.W., Washington, D.C. 20240. Telephone: (202) 208-2719. Internet address: http://www.osmre.gov/.

Bureau of Land Management manages 258 million acres of public lands located primarily in states of Arizona, Alaska, California, Colorado, Idaho, Montana, Nevada, New Mexico, Oregon, Utah, and Wyoming. Agency manages additional 700 million acres of below ground mineral estate located throughout U.S. Bureau manages lands under Federal Land Policy and Management Act. (43 U.S.C. §1701). Address: United States Bureau of Land Management, 1849 C Street, Room 406-LS, Washington, D.C. 20240. Telephone: (202) 452-5125. Fax: (202) 452-5124. Internet address: http://www.blm.gov/nhp/index.htm.

General Regulations.

Government policy to encourage domestic mining and mineral reclamation industries, including study and development of methods for disposal and control of mineral waste products and reclamation of mined land. (30 U.S.C. §21a). Under this law, minerals include fuels such as oil, gas, coal, oil shale, and uranium. Except as noted in other statutes, mineral deposits in lands belonging to U.S. open to exploration and purchase by U.S. citizens. (30 U.S.C. §22). However, only lands deemed to contain valuable mineral deposits subject to exploration and sale. Under Land Policy and Management Act, Secretary of Interior must manage public lands under principles of multiple use, including mining. (43 U.S.C. §1732). Prior to sale of public lands, determination must be made that sale of parcel will serve national interest. (43 U.S.C. §1701[a][1]). However, lands must be managed in manner recognizing nation's need for domestic sources of minerals, food, timber, and fiber. (43 U.S.C. §1701[a][12]).

Land Patent.

After locating land suitable for patent, claimant must file application with Bureau of Land Management. (30 U.S.C.SS. §29). Claim must include description of property, showing all boundaries. (Id.). Notice of claim must be published for 60 days, giving adverse claimants opportunity to challenge claim.

Exploratory Program for Discovery of Minerals.

Secretary of Interior authorized to establish programs for minerals exploration by private industry in U.S. and its territories. (30 U.S.C. §641).

Federal Land Policy and Management Act.

Stated policy of Act is that lands be retained in federal ownership and that lands be managed in “manner which recognizes U.S. need for domestic sources of minerals, food, timber, and fiber.” (43 U.S.C. §1701[a][12]). Under Act, Federal government must reserve rights to all minerals in land, including right to prospect for, mine, and remove minerals. (43 U.S.C. §1719[a]). Bureau may convey mineral interests upon finding that no mineral value exists in land. Bureau must also determine if reserving mineral rights interferes with development of land and development of land has more value than do mineral rights. (43 U.S.C. §1719[b]). Bureau may convey mineral interests to record owner or proposed record owner of surface rights in land. (43 U.S.C. §1719[b][2]). Mineral interests may only be conveyed upon payment of fair market value plus administrative costs. (Id.). Prior to purchase, proposed owner must deposit monies sufficient to cover administrative costs including cost of determining character and value of mineral deposits of land in question. (43 U.S.C. §1719[b][3][i]). Proposed owner must conduct exploratory program to determine value of mineral rights. (43 U.S.C. §1719[b][3][ii]). Exploratory program must be conducted in accordance with standards provided by Bureau of Land Management.

Land Use Plans.

Secretary of Interior must develop land use plans for all federal lands. (43 U.S.C. §1712). Planning process used to determine how lands are to be used. Uses include potential for mining on public lands. Lands may be sold for mining or other uses if determination made that tract is “difficult and uneconomic to manage”, or land was acquired for specific purpose and no longer used for that purpose, or sale will serve important public objective. (43 U.S.C. §1713).

Minerals Management Service.

Federal agency that manages U.S. natural gas, oil and other mineral resources on outer continental shelf. (43 U.S.C. §1332). Outer continental shelf includes submerged lands, subsoil, and seabed, lying between seaward extent of jurisdiction of individual states and seaward extent of Federal jurisdiction. (43 U.S.C. §1331[a]). Extent of federal jurisdiction defined under accepted principles of international law. Agency collects, accounts for and disburses more than $5 billion per year in revenues from federal offshore mineral leases and from onshore mineral leases on federal and Indian lands. (43 U.S.C. §1334). It includes two major programs, Offshore Minerals Management and Minerals Revenue Management. Offshore program, which manages mineral resources on outer continental shelf, comprises three regions: Alaska, Gulf of Mexico, and Pacific. The Minerals Revenue Program is headquartered in Washington D.C., but operationally based in Denver, Colorado. Address: Minerals Management Service, 1849 C Street, N.W., Washington, D.C., 20240. Telephone: (202) 208-3500. Internet address: http://www.mms.gov/.

Leases and Prospecting Permits.

U.S. lands containing deposits of coal, phosphate, sodium, potassium, oil, or natural gas subject to leasing for minerals exploration. (30 U.S.C. §181). Secretary of Interior reserves right to cancel prospecting permit when owner of permit fails to use “due diligence” in prospecting. (30 U.S.C. §183). Prospecting leases must reserve to U.S. easements and rights of way. (30 U.S.C. §186). Prospecting leases and permits not subject to assignment. (30 U.S.C. §187).

21.03 WATER RIGHTS:

In U.S., water rights largely determined by state law. Please see individual State Digests for relevant information.

Development of Waterways.

Party seeking to improve or develop waterway for benefit of interstate or foreign commerce may acquire right to land through right of eminent domain in U.S. District Court. (16 U.S.C. §814). District Court must follow eminent domain procedures used by state in which land located. District Court has jurisdiction only where amount claimed by property owner exceeds $3,000. (Id.). If land owned by state, then public hearings required in community where land located. (Id.).

22 MORTGAGES

22.01 CHATTEL MORTGAGES:

Chattel mortgages and mortgages on personal property are generally matters of state law under Uniform Commercial Code. See individual State Law Digests, category Mortgages, topics Chattel Mortgages and Mortgages of Personal Property; category Debtor and Creditor, topics Creditors' Suits and Liens. See also this digest, categories Business Regulation and Commerce, topic Consumer Protection, subhead Fair Credit Collections Practices Act; Debtor and Creditor, topic Bankruptcy.

22.02 MORTGAGES OF REAL PROPERTY:

Primarily matter of state law. See individual State Digests.

12 U.S.C., Banks and Banking deals with Farm Credit Associations (12 U.S.C. §2001 et seq.) and Farm Credit Banks (12 U.S.C. §2001 et seq.). Other matters relevant to this topic dealt with in Title 12 include provisions on Financial Privacy in Mortgage Transactions (12 U.S.C. §3401 et seq.), Residential Foreclosures (12 U.S.C. §§3701 et seq. and 3751 et seq.) and Homeowners' Protective provisions (12 U.S.C. §4901 et seq.). See also category 3 Business Regulation and Commerce, topic 3.11 Consumer Protection, subheads Truth in Lending Act, Fair Credit Collections Practices Act, Real Estate Settlement Procedures Act, and Home Mortgage Disclosure Act.

23 PROPERTY

23.01 ABANDONED SHIPWRECK ACT:

43 U.S.C. §§2101-2106 enacted 1987, to enable states to protect natural habitats, guarantee recreational exploration of shipwrecks and allow for public and private recovery of shipwrecks protecting historical value and environmental integrity of shipwrecks and sites. U.S. asserts title to wrecks then automatically transferred to appropriate state to abandoned wrecks “embedded in submerged lands of State” (43 U.S.C. §2106); exempts such wrecks from law of salvage and law of finds (43 U.S.C. §2106).

23.02 ADVERSE POSSESSION:

Generally no right of adverse possession against U.S. federal government. However, under 43 U.S.C. §1068 et seq., if tract of public land (other than military reservation) held in good faith and peaceful adverse possession under claim or color of title for more than 20 years and valuable improvements have been made or portion cultivated, or held since Jan. 1, 1901 and state or local taxes have been paid on tract, Secretary of Interior can issue patent for no more than 160 acres on payment of at least $1.25 per acre, coal and mineral rights being reserved to U.S. See individual State Digests for adverse possession claims against privately held property.

23.03 EMINENT DOMAIN:

U.S. has right to condemn for public purpose. Any district court(s) where land located has original jurisdiction of condemnation cases. (28 U.S.C. §§1358, 1403).

23.04 LANDLORD AND TENANT:

In U.S., laws of the 50 states control all aspects of landlord and tenant except for specialized leases dealing with government buildings or uses. See individual State Digests.

23.05 PARTITION:

28 U.S.C. §2409 deals with actions for partition of property of which U.S. is tenant in common. See also 28 U.S.C. §2411 relating to partition, quiet title, foreclosure and condemnation actions involving U.S. in state or federal district court in which land located.

23.06 REAL PROPERTY:

See individual State Digests.

24 TAXATION

—Scope —

Note: All citations are to Title 26 U.S.C. unless otherwise noted. See http://www.irs.gov/index.html.

24.01 ADMINISTRATION:

Internal Revenue Code.

Congress has power to levy taxes. Federal taxes are codified in Internal Revenue Code (IRC) and revised annually. (26 U.S.C.).

Treasury Regulations.

Treasury Department issues regulations (Regulations) interpreting IRC. (26 C.F.R.). Treasury Regulations are presumed valid by courts.

Internal Revenue Service (IRS), division of Treasury Department, administers federal tax laws and oversees assessment and collection of federal taxes. IRS issues and publishes Revenue Rulings interpreting specific sections of I.R.C. and Regulations and Private Letter Rulings responding to individual taxpayer questions about particular transactions. Private Letter Rulings have no precedential value for other taxpayers. See (69 Fed. Reg. 75,839), imposing heightened standard for attorneys and accountants who provide tax shelter opinions.

Payment of Taxes.

Taxpayers self-assess taxes annually on tax return forms and submit forms and payment to IRS. IRS reviews tax returns and may conduct official review called audit. Further administrative process or criminal investigations may be undertaken by IRS.

24.02 ALCOHOL, BEVERAGES AND TOBACCO TAX:

Federal excise tax is imposed on sales of alcohol products (I.R.C. §5001 et seq.) and tobacco products (I.R.C. §5701 et seq.).

24.03 BUSINESS TAX:

See topics 24.05 Employment Tax, 24.08 Foreign Investment Tax and 24.12 Income Tax.

24.04 CUSTOMS DUTY AND TAX:

See category 15 Foreign Trade and Commerce.

24.05 EMPLOYMENT TAX:

Payroll Tax.

Employer withholds prescribed income tax from employee wages. (I.R.C. §§3402-3403). See topic 24.12 Income Tax.

Social Security and Medicare.

Under Federal Insurance Contributions Act (F.I.C.A.) most employers and employees pay federal social security tax and medicare tax. (I.R.C. §§3101-3128). Employer and employee each pay social security tax of 6.2% of wages or earnings up to maximum annually of $80,400 (as of 2001) and medicare tax of 1.45% of all wages or earnings. Employers withhold prescribed social security and medicare tax from employee wages. Self-employed individuals pay employer and employee portions of social security and medicare tax on income over $400. (I.R.C. §§1401-1403).

Unemployment Tax.

Employer pays annual excise tax (unemployment tax) of 6.2% for years 1988-2007 or 6.0% thereafter of total wages paid by employer in year. (I.R.C. §§3301-3311). Employer may credit against unemployment tax portion of contributions paid by employer into certified state unemployment fund. (I.R.C. §3302).

24.06 ESTATE AND GIFT TAX:

Federal estate tax is presently imposed on taxable estate of every U.S. citizen or resident (I.R.C. §2001) and certain nonresident aliens who were U.S. citizens within ten years of death (I.R.C. §2107). Tax is imposed on gratuitous cumulative lifetime transfers or after death transfers exceeding $675,000 (as of 2001) in aggregate ("unified tax credit"). Economic Growth and Tax Relief Rehabilitation Act of 2001 (Tax Relief Act of 2001) gradually phases down estate tax between 2001 and 2010 and repeals estate tax effective Jan. 1, 2010. (Pub. L. No. 107-16, I.R.C. §501). Tax Relief Act of 2001 further provides, however, that all provisions and amendments made by Act shall not apply to taxable, plan, or limitation years beginning after Dec. 31, 2010 or to estates of decedents dying after Dec. 31, 2010 after which date Tax Code of 1986 shall again be applied. (I.R.C. §901). Taxable estate is gross estate less allowable deductions. (I.R.C. §§2051, 2001). Decedent's gross estate includes value of "all property, real or personal, tangible or intangible, wherever situated" at decedent's death. (I.R.C. §2031). Executor has option to value estate as of six months after decedent's death or date of disposition of property by estate rather than date of decedent's death. (I.R.C. §2032). Gross estate also includes, among other items, certain jointly-owned property (I.R.C. §2040), certain life insurance proceeds (I.R.C. §2042), and certain property transferred prior to decedent's death (I.R.C. §2035). Deductions to gross estate may be made for following: funeral and administrative expenses, claims against estate, unpaid mortgages and other indebtedness with respect to property, certain state and foreign death taxes; certain casualty or theft losses; qualified transfers to charity; and all qualified bequests to surviving spouse. (I.R.C. §§2053-2056). In addition to unified tax credit, credits are given for foreign and state death taxes and prior estate or gift tax paid. (I.R.C. §§2011-2015).

Federal gift tax presently imposed on gratuitous lifetime transfers "by any individual, resident or nonresident". (I.R.C. §2501). Gift tax reported annually on calendar-year basis. Tax on particular gift is calculated by applying graduated marginal tax rate to value of gift as of date of gift plus all prior taxable gifts. Donors presently receive annual exclusion for gifts up to $10,000 for any number of donees. Amounts paid by the donor for tuition directly to educational institution or for medical services directly to provider excluded from tax. (I.R.C. §2503[e]). Donors have unlimited charitable deduction and marital deduction. (I.R.C. §§2522-2523). Donor's gift tax liability reduced by any remaining portion of credit for gift and after death transfers. Tax Relief Act of 2001 gradually phases down gift tax between 2001 and 2010 and provides that, beginning Jan. 1, 2010, maximum gift tax rate will be maximum individual rate. (Pub. L. No. 107-16, I.R.C. §511). Tax Relief Act of 2001 further provides, however, that all provisions and amendments made by Act shall not apply to taxable, plan, or limitation years beginning after Dec. 31, 2010 or to gifts made after Dec. 31, 2010 after which date Tax Code of 1986 shall again be applied. (I.R.C. §901).

Generation-Skipping Tax.

Additional 55% (as of 1993) tax presently imposed on qualified annual gift and estate transfers to donees two or more generations younger than donor. (I.R.C. §§2601-2663). Exemptions from tax given for first $1 million per donor (I.R.C. §2631). Annual exemptions also given for transfers excluded from gift tax (I.R.C. §2642[c]) and medical and tuition transfers exempt from gift tax (I.R.C. §2611[b][2]). Tax Relief Act of 2001 gradually phases down generation-skipping tax between 2001 and 2010 and provides that, effective Jan. 1, 2010, generation-skipping tax repealed. (Pub. L. No. 107-16, I.R.C. §501). Tax Relief Act of 2001 further provides, however, that all provisions and amendments made by Act shall not apply to taxable, plan, or limitation years beginning after Dec. 31, 2010 or to generation-skipping transfers made after Dec. 31, 2010 after which date Tax Code of 1986 shall again be applied. (I.R.C. §901).

Tax Rates.

Prior to Tax Relief Act of 2001, Federal estate and gift tax has unified graduated rate structure. (I.R.C. §2001). First dollar over $675,000 unified credit was taxed at rate of 37%. Maximum rate of 55% was imposed at $3,000,000. Additional 5% surtax was paid on aggregate transfers over $10,000,000 until average tax rate of 55% is reached.

Reporting and Payment of Estate and Gift Tax.

Estate tax return must be filed when gross estate of decedent who was U.S. citizen or resident exceeds decedent's remaining unified credit exemption. (I.R.C. §6018). Absent extension, any estate tax return must be filed, and estate tax payment made, within nine months of decedent's death. (I.R.C. §§6075, 6151). Gift tax return must be filed by any U.S. citizen or resident who in any year gave gifts exceeding $12,000 exclusion per donee and not otherwise within gift exclusion or deduction provisions. Absent extension, return must be filed, and payment made, before Apr. 15 of year following calendar year of gifts reported.

24.07 EXCISE TAX:

Federal excise tax is imposed on sale and manufacture of variety of products and services. Excise taxes may be subject to exemptions and conditions. Retail excise taxes imposed on following: passenger vehicles; special fuels; fuels used in commercial transportation vessels; and heavy trucks and trailers. (I.R.C. §§4001-4053). Manufacturers excise taxes imposed on following: automobiles; removal, entry, sale of taxable fuel; aviation fuel; coal from U.S. mines; taxable vaccines; and sport fishing equipment. (I.R.C. §§4064-4227). Excise taxes on facilities and services imposed on following: communications services and taxable air transportation. (I.R.C. §§4251-4293). Excise taxes also imposed on following: foreign insurance policies (I.R.C. §§4371-4374); wagering (I.R.C. §§4401-4424); miscellaneous excise taxes (I.R.C. §§4461-4484); environmental taxes on petroleum and certain chemicals (I.R.C. §§4611-4682); “excess” lobbying expenditures of qualified organizations (I.R.C. §§4911-4912); investment income of certain tax exempt organizations (I.R.C. §§4949-4963); qualified pension plans (I.R.C. §§4971-4980E); qualified investment entities (I.R.C. §§4981-4982); certain group health plans (I.R.C. §5000); stock transfers qualified as “greenmail” (I.R.C. §5881); and manufacture and transfer of firearms (I.R.C. §5801 et seq.).

24.08 FOREIGN INVESTMENT TAX:

Fixed Tax.

Nonresident alien individuals and foreign corporations pay 30% tax on “fixed or determinable annual or periodical gains, profits and income” from U.S. sources. (I.R.C. §871).

Tax on Connected Income.

Nonresident individuals and foreign corporations also pay federal income tax on income “effectively connected” with trade or business conducted in U.S. (I.R.C. §871[b]).

Capital Gains Tax.

Nonresident alien individuals and foreign corporations are subject to tax on certain capital gains including gains from sales of U.S. real property. (I.R.C. §897[a]).

Branch Profits Tax.

Foreign companies pay additional 30% branch profits tax on earnings repatriated from U.S. corporate branch office to foreign home office. (I.R.C. §884).

Foreign Tax Credit.

U.S. citizens, residents, and corporations eligible for foreign tax credit in amount of income tax paid to foreign country recognized by U.S. (I.R.C. §901). Credit is also available to foreign corporations and nonresident aliens taxed on “effectively connected” income. (I.R.C. §906).

Controlled Foreign Corporations.

Any year end U.S. shareholder of corporation qualified as Controlled Foreign Corporations (CFC) for 30 uninterrupted days in year must include in income shareholder's pro rata share of corporation's “subpart F” income and CFC earnings from investment in U.S. property. (I.R.C. §951). “Subpart F” income is defined in I.R.C. and includes “foreign base company income”. (I.R.C. §952). CFC is any foreign corporation in which U.S. shareholders own more than 50% of voting power or more than 50% of total value of stock. (I.R.C. §957[a]). CFC shareholders are eligible for foreign tax credit.

See also topic 24.12 Income Tax, subhead Nonresidents.

24.09 FREE ZONES:

See category 15 Foreign Trade and Commerce.

24.10 GASOLINE AND SPECIAL FUEL TAX:

Federal excise tax is imposed on sale and manufacture of special fuels. See topic 24.07 Excise Tax.

24.11 GIFT TAX:

See topic 24.06 Estate and 24.11 Gift Tax.

24.12 INCOME TAX:

Liability for Tax.

All U.S. citizens, U.S. residents, U.S. corporations, and individuals and entities doing business in U.S. or having U.S. source income are subject to federal income tax. Taxpayers report and pay income tax every calendar or fiscal year. Income tax obligations and penalties for failure to pay are set out in I.R.C. and Treasury Regulations. Qualified foreign governments and controlled entities of foreign sovereigns are exempt from federal tax on income from stocks, bonds, other securities, and interest on bank deposits. (I.R.C. §892[a][1]).

Taxable Income.

U.S. citizens, residents and corporations are taxed on “taxable income” worldwide. Taxable income of individual is gross income less personal exemptions allowed by the I.R.C. (I.R.C. §151) and either itemized deductions allowed by I.R.C. (I.R.C. §63) or standard deduction for individuals who do not itemize (I.R.C. §63). Taxable income of corporations is gross income less allowed deductions. (I.R.C. §§61, 63). Gross income is broadly defined as “all income from whatever source derived” and includes, without limitation: compensation for services including fees, commissions, fringe benefits and similar items; gross income derived from business; gains derived from dealings in property; interest, rents, royalties, dividends; alimony and separate maintenance payments; annuities, life insurance and income from endowment contracts; pensions; income from discharge of indebtedness; share of partnership gross income; income in respect of decedent; and income from interest in estate or trust. (I.R.C. §61). Corporate distributions to shareholders are dividends if made out of current or accumulated earnings and profits of corporation. (I.R.C. §316[a]).

Exclusions from Gross Income.

Subject to additional rules and qualifications, gross income of individual does not include, without limitation, as follows: value of property acquired by gift, bequest, devise or inheritance; qualified employee achievement awards or de minimis fringe benefits; certain prizes and awards assigned to government unit or charity; certain scholarships and fellowships; most life insurance proceeds; portions of life insurance annuity payments; disability payments, accident and health plan payments, damages for personal injury and workers' compensation benefits; damages for libel or slander; interest on state and local government bonds; qualified meals, lodging, and moving expenses furnished by employers; benefits from employer's qualified cafeteria plan of benefits; and value of legal services provided to employee from qualified group legal services plan. (I.R.C. §§101-118). Subject to exceptions, gross income of corporation does not include distributions of additional stock of corporation. (I.R.C. §305[a]). The Mortgage Forgiveness Debt Relief Act of 2007, Pub. L. No. 110–142, excludes discharges of indebtedness on principal residences from gross income.

Personal Exemptions.

Individual taxpayer receives annual $3,400 personal exemption (adjusted annually for inflation) and additional exemptions for each dependent. (I.R.C. §151[c], [d]). Individual taxpayer also entitled to itemize deductions to gross income or to receive statutory standard deduction. (I.R.C. §63).

Deductions in Computing Income.

In calculating taxable income taxpayer may deduct, without limitation, following: business expenses; interest paid on borrowed money including interest on qualified personal residence; certain taxes including taxes on personal-use property; casualty and theft losses; nonbusiness bad debts; depreciation; percentage of charitable contributions to eligible charities; ordinary and necessary expenses incurred in production of income that is not part of business; medical and dental expenses not compensated by insurance and exceeding 7.5% of adjusted gross income; and alimony and maintenance payments. (I.R.C. §§161-222). Corporate deduction for ordinary and reasonable business expenses from gross income includes “reasonable” compensation paid to corporate employees. (I.R.C. §162). Corporations may deduct percentage of dividends received from another corporation. (I.R.C. §243). Deductions may be subject to limitations set out in IRC. IRC disallows deductions for capital expenditures defined as “improvements . . . made to increase the value of property”. (I.R.C. §263). Adjusted Gross Income (AGI) is gross income minus 21 specified deductions set out in IRC. (I.R.C. §62). AGI is used to calculate other individual deductions such as deduction for charitable contributions. (I.R.C. §170).

Tax credits are deducted from actual tax liability. Subject to qualifications credits are given for following: taxes withheld; foreign taxes paid; portion of income of certain elderly or disabled; certain investments; adoption expenses; interest on certain home mortgages; certain household and dependent care expenses; child tax credit; Hope scholarship credit; lifetime learning credit; taxes of foreign countries and possession of U.S.; for producing fuel from non-conventional source; qualified electric vehicles; refundable credits; business related credits; rules for computing investment and opportunity credit; and credit against regular tax for prior year minimum tax liability. (See I.R.C. §§21-53.)

Transfers of Property.

Gross income includes “gains derived from dealing in property”. (I.R.C. §61). Gain from sale of property is “amount realized over the adjusted basis”. (I.R.C. §1001). Amount realized is any money received plus fair market value of other property received. (I.R.C. §1001). Adjusted basis of property is original basis (generally cost of property adjusted as allowed by I.R.C. Adjustments to basis may be made for capital expenditures, exhaustion, wear and tear, obsolescence, amortization and depletion. (I.R.C. §1016). Costs of capital expenditures are added to basis of property. Basis of gift property is generally transferred to donee. (I.R.C. §1015). Under Tax Relief Act of 2001 as general rule with respect to property acquired from decedent dying on or after Dec. 31, 2009: (1) property shall be treated as transferred by gift; and (2) basis of person acquiring property shall be lesser of adjusted basis of decedent or fair market value of property at date of decedent's death. (Pub. L. No. 107-16, I.R.C. §542). Tax Relief Act of 2001 further provides, however, that all provisions and amendments made by Act shall not apply to taxable, plan, or limitation years beginning after Dec. 31, 2010 after which date Tax Code of 1986 shall again be applied. (I.R.C. §901). In exchange of property basis of old property is substituted into new property received. Any liability relieved in connection with sale or disposition of property is included in amount realized and basis of property includes liabilities assumed as part of acquisition of property. Gain realized by exchange of property for “like-kind” property is unrecognized until sale of property. Corporate redemption of stock and corporate distributions due to partial or total liquidation of corporation are treated as exchanges of property. (I.R.C. §302[a], [b]). Parties to qualified reorganizations are treated as parties to exchange. (I.R.C. §346 et seq.). “Toll” tax may be imposed on otherwise unrecognized gains from transfers of property to foreign entities. (I.R.C. §367).

Capital gains result from sale or exchange of capital asset. (I.R.C. §1221). Net capital gains to individuals are taxed at lower rate than other income. (I.R.C. §1201 et seq.). Capital losses of individuals are allowed to extent of capital gains plus lower of $3,000 or excess of losses over gains. (I.R.C. §1211[b]). Capital losses to corporations are allowed to extent of capital gains. (I.R.C. §1211[a]).

Nonresidents.

Nonresident alien individuals and foreign corporations pay 30% tax on “fixed or determinable annual or periodical gains, profits and income” from U.S. sources. (I.R.C. §871[a]). Nonresident individuals and foreign corporations also pay federal income tax on income “effectively connected” with trade or business conducted in U.S. (I.R.C. §871[b]). Federal income tax also imposed on gains of nonresident aliens in U.S. 183 days or more during taxable year. See also topic 24.08 Foreign Investment Tax.

Individual Tax Rates.

Federal income tax rates are graduated based on taxpayer income. (I.R.C. §1). Taxpayers with greater income pay greater percentage (rate) of income tax. Prior to Tax Relief Act of 2001, first $22,100 of taxable income was taxed at 15%. Income above $250,000 was taxed at maximum marginal rate of 39.6%. Tax Relief Act of 2001 amends Internal Revenue Code to establish, as of tax year 2001, 10% individual tax bracket for each filing status applicable to first: (1) $12,000 ($14,000 for 2008 and thereafter) of taxable income for married filing jointly category; (2) $10,000 of taxable income for head of household category; and (3) $6,000 ($7,000 for 2008 and thereafter) of taxable income for either filing as unmarried or married filing separately categories. Act also phases in reductions, beginning in 2001, of remaining tax brackets. (Pub. L. No. 107-16, I.R.C. §1). Tax Relief Act of 2001 further provides, however, that all provisions and amendments made by Act shall not apply to taxable, plan, or limitation years beginning after Dec. 31, 2010 after which date Tax Code of 1986 shall again be applied. (I.R.C. §901).

Corporate Tax Rates.

Federal income tax rates on corporations are graduated. (I.R.C. §11). Rate for first $50,000 of taxable income is 15%. Rate for taxable income over $50,000 and up to $75,000 is 24%. Rate over $75,000 and up to $10,000,000 is 34% and top marginal rate is 35% on taxable income over $10,000,000.

Payment of Tax.

Individuals earning income in excess of personal exemption and standard deduction must file tax return form. Forms filed annually by Apr. 15 of year following taxable year and incorporate tax paid in advance by employer withholding prescribed portion of earning or wages or taxpayer making quarterly estimated tax payments during taxable year. Refunds are made to taxpayers for overpayment. Persons failing to file return are subject to range of penalties.

24.13 INHERITANCE TAX:

See topic 24.06 Estate and 24.11 Gift Tax.

24.14 LOCAL GOVERNMENT TAX:

Individual and corporate taxpayers may also be subject to state and local government taxes including, without limitation: sales tax; income tax; and property tax.

See individual State Digests.

24.15 MINES, MINERALS AND FISHERIES TAX:

Several sections of I.R.C. address treatment of mines and minerals for imposition of federal income tax. (I.R.C. §§611-638). Excise tax imposed on coal mines. (I.R.C. §4121).

24.16 MOTOR VEHICLE TAX:

No federal motor vehicle tax in effect. See individual State Digests.

24.17 PROPERTY TAX:

No federal annual property tax in effect. Annual property taxes are imposed by many state or local governments. Transfer tax may be imposed by states at time of sale of property. Profits from sale of property may be subject to federal income tax but may fall within I.R.C. exclusion or deduction. See individual State Digests. See also topic 24.12 Income Tax.

24.18 SALES TAX:

No federal sales tax in effect. Sales tax imposed by some state and local governments.

See individual State Digests.

24.19 STAMP TAX:

No federal stamp tax in effect.

24.20 TAX INCENTIVES AND EXEMPTIONS:

See topic 24.12 Income Tax.

24.21 TREATIES AND AGREEMENTS:

U.S. has more than 50 bilateral income tax treaties with other countries to avoid international double taxation.

24.22 VALUE ADDED TAX:

No federal value added tax in effect.

24.23 WEALTH TAX:

See topics 24.06 Estate and 24.11 Gift Tax; 24.12 Income Tax.

25 TRANSPORTATION

25.01 AIRCRAFT:

Note: See http://www.faa.gov/.

Federal Aviation Act.

Act promotes safe air travel and protection of lives and property of air travelers and persons on ground. (49 U.S.C.. §40101 et seq.). Federal government has exclusive control of airspace of U.S. (49 U.S.C. §40103).

Federal Statutes.

Aviation federally regulated by several statutes covering: Economic regulation (49 U.S.C. §41101 et seq.); safety (49 U.S.C.. §44101 et seq.); enforcement and penalties (49 U.S.C. §46101 et seq.); airport development and noise (§47101 et seq.); airport financing (49 U.S.C. §48101 et seq.); seizure and forfeiture of carriers transporting contraband (49 U.S.C. §80303; 14 C.F.R. §91.19[a]). See also Hazardous Materials Transportation Act. (49 U.S.C. §5101 et seq.).

Federal Crimes.

Destruction of aircraft or airports. (18 U.S.C. §35). Acts of violence at international air terminals. (18 U.S.C. §37[a]-[c]). Interference with flight crew members and attendants. (49 U.S.C. §46504). Carrying weapons or explosives on board. (49 U.S.C. §46505[b]). Furnishing false information under FAA. (49 U.S.C. §46507 et seq.). See generally 49 U.S.C. §§46306-46315.

Federal Aviation Administration (FAA) has powers and duties over matters such as: Airspace control and air traffic rules (49 U.S.C. §40103); construction and maintenance of airports and air navigation facilities (49 U.S.C. §47101 et seq.); training schools for personnel of aeronautics industry or foreign governments (49 U.S.C. §40108). FAA promulgates regulations on: Procedural rules (14 C.F.R. §11 et seq.); aircraft (14 C.F.R. §21 et seq.); airmen (14 C.F.R. §61 et seq.); airspace (14 C.F.R. §71 et seq.); air traffic and operating rules (14 C.F.R. §91 et seq.); certification and operations of air carriers (14 C.F.R. §119 et seq.); school and other certificated agencies (14 C.F.R. §141 et seq.); airports (14 C.F.R. §150 et seq.); navigational facilities (14 C.F.R. §§170, 171); and administrative matters (14 C.F.R. §183 et seq.). FAA regulations have force and effect of law.

Accidents.

National Transportation Safety Board (NTSB) investigates and determines facts, circumstances, and causes of aircraft accidents. (49 U.S.C. §1111[a]; 49 C.F.R. §§800, 821, 830-31).

Treaties and International Conventions.

Liability of carriers for personal injuries to passengers in international air transportation governed by Warsaw Convention Treaty, to which U.S. is party. (49 U.S.C. §40105). Under Warsaw Convention, air carriers absolutely liable up to preset monetary ceiling for accidents in which passenger suffers bodily injury or death, where accident takes place on board aircraft or in process of embarking or disembarking. Warsaw Convention contains two-year time limitation for bringing suit and absolves carrier from liability on showing of due care. (49 U.S.C. §40105). Under Montreal Agreement, majority of international air carriers increase their liability limit per passenger to $75,000 inclusive of legal fees, and waive defense of due care as to flights originating, terminating or stopping within U.S. (490 U.S. 122). For international flights subject to Warsaw Convention, as modified by Montreal Agreement, carrier absolutely liable unless it can prove negligence on part of passenger. (86 F.3d 498). U.S. is signatory to “Cape Town Treaty,” which extends laws on sale, finance, and lease of aircraft to international arena. (49 U.S.C. §40101). Under Treaty, U.S. to maintain electronic registry system for airplanes.

Registration.

It is unlawful to operate or navigate any aircraft eligible for registration if such aircraft is not registered as provided by statute, or to operate or navigate any aircraft not eligible for registration within U.S. (49 U.S.C. §§44101, 44102 et seq.). Aircraft of national defense force and foreign aircraft navigated in U.S. in accordance with 49 U.S.C. §§40103[d], 41703 excepted. See also 14 C.F.R. §47.

Carrier.

Person may not operate as air carrier without certificate issued by Secretary of Transportation. (49 U.S.C. §41101[a]; 14 C.F.R. §121 et seq.).

Foreign air carriers may engage in foreign air transportation under permits subject to approval by U.S. President. (49 U.S.C. §§41301-41312, 41703). If carrier certificate authorizes air carrier to engage in foreign air transportation, approval of U.S. President needed for certificate. (49 U.S.C. §§41102[d], 41307). Joint pricing and tariffs needed for foreign transportation. (49 U.S.C. §§41501-41503).

Discrimination.

Air carrier or foreign air carrier may not subject person, place, port, or type of traffic in foreign air transportation to unreasonable discrimination. (49 U.S.C. §41310[a]).

Air Carrier Access Act.

Provides private cause of action for discrimination against persons with disabilities in air transportation. (49 U.S.C. §41705).

25.02 MARINE, SHIPS:

Note: See http://www.marad.dot.gov/.

Discrimination.

Foreign cruise ships required to comply with ADA public accommodation requirements, except when vessel modifications would conflict with international legal obligations or threaten shipboard safety. (545 U.S. 119).

See category 23 Property, topic 23.01 Abandoned Shipwreck Act.

25.03 MOTOR VEHICLES:

Note: See http://www.nhtsa.dot.gov/.

Federal Regulation.

Power of federal government to regulate interstate commerce gives it control over motor vehicles engaged in business between states. Federal government has no general power to enact police regulations within individual states.

Federal Statutes.

Motor Carrier Safety Reauthorization Act of 2005.

Regulates motor vehicle safety standards for motor vehicles and equipment in interstate commerce, and undertakes and supports safety research and development. (49 U.S.C. §§30101-30167).

National Driver Registry Act.

Establishes central national clearinghouse for information on drivers. (49 U.S.C. §§30301-30308).

National Motor Vehicle Title Information System.

Regulated by 49 U.S.C. §§30501-30505. Establishes national clearinghouse of information on motor vehicle titles.

Motor Vehicle Air Pollution Control Act.

Regulated by 42 U.S.C. §7401 et seq..

Theft Prevention Act.

Regulated by 49 U.S.C. §§33101-33118.

Consumer Information Act.

Regulated by 49 U.S.C. §§32101, 32301-32309.

Consumer Product Safety Act.

Regulated by 15 U.S.C. §2051 et seq. Purpose of Act to protect public against unreasonable risks of injury, to assist consumers in evaluating comparative safety of products, to develop uniform standards, to minimize conflicting state and local regulations, and to promote research and investigation into causes and prevention of product-related deaths and injuries.

Other Statutes.

Statutes regulating state participation in international registration plan and international fuel tax agreement. (49 U.S.C. §§31701-31708).

Standards and Compliance.

Secretary of Transportation prescribes motor vehicle safety standards. (49 U.S.C. §30111).

Prohibitions on Manufacturing, Selling, and Importing Noncomplying Motor Vehicles and Equipment.

Person may not sell in interstate commerce or import into U.S. any motor vehicle or equipment manufactured after date applicable motor vehicle safety standard prescribed under Title 49 takes effect unless vehicle or equipment complies with standard and is covered under 49 U.S.C. §30115. (49 U.S.C. §30112). Section 30112 does not apply to: motor vehicle or equipment intended only for export, labeled for export, and exported (49 U.S.C. §30112[b][3]); motor vehicle imported for personal use by individual receiving exemption under 49 U.S.C. §30142 (49 U.S.C. §30112[b][5]); motor vehicle under 49 U.S.C. §30143 imported by individual employed outside of U.S. (49 U.S.C. §30112[b][6]); motor vehicle under (49 U.S.C. §30144) imported on temporary basis (49 U.S.C. §30112[b][7]); motor vehicle or equipment under 49 U.S.C. §30145 requiring further manufacturing (49 U.S.C. §30112[b][8]); motor vehicle at least 25 years old (49 U.S.C. §30112[b][9]). Regulations for importing motor vehicles capable of complying with standards covered under 49 U.S.C. §30141.

Maintaining Records.

Secretary of Labor may require manufacturers to produce records related to performance and safety required to satisfy Title 49. (49 U.S.C. §30117).

Notifications of Defects and Noncompliance.

Manufacturers have independent duty to give notification of and to remedy known safety-related defects, if manufacturer learns vehicle or equipment contains defect, or decides vehicle or equipment does not comply with applicable safety standard under Title 49. (49 U.S.C. §30118[c]). Notification procedures for manufacturers regulated by §30119. When notification of defect is required under 49 U.S.C. §30118, manufacturer shall remedy defect without charge. (49 U.S.C. §30120[a]). Manufacturer may remedy defect by repairing, replacing vehicle, or refunding purchase price. (49 U.S.C. §30120[a][A][i]-[iii]). Tire remedies regulated under 49 U.S.C. §30120[b]. Registered importer deemed manufacturer responsible for notification of defects and noncompliance of motor vehicles. (49 U.S.C. §30147).

Tires.

Regulated by 49 U.S.C. §30123.

School Bus and School Bus Equipment.

Regulated by 49 U.S.C. §30125.

Restraint, Seat-belt, Air-bags.

Regulated by 49 U.S.C. §30127.

Commercial Motor Vehicles.

Limitations.

Length and width limitations regulated by 49 U.S.C. §§31111, 31113. Carrying limitations regulated by 49 U.S.C. §31112.

Inspection of Vehicles.

Regulated by 49 U.S.C. §31142.

Safety Standards.

Regulated by 49 U.S.C. §31136. Regulations covering transportation of hazardous materials. (49 U.S.C. §5103).

Liability for Transportation of Passengers.

Regulated by (49 U.S.C. §31138). Level of financial responsibility for motor vehicle with seating capacity for at least 16 passengers $5,000,000; less than 16 passengers at least $1,500,000. (49 U.S.C. §31138[b][1]-[2]). Section 31138 not applicable to motor vehicles: transporting children and teachers to and from school; providing taxicab service with capacity of not more than six passengers; carrying not more than 15 individuals in daily round trip to and from work; and providing transportation service under agreement with federal, state or local government for transporting elderly and disabled individuals. (49 U.S.C. §31138[e]).

Commercial Motor Vehicle Operators.

Regulated by 49 U.S.C. §§31301-31317.

26 TREATIES AND CONVENTIONS

26.01 TREATIES:

Introduction.

U.S. is party to vast number of agreements with foreign nations regulating wide range of international issues. Agreements take several forms and may be titled, among other names, treaties, conventions, protocols, international agreements, executive agreements or compacts. Space constraints prevent listing all treaties here but readers are referred to United States Treaties and Other International Agreements (U.S.T.) and United States Treaties and International Acts Series (T.I.A.S.), for most comprehensive listing of U.S. treaties and agreements. See also, this Digest, Part V, Selected International Conventions.

See also categories 3 Business Regulation and Commerce; 9 Dispute Resolution, 15 Foreign Trade and Commerce; 24 Taxation.

Belarus Democracy Act.

Act intended to encourage free and fair presidential, parliamentary, and local elections in Belarus and to strengthen democratic governance in Belarus. (22 U.S.C. §5811). Under Act, U.S. may observe elections and assist in development of democratic political parties. U.S. also supports development of independent media within Belarus and from locations outside country. Congress authorizes funds necessary for President to carry out Act. (22 U.S.C. §5811).

North Korea Human Rights Act.

Act authorizes President to provide grants supporting programs that promote human rights, democracy, rule of law, and development of market economy in North Korea. Programs may include educational and cultural exchange programs. (22 U.S.C. §7812). President authorized to increase availability of information in North Korea from outlets not controlled by North Korean government. (22 U.S.C. §7814).

Enhanced Partnership with Pakistan

Act intended to strengthen relationship with Pakistan and to define principles upon which relationship should be based. (22 U.S.C. §8403). Act provides for assistance to Pakistan in areas of economic development assistance as well as security assistance. (22 U.S.C. §§8411 to 8425).

Strategy and monitoring reports to be sent to congressional committees on semi-annual basis. (22 U.S.C. §§8441, 8442).

Enactment and Effect.

U.S. President, with advice and consent of Senate, has power to make treaties. (U.S. Const. art. 2, §2). Treaties must be ratified by vote of two-thirds of federal senators to take effect. Senate may also vote to amend or modify treaty. Individual states are prohibited from entering into treaties. Ratified treaties are "supreme law of the land" and bind all state and federal courts. (U.S. Const. art. 6). U.S. is also party to numerous less formal international agreements entered into by President which may not require Senate ratification.

Interpretation.

Treaties and conventions are construed by U.S. courts to give meaning and effect to intention of contracting nations. Courts may consider circumstances at time of making and documents reflecting negotiations and intentions.

1

UNITED STATES COPYRIGHT LAW DIGEST

—Scope —

Revised for 2010 edition by

LexisNexis.

(Unless otherwise specified, all references to sections are to sections of Title 17, U. S. Code Annotated, entitled "Copyrights" as enacted into law on Oct. 19, 1976, and as since amended. All references to Regulations are to sections of the Regulations of the Copyright Office as set forth in sections 201 to 259 of Chapter II, Title 37, Code of Federal Regulations (CFR), as amended. USPQ indicates United States Patent Quarterly. Cross references in this digest are to the principal topics [set out in boldface capital letters], subheads thereunder [set out in upper and lower case boldface] and catchlines under the principal topics [set out in italics].)

NOTE: On Jan. 1, 1978, first major revision of U.S. Copyright statute since 1909 became effective. This new statute changed existing law in many respects. However, for many purposes prior law is still important, for example to determine whether works are in public domain if published prior to Jan. 1, 1978. For purpose of this Digest, new law will be referred to except in those cases where it is expressly stated that reference is being made to old law. There have been several amendments to the statute since 1978.

While much of decisional law referred to herein was rendered under prior law, it is still pertinent under new law.

NOTE: Upon adoption of GATT Agreement in 1994, major revisions were made to the Copyright Statute to comply more fully with the Berne Convention. Restoration of copyright was made in certain foreign works which had fallen into the public domain in the U.S. because of improper nationality or subject matter or failure to comply with U.S. formalities. (§104A). Certain performing rights were recognized in §1101. The effective date of these new provisions was January 1, 1996 and they have been incorporated into this digest.

NOTE: Federal Copyright Law and its application to digital information is one of the hottest areas of judicial and legislative activity. The National Conference of Commissioners on Uniform State Laws has promulgated the Uniform Computer Information Transactions Act (UCITA) affecting contractual restrictions on copying, fair use and decoding of encrypted data. Courts are working out rules to determine questions of exercise of personal jurisdiction in cyberspace, as well as copyright infringement of digital products.

Several amendments have been made to U.S. Copyright Law in recent years. These include:

July 2006—new fees.

Family Entertainment and Copyright Act (P.L. 109-9) signed Apr. 27, 2005 (html) (pdf) which contains, as Title 1, Artists Rights and Theft Prevention Act. This creates criminal liability for certain acts of willful copyright infringement, including work made available on computer network accessible to members of public if accused infringer knew or should have known work was intended for commercial distribution. (17 U.S.C. 103[a]).

Satellite Home Viewer Extension and Reauthorization Act of 2004 (contained in Consolidated Appropriations Act, 2005, P.L. 108-447) signed Dec. 7, 2004 (html) (pdf).

Individuals with Disabilities Education Improvement Act of 2004 §306 amends §121 of Copyright Law (P.L. 108-446) signed Dec. 3, 2004 (html) (pdf).

Copyright Royalty and Distribution Reform Act of 2004 (P.L. 108-419) signed Nov. 30, 2004 (html) (pdf).

Note: This revision incorporates legislation through Aug. 2009.

1.01 INTRODUCTION—THE STATUTORY COPYRIGHT SYSTEM:

The copyright system as well as the patent system, in the United States, derive from Art. I, §8 of the U.S. Constitution, under which Congress is empowered to promote the progress of science and the useful arts, by securing, for limited times, to authors and inventors, the exclusive right to their respective writings and discoveries.

The obtaining as well as protecting of copyright are therefore statutory and federal in scope. Remedies against infringement are available under federal law in U.S. courts, as distinguished from State courts, regardless of whether there is diversity of citizenship of the parties, or interstate commerce involved.

Copyright laws of U.S. are codified and enacted into positive law, to be cited as “Title 17, U.S.C. §. . . . . . ,” by §101 of Act of Oct. 19, 1976. Prior statute was that of July 30, 1947 which codified various statutes relating to copyright. In testing validity or effect of actions taking place prior to Jan. 1, 1978 reference must be made to prior statute.

Current statute is first major revision of U.S. Copyright laws since 1909. Many changes were made including substantial elimination of dual system of common law and statutory copyright.

Register of Copyrights is authorized, pursuant to §702 of Act, to make rules and regulations governing conduct of Copyright Office. These will be found in 37 CFR §200 ff.

Updated version of Copyright Office's Circular 92, “Copyright Law of the United States and Related Laws Contained in Title 17 of the United States Code”, is now available in paperback through Government Printing Office (GPO), http://www.gpoaccess.gov, or online at Copyright Office's website, http://www.copyright.gov. GPO accepts checks drawn on U.S. banks; international Visa, MasterCard, Discover/NOVUS, and American Express accounts; Superintendent of Documents deposit accounts; UNESCO coupons; and international postal money orders.

Protectible Works.

Copyright protection subsists in original works of authorship fixed in any tangible medium of expression, now known or later developed from which they can be perceived, reproduced or otherwise communicated either directly or with aid of machine. No copyright exists in unfixed works. (§102).

Acquisition of Copyright.

Copyright in work created after Jan. 1, 1978 is acquired by author when it is fixed in tangible medium of expression. Such copyright does not require publication in order to be statutory right as under prior law. Each part of work is copyrighted as it is fixed. Registration issued by Copyright Office confirms this right and adds certain statutory presumptions. (§201).

Copyright requires substantial rather than trivial variations over prior works. Originality requirement cannot be satisfied simply by demonstration of physical skill, substantial effort or special training. There must be artistic skill. (2d Cir., 1976, 536 F.2d 486, 189 USPQ 753).

Comparison With System Under Prior Law.

Under law prior to 1978 there was dual system of common law and statutory copyright. Former existing until publication and latter being created when work was first published with proper notice. Under present law, statutory copyright is created immediately upon its being fixed in copy. To substantial extent common law copyright is done away with by new statue. Where federal statutory law has not worked preemption common law still exists.

It is important to know both present and prior laws because validity of copyright is tested under law in effect at time of creation of copyright and infringement is tested under current statute.

Comparison With Other Countries.

Copyright is based on proprietary rights legal systems such as U.K. and Commonwealth Countries recognize. It is similar to but distinct from “authors rights” or “neighboring rights” systems for protecting proprietary rights that are norm in civil law countries around the world. Copyright in other countries, the majority of which belong to the International Union for the Protection of Literary and Artistic Works (the so-called Berne Convention), is somewhat analogous to our system of protecting exclusive rights prior to publication, without publication in such countries during term of copyright having dedicatory effect of throwing work into public domain. Copyrights in Berne Convention and other countries are ordinarily protectible from moment of creation by author without enjoyment and exercise of rights being subject to any formality. However, they are not perpetual; term of copyright is usually fixed by providing for specified moment when all works of particular author will fall simultaneously into public domain, such as specified period of years (usually 70) after his death. Copyright protection in each country must be tested by that country's law. As is explained in detail in Circular 38a of Copyright Office, there are no international copyrights.

International Arrangements.

U.S. has bilateral copyright arrangements, primarily by presidential proclamation and in a few instances by treaty, with over 30 countries, as well as a few multilateral arrangements. These provide mainly for reciprocal national treatment. We permit nationals of these countries to secure copyright protection in U.S. on same basis as U.S. citizens and nonnationals domiciled here, and in turn such other countries presumably give our nationals same copyright protection as they give their own nationals.

The Berne Convention.

On Sept. 9, 1886, ten nations formed The Berne Convention. During ensuing years, Convention became preeminent international arrangement relating to copyright, with 76 member nations. U.S. did not join Convention because of its incompatibility with domestic law, principally in Convention's requirement that there be no formalities to obtaining or enforcing of copyright. Former U.S. domestic law mandated such formalities. One hundred and two years later, by amendment to U.S. copyright law eliminating certain formalities, way was opened for U.S. adherence to Convention. In Nov. 1988, President Reagan signed such legislation effective as of Mar. 1, 1989 and on that date, U.S. became adherent to Berne Convention. Subsequently major revisions were made to U.S. statute, including elimination of many formalities, in order to comply with our Berne obligations.

Convention in effect provides for equal protection of copyright arising in one Berne Convention country in all other Berne Convention countries.

The Universal Copyright Convention.

On Sept. 16, 1955, this Convention, signed by the United States and some 39 other countries (see 1.235 Universal Copyright Convention, infra, subhead Signatories) came into force as to the United States and the 11 other signatories which had deposited their ratifications. It has since come into force as to many additional countries, making a total of some 60 countries where it is now effective. This Convention provides for recognition and protection in member countries, on national treatment basis, of published and unpublished works of nondomiciled nationals of other member countries, or works first published (regardless of author's nationality) in any other member country, without any formalities conditioning acquisition or enjoyment of such protection, other than, as to published works, that prescribed form of notice of copyright be affixed thereto in appropriate place.

For more detailed discussion, see topic 1.235 Universal Copyright Convention.

GATT Treaty.

Adherence by U.S. to this agreement in 1994 expanded our rights and obligations in many areas of intellectual property, including addition of new §§104A and 1101 to Copyright Statute and extension of rights to all citizens of countries who are or become members of World Trade Organization (WTO) formed in 1994.

World Intellectual Property Organization (WIPO).

Convention Establishing World Intellectual Property Organization (WIPO) was also signed at Stockholm on July 14, 1967, by some 51 countries, including U.S.A.

U.S. deposited its instrument of ratification on May 25, 1970 (effective Aug. 25, 1970), but only as to administrative provisions of 1967 Stockholm Act of Paris Convention for Protection of Industrial Property (patents and trademarks).

1.02 ABANDONMENT:

See topic 1.100 Forfeiture and Abandonment.

1.03 ABRIDGEMENTS, ADAPTATIONS, TRANSLATIONS, DRAMATIZATIONS, OTHER

VERSIONS:

See topic 1.73 Derivative Copyright Works.

1.04 ACCESS TO WORK:

In order to prove copyright infringement, plaintiff must prove defendant's access to copyrighted work. Access is defined as reasonable opportunity to see or hear work.

See topic 1.115 Infringement, subhead Access and Appropriation Necessary.

1.05 ACCOUNTING:

Right of copyright owner to accounting of profits made by infringer is expressly authorized by statute. (§504). Copyright statute expressly provides for injunctive relief and accounting of profits and damages as cumulative remedies, rather than injunctive relief being condition precedent to accounting of profits. (§§502-504).

As to determining the portion of the infringer's profits recoverable, and whether actual damages may be awarded in addition to profits, or statutory damages in lieu of both, see topic 1.192 Remedies for Infringement.

Joint owners have duty of accounting to each other for profits from use of copyright, but this remedy is governed by State law.

1.06 ADVERTISEMENTS:

Ownership.

In absence of agreement to contrary, creator of advertisement owns copyright in advertisements published in copyrighted newspaper, and owner of newspaper cannot maintain copyright infringement suit against another newspaper for reproduction of advertisements at request of advertiser. Copyright notice in name of owner of compilation does not suffice as notice for advertisement therein. (§404[a]).

1.07 ALIENS (Protection in U.S.A.):

Those persons and organizations which are allowed to obtain copyright protection in U.S. are set out in §104.

For protection of U.S. citizens or U.S. works in foreign countries, see topic 1.99 Foreign Rights, infra.

Copyright of published work will depend upon country at first publication, domicile, or nationality of alien author. Protection of unpublished works does not depend on domicile or nationality. Copyright in published works extends to works of authors who are citizens or subjects of foreign states or nation only: (a) When such author is domiciled within U.S. at time of first publication of his work; (b) when work is first published in such foreign state or nation that is treaty party, i.e., is signatory to international agreement to which U.S. is also party, e.g., Berne Convention, U.C.C., WTO Agreement, or WIPO treaty; or (c) work within scope of Presidential proclamation issued for countries which provide reciprocal protection to U.S. works. (§104[b][6]).

National Failure to Qualify.

Certain foreign works which were in public domain in U.S. because of ineligibility due to nationality were restored to copyright on Jan. 1, 1996. (§104A).

Publication By International Organizations.

Copyright protection is granted under U.S. law to works first published by U.N. or one of its specialized agencies or by Organization of American States. (§104[b][5]).

Stateless Persons.

Copyright protection is granted to stateless person wherever that person may be domiciled. (§104[b][1]).

Treaties and Proclamations Applicable.

Citizens or subjects of most foreign countries, may secure statutory copyright in the U.S. on same terms as U.S. citizens may, by reason of treaties with their respective countries or proclamations promulgated by President of U.S. or international agreements such as Berne Convention and Universal Copyright Convention. As to copyright protection received abroad by U.S. nationals thereunder, see topics 1.99 Foreign Rights and 1.235 Universal Copyright Convention.

Countries with Relations with U.S.

Available on request from Register of Copyrights, Library of Congress, Washington, D. C. 20540, U.S.A., is Copyright Office Circular 38, on International Copyright Protection, giving in capsule form some general information concerning “Protection in the United States for foreign works,” and “Protection in other countries for United States works.” Also available is Copyright Office Circular 38a on International Copyright Relations of the United States with Other Independent Countries, which lists those having Universal Copyright Convention, Buenos Aires Convention, or Bilateral Proclamation copyright relations with U.S., or any one or more of such relations, as well as those countries with which U.S. copyright relations are “None” or “Unclear.” (For current listings, see Copyright Office Circular 38a).

Proclaimed Bilateral Relationships.

Bilateral relationships (exchange of proclamations between heads of State) which we have had down through the years; each proclamation making copyright protection available to nationals of other country on same basis as to its own nationals, have since been supplemented in most instances by treaty relationships, particularly mutual membership in Universal Copyright Convention and the Berne Convention.

In addition to relations under Berne Conventions or U.C.C., U.S. has bilateral relations with countries identified in Circular 38a.

World Trade Organization.

Adherence of U.S. to GATT Treaty in 1994 created copyright relationships with countries which are members of World Trade Organization but may not be members of Berne or U.C.C. Conventions.

Copyright Relations Status “None” or “Unclear.”

Status of U.S. copyright relations with following countries is respectively below indicated as “None” or “Unclear,” as case may be (Copyright Office Circular 38a):

No copyright relations: Afghanistan; Belau; Bhutan; Ethiopia; Iran; Iraq; Nepal; Oman; San Marino; Tonga; Turkey; Yemen (San'a).

Copyright relations “unclear”: Belau, Comoros, Jordan, Kiribati, Democratic People's Republic of Korea, Nauru, Palau, Sao Tome and Principe, Seychelles, Somalia, Sudan, Syria, Tuvalu, Vanuatu, Western Samoa, Yemen (Aden).

For type of relations with remaining countries see Circular 38a.

As to "Unclear," Copyright Office defines this status as prevailing with certain countries which became independent since 1943, but have not established copyright relations with U.S., although country may be honoring obligations incurred under its former political status.

Assignment by or to Ineligible Alien.

Alien author not entitled to secure copyright in U.S., cannot confer any right to do so upon assignee, even if latter is citizen of U.S. (214 U.S. 236 Copyright Cases or Patent Cases). Where copyright is properly secured, there is no prohibition against transferring it to alien.

Analog Transmissions.

Copyright owner's exclusive right to perform sound recording does not apply to analog recording copyrights. Copyright owners of sound recordings are granted limited exclusive rights in certain digital transmissions. (§114).

1.08 ANONYMOUS WORK:

Work as to which no natural person is identified as author. (§101). Duration of copyright on anonymous work is same as that of Pseudonymous Work as set forth under such topic, 120 years from creation or 95 years from publication whichever is sooner. Filing in Copyright Office of name of author triggers life plus 70 years term. (§302).

1.09 ANTI-CIRCUMVENTION:

Digital Millennium Copyright Act, Public Law 105-304 (1998), (see below) added new c. 12 to Tit. 17 United States Code, which among other things prohibits circumvention of access control technologies employed by copyright owners to protect their works. Specifically, §1201 provides that "No person shall circumvent a technological measure that effectively controls access to a work protected under this title." This prohibition on circumvention became effective on Oct. 28, 2000. Prior to that date, Copyright Office conducted rulemaking proceeding in which Register of Copyrights recommended, and Librarian of Congress determined, whether there were particular classes of copyrighted works that should be exempted from prohibition because persons who are users of those classes of works "are, or are likely to be in the succeeding 3-year period, adversely affected by virtue of the prohibition in their ability to make noninfringing uses of that particular class of works under this title."

Copyright Office first sought written and reply comments from interested parties in order to elicit information and views on whether noninfringing uses of certain classes of works are, or are likely to be, adversely affected by prohibition against circumvention of access control technologies. Information on comment submission is contained in Nov. 24, 1999, Notice of Inquiry published in Federal Register. Further background on this rulemaking may also be found in Notice of Inquiry. After receipt of initial and reply comments, Office conducted public hearings at which interested persons presented relevant information and views. Following public hearings, Office accepted post-hearing written comments addressing points made at hearings. After consulting with Assistant Secretary for Communications and Information of Department of Commerce, Register of Copyrights has made her recommendation to Librarian of Congress, who has accepted Register's recommendation and determined that from Oct. 28, 2000 to Oct. 28, 2003, two classes of work shall be subject to exemption from prohibition on circumvention of technological measures that control access to copyrighted works. Two classes were: Compilations consisting of lists of websites blocked by filtering software applications; and literary works, including computer programs and databases, protected by access control mechanisms that fail to permit access because of malfunction, damage or obsolescence.

Librarian of Congress, on recommendation of Register of Copyrights, has issued final rule in anti-circumvention rulemaking pursuant to §1201(a)(1)(D). Final rule announces that during period from Oct. 28, 2003 through Oct. 27, 2006, prohibition against circumvention of technological measures that effectively control access to copyrighted works shall not apply to persons who engage in noninfringing uses of four classes of copyrighted works.

On Oct. 28, 2003, Librarian of Congress, on recommendation of Register of Copyrights, announced classes of works subject to exemption from prohibition against circumvention of technological measures that control access to copyrighted works. Four classes of works now exempted are: (1) Compilations consisting of lists of Internet locations blocked by commercially marketed filtering software applications that are intended to prevent access to domains, websites or portions of websites, but not including lists of Internet locations blocked by software applications that operate exclusively to protect against damage to computer or computer network or lists of Internet locations blocked by software applications that operate exclusively to prevent receipt of email; (2) computer programs protected by dongles that prevent access due to malfunction or damage and which are obsolete; (3) computer programs and video games distributed in formats that have become obsolete and which require original media or hardware as condition of access. Format shall be considered obsolete if machine or system necessary to render perceptible work stored in that format is no longer manufactured or is no longer reasonably available in commercial marketplace; (4) literary works distributed in ebook format when all existing ebook editions of work (including digital text editions made available by authorized entities) contain access controls that prevent enabling of ebook's read-aloud function and that prevent enabling of screen readers to render text into specialized format.

1.10 ANTI-TRUST:

See topic 1.140 Monopoly and Trade Restraints.

1.11 APPEALS:

Orders, judgments, decrees of any court given jurisdiction by statute over copyright actions, suits or proceedings, may be reviewed on appeal in U.S. Court of Appeals for appropriate circuit, and, upon certiorari being granted, in Supreme Court of U.S. in same manner and to extent provided by law for review of cases determined in such courts. Federal Rules of Appellate Procedure would apply, as would individual procedural rules in respective appellate courts.

1.12 APPLICATION FOR REGISTRATION:

The applicant for registration of a claim to copyright is required to use the blank form furnished on request by the Copyright Office or previously approved reproductions thereof.

For registration requirements see Regulations §202.3, 17 CFR.

Failure to include essential information or inclusion of intentionally misleading statements may be found fraud on Copyright Office leading to misuse and antitrust defenses as well as invalidity of registration. (410 F. Supp. 609).

See also topic 1.72 Deposit and Registration; also topic 1.37 Classification of Works for Registration.

U.S. Copyright Office Forms.

Copyright Office application forms are available in PDF format and are best viewed with latest, free Adobe Acrobat Reader program. Fill-in versions may be completed online at http://www.copyright.gov/forms and then printed. To save forms, you must use full version of

Adobe Acrobat. Forms submitted to Copyright Office must be clear, legible, and on good quality 8.5-inch by 11-inch white paper. Office produces completed registration certificates by scanning submitted applications. Thus, poorly printed applications will result in poor quality registration certificates. You may also request forms by mail.

Form TX—For published or unpublished non-dramatic literary works.

Form TX with instructions.

Short Form TX—Simplified version of Form TX.

Form PA—For published or unpublished works of performing arts.

Form PA with instructions.

Short Form PA—Simplified version of Form PA.

Form SR—For published or unpublished sound recordings.

Form SR with instructions.

Form VA—For published or unpublished works of visual arts.

Form VA with instructions.

Short Form VA—Simplified version of Form VA.

Form GR/PPh/CON—Group registration of published photographs continuation sheet.

Form SE—For serials (newspapers, magazines, newsletters, annuals, journals, etc.).

Form SE with instructions.

Short Form SE—Simplified version of Form SE.

Form SE/Group—For registration of group of serials.

Form RE—For claims to renewal of copyright.

Form RE with instructions.

Form RE/CON—Continuation form to be used only in conjunction with RE application form.

Addendum to Form RE—For all works published between Jan. 1, 1964 and Dec. 1977, that were not registered during their first 28-year term. Must accompany Form RE.

Form GATT—For restored works under URAA.

Form GATT/GRP—GATT group registration form.

Form GATT/CON—Continuation form to be used only in conjunction with GATT application.

Form MW with instructions Non Fill-in version—For registration of mask works which is fixed in semiconductor chip product (mask works).

Form MW/CON Non Fill-in version—Continuation sheet to be used only in conjunction with MW application form.

Form CA—To correct error or amplify information given in registration.

Form CON—Continuation sheet to be used only in conjunction with basic application Forms CA, PA, SE, SR, TX, and VA.

Form GR/CP Non Fill-in version—Adjunct application to be used for group of contributions to periodicals in addition to application Form TX, PA, VA.

Document Cover Sheet—Cover sheet for use when submitting documents for recordation.

New Cable Statement of Account Forms—These forms are for semiannual accounting periods beginning July 1, 2000.

SA1-2 Short Form Non Fill-in version—For use by cable television systems whose semiannual gross receipts are less than $379,600.

SA3 Long Form Non Fill-in version—For use by cable television systems whose semiannual gross receipts are $379,600 or more.

Old Cable Statement of Account Forms.

Licensing Electronic Funds Transfer Form—For use by statutory licensees to receive refund payments via electronic funds transfer.

Form EFT.

Vessel hull design Forms—For further information see Registration of Designs of Vessel Hulls.

Form D-VH Non Fill-in version—For registration of vessel hull designs.

Form D-VH/CON Non Fill-in version—(continuation sheet and multiple designs).

Above application forms may be obtained on request to Copyright Office, Library of Congress, Washington, D. C. 20559.

After examining registration of claim of copyright is effective on day of receipt in Copyright Office of deposit required by statute together with proper application therefor and statutory fees. Upon compliance with provisions of Copyright Act, Register of Copyright issues to applicant certificate of copyright registration.

Who May Apply.

Persons entitled to secure copyright registration are authors entitled to own copyright under §104 or §104A of Act.

Care in Application.

Copyright Office reserves right to refuse to accept any application that is a carbon copy, illegible, defaced, or otherwise not in an acceptable condition for examination and recording. All information requested in form should be given in appropriate spaces provided. Application should be submitted by copyright claimant, or by someone acting under his authority.

Copying of deposits with application are limited to copyright owner and those who can show legitimate need, and is generally limited to actual or anticipated litigation. Copyright Office has form that must be completed for copying.

1.13 APPLICATION FOR RENEWAL:

See topic 1.85 Duration.

1.14 ARCHITECTURAL PLANS AND WORKS:

Copyright extends to copying of architectural plans as to other types of drawings. In 1990, protection was extended to architectural works as well. This amendment brings U.S. law into closer conformance with requirements of Berne Convention. Architectural Works Copyright Protection Act extends copyright protection to architectural works as separate subject matter category. However, Act does not cover works “constructed or otherwise published before December 1, 1990.”

Definition of architectural works includes buildings and parts thereof. (§101.) Buildings are defined as permanent, stationary, humanly habitable structures. (37 CFR §202.11).

1.15 ARCHITECTURE:

See definition of architectural work—§101 and limitations on exclusive rights therein, §120 and §301(b)(4). Owner of architectural works may sue for infringement of plans therefor or of works themselves.

1.16 ART:

See topics 1.240 Visual Art and 1.245 Works of Art.

Artists' Rights.

See topic 1.141 Moral Rights.

1.17 ASSIGNMENT:

Copyright is intangible, incorporeal right, separate and distinct from property in material object in which it may be embodied. Intangible, incorporeal rights in work may be transferred like any other property. Sale or conveyance by gift or otherwise, of material object, does not of itself constitute transfer of copyright or right to copyright in said object, nor does assignment of latter necessarily constitute transfer of title to material object. (§202).

Assignment can be made of whole or any share in whole of copyright. In addition, any individual right granted to owner or author pursuant to §106 may be assigned. Under prior law such individual rights were not assignable but could be licensed.

Assignment must be in writing (§204), and should be recorded in Copyright Office. See subheads Recording and Writing Necessary After Copyright, infra.

Assignment should be executed at time of actual transfer. (29 USPQ2d 1789).

Some courts have allowed nunc pro tunc written assignments confirming oral assignments.

Assignee should make certain that word “copyright” or its close synonym is used in instrument and that assignment includes all worldwide rights to copyright and all rights under copyright now known or later developed.

Assignee of Infringement Choses in Action.

See topic 1.160 Parties, same subhead.

Rescission of Assignment.

Any assignment or license executed by author on or after Jan. 1, 1978 other than that of work made for hire can be rescinded without cause upon written notice by author or his representatives during period between 35th and 40th years after execution thereof. Notice of termination must be given no earlier than ten years or no later than two years before designated date of termination. (§203).

Assignments or licenses of copyrights under prior statute still subsisting as of Jan. 1, 1978 may be similarly cancelled on advance notice at any time during five year period beginning at end of 56 years from date of copyright or beginning on Jan. 1, 1978 whichever is later. (§304[c][3]).

Upon termination all rights so terminated revert to those entitled to terminate. (§203[b]). Derivative works created under 1978 statute and prior to termination of grant may continue to be utilized after termination but new derivative works cannot be created. (§203[b][1]). This right to continue use does not pertain to pre-1978 works.

Right of termination is not assignable or otherwise alienable. Such rights pass to authors' heirs as provided in §§203 and 304.

Scope of Assignments and Transfers of Rights.

As new electronic media usage of more “traditional” media (print, for example) have increased, assignees and licensees have been correspondingly subject to increasing legal challenges to their rights to use and exploit assigned or licensed works in these new media by original copyright proprietors with whom they contracted. Illustration of this issue is decision in Tasini v. New York Times, 981 F. Supp. 841 (S.D.N.Y. 1997), rev'd 206 F.3d 161 (2d Cir. 2000), aff'd sub nom, New York Times Co., Inc. v. Tasini, 533 U.S. 483 Copyright Cases or Patent Cases (2001) holding that print and electronic publishers, absent explicit author consent, did not have privilege to reproduce and distribute freelance authors' articles in electronic databases under §201(c) of Copyright Act that permits copyright owners of collective works to reproduce and distribute “revisions of the collective work”. Rights transferred were limited to print medium; any use in electronic media, such as online Internet websites, required further express permissions from original authors of copyrighted works in question. While many contemporary legal contracts address this issue by providing for assignment or license “in all media, whether now existing or later devised”, this was not case in many agreements in past, including those involved in challenges in Tasini case.

Writing Necessary After Copyright.

Copyright may only be assigned, granted or mortgaged, by an instrument in writing signed by copyright proprietor. (§204). It may also be bequeathed by will. (§201). Instrument should expressly recite that “copyright” is transferred and not merely convey material objects in which copyright may be embodied on assumption that copyright is thereby included. (18 F. Supp. 974). Copyright may be transferred by operation of law without writing. (§204[a]). Parol evidence can be used to understand meaning of words in assignment. At least one court has held that improper oral assignment can be perfected by later written assignment. (17 USPQ2d 1858).

Where joint authors intend other than equal ownership in copyright or to income from copyright written agreement is required. (921 F. Supp. 1154).

Assignment Not Rescindable for Nonpayment of Royalties.

Conveyance of all rights of every kind and description in a song copyright to publisher, successors and assigns, is not rescindable for nonpayment of royalties provided for, and defendant assignee could transfer to another defendant assignee without consulting original assignor. Assignor has ample right to sue, and recover unpaid royalties, but his claim to rescission will not stand. It is merely breach of contract, not fraud. (S.D.N.Y. 1969, 300 F. Supp. 1311, 163 USPQ 181). Such controversies are usually decided in state court actions.

By Operation of Law.

Interest in copyright, once assigned by author, may be transferred by operation of law, e.g., in divorce proceeding. Care should be taken in community property states. Most recent decision (218 F.2d 432 [5th Cir. 2001]) has held that Copyright Statute does not preempt local state community property laws.

Recording.

Every assignment should be recorded in Copyright Office within one calendar month after its execution in U.S. or within two calendar months after its execution without limits of U.S., or it will be deemed void as against any subsequent purchaser or mortgagee for valuable consideration, without notice, whose assignment has been duly recorded. (§205). To perfect security interest, assignment should specify work assigned and registered with Copyright Office. State filings under U.C.C. are not sufficient for registered works. While assignment of unregistered work may be made U.C.C. filings should be made.

Recording Prior to Suit.

One who owns copyright or interest in copyright may bring suit for infringement without recording of assignment of copyright.

Recording of Documents Other Than Assignments.

Any document, assignment or otherwise, pertaining to copyright may be recorded in Copyright Office. (§205[a]). Nonexclusive license, whether recorded or not, prevails over conflicting transfer of copyright ownership if taken before execution of transfer or before recordation of such transfer and without notice thereof. (§205[e]).

Validity of Assignment a Matter of State Law.

Federal court does not have jurisdiction, under copyright statute, where children of music composer sought to set aside assignments of their renewal expectancies on ground of fraud in inducement. (S.D.N.Y. 1962, 210 F. Supp. 253, 135 USPQ 189).

Gift of Future Royalties.

Valid complete present gift may be made to share in future royalties from unproduced stage and film musical versions of play (“My Fair Lady”), when and if thereafter collected, by assignment in letter from donor by way of express gift of stated percentage of his future profits from corporation holding such stage and film production rights. (1961, N.Y.2d 313, 131 USPQ 489). Any such transfer, however, must be proper under law.

Foreign Assignment.

Every assignment of copyright executed in foreign country should be acknowledged by assignor before consular officer or secretary of legation of U.S. authorized by law to perform notarial acts. Certificate of such acknowledgment under the hand and official seal of such consular officer or secretary of legation will be prima facie evidence of execution of instrument. (§204[b]). Such foreign assignments should be recorded within two months of execution. (§205[d]).

Transfers Silent as to their Scope; Trade Custom.

Where a free-lance author sells an article outright to a tabloid newspaper, with contract silent as to scope of public rights sold, testimony of experts, supported by publisher's officers as to their own practice, plus absence of conflicting expert testimony, to effect that prevailing practice of newspaper trade presumed all rights were transferred in absence of express restrictions in sale, it was held that purchaser was not limited merely to first publication rights, and author assignor was not permitted to resell subsequent publication rights to others. (7 Cir. 1967, 385 F.2d 384, 155 USPQ 550, aff'g N.D. Ill. 1966, 259 F. Supp. 433, 152 USPQ 56, cert. denied 390 U.S. 955).

On other hand, permission by corporate employer to plaintiff scientific trade journal to publish two scientific articles by its employees on a by-line basis, did not preclude subsequent permission by employer to re-publish articles in defendant's publication. Findings by court, after trial without jury in first publisher's suit against second publisher for infringement of general copyright in former's journal, established that there was no custom or usage among scientific trade publications showing permission by employer for hire of writers to a first printing of their scientific article to be any more than a nonexclusive publication license. Furthermore, such license for first publication was not, in absence of any expressed intent otherwise, a transfer of full title thereto justifying first publisher to include such articles as part of general copyright obtained in journal as a whole. (S.D.N.Y. 1967, 270 F. Supp. 851, 155 USPQ 342).

Where right is not assigned in assignment or licensed in license agreement, e.g., right to use motion picture in VCR tapes, said right may be considered retained by grantor or licensor, depending on facts of case.

Licensing of film for use on television does not authorize reproduction of film on video cassettes. (Cohen v. Paramount, [9 Cir. 1988], 6 USPQ2d 1723).

License by Co-owner.

See topic 1.38 Co-authors and Co-owners. (cf. 2d Cir. Boosey & Hawkes).

1.18 ATTORNEYS:

There is no Copyright Office Bar, as there is a Patent Office Bar. It is not necessary to make deposits or register claims to copyright in the Copyright Office through an attorney. Because of technical requirements, it is advisable to use attorney skilled in this area.

1.19 ATTORNEY'S FEES:

The court, in its discretion, may award to the prevailing party a reasonable attorney's fee, as part of the costs, in all actions, suits or proceedings brought under the Act, except when brought by or against the U.S. or any officer thereof. (§505). Attorney's fee may be awarded to party prevailing regardless of stage at which action is terminated or copyright claim is otherwise dismissed. Discretion of court in fixing attorney's fee is reviewable on appeal.

Attorneys fees may be awarded when suit was brought in bad faith, capriciously or was otherwise unreasonable or where infringement was willful and wanton. (146 F. Supp. 185; 222 F.2d 488).

Fees may be awarded to either plaintiff or defendant. (S.C. 1994, 29 USPQ2d 1857; 114 S.Ct. 1023).

1.20 ATTRIBUTION:

Improper, see topic 1.141 Moral Rights.

1.21 AUDIOVISUAL WORKS:

Protected works include those that consist of series of related images intended to be shown by machines together with accompanying sounds, if any. (§101).

1.22 AUTHOR:

See also topic 1.174 Proprietor.

The word “author” as used in the Constitution and in the Act, has been very broadly interpreted by courts. It includes human writers, composers, artists, photographers, designers, dramatists, map makers, directors, compilers, etc. Labors of author's mind entitled to protection by way of copyright must involve some element of creative imagination reduced to or expressed in some permanent tangible form where it can be examined separately and apart from personality of creator. This is requirement of Constitution that works must be in “writings” in order to enable Congress to grant exclusive rights for limited period of years. Artistic quality of creation is not important, if there is some element of origination involving some creative labor and judgment by author. Decisions vary on extent and quality of contribution necessary for finding of authorship. Protection extends only to that which is original contribution of author. Author may draw upon works in public domain or, with permission, protected source materials by revising, commenting, abridging, adapting, novelizing, dramatizing, compiling, or digesting same. He may secure protection for result of his labors which involve his own original contribution without affecting availability of any of materials worked on to others. If source materials are subject to exclusive rights under copyright, author must secure permission from owner to use such source materials or he will be infringing on rights of others.

Work is created when it is fixed in tangible medium of expression for first time. Work is considered created as to any portion as soon as that portion is fixed. (§101).

Employers Who Hire, as Authors.

The word “author” includes an employer in the case of works made for hire. (§101). Employer, in case of works created by employee in regular course of his duties, is not deemed assignee of employee with respect to work, but is himself deemed to be author of work. This distinction may be important under those sections of statute which relate to authors as distinguished from owners of copyright. Corporation may be author of copyrighted work, and in case of motion pictures, where corporations often employ various talents that go into production of copyrighted motion picture, copyright is generally claimed, secured and registered by producing corporation as “author” of motion picture.

Works for Hire.

Works of employees within scope of their employment are considered works of their employers. Work specially ordered or commissioned can be considered work made for hire if it is so provided in written agreement between parties signed by both and if type of work so ordered or commissioned is of type set forth in statute. (§101). Types of works so specified are very limited. Whether or not work is created as employee or on commission is to be determined by principles of Agency. (Community For Creative Non-Violence v. Reid [1989]109 S.Ct. 362, 10 U.S.P.Q.2d, 1985).

When commissioned work is not subject of required written agreement or is not of subject matter of §101 definition, copyright remains in creator of work. Where there is some doubt whether work is work for hire, specific assignment of work should also be included in written agreement.

Employees for Hire (Works Outside Scope).

Copyright is owned by employee in works created by employee outside of scope of employment. (N.Y. Sup. Ct. Trial Term, N.Y. Co. 1966, 151 USPQ 603).

Citizenship of Author.

See topic 1.07 Aliens (Protection in U.S.A.).

Joint Authors.

See topic 1.120 Joint Authorship.

Author as Distinguished From Owner.

While author of copyright may also be owner, where assignment takes place author is no longer owner. This distinction is important under several provisions of statute, e.g. §304.

1.23 AUTHORSHIP:

In order to qualify for copyright there must be creative authorship that is original with author, i.e. not copied from another.

1.24 BANKRUPTCY:

For effect of bankruptcy on executory contracts licensing copyrights, see 11 U.S.C. §365. See topic 1.131 Liens.

1.25 BERNE CONVENTION:

Berne Convention, originally formed in 1886, is oldest and most prestigious copyright convention with approximately 80 adherents to one or more of its revisions. U.S. became signatory in Mar., 1989. Author who is national of any one of Berne Convention countries enjoys in any other Berne Convention country such rights as it gives to its own nationals, as well as rights specifically accorded by Convention. Enjoyment and exercise of such rights are not subject to any formality. Late adherence by U.S. (1989) was result of conflicting formalities in domestic U.S. laws which were finally eliminated by Berne Convention Implementation Act of 1988. (P.L. 100-568, 702 Stat. 2853, Oct. 31, 1988).

Prior to adherence of U.S. to Convention, U.S. nationals had been able indirectly to secure rights under Convention through simultaneous first publication in U.S. and in Berne Convention country. This procedure was far from ideal.

Berne Convention Members.

Member nations include: Albania, Antigua, Argentina, Armenia, Australia, Austria, Azerbaijan, Bahamas, Bahrain, Bangladesh, Barbados, Barbuda, Belarus, Belgium, Belize, Benin, Bolivia, Bosnia and Herzegovina, Botswana, Brazil, Bulgaria, Burkina Faso, Cameroon, Canada, Cape Verde, Central African Republic, Chad, Chile, China, Colombia, Congo, Costa Rica, Croatia, Cyprus, Czech Republic, Democratic Republic of Congo, Denmark, Djibouti, Dominica, Dominican Republic, Ecuador, Egypt, El Salvador, Equatorial Guinea, Estonia, Fiji, Finland, France, Gabon, Gambia, Germany, Ghana, Granada, Greece, Guinea, Guinea Bissau, Guyana, Haiti, Holy See, Honduras, Hungary, Iceland, India, Indonesia, Ireland, Israel, Italy, Ivory Coast, Jamaica, Japan, Kenya, Kyrgystan, Latvia, Lebanon, Lesotho, Liberia, Libya, Liechtenstein, Lithuania, Luxembourg, Macedonia, Madagascar, Malawi, Malaysia, Mali, Malta, Mauritania, Mauritius, Mexico, Monaco, Mongolia, Morocco, Namibia, Netherlands, New Zealand, Nicaragua, Niger, Nigeria, Norway, Oman, Pakistan, Panama, Paraguay, Peru, Philippines, Poland, Portugal, Qatar, Republic of Korea, Republic of Moldavia, Romania, Russian Federation, Rwanda, Saint Kitts & Nevis, Saint Lucia, St. Vincent & the Grenadines, Senegal, Singapore, Slovakia, Slovenia, South Africa, Spain, Sri Lanka, Surinam, Sweden, Switzerland, Tajikistan, Tanzania, Thailand, Togo, Tonga, Trinidad and Tobago, Tunisia, Turkey, Ukraine, U.K., U.S., Upper Volta, Uruguay, Venezuela, Yugoslavia, Zaire, Zambia and Zimbabwe. (Copyright Office Circular 38a).

There are several revisions of Convention, and depending on which revision was adopted by country determines its relations with other Berne countries. Up to date membership information and revision adhered to can be obtained from Secretariat, International Bureau of the World Intellectual Property Organization (WIPO), Geneva, Switzerland. U.S. adhered to Paris Text of 1971. (http://www.wipo.org).

1.26 BLIND:

Special exceptions exist to exclusive rights under copyright for materials intended for the blind, e.g. §121.

1.27 BOAT HULL:

In 1944 and 1998 Congress provided protection for designs of new and original boat hulls. (17 U.S.C. §1301). Although Copyright Statute explicitly excludes useful articles from copyright protection, this new hybrid, non-copyrighted design protection, has been placed under jurisdiction of Copyright Office. It does not change law against copyright protection of useful articles.

1.28 BUENOS AIRES CONVENTION:

Multilateral Pan-American Agreement to which U.S. is party. This convention requires notice of reservation of rights, e.g., “All Rights Reserved”.

1.29 BUILDINGS:

By 1990 Amendment, humanly habitable buildings are now protected as architectural work. (§102[a]).

As to copyright in buildings, see topics 1.15 Architecture; 1.112 Ideas, Plans, Systems, Methods, Kits, Etc.

1.30 BURLESQUES:

See topic 1.95 Fair Use.

1.31 CABLE TELEVISION SYSTEMS:

Prior to enactment of present Act, relative rights of copyright owners and licensees and community antenna systems, or as popularly known cable television system, were subject of major controversies. In landmark decisions (Teleprompter, 415 U.S. 394; and Fortnightly, 392 U.S. 390) Supreme Court had held that local and long distance cable systems (including microwave systems) were not infringing in reception and rebroadcast of copyrighted television material.

Under current statute cable systems are allowed to receive and rebroadcast copyrighted television programs under compulsory license. Each year each system must pay to Register of Copyrights percentage of its gross receipts for distribution to owners of copyright who claim their works were subject of transmissions by cable systems. (§111[c], [d], [e]).

Such right to transmit does not, however, permit modification of content of programs or advertising during or immediately before or after program. (§§111, 510).

There are other limitations on such use by cable television systems. (§111).

1.32 CATALOGS (TRADE):

A very low degree of originality is essential for the copyrightability of a catalog. The resulting creative effort is in selection and arrangement of items in catalog. Supreme Court's rejection of “sweat of brow” rule as to telephone directories may preclude copyright in catalogs that are produced only by use of industrious labor. (Feist v. Rural, 111 S.Ct. 1282, 18 USPQ2d 1275 [1991]).

1.33 CERTIFICATE OF REGISTRATION:

When published or unpublished work has been properly deposited, application claiming copyright filed, and statutory fees paid, Register of Copyright issues to applicant certificate of copyright registration. (§410 [a]).

Where certain errors appear in certificate of registration, they may be corrected by supplementary registration. (§408[d]).

Prima Facie Evidence.

The certificate is admissible in any court as prima facie evidence of validity of copyright and of facts therein stated. (§410[c]). When introduced, burden shifts to defendant to produce sufficient evidence to overcome prima facie presumption of validity. (W.D. Mo. 1958, 172 F. Supp. 37, 41, 118 USPQ 446, 449). See Durham case, also, E.D. Pa. 1963, 32 F.R.D. 325; D.N.J. 1964, 228 F. Supp. 630, 141 USPQ 381, 383.

Said presumption applies only if registration issues on application filed within five years of publication of work. (§410). After that period, weight to be granted is within discretion of Court.

Prerequisite to Suit for Infringement.

Certificate of registration is necessary before suit for infringement can be brought for infringement of works whose country of origin is U.S. Registration is not required prior to civil action for infringement of most works whose country of origin is not U.S. (17 U.S.C. 411[a]). For works whose country of origin is U.S., note topic Country of Origin. If Copyright Office refuses registration, suit can then be brought without certificate provided copy of complaint and notice of suit are served on Register of Copyright.

Prerequisite for Certain Remedies.

No award of statutory damages or attorney's fees shall be made in case of infringement of any unregistered, unpublished work or for any infringement of published work commenced prior to registration unless registration takes place within three months of publication. (§412). This rule applies to domestic and foreign works.

1.34 CHARACTERS, NAMES AND TITLES:

Character names used in writing, as well as title of work, are not within protection of copyright statute. Courts have recognized character copyright in recent cases where character has been sufficiently developed. Character names and titles may be protected under theory of unfair competition.

Cartoon Characters.

In Walt Disney Productions v. The Air Pirates (9th Cir. 1978, 581 F.2d 751), Court held that copyright protection extended to cartoon characters.

1.35 CHILDREN:

Children as contemplated by statute are person's immediate offspring, whether legitimate or not, and any children legally adopted by that person. (§101).

1.36 CHOREOGRAPHY:

Choreographic works are copyrightable if fixed in tangible medium of expression from which they can be perceived, reproduced or communicated. (§102[a][4]; cf. Martha Graham School & Foundation, Inc. v. Martha Graham Center for Contemporary Dance, Inc. 2002 U.S. District Lexis 15761 [S.D.N.Y. Aug. 23, 2002]; Horgan v. MacMillan, Inc. 789 F.2d 157 [2d Cir. 1986]).

1.37 CLASSIFICATION OF WORKS FOR REGISTRATION:

Classification of works into classes for registration purposes is designated by §408(c). Application for registration must specify to which of these classes work in which copyright is claimed belongs.

Inaccurate Classification for Registration Inconsequential as to Denying Relief for Copyright Claimant.

Classification is intended primarily for convenience of Copyright Office. Any unintentional error in classification shall not invalidate or impair copyright protection of work. (§408[c]).

Statutory Classifications.

Copyright Office has set up five classes of works: Non-dramatic literary works (TX), works of performing arts (PA), works of visual arts (VA), sound recordings (SR), serials (SE).

Care in Selection and Preparation of Application.

Since courts may look at type of application used and description of rights or work claimed or other statements made in application to determine scope of right covered by certificate, care should be exercised in selection and preparation of application. Copyright Office will not give filing date to application for sound recording not using Form SR.

1.38 CO-AUTHORS AND CO-OWNERS:

Co-authors or co-owners of copyrighted material are considered tenants in common; and each co-owner, acting alone, has power to grant *non-exclusive* licenses to third persons (since he could have exercised such right himself as an owner, but not exclusively), with a duty to account to other co-owners; but *exclusive* rights may be given only by a grant from all co-owners. (1961, 10 N.Y.2d 339, 132 USPQ 82: see, also, 2d Cir. 1963, 324 F.2d 762, 139 USPQ 400).

See also topics 1.120 Joint Authorship; 1.17 Assignment; 1.130 Licenses, subhead License By Co-Owner; 1.85 Duration.

1.39 COLLECTIVE WORK:

Work in which number of contributions, constituting separate and independent works in themselves, are assembled. Collective work is form of compilation. (§101). See topics 1.45 Compilation; Community Property. Copying of one element is not infringement of compilation. Infringer must take substantial part of arrangement of compilation. Copying one element may infringe copyright in that one element and suit may be brought if separately registered. Registration for collective work is not sufficient to allow author of one element of work to sue for infringing.

1.40 COMMISSIONED WORKS:

Copyright in commissioned works usually belongs to party commissioned rather than commissioning party. Narrow exception exists in works for hire as defined in §101. Works created prior to 1978 may be subject to policy then in existence which was more favorable to commissioning party.

1.41 COMMON LAW RIGHTS:

Current statute exclusively governs as to all legal or equitable rights that are equivalent to any of exclusive rights within general scope of copyright as specified in §106 in published and unpublished works of authorship, including letters and diaries, that are fixed in tangible medium of expression and come within subject matter of copyright as specified in §§102 and 103. Thus, after Jan. 1, 1978, common law or State statutory law shall not apply to such rights. Common law or State statutory law have thus been substantially curtailed and will apply only if work: (a) Is not fixed in tangible medium of expression, e.g., improvisation or choreographic work not reduced to tangible form, or (b) is not equivalent to any of exclusive rights within general scope of copyright, for example rights of privacy or publicity, trade secrets, defamation or fraud, or (c) does not come within subject matter of copyrights. This latter situation may present problems for courts to decide as to what is or is not equivalent. (§301).

Specific exception to this preemption deals with sound recordings fixed before Feb. 15, 1972, as to which common law or statutes of any State shall not be annulled until 2047. (§301[c]).

Misappropriation and unjust enrichment claims have been preempted. (§301). But other areas, such as some moral right issues, particularly those for period subsequent to author's death, may still be treated under common law or state statutes.

1.42 COMMUNITY ANTENNA TELEVISION (CATV):

See topic 1.31 Cable Television Systems.

1.43 COMMUNITY PROPERTY:

In states with community property laws, copyright co-ownership may be created by operation of law. (In re Rodriguez, 218 F.3d 432 Copyright Cases or Patent Cases [5th Cir. 2001]; in Re Marriage of Worth, 241 Cal. Rptr. 135 [1987]). This may curtail ability to grant exclusive license rights without joinder of spouse.

1.44 COMPENDIUM:

Copyright Office has created for internal use compendium of copyright practice. This is available to public and provides answers to many issues of copyright registration practice.

1.45 COMPILATION:

Work formed by collection and assembling of preexisting material or of data collected or arranged in such way that resulting work constitutes original work of authorship. (§101). Mere collection of facts without more, such as simple telephone directories, do not reach requisite level of creative authorship. (Feist v. Rural, 111 S.Ct. 1282). Designs consisting of combination of preexisting, utilitarian elements are insufficiently original to be protected as copyright table compilation. (Lamps Plus, Inc. v. Seattle Lighting Fixture Co., 345 F.3d 1140 [9th Cir. 2003]).

Where there is some creative authorship in selection and arrangement of facts, however, copyright may be obtained.

Copyright protection for compilations is “thin” and test for infringement is substantial similarity between those elements that provide copyrightability to allegedly infringed compilation.

Infringement of one element of compilation is not infringement of compilation copyright. To be infringement of compilation there must be taking of what compiler added to individual elements. Copyright registration in compilation may entitle owner to sue for infringement of individual works within compilation, if such works are original, especially if copyright notice appears on each page of compilation. (S.D.N.Y. 2000, 97 F. Supp.3d 395; See also, Stuart Y. Silverstein v. Penguin Putnam, Inc., No. 01 Civ. 309, 2003 U.S. Dist. LEXIS 5487 [S.D.N.Y. Apr. 4, 2003], on appeal to 2d Cir.).

See topic 1.73 Derivative Copyright Works.

1.46 COMPULSORY LICENSES UNDER MUSICAL MECHANICAL RIGHTS:

Statute provides for compulsory licenses including those for certain digital audio transmissions (§114[d][2]); mechanical rights (§115); juke boxes (§116); cable television (§111) and digital audio phonorecord deliveries (§115) and satellite transmissions (§122). When phonorecords of non-dramatic musical work have been distributed under authority of copyright owner, any other person may obtain compulsory license to make phonorecords of same work for statutory royalty fee. Such compulsory license does not apply to visual use of lyrics in videos.

See topics 1.192 Remedies for Infringement; 1.198 Rights Under Copyright; 1.235 Universal Copyright Convention.

1.47 COMPUTER MAINTENANCE:

It is not improper for owner or lessee of computer to make or authorize others to make copy of program if so made by operation of computer and solely for maintenance work on computer.

1.48 COMPUTER PROGRAMS:

Computer programs are copyrightable under current statute (§§101, 102[a]) and such programs have been accepted for registration by Copyright Office for some years under prior Act. Statute amended in 1980 to clarify §117 as covering computer programs.

Methods or processes involved in use of computer are not copyrightable (§102[b]) although patent protection may be available. However, copyright will protect computer programs regardless of their purpose and in various tangible media of expression including tape and silicon chip. (3d Cir. 1983, 714 F.2d 1240 Copyright Cases or Patent Cases, 219 USPQ 113). Object codes, source codes, interfaces and screen depictions are copyrightable if creative authorship is involved.

Semiconductor chips bearing mask works of computer programs are protected for ten years under quasi-copyright concept. (Semiconductor Chip Protection Act of 1984, §2, c. 9, Tit. 17).

Programs may not be lent or rented except in limited situations. (17 U.S.C. §109[b]).

1.49 CONTESTS:

See topic 1.112 Ideas, Plans, Systems, Methods, Kits, Etc.

1.50 CONVENTIONS, PROCLAMATIONS AND TREATIES:

See topic 1.07 Aliens; also topic 1.99 Foreign Rights.

1.51 COPIES:

These are material objects in which work is fixed by any method now known or later developed and from which work can be perceived, reproduced or communicated either directly or with aid of machine or device. (§101). They may be legitimate copies if authorized, or infringing copies if not.

1.52 COPY:

See topic 1.196 Reproduce.

1.53 COPYRIGHT CERTIFICATE:

See topic 1.33 Certificate of Registration.

1.54 COPYRIGHT OFFICE:

Unlike Patent and Trademark Office, which is part of Executive Branch of U.S. Government, Copyright Office of the Library of Congress is organized under Legislative Branch. It performs wide range of administrative functions for copyright owners, issues regulations relating to copyright and works closely with Congress to advise on various matters relating to pending or proposed legislation and budgets relating to copyright. Extensive information about Copyright Office's operations, including Registration Application Forms and Directions and ability to search copyrights electronically online, is available at its Internet website at: http://www.loc.gov/copyright.

The provisions for the administration of the Copyright Office, such as record keeping, the Register and assistants, deposit of monies received, bond, annual report, seal, rules for registration, certificates of registration, catalogs of copyright entries, their distribution and sale, public inspection of records and works, disposition and destruction of deposited articles, and fees, are set forth in §§701-710.

Register.

The office is under the control of the Register of Copyrights who, under the direction and supervision of the Librarian of Congress, performs the duties relating to the registration of copyrights. (§701[a]).

Publications.

Circular 2, Library of Congress, Washington, D.C., lists a variety of “Publications of the Copyright Office,” with prices, available from the Register of Copyrights, Library of Congress, Washington, D.C. 20559, as well as those available only from Supt. of Documents, Government Printing Office, Washington, D.C. 20402. Since prices change from time to time, check with Register's Office as to current price. (§707).

Rules and Regulations.

The Register is authorized to make rules and regulations subject to the approval of the Librarian, for the registration of claims to copyright. (§702). These regulations are given great weight administratively. Current regulations are set forth in Tit. 37, Code of Federal Regulations, ch. II, Parts 201-270. They are also published as annotation to, §702, Tit. 17 U.S.C.A.

Various amendments to Regulations having been made over years, it is important to refer to latest annual Cumulative Pocket Part for its annotation following, §702 of Tit. 17 U.S.C.A. (Copyrights).

Records and Catalogs.

The record books of the office together with the indices to such records, and all works deposited and retained, are open to public inspection. Searches of the records, indices or deposits will be made upon appropriate application to the Register, and payment of a searching fee.

Requests for Copies.

The Copyright Office will approve the making of a copy of a copyright deposit when authorized in writing by the copyright owner, or his designated agent, or pursuant to an order issued by a court having jurisdiction of a case in which the copy is to be submitted as evidence. The making of such copy will be approved by the Copyright Office, when requested in connection with litigation, actual or prospective, in which the copyrighted work is involved; but in all such cases the attorney representing the actual or prospective plaintiff or defendant shall state in writing: the names of the parties and the nature of the controversy; the court where pending, or if a prospective proceeding, a full statement of the facts of the controversy; and satisfactory assurances that the requested copy will be used only in connection with the specified litigation. Specific form is required by regulations.

Time to Take Steps.

When the last day for making any deposit or application, or for paying any fee, or for delivering any other material to the Copyright Office falls on Saturday, Sunday, or a holiday within the District of Columbia, such action may be taken on the next succeeding business day. (§703).

Discretion of Register.

According to the Court of Appeals for the District of Columbia (1958, 117 USPQ 334), there is a wide range of selection within which discretion must be exercised by the Register in determining what he has no power to accept for registration under the Act (citing 122 F.2d 51, 74 App. D. C. 271, 273). The Register's discretion is not uncontrolled, however, but is subject to judicial review and correction. Where Register has doubt as to registrability, he may issue registration under “Rule of Doubt.” See Attari v. Oman cases.

Legal Opinions Unavailable.

The Copyright Office will not compare copyright deposits to determine similarity between works, nor does it give legal opinions concerning rights of persons in cases of alleged infringement, contracts between publisher and author, the copyright status of any particular work other than the facts shown in the records of the Office, or other matters of a similar nature; the scope and extent of protection of works in foreign countries or interpretation of foreign copyright laws or opinions; the sufficiency, extent or scope of compliance with the copyright law. Nor will the Copyright Office undertake to furnish the names of copyright attorneys, publishers, agents or other similar information.

Inspection and Copying of Records.

(1) Inspection and copying of completed records and indexes relating to a registration or a recorded document, and inspection of copies deposited in connection with a completed copyright registration, may be undertaken at such times as will not result in interference with or delay in the work of the Copyright Office; (2) the copying from the Copyright Office records of names and addresses for purpose of compiling mailing lists and other similar uses is expressly prohibited. Copying of deposited materials is prohibited unless copyright owner consents or good cause on Copyright Office form is shown.

Publication of Compendium of Copyright Office Practices.

This manual is published in loose leaf form. Compendium is available from Supt. of Documents, Government Printing Office, Washington, D.C. 20540.

Mail Delay.

Provision is made for late mail delivery of deposits, applications and fees if there is general disruption or suspension of postal service. (§709).

Correspondence.

(1) Official correspondence, including preliminary applications, between copyright claimants or their agents and the Copyright Office, or directly relating to completed registration or to recorded document, is made available for inspection by persons properly and directly concerned. Requests for photocopies of correspondence must be made pursuant to provisions in such regard elsewhere prescribed in Regulations.

(2) (i) Correspondence, application forms and any accompanying material forming a part of a pending or rejected application are not records which are open to public inspection as described in the previous subheading; (ii) inspection of such files may be afforded upon presentation of written authorization of claimant or his agent, or upon submission to the Register of Copyrights, Library of Congress, Washington, D.C. 20559, of a written request which is deemed by him to show good cause for such access and which establishes that person making request is one properly and directly concerned; (iii) where such access is authorized and photocopies of the official file are subsequently requested, the conditions and procedures elsewhere prescribed in the Regulations are controlling.

(3) Correspondence, memoranda, reports, opinions, and similar material relating to internal matters of personnel and procedures, office administration, security matters and internal consideration of policy and decisional matter including work product of attorney not open to public inspection.

(4) The Copyright Office will return unanswered any abusive or scurrilous correspondence.

Review of Decision.

Rejection of application may be appealed by review within Copyright Office or by suit in Federal District Court under Administrative Procedures Act.

Copyright Decisions of Federal and State Courts.

Copyright Office has been publishing volumes of decisions by Federal and State Courts pertaining to copyright cases, as well as those involving related subjects in field of literary and artistic property, some of which decisions are otherwise unreported. These volumes are not up to date. These past volumes can be individually or collectively purchased. Orders may be addressed and remittances made payable either to Superintendent of Documents, U.S. Government Printing Office, Washington, D.C. 20540.

Register's Annual Report.

Copy of Register's Annual Report may be obtained upon application to Superintendent of Documents. In addition to its review of Copyright Office activities, it contains interesting comments of Register on judicial, legislative and administrative developments during year pertaining to field of intellectual and artistic property, and its related aspects, in U.S. and abroad.

1.55 COPYRIGHT MANAGEMENT INFORMATION:

Copyright management information includes information conveyed with work that, inter alia, identifies work, its author and conditions of use. §1202 of statute prohibits any alteration, removal or false statements in such information.

1.56 COPYRIGHT PROTECTION SYSTEMS:

It will be unlawful after 2000 to manufacture, use or sell any device intended primarily to overcome technical means used to protect work from being copied. (§1201).

1.57 COPYRIGHTABLE WORKS:

Original works of authorship fixed in any tangible medium of expression that can be perceived, reproduced or communicated either directly or with aid of device including following categories: (1) Literary works; (2) musical works, including any accompanying words; (3) dramatic works, including any accompanying music; (4) pantomimic and choreographic works; (5) pictorial, graphic and sculptural works; (6) motion pictures and other audiovisual works; (7) sound recordings; and (8) architectural works. (§102[a]). Such works do not include general ideas, theories, procedures, processes, systems or like but only expression of such ideas, etc. (§102[b]).

This list is not intended to be exhaustive of types of works that may be copyrightable. As new types of works of authorship are developed, they too may be included.

Non-copyrightable works include works in public domain, ideas, useful articles, simple compilation of facts. There must be sufficient “originality of authorship” for work to be deemed copyrightable. See Silverstein v. Penguin Putnam Inc., 368 F.3d 77 (2d Cir. 2004) (discussing requisite amount of originality of authorship).

1.58 COSTS:

Costs against unsuccessful party are awardable in actions, suits or proceedings brought under Act. Reasonable attorney's fee to prevailing party, as part of costs, is discretionary with court. (§505). See topic 1.19 Attorney's Fees.

1.59 COUNTERFEITING:

Whoever knowingly traffics in counterfeit labels for phonorecord or infringing copy of motion picture or other audiovisual work may be fined up to $250,000 and/or imprisoned for up to five years. (18 U.S.C. §2318). See topic 1.63 Criminal Liabilities.

1.60 COUNTRY OF ORIGIN:

Determination of country of origin is necessary for purposes of provisions of national eligibility, GATT restoration, and need for certificate of registration before suit. Such certificate is not necessary for suit for infringement of most works of foreign origin (§104[b], §101 [definitions of “international agreement” and “treaty party”]) other than works where country of origin is U.S.

Country of Origin is U.S.

U.S. is country of origin for purposes of §411 if: (a) Published work is first published (i) in U.S. or (ii) simultaneously in U.S. and treaty party country (simultaneously means at same time or within 30 days) or (iii) simultaneously in U.S. and foreign nation not treaty party country or (iv) in foreign treaty party country and all authors are citizens, habitual residents or domiciliaries of U.S.; (b) for unpublished work, all authors are nationals, domiciliaries or habitual residents of U.S.; (c) in case of sculptural, pictorial or graphic work incorporated in structure, and structure is located in U.S. (17 U.S.C. §101).

1.61 COURT REPORTERS' TRANSCRIPTS:

See topic 1.174 Proprietor, subhead Court Reporters' Transcripts.

Inclusion of Copyrighted Material in Court Proceedings Not Dedicatory.

Where author was involved in obscenity prosecutions in which material from his copyrighted books was spread in court transcripts and opinions, such were not thereby dedicated to public domain so as to bar a motion picture using same from being deemed infringing. (S.D.N.Y. 1970, 319 F. Supp. 1269, 168 USPQ 693). To same effect, for same author (Lenny Bruce), in another case against another defendant, see S.D.N.Y. 1971, 335 F. Supp. 282, 173 USPQ 144.

1.62 CREDITORS:

See topic 1.131 Liens.

1.63 CRIMINAL LIABILITIES:

Wilfully Infringing or Abetting Infringement.

Anyone who wilfully and for profit infringes any statutory copyright, upon conviction, may be imprisoned for term of up to five years and fined up to $250,000. (17 U.S.C. §506; 18 U.S.C. §2319). Offense is federal, and U.S. attorneys may proceed by indictment or information in federal courts. Unlike civil infringement, where intent is immaterial, criminal infringement must be wilfully committed. Offender must also commit infringement for profit or knowingly and wilfully aid or abet such infringement. To avoid defense that no profit was involved, statute has been amended to create new basis for criminality based on amount and value of works infringed. (§506[a][2]).

Unauthorized recordings of live musical performances and trafficking therein are criminally punishable under 18 U.S.C. §2319A.

Improper Use of Copyright Notice.

It is misdemeanor, punishable by fine of not more than $2,500, with fraudulent intent to insert notice of copyright on any uncopyrighted article, or to remove or alter copyright notice upon any article duly copyrighted. (§506).

False Representation.

Any person who knowingly makes false representation of material fact in copyright application or statement filed with said application shall be fined not more than $2,500. (§506[e]).

False Copyright Notice.

Anyone who, with fraudulent intent, places false notice on article or imports such falsely marked article shall be fined not more than $2,500. (§506[c]).

Removal of Notice.

Anyone who, with fraudulent intent, removes or alters copyright notice on copyrighted work shall be fined not more than $2,500. (§506[d]).

Conspiracy.

While criminal offenses specified by the Act are characterized as misdemeanors, it should be noted that if the offender conspires with another to commit an offense against the U.S., he may be subject to indictment for conspiracy under Tit. 18, U.S. Code, §371.

Other Criminal Statutes.

Copyright infringement may also involve Wire Fraud Act and Interstate Transportation of Stolen Property Act. Counterfeiting of labels may be criminal (18 U.S.C. §2318), as well as counterfeiting of copyrighted works (17 U.S.C. §506, 18 U.S.C. §2319) or fixing or trafficking without authorization of live performances (18 U.S.C. §2319A). RICO statute has been amended to include copyright counterfeiting.

Limitations.

There is an express statute of limitation of three years, after cause of action arose, on criminal proceedings under Act. (§507).

1.64 CUSTOMS REGULATIONS:

See topic 1.114 Importation.

1.65 DAMAGES FOR INFRINGEMENT:

See topic 1.192 Remedies for Infringement.

1.66 DATABASES:

Computer databases and compilations of data are registrable as literary works and come within the definition of compilations. (§101). Feist v. Rural Telephone Service Co., 499 U.S. 340, 111 S.Ct. 1282, 18 U.S.P.Q.2d 1275 (1991) overturned copyright legal doctrine in some circuits that “original contribution” element of copyright law could be satisfied if there were sufficient “sweat of the brow” efforts exerted in creative effort by rights holder. Single greatest loss due to impact of this judicial interpretation of law was in area of database protection. This doctrine was again reiterated in National Basketball Association v. Motorola, Inc., 105 F.3d 841 Copyright Cases or Patent Cases(1997) when Court of Appeals for the Second Circuit refused to protect data transmissions relating to NBA game statistics by Motorola and its co-defendant on basis that “mere facts” were not protectable by copyright under either federal law or state “unfair competition” legal principles. While EU has adopted sui generis right to protect databases, U.S., despite several bills being proposed in Congress, has not followed suit and, consequently no right of this sort exists per se in U.S. nor may U.S. rights holders avail themselves of such protection in EU as its provision requires reciprocity of coverage. This is, however, area where rights are expected to change in foreseeable future due to combination of pressures from private industry and international bodies. Copyright may still exist in databases whose selection and arrangement are result of creative authorship. Protection of databases is thin. Bills are presently before Congress to redefine rights in such works.

1.67 DATE OF PUBLICATION:

See topic 1.181 Publication.

1.68 DEATH:

Death of Author.

Copyright continues to exist for 70 years after author's death.

Copyright Office Records.

Copyright Office will maintain records of deaths of authors communicated to it as aid to determination of term of copyright. (§302[d]).

Presumption of Death.

After period of 95 years from first publication of work or 100 years from its creation, author is presumed dead for 70 years if Copyright Office certifies no records it maintains indicates otherwise. (§302[e]).

Transfer of Copyright.

Copyright may be transferred by will (§201) but right to terminate transfers or licenses of work can be transferred only as set out in statute (§203 [b]).

Joint Work.

Copyright in joint work expires 70 years after death of last surviving author.

Visual Artists Rights.

Rights granted under §106A to certain works of visual art cease at death of author. States may protect such rights post death.

Pre-1978 Law.

Death of author under prior law had significant effects on rights granted by author. If author died before 1978 rights of assignees and licensees should be determined under prior law.

1.69 DECLARATORY JUDGMENTS:

Actions for declaratory judgments in respect of controversy under copyright may be brought under Tit. 28, U.S. Code, §§2201, 2202.

1.70 DEFENDANTS:

Anyone who infringes any exclusive right granted under §106 or §106A or who induces or contributes to or who is vicariously responsible for such infringement may be named as defendant.

1.71 DEFENSES:

A considerable variety of defenses can be and often are interposed in copyright infringement actions. The following are some of the types of defenses available.

As to Validity or Ownership of Copyright.

Among defenses of this nature are the right of protection to the type of use appropriated, such as ideas, plans and systems discussed in the work, as distinguished from the expression thereof; the originality of alleged authorship; work is useful article containing no original, separable features, failure to comply with statutory requirements in securing copyright under former statute, such as publication without proper notice, deposit, registration, payment of fees; dedicatory publication; forfeiture or abandonment of copyright; improper transfer of right to secure copyright or of copyright after it was secured. Defendants must look to law in effect when copyright was secured to determine if defense applies.

Denial of Appropriation.

The alleged infringer may claim: that he created his work himself or used the works of others entitled thereto or in the public domain, but had no access to and did not borrow from complainant; that neither he nor any agent for whom he was responsible made any use whatever as claimed, or that the use made was not exclusively permitted the owner under the rights granted by the statute; or that such use as may have been made was a “fair use,” or insufficient under the particular circumstances to be deemed an unlawful appropriation.

Affirmative Defenses.

Equitable defenses where injunctive or other equitable relief is sought, may be available for laches, unlawfully extending scope of copyright monopoly by attempting to monopolize, or by forcing tie-in sales of other copyrighted or non-copyrighted commodities or rights, by misusing copyright or by perpetrating fraud upon Copyright Office.

License is available as affirmative defense. See topic 1.130 Licenses.

Unintended Infringement.

Copyright is strict liability tort; as such, intent to infringe is not required. Defense of innocence based on absence of copyright notice was removed from statute in 1989. At same time need for notice was eliminated. (§405[b]).

Estoppel and Laches.

May be available under certain factual situations. See topic 1.192 Remedies for Infringement.

Statute of Limitations.

Five years from date cause of action arose in criminal cases or three years after claim accrued in civil cases. (§507).

Procedural Defenses.

Jurisdiction could be attacked through failure to possess valid registration, lack of standing by plaintiff, or improper venue. Improper venue must be raised by motion, since it can be waived by general appearance in action.

Misjoinder or non-joinder of parties plaintiff or defendant, not amounting to a jurisdictional defect, will be governed by the Federal Rules of Civil Procedure.

Prior Statute.

Many copyrights which arose under pre-1978 statute are still existing. Their validity will be tested under pre-1978 statute while their infringement will be determined under current statute.

See additional discussion under topic 1.192 Remedies for Infringement.

1.72 DEPOSIT AND REGISTRATION:

Deposit and registration are two separate concepts under Act. Owner of copyright or of exclusive right of publication in work published in U.S. shall deposit two copies of work in Copyright Office within three months of such publication. While failure to deposit does not affect copyright in work, failure to deposit after demand by Register of Copyright can result in fines. (§407). Deposit for §407 can be made without application for registration.

Registration, on other hand, is permissive. (§408). Registration also requires deposit of two copies along with application for registration and fee. Single deposit can be used to satisfy deposit (§407) requirements and registration (§408) provisions if deposit and registration are accomplished at same time. If not accomplished simultaneously, two additional copies must be filed with application to register.

Registration.

Description of work as audiovisual work, rather than musical composition, did not limit scope of plaintiff's right to claim copyright in song included on audiovisual work deposited with copyright application. It is acceptable to describe physical nature of deposit submitted with application, rather than only scope of copyright claim.

Deposit and Registration in Relation to Commencement of Infringement Suit.

Except for civil actions for infringement of copyrights in works whose country of origin is not U.S., no civil action for infringement of copyright can be instituted until registration of copyright claim is made. (§411[a]). Where such registration is refused by Copyright Office, civil action may be instituted without registration if notice thereof and copy of complaint are served on Register of Copyrights. (§411). See topic 1.60 Country Of Origin.

Statutory damages or attorneys fees may not be awarded for infringement of unpublished work commenced before effective date of its registration or where infringement commenced after publication of work and before its registration, unless registration is made within three months after first publication. (§412).

Copyright Office permits expedited registration for purposes of suit for additional fee.

Loose-leaf Separate Publications.

Loose-leaf materials published at various intervals, although intended for insertion in single binder, are nevertheless, not to be treated as one work, but as “books” separately published, with separate registration accompanied by separate fee for each published insertion.

Unpublished Works.

Works of which copies are not published may be registered by filing application and deposit of one complete copy of such work just as published works may be registered.

1.73 DERIVATIVE COPYRIGHT WORKS:

Right to make derivative works is one of exclusive rights granted to owner of copyright. (§106).

Derivative work is work based on one or more preexisting works and involves addition of some creative authorship. (§101).

From Public Domain.

Compilations or abridgments, adaptations, arrangements, dramatizations, translations or other versions of works in the public domain, may be copyrighted as new works. However, the protection of the copyright is extended only to the new contributions of the author, nothing being removed by such copyright from the public domain still available to all others. (§101).

Copyright in derivative work extends only to material contributed by authors of such work and is independent of and does not affect or enlarge copyright that may exist in preexisting work. (§103[b]).

Trivial Editing.

Derivative copyright is not supportable by publishing an edition of a biography in public domain with many trivial changes in punctuation, etc. (C.D. Cal. 1967, 264 F. Supp. 603, 152 USPQ 787).

From Copyright Works.

With the consent of the copyright owner, compilations or abridgments, adaptations, arrangements, dramatizations, translations or other versions of copyrighted works, or works republished with new matter, may be copyrighted as new derivative works. However, copyrighting of such new works does not affect validity of original copyright as to material used, does not serve to secure or extend copyright in original work, and is not construed to imply exclusive right to such use of original work. (§§103, 106).

New Editions.

The foregoing principles apply to new editions of a copyrighted work, which may be copyrighted as new works if the same have new matter without serving to extend copyright in the original edition or to affect the validity of the original copyright. (§§101, 103).

Applications.

Care must be taken to refer in application to prior works upon which derivative work is based, otherwise copyright may be invalid or unenforceable.

Cancellation of Agreements.

Assignments and licenses made by author are cancelable without cause at end of 35 years from execution. (§§203, 304[c]). Owner of derivative work made under such agreement may continue to sell such works but no new derivative works may be created. Works copyrighted prior to 1978 have different rules.

1.74 DESIGN PATENT:

Possible Overlapping Jurisdiction Between Patent and Copyright Law over Designs.

Court of Customs and Patent Appeals, pointed out that in Mazer v. Stein (1954, 347 U.S. 201, 217, 100 USPQ 325, 333) U.S. Supreme Court recognized an area of overlapping “statutory subject matter,” but said it was not passing on such issue since only a copyright had been secured. Accordingly, such appellate court reversed a decision by U.S. Patent Office rejecting an application for a design patent on ground that prior copyright registration was an election precluding patent protection. Such was not good ground for rejection by Patent Office.

Design patent may be obtained by anyone who has created new, original and ornamental design for article of manufacture. (Tit. 35, U.S.C., “Patents,” Ch. 16). Problem here, as in case of other patents, is that design must be product of “invention,” and thus novel and never before anticipated by others. Search is required before patent will be issued.

Existence of design or utility patent will not affect registrability of claim otherwise registrable. (37 CFR §202.10).

Issuance of design patent on new boat hull cancels any protection issued by Copyright Office. See topic 1.27 Boat Hull.

1.75 DESIGNS:

Works of art, as well as models or designs for works of art can be copyrighted. This class includes works of artistic craftsmanship, insofar as their form but not their mechanical or utilitarian aspects are concerned, such as artistic jewelry, enamels, glassware, and fabric designs, as well as all works belonging to fine arts, such as paintings, drawings and sculpture. Designs found on useful article are protected only if such designs can be identified separately from, and are capable of existing independently of, utilitarian aspects of article. (§101). Unique combination and arrangement of uncopyrightable elements in jewelry (ring) design was entitled to protection under copyright law when numerous options available to designer, design choices not dictated by function alone and although elements of defendants' design could be found, no ring similar in totality to defendants' was in evidence and there was evidence of independent creation of ring. (S.D.N.Y. 2000, 56 U.S.P.Q.2d 1763).

See topic 1.27 Boat Hull.

1.76 DESTRUCTION:

See topic 1.205 Seizure, Impounding and Destruction.

1.77 DIGITAL/ONLINE ELECTRONIC RIGHTS:

During past decade, Internet has spawned series of new copyright laws and administrative regulations from Congress and Copyright Office of the Library of Congress in attempt to protect proprietary rights of owners from ease of access, copying and global distribution of their works in new electronic media.

Audio Home Recording Act ("AHRA") of 1992 (Pub. L. No. 102-563, 106 Stat. 4237, Oct. 28, 1992) was, with advent of Digital Audio Tape ("DAT") intended to shield consumers against copyright infringement liability for home copying for noncommercial purposes. It was also intended to protect hardware manufacturers, digital equipment sellers and marketers of blank tape provided they paid statutory 3% surcharge on their qualifying sales. Proceeds are then to be divided among musical composers, publishers, record companies and between featured and non-featured artists, musicians and vocalists.

The Digital Performance Rights in Sound Recordings Act ("DPRSR") of 1995 (Pub L. No. 104-39, Jan. 13, 1995) was passed with idea of amplifying rights provided for in AHRA with particular emphasis on digital transmissions via Internet. It added, however, certain "performance" rights for sound recordings that did not exist prior to that time, namely rights of artists performing to compensation for their recorded performances in addition to those collected as royalties for underlying music and lyrics such as have been collected by ASCAP, BMI and SESAC for many years. In doing so, it also created new Digital Distribution Right for digital phonorecord deliveries that can be collected in variety of ways including pursuant to individual contracts, collective bargaining agreements and via statutory digital mechanical licenses. In practice, it is usually artist's record label that handles such negotiations and collections.

Negotiations of these rights can lead to royalty payments that equal or substantially exceed those for more established "performance rights" administered by ASCAP, BMI and SESAC. This may, in time, lead to trade regulation limitations by courts as, in addition to each of major record labels seeking "gross revenue" percentages from music users, there are over 100 independent record labels who also are individually seeking such royalty payments, leaving little or no net revenue for actual music users in end or eliminating independent labels from consideration for practical reasons.

Digital Millennium Copyright Act ("DMCA") (Pub. L. No. 105-304, 112 Stat. 2860, Oct. 28, 1998) covers broad range of copyright issues as they apply to electronic, digital and online environments. It is probably broadest of new electronic enactments and was divided into five Titles as follows. Title I is "WIPO Copyright and Performances and Phonograms Treaties Implementation Act of 1998" and supplements restoration of copyright protection, originally granted in 1994 GATT implementing legislation, and deals with circumvention of technological measures for protection of copyright while providing six sets of specific exemptions to rights created therein. Title II is "Online Copyright Infringement Liability Act" that creates limitations on liability of online service providers for copyright infringement when engaging in certain types of activities. Title III is "Computer Maintenance Competition Assurance Act" that creates exemption for making copies of computer programs by activating computer for purposes of maintenance or repair. Title IV continues six miscellaneous provisions relating to functions of Copyright Office, distance education, exceptions in Copyright Act for libraries and making of ephemeral recordings, "webcasting" of sound recordings on Internet and applicability of collective bargaining agreement obligations in case of transfers of rights in motion pictures. Title V deals with protection for Vessel Hulls. There are many details of DMCA that merit close and careful scrutiny. One, in particular, is provision contained in 17 U.S.C. §512(c) whereby, in order to avail itself of exemptions from liability provided by statute, Internet Service Provider needs to either provide information on its designated agent for notification of claimed infringements on system or network that service provider owns or controls. Such information needs to be provided to Copyright Office and through service provider's publicly accessible website.

In order to avoid liability under “safe harbor” provisions of DMCA, Internet Service Provider must take reasonable steps to prevent use of its service for purposes of infringement. See In re Aimster Copyright Litigation, 334 F.3d 643 (7th Cir. 2003) (Internet Service Provider found liable for contributory infringement for its software enabling users to share music files; ISP found to encourage rather than discourage potential infringers).

1.78 DIGITAL RECORDING AND TRANSMISSION:

All digital recording devices must include means to restrict serial copying. Such devices and recording media therefor must be reported and royalties paid thereon. (§§1001-1003).

Restrictions on Digital Audio Transmissions were enacted in 1995. (§§114, 115). Certain compulsory licenses were provided for as well as need to obtain negotiated licenses for some Digital Audio Transmissions. Amendment was directed to computer transmission and downloading of digital works. Such amendments do not apply to analog transmission.

There are reported decisions involving digital transmission of music. In one, plaintiffs were members of musical groups that made recordings for defendant record companies. Plaintiffs brought suit against record companies and Internet music publisher MP3.Com, Inc. arising from Internet use of recordings produced before Feb. 1, 1996, effective date of DPRSR. (UMG Recordings, Inc. v. MP3.com, 92 F. Supp.2d 349 [S.D.N.Y. 2000]). Held that expansive language of recording contracts, which gave record companies unrestricted right to manufacture, use, distribute and sell sound productions of performances recording thereunder made by any method whatsoever, whether then known or “[t]hereafter to become known” authorized digital transmission of recordings. (2000 S.D.N.Y., 123 F. Supp.2d 198). In A & M Records, Inc. v. Napster, Inc., 114 F. Supp.2d 896 Copyright Cases or Patent Cases (N.D. Cal. 2000), aff'd, 239 F.3d 1004 Copyright Cases or Patent Cases (9th Cir. 2001), district court found that virtually all Napster users had engaged in unauthorized downloading and uploading of plaintiffs' copyrighted music thereby evidencing predicate of direct infringement. Evidence showed that Napster executives had actual knowledge of its users' direct infringement and that Napster executives actively facilitated distribution of “pirated” music. Hence, Napster contributed to third-party direct infringement of plaintiffs' copyrighted music. Although Napster did not derive any revenue from providing its service, it had plans to monetize its customer base and eventually derive profits mainly from advertisement revenue and sales revenue from selling music directly to users.

1.79 DIRECTORIES:

Copyright does not exist in mere compilation of facts in directory. (Feist v. Rural, 111 S.Ct. 1282, 18 USPQ2d 1275 [1991]). But copyright may exist in selection or arrangement of facts which is result of creative authorship.

1.80 DISPLAY:

Concept of display of copyrighted work appears for first time in current statute. Right to public display is one of exclusive rights of copyright owner. (§106[5]). Private displays are not prohibited nor is public display by owner of lawful copy of work to viewers present at place where copy is located. (§109[b]). Display Right has taken on increasing importance with Internet display of Web pages.

1.81 DISTORTION AND DESTRUCTION:

Improper distortion, mutilation and destruction—see topic 1.141 Moral Rights.

1.82 DISTRIBUTION:

Distribution is one of exclusive rights of copyright ownership. (§106). Distribution is release to public by sale or other transfer of ownership or by rental, lease or lending. Once copyright owner has distributed copies such copies may be subsequently redistributed by owners of copies. (§109[a]). This provision does not apply to importation or exportation of genuine works. (§602). See topic 1.97 First Sale Doctrine.

1.83 DOLLS AND TOYS:

See topics 1.215 Statuettes (Three-Dimensional Works); 1.167 Pictorial, Graphic and Sculptural Works.

1.84 DRAMATIZATIONS, ADAPTATIONS, TRANSLATIONS, ETC.:

See topic 1.73 Derivative Copyright Works.

1.85 DURATION:

Copyright in works created on or after Jan. 1, 1978, exists from creation and endures for life of author plus 70 years. In case of joint works, term is life of last surviving author plus 70 years. (§302).

Anonymous and pseudonymous works and works made for hire endure for term of 95 years from publication or 120 years from creation, whichever expires first. In case of anonymous or pseudonymous works, if identity of one of authors is made of record in Copyright Office, term of copyright becomes life of author plus 70 years. (§302.)

Copyright in works created but not published before Jan. 1, 1978, subsists from Jan. 1, 1978, and endures for same periods as set forth above, except term of copyright shall not expire before Dec. 31, 2002, and if published on or before Dec. 31, 2002, it shall not expire before Dec. 31, 2047. (§303).

Copyrights under Pre-1978 Law and in their first term on Jan. 1, 1978, shall continue for 28 years from date originally secured plus renewal term of 67 years. (§304[a]).

Copyrights under Pre-1978 Law and in their renewed term shall continue for term of 95 years from date copyright was originally secured. (§304[b]).

All copyrights run to end of calendar year in which they would otherwise expire. (§305).

Continued existence of copyrights obtained under Pre-1978 Law will be determined by propriety of renewals obtained under said Law. Works which have passed into public domain because of improper notice, failure to renew or other reason prior to 1978 shall not be revived by entry into effect of current Law in 1978. Statutory and case law in effect at time shall determine effect of any act causing loss of copyright.

Works expiring during period immediately before enactment of current Law in 1978 were extended yearly by Congress.

Certain foreign works which fell into public domain for failure to comply with U.S. laws were restored to copyright in 1996. Their duration is to be calculated as if they had never fallen into public domain. (§104A).

1.86 EMPLOYERS AS AUTHORS:

See topic 1.22 Author; also topic 1.85 Duration.

As to rights in works by employees, created within scope of employment, and those created outside scope of employment, see topic 1.174 Proprietor, subhead Work for Hire.

1.87 ENCRYPTION/TECHNOLOGY CIRCUMVENTION:

Caution should be exercised in export of encryption software or its uploading on Internet. Encryption software keys of over 40 bits for symmetric key ciphers and over 512 bits for asymmetric keys must be pre-approved by Department of Commerce before transmission outside U.S.

Recent amendments to copyright statute prohibit evasion of encryption protection to copyrighted works beginning in year 2000.

While there are certain limited exemptions for specific research and similar purposes, Digital Millennium Copyright Act ("DMCA") (17 U.S.C. §1201 et seq.) (see below) creates strong statutory remedies against defendants who disable or circumvent technological protection measures to curb against unauthorized copying, distribution or other protected uses of copyrighted works. This is particularly important in electronic online context as encryption, electronic "watermarking" and "fingerprinting" and industry efforts such as Secure Digital Music Initiative ("SDMI") are being taken in effort to employ technology against infringers who abduct copyrighted works with increasing ease. These measures are designed not only to mark but also to track copies of protected works so enforcement efforts can be mounted against infringers.

Illustrations of enforcement efforts involve these provisions is decision in Universal Studios Inc. v. Corley 273 F.3d 429 Copyright Cases or Patent Cases (2d Cir. 2001), A DeCSS (Decode Content Scrambling System) encryption system, believed to have been created by European computer "hackers" and used to decode DVD encryption system created by motion pictures studios, was posted on defendant's web site and offered free for downloading off web site as way to sidestep studios' copyright protection software on their DVD's. Studios, relying on DMCA, charged defendant Corley and two others with illegal copying and in Jan. 2001, U.S. District Court issued injunction against them. While defendants complied with injunction in respect to their own sites, defendant Corley began linking his site to sites that continued to post software and, since owned by nonparties, were not directly subject to court's injunction. Defendant Corley argued that posting code is protected by Freedom of Expression under First Amendment to the U.S. Constitution and that DeCSS software was designed for individual computer users to make copies of digital DVD's for personal use only. Movie studios argued that software had both intended and actual commercial use and clearly infringed DMCA.

Other DMCA anti-circumvention of technology matter that bears citing are criminal cases, USA v. Sklyarov, Crim. Docket No. 01-M-257-ALL, N.D. Cal. (San Jose) (filed on July 11, 2001) and companion case of USA v. Elcom Ltd., et al., Crim. Docket No. 01-CR-20138-ALL, N.D. Cal. (San Jose) (filed on Aug. 28, 2001). Dmitri Sklyarov, is Russian programmer. His Moscow-based employer, Elcom Ltd. posted his bail and is defendant in separate suit that was filed. He was arrested in Las Vegas while attending computer industry trade show and charged with illegal distribution of program that is alleged to unlawfully crack Adobe Software encryption code used for electronic books. Defendants have argued "fair use" as defense claiming that decryption software has non-infringing uses and that software is legal in Russia and, therefore, raising international cross-border jurisdictional and other legal issues.

1.88 EPHEMERAL RECORDINGS:

It is not infringement of copyright for transmitting organization entitled to transmit to public performance or display of work other than movie or audiovisual work to make one copy of transmission if made for limited purposes and for limited times. (§112). This privilege has also been extended to copies made to Webcasting in DMCA.

1.89 EQUITABLE JURISDICTION:

See topic 1.124 Jurisdiction and Venue; also topic 1.192 Remedies for Infringement.

1.90 ESTOPPEL OF LICENSEE:

For discussion of U.S. Supreme Court's overruling of time-honored doctrine of estoppel of a licensee to question validity of patent or copyright licensed, in Lear v. Adkins patent case (1969, 395 U.S. 653, 162 USPQ 1), see topic 1.130 Licenses, subhead Estoppel of Licensee. It is not clear that this rule applies to copyright licensees.

1.91 EVIDENCE:

See topics 1.33 Certificate of Registration; 1.192 Remedies for Infringement.

1.92 EXECUTORS AND ADMINISTRATORS:

Executors may obtain renewals of Pre-1978 copyright registration in absence of widow or children. (§304).

1.93 EXTENSION OF TERM:

See topic 1.85 Duration.

1.94 FABRIC DESIGNS, JEWELRY, ETC.:

See topic 1.167 Pictorial, Graphic and Sculptural Works.

1.95 FAIR USE:

The courts have always implied the consent of an author to the “fair use” by others of his copyrighted work. Since the rights given to the author are for the Constitutional purpose of “promoting the progress of science and useful arts,” the discussion of ideas, opinions and expressions contained in copyrighted works implies some reasonable quotation or copying of small portions of the work may be made, particularly by way of criticism, comment or discussion thereof. (William Patry, The Fair Use Privilege in Copyright Law [2d ed. 1995]).

Concept of fair use was court developed over the years and statutorily recognized in §107 of 1976 Act. Non-exhaustive statutory list of factors to consider in determining defense of fair use include: (1) Purpose and character of use; (2) nature of work copied from; (3) amount and substantiality of taking; and (4) effect on market for or value of copyrighted work. Other factors may include unpublished nature of copyrighted work, and user; good or bad faith and intent of taker. No one factor should be controlling.

Fair uses can be found in literary criticism, comment, news reporting, teaching, scholarship, research, historical writings, biographical writings and parodies. Such uses, however, are not per se fair use. Each case is fact specific and all factors must be considered.

There is no First Amendment defense, per se, to copyright infringement. Rather, First Amendment concerns are taken into account by fair use defense, and by copyright law's distinction between expression, which is protected by copyright, and ideas, which are themselves not protectable. (471 U.S. 539).

One of the most frequently found fair uses is parody, in which material taken from copyrighted work is subject of humorous treatment. U.S. Supreme Court has defined parody as “the use of some elements of a prior author's composition to create a new one that, at least in part, comments on that author's works.” Campbell v. Acuff-Rose Music (510 U.S. 569). However, even if work is parody, it may not qualify as fair use. Parody is evaluated under §107 as part of fair use analysis. For example, to qualify as fair use, original work must be object of purported parody and only so much of original can be taken as to suggest parody's subject (that is, original work). Analysis is fact-specific. Thus, one court has found to be parody movie advertisement showing superimposition of movie star's face over pregnant model posed identically to pregnant Demi Moore depicted on *Vanity Fair* cover. That court found advertisement commented on pretentiousness of original and was unrelated to movie being promoted. (2d Cir. 1998, 137 F.3d

109). On other hand, another court held that movie advertisement and trailer bearing strong resemblance to another movie advertisement and trailer were not parodies; although advertising copy clearly communicated a joke, it was not targeted at original, but, rather, promoted movie. (1998 11 F. Supp.2d 1179). Another court held that purported parody of Dr. Seuss' *Cat in the Hat* commenting on O.J. Simpson trial was not parody because it did not comment on original work; rather it used Dr. Seuss work merely to “get attention” and “maybe even to avoid the drudgery in working up something fresh”. (9th Cir. 1997, 109 F.3d 1394).

Supreme Court has stated, in dicta, that it is much more difficult to show that satire is subject to fair use defense. Supreme Court noted satire “has been defined as a work ‘in which prevalent follies or vices are assailed with ridicule’ or ‘are attacked through irony, derision, or wit,’”; unlike parody, satire does not comment on work it copies, but, rather, is directed to some subject other than original work. Parody is more likely to qualify for fair use defense than satire, according to Supreme Court, because “[p]arody needs to mimic an original to make its point, and so has some claim to use the creation of its victim's (or collective victims') imagination, whereas satire can stand on its own two feet and so requires justification for the very act of borrowing.” (510 U.S. 569).

Another type of fair use considered common is fleeting use of copyrighted materials as decorative backgrounds in motion pictures and television programs. If use is de minimis, fair use factors need not be applied. Where use is significant, several courts have found infringement.

Fair use is not only exception to exclusive rights of copyright owners. (see §§107-120.)

On Nov. 2, 2002, President Bush signed “The 21st Century Department of Justice Appropriations Authorization Act” (H.R. 2215) into Law. “Intellectual Property” section of Act, captioned “Technology, Education and Copyright Harmonization Act of 2002”, creates new §13302 “Educational Use Copyright Exemption” for certain “Performances and Displays for Educational Use” as “part of a mediated instructional activities transmitted via digital networks and for certain performances of a non-dramatic literary or musical works in live classroom sessions by or in the course of transmission.”

1.96 FEES:

Registration fees and all other remittances sent to Copyright Office should be by means of money order, check or bank draft made payable to Register of Copyrights or Deposit Account. Some payments may be made by credit card. Coin or currency enclosed in letters or packages will be at remitter's risk. Persons or firms for their own convenience may deposit in Copyright Office sum of money in advance against which copyright fees will be charged. See http://www.copyright.gov for details.

Where the statutory fee is submitted in the form of a check, the registration of the copyright claim or other record made by the Office is provisional until payment in money is received. In the event the fee is not paid, the registration or other record will be expunged. (Reg. §201.6[a, b]).

Schedule of fees is now as follows (§708):

All Registrations	$45.00
All Renewals	$75.00
Assignments (1 title)	$95.00

Refunds.

Money paid for applications which are rejected as non-copyrightable subject matter or because claim is invalid for any other reason will not be refunded.

Remittances from Foreign Countries.

These should be in the form of international money order or bank draft payable and immediately negotiable in U.S.A. for full amount of fee required or, traveler's check or Deposit Account. (37 CFR, §201.6[a]).

1.97 FIRST SALE DOCTRINE:

Once owner of copyright in work sells or otherwise relinquishes ownership of material object embodying copyright, owner cannot control subsequent transfer of object. Transferee of object is still bound to recognize other exclusive rights of copyright owner, such as exclusive right to reproduce. This is called 1.97 First Sale Doctrine. This doctrine equally applies to reimportation of copyrighted works. (L'Anza [523 U.S. 135]). Where works licensed for foreign manufacture are imported into U.S., in violation of U.S. distribution rights, importation may be barred.

1.98 FIXATION:

Work is fixed in tangible medium of expression when its embodiment in copy is sufficiently permanent to permit it to be perceived, reproduced or otherwise communicated for period of more than transitory duration. (§101). Work consisting of sounds, images, or both, that are being transmitted is fixed if fixation of work is being made simultaneously with its transmission. Example would be transmission of baseball game.

Unauthorized fixation and trafficking in such fixations of live musical performances is infringement of performers' rights. (§1101). Example would be unauthorized capturing of band's performance.

1.99 FOREIGN RIGHTS:

See also topic 1.07 Aliens (Protection in U.S.A.).

For texts of current foreign copyright laws (in English translation where non-English), see latest supplements of Copyright Laws and Treaties of the World, compiled by UNESCO, Berne Union, U.S. Copyright Office, and U.K. Board of Trade, and jointly published by UNESCO, Paris, France, and Bureau of National Affairs, Inc., Washington, D. C. and World Intellectual Property Organization's Website, http://www.wipo.org.

Rights in copyrights available to U.S. citizens and domiciliaries in foreign countries and available to foreign citizens and domiciliaries in U.S., are dependent upon domestic law, bilateral agreement and treaties (reciprocal relations) and international conventions.

Under reciprocal relations and international conventions, citizens of one contracting nation are generally afforded protection of their copyrights in other contracting countries to same extent such other country affords protection to its own citizens.

International Conventions.

U.S. is member of two major copyright conventions, Berne Convention (since 1989) (see topic: 1.25 Berne Convention) and Universal Copyright Convention (since 1952) (see topic: 1.235 Universal Copyright Convention). Through adherence to GATT Treaty in 1994 and two 1996 WIPO treaties, relations now exist between U.S. and certain World Trade Organization and WIPO members who are not members of Berne or U.C.C.

Inter-American Conventions.

United States ratified certain Inter-American Copyright Conventions (that adopted in Mexico City in 1902 and superceded at Buenos Aires in 1910). Under latter Convention, known as Buenos Aires Convention, for example, act of copyright in any one of states, in conformity with its laws, shall produce its effect of full right in all other countries without necessity of complying with any other formalities, providing always there shall appear in work statement that indicates reservation of property right. (Art. 3). This means that U.S. works published in these countries should have copyright notice indicating reservation of property right.

Members of Convention include Argentina, Bolivia, Brazil, Chile, Colombia, Costa Rica, Dominican Republic, Ecuador, Guatemala, Haiti, Honduras, Mexico, Nicaragua, Panama, Paraguay, Peru, U.S. and Uruguay.

Reciprocal Relations.

For list of countries with which U.S. has reciprocal copyright relations under which U.S. citizens are given copyright protection in such countries on same basis as is given to their own citizens, or at least protection equivalent to that given under U.S. Act, see 1.07 Aliens. This may mean that U.S. citizen has copyright automatically in such countries, without any formalities, if citizens of such countries enjoy copyright protection without formality. But if citizens of any such foreign country are required to observe any formality in connection with their copyrights, such would be required of U.S. citizens.

International Agreement for Protection of Producers of Phonograms against their Unauthorized Duplication.

Problem of piracy of sound recordings by unauthorized duplication of recorded identical sounds on tape, wire, and other phonograms, has taken on great significance not only domestically, but internationally.

This problem resulted in above Convention in 1971 and U.S. joined Mar. 10, 1974.

Members of this Convention are: Argentina, Australia, Austria, Barbados, Brazil, Burkina Faso (Upper Volta), Chile, Costa Rica, Czechoslovakia, Denmark, Ecuador, Egypt, El Salvador, Fiji, Finland, France, Germany, Guatemala, Honduras, Hungary, India, Israel, Italy, Japan, Kenya, Korea (Republic), Luxembourg, Mexico, Monaco, New Zealand, Norway, Panama, Paraguay, Peru, Spain, Sweden, Trinidad and Tobago, U.K., U.S., Uruguay, Vatican City, Venezuela, Zaire. (Copyright Office Circular 38[a]).

1.100 FORFEITURE AND ABANDONMENT:

Under law prior to Jan. 1, 1978, works published by or with authorization of author or copyright owner and without proper notice of copyright fell into public domain. Works so published after Jan. 1, 1978 could be saved from abandonment by complying with requirements of then effective version of §405 of statute. On Mar. 1, 1989, Copyright Act was amended to eliminate need for copyright notice at all for works first published after that date. All works first published prior to Mar. 1, 1989 are still subject to notice requirements in effect as of date of their first publication for copies distributed before that date. Mar. 1, 1989 amendment did not retrieve any works then in public domain and any works published without notice between Jan. 1, 1978 and Mar. 1, 1989 are governed by remedial provisions of then-effective version of §405. (36 F.3d 1214).

See topic 1.152 Notice of Copyright, for advantages to continued use of notice.

Publication is defined as distribution of copies or phonorecords of work to public by sale or other transfer of ownership, or by rental, lease or loaning. Offering to distribute copies to group of persons for purposes of further distribution, public performance, or public display constitutes publication. Public performance or public display itself is not publication. (§101).

Question of whether or not publication actually took place is determined on facts of each case. See topic 1.181 Publication.

Offering without restriction to interested insurance companies 100 printed pamphlets, without copyright notice, of a detailed insurance plan and forms, which several of such insurance companies thereupon adopted and used, dedicated such work to extent so published, and made invalid statutory copyright attempted to be secured thereon nine months later by distributing 500 such pamphlets with notice of copyright affixed thereto. (2d Cir., 1958, 253 F.2d 702).

Where copyright owner had permitted for many years circulation of infringing copies of his work (a caricature print), without copyright notices thereon, and without taking steps to stop infringements, an inference is supported that copyright owner authorized or acquiesced in wide circulation of copies without copyright notice, thereby dedicating copyrighted work to public. (2d Cir. 1965, 342 F.2d 143, 144 USPQ 560).

Well-known and widely disseminated speech such as Martin Luther King's “I have a Dream” speech may be dedicated to public domain and free for others to copy if no restrictions on further dissemination were made and proper notice not affixed (11th Circuit).

Publication by Phonorecord.

In order to correct split among courts, statute has been amended to provide that distribution before 1978 of phonorecord was not publication, and possible abandonment, of underlying musical work. (17 U.S.C. §303[b]).

Failure to apply for renewal during 28th year of original term of renewable copyright threw work into public domain at end of 28th year. See topic 1.85 Duration. Since 1992 renewable copyrights have been automatically renewed. (§304[a]). See topic 1.194 Renewal of Copyright.

Foreign Works Restored.

On Jan. 1, 1996 certain foreign works still copyrighted in home country were restored to copyright protection here if they had fallen into public domain in U.S. because of failure to comply with U.S. formalities or subject matter. (§104A).

1.101 FORMS:

Blank forms are usually not copyrightable as means of merely collecting information. Where forms convey information, they may be copyrightable. (37 CFR §202.1). Registration of forms by Copyright Office is prima facie evidence of copyrightability. (155 USPQ 133).

1.102 FRAUD:

Knowing false representation of material fact in application for copyright or in any written statement relating thereto is punishable by $2,500 fine. (§506). In addition, this will jeopardize copyright registration.

Fraudulent use or removal of copyright notice is subject to same fine. (§506).

1.103 GAMES:

Games as ideas cannot be copyrighted but rules and Playing Board may be. See topic 1.112 Ideas, Plans, Systems, Methods, Kits, Etc. Some games may be patentable.

Public performance of copyrighted game as part of national tournament is not infringement. (964 F.2d 965).

1.104 GIFT:

See topic 1.17 Assignment, subhead Gift of Future Royalties.

1.105 GOVERNMENTAL EMPLOYEES:

As to right of federal governmental employees to secure copyright in their works of authorship, even though ideas were developed in course of performing governmental duties, see topic 1.174 Proprietor. Copyright in works created outside of employment belongs to employee.

Most federal governmental works cannot be copyrighted. (§105). Works of state government are not excluded from protection.

1.106 GOVERNMENTAL INFRINGEMENT:

U.S. Government is liable for infringement of copyright. (28 U.S.C. §1498[b]). However, remedies given copyright owner are not those under copyright statute, Tit. 17, U.S.C., but only by action exclusively against U.S. in Court of Claims for recovery of owner's reasonable and entire compensation as damages for such infringement, including minimum statutory damages as provided in §504 of Tit. 17, but not costs. (§505). Such action is available for infringements committed not only by Government, but by any corporation owned or controlled by it, or by contractor, subcontractor, or any person, firm or corporation acting for Government. Government employee may have such right of action, provided he was not in position to order, influence or induce governmental use, and provided, further, that work was not prepared during such employment, as part of his official functions, or by use of governmental time, material or facilities. Authority is given appropriate governmental corporation, or head of appropriate governmental department or agency, to settle and compromise damage claim administratively, before suit, out of available appropriations. Three-year limitations period is provided; claims arising in foreign countries are inapplicable; and nothing in Act is to be construed to waive any Congressional immunity granted by Art. I, §6 of U.S. Constitution. Since such typical copyright remedies as injunction, seizure, impounding, and destruction, are not made available, legislation does no more in effect than provide reasonable compensation where Government, or one of its agencies, chooses to utilize copyright property.

State Infringement.

States and their agents may be liable for damages for copyright infringement after Nov. 15, 1990. (17 U.S.C. §§501, 511). Recent amendment to statute making states liable for infringement has been held unconstitutional, however, by lower courts.

Governmental Use or Infringement Does Not Authorize Others to Infringe.

Although defendant's use of plaintiff's copyrightable and copyrighted motion picture photographs of shooting of President Kennedy, by way of unauthorized charcoal sketches thereof in defendant's published story of assassination, was ultimately deemed a “fair use” and non-infringing, since too inconsequential to affect value of plaintiff's work in a noncompetitive medium, court does point out by way of dictum, that Government's appropriation of plaintiff's copyrighted motion picture photographs for Warren Commission Report, per se caused no abridgement of copyright or authorized others to use material without copyright owner's consent. (S.D.N.Y. 1968, 293 F. Supp. 130, 159 USPQ 663).

1.107 GOVERNMENTAL PUBLICATIONS:

Copyright is generally not available for any work of U.S. Government, but U.S. Government is not precluded from receiving and holding copyrights transferred to it by assignment, bequest or otherwise. (§105). Government may obtain copyright on certain standard reference data published by Commerce Department (15 U.S.C. 290e), U.S. Postal Service publications and certain other limited forms of works.

Papers created by government employees within scope of their employment are considered governmental publications.

Works created for government by independent contractors may be copyrightable. (1981, 667 F.2d 102).

Whenever copy is published consisting preponderantly of works of U.S. Government, notice of copyright should include statement identifying those portions of copy embodying work protected by statute. (§403).

This requirement was mandatory for works published prior to Mar. 1, 1989 but only recommended for evidentiary purposes for such works first published thereafter.

Works created by states or state bodies may be copyrightable.

1.108 GOVERNMENT PROPRIETORS:

See topic 1.174 Proprietor, subhead Government Proprietors.

1.109 GRAPHIC, PICTORIAL, SCULPTURAL WORKS:

See topic 1.167 Pictorial, Graphic and Sculptural Works.

1.110 GREY MARKET GOODS:

Grey market goods are generally those exported by producer which are reimported to U.S. While this is basically trademark issue, cases based on copyrighted labels under 17 U.S.C. §602, do not allow blocking of such imports. (523 U.S. 135).

1.111 HOTEL REPLAY:

Where hotel, apartment house or similar establishment relays transmitted radio or television signal by broadcast station to private lodgings of guests or residents at no charge, there is no copyright infringement. (§111[a][1]). Where hotel lends video tapes for use by guests in private rooms this is not public performance and not infringement. Where hotel broadcasts or otherwise transmits to hotel room guests, material not transmitted by radio or TV station, such as VCR tapes, such transmission is infringement unless licensed.

1.112 IDEAS, PLANS, SYSTEMS, METHODS, KITS, ETC.:

Copyright protection does not extend to ideas, procedures, processes, systems, methods of operation, concepts, principles or discoveries, but exists only in their form of expression in work. (§102[b]).

Ideas Involving Methods, Processes, etc.

An original idea, such as a plan for a type of motion picture, radio or television program, a new method for an advertising campaign, a new system of playing or teaching contract bridge, keeping accounting records, or selling insurance, is the author's property while he keeps it to himself. The situation is the same as to trade secrets, secret processes, secret lists. The exclusive right thereto will not, however, survive a voluntary disclosure, and will become public property available to anyone desiring to utilize them.

Statutory copyright can be secured for a book describing or illustrating these ideas, plans, methods, systems, secrets and processes. The copyright does not, however, protect the intellectual conceptions themselves. It merely protects the author's expression in describing or illustrating them. Since the securing of copyright involves a voluntary disclosure to the public of the contents, the public is perfectly free, despite the copyright, and unless patented, to utilize any of ideas, plans, methods or processes, disclosed, or to teach them to others, or to illustrate them, or to write about them and secure copyright for their own descriptions. Public is not free to copy author's copyrighted expression in describing his ideas, but is free to utilize ideas themselves, according to leading case of Baker v. Selden (1880, 101 U.S. 99 Copyright Cases or Patent Cases) involving alleged infringement of copyrighted book “Seldon's Condensed Ledger, or Book-keeping Simplified” containing system of rulings for accountants as arranged and described in book.

Such ideas, etc. may be protected by Patent Law.

Merger of Idea.

Where possible ways of expression of ideas are limited or obvious, such as very simple game or contest rules, author's expression may merge with idea and is not protectable. Otherwise idea itself would be protected. (379 F.2d 675).

Scenes A Faire.

Certain events or situations may naturally flow from idea and are called scenes a faire. Use of such events or situations, unless slavishly taking expression, do not indicate improper copying. Thus, idea of cross-continent train trip would necessarily involve station stops, dining car meals and customary sights and sounds.

Means of Protection.

Some ideas and processes may be protected by patents, others by state enforced contracts, express or implied confidential arrangements, or fiduciary duty.

Plans for architectural works are protectable not only to prevent copying of plans, but also erection of structure. (§106). Other type plans, such as electrical drawings and the like may be protected from being copied, but cannot prevent use of plan to construct device or system. Latter is general rule with broader architectural rule because of our obligations under Berne Convention.

Rules of a Game.

Plaintiff's claimed copyright in a book of rules for plaintiff's game Carom could not be deemed infringed by defendant, another distributor of Carom who, despite admitted access to plaintiff's published “Rules”, did not copy same verbatim in defendant's published “Rules”, but made changes in their language to enhance their clarity. Rules of a “game” are in public domain but there may be protection in expression of rules unless rules can be expressed in only very limited way. To hold otherwise would prevent publication of similar rules and afford protection to game itself, citing 379 F.2d 675, 154 USPQ 193. (1st Cir. 1967).

Copyrighted Indemnity Forms.

While detailed insurance plan for blanket bond to cover replacement of lost securities, contained in pamphlet with form of proposed bond, affidavit of loss and indemnity agreement integrated to narrative explanatory material, can be validly copyrighted, standard of proof is so stiff for infringement as to leave little, if any, protection to copyright owner, as far as exclusive utilization of his plan or idea is concerned. (2d Cir., 1958, 253 F.2d 702). Noninfringement in such case was found because alleged infringer's use of language in copyrighted “forms” was merely incidental to his use of underlying idea which he had right to use. There was no slavish copying of language of copyrighted work. Fact, also, that author, prior to affixing notice of copyright to 500 pamphlets, had nine months before distributed 100 pamphlets without copyright notice to interested insurance companies, few of which adopted his plan and began to use forms, was held to be dedicatory and forfeited his right to later copyright. Injunction granted by lower court forbidding author to assert that any of his forms were copyrighted, was modified, however (since forms were copyrightable), to extend no further than to those forms as to which lower court had found forfeiture of right to copyright by prior general publication without copyright notice.

1.113 ILLEGITIMATE CHILDREN:

See topic 1.35 Children.

1.114 IMPORTATION:

Manufacturing Requirements.

Requirement of U.S. or Canadian manufacture to maintain copyright in certain English language literary material expired on July 1, 1986. Improper importation of works in violation of manufacturing provision may have caused loss of copyright prior to 1986. Since many pre-1986 works are still in copyright, importation prior to 1986 should be considered in determining continued viability of copyright. Certain foreign works which fell into public domain for failure to comply with manufacturing requirements may be restored to copyright. (§104A).

Infringing Importation.

Importation of even genuine copies of work manufactured abroad is infringement if done without permission of copyright owner. (§601).

Customs Regulations.

Pursuant to Customs Regulations infringing imports may be seized and forfeited. (§603). Such regulations appear in Tit. 19 CFR Part 133. Copyrights must be registered with customs for §603 to apply.

1.115 INFRINGEMENT:

Infringement is defined by statute as violation of any of exclusive rights of copyright owner as provided by statute (§§106-106A) or importation or exportation of copies in violation of statute (§602). Violation includes proof of access to work, copying and that such copying is substantial taking of work. In determining infringement, courts first determine if there was copying of protectible material, and, if so, it then determines if such copying was substantial. Test for substantial copying is whether ordinary observer would believe accused work was taken from copyrighted work. One court has limited ordinary observer to one in specific market for works. Circuits vary as to how they frame test for infringement.

By U.S. Government.

U.S. Government is liable for infringement of copyright, but by way only of action in U.S. Court of Claims for recovery of copyright owner's reasonable and entire compensation as damages, including minimum statutory damages such as provided by copyright statute. See topic Governmental Infringement, for various conditions under which such remedy is available.

Foreign Infringement.

U.S. courts generally will not find jurisdiction to try issues of foreign infringement and damages therefor. Where foreign infringement is independently based on initial infringement in U.S., some courts will maintain jurisdiction. Mere directing of foreign infringement from U.S. does not give jurisdiction.

By States.

In 1990, states were made liable for infringement. (§§501[a], 511). But some courts have found this provision unconstitutional.

Unfair Use.

The appropriation of an exclusive right must be of a material and substantial part of the copyrighted work, amounting to an unfair use. This is a question of fact depending on the nature of the work and the nature of the use which is not measured quantitatively but qualitatively (558 F.2d 1090; 630 F.2d 905). See topic 1.95 Fair Use.

Access and Appropriation Necessary.

Exclusive rights conferred by copyright prevent only appropriation of particular copyrighted work by infringer, but do not exclude other authors from independently creating similar or identical works, and utilizing or permitting others to utilize them, and of securing copyright themselves in such works, provided creator did not borrow from other copyright. Essence of infringement, therefore, is copying or appropriation of claimant's copyrighted work. Creating without copying your own work, even though identical or similar to prior work is complete defense.

Access Implicit in Infringement.

Access to the claimant's copyright, in order to copy or borrow therefrom, is required in every actionable infringement. This access need not necessarily be proved by direct evidence. Circumstantial evidence, from which conclusion can reasonably be derived that infringer had access to copyrighted claimant's work, is sufficient. Identity of errors common to both works would be circumstantially indicative that common available sources were not consulted by both authors, but that one work was consulted by other without reference to original sources and its errors repeated. Internal similarities in development of work could be such as to be beyond realm of coincidence and lead to no other conclusion than that portions of one musical composition were copied from another. (684 F.2d 821 Copyright Cases or Patent Cases; 558 F.2d 1090).

Intention Immaterial.

Intention to infringe is immaterial. Even subconscious infringement is actionable. (2d Cir. 1983, 722 F.2d 988 Copyright Cases or Patent Cases, 221 USPQ 490). Intention may influence amount of damages awarded. For cases, see topic 1.192 Remedies for Infringement, subhead Innocence of Intent to Infringe Immaterial.

Liability for criminal penalty, on the other hand, requires that the infringement shall have been committed wilfully and for profit or that the infringer shall have aided or abetted such an infringement. See topic 1.63 Criminal Liabilities.

Innocent Infringement.

Former partial defense of innocent infringement was eliminated by elimination of notice requirement in 1989. (§405[f]).

Infringement a Tort.

The infringement involved in an appropriation of any right under copyright, is a tort, like any other invasion of general property rights. The tort feasor is primarily liable for his acts. If they are committed in the course of his duties for an employer, the employer may be jointly and severally liable for the acts of his agent. If acts of infringement are continuing, statute of limitations runs from last infringing act.

Joint and Several Liability.

Those who participate in infringement, as well as for whom infringement is committed, may be jointly and severally liable for infringement, as in other torts. There may also be vicarious infringement. For cases, see topic 1.192 Remedies for Infringement, subhead Joint and Several Liability.

Thus if infringement takes place, those who induced it; contributed to it; or were vicariously responsible for it are also liable. Vicarious liability takes place where one has control over place where infringement occurs as in case of night club owners.

Indirect Copying.

It is infringement to copy protected copyrighted work in French language, even though copying was from unprotected English translation of original French work, and translation was in public domain. (E.D.N.Y. 1965, 247 F. Supp. 518, 147 USPQ 99).

Copying from one who is already copier is infringement.

Additions to Copyrighted Works.

It is improper to insert advertisements in copyrighted work without permission. (National Bank of Commerce v. Shaklee Corp., 503 F. Supp. 533 [W.D. Tex. 1980]). However, addition of advertising on blank lead of video tape or motion picture is not infringement.

Rights Infringed.

Infringement can be found where any right granted by §106 is used or performed without permission. Violation of rights granted under §106A is also considered infringement. Thus, distributor of infringing work is as liable as copier.

Infringement of Performers' Rights.

Unauthorized fixation in records or music videos of live musical performances or trafficking in such fixations is infringement of performers' rights. (§1101). Such actions may also be criminal. (18 U.S.C. §2319A).

Digital Audio Transmission.

Unauthorized Digital Audio Transmission of phonorecord is infringement. (§§114, 115).

1.116 INJUNCTION:

See topic 1.192 Remedies for Infringement.

1.117 INTERNATIONAL COPYRIGHT ARRANGEMENTS:

As to rights of aliens to copyright protection in the United States, under bilateral presidential proclamations, Buenos Aires Copyright Convention (of 1910), and Universal Copyright Convention (of 1952), Berne Convention (1886), GATT (1994), and WIPO Conventions (1996) see: topics 1.07 Aliens (Protection in U.S.A.); 1.114 Importation; 1.152 Notice of Copyright; 1.181 Publication; Unpublished Works; 1.235 Universal Copyright Convention; 1.25 Berne Convention.

As to protection of the copyrights of United States citizens or domiciliaries, outside of the United States, under the above proclamations, treaties and Conventions, see: 1.07 Aliens; 1.99 Foreign Rights; 1.152 Notice of Copyright; 1.235 Universal Copyright Convention; 1.25 Berne Convention.

1.118 INTERNET:

Unauthorized downloading from Internet is infringement as well as unauthorized loading of copyrighted works on Internet. Transmitting copyrighted works digitally over Internet is infringement. Infringement issues that are still developing in courts involve linking to various sites; framing, modification of another site; niching, modifying or eliminating copyright management information; modifying works to allow more rapid transmission; sharing of copyrighted recordings; streaming of music. Providers of Internet services may be responsible for actions of users of service. (907 F. Supp. 1361). However, §512 of statute has now relieved service providers from most liability for material circulated by customers via their service. Party who posted unfinished version of movie “Hulk” on Internet pled guilty to felony copyright infringement and was sentenced to six months home confinement, three years probation, fined $2,000 and ordered to pay $5,000 in restitution to copyright owner in United States v. Kerry Gonzalez, … F. Supp … (S.D.N.Y. September 2003).

Because of worldwide presence of Internet, foreign copyright laws and other statutes may apply to material on U.S. website.

See topic 1.207 Service Providers.

1.119 JEWELRY, DISHES, TAPESTRIES, SILVERWARE, ETC.:

See topic 1.245 Works of Art.

1.120 JOINT AUTHORSHIP:

Joint work is work prepared by two or more authors with intention that their contributions be merged into inseparable or interdependent parts of unitary whole. (§101). While works combined without such intention during preparation are capable of copyright protection, they are not joint works. Intent that work be joint work must be mutual; if only one author has requisite intent, it is not joint work. Authors of joint works may independently license work but are accountable to co-author. Law is not clear on whether said intention must be subjective or objective but it must be prior to creation of work.

Contribution of each joint author need not be equal in amount. Thus, one who suggests idea for work (not copyrightable) is not joint author with person who carried out such work. Likewise, nature of thing depicted in photograph, or subject of photographs is not copyrightable and one who created subject of photograph (e.g. sculpture) or is subject (e.g. celebrity) is not joint author. (N. D. Ill. 2000, 111 F. Supp.2d 1003; S.D.N.Y. 2000, 104 F. Supp.2d 236 Copyright Cases or Patent Cases).

Test for joint authorship prior to 1978 was more liberal. Such test applicable to works created pre-1978.

Varying interest in or proceeds from work or joint work requires written instrument. Since considered assignment. (921 F. Supp. 1154).

1.121 JOINT LIABILITY:

See topics 1.115 Infringement, subhead Joint and Several Liability; and 1.192 Remedies for Infringement, subhead Joint and Several Liability, catchline Sponsors.

1.122 JOINT OWNERSHIP:

Joint ownership includes joint authorship as well as ownership based on assignment of ownership interest from one to another. In community property states care should be taken to consider potential ownership in both spouses.

All interests in copyright may be assigned or subdivided thereby breaking up copyright in many ways.

1.123 JUKE BOXES:

Operators of coin-operated phonorecord players are subject to negotiated compulsory license (§116A), to perform non-dramatic musical works embodied in phonorecord (§§116, 116A).

1.124 JURISDICTION AND VENUE:

Federal Jurisdiction.

Where validity or infringement of copyright is issue, jurisdiction is granted exclusively to federal courts. (18 U.S.C. §1338). Where divisional ownership of copyright or other contractual issues are subject of litigation, no jurisdiction is granted to federal courts except in diversity situations. (Bassett). However, when complaint alleges claim or seeks remedy provided by Copyright Act, federal jurisdiction is properly invoked, even if contract claim is also pled. Also, when interpretation of contract requires construction of Copyright Act and seeks remedies thereunder, federal jurisdiction will lie. Claims as to matters that have not been preempted by Federal statute, such as relating to matters not reduced to tangible medium of expression, may be within jurisdiction of state courts.

Supplementary federal jurisdiction attaches to other state claims accompanying claim for statutory copyright infringement, based on same factual situation, not otherwise cognizable for federal jurisdiction, such as unfair competition, or implied-in-fact contracts for remuneration for misappropriation of idea bearing sufficient concreteness and novelty. See topic Jurisdiction (Pendent). (18 U.S.C. §1338). See also topic Removal.

Copyright Registration Prerequisite to Federal Copyright Infringement Suit.

Certificate of registration is necessary for suit for infringement except where refused by Copyright Office or for infringement of treaty party works whose country of origin is other than U.S. (§411). See topics Country of Origin; 1.33 Certificate of Registration, subhead Prerequisite to Suit for Infringement, supra.

Magazine publisher that registered copyrights in magazines in which plaintiff's authors' articles appeared but did not register copyrights in articles themselves, is not copyright owner capable of satisfying registration requirement of 17 U.S.C. §411(a) with respect to plaintiff's articles and publisher's registration of collective work therefore did not create subject matter jurisdiction necessary for author to bring infringement action. Court held that exclusive licensee is not copyright owner for purposes of §411(a) and affirmed district court's determination that Conde Nast's registrations do not afford copyright protection to Morris' articles. (2d Cir. 2001, 59 USPQ2d 1581 Copyright Cases or Patent Cases).

Copyright registration must be obtained specifically for work infringed; courts do not have subject matter jurisdiction over alleged infringements of unregistered derivative work. See Well-Made Toy Mfg. Corp. v. Goffa Int'l Corp. 354 F.3d 112 (2d Cir. 2003).

Plaintiff.

Infringement suit must be by owner of exclusive right under copyright including exclusive licensee. It cannot be brought by non-exclusive licensee alone. (§501). Owner of entire copyright or only part of copyright may sue.

Injunctions.

The power to grant injunctions to prevent and restrain violations of rights granted under copyright, "in accordance with the course and principles of courts of equity" upon complaint by "any party aggrieved," is specially conferred by §502. Injunction can be served and be operative throughout U.S., and be enforceable by proceedings in contempt or otherwise by any Court possessing jurisdiction of defendants. Copyright proprietor must also be party to action if aggrieved complainant is not proprietor.

Personal Jurisdiction.

Individual state “long arm” statutes have been used to obtain personal jurisdiction over individuals and companies. (352 F. Supp. 1062; 374 F. Supp. 47).

New International Borders of Internet.

While use of firewalls and various technological screening or filtering devices is increasing, traditional limitations of copyright-related jurisdictional claims, whether in personam or in rem in nature, is changing dramatically in not only intellectual property field but also in respect to areas such as defamation, pornography, gambling, taxation and trade practice conduct generally. Court decisions in U.S. distinguish between active and passive web sites to assert personal jurisdiction on traditional “contacts” test. Active web site provides basis for assertion of jurisdiction consistent with due process because owner of foreign web site obtains economic benefit or causes economic harm to forum residents. Owner of passive web site provides information or does not pose economic risk to forum residents. U.S. and international court decisions are skewed in their application of principles of jurisdiction in Internet and online context and Congress and multilateral bodies such as World Intellectual Property Organization (WIPO) and World Trade Organization (WTO), among others, are struggling to develop, adopt and implement protocols and treaties to address these gaps in global legal community of states.

E.g., Cybersell v. Cybersell, 130 F.3d 414 (9th Cir. 1997) (finding that Cybersell FLA. passive website lacked sufficient contacts with State of Arizona to give AZ court jurisdiction with respect to complaint filed by Cybersell AZ); ALS Scan, Inc. v. Digital Service Consultants Inc. 293 F.3d 707 (4th Cir. 2002); Panavision v. Toeppen, 141 F.3d 1316 (9th Cir. 1998) (finding that “cyber pirate” Toeppen's registration of Panavision domain name harmed Panavision in California thereby giving California Court personal jurisdiction over Toeppen in Illinois).

Venue.

While a defect in jurisdiction would be fatal at any stage, defect in venue may be waived.

The venue of any action, suit or proceeding under the copyright statute is the district in which the defendant or his agent resides or may be found. (Tit. 28, U.S.C. §1400[a]).

Suits to Declare Copyrights Invalid.

Purported owners of copyrights are indispensable parties to action seeking to invalidate their copyrights and to divest them of ownership therein, and if jurisdiction cannot be obtained over such nonresident defendants, action cannot be enforced against resident defendants who acted under authority of such nonresident defendants until invalidity of copyrights in question is adjudicated. (8th Cir. 1959, 271 F.2d 204, 123 USPQ 296).

1.125 JURISDICTION (SUPPLEMENTARY):

In addition to exclusive original jurisdiction given to District Courts of U.S. of any civil action arising under Tit. 17 U.S.C. (Copyright) by subsection (a) of 28 U.S.C. §1338, subsection (b) of same section confers original jurisdiction of any civil action asserting claim of unfair competition when joined with substantial and related claim under copyright laws. Such supplementary jurisdiction appears also to cover claims based on same set of facts as infringement claim by which federal jurisdiction was invoked and which are not preempted. Otherwise than as supplementary to such infringement claim based on similar facts, a common law unfair competition, or common law copyright infringement or breach of contract claim is a state matter cognizable in state courts, or by federal court applying state law where federal jurisdiction is obtained by diversity of citizenship and requisite jurisdictional amount. (S.D.N.Y. 1971, 329 F. Supp. 601, 171 USPQ 339). See topic Removal.

1.126 JURY TRIAL:

Where actual damages are requested, parties are entitled to jury trial. Where only injunction is requested, jury trial is not of right. Where only statutory damages are requested, there is right to jury trial. (Feltner).

There is split among courts as to whether request for disgorgement of profits justifies request for jury trial.

1.127 LABELS:

See topic 1.171 Prints and Labels.

1.128 LETTERS, DIARIES, JOURNALS, PRIVATE NOTES:

Such works are considered literary works. (§106). Sending of letter to another does not transfer copyright in letter which remains with author, although recipient may own physical letter itself.

1.129 LIBRARIES:

See topic 1.166 Photocopying.

1.130 LICENSES:

Non-exclusive license is waiver by, or under authority of, copyright owner, of right to consider as infringing any particular use of work which, but for permission and to extent thereof, would have been violation of exclusive right secured by copyright.

Divisibility of Copyright.

Under 1909 law, assignment could not be made of individual rights that are granted to copyright owner. Such rights could only be licensed and non-exclusive licensee could not sue for infringement.

Under current statute, individual rights granted by §106 are divisible and can be licensed or assigned by copyright owner. (§201). Thus one owning by assignment one or more exclusive rights or exclusive licensee may sue for infringement of his right.

Community Property.

Care should be exercised in community property states to obtain signature of both spouses to exclusive license or assignment.

How Granted.

A license may be granted orally or in writing, for consideration or as gift. Ordinarily it is granted for consideration, monetary or otherwise, pursuant to agreement. Scope and extent of license, terms and conditions upon which it is granted and may be terminated, are governed by terms, express or implied in fact, of grant or agreement. Unlike question of infringement of copyright, which is governed exclusively by copyright statutes, questions in respect of licenses are governed by laws of various States as to gifts, contracts, monopoly, illegality, etc., or of applicable federal statutes if interstate commerce is involved.

Licenses may be exclusive or non-exclusive, and may be limited as to time, place, territory, person, or to one or more uses in whole or in part. They may be express or implied, written or oral. Exclusive license is considered transfer of right and must be in writing. See topic 1.17 Assignment.

Interpretation and enforcement of assignments and licenses is properly tried in state courts not federal.

Conflicts with Transfer.

Non-exclusive license, whether recorded or not, prevails over conflicting transfer of copyright ownership if taken before execution of transfer or if taken in good faith without knowledge of transfer before it is recorded. (§205[e]).

Violation of License Limitations.

Where the licensee exceeds or disregards the time, place, personal, or other limitations of his license, such other uses are unlicensed, and the licensor can, at his option, elect to treat the same either as a tortious infringement or as a breach of express or implied obligations of the license agreement not to exceed or disregard license limitations. (530 F.2d 1096). Licensee who enables others to infringe may be guilty of contributory infringement.

Parole Evidence Rule Applicable to License Limitations.

For detailed discussion and documentation of the doctrine that the parole evidence rule will preclude a limited licensee under the copyright from establishing an asserted prior or contemporaneous parole agreement permitting like use of the copyright at other or additional times and places, see 166 F. Supp. 494 D.C. Neb., 1957, 117 USPQ 335, holding that licensee of right to publish copyrighted advertisement, in designated city only, infringed copyright when he also published advertisement in second city, despite claimed contemporaneous oral agreement permitting him so to do.

Term of License.

While the term of a license, in the absence of express agreement, will be dependent primarily on the evidence of the expressed intention of the parties, the rule of patent license construction that the license is for the unexpired term of the patent, may well be followed in copyright cases where the agreement is silent as to term. (20 F. Supp. 314 Copyright Cases or Patent Cases). See subhead Cancellation of License, infra.

Cancellation of License.

License granted by author can be terminated at anytime during period of five years beginning at end of 35 years from date of execution of grant, with or without cause and notwithstanding any express term set forth in license. (§203). As to termination of license made prior to Jan. 1, 1978, see §204(c). See topic 1.17 Assignment, subhead Rescission of Assignment. Right of termination is not assignable or otherwise alienable. Such right may, however pass, to authors' heirs as provided in §203.

Trustee in bankruptcy can reject or terminate executory contracts such as license. This can present problems for both parties to contract. See §265, 11 U.S.C.

License by Co-owner.

A valid license may be given by one joint owner of a copyright without the consent of his co-owners.

However, such license must be *non-exclusive*. All co-owners must join for an effective *exclusive* license, or transfer of *exclusive* rights (e.g., the exclusive motion picture rights to a copyrighted story), and if one such co-owner later seeks to repudiate the exclusive grant, he cannot do so without the other co-owners, unless he takes the burden of pleading and proving their bad faith in refusing to go along with him. (1961, 3 N.Y.2d 339, 132 USPQ 82).

Estoppel of Licensee.

For decades, doctrine of estoppel of a patent licensee, and by analogy a copyright licensee, to question title of his licensor, or validity of his patent, in a suit for unpaid royalties, has been asserted and apparently generally, accepted.

Warranty of Validity Not Implied.

The general rule that warranties of validity are not implied in the case of patent licenses (216 N.Y. 40, 46) would appear to be applicable to copyright licenses.

Implied Negative Covenants.

There are implied mutual negative covenants that the licensor will not injure the licensee by use of his ungranted rights and the licensee will not injure the licensor's ungranted rights. (252 U.S. 317).

Licenses for Uncreated Works.

A license would be good whether the work is in being or to be created in the future, and it would be immaterial whether a subsequent assignee of the work had notice of prior licenses.

Suits by Licensees.

An exclusive licensee whose rights have been invaded can obtain federal jurisdiction for infringement suit under copyright without joining copyright owner as co-plaintiff. (§501[b]).

Licensee has no standing to sue for infringement of statutory copyright, except as an exclusive licensee.

If the legal owner of the copyright is entitled to relief on his own account, he need not join equitable interests in the ownership, but the judgment will be limited to redress of the legal owner's own interests and the rights of the others reserved. (140 F.2d 268; 140 F.2d 266; 140 F.2d 270). A request for injunctive relief in which the rights of the exclusive licensee are those concerned, would appear to require the exclusive licensee of such particular exclusive right as a necessary co-complainant, since he is really the “party aggrieved” and the real party in interest as to such dispute. Court may order service of notice of suit on others with interest in copyright. (§501[b]).

Illegality in Licensing.

See this topic supra; also topics Misuse; 1.140 Monopoly and Trade Restraints.

Compulsory Licenses.

There are several compulsory licenses granted by Act. Principal ones are: cable television (§111), juke boxes (§116), phonorecords of musical works once recorded (§115), public broadcasting (§118), digital recording devices (§1008) and digital audio transmissions (§§114, 115). Satellite retransmissions. (§122).

Licensing Organizations.

Organizations have been formed to handle licensing of works which would be difficult or inefficient for individual copyright owners to arrange. These organizations include ASCAP, BMI, SESAC, Harry Fox Agency and Sound Exchange.

Scope of License.

Care should be taken by licensee to include sufficient rights to accomplish all intended activities. For example, license to publish work should include right to publish in electronic media. Rights not specifically granted may be considered reserved to licensor. In many instances, license terms are included in software packaging and in dialogue box appearing on computer screen (accepted by clicking mouse). If terms are reasonable and purchaser of software can return program if purchaser does not accept license terms, licenses will be enforced against licensee.

Licenses—Authors' Grants of Electronic Rights.

§201(c) of Copyright Act, which permits publishers to revise collective works, does not authorize publisher of periodicals to publish, in electronic and CD-ROM databases, articles that were licensed by independent contractors for publication in printed periodicals. Freelancer may license electronic rights and without such license publisher may not re-publish article that previously appeared as part of collective work, in print, as standalone electronic work or within new collective electronic work. (2001 … U.S. …, 121 S.Ct. 2381 Copyright Cases or Patent Cases, 150 L.Ed.2d 500 Copyright Cases or Patent Cases).

Shrinkwrap Licenses.

While “shrinkwrap” licenses for software have regularly been upheld as enforceable against consumers when tested in federal courts, whether such licenses will continue to be fully enforceable in Internet online environment is being tested presently. Type of legal issues involved are probably best framed by ProCD, Inc. v. Zeidenberg, 86 F.3d 1447 (7th Cir. 1996), wherein Court of Appeals held that “shrinkwrap” licenses are enforceable under general contract law since Zeidenberg who had opportunity to read contract terms and failed to exercise his option of return was deemed to have consented to “shrinkwrap license terms” when he used product. By contrast, in Specht v. Netscape, 2d Circuit Court, applying California law, held that Netscape's license agreement was not enforceable because someone trying to obtain software was not required to read license agreement and consent to its terms in order to download subject software. Some of these issues may be resolved if majority of states adopt UCITA (see topic Uniform Computer Information Transactions Act) but that result is uncertain.

Interpretation and enforcement of licenses is state court action.

1.131 LIENS:

Statute's definition of transfer of copyright includes transfer by mortgage or hypothecation (§101), thus lien may arise as to copyright.

Copyright statute (§202) makes it explicitly clear that incorporeal copyright is distinct from any property in material object copyrighted. Such §202 further provides that sale or conveyance, by gift or otherwise, of material object does not of itself constitute transfer of copyright; and that assignment of copyright does not constitute transfer of material object.

It is important, therefore, to distinguish foreclosure of liens by way of mortgage or otherwise upon the incorporeal copyright from foreclosure of lien on material object.

Involuntary Sales of Copyrighted Goods.

The “first sale” of copyrighted material may be effective and noninfringing, even if not voluntarily made by the copyright owner, as where it is some reasonable and recognized form of compulsory transfer, such as a judicial sale or court compelled assignment. Copyrighted goods are not immune from the normal remedies of unpaid creditors until the copyright owner has made a truly voluntary sale. However, the unpaid manufacturer engaged by the copyright owner to make the goods, cannot resort to self-help by selling the copyrighted goods on the basis of a contract or lien under State law, before an adjudication by a court that the manufacturer is entitled to do so, and a U.S. District Court can temporarily restrain such sale pending determination of the right so to sell. (2d Cir. 1963, 315 F.2d 847, 137 USPQ 268).

Bankruptcy.

In the absence of proof that a bankruptcy court exercised its equitable power to cut off liens on the bankrupt's property, the District Court denied motion for summary judgment of dismissal made by alleged infringing film producer defendant who claimed that plaintiff author, not being the nominal owner of the copyright, had lost any possible lien as equitable owner of all rights therein other than serial publication, when the serial publisher as nominal copyright owner went through bankruptcy. (S.D.N.Y. 1962, 209 F. Supp. 150, 135 USPQ 356).

During bankruptcy, trustee may accept or reject any executory license under copyright thereby possibly extinguishing license. See 11 U.S.C. §365.

1.132 LIMITATION OF ACTIONS:

Criminal and Civil Proceedings.

Statute of limitations is for period of five years after cause of action arose in criminal matter and three years after claim accrued in civil matter. (§507). If infringement continues after said period suit may be maintained for current infringement.

Since general equitable reasons are available to plaintiff to explain away non-timely filing of copyright infringement suit, copyright limitation provisions being remedial rather than substantive, application of Florida Blameless Ignorance rule was unnecessary, and would have been inapplicable in any event under general equitable principles available to plaintiff, if plaintiff could establish same. Plaintiff who had general awareness of infringement, but was unable to obtain actual evidence by way of infringing copy, could have sued, but failed to do so, during three year period following his first awareness. Knowledge of infringement excluded plaintiff from equitable principle that successful concealment of cause of action and fraudulent means to achieve that concealment will toll statute of limitations. (Court indicates that such principle is not to be confused with doctrine applicable where gist of action is fraud, and concealment is inherent in fraud, citing 1946, 327 U.S. 392, 90 L.Ed 743.) Summary judgment dismissing plaintiff's suit was granted. (5th Cir. 1971, 446 F.2d 338, 170 USPQ 378).

Plaintiff's amendment time-barred where plaintiff sued for infringement of her copyright in books two days before three year limitations period expired and sought to amend complaint to include allegations of copyright infringement of TV script as to which she had sought registration one year after filing complaint. Trial court held that infringement of copyright in script is entirely new and different claim than infringement of copyright in book and does not relate back to original filing because does not arise out of same conduct, transaction or occurrence. Circuit court held that plaintiff's amendment was futile regardless of whether it related back; even if infringement has been plead, court would not have had jurisdiction because plaintiff must register or attempt to register copyright before instituting suit, and she did not apply to register copyright in scripts until long after limitations period had run. (11th Cir. 2000, 216 F.3d 1281 Copyright Cases or Patent Cases).

Tort is continuing one with new cause of action arising from each instance of infringement. If no new act of infringement occurs, statute of limitations runs from last act. (37 F.3d 180).

1.133 LOOSE-LEAF PUBLICATIONS:

Each issue is considered separate work.

1.134 MAGAZINES:

See topic 1.163 Periodicals.

1.135 MANUFACTURING PROVISIONS:

Requirement of U.S. or Canadian manufacture to maintain copyright in certain English language literary material expired on July 1, 1986. Validity of U.S. works published before 1986 and still copyrighted may be attacked for failure to comply with manufacturing requirement.

See also topic 1.114 Importation.

1.136 MAPS:

Maps are registrable as pictorial or graphic work.

Defendant cartographer who did not copy from plaintiff's copyrighted outing maps, but largely from independent productions of automobile club, was not infringer because 193 place names thereon for lakes, streams, etc., had been created by plaintiff for latter's maps, since subsequent cartographers could use plaintiff's names with impunity, his copyright not extending to such places so named. (9th Cir. 1960, 281 F.2d 543, 126 USPQ 483, aff'g S.D. Cal. 1959, 177 F. Supp. 303, 123 USPQ 475). Facts are not copyrightable.

There has been a tendency, where copyrighted maps are concerned, of some courts to depart from the otherwise liberal attitude toward “originality.” Such courts want something more than the effort of compiling information secured by others; originality must be predicated on maker securing a reasonable portion of the information himself. (D. Hawaii, 1961, 201 F. Supp. 301, 133 USPQ 65; See, also, E.D. Va. 1957, 162 F. Supp. 561, 117 USPQ 332; Sparaco [2d Cir. 2002]).

A map was upheld as copyrightable, even though source of materials assembled, prepared, collated and compiled was primarily from government maps, aerial photographs, assessor's records, etc., but copyright protection is limited to new and original contributions of map-maker. (9th Cir. 1966, 362 F.2d 515, 150 USPQ 160).

1.137 MECHANICAL RIGHTS (DRAMAS AND MUSIC):

See topic 1.152 Notice of Copyright, infra; also topics 1.198 Rights Under Copyright, infra; 1.192 Remedies for Infringement.

1.138 MERGER:

Where idea is simple and capable of only limited means of expression, protection of such expression may improperly protect idea. Doctrine of merger may preclude finding of infringement except in case of slavish copying.

1.139 MISUSE:

Using copyright beyond its recognized limits or other actions which stifle competition, including using copyrights in antitrust violations, result in misuse. Also included would be improper conduct by copyright owner before Copyright Office. (In re Napster, Inc. copyright litigation 191 F. Supp.2d 1087 [N.D. Cal. 2002]). If court finds misuse it may not enforce copyright until effects of misuse are dissipated. Misuse is not personal defense and can be raised by any defendant.

Of similar nature is concept of unclean hands, which results from some reprehensible conduct of copyright owner against defendant, and court concluding that it would not be equitable to enforce right where plaintiff has himself been inequitable.

Misuse may be found in tying of service contracts with sale of software or computers or in prohibiting licensees from developing competitive software.

1.140 MONOPOLY AND TRADE RESTRAINTS:

The exclusive rights conferred by a copyright are sometimes referred to as a monopoly. Except that the rights are incorporeal, and not necessarily embodied in the physical objects in which expressed (which may be owned by others), the so-called monopoly is essentially no more than that of any owner of real or personal property to prevent trespass or appropriation of his exclusive right to enjoy his own property.

For many years it had been accepted that certain of the restraints necessarily imposed by the exclusivity of the right afforded by patent or copyright were statutory exceptions to restraints prohibited under the anti-trust laws. For a generation, great industries have developed marketing practices, by way of licensing under patent or copyright, deemed legal exceptions to the prohibitions of the anti-trust laws. For example, price fixing by the patent owner of the first sales by a licensee to manufacture and vend, has for many years been legal under U.S. v. General Electric. (272 U.S. 476 Copyright Cases or Patent Cases). Its doctrine, although questioned, has not been overruled (333 U.S. 287 Copyright Cases or Patent Cases), but a conspiracy to fix prices would bring patent or copyright licensors within prohibitions of anti-trust laws.

Antitrust Suits.

Federal and private suits have been brought, particularly in motion picture and music fields. Antitrust violations are also raised as defenses to infringement suits. Objectively reasonable copyright infringement suits cannot be “sham” within meaning of exception to Noerr doctrine immunity from antitrust liability, regardless of plaintiff's subjective intent. (113 S.Ct. 1920, 26 USPQ2d 1641).

Pooling of copyrights of several copyright owners for purposes of licensing and enforcement is not per se illegal, but can lead to antitrust infractions if misused. See such organizations as ASCAP, BMI and SESAC.

1.141 MORAL RIGHTS:

After long debate over moral rights of authors, Copyright Statute was amended on Dec. 1, 1990 providing for similar rights in case of visual art. Visual art rights are now defined in statute as any painting, drawing, print, sculpture and certain photographs made in limited number. Other types of visual and graphic works are specifically excluded from definition. (17 U.S.C. §101). In U.S. term “moral rights” is not accurate description of rights granted and is not coequal to foreign moral rights.

Rights granted are of attribution, that is, to claim or disclaim authorship, and right of integrity, that is, to prevent intentional distortion, mutilation or modification of work which would be prejudicial to author's honor or reputation and to prevent any intentional or grossly negligent destruction of work of recognized stature. There are several detailed limitations on these rights. (17 U.S.C. §§106A, 113[d]).

These rights are personal to author and do not pass with assignment of copyright. These rights may be waived but not assigned.

Rights endure for life of author, not copyright owner.

1.142 MORTGAGES:

The copyright statute expressly provides that the statutory copyright and any of its exclusive rights may be assigned, granted or mortgaged by instrument in writing signed by copyright owner, or may be bequeathed by will. (§201[d]). See topic 1.17 Assignment. Being creature of federal statute and no longer existent at common law, incorporeal right of copyright would not appear to be appropriate subject of chattel mortgage at common law. It has been held that it can be mortgaged only under federal copyright law. (272 Fed. 886).

Where individual author's ownership of copyright has not previously been transferred voluntarily by that author, no action by any governmental body, official or organization may force involuntary transfer of copyright. (§201[e]). Transfer under mortgages or bankruptcy are not considered within this provision against involuntary transfers.

Right of termination of assignment or licenses under §203 cannot be assigned or transferred until such right of termination vests. (§203[b]).

1.143 MOTION PICTURE COPYRIGHTS:

Assignment of copyrights in motion pictures shall, except in case of transfer of security interest, carry with said assignment obligation by assignee to perform under any collective bargaining agreements relating to creation of motion picture. (28 U.S.C. §4001).

1.144 MOTION PICTURE SOUNDTRACKS:

These works are not considered either as sound recordings or phonorecords but are considered part of motion picture. (§101).

1.145 MUSIC RECORDINGS:

See topic 1.165 Phonograph Records (Phonorecords) and Tapes.

1.146 NAME OR TITLE OF WORK:

There is no protection under the copyright statute in name or title of a copyrighted work, although there might be protection under principles of unfair competition (8th Cir. 1962, 299 F.2d 320, 132 USPQ 483) or trademark law if title is for series of works.

See topic 1.150 Non-Copyrightable Works, subhead Titles or Names of Works, infra; also, subhead Appropriation of Title Names: Secondary Meaning under topic 1.232 Unfair Competition.

1.147 NAMES (ANONYMOUS, ASSUMED, FICTITIOUS):

That copyright statute contemplates possibility of names other than author's true name appearing on work, is indicated in §§101, 302. Term of copyright for pseudonymous and anonymous works is 75 years from first publication or 100 years from creation unless author's actual name is recorded in Copyright Office, in which event term becomes life plus 50 years.

Name in Copyright Notice.

The owner's (rather than author's) name should appear in copyright notice when work is published. Under common law, one can adopt any name he chooses so long as he is not engaged in fraud, and he need not use it exclusively in all his businesses. In common law domiciles it would appear owner has right to use his pen name, or new name, in notice, as well as in application for copyright. In jurisdictions which have departed from common law by statutes making illegal use of fictitious individual names for business purposes, or company names, or partnership names, where there is not in fact any partnership or company, or unless fictitious name, company or partnership name has been duly registered in compliance with statute, there may not be sufficient legal entity to justify use of fictitious name in notice of copyright or application for registration.

1.148 NATIONALITY:

See topic 1.07 Aliens.

1.149 NEIGHBORING RIGHTS CONVENTION:

These are rights related to, but not necessarily part of the copyright statute, and are often referred to as “neighboring rights.” Under sponsorship of UNESCO, the BERNE UNION, and International Labor Organization (ILO), the “International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations” was adopted by a diplomatic conference at Rome on Oct. 26, 1961. The U.S. Register of Copyrights acted as Rapporteur-General. Although 23 countries signed, the U.S. decided not to do so. There is very substantial opposition in U.S. by various major copyright interests to U.S. becoming member, or to area of neighboring rights being enlarged by legislation.

This Rome Convention of 1961, or so-called “Neighboring Rights Convention,” provides for reciprocal national treatment between contracting States in respect of protection given to performers, record producers, and broadcasters. Certain minimum general protection is required, such as prohibition of clandestine recording of performances, copying of phonograph records without producer's permission, and “off-the-air” recording of broadcasts without authorization from the broadcasting organization. The principle of payments for the use of phonograph records in broadcasting was written into the Convention, but any member country is permitted to refrain from adopting this principle.

Above Convention Into Effect May 18, 1964.

Above International Convention for Protection of Performers, Producers of Phonograms, and Broadcasting Organizations, finally came into effect, in accordance with its terms, on May 18, 1964, three months after sixth country (Czechoslovakia) had deposited its ratification, acceptance, or accession.

U.S. has not ratified, accepted, or acceded to the convention.

U.S. has given limited rights to performers against unauthorized fixation of live music performances. (§1101).

World Intellectual Property Organization (WIPO) administers above Convention since WIPO Convention came into effect on Apr. 16, 1970.

U.S. Adoption of Similar Rights.

New §1101 was added to U.S. statute providing for protection against unauthorized fixation of live musical performances or transmission thereof or trafficking therein.

1.150 NON-COPYRIGHTABLE WORKS:

Works which are not fixed in tangible medium of expression cannot be protected by statutory copyright.

Works in “Public Domain,” works published before July 1, 1909, in U.S. or any foreign country, and not already copyrighted by that day in U.S., Government publications and seditious works cannot be copyrighted. Obscenity cannot be ground for denial of copyright and suggested same would be true of other types of illegal subject matter. (604 F.2d 852).

Isolated Words and Phrases.

It is well established that copyright or literary right does not extend to words or phrases isolated from their context, nor do they extend to abstract ideas or situations. Common phrase, in and of itself, is not susceptible of copyright nor of appropriation by any individual.

Titles or Names of Works.

Copyright of the work does not give the author exclusive right to use of the title or name by which he identifies his work. Other authors are free to use the same title or name for their works, as far as the copyright statute is concerned. But persons may subject themselves to action for unfair competition if there is an element of “passing off” a different work with the same title as a prior work which the public has come to identify by that title. See also topic 1.232 Unfair Competition.

Listing of Material Not Subject to Copyright.

Materials listed in current statute include: (a) Words and short phrases such as names, titles, and slogans; familiar symbols or designs; mere variations of typographic ornamentation, lettering or coloring; mere listing of ingredients or contents; (b) ideas, plans, methods, systems, or devices, as distinguished from particular manner in which they are expressed or described in writing; (c) blank forms, such as time cards, graph paper, account books, diaries, bank checks, score cards, address books, report forms, order forms and like, which are designed for recording information and do not in themselves convey information; (d) works consisting entirely of information that is common property containing no original authorship, such as, for example: standard calendars, height and weight charts, tape measures and rulers, schedules of sporting events, and lists or tables taken from public documents or other common sources; (e) useful articles; (f) works not reduced to tangible medium of expression; (g) works that are not original. (§§101, 102, 113).

Tradenames, brand names and slogans are not protected by the copyright statute, but are protected under other laws. (2d Cir., 1959, 266 F.2d 541, 121 USPQ 359). See 15 U.S.C. §1051 and also topic 1.232 Unfair Competition.

Ideas, etc.

Ideas, plans, systems, methods and plots, as such, are not protected by copyright from use by others. Expression of author by way of description or illustration may be copyrighted, but copyright will protect only against copying of description or illustration, and not against utilizing, discussing, treating, describing, illustrating or otherwise using ideas, systems, plans, etc., themselves. See topic 1.112 Ideas, Plans, Systems, Methods, Kits, Etc.

Scene A Faire.

Circumstances, characteristics and events that necessarily flow from idea are referred to as scenes a faire and are not protectible under copyright.

Public Documents.

Messages of Governors, reports of legislative committees, opinions of State courts, texts of codes, rules and regulations of departments and agencies of State of New York, are in public domain. However, editorial notes or comments appearing in official compilations thereof may be copyrighted. (Opinion of New York Attorney General, Aug. 21, 1973, reported in 180 USPQ 332).

Noncreative Authorship.

Works that do not rise to level of creative authorship are not copyrightable. (536 F.2d 486).

Infringement.

Infringing material, being non-original, is uncopyrightable.

1.151 NON-PUBLIC PERFORMANCES OR RENDITIONS:

See topic 1.192 Remedies for Infringement; also topic 1.198 Rights Under Copyright.

1.152 NOTICE OF COPYRIGHT:

Absence of copyright notice does not indicate that work is not copyrighted.

Traditionally, proper copyright notice upon publication had been essential part of U.S. copyright law. On Mar. 1, 1989 all requirements for copyright notice were eliminated to allow U.S. to join Berne Convention. To encourage continued voluntary use of notice certain evidentiary benefits have been retained. (§401).

Whether or not work fell into public domain because of defect in notice or no notice will be decided according to law in effect at time of original publication. Therefore works published before Berne adherence in 1989 must be tested by then current notice requirements. Pre-1978 notice requirements were very rigorous. Statements below regarding notice relate primarily to post-1978 law.

Correction of Notice Post-Berne.

Coming into effect of Berne waiver of notice did not relieve from requirement to correct defective notice on pre-Berne publication. (30 USPQ2d 1612).

Position of Notice.

Position of notice shall be in such manner and location as to give reasonable notice of claim of copyright. Register of Copyright shall provide specific examples of proper place and manner of notice. (§401[c]).

Copyright Office published examples of acceptable methods of affixation and positions of copyright notice. (37 CFR §201.20). These examples are not intended to be exhaustive.

Form of Notice.

Notice shall consist of three elements: (a) Symbol “©” or word “copyright” or abbreviation “Copr.” (form “©” is recommended since this also satisfies Universal Copyright Convention); (b) year of first publication of work (except as to greeting cards, postcards, stationery, jewelry, dolls, toys or useful articles); and (c) name of owner of copyright or abbreviation by which he can be recognized, or generally known alternative designation of owner. (§401).

Works published before Dec. 31, 1977, when republished or distributed after that date, may bear notice complying with new Act or old Act.

In case of phonorecords of sound recordings notice requirements are generally same except symbol &copysr; should be used. (§402).

Where work consists preponderantly of works of U. S. Government, notice should designate those nongovernmental portions of work protected under Act in order to obtain evidentiary value of notice. (§403).

In case of collective works, notice for collective work as whole is sufficient to cover individual contributors' rights except for advertisements but individual contributors may or may not use their own separate copyright notice. (§§404, 406[a]).

Omission of Notice.

Under Law prior to Jan. 1, 1978 omission of or defect in notice of copyright upon publication lost copyright in most instances. After that date and until Mar. 1, 1989 omission of or defect in required notice did not invalidate copyright if: (a) Omitted from only relatively small number of copies, or (b) registration is accomplished within five years of publication without notice and reasonable effort is made to add notice to all copies distributed after omission of notice is discovered, or (c) notice was omitted in violation of requirement in writing to include notice. (§405[a]). Subsequent elimination of need for notice in 1989 does not eliminate need to correct improper notice on works published prior to 1989. (36 F.3d 1214).

Infringers who act innocently based on absence of notice on authorized copy of work published prior to 1989 are not liable for damages before receiving notice of copyright. (§405[b]).

Where error in owner's name occurs, one who operates under transfer or license from named owner is not liable for infringement unless registration has been made in true owner's name or document executed by named owner showing ownership has been recorded. (§406[a]).

Where error in date occurs that states date earlier than actual publication date, any rights dependent on date of publication run from stated date. If stated date is later than date of publication, work is treated as having no notice of copyright as discussed above. (§406[b]).

Omission of Notice on Foreign Works.

Many works of foreign origin, published abroad without proper notice, passed into public domain in U.S. Adherence to Berne Convention and GATT prompted restoration of copyright to such works as of Jan. 1, 1996. Provisions protect to limited extent persons who relied on public domain status (“reliance parties”). (§104A).

Prior Act Notice.

Notice under prior Act was much more formalized and failure to comply could result in forfeiture of copyright. In determining whether work published under prior Act is in public domain, prior Act and cases interpreting them control.

When Notice Recommended.

Notice of copyright should be used whenever work is published by authority of copyright owner in U.S. or elsewhere.

Notice in New Editions.

In the case of new editions containing a substantial amount of new matter, it might be sufficient to publish such work with a notice containing the year date of the new edition, on the ground that it is a new work subject to copyright. However, if there is any question as to whether new matter is substantially sufficient to justify work being considered new work, it may be safer to include original copyright notice as well as copyright notice containing year date of later edition, to avoid risk of losing evidentiary value of notice.

Foreign Notices.

Certain foreign laws and conventions may require additional matter with standard U.S. copyright notice, such as “All Rights Reserved” for Buenos Aires Convention or “©” and date of first publication and name of owner for Universal Copyright Convention. Individual foreign laws and conventions should be consulted for such additions.

1.153 NOTICE OF INTENT TO ENFORCE COPYRIGHT:

This is notice required to be filed in Copyright Office or served on infringer stating copyright owner's intent to enforce copyrights which had been lost but restored by §104A. See topic 1.197 Restoration of Copyright.

1.154 OBSCENITY:

Statute does not refer to obscenity as possible ground of refusing copyright, and one court has refused to deny copyright on that ground. (604 F.2d 852).

1.155 ORIGINALITY AND AUTHORSHIP:

Unlike a patentable invention, a copyrightable work does not require “novelty” to be protected under copyright statute. It is sufficient that work be “original” with particular author, and not borrowed by him from others. If it is author's own original work, he is protected against appropriation of contributions of his own origination, to extent permitted by copyright statute, by others who had access directly or indirectly to his work, even though author may have been anticipated by other authors in creation of similar or identical works.

In some instances where simple ideas are involved ways to express idea are so limited that expressions merge with idea and are uncopyrightable. (446 F.2d 738).

While a valid patent gives certain specified exclusive rights, during patent term, to art protected thereby, a valid copyright gives protection only to form of “expression” originated by author for his idea, but unlike patent not to “idea” itself.

That sculptress author of various statues of children, having facial expressions with strong dominant characteristics, permitted her common law rights therein to fall into public domain by sale in open market, and by illustrations in magazine articles, without proper copyright notice, did not bar plaintiff (as assignee of her common law rights in subsequent statuary versions) from securing valid copyrights in such versions, despite similar dominant facial characteristics, where there were sufficient new creative elements expressed. (N. D. Ill. 1972, 347 F. Supp. 1150, 174 USPQ 217).

A modicum of originality, even by way of slight variations on public domain materials, is sufficient to afford copyrightability, and protection against copying. (Feist).

Some Circuits require that such modicum be more than mere trivial variations over prior art.

Courts have found insufficient originality in simple telephone listings, price lists, facts, and lists of facts. However, if there is some creative authorship in selection and arrangement of facts, arrangement is protectable.

Where derivative work is created by changing size of work, Second Circuit requires substantial rather than trivial variations over prior works. Such originality cannot be satisfied by demonstration of physical skill or special training to produce new work. There must be artistic skill. (536 F.2d 486, 2d Cir. 1976, 189 USPQ 753).

A bald statement of fact in a consumer's magazine, which could hardly have been stated in any different fashion, was deemed too noncreative to be copyrightable, so that “quotation” thereof was not enjoined. (S.D.N.Y. 1961, 199 F. Supp. 860, 131 USPQ 438).

Educational flash cards as a teaching device on arithmetical problems, which were old and in public domain, are nevertheless copyrightable and protected against deliberate copying of plaintiff's sequence arrangements, since arrangement, plan and manner in which put together constitutes sufficient originality. (7th Cir. 1963, 313 F.2d 143, 136 USPQ 240, cert. den. 1963, 373 U.S. 913).

Copyright protection covers form of expression although not underlying system described, which is available for use by public, and if published business forms were deemed to convey sufficient information to be accepted for registration by Copyright Office, such was prima facie evidence of sufficient copyrightability. (N. D. Ill. 1967, 155 USPQ 133).

The Supreme Court in Feist v. Rural, 111 S.Ct. 1282, found insufficient authorship in list of facts, namely simple telephone directory.

1.156 PAINTINGS, ETCHINGS, ILLUSTRATIONS, ETC.:

Such works are considered copyrightable subject matter. (§102).

1.157 PANTOMIMES:

Pantomimes, if fixed in tangible medium of expression, are copyrightable. (§102).

1.158 PARAPHRASING:

To Secure Copyright.

To secure valid copyright, alleged author of a new variation in using an old uncopyrighted work or public domain materials, must do something more than merely refrain from outright copying; some non-trivial originality, must be added, which is meaningful and result from original creative work. Trivial word changes in old public domain legal forms by combining various forms and servilely imitating or paraphrasing already stereotyped language therein, is not sufficient to sustain alleged copyright in legal forms against unauthorized reprinting by defendant manufacturer and seller of such forms. (See 5th Cir. 1970, 426 F.2d 1027, 1029-30, 165 USPQ 751, 752-3, citing previous cases, cert. denied 1971, 400 U.S. 992, 27 L.Ed.2d 441; 189 USPQ 753.)

As Infringement of Copyright.

Where defendant's paraphrasing is charged to be an infringement of a valid copyright, it would seem that extent of paraphrasing and original creative effort therein need not be as meaningful as where paraphraser seeks to invest himself with a valid copyright. Copyrights on college physics text books were infringed by a manual of solutions to problems posed in texts, since paraphrasing with evasion may nevertheless be an appropriation. (S.D.N.Y. 1963, 223 F. Supp. 219, 139 USPQ 47).

1.159 PARODY:

See topic 1.95 Fair Use, subhead Parody.

1.160 PARTIES:

Plaintiffs.

Legal or beneficial owner of exclusive right under copyright is entitled to sue for infringement of said right while he or she is owner of it. (§501[a]). Thus one who is owner of only one of exclusive rights may sue for infringement without joining owners of remaining exclusive rights. Nonexclusive licensee is not considered sufficient party to bring, by himself, suit for infringement. Renewal registrant of copyright registration is not necessarily owner of copyright; thus author may renew copyright but another may own renewed copyright. (S.D.N.Y. 2000, 55 USPQ2d 1763).

Where rights of others in copyright may be affected by litigation, court shall order plaintiff to order service of notice of suit on said others. (§501[b]). E.g., motion for joinder of successors-in-interest as necessary parties granted, where defendants, heirs of copyright owner, had attempted to terminate rights by giving notice to plaintiff, neither copyright owner, nor exclusive licensee, and said notice was deemed ineffective. (S.D.N.Y. 2001, Copyr. L. Rep. ¶ 28,237).

Equitable Rights of Strangers to Suit Not Available as Defense Against Plaintiff Copyright Holder.

Where publisher as record holder of copyright, subsequently sues U.S. for infringement by wholesale photoduplication by agencies of Dept. of Health, Education and Welfare, defense of non-ownership by plaintiff of copyrights in suit, on ground that there may be equitable interests therein in absent strangers to suit, cannot be raised as defenses against legal title holder. (Opinion of Trial Commissioner for U.S. Ct. of Claims, 1972, 172 USPQ 670, citing various cases for above).

Licensing Agent of Copyright Proprietor Not Indispensable Party to Infringement Suit.

Defendant's motion to join ASCAP (American Society of Authors, Publishers and Composers) as indispensable party to infringement suit by music copyright proprietors alleging infringement of public performing rights for profit, dismissed, inasmuch as licensing agent of principal is not a necessary party where principal sues directly. (E.D. Wisc. 1971, 53 F.R.D. 364, 171 USPQ 640).

Copyright Play Owner Need not Join Assignee of Motion Picture and Sequel Rights Against Television Infringer.

Plaintiff copyright owner of a play “Stalag 17” who had sued a television broadcasting company for unauthorizedly producing a television series “Hogan's Heroes,” claimed to be based on characters in play, sought to join motion picture producing company to which plaintiff had given an outright assignment of motion picture rights, including right to make sequels using characters of play by way of television series, for which plaintiff was to be paid $16,500 per sequel (although assignee was not obligated to make such sequels). It was held that plaintiff could obtain all relief in his own suit, if entitled thereto, and joinder of assignee motion picture company was not permissible for convenience of plaintiff and inconvenience of such assignee. It was found that neither diversity, nor a federal question warranted joining motion picture company on pendent jurisdiction for alleged breach of contract to sue infringer broadcasting company or pay $16,500 for each sequel so made. Court pointed out that situation might be different if motion picture assignee held as agent or as trustee for copyright owner, and then refused to enforce rights against copyright owner. (S.D.N.Y. 1968, 293 F. Supp. 1366, 161 USPQ 376).

Assignee of Infringement Choses in Action.

Assignee of causes of action for infringement damages, past, present, and future, has right to maintain infringement action whether or not such assignee is proprietor of copyright. See Silvers v. Sony Pictures Entertainment, Inc., 330 F.3d 1204 (9th Cir. 2002), where U.S. Court of Appeals held that accrued cause of action for copyright infringement, without any other copyright rights, can be assigned to third party, thereby granting assignee right to sue for infringement violation. Also see, Gardner, et al. v. NIKE, INC., 279 F.3d 774 Copyright Cases or Patent Cases (9th Cir. 2002) wherein same federal circuit held that exclusive licensee did not have right to resell or sublicense copyright without consent of copyright owner.

Copyright Mortgagors.

Copyright owner who assigns copyright merely as security, to be effectual only in event of default, which has not occurred, continues as real party in interest, as both equitable owner and copyright owner, to maintain infringement suit. (S.D.N.Y. 1968, 294 F. Supp. 545, 160 USPQ 530).

Defendants.

Any person who infringes any one or more of exclusive rights of copyright is proper defendant, including corporate officers, inducing and contributory infringers and vicarious infringers, latter including owners of establishments where infringement takes place and if owner has control over activities there.

Federal and state governments and employees may be defendants.

1.161 PATENTED DESIGN:

See topic 1.74 Design Patent.

1.162 PERFORM:

Performance is one of exclusive rights of copyright owner. (§106).

To perform work means to recite, render, play, dance or act it either directly or indirectly. (§101). Infringement occurs only when performance is public. (§106[4]).

Public performances are those which occur at place open to public or where substantial number of persons outside normal family or its social acquaintances are gathered or which transmit performance to such place by device or process. (§101).

Certain performances in fields of education, religion, charity, government, as well as variety of other situations, are not included within exclusive rights granted to copyright owner. (§110).

Playing of radio in stores or restaurants may be infringement of performance right unless exception of §110(5) is met. For full understanding of exception legislative history and case law must be consulted.

Performance alone is not considered publication.

Transmission Is Performance.

Definition of public performance includes transmission to public or to public place. (§101). Transmission of movie to hotel room, while not transmission to public place, is transmission to public.

Performer's Rights.

Unauthorized fixation in sound recordings or musical videos or trafficking in such fixations of live musical performances shall be treated as infringement of performers' rights. (§1101). Otherwise there is no right under copyright protecting performance of artist except as such performance is included in phonorecord copyright and artist owns part of such copyright.

1.163 PERIODICALS:

This term includes newspapers, magazines, reviews and serial publications, appearing more often than once a year; bulletins or proceedings of societies, etc., which appear regularly at intervals of less than one year; and generally publications which would be registered as second class matter at Post Office. Serial publications which are not clearly “periodicals” should be registered as books.

Individual Contributions.

Only one notice of copyright is necessary for the entire issue of periodical but each contribution receives all protection which it would have if individually bore copyright notice. (§404). Advertisements are not included under such notice.

Individual contribution to periodical may bear its own copyright notice where copyright is owned by someone other than owner of copyright in entire periodical. Where such individual notice appears, separate copyright may be obtained for such work.

If special registration is requested for any individual contribution to a periodical, one complete copy of the periodical in which such contribution appears must be deposited promptly after publication. The contribution to a periodical referred to includes any writing of an author published with copyright notice in any given number of the periodical. The entire copy of the periodical should be sent; a mere clipping or the page containing the contribution does not comply with the requirements of the Copyright Office.

How to Register.

Copyright Office Circular 62 contains general information as to securing copyright to such contributions. Each installment of serial is regarded as separate contribution subject to separate copyright registration.

If separate copyright is desired for the contribution, it should contain a separate copyright notice, either on the contribution itself or in direct conjunction with it.

Copyright Office has issued regulation allowing group registration of certain serials.

1.164 PHONOGRAMS:

A descriptive word used by Secretariats for Berne Union, Universal Copyright Convention, and World Intellectual Property Organization, to cover all forms of exclusively sound recordings, whether on gramophone records, magnetic tape, film, wire, or other recording media.

1961 Rome Convention (International Convention for Protection of Performers, Producers of Phonograms and Broadcasting Organisations) defines “phonograms” in Art. 3(b) as meaning “any exclusively aural fixation of sounds of a performance or of other sounds.” U.S. is not member of this convention. U.S. is member of 1996 WIPO Performances and Phonograms Treaty.

International Protection.

For members of International Convention for the Protection of Performers, Producers of Phonograms, and Broadcasting Organisations (to which U.S. is not an adherent), see topic Neighboring Rights Convention, supra.

Convention for the Protection of Producers of Phonograms Against Unauthorized Duplication of Their Phonograms.

For development and nature of this Convention, see topic 1.99 Foreign Rights, subhead International Agreement for Protection of Producers of Phonograms against their Unauthorized Duplication as to its adoption and coming into force.

1.165 PHONOGRAPH RECORDS (PHONORECORDS) AND TAPES:

Those phonograph records and tapes produced subsequent to Feb. 15, 1972 are protected against copying by federal statute. (§102). Phonograph records produced before Feb. 15, 1972 may be protected under state law until Feb. 15, 2067 when preemption by federal law prevails. (§301[c]). Protection afforded precludes taking of actual sounds from phonorecord. It does not protect against imitating sounds, although copyright in basic music or unfair competition may offer protection.

Restored Phonograph Rights.

Certain foreign phonograph recordings first fixed prior to 1972 or which failed to comply with U.S. formalities, such as notice of renewal, were restored to copyright on Jan. 1, 1996. (§104A).

Rental.

Public rental of phonograph records for commercial advantage is infringement without permission of copyright owners. (§109).

Digital audio transmission of phonorecord may be infringement (§114), though not analog transmission.

Compulsory License.

Once author has recorded his musical work or has licensed others to do so, any other recording company may obtain rights to record same work with proper notice and payment of statutory fee. (§115). Such compulsory license does not grant permission to copy prior recording, nor does it allow reproduction of lyrics on VCR tapes as in sing-along tapes.

1.166 PHOTOCOPYING:

Problem of photocopying has not been completely settled by new Act. Concept of fair use as discussed above will still apply to photocopying.

Archives and Libraries.

It is not infringement of copyright in work where archive or library reproduces one copy if made without commercial advantage, collections of library or archives are open to public or researchers and reproduction includes notice of copyright. (§108[a]). Such sanctioned copying may only be for: (a) Preservation of facsimile of unpublished work for another library or archives. (b) replacement of work, if work is not available at fair price, (c) user of library or archives, where no more than one article or contribution to work or small part of work, or (d) in case of entire work, if it is determined that copy cannot be obtained at reasonable price. Statute also applies additional requirements on such copying (§108) as well as certain guidelines, found in legislative history, expressly adopted by legislature. See text of guidelines following 17 U.S.C. §108.

Reproductions allowed by §108 of statute do not apply to musical works, pictorial, graphic or sculptural work, or motion picture or other audiovisual work. (§108[h]).

Photocopying of articles from technical journals by research personnel of corporations for archival purposes is not fair use. (37 F.3d 881).

Educational Uses.

Fair use, 17 U.S.C. §107 is supplemented by 17 U.S.C. §110(1) and guidelines adopted by Congress in Legislative History. See text of guidelines following 17 U.S.C. §107.

Photocopying for classroom use under fair use section (§107) is subject to certain guidelines set out in legislative history. See House Report 94-1476, Pg 68 ff.

Wholesale excerpting from works without permission to form student textbook is infringement.

1.167 PICTORIAL, GRAPHIC AND SCULPTURAL WORKS:

These are two and three dimensional works of fine, graphic and painted art, photographs, prints, reproductions, maps, globes, charts, diagrams, models, technical drawings, including architectural plans. (§101).

See topics 1.57 Copyrightable Works; 1.238 Useful Articles; 1.141 Moral Rights.

1.168 PLAGIARISM:

See 1.192 Remedies for Infringement, subhead Criteria for Plagiarism.

1.169 PREEMPTION:

Act of 1976, §301, has generally preempted field of common law copyright and turned it into federal statutory copyright. State laws that relate to subject matter of copyright and grant rights equivalent to rights granted under copyright are preempted. Thus, such works as unfixed works may still be protectable under state law. State causes of action that require additional factors for state cause of action qualitatively changing cause of action are not preempted. In addition, laws pertaining to certain criminal penalties for physical transfer of copy, such as laws in California and New York, are not preempted.

As to areas, such as unfixed ideas, in which states have not been preempted by Congress, through its Copyright Act (Tit. 17, U.S.C.), from adjudications under state statutory or common law, see topic 1.41 Common Law Rights.

Note: Transfer of computer programs by license agreement, i.e., contract, how posed question of to what extent can state contract law ignore Federal Copyright Act to restrict copying of programs and get around “first sale” doctrine.

1.170 PRESUMPTIONS:

Certificate of registration made before or within five years of first publication shall constitute prima facie evidence of validity of copyright and facts stated in certificate. (§410[c]).

1.171 PRINTS AND LABELS:

These works, insofar as they include original works of authorship, continue to be covered by copyright statute.

Counterfeit Labels.

Trafficking in counterfeit phonorecord or video tape labels, whether affixed to goods or not, punished by criminal statue. (18 U.S.C. §§2318, 2320). There are also state statutes relating to this subject.

1.172 PRIVACY:

Invasion of privacy or its obverse right of publicity is either statutory tort in certain states, or common law tort in some others, but is not copyright question, although arising at times in copyright matters.

1.173 PROFITS:

See topic 1.192 Remedies for Infringement.

1.174 PROPRIETOR:

See also, topic 1.22 Author.

Copyright statute provides that "owner of copyright," shall have exclusive rights as provided in §106. Rights granted under §106A do not belong to proprietor of copyright but to individual author. Author may or may not be proprietor and vice versa.

The proprietor could be the author himself, or an assignee of the author, or the executor, administrator, legatee, distributee, or assignee of either the author or other owner in the chain of title from the author. A proprietor could be an individual, partnership, corporation, trustee or any other legal entity entitled to hold title to personal property.

Ownership of copyright or exclusive rights thereunder are distinct from ownership of any material object in which work may be embodied. Transfer of such material object does not transfer copyright that may be embodied therein, and similarly, transfer of copyright does not transfer ownership of such material object. (§202). Owner of copyright may demand access to physical embodiment of work in order to make copies.

In dismissing suit for declaratory judgment brought by publishing company which proposed unauthorizedly to publish same on ground that permission was unnecessary, since speeches were governmental property not subject to copyright, it was held that speeches were delivered in Admiral Rickover's strictly private capacity, prepared on his own time, and as no part of his governmental duties, as further confirmed by their content. Accordingly, Rickover's copyrights were valid and infringed. (D. DC 1967, 268 F. Supp. 444, 153 USPQ 598).

Soldiers at Camp Dix employed by Government to erect a statue, cannot subsequently register claimed copyright in their own name and maintain an infringement action against Government, as well as a company licensed by Government to produce and distribute books of matches containing a reproduction of statue on cover. Apart from falling into public domain by fully permitting public to photograph and copy statue, Government, as employer for hire, was entitled under §26 of former, Tit. 17, U.S.C., to any such copyright interest as might exist in statue. (S.D.N.Y. 1967, 160 USPQ 216, aff., 417 F.2d 497).

Work for Hire.

In case of works made for hire, employer or other person for whom work was prepared is considered author and owner of copyright unless otherwise agreed in writing. (§201[b]). See topic 1.22 Author, subhead Works for Hire. Commissioned works in many cases are not considered works for hire unless commissioned party is employee or meets strict requirements of works for hire set out in §101.

Transfer of Ownership.

See topic 1.17 Assignment.

Government Proprietors.

U.S. Government cannot obtain copyright for its works (§105) except for certain limited cases. See topic   Governmental Publications.

Texts of N.Y. State court opinions, e.g., are in public domain and may be used without fear of infringement. However, copyrighted statements of facts, headnotes and other material prepared in connection with publication of such court opinions appearing in New York official reports, may not be copied in absence of express legislative authorization, since copyright on law reports is taken in name of New York Secretary of State under authority of §438 of New York Judiciary Law. (Opinion of N.Y. Attorney General, 7/21/64, 142 USPQ 288).

Court Reporters' Transcripts.

Absent state legislation such as federal statute (28 U.S.C.A. §753) which permits court reporters to charge and collect fees for transcripts of court proceedings requested by parties at rates prescribed by court, Massachusetts free lance reporter was held by District Judge to have no common law right in transcripts of inquest proceedings, since same were intended to be public documents, nor any right to acquire statutory copyright therein. Court granted motion by defendant, Commonwealth of Massachusetts, for summary judgment, dismissing plaintiff court reporter's complaint for injunctive relief against defendant taking from him contractual right to sell copies of transcript which had been impounded in clerk's office for further subsequent proceedings. (District Court, D. Mass. 1970, 311 F. Supp. 593, 166 USPQ 127).

1.175 PROTECTIVE DEVICES:

Beginning in 2001, persons, with some exceptions, may not circumvent technological measure, such as encryption, that controls access to copyrighted work. (17 U.S.C. §1201). Exceptions exist for reverse engineering to enable interoperability with other computer programs, for encryption research and other listed reasons.

1.176 PSEUDONYMOUS WORK:

Work on copies of which author is identified under fictitious name. (§101). Duration of pseudonymous work is 95 years from year of first publication or 120 years from year of its creation, whichever expires first. If before end of terms specified above identity of pseudonymous author is made of record in copyright registration, term of copyright shall be for life plus 70 years of author so identified. (§302[c]). Identity of pseudonymous author may be recorded by anyone having interest in copyright.

1.177 PUBLIC BROADCASTING:

Recognizing public interest in so-called “public broadcasting”, exclusive rights given to copyright owner in published nondramatic musical, pictorial, graphic works and sculptural works are subject to compulsory license to public broadcasting stations at rates and terms to be set by Copyright Office unless parties agree to voluntary license agreement. (§118).

1.178 PUBLIC DOMAIN:

This refers to public ownership in materials that have not been copyrighted or materials that were copyrighted but whose copyright has been lost or expired. Certain works that were neither published nor registered for copyright as of Jan. 1, 1978, entered public domain on Jan. 1, 2003, unless works were published on or before Dec. 31, 2002. Under 1909 Copyright Act, works that were neither published nor registered did not enjoy statutory protection, although they were protected under common law in perpetuity as long as they remained unpublished and unregistered. But under §303 of 1976 Copyright Act, works that were created but neither published nor registered in Copyright Office before Jan. 1, 1978, lost their common law protection and acquired statutory term of protection that was life of author plus 50 years, amended in 1998 to life plus 70 years. As result of 1976 Copyright Act, any of works in question whose author had died over 50 years prior to 1978 would have entered public domain after Dec. 31, 1977. To provide reasonable term of copyright protection for these works, and in light of fact that these works had enjoyed perpetual protection under common law, Congress extended their term by at least 25 more years. Congress also encouraged publication by providing additional 25 more years, extended in 1998 to 45 more years, of protection if work was published on or before Dec. 31, 2002. That first 25-year period expired on Dec. 31, 2002. Any work that was neither published nor registered as of Jan. 1, 1978, and whose author died before 1933 entered public domain on Jan. 1, 2003, unless it was published on or before Dec. 31, 2002. If author died in 1933 or later, work will be protected for 70 years after author's death, due to passage of Sonny Bono Copyright Term Extension Act in 1998.

Restoration of Foreign Copyrights.

For restoration of certain foreign copyrights which had been in public domain prior to Jan. 1, 1996, see §104A.

Other Developments.

While principally §43(a) Lanham Act trademark decision, Court's Opinion in Dastar Corp. v. Twentieth Century Fox Film Corp., et al., 539 U.S. … (2003), 123 S.Ct. 2041 (June 2, 2003), rules that once copyright in work enters public domain, it is not "reverse passing off" to delete prior owner's name from originally copyrighted content and that no credit or attribution is due to former rights holder by subsequent distributor of content.

See topics 1.100 Forfeiture and Abandonment; 1.181 Publication; 1.150 Non-copyrightable Works.

1.179 PUBLIC PERFORMANCE OR RENDITION:

See topics 1.198 Rights Under Copyright; 1.192 Remedies for Infringement; 1.162 Perform.

Public performance is to display or to perform work in place open to public or in which more than normal family or social acquaintances are gathered or to transmit performance to public place. (§101).

Former limitation of liability to for profit performance has been eliminated.

Term "public performance" includes transmission of performance to public place or to public. (§101). See also topic 1.162 Perform.

Unauthorized Bootlegging.

Unauthorized fixation of live music performances, or trafficking in fixations so made, are infringements. (§1101, 18 U.S.C. §2319A).

1.180 PUBLIC RECEPTION:

Reception in public of transmission of copyrighted work on single receiving apparatus of kind commonly used in private homes is not infringement unless direct charge is made to see or hear transmission or transmission is further transmitted to public. (§110[5]). This provision is designed to allow proprietor of public place to play home style radio or television set on premises without liability as long as reception is limited to single radio or television set and is not further augmented.

This exception is intended to be limited to small stores. In considering this exception, courts have generally placed stress on legislative history and facts of specific case. Fact that small store is one of chain is not determinative. (516 F. Supp. 923, aff'd 668 F.2d 84 [1981]).

1.181 PUBLICATION:

To publish or distribute is one of exclusive rights granted to owner of copyright. (§106).

Publication as used in connection with copyrightable works is a word of art. It does not necessarily mean the creation of awareness of the work among the public by dissemination of its contents. Its meaning is governed primarily by the context of the purposes for which the operative facts in question are being examined.

Thus a work is published when copies are distributed to public by sale or other transfer of ownership, or by rental, lease or lending. Such publication includes offering to distribute copies to group of persons for purpose of further distribution, public performance or public display.

(§101).

Publication without proper copyright notice may result under law prior to Mar. 1, 1989 in dedication of work to public domain unless necessary steps to correct omission of notice are taken. (§§401, 405).

Public performance or display of work does not constitute publication. (§101).

Proper date of publication is important for said date must be included in copyright notice (§401[b][2]) and may determine duration of copyright (§302[c]).

Distribution of Performing Devices.

Release of positive motion-picture films, with statutory notice of copyright thereon, made available at branch exchanges of distributor for renting generally by exhibitors would be deemed general publication, upon analogy to Ladd v. Oxnard, 75 F. 703 Copyright Cases or Patent Cases (D. Mass. 1896). Actual date of availability of motion-picture prints for general release being at times uncertain, in view of prerelease special showings, it would be safer to claim date of first such public exhibition as date of publication.

Prohibited Publication.

Under exclusive right granted copyright owner “to publish his work” (§106) publication prohibited on part of unlicensed strangers could well include any species of dissemination of copies of work, regardless of form in which copies are disseminated.

Foreign Publication.

Publications abroad from 1978 to 1989 required U.S. Notice. Prior to 1978 court decisions were unclear on this point. (§401). Certain foreign works which lapsed into public domain for failure to affix notice upon publication abroad were restored to copyright on Jan. 1, 1996. (§104A).

Publication of Phonorecord as Publication.

Publication of phonorecord does not publish underlying musical works. (§303[b]).

Unauthorized Publication.

Publication prohibited by copyright owner is not publication.

Limited Publication.

Dissemination of limited number of copies to select group, with restrictions on use or further disseminating is not treated as publication.

1.182 PUBLICATION CONTRACTS:

Publication in breach of contract can result in award of damages. Publication contrary to contract and without proper notice is not binding on author.

Controversies dealing with contractual matters are generally not considered copyright matters and shall be litigated in state courts.

1.183 PUBLICATIONS BY INTERNATIONAL ORGANIZATIONS:

Copyright protection is granted under laws of U.S. to works first published by U.N. or one of its specialized agencies or by Organization of American States. (§104[b][3]).

1.184 PUBLICITY (RIGHT OF):

See topic 1.172 Privacy.

1.185 PUNITIVE OR EXEMPLARY DAMAGES:

It would not appear that such damages are recoverable in case for infringement of statutory federal copyright, but same effect can be achieved by adjusting statutory damages upward within range set out in statute. (§504[c]).

1.186 PURPOSE OF CREATION:

Fact that work is created for inclusion in uncopyrightable useful object does not prevent protection of work.

1.187 RECORDING:

See topic 1.17 Assignment.

1.188 RECORDINGS:

See topic 1.165 Phonograph Records (Phonorecords) and Tapes.

1.189 REGISTER OF COPYRIGHTS:

See topic 1.54 Copyright Office.

1.190 REGISTRATION OF CLAIM TO COPYRIGHT:

See topic 1.72 Deposit and Registration.

1.191 REGULATIONS:

Statute empowers Register of Copyright to establish regulations to implement law in terms of Copyright Office functions (§702) which regulations are found in 37 CFR cc. II and III.

1.192 REMEDIES FOR INFRINGEMENT:

Common Law.

Common law copyright was pre-empted and absorbed into statutory copyright in 1978. Infringement of said prior rights were tried in state court. Pre-emption left little, if any, rights under common law but debate continues as to protection in areas on fringe of copyright law. Remedies for infringement of common law rights in a work, existing prior to statutory copyright, and where not preempted by 1976 Act, are available under laws and in courts of various states. Recognizing such rights U.S. District Courts may take jurisdiction over such disputes, but only where there is diversity of citizenship of parties and requisite jurisdictional minimum amount involved, such Courts applying appropriate state law as to substantive rights. In determining damages due plaintiff for conversion of his common law literary property, 2d Cir. Court of Appeals, citing Restatement, Torts, §927(a), applied analogous rule that damages, as compensation, indemnity or restitution for harm sustained by plaintiff, for conversion of chattel or destruction of any legally protected interest in land or other thing, includes exchange value of subject matter or plaintiff's interest therein at time and place of conversion or destruction, or different value where that is necessary to give just compensation. (242 F.2d 266).

See also, topic 1.41 Common Law Rights.

Statutory Copyright.

Various remedies are available for infringement of a statutory copyright. Jurisdiction lies exclusively in the District Courts of the U. S., any of its territories and District of Columbia, regardless of citizenship of party and amount involved. (28 U.S.C. §§1338, 1400).

Certificate of Registration.

Under current statute certificate of registration is necessary before suit may be brought unless application for registration has been filed and rejected by Copyright Office except in suit based on Berne Convention work other than work of U.S. origin. See topic 1.33 Certificate of Registration. (§411[a]).

Recording Prior to Suit.

Suit for infringement may be brought prior to recording in Copyright Office of plaintiff's ownership rights.

Parties.

As to complainants in a statutory copyright infringement suit, and necessity of joining copyright owners, see topic 1.160 Parties. Plaintiff must own interest in copyright in order to sue.

Civil Remedies.

Infringer is liable to any one or more of following remedies: Plaintiff's actual damages, defendant's profits, statutory damages, attorney's fees and destruction of infringing work.

Criminal Remedies.

See topic 1.63 Criminal Liabilities.

Attorney's Fees.

In court's discretion it may award full costs to prevailing party including reasonable attorney's fees. There are limitations on such award where registration has not taken place prior to commencement of infringement. (§412). While such fees are frequently awarded to prevailing plaintiffs, they may also be awarded to prevailing defendant. (114 S.Ct. 1023).

Damages.

Infringer is liable for either owner's actual damages plus infringer's profits or statutory damages. Damages of this type would be actual and ordinary damages provable under established rules of evidence. (§504). There are limitations on right to statutory damages where work is unpublished or where infringement commenced before registration has taken place. (§412). Plaintiff must elect which of two bases for damages desired prior to final judgment. Only that portion of infringer's profits attributable to use of copyright are recoverable. In proving defendant's profits, plaintiff is required to prove defendant's gross revenues only and defendant is required to prove every element of deductible expense and elements of profit attributable to factors other than copyrighted work. (§504[b]).

Statutory damages shall be not less than $750 or more than $30,000 as court considers just. Where willful infringement is proved, court may increase statutory damages to not more than $150,000. Where innocence of infringement is proven, court may lower statutory damages to not less than $200. (§504[c]). Statutory damages are based on number of copyrights infringed not number of infringing copies.

Damages for Both Infringement and Unfair Competition.

Court can award damages for copyright infringement and separate damages for unfair competition or trademark infringement. (441 F.2d 579).

Damages for Other Actions.

Damages may be collected both for copyright infringement and violations of other federal statutes, such as those prohibiting unscrambling of coded transmissions. (38 U.S.P.Q.2d 1893).

Impounding and Destruction.

During action court may order impounding of accused copies and means by which they were made. Said materials may be ordered destroyed at conclusion of trial where plaintiff is successful. (§503).

Injunctive Relief.

Preliminary as well as final injunctions may be awarded restraining future infringement. This will be granted in accordance with general equitable principles, and an especially strong case will have to be made out for temporary or preliminary injunctions. (§502). However, if defendant does nothing to challenge validity of copyright and does not deny copying, preliminary injunction may be granted without detailed showing of danger of irreparable injury. (236 F.2d 144). In clear cases of infringement courts may presume irreparable damage. See also 146 F. Supp. 795. If copyright has expired, or possibility is remote that infringer will be in position to commit further infringements, injunctive relief may not be granted.

Preliminary Injunctive Relief.

General rule in 2d Circuit Court of Appeals, is that when prima facie case of copyright has been made out by copyright certificate, with reasonable probability of infringement on merits, there is no necessity to produce evidence of irreparable damage before obtaining preliminary injunction. For review of cases and indication of principles involved, see: S.D.N.Y. 1972, 335 F. Supp. 278, 280, 173 USPQ 188, 189. See, also, 2d Cir. 1971, 446 F.2d 685, 688, 170 USPQ 545, 547, citing other opinions by Second Circuit. To similar effect, E.D.N.Y. 1974, 377 F. Supp. 1372, 182 USPQ 601, 607.

Certificate of Copyright Registration as Prima Facie Evidence of Existence of Valid Copyright, Including Affixation and Publication with Proper Copyright Notice.

This is particularly important in applications for preliminary relief such as seizures of infringing copies and devices, at commencement of suit, and for preliminary restraining orders or injunctive relief. (§410[c]). See topic 1.33 Certificate of Registration, subhead Prima Facie Evidence, supra.

Bond for Preliminary Relief.

Court will require sufficient bond to protect defendant against damages caused by preliminary injunction improvidently issued. (16 F.3d 1032).

Limitations (Equitable Principles Toll Three-Year Statutory Period).

See topic 1.132 Limitation of Actions.

Laches.

Each case where laches is urged must be decided on its own facts. A lower court will be reversed for barring plaintiff on the ground of laches constituting manifest prejudice, where it appeared from affidavits so claiming, that there was no specific prejudice from eleven-year delay in suit; and record shows consents by defendant in various delays, complex questions, a desire of both parties to determine same, and renewed interest stirred by radio and television in the revival of old songs. (2d Cir., 1958, 255 F.2d 518, 523, cert. denied, 358 U.S. 831 (1958)).

Laches from long delay, followed by change of position of party relying on other party's inaction, might result in denial of certain equitable relief, but it would not stand in the way of granting injunction against future violations. (See S.D. Cal. 1959, 177 F. Supp. 303, 307, 123 USPQ 475, 478).

Estoppel.

Ordinarily failure to take action does not give rise to estoppel, but copyright owner's knowing failure for 19 years to institute proceedings may constitute an estoppel barring any remedy. (S.D. Cal. 1959, 177 F. Supp. 303, 123 USPQ 475). See, also, 2d Cir. 1965, 342 F.2d 143, cert. denied, 382 U.S. 822 (1965).

According to Ninth Circuit Court of Appeals four elements must be present to establish defense of estoppel: (1) Party to be estopped must know facts; (2) he must intend that his conduct shall be acted on or must so act that party asserting estoppel has right to believe it is so intended; (3) latter must be ignorant of true facts; and (4) he must rely on the former's conduct to his injury. Accordingly, while infringing uses of copyrighted silent motion picture had been continuing for over twenty-five years, copyright owner's silence and inaction did not estop it, since it had right to assume that its copyright notice on film gave ample notice to users, to call upon them to make inquiry from owner, rather than to rely upon assertions of third parties. (1960, 279 F.2d 100, 125 USPQ 623, cert. denied, 364 U.S. 882 (1960)).

A representation in a copyrighted story that facts related were historically true, when in fact fictitious and created by the author, would estop the copyright owner from saying that the episodes were not historical in an action charging an infringing TV script based thereon. (S.D.N.Y. 1960, 184 F. Supp. 198, 125 USPQ 226).

Unclean Hands.

Improper actions by copyright owner such as misuse may result in finding of unclean hands and nonenforceability of copyright. (In re Napster, Inc. copyright litigation 191 F. Supp.2d 1087 [N.D. Cal. 2002]). It was good defense of unclean hands that plaintiff failed to disclose in application for copyright registration, prior publication of portions of material for which copyright was sought. (N.D. Ill. 1964, 239 F. Supp. 511). See also 410 F. Supp. 609. Intentional failure to inform Copyright Office of material fact or fraud upon Office may result in invalid or unenforceable registration. (968 F.2d 676).

Res Judicata.

If plaintiff sues an infringing retailer who is defended and indemnified by infringing manufacturer, latter is bound by res judicata if later sued. Where, as in instant case, plaintiff sued manufacturer first, and retailer was not a party, there is no res judicata as to a subsequent suit against retailer. (S.D.N.Y. 1971, 323 F. Supp. 1234, 169 USPQ 393).

Vicarious Infringer.

Owner or operator of public establishment at which copyright infringement takes place by independent contractors may be liable for such infringement. (554 F.2d 1213).

Protection of Copyrighted Fraudulent Material.

Copyright in compilations or derivative works does not extend to any part of work in which preexisting material has been used unlawfully. (§103).

Joint and Several Liability.

It has been held that copyright infringers are jointly and severally liable for damages resulting from infringement as well as for costs and attorneys' fees, but that accountability for profits is peculiarly personal as to the infringer who realized the profits. (86 F. Supp. 399

Copyright Cases or Patent Cases; see also 126 F.2d 341 Copyright Cases or Patent Cases).

Officers and directors of corporation found guilty of infringement are individually liable as well if they personally participated in acts constituting infringement. (S.D.N.Y. 1965, 240 F. Supp. 588, 145 USPQ 77, aff'd 2d Cir. 1965, 352 F.2d 285, 147 USPQ 336). To similar effect (W.D. Ark. 1974) 371 F. Supp. 900, 182 USPQ 193.

Where corporate infringer of copyrighted design became inactive and was without assets to satisfy judgment, individual who was its active, conscious force would be liable. (Per Curiam, 2d Cir. 1965, 352 F.2d 285, 147 USPQ 336, aff'g S.D.N.Y. 1965, 240 F. Supp. 588, 145 USPQ 77. To similar effect: S.D.N.Y. 1968, 285 F. Supp. 798, 157 USPQ 693; S.D. Tex. 1971, 326 F. Supp. 80, 170 USPQ 228).

Sponsors.

In holding commercial sponsor of television or radio program, and its advertising agency, vicariously liable with broadcasting network and various participating individuals, for infringement of copyrighted dramatic work, where sponsor and its agency had power, whether exercised or not, to approve or disapprove steps in preparation of program, District Court in 240 F. Supp. 612, 145 USPQ 258 (S.D.N.Y. 1965) relied on holding in another case (2d Cir. 1963, 316 F.2d 304, 137 USPQ 275) finding store owner jointly liable for sale of infringing musical recordings in its store by recordings concessionaire, even in absence of actual knowledge by store owner that copyright monopoly was being infringed, where store owner retained right to supervise conduct of concession and its employees, and was beneficiary in exploitation by reserving percentage of profits.

Television commercial sponsor and advertising agency arranging television broadcast, as well as producer of show and broadcaster, were all liable for infringing television play of copyrighted dramatic work, even though copying was indirectly from screen play based on copyrighted work. (S.D.N.Y. 1965, 240 F. Supp. 612, 145 USPQ 358).

Concert Management Company.

In case for copyright infringement of song sponsored by American Society of Composers, Authors and Publishers (ASCAP), and brought by one of its music publishing members against major artists' management corporation, it was held that latter was liable to minimum statutory damages, and injunction for aiding local citizens' associations sponsoring community concert programs, where performing licenses were not secured by such associations, nor by artists performing copyrighted music. Persuasive was fact that artists' management concert bureau set up hundreds of these local associations, advised and counselled, arranged budgets and programs, charged appropriate fees for artists, and as local associations progressed, raised their artists' fees. Vicarious liability for contributory infringement is no longer predicated on employer-employee relationship (citing 2d Cir. 1963, 316 F.2d 304, 137 USPQ 275), but similarly, one who, with knowledge of infringing activity, induces, causes or materially contributes (not necessarily quantitatively but qualitatively) to infringing conduct, may be held liable as contributory infringer. (2d Cir. 1971, 443 F.2d 1159, 170 USPQ 182, aff'g S.D.N.Y. 1970, 312 F. Supp. 581, 165 USPQ 543).

Jury Trial of Damage Issues.

Trial by jury is available where actual damages, profits or statutory damages only are sought. (Feltner v. Columbia Pictures TV 523 U.S. 340 [1998]).

See also topic Jury Trial.

Expert Opinion Testimony as to Damages.

Where a phonograph record manufacturer which had produced and sold recordings of copyrighted music without complying with the compulsory licensing provisions of the Act requiring notice of use and payment of a 2¢ royalty per record, frustrated proof of amount of its liability to copyright owners, in their infringement actions against it, by failing to disclose facts reasonably known or by failing to keep accurate production records, owners were entitled, in their suit, to introduce expert opinion testimony, as to estimated volume of copying, and all doubts and uncertainties as to volume were to be resolved strictly against manufacturer. (2d Cir., 1959, 265 F.2d 263).

Innocence of Intent to Infringe Immaterial.

Except in case of amount of statutory damages, lack of intention to infringe is immaterial and publisher would be liable even if none of its employees knew publication contained material copied from plaintiff's unpublished work. (S.D.N.Y. 1965, 245 F. Supp. 451 (SDNY 1965), 360 F.2d 928, 149 USPQ 799). See also, S.D.N.Y. 1969, 295 F. Supp. 1366, 161 USPQ 119; S.D.N.Y. 1972, 354 F. Supp. 121, 175 USPQ 471.

Criteria for Infringement.

Similarity or resemblance does not violate copyright in another work, since similarity may result from fact that both deal with same subject or have same source; but availability of common source is not defense if there was actual copying. Since copying is essential, proof of access to work copied is necessity, though access may be established circumstantially. In addition there must be substantial copying. For analysis of various criteria. See topic Infringement.

Overall Arrangements.

Infringement by access to and copying of copyrighted greeting cards containing uncopyrightable words, and art work which was imitated but not copied, was nevertheless found by protecting overall arrangement of text, art work, and association of art work to text (relying upon 2d Cir. 1940, 111 F.2d 432, 45 USPQ 291, “Superman” case). (9th Cir. 1970, 429 F.2d 1106, 166 USPQ 291, with one judge dissenting, disagreeing as to applicability of “Superman” case).

Degree of Infringement Differs Depending Whether Changes Added to Public Domain Material or Work Wholly Original.

Where basic copyrighted design was not original with plaintiff, small variations added by subsequent other designers to public domain material may protect them from charges of infringement, so as to deny preliminary injunction. (S.D.N.Y. 1971, 328 F. Supp. 554, 171 USPQ 42, citing S.D.N.Y. 1971, 328 F. Supp. 1030, 169 USPQ 470, latter in turn citing other cases, and distinguishing 2d Cir. 1960, 274 F.2d 487, 124 USPQ 154, where plaintiff's design was original).

Similarities in Expression of Public Domain Idea Not Necessarily Infringing.

All evidence being before appellate court without any credibility issue, where defendant took advantage of plaintiff's underlying medical research (not here copied) by circulating manual and charts for teaching exercises and muscles involved for course in training weight lifters (which idea was in public domain), and similarities with plaintiff's copyrighted manual were due to describing “idea”, rather than slavish copying, (there also being substantial differences as well in treatment), appellate court was in position to determine there was no appropriation, other than of unprotectable idea. Thus, it reversed summary judgment by District Court of copyright infringement, as well as prior civil judgment for contempt in same case for circulating defendant's manual training chart in violation of preliminary injunction. (3d Cir. 1975, 511 F.2d 904, 185 USPQ 76, and vacating W.D. Pa. 1974, 182 USPQ 274, 278; see, also, same case, 173 USPQ 790).

To similar effect as above case, of no infringement where both plaintiff and defendant deal with same subject, or have common sources (citing many cases), where complained of infringing broadcast and plaintiff's copyrighted script were each based on story of life and death of notorious gangster and woman in his life. (S.D.N.Y. 1975, 390 F. Supp. 877, 185 USPQ 460).

Common Historical Sources.

While repetition of common errors is ordinarily probative of copying, unsubstantial errors traceable to common erroneous sources where historical works or incidents are involved, will not be deemed probative of copying, and plaintiff was denied injunctive relief on his claim of common law appropriation of his literary property. (N.Y. Sup. Ct. 1968, 56 Misc.2d 1071, 290 N.Y.S.2d 637, 159 USPQ 699, citing 2d Cir. 1966, 366 F.2d 303, 150 USPQ 715). See also, to same effect, that there is no infringement as between two biographies, similar in context, but without appropriation of form of expression, involving historical facts and events in Rosenberg treason trial many years ago. (S.D.N.Y. 1975, 391 F. Supp. 940, 185 USPQ 485).

Test of Ordinary Observer.

Using test of ordinary observer, and noting that slight differences between plaintiff's and defendant's textile designs tended to emphasize that there was copying, and that slight differences were deliberately made to conceal copying, Court of Appeals, per curiam, reversed denial of preliminary injunction by District Court. (2d Cir. 1969, 409 F.2d 1315, 161 USPQ 3, rev'g S.D.N.Y. 1969, 296 F. Supp. 736, 161 USPQ 31).

Test for infringement by copying copyrighted dolls does not require examination detail by detail by court, but rather looks to overall appearance to see if creates general impression of substantial similarity, and whether average lay observer would find substantial similarity. (S.D.N.Y. 1974, 385 F. Supp. 218, 184 USPQ 376).

Expert Testimony.

In affirming judgment for defendant, Appellate Court held that District Court could and did properly rely on expert testimony as to absence of plagiarism. (7th Cir. 1967, 376 F.2d 467, 153 USPQ 493, cert. denied, 389 U.S. 832).

Criteria in Determining Music Infringement.

Where there is no direct evidence of access of defendant infringer to plaintiff's copyrighted musical composition, there is nothing in prior art precisely resembling either work, and defendant admitted not going back to prior sources, court by dissection and analysis is warranted in inferring that defendant had access to plaintiff's tune, and infringed the same by copying. Injunction was granted against not only infringing publisher, but broadcasters of infringing tune, and latter's claim of performing license from plaintiff's performing rights society was of no avail to cover such tortious infringement by defendant. (S.D. Cal. 1959, 171 F. Supp. 580).

Where the lower court's findings of fact as to infringing appropriation of musical compositions was assisted by instrumental and vocal musical demonstrations by the parties in analyzing the tunes, but such instrumental and vocal assistance was unavailable to the appellate court, the latter would not reverse the court below which found no infringement because the respective tunes conveyed substantially different musical sound, feeling and impression to the average listener as well as those skilled in music. (9th Cir., 1959, 264 F.2d 942).

1.193 REMOVAL:

Any action where exclusive jurisdiction is in Federal Court, such as copyright infringement, may be removed from State Court to Federal Court along with one or more otherwise non-removable claims originally joined with removable claims. (28 U.S.C. §1441). State court actions relating solely to contractual issues concerning copyright may not be removed.

1.194 RENEWAL OF COPYRIGHT:

Renewal is not required for copyrights obtained subsequent to Jan. 1, 1978 since such copyrights do not have original and renewal terms as did pre-1978 registrations. Prior to June 26, 1992, there was need to renew pre-1978 copyrights before expiration of initial term of copyright. Failure to renew placed work in public domain. Subsequent to June 26, 1992, renewal is automatic for all copyrights secured between Jan. 1, 1964 and Dec. 31, 1977, §304(a). Copyrights secured prior to Jan. 1, 1964 shall be governed by §304(a) as it existed prior to June 26, 1992. There remain, however, substantive and procedural advantages to filing renewal application. Renewal applications may be filed until Dec. 31st in year in which they come due. (17 U.S.C. §§304, 409). Renewal term registrations are possible even if there was no original term registration. For renewal duration of copyrights secured under pre-1978 Act, see topic 1.85 Duration.

Certain foreign works which lapsed into public domain for failure to renew were restored to copyright on Jan. 1, 1996. (§104A).

1.195 RENTAL:

It is illegal to rent or lend publicly for commercial advantage without permission of copyright owner, phonorecords or computer programs. (17 U.S.C. §109[b]). Rental of authorized copies of videotapes is permitted.

1.196 REPRODUCE:

Reproduction is one of exclusive rights granted to owner of copyright. (§106). It is copying of work in such manner and amount as to be substantial taking. Substantial taking is found if ordinary observer, looking at similarities rather than dissimilarities, would believe accused work was copied from plaintiff's.

1.197 RESTORATION OF COPYRIGHT:

On Jan. 1, 1996, in compliance with Berne and GATT obligations, copyright was restored to certain foreign works still under copyright in foreign country that went into public domain in U.S. for failure of compliance with U.S. formalities or for absence of proper subject matter. Limited protection is afforded to those who relied on earlier public domain status. (§104A).

1.198 RIGHTS UNDER COPYRIGHT:

It is important to know what exclusive rights are conferred upon copyright owner in order to determine what he may prevent others from doing with his work. Copyright owner is thus enabled to market these rights, by assigning individual rights or parts thereof or granting licenses, for fee or other consideration, permitting licensee to do, in whole or in part, in limited or extended territories, for limited or extended periods of time, what owner would otherwise have exclusive right to do.

No Right to “Use” Generally.

Exclusive rights, being statutory, are determined by provisions of §106. They do not include every conceivable “use” of copyrighted work, but only those which are expressly provided in section or by judicial construction can be deemed to have been intended by section.

Rights Granted.

Exclusive rights granted in copyright work are (§106): (1) To reproduce work in copies; (2) to prepare derivative works based on work; (3) to distribute copies to public by sale, transfer, rental, lease or loan; (4) to perform work publicly if literary, musical, dramatic, choreographic, pantomimic works or motion picture or other audiovisual works; (5) to display work publicly if literary, musical, dramatic, choreographic, pantomimic, pictorial, graphic or sculptural works; (6) in case of sound recordings, to perform work publicly by means of digital audio transmissions. No other exclusive rights under copyright exist. Additional rights (quasi-moral rights) are granted to authors under §106A, to performance of phonorecord by Digital Audio Transmission, §§114, 115, and to fixation and trafficking in fixations of live musical performances. (§1101).

Limitations.

§§107 through 118 set out specific limitations on exclusive rights.

First Vending Only.

Exclusive right to vend copyrighted work is included in rights to distribute. Vending right, however, includes only first vending. Copyright owner has exclusive right to vend, and thus to withhold from vending, any copies of work. Copyright owner may not thereafter control vending except for importation controls allowed by §602. This is referred to as "Doctrine of First Sale". Vending of copyrighted work does not carry with it right in purchaser to exercise other exclusive rights of copyright owner. Owner of physical copy has right to display it or to re-vend it. (§109).

If copy is vended or title thereto as physical material passed by other disposition, by or with consent or authorization of copyright owner, particular object as physical material, passes out of further domain of copyright. Copyright owner cannot thereafter control, under copyright, subsequent resale, gift, or other disposition of physical material employed in particular copies so sold or to which title has been transferred. (§109). First sale doctrine does not, however, allow rental of purchaser's computer programs or phonorecords. Copyright owner still controls exclusive right to sell any other copy as to which there has not already been authorized sale. Incorporeal exclusive rights of copyright being distinct from property in physical objects in which copyright is embodied, loss of control by copyright owner over physical objects, as they pass in commerce after authorized first sale, does not extend to his incorporeal exclusive rights under copyright. Retail purchaser of book authorized to be sold by copyright owner can do as he pleases with physical material of book, but acquires none of incorporeal rights of copyright by which he can print, reprint, dramatize, make motion picture, or publicly perform it if it be drama.

Sale and Moral Rights.

Sale of work of fine art does not waive author's rights under §106A, thus purchaser cannot violate rights of paternity or integrity without express waiver by author.

Involuntary First Sales.

Since copyrighted goods are not immune from the normal remedies of unpaid creditors until the copyright owner has made a truly voluntary sale, a reasonable and recognized form of compulsory transfer, such as a judicial sale or Court compelled assignment, may be effective and non-infringing. However, a manufacturer of goods for the copyright owner cannot by self-help assert an unpaid seller's lien against such owner by selling the goods before a Court has adjudicated that the manufacturer is entitled to do so. (2d Cir. 1963, 315 F.2d 847, 137 USPQ 268).

It should be noted that with regard to mechanical rights in copyrighted musical compositions, the copyright owner can withhold the composition from recording, but if he records it or authorizes another to do so, a compulsory license takes effect permitting others to record at a statutory rate per recording. See infra, subhead Mechanical Rights (Recordings), catchline (c) Musical Recordings.

Transformation Rights.

These exclusive rights depend upon nature of particular copyrighted work. Owner is given exclusive right to prepare derivative works based on copyrighted work such as translations into other languages or dialects, or make any other version thereof, if it be literary work; to dramatize, if it be nondramatic work; to convert it into novel or other nondramatic work if it be drama; to arrange or adapt it if it be musical work; to complete, execute and finish it if it be model or design for work of art. (§106).

Paraphrasing.

See topic Paraphrasing.

Performing Rights.

Exclusive rights in these instances depend not only upon nature of copyrighted work, but whether it was performed publicly. (§106). Profit issue still remains as to certain exceptions to exclusive performance right. (§110[1]-[4]).

The exclusive right to perform copyrighted dramatic works covers only those performances which are public. Whether a performance was public would be governed by factors spelled out in §101 (see topic 1.162 Perform), controlling factor being availability of performance to general public rather than selected audience.

Exclusive right to perform copyrighted musical compositions depends upon performance being public. If not public one is able to perform without license any copyrighted musical composition.

It is immaterial whether performance is given by living performers or by acoustic recordings of musical composition, or whether such performances are broadcast or accomplished by radio reception.

Right to perform sound recordings in digital audio is now one of exclusive rights of owner. (§106[b]).

Rights of Performers.

Unauthorized fixation in sound recordings or musical videos or trafficking in such fixations of live musical performances shall be treated as infringement of performers' rights. (§1101).

Marketing of Non-Dramatic Commercial Performing Rights in Copyrighted Musical Compositions.

Marketing commercial public performing rights of copyrighted musical compositions, by way of license, to broadcasters, motion picture producers, concert managers, dance halls, and others who provide public performances thereof, is largely done by so-called performing rights societies such as, e.g., ASCAP (American Society of Composers, Authors and Publishers), or BMI (Broadcast Music, Inc.). Individual lyric writers and music composers, and their publishers could not, as practical matter, conceivably police and license every potential public performance of every musical composition throughout U.S. Performing rights societies were formed to meet this need. It was believed, however, that individual copyright owners could appropriately police and license rarer and more publicized performances of musical shows or operas.

ASCAP and BMI operate under consent decrees growing out of prior federal anti-trust actions, and grant nonexclusive performing licenses to applicants under provisions thereof. These are ordinarily granted on a blanket basis for vast repertory in their respective catalogues. Compositions may also be negotiated for on a per program basis.

"Juke-Box" Exception.

An express exception, by statutory definition, is that where rendition of musical composition is accomplished by or upon coin-operated machine (so-called "juke boxes"). Statute grants compulsory license for such performances. See topic 1.123 Juke Boxes.

Mechanical Rights (Recordings).

The Act expressly provides for instrumentalities capable of preserving in a permanent record, a performance or rendition of dramatic or musical works from which such performances or renditions can be mechanically reproduced. By these rights, the copyright owner of dramatic or musical works is given control over the making and distribution and performances from such instrumentalities, although the rights substantially differ for dramas and music.

(a) Dramatic Recordings.

The right to make records or transcriptions of copyrighted dramatic works from which it may be exhibited or performed or reproduced, and to exhibit, perform or reproduce it in any manner, are given by §106. This type of recording could be either visual in form of motion picture film, or sound recording, or combination of both such as synchronized sound motion picture. While film recording may be infringement if made without consent of copyright proprietor of source material used in producing film, motion picture film is itself independently copyrightable subject, if produced with consent of proprietor of source material or if based on source materials which are in public domain.

(b) Nondramatic Literary Recordings.

See discussion above under topic 1.198 Rights Under Copyright, subhead Performing Rights.

(c) Musical Recordings.

The control of musical recordings is given to the copyright owner of the musical manuscript, but subject to a compulsory license feature. (§114).

(d) Rental.

Public rental of phonograph records for profit is infringement without permission of copyright owners. (Rental Amendment Act 1984, §§2, 109, Tit. 17). Public rental or loaning of computer programs is also infringement. (17 U.S.C. §109[b]).

Motion Picture Sound Tracks.

Reproduction of sound tracks that accompany motion picture is considered infringement of motion picture copyright.

Copyright in Sound Recordings Fixed, Published and Copyrighted after Feb. 15, 1972.

Works recorded in a form capable only of perception audibly, such as performances or renditions of musical, literary or dramatic materials, have not, prior to Feb. 15, 1972, been deemed protected under Tit. 17 U.S.C., Copyright Act. By special copyright legislation, captioned in House and Senate Judiciary Committee Reports recommending its passage, as “Prohibiting Piracy of Sound Recordings,” Congress, in 1972, amended Tit. 17 to create, for first time, limited copyright in sound recordings for purpose of protecting against their unauthorized duplication in any kind of sound recording, and distribution of so-duplicated recordings. (P. L. 92-140, 92nd Cong., approved Oct. 15, 1971). This has been carried over into new Act. (§§102, 106). Right granted to reproduce sound recordings does not prohibit simulations of original work but only transfer of original sounds to copy.

Non-Retroactive to Recordings Fixed before Feb. 15, 1972.

Amendment of 1972 did not affect prior state law rights relating to recordings fixed before

1972. Such rights expire in 2047. (§301[c]).

Foreign source recordings fixed prior to 1972 were in public domain in U.S. until restored to copyright on Jan. 1, 1996. (§104A).

Contributing to Making Duplicates of Copyrighted Musical Sound Recordings.

Defendant store sold pre-recorded as well as blank tapes, but kept a special supply of pre-recorded musical tapes (copyrighted under above Act effective Feb. 15, 1972), not for sale but to loan to customers while they re-recorded same at store on blank tapes purchased by customer, using a taping machine furnished by store. Same was held not to be fair use. A preliminary injunction was granted to complaining copyright owners of tapes so loaned for such re-recording purpose. (E.D.N.Y. 1973, 360 F. Supp. 821, 179 USPQ 617).

State Remedies.

Several states have enacted record or tape piracy statutes to protect pre Feb. 15, 1972 recordings. Those state statutes would continue in effect as to recordings fixed before Feb. 15, 1972 until 2047. (§301[c]).

1.199 ROYALTIES:

See topic 1.130 Licenses.

1.200 SALE:

Sale of copyrighted work does not carry with it transfer of copyright in work. See also topic, 1.97 First Sale Doctrine.

1.201 SAMPLING:

Unauthorized taking of small sound portions from copyrighted phonorecord and inclusion in subsequent recording. May be actionable infringement. (780 F. Supp. 182).

1.202 SCENES A FAIRE:

Certain fact patterns automatically follow from certain ideas and are not protectable as expression.

1.203 SCULPTURAL WORKS:

See discussion under topic 1.167 Pictorial, Graphic and Sculptural Works.

1.204 SECRETS:

See topic 1.232 Unfair Competition, subhead Trade Secrets.

1.205 SEIZURE, IMPOUNDING AND DESTRUCTION:

Infringing Copies.

§503 gives court power to order seizure and impounding during pendency of action, as well as destruction of all infringing copies or devices. Supreme Court rules specially prescribing procedure for seizure and impounding of infringing articles may no longer be in effect (see annotation to §501 of Act for these rules):

Contempt to Conceal Copies from Ordered Seizure.

Fines for civil contempt because articles, covered by served seizure order, were withheld or concealed from U.S. Marshall, were made payable to plaintiffs. (E.D. Pa. 1963, 140 USPQ 17).

Destruction of Music Matrices Withheld.

Where infringement of a copyrighted musical composition by manufacture of records, without service of the statutory notice to exercise the compulsory license, was admitted, destruction of matrices or other means for producing the recordings will not be ordered by the court in its decree, if the copyright owner of the musical work has theretofore used or permitted use of his work for mechanical reproduction. This is because the infringing owner of the matrices, by subsequently giving notice of his intention to use, and by paying the required royalties, can at any time thereafter establish for himself a right to use his matrices lawfully. However, if damages are awarded the copyright owner arising out of the prior infringing use of such matrices, the matrices may be impounded by the court until such damages are paid in full or satisfied (125 F. Supp. 348).

Importation of Prohibited Copies.

Importation into U.S., of any piratical copies of any book copyrighted in U.S., or of any book bearing false notice of copyright where there is no existing U.S. copyright, or of any other copies (unless authorized by author or proprietor) is prohibited. (§§601, 602).

Any of the above described copies which are brought into the United States from any foreign country, are subject to seizure and forfeiture by like proceedings as those provided by law for seizure and condemnation of property imported into U.S. in violation of the Customs Revenue Laws. (§603). Such articles when forfeited, may be destroyed in such manner as Secretary of Treasury, or court, shall direct. (§603).

Secretary of Treasury and U. S. Postal Service are empowered by Act to make and enforce individually and jointly such rules and regulations as are necessary to prevent importation into U. S. of articles prohibited importation by Act. See topic 1.114 Importation.

1.206 SEMICONDUCTOR CHIPS:

Ten year protection is given to mask works of computer programs embodied in semiconductor chips. Protection is quasi-copyright and not true copyright protection. (Semiconductor Chip Protection Act of 1984, Tit. 17 §§901-914).

1.207 SERVICE PROVIDERS:

Those entities that provide access to Internet are, with certain limitations, free from liability for material transmitted over their services by consumers. (§512).

1.208 SLOGANS:

Slogans, names, and listing of contents, are not ordinarily deemed subject matter of copyright. (D. Del. 1965, 244 F. Supp. 785, 147 USPQ 188).

1.209 SOFTWARE:

Computer software or programs are copyrightable subject matter as literary works. Once sold they may be resold but not rented or lent. But question arises whether license agreement may deem transfer less than title to program thereby making licensee nonowner.

License agreement for software will be strictly construed to grant only rights specified therein. Thus, license agreement which neither permitted nor prohibited defendant to outsource technical support work to third party, which necessitated copying of software by third party, held to have been breached by such outsourcing. (Beckman Instruments, Inc. v. Cincom Sys., Inc., 232 F.3d 893 [9th Cir. 2000], Copyr. L. Rep. ¶ 28,127, cert. denied, 531 U.S. 1150, 121 S.Ct.

1093).

Assuming access, in determining whether software is “substantially similar” and therefore infringing copy, court employs “abstraction-filtration-comparison” test which: (1) Separates non-protectable ideas from particular expression of work; (2) then filters out non-protectable components of product from original expression; and (3) finally compares remaining protected elements to allegedly copied work to determine if two works are substantially similar.

In one litigation involving software license, court dismissed plaintiff's copyright infringement claim arising out of Sun Microsystem's allegations that Microsoft exceeded scope of license for Sun's Java Virtual Machine Technology. License provided that Microsoft could make derivative works of licensed Java technology so long as derivative works passed compatibility tests. Microsoft argued that copyrighted code itself was licensed. It also argued compatibility obligations were independent covenants which became applicable only after termination of agreement. Court agreed with Microsoft, finding language and structure of agreement suggested compatibility requirements were independent covenants, and not conditions or restrictions on scope of Microsoft's license prior to termination. Where parties intended to condition or limit scope of license, they did so expressly in agreement. Compatibility section of agreement, however, contained no express limitation. (Sun Microsystems, Inc. v. Microsoft Corp., No. C97-20884 RMW [PVT], 2000 U.S. Dist. LEXIS 20222 Copyright Cases or Patent Cases [N.D. Cal. May 8, 2000]).

1.210 SOUND RECORDINGS:

For many years sound recordings were not protectable under copyright until amendment to prior act in 1971 which made sound recordings fixed after Feb. 15, 1972 subject to protection. This protection is continued under current statute. (§102[a][7]). Sound recordings are fixed in phonorecords and rights therein are set out in §106(1), (2) and (3) only. (§114).

Protection granted does not include imitation of sounds but only direct or indirect capture of actual sounds.

Motion picture sound tracks are not considered as sound recordings but are included within scope of motion picture copyright. (§101).

Proper notice of copyright for publicly distributed sound recordings is the letter C in a circle, ©, year of first publication and name of copyright owner. (§402).

While current statute preempts most common law and State statutory law, it expressly provides that with respect to sound recordings fixed prior to Feb. 15, 1972 any rights or remedies granted by common law or by State statute shall not be preempted until Feb. 15, 2047.

Foreign sound recordings fixed prior to Feb. 1972 or which lapsed into public domain for failure to comply with U.S. formalities were restored to copyright on Jan. 1, 1996. (§104A).

See also topics   Digital Recording and Transmission, 1.165 Phonograph Records (Phonorecords) and Tapes.

Analog performance of sound recordings is permissible but not by digital audio.

1.211 SPEECHES:

These are copyrightable if fixed in tangible medium of expression. Broadcast or other giving of speech, lecture, or sermon is not publication. One who records speech without permission and distributes it is infringer. (224 F. Supp. 101). Unlimited distribution of fixed copy of speech may place speech in public domain.

1.212 STATE ACTIONS:

Actions in state court may be brought for enforcement of contracts and for any other matters involving copyright not preempted by federal statute.

1.213 STATE LAWS:

Although most of state copyright laws in area of common law copyright have been preempted, there are still areas in which states may legislate. For example, in areas not covered by federal copyright statute; in pre-1972 record piracy statutes; in author's right to share in resale price of his work or other statutes designed to protect consumer; in post death moral rights area. See topic 1.169 Preemption.

1.214 STATES:

In 1990, states and their employees were made liable for infringement. (§511). See topic 1.115 Infringement.

1.215 STATUETTES (THREE-DIMENSIONAL WORKS):

If the material for which copyright is sought is nonutilitarian and nonmechanical, copyright may be secured for three-dimensional work of art such as, for example, statuette of figures of ballet dancers (S.D. Cal., 1952, 103 F. Supp. 227), or of figure of dog (1st Cir., 1951, 193 F.2d 162), or of cartoon character (2d Cir., 73 F.2d 276). Protection of three-dimensional work so copyrighted is not dissipated by thereafter integrating it into commercially valuable merchandise, such as, for example, using statuettes of dogs as bookends, dance figures as base for electric lamp (347 U.S. 201), or of cartoon character as toy doll (73 F.2d 276). Work qualifies for registration by reason of its purely artistic character, which need not necessarily be of fine arts, and its potentiality for utilitarian use is not matter of concern.

§§101 and 113 of current statute make clear that copyright is not obtainable on useful articles but only upon works that may be incorporated in said articles, and which may exist independently of useful article.

Dolls and Toys.

Despite their utilitarian purpose, dolls and toys are copyrightable. (302 F.2d 623).

Copying abstract idea of a doll on a pole in display box; kissing monkeys or Santa Clause without copying plaintiff's tangible expression of such idea, would not warrant preliminary injunctive relief. (S.D.N.Y. 1965, 241 F. Supp. 675, 145 USPQ 326, aff'd per Curiam, 2d Cir. 1965, 353 F.2d 788, 148 USPQ 7).

For method of registration, see topic 1.37 Classification of Works for Registration. See also topic 1.245 Works of Art.

1.216 STATUTORY DAMAGES:

See topic 1.192 Remedies for Infringement.

1.217 STOLEN PROPERTY:

Transportation of infringing works of or stolen copyrighted works in commerce may constitute crimes under National Stolen Property Act (18 U.S.C. §2314), or under individual state penal laws.

1.218 SUBJECT MATTER OF COPYRIGHT:

Defined in §102 as original works of authorship fixed in tangible medium of expression.

§102 lists recognized types of such works but list is not exhaustive.

1.219 TAPES:

See topic 1.165 Phonograph Records (Phonorecords) and Tapes.

1.220 TAPING:

Ordinarily refers to recording of sounds of readings, renditions or performances of literary, dramatic and musical materials (copyrighted or uncopyrighted), on magnetic tape in reel or cassette form, from which original reading, rendition or performance may be reactivated in sound. Where recording on tape is of visual aspects of readings, renditions or performances of literary, dramatic or musical materials, with or without synchronized accompanying sounds, such recordings are called videotapes. Such taping and tapes are considered as copying and copies under new Act. (§101).

Home taping of television program for later viewing does not constitute copyright infringement. (1984, 464 U.S. 417, 220 USPQ 665, 17 U.S.C. §§1001; 1008).

Unauthorized taping of live musical performances is infringement. (§1101).

1.221 TELEVISION INFRINGEMENT:

See topics 1.31 Cable Television Systems; Community Antenna Television (CATV); and 1.192 Remedies for Infringement, subhead Joint and Several Liability, catchline Sponsors.

1.222 TERMINATION OF TRANSFER:

See topic 1.17 Assignment, subhead, Rescission of Assignment.

1.223 TERM OF COPYRIGHT:

See topic 1.85 Duration.

1.224 TRADE CATALOGS:

See topic 1.32 Catalogs (Trade).

1.225 TRADE RESTRAINTS:

See topic 1.140 Monopoly and Trade Restraints.

1.226 TRADE SECRETS:

See topic 1.232 Unfair Competition.

1.227 TRANSFER OF RIGHTS:

See topic 1.17 Assignment.

1.228 TRANSITIONAL PROVISIONS:

Current statute provides for certain transitional matters between prior and current Acts, including: (a) Current statute does not provide copyright protection for any work going into public domain prior to Jan. 1, 1978; (b) notice provisions of old Act or current statute shall apply to all copies publicly distributed after Dec. 31, 1977; (c) all causes of action that arose under old Act shall be governed by old Act.

1.229 TRANSLATIONS, ADAPTATIONS, DRAMATIZATIONS, OTHER VERSIONS, ETC.:

See topic 1.73 Derivative Copyright Works.

1.230 TRANSMISSIONS:

Transmissions by various means are considered part of exclusive rights to perform or distribute. (§106).

1.231 UNCOPYRIGHTABLE MATERIALS:

See topic 1.150 Non-Copyrightable Works.

1.232 UNFAIR COMPETITION:

See topic 1.41 Common Law Rights.

A cause of action for unfair competition does not arise under the copyright statute. However, if the same facts necessary to prove an infringement of copyright establish a cause of action for unfair competition, the jurisdiction of the federal court to hear the infringement suit, despite absence of diversity of citizenship of the parties and the requisite minimum jurisdictional amount, will be sufficient to carry the additional cause of action for unfair competition. (28 U.S.C. §1338[b]). Otherwise, diversity of citizenship and minimum jurisdictional amount or qualification under 15 U.S.C. §1125(a) is necessary to sustain unfair competition cause of action in federal courts. (289 U.S. 238 Copyright Cases or Patent Cases; 139 F.2d 895 Copyright Cases or Patent Cases; 59 F. Supp. 13).

Where such unfair competition counts claim rights that are equivalent to exclusive rights of §106 and come within subject matter of copyright (§§102 and 103) they are preempted (§301). Such counts include misappropriation and unjust enrichment.

The name or title of a copyrighted work is not protected under the copyright, being merely an identification. However, the name or title may be protected, under principles of unfair competition, where used on another work under such circumstances as to indicate a “passing off” or deception of the public (70 F.2d 310).

Violations of trade secret obligations, fraud and similar causes of action which require proof of elements beyond copyright infringement may not be preempted. See topic 1.169 Preemption.

Appropriation of Title Names: Secondary Meaning.

Titles are not copyrightable subject matter. Titles for series of books or programs may be protected under trademark law. Titles for works not part of series may be protected against another's use if public confusion is likely to occur under general concept of unfair competition.

Trade Secrets.

Cause of action for misappropriation of trade secrets does not arise under copyright statute.

There are several federal and numerous state statutes dealing with misappropriation of trade secrets.

Imitating Performers.

Courts have variously treated imitations of performances, style or image of well known performers. Where protection is afforded, it is not under copyright law but unfair competition or state privacy or publicity statutes or forms of unjust enrichment or commercial piracy. See 610 F. Supp. 612 (Woody Allen).

False Designation of Origin.

Where copyrighted work is infringed by copies bearing infringer's name, this constitutes violation of Trademark Statute. (15 U.S.C. §1125[a], 33 USPQ2d 1266).

1.233 UNFIXED WORKS:

Until work is fixed in tangible medium of expression no copyright exists. (§102). Such unfixed ideas may be protectable under state laws such as implied contract.

1.234 UNIFORM COMPUTER INFORMATION TRANSACTIONS ACT:

Uniform Computer Information Transactions Act (UCITA) is standalone uniform law promulgated by National Conference of Uniform Law Commissioners in 2000. UCITA covers computer information transactions and treats them differently from transactions in goods and services governed by Art. 2 of Uniform Commercial Code. Particularly where “securitization” of loans and where “due diligence” issues are involved in respect to mergers and acquisitions, “due diligence” and transactional work of practitioners in U.S. have long been governed by provisions of Uniform Commercial Code (“U.C.C.”) which, in various ways, has been adopted by all of states in U.S. in order to provide commercial context for laws relating to sale, lease and lending of goods and services. Art. 2 of U.C.C. was particular focus for various committees desiring to update Code to allow for substantial changes that “electronic” contracts involving, among other things, copyrighted works, have made in modern commercial marketplace. Legal underpinnings of economy of so-called “hard goods and services” has been, to degree, eclipsed by new forms of expectations, industry practices and different policies in respect to software, new media and telecommunications industries, among others. After series of unsuccessful efforts relating to amendment of Art. 2b of U.C.C., on Aug. 20, 2000, National Conference of Commissioners of Uniform State Laws passed Uniform Computer Information Transactions Act (“UCITA”) as “a commercial contract code for computer information transactions”. However, UCITA is complex and controversial law raising significant consumer issues and copyright law issues, particularly extent to which private parties may alter effect of federal law by contract. While adoption and implementation of UCITA by each state will doubtless take time and undergo further political debate, UCITA is likely to form key part of foundation for future commercial transactions in U.S. involving copyrighted works. Virginia and Maryland have adopted UCITA. While nearly every one of 50 states has had some level of activity involving UCITA, most of this occurred in 2001. 2002 and 2003 state legislative sessions have largely been dormant and without any passage of UCITA as presented. Iowa, North Carolina, Vermont and West Virginia have actively considered UCITA “bomb shelter” legislation, statutes designed to protect state's residents from unfair and overreaching provisions of UCITA. Others, such as New York, are considering following this trend.

1.235 UNIVERSAL COPYRIGHT CONVENTION:

Signatories.

This Convention was adopted at Geneva Switzerland, on Sept. 6, 1952. It is not effective, however, as to any signatory (or later accessant, if not a signatory), until its instrument of ratification or accession is deposited with UNESCO in Paris.

See also Introduction—The Statutory Copyright System, on first page of this digest.

Ratification by United States.

The Convention was ratified by the United States Senate June 25, 1954. The instrument of ratification was signed by the President on Nov. 5, 1954, and deposited with UNESCO in Paris on Nov. 6, 1954.

Countries as to Which in Force.

Convention is in force in following countries as of 1990: Algeria, Andorra, Argentina, Australia, Austria, Azerbaijan, Bahamas, Bangladesh, Barbados, Belarus, Belgium, Belize, Bolivia, Bosnia and Herzegovina, Brazil, Bulgaria, Cambodia, Cameroon, Canada, Chile, China, Colombia, Costa Rica, Croatia, Cuba, Cyprus, Czech Republic, Denmark, Dominican Republic, Ecuador, El Salvador, Fiji, Finland, France, Germany, Ghana, Greece, Guatemala, Guinea, Haiti, Hungary, Iceland, India, Ireland, Israel, Italy, Japan, Kazakhstan, Kenya, Korea (Republic of), Laos, Lebanon, Liberia, Liechtenstein, Luxembourg, Macedonia, Malawi, Malta, Mauritius, Mexico, Moldova, Monaco, Morocco, Netherlands, New Zealand, Nicaragua, Niger, Nigeria, Norway, Pakistan, Panama, Paraguay, Peru, Philippines, Poland, Portugal, Russian Federation, Rwanda, Saudi Arabia, Saint Vincent and The Grenadines, Senegal, Slovakia, Slovenia, Spain, Sri Lanka, Sweden, Switzerland, Tajikistan, Trinidad & Tobago, Tunisia, Ukraine, U.K., U.S., Uruguay, Vatican City, Venezuela, Yugoslavia, Zambia.

UNESCO has advised the U.S. Government that on Nov. 14, 1955, a letter was received from the Philippine Minister in Paris stating that the Philippine President had directed the withdrawal of the instrument of accession prior to Nov. 19, 1955, the date on which the Convention would become effective in respect of the Philippines. No determination has been reached as to the legal effect of this communication. Copyright Office considers no U.C.C. relations exist. However, the Philippines still continue to be included, each year to date, in status listings of Ratifications and Accessions to U.C.C. (Geneva 1952), as having acceded effective Nov. 19, 1955. (9 Copyright [WIPO-BIRPI] 29, No. 1, Jan. 1973; VI Copyright Bulletin [UNESCO] 6-8, No. 1, 1972).

Text of Convention.

The text of the Universal Copyright Convention, the Appendix Declaration as to Art. XVII, the Resolution as to Art. XI, and the three Protocols are published in U.S. Code, Congressional Service, 1954, Vol. 3, pp. 5419-5428. The same are also published in Senate Executive Report No. 5 (83d Cong., 2d Sess., June 11, 1954) on Executive M, from the Committee on Foreign Relations, recommending that the Senate consent to its ratification. See also annotations to §9 of the Act, 17 U.S.C.A., pocket supplement.

National Treatment Without Formalities.

The basic purpose of the Convention is a harmonization of existing national systems, on a simplified reciprocal national treatment basis, rather than the creation of a new substantive international code of copyright. It seeks equality of treatment, within any given member country, whatever its internal law might be, as between the nationals of that country and nationals of other member countries seeking protection under the Convention in the given country. In essence, each country agrees to provide a regime of protection not less than that given to its own nationals, for the unpublished works of nationals of other member countries, without formalities, as well as for works either first published in another member country (regardless of the author's nationality), or by a national thereof (regardless where published). As to published works, formalities conditioning the acquisition or enjoyment of the right are deemed to be satisfied, as to works first published outside the country by a non-national, if from first publication the copies bear a notice of copyright using the symbol “c” enclosed in a circle (as an international symbol in lieu of the word “Copyright” or the abbreviation “Copr.”) accompanied by the name of the copyright proprietor and the year date of first publication. Such notice of copyright need merely be placed in such manner and location as to give reasonable notice of claim to copyright. Except for further requirement of filing of application for renewal of copyright if renewal is permitted, no other formality may be required, insofar as nonnational seeking protection under Convention in member country is concerned which could affect acquisition and enjoyment of copyright. This eliminates formalities such as deposit, registration, notice, notarial certificates, fee payment, domestic manufacture, or first publication in contracting State (latter being required in British Commonwealth countries), as condition upon acquisition or right to enjoy copyright.

Procedural Formalities Still Retained.

While formalities conditioning the right (other than the above described “c” in a circle form of notice of copyright) are eliminated as to nonnationals seeking protection in a member country, procedural formalities may still have to be observed as a condition precedent to securing remedies for an infringement in the country where the right is sought to be enforced. Such procedural requirements, however, as the use of domestic counsel, or deposit of copies of the work, may not affect the validity of the copyright or the right to continued enjoyment of copyright protection in the country.

Inapplicable to Nationals or Domiciliaries, or Works First Published in Country.

The Convention expressly provides that as to works first published in any particular member country (regardless of nationality of the author), or as to works of its own nationals wherever published, the particular member country may still retain for domestic enforcement as to such works all of its former formalities and conditions upon the right, regardless of the Convention, although it may not otherwise do so as to nonnationals seeking protection under the Convention. (Art. III, subd. 2). Under Art. II, subd. 3, the Convention permits each member state, by its domestic legislation to treat (as the U.S. does) any nonnational domiciled in the country as if he were a national. The Convention would thus be inapplicable for protection thereunder in the U.S. to its nonnational domiciliaries. Likewise, with regard to works first published in a non-Convention country, and as to aliens of non-Convention countries (whose works have not been first published in a Convention country), to which the Convention would not be applicable, the contracting State could also, if desired, preserve its formalities or other conditions upon the acquisition and enjoyment of copyright as to such aliens.

Stateless Persons Deemed Nationals.

By Protocol 1, annexed to the Convention, stateless persons and refugees, who have their habitual residence in a member country, are for the purposes of the Convention, treated as if assimilated to the nationals of that country. This Protocol is separately signed and subject to ratification or acceptance by the signatories, or may be separately acceded to by non-signatories when they accede to the Convention.

Published and Unpublished Works.

Unpublished works, and published works (wherever published), of nationals of any member country, as well as works first published in any member country (regardless of the nationality of the author), enjoy in each other member country the same substantive protection as that country accords to published and unpublished works of its own nationals. Under Art. III, this protection is to be afforded, when a nonnational seeks protection under the Convention for his published or unpublished work, without any formalities excepting only that, for published works, the country may require the formality of publication with the “c” in a circle form of copyright notice. There is no obligation upon the country to require any such notice of copyright, before recognizing and protecting the work, if it chooses to do so without such notice. The Convention merely provides that if member countries do have any formality requirements conditioning acquisition or enjoyment of copyright, the same are to be deemed satisfied by the use of such notice of copyright.

Duration of Protection.

In Art. IV dealing with the term of copyright protection, we find one of the few instances where there is a provision of a substantive nature by calling upon the member countries to have certain minimum terms of copyright. These minima are less than the terms now in effect in most countries including the United States. The duration of protection is governed by the law of the country in which protection is claimed, but such country is not obligated to give a period of protection longer than that fixed for the class of works by the law of the country of which the author is a national in the case of unpublished works, and the law of the country in which first published in the case of published works. In the event of simultaneous (i.e., within 30 days) first publication in two or more member countries, the work is treated as though first published in the country which affords the shortest term. If a work is protected during a renewal term, the period of protection is considered to be the aggregate of the original and the renewal term.

Translation Rights.

This is another of the few instances where the Convention provides certain minimum substantive rights. Under the provisions of Art. V, the member countries are called upon to recognize the exclusive right, for at least seven years, of the author to make, publish and authorize the making and publication of translations of works protected under the Convention. Like the United States, most of the major countries of the world do recognize and protect such exclusive translation rights for the full term of copyright. However, certain of the smaller countries have objected in the past to any recognition, or have given slight recognition, to exclusive translation rights. The Convention secures protection for the author's exclusive right, as part of the copyright, in all member countries, to make, publish, and authorize the making and publication of translations, but in obtaining the consent of these smaller countries certain compromises were made as to so-called "writings." A country may legislate, if desired, so that if after seven years of exclusive translation right from the date of first publication of a "writing" (as distinguished from motion pictures, music, etc.) a translation thereof had not been published in the national language or languages of the particular member country by the owner of the right of translation or with his authorization (or all previous editions of a translation in such language were out of print), any national of such member country can obtain a nonexclusive nontransferable license from the competent authority thereof to translate the work and publish the work so translated in any of the national languages of the country in which it had not been published. The applicant would have to show that he had sought to procure, and was unable to find the owner of the right, and domestic legislation would have to assure to the owner of the right of translation appropriate compensation. The license is not grantable if the author had withdrawn from circulation all copies of the work. Copies of such translation may be imported and sold in other member countries officially using the same language, if the domestic law of such other country has such a license system and does not prohibit such importation and sale.

"Publication" Under the Convention.

The terms "published," "unpublished," "publication," etc., being used throughout the Convention, which provides separately for published and unpublished works, it was necessary for the Convention to have a definition of "publication." Under Art. VI, as used in the Convention, publication means the reproduction in tangible form and the general distribution to the public of copies of a work from which it can be read or otherwise visually perceived. This definition is applicable only to claimants who, as nonnationals not domiciled therein, seek protection in a member country, under the Convention, for works first published in another member country, or because the author of the work was a national of another member country. The definition is not necessarily applicable to domestic claims which are not made under the Convention, such as, for example, where a national seeks protection in his own country. The requirement of distribution to the public of copies of a work from which is can be read or otherwise visually perceived would appear to exclude from the definition of publication gramophone records, or other sound recordings on wire, tape, discs, etc. This does not mean that the source manuscripts of musical or dramatic compositions, for example, so recorded acoustically, would not necessarily obtain protection, under the Convention as unpublished works, if the manuscripts had not been otherwise published. To the extent, if any, that the substantive law of the country where enforcement is sought protects the recording of a rendition or performance, either as published or unpublished, the Convention would call for the same substantive protection, but as for an unpublished work.

No Retroactivity.

Under Art. VII, the Convention does not apply to works or rights in works which are permanently in the public domain in the contracting States. If, when the Convention shall have come into force as to a given country, a work, or right thereunder, shall have fallen permanently into the public domain in that country on that date, the same will not be subsequently restored. In some countries of the world, other than the United States, works may be temporarily in the public domain. In certain countries, such as those of the British Commonwealth, for example, a work, while unpublished, may be unprotected because the author is not a national of that country or of a country with which it has treaty relationships in such regard. Yet, since such country is a member of the Berne Union, it must subsequently give copyright protection to such work under the Berne Convention, regardless of the author's nationality, if its first publication happens to take place in any Berne Union country. At the time of such first publication the unpublished work will come out of the public domain in that country and go into protection as a Berne protected work. In certain other countries, a failure to register may temporarily throw a work into the public domain, subject to restoration of protection by a registration within a prescribed statutory period.

Protection for U.S. Works Automatically Abroad.

The Universal Copyright Convention will provide automatic protection in all other contracting States of works first published in the United States, or in any other member country, with the proper form of notice.

Advantages for U.S. Nationals.

This Convention has advantage of extending U.S. rights to countries which are not members of Berne Convention but are members of Universal Convention.

The Convention will furthermore supplement protection now obtainable under bilateral arrangements by providing for certain minimum standards in the way of term of copyright and translation rights. Furthermore, the protection will definitely be afforded so long as the Convention is in force between the United States and any specific country, which is a definitely ascertainable period, as distinguished from the nebulous state of bilateral arrangements announced many years ago by proclamation.

Notice of Copyright.

It is important to note that for Convention purposes the notice of copyright must be in the form of a “c” in a circle accompanied by the year in which first published and the name of the proprietor. The word “Copyright” or “Copr.” would not be sufficient, although sufficient in the U.S. for domestic purposes. While the year date may not be necessary for certain classes of copyright under U.S. law, it is necessary under Convention. (See 1.152 Notice of Copyright). Since Sept. 16, 1955, when Convention came into force, U.S. law also authorizes use for domestic protection of “c” in circle in lieu of words “Copyright” or “Copr.” Reasonable course for U.S. nationals who desire protection, after Sept. 16, 1955, under Convention in other countries, as well as under domestic law in U.S., will be to use, for every class of work, “c” in circle form accompanied in every instance by year in which first published and name of proprietor. Further, notice should continue to be placed in such position and manner as will comply with present requirements of U.S. statute (see 1.152 Notice of Copyright), since such will also satisfy Convention requirement of place where it will serve to give reasonable notice of claim to copyright. Some who are especially cautious are adding words “Copyright” or “Copr.” immediately preceding or following encircled “c”.

Implementing Legislation.

The necessary implementing legislation, Public Law No. 743 (Act of Aug. 31, 1954), became effective upon the Convention coming into force as to the United States and 11 other countries on Sept. 16, 1955. The implementing legislation necessary for Convention purposes to enable nondomiciled nationals of other member countries to enforce their rights in the United

States, under the Convention, is contained in an amendment added as subsection (c) to §9 of our statute then in effect. This amendment is expressly made applicable to nondomiciled nationals of other countries who can claim under the Convention, by granting them certain exemptions from requirements of our statute still retained: (a) For citizens, (b) for aliens domiciled here, and (c) for works first published here. These exemptions are granted only to nonnationals of member countries when Convention shall be in force between United States and country of which author is national, or in which work was first published. Provisions of this amendment expressly do not extend to works of author who is citizen of United States, or alien domiciled here, regardless of place of first publication, or to works first published in United States, so that domestic law would apply exclusively to these situations.

Protection for U.C.C. Works of Foreign Origin Within the U.S.A.

As to published or registered works, the above exemptions from provisions of the United States copyright statute, by the implementing legislation, Public Law 743, are given exclusively, as above indicated, to works of an origin foreign to the United States coming within the purview and mandate of the U.C.C. Such foreign works of U.C.C. origin, if first published with U.C.C. notice of copyright, are entitled to protection within the United States, as above described, exclusively in the federal courts, under our copyright statute. The substantive rights accorded to these protectible published works of U.C.C. origin are the same as those accorded by the statute to United States citizens (with the exemptions in favor of U.C.C. claimants above indicated).

As to unpublished, unregistered works, although the Convention also requires their protection without formalities, subject to its definition of publication and other requirements, implementing legislation was expressly enacted by Congress in this respect. (§104[a]).

1.236 UNPUBLISHED WORKS:

Unpublished works as well as published works are protectable under copyright. (§104).

At Common Law.

Under prior Act unpublished works were protected under concept of common law copyright. This theory will still apply to those few works involving subject matters that are not covered by current statute. Current statute in effect grants statutory copyright protection to all copyrightable works from moment of their fixation in tangible copy, whether or not published.

Under current statute copyrights can be registered as soon as fixed and there is no need to publish before registration as was case for several types of works under prior Act.

1.237 USE (MECHANICAL) FOR MUSIC:

Where phonorecords of nondramatic musical work have been distributed to public under authority of copyright owner, any other person may obtain compulsory license to make and distribute phonorecords of work. Any person wishing to obtain such license shall serve notice to such effect on owner of work or if this is not feasible, on Copyright Office. Said compulsory license requires payment of royalties set by statute. (§115). This compulsory license gives limited right to rearrange music and does not give right to publish lyrics separately. (§115).

1.238 USEFUL ARTICLES:

Useful articles are those that have intrinsic utilitarian function. Design on useful article shall be copyrightable only if and only to extent that such design incorporates pictorial, graphic or sculptural features that can be identified separately from and can exist separately from utilitarian aspects of article. (§§101, 113). Thus, lamp even though attractive in design cannot be copyrighted but independent frieze on lamp base may be copyrighted.

Similarly, typefaces are not copyrightable.

There are currently substantial differences among Courts on what design features may be separately identified from useful object. (632 F.2d 989).

Case law has made exceptions for certain useful items, including toys, fabric, buildings, computer programs.

See, however, §1301 which provides for non-copyright protection for new and original vessel hull designs. This new right will be administered by Copyright Office although not copyrightable.

1.239 VIDEOTAPES:

On Apr. 19, 1961, Copyright Office for first time accepted for deposit motion picture of operatic performance, recorded on video tape, when it received copies of such tape on three reels, accompanied by playbill, similar to programs distributed in legitimate theatres, which had been distributed to Canadian pay-TV viewers of broadcast of such motion picture performance. While tape itself is incapable of being so perceived through direct observation, symbols embodied thereon can be perceived visually and acoustically in synchronization, in form of typical screening of sound motion picture performance, when electronically activated in appropriate projection apparatus.

Videotapes are recognized under current statute as suitable tangible medium of expression of copyrightable work. (§§101, 102[a]).

1.240 VISUAL ART:

Painting, drawing, print, sculpture, photographic image as defined and limited in §§101 and 113(d).

Visual Artists Rights Act of 1990.

Principally codified in §106A of Copyright Act, these provisions created certain rights for authors relating to attribution and integrity in respect to their works and limited certain transfers and waivers in respect to these works. These affirmative legal rights were part of U.S. Copyright Act's protection of “moral rights” in accordance with certain U.S. treaty obligations under provisions of Berne Convention.

1.241 WARRANTIES:

Implied warranty of merchantability found in Uniform Commercial Code and state statutes adopting it, includes warranty that product sold is free from infringement of copyright. However, with respect to license agreements deeming transfer not sale, question of Art. 2's applicability to software licensees is not clear. See also topic 1.17 Assignment, subhead No Implied Warranty of Title.

1.242 WEBCASTING:

Use of copyrighted works for streaming and other transmissions over Internet is complex and evolving area of copyright law and regulation. See http://www.loc.gov/copyright for June 20, 2003 “Announcements on Rates and Terms for Webcasting Statutory Licenses” and regarding administrative proceedings relating to “Notice and Recordkeeping” for webcasting performances for partial coverage of this complicated subject matter.

1.243 WIDOW OR WIDOWER:

Author's surviving spouse under law of author's domicile at time of his or her death, whether or not spouse has remarried will be considered widow or widower. (§101).

1.244 WORKS FOR HIRE:

Works for hire are defined by §101 of statute as works prepared by employees within scope of their employment or, in case of work specially ordered or commissioned, where there is written agreement signed by both parties expressly providing that work shall be considered as work for hire and subject matter of work is within narrow limits defined by statute.

Controversy over when work would be considered as prepared by employee was resolved by Supreme Court in 1989 in U.S. Community For Creative Non-Violence v. Reid, 10 USPQ2d 1985, where it held that general principles of law of agency must be used.

In true cases of works for hire, hiring party is considered author. Such works have own duration provision (§302[c]) and are not subject to termination of grant provisions of statute (§203[a]).

Where there is some doubt whether there is true work for hire arrangement, assignment of copyright should be obtained.

See topic 1.22 Author, subheads Employers Who Hire, as Authors; Works for Hire.

1.245 WORKS OF ART:

Works of art come within statutory class of pictorial, graphic and sculptural works (§102[a][5]) and include works of fine and applied art. Copyright Office has set our guidelines as to copyrightable subject matter in this class at c. 500 of Compendium II of Copyright Office Practices (1984).

Authors of works of fine art as defined in §101 are entitled to quasi-moral rights granted under §106A.

Important decision by U.S. Supreme Court in Mazer v. Stein (1954, 347 U.S. 201) holding that statuette registrable as copyrighted work of art did not lose its right to protection against infringement, because it had utilitarian features intended to permit its use as base for electric lamp, resulted in flood of applications to Copyright Office to register claims to copyright in costume jewelry, artistic designs applied to various articles of utility such as cloth, dishes, toys, glassware, silverware, etc. Regulations of Copyright Office promulgated in 1956 attempt to delineate criteria under which Copyright Office is attempting to exercise its discretion in accepting registrations of such works (see “works of visual arts”, under 1.37 Classification of Works for Registration). Artistic jewelry, enamels, glassware and tapestries, as well as works belonging to fine arts such as paintings, drawings, and sculpture are acceptable, whether published or unpublished, insofar as their form but not their mechanical or utilitarian aspects are concerned. Where object is clearly work of art in itself, according to Reg. §202.10, fact that it is also useful article will not preclude its registration. If sole intrinsic function of article is its utility, fact that it is unique and attractively shaped will not qualify it as work of art. Registrability is not affected by intention as to use of work or number of copies to be reproduced.

Courts will not judge artistic merit of work to determine copyrightability. They will only look to see if there is creative authorship.

Criteria as to Copyrightability of Slight Version of Public Domain Materials as Work of Art.

For a review of landmark cases from early to modern times, in denying plaintiff's motion for an injunction in connection with infringement claim on a Teddy Bear doll as a work of art, see (E.D.N.Y. 1974), 183 USPQ 642.

For current law in 2d Cir. re: need for more than unsubstantial modification of prior work see 189 USPQ 753.

Fabrics.

The courts are sustaining copyrights of works of art as applied to fabrics and have been granting preliminary injunction against infringement and distribution where designs have been unauthorizedly copied upon other fabrics that went into articles of clothing. (Novelty Textile Mills, Inc. v. Joan Fabrics Corp., 558 F.2d 1090).

Originality, not novelty, was the test in sustaining the “Byzantium” design, even though the same was suggested by ancient art forms. (S.D.N.Y. 1962, 207 F. Supp. 563, 133 USPQ 678).

With plaintiff's copyright design fabric before it, as well as defendant's alleged infringing design, Court of Appeals felt that it was in a position to make a comparison in which ultimate test in case of this sort is whether an average lay observer would find a substantial similarity in designs so as to recognize copy as an appropriation of copyrighted work. Very nature of minor differences only tended to emphasize to court extent to which defendant had deliberately copied from plaintiff. With same record before it, court found that District Court in its discretion should have awarded preliminary injunction and reversed denial thereof. (2d Cir. 1969, 409 F.2d 1315, 161 USPQ 3, reversing S.D.N.Y. 1969, 296 F. Supp. 736, 161 USPQ 31).

Embellishment or expansion of an original design “in repeat” so as to broaden design and thereby cover a bolt of cloth, together with beginning pattern in a particular way so as to avoid having unsightly joint when pattern is printed on textiles on a continuous basis, constitutes modest but sufficient originality so as to support copyright. In reversing District Court's finding of no infringement, 2nd Circuit felt court below had ignored purpose for which fabric was to be used, namely dresses, and had ignored color similarities observable from comparatively short distances, by concentrating on black and white reproductions of design itself, apart from uses to which intended. (2 Cir. 1974, 490 F.2d 1092, 180 USPQ 545, rev'g S.D.N.Y. 1973, 365 F. Supp. 1199, 180 USPQ 362).

Jewelry.

Costume jewelry in the form of pair of earrings, claim to copyright in which was duly registered as work of art in Copyright Office, was upheld as copyrightable and defendant found to have infringed such work. (2d Cir. 1958, 253 F.2d 948, cert. denied, 357 U.S. 936). See, also, 2d Cir. 1962, 309 F.2d 745, 135 USPQ 234). Copyright Office will reject applications for jewelry which do not show sufficient sculptural authorship.

Artificial Flowers.

Artificial lilac was upheld as copyrightable, and a preliminary injunction was awarded against infringement of its copyright and importation of pirated copies from Hong Kong. (S.D.N.Y. 1962, 201 F. Supp. 287, 132 USPQ 350). Other courts have similarly conceded possible validity of copyrights secured in “cactus dahlia” (S.D.N.Y. 1962, 203 F. Supp. 649, 133 USPQ 75), or in sprays of boxwood and chinese asters (S.D.N.Y. 1962, 206 F. Supp. 192, 134 USPQ 70), although preliminary injunctions were denied therein (and such denial sustained *per curiam* in “cactus dahlia” case, 2d Cir. 1962, 301 F.2d 286, 133 USPQ 58), on ground that alleged similarities of defendant's artificial flowers were not striking enough to justify finding of copying in absence of proof of access. See also topic 1.114 Importation.

Copyright Notice.

As to the quantity, nature and position of copyright notices to be attached to copyrighted works of art applied to jewelry, garments containing the fabric design, etc., see various subheads under topic 1.152 Notice of Copyright.

1.246 WORLD INTELLECTUAL PROPERTY ORGANIZATION (WIPO):

See topic 1.99 Foreign Rights, subhead World Intellectual Property Organization (WIPO), supra.

1.247 WORLD TRADE ORGANIZATION (WTO):

Organization formed under Gatt Treaty in 1994. Citizens of member states of WTO are granted some rights under Berne Convention. Also such citizens have right to restore copyright in some public domain works. See topic 1.197 Restoration of Copyright.

1.248 FORMS:

Complaint for Infringement of Copyright and Unfair Competition.

(Official Form No. 17, Federal Rules of Civil Procedure, as amended in 1963). Form should be modified to fit facts of controversy.

1. [Allegation of jurisdiction].

2. Prior to March, 1936, plaintiff, who then was and ever since has been a citizen of the U. S., created and wrote an original book, entitled . . . . . .

3. This book contains a large amount of material wholly original with plaintiff and is copyrightable subject matter under the laws of the U.S.

4. Between March 2, 1936, and March 10, 1936, plaintiff complied in all respects with the Act of (give citation) and all other laws governing copyright, and secured the exclusive rights and privileges in and to the copyright of said book, and received from the Register of Copyrights a certificate of registration, dated and identified as follows: “March 10, 1936, Class . . . . . ., No. . . . . . .”

5. Since March 10, 1936, said book has been published by plaintiff and all copies of it made by plaintiff or under his authority or license have been printed, bound, and published in strict conformity with the provisions of the Act of . . . . . . and all other laws governing copyright.

6. Since March 10, 1936, plaintiff has been and still is the sole proprietor of all rights, title, and interest in and to the copyright in said book.

7. After March 10, 1936, defendant infringed said copyright by publishing and placing upon the market a book entitled . . . . . ., which was copied largely from plaintiff's copyrighted book, entitled . . . .

8. A copy of plaintiff's copyrighted book is hereto attached as “Exhibit 1”; and a copy of defendant's infringing book is hereto attached as “Exhibit 2.”

9. Plaintiff has notified defendant that defendant has infringed the copyright of plaintiff, and defendant has continued to infringe the copyright.

10. After March 10, 1936, and continuously since about . . . . . ., defendant has been publishing, selling and otherwise marketing the book entitled . . . . . ., and has thereby been engaging in unfair trade practices and unfair competition against plaintiff to plaintiff's irreparable damage.

Wherefore plaintiff demands:

1. That defendant, his agents, and servants be enjoined during the pendency of this action and permanently from infringing said copyright of said plaintiff in any manner, and from publishing, selling, marketing or otherwise disposing of any copies of the book entitled . . . .

2. That defendant be required to pay to plaintiff such damages as plaintiff has sustained in consequence of defendant's infringement of said copyright and said unfair trade practices and unfair competition and to account for

(a) all gains, profits and advantages derived by defendant by said trade practices and unfair competition and

(b) all gains, profits, and advantages derived by defendant by his infringement of plaintiff's copyright or such damages as to the court shall appear proper within the provisions of the copyright statutes, but not less than two hundred and fifty dollars.

3. That defendant be required to deliver up to be impounded during the pendency of this action all copies of said book entitled . . . . . . in his possession or under his control and to deliver up for destruction all infringing copies and all plates, molds, and other matter for making such infringing copies.

4. That defendant pay to plaintiff the costs of this action and reasonable attorney's fees to be allowed to the plaintiff by the court.

5. That plaintiff have such other and further relief as is just.

Comment on Official Form of Complaint.

The foregoing form is intended primarily as a guide for an appropriate complaint. It must necessarily be adapted to fit the particular situation. It is not required to be followed verbatim. If injunctive relief is not desired, or would not be available, by reason of expiration of the copyright or otherwise, it is not necessary to include allegations or prayers with reference to such relief. This is similarly so with respect to allegations of unfair competition. The allegation of paragraph 5 is no longer necessary because of demise of manufacturing requirement in 1986. Allegation of jurisdiction should be to the effect that the cause or causes of action arise under Tit. 17 of the U.S. Code entitled Copyrights. Rescission by U.S. Supreme Court of Rule 2 of Copyright Rules, as of July 1, 1966, eliminates necessity of allegation No. 8 in above sample form of copyright infringement complaint. The allegation in paragraph 9 that plaintiff has notified defendant of the infringement and defendant has continued to infringe, is not necessary, but would be important in recovering maximum damages. Allegation in paragraph 10 that defendant is continuing to infringe is not essential, although important if injunctive relief is sought. Defendant would nevertheless be liable for damages or profits, as well as subject to seizure, impounding and destruction remedies in appropriate situation, if he committed single infringement which he did not continue. Pleading request for actual damages allows defendant to seek jury trial.

Complaints under Notice Pleading.

Complaint will be sustained as sufficient where it simply alleges issuance of registration certificate, ownership of copyright by plaintiff, and that defendant is infringing copyright, without alleging “copying” (which is implied). Litigants are not obligated to follow Form No. 17. Any further information can be developed by discovery. (S.D.N.Y. 1970, 166 USPQ 396, [citing Judge Ryan's reference in such regard to 301 U.S. 168, 33 USPQ 247], in S.D.N.Y. 1948, 79 F. Supp. 515, 516, 77 USPQ 155, 156). Adherence by U.S. to Berne Convention eliminates need to plead Certificate of Registration for non-U.S. Berne Works.

Copyright Office Application Forms.

Forms of application for registration of a claim to copyright, either for a published or unpublished work, in the respective classes of copyright, will be supplied free. (For list of such forms, see 1.12 Application for Registration, supra.)

All requests for applications and information, as well as deposits and other material for the Copyright Office, should be addressed to “Register of Copyrights, Library of Congress, Washington, D. C. 20559.”

For the particular form of application used for each separate classification, see 1.12 Application for Registration, supra.

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UNITED STATES PATENT LAW DIGEST

—Scope —

Revised for 2010 edition by

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(This digest is based on U.S. Patent Laws [published as Title 35, U.S. Code, 1952 Edition, as amended], Patent and Trademark Office Rules [published as Regulations in 37 Code of Federal Regulations (CFR), as amended], Patent and Trademark Office Notices [published weekly in Official Gazette], Manual of Patent Examining Procedure (MPEP), and decisional law [published in several reporter services; see topic Decisions]. The comments in this digest are for general information purposes only and are not intended to be legal advice which should be sought from an attorney.)

Note: Except where noted otherwise, this revision is as of July 1, 2009.

1.01 THE PATENT SYSTEM:

Patent rights in U.S. are dependent upon Federal statute, with basis for our system predicated upon Art. 1, § 8 of the Constitution empowering Congress “To promote the progress of science and useful arts, by securing for limited times to . . . inventors the exclusive right to their . . . discoveries.” Under this, Congress has enacted law establishing Patent and Trademark Office (35 U.S.C. § 1), headed by Commissioner of Patents and Trademarks, hereafter “Commissioner” (35 U.S.C. §§ 3, 6), to superintend granting of patents for designated subject matter, after ruling on applications therefor as to substance and form (35 U.S.C. § 131), under procedures regulated by rules promulgated by Commissioner under statutory authority (35 U.S.C. § 6).

Utility patents are granted for process, machine, manufacture, or composition of matter. (35 U.S.C. § 101). Terms of utility patent begin on date patent issues. For applications filed on or after June 8, 1995, terms for utility patents end 20 years from date on which application for patent was filed, or from date of earliest U.S. filing under 35 U.S.C. §§ 120, 121, or 365(c). (35 U.S.C. § 154). Patents in force on June 8, 1995 or which directly result from pending applications filed on June 7, 1995 or before have patent term ending later of 20 years measured from effective filing date of application or 17 years measured from date of patent grant whichever is greater. (35 U.S.C. § 154). Design patents (35 U.S.C. § 171) are granted for ornamental design of article of manufacture for term of 14 years from date of grant (35 U.S.C. § 173); and plant patents (35

U.S.C. § 161) are granted for distinct and new varieties of asexually reproduced plants for term of 20 years. Patent term provisions for utility patents described above are applicable to plant patents but not design patents. See topic 1.44 Design Patents.

In order to secure patent, inventor must file application with proper fee in Patent and Trademark Office. (35 U.S.C. § 41 and see infra, topic Fees.) Applicant for patent may file and prosecute own case, or may be represented by attorney or agent authorized to practice before Office in patent cases. (37 C.F.R. § 1.31). Agent is person who is not attorney but has passed Office's Agent's exam. All written communications with Office must be addressed "Director of the United States Patent and Trademark Office, PO Box 1450, Alexandria, Virginia 22313-1450." (37 C.F.R. § 1.1).

Applications are classified according to various arts and are taken up for examination in regular order of filing unless made "special". (37 C.F.R. § 1.102). In lieu of examination, Statutory Invention Registration may be requested. (See topic 1.145 Statutory Invention Registration.) Otherwise, examination is by official called Examiner and applicant or attorney or agent is notified in writing of any rejections or objections. Applicant who desires to reply must do so in writing within six months or within such shorter time as is fixed in notification, usually three months. (35 U.S.C. § 133; 37 C.F.R. § 1.134). Such shorter period may be extended, but not beyond total of six months. (37 C.F.R. § 1.136). Applicant who does not file reply in time is held to have abandoned application. (37 C.F.R. § 1.135). Applicant's reply, which may be by amendment or argument, and usually is both, is in form of letter addressed to Commissioner and entitled like court paper, bearing name of applicant and identification of case. (37 C.F.R. § 1.111).

Patent and Trademark Office may again reply in writing to applicant's letter and this reply ordinarily allows application or finally rejects it in whole or in part. (37 C.F.R. § 1.113).

After two rejections or final rejection by Examiner, applicant has right of appeal to Board of Patent Appeals and Interferences (35 U.S.C. § 134), hereafter "Board," and, if decision of Board is adverse, review may be had in Federal courts (35 U.S.C. §§ 141-146).

In course of prosecuting application, it may develop that there is another application of another applicant claiming substantially same subject matter, or that patent has been issued to another within one year prior to such application and claiming substantially same subject matter. In such cases, Patent and Trademark Office institutes proceeding called "Interference" (35 U.S.C. § 135 and see topic 1.74 Interferences) to determine which party is prior inventor and, as such, entitled to patent.

If two patents are granted for same invention, they are said to be "interfering patents" and any person interested in one of them may have relief by civil action, in which court may adjudge any interfering patents void, in whole or in part. (35 U.S.C. § 291).

False statements to Patent and Trademark Office are prohibited. (18 U.S.C. 1001). Duty of candor and good faith by any individual associated with filing/prosecution of patent application, including duty of disclosure of all information known to be material, exists toward Office. (37 C.F.R. § 1.56).

On allowance of application, patent will issue on payment of statutory issue fees. If not timely paid, application will lapse unless late payment of fee is accepted. (35 U.S.C. § 151). Patent is granted to patentee giving right to exclude others from making, using, offering for sale, selling or importing invention into U.S. and if patent is process, giving right to exclude others from using, offering for sale or selling throughout U.S., or importing into U.S. products made by that process. (35 U.S.C. § 154). Maintenance fee must be paid 3.5, 7.5 and 11.5 years from grant to maintain utility patent in force for full term. (35 U.S.C. § 41[b]). Term can be extended (to total maximum of five years) for patents issued on applications filed between June 8, 1995, and May

28, 2000, for certain delays during prosecution of application due to interference, national security, or due to appellate review. (35 U.S.C. § 154[b]). For patents issued on applications filed on or after May 29, 2000, unlimited term extensions are available for not only same delays, but also delays caused by certain other processing by Office or failure to grant patent within three years of filing date of application that results in patent. Extensions are also available if claimed composition or process is subject to regulatory review (35 U.S.C. §§ 155, 156), or by act of Congress. But see topic 1.114 Patents. See also topic 1.90 Maintenance Fees.

After issuance of patent, unauthorized making, using, offering to sell or selling of patented subject matter within U.S. infringes patent and may be subject of civil action in Federal courts for injunction and/or damages. Additionally, whoever induces infringement (§ 271[b]) or contributes to infringement (§ 271[c]) will be liable (35 U.S.C. § 271[a]). Under 35 U.S.C. § 284, successful complainant may be awarded damages adequate to compensate for infringement, but in no event less than reasonable royalty—together with interest and costs, and court may increase the damages up to three times amount found or assessed. Under 35 U.S.C. § 285, court may, in exceptional circumstances, award reasonable attorney fees to prevailing party.

Matters relating to prosecution of application and to bringing and conducting of patent suits are explained in more detail in alphabetical digest which follows.

Patent law, rather than bankruptcy law, governs who has the right to bring suit for patent infringement, even when patent rights have been transferred as a result of bankruptcy or proceedings in equity. (499 F.3d 1332).

Patent and Trademark Office publishes each week notices regarding patents in general, patent suits filed, reissue applications filed, patents reexamined, patents granted (including general and mechanical, chemical, electrical, design, and plant patents), and indices of same, including names of inventors, in Official Gazette (OG), subscriptions available. Copies of all types of patent issued also available. Beginning on Nov. 29, 2000, Patent and Trademark Office will publish each week content of certain patent applications 18 months after earliest filing relied on in application.

1.02 ABANDONED EXPERIMENT:

Abandoned experiment is found where one who had endeavored to produce new invention either fails to develop complete and practicable idea, or fails to reduce idea to practice as operative art or instrument and then relinquishes efforts without intending to resume them.

1.03 ABANDONMENT OF APPLICATION FOR PATENT:

(See 35 U.S.C. §§ 41, 133; 37 C.F.R. §§ 1.135, 1.137, 1.155, 1.316.)

Application may be abandoned by express abandonment in writing, signed by applicant, and assignee, if any, and filed in Patent and Trademark Office. If application is not involved in interference, it may also be expressly abandoned by filing written declaration of abandonment signed only by attorney or agent of record. Express abandonment of application may not be recognized by Office unless received in time for action thereon before patent issue date. (37 C.F.R. § 1.138).

Abandonment of application will also result from failure of applicant to prosecute application within six months after any action therein of which notice has been given to applicant, or within such shorter time as fixed by Commissioner in such action. (35 U.S.C. § 133). Period runs from date of mailing of office action. Reply must be responsive or it will not operate to prevent abandonment. Reply must be received by Patent and Trademark Office within specified period unless mailed pursuant to 37 C.F.R. § 1.8 or 1.10.

However, application abandoned unintentionally or unavoidably during prosecution may be reinstated. (See topic 1.138 Revival of Abandoned Application.) (37 C.F.R. § 1.137).

Application is also abandoned if issue fee is not paid within three months from date notice of allowance is mailed to applicant by Patent and Trademark Office. (37 C.F.R. §§ 1.155, 1.316). Commissioner may accept late payment if it is shown that delay was unavoidable. (35 U.S.C. § 151 and 37 C.F.R. §§ 1.155, 1.316, and 1.317). Where late payment of fee is accepted, term of patent may be foreshortened by amount equal to delay.

Abandonment of application is not necessarily abandonment of invention although it may be evidence of intention to abandon invention. Abandonment of application gives no rights to public and applicant may make another application; but statutory conditions (35 U.S.C. § 102) on which right to patent rests are judged as of date of second application, if it is not filed before first application is abandoned, with respect to prior patents, public use and sale, etc.

In litigated matters, infringing party has burden of providing clear and convincing evidence that application for patent was abandoned in order to use abandonment as valid defense. (35 USPQ2d 1385). (See also topic 1.41 Defenses in Infringement Suits.)

1.04 ABANDONMENT OF INVENTION:

Abandonment of right to patent invention operates as surrender or dedication to public, and is statutory bar. (35 U.S.C. § 102[c]). Such abandonment may be either express or implied. (437 F.2d 486). Example of implied abandonment occurs when inventor discloses invention in patent, but does not expressly claim it in said patent, or any other related patent or application meeting all other statutory requirements. (437 F.2d 486). Once made, abandonment cannot be recalled.

1.05 ABATEMENT AND REVIVAL:

1946 amendment to 35 U.S.C. § 70 (1946 Ed.) made basis of recovery in patent infringement suits general damages rather than profits and damages. Previously, cause of action for patent infringement survived death of patent owner or infringer if infringer had made profits. (70 Fed. 498 Copyright Cases or Patent Cases). Civil action for damages based on damage to patent owner and not unjust enrichment to infringer or based on statutory penalty did abate. (245 Fed. 120). Elimination of profits as basis of recovery (35 U.S.C. § 284), except in design patent cases (35 U.S.C. § 289), left issue in doubt. However, subsequent court decisions (297 F.2d 323; 137 F. Supp. 659) hold that where suit was brought during patentee’s lifetime, there is survival to patentee’s legal representatives for infringement both of unexpired patents and of patents which had previously expired during patentee’s lifetime.

If case has gone to decree or judgment, there is no abatement. (110 U.S. 301 Copyright Cases or Patent Cases; 115 U.S. 285).

See Fed. Rules of Civ. Proc., Rule 25.

1.06 ABSOLUTE NOVELTY:

See topics 1.67 Grace Period; 1.104 Novelty.

1.07 ACCOUNTING:

If patent is held valid and infringed and court is satisfied that plaintiff may be entitled to more than nominal recovery, case may be referred to master to take and state account showing amount of damages, not less than reasonable royalty, adequate to compensate plaintiff for infringement. (35 U.S.C. § 284). See topic 1.37 Damages for Infringement.

1.08 ACTUAL REDUCTION TO PRACTICE:

Interference law recognizes actual and constructive reduction to practice. “Actual” generally relates to physical making of invention and “constructive” relates to filing of application, with description of best mode of invention sufficient to enable one skilled in art to make and use invention. (154 F.3d 1321). To establish actual reduction to practice, inventor must prove that he constructed his claimed invention and that it would work for its intended purpose. (323 F.3d 1000).

See also topic 1.74 Interferences.

1.09 ADMINISTRATOR:

See topic 1.57 Executor or Administrator.

1.10 AFFIDAVITS:

Affidavits (see also topic 1.39 Declaration) may be filed in Patent and Trademark Office by applicant to meet objections to allowance of application based on matters of fact, such as for proving, e.g., operativeness or commercial success. (See 37 C.F.R. § 1.132.)

When application is rejected on reference to domestic patent which does not claim subject matter in controversy, or foreign patent, or printed publication, applicant may overcome reference by affidavit (or declaration per below) under 37 C.F.R. § 1.131, if application has been filed within statutory period after date of such patent or printed publication. (35 U.S.C. § 102). Such affidavit must establish completion of invention in U.S. or other NAFTA or WTO country (see topic 1.11 Aliens—Inventions Made Abroad) before date of filing application on which cited domestic patent issued, or before date of foreign patent or of printed publication. Provisional applications and disclosure documents filed by inventor earlier than his application may be used as evidence of invention. See topics 1.125 Provisional Applications and 1.46 Disclosure Documents.

Affidavits are required in some cases before interference will be instituted. If applicant desires interference with issued and unexpired patent, and application bears later filing date than application on which patent was issued, applicant must make affidavit, stating that applicant is entitled to date of invention prior to filing date of patent, and, if applicant is junior to patent by more than three months, affidavit must make prima facie showing of prior invention.

Affidavits must also be filed in support of petition for institution of public use proceedings. Generally, in proceedings before tribunals of Patent and Trademark Office, affidavits will be received or excluded according to prevailing equity practice.

Formalities.

Any proof of facts formerly required to be under oath, with exception of testimony in contested cases, may instead be by written declaration when warning statements set out in 37 C.F.R. § 1.68 are included. See topic 1.39 Declaration.

Provided it is valid as to execution under local law, affidavit may be made before any person within U.S., authorized by law to administer oaths, or where affidavit is made in foreign country, before any U.S. authorized diplomatic or consular officer. (37 C.F.R. § 1.66). In case of foreign officer, authority must be proved by certificate of diplomatic or consular officer of U.S. Affidavit may be made before one foreign notary, who may be certified by second and only second need be certified to by diplomatic or consular officer. Affidavit must bear official seal of officer. When affidavit is taken in foreign country, seal should be impressed on each sheet or ribbon passed through all sheets and thence under seal. If person administering oath in U.S. has no seal, official character may be established by any competent evidence, as by certificate from clerk of court of record or other proper official having seal.

Affidavits must be truthful, and misleading affidavit may render any resulting patent unenforceable. (604 F.2d 17).

See also topic 1.39 Declaration.

1.11 ALIENS—INVENTIONS MADE ABROAD:

Persons contemplating possible filing of U.S. patent applications to claim inventions made abroad should note 35 U.S.C. § 104, which (except as to those who can show knowledge or use of invention in Canada or Mexico or WTO countries, or certain persons serving abroad in connection with operations by or on behalf of U.S.) bars establishment of date of invention by reference to any activity in foreign country except as provided in 35 U.S.C. § 119 and 35 U.S.C. § 365 and except to prove derivation. Establishment of dates of invention by reference to activities in NAFTA countries (effective Dec. 8, 1993) and in WTO member countries (effective Jan. 1, 1996) permitted. In general, same conditions will apply to inventions made in U.S.

35 U.S.C. § 119 is discussed below under topic Application for Patent, subhead Time of Filing and is especially important to aliens because timely compliance with its provisions may entitle applicant to benefit of filing date of first foreign application, whereas lack of compliance with 35 U.S.C. § 119 may restrict effective date of invention to date when invention is introduced into U.S. and restrict effective application date to actual U.S. filing date, see topic 1.17 Application for Patent, subhead Time of Filing. Any person, regardless of citizenship, may file U.S. application.

1.12 AMENDMENT OF APPLICATION:

Applicant for patent has right to amend specification, claims, and drawings, any or all of them, or new claims may be inserted, before final action by Patent and Trademark Office, provided such amendments are supported by original disclosure and requisite fee, if any, is paid. New matter, that is, matter not disclosed by application as originally filed, may not be added by amendment. (35 U.S.C. § 132).

Until final rejection (37 C.F.R. § 1.113), applicant has right to amend as often as Examiner presents new references or reasons for rejection (37 C.F.R. §§ 1.111, 1.112).

After final rejection, amendments relating to matters of form only may be admitted. Rejected claims may be cancelled, new allowable claims added at Examiner's discretion, or substitute claims added for purposes of appeal. (37 C.F.R. § 1.116[a]). After final rejection, amendments of substance may be admitted if new issues not raised or new search not required and upon showing of good reason why they are necessary and were not earlier presented. (37 C.F.R. § 1.116[b]). For applications having effective U.S. filing date of June 8, 1993 or before where submission after final rejection was refused entry, withdrawal of finality of final rejection, entry and consideration of submission can be obtained on two separate occasions by paying requisite fee prior to filing appeal brief. (37 C.F.R. § 1.129[a]).

No amendment can be made as matter of right in appealed cases. (37 C.F.R. § 1.116[c]).

After decision on appeal to Board amendment may be made to carry into effect recommendation of Board under 37 C.F.R. §§ 1.196, 1.198.

Substitute specification may be submitted if accompanied by statement verifying that no new material was added. (37 C.F.R. § 1.125[b]).

Amendments to specification will not be received during pendency of interference without consent of Administrative Patent Judge. (37 C.F.R. § 1.615[a]).

New claims may be proposed to application in interference for purpose of being added to interference. (37 C.F.R. § 1.633[c]).

Specific manner of making amendments in applications has changed in order to remove requirement to provide clean copy of any revisions. (37 C.F.R. § 1.121).

Claim which is same as, or for substantially same subject matter as, claim of issued patent may not be made for first time more than one year after date of patent. (35 U.S.C. § 135[b][1]). To establish entitlement to earlier effective date of existing claims for purposes of this one-year bar, party must show that later filed claim is not materially different from earlier filed claim. (455 F.3d 1371). Claim which is same as, or for substantially same subject matter as, claim of application published under 35 U.S.C. § 122(b) may not be made for first time more than one year after date of publication. (35 U.S.C. § 135[b][2]).

Formal amendments after notice of allowance may be made on recommendation of Primary Examiner approved by Commissioner. (37 C.F.R. § 1.312).

After issue fee is paid no amendment is possible, unless filed with grantable petition to withdraw application from issue that is actually received and acted on by appropriate official before date of issue. (37 C.F.R. §§ 1.313[c], [d]).

Formalities.

Amendment should set forth title, filing date, and application number including series code and serial number of application and, if in response to Patent and Trademark Office action, should refer to date of that action and give group art unit number and Examiner's name appearing on last Office letter; should show how amendment avoids references, rejections or objections and should point out all patentable novelty defined by claims. (37 C.F.R. § 1.111).

Amendment should clearly state matter to be canceled and added and indicate precisely references to original papers. Amendment must be personally signed by applicant, assignee of record of entire interest, or agent or attorney of record or acting in representative capacity. Rubber stamp signatures and law firm signatures are improper and will not be accepted.

Amendment transmittal letter showing calculation of fees should accompany amendment.

Amendment, if signed, can be filed by facsimile if accompanied by certified transmission statement. See topic 1.60 Facsimile Filing.

Time of Filing.

Any response to action of Patent and Trademark Office must be received by Office within six months of date of such action, unless Office has set shorter period not less than 30 days. Shorter period must be specified; may be extended retroactively by petition and fee for up to five months but not more than six months from mailing date of action setting statutory period for reply. Certificate of mailing is available under 37 C.F.R. § 1.8 for filing of certain papers which are timely deposited in U.S. mail, postage prepaid. Only Express Mail is available under 37 C.F.R. § 1.10 for filing papers in Patent and Trademark Office.

1.13 ANIMALS:

Office had long standing policy that multicellular animals were not patentable subject matter. Office reversed its decision, and first patent to animals issued Apr. 12, 1988. (35 P.T.C.J.

508). After delay of four years, Patent and Trademark Office issued patents for genetically engineered mice in Dec. 1992. (45 P.T.C.J. 159). Likewise, human-made, genetically engineered bacterium can be patented. (447 U.S. 303; 927 F.2d 1565).

1.14 ANTICIPATION:

See topic 1.104 Novelty.

1.15 ANTITRUST RESTRICTIONS ON PATENTS:

Right to exclude granted by patent laws enjoys limited exception to prohibitions of antitrust laws. Guidelines have been issued jointly by U.S. Department of Justice and Federal Trade Commission which describe permitted conduct. (49 P.T.C.J. 703, 714). However, patent may be used so as to lose this exception, when patent is enforced with knowledge of its fraudulent procurement (see 382 U.S. 172). However, clear and convincing proof of intentional fraud must be present. (812 F.2d 1381). Antitrust liability imposed if infringement suit brought in bad faith, and question of whether conduct in procuring or enforcing patent is sufficient to strip patentee of immunity from antitrust laws is to be decided as question of Federal Circuit law. (228 USPQ90; 46 USPQ2d 1097). Patent leverage may not be used to affect markets in unpatented goods (see 332 U.S. 392). Patent licenses may not employ certain restrictions contrary to antitrust policy. (395 U.S. 100 and 410 U.S. 52). Unless evidence exists of fraud before PTO, court need not analyze validity of patent when determining antitrust issues of patent litigation settlement agreement involving reverse payment. (544 F.3d 1323). Patentee may enforce restrictions for use of patented item after sale under rule of reason. (976 F.2d 700). In cases involving tying arrangements, plaintiff must prove that defendant has market power in tying product. However, there is no presumption of market power when tying product is patented. (126 S. Ct. 1281 or).

Acquisition of patents, like other assets, is governed by antimerger provisions of Clayton Act. (15 U.S.C. § 18).

1.16 APPEALS:

Ex Parte Cases.

Appeal from second or final action by Examiner may be taken to Board of Patent Appeals and Interferences (Board) within time for response set in action. (See topic 1.61 Fees.) Appeal must specify claim or claims involved. (37 C.F.R. § 1.192[c][3]). No signature required. (37 C.F.R. § 1.191[b]). Brief on appeal (three copies) is due within two months of filing appeal or within time allowed for response to action appealed from if such time is later. (37 C.F.R. § 1.192). If appellant desires oral hearing, appellant must so state to Patent and Trademark Office and Examiner may present oral argument. (37 C.F.R. § 1.194). Time for filing brief may be retroactively extended when filing brief (37 C.F.R. § 1.192) up to earlier of expiration of any maximum period set by statute or five months upon filing of petition and payment of fee (37 C.F.R. § 1.136[a]). Oral hearing must be requested within two months of Examiner’s answer (37 C.F.R. § 1.194[b]) with appropriate fee (37 C.F.R. § 1.17[d]). Oral hearing dates are not extendable. If Examiner states new ground of rejection, appellant must reply within two months of date of answer with appropriate amendment to prevent abandonment. (37 C.F.R. § 1.193[b]). Appeal from action dismissing appeal for failure to file reply is outside scope of authority of Federal Circuit. (432 F.2d 473).

Rehearing or Reconsideration Before Board.

Request for reconsideration of final decision may be made to Board and shall be filed within one month after date of decision. (37 C.F.R. § 1.658[b]). Request for rehearing must be filed within two months from date of original decision. (37 C.F.R. § 1.197[b]). Time for filing notice of appeal to U.S. Court of Appeals for Federal Circuit or for commencing civil action is two months from date of decision of Board. (37 C.F.R. § 1.304).

Applicant aggrieved by decision of Board can elect between (1) appeal to Court Appeals Federal Circuit (CAFC) (35 U.S.C. § 141) or (2) civil action in District Court for District of Columbia (35 U.S.C. § 145) with subsequent appeal to CAFC.

Interference or Inter Partes Cases.

Interference cases are determined in Patent and Trademark Office by Board. Party to interference who is dissatisfied by decision of Board on question of priority may appeal to CAFC under 35 U.S.C. § 141 or may file civil action under 35 U.S.C. § 146. (342 F. Supp. 125). If notice of appeal to CAFC is filed, successful party may secure dismissal of such appeal by filing notice with Commissioner (35 U.S.C. § 141) that party elects to have further proceedings conducted according to 35 U.S.C. § 146. Such notice of election must be filed within 20 days after filing of notice of appeal and must be served on adverse parties.

Formalities.

Appeal to CAFC is taken by filing in Patent and Trademark Office written notice of appeal within two months from date of decision appealed from. (37 C.F.R. §§ 1.302, 304). Motion to stay permanent injunction qualifies as notice of appeal if it: (1) Specifies party or parties taking appeal; (2) Designates judgment, order, or part thereof being appealed; and (3) Names court to which appeal is taken. (515 F.3d 1353). Copy of notice of appeal and appeal fee is filed with Court. (37 C.F.R. § 1.301). Commissioner then prepares certified list of documents and transmits same to Court. Appellant may appear pro se but only attorneys who are members of bar of Court may practice there. Admission is made through Clerk of Court. Attorney who is member of bar of Court makes proper appearance by signing and filing petition of appeal. Additional counsel may appear of record provided appearance form is executed.

Appellant must file brief with Court. Further proceedings are governed by rules of Court, copies of which are available from Clerk.

Court, in its discretion or appellant's motion, may protect trade secret from disclosure. (416 U.S. 470). Court may also issue writ of mandamus to Patent and Trademark Office in exercise of jurisdiction. (599 F.2d 435).

Review of CAFC decision is by petition for writ of certiorari to Supreme Court. (31 PTCJ 558).

Civil Actions Under 35 U.S.C. §§ 145 and 146.

As to pleading and practice, these actions are like other civil actions in respective federal courts. Actions under 35 U.S.C. § 145 are exclusively in U.S. District Court for District of Columbia. Action under 35 U.S.C. § 146 can be brought in federal district court having jurisdiction over adverse party or all adverse parties, and, if there are adverse parties residing in plurality of districts not embraced within same state or adverse party residing in foreign country, U.S. District Court for District of Columbia has nonexclusive jurisdiction. Under either 35 U.S.C. § 145 or 35 U.S.C. § 146, action must be commenced within two months after Patent and Trademark Office decision (37 C.F.R. § 1.304), except, however, that action under 35 U.S.C. § 146 pursuant to notice of election filed by adverse party under 35 U.S.C. § 141 must be commenced within 30 days from filing of such notice.

Appeals in Patent Infringement Actions and Civil Actions Under 35 U.S.C. §§ 145 and 146.

Party aggrieved by decision of district court may appeal to Court Appeals Federal Circuit by filing notice of appeal. (U.S. Ct. of App. Fed. Cir. Rules §§ 1-60).

1.17 APPLICATION FOR PATENT:

Application for patent can be provisional application (cannot issue as patent), or non-provisional application which includes international application under Patent Cooperation Treaty that designates U.S. Application could also be directed to utility invention, design invention, or asexually reproduced plant.

Non-provisional application for patent (35 U.S.C. § 111[a]) shall be by inventor(s) (35 U.S.C. § 116) except as provided otherwise in Tit. 35 (see 35 U.S.C. §§ 117, 118). International application (35 U.S.C. § 351) may also be filed under Patent Cooperation Treaty (PCT) which must be in English language (35 U.S.C. § 361) and comply with certain PCT page size requirements (37 C.F.R. § 1.433). International application is subject to procedure in International Stage (35 U.S.C. §§ 351-368) and procedure in National Stage (35 U.S.C. §§ 371-376). All inventors names must be stated at time of filing international application, but may be named after filing date in provisional or non-provisional application. (37 C.F.R. § 1.45[a]). All questions of substance and procedure in U.S. application based on international applications filed elsewhere and designating U.S. shall be determined as in case of applications regularly filed in Patent and Trademark Office, except in restriction practice of 37 C.F.R. §§ 1.475 and 1.141. Office will accept applications prepared on 8.5” width paper having length of 11” or A4 size paper (21.0 x 29.7 cm.) with 1½ or double spacing between typed lines, page numbering at bottom, title at beginning of specification, and margins required by PCT (Rule 433) and 37 C.F.R. § 1.52. See topic 1.64 Foreign Patents and Applications. Office will not accept letter size for applications destined for PCT filing.

Complete non-provisional application (37 C.F.R. § 1.51) comprises: (1) oath or declaration (see 37 C.F.R. § 1.63 and see topics 1.39 Declaration; 1.105 Oath or Declaration); (2) specification which must contain: (a) description of invention and of manner and process of making and using it, in such full, clear, concise and exact terms as to enable any person skilled in art to which it pertains or art with which it is most nearly connected to make and use same, and must set forth best mode contemplated by inventor of carrying out invention (35 U.S.C. § 112), (b) claims, specification must conclude with one or more claims particularly pointing out and distinctly claiming subject matter which applicant regards as invention (35 U.S.C. § 112). Inventor is not required to disclose in application every detail of invention to satisfy requirement of written description under 35 U.S.C. § 112. (982 F.2d 1527; see also 413 F.3d 1318). However, any details omitted must be obvious to those skilled in art to which application pertains, and not require extensive experimentation to discover. Claims constitute measure of rights secured by patent. Patent infringements are determined by comparing claims with alleged infringer’s device, process, etc. (see topic 1.27 Claims); (3) drawings, where necessary for understanding of subject matter sought to be patented (35 U.S.C. § 113) (see topic 1.50 Drawings); (4) prescribed filing fee, see 35 U.S.C. § 41 and 37 C.F.R. § 1.16. Filing fee and signed oath or declaration may be filed later at time designated by Patent and Trademark Office. (37 C.F.R. § 1.53[f]). Special rules apply to certain biotechnology patent applications. (37 C.F.R. §§ 1.801-825).

Applicants are encouraged to file an information disclosure statement at time of filing non-provisional application or within later of three months thereafter or before first action; see 37 C.F.R. §§ 1.56, 1.97, and 1.98 and topic Information Disclosure Statement.

Provisional applications (35 U.S.C. § 111[b]) can serve as basis for applications filed within one year and making reference thereto. Four requirements must be met for non-provisional application to claim priority to provisional application: (1) Provisional must comply with requirements of § 112 ¶1 and non-provisional must be for same invention; (2) Non-provisional must be filed within 12 months of provisional; (3) There must be overlap of inventorship; and (4) Non-provisional must include specific reference to provisional. (35 U.S.C. § 119[e][1]; 86 USPQ2d 1732). Provisional applications will not be examined except for compliance with 37 U.S.C. §§ 1.53(c) and 1.53(g) Provisional applications cannot claim benefit of earlier-filed application. After one year, provisional application will go abandoned. (37 U.S.C. § 1.53[i]).

Provisional applications ultimately (but not at filing date) must name all inventors, but no oath or declaration (37 C.F.R. § 1.51) is required, nor do provisional applications require any claims; see topic, Provisional Application.

Application contents, if applicable, should be arranged in order listed (37 C.F.R. § 1.77[a]): (1) Utility application transmittal form; (2) fee transmittal form; (3) application data sheet (see § 1.76); (4) specification; (5) drawings; (6) executed oath or declaration. Specification should include following sections in order 37 C.F.R. § 1.77(b): (1) title of invention (37 C.F.R. §§ 1.72[a], 1.77[a]); (2) cross-references to related applications (unless included in application data sheet) (37 C.F.R. § 1.78); (3) statement regarding federally sponsored research or development; (4) reference to "Sequence Listing," table, or computer program listing appendix submitted on compact disc and incorporation-by-reference of material on compact disc (see 37 C.F.R. § 1.52[e][5]), and total number of compact discs including duplicates and files on each compact disc shall be specified; (5) background of invention; (6) brief summary of invention (37 C.F.R. § 1.73); (7) brief description of several views of drawings, if any; (8) detailed description of invention (37 C.F.R. § 1.71); (9) claim or claims (37 C.F.R. § 1.75); (10) abstract of disclosure (37 C.F.R. § 1.72[b]) (purpose of abstract is to enable Patent and Trademark Office and public generally to determine quickly from cursory inspection nature and gist of technical disclosure, and abstract shall not be used for interpreting scope of claims) (but see 320 F.3d 1354 where claim construction includes consultation of preferred embodiment and abstract); (11) "Sequence Listing," if on paper (see §§ 1.821-1.825). Sufficiency of application judged as of filing date. (492 F.2d 1228). Graphs and graphical type illustrations not permitted in specification or claims. (37 C.F.R. § 1.58[a]).

Oath or declaration and specification must be in English language (except as provided in 37 C.F.R. § 1.69), must be legibly written or printed in permanent ink or its equivalent in quality. (37 C.F.R. § 1.52). See topic 1.105 Oath or Declaration. Non-English application papers permitted provided verified literal English translation timely filed when requested.

Applicants who cannot understand English must each make oath or declaration in language applicant understands and must state that applicant understands content of document to which oath or declaration relates. (37 C.F.R. § 1.69). Non-English oaths or declarations may be in form approved by Patent and Trademark Office. If not in approved form, must be accompanied by verified English translation except translation may be filed no later than two months from date applicant is notified to file translation when oath or declaration filed under 37 C.F.R. § 1.63. (37 C.F.R. § 1.69).

If alterations are unavoidable they must have been made before application was signed and sworn to or declaration made and each change should be initialed and dated in ink by inventor in margin or footnote to indicate such fact. Alterations made after execution of application papers must be supported by supplemental oath or declaration. (37 C.F.R. §§ 1.52[c] and 1.67[c]).

Duty of candor and good faith, including duty of disclosure, toward Patent and Trademark Office by inventor and attorney or agent and other individuals substantively involved; see 37 C.F.R. § 1.56 and topic 1.51 Duty of Disclosure. There is no requirement to disclose material to Office in provisional application, or international stage processing of international application. Duty and requirement do apply to U.S. National Stage processing of international application.

Application is filed in Patent and Trademark Office together with application transmittal letter which shows calculation of fee unless fee filed later within time required by Office, though basic fee must be paid at time of filing PCT national application. See topics 1.61 Fees; and 1.63 Filing Dates. Application is given application number including series code and serial number, is classified, and is assigned for examination to appropriate group of Office unless either fee or oath or declaration or translation (verified if non-PCT application) is missing in which event Office gives applicant at least a month to file same in order to retain original filing date. Office may refuse filing date if required information not supplied (37 C.F.R. § 1.53). Applications are examined in order of filing in group to which assigned, unless made special. (37 C.F.R. § 1.102).

During prosecution applications are kept in confidence, subject to any authorized disclosure under act of Congress. (35 U.S.C. § 122). Starting on Nov. 29, 2000 content of patent applications are published 18 months after earliest filing date (foreign or domestic), unless application (1) is no longer pending, (2) relates to national security, (3) is provisional, design or reissue application, or (4) is filed with request not to publish certifying it has not been filed in country or under Patent Cooperation Treaty that requires publication. However, reissue applications are open to inspection by general public. (37 C.F.R. § 1.11[b]).

Who May Execute Application.

Application must be signed by actual inventor (35 U.S.C. § 116), or inventors if invention is joint, except if they are deceased or incapacitated, execution may be by their legal representatives (35 U.S.C. § 117; 37 C.F.R. §§ 1.42, 1.43, 1.422, 1.423), or except if inventor refuses to execute or cannot be found or reached by diligent effort, execution may be by person to whom inventor has assigned or agreed in writing to assign invention or who otherwise shows sufficient proprietary interest in matter (35 U.S.C. § 118; 37 C.F.R. §§ 1.47, 1.425), or except continuations or divisions under 37 C.F.R. §§ 1.53(b) (1) or 1.53(d). Attorney or agent cannot sign on behalf of inventor (except in international application with power of attorney [37 C.F.R. § 1.421(d)]), but can sign for assignee under certain circumstances (37 C.F.R. §§ 1.47[b] and 1.425). Coinventor may sign for coinventor under certain circumstances. (37 C.F.R. §§ 1.47[a] and 1.425). All persons may be inventors and applicants. Patent and Trademark Officer or employee of Office may not make application for patent during period of employment or for one year thereafter. (35 U.S.C. § 4).

Other Applications.

If earlier application is continued, it is called continuing application which may be either divisional application (see topic 1.47 Division and Restriction), continuation application or continuation-in-part (CIP) application. There is no requirement to update best mode in continuation or divisional applications. (38 F.3d 551). Continuation application contains all of subject matter of earlier (parent) application and no more, while CIP application contains additional subject matter. Continuing application must be filed during pendency of parent or original application or of division, continuation or CIP and must contain cross-reference to earlier application(s) by application number and preferably filing date to gain date benefit thereof. However, text of earlier patent application is not relevant to determining whether later continuation application complies with written description requirement at § 112 ¶ 1 of Patent Act. (214 F.3d 1342). In order to claim benefit of earlier patent application under 35 U.S.C. § 120, each application incorporating by reference earlier applications must comply with written description requirement of 35 U.S.C. § 112 to maintain continuity of disclosure. (506 F.3d 1370). Lack of continuity in disclosure does not entitle later patent to date of earlier filed application in family chain, raising anticipation concerns. (506 F.3d 1370). Since continuation application is directed solely to subject matter described and claimed in earlier application as filed, signing of oath or declaration may be omitted if filing is in accordance with 37 C.F.R. § 1.53(d). New declaration must be signed by inventor(s), however, for CIP, but declaration may be filed late under 37 C.F.R. § 1.53(f). Continuing applications must otherwise comply with rules for original applications. Patent and Trademark Office will grant filing date to otherwise complete continuation or divisional application which lacks filing fee or true copy of oath or declaration under certain conditions. (37 C.F.R. § 1.53[f]). Patent term of 20 years is measured from earliest U.S. filing date on or after June 8, 1995, or if reference is made to earlier filed application(s) under §§ 120, 121, or 365(c), from date of earliest filed U.S. application. When dispute arises concerning whether CIP patent is entitled to priority to date of original application and Patent Office has not addressed issue, burden of proof ordinarily should rest with party claiming priority to date of original application. (522 F.3d 1299).

Cases in which predecessor applications or patents were drawn to narrow claims and in which claims in successor application are arguably broader than invention described in specification, present difficult questions of both claim construction and validity. (492 F.3d 1326).

Persons Entitled to Prosecute.

Inventor, if living, or, if dead or insane, personal representative, may prosecute application. See also topic 1.19 Assignment.

Trustee in bankruptcy can elect to prosecute or not. (11 U.S.C. § 110).

An assignee of record of entire interest may prosecute to exclusion of inventor, even though there may be outstanding licenses. (37 C.F.R. § 3.71).

But assignment does not of itself operate as revocation of power of attorney previously given. If assignee desires to control prosecution of application, assignee must do so or appoint own attorney.

Time of Filing.

Applications must be filed within one year from time invention was first patented or described in any printed publication in this or any foreign country or from the time invention was first in public use or on sale in this country. (35 U.S.C. § 102[b]). Filing of disclosure documents does not alter this or any other filing time requirement for applications, but provisional applications stop running of one year bar.

Where foreign application has already been made by foreigner, U.S. application preferably should be filed within 12 months (in case of designs, six months) after filing first foreign application, or in any case prior to any foreign patenting of same subject matter upon application filed by applicant, legal representatives or assigns (35 U.S.C. § 102[d]) more than 12 months before U.S. filing date (six months for designs). (487 F.2d 459). International applications and national applications based on prior filed international applications are subject to specific time limits and procedures. (35 U.S.C. §§ 351-376. See topic 1.64 Foreign Patents and Applications.)

Except for one year bar, supra, application for patent filed in this country by party who previously filed application for patent for same invention in foreign country will be treated as if U.S. patent was applied for on filing date of earlier application, provided that foreign country affords similar privileges, and that time interval between earliest foreign filing date and actual U.S. filing date is less than 12 months (in case of designs, six months). (35 U.S.C. § 119). Similar privilege exists for applicant who has international application if applicant files in this country within 20 months from earliest foreign filing date, or within 30 months therefrom if international preliminary examination is demanded in international application within 19 months from that earliest foreign filing date. (35 U.S.C. § 365).

But no such benefit of priority is had unless claim therefor and certified copy of original foreign application, specification, and drawings upon which claim is based are filed in Patent and Trademark Office not later than date issue fee is paid (37 C.F.R. § 1.55), or time specifically required by examiner. If submitted after payment of issue fee, must be accompanied by petition and fee. (37 C.F.R. § 1.55). Claim to priority need be in no special form and may be made by attorney or agent. (37 C.F.R. § 1.55). Commissioner may require translation of papers filed. (35 U.S.C. § 119).

In National Stage of PCT International Application, certified copy of original foreign application(s) need not be filed if previously filed in International Stage but claim of priority therefor must be made in National Stage to obtain benefit thereof. (37 C.F.R. § 1.451).

In claiming priority of foreign application previously filed under treaty, applicant must disclose foreign application number, filing date, name of treaty, name of country in which foreign application has effect of, or is equivalent to, regularly filed U.S. application, name and location of national or intergovernmental authority which receives such application, and certification by said authority of power to receive such application. See also topic 1.64 Foreign Patents and Applications.

If right of priority is not secured under provisions of 35 U.S.C. § 119 or 365 then (excepting in case of certain persons who can show knowledge or use of invention in Canada or Mexico or WTO countries or persons serving abroad for U.S.) foreign applicant or patentee may not establish in Patent and Trademark Office or courts any date of invention by reference to knowledge or use thereof or other activity with respect thereto in foreign country except to establish derivation. (35 U.S.C. § 104). Thus, when 35 U.S.C. § 119 or 365 is not availed of, foreign inventor is restricted, as to establishing date of invention, to date when invention is introduced into U.S. This may result in such bars as those of 35 U.S.C. § 102 (a), (b), (d), (e), (f), and (g) arising in cases where they might have been overcome or prevented from arising by timely compliance with 35 U.S.C. § 119 or 365. (See topic 1.104 Novelty.)

1.18 ARBITRATION:

Parties may agree in writing to settle patent validity or infringement suit by arbitration, which may be binding between parties. Commissioner must be given notice of award for each patent involved by patentee, assignee, licensee, or any party to proceeding. Award shall be unenforceable until notice is given. Parties to interference proceeding may agree to arbitration. (35 U.S.C. § 135[d]). Under 35 U.S.C. § 294, voluntary arbitration clause in patent license is valid, irrevocable, and enforceable. Whether party is bound by arbitration clause is threshold question for court. (367 F.3d 1350). Federal Circuit has jurisdiction under Federal Arbitration Act (9 U.S.C. § 16) to hear appeal of order denying motion to compel arbitration even when issue of arbitrability is not final. (367 F.3d 1350).

1.19 ASSIGNMENT:

Inventor(s) presumed to be owner of patent application, and any patent that may issue therefrom, unless there is assignment. (37 C.F.R. 3.73[a]). Application may be assigned before or after filing (see topic Exemplary Forms used in Office at end of Digest). Assignments and other documents affecting title to applications or patents will be recorded in Patent and Trademark Office. Assignments filed in Patent and Trademark Office must be accompanied by cover sheet. (37 C.F.R. § 3.31). See 44 P.T.C.J. 242, 252. Assignment may be of entire interest, or any undivided interest throughout U.S. and its territories, or territorial interest. Assignment of patent licenses is governed by federal law. (465 F.2d 1303). Invention may also qualify as trade secret which is property right.

Right to sue, whether for past or future infringements, cannot be assigned except as incident to assignment of patent itself. (261 U.S. 24 Copyright Cases or Patent Cases).

To determine whether agreement is assignment or license, intention of parties and substance of what was granted must be ascertained. Agreement containing “hard” termination date after which all patent rights revert to owner is license and not assignment and does not deprive owner of standing to sue. (434 F.3d 1336).

Assignment is subject to all outstanding licenses whether known or not to purchaser. Assignment of patent does not include transfer of rights of action for past infringement, without express provision for that purpose.

In case of assignment of entire interest in invention and application, or of entire interest in patent to be granted, patent will normally issue to assignee. If assignee should hold undivided part interest, patent will normally issue jointly to inventor and assignee. If it is desired that patent issues as assigned, assignment must have been recorded, not later than payment of issue fee, specified in notice of allowance. When issue fee is paid, statement must be furnished indicating name of assignee, if any. (37 C.F.R. § 3.81).

Officers and employees of Office are incapable, during period for which they hold their appointments, and for one year thereafter, of applying for patent and acquiring, directly or indirectly, except by inheritance or bequest, any right or interest in any patent. (35 U.S.C. § 4).

Joint Tenancy and Tenancy in Common.

Transfer or creation of an undivided interest in invention, application, or patent usually gives rise to tenancy in common. Joint inventors and patentees and co-owners (other than copartners and cotrustees) are tenants in common. In absence of agreement to contrary, each owner may make, use, sell, or license his/her interest in invention, application or patent without consent of or accounting to any other. (35 U.S.C. § 262; 20 F. Supp. 913 Copyright Cases or Patent Cases; 104 F.2d 967).

Transfer by Operation of Law.

Bankruptcy.

Title to patent vests in trustee by operation of law. Title to application also vests subject to revesting in bankruptcy if trustee elects not to prosecute or fails diligently to prosecute. (11 U.S.C. § 110; 96 F.2d 496).

Death.

Right to apply for a patent vests in legal representatives of a deceased inventor. (35 U.S.C. § 117). Patent itself has attributes of personal property (35 U.S.C. § 261), and its disposition is in accordance with law of domicile as to personal property. Courts look to state law when determining ownership of patent following patent owner’s death. (520 F.3d 1354).

Transfer by Master or Receiver.

Judgment or decree ordering assignment will not operate by itself to effect transfer of title, but assignment made by master on default of the defendant will be good. (105 U.S. 126 Copyright Cases or Patent Cases). Such transfers may be made in specific performance cases, or in cases of bills to reach property that cannot be taken under execution at law, i.e., creditors’ bills. State court of equity may, in case of bill for dissolution of partnership, authorize receiver appointed by it to make assignment, on default of defendant, of partnership property including patents. (217 F. 760 Copyright Cases or Patent Cases).

Conditional Assignments.

Invention, application or patent, may be mortgaged.

Assignment may be made on condition, for example, that assignee shall pay specific royalty. Condition may be incorporated in recorded assignment or in unrecorded separate paper. If in separate unrecorded paper, purchasers for value are not bound unless they have been put on notice, as by reference in recorded assignment to existence of unrecorded paper.

Formalities.

Inventions, applications and patents are not “goods, wares, or merchandise” within Statute of Frauds nor “choses in action” within Uniform Sales Act. (196 F.3d 1376 Copyright Cases or Patent Cases). Where these statutes are controlling, oral contracts to assign are, therefore, valid and enforceable except against bona fide purchasers for value. However, inventions, applications and patents are “personal property” under Uniform Commercial Code § 1-206, and, where this statute is in effect, oral contracts to assign may not be enforceable beyond certain amount unless specified writing exists.

No special language is necessary. Instrument purporting to be license which gives exclusive and assignable license to make, use, and sell invention for entire term of patent throughout U. S. and its territories or any part thereof is assignment.

Recording.

To be good against subsequent purchasers or mortgagees for value, assignment must be recorded in Patent and Trademark Office within three months of date of its execution, before subsequent purchase or mortgage. (35 U.S.C. § 261). Statute provides for recording in Office of only “an assignment, grant or conveyance” of application, patent or any interest therein. (35 U.S.C. § 261). It is also possible to record licenses, agreements, and other instruments affecting patents and patent rights (37 C.F.R. § 3.11) but it is doubtful if such recording of instruments, that are not expressly covered by statute, constitutes constructive notice (28 F. Supp. 544, aff’d, 104 F.2d 967). Security interests in patents are perfected without filing assignment. (7 USPQ2d 1719).

Acknowledgment.

If assignment is acknowledged before any notary public in several states or territories, or District of Columbia, or any commissioner of U. S. court, district or territorial, or before any secretary of legation or consular officer with authority to perform notarial acts, certificate of such acknowledgment under officer’s hand and seal is prima facie evidence of execution of such assignment. (35 U.S.C. § 261).

1.20 ATOMIC ENERGY:

Under certain conditions U. S. Government may take title to patent (see, e.g., 42 U.S.C. § 2182) but Government may carry burden of proof to establish title (491 F.2d 1392). Processing of property rights is controlled by statute. (42 U.S.C. § 2182).

1.21 ATTORNEY FEES:

Court in exceptional case may award reasonable attorney fees to prevailing party. (35 U.S.C. § 285, 962 F.2d 1048). Burden of proof lies with movant to show by clear and convincing evidence that case is exceptional. (505 F.3d 1362). Potential infringer having actual notice of another’s patent has affirmative duty of due care. (829 F.2d 1075; 717 F.2d 1380 Copyright Cases or Patent Cases). Both parties have duty to avoid inequitable conduct, misconduct, vexatious, bad faith or unjustified litigation or frivolous suit or defense. Willful infringement may result in award of attorneys fees as well as treble damages. Several factors are considered in determining whether infringer has acted in bad faith and so should be found willfully infringing, including: (1) Whether infringer deliberately copied ideas or design of another; (2) whether infringer, when he knew of other’s patent protection, investigated scope of patent and formed good-faith belief that it was invalid or that it was not infringed; (3) infringer’s behavior as party to litigation; (4) defendant’s size and financial condition; (5) closeness of case; (6) duration of defendant’s misconduct; (7) remedial action by defendant; (8) defendant’s motivation for harm; and (9) whether defendant attempted to conceal its misconduct. (449 F.3d 1209).

1.22 WILLFUL INFRINGEMENT:

Proof of willful infringement permitting enhanced damages requires at least showing of objective recklessness. (497 F.3d 1360 or).

1.22A ATTORNEYS AND AGENTS:

Patent and Trademark Office Bar.

While applicant may prosecute own case, applicant should, unless familiar with such matters, employ patent attorney or agent, as value of patents depends largely upon skillful preparation of specifications and claims and prosecution in Patent and Trademark Office.

Attorney at law in good standing in any court of record in U.S. may be registered in Patent and Trademark Office by presenting certificate of clerk of said court and establishing that he or she has necessary scientific qualifications and by passing Office written examination. Any citizen of U.S., who is not attorney at law, may be registered as agent by establishing that he or she is of good moral character, and reputation, and has necessary legal and scientific qualifications and by passing Office written examination. (35 U.S.C. § 31; 37 C.F.R. § 10.7). Any foreign patent attorney or agent may be registered by filing proof that he or she is registered and in good standing before patent office of country of which he or she is citizen or subject and has necessary qualifications, provided foreign patent office allows substantially reciprocal privileges to those registered in U.S. Patent and Trademark Office. (37 C.F.R. § 10.6). On registration to practice, fee is required. (37 C.F.R. § 10.8). In addition, written application with fee must be made to Commissioner and determination of necessary qualifications will be by written examinations held from time to time, normally at least once per year. (37 C.F.R. § 10.7). No person will be permitted to take examination unless he or she submits satisfactory proof of good moral character and sufficient basic training in scientific and technical matters. (37 C.F.R. § 10.7). Agent is not able to represent parties in courts of law. Attorneys who are not registered before Patent and Trademark Office may represent parties in infringement actions.

Personal power of attorney signed by inventor, or by assignee of entire interest, must be filed before attorney will be recognized for all purposes in case. However, without such power, registered attorney or agent may appear in person on behalf of applicant or file papers in application under own signature and registration number. (37 C.F.R. § 1.34[a]). It is usual to file such power with application papers. (37 C.F.R. § 1.34[b]). Powers to law firms are recognized for correspondence address purposes only. (37 C.F.R. § 1.33).

Applicant may appoint principal attorney who may appoint associate attorney. (37 C.F.R. § 1.34[b]). Power of principal may be revoked or terminated at any time and associate’s power also terminates. Principal cannot appoint substitute whose power survives principal’s. (942 O.G. 1074). When attorney is duly appointed, Patent and Trademark Office will generally hold correspondence with attorney only. (37 C.F.R. § 1.33). Assignment does not operate to revoke power of attorney but recorded assignee of entire interest may revoke previous powers and appoint new attorney. (37 C.F.R. § 1.36).

Any attorney shown to be incompetent, disreputable or guilty of gross misconduct may be suspended or excluded from further practice before Patent and Trademark Office by Commissioner. (35 U.S.C. § 32). Anyone not recognized to practice before Patent and Trademark Office who “holds himself out or permits himself to be held out as so recognized or as being qualified to prepare or prosecute applications for patent” is subject to fine of “not more than $1,000 for each offense.” (35 U.S.C. § 33). Civil remedy may lie for unauthorized practice. Office has specific rules as to misconduct (37 C.F.R. § 10.23) as well as rules for investigations and disciplinary proceedings (37 C.F.R. §§ 10.130 to 10.170).

Bar of Court of Appeals for the Federal Circuit.

Parties must appear in person or be represented in Federal Circuit by attorney. Any attorney who is entitled to practice in U. S. Supreme Court or in U.S. Courts of Appeals or U.S.

District Courts or in court of last resort in any state or territory may be admitted to practice in and have name enrolled upon filing recommendation of any justice of U.S. Supreme Court, U.S. circuit or district judge, or judge of court of last resort of state or territory in which such attorney resides at time of application for admission, or on motion by attorney of Federal Circuit. Admission is made on oral motion of attorney of court in open court during first full week of month from Oct. to May, commencing at 10 A.M. but also may be done in writing.

Attorney must take or subscribe oath of office. Fee for admission to practice and certificate is required.

1.23 BANKRUPTCY:

Patents may be subject to jurisdiction of Bankruptcy Court. (676 F. Supp. 888). Patent licenses and assignments may or may not be subject to acceptance or rejection by trustee. Security interest may be filed under UCC for further protection. Discharge in bankruptcy does not act as injunction against plaintiff asserting claim for debt incurred, or cause of action that arose, after date of bankruptcy discharge. (437 F.3d 1178).

1.24 BOARD OF PATENT APPEALS AND INTERFERENCES:

Board of Patent Appeals and Interferences hears both appeals of examiners' decisions on patentability, and patent interference proceedings between parties seeking to establish priority of invention. (35 U.S.C. § 7). Members of Board include Commissioner, assistant commissioners and examiners-in-chief and appeals are heard in three member panels. (37 U.S.C. § 7). Appeals of Board's decisions are reviewed on record by Court of Appeals for the Federal Circuit. (35 U.S.C. § 141). In alternative, patent applicant dissatisfied with Board's decision may file civil action against Commissioner in District Court for District of Columbia. (35 U.S.C. § 145). Dissatisfied interference party may file civil action against opposing party. (35 U.S.C. § 146).

Although expertise of Board plays role in interpreting record evidence, under Administrative Procedure Act, Board's factual findings should not be upheld unless they are based on substantial evidence in record. (82 U.S.P.Q.2d 1705).

1.25 CERTIFICATE OF CORRECTION:

Whenever mistake in patent, incurred through fault of Patent and Trademark Office, is clearly disclosed by records of Office, Director may issue certificate of correction stating fact and nature of such mistake. (35 U.S.C. § 254). Certificate of correction is only effective for causes of action arising after it was issued. (226 F.3d 1280 Copyright Cases or Patent Cases). Corrections in patent cannot constitute new matter or require reexamination. (35 U.S.C. § 255). If certificate of correction broadens claim, it is only valid if it corrects clerical or typographical error that would have been clearly evident to one skilled in art of reading intrinsic evidence. (482 F.3d 1347).

1.26 CITATION OF PRIOR ART IN PATENTS:

Any person may cite to Patent and Trademark Office, in writing, prior art consisting of patents or printed publications which person states to be pertinent and applicable to patent and believes has bearing on patentability of any claim of particular patent. (37 C.F.R. § 1.501). At written request of person citing prior art, identity of person will be kept confidential. Person may explain pertinency of prior art to at least one claim. Explanation and prior art will become part of official record of patent. (35 U.S.C. § 301, 37 C.F.R. § 1.501; see also topic 1.132 Reexamination.) For patents or publications not in English, some statement of relevance should be supplied.

1.27 CLAIMS:

Claim, found in patent specification, is vehicle by which applicant particularly points out and distinctly claims subject matter which applicant regards as his or her invention. (35 U.S.C. §

112). Thus, claims define rights of inventor and limits of invention. Claims should encompass entire invention and all combinations and subcombinations of its elements insofar as these are patentable. Claims may be written in independent, dependent, or multiple dependant form. (35 U.S.C. § 112). However, if subject matter is disclosed in specification and not claimed, subject matter is dedicated to public. (285 F.3d 1046). Additionally, each claim must be capable of being differentiated from other claims.

Dependent claims refer to previously expressed claims and further limit subject matter claimed. Courts will construe dependent claim as incorporating by reference all limitations of claim to which it refers. (35 U.S.C. § 112). Failure to further narrow subject matter claimed in dependent claim can result in invalidation of that claim. (457 F.3d 1284).

Multiple dependent claims alternatively refer to more than one claim previously set forth and further limit subject matter claimed. (35 U.S.C. § 112). Courts will construe multiple dependent claims as incorporating by reference all limitations of particular claim in relation to which it is being considered. (35 U.S.C. § 112).

As previously mentioned, claims define limits of invention and inventor’s rights. Thus, claims should be drafted with care. Frequently, disputes arise over what is and is not defined by claims. (See topic 1.71 Infringement.) During examination, claims are given their broadest reasonable interpretation consistent with specification. (211 F.3d 1367). When disputes arise, courts will perform claim interpretation analysis to adjudicate dispute. This analysis will be performed by court, as matter of law, and not by jury. (116 S. Ct. 1384). Although district courts have wide latitude in how they conduct proceedings to construe patent claims (268 F.3d 1352), courts construing patent claims begin with examination of intrinsic evidence, which includes claims, other portions of specification (including preferred embodiment and abstract (320 F.3d 1354), and prosecution history (318 F.3d 1363). Courts may consult expert testimony to provide background on technology at issue, to explain how invention works, to ensure that court’s understanding of technical aspects of patent is consistent with that of person of skill in art, or to establish that particular term in patent or prior art has particular meaning in pertinent art. Court should discount any expert testimony that is clearly at odds with claim construction mandated by claims themselves. (459 F.3d 1311 or), and such evidence cannot be relied upon to vary or contradict clear meaning of terms in claims. (318 F.3d 1363). Court of Appeals begins its claim construction analysis with words of claim. (326 F.3d 1215, 35 U.S.C. § 112). Claim construction is question of law that Court of Appeals reviews de novo. (138 F.3d 1448).

Claim interpretation is process of giving proper meaning to language used in patent claims. (122 F.3d 1019). First step is to examine language of claim, which defines scope of protection. (55 F.3d 615). Courts will ascribe ordinary and customary meaning to one of ordinary skill in art to claim terms. (415 F.3d 1303 or). One of ordinary skill in art is deemed to have read claim not only in context of claim but also in context of entire patent including specification. (415 F.3d 1303 or). Determination that claim term needs no construction or has plain and ordinary meaning may be inadequate when term has more than one ordinary meaning or when reliance on term’s ordinary meaning does not resolve parties’ dispute. (521 F.3d 1351). Although claim language is important in interpreting meaning and scope of claims, courts will also consider: (1) Patent specification, which explains invention and may define terms used in claims, and (2) prosecution history of patent, which may clarify and establish scope of claim. (52 F.3d 967). See topic 1.45 Disclaimer. Court may use letters between patent counsel and applicants if letters contain information regarding field of invention or may help court determine what claim terms of patent mean to person of ordinary skill in art. (540 F.3d 1337).

Claim construction should not conflict with claim’s plain meaning nor should it exclude disclosed embodiments. (445 F.3d 1348). No obligation exists for district courts to issue verbal description of design patent because illustration better represents design patent. (543 F.3d 665).

Specification is single best guide to claim interpretation. (415 F.3d 1303 or). Although extrinsic evidence such as dictionaries and treatises may be used to establish ordinary meaning of claim, extrinsic evidence is less significant than intrinsic evidence such as specification and prosecution history. (415 F.3d 1303 or). Literal scope of claim is limited to what it was understood to mean at time of filing even where that meaning is narrower than current definition. (264 F.3d 1377). (See topic 1.55 Estoppel, Prosecution History.) District court can correct patent only if correction is not subject to reasonable debate based on consideration of claim language and specification, and prosecution history does not suggest different interpretation of claims. (351 F.3d 1139).

Claim is not invalid for indefiniteness under § 112 if antecedent basis of claim is present by implication because meaning is reasonably discernible to one of ordinary skill in art given specification and context of case. (435 F.3d 1366).

Claims in one patent application may not cover two or more independent and distinct inventions, except that more than one species of invention may be specifically claimed in different claims provided application also includes allowable claim generic to all claimed species and species claims are written in dependent form. (37 C.F.R. § 1.141). If patent examiner finds two or more distinct inventions are claimed, she may require application be restricted to one of inventions. (35 U.S.C. § 121). Other invention may be filed under separate application or be treated as divisional application, enjoying benefit of filing date of original application. (35 U.S.C. § 121).

One application may contain claims for machine or device as whole, and under certain conditions, to various subcombinations. Such claims may vary in scope. However, in claims covering combinations, elements must form combination rather than aggregation. Further, only instrumentalities that are functionally interrelated may be claimed.

Claims may also cover improvements on prior invention by another individual. However, patentee of improvement may not use prior invention during its patent term without consent of prior inventor.

Normally, process claims should be limited to steps, machine claims should be limited to structure, and manufactured product claims should be limited to elements of manufacture. Claims for compositions of matter should be limited to definition of product by reference to its formula or components, proportions, or, in some instances, to its physical or chemical characteristics. Further, process claims may be used to cover new uses of known processes, machines, manufacture, or composition of matter or material. (35 U.S.C. § 100[b]).

Elements in claims for combinations may be expressed as means or step for performing specific function without recital of structure, material, or acts in support thereof. Use of generic term such as “means”, “mechanism”, “element”, and “device”, which does not connote sufficiently definite structure will invoke treatment as functional claim. (550 F.3d 1090). Taken literally, this language could encompass any conceivable means for performing specified function. However, courts will construe such claims (also called “means-plus-function” claims) to cover corresponding structure, material, or acts described in patent specification and equivalents thereof. (35 U.S.C. § 112; 16 F.3d 1189). This operates like reverse doctrine of equivalents because it restricts coverage of literal claim language, whereas doctrine of equivalents broadens scope of patent protection to prevent infringer from evading patent claims with insubstantial changes. (983 F.2d 1039). Court shall independently review each element of each claim to determine if it is subject to requirements of means-plus-function claim. (35 U.S.C. § 112; 263 F.3d 1356). To determine whether patent claim term recites sufficient structure to fall within ambit of means-plus-function format, courts examine whether claim term, as name for structure, has reasonably well understood meaning in art. (325 F.3d 1364). Construction of means-plus-function claim involves first defining claim function and then identifying structure corresponding to that function. (424 F.3d 1324). Construction of means-plus-function claim that finds no corresponding structure disclosed in specification must be supported by clear and convincing evidence. (250 F.3d 1369). For computer-implemented invention in which inventor has invoked means-plus-function claiming, structure disclosed in specification must be more than simply general purpose computer or microprocessor. To satisfy 35 U.S.C. § 112, patentee must at least disclose algorithm that transforms general purpose microprocessor to special purpose computer programmed to perform disclosed algorithm. (521 F.3d 1328). See topic 1.48 Doctrine of Equivalents.

Claims for both apparatus and method for using that apparatus are invalid for indefiniteness because such claims are not sufficiently precise to provide competitors with accurate determination of “metes and bounds” of protection involved. § 112, ¶ 2, requires that claims of patent particularly point out and distinctly claim subject matter which applicant regards as his invention. Claim is considered indefinite if it does not reasonably apprise those skilled in art of its scope. Rule against claiming both apparatus and method in one claim has also been incorporated into PTO’s Manual of Patent Examination Procedure. (430 F.3d 1377).

Transitional term “comprising,” which is synonymous with “including,” “containing,” or “characterized by,” is inclusive or open-ended and does not exclude additional, unrecited elements or method steps. (377 F.3d 1369). Transitional phrase “comprised of” has same meaning as “comprising”. (504 F.3d 1356). Transitional phrase “consisting of” excludes any element, step, or ingredient not specified in claim. (53 F.2d 520). Transitional phrase “consisting essentially of” limits scope of claim to specified materials or steps and those that do not materially affect basic and novel characteristics of claimed invention. (537 F.2d 549).

Claims must define inventions of inventors. Named inventors need not contribute to each claim, but each inventor must have contributed to subject matter of at least one claim. (37 C.F.R. § 1.45).

Provisional applications need not contain any claim, but applications claiming benefit of filing date of provisional application must contain at least one claim.

1.28 COLLATERAL ESTOPPEL:

See topic 1.54 Estoppel, Collateral.

1.29 COMBINATION:

Combination of elements which is merely work of skillful mechanic, is not patentable. (189 USPQ 449). Combination of elements, even where individual elements are all known, is patentable if not obvious to one of ordinary skill in art to which combination pertains. (396 U.S. 57; see topic 1.100 Nonobviousness.) Useful improvement in combination may be patentable. (35 U.S.C. § 101). When claiming combination, where more than one of certain element is included in combination, term “at least two” means two is minimum number of particular element required. (32 F.3d 542).

1.30 COMMISSIONER OF PATENTS AND TRADEMARKS:

Commissioner superintends Patent and Trademark Office and may make Rules (codified in Code of Federal Regulations, Title 37, c. I), not inconsistent with law, for conduct of proceedings in Office. (35 U.S.C. § 6). *Note:* Title of Commissioner was changed under American Inventors Protection Act of 1999 to Undersecretary of Commerce for Intellectual Property and Director of U.S. Patent and Trademark Office. Title of Commissioner has been retained in this Digest. In certain situations, Rules may be suspended. (37 C.F.R. § 1.183). Supervisory authority of Commissioner may be invoked by petition. (37 C.F.R. § 1.181). Decisions by Commissioner on petitions are reviewable in federal district court by way of action for mandamus. (See 440 F.2d 1395.) Commissioner is appointed by President, and is under supervision of Secretary of

Commerce.

1.31 COMPOSITION OF MATTER:

One of four categories of subject matter for which a patent may be issued, see 35 U.S.C. § 101. Term “composition of matter” covers all composite substances resulting from chemical union or mechanical mixture of two or more substances, or composite articles. (447 U.S. 303). New molecules and chemical compounds fall within this category.

1.32 COMPUTERS:

Programmed digital computer may represent patentable subject matter. (33 F.3d 1526). Proper inquiry is whether claimed subject matter as whole is merely mathematical concept, whether categorized as mathematical formula, mathematical equation, mathematical algorithm, or the like, which represents nothing more than “law of nature”, “natural phenomenon”, or “abstract idea”. (33 F.3d 1526). Claim as whole drawn to machine or process is patentable even though mathematical algorithm included in claim. (149 F.3d 1368). Guidelines for examination of computer-related patent applications are published in Manual of Patent Examining Procedure (MPEP § 2106).

1.33 CONCEPTION:

Conception is formation in mind of inventor of definite and permanent idea of complete and operable invention as applied in practice. (802 F.2d 1367). Conception of compound may require identity of structure, name, formula, or definite chemical or physical properties. (984 F.2d 1164). Conception is complete only when idea is so clearly in inventor’s mind that only ordinary skill would be necessary to reduce invention to practice, without extensive research or experimentation. (317 F.3d 1334). Mere hope of producing compound does not qualify as conception to establish patent priority. (243 F.3d 1345).

1.34 CONVENTIONS AND TREATIES:

President, with advice and consent of Senate, may enter/join U.S. as party to International Conventions relating to patent rights, most important being International Convention of 1883 for Protection of Industrial Property, as revised (generally referred to as Paris Convention). See topics 1.64 Foreign Patents and Applications; 1.101 North American Free Trade Agreement (NAFTA), and 1.66 General Agreement on Tariffs and Trade (GATT); and 1.111 Patent Cooperation Treaty.

1.35 COPIES:

When in print, Patent and Trademark Office will supply uncertified or certified printed copies of U. S. patents for nominal fee. Reproductions of out of print U.S. patents and of foreign patents on file in Office, and of other Patent and Trademark Office records will be furnished by Office for fee per page or per document.

Copies of Patent and Trademark Office papers relating to issued patent may be obtained upon payment of fee therefor. (37 C.F.R. § 1.11). This will include copies of pending applications that are published beginning on Nov. 29, 2000.

1.36 COPYRIGHT:

Federal copyright laws do not preempt federal patent laws. Both forms of protection are available for qualified article. (493 F.2d 1389).

1.37 DAMAGES FOR INFRINGEMENT:

35 U.S.C. § 284 provides that successful claimant in patent infringement suit shall be

awarded damages adequate to compensate for infringement, but in no event less than reasonable royalty for use made of invention by infringer, together with interests and costs fixed by court. Portion of sales price consisting of goodwill, i.e., compensation in excess of tangible assets, is not sales of infringing goods that can form base for determination of reasonable royalty. (290 F.3d 1364). Prejudgment interest ordinarily awarded absent some justification for withholding such award. (461 U.S. 648; 65 F.3d 941).

Increase of Damages.

35 U.S.C. § 284 further provides that court may increase damages up to three times amount found or assessed. This is done only in exceptional cases, such as willful infringement. (415 F.2d 373). See also 727 F.2d 1540; 774 F.2d 459. In awarding increased damages, most important factor to consider is reprehensibility of infringer's conduct. (236 F.3d 1342).

Attorney Fees.

35 U.S.C. § 285 provides that court in exceptional cases may award reasonable attorney fees to prevailing party. See topic 1.21 Attorney Fees.

Measure of Damages.

At minimum, plaintiff is entitled to at least reasonable royalty together with such costs and interest fixed by court. (35 U.S.C. § 284). Reasonable royalty after determination of validity is greater than if measured before suit. There is fundamental difference between reasonable royalty for pre-verdict infringement and damages for post-verdict infringement. Once judgment of validity and infringement has been entered, calculations are different because different economic factors are involved. (517 F.3d 1353). Post-verdict infringement damages may be in form of ongoing reasonable royalties for future infringement. (504 F.3d 1293). Opinion and expert testimony is admissible to determine reasonable royalty. (35 U.S.C. § 284). See also 56 F.3d 1538. Measure of damages may be profit which plaintiff would have made on sales of which plaintiff was deprived by defendant or for loss of profit due to reduced prices caused by defendant's infringing competition. To recover lost profits, plaintiff must prove (1) demand for patented product; (2) absence of acceptable non-infringing substitute for patented product; (3) patent owner's manufacturing and marketing capability to exploit demand; and (4) amount of profit patent owner would have made. (575 F.2d 1152). Patentee may recover lost profits on unpatented components sold with patented item when considered single assembly or functional unit. (514 F.3d 1262). Even if damages are based upon separate statutes or causes of action, such as copyrights or trademarks, when claims arise out of same set of operative facts, there may be only one recovery. (466 F.3d 1000 or).

Profits.

Amount of infringer's profits attributable to infringement constitutes factor in determining what is reasonable royalty to be recovered as "damages." For further information on relevancy of profits, see 377 U.S. 476.

Design Patents.

35 U.S.C. § 289 specifically provides that for infringement of design patent patentee has, in addition to right of recovery of damages, right to recover profit made by infringer attributable to infringement, with minimum recovery of $250. However, patentee may not twice recover profit made from infringement. (35 U.S.C. § 289).

For damages in reissue patents see topic 1.134 Reissue.

1.38 DECISIONS:

Decisions of Board and Commissioner may be reported in U. S. Patent Quarterly

(USPQ). Such decisions are not otherwise published or open to public inspection, or made available except where Commissioner believes decision involves important precedent and applicant, after notice, does not properly object, see 37 C.F.R. § 1.14. Patent decisions of Court Appeals Federal Circuit (CAFC) may be published in Federal Reporter (F., F.2d, F.3d) and U.S. Patent Quarterly (USPQ, USPQ2d) and patent decisions of Federal District Courts may be published in Federal Supplement (F. Supp.) and U.S. Patent Quarterly (USPQ and USPQ2d). Synopsis of decisions may appear in Patents, Trademarks, and Copyright Journal (PTCJ). CAFC regularly designates its decisions as precedential and non-precedential. Commissioner also makes available certain petition and other decisions on Patent and Trademark Office website (http://www.uspto.gov).

1.39 DECLARATION:

Any document to be filed in Patent and Trademark Office which is required by any statute or rule to be under oath may instead be by written declaration if declarant is, on document, warned that willful false statements are punishable by fine or imprisonment, or both (18 U.S.C. § 1001) and may jeopardize validity of application or patent issuing thereon. (See topic 1.105 Oath or Declaration.) Declarant must state in declaration that all statements made of own knowledge are true and that all statements made on information and belief are believed true. Declaration requires no attendance by applicant before any official, and can be used in documents executed either in U.S. or abroad. Summary dismissal of declaration of person skilled in art without explanation by reviewer is deemed error. (37 USPQ2d 1578). In case of application executed in foreign country by declaration, ribboning of papers is not required. For original declaration of inventors, see topic 1.105 Oath or Declaration.

1.40 DECLARATORY JUDGMENTS:

Actions for declaratory judgments affecting patent rights may be brought under 28 U.S.C. §§ 2201-02. (See 88 F.2d 852 Copyright Cases or Patent Cases; 34 USPQ 251; Fed. R. Civ. P. 57.) To establish action for declaratory judgment, declaratory judgment plaintiff must show that there is “actual controversy”. (409 F.3d 1376). “Actual controversy” requirement is established by determining whether facts alleged, under all circumstances, show that there is substantial controversy between parties having adverse legal interests of sufficient immediacy and reality to warrant issuance of declaratory judgment. (549 U.S. 118 or). Patent licensees are not required to terminate license agreement before seeking declaratory judgment in federal court that underlying patent is invalid, unenforceable, or not infringed. (549 U.S. 118 Copyright Cases or Patent Cases). Where patentee asserts rights under patent based on certain identified ongoing or planned activity of another party, and where such party contends it has right to engage in accused activity without license, Article III case or controversy exists. (480 F.3d 1372 or). If district court finds and actual case or controversy but declines to exercise its discretion to hear case, filing of declaratory judgment action in another forum is not per se vexatious litigation. (304 F.3d 1249). See also topics 1.83 Jurisdiction, Original and Appellate; and 1.153 Venue.

When same patent is in issue in action of noninfringement, counterclaim for patent infringement is compulsory and, if not made, is deemed waived. (200 F.3d 795; Fed. R. Civ. P. 13[a]).

1.41 DEFENSES IN INFRINGEMENT SUITS:

By 35 U.S.C. § 282 of Patent Act, patent is presumed valid with burden of establishing invalidity on defendant. Following four items are made defenses, which must be pleaded, in action involving validity or infringement of patent:

(1) Noninfringement, absence of liability for infringement, or unenforceability. For noninfringement see topic 1.71 Infringement. “Absence of liability for infringement” includes defenses such as prior release or discharge of liability, accused activities done under license from patentee, statute of limitations bar (35 U.S.C. § 286), and in case of reissue patent, intervening

rights under 35 U.S.C. § 252.

"Unenforceability" includes defenses such as res judicata, equitable estoppel, acquiescence, unclean hands from misuse (illegal extension of patent rights involved or from fraud upon Patent and Trademark Office in obtaining patent), and unclean hands from inequitable conduct. In order to prove patent unenforceable due to inequitable conduct, alleged infringer must prove (1) affirmative misrepresentations of material fact, failure to disclose material information, or submission of false material information, and (2) intent to deceive. (468 F.3d 1366). While fraud in procurement of patent may be asserted as defense in federal court, later-discovered fraud relating to patent ownership cannot be defense. (476 F.3d 1372).

(2) Invalidity of patent or any claim in suit on any ground specified in part II of Patent Act as condition for patentability. These conditions "for patentability" are specified in 35 U.S.C. §§ 102 and 103, which are quoted under topic Novelty, and further discussed under topics 1.04 Abandonment of Invention; 1.78 Invention; and 1.129 Public Use or Sale.

(3) Invalidity of patent or any claim in suit for failure to comply with any requirement of 35 U.S.C. §§ 112 or 251. Section 112 relates to proper disclosure and claiming of patented subject matter (see second paragraph under topic Application for Patent), while § 251 relates to requirements for reissuing of patents (see topic 1.134 Reissue).

(4) Any other fact or act made defense by this title. This would include defenses such as—plaintiff not entitled to bring action because plaintiff is not "patentee" or owner of patent in suit (35 U.S.C. §§ 100[d] and 281), or because incapable of acquiring ownership because of employment in Patent and Trademark Office (35 U.S.C. § 4); patented subject matter does not fall within any of categories—"process, machine, manufacture, or composition of matter" (35 U.S.C. § 101); patented subject matter lacking in utility (35 U.S.C. § 101), for which see topic 1.151 Utility; application for patent originally made by improper party as by Office employee in contravention of 35 U.S.C. § 4 or in case of applicant other than inventor, applicant not legal representative or assignee of inventor as required under 35 U.S.C. §§ 117 and 118; claims in suit invalid because of statutory bars, such as adverse adjudication by Office in interference proceedings (35 U.S.C. § 135), or failure to present claim in application within one year of its grant to stranger in another patent (35 U.S.C. § 135); invalidity due to violation of Secrecy Order provisions (35 U.S.C. §§ 182, 184 and 35 U.S.C. § 185); patent taken with knowledge by patentee that one of its claims is invalid (35 U.S.C. §§ 253 and 288), or claims in suit had been disclaimed or dedicated to public (35 U.S.C. § 253); or accused use is exempted from liability under 35 U.S.C. § 272 because on vessel, aircraft or vehicle temporarily within U. S. and used exclusively for needs thereof; or under patent exhaustion doctrine, unconditional sale of patent exhausts patentee's right to control purchaser's use of device thereafter. (453 F.3d 1364). Improper revival of abandoned application does not constitute defense to infringement suit under 35 U.S.C. § 282. (543 F.3d 657). If best mode for practicing claimed invention is not disclosed as required by 35 U.S.C. § 112 par. 1, patent may be held invalid if it is shown that inventor both knew of and concealed better mode of carrying out claimed invention than that set forth in specification. (449 F.3d 1209).

In addition to requiring that foregoing defenses be pleaded, 35 U.S.C. § 282 further requires that notice, at least 30 days in advance of trial, must be given of particulars of prior patents, printed publications, instances of prior knowledge, use, offering for sale or inventorship, etc., which are to be relied upon by defendant at trial.

Reliance on advice of counsel can be defense to willful prong of willful infringement claim. (448 F.3d 1294). This, however, waives attorney-client privilege. (448 F.3d 1294). Standard for determining scope of this waiver is that it applies to all other communications relating to same subject matter. (448 F.3d 1294).

See also topics 1.54 Estoppel, Collateral and 1.136 Res Judicata.

1.42 DEFENSIVE PUBLICATION:

Defensive publication program abolished in favor of Statutory Invention Registration. See topic 1.145 Statutory Invention Registration. (37 C.F.R. §§ 1.294-1.297).

1.43 DEPOSITIONS IN PATENT AND TRADEMARK OFFICE:

Commissioner may establish rules for taking affidavits and depositions required in cases in Patent and Trademark Office. Any officer authorized by law to take depositions to be used in courts of U.S. or of state where officer resides may take such affidavits and depositions. (35 U.S.C. § 23). It is policy of Patent and Trademark Office that its employees, including patent examiners, will not appear as witnesses or give testimony in legal proceedings, except under conditions specified in 15 C.F.R. Part 15, Subpart B.

Customary method of adducing proof in interference cases and public use proceedings in Office is by deposition or stipulation.

Time of Taking.

Time for taking testimony is set by Patent and Trademark Office for each case; for example, in interference cases definite times are set by Office for putting in junior party's prima facie case; for putting in senior party's prima facie case; for putting in junior party's rebuttal. Depositions must be begun within time set unless extension is secured. If either party is unable to procure testimony of witness or witnesses within time limited, and said time has expired or is about to expire, and party desires additional time for such purpose, party must file motion, accompanied by statement under oath, setting forth specifically cause of such inability, name or names of witness or witnesses, facts expected to be proved by such witness or witnesses, steps which have been taken to procure such testimony, and dates on which efforts have been made to procure it. (37 C.F.R. § 1.635). Notice of motion must be served on adverse party.

Notice of Depositions.

Notice must be given of time and place of taking depositions, of case in which they are to be used, and of names and residences of witnesses. It is usual also to name officer before whom they are to be taken. (37 C.F.R. § 1.673).

Notice must be served sufficiently long before taking of depositions to afford adversary or attorney reasonable time (at least three working days) to reach place of examination. Notice is served upon attorney of record, or, if there is none, upon adverse party.

Copy of notice may be served on attorney or agent of party: (1) In hand; (2) on employee at usual place of business; (3) if there is no usual place of business, at residence, on suitably aged resident; (4) by first class mail which may also be certified or registered or (5) by Express Mail. If none of above ways are possible, notice is given by publication in Official Gazette on leave obtained. (37 C.F.R. § 1.646).

Notice with statement signed by attorney as to fact, time, and mode of service must be attached to deposition transcript. (37 C.F.R. § 1.673). Proof of service may be dispensed with by securing acknowledgment of service on original notice.

Before Whom Taken.

Within U.S., its territories or possessions, depositions may be taken before any officer authorized to administer oaths by laws of U.S. or of place where examination is held, provided officer is not disqualified for interest. (37 C.F.R. § 1.674).

Mode and Formalities of Taking.

Depositions are taken orally by examination and cross examination, and questions and answers are recorded in their regular order by officer. Each deponent must be duly sworn.

Testimony must be taken stenographically and transcribed, unless parties agree otherwise. Longhand or typewritten copy must be read to witness, or read over by witness as soon as it can be made. Deposition of each deponent must be signed by deponent in presence of officer (37 C.F.R. § 1.675) unless signature is waived by stipulation and consent of witness.

Each exhibit should be marked by officer taking deposition with name and title of case, exhibit number, and officer's signature.

Deposition of each witness must be identified by name of witness written at top of each page, and pages of each deposition must be numbered consecutively. Deposition should be written on legal or letter-size paper with wide margin on left and with writing on one side only. (37 C.F.R. § 1.677).

Witnesses and Evidence.

Clerk of any U.S. court for any district or territory wherein depositions are to be taken must, on application, issue subpoena for any witness residing or being within such district or territory. Federal Rules of Civil Procedure relating to attendance of witnesses and to production of documents and things apply to contested cases in Patent and Trademark Office. (35 U.S.C. § 24). At time of service there should be paid or tendered to witness fees and traveling expenses in going to, returning from, and one day's attendance at place of examination. If such fees are paid or tendered witness can be punished for contempt in not appearing. (35 U.S.C. § 24). See also 37 C.F.R. § 1.687.

Cross examination must be confined to subjects opened in direct examination.

Objections should be made and noted on record, and will be considered by tribunal for which depositions are taken. See 37 C.F.R. §§ 1.685, 1.635.

Officer's certificate must show: (1) Witness was sworn before commencement of testimony; (2) name of person by whom testimony was written out and that, if not written by officer, it was written in his presence; (3) presence or absence of adverse party; (4) place, day and hour of start and end of deposition; (5) reading by or to each witness of deposition before witness signed same, and signature in presence of officer; and (6) that officer was not related to or employed by either of parties or related to or employed by their attorneys or agents, nor interested directly or indirectly in controversy either as counsel, attorney, agent or otherwise. If any of foregoing requirements are waived, certificate must so state. Officer should affix name, office, and seal if officer has one. (37 C.F.R. § 1.676).

Filing.

Depositions together with notice of taking, exhibits and certificate of officer must be sealed up, and envelope inscribed with certificate giving number and title of case, name of each witness, and date of sealing. Envelope so inscribed should be enclosed in another addressed to Commissioner. If weight or bulk of exhibit excludes it from envelope, it must be authenticated by officer and transmitted in separate package marked and addressed as above. (37 C.F.R. § 1.676). It is usual to stipulate that exhibits may be retained by party offering same to be produced at hearing. Deposition should be filed as soon after taking as possible.

Depositions in Foreign Countries.

Such depositions can be taken only after leave secured from Administrative Patent

Judge. (37 C.F.R. §§ 1.671, 1.672).

Motion for leave must designate place for examination at which officer duly qualified by U. S. law to take testimony in foreign country shall reside, must be accompanied by statement that motion is made in good faith and not for purposes of delay or of vexing or harassing any party to case, and must also set forth names of witnesses and particular facts to which it is expected each will testify and grounds on which is based belief that each will so testify. It must appear that testimony is material and competent and cannot be taken in this country at all, or cannot be taken here without hardship and injury to moving party greatly exceeding that to which opposite party will be exposed by taking it abroad. (37 C.F.R. §§ 1.671, 1.672).

On granting the motion, time will be set for moving party to file written interrogatories in duplicate and serve copy of same upon each adverse party. Each adverse party may, within designated time, offer cross interrogatories in duplicate. Objections to interrogatories or cross interrogatories may be filed at any time before depositions are taken. (37 C.F.R. §§ 1.671, 1.672).

When interrogatories and cross interrogatories are in proper form, Commissioner will forward them to proper officer, with request that upon payment of or security for official's fees witnesses be notified and examined. Formalities of reducing answers to writing and transmitting same under official seal and signature are same as in case of depositions. (37 C.F.R. §§ 1.671, 1.672).

By stipulation foreign depositions may be taken on oral questions and answers reduced to writing. (37 C.F.R. §§ 1.671, 1.672).

1.44 DESIGN PATENTS:

Whoever invents any new, original and ornamental design for article of manufacture may obtain design patent therefor (35 U.S.C. § 171), with provisions relating to patents for inventions applicable except as follows.

Application for design patent filed by foreign applicant who has first filed application in foreign country, which by treaty, convention or law affords similar privileges to citizens of U.S., has same effect as if filed in U.S. on date of foreign application, provided application is filed in U.S. within six months from date of filing of first foreign application. (35 U.S.C. §§ 119, 172). If foreign application was filed more than six months before U.S. application and foreign patent has actually issued, or design registered, before filing of U.S. application, no valid design patent can be obtained in U.S. (35 U.S.C. §§ 102[d], 172).

Patents for designs have term of 14 years from date of grant. (35 U.S.C. § 173). Maintenance fees not required for design patents.

Adaptation of known form or ornament to different article is not generally invention of new and patentable design. Nonfunctional visual appearances, not utility controls patentability of design. Design hidden in normal intended use may be patentable under certain circumstances. (16 USPQ2d 1433).

If appearance of claimed design is dictated by use or purpose of article, design is deemed functional such that design patent is invalid. (304 F.3d 1373). However, if other designs could produce same or similar functional capabilities, design of article in question is likely ornamental instead of functional. (304 F.3d 1373).

Application consists of petition, description, claim, drawing and oath or declaration. Description is usually very short, stating merely that drawing shows new design. Claim, also, usually only claims ornamental design as shown. Design must be represented by drawing which conforms to rules established for drawings of mechanical inventions and must contain sufficient number of views to disclose appearance of design. (37 C.F.R. § 1.152). See topic 1.105 Oath or Declaration.

As to filing and issue fees, see topic 1.61 Fees.

Design patent is infringed by applying design or colorable imitation of it to any article of manufacture for purpose of sale. Design patent infringement depends on whether ordinary observer would be deceived by accused device's design; empirical or survey evidence of infringement may not be necessary. (24 USPQ2d 1121). Ordinary observer test must encompass claimed ornamental features of all figures of design patent. (282 F.3d 1370). When two designs are not plainly dissimilar, court should compare claimed and accused designs with prior art to determine substantial similarities between two designs. (543 F.3d 665). Even though this test may require comparison of claimed design with prior art, test remains solely for determining infringement and not for determining validity. (543 F.3d 665). No obligation exists for district courts to issue verbal description of design patent because illustration better represents design patent. (543 F.3d 665). Remedy for infringement, see 35 U.S.C. §§ 281-287, 289. See topic 1.71 Infringement.

Inventor may secure design and utility patent and copyright. (493 F.2d 1389).

Design patent application may claim priority (35 U.S.C. § 120) from utility patent application (11 USPQ2d 1300) and vice versa (228 USPQ 32) providing parent application sufficiently discloses subject matter of subsequent application (35 U.S.C. § 112). Design not subject to experimental use exception to novelty requirement. (35 U.S.C. § 102[b], 8 USPQ2d 2030). See topic 1.129 Public Use or Sale.

Claim of design patent having drawings showing more than one species covers each species independently.

Guidelines for examination of computer generated icons appear in 61 FR 11380.

1.45 DISCLAIMER:

Whenever, without any deceptive intention, claim of patent is invalid, remaining claims shall not thereby be rendered invalid. Patentee, whether of whole or any sectional interest therein, may, on payment of required fee, make disclaimer of any complete claim, stating therein extent of interest in such patent. Such disclaimer shall be in writing, and recorded in Patent and Trademark Office; and shall thereafter be considered part of original patent to extent of interest possessed by disclaimant and by those claiming thereunder. (35 U.S.C. § 253 and 37 C.F.R. § 1.321). Prosecution disclaimer protects public's reliance on definitive statements made during prosecution by precluding patentees from recapturing through claim interpretation specific meanings clearly and unmistakably disclaimed during prosecution. Prosecution disclaimer does not apply to ambiguous disavowal. (519 F.3d 1366). In like manner, any patentee or applicant may disclaim or dedicate to public entire term, or any terminal part of term, of patent granted or to be granted. (35 U.S.C. § 253).

Qualified disclaimer is abolished, as is requirement that disclaimer must be filed without "unreasonable" delay, except that failure to file disclaimer before suit is brought will bar recovery of costs. (35 U.S.C. § 288).

Terminal disclaimer may also be entered during prosecution to avoid obviousness-type double patenting rejection (37 C.F.R. § 1.321[b]), but not to avoid rejection based on claiming same invention (422 F.2d 438, 35 U.S.C. §§ 102, 103; 359 F.2d 886). Terminal disclaimers may be executed by either 100% owner or attorney or record representative of 100% owner. Terminal disclaimer will not overcome rejection under 35 U.S.C. §§ 102(e) and 103. Terminal disclaimer may be untimely. Where terminal disclaimer filed, patents should not be separated in ownership.

Terminal disclaimer may also be required when holding of abandonment withdrawn or abandoned application revived, for period of abandonment. (37 C.F.R. § 1.137[d]). See topic 1.138 Revival of Abandoned Application. Patent term extension under 35 U.S.C. § 156 may be applied to patent subject to terminal disclaimer. (482 F.3d 1317).

1.46 DISCLOSURE DOCUMENTS:

Patent and Trademark Office will accept and preserve for period of two years "Disclosure Documents" which may be used as evidence of conception of invention when followed by diligent reduction to practice of invention or filing of application. (MPEP § 1706). Disclosure document may be any document which discloses invention, is signed by inventor(s), and is forwarded to Office by any one of following: inventor(s), owner, attorney or agent of inventor(s) or owner. This does not change effective filing date of related patent application. However, like patent applications, documents will be retained in confidence by Office until application, which refers to it, issues as patent.

Disclosure document provides more credible form of evidence than "self-addressed envelope" form of evidence often used by inventors. However, value of conventional records properly witnessed and notarized as evidence of conception of invention is not diminished.

Although there are no restrictions as to its content and claims are unnecessary, benefits of disclosure document depend directly upon content and adequacy of disclosure. Therefore, document should contain clear and complete explanation of manner and process of making and using invention in sufficient detail that person having ordinary knowledge in field of invention would be able to make and use invention. When nature of invention admits, drawing or sketch should be furnished. Use or utility of invention should be described, especially in chemical inventions.

Disclosure document will be destroyed two years after receipt date unless referred to in separate paper filed in related patent application within two year period. In new patent application, disclosure document may be referred to in letter of transmittal. Disclosure documents, if accepted, will not be returned. Unless it is desired to rely upon disclosure document as evidence, it need not be referred to in file of later filed patent application. However, if disclosure document is referred to, document will be preserved by Office in manner similar to patent applications.

Disclosure document must be limited to written matter or drawings on paper or other thin flexible material, such as linen or plastic drafting material, having dimensions, or being folded to size, not to exceed 8½ by 13 inches. Photographs will also be acceptable. Each page should be numbered and have permanent indicia sufficiently dark to allow copying by ordinary reproducing equipment.

In addition, each disclosure document, when submitted, must include fee (37 C.F.R. § 1.21[c]), stamped, self-addressed envelope and separate paper, in duplicate, signed by inventor stating that submitter is inventor and requesting that enclosed material be received for processing under Disclosure Document Program. Papers will be stamped by Office with identifying number and receipt date, and duplicate request returned in self-addressed envelope together with notice. Notice will indicate that disclosure document may be relied upon as evidence of conception only and not of reduction to practice and patent application should be diligently filed if patent protection is desired.

Request may take following form:

Undersigned, being inventor of disclosed invention, requests that enclosed papers be accepted under Disclosure Document Program, and that they be preserved for at least a period of two years.

1.47 DIVISION AND RESTRICTION:

Except in compliance with 37 C.F.R. § 1.129(b), more than one independent and distinct invention may not be claimed in single application; but group of claims from different statutory classes forming single inventive concept may be in same application. (37 C.F.R. § 1.141).

More than one species of an invention, not to exceed reasonable number (37 C.F.R. § 1.141[a]), may be claimed in one application if that application also includes allowable claim generic to all claimed species. Other species may be claimed in separate applications called divisional applications.

If application contains claims to independent inventions, Patent and Trademark Office may require restriction. (37 C.F.R. § 1.142 and 440 F.2d 1395). Excluded independent inventions may be made subject of one or more new applications which may be divisional applications; under proper circumstances patent issuing from original or divisional application may not be used as reference against each other. (35 U.S.C. § 121). Protection afforded by 35 U.S.C. § 121 to applications (or patents issued therefrom) filed as result of restriction requirement is limited to divisional applications. (518 F.3d 1353).

Divisional and continuing applications must be complete including drawing, specification, claims, oath or declaration and fee. Fee and oath or declaration can be filed later. Such application usually contains exact copy of or part of original drawings and specifications. If it contains departure from or additions to original application it is continuing application with respect to common subject matter only and is called continuation-in-part or CIP. Continuing application is entitled to benefit of date of original application with respect to subject matter contained in original application.

Such application must be filed during pendency of parent or original application or divisional or continuation thereof; and must contain cross reference to earlier application or applications by application number or serial number and filing date, and indicating relationship of applications where benefit of earlier date desired. If continuation or divisional application is directed solely to subject matter described and claimed in original application as filed, signing by inventor may be dispensed with. (37 C.F.R. § 1.53[d]).

Applications filed under PCT are treated differently with respect to restriction. See O.G. Notice, Sept. 9, 1986 and 37 C.F.R. §§ 1.476, 1.488, 1.499.

1.48 DOCTRINE OF EQUIVALENTS:

Literal infringement requires that each and every claim limitation be present in accused product. Infringement may be found under doctrine of equivalents if every limitation of asserted claim, or its “equivalent,” is found in accused subject matter, where equivalent differs from claimed limitation only “insubstantially.” (467 F.3d 1370). Essential inquiry to determine equivalency is whether accused product or process contains elements identical or equivalent to each claimed element of patented invention. (520 U.S. 17 Copyright Cases or Patent Cases). Infringement is appropriate if each element in accused device performs substantially same function in substantially same way to obtain same result as claim limitation. (339 U.S. 605). Doctrine of equivalents must be applied to individual elements of claim, not to invention as whole, to ensure that doctrine is not allowed such “broad play as to effectively eliminate that element in its entirety”. (520 U.S. 17 Copyright Cases or Patent Cases).

What constitutes equivalency in patent infringement (35 U.S.C. § 271) must be determined against context of patent, prior art, and particular circumstances of case. Proper time for evaluating equivalency is at time of infringement, not at time patent was issued. (520 U.S. 17 Copyright Cases or Patent Cases). Literal scope of asserted claims is determined by court as matter of law. (517 U.S. 370). Equivalency is fact issue for jury. (520 U.S. 17 Copyright Cases or Patent Cases). Doctrine acts to expand scope of patent protection where no literal infringement covers accused device. However, doctrine may be applied such that even though device falls within literal words of patent it may still not infringe claim when it is so far changed in principle from patentable article that it performs same or similar function in substantially different way ("reverse equivalents"). (339 U.S. 605). Federal Circuit has never affirmed district court's finding of non-infringement by reverse doctrine of equivalents. (531 F.3d 1372). Doctrine may be available to extend claimed numerical ranges beyond their literal scope. (505 F.3d 1371).

With respect to patentability, equivalency will negate patentability where operating characteristics are not different and previous device was not of different type. (383 U.S. 39).

Prosecution history estoppel limits doctrine of equivalents by denying equivalents to claim limitation whose scope was narrowed during prosecution for reasons related to patentability. (330 F.3d 1352). Reasons related to patentability include any reason related to statutory requirements for patent. (62 USPQ2d 1705). If patentee narrowed amendment for substantial reason related to patentability, there is rebuttable presumption that patentee has surrendered equivalent in question. (535 U.S. 722). Although prosecution history estoppel may apply to any claim amendment made to satisfy Patent Act's requirements and not just to amendments made to avoid prior art, estoppel need not bar suit against every equivalent to amended claim element. (62 USPQ2d 1705). See topic 1.55 Estoppel, Prosecution History.

"Disclosure-dedication rule" against recapturing disclaimed subject matter using doctrine of equivalents applies only if disclosed but unclaimed subject matter is identified by patentee as alternative to claim limitation. (429 F.3d 1364).

All elements rule provides that doctrine of equivalents does not apply if it would vitiate entire claim limitation. (451 F.3d 819).

Range of equivalents depends on degree of invention, and if pioneer patent, patentee is entitled to broad range of equivalents. But if patent is for slight improvement on old device or combination performing same function as before, range of equivalents is narrower. (118 F.2d 729; 445 F.2d 922). Doctrine is applied where changes in accused device are so insubstantial so as to result in fraud on patent.

Intent plays no role in objective approach to application of doctrine. (520 U.S. 17 Copyright Cases or Patent Cases). Federal Circuit precedent also suggests that doctrine of equivalents cannot be invoked to reach rearranged claim elements. (229 F.3d 1091).

Term "equivalents" applied differently under 35 U.S.C. § 112. (208 F.3d 1352; 145 F.3d 1303). See topic 1.17 Application for Patent.

1.49 DOUBLE PATENTING:

Doctrine of double patenting prevents more than one patent from being issued for single invention. It also prevents new patent from being issued for obvious changes to existing patent. In determining double patenting, one-way or two-way test is applied. One-way test is applied in which examiner asks whether application claims are obvious over patent claims. Two-way test is narrow exception to one-way test, and when applied, patent examiner additionally asks whether patent claims are obvious over application claims. Two-way test arose out of concern to prevent rejections for obviousness-type double patenting when applicants filed first for basic invention and later for improvement, but, through no fault of applicants, PTO decided applications in reverse order of filing, rejecting basic application although it would have been allowed if applications had been decided in order of their filing. Two-way test is only appropriate in unusual circumstance where PTO is solely responsible for delay in causing second-filed application to issue prior to first. (564 F.3d 1313).

Double patenting doctrine prevents patentee from gaining protection for same device for period greater than that is allowed by statute. However, 35 U.S.C. § 253 allows any patentee or applicant to disclaim or dedicate to public either entire term, or any terminal part of it, of patent granted or to be granted. Use of “terminal disclaimer” that causes second patent’s term to expire on same day as related patent, may resolve obviousness type double patenting rejection by PTO. (925 F.2d 1450). However, terminal disclaimer will not be sufficient to overcome statutory type rejection under 35 U.S.C. §§ 102, 103. (946 F.2d 870; 925 F.2d 1450). Further, in order to use terminal disclaimer, applicant must also own previously issued and related patent. Any patent issued due to terminal disclaimer is only enforceable so long as both patents are owned by same individual or assignee.

Normally double patenting is determined by one-way test where examiner asks if application claims are obvious over patent claims. (140 F.3d 1428). However, if PTO is solely responsible for delay causing second-filed application to issue prior to first, two-way test applies where examiner also asks if patent claims are obvious over application claims. (547 F.3d 1371).

1.50 DRAWINGS:

Drawings shall be furnished where necessary for understanding of subject matter sought to be patented. (35 U.S.C. § 113 and 37 C.F.R. § 1.81). Drawings may include illustrations which facilitate understanding of invention (for example, flow-diagrams in cases of processes, and diagrammatic views). (37 C.F.R. § 1.81). Where nature of subject matter sought to be patented admits of illustration by drawing patent examiner may require drawings be submitted. (35 U.S.C. § 113). If examiner requests drawings, inventor will have at least two months to comply with request. (35 U.S.C. § 113). Drawings submitted after filing date of application may not be used to overcome any insufficiency of specification due to lack of enabling disclosure or otherwise inadequate disclosure therein, or to supplement original disclosure thereof for purpose of interpretation of scope of any claim. (35 U.S.C. § 113).

Standards for drawings are governed by 37 C.F.R. § 1.84 and will be strictly enforced. (37 U.S.C. § 1.85). Corrected drawings may show only matter originally described in specification and new matter will not be admitted.

1.51 DUTY OF DISCLOSURE:

Each individual associated with filing and prosecution of patent application has duty of candor and good faith in dealing with Patent and Trademark Office, which includes duty to disclose all information known to that individual to be material to patentability of invention. (37 C.F.R. § 1.56). Duty is violated by either positive misrepresentation or omission that is misleading under circumstances, provided misrepresentation or omission was material to question of patentability and result of bad faith or gross negligence. Misstating expected results as actual results constitutes inequitable conduct. (424 F.3d 1347). Duty of disclosure continues throughout patent prosecution process. (37 C.F.R. § 1.56). Individuals other than attorney, agent, or inventor may comply by disclosing to attorney, agent or inventor. (37 C.F.R. § 1.56). Information is material if it is not already part of record and establishes, by itself or in combination with other information, prima facie case of unpatentability of claim or is inconsistent with any position taken by inventor. (37 C.F.R. § 1.56). If withheld information is merely cumulative in light of other references considered by examiner, information is not material. (419 F.3d 1346). No patent will be granted on application in which fraud was practiced or attempted or duty of disclosure was violated through bad faith or intentional misconduct during prosecution. (37 C.F.R. § 1.56). To prove breach of duty to disclose, or inequitable conduct, one must prove that applicant acted upon deliberate intent to mislead Patent Office. (18 USPQ2d 1001).

1.52 EMPLOYER AND EMPLOYEE:

Relation of employer and employee in and of itself generally gives employer no rights in inventions made by employee. (20 USPQ2d 1401).

If employee is hired for express purpose of making inventions relating to certain subject matter, and does make invention in course of employment, invention will belong to employer and employer may compel assignment of invention and of application and patent claiming it. (264 U.S. 52). Notwithstanding this implied right, it is always prudent for employer to obtain express written contract with employee, binding employee to execute all necessary assignments of inventions and to execute all necessary papers and perform all other acts necessary to secure patents. Employee's refusal to sign standard form for assignment of inventive rights creates genuine issue of material fact as to claim under this implied right. (228 F.3d 1357 Copyright Cases or Patent Cases).

In absence of express or implied agreement to assign inventions and patents to employer, employer may acquire implied license or shop right in any invention made by employee in field of employer's business during working hours and at employer's expense. (20 USPQ2d 1401). Extent of such implied shop right or license depends in each case upon what is reasonably to be inferred from particular circumstances. While no definite rules can be laid down, following general principles may be stated: if invention is process which is independent of specific apparatus, shop right or license is usually unlimited both in extent and time; if invention is machine for making products in which employer deals, license generally extends only to specific machine built and installed with consent of employee, although there is some authority that employer may replace worn-out machines; if invention is in area of products in which employer deals, whether article of manufacture, machine or composition of matter, implied shop right or license is generally held to be unlimited in extent and in time. Such implied license or shop right is nonexclusive and nonassignable. (289 U.S. 178 Copyright Cases or Patent Cases).

This is matter of state, rather than federal law (except in case of federal employment) and, therefore, varies accordingly.

1.53 ENFORCEMENT OF PATENT RIGHTS:

Under Noerr-Pennington doctrine, patentee who enforces patent rights in good faith is immune from antitrust liability. (365 U.S. 127; 381 U.S. 657). This immunity applies outside antitrust context. (508 U.S. 49). Courts presume patentee enforces rights in good faith. (227 U.S. 8 Copyright Cases or Patent Cases; 157 F.3d 1340). Where patentee acts in bad faith, immunity from suit is removed. (182 F.3d 1340 Copyright Cases or Patent Cases).

Bad faith patent enforcement may be attacked using state tort law and § 43 of Lanham Act. (182 F.3d 1340 Copyright Cases or Patent Cases). Party asserting bad faith patent enforcement must show by clear and convincing evidence (1) enforcement action was "objectively baseless"; and (2) patentee knew its claims were false, or acted with disregard for truth. (508 U.S. 49; 362 F.3d 1367; 310 F.3d 1360).

Attorney's fees may be awarded against patentee's counsel for continuing to pursue infringement action in bad faith. (350 F.3d 1242).

See also topic Antitrust.

1.54 ESTOPPEL, COLLATERAL:

Plea of collateral estoppel is full defense to subsequent suit for patent infringement where (1) issue sought to be precluded is same as that involved in earlier action; (2) issue was actually litigated; (3) determination of issue was essential to final judgment; and (4) party against whom estoppel is invoked was represented in prior action. (294 F.3d 1330). Determination of validity or invalidity of patent by International Trade Commission, however, even where that determination is affirmed by Federal Circuit, does not have collateral effect between same parties in subsequent district court action. (90 F.3d 1558). Prior holding of patent validity is entitled to great weight. See also topic 1.85 Laches and Estoppel.

Collateral estoppel does not bind patentee to same royalty rate in earlier litigation involving same parties and same patent where two infringements began at separate and distinct times. (435 F.3d 1356).

1.55 ESTOPPEL, PROSECUTION HISTORY:

Doctrine of prosecution history estoppel, also known as file wrapper estoppel, prohibits patentee from recapturing claim coverage cancelled or rejected during prosecution of patent. Limitations to claims added by amendment create rebuttable presumption that Patent and Trademark Office had substantial reason related to patentability for requiring such amendment. Rewriting dependent claims into independent form coupled with cancellation of original independent claims creates presumption of prosecution history estoppel. (523 F.3d 1304). Patentee has burden of rebutting this presumption by presenting legitimate reason for added limitation, including those related to any of statutory requirements for patent.

In demonstrating that amendment was not made for patentability reasons, motivation for amendment must be shown in prosecution history. Presumption can be overcome if (1) equivalent was unforeseeable at time of application; (2) rationale underlying amendment bears no more than tangential relation to equivalent in question; or (3) there was some other reason suggesting that patentee could not reasonably be expected to have described insubstantial substitute in question. (535 U.S. 722). “Tangential relation” element is narrowly applied. (480 F.3d 1335). Unexplained amendments are not entitled to any range of equivalents. “Some other reason” rebuttal argument refers to situations such as shortcomings in language. (457 F.3d 1293). Voluntary claim amendments are treated same as those initiated by Patent and Trademark Office. If patentee is unable to satisfy this burden, prosecution history estoppel will apply.

Estoppel need not bar suit against every equivalent to amended claim element. (62 USPQ2d 1705). Examiners’ comments in their reasons for allowance do not constitute clear and unambiguous disavowal of claim scope and subject patentee to prosecution history estoppel even if patentee remains silent in response. (414 F.3d 1342). Letters between patent counsel and applicant do not form part of prosecution history because letters are not representation of invention to patent examiner. (540 F.3d 1337).

Patentee’s response to rejection, not examiner’s ultimate allowance of claim, is what gives rise to prosecution history estoppel. (562 F.3d 1167).

Amendment is not essential for estoppel to occur when argument is made, and relied on, to distinguish claimed subject matter from prior art. (216 F.3d 1367). Unlike amendment-based estoppel, patentee’s arguments do not necessarily surrender entire field of equivalents. (460 F.3d 1349). (See topic 1.48 Doctrine of Equivalents.)

1.56 EXAMINERS OF PATENTS:

Examiner in group to which application is assigned takes up assigned new applications for examination in order of filing, subject to prior examination of amended cases which are given preference according to filing dates.

Examiner must pass upon claims presented in application, and either allow them, or give reasons for objection or rejection. Examiner’s allowance is generally final. Examiner may set forth reasons for allowing claims. Applicant may timely file statement commenting on reasons for allowance. Once claims are twice rejected or subject to final rejection, appeal may be taken to Board.

Board members consisting of Commissioner, Deputy Commissioner, assistant Commissioners, and Administrative Patent Judge are required to have competent legal knowledge and scientific ability. Commissioner is authorized to designate primary examiners, or others having higher grade and requisite ability to serve as Administrative Patent Judge for period not exceeding six months each. (35 U.S.C. § 7).

1.57 EXECUTOR OR ADMINISTRATOR:

Executor or administrator may make application for patent and obtain on behalf of inventor who has died before application was made. (35 U.S.C. § 117; 37 C.F.R. §§ 1.42, 1.422). If inventor dies after making application, executor or administrator will be allowed to intervene in prosecution of application by filing certificate of death and certificate of appointment, and patent will be issued to such representative. (37 C.F.R. § 1.42).

1.58 EXPERIMENTAL USE:

Experimental use of invention primarily for bona fide experimental purpose or testing to perfect invention rather than for commercial exploitation more than one year prior to filing application negates statutory bar of 35 U.S.C. § 102(b). (276 F.3d 1347). Experimental use determination depends on whether invention is “ready for patenting” and may end with actual or constructive reduction to practice. (48 USPQ2d 1641 Copyright Cases or Patent Cases). See topic 1.104 Novelty. Use may be experimental only if it is designed to (1) test claimed features of invention or (2) to determine whether invention will work for its intended purpose—itself requirement of patentability. (560 F.3d 1331).

Important consideration in determining experimental use is whether inventor or someone under inventor’s control performs testing. Secrecy is not determinative as to whether use is experimental. (220 USPQ 577). Experimentation includes both activity with view to development or modification as well as activity simply to test invention’s utility.

1.59 EXTENSION:

See topics 1.66 General Agreement on Tariffs and Trade (GATT); 1.114 Patents; 1.135 Renewal.

1.60 FACSIMILE FILING:

Certain specified papers if signed and submitted with facsimile transmission certificate may be filed in Patent and Trademark Office by facsimile. (37 C.F.R. §§ 1.6, 1.8). Receipt date accorded to correspondence is date on which complete transmission is received in Office unless that date is Sat., Sun., or Federal holiday in District of Columbia, in which case date stamped will be next succeeding day. Original should not be filed in Office but retained for proof of filing if necessary.

1.61 FEES:

Fees of Patent and Trademark Office are fixed by law or by Office Rules, and all are payable to Commissioner of Patents and Trademarks concurrently with filing of papers requiring fees, (37 C.F.R. §§ 1.16-1.23) with exception that under 37 C.F.R. § 1.53 application may be assigned filing date without payment of filing fee at that time. With proper charge statement and established funded deposit account in Office fees may be charged to that account. (37 C.F.R. § 1.25). Small entities (see topic 1.143 Small Entity) are entitled to some fees reduced by half. (37 C.F.R. §§ 1.16-21). Fees are subject to change and are published in Official Gazette as well as U.S. Patent Office web site at http://www.uspto.gov/go/fees/. See also 35 U.S.C. § 41. Failure to pay application or issuance fees is treated as abandonment of application, (35 U.S.C. §§ 111[a][4], 151 [2000]); failure to pay required maintenance fees results in expiration of patent, (35 U.S.C. § 41[b]). (466 F.3d 1023 or).

Fees concerning Patent Cooperation Treaty (PCT) are set forth in 35 U.S.C. § 376 and 37 C.F.R. §§ 1.445, 1.492.

1.62 FILE WRAPPER OR PROSECUTION HISTORY ESTOPPEL:

See topic 1.55 Estoppel, Prosecution History.

1.63 FILING DATES:

Correspondence given date of actual receipt in Patent and Trademark Office except for correspondence deposited as first class mail with U.S. Postal Service or transmitted by facsimile, along with signed Certificate stating date of deposit or transmission (37 C.F.R. § 1.8), for which deposit date is considered filing date for purposes of meeting deadline, but actual date of receipt will be used for all other purposes. This procedure does not apply to certain papers, including filing of any type of patent application. (See 37 C.F.R. § 1.8.) Any paper or fee may be filed via Express Mail service of U.S. Postal Service and considered filed as of deposit date. (37 C.F.R. § 1.10).

1.64 FOREIGN PATENTS AND APPLICATIONS:

Effect in United States.

Patent granted by foreign country has no effect to confer any patent rights in U.S. Similarly, rights under U.S. patent extend only throughout territory of U.S. However, there may be certain effects in that foreign patent itself, or publication of specification, constitute prior art and can be used to defeat novelty (35 U.S.C. § 102) or as basis to show obviousness (35 U.S.C. § 103) in case of subsequent application for patent in U.S. by another. Section 102 provides that patent cannot be obtained in U.S. if invention was patented or described in printed publication in this or foreign country before date of invention of applicant in U.S., or more than one year before filing date of application in U.S. Most foreign countries now issue specifications of pending applications in printed form just after 18 months from filing or earlier priority date, and these printed publications likewise constitute available prior art as of their date of publication.

Section 102 also provides that inventor is barred from obtaining U.S. patent if inventor, or representatives or assigns, has obtained patent in foreign country prior to applying for patent in U.S., and foreign patent was obtained on application filed more than 12 months before in U.S. application (487 F.2d 459). See subhead Right of Priority, infra.

Foreign Patent Laws.

Most countries of world have patent laws. These vary in details relating to conditions for patentability, procedure in obtaining patents, formalities, and other matters. In view of territorial limitation of patents, it is necessary to apply separately for patent in each jurisdiction in which patent protection is desired, in accordance with particular requirements of that country, except as noted below.

Few points of differences in foreign laws are noted. In some, chemical compounds and medicines are excluded from patenting, but not process of producing them, although in few, even processes for producing medicines are excluded. In most countries patent can be applied for directly by owner of rights in owner’s own name as applicant. Novelty is generally considered from filing date, with no period of permissible publication and public use before filing, and first applicant to apply gets patent (except U.S. and Philippines). American applicant for foreign patent often loses out because invention has been in public use or publicized before U.S. filing date. Term of patent varies, with 20 years, counted from filing date, being common. In U.S. and most countries periodic, usually annual, renewal fees or annuities (termed maintenance fees in U.S.) are required to keep patent in force; if not paid, patent lapses. Certain countries (not U.S.) have provisions relating to compulsory licenses whereby patent office or court will order grant of license to another in cases of failure to work invention within country without adequate excuse, abuse of patent rights, dependent patents (those which cannot be worked without infringing some other patent), and patents having paramount public interest such as medicines. Laws of U.K. are particularly well developed on these matters. Aside from compulsory license laws countries may have provisions requiring invention to be worked in country.

Working usually means commercial manufacture or practice of patented machine, product or process in country, although in some countries, mostly in South America, satisfying demand by importation is sufficient. When patentee is unable to effect actual working in country within proper time limit, resort may be had in few countries to so-called nominal working, which is advertisement in local trade papers of patentee's willingness to license invention to local industry. Such advertisements alone cannot be guaranteed to maintain patent, but in some instances they lead to negotiations resulting in license and actual working by licensee. If advertisements are unanswered such fact constitutes evidence of lack of demand for invention in that country, which may excuse patentee for delay in actual working when subsequent attack is made against patent. In most countries where working is required, failure to work merely subjects patent to possible grant of compulsory license upon royalty terms fixed by authorities, but in some countries not parties to convention noted infra, patent may become void.

Numerous varying details of formalities and conditions practically make it imperative that patent specialist be consulted in filing and prosecuting foreign applications. See subhead License to File Abroad, infra.

Patent Treaties, International Convention.

There are several treaties relating to patents, most important of which is International Convention for the Protection of Industrial Property (Paris Convention), originally concluded at Paris in 1883. (53 Stat. 1748). It has been revised six times, last three being at London in 1934, at Lisbon in 1958 and at Stockholm in 1967. Parties to this treaty include U.S. and over 130 other countries.

One of important provisions of Paris Convention is Article 2, providing for national treatment; each country must give to nationals (and residents) of other countries same rights which it gives to its own nationals, on compliance with same requirements applicable to its own nationals. Each country maintains its own patent law but there are various provisions detailing certain things which patent law must contain or avoid; for example, patentee cannot be penalized for nonworking until after three years from grant of patent and then patent cannot be revoked for nonworking until compulsory licenses are first tried. (Art. 5). Treaty originated "right of priority" treated in subhead, infra. Paris Convention also contains provisions relating to designs, trademarks, trade names, and unfair competition.

U.S. is also party to Inter-American Convention Relating to Inventions, Patents, Designs and Industrial Models signed at Buenos Aires in 1910 (38 Stat. 1811), along with Bolivia, Brazil, Costa Rica, Cuba, Dominican Republic, Ecuador, Guatemala, Haiti, Honduras, Nicaragua, Panama, Paraguay, and Uruguay. This treaty provides for right of priority.

See topic 1.66 General Agreement on Tariffs and Trade (GATT).

Right of Priority.

Relations exist between U.S. and over 130 countries by virtue of treaties above mentioned whereby filing of application for patent in one of countries generates certain rights in U.S. and vice versa. If corresponding application for patent (see 37 C.F.R. § 1.55 as to inventor's certificates) is filed by same party (or privies) in one of other countries within year from filing of first application in any country of group, this later application is given benefit of filing date of first application. Benefit is also available based on application for plant breeder's right filed in WTO country or UPOV Contracting Party. Events, such as publication and public use during interim, cannot defeat right to patent in second country. To illustrate, if application for patent is first filed in U.S. on Jan. 2, 1972, and then corresponding application is filed in France on Dec. 29, 1972, French application is treated as though filed in France on Jan. 2, and reciprocally of course. One point often overlooked especially in U.S. is that right of priority is not helpful with respect to events occurring before first filing. In example given, suppose that invention had been in public use in U.S. or described in printed publication some time during 1971; under U.S. law right to U.S. patent is not lost but right to French patent would be gone by reason of these events occurring before Jan. 2, 1972 priority date. U.S. has one year grace period (see topic 1.67 Grace Period) which precludes publication, public use or sale of invention no more than one year before filing in U.S. from barring application even if priority date is later than publication date. U.S. application for invention filed under 35 U.S.C. § 111(a) or international application for invention filed under 35 U.S.C. § 363 and disclosed in previously filed provisional application (35 U.S.C. § 111[b]), see topic 1.17 Application for Patent) shall have same effect as though filed on date of provisional application, if filed not more than 12 months after filing date of provisional application and it contains specific reference to provisional application (35 U.S.C. § 119[e]).

Foreign application may only form basis for priority under 35 U.S.C. 119(a) if that application was filed by either U.S. applicant himself, or by someone acting on his behalf at time foreign application was filed. (497 F.3d 1293).

Right of priority is governed by statute both as to earlier filing date in foreign country (35 U.S.C. §§ 119, 365) or in U.S. (35 U.S.C. § 120).

Patent Cooperation Treaty (PCT).

PCT, in force Jan. 24, 1978, began operations June 1, 1978. Participants include U.S. and over 107 other Paris Convention countries. Under PCT, single application (International Application) filed in one of certain appointed Patent Offices and designating member countries of interest is subject to single set of formal requirements. U.S. Patent and Trademark Office is Receiving and Examining Office for such applications and will act as International Searching Authority (35 U.S.C. §§ 351, 361) in U.S. Applications are given preliminary inspection in Patent Office in country where filed. International search and report is then made by Searching Authority. Copies of application and search report are sent to each designated country. Upon applicant's request to each desired designated country for national phase by end of 20th month from date of filing or priority date if earlier (if preliminary examination is not requested in international stage within 19 months from that date, or if it is requested, by end of 30th month) respective countries proceed with examination and grant or refuse patent in accordance with own laws. Applicant must act timely in U.S. to obtain benefits. (37 C.F.R. § 1.495). International Bureau under Paris Convention acts as overall coordinating body. International applications are published after 18 months from date of filing or earlier priority date. Proceedings in U. S. are governed by statute (35 U.S.C. §§ 351-376) and rules thereunder. International fees are set under Treaty and national fees under statute. (35 U.S.C. § 376 and 37 C.F.R. § 1.445). Documents concerning PCT may be obtained from either "Commissioner of Patents and Trademarks, Box PCT, Washington, D. C. 20231" or "World Intellectual Property Organization, CH-1211 Geneva 20, Switzerland". See also 990 OG 127; 1012 OG 20.

European Patent Convention (EPC).

EPC led to treaty establishing European Patent Office (EPO) which began operations June 1, 1978 for granting of European patents. Countries participating are limited to European countries and include Austria, Belgium, Cyprus, Denmark, France, Germany, Greece, Ireland, Italy, Liechtenstein, Luxembourg, Monaco, Netherlands, Portugal, Spain, Sweden, Switzerland, and United Kingdom. Other European countries are preparing to participate. Any person, regardless of citizenship, may file application. Single application is filed, naming number of countries to which it is to apply. Application is examined by EPO and patent granted or refused in accordance with law of treaty. After grant, document represents bundle of patents, one for each country specified. Rights and enforcement are governed by laws of individual country but validity by law of treaty. Proceedings are coordinated with PCT. European patent is not single patent for one area, but represents separate patents, one for each country.

African Regional Industrial Property Organization (ARIPO) includes 14 English speaking African countries and enables multinational protection of patents and industrial designs through single application as in EPC. Member countries for which protection is desired must be designated. Substantive examination is conducted. After grant, designated countries respectively govern effect therein.

Single Patent For Several Countries.

Nine former Republics of Soviet Union have joined in establishing Eurasian Patent Convention. Official language is Russian. System is similar to European Patent Convention, but Eurasian patent is unitary patent covering all Eurasian Convention members, unlike European patent.

Fourteen French speaking African countries (Benin, Burkina Faso, Cameroon, Central African Republic, Chad, Congo, Cote d'Ivoire, Gabon, Guinea, Mali, Mauritania, Niger, Senegal and Togo) have formed "African Intellectual Property Organization" (OAPI) with common patent, design and trademark law and central patent office whereby single patent can be obtained for group of countries as one area. Other than this Union and Eurasian Convention (not counting very few special situations such as Swiss patent covering Liechtenstein) there is no single patent for several countries as yet. Common Market countries have signed treaty not yet in effect to provide single community patent effective as single patent wholly under one law, for Common Market countries as single area, which will be issued by European Patent Office.

License to File Abroad.

Except when authorized by license obtained from Commissioner, person shall not file or cause or authorize to be filed in any foreign country prior to six months after filing in U.S. application for patent or for registration of utility model, industrial design or model in respect of invention made in U.S. (35 U.S.C. § 184). Application considered to include petition for license when filed. Patent and Trademark Office indicates license grant on filing receipt. (37 C.F.R. § 5.12). Term "application" includes applications and may include any modifications, amendments, or supplements thereto, or divisions thereof but only under certain circumstances. (35 U.S.C. § 184). License must be obtained for continuation-in-part application which discloses subject matter in addition to and in respect of subject matter and invention disclosed in parent U.S. application. (202 USPQ-714). Failure to procure such license will result in bar to issue of U.S. patent or, if issued, in its invalidity (35 U.S.C. § 185) and if secrecy order is issued, penalty for willful violation of provisions of 35 U.S.C. § 184 is fine of not more than $10,000 or imprisonment for not more than two years, or both (35 U.S.C. § 186). Under certain circumstances retroactive license may be granted in case of foreign filing made through error without any deceptive intent. License request not necessary upon filing PCT International Application but may be required before application can be forwarded abroad. (35 U.S.C. § 368, 37 C.F.R. §§ 5.1 and 5.11). Note that license is not required if International or U.S. application has been filed and six months have elapsed, unless application is under secrecy order. See topic 1.98 National Security.

1.65 FORMS:

Forms Used in Office can be obtained from Patent and Trademark Office website (http://www.uspto.gov/web/forms/index.html).

1.66 GENERAL AGREEMENT ON TARIFFS AND TRADE (GATT):

Uruguay Round of GATT resulted in agreement which should harmonize specific aspects of intellectual property laws of World Trade Organization (WTO) member countries. In U.S., implementing legislation, Uruguay Agreements Act, was signed into law on Dec. 8, 1995. Areas of Title 35 affected include (1) change in utility patent term (35 U.S.C. § 154), (2) introduction of provisional patent application as domestic priority document (35 U.S.C. § 111[b]), (3) proof of acts of invention in countries other than U.S. and (4) added provisions regarding infringement. Rules and relevant commentary for implementing these changes to 37 C.F.R. Parts 1 and 3 were published in Federal Register in Vol. 60, No. 79 at pages 20195 et seq.

Manner in which utility patent term is measured and its length has changed. Terms for utility patents begin when patent issues. For application filed on or after June 8, 1995, term ends 20 years from date on which application for patent was filed, or from earliest priority date claimed under 35 U.S.C. §§ 120, 121, or 365(c). Patents in force on June 8, 1995 or which directly result from pending applications filed before June 8, 1995 have patent term which ends later of 20 years measured from effective filing date of application or 17 years measured from date of patent grant. 35 U.S.C. § 154 provides for extensions of 20 year patent term up to five years total where application filed between June 8, 1995, and May 28, 2000, is (1) delayed due to interference proceeding, or (2) subject of secrecy order, or (3) delayed by successful appeal to either Board of Patent Appeals and Interferences (BPAI) or Federal Court. For patents issued on applications filed after May 28, 2000, unlimited term extensions are available based not only on same type of delays in Office, but also for certain types of application processing delays in Office including failure to issue patent within three years of filing patent application. (American Inventors Protection Act of 1999). Under certain circumstances, extensions of patent term are also available for patents in which delay of distribution or sale of composition of matter or medical device has been imposed by FDA pursuant to FFDCA regulation. (35 U.S.C. §§ 155 and 156). But where active ingredient has been previously marketed, subsequent patent including that active ingredient may not be granted patent term extension for first commercial marketing under 35 U.S.C. § 156. (362 F.3d 1338). Where active ingredient has been previously marketed, subsequent patent including that active ingredient may not be granted patent term extension for first commercial marketing under 35 U.S.C. § 156. (362 F.3d 1338).

Any person may file provisional application. Provisional application does not have to meet all requirements of regular utility patent application and is subject to lower fee requirements. Provisional application is not required to have claims or declaration but its specification must comply with 35 U.S.C. § 112 and name inventor(s) though it does not require signature(s) of inventor(s). It is examined for formalities only. Filing provisional application at U.S. Patent and Trademark Office does not impact 20 year patent term of regular U.S. application which relies on it for priority. Further, it is confidential and provides basis for priority claim for foreign filings. These priority claims can be obtained when incomplete utility patent application could not be filed due to variety of factors. Other situations suitable for using provisional application include where past U.S. practice would be to file continuation-in-part application. After one year, provisional application goes abandoned. Non-provisional application which relies on provisional application for priority must be filed before expiration of 12-month anniversary date of provisional application. Provisional application can not depend on any other application, U.S. or foreign.

35 U.S.C. § 104 permits consideration of inventive acts of domiciles of WTO member countries starting on Jan. 1, 1996. Mexico or Canada (NAFTA), effective Dec. 8, 1993, and domiciles of countries who are able to use knowledge, use or other activities performed in their country to establish date of invention. Date of invention must be established according to U.S. standards in all other regards. See topic 1.101 North American Free Trade Agreement.

35 U.S.C. § 271 includes as additional infringing acts importation and offers to sell of any patented invention. See topic 1.71 Infringement.

1.67 GRACE PERIOD:

Publication of invention, including offer for sale or sale in U.S. or public use in U.S., when made by inventor or another who derived information from inventor, does not bar patent protection in U.S. if application made within one year of filing date of patent application. (35 U.S.C. § 102[b]).

1.68 IMPORTATION:

Articles, manufactures or compositions of foreign origin, covered by U.S. patent or made, produced, processed or mined under or by means of process covered by U.S. patent may, under certain circumstances, be refused entry into U.S. (19 U.S.C. § 1337); see topic 1.76 International Trade Commission.

1.69 INEQUITABLE CONDUCT:

Inequitable conduct can be defined as intentional misrepresentation to PTO during patent proceedings. (438 F.3d 1123). To successfully prove inequitable conduct, evidence must be presented that (1) made affirmative misrepresentation of material fact, failed to disclose material information, or submitted false material information, and (2) intended to deceive PTO. (560 F.3d 1366). Misrepresentation can be due to omissions by applicant as well as misleading actions. Inequitable conduct is nonstatutory defense that requires proof of materiality and intent. (438 F.3d 1123). Information is deemed material when reasonable examiner would find withheld or false information relevant in awarding patent. Ability to duplicate information is relevant to level of materiality attached to information. (464 F.3d 1339). Intent to deceive is typically measured by gauging level of intent, often in relation to materiality. Intent to deceive may be proven using inferential, rather than direct, evidence. (437 F.3d 1309).

Patent applicants must cite to PTO, as part of duty of disclosure, not only fact of co-pending related applications, but also any and all Office Actions issued in co-pending applications which contain another examiner’s adverse decisions about substantially similar claims. Office Action claim rejections made in co-pending application may be material to patentability and thus withholding them from PTO with deceptive intent may be inequitable conduct. (559 F.3d 1317).

Once threshold findings of materiality and intent are established, court must weigh them to determine whether equities warrant conclusion that inequitable conduct occurred. (48 F.3d 1172). Party asserting inequitable conduct must prove with clear and convincing evidence both materiality and intent to deceive prongs. (537 F.3d 1357). Even if asserting party meets this level of proof, judge must still balance equities to determine whether to hold patent unenforceable because of patent holder’s egregious conduct. (537 F.3d 1357). Failure to disclose relationship between declarants and applicant can be found to be inequitable conduct. (437 F.3d 1181). However, lack of explanation for nondisclosure of prior art does not establish intent to deceive. (439 F.3d 1335). Misstatement or omission can be material under 37 C.F.R. 1.56(b). (437 F.3d 1309).

Judge retains discretion to conduct bench trial on unenforceability of patent due to inequitable conduct in same case where invalidity is to be tried to jury. (451 F.3d 1366). Court may declare patents no longer in suit unenforceable for inequitable conduct. (514 F.3d 1229; 504 F.3d 1223). This power may extend to family of related application. (504 F.3d 1223).

1.70 INFORMATION DISCLOSURE STATEMENT:

Each individual associated with filing and prosecution of patent has duty to disclose to Office all information known to that individual to be material to patentability. (37 C.F.R. § 1.56). (See topic 1.51 Duty of Disclosure.) Applicants are encouraged to file information disclosure statement with application or within three months thereafter or before mailing of first Official Action, whichever is later. Later information disclosure statements will be considered only if accompanied by certification that information was cited abroad, or discovered, less than three months before or by fee. After final rejection or allowance, both are required together with petition. (37 C.F.R. § 1.97). Information disclosure statements shall include listing of patents, publications, or other information and concise explanation of relevance of each non-English item. Copies of patents and pertinent portions of publications shall accompany any statement. Readily available translations shall also be transmitted. (37 C.F.R. § 1.98). Copy of each foreign patent, nonpatent publication, and other non-patent document must be filed with disclosure statement to get documents considered. Requirement of copy for all listed publications does not apply to any IDS submitted in compliance with Offices electronic filing system. (37 C.F.R. § 1.98[e]). Concise explanation of non-English documents not required if accompanied by English foreign search report or action which states relevancy. Applicant must cite information material to examination which is cited in other countries in related or corresponding applications. (37 C.F.R. § 1.56). Applicant may update information disclosure statement prior to issuance of patent. Inventor's disclosure may generally not be considered prior art. (203 USPQ-171). Examiner may rely on admissions of applicant; mere citation and statement of relevance not considered admission that information is necessarily prior art. (37 C.F.R. § 1.97[h]).

1.71 INFRINGEMENT:

Infringement is tort and comprises unauthorized making, using, selling, offering to sell or importation of subject matter covered by patent or contributing to infringement or active inducement of same. Additionally process patent may be infringed by using or selling or importing into U.S. products made by patented process. Scope of product-by-process claim for purposes of determining infringement may be limited in litigation by process recited in claims (23 USPQ2d 1481; however, cf. 18 USPQ2d 1001).

It is not infringement to design around patent or to practice prior art. It is not infringement as to uses of drugs or medical devices reasonably related to development and submission of information under Federal Law which regulates manufacture, use or sale of drugs and medical devices for humans. (35 U.S.C. § 271[e]; 496 U.S. 661). When filing of ANDA infringes valid patent, 35 U.S.C. § 271(e)(4) provides three remedies: injunctive relief, damages, and order making effective date of infringing product later than expiration date of patent in suit. (536 F.3d 1361).

This safe harbor provision also applies to products produced offshore by process patented in United States. (519 F.3d 1343). Demonstrations of devices subject to regulatory approval may be exempt from infringement under 35 U.S.C. § 271(e)(1). (25 USPQ2d 1196). Safe harbor provision of 35 U.S.C. § 271(e)(1) is broad and extends to new drug development activities that may form rational basis for future FDA clinical trials. (545 U.S. 193 or). Filing of paragraph IV certification is itself act of infringement if purpose of ANDA submission is to obtain FDA's approval to engage in commercial manufacture, use, or sale of patented drug before expiration of drug patent. (503 F.3d 1372).

Design patent infringement is tort and comprises nonfunctional visual aspects of design. (5 USPQ2d 1625). When claim language is drawn to capability, infringement will be found for devices reasonably capable of infringing. (555 F.3d 984). Fact that device is merely capable of infringing is not enough to establish infringement. (501 F.3d 1307).

There may be actionable "contributory" infringement whenever one sells component of patented machine, manufacture, combination or composition, or material or apparatus for use in practicing patented process, constituting material part of invention, knowing same to be especially made or especially adapted for use in infringement of such patent, and not staple article or commodity of commerce suitable for substantial noninfringing use. (35 U.S.C. § 271[c]; 62 USPQ2d 1834). Contributory infringement cannot be escaped by embedding component that would otherwise infringe in larger product with additional features if substantial non-infringing uses are based solely on additional feature. (550 F.3d 1325 or).

It is infringement to supply all or substantial portions of components of patented invention to induce combining components outside U.S. (35 U.S.C. § 271[f]). Same is true regarding any component that is especially made or adapted for use in invention and not staple article knowing it will be combined outside U.S. Offer to sell components of infringing device for assembly abroad, however, does not constitute infringing act. (215 F.3d 1246). Plaintiff has burden of showing that alleged infringer's actions induced infringing acts and that he knew or should have known his actions would induce actual infringements. Requirement that alleged infringer knew or should have known his actions would induce actual infringement necessarily includes requirement that he or she knew of patent. (471 F.3d 1293). When multiple parties perform every step of process or method claim, and one party exercises "control or direction" over process or method, that party infringes claimed process or method. (532 F.3d 1318).

While U.S. patent laws are not extraterritorial, § 271(f) is exception. This rule does not permit domestic entity to supply components of patented invention to foreign entity who then assembles those components into infringing product. (35 U.S.C. 271[f][1]).

Software is not "component" under § 271(f) in its abstract source code form. But software does become component under § 271(f) if it exists in its computer-readable object code medium. (127 S. Ct. 1746 or). Party that sells or offers to sell software containing instructions to perform patented method does not infringe under § 271(a). (550 F.3d 1325 or).

In situation where assembled infringing product is tangible, domestic entity does not infringe under § 271(f) if what is supplied is not physically used in that final assembled infringing product. (127 S. Ct. 1746 or). Therefore, if domestic software producer supplies disk containing infringing software program to foreign entity, that domestic producer does not infringe under § 271(f) if foreign entity uses copies of software disk to install software. (127 S. Ct. 1746 or).

§ 271(f) applies to process claims. Phrase "any component of a patented invention" in statute applies to components used in performance of patented process/method inventions. (425 F.3d 1366).

Issue of infringement entails two-step process; first, scope of patent claims are determined as matter of law, and second, patent claims are then compared to potentially infringing device to determine whether all limitations of at least one claim are present, literally or equivalently, in accused device. (299 F.3d 1313). Infringement is not avoided by substitution for one of constituents of patented invention, of known equivalent therefor. See topic 1.48 Doctrine of Equivalents. Use of entire combination as claimed even though other elements are added is infringement of such claim. Owner of improvement on patented machine may not use improvement without consent of owner of dominant patent if such use necessitates use of patented machine. Use of less than claimed combination is not infringement of claim for combination. Infringement suit brought in bad faith is contrary to antitrust laws. In context of patent infringement, defendant cannot avoid liability for direct infringement by having someone else carry out one or more of claimed steps on its behalf. (498 F.3d 1373).

Manufacture of component parts of patented combination within U.S. for assembly outside may be infringement. (35 U.S.C. § 271[f]). Infringing act does not require actual assembly of component parts. (245 F.3d 1364 Copyright Cases or Patent Cases). Temporary presence in U.S. or experimental use may not be infringement. Inventions made, used, or sold in space under U.S. control or jurisdiction may also be infringements. (35 U.S.C. § 105). Currently, states appear to be immune from patent infringement suit. (119 S. Ct. 2199 Copyright Cases or Patent Cases). See topic 1.87 Liability.

Damages and injunction may be recovered in civil action. (See topic 1.37 Damages for Infringement.) For remedy in U.S. Claims Court for infringement by U.S., see Title 28, 35 U.S.C. § 1498. Attorney fees may be awarded for exceptional cases such as bad faith suit or defense. (35 U.S.C. § 285).

Action may lie in ITC to prohibit certain importation, see topic 1.76 International Trade Commission. In context of patent infringement, defendant cannot avoid liability for direct infringement by having someone else carry out one or more of claimed steps on its behalf. (498 F.3d 1373).

1.72 INHERENCY:

Under principle of anticipation, patent will be invalidated if single prior art reference discloses every limitation of claimed invention. Prior art reference may still anticipate claimed invention when claim limitations not expressly found in reference are nonetheless inherent in it. (301 F.3d 1343). For anticipation to be found under principle of inherency, it must be shown that undisclosed information was known to be present in subject matter of reference. (948 F.2d 1264). Inherency cannot be based upon knowledge of inventor; facts which are said to be inherent in prior art must be shown by evidence from prior art. (175 F.3d 994). Disclosure of patented process inherently discloses product produced by process. (348 F.3d 992). See also topic on Novelty.

1.73 INJUNCTION:

Courts having jurisdiction of cases under this Act may grant injunctions in accordance with principles of equity to prevent violation of any right secured by patent (including direct or contributory infringement) on such terms as court deems reasonable. (35 U.S.C. § 283).

U.S. district courts have original and exclusive jurisdiction of any civil action arising under patent laws. (28 U.S.C. § 1338).

Courts may enjoin continuance of acts of infringement, direct or contributory, or threat to begin such infringement.

For injunction after expiration of patent, see 32 F.3d 1541; 906 F.2d 679).

Preliminary injunctions are granted only in clear cases, based on affidavit or verified complaint and after notice to adverse party. They require showing of (1) likelihood of success on merits, (2) irreparable harm absent injunction, (3) balance of hardships favoring injunction, and (4) public policy favoring injunction. (279 F.3d 1357). They are not usually granted on unadjudicated patents. They are usually granted if infringement is clear and validity of patent has been adjudicated in previous suit. Case law and logic both require that movant cannot be granted preliminary injunction unless it establishes both of first two factors, i.e., likelihood of success on merits and irreparable harm. (469 F.3d 1361).

Motions for preliminary injunctions are usually supported by affidavits and opposed by counter affidavits.

In extraordinary cases temporary restraining order, to expire in not more than ten days unless extended for cause, may be granted ex parte. It will only be granted on verified showing of immediate and irreparable injury. If temporary restraining order is granted motion for preliminary injunction must be set down for hearing at earliest possible time.

Injunction pending appeal may issue.

Preliminary injunctions and temporary restraining orders are governed by Fed. R. Civ. P. 65.

Permanent injunctions are within trial court's discretion. There is no longer "general rule" that permanent injunction should follow finding of infringement of valid patent. (126 S. Ct. 1837 or). Permanent injunctions require showing of: (1) Suffering irreparable injury; (2) remedies available at law, such as monetary damages, are inadequate to compensate for that injury; (3) considering balance of hardships between plaintiff and defendant, remedy in equity is warranted; and (4) public interest would not be disserved by permanent injunction. These familiar principles apply with equal force to disputes arising under Patent Act and these factors must be applied on case by case basis. (126 S. Ct. 1837 or). Evidence showing that infringing device harmed patent holder's market share and goodwill is relevant when determining if irreparable harm occurred. (434 F.Supp.2d 437 or).

1.74 INTERFERENCES:

Interference is proceeding instituted in Patent and Trademark Office before Board to determine any question of priority of invention between two or more parties claiming same patentable invention. Unless good cause shown, interference shall not be declared or continued between applications owned by single party or applications and unexpired patents owned by single party. (37 C.F.R. § 1.602). Standard of proof in patent interference is "clear and convincing" evidence, not "beyond a reasonable doubt". (26 USPQ2d 1031). In interference involving co-pending applications or involving patent and application having effective filing date on or before date patent issued, junior party shall have burden of establishing priority by preponderance of evidence. (37 C.F.R. § 1.657[b]). Correct standard of proof of priority of invention, as between co-pending interfering patents, is preponderance of evidence, junior patentee bearing burden of pleading and providing priority. (215 F.3d 1261).

Interference exists when two or more parties each claim same patentable invention. Each such claim is called count. Party with earliest effective filing date is made senior party. All others are called junior parties. Applicant may seek interference with another applicant (37 C.F.R. § 1.604) or another patent (37 C.F.R. § 1.607).

Generally, inventor who establishes first to conceive and first to reduce to practice is entitled to patent, provided no abandonment, suppression or concealment of invention. (843 F.2d 1364). In determining priority of invention, reasonable diligence of first to conceive and last to reduce to practice may be considered. (35 U.S.C. § 102[g]). See topics 1.33 Conception, and 1.131 Reduction to Practice.

In deciding whether parties claim same patentable invention, 37 C.F.R. § 1.601(n), may be interpreted as establishing two-way test. "Two-way" test requires that Invention A anticipates or renders obvious Invention B and Invention B anticipates or renders obvious Invention A in order for interference to be declared. Two-way test assures that interference proceeding is conducted only when warranted. (334 F.3d 1264).

Notice of Interference.

Interference is declared by Administrative Patent Judge who may enter all interlocutory orders in interference and sets times for taking action. (37 C.F.R. § 1.610). Notice of declaration of interference is sent to each party. (37 C.F.R. § 1.611).

After interference is declared each party shall have access to and may obtain copies of files of any application set forth in notice. (37 C.F.R. § 1.612). Prosecution of application is suspended. (37 C.F.R. § 1.615).

Preliminary Statement.

Party may file preliminary statement. Party must give notice to other parties of such filing. (37 C.F.R. § 1.621). Preliminary statement must identify inventor and state facts required by Rules. See 37 C.F.R. §§ 1.622-625. Party may rely on earlier application if relying solely on filing date to prove constructive reduction to practice. (37 C.F.R. § 1.626).

Party is strictly held to any date alleged in preliminary statement. (37 C.F.R. § 1.629).

Unless otherwise ordered by Administrative Patent Judge, all parties filing preliminary statements shall have access to those filed by other parties. (37 C.F.R. § 1.631).

Motions Practice.

Party may file certain preliminary motions (37 C.F.R. § 1.633) as well as other motions (37 C.F.R. §§ 1.634-1.635). Motions must be filed within time period set by Administrative Patent Judge. (37 C.F.R. § 1.636). Rules specify contents of motions. (37 C.F.R. § 1.637). Opportunity to oppose motion and to reply to opposition is provided (37 C.F.R. § 1.638), and evidence may be submitted with motion. Hearings on motions are discretionary. (37 C.F.R. § 1.640). Except for certain papers (37 C.F.R. § 1.646) all papers filed in Patent and Trademark Office must be timely served (37 C.F.R. § 1.646). Party filing motion has burden of proof.

Discovery Period.

Administrative Patent Judge shall set times for motions, discovery, and testimony period, including case-in-chief and rebuttal, provided certain conditions are met. (37 C.F.R. § 1.651). Admissible evidence includes affidavits, transcripts of depositions, agreed facts, interrogatories and answers, and physical exhibits. Rules set forth requirements for evidence and manner of taking testimony. (37 C.F.R. §§ 1.671-688). Party must file record of evidence in specific form. (37 C.F.R. § 1.653). Date of invention may be established by knowledge or use of invention in Canada or Mexico (see topic 1.101 North American Free Trade Agreement) and in WTO countries (see topic General Agreement on Tariffs and Trade [GATT]).

Final Hearing and Decision.

Board gives opportunity to present oral argument which must be presented in specific manner and limited in time. (37 C.F.R. § 1.654). Each party entitled to file briefs which must conform to Rules. (37 C.F.R. § 1.656). Presumption exists that parties made inventions in chronological order of filing dates and burden of proof is on party who contends otherwise. Board will enter decision resolving all issues raised at final hearing. (37 C.F.R. § 1.658). Interference is considered terminated when no appeal has been taken.

Settlement Contracts to be Recorded.

Any agreement or understanding between parties to interference, including any collateral agreements referred to therein made in connection with or in contemplation of termination of interference, must be in writing and true copy thereof filed in Patent and Trademark Office before termination of interference as between said parties to agreement or understanding. Failure so to file will render permanently unenforceable such agreement or understanding and any patent of parties involved in interference or any patent subsequently issued on any application of parties so involved. (35 U.S.C. § 135).

1.75 INTERNATIONAL APPLICATION:

See topics 1.17 Application for Patent and 1.64 Foreign Patents and Applications, subhead Patent Cooperation Treaty (PCT).

1.76 INTERNATIONAL TRADE COMMISSION:

ITC (formerly U.S. Tariff Commission) may prohibit importation of infringing products or products containing infringing articles or articles made by patented process and may examine validity of patent in relation to unfair methods of competition. (645 F.2d 976). ITC also may exclude articles which unlawfully copy trade design, trademarks, or copyrighted material. (19 U.S.C. § 1337). Limited exclusion orders issued by ITC cannot exclude articles manufactured by parties not named in exclusion action, including “downstream” parties. (545 F.3d 1340). Defenses to infringement available under 35 U.S.C. § 271(g) are available to accused infringers in ITC actions. Safe harbor provision of 35 U.S.C. § 271(e)(1) also applies to ITC actions. (519 F.3d

1343). See topic 1.71 Infringement.

1.77 INTERVENING RIGHTS:

See topics 1.134 Reissue and 1.132 Reexamination.

1.78 INVENTION:

To constitute patentable invention, device must involve exercise of inventive faculty as distinguished from skill of persons skilled in art to which it relates.

Not all inventions are patentable, but only those which fall within one of categories defined in Act, namely, per 35 U.S.C. § 101 any new and useful process, machine, manufacture, or composition of matter, or any new and useful improvement thereof; per 35 U.S.C. § 161 any distinct and new variety of plant, asexually reproduced, other than tuberpropagated plant; and per 35 U.S.C. § 171 any new, original and ornamental design for article of manufacture. Supreme Court has broadened any strict adherence to these categories to include “anything under the sun that is made by man”. (447 U.S. 303). See topic 1.104 Novelty, for meaning of novelty (“new”).

No invention is patentable, according to 35 U.S.C. § 103, if differences between new subject matter and prior art are such that said subject matter as whole would have been obvious at time invention was made to person having ordinary skill in art. But new use of known process, machine, manufacture, composition of matter, or material may constitute patentable subject matter. (35 U.S.C. § 100[b]).

Provision of 35 U.S.C. § 103 that patentability shall not be negatived by manner in which invention was made was intended to make immaterial whether alleged invention was arrived at by “a flash of genius” or by slow and painstaking research. Provision of 35 U.S.C. § 103 that subject matter owned by same person shall not preclude patentability intended to modify only 35 U.S.C. § 102(f), (g). 35 U.S.C. § 103 determination involves questions of fact and law. Fact questions include what is scope of relevant prior art; what prior art discloses as whole; what prior art discloses to persons working in art; what is level of skill in art; what differences exist between total relevant prior art and claimed invention; what differences enabled claimed invention to achieve results; whether others for years sought and failed to arrive at claimed invention; whether challenger copied claimed invention; and whether claimed invention achieved commercial success. Law questions include whether Patent and Trademark Office or patent challenger has established by proper standard of proof that just before invention was made in light of all relevant evidence that claimed invention would have been obvious at that time to that person of ordinary skill in art. (35 U.S.C. § 103, 810 F.2d 1561). See also topic 1.100 Nonobviousness.

1.79 INVENTOR:

Applicant for patent generally must be actual inventor who shall make oath or declaration of belief that he or she is original and first inventor of process, machine, manufacture, or composition of matter, or improvement thereof for which patent is sought. Patent and provisional applications must be filed in name of actual inventor or inventors by giving all names, although inventors’ names can be provided after filing date of either provisional or non-provisional application. (37 C.F.R. § 1.48[f]). See also topics 1.17 Application for Patent; 1.82 Joint Invention and Ownership; and 1.86 Legal Representative.

National Inventors Hall of Fame each year may induct certain inventors in ceremonies at Hall of Fame. Inventor of Year Award also may be made annually in ceremonies at Hall of Fame.

1.80 INVENTORSHIP CORRECTION:

Except as done with deceptive intent, misjoinder or nonjoinder of joint inventor applicants through error will not invalidate patent but may be corrected under 35 U.S.C. § 256. Also correctable in Applications. (35 U.S.C. § 116; 37 C.F.R. § 1.48). Similarly sole application may be converted into joint application and joint application may be converted into sole application. (564 F.2d 556). Error in naming sole inventor may also be corrected. (203 USPQ 780; 35 U.S.C. §§ 116, 256). Assignee must file consent to correct (37 C.F.R. § 1.48) by filing signed statement evidencing being assignee of record and certifying that to best of assignee's knowledge and belief title is in undersigned assignee (37 C.F.R. § 3.73[b]). Simplified procedures for correcting inventorship are available when deleting inventors named on filing application who did not contribute to conception of invention recited in claims as amended during prosecution. (37 C.F.R. § 1.48[b]). Inventorship may also be corrected through reissue. (37 C.F.R. §§ 1.171 and 1.175).

1.81 ISSUE FEE:

Issue fees are set forth in 37 C.F.R. § 1.18. Failure to pay issue fee within three months of mailing date of Notice of Allowance results in abandonment. See topics 1.138 Revival of Abandoned Application and 1.61 Fees.

1.82 JOINT INVENTION AND OWNERSHIP:

Several natural persons may make invention jointly. All joint inventors, or their legal representatives, should join in making application and oath or declaration, and patent when it issues is issued to them jointly.

Joint invention is often difficult question of fact, but generally, if two or more inventors acting in collaboration make inventive contribution, it is joint invention although their contributions in type or amount may be unequal or they did not work together or work at same time. Each joint inventor need not have made contribution to subject matter of each claim but each stated inventor must have made contribution to subject matter of at least one claim. (35 U.S.C. § 116). Part or whole owner of invention who did not participate in making invention is not joint inventor, although patent may be granted to part owner as assignee of part interest jointly with true inventor or to whole owner alone.

To be considered inventor of claimed compound, one must have conception of specific compounds being claimed, with all of their component substitutes. (333 F.3d 1330).

Joint Owners.

In absence of agreement to contrary each joint owner of patent may make, use or sell patented invention without consent of and without accounting to other owners. (35 U.S.C. § 262).

1.83 JURISDICTION, ORIGINAL AND APPELLATE:

U. S. district courts and District Court for District of Columbia have exclusive and original jurisdiction of all cases arising under patent laws irrespective of value of matter in controversy, or of diversity of citizenship. (28 U.S.C. § 1338). 28 U.S.C. § 1338 jurisdiction exists where patent law is necessary element underlying separate claim. (504 F.3d 1262; 504 F.3d 1281). Whether allegedly infringing act happened in United States is element of claim for patent infringement, not prerequisite for subject matter jurisdiction. (523 F.3d 1353 or).

Court of Appeals for Federal Circuit (CAFC) has exclusive appellate jurisdiction in patent infringement cases. CAFC has noted that presence of even single claim arising under patent law operates as automatic trigger for Federal Circuit jurisdiction. (253 F.3d 1173 Copyright Cases or Patent Cases). However, patent counterclaim to complaint asserting declaratory judgment and state law claims does not create Federal Circuit appellate jurisdiction. (122 S. Ct. 1889). No appeal or writ of error lies to Supreme Court, but Supreme Court may review patent case on writ of certiorari.

Action lies in U.S. Claims Court for recovery of reasonable compensation for use, without lawful right, of patented invention by U.S., or by others for and with authorization or consent of government, 28 U.S.C. § 1498. Where this section is applicable, such action is patent owner's only remedy. Certain exclusions apply to employees of U.S.

Civil actions for infringement, for declaratory judgments re: infringement or validity, to obtain patents under 35 U.S.C. § 145, to reverse interference decisions under 35 U.S.C. § 146, and to cancel interfering patents under 35 U.S.C. § 291, are cases arising under patent laws. When patent law is necessary element of breach of contract action, case contains substantial issue of patent law. (212 F.3d 1368 Copyright Cases or Patent Cases). Suits to recover royalties or otherwise to enforce, reform or cancel licenses, assignments, or other contracts relating to patents, do not arise under patent laws and must be brought in appropriate state court, or in appropriate federal court on ground of diversity of citizenship.

Court of Appeals for Federal Circuit has established "stream-of-commerce" test setting forth that alleged infringer can be hailed into court in same jurisdiction that he has intentionally placed infringing product into stream of commerce. (21 F.3d 1558). See also topics 1.40 Declaratory Judgments; 1.153 Venue.

1.84 JURY TRIALS:

Right to jury trial on factual issues is provided for by Fed. Rules of Civ. Proc., Rules 38 and 39. Except as had on court's initiative, right is lost by failure to make timely demand. See Fed. R. Civ. P. 38-39; and 352 F.2d 150. No right to jury trial exists as to equitable issues such as fraud on Patent and Trademark Office. (193 USPQ 484). Right to jury trial includes questions of infringement and appears to extend to accused infringer on its counterclaim for declaratory judgment of non-infringement even if patentee's complaint seeks only injunctive relief. (50 F.3d 966). However, defendant, asserting only affirmative defenses and no counterclaims, does not have right to jury trial in patent infringement suit if only remedy sought by plaintiff-patentee is an injunction. (122 S. Ct. 1297). There is no right to jury trial in declaratory judgment action to determine validity where patent holder seeks only injunctive relief. (423 F.3d 1286). Conclusion of validity and construction of patent claims, including meaning of terms of art, are questions of law reserved entirely for court and thus not subject to Seventh Amendment guarantee. (517 U.S. 370). However, district court must instruct jury on court's claim construction, as determined in pre-trial Markman hearing, and it must instruct jury of their obligation to adhere to court's claim construction. (358 F.3d 1356).

1.85 LACHES AND ESTOPPEL:

Laches is equitable defense to patent infringement and may bar damages. Laches is based on patentee's unreasonable and inexcusable delay in bringing suit and infringer suffering material prejudice attributable to delay. (960 F.2d 1020).

Patentee's delay of six years in filing suit after learning patent infringed creates presumption of laches. (960 F.2d 1020). No presumption adheres to equitable estoppel defense (960 F.2d 1020), which consists of conduct by patentee misleading infringer to reasonably infer patentee does not intend to enforce patent; reliance by infringer on conduct to its material prejudices. Totality of circumstances and reasonable inferences made therefrom regarding length of time and reasonableness of delay in bringing suit need to be considered and made before laches can be found to exist. (60 F.3d 770).

Defense of prosecution laches may bar enforcement of patent claims that issued after unreasonable and unexplained delay in prosecution, even though applicant complied with pertinent statutes and rules. (277 F.3d 1361; 422 F.3d 1378).

1.86 LEGAL REPRESENTATIVE:

Legal representative (guardian, conservator etc.) of inventor may sign application papers and make necessary oath or declaration and apply for and obtain patent when inventor is legally incapacitated. (37 C.F.R. §§ 1.43 and 1.423). Filing by other than inventor is only permitted under special circumstances (37 C.F.R. § 1.47) when inventor is not legally incapacitated.

1.87 LIABILITY:

Except as otherwise provided in Title 35, whoever without authority makes, uses, offers to sell or sells patented invention within U.S. or imports into U.S. any patented invention during term of patent infringes patent. Whoever actively induces, or contributes to, infringement of patent also shall be liable. Such liability includes supplying, in or from U.S., all or substantial portion of components of invention patented in U.S. when such components are combined outside U.S., and supplying, in or from U.S. component especially made for use in invention patented in U.S. with knowledge that component will be combined outside U.S. in manner which would infringe patent if combination occurred within U.S. States and State entities were also made liable for patent infringement by 1992 amendment to 35 U.S.C. § 271, but statute later held invalid as not within Congressional enforcement power under 14th amendment due process clause. (119 S. Ct. 2199 Copyright Cases or Patent Cases; 527 U.S. 627 Copyright Cases or Patent Cases).

1.88 LICENSES:

License is permission given by patent owner to another to make, use or sell patented invention. License may be express or implied, written or oral. License may be exclusive or non-exclusive. Transfer which does not convey assignable and exclusive right to practice invention, or undivided interest in exclusive right, for whole or part of territory covered by patent, for term of patent, is non-exclusive license. License is personal and nontransferable unless otherwise expressly provided. Non-exclusive licensee may not sue for patent infringement. Action for breach of patent license agreement does not establish federal jurisdiction under 28 U.S.C. § 1338(a). (439 F.3d 1358). Exclusive licensee with less than all substantial rights does not have standing to sue without joining patent owner. (504 F.3d 1273). When patentee joins exclusive licensee in bringing suit, licensee does not lose standing when patentee does not join in appeal. (504 F.3d 1371).

Determining whether licensee is exclusive licensee or bare licensee is question of ascertaining intent of parties to license as manifested by terms of their agreement and examining substance of grant. Use of word “exclusive” is not controlling; what matters is substance of arrangement. Because patent rights are rights to exclude others, licensee is exclusive licensee only if patentee has promised, expressly or impliedly, that others shall be excluded from practicing invention within field covered by license. Put another way, exclusive license is license to practice invention accompanied by patent owner’s promise that others shall be excluded from practicing it within field of use wherein licensee is given leave. (469 F.3d 1005; 134 F.3d 1481 Copyright Cases or Patent Cases).

Licensees may seek declaratory judgment of invalidity, unenforceability, or non-infringement of underlying patent without terminating their license. (127 S. Ct. 764 or). See topic 1.40 Declaratory Judgments.

In absence of agreement to contrary, joint owner of patent may give valid license without consent of co-owners and without accounting to them.

No warranty of validity of patent is implied from giving of license thereunder. Licensee is not estopped to deny validity of patent, and may escape paying further royalties by establishing patent is invalid. (395 U.S. 653). Licensee challenging validity may be sued for infringement after material breach and cancellation of license. License agreements may provide that licensee’s obligation to continue payment of royalties ceases if licensed patent is adjudged invalid in third party litigation. Contracts providing for royalties in exchange for producing item which is subject of patent application, and that royalties would be reduced if patent not granted within specific period, are not unenforceable after patent is refused. (440 U.S. 257).

Absent provision to contrary, failure by licensee to pay royalty does not terminate license; licensor's remedy is action at law to recover royalty. License agreements usually provide for termination of license by licensor in event of failure to pay royalty.

License is good against subsequent assignee of patent, with or without notice.

License may be for limited time or for whole term of patent. Unless expressly limited in duration, license is for term of patent.

Implied Licenses.

Licenses may be implied from conduct, or from variety circumstances, indicating acquiescence or creating estoppel.

As to shop rights and licenses implied from relationship of employer and employee, see topic 1.52 Employer and Employee.

License to manufacture and sell patented subject matter carries implied license to use. License to manufacture implies license to use or to sell, or both, according to attendant circumstances.

Restrictions on Price, Use and Territory.

Patent owner may grant exclusive right under application or patent to whole or any specified part of U.S. (35 U.S.C. § 261). Licenses fixing price of licensee's goods are permissible in very few situations at most, see 272 U.S. 476 Copyright Cases or Patent Cases, as modified by 333 U.S. 287 Copyright Cases or Patent Cases; 333 U.S. 364 Copyright Cases or Patent Cases. Licenses to particular field of use are generally permissible, see 305 U.S. 124 Copyright Cases or Patent Cases, unless there is royalty discrimination between competitive fields of use, see 366 F.2d 117; 260 F.Supp. 193.

Royalty Provisions.

Royalty not payable for manufacture, use or sale of patented subject matter occurring after patent expires, see 379 U.S. 29, nor may licensor coerce licensee into paying royalty on basis of sale of unpatented goods, see 395 U.S. 100. Otherwise, royalty terms are established by agreement of parties.

1.89 MACHINE:

Machine is class of invention or discovery for which patent may issue. Term "machine" includes every mechanical device or combination of mechanical powers and devices to perform some function and produce certain effect or result. (56 U.S. 252).

1.90 MAINTENANCE FEES:

See topic 1.61 Fees. Maintenance fees, sometimes inaccurately termed annuities or renewal fees or taxes (terms used in other countries), are required periodically to preserve enforceability of U.S. patents. Patents based on patent applications filed before Dec. 12, 1980, are not subject to maintenance fees. (37 C.F.R. § 1.20). Original patents, and reissue patents based on original patent applications, filed on or after Dec. 12, 1980, except for design and plant patents, are subject to maintenance fees at 3.5 years, 7.5 years and 11.5 years after original grant, or within six months thereafter with surcharge, to prevent abandonment. Maintenance fee payments on reissue patents are based on payment schedule of original patent. Patents abandoned due to nonpayment may be reinstated if nonpayment is shown to satisfaction of Patent and Trademark Office to have been unavoidable or unintentional. See 37 C.F.R. §§ 1.137 and 1.378. Office has no duty to notify patentee of fee due. (748 F. Supp. 900). Delayed payment based on unintentional delay is not available where delay exceeds two years after expiration of six month grace period. Patentee must establish that delay in payment of fee was unintentional or unavoidable for entire period up to payment of fee. (35 U.S.C. § 41[c][1], 37 C.F.R. § 1.378, 45 P.T.C.J. 77, 86).

1.91 MANUAL OF PATENT EXAMINING PROCEDURE:

Detailed reference work on patent examining practices and procedures prepared for U.S. Patent and Trademark Office's Examiners, applicants for patents and representatives of applicants. Commonly referred to as MPEP. Manual includes relevant statutes, rules, treaties and court cases. Manual is available from Superintendent of Documents; United States Government Printing Office; Washington, D.C. 20402. Manual is also available on CD-ROM and diskette forms from U.S. Patent and Trademark Office, http://www.uspto.gov; Office of Electronic Information Products and Services; Washington, D.C. 20231. Subscription service includes basic manual, revisions and change notices.

1.92 MANUFACTURE:

"Manufacture," is production of articles for use from raw or prepared materials by giving to materials new forms, qualities, properties, or combinations, whether by hand-labor or by machinery. (283 U.S. 1 Copyright Cases or Patent Cases). It does not include products of nature or printed material.

1.93 MARKING UNDER PATENTS:

Patentees, and persons making, offering for sale or selling within U.S. any patented article for or under them, may give notice to public that same is patented, either by fixing thereon word "patent" or abbreviation "pat.," together with number of patent; or when, from character of article, this cannot be done, by fixing to it or its packaging, label containing like notice. In event of failure so to mark, no damages shall be recovered by patentee in any action for infringement, except on proof that infringer was notified of infringement and continued to infringe thereafter, in which event damages may be recovered only for infringement occurring after such notice. Filing action for infringement shall constitute such notice. (35 U.S.C. § 287). And see 297 U.S. 387 Copyright Cases or Patent Cases; 377 U.S. 476 and 704 F.2d 1578 Copyright Cases or Patent Cases. Actual notice under 35 U.S.C. 287(a) requires affirmative communication of specific charge of infringement by specified accused product or device. (505 F.3d 1371). Marking patent pending is insufficient for constructive notice. Constructive notice requires marking products with patent number. (29 USPQ2d 1526). Marking requirement runs to patentee's implied licensees. Licensee's failure to mark products properly may limit patentee's damage recovery to those occurring after actual notice of infringement is given to defendant. (24 F.3d 178).

Notice from someone closely associated with patent is not enough to entitle them to infringement damages prior to filing of suit. (29 USPQ2d [BNA] 1526). Patentee's identity and affirmative act on part of patentee is required for actual notice. (505 F.3d 1371).

Failure so to mark does not affect right to injunction, but only right to damages prior to notification.

Proof defendant was duly notified of infringement, which statute makes equivalent of patent marking, consists in showing defendant was notified by patent owner or exclusive licensee. It is not sufficient that defendant had actual knowledge or had been notified by party closely associated with patent owner.

False marking is governed by 35 U.S.C. § 292, which provides: whoever, without consent of patentee, marks upon, or affixes to, or uses in advertising in connection with anything made, used, offered for sale or sold or imported in U.S., name or any imitation of name of patentee, patent number, or words “patent,” “patentee,” or like, with intent of counterfeiting or imitating mark of patentee, or of deceiving public and inducing public to believe thing was made offered for sale, sold, or imported into U.S. by or with consent of patentee; or whoever marks upon, or affixes to, or uses in advertising in connection with any unpatented article, word “patent” or any word or number importing same is patented, for purpose of deceiving public; or whoever marks upon, or affixes to, or uses in advertising in connection with any article, words “patent applied for,” “patent pending,” or any word importing application for patent has been made, when no application for patent has been made, or if made, is not pending, for purpose of deceiving public shall be fined not more than $500 for every such offense.

Any person may sue for penalty, in which event one-half shall go to person suing and other half to use of U.S. (35 U.S.C. § 292[b]).

1.94 METRIC SYSTEM:

Applicants should use metric (SI) units followed by equivalent English units when describing their inventions in specifications of patent applications. (MPEP § 608.01).

1.95 MICROORGANISMS:

Microorganisms produced by genetic engineering are appropriate subject matter for utility patents. Question of whether invention embraces living matter is irrelevant to issue of its status as patentable subject matter. (447 U.S. 303). Assuming that microbial products are result of human intervention and are not products of nature, claims directed to those microbial products are not excluded from patent protection under 35 U.S.C. § 101 as directed to unpatentable subject matter. (447 U.S. 303). As part of enablement requirement, deposit of microbial material may be required (37 C.F.R. § 1.802[a]) unless “it is known and readily available to the public or can be made or isolated without undue experimentation.” (37 C.F.R. § 1.802[b]). Deposits are made in recognized depositories. Recognized depositories include those recognized under Budapest Treaty on the International Recognition of Deposited Microorganisms for the Purposes of Patent Procedure or any other recognized to be suitable by Patent Office. (37 C.F.R. § 1.803). Procedures concerning deposit of biological material are set forth in 37 C.F.R. §§ 1.801 through 809. Procedures applicable to disclosure of nucleotide and/or amino acid sequence information are set forth in 37 C.F.R. §§ 1.821-1.825.

1.96 MISUSE:

Patentee or owner may not misuse patent; otherwise, courts will not enforce patent. Patent misuse doctrine is meant to prevent patentee from impermissibly broadening scope of patent right with anticompetitive effect. (459 F.3d 1328). Misuse need not necessarily be antitrust violation as patent misuse is broader wrong. (459 F.3d 1328). Misuse may be purged by change of conduct by patent owner. Statute expressly permits certain acts; see 35 U.S.C. § 271(d)(5).

1.97 MODELS:

Models or specimens are not generally required or admitted in applications for patents. They are to be submitted only when expressly required by Patent and Trademark Office. (35 U.S.C. § 114; 37 C.F.R. §§ 1.191, 1.93-1.95).

1.98 NATIONAL SECURITY:

If publication of subject matter of patent application might be detrimental to national security, Commissioner may withhold grant of patent and issue order of secrecy. (35 U.S.C. § 181). If order is violated, application may be held abandoned, which shall constitute forfeiture of all claims against U.S. based upon such invention. (35 U.S.C. § 182). If damage results from order of secrecy and/or use of invention by government, owner may apply for compensation and, failing settlement agreement, may sue in Claims Court. (35 U.S.C. § 183).

Without obtaining license from Commissioner no foreign application (or international application designating any foreign country [37 C.F.R. § 5.11 (a)(2)]) may be sent abroad for filing on invention made in U.S. which has not been on file in Patent and Trademark Office for at least six months, or which is under secrecy order (35 U.S.C. § 184). As expedited process, every application for patent is deemed to automatically include petition for license. Filing receipt indicates whether license has been granted. (37 C.F.R. § 5.12[a]). If foreign application is subject to 35 U.S.C. § 181 and is filed without proper license, no valid U.S. patent can be secured. (35 U.S.C. § 185). See topic 1.64 Foreign Patents and Applications. Retroactive licenses may be obtained under certain conditions. (See 35 U.S.C. § 184 and 37 C.F.R. § 5.25.)

Violation of 35 U.S.C. §§ 181 or 184 is subject to fine and imprisonment. (35 U.S.C. § 186).

There are additional license requirements and further prohibitions on specific subjects matter involving national security. See 37 C.F.R. §§ 5.1 to 5.25.

1.99 NON-CONVENTION FILING:

Foreign application can still be validly filed in U.S. even if convention date is missed so long as there are no statutory bars precluding its filing. See, for example, 35 U.S.C. §§ 102(b), 102(d) and see topic 1.67 Grace Period.

1.100 NONOBVIOUSNESS:

Patent may not be obtained though invention is not identically disclosed or described as set forth in 35 U.S.C. § 102 if differences between subject matter sought to be patented and prior art are such that subject matter as whole would have been obvious at time invention was made to person having ordinary skill in art to which said subject matter pertains. (35 U.S.C. § 103). Person of ordinary skill in art is also person of ordinary creativity, not automaton, and has good reason to pursue known options within his or her technical grasp. If this leads to anticipated success, it is likely product not of innovation but of ordinary skill and common sense. In that instance, fact that combination was obvious to try might show that it was obvious under 35 U.S.C. § 103. (127 S. Ct. 1727 or).

Obviousness must be established by clear and convincing evidence. (45 F.3d 1550). Court inquiry as to obviousness over prior art is factual, but ultimately conclusion of obviousness is one of law based on fact. Although no per se rules of obviousness have been created by precedent, courts have developed uniform approach for evaluating facts of each case. (71 F.3d 1565). Legal conclusion of invalidity for obviousness must be supported by findings on four factual inquiries identified by Graham v. John Deere Co., 383 U.S. 1, 148 USPQ 459 (1966). Those inquiries concern: (1) scope and content of prior art; (2) level of ordinary skill in art; (3) differences between claimed invention and prior art; and (4) secondary considerations of nonobviousness. (234 F.3d 654). Obvious-to-try standard and use of hindsight in determining obviousness is not permitted. (837 F.2d 469). Invention is obvious unless improvement is more than predictable use of prior art elements according to their established functions. (561 F.3d 1351). If invention is shown to be prima facie obvious, duty to rebut same arises.

Obviousness analysis cannot be confined by formalistic conception of words teaching, suggestion and motivation, or by overemphasis on importance of published articles and explicit content of issued patents. What matters is objective reach of claim. If claim extends to what is obvious, it is invalid under 35 U.S.C. § 103. One of ways in which patent's subject matter can be proved obvious is by noting that there existed at time of invention known problem for which there was obvious solution encompassed by patent's claims. (127 S. Ct. 1727 or). Obviousness determination is not result of rigid formula disassociated from facts of particular case. (485 F.3d

1157).

Court may consider secondary considerations of nonobviousness, including commercial success of invention, fulfillment of long-felt need, failure of others to solve problem, copying of invention by others, and unexpected results. (75 F.3d 1568; 54 F.3d 746). Patentee must establish nexus between secondary consideration and merits of invention. (776 F.2d 281). Evidence of unexpected results can be developed after patent application is filed. (367 F.3d 1381).

Invention is not obvious where prior art reference can be modified to produce invention unless prior art also suggested desirability of modification. (972 F.2d 1260). Obviousness determination may be based on structural similarities and reasons or motivations to make invention. (919 F.2d 688). However, structural similarity is not basis for prima facie obviousness where claimed chemical compound is member of broadly disclosed genus of compounds and guidance necessary to select specific claimed chemical compound from amongst myriad of possibilities is missing. (958 F.2d 347). Further, claimed invention may not be rejected for obviousness if prior art reference is not analogous, i.e., neither in same field of endeavor nor reasonably pertinent to particular problem solved by invention. (966 F.2d 656). But single reference can render claim obvious, although this conclusion must be supported by suggestion or motivation to modify teachings of that reference to claimed invention. (225 F.3d 1349). Evidence of obviousness need not be found in prior art references themselves, but rather may be found in knowledge of one of ordinary skill in art, or in some cases, from nature of problem to be solved. (464 F.3d 1356).

See last paragraph under topics Novelty and Prior Art, and topic Invention.

1.101 NORTH AMERICAN FREE TRADE AGREEMENT (NAFTA):

Intellectual property provisions of North American Free Trade Agreement are contained in Part 6, c. 17 of the treaty. Each party to treaty must accord to nationals of another country that is party to treaty no less favorable than it accords to its own with regard to protection and enforcement of all intellectual property rights. (47 P.T.C.J. 76).

Section 104 provides that in proceedings in U.S. Patent and Trademark Office, courts and before any other relevant authority, any patent applicant or patentee may establish date of invention no earlier than Dec. 8, 1993 for applications filed on or after that date by reference to knowledge or use of invention in NAFTA country (Canada or Mexico [47 P.T.C.J.139]). For WTO countries, relevant date is Jan. 1, 1996. See topic 1.66 General Agreement on Tariffs and Trade (GATT).

1.102 NOTICE:

See topic 1.93 Marking Under Patents.

1.103 NOTICE OF ALLOWANCE:

Upon finding all claimed subject matter allowable Patent and Trademark Office issues Notice of Allowance stating amount of issue fees and due date (unextendable). See topic 1.61 Fees.

1.104 NOVELTY:

Novelty over prior art is statutory condition precedent to patentability of invention or discovery. (35 U.S.C. § 102). Invention is not novel where single prior art reference anticipates or discloses elements of each claim limitation. Anticipating disclosure must enable subject matter of reference and thus of patented invention without undue experimentation. (346 F.3d 1051). Conception under § 102(g)(2) of Patent Act requires its inventor to appreciate or recognize import of invention. In context of chemical compound, conception requires inventor to be able to define compound so as to distinguish it from other materials, and to describe how to obtain it. Conception requires not only evidence that inventor made invention, but also evidence that he understood his creation to have features comprising inventive subject matter at issue. (429 F.3d 1052).

Under 35 U.S.C. § 102, inventor will be entitled to patent unless any of following conditions are met: (1) Invention was known or used by others in this country, or patented or described in printed publication in U.S. or other country before invention thereof by applicant for patent; (2) invention was patented or described in printed publication in U.S. or other country or was in use or on sale in U.S. more than one year prior to date of U.S. patent application; (3) inventor has abandoned invention; (4) invention was first patented by applicant, or was subject of inventor's certificate, in foreign country prior to date of application for patent in U.S. on application for patent or inventor's certificate filed more than one year before filing of application in U.S.; (5) invention was described in application for patent, published under 35 U.S.C. § 122(b), by another filed in U.S. before invention by applicant for patent, except that international application filed under treaty defined in 35 U.S.C. § 351(a) shall have effect under this subsection of national application published under 35 U.S.C. § 122(b) only if international application designating U.S. was published under Art. 21(2)(a) of such treaty in English language; (6) invention was described in patent granted on application for patent by another filed in U.S. before invention by applicant for patent, except that patent shall not be deemed filed in U.S. for purposes of this subsection based on filing of international application filed under treaty defined in 35 U.S.C. § 351(a); (7) during course of interference conducted under 35 U.S.C. § 135 or § 291, another inventor involved therein establishes, to extent permitted in 35 U.S.C. § 104, that before such person's invention thereof invention was made by such other inventor and not abandoned, suppressed, or concealed, or before such person's invention thereof, invention was made in this country by another inventor who had not abandoned, suppressed, or concealed it. In determining priority of invention under this subsection, there shall be considered not only respective dates of conception and reduction to practice of invention, but also reasonable diligence of one who was first to conceive and last to reduce to practice, from time of conception by other.

In order for printed publication to bar patent it must be accessible to public. Microfilm is considered printed publication. (655 F.2d 221). Material not explicitly contained in single, prior art document may still be considered for purposes of anticipation if that material is incorporated by reference into document. (212 F.3d 1272). (See topic 1.67 Grace Period.) On-sale bar triggers when two conditions are satisfied more than one year before filing of application: first, claimed invention must be subject of commercial sale or offer for sale and second, it must be ready for patenting. (399 F.3d 1321).

35 U.S.C. § 102 may be read in connection with 35 U.S.C. § 103. 35 U.S.C. § 102 defines what is prior art for purposes of § 103. Nonobviousness is also statutory condition precedent to patentability. Though not identically disclosed or described as set forth in 35 U.S.C. § 102, patent may not be obtained if differences between subject matter sought to be patented and prior art are such that subject matter as whole would have been obvious at time of invention to person having ordinary skill in art to which subject matter pertains. (See topic 1.100 Nonobviousness.) In determining priority of invention there will be considered not only respective dates of conception and reduction to practice of invention, but also reasonable diligence of one who was first to conceive and last to reduce to practice, from time prior to conception by other.

Subject matter commonly owned is treated differently under 35 U.S.C. § 103 than 35 U.S.C. § 102. See 35 U.S.C. § 103 and topic Nonobviousness.

Novelty is not absolute; see topic 1.67 Grace Period.

1.105 OATH OR DECLARATION:

Patent application must ordinarily contain signed statement of inventor applicant stating applicant's belief that applicant is original and first inventor of subject matter claimed and for which patent is sought; identify each inventor by full name, including family name, and at least one given name without abbreviation; country of which applicant is citizen; residence; postal address; and whether applicant is sole or joint inventor. Applicant must identify each foreign application, if any, by country, number and filing date, from which priority is claimed, as well as any foreign application having filing date before that of earliest application from which priority is claimed. (37 C.F.R. § 1.63[c]). Applicant must acknowledge duty to disclose information applicant is aware of which is material to examination of application. Applicant must state that applicant has reviewed and understands specification including claims. (37 C.F.R. § 1.63[b][1]). Statement must also refer to specification and claims to which it applies and otherwise be fully completed. See 37 C.F.R. § 1.63. Statement must then be signed by each inventor and sworn to (or affirmed) as provided under 37 C.F.R. § 1.66, or must include declaration (see topic 1.39 Declaration) prescribed by 37 C.F.R. § 1.68. (See 35 U.S.C. § 115 and 37 C.F.R. § 1.63).

Oath or declaration shall be made by inventor or inventors personally. (37 C.F.R. § 1.64). If such is impossible by reason of death, legal incapacity, refusal, or inaccessibility, it may be made based on information and belief by legal representative, either executor, administrator or guardian, as case may be (35 U.S.C. §§ 116, 117) or by whoever shows sufficient proprietary interest in matter justifying such action (35 U.S.C. § 118).

Before Whom Oath is Taken.

See topic 1.10 Affidavits.

Oath to Application for Reissue.

See topic 1.134 Reissue. Also see topic 1.39 Declaration.

Oath and Declaration in Foreign Language.

Applicant who cannot understand English must make oath or declaration in language applicant understands and shall state applicant understands content of documents to which oath or declaration relates. (37 C.F.R. § 1.69). Patent and Trademark Office may provide or approve certain foreign language oaths and declaration; otherwise verified English translation must be timely filed. (37 C.F.R. § 1.69).

1.106 OBVIOUSNESS:

See topic 1.100 Nonobviousness.

1.107 OPERABILITY:

See topic 1.151 Utility.

1.108 OWNERSHIP:

Patents have attributes of personal property subject to provisions of 35 U.S.C. § 261. Small businesses and nonprofit organizations may obtain title to inventions resulting from U.S. Government sponsored research. (35 U.S.C. §§ 200-211). Ownership to invention made under R&D contract with U.S. may vest in U.S. depending on date when invention was conceived, not date when patent claim filed in application. (982 F.2d 1546).

1.109 PARTIES:

Patentee and successors in title to patentee may sue for infringement. (35 U.S.C. §§ 100[d], 281, 56 F.3d 1538, 35 USPQ2d 1065). Legal title to patent must have been held by plaintiff at time of infringement. (Id.). Conveyance of legal title applies only to entire patent, undivided part, or all rights in specified geographical region of U.S. “Under certain circumstances, a licensee may possess sufficient interest in the patent to have standing to sue as a co-plaintiff with the patentee.” However, grant of bare nonexclusive license to sell patentee’s products in specified territory does not entitle party standing to sue. (56 F.3d 1538, 35 USPQ2d 1065). All entities with independent right to enforce patent are indispensable or necessary parties to infringement suit. (503 F.3d 1324).

1.110 PATENT AND TRADEMARK OFFICE:

U.S. Patent and Trademark Office is located at 2021 Jefferson Davis Highway, Arlington, Va., and Public Search Room is open 8:00 a.m. to 8:00 p.m., Mon. through Fri., excluding Federal holidays in District of Columbia (see 5 U.S.C. § 6103 and D.C. Code 28-2701), to members of public having proper User Pass which is freely given. Some on-line automated search systems are available for fee. All written communications to Patent and Trademark Office must be addressed “Commissioner of Patents and Trademarks, P.O. Box 1450, Alexandria, VA 22313-1450”. (37 C.F.R. § 1.1). Office has established special boxes to be used for certain types of mail.

1.111 PATENT COOPERATION TREATY:

See topic 1.64 Foreign Patents and Applications.

1.112 PATENT RIGHTS AND FEDERAL ASSISTANCE:

See 35 U.S.C. §§ 200-212.

1.113 PATENTABILITY:

See topics 1.78 Invention; 1.100 Nonobviousness; 1.104 Novelty; 1.151 Utility.

New and useful process, machine, manufacture, or composition of matter, or any new and useful improvement thereof, may be patentable, subject to conditions of Title 35, U.S. Code. If claim covers material not found in any of four statutory categories, that claim falls outside plainly expressed scope of § 101 even if subject matter is otherwise new and useful. (500 F.3d 1346). Transitory, propagating signal is not “process, machine, manufacture, or composition of matter”. (500 F.3d 1346). Patent statute does not allow patents on particular systems that depend for their operation on human intelligence alone. (499 F.3d 1365 or). Ideas and mathematical formulas may not be preempted from use either by patent claim to product or process. (409 U.S. 63). However, patents can be obtained for mathematical programs servicing computer. (545 F.2d 141). See topic 1.32 Computers. Claims with mathematical algorithms may qualify as statutory subject matter when algorithms are applied to one or more limitations such as physical elements or process steps. It is not requirement of patentability that inventor correctly set forth, or even know, how or why invention works.

Claims directed to nonnaturally occurring plants qualify as statutory subject matter. (1060 O.G. 4). Claims directed to nonhuman nonnaturally occurring animals qualify as statutory subject matter. (932 F.2d 920).

See topic 1.32 Computers.

1.114 PATENTS:

Term of patents starts on issue date. Except for design patents (see topic 1.44 Design Patents), end of term of patent is 20 years from filing date for all patents based on applications which have filing date of June 8, 1995 or later (patents in force on June 8, 1995, or which directly result from pending applications filed on or before June 7, 1995, have patent term ending at greater of 20 years measured from effective filing date of application or 17 years measured from date of patent grant). Maintenance fee must be paid 3.5, 7.5, and 11.5 years from grant to maintain utility patent in force for its full term. Patent does not expire on expiration or lapse of corresponding foreign patent. Reissue patent granted for balance of term of original patent. Extension of certain patents permitted based on delays in Patent and Trademark Office (35 U.S.C. § 154[b]), and for certain patents relating to certain drugs and products (35 U.S.C. 156).

Patent grants to patentee right to exclude others from making, using, offering for sale, or selling invention throughout U.S. and territories and possessions thereof or importing invention into U.S. (35 U.S.C. §§ 154, 100[c]). Articles not patented that are publicly known and utilitarian may generally be copied. (489 U.S. 141).

For plant patent, patentee has right to exclude others from asexually reproducing plant or selling or using plant so reproduced. (35 U.S.C. § 163).

In Virgin Islands and Guam there has developed practice according to which patentee can have patent registered with local authorities; this may be advisable if it is contemplated that suit may be brought against infringer in these territories.

Patent may issue to assignee of application if assignment is recorded before payment of issue fee. (35 U.S.C. § 152).

For correction of certain mistakes in Patents see 35 U.S.C. §§ 254 and 255. See also topics 1.134 Reissue and 1.132 Reexamination.

1.115 PAYMENTS IN ERROR:

Commissioner may refund any sum paid by mistake or in excess of fee required by law. Party which establishes itself as small entity is charged half of normal fee for certain Patent and Trademark Office services. If party establishes itself as small entity only after paying full rate for service, refund may only be obtained if statement under 37 C.F.R. § 1.27 and request is filed within two months of date of timely payment of full fee. (37 C.F.R. § 1.28[a]).

1.116 PETITION:

Petitions may be taken to Commissioner from any action or requirement of Examiner which is not subject to appeal to Board or to court; in cases in which statute or Patent and Trademark Office Rules specify that matter involved is to be determined or reviewed by Commissioner; and to invoke supervisory authority of Commissioner in appropriate circumstances. Petitions may also be filed to obtain accelerated examination (37 C.F.R. § 1.102), to suspend action in application (37 C.F.R. § 1.103), to defer issuance of patent (37 C.F.R. § 1.314), or to withdraw application from issue (37 C.F.R. § 1.313).

Fee may be required for petition to Commissioner. Oral hearings on petitions are not granted unless considered necessary by Commissioner. Mere filing of petition will not act as stay of other proceedings. (37 C.F.R. § 1.181).

1.117 PLANTS:

Plants may be protected under variety of statutory schemes.

Plant patent may be granted to anyone who invents or discovers and asexually reproduces any distinct and new variety of plant including cultivated spores, mutants, hybrids, and newly found seedlings other than tuber-propagated plant or plant found in uncultivated state. (35 U.S.C. § 161). Plant protection only covers single plants and their asexually reproduced progeny under § 161. Protection under 35 U.S.C. § 161 does not extend to range or group of plants having same essential and distinct characteristics. (69 F.3d 1560). See also Plant Variety Protection Act. (7 U.S.C. § 2321 et seq.). Certificates of Protection provide 20 year protection from date of issue of certificate in U.S. for seeds of novel sexually reproduced plants. Plant varieties protected by Act may be represented by seed, transplants, plants, tubers, tissue culture plantlets, and other matter. (7 U.S.C. § 2401). Infringement under PVPA may be exempt where farmer saves seed from crop resulting from seed obtained from PVPA certificate holder for purpose of replanting of farmer's own acreage and not broadly to saved seed grown for replanting. Sale is not permitted. (513 U.S. 179). See also Utility Patents, 35 U.S.C. § 100 et seq. Plant Patent Act and Plant Variety Protection Act do not represent exclusive form of protection for plant life. (1060 O.G. 4). Deposits of seeds or other breeding materials may be required to satisfy 35 U.S.C. § 112.

Sale of seeds does not implicate first sale doctrine for new seeds grown from originals, since new seeds have never been sold. (459 F.3d 1328).

1.118 PRELIMINARY STATEMENTS:

See topic 1.74 Interferences.

1.119 PRIOR ART:

Invention must be patentable over prior art. (35 U.S.C. §§ 102, 103). Prior art includes both documentary sources (foreign or domestic patents and printed publications) and nondocumentary sources (things known, used, or invented in U.S.). Reference must be in art pertinent to invention in question or in analogous art. Reference must be dated prior to applicant's date of invention or, in case of statutory bars, more than one year prior to date of application for patent. Foreign design patents may be prior art under § 102(a). Drawings cancelled in foreign application constitute § 102(b) prior art and invalidate U.S. patents. (455 F.3d 1371). See 45 P.T.C.J. 137. Proposition that PTO in reexamination proceedings should not reevaluate prior art considered in initial examination, does not restrict district court's right to consider prior art that was before patent examiner. (174 Fed. Appx. 571 or). See topics 1.104 Novelty and 1.100 Nonobviousness.

1.120 PRIORITY OF INVENTION:

See topics 1.74 Interferences; 1.131 Reduction to Practice.

1.121 PROCESS:

One of four categories of patentability subject matter, term "process" as defined by statute means process, art, or method, and includes new use of known process, machine, manufacture, composition of matter, or material. (35 U.S.C. § 100[b]). However this definition does not cover laws of nature, physical phenomena, abstract idea, mathematical formulae, e.g., see topic 1.32 Computers. Process or method claim is patentable subject matter when it satisfies machine or transformation test. (545 F.3d 943). Patent applicant must tie process or method claim to particular machine or have claim transform article. (545 F.3d 943). Patent applicant cannot place machine or transformation into claim language to serve as insignificant extra-solution activity. (545 F.3d 943). To have been made by process in United States, product must have been physical article that was manufactured. Production of information is not covered by 35 U.S.C. § 271(g). (340 F.3d 1367).

Process, Service of.

28 U.S.C. § 1694 provides that in patent infringement action, commenced in district where defendant is not resident, but has regular and established place of business, service of process, summons or subpoena upon such defendant may be made upon agent or agents conducting such business.

Absent co-owner who will not join as co-plaintiff cannot be brought in as defendant by substituted service. (20 F. Supp. 913 Copyright Cases or Patent Cases; 378 F. Supp. 203). See also topic 1.109 Parties.

1.122 PRODUCT-BY-PROCESS:

Product-by-process claim is product claim where product is described by process by which it is produced. Often used in instances where product itself is difficult or impossible to define, e.g. complex biological compositions. Once product is fully disclosed in art, future claims to that same product are precluded, even if that product is claimed as made by new process. (439 F.3d 1312). Product-by-process claims are also permissible even when product can be claimed in another way. (182 USPQ 106). Product must be new and per se independent of its mode of production in order to be patentable.

Federal Circuit has issued conflicting decisions on whether product-by-process claims are limited to product prepared by process set forth in claims. Determining factor may be whether product could have been claimed other than by process at time claim was made. One three judge panel of Federal Circuit has held that product-by-process claim is not limited to product prepared by process set forth in claim. (927 F.2d 1565, 18 USPQ2d 1001). Product in this case involved human protein which could not be easily defined other than by process. Another three judge panel of Federal Circuit held that infringing product must be produced by claimed process. (974 F.2d 1299, 24 USPQ2d 1138). In this case product could conceivably have been described other than by process.

1.123 PROFITS:

See topic 1.37 Damages for Infringement.

1.124 PROTESTS:

Protests against pending applications may be filed in Patent and Trademark Office. Application must be identified. (37 C.F.R. § 1.291). Protests are not permitted in published patent applications after date of publication. 35 U.S.C. § 301 and 37 C.F.R. § 1.501(a) permit any person at any time during period of enforceability of patent to cite to Patent and Trademark Office, in writing, prior art consisting of patent and printed publications which that person states to be pertinent and applicable to patent and believes to be pertinent to patentability of any claim(s) of patent. See also MPEP §§ 1920, 2202-2208.

1.125 PROVISIONAL APPLICATION:

See topics 1.10 Affidavits; 1.17 Application for Patent; 1.27 Claims; and 1.66 General Agreement on Tariffs and Trade (GATT).

1.126 PUBLICATION:

Inventor's publication of invention in print less than one year prior to effective filing date of U.S. patent application is not bar to patent. Valid patent cannot be printed if such publication occurred more than one year before that date. (35 U.S.C. § 102). Description of invention in printed publication prior to applicant's invention thereof serves as bar to patentability. (35 U.S.C. § 102). Also, publication of invention by others more than one year prior to applicant's application date, bars patent. (35 U.S.C. § 102). To serve as bar, publication must enable one with ordinary skill in art to comprehend or make invention. (122 U.S. 40). Publication must be circulated or publicly accessible; deposit and cataloguing in library has been held sufficient. (781 F.2d 897). If organized and searchable, FTP server may suffice as printed publication. (511 F.3d 1186).

Patent applications filed after Nov. 28, 2000, will be published 18 months after earliest filing date (domestic or foreign) relied on in application unless application: (1) is no longer pending, (2) relates to national security, (3) is provisional, design or reissue application, or (4) is filed with request not to publish certifying it has not been filed in country or under Patent Cooperation Treaty that requires publication. (35 U.S.C. § 122[b]). Patentee may be entitled to provisional rights (reasonable royalty) for infringement of published patent application if claims in

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issued patent are substantially identical to claims in published application.

1.127 PUBLICATION IN LIEU OF EXAMINATION:

See topic 1.145 Statutory Invention Registration.

1.128 PUBLIC REGISTER OF PATENTS AVAILABLE FOR LICENSE OR SALE:

In order to assist owners of unexpired patents in making known publicly their willingness to sell their patents or grant licenses thereunder, Patent and Trademark Office maintains public register of such patents. Notice of entries is published in Official Gazette of Patent and Trademark Office. No formal application is necessary to include patent on register. Written request by patent owner, accompanied by fee, copy of patent and statement that owner will grant licenses or sell on reasonable terms, are sufficient.

1.129 PUBLIC USE OR SALE:

Public knowledge or use of invention by others prior to applicant's invention thereof may serve as bar to patentability. (104 U.S. 333, 27 U.S. 1, 35 U.S.C. § 102). Patentability may be barred if invention was "on sale" or used publicly by applicant or others in this country more than one year prior to application date, whether or not prior to applicant's invention thereof. (35 U.S.C. § 102). Inventor's own work cannot be used to invalidate patents protecting his own later inventive activities unless he places invention on sale or uses it publicly more than a year before filing patent application. Proper test for public use part of § 102(b) statutory bar is whether purported public use: (1) Was accessible to public, or (2) was commercially exploited. Commercial exploitation likely requires more than secret offer for sale. Internal noncommercial use is not public use. (424 F.3d 1374). Contractor's acceptance of agreement to supply embodiments of invention for testing more than a year before filing date constituted invalidating violation of on-sale bar. (213 F.3d 1366). Letters to potential licensees, specifying licensing fee, general product statements, and pricing structure, but not specifying price, quantity, specific product details, or product delivery information, do not constitute offer of sale sufficient to trigger on-sale bar to patentability. (366 F.3d 1336).

Experimental use without commercial profit motive, although public, is not public use. Experimental use does not apply to designs. Experimental use defense is very narrow and strictly limited. (307 F.3d 1351). Inventor's skepticism regarding "workability" of claimed invention is not relevant in determining whether invention was "ready for patenting" under Pfaff test for "on-sale" patent invalidity. (249 F.3d 1307). Statements made to Patent and Trademark Office in trademark application asserting first "use in commerce" did not establish "critical date" for on-sale invalidity of related patent. (228 F.3d 1365 Copyright Cases or Patent Cases).

Public Use Proceedings.

Patent and Trademark Office usually has no means of knowing about prior public use or sale of invention. Function of public use proceedings is to furnish Office with proof of such public use or sale.

Office has no funds with which to investigate public use, and petitioner for public use proceedings must offer to produce witnesses and bear expenses of Office in conducting investigation.

Any person who has lawfully learned (either through interference proceeding or otherwise) that pending application claims subject matter which was in public use or on sale more than one year prior to effective date of filing of said application and who has evidence of such public use or sale may file petition to Commissioner, praying for institution of public use proceedings. Petition must be accompanied by affidavits making prima facie showing that invention had been so used. Petition and affidavits should be filed in duplicate. Alternatively, file one copy in Patent and Trademark Office with proof of service of copy on applicant or attorney of record. Petition for public use proceeding may not be filed after publication of patent application in accordance with 35 U.S.C. § 122(b).

If Primary Examiner to whom petition is referred finds that prima facie case has been made out, hearing may be had before Commissioner to determine whether public use proceeding will be instituted. If instituted, times are set for taking testimony of petitioner and applicant. (37 C.F.R. § 1.292).

Testimony is taken by deposition in same way as in interferences (see topic 1.43 Depositions in Patent and Trademark Office), filed in Patent and Trademark Office, and briefs submitted. If decision is that bar of public use or sale has been established, application is rejected.

There is no appeal from denial of petition to institute public use proceedings as matter is wholly within Commissioner's discretion. Remedy must be by writ of mandamus.

Public use proceedings may in some cases be instituted by Patent and Trademark Office.

1.130 RECORDS:

All records of patents, proceedings leading up to grant of patents, and transfers of patents are open to public only after patent issues. Persons using facilities are required to apply to Patent and Trademark Office for User Pass which is freely given to all members of public, domestic or foreign. Patent records are also available as electronic files. Availability of patent applications is governed by 37 C.F.R. § 1.14.

Assignment, grant, or conveyance is void as against any subsequent purchaser or mortgagee for valuable consideration, without notice, unless it is recorded in Patent and Trademark Office within three months from its date or prior to such subsequent purchase or mortgage. (35 U.S.C. § 261). Recorded assignments of applications are not open to public inspection unless assignment also assigns patent.

Patent and Trademark Office records or printed publications, if competent and pertinent, may be introduced in evidence in interference proceeding merely by filing in Patent and Trademark Office notice to that effect before closing of time for taking testimony of party desiring to use such evidence, such notice being accompanied by record or authenticated copy of record or publication. Notice and copies must be served on other party. (37 C.F.R. § 1.282).

1.131 REDUCTION TO PRACTICE:

Reduction to practice is determinative of which party is prior inventor, with two exceptions. (35 U.S.C. § 102 [g]). First, party which is first to conceive but last to reduce to practice is considered prior inventor if he demonstrates due diligence from time before later conception by another through time of his own reduction to practice. (35 U.S.C. § 102[g]). Second, party which is second to reduce to practice will have priority if first party abandoned, suppressed or concealed invention. (843 F.2d 1364, 35 U.S.C. § 102[g]).

Reduction to practice of invention occurs after conception of invention. Actual reduction to practice requires that claimed invention work for intended purpose. In order to establish actual reduction to practice, inventor must prove that: (1) he constructed embodiment … that met all limitations of interference count; and (2) he determined that invention would work for its intended purpose. (154 F.3d 1321). Requirement that inventor must know that invention is useful might be satisfied when agent of inventor obtains such knowledge. (220 F.3d 1345). Evidence of diligence in interference should be viewed as it would by one skilled in art. (436 F.3d 1376).

Constructive reduction to practice occurs when patent application is filed. (802 F.2d 1367). Work of scientists can qualify as prior reduction to practice even if their documentation does not reflect exact words of claims. (243 F.3d 1316 Copyright Cases or Patent Cases). See topics 1.08 Actual Reduction to Practice, 1.33 Conception and 1.74 Interferences. However, inventor's testimony must be independently corroborated to constitute reduction to practice. (437 F.3d 1157).

1.132 REEXAMINATION:

Patent and Trademark Office will reexamine certain patents under either ex parte reexamination procedures (35 U.S.C. § 302) or under inter partes reexamination procedures (35 U.S.C. § 311). Inter partes procedures are available only for patents issued on applications filed on or after Nov. 29, 1999. Construction of phrase "original application" of § 4608 of American Inventors Protection Act of 1999, which established procedures for inter partes reexamination, includes continuation applications. (536 F.3d 1330).

Under ex parte reexamination procedures, any person may file written request for Patent and Trademark Office to reexamine any claim on basis of prior art or printed publications. (35 U.S.C. § 302). Such request must state pertinency and manner of applying prior art to every claim of patent on which reexamination is requested. (35 U.S.C. § 302, 37 C.F.R. §§ 1.20[c], 1.510). Patent and Trademark Office will determine whether prior art or printed publication raises substantial new question of patentability. Determination that such question is present will result in order for reexamination. Upon issuance of order for reexamination, patent owner will be allowed to file statement and person requesting reexamination may then file reply. (35 U.S.C. § 304). Existence of substantial new question of patentability is not precluded by fact that patented or printed publication was previously cited by or to office or considered by office. (35 U.S.C. § 303[a]). In her statement, patent owner may propose amendment to her patent and include new claims, not enlarging scope of original claims of patent. (35 U.S.C. § 305). Patent owner may appeal and seek court review of any adverse decisions regarding patentability of any original, amended, or new claims. (35 U.S.C. § 306). Decision that no substantial new question of patentability has been raised will be final and non-appealable. (35 U.S.C. § 303). Commissioner will issue and publish certificate stating results of reexamination. (35 U.S.C. § 307). All requests for reexamination will be announced in Official Gazette. (37 C.F.R. § 1.11[c]). Federal district courts are not authorized to compel any party to file request for reexamination. (81 F.3d 1089).

Inter partes reexamination procedures and criteria are substantially identical to ex parte procedures with some significant exceptions. First, third part requesting reexamination may file written comments following reply by patent owner to Office action. Second, third party may appeal favorable decision by patent examiner to Board of Patent Appeals and Interferences, but not to court. Third, various estoppels are applicable to third party who initiates reexamination proceeding. However, party who requested reexamination is not "quasi-estopped" from arguing validity of claims when it acquires patent at issue. (215 F.3d 1297 Copyright Cases or Patent Cases).

Intervening Rights.

Reexamined patents are subject to intervening rights. (35 U.S.C. § 307). (See topic 1.134 Reissue.)

1.133 REFERENCES:

In rejecting claim in patent application for obviousness or lack of novelty, Primary Examiner will send Office Action and cite such references (prior patents, publications, etc.) and render opinion to justify rejection. If reference so cited is complex or shows or describes inventions other than that claimed by applicant, particular part relied on will be designated as nearly as is practicable by Examiner. Pertinence of each reference, if not obvious, will be clearly explained and each claim so rejected will be clearly specified. (37 C.F.R. § 1.104).

Publications and foreign patents are prior art as of publication dates. U.S. patents are prior art as of U.S. filing dates (35 U.S.C. § 102[e]) except for PCT national phase patents which are prior art as of 35 U.S.C. § 102(e) date stated on their face. Patents issued on 35 U.S.C. § 111(a) continuations of PCT international applications have 35 U.S.C. § 102(e) prior art reference date as of filing date of international application.

References cited in rejection of any claim of application may be examined at Patent and Trademark Office, if in possession of Office. Copies of references on record in Office are furnished at reasonable cost of making them. (See topic 1.35 Copies.) One copy of each cited reference is supplied free by Office with Office Action.

1.134 REISSUE:

Whenever any patent is, through error without any deceptive intention, deemed wholly or partly inoperative or invalid, by reason of defective specification or drawing, or by reason of patentee claiming more or less than patentee had right to claim in patent, Commissioner shall, on surrender of such patent and payment of fee required by law, reissue patent for invention disclosed in original patent, and in accordance with new and amended application, for unexpired part of term of original patent. No new matter shall be introduced into application for reissue. (35 U.S.C. § 251). Reissue is available to correct error in inventorship. (157 F.3d 1340).

Historically, reissue was available only to claim subject matter that there was “intent to claim” in original application. (790 F.2d 1576). In 1983, Federal Circuit reduced effect of intent as test for patent reissue. Intent is only one factor that sheds light upon whether claims of reissue application are directed to same invention as original patent. (699 F.2d 1320). Relevant inquiry is analogous to requirement of 35 U.S.C. § 112 para. 1; court must determine whether original disclosure describes and enables invention claimed in reissue. (953 F.2d 613, 616-17). Reissued claims without substantive change are considered identical to those in original application and therefore effective from date of original patent. (807 F.2d 970).

Commissioner may issue several reissued patents for distinct and separate parts of thing patented, upon demand of applicant, and upon payment of required fee for reissue for each of such reissued patents. (35 U.S.C. § 251). Patent cannot be reissued after term has expired. (990 F.2d 1230, 26 USPQ2d 1392).

Provisions of this Act relating to applications for original patent (see topic 1.17 Application for Patent, subheads Who May Execute Application and Persons Entitled to Prosecute), are applicable to applications for reissue of patent, except that applications for reissue may be made by assignee of entire interest if application does not seek to enlarge scope of claims of original patent. (35 U.S.C. § 251).

Application for reissue must be accompanied by offer to surrender original patent. (37 C.F.R. § 1.171). Reissue oath must be signed and sworn to or declaration made by inventor(s) except when inventor is dead, legally incapacitated, or refuses or cannot be reached, and must be accompanied by written consent of all assignees, if any. (37 C.F.R. § 1.172). If reissue is refused original patent is returned to applicant upon demand. (37 C.F.R. § 1.178).

Specification of reissue application must include entire specification and claims of patent, with matter to be omitted by reissue enclosed in square brackets; and any additions made by reissue must be underlined, so that old and new specifications and claims may be readily compared. Claims should not be renumbered and numbering of claims added by reissue should follow number of highest numbered claims of original patent. (37 C.F.R. § 1.173).

Reissue oath or declaration in addition to complying with requirements of 37 C.F.R. §

1.63, must also state that applicant believes original patent to be wholly or partly inoperative or invalid by reason of defective specification or drawing, or by reason of patentee claiming more or less than patentee had right to claim in patent, stating at least one error being relied upon as basis for reissue, and all errors being corrected in reissue application up to time of filing of oath or declaration under this provision that arose without any deceptive intention on part of applicant. Reissue oaths or declarations must contain following: statement that applicant believes original patent to be wholly or partly inoperative or invalid by reason of defective specification or drawing, or by reason of patentee claiming more or less than patentee had right to claim in patent; statement of at least one error which is relied upon to support reissue application, i.e., as basis for reissue; statement that all errors arose which are being corrected in reissue application up to time of filing of oath/declaration that arose without any deceptive intention on part of applicant; and information required by 37 C.F.R. § 1.63. (MPEP §§ 1414[a], [d]). Reissue is based on fundamental principles of equity and fairness, so error requirement should be construed liberally. It is not necessary that error be unavoidable or that error could not have been discovered by patentee through proper communication with prosecuting attorney. (465 F.3d 1360).

Applicant for reissue may not present claims which were canceled from original application in view of prior state of art.

In general, procedure under reissue applications after filing is same as with respect to original applications.

No reissue patent may be granted enlarging scope of claims of original patent unless applied for within two years from grant of original patent. (35 U.S.C. § 251). Reissue copying claims from another patent for interference purposes must be filed within one year of date that other patent issued. No damages for infringing sales before reissue of patent if reissue patent claim is broader than original claim. (991 F.2d 735, 26 USPQ2d 1353).

A reissue will be granted to original patentee, legal representatives or assigns, as their interest may appear.

Surrender of original patent takes effect upon issue of reissued patent, and every reissued patent has same effect and operation in law, on trial of actions for causes thereafter arising, as if same had been originally granted in such amended form, but insofar as claims of original and reissued patents are substantially identical, surrender does not affect any action then pending nor abate any cause of action then existing, and reissued patent, to extent claims are substantially identical with original patent, constitutes continuation thereof and has effect continuously from date of original patent. (35 U.S.C. § 252). Identical means no substantive change to claim. Amendment to claim during reexamination does not as matter of law constitute substantive change. (43 P.T.C.J. 195).

Reissue applications filed after Mar. 1, 1977, are announced in Official Gazette and open to inspection by general public. (37 C.F.R. § 1.11[b]).

Reissued patent expires at end of term of original patent.

Attorney's choice to choose later filing date, as opposed to provisional filing date, in prosecution of PCT application in exchange for inclusion of missing drawings, is not "error" correctable through reissue. (479 F.3d 1359).

Intervening Rights.

No reissued patent shall abridge or affect right of any person or successors in business who made, purchased or used prior to grant of reissue anything patented by reissued patent, to continue use of, or to sell to others to be used or sold, specific thing so made, purchased or used, unless making, using or selling of such thing infringes valid claim of reissued patent which was in original patent. Court before which such matter is in question may provide for continued manufacture, use or sale of thing made, purchased or used as specified, or for manufacture, use or sale of which substantial preparation was made before grant of reissue, and it may also provide for continued practice of any process patented by reissue, practiced or for practice of which substantial preparation was made, prior to grant of reissue, to extent and under such terms as court deems equitable for protection of investments made or business commenced before grant of reissue. (35 U.S.C. § 252). Maintenance fees for reissue patents are due based on issue date of original patent, not of reissue patent.

1.135 RENEWAL:

There is no provision for renewal of patent and term can be extended only by Act of Congress except in certain patents involving compositions of matter or process for using same that have been subject to regulatory review by U.S. Federal Food and Drug Administration (35 U.S.C. §§ 155-56) and/or for those applications filed after June 8, 1995 and subject to delay in granting patent (35 U.S.C. § 154[b]). See topic 1.90 Maintenance Fees.

1.136 RES JUDICATA:

Claims may be rejected on grounds of res judicata if same issue was resolved against applicant in prior rejection by Board of Appeals or during review by any one of reviewing course and when there is no opportunity for further review of earlier decision. (MPEP § 706.03[w]). This type of rejection is most often encountered in continuation applications. Unappealed final rejections by Patent and Trademark Office cannot serve as res judicata grounds for rejection of continuation application. (342 F.2d 80). However, examiners can issue final rejection as very first action on continuation application if no new issues of patentability are presented. (MPEP § 706.07[b], 303 F.3d 1362, 22 USPQ2d 1821). Modification of claim verbiage (427 F.2d 833, 835), narrower claims (312 F.2d 930), modification of legal principles (319 F.2d 277) or different issue of patentability (377 F.2d 610) will ordinarily suffice to prevent application of res judicata.

See also topic 1.54 Estoppel, Collateral, and 402 U.S. 313.

1.137 RESTRICTION REQUIREMENT:

See topic 1.47 Division and Restriction.

1.138 REVIVAL OF ABANDONED APPLICATION:

Application unintentionally abandoned (see topic 1.03 Abandonment of Application for Patent) for failure to prosecute or pay issue fee may be revived as pending application if delay was unintentional and petition and fee timely filed. (37 C.F.R. §§ 1.17[m], 1.137[b]). To qualify for lower fee for revival of application, delay must be shown to have been unavoidable (37 C.F.R. §§ 1.17[1], 1.137[a]) and terminal disclaimer for period of abandonment may be required (37 C.F.R. §§ 1.137[c]). Improper revival of abandoned application does not constitute defense to infringement suit under 35 U.S.C. § 282. (543 F.3d 657).

1.139 ROYALTY:

Royalty is generally sum of money paid for use of any patent right. Unauthorized user of patented invention may be liable for patent infringement to compensate for use in sum not less than reasonable royalty. (35 U.S.C. § 284). No infringement if user has or obtains license or assignment of patent. User may seek same from any joint owner of patent. (35 U.S.C. § 262).

1.140 RULES OF PRACTICE OF THE PATENT AND TRADEMARK OFFICE:

Rules of practice in patent cases (37 C.F.R.) containing detailed information as to procedure are for sale by Superintendent of Documents, United States Government Printing Office, Washington, D. C. 20402. See topic 1.91 Manual of Patent Examining Procedure.

1.141 SALES:

In few states there are statutes imposing certain restrictions on sale of patents and patent rights or requiring negotiable instruments given in payment for patent rights, interests in patents or licenses under patents to show on face consideration for which given and making special provision with respect to defenses available against such instruments. See topic Bills and Notes in various state digests.

Warranty Against Infringement.

Under Uniform Commercial Code § 2-312(3), unless otherwise agreed, seller who is merchant regularly dealing in goods of kind warrants that goods shall be delivered free of rightful claim of any third person by way of infringement but buyer who furnishes specifications to seller must hold seller harmless against any such claim which arises out of compliance with specifications.

1.142 SECRECY ORDER:

See topic 1.98 National Security.

1.143 SMALL ENTITY:

Under certain circumstances applicants or designees who are independent inventors, small business concerns or nonprofit organizations may qualify as “small entity” for purpose of paying some fees reduced by half. (37 C.F.R. §§ 1.9, 1.27, 1.28). Inventors receiving or reasonably expecting to receive revenue stream from entity not entitled to pay small entity fees cannot claim this status. (504 F.3d 1223). Any attempt to fraudulently establish status or pay fees as small entity is considered fraud practiced on Patent and Trademark Office. (37 C.F.R. § 1.28[d]; 504 F.3d 1223).

1.144 SPECIES ELECTION REQUIREMENT:

See topic 1.47 Division and Restriction.

1.145 STATUTORY INVENTION REGISTRATION:

Applicants for patent may waive right to patent before or after pursuing examination and publish application as statutory invention registration (35 U.S.C. § 157) which has all attributes of patent except those of 35 U.S.C. §§ 183 and 271-89. Registration may be used as reference as of filing date of application in U.S.

1.146 TERM OF PATENT:

See topic 1.114 Patents.

1.147 TERMINAL DISCLAIMER:

See topics 1.45 Disclaimer and 1.49 Double Patenting.

1.148 TERRITORIES AND POSSESSIONS:

See topic 1.114 Patents.

1.149 TRADE SECRETS:

Federal patent laws do not preempt State trade secret laws. (40 L.Ed.2d 315). State trade secret protection laws may permit injunctions and recovery of damages. Federal Economic Espionage Act of 1996 makes misappropriation of trade secrets federal criminal offense. Patent and Trademark Office applications are maintained in confidence (35 U.S.C. § 122), unless patent issues (202 USPQ-798).

1.150 TREATIES:

See topic 1.34 Conventions and Treaties.

1.151 UTILITY:

Whoever invents or discovers any new or useful process, machine, manufacture or composition of matter or any new or useful improvement thereof may obtain patent therefor (35 U.S.C. § 101) subject to remaining conditions of Title 35. Under 35 U.S.C. § 101 quantum of utility is generally not important; however, it is questionable whether invention which has utility only as scientific curiosity possesses requisite utility to warrant patent protection. (383 U.S. 519). Invention is "useful" under 35 U.S.C. § 101 if it is capable of providing some identifiable benefit. (185 F.3d 1364 Copyright Cases or Patent Cases, 51 USPQ2d 1700). Invention that does not work lacks utility and is unpatentable. (681 F. Supp. 16, 5 USPQ2d 1880).

Applicant must describe invention and manner and process of making and using invention in such full, clear, concise and exact terms, as to enable any person skilled in art, to which it pertains, or with which it is most nearly connected to make and use same. (35 U.S.C. § 112). (See topic 1.156 Written Description.) Failure to disclose best mode of practicing invention is ground for refusing patent.

Examination guidelines to assist Patent and Trademark Office personnel in their review of patent applications for compliance with utility requirements are published in 60 FR 36263.

1.152 VALIDITY:

Patent is presumed valid. (35 U.S.C. § 282). Burden is on and remains with challenger throughout trial to establish invalidity by clear and convincing evidence. (212 F.3d 1272). Statutory presumption of validity extends to all bases for challenging patent's validity. Only when challenger's burden has been carried should court declare patent invalid. (810 F.2d 1561). Validity challenges during preliminary injunction proceedings can be successful on evidence that would not suffice to support judgment of invalidity at trial. (239 F.3d 1343). Patent infringement and patent validity are treated as separate issues. (320 F.3d 1354).

1.153 VENUE:

Action for patent infringement may be brought in district in which defendant resides or in any district in which defendant has committed acts of infringement and has regular and established place of business. (28 U.S.C. § 1400). Corporate defendant may be sued in any jurisdiction where it is subject to personal jurisdiction at time action commenced. (28 U.S.C. § 1391[c]). Alien may be sued in any district, subject only to requirements of service of process. (28 U.S.C. § 1391[d]).

Defendant in patent suit may counterclaim on own patent against plaintiff (defendant to counterclaim) even though latter has no residence, has no established place of business and has committed no act of infringement in district of suit. (287 U.S. 430 Copyright Cases or Patent Cases).

Declaratory Judgment Act (see 28 U.S.C. §§ 2201-02), contains no venue provision. In suits to invalidate patent under provisions of this Act, federal district courts have jurisdiction, and venue is governed by 28 U.S.C. § 1391, under which suit must be brought in district in which defendant resides, with corporation regarded as residing in district in which it is subject to personal jurisdiction at time action commenced. (28 U.S.C. § 1391[c]).

Transfer of venue in infringement action is appropriate when original venue is not plaintiff's home forum, new location is "center of gravity" of accused activity, and state housing new location clearly has interest in adjudicating case. (82 U.S.P.Q.2d 1035). Venue choice is not factor in 28 U.S.C. § 1404(a) analysis, court must consider, *inter alia* "100-mile rule", "inconvenience to witnesses", and "ease of access to sources of proof". (551 F.3d 1315).

1.154 WAIVER OF ATTORNEY-CLIENT PRIVILEGE:

In most circumstances, trial counsel's attorney-client communications and work product are not waived when party chooses to rely on opinion of counsel to defend against willfulness claim. (497 F.3d 1360 or).

1.155 WITNESSES:

See topic 1.74 Interferences.

1.156 WRITTEN DESCRIPTION:

Patent specification must contain adequate written description. (35 U.S.C. § 112 p.1). Whether specification complies with written description requirement of 35 U.S.C. § 112 paragraph 1 is question of fact. (212 F.3d 1272). Test for compliance with 35 U.S.C. § 112 requires sufficient information in original disclosure to show that inventor possessed invention at time of original filing. (325 F.3d 1306). Possession test requires assessment from viewpoint of one of skill in art. (325 F.3d 1306). One can show possession without examples, actual reduction to practice, and recitation of actual structure. (448 F.3d 1357). Where specification makes clear invention does not include particular feature, it is outside reach of claims even if language of claims alone would be broad enough to encompass it. (452 F.3d 1312). Written description analysis occurs as of filing date sought. (560 F.3d 1366).

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UNITED STATES TRADEMARK LAW DIGEST

—Scope —

Revised for 2010 edition by

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(All section references are to sections of the Trademark Act of 1946, Public Law 489, Seventy-Ninth Congress, effective July 5, 1947, as am'd [hereinafter "Trademark Act" or "Act"]. This law is codified under Title 15, U.S. Code, with different section numbers, commencing with § 1051, and rules relating to this law appear in "the Code of Federal Regulations Title 37, Patents, Trademarks and Copyrights", Trademark Manual of Examining Procedure (TMEP) (a new edition was released June 2002), and Trademark Board Manual of Procedure (TBMP). These publications are available on the United States Patent & Trademark Office's website, located at www.uspto.gov. All rule numbers refer to these rules of practice. "Office" as used herein refers to Patent and Trademark Office. "TTAB" as used herein, refers to Trademark Trial and Appeal Board, which is administrative tribunal, akin to trial court, of Office. "Commissioner" as used herein refers to Assistant Commissioner for Trademarks, whose duties include overseeing staff and operations of Office with regard to trademarks.)

Note: This revision incorporates legislation through Sept. 14, 2009.

1.01 PRELIMINARY NOTE:

Law of trademarks, service marks, trade names, trade dress and false indication of origin is branch of law of unfair competition. Under common law, basic right to exclusive use of mark grows out of its use by manufacturer or seller in direct association with goods or in sale or advertising of services. This right must preexist before right to register arises although, under Trademark Act, application to register can be filed prior to use, with registration contingent upon use. Present digest deals only with more important provisions of Trademark Act of U.S. with respect to securing registrations after adoption and use, opposing or cancelling registrations by persons damaged by registrations, and protecting registered trademarks against infringement.

On Nov. 16, 1989, Trademark Law Revision Act of 1988, P.L. 100-667, 102 Stat. 3935 (1988) (hereinafter "Revision Act") became effective, instituting most sweeping changes to U.S. trademark law in over 40 years. On Oct. 30, 1999, Trademark Law Treaty Implementation Act of 1998, P.L. 105-330, 112 Stat. 3064 (1998) (hereinafter "TLTIA") became effective, making significant changes in registration practice. Also in 1999, Trademark Amendments Act of 1999 became law, amending Trademark Act itself. Federal Trademark Dilution Revision Act of 2006, Pub. L. 109-312 is most recent trademark legislation. This Digest incorporates changes imposed by each of these acts.

In Nov. 2002, Madrid Protocol Implementation Act, P.L. 107-273, 116 Stat. 1758 (2002), facilitating international registration of trademarks, was adopted by U.S. On Aug. 2, 2003 instrument of accession to Madrid Protocol was deposited with World Intellectual Property Organization in Geneva. This action signaled U.S. official membership to treaty, which became effective Nov. 2, 2003.

Federal authority for legislation in field of trademarks stems from Commerce Clause of Constitution, § 8, clause 3. Intent of Trademark Act of 1946 is: "to regulate commerce within the control of Congress by making actionable the deceptive and misleading use of marks in such commerce; to protect registered marks used in such commerce from interference by State, or territorial legislation; to protect persons engaged in such commerce against unfair competition; to prevent fraud and deception in such commerce by the use of reproductions, copies, counterfeits, or colorable imitations of registered marks; and to provide rights and remedies stipulated by treaties and conventions respecting trademarks, trade names, and unfair competition entered into between the United States and foreign nations." (§ 45).

Trademark Act made federal registration more desirable than registration under previous Acts by enlarging scope of subject matter and type of marks that could be registered and by strengthening registrations and improving their presumptions of validity. Certain types of marks that were not registrable under Trademark Act of 1905 may now be registered on Principal Register of present Act, with substantially increased rights. Revision Act enhanced desirability of registration by providing for applications based on intent to use.

Act includes, inter alia, provisions for:

(1) Registration of "service," "collective" and "certification" marks, in addition to trademarks.

(2) Registration of matter that is merely descriptive, deceptively misdescriptive, primarily geographically descriptive, surname, or is not wholly functional except as expressly excluded in Trademark Act Section 2(a-d), which has become distinctive, by proving, for example, that mark has been in substantially exclusive and continuous use in commerce for period of five years.

(3) Registrations by concurrent users where it is shown that such users had acquired valid common law trademark rights in same or similar marks, subject to provisions of § 2(d). See topic 1.21 Concurrent Use.

(4) Certain registrations becoming generally incontestable after a period of five years of registration and continuous use.

(5) Valid assignment of application in which allegation of use has been filed or registration accompanied only by business and good will associated with mark as distinguished from assignor's entire business.

(6) Use of a mark by "related companies" being legitimate and such use inuring to benefit of registrant, or of applicant for registration.

Principal Register offers: (1) prima facie evidence of validity of registration; (2) prima facie evidence of registrant's ownership; (3) prima facie evidence of registrant's exclusive right to use mark in commerce; (4) incontestability after five years of registration; (5) constructive notice of registrant's claim of ownership; (6) nationwide rights in mark; (7) right to bring suit in Federal Court regardless of diversity; (8) statutory remedies; and (9) ability to prevent importation of goods bearing infringing mark by depositing registration with Customs.

These benefits do not apply to Supplemental Register. Mark on Supplemental Register is considered merely "capable" of being mark—there has been no determination that it is mark.

Nevertheless, Supplemental Register does allow: (1) use of registration symbol; (2) use of mark as bar to registration of confusingly similar marks; (3) registration abroad based on U.S. rights and (4) suit to be brought in Federal Court. Mark on Supplemental Register will also be located during search of Trademark Office records, notifying others of owner's claim of rights in mark.

In general, registration is secured by filing application in Office. There are provisions for opposition of application and for cancellation of registration, by persons damaged by registration, to be explained on outline in alphabetical headings below.

Most important modifications to prior law resulting from Revision Act are:

(1) Allowance of applications for federal registration based on statement of bona fide intent to use mark, with actual use in commerce required prior to issuance of registration (former law required use in commerce prior to filing of application).

(2) Providing that filing of application (whether based on actual or intent to use) constitutes nationwide constructive use, contingent on issuance of registration, for purposes of establishing priority over subsequent users of, or filers of applications for, identical or confusingly similar marks.

(3) Tightening definition of "use in commerce" to eliminate token use as basis for (a) federal registration, (b) maintenance of registrations between fifth and sixth year after registration, (c) renewal of registrations, and (d) avoidance of presumptive abandonment of registered mark after three consecutive years of nonuse.

(4) Requirement that applications based on foreign registrations or applications under Paris Convention (Trademark Act, § 44) state bona fide intention to use mark in U.S. commerce under tightened definition of "use".

(5) Reduction of length of term of registration from 20 to ten years.

(6) Clarifications of effect of and remedies available under unfair competition provisions of Trademark Act. (§ 43a).

Most important modifications to prior law resulting from TLTIA are:

(1) Minimized requirements to obtain filing date for new application (prior law required additional information, much of which still required as prerequisite to registration, but not filing date).

(2) Allowance of filing applications without signature (although signature required prior to registration), and broadening of class of persons who may sign application.

(3) Allowance of multiple filing bases, including use and intent-to-use, in one application.

(4) Allowance of amendment and substitution of filing bases, including amendment from use to intent-to-use basis.

(5) Reduction in required specimens from three to one per class.

(6) May file extension of time to file statement of use after deadline on showing of good cause for delay.

(7) Must file § 8 affidavit of continued use within one year of registration’s tenth anniversary.

(8) Revival of abandoned application permitted on showing of unintentional delay (prior law required showing of unavoidable delay).

(9) Eliminate method of use clause requirement.

Most significant changes of Trademark Amendments Act of 1999:

(1) Trademark dilution may be alleged as basis for opposition and cancellation proceeding before Trademark Trial and Appeal Board.

(2) Plaintiff alleging trade dress infringement bears burden of showing its trade dress is not functional.

(3) Federal government waives sovereign immunity for suits alleging trademark infringement and false advertising.

1.02 ABANDONMENT OF APPLICATION:

If within six months following date Office Action is mailed, applicant fails to file any answer responsive to action, application will be declared abandoned. If applicant addresses some but not all of issues, Examining Attorney will issue second Office Action, making outstanding issues final. If applicant fails to address remaining issues within six months of final office action, application may be declared abandoned or, if outstanding issues can be separated from application as whole (such as issues regarding description of some but not all of goods and services listed in application), application will be abandoned as to those issues, but will proceed regarding rest. In such circumstances, abandoned application may be revived if it is shown to satisfaction of Commissioner that delay was unintentional. (37 C.F.R. § 2.66). Failure to timely file statement of use or to request extension of time of statement of use deadline will also result in abandonment of application. However, in such circumstances, abandoned application may be revived if it is shown to satisfaction of Commissioner that delay was unintentional. (§ 1[d][4]; Rule 2.65). That petition to revive must be filed within two months of mailing date of Notice of Abandonment or within two months of actual knowledge of abandonment if applicant did not receive Notice of Abandonment and was diligent in checking status of its application every six months. (37 C.F.R. § 2.66). In either circumstance, $100 fee is required. Additionally, petition to revive application abandoned because applicant did not timely respond to Office Action must include statement, signed by someone with firsthand knowledge of facts, that delay in filing response on or before due date was unintentional, and, unless applicant alleges that it never received Office Action, proposed response to Office Action. (Id.). Likewise, petition to revive application abandoned because applicant did not timely respond to notice of allowance must include statement, signed by someone with firsthand knowledge of facts, that delay in filing statement of use (or request for extension of time to file statement of use) on or before due date was unintentional. (Id.). Unless applicant alleges that it did not receive notice of allowance and requests cancellation of notice of allowance, petition must include required fees for number of requests for extension of time to file statement of use that applicant should have filed if application had never been abandoned. (Id.). And finally, unless applicant did not receive notice of allowance and requests cancellation of notice of allowance, petition must include either statement of use or request for extension of time to file statement of use. (Id.). In application based on both § 1(b) and 44(d), where applicant fails to respond to Office Action inquiring into status of home country application, Commissioner may exercise supervisory authority on petition to abandon § 44(d) basis only, so that application can go forward under § 1(b). Because abandonment of application under examination is not abandonment of trademark, new application may be filed.

An application may also be expressly abandoned by written assertion signed by applicant, or assignee if any, or applicant's attorney or other person representing applicant, identifying application by serial number and date of filing. (37 C.F.R. § 2.68). Express abandonment of application does not affect any common law rights that applicant may have in mark. (Id.). However, if, after commencement of opposition, concurrent use, or interference proceeding before Trademark Trial and Appeal Board, applicant files written statement abandoning its application without consent of every adverse party to proceeding, judgment will be entered against applicant. (37 C.F.R. § 2.135).

1.03 ABANDONMENT OF TRADEMARK:

This is primarily a question of intention. Mark is deemed to be abandoned when its use has been discontinued with intent not to resume, which intent may be inferred from circumstances. (15 U.S.C. § 1127). Nonuse for three consecutive years is prima facie evidence of abandonment. (Id.).

"Use" of mark means bona fide use of that mark made in ordinary course of trade, and not made merely to reserve right in mark. (Id.).

Abandonment will result from any course of conduct of registrant, including acts of omission as well as commission, which causes mark to become generic name for goods or services on or in connection with which it is used or otherwise to lose its significance as mark. (Id.). Abandonment may be inferred from continuous persistent use by another adverse to rights of registrant if he, with knowledge of such use, makes no attempt to stop use. Registrations covering abandoned trademarks may be cancelled. See topic 1.13 Cancellation.

1.04 ACCOUNTING:

See infra, topic 1.55 Remedies.

1.05 AFFIDAVITS OF INCONTESTABILITY:

If registered mark has been in continuous use for five consecutive years subsequent to registration on Principal Register or republication (under § 12[c]) and is then in uncontested use in commerce, registrant's right to use mark may, with certain exceptions, be made incontestable by filing appropriate affidavit or declaration to such effect. (§ 15 and Rules 2.167-168, incl.). See topic 1.42 Incontestability.

1.06 AFFIDAVITS OF USE:

Owner of mark registered on either Principal or Supplemental Register or republished on Principal Register must file within one year before end of sixth year following date of registration or republication, and within one year before end of each successive ten-year period following date of registration, affidavit or declaration setting forth those goods or services recited in registration on or in connection with which mark is in use in commerce, accompanied by evidence of use of mark in commerce or facts showing excusable nonuse. Such evidence shall consist of specimen or facsimile of mark as used in commerce for each class of goods or services that registration covers. $100 fee required. (Rule 2.162). Owner of registration may make submission required under § 8 within grace period of six months after end of sixth year following date of registration or republication or end of each successive ten-year period after registration, upon payment of $100 fee per class. Commissioner will cancel any registration for which required affidavit or declaration has not been filed. (§ 8). See topic 1.69 Use in Commerce.

Commissioner will notify any registrant who files such affidavit or declaration of his acceptance or refusal thereof and, if refusal, his reasons therefor. (§ 8[c]). If any submission filed under § 8 is deficient, deficiency may be corrected after statutory time period and within time prescribed after notification of deficiency, upon payment of $100 fee. Registrant may appeal from refusal of Commissioner. (Rule 2.145). See topics 1.27 Declaration; 1.09 Appeals, infra.

At time of renewing registration affidavit or declaration is required, for details of which see topic 1.56 Renewal. (§ 9).

If times coincide, affidavits or declarations under §§ 8 and 15 may be combined in one document, with $300 fee per class required, and §§ 8 and 9 may be combined in one document, with $500 fee per class required.

1.07 AFFIXATION OF MARK:

Mark used to identify goods or services will be deemed to be used in commerce (§ 45):

(1) on goods when it is placed in any manner on the goods or their containers or on displays associated therewith or on tags or labels affixed thereto, or if nature of goods makes such placement impracticable, then on documents associated with goods or their sale, and goods are sold or transported in commerce, and

(2) in respect to services when it is used or displayed in sale or advertising of services that are rendered in commerce and person rendering services is engaged in commerce in connection with services. (15 U.S.C. § 1127).

In respect to trademark, as distinct from service mark, use in advertising alone is insufficient to constitute basis for registration, though stranger's use in advertising alone may constitute statutory infringement and/or dilution of registration rights.

1.08 AMENDMENTS:

Of Applications.

Application may be amended to correct informalities, or to avoid objections made by Office, or for other reasons arising in course of examination. Identification of goods or services may be amended to clarify or limit identification, but additions are not permitted. If declaration or verification of application under 37 C.F.R. § 2.33 is unsigned or signed by wrong party, applicant may submit substitute verification or declaration under 37 C.F.R. § 2.20. If declaration or verification of statement of use under 37 C.F.R. § 2.88, or request for extension of time to file statement of use under 37 C.F.R. § 2.89, is unsigned or signed by wrong party, applicant must submit substitute verification before expiration of statutory deadline for filing statement of use.

No amendment to dates of use will be permitted unless supported by applicant's affidavit or declaration and by such showing as may be required by Examining Attorney.

In application based on use, no amendment to specify date of use that is subsequent to filing date is permitted.

In application based on intent to use, after filing statement of use, no amendment will be permitted to statement of use to recite dates of use subsequent to expiration of time allowed to applicant for filing statement of use. (Rule 2.71).

Application based on intent to use may, upon submission of appropriate filing and $100 fee per class, be converted into use-based application by filing amendment to allege use. Such amendment may be filed at any time between filing of application and date Examining Attorney approves mark for publication. (§ 1[c]). If Examining Attorney issues final refusal and applicant appeals, amendment to allege use may still be filed during pendency of appeal. TTAB, which retains jurisdiction over application once appeal is filed, may suspend action on appeal and allow examination of amendment to allege use or may defer examination until after disposition of appeal.

Amendments deleting basis in multiple-basis application, notices of change of attorney, and notice of change of address may be entered in § 1(b) application during period between issuance of notice of allowance and submission of statement of use. (Rule 2.77[a]). If any other amendment is filed during this period, it is normally placed in application file for consideration at time of examination of Statement of Use. However, on petition, Commissioner may waive Rule 2.77 to permit Examining Attorney to review and determine acceptability of amendment filed between issuance of Notice of Allowance and filing of Statement of Use.

Application based on actual use may be amended to seek registration based on intent to use. (Rule 2.33[d]).

Applicants may amend application to add or substitute filing basis at any time before publication, if applicant meets all requirements for new basis, but amendment to add § 44(d) filing basis must be made during six-month priority period. (Rule 2.35). After publication, filing basis amendment may be made only on petition to Commissioner, and mark will be republished. Amendment to filing basis does not change original filing date. Significantly, if applicant had valid § 44(d) filing basis, which applicant deletes during examination, applicant still maintains priority filing date no matter basis on which mark eventually registers. (Rule 2.35).

Amendment to description or drawing of mark will not be permitted if character of mark is materially altered. (37 C.F.R. § 2.72[a]-[b]). Determination of whether proposed amendment materially alters character of mark will be made by comparing proposed amendment with description or drawing of mark as originally filed. In application based on use in commerce under section 1(a), applicant may amend description or drawing of mark only if specimens originally filed, or substitute specimens support proposed amendment. (37 C.F.R. § 2.72[a]). Similarly, if application is based on bona fide itent to use mark in commerce under section 1(b), specimens filed with amendment to allege use or statement of use or substitute specimens must support amendment. (TMEP § 2.72[b]).

Change refusing to permit amendments to mark as it appears in application or drawing page if that appearance differs from mark as used on specimen filed with application, overturns holdings in In re ECCS, Inc., 94 F.3d 1578; 39 USPQ2d 2001 (Fed. Cir. 1996) and In re Dekra e.V., 44 USPQ2d 1693 (TTAB 1997).

Amendments should be set forth clearly and completely. (37 C.F.R. § 2.74). Applicant should either set forth entire wording, including proposed changes, or, if it is more efficient, indicate which words should be added and which words should be deleted. (Id.). Applicant, someone with legal authority to bind applicant, such as corporate officer, or practitioner who meets requirements of § 11.14 must sign request for amendment.

Application for registration on Principal Register based on use or on foreign application or registration may be changed to application for registration on Supplemental Register. There is no need (contrary to previous law) for use-based applications to allege use for one year prior to amendment to Supplemental Register.

Application based on intent to use may be amended to change application to Supplemental Register only after submission of acceptable allegation of use. When such application is changed from Principal Register to Supplemental Register, effective filing date of application is date of filing of allegation of use. (Rule 2.75). See topic 1.63 Supplemental Register.

Amendments may be initiated by applicant or by examining attorney. Examiner's Amendment is used whenever appropriate to expedite prosecution of application. (TMEP § 707). Most often, examining attorney will obtain authorization of applicant or applicant's attorney prior to entering Examiner's Amendment. (Id.). Authorization is usually given in telephone conversation, email communication, or in interview between examining attorney and applicant or applicant's attorney. However, examining attorney may exercise discretion to amend by Examiner's Amendment without applicant's prior approval in certain situations such as (1) changes to international classification, except where change is made after publication and change would require republication of mark; (2) deletion of notice of trademark or copyright from drawing; (3) addition of formal description of mark where it is necessary and where record already contains informal indication of what mark comprises; (4) amendment of application to clarify that mark is in typed form when record clearly indicates that drawing is supposed to be in typed form; (5) addition of lining and stippling statements, where such statement is necessary, and where significance of lining or stippling is indicated by specimens or other information of record; and (6) corrections of obvious misspelling in identification of goods and services. Following are examples of matters that cannot be changed on Examiner's Amendment: (1) Dates of use, if verification would be required; (2) mark on special form drawing, if changes would require filing of substitute special form drawing; and (3) amendments that require submission of substitute specimens. (Id.). Examiner's Amendments are generally not used when there are statutory refusals. (Id.). If applicant wishes to object to Examiner's Amendment, it should be done immediately over phone or email so that objection can be considered prior to publication or issue. (Id.).

Of Oppositions and Petitions for Cancellation.

If opposed application or registration was based on §§ 1(a), 1(b), 44(d) or 44(e), petition for opposition or cancellation may be amended in same manner and to same extent as complaint in civil action before U.S. district court, except to add to goods and services opposed. Amendments to pleadings in inter partes proceedings before Trademark Trial and Appeal Board are governed by Fed. R. Civ. P. 15(a), and amendments to conform pleadings to trial evidence are governed by Fed. R. Civ. P. 15(b). Although Trademark Trial and Appeal Board liberally grants leave to amend pleadings at any stage in proceeding if justice so requires, leave to amend may be denied for non-conformity with existing law or prejudice to other side. For applications filed under § 66(a) (Madrid Protocol filings), grounds of opposition cannot be amended, nor can there be any addition to goods and services opposed. (Rules 2.107, 2.115).

Of Registrations.

Subject to approval of Commissioner, registration may be amended at any time during its term. (§ 7[d]). Application must specify amendment, be signed by registrant, be accompanied by fee of $100, new specimens and new drawing of mark if amendment involves change in mark, and original certificate of registration or, if said certificate is lost or destroyed, certified copy thereof. Registration when so amended must still contain registrable matter, and character of mark must not be materially altered. Changes in description of goods (other than to restrict identification or change it in ways that would not require republication of mark) are not ordinarily permissible. (Rule 2.173). However, Examiner's decision denying proposed amendment will be reviewed by Commissioner on petition to determine whether decision was correct, rather than whether it was clear error.

If registration includes disclaimer, description of mark, or miscellaneous statement, any request for amendment of registration must include request to make any necessary conforming amendments to disclaimer, description, or miscellaneous statement. (Rule 2.173[f]).

Of Applications Or Registrations Involved In Proceedings.

Application or registration involved in proceeding may not be amended in substance nor may registration be amended or disclaimed in part, except with consent of other party and approval of TTAB or except upon motion. (Rule 2.133). Additionally, such amendment must comply with other applicable rules and statutory provisions. (Id.). Request to amend application involved in proceeding before Trademark Trial and Appeal Board must be filed with Trademark Trial and Appeal Board, and not with Trademark Examining Operation. (TBMP § 514.01). Similarly, request to amend registration involved in proceeding, must be filed with Trademark Trial and Appeal Board, and not with Post Registration Branch. (Id.).

1.09 APPEALS:

Applicant for registration of mark may, upon final refusal by Examining Attorney, appeal to TTAB upon payment of fee of $100 per class. (37 C.F.R. § 2.141). If applicant does not pay appeal fee for at least one class of goods or services before expiration of six-month statutory filing period, application will be abandoned. (Id.). In multi-class application, if appeal is submitted for fewer than all classes, applicant must specify to what classes appeal pertains. (Id.). Second refusal on same grounds may be considered as final by applicant for purpose of appeal. (Rule 2.141). Such appeal must be taken within six months from date of final refusal or from date of action from which appeal is taken. (Rule 2.142).

Applicant may submit amendment to Supplemental Register, provided it is otherwise proper, and continue to argue entitlement to registration on Principal Register in appeal. Both amendment to Supplemental Register and appeal must be submitted within six-month response period following final refusal of registration on Principal Register. TTAB will suspend action on appeal until action on amendment to Supplemental Register is concluded.

Petition may be taken to Director, in any of these areas: (1) From any repeated action or requirement of Examining Attorney not subject to appeal under Rule 2.141, in ex parte prosecution of application; (2) in cases in which statute or rules specify that matter is to be determined directly by or reviewed by Director; (3) to invoke supervisory authority of Director; in appropriate circumstances; (4) in any cases not specifically defined and provided for by applicable provisions of Title 37 of Code of Federal Regulations; and 5) in extraordinary situations when justice so requires and no other party is injured thereby, to request suspension or waiver of any rules that are not required by Lanham Act. Fee of $100 is required for petition to Commissioner. (Rule 2.146).

Filing of amendment to allege use does not extend deadline for filing appeal to Trademark Trial and Appeal Board, or Petition to Director. (Miscellaneous Changes to Trademark Rules of Practice, 37 FR 67759 [effective as of Jan. 16, 2009]).

Applicant for registration of mark, party to opposition or cancellation proceeding, party to application to register as lawful concurrent user, registrant who has filed affidavit or declaration as provided in § 8, or applicant for renewal, who is dissatisfied with decision of Commissioner or TTAB, may appeal to U.S. Court of Appeals for Federal Circuit, taken within 60 days from date of action appealed from, or by civil action in U.S. District Court brought within similar 60 day time limit. (§ 21, Rule 2.145).

1.10 APPLICATION FOR REGISTRATION:

Who May Apply.

Application for registrable mark, which term includes any trademark, service mark, collective mark, or certification mark, may be filed by:

(a) any person, firm, corporation, union, association, or other organization capable of suing and being sued in court of law, and who (i) is owner of such mark and uses same in commerce or (ii) has bona fide intention to use mark in commerce; or

(b) any owner of mark, as above, residing in or located in any foreign country that, by treaty, convention or law, affords similar privileges to U.S. citizens and who has (i) registered his mark or (ii) applied to register his mark within last six months in his country of origin.

Collective or certification mark, including indications of regional origin, may be registered by any natural or juristic person including nations, states, municipalities, and the like, which exercise legitimate control over use of mark, even though not possessing commercial or industrial establishment.

What May Be Registered on Principal Register.

Any mark, by which goods or services (see §§ 2 and 3) of its owner may be distinguished from goods or services of others, may be registered on Principal Register, except:

(a) immoral, deceptive or scandalous matter.

(b) flag, coat of arms or other insignia of U.S., or of any state or municipality, or of any foreign nation, or any simulation thereof.

(c) any name, portrait or signature identifying particular living individual except by his written consent, or name, signature or portrait of deceased president of U.S. during life of his widow, if any, except by written consent of widow.

(d) mark that so resembles mark registered in Office, or mark or trade name previously used in U.S. by another and not abandoned, as to be likely, when used on or in connection with goods or services of applicant, to cause confusion or mistake or to deceive. (This is subject however to possibility of concurrent registrations for which see topic 1.21 Concurrent Use.)

(e) mark that (1) when used on or in connection with goods or services of applicant is merely descriptive or deceptively misdescriptive of them, or (2) when used on or in connection with goods or services of applicant is primarily geographically descriptive of them, except that indications of regional origin may be registrable as collective or certification marks, (3) is primarily geographically deceptively misdescriptive of them, (4) is primarily merely surname, or (5) is matter that, as whole, is functional. Provided, however that three exceptions stated in subsections (e)(1), (e)(2), and (e)(4) may not apply to mark that has at any time become distinctive of applicant's goods in commerce, unless expressly excluded by paragraphs (a), (b), (c), (d) or (e)(5) above, and that exception stated in subsection (e)(3) may not apply where distinctiveness was established prior to Dec. 8, 1993. Proof of substantially exclusive and continuous use of mark by applicant in commerce for five years before date on which claim of distinctiveness is made may be acceptable as prima facie evidence that mark has become distinctive. (§ 2[f]). Marks registered under ten-year proviso of § 5 of Act of Feb. 20, 1905 as am'd, shall be deemed to have become distinctive of registrant's goods in commerce. (§ 46[b]). However, matter which is wholly functional may not be registered even upon showing that it has become distinctive. (§§ 2[e][5] and 23).

Trademark Amendments Act of 1999 amended section of Act setting out "registrable marks", noting mark may be refused registration on basis that it would cause dilution under § 43(c) of Act in proceeding under § 13, or pursuant to cancellation or opposition proceeding.

What May be Registered on Supplemental Register.

All marks capable of distinguishing applicant's goods or services and not registrable on Principal Register, except those included in §§ 2(a), (b), (c), (d), (e)(3) and (e)(5), may be registered on Supplemental Register. Such mark may consist of any trademark, symbol, label, package, configuration of goods, name, word, slogan, phrase, surname, geographical name, numeral or device or any combination of any of foregoing, provided it is capable of distinguishing applicant's goods or services from those of others. (§ 23). See topic 1.63 Supplemental Register.

Note: TLTIA required Trademark Office to study issues surrounding protection of official insignia of federally and state-recognized Native American tribes. In Aug. 24, 2001 Federal Register, Trademark Office announced procedures it will follow to create and maintain accurate and comprehensive database of these official insignia. Database is intended to assist Examining Attorneys to examine applications for registration. Database does not, however, signify that recorded insignia has been registered as trademark.

Form of Application.

Application shall include request for registration that must be made to Commissioner. Minimum filing requirements for applications under any filing basis comprise: (a) Applicant's name; (b) correspondent's name and address; (c) drawing of mark; (d) list of goods and/or services; and (e) filing fee, which covers at least one class.

While following information is no longer required to secure application filing date, it must eventually be provided: (a) allegation of use or intent to use mark; (b) claim that mark is in standard characters and no claim is made as to any particular font style or description of special form of mark; (c) description of mark if mark is not in standard characters (Rule 2.37, 2.32[a][8]), (d) one specimen per class (prior law required three per class); (e) date of first use; (f) stated filing basis; (g) signature; (h) verified statement to effect that applicant is believed to be owner of mark and that mark is in use in commerce or in application under § 1(b) that applicant is entitled to use mark sought to be registered, and intent to use mark in commerce and that no other entity has right to such mark or one that is likely to confuse. For applications filed under § 44(e), applicant must also eventually provide true copy, photocopy, certification, or certified copy of foreign registration, with English translation if necessary, and, based on timing, certification that foreign registration has been renewed.

All documents, including § 44 filing date, must be in English language and written on one side of paper only. Electronic filing through PTO's TEAS or TEAS Plus system is preferred. If filing on paper, letter size paper is preferred.

If mark includes non-English wording, applicant must submit English translation of that wording. (Rule 2.32[a][9]). If mark includes non-Latin characters, applicant must submit transliteration of those characters and either translation of corresponding non-English words or statement that transliterated term has no meaning in English. (Rule 2.32[a][10]).

Applicant not domiciled in U.S. may designate in writing some person in U.S. upon whom process or notice of proceedings affecting mark may be served. (Rule 2.24). If applicant does not designate resident in U.S. on whom may be served notices or process in proceedings affecting mark, such notices or process may be served on Director of Enrollment and Discipline. (§ 1[e]).

Single application may include goods and/or services falling in several different classes so long as appropriate fees per class are submitted.

Applicant may seek registration based on both actual use and intent to use in single application. (Rule 2.33[d]).

Application based on foreign application or registration can also be based on use in commerce or intent to use. Application based on § 66(a) (Madrid Protocol filing) may claim priority under § 44, but cannot be combined with §§ 1(a) or 1(b) filing bases. In § 66(a) application, classification cannot be changed from classification assigned by International Bureau of World Intellectual Property Organization; classes cannot be added, and goods or services cannot be transferred from one class to another in multiple-class application. (Rule 2.85[d]). For § 66(a) applications, scope of identification for purposes of permissible amendments is limited by class. (Rule 2.85[f]).

Applications for registration on either Register are examined by Trademark Examining Attorney and if refused, applicant will be notified of reason for refusal. (§ 12). Applicant may then traverse objections or amend application within six months. (See topic 1.08 Amendments.) Papers of application cannot be withdrawn from Office. During prosecution of application Office maintains public record showing name and address of applicant, form of mark, goods or services for which its registration is sought, date application was filed and claimed date of first use. Access to file of particular pending trademark application will be permitted prior to publication under Rule 2.81 upon oral request. (Rule 2.27, as am'd). Most files are also available online at http://www.uspto.gov. See topic 1.45 Intent to Use Applications.

1.11 ASSIGNMENTS:

Mark that has been registered or mark for which application for registration has been filed, together with such registration or application, shall, but need not, be assignable with good will of business in which mark is used or with that part of good will of business connected with use of and symbolized by mark. Intent-to-use application, however, is not assignable prior to filing of allegation of use, except to successor to business of applicant, or portion thereof to which mark pertains, if that business is ongoing and existing. Assignments shall be by instrument in writing duly executed. Acknowledgment as provided by § 11 will be prima facie evidence of execution of assignment and when recorded in Office, record will be prima facie evidence of execution. Assignment will be void as against any subsequent purchaser for valuable consideration without notice, unless it is recorded in Office within three months after date thereof or prior to such subsequent purchase. Commissioner will keep separate record of such assignments submitted to him for recording. (§ 10). If assignment is recorded before notice of publication is mailed or if statement that assignment has been filed for recordation is in file by time application is being prepared for issuance, certificate of registration may be issued to assignee upon written request, in case of change of ownership of registered trademark, Commissioner will, upon request, issue to assignee new certificate of registration of mark in name of such assignee for unexpired part of original term. (§ 7[c]). See also topic 1.36 Fees.

Applicant under Trademark Act § 44, see topic 1.10 Application for Registration, may assign U.S. application to another party without assigning underlying foreign application or registration to that same party. (In re De Luxe N.V., 26 USPQ2d 1475 [Fed. Cir. 1993]). Act requires only that applicant own underlying application or registration at time of filing in U.S.

No assignment will be recorded, except as ordered by Commissioner, unless it has been executed and unless:

(1) Certificate of registration is identified in assignment by certificate number (date of registration should also be given) or, application for registration has been first filed in Office and application is identified in assignment by serial number (date of filing should also be given);

(2) It is in English language or, if not, is accompanied by a signed translation; and

(3) Fee for recording is received ($40 for first mark and $25 for each additional mark).

Assignment cover sheet must include citizenship of state or country of organization of party receiving interest; if party receiving interest is domestic partnership or domestic joint venture, cover sheet must include names, legal entities, and national citizenship (or state or country of organization) of all general partners or active members that compose partnership or joint venture. (Rule 3.31[a]).

Date of record of assignment is date of receipt of assignment at Office in proper form and accompanied by full fee for recording. (§ 10).

Filing request to record assignment through PTO’s electronic filing system greatly expedites recordation.

1.12 ATTORNEYS:

Any person who is member in good standing of bar of Supreme Court or of highest court of any state or territory may represent others before Office in trademark cases. Others including foreign attorneys and other authorized representatives may be permitted by Commissioner to represent applicants. (Rules 2.11-19, incl.).

Individual must be appointed. If name of law firm is given, it will be regarded as designation of address for correspondence. Signature of attorney to paper constitutes certificate that paper has been read, its filing is authorized, to best of his knowledge there is good ground to support it, and it is not interposed for delay. Office correspondence will be sent to attorney transmitting paper.

1.13 CANCELLATION:

Any person or entity that believes that he/it is or will be damaged by registration may file petition to cancel registration in whole or in part. Petition need not be verified, and may be signed by petitioner or petitioner’s attorney or other authorized representative. In cases involving any of following grounds such petition may be brought at any time against any registration under any of Acts of 1881, 1905, 1920 or on either register of Act of 1946:

(1) If registered mark becomes common descriptive or generic name of article or substance; if mark has been abandoned; if registration of mark was obtained fraudulently or contrary to provision of § 4 or of subsections (a), (b), (c), (e)(3) or (e)(5) of § 2 or contrary to similar prohibitory provisions of prior acts; if registered mark is being used by, or with permission of, registrant so as to misrepresent source of goods or services; or if mark dilutes prior user’s trademark rights;

(2) If in case of certification mark registrant does not control, or is not able legitimately to exercise control over, use of such mark, or engages in production or marketing of any goods or services to which mark is applied, or permits use of such mark for other purposes than as certification mark, or discriminatingly refuses to certify goods or services of any person who

maintains standards or conditions that such mark certifies. Notwithstanding foregoing, advertising or promoting recognition of certification program or of goods or services meeting certification standards by registrant are not grounds for cancellation under § 14(5), so long as registrant does not itself produce, manufacture, or sell any of certified goods or services to which its identical service mark is applied.

When based on other grounds, such as prior rights of petitioner, cancellation proceedings may be brought at any time against registration on Supplemental Register, registration under Act of 1920 or registration under either of acts of 1881 or 1905 that has not been published under § 12(c), but must be brought against mark registered on Principal Register or mark that has been published in accordance with provisions of § 12(c) within five years from date of such registration or publication. (§§ 14, 15). See topic 1.42 Incontestability.

Federal Trade Commission may apply at any time to cancel, on grounds specified in Subsections (1) or (2) above, any mark originally registered on Principal Register.

Cancellation proceedings are referred to TTAB that is empowered to hear and determine right to registration. If it appears, after hearing, that registration should be cancelled, Commissioner will cancel registration. Appeal may be taken from decision of TTAB. See topic 1.09 Appeals. In its recent decision Nasalok Coating Corp. v. Nylok Corp., 522 F.3d 1320 or (Fed. Cir. 2008), Federal Circuit granted summary judgment in favor of respondent Nylok in TTAB cancellation proceeding because petitioner Nasalok's claim of trademark invalidity was barred by res judicata (claim preclusion). District court had earlier entered default judgment in favor of Nylok on trademark infringement and granted Nylok's motion for preliminary injunction. (522 F.3d at 1322 Copyright Cases or Patent Cases.) While petition to cancel was not compulsory counterclaim in district court infringement action, it amounted to collateral attack on judgment and was, thus, barred under doctrine of claim preclusion. (Id. at 1326 Copyright Cases or Patent Cases, 1330.)

Procedure.

(Rules 2.111-2.114, incl.). Petition for cancellation must state grounds of cancellation including why petitioner believes it would be damaged. Cancellation petition may be signed by attorney. It must be accompanied by $300 fee for each class and must indicate respondent party to whom notification will be sent by Commissioner. If more than one person is joined in petition, $300 fee for each class sought to be cancelled for each person so joined is required.

Plaintiff must serve cancellation proceeding on registrant at its last known address of record on file with PTO. Registrant respondent must file answer presenting its defenses within 40 days, which answer may include request for affirmative relief by way of cancellation of any registration pleaded in petition, in which event $300 fee for each class is due and petitioner has 20 days after service in which to file its reply (Rule 2.114). Thereafter discovery procedures are available under Rule 2.120, and testimony may be taken by deposition or by written questions. (Rules 2.123 and 2.124). Case may be submitted on briefs and, upon written request to TTAB, may be argued orally. (Rules 2.128 and 2.129).

See Rules 2.116-2.136 and TBMP for further information on procedures in inter partes cases.

For failure by registrant to file required affidavit or declaration of use or excusable nonuse of mark during sixth year as provided, Commissioner will at end of sixth year cancel such registration. (§ 8).

1.14 CERTIFICATE OF REGISTRATION:

When requirements of law and of rules have been complied with, and Office has adjudged mark registrable, certificate will be issued to effect that applicant has complied with law and is entitled to registration of mark on Principal Register or on Supplemental Register, as case may be. Certificate will state inter alia, date on which application was filed, date of issue and number of certificate. Attached to certificate and forming part thereof will be reproduction of mark, particular goods or services for which it is registered, term of registration, and any conditions and limitations that may be imposed in grant of registration. (Rule 2.151).

For issuance of registration in first instance to assignee, see topic 1.11 Assignments. If registered mark is assigned after issue of certificate, new owner may apply for and, upon proper showing, obtain new certificate in his own name from Commissioner for fee of $100.

Single certificate may be issued for same mark registered for goods or services in plurality of classes. See topic 1.17 Classification.

Certified copy of Certificate of Principal Register registration will be admissible in evidence in any suit in which trademark is in controversy as follows (§§ 7, 33):

(a) prior to date when registrant's right thereto has become incontestable, as prima facie evidence of validity of mark and of registration of mark, of registrant's ownership of mark, and of registrant's exclusive right to use registered mark in commerce on or in connection with goods or services specified in certificate; and

(b) after it has become incontestable, as conclusive evidence, subject to certain conditions and limitations, of above. See topic 1.42 Incontestability.

Certificates of registration for marks registered on Supplemental Register are conspicuously different from certificates issued for marks registered on Principal Register. (§ 25).

1.15 CERTIFICATION MARKS:

See topic 1.18 Collective and Certification Marks.

1.16 CLAIMING BENEFITS OF 1946 ACT:

Benefits of 1946 Trademark Act may be secured under § 12(c) thereof for unexpired registrations under 1881 and 1905 Acts by registrant's filing in Office, with appropriate fee, affidavit or declaration stating: (a) Goods recited in registration on which mark is in use in commerce, (b) nature of such commerce, and (c) that benefits of 1946 Act are claimed. Thereafter, Office will publish notice of claim with reproduction of mark in Official Gazette and notify registrant of such publication and of requirement for filing proof of use during sixth year thereafter to avoid automatic cancellation. See topic 1.06 Affidavits of Use.

Republished mark retains its original registration number and term, is not subject to opposition proceedings but remains subject to cancellation subject to same terms and conditions as marks registered on Principal Register.

1.17 CLASSIFICATION:

There is established classification system for goods and services for convenience of Office administration. This classification does not limit or extend applicant's rights. If mark is used on goods or services in more than one class, single application for registration may cover goods or services in all classes, upon payment of filing fee of $335 for each class. Alternatively, separate applications for each class may be filed.

International Classification of goods is primary classification system for applications filed after Sept. 1, 1973. U.S. classification still appears on registration and determines classification in Office search records. See listing of classes at end of Digest. Effective Jan. 1, 2002, Office adopted 8th Edition (2002) of Nice Agreement, which added Classes 43, 44, and 45, and changed Class 42 from miscellaneous services class to class covering scientific and legal services, among others. When classification changes under Nice Agreement, new requirements apply only to applications filed on or after effective date of change. (Rule 2.85[e][1]). Office encourages applicants to adopt identification statements from Acceptable Identification of Goods and Services Manual, which is available on Office's website, at www.uspto.gov.

Note: Trademark Office currently makes its records available through database accessible through its website, located at www.uspto.gov, or through public search libraries. Effective Aug. 26, 2002, Office began its transition to electronic records collection system, and began to remove paper records from public search library.

1.18 COLLECTIVE AND CERTIFICATION MARKS:

Collective and certification marks, including indications of regional origin, are registrable in same manner and with same effect as are trademarks, by persons, nations, states, municipalities, and the like, exercising legitimate control over use of marks sought to be registered even though not possessing an industrial or commercial establishment. When registered, such marks will be entitled to same protection as that afforded trademarks, except when used so as to represent falsely that owner or user thereof makes or sells goods or performs services on or in connection with which such mark is used. (§ 4).

Collective mark is defined as trademark or service mark used by members of cooperative, association, or other collective group or organization or which such cooperative, association, or other collective group or organization has bona fide intention to use in commerce and applies to register on Principal Register and includes marks that indicate membership in union, association or other organization.

Certification mark is defined as mark used by person other than owner of mark or which its owner has bona fide intention to permit another person to use in commerce and files application to register on Principal Register. Such mark may certify regional or other origin, material, mode of manufacture, quality, accuracy or other characteristics of such goods or services, or that work or labor on goods or services was performed by members of union or other organization. (§ 45). Certification marks can be cancelled at any time upon proper showing for any of grounds specified in § 14(5). Nothing in § 14(5) shall be deemed to prohibit registrant from using its certification mark in advertising or promoting recognition of certification program or of goods or services meeting certification standards of registrant. Such uses of certification mark are not grounds for cancellation under § 14(5), so long as registrant does not itself produce, manufacture, or sell any of certified goods or services to which its identical service mark is applied. See topic 1.13 Cancellation.

1.19 COLOR:

Color alone (e.g., color of product itself as opposed to color embodied in particular logo or design) can be federally registered and protected as trademark if it meets "ordinary legal trademark requirements". (Qualitex Co. v. Jacobson Prods. Co., 115 S. Ct. 1300 [1995]). However, color can never be inherently distinctive and can only be protected upon showing of secondary meaning. (Wal-Mart Stores, Inc. v. Samara Bros., Inc., 120 S. Ct. 1339 Copyright Cases or Patent Cases [2000]). Color also is registrable as feature of mark if drawing is presented on drawing page in color and describes color and placement of color on mark (prior law required lining drawing for color, which is no longer to be used).

1.20 COMMON LAW AND EQUITABLE RIGHTS:

Rights in marks can exist independently of federal registration under common law and/or state statutes and under unfair competition provisions of Act. (§ 43[a]). Revision Act places some limitation on traditional common law rights by providing for constructive use, as of date of application, for marks that are subject of intent-to-use applications. If such marks mature to registration, they will enjoy priority over common law marks first used after application date even if common law marks were in commerce prior to actual use of registered marks. See topic 1.23 Constructive Use.

1.21 CONCURRENT USE:

Commissioner may register, on Principal Register, as concurrent registrations, same or similar marks to more than one registrant when they have become entitled to use such marks as result of their concurrent lawful use thereof in commerce prior to earliest filing date of applications pending or of any registration issued or prior to July 5, 1947 for marks registered under prior acts. Use prior to filing date of application or registration is not required if owner thereof consents to grant of concurrent registration to applicant. Concurrent registrations may be granted by Commissioner after determination that confusion or mistake or deceit of purchasers is not likely to result from continued concurrent use of marks, under conditions and limitations as to mode or place of use of mark or goods in connection with which such registrations may be granted, which conditions and limitations will be prescribed in grant of concurrent registrations. Concurrent registrations are most frequently granted with geographical limitations. Concurrent registrations may also be issued when court of competent jurisdiction has finally determined that more than one person is entitled to use same or similar marks in commerce. (§ 2[d]). Applications based solely on § 44 and § 66(a) are not subject to concurrent use registration proceedings. (Miscellaneous Changes to Trademark Rules of Practice, 37 FR 67759 [effective as of Jan. 16, 2009] [citing Rules 2.73 and 2.99[g]). Because § 2(d) of Trademark Act requires concurrent lawful use in commerce by parties to concurrent use proceeding, PTO deems it inappropriate to allow amendment to seek concurrent use absent allegation and evidence of use in commerce.

1.22 CONSTRUCTIVE NOTICE:

Registration of mark is constructive notice, as of date of registration, of registrant’s claim of ownership of mark.(§ 22). Principal effect of this provision is to put public on notice so that no one can claim innocent adoption of previously registered mark. See topic 1.50 Marking.

1.23 CONSTRUCTIVE USE:

Contingent on registration of mark on Principal Register, filing of application to register such mark shall constitute constructive use of mark, conferring right of priority, nationwide in effect, on or in connection with goods or services specified in registration against any other person except for person whose mark has not been abandoned and who, prior to such filing: (1) has used mark; (2) has filed application to register mark that is pending or has resulted in registration of mark; or (3) has filed foreign application to register mark on basis of which he or she has acquired right of priority, and timely files application under § 44(d) to register mark that is pending or has resulted in registration of mark.

1.24 COPIES:

Written or printed copies of any records, books, papers or drawings belonging to Office and relating to trademarks, when authenticated by seal of Office and certified by Commissioner thereof, will be evidence in all cases where originals would be evidence.

Copies of registered trademarks can be obtained from Office for fee indicated under topic Fees.

1.25 COUNTERFEIT MARKS:

Trademark Counterfeiting Act of 1984, Pub. L. 98-473, 98 Stat. 2178 (1984) amended Trademark Act to provide specific and strengthened remedies against trademark counterfeiters, including, especially, detailed guidelines for issuance of ex parte seizure orders against counterfeit goods and related business records. (§ 34[d]). If counterfeiting is proved, Act provides that court shall, unless extenuating circumstances exist, enter judgment for three times defendant's profits or plaintiff's damages, whichever is greater, plus attorneys' fees. Prejudgment interest may also be awarded. (§ 35[b]). See topic 1.55 Remedies.

Counterfeiting Act also established criminal sanctions against trademark and product counterfeiting. (18 U.S.C. § 2320).

1.26 DAMAGES:

See topic 1.55 Remedies.

1.27 DECLARATION:

Rule 2.20 provides as alternative for oath, affidavit, verification or sworn statement required as part of application for trademark registration, or as part of other documents relating to trademark matters in Office when prescribed in individual rules, signed declaration that requires no attendance by applicant before any official, provided declaration substantively meets certain requirements that are satisfied by following approved form:

"Undersigned declares further that all statements made herein of his own knowledge are true and that all statements made on information and belief are believed to be true and further that these statements were made with knowledge that willful false statements and like so made are punishable by fine or imprisonment, or both, under section 1001 of Title 18 of U.S. Code and that such willful false statements may jeopardize validity of application or document, or any registration resulting there from."

Foregoing applies to applications and documents executed either in U.S. or abroad.

1.28 DESCRIPTIVE TERMS:

Terms that are merely descriptive or primarily geographically descriptive of goods or services offered under mark are not registrable on Principal Register as trademarks or service marks (§ 2[e][1], [2]) unless it can be shown that such terms have acquired "secondary meaning", that is, they have become distinctive as indicators to public that goods or services originate from single source. This can be accomplished by submitting proof of substantially continuous and exclusive use of mark in commerce. If such showing can be made for five years preceding date on which claim of distinctiveness is made, it will constitute prima facie evidence of distinctiveness. (§ 2[f]). Such showing cannot be made for generic terms. See topic 1.40 Generic Terms.

Terms that are primarily geographically deceptively misdescriptive of goods or services offered under mark are not registrable on Principal Register as trademarks or service marks (§ 2[e][3]), unless it can be shown that such terms became distinctive of applicant's goods or services in commerce before Dec. 8, 1993 (§ 2[f]).

1.29 DILUTION:

Federal Trademark Dilution Act ("FTDA") of 1995, Pub. L. 104-98 added new § 43(c) to Trademark Act (15 U.S.C. § 1125[c]) to provide owners of famous marks cause of action against unauthorized commercial uses of mark that dilute its distinctiveness or disparage or tarnish it. Likelihood of confusion need not be shown to recover under this section. Trademark Amendments Act of 1999 extended coverage of this section to provide statutory ground for opposition or cancellation; dilution is not ground for ex parte refusal by Office and is sole ground for inter partes proceedings. In Moseley v. V Secret Catalogue, Inc., 537 U.S. 418 (2003), Supreme Court held that, under FTDA, plaintiff must prove *actual* dilution of famous mark, rather than likelihood of dilution, by objective proof of actual injury to economic value of famous mark. Plaintiff, owner of VICTORIA'S SECRET mark, lost on summary judgment to owner of adult novelty store "Victor's Little Secret" because it failed to show evidence of *actual* negative impact of store's name on its famous mark. Trademark Dilution Revision Act of 2006 ("TDRA"), Pub. L. 109-312, rectified some problems in judicial interpretation of FTDA, specifically Supreme Court's requirement to prove *actual* dilution. To prevail on dilution claim, trademark owner must now prove following: (1) It owns "distinctive" mark, either inherently distinctive or through acquired distinctiveness; (2) its mark is famous to general U.S. consuming public (not merely in particular market niche); (3) defendant commenced use of allegedly diluting mark or trade name after plaintiff's mark became famous; and (4) defendant's use is *likely* to cause dilution by blurring or tarnishment of famous mark. (15 U.S.C. § 1125[c]). Blurring is association arising out of similarity between trademark or trade name and famous mark that impairs distinctiveness of famous mark (15 U.S.C. § 1125[c][2][b]); tarnishment is association between mark or trade name and famous mark that harms reputation of famous mark. (15 U.S.C. § 1125[c][2][c]). On remand to district court from Supreme Court, *V Secret* court found TDRA applied to remanded dilution claim and granted plaintiff's motion for summary judgment because it showed likelihood of dilution of VICTORIA'S SECRET mark. (V Secret Catalogue v. Moseley, 558 F. Supp. 2d 734 [W.D.Ky., May 21, 2008]).

For both TTAB proceedings and federal court dilution litigation, parties' marks must be very similar. (Carefirst of Md., Inc. v. First Health of Carolinas, Inc., 77 USPQ2D 1492 [TTAB 2005] [CAREFIRST and FIRSTCAROLINA CARE for competitive healthcare plans not similar enough for opposition founded on dilution]).

1.30 DISCLAIMER:

In any application for registration, Commissioner will require unregistrable matter to be disclaimed, but such disclaimer will not prejudice or affect applicant's or owner's rights then existing or thereafter arising in disclaimed matter, nor will such disclaimer prejudice or affect applicant's or owner's rights of registration on another application of later date if disclaimed matter has become distinctive of applicant's or owner's goods or services. (§ 6). Registration may be surrendered or disclaimed in part upon payment of fee of $100. (§ 7, Rule 2.173).

Amendments seeking to eliminate disclaimers are prohibited; and amendment seeking elimination of disclaimer will be permitted only if deletion of disclaimed portion of mark is also sought. (Rule 2.173[g]).

1.31 DOMESTIC REPRESENTATIVE:

If applicant is not domiciled in U.S., he may designate, by written document filed in Office, name and address of some person resident in U.S. on whom may be served notices or process in proceedings affecting mark. Likewise, where assignee is not domiciled in U.S., resident representative may be appointed in paper separate from assignment.

1.32 DRAWINGS:

Upon passage of TLTIA, separate drawing page is no longer mandatory, but still recommended by Office. (Rule 2.52). Sound, scent, and non-visual marks do not require drawing. In those cases, applicant should instead submit detailed description of its mark.

Drawing pages for applications submitted on paper should bear typewritten heading, beginning one inch (2.5 cm.) from top edge and not exceeding one-third of sheet, using caption "DRAWING PAGE" and listing in separate lines, applicant's complete name, applicant's post-office address, dates of first use in application under § 1(a) of Act; priority filing date of relevant foreign application in application claiming benefit of prior foreign application in accordance with § 44(d); and goods or services recited in application (or typical item of goods or services if number of items are recited in application).

Drawing of trademark must be substantially exact representation thereof as actually used or intended to be used on or in connection with goods, except that if trademark consists only of word, letter or numeral, or any combination thereof, not depicted in special form, drawing may be mark typed in capital letters. If mark is not capable of representation by drawing, application must contain adequate description of mark. If mark is displayed in color or color combination, applicant must name color(s) and describe where color(s) appear on mark. (Rules 2.37 and 2.51).

All drawings for applications submitted on paper, except when typed in capital letters must be made with pen or by process that will provide high definition upon reproduction. Photolithographic reproduction or printer's proof copy may be used if otherwise suitable. Every line and letter must be black, clean, sharp, and solid, and they must not be too fine or crowded. Broken lines should be used in drawing of mark on goods, or on packaging therefore, or to show matter not claimed as part of mark, or both, as appropriate. Surface shading, when used, should be open. In application to register mark with three-dimensional features, drawing shall depict mark in perspective in single rendition thereof.

In drawings for applications submitted on paper, size of mark must be such as to leave margin of at least one inch (2.5 cm.) on sides and bottom of paper and at least one inch (2.5 cm.) between it and heading. It is preferable that drawing be 2.5 inches (6.1 cm.) high and/or wide, but not larger than 4 inches (10.3 cm.) by 4 inches (10.3 cm.). However, applications accompanied by drawings on which mark is larger than 4 inches by 4 inches will not be denied filing date. In drawings for applications filed through TEAS or TEAS Plus, digitized images of special form drawings must be no larger than 3.15x3.15 inches (8x8 cm); must be in .jpg format and must be scanned at no less than 250 and no more than 350 dots per inch (dpi).

Where color is feature of mark, drawing must show mark in color, and applicant must name color(s) and described where color(s) appear on mark. If color is not claimed, drawing must show mark in black and white. (Rule 2.52). For all special form drawings, description of mark must be included. (Rule 2.52 [b][5]).

1.33 DURATION:

Unless sooner terminated by cancellation, disclaimer in whole, or surrender, registrations remain in force for ten years from their respective registration dates with right to renewal for similar terms except that registration issued or renewed prior to Nov. 16, 1989 has duration of 20 years, with ten year renewals available. (§§ 8, 9; Rule 2.181).

1.34 EQUIVALENTS:

Word and picture that convey same idea may be each registered to same registrant, or, registration of one of alternatives may also prevent another from registering and protect against unauthorized use of other "equivalent" mark. Similarly, English word and its corresponding foreign word may be considered equivalents, especially if foreign word is of language that is known to or spoken by substantial part of public.

1.35 FAIR USE:

To extent right to use mark has become incontestable under § 15, registration is conclusive evidence of validity of mark, registrant's ownership of mark and exclusive right to use mark in commerce. Such conclusive evidence of right to use is subject to proof of infringement and defense that allegedly infringing mark is used descriptively, not as mark, fairly and in good faith, only to describe goods or services, or their geographic origin, or is party's individual name in his own business, or individual name of anyone in privity with such party. (§ 1115[b][4]). In trademark infringement case, defendant has no independent burden to negate likelihood of confusion in raising affirmative defense that term is used descriptively, not as mark, fairly and in good faith. (KP Permanent Make-Up, Inc. v. Lasting Impression I, Inc., 543 U.S. 111 [2004]). Under *KP Permanent*, some possibility of consumer confusion is compatible with fair use, but extent of any likely consumer confusion is relevant for determination whether "defendant's use is objectively fair." (543 U.S. at 123.)

1.36 FEDERAL TRADE COMMISSION:

Federal Trade Commission may apply to cancel any mark originally registered on Principal Register on grounds enumerated as (1) or (2) under topic Cancellation, supra. It may not apply to cancel registration on Supplemental Register. (§ 14; Rule 2.111).

1.37 FEES:

Trademark Fees.

Following fees and changes are established by Patent and Trademark office for trademark cases:

(a) Trademark Process Fees:

(1) For filing an application, per class—$275.00 for TEAS Plus; $325 for TEAS; $375 for paper submission

(2) For filing an amendment to allege use under section 1(c) of the Act, per class—$100.00

(3) For filing a statement of use under section 1(d)(1) of the Act, per class—$100.00

(4) For filing a request under section 1(d)(2) of the Act for a six-month extension of time for filing a statement of use under section 1(d)(1) of the Act, per class—$150.00

(5) For filing an application for renewal of a registration per class—$400.00

(6) Additional fee for filing a renewal application made within six months after the expiration of the registration, per class—$100.00

(7) Correcting a deficiency in a renewal application—$100.00

(8) For filing to publish a mark under section 12(c), per class—$100.00

(9) For issuing a new certificate of registration—$100.00

(10) For a certificate of correction of registrant's error—$100.00

(11) For filing a disclaimer to registration—$100.00

(12) For filing an amendment to a registration—$100.00

(13) For filing an affidavit under § 8 of the Act, per class—$100.00

(14) Additional fee for filing § 8 affidavit during grace period, per class—$100.00

(15) Correcting a deficiency in § 8 affidavit—$100.00

(16) For filing an affidavit under § 15 of the Act, per class—$200.00

(17) For filing a combined affidavit under §§ 8 and 15 of the Act, per class—$300.00

(18) For petitions to the Commissioner—$100.00

(19) For filing a petition to cancel, per class—$300.00

(20) For filing a notice of opposition, per class—$300.00

(21) For ex parte appeal to the Trademark Trial and Appeal Board, per class—$100.00

(22) Dividing an application, per new application (file wrapper) created—$100.00

(b) Trademark Service Fees:

(1) For printed copy of registered mark, copy only

(i) Regular service—$3.00

(ii) Expedited local service—$6.00

(2) Certified copy of registered mark with title and/or status or of trademark application as filed:

(i) Regular service—$15.00

(ii) Expedited local service—$30.00

(3) Certified or uncertified copy of a trademark-related file wrapper and contents—$50.00

(4) Certified or uncertified copy of trademark document except as otherwise provided in this section—$25.00

(5) For assignment records, abstracts of title and certification per registration—$25.00

(6) Comparing and certifying copies, per document, per copy—$25.00

(7) Self-service copy charge, per page—$0.25

(8) For recording each trademark assignment, agreement or other paper relating to the property in a registration or application

(i) First property in a document—$40.00

(ii) For each additional property in the same document—$25.00

(9) Labor charges for services, per hour or fraction thereof—$40.00

(10) Unspecified other services, excluding labor—At Cost

(11) X-Search terminal session time, per hour—$40.00

(12) Trademark coupons—$3.00

Fees are subject to change, usually on Oct. 1. Call Trademark Assistance Center at (703) 308-9000 or go to Office website at www.uspto.gov for current fee information.

Subscription (through Superintendent of Documents, Government Printing Office, Washington, D.C. 20402), for Official Gazette (Trademark Section) issued weekly, $766 per year domestic; foreign mailing $957.50; single copies $42.50 each domestic, $53.13 foreign.

1.38 FILING OF PAPERS OR FEES:

Papers or fees may be deposited directly in Office, mailed by regular mail to Assistant Commissioner for Trademarks, P.O. Box 1451, Alexandria, VA 22313-1451, or filed through PTO’s electronic filing systems (TEAS or TEAS Plus for application-related papers, TTABVue for opposition and cancellation related papers). Date of filing corresponds to date of receipt by Office (Rule 1.6). However, with exception of new applications, every paper will be considered timely filed as of date it is deposited with U.S. Postal Service as first class mail if accompanied by “certificate of mailing” in appropriate form. (Rule 1.8).

Effective June 24, 2002, Express Mail procedure provided in 37 C.F.R. § 1.10 no longer applies to following trademark documents: trademark/service mark applications; statements of use; amendments to allege use; requests for extensions of time to file statements of use; declarations of continued use under § 8; renewal requests under § 9; combined declarations under §§ 8 and 9; combined declarations under §§ 8 and 15, and requests to change or correct addresses. If these documents are filed by Express Mail, they will receive filing date as of date of receipt in Office and not date of deposit with U.S. Postal Service.

Certain papers may also be filed through Trademark Office’s electronic filing system, known as TEAS, which is available on Office’s website, www.uspto.gov. Papers that may be filed through TEAS include new applications, preliminary amendments, office action responses, statements of use, extensions of time to file statements of use, renewals (§ 9 declarations), declarations of continued use (§ 8 declarations), declarations of incontestability (§ 15 declarations), and forms to change correspondence addresses.

On July 18, 2005, PTO initiated TEAS Plus filing system for new applications. Application filed through TEAS Plus receives lower filing fee of $275 per class. In return for paying lower filing fee, applicants who file using TEAS Plus agree to submit complete applications electronically, and to communicate electronically only with USPTO about application. List of all of requirements to qualify for filing through TEAS Plus is available at www.uspto.gov or in Federal Register at 70 Fed. Reg. 38768.

More information about TEAS may be found on Trademark Office website, located at www.uspto.gov.

Note: Trademark Office released its 21st Century Strategic Plan in July 2002, and it is available on Office website, located at www.uspto.gov. Designed to increase use of electronic filing system and improve speed and quality, Plan proposes, among other things, to create five filing options, amend filing fees, amend time permitted to respond to official actions, and to change signature and specimen requirements. As of June 2003, Trademark Office indicated that there will not be any additional versions of Plan. Most aspects of proposed Plan have not yet been implemented. PTO has implemented plan to reduce new application filing fees to $275 per class if applicant uses TEAS Plus system.

1.39 FOREIGN REGISTRATION:

Laws of foreign countries differ from those of U.S. in respect to trademark rights in that in most foreign countries such rights are entirely, or essentially, statutory. Few countries, including most of English speaking ones, have common law of unfair competition, but even in these statutory trademark registration is of great benefit to U.S. citizen trading in that country. In many countries with legal system derived from Roman, trademark rights are created and acquired by registration and not by use, direct opposite to common law principle.

Local statute determines what subject matter is registrable as trademark, and many foreign countries permit registration of descriptive and geographical marks. Some countries require home registration as condition precedent to local registration and for this any U.S. federal trademark registration is sufficient and ordinarily procurable. If federal registration cannot be secured, some foreign countries are satisfied by state registration.

Duration of term of foreign trademark registration varies according to local statute, but is usually ten years or more, with right to renewal at end of term. Some countries provide for fees or taxes in addition to those of initial application and of renewal at end of term.

Marking goods with notice of foreign registration is usually optional and usually goes only to possible recovery of damages in event of infringement suit. Some countries, especially current or former members of British Commonwealth, require that names of local licensees be filed as “registered users”, often with copy of license agreement.

Once foreign registration is obtained, foreign law is ordinarily quite effective against infringement, most countries supplementing what corresponds to U.S. injunctive relief with fine or jail sentence to infringer. In most countries infringing goods may be excluded from entry through customs.

All U.S. manufacturers having foreign trade of any substantial extent are strongly recommended to insure their foreign markets by registration of their trademarks in their own name, in particular in foreign countries where they sell. Failure to do so is bound to result in delay in suppressing possible infringement and in countries where registration determines rights over prior use, competitor or possibly their own sales agent may register the mark in its own name, and U.S. manufacturer may then find himself excluded from that market unless he changes his marking and packaging, or buys back registration at registrant’s price.

Varying formalities in drawing and signing necessary application papers and difficulties in paying application fees makes it essential that specialist be consulted in effecting foreign trademark registration. U.S. accession to Madrid Protocol can ease some of administrative burdens of foreign registration, although it is not best means for foreign registration in every case.

1.40 FRAUD:

No action can be maintained under certificate of registration fraudulently obtained, and fraudulent securing of incontestable right to use under § 15 is forfeiture of right to have registration treated as conclusive evidence of registrant’s exclusive right to use under § 33(b). Failure of applicant to disclose to Office existence of prior registration is not fraud; and applicant has no duty to investigate potential conflicting uses that might be found through trademark search. (Maids to Order of Ohio, Inc. v. Maid-to-Order, Inc., 78 USPQ2D 1899 [TTAB 2006]). In In re Bose Corp., United States Court of Appeals for Federal Circuit held that trademark is obtained fraudulently under Lanham Act if applicant or registrant knowingly makes false, material misrepresentation with intent to deceive PTO. “There is no fraud if a false misrepresentation is occasioned by an honest misunderstanding or inadvertence without a willful intent to deceive.” (580 F.3d 1240, 91 U.S.P.Q.2D (BNA) 1938). Decision in Bose significantly limited decisions in series of cases beginning with 2003 opinion in Medinol Ltd. v. Neuro Vasx Inc., 67 USPQ2d 1205 (TTAB 2003), where TTAB held that specific intent to commit fraud is not required and that fraud occurs when applicant or registrant makes false, material misrepresentation to PTO that applicant or registrants knew or should have known was false.

Intent for purpose of proving fraud must often be inferred from circumstances and related statements made by applicant/registrant. (See *First Int’l Servs. Corp. v. Chuckles Inc.*, 5 U.S.P.Q.2d (BNA) 1628 [TTAB 1988]; *Torres v. Cantine Torresella s.r.l.*, 808 F.2d 46 [Fed. Cir. 1986]).

Registration obtained by fraud renders registrant liable for damages caused thereby. (§ 38).

1.41 GENERIC TERMS:

Term is generic if it has become so associated with product or service that is recognized by consumers as another name for product or service. Taken another way, wording is generic if it serves as term or art or is genus for all goods or services of that description. Such terms are not registrable under any circumstances, and attempt to show that they have acquired secondary meaning under § 2(f) will not be accepted, as such terms are deemed incapable of becoming distinctive. If registered mark has become generic term, it is subject to cancellation by petition of any person or entity or by Federal Trade Commission. (§ 14). Examples of former trademarks that became generic are: aspirin, cellophane, and trampoline.

Dual-use terms are terms that public uses to distinguish someone else's goods from those of others. Although not strictly generic terms, dual-use terms cannot be protected as trademarks. Otherwise, trademark owner could withdraw from public domain name that public uses to denote someone else's goods, leaving that someone and his customers speechless.

1.42 IMPORTATION:

No article of imported merchandise that copies or simulates name of any domestic manufacturer or trader, or of any manufacturer or trader located in any foreign country that, by treaty, convention, or law affords similar privileges to citizens of U.S., or that copies or simulates registered trademark, other than one registered on Supplemental Register or under Act of 1920, or bears name or mark calculated to induce public to believe that article is manufactured in U.S., or that it is manufactured in any foreign country or locality other than country or locality in which it is in fact manufactured, will be admitted to entry at any customhouse of U.S.; and, in order to aid officers of customs in enforcing this prohibition, any domestic manufacturer or trader, and any foreign manufacturer or trader, who is entitled under provisions of treaty, convention, declaration, or agreement between U.S. and any foreign country to advantages afforded by law to citizens of U.S. in respect to trademarks and commercial names, may for fee of $190 per class, require his name and residence, and name of locality in which his goods are manufactured, and copy of certificate of registration of his trademark to be recorded in books kept for this purpose in Department of Treasury and may furnish to department facsimiles of his name, name of locality in which his goods are manufactured, or of his registered trademark, and thereupon Secretary of Treasury will cause one or more copies of same to be transmitted to each collector or other proper officer of customs. (§ 42; 19 USC § 1526). U.S. Customs Service Regulations that were recently largely upheld by Supreme Court restrict ability of U.S. registrant to have Customs prevent "parallel" or "grey market" imports of genuine goods manufactured abroad by company related to registrant even if those goods were not intended for distribution in U.S. (K Mart Corp. v. Cartier, Inc., 108 S.Ct. 1811 [1988]).

1.43 INCONTESTABILITY:

Except on grounds enumerated under topic Cancellation part (1), in this Digest, and except to extent, if any, to which use of mark registered on Principal Register infringes valid right acquired under law of any state or territory by use of mark or trade name continuing from date prior to date of registration of such registered mark, right of registrant to use such registered mark in commerce for goods or services on or in connection with which such registered mark has been in continuous use for five consecutive years subsequent to date of such registration and is still in use in commerce, will be incontestable: Provided, that:

(1) there has been no final decision adverse to registrant's right of ownership of such mark for such goods or services or to registrant's right to register the mark or keep it on the register; and there is no pending Office or court proceeding involving said rights; and

(2) affidavit or declaration is filed with Commissioner, within one year after expiration of five-year period, setting forth those goods or services stated in registration on or in connection with which such mark has been in continuous use for such five consecutive years and is still in

use in commerce, and other matters specified in paragraph above, and also provided that no incontestable right may be acquired in mark that is generic name for goods or services or portion thereof, for which it is registered. (§ 15).

Registrations on Supplemental Register are not entitled to benefits of incontestability. (§ 26).

To extent that right to use registered mark has become incontestable under § 15, registration shall be conclusive evidence of validity of registered mark and of registration of mark, of registrant's ownership of mark, and of registrant's exclusive right to use mark in commerce. Such conclusive evidence shall relate to exclusive right to use mark on or in connection with goods or services specified in affidavit filed under § 15, or in renewal application filed under § 9, subject to any conditions or limitation in registration or in such affidavit or renewal application. Such conclusive evidence shall be subject to proof of infringement and to following defenses or defects:

(1) registration or incontestable right to use mark was obtained fraudulently;

(2) mark has been abandoned;

(3) registered mark is being used, by or with permission of registrant or person in privity with registrant, so as to misrepresent source of goods or services;

(4) name, term or device charged to be infringement is use, otherwise than as mark, of individual name of accused party in his own business, or of individual name of anyone in privity with such party, or of term or device which is descriptive of and used fairly and in good faith only to describe goods or services of such party, or their geographic origin;

(5) allegedly infringing mark was adopted without knowledge of registrant's prior use and has been continuously used by alleged infringer or those in privity with him from date prior to (A) date of constructive use of mark under § 7(c), (B) registration of mark if application therefor was filed prior to Nov. 16, 1989, or (C) publication of mark under § 12(c). This defense is limited to area in which such continuous prior use is proved;

(6) allegedly infringing mark was registered and used by accused party prior to registration or republication of registrant's mark (under § 12), and accused mark has not been abandoned. This defense applies only to area in which accused mark was used prior to date of registration or republication of registrant's mark;

(7) mark has been or is being used to violate antitrust laws of U.S.; or

(8) equitable principles, including laches, estoppel, and acquiescence, are applicable. (§ 33[b]).

Whenever registered mark is cancelled for any reason (see topic 1.13 Cancellation), incontestable right is lost because it is dependent upon existence of registration.

1.44 INFRINGEMENT:

Any person who, without consent of registrant: (a) Uses in commerce any reproduction, counterfeit, copy, or colorable imitation of registered mark in connection with sale, offering for sale, distribution, or advertising of any goods or services on or in connection with which such use is likely to cause confusion, or to cause mistake, or to deceive; or (b) reproduces, counterfeits, copies or colorably imitates registered mark and applies such reproduction, counterfeit, copy or colorable imitation to labels, signs, prints, packages, wrappers, receptacles, or advertisements intended to be used in commerce upon or in connection with sale, offering for sale, distribution, or advertising of goods or services on or in connection with which such use is likely to cause confusion, or to cause mistake, or to deceive; is liable in civil action by registrant for remedies hereinafter described. Under subsection (b) registrant is not entitled to recover profits or damages unless acts have been committed with knowledge that such imitation is intended to be used to cause confusion, or to cause mistake, or to deceive. (§ 32[1]). See topic 1.55 Remedies.

Principal registration is admissible in evidence and is prima facie evidence of registrant's exclusive right to use registered mark in commerce on goods or services specified in registration subject to any conditions or limitations stated therein, but does not preclude opposing party from proving any legal or equitable defense or defect which might be asserted if such mark had not been registered. (§ 33[a]).

If right to use registered mark has become incontestable, certificate is conclusive evidence of registrant's exclusive right subject to defenses or defects recited in statute. See topics 1.14 Certificate of Registration; 1.42 Incontestability.

1.45 INJUNCTION:

See topic 1.55 Remedies.

1.46 INTENT TO USE APPLICATIONS:

As provided by Trademark Law Revision Act, effective Nov. 16, 1989, Office began accepting applications for registration of marks that have not yet been used in commerce but which contain representation that applicant has bona fide intent to use mark in commerce on or in connection with specified goods or services. See topic Application for Registration for application requirements.

Application will be examined for registrability under § 2 and other applicable criteria. Office actions refusing registration or pointing out technical informalities must be responded to within six months, as in use-based applications. If responses and/or amendments are satisfactory, or if no office action is issued to begin with, mark will be published for opposition in usual manner and may be opposed at that stage. After mark clears publication or opposition process, Office will issue Notice of Allowance (§ 13[b][2]), after which applicant has six months to file verified statement of use and one specimen of mark as used in commerce, together with fee of $100 per class. (Rule 2.56). Statement of use must state that mark is in use in commerce, specify date of first use in commerce for each of goods or services specified in Notice of Allowance. Statement of use will be examined, mainly for issues that could not have been examined earlier, for example, whether there is proper trademark usage, since specimen was not previously available. Although Act provides that this second examination may include all factors considered in first examination, such as likelihood of confusion with registered mark, descriptiveness and the like, legislative history of Revision Act indicates that second examination is intended to consider issues not previously addressed, and this is Office policy, as expressed in TMEP. After mark passes second examination, it will be registered. (§ 1[d][1]; Rules 2.81[b], 2.88). Time for filing statement of use may be extended for five six-month periods upon payment of fee of $150 per class for each extension and filing formal request for extension containing required representations including showing of good cause in second or subsequent request for extension of time to file statement of use. Although second and subsequent extension requests that do not include showing of good cause will be denied, such showing will be accepted on petition to Commissioner. (§ 1[d][2]; Rule 2.89). See topic 1.62 Statement of Use.

1.47 INTERFERENCES:

Upon petition showing extraordinary circumstances, Commissioner may declare that interference exists when application is made for registration of mark that so resembles mark previously registered by another, or for registration of which another has previously made application, as to be likely when used on or in connection with goods or services of applicant to cause confusion, mistake or to deceive. No interference shall be declared between application and registration of mark right to use of which has become incontestable. (§ 16 and Rule 2.91).

1.48 JURISDICTION:

U.S. district and territorial courts have original jurisdiction, and Courts of Appeal of various Circuits have appellate jurisdiction of all actions respecting registered trademarks without regard to amount in controversy or to diversity or lack of diversity of citizenship of parties. (§ 39). Writs of Certiorari may be granted by Supreme Court of U.S. for review of such cases. (§§ 1254 and 1255, Title 28). See topic Appeals regarding appellate jurisdiction over decisions by Commissioner and TTAB.

1.49 LIKELIHOOD OF CONFUSION:

Except for possibility of concurrent registrations (see supra, topic Concurrent Use), § 2(d) prohibits registration of mark that "consists of or comprises mark that so resembles mark registered in Patent and Trademark Office or mark or trade name previously used in United States by another and not abandoned, as to be likely when used on or in connection with goods of applicant to cause confusion, or to cause mistake or to deceive." § 32 of Act defines as infringement of statutory registration rights unauthorized use in commerce by any person of any reproduction, counterfeit, copy, or colorable imitation of registered mark in connection with sale, offering for sale, distribution or advertising of any goods or services on or in connection with which such use is likely to cause confusion or to cause mistake or to deceive.

Office and courts, in testing trademarks for confusing similarity, consider all factors relevant to whether or not purchasing public will reasonably believe that defendant's goods were produced or sponsored by plaintiff or vice versa, with particular attention being paid to nature of plaintiff's mark such as its strength or weakness; differences if any in defendant's mark; nature and similarity of involved goods or services, their price and value to purchaser and whether or not they ordinarily come from single source; markets and customary methods of merchandising goods or services; and sophistication and probable discrimination of particular part of public interested in purchasing goods or services involved.

1.50 MADRID PROTOCOL:

In Nov. 2002, Trademark Act was amended to include new provisions of Madrid Protocol. Madrid Protocol provides process of filing international application with requests for extensions of protection to any of member countries, (known as "outbound" applications) and provides process for foreign trademark owners to seek trademark registration in U.S. through Protocol (known as "inbound" applications). Inbound applications are subject to same registrability requirements as applications filed in U.S. under §§ 44(d) and 44(e). Foreign trademark owners seeking protection of their marks in U.S. through Madrid Protocol should designate U.S. counsel to receive and respond to office actions that arise during prosecution of application.

For U.S. applicants, designed to simplify acquisition and maintenance of trademarks across many countries, Madrid Protocol enables U.S. trademark owner to file application with PTO and apply to extend those trademark rights to most of other countries that participate in Madrid Protocol. Result of Madrid Protocol filing is International Registration, administered by World Intellectual Property Organization (WIPO), located in Geneva, Switzerland. International Registration does not act as "super" or umbrella trademark registration, enforceable on its own throughout member countries. Instead, it represents bundle of independent national registrations.

WIPO acts as middleman of sorts between applicants and trademark offices of each member country, receiving initial application from applicant's home-country trademark office, reviewing that application to ensure it contains certain basic filing information, collecting and distributing required filing fees, and forwarding application to member countries' national trademark offices, each of which examines application under its own standards and laws.

Although Madrid Protocol may offer streamlined means of filing for international trademark protection as well as cost savings in some cases, it has some significant disadvantages, particularly for U.S. trademark owners. U.S. trademark owners seeking to register their marks internationally should always compare costs and benefits of Madrid Protocol filing against costs and benefits of filing directly in each country's national trademark office or, for member countries of EU, filing for Community Trademark (CTM).

1.51 MARKING:

§ 29 provides that proper notice of registration to accompany registered mark in use may be any one of these three markings: "Registered in U.S. Patent and Trademark Office," "Reg. U.S. Pat. & Tm. Off." or letter R enclosed within circle thus (R). This applies to registrations under any of acts. Failure so to mark deprives registrant of its federal right to monetary recovery for infringement except as defendant is shown to have had actual notice of registration. Separate recovery may be had, however, for false designation of origin under § 43(a) of Act.

Marking goods with any of forms specified above when in fact no such registration has been obtained may give rise to equitable defense of "unclean hands" in proceedings in either courts or Office. Rule applies to all Office proceedings, including applications for registration. However, Trademark Act does not include penalty for false marking.

1.52 NOTICE OF ALLOWANCE:

Once intent-to-use application has cleared opposition phase, Office will issue Notice of Allowance. (§ 13[b]). Notice will state serial number of application, name of applicant, correspondence address, mark, identification of goods or services, and date of mailing notice. Applicant will then have six months from date of notice to file statement of use or request six-month extension of time within which to file statement of use. (Rule 2.81[b]). See topics 1.45 Intent To Use Applications; 1.52 Opposition; 1.62 Statement of Use.

1.53 OPPOSITION:

When it appears from Office examination for registrability that application for registration on Principal Register is allowable, mark and data on application are published in Official Gazette so as to give public opportunity to oppose registration of mark. Within 30 days after such publication any person who believes he would be damaged by registration of mark upon Principal Register may, upon payment of $300 fee for each class, oppose same by filing written opposition, which must allege facts tending to show why Opposer would be damaged by registration and state specific grounds for opposition. Opposition may be signed by attorney. Opposition papers may be filed through TTABVue system, available on PTO's website. If more than one person is joined in opposition, $300 fee for each class sought to be opposed for each person so joined is required. Upon written request prior to expiration of 30-day publication period, time for filing opposition may be extended. Due to accession to Madrid Protocol, rules regarding extension request filings have changed. For extensions of time to oppose applications filed under §§ 1(a), 1(b), 44(d) and/or 44(e), extension request may be submitted on paper or through TTAB's TTABVue program on PTO's website. Extensions of time to oppose application filed under § 66(a) must be filed through TTABVue program. First extension of time to oppose application extends deadline by 30 days; second extension of time extends deadline by 60 days (for total of 120 days from application's date of publication). Thereafter, potential opposer may seek one more 60-day extension, but only with consent of applicant. No further extensions will be granted. (Rules 2.101, 2.102).

Opposition must state cause of action. For oppositions filed against applications based on § 66(a), grounds of opposition may not be amended after filing. Intent-to-use application may be opposed and may serve as basis for filing opposition. See topic 1.08 Amendments. If applicant is of opinion that notice of opposition does not state cause of action, or show damage to Opposer, he may move to dismiss opposition.

Effective Nov. 1, 2007, opposer must serve Notice of Opposition on applicant at applicant's last known address of record on file with PTO.

Applicant has 40 days to answer, counting from date of institution.

Pleading and procedure is similar to that in cancellations. See topics 1.13 Cancellation, and 1.09 Appeals.

There is no provision for opposition to registration of marks on Supplemental Register, but party deeming himself injured by such registration may at any time apply to Commissioner for cancellation. (§ 24). See also topic 1.13 Cancellation.

Marks registered under Acts of 1881 or 1905 are published in Official Gazette when their owners claim benefits of Act of 1946 for such registrations, but such publication does not subject them to opposition proceedings, only to cancellation within five years from date of republication. (§§ 12, 13).

1.54 PRINCIPAL REGISTER:

Principal Register is provided for registration of any of following marks that are in use in commerce, which may lawfully be regulated by Congress: all inherently distinctive trademarks, service marks, collective marks, certification marks, and marks that have acquired secondary meaning or that are in lawful concurrent use by more than one person. In addition, mark duly registered in applicant's country of origin may be registered under provisions of § 44(e) of Act in absence of use.

It is to registrations upon this Principal Register that more valuable statutory rights accrue. See Preliminary Note and topics Certificate of Registration; Supplemental Register.

1.55 RELATED COMPANY:

Term "related company" means any person or entity whose use of mark is controlled by owner of mark with respect to nature and quality of goods or services on or in connection with which mark is used. (§ 45). Use of mark by related company inures to benefit of registrant or applicant exercising such control. (§ 5).

1.56 REMEDIES:

Primary remedies available in trademark infringement cases are injunction against use of infringing mark, destruction of infringing goods and marks, and money damages. However, court may not enjoin owner of intent to use application from making use necessary for registration on grounds that another party has used mark subsequent to filing of intent to use application. Otherwise, purpose of intent to use provisions of Act would be defeated. Revision Act expressly extended all remedies to unregistered marks and causes of action for unfair competition, false representations, etc.

Preliminary injunctions and temporary restraining orders are obtainable upon showing of likelihood of success on merits, irreparable injury and inadequate remedy at law. Standard may vary depending upon circuit. In general, irreparable injury and inadequate remedy at law are easy to establish in trademark cases, except in cases of undue delay by movant. Permanent injunctions are almost always granted to prevailing parties. (§ 34).

Act provides that court may order destruction of all labels, signs, packages, advertisements, names, symbols, and the like bearing or consisting of infringing term and any reproduction or imitation of mark and plates, molds, etc. used to create same. (§ 36). In case of counterfeit of registered mark, additional equitable remedies include ex parte seizure of goods, counterfeit mark, means of making such marks, and records documenting manufacture, sale, or receipt of things involved in counterfeiting. Detailed list of requirements must be satisfied in order to obtain ex parte seizure order, bond must be posted, and hearing must be held between ten and 15 days after seizure. (§ 34). See topic 1.25 Counterfeit Marks.

Statutory damages consist of ability to recover (1) defendants' profits, (2) any damages sustained by plaintiff, and (3) costs. Court may assess damages above amount of actual damages, up to three times such amount. Attorney's fees may be awarded in "exceptional cases", usually where infringement or unfair competition was intentional. For intentional counterfeiting violation, plaintiff may collect treble damages or profits, whichever is greater, attorney's fees, and prejudgment interest. (§ 35).

Registered marks and unregistered trade names (under certain circumstances) can be recorded with U.S. Customs Service and will serve as basis for preventing importation of goods bearing infringing or counterfeit marks and their seizure. Current recordation fee is $190 per class. (§ 42). Certain types of parallel imports of genuine goods may not be subject to seizure. See topic 1.41 Importation.

Criminal penalties are available against trademark counterfeiters. (18 U.S.C. § 2320).

Remedies of registrant in suit for infringement are limited in that no profits or damages may be recovered if registrant failed to use notice of registration (such as "(R)") with his mark, unless defendant had actual notice of registration. (§ 29).

Remedies are further limited to injunction against future printing in case of innocent infringer or violator (of § 43[a] rights) who is engaged solely in business of printing mark or violating matter. Similarly, in actions against newspapers, magazines, or electronic media for ads appearing therein, where defendant was unaware of infringement or violation, only injunction against presentation of ads in future issues or transmissions will issue. Restraining dissemination of any particular issue of printed matter or electronic media transmissions due to infringement or violation cannot occur if it would delay dissemination or broadcast beyond its regular time. (§ 32).

1.57 RENEWAL:

Registrations under Act of 1920 are not renewable except as they may form basis of corresponding foreign registrations.

Except for foregoing, registrations or renewals issued prior to Nov. 16, 1989 are granted terms of 20 years; those issued on or after Nov. 16, 1989 are granted terms of ten years (§ 9; Rule 2.181). Subject to provisions of § 8, registration may be renewed for periods of ten years at end of each successive ten-year period following date of registration. (§ 9). $400 fee required. Application for renewal may be made at any time within one year before end of each successive ten-year period for which registration was issued or renewed, or it may be made within grace period of six months after end of each successive ten-year period, upon payment of fee. If any submission filed under § 9 is deficient, deficiency may be corrected after statutory time period and within time prescribed after notification of deficiency, upon payment of fee.

1.58 SERVICE MARKS:

Term "service mark" means any word, name, symbol, or device or combination thereof used by person, or which person has bona fide intent to use in commerce and applies to register on Principal Register, to identify and distinguish services of one person, including unique service, from services of others and to indicate source of services, even if that source is unknown. (§ 45).

Service marks are registrable in same manner and with same effect as are trademarks, and when registered they are entitled to protection provided in case of trademarks. Applications and procedure for registration of service marks shall conform as nearly as practicable to those prescribed for registration of trademarks.

Titles, character names, and other distinctive features of on-going series of radio or television programs may be registered as service marks notwithstanding that they, or programs, may advertise goods of sponsor.

1.59 SIGNATURES:

Passage of TLTIA broadened class of people who may sign application papers on behalf of applicant to include: (1) person with legal authority to bind applicant; or (2) person with firsthand knowledge of facts and actual or implied authority to act on applicant's behalf; or (3) attorney who has actual or implied written or verbal power of attorney from client.

These signature rules apply to all applications, amendments to allege use, statements of use, requests for extensions of time to file statements of use, and designations of domestic representatives, for applications pending on or after Oct. 30, 1999.

Generally, Office will no longer question signatory's authority, absent inconsistency in record.

1.60 SIMILAR MARKS:

Marks may be confusingly similar and hence conflicting under Act if they sound alike, look alike, or have substantially same meaning and are used on or in connection with same or similar goods or services. If mark of another is adopted, infringement is not avoided by fact that later user has added new features to mark, unless added material changes character of mark so that marks, when considered in their entireties, are not confusingly similar.

Mark that has actual or constructive priority of use in commerce will prevail in opposition, cancellation or court proceeding. See topic 1.23 Constructive Use.

1.61 SOUNDS:

Marks may consist of sounds or of word or words used only orally. Specimens would consist of one disc or audio recording. (TMEP § 1202.15).

1.62 SPECIMENS:

Each application based on use (§ 1[a]) must include one specimen showing use of mark in commerce for each class of goods and services covered by application. For applications based on intent-to-use (§ 1[b]), specimen must be filed with Statement of Use. Specimens shall be duplicates of labels, tags, or containers, or displays associated with goods and bearing mark when made of suitable flat material and of size not to exceed 81/2 inches (21.6 cm.) wide and 11 inches (27.9 cm.) long. Alternatively, photographs showing mark as actually used can be submitted, particularly where actual specimens are not practical. Any form of advertising, including catalogs or similar specimens, can be submitted as display associated with goods, provided that (1) it includes picture of relevant goods, (2) it includes mark sufficiently near picture of goods to associate mark with goods, and (3) it includes information necessary to order goods. (TMEP § 904.06[a]). In In re Osterberg, 83 USPQ2D 1220 (TTAB 2007), registration was refused because specimen of use was printout of website page with mark "buried" on page. (*But see* In re Valenite, 84 USPQ2D 1346 [TTAB 2007] [refusal of registration reversed because webpage prominently displayed mark and provided number for ordering]).

1.63 STATEMENT OF USE:

In intent to use application, once notice of allowance is issued, applicant has six months within which to file statement of use and one specimen of mark as used in commerce, together with fee of $100 per class, or to request extension of time, together with fee of $150 per class. Although statements of use or requests for extension of time to file statements of use that do not include required fee will be denied, they may be accepted on petition to Commissioner if general authorization to charge all fees that may become due during pendency application is included in original application.

Statement of use must include verification or declaration to effect that applicant is believed to be owner of mark sought to be registered and that mark is in use in commerce, specifying date of applicant's first use of mark and first use of mark in commerce, type of commerce, those goods or services specified in notice of allowance on or in connection with which mark is in use in commerce and mode or manner in which mark is used on or in connection with such goods or services. (§ 1[d][1]; Rule 2.88 [b][1]).

Statement of use may only be filed when applicant has made use of mark in commerce on or in connection with all of goods or services, as specified in notice of allowance, for which applicant will seek registration in that application, unless statement of use is accompanied by request to divide out from application goods or services to which statement of use pertains. (Rule 2.87). If more than one item of goods or services is specified in statement of use, dates of use given need be for only one of items specified, provided particular item to which dates apply is designated. (Rule 2.88[c]).

If statement of use does not meet at least certain minimum requirements (fee, one specimen, and signed verification or declaration that mark is in use in commerce), applicant will be notified of deficiency. Deficiency may be corrected only within remaining time permitted for applicant to file statement of use, if any. Otherwise, application will be deemed abandoned, subject only to petition. (Rule 2.88[e], [f], [g], [h]).

Timely statement of use meeting minimum criteria will be examined as described under topic Intent To Use Applications. Such statement may be amended to meet requirements set forth in office action. Statement of use need not include all of goods or services contained in original application or in notice of allowance, in which case registration will issue only as to those goods specified in statement of use. It is preferable to formally request to amend identification of goods or services in application to delete goods or services that will not be listed in statement of use. Statement of use may not list goods or services not listed in notice of allowance. (Rule 2.88[i]). If application omits any goods or services that were listed in notice of allowance from statement of use, Intent to Use Unit will delete these goods/services from application. Applicant may not thereafter register these goods/services. (Rule 2.88[i][2]).

Request for six-month extension of time within which to file statement of use must be in writing, submitted prior to expiration of original six-month deadline, together with fee of $150, and must contain verification or declaration by applicant that applicant has continued bona fide intention to use mark in commerce, specifying those goods or services identified in notice of allowance on or in connection with which applicant has continued bona fide intention to use mark in commerce. (Rule 2.89[a]). If applicant submits extension request with fee sufficient to pay for at least one class in multi-class application but insufficient to cover all classes, and if applicant has not specified classes to which fee applies, Intent to Use Unit will issue notice granting applicant 30 days in which to submit additional fees or specify classes to be abandoned. (Rule 2.89[a][2] and [b][2]). If applicant does neither within set time period, PTO will apply fee paid, beginning with lowest numbered class(es), in ascending order, and will delete remaining classes. (See TMEP § 1108.02[c].) Four additional six-month extensions may be requested upon fulfilling above criteria but with additional showing of "good cause". (§ 1[d][2]; Rule 2.89[b], [c]). Such showing of "good cause" must include: Allegation that applicant has not yet made use of mark in commerce on all goods or services specified in notice of allowance on or in connection with which applicant has continued bona fide intention to use mark in commerce, and statement demonstrating ongoing efforts to make use of mark in commerce on or in connection with each of those goods or services. Those efforts may include, without limitation, product or service research or development, market research, manufacturing activities, promotional activities, steps to acquire distributors, steps to obtain required governmental approval, or other similar activities. Statement, that applicant has made use of mark in commerce and is in process of preparing statement of use, will be accepted as showing of "good cause" only once. If that explanation is sole basis for any subsequent extension request, extension request will be denied. In alternative, satisfactory explanation for failure to make such efforts must be submitted. (Rule 2.89[d]).

Any goods or services specified in notice of allowance that are not in turn specified in request for extension of time within which to file statement of use will be presumed to be deleted, and may not thereafter be reinserted. (Rule 2.89[f]).

Applicant will be notified of grant or denial of request for extension of time. Under Rule 2.89(g), failure to notify applicant of grant or denial of request prior to expiration of existing period or requested extension does not relieve applicant of responsibility of timely filing statement of use. If, after denial of extension request, there is time remaining in existing six-month period for filing statement of use, applicant may submit substitute request for extension of time. Otherwise, only recourse available after denial of request for extension of time is petition to Commissioner to revive application, which must be filed within one month from denial of request for extension of time.

1.64 SUPPLEMENTAL REGISTER:

Supplemental Register is provided for registration of all marks capable of distinguishing applicant's goods or services but not registrable on Principal Register. Rule 2.47(a) was amended to remove requirements for specific allegation that mark is in lawful use in commerce, and specification of type of commerce. (Miscellaneous Changes to Trademark Rules of Practice, 73 FR 67759 [effective as of Jan. 16, 2009]). Because definition of "commerce" under § 45 of Trademark Act is "all commerce which may lawfully be regulated by Congress", PTO presumes, absent evidence to contrary, that applicant alleging "use in commerce" is claiming lawful use in type of commerce that Congress can regulate. (Id.). Mark registrable on Supplemental Register may consist of any trademark, symbol, label, package, configuration of goods that is not wholly functional, name, word, slogan, phrase, surname, geographical name that is not primarily geographically deceptively misdescriptive, numeral, or device or any combination of any of foregoing. (§ 23).

Such marks are not published for or subject to opposition, but are published in Official Gazette upon registration. Upon proper grounds (see topic 1.13 Cancellation), these registrations may be cancelled at any time upon application of any person who believes he is or will be damaged by registration. Certificates of registration for these marks are conspicuously different from certificates issued for marks registered on Principal Register. Certificates of these registrations are not prima facie evidence of validity of registration, registrant's ownership of mark, or of registrant's exclusive right to use mark in commerce in connection with goods or services specified therein, and can never become incontestable. Registration on Supplemental Register is not constructive notice of registrant's claim of ownership. Registration of mark on Supplemental Register, or under Act of March 19, 1920, does not preclude registration by registrant on Principal Register, but registrations on Supplemental Register or under 1920 Act can not be filed in Department of Treasury to be used to stop importations.

1.65 THREE-DIMENSIONAL FORMS:

Marks may consist of three-dimensional forms in which case drawing must display mark in three dimensions or in perspective. (TMEP § 807.12).

1.66 TRADE DRESS:

"Trade dress" refers to total image or overall impression created by product's configuration or packaging, interior and exterior decor, architecture and other promotional materials. Trade dress may be protected as trademark. For example, shape of building was found to be inherently distinctive and protectible as trademark for posters on motion for preliminary injunction. Supreme Court found Tex-Mex restaurant appearance and décor inherently distinctive and protectible without showing of secondary meaning. (Two Pesos, Inc. v. Taco Cabana, Inc., 505 U.S. 763 [1992]). Registrable elements of trade dress include features such as size, shape, color, texture, graphics, and packaging.

Trade dress may be registered on Principal Register if it is inherently distinctive or upon showing of secondary meaning under § 2(f). Features of product's design can never be inherently distinctive and are registrable only upon showing of secondary meaning. (TMEP § 1202.02[b][i]). In Wal-Mart Stores, Inc. v. Samara Bros., Inc., 529 U.S. 205 Copyright Cases or Patent Cases (2000), Supreme Court held that in close cases courts should classify ambiguous trade dress as product design, not product packaging, and require to show secondary meaning.

Trade dress may only be registered if it is nonfunctional. If given trade dress simply happens to have some function, it may be registered upon showing of secondary meaning under § 2(f). However, if trade dress is wholly functional, it cannot be registered even upon showing of secondary meaning. (§§ 2[e][5] and 23). Trade dress is wholly functional if it is one of few superior designs available or best or only design available.

Plaintiff claiming infringement of trade dress bears burden of proving trade dress it seeks to protect is not functional.

1.67 TRADEMARKS:

Term "trademark" includes any word, name, symbol, or device or any combination thereof adopted and used by person or which person has bona fide intention to use in commerce and applies to register on Principal Register established by Act to identify his goods, including unique product, and distinguish them from those manufactured or sold by others and to indicate single source of goods, even if that source is unknown. (§ 45).

1.68 TRADE NAMES:

"Trade Name" and "Commercial Name" mean any name used by person to identify his or her business or vocation. (§ 45).

Present practice of Office is to refuse registration of trade name and commercial name because registration thereof is not specifically provided for by statute.

§ 2(d) specifically provides that "trade name" previously used in U.S. by another and not abandoned may bar registration to another of confusingly similar mark.

§§ 44(g) and 44(i) provide that without registration trade names and commercial names will be protected. See also topic 1.41 Importation.

1.69 UNFAIR COMPETITION:

§ 43(a) makes it unlawful for any person to use in commerce in connection with goods or services or any container for goods, any word, term name, symbol or device or any combination thereof, or any false designation of origin, false description of fact, or false or misleading representation of fact which

(1) is likely to cause confusion, or to cause mistake, or to deceive as to affiliation, connection, or association of such person with another person, or as to origin, sponsorship, or approval of his or her goods, services, or commercial activities by another person, or

(2) in commercial advertising or promotion, misrepresents nature, characteristics, qualities, or geographic origin of his or her or another person's goods, services, or commercial activities. It provides that any person doing so will be liable to a civil action by any person who believes that he is or is likely to be damaged by such act.

1.70 USE IN COMMERCE:

Meaning of term "use in commerce" was modified significantly in Revision Act. Primary purpose was to eliminate former practice of "token use" of mark as basis for use-based applications, preservation of registrations under § 8, renewals, and avoidance of abandonment, and to require something akin to actual commercial use. New standard is also incorporated into intent-to-use applications, which allege bona fide intention to use mark in commerce, and also in statement of use. Legislative history supports notion that certain less traditional forms of trademark usage such as clinical shipments of drugs awaiting FDA approval, regional test marketing of goods or services, and infrequent shipments of large, expensive or seasonal products, will also be considered "use in commerce" under new definition.

New definition of "use in commerce" states that term means "the bona fide use of a mark in the ordinary course of trade, and not made merely to reserve a right in a mark." Mark is deemed to be in use in commerce on goods when it is placed on goods or their containers or on displays associated therewith or on tags or labels affixed to goods or, if nature of goods makes such placement impracticable (as in case of bulk goods or goods shipped in tank cars), then on documents associated with goods or their sale, and goods are sold or transported in commerce.

Service mark is deemed to be in use in commerce when it is used or displayed in sale or advertising of services and services are rendered in commerce, or services are rendered in more than one state or in U.S. and foreign country and person rendering services is engaged in commerce in connection with services.

"Commerce" means all commerce that may lawfully be regulated by Congress.

1.71 CLASSIFICATION OF GOODS AND SERVICES

International schedule of classes of goods and services.

Goods

1. Chemical products used in industry, science, photography, agriculture, horticulture, forestry; artificial and synthetic resins; plastics in the form of powders, liquids or pastes, for industrial use; manures (natural and artificial); fire extinguishing compositions; tempering substances and chemical preparations for soldering; chemical substances for preserving foodstuffs; tanning substances; adhesive substances used in industry.

2. Paints, varnishes, lacquers; preservatives against rust and against deterioration of wood; coloring matters, dyestuffs; mordents; natural resins; metals in foil and powder form for painters and decorators.

3. Bleaching preparations and other substances for laundry use; cleaning, polishing, scouring and abrasive preparations; soaps; perfumery, essential oils, cosmetics, hair lotions; dentifrices.

4. Industrial oils and greases (other than oils and fats and essential oils); lubricants; dust laying and absorbing compositions; fuels (including motor spirit) and illuminants; candles, tapers, night lights and wicks.

5. Pharmaceutical, veterinary, and sanitary substances; infants' and invalids' foods; plasters, material for bandaging; material for stopping teeth, dental wax, disinfectants; preparations for killing weeds and destroying vermin.

6. Unwrought and partly wrought common metals and their alloys; anchors, anvils, bells, rolled and cast building materials; rails and other metallic materials for railway tracks; chains (except driving chains for vehicles); cables and wires (nonelectric); locksmiths' work; metallic pipes and tubes; safes and cash boxes; steel balls; horseshoes; nails and screws; other goods in non-precious metal not included in other classes; ores.

7. Machines and machine tools; motors (except for land vehicles); machine couplings and belting (except for land vehicles); large size agricultural implements; incubators.

8. Hand tools and instruments; cutlery, forks, and spoons; side arms.

9. Scientific, nautical, surveying and electrical apparatus and instruments (including wireless), photographic, cinematographic, optical, weighing, measuring, signaling, checking (supervision), life-saving and teaching apparatus and instruments; coin or counterfreed apparatus; talking machines; cash registers; calculating machines; fire extinguishing apparatus.

10. Surgical, medical, dental, and veterinary instruments and apparatus (including artificial limbs, eyes, and teeth).

11. Installations for lighting, heating, steam generating, cooking, refrigerating, drying, ventilating, water supply, and sanitary purposes.

12. Vehicles; apparatus for locomotion by land, air, or water.

13. Firearms; ammunition and projectiles; explosive substances; fireworks.

14. Precious metals and their alloys and goods in precious metals or coated therewith (except cutlery, forks and spoons); jewelry, precious stones, horological and other chronometric instruments.

15. Musical instruments (other than talking machines and wireless apparatus).

16. Paper and paper articles, cardboard and cardboard articles; printed matter, newspaper and periodicals, books; bookbinding material; photographs; stationery, adhesive materials (stationery); artists' materials; paint brushes; typewriters and office requisites (other than furniture); instructional and teaching material (other than apparatus); playing cards; printers' type and clichés (stereotype).

17. Gutta percha, india rubber, balata and substitutes, articles made from these substances and not included in other classes; plastics in the form of sheets, blocks and rods, being for use in manufacture; materials for packing, stopping or insulating; asbestos, mica and their products; hose pipes (nonmetallic).

18. Leather and imitations of leather, and articles made from these materials and not included in other classes; skins, hides; trunks and traveling bags; umbrellas, parasols and walking sticks; whips, harness and saddlery.

19. Building materials, natural and artificial stone, cement, lime, mortar, plaster and gravel; pipes of earthenware or cement; roadmaking materials; asphalt, pitch and bitumen; portable buildings; stone monuments; chimney pots.

20. Furniture, mirrors, picture frames; articles (not included in other classes) of wood, cork, reeds, cane, wicker, horn, bone, ivory, whalebone, shell, amber, mother-of-pearl, meerschaum, celluloid, substitutes for all these materials, or of plastics.

21. Small domestic utensils and containers (not of precious metals, or coated therewith); combs and sponges; brushes (other than paint brushes); brushmaking materials; instruments and material for cleaning purposes, steel wool; unworked or semi-worked glass (excluding glass used in building); glassware, porcelain and earthenware, not included in other classes.

22. Ropes, string, nets, tents, awnings, tarpaulins, sails, sacks; padding and stuffing materials (hair, kapok, feathers, seaweed, etc.); raw fibrous textile materials.

23. Yarns, threads.

24. Tissues (piece goods); bed and table covers; textile articles not included in other classes.

25. Clothing, including boots, shoes and slippers.

26. Lace and embroidery, ribands and braid; buttons, press buttons, hooks and eyes, pins and needles; artificial flowers.

27. Carpets, rugs, mats and matting; linoleums and other materials for covering existing floors; wall hangings (nontextile).

28. Games and playthings; gymnastic and sporting articles (except clothing); ornaments and decorations for Christmas trees.

29. Meats, fish, poultry and game; meat extracts; preserved, dried and cooked fruits and vegetables; jellies, jams; eggs, milk and other dairy products; edible oils and fats; preserves, pickles.

30. Coffee, tea, cocoa, sugar, rice, tapioca, sago, coffee substitutes; flour, and preparations made from cereals; bread, biscuits, cakes, pastry and confectionary, ices; honey, treacle; yeast, baking powder; salt, mustard, pepper, vinegar, sauces, spices; ice.

31. Agricultural, horticultural and forestry products and grains not included in other classes; living animals; fresh fruits and vegetables; seeds; live plants and flowers; foodstuffs for animals, malt.

32. Beer, ale and porter; mineral and aerated waters and other nonalcoholic drinks; syrups and other preparations for making beverages.

33. Wines, spirits and liqueurs.

34. Tobacco, raw or manufactured; smokers' articles; matches.

Services

35. Advertising and business.

36. Insurance and financial.

37. Construction and repair.

38. Communication.

39.	Transportation and storage.
40.	Material treatment.
41.	Education and entertainment.
42.	Scientific and technological.
43.	Food, drink, and temporary accommodations.
44.	Medical and veterinary.
45.	Personal, social, and security.

Prior U.S. schedule of classes of goods and services.

Goods

Class	*Title*
1	Raw or partly prepared materials.
2	Receptacles.
3	Baggage, animal equipments, portfolios, and pocket books.
4	Abrasives and polishing materials.
5	Adhesives.
6	Chemicals and chemical compositions.

7 Cordage.

8 Smokers' articles, not including tobacco products.

9 Explosives, firearms, equipments, and projectiles.

10 Fertilizers.

11 Inks and inking materials.

12 Construction materials.

13 Hardware and plumbing and steamfitting supplies.

14 Metals and metal castings and forgings.

15 Oils and greases.

16 Protective and decorative coatings.

17 Tobacco products.

18 Medicines and pharmaceutical preparations.

19 Vehicles.

20 Linoleum and oiled cloth.

21 Electrical apparatus, machines, and supplies.

22 Games, toys, and sporting goods.

23 Cutlery, machinery, and tools, and parts thereof.

24 Laundry appliances and machines.

25 Locks and safes.

26 Measuring and scientific appliances.

27 Horological instruments.

28 Jewelry and precious-metal ware.

29 Brooms, brushes, and dusters.

30 Crockery, earthenware, and porcelain.

31 Filters and refrigerators.

32 Furniture and upholstery.

33 Glassware.

34 Heating, lighting, and ventilating apparatus.

35 Belting, hose, machinery packing, and nonmetallic tires.

36 Musical instruments and supplies.

37 Paper and stationery.

38 Prints and publications.

39 Clothing.

40 Fancy goods, furnishings, and notions.

41 Canes, parasols, and umbrellas.

42 Knitted, netted, and textile fabrics, and substitutes therefor.

43 Thread and yarn.

44 Dental, medical, and surgical appliances.

45 Soft drinks and carbonated waters.

46 Foods and ingredients of foods.

47 Wines.

48 Malt beverages and liquors.

49 Distilled alcoholic liquors.

50 Merchandise not otherwise classified.

51 Cosmetics and toilet preparations.

52 Detergents and soaps.

Services

100 Miscellaneous.

101 Advertising and business.

102 Insurance and financial.

103 Construction and repair.

104 Communication.

105 Transportation and storage.

106 Material treatment.

107 Education and entertainment.

Schedule for certification marks.

In case of certification marks, all goods and services are classified in two classes as follows:

A. Goods.

B. Services.

Schedule for collective membership marks.

All collective membership marks are classified as follows:

Class	*Title*
200	Collective Membership.

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ARGENTINA LAW DIGEST

—Scope —

Revised for 2008 edition by

CURTIS, MALLET-PREVOST, COLT & MOSLE LLP of New York.

(C. C. indicates Civil Code; C. Com. indicates Code of Commerce; C.C.P. indicates Code of Civil Procedure.)

Note: This revision incorporates legislation through Dec. 10, 2007.

1 INTRODUCTION

1.01 CURRENCY:

Monetary unit is peso, which is divided into 100 centavos. (Decree 2128 of Oct. 10, 1991). Only Banco Central de la República Argentina may issue notes and these constitute legal tender for any obligation. (Law 24144 of Sept. 23, 1992 as am'd).

1.02 GOVERNMENT AND LEGAL SYSTEM:

(Constitution of Aug. 22, 1994).

Republic of Argentina is a federation composed of provinces and one national territory with Buenos Aires as capital of Republic.

Provinces retain all powers which have not been delegated to Federal Government in conformity with Constitution. Among powers so delegated are those of enacting civil, commercial, penal, labor and mining codes for entire nation. These codes are administered by federal or provincial courts as case may be. Federal Government is also delegated power to enact general laws for whole nation as to naturalization and citizenship, bankruptcy, interstate commerce, defense, customs, banking and currency.

Argentine Republic adopts for its Government federal, republican and representative form. Public acts and judicial proceedings of one Province enjoy full faith and credit in others, also citizens of each province shall enjoy same rights, privileges and immunities of citizens in others. All inhabitants of nation (foreigners and citizens) enjoy following rights among others, in accordance with laws that regulate their exercise: To work and practice any lawful industry, to petition to authorities, to enter, remain and travel throughout Argentine territory, etc. Property is inviolable and no inhabitant of nation can be deprived of it except by virtue of judgment founded on law. Expropriation for reasons of public utility may be authorized by law and must be previously compensated. Federal Government consists of Legislative Power which is vested in Congress which has two Chambers, one of Deputies of Nation and other of Senators of Provinces and of Capital.

Executive Power of the nation shall be vested in a citizen with title of President of Argentine Republic and to be elected President or Vice-President of nation it is necessary to have been born in Argentina and to possess the other qualifications to be senator, among others. Finally, Judicial Power shall be vested in a Supreme Court of Justice and in such lower courts as Congress may establish in territory of Republic.

Law 23968 of Aug. 14, 1991 as amended establishes exclusive economic zone located beyond territorial waters. Economic zone shall be extended to 200 nautical miles counted from baseline. Argentinean Nation enjoys within this exclusive economic zone rights of sovereignty for purpose of exploration and exploitation, preservation and administration of natural resources over seabed including jurisdiction over such matters as sanitation, immigration, customs and taxation.

(Const., art. 63).

Chambers of Federal Congress meet from Mar. 1 until Nov. 30, in ordinary meetings, and in extraordinary meetings whenever they are called by President of Nation or term of ordinary meetings is extended.

1.03 HOLIDAYS:

(Law 21329 of June 9, 1976 as am'd, Law 23555 of May 18, 1988 as am'd, Law 25370 of Nov. 22, 2000 as am’d, Law 26085 of Mar. 15, 2006).

Jan. 1 (New Year's Day); Maundy Thursday*; Good Friday*; Mar. 24 (National Day of the Memory for the Truth and the Justice); Apr. 2 (Veterans and Victims of Malvinas War Day); May 1 (Labor Day); May 25 (Anniversary of 1810 Revolution); June 20 (Flag Day); July 9 (Independence Day); Aug. 17 (Death of Gen. San Martin); Oct. 12** (Columbus Day); Dec. 8 (Immaculate Conception); Dec. 25 (Christmas).

*These are movable holidays.

**When fall on Tues. or Wed. are celebrated previous Mon., and when fall on Thurs. and Fri. are celebrated on following Mon.

Note.—Courts are on vacation during whole month of Jan. and during Holy Week. However, urgent business may be transacted during these periods.

1.04 OFFICE HOURS AND TIME ZONE:

Argentina is in the -04:00 and -05:00 GMT time zones (2 and 3 hours later, respectively, then in the United States Eastern Standard Time). Office hours are generally from 9 a.m. to 5 p.m.

2 BUSINESS ORGANIZATIONS

2.01 AGENCY:

(C. C. arts. 1869-1985; Com. C. arts. 221-281).

Agency may be conferred by public or private instrument or orally. Acceptance may be express or implied. General power of attorney only confers power of administration even though power gives authority to do any act which grantee deems convenient in course of administration. (C. C. art. 1880). Special powers are necessary for following purposes (C. C. art. 1881): To make payments which are not in ordinary course of administration; to extinguish obligations which existed at time power was granted; to compromise suit; to arbitrate; to waive jurisdiction; to renounce rights which have been acquired by prescription; to waive right to appeal; to renounce or remit debts gratuitously, except in case of bankruptcy of debtor; to contract matrimony in name of grantor; to recognize natural children; to make any contract for purpose to obtain or transfer real property; to make gifts, except in cases of small sums to employees; to loan or borrow money unless business of administration consists of loaning or borrowing, or unless it is absolutely necessary to borrow money to conserve property which is being administered; to lease real property for more than six years; to make grantee bailee, unless power refers to bailments or bailment is made as result of administration of property; to require grantee to perform any sort of personal services; to form company; to make grantee surety; to encumber real property; to accept inheritances; and to admit obligations existing prior to granting of power.

As general rule anyone capable of contracting may exercise power of attorney. Unless specifically provided to contrary, when power is given to more than one person, it is understood that it is to be accepted by one of them only.

Grantee is required to carry out power within limits of authority given. For instance, special power to sell does not include power to mortgage, nor to receive deferred payments, and power to collect debts does not include power to sue, nor to modify contract or remit debt. Grantee must prefer interests of grantor to his own. He should not carry out power if manifestly injurious to grantor. He must account for all of his operations and deliver to grantor everything received as result thereof, even though received improperly. He is not required to deliver anything obtained as result of illicit transactions, unless power itself has been legal and illicit gains are obtained by abuses of power. Grantee may not sell his own property to grantor or purchase grantor's property without express authority. He may delegate power to another, but is responsible for substitute unless he has been given express authority to substitute, and is always responsible when he has named substitute who is notoriously incompetent or insolvent. Grantee may revoke substitution at any time.

Powers of attorney which are to be presented in court, those for administration of property, and those which concern public instruments or matters which should be in form of public instruments, must themselves be in form of public instruments. (See category 9 Documents and Records, topic Notaries Public [“Escribanos Públicos”] and C. C. art. 1184.)

Power terminates by revocation, by renunciation on part of grantee, by death of grantee or grantor, or when either of parties has become incapacitated. In case of death of grantor power is not terminated with regard to acts which are to be done after his death, and power also remains in force when its termination would otherwise cause dangerous delays. It is necessary that grantee and third persons know or should have known of termination of power in order to make it ineffective with regard to them. Everything that grantee does while he is justifiably ignorant of termination of power binds grantor. (C. C. arts. 1964-1966).

Revocation of power may be express or implied. It is implied when grantor gives new power for same purpose and former grantee has knowledge of subsequent power. (C. C. art. 1971). Granting of special power revokes general power insofar as it affects matters dealt with in special power.

Agent must act within limits of his power but should not do less than what has been entrusted to him. Nature of business determines extent of powers needed to achieve purpose of agency. Agent is not considered to have acted beyond limits of his powers if result has been more advantageous than indicated in agency.

Functions of agent are bestowed on persons holding necessary representation and on persons who through their public office represent specified categories of persons or specified categories of property; on representatives of corporations and of public utility enterprises; on representatives of administration or liquidation of companies in cases so provided by civil or commercial law; on representatives of incompetent persons; on persons acting for another without authority (gestores oficiosos); on procurators; and on executors of estates.

Agent is obligated, by virtue of his acceptance of agency, to comply with terms of agency and he is liable for damages incurred by principal due to partial or total noncompliance, but if he finds it impossible to follow instructions he is not obliged to act without instructions, it being sufficient to take conservation measures indicated by circumstances. He is required to render account of his operations, and to deliver to principal everything he has received under agency, even though it was not owing to principal; latter can even demand any gains resulting from abuse of agent's powers, provided agency was lawful, but he is not entitled to fruits of unlawful agency.

Agent's acts within limits of his authority are deemed to have been done by principal himself; agent cannot enforce them himself, nor is he liable for them. Agent may sign contracts in his own name or in name of his principal. If he exceeds his authority in act that is not ratified by principal, such act is void, provided other contracting party was aware of true extent of agent's authority. Neither would agent be liable in such case, unless he obligated himself personally, or committed himself to obtain ratification. And he would be personally liable if other party was ignorant of his actual authority. Ratification by principal may be tacit, as by his actions, or if he is advised and remains silent. Ratification is retroactive to date of act.

With respect to third parties act is deemed to have been performed within limits of agency if its terms have been carried out, even though agent may have actually exceeded limits of his powers. Third party may not claim that powers have been exceeded or that terms of agency have not been observed once principal has ratified action or wishes to ratify whatever has been done by agent.

Agency may be gratuitous or onerous. It is presumed to be gratuitous if there has been no agreement that agent is to receive remuneration for his work. It is presumed to be onerous if it consists of powers or functions conferred on agent by law or when it consists of work connected with lucrative profession or occupation of agent. If agency is onerous, principal must pay agent for his services. Amount of fees may consist of proportion of money or of goods that agent, in carrying out agency, has obtained or administered, except as provided in codes of procedures concerning lawyers and procurators. Principal must also compensate agent for losses he has incurred in carrying out agency without fault on his part.

2.02 CORPORATIONS (STOCK COMPANIES):

(Commercial Companies Law, “Sociedades Comerciales”, Law 19550 of Apr. 3, 1972, t.o. 1984 [D. 841 of Mar. 20, 1984] as am'd by Law 23576 of July 19, 1988 as am'd).

Under Argentina law, stock companies (Sociedades Anónimas) are classed as mercantile companies although they may not have been formed for commercial purposes. They are defined as one or more persons contributing capital for purpose of producing or exchanging assets or services and dividing profits and losses among themselves.

All private securities issued in Argentina (i.e. stocks) shall be nominated and not transferable by mere endorsement.

Corporate Name.

Firm name may include name of one or more persons of visible existence and should contain expression “sociedad anónima”, its abbreviation, or “S.A.” Use of words “of Argentina” or “Argentina,” suggesting ties with foreign corporation requires special authorization.

Organization.

Following conditions are indispensable for formation of a stock company: (1) Capital stock must be totally subscribed; minimum capital is required by law; (2) subscribers must have paid in at least 25% of subscribed capital stock and same must be deposited with official bank; payment of any amount outstanding must be made within two years; (3) proper administrative and judicial authorization must be obtained.

Such authorization will be granted if organization and by-laws of company are in conformity with provisions of law and if its objects are not contrary to public policy.

Articles of incorporation should contain: (1) Name, age, marital status, nationality, profession, domicile and identification of all shareholders; (2) firm name and domicile; (3) precise indication of its purposes; (4) amount of capital, expressed in Argentine currency, setting forth each shareholder's contribution; (5) duration; (6) organization of management, of its supervisory and accounting procedures and of shareholders' meetings; (7) rules regarding distribution of profits and losses; (8) rights and duties of shareholders with respect to each other and to third parties; (9) provisions regarding operation, dissolution and liquidation.

Procedure.

(a) If incorporators of company have subscribed for all requisite capital stock, they may commence business as soon as they have executed articles of incorporation, recorded same and published them together with by-laws, authorization and other fundamental documents. (b) With respect to a public subscription, promoters draw up a prospectus, by public or private instrument, and submit it to administrative authority for approval. Approval is granted within 15 days when all legal and regulatory conditions are duly complied with. Company must then register with Public Commercial Registry within 15 days thereafter. All signatories of prospectus are deemed to be promoters. Decision of Registry is appealable; appellate court may interpose its finding within five days. Prospectus must contain following: (1) Name, age, marital status, nationality, profession, identification and domicile of each promoter; (2) provisions of by-laws; (3) characteristics of shares, amount of planned issuance, conditions for subscription and advance payments; (4) designation of a bank with which promoters must make a contract for purposes of such bank assuming role of representative of future subscribers; (5) advantages and eventual benefits foreseen by promoters. Advance cash subscriptions must not be less than 25% of par value of subscribed shares and term of subscription may not exceed three months.

Organizational meeting must be called and presided over by a representative of administrative authority with intervening bank present. Quorum is constituted by one-half plus one of subscribed shares. Each subscriber has a right to as many votes as he has subscribed and paid-up shares. Decisions are adopted by a majority of subscribers present, representing at least one-third of subscribed capital with a right to vote. First meeting will decide on following matters: (1) Formation of company; (2) action of promoters; (3) by-laws; (4) provisional valuation of non-cash contributions; (5) designation of directors, supervisors (síndicos), and board of overseers (consejo de vigilancia); (6) terms of payment for remaining subscribers; (7) any business presented by bank; (8) designation of two subscribers or representatives who together with president and bank representative shall approve and sign minutes of meeting drafted by administrative authority. Minutes must be published, recorded and approved by administrative and judicial authorities. Funds are then deposited in official bank and documents turned over to board of directors.

Liability of Stockholders and Directors.

During incorporation, promoters and directors are jointly and unlimitedly responsible for any debts. Directors are only authorized to carry out activities related to incorporation and those activities related to company's purpose if they are authorized by articles of incorporation. Once company is constituted, it assumes all responsibilities undertaken in its name and promoters and directors are released from responsibility to third parties, although they may still be held liable to company.

Stockholders who have fully paid for their stock are not liable for obligations of company. All stockholders with interests contrary to that of company have a duty to abstain from voting in any such related matter. If such stockholders do not comply with this provision, they will be responsible for resulting damages or injury, if without such vote there would not have been present the majority vote necessary to adopt such resolution. All stockholders voting in favor of a resolution subsequently declared null shall be unlimitedly and jointly responsible for any consequences resulting therefrom.

Stockholders have a preemptive right with respect to all subsequent stock issues. If such right is violated, stockholders may demand that such issue be cancelled or may initiate a suit against company and its directors for damages not less than three times par value of shares so subscribed.

Directors, supervisors and overseers are unlimitedly and jointly liable for irregularities in public stock offerings and distribution of dividends.

All administrators and representative of the company are subject to a standard of loyalty and diligence; noncompliance resulting in unlimited and joint liability for damages arising therefrom. Director of a company has duty: (1) to reveal any conflict in interest to board of directors and supervisors; (2) to abstain from any related deliberation; and (3) to refrain from competition with company. Directors and supervisors are unlimitedly and jointly liable for negligent performance of their offices, or for violations of law or of by-laws and rules of company. Directors who timely file written protests with supervisors or initiate proceedings against acts of board of directors are exempt from any consequences arising therefrom. Directors and managers may be exonerated from certain acts by a subsequent vote of stockholders. Majority of directors must be domiciled in Argentina and all directors must have special domicile in Argentina.

Company may censure any director and any such resolution results in removal from office of such director.

Management and Supervision.

Active management of stock companies is placed in hands of one or more directors elected by stockholders at general assembly. Directors, who need not be stockholders, may be elected to hold office for a period not exceeding three years, and may be re-elected. Meetings of board of directors are regulated by by-laws. Directors must be present in meeting, teleconferences are not permitted. Directors may receive remuneration, which shall not exceed 25% of profits if dividends are paid, or 5% of profits if no dividends are paid. If there is more than one class of stock, by-laws may provide for election of one or more directors from each such class. Cumulative voting may be authorized for up to one-third of director vacancies to be filled. Executive committee may be constituted by directors for conduct of ordinary business. Stockholders at their annual meeting may elect one or more supervisors (síndicos). Companies subject to permanent state supervision need to appoint supervisors. Other companies only need to appoint supervisors if provided for in by-laws. In this case, if supervisors are not appointed, shareholders have right to exercise individual inspections of company's books.

Supervisors have following general powers and duties: (1) Supervise financial administration of company; (2) verify value of securities; (3) attend all meetings; (4) correct any irregularities; (5) analyze annual report; (6) provide information to stockholders; (7) call special meetings; (8) put important matters on agenda; (9) verify whether company is carrying out law and wishes of its stockholders; (10) supervise liquidation; (11) investigate accusations by stockholders.

By-laws may also provide for a council of overseers (consejo de vigilancia), composed of three to 15 stockholders. Duties of overseers are to: (a) Supervise conduct of board of directors, examine accounting and make cash audits; (b) convoke special meetings; (c) approve certain company business; (d) elect board of directors under some circumstances; (e) report to stockholders on annual report and balance sheets; (f) examine accusations by stockholders; (g) conduct certain other functions of supervisors. If by-laws adopt council, they may dispense with designation of supervisors.

Company is subject to state supervision (fiscalización estatal) in following cases: (1) If it makes a public offer of stocks or debentures; (2) if its capital is greater than certain amount; (3) if it is mixed company of state-private interests; (4) if it engages in investment banking or in public transactions of cash or securities; (5) if it operates public services or concessions; and (6) if it is controlled or controls another company subject to state supervision. Administrative authority can exercise supervisory powers in any other stock companies: (1) If requested to do so by shareholders representing at least 10% of capital stock of company; or (2) when deemed necessary in public interest. In event of any violation of law or of corporate resolutions, administrative authority may issue warnings and fines for each such infraction.

Stockholders' meetings must take place at company headquarters or within its legal domicile, and are either regular (ordinario) or special (extraordinario). Regular meetings are empowered to consider: (1) General balance sheets, annual report, supervisors' report and distribution of profits; (2) designation and removal of directors, supervisors and overseers; and responsibilities of same; (3) any increase in authorized capital up to five times original amount. Special meetings are empowered to consider: (1) Additional increases in authorized capital; (2) reductions and reintegration of capital; (3) redemption, reimbursement and amortization of stock; (4) mergers, dissolutions, liquidations; (5) limitation or suspension of preemptive rights in subscription to new stock issues; (6) issue of debentures and conversions of stock; (7) issue of bonds.

Regular and special meetings shall be held when called by directors or supervisors or by stockholders representing 5% of authorized capital, unless by-laws permit a smaller number.

Notices of meetings are given by means of announcements published for five days at least ten days in advance of date specified for holding of meeting and in such other manner as by-laws may provide. Notices are required to state matter to be considered at meeting. Any action upon matters not specified in notice is void, unless such action: (1) Is approved by unanimous agreement of stockholders representing totality of capital; (2) is expressly exempt under law; or (3) is expressly approved by interested individuals through signatures placed on minutes. Meeting may be recessed and reconvened within 30 days, but only stockholders who participated in first meeting have right to participate in second meeting. In case a meeting cannot be held because a quorum is lacking, another meeting is required to be held within 30 days upon publication of notice three times at least eight days in advance.

Stockholders may be represented at any meeting by a proxy who may not be an officer, supervisor, manager or employee of company. Quorum for regular meetings on first call requires presence of a majority of shares with a right to vote; regular meetings shall be deemed to be constituted on second call regardless of number of shares present. Special meetings require on first call a quorum of 60% of shares with a right to vote, and on a second call a quorum of 30% of voting shares, unless by-laws set a higher percentage. Majority of votes present at regular or special meetings is sufficient to carry a resolution unless by-laws require a higher number. When meeting treats transformation, extension, or dissolution of company, transfer of domicile abroad or any fundamental change in corporate purposes or capital, favorable vote of majority of shares with a right to vote, discounting any plurality of vote, is necessary in order to adopt any resolution related thereto. Such requirement also applies in case of merger, except that absorbing entity is governed by rules applicable to capital increases.

Any resolution affecting one particular class of stock must also be ratified by that class at a special meeting governed by rules for ordinary meetings.

Any resolution adopted at a stockholders' meeting may be challenged by directors, supervisors, overseers, administrative authorities and certain stockholders if such resolution violates law, by-laws or public policy. Minority stockholders dissenting from a decision or from affirmative action regarding matters specified in preceding paragraph may withdraw from company and demand reimbursement of value of stock held by them, as shown by last approved balance sheet of company except in case of dissolution and merger (absorbing entity and publicly traded companies) and capital increase (publicly traded companies). This right of reimbursement, however, must be exercised by those present within five days after termination of meeting, or in case of absent stockholders, within 15 days subsequent to closing of such meeting.

Stocks and Bonds.

Stock certificates must be consecutively numbered and signed by at least one director and one supervisor and must contain: (1) Name of company, its domicile, date and place of incorporation, duration and registration; (2) its authorized capital; (3) number, par value and class of stock which certificate represents and rights embodied therein; (4) if provisional certificates, a notation thereon of amount paid in. Shares of stock are always of equal value and expressed in Argentine currency. Various classes of stock may be established. Certificates may represent one or more shares, which are nominative, negotiable if fully paid. Public companies are authorized to issue global certificates that can be deposited with securities registration systems. Registration of shares is mandatory. Records of shareholdings and stock transfers are kept by local and international clearing houses. Stock Registry Book must be maintained in which information relevant to certificates and their transfer is recorded. Each share of common stock gives holder right to one vote. By-laws may create classes of stock that recognize up to five votes per common share, but only if no public offering has been made. Preferred stock may also be given voting power in certain cases.

Company may issue (1) redemption bonds (bonos de goce) to holders of fully paid-in stock, entitling them to a share of company profits and, in event of dissolution, of proceeds derived from liquidation; and (2) participation bonds (bonos de participación) for amounts which are not capital contributions and which entitle holders to a share of profits in fiscal year. Participation bonds may also be made available to employees in profit-sharing programs and in such case are nontransferable. Modifications of bond conditions require agreement of an absolute majority of bondholders of respective class.

Accounts.

Directors must prepare an annual accounting statement which includes a balance sheet, profit and loss statement and an analysis of same. Annual report must be filed including: (1) Analysis of assets and liabilities; (2) analysis of expenses and profits; (3) reasons for establishing reserves; (4) justification of dividends; (5) estimate of future operations; (6) relations with controlling, controlled and encumbered operations; and (7) amounts not appearing in profit and loss statement.

Financial statements must be approved by stockholders at their annual meeting. Approval does not free directors, supervisors or overseers from their responsibilities of analyzing and reporting on company operations. Certain companies are also subject to state supervision. (See Art. 299.)

Dividends.

No dividend can be declared or distributed to stockholders except out of actual net profits, as per certified balance sheet. Company must set aside at least 5% of its annual net profits for purposes of creating a legal reserve fund until such fund amounts to 20% of its authorized capital. No profits may be distributed until prior losses are covered; nor may they be provisional or anticipatory. Directors, supervisors and overseers are unlimitedly and jointly liable for any unauthorized distributions. Dividends received in good faith are not recoverable.

Issuance of Debentures.

Stock company may issue debentures when permitted to do so by its by-laws. Under

Argentine Law debentures are of three classes: (1) Those secured by specific real property, in which case ordinary laws governing execution and filing of mortgages are applicable. Such debentures are termed “Debentures with Special Security” (con garantía especial); (2) those secured by a floating guaranty, such as existing and after-acquired assets or portions thereof. Such debentures are termed “Debentures with Floating Security” (con garantía flotante). Preferred credits existing at time floating security is given and those created during existence of such security, in accordance with general laws, have preference over it; (3) debentures without security (garantía común). Debenture securities must be of equal value and may be converted into shares and issued in foreign currencies. Coupons may be utilized for interest collection.

Company desiring to issue debentures is required to enter into a contract with a bank (fideicomiso) representing prospective holders of debentures. Requirement that trustee be a banking institution prevails only during period of issuance and subscription. After such period, a meeting of holders of debentures may name any person as trustee. Contract is required to stipulate terms upon which loan is to be made and security, if any, furnished for loan. This document is required to be a public document and to be recorded in Public Registry of Commerce. Before debentures are actually issued, company is further required to publish a prospectus containing certain specified information relative to issue and to record document.

Rights and duties of trustees are prescribed by law, which insures to them, in cases of debentures issued without security or with a floating security, means necessary to keep themselves informed as to condition of company as well as right to demand removal of managing director or board of directors in following cases: (a) When company has lost 25% or more of capital it had on date of issuance of debentures; (b) when 30 days have elapsed since it defaulted in payment of interest or sinking fund requirements; and (c) in case of forced liquidation or bankruptcy of company. Trustee may be removed at any time without cause by meeting of holders of debentures. Such meeting may be called by supervisory authority or by a judge when so requested by 5% of holders of debentures.

Foreign companies that issue debentures with floating security or assets located in Argentina must register contract from which issue of debentures originates, as well as any guarantees related thereto. If it is not registered, debentures shall have no legal effect in Argentina. Every issue of secured debentures which is not limited to specific property susceptible to mortgage shall be deemed an issue with floating security.

Negotiable Bonds.

Corporations and branches of foreign companies are among those authorized to issue negotiable bonds to obtain loans. Such bonds may be traded publicly or privately in local and international capital markets, and issued in local or foreign currency, nominative with different types of repayment guarantees which may be floating, special or common securities over tangible and intangible assets or other types accepted by law.

Dissolution.

Stock company may be dissolved in following cases: (a) At termination of period fixed for its duration; (b) at conclusion of purpose for which it was formed; (c) upon bankruptcy; (d) where it has lost its capital; (e) where it is shown that company is unable to carry out objects for which it was formed. Where 50% of capital of company has been lost, directors are required to report fact to Court of Commerce and to publish a statement to that effect. Where 75% of company's capital has been lost, company is deemed to be dissolved and directors are made jointly and severally liable to third persons for all obligations which directors have contracted since existence of such deficit came or should have come to their knowledge.

Limited liability companies may be formed for any commercial purpose. Number of members cannot exceed 50; they are liable for amounts stipulated next to their names in company contract. Name of company must be preceded or followed by words “sociedad de responsabilidad limitada.” Capital is divided into quotas of equal value of ten pesos or multiples thereof. Twenty-five percent of subscribed quotas must be paid in within two years. Transfer of quotas is not subject to conditions unless otherwise stipulated in by-laws.

Company is managed by one or more managers who have same rights and duties as directors of a corporation. Company may form a supervisory body or a committee of overseers which will be governed by same provisions established for corporations. Committee of overseers is compulsory when company's capital is over 2,100,000 pesos. Modifications of purpose, extensions of duration, transformations, mergers, splits, and all modifications that result in quotaholders having greater responsibilities may only be adopted by vote of ¾ of company's capital. All other resolutions, such as appointment of managers, may be adopted by majority vote of capital present. Each quota gives its holder right to one vote.

Majority State participation connotes ownership by State or by certain other governmental entities of 51% or more of a company's capital. By-laws may provide for designation of one or more minority directors and supervisors. If extent of private capital is 20% or more, there will be proportional representation on board of directors and minority stockholders will be able to elect at least one supervisor. When minority stockholders exercise this right, public officials may not represent private capital. In all events private capital must be represented on board of directors by at least one director. If charter indicates an intent to maintain State predominance, any stock transaction resulting in a diminution of majority State participation therein must be authorized by law. Company with majority State participation may not be declared bankrupt. Liquidation proceedings must be conducted by state appointed administrators.

Joint stock company (sociedad en comandita por acciones) is an entity in which active partners incur liability to same degree as active partners of a general partnership and silent partners limit their liability to extent of their subscribed capital. Only capital contributions of silent partners are represented by shares. Unless otherwise provided, joint stock companies are subject to provisions governing stock companies, and, supplementally, to provisions governing general partnerships. Firm name must include words “sociedad en comandita por acciones” its abbreviation, or letters “S.C.A.” Administrator shall become jointly liable with company if such words are not included therein. If firm name does not contain names of all partners, words “y compañía” or its abbreviation must also appear therein. Administration may be unipersonal and undertaken by an active partner or a third party, whose term of office shall not have any maximum duration. Removal of administrator is governed by same rules pertaining to general partnership, although silent partner may legally request his removal with cause if such silent partner represents at least 5% of capital. Active partner removed as administrator has right to withdraw from company or become a silent partner thereof. Administration must be reorganized within three months if it is incapable of functioning as such, in which case a provisional administrator shall be designated. Meetings of company shall include active and silent partners and administrator shall have a voice, but no vote thereat. Assignment of any active partner's share of capital requires a favorable vote of a majority of shares with a right to vote, without applying thereto provisions governing shares with multiple votes.

Joint Venture.

(a) Business cooperation agreements: Juridical persons organized in country and locally domiciled individuals may organize in group to develop or facilitate certain aspects of business activity of their members or to complete or increase results of such activities. Profits resulting from such activity directly benefit assets of group. Member contributions and property acquired with such contributions form operative common fund of group. Individual creditors of members are unable to enforce their rights over such fund. Members are jointly, severally and unrestrictively liable to third parties on account of obligations assumed by representatives on behalf of entity. Parties may agree by public or private instrument and must register with Public Commercial Registry. (b) Temporary enterprises: Juridical persons organized within country and individuals locally domiciled may agree to temporarily organize as enterprise to develop or perform work, service or supply within or outside country. Except as otherwise provided for in agreement, joint liability of entities is not presumed with respect to acts and transactions developed or performed, or to obligations contracted with third parties. Parties may agree to organize as temporary enterprise by public or private instrument. Foreign companies may participate in such agreements if agreements comply with provisions of law. This enterprise is considered legal entity only for some tax purposes.

Foreign Companies.

(Law 19550, Arts. 118-124, and Law 8867 of Feb. 6, 1912). Company formed abroad and having only occasional dealings in Argentina is governed as to its existence and form by laws of country in which it is legally constituted. It is thus authorized to perform isolated acts in country and to participate in lawsuits. In order to habitually engage in business within scope of its charter, or to establish branches, or any other type of permanent representation in Argentina, a foreign company must comply with following: (1) Certify its existence in accordance with laws of its domicile; (2) establish domicile in Argentina by complying with all local publication and registration requirements; and (3) justify its decision to create such representation and designate a representative to represent it in all civil and commercial matters. Branches must state amount of capital assigned to their operations. If a company is formed in another country with unfamiliar laws, judge of registry will determine formalities to be completed in each case. It is mandatory that foreign company maintain separate accounts in Republic and that it submit to administrative inspection. Normally, corporate papers, by-laws and other documents relative to organization of company are required to be registered in Commercial Registry of place where office or agency has been established. Papers to be forwarded to Argentina should include certified copies of certificate of incorporation and by-laws of parent company and a broad power of attorney authorizing registration of company and empowering representative to conduct business of company in Argentina. If company has a large capitalization it is well to add a certified copy of a resolution of board of directors which indicates amount of capital to be employed in Argentina. This is for purpose of reducing taxes and fees. All of these papers should be authenticated by an Argentina consul. (See category 9 Documents and Records, topic 9.01 Acknowledgments.) It is also well to add certified translations of all documents if practicable to avoid great expense of translation in Argentina.

Service of process on a foreign company may be accomplished as follows: (1) If related to an isolated act, personally on agent who took part in act or contract resulting in litigation; (2) if there exists a branch or other representation, personally on designated representative.

2.03 FOREIGN CORPORATIONS:

See topic 2.02 Corporations (Stock Companies).

2.04 LIMITED LIABILITY COMPANIES:

See topic 2.02 Corporations (Stock Companies).

2.05 LIMITED PARTNERSHIP:

See topic 2.06 Partnerships.

2.06 PARTNERSHIPS:

(Law 19550 of Apr. 3, 1972, t.o. 1984).

General partnership (sociedad colectiva) is a partnership of two or more persons with unlimited and joint responsibility, which is formed for commercial purposes under a firm name which must include words “sociedad colectiva” or an abbreviation thereof. If firm name does not contain names of all partners, words “y compañía” or its abbreviation must also appear therein.

Partnership agreement regulates administration of company and in absence of any such provision therein any partner may indiscriminately administer company. If certain partners are charged with administration of company without determining their specific roles, or without expressly stating all activities that must be undertaken jointly, they may indiscriminately undertake any administrative act. Administrator, partner or not, even if designated in partnership agreement, may be removed at any time without cause by majority vote of partners, unless otherwise provided. If partnership agreement requires removal with cause, any partner may request a judicial determination thereof. Administrator may resign as such at any time unless otherwise provided, but he remains responsible for any damages resulting therefrom in event his resignation is fraudulent or untimely. All modifications of partnership agreement require unanimous approval of partners, unless otherwise provided, and all other resolutions shall be adopted by majority vote (majority vote herein expressly referring to an absolute majority of capital, unless partnership agreement provides otherwise). Partner cannot undertake acts for himself or for third parties that in any way compete with partnership, except with express and unanimous consent of other partners. Noncompliance with this prohibition authorizes exclusion of partner, reimbursement of all profits derived therefrom and indemnification for all resulting damages.

Limited partnership (sociedad en comandita simple) is a partnership formed for commercial purposes with two or more persons. Active partners have same responsibilities as partners of a general partnership, while silent partners are liable to extent of their capital contribution. Firm name must include words “sociedad en comandita simple” or its abbreviation and names of all active partners should appear therein. Capital contribution of a silent partner is paid-in only by determinate obligations. Administration of a limited partnership is undertaken by active partners or third parties and is subject to same norms as general partnerships. Silent partners may not interfere in business or act as agents of partnership, becoming unlimitedly liable for all such acts, although they may examine books and opine and advise in matters undertaken by partnership. Resolutions are adopted in same manner as general partnership. Silent partners have right to vote in accounting matters and on appointment of administrators. In event of bankruptcy, death, or incapacity of all active partners, silent partner may undertake all urgent acts of partnership until situation stabilizes without incurring liabilities otherwise applicable. Partnership is dissolved if not stabilized within three months. If silent partners do not comply with all legal provisions, they shall be unlimitedly and jointly liable for their conduct.

Partnership of capital and industry (sociedad de capital e industria) is formed by (1) individuals who supply capital and are subject to unlimited liability; and (2) one or more individuals who contribute only their personal services and are not personally liable (although all earnings not received by them may be lost). Firm name must include words “sociedad de capital e industria” or its abbreviation and names of any partners exclusively contributing personal services may not appear therein. Its administration is governed by same rules as set forth for a general partnership, partner providing personal services remaining eligible to become administrator. Voting requirements are same as for a limited partnership, capital of partner providing personal services being deemed to be for such efforts same as capital of active partner with smallest capital contribution. Partnership agreement should contain share of profits to be allocated to partner providing personal services, otherwise such share shall be determined by judicial proceeding.

Cooperative Societies.

Name must be followed by word “limitada.” Cannot be restricted as to number of members or shares, capital or duration. Shares must be registered and can be transferred only on conditions expressed in by-laws. Each member has only one vote regardless of total number of shares. Members can withdraw only as specified in by-laws or by law. Of net profits, at least 5% must be allocated to reserve fund and 90% distributed among members. (Law 20337 of May 2, 1973 as am'd).

3 BUSINESS REGULATION AND COMMERCE

3.01 BANKS AND BANKING:

(Law 21526 of Feb. 14, 1977 as am'd, and Law 24144 of Sept. 23, 1992 as am'd regulated by Decree 2708 of Dec. 29, 1993). It applies to banks and to other juridical persons, public or private, who mediate regularly between offer and supply of financial resources.

Central Bank supervises compliance with law and authorizes opening of branches of financial institutions. Deposits in Argentine currency are protected in case of insolvency of recipient bank. Central Bank may control financial institutions in danger of insolvency and has enough power to apply consolidation rules to entities that are in danger of insolvency. In such case, entity may enter into agreement for administration with option to be purchased by another entity. If Central Bank considers either that alternative of recuperation has failed or that those for consolidation provided for by such law are not viable or have failed, it may order liquidation of entity with or without revocation of its authorization to operate.

3.02 BILLS AND NOTES:

(Decree-Law 5965 of July 19, 1963 as am'd).

A bill of exchange must state: (1) that it is to the order or contain the words “bill of exchange” in the language used for the bill; (2) unconditional promise of payment of a specified sum of money, inclusion of interest not being permissible except if the bill is at sight or term after sight and the rate is specified, otherwise the clause is deemed not written; (3) name of drawee who will pay; (4) date of payment or whether payable at sight or at a term after date or after sight or at a number of months after date or sight or at the beginning, middle or end of a month; other periods or successive due dates annul the bill; lack of indication makes the bill at sight; (5) place of payment, otherwise it is payable at place stated beside the name of drawee or at his domicile; (6) name of payee; (7) date of issue and place of same, otherwise deemed issued at place stated beside name of drawer. The bill may be drawn to the drawer's order and for a third party's account. Incapacity of signers, signatures forged or of imaginary persons do not destroy the liability of other obligors under the bill.

The drawer guarantees acceptance unless otherwise stated. He always guarantees payment. An incomplete bill, completed later against agreed conditions creates liabilities in favor of a holder who acquired the bill without bad faith or gross negligence. A bill, to the order or not is endorsable, but if it contains the clause “not to the order” it is only assignable. An endorsement may be made to any person, including drawer or drawee who may re-endorse. Conditions in endorsements are deemed not written and partial endorsements are null and void. An endorsement may be to the bearer, or in blank which is equivalent unless filled in. Endorsers are jointly liable for acceptance and payment unless otherwise stated. They may forbid re-endorsement and thus be free from liability of subendorsers. Endorsements for collection or with similar limitations constitute only an agency; if made “in guarantee” or “pledge” or other expression of suretyship personal defenses against the endorser are not available against a holder without notice. Endorsements after due date are effective, unless after protest for nonpayment or lapse of period therefor, when they constitute assignment which gives the same rights of an endorsement except immunity for personal defenses against endorsers.

Presentment for acceptance may be made on or before due date. Drawer may state the term of presentment for acceptance or forbid it, except if the bill is payable at a term after sight when the period for presentment is one year if not otherwise stated by the drawer, or by endorsers, but the latter may only shorten it. If a bill presented is not accepted drawer may demand to have it presented again the following day. There is no need to leave the bill. Acceptance must be unconditional but it may be limited to a smaller amount. It is signified by the signature alone of the drawee on the note or after the words “accepted” or “seen” or others of similar import, but if a term was established or the bill is payable at a term after sight the acceptance must be dated.

Presentment of a bill payable on a certain date or a period after date or sight may be made on the due date or the two subsequent working days. Presentment to a clearing house is effective. Partial payment may not be rejected. If payable in currency which is no legal tender in the place of payment the bill may be paid in the place's currency at due date exchange rates but in case of arrears holder has option to demand the rate of the actual payment date. When “without protest” clause forms a part of printed text of bill, drawer's signature on bill is sufficient to make clause binding. However, when clause is written in by hand, clause itself must be accompanied by signature of either drawer or endorser. A “without protest” clause, moreover, binds all parties signing bill if placed there by drawer. If placed there by a party other than drawer, however, it binds only that party.

Failure to accept or pay must be established by a protest; if for lack of acceptance, within the period for presentation for acceptance, but if the first presentation was made the last day of the term the protest must be made the subsequent day; if for nonpayment of a bill due on a term after date or sight, the protest must be made within the two days following dishonor and if at sight, within the term for presentation or if presented on the last day, on the following. However, drawer, or an endorser or guarantor, may insert the clause “without protest” or “return without expenses” or other of similar import which if signed relieves holder from protesting but not from presenting the bill. The clause is binding upon the signer and subsequent endorsers.

Protest is made at place indicated for acceptance or for payment, in its case. If no payment place was indicated then at domicile of drawee or of person indicated to pay for him, or other person indicated for the purpose. There are two forms: (a) by a separate notarial document, the notary inserting also a notation in the bill or (b) by mail notice sent by a bank.

The notarial protest contains: date and hour; copy of bill, with acceptances, endorsements, guarantees and other data; demand to drawee or person liable to accept or pay, stating whether he was present or not; reasons for refusal or statement that none was offered; his signature or statement or impossibility of obtaining it or refusal to sign; signature of protesting party or statement of impossibility. The mail notice protest by a bank is made by delivering the bill within two banking days to a bank of the place of the protest. A bank which discounted the bill or advanced funds on it or took it for collection may also act. Within the two subsequent banking days, the bank will send a notice to the drawer or debtor by registered mail, with return receipt requested, demanding acceptance or payment, expenses included, within the banking day following receipt of the notice if within the same village or city or if out of the place within an additional term for the distance as regulated by the Executive Power. Until regulations are issued this kind of protest is not applicable. A certification of the facts including number of the registered mail card, date of delivery of the notice as per returned receipt, that the period to accept or pay has elapsed and whether a counter-protest has been made, giving details of same, shall be issued by the bank, sealed and signed, and delivered with the bill with a notation of the card and receipt, signed and sealed. A counter-protest is an allegation, in protest form, against a mail protest stating reasons for refusal to accept or pay.

Lack of presentation in time or of protest, when necessary, prejudices the bill as against endorsers, drawer and other liable parties, but not the acceptor.

Within four days of a notarial protest or of having received a bank protest certificate or of dishonor of bill, if protest is excused, holder must send notice to his endorser and to drawer and corresponding guarantors. Lack of notice does not prejudice the bill but may create liability for damages to others resulting from negligence. Notice may consist in a letter or the mere sending of the bill, but evidence of the sending is important.

A bill duly protested gives a right to immediate attachment and sale of the assets of persons liable for payment. A bill or its negotiation does not constitute novation, unless so intended, and the original action on the underlying obligation may be brought if the bill is returned and is not prejudiced to the detriment of the defendant.

A bill may be issued in several numbered counterparts. Any holder of a bill may make copies of the same, stating in the copy who holds the original and in the bill up to what point the copy goes. A copy may be endorsed and guaranteed. If the holder of the original refuses to deliver it to the holder of the endorsed copy, latter has action against endorsers and guarantors of the copy, showing the refusal by a protest.

Aval.—An aval is a joint guarantee which may be given by a third party for the drawer or any endorser, by signing on the back of the bill after the words “por aval” or others signifying a joint guarantee or in a separate document.

Promissory notes are governed by the applicable provisions of the bills of exchange. The maker takes the place of an acceptor.

Checks.

(Law 24452 of Feb. 22, 1995 as am'd). Law governing check is law of domicile of drawee bank. Following data must be inserted for validity of check: (1) Word “cheque,” or equivalent in language used, within its text; (2) number, although in international checks it may be omitted; (3) name of drawee and its domicile which is place of payment and which omitted makes check payable at principal place of bank within country; (4) date and place of issue, but latter may be omitted and then domicile of drawer applies; (5) single payment order indicated in writing and in figures; (6) signature of drawer. Checks may be made to specified person to his order or not or to bearer. No insertion of interest is to be made. Invalidity for incapacity or lack of power of drawer does not invalidate liabilities of other signers or endorsers. Drawer cannot exempt himself from liability. Checks issued to specified person to his order are endorsable and when issued to specified person not to his order are generally transferred by assignment of credits. Bearer checks are transferred by delivery. Endorsements are subject to rules similar to those applicable to bills of exchange. Checks must be payable at sight. Postdated checks are payable at presentment. Checks made and payable within country are to be presented within 30 days; if issued abroad, within 60. Term may be extended as indicated by law. Bank rejecting payment must state on check reasons and date and hour of presentment and this amounts to protest in which case holder must give notice within two days to drawer and endorsers and these to their corresponding predecessor. Lack of notice does not prejudice actions but endorser who fails to give it will be liable for damages, not in excess of check, to his predecessor. There are provisions on crossed, certified or to be credited in account. Certified checks cannot be issued to bearer, nor for period longer than five days. At expiration of that period, bank shall credit amount to drawer, but check, as such, retains its value. Drawer or endorser may insert statement indicating that check is in payment of specified debt and such statement binds only immediate parties and only creditor of specified debt may then endorse it, negotiability remaining in effect.

3.03 COMMERCIAL REGISTER:

See category 9 Documents and Records, topic 9.04 Records.

3.04 CONDITIONAL SALES:

See topic 3.12 Sales.

3.05 CONSUMER PROTECTION:

See topic 3.10 Monopolies, Restraint of Trade and Competition.

3.06 CONTRACTS:

The nature, form, objects and obligations of contracts are governed generally by the Civil Code. Nevertheless there is a definite class of contracts known as commercial or mercantile contracts, concerning which the provisions of the Civil Code are supplemented by the Commercial Code. The Civil Code, except as modified by the Commercial Code, however, governs mercantile contracts. (C. C. arts. 1137-1216).

To constitute a contract there must be an offer and acceptance, express or implied. The offer is void if the offeror dies or becomes incapacitated before the acceptance is received. Offers may be retracted any time before acceptance if the offeror has not renounced his right to retract. Verbal offers must be accepted immediately. A modification of the offer in the acceptance constitutes a new offer. The offeree may retract his acceptance any time before it reaches the offeror. If the offeree has accepted in the ignorance of a retraction by the offeror or of his death or incapacity he is entitled to reimbursement for all losses suffered by him and expenses incurred.

Only those persons having legal capacity may enter into contracts, but only the incapacitated person, his representative and third parties affected may have a contract nullified because of incapacity. Ratification of a contract made in one's name has the same effect as previous authorization.

The objects of a contract must be definite or subject to definite determination. Future inheritances and future hereditary rights cannot be the object of a contract.

Form of contract is determined by place where executed. If executed by various parties in different places, formalities are governed by law of place most favorable to its validity. According to Civil Code following contracts, except when executed at public auction, must be in form of public instruments (see category 9 Documents and Records, topics Notaries Public ["Escribanos Públicos"] and 9.03 Public Instruments): contracts regarding real property; extrajudicial partition of inheritances; contracts of incorporation or partnership and extensions of same or when part of capital is real property; contracts of marriage and dower; life annuities; transferring, repudiation or renunciation of hereditary rights; general and special powers of attorney for use in court, for administration of property or which concern a public instrument or execution of one; adjustments with regard to real property; transfer of rights arising from public instruments; acts accessory to contracts which are in form of public instruments; and payments of obligations originating in public instruments, with exception of partial payments, interest and rent.

A contract which should be in the form of a public instrument, but which is drawn up as a private document constitutes an obligation to reduce the same to a public instrument. The same rule applies to verbal contracts. Penalty clauses in contracts are enforceable.

Civil contracts involving more than 10,000 pesos must be in writing and cannot be proved by parol evidence. (See below with regard to modification in mercantile contracts).

Contracts made in Argentina to violate the laws of a foreign country are void. The validity, nature and obligations of contracts to be carried out in Argentina are governed by Argentine laws, whether made in Argentina or in a foreign country, but if they are to be carried out in a foreign country they are governed by the laws of that country. Contracts referring to real property in Argentina, executed in a foreign country, are valid if in the form of public instruments and properly legalized. If they are for the purpose of transferring title to real property the contracts must be protocolized by order of a competent judge.

As stated above the civil law is supplemented by the Commercial Code in respect to mercantile contracts. In general the law of contracts set forth above is generic and applies to all contracts whether mercantile or otherwise. Matters falling within the scope of the Commercial Code are those relating to the transfer of personal property for purpose of obtaining a profit from the same whether in its form when transferred or after changing its form; operations of exchange, banking, or brokerage; negotiations with regard to bills of exchange, checks or other endorsable paper; operations of factories, commercial agents, warehouses and transportation; suretyship and corporate transactions, freight, construction, purchase or sale of vessels, their equipment, provisioning and everything relative to maritime commerce; operations of factors, bookkeepers and other employees of merchants concerning their employers; agreements with regard to salaries of clerks and other employees of merchants; letters of credit, bonds, pledges, etc., and other matters especially treated of in the Code of Commerce. (art. 8, C. Com.). If a contract is commercial as to one party it is deemed commercial as to all parties. Commercial contracts may be evidenced by public instruments; by notations of mercantile agents and certificates of the contents of their books; by private documents signed by the parties or a witness in the contractor's name; by correspondence, telegrams, books of merchants, admission of the parties; by witnesses, and by presumptions. Witnesses may not be used to prove a mercantile contract in matters involving more than m.$n. 200 unless there is some written evidence of the contract. All blank spaces and amendments in mercantile contracts must be authenticated by the signatures of the parties. Telegrams have the same force as letters. Words are understood in their general sense. In case of ambiguity the intention of the parties must be sought and when found outweighs the literal sense. The customs of business are taken into account in interpreting the contract. In general it may be said that contracts governed by the Commercial Code are made with much less formality than those which depend solely on the Civil Code and the methods by which their existence and scope are proved are more numerous. Moreover, in many of the classes of commercial contracts, such as bills of exchange, checks, partnership agreements, etc., special rules are provided in the Commercial Code to govern their effect and operation. (See topic 3.02 Bills and Notes; category 2 Business Organizations, topics 2.02 Corporations [Stock Companies], 2.06 Partnerships.)

Public contracts are regulated by Decree Law 23354 of Dec. 31, 1956 as amended, ratified by Law 14467, in force according to art. 137 of Law 24156, Decree 436 of May 30, 2000 as amended, Decree 1023 of Aug. 13, 2001 as amended.

3.07 INFORMATION TECHNOLOGY, INTERNET AND NEW MEDIA:

Digital Signature.

(Law 25506 of Dec. 11, 2001 regulated by Decree 2628 of Dec. 19, 2002 as am’d). Law defines and regulates digital signatures and their certification process. Digital signature has same legal effect and value as handwriting signature when used according to law. Digital signature may be in any document, except, in wills, juridical acts related to family law, personal acts and acts required by law to be contained under formal conditions or which are non-compatibles with use of digital signature. Digital signature is defined as numeric value affixed to data message and where, by mathematical procedure, is linked to code of originator and text of message, allowing to determine that above value has been obtained exclusively with code of originator and that initial message has not been modified after transmission. Law establishes requirements for certification entities to be authorized, and includes sanctions against certification entities for noncompliance with their obligations under law. Electronic certification issued by foreign entities, non-authorized in country has same legal value and effect as local certifications when its validity is guaranteed by local certification entity. Sanctions for infringement of law include fines and cancellation of license.

Internet.

Right to search, receive and transmit ideas by Internet is protected by Constitution under freedom of expression right. (Law 26032 of May 18, 2004).

Protection of Personal Data.

Law 25326 of Oct. 4, 2000 regulated by Decree 1558 of Nov. 29, 2001, protects personal data on public and private records. Law considers sensitive data, such as racial or ethnic origin, political affiliation, religion, moral or political convictions, union affiliation, information related to health or sexual inclination which can be obtained only voluntarily, unless for scientific or information purposes where identity of person is unknown. In general, user of data shall have written authorization of owner of information. Law regulates use of data of commercial, financial or banking nature and legal proceeding for enforcement of law. Infringement of law is sanctioned with fines and imprisonment.

3.08 INTEREST:

Obligations may bear interest at any rate which contracting parties stipulate (C. C. art. 621), but in practice courts will not enforce interest rates above those which Argentinean banks are permitted to charge, on ground that usury is against public policy. Interest may not be compounded except by an agreement made after it is due, which authorizes addition of interest to capital, or when a judgment is obtained for principal and interest and debtor defaults in payment. When a debt is past due, interest must be paid at rate agreed upon, or, in absence of an agreement at interest rate established by law, and if no interest rate is established by law, at such rate as court may determine. (C. C. art. 622). Debtor is not in default until demand is made judicially or extrajudicially except when contract provides that default shall occur if debt is not paid at a certain time, or when nature and circumstances of obligation indicate that time is of essence. Interest rate established by courts in case of default varies in different parts of Republic. C. Com. (art. 565) provides that in case interest is stipulated but amount is not set, rate established by public banks is intended, and then only in case of default, and that where law or contract speaks of interest at current rate, rate charged by National Bank is understood. Art. 569 of Code of Commerce provides that by means of a judicial proceeding or by private agreement, interest may be earned on arrears of interest. In case of a judicial proceeding, interest must be in arrears for at least one year. Interest is likewise earned on balance due at end of each year pursuant to settlements. It would seem that rate established by National Bank in particular locality is followed generally by courts in fixing rate of interest.

Article (175 bis) of Penal Code provides that if person taking advantage of inexperience, or necessity of another induces him to promise or to give in any way interest or other pecuniary gains that do not reasonably relate to services promised or rendered, or to grant deposits or guarantees that can be deemed extortion, he shall be penalized with imprisonment and with fine. Same penalty is applicable to person who in bad faith acquires, transfers or claims credit bearing usurious interest. Imprisonment and fine shall be increased if person is professional lender or commission merchant who commits acts of usury frequently.

3.09 LICENSES, BUSINESS AND PROFESSIONAL:

Law 22426 of Feb. 23, 1981 as amended and its regulation, Decree 580 of Mar. 25, 1981, govern transfer of technology agreements. Law applies to all onerous juridical acts object of which is transfer of technology or trademarks by persons domiciled outside country to physical or juridical persons domiciled inside country, when said acts produce effects in latter. License Agreements between related parties (such as parent-subsidiary) and unrelated parties do not require approval but must be registered with National Institute of Industrial Technology for information purposes only.

3.10 MONOPOLIES, RESTRAINT OF TRADE AND COMPETITION:

(Const. art. 10; Law 25156 of Sept. 16, 1999 as am'd regulated by Decree 89 of Jan. 25, 2001; and Law 22802 of May 10, 1983 as am'd and its regulations, Decree 2121 of Nov. 30, 1994, Law 24240 of Sept. 22, 1993 as am'd, Law 24425 of Dec. 7, 1994, Decrees 1059 of Sept. 19, 1996, 1326 of Nov. 10, 1998 as am'd, 1088 of Aug. 28, 2001 as am'd, and 1219 of Sept. 12, 2006).

Antitrust law prohibits acts or conduct that may harm general economic interest, expressed in any form, related to production and trade of products and services, which purpose is or may result in distortion or restriction of competition or access to market, or constitute abusive dominant position in market. Following are practices which are considered restrictive practices, among others: price arrangement between competitors; market division, combined bids, refusal to sell, underselling, dumping, imposition of resale prices on distributors, retailers and representatives, retaining of products or consumer goods, excessive increase in price or abusive profits. Law is applicable to individuals and public or private entities which operate in country and to companies operating abroad whose acts or activities may produce effects in local market. Infringement of economic order implies joint responsibility of enterprise and of its administrators. Law is enforced by Tribunal Nacional de Defensa de la Competencia that can collect evidence ex officio or at party's request, may order end of restrictive practice and also impose fines up to 150 million pesos, that may be duplicate in case of second offense. Furthermore, acts and agreements between enterprises that may be considered as economic concentration are subject to notice and to its approval when sales are over 200 million pesos. Failure to report economic concentration is subject to daily fines of one million pesos. Agreements between companies that may reduce market competition are valid if approved by Tribunal Nacional de Defensa de la Competencia when they do not cause harm to general economic interest.

Local production is protected from unfair practices of international trade by imposition of countervailing duties on import of foreign goods. Dumping and subvention are considered unfair practices. Dumping is defined as import of foreign goods at lower price than normal value of similar or same product in origin or export place in normal commercial transactions. Normal value is determined according to method indicated by law. Subvention is defined as financial assistance from government or public organization in country of origin or exporting country to producer or exporter, such as direct or indirect incentives, premiums, repayment or similar advantages in order to make them more competitive on international market.

Restrictive covenants implementing principles established by Multilateral Trade Negotiations, The Uruguayan Round, are in effect. Local production is protected from massive import of same or similar products that may cause pecuniary loss. Temporary restrictive covenants are issued for up to 200 days while pending investigation is completed. Final restrictive covenants are issued for up to four years, subject to renewal for up to eight years.

Consumer Protection Law.

Law deals with consumer's right to be informed, general representations and warranties, credit operations, lack of performance, services, domiciled sales and mail order and general regulations on subject.

Secretary of Industry and Commerce is in charge of enforcing law.

3.11 NEGOTIABLE INSTRUMENTS:

See topic 3.02 Bills and Notes.

3.12 SALES:

(C. C. arts. 1363-1407).

Sales of real property may be made subject to such conditions as the contracting parties desire to make. A general provision not to resell is void, but a contract not to resell to a specific person is valid.

The law of conditional sales of personal property as known in Anglo-Saxon countries, is not developed in Argentina. It is specifically forbidden to sell personal property with a condition that title shall not pass until the price is paid, or that the vendor may reclaim the property on returning the purchase price, nor may personal property be sold on condition that the sale is void if a purchaser can be obtained who offers a better price.

International Sale of Goods.

United Nations Convention for the International Sale of Goods. See category 24 Treaties and Conventions, topic 24.01 Treaties and Part V, Selected International Conventions.

4 CITIZENSHIP

4.01 ALIENS:

See category 16 Immigration, topic 16.01 Aliens.

5 CIVIL ACTIONS AND PROCEDURE

5.01 ACTIONS:

Limitation of.

See topic 5.05 Prescription.

5.02 FOREIGN JUDGMENTS:

(C.C.P. arts. 517-519).

Code of Civil Procedure for federal courts is taken as basis for this article.

Foreign judgments have the force provided by treaty. In the absence of treaty a foreign judgment may be executed if the following circumstances exist: (1) That the judgment was obtained in an action in personam; (2) that the judgment was not entered by default against a defendant who was a resident of Argentina; (3) that the obligation with regard to which the judgment has been issued is valid according to the law of Argentina; (4) that the judgment was issued in compliance with all the legal requirements of the country where issued and properly authenticated according to the laws of Argentina and (5) judgment must not be contrary to prior or contemporary judgment of local court. Petition for execution of judgment must be presented to judge of first instance. Judgment is translated if in foreign language and judge then hears parties and District Attorney and decides whether or not it shall be enforced. Foreign judgments are executed in manner provided for execution of local judgments. Appeals may be taken from decisions of court of first instance.

5.03 JUDGMENTS:

See topic 5.02 Foreign Judgments.

5.04 LIMITATION OF ACTIONS:

See topic 5.05 Prescription.

5.05 PRESCRIPTION:

(C. C. arts. 3947-4043; C. Com. arts. 846-855).

The acquisition and loss of real and personal rights through the lapse of time is called “prescription.” Prescription runs against the state, as well as against private persons, in so far as property of the state which is susceptible of becoming private property is concerned.

Prescription in the case of things which are held by force or violence does not begin to run until the illegality of the possession has been cured. Prescription as a general rule does not run against minors nor against persons under guardianship. Prescription does not run between husband and wife, even although the administration of their property may be separated and although they be divorced. When because of difficulties or impossibilities, the bringing of an action has been temporarily prevented, the courts are authorized to free a creditor or proprietor from the consequences of prescription, if, after the difficulty has ceased, the creditor or proprietor has taken immediate advantages of his rights. When prescription is suspended, the time prior to the suspension may be added to the time subsequent in establishing a right of prescription.

Prescription is interrupted when the possessor is deprived of the thing for a year, even though the new possession be illegal or violent. Prescription is interrupted by an action against the possessor although begun before an incompetent judge and although it be void for defects of form or because the complainant has not legal capacity to sue. Prescription is also interrupted by an express or implied acknowledgment by the debtor or possessor of the right of the person against whom prescription is running. When prescription is interrupted the situation is the same as though no part of the period of prescription had run, and thereafter the whole period must elapse before prescriptive title can be obtained.

Title to real property is obtained by ten years' continuous possession, provided possessor holds property in good faith and with a presumptive title. Good faith consists of belief without any doubt on part of possessor that he is exclusive owner of property; and by a presumptive title is meant a title which on its face is valid and sufficient to establish ownership. Formal defects constitute a presumption of bad faith. Ignorance on part of possessor, based on an error of fact is excusable, but ignorance based on an error of law is not excusable. Possession of real property and real rights for a continuous period of 20 years with purpose of holding same in ownership, gives absolute title regardless of whether possessor has a presumptive title or holds in good faith, and regardless of whether rightful owner is present or absent from country.

Actions.

Regarding any kind of actions, mere inaction of creditor for period designated by law, without necessity of a presumptive title or good faith, frees obligee from all obligations. Period of prescription varies according to class of action from two months in case of an action by a husband to declare illegitimate a child born during matrimony, to 20 years in case of an action to partition an inheritance and in other cases enumerated below. In each case not only chapters of Civil Code and Code of Commerce on prescription should be consulted, but also provisions of law with respect to particular subject. Regardless of provisions of Civil Code, Code of Commerce must be carefully consulted in all cases involving commercial and mercantile matters. Enumeration below covers period of prescription in only a few of more important cases covered by Civil Code.

Action to demand partition of an inheritance against a co-heir who has possessed same in whole or in part in his own name, prescribes in 20 years. Action of a debtor to demand restitution of a pledge given as a security of a credit prescribes in same period, if pledge has remained in possession of creditor or his heirs.

Personal actions for debt prescribe in ten years. Right of a minor or his heirs against his guardian for an accounting prescribes in ten years from date of minor's majority or death.

The obligation to pay pensions for support prescribes in five years as also rents and any payment which must be made annually or in shorter periods.

An action to nullify judicial acts for violence, intimidation, error, fraud, etc., prescribes in two years from the date in which the violence or intimidation ceases, or the cause of action is known in case of error, fraud, etc. The obligation to pay the fees of arbitrators, lawyers, and all classes of employees in the administration of justice, notaries, the salaries of agents, and fees of doctors, surgeons and druggists prescribes in two years.

The action of creditors to revoke agreements made by debtors in fraud or prejudice of their rights, prescribes in one year. The obligation to pay for food and lodging, tuition in schools, the wages of servants who are paid annually or oftener and wages of workmen and mechanics prescribes in one year. Actions for libel and slander, for damages caused by animals and for damages as a result of crimes or quasi crimes prescribe in two years.

The action of a purchaser to rescind a contract prescribes in six months.

In mercantile matters the period of prescription is ten years unless a shorter period is provided by the Code of Commerce, the Civil Code or other laws. (C. Com. art. 486). The Code of Commerce has a classification of commercial actions which prescribe in less than ten years. Arts. 847 to 855. For example: The liquidated debt as a result of a sale, interest payable annually or in less periods, and an action to rescind a judicial act of a commercial nature, unless a different period is specifically provided, prescribe in four years; actions regarding improper operations of a company, and actions regarding certain classes of endorsable documents or of documents payable to bearer prescribe in three years; actions arising out of mortgage of ships prescribe in two years; actions arising out of maritime freight contracts, contracts of surety, and the provisioning of vessels prescribe in one year. The articles of the Code of Commerce above mentioned enumerate the periods of prescription in a number of other cases.

6 COURTS AND LEGISLATURE

6.01 COURTS:

Federal justice is administered by a Supreme Court composed of nine judges and Attorney General, located in City of Buenos Aires; by national courts of appeals in federal capital and provinces as well as courts of first instance and oral courts.

Justice is administered in national capital by following authorities: National Criminal Superior Court, National Courts of Appeals, Oral Courts, national judges of first instance of civil matters. There are likewise judges of misdemeanors, with jurisdiction over minor municipal violations. (Decree Law 1285/58, as ratified by Law 14467 t.o. 1993, as am'd).

Judicial procedure in provincial courts depends upon laws enacted by respective provinces, and federal procedure is governed by federal law. Consequently, though there is legislative unity throughout Republic as to substantive law (civil, penal, commercial, aeronautic and mining codes), adjective laws, or those laws which determine procedure before courts, depend in each case upon such provisions as legislative power of each province may provide. For this reason it is necessary in matters of procedure to examine national or provincial laws as case may be, however great resemblances between them. Acts of administrative nature are governed by procedures set forth in Law 19549 of Apr. 3, 1972, t.o. 1991 and Decree 1759 of Apr. 3, 1972, t.o. 1991.

In the provinces there are also Mayors (Intendentes), justices of the peace, judges of first instance (jueces letrados), courts of appeal, and Supreme Courts of the provinces.

6.02 JUSTICES OF THE PEACE:

See topic 6.01 Courts.

6.03 STATUTES:

Laws are published in official paper of Government called “Boletín Oficial,” which appears daily. Among most important laws are : Civil Code, Code of Civil and Commercial Procedure, Code of Commerce, Stock Exchange Law, Penal Code, Code of Criminal Procedure, Mining Code, Taxation Code, Petroleum Law, Bankruptcy Law, Legislation of Customhouses, Environmental and Antitrust Legislation.

7 DEBTOR AND CREDITOR

7.01 ATTACHMENT:

(C.C.P. arts. 209-220, 531-558).

The Code of Civil Procedure for Federal Courts is taken as basis for this article.

In order to attach property in an ordinary civil action, one of following conditions must exist: (1) That debtor is not domiciled in Republic; (2) that debt is evidenced by certain written instruments; (3) that in case of an action on a bilateral contract, contract is in writing and complies with certain requirements as to its execution; (4) that debt is evidenced by mercantile books kept in due form; or (5) when debt is subject to a condition, that plaintiff proves that debtor tried to alienate, hide or remove his property or that responsibility of debtor has decreased after obligation was contracted.

An attachment will also issue against specific property which is the object of a possessory action, and in an ordinary action, an attachment will issue at the request of any of the parties when facts are admitted which make out a prima facie case in their favor, or when a favorable judgment has been obtained.

The party who obtains an attachment must give security for costs and damages. Attachments will also issue in the summary actions known as “executory actions.”

7.02 BANKRUPTCY AND INSOLVENCY:

(Law 24522 of Aug. 7, 1995 as am'd).

Law is applicable to licensed merchants, private entities and mixed companies.

Reorganization Process.

Reorganization may be to prevent or suspend bankruptcy from time filed at court, before or after bankruptcy proceedings. Reorganization agreement to prevent bankruptcy (concurso preventivo) may be proposed by debtor by filing petition with judge stating his financial conditions and reasons for his petition. Petition itself must comply with specific requirements of form and substance. Debtor must file petition provided no bankruptcy has been declared. Judge of commercial court must rule on petition within five days from its filing date, either rejecting it for failure to meet procedural requirements or declaring opening of preventive proceedings. Ruling of judge opening preventive proceedings identifies petitioner and schedules a hearing for appointment of a receiver and orders publication of notice in order that creditors and interested parties may appear, fixes period for creditors to qualify as such and also orders stay of execution against debtor on claims subject to concurso. Debtor continues to manage business under supervision of receiver, but is prohibited from changing situation of his creditors and judge must authorize payment of salaries and indemnifications for industrial accidents due all employees, subject to receiver's verification of such amounts outstanding. Prior judicial consent must also be obtained for a number of other significant activities undertaken during this period. If debtor fails to obtain such authority, or fails in any other way to observe requirements of receivership, administration of his business can be turned over to a successor by judge. Dismissal of preventive petition may occur when debtor does not observe proper filing requirements or fails to give creditors proper notice of commencement of proceedings. Otherwise, debtor may not voluntarily dismiss action after notices of same have already been properly published.

Creditors must request that receiver verify validity of their claims, indicating amount, substance, and priority thereof and accompanying such written request with all appropriate documentation. Receiver then checks validity of such claims by reviewing books of debtor and, if appropriate, of creditors. Receiver files an individual report on each creditor's claim so presented, but each creditor is permitted to formally object to such report within ten days of its filing and any such objection will be resolved by judge. Judge's decision in this regard is final. Receiver must also file his general report with judge. Such general report contains, among other things, reasons for debtor's financial difficulties, detailed account of assets and liabilities, thorough analysis of debtor's books, statement of when payments technically ceased, formal opinion on viability of proposed agreement, account of debtor's activities during receivership, and, in case of a partnership, whether partners other than debtor have any liability therein. General report may also be objected to by creditors and debtor.

Creditors are grouped into different categories according to nature of their credits; debtor must file payment arrangement to each group of creditors. Payment arrangements must be approved by creditors as stipulated by law and confirmed by judge. After confirmation of same, judge provides for its execution and compliance, dismisses receiver and declares preventive proceedings terminated. If proposed reorganization agreement is rejected by creditors, judge forthwith declares involuntary bankruptcy, which decision may be appealed only for purposes of remanding same. When reorganization agreement is rejected by creditors, in concurso of private entities and mixed companies, creditors, shareholders, employees or third parties may offer to purchase business. Any creditor affected by reorganization agreement may demand its annulment based on causes indicated in law. Decision declaring annulment of agreement must declare bankruptcy of debtor. Bankruptcy is also declared for noncompliance with agreement and by impossibility of debtor to fulfill agreement. Debtor may also enter into out of court reorganization agreement with creditors. Agreement may be confirmed by court decision at request of majority of creditors.

Liquidation Proceeding.

Bankruptcy must be declared at creditor's or debtor's request or in cases indicated above.

Bankruptcy is determined by cessation of payments, which, in turn, may be evidenced by recognition of same by debtor, delay in fulfillment of an obligation, absence of debtor, closing of principal place of business of debtor, delivery or sale of assets of debtor at worthless price, annulment of acts or debtor in defraud of creditors, or by any other fraudulent method utilized by debtor to obtain funds. All assets of debtor are affected thereunder, unless expressly exempted therefrom under law (e.g., non-patrimonial rights, assets not ordinarily attachable, usufruct of assets of minor children of debtor, personal assets of spouse, right to legally defend debtor's assets, indemnifications due debtor for personal injury or mental anguish and all others exempted under other laws). It is not necessary that more than one creditor petition for a declaration of bankruptcy, although creditor must summarily prove that assets of debtor are insufficient to cover his debts. Petitioning creditor may subsequently unilaterally abandon his petition. After creditors have filed their petition and summarily proved debtor's cessation of payments, debtor has a period of five days within which to appear and prove otherwise, after which a judge rules on declaration of bankruptcy. Before any declaration of bankruptcy, if creditors have a good prima facie case, judge may order such precautionary measures as a general inhibition of debtor's assets or a supervised intervention in business in order to protect value of remaining assets of debtor. If debtor himself petitions for a declaration of bankruptcy, he must place his assets in custody of court. He may not subsequently unilaterally abandon his petition unless he can prove prior to first publication that his cessation of payments has terminated.

Formal declaration of bankruptcy deprives debtor of all control over his assets, same being placed under supervision of a receiver for orderly distribution to creditors. Within ten days of last publication, liquidation proceedings may be converted into reorganization proceedings, at debtor's request after complying with conditions stipulated by law. Bankruptcy decree must be published for five days in legal journal and may be appealed by debtor within such period if it was declared upon petition of creditors. Bankruptcy decree also has following impact upon debtor's personal activities: he must fully cooperate with receiver in establishing his net worth; he is not permitted to leave country without court's permission; and he must continue to function in his previous capacity if so requested, unless expressly exempted therefrom. Period between cessation of payments and formal declaration of bankruptcy is designated “period of suspicion,” and it is within such period that certain transfers of property by debtor are rendered void or without effect and creditors present their respective claims to receiver.

Once bankruptcy is declared, all claims of creditors become subject to Law of Bankruptcy and may only be satisfied in accordance with provisions of same. Declaration of bankruptcy results in maturity of all debts of bankrupt and all interest on same is suspended, except in case of mortgagees and other secured creditors with liens upon specific property of debtor, who are not prejudiced in their foreclosure remedies and are entitled to receive interest up to amount obtained in liquidation of secured asset. Specific provisions deal with all legal relations previously established by bankrupt (e.g., executory contracts, reciprocal loans, agreements to agree, partnership relations, debenture agreements, etc.). Under some circumstances, such as where immediate liquidation would cause irreparable harm to interests of some creditors, court may order that business of bankrupt be continued under supervision of receiver. Normally, however, receiver proceeds to an immediate liquidation of debtor's business in accordance with following priorities: (1) Sale of entire business, as a going concern; (2) bulk sale of all assets of business; and (3) sale of all or part of assets of business. Receiver must present his final report and accounting within ten days after last assets have been sold. Once it has been established by judge that a proper and complete liquidation has taken place, all creditors are declared paid in full and bankruptcy proceeding is declared closed. Such declaration may be appealed only by proving that there are new assets of debtor subject to attachment by court.

Foreign reorganization agreement may serve as a basis upon which to open a concurso proceeding in Argentina, upon petition of debtor or of creditor wishing to satisfy claims in country. Notwithstanding international treaties, reorganization agreement may not be invoked against creditors whose claims must be paid in Argentina for purposes of disputing their rights to assets located therein or annulling actions taken by debtor. Those creditors whose claims must be satisfied from assets located in Argentina will take priority over creditors whose claims must be paid exclusively out of assets located abroad, although latter do have rights to claim any residuary assets of debtor after payment of all such domestic claims. In case of single bankruptcy proceedings processed in Argentina, claims payable abroad may be included among local claims, if law of their country of origin provides for same treatment with respect of credits payable in Argentina.

7.03 FORECLOSURE:

See category 20 Mortgages, topic 20.02 Mortgages.

7.04 INSOLVENCY:

See topic 7.02 Bankruptcy and 7.04 Insolvency.

8 DISPUTE RESOLUTION

8.01 ALTERNATIVE DISPUTE RESOLUTION:

(C.P.C. arts. 359-367, 736-773, Law 24573 of Oct. 25, 1995 as am'd regulated by Decrees 1021 of Dec. 28, 1995 as am'd and 91 of Jan. 26, 1998 as am'd).

Arbitration.

Any matter on which compromise may be reached is allowed to be submitted to arbitration. There are two types of arbitration: arbitration de jure, in which arbitrators are empowered by parties to decide according to rules of law, and arbitration ex aequo et bono, in which case award is rendered by arbitrators according to their best knowledge and understanding. Arbitration agreement may be in public or private document or act before judge. Number of arbitrators should be three.

Mediation.

Dispute resolution by mediation is mandatory prior to submitting dispute to litigation, except: in criminal matters, matrimonial actions, filiation and child custody (except for monetary aspect of matrimonial actions), declaration of incompetency and rehabilitation, habeas corpus, provisional remedies, reorganization and bankruptcy, labor disputes, discovery before trial, among others. Mediators are elected at random from list of mediators recorded at Registry of Mediators. In order to be registered as mediator, attorney must comply with requirements of law. Registry of Mediators operates under responsibility of Secretariat of Justice. In case of noncompliance with reached agreement, enforcement by judge may be requested.

Dispute resolution arising out of international commercial relations between individuals and legal entities domiciled in member countries of southern common market Mercosur may be submitted to arbitration to Centre for Conciliation and Arbitration of International Arbitration Court for Mercosur.

Conventions.

Inter-American Conventions on Extraterritorial Validity of Foreign Judgments and Arbitral Awards, Montevideo, 1979; Convention on the Recognition and Enforcement of Foreign Arbitral Awards, New York, 1958; International Commercial Arbitration Agreement of Mercosur, Buenos Aires, July 23, 1998.

9 DOCUMENTS AND RECORDS

9.01 ACKNOWLEDGMENTS:

(C. C. arts. 12, 950).

According to the system in force generally where the civil law prevails, contracts, deeds and other documents which require authentication by a public official are prepared in Argentina by a notary or other authorized public official, and made a part of his protocol. That is, the original documents are kept in an official register in the office of the notary or official. (See topics 9.02 Notaries Public ["Escribanos Públicos"] and 9.03 Public Instruments.) Instruments executed in foreign countries, however, are given full recognition in Argentina if duly acknowledged in the manner required in the country where they were executed, authenticated by a consular or diplomatic agent of Argentina, or by apostille if country of execution is party of Hague Convention of 1961.

9.02 NOTARIES PUBLIC ("ESCRIBANOS PÚBLICOS"):

(Notarial Law 12990 of June 19, 1947 as am'd, regulated by Decree 26655/51 of Dec. 28, 1951; C. C. arts. 997-1011).

A notary must be an Argentine citizen, hold a diploma as notary issued by the National University, and be a member of the notarial association called College of Notaries. A notary may not hold any salaried position, public or private, nor engage in commerce or banking, nor in the practice of law, and must reside in the locality where his notarial office is situated. The number of such notarial offices is limited; appointments are made by the Federal Executive from lists of three names submitted by the College of Notaries after competitive examination, but the appointee may designate one or two assistant notaries. Special notaries may be appointed on competitive examination for branches of the Government, municipalities and official banks. Notaries must give bond before entering upon their duties and are subject to the supervision of the courts and of the College of Notaries.

Importance of office is due to fact that all of more important documents which are referred to so often in this digest as notarial documents (escrituras públicas) and which are a class of public instruments (see topic 9.03 Public Instruments), to have legal effect, must be prepared by a notary or other competent official, and preserved in his record or protocol, which is an official registry kept in manner provided by law and carefully preserved and inspected by public authorities.

Notarial documents must be in the Spanish language. If the person executing the document does not know the Spanish language, the document should be made in the form of a memorandum signed by the parties in the presence of the notary and authenticated by him. If not signed in his presence the genuineness of the signature must be certified to by the notary. It is then translated by an official interpreter. The memorandum and the translation are then placed in the notary's protocol. A notarial document must state its nature, object, the names and surnames of the persons executing it, whether or not they are of age, their family status, domicile or residence, the place, day, month and year when it was signed, which may be a holiday or Sunday. The notary must certify that he knows the persons executing the document, and when completed should read it to the parties, and should at the end certify in his own handwriting to any interlineations, or amendments in the document. If any party does not know how to sign, another person, except witness, can sign in his or her name. Document containing all conditions, clauses, periods of payment, and statement of sums delivered in presence of notary which should be written out in full, is then signed by parties, and if parties or notary consider it is necessary, in presence of two witnesses whose names and domiciles must be stated in body of document, and is then authenticated at end by notary. Identity of parties must be done by declaration of notary, by declaration of two witnesses or by official document. If parties are represented by agents, document must state that power of attorney has been presented, and it must be transcribed in notary's register along with document. If power has been executed in his own office notary need only refer to its place of record. Notarial documents which do not state place and date of execution, names of person executing them, their signatures, and which do not include power of attorney when executed by agent, and statement of presence of two witnesses and their signatures, are void. Absence of other formalities does not vitiate document but renders notary liable to fine. Documents are also void which are not found in their proper place in notary's protocol. Notary must give parties who request it, authenticated copy of document. Subsequent copies may be given also, but in case any of parties is required by document to do any act, he may only have subsequent copy by order of court. Copies may only be given on citation of parties in order to give them opportunity to compare copy with original, and in case of their absence public official is appointed by court for purpose.

9.03 PUBLIC INSTRUMENTS:

(C. C. arts. 979-996).

The following are public instruments: (1) Notarial documents (“escrituras públicas”), prepared by notaries in their registries (“protocolo”) or by other public officers who have the same powers, together with copies of the same made in the manner provided by law; (2) other instruments prepared by notaries or public officers in the form provided by law; (3) entries by brokers in the cases and in the manner provided for in the Code of Commerce; (4) judicial documents made in the records by the clerks of courts and signed by the parties as provided in the laws of procedure, and copies of the same made by judicial orders; (5) bills of exchange accepted by the government or its delegates and credits issued by the Public Treasury; (6) bills of exchange of private individuals made in payment of customs duties with an annotation that they belong to the Public Treasury; (7) registrations of the public debt; (8) shares of stock of companies especially authorized; (9) bills and certificates of credits issued by authorized banks; and (10) records of marriages in the books of the church or in municipal registries and copies thereof.

Public instruments must be signed by the interested parties who appear as having taken part in their execution. Unemancipated minors, insane persons, the blind, nonresidents of the place, those who do not know how to sign, clerks of the office and of other offices authorized to prepare public documents, relatives of the public official to the fourth degree, bankrupts, the clergy, and those convicted of certain crimes, may not be witnesses to public documents.

The class of public instruments included in subdivision (1) above which are referred to as notarial documents (“escrituras públicas”) in this digest are of most importance to foreigners. They are fully discussed under topic Notaries Public and referred to from time to time throughout the digest.

9.04 RECORDS:

Registry of Real Property.

Law 17801 of June 28, 1968 as amended and its regulations Decree 2080 of Sept. 24, 1980, as amended, regulates Real Property Registry.

Being a Federal law, registries existing in each province, Federal District and National Territory of Tierra del Fuego, Antártida and South Atlantic Islands are regulated by provisions of present law. Following documents shall be registered: (a) Those that constitute, transmit, declare, modify or extinguish rights upon real estate; (b) those that impose attachments and any other injunctions and (c) those documents established by other national or provincial laws.

To register these documents, certain formalities are required, e.g., to be acknowledged by a notary public or by an administrative or judicial resolution.

Registry is public. Anybody with legitimate interest can investigate legal status of real estate therein registered, and deeds, limitations and attachments recorded. Law does not determine fees for registering documents; its scope covers only general provisions. Fees usually depend upon amount of value of real property registered, capital in mortgages, etc., and vary in each town or province according to their respective laws.

For the law of any particular province the provincial law must be examined.

Registry of Persons.

(Law 17671 of Feb. 29, 1968 as am'd). Argentineans and foreigners domiciled in country and Argentineans domiciled abroad must be registered in order to obtain identity cards.

National registry of vital statistics called “National Civil Registry” is regulated by Decree 8204 of Sept. 27, 1963 as amended. Births and death, marriages, divorce and separation judgments, annulment of marriage, acknowledgment of children and adoptions, emancipation, guardianship, naturalization are records at Registry. Law 18248 of June 10, 1969 regulates registration of names of physical persons. Right to elect first name can be freely exercised except when names selected are ridiculous or express any particular ideological or political tendency. Foreign names are allowed to be recorded when there is proper Spanish translation, in which case latter should be used. When foreign name has easy pronunciation, is also name of parents and there is no translation of it into Spanish, recording officer is permitted to register it. In any case no person is entitled to have more than three initial names. Married women have option to add after their single name their husband's name preceded by preposition “de” (meaning “of”). After judicial separation it would be optional for divorcees to continue using their husband's name.

When foreigners apply for citizenship they may petition authorities to simplify spelling of their names. When pseudonyms have acquired notoriety, they are entitled to same full protection provided by law as real ones.

Commercial Register.

A public register is maintained by each commercial court for registration of all merchants under its jurisdiction who are required to register their business license and other documents such as articles of incorporation and by-laws in case of a corporation, powers of attorney for managing enterprise granted by merchants to factors or agents and revocation of same. Other acts such as contracts between husband and wife concerning property rights and adjudication of divorce or legal separation are also registered in public commercial register. (C. Com. Arts. 34-42).

Registries of Juridical Persons.

(Law 26047 of July 7, 2005). Law regulates National Registry of Stock Companies, National Registry of Non-Stock Companies, National Registry of Foreign Companies and National Registry of Associations and Foundations.

Industrial Register.

Law 19971 of Nov. 27, 1972 regulated by Decree 8330 of Nov. 27, 1972 created “National Industrial Register”. All natural and juridical persons whether public or private, national or foreign, which engage in any kind of industrial activity in country must be registered within 30 days of obtaining administrative authorization. Registration must be made for each separate industrial activity on annual basis.

Foreign Investment Register.

See category 14 Foreign Trade and Commerce, topic 14.04 Foreign Investment.

10 EMPLOYMENT

10.01 LABOR RELATIONS:

(Const. arts. 14, 14 bis, Laws 9511 of Sept. 29, 1914, 11544 of Sept. 12, 1929 as am'd, 14250 of Sept. 29, 1953 t.o. 2004, 20744 of Sept. 11, 1974 t.o. 1976 as am’d, 23546 of Dec. 22, 1987 t.o. 2004, 24013 of Nov. 13, 1991 as am’d, 24557 of Oct. 3, 1995 and 24635 of Apr. 26, 1996; Law 24241 of Oct. 13, 1993 as am'd regulated by Decree 313 of Mar. 29, 2007).

Federal Constitution provides that labor must enjoy protection of law, which must guarantee workers equitable working conditions, limited working day, paid days of rest and vacations, fair remuneration, flexible minimum essential wage, equal pay for equal work, share in enterprises' earnings. Organization of labor and trade unions is guaranteed, to conclude collective bargaining, and right to conciliation and arbitration is consequently protected by Constitution as well as right to strike. Government grants social security benefits which are compulsory and non-waivable, and flexible retirement pay and pensions. Full protection of family, its welfare and access to decent housing are also expressly contemplated in Constitution among other provisions.

Argentina does not have labor code. Labor Contract Law, decrees and regulations have been issued for each specific work or type of work; these legal instruments regulate employment conditions and collective bargaining agreement.

Employment contracts are for indefinite or fixed period. Indefinite period contracts provide for three month trial period during which either party may terminate relationship without prior notice or severance payment. Employer can hire same employee only once on trial basis. Union may authorize extension up to six months. Fixed period contracts may not exceed five-year term and if terminated before expiration, employee may claim compensation for damages. Minimum salary established by law and also by collective bargaining agreements. Hours of labor are limited to eight per day or 48 per week. Overtime is limited to maximum hours per month and per year. Minors under 14 years of age cannot be employed in any kind of activity, whether profit-making or not. Workers are entitled to paid vacations from 14 to 35 days per year, depending on time of employment. They are also entitled to one salary bonus per year. Salaries, pensions and certain other compensation cannot be subject of deduction and/or attachment up to certain amount. Workers may be dismissed only if serious offense is committed. In case of dismissal without justified cause employer must pay to worker indemnity of one month salary for each year of service or any period greater than three months calculated according to formula indicated in law. Unemployment benefits are paid at rate equivalent to last month's pay, for four months to one year after dismissal, to employees dismissed without justified cause, laid off, resignation due to justified cause, bankruptcy, expiration of labor contract, death, retirement or disability of employer, among others. Short-term employment contracts are regulated. Compensation for accidents and injuries is limited by law. Most labor disputes must be submitted to conciliation prior to submitting dispute to labor courts. Statute of limitations is two years. There is national workers register which includes work history, registration of employers, pension and medicare contributions. There is social security system for retired workers. There are two retirement and pension systems: (1) One which funds pension benefits to retirees entirely through deductions assessed against salaries and contributions made by employers; and (2) privately-owned and managed pension funds, in which employee's contribution is deposited into personal retirement accounts managed by administrators of pension and retirement funds of their choice.

11 ENVIRONMENT

11.01 ENVIRONMENTAL REGULATION:

(Const. art. 41, Law 25612 of July 25, 2002, Law 24051 of Dec. 17, 1991 regulated by Decree 831 of Apr. 23, 1993, Law 25675 of Nov. 27, 2002).

Constitution establishes legal framework for environmental legislation granting to each person right to enjoy healthy well-balanced environment, suitable for human development, imposing duty to preserve it. Present needs should be satisfied by productive activities without compromising those of future generations. Environmental damage imposes duty to repair damage. Entry of hazardous waste into country, whether actually or potentially dangerous is prohibited. Law regulates generating, handling and treatment of waste generated by industrial activities and by rendering services that may cause damage, directly or indirectly, to living beings or when it may pollute water, soil, atmosphere or environment. Registration and authorization must be obtained before generating or handling hazardous waste. Generator is responsible for its elimination, including final treatment. Law regulates operation of treatment plants. Administrative or criminal penalties are imposed for violations of law. Administrative sanctions include fines, suspension or cancellation of registrations, depending on gravity of offense and prior violations. Criminal sanctions include fines and imprisonment as established by Criminal Code. Environmental liability is regulated by general principles of civil code which create obligation to indemnify for causes of damages or to restore environment to previous state. Environmental protection for areas such as zoning, mining, oil, energy, water pollution, and agriculture are regulated by specific legislation.

Law on national environmental policy establishes minimum assumptions for achieving uniform environmental protection in country and necessary conditions to guarantee environmental protection. It deals with court jurisdiction, environmental damages, rules, impact assessment and education, and information and economic regime for promotion of sustainable development. It creates Federal Environmental System in charge of developing and coordinating environmental policies in order to achieve sustainable development. It also creates Environmental Compensation Fund which warrants environmental quality, prevention and mitigation of damages and harmful effects on environment, restoration of environment conditions or compensation for damages caused, and protection, preservation and conservation.

12 ESTATES AND TRUSTS

12.01 ADMINISTRATION:

See topics 12.02 Claims Against Decedents' Estates, 12.06 Executors and Administrators.

12.02 CLAIMS AGAINST DECEDENTS' ESTATES:

See topic 12.06 Executors and Administrators.

12.03 DEATH:

The absence of a person from his domicile or place of abode within the Republic, and where there is no information as to his whereabouts for a period of six years, gives rise to a presumption of death. The absentee's estate is provisionally distributed among his heirs or legatees. After 15 years from date of presumption of death, or 80 years from birth of absentee, distribution becomes final. (C. C. arts. 110-125).

Deaths are recorded in the Civil Registry of the Judicial District, of which there are several in each province. Death certificates may be obtained from the official in charge of the Civil Registry Office. Amount of fee is fixed by provincial or local regulations.

Actions for Death.

There is no statute specifically providing for wrongful death action, but this could be supported by the general text of the provisions on torts under which any damage suffered by a person by the fault of another constitutes a tort. There is two year limitation period. However, when a crime is involved, all damages therefrom are determined in the penal judgment as accessory penalty. (C. C. arts. 1109, 1068, 1069, 1110 and 4037).

12.04 DECEDENTS' ESTATES:

See topics 12.02 Claims Against Decedents' Estates, 12.05 Descent and Distribution, 12.06 Executors and Administrators, 12.10 Wills.

12.05 DESCENT AND DISTRIBUTION:

(C. C. arts. 3279-3576, 3585-3595, 3598-3605).

Estates of decedents pass either by will or by operation of law.

A child conceived at the time of the death of the decedent inherits, unless it be still-born. The following persons are incapable of inheriting: Persons under sentence, as principal or accomplice, for the murder or attempted murder of the decedent, his or her spouse or descendants; heirs who are of age and have knowledge that the death of the decedent resulted from a crime and do not inform the judicial authorities within one month thereafter, unless the crime was committed by an ascendant, descendant, husband, wife, brother or sister of the heir; persons who have accused the decedent of a crime punishable by imprisonment at hard labor for five years or more; persons under sentence for adultery with the wife of decedent; the relatives of the decedent who have found the latter in a demented or destitute condition and have not taken steps to protect him or place him in a public institution; persons who, by force or fraud, have induced the decedent to make or revoke a will or who have concealed a will or have forced the decedent to make certain provisions therein; and natural parent who has refused to recognize or support natural child during his infancy. Wills executed after the person has become disqualified do not preclude him from inheriting by virtue of the will. Three years' possession of an inheritance or legacy cures a previous incapacity to inherit. The children of an incapacitated person are entitled to their shares of the estate in their own right regardless of the incapacity of the parent. Foreigners have the same right to inherit as citizens.

Only part of the decedent's estate may be disposed of freely by will; a certain portion goes to heirs by operation of law, the amount of such portion depending upon the degree of relationship between the decedent and the heirs. Heirs by operation of law and their shares, commonly called “legitimate portions,” are briefly as follows:

(1) Children inherit per capita; other descendants per stirpes. When there are children and surviving spouse, latter is entitled to same share as child. Total legal shares of all persons falling within this paragraph is four-fifths of inheritance.

(2) In default of children and descendants, ascendants inherit. Should the father and mother of the decedent survive, they take equal shares. If only one survives he or she will take the entire part of the estate which is inherited by operation of law. In default of surviving father or mother, those ascendants nearest in degree of consanguinity inherit in equal parts. Should there be surviving ascendants and spouse, latter shall inherit one-half of separate property of deceased and one-half of community property belonging to deceased, remaining half of same shall be inherited by legitimate ascendants. Should there be surviving natural parents and spouse, former shall inherit one-half of aforementioned portions otherwise distributable to ascendants.

(3) If there be no descendants, or ascendants surviving, surviving husband or wife has right to one-half of amount of inheritance, and if there survive only husband or wife estate is given to surviving spouse.

Gifts made during the life of the decedent to heirs who are entitled to take by operation of law are charged against their shares of the estate.

In default of heirs by operation of law as stated above, and of a will, inheritance passes to collateral relatives to fourth degree. In this case a full brother excludes a half-brother. Those of equal degree inherit in equal parts. In default of heirs by operation of law, of collateral relatives to fourth degree and of a will, inheritance passes to state.

In order to be entitled to an inheritance, the estate must be accepted by the heir or heirs. The acceptance may be unconditional or subject to the making of an inventory. The heirs accept the estate individually, and the acceptance by one does not affect the rights of any of the others. An unconditional acceptance may be made in writing or may be implied from any act which indicates that the heir has accepted the inheritance. In the case of an unconditional acceptance, the heir is liable for all of the debts of the decedent not only out of the estate which he accepts, but also out of his own property. In other words, the inheritance is merged into his own estate and he takes the place of the decedent with regard to creditors. An acceptance with benefit of inventory must be made expressly before the judge who has cognizance of the estate. In the case of such qualified acceptance, the heir is responsible for the debts of the decedent only out of the estate which he inherits, and his own property is not affected. After making the proper declaration of acceptance with benefit of inventory, three months are allowed in which to make an inventory of the property, and thereafter the heir has 30 days to decide whether he will accept or decline the inheritance.

The heirs, by operation of law, have the right to administer their inheritance but must account to creditors and legatees. Ascendants and descendants who are entitled by operation of law, may take possession without judicial action, but others must prove their right before court. Ascendants or descendants who are out of country at time of death of decedent, must petition court for permission to take their inheritance. Where there are several heirs, no one heir has power to administer estate, and any difference of opinion which arises among heirs regarding administration must be decided by court. Appointment of executor by testator does not deprive heirs by operation of law, of possession of their inheritance, but sufficient property should remain in his possession to pay debts and legacies, unless objection is made to payment of legacies on ground that they prejudice rights of heirs by operation of law.

The partition of an inheritance may be made by the heirs without judicial action when all of them are in possession of their full civil rights. The decision of the majority governs; absentees are cited judicially to appear. Partition must be judicial whenever minors have an interest in the inheritance, when a judicial distribution is requested by interested parties, and when the heirs cannot agree among themselves to make partition out of court. A judicial partition is based on a valuation of the estate made by experts. Before final distribution, sufficient property must be set aside to pay creditors and legatees. The creditors may demand that neither the heirs nor the legatees receive their respective portions until their claims are paid. In case the decedent leaves property both in Argentina and in a foreign country, divisible between foreign heirs and Argentines or foreigners residing in Argentina, the Argentines and the resident foreigners have the right to take from property situated in Argentina a portion equal in value to the property situated in a foreign country from which they may be excluded because of the foreign laws or customs.

12.06 EXECUTORS AND ADMINISTRATORS:

(C. C. arts. 3844-3874).

A testator may appoint one or more executors. If he does not name an executor the heirs or legatees may by agreement appoint an administrator. If there are neither executors nor administrators, the heirs themselves execute the provisions of the will. The appointment of an executor by a testator must be in one of the forms prescribed for wills (see topic 12.10 Wills), but need not be in same instrument as will.

A married woman may be appointed executrix and act in that capacity. Heirs, legatees, witnesses of the will, and the notary before whom it was executed may also be executors. A legatee who is named as executor cannot accept his legacy without accepting the duties of executing the will, when the legacy was made in view of the duties imposed upon him as executor. The testator may define the duties of the executor but if he makes no special provisions, the executor has all the powers which are necessary to execute the will. The heirs and legatees may, in case they have justified reason to believe that the executor is not responsible, demand that he give adequate security. When the will is only for the purpose of making legacies and when there are no heirs by operation of law the executor is given possession of the estate.

The executor cannot delegate his authority but may execute his functions through representatives for whose acts he is fully responsible. The testator may give the executor authority to sell his property but the executor may only use this power when it is indispensable for the purpose of executing the will, and by agreement of the heirs or with the authority of a competent judge.

The executor must make an inventory of the estate after citing the heirs, legatees and other interested parties. If there are absent heirs, or persons under guardianship the inventory must be made judicially. The testator cannot excuse the executor from the obligation of making an inventory.

The executor has the right to intervene in any action relative to the validity of the will or any of its provisions.

The heirs may have the executor removed because of incapacity, malconduct or bankruptcy. The executor is required to account to the heirs for his administration although he has not been required to do so by the testator.

When several executors are named the authority is executed by them in the order in which they are named, unless the testator provided that they should act jointly.

The executor is entitled to a commission which is determined according to the importance of his duties and the value of the estate. His expenses are charged to the estate.

Claims Against Decedents' Estates.

(C. C. arts. 3311 to 3381). Creditors of decedents have the right to exact payment of their claims, but the period within which a creditor may enforce this right and the extent of the right depends on whether there has been an unqualified acceptance of the estate by the heirs or an acceptance subject to the making of an inventory (a beneficio de inventario). See topic 12.05 Descent and Distribution.

In case of unqualified acceptance, the creditor may present his claim at any time after the acceptance of the estate. In this case, the thing inherited becomes an integral part of the estate of the heir and he is obliged with respect to his coheirs, the creditors and legatees, to pay all debts and charges upon it, not only out of the inheritance which he has accepted, but also out of his own property. Creditors of the heir may, in case of a collusive acceptance made fraudulently with creditors of the estate, demand a revocation of the acceptance.

In case of acceptance subject to the making of an inventory, the heir is only obliged to pay the debts of the decedent from the property inherited. He has a period of three months in which to make out the inventory of the property to be inherited, and 30 days thereafter to decide whether he will accept or decline the inheritance. Within this period or during any extension thereof which may be granted by the courts, neither the creditors nor legatees may request payment of their claims. The heir who accepts subject to inventory may abandon all the property to the creditors and legatees, in which case he is entitled to all the assets after the debts are paid, and is not considered as renouncing the inheritance. The heir, if he does not abandon the estate, has the entire administration thereof, but must not prejudice the rights of creditors. The heir must render accountings to the creditors and legatees.

12.07 FIDUCIARIES:

See topics 12.06 Executors and Administrators, 12.09 Trusts.

12.08 INTESTACY:

See topic 12.05 Descent and Distribution.

12.09 TRUSTS:

(C.C. arts. 2661-2672, arts. 1-26 of Law 24441 of Jan. 9, 1995).

Trust may be created by will or by inter vivos act and may comprise personal or real property. Trust of real property must be recorded in Registry of Real Property. Any individual or entity may be appointed as trustee, but only financial corporations duly authorized may act as financial trustees. Maximum term of trust is 30 years. Trust is terminated: upon occurrence of condition subsequent or expiration of its term; upon revocation by settler of trust if so provided in instrument, or by any other condition stipulated in contract.

12.10 WILLS:

(C. C. arts. 3606-3823).

Every person in possession of his mental faculties and capable of manifesting his wish, may dispose of his property by will, unless he is under 18 years of age. Dispositions which are illegal or physically impossible of carrying out or contrary to public policy, are void. The following conditions are prohibited: of dwelling in a particular place or in a place designated by third party; of changing or not changing religion; marrying with a certain person or with the approval of a third person or in a certain place or time; of remaining single, either permanently or temporarily, or of not marrying a certain person; and of divorcing. (C. C. art. 531).

Only a part of the estate may be freely disposed of by will. See topic 12.05 Descent and Distribution.

The law of the domicile of the testator at the time of making his will determines his capacity to make the will, but the validity of the contents of the will is determined by the law of the domicile of the testator at the time of his death. Capacity to make a will is determined as of the time the will is executed. Insane persons may only make wills during lucid intervals. The law presumes that every person is in his right mind until the contrary is proven. Deaf mutes who can neither read nor write may not make a will. Mutual or joint wills in a single document are prohibited.

The nullity of a will because defective in form nullifies all of the dispositions contained therein, but the nullity of one disposition does not affect the other dispositions of the will. When the signature of the testator is required he must write out his full name without initials, but a signature which is in the form which the person is accustomed to use in signing public and private documents is sufficient. A citizen of Argentina in a foreign country may make a will in the form established by the law of the country in which it is executed. A will made in a foreign country before a minister of Argentina, chargé d'affaires or a consul and two witnesses domiciled in the place where the will is made and containing the seal of the legation or consulate is valid. If there are no such officers in the place, a minister or consul of a friendly nation may exercise the same function. Copies of open wills and of the envelopes containing closed wills, made in foreign countries are sent by the minister or consul to the Minister of Foreign Relations who certifies to the signature of the minister or consul and sends the same to the judge of the last domicile of the deceased in the republic for incorporation in the protocol of the notary of that place.

There are four forms of wills: Holographic wills, open wills or wills in the form of public instruments, closed or sealed wills, and military wills. The law regarding the nature and effect of the dispositions is the same regardless of the class of will. The testator may choose the form of will which he desires to adopt, provided he has the physical and intellectual capacity to execute that class of will.

Holographic Wills.

To be valid a holographic will must be written entirely by the testator, dated and signed by him. Any writing on the will if not in the handwriting of the testator nullifies the will if made by the order or consent of the testator. Holographic wills may be written in any language. The will is not invalid because the place where it has been made is not stated, or because it is erroneously stated. It may be written at different times and in different places. In this case the will may be dated and signed at different times or after it is finally completed. Holographic wills must be separate from other writings and books of the testator. Letters cannot constitute holographic wills. The testator may, if he desires, have the will witnessed and may deposit it with a notary or use any other means he desires to secure it.

Open Wills.

A will in the form of a public instrument or open will is one which is prepared for the testator by a notary. A person who is deaf, dumb or a deaf mute may not make a will in this form, but a blind person may. A notary who is a relative of the testator in the direct line to any degree or in a collateral line to the third degree of consanguinity or affinity may not take part in the preparation of the will. Three witnesses of legal age and residing in the place are required. The testator may dictate his will to the notary or give it to him already written, or may give the notary the provisions which he desires to make in order that the notary may make the will in the ordinary form. The notary must state in the will the place of execution, the date, the names of the witnesses, their residences and age, and whether he has made the will or has received the provisions already prepared. The will must be read to the testator in the presence of the witnesses and signed by the testator, the witnesses and the notary. At least one of the witnesses must be able to write, and if he signs for any of the other witnesses, the notary must so state. If the testator does not know how to sign or is unable to do so, another person or one of the witnesses may sign for him. In this case two of the witnesses at least must know how to sign. If the testator does not understand the Spanish language, the presence of two interpreters who reduce the will to Spanish is necessary. In this case the will must be written in both languages. The witnesses must understand both languages. Neither the notary nor the witnesses nor their wives or relatives to the fourth degree may take advantage of any disposition under the will.

Closed Wills.

One who does not know how to read cannot execute a closed will. A closed will is signed by the testator, and placed in a sealed package. The will must be delivered to a notary public in the presence of five resident witnesses of legal age with a statement that its contents is the will of the testator. The notary certifies as to the presentation on the cover of the will which certificate is signed by the testator and all the witnesses. At least three of the witnesses must be able to sign for themselves. If the testator is unable to sign, another may sign for him. The notary must include in the certificate the name of the testator, his residence, the names and residences of the witnesses and of whoever may sign for the testator, and the place and date. The delivery of the will to the notary and the entries on the cover must be one continuous act. If the testator cannot talk but is able to write, the will must be written and signed in his handwriting and the statement that it is his will must be made by him on the cover. Deaf persons may execute closed wills. If a closed will is not valid for defect of form, it may be valid as an holographic will, if it complies with all the requirements of holographic wills.

Military Wills.

In times of war, sailors on war vessels, and soldiers on military expeditions or in besieged places, or in camp or barracks outside of the republic, and prisoners and camp followers may execute wills before certain specified officers and the required number of witnesses. If the testator dies within 90 days after the situation ceases which permits him to make a military will, his statement is valid.

On the death of the testator holographic wills and closed wills must be presented to the judge of the last domicile of the testator. The judge takes evidence of the handwriting of the testator in the case of holographic wills and if he finds them genuine certifies to each page, and has them recorded. Closed wills cannot be opened by the judge until the witnesses and notary have recognized their signatures and that of the testator. The will is then recorded. If the notary and witnesses cannot appear, the judge receives proof as to the handwriting. Any person who has an interest in a closed will may petition the court to open it.

Witnesses.

Witnesses must have legal capacity to act as such, must be known to the notary or be identified for him, and must understand the language of the testator and the language in which the will is written; they should be residents of the place where the will is executed and must be of legal age. Neither ascendants nor descendants of the testator may be witnesses. Executors and guardians may not be witnesses of the will by which they are appointed. Neither heirs nor the legatees nor anyone who receives a gift from the testator nor the relatives of the notary up to the fourth degree, nor the clerks in his office nor his servants may be witnesses. The blind, deaf, mute and insane cannot be witnesses to wills.

13 FAMILY

13.01 ADOPTION:

(C. C. arts. 311-340, Law 25854 of Jan. 2, 2004 regulated by Decree 383 of Apr. 28, 2005 as am'd).

Adopting party must be over 30 years of age, except when married for more than three years, or there is proof of impossibility of childbearing. Adopting party must be 18 years older than adopted party and must have permanent residency in country for at least five years prior to filing custody petition in court. There are two types of adoption: Full adoption (adopción plena) and partial adoption (adopción simple). Full adoption gives adopted party identical status with that of natural child, creating lines of kinship between adopted party and adoptive parent's family. Full adoption extinguishes legal bonds between adopted party and his natural parents and family. Partial adoption creates same juridical ties between adopted and adopting parties as exist between parents and children; but does not create any legal relationship between adopted party and family of adopting party. Partial adoption does not extinguish legal bonds between adopted person and his natural parents and family. Partial adoption may be ended or revoked. There is Sole Registry of Ward Candidates for Adoptive Purposes where individuals interested in adoptions shall be registered.

13.02 COMMUNITY PROPERTY:

See topic 13.05 Husband and Wife.

13.03 DESERTION:

See topic 13.04 Divorce.

13.04 DIVORCE:

(C. C. arts. 201-218).

The causes of separation are: Adultery by either spouse; attempt by one spouse against life of other or of their children; provocation by one party to other to commit any crimes; serious offenses; mutual consent, after two years of marriage; and voluntary and malicious abandonment.

After decree of separation spouses may reside in any place.

Divorce dissolving marriage may be granted for: Any reason authorizing separation; separation in fact for three years; and mutual consent after three years of marriage. Divorce decree has same legal effects as separation decree. Spouse may remarry. Support obligation terminates when supported party remarries, lives with someone else without being married or for serious insults by supported party.

Children under five years of age are given to the custody of the wife; those over five years are given to the spouse at court election. If one of spouses has been sentenced to confinement for crime on accusation of other he or she is not given custody of any children unless other consents. Both spouses are obligated to support children.

Spouse who has given cause for divorce or separation is required to support other spouse. In case of necessity, innocent spouse is required to support guilty spouse, if he or she has means.

Pending actions for divorce or separation are terminated, and effects of divorce or separation already granted cease, upon reconciliation of parties. Reconciliation is presumed from cohabitation.

13.05 HUSBAND AND WIFE:

(C. C. arts. 198-200, 1217-1290).

Spouses owe each other fidelity, assistance and support. They should live in same house unless relieved by court on special grounds.

Property acquired during marriage is considered community property, except when it is acquired with property owned solely by one spouse. Spouses retain sole right to property owned before marriage or acquired by bequest, gift or succession after marriage. During marriage, spouse retains administration of property solely owned by said spouse and part of community property acquired with income generated by such spouse. Husband and wife are in charge of administration of community property whenever source of funds used to acquire such property is unclear; consent of both spouses is necessary to sell, transfer or encumber real estate or registered personal property considered community property.

13.06 INFANCY:

(C. C. arts. 54-59, 126, 139, 264-310, 377-467, 1045; Law 26061 of Sept. 28, 2005 regulated by Decree 415 of Apr. 17, 2006).

Age of majority is 21. Contracts of minors under 14 are void and over 14 voidable, except some by emancipated children. Ordinarily, minors are subject to parental authority of father and mother. Parental authority gives parent usufruct of property, with certain exceptions, owned by minor, as well as its administration. In absence of parents a guardian is appointed but he is not entitled to usufruct. Parents and guardians have limited powers of disposition.

Law on protection of rights of children under 18 established that rights recognized by law are non-waivable. Among them are right to life, to identity, including nationality, name and family relations, right to freedom of expression; and right to freedom of thought, conscience and religion, right to privacy, honor and reputation, right of child to education, health care and healthy environment, right to be protected from economic exploitation and from all forms of sexual exploitation and sexual abuse, right of every child alleged as, accused of, or recognized as having infringed penal law to be treated in manner consistent with promotion of child's sense of dignity. Convention on the Rights of the Child, New York, Nov. 20, 1989.

13.07 MARRIAGE:

(C. C. arts. 159-197).

The following conditions are a bar to marriage: Consanguinity between ascendants and descendants, brothers and sisters and half brothers and sisters; between those related by adoption; affinity in direct line; fact that woman is under 16 years of age, and man is under 18 years of age; existing prior marriage; fact of having been accomplice in murder of prior husband or wife; and insanity. Minors over 16 years of age in case of women, and 18 years in case of men, may not marry without consent of their parents, their guardians, or court; and deaf mutes who cannot write may not marry unless they can express their concept in other way. Guardian and his descendants who are not emancipated may not marry minor under guardianship until accounts of guardian are settled and guardianship ends.

Consent of the parties expressed before the official in charge of the civil registry is necessary. Persons desiring to marry must appear before officer in charge of civil registry in domicile of either one of them; must state their intention verbally which is reduced to writing and signed by public officer, parties and two witnesses. If parties do not know how to sign another may sign for them. Record must state names of parties, their age, nationality, domicile, place of birth, profession, the names, nationality, profession, domicile of their parents, and whether or not they have been previously married, and if so, name of former spouse, place of marriage and cause of dissolution. Legalized copy of nullification of prior marriage must be presented and also declaration of person whose consent is required if that person is not present and becomes party to proceeding. Two witnesses must certify as to identity of parties and that they believe them to be capable of marrying. Marriage may be opposed on any of grounds of incapacity stated at beginning of this article, either by husband or wife of person who desires to marry another, by ascendants, descendants, brothers and sisters, guardians, and public prosecutor in case he has knowledge of any incapacity. If no objection is made to marriage, or if objection has been resolved in favor of contracting parties, marriage may be performed. Ceremony must take place before officer in charge of civil registry, publicly in his office. Parties may appear personally. There must be two witnesses. If one of parties cannot appear, marriage may be performed in his home. Proceedings are reduced to writing and include declaration that parties have taken each other as husband and wife and that they have been married in name of law. Statement of recognition which parties make of natural children by means of marriage, names, ages, civil status, profession and domicile of witnesses. Record is then signed by all of persons who took part in ceremony and copy of record is given to parties. Proceedings may be shortened when, on petition of physician, it appears that one of parties is in danger of death.

13.08 MARRIED WOMEN:

See topics 13.05 Husband and Wife, Marriage; category 12 Estates and Trusts, topic 12.06 Executors and Administrators.

14 FOREIGN TRADE AND COMMERCE

14.01 CUSTOMS:

Customs Code (Código Aduanero) enacted on Mar. 2, 1981 regulated by Decree 1001 of May 21, 1982 as am'd is divided into following 17 sections or chapters: Preliminary Title; Subjects; Control; Importation; Exportation; Common Rules for Importation and Exportation; Special Regimes; Zones Outside the General Customs Territory; Prohibitions of Importation and Exportation; Taxes Ruled by Customs Legislation; Incentives to Exportation; Reciprocity; Penalties; Customs Preference; Procedure; Complementary Rules; Transitory Rules.

Taxes and customs duties on imports and exports must be determined in U.S. dollars. Payment may be in dollars or in pesos at exchange rate of day before date of payment.

Common External Tariff, approved by member countries of southern common market (MERCOSUR) purpose of which is gradual elimination of all tariff barriers between its members and common external tariff for nonmembers; each member country has list of goods excluded from common external tariff and subject to their own duty rates. Most goods traded among member countries are not subject to tariff or quota restrictions.

14.02 EXCHANGE CONTROL:

(Law 25445 of June 22, 2001 as am'd, Law 25.561 of Jan. 6, 2002, Decree 1570 of Dec. 1, 2001 as am'd, Decree 260 of Feb. 8, 2002, Decree 2568 of Dec. 11, 2002 and Decree 616 of June 9, 2005).

Exchange control system is in force. There is single exchange market controlled by

Central Bank which issues regulations from time to time.

Entry and exit of foreign currency into and out of local market and its negotiation is subject to registration with Central Bank. Incoming foreign currency from foreign loans, foreign funds invested in government bonds in secondary markets, foreign funds used to purchase assets or financial indebtedness or local currency may be withdrawn after 365 day period from date of entry, with exception of foreign currency related to direct foreign investment and foreign trade. Noncompliance with this is subject to Foreign Exchange Criminal Regime.

See also topics 14.04 Foreign Investment, 14.05 Foreign Trade Regulations.

14.03 FOREIGN EXCHANGE:

See topics 14.02 Exchange Control, 14.04 Foreign Investment.

14.04 FOREIGN INVESTMENT:

Law 21382 of Aug. 13, 1976, t.o. 1993, and Law 25750 of July 4, 2003 provide that foreign investors shall have same rights and obligations that Constitution and laws afford to national investors when they invest in economic or productive activities.

Foreign Investment.

(a) Any contribution of capital belonging to foreign investors; (b) acquisition of shares with foreign capital of existing domestic enterprise.

Foreign Investor.

Any person or entity domiciled abroad who owns investment of foreign capital and local enterprises formed by foreign capital.

Domestic Enterprise of Foreign Capital.

Enterprise domiciled within country in which more than 49% of capital is owned by individuals or legal persons domiciled outside country or management is controlled by investors domiciled abroad. Foreign capital participation is restricted in communication media. Foreigners are allowed to hold up to 30% stake in radio, television, Internet access and publishing and journalistic companies.

Domestic Enterprise of National Capital.

Any enterprise domiciled within country in which 51% or more of capital is owned directly or indirectly by individuals or legal entities locally domiciled and management control is in hands of investors domiciled in country.

Domicile as defined in Civil Code. (Art. 2).

Foreign investment may be effected in form of freely convertible foreign currency; capital assets, profits or national currency, capitalization of foreign credits in freely convertible foreign currency; intangible assets; and in any other form stipulated in special or promotion regimes (Art. 3). Foreign investment does not require prior approval.

Registration on Registry of Investments of Foreign Capital is optional.

Remittances.

Foreign investors may remit abroad net and liquid profits derived from their investments arising from balance sheets adjusted in line to inflation. Such profits may be effected: (1) In same currency in which investment was made or in another foreign currency; (2) in national debt bonds; or (3) in Argentine currency.

Capital Repatriation.

Foreign capital invested may be repatriated. Foreign investors shall have right to remit proceeds from their investments.

Any form of business organization may be utilized by foreign investors, but in case of corporation, nominative shares must be issued.

Any legal transaction between domestic enterprise and one which controls same or subsidiary of latter is considered as executed between independent parties, when terms and conditions of transaction are according to normal practices between independent parties.

See also category 3 Business Regulation and Commerce, topic 3.09 Licenses, Business and Professional.

14.05 FOREIGN TRADE REGULATIONS:

(Law 22415 of Mar. 2, 1981 as am'd, Decree 1001 of May 21, 1982, Decree 177 of Jan. 25, 1985).

Most importations are subject to system of import duties and ad valorem surcharges, unless expressly exempted therefrom. Import duties and surcharges are subject to constant revision. Special tariff concessions are granted to products originating in member countries of Latin American Integration Association, of South American Common Market and products originating in countries which have signed trade agreements with Argentina.

Exports are also subject to specific incentive and rebate programs. Tax incentives and other benefits are granted to export of services. Countertrade is also regulated.

15 HEALTH

15.01 TRANSPLANT AND DONATION OF ORGANS:

Law 24193 of Mar. 24, 1993 as amended regulated by Decree 512 of Apr. 10, 1995 as amended, regulates donations and transplants of organs; removal of organs and body parts, from dead and living persons, prohibits intermediaries from receiving compensation or collecting payment for arranging donation of organs or body parts. Sanctions for infringement of law include imprisonment, fines and suspension and cancellation of authorization to practice medical profession. “Instituto Nacional Central Único Coordinador de Ablación e Implante” supervises compliance with this law.

16 IMMIGRATION

16.01 ALIENS:

(Law 346 of Oct. 18, 1869 as am'd; Law 23059 of Mar. 22, 1984 regulated by Decree 3213 of Sept. 28, 1984).

Foreigners enjoy the same civil rights in Argentina as Argentine citizens. They may do business, follow their trade or practice their profession, buy and sell real property, make wills and marry in conformity with the law, and enjoy entire religious freedom. They are not obliged to become citizens or to pay extraordinary taxes.

Naturalization is granted to residents over 18 years of age after two years of continuous residence who meet requirements set forth in Art. 2 of Law 346. Foreigners obtain naturalization or citizenship by submitting written application to federal judge having jurisdiction at their domicile, following corresponding proceedings in accordance with Code of Civil Procedure and Commercial Code.

Foreigners.

Law 25871 of Dec. 17, 2003 regulates immigration matters (such as admission, entrance, residency and expelling of foreigners). Foreigners may be allowed in country as permanent, temporary or transitory residents. National identity card will be issued to foreigners who prove their permanent or temporary residency.

17 INTELLECTUAL PROPERTY

17.01 COPYRIGHT:

(Law No. 11723 of Sept. 28, 1933 as am'd).

Copyrights may be obtained for scientific, literary and artistic works, including literary, dramatic and musical compositions, moving picture films, paintings, sculptures, maps, phonograms, software, etc. Unless otherwise agreed, employer is owner of any author's right to computer program produced by employee during employment. Privilege pertains to author for life and to his heirs and assigns for 75 years as of Jan. 1 following author's death. It is subject to assignment, record of which must be entered in National Copyright Registry. For posthumous works period begins at death of author and continues for 50 years. If there are no heirs or assigns privilege belongs to state. Heirs and assigns cannot object to republication of work if they permit ten years to elapse without publishing it, nor to its translation ten years after author's death; but in such cases they may demand compensation to be determined by experts. Copyrights of anonymous works belonging to corporations last for 50 years. For photographic works, copyright period runs for 20 years from first publication and for motion pictures 50 years from date of death of last person participating in production.

For purposes of instruction or scientific purposes, it is allowed to publish commentaries including up to one thousand words of literary and scientific works and the indispensable parts of the text. When the inclusion of other works comprises the principal part of the new work, the courts may determine the amount payable to the authors of the included works. Photographs of a person cannot be published without the consent of such person nor, for 20 years after his death, without the consent of his heirs, except in connection with scientific or other cultural works or matters which happened publicly. Letters cannot be published without the consent of the author or his heirs until 20 years after his death.

Copyrights may be obtained for foreign works with the same rights as for native works except that the privilege does not continue for a longer period than provided in the law of the country where the work was published; if such period be longer than that designated in the Argentine law, the latter prevails.

In order to obtain a copyright three copies of the work must be deposited within three months after its appearance in the National Copyright Registry. For foreign works the period runs from the day the work is offered for sale in Argentine territory. In the case of paintings, sculptures, etc., a sketch or photograph must be deposited with data to permit identification. For moving picture films the deposit consists of an account of the plot and dialogue and photographs of the principal scenes. The National Copyright Registry publishes a daily report in the official newspaper of the works files and if no objection is received within one month the copyright is granted.

Under Dec.-Law 1224 of Feb. 3, 1958 as amended regulated by Dec. 6255 of Apr. 28, 1958 as amended, works becoming of public domain shall nevertheless earn dues for exhibition, performance, reproduction, edition and other uses for benefit of "Fund for the Development of the Arts."

Industrial Models and Designs.—Dec.-Law, No. 6673 of Aug. 9, 1963, grants five year protection, renewable for two five year terms, to registered industrial models and designs, including foreign ones filed within six months of registration in foreign country.

17.02 PATENTS:

(Const. art. 17, Law 24481 of May 23, 1995, t.o. 1996 as am'd, Decree 897 of Dec. 11, 1995, Law 24766 of Dec. 18, 1996).

Constitution provides that inventor is exclusive owner of his work, invention or discovery for period established by law.

Invention Patents.

Any individual or juridical person who invents or discovers or improves something of industrial application may obtain patent. Juridical persons may petition patents for inventions made by persons under their employment. Any invention of products or proceedings in any technology field which is novel, represents inventive step and are susceptible of industrial application is patentable. Invention is novel when it is not within state of art. Discoveries, scientific theories and mathematical methods; scientific, literary and artistic works; diagnostic, therapeutic and surgical methods; computer programs among others are not considered inventions. Invention for which commercial exploitation must be denied in order to protect public policy, morals and people's and animals' health or life, or to preserve vegetation or to prevent serious environmental damages; and natural or artificial, genetic and biological substances are not patentable. Patent rights belong to inventor or his descendants who may transfer, assign or pledge their rights. Patents are granted for 20 years from filing date. Patent gives exclusive right of exploitation. Patent owner must exploit it, directly or by granting license. Compulsive license may be granted by lack of exploitation within three years after granting date or within four years of filing date, and in case of proof of owner's involvement in anticompetitive practices, such as refusing to supply market in reasonable commercial conditions or fixing excessive prices; and in case of declared emergency or national security reasons.

Utility Models.

New forms of objects or mechanisms, provided they have practical use are registrable. They may be registered as ownership of author if no publicity has been made before filing application. Registration term is ten years from filing date. Provisions regarding patents are applicable to models.

Trade Secrets.

Law protects trade secrets and considers them as confidential, valuable information which owner has taken reasonable measures to protect. Information considered trade secret must be expressed in documents, laser discs, microfilms, films or similar forms.

17.03 TRADEMARKS:

Law 22362 of Dec. 26, 1980 and its regulation, Decree 558 of Mar. 24, 1981 as amended, govern matters related to trademarks and tradenames. (Law on Transfer of Technology 22426 of Mar. 12, 1981 as am'd and its regulations).

Following may be registered as trademarks to distinguish products and services: One or more words with or without conceptual contents, drawings, emblems, monograms, engravings, vignettes, stamps, images, bands, color combinations by which products or packages are distinguished, containers, letters or numbers with special drawing, advertising slogans, and any other sign with distinctive characteristics. Following cannot be used as trademarks: Names, words, and signs which are given to products or services by manufacturer describing its nature, function or qualities; names, words, signs and advertising slogans which have become of general usage before application for registration; form which is given to products; color of products. Following cannot be registered: Trademark identical or similar to another trademark previously registered; national or foreign place names of native country; drawings or expressions contrary to good morals. Trademarks which would produce confusion with other products may not be used. Names and photographs of persons may not be used as trademarks without consent of persons or their heirs; nor can advertising slogans lacking originality be used.

Ownership and exclusive right of trademark is obtained by registration. To have legitimate interest is legal requirement for ownership of trademark or to oppose applications filed by third parties. Protection of trademark lasts for ten years and may be renewed indefinitely for periods of ten years if said trademark has been used within period of five years prior to each renewal in commercialization of product, or rendering of service, or as part of name of activity. Rights to trademarks may be transferred freely to third parties, provided transfer is recorded in National Direction of Industrial Property.

Petition for trademark registration must specify: Name of petitioner, domicile, description of mark and indication of products or services to be identified. Once application for registration has been filed it is published officially. National Direction of Industrial Property must make decision within 30 days. Art. 20 of Law establishes that application for renewal of trademark must be accompanied by sworn statement declaring that trademark has been used within five years prior to renewal, and for at least one class, or as tradename. Product, service or activity for which trademark was used will also have to be stated.

Right of ownership of trademark expires by waiver of holder, termination of term of duration or by court order nullifying or cancelling registration. Right of action for nullification prescribes after ten years. Order of nullifying can be obtained against holder of registration that knew or was in condition to know that trademark belonged to third party or when trademark has been registered for purpose of selling it to third party. Judicial cancellation can be requested by legitimate interested party for nonlocal use of trademark in any of classes in which it was registered, within five years prior to date of filing such request.

Misuse of trademarks or commission of acts made illegal by Law is punishable by fine and arrest. Those who commit punishable acts will be liable for from three months to two years imprisonment plus fine. Attachment may be obtained by owner of trademark against articles which bear his trademark illegally.

Conventions: Berne Convention for the Protection of Literary and Artistic Works; Paris Convention for the Protection of Industrial Property of Mar. 20, 1883 as revised; International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations, done at Rome on Oct. 26, 1961; Strasbourg Agreement Concerning the International Patent Classification, Mar. 24, 1971 as amended; Convention for the Protection of Producers of Phonograms Against Unauthorized Duplication of their Phonograms of Oct. 29, 1971; Nairobi Treaty on the Protection of the Olympic Symbol adopted at Nairobi on Sept. 26, 1981; Treaty on the International Registration of Audiovisual Works (Film Register Treaty), done at Geneva, on Apr. 20, 1989; WIPO Copyright Treaty, adopted in Geneva on Dec. 20, 1996; WIPO Performances and Phonograms Treaty (WPPT), adopted in Geneva on Dec. 20, 1996.

18 LEGAL PROFESSION

18.01 ATTORNEYS AND COUNSELORS:

(Laws 22192 as am'd of Mar. 14, 1980 and 23187 of June 25, 1985).

In order to practice law attorney must hold law degree of Argentinean university and be registered with proper authority. In provinces they must be registered with “Cámaras Federales de Apelaciones” (Federal Court of Appeals) or with local professional associations of lawyers. Registration is allowed in more than one province. To practice in Buenos Aires, Federal Capitol, registration is required with “Colegio Público de Abogados de la Capital Federal” (Federal Capitol Bar Association).

Attorney holding law degree from foreign university may only give legal advice on foreign law.

19 MINERAL, WATER AND FISHING RIGHTS

19.01 MINES AND MINERALS:

The Mining Law consists of the Code of Mines, enacted by Law 1919 of Dec. 8, 1886, t.o. 1997 as amended and various governmental decrees. Mines, and the buildings, machinery, animals, cars, etc., used in exploiting them are considered real property distinct from the land on which they are located. They may be alienated, leased or mortgaged like any other real property. Mining concessions may be obtained on lands owned by other persons subject in certain cases to prior rights of the owners of the surface.

Mines are divided into three classes:

(1) Mines belonging exclusively to the state, the private ownership of which may be acquired only by virtue of concessions. This class of mines includes all of the precious metals which are enumerated specifically in the Code of Mines, combustibles, such as lignite, anthracite, mineral oils, etc., arsenic, wolframite, mica and precious stones.

Concessions may be obtained by the persons who discover the deposits either as a result of legally authorized exploration or accidentally. In order to make explorations, a permit must be obtained whether the land is on public or on private property, but the owner of the surface need not obtain a permit to make exploration on his own estate. He cannot interfere, however, with any person who has obtained formal permission to explore his land. A petition containing the information required by the Code of Mines must be presented to the Registrar of Mines who notifies the land owner and records and publishes the petition so that anyone opposing it may appear and object. In the national territory petitions may be presented in sealed envelopes to the postmasters who make a record of their receipt and give a receipt to the petitioner. The envelopes containing the petitions are then forwarded to the proper authorities. If no objection is made, the permission is granted and the place of exploration is then fixed and a record made. The right of exploration gives the grantee the exclusive privilege of exploring and obtaining the concession to work any deposit discovered within the bounds of his grant. The exploration may continue for a definite length of time. The right to explore does not include the right to work mines but includes the right to do the necessary work in connection with the exploration.

The grantee may obtain the right to do formal work necessary to establish the existence of a seam, and to examine its nature and importance. For this purpose, he may have marked out three claims or pertenencias in the area of exploration. When the work is completed a formal concession may be applied for.

In case a discovery is made on land in the course of exploration or accidentally, a formal concession may be obtained. A petition must be presented to the registrar of mines containing the data required by the Mining Code.

The petition is inserted in the protocol of the registrar by order of the court and is duly published. The miner must determine the depth and direction of the deposit by excavations and may take three adjoining claims in the seam which he has chosen. The next step is to have the limits within which the concession may be worked, or the claims, determined. A petition must be presented for the measuring of the claims which must be duly published and the adjoining owners notified. If no objection is presented, the measurement is made by a government official accompanied by an official engineer, the registrar of mines, and a representative or an expert named by any interested party if he so desires. A record is then made of all the proceedings which are signed by the government's representative, the parties and the engineer, and is authenticated by the registrar. It is then recorded and a copy is given to the petitioner as evidence of his title; the grantee must then mark his boundaries and keep them well preserved.

Neither the right to explore nor a formal concession gives permission to occupy the surface of private property under cultivation with works of construction without the consent of the owner, but permission may be obtained from the public authorities to do certain classes of work on cultivated land, such as constructing wells, galleries, etc. The concession of a mine of this class gives a right to purchase the land covered by the claim. If the land is owned by the state or municipality, the grant is gratuitous. If the land is not purchased, the miner has the right to certain established easements provided he pays for the same.

(2) The second class of mines is divided into two subdivisions and comprises those which may be exploited by anyone without concessions and those which are granted preferentially to the owners of the soil. The first subdivision consists of those metallic sands and precious stones which are found in the beds of rivers, running water and deposits along the sides of streams, as well as the workings and wastes of abandoned mines. Anybody may exploit deposits falling within this subdivision unless they are on cultivated lands, but exclusive permission may also be obtained to work them. The second subdivision of this class of mines includes borates, saltpeter, salt, peat, metals not comprised in the first class, and various classes of earths, such as borates, those containing aluminum, phosphates of lime, kaolin, etc. The owner of the surface has a preferential right to the deposits falling within this subdivision but must have his claims marked out officially. A concession may, however, be granted to a person other than the owner of the surface in case a demand is made on the owner to exploit the same and he fails to do so within a specified period. Concessionaries of mines in this class must employ in working them a sum determined by the government within period of four years.

(3) The third class of mines includes deposits of stone and materials which are useful for construction and ornament. They belong to the owner of the surface. In case of lands owned by the state or the municipalities, deposits falling within this class may be worked by virtue of a contract with the government, but in case there is no contract they may be exploited by anyone.

Groups of miners may be formed to work their adjoining claims together on obtaining proper authority. The Code of Mines also provides for a special class of mining companies which may be formed by agreement between two or more persons who have obtained a concession and reduced their contract of association to the form of a public document or who have obtained a concession as a company. The affairs of the company are controlled by a majority vote of the members, one-half of the members forming a quorum, provided that the others have been cited. A representative is appointed to deal with the government and third parties, and an administrator may be appointed to administer the affairs of the company. No member of the company may transfer his rights to a person who is not a member without the consent of all the others.

The right to abandoned and unregistered mines is obtained by prescription by the persons who have exploited them uninterruptedly for a period of three hundred and fifty days. When a person holds a mine by a title apparently good and obtained in good faith, his ownership is complete after two years' occupancy. In other cases other than those above mentioned, the period of prescription is five years.

Geological research as a public service is governed by Mining Code. Mines discovered on occasion of geological research become vacant and are so registered two years after discovery, unless granted to private party, State not being entitled to exploit them, except for reasons of public utility. Code of Mines also regulates concessions and legal regime of hydrocarbons and nuclear minerals. In order to promote foreign investment in mining activities, Decree 816 of May 21, 1992 recognizes same rights to foreign investors as to national investors. Law 24196 of Apr. 23, 1993 as amended regulated by Decree 2686 of Dec. 28, 1993 as amended on investments regime for mining activity grants tax incentives to investors in prospecting, exploration, exploitation and processing of minerals, including tax stability for 30 years from date of presentation of feasibility study.

Hydrocarbons.

Survey licenses, exploration permits and exploitation concessions are granted to privately owned or mixed companies. Survey licenses and exploration permits are awarded through competitive bidding system. Exploration permits are automatically converted into exploitation concessions when discovery of crude oil is declared commercial. Concessionaire has free disposition of hydrocarbons produced thereunder, such right may involve entire production of certain share of production. He may sell his share of production in domestic market or abroad and keep abroad 70% of foreign currency proceeds derived from export; export of hydrocarbons and by-products are exempted from duties, tariffs and withholding. Concessionaire has to pay royalty of 12% and general taxes in effect. (Law 17319 of June 23, 1967 as am'd, as regulated by Law 21778 of Apr. 14, 1978 as am'd, Law 1589 of Dec. 27, 1989 and Law 24145 of Sept. 24, 1992 as am'd). Law 26154 of Oct. 11, 2006 grants special tax treatment to exploration and exploitation activities for up to ten-year term.

20 MORTGAGES

20.01 CHATTEL MORTGAGES:

Two kinds of chattel mortgages are recognized: the so-called agrarian pledge (prenda agrarian) and the registered pledge (prenda con registro). Both permit the debtor to retain possession of the article pledged, require the recording of the contract, provide a summary procedure for foreclosure, and forbid stipulations waiving such procedure, except that in certain cases, when the creditor is a government or banking institution, it may itself make the sale. Pledges are effective as towards third parties only from date of recording. No subsequent pledge affecting same property may be executed by debtor, except with consent of creditor.

Agrarian pledges (Law 9644 of Oct. 19, 1914 regulated by Decree of Oct. 31, 1914) may affect: (a) machines in general, automobiles, agricultural implements and tools; (b) animals and their products and personal property devoted to rural operations; (c) fruits and crops corresponding to the year in which the pledge is made, whether pending, severed or harvested, and timber, mining products and products of national industries. The lien subsists for two years from date of registration.

Registered pledges (Decree-Law 15348 of May 28, 1946 t.o. 1995) may cover chattels of any nature as well as growing crops to guarantee payment of any amount of money or compliance of any obligation to which parties involved give monetary value. Registered pledges may be granted on behalf of any individual or juridical person, domiciled or non-domiciled in country. Pledge may be of two kinds: (a) Specific pledge, covering specific articles of any nature, or (b) floating pledge, covering merchandise and raw material in general; this pledge covers original articles and also those manufactured from them. Pledge contract may be assigned by endorsement, which to be valid against third persons must be recorded. Pledges of motor vehicles are subject to additional registration under Decree-Law 6582 of Apr. 30, 1958 as am'd t.o. 1997, regulated by Decree 335 of Mar. 8, 1988.

Personal property such as machinery, cattle, crops, etc., may be included in mortgages on realty whenever such personal property forms an inherent part of the realty. As to ships and aircraft, see topic 20.02 Mortgages.

Creditors have the right to force the heir to accept or decline the inheritance within a period of not more than 30 days. See category 12 Estates and Trusts, topic 12.05 Descent and Distribution.

20.02 MORTGAGES:

Mortgages in Argentina, have an effect similar to that of common law, must be recorded to be good as against third parties, and do not pass title to mortgagee with an equity of redemption in mortgagor. Mortgagor retains title subject to lien of mortgage. Mortgages cannot be placed on personal property nor on right of usufruct or use and habitation (see category 21 Property, topic 21.05 Real Property). Mortgages on real property are provided for in C. C. arts. 3108-3203.

A mortgage of real property extends to all accessories, so long as they are united to the property, to all improvements, to buildings erected on vacant land, to the advantages resulting from the extinction of servitudes, to rents, and to the products of insurance. A mortgage is not divisible. All of the properties mortgaged to secure a debt are bound for the whole amount and the creditor may proceed against any or all of them. Mortgages may be subject to any condition. Only the owner of property may mortgage it. Mortgages may be given to secure the debt of a third party. A joint owner of property may mortgage his share, but in case of partition, the mortgage attaches to his share alone.

A mortgage must be in the form of a notarial or public instrument and the contract to which it is an accessory may be in the same document. The instrument may be executed in a foreign country if properly legalized and protocolized (see category 9 Documents and Records, topic Notaries Public [“Escribanos Públicos”]) by order of court. (C. C. art. 1211). Unless presented for registration within six days after order of protocolization has been issued, mortgages executed in foreign country do not affect third parties until recorded. Mortgages must be accepted by creditor.

The instrument constituting the mortgage must contain the names and domiciles of the debtor and creditor, the date and nature of the contract to which it is accessory and where filed, the situation of the property and its boundaries, and if rural property, the district, and if urban the city or town and street, and the exact amount of the debt. A general designation of property such as “all my property in X City” is not sufficient. The mortgage must be recorded in the mortgage registry. A mortgage is good as against third parties immediately upon execution if recorded within six days thereafter, unless the office of registry is more than two leagues distant from the office of the notary where executed, in which case an additional day is allowed for each two leagues. Otherwise the mortgage does not affect third parties until recorded.

Unrecorded mortgages, however, are good as against those persons who took part in executing them, such as the notary and witnesses. To record a mortgage the first copy must be presented. The expenses of recording are borne by the debtor. Recording may be requested by the grantor, the grantee, the representative of either, and by those interested in the security. A person who mortgages his property a second time before the first mortgage is recorded is liable for fraud. Mortgages must be re-recorded every ten years to be effective.

The debtor must not decrease the value of the mortgaged property. If he does so, the mortgagee may require a deposit of an amount sufficient to make the security good, and may foreclose the mortgage. The mortgagee may pursue any part of the property mortgaged which has been separated and alienated, into the hands of third parties if that part is realty, but not if it is personal property which is only realty by virtue of its relationships to the estate. In the former case a demand must first be made on the debtor for payment.

Mortgages are foreclosed by executory actions defined in the Code of Civil Procedure.

Mortgages on vessels are governed by Arts. 499 to 514 of Law 20,094 of Mar. 2, 1973. Vessels in excess of ten tons may be mortgaged. Mortgage may be in form of public or private instrument and shall be effective vis à vis third parties only from date of its registration in National Registry of Vessels. Ships under construction may also be mortgaged. Preferential rights among different mortgages are determined by date of registration of contract. Vessels may be mortgaged during a voyage. Mortgages effective outside of country are recorded by Argentine consul who must then communicate existence of said mortgage to National Registry of Vessels. As a rule, mortgages must be renewed every three years. All other naval contrivances can also be mortgaged, subject to aforementioned rules. When Code of Commerce is silent on any given point provisions of Civil Code shall govern maritime mortgages.

Aircraft may be mortgaged for up to seven years under Aeronautics Code. (Law 17285 of May 7, 1967 as am'd, regulated by Decree 326 of Feb. 10, 1982).

Motor vehicles may be mortgaged for up to five years. (Decree-Law 15348 of May 28, 1946 t.o. 1995, and Decree-Law 6582 of Apr. 30, 1958, t.o. 1997 as am'd).

Chattel Mortgages.

See topic 20.01 Chattel Mortgages.

21 PROPERTY

21.01 ABSENTEES:

See category 12 Estates and Trusts, topic 12.03 Death.

21.02 ADVERSE POSSESSION:

See category 5 Civil Actions and Procedure, topic 5.05 Prescription.

21.03 CONVEYANCES:

See topic 21.04 Deeds and Registration.

21.04 DEEDS AND REGISTRATION:

(C.C. arts. 997-1011).

Contracts involving the conveyance, alienation or encumbrance of real property must be in the form of public documents or documents duly authenticated and registered. See category 9 Documents and Records, topics 9.01 Acknowledgments, Notaries Public (“Escribanos Públicos”), 9.03 Public Instruments, 9.04 Records.

21.05 REAL PROPERTY:

Practically the same distinction exists in the Law of Argentina between real and personal property as exists at common law. The law governing real or “immovable” property (“inmuebles”) is different in many respects from that governing personal or “movable” property (“muebles”). Real property includes land and all solids and liquids thereon and therein whatever the depth, as well as all things of a permanent character fixed to the soil. Personal property which has been made accessory to real property by the owner is also considered realty. Public documents evidencing title to real rights, other than mortgages and antichresis (see subhead Antichresis, infra) are also considered realty. (C. C. arts. 2311-2317).

The ownership, possession and administration of real property, as well as encumbrances thereon, and its transfer are governed by the provisions of the Civil Code.

Some of the rights in real property other than ownership are as follows:

Usufruct (“usufructo”) consisting of the right to use and enjoy property belonging to another, but without changing its substance. This right may also attach to personal property.

Use and habitation (“uso y habitación”) consisting of the right to take from land the products which are necessary for the sustenance of a person and his family in the case of use, and the right to occupy a house in the case of habitation.

Servitude (“servidumbre”) consisting of a temporary or perpetual right to use real property of another or exercise certain rights thereon, or to prevent the owner from exercising certain rights of ownership.

Mortgage (“hipoteca”) see category 20 Mortgages, topic 20.02 Mortgages.

Antichresis, a real right consisting of the possession of realty by a creditor for the purpose of applying the revenues to the interest or to the interest and capital of a debt.

Transfer of real property see topic 21.04 Deeds and Registration; category 9 Documents and Records, topic 9.04 Records.

22 TAXATION

22.01 ADMINISTRATION:

Under national constitution, Congress has exclusive power to levy import and export duties and direct taxes. Power to levy other forms of taxation has been reserved under said constitution to each of the 22 provinces of republic, provisions of whose tax laws are too numerous to be reviewed here.

Tax Evasion.

(Law 24769 of Dec. 19, 1996 as am'd). Imprisonment is imposed for evasion of payment of taxes and social security contributions, including withholding agents for non-deposit of amounts withheld.

Law 25345 of Nov. 14, 2000 as amended and Decree 22 of Jan. 11, 2001 established that payments in cash over certain amount lack all legal effects.

22.02 EXCISE TAXES:

Internal Revenue Taxes.

There is an internal revenue tax on tobacco, beers, insurance premiums, steamship passages, alcoholic beverages, other alcoholic preparations, and nonalcoholic beverages, firearms, electronic appliances, cameras and accessories, among others. Amount of internal revenue tax payable in each instance is determined in conformity with provisions of numerous laws, which have been compiled in Decree 2682 of Oct. 23, 1979 as amended, regulated by Decree 875 of Apr. 25, 1980 as amended.

22.03 INCOME TAX:

Law 20628 of Dec. 27, 1973, t.o. 1997 as am'd and its regulations in Decree 1344 of Nov. 19, 1998 as am'd imposes “Profits Tax” (Impuesto a las Ganancias).

Any person, corporation or undistributed estate while the will is not probated or the heirs not recognized by judicial decree, resident in Argentina, is subject to tax on worldwide income and when resident abroad is subject to tax on income obtained from sources within Argentina, but payment of foreign taxes is credit against Argentinean tax. Nonresident legal entities and individuals with permanent establishment in Argentina are taxed on income from Argentine sources. Export trade benefits related to merchandise produced, manufactured or purchased in Argentina, even those of agencies, branches, representatives or intermediaries. International activities, such as transportation, communications, news services, insurance or reinsurance, movie films distribution and others are made subject to specific percentages in determining that portion of gains which should be Argentine source.

Except when transactions refer to loans or technology contracts, legal acts between local company of foreign capital and its foreign parent company will be considered as effected between independent parties.

Exemptions.

Among others: (1) Income of religious institutions; (2) income of charitable, scientific, artistic and educational membership associations, provided their income is devoted to purpose of their creation; (3) royalties from copyrights when received directly by author of work protected by registration up to certain amount; (4) interest of debentures, bonds and other credits issued to finance new works or investments declared of national interest for this purpose by government; (5) premiums on stock issuance; (6) interest paid by national, provincial and municipal agencies as well as interest paid by official banks for loans obtained abroad; (7) interest earned by financial institutions and banks in certain credit transactions.

Basic deduction for individuals residing in country is allowed if resident taxpayer obtains third category income basic deduction may be increased, depending upon exact nature of such third category income.

Dependents.

Taxpayers with dependents residing in Argentina having an income of no more than certain amount from any source are entitled to additional deductions: For spouse, for each infant or incapacitated child, and for each additional dependent authorized by law.

Deductions for Doctor's Fees, Medicine and Funeral Expenses.

Annual deduction per dependent is allowed for medicine; funeral expenses are also allowed up to certain amount.

Community Property.

When a married couple is under system of community property, each spouse is taxed for his or her own income from personal services or work, commerce or industry, and with respect to separate property or property obtained with money from salary or personal fees if, in case of wife, it so appears from proper document of purchase. Husband shall also be charged for community property income, except in case of judicial separation. Companies owned by spouses are not treated as such for tax purposes, being subject to special rules.

Categories.

Gains are divided into four categories: (1) Gains from real property: including rents from rural or urban property, with or without furniture, either in cash or in kind or any other form, and rental value of any property, except his own dwelling, used by its owner, this exemption does not apply for recreational properties; (2) gains from capital: certificates, cédulas, debentures, bonds, credits, loans, rentals of personal property, royalties, periodic payments for good will and similar rights; annuities, benefits or participations in life insurance; amounts received for forbearing from acting, except in commerce, industry, profession or employment; (3) company gains and those earned by certain other types of mercantile entities or persons: corporations' profits, profits earned by other companies or individual proprietorships; profits of brokers; merchants auctioneers, consignees and any other commercial auxiliaries not expressly included in fourth category; profits derived from sale of any real property; any income not included in other categories; (4) income from personal services: salaries of public employees; income from exercise of professional endeavors; income from activities of brokers, customhouse brokers, traveling salesmen; income obtained by corporate directors, administrators, attorneys-in-fact, business managers and similar personnel; fees of executors, receivers and trustees; employee's salaries, compensation paid by cooperatives to members for services rendered; pensions and retirement income received as a consequence of personal labor.

Deductible expenses in general are only those made in order to obtain and keep the taxable income, among them: interest on some loans or credits and expenses for obtainment, renewal and cancellation thereof; taxes and duties imposed on income-producing property, including penalties for delinquency, except for fraud to treasury; premiums for insuring income-producing property and for life insurance, with some limitations; gifts to government, provinces, and municipalities; gifts to entities with public and private participation, to extent of such public participation therein up to maximum of 5% of taxpayer's total net income. Also deductible are depreciation and depletion of assets, subject to special provisions; payment of fees or salaries to directors, advisers and organisms of direction acting from abroad; amounts directly invested in mining; amounts invested in housing construction. Fees and other remunerations paid for technical, financial or other types of services performed abroad shall be deductible, as indicated by law. In no category may taxpayer deduct personal expenses, interest and capital of same taxpayer, income tax, and other similar taxes, depreciation of good will, trademarks and similar assets, gifts, except to government, municipalities and certain charitable organizations, net losses resulting from illegal activities and others. From first category income, expenses are deductible for upkeep of real property. From third category income, following are especially deductible: necessary expenses incurred in course of business; depreciation on reserves against bad debts in form approved by Internal Revenue Bureau; organization expenses, which are deductible first year or in first five years, at option of taxpayer; commissions and expenses incurred abroad under certain circumstances and other similar expenses, but legal reserves of corporations are not deductible; depreciation of assets and other similar deductions.

Tax Rates.

Net income of individuals and taxable estates is subject to a progressive tax rate, ranging from 9% to 35%.

Foreign and domestic corporations are subject to 35% tax rate on their taxable income.

Salaries and fees paid to members of board of directors, councils or other organisms of direction and fees or other compensations paid for technical advice, financial or of any other character, when the directors, members or advisers render services from abroad, are subject to a sole and final withholding tax of 35%. 60% of such technical assistance fees and/or salaries is considered net taxable income and 90% of gross payment to nonresident member of board of directors for purposes of said withholding tax.

All income paid or credited to a foreign corporation, any other nonresident beneficiary, or to their attorneys-in-fact, agents or other representatives in Argentina is subject to a withholding tax of 35%. Interest payments to nonresidents are taxed at 15.05% or 35% rate, as indicated by law. Dividends and distributions paid by local companies in excess of their net taxable income are subject to income tax at rate of 35%.

Minimum Presumed Income Tax.

(Law 25063 of Dec. 24, 1998 as am'd regulated by Decree 1533 of Dec. 24, 1998 as am'd). Tax is calculated at 1% rate on total assets held at end of tax period by individuals and estates on their rural real estate; local juridical persons; permanent establishments of foreign persons such as branch, agency, business place; some trust, investment funds and public companies in excess of certain amount.

Tax on Real and Personal Property.

(Law 23966 of Aug. 8, 1991 t.o. 1997 as am'd regulated by Decree 127 of Feb. 9, 1996 as am'd). Tax is levied on personal and real property of individual or undivided estates, not included in economic process, located in Argentina or abroad and personal and real property of nonresidents, individuals and undivided estates located in Argentina. Tax rate is 0.5%, 0.75%, 1% and 1.25%, depending on property value. Shares or quotas of local companies owned by individuals and undivided estates domiciled in country or abroad, and shares or quotas of local companies owned by legal entities domiciled abroad are subject to tax, which is paid by local company at 0.5% tax rate on asset value as of Dec. 31 each year. Shares or quotas of local companies owned by legal entities domiciled abroad are presumed to belong to individuals domiciled abroad.

22.04 PROPERTY TAXES:

Real Property Tax.

All lands and buildings situated in federal district (City of Buenos Aires), states and national territory, are subject to this tax; rates varying according to several factors, such as type of improvements made on land before or after certain periods of time, value of buildings constructed upon land and use of same. In provinces (states) tax is similar to one in force in federal district and rates also vary depending upon type of lands (agricultural lands, forestries, uncultivated lots, etc.), location and improvements.

Municipal taxes also regulate this matter together with provisions regarding taxes for city services such as light, sanitation, water, maintenance of streets and sidewalks, etc. In general, laws and regulations governing this subject are very detailed and are amended often. Surcharges are also imposed from time to time according to type and area of land.

Tax on Sale of Real Estate.

(Law 23905 of Feb. 16, 1991). Sale of real estate by individuals and undivided estates is taxed at rate of 1.5% on transfer value.

22.05 VALUE ADDED TAX:

Added Value Tax.

Sales made and personalty located within country, works, insurance, leases, rendering of services and imports of personalty are subject to this tax during final commercialization stage. Tax shall be levied on net price obtained by deducting from amount of invoice discounts or other reductions made according to commercial usage.

General rate is 21%.

Books, newspapers, periodicals, among others, are exempted from this tax.

(Law 23349 of Sept. 19, 1986 t.o. 1997 as am'd and its Regulations in Decree 692 of June 11, 1998 as am'd).

Tax Treaties.

Effective with Australia, Austria, Belgium, Bolivia, Brazil, Canada, Chile, Denmark, Finland, France, Germany, Italy, Netherlands, Norway, Spain, Sweden, Switzerland and U.K.

23 TRANSPORTATION

23.01 MOTOR VEHICLES:

(Law 24449 of Feb. 6, 1995 as am'd, regulated by Decree 646 of May 4, 1995).

Law 24449 contains complete regulations governing motor vehicles and public ways. License plates are required for all motor vehicles and drivers must obtain license which must be renewed every five years. Minors between 18 and 21 years of age are permitted to operate motor vehicles in special circumstances. In case of traffic accidents, law provides for fines or imprisonment or both depending upon type of violation; imprisonment is applied when driving while intoxicated.

There is National Registry of Motor Vehicles in which detailed information on vehicles and owners of all motor vehicles authorized to use public ways is kept. Registration is compulsory. (Decree 1114 of Oct. 24, 1997).

23.02 SHIPPING:

Coastwise trade is restricted to national vessels. In order that a vessel may be considered as national: (a) It must be enrolled in the Argentine registry; (b) the captain and officers must be Argentine citizens; (c) at least one-fourth the crew must be Argentineans; (d) the language used in commands and documents must be Spanish. (Decree 19492 of July 25, 1944).

General Navigation Rules are contained in the Maritime, Fluvial and Lacustral Regime approved by Decree 4516 of May 16, 1973, as am'd.

Law 20,094 (Law of Navigation) of Jan. 15, 1973 as am'd and its regulations, contains provisions and regulations governing maritime contracts and liabilities.

Law 17,094 of Dec. 29, 1966 as amended, extends national sovereignty up to a distance of 200 marine miles, measured from low tide marks. However, freedom of navigation and aeronavigation is not affected by dispositions of law.

Law 18502 of Dec. 24, 1969 as amended, determines that provinces shall have exclusive jurisdiction up to a distance of three marine miles. From that point up to 200 marine miles mentioned above, Federal Government shall have absolute jurisdiction.

Law 18870 of Jan. 7, 1971 as am'd creates Administrative Court of Admiralty which shall be located in city of Buenos Aires. Court has jurisdiction: (a) Over all navigable waters of nation and states used for interjurisdictional commerce and coasts, as well as over ports under supervision of national jurisdiction; (b) in open sea when accidents have been caused or suffered by national ships or occurred on board. Decisions of court shall be to determine lack of professional skill, inability or negligence of persons directly or indirectly liable for accidents, as well as observance of laws and general regulations in force in each particular case. Court cannot impose civil or penal liabilities; however, if after considering case there is “prima facie” evidence of crime or offense, court must deliver record to competent judge for further proceedings. Court consists of seven members who are designated by Executive Power, and who hold office for two years and may be re-elected. Law sets forth in detail rights and duties of members of court as well as general rules of procedure.

24 TREATIES AND CONVENTIONS

24.01 TREATIES:

Convention on the Limitation Period in the International Sale of Goods, 1980; Montevideo Treaty, 1980 (“Latin American Integration Association”), Asuncion Treaty, Signed on Mar. 26, 1991 creating common market “Southern Common Market” (MERCOSUR); Inter-American Convention of legal regime of powers of attorney to be used abroad; Inter-American Convention on international commercial arbitration; and Inter-American Convention on conflicts of laws concerning bills of exchange, promissory notes, and invoices. Signed at Panama on Jan. 30, 1975. Inter-American Conventions: On conflicts of laws concerning commercial companies, on general rules of private international law, on extraterritorial validity of foreign judgments and arbitral awards, and on execution of preventive measures. Signed at Montevideo on May 8, 1979. Convention on abolishing requirement of legalization for foreign public documents, The Hague, 1961. International Convention on applicable law for Representation and Intermediation Contracts, signed at The Hague on Mar. 14, 1978, Convention on recognition of the legal personality of corporations, associations and foreign foundations, The Hague June 1st, 1956. Multilateral Trade Negotiations, The Uruguay Round, Final Act, Marrakech, Apr. 15, 1994 and Agreement Establishing the World Trade Organization, Marrakech, Apr. 15, 1994.

Note: MERCOSUR, established in 1991, is regional trade market. Member countries are Argentina, Brazil, Paraguay, Uruguay and Venezuela. Member countries liberalize trade with one another while imposing common external tariff on goods imported from nonmember countries. MERCOSUR has extended its scope by entering into free trade agreements with Chile, Bolivia, Colombia, Ecuador and Peru.

Treaties in force between U.S. and Argentina.

Investment Guaranties.

Agreement relating to investment guaranties under §413(b)(4) of Mutual Security Act of 1954, as amended. Signed at Buenos Aires Dec. 22, 1959. Treaty Concerning the Reciprocal Encouragement and Protection of Investment. Signed at Washington, D.C. Nov. 14, 1991.

Agricultural Commodities.

Agreement providing for sale and purchase of cottonseed oil, etc. Signed at Washington Apr. 25, 1955; Agricultural commodities agreement to finance sale to Argentina of edible oils and/or fat. Signed at Buenos Aires Dec. 21, 1955; Agricultural commodities agreement with exchange of notes. Signed at Washington June 12, 1959.

Atomic Energy.

Agreement providing for grant to assist in acquisition of certain nuclear research and training equipment and materials of May 1960. Agreement for cooperation concerning civil uses of atomic energy. Signed June 25, 1969.

Copyright.

Copyright arrangement. (1934).

Economics and Technical Cooperation.

General Agreement for program of technical cooperation. Signed at Buenos Aires June 3, 1957.

Education.

Agreement for financing certain educational exchange programs. Signed at Buenos Aires Aug. 21, 1963.

Extradition.

Treaty on extradition between the two countries. Signed Jan. 21, 1972.

Investment Guaranties.

Agreement relating to investment guaranties under §413(b)(4) of Mutual Security Act of 1954, as am'd. Signed at Buenos Aires Dec. 22, 1959.

Inland Navigation.

Treaty for free navigation of rivers Paraná and Uruguay. Signed at San José de Flores July 10, 1853.

Postal Matters.

Agreement for exchange of insured parcel post packages. Signed in 1939.

Publications.

Agreement relating to exchange of official publications. Entered into force on Oct. 17, 1939.

Social Security.

Agreement by reciprocal notes concerning payment of social security benefits to citizens of one of parties residing abroad. (1972).

Taxation.

Agreement for relief from double taxation on earnings derived from operation of ships and aircraft (1950).

Tracking Stations.

Agreement relating to co-operative program for optical satellite tracking station at Villa Dolores, Argentina (1962); Agreement by reciprocal notes for installation of OMEGA navigation station in Chubut Province. Signed Dec. 4, 1970.

Trade and Commerce.

Trade agreement and exchanges of notes. Signed at Buenos Aires Oct. 14, 1941; Agreement by reciprocal notes concerning operation of Trade convention of 1941. Signed Aug. 3, 1966.

Visas.

Agreement relating to reciprocal waiver of nonimmigrant passport visa fees (1942).

Bilateral agreements for relief from double taxation on earnings derived from operation of ships and aircraft, with Spain and Israel signed at Buenos Aires on Nov. 30, 1978 and May 19, 1981, respectively. United States of America Concerning the Reciprocal

Encouragement and Protection of Investment, signed Nov. 14, 1991, Washington.

International Sale of Goods.

United Nations Convention for the International Sale of Goods, in force on Jan. 1, 1988. See category 3 Business Regulation and Commerce, topic 3.12 Sales and Part V, Selected International Conventions.

1

AUSTRALIA LAW DIGEST

—Scope —

Revised for 2010 edition by

ALLENS ARTHUR ROBINSON of Australia.

Preliminary Note.—In order to present the law of Australia accurately and clearly, this Digest is divided into two parts: Pt I, presenting the laws of the Commonwealth, and Pt II, presenting the laws of the several States and internal Territories comprising the Commonwealth. Particular topics will be found in Pt I or Pt II, or in both parts, according to which law governs the subject.

Note: This revision incorporates legislation through Sept. 30, 2009.

PART I THE COMMONWEALTH

1 INTRODUCTION

1.01 CURRENCY:

See category 3 Business Regulation and Commerce, topic 3.01 Banking and Currency.

1.02 GOVERNMENT AND LEGAL SYSTEM:

Commonwealth of Australia was established on Jan. 1, 1901, by Royal Proclamation dated Sept. 17, 1900, pursuant to Act of British Parliament known as Commonwealth of Australia Constitution Act 1900 (63 and 64 Vic, c. 12). Prior to that date colonies of New South Wales, Tasmania, Victoria, Queensland and Western Australia and Province of South Australia, had existed as self-governing colonies of Great Britain; but upon establishment of Commonwealth they became States of Commonwealth of Australia. Australian Constitution is modelled in some respects on that of U.S.A., although American theory of separation of powers only followed in Australia with respect to judiciary.

The Commonwealth Government is government of specified powers, which are for most part not exclusively within Commonwealth sphere, but where Commonwealth law conflicts with State law the former is paramount. (§109, Commonwealth of Australia Constitution Act 1900). Matters not specified as subjects upon which Commonwealth may legislate remain exclusively in sphere of State legislation except that Commonwealth may legislate through external affairs power to implement bona fide international agreement regardless of subject matter. Queen represented in Commonwealth by Governor-General, appointed on advice of Prime Minister, and in each of six States by Governor appointed on advice of State Premier. These officers in general occupy same relative position towards their respective Parliaments as Queen occupies towards British Parliament.

Proposal that Australia sever British constitutional ties and become republic rejected by constituency in 1999. Constitution Alteration (Establishment of Republic) Bill 1999 proposed Commonwealth of Australia be established as republic with President chosen by two-thirds majority of members of Commonwealth Parliament.

Parliament.

Commonwealth Parliament consists of two Houses: Senate and House of Representatives. Twelve Senators are elected by each State and two Senators by each of Australian Capital Territory and Northern Territory; each State and Territory votes as one electorate. House of Representatives has as nearly as practicable twice as many members as Senate, each representing small electorate. Electorates distributed amongst States and Territories in proportion to population size. Australian Capital Territory and Northern Territory both have two members. Cocos (Keeling) Islands Self-Determination (Consequential Amendments) Act 1984 and Christmas Island Administration (Miscellaneous Amendments) Act 1984 extended franchise to inhabitants of external territories of Cocos (Keeling) Islands and Christmas Island. Commonwealth Electoral Act 1918 specifies Australian Antarctic Territory, Territory of Heard and McDonald Islands, Coral Sea Islands Territory and Territory of Ashmore and Cartier Islands as “other” territories to be included in population assessments by Electoral Commissioner. Voting is compulsory for all Australian citizens over 18 years in election of members to both Houses. Legislation following referenda conducted May 21, 1977 gives residents of Australian Capital Territory and Northern Territory right to vote in future constitutional referenda. Casual vacancies in Senate filled by appointees of same political party. Casual vacancies in House of Representatives filled at by-elections. Determination of members of House of Representatives updated by Commonwealth Electoral Amendment (Representation in House of Representatives) Act 2004.

Both Houses meet from Feb. to Mar., May to June, and Aug. to Dec. During these three periods, Houses usually meet in blocks of two sitting weeks followed by two non-sitting weeks. See website for current sitting schedule: http://www.aph.gov.au/index.htm.

Commonwealth Electoral Act 1918 establishes Australian Electoral Commission to determine electoral divisions, regulate qualifications for voting, regulate gifts to political parties, report to Minister on electoral matters and generally conduct elections.

Legislative Powers.

Commonwealth Parliament has power to make laws for peace, order and good government of Commonwealth, with respect to: (1) Trade and commerce with other countries and among States; (2) taxation, but so as not to discriminate between States or parts of States; (3) bounties on the production or export of goods, but such bounties must be uniform throughout Commonwealth; (4) borrowing money upon public credit of Commonwealth; (5) postal, telegraphic, telephonic and other like services; (6) naval and military defence of Commonwealth and of the several States, and control of forces to execute and maintain laws of Commonwealth; (7) lighthouses, lightships, beacons and buoys; (8) astronomical and meteorological observation; (9) quarantine; (10) fisheries in Australian waters beyond territorial limits; (11) census and statistics; (12) currency, coinage and legal tender; (13) banking, other than State banking; also State banking extending beyond limits of State concerned, incorporation of banks, and issue of paper money; (14) insurance, other than State insurance, also State insurance extending beyond limits of State concerned; (15) weights and measures; (16) bills of exchange and promissory notes; (17) bankruptcy and insolvency; (18) copyrights, patents of inventions and designs, and trademarks; (19) naturalization and aliens; (20) foreign corporations, and trading or financial corporations formed within limits of Commonwealth; (21) marriage; (22) divorce and matrimonial causes, and in relation thereto parental rights and custody and guardianship of infants; (23) invalid and old age pensions; (23A) provision of maternity allowances, widows' pensions, child endowment, unemployment, pharmaceutical, sickness and hospital benefits, medical and dental services (but not so as to authorize any form of civil conscription), benefits to students and family allowances; (24) service and execution throughout Commonwealth of civil and criminal process and judgments of courts of States; (25) recognition throughout Commonwealth of laws and public acts and records and judicial proceedings of States; (26) people of any race, for whom it is deemed necessary to make special laws; (27) immigration and emigration; (28) influx of criminals; (29) external affairs; (30) relations of Commonwealth with Islands of the Pacific; (31) acquisition of property on just terms from any State or person for any purpose in respect of which Parliament has power to make laws; (32) control of railways with respect to transport for naval and military purposes of Commonwealth; (33) acquisition, with consent of State, of any railway of State, on terms arranged between Commonwealth and State; (34) railway construction and extension in any State with consent of that State; (35) conciliation and arbitration for prevention and settlement of industrial disputes extending beyond limits of any one State; (36) matters in respect of which Constitution makes provision until Parliament otherwise provides; (37) matters referred to Parliament of Commonwealth by parliament or parliaments of any State or States, but so that law must extend only to States by whose parliaments matter is referred, or which afterwards adopt law; (38) exercise within Commonwealth, at request or with concurrence of parliaments of all States directly concerned, of any power which could, at establishment of Constitution, be exercised only by Parliament of the U.K. or by Federal Council of Australasia; (39) matters incidental to execution of any power vested by Constitution in Parliament or in either house thereof, or in government of Commonwealth, or in federal judicature, or in any department or officer of Commonwealth. (§51[i]-[xxxxix]).

In addition to above powers, which are not exclusively conferred upon Commonwealth, but which may be exercised by States until such time as Commonwealth overrides them, Commonwealth Parliament has exclusive power to make laws for peace, order and good government of Commonwealth with respect to: (a) Seat of government of Commonwealth and all places acquired by Commonwealth for public purposes; (b) matters relating to any department of public service, control of which is by Constitution transferred to Executive Government of Commonwealth; and (c) other matters declared by Constitution to be within exclusive power of Parliament (such as imposition of duties of customs and excise and making of laws for Territories [§§90 and 122]). (§52).

Not all above powers have been exercised, but most important legislation enacted under above powers is referred to below. Scope of legislative power conferred by Constitution subject to judicial review.

Executive.

In accordance with British practice, Constitution says very little about Executive. It does not attempt to codify British Cabinet system, but merely refers to Federal Executive Council and provides that members of Federal Executive Council must administer departments of state and be Ministers of State, and must not hold office for longer than three months without becoming senators or members of House of Representatives. High Court determined in Victorian Stevedoring & General Contracting Co Pty Ltd v Dignan (1931) 46 CLR 73 that strict separation of powers between Legislature and Executive not required. Framers of Constitution had British notion of responsible government in mind, and that system is in fact more or less closely followed in Commonwealth.

Judiciary.

Constitution establishes Federal Supreme Court, called High Court of Australia, and vests judicial power of Commonwealth in that court and in such other federal courts as Parliament creates or invests with federal jurisdiction. As in U.S.A., Constitution does not interfere with State judiciaries, but provides federal judiciary capable of pronouncing judgment upon Commonwealth powers, and protecting Constitution not only against States, but against Legislature and

Executive of Commonwealth.

High Court of Australia.

High Court primarily court of appeal (both in constitutional and non-constitutional matters) from State and Territory courts, but Constitution confers original jurisdiction upon it in all matters: (a) Arising under any treaty; (b) affecting consuls or other representatives of other countries; (c) in which Commonwealth, or person suing or being sued on behalf of Commonwealth, is party; (d) between States, or between residents of different States, or between State and resident of another State; or (e) in which writ of mandamus or prohibition or injunction sought against officer of Commonwealth. (§75). In addition, Parliament of Commonwealth may confer original jurisdiction upon High Court in relation to certain other matters. (§76). Constitution provides that justices of High Court must be appointed by Governor-General in Council, and must not be removed except on address from both Houses of Parliament in same session, praying for such removal on ground of proved misbehavior or incapacity; and that remuneration of Justices of High Court is not to be diminished during their continuance in office. (§72). Legislation following referendum of May 21, 1977 provides for retiring age of 70 years for future Justices of High Court and judges in other Federal Courts. (§72).

Appeal to Privy Council.

Any remaining rights of appeal from High Court or State courts to Privy Council abolished by Australia Act 1986. (§11[1]).

Federal Court of Australia.

Under Federal Court of Australia Act 1976, Parliament established Federal Court of Australia and conferred on it: (a) Original jurisdiction in matters arising under specified Federal Acts, including those related to income tax, trade practices, industrial relations, corporations law and intellectual property; and (b) certain appellate jurisdiction, including jurisdiction in specified cases to determine appeals from courts exercising Federal jurisdiction, other than Full Courts of State Supreme Courts. (§24).

Conferral of State jurisdiction upon Federal Court pursuant to State cooperative schemes such as former Corporations Law held invalid in decision of Re Wakim; Ex parte McNally (1999) 198 CLR 511. Federal Magistrates Act 1999 established Federal Magistrates Court and confers some jurisdiction to deal with federal civil and family law matters.

Administrative Decisions (Judicial Review) Act 1977 empowers Federal Court to hear complaints against decisions of ministers and officers acting under Commonwealth laws. Act provides number of grounds for review of decisions to which it applies. Act also applies to omissions to decide. Other rights of review outside Act also preserved. “Order of Review” enables “person affected” by decision to obtain reasons for decision. Certain government decisions exempted from operation of Act. See category 6 Courts and Legislature, topic 6.01 Administrative Appeals.

Family Court of Australia.

Family Court of Australia operates in all States and Territories of Australia (except Western Australia) and has jurisdiction in respect of marriage, divorce, matrimonial causes and children. *Note:* Family Court of Western Australia also exists which has powers under certain Commonwealth laws such as Family Law Act 1975 as well as State laws such as Family Court Act 1997 (WA).

Certain non-judicial bodies also exist. For example, Administrative Appeals Tribunal Act 1975 establishes Tribunal to which appeals can be made by person affected by decision, or by special interest association, where decision is made by person under certain Commonwealth

Acts, and Ombudsman Act 1976 establishes Ombudsman, who has wide powers of investigation into any matter of administration either on complaint or of own motion with respect to any department or prescribed authority over which Commonwealth exercises control.

Trade and Intercourse.

Constitution provides that trade, commerce and intercourse among the States, whether by means of internal carriage or ocean navigation, must be absolutely free. (§92). Freedom of trade and commerce guaranteed by §92 has been interpreted by High Court to be freedom from discriminatory burdens of protectionist kind. Law will violate §92 if on its face protectionist or if factual operation of law produces such result.

Implied Rights.

High Court in recent decisions has in its interpretation of Commonwealth Constitution implied certain rights previously unseen by Court (e.g., right to freedom of political communication).

Australia Act 1986 severs all remaining constitutional links between Australia and U.K. Provides that U.K. Parliament has no power to make laws for Australia, removes limitations on legislative powers of States and terminates all responsibilities of U.K. Government in respect of States.

1.03 OFFICE HOURS AND TIME ZONE:

Australia is between eight and ten hours ahead of Greenwich Mean Time. Office hours are generally from 9 a.m. to 5 p.m., Mon. to Fri. Daylight saving occurs in summer (Oct. - Mar.), however regulated by each State. See Pt II, category 19 Introduction, topic 19.03 Office Hours and Time Zone.

2 BUSINESS ORGANIZATIONS

2.01 CORPORATIONS:

Company is separate legal entity from members and can, among other things, initiate or defend legal proceedings and enter into contracts (subject to certain common law and statutory restraints).

Background.

Corporations Law regime in force from 1991 until 2001. Regime allowed separate corporations legislation enacted in all States and Territories to operate as national Corporations Law regime because Commonwealth did not have direct power over all matters relating to corporations. Operation of regime also governed by Heads of Agreement between States, Territories and Commonwealth. Constitution §51xx allows Commonwealth to legislate with respect to “foreign corporations, and trading and financial corporations formed within the limits of the Commonwealth”. High Court held that power did not allow Commonwealth to legislate with respect to some important corporations law matters, such as incorporation of companies. (Huddart Parker & Co Pty Ltd v Moorhead [1909] 8 CLR 330). 1991 regime last of number of attempts by Commonwealth to gain capacity to legislate with respect to corporations.

Constitutional validity of cooperative system challenged in Re Wakim; Ex parte McNally (1999) 198 CLR 511 and R v Hughes (2000) 202 CLR 535. In Re Wakim; Ex parte McNally (1999), High Court found c. III of Constitution did not allow Federal Court to exercise State jurisdiction. This meant that Federal Court no longer able to exercise jurisdiction over majority of corporations law matters, limiting cross vesting provisions in Corporations Law and curtailing national operation of 1991 Corporations Law regime.

Uncertainty resolved by agreement of States to refer their corporations powers to Commonwealth Parliament under Constitution §51xxxvii which gives Commonwealth power to legislate with respect to "matters referred to the Parliament of the Commonwealth by the Parliament or Parliaments of any State or States". Provided Constitutional basis for Commonwealth Parliament to enact national corporations law legislation. *Note:* Not necessary for Northern Territory and Australian Capital Territory to refer their powers as Commonwealth already has power to legislate with respect to Territories.

National Scheme.

Corporations Act 2001 and Australian Securities and Investments Commission Act 2001 took effect on July 15, 2001 as single national law which governs company formation, operation and administration and replaces former Corporations Law regime. Period under which corporations power referred by States to Commonwealth Parliament extended until July 15, 2011. (See Corporations [Commonwealth Powers] Act 2001 for each State.)

Australian Securities and Investments Commission (established by Australian Securities and Investments Commission Act 2001) is sole administrative and regulatory authority, formally responsible to Commonwealth Treasurer (who can give directions regarding policy and priorities) and Commonwealth Parliament. Australian Securities and Investments Commission has extensive power to make declarations modifying or exempting application of Corporations Act in particular circumstances. Australian Securities and Investments Commission Act 2001 established Takeovers Panel and Corporations Act 2001 grants it power to determine applications by Australian Securities and Investments Commission or other interested parties for declarations of unacceptable circumstances in relation to control or potential control of, or acquisition of substantial interests in, certain types of companies.

Corporations Law Reform.

Since commencement of 1991 Corporations Law regime, substantial amendments have been made to legislation with aim of simplification. Major amending acts include Corporate Law Reform Act 1992, Corporate Law Reform Act 1994, First Corporate Law Simplification Act 1995, Company Law Review Act 1998, Managed Investments Act 1998, Financial Sector Reform (Amendments and Transitional Provisions) Act 1998, Financial Sector Reform (Amendments and Transitional Provisions) Act (No. 1) 1999, Corporate Law Economic Reform Program Act 1999 (CLERP Act 1999), Corporate Law Economic Reform Program (Audit Reform and Corporate Disclosure) Act 2004, Corporations Legislation Amendment (Simpler Regulatory System) Act 2007, Corporations Amendment (Insolvency) Act 2007 and Corporations Amendment (Short Selling) Act 2008. Company Law Review Act 1998 attempted to improve and simplify core provisions of former Corporations Law including registering companies, meetings, share capital, financial reporting, annual returns, deregistration of defunct companies and company names. Corporate Law Economic Reform Program shifted focus to economic improvements and introduced CLERP Act 1999 which introduced significant changes to corporations law (such as directors' duties and corporate governance, takeovers, fundraising and accounting standards). Changes have important implications for company directors and other officers, and their legal, accounting and financial advisers. Corporations Act further amended by Financial Services Reform Act 2001, Financial Services Reform (Consequential Provisions) Act 2001, Financial Services Reform Amendment Act 2003, Corporations Legislation Amendment Act 2003, Corporations Legislation Amendment (Simpler Regulatory System) Act 2007 and Financial Sector Legislation (Enhancing Supervision and Enforcement) Act 2009. Transitional period for Financial Services Reforms ended on 11 Mar. 2004. Financial Services Reforms aim to regulate and simplify conduct in relation to financial products including introduction of: uniform licensing regime, stricter disclosure standards and uniform rules between comparable financial products. Financial Services Reforms do not extend to credit products.

Commonwealth must obtain approval of Ministerial Council to effect amendments to most provisions of Corporations Act. Amendments take effect upon agreement of at least three jurisdictions. Ministerial Council (made up of representatives from each State, Northern Territory and Commonwealth) retains consultative role, Commonwealth having four votes and casting vote and each State and Northern Territory having one vote. Commonwealth has right of veto over any reform proposal.

Corporations Act deals with wide range of corporate activity: Formation of companies, management of companies, constituent documents of companies and alteration thereof, directors' duties, financing of corporate activities and raising of finance (through share capital and loans), shares and classes of shares, dividends and other types of distribution, and company liquidations and windings up. Mechanical and administrative matters found in Corporations Regulations 2001.

Corporations Act c. 6 regulates various aspects of takeovers. Purpose to ensure acquisition of permitted relevant interests in voting shares takes place in efficient, competitive and informed market and appropriate procedures are followed.

Stock Exchange.

Financial Services Reform Act 2001 and related legislation, introduced c. 7 of Corporations Act which regulates various aspects of securities and financial services industries and markets including licensing of financial markets, providers of financial services, clearing and settlement facilities, provision of financial services and product disclosure, issue and sale of financial products, title to and transfer of securities and market misconduct.

Brokers can incorporate and nonmembers of stock exchanges may acquire up to 50% shareholding in brokering companies. Overseas entry into Australian exchanges permitted from brokers in countries with reciprocal entry requirements. Corporations can be admitted as members of exchanges and brokers may become members of more than one exchange.

Creation of Corporations.

Corporations may be created by Act of Commonwealth or State Parliament or registered under provisions of Corporations Act. Incorporation by Act of Parliament generally only employed in connection with public trusts or utilities, some government or charitable concerns or activities, or in cases where power which is sought cannot be acquired under companies legislation. All ordinary trading companies formed under provisions of Corporations Act. Trade union cannot be registered under Corporations Act (§116); can incorporate under specific legislation dealing with trade unions such as Workplace Relations Act 1996 and Workplace Relations Amendment (Registration and Accountability of Organisations) (Consequential Provisions) Act 2002.

Formation.

Prior to formation application including list of directors and subscribers and notice of situation of registered office (and where registered office not company's usual place of business consent of person in occupation of office) must be lodged with Australian Securities and Investments Commission. (Corporations Act §117). Proprietary companies no longer required to lodge company constitution with Australian Securities and Investments Commission. Public companies must lodge company constitution if they have one. Companies incorporated in Australia need only lodge documents in jurisdiction (State or Territory) of registration. Company comes into existence when registered by Australian Securities and Investments Commission.

Terminology.

Company means company registered under Corporations Act. Corporations Act enables creation of company under Act whether company is to operate in one State or Territory or nationally.

Foreign company means body corporate formed in external Territory or outside Australia (not being corporation sole or exempt public authority) or unincorporated body formed in external Territory or outside Australia having capacity under law of its place of formation to sue or be sued and to hold property and does not have its head office or principal place of business in Australia. Foreign company that registers is “registered foreign company”.

Incorporated in Australia means under law of Commonwealth, State or internal Territory.

Limited company means company in which liability of each member limited. Two types of limited companies (formerly three): (a) Company limited by shares—maximum liability of member is to contribute amount not exceeding amount of capital unpaid on shares held by member. Trading companies often take this form; (b) company limited by guarantee—maximum liability of member is to contribute amount not exceeding amount undertaken to be contributed by member in event of company being wound up. Non-trading associations often take this form. Will always be public company. Formerly (c): company limited both by shares and guarantee—hybrid of (a) and (b), however form of company can no longer be created under Corporations Act.

Unlimited company means company in which liability of each member is unlimited (i.e., if company wound up members personally liable for debts of company to extent that assets of company insufficient to pay debts). No unlimited company may be registered without share capital. (Corporations Act §112[1]).

No Liability Company.

Corporations Act makes provisions for incorporation of “No Liability” company but activities must be limited to mining purposes and has no contractual right to recover unpaid calls. Will always be public company. Acceptance of share in such company, whether by subscription, allotment, transfer or otherwise, is not to be deemed contract on part of person accepting same to pay any calls in respect thereof or to pay any contribution to debts and liabilities of company. No dividends are receivable upon any share in such company upon which call is due and unpaid. When call remains unpaid for prescribed period share is automatically forfeited but can be redeemed upon payment of such call at any time before resale of share.

Public company means company other than private company. Public company must have at least three directors, with at least two ordinarily resident in Australia.

Private company means any company registered as or which converts to private company under Corporations Act, similar to those permitted under English Acts, which companies are not required to comply with all requirements which relate to other companies. These companies are called “proprietary companies”. Proprietary company must be limited by shares or be unlimited company with share capital, cannot have more than 50 non-employee shareholders, and cannot do anything that would require disclosure to investors for purposes of fundraising (except in limited circumstances [Corporations Act §113]). Proprietary company must have at least one director who must be ordinarily resident in Australia. Distinction made between provisions applying to large and small proprietary companies and single director/shareholder companies under Corporations Act.

Small proprietary companies generally have reduced financial reporting requirements, not obliged to appoint auditor. Company may be required to prepare annual financial and directors' reports if directed by Australian Securities and Investments Commission or members.

Large proprietary companies generally required to appoint auditor and lodge financial audited accounts with Australian Securities and Investments Commission. Company will be large proprietary company if two of three requirements satisfied: if company and entities it controls, in financial year: (a) Has consolidated revenue of A$25 million, or any other amount prescribed by regulations, or more; (b) has consolidated gross assets of A$12.5 million, or any other amount prescribed by regulations, or more; (c) has 50, or any other number prescribed by regulations, employees or more. If at least two of these three requirements not satisfied, company will be small proprietary company. These thresholds introduced on June 28, 2007 by Corporations Legislation Amendment (Simpler Regulatory System) Act 2007.

With certain exceptions, possible to convert from one type of company to another. (Corporations Act Pt 2B.7). Change does not create new legal entity or affect company's existing relationship with outsiders including legal proceedings by or against company or its members.

On registration under Corporations Act company given Australian Company Number (ACN), and foreign corporation or registrable Australian body is given Australian Registered Body Number (ARBN). Company number must be displayed after company name when first mentioned on all public documents, negotiable instruments (with some exceptions) and on seal of company (if any).

Foreign Corporations.

Foreign company must not carry on business in Australia unless registered or has applied for registration. To obtain registration foreign company must provide under Corporations Act (Pt 5B.2 Div. 2), in addition to application for registration: (a) Certified copy of certificate of incorporation or equivalent document; (b) certified copy of its constitution; (c) list of directors containing personal details of those directors; (d) appointment of local agent authorized to accept service; (e) duly executed memorandum stating powers of directors who are resident in jurisdiction and members of any local boards; (f) documents in relation to any registrable charges; (g) notice of address of registered office or principal place of business in place of formation; and (h) notice of address of its registered office in Australia. Registered foreign company must lodge copies of balance sheet, cash flow statement, and profit and loss statement at least once every calendar year. *Note:* Corporations Act now exempts certain foreign companies from lodging information or documents if already lodged with authority of foreign country functions of which are equivalent to those of Australian Securities and Investments Commission. Exemption currently only applies to New Zealand. (Corporations Act §601CDA).

See also Pt I, category 13 Immigration, topic 13.01 Aliens, subhead Corporations Owned or Controlled by Aliens.

Name.

Company can use available name or “Australian Company Number” followed by its ACN, followed by “Limited”, “Proprietary Limited”, “Proprietary” or “No Liability” (according to type of company). Search as to availability of proposed company name for registration may be initiated by completion and lodgment of form of inquiry. Register of names can be searched on Australian Securities and Investments Commission website http://www.search.asic.gov.au. Any person may apply to Australian Securities and Investments Commission for reservation of name for period of two months but not compulsory to reserve name prior to registration. Period for which any name is reserved may be extended by administering officer for further period of two months if application made during currency of reservation and officer satisfied as to bona fides of application. Name will be available unless has been registered or reserved in respect of another entity, is included on national business names register in respect of another person, or is unacceptable for registration in any of following ways: (a) Suggests connection, where connection does not exist, with members of Royal Family (or receipt of Royal patronage), Crown, Commonwealth Government or State or Territory Government, government of foreign country, government department or municipal or other local authority, or ex-servicemen's organization; (b) in opinion of Australian Securities and Investments Commission is undesirable or likely to be offensive to members of public or section of public; (c) suggests members are disabled if they are not; or (d) includes certain restricted words or phrases (unless Minister gives consent), including “Incorporated”, “Trust”, “Trustee”, “Guarantee”, ``United Nations''.

Limited public companies must include “Limited” or “Ltd” in name unless exempt. Certain nonprofit companies and certain licensed companies can be exempt. Proprietary company must include “Proprietary Limited” or “Pty Ltd” (or other variations). No Liability Companies must include “No Liability” or “NL”. Company can change name after registration, but requires special resolution of members and application to Australian Securities and Investments Commission.

Powers of Company.

Corporations Act gives company legal capacity and powers of natural person and all powers of body corporate; further, company need not list objects in constitution.

Subsidiary companies may not own shares in their holding companies (subject to certain limited exceptions).

Raising Capital.

Private company prohibited from inviting public to subscribe for debentures of, or shares in, company and from inviting public to deposit money with company for fixed periods or payable at call. Public company may do so if company meets legal requirements: (a) Directors must act in good faith in interests of company and for proper purposes, with reasonable care and no conflict of interest (i.e., customary directors' duties continue to apply); (b) if required, member approval of proposed issue obtained (e.g., if creating new class of shares or variation in class rights); (c) consider any restrictions on people to whom shares can be offered (e.g., preemptive rights); and (d) meet disclosure requirements under Corporations Act.

Generally, company offering securities must provide investors with disclosure document (prospectus or similar) setting out detailed information about company and shares. (Corporations Act §706). Prospectus must comply with extensive disclosure obligations in c. 6D of Corporations Act including: (a) Sets out all specific disclosure requirements (Corporations Act §711); (b) does not contain any misleading or deceptive statements (Corporations Act §728); (c) disclosure document must be worded and presented in clear, concise and effective manner (Corporations Act §715A); (d) disclosure document is dated (Corporations Act §716); and (e) directors consent to disclosure document (Corporations Act §720).

Prospectus must contain all information investors and their professional advisers would reasonably require to make informed assessment of rights and liabilities attaching to securities offered, interests or options, assets and liabilities, financial position and performance, profits and losses and prospects of corporation. (Corporations Act §710).

Special (reduced) prospectus content rules apply for continuously quoted securities. (Corporations Act §713).

Significant penalties and sanctions imposed on company, directors and advisors under Corporations Act if prospectus contains misleading or deceptive statement or material omission. (Corporations Act §§728, 729).

Due diligence defense for prospectus if person proves they made all inquiries reasonable in circumstances and believed on reasonable grounds statement not misleading or deceptive or there was no omission from prospectus. (Corporations Act §731). Also general defense if person reasonably relied on information given by another person other than director, employee or agent of corporation (individual). (Corporations Act §733).

Prospectus must be lodged with Australian Securities and Investments Commission. Certain kinds of offers do not require prospectus including: (a) Some small-scale offerings; (b) offers to “sophisticated” investors; (c) offers through financial services licensees in specified circumstances; or (d) offers to most “professional investors”. (Corporations Act §708). Prospectus valid for offer of securities for 13 months after prospectus date. (Corporations Act §711).

Australian Securities and Investments Commission must be notified within 28 days after share issue. Australian Securities Exchange must also be notified if company listed.

Most charges and like securities created by corporation require notification to Australian Securities and Investments Commission within certain time frame: creation of charge requires notice within 45 days. Corporations Act extends charge registration requirements to foreign corporations. Also provides for priority system of registration of charges. Some equitable charges should be registered.

Issue of financial products other than securities (e.g., interests in managed investment schemes) regulated by Pt 7.9, rather than c. 6D.

Alterations to Capital.

Reductions of capital not otherwise authorized must: (a) Be fair and reasonable to shareholders; (b) not materially prejudice company's ability to pay its creditors; (c) be approved by shareholders; and (d) be notified to Australian Securities and Investments Commission within one month after share cancellation and 14 days after resolution in some circumstances. Company may buy back its own shares if it does not materially prejudice company's ability to pay creditors and company follows procedures in Corporations Act. (Pt 2J.1, Div. 2). Additional provisions for issue of redeemable preference shares. (Corporations Act Pt 2H.2).

Directors.

Corporations Act requires every public company to have at least three directors (at least two of whom are ordinarily resident in Australia), private company must have at least one director (at least one director must ordinarily reside in Australia). Director must be individual, of at least 18 years. Person ceases to be director if disqualified from managing corporations as set out in Corporations Act Pt 2D.6, unless Australian Securities and Investments Commission or court allows person to manage company.

Directors may be required by company's constitution to hold specified share qualification.

Directors must comply with common law and statutory duties, e.g.: (a) Directors must exercise their powers and discharge their duties with degree of care and diligence that reasonable person would exercise if they were director in those circumstances and occupied office held by, and had same responsibilities as, director (Corporations Act §180[1]); (b) directors must exercise powers and discharge duties in good faith in best interests of company and for proper purposes (Corporations Act §181[1]); (c) directors with material personal interest relating to affairs of company must disclose to fellow directors (Corporations Act §191). Under statutory “business judgment rule” courts will not review merits of director's business decisions (e.g., decisions relevant to business operations of company) where director: (a) Makes judgment in good faith for proper purpose; (b) did not have material personal interest; (c) informs self about subject matter to extent they reasonably believe appropriate; and (d) rationally believes judgment in best interests of corporation (Corporations Act §180[2])—provides directors with “safe harbor” from personal liability if requirements met.

Directors may delegate any of their powers to: (a) Committee of directors; (b) director; (c) employee of company; or (d) any other person, unless prevented from doing so by company's constitution. (Corporations Act §198D). Directors' report for financial year for listed company must include policy for remunerating key management personnel of company group and details of nature and amount of each element of remuneration of each director and each of five named executives of company, and five named executives of company's group, receiving highest remuneration. (Corporations Act §300A). Company must disclose remuneration paid to each director of company, subsidiary or entity controlled by company if directed by: (a) Members with at least 5% of votes that may be cast at general meeting of company; or (b) at least 100 members who are entitled to vote at general meeting. (Corporations Act §202B). Listed companies have expanded remuneration reporting requirements, must include “Remuneration Report” in annual directors' report. Report subject to non-binding vote by shareholders at AGM. (Corporations Act §250R[3]). Auditor must provide opinion to members on whether remuneration report complies with §300A and reasons for any non-compliance. (Corporations Act §308[3C]).

Accounts and Audit.

Every company must keep accounts and records of transactions for at least seven years after completion of transaction to which they relate. (Corporations Act §286[2]). Financial report must be presented to company in general meeting together with directors' and auditors' reports. (Corporations Act §317[1]). Financial and directors' report not required for small proprietary company unless requested by members or Australian Securities and Investments Commission, or controlled by foreign company and not consolidated in financial statements. (Corporations Act §292[2]).

Generally large proprietary companies, public companies and small proprietary companies controlled by foreign companies must prepare annual financial statements including: profit and loss account, balance sheet, directors' and auditors' reports. Annual financial reporting to members required. All companies must appoint auditor except small proprietary companies. Small proprietary companies only required to keep accounting records unless more required by Australian Securities and Investments Commission or members. Company must make out consolidated profit and loss accounts and balance sheet of economic entity constituted by company and entities (including bodies corporate, partnerships and unincorporated bodies) it controls.

General requirement of auditor independence. Auditor must comply with auditing standards issued by Auditing and Assurance Standards Board. Auditor must notify Australian Securities and Investments Commission if suspects contravention of Corporations Act.

Companies that are “disclosing entities” must report on half yearly basis or as certain material events arise. (Corporations Act Pt 2M.3, c. 6CA and for listed companies Australian Securities Exchange Listing Rules).

Corporations Act provides company may send out summary version of financial, directors' and auditors' reports to members if full version available on request and member requests summary version. Company may make reports available online and only send reports to those who request them. Financial reports must meet approved accounting standards.

Annual General Meeting.

Public company must hold annual general meeting within 18 months after registration. (Corporations Act §250N[1]). Public company, except those with one member, must hold annual general meeting each calendar year and within five months after end of its financial year. (Corporations Act §§250N[2] and [4]). Business of annual general meeting may include, even if not referred to in notice of meeting: (a) Consideration of annual financial report, directors' report and auditor's report; (b) election of directors; (c) appointment of auditor; and (d) fixing of auditor's remuneration. Non-binding resolution to approve Remuneration Report in annual directors' report must also be put to shareholders. (Corporations Act §250R).

Takeovers.

Corporations Act c. 6 prohibits person acquiring relevant interest in issued voting shares in company if company is listed, or has more than 50 members, and, because of acquisition, that person's or someone else's voting power in company increases from 20% or below to more than 20%, or from starting point that is above 20% and below 90%. (Corporations Act §606). Relevant interest exists if person is holder of securities, or has power to exercise, or control exercise of, right to vote attached to securities, or has power to dispose of, or control exercise of power to dispose of, securities. (Corporations Act §608). Does not matter how remote relevant interest is or how it arises. Situations which do not give rise to relevant interest include, subject to certain conditions, person who holds charge or other security over relevant securities, nominee or bare trustee, securities dealer, or proxy. Voting power equal to person's and associate's votes in company as percentage of total votes in company.

Corporations Act c. 6C requires any person who acquires voting power in excess of 5% in listed company, or whose voting power after that time changes up or down by more than 1%, to notify company.

Principal methods of increasing voting power beyond 20% limit provided in Act: (a) By purchase of up to 3% of target company's voting shares in any six month period; (b) by making formal off-market takeover bid under Act for all shares in class or uniform proportion thereof, offers under bid being open for at least one month and being attended by certain statements containing information relating to bid; (c) by making formal takeover bid via home Stock Exchange of target company unconditionally undertaking to take for at least one month at specified cash price all shares offered (and being attended by certain statements containing information relating to bid); (d) (subject to certain conditions) by obtaining target company shareholder approval; or (e) by target company proposing scheme of arrangement under Pt 5.1 of Corporations Act. (Corporations Act §611).

Information requirements for off-market or on-market takeover bid to be met in bidder's statement prepared by acquirer (bidder). Corporations Act §636 requires disclosure on specific matters (e.g., bidder's intentions regarding target's business, assets and employees; details of funding arrangements for offers) as well as any other information known to bidder that is material to decision whether to accept bid. Where consideration includes securities, prospectus-type information also required (see subhead Raising Capital, supra).

Target company must respond with target's statement, containing all information known to directors that holders of bid class securities and their professional advisers would reasonably require (and reasonably expect to find in target's statement) to make informed assessment whether to accept bid. (Corporations Act §638).

Bidder's statement and target's statement must be lodged with Australian Securities and Investments Commission. Both bidder's statement and target's statement subject to supplementing obligations. (Corporations Act §§643, 644).

All offers under bid must be same, subject to certain statutory exceptions. Offers cannot be open for more than 12 months. Consideration offered must at least equal maximum consideration that bidder or associate provided, or agreed to provide, for bid class security under purchase or agreement during four months before bid. Conditions to off-market bid cannot be dependent on bidder's opinion, or on events within its control or that are direct result of bidder's actions. No maximum acceptance conditions allowed. Collateral benefits (benefits to induce disposal of securities that are not offered to all shareholders) not allowed during bid period.

Significant penalties and sanctions imposed on bidder/target, directors and advisors under Corporations Act if bidder's statement/target's statement contains misleading or deceptive statement or material omission. (Corporations Act §670A). No due diligence defense available, but general defenses if person did not know that statement was misleading or deceptive or that there was omission, or person reasonably relied on information given by another person other than director, employee or agent of corporation (individual). (Corporations Act §670D). Criminal liability and other sanctions for person who publicly proposes takeover bid but fails to carry through with bid within two months after proposal. (Corporations Act §631).

If bidder acquires at least 90% of securities in bid class and at least 75% of securities bidder offered to acquire under bid during or as result of takeover bid, bidder may compulsorily purchase remaining bid class securities. (Corporations Act §661A). Person holding at least 90% by value of target securities and having 90% voting power may generally compulsorily purchase remaining securities. (Corporations Act §664A).

Takeovers Panel determines if unacceptable circumstances exist in relation to takeover or acquisition process. See also Pt I, categories 3 Business Regulation and Commerce, topic 3.05 Monopolies, Restraint of Trade and Competition; 13 Immigration, topic 13.01 Aliens, subhead Corporations Owned or Controlled by Aliens.

Insider Trading.

Corporations Act, c. 7 Pt 7.10 severely penalizes insider trading in securities of company by person who possesses information not generally available but if generally available would reasonably be expected to have material effect on price or value of securities of corporation. Party to such transaction who suffers loss, body corporate that issued securities, or Australian Securities and Investments Commission can bring action to recover profits from insider traders.

Winding Up.

Company may be wound up voluntarily upon special resolution of members or by court following application to wind up company by creditor or member or other specified person. (Corporations Act Pts 5.4, 2F.1).

Any member of company who believes its affairs are being conducted in manner oppressive or unfairly prejudicial to, or unfairly discriminatory against, member or members, or in manner contrary to interests of members as whole, can apply to court for order that company be wound up. Court given wide discretion to make such order or orders appropriate to circumstances. (Corporations Act Pts 5.4A, 2F.1). Deed of company arrangement to provide for priority of employee entitlements. (Corporations Act §444DA). Administrators and liquidators must declare “relevant relationships” and indemnities. (Corporations Act §§436DA, 449CA). Provision for statutory pooling process for winding up related companies. (Corporations Act Pt 5.6 Div. 8). Person can obtain compensation where breach of alteration or condition of scheme of compromise or arrangement under Pt 5.1. (Corporations Act §411). Australian Securities and Investments Commission can apply for court order to prevent avoidance of liability to company by officer or related entity. (Corporations Act §486A). Time limit of six months for liquidators to lodge reports on possible offenses by officers or members of company. (Corporations Act §533). Person may not fail to comply with requirement on grounds that compliance might result in disqualification, banning, suspension or cancellation order, or declaration to that effect. (Corporations Act §1349). Administrators protected from liability for “debts or liabilities incurred, or damages or losses sustained” when acting as administrator. (Corporations Act §443D). Accounts of administrators and deed administrators to be lodged with Australian Securities and Investments Commission. (Corporations Act §§438E, 445J). Equity for debt offers by administrators exempted from fundraising provisions in Pt 6D.2. (Corporations Act §708[17A]). See Pt I, category 7 Debtor and Creditor, topic 7.07 Insolvency.

Exchange Control.

See category 12 Foreign Trade and Commerce, topic 12.02 Exchange Control.

Securities Regulation.

Australian Securities and Investments Commission has power to prohibit trading in particular securities on stock market, and powers relating to investigation of securities dealings, insider trading, licenses and stock market manipulation. Operator of securities market must have Australian markets license.

Under c. 7 of Corporations Act, person will generally require Australian Financial Services License if they carry on financial services business (Corporations Act §911A[1]) unless exemption applies (Corporations Act §911A[2]) or they are representative of licensee. Person who provides financial services as representative of licensee will generally need to be authorized under Corporations Act unless representative is employee or director of licensee or related body corporate. (Corporations Act §911B). Corporations Act imposes numerous obligations on licensees and representatives.

Licensees must ensure compliance with financial services laws and are responsible for conduct of their representatives. Representatives also required to comply with: (a) Financial services disclosure in Corporations Act Pt 7.7; (b) financial disclosure obligations in Corporations Act c. 6D for securities or Pt 7.9 for other financial products; and (c) consumer protection provisions in Australian Securities and Investments Commission Act 2001.

Corporations Act allows use of Clearing House Electronic Sub-Register System by Australian Securities Exchange which provides central register for electronic transfer of share ownership whereby transferor need not sign transfer form personally, if stamped by market licensee or designated broker. Australian Securities Exchange has replaced floor trading with screen trading.

Futures Industry Regulation.

Australian Securities and Investments Commission has power to give directions regarding dealings in futures on futures market. Operator of futures market must hold Australian market license.

3 BUSINESS REGULATION AND COMMERCE

3.01 BANKING AND CURRENCY:

Banking Act 1959 provides banking business must be carried on only by Reserve Bank of Australia (§8) and bodies corporate so authorized in writing by Australian Prudential Regulation Authority (§9). Australian Prudential Regulation Authority consent required to use word “bank” or “banking” in business name. (§66). Governor-General has regulation-making powers for purposes related to certain aspects of foreign exchange, protection of Australian currency and certain aspects of foreign investment, ownership and control of property in Australia. (§39). Act also provides for extraterritorial application of Banking (Foreign Exchange) Regulations 1959. Reserve Bank empowered to control monetary policy and supervise domestic payments system.

No distinction between trading and savings banks. Banks have appointed Financial Ombudsman Service to deal with complaints by retail customers. Australian Bankers' Association implemented voluntary self-regulating 2004 Code of Banking Practice for member banks in relation to service to retail customers and small businesses (http://www.bankers.asn.au). While Code has no legislative effect, once bank subscribes to Code, it is binding contract with customer. Code promotes good banking practice by setting minimum standards for disclosure (including disclosure of fees and charges), privacy and confidentiality, dispute resolution handling processes and conduct for dealing with guarantors. Uniform Consumer Credit Code (UCCC) legislation regulates credit provided to personal customers and some businesses, where credit provided for personal domestic or household purposes. UCCC requires standardization in presentation and format of consumer credit agreements, disclosure of fees and charges, with substantial penalties for credit providers failing to comply.

Australian Prudential Regulation Authority Act 1998 establishes Australian Prudential Regulation Authority for prudential supervision and regulation of Approved Deposit-taking Institutions (ADIs). Extends to ensuring efficient, competitive and safe financial system, which includes enforcing capital adequacy requirements. ADIs include banks, building societies, credit cooperatives, insurers and superannuation (retirement) funds.

Reserve Bank Act 1959 establishes Reserve Bank of Australia which is required to act as central bank (§26) and bank for Commonwealth (§27). Bank required to ensure that its monetary and banking policies are directed to greatest advantage of people of Australia and that its powers are exercised in such manner as, in opinion of Board, best contributes to: (a) Stability of Australian currency; (b) maintenance of full employment in Australia; and (c) economic prosperity and welfare of Australian people. (§10[2]).

In event of any difference of opinion between board of Reserve Bank and Government as to whether monetary and banking policies of Reserve Bank are directed to greatest advantage of people of Australia, Government has ultimate right to direct Bank's policies (§11), however 1996 agreement between Commonwealth Government and Reserve Bank provides for Reserve Bank board decisions regarding monetary policy to be free of political interference from Government (http://www.rba.gov.au/MonetaryPolicy/statement_conduct_mp_1_14081996.html).

Foreign Banks.

Foreign bank entry liberalized. Foreign banks may apply to Australian Prudential Regulation Authority to conduct banking business in Australia. (Banking Act 1959 [§9]). Foreign banks operating representative offices in Australia must obtain Australian Prudential Regulation Authority consent. (Banking Act 1959 [§67]).

Interest withholding tax on interest paid overseas is 10%, however wide-ranging exemptions exist for publicly offered debt issuances, syndicated loans,and for loans by certain U.K. and U.S. resident institutions. See category 16 Taxation.

Financial Sector (Shareholdings) Act 1998 prohibits person from having more than 15% stake in bank, insurance company or holding company. However, Commonwealth Treasurer may approve stake in excess of 15% subject to “national interest” test. (§§8, 13). Treasurer may apply “practical control” test where person and associates have effective control, despite no breach of 15% limit. (§23).

Australian Notes.

Issued by Note Issue Department of Reserve Bank, and are legal tender for their face value in Commonwealth and in all Territories under control of Commonwealth.

Reserve Bank Act 1959 permits issue of Australian notes in denominations of one, two, five, ten, 20, 50 and 100 dollars, and any other denomination determined by Commonwealth Treasurer. (§35). Currency Act 1965 permits issue of coins in denominations of five, ten, 20 and 50 cents, and issue of notes in denominations of one, ten, 25, 50, 100 and 200 dollars (§§13, 14 Sched.). Currently in circulation are coins in denominations of five, ten, 20 and 50 cents, and of one dollar and two dollars, and notes in denominations of five, ten, 20, 50 and 100 dollars. One and two dollar coins have replaced one and two dollar notes. One and two cent coins not reissued after Oct. 1, 1990.

Legal Tender.

Currency Act 1965 provides tender of payment of money is legal tender if made in case of coins of denominations of 5¢, 10¢, 20¢ or 50¢ for payment of amount not exceeding $5; in case of coins of denominations of 1¢ or 2¢ for payment of amount not exceeding 20¢; in case of coins of denomination greater than 50¢ but less than $10 for payment of amount not exceeding ten times face value of coin; in case of coins of denomination of $10 for payment of amount not exceeding $100; in case of coins of another denomination for payment of any amount. (§16).

Financial Sector (Collection of Data) Act 2001 provides for registration and categorization of certain corporations by Australian Prudential Regulation Authority to facilitate formulation by Reserve Bank of monetary policy (§3); and authorizes Australian Prudential Regulation Authority to determine reporting standards. Entities covered by current Act include registered entity, regulated entity and medical indemnity entities (§§5, 5A). Includes monitoring entities and discretionary mutual funds. “Regulated entities” which, although not required to register under Act, are still regulated by it, including insurance and superannuation companies. Act may apply to financial corporations with assets over A$5 million whose principal business in Australia is borrowing money and provision of finance, and which are not already covered by Banking Act 1959.

Privacy.

Privacy Act 1988 covers Federal Government agencies and most private sector organizations (including not-for-profit organizations) with annual turnover of more than A$3 million. (§§6-6F). Provisions also apply to all health service providers regardless of turnover. (§80P). General exemption for small businesses with annual turnover of A$3 million or less (excluding health service providers, businesses that trade in personal information, contractors with Government and businesses related to larger businesses). (§6D).

Privacy (Extension to Political Acts and Practices) Amendment Bill 2006.

Bill introduced in Senate on June 22, 2006; if implemented, ensures registered political parties are included in and subject to Privacy Act.

Health Privacy.

Privacy Act also applies to private health sector. Health records now covered by Privacy Act to promote increased openness between health service providers and consumers regarding handling of health information: Includes general right of access for consumers to own health records; requires health service providers to have available documentation clearly setting out policies for management of personal information. Some State legislation also applies. (§§95A, 95AA).

National Privacy Principles.

Privacy Act contains ten National Privacy Principles (NPPs) which prescribe how private sector organizations should collect, use, keep secure and disclose personal information. NPPs cover collection (NPP 1), use and disclosure (NPP 2), data quality (NPP 3), data security (NPP 4), openness (NPP 5), access and correction (NPP 6), identifiers (NPP 7), anonymity (NPP 8), transborder data flows (NPP 9) and sensitive information (NPP 10). Principles also give individuals right to know what information organization holds about them and right to correct information if incorrect. Privacy Act also gives organizations option of adopting privacy code, which, once approved by Privacy Commissioner, effectively replaces NPPs for those organizations bound by it. (c. IIIAA, §§18BC, 18BF). Damages may be awarded including damages for “hurt feelings”. (§52[1A]). Privacy Commissioner has issued guidelines to NPPs to assist organizations and health service providers to meet privacy obligations for handling personal information. (§§95A, 95AA).

3.02 BILLS AND NOTES:

Bills of Exchange Act 1909 follows very closely English Bills of Exchange Act of 1882, only minor variations having been made to adapt it to local conditions. See England Law Digest. Does not apply to cheques.

Cheques.

Cheques Act 1986 substantially amended law relating to cheques. Cheque defined as unconditional order in writing addressed by person to financial institution, signed by person giving it and requiring financial institution to pay on demand sum certain in money. (§10). Establishes principles including: (a) Cheque need not be physically presented by collecting financial institution to drawee institution and drawers and indorsers not liable until presentment; (b) no restrictions imposed by electronic presentment where presentment occurs within same financial institution (i.e., internal presentments); (c) cheque becomes stale after 15 months (§3[5]); (d) includes bank cheques and post-dated cheques within Cheques Act (§16); (e) either payable to order or bearer, if not payable to order, deemed payable to bearer; (f) negotiable until discharged (§39); (g) paying institution must communicate refusal to pay cheque holder or person presenting cheque on holder's behalf (§69); (h) drawer or indorser liable on dishonored cheque whether or not they received notice of dishonor; (i) financial institution with whom cheque deposited required to present cheque for payment as soon as reasonably practicable or liable for any loss holder suffers as result; and (j) ante-dating and post-dating not invalidating factors. Cheques Act also provides that certain provisions of Cheques Act cannot be altered by agreement between two or more parties to cheque.

Act allows cheques to be drawn on financial institutions (includes building societies, credit unions and foreign banks) and abolishes payment orders.

Act also provides circumstances in which cheque dishonored due to drawee institution becoming insolvent or Reserve Bank appointing investigator into affairs of institution.

3.03 CONSUMER PROTECTION:

Trade Practices Act 1974 contains certain provisions in Pts IVA, V and VA aimed at protecting consumers from unfair commercial practices engaged in by corporations and, in certain cases, persons other than corporations. Trade Practices Act 1974 is administered by Australian Competition and Consumer Commission, independent statutory authority with broad powers and functions. (See http://www.accc.gov.au.) Pt IVA prohibits corporations in trade or commerce engaging in conduct unconscionable within meaning of unwritten laws (i.e., common law and equity) of States or Territories. (§51AA). It also prohibits unconscionable conduct in connection with supply or possible supply to person of goods or services of kind ordinarily acquired for personal, domestic or household use or consumption (§51AB) and with supply or acquisition of goods or services to/from small businesses (§51AC). Among practices specifically prohibited by Div. 1 of Pt V of Act are: (a) Misleading or deceptive conduct (§52); (b) false or misleading representations or statements in connection with supply or possible supply of goods or services as to standard, quality, value, grade, composition, style or model, history, sponsorship, price, facilities for repair or spare parts, place of origin or conditions or warranties attached to goods or services (§53); (c) false representations and misleading or inappropriate conduct in relation to sale or grant of interest in land (§53A); (d) misleading conduct in relation to offer of employment (§53B); (e) offering and not providing gifts and prizes (§54); (f) bait advertising, whereby consumers attracted to trade premises by advertisement of goods at low prices where no real intention to make goods available for sale exists (§56); (g) referral selling, whereby consumers offered rebate, commission or other benefit as inducement to acquire goods or services for assisting in supply of goods or services to another consumer and where receipt of rebate, commission or other benefit is contingent on event occurring after consumer's contract of supply entered into (§57); (h) accepting payment without intending or being able to supply as ordered (§58); (i) false or misleading representations about profitability, risk or other material aspect of home-operated businesses (§59); (j) physical force or undue harassment in connection with supply or possible supply of goods or services to consumer or payment for goods or services by consumer (§60); (k) pyramid selling, whereby new participants make payment to existing participants in scheme and induced to participate by entitlement to payment from further new participants (Div. 1AAA); and (l) asserting right of payment for unsolicited goods or services or for making entry in directory (§64). Div. 1AA of Pt V of Act provides circumstances where making representations concerning country of origin of goods is not misleading or deceptive conduct. Div. 1A also provides for product information and safety standards, and product recall procedures.

Implied Terms.

Div. 2 of Pt V of Act sets out non-excludable conditions and warranties implied in consumer contracts for goods and services including: (a) That where goods supplied by corporation are described in contract, there is implied condition that goods will correspond with description (§70); (b) that where corporation supplies goods to consumer in course of business, goods must be of merchantable quality, provided that no defects were drawn to consumer's attention before contract made or if consumer has examined goods there will be no implied condition as regards defects which such examination ought to have revealed (§71[1]); (c) that where consumer expressly or by implication makes known to supplier particular purpose for which goods are required so as to show that consumer relies on supplier's skill or judgment there is implied condition that goods must be reasonably fit for such purpose (§71[2]); and (d) that where goods are sold by sample there is implied condition that bulk must correspond with sample in quality, that consumer will have reasonable opportunity of comparing bulk with sample and that goods must be free from any defect rendering them unmerchantable which would not be apparent on reasonable examination of sample (§72). There is also implied condition that supplier has title to sell goods and implied warranties that consumer will have quiet possession of goods and that goods must be free from any charge or encumbrance in favor of any third party and not known to consumer at time contract of sale is made. (§69)

Conditions and warranties may not be excluded, restricted or modified (§68) except to limit liability to replacement or repair of goods or resupply of services (§68A) or in relation to supply of recreational services (§68B). Breach entitles consumer to action for breach of contract. Certain credit transactions linked to provision of goods or services are also regulated. Vienna Convention on Contracts for International Sale of Goods prevails over provisions dealing with conditions and warranties in Div. 2 to extent of any inconsistency. (§66A).

Manufacturers and Importers.

Div. 2A of Pt V of Act imposes limited product liability code on manufacturer in favor of consumers in relation to goods ordinarily acquired for personal, domestic or household use or consumption. Term ``manufacturer'' can include importer of goods if actual manufacturer has no place of business in Australia, and corporation which applies its own brand name on goods. ``Consumer'' (definition below) has similar rights against importer and manufacturer as against seller of goods. (§74H). Consumer has right to compensation from manufacturer, importer or seller where goods: (a) Do not correspond with description under which they are sold (§74C); (b) are not of merchantable quality (§74D); (c) do not correspond with sample supplied (§74E); (d) are unfit for stated purpose (§74B); (e) do not comply with express warranty provided (§74G); and (f) are not provided with reasonable repair and parts replacement facilities (§74F). Consumer must commence proceedings within three years of date on which cause of action accrued (but within ten years from date of first supply). (§74J). Pt VA makes corporations which supply, in trade or commerce, defective goods manufactured or imported by them, liable for injury, loss or damage suffered as result of defective goods. Defect in goods may relate to: (a) Manner in which marketed; (b) purposes for which marketed; (c) packaging; (d) use of any mark in relation to goods; (e) instructions or warnings provided with goods; (f) what might reasonably be expected to be done with goods; and (g) time goods were supplied by manufacturer. (§75AC). Person must commence proceedings within three years of date on which became or ought to have become aware of loss, defect and identity of manufacturer (but within ten years from date of supply).

(§75AO).

Consumer.

Statutory warranties and conditions under Act arise only where sale is to “consumer”. Act defines person as consumer if: (a) Price of goods or services does not exceed prescribed amount (currently A$40,000); or (b) where price exceeds prescribed amount but goods or services are of kind ordinarily acquired for personal domestic or household use or consumption or are vehicles acquired for use principally in transport of goods on public road and goods not acquired for purpose of resupply or use in manufacture, production, repair or treatment of other goods or fixtures. (§4B).

Financial Services.

Australian Securities and Investments Commission Act 2001 regulates conduct of persons engaging in conduct in relation to financial services, prohibits conduct that is misleading or deceptive (or is likely to mislead or deceive), making of false or misleading representations and unconscionable conduct.

Penalties under Act for breaches of Pt V except for misleading conduct under §52 are up to A$1.1 million for corporations and A$220,000 for individuals. (Pt VC). Courts may grant injunctions and damages or other orders (e.g., corrective advertising orders) in favor of party who has suffered loss as result of prohibited practice. Australian Competition and Consumer Commission has power to obtain information, documents and evidence, inspect documents, seek declarations regarding provisions under Act and initiate proceedings and intervene. Australian Competition and Consumer Commission may institute proceedings in Court for recovery on behalf of Commonwealth of pecuniary penalty.

See also Pt II, category 21 Business Regulation and Commerce, topic 21.03 Consumer Protection.

Australian Consumer Law.

Productivity Commission inquiry into Australia's consumer policy framework commenced Dec. 11, 2006. Purpose to improve coordination of consumer policy development, harmonization of consumer laws and administration across jurisdictions. Report presented to Government Apr. 30, 2008. Council of Australian Governments agreed to establish Australian Consumer Law, single national consumer law framework. Reforms to be introduced in two stages.

First stage, Trade Practices Amendment (Australian Consumer Law) Bill 2009 scheduled to take effect Jan. 1, 2010. Establishes Australian Consumer Law. Focuses on unfair contract terms, consumer law remedies and enforcement powers. States and Territories able to implement Australian Consumer Law from time of commencement.

Second stage of Australian Consumer Law expected to be introduced into Parliament early 2010. Introduces bulk of reforms including: (a) New national product safety system; (b) reforms on best practice in State and Territory consumer laws, where they have been agreed; and (c) remainder of Australian Consumer Law provisions drawn from existing consumer protection provisions of Trade Practices Act. Australian Consumer Law to be fully implemented by Jan. 1, 2011.

3.04 FRANCHISES:

Franchising regulated by mandatory industry code of conduct prescribed under Pt IVB, Trade Practices Act 1974. Franchising Code of Conduct, being Trade Practices (Industry Codes—Franchising) Regulations 1998, applies to all franchise agreements entered into on or after Oct. 1, 1998 and imposes some obligations on franchisors prior to that date. Code does not apply to franchise agreements where: (a) Another mandatory industry code applies; or (b) franchisee previously supplied goods or services similar to franchise goods or services for at least two years before entering franchise agreement and sales under franchise likely to account for no more than 20% of gross turnover for first year of franchise (cl.5). Despite (b), Code will apply if sales under franchise provide more than 20% of gross turnover for three consecutive years. (cl.5). Where Code applies franchisor required to provide franchisee with disclosure document prior to entering into franchise agreement and upon each renewal or extension of agreement. (cl.6B). Document must contain information proscribed in annexure to Code, including details relating to franchisor, other existing franchises, whether exclusive or non-exclusive territory applies to franchise, establishment costs and other payments required by franchisor, summary of franchisor and franchisee's obligations and other material terms of franchise agreement. Short-form disclosure only for franchise with annual turnover less than A$50,000. (cl. 6[2]). Disclosure must also be made to prospective sub-franchisees by franchisor and franchisee. (cl.6B). Franchisee transferring franchise business no longer required to provide disclosure document to transferee franchisee. Code provides for mandatory seven day cooling off period for prospective franchisees (cl.13) and imposes notice and time requirements on franchisors in event of termination of agreement by franchisor (cl.21-23). Code encourages dispute resolution procedures for settlement of disputes between franchisors and franchisees. (Pt 4 of Code). Remedies for breach of Code include: injunctions, corrective advertising and/or award of damages to persons suffering loss or damage. Australian Competition and Consumer Commission enforces Code and any breach of Code results in liability to sanctions under Trade Practices Act 1974.

Franchises excluded from definition of managed investment scheme in Corporations Act 2001, so that that Act does not apply to franchises. (§9). Various provisions of Trade Practices Act 1974 and common law rules against restraint of trade of potential application.

3.05 MONOPOLIES, RESTRAINT OF TRADE AND COMPETITION:

Trade Practices Act 1974 intended to control restrictive trade practices, promote competition, protect consumers from unfair commercial practices and provide access regimes for essential services and telecommunications services.

Pt IV of Trade Practices Act prohibits certain restrictive trade practices: (a) Contracts, arrangements or understandings between competitors containing cartel provisions, being provisions with purpose or likely effect of fixing, controlling or maintaining price, discount, allowance, rebate or credit, or purpose of preventing, restricting or limiting output; allocating customers, suppliers or territories (market sharing); or bid-rigging (§§44ZZRD, 44ZZRF, 44ZZRG, 44ZZRJ, 44ZZRK) (*Note: New parallel civil and criminal offenses for making or giving effect to cartel provision were introduced into Trade Practices Act by Trade Practices Amendment [Cartel Conduct and Other Measures] Act 2009*); (b) contracts, arrangements or understandings having purpose or effect of substantially lessening competition in any market in which corporation party supplies or acquires goods or services (§45); (c) restrictive covenants running with land with purpose or effect of substantially lessening competition (§§45B, 45C); (d) ``exclusionary provisions'' i.e., provisions in contract, arrangement or understanding between competitors which provisions have purpose of preventing, restricting or limiting supply or acquisition of goods or services to or from particular persons (§§45, 4D); (e) secondary boycotts—including actions taken by person in concert with second person that hinder or prevent third person supplying goods or services to, or acquiring goods or services from, fourth person, with purpose, effect or likely effect of causing either substantial loss or damage to business of fourth person or substantial lessening of competition in any market in which fourth person supplies or acquires goods or services (§§45D, 45DA); (f) boycotts affecting trade or commerce—i.e., actions taken by person in concert with second person that have purpose and effect or likely effect of preventing or hindering corporation (third person) engaging in trade or commerce involving movement of goods to and from Australia (§45DB). Conduct with dominant purpose related to remuneration, conditions of employment, hours of work or working conditions does not infringe boycotts affecting trade or commerce or secondary boycott provisions (§45DD); (g) misuse of market power by corporations with ``substantial'' degree of power in that or any other market including misuse of market power in ``trans-Tasman market'' (i.e., market in Australia, New Zealand or Australia and New Zealand for goods or services) (§§46, 46A); (h) supplying or offering to supply goods for sustained period at price less than relevant cost (§46[1AA]); (i) exclusive dealing or ``vertical restraint'' (e.g., supply or offer to supply goods or services on condition that purchaser will not buy from competitor of supplier) and third line forcing (§47); (j) resale price maintenance (§48); and (k) acquisitions of shares or assets with effect or likely effect of substantially lessening competition in substantial market for goods or services (§50). Acquisitions outside Australia come within Act if acquisition has effect or likely effect of substantially lessening competition in substantial market for goods or services in Australia. (§50A).

Under Pt VII of Act, Australian Competition and Consumer Commission can authorize corporation to enter into or give effect to contract, arrangement or understanding with cartel provision, exclusionary provision or anticompetitive effect if Australian Competition and Consumer Commission determines: (a) There is benefit to public outweighing anticompetitive detriment; and (b) in case of cartel provisions, exclusionary provisions, secondary boycotts, third line forcing, resale price maintenance and acquisitions outside Australia—conduct otherwise in contravention of Act would in all circumstances result in such benefit to public that should be allowed. (§90). Does not apply to contracts already entered (§88[12]) unless contract subject to condition precedent in relation to obtaining authorization within 14 days (§45[9]). Misuse of market power cannot be authorized. Applications for authorization will be made public. (§89[2]).

Australian Competition and Consumer Commission's decision to grant or refuse authorization may be appealed to Australian Competition Tribunal. (§101).

There is separate authorization process in respect of mergers. Mergers only authorized by Australian Competition Tribunal. (§95AT).

Immunity may also be obtained for exclusive dealing and third line forcing conduct under more simple notification procedure. (§93AT).

Penalties under Act for breaches of Pt IV are up to greatest of A$10 million, three times gain from contravention, and, if gain from contravention cannot be determined, 10% of corporate group's Australian annual turnover for corporations (§§76[1A], 44ZZRF, 44ZZRG), and up to A$500,000 for individuals, except in case of secondary boycotts where penalties are up to A$750,000 for corporations and A$500,000 for individuals. Maximum of ten years imprisonment and A$220,000 fine for individuals convicted of criminal cartel offense. (§79). Individuals involved in contraventions can be disqualified from managing corporation. (§86E). Court may also impose injunctions (§80), award damages (§82) and make remedial orders in favor of party that has suffered loss as result of prohibited conduct. Australian Competition and Consumer Commission has power to obtain legally enforceable undertakings. (§87B). In case of mergers, court may order divestiture of shares or assets illegally acquired. (§81).

“Corporation” is defined in §4(1) of Act as body corporate that is: (a) Foreign corporation; (b) trading or financial corporation formed within limits of Australia; (c) incorporated in Australian Territory; or (d) holding company of body corporate of kind referred to in (a), (b) or (c) above.

Restrictive Trade Practices in Relation to Liner Cargo Shipping.

Pt X sets up system for regulating international liner cargo shipping services. If parties register conference agreement under Pt X, obtain partial and conditional exemptions from certain provisions of Pt IV.

Trade Practices Amendment (International Liner Cargo Shipping) Acts 1989 and 2000 effected major changes in regulatory system governing international liner cargo shipping to improve competitiveness of this area of activity. Previous exemption from Pt IV of Trade Practices Act 1974 for conferences (i.e., shipping cartels) reduced to level necessary for continued provision of rationalized services. Exemption: limited to cartel conduct (§44ZZRD), anticompetitive agreements (§45) and exclusive dealing (§47) in Australia's export trades; applied only to specified conduct; and made available for other restrictive conduct but only where there is overall shipper benefit. §46 (misuse of market power) applied to conference operations. Carriage of Goods by Sea Act 1991 provides for Minister to conduct review from time to time of desirability of bringing Hamburg Rules into force in Australia. Productivity Commission undertook review of Pt X of Trade Practices Act 1974 and Government released report in Oct. 2005 recommending either repeal Pt X or, if Pt X retained, more selective registration process. In Aug. 2006, Government outlined proposed amendments to Pt X in relation to objectives, discussion agreements, confidential service contracts and remedies.

Restrictive Trade Practices in Relation to Telecommunications.

Pt XIB of Trade Practices Act 1974 governs anticompetitive conduct in telecommunications industry in addition to general competition regime in Pt IV of Act. Pt XIB prohibits carriers or carriage service providers from engaging in anticompetitive conduct. Prohibition is called “competition rule” and is based on effects test of substantial lessening of competition. Australian Competition and Consumer Commission may issue “Pt A competition notice” stating specified carrier or carriage service provider has engaged, or is engaging in, anticompetitive conduct. (§151AKA). Proceedings for enforcement of competition rule (other than proceedings for injunctive relief) must not be instituted unless alleged conduct is of kind dealt with in Pt A competition notice in force at time when alleged conduct occurred. Australian Competition and Consumer Commission may issue “Pt B competition notice” stating specified carrier or carriage service provider has contravened, or is contravening, competition rule. (§151AL). Pt B competition notice sets out particulars of contravention and is prima facie evidence of matters set out in notice. Certain conduct may be exempted from competition rule under terms of exemption order made by Australian Competition and Consumer Commission. Australian Competition and Consumer Commission may also require carrier or carriage service provider to comply with record keeping requirements or to file tariff filing directions. Australian Competition and Consumer Commission may issue “disclosure direction” requiring carrier or carriage service provider to make certain reports available for inspection and purchase. Penalty for breach of competition rule in case of corporation is, if breach continues for more than 21 days, fine up to A$31 million plus A$3 million for each day in excess of 21 that contravention continues, otherwise fine up to A$10 million and A$1 million for each day contravention continues; for breach of competition rule by individual penalty A$500,000; breach of tariff filing direction by corporation penalty A$10 million; breach of tariff filing direction by individual penalty A$500,000; breach of record keeping rule or disclosure direction by corporation penalty A$250,000; breach of record keeping rule or disclosure direction by individual penalty A$50,000. Also, court may impose injunctions, require information to be released to public or advertisement published or award damages or other compensation. Pt XIC of Act provides access regime for telecommunications carriage and related services. General access regime in Pt IIIA of Act does not apply.

Telecommunications Legislation Amendment (Competition and Consumer Safeguards) Bill 2009 before Parliament. Introduce reforms aimed at enhancing competitive outcomes in Australian telecommunications industry and strengthening consumer safeguards. Reforms of Pt XIB and XIC of Trade Practices Act. Reform of Pt XIB to ensure Australian Competition and Consumer Commission is able to act quickly on breaches of competition law and prevent unnecessary detriment to market. Including removing requirement that Australian Competition and Consumer Commission consult with party prior to issue of competition notice and clarifying that competition notice regime applies to content services, such as subscription television services and online services. Reform of Pt XIC to require Australian Competition and Consumer Commission to: (a) Set upfront pricing, terms and conditions for declared services for three to five years; (b) make binding rules of conduct allowing immediate remedies for breaches to be applied; and (c) determine fixed principles to apply beyond duration of access determination. Furthermore, no merits review of regulatory decisions made by Australian Competition and Consumer Commission under Pt XIC and reduction of scope for exemptions from access obligations and access undertakings.

Access to Essential Facilities.

Pt IIIA of Act provides regime for third parties to obtain access to services provided by means of facilities. Regime provides three mechanisms for obtaining access to services by: (a) Access undertaking between access provider and access seeker; (b) industry access code; and (c) access seeker applying to National Competition Council to have service declared open to access by third parties by Commonwealth Treasurer. "Services" defined to include: (a) Use of infrastructure facility such as road or railway line; (b) handling or transporting things such as goods or people; and (c) communication service or similar service. Service does not include: (a) Supply of goods; (b) use of intellectual property; or (c) use of production process. (§44B). Following criteria must be satisfied if service to be recommended for declaration by National Competition Council and subsequently declared by designated Minister: (a) Access must promote competition in at least one market other than market for service; (b) must be uneconomical for another facility to be developed to provide service; (c) facility must be of national significance; (d) access must be provided without undue risk to human health or safety; (e) access must not be subject of another effective access regime; and (f) access to service must not be contrary to public interest. (§§44G[2] and 44H[4]). Number of state based regimes have been declared effective (e.g., gas, rail and electricity). If service declared, terms and conditions upon which access provided may be determined by agreement between provider and third party or by Australian Competition and Consumer Commission in arbitration proceedings. Review of decision to declare or not to declare service and from Australian Competition and Consumer Commission arbitration determination available by Australian Competition Tribunal. Trade Practices Amendment (National Access Regime) Act 2006 amended Pt IIIA to implement number of recommendations by Productivity Commission. Apr. 2009 Government announced consultations with States and Territories on further amendments to streamline Pt IIIA.

3.06 NEGOTIABLE INSTRUMENTS:

See topic 3.02 Bills and Notes.

3.07 RESTRAINT OF TRADE:

See topic 3.05 Monopolies, Restraint of Trade and Competition.

4 CITIZENSHIP

4.01 ALIENS:

See category 13 Immigration, topic 13.01 Aliens.

4.02 DISCRIMINATION:

Australia party to International Covenant on Civil and Political Rights. Australian Human Rights Commission Act 1986 establishes Commission to promote human rights and investigate complaints of violations of Covenant. See also Pt II, category 22 Citizenship, topic 22.02 Discrimination.

Religious Discrimination.

Constitution §116 forbids prohibition of free exercise of religion, and no religious test to be required as qualification for any office or public trust under Commonwealth.

Disability Discrimination.

Disability Discrimination Act 1992 prohibits direct or indirect discrimination against persons with disability, in areas of work, education, access to premises, provision of goods, services and facilities, provision of accommodation, disposal of land, membership of clubs and incorporated associations, sport, administration of Commonwealth laws and programs unless avoiding discrimination would impose unjustifiable hardship on discriminator. Act prohibits request for information from person for purpose of discriminating against them or if person without disability would not be required to provide information. Harassment on disability grounds prohibited in employment, education and in relation to provision of goods and services. Victimization and other acts of incitement prohibited. Limited exclusions for superannuation and insurance. Various other exemptions, such as for infectious diseases. Act applies throughout Australia, but State and Territory Acts may still apply. Act provides that complaints to be dealt with in accordance with procedures for redress set out in Australian Human Rights Commission Act 1986, including conciliation or application to Federal Court or Federal Magistrates Court. Act provides for Disability Standards formulated by Commonwealth Attorney-General. Breach may give rise to complaint. Compliance with Disability Standards defense to complaint under general provisions. Australian Human Rights Commission to grant exemptions from Disability Standards dealing with public transportation facilities. Governor-General may make inconsistent regulations under Civil Aviation Act 1988 in best interests of aviation safety.

Age Discrimination.

Age Discrimination Act 2004 prohibits direct or indirect discrimination against persons on ground of age in areas of work, education, access to premises, provision of goods, services and facilities, provision of accommodation, disposal of land, administration of Commonwealth laws and programs and request for information. Discriminatory advertising and victimization are specifically prohibited. Exemptions provided for payment of youth wages, positive discrimination, charities, practises of religious bodies, membership of voluntary bodies, superannuation, insurance and health programs. Act applies throughout Australia, but State and Territory Acts may still apply. Act provides that complaints are to be dealt with in accordance with procedures for redress set out in Australian Human Rights Commission Act 1986, including conciliation or application to Federal Court or Federal Magistrates Court.

Racial Discrimination.

Racial Discrimination Act 1975 introduced into Australian law obligations contained in International Convention on Elimination of All Forms of Racial Discrimination signed on behalf of Australia on Dec. 21, 1965. Following definition of Convention, Act makes it unlawful for person to act in way involving discrimination based on race, color, descent or national or ethnic origin which impairs enjoyment of fundamental rights and freedoms. Act makes it unlawful to incite others to commit unlawful acts. Act also guarantees equality before law and deals with discrimination concerning access to places and facilities, provision of land, housing and other accommodation, provision of goods and services, right to join trade unions, employment and advertisements. Vicarious liability for acts of employees or agent unless established that person took all reasonable steps to prevent employee or agent from doing act. (§18A). Act not intended to limit operation of State law furthering objects of Convention and capable of operating concurrently.

Act establishes Race Discrimination Commissioner as independent statutory authority responsible for research and educational programs and to promote Act and develop guidelines. Australian Human Rights Commission Act 1986 sets out procedures for redress for unlawful discrimination by conciliation or application to Federal Court or Federal Magistrates Court.

Australian Human Rights Commission Act 1986 creates Aboriginal and Torres Strait Islander Social Justice Commissioner and gives Commissioner specific responsibility for protecting human rights of Australian Aborigines.

Australian Human Rights Commission Act 1986 establishes Commission to implement objects of International Covenant on Civil and Political Rights. Race Discrimination Commissioner is member of Australian Human Rights Commission. See also subhead Sex Discrimination, infra.

Australian Human Rights Commission Act 1986 provides for complaint procedure for racially offensive or abusive behavior. Racial Discrimination Act 1975 makes it unlawful to publicly engage in conduct which is reasonably likely to offend, insult, humiliate or intimidate another person or group of people and which is based on race, color or national or ethnic origin. Exceptions exist for certain acts with artistic, academic or scientific purposes.

Equal Employment Opportunity (Commonwealth Authorities) Act 1987 (see subhead Sex Discrimination, infra).

See also Pt II, category 22 Citizenship, topic 22.02 Discrimination.

Sex Discrimination.

Sex Discrimination Act 1984 gives effect to certain provisions of U.N. Convention on Elimination of All Forms of Discrimination Against Women.

Act prohibits discrimination on grounds of sex, marital status, pregnancy or potential pregnancy and family responsibilities in areas of work, accommodation, education, provision of goods, facilities and services, disposal of land, membership of clubs, administration of Commonwealth laws and programs and requests for information. Act affirms individual equality before law. Act prohibits: Discrimination against women who are breastfeeding; employers asking questions regarding pregnancy or potential pregnancy during recruitment processes; and employers requesting medical information from pregnant women for inappropriate purposes. Limited exemptions provided where sex is genuine occupational requirement for employment, student accommodation, residential care of children, charities, religious bodies, membership of voluntary bodies and educational institutions established for religious purposes. Governor-General may make inconsistent regulations relating to medical standards under Civil Aviation Act 1988 in best interests of aviation safety.

Australian Human Rights Commission Act 1986 establishes Commission to implement objects of International Covenant on Civil and Political Rights. Commission also administers Sex Discrimination Act, supra.

Sex Discrimination Commissioner appointed to promote Sex Discrimination Act, conduct research and educational programs, examine enactment to ascertain consistency with Act, report to Minister as to laws that should be made, publish guidelines and in certain circumstances to intervene in proceedings. Australian Human Rights Commission Act 1986 sets out procedures for redress for unlawful discrimination by conciliation or by application to Federal Court or Federal Magistrates Court.

Equal Opportunity for Women in the Workplace Act 1999 requires private sector employers, community organizations, nongovernment schools, unions and higher educational institutions with more than 100 employees to implement equal opportunity for women in workplace programs to promote employment of women and submit annual progress reports. Act also establishes office of Director of Equal Opportunity for Women in the Workplace Agency, managed by Director of Equal Opportunity for Women in the Workplace. Objects of Act expressed as to: (a) Promote principle that employment of women be dealt with on basis of merit; (b) promote elimination of discrimination and provision of equal opportunity for women in relation to employment matters; and (c) foster workplace communications on issues concerning equal opportunity for women in workplace.

Equal Employment Opportunity (Commonwealth Authorities) Act 1987 requires certain Commonwealth authorities to develop and implement programs to promote equal opportunity in employment.

4.03 DOMICILE:

In Australia, “domicile” has its common law meaning. It connotes “permanent home”, place person is presumed at time in question to consider their true home, wherever they may be resident or traveling for time being. Any evidence of person's hopes, intentions and behavior is relevant in aiding court to establish their domicile.

Person can only have one domicile at any one time. Rule of law that infant is deemed to have its father's domicile and wife has her husband's domicile has been revoked by Domicile Act 1982 which provides that married woman has independent domicile and child of marriage under age of 18 takes domicile of that parent with whom child has principal home unless child under age of 18 is, or has at any time been, married, in which case child is capable of having independent domicile.

Common law rule of revival of domicile of origin on abandonment of domicile of choice has been revoked by Domicile Act 1982. Act makes provision for dependent domicile of adopted children, and children of separated parents.

See also Pt II, category 22 Citizenship, topic 22.03 Domicile.

4.04 IMMIGRATION:

See category 13 Immigration, topic 13.02 Immigration.

4.05 NATIONALITY:

Australian Citizenship Act 2007 recognizes status of “Australian citizen”.

Following Persons are automatically Australian Citizens: (a) Person who was Australian citizen July 1, 2007 (§4[1][b]); (b) person born in Australia where: (i) parent is Australian citizen, or permanent resident, at time person was born, or (ii) person was resident in Australia for ten years following birth (§12); (c) person was adopted under law in force in State or Territory of Australia by person who is Australian citizen and permanent resident at time of adoption (§13); and (d) person found abandoned in Australia as child, unless and until contrary is proved (§14).

Grant of Australian Citizenship.

*Person must take ``pledge of commitment'' to become Australian citizen:* Unless person aged under 16 at time of application or has permanent physical or mental incapacity that means person is not capable of understanding nature of application for Australian Citizenship. Person who is required to make ``pledge of commitment'' becomes Australian citizen day person makes pledge. (§26).

Following Persons may apply for Australian Citizenship: (a) Person born outside Australia after Jan. 26, 1949 if: (i) parent was Australian citizen at time of birth, and (ii) if parent was citizen due to descent or adoption: (A) parent has been present in Australia for total period of at least two years prior to application, or (B) person is not national or citizen of any country at time of application and has never been such national or citizen (§16); (b) person adopted under Hague Convention by person who is Australian citizen at time of adoption and all of following are satisfied: (i) adoption compliance certificate issued in that country is in force, (ii) adoption is recognized and effective, (iii) legal relationship between person and individuals who were, immediately prior to adoption, person's parents has been terminated, and (iv) if person over 18, Minister is satisfied that applicant is of good character (§19C); (c) person over age of 18 who has been permanent resident for one year prior to application (§21[2]); and (d) person who ceased to be Australian citizen in past (§29).

Permanent resident eligible to become Australian citizen if that person: (a) Is aged 18 or over; (b) has been permanent resident for one year prior to application; (c) understands nature of application; (d) was lawfully resident in Australia for period of four years immediately before application; (e) possesses basic knowledge of English language; (f) has adequate knowledge of responsibilities and privileges of Australian citizenship (assessed by citizenship test); (g) is likely to reside in and maintain close association with Australia; and (h) is of good character. (§21[2]).

Limited exemptions to eligibility requirements apply for persons with permanent physical or mental incapacity; persons aged 60 or over; persons with hearing, speech or sight impairments; persons aged under 18; persons born to former Australian citizens; persons born in Papua before Sept. 16, 1975 and stateless persons. (§21[3]-[8]). Limited exemptions to eligibility requirements for persons engaged in specified kinds of work requiring extensive international travel. (§§22A, 22B, 22C). If there is significant hardship, Minister may treat unlawful non-citizen's period of stay in Australia as period of permanent residency. (§22[6]). Person will not be taken to have been lawfully resident in Australia if person was confined in prison or in psychiatric institution by order of court made in connection with proceedings for offense against Australian law. (§22[1C]).

Persons eligible to apply for Australian citizenship who are not permanent residents: Persons can apply for Australian citizenship on basis of: (i) Past cessation of citizenship; (ii) parent being Australian citizen; or (iii) adoption by Australian under Hague Convention subject to different requirements. (§§17, 19D, 30).

Loss of Citizenship.

Australian citizen may renounce citizenship if: (a) Over 18 years and is national or citizen of foreign country; or (b) was born, or ordinarily resident, in foreign country and is not entitled to acquire citizenship of that country by reason of being Australian citizen. (§33). Act provides for revocation of citizenship for persons granted citizenship after application (see subhead Grant of Australian Citizenship) in cases where: (a) Person knowingly makes false or misleading representation or conceals material circumstance in relation to their application for citizenship; or (b) grant was obtained as result of third-party fraud or migration-related fraud; or (c) person has been convicted of offense (committed prior to application for citizenship) for which person has been sentenced to death or to serious prison sentence; and (d) Minister is satisfied that it would be contrary to public interest for person to be Australian citizen. (§34). Person ceases to be Australian citizen if person is national or citizen of foreign country and serves in armed forces of country at war with Australia. (§35). If person ceases to be Australian citizen and person is responsible parent of child under age of 18, Minister may revoke child's Australian citizenship. (§36). Child will not lose their Australian citizenship if there is responsible parent who remains Australian citizen or there ceases to be such responsible parent because of death of responsible parent. Minister may not revoke person's Australian citizenship if person would become person who is not national or citizen of any country.

5 CIVIL ACTIONS AND PROCEDURE

5.01 ACTIONS:

Commonwealth Constitution provides that full faith and credit must be given throughout Commonwealth to laws, public acts and records and judicial proceedings of every Australian State. (§118). Evidence Act 1995 (Cth) requires full faith and credit be given to public acts, records and judicial proceedings of State or Territory authenticated in accordance with legislation. (§185). Foreign claims and foreign law are regarded as matters of fact and must be proved accordingly. In Western Australia, under Evidence Act 1906 (WA), Courts are required to take judicial notice of statutes of New Zealand, Fiji and U.K. (§53[1][b]). In Victoria, under Evidence Act 1958 (Vic), there is provision for judicial notice to be taken of U.K. (§76), New Zealand and Fiji Acts of Parliament (§77). Under State and Territory Evidence Acts, evidence of foreign laws will generally be accepted in form of books of statutes, ordinances.

Foreign Judgments.

Foreign Judgments Act 1991 (Cth) enacts statutory system of registration of foreign judgments in Federal Courts or State/Territory Supreme Courts. (§6). Act applies to judgments of courts of declared countries that give reciprocal treatment to enforcement of Australian judgments. (§5). Upon registration foreign judgment has same force and effect as judgment of court in which registered. (§6[7]). Party liable under registered foreign judgment may apply to have registration set aside (§7) or enforcement stayed (§8). Requirements for registration and grounds to set aside registration parallel both common law and currently existing State legislation in this area. Where judgment may be registered under Act, party cannot institute proceedings for sum payable under that judgment other than by way of registration. (§10[1]). Act replaces State and Territory legislation relating to registration of foreign judgments. (§19). Act contains some innovations that do not exist in State legislation. Act allows prohibition of enforcement of money judgments of countries that provide substantially less favorable treatment to Australian judgments (§13), and choice of judgment in foreign currency or converted to Australian dollars, based on rate of exchange prevailing on second business day before date of application for registration (§6[11]). Judgment must be final and conclusive. (§5[4]). Creditor under foreign judgment must apply to appropriate court in Australia within six years of date of last judgment of proceedings to register judgment. (§6[1]).

Prohibition Orders.

Foreign Proceedings (Excess of Jurisdiction) Act 1984 (Cth) empowers Attorney-General to make order prohibiting: (a) Production in foreign court or to or for purposes of foreign authority of document located in Australia; (b) doing of any act in Australia in relation to document located in Australia with intention or likely result that act will result in document or evidence of or information about document's contents being produced in foreign court or to foreign authority; (c) giving of evidence or information in foreign court or to foreign authority by Australian citizen or resident about document located in Australia; or (d) production of document or giving of evidence of or information about document in Australian court or to Australian authority for purposes of proceedings in foreign court. (§7). Such order only made if Attorney-General is satisfied that: (i) Order desirable for protection of national interest; (ii) assumption of jurisdiction by foreign court or manner of exercise of jurisdiction is contrary to international law, or is inconsistent with international comity or practice; or (iii) taking or manner of taking of action by foreign authority contrary to international law, or inconsistent with international comity or practice. (§6[4]). These orders enforceable by injunction. (§8).

Blocking Orders.

Under Foreign Proceedings (Excess of Jurisdiction) Act 1984, Attorney-General may by instrument block foreign antitrust judgments if satisfied necessary for protection of national interest, or that assumption of jurisdiction or exercise of power by foreign court contrary to international law, or inconsistent with international comity or practice. (§9). In such case, defendants in foreign antitrust proceedings can recover damages enforced against them and reasonable costs and expenses incidental to proceeding. (§§10-11). Attorney-General may declare judgment given by foreign court in antitrust proceedings enforceable if reciprocal agreement with other country. (§12). Where foreign government action or decision made under that country's foreign trade law, which relates to or affects Australian foreign or interstate trade, trading operations of certain corporations, banking, insurance or external affairs and requires Australian person, residents or corporations to perform obligation in Australia, Attorney-General may prohibit such performance. Attorney-General must be satisfied that non-compliance is in national interest. (§13). Attorney-General may make order prohibiting compliance in Australia with certain foreign court judgments relating to trade or commerce, trading or business operations of Australian corporation, banking, insurance or external affairs where such judgment imposes obligation to be performed in Australia and such blocking order desirable in national interest. (§14).

Penalty for contravention of order: (a) Maximum A$50,000 fine or 12 months imprisonment or both for natural person; and (b) maximum A$250,000 fine for corporation. (§18).

Foreign Evidence.

Foreign Evidence Act 1994 (Cth) deals with use of foreign evidence in Australian courts and Australian evidence in foreign courts. Superior Court may make order if it appears in interests of justice to do so, for examination of person outside Australia. Interests of justice include willingness of person to come to Australia and whether evidence material to any issue to be tried. (§7). This evidence may be tendered in evidence in proceedings. (§9). Attorney-General may request foreign country to provide testimony of person, or exhibit annexed to such testimony, to be used in criminal proceeding or related civil proceeding. (§§20-27). Court may exclude evidence in interests of justice. (§25). Australian Securities and Investments Commission may request foreign business authority to provide testimony, or exhibit annexed to such testimony, for use in civil proceedings not being related civil proceedings or proceedings under Corporations Act 2001 (Cth). (§§29-36). Again, court may exclude evidence in interests of justice. (§33). Evidence may be taken in Australian courts for use in proceedings instituted in foreign court. (§40). Attorney-General may make written order prohibiting production of document or thing or giving of evidence to prevent prejudice to Australia's security. (§§41-42).

Superior Court means High Court, Federal or Family Court of Australia, Supreme Court of State or Family Court of Western Australia when exercising federal jurisdiction and Supreme Court of Territory. (§3).

Related civil proceeding means proceeding arising from same subject matter from which criminal proceedings arose including proceedings under Proceeds of Crime Act 1987 (Cth), Proceeds of Crime Act 2002 (Cth), Customs Act 1901 (Cth) or proceeding for recovery of tax, duty, levy or charge payable to Commonwealth. (§3).

Evidence and Procedure (New Zealand) Act 1994 (Cth) provides statutory system for service in Australia and New Zealand of New Zealand and Australian subpoenas, for video link and telephone evidence and special rules for judicial notice of New Zealand laws.

See also Pt II, category 23 Civil Actions and Procedure, topic 23.03 Depositions and Discovery.

5.02 JUDGMENTS:

In most jurisdictions, court rules provide procedures for judgment to be entered by consent without attendance of parties, upon written consent of all parties or their solicitors being filed. Procedure exists for plaintiff to enter judgment in default should defendant fail to appear in action or fail to comply with relevant procedural rule. See also Pt II, category 23 Civil Actions and Procedure, topic 23.05 Judgments.

See also topic 5.01 Actions.

5.03 PRESCRIPTION:

See Part II, category 23 Civil Actions and Procedure, topic 23.06 Limitation of Actions.

5.04 SEQUESTRATION:

See category 7 Debtor and Creditor, topic 7.04 Bankruptcy.

6 COURTS AND LEGISLATURE

6.01 ADMINISTRATIVE APPEALS:

Judicial review of administrative decisions available. High Court has original jurisdiction for judicial review deriving from Commonwealth Constitution (§75[v]), to grant mandamus, prohibition, or injunction against officer of Commonwealth. Federal Court has similar power from Judiciary Act 1903 (§39B). Also common law provides right to indirect/collateral review. Judicial review also under Administrative Decisions (Judicial Review) Act 1977 by Federal Court or Federal Magistrates Court. (§5[1]). Act provides mechanism for review on prescribed grounds for persons aggrieved by certain administrative decisions made (§§5, 6); or failure for administrative decisions to be made where duty exists (§7). Applicant has right to know reasons for decision. (§13). To be reviewable, decisions must have specified qualities. (§§3, 5 & 6). Certain decisions not reviewable. (See Sch. 1.)

Administrative Appeals Tribunal Act 1975 establishes Commonwealth Administrative Appeals Tribunal to provide merits review of certain administrative decisions. Power to review derives from Administrative Appeals Tribunal Act 1975 and provision in relevant Acts which confers jurisdiction on Tribunal to review particular decision. Application for review made by, or on behalf of, person whose interests affected by decision. (§27). Ordinarily, applicant must pay prescribed fee of A$500. (See Administrative Appeals Tribunal Regulations 1976 Reg. 19.) Applicant may obtain written statement of reasons from decision maker (§28) unless Attorney-General certifies certain information not to be disclosed as contrary to public interest (§§36, 36B). During review, Tribunal can exercise all powers and discretions conferred on decision-maker: it can affirm; vary; or set aside original decision, in which case it can either substitute own decision or remit matter for reconsideration by original decision-maker in accordance with such directions and recommendations as Tribunal might give. (§43). Applicant has automatic right to appeal Tribunal decision on a question of law to Federal Court of Australia. (§44[1]). Federal Court may make order as it thinks appropriate (§44[4]), including affirming Tribunal's decision or setting decision aside and remitting case back to Tribunal (§44[5]).

Ombudsman.

Ombudsman Act 1976 provides mechanism for complaint to and investigation by Commonwealth Ombudsman in relation to administrative actions, including actions in relation to freedom of information requests. Act is similar to State Ombudsman Acts. For description, see Pt II, category 24 Courts and Legislature, topic 24.01 Administrative Appeals, subhead Ombudsman.

Freedom of Information.

Freedom of Information Act 1982 No. 3 provides legally enforceable right of access to documents held by government agencies. (§11). Access may be refused if: (i) Involves unreasonable diversion of department resources (§24); (ii) document is exempt under Pt IV of Act e.g., documents affecting national security, defense and international relations; relations between states; personal privacy; national economy; Cabinet documents; Executive Council documents; internal working documents; documents disclosing trade secrets, or commercial and business affairs where disclosure would have adverse affect on person or agency; documents relating to unfinished research; or (iii) other grounds under §12 apply, e.g. already publicly available. Internal review available where access refused or decision not made within 30 days. (§§54, 56). Ordinarily, application for internal review must be made within 30 days of notification of decision. (§54[1A]). Application available for external review of decisions by Administrative Appeals Tribunal within 60 days of notification of decision. (§55). Complaint to Commonwealth Ombudsman can also be made under Ombudsman Act 1976 about actions related to request.

(§57).

Act also allows documents held by government and by agencies in respect of citizen's personal affairs and to which citizen has had lawful access to be amended by citizen where record incorrect. (§48).

Appeals.

Right of appeal to Federal Court from Administrative Appeals Tribunal decisions on question of law; right of appeal from single judge in Federal Court decision to full court Federal Court; appeal to High Court with special leave.

See also category 1 Introduction, topic 1.02 Government and Legal System, subhead Judiciary; and Pt II, category 24 Courts and Legislature, topic 24.02 Courts, subhead Appeal to High Court.

Treaties.

High Court has held that signing of treaty could give rise to legitimate expectation that government decision-makers would make decisions consistent with Australia's obligations under treaty, irrespective of whether treaty obligations have been enacted into Australian law (see Minister for Immigration and Ethnic Affairs v. Teoh [1995] 183 CLR 273). However, this approach has been questioned by High Court in decision of Re Minister for Immigration & Multicultural Affairs; Ex parte Lam (2003) 214 CLR 1.

6.02 COURTS:

See category 1 Introduction, topic 1.02 Government and Legal System, subhead Judiciary.

6.03 LAW REPORTS:

See category 6 Courts and Legislature, topic 6.05 Reports.

6.04 LEGISLATURE:

See category 1 Introduction, topic 1.02 Government and Legal System, subhead Parliament.

6.05 REPORTS:

Official reports for High Court of Australia reported in Commonwealth Law Reports (CLR); official reports for Federal Court reported in Federal Court Reports (FCR).

Other Reports: High Court, other Federal courts and tribunals and Supreme Courts of States and Territories exercising federal jurisdiction, reported in Australian Law Reports (ALR); decisions of all Federal courts (except High Court) reported in Federal Law Reports (FLR); High Court and High Court decisions appealed to Privy Council reported in Australian Law Journal Reports (ALJR).

6.06 STATUTES:

Each Act of Commonwealth Parliament has long and short title and Acts are numbered from beginning of each year. Acts and any amendments consolidated periodically and reprinted. Acts Interpretation Act 1901 (Cth) provides Act may be cited by reference to year in which Act was made without reference to years in which it may subsequently have been amended. (§10). Also deals with such matters as: (a) Commencement (Pt II); (b) repeal and expiration (Pt III); (c) meaning of certain words and references in Acts (including Judicial Expressions) (Pts V, VI); (d) construction of powers conferred by Acts (Pt VII); and (e) measurement of distance and time (Pt VIII). Notably, Act provides that in interpretation of provision of Act, construction that would promote purpose or object underlying Act (whether purpose or object expressly stated or not) must be preferred to construction that would not promote purpose or object. (§15AA[1]). Extrinsic material, including reports, journals, speeches and explanatory memoranda of Ministers, Parliament or Commissions may also be used in interpretation of provision of Act. (§15AB).

7 DEBTOR AND CREDITOR

7.01 ARRANGEMENTS FOR BENEFIT OF CREDITORS OUTSIDE BANKRUPTCY:

Pt X Bankruptcy Act 1966 is formal alternative to bankruptcy and allows debtor to come to binding arrangement with creditors for payment and/or settlement of debts.

Debtor who desires that affairs be dealt with under Pt X without estate being sequestrated may sign authority in accordance with approved form (Bankruptcy Regulations 1996 [Cth] §10.03) authorizing registered or Official Trustee (or solicitor) to call meeting of creditors and registered trustee to take over control of debtor's property (Bankruptcy Act 1966 §188). Upon passing of special resolution at meeting of those entitled to vote (by simple majority in number of creditors present and voting and at least three-quarters in value), debtor may be required to enter into personal insolvency agreement (in prescribed form) to dispose of all property in favor of creditors, where property would be divisible among them if debtor became bankrupt or offer money in full satisfaction of debts; or arrange affairs to pay whole or part of debts e.g., deed of arrangement may release some or all debts, assign some or all property or be conditional on receipt of undertaking from third parties. (Bankruptcy Act 1966 §204).

Personal Insolvency Agreements.

Standard provisions in these agreements are elected by creditors and include: Identifying debtor's property and how it is to be dealt with; identifying debtor's income and how it is to be dealt with; determining whether and how debtor is to be released from debts; specifying conditions of operation and termination of agreement; specifying order in which debtor's property and/or income is to be distributed among creditors. (§188A). Voidable transaction provisions available to recover assets disposed of to third parties prior to agreement. If accepted by special resolution, agreement requires execution as deed. Meeting procedures included in regulations. Regulations provide performance standards for trustees.

Judicial review of agreements relate to method of terminating or avoiding Pt X agreement. (§§222, 222C). Disclosure requirements exist regarding information for debtor's affairs and creditors' interest (§189A) and disclosure of controlling trustee interests (§190A).

Controlling trustee must make available at meeting copy of debtor's Statement of Affairs. (§194A).

Trustees have investigatory and recovery powers. (§§190, 190A). Courts empowered to vary agreements to remedy defects which prevent achievement of parties' intentions. (§222). Creditor's petition automatically stayed by debtor's initiation of Pt X process. (§189AAA). Time periods measured in working days. Bankruptcy terminates Pt X agreements.

Arrangements with creditors post-bankruptcy which annul bankruptcy if accepted by creditors must be preceded by bankruptcy.

Registrar may issue warrant for arrest of bankrupt who fails to attend before Official Receiver or other authorized person. (§267E).

Agreements bind all creditors although creditor may not be present. Creditor may not proceed with creditor's petition (deeds of arrangement require leave of court) or enforce any remedy against person, debtor property or commence or renew legal proceedings regarding provable debt. (§229). Agreements have additional effect of releasing debtor from all provable debts other than those that would not have been released by debtor's discharge from bankruptcy if he or she had been bankrupt. (§230).

Trustee must file deed and Statement of Affairs with Official Receiver and, when satisfied that all divisible property of debtor has been realized and final dividend paid, must provide debtor with certificate of release (upon request). Trustee of deed of arrangement, assignment or composition must be satisfied terms have been carried out before providing certificate. (§232).

Agreements can be varied by debtor's written consent together with either special resolution of creditors or trustee's notice. (§221A). Creditors may object to trustee's notice. (§221A[5]). If debtor in default, trustee may give required notice to entitled creditors and propose termination of agreements. (§222A). Creditors can lodge written notice of objection prior to two days before termination. (§222A[3]).

Court may declare void any agreement where not in accordance with Act or where debtor gave false or misleading information at creditor meeting or has omitted material particular from Statement of Affairs or included incorrect material particular in it. (§222[5]). Court may set aside agreement on grounds including that agreement was not entered into in accordance with or does not comply with requirements of Pt X. (§222[2]).

Court may set aside agreement on grounds including terms are unreasonable or not calculated to benefit creditors generally. (§222[1]).

See also topic 7.04 Bankruptcy.

7.02 ASSIGNMENTS:

See category 14 Intellectual Property, topics 14.01 Copyright, subhead Ownership; 14.02 Designs, subhead Ownership; 14.03 Patents, subhead Ownership; 14.04 Trademarks, subhead Ownership.

7.03 ATTACHMENT:

In High Court, judgment or order for payment of money into court or for performance of judgment, order or writ by which any person is required to do any act, other than payment of money to some person, may be enforced by writ of attachment. Writ of attachment cannot be issued without leave of court applied for on notice to party against whom attachment to be issued. Failure to observe order or judgment for attachment constitutes contempt of court. See also Pt II, category 26 Debtor and Creditor, topic 26.02 Attachment.

7.04 BANKRUPTCY:

Bankruptcy Act 1966, Bankruptcy (Estate Charges) Act 1997 and Bankruptcy Regulations 1996 provide uniform law and procedure throughout Commonwealth for insolvency of natural persons (including foreign debtors). Insolvency and Trustee Service Australia performs some administrative and regulatory functions. Cross-Border Insolvency Act 2008 allows person or body authorized to administer debtor's assets or affairs in foreign proceeding or to act as representative of such foreign proceeding, to apply to Australian court for recognition of that proceeding. Upon recognition, person may participate in proceeding under Bankruptcy Act 1996 regarding debtor and may be allowed to intervene in proceedings to which debtor is party. Foreign creditors have same rights to commence and participate in proceeding under Bankruptcy Act 1966 as creditors in Australia and claims of foreign creditors, other than those concerning tax and social security obligations, will not be ranked lower than unsecured claims of other creditors solely because creditor is foreign.

Federal Court of Australia, Federal Magistrates Court and Family Court of Australia have jurisdiction in respect of bankruptcy proceedings. Proposed structural changes would, if implemented, dissolve Federal Magistrates Court leaving Federal Court of Australia and Family Court of Australia with jurisdiction. See also category 1 Introduction, topic 1.02 Government and Legal System, subhead Judiciary.

Debtor's Petition.

(Pt IV, Div. 3 Bankruptcy Act 1966). In certain circumstances, debtor may present to Official Receiver declaration of intention to present debtor's petition. Debtor for any amount may become bankrupt on own initiative by filing petition and statement of affairs in accordance with approved form. Once accepted and endorsed by Official Receiver, debtor is automatically declared bankrupt and bankruptcy dates from date of acceptance of petition by Official Receiver. In such case, creditor to whom debtor owes frozen debt cannot apply for issue of enforcement process in respect of debt or enforce remedy against person or property of debtor in respect of debt during stay period (day declaration accepted by Official Receiver until seven days thereafter or earlier occurrence of other stipulated events). Proposed amendments to Act contained within exposure draft Bankruptcy Legislation Amendment Bill 2009 would increase period from seven to 28 days. Provision is made for presentation of debtor's petition by partnership and by joint debtors. Official Receiver must accept debtor's petition, unless Official Receiver refuses by reason of: (a) Failure to comply with approved form; (b) failure to provide statement of affairs; (c) inadequate statement of affairs; (d) lack of territorial connection; or (e) otherwise where court directs. If debtor's petition presented at time creditor's petition pending against group of debtors including presenter of petition, Official Receiver must refer debtor's petition to court for direction to accept or reject it. Official Receiver has discretion to reject debtor's petition where it appears that debtor has capacity to pay debts or petition is abuse of bankruptcy system even if debtor insolvent.

Creditor's Petition.

(Pt IV, Div. 2 Bankruptcy Act 1966). Individual or multiple creditors can petition for sequestration of debtor's estate when debtor owes aggregate of A$2,000 or more payable as liquidated sum either immediately or at certain future time. Proposed amendments to Act contained within exposure draft Bankruptcy Legislation Amendment Bill 2009 would increase minimum debt for which creditor may petition for bankruptcy from A$2,000 to A$10,000. Debtor must have territorial connection with Australia, and must have committed act of bankruptcy within six months before date of petition. Debtor becomes bankrupt upon making of sequestration order. Secured creditor may present such petition as if he or she were unsecured creditor if willing to surrender security for benefit of all creditors in event of sequestration order being made.

Creditor's petition lapses after 12 months unless extended by court up to maximum of 24 months from date of creditor's petition. Creditor's petition cannot be withdrawn without leave of court.

For creditor to make application to court to bankrupt debtor, creditor must first establish that debtor has committed “act of bankruptcy”. (Bankruptcy Act 1966 §40). Most common act relied upon is debtor's failure to comply with bankruptcy notice requiring creditor's debt to be paid within 21 days. Creditor must serve bankruptcy notice on debtor within six months of issue. Official Receiver may extend this time. Any challenge by debtor to notice must be made to court.

Acts of Bankruptcy.

(Bankruptcy Act 1966 §40). (a) If debtor makes conveyance or assignment of property for benefit of creditors generally; (b) if debtor makes conveyance, transfer, settlement or other disposition of property or any part thereof, creates charge over property or any part thereof, makes payment or incurs obligation that would, if bankrupt, be void as against trustee in bankruptcy; (c) if with intent to defeat or delay creditors debtor departs or remains out of Australia, departs from normal dwelling or place of business, otherwise absents himself or herself or begins to keep house; (d) if execution is issued against debtor and either property sold or held by sheriff for 21 days or execution is returned unsatisfied; (e) if debtor presents debtor's petition; (f) if debtor presents to Official Receiver declaration of intention to present debtor's petition; (g) if at meeting of creditors debtor consents to present debtor's petition or to sign §188 authority authorizing trustee, solicitor or Official Trustee to take control of debtor's property but does not do so within seven days of consent; (h) if at meeting of creditors debtor admits to insolvency and fails within seven days at request of majority of creditors to present debtor's petition or to sign §188 authority; (i) if debtor fails to comply with bankruptcy notice filed by way of final judgment or order; (j) if debtor gives notice to any creditor that debtor has suspended or is about to suspend payment of debts; (k) if debtor gives Official Receiver debt agreement proposal; (l) if creditors accept debt agreement proposal given by debtor to Official Receiver; (m) if debtor breaches debt agreement; (n) if debt agreement is terminated according to law; (o) if debtor signs §188 authority; (p) if meeting of creditors is called in pursuance of such authority; (q) if debtor fails to attend such meeting; (r) if debtor fails to execute Personal Insolvency Agreement or to present debtor's petition within specified time having been required by Act or by special resolution of meeting of creditors to do so; (s) if Pt X Personal Insolvency Agreement terminated or set aside; (t) if scheme of arrangement or composition terminated or set aside; (u) if debtor made insolvent by Family Law Act financial agreement. (§40).

Act allows bankruptcy notice to be issued in respect of judgment or order for payment by court exercising bankruptcy jurisdiction. (§40[3][e]).

Act also protects maintenance creditors where orders for arrears of maintenance obtained under Family Law Act 1975 by allowing them to serve bankruptcy notice. (§40[3][f]).

Date of commencement defined as date of earliest act of bankruptcy within period of six months preceding presentation of creditor's petition or application for making sequestration order or, where no act of bankruptcy committed within six months prior to presentation of debtor's petition, date of presentation of debtor's petition. Where creditor's petition based on breach of bankruptcy notice, special rules apply. Where debtor becomes bankrupt from acceptance of debtor's petition, date for commencement depends on circumstances surrounding petition. (§115[1], [1A], [1B]).

Where petition is accepted by Official Receiver under direction of court, commencement date is time specified by court. Where debtor's petition is accepted by Official Receiver without direction from court and at least one creditor's petition is pending, date of commencement is earliest act of bankruptcy on which any creditor's petition was based. Where debtor's petition is accepted by Official Receiver without direction from court and no creditor's petitions pending but debtor has committed at least one act of bankruptcy in past six months, then commencement date is date of earliest act of bankruptcy within six months before presentation of petition. Otherwise, commencement date is date of presentation of petition to Official Receiver. (§115[2]).

See also topic 7.06 Fraudulent Sales and Conveyances.

Property divisible amongst creditors includes (subject to many exceptions and protective provisions): (a) All property that belonged to or was vested in bankrupt at commencement of bankruptcy; (b) all property bankrupt acquires by own effort or effort of others, and all property that devolves or is devolved upon bankrupt after commencement of bankruptcy and before discharge; (c) proceeds of certain executions and other proceedings; (d) property disposed of by bankrupt in certain settlements within five years before commencement of bankruptcy; (e) property disposed of by bankrupt with intent to defraud creditors, including property disposed of by way of superannuation contributions; (f) property transferred to creditors within six months before petition with effect of giving that creditor preference over other creditors. (§§116, 118, 120-122, 128A-C). Act also includes capacity to exercise powers and to take proceedings over or in respect of property by bankrupt for own benefit after commencement of bankruptcy.

Property not divisible amongst creditors includes (subject to many exceptions and protective provisions): (a) Property held in trust for other persons; (b) household property of kind prescribed under bankruptcy regulations or identified by creditors' resolution; (c) personal property with sentimental value of kind prescribed under bankruptcy regulations and identified by creditors' resolution; (d) property used by bankrupt for earning income by personal exertion with value that does not exceed that prescribed by regulations, or otherwise as identified by creditors' resolution or court order; (e) property used by bankrupt primarily as means of transport (up to allowable maximum value, or as agreed by creditors' resolution); (f) life and endowment assurance policies in respect of life of bankrupt or of spouse or de facto partner (which may include partner of same-sex in certain circumstances) and proceeds received therefrom on or after date of bankruptcy up to value of bankrupt's pension; (g) interest in regulated superannuation fund or approved deposit fund and payments received therefrom (not as pension) on or after date of bankruptcy up to value of bankrupt's pension; (h) amounts paid to or held in Retirement Savings Account (not as pension) within meaning of Retirement Savings Account Act 1997; (i) amounts paid to bankrupt under scheme operated by State or Territory for support of farming and rural industry, being amounts paid by way of grant or loan as assistance for purpose of rehabilitation or household support; (j) property purchased wholly or substantially with exempt money or exempt loan money in relation to that time; (k) amounts paid under legislation; (l) insurance moneys under contract of insurance against liabilities to third parties; (m) any right to recover damages or compensation for personal injury or wrong to bankrupt, spouse, de facto partner or family member of bankrupt or death of spouse, de facto partner or family member of bankrupt; (n) certain superannuation related payments to bankrupt under Family Law Act 1975; and (o) property that trustee is required to transfer to current or former spouse or de facto partner of bankrupt under Family Law Act 1975. (§§116-117).

Debts Provable.

All debts and liabilities, present or future, certain or contingent, to which a bankrupt was subject at date of bankruptcy or to which bankrupt may become subject before discharge by reason of an obligation incurred before date of bankruptcy. (§82). For these purposes “liability” includes: (a) Compensation for work or labor done; (b) obligation or possible obligation to pay money or money's worth on breach of express or implied covenant, contract, agreement or undertaking, whether or not breach occurs, is likely to occur or is capable of occurring before discharge of bankrupt; and (c) express or implied engagement, agreement or undertaking to pay or capable of resulting in payment of money or money's worth, whether payment is: (i) In respect of amount, fixed or unliquidated; (ii) in respect of time, present or future or certain or dependent on contingency; or (iii) in respect of manner of valuation, capable of being ascertained by fixed rules or only as matter of opinion. Certain sums payable under maintenance agreement or order registered or approved by court are also provable in bankruptcy. Proceeds of Crime Act 1987 §26[9] provides that pecuniary penalty order or interstate pecuniary penalty order under Act (such order being order that deprives persons of proceeds of and benefits derived from crimes) is provable in bankruptcy.

Order of Payment of Debts.

To extent that security is not relied on, all debts rank equally and if assets are insufficient debts are paid proportionately. (§108). However, there is statutory list of debts whose payment takes priority. (See Bankruptcy Act 1966 §§109, 109A).

Effect of Bankruptcy.

Present and after-acquired property of bankrupt vests in Official Trustee or registered trustee. No creditor, other than secured creditor, can enforce their debt against debtor or their property (§58), except where order under Proceeds of Crime Act 1987 comes into force before date of bankruptcy (§58A). Ranking affected by order under Proceeds of Crime Act 1987. (Bankruptcy Act 1966 §§114A, 114B, 114C).

Litigation commenced by bankrupt before bankruptcy is stayed upon becoming bankrupt, until trustee makes election to prosecute or discontinue action; however bankrupt may continue in own name such action where action is in respect of: (a) Personal injuries or wrongs done to bankrupt, spouse or family member; or (b) death of bankrupt's spouse or of family member. Court cannot stay proceedings under proceeds of crime law. (Bankruptcy Act 1966 §60).

Where bankrupt dies before discharged from bankruptcy, proceedings in bankruptcy must, unless court otherwise directs, be continued so far as they are capable of being continued as if were alive. (Bankruptcy Act 1966 §63).

Discharge and Annulment.

By operation of law, bankrupt is discharged automatically three years from date of bankruptcy. (Bankruptcy Act 1966 §149). However, extension of time may be granted where trustee files objection to discharge with Official Receiver and Inspector-General does not cancel objection.

Trustee required to deal with bankrupt's property within six years after discharge. Trustee's powers stronger to object to discharge from bankruptcy of uncooperative bankrupts after standard bankruptcy period. (Bankruptcy Act 1966 §§149A-Q).

Order of discharge releases bankrupt from all debts provable in bankruptcy (including secured debts) but excluding those debts incurred by fraud, liability under Family Law Act maintenance order or agreement (subject to contrary order by court), debts on recognizance, income contribution amounts payable under Div. 4B, Pt VI (see subhead Contribution, infra), bail and any liability under pecuniary penalty order or interstate pecuniary penalty order. Discharge of bankrupt does not affect right of secured creditor to realize or otherwise deal with security if secured creditor has not proved in bankruptcy for secured debt or part thereof, and purpose is to obtain payment of secured debt or part thereof. (Bankruptcy Act 1966 §153).

Bankruptcy may be annulled if: (a) Trustee is satisfied that all bankrupt's debts have been paid in full; or (b) court is satisfied that petition ought not to have been presented or accepted by Official Receiver. Court has power to annul bankruptcy if petition was abuse of process, even if debtor is insolvent. (Bankruptcy Act 1966 §§153A, 153B).

Contribution.

(Pt VI, Div. 4B). Requires bankrupt to pay to trustee contribution from income exceeding certain amount. Bankrupt must provide evidence of income to trustee, no later than 21 days after end of contribution.

Aid.

Australian courts will act in aid of Bankruptcy Courts of prescribed countries and may act in aid of Bankruptcy Courts of non-prescribed countries on letter of request. Australian courts may request courts in other countries to act in their aid. (See §29). Current prescribed countries are Canada, New Zealand, U.K., U.S.A., Jersey, Malaysia, Papua New Guinea, Singapore and Switzerland.

Corporate Insolvency.

See topic 7.07 Insolvency.

7.05 EXECUTION:

Attachment or execution may issue to enforce a judgment. Attachment of persons can only issue by leave of the court, but execution against land or goods, unless restrained, can issue as of course upon a judgment for a sum of money. There is no equitable relief against execution of a judgment. See also Pt II, category 26 Debtor and Creditor, topic 26.03 Execution.

7.06 FRAUDULENT SALES AND CONVEYANCES:

Under Bankruptcy Act 1966 transfer of property which would have become part of transferor's estate or been available to creditors, where main purpose of transfer was to prevent property from becoming available to be distributed among creditors or hindering or delaying making property available to creditors, is invalid. (§121). Superannuation contributions intended to defraud creditors also invalid. (§§128A-128C). Where transfer of property takes place for consideration less than market value in period five years before transferor's bankruptcy transfer is void unless transaction took place not sooner than four years before bankruptcy (in case of related entity or person) or two years (in all other cases), and transferor was solvent at time. (§120). Rebuttable presumption of insolvency where debtor has failed to keep proper records of such transactions. Transactions by debtor where consideration given by transferor to third party also void against trustee: such consideration is recoverable by trustee. (§121A). At common law in order to impeach transaction as fraudulent, it is necessary to show fraudulent intent on both sides unless assignee gave no consideration. Under Act it is sufficient to show debtor's main purpose was to prevent or hinder creditors, which can be inferred from circumstances of imminent insolvency. (§121).

7.07 INSOLVENCY:

Corporate Insolvency.

Corporations Act 2001 provides for uniform law throughout Commonwealth for corporate insolvencies. Cross-Border Insolvency Act 2008 allows person or body authorized to administer debtor's assets or affairs in foreign proceeding or to act as representative of such foreign proceeding, to apply to Australian court for recognition of that proceeding. Upon recognition, person may participate in proceedings regarding debtor under specified sections of Corporations Act 2001 and may be allowed to intervene in proceeding in which debtor is party. Foreign creditors have same rights to commence and participate in proceeding under certain sections of Corporations Act 2001 as creditors in Australia and claims of foreign creditors, other than those concerning tax and social security obligations, will not be ranked lower than unsecured claims of other creditors solely because creditor is foreign.

Federal Court of Australia, Supreme Court of each State and Territory, and Family Court of Australia have jurisdiction in respect of insolvency-related proceedings. See Pt I, category 1 Introduction, topic 1.02 Government and Legal System, subhead Judiciary.

Insolvency.

Company insolvent when unable to pay all debts as they fall due. (§95A). Corporations Act provides for various forms of external administration of insolvent companies, including receivership, voluntary administration, voluntary liquidation and liquidation by court order (compulsory winding up). In addition, company may execute Deed of Company Arrangement.

Directors personally liable for insolvent trading. (§588G).

Receivership.

(Pt 5.2 Corporations Act 2001). Secured creditors may appoint receiver or “receiver and manager” over secured company property. Court may also appoint one or more receiver or “receiver and manager” in certain circumstances. “Receiver and manager” empowered to carry on company's business. Only registered liquidator may be appointed as receiver. Receivership may be general (where security is over company's business and whole, or substantially whole, of its property) or particular (where receiver appointed to take control of particular piece of property). Appointment of receiver must be notified publicly and notice of appointment must be served on company. Company's reporting officer must provide report on company's affairs to receiver within 14 days of receiving notice. (§429). Receiver empowered to preserve, recover and realize assets subject to security in order to satisfy secured debts. (§420). Receiver personally liable for debts incurred in course of receivership. (§419). If more than one receiver or controller, powers may be exercised individually or jointly. (§434D-434G).

“Controllers” and “Managing Controllers” enforce security and owe similar Corporations Act duties as receivers. Secured creditor (or creditor's agent) may be controller.

Company remains in existence during receivership. Directors relinquish control of company's affairs if general receivership, but remain in office. Appointment of receiver does not operate to stay proceedings. Company reverts to directors' control once secured debt satisfied in full, provided that company solvent. Company may be wound up if insolvent after general receivership or may come under administration.

Voluntary Administration.

(Pt 5.3A Corporations Act 2001). Objectives of scheme of voluntary administration are to maximize prospect of insolvent company (or company likely to become insolvent) profitably continuing in existence or, if not attainable, to ensure higher return for company's creditors and shareholders than otherwise achievable in liquidation. Administrator investigates company's affairs and recommends to creditors whether company (with creditors' approval) should execute Deed of Company Arrangement, be handed back to directors, or whether company should be wound up.

Directors, liquidator or chargee entitled to enforce charge over whole (or substantially whole) of company's property may appoint administrator. Administrator controls company during voluntary administration and only administrator entitled to deal with company property. Directors not permitted to exercise powers without administrator's written approval. Company remains in existence during administration.

General moratorium on commencement and continuation of legal and enforcement action against company during administration. Applications to wind up company for insolvency adjourned pending determination of company's future direction. Creditors prohibited from enforcing guarantee of company's obligation against director or relative of director. Charge over whole (or substantially whole) of company's property must be enforced during first 13 business days of administrator's appointment. (§441A). Other charges unenforceable against company's assets during administration, except with administrator's written consent or leave of court.

Administrator must convene meetings of creditors. At first meeting creditors may confirm administrator's appointment or appoint another administrator. (§436E). At second meeting administrator required to make recommendation as to whether: (a) Company should execute Deed of Company Arrangement; (b) administration should end with result that directors regain control of company property; or (c) company should be placed in liquidation. (§439A). Administration period ends when one of these events occurs.

Administrator must take into account interests of secured creditor under any charge which has not been, or cannot be, enforced. Administrator may dispose of company property subject to charge in following circumstances only: (a) In ordinary course of company's business; (b) with chargee's written consent; or (c) with leave of court. Leave only granted if arrangements made to protect adequately chargee's interests. Court may prevent chargee performing specified functions, so as not to sabotage administrator's role, but may grant leave if satisfied that chargee's interests adequately protected by administrator's intended course of action.

Deed of Company Arrangement (DOCA) (Pt 5.3A, Div. 10 Corporations Act 2001) may be executed by creditors' resolution. Administrator must prepare and execute DOCA within 15 business days of creditors' resolution or further period allowed by Court on application. (§444B). Administrator may become administrator of deed unless creditors appoint another person. DOCA binds company, directors, shareholders, deed administrator and all creditors with claims arising on or before date specified in DOCA. (§§444D, 444G). DOCA must specify, inter alia: (a) Company property available to pay creditors' claims; (b) nature and duration of moratorium period under DOCA; (c) extent to which company released from debts; (d) order in which proceeds of realized company property to be distributed among creditors bound by DOCA; and (e) specified day on or before which admissible claims arose. (§444A). Secured creditor may realize or deal with security notwithstanding DOCA unless: (a) DOCA limits secured creditor's rights and creditor voted in favor of DOCA; or (b) court orders secured creditor not to realize or deal with security. (§444D). Order only made if court satisfied that creditor's action would adversely affect DOCA, and secured creditor's interests adequately protected. (§444F). DOCA may be challenged by creditor, inter alia, where it is oppressive or unfair. (§445D).

Under proposed reforms, DOCA would be required to adhere to debt priority requirements contained in Corporations Act unless majority of creditors, by value and number, agree otherwise. Court would be able to approve non-compliant DOCA where it produces same or better outcome for creditors. Circumstances in which creditors can challenge DOCA would be narrowed.

Winding Up in Insolvency.

(Pt 5.4 Corporations Act 2001). On application of entity with standing to do so, court may order that company be wound up on ground of insolvency. (§§459P, 459A).

Creditor may serve Statutory Demand on company requiring payment of debt of A$2,000 or more. (§459E). Statutory Demand must set out details of debt claimed. Company presumed insolvent if failure to act within 21 days after receipt of Statutory Demand. Creditor may apply to court to have insolvent company compulsorily wound up. Company, certain government agencies and shareholders may apply to court to have insolvent company compulsorily wound up. (§459P).

Court may appoint provisional liquidator pending outcome of application for compulsory winding up order. Provisional liquidator safeguards company's business and property pending outcome of application. Corporations Act does not provide for process of provisional liquidation.

Court may appoint registered liquidator when it makes compulsory winding up order. Registered liquidator must be natural person. Court-appointed liquidator: (a) Takes control of company; (b) realizes or sells company property; (c) distributes proceeds to company's creditors and, if funds available, to shareholders. (§477). Winding up order binds all company's creditors. Liquidator has broad investigative powers and may recover funds from parties to certain voidable transactions and directors in breach of duties to company. Liquidator may disclaim onerous property and contracts. Proceedings against company stayed except by leave of court, and creditors may not begin proceeding against company or in relation to its property. Directors may not exercise their powers as directors during winding up.

All debts and claims rank equally in winding up, apart from debts owing to secured creditor and claims with priority in winding up. (§§555, 556). Secured creditors may realize security and retain proceeds of realization to extinguish or reduce outstanding debts. Debts and claims with priority include: (a) Directors' costs in preparing report on company's affairs for liquidator; (b) liquidator's costs; and (c) retrenchment payments payable to company's employees. (§556). If company property is insufficient to meet debts and claims in full, debts and claims must be paid proportionately. (§555).

After realization of property and final distribution to creditors court may order dissolution of company on application by liquidator.

(Pt 5.6, Div. 8 Corporations Act 2001). Companies in group which are both being wound up permitted to pool assets to pay group debts. Companies may extinguish debts within group. Pooling permitted where: (a) Following determination by liquidator to pool, approval through resolution by eligible unsecured creditors of each company passed by 75% in value and 50% in number (§§571, 574); or (b) Court order if just and equitable and other conditions satisfied (§579E).

Voluntary Winding Up.

(Pt 5.5 Corporations Act 2001). If company solvent, shareholders may pass special resolution to wind up company and may nominate liquidator. (§495). Liquidator must hold creditors meeting within 11 days after resolution for voluntary winding up is passed. Creditors may replace liquidator at creditor meeting. (§497). Creditors nominate liquidator if company insolvent. (§499). Liquidator assumes office without court order. Liquidator may require company officers to provide report on company affairs. (§446C).

8 DISPUTE RESOLUTION

8.01 ALTERNATIVE DISPUTE RESOLUTION:

Alternative dispute resolution processes are being incorporated into rules and practises of all Australian courts and tribunals. Many areas of law have mandatory and voluntary alternative dispute resolution avenues. Under Federal Court Act 1976 (Cth) (§§53A-C) and Federal Court Rules (Order 72), Federal courts may order mediation even where parties do not consent.

Alternative dispute resolution methods include mediation, conciliation, conferences and approved or private arbitrators.

Range of specialist Ombudsmen and tribunals established to investigate and decide complaints.

Arbitration.

International arbitration is regulated by International Arbitration Act 1974 (Cth).

Gives force of law to UNCITRAL Model Law on International Commercial Arbitration. (§16). Allows parties to opt out of model law by written agreement. (§21), in which case State and Territory Commercial Arbitration Acts apply.

Enacts United Nations Conference on International Commercial Arbitration Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 allowing stay of proceedings where in breach of arbitration agreement and enforcement of foreign arbitral awards subject to specified restrictions. (§§7, 8). Courts take narrow view requiring arbitration agreement to be contractually and substantively arbitrable and that enforcement of award is not contrary to public policy. (§7).

See also Pt II, category 27 Dispute Resolution, topic 27.01 Alternative Dispute Resolution.

9 EMPLOYMENT

9.01 INDUSTRIAL RELATIONS:

Commonwealth has power to make laws only in specific areas stipulated in Commonwealth Constitution. Prior to Mar. 27, 2006, Commonwealth laws concerning employment relationship based primarily on power to make laws with respect to “conciliation and arbitration for the prevention and settlement of industrial disputes extending beyond the limits of any one State” (Commonwealth Constitution §51xxxv; conciliation and arbitration power), and power to give effect to treaties entered into with other countries (Commonwealth Constitution §51xxix; external affairs power). From Mar. 27, 2006, fundamentally redrawn legislation (known as Work Choices) took effect. Work Choices is based on Commonwealth's power to make laws with respect to trading and financial corporations. (Commonwealth Constitution §51xx; corporations power). Work Choices amends Workplace Relations Act 1996 (WR Act), which at time was major instrument governing industrial relations in Australia.

In Nov. 2006, High Court dismissed challenge by trade unions and State governments to constitutional validity of Work Choices. Court upheld Commonwealth's reliance on corporations power to legislate directly relations between corporation and its employees.

On Mar. 28, 2008, Australian Labor Government introduced Workplace Relations Amendment (Transition to Forward with Fairness) Act 2008 (known as Forward with Fairness), relying on corporations power. Amendments made number of changes to framework for workplace agreements and facilitated process of award modernization.

Process culminated in Fair Work Act 2009 (FW Act), which became dominant industrial relations instrument in Australia. FW Act also based on Commonwealth power to make laws with respect to trading and financial corporations. Bulk of FW Act came into effect on July 1, 2009, but some provisions not operative until Jan. 1, 2010. Some provisions only made operative by later proclamation. From July 1, 2010, many modern awards, pay rates, minimum wage decisions and some loading and penalty rates will start to be phased in. Changes to pre-existing rates may be phased in for up to five years.

Transition from WR Act to FW Act governed by Fair Work (Transitional Provisions and Consequential Amendments) Act 2009 (TPCA Act). TPCA Act provides for repeal of WR Act and outlines what will happen to ``old'' awards and agreements.

Application.

FW Act applies to all employees who are employed by trading or financial corporations within Australia, Commonwealth, including its authorities, and all employees in States which have referred industrial relations powers to Commonwealth as part of national industrial relations system. Currently, only Victoria has passed necessary legislation to refer powers to Commonwealth. South Australia in process of passing necessary legislation.

Statutory Employee Entitlements.

WR Act established statutory minimum conditions (Australian Fair Pay and Conditions Standard [AFPCS]) in respect of Federal Minimum Wage (FMW) (A$14.31 per hour or otherwise as provided for by Australian Fair Pay Commission [AFPC]). Wage reviews were conducted annually by AFPC. Results of review released in July of each year and implemented in Oct. Most recent wage review in July 2009 decided to maintain FMW. FMW reviews will continue to take place under new system in July of each year.

Current AFPCS standards also include hours of work (employees may not be required or requested to work more than 38 hours per week on average plus reasonable additional hours), annual leave (generally four weeks per year, though some continuous shift employees receive five weeks per year), personal leave (comprising sick leave and carer's leave, ten days per year, and compassionate leave, two days on each occasion required) and parental leave (generally 12 months unpaid leave for primary caregiver if employee has worked 12 months continuously with current employer).

FW Act and TPCA Act will abolish AFPC as from Jan. 1, 2010. Function of determining minimum wages will pass to Fair Work Australia (FWA). Ten National Employment Standards (NES) to act as new legislative minimum entitlements to cover all employees in federal system. NES will come into effect on Jan. 1, 2010. NES make reference to maximum weekly hours of work, right to request flexible working arrangements, parental leave and related entitlements, annual leave, personal or carer's leave and compassionate leave, community service leave, long service leave, public holidays, notice of termination and redundancy pay and ``Fair Work Information Statement'' for employees that highlight rights and entitlements under new system.

WR Act also includes general entitlements to public holidays and meal breaks, part-time employment due to family responsibilities if agreed with employer and requirements for lawful termination of employment (including minimum periods of notice). Entitlements under AFPCS and entitlement to public holidays do not apply to employees subject to pre-reform certified agreements, pre-reform AWAs or award made under §170MX(3) of pre-reform WR Act if relevant agreement or instrument deals with that matter. Certain other entitlements (e.g., long service leave, discrimination and health and safety laws) governed by State or Territory legislation.

FW Act will generally exclude State or Territory legislation that concerns industrial relations. Will not exclude State or Territory laws that concern long service leave, leave for victims of crime, discrimination and equal opportunity, occupational health and safety, workers compensation, superannuation, some training arrangements, jury or emergency service duties and child labor.

Other Instruments Governing Entitlements.

Awards of Australian Industrial Relations Commission (AIRC) in settlement of all or part of industrial dispute (e.g., strike, ban on performing certain work, or demarcation dispute) may bind specified employers, employees and organizations or classes. Awards are typically comprehensive instruments which stipulate wide range of conditions including shift work, penalties, allowances and related matters. From Jan. 1, 2005, AIRC could declare that existing federal award will apply to all employees of particular class (e.g., all clerical or administrative employees), regardless whether employee is employed by employer that is party to award.

From Jan. 1, 2010, AIRC's functions will be subsumed by Fair Work Australia (FWA).

In Apr. 2008, Minister of Employment and Workplace Relations requested that AIRC commence extensive award modernization process, facilitated by Forward with Fairness legislation. Award modernization to be completed by Jan. 1, 2010.

Award system complemented by option available to employees and employers to reach agreement at enterprise level. Under Pt 8 of WR Act was possible for parties to enter workplace agreements. Workplace agreements prevail over inconsistent award provisions to extent of inconsistency. Workplace agreements include five types of collective agreement (including with or without unions, and special agreements for newly established businesses) and “Individual Transitional Employment Agreements” (ITEAs) which replace “Australian Workplace Agreements” (AWAs) (type of registrable individual agreement). ITEAs are individual written agreements between employee and employer with nominal expiry date of no later than Dec. 31, 2009. Benefit of collective agreement or ITEAis agreement will prevail over Act and many State laws to extent that those laws are inconsistent with workplace agreement.

Following commencement of Forward with Fairness and FW Act, no new AWAs allowed, but could lodge AWAs made prior to Mar. 28, 2008 before Apr. 11, 2008 (transition period). Existing AWAs continue to operate, but cannot be varied.

New ITEAs available during transition to new workplace relations system. ITEAs assessed against ``no disadvantage'' test by Workplace Authority to ensure does not disadvantage employee against applicable collective agreement or applicable award. ITEAs only available to employers who have at least one person engaged on AWA as of Dec. 1, 2007.

FW Act provides for operation of ``modern awards'', required to be made in accordance with ``modern awards objectives''. FW Act requires FWA to ensure such awards, together with NES, provide fair and relevant safety net of minimum conditions. Modern awards reviewed by FWA systematically every four years. Modern awards inapplicable to high income employees, defined in Fair Work Regulations 2009 as earning more than A$108,300.

Under FW Act, ``enterprise agreement'' (EA) is collective agreement that covers employers and employees specified in EA. Must be approved by FWA. No formal distinction between union and non-union EAs. Union can only be covered by EA if formal notice given to FWA to that effect. Exception where EA is in relation to genuine new enterprise.

To approve EA, FWA must be satisfied that ``better off overall'' test passed. This replaces WR Act's ``no disadvantage'' test. Each modern award covered employee must be better off overall under EA than if relevant modern award applied. EA that fails test may be approved by FWA if in public interest to do so, but must have nominal term of less than two years.

No longer any requirement to register multi-enterprise EA but protected industrial action as defined in FW Act may not be taken in support of such EA.

Contents of EAs still restricted, but not as severely as under WR Act. Any EA that contravenes restrictions will be unenforceable to extent of inconsistency with restrictions. FWA cannot approve EA unless satisfied that it contains no unlawful terms.

Certain terms must be included in EA, including nominal expiry date (within four years from date of approval by FWA), allowance for individual flexibility to EA, requirement that employees be consulted over major workplace changes and base rate of pay cannot fall below applicable modern award.

Right to strike recognized in course of bargaining for EAs. However, complicated secret ballot process must be undertaken before protection afforded by FW Act is conferred on union(s) and employees involved. Action not protected if involves damage to property or physical injury. Conversely, employer can lock out disputant workers during bargaining period provided it similarly gives notice. Employer cannot discriminate against employees who engage in, or propose to engage in, protected industrial action. FWA to suspend bargaining period if party not genuinely trying to reach agreement. No protected action could occur while period suspended.

FW Act prohibits inclusion of some content in workplace agreement. AFPCS and NES prevails over modern award or EA to extent that AFPCS or NES is more generous (except as noted above, where pre-reform agreements, AWAs, and certain awards deal with that matter). NES cannot be excluded or modified by any contract of employment or industrial instrument (such as awards or workplace agreements) to detriment of employees.

Regulatory Authorities.

AIRC to be replaced by FWA on Jan. 1, 2010. FWA is statutory body created by FW Act. Aside from AIRC, also assumes role of AFPC. FWA intended to be ``one stop shop'' for industrial relations, possessing jurisdiction over disputes under modern award or EA, bargaining disputes and disputes arising under general protection provisions of FW Act. FWA settles disputes by mediation, conciliation and arbitration.

FW Act and TPCA Act also dissolve and replace other bodies under WR Act, namely Workplace Authority (replaced by Fair Work Ombudsman [FWO]), Workplace Ombudsman (replaced by FWO) and Australian Building and Construction Commission (replaced by Office of Fair Work Building Industry Inspectorate).

FWO is independent statutory office created by FW Act. Although legally separate from FWA, works closely together to create single ``shopfront''. FWO is responsible for compliance and enforcement under FWA.

Office of Fair Work Building Industry Inspectorate (FWBII) is division of FWO. FWBII has particular responsibility for compliance and enforcement in construction and building industry. FWBII will not possess functions unless Building and Construction Industry Improvement Amendment (Transition to Fair Work) Bill 2009 passes Senate.

FWA to function in similar way to pre-Work Choices AIRC. Comprises Presidents, Deputy Presidents and Commissioners. Full Bench hears appeals. Existing members of Commission appointed to FWA. Unlike AIRC, FWA not always required to hold hearing to discharge functions and FWA staff members can be delegated authority to collect information or hold conciliation meetings in certain circumstances.

Pt 4-2 of FW Act confers jurisdiction on Federal Court of Australia (FCA) and Federal Magistrates Court of Australia (FMC) to determine appeals from FWA. FCA can hear appeals from FMC or courts of State or Territory exercising jurisdiction under FW Act. Special Fair Work Division of FCA and FMC created by recent reforms. FMC to merge with FCA shortly to become lower tier of FCA. When merger occurs, FMC's functions under FW Act to be transferred to lower tier of FCA.

Union Organization.

Sched. 1 of WR Act survived repeal of WR Act. By virtue of Sched. 22 of TPCA Act, Sched. 1 of WR Act continues to have effect as separate statute, Fair Work (Registered Organisations) Act 2009 (FWRO Act). FWRO Act similar in effect to WR Act. Provides that each employer or employee association applying for registration under FWRO Act or organization registered under FWRO Act must have rules regarding certain matters including democratic control by members, elections, objects, powers and duties, internal management, audit, eligibility for membership, terms of office in organization and manner of removal of officers.

Registration provisions give organization legal personality separate from persons who collectively make up its membership, and powers of that separate legal personality are defined by its registered rules which derive their authority from FWRO Act.

FWRO Act also provides for supervision of union elections (such elections to be held by secret ballot) and for declarations as to void elections in cases of irregularity. Elections may be conducted and supervised by Australian Electoral Commission under c. 7, Pt 2 of FWRO Act. Further provisions regulate loans, grants and donations by organizations. FWRO Act allows for enforcement of rules directly without need for common law actions.

C. 10 of FWRO Act defines civil penalties where either employer or organization (registered under Act) takes or advises, encourages or incites person (whether employer or not) to take discriminatory action against employee on grounds of their membership or nonmembership of union or their failure or refusal to join in industrial action or proceedings in FWA. FWRO Act makes any arrangement or agreement for compulsory unionism or union preference void. Under FWRO Act, FWA has increased powers to make orders to resolve disputes over organization representation rights. FWRO Act also makes allowance for conscientious objection to membership of organization. All proceedings for contravention of civil penalty provisions in FWRO Act may be instituted by summons issued on information, without indictment. Penalty for offense by natural person generally up to A$2,200 and for offense by corporation generally up to A$11,000, to be ordered by FCA. Compensation orders may also be made by FCA in addition to penalty orders.

Workplace inspectors (appointed under Pt 3-4 FW Act) investigate observance of FW Act, regulations, modern awards, EAs and employee safety. Union right of access to workplaces for purpose of investigating suspected breach of health and safety legislation, award, workplace agreement or Act only available when individual union official has obtained permit allowing access to those premises from FWA. Permit holder must generally give 24 hours' notice before exercising right of access and must describe nature of alleged breach if asked to do so.

FW Act contains right to enter for discussion purposes, which is not confined to discussions with member covered by modern award or EA to which union is bound. Sufficient that there are persons on premises that belong to relevant union.

Pt 3-2 of FW Act restores many unfair dismissal rights removed by Work Choices reforms. Dismissal seen as ``unfair'' where harsh, unjust or unreasonable. Dismissal will not be unfair where small business owner has complied with ``Small Business Fair Dismissal Code''. Dismissal will not be unfair if it occurs in circumstances of ``genuine redundancy''. No longer exception to unfair dismissal laws for employers with fewer than 100 employees. Employees covered by FW Act protected from unfair dismissal where they have completed minimum employment period and earn less than high income threshold. No longer exclusion for employees on fixed term, fixed tasks or seasonal contracts, but will not be held ``dismissed'' if not re-hired at end of agreed engagement.

Unfair dismissal claims must be lodged within 14 days of dismissal, though FWA can grant extension. FWA has discretion as to mode of hearing. Appeals heard by Full Bench of FWA, but appeal can only succeed if ``significant error'' made at first instance.

In respect of unfair dismissal claims, FWA may not hold contested hearing unless appropriate. Preferred mode of dispute resolution is mediation or conciliation, taking place in private.

Secondary boycotts involving industrial action are dealt with under Trade Practices Act 1974. See also category 3 Business Regulation and Commerce, topic 3.05 Monopolies, Restraint of Trade and Competition.

10 ENVIRONMENT

10.01 ENVIRONMENTAL REGULATION:

General Legislation.

At Commonwealth level key piece of environmental legislation is Environment Protection and Biodiversity Conservation Act 1999 (EPBC Act). It establishes process for assessment of proposed actions likely to have significant impact on matters of national environmental significance or Commonwealth land. Actions include projects, developments, undertakings and activity or series of activities.

Matters of national environmental significance include World Heritage properties, National Heritage places, Ramsar wetlands, listed threatened species or endangered communities, listed migratory species, certain nuclear actions including uranium mining, certain actions in Commonwealth marine areas or affecting such areas and matters prescribed by regulations. Strict liability offenses are included for offenses relating to matters of national environmental significance.

Australian Heritage Council Act 2003 establishes Australian Heritage Council to nominate places for inclusion in National Heritage List or Commonwealth Heritage List and make assessments on heritage matters under EPBC Act.

National Environment Protection Council Act 1994 establishes National Environment Protection Council to oversee uniform national approach to protection of environment. Council's membership comprises Commonwealth and participating State and Territory representatives. Function of Council is to make National Environmental Protection Measures (NEPMs) relating to air or water quality, noise, site contamination, hazardous wastes and recycling, and to assess and report on implementation and effectiveness of such measures. NEPMs aim to protect, restore and enhance quality of Australian environment and provide community access to pollution information. Breaches of protection measures attract significant penalties. Act extends to external Territories other than Norfolk Island.

Generally, NEPMs are implemented under State and Territory law. However, activities of Commonwealth or Commonwealth authorities under NEPMs are implemented by National Environment Protection Measures (Implementation) Act 1998 and associated regulations.

Natural Heritage Trust of Australia Act 1997 establishes Natural Heritage Trust of Australia Account to conserve, repair and replenish natural infrastructure by allocating funding for environmental protection, sustainable agriculture and natural resources management.

National Water Commission Act 2004 establishes National Water Commission to assess implementation and promote objectives and outcomes of National Water Initiative Intergovernmental Agreement. Agreement signed to increase productivity and efficiency of Australia's water resources and ensure health of river and groundwater systems. Water Act 2007 and Water Amendment Act 2008 relates to management of water resources, particularly Murray-Darling Basin. Acts establish Murray-Darling Basin Authority to manage Basin water resources and prepare Basin Plan in consultation with or at direction of Ministerial Council. Australian Competition and Consumer Commission also regulates Murray Darling Basin's water service providers. Minister can make water charge rules and water market rules. Penalties are imposed for contravention of Act, regulations, or rules. Act operates concurrently with State water legislation. Water Amendment (Saving the Goulburn and Murray Rivers) Bill 2008 proposes to prohibit use of Basin water resources outside Murray-Darling Basin and to impose penalties for contravention. See Pt I, category 15, topic 15.03 Water and Fishing Rights.

National Greenhouse and Energy Reporting Act 2007 establishes framework for reporting and dissemination of information related to greenhouse gas emissions, greenhouse gas projects, energy consumption and energy production of corporations. Minister may specify conditions and rating systems for emissions, reduction, removal, offsets, production and consumption measurements. Corporation must be registered on national database if it is ultimate Australian holding company of corporate group and corporate group or facilities under operational control of corporate group meet one or more specified thresholds for greenhouse gas emissions, energy production or energy consumption. Registered corporations must report every year. Carbon Pollution Reduction Scheme (Consequential Amendments) Bill 2009 proposes to extend (a) Reporting obligations of entities to legal ``persons'' and expand definition of operational control; (b) deregister liable entities for failure to comply with reporting requirements; (c) require entities with over 125,000 ``emissions numbers'' to submit reports for audit; and (d) increase maximum penalty under National Greenhouse and Energy Reporting Act to up to A$1,100.

Offshore Petroleum and Greenhouse Gas Storage Act 2006 establishes framework for petroleum exploration and recovery, and injection and storage of greenhouse gas substances offshore. Offshore Petroleum Amendments (Greenhouse Gas Storage) Act 2008 establishes framework authorizing transport, injection and storage of greenhouse gas substances in deep geological storage formations under offshore sea beds. See Pt I, category 15, topic 15.02, Minerals Other than Petroleum.

Carbon Pollution Reduction Scheme Bill 2009, accompanied by five consequential amendment bills and five scheme implementation bills were all negated from the Commonwealth legislature in August 2009. Government plans to reintroduce bills at end of 2009, coinciding with Copenhagen Climate Change Conference. If reintroduced bills are successful, scheme in its current form proposes domestic greenhouse gas reduction and trading scheme where liable entities must acquire and surrender emissions unit for every ton of greenhouse gas emitted, with unlimited access to imported eligible international units. Transfer of Australian emission units internationally not permitted for initial years of Scheme in order to manage domestic price risk.

Specific Legislation.

Australian Radiation Protection and Nuclear Safety Act 1998 prohibits certain nuclear installations and regulates nuclear installations, prescribed radiation facilities, controlled material and controlled apparatus. Act establishes Radiation Health and Safety Advisory Council, Radiation Health Committee and Nuclear Safety Committee to regulate radiation protection and nuclear safety, and set policies promoting uniform national standards. Act applies within and outside Australia. Commonwealth Radioactive Waste Management Act 2005 (is pending repeal).

Great Barrier Reef Marine Park Act 1975 and Great Barrier Reef Marine Park and Other Legislation Amendment Act 2008 establishes Great Barrier Reef Marine Park Authority to advise Government on development, care and long term protection of Marine Park. Acts regulate actions of significant impact on environment irrespective of whether action affecting Marine Park taken within or outside Marine Park. Acts have limited extraterritorial application. Act: (a) Makes provision for Governor-General to declare area within Great Barrier Reef Region as ``Marine Park''; (b) prohibits mining in area so declared; (c) prohibits buildings, pontoons, etc. in certain areas; (d) regulates operation of certain vessels in those areas; (e) prohibits discharge of waste in Marine Park; (f) establishes scheme of compulsory pilotage on regulated ships within defined area of Great Barrier Reef Region; (g) imposes charges on commercial users of area to meet costs required to protect it; (h) regulates discharge of waste and management plans for specified areas; and (i) regulates preparation and management of zoning plans of those areas. Acts also imposes civil and criminal penalties on individuals and corporations for pollution, illegal fishing, negligent damage and ships operating contrary to zoning plans. Great Barrier Reef Marine Park and Other Legislation Amendment Act 2008 also introduces further enforcement mechanisms through enforceable undertakings, emergency directions, enforceable directions, injunctions and remediation orders and publicizing of offenses and contraventions. Act also prescribes liability of Marine Park users including executive officers, directors, employees and agents and permission and license holders for contravention of law or regulation.

Protection of the Sea (Prevention of Pollution from Ships) Act 1983 incorporates International Convention for the Prevention of Marine Pollution from Ships, 1973 as modified by Protocol of 1978 relating thereto (MARPOL 73/78). Maritime Legislation Amendment (Prevention of Pollution from Ships) Act 2003 gives effect to Annex IV of Convention as amended in 2000. Protection of the Sea (Prevention of Pollution from Ships) Act 1983 relates to protection of Australian waters from pollution by oil and other harmful substances discharged from ships. Act also provides for detention of foreign ships which are suspected of, or have committed, acts of pollution. Act prohibits escape or discharge of pollutants from ship in Exclusive Economic Zone and includes numerous offenses relating to air pollution. Protection of the Sea (Civil Liability) Act

1981 implements provisions of International Convention on Civil Liability for Oil Pollution Damage 1969, 1976 Protocol, and 1992 Protocol. Objective of Act to ensure adequate compensation where pollution by oil occurs on land or in territorial sea. Act requires all ships of 400 or more gross tons to maintain insurance to cover cost of clean up. Maritime Safety Authority has statutory right to recover any costs incurred in performing its obligations to combat pollution. Protection of the Sea (Powers of Intervention) Act 1981 implements International Convention Relating to Intervention on the High Seas in Cases of Oil Pollution Casualties 1969, as effected by Intervention Protocol 1973 and resolution of Marine Environment Protection Committee, adopted July 4, 1991. Protection of the Sea (Powers of Intervention) Amendment Act 2006 clarifies Commonwealth Government's powers to deal with serious marine pollution threats. Protection of Sea (Civil Liability for Bunker Oil Pollution Damage) (Consequential Amendments) Act 2008 also clarifies AMSA's right to recover preventative and pollution response costs and receive compensation for pollution damage. See also category 17 Transportation, topic 17.04 Shipping. Protection of the Sea (Oil Pollution Compensation Fund) Act 1993 and associated taxing Acts require persons who receive into Australia by ship more than 150,000 tons of oil in each year to pay contribution to fund established pursuant to International Convention on Establishment of International Fund for Compensation for Oil Pollution Damage 1992. Fund available to compensate for spills where Liability Convention inadequate and to offset liability for ship owners under Protection of the Sea (Civil Liability) Act 1981. Protection of Sea Legislation Amendment Act 2008 implements provisions of Supplementary Fund Protocol 2003. Supplementary Fund available to compensate for oil pollution damage where 1992 Liability Convention and 1992 Fund Convention are exhausted.

Hazardous Waste (Regulation of Exports & Imports) Act 1989 regulates export, import and transit of hazardous wastes to ensure safe disposal. Act implements Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal. Act regulates hazardous waste import and export by requiring import and export permits. Act applies to hazardous waste in transit, defined as waste brought into Australia and exported within 30 days. Act classes permits as either Basel or Special Permits and requires applications to be made to relevant Minister who can impose conditions and has power to revoke permits. Minister must notify foreign country if export permit to that country has been authorized. Act prohibits sale of hazardous wastes to foreign company unless export permit in force. Extensive powers of search and seizure vested in inspectors and heavy penalties imposed for offenses under Act. Penalties can extend to executive officers of body corporate.

Hazardous Waste (Regulation of Exports & Imports) (Waigani Convention) Regulations 1999 gives effect to Convention to Ban the Importation into Forum Island Countries of Hazardous and Radioactive Wastes and to Control the Transboundary Movement and Management of Hazardous Wastes within the South Pacific Region (known as Waigani Convention), except so far as that Convention relates to radioactive wastes. Hazardous Waste (Regulation of Export & Imports) (Imports from East Timor) Regulations 2003 prevents shipment of hazardous wastes from East Timor to Australia without prior grant of import permit by Australian Government.

Industrial Chemicals (Notification & Assessment) Act 1989 provides for notification and assessment of industrial chemicals and national standards for cosmetics imported into, or manufactured in, Australia. Establishes Inventory of Chemical Substances, assessment certificate system and permits for commercial evaluation. Importers and manufacturers of industrial chemicals must be registered. Act provides for information to be exchanged under Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade, Sept. 10, 1998.

Environment Protection (Sea Dumping) Act 1981 gives effect to Australia's obligations under 1996 Protocol to the Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter, 1972 (London Convention). Act amended by Environment, Sport and Territories Legislation Amendment Act 1997 to include amendments to annexes to Convention on

Phasing Out Sea Disposal of Industrial Waste. Offense for foreign and Australian vessels to dump or incinerate (or export for this purpose) wastes or for any person to construct artificial reef in Australian waters, including in Exclusive Economic Zone, without permit. Special provisions relate to dumping of radioactive wastes. Environment Protection (Sea Dumping) Amendment Act 1993 implements ratification Protocol for the Prevention of Pollution of the South Pacific Region by Dumping to Convention for the Protection of the Natural Resources and Environment of the South Pacific Region.

South Pacific Nuclear Free Zone Treaty Act 1986 gives effect to Treaty in Australia; prohibits dumping at sea of radioactive wastes and manufacture or possession of nuclear explosive devices.

Ozone Protection and Synthetic Greenhouse Gas Management Act 1989, Ozone Protection and Synthetic Greenhouse Gas (Import Levy) Act 1995 and Ozone Protection (Manufacture Levy) Act 1995 implement provisions of Vienna Convention for the Protection of the Ozone Layer, as modified and added to by Montreal Protocol on Substances that Deplete the Ozone Layer. 1995 Acts provide for payment of fees in relation to HCFCs, synthetic greenhouse gases and methyl bromide under license granted under Ozone Protection and Synthetic Greenhouse Gas Management Act 1989. Carbon Pollution Reduction Scheme (Consequential Amendments) Bill 2009 proposes to include sulphur hexafluoride as controlled substance and to consolidate existing gas import licenses granted under Act. Bill also proposes to prohibit importation of hydrochlorofluorocarbons.

Ozone Protection and Synthetic Greenhouse Gas Management Amendment Regulations (No. 1) 2004 prescribe information to be reported on import or export of synthetic greenhouse gases and equipment containing HCFCs and HFCs. Ozone Protection and Synthetic Greenhouse Gas Management Amendment Regulations 2006 prescribe exempt users of methyl bromide, including exempt companies, and companies who can supply methyl bromide to exempt users.

Environment Protection and Biodiversity Conservation Amendment (Wildlife Protection) Act 2001 repeals and incorporates Wildlife Protection (Regulation of Exports and Imports) Act 1982 into EPBC Act. Act deals with obligations to protect and conserve wild fauna and flora in Australia by implementing 1973 Washington Convention on International Trade in Endangered Species of Wild Flora and Fauna. Act sets up system of assessment and approval to regulate international movement of wildlife species, including cetaceans, and establishes offenses for movement of wildlife without permits. Prohibits export of live native mammals, birds, amphibians and reptiles for commercial purposes.

Antarctic Territory.

Australia signatory to Antarctic Treaty, adopted into domestic law by various statutes. Antarctic Treaty Act 1960 prohibits nuclear explosion in Antarctica and disposal of radioactive waste material.

Antarctic Treaty (Environment Protection) Act 1980 gives effect to measures of Antarctic Treaty for conservation of Antarctic fauna and flora and implements obligations under Protocol on Environmental Protection to Antarctic Treaty 1991. It prescribes offenses for unauthorized collection of rocks and meteorites in Antarctic environment. Contains provisions relating to specially protected species and areas and to historic sites and monuments, provides for environment impact assessments and monitoring of proposed activities in Antarctic environments, and prohibits mining in Australian Territory by non-Australians and outside it by Australians. (Mining activity includes activity in connection with recovery or exploitation of minerals, but does not include activity connected with scientific investigation or research.) Penalties of up to A$116,820 can be imposed. Offenses are indictable with possible terms of imprisonment ranging from one year for permit contraventions up to 16 years for certain mining offenses in Northern Territory and Antarctic Territories. Courts of summary jurisdiction may also hear and determine proceedings. Such courts may impose fine not exceeding A$11,700 in case of individuals, or fine not exceeding A$58,500 in case of body corporate. Antarctic Marine Living Resources Conservation Act 1981 gives effect to Convention on Conservation of Antarctic Marine Living Resources.

11 FAMILY

11.01 DIVORCE:

Family Law Act 1975 regulates divorce throughout Commonwealth.

There is only one ground for dissolution of marriage, irretrievable breakdown of marriage (§48[1]), held to be established if parties have been continuously separated for 12 months prior to application (§48[2]). Act also recognizes union in nature of marriage which is or has at any time been polygamous (provided union entered into outside Australia), for purposes of proceedings under Act. (§6). Separation may be effected even though cohabitation was terminated by action or conduct of only one party, and may be held to have continued notwithstanding that parties reside in same residence. (§49). No divorce order will be granted where there is ``reasonable likelihood'' of cohabitation being resumed. (§48[3]).

Act confers divorce jurisdiction on Family Court of Australia, state Family Court of Western Australia (only state Family Court), Supreme Court of Northern Territory, Federal Magistrates Court and some other State and Territory Magistrates courts. All divorce applications to be filed in Federal Magistrates Court, except in Western Australia where divorce applications are to be filed in state Family Court.

Proceedings may be commenced if, at time application is filed, either party is Australian citizen, or is domiciled in Australia or is ordinarily resident in Australia and has been so resident for at least one year immediately preceding that date. (§39[3]).

Act provides for counseling and alternative dispute resolution for families where parties file for separation or divorce. Amendments to Act commenced on July 1, 2006 encourage use of “non-court based” accredited family counseling and dispute resolution services. Legal practitioners and court staff now required to provide information on services available and courts given greater powers to advise or order parties to attend relevant services. (Pt IIIA). Amendments build upon reform introduced by Family Law Reform Act 1995.

Commonwealth constitutional power allows Family Court jurisdiction in marriage, divorce and all “matrimonial” causes including when at least one party to marriage is party to action for adoption, and in relation to parental rights, custody and guardianship of children including certain ex-nuptial children, adopted or foster children and proceedings with respect to property of parties to marriage. However, it is required to take account of certain principles when granting relief, such as need for protection and preservation of institution of marriage, protection of family and protection of rights of children and promotion of their welfare. (§43). Parenting or child maintenance orders may be sought by person other than party to marriage including grandparent or any other person concerned with care, welfare or development of child. (§66F[1]). Under Commonwealth Constitution, custody and guardianship of children other than in divorce and matrimonial causes is State matter. Between 1986 and 1990, certain powers with respect to children, including ex-nuptial, transferred by most States to Commonwealth. Purported transfer of State jurisdiction to Federal Courts, including Family Court, by 1987 cross-vesting legislation, however declared unconstitutional by High Court in Re Wakim; Ex parte McNally (1999) 198 CLR 511. See also Pt II, category 32 Family, topic 32.03 Guardian and Ward.

Divorce order does not take effect until court is satisfied that proper arrangements have been made for care, welfare and development of child. (§55A[1]). In making parenting order court is to consider best interests of child as paramount consideration including wishes expressed by child. (§60CA). Act empowers parents to enter into informal written agreement known as “parenting plan” in relation to parenting arrangements. (§§63A-63H). Parenting plan may be varied or revoked by further written agreement. (§63D). From Jan. 14, 2004 ability for parents to register parenting plans removed. However registered parenting plan previously entered into remains in force until revoked, set aside, varied or discharged. (§63DB[2]). Reaching agreement in regard to best interests of child is paramount consideration. (§63B[e]). Further, amendments to Act commenced on July 1, 2006 requiring legal practitioners, family counselors and family dispute resolution practitioners to inform people about option of parenting plans. (§63DA).

Parents who seek enforceable agreements require parenting orders issued by Court. These can be obtained by consent, or application by either parent, child, grandparent or any other person concerned with care, welfare or development of child. (Div. 6, Pt VII). Disputes about children also resolved by Court in accordance with provisions of Pt VII of Family Law Act. Legislative reform in Family Law (Shared Parental Responsibility) Act 2006 introduces less adversarial approach to Pt VII related proceedings, primarily via active judicial case management. Further, from July 1, 2007, court must not hear new applications for Pt VII order unless parties have filed certificate from family dispute practitioner indicating attendance at “family dispute resolution”. (§60I). New regime subject to exceptions including where order sought by consent or where family violence or child abuse has occurred. (§60I[9]).

Family Law Act also makes provision for where party to proceedings makes allegations of child abuse and situation where member of Court personnel has reasonable grounds for suspecting that child abuse has taken place. (§§60J, 60K).

Party to marriage only liable to maintain other party so far as he or she is reasonably able, and only if other party unable to adequately support himself or herself. (§72). Each parent has parental responsibility for children despite any changes in nature of relationship of parents. (§61C[2]). Court may also make declarations as to interests of parties in matrimonial property and orders altering their interests in such property. (§§79[1], 78). Amendments to Family Law Act commenced on Dec. 28, 2002 which allow superannuation interests to be divided between parties as property of marriage. (§§90MA-90MZH). Further, amendments commenced on Dec. 17, 2004 which granted Family Court wider power to make certain orders and provide injunctions against third parties. (§§90AA-90AK). Family Law Amendment (De Facto Financial Matters and Other Measures) Act 2008 provides for opposite-sex and same-sex de facto couples to access federal family law courts on property and maintenance matters. ``De facto relationship'' means relationship where parties are not married or related to each other by family where, having regard to all circumstances of relationship, they have relationship as couple living together on genuine domestic basis. Under Same Sex Relationships (Equal Treatment in Commonwealth Laws—General Law Reform) Act 2008 same-sex de facto relationships have equal status to opposite-sex de facto relationships.

Family Law Act deems child born to woman, whilst married to man, as result of artificial insemination or implantation of embryo in woman's body, to be child of woman and husband regardless of biological parentage. (§60H[1]).

Family Law Amendment Act 2005.

Provisions of Act replace outdated terms in Family Law Act 1975 relating to termination of marriage with more modern language including use of term divorce. “Decrees nisi” and “absolute” are replaced by term “divorce order”. Term “dissolution of marriage” is replaced by concept of “divorce”. Definition of divorce is set out in definition section of Act.

Family Law Amendment (Shared Parental Responsibility) Act 2006.

Act represents most significant changes to Family Law Act 1975 (Cth) since its inception.

Act provides for presumption of equal shared parental responsibility so that both parents have equal role in making decisions about major long-term issues for benefit of their child. Where presumption applies, court will be required to consider child spending equal time with both parents. This only applies where reasonably practicable and in best interests of child. If not appropriate, court must consider arrangement for substantial and significant time with both parents.

Maintenance.

Family Law Act extends application to ex-nuptial children within defined limits. (§55A[3]). Act ensures children receive proper level of financial support by way of child maintenance orders which provide reasonable and adequate share of income, property and financial resources of their parents. (§66B).

Court has power to grant leave for proceedings to be commenced for adoption of child by: (a) Parent of child; (b) spouse of, or person in de facto relationship with, parent of child; or (c) parent of child and either his or her spouse or person in de facto relationship with parent. (§§4, 60G).

Child Support (Registration and Collection) Act 1988 (formerly Child Support Act 1988) provides for collection of certain periodic child and/or spousal maintenance payable under court orders, maintenance agreements and child support assessments. Child Support Register is established and Registrar enters child and spousal support obligations created by court orders, agreements or assessments. (§§10[1], 17). Once obligation entered becomes debt owed to Commonwealth and amount of debt generally automatically withheld from salary or wages. (Pt IV). Entitlement of payee is to receive maintenance from Registrar of Child Support Agency. (§76). Provision is made for: (a) Commonwealth to be sole party in recovering from overseas payers; (b) Registrar to recover from third parties; (c) appropriation of money earned within Australia by person owing child support debt who is outside Australia, to pay debt; and (d) court to set aside transactions designed to defeat child support debt. (§§30A, 72A-72C). Penalty interest accrues on late payments, with exceptions. (§67).

Child Support (Assessment) Act 1989 establishes administrative assessment system based upon taxable income of paying parent. Formula applies which takes into account number of children, income of both parents and their liability to support other persons.

Objective of reform is to ensure both parents share costs of supporting their children according to their capacity to pay and that adequate support available for children of separated parents. Under Same Sex Relationships (Equal Treatment in Commonwealth Laws—General Law Reform) Act 2008 child support requirements may apply in same-sex relationship.

Family Law Act implements Convention on Recovery Abroad of Maintenance signed in New York on June 20, 1956 and Convention on the Recognition and Enforcement of Decisions Relating to Maintenance Obligations signed at The Hague on Oct. 2, 1973.

Family Law Act 1975 §66X provides that where court determines that party to child maintenance order is found not to have been parent or liable step-parent of child to whom order relates, and that person has made payments under purported order in respect of child, amount paid may be recovered in court.

Child Support Legislation Amendment Acts 2006.

Acts provide for staged reform of Child Support Scheme to better balance interests of parents and meet best interests of children. Amendments commenced July 1, 2006, increase minimum payments, reduce income cap for high income earners and alter considerations regarding “parent's capacity to earn”. Amendments commenced Jan. 1, 2007, which enable parents to apply to Social Security Appeals Tribunal for independent review of child support decisions and provide courts with greater enforcement powers. Families, Community Services and Indigenous Affairs Legislation Amendment (Child Support Reform Consolidation and Other Measures) Act 2007 clarifies operation of these amendments by further refining child support scheme and family assistance law.

Foreign Divorces.

Divorce or annulment of foreign marriage or legal separation of parties to marriage effected or deemed to have been effected in accordance with law of overseas jurisdiction is recognized as valid in Australia where: (a) Respondent was ordinarily resident in foreign country at time proceedings were instituted ("relevant date"); (b) applicant was ordinarily resident in foreign country and such residence had continued for not less than a year immediately before relevant date or last place of cohabitation of parties was in that country; (c) applicant or respondent was domiciled in foreign country at relevant date; (d) respondent was national of foreign country at relevant date; (e) applicant was national of foreign country at relevant date and was ordinarily resident there at that time, or had been ordinarily resident there for continuous period of one year falling, at least in part, within two years immediately preceding relevant date; (f) applicant was national of, and present in, foreign country at relevant date, and last place of cohabitation of parties was in country law of which, at relevant date, did not provide for dissolution or annulment of marriage; or (g) divorce, annulment or legal separation would be recognized as valid under common law rules of private international law. (§§104[3], [5]). Divorce or annulment of marriage, or legal separation of parties to marriage, deemed to have been effected in accordance with law of overseas jurisdiction if it was effected in another overseas jurisdiction in circumstances where, at relevant date, it would have been recognized as valid by law of first-mentioned overseas jurisdiction.(§104[8]).

Foreign Maintenance Orders.

Family Law Regulations 1984 Pt III provide for registration and enforcement in Australia of maintenance orders made by courts of reciprocating jurisdictions or of jurisdictions with restricted reciprocity as defined in Act and Regulations. Overseas maintenance agreements from prescribed overseas jurisdictions as defined in Act may also be registered and enforced in Australia. However, from July 1, 2000 Child Support (Registration and Collection) (Overseas and related maintenance obligations) Regulations 2000 provide for system of registration of overseas maintenance orders, agreements and administrative assessments with Child Support Agency. Once registered, maintenance obligation is debt due to Commonwealth, able to be enforced by Child Support Registrar.

Foreign Custody Orders.

Regulations provide for registration in courts in Australia of custody orders known as child orders, of prescribed overseas countries, and vice versa.

Intercountry Adoption.

Under Family Law (Bilateral Arrangements Intercountry Adoption) Regulations 1998 adoptions by Australian residents of children in prescribed overseas jurisdictions recognized in Australia. Adoption compliance certificate required to demonstrate validity of overseas adoption.

Under Family Law (Hague Convention on Intercountry Adoption) Regulations 1998 adoption of children in convention countries recognized in Australia unless contrary to public policy. Adoption of Australian child in convention countries possible through application to Court.

11.02 MARRIAGE:

Marriage Act 1961 enacts uniform marriage laws for whole of Commonwealth.

Celebration.

Marriages may be celebrated by authorized or registered ministers of religion or by authorized celebrant or marriage registrar. (§41). Marriage Celebrant's Program under Marriage Act reformed by Marriage Amendment Act 2002. Consent of parents or guardians of any person under age of 18 who has not previously been married is necessary before marriage of such person to any other person may be solemnized. (§13). Where such consent unavailable or refused may apply to judge for consent or for dispensation with consent. (§§15, 16).

Marriage not invalid by reason of failure to satisfy requirements of notice or provide declarations of date and place of birth and conjugal status nor on account of any unauthorized person solemnizing marriage if either party to marriage at time marriage was solemnized believed that that person was lawfully authorized to solemnize it. (§48).

Marriageable Age.

Under Marriage Act 1961 marriageable age for both males and females is 18 years (or 16 years if there are exceptional circumstances and Judge or Magistrate gives authorization and parents give consent). (§§12 and 13). Requirement extends to: (a) Marriages celebrated within Australia; (b) marriages celebrated overseas in accordance with provisions of Marriage Act; and (c) marriage of person domiciled in Australia wherever marriage takes place. (§10). Where either party to marriage is not of marriageable age marriage is void, unless marriage of minor has been consented to by parent or guardian and by Judge or Magistrate under Marriage Regulations. (§§23, 23B). Requirement for parental consent can be waived by court in certain circumstances, e.g., if parents cannot be found or refuse consent unreasonably. (§§15, 16).

Prohibited Marriages.

Following marriages are prohibited: Where either party is married; between brother and sister (including half relations); between person and ancestor (i.e., parent, grandparent); or between person and descendant (i.e., child, grandchild) or where either party does not give real consent. (§§23, 23B). Marriage between cousins is not within prohibited degrees of consanguinity.

Marriage Amendment Act 2004 defines marriage as union of man and woman to exclusion of others, voluntarily entered into for life. Aimed at ensuring that marriage means union of man and woman and that same-sex relationships cannot be equated with marriage. Private member's Bills in 2006, 2007, 2008 and 2009 sought to alter this definition.

Domicile.

Domicile Act 1982 abolishes prior rule of law whereby married woman was at all times deemed to have domicile of her husband.

Marriages solemnized in Australia by foreign diplomats and consular officers of proclaimed countries, according to law or custom of their countries, are valid, provided at least one of parties to marriage is national of proclaimed country and neither party is Australian citizen. (§§52-59 Marriage Act 1961). Exceptions to validity: One or both already married; not of marriageable age or are within prohibited relationship. (§55 Marriage Act 1961).

Recognition of Foreign Marriages.

Marriage Act 1961 gives legislative effect to Hague Convention on Celebration and Recognition of the Validity of Marriages (1978). Foreign polygamous marriages recognized as “marriage” for purposes of Family Law Act 1975 (§6) (exception: where either party was, at time of marriage, party to another marriage which was, at time, valid in Australia [see Marriage Act 1961 §88D]). Foreign marriage valid if: (a) Valid according to law of country of solemnization ("local law"); (b) initially invalid under local law but subsequently valid under that law unless party remarried before subsequent validation of first marriage; (c) solemnized in foreign country by embassy official of other foreign country and recognized as valid by second country and not prohibited by first; (d) as category (c), but only subsequently recognized as valid by second country; or (e) not required by (a)-(d) to be recognized as valid, but solemnized in foreign country and recognized as valid under common law rules of private international law. (§§88A-88G).Exceptions to recognition: Parties already married; not of marriageable age (if neither party domiciled in Australia, both parties must be over 16 years); within prohibited relationship; lack of consent. (§88D). Foreign marriage also not valid if voidable under local law. (§88D[4]).

Unions solemnized overseas between same-sex couples are not recognized as marriages in Australia. (§88EA).

See also topic 11.01 Divorce, and category 4 Citizenship, topic 4.03 Domicile.

12 FOREIGN TRADE AND COMMERCE

12.01 CUSTOMS:

Australian Constitution gives exclusive power to impose customs duties to Commonwealth (prohibiting interstate customs duties). Customs Act 1901 deals with general management of customs and collection of customs duty. Customs Tariff Act 1995 imposes customs duty on goods imported into Australia and specifies duties collected on particular goods or classes of goods. Pt XV of Customs Act 1901 provides for schemes dealing with tenders for right to enter goods for home consumption at concessional rates of duty. Customs Administration Act 1985 establishes Australian Customs and Border Protection Service and Chief Executive Officer of Customs (CEO).

Customs Act 1901 provides officers with powers to: (a) Chase and board ships; (b) request aircraft to land for boarding; (c) request information to identify aircraft; (d) search ships and aircraft; (e) search people found on ships and aircraft; (f) examine and secure any goods found on ship or aircraft; and (g) copy or take extracts from documents.

Act requires reporting of goods in transit through Australia and reporting of passenger and crew information.

Officers may arrest person suspected of committing or attempting to commit offenses against Act or specified laws and may seize, without warrant, any narcotic goods found on ship or aircraft.

Seizure warrants may be issued for searching premises and seizing forfeited goods. Search warrants may also be issued to search premises for evidential material in relation to offenses against Act and specified laws. Customs Legislation Amendment (Border Compliance and Other Measures) Act 2007 allows officers to dispose of seized goods where CEO or Regional Director is satisfied that retention of goods constitutes danger to public health or safety.

Officers may also detain and move ship or aircraft, and detain and move any person found on detained ship or aircraft. Officers may move and/or destroy ship if unseaworthy or if poses serious risk to navigation, quarantine, safety, public health, property or environment.

Officers may also monitor and audit persons in relation to offenses or suspected offenses under Act.

Customs Tariff Act 1995 imposes duties of customs on goods imported into Australia. Act sets out method of calculating duty. Special rates for goods imported from Canada, Singapore, Papua New Guinea, Forum Island Countries and Developing Countries as defined in Sched. 1 of Act. Sched. outlines concessional rates of duty for prescribed persons, bodies, authorities,countries, and classes of goods.

Australia and New Zealand entered into Closer Economic Relations Trade Agreement in 1983. Free Trade Agreements in force between Australia and Singapore (July 2003), U.S. (Jan. 2005) and Thailand (Jan. 2005) and Chile (Mar. 2009). No duty applies for goods from New Zealand, Singapore, U.S., Thailand or Chile except where specified in Schedules. Free Trade Area negotiations with New Zealand and ASEAN concluded in Feb. 2009; agreement expected to enter into force in Jan. 2010.

Customs Act 1901 provides rules for determining whether goods are produce or manufacture of country other than Australia, including New Zealand, U.S., Singapore, Thailand, Chile or developing countries.

Entry must be given to Customs for all imported goods to be unshipped for: (a) Home consumption; or (b) warehousing. Transshipment entries abolished in 2005. Import duties must be paid at rate in force when goods are entered for home consumption.

Changes in July 2006 repeal provisions in Customs Act 1901 relating to fuel penalty surcharge as part of replacement of existing fuel rebates and subsidies with new fuel tax credit scheme.

Customs Tariff Act 1995 applies International Convention on Harmonized Commodity Description and Coding System (HS). Amendment in 2006 applies third revision of HS effective Jan. 1, 2007, as reflected in Sched. 3.

Customs Act 1901 provides that CEO may give concessions (tariff concession orders) if satisfied there is no producer in Australia of substitutable goods. Orders may be revoked. Goods prescribed in regulations ineligible for consideration.

Customs Act 1901 imposes certain import processing charges.

Prohibited Goods—Customs Act 1901.

Customs Act 1901 empowers Governor-General to declare by regulation certain goods prohibited from import. Prohibited imports forfeited to Crown pursuant to Act.

Classification (Publications, Films and Computer Games) Act 1995 introduces censorship laws to apply throughout Australia (with cooperation of States and Territories). Act establishes Classification Board and Classification Review Board and sets out procedures for classification of publications, films and computer games. Classification decisions to be made in accordance with National Classification Code and Guidelines to help apply Code. Both Code and Guidelines must be agreed by Commonwealth, States and Territories. Board, Review Board, Director and Convenor may exercise powers and perform functions conferred by arrangement between Commonwealth and State and Commonwealth and Northern Territory. Complementary State and Northern Territory Acts adopt both Code and Guidelines.

Customs (Prohibited Imports) Regulations 1956 specify goods importation of which absolutely prohibited, or which cannot be imported without ministerial consent, or without complying with specified conditions or restrictions. Commerce (Trade Descriptions) Act 1905 imposes prohibition on import (or export) for classes of goods specified under regulations having false trade description, or no trade description.

Protection of Movable Cultural Heritage Act 1986 prohibits export of Australian protected objects without permit or certificate and import of protected objects exported without permission from foreign country.

Imported Food Control Act 1992 provides for inspection of imported food and drink and monitoring of safety, quality and labeling, and allows for treatment, destruction or re-exportation of noncomplying items. Act prohibits importation of noncomplying or unsafe food. Strong enforcement provisions. Act does not apply to food imported for private consumption, some food imported from New Zealand, food in ship or aircraft stores or food imported as trade sample.

Food Standards Australia New Zealand Act 1991 provides for Food Standards Australia New Zealand Authority and Food Standards Code. Development of joint food standards governed by Act and Australia New Zealand Food Standards Treaty. Signing of intergovernmental Food Regulation Agreement between Commonwealth, States and Territories in 2000.

Customs Act 1901 provides for forfeiture of boats, ships and aircraft engaged in smuggling or unlawful importations, in addition to fines of up to five times of duty not paid, or three times value of goods, or up to A$110,000.

Valuation.

Customs Act 1901 states that value of imported goods for purposes of imposing duty is customs value of goods, determined by Collector of Customs in accordance with methods in Act. Series of fall-back steps to aid valuation: If Collector can determine transaction value of imported goods, then customs value is transaction value; if not, identical goods value; if not, similar goods value; etc. See Customs Act 1901 §§154-161L.

Import Quotas.

Tender schemes for rights to enter goods for home consumption at concessional rates. “Declared period” quotas may be imposed.

Refund, rebate or remission of duty to be made in certain circumstances prescribed by Customs Regulations 1926 including where goods deteriorated, damaged, or destroyed while under Customs control and where duty paid through manifest error of fact or patent misconception of law. In general, apart from cases mentioned above, no action for recovery of any sum paid to Customs, unless signed ``paid under protest'' notice is provided to Customs within seven days of payment being made. Notice must state grounds for protest. Must bring action for recovery of duty paid within six months.

Whenever new tariff schedule tabled in Parliament, practice of department to collect duty at existing rate or proposed rate, whichever is higher. If new schedule becomes law, it dates back to date when tabled, and if not, validating Act is passed, legalizing collections made under it.

Dumping.

Customs Act 1901 and Customs Tariff (Anti-Dumping) Act 1975 provide for imposition of higher rate of duty on imported goods where: (a) (i) Export price (including charges within exporting country) less than normal value of goods so exported, or (ii) direct or indirect assistance has been given to production or export of goods; and (b) (with some exceptions) material injury caused or threatened to Australian industry producing like goods or another country's trade in Australian market. Customs Act 1901 provides for special approach for determining normal value of allegedly dumped goods where goods exported from countries in process of transition to market economy. Types of duty are dumping duty, countervailing duty, third country dumping duty and third country countervailing duty.

Customs Act 1901 provides antidumping notices and undertaking remain in force for five years (unless revoked). Act allows for extension of such measures. Antidumping provisions do not apply to goods that are produce or manufacture of New Zealand.

12.02 EXCHANGE CONTROL:

Floating Dollar, Reserve Bank Discretionary Power to Trade.

Australian dollar is freely traded on global markets, however Reserve Bank of Australia retains discretionary power to intervene in currency to maintain orderly market. Few exchange controls now exist following enactment of Financial Transaction Reports Act 1988. Some restrictions remain relating to anti-money laundering and counter-terrorism financing. (See subhead Restrictions relating to Anti-Money Laundering and Counter-Terrorism Financing, infra.) Previous foreign exchange controls contained in Banking Act 1959 regulations have mostly been repealed. In particular: (a) No restrictions on payment for imports or expenditure of proceeds from exports; (b) banks free to deal with customers in currencies at negotiated rates; and (c) financial institutions in Australia permitted to offer foreign currency denominated accounts to clients.

Restrictions Relating to Anti-Money Laundering and Counter-Terrorism Financing.

Under Anti-Money Laundering and Counter-Terrorism Financing Act 2006, it is offense to transfer Australian currency or foreign currency out of or into Australia if amount of transfer exceeds A$10,000 in value and report in approved form in respect of transfer not given to customs officer, police officer, or CEO of AUSTRAC (Australian Transaction Reporting and Analysis Center). Act allows officer to request declaration whether person departing or leaving Australia has bearer negotiable instruments. Not complying with request is offense under Act. Act requires institutions to keep records of originator information in electronic funds transfers.

Purchasing Foreign Exchange.

Reserve Bank may give direction under Banking (Foreign Exchange) Regulations 1959 to person or resident not to buy, borrow, sell, lend or exchange foreign currency in Australia or not to deal with foreign currency in any other way in Australia. May direct person not to be party to transaction if takes place in Australia or resident is party and has effect of or involves purchase, borrowing, sale, loan, exchange of foreign currency, or otherwise relates to foreign currency. Australian Securities and Investments Commission responsible for authorizing and licensing buying and selling of foreign currency where activities fall under financial services licensing regime of Corporations Act 2001. Reserve Bank retains other powers over foreign currency. See categories 2 Business Organizations, topic 2.01 Corporations; 3 Business Regulation and Commerce, topic 3.01 Banking and Currency.

All transactions involving transfer of funds or payments to, by order of, or on behalf of specified supporters of former government of Federal Republic of Yugoslavia, specified ministers and senior officials of Government of Zimbabwe, certain entities associated with Democratic People's Republic of Korea, and individuals associated with Burmese regime and certain Iranian entities and persons prohibited without specific approval of Reserve Bank. In 2003 Reserve Bank sanctions against Iraq and Angola removed. Anti-Money Laundering and Counter-Terrorism Financing Act 2006 requires financial providers designated as reporting entities to report suspicious matters arising in international funds transfers including where relating to tax evasion, money-laundering or financing of terrorism. (See subhead Tax Evasion Controls on Foreign Exchange Transactions, infra.)

Tax Evasion Controls on Foreign Exchange Transactions.

Taxation Administration Act 1953 and Banking Act 1959 provide comprehensive legislative basis for tax screening arrangements to prevent evasion or avoidance of Australian tax through transactions with overseas tax havens.

Anti-Money Laundering and Counter-Terrorism Financing Act 2006 requires reporting of certain currency transfers to and from Australia of not less than A$10,000 to AUSTRAC

(Australian Transaction Reporting and Analysis Centre) and suspicious matters in international funds transfers including tax evasion. Mutual Assistance in Criminal Matters Act 1987 enables faster and more efficient response to foreign country requests for information from AUSTRAC on financial transaction reporting, including communication of such information to foreign law enforcement and intelligence agencies.

See categories 3 Business Regulation and Commerce, topic 3.01 Banking and Currency, subhead Banking Act 1959; 13 Immigration, topic 13.01 Aliens; 16 Taxation, topic 16.09 Income Tax, subhead Taxation of Foreign Sourced Income.

12.03 EXPORT AND IMPORT CONTROL:

Customs Act 1901 and Export Control Act 1982 provide for regulations to be made controlling, prohibiting or restricting export of prescribed goods, inspection and seizure and associated offenses. Certain goods declared ``prescribed goods'' by regulations and orders, including food, animals, or plants (dead or alive). Prohibited exports also pursuant to Customs (Prohibited Exports) Regulations 1958. Certain prohibitions imposed on exports to countries such as Sierra Leone, Afghanistan, Liberia, Sudan, Cote D'Ivoire, Democratic Republic of Congo, Democratic People's Republic of Korea, Lebanon, and Iran. Requirements for export are generally notifying customs and obtaining relevant authority to deal with goods. Customs Act 1901 empowers Minister for Defence to suspend licenses and permissions to export goods where in Australia's national interest. Customs Act 1901 amended by International Trade Integrity Act 2007, introducing offense to export or import prohibited UN-sanctioned goods without permission.

Export control achieved also through provisions of subject-specific statutes, e.g., Environment Protection and Biodiversity Conservation Act 1999, Protection of Movable Cultural Heritage Act 1986, and Ozone Protection and Synthetic Greenhouse Gas Management Act 1989.

Customs (Prohibited Imports) Regulations 1956 prohibits import of firearms and related products, ozone depleting substances, synthetic greenhouse gases and asbestos except under prescribed circumstances (including with Ministerial authorization). Regulations restrict other imports such as specified dog breeds.

12.04 FOREIGN EXCHANGE:

See topic 12.02 Exchange Control.

12.05 FOREIGN INVESTMENT:

See topic 12.02 Exchange Control; categories 3 Business Regulation and Commerce, topic 3.01 Banking and Currency; 13 Immigration, topic 13.01 Aliens; and 16 Taxation.

12.06 FOREIGN TRADE REGULATIONS:

Australia is party to Marrakesh Agreement Establishing the World Trade Organization incorporating General Agreement on Tariffs and Trade and is member of International Monetary Fund, International Labour Organization, Asia Pacific Economic Cooperation and Organisation for Economic Co-operation and Development.

See topics 12.01 Customs, 12.02 Exchange Control.

See Australian Treaties Database, Treaty Series, Department of Foreign Affairs and Trade, Canberra, Australian Capital Territory (http://www.dfat.gov.au/treaties).

13 IMMIGRATION

13.01 ALIENS:

Aliens Act 1947, which required registration of aliens and penalized failure to do so, repealed by Aliens Act Repeal Act 1984.

See also topic 13.02 Immigration.

Corporations Owned or Controlled by Aliens.

Foreign Acquisitions and Takeovers Act 1975 provides for control of foreign takeovers of Australian businesses through detailed provisions for screening proposed acquisitions and arrangements giving foreign persons control of Australian businesses, and prohibition of takeover proposals determined by Treasurer to be against national interest. Foreign Investment Review Board advises and assists Treasurer in implementation of policy and examining proposals for foreign investment in Australia. (See http://www.firb.gov.au/content/default.asp.) Special notification provisions apply for proposed acquisitions by U.S. investors. U.S. investors include U.S. nationals and enterprizes.

Orders prohibiting proposal may be made where: (a) Person proposes to: (i) acquire shares in prescribed corporation carrying on Australian business (or its holding corporation), or (ii) acquire assets of Australian business carried on solely by prescribed corporation, or (iii) enter into agreement relating to affairs of Australian corporation carrying on Australian business (or its holding corporation), or (iv) alter constituent documents of such corporation, or (v) enter into or terminate arrangement in relation to Australian business carried on solely by prescribed corporation; (b) corporation proposes to issue shares and result will be that: (i) business or corporation will be controlled by foreign persons (or their associates), and (ii) result would be contrary to national interest; or (c) foreign person proposes to acquire interest in Australian urban land, or becomes beneficiary in trust estate (other than deceased estate) that consists of or includes Australian urban land, and result would be contrary to national interest. Orders may be made restoring former control of corporation or ownership of Australian urban land where acquisition or arrangement has been completed.

Controlling Interest.

In determining whether arrangement is within Act, person holds “substantial interest” if person, alone or with associates, is in position to control not less than 15% of voting power or holds not less than 15% of issued shares in corporation or holds beneficial interest in not less than 15% of corpus or income of trust estate. Two or more persons hold “aggregate substantial interest” where they (together with any associates) are in position to control not less than 40% of voting power, hold interests in not less than 40% of issued shares in corporation or hold beneficial interest in not less than 40% of corpus or income of trust estate. Such persons deemed to hold “controlling interest”, or “aggregate controlling interest” (as case may be), unless Treasurer satisfied that in circumstances they (or their associates) not in position to determine policy of corporation.

Foreign Acquisition and Takeovers Amendment Bill 2009 seeks to expand definition of ``substantial interest'' to capture shares (and potential voting power of shares) that may be issued as result of exercise of right, including right under instrument, agreement or arrangement, exerciseable presently or in future, whether on fulfillment of condition or not (e.g., options, convertible notes).

Associate of person defined widely to include relatives of person; persons in partnership; corporations of which person is officer; where person is corporation, any officer of corporation; employee or employer of person; any officer of any corporation of which person is officer; any corporation in which person holds substantial interest; trustee of trust estate in which person holds substantial interest; where person is corporation, person who holds substantial interest in corporation; where person is trustee of trust estate, person who holds substantial interest in trust estate; any employee of natural person of whom person is employee; any corporation directors of which are accustomed to act in accordance with instructions of person or, where person is corporation, of directors of person; any corporation in accordance with instructions of which, or of directors of which, person is accustomed to act; any person who, because of Foreign Acquisitions and Takeovers Act 1975, is associate.

Foreign person means: (a) Natural person not ordinarily resident in Australia; (b) corporation in which natural person not ordinarily resident in Australia or foreign corporation holds controlling interest; (c) corporation in which two or more persons, each of whom is either natural person not ordinarily resident in Australia or foreign corporation, hold aggregate controlling interest; (d) trustee of trust estate in which natural person not ordinarily resident in Australia, or foreign corporation, holds substantial interest; or (e) trustee of trust estate in which two or more persons, each of whom is either natural person not ordinarily resident in Australia or foreign corporation, hold aggregate substantial interest. Under amendments to Foreign Acquisitions and Takeovers Act 1975 in 2004 U.S. not treated as foreign persons for proposals to acquire interests in prescribed corporations with assets less than special specified threshold (subject to annual indexation based on GDP IPD value). Threshold A$953 million during calendar 2009 year.

Threshold is A$219 million for 2009 calendar year (annual indexation applies) if proposal from U.S. Government investor or relates to sensitive sector. Sensitive sectors are media, telecommunications, transport, encryption, security and communications technologies, supply of goods or services to military, extraction of uranium or plutonium and operation of nuclear facilities. U.S. treated as foreign persons where proposal relates to acquisition of interest in Australian urban land.

Prescribed corporation means Australian corporation; foreign corporation (or its holding corporation) holding assets value of which exceeds A$219 million being assets consisting of land situated in Australia, mineral rights or shares in corporation incorporated in Australia; foreign corporation (or its holding corporation) that is holding corporation of one or more Australian corporation(s) where value of assets held by Australian corporation(s) exceeds A$219 million.

Australian urban land means land situated in Australia that is not used wholly or exclusively for carrying on business of primary production.

Notification.

Person may deliver notice to Treasurer stating that person proposes to acquire shares, assets or interests, increase substantial shareholding, or enter into agreement or enter into or terminate arrangement to which Act applies. Treasurer may raise no objection to proposal if Treasurer considers that not contrary to national interest. Treasurer may approve of proposal subject to conditions that render proposal not contrary to national interest. Failure to comply with conditions is offense. Treasurer must make decision within 30 days of receiving notification. Treasurer must provide decision in writing within ten days of making decision. Treasurer may make interim order within 30 days extending period during which order may be made for up to 90 days. Where no notice given to Treasurer, Treasurer may make decision on proposal at any stage. If no advice given or order made, proposal cannot subsequently be questioned. If approved transaction does not proceed timely within period anticipated, parties enter into subsequent new agreements, or transaction not complete within 12 months, further approval must be sought. Approved period may be varied where can show extension fundamental to success and does not involve activity contrary to national interest.

Foreign Investment Proposals Requiring Notification.

Foreign person proposing to acquire substantial interest in Australian corporation or interest in Australian urban land must notify Treasurer before proceeding with proposal. Failure to do so is offense subject to fine not exceeding A$55,000 or imprisonment for two years or both in case of natural person. Even when notice furnished, person commits offense if that person proceeds with acquisition before: (a) Obtaining written advice from Commonwealth Government allowing acquisition; or (b) failing to wait until expiration of 40 days from date notice was received by Treasurer.

On receiving notice, Treasurer required to make decision on proposal within 30 days and provide person with written advice within ten days after making decision, or publish order ten days after making of decision. If no advice given or order made, proposal cannot be subsequently questioned. Treasurer may make interim order within 30 days extending period during which order may be made for up to 90 days. Order may completely deprive foreign person of rights gained pursuant to acquisition.

Under foreign investment policy, following types of investment proposals must be notified to Treasury for approval: (a) Acquisitions of substantial interests in existing Australian businesses with total assets over A$219 million or where proposal values business at over A$219 million; (b) portfolio investments in media of 5% or more and all non-portfolio investments; (c) takeovers of offshore companies whose Australian subsidiaries or assets are valued at A$219 million or more, or account for more than 50% of target company's global assets or A$953 million (subject to annual indexation) for non-government U.S. investors; (d) acquisitions of interests in urban land that involve acquisition of developed nonresidential commercial real estate where property subject to heritage listing, valued at A$5 million or more and acquirer is not U.S. investor, acquisitions of developed nonresidential commercial real estate where property not subject to heritage listing and valued at A$50 million or more or A$953 million (subject to annual indexation) for U.S. investors, acquisitions of accommodation facilities, vacant urban real estate and residential real estate irrespective of value, and acquisitions of shares or units in Australian land corporations or trust estates of any value; (e) direct investments by foreign governments or their agencies; and (f) proposals (including funding arrangements which include debt instruments with quasi-equity characteristics) where doubt exists as to notifiability.

Specific sectors:

Banking.

Under Banking Act 1959, Financial Sector (Shareholdings) Act 1998 and banking policy, proposals for foreign investment in banking sector will be approved if Australian Prudential Regulation Authority (APRA) is satisfied that bank and its home supervisor are of sufficient standing, and where bank agrees to comply with APRA's prudential supervision and arrangements. Financial sector companies subject to 15% shareholding limit. Limit applies to person's stake. Stake is aggregate of person's and associates' voting power. Treasurer can approve greater stake if in national interest. Treasurer may declare person has practical control if person holds less than 15%. Under amendments made in 2004 to Foreign Acquisitions and Takeovers Act 1975, U.S. enterprises exempt from Foreign Acquisitions and Takeovers Act for acquisitions of interests in financial sector companies covered by powers under Financial Sector (Shareholdings) Act 1998.

Civil Aviation and Airports.

Proposals for acquisition by foreign persons of interests in Australian airlines or airports subject to Foreign Acquisitions and Takeovers Act 1975. Foreign persons, including foreign airlines, can expect approval to acquire up to 100% equity in Australian domestic carrier (other than Qantas), unless contrary to national interest. Air Navigation Act 1920 restricts foreign ownership of Australian international carriers to maximum of 49%. Proposals to acquire up to 49% of equity in Australian international carrier (other than Qantas) individually or in aggregate generally approved unless considered contrary to national interest. Qantas Sale Act 1992 limits total foreign ownership of Qantas to 49%, individual holdings to 25%, aggregate holdings by foreign airlines to 35%. Qantas Sale (Keep Jetstar Australian) Amendment Bill 2007 seeks to limit foreign ownership of Qantas subsidiaries. Bill restored to Notice Paper (for reconsideration by

Senate).

In relation to airports offered for sale by Commonwealth, Airports Act 1996 stipulates 49% limit on foreign ownership, 5% limit on ownership by airlines and 15% limit on cross ownership between Sydney (together with Sydney West), Melbourne, Brisbane and Perth airports.

Telecommunications.

In Oct. 1997, Commonwealth Government partially privatized Telstra Corporation Limited through sale of one-third of its equity. Further privatization of Government ownership of Telstra occurred at end of 1999. Final privatization of Telstra approved by Telstra (Transition to Full Private Ownership) Act 2005. Currently, 83% of Telstra is owned by institutional and individual investors, remaining 17% transferred to Future Fund for public service superannuation liabilities. Aggregate foreign ownership in Telstra restricted to 35%, individual foreign investors restricted to no more than 5% of privatized equity under Telstra Corporation Act 1991.

See also Pt II, categories 20 Business Organizations, topic 20.04 Corporations; 34 Immigration, topic 34.01 Aliens.

Shipping.

Shipping Registration Act 1981 requires majority Australian ownership for registration in Australia unless ship is on demise charter to Australian based operator.

Media.

Broadcasting Services Act 1992, amended by Broadcasting Services Amendment (Media Ownership) Act 2006 to remove restrictions on foreign ownership of television and newspaper entities, remove restrictions on cross media ownership and provide minimum local content conditions for regional markets. Media is sensitive sector under Foreign Acquisition and Takeovers Act. Foreign acquisition by portfolio proposal must be submitted to Treasurer for approval if involves shareholding of 5% or more shareholding. Direct proposals (non-portfolio), irrespective of size, subject to prior approval. Proposals for foreign investment in radio also regulated by Foreign Acquisitions and Takeovers Act and are considered on individual basis. Australian Communications and Media Authority regulates broadcasting licenses. (See http://www.acma.gov.au.)

Television, Radio and Newspapers

Limitations regarding foreign control rules and cross-media ownership repealed by Broadcasting Services Amendment (Media Ownership) Act 2006. Foreign ownership only regulated by foreign investment policy under Foreign Acquisitions and Takeovers Act.

Under Broadcasting Services Act 1992 (amended by Broadcasting Services Amendment [Media Ownership] Act 2006), cross-media mergers permitted subject to ``media diversity'' requirements. All mergers involving commercial radio, television, and associated newspapers within regional radio license area must be pre-approved by Australian Competition and Consumer Commission. Public disclosure required by media companies when reporting on cross-held entity activities. Australian Communications and Media Authority can impose license conditions in regional Queensland, New South Wales, Victoria and Tasmania stipulating minimum locally significant content levels. Regional radio licenses subject to local content license conditions and ``local content plan'' approval.

13.02 IMMIGRATION:

Noncitizen Entry.

Migration Act 1958 states noncitizen entry unlawful unless traveling with current Australian visa.

Visas.

Migration Act 1958 provides for grant of visas to travel to enter and remain in Australia. Fees usually payable at two stages: first installment upon application; second installment upon grant. Permanent visa is visa to remain indefinitely. Classes of permanent and temporary visas available are detailed in Migration Regulations 1994 Sched. 1. There are currently over 30 permanent visa classes ranging from Business Skills visas to Aged Parent residence visas. There are currently over 30 temporary, non-bridging visa classes ranging from temporary Medical Practitioner visas to Witness Protection temporary visas. Temporary visa is visa to remain during specified period, until specified event happens, or while holder has specified status. Bridging visas listed in Migration Regulations Sched. 1. All visa applicants over 18 years of age must sign ``values statement'' in prescribed form pledging respect of Australian way of life and laws. Regulations may prescribe form and method for application and allow grant of visa only in specified circumstances or subject to conditions.

Protection visa available to refugees found to be owed Australia's protection obligations under Status of Refugees Convention (made at Geneva July 28, 1951, as amended by Refugees Protocol) and relevant Australian laws. Temporary protection and temporary humanitarian visas (granted to people outside Australia) were abolished by amendments to Migration Regulations 1994 coming into force in Aug. 2008 so that current and former temporary protection and temporary humanitarian visa holders entitled to permanent visa, subject to health, character, and security requirements. Reassessment of protection claims not required. Temporary safe haven visa may be granted to give person temporary safe haven in Australia.

Migration Amendment (Complementary Protection) Bill 2009 seeks to amend Migration Act 1958 by introducing complementary protection arrangements and streamlined consideration of claims from persons not considered ``refugee'' who rely on Australia's non refoulement obligations under international instruments.

Business owners, senior executives and investors eligible for Business Visa. State/Territory governments may also sponsor migrant who is business owner, senior executive or regional established business owner.

Australian employers may sponsor skilled migrants or temporary staff, if unable to fill vacancy from within Australian labor market or through training programs.

Migration Legislation Amendment (Worker Protection) Act 2008 amended Migration Act 1958 by prescribing obligations relating to sponsorship of certain visa holders. As of Sept. 2009, sponsored workers must provide their own health insurance and demonstrate basic English language proficiency. Sanctions apply to sponsors who pay their sponsored workers less than market salary rates.

Grant of visa is at discretion of Immigration Minister subject to detailed “points system” and character and health threshold requirements. “Points system” evaluates applicant on basis of applicant's characteristics (such as employment qualifications, age and language skills). Minister may determine maximum number of each class of visa per year. Minister may refuse or cancel visa if: misleading information given in relation to noncitizen; conditions not complied with; circumstances which permitted grant of visa no longer exist; or presence contrary to foreign policy interests. Visa may be refused or cancelled on character grounds. Before cancellation, noncitizen must be notified and invited to comment. Migration Act 1958 stipulates criminal offenses for some breaches.

Migration Legislation Amendment Act (No. 1) 2008 amended Migration Act 1958 by amending various provisions relating to visas, making character cancellation provisions apply to all temporary and permanent traditional visas, and harmonizing various offense provisions with Criminal Code Act 1995. In contrast, Migration Legislation Amendment (Restoration of Rights and Procedural Fairness) Bill 2007 and Migration Legislation Amendment (Provisions Relating to Character and Conduct) Bill 2006 seek to amend Migration Act 1958 by repealing Minister's powers to deny visa applications on character grounds, and repealing and replacing provisions which prescribe circumstances under which Minister may refuse or cancel visa, respectively.

Detention, Removal and Deportation of Unlawful Noncitizens.

Immigration officer may ask noncitizen to prove status as lawful noncitizen. System of mandatory detention of unlawful noncitizens reformed in July 2008. Three groups subject to mandatory detention: (a) Unauthorized arrivals pending health, identity and security assessment; (b) unlawful noncitizens presenting unacceptable risk to community; and (c) unlawful noncitizens who repeatedly refuse to comply with visa conditions. Presumption that persons will remain in community while their immigration status is resolved. Government policy is that children will not be held in immigration detention centers. In 2004 High Court held that unsuccessful visa applicants who could not be removed to another country because of stateless status are able to be detained indefinitely. (Al-Kateb v Godwin [2004] 219 CLR 562).

Migration Act 1958 Pt 2 Div. 8 provides for circumstances in which removal of noncitizens required. Unlawful noncitizen, who is without immigration clearance and who has not validly applied for visa other than bridging visa or criminal justice visa, or is detainee whose visa application was rejected, is required to be removed from Australia, as soon as reasonably practicable, by immigration officer. Migration Act 1958 Pt 2 Div. 9 provides for circumstances in which noncitizen can be deported. Noncitizen can be deported if: Permanent resident in Australia for less than ten years and convicted of offense in Australia carrying sentence of not less than one year; noncitizen is security threat; or noncitizen convicted of one of certain serious offenses against government, including treason, sedition or treachery. Noncitizen liable in debt to Commonwealth for costs of removal and deportation. Non-voluntary removal may restrict reentry to Australia for specified period.

Migration Act 1958 gives immigration officers power to board and search Australian and international vessels in Australian territorial waters and on high sea. Immigration officers also have power to board and search aircraft. Migration Act 1958 creates offenses for ship owners and masters who carry unlawful noncitizens.

Immigration Assistance.

Migration Act 1958 limits persons able to give immigration assistance to noncitizens. It is offense for person to give immigration assistance unless person is: (a) Parliamentarian or member of their staff; (b) lawyer giving immigration legal assistance; (c) individual not receiving fee in relation to certain immigration assistance (excluding assistance given in capacity as employee or voluntary worker for another person or organization or in course of or in association with conduct of profession or business); (d) public service official acting in course of duties; (e) diplomat, consular official or member of international organizations; (f) close family member; or (g) registered migration agent. Penalty for giving immigration assistance is 60 penalty units (A$6,600) for individuals. Onus of proof upon person who seeks to rely on exceptions (a)-(g). Penalty for person receiving fee for giving immigration assistance or making immigration representations is ten years' imprisonment, unless person is lawyer giving immigration legal assistance or registered migration agent. Individuals may apply to Migration Agents Registration Authority for registration as migration agent. Migration Agents Regulations 1998 set out details for registration.

Review of Decisions.

Migration Act 1958 provides codes of procedure for decision making. Migration

Regulations provide details of codes. Four tiers of review of decisions: (a) Internal review on merits by Immigration Department of decisions concerning visas other than protection visas; (b) review on merits by Refugee Review Tribunal of decisions concerning protection visas and by Migration Review Tribunal concerning other decisions; (c) review by Administrative Appeals Tribunal if referred by either Tribunal in (b); and (d) limited appeal on certain questions of law to Federal Magistrates Court, Federal Court or High Court. Migration Legislation Amendment (Judicial Review) Act 2001 further limited judicial review by ousting review of "privative clause" decisions. Migration Legislation Amendment (Procedural Fairness) Act 2002 attempted to reduce jurisdiction of Federal Court by stipulating exhaustive statement of natural justice considerations. In 2003, High Court held provisions which limited grounds of review to Federal Court did not apply to decisions affected by jurisdictional error. (See Plaintiff S157/2002 v Commonwealth of Australia [2003] 211 CLR 476.) Migration Litigation Reform Act 2005 confers jurisdiction on Federal Magistrates Court to hear migration matters, standardizes scope of judicial review in all Federal Courts, imposes uniform time limits on applications for judicial review of migration decisions, provides for summary dismissal of judicial review of migration decisions with no reasonable prospect of success and provides for costs orders against persons, including lawyers and migration agents, who encourage unmeritorious migration litigation.

14 INTELLECTUAL PROPERTY

14.01 COPYRIGHT:

Copyright Act 1968.

Copyright does not exist otherwise than by virtue of Act, and there is no provision for registration. Act extends to every State and Territory of Commonwealth.

Subsistence of Copyright.

Threshold test for subsistence of copyright is that work is "original". Test does not require examination of literary or artistic merit, simply requires that work originate from author and some skill, labor and expertise be involved in devising and/or making work (common law rules govern).

Two Categories of Copyright.

(a) Original Works.

Comprising literary (including computer programs), dramatic, musical and artistic (including buildings or models of buildings or works of artistic craftsmanship) works (Pt III).

(b) Subject Matter Other Than Works.

Comprising sound recordings, cinematograph films, television and sound broadcasts (including satellite broadcasts where made from place in Australia) and published editions of works (Pt IV). Nature of copyright in these depends on nature of subject matter. No specific requirement that subject matter be "original". Notably, copyright in subject matter subsists independently of copyright in original works.

Ownership.

(a) Original Works.

Generally speaking, author is owner of copyright. This applies to independent contractors. However, exceptions exist where: (i) Work is created in course of employment, copyright will vest in employer not employee (note special provisions for employees of newspapers, magazines and periodicals); or (ii) work is photograph taken for private/domestic purpose or portrait or engraving, copyright will vest in commissioner of work.

(b) Subject Matter Other Than Works.

Unlike copyright in original works, concept of authorship does not apply to subject matter other than works. Owners of copyright are: (i) Maker of sound recording; (ii) producer (and director, where film is not commissioned, but only limited to right of retransmission in free-to-air broadcast: see Copyright Amendment [Film Directors' Rights] Act 2005) of film; (iii) maker of broadcast; or (iv) publisher of published edition. However, since U.S. Free Trade Agreement Implementation Act 2004, performers now granted copyright in sound recording of their performances, where previously copyright vested solely in owner of sound recording. (See subhead Performers' Rights, infra.) Ownership of copyright (including future copyright) can be amended by agreement between parties.

Exclusive Rights.

Copyright confers proprietary rights on author or maker of copyright. For literary, dramatic or musical work, or film, sound recording, broadcast or printed edition of work, copyright is exclusive right to reproduce such work in material form, publish it, perform it in public, communicate it to public (including making available to public online: see Copyright Amendment [Digital Agenda] Act 2000), or make adaptation of it. Artistic works are same except that copyright gives no performance or adaptation right. However, rights conferred by copyright are subject to: rights of Crown; any assignment of copyright; and special provisions regarding contract of service and work under commission. Copyright Act (World Trade Organization) Amendment Act 1994 enables authors to grant commercial rental rights for computer software and sound recordings.

Assignment and Licenses.

Copyright (including future copyright) can be assigned or licensed. Assignment must be in writing (generally by deed). Author cannot assign moral rights.

Term of copyright extended by U.S. Free Trade Agreement Implementation Act 2004. Duration of copyright for:

(a) Original Works.

(i) Including photographs, continues until 70 years from end of year in which author died; and (ii) excluding computer programs and artistic works, if published, performed in public, broadcast or offered for public sale after death of author, continues until 70 years from end of year in which first published, performed in public, broadcast or offered for public sale. No extension of copyright if first published, performed in public, broadcasted or offered for public sale after expiration of 70 years from end of year in which author died.

(b) Subject Matter Other Than Works.

(i) Sound recordings and cinematograph films, continues until 70 years from end of year in which first published; (ii) television and sound broadcasts, continues until 50 years from end of year in which broadcast made; (iii) published editions, 25 years from end of year in which edition first published; and (iv) performances, continues until 20 years from end of year in which performance given (and in some circumstances, 50 years).

Infringement.

Copyright infringed by doing or authorizing doing of acts comprised in copyright, by person who is not owner and without license of owner. Copyright also infringed indirectly in three ways: (a) Importing for sale, distribution etc., copies of original works without license (including electronic copies: see Copyright Amendment Act 2006); (b) selling, letting for hire, etc. copies of works when know or ought reasonably to know is infringing copy or where imported, would be infringing copy if made in Australia by importer; and (c) allowing place of public entertainment to be used for infringing performance.

Technological Protection Measures.

Copyright Amendment Act 2006 expanded definition of "technological protection measure" to include "access control technological protection measure". Hence, technological protection measure means technological measure which: (i) Prevents, inhibits or restricts doing of act comprised in copyright ("copy control mechanism"); or (ii) controls access to work or other subject matter and is used in connection with exercise of copyright ("access control mechanism"). Criminal and civil penalties apply for: (i) Circumventing access control mechanism; (ii) manufacturing and dealing in circumvention device for copy or access control mechanism; and (iii) providing circumvention service for copy or access control mechanism. Notably, access control mechanism which effects geographical market segmentation is excluded from definition, but this is subject to qualification.

Defenses to Infringement.

Unlike situation in U.S., Copyright Act does not contain general "fair use" defense. Contains specific "fair dealing" defenses, where copyright in work is used for purpose of: (a) Research or study; (b) criticism or review; (c) parody or satire (see Copyright Amendment Act 2006); (d) reporting news; or (e) giving of professional advice by lawyer or patent or trademark attorney. Limited defenses are available where work is, or could be, subject of registration as design. (See subhead Copyright/Design Overlap. infra and topic Designs.)

Copyright Amendment Act 2006 introduced defenses to infringement relating to technological protection measures: (a) Permission; (b) certain acts by libraries (excludes libraries conducted for direct or indirect profit of individuals), archives (statutorily defined) and educational institutions; (c) online privacy; (d) prescribed acts; (e) encryption research; (f) computer security testing; (g) service which is circumvention service only because promoted or advertised as so but person did not request such promotion or advertisement; (h) making interoperable computer program; and (i) law enforcement and national security. Availability of defenses vary according to type of infringing conduct.

Exceptions to Infringement.

Specific exceptions granted for works generally include: (a) Reproductions for purpose of judicial proceedings or professional advice; (b) temporary reproductions made in course of communication or as part of technical process of use; and (c) inclusion of works in collection for use by places of education.

In relation to literary, dramatic and musical works, exceptions exist for: (a) Reading or recitation in public or for broadcast of extract of reasonable length from published literary or dramatic work; (b) public performance of literary, dramatic or musical work by playing television, radio or record player for residents and their guests at premises where people reside and sleep; and (c) certain reproductions for purpose of broadcasting or simulcasting.

In relation to computer programs, exceptions exist for: (a) Making copy of computer program resulting from process of normal use or for back-up purposes; and (b) reproducing or adapting computer program to make interoperable product, to test its security, or to correct error —if required information about program, or error-free copy, is not readily available. Act also provides actions against devices which circumvent technological protection measures.

In relation to artistic works, exceptions exist for: (a) Filming, televising, painting, drawing, engraving or photographing either sculptures and works of artistic craftsmanship in public places, buildings or models of buildings; and (b) filming or televising of artistic work, generally where its inclusion is incidental to principal matters in film or broadcast.

Other statutory exceptions for certain uses include certain copying of works for members of Parliament, copying of works by libraries and archives for users of other libraries and archives, and copying of works by institutions to assist persons with intellectual or print disability. Copyright Amendment Act 2006 expanded exceptions under educational statutory licenses (e.g., educational institutions permitted to download and store selected websites on proxy server for educational instruction ["active/proxy/forward caching"]).

Copyright Amendment Act 2006 introduced: (a) "Private and domestic use" exception allowing: (i) recording of broadcasts to be replayed at more convenient time ("time-shifting"), (ii) reproduction of certain copyright material purchase in different format ("format-shifting"), and (iii) reproduction of sound recordings purchased in same format ("space-shifting"); and (b) "flexible dealing" exception allowing non-commercial use of copyright material: (i) by library or archives for purpose of maintaining or operating library or archives, (ii) by educational institutions to give educational instruction, and (iii) by or for person with disability to reduce their difficulty in reading, viewing or hearing copyright material. "Flexible dealing" exception does not apply where other specific exception or statutory license exists (i.e., cannot be used to avoid paying remuneration under statutory license).

As general principle parallel importation amounts to infringement of copyright, but exceptions exist for: Hard copy books; electronic books, periodical publications and sheet music; and sound recordings and computer programs. Works or other subject matter embodied in, or included with, parallel import may be imported as non-infringing accessory. Amendments may be made in this area following Productivity Commission research report into copyright restrictions on parallel importation of books.

Remedies.

Copyright Amendment Act 2006 introduced three-tiered criminal offense system: (i) Indictable offenses (up to five years' imprisonment or up to A$60,500 in fines [up to five times this amount for corporation]); (ii) summary offenses (two years' imprisonment and/or A$13,200 in fines); and (iii) strict liability offenses (A$6,600 in fines.) Copyright infringement notice scheme introduced on-the-spot fines and forfeiture of infringing articles for strict liability offenses: see Copyright Regulations 1969). Criminal procedures and penalties apply to cases of willful copyright piracy on commercial scale. (See Copyright Legislation Amendment Act 2004.) Amendment implements general criminal law obligations under U.S. Free Trade Agreement Implementation Act 2004. Civil remedies include injunction, damages or account of profits, additional damages (for flagrant infringement etc.) and action for conversion. Court may order surrender or destruction of infringing material. In deciding relief (e.g., scope and timeframe of injunction or additional damages), court may take into account commercial-scale electronic infringements (e.g., peer-to-peer context; hyperlinking or downloads from remote websites).

Moral Rights.

Copyright Amendment (Moral Rights) Act 2000 introduced moral rights for authors of works in which copyright subsists. Authors granted three rights: (a) Right of attribution (right to be identified as author); (b) right of integrity (right not to have work subjected to derogatory treatment); and (c) right not to have authorship falsely attributed. Authors can give written consents to others to do, or omit to do, something that would otherwise constitute infringement of that right. "Authorship" only conferred on individuals, not companies. For film, moral rights conferred on screenwriter, director and producer. Moral rights subsist until copyright ceases to subsist (with exception of cinematograph films, where right of integrity of authorship only lasts until author dies). Remedies available for infringement include injunctions and damages. Moral rights apply to works made either before or after Dec. 21, 2000, however films treated differently and careful consideration of provisions necessary.

U.S. Free Trade Agreement Implementation Act 2004 introduced moral rights for performers. These provisions became effective when WIPO Performances and Phonograms Treaty came into force in Australia on July 26, 2007. Performers' moral rights only subsist in performances which occur after commencement of provisions. Performer (includes session musician and conductor of musical work) has moral rights only insofar as performance consists of sounds. Performance may be live or recorded. Performers' moral rights do not apply to: (i) Reading of news; (ii) performance of sporting activity; (iii) participation by members of audience; or (iv) certain performances by teachers and students in course of educational instruction. Defenses to infringement: (i) Consent: need not relate to specified acts or omissions which would otherwise amount to infringement and can relate to performances before or after consent is given; and (ii) reasonableness: note no defense of reasonableness for false attribution.

Performers' Rights.

U.S. Free Trade Agreement extends performers' rights over sound recordings of their performances from Jan. 1, 2005. Performer and owner of record on which sound recording of live performance is made own copyright as makers of sound recording and as tenants in common in equal shares. For pre-existing sound recordings (pre-Jan. 1, 2005), former owners and new owners of copyright each own half copyright as tenants in common in two equal shares i.e., makers do not share equally, but rather any owners of copyright who are makers by virtue of their ownership of record pre-commencement collectively hold 50% of copyright, and owners of copyright who are makers by virtue of their status as performers collectively hold 50% of copyright. Act provides statutory right of action against making of unauthorized recording of performance and certain uses of unauthorized recordings. (See subhead Ownership, supra.)

International Protection.

Copyright Act 1968 and complementary regulations grant equivalent protection to works and other subject matter by citizen or resident of, or first published in, countries having ratified various treaties (which depending on work or subject matter, include International Convention for Protection of Literary and Artistic Works [1866], Rome Convention for the Protection of Performers, Producers of Phonographs and Broadcasting Organisations [1961], Universal Copyright Convention [1952], WIPO Copyright Treaty [1996], WIPO Performances and Phonograms Treaty [1996], and members of World Trade Organization [WTO]). Similar protection granted to performances, sound recordings of performances, and broadcasts of performances in countries that have ratified Rome Convention for the Protection of Performers, Producers of Phonographs and Broadcasting Organisations (1961), WIPO Performances and Phonograms Treaty (1996), and members of WTO.

Copyright/Design Overlap.

Overlap provisions of Copyright Act 1968 aim to prevent dual copyright and design protection in artistic works (not including building or model of building or work of artistic craftsmanship) which have been industrially applied as three-dimensional designs, whether or not registration of design is possible. Effectively provisions mean no infringement of copyright in artistic work to reproduce work by embodying design in product. However, number of qualifications, particularly in relation to works of artistic craftsmanship. See topic 14.02 Designs.

14.02 DESIGNS:

Designs Act 2003.

Provides for registration of designs for nominated products. Commenced operation June 17, 2004. Designs registered prior to June 17, 2004 continue to be governed by Designs Act 1906 (applications filed under 1906 Act will be registered under that Act unless expressly converted to new Designs Act). Manual for 1906 Act applications and incomplete draft manual for

2003 Act applications (as of Sept. 30, 2009) available at http://www.ipaustralia.gov.au/resources/manuals_designs.shtml.

Designs Regulations 2004 provide for practice and procedure in relation to application for and registration of designs. Countries specified in Sched. 1 of Regulations declared to be "Convention Country" for purposes of Act. Applications made in such countries deemed to be applications made in each other Convention Country.

Design Registration.

Threshold test for registrability of design is that design is new and distinctive. Test is more strict than copyright and requires that design not only originate from author, but is also "new" and "distinctive" in light of "prior art base" (i.e., design publicly used in Australia or overseas or contained in prior registration application) for design at priority date of application. Design "new" unless identical to design that forms part of prior art base. Design "distinctive" unless substantially similar in overall impression to design that forms part of prior art base.

Registration protects overall appearance of product resulting from one or more of its visual features. Features include shape, pattern, configuration or ornamentation applicable to article. Following are not considered visual features: (a) Feel of product; (b) materials used in product; and (c) product's indefinite dimension including repeat of pattern.

Design applications undergo mere formalities check (specified in regulations) prior to gaining registration. No substantive examination required, as was required under 1906 Act.

To meet formalities check, application must be in approved form, written in English, and identify product or products in relation to which design is to be registered sufficiently to enable design to be classified in accordance with Locarno Treaty. Owner of design or third party may request examination of registered design at any time during its ten years of registration. Designs Office carries out full examination as to registrability, then "certifies" design or revokes registration.

Ownership.

Author of design is first owner thereof and therefore person entitled to make application for registration. However, in situation of independent contractor and employee, it is person contracting or employer who (in absence of agreement to contrary) will own design.

Exclusive Rights.

Registration confers proprietary rights on registered owner. Registered owner of registered design has exclusive right during term of registration of design to: (a) Make or offer to make product which embodies design; (b) import such product into Australia; (c) sell, hire or otherwise dispose of such product; (d) use such product in any way for purpose of any trade or business; (e) keep such product for purpose of doing any of things in (c) or (d); and (f) authorize another person to do any of things in (a) through (e).

Assignment and Licenses.

Owner of design may assign or license his or her rights. Registered design may be assigned in writing (generally by deed), and owner of unregistered design may assign whole or part of interest in design.

Term.

Initial period of registration is five years, with possibility of renewal up to ten years. Designs registered under Designs Act 1906 have maximum term of 16 years.

Infringement.

No action for infringement can be taken until design certified by Designs Office as validly registered design (but designs registered under Designs Act 1906 deemed to have been certified). Infringement will occur by applying registered design (or any design "substantially similar in overall impression") to any product in respect of which design is registered, or by importing for trade or business such products. In assessing "substantial similarity in overall impression", Act directs decision maker to focus on similarities, not differences. Where design registered prior to June 17, 2004, test of infringement under Design Act 1906 will still apply and infringement will occur where product involves application of design or obvious or fraudulent imitation.

Defenses to Infringement.

2003 Act introduced "right of repair" defense which provides for non-infringement of registered design where component part of complex product is made/sold or otherwise commercially dealt with for purpose of repair of complex product. Designs for spare parts still registrable under new Act, but "right of repair" defense may limit enforcement options in relation to spare part registered designs.

Exceptions to Infringement.

(a) Importing product in which design is embodied with authority or license of registered owner of design; and (b) restoration of design. 2003 Act provides further exception where person uses design commercially in period between design registration expiration and restoration. Person using design during this period may continue to use design without infringing after registration is restored or sell right to use design to another person.

Remedies.

Include actions for damages, account of profits or injunction.

Design/Copyright Overlap.

Most registrable designs will also be subject of copyright, and copyright/design overlap provisions. (§§74-77 Copyright Act 1968). Overlap provisions intended to prevent dual protection for certain design and therefore have effect of excluding copyright protection where certain design has been applied industrially, irrespective of whether design was registered or registrable. Overlap provisions apply to designs which are visual features of shape and configuration. Three-dimensional designs will effectively lose copyright if: (a) Registered; or (b) "corresponding design" to artistic work not registered and industrially applied to products sold in Australia or elsewhere. Overlap provisions do not apply to features of pattern or ornamentation and to large extent do not apply to category of artistic works known as "works of artistic craftsmanship". See topic 14.01 Copyright.

Designs (Consequential Amendments) Act 2003 introduced changes to design/copyright overlap provisions. Amendments provide that publication of complete patent specification or representation in design application relating to corresponding design are deemed to be "industrial application" of that corresponding design for purpose of overlap provisions. Act stipulates that it is not infringement of copyright to make two-dimensional reproduction of artistic work if reproduction is derived from three-dimensional product and two-dimensional reproduction is made in course of or incidental to: (a) Making three-dimensional product, if making three-dimensional product would not infringe copyright because of overlap provisions; and (b) selling or letting for hire such three-dimensional product.

Circuit Layouts.

Circuit Layouts Act 1989 protects original circuit layouts (meaning representations of integrated circuits), such that these cannot be registered under Design Act 2003. Act consistent with draft Treaty on Circuit Layouts developed by World Intellectual Property Organisation. Protects circuit layouts whether made before or after Act, but action lies only for acts after Act comes into operation (i.e., after Oct. 1, 1990). Acts done by Commonwealth for purpose of defense and security of Australia non-infringing.

14.03 PATENTS:

Patents Act 1990.

Provides that invention is patentable invention if it is: (a) Manner of manufacture; (b) novel and inventive when compared with prior art base (i.e., public information contained in acts and/or documents from patent area and, for applications filed after 2002, anywhere in world) as it existed before priority date; (c) useful; and (d) has not been secretly used by patentee (or their nominee) before priority date. Human beings and biological processes for their generation are not patentable inventions. Whether life forms or microorganisms are patentable is decided according to usual principles of patentability, subject to particular requirements for deposit of samples.

Patents Regulations 1991 provide for practice and procedure in relation to application for patents and prescribe time frame for opposition, consideration etc.

Types of Patent.

(a) Standard invention patent: long term protection; monopoly defined by unlimited number of claims; (b) innovation patent: relatively short term protection; monopoly defined by up to five claims. Innovation patent system introduced by Patents Amendment (Innovation Patents) Act 2000, to provide quicker, cheaper patent protection for inventions that may not meet patentability of standard patents (i.e., patents which involve innovative, rather than inventive, step). System, which commenced on May 24, 2001, replaces former petty patent system, however petty patents already in force on May 24, 2001 remain in force under amended Patents Act.

Patent Application.

Invention subject of patent must be described in specification document and precise scope of monopoly must be defined in claims. Provisional application sets “priority date” and remains live for 12 months. Complete specification: (a) Must describe invention fully including best method of performing invention; (b) must contain at least one claim; (c) claims must be clear, succinct and fairly based; and (d) claims must relate to one invention only.

High Court held formal requirements do not require patentee to identify inventive steps or other requirements proving invention is patentable (Lockwood Security Products Pty Ltd v Doric Products Pty Ltd [2004] 217 CLR 274). High Court held whether matters described in specification amount to admissions of common general knowledge is to be considered with other available evidence (Lockwood Security Products Pty Ltd v Doric Products Pty Ltd [2007] 235 CLR 173).

Convention applications may be filed in Australia to claim priority date from earlier application filed in Paris Convention country within preceding 12 months. Such applications are made and dealt with in same way as other patent applications.

Patent Cooperation Treaty (PCT) applications constitute single international patent application designating up to 120 countries and regions (including Europe). In Australia, national phase entry required within 31 months from priority date. PCT allows claim of priority date from earlier application in Paris Convention country filed within preceding 12 months. PCT applications designating Australia treated as complete application under Act. Filing date of PCT application taken to be international filing date.

Opposition.

Patent application may be opposed pre-grant on general ground that it is not ``patentable invention''. Granted patent may be revoked by court on same grounds applicable at examination stage. Renewal fees required for continued valid registration of patent. Re-examination of standard or innovation patent by Commissioner may lead to refusal to grant or revocation.

Ownership.

Act grants patentee exclusive right to exploit invention during term of patent. State grants inventor limited statutory monopoly to exploit invention in return for inventor disclosing invention and best method of performance for benefit of others when monopoly ceases. Exploit includes: (a) For product invention, make, hire, sell or otherwise dispose of product, offer to make, sell, hire or otherwise dispose of it, use or import it, or keep it for purpose of doing any of those things; (b) for method or process invention, use method or process or do any act mentioned in (a) in respect of product resulting from such use.

Co-ownership of patent is acceptable. Patent grant only to inventor(s) or those entitled to assignment of patent upon grant or those deriving title from inventor(s). Patent issued in name of incorrect inventor(s) or omitting name(s) of inventor(s) will be void. If substantial amendments are made to patent application, it may require inventors to be added or removed to ensure patent issued in names of correct inventors. Entitlement is to be assessed individually where there are two or more persons entitled to grant (University of British Columbia and Anor v Conor Medsystems [2006] 70 IPR 248).

Assignment and Licenses.

Patents are form of personal property and may be sold, licensed, assigned, etc. Entitlement to interest in patent, or transfer or such entitlement, to be registered. License may be terminated after patent protecting relevant invention ceases to be in force. Condition in contract for sale, lease or license void if would have effect of restricting party from using or acquiring product or process not protected by patent or applying for examination of patent. Patent assignments must be in writing, signed by or on behalf of assignor and assignee. Assignments of patents are ordinarily made by deed. Act allows exclusive licensee to take action for infringement, but patentee must be joined as party to action.

Compulsory Licenses.

Federal Court, upon application, may order patentee to grant compulsory license to interested person: if applicant has tried without success to gain license on reasonable terms, reasonable requirements of public with respect to patented invention not satisfied, and patentee has given no satisfactory reason for failing to exploit patent; or if patentee has contravened, or is contravening, Pt IV of Trade Practices Act 1974 in connection with patent. Application for compulsory license uncommon, Federal Court has not yet made order of grant of compulsory license.

Patents of Addition.

May be granted to protect improvements or modifications of already patented invention. Patents of addition not available for innovation patents. Patent of addition expires at same time as parent patent.

Term.

Standard patent granted for term of 20 years; innovation patent granted for term of eight years.

Act permits extension of standard pharmaceutical patent for maximum of further five years where: (a) One or more pharmaceutical substances per se, or when produced by recombinant DNA technology, disclosed in specification and falls within claims of specification; and (b) goods containing substance are included in Australian Register of Therapeutic Goods and first regulatory approval date five years from date of patent. Term of patent must not have been previously extended. Term of extension determined by reference to period between date of patent and date on which first product under patent was included in Australian Register of Therapeutic Goods reduced (not below zero) by five years. First product for purpose of determining term may be different from product by which patent qualified for extension.

Infringement.

Person infringes patent by doing something which falls within patentee's monopoly as defined by claims. Action for infringement can only be based on granted standard patent or certified innovation patent, not application. Act provides for contributory infringement by supply of products if use of products would constitute infringement. Importation is exclusive right of patentee, but importation by third party of goods made overseas by patentee will not infringe patent in Australia, unless patentee who owns patent in Australia and overseas has limited right to export goods to Australia. Legislation clearly specifies limitation on right to export goods to Australia. Act also provides for person seeking to exploit invention to apply to court for declaration of non-infringement of relevant patent. Act makes actionable unjustified threats of legal action.

Defenses to Infringement.

Principal defense to infringement is ``prior use'' defense. If shown that infringing party has been exploiting product, method or process in Australia immediately prior to filing of patent application (priority date), infringing party may continue to exploit product, method or process. Person who has benefit of prior use exemption may assign/dispose (but not license) whole of their entitlement to that exemption to another person. Defense commonly includes cross-claim for revocation on grounds of invalidity.

Exemptions to Infringement.

Where invention used on foreign vessels/aircraft/land vehicles which come into Australia accidentally or temporarily. Pharmaceutical companies may exploit patented product to obtain regulatory approval of generic version of product in preparation for entry into market when patent expires, i.e., “springboarding”.

Remedies.

Remedies for infringement are injunctions (primarily), damages, or account of profits. Right to damages or account of profits for infringement backdated to date of publication of complete specification (except in case of patent obtained by Convention or PCT application). Court discretion to award exemplary damages if it considers appropriate. Exemplary damages not yet awarded in any case.

14.04 TRADEMARKS:

Trademark rights can be acquired only through: (a) Registering mark within Australia under Trade Marks Act 1995 (Cth); or (b) common law use establishing reputation. Overseas use, reputation or registration is of little assistance and does not bar imitation by Australian entrepreneurs (unless overseas use has created reputation in market which extends to Australia).

Unregistered Trademarks.

Trademarks protected at common law by action for “passing off”. First user of unregistered mark in Australia in any particular trade and area generally prevents others from registering mark or otherwise acquiring exclusive rights in that trade and geographical area, unless first user's rights abandoned or mark is not inherently or factually distinctive. To acquire exclusive rights in unregistered mark, first user must acquire and maintain exclusive reputation for mark. To prevent others from using unregistered mark, first user must show that use by another party would likely deceive public and cause damage to first user.

Rights in unregistered mark cannot be assigned or licensed separately from goodwill of business concerned. Intending users of new marks in Australia are advised to safeguard their position by seeking registration as early as possible, even though registration not prerequisite to use. Applicants for registration of trademark have priority according to date of application.

Right to sue based on "passing off" is coterminous with inability to prove that trademark is associated with owner's reputation in market.

Registered Trade Marks.

Trademark application must be in approved form and lodged at Trade Marks Office. If application accepted by examiner, three month period from advertisement date exists for third parties to object to registration in opposition. Registration backdates to date application filed.

Act broadly defines registerable trademark as "a sign" which: (a) Includes any letter, word, name, signature, numeral, device, brand, heading, label, ticket, aspect of packaging, shape, color, sound or scent; (b) is used or intended to be used to distinguish goods or services dealt with or provided in course of trade from other goods and services; (c) is capable of graphical representation; (d) is capable of distinguishing owner's goods or services from others; (e) is not likely to deceive or cause confusion; (f) is not substantially identical or deceptively similar to another registered trademark; and (g) is not scandalous and use not contrary to law.

Trade Marks Regulations 1995 set out procedure for registration under Act. Sched. 1 lists classes of goods and services.

Fundamental requirement that trademark capable of distinguishing applicant's goods or services from goods or services of other persons. Mark that is merely descriptive of character of goods or geographic origin cannot be inherently distinctive.

Trademark can be: (a) Collective trademark (used to distinguish other goods or services provided by association); (b) certification trademark (used to distinguish goods or services certified by owner to be of particular quality, accuracy or other characteristic including origin or materials); or (c) defensive trademark (where registered owner wants to prevent any use of mark on unrelated goods that may suggest those goods are connected to registered trademark goods). Act contains separate parts dealing specifically with each of those marks.

Opposition.

Following acceptance of trademark application, three month period in which application can be opposed by any person on any of grounds specific in Act, including those grounds upon which application could be rejected and also on grounds that: (a) Applicant not owner of trademark; (b) depending on basis on which trademark was registered, opponent has used similar registered trademark earlier; (c) applicant does not intend to use trademark in Australia; (d) opponent's trademark had acquired prior reputation in Australia, and consequently, use by applicant of its mark would likely deceive or cause confusion; (e) trademark contains false geographical indication; (f) application was defective; or (g) application made in bad faith.

Ownership.

Act grants registered trademark owner exclusive right to use, and authorize others to use, mark in relation to particular good(s) and/or service(s) in respect of which mark registered.

Registration of users of trademark no longer required. Concept of ``authorized use'' where use by ``authorized user'' under control of registered trademark owner. In case of infringement by third party, authorized user may, subject to any agreement between trademark owner and authorized user, bring action for infringement: (a) At any time with consent of owner; (b) during prescribed period if registered owner refuses to bring such action; or (c) after prescribed period if registered owner failed to bring such action in that period. Again subject to agreement between trademark owner and authorized user, authorized user may also request Australian Customs Service to seize imported falsely marked goods at point of entry into Australia.

Assignment and Licenses.

Registered trademark may be licensed or assigned or transmitted in whole or in part with or without goodwill of business concerned in goods or services. Important for trademark owner to retain quality/financial control over licensed trademarks because uncontrolled licensing may ultimately render trademark invalid and unenforceable. Failure to monitor and control use may result in registration becoming misleading and liable to cancellation. Marks pending registration can also be assigned. If registered trademark, or mark pending registration, is assigned or transmitted, registered owner, or applicant for registration of trademark, or assignee must apply to Registrar to record assignment in register.

When trademark is or contains sign that becomes generic (i.e., generally accepted within relevant trade as sign describing article, substance or service, and thus no longer capable of distinguishing goods or services) as determined by prescribed court, registered owner no longer has exclusive rights to trademark or sign for such article, substance or service.

Term.

From date of first filing of application for registration, trademark term is ten years. Thereafter, trademark term is renewable for successive periods of ten years upon payment of appropriate fees.

Infringement.

Occurs if person uses sign as trademark that is substantially identical or deceptively similar to registered trademark, for goods or services covered by registration. Trademark is “deceptively similar” if it so nearly resembles other trademark that it is likely to deceive or cause confusion. Also infringement if such mark used on goods or services “of the same description” or “closely related”, unless use not likely to deceive or cause confusion. Use of well-known trademark in Australia is infringement, even on unrelated goods or services, if use can be taken to indicate connection between goods or services and registered owner.

If notice of prohibition displayed on goods carrying trademark, it is infringement to do certain acts inconsistent with prohibition (e.g., using trademark with altered goods).

Defenses to Infringement.

Six defenses to infringement where: (a) Person uses, in good faith, own name or place of business, or uses sign as indication of kind, quality, quantity, intended purpose, value, origin or some other characteristic of goods or services, or time of production of goods or rendering of services; (b) person uses mark for purpose of comparative advertising; (c) person (or predecessor in title) continuously used unregistered mark in Australia in course of trade starting prior to registration or use by registered owner (“prior use”); (d) court of opinion that accused infringer would obtain registration of mark in his/her own name if they were to apply for it; (e) court of opinion that accused infringer would obtain registration of substantially identical or deceptively similar mark in his/her own name if they were to apply for it; and (f) trademark applied with consent of owner (i.e., parallel importation).

Where person has “prior use” defense, he or she may also (in absence of honest concurrent use by proprietor, and depending on similarity between two marks) successfully challenge proprietor's registration.

Remedies and Actions.

Remedies for infringement are injunctions, damages or account of profits. Various other causes of action associated with unauthorized use of trademark including common law action of “passing off” and statutory action under §52 of Trade Practices Act 1974 (Cth).

Removal for Non-use.

Removal from register occurs if: (a) Trademark not renewed within 12 months of expiring (or six months of expiring for trademarks expiring on or after Mar. 27, 2008); or (b) registration cancelled by Registrar or court.

Grounds for cancellation under (b) are: (i) Applicant had no intention in good faith of using trademark in Australia when application filed, and/or (ii) trademark has not been used in good faith in Australia for continuous period of three years (application not invalid until period of five years of non-use has passed from original date of filing application). Any person can apply to Registrar to remove trademark. Registrar can decide or refer matter of nonuse to court, but owner of registered trademark has onus of proof of use. Discretion in Registrar or Court not to cancel registration even if no such use. Nonuse provisions do not apply to certification marks or defensive marks.

Revocation.

Registrar may revoke acceptance of trademark application if satisfied reasonable to do so after taking account of all circumstances. Registrar may revoke registered trademark if notice of proposed revocation given within 12 months of registering mark and if, taking account of all circumstances: (a) Satisfied trademark should not have been registered; and (b) reasonable to revoke registration. Circumstances to consider under (a) include: (i) Errors or omissions leading to registration; (ii) relevant obligations of Australia under international agreement; and (iii) any other special circumstances. Circumstances to consider under (b) include: (i) Any use that has been made of trademark; (ii) legal proceedings relating to trademark; (iii) other actions relating to trademark; and (iv) any other special circumstances.

Overseas Protection.

Under Paris Convention, trademark applications made in Australia within six months of first application for registration of mark in question in country which is party to Convention will be given same priority date as initial application. Convention priority must be claimed within two days of filing of Australian application.

Since July 11, 2001 Australia is party to Madrid Protocol on trademarks, allowing applications to be filed by Australians in other protocol countries, and vice versa. Madrid Protocol provides mechanism for opposing domestic trademark registration on basis that it conflicts with prior rights held in another trademark protected under Madrid Protocol. International application must: (a) Meet usual requirements for registration in member country; and (b) designate member country address. If trademark does not proceed to registration in home country or if home registration is revoked within five years of filing, international protection under Madrid Protocol also fails.

15 MINERAL, WATER AND FISHING RIGHTS

15.01 ENERGY:

Nuclear.

Atomic Energy Act 1953 provides that persons discovering prescribed substance at any place in Australia must report it within one month to Minister. (§36). Prescribed substance defined to mean uranium and other substances used in connection with atomic energy. (§5). Any prescribed substance automatically property of Commonwealth. (§35). Act also provides that authority may be granted to person or to two or more persons engaged in joint venture to undertake operations for discovering, mining, recovering, treating and processing prescribed substances on land in Ranger Project Area on behalf of or in association with Commonwealth. (§41).

Nuclear Non-Proliferation (Safeguards) Act 1987 gives effect to Australia's obligations as party to certain international treaties and agreements. Act imposes permit requirement for dealing with nuclear material or associated items, including for decommissioning facilities. (Pt 2). Penalty for possession of nuclear material or associated item without permit is imprisonment for not more than ten years. (§23). Penalty for contravening permit or order of responsible Minister is imprisonment for not more than two years. (§25). Offense to communicate certain information related to nuclear material without authorization (§26), or to knowingly communicate information that could prejudice physical security of nuclear material or associated item (§26A). Act provides exception with respect to activities under Patents Act 1990 in relation to possession offense (§23) and for unauthorized communication of information provisions (§26). Offense to steal nuclear material (§33), demand nuclear material by force or threat (§34), carry, send or move nuclear material into or out of Australia or foreign country (§34A), use nuclear material to cause death or serious injury or substantial damage to property or environment (§35) including by interfering with operation of nuclear facility (§35A), threaten to use nuclear material (§36) or interfere with containment or surveillance devices (§28). Offense provisions may also apply to acts or things done outside Australia. (§38). Act establishes office of Director of Safeguards to administer Australian safeguards system. (§§42-43). Australian Radiation Protection and Nuclear Safety Act 1998 prohibits Commonwealth entities, Commonwealth contractors and persons in prescribed Commonwealth places from dealing with controlled material or controlled apparatus (§31) and from constructing or operating nuclear installation or radiation facility (§30) without license. Controlled material defined as natural or artificial material which spontaneously emits ionizing radiation. (§13). Penalty is fine of up to A$220,000. (§§30-31). Act establishes office of Chief Executive Officer of Australian Radiation Protection and Nuclear Safety Agency responsible for issuing licenses. (§§14, 32). Act also establishes Radiation Health and Safety Advisory Council to advise Chief Executive Officer on matters relating to radiation protection and nuclear safety. (§§19-20). National Environment Protection Measures (Implementation) Act 1998 makes provision for environmental protection in respect of certain activities carried on by or on behalf of Commonwealth and Commonwealth authorities. Comprehensive Nuclear Test-Ban Treaty Act 1998 makes it offense to cause nuclear weapon test explosion or any other nuclear explosion; penalty is imprisonment for life. (§8). Act also provides for inspection of sites in and out of Australia (Pt 3), and provides for designation of Australian Comprehensive Test Ban Office to administer Act and to carry out Australia's obligations under Comprehensive Nuclear Test-Ban Treaty (Pt 5).

See also category 10 Environment, topic 10.01 Environmental Regulation.

Australian Nuclear Science and Technology Organisation Act 1987 creates statutory body under that name (§4) to undertake research and development into nuclear science and technology and its use in medicine, science, industry, commerce and agriculture (§5[1][a]). Not permitted to work on nuclear weapons or nuclear explosive devices. (§5[2]). Also functions to facilitate application of research results (§5[1][b]), to condition, manage and store radioactive materials and waste arising from own activities (§5[1][ba]) or from Commonwealth or Commonwealth entity (§5[1][bb]), at request of certain government or law enforcement agencies (§5[1][bc]) or under contractual arrangement (§5[1][bd]), and to make available its knowledge, expertise, resources and facilities by providing training, selling or leasing land or equipment, or as appropriate (§5[1][ea]). Certain State and Territory laws concerning land use, environment, radioactive material and licensing do not apply to Organisation. (§7A).

15.02 MINES AND MINERALS:

By Seas and Submerged Lands Act 1973 Commonwealth claims sovereignty over territorial sea, airspace over it, its bed and subsoil (§6) and sovereign rights over Exclusive Economic Zone (§10A) and continental shelf (§11) and to recovery of minerals other than petroleum from seabed, subsoil, and from continental shelf. Act also declares rights of control in Australian contiguous zone. (§13A). Exception made in case of bays, gulfs, estuaries, rivers, creeks, inlets, ports, and harbours which were within limits of States on Jan. 1, 1901 and remain therein. (§14). Validity of Act was upheld by High Court in 1975 following challenge brought by States about ownership of territorial sea. However, High Court decided in 1976 that State law extending to area of Commonwealth sovereignty will apply insofar as it is for peace, order and good government of State and until Commonwealth legislates to contrary. Act as amended gives effect to exclusive economic zone as defined in 1982 United Nations Convention on Law of the Sea. Regulations for exercise of Australia's rights under international law with respect to exploring and exploiting natural resources of continental shelf also provided for under Offshore Petroleum and Greenhouse Gas Storage Act 2006 in relation to petroleum (§786) and under Offshore Minerals Act 1994 in relation to minerals (§440). *Note:* Offshore Petroleum Act 2006 amended by Offshore Petroleum (Greenhouse Gas Storage) Act 2008 and renamed Offshore Petroleum and Greenhouse Gas Storage Act 2006.

Offshore Petroleum.

Offshore Petroleum and Greenhouse Gas Storage Act 2006 governs search and production of petroleum and activities related to greenhouse gas sequestration in Australia's offshore area; provides that Commonwealth alone will have legislative responsibility for Australia's continental shelf areas beyond three- mile territorial sea limit. Legislation to be administered by Joint Commonwealth and State Authorities. (§56). Act provides for petroleum permit terms (§§102-103) including renewal procedures (§§119-127), permit conditions (§99) and suspension of petroleum permits in national interest (§266), as well as surrender (§§269-271) and cancellation (§§274-277). Certain petroleum exploration permits, retention leases and production licenses available under Act. (c. 2). Petroleum operations permitted on most parts of Australia's continental shelf, except for environmentally sensitive areas such as Great Barrier Reef (e.g., Great Barrier Reef Region [Prohibition of Mining] Regulations 1999).

Act establishes enlarged safety zones around offshore installations (§616), empowers Commonwealth and State Joint Authority to give directions as to rate of petroleum production (§§189-190), provides for granting of retention leases over not yet commercially viable discoveries (c. 2, Pt 2.3), and revises registration and dealings provisions for petroleum titles (c. 4). Where competitive bidding applies for offshore tenement, choice, at discretion of granting authority, may be between work program bidding system (§104) or cash bidding system (used for areas considered highly prospective) (§110). Exploration title holder who discovers petroleum offshore entitled as of right to grant of production license in respect of discovery; size limitation; competitive bidding does not apply. (§§168-177). License may be terminated if no operations for recovery of petroleum carried out for continuous period of at least five years. (§166). Certain provisions of Offshore Petroleum and Greenhouse Gas Storage Act 2006 relating to pipelines subject to obligations of Australia under international law and international treaties. (§36). Act also establishes National Offshore Petroleum Safety Authority (§645); functions include to monitor and promote occupational health and safety in offshore petroleum operations (§646). South Australia, Western Australia, Victoria and Northern Territory have conferred equivalent functions on National Offshore Petroleum Safety Authority in relation to petroleum activities in State and Northern Territory coastal waters. New South Wales, Queensland and Tasmania in process of making similar legislative amendments. See also Pt II, category 37 Mineral, Water and Fishing Rights, topic 37.02 Mines and Minerals.

Offshore Petroleum and Greenhouse Gas Storage Act 2006 and Offshore Minerals Act 1994 provide that ownership of petroleum or minerals recovered under terms of licenses, permits or consents under these Acts not subject to rights of other persons such as native title holders (Offshore Petroleum and Greenhouse Gas Storage Act 2006 §285, Offshore Minerals Act 1994 §42). However, activities must not interfere with enjoyment of such rights more than reasonably necessary (Offshore Petroleum and Greenhouse Gas Storage Act 2006 §280, Offshore Minerals Act 1994 §44) and underlying native title not extinguished by license or consent under Offshore Minerals Act 1994 (§43).

Timor Sea Treaty (Treaty) between Government of Australia and Democratic Republic of East Timor signed May 20, 2002. Ratified East Timor Dec. 17, 2002 and Australia Mar. 6, 2003. (See Petroleum [Timor Sea Treaty] Act 2003.) Treaty provides for Joint Petroleum Development Area (JPDA) delineated in Timor Sea to be controlled by Joint Commission under Petroleum Mining Code. (Arts. 6, 7). Final Code approved by Joint Commission, Feb. 6, 2006, available at http://www.timorseada.org. Treaty also provides for East Timor 90% title to petroleum produced in JPDA and Australia 10%. (Art. 4). Australian share of petroleum projects in JPDA subject to Petroleum Resource Rent Tax. See subhead Petroleum Taxation, infra.

Offshore Petroleum (Royalty) Act 2006 provides for payment of royalties by registered holders of North West Shelf exploration permits and associated leases and licenses (§§5-8), and adjustment of payment in certain situations (§§9-10). Offshore Petroleum and Greenhouse Gas Storage (Annual Fees) Act 2006 provides for payment of fees in respect of permits, licenses and leases under Offshore Petroleum and Greenhouse Gas Storage Act 2006. Petroleum (Submerged Lands) (Management of Safety on Offshore Facilities) Regulations 1996 require operators of offshore facility to prepare detailed documented system for safe performance of activities. (§§14, 51). Penalties for failure to comply can apply to operators and titleholders. (Pt 6).

Note: Offshore Petroleum (Royalty) Act 2006 and Offshore Petroleum (Annual Fees) Act 2006 replaced Petroleum (Submerged Lands) (Royalty) Act 1967 and Petroleum (Submerged Lands) Fees Act 1994. New Acts have similar scope and coverage as 1967 and 1994 equivalents. See also Offshore Petroleum and Greenhouse Gas Storage (Safety Levies) Act 2003 which imposes levies on exploration, development and production of offshore petroleum and Offshore Petroleum and Greenhouse Gas Storage (Registration Fees) Act 2006 which imposes fees for registration of transfers of titles and approvals of dealings.

Note: Sched. 3 to Offshore Petroleum and Greenhouse Gas Storage Act 2006 regulates occupational health and safety at or near facilities in Commonwealth waters being used for offshore petroleum operations. Act imposes duties and penalties for breach. Specific obligations for operators, manufacturers, employers, and any persons entering facility.

National Gas (South Australia) Act 2008 new national gas regime on July 1, 2008including National Gas Law and National Gas Rules. All jurisdictions except Western Australia have adopted National Gas Law. National Gas Access (Western Australia) Act 2009 (WA) applies law in similar terms but retains jurisdictional regulator in Western Australia. New regime resembles national electricity regime; constitutes effective access regime under Trade Practices Act 1974 Pt IIIA. Australian Energy Regulator is national economic regulator except in Western Australia.

Note: Australian Energy Market Amendment (Gas Legislation) Act 2007 repealed Gas Pipelines Access (Commonwealth) Act 1998. Replaced by National Gas Law and National Gas Rules.

Minerals Other than Petroleum.

Offshore Minerals Act 1994 (and various consequential Acts) applies to all minerals other than petroleum. (§§22, 35). Provides legal framework for exploration for, and production of, minerals on areas of Australia's continental shelf under Commonwealth jurisdiction, being area beyond three nautical mile limit from territorial sea base line. Offshore Constitutional Settlement between Commonwealth and State Governments provides that States will introduce mirror offshore minerals legislation for area within three mile limit, to establish common offshore mining code. (§3). (See Pt II, category 37 Mineral, Water and Fishing Rights, topic 37.02 Mines and Minerals.) Principles underlying this regulatory arrangement are: (a) All offshore mineral activity in Commonwealth area adjacent to particular State governed by Joint Authority consisting of relevant Commonwealth and State Ministers (§32); (b) Joint Authority responsible for major decisions relating to titles, such as grants, refusals and the like (§§47-49) and in event of disagreement, decision of Commonwealth Minister prevails (§409); and (c) day to day administration of Commonwealth legislation carried out by each State's Designated Authority which implements Joint Authority's decisions and is primary point of contact between industry and governments (§§29-30). Act sets up licensing scheme providing for five kinds of authorization: exploration licenses (Pt 2.2), retention licenses (Pt 2.3), mining licenses (Pt 2.4), works licenses (Pt 2.5) and special purpose consents (Pt 2.6). For each authorization it deals with applications, grants, duration, renewal, obligations of holder and expiry. Also deals with related topics of registration and dealings in licenses and administration of licensing system.

Offshore Minerals (Mining Licence Fees) Act 1981 and Regulations 1994 prescribe amount of annual mining license fees. Offshore Minerals (Exploration Licence Fees) Act 1981 and Regulations 1994 prescribe amount of annual minerals exploration license fees. Other associated legislation includes Offshore Minerals (Registration Fees) Act 1981 and Regulations 1994, Offshore Minerals (Retention Licence Fees) Act 1994 and Regulations 1994 and Offshore Minerals (Works Licence Fees) Act 1981 and Regulations 1994.

Offshore Minerals (Data Lodgment and Reporting) Regulations 1996 require that license holders prepare reports with details of exploration work (§4) and copies of data and samples acquired (§8) and lodge these with designated authority.

Note that Australian customs, immigration, quarantine and sales tax laws apply to ships and installations engaged in exploration for minerals and petroleum in Australian waters and to certain sea installations. See for example Excise Act 1901 §4A.

Coastal Waters (State Powers) Act 1980 provides that legislative powers of each State extends to territorial sea, being those seas within three miles of low water mark of littoral State. (§§4-5).

Coastal Waters (State Title) Act 1980 vests in each State proprietary rights in seabed subsoil (including all minerals), structures attached to seabed, and space above seabed of territorial sea in littoral State. (§§3-4). Rights of States subject to exceptions for certain uses by Commonwealth including authorizing construction of petroleum pipelines, and for purposes in relation to communications, safety of navigation, quarantine or defense, and Commonwealth's right to place, construct and maintain equipment and structures for purposes of such use. (§4).

Offshore Petroleum and Greenhouse Gas Storage Act 2006 establishes framework for access to offshore geological storage formations, and create property rights for greenhouse gas injection and storage activities in Commonwealth offshore waters. Act amends Offshore Petroleum Act 2006 by introducing regime which is similar to existing oil and gas permit regimes. See Pt I, category 10, topic 10.01 Environmental Regulation.

Petroleum Taxation.

Excise Act 1901 (Pt VIIB) and Excise Tariff Act 1921 impose excise upon crude oil recovered. Petroleum Excise (Prices) Act 1987 and Regulations 1988 establish mechanism for determining duties of excise on certain crude petroleum oil. Amount depends on whether onshore or offshore and production levels.

Offshore Petroleum (Royalty) Act 2006 imposes royalty generally of 10% upon petroleum recovered from North West Shelf submerged land adjacent to Australian coast. (§§6-8). *Note:* Offshore Petroleum (Royalty) Act 2006 replaced Petroleum (Submerged Lands) Royalty Act 1967 on July 1, 2008 and has similar coverage and objectives to1967 Act.

Petroleum Resource Rent Tax Assessment Act 1987 imposes profit based tax upon petroleum projects established after July 1, 1986. Where Resource Rent Tax applies excises and royalties are excluded. Act extended to apply to Joint Petroleum Development Area by Greater Sunrise Unitisation Agreement Implementation Act 2004.

Petroleum Revenue Act 1985 provides that where agreement is reached between State government and producer and between State government and Federal Government, profits based tax will be applied to exclusion of excises (§6) and royalties (Sched. 1[1][d]) upon projects otherwise in State jurisdiction.

Cleaner Fuels.

Energy Grants (Cleaner Fuels) Scheme Act 2004 establishes Energy Grants (Cleaner Fuels) Scheme, under which manufacturers and importers of cleaner fuels such as biodiesel entitled to special grant to offset customs charge or excise duty. Fuel Tax (Consequential and Transitional Provisions) Act 2006 assists transition to single fuel tax credit scheme established by Fuel Tax Act 2006.

See also Energy Grants (Credits) Scheme Act 2003. *Note:* Act will be repealed by Fuel Tax (Consequential and Transitional Provisions) Act 2006 on 1 July 2012.

See also category 16 Taxation, topic 16.07 Gasoline and Special Fuels Taxes.

Uranium.

Control over mining of prescribed substances associated with nuclear production (mainly uranium) governed by Atomic Energy Act 1953. (See also topic 15.01 Energy, subhead Nuclear.) Applies in all States and Territories. Proposals for uranium mining governed by ministerial assessments and approval as matter of national environmental significance pursuant to Environment Protection and Biodiversity Conservation Act 1999 (EPBC Act) which commenced July 16, 2000. (§§22-22A).

Environmental impact assessment and approval required for all proposed mining likely to have significant impact on environment or which is matter of national environmental importance under EPBC Act. (See category 10 Environment, topic 10.01 Environmental Regulation, subhead General Legislation.) Further special procedures needed in certain areas to satisfy Aboriginal Land Rights. See also topic 15.01 Energy, subhead Nuclear; Pt II, category 37 Mineral, Water and Fishing Rights, topic 37.02 Mines and Minerals.

15.03 WATER AND FISHING RIGHTS:

Water rights largely regulated by States and Territories. (See Pt II, category 37 Mineral, Water and Fishing Rights, topic 37.03 Water and Fishing Rights, subhead Water.) National Water Commission Act 2004 establishes Commission of same name (§6) to assist implementation of Intergovernmental Agreement on National Water Initiative between Commonwealth and States and Territories, signed in June 2004 (§7). Functions also include advising and making recommendations to governments on matters of national significance relating to water. (§7). Water Efficiency Labelling and Standards Act 2005 and Regulations 2005 form part of cooperative scheme between Commonwealth and States and Territories to encourage domestic and commercial use of water efficient products and appliances. (See: Water Efficiency Labelling and Standards Act 2005 [ACT]; Water Efficiency Labelling and Standards Act 2006 [NT]; Water Efficiency Labelling and Standards Act 2006 [WA]; Water Efficiency Labelling and Standards Act 2006 [SA]; Water Efficiency Labelling and Standards Act 2005 [Vic]; Water Efficiency Labelling and Standards [New South Wales] Act 2005 [NSW]; Water Efficiency Labelling and Standards Act 2005 [Qld]; and Water Efficiency Labelling and Standards Act 2005 [Tas].)

Water Act 2007 provides for implementation of Murray-Darling Basin intergovernmental agreement between Governments of Commonwealth, New South Wales, Queensland, South Australia and Victoria. Act establishes Murray-Darling Basin Authority (§171) and framework for management of Murray-Darling Basin water resources. Act provides that Minister may make rules relating to creation of water entitlement, trading in water resources and protection of environment and water charge rules to regulate water charges. (§97). Act makes Commonwealth Bureau of Meteorology responsible for collection and assessment of water resources data. (§120). See Water Market Rules 2009 and Water Charge (Termination Fees) Rules 2009. See Pt I, category 10, topic 10.01 Environmental Regulation.

Fisheries Regulation.

Fisheries Administration Act 1991 establishes Australian Fisheries Management Authority (AFMA) to implement efficient and cost-effective fisheries management and to ensure Australia's compliance with international obligations relating to fish stocks and fishing zones (§§5-6), particularly Convention on Conservation and Management of Highly Migratory Fish Stocks in the Western and Central Pacific Ocean (WCPFC). Act gives AFMA power to disclose information (including personal details) about suspected illegal fishers to assist in foreign investigation of breach. (§§7[1][gb], 7[3]). Fisheries Management Act 1991 regulates fishing within Australian fishing zone (AFZ). (§7). AFZ, third largest fishing zone in world, extends to outer limits of Exclusive Economic Zone (200 nautical miles) adjacent to Australian coastline and includes water surrounding Australian external territories. (§4). Coastal waters of, and waters within, States and Territories excluded from AFZ. (§4). (See topic 15.02 Mines and Minerals, subhead Minerals Other than Petroleum.) Act largely administered by AFMA. Joint Authorities (State and Commonwealth cooperation) may also be established. (§61).

Fisheries Management Act 1991 provides for statutory fishing rights (§21) administered by AFMA (§22) and fishing (§32) or scientific (§33) permits granted by AFMA. Act provides for surveillance of AFZ and enforcement of Act. (Pt 6). Act has certain extraterritorial application (§7), but officers' powers (see §84) do not extend to territorial sea of other countries (§87). Penalties for use of foreign boats in breach of Act include fines (§100) and seizure and destruction of unseaworthy or dangerous boats (§106D). Maximum penalty for foreign fishing offenses committed in AFZ A$825,000. (§100A). Act also amended to implement WCPFC obligations, granting AFMA ability to disclose information about illegal fishers to international organizations (§108B), extending surveillance and enforcement provisions (§§105H-J) and further managing detention of illegal foreign fishers (§§84, 105Q).

Other relevant legislation includes Fishing Levy Act 1991, Foreign Fishing Licences Levy Act 1991 and Statutory Fishing Rights Charge Act 1991.

Commonwealth cooperates with State and Territory fisheries regulation. See also Pt II, category 37 Mineral, Water and Fishing Rights, topic 37.03 Water and Fishing Rights, subhead Fisheries Regulation.

16 TAXATION

16.01 ADMINISTRATION:

Tax Administration.

Taxation Administration Act 1953 (TAA) and Income Tax Assessment Acts 1936 and 1997 (1936 Act and 1997 Act) administered by Federal Commissioner of Taxation (Commissioner) supported by Australian Tax Office (ATO). Self assessment regime (where taxpayer reports own income and deductions in each financial year [July 1 to June 30]) with comprehensive uniform penalties and appeal procedures. Base penalties for tax shortfall ranging from 25% of tax payable (e.g., not reasonably arguable position) to 75% (e.g., intentional disregard) plus interest can be imposed by Commissioner for breach resulting in underpayment of tax. Some penalties reduced if taxpayer makes voluntary disclosure and increased if hindrance or repeat offense. Post assessment of tax returns and auditing of taxpayers are main methods of enforcing 1936 and 1997 Acts.

System of public (applies to general class of transactions) and private (relates only to individual case) rulings are binding on Commissioner and set out ATO interpretation of particular provisions of tax law.

Taxpayer can object to tax decisions and can appeal Commissioner's decision on objection to Administrative Appeals Tribunal or Federal Court. Some decisions of Commissioner are subject to review under Administrative Decisions (Judicial Review) Act 1977 in Federal Court and Federal Magistrates Court.

Board of Taxation (BOT) is non-statutory advisory body that contributes business and broader community perspective advising Government to improve overall design of taxation laws and operation. Majority of BOT members are tax experts from private sector. Independent Inspector-General of Taxation (introduced Apr. 1, 2003) advises Government on improvements to tax administration systems.

Pay as You Go (PAYG) tax collection system applies from July 1, 2000.PAYG system has two elements: PAYG withholding and PAYG instalment. PAYG withholding details responsibilities of payers to withhold tax from payments and pay to Commissioner. Types of payments that require withholding are listed in TAA and include salary, retirement payments, and also, royalties, dividends and interest payments to non residents. Instalment component concerns taxpayers paying their own tax liability (i.e., company and non employment tax), generally quarterly PAYG instalment system is designed to match payment of tax with earning of associated income.

16.02 ALCOHOL, BEVERAGES AND TOBACCO TAXES:

Wine Tax.

29% wine equalization tax (WET) is single stage value-based tax generally payable on last wholesale sale of wine consumed in Australia. GST also applies to all alcoholic beverages sold in Australia.

Tobacco and Alcohol.

Excise duty applies to manufacture of tobacco and alcohol (except where WET applies) at varying rates, whilst customs duty applies to importation of tobacco and alcohol at varying rates.

16.03 BUSINESS TAXES:

R&D Deductions.

1936 Act provides deduction generally at rate of 125% of certain qualifying expenditure, including contracted expenditure to registered research agency. 175% deduction can apply to increased amounts of R&D expenditure (over average of previous three years' amounts).

Deduction available to eligible companies which are body corporates incorporated under law of State/Territory or Commonwealth. Includes companies, companies conducting R&D in partnership and companies incorporated in Australia that are trustees of public trading trusts. Changes introduced July 1, 2007 allow foreign-owned eligible companies undertaking Australian-centered R&D activities on behalf of foreign entity within same group to claim 100% deduction or 175% for activities above rolling three year average expenditure. Deduction only available if expenditure incurred by or on behalf of claimant company. Annual registration of eligible company and R&D activities required with Innovation Australia under Industry Research and Development Act 1986. Adequate records must be kept to substantiate expenditure, including R&D Plan.

Government to replace existing R&D deduction from July 1, 2010. New tax credit scheme to provide 45% refundable credit for firms with annual turnover of less than A$20 million. Refundable credit will be available to small businesses with tax loss, with no limit on level of R&D expenditure. Businesses with turnover of more than A$20 million will have access to 40% non-refundable credit. Non-refundable credit also available to companies undertaking R&D in Australia where intellectual property held offshore.

Investment in Australian Films.

Producer, location or post, digital and visual effects production (PDV) tax offset may be available for ``qualifying Australian production expenditure'' (QAPE) incurred by companies in making foreign or Australian films. Company must be Australian resident or nonresident with permanent establishment and Australian Business Number (ABN). For QAPE incurred on or after July 1, 2007, producers may be entitled to 40% producer offset for QAPE, or 20% if film is not feature film. For films commencing principal photography or production of animated image on or after May 8, 2007, if film certified by Arts Minister, may be entitled to location offset of 15% of QAPE. Total QAPE determines whether offset claimed in last year when general production expenditure incurred or last year when QAPE incurred. Post, digital and visual effects tax offset of 15% of film's QAPE where production commences on or after July 1, 2007. Offset claimed in income year when PDV expenditure has ceased being incurred.

Deductions previously available under 1936 Act Divs. 10B and 10BA repealed as consequence of new film production offsets described above. Application under Divs. 10B and 10BA no longer accepted and deduction no longer allowable.

Restriction on Tax Deductions for Interest Payments.

Thin capitalization rules in Div. 820 1997 Act apply to deny deductibility of debt finance expense (e.g., interest payments) where debt used to finance Australian operations exceeds certain limits. Disallowed debt deductions cannot be carried forward. Provisions apply to foreign controlled Australian entities, Australian entities operating internationally and foreign entities operating in Australia. De minimis thresholds must be exceeded before rules apply (do not apply if debt deduction less than A$250,000 for entity and associates in income year or entity and associates' average Australian assets divided by average total assets is 0.9 or greater). Rules differ depending on whether inward or outward investing entity and whether or not entity is Approved Deposit-taking Institution (ADI). Outward investor is entity or associate that is Australian controller of Australian controlled foreign entity or carrying on business through overseas permanent establishment (e.g., branch) or associate entity of outward investor. Inward investor is foreign controlled Australian entity or foreign entity with Australian income-producing assets. If entity both outward and inward investor, outward investor rules apply but cannot use world-wide gearing debt test.

Non-ADI is thinly capitalized if adjusted average debt exceeds prescribed maximum allowable debt. Non-ADI uses safe harbour test (debt to equity within three to one ratio) and arm's length debt test. Australian non-ADI (outward investor) can also use worldwide gearing debt test (up to 120% gearing of worldwide group).

ADI thinly capitalized if capital less than prescribed level. Applies to Australian banks and foreign banks with permanent establishment (e.g., bank branch). Minimum capital amount for ADI is lesser of amounts calculated using safe harbour capital and arm's length capital tests. Australian ADI (outward investor) can also use worldwide capital test. If equity capital is more than amount calculated under any available test thin capitalization rules do not apply to ADI.

Rules incorporate statutory definition of debt and equity based on economic substance of instrument. Debt defined as interest with effectively non-contingent obligation on issuer to return amount at least equal to issue price. Equity is shares, interests in company where return is contingent on economic performance or is discretionary, and converting interests. Instrument that could be classified as both debt and equity will be treated as debt. Debt/equity definition has implications for interest deductions and determining if distribution is dividend (and frankable).

Under tax consolidation regime, thin capitalization rules apply to head company of group.

Taxation of Financial Arrangements.

Taxation of Financial Arrangements Act 2009 introduced new Div. 230 to 1997 Act. Div. 230 deals with tax-timing and treatment of gains and losses from financial arrangements. Changes to apply for income years commencing on or after July 1, 2010. Taxpayers may elect to apply rules for income years commencing on or after July 1, 2009. Rules will not apply to individuals and certain entities that are below relevant thresholds if financial arrangement satisfies certain criteria.

Financial arrangement defined as cash settlable legal or equitable right to receive and/or obligation to provide financial benefit. Excludes arrangements if cash settlable rights and obligations are insignificant compared to other rights and obligations under arrangement or if cash settlable rights and obligations no longer exist. Includes foreign currency, non-equity shares in companies, commodities held by traders and some equity interests. Exclusions include short term arrangements (less than 12 months) for provision of goods or services, certain leasing or property arrangements, and trust or partnership interests.

Distinction between capital and revenue largely removed. Most gains and losses treated as being on revenue account. Apply realization or accrual method to determine tax timing treatment or, if eligible to make election, may apply fair value, retranslation, hedging and reliance on financial records method. Election irrevocable once made.

Anti-avoidance Provisions.

1936 Act contains Pt IVA general anti-avoidance rule (GAAR) which strikes down schemes entered into for sole or dominant purpose of obtaining tax benefit. Act authorizes Commissioner to cancel whole or part of tax benefit and effect tax adjustments. Other anti-avoidance measures operate to deny tax benefits from schemes involving withholding tax, stripping of company profits, franking credits, foreign tax credits and non-arm's length dealings in trading stock and capital assets.

1936 Act contains comprehensive regime to prevent understating of Australian income through inter-company transfer pricing arrangements, such as non-arm's length dealing between companies in two different countries where income and losses can be shifted by internal valuation of assets. Also applies to intra-company transactions across tax jurisdictions.

Financial Transaction Reports Act 1988 requires reporting of certain domestic currency transactions of A$10,000 or more to Australian Transaction Reporting and Analysis Centre (AUSTRAC). Must also report transfers of A$10,000 value in Australian or foreign currency to and from Australia. Act aims to minimize tax evasion in "cash economy" and to enable easier tracing of assets. Certain exemptions available. See also category 12 Foreign Trade and Commerce, topic 12.02 Exchange Control.

Crimes (Taxation Offences) Act 1980 makes it offense to fraudulently evade income or other taxes, by taking deliberate actions for person to enter into transaction or arrangement for purpose of ensuring that company or trustee will be or likely to be unable to pay tax assessed. Penalty up to ten years' imprisonment or A$110,000 fine (or both) and additional tax penalty.

Civil penalty regime for promoters of tax evasion schemes applies from Apr. 6, 2006. Penalty faced greater of A$550,000 (individuals) or A$2.75 million (companies) and twice total consideration promoter received from scheme.

Goods and Services Tax (GST).

GST at rate of 10% payable on supplies of goods and services (including land) made for consideration by registered entities, which have prescribed connection with Australia. GST also applies at rate of 10% on most importations of goods. Two circumstances where GST is not payable on supplies which would otherwise be taxable: supplies are "GST-free" and where they are "input taxed". Examples of supplies which are GST-free include health supplies, supply of some food items, education and going concerns. Examples of supplies which are input taxed include broad range of financial supplies (e.g., loans and share sales) and supply of residential premises.

Also limited circumstances where GST not payable on importation of goods: e.g., where goods would have been GST-free or input taxed if they had been supplied in Australia and certain category of concessionally taxed goods for customs purposes. Generally, entities registered for GST purposes are entitled to claim credit, known as input tax credit, for GST borne on creditable acquisitions made or goods imported for business purposes unless acquisitions or importations fall into one of two categories. First category comprises acquisitions or importations which are of private nature and second category comprises acquisitions or importations which relate to making of supplies which would be input taxed.

Reduced input taxed credits, are available for certain acquisitions relating to making of financial supplies (i.e., at rate of 75%). Entities which carry on business and which have annual turnover of at least A$75,000 or more (A$100,000 for non-profit entities) are required to be registered. Prior to July 1, 2007, registration turnover thresholds were A$50,000 and A$100,000, respectively. Certain revenue streams ignored when calculating turnover.

Consolidations.

From July 1, 2002, single entity rules in 1997 Act allow certain groups of Australian wholly-owned entities to be essentially treated as single entity for income tax purposes, with head company lodging single tax return for group. Consolidation optional but once elected irrevocable. Consolidation is "one in all in" for eligible subsidiary companies (on election by holding company, all eligible subsidiary companies must form part of consolidated group). On consolidation, under entry history rule head company inherits income tax history of subsidiary members as though subsidiary's tax history happened to head company. Consolidation regime only applies to income tax. Non-income tax matters (e.g., FBT) remain individual entities' responsibility. Transactions between members of group should have no tax consequences as entity cannot make loss or gain from dealing with itself. Where two or more eligible head companies owned by foreign resident company, multiple entry consolidated group (MEC group) provisions apply and one head company must be appointed. Subsidiary member that ceases to be eligible (i.e., not wholly-owned) automatically leaves consolidated group. Grouping provisions (e.g., for loss transfers and

CGT group rollover provisions) removed from July 1, 2003. Special grouping and value rules exist for entities joining and exiting consolidated group. Thin capitalisation rules also modified to recognize consolidated group as single entity.

Government has signalled broad range of amendments to resolve number of outstanding consolidation taxation issues including technical issues relating to tax cost setting rules and interaction between consolidation rules and other parts of tax law.

Small Business Entity Provisions.

For income years after June 30, 2001 certain taxpayers could elect Simplified Tax System (STS). STS provided administrative and tax concessions in respect of, e.g., capital allowances, trading stock and prepayments. From July 1, 2007, STS replaced with small business entity provisions. Certain entities eligible to continue using STS accounting method until opted out or no longer small business entity. Concessions previously available to entities that elected STS now apply for all small business entities without needing to elect. Eligible small business entity taxpayer has less than A$2 million aggregated turnover for year. Aggregated turnover is annual turnover plus annual turnover of connected or affiliated businesses. Aggregation rules similar to previous STS grouping rules.

16.04 EMPLOYMENT TAXES:

Fringe Benefits Tax (FBT) imposed by Fringe Benefits Tax Assessment Act 1986. FBT payable by employers on total taxable value of benefits (other than those excluded such as salary and superannuation contributions) provided to employee, or associate of employee, in respect of employee's employment. Specific rules determine taxable value of particular benefits, e.g., car benefits. FBT is annual tax. Each FBT year runs from Apr. 1 to following Mar. 31. FBT rate is 46.5%, but tax is calculated under gross-up rules. That is, fringe benefit's taxable value is calculated by formula 1/(1-FBT rate). If employer entitled to GST input tax credits, gross up formula adjusted to take into account effective lower fringe benefit taxable value of goods or services to employee. FBT rate then applied to grossed-up amount to determine tax payable. Income tax deduction is allowed to employers for cost of benefit and amount of FBT paid. Employers required to record grossed up value of fringe benefits on employees' annual employment statements to enable value of benefits to be taken into account when income tests utilized.

16.05 ESTATE DUTY AND GIFT DUTY:

Estate duty and gift duty abolished with effect from 1979.

16.06 ESTATE TAX:

See topic 16.05 Estate Duty and Gift Duty.

16.07 GASOLINE AND SPECIAL FUELS TAXES:

Petroleum Resource Rent Tax (PRRT).

Petroleum Resource Rent Tax Act 1987 (PRRTA) imposes tax on taxable profits of person in relation to offshore petroleum projects, other than North West Shelf. Rate of tax is 40%. Applies in addition to other taxes, e.g., company tax. Tax payable is assessed under Petroleum Resource Rent Tax Assessment Act 1987 (PRRTAA) and determined on accruals basis on excess of “assessable receipts” over “deductible expenditure” and transferred exploration expenditure. Replaced royalty and excise system which based tax payable on production rather than receipts. Designed to ensure community receives fair share of profits from non-renewable resources while ensuring adequate returns for risk taken in offshore exploration and development. Exploration expenses incurred after July 1, 1990 can be transferred to other projects held by same entity and deducted from notional taxable profit. Prior to July 1, 1990, expenditure deductible only against taxable profit from same PRRT liable project. PRRT losses carried forward are compounded and can only be applied against future PRRT income.

Payments or installments of PRRT are tax deductible in year in which paid. Refunds and amounts credited, paid or applied under PRRTA are included in taxpayer's assessable income. Self-assessment system applies to PRRT taxpayers from July 1, 2006. See also category 15 Mineral, Water and Fishing Rights, topic 15.02 Mines and Minerals, subhead Petroleum Taxation.

16.08 GIFT TAX:

See topic 16.05 Estate Duty and Gift Duty.

16.09 INCOME TAX:

Income Tax Framework.

Commonwealth government imposes national uniform income tax regime on all Australian source income and overseas source income with Australian connection. Current regime covered by 1936 and 1997 Acts. States share in national grants from Commonwealth in lieu of imposing own income tax. As of July 1, 2000 States also receive GST revenue.

Tax liability is imposed on taxable income. Tax rates specified in Income Tax Rates Act 1986. Taxable income defined as assessable income less deductions. Assessable income consists of ordinary income and statutory income. Ordinary income is income according to ordinary concepts, as interpreted by courts, and includes income from personal services (wages, bonuses, reimbursements), from property (rent, royalties, dividends, interest), and from carrying on business (trade or activity of commercial nature for profit, but not hobby).

Statutory income includes items such as: net capital gains (see subhead Capital Gains Tax [CGT], infra), benefits received under employee share benefits scheme and superannuation benefits. Retirement and termination payments are statutory income and included under 1997 Act Divs. 82, 83 and 301.

Capital Gains Tax (CGT).

1997 Act Pts 3-1 and 3-3 provide that net capital gains realized on assets acquired or deemed to have been acquired after Sept. 19, 1985 (post-CGT assets) are to be included in assessable income. Assets acquired earlier referred to as pre-CGT assets. Catch-all provisions rely on whether CGT Event (set out in 1997 Act Div. 104) occurs rather than asking whether gain itself is capital in nature. Disposal on death is not taxable but receipt as beneficiary upon death of third person is an acquisition and asset subject to tax on disposal.

Tax is levied at ordinary rates of personal and company income tax. Individuals, complying superannuation entities and trusts (but not companies) that make capital gain can be eligible for 50% discount (331/3% for superannuation entities) provided asset has been held for at least 12 months. Gains on taxpayer's main residence are exempt. In non-arm's length disposals where consideration is not at market value, market value substitution rules apply. Exception to market value substitution rule introduced in 2008 applies to capital gains in 2006-7 income year or later where CGT Event is cancellation, surrender or similar ending and CGT asset is share in widely held company or unit in widely held unit trust.

Net capital losses quarantined—can be carried forward but apply only to reduce future capital gains (cannot reduce other income). From July 1, 2005, broader range of expenditures recognized under CGT regime.

Definition of asset includes rights which are not forms of property: thus restrictive covenants and trade ties are subject to CGT.

Subdivs. 149-B and 149-C may ``freshen up'' pre-CGT asset by deeming to be post-CGT asset where majority underlying ownership changed. CGT exceptions (Div. 104), exemptions (Div. 118) and small business concessions (Div. 152) apply.

Replacement-asset and same-asset roll-over relief (e.g., scrip-for-scrip relief) where imposition of CGT is deferred or pre-CGT status of assets is preserved available. Roll-over relief also applies with transfers of assets on marriage breakdown. Under consolidation rules, group companies only entitled to roll-over relief if part of consolidated group and assets transferred between nonresident companies or nonresident company and head company of consolidated group (applies from July 1, 2003).

Exempt Income.

Two categories of income are non-assessable: exempt income and non-assessable non-exempt income. (1997 Act §§11-10 and 11-15). (1997 Act Subdiv. 11-B contains list of non-assessable non-exempt income provisions.) While both categories are excluded from taxable income, exempt income is taken into account in working out losses.

Tax Deductions.

System of general and specific deductions applies. In general, expenses incurred either in producing assessable income or in carrying on business for purpose of producing such income are deductible. Expenditure must have sufficient nexus with carrying on current income producing activity. Deduction not permitted to extent to which expenses are of capital, private or domestic nature. Item of expenditure may be apportioned into deductible and non-deductible components.

Entertainment expenses only deductible in very limited circumstances.

Where taxpayer incurs loss, viz excess of allowable deductions over sum of assessable and exempt income, loss can be carried forward indefinitely and deducted in subsequent income years. Company can only carry forward loss if either there has not been change in majority ownership or company carries on same business. From 2002/03 year, companies can choose to limit losses they utilize in year.

Commercial debt forgiveness measures provide that net amount of certain commercial debts forgiven is applied to reduce debtor's accumulated revenue losses, net capital losses, certain undeducted expenditures and cost bases of assets.

Previous rules allowing deduction for depreciating value of assets consolidated into new uniform capital allowances (UCA) rules in 1997 Act. From July 1, 2001, UCA rules apply in general to depreciating assets acquired on or after that date. Specific rules remain in UCA for some primary production and software development expenses. Retrospective changes made in June 2007 to UCA rules to align treatment of mining and exploration expenses with those under general depreciation rules (effective July 1, 2001). Generally taxpayer entitled to claim deduction for decline in value of depreciating asset over its effective life. Only taxpayer that “holds” asset entitled to claim deduction. “Holder” of asset is determined to be its economic holder, not just legal owner, though the two can coincide. Adjustments can occur on disposal of depreciating asset.

Separate deduction provisions for capital works (including buildings) and film expenditure (see topic 16.03 Business Taxes, subhead Investment in Australian Films).

Incentive deductions apply to encourage investment (but coupled with qualifications and anti-avoidance measures). Includes: development allowance, gifts, Australian films, intellectual property rights, R&D expenditure and environment-related incentives. Venture capital limited partnership regime replaces pooled development funds incentive program effective Jan. 1, 2007. Limited partnership entities making eligible venture capital investments exempted from income tax and CGT.

From July 1, 2005, provision of last resort allows deductibility over five years for business capital expenditures (and some pre-business expenditures) not elsewhere recognized in taxation laws.

Taxpayers.

Individuals.

Individuals required to lodge annual tax returns if their annual income exceeds A$6,000, usually by end of Oct. for previous financial year (July 1 to June 30). Progressive marginal tax rates for 2009/10 year: up to A$6,000/nil; A$6,001-$35,000/15%; A$35,001-$80,000/30%; A$80,001-$180,000/38%; A$180,001+/45%. These rates apply to resident taxpayers. Families meeting particular requirements are eligible for family assistance under program commenced July 1, 2000. Family assistance administered by Family Assistance Office. Income averaging scheme will still apply to artists, composers, inventors, performers, production associates, sportspersons, writers and primary producers to prevent over-taxing of fluctuating incomes over tax years.

Rebates (also known as tax offsets) subtracted from tax after it has been calculated. Rebates available to individual taxpayers for dependants, housekeepers, medical expenses and income arrears and also available for low income earners and certain superannuation contributions and private health payments.

Medicare Levy Act 1986 requires individuals to pay levy based on taxable income which funds national public health and hospital insurance. Rate is 1.5% for 2009/10 financial year. Low income earners (for individuals, income below A$17,794; for families, income below A$35,323 plus A$3,243 per dependent child) obtain full relief from paying levy and partial relief also available. Additional 1% levy surcharge payable if income exceeds A$73,000 from July 1, 2009 (A$146,000 for families, plus A$1,500 for each dependent child after first) if person not covered by private health insurance.

Tertiary student loans available under Higher Education Loan Programme (HELP) to assist payment of fees for study in Australia and overseas. HELP replaced Higher Education Contribution Scheme (HECS) from Jan. 1, 2005. HELP debts added to any earlier HECS debts to become single accumulated HELP debt on June 1, 2006. Deferred payment available under HELP scheme: repayments required once “repayment income” reaches minimum level. HELP liability paid up-front (part or whole) at 20% discount or repay accumulated debts at progressive rate from 4%-8% of repayment income.

Partnerships.

Broad definition of partnership for tax purposes, includes general law partnerships but also associations of person in receipt of income jointly (e.g., joint owners of property). Companies explicitly excluded from definition of partnership for tax purposes. Partnerships are generally not taxed at entity level. Instead, each individual partner includes their share of partnership income in individual assessable income. Partnership income is determined by lodging tax return for partnership. Limited partnerships treated as companies for tax purposes, with exception of certain foreign limited partnerships, which are taxed as partnerships from 2003/04 income year.

Trusts.

Trusts are subject to specific rules in 1936 Act; 1997 Act may also apply. Rules operate to tax either trustee or beneficiary, depending on who is entitled to trust income. Net income of trust estates is taxed to beneficiaries who are presently entitled to net income (and who are not under legal disability), otherwise to trustee. Losses are carried forward in trust to be offset against future trust income. Trustee generally taxed at 45% on income to which no beneficiary is presently entitled.

Companies.

Companies must lodge tax return for year of income with ATO. Corporate tax rate is 30% for year ending June 30, 2002 and subsequent years. This rate applies to taxable income.

Dividend Imputation System.

“Imputation” system applies to dividends paid on or after July 1, 1987. System prevents double taxation of company profits by allowing tax offset to shareholders who receive taxable dividends which have been paid out of profits in respect of which Australian income tax has already been paid by company (``franked'' dividends). Benefits of these franking credits only available to resident shareholders. For overseas shareholders, withholding tax not payable on fully franked dividends and therefore offset is not required. Amount transferred to company's share capital account from any of its other accounts may involve ``tainting'' rules. Consequences of tainting include that distribution from tainted account is taxed as dividend in hands of shareholder and is unfrankable. Company may ``untaint'' its share capital account but may be liable to pay untainting tax. Amended share capital tainting rules apply retrospectively from July 1, 1998. Rules not applicable in certain cases, e.g., in relation to insurance companies and debt-for-equity swaps in certain circumstances. Only head company of consolidated group maintains franking account.

Simplified imputation system applies from July 1, 2002. New system introduces franking account on tax paid basis and franking period (generally either six or 12 months). Extent of franking credits allocated to dividend distribution known as franking percentage. Franking percentage can be set by taxpayer company. Once franked distribution made in first franking period, benchmark rule applies to frank further distributions in that period to same extent. Franked distributions over benchmark lead to over-franking tax. Franked distribution under benchmark leads to under-franking penalty debit to franking account. Franking deficits tax will apply if franking account is in deficit at end of income year. While generally this can be offset against company's future income tax liabilities, offset may be reduced where there has been excessive over franking.

From July 1, 2000, eligible taxpayers (individuals, trustees and superannuation funds—not companies) entitled to refund of imputation credits for excess over income tax liability.

Australian and New Zealand governments now provide tax relief on trans-Tasman dividends.

Taxation of Public Trading Trusts.

Company tax arrangements extend to public unit trusts that carry on trade or business. Taxable income of public trading trust taxed at company rate. Distributions to unit-holders taxed at rate applicable to company dividends, subject to imputation system.

Superannuation.

Concessional tax rate of 15% applies to all taxable contributions and fund income provided fund complies with Superannuation Industry (Supervision) Act 1993 effective July 1, 1994. Non-complying funds are subject to tax at top marginal rate (45%) on income which includes employer contributions (even though not deductible) and realized capital gains. Taxation of superannuation benefits depends primarily on age of member and type of benefit. All superannuation benefits are tax free from July 1, 2007 for people over 60 years, where those benefits have been subject to tax in fund.

Until July 1, 2007, “reasonable benefits limit” rules restricted amount of superannuation benefits that would benefit from concessional tax treatment. “RBL” rules have been abolished and replaced with new “excess contributions taxes”. While there are no limits on amounts that can be contributed to superannuation funds, superannuation contributions that exceed specified “contribution caps” are subject to additional tax. For complying superannuation funds, CGT imposed on gains arising on disposal of all assets, whenever acquired. CGT discounts and indexation limitations introduced in 1999. Superannuation fund has ability, in certain instances, to elect 1/3 CGT discount or have frozen cost base used in calculating gains with no CGT discount. Funds can use imputation system and foreign tax credit system to reduce tax liabilities. Income determined as if fund trustee were resident taxpayer, subject to some adjustments. Investment income, net capital gains, taxable contributions and premium rebates or refunds generally included in assessable income. Usual range of deductions available to taxpayers under 1936 and 1997 Acts available to superannuation funds. Expenses for death or disability benefits (either on premiums basis or actual cost basis) also allowable deductions.

Employers may deduct contributions made to superannuation fund for purpose of providing superannuation benefits for persons who are their employees (known as concessional contributions). Employer who fails to make superannuation contributions in respect of employees (extended definition applies) at rate set out in Superannuation Guarantee (Administration) Act 1992 (9% for 2002-2003 and subsequent years) obliged to pay superannuation guarantee charge of amount equal to shortfall, plus interest and administration fee. Charge amount is not deductible. Shortfall amount paid to ATO and then distributed to relevant fund or employee. Concessional contributions to superannuation (excluding contributions made in accordance with Superannuation Guarantee [Administration] Act 1992 so as to avoid application of superannuation guarantee charge) limited to A$25,000 per person for 2009/10 financial year subject to additional tax.

Personal superannuation contributions from individual's post-tax income (known as non-concessional contributions) will continue not to be taxed when contributed and may be eligible for Government co-contribution (as currently). Non-concessional contributions limited to A$150,000 for 2009/10 year then indexed annually or subject to additional tax.

Taxation of Foreign Residents.

Nonresidents liable to Australian income tax on all income derived directly or indirectly from all sources in Australia. Income derived by nonresident from sources wholly out of Australia exempted from Australian income tax. Australian company receiving income from foreign sources can pay nontaxable dividends to foreign shareholders if they declare it to be conduit foreign income. Certain dividends, royalties and interest paid to nonresidents subject to withholding tax: this tax must be withheld from payment to nonresident and remitted to ATO. Amount represents final tax liability on income. Withholding tax on dividends paid by resident company to nonresidents generally imposed at flat rate of 30%, but where recipient is resident of country with which Australia has double tax agreement, rate is generally 15%. Australian company dividends paid to Australian branch of nonresident on or after June 26, 2005, taxed on net assessment basis, rather than under withholding tax. Not applicable to nonresident trusts. Dividends paid out of profits that have borne company tax (“franked” dividends) not subject to withholding tax. Withholding tax applies where royalties or interest paid by resident, except where expense of carrying on business outside Australia or where it is derived by nonresident carrying on business in Australia through branch. Rate of withholding tax on royalties is 30%; but generally 10% if recipient is in country with which Australia has double tax treaty. Withholding tax on interest generally imposed at flat rate of 10%. From July 1, 2004, new withholding obligations apply on payments made directly or indirectly to nonresidents for operating/promoting casino junket tour (at 3%), for entertainment and sports activities (at individual nonresident marginal tax rate or company tax rate) and for construction and related activities (at 5%). Existing withholding obligations are unaffected.

From July 1, 2008, foreign residents liable to Australian income tax on amounts paid from net income of managed investment trust from Australian sources (excluding dividends, interest, and royalties). Managed investment trust withholding tax applies. Proposal was announced in 2009/10 Federal Budget to allow Australian managed investment trust to make irrevocable election to apply CGT regime to disposals of eligible assets.

On or after Dec. 12, 2006, foreign resident makes capital gains only on disposal of taxable Australian property (as defined in 1997 Act).

Taxation of Foreign Sourced Income.

1936 Act contains accruals taxation system which attributes income derived by controlled foreign companies (CFC) to certain resident Australian controllers ("attributable taxpayers"). Application of CFC rules depends upon "control test" and whether company resident in "unlisted country" or "listed country". If income is derived by foreign company resident in listed country or by foreign company resident in unlisted country where company predominantly engaged in active business, then income is generally exempted from accruals system. For income subject to system, taxing point for attributable taxpayers is shifted from point at which dividend paid by foreign company to point at which distributable profits derived by foreign company.

Accruals system of taxation may also apply to foreign source income derived by nonresident trusts in "unlisted countries" where beneficiaries are Australian residents. In 2009/10 Federal Budget, Government announced intention to proceed with reforms to accruals taxation system. Measures anticipated to start in 2011, aimed at simplifying operation of current rules.

Foreign investment funds (FIF) provisions may apply to Australian residents who have interest in foreign company or foreign trust, even though not controlled by Australian resident, and Australian residents who have invested in foreign life assurance policy. 1936 Act contains provisions to determine amount of assessable income to be included in such taxpayer's income.

16.10 MOTOR VEHICLE TAXES:

33% luxury car tax applies to value of car over luxury car tax threshold (for 2009/10 year A$57,180 then indexed annually) and effectively payable on retail sale or importation of car. Paid in addition to any GST payable.

16.11 PROPERTY TAXES:

Land tax is imposed only by States and Territories. See also Pt II, category 40 Taxation, topic 40.06 Property Taxes.

16.12 SALES TAX:

Wholesale sales tax abolished July 1, 2000 with introduction of GST.

16.13 STAMP TAX:

Stamp duty is imposed only by States and Territories. See also Pt II, category 40 Taxation, topic 40.07 Stamp Tax.

16.14 TREATIES AND AGREEMENTS:

International Double Tax Agreements.

Agreements/Conventions have been reached with Argentina, Austria, Belgium, Canada, China, Czech Republic, Denmark, Fiji, Finland, France, Germany, Greece (restricted to international air transport), Hungary, India, Indonesia, Ireland, Italy, Japan, Kiribati, Korea, Malaysia, Malta, Mexico, Netherlands, New Zealand, Norway, Papua New Guinea, Philippines, Poland, Romania, Russia, Singapore, Slovakia, South Africa, Spain, Sri Lanka, Sweden, Switzerland, Taiwan, Thailand, U.K., U.S.A., and Vietnam. Agreements are currently being negotiated between Chile and Turkey. All agreements governed by International Tax Agreements Act 1953. Tax agreements prevail over any conflicting provisions in 1936 or 1997 Acts and over any other Act imposing Australian tax other than general anti-avoidance provisions.

Income Tax Convention signed on Aug. 6, 1982 and came into force in Australia on Oct. 31, 1983, between Australia and U.S.A. (U.S.A. Convention) for avoidance of double taxation and prevention of fiscal evasion with respect to taxes on income. 1983 Convention replaced and extended 1953 Convention. New protocol amending U.S.A. Convention signed Sept. 27, 2001 given effect by International Tax Agreements Act (No. 1) 2002. New protocol to apply for withholding tax purposes to payments made on and after July 1, 2003. For other taxes covered, protocol to apply from July 1, 2004.

Under U.S.A. Convention, income from real property is taxed by contracting state in which situated. Business profits of enterprise of one contracting state taxable only in that State unless enterprise carries on business in other contracting state through “permanent establishment” (extensively defined). If there is permanent establishment, only so much of business profits as are attributable to establishment can be taxed by other contracting state. Profits of resident of one contracting state from operation in international traffic of ships or aircraft taxable only in that contracting state. Associated enterprises are taxed as if operating at arm's length.

Dividend, interest and royalties from sources in one contracting state to which resident of other state entitled may be taxed in other contracting state. May also be taxed in contracting state of source, subject to certain rate limits. New protocol generally limits dividend withholding tax to 15%, but eliminates dividend withholding tax on payments to controller (80%) company resident in either contracting state, and reduces dividend withholding tax to 5% for other company distributions if 10% or more shareholding. Interest withholding tax continues generally at 10%, but eliminated on interest derived by government bodies and financial institutions and imposed at 15% if calculated by reference to profits. Royalty withholding tax reduced to 5% and amounts from equipment leasing no longer “royalty” (excluded). U.S.A. Convention also has provisions relating to: alienation of property, income from personal services, entertainers, pensions, annuities, alimony, child support, students and governmental remuneration.

Changes in new protocol to alienation of property article allowing source country to tax capital gains not specifically covered. Petroleum Resource Rent Tax included in new protocol.

Many double taxation agreements (DTA) contain most favoured nation (MFN) clauses requiring Australia to renegotiate terms of DTA with country if Australia subsequently enters into DTA with another country on more favourable terms. Reduction in withholding rates in U.S.A. Convention triggered MFN obligation with U.K. resulting in replaced agreement and amended protocol, generally effective from July 1, 2004, with no tax on dividend where recipient is company directly holding 80% of voting power of payer, 5% withholding tax where dividend recipient holds directly 10% of voting power, and 15% rate to other dividends. No withholding tax on interest derived by financial institution or government body. Rate on royalties reduced from 10% to 5%.

17 TRANSPORTATION

17.01 AIR NAVIGATION:

Liability— 1999 Montreal Convention, 1929 Warsaw Convention and parts of 1955 Protocol to Warsaw Convention, 1961 Guadalajara Convention and Montreal No. 4 Convention have force of law in Australia, by Civil Aviation (Carriers' Liability) Act 1959. By that Act maximum liability of domestic carriers for death or injury in air accidents A$500,000 per person, for international carriers 100,000 special drawing rights although may be higher if negligent (for value of special drawing rights see International Monetary Agreements Act 1947) and for other carriers liable under Pt IV 260,000 special drawing rights. Maximum liability of domestic carriers for registered baggage A$1,600, for international carriers 1,000 special drawing rights. Maximum liability of international carriers for delay 4,150 special drawing rights. Carrier's liability under Act extinguished two years after accident. Carriers to be insured against liability to passengers for death or injury. Where Pt IV of 1959 Act does not apply, Air Accidents (Commonwealth Government Liability) Act 1963 limits liability of Commonwealth to A$500,000 for death or injury in air accidents of Commonwealth employees and others traveling for Commonwealth purposes.

Regulation.

Air Navigation Act 1920 approves ratification of Convention on International Civil Aviation (Chicago 1944) and amending protocols (§3A[2]) and regulates for purposes under Commonwealth Constitution §51(i). Foreign aircraft must carry certificates, licenses and log books issued in home country. Foreign shareholdings in Australian international airlines (other than Qantas, see subhead Deregulation, infra) restricted to 49%. Air Navigation Regulations control airports, facilities and services, statistical returns, flight conditions, airline licenses, fares (``tariffs''), timetables, aviation security, penal provisions, prosecutions and similar matters.

Civil Aviation Act 1988 establishes Civil Aviation Safety Authority (CASA) to regulate civil aviation safety (http://www.casa.gov.au). Air Services Act 1995 establishes Airservices Australia to facilitate safe air navigation, air traffic services, aeronautical communications and information services, search, rescue, fire fighting, and aviation environmental regulation (http://www.airservicesaustralia.com). Transport Safety Investigation Act 2003 establishes Australian Transport Safety Bureau and regime for investigation of transport safety matters including aviation accidents (http://www.atsb.gov.au). Mutual recognition of New Zealand Air Operator's Certificates for aircraft with more than 30 seats or weighing over 15,000 kg. under Civil Aviation Act 1988 and Civil Aviation Regulations 1988. Airspace Act 2007 establishes need for Australian Airspace Policy Statement every three years which must be consistent with Chicago Convention and gives CASA further power to administer and regulate Australian-administered airspace. Civil Aviation Safety Regulations 1998 regulate administrative and enforcement procedures, certification and airworthiness requirements for aircraft and parts, registration and marking of aircraft, synthetic training devices, air traffic services licensing and training providers, medical standards, general operating and flight rules, drug and alcohol management plans, unmanned aircraft and rockets, aerodromes, telecommunication and radio navigation service providers and instrument flight procedure design.

Under Civil Aviation Act 1988 cockpit voice recording not generally admissible in court proceedings against crew member unless court makes order on public interest grounds. Party seeking damages may apply to court for order. (§§32AP, 32AR, 32AS).

Deregulation.

Qantas Sale Act 1992 regulates privatization of Qantas Airways. Act limits total foreign ownership of Qantas to 49%, including maximum 25% for foreign persons and maximum 35% for foreign airlines.

Commonwealth sold Essendon Airport 2001, Sydney Airport 2002, Bankstown, Camden and Hoxton Park airports 2003.

Domestic passenger market remains deregulated even though Airlines Agreement

(Termination) Act 1990 has been repealed.

Airports.

Airports Act 1996. Commonwealth can lease out airports. Only one company can lease each airport site. Company cannot lease more than one airport site. Transfer of leases restricted. Airport lessee company can contract out management of airport to another company. Obligations to use airport site for purpose consistent with continued use of airport. Minister must approve management agreements. Foreign ownership of airport operator companies restricted to 49%, cross ownership to 15%, and airline ownership for certain airports to 5%. Act regulates land use, planning and building controls, environmental management, monitoring of accounts, services and facilities by Australian Competition and Consumer Commission, approval of CASA for air traffic, rescue and fire-fighting services, protection of airspace around airports and access to airports and demand management at airports. Regulations may implement international agreements on airports.

Aviation Legislation Amendment Act 2002 repeals Federal Airports Corporation Act 1986; transfers contracts, assets and liabilities of Federal Airports Corporation, previously operator of major passenger airports, to Commonwealth. Adelaide Airport Curfew Act 2000 and Sydney Airport Curfew Act 1995 restrict hours of flight operations at Adelaide and Sydney Airports.

Fees & Charges.

Passenger Movement Charge Act 1978 imposes A$47 passenger movement charge. Air Passenger Ticket Levy (Imposition) Act 2001 and Air Passenger Ticket Levy (Collection) Act 2001 impose A$10 levy on Australian flights when ticket obtained in Australia. Australian airports impose security services charge (ranging from 20¢ to A$4.75) on passengers to recover cost of mandated airport security services under Aviation Transport Security Act 2004. (See: http://www.brisbaneairport.com.au; http://www.aal.com.au; http://www.goldcoastairport.com.au; http://www.melbourneairport.com.au; http://www.accc.gov.au; http://www.sydneyairport.com.au; and http://www.perthairport.net.au.) Australian Competition and Consumer Commission responsible for monitoring prices, costs and profits relating to aeronautical services and facilities at Adelaide, Brisbane, Melbourne, Perth and Sydney Airports under Airports Act 1996 Pt 7 and Trade Practices Act 1974 §95ZF.

Hijacking.

Air Navigation Act 1920 and Civil Aviation Act 1988 provide aircraft not of contracting state nationality (party to Convention on International Civil Aviation, Chicago 1944) cannot make nonscheduled flight into Australian territory without permission of CASA. Crimes (Aviation) Act 1991 relates to hijacking and other unlawful acts in respect of air transport, partly implements Convention on Offenses and Certain other Acts Committed on Board Aircraft (Tokyo 1970). Crimes (Hostages) Act 1989 implements International Convention Against Taking of Hostages (New York 1979).

Aviation Transport Security Act 2004 establishes regulatory framework to prevent unlawful interference with aviation. Aviation industry participants required to implement and comply with transport security programs. Secretary of Department may designate airports as security controlled airports. Includes enforcement, penalty, defense and appeal provisions. (See also topic 17.04 Shipping, suhead Maritime Security)

17.02 NAVIGATION:

See topic 17.04 Shipping.

17.03 ROAD TRANSPORT:

Interstate Transport.

Interstate Road Transport Act 1985. Motor vehicles weighing over 4.5 tonnes and engaged in carriage of passengers or goods between states, in trade or commerce, may be registered under Act as alternative to state registration. Interstate Road Transport Charge Act 1985 imposes registration fees. (See Interstate Road Transport Charge Regulations 2009.) Road Transport Reform (Heavy Vehicle Registration) Act 1997 establishes uniform national regime of heavy vehicle registration to be adopted by states. Size and weight restrictions regulated by Road Transport Reform (Heavy Vehicle Standards) Regulations 1995, Road Transport Reform (Mass and Loading) Regulations 1995 and Road Transport Reform (Oversize and Overmass Vehicles) Regulations 1995.

National Road Rules.

National Transport Commission Act 2003 establishes Commission to develop and maintain nationally consistent operational and regulatory reforms on road, rail and intermodal transport. (See http://www.ntc.gov.au). Act provides for making regulations in line with intergovernmental agreement. Under Road Transport Reform (Vehicles and Traffic) Act 1993 Commonwealth makes regulations for Australian Capital Territory (see Pt II, category 19 Introduction, topic 19.01 Government and Legal System) adopting Australian Road Rules published by National Transport Commission (current edition Feb. 2009). Australian Road Rules adopted in whole or substantially in each State or Territory: Traffic Regulations 1999 (NT); Road Transport (Safety and Traffic Management)Regulation 1999 (NSW); Road Rules 2008 (NSW); Australian Road Rules 1999 (SA); Road Traffic Code 2000 (WA); Road Safety (Road Rules) Regulations 1999 (Vic); Transport Operations (Road Use Management-Road Rules) Regulations 1999 (Qld); Traffic (Road Rules) Regulations 1999 (Tas).

17.04 SHIPPING:

Navigation Act 1912 applies to Australian and foreign non-defense or military ships. Foreign application limited to imported ships, Australian crewed or operated ships and ships operating within Australian territorial waters. Act provides for ships' seaworthiness, lifesaving appliances, fire protection, deck and load lines, signals, radio equipment, compasses, musters and drills, equipment checks, containers, collisions, loss and damage, dangerous goods, livestock, grain, deck and other cargoes, prevention of pollution, reporting of accidents, shipping dangers and shipping movement, crew employment, qualifications, health, accommodation, survey and safety certificates, pilotage, passengers, coasting trade, wrecks and salvage, ship owners' liability, legal proceedings and tonnage measurement. Trading ship or fishing fleet support vessel under State or Territory jurisdiction can be brought under Federal jurisdiction on application by owner. Act creates Marine Council (§424) which has power to make recommendations on suitability of person for service at sea, investigate certain matters relating to seamen's employment, provisioning and accommodation and report to Minister on any matter referred by Minister under Act. Act provides for regulations relating to maritime pilots in Australian coastal sea. Act adopts provisions of International Convention on Salvage (London 1989). Australian Maritime Safety Authority Act 1990 establishes Australian Maritime Safety Authority (AMSA) to combat marine pollution, provide search and rescue service and provide services to marine industry and government on request. AMSA Marine Order—Pt 63 requires sailing plan, position report, deviation report and final report to be lodged with Rescue Coordination Centre. (See http://www.amsa.gov.au.)

Admiralty Jurisdiction.

Admiralty Act 1988 applies to all non-inland ships and maritime claims. Admiralty jurisdiction conferred on Federal Court, Federal Magistrates Court (for acts in personam only) and State and Territory Supreme Courts. Actions in rem against ship, including service of process, must comply with Act. Provision for claims under international maritime liability conventions.

Limitation of Liability for Maritime Claims Act 1989 applies nearly all provisions of Convention on Limitation of Liability for Maritime Claims (London 1976) as amended at London May 2, 1996.

Carriage of Goods.

Carriage of Goods by Sea Act 1991 adopts International Convention for Unification of Certain Rules of Law Relating to Bills of Lading (Brussels 1924) as amended by Visby Protocol (Brussels 1968) and SDR Protocol (Brussels 1979) and United Nations Convention on the Carriage of Goods by Sea, including Annex 1 and 2 of Final Act of the UN Conference on the Carriage of Goods by Sea (Hamburg 1978). Act's adoption of conventions introduces regime of marine cargo liability. Carrier to ensure ship seaworthy, cargo-worthy, properly manned, equipped, supplied, loaded. Due diligence defense for carrier and vessel from liability for loss or damage arising from unseaworthiness.

Pollution.

Navigation Act 1912 regulates ship construction, oil pollution, chemical construction, sewage, and air pollution certificates to ensure tankers environmentally safe. Offenses if uncertified Australian tankers taken to sea and if foreign tankers enter Australian port contrary to direction of AMSA. Protection of the Sea (Prevention of Pollution from Ships) Act 1983 gives effect to Australia's obligations under International Convention for the Prevention of Pollution from Ships (London 1973) as amended by 1978 Protocol and Annex IV of Protocol on Environmental Protection to the Antarctic Treaty. Act imposes offenses for pollution by oil, noxious substances, packaged harmful substances, sewage, garbage and air pollution in territorial sea or exclusive economic zone and by Australian ships beyond exclusive economic zone. Act provides for detention of any foreign vessels suspected of causing maritime pollution in Australia's Exclusive Economic Zone.

Protection of the Sea (Oil Pollution Compensation Fund) Act (1993) gives effect to International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage (1971) as amended by 1976 Protocol, 1992 Protocol and 2003 Protocol by establishing compensation fund for certain oil pollution damage.

Protection of the Sea (Civil Liability) Act 1981 implements certain provisions of International Convention on Civil Liability for Oil Pollution Damage (1969) as amended by 1992 Protocol and provides for recovery for loss incurred by AMSA in combating maritime pollution.

Environment Protection (Sea Dumping) Act 1981establishes offenses in relation to dumping, incineration and artificial reef placement; liability for Commonwealth's expenses incurred remedying damage in relation to offenses. Act implements aspects of 1996 Protocol to the Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter (1972).

Protection of the Sea (Civil Liability for Bunker Oil Pollution Damage) Act 2008 gives effect to International Convention on Civil Liability for Bunker Oil Pollution Damage (2001).

See category 10 Environment, topic 10.01 Environmental Regulation.

Foreign ships taking on board passengers or cargo in Australia, to be landed at any other port in Australia ("coasting trade") liable to certain provisions of Navigation Act 1912. Under Pt VI, must be licensed, seamen to be paid Australian rates of pay. Coasting traders trading beyond Australia must pay seaman's wages before departure from Australia, master must produce evidence of payment. General provisions for terms of employment, discipline, manning, qualifications, health and accommodation apply to coasting trade.

Levies.

All nonexempt ships in Australian waters liable to Commonwealth levies. Marine Navigation Levy Act 1989 and Regulations 1991 impose levy for navigation services: 23.5c per ton up to 5,000 tons, 12c per ton between 5,000 and 20,000 tons, 7c per ton between 20,000 and 50,000 tons, 2.5c per ton over 50,000 tons, payable in accordance with Marine Navigation Levy Collection Act 1989 and Regulations 1990. Marine Navigation (Regulatory Functions) Levy Act 1991 and Regulations 1992 impose levy for safety and regulatory services: 17c per ton up to 5,000 tons, 17.1c per ton between 5,000 and 20,000 tons, 17c per ton between 20,000 and 50,000 tons, 15.5c per ton over 50,000 tons, payable in accordance with Marine Navigation (Regulatory Functions) Levy Collection Act 1991 and Regulations 1991.

Trade Practices Act 1974 (see category 3 Business Regulation and Commerce, topic 3.05 Monopolies, Restraint of Trade and Competition) prohibits restrictive trade practises. Pt X creates specific partial and conditional exceptions to §§44ZZRF, 44ZZRG, 44ZZRJ and 44ZZRK (making contract containing cartel provision or giving effect to cartel provision), §45 (contracts, arrangements or understandings that restrict dealings or affect competition) and §47 (exclusive dealing) for International Liner Cargo Shipping. Exceptions permit continued conference operations by Australian flag shipping through registered agreements.

Maritime Security.

Maritime Transport and Offshore Facilities Security Act 2003 applies to (subject to constitutional limitations) non-military and non-government-controlled Australian ships and non-military foreign ships in Australian waters intending to proceed to Australian ports if they are passenger ships, cargo ships of 500 gross tonnage or more, mobile offshore drilling units or ships prescribed by regulation. Act also covers security regulated offshore oil and gas facilities. Act regulates development, approval, variation and cancellation of, and compliance with, maritime, ship and offshore security plans, possession of International Ship Security Certificates, compliance with maritime security levels and security directions, provision of certain information, reporting of security incidents and other security measures. Secretary of Department can establish maritime security zones subject to additional security requirements. Failure to comply attracts penalties. Act also establishes powers of maritime security officials and enforcement procedures.

Australian authorities have power under Customs Act 1901, Migration Act 1958 and Fisheries Management Act 1991 to board, chase, search, move and destroy ships and aircraft involved in people smuggling, or which are unseaworthy or pose serious risks to navigation, safety, public health or environment. Acts also require operators of aircraft and ships arriving in and leaving Australia to provide information about passengers and crew. Regulations prescribe rules relating to reporting deadlines: Customs Regulations 1926 and Migration Regulations 1994. Customs officers able to detain and question persons suspected of committing certain offenses under Customs Act 1901. Migration Act 1958 permits maritime crew members to travel to and enter Australia on temporary visa known as maritime crew visa and imposes offenses in relation to carriage to Australia on noncitizens without documentation.

Compensation.

Seafarers Rehabilitation and Compensation Act 1992 establishes system of compensation and rehabilitation for seafarers injured in course of employment. Act applies to employees on prescribed ship engaged in trade or commerce with other countries or among States and Territories or on offshore industry vessel or trading shop to which Navigation Act 1912 applies by declaration of AMSA. Prescribed ship is ship to which Pt II of Navigation Act applies but does not include Government ships. Compensation payable by employer for medical expenses, loss of earning capacity, damage to property and non-economic loss. Employer to pay benefit on death of, or permanent injury to, employee. Employer to insure full liability under Act. Rehabilitation provisions to get employee back to suitable employment. Act establishes Seafarers Safety Rehabilitation and Compensation Authority to monitor operation of Act. (See http://www.seacare.gov.au.)

Shipping Registration Act 1981 requires Australian-owned ships to be registered. Ship is any vessel capable of navigating high seas. Australian-owned if majority owned by Australian nationals. Fishing vessels, government and defense force ships, pleasure craft and ships less than 24 meters exempt. AMSA can exempt Australian-owned ship operated by foreign resident under demise charter from registration.

Naval Defence Act 1910 provides for organization of Australian Navy. Act establishes Permanent Navy, whose members must render full time naval service, and Naval Reserve, whose members are not bound to serve continuously except voluntarily or subject to call out order under Defence Act 1903 in circumstances of war, defence emergency or preparation, peacekeeping, national security, community activities of international or national significance, civil aid, humanitarian assistance, medical emergency or disaster relief. Defence Act 1903 also permits call out of Australian Navy as last resort in response to domestic violence or threats to Commonwealth interests. Act prescribes powers that naval personnel may exercise during call-out.

18 TREATIES AND CONVENTIONS

18.01 TREATIES:

Australia-U.S. Free Trade Agreement agreed Feb. 8, 2004, Washington, signed May 18, 2004, Washington. Entered into force Jan. 1, 2005.

Agreement Establishing ASEAN Australia-New Zealand Free Trade Area, signed Feb. 27, 2009. Expected to enter into force Jan. 1, 2010.

Australia-Thailand Free Trade Agreement signed July 5, 2004. Entered into force Jan. 1, 2005.

Singapore-Australia Free Trade Agreement. Entered into force July 28, 2003.

Australia-Chile Free Trade Agreement. Signed July 20, 2008. Entered into force Mar. 6, 2009.

Australia-New Zealand Closer Economic Relations Trade Agreement. Entered into force Jan. 1, 1983.

Australia is member of World Trade Organization. Bilateral preferential trade agreements in force between Australia and Canada, Malaysia and Papua New Guinea. Bilateral trade agreements in force between Australia and Bahrain, Brazil, China, Croatia, Egypt, European Community, Fiji, India, Indonesia, Iraq, Israel, Italy, Japan, Jordan, Kazakhstan, Republic of Korea, Lebanon, Mexico, Nigeria, Oman, Pakistan, Peru, Philippines, Romania, Russia, Turkey, Ukraine, United Arab Emirates, Venezuela, and Vietnam.

May 12, 2003 Australia and U.S.A. exchanged instruments of ratification of Protocol Amending Australia-U.S.A. Convention for Avoidance of Double Taxation and Prevention of Fiscal Evasion with respect to Taxes on Income, bringing protocol into force. Protocol amends double tax treaty between Australia and U.S.A. For withholding taxes, protocol applies to payments made on or after July 1, 2003. For other taxes covered, protocol applies in respect of income, profits or gains of years of income beginning on or after July 1, 2004. See also category 16 Taxation, topic 16.14 Treaties and Agreements

Mar. 6, 2003, Australia and Timor-Leste signed Unitization Agreement and

Memorandum of Understanding relating to exploitation of Greater Sunrise. Agreement entered into force Feb. 23, 2007. See also category 15 Minerals, Water and Fishing Rights, topic 15.02 Mines and Minerals.

See also Pt I, categories 4 Citizenship, topic 4.02 Discrimination; 8 Dispute Resolution; 10 Environment, topic 10.01 Environmental Regulation; 12 Foreign Trade and Commerce, topics 12.01 Customs, 12.06 Foreign Trade Regulations; 14 Intellectual Property, topics 14.01 Copyright, 14.02 Design, 14.03 Patents; 15 Mineral, Water and Fishing Rights, topics 15.01 Energy, 15.02 Mines and Minerals; 16 Taxation, topics 16.09 Income Tax, 16.14 Treaties and Agreements; 17 Transportation, topic 17.04 Shipping; Pt II, categories 21 Business Regulation and Commerce, topic 21.12 Sales; 24 Courts and Legislature, topic 24.01 Administrative Appeals, subhead Treaties.

Australia is party to many international conventions, treaties and agreements. These include Hague Conventions of 1907, Geneva Conventions of 1949 (and Protocols I and II), Status of Refugees Convention 1951, Patent Cooperation Treaty 1970, Treaty on the Non-Proliferation of Nuclear Weapons 1968 and Safeguards Agreement 1974, United Nations Convention on the Law of the Sea 1982, South Pacific Nuclear Free Zone Treaty 1985, Treaty on Fisheries between the Governments of Certain Pacific Island States and the Government of the U.S.A. 1987, United Nations Framework Convention on Climate Change 1992 (and Kyoto Protocol 1997), Convention on Nuclear Safety 1994, Comprehensive Nuclear-Test-Ban Treaty 1996 (not yet in force), Convention on Prohibition of Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and their Destruction 1997, Rome Statute of the International Criminal Court 1998, United Nations Convention against Corruption 2003 and numerous human rights Treaties and Conventions. See also Australian Treaties Database, Department of Foreign Affairs and Trade (http://www.dfat.gov.au/treaties/).

Note: High Court in Minister for Immigration and Ethnic Affairs v Teoh (1995) 183 CLR 273 held, "ratification of a convention is a positive statement by the executive government of this country to the world and to the Australian people that the executive government and its agencies will act in accordance with Convention" (at 291). Indicates that, absent any statutory or executive indications to contrary, Australia's ratification of Convention is adequate foundation for legitimate expectation that decision-makers will act in conformity with terms of Convention. However, in 1995 and 1997, joint statements issued by Minister for Foreign Affairs and Attorney-General on behalf of federal executive government indicated that ratification of Treaty does not create legitimate expectations in Administrative Law. Also strong criticism of legitimate expectation doctrine by High Court in Lam case (Minister for Immigration and Cultural Affairs, Re: Ex parte Lam [2003] 214 CLR 1). Issue not resolved by legislation.

Joint Standing Committee on Treaties established in 1996 inquires into and reports on matters arising from treaties (http://www.aph.gov.au/house/committee/jsct/index.htm).

International Sale of Goods.

United Nations Convention on Contracts for the International Sale of Goods, in force since Apr. 1, 1989. See also Pt II, category 21 Business Regulation and Commerce, topic 21.12 Sales.

Terrorism.

Sept. 28, 2001 UN Security Council adopted Resolution 1373 (2001), imposing series of obligations on UN Member States to suppress terrorism. Includes obligation to freeze assets, funds or economic resources of persons and entities who commit or attempt to commit, terrorist acts or participate in or facilitate commission of terrorist acts. From Dec. 13, 2002, obligation implemented in Australia through Pt 4 of Charter of the United Nations Act 1945 and Charter of the United Nations (Terrorism and Dealings with Assets) Regulations 2002. Pt 4 of Act and 2002

Regulations replace Charter of the United Nations (Anti-terrorism Measures) Regulations 2001 that had been in operation since Oct. 15, 2001. International Convention for Suppression of Financing of Terrorism entered into force Oct. 26, 2002. Sept. 14, 2005, signed International Convention for Suppression of Acts of Nuclear Terrorism (not yet in force).

PART II THE STATES

19 INTRODUCTION

19.01 GOVERNMENT AND LEGAL SYSTEM:

States continue to retain constitutions which, as colonies, they possessed prior to federation, except as modified by Commonwealth Constitution and as amended by State Parliaments from time to time.

The governors of the States are appointed by the Queen on the advice of the State Premier, and occupy a similar position and carry out similar duties to the Governor-General in the Commonwealth and the Queen in England.

Parliament.

Every State has separate parliament, which, except in Queensland, consists of two houses, both being elected. Queensland has one elected house. Each Territory has separate parliament which consists of one house. Sitting patterns of each house in States and Territories vary. See website for each State and Territory for current sitting schedule: http://www.parliament.nsw.gov.au (NSW); http://www.parliament.sa.gov.au (SA); http://www.parliament.tas.gov.au (TAS); http://www.parliament.vic.gov.au (Vic); http://www.parliament.wa.gov.au/index.htm (WA); http://www.parliament.qld.gov.au/ (Qld); http://www.legassembly.act.gov.au (ACT); http://www.nt.gov.au/lant (NT).

Statute of Westminster 1931 (U.K.), Act of United Kingdom Parliament, established in U.K. legislation independence of government of Commonwealth of Australia, and governments of other former Dominions of U.K. Statute of Westminster was adopted by Commonwealth of Australia passing Statute of Westminster Adoption Act 1942. Its substantive provisions had no application to States. State legislatures had no power to amend or repeal paramount British legislation which had entered into legislation of States. British amending acts would not apply unless clear and unequivocal statement that British parliament intended amending acts to apply to States. However, all States have enacted Australia Acts (Request) legislation which, with Australia (Request and Consent) Act 1985 and identical legislation in U.K. Parliament, remove legal incidents of colonial status from Mar. 3, 1986. State legislative power defined in broad terms and enlarged by Australia Act 1986, but Australia Act 1986 restrains State parliaments from enacting legislation that would repeal, amend or be repugnant to Australia Act 1986, Commonwealth of Australia Constitution Act 1900, Constitution of the Commonwealth or Statute of Westminster 1931. (See §5[b]). Constitution provides that Commonwealth legislation prevails in event of inconsistency with any State legislation. (§109).

Territories.

Northern Territory (Self-Government) Act 1978 substantially grants local autonomy to Northern Territory. Act gives Northern Territory control over its own treasury as well as general grant of plenary legislative powers to elected unicameral Legislative Assembly.

In Australian Capital Territory, Seat of Government (Administration) Act 1910 grants power to Governor-General to make Ordinances for government of Australian Capital Territory. Under Seat of Government Acceptance Act 1909, certain laws of New South Wales have effect in Australian Capital Territory. Australian Capital Territory (Self-Government) Act 1988 establishes independent Legislative Assembly. (§8[1]). Commonwealth still retains power to disallow legislation passed by territory legislatures.

19.02 HOLIDAYS:

In all States and Territories Jan. 1 (New Year's Day), Jan. 26 (Australia Day), Good Friday, Easter Saturday (except for Tasmania), Easter Monday, Apr. 25 (Anzac Day, which is in some States and Territories celebrated on following Mon. if Apr. 25 falls on weekend), Queen's Birthday (which is celebrated on proclaimed date), Dec. 25 (Christmas Day) and Dec. 26 (Boxing Day, or Proclamation Day in South Australia) are public holidays. Labour Day, celebrated on different days in different States, is also a holiday (with exception of Northern Territory and Tasmania). Some places celebrate public holidays in honor of premier horse race (e.g., Melbourne Cup Day [first Tues. in Nov.: Victoria] or Adelaide Cup Day [Mar.: South Australia]), agricultural show (e.g., Royal Queensland Show Day [Aug.: Brisbane (regional observance only)] Alice Springs Show Day [July: Northern Territory (regional observance only)]), or other event (e.g., Royal Hobart Regatta [Feb.: Tasmania]). Individual States' and Territories' holidays are Foundation Day (June: Western Australia), Canberra Day (Mar.: Australian Capital Territory), Family and Community Day (Nov.: Australian Capital Territory), Picnic Day (Aug.: Northern Territory), May Day (May: Northern Territory), Tennant Creek Show Day (July: Northern Territory [regional observance only]), Katherine Show Day (July: Northern Territory [regional observance only]), Darwin Show Day (July: Northern Territory [regional observance only]), Boroloola Show Day (June: Northern Territory [regional observance only]), Bank Holiday (Aug.: New South Wales [regional observance only]), Devonport Cup (Jan.: Tasmania [regional observance only]), Launceston Cup (Feb.: Tasmania [regional observance only]), King Island Show (Mar.: Tasmania [regional observance only]), AGFEST (May: Tasmania, regional observance only), Burnie Show (Oct.: Tasmania [regional observance only]), Royal Launceston Show (Oct.: Tasmania [regional observance only]), Flinders Island Show (Oct.: Tasmania [regional observance only]), Royal Hobart Show (Oct.: Tasmania [regional observance only]), Recreation Day (Nov.: Tasmania [regional observance only]), Devonport Show (Nov.: Tasmania [regional observance only]) and Eight Hours Day (Mar.: Tasmania).

Bills of Exchange and promissory notes apparently payable on Sun. or public holidays, may be paid on the day following. In general, no person is compellable to do any act or make any payment on public holiday which he would not be obliged to do or make on Sun. Position with regard to Sun. is governed by statutes in each State regulating particular situations.

In all States and Territories, where last day of period prescribed by statute or ordinance for doing anything falls on Sat., Sun., or public or bank holiday in place where thing is to be done, thing may be done on first day following that is not Sat., Sun., or public or bank holiday.

19.03 OFFICE HOURS AND TIME ZONE:

New South Wales (except Broken Hill), Victoria, Queensland, Tasmania and Australian Capital Territory are ten hours ahead of Greenwich Mean Time (GMT). South Australia, Northern Territory and Broken Hill are 9.5 hours ahead of GMT. Western Australia is eight hours ahead of GMT. Daylight saving time (one extra hour ahead of GMT) is observed in New South Wales, Victoria, South Australia, Tasmania, and Australian Capital Territory. Western Australia, Queensland and Northern Territory do not observe daylight saving. Across south-eastern states and Australian Capital Territory, daylight saving begins 2 a.m. Eastern Standard Time on first Sun. in Oct., and ends 2 a.m. Eastern Standard Time (3 a.m. daylight savings time) on first Sun. in Apr. Office hours are generally from 9 a.m. to 5 p.m, Mon. to Fri.

20 BUSINESS ORGANIZATIONS

20.01 AGENCY:

Existence of relationship of principal and agent is question of fact, and agency may exist notwithstanding fact that agent is described as buyer, or referred to by some term inconsistent with agency, and vice versa. Relationship of principal and agent may arise: (a) By express appointment; (b) by implied agreement whereby conduct of parties toward each other makes it reasonable to infer consent to relationship of agency; (c) as result of doctrine of estoppel whereby principal represents to third party by conduct or words that person is their agent; (d) by ratification whereby principal ratifies and adopts contract entered into by professed agent without previous authority; (e) as result of doctrine of necessity; or (f) as result of presumption arising from cohabitation. Agent owes certain duties to their principal including duty to perform, exercise care, skill and diligence and certain fiduciary duties (e.g., to make full disclosure, avoid conflicts of interest and not to profit from position). Third persons dealing with agent may have recourse against principal or agent or both. A del credere agent guarantees to their principal due performance by third persons of contract he enters into on behalf of principal. Del credere agency may be implied from facts showing agent was charging additional commission for risk.

20.02 ASSOCIATIONS:

Unincorporated associations or partnerships of more than 20 persons formed for purpose of acquisition of gain by association or partnership or by individual members thereof are prohibited unless partnership or association is incorporated or formed under Australian law (Corporations Act 2001 §115) or is limited partnership. Corporations Act 2001 permits partnerships in certain proclaimed professions to consist of more than 20 persons. Limit for solicitors is 400 persons, for architects, chemists, and veterinary surgeons is 100 persons, for sharebrokers, stockbrokers, medical practitioners, actuaries, patent attorneys and trademark attorneys is 50 persons, and for accountants is 1,000 persons. Law also makes provision for winding up of associations.

In all States and Territories provision has been made for incorporation of associations not formed for purpose of trading or securing pecuniary benefit to members and which also (for purposes of South Australia, Western Australia, Tasmania and Northern Territory) have purpose that falls within certain listed purposes (Associations Incorporation Act 1981 [Vic]; Associations Incorporation Act 2009 [NSW]; Associations Incorporation Act 1981 [Qld]; Associations Incorporation Act 1985 [SA]; Associations Incorporation Act 1987 [WA]; Associations Incorporation Act 1964 [Tas]; Associations Incorporation Act 1991 [ACT]; and Associations Act 2003 [NT]). Incorporated body has power to hold property and deal with it as fully and effectually as natural person and may sue or be sued in its corporate name. Contracts made on behalf of such body may be under common seal or executed by person acting under its express or implied authority and will be effective in law and will bind association and its successors and all other parties thereto. Personal liability of members to creditors of association is limited solely to express provision in rules or trust deed of association. In Australian Capital Territory, New South Wales and Victoria, members can be personally liable to creditors of association where there has been contravention of restriction on trade provision. Winding up of incorporated associations is, with necessary modifications, governed by winding up provisions of Corporations Act 2001. In all States and Territories (including Tasmania as of July 26, 2006), incorporated associations may register as companies. Corporations Act 2001 provides for registration process under Pt 5B.1. In New South Wales, Northern Territory and Victoria, incorporated association may be directed to become registered as company. Associations Incorporation Acts also deal with other matters, such as required contents of rules of association, voting when interested party, amalgamations, accounts, auditors, meetings, etc.

20.03 BUSINESS NAMES:

Legislation in each State and Territory regulates business names (Business Names Act 1962 [Vic]; Business Names Act 2002 [NSW]; Business Names Act 1962 [Qld]; Business Names Act 1996 [SA]; Business Names Act 1962 [WA]; Business Names Act 1962 [Tas]; Business Names Act 1963 [ACT]; and Business Names Act 2007 [NT]).

Any person, company or partnership trading or carrying on business under name not being their full name or names, must register name as business name in State or Territory concerned, showing name or names of persons or company so trading or carrying on business, and must register changes of these and other particulars from time to time, and must notify proper officer if business is discontinued. Rules as to "carrying on business" and acts not regarded as such (e.g., Victoria—not carrying on business merely because funds invested or property held in State). Business name must be used and cannot be registered merely as device to prevent use by others. Business names will not be registered if deceptive or likely to cause confusion with other business names or company names reserved or registered in State or Territory in question. Australian Securities and Investments Commission may act as agent of proper officer. Business name registers kept in each State and Territory.

Business Names Acts do not expressly confer on persons registered any right to enjoin others from misappropriating registered business names, but such persons have usual rights against those who misappropriate distinctive features of their businesses, e.g., action for "passing-off." (See Pt I, category 14 Intellectual Property, topic 14.04 Trademarks, subhead Unregistered Trademarks.)

20.04 CORPORATIONS:

Governed by Corporations Act 2001. See Pt I, category 2 Business Organizations, topic 2.01 Corporations, subhead Foreign Corporations.

20.05 FOREIGN CORPORATIONS:

See Pt I, category 2 Business Organizations, topic 2.01 Corporations.

20.06 PARTNERSHIPS:

Membership.

See topic 20.02 Associations.

Liability.

Partners are jointly liable for debts of partnership, and may sue and be sued in partnership name. Order in bankruptcy may be made against partnership and operates as sequestration of estates of several partners. Corporations may be partners, provided they have such power under their constitution or other charter or (if pursuant to Corporations Act company chooses not to list any objects) provided such power is not expressly prohibited in those documents. In most States and Territories there is statutory provision for limited partnerships whereby some partners may have limited liability: Partnership Act 1891 (Qld); Limited Partnerships Act 1909 (WA); Partnership Act 1891 (Tas); Partnership Act 1892 (NSW); Partnership Act 1891 (SA); Partnership Act 1963 (ACT); Partnership Act 1958 (Vic); and Partnership Act 1997 (NT).

Form.

No particular formalities are necessary to constitute a partnership, the contract for which may be either verbal or written, expressed or implied (except partnerships effecting transfer of interest in real property and partnerships that will exist for more than a year which must be evidenced in writing).

Agreement for partnership which is to last for more than a year need not be in writing, if it has been partly performed. Where no fixed term has been agreed upon for partnership, any partner may dissolve partnership at any time by giving notice to other partners. Partnership will also be dissolved by expiration of time specified in partnership agreement; by death of any one member of partnership, unless there is agreement to contrary; by bankruptcy of any one partner, unless there is agreement to contrary; or by happening of any event which renders business of firm illegal. Courts have wide powers to dissolve partnerships.

Relevant acts are Partnership Act 1892 (NSW); Partnership Act 1958 (Vic); Partnership Act 1891 (SA); Partnership Act 1891 (Qld); Partnership Act 1895 (WA); Partnership Act 1891 (Tas); Partnership Act 1963 (ACT); and Partnership Act 1997 (NT).

21 BUSINESS REGULATION AND COMMERCE

21.01 BILLS OF SALE:

See category 38 Mortgages, topic 38.01 Chattel Mortgages.

21.02 COMMERCIAL REGISTER:

See category 20 Business Organizations, topics 20.03 Business Names, 20.04 Corporations.

21.03 CONSUMER PROTECTION:

All States and Territories have enacted legislation establishing bodies to investigate matters affecting interests of consumers and to make recommendations in relation thereto to respective Governments, to advise and receive complaints from consumers and to conduct research into matters affecting consumers. See Fair Trading Act 1999 (Vic); Fair Trading Act 1987 (NSW); Fair Trading Act 1989 (Qld); Fair Trading Act 1987 (SA); Consumer Affairs Act 1971 (WA); Fair Trading (Consumer Affairs) Act 1973 (ACT); Consumer Affairs and Fair Trading Act 1990 (NT); and Consumer Affairs Act 1988 (Tas). New South Wales, Victoria and Queensland have enacted legislation establishing and enabling Tribunals to deal with consumer claims. (ACT Civil and Administrative Appeals Tribunal Act 2008 [ACT] and Fair Trading [Consumer Affairs] Act 1973 [ACT]; Consumer Claims Act 1998 [NSW] and Consumer, Trader and Tenancy Tribunal Act 2001 [NSW]; Fair Trading Act 1999 [Vic] and Victorian Civil and Administrative Tribunal Act 1998 [Vic]). In Queensland, Small Claims Tribunal established under Small Claims Tribunals Act 1973 (Qld) will be replaced on Dec. 1, 2009 by Queensland Civil and Administrative Tribunal, established under Queensland Civil and Administrative Tribunal Act 2009 (Qld).

Remaining States and Territories provide for small claims proceedings within existing court systems (Magistrates Court [Civil Division] Act 1992 [Tas] Pt 5, Div. 4; Small Claims Act 1974 [NT] Pt II; Magistrates Court Act 1991 [SA] Pt 2, Div. 3 and Pt 5, Div. 2; and Magistrates Court [Civil Proceedings] Act 2004 [WA] Pt IV). In addition there are various other provisions which differ between States and Territories but include requirements relating to safe design and construction of goods, product safety and recall, product information standards, dangerous goods, misleading and deceptive conduct, unconscionable conduct, false or misleading representations, gifts and prizes, bait advertising, referral selling, pyramid selling, unsolicited credit and debit cards, unsolicited goods, mock auctions, door to door sales and unordered goods (See Fair Trading Act 1999 [Vic]; Fair Trading Act 1987 [SA]; Fair Trading Act 1987 [WA]; Fair Trading Act 1987 [NSW]; Fair Trading Act 1989 [Qld]; Fair Trading Act 1990 [Tas]; Consumer Affairs and Fair Trading Act 1990 [NT]; Fair Trading Act 1992 [ACT]; Fair Trading [Consumer Affairs] Act 1973 [ACT]; Sale of Hazardous Goods Act 1977 [Tas]; Door to Door Trading Act 1987 [WA]; Door to Door Trading Act 1986 [Tas]; Door-to-Door Trading Act 1991 [ACT]; and Unordered Goods and Services Act 1973 [Tas].) Some Acts also imply certain terms into sales and/or leases of goods to consumers (e.g., Fair Trading Act 1999 [Vic] Pt 2A; Goods Act 1958 [Vic]; Consumer Transactions Act 1972 [SA]; Consumer Affairs and Fair Trading Act 1990 [NT] Pt 5 Div. 2; Sale of Goods Act 1972 [NT]; Sale of Goods Act 1954 [ACT]; Sale of Goods Act 1923 [NSW]; Sale of Goods Act 1896 [Qld]; Sale of Goods Act 1896 [Tas]; and Sale of Goods Act 1895 [WA]).

Fair Trading Act 1987 (SA) Pt V, Consumer Affairs and Fair Trading Act 1990 (NT) Pt 8 and Fair Trading Act 1999 (Vic) Pt 5A confer on consumers certain rights in relation to accumulated information that might be used to their detriment, e.g., credit information. In New South Wales similar provisions apply by self-regulation of interested parties. Privacy Act 1988 provides for national regulation of consumer credit reporting to prevent privacy abuse and to establish uniformity between States and Territories in this area. See also Pt I, category 3 Business Regulation and Commerce, topic 3.01 Banking and Currency, subhead Privacy.

Chattel Securities Act 1987 (Vic) and Chattel Securities Act 1987 (WA) regulate granting and taking of security over goods (see category 38 Mortgages, topic 38.01 Chattel Mortgages). All States and Territories have consumer credit legislation in force: Consumer Credit (Victoria) Act 1995; Consumer Credit (New South Wales) Act 1995; Consumer Credit (Queensland) Act 1994; Consumer Credit (Tasmania) Act 1996; Consumer Credit (Northern Territory) Act 1995; Consumer Credit (South Australia) Act 1995; Consumer Credit Act 1995 (ACT); and Consumer Credit (Western Australia) Act 1996. Acts incorporate Consumer Credit Code which operates in all States and Territories. Code regulates negotiation of credit contracts, interest charges, fees, mortgages, guarantees, related sale contracts, related insurance contracts, enforcement and advertising. Code not limited to financial institutions. Applies to any person who carries on business, if consumer credit provided as part of, or incidentally to, business. (See http://www.creditcode.gov.au.)

See also topic 21.07 Interest.

21.04 CONTRACTS:

The law of contracts throughout Australia, especially with regard to necessity for consideration and effect of sealing, follows English law. Certain contracts require written evidence to make them enforceable. See topic 21.05 Frauds, Statute of. See also category 39 Property, topic 39.04 Deeds.

Electronic Commerce.

See topic 21.06 Information Technology, Internet and New Media, subhead Electronic Commerce.

Excuses for Nonperformance.

Nonperformance of contract legal and valid at time of agreement only excused if clause specifically excuses performance in circumstances or if contract frustrated. Contract regarded as frustrated if event or change of circumstances so fundamental that strikes at root of contract and entirely beyond what was contemplated by parties when they entered into agreement. At common law, loss lay where it fell, unless total failure of consideration, when money recoverable. Statute has modified common law in certain states: See Fair Trading Act 1999 (Vic) Pt 2C; Frustrated Contracts Act 1988 (SA); and Frustrated Contracts Act 1978 (NSW). Under statute, money paid before frustrating event recoverable, whether failure of consideration total or partial. Relief available in certain circumstances involving unjust, harsh or oppressive contracts or unconscionable conduct. See Contracts Review Act 1980 (NSW) Pt 2 and Trade Practices Act 1974 Pt IVA. Misrepresentation Act 1972 (SA) generally similar to common law. Prepaid Funerals Act 2004 (Tas), Funerals Act 2006 (Vic) Pt 5, and Fair Trading (Pre-Paid Funerals Code of Practice) Regulations 1996 (SA) give certain rights and protections to persons who prepay for funerals.

See also topics 21.03 Consumer Protection and 21.07 Interest.

Applicable Law.

Essential validity of contract governed by its proper law which, in case of contract with private international element, if not expressly specified by parties, is law of country with which contract has most "real connection". Capacity to enter commercial contract generally governed by proper law. Courts will not enforce contract which is valid by its proper law but performance of which is illegal by law of place of performance.

Where parties expressly stipulate that contract will be governed by particular law, that law will be proper law of contract provided that selection is bona fide and no infringement of public policy i.e., selecting another law for purpose of avoiding application of particular State or law. In certain circumstances, legislation may override parties' express choice (e.g., Insurance Contracts Act 1984).

Legislation in each State and Territory gives effect to United Nations Convention on Contracts for the International Sale of Goods acceded to on Mar. 17, 1988 and came into force on Apr. 1, 1989.

Government Contracts.

Ordinary law of contract applies.

Sale of Goods.

See topic 21.12 Sales.

Franchises, Dealerships and Distributorships.

Franchising regulated by mandatory industry code of conduct prescribed under Pt IVB, Trade Practices Act 1974 and Trade Practices (Industry Codes—Franchising) Regulations 1998. See Pt I, category 3 Business Regulation and Commerce, topic 3.04 Franchises and http://www.franchise.org.au. Certain Acts regulating specific franchising industries remain in force.

Victoria has Acts dealing with business franchise licenses for tobacco products and/or petroleum products. (See Business Franchise [Petroleum Products] Act 1979 [Vic] and Business Franchise [Tobacco] Act 1974 [Vic]). See Pt I, category 3 Business Regulation and Commerce, topic 3.05 Monopolies, Restraint of Trade and Competition. Consumer protection, intellectual property, tax, agency and misrepresentation issues may also arise. Distributors may have to observe fiduciary rules of equity in actions affecting supplier. States and Australian Capital Territory have Acts regulating motor vehicle traders. Acts and regulations deal with licensing (not Tasmania), conduct of business, obligations of dealers, rights of buyers and (not Tasmania) establishment of compensation fund. See Motor Dealers Act 1974 (NSW); Sale of Motor Vehicles Act 1977 (ACT); Second-hand Vehicle Dealers Act 1995 (SA); Motor Car Traders Act 1986 (Vic); Motor Vehicle Dealers Act 1973 (WA); Fair Trading (Code of Practice for Motor Vehicle Traders) Regulations 1996 (Tas); and Property Agents and Motor Dealers Act 2000 (Qld). States and Territories also have Acts and regulations dealing with secondhand dealers and pawnbrokers. For securities dealers, see Pt I, category 2 Business Organizations, topic 2.01 Corporations.

21.05 FRAUDS, STATUTE OF:

Statute of Frauds 1677 originally received into Australia but now repealed in States and Territories except Western Australia (where Statute of Frauds 1677 has been amended). Writing requirements akin to original provisions have been legislatively introduced. Certain contracts must either be in writing or be evidenced in writing. Most important category which applies to all States and Territories is contracts for sale or disposition of interest in land. Writing requirements also apply to contracts of guarantee (Northern Territory, Queensland, Tasmania, Victoria, Western Australia); contracts not to be performed within a year of being made (Tasmania); sale of goods over A$20 (Tasmania, Western Australia); agreements in consideration of marriage (Tasmania) and promises by executor or administrator to answer damages out of estate (Tasmania).

Contract that does not comply with writing requirements still valid, but will not be enforced by court or form basis of damages award. In some circumstances court will order specific performance or equitable damages if party has sufficiently committed to contract (doctrine of part performance). Doctrine of estoppel also relevant.

Consumer Credit Code requires certain guarantees to be in writing. See topic 21.07 Interest.

Adoption of 1980 United Nations Convention on Contracts for International Sale of Goods (Vienna Convention) by all States alters application of Statute of Frauds in some States. See topic 21.12 Sales.

21.06 INFORMATION TECHNOLOGY, INTERNET AND NEW MEDIA:

Electronic Commerce.

Commonwealth Government released information economy policy in Dec. 1997 which stated commitment to providing light-handed regulatory framework to develop electronic commerce. Enacted Electronic Transactions Act 1999 based upon United Nations Commission on International Trade Law (UNCITRAL) Model Law on Electronic Commerce. Applies to all Commonwealth laws unless specifically exempted. Act takes form of uniform model law for adoption in all States and Territories. Uniform law: (a) Allows people to deal with many Commonwealth, State and Territory departments and agencies electronically; and (b) gives electronic transactions same legal status as written documents in certain situations. Act primarily relates to dealings between persons and Commonwealth government agencies, not dealings between private parties. All States and Territories have now enacted mirror legislation closely modeled on Electronic Transactions Act.

Internet censorship regime in Australia comprises Commonwealth, State and Territory legislation and regulation. Australian Communications and Media Authority (ACMA) administers co-regulatory scheme (i.e., Government, industry and community) for Internet content. (See ACMA website: http://www.acma.gov.au; Internet Industry Association website: http://www.iia.net.au.) Scheme established under Schedules 5 and 7 of Broadcasting Services Act 1992 aims to address community concerns about illegal and offensive content on Internet. Scheme applies to content on World Wide Websites, Usenet newsgroups and other types of stored information that can be accessed over Internet. As of Jan. 20, 2008, operation of Act extended to live and ephemeral content and content delivered over convergent devices such as mobile phones, and to ensure age verification where MA15+ material supplied. Under Act, following categories of Internet content prohibited: (a) Any Internet content classified RC or X18+ by Classification Board; (b) content classified R18+ and not subject to restricted access system; (c) content provided by commercial service classified MA15+ and not subject to restricted access system which does not consist of text and still images; and (d) content provided by mobile premium service classified MA15+ and not subject to restricted access system. Unless content falls within above categories ACMA cannot take action (unless conduct unclassified and, if classified, would be prohibited). Act does not make it offense for content host to host prohibited content, however, under Act, Internet content hosts must comply with take-down notice, cessation notice or deletion notice from ACMA. Internet Service Providers (ISPs) and mobile carriers must remove access to prohibited content on receipt of access-prevention notice from ACMA. Failure to do so may be offense.

Content Hosted in Australia.

Commonwealth law applies to Internet Content Hosts (ICHs) including ISPs, but not to content creators/providers. For purpose of investigating complaint about Internet content and administering registered Internet industry code of practice, ACMA regards person who hosts Internet content in Australia, including mobile carrier, as ICH. If ACMA determines content is sufficiently serious (e.g., illegal content), may also refer matter to relevant State or Territory police force. State and Territory criminal law applies to content providers and creators. Laws enable prosecution of Internet users for making available material deemed "objectionable" or "unsuitable for minors". (*Note:* As of Sept. 30, 2009, not all States and Territories had such laws in force.) ISPs and ICHs also have obligation to report child pornography and child abuse material to Australian Federal Police. (§474.25 of Criminal Code Act 1995).

Content Hosted Outside Australia.

ACMA may forward details of prohibited and potential prohibited content hosted outside Australia to makers or suppliers of filter software products listed in Sched. of registered code of practice for ISPs. Makers or suppliers of these products have agreed to update their products to give effect to these notifications. Code requires Australian ISPs to provide one of these products to their subscribers. If ACMA determines content is sufficiently serious must refer matter to Australian Federal Police, or to law enforcement officials in country concerned.

Spam.

Spam Act 2003 regulates commercial email and other commercial electronic messages with "Australian link". Prohibits sending most unsolicited commercial electronic messages. Commercial electronic messages sent must include sender information and generally contain functional unsubscribe facility. Address harvesting software must not be supplied, acquired or used. Act enforced by ACMA with breaches subject to significant civil penalties, injunctions or court-ordered compensation. Telecommunications Act 1997 also applies.

21.07 INTEREST:

Usury.

Consumer Credit Code developed as national initiative to standardize credit practice. (See http://www.creditcode.gov.au.) Consumer Credit Code and Consumer Credit Code Regulations known as template Act and Regulations. Template law exists as law of Queensland (Consumer Credit [Queensland] Act 1994 [Qld] and Consumer Credit [Queensland] Regulation 1995 [Qld]). Other States and Territories have passed enabling legislation which adopts template legislation and applies it in State or Territory as "in force from time to time". (WA Act slightly different, but to same effect.) Amendments to Code or Regulations only need to be made to template legislation and automatically apply in other States and Territories without amendment to enabling acts. There are some differences in way Tasmania and Western Australia legislation has been established, compared with other jurisdictions.

"Credit provider" defined as any person who provides credit, and includes prospective credit providers. Code applies to credit providers if they charge for credit and if their customers are individuals or residential strata corporations who use it mostly for personal, household or domestic purposes.

Consumer Credit Code outlines key provisions governing: (a) Contract formation and formalities; (b) contract formation and formalities relating specifically to mortgages and guarantees; (c) changes to obligations under credit contracts, mortgages and guarantees; (d) ending and enforcing credit contracts, mortgages and guarantees; (e) related sale and insurance contracts and linked credit providers; (f) credit advertising and related conduct involving promotion of credit including requirement for comparison rates in advertisements; (g) consumer leases; and (h) civil penalty regime and other remedies for breaches of Code.

Code in conjunction with State and Territory legislation provides for courts or tribunals to reopen transaction on application of mortgagor, guarantor or debtor where contract, mortgage or guarantee is unjust. Depending on circumstances, for example, if court satisfied that: (a) Interest charged is excessive; or (b) transaction is harsh, unconscionable or oppressive, open to court to relieve person sued from payment of any sum in excess of sum adjudged by court to be fairly due in respect of principal.

See Consumer Credit (Queensland) Act 1994 (Qld); Consumer Credit (New South Wales) Act 1995 (NSW), Consumer Credit Administration Act 1995 (NSW); Consumer Credit (Victoria) Act 1995 (Vic), Credit (Administration) Act 1984 (Vic); Consumer Credit (South Australia) Act 1995 (SA), Credit Administration Act 1995 (SA); Consumer Credit (Western Australia) Act 1996 (WA), Credit (Administration) Act 1984 (WA); Consumer Credit (Tasmania) Act 1996 (Tas); Consumer Credit (Northern Territory) Act 1995 (NT); Consumer Credit Act 1995 (ACT), Consumer Credit (Administration) Act 1996 (ACT).

State and Territory Credit Acts (not Northern Territory) govern provision of loan contracts to consumers (excluding body corporates) where amount is less than A$20,000 (in Queensland, A$40,000 and in Australian Capital Territory, A$30,000), contracts where goods are provided on credit (i.e., hire purchase), and continuing credit contracts where credit is provided on ongoing basis for goods or services. See Credit Act 1984 (NSW); Credit Act 1984 (Vic); Credit Act 1987 (Qld); Credit Act 1984 (WA) and Credit Act 1985 (ACT). See also Consumer Affairs and Fair Trading Act 1990 (NT) which regulates credit providers in Northern Territory.

21.08 LICENSES, BUSINESS AND PROFESSIONAL:

Licenses may be required in different industries for activities including broadcasting, airlines, gaming and/or gambling, provision of consumer credit, banking, dealing in securities or providing financial services or advice. Individuals may need license to keep, raise or experiment on animals; shoot game; fish; own or carry gun or other dangerous weapons; and other activities regulated by government.

See also Pt I, categories 2 Business Organizations, topic 2.01 Corporations; 3 Business Regulation and Commerce, topic 3.01 Banking and Currency; and 17 Transportation, topics 17.01 Air Navigation, 17.04 Shipping.

21.09 MONOPOLIES, RESTRAINT OF TRADE AND COMPETITION:

Several States have enacted laws in area of restrictive trade practices. However, legislation, outlined below, has not been rigorously enforced and less significant than Trade Practices Act 1974 and Competition Policy Reform Act 1995. Competition Policy Reform Act 1995 (Vic), (NSW), 1996 (NT), (ACT), (Qld), (SA), (WA), (Tas) provide that Competition Code, contained in Scheduled version of Pt IV of Trade Practices Act 1974, applies as law in each State or Territory.

As result of infrastructure privatization, most States and Territories have enacted legislation to prevent abuse of monopoly power and ensure third-party rights of access to essential infrastructure such as gas pipelines and electricity networks. See e.g., National Gas Law as contained in Sched. to National Gas (South Australia) Act 2008 (SA) and as applicable in States and Territories by Acts of similar names. See also National Electricity Law as contained in Sched. to National Electricity (South Australia) Act 1996 (SA) and as applicable in Australian Capital Territory, New South Wales, Queensland, Tasmania and Victoria.

South Australia.

Prices Act 1948 deals with price control and imposes statutory restrictions on certain trade practices relating to goods where maximum price fixed. As of Sept. 30, 2009, there are no such goods. Similar Act in New South Wales: New South Wales Price Regulation Act 1948 (NSW).

Western Australia.

Petroleum Products Pricing Act 1983 provides for some enquiry into and control over excessive prices for petroleum products and services. Similar legislation in Australian Capital Territory and Victoria: Fair Trading (Fuel Prices) Act 1993 (ACT) and Fuel Prices Regulation Act 1981 (Vic).

Victoria.

Under Collusive Practices Act 1965, tendering or bidding, abstaining from tendering or bidding and joint tendering or bidding in accordance with collusive tendering or bidding agreement forbidden. These practices punishable by fines or imprisonment or both. “Collusive bidding agreement” and “collusive tendering agreement” defined to include agreement with purpose or effect of preventing or restricting competition among all or any parties in respect of tendering or bidding. “Tender” defined as offer for supply or acquisition of goods or services made in response to invitation published by or on behalf of Government of Victoria, Victorian statutory corporation, municipality or certain charitable institutions and hospitals.

“Agreement” includes arrangement or understanding, formal or informal, express or implied and whether enforceable or intended to be enforceable by legal proceedings or not and whether made within or without Victoria.

Restraint of Trade.

Common law doctrine of restraint of trade still exists insofar as consistent with Trade Practices Act 1974. (Trade Practices Act 1974 §4M). Prima facie, any restraint of trade void at common law, and onus upon person desirous of supporting restraint to show it is reasonable in interest of parties. Onus then switches to party alleging restraint nevertheless injurious to public. Question of reasonableness or otherwise matter of law determined by court, and not question of fact for jury. Evidence as to reasonableness cannot be given by persons engaged in trade, but judge will have regard to all circumstances of case, and may hear evidence of nature of business and conditions under which carried on. Operation of common law doctrine modified in New South Wales by Restraints of Trade Act 1976 (NSW).

Reasonableness of contract in restraint of trade examined in relation to consideration given, and time and space for which restraint extends.

Consideration of covenants in restraint of trade usually arises out of contracts of employment, or contracts for purchase of goodwill of business, in both of which classes of contracts may be necessary to restrain right of vendor or employee, after conclusion of sale or employment, from depriving purchaser or employer of benefit received under contract.

See also topics 21.03 Consumer Protection; 21.09 Monopolies, Restraint of Trade and Competition.

21.10 PUBLICATIONS:

National Classification Code has been enacted by Commonwealth, States and Territories. Classification (Publications, Films and Computer Games) Act 1995 provides for classification of publications, films and computer games. Classification based on principles that: (a) Adults should be able to read, hear and see what they want; (b) minors should be protected from material likely to harm or disturb them; (c) everyone should be protected from exposure to unsolicited material that they find offensive; and (d) consideration should be given to community concerns about depictions of violence particularly sexual violence and portrayal of persons in demeaning manner. Publication, film, or computer game that advocates doing of terrorist act must be classified Refused Classification.

Under scheme, Commonwealth classifies film, publications and computer games and States and Territories enforce classifications. Some States and Territories reserve rights to override Commonwealth classifications. (See: Classification [Publications, Films and Computer Games] [Enforcement] Act 1995 [ACT]; Classification [Publications, Films and Computer Games] Enforcement Act 1995 [NSW]; Classification [Publications, Films and Computer Games] Act 1995 [SA]; Classification [Publications, Films and Computer Games] Enforcement Act 1995 [Tas]; Classification [Publications, Films and Computer Games] [Enforcement Act] 1995 [Vic]; Classification of Publications, Films and Computer Games Act 1985 [NT]; Classification [Publications, Films and Computer Games] Enforcement Act 1996 [WA]; Classification of Publications Act 1991 [Qld]; Classification of Films Act 1991 [Qld] and Classification of Computer Games and Images Act 1995 [Qld].)

Internet.

See topic 21.06 Information Technology, Internet and New Media.

21.11 RESTRAINT OF TRADE:

See topic 21.09 Monopolies, Restraint of Trade and Competition.

21.12 SALES:

English Sale of Goods Act 1893 has been generally adopted throughout Australian States. Local Acts are largely uniform and codify principles of law relating to sale of goods which have evolved from court decisions: Sale of Goods Act 1923 (NSW); Goods Act 1958 (Vic); Sale of Goods Act 1896 (Qld); Sale of Goods Act 1895 (SA); Sale of Goods Act 1895 (WA); Sale of Goods Act 1896 (Tas); Sale of Goods Act 1972 (NT); and Sale of Goods Act 1954 (ACT).

Stoppage in Transitu.

See England Law Digest.

Notices Required.

No notices required to perfect right of damages or rescission. Identical with English law in this area.

Applicable Law.

See topic 21.04 Contracts.

Warranties.

Various Acts including Trade Practices Act 1974 Pt V provide for certain conditions or warranties to be implied into contracts for sale of goods which may not be excluded from contract although liability may be limited, for example, implied undertakings as to title, encumbrances, quiet possession and quality. See Pt I, category 3 Business Regulation and Commerce, topic 3.03 Consumer Protection.

Fair Trading Act 1999 (Vic) makes provision for non-excludable terms (similar to those listed above) to be implied in sales of goods and of services and certain leases of goods where cash price of goods or services does not exceed A$40,000 or, if it does exceed that amount, where goods or services are for personal, domestic or household use or consumption. (Pt 2A). Consumer Transactions Act 1972 (SA) includes similar non-excludable conditions relating to sale of goods and services to consumers. Manufacturers Warranties Act 1974 (SA) implies conditions and warranties (equivalent to those given by retailers under Sale of Goods Acts) into supply of goods by manufacturers or importers to consumers despite absence of contractual relationship between them.

Where contract of sale is not severable and buyer has accepted goods or part thereof or where contract is for specific goods property in which has passed to buyer, breach of any condition to be fulfilled by seller can only be treated as breach of warranty and not as ground for rejecting goods and treating contract as repudiated unless term of contract express or implied to that effect. See Goods Act 1958 (Vic), Sale of Goods Act 1895 (WA), Sale of Goods Act 1896 (Tas), Sale of Goods Act 1986 (Qld) and Sale of Goods Act 1972 (NT). Slightly different provisions operate in New South Wales and South Australia. See Sale of Goods Act 1895 (SA) and Sale of Goods Act 1923 (NSW). See Pt I, category 3 Business Regulation and Commerce, topic 3.03 Consumer Protection.

International Sale of Goods.

All States and Territories have enacted legislation to give effect to United Nations Convention on Contracts for the International Sale of Goods: Sale of Goods (Vienna Convention) Act 1986 (NSW), (WA), (SA), (Qld); 1987 (Tas), (Vic), (NT), (ACT).

Consumer Protection.

See topic 21.03 Consumer Protection.

21.13 STATUTE OF FRAUDS:

See topic 21.05 Frauds, Statute of.

22 CITIZENSHIP

22.01 ALIENS:

See category 34 Immigration, topic 34.01 Aliens.

22.02 DISCRIMINATION:

Anti-discrimination Acts in States prohibit discrimination in areas extending beyond employment, such as education, provision of goods and services and accommodation. Legislative prohibitions against sexual harassment in workplace are in force in all States. Commonwealth legislation also covers anti-discrimination in Sex Discrimination and Human Rights Acts (see Pt I, category 4 Citizenship, topic 4.02 Discrimination).

Each Act prescribes certain exceptions to prohibition against discrimination and establishes procedures by which complaints can be heard and determined.

All anti-discrimination Acts allow special measures designed to achieve equality. Most jurisdictions have legislated to implement affirmative action programs in relation to employment opportunities in public service.

Particular acts in individual States provide as follows:

Victoria.

Equal Opportunity Act 1995 makes it unlawful to sexually harass or discriminate in specific areas on basis of age, impairment, industrial activity, employment activity, lawful sexual activity, marital status, physical features, political belief or activity, pregnancy, race, religious belief or activity, sex, parental status, status as carer, breastfeeding, gender identity, sexual orientation and any personal association with someone with such attribute. Act makes it unlawful to sexually harass or discriminate in specific areas against employees who ask reasonable questions or communicate concerns about employee entitlements. Specific areas in which discrimination is prohibited include employment, education, provision of goods or services, disposal of land, accommodation, clubs, sport and local government. Act allows for limited exceptions on public interest grounds. Victorian Equal Opportunity and Human Rights Commission may require persons to appear or produce documents to assist complaint investigations or conciliations—penalty for failure applicable.

New South Wales.

Anti-Discrimination Act 1977 prohibits sexual harassment and discrimination in specific areas on grounds of race, sex (including on grounds of breastfeeding), marital status, responsibility as carer, disability (excluding addiction to prohibited drug), transgender, homosexuality, age and infectious diseases (unless necessary to protect public health). Specific areas in which discrimination is prohibited include employment, education, membership of clubs, provision of goods and services, access to places and vehicles, accommodation etc. As of Sept. 22, 2008, definition of de facto relationship includes same—sex couple.

Queensland.

Anti-Discrimination Act 1991 prohibits discrimination on grounds of sex, relationship status, pregnancy, parental status, breastfeeding, age, race, impairment, religious belief or activity, political belief or activity, trade union activity, lawful sexual activity, gender identity, sexuality, family responsibilities and any personal association with someone with such attribute. Extends to discrimination occurring in areas of employment, education, provision of goods and services, superannuation, insurance, land, accommodation and clubs. Limited exceptions for public health, workplace health and safety, religious bodies, charities and participation in sport.

South Australia.

Equal Opportunity Act 1984 prohibits discrimination in specific areas on grounds of age, association with child (prohibited in connection with supply of goods and services), caring responsibilities, chosen gender, disability, marital or domestic partnership status, pregnancy, race, religious appearance or dress (in work or study), sex, sexuality or spouse or partner's identity. Specific areas in which discrimination is prohibited include employment, education, provision of goods, services or land, accommodation, superannuation (with exceptions). Limited exceptions for, religious bodies, insurance and participation in sport and for measures intended to achieve equality. Act permits positive discrimination to women in connection with pregnancy or childbirth.

Western Australia.

Equal Opportunity Act 1984 prohibits discrimination in specific areas on grounds of sex, marital status, pregnancy, age, family responsibility or family status, race, gender history, sexual orientation, religious or political conviction or impairment. Equal Opportunity Amendment Bill 2009 proposed to prohibit discrimination against mother breastfeeding in public place on date yet to be proclaimed. Specific areas in which discrimination is prohibited include employment, education, provision of goods, services and facilities, accommodations, clubs, application forms, land, sport, superannuation and access to places and vehicles. Limited exceptions for charities, voluntary bodies, religious bodies and housing accommodation for aged persons.

Tasmania.

Anti-Discrimination Act 1998 prohibits direct and indirect discrimination in specific areas on grounds of race, age, sexual orientation, lawful sexual activity, gender, marital status, relationship status, pregnancy, breastfeeding, parental status, family responsibilities, disability, industrial activity, political belief or affiliation, political activity, religious belief or affiliation, religious activity, irrelevant criminal or medical records, or association with person who has, or is believed to have, any of these attributes. Specific areas in which discrimination is prohibited include employment, education and training, provision of facilities, goods and services, membership and administration of clubs, administration of laws, awards and specified agreements.

Australian Capital Territory.

Discrimination Act 1991 prohibits discrimination in specific areas on grounds of sex, sexuality, transsexuality, relationship status including same-sex relationship status, status as parent or carer, pregnancy, breastfeeding, race, religious or political conviction, disability, membership or nonmembership of association of employees or employers, age, profession, trade, occupation, spent criminal conviction or association with person identified by reference to any of these attributes. Specific areas in which discrimination is prohibited include employment, education, access to premises, provision of goods and services, access to facilities, accommodation and clubs and provision of information. Human Rights Act 2004 recognizes fundamental civil and political rights in ACT law and provides for Human Rights Commissioner to review, educate and advise on human rights. Human Rights Commission provides community and government with independent mechanism for resolution of disputes concerning health and disability services, and services for elderly.

Northern Territory.

Anti-Discrimination Act 1992 prohibits discrimination in specific areas on grounds of race, sex, sexuality, age, marital status, pregnancy, parenthood, breastfeeding, impairment, trade union or employer association activity, religious belief or activity, political opinion, affiliation or activity, irrelevant medical record and irrelevant criminal record or association with person who has or is believed to have these attributes. Specific areas in which discrimination is prohibited include employment, education, accommodation, provision of goods, services and facilities, clubs and superannuation and insurance.

Racial Discrimination.

Each State and Territory prohibits discrimination based on person's race. Racial Discrimination Act 1975 (Cth) not intended to limit operation of State law which furthers objects of International Convention on Elimination of all forms of Racial Discrimination and is capable of operating concurrently. Concurrent operation ensured by provision that actions or proceedings taken under State law in respect of act or omission remove entitlement for proceedings under Commonwealth Act. See Pt I, category 4 Citizenship, topic 4.02 Discrimination, subhead Racial Discrimination. Equal Opportunity Act 1995 (Vic) and Charter of Human Rights and Responsibilities Act 2006 (Vic) establishes Victorian Equal Opportunity and Human Rights Commission and enables Commission to initiate investigations in certain discriminatory circumstances of serious nature where lodging of complaint by one person only in class or group would be inappropriate. See also Anti-Discrimination Act 1991 (Qld) and Anti-Discrimination Act 1991 (NT).

Harassment and Vilification.

Anti-Discrimination Act 1977 (NSW) prohibits sexual harassment and public vilification on grounds of race, transgender, homosexuality and HIV/Aids. Equal Opportunity Act 1996 (Vic) prohibits sexual harassment. Racial and Religious Tolerance Act 2001 (Vic) makes it unlawful to incite hatred against, serious contempt for, or revulsion or severe ridicule of, another person or group of people on basis of their race or religion. Limited exceptions for performance, exhibition or distribution of artistic work, discussion or statement of genuine academic, artistic, religious or scientific purpose or fair or accurate reporting of event or matter of public interest. Anti-Discrimination Act 1991 (Qld) prohibits vilification on grounds of race, religion, sexuality or gender identity. Racial Vilification Act 1996 (SA) makes racial vilification unlawful. Equal Opportunity Act 1984 (WA) prohibits sexual and racial harassment. Western Australian Criminal Code criminalizes possession, publication and display of written or pictorial material that is threatening or abusive with intention of inciting racial hatred. Anti-Discrimination Act 1998 (Tas) prohibits any conduct which offends, humiliates, intimidates, insults or ridicules another person on basis of gender, marital status, pregnancy, breastfeeding, parental status and family responsibilities. Act makes it unlawful to sexually harass, victimize, incite hatred (by public act) or promote discrimination on grounds of race, disability, sexual orientation, lawful sexual activity and religion. Discrimination Act 1991 (ACT) prohibits sexual harassment and vilification on grounds of race, sexuality, transsexuality and HIV/Aids. Anti-Discrimination Act 1992 (NT) prohibits sexual harassment. Criminal penalties apply in most States and Territories for serious vilification (except Tasmania and Northern Territory).

Disability Discrimination.

Each State and Territory prohibits discrimination based on person's physical or intellectual impairment. Guardianship and Administration Act 1986 (Vic), Guardianship Act 1987 (NSW), Guardianship and Administration Act 2000 (Qld), Guardianship and Administration Act 1990 (WA), Guardianship and Management of Property Act 1991 (ACT), Adult Guardianship Act 1988 (NT), Guardianship and Administration Act 1995 (Tas) and Guardianship and Administration Act 1993 (SA) establish Guardianship Boards or Tribunals to appoint guardians in respect of persons with disability and to appoint administrators of estates of persons with disability. Acts also create office of Public Advocate or Public Guardian to investigate complaints or allegations of abuse of disabled persons and to promote community involvement in provision of services to disabled people. “Disability” encompasses senility and mental and physical impairment. See also Disability Act 2006 (Vic), Disability Services Act 1993 (NT), Disability Services Act 1993 (WA), Disability Services Act 2006 (Qld), Disability Services Act 1993 (SA), Disability Services Act 1993 (NSW), Disability Services Act 1992 (Tas) and Disability Services Act 1991 (ACT). See Pt I, categories 4 Citizenship, topic 4.02 Discrimination, subhead Disability Discrimination and 32 Family, topic 32.03 Guardian and Ward.

22.03 DOMICILE:

In Australia, domicile has its common law meaning. It connotes “permanent home”, place person is presumed at time in question to consider their true home, wherever they may be resident or traveling for time being. Any evidence of person's hopes, intentions and behavior is relevant in aiding court to establish their domicile.

Each of States and Northern Territory have introduced Acts which revoke rule that wife has husband's domicile and modify rule that infant has father's domicile where parents living separately and apart, in which case infant's domicile is that of parent with which infant lives. Australian Capital Territory is subject to Commonwealth Domicile Act 1982 which has same effect. Acts also make provision for domicile of adopted children. See also Commonwealth legislation (Domicile Act 1982) which effects similar changes, Pt I, category 4 Citizenship, topic 4.03 Domicile.

22.04 RACIAL DISCRIMINATION:

See topic 22.02 Discrimination.

23 CIVIL ACTIONS AND PROCEDURE

23.01 COSTS:

No fixed rule, but successful litigant usually awarded order for their costs in action on “party and party” basis. Normally leads to less than full reimbursement as not all legal costs are covered on this basis.

Security for costs order is discretionary. Factors relevant to security for costs order contained in court rules and common law of most jurisdictions. No fixed rule, however, plaintiff ordinarily resident outside jurisdiction may be required to give security for costs. Other factors include whether plaintiff is suing for benefit of another, misstatement of plaintiff's address on originating process made with intention to deceive, or whether plaintiff is corporation and unlikely to be capable of paying future costs.

23.02 DAMAGES:

Common law rules govern awards and calculation of damages in Australia. Statutory provision in all States provides exception to common law rule that no action for damages in respect of death normally maintainable, allows action at law in cases where deceased has left dependants who will suffer pecuniary loss as result of death. See category 31 Estates and Trusts, topic 31.02 Death, subhead Actions for Death.

In Victoria thresholds exist for recovery of damages for noneconomic loss. Pt VBA of Wrongs Act 1958 (Vic) creates threshold of 5% impairment in case of injury and 10% impairment in case of psychiatric injury. (See definition of “threshold level”: §28LB.) If injury satisfies “threshold level” deemed to be “significant injury”. (§28LF). Unless plaintiff has “significant injury” damages not recoverable for noneconomic loss. (§28LE).

Legislation applying ``proportionate liability'' principles for claims involving economic loss or property damage in negligence actions now enacted in all Australian jurisdictions. Persons (including entities and governments) responsible only for proportion of loss or damage caused by their own negligence.

Every State and Territory has legislation providing for reduction of damages where victim guilty of contributory negligence.

23.03 DEPOSITIONS AND DISCOVERY:

Under Foreign Evidence Act 1994 (Cth), on application of party, superior Court may order taking of evidence abroad if it appears in interests of justice to do so. (§§7-11). Court may make order for examination of person at any place outside Australia by judge or officer of court, issue of commission for examination of person or issue of letter of request to foreign judicial authorities. Depositions of persons in Australia may also be taken with object of using them as evidence in foreign courts. (§§40-47). But see Pt I, category 5 Civil Actions and Procedure, topic 5.01 Actions.

23.04 EVIDENCE:

See topic 23.03 Depositions and Discovery.

23.05 JUDGMENTS:

Under Service and Execution of Process Act 1992 (Cth), judgment may be registered in court of another State by lodging sealed copy of judgment. (§105). Faxed copy may be lodged if sealed copy lodged within seven days. (§105[3]). On registration, judgment has same force and effect and is enforceable as if given by court in which registered, except for interest and stay of proceedings. (§105[2]). Interest is assessed on same basis as in court in which judgment given. (§108). Court in which judgment registered may order that proceedings be stayed or not commenced to allow judgment debtor to appeal. (§106). Rules of private international law about recognition and enforcement of foreign judgments cannot prevent enforcement of judgment under Act. (§109).

Commonwealth Constitution provides that full faith and credit must be given throughout Commonwealth to laws, public acts and records and judicial proceedings of every State. (§118). However due to system of registration, full faith and credit is not as significant in relation to interstate judgments as it is in U.S.A.

Foreign Judgments.

Under common law, judgments of foreign courts have been recognized in Australian States under certain conditions, general requirements being as follows: (a) Judgment must be final and conclusive; (b) judgment must be for sum certain (not being tax or penalty); (c) enforcement of judgment would not be contrary to public policy of State in which sought to be registered; (d) foreign court must have had jurisdiction, according to Australian rules of private international law (for judgments in personam by presence or residence of judgment debtor in foreign country, or voluntary submission to jurisdiction of foreign court, by appearance or contract; for judgments in rem by situation of property in foreign country); (e) judgment not obtained by fraud; (f) judgment debtor not denied natural justice; and (g) parties must be identical.

On June 27, 1991 Commonwealth Foreign Judgments Act 1991 replaced State systems for registration and enforcement of foreign judgments, and in certain circumstances replaced common law action on judgment debt. Act applies to judgments of superior courts of country if Governor-General satisfied that substantial reciprocity of treatment assured in that country. (§5[1]). As of Sept. 2009, following countries' superior courts are covered in Sched. of Foreign Judgments Regulations 1992: Bahamas, British Virgin Islands, Canada (some provinces only), Cayman Islands, Dominica, Falkland Islands, Fiji, France, Germany, Gibraltar, Grenada, Hong Kong S.A.R., Israel, Italy, Japan, Republic of Korea, Malawi, Montserrat, New Zealand, Papua New Guinea, Poland, St Helena, St Kitts and Nevis, St Vincent and the Grenadines, Seychelles, Singapore, Solomon Islands, Sri Lanka, Switzerland, Taiwan, Tonga, Tuvalu, U.K. and Western Samoa. Regulations also provide that Act extends to specified inferior courts of Switzerland, New Zealand, Poland, Canada and U.K. (§5). Act does not extend to any jurisdictions of U.S.A. Act also provides that, for purposes of proceedings in Australia, foreign court not taken to have jurisdiction merely because judgment debtor entered appearance or participated in proceeding for purpose of protecting or obtaining release of seized property, to contest jurisdiction of court or to invoke court's discretion. (§11).

See Pt I, category 5 Civil Actions and Procedure, topic 5.01 Actions.

23.06 LIMITATION OF ACTIONS:

Various statutory provisions exist in States and Territories that limit time plaintiff may take to commence action. Actions for torts must generally be brought within six years (three years in Northern Territory); actions for simple contract debts generally within six years; and actions for personal injuries in Victoria, Queensland, South Australia, Tasmania, Australian Capital Territory and in New South Wales within three years of date of discovery of injury.

Defamation cases must be brought within one year from date defamatory material published.

Cause of action founded on deed generally not maintainable after 12 years except in Victoria (§5[3] Limitation of Actions Act 1958 [Vic]) and South Australia (§34 Limitation of Actions Act 1936 [SA]), where period is 15 years. Action to recover land not maintainable by Crown after 30 years in New South Wales and Tasmania, 60 years in South Australia. In other States or Territories, no limitation period for actions by Crown to recover land, or no relevant statutory provision. In New South Wales, Queensland, Tasmania and Western Australia, action to recover private land by other persons not maintainable after 12 years. In Victoria and South Australia, action extinguished after 15 years. In Australian Capital Territory and Northern Territory, title to land not extinguished by limitations statutes.

Limitation Act 1974 (Tas) provides that where option to purchase land or right of preemption in respect of land does not provide for time limit for exercise of option or right, action arising out of that option or right must be brought within one year of grant of option or right. (§23A).

Action for contributions between tortfeasors in Australian Capital Territory, New South

Wales, Northern Territory and Queensland not maintainable after two years from date cause of action for contribution first accrued and four years after expiration of limitation period for principal cause of action. Wrongs Act 1958 (Vic) provides action for contribution must be brought within 12 months of service of original writ or any time within which action may have been commenced. (§24[4]). Law Reform (Contributory Negligence and Apportionment of Liability) Act 2001 (SA) provides that action must be brought within longer of: period in which plaintiff could have brought action; and two years after damages payable by person entitled to contribution finally determined. (§6[4]). In Western Australia, action for contribution must be brought within two years of judgment being given regarding tort. (§17 Limitation Act 2005 [WA]).

Limitation Act 1981 (NT) provides that actions based on contract and tort must be brought within three years of date of accrual of action. (§12).

Motor Accidents Compensation Act 1999 (NSW) provides for scheme of compulsory third-party insurance (§8) and for payment of compensation relating to death or injury to persons as consequence of motor accidents, and sets period of six months from date of accident to make claim (§72).

In certain jurisdictions action to recover any tax, fee, charge or other impost paid under authority of any Act must be commenced within 12 months after date of payment: Limitation Act 2005 (WA) (§28); Limitation of Actions Act 1958 (Vic) (§20A); Recovery of Imposts Act 1963 (NSW) (§2); Limitation of Actions Act 1974 (Qld) (§10A); Limitation Act 1974 (Tas) (§25D).

Limitation Act 1981 (NT) (§35D), Limitation Act 1985 (ACT) (§21A), and Limitation of Actions Act 1936 (SA) (§38), same but with six months limitation period.

Time begins to run as soon as cause of action accrues to plaintiff. In case of contract, cause of action accrues on breach. In case of contract of indemnity, cause of action accrues when plaintiff suffers loss against which defendant has promised to indemnify him or her.

In relation to personal injuries, action usually accrues at time damage suffered. In New South Wales and Victoria, cause of action accrues when plaintiff knew or ought to have known that injury or death had occurred, was caused by fault of defendant and was sufficiently serious to justify bringing action (Limitation Act 1969 [NSW] §50D[1] and Limitation of Actions Act 1958 [Vic] §27F[1]). In Western Australia, cause of action accrues on earlier event of person becoming aware of having sustained significant personal injury or first manifestation of personal injury. (Limitation Act 2005 [WA] §55[1]). Where asbestos related disease, action in Western Australia accrues when person has knowledge of relevant facts, provided that claimant did not become aware of relevant facts until after Jan. 1, 1984. (Limitation Act 2005 [WA] §56).

Flexibility of court to extend time for up to five years in New South Wales, where cause of action accrues on or after Sept. 1, 1990. (§§60A-60C Limitation Act 1969 [NSW]). If plaintiff unaware of injury at relevant time court may grant further extension if it decides that just and reasonable to do so. (§60G Limitation Act 1969 [NSW]). In Victoria (§27K Limitation of Actions Act 1958 [Vic]), South Australia (§48 Limitation of Actions Act 1936 [SA]) and Tasmania (§5[3] Limitation Act 1974 [Tas]), court has discretion to extend limitation period if just and reasonable to do so. In Northern Territory court has discretion to extend limitation period if satisfied of certain matters. (§44 Limitation Act 1981 [NT]). Western Australia provides for extension of limitation period for certain types of actions. (§§38-44 Limitation Act 2005 [WA]).

Effect of Acknowledgment.

Acknowledgment in writing or part payment of debt causes limitation period to start running afresh from date of acknowledgment or part payment. In all jurisdictions, where person has right of action to recover land, written acknowledgment of title to land causes action to accrue on date of acknowledgment and may therefore extinguish any adverse claim of person making acknowledgment.

Person Under Disability.

Each State and Territory suspends running of limitation period where person to whom cause of action accrues is under disability (infant, mentally deficient, mentally disordered), but usually maximum period 30 years from date cause of action arises.

Forum Shopping.

Various Acts provide that limitation laws of other State or Territory or New Zealand to be regarded as substantive law of jurisdiction and thus govern claim brought in another jurisdiction under substantive laws of first jurisdiction. See Choice of Law (Limitation Periods) Act 1993 (NSW) (§5); Limitation Act 1985 (ACT) (§56); Choice of Law (Limitation Periods) Act 1993 (Vic) (§5); Choice of Law (Limitation Periods) Act 1994 (NT) (§5); Choice of Law (Limitation Periods) Act 1994 (WA) (§5); Choice of Law (Limitation Periods) Act 1996 (Qld) (§5); and Limitation of Actions Act 1936 (SA) (§38A).

24 COURTS AND LEGISLATURE

24.01 ADMINISTRATIVE APPEALS:

Judicial review of administrative decisions available. State and Territory Supreme Courts have inherent jurisdiction for judicial review and to grant prerogative writs and equitable remedies. Statutory schemes for review now available in Australian Capital Territory, Queensland, Tasmania and Victoria under: Administrative Decisions (Judicial Review) Act 1989 (ACT); Judicial Review Act 1991 (Qld); Judicial Review Act 2000 (Tas); Administrative Law Act 1978 (Vic), respectively. Australian Capital Territory, Queensland, Victorian statutes operate alongside inherent jurisdiction. Judicial Review Act 2000 (Tas) abolished prerogative remedies for Tasmanian Supreme Court. (§43).

Administrative Appeals Tribunals.

Tribunals established primarily for purpose of merits review of administrative decisions. Tribunals' power to review decisions constrained by legislation conferring jurisdiction on Tribunals in respect of particular decision. On reviewing decision, Tribunals can exercise all powers and discretions conferred on decision-maker; they can affirm or vary original decision or set aside original decision and either substitute their own decision or remit matter for reconsideration by original decision-maker in accordance with such directions and recommendations as Tribunals might give. Also, Tribunals bound by law, but rules of pleadings and evidence not applicable; have power to review decision and not reason for decision; not restricted by case stated by parties or material before primary decision-maker. Neither party bears onus of proof (see Re Greenham and Minister for Capital Territory [1979] 2 ALD 137). Decision-makers of reviewable decisions must ordinarily provide reasons for decision; and appeal from decision of Tribunals on question of law lies to relevant Supreme Court. All jurisdictions have specialist tribunals, but some jurisdictions also have generalist tribunals or specialized divisions in courts.

Australian Capital Territory: Generalist tribunal, ACT Civil and Administrative Tribunal (ACAT), established under ACT Civil and Administrative Tribunal Act 2008 (ACT); also specialist tribunals. Freedom of Information (FOI) decisions in Australian Capital Territory reviewed by ACAT.

New South Wales: Specialist tribunals, but also generalist tribunal, Administrative Decisions Tribunal (ADT), established under Administrative Decisions Tribunal Act 1997 (NSW). Tribunal has original jurisdiction to make certain decisions; and jurisdiction to review reviewable decisions. Tribunal has Appeal Panel to hear appeals on questions of law (§114) and on occasions to conduct merits review (§§113[2][b], 115). Tribunal may refer matters to Ombudsman with agreement. (§39). Other significant review bodies in NSW include Land and Environment Court and Consumer, Trader and Tenancy Tribunal. New South Wales decision-maker must disclose certain Freedom of Information exempt documents to ADT; however, New South Wales Minister may certify that cabinet documents not to be disclosed to ADT. FOI decisions in New South Wales reviewed by General Division of ADT.

Victoria: Victorian Civil and Administrative Tribunal (VCAT) established under Victorian Civil and Administrative Tribunal Act 1998 (Vic). Original jurisdiction to hear and adjudicate certain civil disputes; also jurisdiction to conduct merits review of government decisions in selected areas. Decision refusing grant of access under Freedom of Information Act 1982 (Vic) may be reviewed through VCAT's Administrative Division (as opposed to its Civil Division) General List. Administrative Division of VCAT exercises jurisdiction of former Victorian Administrative Appeals Tribunal. Victorian Attorney General or Premier can certify that on public interest grounds certain information is not to be disclosed in reasons of decision-maker, in course of VCAT hearing or in decision of VCAT.

South Australia: No generalist tribunal, but Administrative Appeals Division in District Court of South Australia. (See District Court Act 1991 [SA] §7.) Most decisions still reviewed by specialist tribunals.

Tasmania: No generalist tribunal, but Administrative Appeals Division in Magistrates Court established under Magistrates Court (Administrative Appeals Division Act 2001 [Tas]). Right to internal review must be exercised before application to Administrative Appeals Division.

Western Australia: State Administrative Tribunal headed by President who is Supreme Court Judge. Original jurisdiction in civil matters and administrative review function.

As to registration of conciliated agreements see category 27 Dispute Resolution, topic 27.01 Alternative Dispute Resolution.

Ombudsman.

States and Territories enacted legislation creating office of Ombudsman (Parliamentary Commissioner in Western Australia): Ombudsman Act 1974 (NSW); Ombudsman Act 1973 (Vic); Ombudsman Act 2001 (Qld); Ombudsman Act 1972 (SA); Parliamentary Commissioner Act 1971 (WA); Ombudsman Act 1978 (Tas); Ombudsman Act 2009 (NT); Ombudsman Act 1989 (ACT). Statutory model largely same in all jurisdictions: Ombudsman has extensive powers to investigate, either on receipt of written or oral complaint or own motion, action that relates to matter of administration; jurisdiction extends to respective State or Territory government departments of public service and statutory authorities constituted for public purpose, including local authorities and in some cases police (excluding Queensland, South Australia, Western Australia), but does not extend to actions of Ministers or courts and tribunals; investigations conducted in private; powers non-determinative, but can make recommendations to bodies, although body concerned not bound to accept recommendation. However, Ombudsman can report to Parliament if not satisfied of agency's response to recommendations. Ombudsman has discretion not to investigate where other prescribed grounds satisfied: e.g., delay of 12 months in bringing complaint; alternative means of review available. Ombudsman generally cannot conduct investigation where aggrieved person has right of appeal to tribunal or remedy by way of proceedings in court of law unless such alternative course is unreasonable or immediate investigation warranted to avoid justice.

In New South Wales, Joint Parliamentary Committee known as Committee on Office of Ombudsman and Police Integrity Commission established to monitor and review Ombudsman's exercise of powers. Committee has power of veto in relation to any proposed appointment or reappointment as Ombudsman.

Freedom of Information.

States and Territories have similar Acts with respect to Freedom of Information: Freedom of Information Act 1989 (ACT); Freedom of Information Act 1989 No. 5 (NSW); Right to Information Act 2009 (Qld); Freedom of Information Act 1991 (SA); Freedom of Information Act 1991 (Tas); Freedom of Information Act 1982 (Vic); Freedom of Information Act 1992 No. 76 (WA); Information Act 2002 (NT). Provisions similar to Freedom of Information Act 1982 (Cth). (See Pt I, category 6 Courts and Legislature, topic 6.01 Administrative Appeals, subhead Freedom of Information.)

All Acts give legally enforceable right to access documents held by government agencies, except where: (a) Application involves unreasonable diversion of department resources; (b) document falls in exempt category; or (c) other specified grounds made out e.g., documents already publicly available. Categories of exempt documents differ slightly between Acts, but generally include documents relating to state security; state relations; law enforcement; personal privacy; confidential information; contrary to public interest; documents to which legal professional privilege applies. New South Wales Act provides, inter alia, that Ombudsman may recommend release of documents if in overall public interest although exempt documents. Acts may also allow for documents held by government and agencies relating to citizen to be amended by citizen where record incorrect. Acts also provide mechanism for review of unfavorable or delayed decisions. Mechanisms for review differ.

Australian Capital Territory: Application may be made for internal review within 28 days of notice of decision (§59[1]). Application for external review must first be made to Australian Capital Territory Ombudsman (§54); then ACT Civil and Administrative Tribunal within 28 days of being informed of outcome by Ombudsman (§60).

New South Wales: Application may be made for internal review within 28 days of notice of decision, or where no notice is given, within 49 days of application. (§47). Application for external review may be made to New South Wales Ombudsman (§52); or to Administrative Decisions Tribunal within 60 days of notice of decision (§54[a]), or 60 days following notice of determination with respect to investigation by Ombudsman (§54[b]).

Queensland: Application may be made for internal review within 20 business days of notice of decision (§82); or external review by application to Queensland Information Commissioner within 20 business days (§88); referral to Supreme Court of Queensland possible through Commissioner on question of law (§117).

South Australia: Application may be made for internal review within 30 days of notice of decision (§38[2][d]); or complaint may be made within 30 days (§39[3]) to South Australian Ombudsman, or to Police Complaints Authority, if applicable (§39[1][b]). Right of appeal to South Australian District Court on question of law within 30 days. (§40).

Tasmania: Application may be made for internal review within 28 days of notice of decision (§47[1]); or complaint may be made to Tasmanian Ombudsman within 60 days (§§48, 49).

Victoria: Request for internal review of decision, other than by responsible Minister or head of agency, may be made within 28 days, or if health record involved, then within 70 days in accordance with Health Records Act 2001. (§51[1]). Complaint may be made to Victorian Ombudsman. Complaint may also be made to Victorian Civil and Administrative Tribunal within 60 days of notice of decision (§52), or after 28 days of making complaint to Ombudsman (§25A[9]). If health record involved, then internal review by Health Services Commissioner also available under Div. 3 Pt 6 of Health Records Act 2001.

Western Australia: Application may be made for internal review within 30 days of notice of decision (§40); or external review by Western Australian Information Commissioner within 60 days (§66[2]); referral of question of law to Supreme Court of Western Australia also possible (§78[2]).

Northern Territory: Application may be made for internal review within 30 days of notice of decision (§39[2]); or for external review by Northern Territory Information Commissioner within 90 days (§106[3]); appeal of Commissioner's decision on question of law to Northern Territory Supreme Court also possible (§129).

See also Pt I, category 3 Business Regulation and Commerce, topic 3.01 Banking and Currency, subhead Privacy.

24.02 COURTS:

Superior court in each State and Territory called Supreme Court. Created by State Constitution, Supreme Court has original and appellate jurisdiction in both criminal and civil matters. Jurisdiction limited only by legislation. Appeal of decisions from Supreme Courts to High Court. Each State and Territory has subordinate Courts created and given jurisdiction by legislation.

New South Wales: Inferior courts termed Local Courts. (Legislation Local Court Act 2007 [NSW]). Magistrate presides. No jury. Criminal jurisdiction for matters not requiring jury; civil claims to A$60,000. Intermediate court termed District Court. Established by District Court Act 1973 No. 9 (NSW). Judge presides. Jurisdiction to hear indictable offenses; civil claims to A$750,000. Appellate jurisdiction in relating to Local Court decisions.

Victoria: Inferior court termed Magistrates' Court. (Legislation Magistrates' Court Act 1989 [Vic]). Magistrate presides. No jury. Criminal jurisdiction for summary offenses and indictable offenses where maximum fine A$120,000 or jail term ten years. Civil jurisdiction ordinarily for maximum claim A$100,000. Civil appeals to Supreme Court of Victoria. Intermediate court termed County Court. (Legislation County Court Act 1958 [Vic]). Judge presides. Unlimited criminal jurisdiction except for treason, murder, murder-related offenses. Unlimited civil jurisdiction. Appellate jurisdiction in relation to Magistrates' Court sentencing decisions.

South Australia: Inferior court termed Magistrates Court. (Legislation Magistrates Court Act 1991 [SA]). Magistrate presides. No jury. Criminal jurisdiction for summary offenses with fine or maximum prison term two years; civil jurisdiction maximum claim A$40,000, or for motor vehicle accidents A$80,000. Criminal and civil appeals to Supreme Court of South Australia. Intermediate court termed District Court. (Legislation District Court Act 1991 [SA]). Judge presides. Unlimited criminal jurisdiction except for murder and treason. Unlimited civil jurisdiction except for probate and admiralty. Appellate jurisdiction for certain administrative decisions where jurisdiction conferred by particular Act.

Queensland: Inferior court termed Magistrates Court. (Legislation Magistrates Court Act 1921 [Qld]). Magistrate presides. No jury. Criminal jurisdiction for summary offenses and committal hearings; civil jurisdiction, maximum claims A$50,000. Criminal and civil appeals to District Court. Intermediate court termed District Court. (Legislation District Court of Queensland Act 1967 [Qld]). Judge presides. Unlimited criminal jurisdiction except for murder, treason, and serious drug offenses. Civil jurisdiction, maximum claim A$250,000. Appellate jurisdiction in relation to Magistrates Court decisions.

Western Australia: Interior court termed Magistrates Court. (Legislation Magistrates Court Act 2004 [WA]). Magistrate presides. No jury. Criminal jurisdiction for simple or “either way” indictable offenses; commencement only of proceedings for more serious indictable offenses. Civil jurisdiction, maximum claim A$75,000; A$10,000 for minor claims; A$75,000 for consumer trade claims; A$10,000 for minor consumer trade claims. Appeals to Supreme Court of Western

Australia. Intermediate court termed District Court. (Legislation District Court of Western Australia Act 1969 [WA]). Judge presides. Criminal jurisdiction, maximum prison term 20 years. Civil jurisdiction, maximum claim A$750,000; unlimited jurisdiction, personal injury; exclusive jurisdiction, motor vehicle accidents. Appellate jurisdiction in relation to Magistrates Court Decisions.

Tasmania: Only subordinate court termed Magistrates Court. Magistrate presides. Primary legislation Magistrates Court Act 1987 (Tas). No jury. Criminal jurisdiction for simple offenses; civil jurisdiction, deals with disputes involving amounts of up to A$50,000 (amounts in excess of A$50,000 if all parties agree). Appeals to Supreme Court of Tasmania.

Northern Territory: Less serious criminal offenses heard in Court of Summary Jurisdiction of Northern Territory. Established under Justices Act (NT). Civil claims to maximum A$100,000 heard in Local Courts. Established under Local Court Act (NT). Both subordinate courts collectively called Magistrates' Courts. Appeals to Northern Territory Supreme Court.

Australian Capital Territory: Only subordinate court Magistrates Court. Legislation Magistrates Court Act 1930 (ACT). Magistrate presides. No jury. Criminal jurisdiction for offenses punishable on summary conviction; acts punishable by penalty (§19); civil jurisdiction maximum claim A$50,000 (§257). Appeals to Northern Territory Supreme Court. (§§207, 273).

Cross Vesting.

States and Territories have complementary Jurisdiction of Courts (Cross Vesting) Acts 1987 vesting State and Territory jurisdiction in courts of other States and Territories; federal jurisdiction in State and Territory courts; and State and Territory Jurisdiction in Federal Courts. Proceedings transferred where applicant establishes alternate forum more appropriate. Aims to reduce inconvenience and expense occasionally caused to litigants by jurisdictional limitations in those courts. High Court held Commonwealth Constitution does not permit Commonwealth Parliament to consent to vesting State jurisdiction in federal courts (In Re Wakim; ex parte McNally [1999] 198 CLR 511). States enacted Federal Courts (State Jurisdiction) Act 1999 providing that certain decisions of Federal Court or Family Court of Australia have effect as decisions of Supreme Court.

Appeal to High Court.

Appeals from State Supreme Court may be made to High Court with special leave. Judiciary Act 1903 §35A provides special leave only to be granted where case involves question of law of public importance; or if required by interests of administration of justice. No appeal from High Court decision.

See Pt I, category 1 Introduction, topic 1.02 Government and Legal System, subhead Judiciary.

Also see category 27 Dispute Resolution, topic 27.01 Alternative Dispute Resolution.

24.03 LAW REPORTS:

See Pt I, category 6 Courts and Legislature, topic 6.05 Reports.

24.04 LEGISLATURE:

See category 19 Introduction, topic 19.01 Government and Legal System.

24.05 REPORTS:

Principal State and Territory Law Reports are: New South Wales Law Reports; South Australian State Reports; Queensland Reports; Tasmanian Reports (formerly Tasmanian State

Reports); Victorian Reports; Western Australian Reports; Northern Territory Law Reports; and Australian Capital Territory Reports.

See Pt I, category 6 Courts and Legislature, topic 6.05 Reports.

25 CRIMINAL LAW

25.01 CRIMINAL LAW:

States and Territories, rather than Commonwealth, have primary jurisdiction in legislating for criminal offenses. Criminal law in Northern Territory, Queensland, Tasmania and Western Australia is codified largely in Criminal Code Act 1983 (NT); Criminal Code Act 1899 (Qld); Criminal Code Act 1924 (Tas) and Criminal Code Compilation Act 1913 (WA), respectively. Australian Capital Territory, New South Wales, South Australia and Victoria rely on common law as main source of their criminal law. To extent that criminal law is codified in these jurisdictions, principal statutes are Crimes Act 1900 (NSW), Criminal Law Consolidation Act 1935 (SA) and Crimes Act 1958 (Vic). Australian Capital Territory has two principal statutes, being Crimes Act 1900 (ACT) and Criminal Code 2002 (ACT).

Commonwealth powers to legislate for criminal offenses are either derived from Constitution, for example, in relation to customs and excise, taxation, insurance, social security, broadcasting and internet; or where States have referred their power to the Commonwealth to legislate on national level, for example, corporations regulation and anti-terrorism legislation. Commonwealth offenses are set out in wide range of statutes, in particular in Criminal Code Act 1995 and Crimes Act 1914.

26 DEBTOR AND CREDITOR

26.01 ASSIGNMENTS:

Assignments of debts and other rights are in general effected by deed, but may in many cases be carried out by writing not under seal. As a rule no particular form is required, provided the intention of the parties is clear and notice is provided to debtor. Assignment of book debts constitutes registrable charge. (Corporations Act 2001 [Cth] §262[1]).

Before deed will be admissible in evidence it must bear appropriate stamp duty. See category 40 Taxation, topic 40.07 Stamp Tax.

26.02 ATTACHMENT:

Of Persons.

Persons in contempt of court may be committed to prison, but attachment no longer available in any jurisdiction. For all practical purposes, imprisonment for debt has been abolished. Fraudulent debtors, however, may be examined before court, and committed to prison in default of payment. Enforcement of Judgments Act 1991 (SA) provides for arrest and imprisonment of debtor in limited circumstances. (§§4[4] and 5[7]). Other jurisdictions provide for arrest of debtors, and restraint of debtor's property if debtor intends to abscond. (Supreme Court Act 1995 [Qld] §90, 91; Debtors Act 1870 [Tas] §5[2]; Imprisonment of Fraudulent Debtors Act 1958 [Vic] §5; Supreme Court Act 1986 [Vic] §§87-100; and Restraint of Debtors Act 1984 [WA] Pt II).

Of Property.

In some States there is procedure where, in relation to cause of action arising in jurisdiction, assets of nonresident defendant can be attached pending resolution of action.

26.03 EXECUTION:

Attachment or execution may issue to enforce a judgment. Execution against land or goods, unless restrained, can issue as of course upon judgment for sum of money. Land and goods must be within jurisdiction of court.

There is no equitable relief against execution of judgment but it is a tort to levy manifestly excessive execution on debtor's goods, even in absence of malice.

When court official responsible for execution (sheriff) receives notice of presentation of creditor's bankruptcy petition they must refrain from continuing with execution or making payment to any creditor until petition is withdrawn, dismissed or has lapsed. (Bankruptcy Act 1996 [Cth] §119).

Where execution has issued both legal and equitable interests pass but title to land passes subject to all registered encumbrances. Equitable interests in general may be seized and sold with following exceptions: Trust properties, even where they are held for benefit of trustee and other beneficiaries; goods held on bailment; goods subject to bill of sale or under hire purchase; patent rights and claims of purely personal nature in tort.

In cases where other forms of execution are inapplicable, receiver may be appointed by way of equitable execution, or garnishee order may be obtained.

In settlement of debts generally, sheriff apportions them in order in which he or she receives them. But where writs are issued simultaneously if any step is taken by sheriff under one writ which necessitates a return to such writ for his protection, such return must be made before any step is taken under other writ.

Certain items exempted from execution, including kitchen or bedroom furniture, clothing, and tools of trade. (Bankruptcy Act 1966 [Cth] §116[2]). No exemption in relation to homesteads.

See topic 26.04 Garnishment and Pt I, category 5 Civil Actions and Procedure, topic 5.01 Actions.

Supplementary Proceedings.

See topic 26.04 Garnishment.

26.04 GARNISHMENT:

Where judgment or order is for recovery or payment of money, party entitled to enforce it may apply to have debtor examined as to whether any and what debts are owing to him; and any debts owing to debtor may be attached in satisfaction of judgment and garnishee order may be obtained requiring person owing money to debtor to pay same to judgment creditor. Civil Procedure Act 2005 (NSW) §119(1)(a), Uniform Civil Procedure Rules 2005 (NSW) §39.37, Court Procedures Rules 2006 (ACT) Pt 2.18, Supreme Court Act 1935 (WA), Supreme Court Act 1986 (Vic) §23(1), Supreme Court Rules 2000 (Tas) Div. 6 and Supreme Court Rules 1987 (NT) allow courts to make garnishee order over salary or wages. Enforcement of Judgments Act 1991 (SA) requires consent of judgment debtor before garnishee order made over salary or wages. Debt is bound as soon as order is served on person liable to pay same, but judgment creditor acquires no greater right than judgment debtor possessed. Uniform Civil Procedure Rules 2005 (NSW) §37.4, Enforcement of Judgments Act 1991 (SA) §5, Judgment Debt Recovery Act 1984 (Vic) §5(1), Debtors Act 1870 (Tas) §4(5) and Uniform Civil Procedure Rules 1999 (Qld) §868 allow court to order that judgment debt be paid by installments. Registered maintenance agreements treated as debts to Commonwealth. (Child Support [Registration and Collection Act] 1988). See Pt I, category 11 Family, topic 11.01 Divorce.

26.05 LIENS:

Common law lien is mere right to retain possession of property upon which lien exists, and cannot as rule be enforced by sale. Lien arises by implication of law or by statute. (Fisher v Automobile Finance Co of Australia Ltd [1928] 41 CLR 167 and Majeau Carrying Co Pty Ltd v Coastal Rutile Ltd [1973] 129 CLR 48).

Particular Liens.

Particular lien entitles holder to retain property subject to lien until payment of particular charges incurred in relation to property. Such liens arise, for example: (a) Where creditor is compellable by law to receive goods or to perform certain services to owner of such goods, as in case of common carriers and inn-keepers; (b) where creditor has spent money, skill or labor upon property, as in case of workmen; (c) under maritime law in case of salvage.

General lien entitles holder to retain property as security for payment of full indebtedness of owner no matter on what account charge in relation to property was incurred. Examples of general liens: liens of solicitors, bankers, factors, stockbrokers and insurance brokers. In order to establish general lien by custom of trade, must be shown that there was certain usage, that such usage reasonable and not inconsistent with law, and that so universally acquiesced in that everybody in trade knew it or ought to have known it. However, in case of above examples, judicial notice has resulted in it being unnecessary to demonstrate actual proof of usage for such liens to be established.

26.06 PLEDGES:

Delivery of possession to pledgee essential to pledge. Pledge includes lien which may be available when contract is barred by Statute of Limitations. When two or more articles are pledged together, each is security for whole debt. Pledgee must exercise care and is liable for any loss or injury due to negligence; but is not liable if property is stolen without fault or accidentally destroyed. Each State and Territory has Pawnbrokers Act: Second-Hand Dealers and Pawnbrokers Act 1989 (Vic); Pawnbrokers and Second-hand Dealers Act 1996 (NSW); Second-hand Dealers and Pawnbrokers Act 2003 (Qld); Summary Offences Act 1953 (SA); Second-hand Dealers and Pawnbrokers Act 1996 (SA); Second-hand Dealers and Pawnbrokers Act 1994 (Tas); Pawnbrokers and Second-hand Dealers Act 1994 (WA); Consumer Affairs and Fair Trading Act 1990 (NT); Pawnbrokers Act 1902 (ACT). Every pawnbroker must be licensed, except in South Australia and Tasmania where need only notify police and in Victoria where need only be registered. (Pawnbrokers Act 1902 [ACT] §6, Consumer Affairs and Fair Trading Act 1990 [NT] §247, Pawnbrokers and Second-hand Dealers Act 1996 [NSW] §6, Second-hand Dealers and Pawnbrokers Act 2003 [Qld] Pt 3 Div. 1 and Pawnbrokers and Second-hand Dealers Act 1994 [WA] §6). Must keep in book particulars in relation to every pledge received. Articles subject of pledge can only be sold in accordance with statutory provisions. Acts also regulate pawnbrokers' business in number of other ways.

27 DISPUTE RESOLUTION

27.01 ALTERNATIVE DISPUTE RESOLUTION:

Alternative dispute resolution processes are being incorporated into rules and practises of all Australian courts and tribunals. Many areas of law have mandatory and voluntary alternative dispute resolution avenues. Courts may order varying forms of alternative dispute resolution even where parties do not consent.

Alternative dispute resolution methods include mediation, conciliation, conferences, and approved or private arbitrators.

Arbitration.

All States and Territories have Acts to regulate commercial arbitration and arbitration agreements: Commercial Arbitration Act 1986 (ACT); Commercial Arbitration Act 1984 (NSW); Commercial Arbitration Act 1985 (NT); Commercial Arbitration Act 1990 (Qld); Commercial Arbitration and Industrial Referral Agreements Act 1986 (SA); Commercial Arbitration Act 1986 (Tas); Commercial Arbitration Act 1984 (Vic); and Commercial Arbitration Act 1985 (WA). Common law rules also govern.

See also Pt I, categories 3 Business Regulation and Commerce, topic Privacy, and 8 Dispute Resolution, topic 8.01 Alternative Dispute Resolution.

28 DOCUMENTS AND RECORDS

28.01 ACKNOWLEDGMENTS:

Where deed is executed abroad, advisable it be acknowledged before notary public in British possessions, or before Australian or British consul elsewhere. Where proof of documents required through legalization, public documents from countries party to Hague Convention Abolishing Requirement of Legalization for Foreign Public Documents require apostille only.

28.02 AFFIDAVITS:

In all States and Territories, affidavits can be witnessed by legal practitioners, justices of the peace, and (except in Tasmania and Northern Territory) public notaries. Other persons may be authorized to witness affidavits. Affidavits sworn out of State for use within State must be before any person having authority to administer oaths in that place or (except in Queensland) before Australian consular officer. Provision is made for making of affirmations in lieu of swearing affidavits. See: Evidence Act 1995 (Cth); Oaths and Affirmations Act 1984 (ACT); Oaths Act 1939 (NT); Oaths Act 1900 (NSW); Oaths Act 1867 (Qld); Oaths Act 1936 (SA); Supreme Court Civil Rules 2006 (SA); Oaths Act 2001 (Tas); Evidence Act 1958 (Vic); and Oaths Affidavits and Statutory Declarations Act 2005 (WA).

For purposes of certain legislation other persons may have affidavits sworn before them.

Statutory declarations which are used in certain cases in substitution for affidavits, may be made before a wider class of persons. Oath not administered, but making of false declaration constitutes perjury. See: Statutory Declarations Act 1959 (Cth); Oaths Act 1939 (NT); Oaths Act 1900 (NSW); Oaths Act 1867 (Qld); Oaths Act 1936 (SA); Supreme Court Civil Rules 2006 (SA); Oaths Act 2001 (Tas); Supreme Court Rules 2000 (Tas); Evidence Act 1958 (Vic); and Oaths Affidavits and Statutory Declarations Act 2005 (WA).

28.03 NOTARIES PUBLIC:

Australian legal practitioner may apply for appointment as public notary, pursuant to State and Territory legislation. Appointment usually by Supreme Court. In Western Australia, appointment by Full Court of Supreme Court. In Queensland, public notaries appointed by Court of Faculties in London. Functions of notaries public by reference to powers lawfully exercisable by notary public in U.K. (specific statutory reference only in Northern Territory, Tasmania and Western Australia; U.K. case law governs other States and Australian Capital Territory). New South Wales notaries public must not carry out notarial work for employer or client of employer unless employed by solicitor, solicitor corporation or other as prescribed by regulation. See Public Notaries Act 1997 (NSW); Public Notaries Act 2001 (Vic); Public Notaries Act 1979 (WA); Legal Practitioners Act 1981 (SA); Notaries Public Act 1990 (Tas); Notaries Public Act 1984 (ACT); and Public Notaries Act 1992 (NT).

28.04 SEALS:

At common law, seals are necessary in execution of deeds, but no particular form of seal is needed. Common law position has been altered by statute. States and Territories do not require physical act of sealing to ensure validity; enough that document expressed to be deed, or sealed. See: Civil Law (Property) Act 2006 (ACT); Conveyancing Act 1919 (NSW); Law of Property Act 2000 (NT); Property Law Act 1974 (Qld); Law of Property Act 1936 (SA); Conveyancing and Law of Property Act 1884 (Tas); Property Law Act 1958 (Vic); and Property Law Act 1969 (WA). Corporations Act 2001 (Cth) §127(1) does not require companies to execute document with common seal if document expressed to be deed and signed by two company directors, director and company secretary or sole director/secretary if proprietary company. Document may be treated as deed even though seal has been accidentally torn off. In general, contracts in form of deed are valid, notwithstanding absence of any mutual consideration as required in contract without seal. Contract in restraint of trade which would otherwise be void, is not made valid by execution under seal.

29 EMPLOYMENT

29.01 LABOR RELATIONS:

Most Australian employees covered by Federal legislation (formerly Workplace Relations Act 1996, currently Fair Work Act 2009 [FW Act]). FW Act operates to exclusion of all State laws that attempt to cover same area, with some exceptions provided. Due to constitutional limitations on Federal Parliament's legislative power, Federal legislation cannot cover some employees (main classes are employees of individuals, partnerships, or non-trading/non-financial corporations such as certain charities, and State Public Service employees). For these excluded employees, States have power to regulate labor relations and industrial disputes within territorial limits. Queensland, Western Australia, South Australia, Tasmania and New South Wales do so by means of conciliation and arbitration: Industrial Relations Act 1996 (NSW); Industrial Relations Act 1999 (Qld); Fair Work Act 1994 (SA); Industrial Relations Act 1984 (Tas) and Industrial Relations Act 1979 (WA). No State industrial relations system for Victorian employees, all covered by Federal system. See Pt I, category 9 Employment, topic 9.01 Industrial Relations.

FW Act attempts to create unified workplace relations regime for Australia. States have ability to refer powers in this area to Commonwealth. At this stage, only Victoria has referred powers. South Australia expected to follow if Statutes Amendment (National Industrial Relations System) Bill 2009 (SA) passes into law. Currently, other States still negotiating with Australian Labor Government.

Workers Compensation provided for in State and Territory legislation which imposes liability on employer to pay compensation (weekly payments, medical like expenses, lump sums for certain injuries and death benefits for dependents) for personal injury or death arising out of or in course of their employment. Traveling to and from workplace from residence is compensable in some, but not all, states. Employee common law rights in respect of compensable injury are available but generally restricted. Employers obliged either to obtain insurance cover for full amount of their liability (under compulsory schemes in workers compensation legislation), or in case of large employers to satisfy stringent prudential requirements to operate as “self-insurers”. Workers compensation authorities and tribunals set up to hear compensation claims and make awards: Workplace Injury Management and Workers Compensation Act 1998 (NSW); Accident Compensation Act 1985 (Vic); Workers' Compensation and Rehabilitation Act 2003 (Qld); Workers Rehabilitation and Compensation Act 1986 (SA) and WorkCover Corporation Act 1994 (SA); Workers Rehabilitation Compensation Act 1988 (Tas); Workers' Compensation and Injury Management Act 1981 (WA); Workers Rehabilitation and Compensation Act 1986 (NT); Workers' Compensation Act 1951 (ACT) and Workers Compensation Regulation 2002 (ACT). Dust Diseases Tribunal Act 1989 (NSW) sets up tribunal in New South Wales to determine claims relating to death or injury resulting from certain dust diseases (e.g., asbestosis). Employee claims generally conciliated and, if not resolved, determined by relevant court or tribunal.

Occupational Health and Safety legislation exists in all States and Territories: Occupational Health and Safety Act 2004 (Vic); Occupational Health and Safety Act 2000 (NSW); Workplace Health and Safety Act 1995 (Qld); Occupational Health, Safety and Welfare Act 1986 (SA); Workplace Health and Safety Act 1995 (Tas); Occupational Safety and Health Act 1984 (WA); Workplace Health; and Safety Act 2007 (NT) and Work Safety Act 2008 (ACT). Key purpose of legislation is to impose on employers and others who control workplace obligation to ensure health and safety of people in that workplace.

Common duties imposed on employers include: Duty to provide working environment that is safe and without undue risk to health; duty to monitor health of employees and conditions in workplace; duty to ensure that persons are not exposed to risks to their health and safety arising from employer's business; duty to consult with workers who may be directly affected by employer's occupational health and safety decisions; duty to notify relevant supervisory authority immediately after becoming aware that incident has occurred at workplace under management or control; and duty to ensure workplace site at which incident has occurred remains undisturbed until directed otherwise, unless protecting health and safety of person, aiding injured person, or preventing further occurrence of incident.

Legislation also imposes ``upstream'' duties on persons who supply to or otherwise interact with employers, including persons with management or control of workplace, designers and manufacturers and suppliers of structures, substances or equipment installed in workplace.

Person or other entity that breaches legislation may be liable to significant fines. Legislation in some jurisdictions includes obligations for employers to keep injured employee's job open. Other purposes of legislation are to establish regime for enforcing key health and safety obligations and to provide for making of regulations that impose specific rules on particular types of hazards that may be present in workplace (e.g., certain hazardous substances, working with scaffolding, etc.).

See Pt I, category 9 Employment, topic 9.01 Industrial Relations.

30 ENVIRONMENT

30.01 ENVIRONMENTAL REGULATION:

State environmental legislation is generally divided into following topics: pollution control; land use planning; biodiversity conservation; and environmental impact assessment.

Pollution Control.

All States have enacted legislation which provides for environmental control body or bodies. Functions of these bodies include environmental planning, surveying and researching pollution problems and making recommendations to government and, in some cases, regulation of environmental hazards. See Protection of the Environment Administration Act 1991 (NSW); Protection of the Environment Operations Act 1997 (NSW); Environment Protection Act 1970 (Vic); Environment Protection Act 1993 (SA); Environmental Protection Act 1986 (WA); Environmental Protection Act 1994 (Qld); Environmental Management and Pollution Control Act 1994 (Tas); Environment Protection Act 1997 (ACT); Waste Management and Pollution Control Act 1998 (NT); and Environment Protection Authority Act 2007 (NT).

Protection of the Environment Administration Act 1991 (NSW) establishes Environment Protection Authority (EPA) to assume general responsibility for environmental protection under wide variety of legislation. Protection of the Environment Operations Act 1997 (NSW) consolidates environmental legislation in New South Wales, and enables Government to set environment protection policies to establish environmental standards and implement protection measures of National Environment Protection Council. Act establishes licensing arrangement relating to air pollution, water pollution, noise pollution, waste management and contaminated groundwater treatment regulated by EPA and local councils. Licenses remain in force until suspended, revoked or surrendered but are subject to regular review. EPA has power to grant exemptions. Act also imposes significant penalties for major offenses, and imposes duty to notify authorities of pollution that causes or threatens material harm to environment. Miscellaneous amendments made by Protection of the Environment Operations Amendment Act 2005: apply to grant and treatment of environmental protection licenses; increase penalties; further empower officers; and create new offense of land pollution.

Environment Protection Act 1970 (Vic) establishes Victorian EPA and contains provisions designed to prevent pollution of land, air and water. Act contains provisions to lower level of disposal of solid wastes and reduce environmental impact through neighborhood environmental improvement plans and sustainability covenants. Act introduces accredited license system for corporations, imposes liability for contaminated sites on lenders, and provides for creation of State Environment Protection Policies (SEPPs). SEPPs provide framework for environmental decision making and set of environmental objectives giving effect to Environment Protection Act 1970 (Vic). Furthermore, Act imposes significant penalties for polluting corporations, creates Environment Protection Board and Environment Protection Authority, imposes landfill levy and provides for Industry Waste Reduction Agreements. Commissioner for Environmental Sustainability Act 2003 (Vic) establishes role of Commissioner for Environmental Sustainability to report on environmental issues and audit Government agencies. Sustainability Victoria Act 2005 (Vic) establishes Sustainability Victoria (SV), provides for SV to be successor in law of Sustainable Energy Authority Victoria and EcoRecycle Victoria and amends Environment Protection Act 1970 (Vic) by transferring EcoRecycle Victoria's functions and powers to SV.

Planning and Heritage.

Most States have environmental planning legislation which aims to balance conflicting land uses. See Planning and Environment Act 1987 (Vic); Planning and Development Act 2007 (ACT) (repealed Land [Planning and Environment] Act 1991 [ACT]); Environmental Planning and Assessment Act 1979 (NSW); Planning Act 1999 (NT); Development Act 1993 (SA); Sustainable Planning Act 2009 (Qld) (repealed Integrated Planning Act 1997 [Qld]); Planning and Development (Consequential and Transitional Provisions) Act 2005 (WA) (repealed Western Australian Planning Commission Act 1985 [WA]; Town Planning and Development Act 1928 [WA] and; Metropolitan Region Town Planning Scheme Act 1959 [WA]). Repealed Acts' provisions consolidated by Planning and Development Act 2005 (WA). Act aims to provide efficient and effective land use planning system and promote sustainable use and development of land in Western Australia.

Land Use Planning and Approvals Act 1993 (Tas), State Policies and Projects Act 1993 (Tas) and Resource Management and Planning Appeal Tribunal Act 1993 (Tas) relate to Tasmania's resource management and planning system, objective of which is to promote sustainable development of natural and physical resources and maintenance of ecological processes and genetic diversity. See also Natural Resource Management Act 2002 (Tas). Natural Resources Commission Act 2003 (NSW) establishes independent National Resources Commission to advise Government on natural resource management.

Most States have shown increasing interest in conservation of significant buildings, works, objects, places (including parks and reserves) and flora and wildlife. Relevant statutes are: Heritage Act 1977 (NSW), Heritage Amendment Act 2009 (NSW), National Parks and Wildlife Act 1974 (NSW), Wilderness Act 1987 (NSW), Native Vegetation Act 2003 (NSW), Threatened Species Conservation Act 1995 (NSW), Historic Houses Act 1980 (NSW), Rural Lands Protection Act 1998 (NSW), Aboriginal Land Rights Act 1983 (NSW); Coastal Management Act 1995 (Vic), Aboriginal Heritage Act 2006 (Vic), National Parks Act 1975 (Vic), National Parks and Crown Land (Reserves) Acts Amendment Act 2008 (Vic), Wildlife Act 1975 (Vic), Heritage Act 1995

(Vic), Flora and Fauna Guarantee Act 1988 (Vic), National Parks and Wildlife Act 1972 (SA), Coast Protection Act 1972 (SA), Aboriginal Heritage Act 1988 (SA), Native Vegetation Act 1991 (SA), Wilderness Protection Act 1992 (SA), Heritage Places Act 1993 (SA), Heritage (Heritage Directions) Amendment Act 2005 (SA), Historic Shipwrecks Act 1981 (SA), Marine Parks Act 2007 (SA); Wildlife Conservation Act 1950 (WA), Conservation and Land Management Act 1984 (WA), Maritime Archaeology Act 1973 (WA), Aboriginal Heritage Act 1972 (WA), Reserves (National Parks, Conservation Parks, Nature Reserves and Other Reserves) Act 2004 (WA), Heritage of Western Australia Act 1990 (WA); National Parks and Reserves Management Act 2002 (Tas), Historic Cultural Heritage Act 1995 (Tas), Aboriginal Relics Act 1975 (Tas), Nature Conservation Act 2002 (Tas); Nature Conservation Act 1992 (Qld), Aboriginal Land Act 1991 (Qld), Aboriginal Cultural Heritage Act 2003 (Qld), Torres Strait Islander Cultural Heritage Act 2003 (Qld), Queensland Heritage Act 1992 (Qld), Wet Tropics World Heritage Protection and Management Act 1993 (Qld), Marine Parks Act 2004 (Qld), Cape York Peninsula Heritage Act 2007 (Qld), Iconic Queensland Places Act 2008 (Qld), Resorts and Other Acts Amendment Act 2009 (Qld), Great Barrier Reef Protection Amendment Bill 2009 (Qld); Territory Parks and Wildlife Conservation Act 1976 (NT), Parks and Reserves (Framework for the Future) Act (2003) 2004 (NT), Heritage Conservation Act 1991 (NT), Northern Territory Aboriginal Sacred Sites Act 1989 (NT); Nature Conservation Act 1980 (ACT), Heritage Act 2004 (ACT). Public Land (Administration and Forests) Act 1991 (Tas) sets out functions of Resource Planning and Development Commission, established under Resource Planning and Development Commission Act 1997 (Tas), including to promote balanced use of public land based on evaluation of its potential to fulfill social, economic and environmental needs, amongst other objectives.

Environmental Impact Assessment.

States are responsible for environmental impact assessment (EIA) and approval of actions that have or may have significant effect on environment and do not fall within Commonwealth jurisdiction under Environment Protection and Biodiversity Conservation Act 1999. Some States have separate EIA legislation. See Environmental Assessment Act 1982 (NT); Environment Effects Act 1978 (Vic). Other States incorporate EIA in existing legislation. See Environmental Planning and Assessment Act 1979 (NSW); Environmental Management and Pollution Control Act 1994 (Tas); Environmental Protection Act 1986 (WA).

Courts and Tribunals.

In Victoria, Magistrates' Court hears most prosecutions for breaches of Environment Protection Act 1970 (Vic) and Victorian Civil and Administrative Tribunal hears planning matters and reviews decisions under Environment Protection Act 1970 (Vic) and applications for licences and works approvals. Civil and Administrative Tribunals in Australian Capital Territory and Queensland perform similar role under ACT Civil and Administrative Tribunal Legislation Amendment Act (No. 2) 2008 (ACT) and Queensland Civil and Administrative Tribunal (Jurisdiction Provisions) Amendment Act 2009 (Qld). New South Wales has established Land and Environment Court which handles all proceedings under State environment protection legislation and all environmental planning appeals and objections. (See Land and Environment Court Act 1979 [NSW].) Queensland has Planning and Environment District Court. (See Integrated Planning Act 1997 [Qld].) See also Environment Resources and Development Court Act 1993 (SA).

Miscellaneous.

Commonwealth, South Australia, New South Wales, Victoria, Queensland have each introduced Water (Commonwealth Powers) Acts (repealing Murray-Basin Acts in each State) to approve and give effect to interstate agreements to refer powers to Commonwealth to regulate preservation of water and resources of Murray and Darling rivers and basins and halt salination. See also Murray-Darling Basin Agreement Act 2007 (ACT). South Australia has proposed Willunga Basin Protection Bill 2009 (SA) to establish Willunga Basin Protection Committee for protection of environment and heritage of Willunga Basin.

Most States (except New South Wales which has consolidated its environmental legislation: see Protection of the Environment Operations Act 1997[NSW]) have specific antipollution legislation applying to pollution control, litter, waste disposal and protection of waters. E.g., Pollution of Waters by Oil and Noxious Substances Act 1986 (Vic), Marine Act 1988 (Vic); Marine Pollution Act 1987 (NSW); Marine Pollution Act 1999 (NT); Protection of Marine Waters (Prevention of Pollution From Ships) Act 1987 (SA); Litter Act 2007 (Tas); and Waste Avoidance and Resource Recovery Act 2007 (WA). Safe Drinking Water Act 2003 (Vic) places obligations on water suppliers and water storage managers in relation to drinking water quality and risk management. See also Waste Management and Pollution Control Act 1998 (NT); and Zero Waste SA Act 2004 (SA). Victoria and South Australia have also proposed bills seeking to, and Commonwealth has existing regulations to, impose environmental levies on importation and production of beverage containers into relevant State, with maximum penalties of A$280,300 for contravention of Scheme in Victoria. See: Environment Protection (Beverage Container Deposit and Recovery Scheme) Bill 2009 (Cth); Environment Protection Amendment (Beverage Container Deposit and Recovery Scheme) Bill 2009 (Vic); and South Australian Environment Protection regulations.

Radiation Act 2005 (Vic) aims to protect health and safety of persons and environment from harmful effects of radiation. Outlines Radiation Protection Principle; provides for regulation of matters including licensed activities and testing of prescribed radiation sources; establishes Radiation Advisory Committee.

Some States provide for protection of ozone in atmosphere by control of ozone depleting substances. See Electricity (Greenhouse Gas Emissions) Act 2004 (ACT); Ozone Protection Act 1989 (NSW); Environmental Protection Act 1994 (Qld); and Environment Protection Act 1970 (Vic). Ozone related provisions in Environment Protection Act 1993 (SA), Environmental Management and Pollution Control Act 1994 (Tas) and Environment Protection Act 1997 (ACT) repealed. Ozone depleting substances in ACT now regulated by Ozone Protection and Synthetic Greenhouse Gas Management Act 1989 (Cth). See also proposed Carbon Pollution Reduction Scheme (Consequential Amendments) Bill 2009 (Cth). In recognition of measures to reduce greenhouse gas emissions, several States have introduced laws to give legally recognized rights associated with carbon sequestrated by trees and forests: see Forestry Rights Act 1996 (Vic); Forestry Rights Registration Act 1990 (Tas); Forestry Act 1959 (Qld); and Carbon Rights Act 2003 (WA), Tree Plantation Agreements Act 2003 (WA). See also Greenhouse Gas Storage Act 2009 (Qld) which regulates and facilitates storage of greenhouse gases in geological formations. Greenhouse measures that target electricity industry are found in Electricity Supply Act 1995 (NSW), Electricity Supply Amendment (Energy Savings) Act 2009 (NSW) and Electricity Industry Act 2000 (Vic). In Victoria, Geothermal Energy Resources Act 2005 (Vic) facilitates use of geothermal energy resources. Victorian Energy Efficiency Target Act 2007 (Vic) aims to reduce household energy consumption, and Electricity Industry Amendment (Premium Solar Feed in Tariff) Act 2009 (Vic) introduces scheme of feed in tariff for residential small scale solar photovoltaic cells. Clean Energy Act 2008 (Qld) aims to improve efficiency in use of energy to reduce greenhouse gas emissions. Climate Change and Greenhouse Emissions Reduction Act 2007 (SA) is first State Act which prescribes specific target for reduction of greenhouse gas emissions and related renewable electricity targets. Act established Premier's Climate Change Council to advise on climate change related issues. See Climate Change (State Action) Act 2008 (Tas) and Climate Change (Greenhouse Gas Emissions Targets) Bill (No. 2) 2008 (ACT). Other States are in process of enacting similar legislation. Greenhouse Gas Storage Act 2009 (Qld) facilitates greenhouse gas geological (``GHG'') storage by regulating capture of carbon dioxide emissions and their subsequent transportation and permanent storage by injection into underground reservoirs by prescribed GHG authorities. See also Greenhouse Gas Geological Sequestration Act 2008 (Vic).

There is increasing State concern over protection of water resources. Water

Management Act 2000 (NSW) provides for protection, conservation and integration of State water sources. Act establishes Water Administration Ministerial Corporation. Relevant Minister can determine area to be water management area and establish committee to carry out specific tasks. Act provides for principles of water sharing and use, classification of water sources and management of drainage and flood plains. Act also provides for granting, renewal and registration of various categories of access licenses to non-landowners, irrigation corporations and boards, private water trusts, and public works. Water Management Amendment Act 2008 (NSW) introduces powers of authorized offices to enter and search premises and give directions for protection of water. Act implements court orders against offenders and increases penalties for contravention. See also Water Industry Competition Act 2006 (NSW); Water Resources Act 1997 (SA), River Murray Act 2003 (SA); Water Act 2000 (Qld), Water Supply (Safety and Reliability) Act 2008 (Qld); Water Management Act 1999 (Tas), Water Legislation and Amendment Act 2008 (Tas); Water Act 1989 (Vic); and Water Resources Act 2007 (ACT). Catchment Management Authorities Act 2003 (NSW) establishes authorities to develop and implement catchment action plans. Wild Rivers Act 2005 (Qld) aims to preserve natural values of rivers with all or almost all natural values intact, including by establishing framework to declare wild river areas and regulating activities and taking of natural resources in wild river areas.

Legislation in all States and Territories regulates transportation and packaging of dangerous goods; directed more at public safety than environmental issues. See: Dangerous Goods Act 1985 (Vic), Road Transport (Dangerous Goods) Act 1995 (Vic); Dangerous Substances Act 2004 (ACT); Dangerous Goods Act 1998 (NT), Dangerous Goods (Road and Rail Transport) Act 2003 (NT); Dangerous Goods Safety Management Act 2001 (Qld), Transport Operations (Road Use Management) Act 1995 (Qld), Transport Infrastructure Act 1994 (Qld); and Dangerous Substances Act 1979 (SA), Dangerous Substances Regulations 2002 (SA); and Dangerous Goods Safety Act 2004 (WA)(repealed Dangerous Goods [Transport] Act 1998 [WA]). Greenhouse Gas Storage Act 2009 (Qld) regulates subsequent transportation of carbon dioxide emissions after capture.

31 ESTATES AND TRUSTS

31.01 ADMINISTRATION:

See topic 31.05 Executors and Administrators.

31.02 DEATH:

No statutory presumption of death of an absentee. Presumption arises at common law if unseen or unheard of for seven years by those likely to see or hear of person if alive. Shorter period may give rise to presumption of death where person was aged, infirm, ill or exposed to extraordinary peril. Courts likely to accept grant by foreign court made upon presumption of death. Presumption is rebuttable and persuasive. Upon presumption arising at common law, State statutes confer jurisdiction to distribute estate subject to certain safeguards.

Application of rule does not establish death at any particular time; only produces result that person might be presumed dead at date when question of death arose in legal proceedings.

Human Tissue Act 1983 (NSW) (§33), Human Tissue Act 1982 (Vic) (§41), Transplantation and Anatomy Act 1979 (Qld) (§45), Death (Definition) Act 1983 (SA) (§2), Human Tissue Act 1985 (Tas) (§27A), Human Tissue Transplant Act 1979 (NT) (§23) and Transplantation and Anatomy Act 1978 (ACT) (§45) define death to be either: (a) Irreversible cessation of all functions of brain; or (b) irreversible cessation of circulation of blood.

Common law principle that competent adult can refuse medical treatment. Some jurisdictions also have legislation providing competent adults with mechanism giving effect to refusal of treatment if later become incompetent: Natural Death Act 1988 (NT); Medical

Treatment (Health Directions) Act 2006 (ACT); Consent to Medical Treatment and Palliative Care Act 1995 (SA); Medical Treatment Act 1988 (Vic); Powers of Attorney Act 1998 (Qld); and Guardianship and Administration Act 1990 (WA).

Rights of the Terminally Ill Act 1995 (NT) commenced operation in 1996. Act confirmed right of terminally ill person to request assistance from medically qualified person to voluntarily terminate life in humane manner. First legislation to legalise voluntary euthanasia in world. Four people utilised Act to end their lives before it was overruled by Commonwealth legislation. Euthanasia Laws Act 1997 (Cth) revoked right of Territories to legalise euthanasia, nullifying Northern Territory's Act. Rights of Terminally Ill (Euthanasia Laws Repeal) Bill 2008 tabled in Commonwealth Parliament to repeal Euthanasia Laws Act 1997 (Cth), once again giving effect to Rights of the Terminally Ill Act 1995 (NT). Currently under consideration but unlikely to be passed. Bills also tabled in South Australia and Tasmania conferring right to voluntary euthanasia. See Voluntary Euthanasia Bill 2008 (SA) and Dying with Dignity Bill 2009 (Tas).

Actions for Death.

No action for damages in respect of death is available at common law.

Each jurisdiction has statutory exceptions to common law rule where deceased had dependants who will suffer pecuniary or quantifiable nonpecuniary loss as result of death. Such action founded upon negligence of person causing death and usually brought by executor or administrator of deceased person's estate on behalf of that person's dependants. Damages which can be claimed are for loss of material pecuniary benefit sustained by dependants as result of deceased person's death. Dependants must show that deceased could have sued and recovered against wrongdoer at time of death. See Civil Law (Wrongs) Act 2002 (ACT); Compensation (Fatal Injuries) Act 1974 (NT); Compensation to Relatives Act 1897 (NSW); Supreme Court Act 1995 (Qld); Civil Liability Act 1936 (SA); Fatal Accidents Act 1934 (Tas); Wrongs Act 1958 (Vic); and Fatal Accidents Act 1959 (WA).

All jurisdictions have specific statutory provision for damages to be claimed by deceased's estate in respect of funeral and medical expenses occasioned by death (only funeral expenses in New South Wales, Queensland and Victoria). These may be claimed where no dependency and pecuniary loss can be proved.

See category 29 Employment, topic 29.01 Labor Relations, subhead Workers Compensation.

31.03 DECEDENTS' ESTATES:

See topics 31.04 Descent and Distribution, 31.05 Executors and Administrators, 31.08 Wills.

31.04 DESCENT AND DISTRIBUTION:

Exact method of distribution on intestacy differs somewhat in particular States and Territories. All States and Territories have Administration and Probate Acts (except Queensland which has Succession Act 1981, New South Wales which has Probate and Administration Act 1898 and Western Australia which has Administration Act 1903). Where deceased leaves surviving spouse or partner and no issue, spouse or partner is entitled to whole estate (in all jurisdictions except Northern Territory and Western Australia). In Northern Territory and Western Australia, for spouse to take whole estate, there must be no surviving parents, siblings or children of siblings. Administration and Probate Act 1969 (NT); Administration Act 1903 (WA).

Each jurisdiction provides for either de facto spouses, putative spouses or partners: Administration and Probate Act 1958 (Vic) (§3); Family Relationships Act 1975 (SA) (§11); Probate and Administration Act 1898 (NSW) (§32G[1]); and Administration and Probate Act 1935

(Tas) (§44); Succession Act 1981 (Qld) (§5AA); Administration and Probate Act 1929 (ACT) (§44); Administration and Probate Act 1969 (NT) (§66); Administration Act 1903 (WA) (§15). Australian Capital Territory introduced Civil Unions Act 2006 (formal civil unions given equivalent treatment to marriage under all legislation in Australian Capital Territory) but was disallowed by Australian Governor-General.

Provision is made in legislation of some jurisdictions for spouse's share of estate to be distributed between surviving spouse and de facto spouse: In Victoria if deceased leaves both surviving spouse and surviving domestic partner spouse's share of estate is shared according to sliding scale (Administration and Probate Act 1958, §51A); in Australian Capital Territory, if deceased leaves surviving spouse and eligible partner and if eligible partner has lived with deceased continuously for at least five years, eligible partner is entitled to spouse's share of estate; if eligible partner has lived with deceased for less than five years spouse's share of estate is shared equally between eligible partner and spouse (Administration and Probate Act 1929, §45A); in Queensland if deceased leaves both surviving spouse and de facto spouse, spouse's share of estate is distributed either in accordance with written agreement between them as to distribution or in accordance with distribution order by court or in equal shares (Succession Act 1981, §36); in South Australia if deceased leaves surviving spouse and de facto (putative) spouse, spouse's share of estate is shared between them (Administration and Probate Act 1919, §72H).

Where deceased leaves surviving spouse and issue: (a) New South Wales: spouse entitled to first A$200,000, household chattels, and one-half of remainder of estate, with issue receiving other half of remainder. Succession Amendment (Intestacy) Act 2009 (NSW) due to commence on day appointed by proclamation. From commencement, spouse entitled to whole of estate, unless issue are not also issue of spouse; (b) South Australia: spouse entitled to first A$100,000, household chattels, and one-half of remainder of estate, with issue receiving other half of remainder; (c) Victoria: spouse entitled to first A$100,000, household chattels, and one-third of remainder of estate, with issue apportioned balance; (d) Western Australia: spouse entitled to first A$50,000, household chattels, and one-third of remainder of estate, with issue receiving balance of estate; (e) Tasmania: spouse entitled to first A$50,000 and one-third of remainder, with issue receiving balance of estate; (f) Queensland: spouse entitled to first A$150,000, household chattels, and one-half of remainder of estate if one issue or one-third of remainder where more than one issue, with issue receiving balance of estate; (g) Australian Capital Territory: spouse entitled to first A$200,000, household chattels, and one-half of remainder of estate if one issue or one-third of remainder where more than one issue, with issue and next of kin receiving balance of estate; and (h) Northern Territory: spouse entitled to personal chattels, first A$120,000 and one-half of remainder of estate where one child or issue of one child, or one-third of remainder of estate if more than one issue, with issue being entitled to balance.

In Northern Territory, where not survived by issue, but survived by parent, sibling or issue of sibling, spouse entitled to personal chattels, first A$500,000 and one-half of remainder of estate, with parent entitled to remainder of estate. Then, if no parent, sibling or issue of sibling entitled to balance of remainder estate. Similar distributions available in other jurisdictions where parents or next of kin other than issue survive deceased. All jurisdictions except Tasmania give surviving spouse right to elect to take deceased's interest in matrimonial or shared home.

If deceased leaves neither spouse nor children, in all States and Territories except Western Australia, father and mother of intestate equally entitled to estate whether there are brothers and sisters or not. In Western Australia, if no brothers or sisters, parents entitled to whole property; if brothers and sisters, parents are entitled to A$6,000 plus half balance. Brothers and sisters, and children of deceased brothers and sisters, entitled to other half of balance.

See topics 31.05 Executors and Administrators, 31.08 Wills; category 32 Family, topic

32.05 Infants.

31.05 EXECUTORS AND ADMINISTRATORS:

Upon grant of probate of will of deceased person, or letters of administration of estate, all property, whether real or personal, devolves upon executor or administrator. See Administration and Probate Acts in South Australia, Victoria, Tasmania, Northern Territory and Australian Capital Territory, Succession Act 1981 (Qld), Probate and Administration Act 1898 (NSW), and Administration Act 1903 (WA).

Eligibility and Competency.

Any person of full age and capacity may act as an executor, but company cannot so act unless authorized by its incorporating statute. Trustee companies, specially authorized by Act of Parliament to administer estates, exist in all jurisdictions. Such companies are not required to enter into any bond, even where acting as administrators. Private individuals, however, may be required to enter into guarantees when acting as administrators. Each State and Territory has Public Trustee or equivalent which may act as executor.

Where will omits to appoint executor, or appointed executor has died or is unable or unwilling to act, letters of administration cum testamento annexo may be granted. Where administration has not been completed, letters of administration de bonis non may be granted to enable finalization of administration.

Resealing.

Probate or letters of administration granted in any State, or in any other jurisdiction with which reciprocal arrangements exist, may be resealed in any State.

31.06 INTESTACY:

See topic 31.04 Descent and Distribution.

31.07 TRUSTS AND TRUSTEE COMPANIES:

English law generally applicable. Each State and Territory has Trustee Act.

Trustee companies generally incorporated under Act of Parliament, with power to act as executors and administrators, and to make charge for their services. Victorian Trustee Companies Act 1984 allows corporations to apply to Victorian Attorney-General for authority to carry on business as trustee company. Tasmanian Trustee Companies Act 1953 allows any company or association to present petition to Parliament to have it declared to be trustee company. Queensland, New South Wales, South Australia, Western Australia and Australian Capital Territory also have Trustee Companies Acts. Northern Territory has Companies (Trustees and Personal Representatives) Act 1981. See also topic 31.05 Executors and Administrators. Each State and Territory has Public Trustee (see e.g., State Trustees [State Owned Company] Act 1994 [Vic]) which may act as executor and allow members of public greater access to trustee, administrative and will-making services.

31.08 WILLS:

Statutory law relating to wills embodied in Wills Acts of various States: Succession Act 2006 (NSW) and Probate and Administration Act 1898 (NSW); Wills Act 1997 (Vic) and Administration and Probate Act 1958 (Vic); Wills Act 1936 (SA); Succession Act 1981 (Qld); Wills Act 1970 (WA); Wills Act 2008 (Tas); Wills Act 1968 (ACT); and Wills Act 2000 (NT). Formal requirements of wills in all States and Territories follow English pattern and are as follows:

Will must be in writing and signed by testator, or by some other person in testator's presence and by their direction (in Western Australia must be signed on face of will, and in Tasmania must be signed at foot), such signature being made or acknowledged by testator in presence of at least two witnesses present at same time; such witnesses must attest and subscribe will in presence of testator. In all jurisdictions document may still be taken as will of deceased notwithstanding that it has not been executed with requisite formalities, provided court satisfied there can be no reasonable doubt that deceased intended document to constitute deceased's will.

Where beneficiary under will witnesses will, gift to such witness or witness' spouse void except in Australian Capital Territory, South Australia, Victoria and Western Australia. In New South Wales, Northern Territory, Queensland and Tasmania exceptions apply, including where: there are at least two other witnesses to will who are not beneficiaries, or other beneficiaries give consent. In Queensland gift to interpreter of will or person claiming under interpreter void, unless all persons who would benefit from avoidance of gift give consent, or Court satisfied that gift was made freely and voluntarily.

In all States and Territories, will may be made by person aged 18 years or over or (except in Western Australia) married or previously married person, or person contemplating marriage under 18 years (or with leave of Court in New South Wales, South Australia and Australian Capital Territory).

Testators' Family Maintenance.

In all jurisdictions there are statutory provisions giving certain defined eligible persons including spouse and children of testator or intestate right to apply to courts to obtain increased share of deceased person's estate where either will or intestacy provisions (see topic 31.04 Descent and Distribution) do not make adequate provision; courts have power to alter provisions to provide for maintenance of applicant: Family Provision Act 1969 (ACT) (§8); Family Provision Act 1970 (NT) (§8); Succession Act 2006 (NSW) (§59); Succession Act 1981 (Qld) (§41); Inheritance (Family Provision) Act 1972 (SA) (§7); Testator's Family Maintenance Act 1912 (Tas) (§3); Administration and Probate Act 1958 (Vic) (§91); Inheritance (Family and Dependants Provision) Act 1972 (WA) (§6).

Foreign Wills.

Generally probate of will of foreign testator will be granted by State court concerned only if will complies with law of foreign country in which testator was domiciled at death or with law of State concerned. In all jurisdictions probate will be granted if execution of will conformed to internal law in force in place where executed or in place where, at time of execution or of testator's death testator was domiciled or had their habitual residence or in country of which, at either of such times, was national. Probate also granted of will executed on board vessel or aircraft if execution of will conformed to internal law in place with which vessel or aircraft may be taken to be most closely connected. In practice, upon production of an exemplified copy of probate granted by proper court of foreign country where testator was domiciled, Australian court concerned will follow such grant in granting probate in State or Territory upon application before it of executor.

In addition to above rules will, to extent that it disposes of immovables (i.e., in general, land), is valid if execution conformed to internal law in place where property was situated.

32 FAMILY

32.01 DESERTION:

See Pt I, category 11 Family, topic 11.01 Divorce.

32.02 DIVORCE:

See Pt I, category 11 Family, topic 11.01 Divorce.

State Acts in this field superseded by Commonwealth legislation. State law only relevant to unmarried couples.

In general, de facto spouses not under duty to maintain one another. However, Property (Relationship) Act 1984 (NSW) deals with redistribution of property when de facto relationship breaks down. (§14). All couples (including same-sex) can apply for court orders relating to distribution of property or maintenance. Also gives limited ability for court to order maintenance, and governs cohabitation and separation agreements. (Pt 4). Domestic Relationships Act 1994 (ACT) and De Facto Relationships Act 1991 (NT) provide similar rights. Relationships Act 2008 (Vic) and Relationships Act 2003 (Tas) give recognition to de facto relationships irrespective of gender, allows compensation for lost and gained financial resources upon breakdown of relationship, and allows orders for maintenance in limited circumstances. Family Court Act 1997 (WA) gives de facto couples legal rights in relation to property and maintenance. (Pt 5A). Domestic Partners Property Act 1996 (SA) gives courts broad discretion to grant any just and equitable order considered necessary. (§10[1]). Property settlements, but not maintenance, can be ordered by court under Property Law Act 1974 (Qld).

State legislation is not uniform and different provisions are applicable to division of property in each State.

32.03 GUARDIAN AND WARD:

Inherent jurisdiction of Supreme Court of each State and Territory includes exercise of parens patriae power for protection of person and property of infants and mentally infirm. Also powers bestowed by relevant Supreme Court Acts; statutory powers do not derogate from inherent powers. All States and Territories have also established special children's courts to hear proceedings related to children who are at risk or in need of protection, e.g., Children's Court Act 1987 (NSW).

Powers of Family Court include making decisions about medical treatment (see subhead Medical Treatment, infra); in case of conflict between State boards and Family Court, Family Court prevails.

Children.

Under Constitution, guardianship, custody of children other than in matrimonial cause is States' matter. However, revocable reference of certain powers to Commonwealth by all States (except Western Australia), so that Family Law Act (Cth) applies to dispute over guardianship, custody, access or maintenance of child, except where child already subject to State custody or care under State welfare law, or where interim protection order sought, as under, e.g., Children, Youth and Families Act 2005 (Vic). (§69ZK Family Law Act). All other guardianship powers transferred to Commonwealth by Jurisdiction of Courts (Cross-vesting) Acts of each State. As result of 1999 challenge to constitutionality of cross vesting legislation, Federal Court no longer vested with State jurisdiction. Federal Court may only exercise non-federal jurisdiction where it forms integral part of federal matter. Welfare provisions of Family Law Act cover areas under States' wardship jurisdiction such as medical treatment, blood transfusions and emotional well-being of child but do not give power to make child ward of court. Provisions of Family Law Act now apply to all children in Australia, including ex-nuptial, as all States and Territories referred power to make laws regarding ex-nuptial children to Commonwealth (except Western Australia, where State Family Court exercises Federal jurisdiction under Family Law Act). Paramount consideration in all cases is welfare of child. See Child Protection Act 1999 (Qld) (§§5, 104). See also Pt I, category 11 Family, topic 11.01 Divorce.

Jurisdictional requirement is ordinary residence, though physical presence sufficient territorial connection if protection needed. Child may be ward of person, State or Supreme Court. If ward of Supreme Court, judge awards guardianship to party and can make orders with respect to custody, access and maintenance. Guardian retains personal responsibility for child until age 18. Ward of Supreme Court may not be removed from jurisdiction, allowed to leave school or marry without judge's permission.

Mental Illness.

Supreme Court has inherent jurisdiction to make orders concerning estate of person with mental illness, and all States have legislation whereby guardian/committee of person and/or administrator of estate may be appointed where person over 18 suffering mental disability (variously defined) and unable to manage own affairs. Views of person to be taken into account in most States. Some States include deterioration through age of mental faculties. Relative of incapacitated person is to be preferred for appointment as guardian, unless good reason not to appoint (Re NB Mc v Guardianship Administration Board [1989] 3 VAR 87).

Relevant legislation includes: Guardianship and Administration Act 1986 (Vic); Guardianship Act 1987 (NSW); Guardianship and Administration Act 2000 (Qld); Guardianship and Administration Act 1990 (WA); Guardianship and Administration Act 1993 (SA); Guardianship and Management of Property Act 1991 (ACT); Adult Guardianship Act 1988 (NT); Guardianship and Administration Act 1995 (Tas) and Mental Health Acts of all States and Territories.

Public Trustee (e.g., Victoria—State Trustees Limited, NSW—NSW Trustee and Guardian) may be preferred administrator of estate.

Foreign order of appointment of guardian not regarded as foreign judgment for purposes of law applicable to recognition of foreign judgments in general. Forum itself must make appointment, even if only confirming foreign appointment.

Guardianship orders may be enduring or temporary, plenary or limited, depending on relevant jurisdiction, and appeal and review rights exist in all States.

Medical Treatment.

Consent to major nontherapeutic medical treatment (e.g., sterilization), usually only with consent of guardian and approval of court. In Victoria, approval of Victorian Civil and Administrative Tribunal required; in New South Wales, Guardianship Tribunal; in South Australia, Guardianship Board; in Tasmania, Guardianship and Administration Board; in Western Australia, State Administrative Tribunal; in Australian Capital Territory, Guardianship and Management of Property Tribunal; and in Queensland, Guardianship and Administration Tribunal. Any person aggrieved may challenge decision in court.

Judicial criteria for consent unsettled, but paramount consideration best interests of person. Provision for enduring guardians, consent to medical or dental treatment on behalf of persons incapable of giving consent, and registration of interstate guardianship and administration orders. Guardianship and Administration Act 1986 (Vic) established Office of Public Advocate to advocate on behalf of people of all ages with disabilities, defined in Act to include intellectual impairment, mental disorder, brain injury, physical disability and dementia. (§§3[1], 4[1]; Pt 3). Similar Public Advocates established in Western Australia, South Australia and Australian Capital Territory.

Since decisions of Secretary Department of Health and Community Services v JWB and SMB (Re Marion) (1992) 175 CLR 218 and P v P (1994) 181 CLR 583, Family Court is appropriate forum to seek consent for sterilization of children. Consent for sterilization of adults may still be sought from Guardianship Boards in some instances. Decision of Family Court will prevail in any dispute between it and Board as mentioned above.

Power of Attorney by competent donor may continue to operate in some circumstances in event of subsequent incapacity of donor in all States and Territories: Instruments Act 1958 (Vic) (Pt XIA); Power of Attorney Act 2003 (NSW) (Pt 4); Powers of Attorney and Agency Act 1984 (SA) (§6); Powers of Attorney Act 2000 (Tas) (Pt 4); Powers of Attorney Act 2006 (ACT) (§32); Powers of Attorney Act 1980 (NT) (Pt 3); Powers of Attorney Act 1998 (Qld) (Pt 2); and Guardianship and Administration Act 1990 (WA) (Pt 9).

32.04 HUSBAND AND WIFE:

See Pt I, category 11 Family, topics 11.01 Divorce, 11.02 Marriage.

On marriage a woman's property remains her own unless she makes disposition of it to the contrary. De facto relationships recognized in all States.

Married women hold and dispose of property, make contracts and carry on business separately from their husbands as if they were single. In all States married women may be liable in respect of any tort, contract, debt or obligation incurred prior to entering marriage and in New South Wales and Western Australia contractual liability of married woman is limited to her own property. Married Persons (Equality of Status) Act 1996 (NSW) (§4[1]) and Law Reform (Miscellaneous Provisions) Act 1941 (WA) (§3[1]). However, distinction of little importance, as married women and men subject to provisions of Commonwealth Bankruptcy Act 1966. Resulting trust relationship will arise between husband and wife if spouse contributes to joint property. Spouses can sue each other in contract or tort. Married woman no longer acquires domicile of husband, and there is no legal obligation to assume surname of spouse. In Australian Capital Territory, effect of Married Persons' Property Act 1986 is to abolish rule that husband is liable for contracts entered into by his wife for necessaries. (§5).

32.05 INFANTS:

Age of Majority is now 18 years whether male or female, married or not, in all States and Territories (e.g., Age of Majority Act 1977 [Vic]).

Contracts.

In general infants not bound by contracts except for “necessaries” (such as food, shelter, clothing, medical services and good teaching whereby they may profit afterwards). This remains law in all jurisdictions except New South Wales where Minors (Property and Contacts) Act 1970 (NSW) applies. Generally, contracts other than for necessaries may be ratified either orally or in writing upon attainment of age of majority, e.g., §4 Minors Contracts (Miscellaneous Provisions) Act 1979 (SA). Contracts of minors (other than for necessaries) are voidable at option of minor, but adult cannot plead minor's incapacity to contract as defense, so minor could enforce rights against adult in most cases. Contracts that are unfair or prejudicial to minor may be cancelled by court after looking at whole contract. Contracts entered into by minor may also be valid if approved by Court in advance of signing, e.g., §6 Minors Contracts (Miscellaneous Provisions) Act 1979 (SA).

Torts.

In general infant is liable for torts, if he or she was capable of intending act. Where standard of care is relevant to establishing tort, age of minor will be taken into account.

Actions.

An infant may sue by guardian, if any, or next friend. A guardian ad litem or next friend may upon request be appointed by court to protect interest of any minor in any suit relating to property in which minor may be or may become interested.

Status of Children.

Legislation passed in all States except Western Australia removes legal disabilities of children born out of wedlock (e.g., Status of Children Act 1974 [Vic] §3). Western Australia has only removed legal disability of children born out of wedlock in relation to specific laws such as dispositions by will (Wills Act 1970 [WA] [Pt IX]) and adoption (Adoption Act 1994 [WA]). Relationship between every child and father and mother determined irrespective of whether father and mother are or have been married to one another. Acts apply to every person irrespective of date or place of birth or domicile of father or mother. Acts provide that child born to woman during her marriage or within ten months after marriage dissolved by death or otherwise will in absence of contrary evidence be presumed to be child of mother and her husband or former husband, e.g., §5 Status of Children Act 1974 (Vic). Acts provide that relationship of father and child for any purpose related to succession to property, etc. recognized only if father and mother of child were married to each other at time of its conception or some subsequent time or paternity has been admitted (expressly or by implication) by or established against father in his lifetime. Methods of establishing paternity also provided for in Acts. Legitimation Act 1909 (WA) repealed by Acts Repeal and Amendment (Births, Deaths and Marriage Regulation) Act 1998 (WA).

Artificial Conception.

Status of Children Act 1996 (NSW) provides that where married woman, or woman in defacto relationship, with her husband's, or defacto equivalent's, consent has undergone fertilization procedure resulting in pregnancy (including artificial insemination and in vitro fertilization) husband, or defacto equivalent, will be irrebuttably presumed to have caused pregnancy and be father of child. (§14). Similar provisions exist in Status of Children Act 1974 (Vic) (Pt II), Family Relationships Act 1975 (SA) (Pt 2A), Status of Children Act 1978 (Qld) (§17), Parentage Act 2004 (ACT) (§11), Status of Children Act 1979 (NT) (Pt IIIA), Status of Children Act 1974 (Tas) (Pt III), and Artificial Conception Act 1985 (WA). Also recognized under Family Law Act 1970 (Cth) (§60H).

Queensland, Australian Capital Territory, South Australia, New South Wales, Tasmania and Victoria have enacted legislation prohibiting commercial surrogacy agreements. Legislation is not uniform but there are some similarities: (a) Advertising of surrogacy agreement is prohibited; (b) all surrogacy agreements are void; and (c) provisions apply in circumstances where woman becomes pregnant pursuant to surrogacy agreement and also where woman who is already pregnant enters into surrogacy agreement. New South Wales and Queensland Parliamentary committee reports issued in 2008/2009 have recommended lifting prohibition on altruistic surrogacy.

Surrogate Parenthood Act 1988 (Qld) prohibits surrogacy agreements; applies where offender ordinarily resident in Queensland at time proscribed act occurs, irrespective of where act occurs. Family Relationships Act 1975 (SA) prohibits surrogacy agreements, although Statutes Amendment (Surrogacy) Bill 2008 proposes lawful surrogacy under recognized non-commercial agreements in that State. Infertility Treatment Act 1995 (Vic) will be repealed at commencement of Assisted Reproductive Treatment Act 2008 (Vic) (at or before Jan. 1, 2010). Assisted Reproductive Treatment Act recognizes altruistic surrogacy agreements and commissioning parents will automatically be considered legal parents of child. Surrogacy Contracts Act 1993 (No. 4) (Tas) in substantially similar terms to Victorian Act. In Australian Capital Territory situation governed by Parentage Act 2004.

Reproductive Technology (Clinical Practices) Act 1988 (SA) establishes South Australian Council on Reproductive Technology which governs artificial fertilization procedures in South Australia. Infertility Treatment Act 1995 (Vic) to be repealed by Assisted Reproductive Treatment Act 2008 (Vic). Assisted Reproductive Treatment Act provides wider access to assisted reproductive technologies, permitting use by women who are not married or in opposite-sex de facto relationship. Technology Act 2007 (NSW) regulates medical treatments and procedures to procure pregnancy. Requires technology providers to be registered with Director-General and provides for establishment of central Assisted Reproductive Technology Register.

32.06 MARRIAGE:

Under Commonwealth Constitution power in relation to marriage held by Commonwealth Government. However, many States and Territories have enacted legislation for registration of civil partnerships, e.g., Relationships Act 2003 (Tas), Civil Partnerships Act 2008 (ACT), and Relationships Act 2008 (Vic). Registered civil partnerships provide recognition by State/Territory as valid domestic relationship for purpose of other legislation such as property or estate administration laws. See Pt I, category 11 Family, topic 11.02 Marriage.

32.07 MARRIED WOMEN:

See topic 32.04 Husband and Wife; Pt I, category 11 Family, topic 11.02 Marriage.

33 HEALTH

33.01 HEALTH:

Health programs and functions administered at Commonwealth level and by all States and Territories. Legislation addresses issues including: sanitation, disease prevention, licensing and regulation of activities dangerous to public health, food safety, therapeutic goods, tobacco and radiation safety. See: Dept. of Health and Ageing (Cth) (http://www.health.gov.au); Dept. of Health (ACT) (http://www.health.act.gov.au); Dept. of Health and Families (NT) (http://www.health.nt.gov.au); Dept. of Health (NSW) (http://www.health.nsw.gov.au); Queensland Health (Qld) (http://www.health.qld.gov.au); Dept. of Health (SA) (http://www.health.sa.gov.au); Dept. of Health and Human Services (Tas) (http://www.dhhs.tas.gov.au); Dept. of Health (Vic) (http://www.health.vic.gov.au/); and Dept. of Health (WA) (http://health.wa.gov.au/).

All States and Territories have enacted health and food legislation which prescribe standards for public health: Health Act 1993 (ACT), Food Act 2001 (ACT), Public Health Act 1991 (NSW), Food Act 2003 (NSW), Public Health Act 1952 (NT), Food Act 2004 (NT), Health Act 1937 (Qld), Food Act 2006 (Qld), Food Production (Safety) Act 2000 (Qld), Public and Environmental Health Act 1987 (SA), Food Act 2001 (SA), Public Health Act 1997 (Tas), Food Act 2003 (Tas), Health Act 1958 (Vic), Food Act 1984 (Vic), Health Act 1911 (WA), Food Act 2008 (WA). See also associated regulations. *Note:* At Federal level National Health Act 1953 (Cth) regulates national health services, subsidy and benefit schemes and insurance.

Statutory control of packaging, marketing and content of therapeutic goods and cosmetics is prescribed by Commonwealth legislation: Therapeutic Goods Act 1989 (Cth). Some States and Territories have enacted complementary legislation: Poisons and Therapeutic Goods Act 1966 (NSW), Therapeutic Goods (Victoria) Act 1994 (Vic), Therapeutic Goods Act 2001 (Tas) and Medicines, Poisons and Therapeutic Goods Act 2008 (ACT). See also Therapeutic Goods and Cosmetics Act 1986 (NT), South Australia and Western Australia have not enacted specific legislation.

Food Standards Australia New Zealand (FSANZ) (formerly Australia New Zealand Food Authority and prior to that National Food Authority) is statutory authority which commenced operating under Food Standards Australia New Zealand Act 1991 on July 1, 2002. Act provides for cooperation between State and Territory governments, industry and community for maintaining uniform food regulation and labeling requirements in Australia and New Zealand. (See http://www.foodstandards.gov.au/).

On Dec. 20, 2002, Australian Food Standards Code (Volume 1 of Food Standards Code) and New Zealand food regulations replaced, following two year transition period, by joint

Food Standards Code for both Australia and New Zealand. It specifically regulates residue limits, processing requirements, health claims, and food hygiene issues.

Genetically Modified Foods.

Current regulatory system includes number of agencies with specific roles in control and regulation of genetically modified products (such as imports, food, agricultural and veterinary chemicals) including: FSANZ; Office of the Gene Technology Regulator (http://www.ogtr.gov.au/); Therapeutic Goods Administration (http://www.tga.gov.au/); Australian Pesticides and Veterinary Medicines Authority (http://www.apvma.gov.au/) and Australian Quarantine and Inspection Service (http://www.daffa.gov.au/aqis). Safety of genetically modified foods continues to be assessed and regulated by FSANZ under direction of Australia New Zealand Food Regulation Ministerial Council comprising Health and Agricultural Ministers from Commonwealth, each State and Territory, and New Zealand. Genetically modified foods are subject to assessment and labeling under Standard 1.5.2 of Food Standards Code. Enforcement of Standard 1.5.2 carried out by individual States. May be liable under Trade Practices Act 1974 (Cth). See Pt I, category 3, topic 3.03 Consumer Protection.

34 IMMIGRATION

34.01 ALIENS:

Foreign Ownership of Land Register Act 1988 (Qld) establishes register of details of interests in land in Queensland presently held or acquired by foreign persons. Any foreign person or trustee for foreign person or trust (including Australian citizen) who acquires or disposes of legal estate or interest after Apr. 17, 1989 must notify Registrar within 90 days. Person who, as trustee holds legal interest in land for foreign person, must notify Registrar within 90 days of disposal of equitable interest if result is that trustee no longer holds legal estate for foreign person. Person who, as trustee holds equitable interest in land must give details of beneficiary's interest, and whether or not beneficiary foreign person, if requested by person who, as trustee, holds legal estate. Foreign Ownership of Land Register Act stipulates offenses and monetary penalties for breaches of Act. At present, no similar scheme exists in other States and Territories.

Foreign person.

In Foreign Ownership of Land Register Act 1988 defined widely as foreign natural person, foreign corporation, corporation in which foreign natural person or foreign corporation holds controlling interest, or two or more hold aggregate controlling interest. Foreign natural person is person who is not Australian citizen and whose right to reside in Australia is limited to set time imposed by law, or who is not domiciled in Australia.

Foreign corporation.

In Foreign Ownership of Land Register Act 1988 means body (incorporated or unincorporated) formed outside Australia and external Territories.

Foreign Trust.

In Foreign Ownership of Land Register Act 1988 means unit trust in which foreign person holds controlling interest, or two or more hold aggregate controlling interest, or trust other than unit trust in which not less than 15% of total income of trust paid to, or applied for benefit of, foreign person, or not less than 40% total income of trust paid to, or applied for, benefit of two or more foreign persons, together with any associate(s), or trust other than unit trust in which trustee holds not less than 15% of capital of trust for foreign person, or not less than 40% of capital of trust for two or more foreign persons, together with any associates.

Substantial Interest.

Under Foreign Ownership of Land Register Act 1988 person taken to have substantial interest in corporation or unit trust where: person (alone or with associate) controls at least 15% voting power; or two or more persons (with or without associates) control at least 40% voting power; person(s) with substantial interest in corporation or unit trust deemed to have controlling interest unless Minister declares such persons not in position to determine policy of corporation or unit trust. Tracing provisions apply. Control of voting power defined. Extremely wide definition of associate. “Acquire” includes obtain, gain, receive or acquire by purchase, exchange, lease, will, devolution or operation of law, by grant or gift, by enforcement of security. “Interest in land” includes licenses and leases granted under various statutes, but expressly does not include, among others, easements, leases for less than 25 years, most security interests.

Any person, trustee or trust becoming, or ceasing to be, foreign person, trustee or trust must notify Registrar within 90 days. Registrar has broad powers to elicit information. Serious penalties may be imposed for breach of Act, including, ultimately, forfeiture without compensation where foreign person has failed to notify, and not appealed against Minister's determination. See Pt I, category 13 Immigration, topic 13.01 Aliens.

35 INTELLECTUAL PROPERTY

35.01 TRADEMARKS:

See Pt I, category 14 Intellectual Property, topic 14.04 Trademarks.

35.02 TRADENAMES:

Registration of company or business name through Australian Securities and Investments Commission, and/or relevant State/Territory Business Names Offices, gives no right to act against “infringers”, or to use “protected” name if use would amount to trademark infringement, passing off or misleading and deceptive conduct. Registration is pre-requisite to carrying on business under name.

See category 20 Business Organizations, topic 20.03 Business Names.

36 LEGAL PROFESSION

36.01 ATTORNEYS AND COUNSELORS:

In all jurisdictions, admission is as solicitor, barrister, lawyer or “legal practitioner”.

Legislation in each jurisdiction deals with matters such as powers and functions of statutory and professional bodies, definitions of legal work and persons permitted to do it, requirements for legal education, admission and practising certificates including practitioners' fees, regulation of trust accounts, indemnity and insurance, fidelity funds and management and receivership of failed practices, disciplinary offenses, procedures and penalties and determination of fee scales and arrangements and ongoing costs disclosure obligations. In Aug. 2006, Standing Committee of Attorneys-General endorsed Model Bill and Regulations to create uniform system for regulating legal profession (although variations between States and Territories still exist). Announcement by Commonwealth Attorney-General in Feb. 2009 of Taskforce to prepare draft uniform legislation by Apr. 2010. See Legal Profession Act 2004 (NSW); Legal Profession Act 2004 (Vic); Legal Profession Act 2007 (Qld); Legal Profession Act 2008 (WA); Legal Practitioners Act 1981 (SA); Legal Profession Act 2007 (Tas); Legal Profession Act 2006 (ACT); and Legal Profession Act 2006 (NT).

Detailed regulation in statutory rules and rules of professional bodies. In each jurisdiction law societies represent legal practitioners. Bar associations represent legal practitioners specializing as barristers. Membership is voluntary. Eminent barristers may be appointed Senior Counsel in all States except South Australia where appointment is as Queen's Counsel. Under cab rank principle, barrister must accept brief from solicitor if barrister available, fee acceptable and brief within barrister's skill, capacity and experience (subject to limited exceptions).

Admission to Practice.

Certain legal work must be conducted by qualified practitioner with current practising certificate. For admission to legal profession person must have recognized legal education, usually law degree. Recognition at discretion of local admission body. Also require post-graduate training in practice and/or practical institutional course. Applicant must be fit and proper person. Following admission, practising certificate must be obtained on payment of annual fee. Professional indemnity insurance must be acquired. Mutual recognition legislation makes interstate admission virtually automatic on application. Mutual recognition principle also extends to New Zealand practitioners. See Trans-Tasman Mutual Recognition Act 1997 (Cth), adopted by reference by all States and Territories. National practising certificate regime provides reciprocal recognition of practising certificates in all States and Territories. Admission of overseas practitioners governed by Acts and Rules of States and Territories. May have to apply for direction that existing qualifications sufficient for admission in State or Territory. Further study or practical legal training may be necessary. Practitioners from jurisdictions based on common law may have fewer requirements to satisfy.

Specialization Schemes.

Formal accreditation available in particular areas in New South Wales, Victoria, Queensland and Western Australia, but not necessary as prerequisite to practise in area. Requirements differ but include five years full time practise with substantial involvement in specialty area in preceding period, written assessment and provision of references. Family law and immigration law accreditation available on national basis.

Business Structure.

Practitioners may practise as sole practitioners. Solicitors may practise in partnership. Legal practises may incorporate all States and Territories. Must be at least one legal practitioner director. Structure allows limitation of liability. Barristers generally more restricted by rules but degree of restriction varies between jurisdictions, e.g., barristers usually must practise as sole practitioners and are commonly forbidden from practising with non-barristers and from receiving trust money. See category 20 Business Organizations, topic 20.02 Associations.

Fees.

Costs agreed between practitioner and client. Guidance for fees charged available from professional associations. At common law, legal practitioner has lien over client's documents until all taxed costs paid. Right qualified with respect to third parties. Uniform legislation confers stricter obligations on legal practitioners for upfront and ongoing disclosure of costs. Contingency fees on percentage basis prohibited, although legal practitioners may agree that some or all legal costs are payable only if client is successful. Some jurisdictions allow fee uplifts within statutory limits. See category 23 Civil Actions and Procedure, topic 23.01 Costs.

Third party funding for actions, litigation funding, may be available to clients. Available for insolvency proceedings in all States and Territories if law suit can be classed as company property. See §§420(2)(b), (g) and 477(2)(c) Corporations Act 2001 (Cth). Recent use extended to class actions and other large claims. Litigation funding not abuse of process by statute in Australian Capital Territory, New South Wales, Victoria and South Australia. See Civil Law (Wrongs Act) 2002 (ACT); Maintenance, Champerty and Barratry Abolition Act 1993 (NSW); Criminal Law Consolidation Act 1935 (SA); Wrongs Act 1958 (Vic); and Crimes Act 1958 (Vic). Common law position in all States and Territories that litigation funding generally not considered abuse of process or contrary to public policy.

Legal professional privilege conferred upon clients to protect confidential communications from disclosure if made for dominant purpose of giving or obtaining legal advice or in contemplation of or for purpose of litigation.

Complaints and Discipline.

Statutory bodies or law societies and bar associations deal with complaints against practitioners for professional misconduct or unsatisfactory professional conduct. Systems vary across jurisdictions. In Queensland, New South Wales and Victoria all complaints made to Legal Services Commissioner. Penalties include reprimand, fines, restrictions on right to practise and revoking license to practice.

Contacts.

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36.02 BARRISTERS AND SOLICITORS:

See topic 36.01 Attorneys and Counselors.

37 MINERAL, WATER AND FISHING RIGHTS

37.01 ENERGY:

Increasing awareness of economic and environmental challenges to energy sector have prompted States to institute national energy reform. Ministerial Council on Energy (MCE) established by Council of Australian Governments (COAG) as national policy and governance body for national energy market (see http://www.ret.gov.au/Documents/mce/default.html). Privatization reforms have seen disaggregation of electricity generators and distributors, third party access to gas pipelines network and introduction of full retail competition in retail electricity and gas markets. Rule-making and regulation of electricity and gas distribution networks and access to gas transmission pipelines (excluding Western Australia) responsibility of national bodies: Australian Energy Regulator; Australian Energy Market Commission and Australian Competition and Consumer Commission (see http://www.aer.gov.au; http://www.aemc.gov.au; http://www.accc.gov.au), however economic regulation of retail gas and electricity sector and energy safety and technical regulation remains with state and territory bodies: Essential Services Commission Victoria; Energy Safety Victoria; Independent Pricing and Regulatory Tribunal (NSW); Office of the Tasmanian Economic Regulator; Queensland Mines and Energy; Economic Regulation Authority (WA); Energy *Safety* (WA); Essential Services Commission of South Australia; Utilities Commission of the Northern Territory; Independent Competition and Regulatory Commission (ACT) (see http://www.esc.vic.gov.au; http://www.esv.vic.gov.au; http://www.ipart.nsw.gov.au; http://www.economicregulator.tas.gov.au; http://www.dme.qld.gov.au; http://www.era.wa.gov.au; http://www.docep.wa.gov.au/EnergySafety/; http://www.excosa.sa.gov.au; http://www.energy.sa.gov.au; http://www.nt.gov.au; http://www.utilicom.nt.gov.au; http://www.icrc.act.gov.au). Complaints about electricity and gas companies investigated and resolved by energy ombudsman (see http://www.ewov.com.au; http://www.ewon.com.au; http://www.energyombudsman.tas.gov.au; http://www.eoq.com.au; http://www.eiosa.com.au; http://www.ombudsman.wa.gov.au/energy/; http://www.ombudsman.nt.gov.au; http://www.ombudsman.act.gov.au).

South Australia, Queensland, Victoria and New South Wales have adopted renewable energy plans to achieve national Renewable Energy Target (20% of electricity to come from renewable resources by 2020) or State target. South Australia has legislated renewable energy targets: Climate Change and Greenhouse Emissions Reduction Act 2007 (SA). Victorian Renewable Energy Target Scheme under which tradable Victorian Renewable Energy Certificates created by generation of electricity from renewable sources (see Victorian Renewable Energy Act 2006 [Vic]) to be subsumed by national mandatory renewable target scheme in 2010: Renewable Energy (Electricity) Act 2000 (Cth).

Nuclear.

Uranium Mining and Nuclear Facilities (Prohibitions) Act 1986 (NSW) prohibits prospecting or mining uranium, although person who mines uranium in course of mining for another mineral is not guilty of offense if uranium represents .02% or less of total material removed. (§7). Construction or operation of certain nuclear facilities also prohibited. (§8). Nuclear Activities (Prohibitions) Act 1983 (Vic) prohibits mining, exploring, or quarrying for uranium or thorium (§5) although person who mines uranium or thorium in course or mining for another mineral is not guilty of offense if uranium represents .02% or less or thorium represents .05% or less of total material removed (§6). Construction or operation of certain facilities (including nuclear reactor, conversion, enrichment, reprocessing, storage or disposal facilities) (§8) and unauthorized possession, use, sale, transportation, storage or disposal of nuclear material (§9) also prohibited. Nuclear Activities Regulations Act 1978 (WA) makes provision for regulation and control of nuclear activities. Nuclear Waste Storage and Transportation (Prohibition) Act 1999 (WA) prohibits construction or operation of nuclear waste storage facility (§7) and transport of nuclear waste (§7A). Nuclear Waste Storage Facility (Prohibition) Act 2000 (SA) prohibits construction or operation of nuclear waste storage facility (§8) and importation or transportation of nuclear waste for delivery to storage facility within South Australia (§9). Mining Act 1971 (SA) prohibits mining uranium without appropriate lease endorsed by Minister authorizing such activity. (§10A[1]). No restrictions on recovery of uranium in course of mining other minerals, provided it is stockpiled in accordance with Ministerial conditions. (§10A[3]). Nuclear Waste Transport Storage and Disposal (Prohibition) Act 2004 (NT) prohibits construction or operation of nuclear waste storage facility (§6) and transportation of nuclear waste into Northern Territory for storage (§7). Mining Act 1980 (NT) provides Northern Territory Minister shall exercise power, with respect to uranium and thorium, in accordance with Commonwealth Ministerial advice. (§175). Nuclear Facilities Prohibition Act 2007 (Qld) prohibits constructing or operating nuclear facility (§7) and requires Minister to hold plebiscite if Commonwealth has taken or is likely to take any step toward supporting construction of nuclear facility in Queensland (§21).

Solar and Wind.

Sustainability Victoria Act 2005 (Vic) establishes Sustainability Victoria (§5) with objective to facilitate and promote environmental sustainability in use of resources partly by promotion of renewable energy including solar and wind (§6) (see http://www.sustainability.vic.gov.au). Electricity Industry Act 2000 (Vic) establishes pricing principles to facilitate development of wind energy generation. Queensland and South Australia require feed-in tariffs to be paid to electricity customers to promote installation of small solar energy generation facilities: Electricity Act 1994 (Qld) and Electricity Act 1996 (SA). Similar schemes to commence in Victoria on proclamation of Electricity Industry Amendment (Premium Solar Feed-In Tariff) Act 2009 (Vic) and in NSW on Jan. 1, 2010. Australian Capital Territory provides feed-in tariff for small renewable generation including wind and solar: Electricity Feed-In (Renewable Energy Premium) Act 2008 (ACT).

Electricity.

National Electricity Market administered by Australian Energy Market Operator (AEMO), company limited by guarantee under Corporations Act 2001 (Cth) (see http://www.aemo.com.au). Participating States and Territories are South Australia, Victoria, New South Wales, Australian Capital Territory, Tasmania and Queensland. National Electricity Law including National Electricity Rules set out in Sched. to National Electricity (South Australia) Act 1996 (SA) now implemented by other participating States (see National Electricity [Victoria] Act 2005 [Vic]; National Electricity [New South Wales] Act 1997 [NSW]; Electricity [National Scheme] Act 1997 [ACT]; Electricity—National Scheme [Queensland] Act 1997 [Qld]; Tasmania National Scheme [Tasmania] Act 1999 [Tas]). Western Australian industry regulated by Electricity Corporations Act 2005 (WA) and Electricity Industry Act 2004 (WA). Other relevant legislation includes: Electricity Supply Act 1995 (NSW); Electricity Industry Act 2000 (Vic); Electricity Act 1994 (Qld); Electricity Industry Act 2004 (WA); Electricity Act 1996 (SA); Electricity Supply Industry Act 1995 (Tas); Electricity Reform Act 2000 (NT); and Utilities Act 2000 (ACT).

Gas.

Legislation, namely Pipelines Act 2005 (Vic), Pipelines Act 1967 (NSW), Gas Pipelines Act 2000 (Tas), Petroleum Pipelines Act 1969 (WA), and Energy Pipelines Act 1982 (NT) regulates construction, ownership, use and operation of pipelines.

National Gas Law commenced July 2008 regulating gas pipeline services throughout Australia. Brings natural gas pipeline regulation under national energy market institutions alongside electricity network regulation. Adopted by all jurisdictions except Western Australia: National Gas (Victoria) Act 2008; National Gas (New South Wales) Act 2008; National Gas (South Australia) Act 2008; National Gas (Tasmania) Act 2008; National Gas (Queensland) Act 2008; National Gas (Northern Territory) Act 2008; National Gas (ACT) Act 2008. National Gas Law replaced Gas Pipeline Access Law and Code. Key changes include single national gas objective; national energy market governance arrangements; revised coverage test; revised regime for revenue and pricing; revised information gathering powers; extended grounds for merits review; and provision for new market information bulletin board. Western Australia regulated by Gas Pipelines Access (Western Australia) Act 1998. Amended 2009 by National Gas Access (WA) Act 2009 to implement modified National Gas Law.

Other relevant legislation includes: Gas Industry Act 2001 (Vic); Gas Supply Act 1996 (NSW); Gas Safety Act 2000 (ACT); Gas Supply Act 2003 (Qld); Petroleum and Gas (Production and Safety) Act 2004 (Qld); Gas Act 1997 (SA); Gas Act 2000 (Tas).

Geothermal.

South Australia, New South Wales, Western Australia and Tasmania incorporate regulation of geothermal energy in general mining and resources legislation. (See Petroleum Act 2000 [SA], Mining Act 1992 [NSW], Petroleum and Geothermal Energy Resources Act 1967 [WA], and Mineral Resources Development Act 1995 [Tas].) In New South Wales and Tasmania geothermal substances are included in definition of mineral in mining legislation. (See topic 37.02 Mines and Minerals.) Geothermal energy defined separately in South Australian petroleum and resources legislation. Northern Territory, Queensland and Victoria have enacted specific geothermal legislation. Geothermal Energy Act 2009 (NT) provides Northern Territory owns geothermal energy in Territory before resources extracted under geothermal production lease. (§9). Geothermal Exploration Act 2004 (Qld) provides that all geothermal energy on or below surface is property of Crown. (§11). Act prohibits unauthorized geothermal exploration. (§13). Geothermal Energy Resources Act 2005 (Vic) prohibits unauthorized geothermal energy exploration and extraction. (§§14-15). Geothermal energy and geothermal energy resources are Crown property (§12) until extracted by authorized persons under Act (§16). Unlike Northern Territory, South Australian and New South Wales regulatory schemes, Queensland and Victorian geothermal exploration permits granted by competitive tender. (c. 3 Queensland Act, Pt II Victorian Act). Queensland and Victorian Acts establish geothermal registers. (Queensland Act §122, Victorian Act §152). *Note:* Water legislation may apply to some geothermal resources (e.g., hot groundwater). See also Pt I, category 15 Mineral, Water and Fishing Rights, topic 15.01 Energy.

37.02 MINES AND MINERALS:

Ownership of Minerals.

Petroleum and natural gas belong to Crown. In South Australia and Northern Territory, all other minerals belong to Crown. (See Mining Act 1971 [SA], Native Title Act 1993 [Cth] and Mining (Acquisitions) Act 1953 [NT]). In Victoria, Mineral Resources (Sustainable Development) Act 1990 provides that Crown owns all minerals except: (a) those in respect of which minerals exemption is current; and (b) those separated from land by holder of license, miner's right or tourist fossicking authority. (§§1, 9). Property in minerals passes from Crown to holder of license, miner's right or tourist fossicking authority when minerals are separated from land in accordance with relevant authority. (§11). Royalties are payable to Crown in accordance with license. (§12). In all jurisdictions just compensation must be paid for use of native title land, Crown land as well as private land. (See e.g., Pt 8 Mineral Resources (Sustainable Development) Act 1990 [Vic], Land Titles Validation Act 1994 [Vic].) In all other States and Australian Capital Territory, minerals (usually including gold) belong to Crown, unless alienated in original Crown grant of land. In Tasmania, Mineral Resources Development Act 1995 provides that any gold, silver, atomic substance, helium, hydrogen and oil in natural state existing above or below ground belong to Crown. (§6). *Note:* Geothermal substances included in definition of mineral in some States. See topic 37.01 Energy, subhead Geothermal.

Minerals Exploration.

In most jurisdictions any person may take out miner's right which grants entitlement to occupy land (with certain exceptions) and to commence mining operations (e.g., Mineral Resources Development Act 1995 [Tas] §84). Term of miner's right varies depending upon jurisdiction, generally at Minister's discretion (e.g., Mining Act 1992 [NSW] §71). Land subject to mining authority deemed to be mining land possessed by holder of right (e.g., Mining Act 1992 [NSW] §58). Some States have established specialist bodies to hear issues relating to minerals exploration and development (inter alia), e.g., Land and Resources Tribunal Act 1999 (Qld) and Lands, Planning and Mining Tribunal Act 1998 (NT).

In return for payment of royalties, lease may be granted to miners (e.g., Mining Act 1992 [NSW] §§282-285).

Mining lease or license generally granted on application showing reasonable probability of finding minerals on land not occupied by holder of miner's right. Mining rights may be allocated via tender process (e.g., Mineral Resources [Sustainable Development] Act 1990 [Vic] [§27] and Mining Act 1992 [NSW] [§§14, 52]). Mining Act 1992 (NSW) provides for transfer of parts of leases. (§123). Mineral Resources (Sustainable Development) Act 1990 (Vic) establishes Mining and Environment Advisory Committee (§48) to advise Minister on amendments to planning schemes on exploration or mining (§49). Act provides that licensee must rehabilitate land (§78) and compensate owners/occupiers of private land for loss/damage sustained from work done under license. (§§85-86). License may be subject to conditions including protection of environment. (§26).

Offshore Minerals Act 1999 (NSW), Offshore Minerals Act 2000 (SA), Offshore Minerals Act 1998 (Qld), and Offshore Minerals Act 2003 (WA) regulate exploration for, and recovery of, minerals (other than petroleum, which is regulated by Petroleum [Submerged Lands] Acts in each respective jurisdiction) in first three nautical miles of State's territorial sea. Acts are result of Offshore Constitutional Settlement between States and Commonwealth. All States and Territories have restrictions on mining in public areas, including national parks (e.g., Mineral Resources [Sustainable Development] Act 1990 [Vic] §6). Most require consent of Parliament even for prospecting (e.g., Mining Act 1978 [WA] §480). Relevant legislation includes Mining Act 1992 (NSW), Mining Act 1980 (NT), Mineral Resources Act 1989 (Qld), Mining Act 1971 (SA), Mineral Resources Development Act 1995 (Tas), Mining Act 1978 (WA). No express provision for exploration titles in Planning and Development Act 2007 (ACT), however right to extract minerals may be granted by planning and land authority through lease or agreement, subject to provisions agreed between parties. (§417). National Parks Act 1975 (Vic) establishes national parks, State parks, wilderness parks, marine national parks and marine sanctuaries in Victoria. (§17). Mineral Resources (Sustainable Development) Act 1990 (Vic) restricts national parks, wilderness parks and State parks from being subject to license or other authority, unless such land is already covered by lease, license, permit or authority under Mines Act 1958 (Vic), or mining license (or exploration license) was granted prior to land being subject to National Parks Act. (§6). Act also restricts marine national parks or marine sanctuaries from being subject to license or other authority. (§6).

Short term titles (usually renewable from year to year on compliance with expenditure conditions) are available for prospecting (e.g., Mining Act 1992 [NSW] §140).

Mining Management Act 2001 (NT) relates to inspection and management of mines with focus on safety, health and environment. Act establishes Mining Board of industry representatives to advise Minister on relevant mining activities and their management. (§§49-58). Act requires mining operator to obtain authorization to commence mining. (§35). Application for authorization must include mining management plan. (§35[3]; see also §§40-42). Authorizations may contain operational conditions, and can be amended or revoked by Minister. (§§37-38). Responsibility for control and management of mining site and activities on site rests with operator of site. (§9). Act requires consultation and cooperation on site to ensure safety and health. States have similar legislation: Mine Health and Safety Act 2004 (NSW); Mining and Quarrying Safety and Health Act 1999 (Qld); Mines and Works Inspection Act 1920 (SA); Mineral Resources (Sustainable Development) Act 1990 (Vic); Mines Safety and Inspection Act 1994 (WA).

Most jurisdictions also have legislation that deals with particular types of mining. See for example Coal Mine Health and Safety Act 2002 (NSW), Coal Mining Safety and Health Act

1999 (Qld) and Opal Mining Act 1995 (SA) which regulates prospecting and mining for opals and other precious stones. (See also category 37 Mineral, Water and Fishing Rights, topic 37.01 Energy, subhead Nuclear).

Aboriginal Land Rights.

Aboriginal Land Rights (Northern Territory) Act 1976 (Cth) (Pt IV), Aboriginal Land Act 1978 (NT) and Northern Territory Aboriginal Sacred Sites Act 1989 (NT) qualify rights of mining interests and operations on aboriginal land. Other jurisdictions have legislation that controls (to varying extent) mining and exploration on aboriginal sacred sites. For example, under Aboriginal Land Rights Act 1983 (NSW), grant of land includes transfer of mineral resources or other natural resources contained in land (§45[2]), subject to retention of prerogative rights and powers of Crown with respect to gold and silver mines, coal and petroleum (§45[11]). Aboriginal Land Rights (Northern Territory) Act 1976 (Cth) and Aboriginal Land Act 1991 (Qld) preserve Crown ownership of all minerals. Under Aboriginal Lands Act 1995 (Tas) land granted under Act is vested to depth of 50 metres and includes minerals other than oil, atomic substances, geothermal substances and helium.

In important case of Mabo v Queensland (No. 2) (1992) 175 CLR 1, High Court of Australia held that native title survived European settlement of Australia. Accordingly, Aborigines who can show continuous occupation of land during European settlement can claim native title to land. As result certain titles to land required confirmation. Validation of mining licenses and compensation for certain customary titles provided for by Land Titles Validation Act 1994 (Vic) (Pt II). Native Title Act 1993 (Cth) provides mechanism for native title claim. National scheme implemented by Native Title (Queensland) Act 1993 (Qld); Native Title Act 1994 (ACT); Native Title (New South Wales) Act 1994 (NSW); Validation (Native Title) Act 1994 (NT); Native Title (South Australia) Act 1994 (SA); Native Title (State Provisions) Act 1999 (WA); Native Title (Tasmania) Act 1994 (Tas); Land Titles Validation Act 1994 (Vic).

High Court in Wik Peoples v State of Queensland (1996) 187 CLR 1 held that native title could coexist with pastoral leases. Decision meant compensation payable if native title subsequently extinguished. Government responded with Native Title Act Amendment Act 1998: (a) Validates certain grants of land; (b) confirms extinguishment of native title on “exclusive” tenures; (c) allows provision of Government services to land on which native title may exist; (d) extinguishes native title which coexists with pastoral leases to extent of inconsistency (enhances rights of pastoralists); (e) grants statutory access rights for native title claimants who have physical access to land; (f) establishes stringent registration test for native title claimants seeking right to negotiate over mining activity; (g) removes right to negotiate in respect of future government and commercial development; (h) gives Government right to regulate and manage surface and subsurface water, offshore resources and water; (i) sets more stringent registration test for native title claims and amended sunset clause; (j) facilitates negotiation of voluntary binding agreements. Constitutionality questioned.

High Court narrowed scope of native title rights under Native Title Act 1993. Confirmed grant of pastoral or mining leases under relevant Western Australian or Northern Territory legislation extinguishes native title rights to control access to land or to be asked for permission to use land. If claims to protect cultural knowledge go beyond denial or control of access to land or waters, they are not protected by Native Title Act 1993. See Western Australia v Ward (2002) 213 CLR 1.

Native Title extends to Australian Coastal Waters but in non-exclusive way. High Court rejected exclusive right over coastal seas because inconsistent with public right to navigate, fish and the right of innocent international passage: see Commonwealth of Australia v Yarmirr (2001) 208 CLR 1.

Note also Racial Discrimination Act 1975 (Cth) may affect titles granted, or acts performed, between 1975 and 1996.

Environment.

Balance must be struck between mining interests and environmental and conservation interests. Mining (Strategic Prospectivity Zones) Act 1993 (Tas) guarantees mining access to areas of Tasmania with very high potential for efficient mining. See also Mineral Resources (Sustainable Development) Act 1990 (Vic), Mineral Resources Development Act 1995 (Tas),Planning and Development Act 2007 (ACT). Pt III, Div. 1B of National Parks Act 1975 (Vic) establishes 13 marine parks and 11 marine sanctuaries. Act bans commercial fishing in designated areas and restricts mineral and petroleum exploration.

Petroleum exploration regulated independently of other minerals. Miners must obtain petroleum exploration permit or petroleum prospecting license (depending on jurisdiction). Permit holder may apply for petroleum production license or petroleum mineral lease (depending on jurisdiction). See Petroleum Act 1998 (Vic), Petroleum (Onshore) Act 1991 (NSW), Petroleum Act 2000 (SA), Petroleum Products Regulation Act 1995 (SA), Petroleum and Geothermal Energy Resources Act 1967 (WA), Petroleum Act 1984 (NT), Petroleum Act 1923 (Qld), Mineral Resources Development Act 1995 (Tas). No specific petroleum legislation in Australian Capital Territory. States and Commonwealth have also passed legislation for regulation and control of exploration and exploitation of petroleum resources of submerged lands, e.g., Petroleum (Submerged Lands) Act 1982 (NSW), Petroleum (Submerged Lands) Act 1982 (Vic), Petroleum (Submerged Lands) Act 1982 (Tas). States and Northern Territory legislation reflects Offshore Petroleum Act 2006 (Cth) and establishes National Offshore Safety Authority. See also Pt I, category 15 Mineral, Water and Fishing Rights, topic 15.02 Mines and Minerals.

Offshore Petroleum Act 2006 (Cth) replaced Petroleum (Submerged Lands) Act 1967 (Cth). Act makes conspicuous changes to structure and style of legislation, but seeks to make only modest number of minor policy changes. Purpose of Act is to reduce compliance cost for upstream petroleum industry and for governments charged with administering Act.

Compensation.

Holder of petroleum title liable to compensate persons with interest in land injuriously affected as result of operations conducted or actions in pursuance of relevant legislation or petroleum title. See, e.g., Petroleum (Onshore) Act 1991 (NSW) Pt 11.

See also Pt I, categories 2 Business Organizations, topic 2.01 Corporations, subhead No Liability Company; 13 Immigration, topic 13.01 Aliens; 12 Foreign Trade and Commerce, topic 12.01 Customs; 15 Mineral, Water and Fishing Rights, topic 15.02 Mines and Minerals.

37.03 WATER AND FISHING RIGHTS:

Water.

Legislation regulating water includes Water Resources Act 2007 (ACT), Water Management Act 2000 (NSW), Water Industry Competition Act 2006 (NSW), Water Act 1992 (NT), Water Act 2000 (Qld), Natural Resources Management Act 2004 (SA), Water Management Act 1999 (Tas), Water Act 1989 (Vic), Rights in Water and Irrigation Act 1914 (WA), Water Resources Legislation Amendment Act 2007 (WA).

National Water Commission Act 2004 (Cth) establishes National Water Commission. (Pt II). National Water Initiative signed by all States addresses water access entitlements, environment, water planning, risk sharing, water markets and trading, water pricing, institutional reform. *Note:* Will result in staged legislative reforms until 2014.

Fisheries Regulation.

States and Territories cooperate with Commonwealth to regulate Australian fisheries. Cooperative arrangements determine whether fishery subject to State or Commonwealth laws. States and Territories responsible for coastal and inland waters. Commonwealth responsible for Australian fishing zone (see Pt I, category 15 Mineral, Water and Fishing Rights, topic 15.03 Water and Fishing Rights, subhead Fisheries Regulation). For marine species with broad distribution, cooperative regulation can also be species dependent. Generally States and Territories responsible for freshwater, coastal and sedentary marine species, Commonwealth responsible for more widely distributed species. Commonwealth generally responsible for commercial fishing, States and Territories responsible for recreational and some commercial fishing.

Fisheries Act 2000 (ACT), Fisheries Management Act 1994 (NSW), Fisheries Management Amendment Act 2006 (NSW), Fisheries Act 1988 (NT), Fisheries Act 1994 (Qld), Fisheries Management Act 2007 (SA), Living Marine Resources Management Act 1995 (Tas), Inland Fisheries Act 1995 (Tas), Fisheries Act 1995 (Vic) and Fish Resources Management Act 1994 (WA) provide for regulation, conservation and management of State and Territory fisheries and fishery resources. Relevant State and Territory authorities administer Acts and issue permits and licenses.

38 MORTGAGES

38.01 CHATTEL MORTGAGES:

Mortgages of chattels, such as household furniture, trade stock, trade machinery or plant, are known as bills of sale; but in addition to these, there are farming and pastoral securities, such as liens on crops, liens on wool, and stock mortgages. In all jurisdictions mortgages made by companies must be registered under Corporations Act 2001. Australian Securities and Investments Commission maintains Australian Register of Company Charges. Registration requirements of Bills of Sale Acts then generally do not apply other than in Queensland.

New Commonwealth Personal Property Securities Bill 2009 expected to be passed by end 2009. Intended to replace State and Territory statutes governing use of chattels including motor vehicles, crops, livestock and intellectual property rights as security for obligations. If passed, Commonwealth statute will establish national register of personal property security interests and States will have ability to refer powers to Commonwealth (see Queensland and New South Wales Personal Property Securities [Commonwealth Powers] Acts 2009, and South Australia and Victoria Personal Property Securities [Commonwealth Powers] Bills 2009).

All States and Territories have Bills of Sale legislation with general application. (Security Interests in Goods Act 2005 [NSW]; Instruments Act 1958 [Vic]; Chattel Securities Act 1987 [Vic]. Bills of Sale Act 1899 [WA]; Bills of Sale Act 1886 [SA]; Bills of Sale Act 1900 [Tas], Bills of Sale and Other Instruments Act 1955 [Qld]; Instruments Act 1935 [NT], and Instruments Act 1933 [ACT]). Under these Acts effects of failure to register relevant instruments vary, i.e., may cause mortgage or other security over chattel to be avoided either as against all persons save grantor and grantee (e.g., in Queensland) or as against certain nominated persons (e.g., in South Australia and Australian Capital Territory, where bill of sale is avoided only against official receiver or trustee in bankruptcy of grantor or trustee under any assignment by grantor for benefit of creditors, sheriff's officer seizing goods of grantor in course of execution, and judgment creditor on whose behalf such execution has been issued) or to be totally void as security (as is case in Northern Territory, and is general case in Tasmania, subject to certain qualifications). Upon registration, effect of instrument dates from time of execution, priority from time of registration. These Acts also imply certain powers and covenants into bill of sale e.g., power to seize or sell on default (Queensland, South Australia and Western Australia), covenant to keep goods in good repair (except in New South Wales and Northern Territory), covenant to pay principal and interest (Queensland, South Australia, Western Australia and Tasmania) and covenants relating to title (Tasmania and Queensland). Assignment of bill of sale need not be registered. Victorian legislation only applies in relation to stock, wool and crop securities. (See Instruments Act 1958 [Vic]). New South Wales legislation allows creation of stock and wool mortgages which only have effect if registered. (See Security Interests in Goods Act 2005 [NSW].)

Chattel Securities Act 1987 (Vic) provides for registration of mortgages, hire purchase agreements and leases relating to motor vehicles, trailers, agricultural machines and implements, and certain vessels within meaning of Marine Act 1988 (Vic). Act makes mortgage, hire purchase agreement or lease interest void against purchaser unless registered. Information relating to goods registered in other States and Territories may be obtained from Victorian register. See also Chattel Securities Act 1987 (WA). Motor Vehicles Securities Act 1984 (Tas) provides for registration of security interests in motor vehicles and trailers and makes bills of sale relating to these void as against purchaser unless holder of such bills of sale is registered as holder of security interests.

Motor Vehicle and Boats Securities Act 1986 (Qld) provides for registration of instruments creating security interests in motor vehicles, boats, outboard motors, caravans and trailers and takes interests in boats and outboard motors outside scope of Bills of Sale and Other Instruments Act 1955 (Qld). Unregistered interest unenforceable against those not party to it. Two registered interests have priority according to date of registration; unregistered interest loses priority to later registered interest unless notice of it was had. Assignment of interest need not be registered, but may be.

Registration of Interests in Goods Act 1986 (NSW) provides for registration of security interests, interest of lessors and interests of owners under hire purchase agreements in motor vehicles and other prescribed goods. Such goods do not need to be registered under Bills of Sale legislation. Goods Securities Act 1986 (SA), Registration of Interests in Motor Vehicles and Other Goods Act 1989 (NT) and Sale of Motor Vehicles Act 1977 (ACT) are to similar effect.

38.02 COLLATERAL SECURITY:

See category 26 Debtor and Creditor, topic 26.06 Pledges.

38.03 MORTGAGES:

See topic 38.01 Chattel Mortgages and category 39 Property, topic 39.08 Real Property.

39 PROPERTY

39.01 ABSENTEES:

Generally the position with regard to nonresidents is dealt with under particular topics. There are no provisions specifically directed to protecting absentees' property.

39.02 CONVEYANCES:

See topic 39.04 Deeds.

39.03 CURTESY:

Abolished.

39.04 DEEDS:

Execution.

Deeds by individuals are universally signed, sealed and delivered, and generally attested. Neither signature nor attestation is requirement at common law, although required by statute for certain documents. Attestation has value of recording delivery, which is of importance in case of deeds by individuals. Gratuitous promises by deed under seal are enforceable notwithstanding lack of consideration. Sealing requires only that deed be expressed to be sealed, affixation of seal not required. Delivery means delivered in old legal sense, namely, an act done so as to evince an intention to be bound.

Corporations Act 2001 provides that corporation may execute document as deed provided that: (a) Document expressed to be executed as deed; and (b) common seal of company affixed to document and witnessed by two directors of company, or director and secretary of company, or in case of sole director company that sole director; or (c) if no common seal document is signed by company officers mentioned above. (§127). Corporations Act permits persons dealing with company to assume deed duly executed if signed or sealed and witnessed by officers mentioned above unless actual knowledge or suspicion of irregularity in execution. (§§128[1], 128[4], 129[5]). Corporation may also execute deed according to constitution or by agent or attorney. (§127[4]). Deed must be delivered to become operative: presumption in case of corporation is affixing of common seal imports delivery; corporation may, however, by express words suspend operation of deed.

Generally, admissibility in evidence of deeds is dependent upon deed bearing appropriate stamp duty, if any.

See also categories 28 Documents and Records, topic 28.04 Seals; 40 Taxation, topic 40.07 Stamp Tax.

39.05 DOWER:

Abolished.

39.06 PERPETUITIES:

In Victoria, New South Wales, Queensland, Tasmania, Australian Capital Territory, Northern Territory and Western Australia statute reforms common law rule against perpetuities (no interest is valid unless it is stated to vest prior to 21 years after death of life in being at time of purported creation of interest) and abolishes rule against accumulations (accumulations to capital must not violate rule against perpetuities). Reformed “wait and see rule” applies (courts may “wait and see” if interest vests in perpetuity period, in which case interest will be valid) and power is given to specify perpetuity period of up to 80 years. In New South Wales and Australian Capital Territory, perpetuity period is automatically 80 years. Restrictions of rule against perpetuities do not apply to charitable bequests, trust and certain other limited cases. In South Australia rule against perpetuities is abolished.

In all jurisdictions except South Australia direction to accumulate income generated from property is void if disposition of accumulated income offends rule against perpetuities; valid if vests within perpetuity period and “wait and see” is permitted. Direction to accumulate without direction as to its disposition is not valid. In South Australia where disposition provides for accumulation or partial accumulation of income for period exceeding 80 years, court may on application vary terms of disposition so as to vest capital and income within 80 year period.

39.07 POWERS OF ATTORNEY:

Powers of attorney very strictly construed in Australia, and wide general powers restricted by enumeration of more particular powers. Attorney under power generally has no authority to appoint sub-agents, unless right is included in appointment (expressly, or, in some cases, impliedly) or statute (see Powers of Attorney Act 2006 [ACT] §33). All States and Territories have Acts dealing with execution and revocation of powers of attorney and effect of revocation of power of attorney on donee of power and on third parties.

Powers of Attorney Act 1998 (Qld), Instruments Act 1958 (Vic) Pt XI, Powers of Attorney and Agency Act 1984 (SA), Powers of Attorney Act 2006 (ACT), Powers of Attorney Act 2003 (NSW) and Powers of Attorney Act 2000 (Tas) provide for abridged form of Power of Attorney authorizing donee of power to do on behalf of donor all things which donor can lawfully do by attorney (within scope).

All States and Territories provide form of power that is not revoked by incapacity of donor of power where such incapacity occurs after execution of instrument creating power. See category 32 Family, topic 32.03 Guardian and Ward. Some States have enactments modeled upon §§126 and 127 of English Property Law Act 1925, providing that powers given for valuable consideration, and expressed in instruments creating them to be irrevocable, cannot be revoked as against purchasers by death, mental disability or bankruptcy of donor. (Property Law Act 1969 [WA] Pt VIII; Powers of Attorney Act 2000 [Tas]; and Powers of Attorney Act 2003 [NSW]). Powers of Attorney Act 1998 (Qld) and Powers of Attorney Act 2003 (NSW) provide for enduring power of attorney which are not revoked by impaired capacity of donor of power. Pt XIA Instruments Act 1958 (Vic) and Pt 9 Guardianship and Administration Act 1990 (WA) details more formal requirements for making enduring power of attorney. By virtue of Guardianship and Management of Property Act 1991 (ACT) if guardian is appointed for person with impaired decision making ability, Tribunal that appointed guardian may on application give direction regarding continued operation of power executed by such person.

Power of Attorney must be registered in Tasmania and, except in Victoria, must be registered in all other States and Territories for certain dealings in relation to land to take effect pursuant to such power of attorney.

39.08 REAL PROPERTY:

Most land throughout Australia has been brought under the Torrens system of title registration whereby State guarantees indefeasible title to land included in register. Interest of registered proprietor considered to be paramount and protected against all prior interests and estates existing (except in case of fraud or statutory exception). In respect of each piece of land under this system Certificate of Title is issued by Government, all original certificates being kept in central office and duplicate being issued to registered proprietor (except Queensland and Northern Territory). Registration of instrument operates to place record of each registrable transaction on face of register. Examination of register or title search in relevant State or Territory will reveal location of land in question, dimensions, registered owner and any registered encumbrances or restrictive covenants to which it is subject. Number of exceptions to indefeasibility exist so that unregistered third parties may claim interest in property where: (a) Registration procured by fraud (notice of earlier interest does not amount to fraud); (b) estate or interest expressed by statute to take priority over registered interest e.g., adverse possession, easements; (c) specific legislative exception such as compulsory acquisition of land by State; (d) obligations able to be enforced against registered proprietor personally (contracts and personal equities); and (e) in limited circumstances where registered proprietor is volunteer. First registered interest obtains priority over subsequent registered interest (depends on date of lodgment for registration). Equitable and common law principles apply to resolution of priority between unregistered interests. Compensation for deprivation of interest in lot payable by State in some circumstances (e.g., Real Property Act 1900 [NSW]; Transfer of Land Act 1958 [Vic];and Land Title Act 1994 [Qld]). Transfer of Land Act 1958 (Vic) Pt IIIA provides for lodgment and registration of electronic land transactions.

In New South Wales and Victoria, some lands are not yet under Torrens system. Land not yet under Torrens system is dealt with under old conveyancing system under which title is traced through series of conveyances. In Victoria, land must be brought under Torrens system in order to register any new dealing with it.

Application may be made to bring any land under Torrens system.

Conveyancers Licensing Act 2003 (NSW), Conveyancers Act 2006 (Vic), and Conveyancers Act 1994 (SA) provide for licensing and regulation of persons not legal practitioners involved in business of conveyancing legal work in relation to residential property.

Guidelines for foreign investment set by Commonwealth. Foreign Acquisitions and Takeovers Act 1975 (Cth) controls acquisition of Australian urban land by foreigners. Foreign Ownership of Land Register Act 1988 (Qld) establishes register of details of foreign interests in Queensland land. See also category 34 Immigration, topic 34.01 Aliens; Pt I, category 13 Immigration, topic 13.01 Aliens.

In Australian Capital Territory with a few exceptions, land is not freehold but Territory Land, leased to tenants usually for a period of 99 years which can be renewed.

Mortgages.

Mortgage of general law land takes form of actual conveyance of land to mortgagee with equitable right of redemption being reserved to mortgagor to require re-transfer of land on repaying full amount of loan with interest. Under Torrens system mortgage does not take form of transfer but is charge effected by statutory instrument of mortgage which is registered as encumbrance on certificate of title and remains there until discharge is noted on certificate and register. Mortgagor has statutory right to discharge of mortgage and retains right to possession. Mortgage instrument would generally provide that mortgagee is entitled to take possession upon mortgagor's default. Irrespective of whether mortgage document is in registrable form, unregistered mortgage will only create equitable interest in mortgagee. Once registered, mortgage overrides later registered or unregistered interests, including mortgages. Between two or more registered mortgages, priority is determined according to date of registration (unless agreed otherwise [e.g., Real Property Act 1900 [NSW] §56A; Land Title Act 1994 [Qld] §77; and Transfer of Land Act 1958 [Vic] §75B]).

Mortgagor of Torrens land may create several mortgages in succession. In some jurisdictions, prior mortgagee is obliged to produce certificate of title to allow registration of second or subsequent mortgage (e.g., Transfer of Land Act 1958 [Vic] §86; Land Titles Act 1980 [Tax] §87; and Transfer of Land Act 1893 [WA] §127).

Leases.

In all States, leases may be granted by Torrens system registered proprietor of land (as lessor) to tenant (as lessee). Lease is grant of right to exclusive possession of land for definite term less than that which lessor has in land. Lessee then has leasehold estate created in its favor. Lessor has reversionary interest i.e., upon termination of lease interest granted to lessee will revert back to registered proprietor.

Lease derived from longer leasehold interest is sublease. Original lease is head-lease. Original lessee becomes sublessor and new lessee becomes sublessee.

Under general law land, lease is void for purpose of creating legal estate unless made by deed (or in Northern Territory, Queensland, and Australian Capital Territory, in writing). Rule does not apply to lease taking effect in possession for term not exceeding three years. Under Torrens system, lessee gets legal title by executing instrument of lease and registering instrument. In New South Wales, Tasmania, Victoria and Western Australia, lease not registrable unless for period in excess of three years or in South Australia, in excess of one year. In

Australian Capital Territory, Northern Territory and Queensland, Torrens legislation does not specify minimum period for lease to be registered.

Leases may also be enforceable in equity where not created by deed or term within minimum statutory exception where there are sufficient acts of part-performance (e.g., lessee entering possession) under rule in Walsh v Lonsdale (1882) 21 Ch.D.9.

All States and Territories have legislation specific to particular types of leases—e.g., retail leasing is regulated under Retail Leases Act 2003 (Vic), Retail Leases Act 1994 (NSW); Retail Shop Leases Act 1994 (Qld); Retail and Commercial Leases Act 1995 (SA); Leases (Commercial and Retail) Act 2001 (ACT); Commercial Tenancy (Retail Shops) Agreements Act 1985 (WA); Business Tenancies (Fair Dealing) Act 2003 (NT); and Fair Trading (Code of Practice for Retail Tenancies) Regulations 1998 (Tas). Commonwealth Government has raised possibility of future Federal regulation of retail leasing (Productivity Commission Report 2007).

Leases are also subject to overarching provisions of Trade Practices Act 1974 (Cth). See Pt I, category 3 Business Regulation and Commerce, topic 3.03 Consumer Protection.

40 TAXATION

40.01 BUSINESS TAXES:

Financial Institutions Duty.

FID abolished as of July 1, 2001, in exchange for Commonwealth channelling GST revenue to States and Territories.

Debits Tax.

States and Territories abolished tax on debits made to various debitable accounts from July 1, 2005 (except New South Wales: already abolished from Jan. 1, 2002).

40.02 EMPLOYMENT TAXES:

Payroll tax imposed annually by all States and Territories on wage, salary, bonus, commission, allowance or benefit (``wages'') paid or payable by employer to employee (deemed to include contractors) that have relevant connection with State. Threshold amounts and rates vary between States: e.g., 5.75% of excess over A$638,000 p.a. in New South Wales (5.65% from Jan. 1, 2010) and 4.95% of excess over A$550,000 p.a. in Victoria. Wages of related/associated businesses are ``grouped''. Employers to register and forward monthly return and end of financial year returns. See Pay-roll Tax Acts.

40.03 ESTATE TAX:

Probate or death duties have been abolished in all States.

40.04 GIFT TAX:

Gift duty no longer imposed in any State.

40.05 INCOME TAX:

Income tax is imposed only by the Commonwealth although States also have constitutional power. See also Pt I, category 16 Taxation, topic 16.09 Income Tax.

40.06 PROPERTY TAXES:

Land tax imposed annually on legal and equitable (joint and several) “owner” of freehold (and leasehold in ACT) interest in land by all States and Territories (except Northern Territory). Exemptions apply (e.g., principal residence). Land value based on unimproved value of land. Threshold amounts and scale of rates vary between States and Territories: e.g., A$100 and 1.6% of excess over A$368,000 in NSW. See Land Tax Acts.

40.07 STAMP TAX:

Stamp duty is State and Territory based tax which applies to defined category of instruments and transactions. No uniformity between States and Territories as to types of instruments and transactions on which stamp duty applies. Some dutiable instruments and transactions include: transfers of property (e.g., land, goodwill, plant, intellectual property), mortgages and charges, hiring arrangements, trust arrangements and leases. Rates of duty applicable to dutiable instruments and transactions vary depending on nature of particular instrument or transaction. E.g., property transfers can attract duty at rates of up to 6.75% on unencumbered value of some property. Exemption applies in most States and Territories to transfer of property between group companies (subject to certain conditions being met). Consequence of not paying duty on dutiable instruments is that instrument cannot be used in evidence in court proceedings except criminal proceedings in some States.

41 TRANSPORTATION

—Scope —

Aircraft. See Pt I, category 17 Transportation, topic 17.01 Air Navigation.

41.01 AUTOMOBILES:

See topic 41.02 Motor Vehicles.

41.02 MOTOR VEHICLES:

Road Traffic Rules.

Despite national reform (see Pt I, category 17 Transportation, topic 17.03 Road Transport) some variation in road traffic rules between States.

Registration, Licensing.

Registration and Licensing regulated by various State and Territory legislation: Road Transport (Driver Licensing) Act 1999 (ACT) and Road Transport (Driver Licensing) Regulation 2000 (ACT); Road Transport (Vehicle Registration) Act 1999 (ACT) and Road Transport (Vehicle Registration) Regulation 2000 (ACT); Road Transport (Driver Licensing) Act 1998 (NSW) and Road Transport (Driver Licensing) Regulation 1999 (NSW); Vehicle and Traffic (Driver Licensing and Vehicle Registration) Regulations 2000 (Tas); Transport Operations (Road Use Management —Driver Licensing) Regulations 1999 (Qld); Road Safety (Drivers) Regulations 1999 (Vic) and Road Safety (Vehicles) Regulations 1999 (Vic); Road Traffic (Authorisation to Drive) Regulations 2008 (WA) and Road Traffic (Licensing) Regulations 1975 (WA); Motor Vehicles Act 1959 (SA) and Motor Vehicles Regulations 1996 (SA); Motor Vehicles Act 1949 (NT) and Motor Vehicles Regulations 1977 (NT).

Motor vehicles must be registered in State of vehicle's garage address and bear distinguishing registration number. Vehicles registered in one State may be driven in another temporarily. Drivers must not drive vehicle without license of appropriate class. Foreign license must be in English or accompanied by International Driving Permit. Persons holding international or interstate license intending to become permanent State or Territory resident must obtain local license within three months. New residents of State must transfer vehicle registration within three months.

See: http://www.transport.sa.gov.au; http://www.rta.nsw.gov.au; http://www.transport.qld.gov.au; http://www.nt.gov.au/transport; http://www.dpi.wa.gov.au; http://www.rego.act.gov.au; http://www.vicroads.vic.gov.au; http://www.transport.tas.gov.au.

Insurance.

All States and Territories have comprehensive scheme of compulsory third-party insurance and compensation for injuries sustained in motor accidents: Road Transport (General) Act 1999 (ACT) and Road Transport (Third-Party Insurance) Act 2008 (ACT); Motor Accident Compensation Act 1999 (NSW) and Motor Accidents Compensation Regulations 2005 (NSW); Motor Vehicles Act 1949 (NT), Motor Accidents (Compensation) Act 1979 (NT) and Motor Accidents (Compensation) Regulations 1984 (NT); Motor Accident Insurance Act 1994 (Qld) and Civil Liability Act 2003 (Qld); Motor Vehicles Act 1959 (SA) and Motor Vehicles Regulations 1996 (SA); Motor Accidents (Liabilities and Compensation) Act 1973 (Tas) and Motor Accidents (Liabilities and Compensation) Regulations 2000 (Tas); Transport Accident Act 1986 (Vic) and Transport Accident Regulations 2007 (Vic); Motor Vehicle (Third Party Insurance) Act 1943 (WA) and Motor Vehicle (Third Party Insurance) Regulations 1962 (WA).

41.03 SHIPPING:

Bills of Lading regulated by Sea-Carriage Documents Act (various years) in each State and Northern Territory.

Where ship has connection with State or Northern Territory, marine safety, registration of vessels regulated by State legislation: Marine Act 1988 (Vic); Transport Operations (Marine Safety) Act 1994 (Qld); Marine Safety Act 1998 (NSW); Marine Act 1981 (NT); Western Australian Marine Act 1982 (WA); Harbors and Navigation Act 1993 (SA); Marine and Safety Authority Act 1997 (Tas).

Under co-operative scheme and inter-governmental agreement with Commonwealth, States and Northern Territory each enacted Crimes at Sea Act (various years). Criminal law of State or Territory applies extraterritorially to adjacent areas.

1
AUSTRIA LAW DIGEST

—Scope —

Revised for 2010 edition by

ZEINER & ZEINER, of Vienna.

(Abbreviations used are: A.B.G.B., Allgemeines Bürgerliches Gesetzbuch, Civil Code; H.G.B., Handelsgesetzbuch, Commercial Code; Z.P.O., Zivilprozessordnung, Code of Civil Procedure; BGBl., RGBl., and StGBl., Bundesgesetzblatt, Reichsgesetzblatt and Staatsgesetzblatt, Federal Gazette.)

Austria is member of EU. See European Union Law Digest.

Note: This revision incorporates legislation through Oct. 15, 2009.

1 INTRODUCTION

1.01 CURRENCY:

Monetary unit in Austria is EURO, divided into 100 cents. Austrian Schilling (ATS) ceased to be official currency on Feb. 28, 2002. Official exchange rate: 1 EURO = 13.7603 ATS.

Austrian National Bank owns monopoly of issuing banknotes. Statutes of Austrian National Bank are regulated by Law of Jan. 20, 1984, BGBl. No. 50 in latest wording of BGBl. I. No. 108/2007. Under Foreign Exchange Law Austrian National Bank is pertinent foreign exchange authority. (Law of July 25, 1946, BGBl. No. 162, in latest wording of BGBl. I. No. 60/1998).

All foreign exchange transactions are permitted by law unless National Bank declares them to be subject to approval or generally prohibited, if necessary.

Austria is a member of O.E.C.D. and of European Monetary Agreement of Aug. 5, 1955.

1.02 GOVERNMENT AND LEGAL SYSTEM:

On May 15, 1955 State Treaty was concluded between Austria on the one hand and France, U.K., U.S.A., and U.S.S.R. on the other hand and became effective on July 27, 1955. (BGBl. 152/1955). In compliance with Art. XX of State Treaty, Allies quitted Austria by Oct. 27, 1955, on which day Austria regained her full sovereignty. On July 17, 1989 Austria applied for membership to EU. Treaty of Accession to EU was concluded and approved by referendum in Austria. Membership became effective as of Jan. 1, 1995.

After World War II, Constitution of Oct. 1, 1920, as am'd in 1929 (BGBl. No. 1/1930 in latest wording of BGBl. I. No. 106/2009) was reestablished (Law of May 1, 1945, St GBl. No. 4).

The Constitution of 1920 provides that Austria is a democratic, federal republic, with a two-chamber parliament. One chamber is called “Nationalrat” (National Assembly), the other “Bundesrat” (Federal Assembly). The “Nationalrat” is elected by means of general election every fourth year; members of “Bundesrat” are appointed by Diets of the nine Federal Provinces (Bundesländer). The nine Federal Provinces (Bundesländer) that compose the republic are to a comparatively large degree autonomous.

“Nationalrat” shall assemble in ordinary sessions from Sept. 15 of each year until July 15 of subsequent year. In addition, extraordinary sessions may be summoned upon request of government or of one-third of members of “Nationalrat” or “Bundesrat”. (Art. 28 Constitution). All sessions of “Nationalrat” are summoned by President of Austrian Republic. During ordinary sessions President of “Nationalrat” summons meetings. Meetings of “Bundesrat” are summoned by its chairman. There are no session periods for “Bundesrat” determined by law.

By constitutional Law of Oct. 26, 1955, BGBl. No. 211, Austria by her own will declared her permanent neutrality and undertook not to join any military treaty nor to permit military bases of other countries on her territory.

Political parties are entitled to receive public subsidies, if they have at least five representatives in “Nationalrat” or received more than 1% of votes at last election. (Law of July 2, 1975, BGBl. No. 404 in latest wording of BGBl. I. No. 71/2003).

Austria is member to Vienna Convention on the Law of Treaties (BGBl. No. 40/1980) and to European Charter of Local Self-Government (BGBl. No. 357/1988).

1.03 HOLIDAYS:

(Feiertagsruhegesetz 1957 [Law of June 18, 1957, BGBl. No. 153] in latest wording of BGB1. 144/83).

Legal holidays are: New Year's Day; Epiphany (Jan. 6); Easter Monday; Labor Day (May 1); Ascension Day; Whitmonday; Corpus Christi, Assumption Day (Aug. 15); All Saints' Day (Nov. 1); Immaculate Conception (Dec. 8); Christmas Day (Dec. 25); St. Stephen's Day (Dec. 26).

For members of the Protestant Church Good Friday and Oct. 31 are also legally recognized holidays.

For all legal terms and terms of judicial proceedings (except terms relating to bills and checks) as well as for all terms relating to payment of taxes and tax proceedings, all Saturdays and Good Friday are recognized as legal holidays. If the expiration of a term coincides with a holiday, the term expires on the subsequent working day.

Court holidays are from July 15 to Aug. 25 and from Dec. 24 to Jan. 6 of each year. Court holidays only apply to civil cases and no court hearings are to be held at such times with few exceptions. Certain time limits in civil matters are extended until end of court holidays.

1.04 OFFICE HOURS AND TIME ZONE:

Austria is in the Central European (+01:00 GMT) time zone. Office hours are mostly from 8 or 9 a.m. to 4 or 5 p.m.

2 BUSINESS ORGANIZATIONS

2.01 AGENCY:

Commercial Agents.

Rights and duties of commercial agents are defined by Commercial Agents Act 1993. (BGBl. No. 88/1993 in latest wording of BGBl. I. No. 103/2006). Commercial agents acting in name of principal and receiving commission on one hand and distributors acting in their own name on other hand are strictly differentiated. In case of termination of agreement without fault of agent, agent is entitled to compensation, maximum amount of which is equivalent of one year's commission based on average of preceding five years. Distributors have no equivalent claim, unless their actual position is equivalent to that of agent in almost all respects, particularly if their gross margin does not exceed commission rate usually paid to agents under comparable circumstances.

2.02 ASSOCIATIONS:

See topic 2.03 Corporations.

2.03 CORPORATIONS:

Following forms of business organizations qualify as undertakings as result of their corporate form: (1) Aktiengesellschaft (joint stock corporation); (2) Gesellschaft mit beschränkter Haftung (private limited liability company); (3) European company; and (4) Genossenschaft (cooperative association).

Aktiengesellschaften (Joint Stock Corporations).

(Law of Mar. 31, 1965, BGBl. No. 98 in latest wording of BGBl. I. No. 71/2009). Joint stock corporation must have minimum capital of [Euro]70,000 divided into shares of at least

[Euro]1 each. Shares may be issued in form of registered or bearer shares. Registered shares are transferred by endorsement. Rights deriving from registered shares can only be enforced against corporation by owner registered in stock ledger. If according to by-laws approval of corporation is required for transfer of registered shares and corporation refuses such approval decision of court may be obtained, which is of binding force to corporation.

Government permission is required for the formation of an Aktiengesellschaft only if the corporation is to engage in the banking business, and for the establishment in Austria of a branch office of a foreign corporation.

Aktiengesellschaft comes into legal existence by registration in commercial register of the court.

Multiple shares are not allowed in Austria.

Corporation is managed by executive board (Vorstand), which is appointed by the supervisory board (Aufsichtsrat). Appointment of a member of executive board may only hold for maximum period of five years, but may be renewed for further maximum periods of five years each.

Supervisory board is elected by the general assembly. Management of executive board is supervised by supervisory board, which consists of at least three members, but no more than 20 members.

Beginning from Jan. 1, 2006, undertakings are responsible under penal law through their decision makers and employees.

Gesellschaft mit beschränkter Haftung (Limited Liability Company).

(Law of Mar. 6, 1906, RGBl. No. 58, in latest wording of BGBl. I. No. 70/2008). This corporate form is simpler and widely used. Formation requires one or more founders. Minimum capital is [Euro]35,000 of which [Euro]17,500 must be paid in. Above that minimum at least one quarter of capital contributions to be made in cash must be paid in. Each share must amount to at least [Euro]70. Shares are only transferable inter vivos by means of Austrian notarial act.

Company may have one or more managers. Supervisory board is only required if capital exceeds [Euro]70,000 and number of shareholders exceeds 50 or if company has more than 300 workers and employees. Managers as well as members of supervisory board are appointed by shareholders' meeting.

European Company.

(BGBl I. No. 67/2004 in latest wording of BGBl. No. 71/2009). European corporations follow same rules as joint stock corporations unless Regulation (EC) No. 2157/2001 or Austrian Law regulating these companies provide otherwise. Law permits either dualistic system (executive board and supervisory board like joint stock corporations) or monistic system (administrative board of three to ten members, which may delegate certain management functions to managing directors). Members of administrative board are appointed by general assembly for period up to five years. Reelection is permissible. Members of administrative board with exception of chairman and first vice-chairman may be appointed simultaneously as managing directors. Responsibility transferred by law upon members of administrative board must not be delegated to managing directors. Special rules apply in case seat of European company is transferred abroad. European companies may be created by merging Austrian company into it. Law contains special rules on European holding companies.

Genossenschaften (Cooperative Associations).

(Law of Apr. 9, 1873, RGBl. No. 70, in latest wording of BGBl. I. No. 70/2008). There are several kinds of cooperative associations (Genossenschaften) regulated by special laws. They have no capital stock, but enjoy rights of corporations. Respective shares must have minimum nominal value of [Euro]1. Liability of members (whether limited or unlimited) depends upon form of association and provisions of its statutes.

European Cooperative Association.

(BGBl. No. 104/2006). Law now transforms Directive (EC) No. 1435/2003 of European Council of July 22, 2003.

Merger or Change in Status of Corporations and/or Partnerships.

Tax treatment of restructuring of companies and businesses is regulated by Restructuring Tax Act (Umgründungssteuergesetz BGBl. No. 699/1991, in latest wording of BGBl. I. No. 161/2005). (a) Mergers (Verschmelzungen), (b) transformations (Umwandlungen), (c) contributions of business in kind (Einbringungen), (d) associations in form of partnerships (Zusammenschlüsse), (e) transfer of business property of partnership to successors who were deemed owners (Realteilungen) and (f) spin-offs (Spaltungen) are either not or only partially subject to income tax, corporate income tax and turnover tax. Under certain conditions these transactions are exempted from capital transfer tax and State fees. Hidden reserves shall only be taxed as transfer gains if they would otherwise definitely escape taxation. With few exceptions continuation of book values is compulsory. Law facilitates acquisition of shares or other participations of minority shareholders or partners in course of such transactions or acquisitions. Capital companies located in different member states of the EU may be merged pursuant to BGBl. 1. No. 72/2007 implementing EU Directive 2005/56/EC.

Foreign Corporations.

Foreign corporation can found branch offices in Austria, which, before starting business activity, must be entered into commercial register (Firm Book) at Commercial Court competent for district in which branch has its seat.

See also subhead Aktiengesellschaften (Joint Stock Corporations), supra.

See also categories 3 Business Regulation and Commerce, topic Commercial Register; Foreign Trade and Commerce, topic Foreign Investment.

Taxation.

See category 20 Taxation, topic Taxes.

See also topic 2.04 Partnerships; category 3 Business Regulation and Commerce, topic 3.06 Licenses, Business and Professional.

2.04 PARTNERSHIPS:

General Partnership (Offene Gesellschaft).

This is a partnership for the purpose of carrying on a trade or production, under the name of the firm. The name of the firm is registered in the commercial register. The name of the firm must include the name of at least one of the partners and, in addition, some wording that will clearly indicate that the firm is a partnership. However, being once registered the partnership may sell the business to a third person (or to third persons) who may continue to use the original firm name. Each of the partners is jointly and severally liable to creditors of partnership, with all his personal assets; however, fact that name of certain individual person appears in name of firm does not make him liable to creditors of firm unless he was actually still partner at time debt originated.

Limited Partnership (Kommanditgesellschaft).

This is a partnership for the purpose of carrying on a trade or production, under the name of the firm, consisting of two or more persons of whom at least one is liable to the creditors of the partnership with all his personal assets (Komplementaer), while at least one is liable to the creditors of the partnership only to the extent of his contribution to the capital of the partnership (Kommanditist). The name of the latter must not appear in the name of the firm.

Dormant Partnership (Stille Gesellschaft).

This is a partnership only between the partners that does not operate as such against third persons. Only the owner not his dormant partner is liable to creditors.

Professional Association (Erwerbsgesellschaft).

This form of undertaking has been abolished. Professional associations created prior to Jan. 1, 2007 shall continue as general partnerships and limited partnerships. Names of such associations shall be adapted to new legal provisions by including correct name of form of undertaking until Jan. 1, 2010.

See also topic 2.03 Corporations, subhead Merger or Change in Status of Corporations and/or Partnerships; category 3 Business Regulation and Commerce, topic 3.06 Licenses, Business and Professional.

3 BUSINESS REGULATION AND COMMERCE

3.01 BILLS AND NOTES:

(Law of Feb. 16, 1955, BGBl. No. 49, in wording of Law of June 7, 1978, BGBl. No. 306).

A bill of exchange must contain a statement to the effect that the instrument is a bill of exchange ("Wechsel"). It is usually made payable to order, but this is not essential since a bill payable to a person is presumed to be payable to his order unless it states expressly "not to order."

Bills payable "to bearer" or in which the name of the payee is left blank are not bills of exchange. Promissory notes are treated as a form of bills of exchange.

Bills may fall due at sight, at a certain time after sight, at a certain time after the date of issue, or on a specified day. There are no days of grace. Default of acceptance or of payment must be evidenced by a protest levied by a notary public not later than on second working day following maturity.

Austria is a member of the Convention providing a uniform law for bills of exchange and promissory notes of June 7, 1930, effective since Jan. 1, 1934. (BGBl. No. 289/1932).

Checks.

A check must contain a statement to the effect that the instrument is a check. An acceptance written on a check ("certified check") is of no legal effect. Checks bearing the clause "Payable to account" (often symbolized by a cross drawn across the instrument) are not discharged by payment in cash, but by crediting the sum in question to the payee's bank account.

(Law of Feb. 16, 1955, BGBl. No. 50. in latest wording of BGBl. I. No. 112/2003).

Uniform Law on checks based on the Convention of Mar. 19, 1931, effective in Austria as from Mar. 1, 1959. (BGBl. No. 47/1959 and 246/1959).

3.02 COMMERCIAL REGISTER:

Individual firms exceeding volume of small-scale trade as well as partnerships, professional associations, joint stock corporations, limited liability companies, insurance associations, savings banks and other legal entities specifically designated by law must be entered into commercial register (firm book) of High Courts. Juridical persons start their legal existence only upon their entry into commercial register.

Not only establishment of enterprise (firm), but also each branch establishment and any alterations in person of ownership, partners, managers and proxies have to be registered promptly. In case of juridical persons any change of articles of association or by-laws has also to be notified to commercial register and to be made known there. Any such fact has to be reported to competent commercial register by proprietor of enterprise, partners, board of directors of corporation or managers of private limited liability company, respectively. This notification has to be signed by persons named and to be authenticated by notary public. Any failure of registration may be penalized by Commercial Court having jurisdiction.

As long as any factual data are not recorded in commercial register they are not effective to third parties relying in good faith on principle of confidence in such a register.

Commercial registers are maintained by all High Courts acting as Commercial Courts and comprise all enterprises that have their seat or branch establishment in area for which this court is locally competent. Branch establishment has to be registered in both commercial register competent for seat of firm and commercial register competent for branch establishment itself.

3.03 CONTRACTS:

Civil Code (ABGB) contains essential provisions about contracts and their interpretation. There are special regulations in Commercial Code (HGB) with regard to interpretation of contracts between merchants.

Contract infringing statutory prohibition or good morals (public policy) is invalid. (§879 ABGB).

Contracts in favor of third parties are permissible.

An offer must be accepted within period stated by offeror. If no period is stipulated, an offer must be accepted immediately by a person present or within a reasonable period by a person absent. Otherwise offer expires. An offer may also be accepted tacitly by acts permitting such conclusions.

Contracts may be concluded in writing, orally or conclusively. Only in special cases contract in writing is explicitly required.

Excuses for Nonperformance.

No consequences for both parties will result from nonperformance, if performance is made impossible for either party by force majeure. Each party is entitled to withdraw from contract, if performance of contract has become impossible through fault of the other party. (§§918-921 ABGB).

Contract Violation.

If performance is not made at stipulated time, place or in stipulated form, other party may either insist on performance and claim damages for bad performance, or may rescind contract upon granting reasonable period of grace for performance. If performance is impossible because of fault of one party, other party may either claim damages or rescind contract. Rescission of contract is not deemed to be waiver of damage claims.

General Business Conditions.

Provision in form contracts or business conditions not relating to main subject matter is void, if it constitutes serious disadvantage for other party. Unusual provisions used therein by one party, which other party could not reasonably expect, do not become part of contract, unless they were specifically indicated to other party.

Consumer Protection.

Consumers are entitled to special protection against unfair treatment. Contract provisions in violation of Consumer Protection Act (BGBl. No. 140/1979 in latest wording of BGBl. I. No. 66/2009) and related laws are considered null and void.

Applicable Law.

Factual situations comprising links to other jurisdictions are in principle subject to laws of that country to which they are related.

Austria is member to Rome Convention on Law Applicable to Contractual Obligations. Contracts are subject to that law which parties expressly or conclusively stipulated or which they implicitly considered as governing. Choice of law must not result in depriving employee or consumer of protection granted by obligatory provisions of law which would be applicable without such choice. If applicable law is not determined by contracting parties, contract is subject to law of country with which it is most closely related. Closest relation is assumed with country in which party who has to fulfill characteristic part of contract is resident or has its seat. This rule does not apply to contracts concerning rights connected with real estate. For such contract closest relation to country where real estate is situated is assumed.

Employment contracts are subject to law applicable at place where employee usually works even if employee is sent to another country for limited period of time. If employee does not usually work in same country, law of country in which employer has its seat is applicable.

Austria is member to Convention on Contract for International Carriage of Goods by Road (CMR) of May 19, 1956 (BGB1. No. 138/1961) and of Protocol thereto of July 5, 1978 (BGB1. No. 192/1981).

Government Contracts.

There exists no legislation in Austria according to which contracts with governmental bodies must have different wording or contents from contracts between private persons.

3.04 FRAUDS, STATUTE OF:

While Austria has no statute of frauds, certain contracts must be in writing (e.g., guarantees, arbitration agreements); others must be executed in form of notarial act (e.g., gifts unless actual delivery takes place, contracts between husband and wife, transfer of shares in companies called Gesellschaft mit beschraenkter Haftung, etc.). In some cases notarial certification is sufficient (e.g. some legal documents for joint stock corporations and limited liability companies). All contracts for which law does not specifically require certain form may be executed also orally or conclusively.

3.05 INFORMATION TECHNOLOGY, INTERNET AND NEW MEDIA:

Telecommunication Act (BGBl. I. No. 70/2003 in latest wording of BGBl. I. No. 65/2009) regulates area of telecommunication in view of modern telecommunication infrastructure, functioning competition, global coverage and requirements for rendering telecommunication services (simple notification or license, depending on type of services).

E-commerce.

E-Commerce Act (BGBl. I. No. 152/2001) provides legal framework for certain aspects of electronic commerce. In principle information society services are subject to law of EU-Member State in which service provider is established.

Service providers do not require license. They must provide recipient with certain minimum information. Unsolicited emails for advertising purposes are not permitted. Providers of intermediary services are basically not liable for information given by third parties.

Provisions on consumer protection with respect to distance selling (information and cancellation rights) are contained in Consumer Protection Act. (BGBl. No. 140/1979 in latest wording of BGBl. I. No. 21/2008).

Computer programs and data bases are protected under Copyright Act. See category 16 Intellectual Property, topic 16.02 Copyright.

3.06 LICENSES, BUSINESS AND PROFESSIONAL:

Exercise of virtually any trade or industrial activity requires license to be issued by trade agencies. (Trade Act 1994 BGBl. No. 194/1994 in latest wording of BGBl. I. No. 42/2008). For obtaining license for so-called “regulated trade” certain qualifications must be proved (specialized education and experience of certain duration according to kind of activity). In case of so-called “free trades” registration suffices without proof of education and experience.

Joint stock corporations, private limited liability companies and cooperative associations must nominate person qualifying under Trade Act as holder of license. In partnership at least one general partner must qualify under Trade Act.

Brokerage.

Rights and duties of brokers (real estate agents, insurance brokers, etc.) are defined in Brokers Act 1996. (BGBl. No. 262/1996 in latest wording of BGBl. I. No. 131/2004).

3.07 MONOPOLIES, RESTRAINT OF TRADE AND COMPETITION:

Nationalized Enterprises.

A number of individual commercial enterprises have been nationalized by law after World War II. Former owners have received indemnification to a certain extent. See Law of July 7, 1954.

Cartels.

(Cartel Act 2005, BGBl. No. 61/2005). Cartels are agreements, decisions of associations of undertakings and understandings intending or causing prevention, restriction or distortion. As such they are null and void. Recommendations to keep certain prices, price limits, calculation guidelines, margins or discounts which intend or cause restrictions of competition shall be deemed to be equivalent to cartels, unless their noncommittal character is expressly referred to and neither economic or social pressure is exercised nor should be exercised.

It is also necessary to announce to register those firms which can be considered as “marktbeherrschend” (dominating market). Undertaking is considered as “marktbeherrschend” if

(a) it is not exposed to any or only to negligible competition or (b) if it has outstanding market position as compared with competitors. Undertaking has burden of proof that above criteria are not fulfilled if its share of total domestic market or any other geographically relevant market (a) is at least 30% or (b) exceeds 5% and undertaking has not more than two competitors or (c) exceeds 5% and undertaking belongs to four largest enterprises which supply together at least 80% of market. Dominating position on market must not be misused.

Minister of Justice may, upon consultation with Minister of Economic Affairs and with special committee in cartel matters, by means of regulation exempt certain groups of cartels from application of cartel act.

Anybody having legal or economic interest may request declaratory decision of Cartel Court whether certain situation is subject to Cartel Act.

Mergers are to be notified to Cartel Court if merged businesses reached at least following turnover in business year preceding merger: (1) total of [Euro]300,000,000 worldwide, (2) total of [Euro]30,000,000 in Austria and (3) at least two businesses each [Euro]5,000,000 worldwide. Certain public institutions may request examination of justification of such mergers. If no request is made, Cartel Court must confirm this fact. Otherwise economic justification of merger must be proved. Special rules apply to mergers of mass media businesses.

Restraint of Free Trade.

(Law of June 29, 1977, BGBl. No. 392 in latest wording of BGBl. I. No. 131/2001). Upon application of several specified public agencies, suppliers of goods may be forced by Cartel Court to sell to retailers at same conditions. Different conditions are only allowed if justified. Merchants usually supplying retailers may equally be forced to sell to retailer if otherwise requirements of consumers for basic goods cannot be adequately satisfied or if competitiveness of retailer would be jeopardized by nondelivery.

Unfair Competition.

Act Against Unfair Competition (BGBl. No. 448/1984 in latest wording of BGBl. I. No. 106/2006) prohibits various business practices, which are considered to be unfair, mainly (i) violation of good morals in business; (ii) misleading or deceptive statements or advertising; (iii) disparaging of competitors; (iv) infringement of intellectual property rights, (firm) name rights and well-known product get-ups. Competitor may claim (preliminary and/or final) injunction, damages, rendering of account, specific revocation of public statements, removal of illegal situation and publication of judgment. Extensive jurisprudence and literature interprets term “violation of good morals in business”, which may consist in breach of contract or conduct independent from any contract. Comparative advertising is permitted in principle, but must not disparage any competitor; in practice comparative advertising is legally only possible in exceptional circumstances. Premiums offered by advertising are generally prohibited and only allowed in few very specific cases.

See also topic 3.08 Registers.

3.08 REGISTERS:

The courts keep land registers, registers relating to mining and railway property, commercial registers and ship registers. Trademark register and patent register are kept by Patent Office (Vienna). There exists “Kartellregister” (Cartel Register) at Courts of Appeals in Vienna where all cartels liable to registration must be entered.

Registers of births, marriages and deaths were kept until 1938 by the religious ministers who performed the baptism, marriage or funeral ceremonies; they are since kept by registry offices (“Standesämter”). Austria is member of Convention of Sept. 8, 1976 on issuance of multilingual extracts from registers of personal status. (BGBl. No. 460/1983).

See also topics 3.02 Commercial Register, and 3.07 Monopolies, Restraint of Trade and Competition.

3.09 SALES:

No particular form is necessary to close contract of sale; sale is completed as soon as parties have agreed upon object of sale and price. However, buyer does not acquire ownership as to object sold until it is delivered. Oral sales contracts are as valid as written contracts. Special rules apply to contracts with consumers.

If a party has delayed fulfilment of the contract, the other party may, at his choice, either demand performance and indemnity for delayed performance, or (after granting a proper period of grace) indemnity instead of performance, or cancellation of the contract.

If buyer is merchant, he must inspect article delivered without delay and notify seller immediately of any defect; otherwise he is considered as accepting article.

Warranties.

Seller warrants that article sold has qualities expressly stipulated or, if no such stipulation took place, qualities usually to be found in article of that kind. If article sold shows defect, such defect must be remedied within reasonable time or article must be exchanged. If remedy of defect and exchange of article are impossible or could only be carried out at disproportionate cost, buyer has choice of cancellation of contract or proportionate reduction of price. Same applies if seller does not remedy defect or exchange article within reasonable period of time. Strict liability applies to manufacturers or, in case of goods of foreign origin, to domestic importers, if marketed product is defective or does not have qualities usually to be expected of such product. Product Liability Law of Jan. 21, 1988, BGBl. No. 99, in latest wording of BGBl. I. No. 98/2001, follows closely EEC Directive on product liability.

Notices Required.

If object of contract does not correspond to conditions agreed upon or to usual terms of such an object, any claim for the deficiency must be asserted at the court in case of real estate within three years, in case of movables within two years. Otherwise, right to claim expires. Period begins with day of delivery. If deficiency has been advised to supplier of goods orally or in writing within period mentioned, any claim for damages caused by this deficiency may be raised as defense even after expiration of these periods.

Prices.

(Price Act, BGBl. No. 145/1992 in latest wording of BGBl. I. No. 151/2004). In principle, prices for goods and services can be freely determined. However, following exceptions apply: (a) economically justified prices may be fixed for electricity, gas, heating supply and for freely sold pharmaceutical products; (b) for other goods and services Minister of Economic Affairs may only fix economically justified prices in certain cases of emergency determined by regulation of federal government; (c) economically justified prices may also be fixed for goods and related services subject to rationing and control measures pursuant to other federal laws; (d) for maximum period of six months Minister of Economic Affairs may fix economically justified prices if price policy of entrepreneur is found unjustified as result of investigation requested by member of price commission or if abuse of market dominating position has been enjoined by Cartel Court. Members of price commission are: representatives of Minister of Economic Affairs, Minister of Finance, Minister of Agriculture, Minister of Health, Sports and Consumer Protection, Federal Chamber of Commerce, Chamber of Agriculture and Federal Chamber of Labor. Pursuant to Price Labelling Act (BGBl. No. 146/1992 in latest wording of BGB1. I. No. 55/2000) and EURO

Indication Act (BGBl. I. No. 110/1999) price of goods and services offered to consumers must be marked in clearly visible form.

Under Tobacco Act Ministry of Health and Women is entitled to fix minimum retail prices for tobacco products and has actually done so. This may violate community law and will be examined by European Court of Justice.

International Sale of Goods.

Austria is member to U.N. Convention on Contracts for the International Sale of Goods of Apr. 11, 1980 (BGBl. No. 96/1988 in latest wording of BGBl. III. No. 147/2001), effective as of Jan. 1, 1989. See Selected International Conventions section.

Applicable Law.

See topic 3.03 Contracts.

4 CITIZENSHIP

4.01 ALIENS:

See category 15 Immigration, topic 15.01 Aliens.

4.02 CITIZENSHIP:

(Law of July 19, 1985, BGBl. No. 311 in latest wording of BGBl. I. No. 37/2006).

Austrian citizenship may be obtained by: (a) Origin, (b) written declaration under particular circumstances, (c) grant by government agency and (d) acceptance of position as ordinary or extraordinary professor at Austrian university. Legitimate children obtain citizenship of their father at time of child's birth. Illegitimate children obtain citizenship of their mother at time of child's birth.

Alien woman may obtain citizenship of Austrian spouse by written declaration filed with competent authorities as long as marriage is not dissolved. Austrian citizenship has to be granted to alien after 30 years of residence in Republic of Austria conditioned upon fulfilment of specific requirements (no sentence, sufficiency of self-support, etc.).

Austrian citizenship has to be regranted to alien, (1) if alien has lost Austrian citizenship by marriage with alien or by obtaining foreign citizenship together with spouse during existence of such marriage, (2) if such marriage was dissolved by death of spouse or by divorce and (3) if regranting of Austrian citizenship is applied for within five years after dissolution of such marriage.

Austrian citizenship is generally lost by acquisition of a foreign citizenship. In addition thereto Austrian citizenship is lost by voluntary military service for a foreign country.

Austrian citizenship can be withdrawn from a person in case he or she is employed in administration of a foreign country, if his or her conduct represents considerable damage to interests of Republic of Austria.

Every Austrian citizen may waive his rights of citizenship (1) if he has already obtained a foreign citizenship, (2) if no criminal proceedings are pending against him and (3) if he has fulfilled his duties with respect to Austrian military service.

Citizenship may only be granted if: (i) Applicant is knowledgable of German language, (ii) if he proves basic knowledge of democratic order, and (iii) if he shows basic knowledge of Austrian history. For this purpose special examinations are organized.

Record of citizenship is kept by competent community, i.e., (1) in case of birth in Austria, Austrian community of birth place and (2) in case of birth in a foreign country, community of Vienna.

Austria is member of New York Convention on the Reduction of Statelessness of Aug. 30, 1961. (BGBl. No. 538/1974) and to the Convention Relating to the Status of Stateless Persons of Sept. 28, 1954 (BGBl. III No. 81/2008).

4.03 IMMIGRATION:

See category 15 Immigration, topic 15.02 Immigration.

5 CIVIL ACTIONS AND PROCEDURE

5.01 ACTIONS:

It is permissible to agree upon the application of foreign laws for interpretation of contracts between Austrian citizens and aliens. If an Austrian court is to decide about interpretation of such a contract, it has to apply foreign law agreed upon, so far as its provisions are not against public policy.

See also topic 5.06 Limitation of Actions; categories 3 Business Regulation and Commerce, topic Contracts; Courts and Legislature, topic Courts.

5.02 COSTS:

Party fully defeated at court has to pay to winning party all costs, including attorney's fees according to legal tariff, caused by case. Extent of costs to be paid is determined by court. Award of costs is only effected upon request of litigant parties. Basis for assessment of costs depends on value of litigious matter, as stated by plaintiff in the suit. If plaintiff does not fully succeed with his claim put forward, court may upon its discretion abate costs mutually or award reduced amount of costs to party partially winning.

Security for Costs.

Aliens appearing as plaintiffs before Austrian court have to furnish security upon request of defendant for costs of proceedings, insofar as aliens are not exempted from furnishing security by state treaties. There is no agreement at present between Austria and U.S.A. with regard to exemption from furnishing security. In case of matrimonial suits no such deposit can be fixed.

5.03 DAMAGES:

See topic 5.06 Limitation of Actions; and category 12 Estates and Trusts, topic Death (Presumption of and Actions for).

5.04 DEPOSITIONS AND DISCOVERY:

The Austrian courts will examine witnesses upon direct request of a foreign court if a respective legal aid convention exists or if such request is transmitted through diplomatic or consular officials. Counsel may appear at the examination of witnesses but only in civil suits.

According to Austrian law it is admissible that the court, on demand of party introducing evidence authorizes same to take proofs abroad; however, a public document which must be valid according to laws of the foreign country in question must be drawn up and then be submitted to Austrian court.

5.05 JUDGMENTS:

Judgments of Austrian courts against which no further appeal lies are enforceable by way of execution. Even if an appeal be admissible, “security” execution may be granted under certain circumstances.

Foreign judgments are enforceable only if passed by the courts of a country where Austrian judgments are enforceable. A foreign judgment which is not enforceable in Austria is not considered as evidence of the claim of the plaintiff.

Agreements exist on mutual acknowledgment and execution of judgments in general with following countries: Aruba, Belgium, Federal Republic of Germany, France, Greece, Great Britain, Israel, Italy, Liechtenstein, Luxembourg, Netherlands, Norway, Spain, Switzerland, Turkey.

Austria is member to Brussels Convention and Lugano Convention on Jurisdiction and Enforcement in Civil and Commercial Law Matters. With respect to EU-Member States jurisdiction and enforcement in civil and commercial matters is regulated by EU-Regulation No. 44/2001.

On ground of Hague Convention of Mar. 1, 1954 on proceedings in civil matters, judgments on law costs rendered in following countries are acknowledged and enforceable: Belgium, Belorussian S.S.R., Croatia, Czech Republic, Denmark, Finland, France, Germany, Holy See, Hungary, Iceland, Israel, Italy, Japan, Lebanon, Lithuania, Luxembourg, Moldavia, Morocco, Netherlands (including Netherlands Antilles), Norway, Poland, Portugal, Romania, Slovakia, Slovenia, Sweden, Switzerland, Spain, Surinam, Turkey, Ukrainian S.S.R., U.S.S.R., Yugoslavia.

On ground of Hague Convention of Apr. 15, 1958 on recognition and enforcement of alimony decisions judgments on alimony claims rendered in following countries are enforceable: Argentina, Belgium, Bosnia-Herzegovina, Croatia, Czech Republic, Denmark, Egypt, Finland, France, Germany, Hungary, Italy, Lebanon, Liechtenstein, Lithuania, Luxembourg, Moldavia, Netherlands (including Netherlands Antilles), Norway, Poland, Portugal, Romania, Russian Federation, Slovakia, Slovenia, Surinam, Sweden, Switzerland, Turkey, USSR, Yugoslavia.

On ground of recognition of reciprocity, judgments in alimony matters rendered in following countries can be enforced: (BGBl. No. 160/1990): British Columbia, Nova Scotia, Saskatchewan (BGBl. No. 495/1992); Australia (BGBl. No. 399/1992); most states of U.S.A. (BGBl. No. 479/1990).

5.06 LIMITATION OF ACTIONS:

General.

Period of limitation of actions in civil law is not uniform. Most claims in commercial law are barred after three years, same as most claims arising from transactions of “everyday life.” Thirty-year period is standard period of limitation if there runs no other. This period governs after judgment has been rendered.

Prescription period is interrupted if claim is expressly or conclusively recognized or if suit is filed and action is duly pursued. If action is rejected, prescription period is retroactively deemed uninterrupted. New prescription period begins upon recognition of claim by debtor. Only if debtor recognizes claim expressly in such way that claim is then based on acknowledgment and not any more on original transaction, then prescription period of 30 years applies.

Railways.

Claims for damages caused by rail accidents: Railroad company is liable for all injuries to property or persons caused by the operation of the railroad, insofar as they are not due to any Act of God or direct fault of person injured.

In case of death of a person reimbursement must be made for cost of medical treatment attempted, the pecuniary damages suffered by loss of ability to earn a livelihood and funeral expenses. In case of physical injury reimbursement has to be made for cost of medical treatment, pecuniary damages caused by the injury and cost of a possible increase in his personal wants resulting from injury. In case of any claims due to the loss or any diminishing of ability to earn a livelihood or increase of personal wants or any claims of third persons for furnishing of support all resulting from the injury, an annuity has to be paid in monthly instalments at beginning of each month. Liability of railroad companies for injuries to persons is limited to total of [Euro]1,600,000 or to annuity of [Euro]100,000 for each person injured. Liability of railroad companies for injuries to property is limited to [Euro]1,000,000 for one accident. If several objects are injured by one accident compensation to be paid is to be distributed proportionally.

Claims for damages are limited to a period of three years after the injury or the name of the person under obligation to reimbursement came to the legitimate claimant's knowledge, or 30 years, regardless of this knowledge. The claimant foregoes any right of claim according to the Railroad-Liability Act, unless he notifies in a written statement the person under obligation to reimbursement within three months after injury and name of the person having caused it came to his knowledge. (BGBl. No. 48/1959 in latest wording of BGBl. I. No. 37/2007).

Motor Vehicles.

Claims for damages caused by motor accident: Holder of vehicle is liable for any injuries to property and persons caused by operation of his vehicle, insofar as they are not due to any Act of God or direct fault of person injured. In case of death of a person reimbursement has to be made for cost of medical treatment attempted, for pecuniary damages suffered by loss of ability to earn a livelihood and funeral expenses. In case of physical injury reimbursement has to be made for cost of medical treatment, pecuniary damages caused by injury and cost of a possible increase in his personal wants resulting from the injury. In case of any claims due to loss or any diminishing of ability to earn a livelihood or increase of personal wants or any claims of third persons for furnishing of support, all resulting from the injury, an annuity has to be paid in monthly installments at beginning of each month. Liability of holder of motor vehicle for injuries to persons is limited to total of [Euro]1,600,000 or to annuity of [Euro]100,000 for each person injured. Total liability for homicide and injury of one or several persons by same accident is limited to [Euro]5,000,000 for holder of motor vehicle and to [Euro]7,000,000 for holder of motor vehicle transporting dangerous goods if damage is caused by nature of such goods. Liability for injuries to property is limited to [Euro]1,000,000 with respect to one accident for holder of motor vehicle and to [Euro]11,000,000 for holder of motor vehicle transporting dangerous goods if damage is caused by nature of such goods. If several objects are injured by one accident compensation to be paid is to be distributed proportionally. Foreign insurance companies can be sued on basis of accidents in Austria through Austrian association of insurers before Austrian courts.

Claims for damages are limited to period of three years after injury or name of person under obligation to reimbursement came to the legitimate claimant's knowledge, or 30 years, regardless of this knowledge. Claimant foregoes any right of claim according to Motor Vehicle Liability Act, unless he notifies in a written statement the person under obligation to reimbursement within three months after injury and name of the person having caused it came to his knowledge. (BGBl. No. 48/1959 in latest wording of BGBl. I. No. 98/2001).

Aircraft.

Liability for accidents in aviation (BGBl. No. 253/1957 in latest wording of BGBl. I. No. 83/2008): (a) Liability of holder of aircraft or motorized model airplane for injuries to persons and goods that are not transported by aircraft is limited per accident according to weight of aircraft or model airplane from [Euro]872,000 (model airplanes up to 20 kg) to [Euro]65,400,000 (aircraft with maximum weight of more than 14,000 kg). Liability for each person injured is limited to [Euro]1,090,000. If damages exceed maximum liability compensation is reduced proportionally. Compensation claim must be announced to holder of aircraft not later than three months after person entitled to damages has learned of damage and name of person under obligation; (b) liability of holder of aircraft for injuries to passengers, luggage and airfreight can be excluded if holder proves that all necessary measures in order to avoid damage were taken or that such measures could not be taken. Liability for loss or damage of goods can be limited to [Euro]35 per kg of freight or to [Euro]1,800 per passenger's luggage in case of slight negligence. Additional limitations of liability are void.

Nuclear and Radioactive Material.

Liability for damages caused by nuclear power stations, nuclear material and other radioactive substances (BGBl. I. No. 33/2003): (a) Liability of operator of nuclear power plant is not based on fault and cannot be restricted. Liability insurance is obligatory. (b) Transporter of nuclear material is liable for damages caused by such material during transport unless he can prove that he did not know and could not have known that transported goods were nuclear material. Liability insurance is obligatory. (c) Person using radioactive substances other than nuclear material on his account is liable for damages caused by such substances unless he can prove that he and his employees have exercised due diligence and care required in each specific case. When radioactive substances are used for medical treatment, evidence that such treatment is state of art is considered sufficient.

Who May Assert.

Primarily the person injured or in case of his death his heirs by will or heirs-at-law are entitled to assert all aforesaid claims. (See also category 12 Estates and Trusts, topic Death [Presumption of and Actions for].)

Court.

For bringing an action for damages, caused by the aforesaid accidents, that court is competent in whose judicial district the accident occurred. All actions may also be filed with court having jurisdiction for sued person's residence.

Aliens.

All aforesaid claims may be asserted in the same way by Austrians and aliens in the competent Austrian court.

Scope of Liabilities for Railways, Motor Vehicles and Aircraft.

These liabilities are based on danger of operating railways, motor vehicles and aircraft and not on fault. If fault of holder or operator of railway, motor vehicle or aircraft can be proved, limits of liability do not apply, but liability covers whole damage caused by accident.

5.07 PRESCRIPTION:

See topic 5.06 Limitation of Actions.

6 COURTS AND LEGISLATURE

6.01 COURTS:

In Austria District Courts (Bezirksgerichte) are competent for civil law suits, if value of litigious object does not exceed amount of [Euro]30,000. If value of litigious object is higher High Courts (Landesgerichte) are competent as courts of first instance. Complaints suitable for issuance of payment order by court may be filed by means of electronic data transmission, but not by telecopy.

Guardianship Courts and Probate Courts are always a part of a District Court.

High Courts (Landesgerichte) act as courts of appeals superior to District Courts (Bezirksgerichte) and Courts of Appeals (Oberlandesgerichte) act as courts of appeals to High Courts.

Supreme Court (Oberster Gerichtshof) in Vienna acts as third instance for lawsuits where value in litigation exceeds [Euro]4,000 provided it accepts appeal on basis that important question of law is involved. Important question of law is defined as issue which must be decided for purposes of legal consistency, security or development which is to be assumed, if no relevant jurisdiction of Supreme Court yet exists, or if High Court differed from previous legal approach of Supreme Court. Appeal to Supreme Court is excluded if value in litigation does not exceed [Euro]20,000 and High Court confirms that important question of law is not involved. In some specific cases appeal to Supreme Court is generally excluded.

For any litigation with respect to: (a) Paternity of an illegitimate child, (b) any obligation of the illegitimate father towards mother and child, (c) any claim for maintenance and support, which is enforced independent of other titles, (d) any claim in matters of boundary regulations, (e) disturbances of possession, (f) any dispute resulting from lease contracts, (g) any claim of travelers towards transport firms and establishments offering accommodation, independent of the value of the litigious object, the local district court is exclusively competent.

Specialized Labor and Social Courts (Arbeits- und Sozialgerichte) have exclusive jurisdiction for all litigation resulting from employment or similar relationships as well as for all litigation relating to pension and social security matters.

For any litigation with respect to violations of patent rights Commercial Court (Handelsgericht) in Vienna is exclusively competent.

Representation by Austrian Attorney at Law in litigation matters is compulsory except before District Courts in family matters, rental matters and in matters not exceeding [Euro]4,000 and before first instance labor courts.

Supreme Constitutional Court decides on constitutionality of laws and regulations and on violations of basic human rights by court or administrative decisions otherwise unappealable. In latter case individual citizens are authorized to appeal to this court.

Supreme Administrative Court decides as last instance on administrative decisions.

6.02 LAW REPORTS, CODES:

See topics 6.03 Legislature, 6.04 Reports.

6.03 LEGISLATURE:

All Federal laws must be passed by the Austrian Parliament and published in the Federal Gazette. Since 1997 publications in Federal Gazette (BGBl.) have been divided into three parts: part I. contains federal laws, part II. contains federal regulations, part III. contains federal decrees. All provincial laws must be passed by the Diet and published in the Provincial Gazette. Each administrative authority can—on the grounds of the law—issue ordinances and regulations within sphere of its activity, which are also published in various official gazettes.

See also category 1 Introduction, topic 1.02 Government and Legal System.

6.04 REPORTS:

There are official reports issued once a year of the more important decisions of the Supreme Court. However, no decision is a binding precedent upon future cases.

6.05 STATUTES:

See topic 6.03 Legislature.

7 DEBTOR AND CREDITOR

7.01 ASSIGNMENTS:

The assignment of personal property is effected by agreement about the transfer of title to the assignee.

Assignment of claims is, except where claims are transferred by virtue of law or by judicial act, effected by oral or written agreement between assignor and assignee. Notice to debtor is not required for validity of assignment but is advisable to prevent bona fide debtor from discharging his debt by payment to assignor.

For validity of assignments by way of payment between spouses and assignment by way of gift without handing over object, document of notary public is required.

7.02 ATTACHMENT:

(Law of May 27, 1896, RGBl. No. 79, in wording of Law of July 18, 1956, BGBl. No. 58).

In Austrian law there is no equivalent for attachment in American law. It is possible in form of interlocutory injunction only. Interlocutory injunction is permissible before bringing action or during proceedings, provided that prima facie evidence is furnished for claim and collection of claim would be jeopardized by later enforcement. Latter is assumed, if judgment will have to be enforced abroad.

7.03 BANKRUPTCY:

(Law of Dec. 10, 1914, in latest wording of BGBl. I. No. 8/2006).

Bankruptcy proceedings (Konkurs) are ordered by the court in the case of insolvency upon petition made by the debtor or by any creditor, who furnishes prima facie evidence of insolvency of debtor and unsettled claim of at least one further creditor. Suspension of payments is prima facie evidence of insolvency. As regards companies and estates of deceased persons, bankruptcy order can also be obtained if liabilities exceed assets. In these cases as well as in case debt/equity ratio is less than 8% and assumed repayment period exceeds 15 years, credits granted by shareholders are considered to replace capital and shall be treated accordingly.

When ordering bankruptcy, the court appoints a receiver (Masseverwalter), in whom the bankrupt's assets are vested. He is supervised by the court and may be supervised as well by a committee of the creditors.

All rights of lien or mortgage obtained by way of judicial execution expire on day when bankruptcy proceedings are opened, unless they were established more than 60 days before opening of bankruptcy proceedings. Any other right of lien or mortgage remains unimpaired by debtor's bankruptcy, subject, however, to receiver's right to impugn it. See topic 7.05 Fraudulent Sales and Conveyances.

In case continuation of bankrupt business would be jeopardized by fulfillment of privileged claim (property right, retainer of title), creditor must not claim fulfillment before expiration of 90 days after opening of bankruptcy proceedings, unless such postponement would cause serious personal or economic disadvantages to creditor.

Distribution of assets by receiver does not effect bankrupt's discharge, but discharge can be obtained by way of judicial composition. Bankruptcy order having been issued, bankrupt may still apply for compulsory composition (Zwangsausgleich), if dividend of at least 20% is offered to normal trade creditors.

Composition with Creditors.

At the request of an insolvent debtor, judicial composition proceedings (Ausgleichsverfahren) may be instituted by the court. Upon institution of such proceedings, rights of lien or mortgage expire to the same extent as in the case of bankruptcy. Minimum dividend to be offered to normal trade creditors is 40% (majority of creditors present at vote and majority of three quarters of unprivileged claims). Privileged creditors must be fully satisfied.

Subject to the court's confirmation, the composition becomes valid (and binding for all creditors) if agreed upon by qualified majority of creditors.

Special regulations are in force with regard to composition proceedings of bankers and banks.

Bankruptcy of Private Persons.

Special debt redemption proceedings which consist of system of payment plans with target of full discharge of debt (minimum payment of 10% within three years), exists for private persons.

Pursuant to bilateral treaties with Belgium, Federal Republic of Germany, France and Italy, effects of insolvency proceedings opened in one country extend to other country.

See topic 7.05 Fraudulent Sales and Conveyances.

7.04 EXECUTIONS:

Execution is granted upon judgments and court settlements (stipulated judgments) as well as on grounds of enforceable document set up before notary public. Movable property must first be seized in order to be realized according to legal regulations. Immovable property can, without previous seizure, be realized by sequestration or public sale.

7.05 FRAUDULENT SALES AND CONVEYANCES:

(Law of Dec. 10, 1914, RGBl. No. 337, in latest wording of Law of June 19, 1968, BGBl. I. No. 8/2006).

Acts performed by a debtor with the intention to defraud his creditors are voidable by any creditor, who has levied execution without success.

Action for avoiding the fraudulent act must be brought within two years. Similar actions will lie to attack, within two years, any gratuitous conveyance of debtor's property, as well as any act performed by a debtor with an intention, actually or constructively known to the other party, to waste his property.

In case of bankruptcy all those rights of actions are vested in the bankruptcy receiver. In addition, the bankruptcy receiver may attack any act performed by the bankrupt in order to give a preference to one or some of his creditors, provided the creditor or creditors in question had actual or constructive knowledge of such intention and the act was performed within 60 days before the bankrupt's insolvency and no more than a year before commencing bankruptcy proceedings. Moreover, the bankruptcy receiver can attack any act prejudicial to the creditors performed by the bankrupt when already insolvent and not earlier than six months before opening bankruptcy proceedings, provided the person with whom he contracted had actual or constructive knowledge of his being insolvent.

7.06 GARNISHMENT:

Attachment of outstanding debts of the debtor is done by decree of court pursuant to which the debt is assigned to the creditor. This decree, together with a garnishee order stating that the debtor's debtor is forbidden to pay to his creditor, must be served upon the debtor's debtor by court. If creditor alleges that debtor has receivables, court must order debtor to specify such receivables under oath with threat of imprisonment.

7.07 INSOLVENCY:

See topic 7.03 Bankruptcy.

7.08 LIENS:

Owners of warehouses, carriers and brokers have special liens for their charges. Landlords have a lien on tenants' chattels.

In other cases the law provides for a so-called right of retention which actually nearly amounts to a lien. Thus, a merchant has a right of retention in respect of another merchant's chattels, in order to secure debts arising out of reciprocal business transactions; in case of the debtor's insolvency such right of retention may be exercised even to secure recovery of debts that have not yet become due. Banks have similar rights of retention in respect of securities they are holding for a customer.

7.09 PLEDGES:

Movable objects and assignable claims may be the subject of pledge (Pfand). Movable objects are pledged by actual transfer of possession, where actual transfer of possession is unfeasible, symbolical delivery is necessary (e.g. surrender of documents that will enable the holder actually to dispose of the objects in question).

Remedies of Pledgee.

The pledgee, in order to recover his debt, must sue at law and have the pledge sold by the court at public auction.

8 DISPUTE RESOLUTION

8.01 ALTERNATIVE DISPUTE RESOLUTION:

As Austrian civil law procedure is considered comparatively fast and efficient, alternate dispute resolution is relevant mainly with respect to international commercial transactions.

See also topic 8.02 Arbitration.

Mandatory Dispute Resolution.

Certain rental law matters (disputes on amount of rent, etc.) must be filed with conciliation bodies set up at local administrative authorities. Decisions of such conciliation bodies are enforceable as administrative decisions but will cease to be in force if case is brought before court within 14 days after decision has been rendered.

Arbitration Court of Stock Exchange has exclusive competence for disputes arising from stock exchange transactions.

Voluntary Dispute Resolution.

Some courts of arbitration are established under specific laws and set up on permanent basis (i.e. Permanent Arbitration Court of Chamber of Commerce and Arbitration Court of Stock Exchange) and can be made competent by arbitration agreement.

Mediation bodies set up by professional associations (doctors, chartered accountants, etc.) may be applied in disputes involving member of respective profession. Involvement of such mediation bodies does not suspend statute of limitations and does not exclude court proceedings. Decisions of such mediation bodies are considered recommendations and are not enforceable.

8.02 ARBITRATION:

According to Austrian law (§§577-618 Z.P.O.) every legal dispute which can be decided by a regular court may also be decided by a court of arbitration agreed upon by parties thereto. Every arbitration agreement has to be concluded in form of written document signed by both parties or by exchange of letters, facsimiles, emails or other forms of communication which may constitute proof of agreement.

Number of arbiters is not limited. In case of even number, arbiters must appoint additional arbiter. In absence of agreement on number of arbiters, three shall be appointed. If one party does not appoint his arbiter, other party may apply for appointment of an arbiter by court.

Active judges are not allowed to act as arbiters.

Procedure before courts of arbitration is fixed by arbiters, if parties have not yet agreed upon a particular procedure in arbitration agreement.

Court of arbitration may request a regular court having jurisdiction for execution of those measures which court of arbitration, according to law, is not allowed to execute itself.

In case more arbiters are appointed, absolute majority decides upon arbiter's award to be rendered. This award is a basis for execution just as a judicial verdict.

Action for annulment of an award can be brought at competent regular court in specific cases itemized in law.

Foreign Arbitral Awards.

On ground of bilateral treaties awards rendered in following countries can be enforced: Belgium, Federal Republic of Germany, Liechtenstein, Switzerland, Turkey, U.S.S.R. (situation with successor states still unclear), Yugoslavia (applicable to Slovenia pursuant to exchange of diplomatic notes, applicable to Macedonia, situation with successor states still unclear).

On ground of Convention on Recognition and Enforcement of Foreign Arbitral Awards of June 10, 1958 awards rendered in countries listed in Part V of this volume are enforced.

Geneva Convention of Sept. 26, 1927 on Enforcement of Foreign Arbitral Awards is still in force with following countries: Antigua and Barbuda, Bahamas, Bangladesh, Burma, Croatia, Ireland, Jamaica, Malta, Mauritius, Pakistan, Slovakia, Spain, Yugoslavia (applicable to Slovenia pursuant to exchange of diplomatic notes, applicable to Macedonia, situation with successor states still unclear).

On ground of recognition of reciprocity arbitral awards rendered in British Columbia (Canada) can be enforced. (BGBl. No. 314/1970).

Austria is member of European Convention on International Commercial Arbitration of Apr. 21, 1961 (BGBl. No. 107/1964) and of Convention on the Settlement of Investment Disputes between States and Nationals of other States of Mar. 18, 1965 (BGBl. No. 357/1971).

9 DOCUMENTS AND RECORDS

9.01 ACKNOWLEDGMENTS:

Form of acknowledgment in use in country where document is executed may be employed. Signatures of parties may be authenticated by Austrian diplomatic or consular officer, or by notary public, his signature finally being acknowledged by Austrian diplomatic or consular officer, unless multilateral or bilateral treaties provide otherwise. (See Part V of this Volume.)

9.02 AFFIDAVITS:

Austrian law does not permit substitute evidence by submitting affidavits in court proceedings or before administrative agencies and authorities with exception of proceedings for interlocutory injunctions.

9.03 NOTARIES PUBLIC:

Notaries public are appointed by the Government. No periodical renewal of license is necessary.

Though appointed for a specific district, a notary public may exercise his functions anywhere in Austria.

9.04 RECORDS:

See category 3 Business Regulation and Commerce, topic 3.08 Registers.

9.05 SEALS:

There is no distinction between sealed and unsealed instruments.

9.06 VITAL STATISTICS:

See category 3 Business Regulation and Commerce, topic 3.08 Registers.

10 EMPLOYMENT

10.01 LABOR RELATIONS:

Relations between employers on one hand and employees and workers on other hand are basically regulated by Labor Constitution Act of Dec. 14, 1973, BGBl. No. 22/1974, in latest wording of BGBl. I. No. 74/2009. Associations representing either workers and employees or employers may be granted power to conclude collective bargaining agreements by public agency set up pursuant to Labor Constitution Act. Collective bargaining agreements are also binding for nonmembers and only lay down minimum requirements. Changes in favor of employees or workers are always permitted and usual. Matters not regulated by collective bargaining agreements may be regulated by specific agreements between employer and works committee (Betriebsrat).

Number of members of works committee depends on number of workers and employees, begins at five with one member, reaches four members with 100 workers and employees, 13 members with 1,000 workers and employees etc. Office is held for three years.

Members of works committee shall supervise compliance with collective bargaining agreements and with other laws for protection of workers and employees. They have no right to interfere with management, but must be heard and periodically informed. Special rules apply to European companies.

If company has supervisory board, for every two elected members works committee shall appoint one member of its choice.

Legal status of employees is regulated by Law of May 11, 1921, BGBl. No. 292, in latest wording of BGBl. I. No. 61/2007.

There is only one accredited union of workers and employees, which is entitled to conclude collective agreements with associations of employers, the "Austrian Labor Union" (Österreichischer Gewerkschaftsbund). Although such collective agreement is binding upon any worker and employee, there is no obligation to be a member of "Austrian Labor Union."

Pursuant to Law of Dec. 11, 1969 (BGBl. No. 461 in latest wording of BGBl. I. No. 138/2006) working time of any employee and worker with few exceptions is 40 hours per week. Shorter working time applies in some fields of industry on basis of general collective bargaining agreements. Prohibitions and restrictions on work apply to juvenile workers and are defined by regulations of Ministry of Commerce, Trade and Industry.

Any worker and employee is entitled to uninterrupted and paid vacation. (Law of July 7, 1976, BGBl. No. 390 in latest wording of BGBl. I. No. 98/2001). Generally, with few exceptions, employees with less than 25 years of service are entitled to annual vacation of 30 working days and thereafter to 36 working days. For this purpose Sats. count as working days. Monetary compensation of unused vacation is void by law.

If bankruptcy or judicial composition proceedings are opened against employer, workers and employees are entitled to file claim for salaries and wages not paid by employer during four months after opening of such proceedings with competent labor agency. Necessary means to satisfy these claims are taken from specially created fund. (Law of June 2, 1977, BGBl. No. 324 in latest wording of BGBl. I. No. 86/2006).

One parent (father or mother) is entitled to maternity leave with job guarantee. He or she receives not salary but support from state. Mother has right to part-time job until child goes to school (maximum seven years) and provided that employment has lasted continuously for three years prior to maternity leave.

Special rules on vacation, breaks, severance pay and worker protection apply to night shift workers doing heavy work. Employee Protection Act (BGBl. No. 450/1994 in latest wording of BGBl. I. No. 13/2007) contains provisions on health inspections of employees and for work safety.

Detailed rules on length of permissible overtime, length of required rest for employees and kinds of work permitted on weekends and holidays are contained in Law of Feb. 3, 1983, BGBl. No. 144 in latest wording of BGBl. I. No. 138/2006.

Men and women are to be treated equally in all respects of labor relations. (BGBl. I. No. 66/2004 in latest wording of BGBl. I. No. 98/2008). Unlawful discrimination is defined as unequal treatment based on ethnic, religious or ideological grounds, on age or sexual orientation, particularly in connection with creation and termination of employment, salary, social benefits, continued education, carrier, promotion and other employment conditions. Discrimination also includes harassment. Similar rules apply to public employees (BGBl. I. No. 65/2004 in latest wording of BGBl. I. No. 53/2007) with special provisions on promoting female public employees and on procedure. No job may be offered publicly only to men or only to women, unless sex of employee is unabandonable condition for job.

Retirement age for male employees is 65 years, for female employees 60. Premature retirement is possible, provided employee has worked enough time. Premature retirement age for female employees of presently 55 years will be increased during years 2019 to 2028 by six months annually and regular retirement age for female employees will be increased during years 2024 to 2033 by six months annually, in order to equal retirement status of male and female employees.

Rental of labor is permissible, but restrictively regulated by Law of Mar. 23, 1988, BGBl. No. 196 in latest wording of BGBl. I. No. 68/2002.

See also category 13 Family, topic 13.05 Infancy.

11 ENVIRONMENT

11.01 ENVIRONMENTAL REGULATION:

General.

Constitutional Act on General Environmental Protection (BGBl. No. 491/1984) makes environmental protection political goal. Act on the Examination of Environmental Compatibility (BGBl. No. 697/1993 in latest wording of BGBl. I. No. 87/2009) is applicable to major construction projects, especially for roads and railways and allows participation of public affected. Trade Act regulates basic conditions for construction and restoration of business plants. Certain business plans and installations are subject to reporting requirements to Ministry of Environmental Protection. Disturbances, which must be reported are events, which result from uncontrolled occurrences leading to serious danger to health of people or to environment. (BGBl. No. 495/1993 in latest wording of BGBl. I. No. 6/2005). In 2007 a special public Climate and Energy Fund was created in order to promote research and development as well as projects relating to sustainable energy and climate. Financing comes mainly from public funds. (BGBl. I. No. 37/2009).

In order to carry out Regulation (EC) No. 842/2006, law was passed to contribute to reduction of emissions of greenhouse gases covered by Kyoto Protocol. (BGBl. I No. 103/2009). However, Austria was only European country which in 2009 missed Kyoto targets by 19%.

See also category 2 Business Organizations, topic Licenses, Business and Professional. Austria acceded inter alia to following treaties: Montreal Protocol (BGBl. No. 283/1989 in latest wording of BGBl. No. 846/1993), Basle Treaty on Crossborder Transport of Dangerous Waste (BGBl. No. 229/1993 in latest wording of BGBl. No. 957/1994), Washington Treaty (on trade with endangered species) of Mar. 3, 1973 (BGBl. Nos. 188, 189/1982 in latest wording of BGBl. Nos. 256/1993 and 442/1994).

Waste.

Act on Waste Management (BGBl. I. No. 102/2002 in latest wording of BGBl. I. No. 54/2008) and Packaging Regulation (BGBl. No. 648/1996 in latest wording of BGBl. II. No. 364/2006) and Waste Disposal Area Regulation (BGBl. No. 164/1996 in latest wording of BGBl. II. No. 49/2004) regulate avoidance, utilization and disposal of waste as well as export and import thereof. Collection and recycling of household and industrial packaging is managed by private sector under license system (Austria Recycling AG-ARA). Sellers and importers of packaged goods must either prove that they collect and recycle certain percentage of packages themselves —percentages increase every year—or they must participate in nationwide recycling system.

Only one system called ARA-system exists for collection of household waste. There exist several competing business waste collection systems.

Real Estate.

Law on Sanitation of Environmentally Damaged Land (BGBl. No. 299/1989 in latest wording of BGBl. I. No. 24/2007) is based on principle that such person, which caused damage is responsible for removal of damages (e.g. former dumping sites, oil spills). However, under certain conditions also owners of land can be held responsible. Buyers are not liable if they can prove that damage could not be detected upon due examination of property and register of risk zones.

Cars.

Car manufacturers and importers must take back cars which are no longer fit for circulation and must organize their recycling as far as possible and then their shredding.

Electric Appliances.

Similar rules as for cars also apply to electric appliances.

Water and Air.

Water Act (BGBl. No. 215/59 in latest wording of BGBl. I. No. 123/2006) regulates utilization of public and private water, such as rivers and underground water (removal of water, hydroelectric power, channel building, sewage, purification plants). Measures for control and reduction of air pollution are regulated in Emission Protection-Air Act. (BGBl. I. No. 115/1997 in latest wording of BGBl. I. No. 70/2007). Austria is member to Convention on Long-range Transboundary Air Pollution of Nov. 13, 1979 as well as to two Protocols of June 24, 1998 (BGBl. No. III 141/2004 and No. III 157/2004) and to Kyoto Protocol (BGBl. No. III 89/2006).

Chemicals.

Chemical Act (BGBl. I. No. 53/1997 in latest wording of BGBl. I. No. 88/2009) contains provisions for licensing of new substances, general prohibitions and limitations, duty of care and provision of information, packaging and handling of poison. It is basis for various regulations e.g. on asbestos, fertilizers, detergents, plant protective agents, formaldehyde.

Nature.

Further provisions on environmental protection in specific cases are contained in Forest Act (BGBl. No. 440/1975 in latest wording of BGBl. I. No. 55/2007), Plants Protection Act (BGBl. 532/1995 in latest wording of BGBl. I. No. 87/2005).

12 ESTATES AND TRUSTS

12.01 DEATH (PRESUMPTION OF AND ACTIONS FOR):

Presumption of Death.

(Law of Dec. 5, 1950, BGBl. No. 23 in latest wording of Law of Feb. 2, 1983, BGBl. I. No. 112/2003).

Each person's death must be recorded in the Register-Book of Deaths. The entry can be recorded provided there is either a doctor's certificate establishing the death and the reason for it, or a certificate of any foreign official institution.

An official certificate of death may be obtained at registry office of place of death. If such certificate cannot be given it is possible to apply for a declaration of death to High Court of district in which deceased had his last residence, provided certain conditions are met.

Declaration of death is possible ten years after end of that year when person could be proved to have been still alive. Presumption of death is not admissible before end of that year in which that person completed his 25th year of life. Declaration of death may be applied for in case of soldiers or persons officially declared missing one year after end of that year when World War II came to end. Application may be filed by anybody who possesses manifest interest in declaration of death. This court is competent, when person missing was Austrian. Declaration of death with regard to alien can only be issued by Austrian court insofar as this declaration is required for settling of any matter concerning property in Austria of person missing, or if wife of missing person has her permanent residence in Austria.

Probate Proceedings.

In case deceased possessed any estate, "Verlassenschafts-abhandlung" (court proceeding dealing with total property left) must be taken by competent Probate Court (which is always part of District Court) at domicile of deceased. Right of property is transferred from deceased to heirs by virtue of deed, called "Einantwortungsurkunde," to be issued by Probate Court after termination of court proceedings. If alien dies in Austria, court proceedings must be taken as to his real estate left in Austria at local Probate Court competent for matters of real estate.

Movable property left by deceased alien has to be passed to competent authority in native country of deceased for further disposition. If native state of the alien refuses to dispose of movable property of deceased, competent Austrian court must also deal with this estate.

See also topic 12.02 Descent and Distribution.

12.02 DESCENT AND DISTRIBUTION:

An intestate's property, including all his real and personal property, is distributed among his so-called heirs-at-law.

Heirs-at-law are, in the first line, the children of the deceased. A deceased child is represented by his descendants as regards the inheritance. Distribution is made per stirpes. Illegitimate children inherit from their mother as legitimate children. From their father they inherit as legitimate children, if no legitimate children nor mother survive and if it is officially established that intestate is their father.

If the intestate left no issue his parents are heirs in equal shares. If there be but one parent alive the other parent's share devolves on his children (the intestate's brothers or sisters of full or half-blood), previously deceased brothers or sisters being represented by their issue (the intestate's nephews and nieces or as the case may be his grandnephews, grandnieces, etc.). If but one parent or his issue be alive, such parent or his issue (per stirpes) takes the entire estate.

In default of descendants or parents' descendants, the intestate's grandparents are his heirs, previously deceased grandparents being represented by their descendants per stirpes. If there be no issue of previously deceased grandparent, such grandparent's portion falls to portion of other grandparent of same (paternal or maternal) line and of this grandparent's descendants. If there are only paternal or only maternal grandparents or their respective issue surviving, such surviving grandparents or descendants (per stirpes) take whole estate.

In the last resort, the surviving great grandparents of the deceased but not their issue, will be his heirs, division in this case being made per capita.

An intestate's surviving spouse succeeds to one-third of his estate if deceased has left descendants. If there be no issue but parents, parent's descendants or grandparents, surviving spouse is entitled to two-thirds. Grandparents' descendants and great grandparents are excluded from intestate's succession by his surviving spouse.

If there are neither relatives of above-mentioned degrees nor spouse surviving, intestate's goods escheat to Federal Treasury.

Property left is legally transferred. Any heir is entitled to take possession of property left only by decision of Probate Court.

Except special rules of distribution existing in some provinces about farmers' tenures no distinction is made in the rules of distribution between movable and immovable assets.

Due Portions.

Any testator must bequeath part of his property: (a) To his children and in case he has no children to his parents as well as (b) to his surviving spouse. These persons have right to claim their due portion, which for children and surviving spouse amounts to one-half and for parents to one-third of that share of estate to which they would have been entitled in case of intestacy. Claim for due portion is money claim against heir(s). Surviving spouse is entitled to claim alimony from estate or from heir(s) when lacking sufficient own income. In specific cases (acts of ingratitude, life imprisonment, etc.) due portion can be excluded by last will. If relationship between parent and child was at no time of such nature as it usually exists in family, testator may direct by testament that due portion shall only be 50% of that otherwise due.

Renunciation of Succession.

Rights expectant to succession at law and to due portions can be renounced by agreement to be concluded between the presumptive heir and the still living owner. Such agreement must be filed on the record of a notary public or a court.

Applicable Law.

Succession by inheritance is subject to law of that country of which deceased was citizen. If he had foreign citizenship and Austrian citizenship, Austrian law applies.

12.03 EXECUTORS AND ADMINISTRATORS:

The function of executor is not provided for by Austrian law. The estate is administered, under the supervision of the court, by the heir or heirs, even though an executor has been appointed by will.

Administrators in the sense of that term in American law are not known in Austrian law, as all the powers and authorities of an administrator (in the common-law sense) are vested in the heir or heirs.

12.04 TRUSTS:

Privatstiftung (Private Law Foundation).

(BGB1. No. 694/1993 in latest wording of BGBl. 120/2005). Private law foundation is legal entity with structure similar to corporation for purpose of administering certain funds according to directions of founder. It has no owners, only beneficiaries who must be determined either specifically or generally in foundation charter. Private law foundation is either established inter vivos by foundation charter or set up by will and enters into existence upon registration in Commercial Register. Minimum endowment to be donated is [Euro]70,000. Corporate income tax for private law foundations amounts to 12.5%.

12.05 WILLS:

It is an axiom of Austrian law that a will, to be valid, must be executed in accordance with law in force at time when, and at place where will has been drafted.

A will may be either holograph or allograph; a holograph testament to be written by the testator in his own hand and signed with his full name, an allograph testament to be signed by the testator and by three witnesses, or else made before a judge or notary public (deposit of the instrument with the court or notary public being optional).

Foreign Wills.

Wills of aliens are valid if executed in accordance with the laws of the country where they were drafted.

Austria is a member of International Convention on Conflicts of Laws relating to form of testamentary dispositions. (BGBl. No. 295/1963).

13 FAMILY

13.01 ADOPTION:

Persons of age are entitled to adopt minor or major persons. Adoption of an adoptee by more than one person is only admissible if adopters are married. (ABGB §§179-186).

Austria is member to European Convention on Adoption of Children of Apr. 24, 1967. (BGBl. No. 314/1980).

Consent Required.

Adoptee and adopter must conclude written contract about adoption, which requires permission of Guardianship Court (which is always part of a District Court). Persons under age will be represented in such case by guardian.

Conditions Precedent.

Male adopter must be at least 30 years and female adopter 28 years old. Difference of age between adopter and adoptee must be at least 18 years. If adoptee is relative of adopter or child of one of adopting parents, 16 years difference of age will suffice.

Proceedings.

Permission for adoption is granted by Guardianship Court within its discretion after investigation of domestic situation of adopter(s).

Name.

Adoptee receives surname of adopter.

Effect of Adoption.

Upon conclusion of adoption contract, adoptee obtains same rights against his adopting parents as their legitimate children. On the other hand, in spite of adoption, adoptee retains right of support by true parents and relatives, and adoptee is obliged to support his true parents if necessary. Adoptee has legal right of inheritance from adopting parents.

Setting Aside Adoption.

Under requirements provided by law, court may later revoke or annul adoption retroactively. With annulment or revocation of adoption all rights between adoptee and his true parents revive.

13.02 ALIMONY:

See topics 13.03 Divorce, 13.05 Infancy.

13.03 DIVORCE:

A suit for divorce may be brought before the Austrian courts if (a) at least one spouse is an Austrian citizen; or (b) both parties being aliens, at least one has his permanent residence in Austria; provided, however, that the courts in the husband's home country do not refuse to recognize the validity of an Austrian judgment under such circumstances; or (c) if at least one spouse has no citizenship at all, but one has permanent residence in Austria.

Reasons for divorce are: (a) Adultery; (b) denial of offspring; (c) serious misconduct; (d) mental derangement and illness; (e) serious contagious disease; (f) dissolution of marital community for three years (if defendant objects, court decides on given circumstances but after six years divorce must be granted); (g) agreement between both spouses, provided that marital community has been dissolved for six months and they have concluded or conclude before court written agreement on division of property, on alimony and on relations with minor children. In any case divorce requires court decision.

After divorce property used by spouses during marriage and their savings must be divided. Not subject to this division are: (a) Property which belonged to one spouse already before marriage or which he acquired by inheritance or as gift during marriage; (b) personal property of one spouse or property serving for his profession; (c) property belonging to enterprise; and (d) participations in enterprise unless they are only securities. If spouses cannot agree, court must render equitable decision. If division in kind is impossible court may order compensation payments from one spouse to other. If court decides or spouses agree in divorce procedure that only one of them shall be liable for common bank debts, court must order upon request of either of them that spouse so liable under internal relationship shall be principal debtor and other spouse shall only be conditional guarantor. Such court order is legally effective against creditors.

The divorced wife may resume her maiden name (certain formalities to be observed). If the wife has been declared solely or preponderantly guilty, the husband may prohibit her from continuing to use his name.

Under certain conditions divorce proceedings may be continued, or even started, on anyone's behalf, but this must be done, at the latest, three years after the husband's or wife's decease.

Alimony.

The party who has been declared solely or preponderantly guilty is as a rule required to pay alimony to the other party.

Foreign Divorces.

A divorce granted by a foreign court is valid in Austria only if recognized by the Minister of Justice (Attorney General).

13.04 HUSBAND AND WIFE:

Unless otherwise expressly agreed, all property owned by either spouse before marriage, and all property acquired by either spouse after marriage, remains his or her personal property with exception of property used by spouses during marriage. See topic 13.03 Divorce.

Spouses shall agree, which of them takes care of household and which one earns a livelihood. That spouse who takes care of common household has claim for support against other spouse and represents other spouse in usual transactions for common household, for which other spouse is liable.

Married persons can retain former surname independently of surname of partner or add surname of spouse either to beginning or end of his (her) surname. In absence of agreement common surname is husband's surname. Spouses have to agree on surname of children. Surnames acquired during previous marriages cannot be used as common surname. Either spouse can request change of common residence, if this is justified. Court decides if spouses do not agree.

Community Property.

Agreements providing for complete or partial community of property may be entered into before or after marriage, before a notary public.

13.05 INFANCY:

Minority ends for both males and females on completion of 19 years of age. (§21 A.B.G.B.).

Minors having completed 18 years of age may be released from parental power before completion of 19 years of age, but only with consent of parents and approval of court after pertinent petition has been filed, in which special advantage to person under age has to be justified.

Children under age of 14 years are not subject to any prosecution under penal code. Minors on completion of 14 years and until completion of 18 years are subject to special regulations of penal code. (Juvenile Court Law 1961).

As regards employment in any kind of commercial enterprises minors are subject to special protective provisions.

For marriage, male minors under 19 and female minors under 16 years of age require consent of their parents or guardian. If this consent is refused, it may be replaced upon request by decree of competent Guardianship Court in case of male minors of more than 18 and female minors of more than 15 years of age.

Minor daughters are released from parental power if they marry, and do not return into parental power if divorced during their minority.

Minor children of less than 14 and infants of less than seven years of age are represented by their parents. Each of parents is alone entitled to represent minor child or infant, but for important matters both parents must agree. If one parent is dead, incapacitated or of unknown residence, other parent exercises all parental powers alone. If this applies also to other parent district administration decides, which grandparents shall have parental powers, but guardian is charged with representation of and property administration for minor child or infant.

Person under age can transact business only with consent of his parents or guardian and in important cases also of court, but may freely use earnings acquired by himself.

Before taking any decision regarding custody or education, court shall hear child personally.

Same rules apply to illegitimate children with exception that education and care is exclusively incumbent upon mother.

If person bound to pay alimony and support does not live in common household with minor child and does not pay alimony, advances for such alimony are to be paid by federal agencies, if, upon application, Guardianship Court renders respective decision. Advances paid are to be repaid to federal agencies by person bound to pay alimony and support.

Federal Law of Mar. 1, 1990 (BGBl. No. 160) regulates alimony claims of persons residing in Austria against persons residing in other countries, provided that reciprocity is established by Federal Ministry of Justice. Contrary to claims of other nature, reciprocity exists for alimony claims with most States of U.S. and Australia.

Austria is member to European Convention on the Legal Status of Children Born Out of Wedlock of Oct. 15, 1975 (BGBl. No. 313/1980), to European Convention on Recognition and Enforcement of Decisions Concerning Custody of Children and on Restoration of Custody of Children of May 20, 1980 (BGBl. No. 321/1985), to Convention of the Rights of the Child of Jan. 26, 1990 (BGBl. No. 7/1993 as am'd by Protocol of Dec. 12, 1995, BGBl. III. No. 16/2003) and to European Convention on the Exercise of Chidren's Rights (BGBl. III. No. 124/2008).

Austria acceded to Convention on the Civil Aspects of International Child Abduction of the Hague of Oct. 25, 1980. (BGBl. No. 512/1988; cf. Law of June 9, 1988, BGBl. No. 513).

Adoption.

See topic 13.01 Adoption.

13.06 MARRIAGE:

Celebration of marriage must be performed before a civil officer. Celebration before a religious minister is permitted, but no legal significance whatever is attached to it.

Marriage between certain groups of close relatives is prohibited. Prohibited also is marriage between parties who have committed adultery, but an exemption is possible.

Aliens desiring to be married in Austria are required to produce a certificate issued by their home authorities and attesting to their legal capacity of entering into marriage.

Personal relations and property relations between spouses are governed by law of that country to which they both belong or last belonged as citizens; otherwise law of country of their last common residence applies. Property relations between spouses may also be governed by that law on which they expressly agree.

Austria is member to New York Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages of Dec. 10, 1962 (BGBl. No. 433/1969) and to Convention on Issuance of Nubility Certificates of Sept. 5, 1980 (BGBl. No. 417/1985).

See also topics 13.05 Infancy, 13.04 Husband and Wife.

13.07 MARRIED WOMEN:

See topic 13.04 Husband and Wife.

14 FOREIGN TRADE AND COMMERCE

14.01 CUSTOMS:

Austria is Member of EU and therefore EU customs laws and regulations apply with special adaptations. (Law of Aug. 23, 1994, BGBl. No. 659 on Execution of Customs Law of EU in latest wording of BGBl. I. No. 161).

In addition to duty, on every imported commodity importation turnover tax of generally 20% (in few cases lower rates are applicable) is levied, unless exemptions exist under community law.

For a few other specific goods (liquors, tobacco, etc.) additional duties are levied.

Austria is member to Customs Convention on the Temporary Importation of Private Road Vehicles of June 4, 1954 in latest wording pursuant to BGBl. No. 248/85. If road vehicle is destroyed in Austria by force majeure, Austria will not levy any import duties and taxes.

Austria is member of WTO.

Austria and U.S.A. concluded on Sept. 15, 1976 agreement regarding mutual assistance between their customs services (BGBl. No. 278/1978), Convention on the Harmonization of Frontier Controls of Goods of Oct. 21, 1982 (BGBl. No. 467/1987) and Convention on the Harmonized Commodity Description and Coding System of June 14, 1983 (BGBl. No. 553/1987).

See also topic 14.05 Foreign Trade Regulations and European Union Law Digest, category 14 Foreign Trade and Commerce, topic Customs Duties.

14.02 EXCHANGE CONTROL:

See topic 14.04 Foreign Investment; category 1 Introduction, topic 1.01 Currency; and also category 4 Citizenship, topic Aliens.

14.03 FOREIGN EXCHANGE:

See category 1 Introduction, topic 1.01 Currency; also category 4 Citizenship, topic Aliens.

14.04 FOREIGN INVESTMENT:

Foreigners (i.e., physical persons or corporations not considered as residents under Exchange Control Act, BGBl. No. I. 123/2003) may acquire and own individual businesses and companies or participations therein and shares thereof without any restrictions. Participation in foreign companies or businesses by Austrians or Austrian companies does not require any approval. See category 1 Introduction, topic 1.01 Currency.

Acquisition of real estate by foreigners, foreign corporations and Austrian companies controlled by non-EEA citizens is subject to special permission of real estate transfer commissions which are regulated by provincial laws and vary therefore from province to province.

Austria concluded treaties for promotion and mutual protection of investments (most favored nation clause, free transfer of proceeds and royalties, retransfer of loans, etc.) with Armenia (BGBl. III. No. 12/2003, Cape Verde (BGBl. No. 83/1993), People's Republic of China (BGBl. No. 537/1986), Czechoslovakia (BGBl. No. 513/1991, also applicable to Slovakia pursuant to exchange of diplomatic notes), Georgia (BGBl. III. No. 45/2004), Iran (BGBl. III. No. 96/2004), Lithuania (BGBl. III. No. 74/1997), Libya (BGBl. III. No. 127/2003), Malaysia (BGBl. No. 601/1986), Malta (BGBl. III. No. 38/2004), Hungary (BGBl. No. 339/1989), Philippines (BGBl. III. No. 128/2003), Poland (BGBl. No. 473/1989), Romania (BGBl. III. No. 73/1997), Saudi Arabia (BGBl. III. No. 85/2003), United Arab Emirates (BGBl. III. No. 129/2003), Yemen (BGBl. III. No. 44/2004), Yugoslavia (BGBl. No. 152/1991), Korea (BGBl. No. 523/1991) and Turkey (BGBl. No.

612/1991), which apply also to Austrian subsidiaries of foreigners. Austria is contributory country to Polish Stabilization Fund.

14.05 FOREIGN TRADE REGULATIONS:

On principle import and export of goods is not subject to restrictions in Austria. However, by Foreign Trade Law (Aussenhandelsgesetz 2005, BGBl. I. No. 50 in latest wording of BGBl. I. No. 22/2008), permission for import, export and transit of certain chemicals requires special approval. Restrictions can be introduced for export, import and transit of certain groups of commodities. Law is specifically made subject to provisions of EU law. Special commodities may be made subject to approval of Ministry of Economic Affairs, provided that this is not in conflict with EU law if: (i) Required to prevent serious economic damages; (ii) necessary to prevent or to remove economic emergency situations; (iii) in compliance with international obligations; or (iv) necessary to carry out international measures to restrict commerce with specific countries or areas. Severe restrictions apply to weapons and war material.

Strict labelling requirements exist especially for foods, pharmaceuticals, chemical products, cosmetics, meat, animal food, wine, etc.

In order to promote exports Minister of Finance is authorized to guarantee in name of Federal Republic performance of foreign partners in transactions with Austrian exporters up to aggregate amount of [Euro]50,000,000,000 through Österreichische Kontrollbank AG. (Law of Apr. 8, 1981, BGBl. No. 215 in latest wording of BGBl. I. No. 145/2008). This authorization will expire on Dec. 31, 2012.

Exportation of objects of historical, artistic or cultural importance needs approval by federal agency of national monuments. Works of living artists until 20 years after their death do not require export approval.

Austria is member of EU.

15 IMMIGRATION

15.01 ALIENS:

In private and commercial law, aliens have generally same rights as natives. (A.B.G.B. §33).

See also topic 15.02 Immigration; categories 5 Civil Actions and Procedure, topic Costs, subhead Security for Costs; Family, topic Marriage.

Corporations Owned or Controlled by Aliens.

See category 14 Foreign Trade and Commerce, topic 14.04 Foreign Investment.

15.02 IMMIGRATION:

Aliens are persons not having Austrian citizenship. They need passports and visas for entering, staying in and leaving Austria, unless international treaties provide otherwise, or if they are transit passengers only. Citizens of Afghanistan, Bangladesh, Ghana, Iraq, Iran, Liberia, Libya, Nigeria, Pakistan, Somalia, Sri Lanka and Zaire require even visa for transit. No transit visa is required for citizens of EU countries, Andorra, Argentina, Australia, Bahamas, Barbados, Bolivia, Brazil, Canada, Chile, Colombia, Costa Rica, Croatia, Cyprus, Ecuador, El Salvador, Finland, Guatemala, Holy See, Iceland, Israel, Jamaica, Japan, Liechtenstein, Malaysia, Mexico, Monaco, New Zealand, Norway, Panama, Paraguay, San Marino, Seychelles, Singapore, South Korea, Switzerland, Tobago, Trinidad, Uruguay, USA, and Venezuela. Special permission is required if alien intends to establish regular residence in Austria. This does not apply to nationals of EU with exception of citizens of new member states Estonia, Latvia, Lithuania, Poland, Czech Republic, Slovakia, Hungary and Slovenia for whom special transition periods apply. Aliens are assumed to have intention to establish regular residence if they stay for more than six months per calendar year in Austria or work in Austria (employed or self-employed).

All aliens other than citizens of countries of EEA intending to take up work in Austria, however, require residence permit and work permit. Basis for work permit in Austria is either (a) work permit obtained by and issued to employer for up to one year, or (b) authorization to work obtained by and issued to employee for up to two years, provided that employee has been legally working 52 weeks in Austria during preceding 14 months, or (c) release of work permit requirement obtained by and issued to employee for five years, provided that employee has been legally working five years in Austria during preceding eight years.

Applications for residence permit must in principle be submitted from abroad before entry into Austria. Exceptions are family members of Austrians, EEC citizens or Swiss, aliens legally resident previously, children within six months after birth, aliens not required to obtain visa and scientists as well as their family members. Residence permits are issued for 12 months or less. After five years of residence, permanent residence permit may be issued. Maximum number of residence permits per year is laid down each year for regular employees and separately for leading employees. Residence permits for students are linked to length of studies and successful progress of studies must be proved.

Foreign persons requesting asylum in Austria have to be recognized and for this purpose a new Asylum Court was created (BGBl I. No. 4/2008)

16 INTELLECTUAL PROPERTY

16.01 ANTI-PIRACY:

For implementing Regulation (EC) No. 3295/1994 as amended by Regulation (EC) No. 241/99 Austria passed special law on anti-piracy. (BGBl. I. No. 56/2004 in latest wording of BGBl. I. No. 17/2007). Products withheld or confiscated as potential counterfeits may be destroyed without court order, if owner or recipient of goods consents thereto or does not object within ten days (three days in case of perishable goods) after receipt of respective notification.

16.02 COPYRIGHT:

(Law of Apr. 9, 1936, BGBl. No. 111, in latest wording of BGBl. I. No. 75/2009).

Term of copyright for works of literature, music and fine arts is author's life and 70 years thereafter. Term of copyright for a cinematographic work ends ten years after death of one of following persons, depending on who lives longest: principal director, author of script, dialogues and of especially created work of music. Computer programs, photographs and data banks are specifically protected.

Encroachments on the copyright can be prosecuted by civil and criminal action.

Austria is member of Berne Convention of Sept. 9, 1886 in Paris wording of July 24, 1971 (BGBl. No. 319/1982 and 133/1985) and of Montevideo Convention of Jan. 11, 1889 (BGBl. No. 75/1924). As to U.S. reciprocity is granted. Austria is member of Universal Copyright Convention in its Paris wording of July 24, 1971. (BGBl. No. 293/1982 as am'd by BGBl. No. 460/1994). Austria has joined International Convention for Protection of Performers, Producers of Phonograms and Broadcasting Organizations of Oct. 26, 1961 (BGBl. No. 413/1973) and Convention for Protection of Producers of Phonograms against Unauthorized Duplication of their Phonograms of Oct. 29, 1971 (BGBl. No. 294/1982). Austria concluded Treaty on Mutual Copyright Protection with USSR on Dec. 16, 1981 (BGBl. No. 424/1983, specifically made applicable by exchange of diplomatic notes to Russian Federation BGBl. No. 257/1995) enhancing protection under Universal Copyright Convention for their nationals.

Pursuant to Agreement between Austria and World Intellectual Property Organization of Oct. 25, 1989 (BGBl. No. 674/1990) International Registry of Audiovisual Works shall be established at Klosterneuburg near Vienna. Details are regulated in further agreement of Dec. 11, 1991 (BGBl. No. 405/1992) which came into force on June 4, 1992. Austria is member to Treaty on the International Registration of Audiovisual Works of Apr. 20, 1989. (BGBl. No. 48/1991).

Industrial Designs.

(Law of June 7, 1990, BGBl. No. 497 in latest wording of BGBl. I. No. 151/2005). Protection of industrial designs starts upon application. First protection period expires five years thereafter on last day of that month in which five year period ends. Industrial designs can be renewed four times for protection periods of five years each so that maximum protection period extends to 25 years. Priority under Art. 4 of Paris Union Treaty may be claimed. Registrable industrial designs must be new or are otherwise subject to cancellation by third party. Austria is member to Locarno Agreement of Oct. 8, 1968 establishing International Classification for Industrial Designs. (BGBl. No. 496/1990).

16.03 PATENTS:

(Patent Act 1970, BGBl. No. 259, in latest wording of BGBl. I. No. 81/2007).

Patent law protects new inventions, which do not suggest themselves for the expert from state of art and which are susceptible of industrial application. Shall not be considered as inventions: (a) Discoveries, scientific theories, mathematical methods; (b) human body; (c) discovery of component of human body; (d) esthetic design creations; (e) plans, rules and processes for mental activities, for games or business activities and programs for data processing equipment; (f) reproduction of information. Patents shall not be granted: (a) For inventions violating good morals; (b) for cloning human beings; (c) for processes to change genetic identity of human beings; (d) for use of human embryos; (e) for manufacturing and using hybrid beings out of cells of humans and animals; (f) for changing genetic identity of animals; (g) for processes of surgical or therapeutic treatment and for diagnostic processes; (h) for plant varieties and animal species. Last exception shall, however, not apply to microorganisms, to microbiological processes and to products made by such processes, so that patents may be obtained therefor. Process patents also protect goods manufactured by means of such processes.

Patent applications filed are examined by Patent Office in Vienna as to patentability of invention. Applicant must be given possibility to answer objections of examiner and, if possible, to change and amend patent application. After such examination application is published.

Within four months after publication objections may be filed by third parties. If no objections are filed or if objections are definitely rejected, patent is granted.

Patents are valid for 18 years from date of publication, but not for longer period than 20 years after filing, provided that annual fees are duly paid. Annual fees increase from year to year.

Anybody may file nullity action against granted patent before nullity department of patent office. Upon appeal supreme patent and trademark board decides finally as second instance.

Foreigners have same right to obtain patents as nationals but must act through Austrian patent attorney or attorney at law. Patent attorneys or attorneys at law do not have to submit written powers, but may simply declare their appointment to Patent Office. Power does not terminate upon death of patent owner or change in his legal status.

Patent infringement suits are handled by courts. For civil infringement actions Commercial Court of Vienna has exclusive jurisdiction.

Inventions by employees are those which: (a) Are result of employee's work for employer or which (b) are based on incitements derived from employee's work for employer or which (c) are made by using knowledge or equipment of employer's business. Employed inventor is entitled to adequate compensation from employer for transfer or use of invention, regardless whether invention is patentable or not, unless he is employed as inventor and compensated for this purpose.

European patents under European Patent Convention are protected; they may however be declared void in Austria, if they protect chemical, pharmaceutical or food products as such.

Fees of Patent Office were substantially increased effective as of July 1, 2005.

Special law protects topographies of microelectronic semiconductor products. (Law of June 23, 1988, BGBl. No. 372 in latest wording of BGBl. 96/2006). Protection starts: (a) Upon first public use of topography, provided that application for registration is filed within two years thereafter with Patent Office, or (b) at day of filing with Patent Office, if topography has not been used in public earlier. Protection expires within ten years after beginning of protection. Protection may only be claimed upon registration. Special semiconductor register is kept at Patent Office. Protection is similar to patent. Fee is to be paid at time of filing of application, but no further annual fees. Based on reciprocity, nationals of Belgium, Federal Republic of Germany, Denmark, France, Greece, Great Britain, Ireland, Italy, Japan, Luxembourg, Netherlands, Portugal, Sweden, Spain and U.S.A. are also entitled to file for protection of topographies.

Austria is member of Paris Convention of Mar. 20, 1883 for Protection of Industrial Property in Stockholm wording of July 14, 1967 (BGBl. No. 399/1973 and 384/1984), of Stockholm Convention establishing World Intellectual Property Organization of July 14, 1967 (BGBl. No. 397/1973 and 381/1984), of Strasbourg Agreement Concerning International Patent Classification of Mar. 24, 1971 (BGBl. No. 517/1975 and 125/1984), of Patent Cooperation Treaty of June 19, 1970 (BGBl. No. 348/1979 and 525/1984), of European Patent Convention of Oct. 5, 1973 (BGBl. No. 350, 351/1979 as am'd by BGBl. Nos. 483, 484/1994 and BGBl. III. No. 136/2007) and of Budapest Treaty of Apr. 28, 1977 on International Recognition of Deposit of Microorganisms for Purpose of Patent Procedure (BGBl. No. 104/1984). Headquarters of International Patent Documentation Center established in cooperation with World Intellectual Property Organization is located in Vienna. Austria concluded special treaties with USSR (BGBl. No. 194/1982—applicable to Russian Federation pursuant to exchange of diplomatic notes) on legal protection of industrial property.

Utility Models.

(Utility Model Act BGBl. No. 211/1994 in latest wording of BGBl. I. No. 81/2007). Utility models are inventions, which are new and economically applicable. Whether invention is new, including inventive step which is economically applicable, will not be examined in application procedure before Patent Office unless requested by applicant. Term of protection expires not later than ten years after end of month of filing. Software logic may constitute utility model.

16.04 TRADEMARKS AND TRADENAMES:

Firm Names.

All businessmen whose business exceeds size of small merchants must be registered with their name in commercial register. Registered name of owner of individual firm constitutes firm name. Firm name of partnership must contain at least name of one general partner. Special rules apply to firm names of limited liability companies and joint stock corporations. Registered firm names enjoy broader scope of protection than registered trademarks under unfair competition law. Every new firm name must be easily distinguishable from all other registered firm names within same community. Firm names of foreign companies enjoy protection as unregistered tradenames if they are known to some extent on market. Every businessman and company is free to use certain designation for business or parts of it (unregistered tradename) provided that such designation is not misleading.

See also category 3 Business Regulation and Commerce, topic 3.02 Commercial Register.

Trademarks.

(Trademark Act 1970, BGBl. No. 260, in latest wording of BGBl. I. No. 81/2007). Trademarks and service marks are protected if entered in trademark register of Patent Office in Vienna. Period of protection is ten years. If renewed in time there is no limit to its prolongation. If application for registration of trademark is filed by alien individual or corporation Austrian attorney has to be named by him. Patent attorneys or attorneys at law do not have to submit written powers of attorney, but may simply declare their appointment to Patent Office. Power does not terminate upon death of trademark owner or change in his legal status. Trademarks may be transferred to another owner without business. If trademark has not been used for uninterrupted period of five years it may be cancelled upon application of any third party. Fees of Patent Office were substantially increased effective as of July 1, 2005.

Austria is a member of Paris Convention of Mar. 20, 1883 for Protection of Industrial Property in Stockholm wording of July 14, 1967 (BGBl. No. 399/1973 and 384/1984 as am'd by BGBl. No. 541/1994), of Madrid Agreement of Apr. 14, 1891, on international registration of trademarks in Stockholm wording of July 14, 1967 (BGBl. No. 400/1973 and 123/1984 as am'd by BGBl. No. 541/1994), of Nice Agreement of June 15, 1957 in Geneva wording of May 13, 1977 concerning international classification of goods and services for purpose of registration of marks (BGBl. No. 340/1982 and 124/1984) and of Convention of Stockholm of July 14, 1967 establishing World Intellectual Property Organization (BGBl. No. 397/1973 and 381/1984) and of Madrid Protocol (Protocol Relating to The Madrid Agreement Concerning The International Registration of Marks) (BGBl. III. No. 32/1999 as am’d by BGBl. III. No. 88/2008). Reciprocity for trademark registrations exists with all member countries of Paris Union Treaty and for Afghanistan, Bahamas, Bahrain, Bermuda, Cayman Islands, Chile, China (People's Republic), Colombia, Hong Kong, India, Iran, Jamaica, Korea, Liberia, Malaysia, Panama, Peru, Saudi Arabia, Singapore, Taiwan, Thailand, United Arab Emirates, Venezuela. Austria concluded special treaty with USSR (BGBl. No. 194/1982—applicable to Russian Federation pursuant to exchange of diplomatic notes) on legal protection of industrial property.

17 LEGAL PROFESSION

17.01 ATTORNEYS AND COUNSELORS:

No division between barristers and solicitors exists. All Austrian Attorneys at Law are entitled to represent clients before all courts and public agencies throughout Austria. Only in specific cases, are other persons entitled to represent clients before courts and public agencies, namely (a) Patent Attorneys before Austrian Patent Office, (b) specialised jurists of Chamber of Commerce and of Chamber of Labor before first instance Labor and Social Courts and (c) tax advisers and certified public accountants before tax authorities. In very exceptional cases, notaries may also appear before courts.

Every Attorney at Law must be member of local Chamber of Lawyers. Each of the nine federal provinces has its own Chamber of Lawyers. All Chambers of Lawyers form Austrian Lawyers' Diet.

Conditions for becoming Attorney at Law are (a) University degree (Master of Jurisprudence or Doctor of Law), (b) five years of legal practice of which at least nine months must be served as court clerk (foreign practice may be recognized to certain extent) and (c) passing of special bar examination during five years of practice.

Foreign lawyers from EEA countries may be admitted as resident lawyers in Austria provided that they qualify in their home country and pass additional examination in Austria generally similar to bar examination. Foreign nonresident lawyers may appear before courts in Austria provided that they are accompanied by Austrian Attorney at Law who acts jointly for them (not for client).

Fees of attorneys are regulated as minimum fees by law. Free fee arrangements are possible provided that Attorney at Law gets adequate remuneration for his services. Discounts below legal minimum rates must not be agreed upon in advance with few exceptions like collection cases. Fee arrangements based on amount gained by litigation are considered unethical and void.

18 MORTGAGES

18.01 CHATTEL MORTGAGES:

There is no equivalent for a chattel mortgage in the Austrian law.

18.02 MORTGAGES:

Mortgages on lands are constituted by having mortgagee's name and sum due entered into land register (see categories 3 Business Regulation and Commerce, topic Registers and category 19 Property, topic Real Property). Such entry is made either upon a mortgage deed bearing mortgagor's certified signature or by way of execution on a judgment or similar instrument for recovery of a debt. If there are several mortgages their priority depends on day of presenting application for registration.

In case of nonpayment the mortgagee can obtain either the appointment of an official receiver or the public sale of the mortgaged land. The proceeds are distributed among the mortgagees according to their priority, the surplus, if any, being paid over to the mortgagor.

19 PROPERTY

19.01 ABSENTEES:

If a person is absent from his permanent residence and of unknown sojourn, or if a person is incapable of action, a guardian may be appointed by the competent District Court for the absentee or person incapable of action, upon motivated request of a third party or ex officio. This guardian is obliged to inform court immediately as soon as place of sojourn of absentee is ascertained or incapacity of action has ceased.

As long as guardianship has not been revoked by court, legal transactions with absentee can only be concluded with guardian of the absentee and have to be approved by guardianship court. In case of a lawsuit being filed against an absentee or a person incapable of action, court where suit is filed has to appoint a guardian on request of suing party for the absentee, but only for this suit.

19.02 CONVEYANCES:

See topic 19.03 Deeds.

19.03 DEEDS:

Deeds, in the common law sense, are unknown in Austria. The transfer of real estate is effected by a declaration of both parties before the recording judge or notary and by entry of transfer of title in land register (Grundbuch).

For the validity of certain transactions the establishment of notarized documents is provided by law, e.g., donations between spouses, donations without handing over the object.

19.04 POWERS OF ATTORNEY:

Power of Attorney.

Power of attorney contracts can be made either verbally or in writing. Power of attorney can be general or special. In order to carry out certain business transactions (purchase and sale of articles, loan agreements, carrying on lawsuit, signing settlement, etc.) power of attorney is necessary, which is given expressly for these kinds of transactions. For certain other transactions (gifts, company contracts, etc.) special power of attorney is needed which is given for each separate transaction.

A lawsuit power of attorney must be given in writing; if made out in a foreign country, the court can demand a notarial attestation of the principal's signature.

Speaking generally, the power of attorney expires at the death either of the principal or of the agent; but a lawsuit power of attorney is not withdrawn at the death of the principal, nor a power of attorney made out by a merchant in mercantile trade.

A power of attorney can be withdrawn at all times by either the principal or the agent. The principal is, however, responsible to the agent for all damages incurred by him in consequence of premature withdrawal, and agent is responsible to principal for all damages incurred by him by reason of agent's prematurely ending power of attorney which was given him for purpose of completing transaction entrusted to him.

Where an agent enters into a legal transaction with a third person who is aware that he is acting under a power of attorney all rights and duties thereunder belong to and are imposed on the principal. An agent who exceeds the limits of his power of attorney or one who falsely pretends to act in behalf of a principal (falsus procurator) is responsible to third persons dealing with him in good faith, for all damages sustained, and in commercial transactions he can be compelled by the third person to perform all obligations which he, in virtue of his supposed power of attorney, has incurred in the name of the supposed principal.

19.05 REAL PROPERTY:

There are land registers with online access kept by District Courts which keep record of any real estate within Austrian territory.

The rights in rem referring to each separate parcel of land and the names of the respective beneficiaries appear on the face of the land registers. Rights in rem are ownership, mortgage rights, usufructus, and a limited number of rights resulting from easements, etc. Subject to very few exceptions no such right can be acquired, transferred or extinguished except by obtaining proper entry in the land register which will be granted by the court upon production of a duly certified title deed, a certified copy of such deed being filed in the court's record. The land registers are kept open to the public, and a purchaser in good faith who has acted in reliance upon the land register entries is largely protected against the claims of any former true owner. So the difficulties arising from search of title when acquiring interests in land are unknown in Austrian practice.

An agreement concerning interests in land, entry whereof is not made in the land register, gives but a personal right of action against the parties thereto.

Transfer of real property in rural areas is subject to approval of local real property transfer commission. In absence of such approval contract is null and void.

20 TAXATION

20.01 EMPLOYMENT TAX:

Payroll Tax (Kommunalsteuer).

(BGBl. No. 680/1994). Tax basis is total sum of all wages and salaries paid by employer. Tax amounts to 3% of assessment basis.

20.02 GIFT TAX:

See topic Inheritance and 20.02 Gift Tax.

20.03 INCOME TAX:

Income Tax (Einkommensteuer).

(Law of July 7, 1988, BGBl. No. 400 in latest wording of BGBl. I. No. 61/2009). Individuals residing in Austria, regardless of their nationality, are subject to income tax in respect of their entire income, whether derived from sources within Austria or from sources abroad.

Individuals residing abroad are subject to Austrian income tax only in respect of income derived from Austrian real property, from Austrian business enterprises, from licenses in the exercise of industrial property rights, etc. (This rule applies also to Austrian citizens who have no residence in Austria.)

Income tax assessed abroad is not deductible from the Austrian income tax, but is merely considered an expense that reduces the total income subjected to taxation in Austria unless provided otherwise in particular treaties for avoidance of double taxation.

Income tax is assessed on a progressive scale. Tax rate ranges from 23% to 50%. Incomes of less than [Euro]10,000 are tax exempt. Rate of 50% applies to incomes exceeding [Euro]51,000. Capital Yields Tax levied on interest, dividends and similar capital yields amounts to 25%. Implementation of Directive of the Council of the EU on taxation of parent and subsidiary corporations of member states allow certain tax reliefs. Workers and employees are subject to corresponding wage tax, which is income tax withheld by employer and paid to tax authorities each month. Rates of wage tax are slightly different.

Austria concluded agreements on taxation of savings income with Isle of Man, Anguilla, Cayman Islands, Turks and Caicos Islands, Netherland Antilles, British Virgin Islands, Jersey, Montserrat and Aruba.

See category 22 Treaties and Conventions, topic 22.01 Treaties, as to double taxation treaties.

Corporate Income Tax (Körperschaftssteuer).

(Law of July 7, 1988, BGBl. No. 401 in latest wording of BGBl. I. No. 102/2007).

Corporations, having their seat in Austria, are liable to pay taxes on their overall profit. Corporate income tax amounts to 25% irrespective of amount of taxable income. Income derived from participations in foreign companies or businesses of at least 25% held not less than 12 months at key date of balance sheet, is exempt from corporate income tax. Twelve month term does not apply to shares resulting from capital increase. Minimum tax amounts to [Euro]1,750 for limited liability companies and to [Euro]1,900 for joint stock corporations per year. Higher amounts apply to credit institutions and insurance companies.

EU Withholding Tax.

(BGBl. I. No. 33/2004, in latest wording of BGBl. I. No. 65/2008). Interest to be paid by domestic debtor to foreign creditor located in EU is subject to withholding tax of 15% during first three years after coming into force of law, of 20% of three subsequent years and of 35% thereafter. No withholding is required if recipient submits to debtor confirmation on his foreign tax agency indicating personal data and foreign tax number.

20.04 INHERITANCE AND GIFT TAX:

Inheritance and Gift Tax (Erbschafts und Schenkungssteuer).

Austrian Constitutional Court held inheritance and gift tax to be unconstitutional in its decisions of Mar. 7, 2007 (VfGH G 54/06) and June 15, 2007 (G23/07) as differences in taxation of immovable and movable property lead to unfair results. Inheritance and gift tax became therefore invalid on July 31, 2008. As a result the double taxation treaty with Germany relating to inheritance and gift tax was cancelled. Transactions previously subject to this tax have still to be notified to the tax authority.

20.05 INHERITANCE TAX:

See topic Inheritance and 20.02 Gift Tax.

20.06 LOCAL GOVERNMENT TAXES:

Provincial and Communal Taxation.

There are, in addition to the aforementioned taxes, numerous provincial and communal taxes, particularly on real estate.

20.07 PROPERTY TAXES:

Land Tax (Grundsteuer).

(Law of July 13, 1955, BGBl. No. 149, in wording of BGBl. I. No. 59/2001). Land tax has to be paid by proprietor on all plots of land, which tax is different in various communities (approximately 0.8% of standard tax value).

Land Value Tax (Bodenwertabgabe).

(Law of Dec. 15, 1960 BGBl. No. 285, in latest wording of BGBl. I. No. 142/2000). Owners of unused plots have to pay, apart from land tax, land value tax which amounts to 1% per annum of taxable uniform assessment value.

All plots of land which have not been built up and have a tax value of less than [Euro]14,600 are exempt from aforementioned tax.

Land Transfer Tax (Grunderwerbsteuer).

(Law of July 2, 1987, BGBl. No. 309 in latest wording of BGBl. I. No. 20/2009). All legal transactions inter vivos by which ownership of real property is acquired or which gives right to one party to acquire such ownership of real property (including construction rights on public property and buildings on land owned by third party) are subject to this tax. Rate of tax is 3.5% (2% for transactions between parents and their children and between spouses) of price paid for real property or, in absence of definite price, of actual value of real property. Exemptions mainly relate to acquisitions in course of probate proceedings by heirs and to gifts.

20.08 STAMP TAX:

Stamp Duties.

Most kinds of applications to judicial and administrative authorities as well as most written contracts are subject to highly technical stamp duty rules. Documents drawn up abroad are in most cases not subject to stamp duties unless both parties are Austrian persons or companies or unless transaction is to be recorded by Austrian public agencies or document or notarized copy thereof is physically brought into Austria.

20.09 VALUE ADDED TAX:

Added Value Tax (Umsatzsteuer).

(BGBl. No. 663/1994 in latest wording of BGBl. I. No. 140/2008). Most deliveries of goods and services performed by person or company exercising business activity, regardless of legal or operating status, in Austria are subject to this tax. Certain services are deemed to be rendered and are taxable at seat of firm providing services, some where ordering party operates its business. Tax rate amounts in general to 20% and in some exceptions lower tax rates apply. Computation is made in such way, that in principle tax is only paid from added value at each step. This is made by deducting added value tax charged by supplier from amount of tax to be paid. Added Value Tax and special surtax on motor vehicles are not deductible even for entrepreneurs with few exceptions.

21 TRANSPORTATION

21.01 ACCIDENTS IN TRAFFIC AND TRANSPORT:

See category 5 Civil Actions and Procedure, topic 5.06 Limitation of Actions.

21.02 AIR NAVIGATION:

(Law of Dec. 2, 1957, BGBl. No. 253 in wording of BGBl. I. No. 70/2008).

On principle everybody is free to use the aerial area, unless local or temporary restrictions be made by the pertinent ministry in this respect. A license must be obtained for every air-vehicle; admission of foreign air-vehicles will be acknowledged if reciprocity can be proved. Every pilot must be in possession of a civil pilot's license; foreign pilots' licenses will be acknowledged if reciprocity can be proved. Taking-off and landing of air-vehicles is permitted from and on aviation-fields only. Traffic in air and on ground of any kind of aircraft is regulated by Regulation of Feb. 15, 1967, BGBl. No. 56 in latest wording of BGBl. II. No. 454/2005.

International traffic by aircraft is subject to a special law on international air traffic regulating flights to other countries and flights within Austria through foreign undertakings. (BGBl. I. No. 96/2008 in latest wording of BGBl. I. No. 89/2009).

In Austria air-transportation enterprises are subject to explicit admission, to be granted also to foreign enterprises if reciprocity can be proved. Admitted air-line enterprises have the duty to maintain operation.

All Austrian civil aircraft must be registered with aircraft register and marked with registration number and Austrian colors. Special rules apply to parachutes, paraglider and hang glider. Airworthiness of aircraft must be proved and proofs by foreign authorities must be accepted under certain conditions. (Regulation of Ministry of Traffic, Invention and Technology BGBl. II. No. 424/2005).

Requirements for civil airports are laid down in Regulation of Traffic Ministry of July 1, 1972, BGBl. No. 313.

In case of accidents of foreign aircraft, notification according to Agreement on International Civil Aviation of Dec. 7, 1944 shall be made and foreign observers can, with consent of Austrian authorities, be sent to place of accident.

Limits of noise of aircraft are determined by Regulation of Ministry of Traffic, Invention and Technology. (BGBl. II. No. 425/2005).

On claims for damages caused by accidents in aviation, see category 5 Civil Actions and Procedure, topic 5.06 Limitation of Actions.

Austria is member to Convention on International Civil Aviation of Dec. 7, 1944, (BGBl. 97/1949) in wording of Protocol of Oct. 16, 1974 (BGBl. No. 194/1980), to Protocol on authentic trilingual text of Convention on international civil aviation of Sept. 24, 1968 (BGBl. No. 138/1971), to multilateral agreement of Apr. 30, 1956, on Commercial Rights of Non-Scheduled Air Services in Europe (BGBl. 163/1957), to International Air Services Transit Agreement of Dec. 7, 1944 (BGBl. No. 46/1959), to Convention for unification of rules relating to international carriage by air of Oct. 12, 1929 (BGBl. No. 286/1961) as am'd by Protocol of the Hague of Sept. 28, 1955 (BGBl. No. 161/1971), to agreement of Apr. 12, 1979 on trade in civil aircraft (BGBl. No. 276/1980) as amended by Protocol of Dec. 2, 1986 (BGBl. No. 83/1988) and to Convention for unification of certain rules for international carriage by air of May 28, 1999 (BGBl. No. 131/2004).

21.03 MOTOR VEHICLES:

On claims for damages caused by motor vehicles, see category 5 Civil Actions and Procedure, topic 5.06 Limitation of Actions. Admission, equipment and operation of motor vehicles is regulated by Motor Vehicle Law. (BGBl. No. 267/1967 in latest wording of BGBl. I. No. 94/2009).

Acquisition of driving license is regulated by Driving License Law. (BGBl. I. No. 120/1997 in latest wording of BGBl. I. No. 93/2009).

Traffic on public roads is regulated by Road Traffic Regulation. (BGBl. No. 159/1960 in latest wording of BGBl. I. No. 93/2009). Security belts are compulsory. Police may prevent inebriated driver from driving. Driver's condition is considered impaired if his alcohol level is above 0.5 g/l. In such case driving license may be withheld temporarily, or permanently in case of repeated violations. In case of accident blood test is compulsory if preliminary test shows suspicion of inebriation.

Austria is a member of the Interstate Convention of Motor Vehicle Traffic, set up in Geneva on Sept. 19, 1949 and/or Sept. 16, 1950.

Austria is member to Agreement of Mar. 20, 1958 concerning adoption of uniform conditions of approval and reciprocal recognition of approval for motor vehicle equipment and parts. (BGBl. No. 177/1971).

If by a motor vehicle a person is injured or killed or damage is caused to objects, both driver and owner of motor vehicle are jointly liable for damage unless either can prove that accident which caused damage was due to force majeure. If damage was at least partially due to fault of injured, parties are liable for damage proportionately to degree of their respective guilt. If this cannot be ascertained, they are liable to equal parts.

Transportation of goods in Austria by domestic and foreign trucks is subject to special duty for maintenance of roads.

Law on Transportation of Dangerous Goods (BGBl. I. No. 145/1998 in latest wording of 63/2007) regulates obligations of people involved in such transport and contains provisions on obligatory safety measures.

Claims for damages caused by motor accidents, see category 5 Civil Actions and Procedure, topic 5.06 Limitation of Actions, subhead Motor Vehicles.

Liability insurance is compulsory and insurance contracts must be concluded pursuant to general terms and conditions of motor vehicle liability insurance as laid down in regulation of Ministry of Finance. Deviations from such terms to detriment of injured third parties cannot be invoked by insurer. Austria is member of European Convention on compulsory insurance against civil liability in respect of motor vehicles since July 9, 1972. (BGBl. No. 236).

22 TREATIES AND CONVENTIONS

22.01 TREATIES:

There Exist Conventions between Austria and Following Countries for Avoidance of Double Taxation.

(1) Albania: Convention of Dec. 14, 2007 for the avoidance of double taxation with respect to income and on capialt and for the prevention of fiscal evation (BGBl. III. No. 107/2008); (2) Algeria: Convention of June 17, 2003 with regard to taxes on income and property (BGBl. III. No. 176/2006); (3) Armenia: Convention of Feb. 27, 2002 for avoidance of double taxation with respect to taxes on income and on capital (BGBl. III. No. 29/2004); (4) Azerbaijan: Convention of July 4, 2000 for avoidance of double taxation and prevention of fiscal evasion with respect to taxes on income and property (BGBl. III. No. 176/2001); (5) Australia: Agreement of July 8, 1986 for avoidance of double taxation and prevention of fiscal evasion with respect to taxes on income (BGBl. No. 480/1988); (6) Barbados: Convention of Feb. 27, 2006 for avoidance of double taxation and prevention of fiscal evasion with respect to taxes on income and property (BGBl. III. No. 40/2007); (7) Belarus: Convention of May 16, 2001 for avoidance of double taxation and prevention of fiscal evasion with respect to taxes on income and property (BGBl. III. No. 69/2002); (8) Belgium: Convention of Dec. 29, 1971 for avoidance of double taxation and for regulation of specific other questions in field of income and property taxes including trade and real estate taxes (BGBl. No. 415/1973 und 216/1974); (9) Belize: Convention of May 8, 2002 with respect to taxes on income and on capital (BGBl. III. No. 132/2003); (10) Brazil: Convention of May 24, 1975 for avoidance of double taxation with respect to income and property taxes (BGBl. No. 431/1976 and 633/1976); (11) Bulgaria: Convention of Apr. 20, 1983 for avoidance of double taxation with respect to income and property taxes (BGBl. No. 425/1984); (12) Canada: Convention of Dec. 9, 1976 for avoidance of double taxation and prevention of fiscal evasion with respect to taxes on income and on capital (BGBl. No. 77/1981 and 318/1982 and BGBl. III. No. 2/2001); (13) China: Agreement of Apr. 10, 1991 for avoidance of double taxation and prevention of fiscal evasion with respect to taxes on income and on capital (BGBl. No. 679/1992); (14) Croatia: Convention of Sept. 21, 2000 for avoidance of double taxation with respect to income and property taxes (BGBl. III. No. 119/2001); (15) Cuba: Convention of June 26, 2003 for avoidance of double taxation and

prevention of fiscal evasion with respect to taxes on income and capital (BGBl. III. No. 149/2006); (16) Cyprus: Convention of Mar. 20, 1990 for avoidance of double taxation with respect to taxes on income and on capital (BGBl. No. 709/1990); (17) Czech Republic: (a) Convention of June 8, 2006 for avoidance of double taxation with respect to income and property taxes (BGBl. III. No. 39/2007), (b) Convention of Sept. 19, 1996 for avoidance of double taxation in field of inheritance and gift tax (BGB1. III. No. 17/2000); (18) Denmark: (a) Convention of May 25, 2007 for avoidance of double taxation with respect to income and property taxes (BGBl. III. No. 41/2008), (b) Agreement between Austrian and Danish Ministers of Finance on withholding taxes on dividends (BGBl. No. 172/1972); (19) Egypt: Convention of Oct. 16, 1962 for avoidance of double taxation and prevention of tax evasion with respect to income and property taxes (BGBl. No. 293/1963); (20) Estonia: Convention of Apr. 5, 2001 for avoidance of double taxation with respect to income and property taxes (BGBl. III. No. 11/2003); (21) Federal Republic of Germany: (a) Convention of Aug. 24, 2000 for avoidance of double taxation with respect to income and property (BGBl. III. No. 182/2002); (22) Finland: (a) Convention of July 26, 2000 for avoidance of double taxation with respect to income and property taxes (BGBl. III. No. 42/2001), (b) Agreement between Austrian and Finn Ministers of Finance on tax relief regarding dividends and interest (BGBl. No. 277/1973); (23) France: (a) Convention of Oct. 8, 1959 for avoidance of double taxation and on mutual assistance with respect to income, property and inheritance taxes (BGBl. No. 246/1961) as amended by Protocol of Oct. 30, 1970 (BGBl. No. 147/1972 and 387/1973) and by Protocol of Feb. 26, 1986 (BGBl. No. 588/1988) partially replaced by Convention of Mar. 26, 1993 for avoidance of double taxation and prevention of fiscal evasion with respect to taxes on income and property (BGBl. No. 613/1994), (b) Convention of Mar. 26, 1993 for avoidance of double taxation and prevention of fiscal evasion with respect to taxes on inheritances and gifts (BGBl. No. 614/1994), (c) Convention of Mar. 26, 1993 for avoidance of double taxation and prevention of fiscal evasion with respect to taxes on income and property (BGBl. No. 613/1994); (24) Georgia: Convention of Apr. 11, 2005 for avoidance of double taxation with respect to taxes on income and on capital (BGBl. III. No. 60/2006); (25) Greece: Convention of July 18, 2007 for avoidance of double taxation with respect to taxes on income and capital with protocol (BGBl. III. No. 16/2009); (26) Guernsey: Agreement in form of exchange of letters of June 1, 2004 and Nov. 19, 2004 on taxation of savings income (BGBl. III. No. 176/2005); (27) Hungary: (a) Convention of Feb. 25, 1975 for avoidance of double taxation with respect to taxes on income, proceeds and property (BGBl. No. 52/1976 and 101/1978); (b) Convention of Feb. 25, 1976 for avoidance of double taxation with respect to estate and inheritance taxes (BGBl. No. 51/1976); (28) India: Convention of Nov. 8, 1999 for avoidance of double taxation and prevention of fiscal evasion with respect to income taxes (BGBl. III. No. 231/2001); (29) Indonesia: Agreement of July 24, 1986 for avoidance of double taxation and prevention of fiscal evasion with respect to taxes on income and on capital (BGBl. No. 454/1988); (30) Iran: Convention of Mar. 11, 2002 for avoidance of double taxation and prevention of fiscal evasion with respect to taxes on income and on capital (BGBl. III. No. 81/2004); (31) Ireland: Convention of May 24, 1966 for avoidance of double taxation with respect to income taxes (BGBl. No. 66/1968 and 154/1970) as amended by Protocol of June 19, 1987 (BGBl. No. 12/1989); (32) Isle of Man: Agreement in form of exchange of letters of June 1, 2004 and Nov. 19, 2004 on taxation of savings income and provisional application thereof (BGBl. III. No. 141/2005); (33) Israel: Convention of Jan. 29, 1970 for avoidance of double taxation with respect to taxes on income and capital (BGBl. No. 85/1971 as am’d by BGBl. III. No. 31/2008); (34) Italy: Convention of June 29, 1981 for avoidance of double taxation and prevention of fiscal evasion with respect to taxes on income and property (BGBl. No. 125/1985) as amended by Protocol of Nov. 25, 1987 (BGBl. No. 129/1990); (35) Japan: Convention of Dec. 20, 1961 for avoidance of double taxation with respect to income taxes (BGBl. No. 127/1963); (36) Kazakhstan: Convention of Sept. 10, 2004 for avoidance of double taxation with respect to taxes on income and on capital (BGBl. III. No. 69/2006); (37) Korea: Convention of Oct. 8, 1985 for avoidance of double taxation and prevention of fiscal evasion with respect to taxes on income and on capital (BGBl. No. 486/1987 as am'd by BGBl. III. No. 68/2002); (38) Kuwait: Convention of June 13, 2002 for avoidance of double taxation and prevention of fiscal evasion (BGBl. III. No. 30/2004); (39) Kyrgyz Republic: Convention of Sept. 18, 2001 for avoidance of double taxation and prevention of fiscal evasion with respect to income and property taxes (BGBl. III. No.

89/2003); (40) Latvia: Convention of Dec. 14, 2005 for avoidance of double taxation with respect to taxes on income and capital (BGBl. III. No. 76/2007); (41) Liechtenstein: (a) Convention of Nov. 5, 1969 for avoidance of double taxation with respect to income and property taxes (BGBl. No. 24/1971) (cf. Regulation BGBl. No. 437/2005), (b) Agreement of Sept. 27 and Oct. 12, 1971 regarding reimbursement of withholding taxes (BGBl. No. 437/1971), (c) Convention of Dec. 7, 1955 for avoidance of double taxation with regard to taxes on income and property as well as inheritance taxes (BGBl. No. 214/1956 in latest version of BGBl. No. 325/1968); (42) Lithuania: Convention of Apr. 6, 2005 for avoidance of double taxation on income and on capital (BGBl. III. No. 209/2005); (43) Luxemburg: (a) Convention of Oct. 18, 1962 for avoidance of double taxation with respect to income and property taxes (BGBl. No. 54/1964 as am'd by BGBl. No. 835/1993); (b) Agreement of Mar. 23 and Apr. 10, 1964 on reimbursement of withholding taxes (BGBl. No. 143/1964); (44) Macedonia: Agreement of Sept. 10, 2007 for avoidance of double taxation and prevention of fiscal evasion with respect to taxes on income and on capital (BGBl. III. No. 9/2008); () Malaysia: Convention of Sept. 20, 1989 for avoidance of double taxation and prevention of fiscal evasion with respect to taxes on income (BGBl. No. 664/1990); (45) Malta: Convention of May 29, 1978 for avoidance of double taxation with respect to taxes on income and on capital (BGBl. No. 294/1979); (46) Mexico: Convention of Apr. 13, 2004 for avoidance of double taxation and prevention of fiscal evasion with respect to taxes on income and on capital (BGBl. III. No. 142/2004); (47) Moldova: Convention of Apr. 29, 2004 for avoidance of double taxation and prevention of fiscal evasion with respect to taxes on income and on property (BGBl. III. No. 160/2004); (48) Mongolia: Convention of July 3, 2003 with respect to taxes on income and on capital (BGBl. III. No. 92/2004); (49) Morocco: Convention of Feb. 27, 2002 for avoidance of double taxation and prevention of fiscal evasion with regard to income taxes (BGBl. III. No. 168/2006); (50) Nepal: Convention of Dec. 15, 2002 on avoidance of double taxation and prevention of fiscal evasion with regard to income taxes (BGBl. III. No. 26/2002); (51) Netherlands: (a) Convention of Sept. 1, 1970 for avoidance of double taxation with respect to income and property taxes (BGBl. No. 191/1971 and 83/1972) as amended by Protocol of Dec. 18, 1989 (BGBl. No. 18/1991) and by Protocol of Nov. 26, 2001 (BGBl. III. No. 14/2003); (b) Convention of Nov. 26, 2001 for avoidance of double taxation and prevention of fiscal evasion with respect to estate, inheritance and gift taxes (BGBl. III. No. 13/2003); (52) New Zealand: Agreement of Sept. 21, 2006 with respect to taxes an income and on capital (BGBl. III. No. 127/2007); (52) Norway: Convention of Nov. 28, 1995 for avoidance of double taxation and prevention of tax evasion with respect to taxes on income and on property (BGBl. III. No. 1/1997, in latest version of BGBl. III. No. 181/2006); (53) Pakistan: (a) Convention of July 6, 1970 for avoidance of double taxation with respect to income taxes (BGBl. No. 297/1971), (b) partially replaced by Convention of Aug. 4, 2005 for avoidance of double taxation with respect to income taxes (BGBl. III. No. 49/2007); (54) Philippines: Convention of Apr. 9, 1981 for avoidance of double taxation and prevention of fiscal evasion with respect to taxes on income (BGBl. No. 107/1982); (55) Poland: Convention of Jan. 13, 2004 for avoidance of double taxation with respect to taxes on income and on capital (BGBl. III. No. 12/2005); (56) Portugal: Convention of Dec. 29, 1970 for avoidance of double taxation with respect to income and property taxes (BGBl. No. 85/1972 and 469/1975); (57) Romania: Convention of Mar. 30, 2005 for avoidance of double taxation and prevention of fiscal evasion with respect to taxes on income and on capital (BGBl. III. No. 29/2006); (58) Russia: Convention of Apr. 13, 2000 for avoidance of double taxation with respect to income and property taxes (BGBl. III. No. 10/2003); (59) San Marino: Convention of Nov. 24, 2004 with respect to taxes on income and on capital (BGBl. III. No. 208/2005); (60) Saudi Arabia: Convention of Mar. 19, 2006 for avoidance of double taxation and prevention of fiscal evasion with respect to taxes on income and property (BGBl. III. No. 62/2007); (61) Singapore: Convention of Nov. 30, 2001 for avoidance of double taxation and prevention of fiscal evasion with respect to taxes on income (BGBl. III. No. 248/2002); (62) Slovakia: Convention with CSSR of Mar. 7, 1978 for avoidance of double taxation with respect to income and property taxes (BGBl. No. 34/1979) still applicable to Slovakia until separate convention will be entered into; (63) Slovenia: Convention of Oct. 1, 1997 for avoidance of double taxation with respect to income and property taxes (BGB1. III. No. 4/1999) as am'd by Protocol of Sept. 26, 2006 (BGBl. III. No. 126/2007); (64) South Africa: Convention of Mar. 4, 1996 for avoidance of double taxation with respect to taxes on income and property (BGBl. III. No. 40/1997); (65) Spain: Convention of Dec. 20, 1966 for avoidance of double taxation with respect to income and property taxes (BGBl. Nos. 395/1967, 266/1973 and 21/1995 in latest version of BGBl. No. 709/1995); (66) Sweden: (a) Convention of May 14, 1959 for avoidance of double taxation with respect to income and property taxes (BGBl. No. 39/1960 and 341/1970) as amended by Protocol of Nov. 5, 1991 (BGBl. No. 132/1993) and Protocol of Aug. 21, 2006 (BGBl. III. No. 75/2007), (b) Convention of Nov. 21, 1962 for avoidance of double taxation with respect to inheritance taxes (BGBl. No. 212/1963), (c) Agreement of Mar. 14 and Apr. 17, 1972 on withholding taxes on dividends and interest (BGBl. No. 298/1972); (67) Switzerland: (a) Convention of Jan. 30, 1974 for avoidance of double taxation with respect to estate and inheritance taxes (BGBl. No. 63/1975 and 161/1995); (b) Convention of Jan. 30, 1974 for avoidance of double taxation with respect to income and property taxes (BGBl. No. 64/1975); (c) Agreement of Dec. 5 and 6, 1974 on dividends, interest and royalties (BGBl. No. 65/1975); (68) Tadzhikistan: Convention of Apr. 10, 1981 for avoidance of double taxation with respect to income (BGBl. No. 411/1982); (69) Thailand: Convention of May 8, 1985 for avoidance of double taxation and prevention of fiscal evasion with respect to taxes on income and on capital (BGBl. No. 263/1986); (70) Tunisia: Convention of June 23, 1977 for avoidance of double taxation with respect to income and property taxes (BGBl. No. 516/1978); (71) Turkey: Convention of Mar. 28, 2008 for avoidance of double taxation in respect of taxes on income with Protocol (BGBl. III. No. 96/2009); (72) Turkmenistan: Convention of Apr. 10, 1981 for avoidance of double taxation with respect to income (BGBl. No. 411/1982); (73) Ukraine: Convention of Oct. 16, 1997 for avoidance of double taxation and prevention of fiscal evasion with respect to taxes on income and property (BGBl. III. No. 113/1999); (74) Uzbekistan: Convention of June 14, 2000 for avoidance of double taxation and prevention of fiscal evasion with respect to taxes on income and property (BGBl. III. No. 150/2001); (75) United Arab Emirates: Convention of Sept. 22, 2003 with respect to taxes on income (BGBl. III. No. 88/2004); (76) United Kingdom: Convention of Apr. 30, 1969 for avoidance of double taxation and prevention of fiscal evasion with respect to taxes on income (BGBl. No. 390/1970, 356/1971, 585/1978, 505/1979 and 835/1994); (77) U.S.A.: (a) Convention of May 31, 1996 for avoidance of double taxation and prevention of fiscal evasion with respect to income taxes (BGBl. III. No. 6/1998), (b) Convention of June 21, 1982 for avoidance of double taxation and prevention of fiscal evasion with respect to taxes on estates, inheritances, gifts and generation-skipping transfers (BGBl. No. 269/1983); (78) Venezuela: Convention of May 12, 2006 for avoidance of double taxation and prevention of fiscal evasion with respect to taxes on income and property (BGBl. III. No. 33/2007).

There Exist Treaties between Austria and following States about Mutual Legal Aid.

Multilateral Treaties: (1) Hague Convention of July 17, 1905 on proceedings in civil matters (RGBl. No. 60/1909); (2) Hague Convention of Mar. 1, 1954 on proceedings in civil matters (BGBl. No. 91/1957); (3) Protocol on Arbitration Clauses of Sept. 24, 1923 (BGBl. No. 57/1928); (4) Geneva Convention of Sept. 26, 1927 on enforcement of foreign arbitral awards (BGBl. No. 343/1930); (5) European Convention on international commercial arbitration of Apr. 21, 1961 (BGBl. No. 107/1964); (6) Hague Convention of Sept. 15, 1958 on recognition and enforcement of alimony decisions (BGBl. No. 294/1961); (7) New York Convention of June 20, 1956 on the recovery abroad of maintenance (BGBl. No. 316/1969); (8) European Convention on information on foreign law of Sept. 6, 1968 (BGBl. No. 417/1971), and Additional Protocol of Mar. 15, 1978 (BGBl. No. 179/1980); (9) Convention of Sept. 8, 1967 on recognition of decisions in matrimonial cases (BGBl. No. 43/1978 and 44/1978); (10) European Agreement on the Transmission of Applications for Legal Aid (BGBl. No. 190/1982); (11) European Convention on service abroad of documents relating to administrative matters of Nov. 24, 1977 (BGBl. No. 67/1983); (12) European Convention on calculation of time limits of May 16, 1972 (BGBl. No. 254/1983); (13) various treaties in field of criminal prosecution.

Austria is party to Convention Abolishing the Requirement of Legalisation for Foreign Public Documents. See Part V of this volume for list of member countries.

Bilateral Treaties: (1) Belgium: (a) Convention of Oct. 25, 1957 on mutual recognition and enforcement of court decisions and public documents regarding alimony obligations (BGBl. No. 141/1960); (b) Convention of July 16, 1959 on mutual recognition and enforcement of court decisions, arbitral awards and public documents in the field of civil and commercial law (BGBl. No. 287/1961); (c) Convention of Oct. 23, 1989 on legal aid and legal cooperation amending Hague Convention of Mar. 1, 1954 (BGBl. III. No. 115/1998); (2) Bulgaria: Treaty of Oct. 20, 1967 on legal aid in civil matters and on public documents (BGBl. No. 268/1969); (3) Croatia: Treaties concluded with Yugoslavia, namely—(a) Treaty of Dec. 16, 1954 on mutual legal relations (BGBl. No. 224/1955), (b) Treaty of Mar. 18, 1960 on mutual recognition and enforcement of arbitral awards in commercial matters (BGBl. No. 115/1961), (c) Treaty of Oct. 10, 1961 on mutual recognition and enforcement of alimony decisions (BGBl. No. 310/1962) are still applicable with regard to the Republic of Croatia according to notice of Sept. 6, 1996 (BGBl. No. 474/1996); (4) Czech Republic: Treaty of Nov. 10, 1961 on communications in civil matters, on public documents and on furnishing of information on legal matters (BGBl. No. 309/1962—still applicable to Czech Republic pursuant to exchange of diplomatic notes, BGBl. III. No. 123/1997); (5) Denmark: Treaty of Nov. 8, 1979, amending Hague Convention of Mar. 1, 1954 (BGBl. No. 41/1981); (6) Federal Republic of Germany; (a) Treaty of Oct. 4, 1954 on legal aid in fiscal matters (BGBl. No. 249/1955); (b) Treaty of June 6, 1959 amending Hague Convention of Mar. 1, 1954 (BGBl. No. 27/1960); (c) Treaty of June 6, 1959 on mutual recognition and enforcement of court decisions, settlements and public documents in civil and commercial matters (BGBl. No. 105/1960); (d) Treaty of Sept. 11, 1970 on legal aid in customs and fiscal matters (BGBl. No. 430/1971); (7) Finland: (a) Convention of Nov. 17, 1986 on recognition and enforcement of decisions in civil matters (BGBl. No. 118/1988); (b) Treaty of Nov. 17, 1986 amending Hague Convention of Mar. 1, 1954 (BGBl. No. 244/1988); (8) France: (a) Treaty of Feb. 27, 1979 amending Hague Convention of Mar. 1, 1954 (BGBl. No. 236/1980), (b) Convention of July 15, 1966 on recognition and enforcement of court decisions and public documents in field of civil and commercial law (BGBl. No. 288/1967), (c) Convention of Feb. 27, 1979 on jurisdiction recognition and enforcement of bankruptcy decisions (BGBl. No. 237/1980); (9) Greece: Treaty of Dec. 6, 1965 on mutual legal aid in field of civil and commercial law (BGBl. No. 2/1971); (10) Hungary: (a) Treaty of Apr. 9, 1965 on mutual relations in civil law matters (BGBl. No. 305/1967), (b) Treaty of Apr. 9, 1965 on estate matters (BGBl. No. 306/1967); (11) Iran: Treaty of Friendship of Sept. 9, 1959 (BGBl. No. 45/1966); (12) Israel: (a) Treaty of June 6, 1966 on recognition and enforcement of court decisions in field of civil and commercial law (BGBl. No. 349/1968), (b) Treaty of July 21, 1975 simplifying procedure under Hague Convention of Mar. 1, 1954 (BGBl. No. 225/1982); (13) Italy: (a) Legal Aid Treaty of Apr. 6, 1922 (BGBl. No. 261/1924), (b) Treaty of Mar. 29, 1990 on abolition of legalizations, transmission of legal status documents and simplification of marriage formalities (BGBl. No. 126/1992), (c) Convention of Nov. 16, 1971 on recognition and enforcement of court decisions in civil and commercial matters, of court settlements and of notarial acts (BGBl. No. 521/1974) am'd by Exchange of Diplomatic Notes of Apr. 7, 1987 (BGBl. No. 472/1989), (d) Convention of June 30, 1975 amending Hague Convention of Mar. 1, 1954 (BGBl. No. 433/1977); (14) Liechtenstein: (a) Treaty of Apr. 1, 1955 on enforcement of decisions in alimony matters (BGBl. No. 212/1956), (b) Treaty of Apr. 1, 1955 on legal aid, attestations, documents and guardianship (BGBl. No. 213/1956 am'd by Treaty of June 1, 1966, BGBl. No. 99/1968), (c) Treaty of July 5, 1973 on recognition and enforcement of court decisions, arbitral awards, settlements and public documents (BGBl. No. 114/1975); (15) Luxemburg: (a) Treaty of Mar. 17, 1972 amending Hague Convention of Mar. 1, 1954 (BGBl. No. 217/1975), (b) Convention of July 29, 1971 on recognition and enforcement of court decisions and public documents in field of civil and commercial law (BGBl. No. 610/1975), (c) Convention of Oct. 16, 1979, on exchange of status documents and waiver of legalization (BGBl. No. 112/1981); (16) Macedonia: Treaties concluded with Yugoslavia, namely—(a) Treaty of Dec. 16, 1954 on mutual legal relations (BGBl. No. 224/1955), (b) Treaty of Mar. 18, 1960 on mutual recognition and enforcement of arbitral awards in commercial matters (BGBl. No. 115/1961), (c) Treaty of Oct. 10, 1961 on mutual recognition and enforcement of alimony decisions (BGBl. No. 310/1962) are still applicable with regard to former Yugoslav Republic of Macedonia according to notice of June 3, 1997 (BGBl. III. No. 92/1997); (17) Montenegro: Treaties concluded with Yugoslavia, namely—(a) Treaty of Dec. 16, 1954 on mutual legal relations (BGBl. No. 224/1955), (b) Treaty of Mar. 18, 1960 on mutual recognition and enforcement of arbitral awards in commercial matters (BGBl. No. 115/1961), (c) Treaty of Oct. 10, 1961 on mutual recognition and enforcement of alimony decisions (BGBl. No. 310/1962) are still applicable with regard to Montenegro according to notice of Sept. 19, 1997 (BGBl. III. No. 156/1997); (18) Netherlands: Treaty of Feb. 6, 1963 on mutual recognition and execution of court decisions and public documents in the field of civil and commercial law (BGBl. No. 37/1966) extended to Aruba (BGBl. No. 399/1986); (19) Norway: (a) Treaty of May 21, 1984 on recognition and enforcement of decisions in civil matters (BGBl. No. 406/1985), (b) Treaty of May 21, 1984 amending Hague Convention of Mar. 1, 1954 (BGBl. No. 455/1985); (20) Poland: Treaty of Dec. 11, 1963 on mutual relations in civil matters with Additional Protocol, of Jan. 25, 1973 (BGBl. No. 79/1974); (21) Romania: Treaty of Nov. 17, 1965 on legal aid in civil matters and on public documents (BGBl. No. 112/1969) as am'd by Additional Protocol of Feb. 18, 1974 (BGBl. No. 123/1974); (22) Russia: Convention of Mar. 11, 1970 on civil law proceedings (BGBl. No. 112/1972—concluded with U.S.S.R. applicable to Russian Federation pursuant to exchange of diplomatic notes, BGBl. No. 257/1994); (23) Serbia: Treaties concluded with Yugoslavia, namely—(a) Treaty of Dec. 16, 1954 on mutual legal relations (BGBl. No. 224/1955), (b) Treaty of Mar. 18, 1960 on mutual recognition and enforcement of arbitral awards in commercial matters (BGBl. No. 115/1961), (c) Treaty of Oct. 10, 1961 on mutual recognition and enforcement of alimony decisions (BGBl. No. 310/1962) are still applicable with regard to Serbia according to notice of Sept. 19, 1997 (BGBl. III. No. 156/1997); (24) Slovakia: Treaty of Nov. 10, 1961 on communications in civil matters, on public documents and on furnishing of information on legal matters (BGBl. No. 309/1962—applicable to Slovakia pursuant to exchange of diplomatic notes, BGBl. No. 1046/1994); (25) Slovenia: Treaties concluded with Yugoslavia, namely—(a) Treaty of Dec. 16, 1954 on mutual legal relations (BGBl. No. 224/1955), (b) Treaty of Mar. 18, 1960 on mutual recognition and enforcement of arbitral awards in commercial matters (BGBl. No. 115/1961), (c) Treaty of Oct. 10, 1961 on mutual recognition and enforcement of alimony decisions (BGBl. No. 310/1962) are still applicable with regard to Slovenia according to exchange of diplomatic notes (BGBl. No. 714/1993); (26) Spain: (a) Treaty of Nov. 14, 1979 amending Hague Convention of Mar. 1, 1954 (BGBl. No. 280/1981), (b) Treaty of Feb. 17, 1984 on recognition and enforcement of court decisions, settlements and enforceable public documents in civil and commercial matters (BGBl. No. 373/1985); (27) Sweden: (a) Treaty of Sept. 16, 1982 amending Hague Convention of Mar. 1, 1954 (BGBl. No. 555/1983), (b) Treaty of Sept. 16, 1982 on mutual recognition and enforcement of decisions in civil matters (BGBl. No. 556/1983); (28) Switzerland: (a) Treaty of Dec. 16, 1960 on recognition and enforcement of court decisions (BGBl. No. 125/1962), (b) Treaty of Aug. 26, 1968 amending Hague Convention of Mar. 1, 1954 (BGBl. No. 354/1969), (c) Treaty of May 23, 1979 on reciprocity in official responsibility matters (BGBl. No. 424/1981); (29) Tadzhikistan: Convention of Mar. 11, 1970 on civil law proceedings (BGBl. No. 112/1972—concluded with U.S.S.R. applicable to Russian Federation pursuant to notice of Jan. 12, 1998, BGBl. III. No. 4/1998); (30) Tanzania: Agreement of Nov. 23, 1972 on legal proceedings in civil and commercial matters (BGBl. No. 222/1980); (31) Tunisia: (a) Treaty of June 23, 1977 on legal aid in civil and commercial matters (BGBl. No. 304/1980), (b) Treaty of June 23, 1977 on recognition and enforcement of court decisions and public documents in field of civil and commercial law (BGBl. No. 305/1980); (32) Turkey: (a) Treaty of May 23, 1989 on recognition and enforcement of court decisions and settlements in civil and commercial matters (BGBl. Nos. 571/1992 and 949/1994), (b) Treaty of Sept. 16, 1988 amending Hague Convention of Mar. 1, 1954 (BGBl. No. 570/1992); (33) Ukraine: Convention of Mar. 11, 1970 on civil law proceedings (BGBl. No. 112/1972—concluded with U.S.S.R. applicable to Ukraine pursuant to notice of June 28, 1996, BGBl. No. 291/1996); (34) United Kingdom: (a) Treaty of Mar. 31, 1931 on mutual legal aid (BGBl. No. 45/1932). This Treaty also applies to: Antigua, Australia, Bahamas, Barbados, Botswana, Canada, Cyprus, Dominica, Fiji, Gambia, Ghana, Grenada, Guyana, Jamaica, Kenya, Lesotho, Malawi, Malaysia, Malta, Nauru, New Zealand, Nigeria, St. Christopher-Nevis-Anguilla, St. Lucia, St. Vincent, Sierra Leone, Singapore, Swaziland, Trinidad and Tobago, Tonga, Uganda, West Samoa, Zambia; (b) Convention of July 14, 1961 providing for reciprocal recognition and enforcement of judgments in civil and commercial matters (BGBl. No. 224/1962) as am'd by Protocol of Mar. 6, 1970 (BGBl. No. 453/1971). This Convention also applies to Hong Kong; (35) U.S.A.: (a) Treaty of Friendship, Commerce and Consular Rights of June 19, 1928 (BGBl. No. 192/1931), (b) Exchange of diplomatic notes of Mar. 27, 1998 on mutual legal aid in certain matters (BGBl. III. No. 50/1998).

International Sale of Goods.

United Nations Convention on Contracts for the International Sale of Goods, in force on Jan. 1, 1989. See category 3 Business Regulation and Commerce, topic 3.09 Sales and Part V, Selected International Conventions.

See also other appropriate categories, e.g., Business Regulation and Commerce, topic Sales; Civil Actions and Procedure, topic Judgments; Dispute Resolution, topic Arbitration; Foreign Trade and Commerce, topic Customs; Intellectual Property, topics Copyright, Patents, Trademarks and Tradenames; Introduction, topic Government and Legal System; Transportation, topic Air Navigation.

1
BAHAMAS LAW DIGEST

—Scope —

Revised for 2010 edition by

HARRY B. SANDS, LOBOSKY and COMPANY of Bahamas.

See category 6 Courts and Legislature, topics 6.02 Law Reports and 6.04 Statutes.

Note: This revision incorporates legislation through Dec. 31, 2009.

1 INTRODUCTION

1.01 CURRENCY:

As from May 25, 1966, currency of Bahamas is expressed in Bahamian dollars, each containing 100 cents and expressed thus: B$1.00. One Bahamian dollar is approximately equal to U.S. $1.

Bank notes are issued in Bahamian currency in denominations of one, three, five, 10, 20, 50, and 100 dollars.

See also category 15 Foreign Trade and Commerce, topic 15.04 Foreign Exchange, Investment and Trade.

1.02 GOVERNMENT AND LEGAL SYSTEM:

As from 10th July, 1973, when Bahamas became independent, supreme power is vested in parliament consisting of the Queen (i.e., Queen Elizabeth II of U.K.), a Senate and a lower legislative house called House of Assembly; this has 41 members voted in office on franchise system similar to most other countries. Authority of Queen is represented within Bahamas themselves by Governor-General.

Constitution of The Bahamas provides that Governor General shall appoint session of Parliament at least once during any 12 month period.

Head of party put in office by voters is Prime Minister, and he with other ministers forms Cabinet which is main executive organ of state. Judicial authority is vested in a chief justice, assisted by justices and, in lower courts, by magistrates.

Country is fully independent and therefore entirely responsible for running its own affairs, and eligible for membership of various international organizations, including in particular those relating to law of sea.

Integrity of Constitution and its officers maintained by statute law on bribery and disclosure of assets.

Exact meaning of words and phrases explained by Interpretation Act.

1.03 HOLIDAYS:

The Public Holidays Act (Bahamas) provides that the following days shall be kept as closed holidays in all public offices and banks and in all shops as defined by the Act: Jan. 1, Good Friday, 1st Mon. after Easter, 1st Mon. after Whitsunday, Labour Day (1st Fri. in June), Independence Day (July 10), 1st Mon. in Aug., Oct. 12, Christmas Day, Boxing Day (Dec. 26). Government offices are not open on Saturdays.

If holiday falls on Sunday, following day is usually observed in its place.

Bill of exchange falling due on Saturday, Sunday or holiday normally matures on next business day.

Most shops are forbidden to do business on Sundays or holidays.

1.04 OFFICE HOURS AND TIME ZONE:

Bahamas is in the Eastern Standard (GMT -05:00) time zone. Office hours are generally from 9 a.m. to 5 p.m.

2 BUSINESS ORGANIZATIONS

2.01 ASSOCIATIONS:

See topics 2.02 Corporations, 2.07 Partnerships.

2.02 CORPORATIONS:

On 1st Aug., 1992 new consolidating Companies Act, 1992, came into effect, repealing previous Companies Act, and introducing distinction between private and public companies. Limited companies are incorporated by filing with Registrar General memorandum of association, which is company's charter, and may contain objects for which proposed company is to be established, but need not, with effect that company has capacity and all rights, powers and privileges of individual of full capacity without legal disabilities. This represents abandonment of ``Ultra Vires'' doctrine. Fee of B$300 is payable. Minimum of two subscribers to memorandum are required. Articles of Association, which are by-laws of company, must also be filed with Registrar General. Fee of B$30 is payable upon filing.

Aliens may comprise any or all of shareholders, directors (of which there must be minimum of two) and officers of company, which must have registered office situate within The Bahamas.

In certain circumstances company may purchase or otherwise acquire its own shares.

Directors may conduct meetings by telephone or by certain other permitted electronic means.

Stamp duty payable on Memorandum of Association is: (a) For company limited by guarantee without an authorised capital: B$60; (b) for company formed for charitable purposes; B$5; (c) in every other case, B$60 for first B$5,000 of capital and B$3 for every subsequent B$1,000.

There are no dividend, share certificate or company taxes of any nature, except that fee of B$350 per annum is payable to Registrar General for each Bahamian owned company, during month of Jan. in every year. If company is not at least 60% beneficially owned by Bahamian citizens or by another Bahamian company within this definition, annual fee is increased to B$1,000.

For stamp duty on debentures, see category 23 Taxation, topic Taxes, subhead Stamp Duties.

Any corporation carrying on business as bank or trust company or insurance company must be licensed. Additional annual fees are payable in respect of such companies.

Company may hold and deal in lands, personal property, and Bahamian vessels. Foreign-owned Bahamian company acquiring real property in The Bahamas must comply with International Persons Landholding Act. See category 4 Citizenship, topic 4.01 Aliens.

Certain names may be used only with consent of Registrar General, e.g. names which suggest patronage by or proximity to British Royal Family.

Foreign Companies.

A company incorporated abroad before carrying on undertaking in The Bahamas must under Companies Act, 1992 deposit in Registry of Records copy of Act or charter of incorporation of company, and, having complied with certain other requirements set out in Acts. Acquisition of land in Bahamas by foreign companies is subject to provisions of International Persons Landholding Act. See category 4 Citizenship, topic 4.01 Aliens. Stamp duty on Act or charter of incorporation is B$600 and fee of B$50 is payable at Registry of Records.

The International Business Companies Act.

On 28th Dec. 2000 new International Business Companies Act came into effect amending and repealing previous International Business Companies Act. It provides for incorporation, registration and operation of international business companies, including Limited Duration Companies, not providing securities investment advice nor carrying on banking, trust, insurance or reinsurance business or business of providing registered offices of companies. However, such companies may maintain banking accounts in any currency in The Bahamas and lease offices there and generally conduct their corporate affairs from The Bahamas and they may hold shares, debt obligations or other securities of other Bahamian companies. Also such companies may under new Act do business and own real estate in The Bahamas provided that stamp duty is applicable on any such ownership.

Shares without par are permitted as well as registered shares. Shares may be issued also in fractions, and at less than par value and company may, in certain circumstances, purchase, redeem or otherwise acquire its own shares and may also in certain circumstances reduce its capital without necessity of order of Court. Persons ordinarily residents in The Bahamas may now own shares.

Exemptions.

The Exchange Control Regulations Act does not apply to companies whose operations are carried out overseas.

Exemption from Taxes.

Companies incorporated under Act are exempt from all taxes for 20 years.

Confidentiality.

No information is required to be filed relating to shareholders.

Directors and Officers.

Only one director is required, officers are optional and no member, officer or director need be Bahamian citizen or resident. Corporations may serve as officers and directors.

Capital of companies incorporated under Act may be expressed in any currency.

How Incorporated and Corporate Documents.

Companies are incorporated under Act by filing Memorandum (Charter) and Articles (Bye-laws) of Association. Subject to any limitation in Memorandum or Articles of Association both documents can be amended following incorporation but Memorandum initially may be drawn in broadest terms so as to include, inter alia, all and any acts and activities not prohibited by Bahamian law. Specific reference to objects and powers, is not, as formerly, now required. “Ultra vires” doctrine is therefore effectively abolished. However, if desired, particular objects may be set out in Memorandum.

Continuation of Existing Bahamian and Other Companies.

Both existing Bahamian company or company incorporated outside The Bahamas which satisfies requirements of Act may, upon filing Articles of Continuation, continue as company incorporated under Companies Act or International Business Companies Act and company incorporated thereunder may be resolution of directors or members continue as company incorporated under laws of jurisdiction outside The Bahamas in manner provided under those laws.

Merger and Consolidation.

Two or more companies may merge into one or they may be consolidated into new (consolidated) company.

Name.

Any name is permissible which is not identical or too similar to name of company already on Register of Companies but certain words e.g. assurance, bank, imperial, insurance, trust, royal or words conveying similar meaning or suggesting patronage by Her Majesty the Queen or by any member of the Royal Family or by Government of The Bahamas may not be included in name of company. Last word in name of such companies may be limited, corporation, incorporated, societe anonyme or sociedad anonima or abbreviations ltd., corp., inc., or S.A.

Registered Office and Agent.

In order to incorporate companies one must be licensed under Financial and Corporate Service Providers Act 2000. Companies incorporated under this Act must maintain registered office and registered agent in The Bahamas. Registered Office must keep register of shareholders and beneficial owners and may be subject to inspection by Inspector of Financial and Corporate Services.

Official Fees.

Official fee initially and annually for international business company whose authorized capital is B$50,000 or less is B$350 per annum. There is no requirement for capital in excess of B$5,000 but should greater capital than B$50,000 be necessary of annual fee is $1,000. Fees are payable on merger, consolidation or continuation.

Limited Duration Companies (``LDCs") may be established afresh or converted from IBC. Memorandum (Charter) of LDC limits its existence to 30 years or less and name of LDC must include words ``Limited Duration Company" or abbreviation ``LDC". LDCs can be utilized, inter alia, in creation of mutual funds and may be preferred for this purpose to IBC. LDCs may be converted to IBCs. In addition to its restricted life LDC need have no directors and may be managed by its members and/or by managing agents removable with or without cause at any time. Articles of company may restrict transferability of share or other interest of member. Winding-up is automatic upon expiry of period fixed for duration of company or upon happening of other events such as, for example, would terminate partnership or upon occurrence of any circumstance prescribed in Memorandum or Articles terminating membership of member of company. Liability of members may be limited or unlimited. Also see categories 3 Business Regulation and Commerce, topic Banking and Financial Services, subheads Financial and Corporate Service Providers Act and Financial Transactions Reporting Act; Foreign Trade and Commerce, topic Foreign Exchange Investment and Trade.

2.03 FOREIGN CORPORATIONS:

See topic 2.02 Corporations.

2.04 FOUNDATIONS:

Pursuant to terms of Foundations Act 2004 foundation is legal entity that must be filed with Registrar of The Bahamas.

No perpetuity rules apply to foundations and they are not subject to forced heirship laws of foreign jurisdiction.

Most common use of foundations is for estate planning but they can be used to provide for subordinated debt, for ownership of private trust company, for provision of employee share option scheme, to hold benefit of warranties for wider or changing class of investors or for philanthropic purposes. Foundations (Winding-Up) Rules, 2007, govern winding up by court and also (unless context or subject matter otherwise requires) every winding up subject to supervision of court.

2.05 JOINT STOCK COMPANIES:

See topic 2.02 Corporations.

2.06 LIMITED PARTNERSHIP:

See topic 2.07 Partnerships.

2.07 PARTNERSHIPS:

The Partnership Act (Bahamas) declares the law of partnership and deals with the nature of partnerships; the relations of partners to persons dealing with them; the relation of partners to one another; the dissolution of partnerships and its consequences; and provides for the saving of the rules of equity and of common law.

Limited Partnership.

The Partnership Limited Liability Act (Bahamas) authorizes the formation of partnerships with limited liability. As greater advantages can be obtained under The Companies Act, limited partnerships are rarely if ever formed.

Exempted Limited Partnerships.

("ELPs") are governed by newly enacted Exempted Limited Partnership Act. Although ELPs are prohibited from carrying on business with "public in The Bahamas", other than as necessary for purposes of carrying on its external business, this term does not include Bahamian registered IBCs or foreign companies. ELPs are exempted from all business licence fees, other taxes such as income, inheritance and stamp tax and exchange control regulations for period of 50 years. Registration and annual fee in respect of ELPs is B$850.

ELPs are created by filing statement with Registrar containing particulars prescribed by Act and consist of one or more general partners and one or more limited partners. Former are liable for debts and obligations of partnership in event of shortfall; latter incur no liability, other than may be provided in partnership agreement, unless such partner takes part in conduct of business of partnership. Partners may be non-Bahamian or domestic corporations or partnerships. ELPs acquire limited liability upon issue of Certificate of Registration by Registrar. ELPs are dissolved by partners subsequent to filing notice of dissolution with Registrar. Provisions of Partnership Limited Liability Act are not applicable to ELPs.

2.08 SEGREGATED ACCOUNT COMPANIES:

The Segregated Accounts Companies Act 2004 provides for registration of entity incorporated under either International Business Companies Act or Companies Act as Segregated Accounts Company ("SAC").

SAC may segregate each of its assets into separate accounts which are thereby shielded from exposure to losses or claims of creditors of SAC. Also known in securities industry as Protected Cell Company, SAC allows for management of risks within single corporate structure.

SACs are being used as investment funds, in business of issuing securities and in insurance business.

See topic 2.02 Corporations; category 3 Business Regulation and Commerce, topics 3.10 Mutual Funds; 3.13 Securities and Investment.

3 BUSINESS REGULATION AND COMMERCE

3.01 BANKING AND FINANCIAL SERVICES:

The Bahamas has enhanced its regulatory regime of banks and financial institutions in order to comply with international best standards and practice and in this regard various laws have been passed.

Banks and Trust Companies Regulation Act, 2000 repealed Banks Act, 1909 and Banks and Trust Companies Regulation Act, 1965 and provides for new provisions regulating banks and trusts companies including expanding licensing criteria for banks and trust companies, rules for inspection and supervision of banks including cross-border supervision by foreign banking regulators, and preservation of bank confidentiality with several exceptions.

Act enhances powers of Governor of Central Bank as licensor, supervisor and regulator of banks and trust companies viz: grant and revocation of licenses, power to require substitution of any director or officer of licensee, appointment of someone to advise licensee on proper conduct of its affairs and to report to Governor, appointment of receiver to assume control of licensee's affairs in interest of creditors, approval of auditors and to require such other actions to be taken as Governor deems necessary.

Act also provides for office of Inspector whose duties include maintaining general review of bank and trust company practice in The Bahamas, inspecting and supervising banks, ensuring compliance with Financial Transactions Reporting Act, 2000 setting appropriate capital adequacy requirements not less than those established in Basle Capital Accord and cooperating with inspectors and supervisors in other jurisdictions to extent necessary for purposes of cross-border supervision in accordance with Basle Committee of Banking Supervisory Authorities established by Central Bank governors of Group of Ten countries in 1975.

In relation to cross-border supervision, Act provides that foreign Supervisory Authority ("SA") which is responsible for regulating bank or trust company with branch or subsidiary incorporated inside The Bahamas may upon written notification to and approval by Inspector, conduct inspection solely for purposes of consolidated supervision of books and accounts of any branch or subsidiary within The Bahamas. Such inspections are to be conducted under conditions of confidentiality which include undertaking by SA that it shall not transmit information obtained during course of its inspection to any other authorities without written consent of Inspector. SA in carrying out inspection shall not have access to information relating to assets under management or deposit operations of individual customers of licensee provided that where SA does wish to gain access to such information for purpose of addressing any specific supervisory concerns, SA must inform Inspector and Inspector shall gather information himself. Information will be transmitted to SA if Inspector is satisfied that information meets requirements set out in Act.

Also see subhead The Financial Transactions Reporting Act, 2000, infra.

The Financial Transactions Reporting Act, 2000 imposes obligations upon financial institutions in relation to financial transactions viz: verifying identity of beneficial owner of account ("facility holder"), reporting suspicious transactions and retaining records. Term financial institutions is broadly defined and includes Bahamian bank and trust companies, casino operators, broker-dealers, real estate brokers, mutual fund administrators, investment managers, financiers, attorneys and accountants.

Regulations published pursuant to Act set out what documentation must be obtained and retained by financial institution for purposes of verifying identity of facility holder. If financial institution is unable to verify identity of facility holder Act provides that account is to be transferred to Central Bank of The Bahamas.

Act also requires financial institution to verify identity of somebody who conducts transaction over $10,000 otherwise than through account in respect of which that person is facility holder. Also, where financial institution has reason to believe that person is conducting transaction on behalf of somebody else there is duty to verify beneficiary of transaction; both instances being defined as "occasional transactions" pursuant to Act.

Financial institutions have duty to report to Financial Intelligence Unit established under Financial Intelligence Unit Act, 2000, any transaction or proposed transaction which financial institution knows, suspects or has reasonable grounds to suspect involves proceeds of criminal conduct as defined in Proceeds of Crime Act 2000 or any offence under Proceeds of Crime Act or attempt to avoid enforcement of any provision of Proceeds of Crime Act. Persons reporting suspicious transactions are protected from any civil, criminal or disciplinary proceedings. Attorneys are not obliged to disclose any privileged communications. Act further provides that financial institution may not disclose that they have made or are contemplating making report to any person except its attorneys, Financial Intelligence Unit, Commissioner of Police, Financial Institution's Supervisory Authority or Central Bank of The Bahamas.

Records of transactions must be maintained by financial institution for minimum of five years after completion of transaction. Identity verification records must be maintained for continuation of account and for minimum of five years after account has been closed or occasional transaction has been completed. Act requires financial institutions to destroy records after five years except where there is lawful reason for retaining them.

Act establishes Compliance Commission consisting of three persons appointed by Governor General. Duty of Commission is to ensure compliance with provisions of Act by cooperative societies, friendly societies, managers, financiers, attorneys and accountants.

Also see subheads Banks and Trust Companies Regulation Act, supra, Financial Intelligence Unit Act, infra; category Criminal Law, topic Proceeds of Crime Act.

The Central Bank of The Bahamas Act, 2000 repealed Central Bank of The Bahamas Act, 1974 and makes fresh provisions for establishment of Central Bank and its functions and duties which include inter alia promoting and maintaining monetary stability and credit, regulating banking and trust services, issuing and redeeming notes and coins, managing country's foreign reserves, acting as banker to commercial banks in The Bahamas, acting as banker to and as agent for Government and administering exchange control regulations.

Central Bank has power to require financial institutions and trust companies to supply Central Bank with such information as deemed necessary to enable it to carry out its functions under Act. Also, Act provides that Central Bank may disclose information to overseas regulatory authority to assist that authority to exercise its regulatory functions including conduct of civil and administrative investigations and proceedings. Act defines overseas regulatory authority as authority which exercises functions corresponding to any functions of Central Bank or functions in relation to companies or financial services as Central Bank may specify by order. In deciding whether or not to exercise its discretion to assist, Central Bank may take into account whether inquiries relate to possible breach of law, which has no close parallel in The Bahamas, and seriousness of matter and importance of information. Recipient authority must give undertaking of confidentiality or undertaking not to disclose information without consent of Central Bank and that information provided will not be used in criminal proceedings against person providing information.

The Financial and Corporate Service Providers Act, 2000 provides for licensing and regulation of financial and corporate services carried on in or from The Bahamas. These services include, on-line financial services, registration or management and administration of international business companies ("IBCs") incorporated or existing under International Business Companies Act 2000 provision of directors or officers for Bahamian IBCs, provision of nominee shareholders for Bahamian IBCs, provisions of partners for partnerships registered and existing under Exempted Limited Partnership Act, 1995 and provision of registered agent services and registered office services for partnerships registered and existing under Exempted Limited Partnership Act, 1995.

Act appoints Inspector of Financial and Corporate Services to whom application must be made by persons wishing to carry on business of financial and corporate services as defined under Act for license under Act. Functions of Inspector are to maintain general review of financial and corporate services in The Bahamas on annual basis and when required by Minister responsible for companies, at expense of licensee to conduct on-site and off-site examinations of business of licensee for purpose of satisfying Inspector that provisions of Act, Financial Transactions Reporting Act, 2000, International Business Companies Act, 2000 and any other law are being complied with and in such cases where Inspector is unable to conduct such examination to appoint auditor at expense of licensee to conduct such examination and to report thereon to Inspector. Act also gives Inspector power to suspend and revoke licenses.

Banks and trust companies licensed under Banks and Trust Companies Regulation Act, 2000 do not need to apply for license to provide financial and corporate services.

Inspector shall in granting license take into account following criteria: whether applicant is fit and proper person, whether applicant is qualified to carry out business of financial and corporate service provider, professional reputation and experience of applicant, whether each officer, director or manager of applicant is fit and proper person to act in such capacity, in case of application by partnership, whether each partner is fit and proper person to act as such and whether applicant, if individual, is resident in The Bahamas or if company, is registered under Companies Act, 1992.

Inspector will maintain register of licensees, which shall be open to inspection by public.

Inspector has power to require licensee to produce for examination books, records and other documents that licensee is required to maintain pursuant to provisions of Act and to require licensee to supply such information or explanation as Inspector may reasonably require for purpose of enabling him to perform his functions under Act.

Licensee has duty to maintain high standard of professional conduct in performance of his duties and refrain from engaging himself or any of his employees in any illegal or improper conduct, refrain from engaging in any activity in or outside The Bahamas which may reflect negatively on other service providers or reputation of country as international financial centre, to verify identity of clients who request provision of financial or corporate services and to maintain record in respect of each client including inter alia names and addresses of beneficial owners of IBCs.

Financial Intelligence Unit Act, 2000 establishes and makes provision for functions and power of Financial Intelligence Unit (“FIU”). FIU shall be composed of chief executive officer (director), attorney, public accountant, number of consultants and police officers.

FIU is responsible for receiving, analyzing, obtaining and disseminating information (including information from any foreign FIU) which relates to or may relate to proceeds of offences under Proceeds of Crime Act, 2000. FIU upon receipt of any such information may order any person to refrain from completing transaction without necessity of Court Order. Order must be in writing and cannot exceed three days. In addition, upon receipt of request from foreign FIU or law enforcement authority including Commissioner of Police of The Bahamas, FIU may order freezing of any person's bank account for period not exceeding five days. There is no requirement of Court Order nor that order of FIU be in writing. Provided that aggrieved person may apply to judge in Chambers to discharge order of FIU freezing bank account. No action in damages lies against FIU as result of erroneous freezing of assets in good faith.

FIU shall provide information to Commissioner of Police subject to conditions as may be determined by Director and may provide information relating to commission of offences to foreign FIU subject to any conditions as may be considered appropriate by Director. Also, FIU may enter into written agreements with foreign FIU in order to discharge its functions.

All information received by FIU is to be kept for minimum of five years. FIU is also responsible for informing public and financial and business entities of their obligations in relation to measures that have been or might be taken to deter commission of offences set out in Proceeds of Crime Act. In this regard FIU is charged with setting out features of transactions in respect of each type of financial institution to which Financial Transactions Reporting Act, 2000 applies that may give rise to suspicion that transaction is relevant to enforcement of Proceeds of Crime Act.

No proceedings for breach of banking or professional confidentiality may be instituted against any financial or business entity who in good faith transmits information or submits reports in accordance with Act or under Proceeds of Crime Act, 2000. Also, Act provides that any person who obtains information as result of his connection with FIU shall not disclose that information to any person except as permitted under Act or by law.

Also, FIU may require production of information that it considers necessary to fulfill its functions except for any such information subject to legal professional privilege.

Also see subhead Financial Transactions Reporting Act, supra; category Criminal Law, topic Proceeds of Crime Act.

3.02 BILLS AND NOTES:

The Imperial Statute, the Bills of Exchange Act 1882 (45 & 46 Vict. c. 61) was extended to the Bahamas by Bahamas Act 5 of 1892 and is Chapter 308 of 1987 Revised Edition of the Statute Law of the Bahamas. See England Law Digest. There have been certain amendments which follow legislation of U.K.

3.03 COMMERCIAL REGISTER:

The Registration of Business Names Act, which came into force on 1st July, 1995, requires every individual, firm and company having place of business in The Bahamas and carrying on business therein to register its business name and every change thereof. Certain exceptions are provided for under said Act.

3.04 CONTRACTS:

Unfair Terms in Consumer Contracts Act 2006 applies to any term in contract concluded between seller or supplier and consumer where such term has not been individually negotiated. No assessment shall be made of fairness of any terms which defines main subject matter of contract or concerns adequacy of price or remuneration, as against goods or services sold or supplied. Act does not apply to any contract relating to employment, succession rights, rights under family law or relating to incorporation of companies or partnerships.

Hire-Purchase.

Hire-Purchase Act, 1974 contains lengthy provisions for regulation of Hire-Purchase, credit sale and conditional sale agreements and for purposes connected with these matters. Act generally covers many kinds of purchase and sale including motor vehicles; there are implied warranties as to title; form of agreement and conditions for signature etc. are described, and conditions for cancellation and effective service of notices, including those leading to recovery of possession of article hired or to be sold.

3.05 FRAUDS, STATUTE OF:

The former English Statute of Frauds, 29 Charles 2, c. 3, is extended to Bahamas by c. 2 of 1799.

3.06 INFORMATION TECHNOLOGY, INTERNET AND NEW MEDIA:

Database Protection.

Data Protection (Privacy of Personal Information) Act, 2003 imposes duties on data controllers and data processors regulating collection, processing, keeping, use and disclosure of information.

Computer Materials.

Computer Misuse Act, 2003 protects materials stored on computers from unauthorized access and makes it criminal offence punishable by fine not exceeding B$5,000 or imprisonment for term not exceeding six months or both fine and imprisonment. Fine and imprisonment can be increased for subsequent conviction. If damage is caused as result of offence, this is punishable by fine not exceeding B$20,000 or imprisonment for term not exceeding three years or both fine and imprisonment. Damage is defined under Act as any impairment to computer or integrity or availability of data, program or system or information that causes economic loss aggregating B$10,000 in value, or such other amount as government may prescribe save that any such loss incurred or accrued more than one year after date of offence in question shall not be taken into account. Related conduct is also criminalized including unauthorized alteration, access, use, interception or modification of computer material and interception of computer material and interception of computer service. Law is expressed to have extraterritorial effect. Special powers of arrest and procedure are given to police.

Electronic Communications.

Electronic Communications and Transactions Act, 2003 provides for legal recognition of electronic writing, electronic contracts, electronic signatures and original information in electronic form in relation to commercial and other transactions and provides for facilitation of electronic transactions and related matters. Information in form of electronic communication is admissible in evidence in Court proceedings. Legal recognition and functional equivalency provisions of Act do not apply to any rule of law requiring writing or signatures inter alia for: (1) wills or testamentary instruments; (2) trusts; (3) conveyances or transfers of interests in real property; (4) enduring powers of attorney to extent that they concern financial affairs or personal care of individual. Nothing in Act requires any person to use or accept electronic communications, electronic signatures or electronic contracts.

Also see category 5 Civil Actions and Procedure, topic 5.03 Evidence.

3.07 INTEREST:

The Money Lending Act gives the Supreme Court or any Magisterial Court, to the extent to which it has civil jurisdiction under any act, power to re-open a transaction which is harsh and unconscionable, and to take an account between the lender and the person sued.

Judgments of Supreme Court bear interest at rate of B$10 per centum per annum.

The Rate of Interest Act provides that maximum permitted rate of interest on any loan of more than B$100 shall be 20% per annum and any loan not exceeding such amount, 30% per annum. Such permitted rate shall not apply to loans in foreign currency or loans made in Bahamian currency by institutions licensed under provisions of The Banks and Trust Companies Regulations Act, 1965. Recent amendment to Act seeks to avoid any question that loan may otherwise be void if there is provision for capitalization of arrears of interest which could result in such maximum rate being exceeded. Privy Council has ruled subsequent to this Amendment that, upon proper construction of Act prior to such Amendment, position was thus in any event. See also category 2 Business Organizations, topic 2.02 Corporations. Also see topic 3.01 Banking and Financial Services, subhead Financial and Corporate Service Providers Act, 2000.

3.08 LICENSES, BUSINESS AND PROFESSIONAL:

License is required to carry on businesses of hotels, banking, trusts and insurance. Licenses are also required to operate shop or restaurant or sell liquor; for music and dancing, showing films, acting as auctioneer or as travelling salesman, making beer or spirits, and operating taxi cabs.

Additional license of The Grand Bahama Port Authority is required for all businesses at Freeport, Grand Bahama.

The Business Licence Act provides with certain exceptions that all persons and companies carrying on business or practising profession in Bahamas must obtain business licence annually, cost of which is percentage of gross profits arrived at by reference to scale. Nonresident owned companies pay yearly fee of $100.

3.09 MONOPOLIES, RESTRAINT OF TRADE AND COMPETITION:

The common law of England applies.

The Telecommunications Act 1999 has removed monopoly rights of The Bahamas Telecommunications Corporation and established licensing regime for telecommunications.

The Public Utilities Commission (Amendment) Act, 1999 provides for regulation of controlled public utilities which include production and transmission of electricity, conveyance or transmission of messages or communications by telephone and supply of water or provision of sewerage facilities.

3.10 MUTUAL FUNDS:

Investment Funds Act, 2003 regulates all types of funds. Definition of fund includes SMART fund (Specific Mandate Alternative Regulatory Test Fund). Securities Commission of The Bahamas has defined supervisory powers over funds. Act abolishes exempt funds.

3.11 NEGOTIABLE INSTRUMENTS:

See topic 3.02 Bills and Notes.

3.12 SALES:

The Sale of Goods Act (Bahamas) is virtually a re-enactment of the Imperial Statute, The Sale of Goods Act 1893. See England Law Digest. Also, The Consumer Protection Act 2006 provides for establishment of Consumer Protection Commission. Act also makes provision for greater protection of consumers.

Act provides that seller of goods or provider of services shall issue explicit warranties in relation to goods and services, whether goods are new or used and whether service offered is repair of any appliance, furniture, equipment or other goods. Any warranty given by manufacturer (whether local or foreign) and attached to any goods or services sold or provided as case may be in The Bahamas shall be deemed to extend to provider in The Bahamas who shall be liable to consumer in relation to such warranty. In absence of explicit warranty which shall be at discretion of provider, implied warranty of six months or parts and labour shall, subject to standard conditions of warranties attach to transaction.

Also, see topic 3.04 Contracts, subhead Hire-Purchase.

3.13 SECURITIES AND INVESTMENT:

The Securities Act 1999 has established system for regulating securities industry. Act contains provisions for registration and operation of Securities Exchanges and sets forth requirements for registration and licensing of broker-dealers and traders and securities investment advisors.

4 CITIZENSHIP

4.01 ALIENS:

See category 17 Immigration, topic 17.01 Aliens.

4.02 IMMIGRATION:

See category 17 Immigration, topic 17.01 Aliens.

4.03 VISITORS:

See categories 15 Foreign Trade and Commerce, topic Foreign Exchange, Investment and Trade; Introduction, topic Currency; Transportation, topic Motor Vehicles.

5 CIVIL ACTIONS AND PROCEDURE

5.01 ACTIONS:

By § 2 of The Declaratory Act (Bahamas), it is enacted that: Common law of England, in all cases where same hath not been altered by any of Acts or Statutes enumerated in schedule to this Act or by any Act (except so much thereof as hath relation to ancient feudal tenures, to outlawries in civil suits, to wager of law or of batail, appeals of felony, writs of attaint and ecclesiastical matters), is, and of right ought to be, in full force within The Commonwealth, as same now is in that part of Great Britain called England. For action for damages for death of person see category 13 Estates and Trusts, topic 13.01 Death, subhead Actions for Death.

Equity.

By § 23 of The Supreme Court Act (Bahamas), law and equity are administered concurrently; and in all matters in which there is any conflict or variance between the rules of law and the rules of equity with reference to the same matter, the rules of equity shall prevail.

Limitation of.

See topic 5.05 Limitation of Actions.

Foreign Claims and Judgments.

In all cases full information should be provided. See also topic Judgments (The Reciprocal Enforcement of Judgments Act). In any other case person may be sued under judgment obtained in foreign court of competent jurisdiction, or alternatively sued on merits.

5.02 DEPOSITIONS AND DISCOVERY:

See category 10 Documents and Records, topic 10.02 Affidavits.

5.03 EVIDENCE:

The Evidence Act, 1996 consolidates with amendments written laws relating to law of evidence and for connected purposes. Act provides that statements in documentation produced by computer admissible as evidence of any facts or date therein of which direct oral evidence would be admissible if certain requirements met as to regular use of computer to store information of kind to be given in evidence and proper operation of computer over relevant period.

Evidence (Proceedings in Other Jurisdictions) Act 2000 repealed Foreign Tribunal Evidence Act, 1856 and makes provision for Supreme Court to assist foreign court or tribunal in obtaining evidence required for purposes of criminal or civil proceedings in other jurisdictions whether pending before court or in investigative stage.

The Criminal Justice (International Cooperation) Act 2000 makes provision for Bahamian government to assist foreign courts, tribunals or relevant authorities in obtaining evidence required for criminal proceedings in respect of predicate offences under Proceeds of Crime Act, 2000 whether pending before Court or in investigative stage.

Also see category 7 Criminal Law, topic Proceeds of Crime Act.

5.04 JUDGMENTS:

Judgment of the Supreme Court, unless otherwise provided by the rules of the Supreme Court, must be obtained by motion for judgment.

Summary judgment may be obtained in Supreme Court when amount sought to be recovered or value of property in dispute exceeds B$5,000.

By means of a specially indorsed writ of summons, summary judgment may be obtained in respect of a claim for a liquidated demand in money.

By The Judgments Act 1931 (Bahamas), all judgments entered up in the Supreme Court bind the real estate of the judgment debtor, and have priority according to the respective days on which they were so filed.

The Reciprocal Enforcement of Judgments Act (Bahamas) is expressed to be an act to facilitate the reciprocal enforcement of judgments, orders and awards in the Bahamas and the United Kingdom and other parts of British Commonwealth. Amendment has been passed whereby Governor General may by Order bring other countries within scope of Act.

By The Maintenance Orders Facilities for Enforcement Act (Bahamas), provision is made for the enforcement in the Bahamas of maintenance orders made in England or Ireland.

5.05 LIMITATION OF ACTIONS:

The Limitation of Actions Act 1995 came into force on 28th Aug., 1995 and it repeals earlier Limitations of Actions Act. New Act also repeals Real Property Limitations Acts and various other limitation statutes. Actions must be brought within following periods after respective causes of actions accrue.

Twelve Months.

Any action or proceeding against any person for any act, alleged or neglect or default done in pursuance or execution of any statutory duty or any public duty or authority.

Two Years.

Recovery of contribution between tortfeasors.

Three Years.

Personal injuries: negligence, nuisance or breach of duty in respect of; actions for damages in respect of wrongful acts causing death.

Six Years.

Simple contract, actions to recover any sum by virtue of any written law actions to enforce recognisance or judgment, actions for negligence in respect of latent damage not involving personal injuries and generally all torts for which no other period of limitation is provided.

Twelve Years.

Actions upon deeds, actions for recovery of principal moneys secured by mortgage or other charge, recovery of lands: 12 years adverse possession of land defeats title of owner except against persons under disability. Time will run against reversioners of remaindermen only from date of vesting of such estates in possession.

Fifteen Years.

Negligence actions not involving personal injuries.

Exceptions.

Act contains provisions extending prescribed limitation periods in cases involving disability, acknowledgment, part payment, fraud and mistake. Transitional section provides inter alia that no action can be brought which was barred before coming into force of Act by any written law repealed by Act. Furthermore, any action pending at commencement of Act shall be determined in accordance with law in force immediately preceding that commencement.

Act Not Applicable.

1995 Act will not affect equitable jurisdiction of Supreme Court to refuse relief on ground of acquiescence, laches etc. Similarly, Act has no application to any action for which period of limitation is prescribed by some other law (e.g. The Fraudulent Dispositions Act 1991).

5.06 PRESCRIPTION:

See topic 5.05 Limitation of Actions.

5.07 REPLEVIN:

The common law applies. By § 185 of The Magistrates Act, magistrates have jurisdiction in replevin.

5.08 SEQUESTRATION:

See England Law Digest.

6 COURTS AND LEGISLATURE

6.01 COURTS:

Supreme Court consists of Chief Justice and justices; for lesser matters including civil claims or debts of up to $5,000 there are several Magistrates Courts in New Providence and one in Grand Bahama.

See category 1 Introduction, topic 1.02 Government and Legal System.

6.02 LAW REPORTS:

There are some published reports of cases but generally speaking files containing relevant information are open for inspection. English common law decisions are generally binding in Bahamas and are reported in U.K.

6.03 LEGISLATURE:

See category 1 Introduction, topic 1.02 Government and Legal System.

6.04 STATUTES:

Statute laws are set out in full in the “Statute Law of The Bahamas Revised Edition of 2000” as am'd by annual supplements.

7 CRIMINAL LAW

7.01 CRIMINAL LAW:

Other than Dangerous Drugs Act and Firearms Act which are dealt with separately, Penal Code constitutes legislation on all matters concerning crime and criminal jurisdiction, including nature of crimes and whether summary or indictable. Case may commence by summons or by directive of Attorney-General in serious cases; minor matters are usually heard by magistrate in first instance, from whom appeal lies to Supreme Court of Bahamas, and from there to Court of Appeal and in exceptional cases to Judicial Committee of Privy Council in England. Criminal Procedure Code Act, 1968, contains detailed regulations for procedure, arrest, investigations, trial, etc., of accused persons.

It may be noted that use or possession of firearms or drugs are liable to be severely penalised in The Bahamas.

7.02 MONEY LAUNDERING:

The U.S. Treaty on Mutual Assistance in Criminal Matters, ratified by Government of The Bahamas, has received legal recognition in The Mutual Legal Assistance Act. The Proceeds of Crime Act, 2000 repealed Tracing and Forfeiture of Proceeds of Drug Trafficking Act, 1986 and Money Laundering (Proceeds of Crime) Act, 1996 and is aimed at tracing assets of drug traffickers and identifying and punishing those facilitating laundering of such assets.

Proceeds of Crime (Designated Countries and Territories) Order, 2001 was made by Minister Responsible for the Police pursuant to powers granted to him under Act. Order provides for registration and execution in The Bahamas of foreign orders similar in effect to Confiscation Order created by Act. Order also sets out list of countries and territories from which these orders may be registered and enforced in The Bahamas.

Also see category 3 Business Regulation and Commerce, topic 3.01 Banking and Financial Services, subheads Financial Transactions Reporting Act, Financial Intelligence Unit Act.

8 DEBTOR AND CREDITOR

8.01 ASSIGNMENTS:

By Choses in Action Act any absolute assignment, by writing under hand of assignor of any debt or other legal chose in action, of which express notice in writing shall have been given to debtor, trustee or other person from whom assignor would have been entitled to receive or claim such debt or chose in action shall transfer legal right to such debt or chose in action from date of such notice.

8.02 ATTACHMENT:

Attachment of debts may be effected by either garnishment or charging order.

8.03 BANKRUPTCY:

The Bankruptcy Act (Bahamas) is virtually a re-enactment of the Imperial Statute, The Bankruptcy Act 1861. (24 & 25 Victoria, c. 134).

By § 4 the following are declared to be acts of bankruptcy: (a) That the debtor has made a conveyance or assignment of his property to a trustee for the benefit of his creditors; (b) that the debtor has made a fraudulent conveyance of his property; (c) that the debtor has absented himself; (d) that the debtor has filed a declaration admitting his inability to pay his debts; (e) that execution has been levied, in the case of a trader, by seizure and sale of the goods of the debtor, for a debt of not less than B$200; (f) that debtor has been served with debtor's summons for not less than B$200 three weeks, or in case of trader seven days, prior to petition for adjudication in bankruptcy.

The act of bankruptcy must have occurred within six months of the presentation of the petition and the debt must be liquidated and not a secured debt, unless the creditor agrees to give up his security.

Preferential Payments.

All debts due to Crown and wages or salary of any clerk or servant not exceeding four months and B$200, wages of any labourer or workman not exceeding two months and all contributions payable pursuant to The National Insurance Act, 1972. All other debts are paid pari passu.

Landlord may also distrain for rent with certain limitations and an apprentice or articled clerk may recover certain amounts.

See also topic 8.06 Fraudulent Sales and Conveyances.

8.04 EXECUTIONS:

Judgments may be enforced by attachment of debts or by writ of fieri facias. The Court has power to appoint a receiver in aid of equitable execution.

8.05 EXEMPTIONS:

The wearing apparel and bedding of a person and his family, and the tools and implements of his trade to value of B$100, may not be taken under distress issued by magistrate.

8.06 FRAUDULENT SALES AND CONVEYANCES:

The Imperial Statute, The Fraudulent Conveyances Act, 27 Elizabeth, c. 4, is extended to the Bahamas by c. 2 of 1799. The Act provides for avoiding mischiefs by fraudulent conveyances of lands. Fraudulent conveyances made to deceive purchasers are declared void as against such purchasers.

By The Voluntary Conveyances Act (Bahamas), voluntary conveyances, if bona fide and without any fraudulent intent, may not be avoided under Act of the Imperial Parliament 27 Elizabeth, c. 4.

By Fraudulent Disposition Act, 1991 any disposition of property made with intent to defraud and at undervalue shall only be voidable at instance of creditor within two years of date of such disposition. Onus of proof of intent to defraud is upon creditor.

8.07 GARNISHMENT:

See England Law Digest.

8.08 LIENS:

See England Law Digest.

8.09 PLEDGES:

See England Law Digest.

9 DISPUTE RESOLUTION

9.01 ALTERNATIVE DISPUTE RESOLUTION:

At present only forms of alternate dispute resolution available to parties are:

(1) Voluntary dispute resolution pursuant to Arbitration Act, c. 168; and

(2) Mandatory dispute resolution under Industrial Relations (Amendment) Act, 1996, whereby responsible minister may, if public interest so requires, refer dispute within Act to industrial tribunal in absence of settlement by parties within 16 days of report of dispute. Industrial Relations (Amendment) Act, 1997 allows recently established industrial tribunal to perform its functions and makes provision for related matters.

10 DOCUMENTS AND RECORDS

10.01 ACKNOWLEDGMENTS:

An acknowledgment by a witness before a notary public is not sufficient proof of a deed for registration at the Registry of Records. Every deed should be executed before a witness, who should sign as such, and who should make an affidavit before a notary public or other person authorized to take an affidavit. The person executing a deed can make an acknowledgment that he or she executed the same.

Proof by Attesting Witness.

See topic 10.02 Affidavits; category 22 Property, topic 22.03 Deeds.

10.02 AFFIDAVITS:

Any deed or document which it is intended to record at the Registry of Records in The Bahamas must have attached thereto an affidavit by an attesting witness. For places outside The Bahamas, following persons are empowered to administer oaths: British or Bahamian consuls, judges, justices of peace, notaries public or other persons legally authorized to administer oaths or take acknowledgments. When such oath or acknowledgment is taken or made in foreign country (except in case of British or Bahamian Consul) official character of officer before whom same was taken or made or official standing of person who attests or certifies official character of such officer must be verified by British or Bahamian consul. Alternatively, The Bahamas being signatory to Hague Convention Abolishing the Requirement of Legalisation for Foreign Public Documents procedure set out in Convention may be adopted.

The affidavit is in the first person and the jurat is as follows: Sworn to at the City of . . . . . ., this . . . . . . day of . . . . . ., A.D. 20. . . ., before me, ...

Notarial declarations are frequently used for various purposes but cannot be substituted for affidavits of proof.

10.03 NOTARIES PUBLIC:

Notaries Public Act, 1971, gives qualifications for being licensed by appropriate Minister to act as notary, viz: (a) any person duly admitted to practise as Counsel and Attorney of Supreme Court of the Bahamas; (b) any person duly admitted as notary when Act came into force; (c) certain government and public officers. Application may be made to Minister by duly qualified persons, who can issue license for up to one year. Complaint as to misconduct or unfitness may be made to Supreme Court.

10.04 RECORDS:

All deeds relating to land may, and should, as a matter of course, be recorded in the Registry of Records.

Public Records Act, 1971, provides for official registration and custody of official records, and for appointment of archivist.

10.05 SEALS:

See England Law Digest.

11 EMPLOYMENT

11.01 LABOUR RELATIONS:

Industrial Relations Act 1971 provides for registration and control of trade unions, recognition of trade unions, industrial agreements, establishment and operation of Industrial Tribunal and trade dispute procedure.

The Employment Act, 2001 establishes minimum standard hours of working; makes provisions for grant of maternity and family leave; provisions for redundancy payments; provisions relating to summary dismissal and unfair dismissal; provisions relating to employment of children and young persons; provisions in respect of wages and provisions relating to fingerprinting and lie detector tests.

Act repeals Fair Labour Standards Act, 1970 and Female Employees (Grant of Maternity Leave) Act, 1988.

The Health and Safety at Work Act, 2002 makes provision for securing health, safety and welfare of persons and work by imposing statutory duties of care on employers and employees.

The Minimum Wages Act, 2002 fixes minimum wages as follows: (a) If employee is employed by week—$150; (b) if employee is employed by day—$30; (c) if employee is employed by hour—$4.

See also categories 9 Dispute Resolution, topic Alternative Dispute Resolution; Health.

12 ENVIRONMENT

12.01 CONSERVATION:

The Conservation and Protection of the Physical Landscape of The Bahamas Act 1997 provides for application to be made to Minister responsible for Physical Planning and Land Use for permit for excavation and landfill operations in relation to inter alia work connected with canal, bulkhead or pier and removal of sand, earth or stones from any part of beach or seashore. Act also provides that Minister may by order declare certain trees to be protected trees for purposes of the Act.

The Antiquities, Monuments and Museum Act, 1998 provides for preservation, conservation, restoration, study and presentation of sites and objects of historical, anthropological, archaeological and palaeontological interest and to establish national museum.

See also category 22 Property, topic 22.06 Real Property.

12.02 ENVIRONMENTAL REGULATION:

Environmental Health Act provides for regulations to be made by Minister of Health and Environment to give effect to provisions of Act dealing with topics of air and water pollution, sanitation and waste disposal. Act also provides for establishment of Department of

Environmental Health Services to implement provisions of Act and Regulations thereunder, and Environmental Health Board to advise on matters concerning environment referred to it by Minister.

13 ESTATES AND TRUSTS

13.01 DEATH:

There is no statutory presumption of death of an absentee. Seven years continuous absence under certain circumstances is a defence to bigamy. By Presumption of Death Act it is provided that persons upon whose lives estates depend shall be accounted as naturally dead if they "remain beyond the seas, or elsewhere absent themselves in this realm" for seven years. Evidence that a person has been absent and not heard of for upwards of seven years by those who would be likely to hear of him if living, may raise the presumption that he is dead; but there is no presumption that he died at any particular time. There is no presumption of law as to survivorship among persons perishing by a common calamity, nor that they all died at the same time. The question is one of fact and the evidence may leave the matter in mere conjecture.

Actions for Death.

By Fatal Accidents Act an executor or administrator of a deceased person or other interested party may, for benefit of wife, husband, parent, and child or other near relative bring an action for damages against party causing death of such person. Such action must be brought within six months on behalf of deceased or otherwise within three years of such death. Further, under Survival of Action Act, cause of action survives for benefit of deceased person's estate and damages are recoverable for benefit of estate. Such action, which is in addition to any right of action under Fatal Accidents Act, must be instituted within three years of death of deceased person.

Death certificate may be obtained from the Registrar General, Registry of Records, Nassau, fee, B$10.00.

13.02 DECEDENTS' ESTATES:

See topics 13.03 Descent and Distribution, Executors and Administrators, Wills; category 22 Property.

13.03 DESCENT AND DISTRIBUTION:

The Inheritance Act, 2002 repeals previous Act relating to property of deceased persons. With regard to real and personal estate of every person dying after commencement of Act following have been abolished: (a) descent to heir; (b) tenancy by curtesy; (c) dower.

Distribution of estate is made in proportionate values amongst surviving spouse and issue, with children of issue or relatives of intestate taking per stirpes that portion which their parent would have inherited had that parent survived intestate.

Act also makes provisions for dependants. Court may make provisions for minor issue, incapacitated children and others of testator where will of deceased "is not such as to make reasonable financial provision" for applicant.

First Schedule of Act deals at length with "rights of surviving spouse as respects the matrimonial home".

The Widows of Intestates Act and Statute of Distributions Act are repealed.

See also category 22 Property, topic 22.01 Absentees.

13.04 EXECUTORS AND ADMINISTRATORS:

An executor is appointed by the will and an administrator by the Court. Probate of a will is not to be granted for at least 14 days after the death. Letters of administration are granted after a notice of the application has been published in three successive issues of the official newspaper; the hearing of the application may not be earlier than 14 days from the date of the notice.

The Supreme Court has power to seal with the seal of the probate or letters of administration granted by a court of probate in Great Britain or in any part of British Commonwealth, or in U.S.A.

The Supreme Court Act 1996 makes provisions whereby person claiming to be entitled to bank deposits being held to credit of deceased person can show evidence of such entitlement to bank manager and at discretion of bank need not produce probate or letters of administration.

The Administration of Estates Act, 2002 vests in personal representatives who hold as trustees for persons entitled thereto real and personal property (including chattels real). One year is usually allowed to personal representatives for winding up estate. Act deals with powers of personal representatives to sell and act as trustees, administration of assets and charges on property of estate. Real and personal estate are assets for payment of debts.

Personal representatives are entitled to remuneration as fixed by will of deceased or in case no such remuneration is fixed or deceased died intestate sum is determined by Registrar but in no case exceeding following: (1) where total value of property does not exceed $10,000, 3% on amount of all receipts, and (2) where total value of property exceeds $10,000, 3% on $10,000 and 2% on amount of all receipts over and above $10,000.

Probate Duty.

See category 23 Taxation, topic Taxes.

See also topic 13.01 Death.

13.05 TRUSTS:

The Trustee Act, 1998 repeals Trustee Act, 1893 and Variation of Trusts Act, 1961. Act maintains many of provisions of repealed legislation but in addition provides, inter alia, for settlor to retain number of powers without invalidating trust instrument, disclosure of certain information by trustees to beneficiaries with vested interest and, for first time, concept of protector has been recognised by statute which also defines powers and duties attached thereto. Also, in relation to decisions to be made by trustees, new Act provides for action based upon majority decision whereas under repealed legislation, in absence of any express provision contained in trust instrument, action had to based on unanimity.

The Judicial Trustees Act 1969 provides power for Supreme Court to appoint a trustee. The Public Trustee Act 1970 establishes office of Public Trustee.

Purpose Trust Act, 2004 allows for creation of trusts for purposes (charitable or non-charitable), or both. Such trusts provide for flexibility in estate planning and commercial transactions. Trustee must be licensed bank or trust company or licensed as financial and corporate service provider.

The Trust (Choice of Governing Law) Act, 1989 provides for choice of governing law in creation of trusts and for matters connected therewith. Settlor, whether or not resident or domiciled in The Bahamas, may expressly declare in trust instrument that laws of The Bahamas shall be governing law of trust. No disposition of property held on trust that is valid under laws of

The Bahamas can be set aside by reference to foreign law.

13.06 WILLS:

The Wills Act, 2002 repeals previous legislation.

Testamentary Capacity.

No will made by any person under age of 18 years is valid.

Testamentary Disposition.

Any property real or personal is capable of being devised or bequeathed by will.

Execution.

A will executed within The Bahamas must be signed by testator in presence of two attesting witnesses present at same time. Exception is made in case of soldiers and sailors on active service. In relation to wills executed outside The Bahamas, will shall be treated as properly executed if its execution conforms to internal law in force in country where at time of execution or of testator's death he was domiciled or had his habitual residence, or in state of which, at either of those times he was national.

Revocation.

A will is revoked by marriage. But where it appears from will that at time it was made testator was expecting to be married to particular person and that he intended that will should not be revoked by marriage, then will shall not be revoked by marriage.

Gift to an attesting witness is void.

Construction.

A devise without any words of limitation must be construed to pass the fee simple or the whole other estate or interest in such real estate which the testator had power to dispose of by will, unless a contrary intention appears by the will.

Probate Duty.

Nil. See category 23 Taxation, topic Taxes.

See also category 22 Property, topic 22.01 Absentees, subhead Escheat.

14 FAMILY

14.01 ADOPTION:

Adoption of Children Act, 1954, and Rules made under Act provide that order may be given by Supreme Court for adoption of any unmarried infant within jurisdiction provided application made in prescribed manner. Spouses may make joint application; if one spouse applies, order will not usually be made without written consent of other. Consent of parent or guardian is required unless such party cannot be found, has neglected or ill-treated infant, or withholds consent unreasonably. Infant should usually be at least six weeks old. Order when given confers on adopter all legal rights and responsibilities of parent vis-a-vis infant, including right to take under dispositions of property made after order.

14.02 DIVORCE:

By The Supreme Court Act (Bahamas), the Chief Justice is the Judge Ordinary of the

Divorce and Matrimonial Side of the Court; and subject to any rules made under the Act and to the laws in force in the Bahamas, the jurisdiction of the Court of Probate, Divorce and Matrimonial Causes for the time being in force in England, is deemed to be extended to the Bahamas. (See England Law Digest.) Under provisions of Matrimonial Causes Act, either husband or wife must prove against other since date of marriage either (a) Adultery, (b) cruelty, (c) desertion—two years, (d) separation for continuous period of five years, or (e) homosexuality, sodomy or bestiality. Wife may petition also on ground of rape during marriage. Act contains provisions relating, inter alia, to void and voidable marriages, property settlements, custody maintenance and education of children and for recognition of foreign decrees in certain cases.

14.03 HUSBAND AND WIFE:

By The Married Women's Property Act (Bahamas), a married woman is capable of holding property and of disposing by will or otherwise of any real or personal property as her separate property in the same manner as if she were a feme sole. The Act provides that a married woman may convey any real estate to her husband, and a husband may convey any real estate to his wife, alone or jointly with another person. The separate property of a married woman which she is restrained from anticipating is not available to satisfy contracts entered into by her.

No community property laws exist.

14.04 INFANCY:

Age of majority in most cases is 18 for both sexes. Parents are not normally responsible for torts of their children, who themselves remain liable.

Marriage.

Consent is generally required from parents. See topic 14.05 Marriage.

Contracts.

By Infants Relief Act, most contracts, except for sale of necessaries are void. Certain other contracts, involving proprietary rights become binding upon majority unless repudiated within reasonable time.

Guardianship.

Guardianship and Custody of Infants Act 1961 governs.

Adoption.

See topic 14.01 Adoption.

Limitation of Actions.

Infancy is a bar to respective periods of limitation of actions.

See also category 13 Estates and Trusts, topic 13.06 Wills.

The Status of Children Act, 2002 provides inter alia that relationship between every person and his mother and father shall be determined irrespective of whether father and mother are or have been married to each other. Legitimacy Act is repealed.

Also see category 13 Estates and Trusts, topic 13.03 Descent and Distribution.

14.05 MARRIAGE:

Depending on the circumstances persons under age not being widowers or widows must have the consent of both parents or one of them or of a legal custodian or of the surviving parent and guardian or guardian alone; in the event that such consent cannot be obtained of the Chief Justice.

The Marriage Act (Bahamas) provides that marriage may be solemnized under authority of: (1) Registrar's certificate or registrar's certificates; (2) marriage officer's certificate or marriage officer's certificates; (3) license from Registar General. Fee of B$40 is charged for such license.

Prohibited Marriages.

Under provisions of The Marriage Act marriages within prohibited degrees of consanguinity or affinity according to law of Bahamas are null and void. However, no law has been promulgated in The Bahamas setting forth prohibited degrees.

There are no restrictions on marriage with a foreigner.

See also topic 14.03 Husband and Wife.

14.06 MARRIED WOMEN:

See topics 14.03 Husband and Wife; categories 10 Documents and Records, topic Acknowledgments; Estates and Trusts, topic Descent and Distribution; Property, topic Dower.

15 FOREIGN TRADE AND COMMERCE

15.01 CUSTOMS DUTIES:

See topic 15.04 Foreign Exchange, Investment and Trade; category 23 Taxation, topic Taxes.

15.02 EXCHANGE CONTROL:

See topic 15.04 Foreign Exchange, Investment and Trade.

15.03 EXPORTS:

The Export Manufacturing Industries Encouragement Act, 1989 makes provision for establishment and development of export manufacturing industries and for matters connected therewith. Export manufacturer is one who annually exports at least 95% of output. Both manufacturer and product require ministerial approval. Raw materials and machinery may be imported free of customs duty under bond by approved export manufacturer.

15.04 FOREIGN EXCHANGE, INVESTMENT AND TRADE:

Purchase and conversion of foreign currency and trade are controlled by Central Bank of Bahamas acting in liaison with appropriate Government Ministry. All foreign businesses operating in Bahamas and foreign capital used for investment in Bahamas should be registered with Central Bank of Bahamas and “approved” status for such investment sought. Such status broadly speaking allows repatriation of immediate income and eventual capital proceeds and profit. Such investments, whether or not operated through company or corporation, will receive “resident” or “nonresident” status according to their degree of involvement with Bahamas. Financial transactions of resident businesses, companies etc., should normally be carried out with Bahamian dollars, and vice versa, but exceptions are sometimes made with approval of Exchange Control Department of Central Bank of The Bahamas. Persons living but not working in The Bahamas for less than one year from date of arrival are treated as nonresident as are holders of Certificates of Permanent Residence without right to work. Other foreigners living in

The Bahamas for less than ten years are treated as temporary residents.

The Bahamas Investment Incentives Act 1991 establishes various zones for “approved developer” or licensee to be granted certain exceptions and fiscal incentives in respect of certain manufacturing, industrial or other business undertakings or enterprises.

In addition, Bahamas Government has enacted Investment Programme designed to attract capital and technology. Under this scheme approved persons will be guaranteed tax exemptions and will be granted permanent residence status. It is also designed to attract persons in sphere of the arts. *Note:* This programme is presently under review.

15.05 FOREIGN INVESTMENTS:

See topic 15.04 Foreign Exchange, Investment and Trade.

15.06 FOREIGN TRADE REGULATIONS:

See topic 15.04 Foreign Exchange, Investment and Trade.

16 HEALTH

16.01 FOOD AND DRUGS:

Food and Drug Regulation and Control is managed by Ministry of Health and the Environment, Ministry of Commerce, Trade and Agriculture and Department of Environmental Health. In tandem, these agencies control import, export and manufacture, distribution, sale and use of foods, plant materials and drugs. Relevant pieces of legislation are Dangerous Drugs Act, which regulates importation, exportation, manufacture, sale and use of opium and other dangerous drugs; Plant Protection Act, which regulates importation of plant material; Health Services Act, which makes provision for securing public health; Environmental Health Act, which promotes conservation and maintenance of environment in interest of health, for proper sanitation in matters of food and drinks generally, and for provision and control of services, activities and other matters connected therewith or incidental thereto; Food Act, which regulates manufacture of food, to provide for quality control, testing and certification, for food processing and preservation and for matters incidental thereto and connected therewith; Pharmacy Act, which is Act that provides for licensing of pharmacists and for control of sale and distribution of drugs and poisons and Export Control Regulations Act which provides for control of exports from The Bahamas.

It is responsibility of these Ministries and Department to regulate and ensure compliance in all matters and activities relating to general health as well as to establish minimum standards for population.

License is required to import any food or drug and record is kept by relevant Ministry or Department in register. Every drug dispensed from medical prescription should be placed in box, bottle, vessel, wrapper or other receptacle bearing label giving instructions as to how it is to be used according to directions furnished by medical practitioner who has prescribed it. Poisons, when sold by wholesaler or retailer should be in box, bottle, vessel, wrapper, cover, in which such poison is contained, and should be distinctly labeled with red label bearing name of article and word poison with name and address of seller of poison.

Also see categories 12 Environment, topic Environmental Regulation; Criminal Law; Employment, topic Labour Relations, subhead The Health and Safety at Work Act, 2002.

17 IMMIGRATION

17.01 ALIENS:

The Imperial Statutes, the British Nationality Act, 1948, defines an alien, but such definition was intended essentially as a part of British law and position is now different in the Bahamas, following Independence on 10th July, 1973, (see category 1 Introduction, topic Constitution and Government). Basically, alien is now anybody who is not Bahamian, and Bahamian is essentially person born in The Bahamas or born elsewhere but of Bahamian parents. Provisions also exist under constitution for other persons to apply to become Bahamian citizens. Further provisions allow for status of permanent resident, either with or without automatic right to work. This status covers broadly three categories of persons: those who because of their long and close connection with Bahamas were formerly known as “Belongers”; spouses of Bahamian citizens and those who specifically apply for and are granted such status.

Under International Persons Landholding Act (which replaced former Immovable Property [Acquisition by Foreign Persons] Act 1981), acquisitions of real property by foreign persons do not require permit, but must be registered in following circumstances: (1) Where property is to be used by acquirer as single family dwelling and, in case of undeveloped land, does not result in him owning in excess of five contiguous acres; (2) where acquirer is permanent resident; (3) where acquisition is by devise or inheritance. Alien is not eligible to hold any public office or to vote in any election. Company incorporated under Bahamas Companies Act may be composed entirely of foreign shareholders, directors and officers.

Corporations Owned or Controlled by Aliens.

See category 2 Business Organizations, topic 2.02 Corporations.

17.02 IMMIGRATION:

See topic 17.01 Aliens.

18 INSURANCE

18.01 INSURANCE COMPANIES:

The Insurance Act 2005 regulates carrying on of insurance business in The Bahamas. Act makes provision for capital and solvency requirements of insurance companies and provides for establishment of regulatory authority.

Motor Cars.

Wide forms of insurance are possible and usual, though only third party risk is compulsory.

19 INTELLECTUAL PROPERTY

19.01 COPYRIGHT:

The Copyright Act, 1998 encompasses many provisions comparable to legislation applicable in U.S. The Bahamas is now member of The Berne Copyright Union and The Universal Copyright Convention.

19.02 PATENTS:

Under Industrial Property Act 1965 and Industrial Property Rules 1967, Registrar General has power to direct issue of letters patent to an applicant which shall extend to Bahamas.

Application for grant of a patent according to forms in schedule to Act is directed to Registrar General and is accompanied by specifications of invention and filed at Industrial Property Department at Registry of Records.

Every person obtaining letters patent may make, use, exercise, and vend within Bahamas the invention described in specification for a period of four years. Renewal of privileges is annual thereafter for a total period of 15 years.

Act generally consolidates and amends law relating to patents for inventions and trademarks, and provides for protection of industrial designs, and penalizes application of false trade descriptions to goods.

19.03 TRADEMARKS AND TRADENAMES:

Trademarks.

The Trade Marks Act (Bahamas) is in effect largely based on the Imperial Trade Marks Act, 1905. The Imperial Trade Marks Act, 1937, has not been extended to the Bahama Islands.

The Trade Marks Amendment Act 1959 (Bahamas) provides in certain instances that a person other than the proprietor of a trade mark may be registered as a registered user thereof in respect of all or any of the goods in respect of which it is registered (otherwise than as a defensive trade mark) and either with or without conditions or restrictions. The Act also provides for defensive registration of well known trade marks consisting of an invented word or invented words.

The Registrar General keeps at the Registry of Records a register of trademarks. Appeals from any decision of the Registrar General lie to the Supreme Court.

Tradenames.

The common law applies. A man is not allowed to use from dishonest motives a tradename used by another.

The Registration of Business Names Act, 1989 provides for registration of firms, individuals and corporations carrying on business under business names.

See also topic 19.02 Patents.

20 LEGAL PROFESSION

20.01 ATTORNEYS AND COUNSELORS:

The Legal Profession Act, 1992 provides mechanism for regulation of profession's practice conduct etiquette and discipline and lays down that Bahamian subjects may, if duly qualified under Act, apply to Bar Council of Bahamas for admittance to practice, and if successful are admitted by Chief Justice, and have their names enrolled. Twelve month term of pupillage is normally required. Attorneys have lien over their clients' papers for unpaid fees.

Person qualified as a barrister or solicitor in any British Commonwealth country and having right to work in Bahamas may be employed by attorney as associate, and assist generally in attorney's practice. Regulations provide for registration of such persons.

21 MORTGAGES

21.01 CHATTEL MORTGAGES:

A mortgage of personal property should be by assignment by deed with a proviso of redemption on payment of the principal and interest secured. As recording of any document in the Registry of Records affords priority of charge, all mortgages should be at once lodged for record with the Registrar General, although recording is not essential to validity of a document.

21.02 MORTGAGES:

Registration of mortgages of both real and personal property gives priority of title. An equitable mortgage of real property can be created by deposit of the title deeds with an accompanying memorandum.

First legal mortgage of real property operates to vest legal estate in mortgagee.

Stamp duty on mortgages amounts to 1% of sum assured.

22 PROPERTY

22.01 ABSENTEES:

In absence abroad a person may generally delegate authority to any person of full capacity. Usual instrument is power of attorney, which may be special or general.

22.02 CONVEYANCES:

See topic 22.03 Deeds.

22.03 DEEDS:

Execution.

A deed should be signed, sealed and delivered by the person executing the same in the presence of at least one witness.

Recording of deeds in The Registry of Records is not compulsory but affords priority of title.

To be recorded in The Registry of Records an affidavit of proof has to be sworn to by attesting witness (see category 10 Documents and Records, topic 10.02 Affidavits) and stamped, if not stampable under specific head, deeds bear duty of B$10.

Stamp Duty on Conveyances.

Duty is normally payable on ad valorem basis on value of real property and any chattels passing under transaction as follows: Consideration of up to $20,000, 2% of consideration; consideration of over $20,000 and up to $50,000, 4%; of over $50,000 and up to $100,000, 6%; over $100,000 and up to $250,000, 8%; over $250,000, 10%.

In absence of agreement to contrary, duty to pay stamp duty rests jointly and severally upon parties to instrument or transaction. Where no beneficial interest passes or conveyance is through trust duty may be mitigated.

Short forms of conveyances, mortgages, and other deeds are given in the Schedules to The Conveyancing and Law of Property Act (Bahamas).

22.04 PERPETUITIES:

Perpetuities Act of 1995 modifies rule against perpetuities to provide that disposition of non-vested interest in property becomes void if interest does not vest within perpetuity period defined by Act, being lives of persons living plus 21 years or, if none specified, 150 years. Act also introduces “wait and see” principle. Rule against perpetuities does not apply to purpose trusts.

22.05 POWERS OF ATTORNEY:

(See England Law Digest.) The Powers of Attorney Act, 1992 came into force in 1996 and repeals and reenacts earlier statutory provisions governing powers of attorney contained in Part VIII of Conveyancing and Law of Property Act. Act also introduces concept of enduring powers of attorney.

22.06 REAL PROPERTY:

All real property in the Bahamas is held in fee simple, that is to say the freeholder holds feudally of the Crown, who is the supreme owner.

Property may be conveyed or devised for any interest recognized by the common law or equity. An estate tail is rarely if ever created in The Bahamas, and if so created may be enlarged to estate in fee simple by virtue of The Estates Tail Barring Act (Bahamas).

Adverse possession for 60 years against the Crown, and for 20 years, with certain exceptions, against an individual, establishes a good possessory title.

The Imperial Act, the Law of Property Act 1925, is not in effect in the Bahamas.

Condominium Units are governed by Law of Property and Conveyancing (Condominium) Acts.

The Rent Control Act, 1975, applies to any dwelling where value does not exceed B$25,000. Rent payable for any dwelling subject to Act shall not exceed 20% per annum of its value as determined under Act with additional permitted maximum if dwelling is let furnished. Presently, rent payable has been established at 15%.

See also categories 2 Business Organizations, topic Corporations, subhead Foreign Companies; Citizenship, topic Aliens; and categories 12 Environment; Foreign Trade and Commerce, topic Foreign Exchange, Investment and Trade; and Estates and Trusts, topic Trusts.

23 TAXATION

23.01 ADMINISTRATION:

None.

23.02 ALCOHOL, BEVERAGES AND TOBACCO TAXES:

Tax is charged to breweries on production of beer. Liquor is imported free of imposition of duty.

23.03 CUSTOMS DUTY AND TAX:

Chief source of revenue is from import duties which are charged on most items in accordance with published scale ad valorem.

23.04 EMPLOYMENT TAXES:

The National Insurance Act, 1972, lays down provisions for weekly contribution by employers and employees, and self-employed persons, and benefits payable to retired persons, sick or injured persons, widows and women during childbirth.

23.05 ESTATE TAX:

None.

23.06 EXCISE TAXES:

None.

23.07 FOREIGN INVESTMENT TAXES:

None.

23.08 GAMBLING AND ENTERTAINMENT TAXES:

The Casino Taxation Act 1995 provides for annual tax divided into three categories based on floor space; $50,000, $100,000 and $200,000. Act also legislates for six categories of taxes based on winnings.

Also see category 3 Business Regulation and Commerce, topic 3.08 Licenses, Business and Professional.

23.09 GASOLINE AND SPECIAL FUELS TAXES:

Tax on gasoline is charged to suppliers.

23.10 GIFT TAX:

None.

23.11 HOTEL AND RESTAURANT TAXES:

The Hotels Act provides for hotel guest tax of 4% payable on room rate.

23.12 INCOME TAX:

None.

23.13 INHERITANCE TAX:

None.

23.14 LOCAL GOVERNMENT TAXES:

None.

23.15 MOTOR VEHICLE TAXES:

See category 24 Transportation, topic 24.01 Motor Vehicles.

23.16 PROPERTY TAXES:

There is property tax which has been extended to cover all of Bahamas and both developed and undeveloped land; property owned by non-Bahamians is particularly affected. Rate of tax for owner-occupied houses is: (a) on first $500,000 of assessed value on which tax is payable ¾% per annum, (b) on assessed value in excess of $500,000, 1% per annum. Rate of tax for property used for commercial or industrial purpose is: (a) On first $500,000 of assessed value 1% per annum, (b) on assessed value in excess of $500,000 2% per annum. There is exemption for owner-occupation in respect of first $250,000 of assessed value.

23.17 SALES TAX:

None.

23.18 STAMP TAX:

In addition to other specific duties (see categories 2 Business Organizations, topic Corporations, Property, topic Deeds and Mortgages, topic Mortgages) various stamp duties are imposed. Duty on debentures is B$4 per B$1,000 assured.

There is usually 7% stamp tax of c.i.f. value of imported goods requiring entry.

23.19 TAX INCENTIVES:

In order to encourage development of Freeport, Grand Bahama, Government has granted certain concessions to The Grand Bahama Port Authority and its licensees providing for certain exemptions from customs duties and taxation.

The Hotels Encouragement Act 1954 (as amended) provides for refund of customs and stamp duties on certain materials used in construction and furnishing of hotels and for exemption from certain taxes.

The Industries Encouragement Act 1970 provides incentives for manufacturers of approved products including duty-free importation of machinery and raw materials as well as tax exemptions.

The Export Manufacturing Industries Act, 1989 allows for persons to apply to be deemed approved export manufacturer and to therefore avail of duty free exemptions on importation of raw materials and machinery and also relief from real property tax and other taxes.

Also see category 15 Foreign Trade and Commerce, topic 15.04 Foreign Exchange, Investment and Trade.

Also see category 2 Business Organizations, topic 2.02 Corporations.

23.20 TREATIES AND AGREEMENTS:

The Bahamas is member of Caribbean Community and Common Market (CARICOM), Caribbean Basin Initiative (CBI), Canadian sponsored CARIBCAN and Lomé IV Convention agreement between African-Caribbean Pacific states and European Union.

Bahamas signed Tax Information Exchange Agreement with U.S. on 24th Jan. 2002.

23.21 VALUE ADDED TAX:

None.

23.22 WEALTH TAX:

None.

24 TRANSPORTATION

24.01 MOTOR VEHICLES:

Driver's license and motor car license are required.

A bona fide visitor may import an automobile into the Bahamas for a period of not more than six months free of duty. However, at their discretion H.M. Customs can require a cash deposit of the amount of the duty which is refundable at the time of exportation within the six months period.

Having entered the Bahamas the automobile should not be driven until it has been licensed. As a prerequisite to being licensed a Certificate of Insurance or insurance clearance must be obtained locally. The minimum insurance required by a resident is unlimited third party (bodily injury) risks but in the case of a bona fide visitor The Road Traffic Authority may exercise a discretion.

The procedure normally followed by visitors bringing automobiles to the Bahamas is to have their own insurance policies endorsed by the insuring companies for the purpose of extending the validity of such policies to the Bahamas. The Road Traffic Authority here in exercise of its discretion referred to earlier may accept such endorsed policies or require a Certificate of Insurance from local Authorized Agents.

License or registration fees are based upon square footage of vehicle, minimum fee being B$75 per annum for automobiles of up to and including 60 square feet. Over 60 square feet, there is a further charge according to size of automobile, maximum fee being B$360. It will be noted that these are annual fees. Annual drivers' license costs B$16.25 throughout Bahamas, as does compulsory Road Traffic Inspection Certificate.

Visitors may use valid American, Canadian and International Drivers licenses (providing holder thereof is not under 17 years of age) until they expire or for three months whichever is the shorter period.

Import Duty.

There is import duty on motor vehicles imported which fluctuates, depending on value of vehicle between 45% and 65%. See category 23 Taxation, topic Taxes, subhead Import Duties. In addition, 7% ad and valorem stamp duty is payable.

See also categories 3 Business Regulation and Commerce, topic Contracts, subhead Hire-Purchase; Insurance, topic Insurance Companies.

24.02 SHIPPING:

The Merchant Shipping Act, 1976 (Bahamas) as am'd, came into operation on Dec. 31st, 1976. In it provision is made for registration of ships; for control, regulation and orderly development of merchant shipping; for proper qualification of persons employed in sea service; for regulation of terms and conditions of service of persons so employed; and for matters connected with and incidental to foregoing.

The Carriage of Goods by Sea Act (Bahamas) makes uniform the law with respect to the carriage of goods by sea.

The Pilotage Act (Bahamas) regulates the powers and duties of the Pilotage Board and matters relating to pilots and pilotage.

The Bahamas Maritime Authority (Created by The Bahamas Maritime Authority Act, 1995) is responsible, inter alia, for regulation, control and administration of all matters related to merchant shipping as provided for under Merchant Shipping Act (including collection of all registration, annual and other fees and moneys) or any other law. Authority, a corporate body, comprises Chairman, Deputy Chairman and five other members appointed by Minister responsible for maritime affairs. It is presided over by Director of Maritime Affairs (who has general managing direction of authority and superintendence of ships registered in Bahamas), Deputy Directors and staff recruited from without Civil Service, all of whom are employees of Authority. Act prescribes relationship between Authority and Minister.

See also category 4 Citizenship, topic 4.01 Aliens.

25 TREATIES AND CONVENTIONS

25.01 TREATIES:

Bahamas is signatory to The Hague Convention Abolishing the Requirement of Legalisation for Foreign Public Documents.

See also England Law Digest.

1

BELGIUM LAW DIGEST

—Scope —

Revised for 2006 edition by

UNIVERSITÉ LIBRE DE BRUXELLES

(Abbreviations used are: C. C., Civil Code; Comm. C., Commercial Code; Const., Constitution; E. C., European Community; E. E. C., European Economic Community; Hyp., Law on Liens and Mortgages; Cons. Comp., Consolidated Laws on Companies; Jud. C., Judicial Code; R. D., Royal Decree.)

Belgium is member of EU. See also European Union Law Digest.

Note: This Digest not updated for 2007 and 2008 editions.

1 INTRODUCTION

1.01 CURRENCY:

Belgium is member of International Monetary Fund and of European Monetary System.

Since Jan. 1, 2002, EURO ([Euro]) is single currency in Belgium. (Belgian Law of Dec. 10, 2001 and EC Regulation No. 974/98 of May 3, 1998).

The National Bank of Belgium, a private corporation of which the State owns 50%, has the exclusive right to issue banknotes. These are legal tender.

Foreign Exchange.

Exchange control was organized by R. D. of Oct. 6, 1944 on a strict basis, submitting all payments to and transactions with foreigners to authorization of the Belgo-Luxemburg Exchange Institute. Controls were progressively relaxed and at present liberty of exchange dealings is in practice complete. Certain disclosure requirements still exist concerning nature and currency of payment. Aliens travelling in Belgium may freely import and export foreign or Belgian currency, subject to money laundering regulations.

See also category 13 Foreign Trade and Commerce, topic Foreign Trade and 13.04

Foreign Investment.

1.02 GOVERNMENT AND LEGAL SYSTEM:

Belgium is a hereditary constitutional Kingdom. The Belgian constitution was promulgated Feb. 7, 1831, and has, on various occasions, been amended. It is based on Montesquieu's theory of separation of power and English constitutional tradition.

Since 1993 Belgium is federal state. Belgium consists of three Communities and three Regions. Communities are competent in educational, cultural matters and person-related matters. Regions are competent in economic, environmental, zoning law matters and in some very limited tax matters.

On federal level, Legislative Power is exercised by Parliament, consisting of Chamber of Representatives, elected by universal suffrage, and federal Senate, which is only partially elected by universal suffrage. Senate has limited legislatory powers. Executive Power is vested in King in ministry.

Each federate entity has its own Legislature, elected by universal suffrage, and its own Executive.

Judiciary.

Judges are appointed by King for lifetime. They are independent of administration and Parliament. Court of Cassation is highest ordinary law court. Judicial review of administrative action is exercised by Council of State. Court of Arbitration is constitutional court.

1.03 HOLIDAYS:

Fixed and regular legal holidays are: New Year's Day; Easter Monday; May 1; Ascension Day; Whit Monday; July 21; Aug. 15; Nov. 1 and 11; Christmas Day.

Saturdays are treated as legal holidays for presentation and protest of bills and for periods for bringing judicial action.

1.04 LANGUAGE:

Official languages in Belgium are French, Dutch and German. German has official status in one district only. Use of language in labor relations and legally required commercial documents is regulated on basis of place of business.

1.05 OFFICE HOURS AND TIME ZONE:

Belgium is in the +01:00 GMT time zone. Office hours are generally from 9 a.m. to 5 p.m.

2 BUSINESS ORGANIZATIONS

2.01 AGENCY:

On Apr. 13, 1995, Law on Commercial Agency Agreement (“Law”) was enacted and entered into force on June 12, 1995.

Belgian law therefore now distinguishes between agency agreements in general and commercial agency agreements.

Belgian Civil Code provides for general rules applying to agency agreements.

Under Civil Code, either general or specific authority can be given. General power of attorney only allows acts of management; for acts of property specific power of attorney is required. Agent cannot bind principal outside scope of his power, except where principal subsequently ratifies acts performed by agent or where there is apparent authority.

Agent is liable for fraud and negligence (duty of care being however construed less strict if agency is performed for free). Vis-à-vis third parties, agent cannot be sued personally unless he has acted outside scope of his powers.

Agent is required to perform his mandate as long as he has not been revoked. He is liable for any damage caused by his nonperformance.

Principal is required to comply with undertakings entered into by agent within scope of his powers, or when acts are subsequently ratified or where there is apparent authority. He must reimburse agent's expenses and pay commission if agreed, even in case of failure of agent when such failure is not due to agent's fault. He must indemnify agent for losses incurred when they are not due to any lack of care. He also owes interest on any advances made by agent.

Noncommercial agents are entitled to remuneration or commission only pursuant to specific agreement, except in cases where remuneration is common practice. Contrary to principle of contractual freedom, Belgian case law allows courts to reduce agreed commissions, when excessive.

Revocation of noncommercial agency can be made at any time unless otherwise provided in written power of attorney. Such revocation is effective when notified to persons contracting with agent. Agency is likewise terminated by death, bankruptcy or insanity of either principal or agent.

Law implements E.E.C. Directive No. 86/653 of Dec. 18, 1986 on coordination of laws of Member States relating to self-employed commercial agents. Commercial agency agreement, within meaning of Law, is agreement in which one party, principal, charges other party, commercial agent, on permanent basis and in exchange for remuneration, with negotiation and possible conclusion of transactions in name and on behalf of principal. Commercial agent acts on independent basis. Scope of law is broad. It applies not only to independent commercial agent trading in goods but to any such agent acting as intermediary for any other kind of transactions. Excluded are commercial agents who do not regularly act as intermediaries. Except when otherwise provided, law has mandatory character.

Written commercial agency agreements are not required except to enter into commercial agency agreements for definite period. Commercial agency agreements for definite duration which are continued after their expiration are deemed to be agreements for indefinite duration. If commercial agency agreements are for indefinite duration or for definite duration with possibility of termination before normal expiry date, early termination is possible by either party by giving notice of termination of one month if agreement is in its first year, two months if agreement is in its second year and so on. As of sixth year, notice period becomes six months maximum. Shorter notice periods are not valid. Longer notice periods may be agreed to provided that notice to be served by principal is not shorter than notice to be served by commercial agent. Termination notice is given by written document delivered to other party, indicating beginning and duration of notice period. It may also be given by registered letter or bailiff writ. If notice is sent by registered letter, it only has effect on third business day as of date of sending. If party fails to give sufficient prior notice, compensation will have to be paid.

Commercial agency agreements can be terminated without notice in exceptional circumstances which make any further professional cooperation between principal and commercial agent impossible, or when one party seriously defaults in implementing his obligations. Such termination is only possible during period of seven business days as from occurrence of circumstances or defaults justifying early termination.

Commercial agents may receive fixed remuneration, commissions or combination of both, according to will of contracting parties. Commissions become due when principal has performed agreement or should have done so in accordance with terms of agreement concluded with third party, or when third contracting party implemented his obligations. Principal must give to agent state of commissions due no later than on last day of month following quarter during which commission became due. Agent has right to verify amount of commissions due, and may ask to check accounts of principal for that purpose. Agent can only agree to waive his right to commission in specific cases provided by law.

Law allows that commercial agent guarantees, under certain conditions and within certain limits, obligations of third contracting party.

After termination of commercial agency agreement, commercial agent is entitled to indemnity when he has brought new clients to principal or when he has increased volume of trade with existing clients with substantial advantages for principal after termination (this is presumed when agreement includes noncompetition clause). Indemnity is equal to maximum one year of remuneration calculated on basis of average remunerations for last five years. No indemnity is due when principal terminated agreement for serious fault committed by commercial agent, when commercial agent terminated agreement (unless for cause due to principal or because of his age, invalidity or illness), or when commercial agent or his successors transferred their rights and obligations under agreement to third party. Indemnity must be claimed within one year after termination. If indemnity is not sufficient to cover real damage suffered by agent due to termination of agreement, agent can claim additional damages. Contractual derogations to rules on termination indemnity are only possible after termination.

Law further allows written noncompetition clauses in commercial agency agreement provided they cover only type of activities handled by agent, are limited to specific group of clients or specific territory and do not exceed six months after termination. Said clauses do not apply when commercial agency agreement is terminated by principal without cause or by commercial agent with specific cause of termination. Damages in case of violation of noncompetition clause are limited to one-year remuneration unless principal proves higher damage.

Claims resulting from commercial agency agreement expire, pursuant to law, five years after relevant facts and, in any case, one year after expiration of agreement.

Unless international treaties provide otherwise, law applies to any activity of commercial agents having their main establishment in Belgium, Belgian courts having jurisdiction for any dispute relating to such activity.

Law applies to all commercial agency agreements even if they were signed and effective before entry into force of law. It does not apply, however, to obligations resulting from commercial agency agreements submitted to courts before entry into force of law.

Other forms of agents include: commission agents acting in their own name and personally liable vis-à-vis third parties which are subject to rules of Commercial Code and specific customs; they are also subject to rules of Civil Code described above; stock-broking companies, insurance brokers, real estate agents, bank agents etc. are also subject to specific regulations.

See also category 3 Business Regulation and Commerce, topic 3.10 Sales.

2.02 ASSOCIATIONS:

National or international nonprofit associations can be incorporated with limited liability by publication of articles.

There is also possible incorporation by Royal Decree for international scientific associations.

Private or public foundations can be incorporated with limited liability further to law of May 2, 2002.

2.03 CORPORATIONS:

See topics Stock Corporations, 2.08 Partnerships.

2.04 ECONOMIC INTEREST GROUPINGS:

Two company structures have recently appeared in Belgian law: European Economic Interest Grouping and Belgian Economic Interest Grouping.

Economic Interest Groupings can be formed through public or private deed by legal entities or individuals. European Economic Interest Grouping should have members from different E.E.C. states: (European) Economic Interest Grouping has to be registered with Register of Commerce only if it engages in commercial activities and only in judicial districts where Grouping has principal place of business, branch or office. In any event, it must be registered with Register of (European) Economic Interest Groupings. It is subject to same accounting requirements as joint stock company. Activity of Economic Interest Grouping should be supportive and ancillary to that of members. Economic Interest Grouping cannot serve as holding.

Economic Interest Grouping has legal capacity. Members are jointly and severally liable for debts of Economic Interest Grouping. Economic Interest Grouping has no capital requirements. Contributions in kind have to be valued by certified auditor. Contributions are not subject to 0.5% registration tax.

Rules on management and membership of Economic Interest Grouping are comparable to those of cooperative company.

Economic Interest Grouping is transparent from direct taxation standpoint. Profits of Economic Interest Grouping are considered profits of its members.

2.05 FOREIGN COMPANIES:

All foreign stock corporations and other business associations may carry on business and enter suit in Belgium. If they have branch or office in Belgium, they must file their deed of incorporation and all changes to it with Commercial Court together with other relevant information regarding foreign company. Such documents must be officially translated in French or Dutch. They must also deposit their annual accounts and their consolidated accounts prior to opening of branch and thereafter on yearly basis, as approved and filed abroad, within one month from date of approval by general meeting and within seven months from close of business year. Stationery must indicate name, type, registered address and registration number of foreign company. It must also report Belgian branch's registration number to local Commercial Register and VAT number. Managers of Belgian branches have same liability toward third persons as managers of Belgian corporations.

2.06 STOCK CORPORATIONS: ("Sociétés anonymes" — "Naamloze Vennootschappen"):

Stock corporations can be formed only by notarial deed filed at Commercial Court. Extract of act is published in Belgian State Gazette. This deed of incorporation is not submitted to governmental approval. Stock corporations have separate legal personality as of date of filing of deed of incorporation. Requirements for formation of stock corporation are: (1) Minimum number of two members, Belgians or aliens, individuals or companies or associations; (2) minimum subscribed capital of [Euro]61,500; (3) complete subscription of capital as determined by act of incorporation; (4) actual payment, either in cash or in kind for at least amount of minimum capital (cfr. supra 2) and also, with regard to each share, for at least one quarter. Contributions not in cash must be described and valued by chartered public accountant, whose report must be filed with Commercial Court. Articles of association may provide for authorized capital in which case board of directors may within period of five years from incorporation or from time authorized capital was introduced increase capital up to authorized amount by notarial deed filed at Commercial Court. For corporations having made public offerings of their securities, amount of authorized capital may not exceed that of subscribed capital. Authorized capital procedure is not available in certain cases, in particular for capital increases to be effected mainly through noncash contributions by shareholders owning more than 10% of voting rights in company.

This type of corporation is characterized by the fact that each member's liability is strictly limited to the amount of his investment determined by his subscription. However, at time of incorporation, founding shareholders must furnish notary with financial forecast for purpose of assessing liability of founding shareholders in event of bankruptcy within three years of incorporation, if capital was obviously insufficient to cover proposed activities for initial period of at least two years. On other hand, if number of shareholders is reduced to one, this sole shareholder after one year becomes jointly liable for obligations of company.

Shares are registered or bearer. *Note:* When Royal Decree implementing new legal provision is passed, companies will be allowed to issue dematerialized shares. Shares must remain registered until fully paid up. Apart from shares representing capital, shares may be issued entitling holder to part of profits, portion being determined by deed of incorporation. Part profit shares must remain deposited with corporation until ten days after publication of second annual balance sheet. Until expiration of aforesaid period, these shares can only be transferred by written contract containing specified information and notified to corporation within one month of transfer. In corporations having made public offerings of their securities, part profit shares which are subscribed in cash must be fully paid in and are immediately freely transferable.

Founders' shares or other shares entitling holder to part of profits as above may be of unlimited number, but legislation restricts voting rights attached to said shares.

Law of July 15, 1998 introduced possibility for holders of Belgian shares to issue share certificates. Relationship between shareholder and certificate holder is contractual, but submitted to certain provisions provided in Belgian Companies Code.

Stock corporations are managed by board of at least three directors elected by general meeting of shareholders. *Note.*—However, board of stock corporation may consist of two directors, if company only has two shareholders. Directors are elected for maximum period of six years. Reelection is permitted. They are subject to removal at any time. Deeds relating to their appointment, resignation, removal and statement of their death are filed at Commercial Court and published in annexes to Belgian State Gazette. Board may delegate his power of management, except definition of general corporate policy to management committee and may also delegate to one or more persons, acting solely or jointly, daily management of business. Such delegation of power is normally filed and published likewise. Directors and members of management committee who have direct or indirect conflict of interest with monetary value in matter submitted to Board must so inform Board and statutory auditors. They may attend and vote at Board meeting, except in corporations having made public offerings of their securities. Board and statutory auditor must report on such matters at next annual general meeting of shareholders. There is also procedure to be complied with in listed companies when board makes decision concerning relations with connected corporation.

Control of company must be entrusted to one or more chartered public accountants, appointed by shareholders meeting for renewable period of three years, if company, meets more than one of following criteria: (1) 50 employees; (2) [Euro]3,650,000 balance sheet total; (3) [Euro]7,300,000 turnover or if company employs 100 or more employees. These criteria are not computed on consolidated basis, except for listed corporations, some holding corporations and corporations which are part of group that is required to give consolidated accounts. In all other cases no statutory auditor need be appointed and each shareholder has individual right of control. Shareholder may then be assisted by accountant.

General meeting of shareholders, is held at least once a year on day fixed by act of incorporation (“ordinary general meeting”). Board of directors and auditors may call other meetings in case of modification of articles or for any other purposes, if they deem it necessary (“extraordinary general meeting”). They must call special meeting if requested to do so by number of shareholders representing at least one-fifth of capital. Meetings are convened by means of press convocation or by registered letter for registered shareholders. Directors and statutory auditors must also be convened. General meeting hears reports by board of directors (management report) and by auditors. Balance sheet, profit and loss account are discussed, adopted or rejected; distribution of profits, if any, is decided; discharge is given or refused to directors and statutory auditors. Discharge is bar to any later action against these persons by corporation, except where accounts submitted to meeting hide real situation of corporation or, concerning acts committed in violation of code of companies or articles of incorporation, if they have not been specifically mentioned in convocation. In all kinds of meetings each shareholder may vote, either in person or by proxy. Articles of association may provide for restrictions to voting powers of shareholders. Normally, no change is permitted unless passed on by three-fourths majority. It may only vote on changes of articles of incorporation if shareholders at meeting represent at least one-half of capital. If this quorum is not attained, meeting is adjourned and second one must be called which may then deliberate whatever proportion of capital represented.

Stock corporation may issue debentures in bearer or registered form.

Note: When Royal Decree implementing new legal provisions is passed, companies will be allowed to issue debentures in dematerialized form.

Dividends may only be distributed out of real profits. Any dividends of which shareholders knew or should have known that they exceeded available profits must be reimbursed. Interim dividends may be distributed out of real profits at most twice a year by decision of board of directors, and if deed of incorporation so provides.

Annual accounts must be filed with National Bank and are available at bank to public for consultation.

Articles of incorporation or shareholders' agreements may restrict share transfers by various clauses provided that (a) they have limited duration and (b) they are justified by corporate interest at any moment. Moreover, in case of agreement or preemption clause, this clause may not have lead to extension of inalienability beyond six months from petition for agreement or invitation to exercise right of preemption. Maximum duration for approval and/or preemption clauses is six months.

Stock corporations may issue voting and nonvoting shares. Nonvoting shares may not represent more than 1/3 of capital and must give right to preferred dividend and preferred right to reimbursement of capital contributions. Holders of nonvoting shares may nevertheless vote their shares under certain circumstances as determined by law.

Stock corporations may acquire their own shares only under certain conditions as determined by law.

Stock corporations may not advance funds, extend loans or give securities for purposes of acquisition of their own shares by third party, except under conditions as determined by law.

Shares held in excess of this threshold must be transferred within one year and, in meantime, voting rights attached to these shares are suspended. Cross-participations among affiliated or independent companies may not exceed 10%.

Under certain circumstances as determined by law, stock corporations may issue voting shares which are reserved in whole or in part to their personnel.

Minority shareholders owning shares representing at least 1% of voting rights or [Euro]1,250,000 may sue directors on behalf of company. This minority action (“action minoritaire”/“minderheids-vordering”) is somewhat comparable to derivative action under U.S. law.

Voting agreements may be entered into provided that (a) they have limited duration and (b) they satisfy corporate interest. They may not provide that shareholder shall exercise his voting rights upon instructions from company.

Procedure aimed at resolving conflicts between shareholders in stock corporations having made no public offerings of their securities was recently introduced. Procedure allows one or several shareholders owning 30% or more of company's voting rights to force another shareholder to sell them its shares in company. Reverse situation is also covered as any shareholder will be allowed to force other shareholders to buy its shares in company. In both cases, procedure is available only if plaintiffs can prove that their request is supported by good reasons.

Law also authorizes shareholders owning 95% or more of voting rights in same corporation to squeeze out minority shareholders, even in absence of any conflict between shareholders.

Note: Complete squeeze out is available for companies which have called upon people's savings in public manner (mainly listed companies). Companies Code implements partial squeeze out procedure for private companies; shareholders of private company cannot be squeezed out against their will.

Accounts.

Business companies must prepare their accounts for publication in accordance with rules of presentation established by Law. Company books have to be kept in accordance with minimum standards fixed in accounting plan defined by Law. (Royal Decree of Jan. 30, 2001). Listed companies must furthermore prepare consolidated accounts in accordance with standards fixed by International Accounting Standards Board as adopted by European Commission.

Loss of Bearer Securities or Debentures.

Person who involuntarily loses possession of bearer securities may file opposition to “National Office of securities” (“Office National de valeurs mobilières”). (Law of July 24, 1921 as am'd). This opposition is published within two days in special bulletin. All acts of alienation of instrument after day of publication are null and void with regard to opponent. Any one receiving share or dividend warrant under opposition must retain same and warn real owner. If instrument is not found, new one is delivered after publication of opposition in bulletin during four consecutive years. All contestations relating to opposition must be examined by court.

Private limited companies (sociétés privées à reponsabilité limitée [S.P.R.L.], besloten vennootschap met beperkte aansprakelijkheid [B.V.B.A.]) correspond to certain degree to private companies as known under English law. Such as in stock corporations, liability of members is, in principle limited, to amount of their investment by their subscription. Shareholder(s) may be Belgian or aliens, individuals or companies or associations. No minimum of members is required (it is sole company which may be founded by one person alone).

Minimum capital [Euro]18,550 of which minimum [Euro]6,200 paid up in full; minimum one fifth of each share must also be paid up in full; only registered shares. Minimum capital to be paid up in full in case of company founded by one person amounts however to [Euro]12,400.

General management may be entrusted to one or more persons whose period of office and powers are decided by members. Manager nominated in bylaws of company can only be dismissed in accordance with rules relating to modification of bylaws (¾ majority and 50% quorum in first meeting). Otherwise manager can be dismissed by simple majority of votes cast. Provisions as to control of company and accounts are same as for stock corporations.

In general, same publication regulations apply as to stock corporations. Company has separate legal personality as of date of filing of deed of incorporation.

With some exceptions (such as transfers to members or some relatives), shares can only be transferred upon approval of minimum half of members owning minimum three fourths of capital after deduction of shares to be transferred. Articles may however provide for more stringent transfer limitations.

Minority shareholders owning at least 10% of voting rights may sue managers on behalf of company.

Procedure aimed at solving conflicts between shareholders in stock corporations also applies in private limited companies.

Cooperative companies (“sociétés coopératives”/“coöperatieve vennootschappen”) used to be characterized essentially by lack of fixed capital.

Originally designed as vehicle for small cooperative ventures where profits shared in relation to amount of business with company, they are now often used as vehicle for large scale capital ventures. This has been possible because most of rules laid down by Belgian law for cooperative companies could be freely derogated from in deed of incorporation.

Shareholders can opt for limited liability (to amount of their subscription) or unlimited and joint liability. This choice has to be made in articles of incorporation.

Shares may be transferred under conditions set forth in articles of incorporation.

Minimum number of shareholders is three.

Limited liability cooperative companies must have fixed capital of at least [Euro]18,550, of which [Euro]6,200 has to be fully paid up. Company has separate legal personality as of date of filing of deed of incorporation.

Societas Europaea (“société européenne”/“europese vennootschap” or “SE”) is separate corporate form. It is subject to number of provisions applicable to stock corporation, with some exceptions. Like stock corporation, SE incorporated in Belgium is public company whose shares are in general freely transferable (subject to certain restrictions in articles of association or shareholders' agreement) and it may offer shares or other securities to public.

SE can be formed: (i) By merger of public limited liability companies from at least two Member States; (ii) as holding company by contribution of shares of public and/or private limited liability companies from at least two Member States; (iii) as subsidiary by at least two legal entities (including nonprofit organizations) governed by laws of at least two Member States or which held subsidiary or operated branch in another Member State for at least two years; (iv) as subsidiary of SE; and (v) by conversion of national public limited liability company which has had subsidiary in another Member State for at least two years. Only legal entities with both their registered and head offices in European Union (or EEA) can participate in formation of SE. Special rules apply regarding information and consultation of employees of companies involved in SE.

Upon registration with appropriate registers, SE acquires legal personality or, in event of merger or conversion, upon legally becomes SE.

SE may have either one-tier or two-tier system of management. In one-tier system, management is entrusted to board of directors, which can delegate daily managerial authority. Management is organised in same manner as in stock corporation, except that it is prohibited to set up management committee (comité de direction/directiecomité) within meaning of Art. 524bis of Companies Code. In two-tier system, management is entrusted to management committee (conseil de direction/directieraad), which is overseen by supervisory board (conseil de surveillance/raad van toezicht). Supervisory board cannot intervene in management. Decisions of management committee can be made subject to approval of supervisory board. Members of supervisory board cannot sit on management committee, and management committee may consist of only one person.

Shareholders of SE make decisions through general meeting, which has limited number of powers similar to those held by shareholders' meeting of stock corporation. However, Companies Code provides that articles can be amended by simple majority of votes cast if quorum of at least 50% of share capital is present or represented.

SE must prepare annual accounts and consolidated accounts in accordance with applicable national legislation.

Belgian law governs liquidation, bankruptcy and other insolvency procedures when SE has its registered office in Belgium. It is possible to transfer registered office of SE to another Member State of European Union or to member country of EEA without liquidation. Head office should follow suit, as SE should always have its head office and registered office in same country. See European Union Law Digest, category Business Organizations, topic Corporations, subhead European Company.

2.07 LIMITED PARTNERSHIP:

See topics Stock Corporations, 2.08 Partnerships.

2.08 PARTNERSHIPS:

Partnerships may be common partnerships, limited partnerships or limited partnerships by shares. They all have separate legal personality as of date of filing of deed of incorporation.

Common partnerships (“société en nom collectif” — “vennootschap onder firma”) may be entered into by public deed or ordinary contract in writing. Partners are jointly and severally liable for all obligations of firm, even though signed or incurred by one partner only, as long as obligation was taken under firm's name. Liability is unlimited.

Limited partnerships (“société en commandite simple” — “gewone commanditaire vennootschap”) which are founded by public deed or by ordinary contract exist between one or more general partners, whose liability is joint and unlimited, and one or more special partners, who are liable for partnership debts only to amount which they have agreed to contribute. Special partners may not participate in management or even act as agents of partnership. In case of infringement of this rule, they become jointly and severally liable toward third party with whom they have transacted business for partnership. If special partner allows his name to be used in that of firm or usually participates in management, he will be held jointly and severally liable with general partners.

Limited partnership by shares (“société en commandite par actions” — “commanditaire vennootschap op aandelen”) exist also between one or more partners whose liability is joint and unlimited, and one or more shareholders liable only for amount of their subscription. Main difference with limited partnership is that unless there are other legal provisions, rules governing stock corporations are applicable. This type of entity is very rare in Belgium.

Limited Partnership Companies.

See topic Stock Corporations.

Unregistered Business Associations.

In addition to above mentioned partnerships, Belgium law allows different types of business associations which do not have to be registered and which do not have legal personality. These include “société interne” of which existence is not revealed to third parties (manager acts in his own name and on his own behalf and is solely liable vis-à-vis contractual parties), “société momentanée” conceived for business transactions who are limited in time (and in which all partners have total liability) and “société de droit commun”. When two or more individuals carry on business together without registering and without having adopted legal form of “société interne” or “société momentanée”, they are deemed to have formed “société de droit commun”.

Clubs and charitable organizations can obtain limitation of personal liability of members, and acquire Belgian legal entity (“association sans but lucratif” — “vereniging zonder winstoogmerk”).

3 BUSINESS REGULATION AND COMMERCE

3.01 BILLS AND NOTES:

Belgium has approved Treaty of Geneva of June 7, 1930 on bills of exchange and content of law is, except some particular rules, text of uniform law attached to this Treaty.

Bill of exchange must include the words “bill of exchange.” It must be dated and signed and must show amount to be paid, name of person liable to pay, time and place of payment, name of payee (either third party or drawer himself), place of drawing and rank of each copy if several are issued. If no date of payment is mentioned, bill is payable at sight. Bill is always trading transaction and under jurisdiction of commercial court except for bills under [Euro]1,860 which are under jurisdiction of Justice of Peace.

Drawer is unconditionally liable for payment, except if formal rules have not been adhered to or if drawer was not of full capacity.

So is drawee if he signs bill for acceptance. Acceptance may, at any time before maturity, be required by holder, who is in certain cases under obligation to require acceptance before certain date. Drawer and endorsers are jointly liable for acceptance by drawee.

Acceptance is expressed by word “accepted” or any equivalent term on bill. Sole signature of drawee on front of bill means acceptance. Refusal of acceptance is established by protest drawn up by public officer.

Bills are transferred by endorsement. Endorsement after maturity is valid provided it takes place before the formal protest of nonpayment. Endorsement should give name of endorsees, unless made in blank. Endorsement by means of mere signature of endorser on back of bill suffices.

Bills must be paid in the currency indicated therein.

Holder of bill payable on specified date must demand payment on day it falls due. Holder of bill payable at sight must demand payment within one year from signature, unless shorter period has been indicated. Nonpayment must be established no later than second day after maturity by formal protest known as “protest of nonpayment.” Failure to observe these periods of limitation and formalities makes bearer lose his right of action against endorsers and normally, also against drawer. Holder of protested bill must within four working days notify last endorser and drawer of nonpayment. Every endorser must notify previous endorser within two working days of previous notification. Notifications may be effected in any form, even by simply sending bill back. Holder of protested bill may enter suit separately against drawer and each of endorsers, or jointly against drawer and endorsers, on grounds of several or joint liability, action must be brought within one year. Each endorser has right to enforce same remedy against drawer and preceding endorsers; action must be brought within six months.

“Aval” is security given by third party who guarantees acceptance or payment, or both. It is given in writing on bill or by separate act. This third party becomes jointly liable with party for whom security was given. If party for whom security is given is not specified, aval is deemed to have been given for drawer.

Check must include the word “check”, be signed by drawer and show day and place of drawing. Check is payable at sight. Checks may be to order or to bearer. Payment must be demanded within eight days if drawn in Belgium, 20 days if drawn in Europe including countries bordering Mediterranean, 120 days if drawn outside Europe. Rules governing joint and several liability of all parties to bill of exchange and those relating to protests apply to checks. Drawing of check without “provision” (sufficient funds) is punishable under criminal laws and drawer who withdraws provision during above mentioned delays can also be prosecuted criminally.

Crossed check may be presented for payment only by banker or client of drawee bank. If specific banker is mentioned in crossing, he alone can cash check. Nonobservance of these rules results in liability for damages not exceeding amount of check.

Drawer or bearer of check may instruct bank not to pay in cash, by writing on back of check words “credit in account” or equivalent.

Promissory notes at order come under same rules as bills of exchange.

3.02 BILLS OF LADING:

See category 20 Transportation, topic 20.02 Shipping.

3.03 COMMERCIAL REGISTER—CROSSROADS BANK FOR ENTERPRISES:

All traders, whether individual or corporate, whether Belgians or foreigners must register before commencing operations. Operating without registration or outside scope of registration entails fine. Suit initiated without proper registration can be dismissed.

For certain types of business registration is conditional on showing that owner or manager meets statutory requirements of education and training.

Crossroads Bank for Enterprises ("Kruispuntbank voor Ondernemingen/Banque-Carrefour des Enterprises") is register organized as of July 1, 2003 for all enterprises (legal entities, associations and natural persons) purpose of which is to register and manage all basic information pertaining to enterprises and to simplify burdensome administrative formalities that must be complied with in order to establish and manage business in Belgium. Every company has enterprise number, which is its unique identification number with Belgian authorities (VAT, CBE, social security, etc.) and courts. This number must be used on all company documents, including Internet sites, invoices and judicial documents.

3.04 CONTRACTS:

Written contracts are usually made privately, but may be formally made before notary and so become public deeds. Private written contract must be made in as many copies as there are parties to agreement having separate interests, and number of copies must be mentioned at foot of contract. (C. C. 1325).

Witnesses to signatures are not required in any event.

Any private agreement or contract which can be registered for small fee, and such registration enables date thereof to be fixed without risk of subsequent challenge. Registration duty is dependent upon object of contract.

Private contracts do not require to be stamped except when registered.

General requirements to meet in order to ensure validity of contracts imply that both parties were of full capacity, that they have both consented freely—i.e., consent which has not been given by error and which has not been extorted by duress or abused by deception—as well as existence of defined object and of "cause" (defined as motive) which are not contrary to public order or morals.

Excuses for nonperformance are admitted with respect to facts or legislation that were unforeseeable and that entail impossibility of performance.

Applicable law is that chosen by parties or, in absence of such choice, law of jurisdiction with which contract is most closely connected excepted for distribution agreements falling within scope of law of July 27, 1961 concerning unilateral termination of exclusive concession agreements where Belgian law is always applicable, even if any other law has been chosen in contract.

Government contracts are, as rule, subject to competitive bidding. (Law of Dec. 24, 1993). Special rules covering performance bond, price revision, approval of performance, fines for delay, unilateral termination, limitation of actions are spelled out in Royal Decree of Jan. 8, 1996.

3.05 INFORMATION TECHNOLOGY, INTERNET AND NEW MEDIA:

Telecommunications.

Since beginning of nineties, telecommunications industry in Belgium has been extensively reformed as result of gradual deregulation imposed by European Community legislation, which has led to liberalisation of telecommunications network and services on Jan. 1, 1998. Telecommunications regulation is mainly addressed in Law of Mar. 21, 1991 on reform of certain autonomous public enterprises, as amended.

Belgian Institute for Postal Services and Telecommunications ("BIPT") is regulatory body competent in telecommunications sector in Belgium. BIPT is still under control of Ministry of Telecommunications. Its lack of independence vis-à-vis government has been criticised, especially given that incumbent operator is still majority-owned by Belgian State.

Under current legislation, individual license is required for provision to public of voice telephony services, mobile telephony services and paging and for establishment and operation of public telecommunications networks. Specific Royal Decrees implementing law set forth rules regarding granting of these licenses. Licenses are granted by Minister of Telecommunications upon proposal of BIPT. So far, licenses for mobile telecommunications services (including paging) have been granted following tender procedure with specific rule book. As in other countries, third generation mobile licenses (UMTS) have been granted through auction procedure.

Other telecommunications-related activities (i.e., supply of service of leased lines, establishment and operation of non-public telecommunications network, etc.) do not require individual license but mere notification to BIPT at latest four weeks prior to beginning of commercial operation of such activities.

Internet and E-Commerce.

Provision of services over Internet and, in general, electronic commerce do not require specific license or approval. They are nevertheless regulated by general civil and criminal law rules as well as by increasing number of specific legal rules largely based on EU directives.

Most stringent rules apply in B2C environment, i.e., in relation with consumers. This is case of Law of July 14, 1991 on trade practices and protection and information of consumers, which contains various provisions including those governing distance sale. One of main characteristic of these provisions is that they grant consumer right of withdrawal within seven working days without penalty and without any justification being necessary. This right of withdrawal is obviously subject to exceptions (e.g., for consumable goods).

Increasing number of transactions carried out on Internet has resulted in need for legal recognition of electronic contracts. European Community has adopted several directives in that respect that have been implemented in Belgian law, including Directive 1999/93/CE of Dec. 13, 1999 on European framework for electronic signatures ("the E-signature Directive").

Absent any specific legislation or case law concerning contracts concluded via electronic means, their validity and evidence have long remained uncertain, again especially in relation involving non-professionals where civil rules usually impose written evidence (i.e., document signed in handwritten form by relevant parties).

First modification to these traditional rules has already been introduced by Law of Oct. 20, 2000 regarding use of means of telecommunication and electronic signatures in judicial and extra-judicial proceedings. This law has changed rules on evidence set out in Civil Code by providing that where law requires handwritten signature, this requirement can also be fulfilled by electronic signature defined as "a whole set of electronic data attributable to a specific person and demonstrating the integrity of the contents of the document".

Law further modernises evidentiary rules of Civil Code by providing that whenever written notification is required by law, this requirement can also be fulfilled by telegram, telex, telefax, electronic mail or "any other means of telecommunication that results in a written document on the side of the addressee". These provisions entered into force on Jan. 2, 2001.

Law of July 9, 2001 determining certain rules regarding legal framework for electronic signatures and certification services has implemented another important aspect addressed in E-signature Directive with respect to certification authorities and recognition of electronic signatures. Pursuant to this law, so-called advanced electronic signatures meeting certain requirements are granted same evidentiary value as handwritten signatures.

Law of Mar. 11, 2003 on electronic commerce, has implemented Directive 2000/30/EC of June 8, 2000 on electronic commerce (“the E-commerce Directive”). Among other provisions, this Directive sets forth certain rules for electronic conclusion of agreements over Internet (with system of acknowledgment of receipt). Scope of this law does not include online gambling activities nor does it address tax matters regarding online activities. Services provided by State (or by other similar public entities), such as “e-government” services, do not fall in scope of this law. Law contains set of rules governing electronic conclusion of agreements over Internet, but also electronic publicity over Internet. Concerning unsolicited emails, it has confirmed choice of European Commission by providing for opt-in system.

This law also addresses another important issue which is dealt with in E-commerce Directive, i.e., liability of Internet actors (primarily Internet Service Providers or “ISPs”) for illicit content made available on Internet through their intermediary. In this respect, Internet Service Providers cannot, according to law, be held liable for any information or content coming from third parties provided that they have purely passive role (limited to “transport of information”). Hosting providers will not be held liable for illegal content provided that they had no effective knowledge of content or that as soon as having such knowledge, they immediately informed Crown prosecutor while blocking any access to such content.

Data Protection and Privacy.

Law of Dec. 8, 1992 on privacy protection with regard to processing of personal data constitutes general legal framework in Belgium for protection of individuals' privacy rights with respect to processing of their personal data. This law has been amended by Law of Dec. 11, 1998 implementing Directive 95/46/EC of Oct. 24, 1995. Amended law has entered into force on Sept. 1, 2001.

Law applies to any processing (any operation or set of operations which is performed upon personal data) of personal data (broadly defined as any data enabling to directly or indirectly identify individual) whether or not this processing is automated.

Entity responsible for compliance with law is data controller, i.e., entity competent to decide on purpose of processing and categories of data to be processed, while data processor is entity which processes data on behalf of data controller.

If data controller is established in EU, it has to comply with law of Member State where controller's establishment within context of activities of which processing is carried out is located. When data controller is not established in EU but, for purposes of processing personal data, makes use of equipment situated in EU, it has to comply with law of Member State(s) where equipment is located, unless such equipment is used only for purposes of transit through EU territory.

Lawful processing of personal data requires compliance by data controller with number of principles: (i) fair and lawful processing, (ii) processing for specified, explicit and legitimate purposes, (iii) adequacy and proportionality of data processed, (iv) its accuracy and (v) obligation not to keep data for longer than is necessary.

Data controller must also comply with number of obligations, including (i) complete information of data subject, (ii) observance of rights of data subject (rights of access, deletion and correction of data, right to object to processing of data, e.g., for direct marketing purpose, etc.), (iii) implementation of appropriate technical and organisational security measures to protect processed data and (iv) prior notification to Commission for The Protection of Privacy.

More stringent rules apply to processing of so-called sensitive personal data, i.e., data relating to information regarding racial or ethnic origin, political opinions, religious or philosophical beliefs, trade-union membership, physical or mental health or conditions and sexual life.

Transborder flow of personal data to non-EU Member State is only allowed when country of destination ensures adequate level of protection, with number of exceptions including unambiguous consent of data subject.

Electronic Payments.

Law of July 17, 2002 governing all transactions performed by means of electronic transfer of money has implemented EU recommendation of July 30, 1997 which aims to increase confidence of consumers in means of electronic payment. Law includes all instruments enabling any kind of electronic transfer of money, including so-called “rechargeable instruments” and even means which are only partially electronic (example: credit card of which paper print is taken), as long as, at least one stage of whole payment transaction is electronically initiated. Law obliges company who delivered card giving access to electronic means of payment to provide information to card user, and more specifically regulates content of such information and form through which it has to be addressed to card user (most commonly this information takes form of “general conditions governing the card”). Law also governs liability of company who delivered card, especially in case of lost card or of theft. In case of noncompliance with law, company delivering card can be subject to civil or to criminal sanctions.

Computer Criminality.

Computer crimes have been subject of law on computer criminality, enacted on Nov. 28, 2000.

Law includes four new categories of offences in Belgian Criminal Code: (i) computer forgery and use of forged computerised documents (new Art. 210bis of Criminal Code), (ii) computer fraud (new Art. 504quater of Criminal Code), (iii) unauthorised access to computer systems and networks (hacking) (new Art. 550bis of Criminal Code) and (iv) violation of integrity and availability of computer systems or data stored on such systems (computer sabotage) (new Art. 550ter of Criminal Code).

Law also introduces number of new techniques of criminal investigation in Code of Criminal Proceedings, such as search of computer systems, seizure of data, obligation for people with particular knowledge of computer systems and/or software to cooperate with investigators and interception of communications. Criminal sanctions range from approximately [Euro]13 to 100,000 and/or imprisonment from three months to five years.

Law also results in number of changes to telecommunications laws and regulations in order to authorise government to define obligations imposed on telecom operators and providers of telecom services relating to storing of data and identification.

Domain Names.

Since Dec. 11, 2000, it is possible for everyone (legal entities and individuals) to register domain name without being required to have any connection with such name. Under former Belgian system, only legal entities were allowed to register domain names. They had to produce evidence that they were trading under same name or were owner of corresponding trademark.

Under new rules, all applications must be made via agents accredited by DNS Belgium, authority responsible for registration of “.be” domain names in Belgium. DNS Belgium will no longer intervene in procedure. Verification of availability as well as necessary formalities will entirely be handled by agents. For this reason, registration procedure has become much easier and faster.

Procedure also allows registration of generic names. Belgium was one of last countries in world where generic names were not allowed for registration. These rules are intended to promote access to Internet and encourage creativity of Belgian companies.

Rules have also implemented dispute resolution procedure that is similar to that of ICANN (Internet Corporation for Assigned Names and Numbers). According to this procedure, all disputes relating to domain names must be submitted to one of administrative dispute resolution service providers listed at website of DNS Belgium (http://www.dns.be). At present only CEPANI/CEPINA, Belgian Centre for Arbitration and Mediation has been listed. CEPANI/CEPINA has worked out ad hoc rules for this purpose. Particularly noteworthy is speed of proceedings and fact that entire proceedings will be conducted on-line, without actual presence of parties before panel being necessary. Person or entity filing complaint must have corresponding Benelux or Community trademark, trade name, social name, corporation's name, geographical designation, name of origin, designation of source, personal name or name of geographical entity; it must demonstrate that domain name holder has no rights or legitimate interests in domain name and it must prove that domain name has been registered or is being used in bad faith. Decision of CEPANI/CEPINA will be published on Internet and communicated to DNS Belgium, who will cancel domain name or transfer domain name registration to plaintiff.

3.06 INTEREST:

At present, legal rate is 7%. Except in few cases determined by law, interest is only due after summons to pay debt, served by bailiff. For trade debts such summons may be given by other means, e.g. registered letter. Interest is due without summons in cases against: (1) Buyer of thing delivered him which yields emblements or any income; (2) guardian, unjustifiably detaining minor's money; (3) principal owing interest to agent on funds advanced by latter.

Usury.

Any rate of interest may legally be agreed on by contract, except in instalment sales and in any kind of loan falling within scope of law of June 12, 1991 concerning consumer credit, where maximum is fixed by decree. Question of reasonable or maximum rate is one which is decided on merits of each case and is left to entire discretion of court. Broadly speaking anything higher than twice prevailing commercial or bank rate would be considered as usury. In most cases, however, decisive factor is level of recurrence. One isolated transaction at extortionate rate between two individuals is looked on with greater leniency than several transactions at high rate. It is taking of unfair advantage of borrower's necessity which constitutes criminal offense of usury. Court has power, under Civil Code art. 1907 ter, to reduce obligation of debtor to amount actually loaned, plus interest at current legal rate, and such reductions apply to any partial repayments already made, provided application is made within three years from dates of such payments.

3.07 LICENSES, BUSINESS AND PROFESSIONAL:

Required, among others, for banks, stockbrokers, instalment financing, insurance, road haulage, transport middlemen, real estate brokers.

3.08 MONOPOLIES, RESTRAINT OF TRADE AND COMPETITION:

Law of Aug. 5, 1991, establishing general competition law, coordinated by Law of July 1, 1999, as amended.

Belgian competition law seeks to preserve system of vigorous competition within Belgium. Its territorial scope is Belgian market or any substantial part of it. Law is modelled on EU competition law. Three types of practices are covered: (i) restrictive agreements, (ii) abuses of dominant position, and (iii) mergers and acquisitions (“concentrations”).

Belgian competition law is enforced by Belgian courts, and by Competition Council, independent administrative court consisting of judges, lawyers and competition experts. Competition Council will make decisions with regard to restrictive agreements, abuses of dominant position and concentrations (compare with powers of Commission at EU level). Decisions of Competition Council may be appealed to Brussels Court of Appeal. This Court can also give preliminary rulings on issues of competition law pending before Belgian courts. Decisions prohibiting concentrations can be appealed to Council of Ministers.

Law's provisions on restrictive agreements and abuses of dominant position are virtually identical to provisions existing at EU level (see respectively, Arts. 81 and 82 of EC Treaty). Parties can obtain exemption ex post from prohibition on restrictive agreements, provided they establish objective economic advantages, which offset any restrictive effect of agreement on competition.

Law institutes concentration control system, which closely follows provisions of Council Regulation. (EC No. 4064/89). Decisive test for clearance of concentration is whether concentration has effect of creating or strengthening dominant position on Belgian market or on substantial part of it. Concentrations between undertakings with combined market shares under 25% in Belgium must be declared permissible. Thresholds for notification are: (i) combined aggregate turnover of all undertakings concerned in Belgium of at least [Euro]40 million, and (ii) turnover of more than [Euro]15 million in Belgium by at least two of undertakings concerned. Notification must be filed with Competition Council. Within 45 days, Competition Council must make decision. If there is serious doubt as to legality of concentration, Competition Council may order full investigation, which can take up to 60 additional days. In absence of decision within first period of 45 days, or after subsequent period of 60 days, concentration is deemed to be approved.

3.09 NEGOTIABLE INSTRUMENTS:

See topic 3.01 Bills and Notes.

3.10 SALES:

Contracts of sale may be either oral or written.

Written agreement is useful proof. Special formalities are required for sales of real estate.

If sale price of real estate represents less than five-twelfths of true value, seller may rescind sale within two years, in which case buyer has right to recuperate price paid or to avoid rescission by payment of balance of fair value, subject to reduction of one-tenth of total price. (Art. 1674 C.C.).

Warranties.

Seller is only liable for latent defects, and not for apparent ones. (Art. 1642 C.C.). Claims based on latent defects must be made within short time. Professional sellers are deemed to know hidden defects of goods they sell and are liable for them to purchasers and sub-purchasers. Belgian law does not allow professional seller to exclude his normal guarantees with respect to latent defects in goods or with respect to damages resulting from said defects, unless it is absolutely impossible for seller to discover defect. Thus, exclusion of liability clauses stipulated by company habitually selling goods in question will be invalid. Since law of Sept. 1, 2004 implementing EU Directive 1999/44 on certain aspects of sale of consumer goods and associated guarantees came into force on Jan. 1, 2005, special rules apply in case of sale of consumer goods. In such case warranty for latent defects remains valid during two years after delivery.

Delay will be suspended during time of negotiations or discussions with seller concerning replacement of sold good. For second hand goods, seller and buyer can agree on shorter delay (but which cannot be inferior to one year). Claims based on latent defects of goods sold to consumers must be made within one year after date at which consumer has detected defect. This delay to act cannot expire within first delay of two years (warranty).

Retention of Ownership Clause.

It is possible for seller to retain ownership of goods until final payment. However, in case of bankruptcy of buyer, such clause is only opposable vis-à-vis third parties, if retention of title clause has been agreed upon in writing at latest on moment of delivery of goods, if goods are still present in kind with debtor and if some other conditions are met. (Art. 101 New Bankruptcy Law).

General Sales Conditions.

It is not because standard conditions of sale are printed on back of invoice that these conditions will necessarily govern sale. Belgian courts examine if buyer has had effective knowledge of these conditions, has understood them and has accepted them.

Product Liability.

Product Liability Act of Feb. 25, 1991 incorporates into Belgian law E.E.C. directive of July 25, 1985. Product Liability Act is based on principle that producer is liable for damage caused by defect in his product and that injured person must prove damage, defect and causal relationship between defect and damage. Product is defective when it does not provide safety which person is entitled to expect, taking all circumstances into account. Damage is defined as damages caused to persons including pain and suffering and, subject to certain restrictions, property damage. Property damages only give rise to compensation if item of property is ordinarily intended for private use or consumption and is used by injured person mainly for his only private use or consumption. Both of these conditions must be met.

International Sales.

The Hague Uniform Acts on international sale of movable property and on formation of international sale contracts of movable property of July 1, 1964 were applicable until Oct. 31, 1997. As from Nov. 1, 1997, U.N. Vienna Convention of Apr. 11, 1980 will apply.

Regulated Sales Methods and Consumer Contracts.

See topic 3.12 Trade Practices, infra.

Distributorships, if they are made for indefinite period of time, or are expected to be so, or if they are either factually exclusive or coupled to important obligations imposed on distributor, can be terminated by principal only by giving adequate notice or compensation in lieu thereof and additional compensation for goodwill. (Law of July 27, 1961).

3.11 STATUTE OF FRAUDS:

See topic Frauds, Statute of.

3.12 TRADE PRACTICES:

This matter is governed by Law of July 14, 1991 on trade practices and on information for and protection of consumer (hereinafter trade practices and consumer protection act or “T.P.C.P. Act”).

This law is, to large extent, restatement of previously existing rules on trade practices (rules dated on previously Law of July 14, 1971). While reinstating old rules, however, some new features have been introduced. These features are sometimes confirmation of case law that has emerged since entry into force of old statute of July 14, 1971 or necessary amendments of or corrections to existing regulations or European directive's implementation in Belgian law.

Unlike old law, however, T.P.C.P. Act law covers not only relationship amongst business people and corporations. Law indeed contains number of new regulations that will have to be applied in relationship between sellers, defined for purpose of this law as natural or legal persons offering products or services in course of business or in order to realize purposes laid down in their articles of corporation, and consumers, defined as any natural or legal person who buys or uses products or services for purposes other than professional.

T.P.C.P. Act has dual objective: on one hand, to ensure fair competition and trade relations and, on other hand, to ensure consumer protection as well as to supply sufficient and adequate information to consumer. All provisions of this Act have been written in consideration of this dual purpose and are to be read within this perspective.

Indication of Price.

Any product that is being offered to consumer should have price mentioned in EURO ([Euro]), mentioning clearly price to be paid. Any price that is being indicated has to cover full price, covering VAT, any other taxes and mandatory fees. Cost of noncompulsory additional charges like for delivering, setting up, etc. shall be marked in visible and unequivocal writing. (art. 3 of T.P.C.P. Act).

Indication of Quantity.

Law also contains number of specific regulations on manner in which weight, contents or, more generally, quantity of particular product is to be indicated on label. (art. 7 to 12 of T.P.C.P. Act).

As rule, nominal quantity of any goods or products packed and intended for sale must be indicated on packaging, in such way to be clearly readable, visible and unequivocal. Quantity must be expressed in legal unit of measurement. If packaged goods or products are imported, nominal quantity has to be indicated by importer.

Labeling Regulations.

Any mandatory indication on label, for product or service, is by virtue of art. 13 of law to be mentioned in language or languages of region where product or service is being offered. Apart from this or these languages, use of other complementary languages is allowed.

Denominations of origin are names referring to any place playing important if not conclusive role as regards quality or particular characteristics of product. (art. 16 of T.P.C.P. Act). Denomination of origin can only be used for product when such denomination has been formally recognized as such by Royal Decree and when, moreover, product that is being offered for sale under such denomination of origin is fulfilling requirements laid down by said Royal Decree. Moreover, seller is to be in possession of certificate establishing origin of product, whenever such certificate is being required. (art. 20 of T.P.C.P. Act).

Publicity.

T.P.C.P. Act contains number of rules with respect to publicity and advertising.

Publicity or advertising governed by law is defined as any information, of whatever nature, intended either directly or indirectly to promote sale of products or services. (art. 22 of T.P.C.P. Act).

Art. 23 of law contains list of what is considered as unlawful advertising, such as: (a) advertising that is misleading as to characteristics, advantages or conditions of acquisition of particular product or service; (b) advertising that is misleading as to characteristics, advantages or conditions of acquisition of particular service; (c) advertising that is misleading as to identity and qualities of seller of product or service; (d) advertising that withholds essential information, with intent to mislead; (e) advertising that cannot be recognized as such at first sight, while not containing clearly visible and unambiguous word "advertising" (unsolicited advertising by email must be clearly and unambiguously recognizable as such by recipient); (f) advertising that is denigrating vis-à-vis competitor, its products, its services or its activity; (g) comparative advertising that is either deceiving or denigrating, or referring to identity of competitor without any necessity to do so; (h) advertising that may cause confusion with another competitor, its products, its services or its activity; (i) advertising with respect to offer of products or services, while seller does not dispose of stock that is sufficient to meet demand that is to be expected in view of advertising that is being made; (j) advertising that suggests that consumer has or is able to win service or other advantage by chance; (k) advertising for unfair trade practises; (l) advertising that is referring to comparative tests that have been performed by consumer organization; (m) advertising with respect to products or devices that are not medicinal products, while wrongfully claiming that medical condition of consumer could be improved by such products or devices; (n) advertising that, unless in case of authorized joint or combined offers, relates to offer for free products, services or other advantages, when demand to acquire such free products, services or other advantages is not separated from any order form for products or services.

By Law of May 25, 1999 (entry into force: Oct. 1, 1999), Directive 97/55/EC of Oct. 6, 1997 on comparative advertising has been implemented in Belgian law.

Art. 22 defines "comparative advertising" as "any advertising which explicitly or by implication identifies a competitor or goods or services offered by a competitor".

Art. 23bis of T.P.C.P. Act states that comparative advertising shall, as far as comparison is concerned, be permitted when following conditions are met: (a) it is not misleading within meaning of according to art. 23, 1 to 5 T.P.C.P. Act; (b) it compares goods or services meeting same needs or intended for same purpose; (c) it objectively compares one or more material, relevant, verifiable and representative features of those goods and services, which may include price; (d) it does not create confusion in market place between advertiser and competitor or between advertiser's trademarks, trade names, other distinctive signs, goods or services, activities or circumstances; (e) it does not discredit or denigrate competitor's trademarks, trade names, other distinctive signs of competitors or of designation of origin of competing products, activities and circumstances of competitors; (f) for products with designation of origin, it relates in each case to products with same designation; (g) it does not take unfair advantage of reputation of competitor's trademark, trade name or other distinctive signs of origin of competing products; and (h) it does not present goods or services as imitations or replicas of goods or services bearing protected trademark or trade name.

Any advertising that does not comply with above criteria is prohibited.

Art. 23bis of T.P.C.P. Act further states that any comparison referring to special offer shall indicate in clear and unequivocal way date on which offer ends or, where appropriate, that special offer is subject to availability of goods and services, and, where special offer has not yet begun, date of start of period during which special price or other specific conditions shall apply.

By Royal Decree of Dec. 5, 2000, provisions of T.P.C.P. Act relating to publicity have been made applicable to securities and other financial instruments. Certain exceptions however have been provided for.

Unfair Contractual Clauses.

Any sale of products or services entered into between seller and consumer may not contain one of 29 unfair contractual clauses that are listed in art. 32 of law or, more generally, clause that, when considered as such or together with other clauses, will cause disproportion between obligations of parties. (art. 31 of T.P.C.P. Act).

It is important to stress that for purposes of provisions on unfair contractual clauses seller is being defined as any merchant, craftsman or, more generally, any natural or legal person that is offering for sale products or services in course of business or in order to realize purposes laid down in articles of incorporation and any natural or legal person, other than practitioner of liberal professional, who is acting in course of business when entering into contract with consumer. Consumer, on other hand, is being defined as any buyer who is not buying products or services for exclusive professional purposes. (arts. 1.6, 1.7 and 31, §2, 2 of T.P.C.P. Act).

Royal Decree of Dec. 5, 2000 has rendered provisions of T.P.C.P. Act relating to unfair contractual clauses applicable to securities and other financial instruments. Certain clarifications and exceptions however have been provided for in order to take into account specific nature of securities and other financial instruments.

Sales at Loss.

It is forbidden to sell products at loss. This will be case when product is offered for sale at price which is not at least equal to price against which product has been or will be invoiced upon supply. Any sales with very limited profit margin, taking into consideration price of supply and general expenses is also considered to be sale at loss. (art. 40 of T.P.C.P. Act). Law does not contain specific provision prohibiting sale at loss of services. Such sale at loss of services can however under circumstances be considered as dishonest commercial practice (see subhead Dishonest Commercial Practices, infra).

Price Deductions.

When seller is making reference to price deduction, old price referred to has to be price asked for similar products or services in same establishment. This old price must have been used for period of at least one month prior to price deduction in favour of consumers. Moreover, deduction of price is to be applied for at least one day. It may not be applied for more than one month. During full period of price deduction date as from which price deduction will be granted is to be indicated. (art. 43 of T.P.C.P. Act).

Clearance Sales.

Art. 46 of T.P.C.P. Act states that clearance sales are permitted under specific conditions. Law of May 25, 1999 has extended clearance sales to five months and has suppressed prolongation of clearance.

For seller who retires, period shall be one year (new art. 46.9 of T.P.C.P. Act since law of 1999). This enables him to sell off his stock under most suitable conditions. However, during prior year, no clearance sale may have been carried out under art. 46.4 of T.P.C.P. Act (cessation of activities) or art. 46.6 (closedown of subsidiary).

By law of 1999, duration of clearance sales for fittings or repair works (art. 46.5 of T.P.C.P. Act) has been reduced to 20 days.

Combined Offer.

Law defines tied or combined offer as offer of products, services, fringe benefits or titles allowing owner to obtain products, services or fringe benefits, that are tied to acquisition of other, even similar, products or services, which means that some advantage is granted when buying good or service. As general rule, such combined offers are not authorized. (art. 54 of T.P.C.P.

Act). These exceptions correspond, in general, with situations in which consumer is able to determine price or value of additional product or service sold tied with principal product or service.

Arts. 55, 56 and 57 of T.P.C.P. Act do, however, contain number of exceptions to general prohibition of combined offers to consumers.

Public Sales.

Art. 70 of T.P.C.P. Act authorizes public sales only for worn or used products. Seller is not authorized to organize public sale within framework of related clearance sale.

Any seller who organizes public sale must indicate in readable manner his full name or trade name, his domicile or head office and his commercial register number or craft register number in any announcement, advertisement or document related to public sale. (art. 72 of T.P.C.P. Act).

Unsolicited Goods or Services.

It is prohibited to send to someone, without prior request on his part, any product and invite him to acquire this product against payment of its price, or, in absence thereof, to return it to sender, even at no expense. (art. 76 of T.P.C.P. Act). Same rule applies to services. Same rule also applies to securities and other financial instruments. (Royal Decree of Dec. 5, 2000).

Sales “at Distance”.

T.P.C.P. Act regulates sales of products and services which are concluded between sellers and consumers that are not physically present on same location. (art. 77 of T.P.C.P. Act). For such sales sales mechanism is used based on communication methods at distance. Provisions regarding sales “at distance” implement principles of Directive 97/7/EC of May 20, 1997 in Belgian law. By law of Aug. 24, 2005 provisions concerning sales “at distance” were completed. Provisions of this law implement principles of Directive 2002/65/EC of Sept. 23, 2002 concerning marketing “at distance” of financial services in Belgian law.

Since law of Aug. 24, 2005, T.P.C.P. Act regulates, on one hand, contract “at distance” which does not relate to financial services and, on other hand, contract “at distance” which relates to financial services. (art. 83bis of T.P.C.P. Act). Financial services are all services concerning bank, credit, insurance, individual retirements, investments and payments. Contracts which do not enter this definition relate to nonfinancial products or services which are regulated by arts. 78 to 83 of T.P.C.P. Act.

In order to protect consumer, in contracts “at distance” which do not relate to financial services, consumer has period of at least seven working days as of day following day of delivery (products) or following day of entering into contract (services) in which to withdraw from contract without penalty and without giving any reason. For contracts “at distance” relating to financial services, this period is 14 working days (art. 83 sexies §1 of T.P.C.P. Act). No payment nor advances can be asked from consumer before these two respective periods have expired. For contracts which relate to certain financial services (such as exchange transactions, negotiable bond, swaps, etc.), this period during which consumer could withdraw from contract does not apply. This exception relates to primarily financial services whose price depends on fluctuations of money market and on which seller does not have any influence.

Such for concluded contracts “at distance” which relate to financial services than for those which do not relate to financial services, payment can be carried out by means of electronic instrument of transfer of funds (credit card, microprocessor card). This mode of payment is regulated by art. 83 novies T.P.C.P. Act. When seller fraudulently uses this electronic transfer of funds, consumer can require cancellation of payment by specific procedure, except if he acted himself fraudulently.

Illegal Sales Practices.

It is forbidden to organize or to participate in “chain of sales”. T.P.C.P. Act defines “chain of sales” as method of creating network of professional or non-professional sellers through which each receives advantages from growing the network rather than from sales to consumer. (art. 84 of T.P.C.P. Act). Selling with “snowball effect” is also prohibited. This method consists of offering products to consumer while making him believe that he can acquire these products for free or at reduced price when he sells coupons of other titles to third person or when he is able to gather new members or inscriptions. It is also forbidden to sell or to offer for sale by making reference to actions of humanitarian or philanthropic nature or to actions that provoke feelings of generosity with consumer. (art. 85 T.P.C.P. Act). Arts. 84 and 85 of T.P.C.P. Act also apply to securities and other financial instruments. (R. D. of Dec. 5, 2000).

Sales to Consumer Concluded Outside Seller's Place of Business.

Rules concerning sales concluded outside seller's establishment implement principles of European directive on consumer protection (55/77 of Dec. 20, 1985), in Belgian law.

Dishonest Commercial Practices.

T.P.C.P. Act prohibits, in general way, any act contrary to honest commercial customs whereby seller injures or may injure professional interests of one or several other sellers. (art. 93 of T.P.C.P. Act). Law does not provide any definition of fair commercial practices (or of dishonest commercial practices). It is therefore up to Courts to interpret this concept. Will be considered as dishonest commercial practices for example, fact of trying to poach clients with advertising that is denigrating vis-à-vis competitor or boycotting competitor in order to disorganize his business, acts tending to create confusion with other sellers etc.

T.P.C.P. Act has also introduced similar general clause in order to protect interests of consumers (art. 94 of T.P.C.P. Act) concerning dishonest commercial practices causing damage to one or more consumers. Act defines consumer as every physical or moral person which acquires or uses goods or services for nonprofessional purposes only.

In general, professional practice or infringement of honest commercial practices giving seller advantage to detriment of economical interests of other sellers or noneconomical or economical interests of consumers will be considered as dishonest commercial practice.

In order to file complaint under these articles, it is not necessary that damage actually exists, sole risk of causing damage is sufficient.

Sanctions and Enforcement.

Noncompliance with T.P.C.P. Act is sanctioned by ordinary actions tending to get repair of damage or to have illegal contracts being declared void. Moreover, art. 95 of T.P.C.P. Act allows filing for order to cease and desist which may be issued by President of Commercial Court. (art. 95 of T.P.C.P. Act). Procedural rules are those of summary proceedings even though judgment is decision on merits. Such order may be given within few weeks.

In event infringement of T.P.C.P. Act has been brought to attention of Minister of Economic Affairs, he can send warning letter to infringer ordering him to stop his acts. Warning letter must indicate alleged violations and articles which have been infringed upon as well as delay to stop infringement. Further, Minister must reveal if, in event infringer does not react in due course, he will bring action to cease or if he will inform public prosecutor or if he will settle case according to procedure as provided in Act. (art. 101 of T.P.C.P. Act). In addition to this warning letter, certain number of act violating provisions of T.P.C.P. Act are penally sanctioned. (art. 102 to 110 of T.P.C.P. Act). These penal infringements are sanctioned by either imprisonment or heavy fines. Judgment which relates to these penal infringements is given by penal court (and not by President of Commercial Court). It can be rendered only after judgment which contains order to cease (issued by President of Commercial Court).

Disagreement exists on consequences for potential infringer neglecting warning letter.

Some authors believe that neglecting warning letter is indication that infringer is acting in bad faith, which has to be shown for some infringements to be qualified as penal acts.

4 CITIZENSHIP

4.01 ALIENS:

See category 15 Immigration, topic 15.01 Aliens.

4.02 IMMIGRATION:

See category 15 Immigration, topic 15.01 Aliens.

5 CIVIL ACTIONS AND PROCEDURE

5.01 ACTIONS:

See categories 4 Citizenship, topic Aliens, subhead Actions by Aliens; Courts and Legislature, topic Courts.

Limitation of.

See topic 5.05 Limitation of Actions.

5.02 DEPOSITIONS AND DISCOVERY:

American style deposition does not exist under Belgian law but judge can decide to hear witnesses. However, if witness is incapable of appearing before court (for example, because of illness) court may decide to take statement of witness at his home or, if witness lives outside district of court hearing case, appoint local judge to conduct inquest. Written statements are not used as alternative to holding inquest.

Belgian judges may send letters rogatory to foreign courts. In absence of treaty, permission of Minister of Justice is necessary to execute commissions issued by foreign courts. (Jud. C. Art. 873). Once permission is obtained, judges are obliged to execute commission. Testimony is taken in usual form determined by Belgian law. Foreign letters rogatory are transmitted through diplomatic channels. The Convention of The Hague of Mar. 1, 1954 relating to Civil Actions and number of bilateral conventions contain, for parties to these Conventions, applicable procedure for seeking assistance of Belgian Court by way of letters rogatory.

There is no discovery in Belgium. As rule, each party produces only documents necessary to sustain its own allegations and may choose not to produce certain documents. However, court may order production of document where there is strong reason to believe that party to proceedings or third party is in possession of document which will prove fact relevant to case or when party to proceedings demands such injunction against other party when latter refuses to produce relevant document.

5.03 EVIDENCE:

Oral arguments are generally less important than trial briefs, except in matters of criminal law. Judges are only obliged to address arguments put forward in briefs, not those raised in pleadings. As rule, hearings are public. Deadline for submitting evidence is time of filing of last brief or exceptionally up to 30 days before hearing. Hearing of witnesses is rare, except in matters of family law. Questioning is done by judges only. At request of party or at its own discretion, court may appoint independent expert to examine specific issues. His conclusions, although not binding, are generally followed by court. Court may also require one or more parties to proceedings to appear personally before court in order to be heard by latter. Personal appearance of parties is rare in matters of commercial law.

5.04 JUDGMENTS:

Ordinarily, a foreign judgment can be rendered executory only after a procedure of enforcement in course of which following facts and matters are reexamined by court before which enforcement is sought: (1) If decision is not contrary to Belgian public policy; (2) if defendant was given opportunity to set up his defense; (3) if foreign court's jurisdiction was not solely on grounds of plaintiff's nationality; (4) if judgment is final under laws of country where it was rendered; (5) if, under same laws, copy of judgment is official one. (Jud. C. 570).

Enforcement is refused if it is uncertain to what extent court can also examine case on its merits or if answer to one of five points is negative. Burden of proof lies with defendant.

Where Belgium has signed treaty with country on enforcement of judgments, court limits examination to points covered in treaty and does not reexamine case itself before granting exequatur.

Council Regulation (EC) No. 44/2001 of 22 Dec. 2000 on jurisdiction and recognition and enforcement of judgments in civil and commercial matters, is directly applicable in different Member States of European Union (except for Denmark) and provides for simplified procedures with regard to recognition and enforcement.

Arbitration Awards.

Foreign awards are not treated differently from domestic awards. Enforcement order is given by President of Court and can be opposed if award is in any way not final, if enforcement is contrary to public order or if ground for annulment is proven to exist. (Jud. C. 1723). Where award falls within scope of New York Convention, enforcement will only be refused on limited number of grounds listed in Art. 5, New York Convention.

5.05 LIMITATION OF ACTIONS:

In general, all actions with regard to real estate are limited to 30 years. All other (so-called “personal”) claims are, since law of June 10, 1998 came into force, normally subject to time limitation of ten years and claims existing before this law—changing delay of 30 years into ten years—came into force, but which were not yet extinguished by limitation at that date are limited to maximum ten years after date at which law came into force (and to less if original delay of 30 years expired before 2008). Claims based on tort liability are limited to five years.

Numerous civil actions are limited by periods varying from six months to five years (e.g., five years for periodical payments such as interest or rentals).

In commercial matters also numerous actions are limited by short periods (e.g., three years for action against drawee in respect of bill of exchange), while in labor matters actions by one or five year statute.

5.06 PRESCRIPTION:

See topic 5.05 Limitation of Actions.

6 COURTS AND LEGISLATURE

6.01 COURTS:

Actions involving less than [Euro]1,860 (art. 590 Jud. C.) are normally dealt with by justice of peace with possibility to appeal in case value of claim exceeds [Euro]1,240 (art. 617 Jud. C.). Actions involving larger sums are dealt with by Courts of First Instance, unless special jurisdiction is granted by law to justice of peace (art. 591 Jud. C.), to Commercial Courts or Labor Courts. In litigation involving over [Euro]1,860 (art. 617 Jud. C.) appeals are brought before Court of Appeal.

In criminal matters, Police Court deals with minor offences such as car accidents. Correctional Tribunal deals with most of other offences, including major crimes when extenuating circumstances have been admitted by prosecution. Courts of Assizes have jurisdiction for major crimes, political offences and violations of press laws and are only courts to have jury.

Appeals against judgments of Police Court are dealt with by Correctional Tribunal and appeals against judgments of Correctional Tribunal by Court of Appeal.

Legal and formal regularity of judgments in last instance may be subject to petition for Cassation. If judgment is quashed, Court of Cassation refers case to another court of same level as court that quashed judgment.

Arbitration Court decides on possible conflicts between laws enacted by National Parliament and decrees enacted by community or regional councils or between decrees of various community or regional councils, and between these laws and decrees and constitutional provisions.

Council of State is administrative court which decides on suspension and/or annulment of decisions of administrative authorities.

6.02 LAW REPORTS, CODES:

See topic 6.04 Statutes.

Treaties, Acts of Parliament, Royal and Ministerial Decrees and decrees enacted by regional councils are published in state gazette (Moniteur Belge—Belgisch Staatsblad). Some Court decisions are reported and annotated in commercially published legal periodicals.

6.03 LEGISLATURE:

See category 1 Introduction, topic 1.02 Government and Legal System.

6.04 STATUTES:

Main part of Belgian law is codified. Principal codes are, Civil Code of 1804, Judicial Code of 1967 and codes on commercial law, criminal law, criminal procedure, companies, etc.

7 DEBTOR AND CREDITOR

7.01 ASSIGNMENTS:

Assignment of claims can be opposed to third parties by mere concluding of agreement of assignment.

In order to be opposable to original debtor, however, assignment must first be notified to debtor or be acknowledged by him.

If creditor assigns same claim to several persons, assignee who can prove in good faith that he was first to notify debtor or whose assignment was first acknowledged by debtor, will be given preference prior to other assignees.

Assignment cannot be opposed to good faith creditor of assignor, whom debtor, in good faith and before assignment was notified to him, has already paid.

Business debts evidenced by an invoice can be assigned or pledged to a bank or financial institution by endorsing the invoice.

7.02 ATTACHMENT:

Creditor may, in urgent cases (e. g., when debtor is disposing of his personal property), obtain from court authority to attach debtor's movables. (Jud. C. 1413). Bearer of a bill of exchange protested for default of payment may also obtain permission to attach movables of drawer and endorsers and of a drawee who has accepted bill. (Cons. Laws on Bills of Exch. 94).

Any creditor, if existence of debt is sufficiently established, may obtain authority to attach debts, property or amounts due to his debtor in hands of third persons. (Jud. C. 1447).

Creditor holding prima facie evidence may, on that sole title, without any permission of court, attach and issue garnishee order to any third persons holding property of or owing money to his debtor and thus attach all amounts due from them to debtor. (Jud. C. 1445).

Lessors or lessees subleasing have a right, day after summons to pay, to seize tenant's furniture and chattels for unpaid rent. (Jud. C. 1461).

Certain items judged essential for living or for exercising profession, may not be seized; salaries and pensions may be seized only in part.

7.03 BANKRUPTCY:

Belgian bankruptcy law and judicial composition law (“gerechtelijk akkoord” — “concordat”) have recently been reformed by law of Aug. 8, 1997 and law of July 17, 1997 respectively.

Only merchants can be declared bankrupt under law of Aug. 8, 1997. Insolvency of non-merchants is regulated by law of July 5, 1998.

Merchant who, on long-term basis, ceases to make payments and whose credit is failing or who is insolvent is deemed to be in state of bankruptcy. (art. 2 Bankruptcy Law).

Within one month after cessation of payments, bankrupt must, at office of clerk of commercial court of his domicile, submit either declaration accompanied by balance sheet or note explaining why he cannot deposit balance sheet and other books that must be maintained. (arts. 9-10 Bankruptcy Law).

Bankruptcy may also be declared by commercial court at request of one or more creditors, or public attorney. (art. 6 Bankruptcy Law).

Court designates one or more sworn trustees, and appoints judicial commissioner to inspect and supervise liquidation of bankrupt's estate. Merchant is deemed to have ceased payments as from date of bankruptcy judgment. If, however, serious and objective circumstances clearly indicate that merchant has ceased making payments at earlier point in time, court can advance date of cessation of payments, which must be within six months prior to bankruptcy judgment. Bankruptcy judgment divests bankrupt of administration of his property, and all payments or transactions by bankrupt, or to or with bankrupt after bankruptcy judgment are not opposable to creditors. Same applies for following transactions, if carried out by bankrupt after date fixed by court as that of cessation of payments: donations of movables and immovables; transfers of property when consideration is grossly less than real value; payments of debts prior to maturity; payments of debts at maturity otherwise than in cash or negotiable instruments; mortgages and rights of security created over property of debtor to secure debts previously contracted. (art. 17 Bankruptcy Law). All payments of debts at maturity and all other contracts and transfers of property for valuable consideration cannot be opposed if persons receiving payment or dealing with debtor had knowledge of cessation of payments. (art. 18 Bankruptcy Law).

Bankruptcy judgment matures all debts owed by bankrupt. With regard to general body of creditors only, bankruptcy judgment stops running of interest on unsecured or non-preferred debts, but not on debts secured by mortgage, pledge or other specific security.

Creditors have to file declaration of their claims and rights at office of clerk of commercial court within period fixed by bankruptcy judgment. Creditors are notified via publications and advertisements, and, as soon as trustees are able to identify them, also by letter.

Declaration of claims and rights must contain full particulars regarding creditor, amount of and consideration for debt, and titles and preferential rights if any. This declaration contains solemn assertion and must be signed by creditor himself or by attorney, and in case stamped and registered power of attorney must be filed with declaration.

Trustees examine all creditor's claims after their declaration in presence of bankrupt, and draw up report of this examination. Claims are either accepted or disputed, and in latter case, they are transferred to court for examination.

After this examination has taken place, trustees liquidate estate by selling property of bankrupt and paying off existing debts.

Assets are divided equally among creditors, after payment of costs and expenses of bankruptcy, including trustees' fees, after deduction of secured debts and necessities provided for bankrupt, spouse and children, including actual living expenses.

Particulars regarding bankrupt's estate can be obtained from registry of commercial court by means of lawyer.

Judicial Composition.

Under new Act of Judicial Composition of July 17, 1997, debtor can apply for judicial composition if any single one of following conditions is satisfied: (a) debtor is temporarily unable to meet his payment obligations, or (b) if certain difficulties endanger continuation of debtor's business which could lead to bankruptcy situation in short run. If debtor's net assets have decreased below one half of his equity capital, continuation of business will be deemed to be in danger.

Debtor shall only be eligible for judicial composition if financial position of his business can be restructured and if economic recovery is possible. In other words, if debtor is already in bankruptcy situation, he will not qualify for judicial composition.

Request for judicial composition can be filed either on initiative of debtor (by petition) or on initiative of public attorney. As long as no decision is rendered on request, debtor's company cannot be dissolved and debtor cannot be adjudicated into bankruptcy. Court has to render decision within 15 days as from filing of petition or notification of writ of summons, as case may be.

If court considers that conditions for preliminary suspension of payments are fulfilled, it will award preliminary suspension of payments for maximum period of six months and it will appoint one or more judicial commissioners in order to assist debtor in management of his business and under court's supervision. Commissioner shall draw up report at request of court and whenever this is appropriate. Six-month period during which preliminary suspension of payments is ordered can be extended by up to maximum period of three months.

During period of preliminary suspension of payments, creditors cannot enforce their rights against debtor's assets. Creditors benefiting from security can be entitled to create additional securities if they can show that their securities could be subject to significant decrease of value during this period. This is often not possible in practice, however, because debtor will already be in poor financial situation at time.

Creditors have to file their claims within period indicated in judgment.

During preliminary suspension period, debtor must draw up installment plan or reorganization plan which must be approved by creditors. In order for plan to be approved, majority of creditors (having filed their claims) has to be present at meeting and creditors representing over half of amount of debts have to be in agreement. Individual approval of creditors having security on assets of debtor is not required provided that: (a) plan provides for payment of interest on outstanding debts, and (b) final suspension period does not exceed period of 18 months. If plan would modify current or future position of creditors (e.g. if certain measures would be provided for which go further than mere suspension of payments), individual approval of these creditors will be required.

Upon approval of plan by creditors, court can award final suspension of payments for maximum period of 24 months as from date of judgment. This term can be extended by up to maximum of 12 months.

7.04 EXECUTIONS:

Execution is by way of seizure and public sale of property belonging to debtor. It is possible on basis of either a judgment or a notarially acknowledged debt. Execution is carried out by bailiff (“huissier de justice”—“gerechtsdeurwaarder”) at request of creditor.

Seizures can be ascertained at court registry. (Jud. C. 1391).

All other creditors making themselves known are entitled to share in proceeds of sale. (Jud. C. 1627). As incentive for debtor to give performance to judgment, latter can provide for penal sum to be forfeited in case of noncompliance with judgment.

See also topic 7.02 Attachment.

7.05 EXEMPTIONS:

See topic 7.02 Attachment.

7.06 GARNISHMENT:

See topic 7.02 Attachment.

7.07 INSOLVENCY:

See topic 7.03 Bankruptcy.

7.08 LIENS:

Liens on immovable assets have to be recorded in mortgage register. (Hyp., Art. 29).

Most common claims benefitting from liens on movable assets are: (1) Costs of preservation; (2) freight charges; (3) rents; (4) employee claims for wages and termination compensation; (5) social security contributions. (Hyp., Arts. 19 and 20).

Moreover a person holding property under obligation to return it is entitled to a possessory lien ("droit de rétention" — "retentierecht") whereby he may retain property until his charges or claims connected with it have been paid.

7.09 PLEDGES:

Pledges require pledged property to be in possession of creditor or third party agreed upon. In case of pledge of claims, creditor-pledgee acquires possession of pledged claim by entering into agreement and pledge becomes operative against debtor by notification to debtor or acknowledgment by debtor. (C. C. 2075).

Creditor is entitled to preference over unsecured creditors and other liens on proceeds of sale. Sale must be authorized by court. (C. C. 2078 and art. 4, Act 5, May 1872).

Special rules apply to financial collateral arrangements and more specifically to pledge of financial instruments (Law of Dec. 15, 2004 implementing EU Directive 2002/47/EC of June 6, 2002 on financial collateral arrangements). Usual formal requirements related to creation, validity and enforceability of pledge are waived and such pledges can be enforced, without prior court authorization, by immediate sale or appropriation of financial instruments on occurrence of enforcement event (appropriation is only possible as far as this has been agreed by parties in security financial collateral arrangement and as far as they have agreed on valuation of financial instruments). Law also grants right of use in relation to financial instruments provided under security financial collateral arrangement. Transfer of title within framework of security financial collateral arrangement is valid (whereas validity of such transfer of title for security purposes without scope of law remains discussed) and enforceable. Certain insolvency provisions are disapplied and financial collateral arrangement cannot be declared void or invalid on sole basis that financial collateral arrangement has come into existence. It can however be declared void if arrangement has been finalized after date at which debtor has ceased to pay (this date is fixed by court and has to be within six months prior to judgment of insolvency) and under condition that arrangement is to guarantee payment of ancient debts (debts prior to financial collateral arrangement). In case of judicial composition, general rule according to which creditors benefiting from security cannot enforce their security during preliminary suspension of payments, is waived in case of security financial collateral arrangements.

See also category 17 Mortgages, topic 17.01 Chattel Mortgages.

8 DOCUMENTS AND RECORDS

8.01 ACKNOWLEDGMENTS:

The form of an act is that of the country where it was drawn up. If it is to be used in Belgium, the signature of the foreign officer (e. g., a notary) before whom it was acknowledged must be certified by the authorities of his country, the latter signature then being certified by a Belgian consular or diplomatic officer abroad. This procedure is simplified for public deeds drawn in one of countries having ratified Hague Convention of Oct. 5, 1961. (Belgian Law of June 5, 1975).

8.02 AFFIDAVITS:

Affidavits, such as provided for by English and Canadian law, do not exist under the law of Belgium. A Belgian lawyer may, however, swear a "Certificat de Coutume" (Declaration as to

Custom) before the consul of the country whose court requires to have precisions regarding Belgian law. Moreover pursuant to European convention on information relating to foreign law (signed in London on June 7th, 1968), such information can be obtained through official channels.

8.03 COMMISSIONS TO TAKE TESTIMONY:

See category 5 Civil Actions and Procedure, topic 5.02 Depositions and Discovery.

8.04 NOTARIES:

The duties of a Belgian notary are different from those of a notary public as understood in some other countries. He performs many functions more usually associated with solicitors or attorneys.

Belgian notaries are legally trained public officials appointed by the King. They exercise their functions within specific territorial limits. They draw up contracts and agreements to which the parties wish or have to give authentic form or date; they make a record of same and issue certified copies and copies for use in execution. They have also authority to take proof of facts relating to family relationship, ownership, the status of individuals or matters of public interest. Such attestation has the value of prima facie evidence.

They do not do the work of attesting, legalizing and translating documents or such other work as is usually associated with “notaries public” in other countries. Their signatures are not registered at Belgian Consulates abroad.

8.05 SEALS:

The sealing and delivering of contracts, wills or other documents are unknown in Belgium; only methods of execution are by simple signature or by public deed before notary.

Stock corporations do not use corporate seal, but operate by means of signatures of officers authorized by company's charter.

In case of death of property owner, if heirs are minors or absent or if creditor or interested party requests it, official seals can be attached to any property, and can be broken only in presence of notary drawing up inventory.

Seals are always affixed to deed boxes in banks and safe deposits in case of death.

9 EMPLOYMENT

9.01 LABOR RELATIONS:

Collective and individual labor relations are governed by extensive body of law and regulations, including collective bargaining agreements (CBA) concluded in various joint (manager-union) committees, set up for virtually every branch of industry and trade. (Law of Dec. 5, 1968).

Minimum pay scales, indexation of salaries, and year-end bonuses are normally determined by collective bargaining agreements. At present system of wage restraints is imposed. Salaries cannot increase more, per two-year period, than percentage set at national level. Payment of 13th month at end of calendar year is general practice.

In companies employing 50 employees or more, committees for prevention and protection at work must be elected on union sponsored slates. (Law of Aug. 4, 1996). Election of works council is mandatory as soon as 100 employees or more are employed. (Law of Sept. 20, 1948). These social elections are organized every four years. Last social elections took place in

May 2004.

European Works Council should be installed in multinational corporations with (real or chosen) headquarters in Belgium if overall number of employees is at least 1,000 and if there are at least 150 employees employed in two subsidiaries established in at least two different Member States of European Union. (CBA, No. 62, 6 Feb. 1996).

Union appointed delegates may require formation of union delegation recognized by employer if specific conditions fixed by collective agreement are fulfilled (minimal number of employees, minimal number of requests for formation of union delegation, etc.). This delegation supervises respect of regulations by employer, negotiates collective bargaining agreements at company level and handles grievances. (National Collective Agreement of May 24, 1971).

Union delegates, candidates and delegates to work councils and committees for prevention and protection at work and European Work Councils are highly protected against dismissal.

Termination of blue collar workers can be effected on relatively short notice (recent extension of notice period by CBA, No. 75, 20 Dec. 1999, and Law of 22 Apr. 2003: period varying from 35 to 112 days). Salaried employees are entitled to three months of notice, increased with three months per additional five years period of seniority that started running. Labor Courts grant employees earning [Euro]26,418 (as of Jan. 1, 2004) or more per year, additional severance pay taking into account abstract chances of reemployment. Such chances of reemployment are determined by criteria such as seniority, age, position and salary.

In case of dismissal, in addition to severance allowance, sales representatives are entitled to client indemnity if they can prove that they brought in clients to employer, unless non-competition clause was inserted in their employment contract, in which case they are presumed to have brought in clients. This indemnity is equal to three months of salary for representatives having one to five years of seniority plus one additional month for each additional period of five-years seniority.

Contracts generally include trial period, which for employees may not exceed six or 12 months depending on whether concerned employee earns less or more than [Euro]32,261, as of Jan. 2005. During trial period notice is reduced to seven days. Notice of seven days given during first month of trial period will moreover result in termination at end of first month, at earliest.

Discharge for urgent reason is valid if given within three working days of employer learning of facts and, if notified by registered letter of reasons underlying, within three working days following discharge.

Social security contributions are at 32.44% (+1.69% if employer had at least ten employees during last year) of gross wages for employees and 38.44% (+1.69% if more than ten workers) for blue collar workers; employee's contribution is set at 13.07%, to be withheld from wages as payment takes place.

Elaborate systems of early retirement have been established, charged directly or indirectly to employer.

In case of transfer of enterprise, workers have automatic right to be transferred to new employer, with all debts of former employer towards his employees. With regard to debts existing at time of transfer former employer will be jointly liable.

For blue collar workers, vacation allowances are included in social security system, but for white collar workers (non-manual workers) extra or double vacation allowance of 92% of current monthly salary has to be paid by employer.

10 ENVIRONMENT

10.01 ENVIRONMENTAL REGULATION:

Belgian State Structure and Environmental Legislation.

Pursuant to 1980-1988-1993-2001 State reforms, Belgium is federal State composed of three Regions, i.e., Flemish Region, Walloon Region and Brussels Metropolitan Region. Regional authorities have been granted substantial legislative powers over environmental issues. As general rule, Regions are competent for almost all sectors of environmental policy. Federal State retains competence for, inter alia, protection of workers' health in workplace, protection against radiation, international transit of waste, adoption of product standards and protection of North Sea.

Environmental Permits.

Industrial activities likely to harm environment are generally not prohibited, but are subject to permit and consequently bound to conditions. Companies must apply for several permits in order to perform their activities. Legal framework of environmental permits is quite different in the three Regions.

In Walloon Region, Regional Statute of Mar. 11, 1999 on environmental permit governs environmental permit. Statute introduces one single environmental permit covering operation stricto sensu as well as building permit and all necessary accessory authorisations (e.g., waste water discharge).

In Flemish Region, Regional Statute of June 28, 1985 on environmental permit and Decree of the Flemish Government, dated Feb. 6, 1991 on environmental permit (VLAREM I), have introduced one single environmental permit, which is granted for majority of activities likely to harm environment.

However, not all permits have been integrated into environmental permit. Company might thus possess other permits which are governed by separate rules, such as building permit, permit for use and possession of radioactive material, etc.

Decree of the Flemish Government of June 1, 1995 on environmental activities likely to harm environment (VLAREM II) enacts exhaustive list of general (imposed on all industries) and sectoral (imposed on industries of certain sector) standards classified industries must comply with. These standards are intended to prevent air pollution, pollution of surface water, groundwater, noise disturbances, etc.

In Brussels Region, Regional Statute of June 5, 1997 on environmental permits also provides for one single environmental permit for majority of activities likely to harm environment.

Regional Statute of Mar. 25, 1999 implements rules concerning investigation, prosecution and punishment of infringements on environmental law prescriptions.

Air.

In Flemish Region VLAREM II details general and sectoral standards for prevention of air pollution. In Walloon and Brussels Regions atmospheric pollution is primarily fought through operating or environmental permit and in general and specific regulations elaborated per kind of installation.

Waste Water.

In each of three Regions, environmental permit is required for discharge of cooling water and industrial waste water into surface water or public sewage system on basis of above-mentioned legislation on environmental permit.

Respective regional legislation contains standards relating to composition of discharged water (prohibition to discharge certain substances or maximum level of admitted substances), quantities of discharges and control and measurements of discharges.

Waste.

In Flemish Region, management of waste is governed by Regional Statute, dated July 2, 1981 and its implementing decrees, especially Decree of the Flemish Government of Dec. 17, 1997 (VLAREA).

According to this Statute, environmental permit is required for disposal or removal of waste. Disposal and removal of waste can be carried out by third parties, provided these have been licensed by provincial government. In that case, generator of waste needs not apply for permit.

It is compulsory for company producing industrial waste to file annual reports on quantities, composition and treatment of waste to Flemish Public Waste Company (OVAM). Company must ensure that any waste is removed properly and in compliance with regulations.

In Walloon Region management of waste is governed by Regional Statute of June 27, 1996 on waste. Brussels Region adopted Regional Statute of Mar. 7, 1991 on prevention and management of waste.

Pursuant to this legislation, set up and exploitation of waste ground, depot or waste processing installation is subject to prior permit.

On May 30, 1996, three Regions concluded cooperation agreement on prevention and management of packaging waste. Companies defined as “packaging responsibles” have to obtain certain recycling levels for packaging waste originating from both households and industry, or have to charge third parties with such obligation.

Soil Pollution.

In Flemish Region, Statute of Feb. 22, 1995 on soil clean-up governs soil and groundwater contamination. Distinction is made between soil pollution caused after entering into force of Statute and soil pollution having occurred prior to Statute's entering into force (historical pollution). Statute indicates cases for which soil clean-up is required, which party has obligation to clean up site and which party is ultimately liable for costs.

Legislation provides for keeping of register of contaminated soils. No transfer of land may occur without seller having obtained soil certificate from Flemish Public Waste Agency (OVAM) based on aforementioned register.

Transfer of land on which certain activities have taken place are subject to prior soil investigation and financial bounds.

Implementing decree has been adopted by Flemish Government on Mar. 5, 1996 (VLAREBO).

Two other Regions have also adopted similar legislation (Regional Statute of Apr. 1, 2004 in Walloon Region and Regional Statute of May 13, 2004 in Brussels Region).

General Supervision.

As general rule, authorities competent for delivery of permits are local (provincial and municipal) authorities. In certain cases permits are granted by Minister in charge of environment.

In Flemish Region competent supervising officers are civil servants of Administration for Environment, Nature and Land Organization of Flemish Ministry of Environment (AMINAL, Bd. Roi Albert II, 1000 Brussels). Officers of Flemish Public Waste Company (OVAM, Stationsstraat 110, 2800 Mechelen) have been granted powers in sectors of waste, groundwater and soil pollution.

In Walloon Region competent supervising officers are civil servants of Division of Environmental Police (Division de la Police de l'Environnement, Service Central, Av. Prince de Liège 15, 5100 Namur; Direction de Mons, Chaussée de Binche 101, 7000 Mons; Direction de Charleroi, Rue de l'Ecluse 22, 6000 Charleroi; Direction de Namur-Luxembourg, Rue Nanon 98, 5000 Namur; Direction de Liège, Montagne Sainte-Walburge 2, 4000 Liège).

For Brussels Region reference is made to officers of Brussels Institute for management of environment (I.B.G.E., Gulledelle 100, 1200 Brussels).

11 ESTATES AND TRUSTS

11.01 ADMINISTRATION:

See topic 11.05 Executors and Administrators.

11.02 DEATH:

See category 18 Property, topic 18.01 Absentees.

When a person ceases to appear at the place of his domicile or residence and has not been heard of for four years, proceedings may be instituted before the civil tribunal to have the absence established. (C. C. 115). When a judgment declaring the absence has been rendered, the presumptive heirs can be placed in temporary possession of the property which belongs to the absentee. (C. C. 120). If the absence lasts 30 years after temporary possession is granted, the interested parties may apply to the tribunal for a judgment granting final possession. (C. C. 129).

Action for Death.

Surviving spouse, descendants and ascendants, whether nationals or foreigners may claim damages where death is caused by willful deed or negligent conduct. Amount is not limited. It covers pecuniary and nonpecuniary damages.

11.03 DECEDENTS' ESTATES:

See topics 11.04 Descent and Distribution, 11.08 Wills.

11.04 DESCENT AND DISTRIBUTION:

The same rules govern succession to movable and immovable property, located in Belgium. Relationship is determined by degrees which exist in the direct line, ascending or descending or in the collateral line. In the direct line, each generation counts for a degree. In the collateral line, the number of generations is counted up to the common ancestor and from him down to the person whose degree of relationship has to be determined. There is no distinction between the sexes and no right of primogeniture.

Heirs at law are of two types: legitimate heirs and State. Legitimate heirs are children and direct descendants, surviving spouse, direct ascendants, brothers and sisters and their descendants, and collaterals.

Children and direct descendants exclude all other heirs with exception of surviving spouse who in such case is entitled to usufruct of estate. Direct descendants of child who has predeceased decedent inherit his part by virtue of legal fiction called “representation.” If decedent leaves spouse but no children and no direct descendants, and there are other heirs, surviving spouse receives property of estate common to spouses and usufruct of remaining. If decedent leaves brothers and sisters and ascendants other than father or mother, ascendants are excluded. If father and mother survive decedent who leaves brothers and sisters, one-half of estate only goes to latter, other half to parents. If one of parents alone survives, he or she gets one-fourth of estate, remainder being distributed among brothers and sisters.

In case surviving spouse is only heir, he/she inherits all of estate.

Representation in the collateral line takes place only as regards children and descendants of brothers and sisters and of uncles and aunts of decedent.

If decedent leaves no spouse, no descendants, and no brothers and sisters or descendants of same, estate is divided equally between ascendants of both paternal and maternal lines. In each line right to succeed applies to nearest in relationship who, to exclusion of all more distant relations, inherits part coming to his line. Ascendants in one line related in same degree inherit per capita. Collaterals beyond fourth degree do not inherit, except by representation.

In default of legitimate heirs or legatees (see topic 11.08 Wills) entitled to inherit, estate passes to State.

Notarial determination of heirs and successors based on information given by next of kin (acte de notoriété- akte van bekendheid) carries great weight with banks and official agencies.

As regards foreigners, their immovable property in Belgium is governed by Belgian law, but their personal property is governed by the law of their last domicile. Where foreigners and Belgian citizens inherit together and various parts of the estate come under different laws, the Belgian heirs can take compensation on goods situated in Belgium for any amount from which they have been excluded on account of different conflict rules governing the distribution of goods situated outside Belgium. (Law of April 27, 1865).

Forced Heirship.

See topic 11.08 Wills.

11.05 EXECUTORS AND ADMINISTRATORS:

Executors may be appointed by will but only for a period of one year and one day, and they have only very limited powers, being little more than advisers and arbitrators. They may have the right of seizin over movable property to the extent required to pay any legacies, but the estate devolves directly on the heirs and not on the executors.

Legitimate heirs (see topic 11.04 Descent and Distribution) can take possession of the estate, whereas State has to petition court before taking possession. (C. C. 724). Legatees have to receive possession from heirs, successors or residuary legatee as case may be (C. C. 1010, 1014); residuary legatee from heirs only when they are entitled to a reserved portion (see topic 11.08 Wills) (C. C. 1004, 1006).

Heirs, successors and residuary or demonstrative legatees are personally liable for estate debts, unless they file a statement with the court and have a notarial inventory of assets and liabilities drawn up.

An administrator can be appointed by the court only where the heirs are undiscovered.

See also topics 11.04 Descent and Distribution, 11.08 Wills.

11.06 INTESTATE SUCCESSION:

See topic 11.04 Descent and Distribution.

11.07 TRUSTS:

Trusts and trustees are recognized under Belgian jurisdiction since new Belgian international private law code entered into force on Oct. 1, 2004.

11.08 WILLS:

To make a will one must be sound in mind. A minor under 16 years of age has no right to make a will. When the age of 16 is attained, a minor may dispose of his property by way of will but only to the extent of one-half of the amount which the law would permit him to dispose of were he a major.

There are three forms of wills:

The holographic will must be handwritten, dated and signed entirely by the testator, but no witnesses are required.

The notarial will is received by a notary to whom testator describes his intentions in the presence of two witnesses, or by two notaries.

The international will needs only to be signed by testator who declares it to be his will in presence of two witnesses and one or more notaries. It is sealed in presence of said persons and deposited in hands of notary who draws up protocol of declaration. Protocol is signed by notary, testator and witnesses.

Wills can be revoked specifically or by implication. Implied revocation occurs when a subsequent will contains provisions inconsistent with those contained in previous wills. If provisions of a subsequent will are in accordance with those of a previous will not revoked by a specific act, the different provisions are valid and must be executed.

Three categories of legacies are distinguished: specific, residuary and demonstrative (these last being for a portion of the estate).

Forced Heirship.

The general principle is that any person may freely dispose of his property by gift or will, no distinction being made between chattels or immovables. This rule knows but three exceptions: (1) When there are children or representatives of children; (2) when decedent's ascendants are still alive; (3) when there is surviving spouse. If decedent leaves one child, he can only dispose of one-half of his property; if he leaves two, only of one-third; if he leaves three or more, only of one-fourth. Reserved portion goes equally to testator's children. Free portion may be left either to third person or to child he wishes to favour. In absence of children and of surviving spouse, ascendants in both paternal and maternal lines have reserved portion of one-fourth per line. Surviving spouse is entitled to usufruct of half of estate. Usufruct of surviving spouse covers principal family dwelling even if its value exceeds half of estate. This reserved portion of surviving spouse is deducted from reserved portion of children or descendants and from free portion in accordance with their respective sizes.

Foreign Wills.

Will is valid if made either in form prescribed by law of place where drawn or in form prescribed by national law.

12 FAMILY

12.01 ADOPTION:

Regulation governing adoption has been changed by Law of Mar. 20, 2003 and Apr. 24, 2004 (not yet entered into force). Children can be adopted by one person alone, by two married people (of different sex) or by two cohabiting people (not belonging to same family) who live together on permanent and effective basis for three years at least.

New law regulates also international adoption by transposing into Belgian law content of Convention of The Hague from May 29, 1993, including more cooperation between Belgium and state of which adopted child is inhabitant during process of adoption. Aim of such regulation is to enforce measures against traffic of children from developing countries.

New law does not affect distinction between simple adoption and full adoption which remains as such, whereby simple adoption is much more limited in its effects than full adoption.

Each demand for child adoption must be filed in court. Court examines motives for adoption as well as interest of child through so-called “socio-psychological” check of concerned child on basis of his personal, medical and family situation.

12.02 ALIMONY:

See also topic 12.05 Divorce.

Law of Feb. 21, 2003 has created service for alimony claims (public institution) which entered in force on June 1, 2004. So-called “Fonds de pensions alimentaires” can pay in advance alimony claims for amounts which remain unpaid by debtors. Up to now, intervention of Fund is limited to alimony claims related to maintenance and education of children (up to [Euro]175 per month and per child). Alimony between spouses and ex-spouses do not enter into scope of law.

12.03 COMMUNITY PROPERTY:

See topic 12.06 Husband and Wife.

12.04 DESERTION:

See topic 12.05 Divorce.

12.05 DIVORCE:

Divorce may be for specific cause or by mutual consent. Court of district of matrimonial home or of defendant's domicile has jurisdiction.

Aliens will be granted divorce in Belgium only if matrimonial home or domicile of one of spouses is in Belgium. If only petitioner has his domicile or residence in Belgium, he may bring action before court of his domicile or residence. Defendant may however claim incompetence of that court, if he can prove that petitioner has same rights in country of defendant. Council Regulation “Brussels II” adopted by EU on May 29, 2000 came into force in Belgium on Mar. 1, 2001 and determines, with Code of Private International Law (Law of July 16, 2004), new rules of attribution for Belgian judges. As result of this regulation, proceedings which take place entirely within EU are dealt with by Belgian judge if one spouse has either his/her usual residence in Belgium, or either has Belgian nationality. As to law governing divorce proceedings, spouses can choose either their common national law or Belgian law. If no law has been chosen by spouses, applicable law will be law of last common residence or last common national law of both spouses. If none of these apply, divorce will be governed by Belgian law.

Divorce for a specific cause may be granted on grounds of adultery, abuse, cruelty or gross insult, actual separation during two years. Conduct which, having regard to social standing of parties, amounts to breach of marriage vows they implicitly or explicitly assumed in marrying is considered as gross insult.

Proceedings begin by petitioner in person, or by attorney with special proxy if petitioner resides out of country, lodging citation before civil tribunal. Preliminary measures can also be requested, separately or in citation. If parties agree about these preliminary measures, judge will take note of this agreement, which will be valid as judgment. If they do not agree, request for preliminary measures will be sent to president of civil tribunal. Facts and wrongs invoked must be enumerated with greatest possible precision. Marriage and birth certificates as well as any proof (not especially certificate) of nationality must be attached. If plaintiff produces sufficient evidence of wrongs invoked, court immediately grants “de plano” divorce at first hearing. Otherwise, plaintiff will be compelled to prove his grievance in later hearings. After hearings, case is resumed before court, which grants divorce if evidence is sufficient. Belgian law knows no setoff in relation to such offenses. If both parties have good reason to complain, counterpetition will be admitted, and divorce pronounced against either or both parties. Court's decree granting or refusing divorce is appealable to higher court within one month of its service. After this delay, successful plaintiff must notify judgment to municipal officer who records it.

Alimony and Custody of Children.

After request has been lodged, president of civil tribunal makes provision for temporary alimony and for a sum covering indigent spouse's living expenses. Provision is also made for custody of children pendente lite. All these matters are decided according to wishes of parties or, failing agreement, in children's best interests.

When divorce is decreed, provision for custody of children becomes final. When no provision has been made, custody of children remains with parents (C. C. 302), unless Juvenile Court decides otherwise. Court may also grant successful plaintiff alimony in amount not exceeding one-third of defendant's income.

Divorce by mutual consent is possible if both parties have been married more than two years. Parties must agree on friendly settlement of their pecuniary interests, on their residences pendente lite, on question of alimony and on custody of children during and after proceedings.

Proceedings are simple. Parties appear before civil tribunal within month after request is lodged. Three to four months later (extendible if children are heard to give their opinion), parties have to appear again to confirm their mutual consent. Tribunal then grants divorce if all legal requirements have been complied with.

Separation may be petitioned for and granted on same grounds as divorce either for specific cause or by mutual consent. Private separation agreements have no legal value. Legal separation always carries with it separation of property.

Divorce after Separation.

Two years after judgment granting separation for specific cause has been recorded, either party may apply for divorce, which is in discretion of tribunal. Two years after judgment granting separation by mutual consent has been recorded, parties may jointly request that separation be converted into divorce.

12.06 HUSBAND AND WIFE:

Basic Rules.

Husband and wife owe fidelity, help and assistance to one another. Matrimonial residence is chosen by common accord or failing this by court. (C. C. 213, 214).

Each spouse contributes to marriage expenses according to his (her) means. In case this obligation is not met, justice of peace of last common residence may authorize one of spouses to receive other's income, credits, wages, salaries and debts, under certain conditions and to extent specified in his decision. After notification by recorder, decision of judge must be complied with by debtors of spouse. (C. C. 221). Each spouse also has power to engage joint liability of defaulting spouse for household and educational debts. (C. C. 222).

Each spouse may engage upon a business or professional activity but the other spouse may apply to the court for an injunction if he (she) thinks his (her) or the children's interests are thereby adversely affected. Husband and wife may not make use of each other's name in their business or professional transactions without consent of other spouse. (C. C. 216).

One spouse cannot unilaterally dispose of matrimonial home, unless authorized by court. All notifications concerning lease of matrimonial home have to be addressed to or have to originate from both spouses. (C. C. 215).

Community of Property.

In absence of matrimonial agreement to contrary or evidence that specific goods are exclusively owned by one of spouses, community of property comes into being upon marriage. (C. C. 1405). Under legal community rules, each spouse retains whole ownership of property owned at time of marriage or acquired during marriage either by inheritance or gift as well as other personal property such as clothing, small objects of personal use (diplomas, decorations, souvenirs), industrial, literary or artistic property rights, damages awarded for personal injuries, pensions and rents. (C. C. 1399 to 1401). Income from assets or professional activity of spouses as well as acquisitions made by onerous title during marriage are considered community property. (C. C. 1405).

Debts proper to one spouse, that is incurred for benefit of his/her personal property or in his/her exclusive interest, generally encumber his/her individual property and income. (C. C. 1409).

In contrast, payment of common debts, contracted by both spouses or by one spouse in their common interest, can generally be charged against community property or jointly against all three properties. (C. C. 1413).

Each spouse manages his own property, his personal income and bank accounts to which he holds title (C. C. 218); each spouse undertakes individually all acts of management necessary for his professional activity (C. C. 1417).

Household expenses can be carried out by use of community property by either spouse who can individually manage such operations and bind other spouse vis-à-vis such acts. (C. C. 1416).

For more important expenditures, law requires consent of both spouses. (C. C. 1418-1419).

Court can take measures in order to avoid mismanagement by one of spouses. It can also, in case of abuse by one of spouses, set aside such acts. (C. C. 1420-1422).

Community of property rules are rendered inapplicable by death of either spouse, divorce or separation, judicial separation of property, alteration of above rules by contract between parties. (C. C. 1427).

Matrimonial Agreements.

It is customary for people possessing property, who marry in Belgium, to fix their property rights by contract, which must be drawn up by notary. Greatest freedom prevails as to terms of contract, but parties may not depart from basic rules and from rules governing legal powers of parents over children or from rules of inheritance. Marital property agreement can be altered after marriage upon condition of not causing prejudice either to interests of family, or those of children, or rights of third parties. (C. C. 1394-1396).

Spouses can thus adopt either system of community property which is more extensive than that provided by law thus placing all of their property in common or adopt system of complete separation of their property. (C. C. 1466-1469). Under community system, parties cannot depart from rules governing management of personal and community property. Under same system, it is also customary to make allotment of community property in favor of surviving party. Such dispositions are not treated as gifts.

12.07 INFANCY:

Age of majority is 18 for both sexes. Emancipation is possible at 15 by court order and is automatic upon marriage.

Infants are represented in contracts and court actions by parents. (C. C. 376). For sums owed to infants, courts may establish special conditions governing their use by parents. (C. C. 379).

Mentally deficient persons may be subject to status of prolonged infancy. (C. C. 487 bis e.s.).

12.08 MARRIAGE:

The minimum age at which a person may lawfully marry is 18, but in exceptional circumstances the court may permit persons under this age to marry.

Where either party is under age of 18, it is necessary to have consent of both parents. If parents disagree, or are without legal capacity to consent, court decides. Consent can also be given by court if it feels refusal is unjustified.

Marriage is a civil contract and no legal recognition is accorded to religious ceremony. Marriage takes place in public before municipal officer in presence of two witnesses. Protocol or “marriage act”, aside from details relating to marriage itself, must also mention date of marriage contract, if spouses choose to have one, and name of notary who drew up instrument; if these are left out, clauses of contract derogatory to common law will not be effective against third persons.

Since June 1, 2003, Belgian law authorizes marriages between individuals of same sex. Same sex marriage does not, however, produce any effect at all in field of descendance or adoption. Adoption remains prohibited to homosexual couples, even if they are married.

See also topic 12.06 Husband and Wife.

12.09 MARRIED WOMEN:

See topics 12.06 Husband and Wife, 12.08 Marriage.

13 FOREIGN TRADE AND COMMERCE

13.01 CUSTOMS:

As member of European Union (“EU”), Belgian customs law is largely based on EC customs legislation. Thus, virtually all Belgian customs duties are established in accordance with Common Customs Tariff, and rules relating to origin, valuation, payment of customs debt, transit procedures, and special customs arrangements such as duty-free import under inward or outward processing regimes are governed by EC law. Belgian customs law is codified in Customs and Excise Code.

Agents of Customs and Excise Administration are responsible for administering Belgian customs law by, inter alia, collecting customs duties; enforcing import regulations; verifying customs documentation; and engaging in related inspection and investigative activities.

Belgium is member of General Agreement on Tariffs and Trade.

See also European Union Law Digest, category Foreign Trade and Commerce, topic Customs Duties.

13.02 EXCHANGE CONTROL:

See category 1 Introduction, topic 1.01 Currency, subhead Foreign Exchange.

13.03 FOREIGN EXCHANGE:

See category 1 Introduction, topic 1.01 Currency, subhead Foreign Exchange.

13.04 FOREIGN INVESTMENT:

See topic Foreign Trade and 13.04 Foreign Investment.

13.05 FOREIGN TRADE AND FOREIGN INVESTMENT:

International trade policy is within exclusive competence of EU authorities. Even though import regimes for certain goods may differ from one Member State to another, rules applicable to imports into and exports from Belgium, including rules relating to anti-dumping and countervailing duties, are laid down in E.U. regulations.

Foreign investment in Belgium is free. However, prior notification to governmental authorities is always required for acquisition of at least 1/3 of capital of enterprises whose activity is taking place on Belgian territory having equity of at least 100,000,000 BF.

Furthermore, any acquisition of voting shares of Belgian companies listed on E.U. Stock Exchange has always to be disclosed to company and Commission for Banking and Finance, if such acquisition results in shareholding of 5% or more of outstanding voting equity as well as any subsequent acquisition which would increase shareholding above further 5% increments (i.e. 10, 15, 20% etc.). Sales of such voting equity causing holder to cross any of these thresholds must be disclosed.

Public bids to acquire Belgian securities made by non-E.U. resident are subject to authorization of Minister of Finance.

Special prospectus and other rules apply on takeover bids and public offers.

Several Acts authorize important incentives to investment by large or small business in certain regions or in accordance with government planning goals. Incentives include interest subsidy, investment premiums, employment premiums and tax exemptions.

Belgium is member of Benelux, European Union and O.E.C.D.

13.06 FOREIGN TRADE REGULATIONS:

See topic Foreign Trade and 13.04 Foreign Investment.

14 HEALTH

14.01 REGULATION AND CONTROL:

General Pharmaceutical Inspectorate of the Health Protection Division of the Ministry of Social Affairs, Public Health and Environment regulates and controls quality, efficiency and safety of medicines and related products, including veterinary products. This is done through monitoring of implementation of Law of Mar. 25, 1964 on medicinal products (“1964 Law”) and related Royal Decrees, including issue of marketing authorization and registration in relation to medicinal products (for human and veterinary use), medical devices, narcotics and other related raw materials, quality in manufacture and distribution, pharmacovigilance (safety issues), advertising, infringements, etc.

Medicinal product is defined in 1964 Law as any substance or composition presented as having remedial or preventive properties in respect of human or animal diseases. Provisions of 1964 Law do not cover issues relating to cosmetics, foodstuff, food supplements and pesticides, which are individually regulated under other specific legislation. Distinction is also made between medicinal products for human and veterinary use, latter of which may also fall within scope of specialized rules controlled by Ministry of Agriculture and Small Enterprises.

1964 Law was completed and amended by Law of Dec. 16, 2004 (entry into force on Feb. 23, 2005) in order to fight against excesses of promotion of medicinal products. Regulation relating to such promotion is examined below. (See subhead Promotion, infra.)

Rules relating to medical devices are contained separately in Royal Decree of Mar. 18, 1999 as amended by Royal Decree of July 13, 2001 which addresses their registration, issue of marketing authorization, import/export, etc.

Rules relating to registration procedure of medicinal products as in conditions which make it possible to sell it on market are described separately by Royal Decree of June 23, 1999 (“1999 RD”) which was modified by Royal Decree of Feb. 2, 2005.

Clinical Trials (Human) Experimentation.

Three regulations govern clinical research, i.e., 1964 Law and Royal Decree of Sept. 22, 1992 regarding rules about clinical trials for human medicinal products (“1992 RD”).

1964 Law and “1992 RD” were recently completed by Law of May 7, 2004 on experimentation on human being implementing, i.e., Law on Human Experimentation.

To prevent unbridled and uncontrolled development of new medicinal products, 1964 Law imposes system of prior authorization. Law does not regulate drug research. To obtain this authorization, medicinal products have to meet certain minimal criteria. This authorization is final piece of slow process. Clinical research is implicitly controlled by this process described in 1964 Law.

Contrary to 1964 Law, 1992 RD is rather detailed about drug research. File, results of chemical, pharmaceutical and biological studies and clinical documentation, must accompany every application for manufacturing and marketing of medicinal product. Regulation of authorization and manufacturing of medicinal products mention drug research. Ethical Code of Belgian Medical Association contains ethical rules about human clinical trials and experimentations. These rules are general guidelines on “Good Clinical Practice” (CPMP/ICH/135/95) produced by Committee for Proprietary Medicinal Products.

All clinical research in gene therapy using genetically modified organisms (“GMOs”) or pathogen organisms falls under scope of 2004 Law on Human Experimentation. 2004 Law applies to pharmacological research and any experimentation on human persons. Law protects rights of guinea pig (informed assent of guinea pig and protection of their private life). 2004 Law contains specific protection for minors and any persons which are unable to express their will. Brief times are imposed to approve protocols of research by ethical authorities and ethical committees. Possibility to allow authorization for exceptional research in emergency cases is mentioned by 2004 Law.

Registration and issue of marketing authorizations in respect of medicinal products are regulated primarily by Royal Decree of June 23, 1999, as amended by Royal Decree of Feb. 2, 2005, relating to procedure and conditions of medicinal product's registration (“1999 RD”) and Royal Decree of June 6, 1960, as amended by Royal Decree of Sept. 5, 2001 relating to manufacture, preparation, and wholesale distribution of medicinal products and their dispensation (“1960 RD”). In addition, provisions of these two Royal Decrees also contain rules concerning transfers of marketing authorizations, generic medicinal products and pharmacovigilance.

All medical devices must be “CE” marked in order to qualify for registration, as well as conform to certain “essential requirements” set forth in 1999 RD, depending on product classification.

Promotion.

Law of Dec. 16, 2004 (entry into force on Feb. 23, 2005) completes 1964 Law to limit excesses of medicinal product's promotion. Law of Dec. 16, 2004 (“2004 Law”) establishes regulation that fights against these excesses. This regulation does not completely prohibit promotion of medicinal products for human use or for veterinary use. It limits this promotion with aim of consolidating relation of confidence between doctor and his patient. 2004 Law prohibits in principle to people and institutions which prescribe, deliver or apply medicinal products for human use as opposed to people who provide themselves medicinal products for veterinary use: to promise, offer or grant, directly or indirectly, premiums or advantages at time of supply of medicinal products. This prohibition provides exceptions particularly when these premiums or advantages offered make it possible to finance scientific demonstrations or scientific services accomplished by health professionals.

2004 Law regulates, in framework of these offered premiums or advantages, relations between manufacturers, importers, wholesalers of original or generic medicinal products and professionals of health (doctors, dentists, veterinary, pharmacists, etc.).

Any person directly concerned with offer of premiums or advantages at time of supply of medicinal products can request from health minister opinion of conformity to law before undertaking such promotional action.

Pricing.

Medicinal products are subject to price regulation, according to whether they fall into category of reimbursable or non-reimbursable products, OTC and prescribed products. These regulations are meant to ensure that pharmaceuticals are of minimum standard and to control cost of healthcare provision.

Setting of maximum prices of new reimbursable pharmaceutical products as well as any price increases requires prior approval of Minister of Economic Affairs (Law of Dec. 22, 1989 relating to price setting of reimbursable medicinal products within scope of mandatory insurance against illness and invalidity). Non-reimbursable pharmaceutical products are subject to distinct regulations, depending on whether medicinal products require any medical prescription. In addition, for reimbursable products, maximum margins are imposed on pharmacists, doctors and hospitals for products sold to final consumers. Other regulations govern specific situation of generic products.

Trade Practices.

Advertising of medicinal products for human use is governed by Royal Decree of Apr. 7, 1995 completed by Royal Decree of June 9, 2003 and by Royal Decree of July 4, 2004 on information and advertising regarding medicinal products for human use, general provisions on medicinal products, general rules on advertising and industry codes. Nonregistered medicinal products cannot be advertised. In addition, certain means of advertisement are prohibited and where advertising is allowed, strict rules apply regarding minimum information, prohibition of misleading information, and approval of Ministry of Health. These rules depend on whether advertising is aimed at public at large or only medical profession.

Royal Decree of June 9, 2003 contains particular rules to stimulate advertising and information about medicinal products against nicotine addiction.

Rules relating to advertising of veterinary medicinal products are set forth in Royal Decree of July 9, 1984, which contains similar provisions to that of Royal Decree of Apr. 7, 1995.

Conduct of clinical trials is regulated by Royal Decree of Sept. 16, 1985 on applicable norms and protocols regarding trials of medicinal products for human use, as well as ethical rules adopted by Belgian Association of Physicians and Belgian Association of Pharmaceutical Industry. These rules generally mirror guidelines on “Good Clinical Practice” (CPMP/ICH/135/95) produced by Committee for Proprietary Medicinal Products. These rules are inspired in particular by those described by European Code relating to medicinal products for human use which was founded by European Directive No. 2003/83/CE.

Import/Export.

Granting of import/export authorization of medicinal products is regulated by Royal Decree of Apr. 19, 2001 concerning parallel import and distribution of medicinal products for human and veterinary uses (“2001 RD”), imposing process of authorization to import or to manufacture medicinal products.

Parallel import of medicinal products is also allowed under Belgian and European competition rules, subject to compliance by parallel importer with applicable Belgian rules on medicinal products, in particular 1999 RD, and observance of intellectual property rights of owner of medicinal products.

Liability/Insurance.

Law of Feb. 25, 1991 on defective product liability provides for strict liability for manufacturers and importers of defective pharmaceutical products. Product is considered defective when it does not provide safety expected taking into consideration its presentation, its normal use or reasonably foreseeable use at time product was put into circulation.

Marketing of medicinal products is not allowed until authorization is obtained from Belgian authorities, including fixing of price. Registration and marketing authorization of medicinal product will only be granted after completion of clinical trials and complete and detailed file is submitted in respect of product. There is continuing obligation on marketing authorization holder to study adverse events and keep safety of products under review.

Physicians are also bound by strict legal and moral codes relating to supply of pharmaceuticals to patients.

Insurance for conduct of clinical trials is not compulsory but is customarily included in trial protocol. As there is no specific legislation on insurance for medicinal products, regulations applicable to insurance in general apply. These are contained in Law of June 25, 1992, which provides for certain mandatory rules to be reflected in all policies. Insurance policies cannot cover damages resulting from insured's willful misconduct. Most insurance policies exclude coverage for damages resulting from products willfully made with manufacturing method prohibited by regulations.

Ethical Rules.

Ethical Code of the Belgian Association of Physicians regulates ethical aspects of physician's practice, including issues relating to sponsoring, clinical trials, protection of medical data, advertising etc.

Further, Ethical Code of the Belgian Association of Pharmaceutical Industry provides professional ethics in relation to medicinal products for human use. This Ethical Code relates mainly to regulation of advertising and promotion of medicinal products and prohibits pharmaceutical companies in particular from influencing prescription of physicians.

E-Commerce Related Issues.

Use of Internet and e-commerce in pharmaceutical sector is primarily focused on business-to-business relationship, as heavy regulations on product classification, pricing and reimbursement policy as well as advertising act as barriers in promoting use of Internet on retail level. These relationships are governed by related Law of July 14, 1991 on trade practices which contains provisions regarding “sales at distance” and implements principles of Directive 2000/31/EC of June 8, 2000 concerning electronic commerce in Belgian Law.

15 IMMIGRATION

15.01 ALIENS:

Status and capacity are governed by alien's federal law. (Law of Dec. 15, 1980, R.D. Oct. 8, 1981).

Residence.

Under present regulations, before residence permit in Belgium more than three months is issued to non-EU citizens, latter is recommended to have obtained firstly work permit or professional card.

Civil Rights.

Constitution grants aliens on Belgian soil same protection as Belgian citizens, both for themselves and their belongings, save few minor exceptions established by law. (Const. 191). Practically, position of aliens in civil matters is nearly same as that of Belgian citizens.

Real property located in Belgium and owned by aliens is governed by Belgian law. (C. C. 3).

Actions by Aliens.

Aliens suing in Belgium may be compelled at request of Belgian defending party, unless treaty removes this ability, to give such surety as court may fix, considering costs of suit and amount of damages to which alien plaintiff might be sentenced. (Jud. C. 851-852).

Actions Against Aliens.

Where foreigner is resident in Belgium civil proceedings can always be commenced against him. There are also numerous cases where foreigner not resident in Belgium can be summoned to appear before Belgian courts: e. g., where proceedings concern real estate situate in Belgium, contracts entered into or to be performed in Belgium, claims enforced in Belgium, bankruptcy declared in Belgium, choice of forum clause, etc. (Jud. C. 635). Belgian courts also have jurisdiction on basis of plaintiff's residence, unless alien defendant shows that his country's courts would not take jurisdiction in converse situation. (Jud. C. 638 and 636). See also Brussels Convention of Sept. 27, 1968 on jurisdiction and recognition of judgments and bilateral conventions.

Alien Workers and Professional People.

Non-EU citizens may only work in Belgium if they have obtained prior to entering Belgium, in case of employees, work permit (“Permis de Travail”—“Arbeidskaart”). In addition, employer who engages aliens must in principle be licensed thereto. Permit is sent to applicant who has to obtain from Belgian embassy or consulate special visa authorising person in question to reside in Belgium. (Law of Apr. 30, 1999, R.D. of June 9, 1999).

In case of non-EU subjects who wish to exercise in Belgium independent profession (businessman, lawyer, etc.) they must apply for Professional Card (“Carte Professionnelle”—“Beroepskaart”). Their application must be filed by means of special forms issued by Belgian embassy or consulate of their place of residence or by local authorities, if alien applicant is already residing in Belgium on another basis. Request is examined and thereafter Professional Card is issued; this permits issue of residence permit. (Law of Feb. 19, 1965, R.D. of Aug. 2, 1985).

In case of refusal by Belgian Authorities to issue either work permit or Professional Card, it is possible to appeal.

Corporations incorporated under foreign law enjoy same rights as corporations incorporated under Belgian law, except only with respect to some highly regulated areas such as banking, financial and insurance law. Specific rules concern licensing for performance of public works and flag requirements for aircraft and for ships.

For other provisions relating to aliens, see categories 11 Estates and Trusts, topic Descent and Distribution; Family, topics Divorce, Marriage; Intellectual Property, topic Copyright.

16 INTELLECTUAL PROPERTY

16.01 COPYRIGHT:

Statute and Treaties.

On international level, Belgium is member of 1886 Bern Convention (in its 1971 Paris Version) and 1952 Universal Copyright Convention. As member of World Trade Organization since Jan. 1, 1995, Belgium is bound by Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPs). Belgium is member of World Intellectual Property Organisation (WIPO) and signatory to 1996 WIPO Copyright Treaty.

On national level, copyright is governed by “Copyright” Statute of June 30, 1994, which entered into force on Aug. 1, 1994. This Statute has been modified number of times in order to implement European legislation in field of copyrights and database rights, and contains number of modern features. Council Directive of May 22, 2001 has been implemented into Copyright Act by Law of May 22, 2005 and entered into force on May 22, 2005.

Protected Subject Matter.

Original works of authorship expressed in tangible form are protected. No filing or registration is required for protection and enforcement against third parties. Only requirement for work to be protected by copyright is that work has “original character”, which does not mean “novelty” or “artistic value”. Work must in fact reflect intellectual effort and personal character of author. Case law shows that Belgian Courts do not hesitate to grant copyright protection to (unregistered) works of applied art. Copyright protection, however, is not available for technical features. Ideas, as such, do not receive protection either.

Rights Conferred to Copyright Holder.

Copyright includes right to reproduce work and communicate it to public, to adapt and translate it, to allow its reproduction by any means, right to remuneration for same, and right to transfer same to individuals and legal entities.

Authors also enjoy moral rights, such as right to divulge or not divulge work, to claim and refuse authorship, and right to oppose any modification causing harm to author's repute.

Specific Provisions.

“Copyright” Statute contains specific provisions regarding copyright on audiovisual works, copyright on databases, publishing contracts and performance contracts.

Neighboring Rights.

Exclusive rights are granted to performing artists, producers of phonograms, producers of first recording of movies and to broadcast organizations. Belgium is member of 1961 Rome Convention and signatory to 1996 WIPO Performances and Phonograms Treaty.

Term of copyright is life of author plus 70 years. In case of joint authorship, term of copyright is 70 years from time of death of longest surviving coauthor. Where works are published anonymously or under pseudonym, term of copyright is 70 years from year in which work was lawfully made accessible to public.

Transfer.

In general, first ownership of copyright will belong to author. Only economic rights (as opposed to moral rights) of authorship are transferable. Most contracts for transfer of rights must be in writing and define work and authorized use in great detail (type of media, duration and remuneration for transfer). Rights in works created by employee while performing employment contract remain with employee, unless it is explicitly provided that rights are transferred to employer. Rights in works created by contractor pursuant to order of commissioning party remain with contractor, unless it is explicitly provided that rights are transferred to commissioning party.

Infringement.

There is infringement whenever given work is characterized by features which render protected work original, and whenever, in these circumstances, similarities outweigh differences so that said given work gives same global impression as protected work. Differences in details are not sufficient to avoid infringement.

Remedies.

Depending on circumstances, remedies include (i) cease-and-desist orders which are issued after very quick trial and which are permanent (as opposed to preliminary injunctions) and enforceable pending appeal, (ii) Anton Piller Orders issued ex parte, (iii) monetary relief and (iv) confiscation. In certain circumstances, infringements are subject to criminal penalties. Seizures at customs are also available.

Software.

Computer programs are also granted copyright protection under separate “Software” Statute of June 30, 1994, which entered into force on Aug. 6, 1994. Protection extends beyond object and source code to structure and sequential organization of program. Except in case of explicit contractual or statutory clause to contrary, employer is deemed to be transferee of economic rights in computer programs created by employee or public servant during execution of his/her duties or by order of his/her employer.

Databases.

Protection of databases is twofold and governed by “Database” Statute of Aug. 31, 1998, which entered into force on Nov. 14, 1998, and “Copyright” Statute of June 30, 1994.

Sui generis protection refers to right of producer of database to prevent extraction and/or reutilization of whole or substantial part of contents of database under condition that producer can demonstrate that there has been substantial investment in either obtaining, verifying or presenting contents of database. Term of sui generis right is date of completion of making of database plus 15 years.

“Database” Statute does not contain any provision governing fate of sui generis right in databases created by employee for benefit of employer. By operation of law, sui generis right is conferred to “producer” of database, i.e. natural person or legal entity that has taken initiative and bears risks of investments in creation of database. In most if not all cases this will be employer and not employee.

Copyright protection is granted for structure of database when it, by reason of selection or arrangement, reflects intellectual effort and personal character of author. Copyrights in databases created by employee while performing employment contract remain with employee, unless it is explicitly provided that rights are transferred to employer. Copyrights in databases created by contractor pursuant to order of commissioning party remain with contractor, unless it is explicitly provided that rights are transferred to commissioning party.

16.02 DESIGNS AND MODELS:

Statute and Treaties.

Belgium is member of 1925 Hague Agreement. Relevant Statute is Benelux Uniform Design and Model Act. Council Directive 98/71/CE has been implemented into Benelux Uniform Design and Model Act by protocol of June 20, 2002 and entered into force in Dec. 2003. Uniform Benelux Act approving protocol modifying this Benelux Uniform Design and Model Act has been adopted on Dec. 20, 2002 and approved by Belgian legislature by Law of Mar. 14, 2003. Note: As this Act of modification has not yet been approved by Luxembourg, it has not yet entered into force.

Conditions for Protection.

Any new design and model which is capable of industrial application can be protected. Designs and models solely created for achieving certain technical effects are excluded, however. Registration is required. Unregistered designs and models, if they fulfill conditions laid down in Copyright Act, may however enjoy copyright protection.

Scope of Protection.

Rightholder is given exclusive right to design or model which includes right to prevent manufacture, importation, exportation, sale or offer for sale, hire or offer for hire, display, delivery or use or possession of product for one previously mentioned purposes which is identical in appearance with registered design or model or differs only in details.

Rightholder can also take action against application of suspensive procedure to counterfeit goods or pirated goods, as regulated by Council Regulation (EC) No. 3295/94 of Dec. 22, 1994.

Duration of Protection.

Initial protection under registration is five years from date of filing application and may be extended twice.

Transfer.

In general, first ownership of design and model right will vest in first applicant. If applicant is not author of design or model, latter may claim ownership within five years from date of official publication of design or model. Design and model rights are transferable. Unless otherwise provided, employer is deemed to be owner of designs or models created by employee in course of his/her employment.

Remedies include (i) preliminary injunctions and (ii) main relief options, such as injunctive relief, requiring infringer to cease and desist, and damages.

16.03 PATENTS:

Statute and Treaties.

Belgium is member of 1883 Paris Union Convention, Strasbourg Convention of Nov. 27, 1963, Washington Patent Cooperation Convention of June 19, 1970, Munich European Patent Convention of Oct. 5, 1973, and Luxembourg Community Patent Convention of Dec. 15, 1975. Latter never entered into force but will in near future be replaced by European Council Regulation on the Community Patent.

Patents are governed in Belgium by Patent Act of Mar. 28, 1984, which entered into force on Jan. 1, 1987. Patent Act explicitly incorporates existing laws on priority right, established by Paris Convention and EU Directives.

Patentable subject matter covers those inventions which are new, which involve inventive step and which are suitable for “industrial application”. (art. 2 Patent Act). Patent Act explicitly excludes discoveries as well as scientific theories and mathematical methods, esthetical creations, mental steps, business methods, computer software and presentation of data. (art. 3 Patent Act). Plant varieties are excluded, as protection of breeder's rights is governed by International Union for Protection of New Varieties of Plants Convention of Dec. 2, 1961, Plant Varieties Protection Act of May 20, 1975 and EC Regulation 2100/94 of July 27, 1994. Animal varieties and mostly biological (as opposed to microbiological) processes for production of plants or animals are also excluded. (art. 4, §1, 1bis and 1ter Patent Act). Pursuant to art. 4, §2, no patent will be granted for inventions which are against public policy. Pursuant to art. 4, §3, no patent will be granted for human cloning or such process, nor for human body in different steps of constitution and development, except for isolate elements resulting of technical process (art. 4, §4 Patent Act).

Novelty is assessed on worldwide basis. “State of the art” is very broadly defined and includes everything made available to public by whatever means before filing date. “Secret” prior art (applications filed previously but not yet published) is also part of “prior art” with respect to novelty assessment, as long as prior application is eventually published, and if it is application for Belgian patent or European or international application that envisages patent protection in Belgium. Content of applications that do not concern Belgium are not taken into account.

Nonobviousness.

Secret prior art is not taken into consideration with respect to requirement of nonobviousness.

Registration.

In order to assure exclusive rights to invention, one must apply for Belgian or European patent, latter culminating in national patents in countries having ratified 1973 Munich Convention and which were specified in application.

Duration—Examination by Patent Office.

Under Belgian law, patent is automatically granted for period of six years by national authorities upon application. Applicants desiring protection for 20 years must apply for novelty and nonobviousness examination. (art. 39 Patent Act). However, Belgian Patent Office cannot refuse to grant patent on basis of this prior examination. Examination is meant only to inform applicant and not to be basis for refusal of patent application. In event of dispute, validity of Belgian patent will eventually be decided upon by court of law. With some exceptions, nullification of patent by court of law has retroactive effect.

Scope of Protection.

Belgian patent's scope of protection is determined on basis of claims. Description and drawings can be used, however, to interpret claims and when concerning biological matter, sample must be added.

Infringement.

Holder of patent can enjoin every third party from exploiting invention claimed in its patent. Infringing acts include manufacture, offer for sale, distribution, use and import or stock for this purpose. If invention relates to process, patent protection will include not only use of patented process, but also of all products which were obtained directly by using this patented process. (art. 27, §1 Patent Act).

Contributory infringement, i.e. action of providing means necessary for direct infringement, is also prohibited in certain circumstances. (art. 27, §2 Patent Act).

Remedies include injunctive and monetary relief. Evidence relating to infringement can be very easily obtained through ex parte proceedings to obtain seizure of infringing goods. (arts. 1481-1488 Civil Procedure Code). In certain circumstances, these ex parte measures can extend to injunctions.

Infringing party's good faith is no valid defense. (art. 52, §1 Patent Act). Infringing party's bad faith may result in confiscation and allocation to patentee of damages equal to price of goods sold. (art. 53 Patent Act).

Statute of Limitations.

Infringement claims are time-barred after period of five years from date of infringement. (art. 54 Patent Act).

Jurisdiction—Arbitration.

Five civil courts have exclusive jurisdiction with respect to patent litigation in Belgium. (art. 73 Patent Act). This, however, is without prejudice to possibility to settle almost any patent dispute by way of arbitration. (art. 73, §6 Patent Act).

16.04 TRADEMARKS:

Statute and Treaties.

Belgium is member, inter alia, of 1883 Paris Union Convention and 1891 Madrid Agreement and of 1989 Madrid Protocol and bound by EC Regulation 40/94 on Community trademark of Dec. 20, 1993.

Uniform Trademark System in Benelux.

Trademarks (including service marks) are governed in Belgium by Benelux Uniform Trademark Act ("BUTA"). For purpose of trademark registrations, Benelux countries (i.e., Belgium, The Netherlands, and Luxembourg) are considered as one single territory. Benelux trademark registrations extend geographically to territory of those three countries. National courts retain jurisdiction on trademark litigation. However, questions of interpretation of BUTA can, and under certain circumstances must, be referred to Benelux Court of Justice.

Council Directive of Dec. 21, 1988 to harmonize trademark laws of Member States has been implemented into BUTA. New Protocol entered into force on Jan. 1, 2004. Benelux Act approving Protocol modifying Uniform Benelux Act on Patents has been adopted on Dec. 24, 2002 and approved by Belgian legislature by Act of Mar. 19, 2003. Note: As this Benelux Act has not yet been approved by Luxembourg, it has not yet entered into force.

Trademarks.

Any sign which is capable of distinguishing goods or services of one undertaking from those of another undertaking can be registered as trademark. Illustrative list includes words, names, drawings, prints, and even letters, figures, or shapes of goods or of packaging, provided they are distinctive. However, shapes which are determined by very nature of the good, which affect its essential value or which are functional, cannot be protected as trademarks.

Registration.

Exclusive right to trademark is acquired by registration. Unregistered trademarks are not protected under BUTA. When no private clearance search is conducted prior to filing of application, Benelux Trademark Office carries out official search for prior registrations. Benelux Trademark Office, however, has no authority to reject application due to prior right. It only has authority to refuse trademark registration if sign in its view (i) has no distinctive character at all or is merely generic or descriptive, (ii) is contrary to public order policy or accepted principles of morality, or (iii) is misleading. Applicant may lodge appeal against such refusal before Court of Appeal of either Brussels, The Hague or Luxembourg.

No opposition proceedings are available during registration process.

Duration of protection is ten years as of application date but can be renewed for successive periods of ten years without any limit, as long as mark remains distinctive.

Infringement.

Based on his/her exclusive rights, owner of registered trademark can (i) prevent any unauthorized third party from using same sign in relation to identical goods or services; and (ii) prevent any unauthorized third party from using same or similar sign in relation to identical or similar goods or services, when there exists likelihood of association between sign and trademark on part of public. (See however remark under Scope of Protection, infra.)

Trademark's scope of protection extends beyond goods and services for which trademark has been registered and beyond use of protected sign as trademark. In fact, trademark owner can (i) prevent any unauthorized third party from using same or similar sign for non-similar goods and services if his/her trademark is of repute in Benelux countries and if such use without due cause takes unfair advantage of or is detrimental to distinctive character or reputation of trademark; and (ii) prevent any unauthorized third party from using same or similar sign for purpose other than distinguishing goods or services if such use without due cause takes unfair advantage of or is detrimental to distinctive character or reputation of trademark.

Scope of Protection.

Benelux trademark's scope of protection heavily depends on distinctiveness of trademark, i.e., on its strength, as of time protection is requested.

Criterion traditionally used by Belgian Courts to find trademark infringement (likelihood of association) is very broad. “Likelihood of association” concept is meant to be much wider criterion than classical notion of likelihood of confusion. However, concept of likelihood of confusion (which includes, Directive says, likelihood of association) has now become European law concept. In decision dated Nov. 11, 1997 (Sabel/Puma), European Court of Justice has decided that criterion of “likelihood of confusion which includes the likelihood of association with an earlier mark” contained in Directive 89/104/E.E.C. of Dec. 21, 1988 is to be interpreted as meaning that mere association which public might make between two trademarks as result of their analogous semantic content is not in itself sufficient ground for concluding that there is likelihood of confusion within meaning of that provision.

Remedies include injunctive and monetary relief. Preliminary injunction available. When, inter alia, infringement was in bad faith, trademark owner can claim profits made by infringer through infringement. Also, in case of bad faith infringements, confiscation and/or destruction of counterfeited goods, and even of devices which have been used to perform infringement, may be ordered. Seizures at customs are also available.

Cancellation.

Trademark registrations can be canceled in court, inter alia, (i) due to prior registration of same or similar trademark for same or similar kind of goods or services, (ii) when registered sign lacks distinctiveness, (iii) when registered sign is explicitly excluded from trademark protection under BUTA provisions (functional shapes, for instance), or (iv) when filing was fraudulent. Such cancellations are effective as of filing date. Fraudulent filing might result from prior use of same sign or similar sign in Benelux, or even abroad, prior to filing date.

Loss of Right.

Registered trademark owner may lose his/her exclusive rights, inter alia, in case no normal use of trademark has been made by trademark owner or by authorized third party within five years of filing or for uninterrupted period of five years. In some circumstances, later use may revive extinguished trademark.

In addition, trademark owner is no longer entitled to file nullification or infringement claim if, under certain circumstances, he/she has acquiesced for period of five successive years as regards use by unauthorized third party of similar registered trademark, even when this similar trademark was registered at later moment in time. In that case, both marks would coexist.

Loss of right can also result from trademark having become generic due to trademark owner's (active or passive) behavior.

Assignments and Licenses.

In order to be valid, assignments must be in writing. Licenses, however, no longer need be in writing. However, in order to be enforceable vis-à-vis third parties they still must be recorded in trademark register. Trademark may be assigned without business with regard to which it was used.

New BUTA provides for possibility to record pledge and attachment of trademark, in order to make it enforceable vis-à-vis third parties.

17 MORTGAGES

17.01 CHATTEL MORTGAGES:

These are unknown in Belgium, save in respect to ships. See category 20 Transportation, topic Shipping; also category 3 Business Regulation and Commerce, topic 3.10 Sales, subhead Conditional Sales.

General pledge can be established on following assets of business: goodwill, patents, trademarks, lease of premises, business equipment and 50% of inventory, receivables only if specially mentioned. Such pledge must be registered in mortgage registry and can only be established in favor of banks or financial institutions.

17.02 MORTGAGES:

Mortgage gives mortgagee right to preference on sale of immovable property.

Mortgages are of three types: legal, by will, or by agreement, and dominating principle is that of publicity.

Legal mortgages are those given to minors and persons under legal disabilities on their guardians' or curators' immovables, and those in favor of public bodies on property of their accountants. Family council decides on amount of mortgage which must be taken on guardian's immovables as warranty for proper administration.

Mortgages by will are those established by testator on one or several of his estates specified by will, to secure payment of legacies.

Mortgages by agreement may be granted on real estate only by persons legally capable of alienating same, and unless deposed to before notary and recorded are invalid as against third persons.

Execution and Inscription.

Mortgages may only be granted on immovables specifically described and must be created by notarial instrument or by private agreement recognized by judgment. They must be recorded at office of registrar of mortgages in district where immovables are located, and take rank from time of this inscription. Inscription preserves mortgages during 30 years, and may be renewed before expiration of said period.

Whenever requested, registrar of mortgages must deliver copies of mortgage entries or certificate stating that no mortgage has been taken on specified immovables.

18 PROPERTY

18.01 ABSENTEES:

Absent persons can act through attorney in fact. If whereabouts unknown, court can appoint provisional administrator. (C. C. 112). See category 11 Estates and Trusts, topic 11.02 Death.

18.02 ADVERSE POSSESSION:

See category 5 Civil Actions and Procedure, topic 5.05 Limitation of Actions.

18.03 ESCHEAT:

See category 11 Estates and Trusts, topic 11.04 Descent and Distribution.

18.04 REAL PROPERTY:

Ownership.

Main principle is that all land is held in private ownership and owner of land is free to dispose of it.

Zoning, Planning and Old Building Protection Regulations.

Right to develop land is, however, strictly regulated by zoning, building and environmental legislation. As Regions (federate entities) have competence in these matters except for German community which has competence for protection of historical buildings and sites, different regulations and procedures will apply depending on where property is located. There are also protective regulations in relation to historic buildings and sites, for which Regions have jurisdiction. Existence of these regulations may have some bearing on granting of building permits.

Following regulations are in force: Flemish regional statute of May 18, 1999 related to zoning, planning, Walloon code of zoning, planning and protection of historical buildings and sites (so-called “CWATUP”) and Brussels code of zoning (so-called “COBAT”).

For Flemish and Walloon region authorized constructions according to zoning regulation (industrial, agricultural, residential areas, etc.) are determined by section plans. In Brussels they are determined by regional plan of ground assignment. These plans have same value as any other administrative statute and are therefore compulsory. More detailed plans can provide more precise assignments without prejudice to more general plans. In each of concerned regions, diminished value of estate resulting from new section or assignment plan can lead to payment of compensation. Building statutes cover architectural characteristics of buildings. Schemes aim to give to administration planning goals. Administration can, however, act in different way if its decision as well as reasons why decision differs from compulsory schemes are articulated.

Numerous acts and works require permit from town-planning. Permit from town-planning has to be consistent with assignment plans, although it may, under certain well-determined conditions, differ from those plans.

Permit to parcel land, which is identical in each of three regions, can increase value of estate by dividing it into lots and getting estate equipped before its sale. Such permits may be subject to some restrictions or conditions—such as development of green space for example—which have to be proportionate to object of permit.

In Walloon region, original system of individualized single permits is in force. One decision covers buildings, classified fittings of those buildings and waste water. In other two regions, proceedings required for town-planning permit and for environmental permit are linked together, but remain nonetheless distinct and result in two distinct decisions. As general rule, town-planning and parcel out permits are delivered by local authorities of place where estate is located. Important projects are subject to prior public enquiry. Projects which may seriously affect environment are subject to prior study of impact.

When permit is refused or delivered under unacceptable conditions, appeal can be filed to superior authorities.

Public authorities also have right to expropriate or to use right of preemption for public utility in relation to town-planning or zoning development.

Historical buildings and sites which are considered to be of regional interest can be protected by special measures. Owners can get, under certain conditions, subsidies in order to ensure maintenance or renovation of their building.

Acquisition Regulations and Preemption Rights.

Number of acquisition regulations should be kept in mind. Of particular significance, is right of public entity to buy back industrial land where land was initially acquired from public entity which gave financial help to buyer. In addition, preemption rights of farmer on sale of farming land; and sale of family residence (requiring consent of spouse of owner/seller) are of practical significance.

Right of Surface Ownership (“opstalrecht/droit de superficie”).

This is situation where owner grants real right to put up buildings on his land. It is horizontal division of ownership rights. Such right is granted for mandatory maximum period of 50 years.

Long Lease (“erfpacht/emphytéose”).

This is real right (minimum of 27 years and maximum of 99 years) under which owner of land grants right to use land and buildings on it.

Concession Right (“concessie/concession”).

Public entities owning land may grant to private persons or entities right to use land and to build on land by way of concession. One of main characteristics is that public entity is always entitled to terminate agreement if it is in best interest of community.

Usufruct (“vruchtgebruik/usufruit”) and Ownership Without Usufruct (“naakte eigendom/nue propriété”).

This is division of ownership rights over same property. Usufruct is in essence right to use property or to receive proceeds generated by it. Usufruct can be granted for fixed or indefinite period, but it is always terminated at moment of death of usufructuary, even if right of usufruct has been assigned to another party. Usufruct in favour of legal entity can only be granted for (mandatory) maximum period of 30 years.

Co-ownership of Apartments.

Legal position of owners of apartments is regulated by Civil Code. In essence, there is co-ownership of common parts such as grounds, roof, corridors, landings, stairways, and private ownership of apartments. Co-ownership can act as legal person on behalf of all co-owners.

Land Easements.

There are several types of easement ("erfdienstbaarheden/servitudes") under Belgian law. Main division is distinction between legal easements and voluntary easements.

Voluntary easement can be established by contract. This easement must be granted for benefit of one property (as opposed to benefit of particular person) and at encumbrance of another property (as opposed to personal obligation solely borne by particular person). In order to be effective against third parties, easements established by contract must be recorded in Mortgage Register. Voluntary easement can also be established either by continuous use for 30 years or after having been set up by previous owner within his property. Such easements are less common in practice.

Legal easements consist of natural easements and legal easements in strict sense. Natural easements exist because of natural location of properties (e.g. river between two properties). Legal easements in strict sense are concerned with matters such as common walls, right of way, etc. In addition, there are charges of public usefulness, which can be of significance in practice.

19 TAXATION

19.01 ALCOHOL, BEVERAGES AND TOBACCO TAXES:

See topic 19.03 Excise Duties.

19.02 CORPORATE TAX:

Resident companies (with central management or registered address in Belgium) are subject to tax on worldwide income that is reported in annual financial statements and includes distributed and non-distributed profits as well as nondeductible items. Tax levied only on Belgian-source income for nonresident companies. General corporate tax rate is 33%. Reduced rates ranging from 24.25% to 34.5% on income below [Euro]322,500 apply only if company pays annual fee of at least [Euro]27,000 to at least one director or partner and does not distribute dividends which exceed 13% of paid-in capital at beginning of taxable period; reduced rates do not apply if company is holding company or is 50% or more owned by another company. Reduced rate to one-fourth of Belgian corporate tax on net income earned and taxed abroad if not exempted under provisions of tax treaties has been abolished from tax year 2004. Surtax of 3% (temporary crisis contribution) imposed in addition to above standard or reduced rates. Rate of 33% generally applies on branches of nonresident companies (lower rates possible but above requirements difficult to be met).

95% of dividends, whether domestic or foreign, received by qualifying corporate shareholder (Belgian company or Belgian branch) are exempt from tax under intercompany dividend exclusion of participation exemption, provided both participation and taxation tests are satisfied: (1) receiving company required to have owned for at least one year minimum participation of 10% or [Euro]1,200,000 recorded as financial assets; (2) distributed profits must have been taxed at minimum rate of 15% ("subject-to-tax requirement", exceptions for financial, insurance and qualifying investment companies). Participation exemption does not apply for dividends distributed by foreign companies or branches from countries listed in Royal Decree of 13 Feb. 2003 established in countries where tax regime is significantly more favorable than in Belgium. Tax regime of companies of EU Member States is however deemed not to be significantly more favorable than Belgian one.

Capital gains on shares are tax-exempt when dividends qualify for participation exemption based on taxation test, however without minimum participation threshold nor minimum holding period requirement (exception for proportional recovery of previously deducted losses on these shares). Other capital gains are part of income taxed at ordinary rate, with exclusion of part exceeding monetary depreciation before 1950. Optional spread taxation available for capital gains on depreciable tangible or intangible fixed assets invested for more than five years provided indemnities or proceeds of alienation are reinvested in Belgium in other depreciable tangible or intangible assets; ordinary tax rate applies on gains in proportion to depreciation of assets acquired as reinvestments.

There is tax credit for interest and royalties taxed in foreign source country. Tax credit amounts to 15/85 of net amount of royalties received; for interest, tax credit is calculated according to fraction, numerator of which is equal to foreign tax expressed as percentage of income on which this tax is calculated, limited to 15%, and denominator of which is equal to 100% reduced by amount of numerator. For interests, tax credit thus calculated must in addition be multiplied by coefficient which reflects proportion of total income less movable expenses to total income and is proportionate to period of holding of income generating asset in full property. Income received is grossed up by this tax credit.

Interest on loans is deductible provided rate does not exceed market rate. Thin capitalization rules prevent deduction of interest paid to beneficiary enjoying particularly advantageous tax regime if and to extent loans exceed seven times paid-in capital at end of tax period plus taxable reserves at beginning of tax period.

Losses can be carried forward indefinitely but may not be carried back. However losses may not be carried forward if shareholders' control of company changes unless legitimate financial or economic reasons underlying change of control. Deduction of losses is restricted in case of tax-free merger of profitable company with loss-making company.

Deductible business expenses include yearly reported depreciation of assets according to rates based on nature and useful economic life of assets. Provisions also deductible when relating to definite losses occurring in considered tax period. Commissions paid to unidentified beneficiaries are not deductible from taxable income. When made by companies, so-called secret commissions are subject to special separate assessment of 309% (surtax included); both amounts of commissions and special tax are however deductible from corporate taxable income.

Special tax regime for coordination centers set up within multinational companies with purpose of carrying out specific qualifying activities for interdependent group companies taxed on cost-plus basis, is phased out and is to be replaced by new legislation—based on advance pricing agreements—waiting for approval by European Commission. Based on agreement reached on Jan. 21, 2003, existing licenses granted by Royal Decrees based on former legislation will remain valid until at least end of 2010. Based on agreement reached on Jan. 21, 2003, existing licenses granted by Royal Decrees based on former legislation will be abolished in stages by end of 2010 (88 BCC will already lose their status by end of 2005). As alternative which could convince multinational groups to maintain activities of their BCC, Belgian Parliament approved bill, on June 22, 2005, which introduces risk capital deduction or notional interest deduction (NID) providing for tax deduction for cost of capital for both Belgian and foreign companies (as from tax year 2007). Conceived as compensation for economic cost of use of company's equity, at hypothetical interest rate that reflects cost of long-term, risk-free financing, purpose is to reduce currently existing discrimination between tax treatment of equity-financing (dividends being included in taxable basis) and tax treatment of debt-financing (interest payments being deductible) and therefore to increase Belgian companies attractiveness for financing multinational groups. Indeed, NID should offer attractive tax-planning tool for group financing and licensing activities, supply chain management restructuring and real estate. Bill provides for abolition of capital duty (from Jan. 1, 2006, only fix-duty of [Euro]25) except when private individual contributes residential property to company against shares issued by company. Capital duty would then be charged for transfer of real property at rate of 12.5% (10% in Flemish region).

Risk capital deduction should not be granted if income from equity is tax-exempt (if for example, exempted under tax treaty). Deduction would be fixed percentage to be determined by government based on interest rate paid by Belgium on ten-year linear bonds it issues. Around 3.5% currently, but average over past decade has been around 5.5%. Rate for tax year 2007 would be determined on Dec. 31, 2005, as average over past year. For following year, average of 2006 would be taken into account. However, rate could not vary more than 1 percentage point from one year to next and would be limited to 6.5%, but in years of high inflation, Government would be able to raise it over that limit. Small and medium-size enterprises, as defined in Belgian company code, would be entitled to opt for risk capital deduction that is half percentage point higher. They then would have to abandon investment reserve to which they are currently entitled (art. 194quater, Income Tax Code 1992, which took effect in tax year 2004).

While risk capital deduction is being introduced, tax credit (art. 289bis, §2, and 292bis Income Tax Code 1992), introduced in 1996, and investment deduction are abolished from tax year 2007.

Under EU Parent-Subsidiary Directive incorporated in Belgian domestic law, no withholding tax applies on dividends paid by Belgian subsidiary to parent company in EU state owning for at least one year of at least 25% of capital of company distributing profits. Out of scope of European Directive, normal statutory rate of 25% is reduced under most of Belgium's tax treaties.

EU Directive 2005/19/CE of Feb. 17, 2005 modified EU Directive 90/434/CEE about mergers, division of companies, transfers of assets and exchanges of shares. Amendment broadens existing EU Directive scope to cover larger range of companies (entities that are subject to corporate tax in their Member States of residence) including European Company (EC) and European Cooperative Society (ECS) and also extended in Belgium to limited and unlimited cooperative companies (société coopérative à responsabilité limitée ou illimitée—cooperatieve vennootschappen), Common Partnership (société en nom collectif—vennootschap onder firma), Limited Partnership (société en commandite simple—gewone commanditaire vennootschap) and to any company constituted in accordance with Belgian law and subject to corporate tax.

EU Directive 2005/19/EC also provides for capital gains exemption when receiving company holds shares in transferring company. Holding threshold required to enjoy this exemption is now set consistently with that of Parent Subsidiary Directive. This threshold will be lowered in stages from 25% now to 20% in 2006, 15% in 2007 and 10% in 2009. EC transferring its registered office will enjoy tax deferral on capital gains where its assets remain connected with permanent establishment situated in Member State from which it is moving. Shareholders of EC should not be liable to tax on this occasion. This provision will have to be implemented in Belgium where as Member State of transferring company of permanent EU establishment to foreign company, no tax exemption is provided.

Effective from Jan. 1, 2002, 10% withholding tax is imposed on proceeds paid out or allocated from complete or partial liquidation of company or paid when company buys its own shares. However, EU Parent-Subsidiary Directive applies to this withholding tax, which also applies to proceeds of foreign liquidated companies when allocated to Belgian resident shareholders who are individuals.

19.03 EXCISE DUTIES:

Excise duties are levied on production and importation of mineral oils, alcohol and alcoholic beverages, manufactured tobacco, as well as on consumption of some nonalcoholic beverages and coffee. Rates vary according to volume, weight, density and alcoholic content.

19.04 GIFT TAX:

Gift tax rates vary according to sliding scales from 3 to 80%, depending on region where donor is established, amount of gift as well as on beneficiary's relationship to donor. Manual gift is exonerated unless written evidence issued by donor. Rate reduced to 0% (Wallonia), 2% (Flemish Region) or 3% (Brussels) between individuals for gift of self-employment businesses or shares—on condition of threshold of control—from companies whereof central management office situated in EU Member State.

19.05 INCOME TAX:

Income tax is levied on income of: (1) resident individuals of Belgium: individual income tax (impôt des personnes physiques—personenbelasting); (2) resident companies of Belgium: corporate income tax (impôt des sociétés—vennootschapsbelasting); (3) Belgian legal entities being nonprofit organizations (impôt des personnes morales—rechtspersonenbelasting); (4) nonresident individuals and companies (impôt des nonrésidents—belasting van niet-inwoners).

Withholding tax (précompte—voorheffing) credited against tax on total income is levied on three types of income: income from real property (précompte immobilier—onroerende voorheffing), income from personal property (précompte mobilier—roerende voorheffing) and earned income (précompte professionnel—bedrijfsvoorheffing).

Withholding tax on real property income is levied on assessed rental value (revenu cadastral—kadastraal inkomen). Rate varies according to situation of real property. Credit is only granted in respect of individual taxpayer's personal residence and is limited to 12.5% of assessed rental value subject to withholding tax on real property and excess withholding tax is nonrefundable.

Withholding tax on personal property income is levied at 25% or, under certain conditions, at 15% on dividends. Withholding tax of 15% is due on interest from debt securities and on income from lease, use or license of personal property. In general, this withholding tax on income from private placement represents final tax for individual taxpayers.

Withholding tax on professional income is levied on salaries, wages, pensions and compensations of employees and of working manager. It follows progressive rate of individual income tax.

19.06 INDIVIDUAL INCOME TAX:

Individual income tax is progressive to 50% (last bracket starting at [Euro]29,740). Business income of married taxpayers is taxed separately regardless of amount of their income and both are entitled to tax-exempt amount of [Euro]4,420 (for single taxpayer tax exempt amount raises to [Euro]5,570). Other income items of spouses are no longer aggregated from tax year 2004. If only one spouse has earned income, 30% of his/her income (with maximum of [Euro]8,330) is attributed to other spouse and both parts of income are submitted to normal tax rates separately. Reductions of income tax are allowed for dependents.

Capital gains of tangible and financial fixed assets, if used by individuals in business activities during more than five years are taxed at reduced rate of 16.5%. Capital gains on non-business assets are tax-exempt except for capital gains on speculative transactions (33%), and capital gains on buildings if sold within five years of acquisition (rate 16.5%), capital gains on unimproved land if sold within eight years of acquisition (rate 16.5-33%), capital gains realized on substantial (25%) shareholding in Belgian companies upon sale to nonresident legal entity, which were previously taxed at rate of 16.5%, are no longer taxed in consequence of decision rendered by EU Court of Justice in 2004.

Council Directive 2003/48/EC entered into force on July 1, 2005 on taxation of saving income in form of interest payments from one Member State to another, provides for automatic exchange of information or upon request by means of reporting from paying agent to State of residence to achieve effective taxation of those income. Transitional period foreseen for Belgium, Austria and Luxemburg who will apply withholding tax at progressive rate (15% from July 1, 2005, 20% from July 1, 2008 and 35% from July 1, 2011) of which they will retain one quarter and transfer three quarters to State of residence. Series of agreements with measures equivalent to those contained in Directive regarding withholding tax has been signed with Principalities of Monaco, Liechtenstein and Andorra, Republic of San Marino and Swiss Confederation with exchange of information as final objective.

Nonresident individuals and foreign companies are taxable on Belgian source income. In absence of permanent establishment tax liability of foreign companies is generally limited to withholding rate. If there is permanent establishment Belgian source income is taxed at rate of 33.99%.

Non-Belgian expatriate executives of multinational enterprises qualify for special deductions and exemption of portion of salary corresponding to work performed abroad (“travel exclusion”).

19.07 INHERITANCE TAX:

Death duties apply on net value of worldwide assets of deceased residents (also aliens). Transfer duties apply on gross value of real estate located in Belgium of deceased nonresidents (also Belgian). Rate of both inheritance and transfer duties vary according to sliding scales depending on deceased region of residence, size of estate accruing to each beneficiary and relationship of heir or legatee to deceased. Same rate as for married people applies to spousal equivalents when cohabitation has been registered (Brussels, Wallonia) or to all individuals cohabiting for at least one year (Flanders). Special rules apply with respect to succession of family-owned businesses or shares of company whereof central management office situated in EU Member State: upon varying conditions depending on decedent's region of residence, rate is reduced to 3% (Brussels, Wallonia) or transfer is exempt from duties (Flanders).

Treaties to prevent double estate taxation have been concluded by Belgium only with France and Sweden.

19.08 LOCAL AND REGIONAL GOVERNMENT TAXES:

Taxes are levied in each community, region, province, city and town, either on same basis as and in addition to State taxes (real estate withholding tax, individual income tax, road tax on motor vehicles) or on different specific basis (e.g., office furniture and space, entertainment, environmental taxes). Since Corporate Tax Reform Act of Dec. 24, 2002, taxes, fees and retributions other than those referred to in art. 3 of Special Act on financing of Communities and Regions are no longer deductible from corporate taxable income: this exclusion concerns levies specifically introduced as part of regional political options to encourage or discourage certain environmental attitudes (e.g., levies on surface waters, on decommissioned industrial or empty buildings).

19.09 MOTOR VEHICLE TAXES:

Car registration tax and road tax are levied on motor vehicles.

19.10 REGISTRATION TAX:

Registration duties are levied on several types of transactions. Rate is 0.5% on contributions to capital of companies (with certain exceptions and exemptions); 12.5% (Brussels, Wallonia) or 10% (Flanders) on sales of real estate as well as on contribution by individuals to corporate capital consisting in real estate used for inhabitation purposes; 0.2% on leases and transfer of leases other than leases for individual housing purposes (duty based on amount of rent for entire period of lease). Gift deed must be registered for registration purposes.

19.11 RULING SYSTEM:

Corporate Tax Reform Act of Dec. 24, 2002, has introduced general ruling practice in Belgian tax legislation giving taxpayers opportunity to apply for advance rulings covering all matters under jurisdiction of Federal Finance Department, with purpose of increasing certainty for investors as well as reducing controversies between taxpayers and tax authorities regarding tax consequences of transactions. Tax authorities must deal with ruling request within three-month period, decision being valid for maximum of five years and published anonymously.

However, no advance ruling may be issued concerning already implemented operations or in litigation phase or regarding collection of taxes.

Regarding transfer pricing, two internationally recognized concepts have been introduced into Belgian legislation by Law of July 21, 2004: “at arm's length principle” and legal basis for OECD correlative adjustments principle towards bottom to avoid double taxation but both only applied in case of international procedure or when advanced ruling asked. In absence of asked advanced ruling, transfer pricing former provisions will apply, including art. 26 of Belgian Income Tax Code that cannot apply to operations between Parent Company and subsidiary.

In frame of anti-avoidance rule, using ruling system as provided in Belgian law is not mandatory but highly recommended for investments. Different anti-avoidance law provisions (one for each form of taxation) apply whereunder art. 344, §1, of Belgian Income Tax Code providing for general anti-avoidance rule, which gives tax authorities more latitude to disregard certain transactions, set up only to avoid taxation, and re-classify them in order to assess applicable tax. This provision was declared not to violate constitutional principle of “no taxation without representation” by Belgium's Court of Arbitration in decision of Nov. 24, 2004. Anti-avoidance rule is limited to economic activities that result in profits or benefits subject to taxation. To avoid re-classification, taxpayer has to give evidence that legal classification initially given to transaction meets lawful financial or economic requirements.

19.12 STAMP TAXES:

Stamp taxes are due, amongst others, on physical delivery of bearer securities, on certain security transactions and on insurance premiums.

19.13 TREATIES AND AGREEMENTS:

Belgium has concluded double tax treaties with 66 countries. Treaty with U.S.S.R. has been replaced for Russian Federation from 2001 (published on Oct. 27, 2000) but still applies to some former Soviet Union republics. Treaty with China does not apply to Hong Kong: first ever double tax treaty concluded with Hong Kong has been signed by Belgian authorities and is to be enforced by end of 2004. New treaty with Netherlands has been published on Dec. 20, 2002. Note: Treaties signed with Estonia, Iceland, Latvia and Lithuania have not yet become effective.

Treaties provide for reduction of withholding tax rates on dividends, interest and royalties, with lower rates applying to dividends paid by subsidiaries when recipient holds minimum level of participation. Reduction of double taxation of Belgian individual residents applies through exemption with progression method: foreign source income is tax exempt in Belgium but must be aggregated in worldwide taxable income for purpose of computation of tax on other income (Belgian source and non-treaty countries) at average rate that would apply if foreign tax exempt income were included in Belgian taxable income.

Protocol amending Belgium-U.S. Income Tax Treaty was initiated on Dec. 31, 1987 and has been ratified (entered into effect on Jan. 1, 1998). Among more important of substantive provisions of Convention are following, in summary: (1) adoption of principles for determining and taxing business income derived by enterprises of one country from permanent establishments within other country; (2) reciprocal exemption from taxation upon certain conditions of various items of income derived from sources within one country by residents or corporations of other country, including profits from operation of ships and aircraft, royalties, pensions, private pensions and life annuities, and remuneration or payments received by teachers and students; (3) limited reservation by each country of right to tax its own citizens, residents or corporations without regard to provisions; (4) reciprocal reduction to 15% (as of Jan. 1, 1988 5% provided recipient owns at least 10% of voting stock of company paying dividends) of U.S. and Belgium tax on dividends to shareholder resident in other country; (5) Belgian taxes are allowed as credit against U.S. taxes; income taxed in U.S. and received by resident of Belgium generally is exempted from tax in Belgium but has to be included in order to compute tax rate; (6) as rule, citizens or corporations of one country residing in other country may not be subject to heavier tax burden in latter country as citizens or corporations of latter country are subject to; (7) provisions assuring taxpayers right of appeal when they can show that they are taxed contrary to principles of present Convention; (8) provisions for reciprocal exchange of information, subject to certain limitations similar to those provided for in certain other tax treaties of U.S., and for assistance in collection of taxes in certain cases, subject to provisions to ensure that exemption or reduced rate of tax granted by Convention shall not be enjoyed by persons not entitled to such benefits.

19.14 VALUE ADDED TAX:

Value added tax is levied on goods and services delivered or rendered in exercise of regular business or professional activity. Tax is charged to customer and paid to Treasury by supplier after deduction of any VAT paid by him on deliveries of goods and services. Rates are as follows: 21% general rate; 1% on gold used as investment; 6% on foodstuffs, pharmaceuticals, other necessaries and on certain construction transactions (e.g., repairs with respect to at least 15 year old dwellings; other construction transactions are subject to 21% rate); 12% on certain other goods and services, including social dwellings and pay television. Zero rate is applicable to exports outside EU Member States and to newspapers and magazines. Tax exemptions for legal, medical, cultural and social services as well as for services with educational purposes.

20 TRANSPORTATION

20.01 MOTOR VEHICLES:

Motorists must carry unlimited liability insurance. In all cases of accident, police may be asked to write a report that will carry weight with courts.

20.02 SHIPPING:

Vessels of 25 tons or more intended or ordinarily used for transportation of passengers, carriage of goods, fishing, towing or any other lucrative occupation at sea are considered as sea-going ships. (Comm. C., Book II, 1). Vessels of less than 25 tons and vessels intended for or ordinarily used for above mentioned activities in territorial waters are considered as river ships. (Comm. C., Book II, 271).

Sea-going ships may be registered at office of registrar of maritime mortgages in Antwerp. Registration can be secured before completion of construction. (Law of Dec. 21, 1990, concerning registration of ships, in force on May 11, 1996). Pleasure craft may be registered in register of pleasure craft. (R.D. of June 4, 1999, in force since Oct. 1, 1999).

Certain debts and claims are allowed as liens on ship and freight, in the following order: (1) Court costs and costs spent in common interest of creditors for preservation of ship or up to date of sale; taxes and public charges, costs for dues and maintenance from date of entrance of ship in port; (2) wages of captain and crew and related social contributions; (3) costs and indemnities for salvage and contribution to general average; (4) collision indemnities due for damage caused to other vessels, their cargo or persons on board or for damages caused to portal structures, docks and waterways; (5) necessary costs resulting from act or contract concluded by captain (sea-going ships only). (Comm. C., Book II, 23).

Ships, including those in process of building, may be mortgaged for a fixed sum. (Comm. C., Book II, 26). Mortgage also covers three years of interest. It must be registered at office of maritime mortgages, and is valid for 15 years. (Comm. C., Book II, 28 and 32).

Shipowners are personally liable for their acts, faults, torts or engagements. They are vicariously liable for the acts of and engagements made by captain within limits of his authority, acts of crew, pilot on board and other agents. (Comm. C., Book II, 46). They can limit their liability in accordance with Treaty of Athens of Dec. 13, 1974 on Transport of Passengers and Treaty of London of Nov. 19, 1976 on Limitation of Liability for Maritime Claims (except for art. 2, §1d and e of this Treaty for sea-going ships). (Comm. C., Book II, 47).

Charterers may limit their liability under same conditions as ship owner.

A law of Nov. 28, 1928, on bills of lading determines obligations of carrier of goods by sea, indispensable stipulations of bills of lading and unavoidable liability of carrier and ship according to so-called “Hague Rules”. Law of Apr. 11, 1989 adapted law of Nov. 28, 1928 to so-called “Visby Rules”. (Comm. C., Book II, 91).

A captain may, in certain extreme cases, hypothecate his ship or sell cargo. He is liable in damages for any negligence on the part of his crew, and for damage to or loss of his cargo. (Comm. C., Book II, 59 and 69).

Sea-going vessels may be arrested after leave of arrest has been granted by Judge of Seizure. Brussels Convention of May 10, 1952 for unification of certain rules relating to arrest of sea-going ships has been incorporated in Jud. C., 1467-1480.

21 TREATIES AND CONVENTIONS

21.01 TREATIES:

Self-executing provisions of treaties, if properly approved and published, take precedence over statutes.

Treaty of Friendship, Establishment and Navigation with U.S. is of Feb. 21, 1961.

Belgium is member to European Convention on Human Rights and has accepted right of personal application and jurisdiction of Court of Strasbourg.

See category 19 Taxation, topic Taxes, subhead Avoidance of Double Taxation.

See category 16 Intellectual Property, topic 16.03 Patents.

See also Selected International Conventions section.

Revised for 2010 edition by

APPLEBY, of Bermuda.

See category 6 Courts and Legislature, topic 6.02 Law Reports, Codes.

Note: This revision incorporates legislation through 1 Oct. 2009.

1 INTRODUCTION

1.01 CURRENCY:

Bermuda Monetary Authority was established by legislation in 1969. Principal objects of Authority are to issue and redeem notes and coin, to supervise banks operating in or from Bermuda, to foster close relations between banks themselves and between banks and Government and to advise Government on banking and monetary matters.

Currency of Bermuda is Bermuda dollar which is divided into 100¢. Parity of Bermuda dollar is prescribed by order of Governor, acting in accordance with provisions of Articles of Agreement of International Monetary Fund. Current parity of Bermuda dollar is equivalent to $1 in currency of USA.

See also category 14 Foreign Trade and Commerce, topic 14.01 Exchange Control.

1.02 GOVERNMENT AND LEGAL SYSTEM:

Bermuda is administered under the Crown, but by its 1968 Constitution (U.K. Statutory Instrument No. 182 of 1968, as subsequently amended), it has obtained a great measure of internal self-government, with external affairs, defence (including armed forces), internal security and police being reserved to Governor (``the reserved matters''). Governor has power to delegate any of reserved matters to Premier.

There is Cabinet which consists of Premier and not less than six other Ministers appointed by Governor on advice of Premier. Governor, acting on advice of Premier, may assign to Ministers responsibility for conduct of any government business or administration (other than in exceptions noted above). Boards which formerly had executive duties are now largely advisory.

There is a Governor's Council comprising Governor (as chairman), Premier and not less than two nor more than three other Ministers appointed by Governor after consultation with Premier. Purpose of Governor's Council is to consider reserved matters and to advise Governor thereon; however Governor is not required to act in accordance with advice of Governor's Council.

Ombudsman Act 2004 prescribes function and jurisdiction of Ombudsman's Office and applies to Government Departments, public authorities, government boards, and statutory bodies and corporations. Ombudsman has authority to investigate or review administrative action taken by authority and to make recommendations for improving administrative practices and procedures. Action may be taken when members of public make complaint or where Ombudsman is satisfied that reasonable grounds exist to carry out investigation in public interest.

Legislative authority is vested in Governor, Senate and House of Assembly. Senate consists of 11 appointed members, five appointed by Premier, three appointed by Opposition Leader and three appointed by Governor in his discretion. House of Assembly consists of 36 members, one from each of 36 constituencies, elected for maximum term of five years, under system of universal suffrage, with qualifications for voting being either in possession of

Bermudian status or being British subject residing in Bermuda and registered as elector as of 1 May 1976.

Premier is member of House of Assembly who leads majority party and Opposition Leader is leader in House of Assembly of any opposition party numerically stronger in numbers than any other opposition party.

1968 Constitution also served to entrench fundamental rights and freedoms which to some extent proscribed legislative authority of Government. All legislation must be consistent with provisions of Constitution.

Legislative Process.

Minister requests Permanent Secretary or Head of Government Department to prepare intent of legislation. Cabinet considers this and Parliamentary Council subsequently drafts Bill which is forwarded to Cabinet for approval. Bill is scrutinized by Government Caucus before going to House for debate.

House of Assembly reconvenes for first time after reading of Speech from the Throne and usually takes place at end of Oct. or early Nov. of each year as set out by proclamation of Governor. There are three sessions consisting of winter (Oct.-Feb.), Easter (Mar.-May), and summer (May-June). House recesses from Christmas until late Feb. when Budget Statement is introduced.

Special sessions are governed by Rule 64 of Rules of House of Assembly and are rare. Normally, summer recess stands adjourned until formally prorogued by Governor pursuant to formal proclamation under Constitution.

Budget debated during Mar. of each year. Government's financial year ends 31st Mar. and estimates of Government revenue and expenditure considered and approved. Last week in Feb. of each year, Budget Statement read by Minister of Finance. All Members debate on following Fri. Opposition subsequently replies to Statement. In respect of budget, there are seven sittings in each House within period of two weeks.

Throne Speech.

Read by Governor upon reconvening of House of Assembly at end of Oct. Speech outlines Government policy and legislative programme for year.

Senate has no control over any money bills. By precedent independents are chosen as President and Vice-President. At Committee stage, where Bill is scrutinized clause by clause one of independents takes Chair.

Private bills are introduced to House by way of filing of petition and private bill which is subsequently referred to Joint Select Committee which comprises three Members of Senate and five Members of House of Assembly.

Speaker of House has casting vote in case of tie whenever vote is taken. President of Senate, however, has original vote on each occasion vote is taken.

Judicial Authority.

See category 6 Courts and Legislature, topic 6.01 Courts.

1.03 OFFICE HOURS AND TIME ZONE:

Bermuda is in the Atlantic Standard (GMT -04:00) time zone. Office hours are generally from 9 a.m. to 5 p.m.

1.04 UNITED STATES BASES:

As part of general winding down of U.S. overseas military installations, U.S. Government withdrew from bases effective 1 Sept. 1995. Leased areas have been returned to Government of Bermuda. Following is of historical interest only.

By an Agreement made in 1941 between the Governments of the United Kingdom and the United States of America, bases were released to the United States of America in certain British territories, of which Bermuda was one. The United States Bases (Agreement) Act 1952 (No. 54), was designed to implement in Bermuda provisions of the above agreement, dealing primarily with matters of jurisdiction, legal proceedings, and police powers.

Leased Areas comprised number of islands at East-End of Island connected by land-fill. Bermuda Civil Air Terminal uses facilities of Base but was not included in Leased Area. Further land was leased at West End as annex of Base. Bases in Bermuda were responsibility of their Commanding Officer.

2 BUSINESS ORGANIZATIONS

2.01 AGENCY:

Common law rules apply. Agency is relationship which arises when one person, principal, authorises another, agent, to act on his behalf, and other agrees to do so. Generally, this relationship arises out of agreement, but there may be agency without agreement.

Types of Principal.

There are two types—disclosed: one of whose existence third party is aware at time of contracting. Undisclosed: one of whose existence third party is unaware at time of contracting.

Rights and liabilities of principal: In general principal can sue third party directly and be sued by third party. However, undisclosed principal's right to sue is limited so as not to prejudice third party who thought he was dealing only with agent, this will be subject to construction of contract (e.g. undisclosed principal can only sue third party subject to defences which third party has against agent and if agent contracts on terms which imply he is only or real principal, or if third party contracts with agent for reasons personal to agent then principal cannot sue upon contract). Of agent: General rule is that agent is neither liable under nor entitled to enforce contract he makes on behalf of his principal, however, there are exceptions to this rule: where name or existence of principal is undisclosed, where agent purports to act on behalf of unnamed principal when he is in fact acting on his own behalf. Agent will also be liable for breach of warranty of authority.

Indemnity.

Agent is entitled to be indemnified by his principal against all liabilities reasonably incurred by him in execution of his authority. He is not entitled to any indemnity in respect of obviously illegal transaction nor in respect of liability due to his own breach of duty.

Duties of Agent.

To act with due care and skill and to carry out instructions. In addition, agent has fiduciary duties: He must not put himself into position where his interests and duty conflict, he must not make secret profit or take bribe and he must not delegate performance of his duties, unless principal expressly or impliedly authorises him to appoint subagent. Agent does not delegate by instructing his own employees.

Termination.

Agent's authority can be terminated by either acts of principal or agent (e.g., acts by principal amounting to revocation, or renunciation by agent, such as oral or written notice, or conduct inconsistent with its continuance) or by operation of law (e.g., effluxion of time, complete performance of undertaking, by supervening insanity of his principal or of himself, by his death or by death of his principal). Irrevocable agency is possible where authority is coupled with interest.

2.02 CORPORATIONS:

General.

Companies Act 1981 (as am'd) is principal legislation concerning incorporation, management, administration and winding up of companies in Bermuda and is consolidation of law relating to them.

Modes of Incorporation.

Limited liability and unlimited liability companies may be incorporated by registration under Companies Act 1981 (“registered company”) or by Private Act of Legislature (“statutory company”). Limited liability company can reregister as unlimited liability company.

Statutory or registered company may be either “local” or “exempted.” Exempted company is one which, in case of a statutory company, is declared by its incorporating Act to be exempted company or, in case of a registered company, is registered as exempted company. Exempted company is designed for ownership by non-Bermudians and is free from exchange control restrictions. Generally, exempted company is prohibited from offering services locally and from owning land in Bermuda. Exempted companies may buy and hold securities issued by exempted company, permit company, exempted partnership, or up to 40% of shares of local company.

Local company is company which is designed for ownership by Bermudians and may offer services locally. Local companies may be incorporated after prescribed advertisement specifying name of proposed company, names of intended initial shareholders, stating whether it is to be local company and summarizing its principal objects or stating that it has unrestricted objects.

Exempted companies are exempted from need to advertise intention to incorporate new company.

Bermuda Monetary Authority must approve all beneficial owners of companies.

General Supervision.

Business of company is managed and conducted by board of directors consisting of at least two persons or such number in excess of two as shareholders may determine. Every exempted company must have one individual resident of Bermuda who serves either as secretary or as resident representative or as director of that exempted company. Directors are elected annually or for such period as by-laws may stipulate. Directors must appoint secretary of company and, where applicable, may appoint resident representative. Other officers (who may or may not be directors) such as treasurer and assistant secretary are optional. Officers are appointed by board. Register of Directors and Officers is subject to inspection by public. Register of Members is also subject to public inspection, must be kept up to date, and is maintained at company's registered office, which shall not be post office box, in Bermuda. Bermuda Monetary Authority is supervisory authority for AML/ATF regulated financial institutions as defined by Proceeds of Crime Regulations (Supervisory and Enforcement) Act 2008. These institutions are required to show compliance with Bermuda's Proceeds of Crime Act 1997, as amended, and various Regulations and relevant Guidance Notes. Criminal Code Amendment (No. 2) Act 2005 provides sections for offences of fraud and blackmail, obtaining property under false pretences, and publishing misleading information about company with intent to deceive members of company or creditors. Anti-Terrorism (Financial and Other Measures) Act 2004 establishes series of offences related to involvement in arrangements for facilitating, raising or using funds for terrorism purposes. Bermuda Monetary Authority has enforcement powers and can impose penalties for failure to comply with various Regulations.

By-laws.

By-laws regulate internal affairs of company. All by-laws and amendments thereto are subject to approval by shareholders in general meeting. By-laws of company are private and not subject to inspection by public.

Licence to do Business.

No company incorporated in Bermuda can carry on business in Bermuda (that is, offer services locally) unless: it is local company with at least 60% of its shares being beneficially owned by Bermudians and at least 60% of its directors are Bermudians or it is local company which is wholly-owned subsidiary of such company; or alternatively, it is licenced by Minister of Finance under provisions of Companies Act 1981. Exempted company or foreign company doing business in or from Bermuda will require permit from Minister of Finance. Trust companies offering services to public must also be licensed in accordance with provisions of Trusts (Regulation of Trust Business) Act 2001, unless otherwise exempted. It is usual for Private Trust Company to apply for exemption from requirement to be licensed.

Paid in Capital Requirements.

Bermuda companies are no longer subject to any general requirements with respect to minimum share capital. Minimum amount paid up on share capital of insurance company will be subject to provisions of Insurance Act 1978 (as am'd), which must be paid prior to company's registration as insurer. There are minimum statutory capital and surplus requirements which vary according to class of insurer and type of business. (See category 16 Insurance, topic Insurance Companies for Capital Requirements.) Trust company licensed under Trusts (Regulation of Trust Business) Act 2001 is required to have minimum paid up share capital of $250,000 or such larger amount as Bermuda Monetary Authority may require for any particular undertaking. Investment providers licensed under Investment Business Act 2003 are also subject to capital requirements between $12,000 and $250,000 depending on nature of business or such larger amount as Bermuda Monetary Authority may require.

Stock.

All shares must have a fixed par value. Par value of local companies must be expressed in Bermudian dollars. Capital of exempted companies must be denominated in other currencies. Registered companies may not issue bearer shares and statutory companies have seldom been permitted to have bearer shares. Subject to Companies Act 1981 and authorisation in company's memorandum of association or by-laws, company may purchase its own shares.

Shareholders' Liabilities.

Liability of shareholders of companies (other than banks) is normally limited to amount for time being unpaid on shares respectively held by them.

Dissolution.

Companies are wound up under provisions of Companies Act 1981, which largely follows laws of England. Court having jurisdiction over winding up is Supreme Court of Bermuda.

Company may be wound up voluntarily: if resolution to that effect is passed at special general meeting of shareholders held for that purpose, and for which prescribed notice by advertisement has been given; by effluxion of time if duration of company is fixed by incorporating act or memorandum of association; or by occurrence of event on which incorporating act or memorandum of association provides company is to be dissolved. Company may also be wound up by or subject to supervision of Supreme Court, on application by company or by any creditor or shareholder, or as otherwise prescribed, in number of different circumstances including, inter alia, on it being proved to satisfaction of Supreme Court that company is unable to pay its debts, or Supreme Court is of opinion that it is just and equitable that it should be wound up. In addition, Registrar of Companies has statutory authority to dissolve company which he finds is no longer carrying on business or in operation.

Charges.

The Charges Register is voluntary register for all charges on assets of Bermuda companies. Charges may also be registered against property in Bermuda owned by companies not incorporated in Bermuda. Registered charges rank according to date of registration and in priority to unregistered charges. Unregistered charges are not void for want of registration. In cases of exempted companies, instrument creating charge is exempt from stamp duty.

Government Fees.

There is no stamp duty payable to Bermuda Government for exempted companies on authorised capital of or on transfer of shares of exempted companies, or company shares listed on Bermuda Stock Exchange (per Stock Exchange Amendment Act 2002, §3). Stamp duty on transfer of shares in local company ranges from 2.5%-6% depending on value transferred. There are annual government fees based on ``assessable'' capital of exempted company (authorised capital and amount of share premium account). Such fees are as follows: (1) $0-$12,000 - $1,995 (2) $12,001-$120,000 - $ 4,070 (3) $120,001-$1,200,000 - $ 6,275 (4) $1,200,001-$12,000,000 - $8,360 (5) $12,000,001-$100,000,000 - $ 10,455 (6) $100,000,001-$500,000,000 - $18,670 (7) $500,000,001 or more - $31,120.

Exempted Companies.

Where company's business includes management of unit trusts, $2,905 is payable for each unit trust managed in addition to appropriate annual government fee. Exempted companies are entitled to apply for, and ordinarily receive, undertaking from Minister of Finance that, in event of legislation imposing tax on profits, income, etc., such tax shall not be applicable to them for such period as is specified by Minister. Currently Minister's undertaking expires on 28 Mar. 2016.

All companies will be designated as “resident” or “nonresident” for exchange control purposes. Broadly, if designation is “resident,” which will only be case if company is controlled by Bermudians, company cannot without consent deal in any currency other than “resident” currency whereas if designation is “nonresident”, company can deal in any currency of its choosing other than “resident” currency. (*Note:* At time of writing, general consent exists for residents to hold and deal in foreign currency.)

Real Property.

Pursuant to Companies Act 1981, exempted company, unless otherwise authorised (which in practice is seldom granted) does not have power to acquire or hold land in Bermuda other than either (1) land required for its business held by way of lease or tenancy agreement for term not exceeding 50 years, or (2) with consent of Minister of Finance land held by way of lease or tenancy agreement for term not exceeding 21 years in order to provide accommodation or recreational facilities for its officers and employees. Local company, as matter of policy, is only permitted to acquire land in Bermuda which is bona fide required for purposes of company's business.

Exempted company may hold in its corporate name mortgage on real and personal property of every description in Bermuda in same manner and in same respects as local company and has as mortgagee all rights that local company would have provided that no exempted companies may take any mortgage on land in Bermuda whereby such mortgage secures principal sum exceeding $50,000. Where principal sum exceeds $50,000, exempted company cannot take any mortgage on land in Bermuda without prior consent of Minister of Finance.

See also categories 4 Citizenship, topics Aliens, Immigration; Foreign Trade and Commerce, topic Exchange Control; Introduction, topic Currency; Taxation, topic Taxes.

2.03 FOREIGN CORPORATIONS:

See topic 2.02 Corporations; category 4 Citizenship, topics 4.01 Aliens, 4.03 Immigration.

2.04 PARTNERSHIPS:

Partnerships may be either: (1) General partnerships, which are governed by Partnership Act 1902; (2) limited partnerships which are governed by Limited Partnership Act 1883 or (3) overseas partnerships, which are governed by Overseas Partnerships Act 1995. Exempted partnerships as governed by Exempted Partnerships Act 1992, discussed below, may be general or limited partnerships. Exempted or limited partnership must not operate financial institutional other than investment fund or person registered under §4 or 10 of Insurance Act 1978 and shall not carry out any prohibited business activities as defined in Companies Act 1981.

With effect from 28 Aug. 2006, it has been possible for partnership to register declaration upon formation to elect “legal personality”. Partnership (general or limited) that registers declaration stating that it has legal personality is legal person separate from its partners with power to own and deal with its separate property in accordance with agreement of its partners and has unlimited capacity at law. Once made, “legal personality” election is irrevocable.

General Partnerships.

There is no upper limit to number of persons constituting any partnership. Every partner is agent of firm and of his other partners for purpose of partnership business and he is liable jointly with other partners for debts and obligations of firm incurred while he is partner. However, liability of partners is joint and several in respect of certain specified liabilities of firm including torts, frauds and misapplication of money or property received for or in custody of firm.

Subject to any agreement between partners, every partnership is dissolved by retirement, death or bankruptcy of any partner and may be dissolved by court in certain specified cases. Mutual rights and duties of partners may be varied by unanimous consent which may be express or inferred from a course of dealing.

Limited Partnerships.

They may consist of one or more general partners, who are jointly and severally responsible, and of any other persons contributing cash or other property (but not services) as capital, who are limited partners and, except as provided in 1883 Act, limited partner's liability for partnership debts is limited to value of capital undertaken to be contributed. Register of limited partners is to be kept at limited partnerships' registered office. Applications for establishment of limited partnerships are subject to approval of Bermuda Monetary Authority.

Overseas Partnerships.

Overseas Partnerships Act 1995 provides opportunity for partnerships, formed under law of jurisdictions other than Bermuda, to obtain and register permit to do business in Bermuda. Overseas partnership must maintain resident representative and registered office in Bermuda, which shall not be post office box. 1995 Act restricts ability of overseas partnership to conduct business in Bermuda and permit granted may impose further restrictions. However, such partnerships are able to establish place of business in Bermuda from which to conduct their business outside Bermuda. Overseas partnership may hold land in Bermuda required for its business by lease or tenancy agreement not exceeding 50 years. Annual government fee for Overseas Partnership is $2,235.

Overseas partnership fund (as defined by Investment Funds Act 2006) that engages administrator or registrar to perform certain activities in Bermuda, including corporate secretarial and administrative services is exempted from requirement for permit.

Exempted Partnerships.

Usually, where one or more partners do not possess Bermudian status (see category 4 Citizenship, topic 4.03 Immigration) partnership may be registered as exempted partnership. Upon registration and annual payment of $2,235 (reduced by half where registration occurs after 31 Aug.), exempted partnership may carry on business outside Bermuda from office in Bermuda. Exempted partnership may, however, transact business in Bermuda with another exempted partnership, exempted company or with corporation incorporated abroad. With companies resident in Bermuda, exempted partnership may also transact business but only in furtherance of business of exempted partnership carried on outside Bermuda. Exempted partnerships may not engage in retail trade in Bermuda, including retail trade with another exempted undertaking. Exempted partnership may hold land in Bermuda required for its business by lease or tenancy agreement not exceeding 50 years. It must maintain resident representative and registered office in Bermuda and keep books of records that enable determination of partnership's financial position every three months. Applications for establishment of exempted partnerships are subject to approval of Bermuda Monetary Authority. Partnership Amendment Act 2006 provides all partnerships (excluding overseas partnerships) with opportunity to obtain legal personality through election and registration of said election at Registrar of Companies. Accordingly, such partnerships will be able to sue and be sued in its own right.

Partnership (For Tax Purposes).

Bermuda seeks to offer clients comprehensive range of options for structuring of international business transactions. Traditional option of limited company has recently been extended to include “limited life” companies, which can feature tax transparency for shareholders, with resultant treatment in other jurisdictions (e.g., U.S.) as “partnerships” for tax purposes.

3 BUSINESS REGULATION AND COMMERCE

3.01 BANKS AND BANKING:

Bermudian legislators have adopted international regulatory standards in respect of operation of banks and other deposit-taking institutions in Bermuda. Banking and deposit-taking business in Bermuda is regulated by Banks and Deposit Companies Act 1999 (“Act”) as amended.

Act repeals Banks Act 1969 and Deposit Companies Act 1974, the two pieces of legislation that governed operation of banks and deposit companies respectively, and under which their licences were granted. Now two separate classes of licence, banking licences and deposit company licences, will be granted under one piece of legislation.

Act incorporates the 25 core principles for effective banking supervision (``Core Principles'') set out by Basle Committee on Banking Supervision (``Basle Committee''), committee of banking supervisory authorities established by central bank governors of Group of Ten countries in 1975.

Basle Committee strongly recommended that national agencies incorporate Core Principles in supervision of all banking organisations and other organisations that provide services similar to those provided by banks, within their jurisdictions. Aim is to create consistency of standards across international boundaries that would be significant step in process of improving financial stability both domestically and internationally.

Broadly speaking, principles relate to: Pre-conditions for effective banking supervision; licensing and structure; prudential regulations and requirements; methods of ongoing banking supervision; information requirements; formal powers of supervisors; cross-border banking.

Act provides for joint process of prudential assessment, and political assessment, of applicants. Bermuda Monetary Authority (``BMA'') succeeds Ministry of Finance as licensor, supervisor and regulator of banks and deposit companies on Island. BMA is granted wide powers under Act which include power to grant licences, power to impose conditions on licensees, and power to revoke licences where certain conditions are present that pose significant threats to interests of depositors or potential depositors.

BMA may only grant licence where applicant fulfills minimum criteria set out in Second Schedule to the Act. In addition, licence may only be granted where Minister of Finance (``Minister'') has advised BMA that he is satisfied that grant of licence is in accordance with economic and financial policy of Government of Bermuda.

Criteria in Second Schedule provide that institutions must: establish fitness of directors, controllers or senior executives of institutions to hold their particular positions; carry on their business in prudent manner, which includes minimum capital requirements; carry on their business with integrity and professional skills appropriate to nature and scale of their activities; in case of banks, have initial net assets of not less than $10 million and, in case of deposit companies, have initial net assets of not less than $1 million, at time when their respective licences are granted.

As well, BMA must be satisfied that applicant has ability and willingness to provide and maintain minimum level of services set out in Act.

BMA, in its supervisory role, is to receive quarterly prudential returns from institutions licensed under Act. It will also hold regular meetings with senior management and perform on-site, onshore and offshore reviews of institution's systems and controls. ``Reporting accountants'' regime has also been instituted, similar to those already in place in other jurisdictions.

Consistent with international regulatory standards, BMA as ``home supervisor'' of banks licensed in Bermuda is responsible for supervision of banks' worldwide activities. In Bermuda's case, those activities extend to 18 overseas jurisdictions, which will require BMA to have cooperation of home supervisors in those 18 countries. Information is to pass on ``supervisor to supervisor'' basis only, which will enhance Bermuda's reputation as financial centre. International protocol allows such information to be withheld if it is suspected that information is going to be used for anything other than prudential supervision.

Act also provides that position of institution within structure of any group to which it belongs, or its links with related companies, must be such that it will not obstruct conduct of effective consolidated supervision by BMA. SEC in USA will be regulated in due course; licensed institutions must have in place management, systems and controls adequate and appropriate for their particular businesses.

BMA has statutory duty to review operation of Act and developments in field of deposit-taking which appear to it to be relevant to exercise of its powers and discharge of its duties.

Act provides for vetting of all shareholders at or above 10% threshold. That vetting allows BMA to monitor and block predatory moves against Island's institutions, if those moves are considered counter-prudential or not in public interest.

Bermuda has traditionally adopted protectionist approach in respect of operation of banking and deposit-taking institutions in Bermuda. Their operation has been limited to companies whose majority ownership is Bermudian (so-called “60:40 Rule”).

Twice over last 25 years, experts commissioned by Government to write reports about Island's banking industry have recommended that Bermuda relax the 60:40 rule that has protected local banks from predators and discouraged foreign bank entry into Bermuda market. Bermudian legislators have, to date, resisted pressure to open up market, as some other offshore jurisdictions have done. That protectionist policy remains in place today but all four of Bermuda's existing banks have been given permission by Minister to accept foreign shareholdings in excess of 40% and Bank of Bermuda itself was acquired by HSBC in 2003.

Act provides that only companies incorporated in Bermuda, and licensed by BMA under Act are permitted to carry on deposit-taking business in or from within Bermuda. Those provisions do not apply to persons specified in First Schedule to the Act which, for time being, includes Government of Bermuda, BMA and every public authority in Bermuda.

However, Act empowers Minister, acting on advice of BMA, to amend First Schedule by adding any person or class of persons, or by relaxing any restriction, or by removing any person or class of persons for time being specified in it, or imposing or extending any restriction.

3.02 BILLS AND NOTES:

Bills of exchange are governed by Bills of Exchange Act 1934, which largely adopted law of England. See England Law Digest.

3.03 BULK SALES:

See topic 3.12 Sales.

3.04 COMMERCIAL REGISTER:

See categories 2 Business Organizations, topic Corporations; Citizenship, topic Immigration.

3.05 CONTRACTS:

Gratuitous promise, even though made in writing, is not enforceable unless it is made in deed under seal. If there has been consideration for promise, i.e. either some right, interest, profit or benefit accruing to promisor, or some forbearance, detriment, loss or responsibility given, suffered or undertaken by promisee it may be enforced if under hand, or frequently, if by parol.

Misrepresentation.

A false statement of existing or past fact made by one party to other before or at time of making contract is a misrepresentation.

If misrepresentation is fraudulent, party misled may rescind or repudiate contract. If misrepresentation is made negligently, party misled may institute proceedings in negligence, and if misrepresentation is made innocently, contract may be rescinded by court. Law Reform (Misrepresentation and Frustrated Contracts) Act 1977, (No. 53) provides that injured party may recover damages as if misrepresentation was fraudulent or that injured party can rescind contract in which case court can, in appropriate circumstances, award damages in lieu of rescission. Act also provides that certain provisions excluding or restricting liability for misrepresentation are of no effect unless allowed by court as fair and reasonable in circumstances.

Excuses for Nonperformance.

A contract which is not capable of performance when made is in general void. Doctrine of frustration operates to excuse further performance where: (i) It appears from nature of contract and surrounding circumstances that parties have contracted on basis that some fundamental thing or state of things will continue to be available or that some future event which forms foundation of contract will take place, and (ii) before breach performance becomes impossible or only possible in very different way to that contemplated without default of either party or owing to fundamental change of circumstances beyond control and original contemplation of parties. To excuse nonperformance, impossibility must be in nature of physical or legal one and not merely relative impossibility, i.e., referable solely to ability or circumstances of promisor.

Act of God or of Queen's enemies may also excuse performance. Act of God is generally an extraordinary occurrence or circumstance which could not have been foreseen or which could not have been guarded against.

A statute may also render performance impossible, which is sufficient excuse.

Rescission.

Contract may be rescinded at instance of party induced to enter it by a misrepresentation of facts made by other party. This is so, even if contract performed. Damages may be ordered by court in lieu of rescission and are also available in addition to rescission (or damages in lieu) where this representation is negligent or fraudulent. These provisions can be excluded only insofar as court deems an exclusion of liability to be fair.

Mistake.

Contract made under fundamental mistake of fact is void. Other less fundamental mistakes will render contract voidable and such contract may be rescinded by court.

Where contract is expressed in writing and there is a mistake in writing, court may rectify writing to express true intention of parties.

Rectification.

Court has power under Human Rights Act 1981 to rectify contract or term in contract so it does not contravene prohibited policies under Act.

Illegality.

An ostensibly valid contract may be rendered void as being contrary to statute or to public policy. These contracts are regarded as illegal and will not be enforced by courts. Contracts falling within this category include: (i) Contract of unlawful gaming; (ii) contracts which are immoral or involve commission of a crime or tort; (iii) contracts which are prejudicial to administration of justice; (iv) contracts which prejudice public service or state in its relation with other states. (See further excuses for nonperformance above.)

Privity.

Person not party to contract cannot sue upon it even if it is for his benefit unless it is insurance policy of vendor of property and he is purchaser, or he is a principal suing on contract made for him by agent, or contract constitutes a trust and person seeking to sue is beneficiary thereunder.

Applicable Law.

Interpretation of contract and rights and obligations of parties are governed, generally, by law which parties agree or intend shall govern it or which they are presumed to have intended, known as proper law of contract. Law expressly stipulated will be proper law of contract provided selection is bona fide and legal and there is no objection on grounds of public policy even where law has no real connection with contract. Where parties make no stipulation courts decide by considering contract as whole and relevant surrounding circumstances and are guided by certain presumptions. Written contracts may also be liable for stamp duty under Stamp Duties Act 1976 and failure to affix appropriate duty may not only result in monetary penalty, but also refusal by Court to admit contract into evidence.

Sale of Goods.

See topic 3.12 Sales.

Distributorships, Dealerships and Franchises.

In general, franchises etc. are not allowed in Bermuda. Only under strictly controlled circumstances are they permitted.

3.06 FRAUDS, STATUTE OF:

English Statute of Frauds (29 Car. 2., c. 3) does not extend to Bermuda. Conveyancing Act 1983 provides that contracts for disposition of land be in writing. This provision however does not apply to leases or tenancies for terms not exceeding three years (which period must include options to renew) nor does it affect contract when there has been part performance or sale by order of court.

3.07 INFORMATION TECHNOLOGY, INTERNET AND NEW MEDIA:

E-commerce.

The Bermuda Ministry of the Environment, Telecommunications & E-Commerce is currently reviewing legislative framework in connection with provision of telecommunication services. The review is being conducted to ensure that Bermuda keeps up to date with both technological advances and worldwide standards. As of 1 Oct. 2008 however, legislation has not been updated, and leading legislation in connection with e-commerce remains Electronic Transactions Act 1999 (“ETA”) and its accompanying Standard for Electronic Transactions (“Standard”).

The ETA states that electronic records can form basis of binding legal agreement. Where signature is required, that requirement can be satisfied by electronic record if certain tests are met. The ETA (and related regulations) expressly provide for “authorised certification service providers”, licensed by Minister responsible for telecommunications and electronic commerce, who are allowed to issue accredited certificates and digital signatures to verify accuracy of information contained within such electronic record. Electronic signatures associated with accredited certificates issued by authorised certification service providers are deemed to satisfy requirement under Act that, inter alia, indicates person intended to adopt information contained in electronic record.

Subject to provisions at Standard, intermediaries (such as Internet service providers) are not liable for contents of electronic records or content they may be hosting provided they are not originators of that electronic record and have no knowledge that information gives rise to civil or criminal liability. While intermediaries are not required to monitor information authored by it customers or clients, intermediaries are required to provide reasonable efforts that electronic records handled by their business do not contravene standard and to take action if they have been informed of any potential criminal liability. Intermediaries and e-commerce service providers must comply with any code of conduct or standard that may be issued by Minister responsible for telecommunications and electronic commerce, pursuant to ETA.

Where company is found to be guilty of offence under ETA, every person who at time of commission of offence was director or officer of company is guilty of offence unless they can show that they did not consent to offence or that they exercised all due diligence in order to try and prevent offence from occurring.

The Standard provides code of conduct and best practice guidelines that intermediaries and e-commerce service providers must adhere to.

Computer Programs.

As of 8 Feb. 2008, Copyright and Designs Act 2004 (“Copyright Act”) is operative and extends certain provisions of U.K. Copyright, Designs and Patents Act 1988 to Bermuda. As Copyright Act is now operative in Bermuda, Copyright (Computer Software)(Extension to Territories) Order 1987 is no longer applicable to Bermuda. The Copyright Act provides copyright protection to computer software in Bermuda.

Data Protection.

The Bermuda Government is currently reviewing both data-protection and access to information legislation, however, currently Bermuda does not have any specific data-protection legislation. Notwithstanding absence of specific legislation, Standard does contain provisions in connection with method of collection and protection of information by e-commerce service providers and intermediaries (as defined in ETA) who are carrying on trade or business electronically, or assist others to do so, in or from within Bermuda. The Standard references Safe Harbour Guidelines and sets out, inter alia, requirement to protect privacy of costumers. Pursuant to ETA, all e-commerce service providers and intermediaries must comply with Standard and any other rules or regulations Minister introduces.

Computer Misuse Act 1996.

In line with its emphasis on information technology, Bermuda implemented Computer Misuse Act 1996 to legislate for unauthorized access to computers and modification of computer material which has significant link to Bermuda. This Act also provides for separate offence where person has secured unauthorized access to computer with intent to commit further offence. Penalties for contravention of this Act are provided for in form of fines and/or imprisonment. Bermuda courts have right to order forfeiture of any property used to commit any offence under this Act.

3.08 INTEREST:

Part II of Interest and Credit Charges (Regulation) Act 1975 and related Regulations (“Act”) provides that where interest is payable under contract governed by Bermuda law or by law and no rate is fixed, rate of interest shall be 5%. Act permits, in absence of any agreement, interest to be charged at rate of 7% on unpaid balance of account commencing six months after it was rendered until debt is satisfied.

The Interest and Credit Charges (Regulation) Amendment Act 1994 suspended application of maximum rate of interest, in relation to contracts to which Part III of Act applies. Bermuda Monetary Authority has power to prescribe maximum rate at any time.

By Part IV of Act, interest accrues at 7% p.a. from date that judgment is given or order or decree is made until judgment, order or decree is satisfied unless court otherwise directs. In case of action for death or personal injury, court may award interest at 7% for periods between cause of action arising and date of judgment.

3.09 LICENSES, BUSINESS AND PROFESSIONAL:

These are required for many activities including following: To conduct betting office or hold lottery, fly aircraft, sell intoxicating liquors, conduct street trading or hold fair, drive motor vehicle on public road or marry. Term also used to describe certain contractual arrangements, e.g. relating to copyright, patents, trademarks and occupation of land.

Members of certain professions, such as architects and surveyors, medical professionals and dentists, are required to be registered. National Occupational Certification Act 2004 provides powers to require certification for certain professions and trades, although, to date, none have been implemented.

See also category 2 Business Organizations, topic 2.02 Corporations.

3.10 MONOPOLIES, RESTRAINT OF TRADE AND COMPETITION:

There is no statutory regulation of monopolies, but common law rules apply. It is monopoly and against public policy for any person or group of persons to secure sole exercise of any known trade throughout country. Permitted monopolies may come into being by Crown Grant or statute; i.e. Post Office. Therefore agreement may be void as being monopoly or otherwise as being in restraint of trade at common law. Agreement may be illegal at common law if by causing control over trade or industry to pass into hands of individual or group of individuals it creates monopoly calculated to enhance prices to unreasonable extent. Such agreement is merely unenforceable; it is not illegal in any criminal sense, nor does it give any cause of action to third person. Agreements in restraint of trade are illegal to extent that they are unreasonable.

3.11 NEGOTIABLE INSTRUMENTS:

See topic 3.02 Bills and Notes.

3.12 SALES:

Sales are regulated by Sale of Goods Act 1978, as amended (“SGA”).

Rights of Unpaid Seller.

Unpaid seller who is still in possession of goods is entitled to retail possession of them until payment is made where a) no credit terms have been stipulated b) credit period has expired or c) buyer becomes insolvent. If title in goods has passed to buyer, seller has: (a) Lien on goods for price while he is in possession of them; (b) in case of insolvency of buyer, right of stopping goods in transit after he has parted with possession; (c) right of resale as limited by SGA.

Seller of goods is deemed to be ``unpaid seller'': (a) When whole of price has not been paid; or (b) negotiable instrument has been received as conditional payment and has not been duly met.

Applicable Law.

See topic 3.05 Contracts, subhead Applicable Law.

Stoppage in Transitu.

Law on this subject is chiefly governed by SGA by which goods are deemed to be in course of transit from time when they are delivered to carrier (by land or water) or other bailee (for purpose of transmission to buyer) until buyer or his agent in that behalf takes delivery from such carrier or other bailee.

Unpaid seller may exercise his right of stoppage in transitu either: (1) by taking actual possession of goods or (2) by giving notice of his claim to carrier or other bailee in whose possession goods are. Such notice may be given either to person in actual possession of goods or to principal of agent so in possession. To be effectual, notice must be given in sufficient time to enable principal to communicate it to his servant or agent in time to prevent delivery. Where notice is given to ship-owner, it is his duty to transmit it with reasonable diligence to master of ship.

Where document of title to goods has been lawfully transferred to any person as buyer or owner of goods, and that person transfers document to person who takes it in good faith, without notice and for valuable consideration, then that transfer was by way of sale and unpaid seller's right of lien or stoppage in transitu is defeated; if transfer was by way of pledge or other disposition for value, unpaid seller's right of lien, or retention or stoppage is only exercisable subject to rights of transferee. Otherwise, general rule is that unpaid seller's right of lien or stoppage in transitu is not affected by sale or other disposition of goods which buyer may have made, unless seller has assented thereto.

Warranties.

SGA implies following conditions in contracts for sale of goods: (1) Seller has right to sell goods and that goods are free from any charge or encumbrance not disclosed; (2) when sale is by description (as defined in SGA) that goods correspond to that description; (3) where goods sold in ordinary course of business, that goods supplied are of satisfactory quality except in relation to defects brought to buyer's attention before contract or where buyer examines goods or sample, all defects which that examination ought to reveal; (4) where goods sold in ordinary course of business, that goods are fit for purpose for which they are required provided that buyer impliedly or expressly makes known to seller purpose for which goods are required (except where circumstances show that buyer did not rely, or it would be unreasonable for him to rely, on seller's skill or judgment); (5) where sale is by sample, that bulk corresponds with sample in description and quality and that buyer should have reasonable chance of comparing two.

Above conditions cannot be excluded by parties to contract in case of “consumer sales” (as defined in SGA) or in any other case where such exclusion would be unfair or unreasonable in accordance with guidelines laid down by SGA. Seller can never exclude warranty of good title. Neither can seller exclude warranties of merchantable quality, fitness for purpose and conformity to description where sale is consumer sale. Consumer sale is sale in ordinary course of business of goods of type ordinarily bought for private use to person who does not buy them in ordinary course of business. Implied warranties may be excluded in all other sales where it is fair and reasonable to do so within guidelines laid down by SGA. Similar provisions apply to hire purchase contracts.

Bulk Sales.

Under Bulk Sales Act 1934, every agreement for sale or transfer of any business or stock in trade in bulk must be in writing, must contain inventory of things sold, must be filed in Registry of Supreme Court within ten days, and purchase price of any part thereof must not be paid or any promissory note or security for purchase price be delivered within 30 days of agreement.

See also category 7 Debtor and Creditor, topic 7.09 Liens.

Instalment and Hire Purchase Sales.

By Purchase of Goods by Instalments Act 1943, vendor may not enforce installment purchase agreement, hire-purchase agreement or guarantee in respect thereof unless agreement: (a) Is executed in duplicate, signed by parties and duplicate delivered to customer; (b) comprises down payment of 25% receipted thereon; and (c) contains provision for payment of balance by equal instalments payable at least monthly over period not exceeding two years. Act requires certain other formalities, and relief may be granted by court in certain cases. When 50% of purchase price has been paid vendor may not recover goods without leave of court. Provisions of Act may not be waived by agreement. In respect of motor cars, principal Act is varied by Purchase of Motor Cars by Instalments Act 1952, so that minimum down payment must be 50% and period of repayment one year.

4 CITIZENSHIP

4.01 ALIENS:

See category 15 Immigration, topic 15.01 Aliens.

4.02 BERMUDIAN STATUS:

See category 15 Immigration, topic 15.02 Immigration.

4.03 IMMIGRATION:

See category 15 Immigration, topic 15.02 Immigration.

4.04 NATIONALITY:

See category 15 Immigration, topics 15.01 Aliens, 15.02 Immigration.

5 CIVIL ACTIONS AND PROCEDURE

5.01 ACTIONS:

Nature of action is defined by Supreme Court Act 1905, as amended, as civil proceedings commenced by writ or in such other manner as is prescribed by statute or by Rules of Supreme Court of Bermuda. Right to bring action and its incidents are determined by English common law and equitable principles, but nature of remedies sought does not affect form of action which is governed by Supreme Court Rules which in turn are largely based upon English Supreme Court Rules.

Mode of Proof of Foreign Claims.

The Evidence Act 1905, as amended by Evidence Amendment Act 1984, regulates proof of judgments, judicial proceedings in foreign countries and foreign law; proof of deeds executed abroad is governed by application of English common law.

See also topic 5.04 Limitation of Actions; category 12 Estates and Trusts, topic 12.01 Death.

5.02 DEPOSITIONS AND DISCOVERY:

Local provisions are substantially similar to English law. Application to take evidence by deposition in Supreme Court by application under Order 39 of Rules of the Supreme Court, 1985, including examination of person outside jurisdiction by special examiner. Statutory provision for taking of evidence required for proceedings in other jurisdictions. (The Evidence Act 1905 as am'd).

5.03 JUDGMENTS:

Judgments in civil matters may be obtained in Magistrate's Courts on simple summons for amounts not exceeding $25,000 and in Supreme Court (without limit) in actions commenced by writ, petition or originating summons.

Supreme Court has power under Judgments (Reciprocal Enforcement) Act 1958, to permit enforcement in Bermuda of judgment or order of High Court of Justice in U.K. within six years of judgment or order being given. Act has been extended to a number of territories specified in Statutory Instrument made under Act including Australia and most former British colonies in West Indies. Act does not extend to U.S.

Maintenance orders are similarly enforceable under The Maintenance Orders (Reciprocal Enforcement) Act 1974. Execution cannot issue without leave of court after six years from entry of judgment. Reciprocating jurisdictions include U.K., Nigeria, Jersey, Guernsey, Barbados, Hong Kong, and States of California, Missouri, Hawaii, and Florida.

Lien.

A judgment of the Supreme Court for a debt can create a lien or charge on the real estate of the debtor. A judgment more than 20 years old may be presumed satisfied.

5.04 LIMITATION OF ACTIONS:

The Limitation Act 1984, which received legislative assent 17 Dec. 1984, became law on 1 Dec. 1987, consolidating in one Act various limitation provisions, and standardising them, with appropriate exceptions, in respect of all types of actions and proceedings. Readers are advised to consult Act before proceeding.

Some of major provisions:

Actions for debt (on simple contract) and those founded on tort, including negligence, nuisance or breach of duty embracing personal injury claims, must be brought within six years after cause of such action arises.

Actions under Survival of Actions Act 1949 and Fatal Injuries (Action for Damages) Act 1949 are extended from one to three years from date of death or date of knowledge (as defined under Act).

Actions to recover land must be brought within 20 years (if Crown land 60 years) from date when right to action accrued (as defined under Act), conversely title extinguished after adverse possession for 20 years. Note: Crown must bring action within six years.

No action can be brought to recover arrears of rent, or damages in respect to rent arrears, or any distress made, after six years.

Action to recover money secured by mortgage or charge or to recover proceeds from sale of land must be brought within 20 years.

Actions on judgments must be brought within 20 years from date on which judgment became enforceable, and interest in respect of any judgment debt must be recovered within six years from date it became due.

There is provision for extension of limitation period by six years in cases of disability, although ceiling of 30 years is placed on actions to recover land or money charged on land, and ceiling of six years in total in respect of personal injury claims and death.

Court is also given discretion to extend limitation periods in certain circumstances with respect to personal injury claims, and claims under both Survival of Actions Act and Fatal Injuries

(Action for Damages) Act having regard to, inter alia, reason for delay and conduct of defendant.

There can also be postponement of limitation periods in cases of fraud, concealment or mistake.

5.05 PRESCRIPTION:

See topic 5.04 Limitation of Actions.

6 COURTS AND LEGISLATURE

6.01 COURTS:

Law administered is common law, law of equity, and statutes. Bermuda is governed by principle of binding precedent. Only English common law, principles of equity, and statues of England up to 1612 are binding in Bermuda except (1) when Queen, by Order in Council, makes later U.K. Act expressly applicable to Bermuda (list is available in Revised Laws of Bermuda); (2) when Bermuda legislation amends, repeals or supersedes application of pre-1612 English legislation; or (3) by expansion and/or restriction of common law and law of equity by courts and/or legislation. Decisions of English courts after 1612 have persuasive authority in Bermuda.

Law and equity are administered concurrently. In any conflict, rules of equity prevail. Procedure in Supreme Court governed by Rules of Supreme Court 1985, is modelled on former rules of High Court of Justice in England, prior to enactment of Civil Procedure Rules.

Supreme Court.

This is superior Court of Record. It consists of Chief Justice appointed by Governor after consultation with Premier; also four Puisne Judges appointed by Governor after consultation with Chief Justice.

Commercial Court.

There is now this branch of Supreme Court, staffed by specialist Puisne Judges, to deal with commercial disputes.

Admiralty jurisdiction is dependent on Supreme Court Act 1905. Jurisdiction is similar to that of High Court in England.

Appeals.

In all civil and criminal matters appeal lies to Supreme Court from lower courts. Appeals from Supreme Court lie to Court of Appeal established under Court of Appeal Act 1964. Further appeal lies from Court of Appeal to Privy Council in England under The Appeals Act 1911, as of right if subject matter is worth $12,000 or more and it is appeal from final decision. Leave is required if matter appealed from is interlocutory or is worth less than above-stated amount. Leave can be sought from Privy Council in event of refusal by Court of Appeal.

Magistrate's courts exercise jurisdiction under statute only in matrimonial and civil claims (jurisdiction up to $25,000) as well as minor criminal matters. Procedure governed by Magistrates Court Rules 1973.

See also categories 5 Civil Actions and Procedure, topic Judgments; Transportation, topic Shipping.

6.02 LAW REPORTS, CODES:

Considered judgments of Supreme Court are collected in Registry. Official “Bermuda Law Reports” series was launched in May 2002. Subscription service providing selection of judgments from 1985 to present is available on-line on Justis website: http://www.justis.com. Law has been codified substantially (i.e., The Criminal Code). Reports of some Bermuda cases in Supreme Court and Court of Appeal are reported in West Indies Law Reports and Law Reports of Commonwealth. Court of Appeal judgments have been indexed and digest of cases has been prepared and includes index of cases, digest of criminal cases and digest of civil cases. Some Privy Council decisions have been reported in major British law reports.

6.03 LEGISLATURE:

See category 1 Introduction, topic 1.02 Government and Legal System.

7 DEBTOR AND CREDITOR

7.01 ASSIGNMENTS:

Subject to public policy and contractual or statutory stipulations to contrary, assignments of legal or equitable things are recognised as valid.

By §19(d) of The Supreme Court Act 1905, any absolute assignment, by writing under hand of assignor (not purporting to be by way of charge only), of any debt or other legal chose in action, of which express notice in writing has been given to debtor, trustee or other person from whom assignor would have been entitled to receive or claim such debt or chose in action, shall be, and be deemed to have been, effectual in law (subject to all equities having priority over rights of assignee), to pass legal right to such debt or chose in action.

Such assignments give assignee right to sue in his own name from date of notice. Normally, other assignments can only be enforced by assignee joining assignor in action and notice should be given to preserve priority.

The Life Insurance Act 1978 contains special provisions relating to assignment of life policies.

The Companies Act 1981 and The Exchange Control Act 1972 contain or refer to provisions affecting transfers of shares in Bermuda companies which transfers are also subject to any restrictions in by-laws.

Assignments by way of security of property in Bermuda or assets of Bermuda companies should be registered to establish priority.

Subject to certain exemptions, assignments are subject to ad valorem stamp duty under The Stamp Duties Act 1976.

See also categories 3 Business Regulation and Commerce, topic Bills and Notes; Intellectual Property, topics Copyright, Patents and Designs, Trademarks.

7.02 ASSIGNMENTS FOR BENEFIT OF CREDITORS:

See topic 7.04 Bankruptcy.

7.03 ATTACHMENT:

By Attachment Act 1874, persons having just cause of action at law for sum exceeding $14.40 against defendant who has been in Bermuda but is presently absent, having entered action in Supreme Court Registry, filed various documents and given bonded security, may sue out a writ of attachment, inserting as many garnishees in writ as necessary. Only actions of trover or actions founded on contract may be commenced under this Act.

There are penalties for noncompliance by persons served with writ, but if garnishee acknowledges debt in excess of $240 which is less than amount of cause, he may be allowed six months for payment on giving sufficient bonded security. Act provides for liability of garnishees and for their departure from Bermuda, rights of retention and entitlement to costs in certain cases.

Bonded security must be given by plaintiff before suing out execution where defendant has not appeared. Actions are tried in Supreme Court with jury in term in which writ returnable if more than six months since defendant's departure from Bermuda, or if not, at next regular Civil Sessions, but Court has power to grant application to have cause tried in less than six months. No final judgment may be obtained by default.

Goods of defendant in hands of wife, attorney, agent, trustee or servant liable to attachment. Defendant or garnishee has right of appeal similar to defendant in any ordinary suit. (See category 6 Courts and Legislature, topic 6.01 Courts.)

Under Debtors Act 1973 power to arrest any defendant in any action before Supreme Court where plaintiff can show: (1) Good cause of action against defendant (2) who is about to leave Bermuda and (3) whose absence will materially prejudice plaintiff's claim. Under (§27) Magistrate's Act 1948, attachment of earnings order can be made by courts of summary jurisdiction in respect of payments under: (i) Care order or supervision order under Children Act 1998; (ii) order for maintenance under Matrimonial Proceedings (Magistrates' Courts) Act 1974; (iii) payments in respect of children made under contribution order under Children Act 1998; and payments ordered under Minors Act 1950; (iv) payment of judgment debt in excess of $100; (v) to secure discharge or liabilities arising before or after 1 Dec. 1988.

Attachment of earnings order is an order directed to employer of debtor and instructs employer to make periodic deductions from debtor's earnings which exceed “protected earnings rate” (rate below which court thinks it reasonable that debtor's earnings should not be reduced), and to pay those deductions to Magistrates' Court Clerk for onward transmission. Duty on employer and debtor to thereafter advise of any change in employment and/or pay.

Attachment of earnings order may be made instead of committal order under §3 of Debtors Act 1973, and may be varied or revoked in light of material change of circumstances.

Upon satisfying a Supreme Court Judge of expediency, an order of Supreme Court for payment of money may be enforced by way of attachment of earnings. This includes enforcement of maintenance orders made under Matrimonial Causes Act 1974.

Mareva Jurisdiction.

Pre-trial “Mareva” injunction may be obtained preventing foreign defendant removing assets out of country, pending determination of claim justiciable before Supreme Court of Bermuda.

Four basic conditions must be satisfied: (i) Claim is justiciable in Bermudian Courts; (ii) applicant has good arguable case; (iii) it is shown prima facie that there are assets within jurisdiction; and (iv) there is likelihood that they will be removed.

Anton Piller Jurisdiction.

On application of any party to cause or matter, court may make order for detention, custody or preservation of any property which is subject matter of cause or matter, or as to which any question may arise therein, or for inspection of any such property in possession of party to cause or matter. Three preconditions are established for granting of Anton Piller Order: (i) There must be extremely strong prima facie case; (ii) damage, potential or actual, must be very serious to applicant; and (iii) there must be clear evidence that defendants have in their possession incriminating documents or things and that there is real possibility that they may destroy such material before any application inter partes can be made.

7.04 BANKRUPTCY:

Under Bankruptcy Act 1989 (operative date 31 Jan. 1990), debtor who has committed “Act of Bankruptcy” may be declared bankrupt, at suit of creditor or creditors, where debt or debts due petitioner or petitioners amount to BDA $5,000 or more.

Acts of bankruptcy may be any of following: That debtor has: (1) made conveyance or assignment to trustee for benefit of his creditors generally; (2) made fraudulent conveyance of his property or any part thereof; (3) with intent to defraud or delay his creditors, departed out of or remained out of Bermuda or from his dwelling house or otherwise absented himself or begun to keep house; (4) suffered execution by seizure of his goods and that goods have either been sold or held by Provost Marshal General (with certain exceptions) for 21 days; (5) filed in Court a Declaration admitting his inability to pay his debts; (6) suffered final judgment and Bankruptcy Notice served upon him and has not within 14 days after service of Notice complied with requirements of Notice or satisfied Court that he has counter-claim, set off or cross demand which equals or exceeds amount of judgment; or (7) given notice to any of his creditors that he has suspended, or that he is about to suspend, payment of his debts.

Debtor may present his own petition for bankruptcy.

Act of Bankruptcy must have occurred within three months before presentation of petition and debt must be liquidated and not secured debt, unless creditor agrees to give up his security.

Preferential debts are confined to municipal rates, land taxes and wages. Absconding bankrupt may be arrested to prevent frustration of bankruptcy proceedings. Debtor may make proposal to his creditor for composition in satisfaction of his debts or scheme of arrangement of his affairs. Creditors at any time after bankruptcy adjudication may accept composition or scheme and Supreme Court may annul bankruptcy adjudication and vest bankrupt's property in him or some other person on such terms and conditions as Supreme Court may declare.

Assignment with intention to prefer creditor by person unable to pay his debts as they become due from his own monies shall, if that person becomes bankrupt within six months of assignment, be void as fraudulent preference. Voluntary settlement made within two years preceding bankruptcy is void; if made within five years preceding bankruptcy it is also void, unless settlor is able to pay all his debts without property settled.

7.05 EXECUTION:

Judgments are enforceable according to provisions of Rules of Supreme Court 1985. Order 45, rule 1 of these Rules provides for enforcement of payment of money, not being judgment or order for payment of money into Court; Order 45, rule 1(2) provides for enforcement of judgment or order for payment of money into Court; Order 45, rule 3 regulates enforcement of judgment for possession of land and Order 45, rule 4 judgment for delivery of goods. Means available include writ of fieri facias, garnishee proceedings, appointment of receiver and writ of sequestration. Power of Court to commit to prison for default in payment is governed by Debtor's Act 1973.

Time for Issuance.

Writ of execution to enforce judgment or order may not issue without leave of Court where six years or more have elapsed since date of judgment or order. Leave is also required where any change has taken place in parties concerned, whether by death or otherwise. Where Court grants leave and writ is not issued within one year, order shall cease to have effect. However, fresh order may be sought. Otherwise, writ of execution may normally be issued immediately after entry of judgment.

Stay.

Party against whom judgment or order has been made may apply to Court for stay of execution or other relief on grounds that: (1) Special circumstances exist which render enforcement inexpedient or (2) unable to pay from any cause.

Lien.

See topic 7.09 Liens.

Levy.

All land, houses, goods, money, bank notes, cheques, bills of exchange, promissory notes, government securities, bonds, or other securities for money, debts, shares in capital or joint stock of any company and all other property whatsoever, whether movable or immovable belonging to judgment debtor, whether held in his own name or by another person in trust for him or on his behalf, are liable to attachment and sale in execution of judgment.

Return.

Any party at whose instance writ of execution was issued may serve notice on Provost Marshal General requiring him, within such time as may be specified in notice, to indorse on writ statement of manner in which he has executed it.

Sale.

Every sale shall be made under direction of Registrar and conducted according to such order as Court may make on application and shall be made by public auction or in such other manner as Court may order.

7.06 FRAUDULENT SALES AND CONVEYANCES:

There are various doctrines under law of Bermuda whereby transactions with insolvent company may be illegal, as follows: (1) Disposition in favour of creditor by insolvent company, within six months prior to filing of petition for winding-up of company and for purpose of preferring creditor, is void. Express statutory exemption protects interests of any person obtaining title to property through or under creditor of insolvent company in good faith and for valuable consideration; (2) within certain limits, disposition of property (a) made with dominant intention of putting property beyond reach of person (or class of persons) who has claim or may at some time have claim against transferor, and (b) without adequate consideration, is voidable at instance of certain eligible creditors. This rule applies within or outside liquidation. Insolvency is not prerequisite; (3) void disposition under Bermuda law is any disposition of property of company after filing of petition for winding-up of company. Such disposition is void unless approved by court. See §166 of Companies Act 1981; (4) under Bermuda law there is concept of fraudulent trading which entails carrying on of business of company with intent to defraud creditors of company or for any other fraudulent purpose. Any person found by court to have been conducting business in this way may be held personally liable for any or all of debts of company. See §246 of Companies Act 1981; (5) statutory jurisdiction exists for court to compel repayment or compensation from any director or officer who has misapplied any money or property of company or has been guilty of any misfeasance or breach of trust in relation to company; (6) floating charge granted by company while it was insolvent and within 12 months prior to presentation of petition is void, except to extent of cash advances made in consideration for floating charge. See §239 of Companies Act 1981; (7) conveyance or assignment by company of all its property to trustees for benefit of its creditors shall be void.

Bulk Sales.

See category 3 Business Regulation and Commerce, topic 3.12 Sales, subhead Bulk Sales.

7.07 GARNISHMENT:

Cause of action for more than $14.40 against person absent from Bermuda but who has been in Bermuda may be enforced by garnishment of that person or corporation subject to action being entered, affidavit of cause of action being filed, security being given with sureties for double amount claimed and writ served on garnishee. Attachment Act 1874, which provides this remedy, requires trial of action within six months of return date of writ. Anything belonging to such a debtor in hands of his wife, attorney, agent, trustee, clerk or other servant may be garnished.

Other provisions relating to garnishment appear in Supreme Court Rules.

These provisions include means to enforce judgment of Supreme Court.

Application ex parte by affidavit and in first instance there should be show cause hearing after service on garnishee personally and, unless court otherwise directs, on judgment debtor.

7.08 INSOLVENCY—CORPORATE:

Insolvent company can be wound up: (1) by resolution passed at members and creditors meetings or (2) by court order. Members of solvent company can resolve to wind up voluntarily.

Company unable to pay its debts can be wound up by petition to court pursuant to Companies Act 1981: (1) by creditor proving to court that company cannot pay debts, including prospective and contingent liabilities, or (2) if execution or judgments unsatisfied, or (3) by creditor serving on company demand for payment of debt due exceeding $500 which remains unsatisfied three weeks after service.

Court appoints liquidator, being official receiver in default of other nomination. Liquidator has power to examine persons involved in company or believed to have its property.

After presentation of petition disposition of company property is void, court can appoint Provisional Liquidator to protect assets. Various kinds of antecedent transactions are reversible. After Winding Up Order made or Provisional Liquidator appointed actions against company are stayed. Creditors may file proofs in respect of virtually all claims, including contingent and unliquidated claims.

Preferential creditors are Government taxes and rates, wages, holiday pay, employer contributions, workmen's compensation. Otherwise assets are distributed to unsecured creditors on pari passu basis. Set off is broad in scope and mandatory.

Undistributed property of dissolved company passes to Crown; interested party can apply for declaration that dissolution is void within two years of dissolution.

7.09 LIENS:

Certain liens, in sense of right to retain possession of property against satisfaction, arise at common law by virtue of usage. They may be general (e.g. banker's lien) or over goods for costs incurred in respect of them (e.g. common carriers particular lien). Similar rights may be created by contract.

Certain equitable liens not founded on possession may arise by virtue of relationship of parties (e.g. partnership or vendor and purchaser) or be created by contract. They are enforceable by sale after judgment.

Certain contractual liens and all equitable liens give rise to charges after possession has passed. Such charges may be registerable. Registration is not necessary to perfect security, but preserves priority.

Maritime liens (e.g. for seamen's wages) are enforceable by action in rem pursuant to §25(3) of Supreme Court Act 1905.

See also categories 3 Business Regulation and Commerce, topic Sales; Civil Actions and Procedure, topic Judgments.

7.10 PLEDGES:

Pledge of personal chattels involves delivery of possession by way of security for debt or contract upon terms that pledgee acquires right of sale (but not of foreclosure) on default. General law of contract applies to pledges.

See topic 7.09 Liens; category 18 Mortgages, topic 18.01 Chattel Mortgages.

7.11 USURY:

See category 3 Business Regulation and Commerce, topic 3.08 Interest.

8 DISPUTE RESOLUTION

8.01 ALTERNATIVE DISPUTE RESOLUTION:

Alternative Dispute Resolution is assisted by Arbitration Act 1986 which deals with arbitration of non-international disputes. Bermuda International Conciliation and Arbitration Act 1993 is concerned with arbitration and conciliation of international disputes. 1993 Act adopts UNCITRAL model law. By association with U.K., Bermuda is signatory to Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 (“The New York Convention”). 1993 Act provides for very limited court intervention and very limited appeals of award.

Parties can opt out of 1993 Act in which case 1986 Act will apply.

1993 Act has no restrictions on use of foreign counsel and immigration procedures (work permits) are relaxed.

Bermuda has international arbitration centre and international register of arbitrators, as well as local arbitrators.

8.02 ARBITRATION AND AWARD:

See topic 8.01 Alternative Dispute Resolution.

8.03 MEDIATION:

Mediation is provided by accredited mediators in Bermuda.

9 DOCUMENTS AND RECORDS

9.01 NOTARIES PUBLIC:

Notaries Public are now appointed by Supreme Court under Commissioners for Oaths and Notaries Public Act 1972. To be eligible, applicant must be barrister and attorney of at least five years standing and must possess Bermudian status. Certain public officers are ex officio Notaries Public.

10 EMPLOYMENT

10.01 LABOUR RELATIONS:

See category 4 Citizenship, topic 4.03 Immigration.

Relationship between employers and employees are governed by Employment Act 2000 as amended. This provides that statement of employment must be provided by employer within week of employment commencing; overtime is permitted; employees are entitled to two weeks vacation after their first year of continuous employment; eight days sick leave per year is permitted if employee has completed one year of continuous employment; maternity leave, ante-natal care and bereavement leave is permitted; “at will” termination is not permitted; employee can be terminated summarily if employee is guilty of gross misconduct, repeated misconduct or unsatisfactory performance; dismissal can be held to be unfair if various grounds are established; constructive dismissal is possible; employees can be made redundant or laid off under Act also. Employer or employee aggrieved under Act can make complaint to Labour Relations Office. If complaint cannot be conciliated, Labour Relations Inspector may refer complaint to Employment Tribunal. Remedies available include reinstatement, re-engagement and/or compensation. Act does not prevent aggrieved employee/employer from pursuing wrongful dismissal in courts.

Human Rights Act 1981 as amended is of general application and wide in scope. It expressly applies to employers who must not discriminate in any of ways prescribed by Act. Any term of employment that contravenes Act is void and of no effect. Act provides regime for investigating alleged abuses and complaints, and seeks to achieve reconciliation and compensation for injured party. Discrimination in employment is not permitted in recruitment, termination, training, transfers, probation, apprenticeships or promotions. Discrimination occurs if less favourable treatment is given to employees because of their race, place of origin, colour, ancestry, sex, marital status, disability, legitimacy, or religious or political belief. 2006 amendment to Act provides that no employee shall be harassed in workplace by employer or another employee, whether such harassment is based on race, colour, ancestry, or place of origin.

Workmen's Compensation Act 1965, imposes liability upon employers to pay compensation for death or injury of employees arising out of and in course of employment.

Hospital Insurance Act 1970 and regulations, makes provision for both compulsory and voluntary hospital insurance. Every employer of three or more people is required to provide insurance in respect of hospital treatment for both employee and employee's wife if she is not employed. Cost of premiums is shared equally between employer and employee. Both voluntary and compulsory hospital insurance business may be undertaken only by insurer licensed by Government.

The Occupational Safety and Health Act 1982 as amended makes provision for securing health, safety and welfare of persons at work by imposing certain statutory duties of care on employers and employees.

Labour Unions.

Trade Union Act 1965 as amended, provides for registration of unions and enacts compulsory rules for them. Certain contracts between members of unions, between unions, collective agreements between unions and employers and other types of contracts are unenforceable although lawful. Trade unions are protected against liability in tort. Labour Relations Act 1975 provides for reference to inquiry settlement and arbitration in event of labour dispute and for establishment of Permanent Arbitration Tribunal and also specially provides for protection of essential services and for conduct of industrial disputes arbitration and other settlement procedures in connection with them. Acts done in contemplation or furtherance of trade disputes which interfere with another person's business are not actionable or punishable. Peaceful picketing is lawful, but intimidation, illegal strikes and lock-outs are punishable criminally. Person who refuses to take part in illegal strikes or lock-outs is protected against any discrimination or disability from within his union. Essential services are protected against strike action.

Labour Relations Amendment Act 1991 further establishes essential industries disputes settlement board to resolve disputes within hotel industry and at Bermuda Civil International Airport, as well as any other industry or business that Parliament may deem to be essential industry in Bermuda. Any award is binding and enforceable in Supreme Court on applications by any party to dispute. Further, Trade Disputes Act 1992 permits Minister responsible for Labour to refer any labour dispute, including any apprehended dispute, in any trade or industry specified in published notice, to tribunal under Act. Any decision or award is binding and tribunal can levy further monetary awards for subsequent noncompliance. Industrial action following referral is unlawful.

See also category 20 Taxation, topic Taxes.

11 ENVIRONMENT

11.01 ENVIRONMENTAL REGULATION:

Basic Statutes.— Public Health Act 1949 covers water pollution, regulation of operation and maintenance of sewerage systems, drainage of yards, ventilation of buildings, collection and disposal of house and trade refuse, disposal of human remains and almost all other environmental nuisances. Development & Planning Act 1974 contains provisions enabling regulation of development to protect environment.

Waste and Litter Control Act 1987 provides primarily for control of litter and deposit and collection of household and commercial waste by licensed collection authorities. Criminal penalties and compensatory remedies stipulated.

Recent legislation is Clean Air Act 1991, regulating emission of air contaminants. Provides for granting of construction permits and operating licences to operators of controlled plants. Regulates operation of Bermuda's new incinerator.

New regulations also prohibit importation or use of anti-fouling paints containing organotin, irgarol, or diuron (Fisheries [Anti-Fouling Paints Prohibition] Amendment Regulations 2005 BR 25/2005).

Also see: Environment Protection (Overseas Territories) Order 1988 (SI 1988, No. 1084), extending application of certain provisions of (U.K.) Food and Environment Protection Act 1985, in particular provisions relating to deposit or incineration of substances at sea and protection of marine environment; Prevention of Oil Pollution Act 1971 (Bermuda) Order 1980 (SI 1980, No. 1520) extending application of certain provisions of (U.K.) Prevention of Oil Pollution Act 1971, in particular regulation of discharge of oils into sea and keeping of oil record books in ships registered in Bermuda; Merchant Shipping (Prevention of Pollution—Substances other than Oil) Order 2004 (BR 54/2004); Fisheries Act 1972, Protection of Birds Act 1975; and Endangered Animals and Plants Act 1976.

General Supervision.— Minister of the Environment; Environmental Authority (established by §3 of Clean Air Act 1991 consisting of not more than seven members appointed by Minister of the Environment, Minister of Health and Minister of Works and Engineering); Minister of Works and Engineering (waste collection; air pollution); Minister of Health (environmental nuisances).

12 ESTATES AND TRUSTS

12.01 DEATH:

Person of whom nothing has been heard for period of seven years by those to whom such person is likely to have communicated will usually be presumed dead. Proof of these circumstances is defence on charge of bigamy and will also support suit for presumption of death or dissolution of marriage. See also category 5 Civil Actions and Procedure, topic 5.01 Actions.

Records of death (and of births and marriages) are kept in Office of Registrar General at Hamilton. Certificates may be obtained on application to above Office.

Actions for Death.

By Fatal Injuries (Actions for Damages) Act 1949, in any case where death of person is caused by any act, neglect or default, whether criminal or tortious, then personal representatives or any near relation of deceased has same right of action for damages as deceased if he had survived, provided that not more than one action lies in respect of same subject matter of complaint and any such action must be commenced within three years from date of death or date of knowledge of person for whose benefit action brought, whichever is later, by Limitation Act 1984. Any such action shall be for benefit of deceased's dependants, who may be awarded damages appropriate to actual or reasonably expected pecuniary loss caused to him or to her by reason of death of deceased.

By Survival of Actions Act 1949, subject to provisions thereof, all causes of actions subsisting against or vested in any deceased person on his death survived against, or for benefit of, respectively, his estate. No cause of action shall be maintained in respect of action in tort which by virtue of this Act has survived against estate of deceased person unless proceedings in respect thereof were pending at time of death, or cause of action arose not earlier than six months before death and proceedings are taken in respect thereof not later than 12 months after death. Limitation Act 1984 provides for action for benefit of estate to be taken within three years from date of death or date of estate representatives' knowledge, whichever is later.

Rights conferred by Survival of Actions Act 1949 for benefit of estates of deceased persons are in addition to those conferred on dependants of deceased persons by Fatal Injuries (Actions for Damages) Act 1949. Although heads of damages under each Act differ and duplication of damages is not possible, it would seem that provisions of both these Acts apply to all persons.

12.02 DECEDENTS' ESTATES:

See topics 12.03 Descent and Distribution, Executors and Administrators; category 19 Property, topics 19.03 Curtesy, 19.05 Dower.

12.03 DESCENT AND DISTRIBUTION:

Substantial changes in law governing intestacy were made by Succession Act 1974 (operative date 1 Sept. 1974) and further by Succession Amendment Act 1987 (operative date 1 Jan. 1988).

Inheritance Act 1835, remains in force for purpose of ascertaining devolution of entailed estates and interests and entitlement thereto (for persons dying prior to 1 Sept. 1974) but otherwise no longer applies in relation to intestacies.

No distinction is now made between real and personal property which both vest in estate representatives who hold on trust with a power of sale.

In intestacies, estate representatives must pay all funeral, testamentary and administration expenses, (and pecuniary legacies in case of partial intestacy), debts and property liabilities and residuary estate is then to be distributed or held on trusts according to following rules: (1) surviving spouse (whether husband or wife) is entitled to: (a) personal chattels absolutely, (b) if deceased left issue, 50% of value of residuary estate which does not include personal chattels or $100,000 (whichever is greater) with interest at 5% p.a. from end of time allowed for administration (one year from death or six months from grant, whichever is later) until payment, (c) if deceased left no issue, 662/3% value of residuary estate which does not include personal chattels or $150,000 (whichever is greater) with interest at 5% p.a. as above and remainder goes to surviving parents in equal shares or if none, to brothers and sisters of whole blood or their issue, (d) if deceased left no issue, no parent, no brother or sister of whole blood or issue of same, residuary estate is held on trust for surviving spouse absolutely; (2) issue are entitled to: (a) where deceased leaves surviving spouse, to remainder of residuary estate which is held for them on intestacy trusts, i.e., in trust in equal shares for issue attaining 18 years or their issue on same terms, (b) where deceased leaves no surviving spouse, to whole residuary estate which is held on intestacy trusts; (3) if no issue attain vested interest, then subject to any claim by surviving spouse as above, relatives of deceased are entitled in following order: (a) parents in equal shares absolutely, (b) brothers and sisters of whole blood or their issue on intestacy trusts, (c) brothers and sisters of half blood or their issue on intestacy trusts, (d) grandparents in equal shares absolutely, (e) uncles and aunts of whole blood or their issue on intestacy trusts, (f) uncles and aunts of half blood or their issue on intestacy trusts, (g) government as bona vacantia. Government has power to make payments out of estate to certain dependents of deceased or other person having legal, equitable or moral claim. Any member of one of classes above who attains vested interest excludes all members of subsequent classes.

Where persons die commorientes, younger is deemed to survive by virtue of §1 of Presumption of Survivorship Act 1956. However, in case of intestacy, where intestate and intestate's spouse are commorientes for purposes of intestate succession spouse shall be deemed not to have survived intestate. Assets fall into respective estate of each deceased spouse for distribution to relatives.

Children Amendment Act 2002 effectively removed all distinction and references to legitimate and illegitimate in respect of birth from Bermuda's statutes. Issue includes adopted and illegitimate children and child en ventre sa mere (conceived but not born at time of intestate's death).

Application may be made to Court by spouse, former spouse who has not remarried, child or grandchild who is being maintained by deceased directly before death, for provision out of deceased's estate on ground that disposition of estate by will or laws of intestacy is not such as to make reasonable financial provision for applicant. Orders may be made for periodical payments or lump sum provision. Court must have regard to financial needs and resources of applicant and all beneficiaries, obligations of deceased to applicant and beneficiaries, applicant's conduct and other relevant matters.

Application must be made within six months of date of grant, except where Court gives permission to make application out of time. Court has power to make interim orders where there is immediate need and there are assets available to meet such orders. Court has power to take into account property given donatio mortis causa, dispositions made within three years prior to death (voluntarily or for less than full value of property) or property contracted to be willed. Court must be satisfied that disposition was made with intent to defeat claim under Part III of Act—test being balance of probabilities.

See category 19 Property, topics 19.03 Curtesy, 19.05 Dower.

12.04 EXECUTORS AND ADMINISTRATORS:

Substantial changes in law were made by Administration of Estates Act 1974 (operative date 1 Sept. 1974).

Executors take by virtue of appointment in will, but probate is necessary to enable them to deal fully with real estate. In event of intestacy, administrators are appointed by court in accordance with rules governing order of priority, their powers deriving from grant. Where infant is absolutely or contingently entitled by will or intestacy, administration shall be granted either to trust corporation with or without individual or not less than two individuals. Court has discretion as to persons to whom administration may be granted and may limit grants as thought fit. Provision is made for distribution of small estates consisting of personalty only not exceeding $20,000 without grant.

Both real and personal property of deceased person now vest in his executors, or upon grant by court in event of an intestacy in his administrators. Grant of probate immediately upon death or of administration has effect over both real and personal property unless containing an express limitation and both real and personal estate are made liable for satisfaction of debts of deceased.

Executors and administrators are not bound to distribute before expiration of one year after death or six months from grant (whichever is later). After publishing prescribed advertisements for claims against estate of deceased, they are not liable after distribution for any claims of which they have not had notice, however, creditors retain right to follow distributed property into hands of beneficiaries. Order of distribution of solvent and insolvent estates is similar to that contained in English Administration of Estates Act 1925. Rule in Allhusen v. Whittell has been abolished unless will shows express contrary direction.

Executor of sole or last surviving executor of testator is executor of that testator. Chain is broken by an intestacy, failure of testator to appoint executor or failure to obtain probate.

Estate representative may agree to remuneration for a trust corporation appointed by him as trustee. Rights of preference and retainer have been abolished.

12.05 TRUSTS:

General.

Virtually all trusts recognised by English rules of equity may be created and enforced. There are two notable exceptions. First is non-charitable purpose trust permitted by Trusts (Special Provisions) Act 1989 as amended in 1998. Second implemented by Trusts (Special Provisions) Amendment Act 2004 provides for creation of asset protection trusts and prevents heirship laws of other jurisdictions being enforced in Bermuda.

With effect from 1st June, 1989, provisions of Hague Convention (Convention relating to law applicable to trusts and their recognition) were extended by order-in-council to Bermuda. Trusts (Special Provisions) Act 1989 also legislated in respect of capacity to create trust, governing law of trust and circumstances under which Supreme Court may assume jurisdiction.

Trustees are regulated by Trustee Act 1975, statute corresponding in many respects to

English Trustee Act 1925. Statute is fairly comprehensive but it may be desirable to confer express powers in trust instrument to give greater flexibility of action. Trusts (Special Provisions) Act 1989 allows for incorporation by reference of standard administrative provisions into trust instruments.

Trusts (Regulation of Trust Business) Act 2001 (operative date 25 Jan. 2002) replaces Trust Companies Act 1991 and makes new provisions for licensing and regulation of companies, partnerships and individuals carrying out trust business in or from within Bermuda.

Trustees.

No requirement that trustees be resident in Bermuda although there may be stamp duty implications if no trustee is resident in Bermuda. There may also be other benefits to having Bermuda trustee. Individuals, public trust companies or private trust companies are eligible and most commonly serve as trustees. Differences are as follow:

Individuals.

Settlor or grantor may have, as one of his trustees, relative, trusted friend or adviser, or may choose his trustees from bank or other professional personnel. Ordinarily, care should be taken to avoid appointing as trustee someone who is beneficiary of trust, even where trust document itself does not expressly prohibit this appointment. Care must be taken not to contravene trust licensing rules.

Public Trust Companies.

In international setting, trustee is usually one of Bermuda's licensed trust companies, acting either alone or with one or more individual co-trustees. At present, Bermuda has some 32 licensed trust companies, ranging from trust companies owned by law firms and accounting firms to large public trust companies owned by banks. Public trust companies are licensed and regulated under Trusts (Regulation of Trust Business) Act 2001. The Bermuda Monetary Authority is appointed regulatory body under that Act and must comply with general policy directions issued by Ministry of Finance.

Private Trust Companies.

Private trust company may be expressly authorised by its objects to act as trustee of special trust or class of trusts e.g. ABC Trust. Private trust companies are generally exempted from licensing regime of Trusts (Regulation of Trust Business) Act 2001. However, some companies may require licences and advice should be taken in each case on question of whether licence is required or not.

Investment.

Trustee Amendment Act 1999 (operative from 10 July 1999 but applicable to all trusts created before or after that date) replaced list of authorised investments previously imposed by Trustee Act 1975. Subject to any enlargement or restriction of powers by trust instrument, trustees may invest in any property of any kind whether or not situated in Bermuda, subject to exceptions below (see subhead Acquisition of Land in Bermuda, infra). In so investing trustee acts as prudent investor would by considering purposes, terms, distribution requirements and other circumstances of trust and by exercising reasonable care, skill and caution. Trust instrument may now also reserve powers to managing trustee and in that event no other trustee is liable for decision, act or transaction of managing trustee in exercise of reserved powers.

Remuneration.

In the absence of express provisions in trust instrument, trustees may be allowed remuneration by court.

Variation of Trusts.

Supreme Court may, on behalf of certain classes of persons, approve any arrangements varying or revoking trusts of real or personal property or enlarging trustees' powers of administration or management.

Acquisition of Land in Bermuda.

Any conveyance or other assurance of land in Bermuda to a person as trustee for a restricted person (i.e., any person not possessing Bermudian status or Bermuda exempted companies or companies incorporated outside Bermuda) is void, except under authority of license granted by Minister.

Where land in Bermuda is devised by will to person as trustee for any person not possessing Bermudian status, vesting of such land is unlawful except under authority of licence granted by Minister of Home Affairs. If such licence is not forthcoming, trustee, or other person having power of sale, must sell land within three years, or such longer period as Minister of Home Affairs may allow just period not to exceed three years, from date of death.

Tax.

In Bermuda, stamp duty is name given to tax levied on estates. Applicable rates are set out in Stamp Duties Act 1976.

Where no Bermuda dollar assets are involved, grant may not be required. Application for grant can, however, be made where deceased was either domiciled or ordinarily resident in Bermuda. There are no strict tests for domicile or residence in Bermuda. Whether deceased or beneficiaries hold Bermudian status is determined with reference to Bermuda Immigration and Protection Act 1956, as amended.

There are no connecting factors applicable, as imposition of tax is based on currency denomination of property under §47 of Stamp Duties Act 1976.

Stamp Duty on Lifetime Gifts.

Stamp duty payable on immovable Bermuda dollar denominated assets as defined in Stamp Duties Act 1976 and shares in local Bermuda companies which are not listed on Bermuda Stock Exchange, is at following ad valorem rates on gifts:

First $100,000	2%
Next $400,000	3%
Next $500,000	4%
Next $500,000	6%
Over $1,500,000	7%

Stamp Duty on Settlements or Transfers to Bermuda Trusts.

Rate of stamp duty payable on settlement of Bermuda property to Bermuda trust is as follows:

$250 plus the following:

First $50,000	Nil,
Next $150,000	5%,
Next $800,000	10%,
Over $1,000,000	15%

Rate applicable on addition or subsequent transfer of Bermuda property to Bermuda trust is as follows:

Up to point at which total amount of any duty paid on Bermuda property equals

$7,750 in aggregate	5%
On next $500,000	10%
Thereafter	15%

Where gift is one of non-Bermuda property to Bermuda trust, generally only nominal stamp duty applies where one or more of trustees are local. If no trustees are local, then gifts of non-Bermuda property to trust are subject to duty of 1% of value of property, up to maximum amount of $7,500.

Stamp duty is payable on instrument which effects transfers of property. It follows, therefore, that where movable assets can be transferred by delivery, there is no duty payable on transfer.

12.06 WILLS:

Testator must be 18 years old and of sound disposing mind. Bermuda follows English common law when defining capacity. Testator, in order to make valid will, must not only understand extent of his property and nature of his act in disposing of such property, but must also be able to comprehend and appreciate claims upon him and to which he ought to give effect.

Testamentary Disposition.

All manner of real and personal property may be effectively disposed of by will, but any gift to an attesting witness is void.

Execution.

Will must be in writing and either: (1) entirely in handwriting of testator and signed at foot or end thereof by him; or (2) signed at foot or end by testator, or by some other person in his presence and at his direction, and such signature must be made or acknowledged by testator in presence of two or more witnesses present at same time who attest and subscribe will in presence of testator.

Revocation.

Will is revoked by marriage, unless it is made in contemplation of marriage to a named person which thereafter takes place, and may be revoked by subsequent will or codicil or by testator destroying will with intention of revoking same. Gifts and appointments in favour of spouses and appointment of spouse as executor are revoked upon divorce. (Wills Amendment Act 1998 effective date 1 Aug. 1998).

Construction and Effect.

Unless a contrary intention appears in the will it is construed to speak and take effect as from the time of the death of the testator.

Unless a contrary intention appears in will, where gift of property is made to any person, being a child or other issue of testator, for an estate or interest not determinable at or before death of such person and such person predeceases testator leaving issue surviving testator, gift does not lapse but takes effect as follows: (a) In respect of wills executed prior to 24 Mar. 1988 as if person had died immediately after testator's death; (b) in respect of wills executed after 24 Mar. 1988 as gift to person's issue per stirpes.

Pursuant to Children Amendment Act 2002 term “child” in Will is expanded to include legitimate, illegitimate and adopted children. Courts have power to determine whether child is child of testatrix after death.

Courts have power to rectify will where testator died after 2 July 1986 if it fails to carry out testator's intention because of: (a) Clerical error; or (b) failure to understand testator's instructions.

Court can alter will to carry out testator's intentions. Application for rectification should normally be made within six months of grant of administration.

Extrinsic evidence of testator's intention may be admitted to interpret will where will is ambiguous or part of will is meaningless where testator died after 24 Mar. 1988.

Subject to provisions of will devise of real estate without words of limitation is construed to pass whole estate or interest of which testator had power to dispose by will. Where real estate is devised to two or more persons as co-owners it will be construed as devise of tenancy in common in absence of words indicating joint tenancy in any will made after 1 Apr. 1974.

Foreign Probated Wills.

Probate or letters of administration granted in U.K. and colonies, U.S.A. or any Commonwealth jurisdiction may be resealed on production of a copy of will and probate or letters of administration, certified under seal or authority of original court of probate. Before resealing, in case of letters of administration, court must be satisfied that security has been given sufficient to cover property in Bermuda. Court may also require evidence as to domicile of deceased person and adequate security in respect of debts due to creditors in Bermuda. Upon resealing, stamp duty must be paid on so much of estate as consists of real and personal property situated or being in Bermuda.

Under Evidence Act 1905, certified copy of will and probate granted by any British court or by any competent court in any of non-British islands of West Indies or in any part of United States of America will, on recording same in Bermuda, be allowed and taken prima facie as good proof of such will in all causes and matters.

Wills with Foreign Element.

There are no formalities required for disposition of personal estate of any member of Her Majesty's Forces whilst in actual naval, military or air force service, or any mariner or seaman at sea by way of “privileged will”. In accordance with §8 of Wills Act 1988, rules governing validity and recognition of wills with foreign element or executed on board ship or aircraft or which for any other reason may not comply with Bermuda law, may be made by Premier under affirmative resolution procedure of Bermuda's House of Assembly.

Multiple Wills.

It is not necessary to make will specifically dealing with Bermuda property because laws of Bermuda recognize validity of foreign wills. Bermuda will may be prudent, however, as special rules will apply in respect of Bermuda real property and shares in local companies. In addition, where there are assets in several jurisdictions, administration of estate may be more straightforward if there are multiple wills. Where multiple wills are used, necessity for foreign grant may be negated. However, care must be taken to ensure that multiple wills are not accidentally revoked.

Guardianship.

Under Minors Act 1950, guardians of minors may be appointed by either parent by will or deed.

13 FAMILY

13.01 ADOPTION:

Adoption of Children.

Adoption of Children Act 2006 was given assent on 29 Dec. 2006 but Royal Assent has not been given. Therefore until Royal Assent has been given, Adoption of Children Act 1963 remains in force. The Director of Child and Family Services is responsible for administering adoptions; Special Court established under Magistrates Act has jurisdiction to make adoption orders with respect to child (unmarried person under 18 years of age) where child is Bermuda resident or was born in Bermuda, person with parental responsibility is resident in Bermuda, or applicant is resident of Bermuda. Application to adopt child may be made by person 18 years of age or older, or jointly by married couple that has lived together for not less than one year. Except for stepparents, application may only be made if child has been placed with applicant for at least three months prior to application. Child may be placed by Director or parent or guardian of child. Consent of each parent or guardian and child (if 12 years of age or over) is required for placement. In deciding whether to make adoption order, best interests of child is paramount consideration and court will consider home study report and post placement report with respect to applicant. On making of adoption order, child becomes child of adoptive parents and previous relationships to relatives prior to adoption cease. New relationships have effect in accordance with relations of adoptive parent. Disposition of property by instrument or by will to children shall, unless contrary intention is shown, be construed as including adopted children.

Provision is made for overseas adoptions. Approval of court is required to bring nonresident child into Bermuda for adoption or to transfer care and custody of child from Bermuda to proposed adopter overseas.

Registrar-General is charged with maintaining register of adopted persons. Requests for information or contact with relatives of adopted persons are made to Director.

Payment of reward for adoption and advertisement for adoption are prohibited.

13.02 DIVORCE:

Jurisdiction.

By Matrimonial Causes Act, general jurisdiction in divorce, judicial separation, nullity and dissolution of marriage on ground of presumption of death was granted to Supreme Court.

Domicile or Residence Requirements.

Jurisdiction for divorce and judicial separation arises where either party (1) is domiciled in Bermuda on the date when proceedings are begun or (2) was ordinarily resident in Bermuda throughout period of one year ending with that date. Jurisdiction for nullity of marriage arises where either party (1) is domiciled in Bermuda on date when proceedings are begun or (2) was ordinarily resident in Bermuda throughout period of one year ending with that date or (3) died before that date and either (i) was at death domiciled in Bermuda; or (ii) had been ordinarily resident in Bermuda throughout period of one year ending with date of death.

Grounds of Divorce.

By §5 it is provided that sole ground for divorce shall be that marriage has broken down irretrievably. §5(2) provides that proof of such breakdown is only afforded if one or more of following conditions are fulfilled: (1) That respondent has committed adultery and in consequence of that adultery petitioner finds it intolerable to live with respondent; (2) that respondent has behaved in such a way that petitioner cannot reasonably be expected to live with respondent; (3) that respondent has deserted petitioner for continuous period of at least two years immediately preceding presentation of petition; (4) that parties to marriage have lived apart for continuous period of at least two years immediately preceding presentation of petition and respondent consents to decree being granted; (5) that parties to marriage have lived apart for continuous period of at least five years immediately preceding presentation of petition.

When Action May Be Started.

Petition for divorce cannot be presented until three years after marriage but judge may grant leave in cases of exceptional hardship suffered by petitioner or exceptional depravity on part of respondent.

Judicial separation may be granted on any of conditions enumerated in subhead Grounds for Divorce (above) and it is not necessary for court to consider whether marriage has broken down irretrievably.

Annulment of Marriage.

See topic 13.06 Marriage.

Recognition of Foreign Decree.

Recognition of foreign divorces is governed by Recognition of Divorces and Legal Separations Act 1977, effective as of 1 Aug. 1977. This act adopts Hague Convention of 1968 with minor variations. Overseas divorce or legal separation will be recognised in Bermuda if at date of proceedings (a) either spouse was habitually resident in that country or (b) both spouses were nationals of country or (c) petitioner was national and was either habitually resident there or had been for period of one year within two years immediately preceding institution of proceedings. Further ground for recognition is that petitioner was national of country and was present at date of proceedings and country in which petitioner and respondent last habitually resided did not provide for divorce.

13.03 DOMESTIC VIOLENCE:

Supreme Court Act 1905.

Under §19(c) of Act, Supreme Court possesses inherent jurisdiction to issue injunctions in all cases where it is just and convenient to do so. Although wording suggests very broad discretion, it is clear that such injunction will only be granted in support of existing legal or equitable right. Matrimonial Proceedings (Magistrates' Courts) Act 1974 and Domestic Violence (Protection Orders) Act 1997 govern applications for non-molestation and exclusion orders made in Magistrates' Court.

Matrimonial Proceedings (Magistrates' Courts) Act 1974.

Under this Act non-molestation orders and expedited orders (ouster/exclusion orders) are applied for by way of Complaint and §§9A and 9B apply to man and woman who are living with each other in same household as husband and wife and to former spouses as it applies to parties to marriage. For purposes of §§9A, 9B and 9C “matrimonial home” means any building or part thereof where: (a) parties to marriage live with each other in same household; (b) man and woman live with each other as husband and wife in same household; (c) former spouses last lived with each other in same household before dissolution of marriage and which at date of application for Order under §9A is occupied by one of former spouses.

Domestic Violence (Protection Orders) Act 1997 covers broader class of applicants. Object of Act is, as far as possible, to prevent domestic violence by making effective legal protection available for persons who have suffered such violence or are threatened by it. “Domestic Violence” means violence by one person against another person with whom that first-mentioned person is, or has been, in domestic relationship. For purpose of this Act person is in domestic relationship with another person if: (a) he is partner of that other person; or (b) he is family member of that person; or (c) he ordinarily shares household with that other person; or (d) court determines that he has close personal relationship with that other person.

Application for Protection Order under this Act is made ex parte initially and Court may make ex parte Temporary Order. Temporary Order remains in force for such period, not exceeding 28 days, as Court specifies in Order. However, Court may extend period for which Temporary Order is to remain in force until date fixed for further hearing of application. Upon hearing of application Court may make Protection Order which remains in force for 12 months. Prior to expiry of Protection Order further Protection Order can be applied for.

Court has wider powers under this Act than under Matrimonial Proceedings (Magistrates' Courts) Act 1974 as protection order may prohibit respondent as follows: (a) from using violence against protected person, but so that order identifies kind or kinds of violence in terms of definition of “violence” as outlined in subsection (2) of §3; or (b) from entering or remaining in place of residence of protected person; or (c) from entering or remaining in area specified in Order, being area in which place of residence of protected person is located; or (d) from entering place of work or education of protected person; or (e) from entering or remaining in particular place; or (f) from harassing protected person.

Court may attach power of arrest to protection order if it is satisfied that respondent: (a) in past caused actual bodily harm, or threatened to cause bodily harm, to applicant or child of applicant; and (b) is likely in future to cause bodily harm to applicant or child of applicant.

Where power of arrest is attached to protection order, police officer may arrest without warrant person who he has reasonable cause to suspect is in breach of order.

13.04 HUSBAND AND WIFE:

Law relating to capacity, property and liabilities of married women and liabilities of husbands was amended by Law Reform (Husband and Wife) Act 1977. Married woman is capable of acquiring, holding and disposing of any property as if unmarried and is similarly liable in respect of tort, contract, debt or obligation and capable of suing and being sued, as well as subject to law relating to bankruptcy and to enforcement of judgments and orders, as if she were unmarried. Restraint upon anticipation is abolished by Act which also incorporates provisions concerning determinations of questions between husband and wife as to ownership of property, formerly contained in Married Women's Property Act 1901. Husband's liability for wife's torts and ante-nuptial contracts, debts and obligations are abolished and parties to marriage now have like right of action in tort against other as if not married.

13.05 INFANTS:

Age of majority for each sex is 18 years. Law regarding guardianship custody and property of minors is contained in Minors Act 1950, and Matrimonial Causes Act 1974. Another relevant statute is Adoption of Children Act 2006.

Contracts.

Contract made by infant, except beneficial contract of service and contract for necessaries, voidable at infant's option.

Actions.

Infants may sue by their next friend according to practice in Chancery Division of High Court of Justice in England and may in like manner defend by guardians appointed for that purpose under provisions of Rules of Supreme Court, 1952.

Parental Responsibility.

Parents are not prima facie liable for torts of infants but may be liable if personally negligent or if infant is servant or agent of parent.

Adoption.

See topic 13.01 Adoption.

The Protection of Children Act 1943.

Repealed and replaced by the Children Act 1998—see infra.

International Child Abduction Act 1998 applies provisions of Convention on Civil Aspects of International Child Abduction which was signed at the Hague on 25 Oct. 1980 and extended to Bermuda as contracting state as of 1 Nov. 1999.

Children Act 1998 replaces Protection of Children Act 1943. Court has broader powers to make care supervision order where court is satisfied that child (under 18, or if married, under 16) is suffering or is likely to suffer significant harm and that harm, or likelihood of harm is attributable to (i) care given to child or likely to be given to him if order were not made, not being what it would be reasonable to expect parent to give him; or (ii) child's being beyond parental control. Children Amendment Act 2002 amends Children Act 1998 to remove any distinction in law between children born inside or outside marriage, to make provision for determination of parentage, to reform law governing custody of and access to children, to revise law relating to obligation of parents to support their children and to make changes to other enactments for connected purposes.

“Parental responsibility” and “significant harm” are defined terms. Definition of “significant harm” is broad.

Act also requires mandatory reporting of child abuse and maintenance of Child Abuse Register whereby (i) persons who have been found by court to have caused significant harm to child and where child has suffered physical harm, sexual abuse, or serious emotional harm, and (ii) persons who have been convicted of specified criminal offences, are listed on Register.

Domestic Violence (Protection Orders) Act 1997 applies to children. They may seek Protection Order (through representative, if child is under 18) if sufficient grounds exist and against person with whom they are in domestic relationship. (See topic 13.03 Domestic Violence.)

13.06 MARRIAGE:

Regulated by Act 1944, No. 25.

The requisites are: (1) That each of the parties should as regards age, mental capacity and otherwise be capable of contracting marriage; (2) that they should not be within the prohibited degree of consanguinity or affinity; (3) that there should not be a valid subsisting marriage of either of the parties with any other person; (4) that the parties, understanding the nature of the contract, should freely consent to marry one another; (5) that the forms and ceremonies prescribed by the Marriage Act should be observed.

The age of consent is 16 years.

In the case of any person under 18 years of age, not being widower or widow, consent of parents or parent having lawful custody or lawfully appointed guardian or judicial consent should be obtained.

The ceremony must be performed by a duly licensed marriage officer in the presence of two credible witnesses and either after publication of banns or certificate for marriage by the registrar or by licence of the Governor.

In the case of a marriage in Bermuda between a British subject resident in Bermuda, and a British subject resident in England, Scotland or Northern Ireland a certificate for marriage issued by a Superintendent Registrar in England, or by a Registrar, or a certificate of proclamation of banns in Scotland, or by a Registrar in Northern Ireland, has the same effect as a publication of banns in Bermuda.

Annulment.

Marriages celebrated prior to 31 Dec. 1974:

Marriage is void or voidable for following disabilities, existing at time of ceremony: (1) Existing prior marriage; (2) relationship within prohibited degrees (as defined by English Marriage Acts [see England Law Digest]); (3) insufficient age; (4) mental incapacity or insensibility; (5) lack of consent; (6) incapacity to consummate marriage; and also (7) for certain formal irregularities.

Marriages celebrated after 1 Jan. 1975:

By §15 of The Matrimonial Causes Act 1974, marriage celebrated after commencement of this Act shall be void on following grounds only, that is to say: (a) that it is not valid marriage under provision of Marriage Act 1944; (b) that at time of marriage either party was already lawfully married; (c) that parties are not respectively male and female.

By §16 of The Matrimonial Causes Act 1974, marriage celebrated after commencement of this Act shall be voidable on following grounds only, that is to say: (a) that marriage has not been consummated owing to incapacity of either party to consummate it; (b) that marriage has not been consummated owing to wilful refusal of respondent to consummate it; (c) that either party to marriage did not validly consent to it, whether in consequence of duress, mistake, unsoundness of mind or otherwise; (d) that at time of marriage either party, though capable of giving valid consent, was suffering (whether continuously or intermittently) from mental disorder within meaning of Mental Health Act 1968 of such a kind or to such an extent as to be unfitted for marriage; (e) that at time of marriage respondent was suffering from venereal disease in communicable form; (f) that at time of marriage respondent was pregnant by some other person other than petitioner.

13.07 MARRIED WOMEN:

See topics 13.02 Divorce, Husband and Wife, Marriage; categories 12 Estates and Trusts, topics Descent and Distribution, Executors and Administrators, Trusts, Wills; Property, topic Dower.

14 FOREIGN TRADE AND COMMERCE

14.01 EXCHANGE CONTROL:

Control over foreign currency transactions has existed since 1940 and is now governed by Exchange Control Act 1972 and Regulations made thereunder and administered by Bermuda

Monetary Authority (“BMA”). In general, legislation does not impose restrictions on transactions between residents of Bermuda; it applies mainly to financial transactions between residents of Bermuda and individuals resident in countries outside Bermuda who are termed “nonresidents”. For Exchange Control purposes certain persons normally resident in Bermuda have also been designated as nonresident (e.g., non-Bermudian employees of exempted companies).

Exempted companies are also designated nonresident for Exchange Control purposes. Prior consent of BMA is also required to issue or transfer any share, debenture or other security of exempted company.

However, in June 2005, general permission was given for free issue and transferability of, inter alia, nonvoting shares, shares listed on recognized stock exchanges, and (with some restrictions) between current holders of shares in same company, or within groups of affiliated companies. Also, general permission has been given for licensed banks in approved jurisdictions to take security over shares of Bermuda exempt companies. In addition, the BMA has relaxed certain former exchange control restrictions such that Bermuda residents may purchase foreign currency without limit.

Exchange Control powers under Act and Regulations are broad, but exemptions are granted, either generally or specifically, and applications can be made for further stock exchange to be recognized depending on advantages or disadvantages to economy of Bermuda. Nonresident investment in, and loans to residents of, Bermuda are cautiously welcomed. In case of loans, residents must observe capital repayment allowance in force at that time.

See also categories 2 Business Organizations, topic Corporations; Introduction, topic Currency.

14.02 FOREIGN EXCHANGE:

See category 1 Introduction, topic 1.01 Currency.

14.03 FOREIGN TRADE REGULATIONS:

See topic 14.01 Exchange Control; categories 2 Business Organizations, topic Corporations; Citizenship, topic Immigration; Introduction, topic Currency.

14.04 TRADE:

See categories 2 Business Organizations, topic Corporations; Citizenship, topic Immigration.

Trade Unions.

See category 10 Employment, topic 10.01 Labour Relations.

15 IMMIGRATION

15.01 ALIENS:

An alien is by definition a person who is neither Commonwealth citizen, nor British protected person, nor citizen of Republic of Ireland. British law recognizes concept of plural nationality. Aliens have rights and liabilities of Commonwealth citizens who do not possess Bermudian status: They may not exercise parliamentary or other franchises or hold public offices and are subject to certain other restrictions mostly under Bermuda Immigration and Protection Act 1956, as amended.

The British Nationality Act 1981 has made considerable changes in status of British subjects etc.

See topic 15.02 Immigration.

Personal property may be generally acquired and disposed of by aliens, except any share in a British ship, and not more than 40% of issued share capital of any local company may be held by aliens; ownership of share in local partnership is subject to Immigration permission.

Real Property.

Generally, only those houses with Annual Rental Value (A.R.V.) of $153,000 and those condominiums with A.R.V. of $32,400 are available for purchase by “restricted persons” provided they are purchased from restricted persons (as opposed to Bermudians). Under Bermuda Immigration and Protection Act 1956, restricted persons may only acquire real property by purchase, gift or inheritance after obtaining sanction of Minister of Labour, Home Affairs and Housing. Persons acquiring by devise or inheritance must otherwise dispose of property within one year of death or such extended period as may be sanctioned. Recent amendments have extended restrictions to prohibit restricted persons from entering into any arrangement related to obtaining “benefit” of land. Under these provisions, licence is required for restricted persons to provide or arrange for financial assistance for acquisition of land.

Restricted person may not purchase undeveloped residential land. Houses, condominiums and apartments are subject to alien licence application fee of $1,335, where acquisition is by devise or inheritance or by voluntary conveyance. In any other case, licence fee payable is 18%-25% of value of property.

Application for sanction to acquire or hold real property is made to Chief Immigration Officer, supported by one banker's reference and two personal references. Registration of land acquired by restricted person must be effected in office of Registrar General within six months following date of acquisition.

Restricted persons holding real property may not lease or rent same without permission from Minister of Labour, Home Affairs and Housing. Where real property is rented to visitor, The Bermuda Immigration and Protection (Rental and Use) Regulations 2007 levies statutory charge on grant of relevant permit to rent which is either $1000.00 or 7.25% of total rent (whichever is greater). Additional limitations apply restricting rental of condominiums to visitors.

Corporation that does not fall within definition “local company” (as defined in Companies Act) is generally precluded from acquiring real property in Bermuda in fee simple and may only take real property on basis of lease for term up to 21 years, in respect of residential property and 50 years, in respect of commercial property (required for business purposes).

Individual who is restricted person, may acquire real property by way of lease for term that does not exceed five years without Minister of Labour, Home Affairs and Housing's prior consent.

Companies.

Exempted companies may be owned by foreign (i.e. non-Bermudian) companies or persons. Not more than 40% of issued shares of local companies may be held by aliens (or non-Bermudian Commonwealth citizens). Nonresident corporate bodies (those not incorporated in Bermuda) may carry on business from Bermuda, which includes carrying on business abroad from local office, with prior permission of Minister of Finance and upon payment of annual fee to government.

As to banks, see categories 2 Business Organizations, topic Corporations; Business

Regulation and Commerce, topic Banks and Banking.

See also topic 15.02 Immigration; categories 12 Estates and Trusts, topic Trusts; Property, topic Real Property.

15.02 IMMIGRATION:

Residence.

It is unlawful for any person other than one who possesses Bermudian status (see subhead Bermudian Status, infra) or is spouse of one who possesses Bermudian status, or special category persons (mainly Government employees) or is bona fide visitor to enter and reside in Bermuda without permission of Minister of Labour, Home Affairs and Public Safety. Applicants for such permission may be required to furnish references as to character and means, medical certificates, etc. Bona fide visitors must be in possession of return air ticket on arrival in Bermuda and most visitors are allowed to remain on Island for periods not exceeding three weeks. Permission required for longer periods is usually forthcoming.

Employment.

It is unlawful for non-Bermudian, other than non-Bermudian spouse of Bermudian, to engage in gainful occupation (which is widely construed) without prior specific permission of Minister, which permission may be subject to conditions and limitations. Permission must be sought by way of application and applicants are required to produce references and evidence of qualifications.

Generally, work permit holders are subject to term of six years with one three-year extension in certain cases.

Length of time applicant needs to work in Bermuda will determine type of work permit sought: (a) general work permit—periods of between one to five years; (b) temporary work permit—employees of international companies required to fill specific position for up to three months and may be renewed for three months only; (c) periodic work permit—nonresident applicants to work, enter and leave Bermuda for three months to one year period; (d) periodic work permit for representative—particular position for three months to one year period. Non-Bermudians can enter Bermuda without permit if they have business visitor letter from host Bermuda Company, as long as they undertake specific activities (e.g. attending conferences or presenting business seminars). Such business visitor can attend Bermuda for nine working days or 21 working days if business visitor is from host Bermuda Company. All work permit holders must now have Statement of Employment (per Employment Act 2000).

To qualify for working resident's certificate to allow applicant to reside in Bermuda indefinitely and seek employment in Bermuda without restriction, applicant must: (a) have been ordinarily resident in Bermuda continuously for at least 20 years up to 1 Aug. 1998; (b) within period of 20 years continuous residence, have worked in Bermuda for at least 15 years in aggregate (in aggregating 15 years, only continuous periods of ordinary residence in Bermuda of 12 months or more can be counted); and (c) is and continues to be of good character and conduct.

Trading.

Similarly, it is unlawful for companies which are not incorporated in Bermuda to trade in or from Bermuda without permit issued by Minister and payment of annual fee.

Bermudian Status.

The Bermuda Immigration and Protection Act 1956, as amended (“Act”) provides for acquisition of Bermudian status i.e., freedom from immigration regulations, controls entry and residence of non-Bermudians, restricts acquisition of property by non-Bermudians, and, generally, governs matters of immigration nature. Act is supplemented from time to time by immigration policies promulgated by Minister.

Person is deemed to possess Bermudian status if that person is Commonwealth citizen: (a) possessed “domicile” within meaning of Immigration Act 1937; (b) is born in Bermuda or elsewhere where at time of birth one of his parents possesses Bermudian status and one parent is domiciled in Bermuda (sections of Act relating to acquisitions of status by birth are, subject to certain modifications, applicable to children born out of wedlock).

Children or adopted children of persons who possess Bermudian status will be “deemed” to possess Bermudian status if child is Commonwealth citizen and under age of 22 years (per §2, Bermuda Immigration and Protection Amendment Act 2000). Child can obtain status in his own right if he makes application to Minister demonstrating he is over 18 and less than 22 years and has been resident continuously for period of five years preceding his application and has been “deemed” for five years immediately preceding application to possess Bermudian status. In absence of such application child will cease to be “deemed” on attaining age of 21 years and, therefore, will be treated as non-Bermudian.

Commonwealth citizen who is spouse of person possessing Bermudian status has special right to status on application to Minister, provided such applicant: (a) Has for period of ten years immediately preceding application been continuously married to Bermudian spouse who throughout that period possessed Bermudian status; (b) has been ordinarily resident in Bermudian for seven years immediately preceding application; (c) submits letter from applicant's spouse supporting application. Such application will be approved unless applicant, in Minister's opinion, is estranged from spouse at time of application, has previously been convicted of offence involving moral turpitude, or has otherwise demonstrated bad character or conduct.

New amendments (The Bermuda Immigration and Protection Amendment Act 2002 and 2003) set out general qualification requirements for grant of Bermudian status to siblings and parents of Bermudians and non-Bermudian parliamentary electors.

§31A introduces Permanent Resident's Certificates (PRC). One may apply if he was ordinarily resident in Bermuda on or before 31 July 1989, has been ordinarily resident for 20 years preceding application, is not less than 40 years of age on date of application and applies before 1 Aug. 2010. Absences for more than two years disqualify person in absence of secondment to work outside Bermuda in certain companies.

§31B provides certain siblings, parents and spouses right to apply for PRC. Applicant must be at least 18 years of age, being ordinarily resident in Bermuda for period of ten years immediately preceding application and apply before 1 Aug. 2010. Secondment to company as above will not interrupt period of 20 years.

New §31C identifies rights of permanent residents and makes provision for periods of absences from Bermuda to work with various related companies. §31D makes provision for revocation of PRC.

Prior to 1 June 1980, British woman married to Bermudian was automatically deemed to possess and enjoy Bermudian status. With passage of amendment act in 1980 this privilege has been withdrawn with effect from 1 May 1980. However, any woman who was deemed to possess and enjoy by virtue of either being married to Bermudian or being widow of Bermudian (provided she is British) continues to possess and enjoy and can make application for grant in her own right after five years provided she meets certain requirements. Finally, it should be noted that in certain circumstances Bermudian status may be lost.

See also topic 15.01 Aliens; categories 2 Business Organizations, topic Partnerships; Property, topic Real Property.

16 INSURANCE

16.01 INSURANCE COMPANIES:

Governing Statutes.

The Companies Act 1981 generally and related Regulations (see category 2 Business Organizations, topic 2.02 Corporations) and additional requirements of The Insurance Act 1978 and Regulations, Life Insurance Act 1978, Non-Resident Insurance Undertakings Act 1967, Companies (Financial Statements and Auditor's Report) Rules 1995 and Third Parties (Rights against Insurers) Act 1963, which extend to all insurers, insurance managers and insurance brokers, agents and salesmen, third parties and others.

Supervision.

Bermuda Monetary Authority.

Registration.

Any person carrying on insurance business in or from within Bermuda, and any person acting as insurance manager, broker, agent or salesman must register. Insurer must fulfill minimum criteria for registration.

Conditions of Registration.

Insurer must maintain relevant solvency margin, liquidity and other ratios applicable.

Classes of Insurance Licence.

Bermuda Monetary Authority has discretion to ascribe insurers to one of six classes of general business insurance licence, depending on relationship between insurer, its shareholders, its policyholders and type and scope of business. Class 1—pure captive or companies which write coverage for group of affiliates; Class 2—insurers owned by unrelated shareholders who insure themselves and affiliates of each or any of such unrelated shareholders. May write maximum of 20% third party business; Class 3—insurers underwriting between 20% to less than 50% unrelated business; Class 3A—small commercial insurers underwriting 50% or more unrelated business with total net premiums of less than $50 million; Class 3B—large commercial insurers underwriting 50% or more unrelated business with total net premiums of $50 million or more; Class 4—large property, catastrophe and excess liability carriers; Special Purpose Insurer—insurer carrying on insurance business which fully funds its liabilities to insured through: (a) Subordinated debt issuances or other financing mechanism approved by Bermuda Monetary Authority; (b) cash; and (c) time deposits. Bermuda Monetary Authority must be satisfied that insurer meets minimum criteria.

General and Long-Term Business.

Any insurer Class 1, 2, 3, 3A, or 3B carrying on general business must have minimum authorized share capital in respect of which at least $120,000 has been paid up in cash. Insurer carrying on long-term business must have paid-up share capital of at least $250,000 in cash. Insurers combining both classes of business must have share capital in respect of which at least $370,000 has been paid up in cash. Class 4 general business insurers must have minimum authorised share capital of $1,000,000. Class 4 insurers combining both classes of business must have minimum authorised share capital of $1,250,000. Special Purpose Insurer must have minimum authorized share capital of $1.00.

Principal Representative, Auditor.

Every insurer must appoint and maintain principal representative and maintain principal office in Bermuda. In most cases insurer's insurance manager will act as principal representative and will provide principal office for insurer. However, Bermuda Monetary Authority has discretion to approve any persons, whether natural person or company, to serve as principal representative. Every insurer must appoint and maintain auditor approved by Bermuda Monetary Authority.

Accounting Provisions.

Every insurer must prepare statutory financial statements in prescribed form, and these must be audited annually by insurer's approved auditors. Statements and auditors' report must be kept available at insurer's principal office for at least five years. Classes 2, 3, 3A, 3B and 4 and long-term insurers must file statutory financial statements annually, in addition to statutory financial returns. Every Class 4 must file annually within four months of insurer's year end audited financial statements prepared in accordance with International Financial Reporting Standards or generally accepted accounting principles applied in Bermuda, Canada, United Kingdom, and United States, or as Bermuda Monetary Authority may approve. Every Class 1 insurer must keep copy of its statutory financial statements, together with auditor's report, available for production to Bermuda Monetary Authority on demand for up to five years. Statutory financial returns must be filed with Bermuda Monetary Authority within six months of insurer's financial year end for Class 1 or Class 2 and within four months for Class 3, 3A, 3B or Class 4 or long-term insurer, which filing deadlines may be extended between seven to nine months depending on class on application to Bermuda Monetary Authority. Statutory financial returns must be accompanied by general business solvency certificates. Class 4 must include schedule of reinsurances. Financial return includes three ratios: Premiums to statutory capital and surplus ratio; five year operating ratio; change in statutory capital and surplus ratio. Every Class 4 must maintain available statutory capital and surplus to amount equal to or exceeding value of enhanced capital requirements, calculated at end of relevant year by reference to: (a) Bermuda Solvency Capital Requirement Model or (b) insurer's internal capital model approved by Bermuda Monetary Authority. Every Class 4 must file annually within four months of insurer's financial year end capital and solvency return and shall file GAAP/IFRS financial statements. Severe penalty for late filing.

Loss Reserve Specialist, Actuary.

Statutory filings must include opinion from loss reserve specialist. This does not apply to Class 1 insurers, but Class 2 must supply opinion every three years. Classes 3, 3A, 3B and 4 must supply opinion annually. Where net premiums derived from products liability insurance or professional liability insurance, or from both together, constitute in any relevant year more than 30% of net premiums written by insurer during that year, loss reserves relative to insurance of either or both of these classes must be certified by insurer's Loss Reserve Specialist approved by Bermuda Monetary Authority. Long-term insurer must not carry on long-term business at any time if it does not have approved (by Bermuda Monetary Authority) actuary. Annual statutory filing for long-term insurer must include certificate from actuary as to amount of insurer's liabilities outstanding on account of its long term business.

Solvency Margin.

Varies in relation to premiums written, but general rule is minimum of: $120,000 for Class 1; $250,000 for Class 2; $1,000,000 for Class 3, 3A and 3B; $100,000,000 for Class 4. Every Class 4 must maintain available statutory capital and surplus to amount equal to or exceeding value of enhanced capital requirements. Solvency Margin for special purpose insurer is $1 and for long-term insurer is $250,000.

Premium Writings Restriction.

Maximum premium writings of general business insurer are restricted by operation of solvency margin. Insurer's capital and surplus must be maintained at level calculated by reference to its net premiums written. Basic rule is ratio 1:5.

Restriction on Assets.

Minimum liquidity ratio for general business carriers is that value of its “relevant assets” be not less than 75% of amount of its ``relevant liabilities''. Liquidity ratio does not apply to insurers carrying on long-term business.

Long-Term Business.

Separate accounts must be kept. All receipts must be credited to long-term business fund. No payment may be made directly or indirectly from this fund for any purpose other than in conduct of insurer's long-term business, except to extent that there is surplus certified by approved actuary to be available otherwise than to policyholders. Dividends may only be declared or paid to persons other than policyholders to extent that approved actuary certifies that value of assets in insurer's long-term business fund exceeds liabilities of its long-term business.

Mutual Insurance Companies.

These companies may register in same manner as other companies. Mutual companies will have insurance and reinsurance business as their principal objects. They must maintain reserve fund in lieu of share capital and stipulate that liability of members is limited to amount of their unpaid premiums.

Guidance Notes, Statement of Principles, Prudential Standards.

Bermuda Monetary Authority has published Guidance Notes providing guidance as to duties, requirements and standards to be complied with by persons registered under Insurance Act and principles to be observed by such persons, auditors, principal representatives and loss reserve specialists. Bermuda Monetary Authority has published Statement of Principles relating to its decisions on whether to register entity, cancel registration, impose conditions on insurer, or give directions. Bermuda Monetary Authority has published, by order, Prudential Standards in relation to enhanced capital requirements and capital and solvency returns for Class 4 insurers and has power to make further Orders prescribing Prudential Standards to be complied with by different classes of insurers specified class or particular insurer.

Supervision, Investigation and Intervention.

Bermuda Monetary Authority (i) may appoint inspector with extensive powers to investigate insurer's affairs if in best interests of its policyholders or persons who may become policyholders, (ii) may direct insurer to produce documents or information relating to its business, (iii) has power to (a) require production of documents from any person who appears to be in possession of such documents and (b) appoint professional person to prepare report on any matter about which Bermuda Monetary Authority has required or could require information and (iv) may exercise powers in relation to certain categories of companies related to person registered under Insurance Act. Bermuda Monetary Authority has power to investigate suspected breaches of Insurance Act by unregistered persons. Magistrate may issue warrant authorising entry into premises to search documents and question persons.

If risk of insurer becoming insolvent, or insurer is in breach of Insurance Act or minimum criteria has not been fulfilled, or controller notification has not been served, or person remains controller after being served notice of objection, or insurer is in breach of enhanced capital requirements or any conditions imposed upon it, Bermuda Monetary Authority may, among other things, direct insurer (i) not to take on any new insurance business, (ii) not to vary any insurance contract if effect would be to increase its liabilities, (iii) not to make certain investments, (iv) to liquidate certain investments, (v) to maintain in, or transfer to custody of specified bank, certain assets, (vi) not to declare or pay any dividends or other distributions or to restrict making of such payments and/or (vii) to limit insurer's premium income.

Disclosure of Information.

Bermuda Monetary Authority may require information from insurer (or certain other persons) and has power to assist other regulatory authorities, including foreign insurance regulatory authorities, with investigations involving insurance and reinsurance companies in Bermuda, subject to restrictions, e.g., Bermuda Monetary Authority must (i) be satisfied that assistance requested is in connection with discharge of regulatory responsibilities of foreign regulatory authority and (ii) consider whether cooperation is in public interest. Grounds for disclosure are limited and there are sanctions for breach of statutory duty of confidentiality. Under Companies Act Minister of Finance has similar powers (and restrictions) to assist foreign regulatory authority.

Controller Notifications.

Private company - Person shall not become 10%, 20%, 33% or 50% shareholder controller (directly or indirectly) unless that person serves notice on Bermuda Monetary Authority. Latter may object. Public company—person who has become 10%, 20%, 33%, or 50% shareholder controller (directly or indirectly) must serve notice on Bermuda Monetary Authority. Insurer must serve notice on Bermuda Monetary Authority of fact that any person has become or ceased to be controller of it. Controller Means: a) Managing director of insurer or its parent; b) Chief Executive of insurer or its parent; c) Shareholder Controller; and d) person in accordance with whose directions or instructions directors of insurer or its controllers are accustomed to act.

Maintenance of Records in Bermuda.

Certain financial and other business records must be kept in Bermuda. Level of detail varies by class of insurer.

Rent-a-captive is insurer which rents its capital, surplus and legal capacity to engage in underwriting activities to Policyholders which are not its voting shareholders. Insured party obtains equivalent benefits to those provided by standard form captives without participation in ownership or management.

Segregated accounts structure is obtained through Segregated Accounts Companies Act 2000 and provides form of rent-a-captive where each participant's program is legally segregated from other and should withstand claims of third party creditors of other participants.

17 INTELLECTUAL PROPERTY

17.01 COPYRIGHT:

Bermuda Copyright and Designs Act 2004 (``Copyright Act'') became operative in Bermuda on 8 Feb. 2008 and it incorporates substance of Copyright, Designs and Patents Act 1988 of U.K. with certain modifications and exceptions. Consequently, Bermuda Copyright Act 1956, Copyright (Bermuda) Order 1962, and Copyright (Bermuda) (Amendment) Order 1985 have been repealed.

The Copyright Act includes various provisions to protect rights performers, works in electronic form, database rights, and original designs. It updates law of copyright in Bermuda to take into account technological advances and implement international standards and conventions on copyright. General reference may be made to Martindale-Hubbell's England Law Digest, topic Copyright and Designs.

17.02 PATENTS:

Patents continue to be governed by Patents and Designs Act 1930 and Patents and Designs Rule 1903 (as amended). 1930 Act is largely based on Patents and Designs Act 1919 of U.K.

Any person or persons claiming to be inventor or proprietor of any invention, or that person's agent, may apply for provisional patent, operative for nine months, or full patent which is operative for 16 years and may be extended for further periods of seven years each.

Grantee of patent registered in U.K. may apply within three years for registration in Bermuda. There are no other similar arrangements with other jurisdictions.

Patents may be revoked on grounds that: (1) Patent was obtained by fraud; (2) grantee was not true inventor or proprietor of every invention included in his application; or (3) anything claimed by grantee as his invention was publicly manufactured, used or sold in Bermuda before date of patent, or included in some prior patent.

Court may order patentee to grant licences on reasonable terms in certain circumstances.

Priority of assignments and charges are, as regards purchasers for value without notice, determined by priority of registration.

17.03 REGISTERED DESIGNS AND DESIGN RIGHTS:

Design is defined in §2 of Patents and Designs Act 1930 (“1930 Act”) as including only features of shape, configuration, pattern, or ornament, applied to any article by any industrial process or means, which in finished article appeal to and are judged solely by eye. Design is not, therefore, product or means by which product is made. It is aesthetic product that appeals to eye and thus gives attractive or distinctive quality to good(s) to which it is applied (i.e., “eye-appeal”).

Any person claiming to be an author of any new or original design, as defined above, is deemed, except in certain circumstances, to be the proprietor and may register the design under 1930 Act and Patents and Designs Rule 1903 (as amended) (“1903 Rule”) with Registrar General. There are 14 different classifications of goods (as contained in First Schedule to 1903 Rule) and registration provides initial copyright in design five years from date of registration, which may be renewed on two occasions for five years each.

Before delivery can be made on sale of any goods or articles to which registered design has been applied, proprietor of such design must mark each of goods or articles with mark or figure denoting that design is registered. If proprietor fails to do so he will not be entitled to any penalty or damages in respect of any infringement of his copyright in design, unless he shows that he took all proper steps to ensure marking of article, or unless he shows that infringement took place after such infringing party is put on notice of existence of copyright in design. Penalties are specified for infringement of copyright in goods or articles to which registered design has been applied.

Copyright in design may cease in certain circumstances including where design has been published in Bermuda prior to date of registration. There is also provision for granting compulsory licences.

Registered proprietor of any design registered in U.K. shall enjoy in Bermuda like privileges and rights as though certificate of registration had been issued with extension to Bermuda. Assignments or all matters affecting proprietorship or validity of patents or designs should be registered. 1930 Act sets out prescribed forms in respect of various applications.

Part V of Copyright and Designs Act 2004 (“Copyright Act”), has introduced unregistered design rights.

Under §292 of Copyright Act, “design” means design of any aspect of shape or configuration (internal or external) of whole or part of article. Design rights do not subsist in: a) Method or principle of construction (see topic 17.02 Patents; b) features of shape or configuration of article which enable article to be connected to or placed in, around or against, another article so that either article may perform its function or are dependent upon appearance of another article of which article is intended by designer to form integral part; c) or, in surface decoration.

Designer is first owner of any design right in design which is not created in pursuance of commission or in course of employment.

Design rights expire 15 years from end of calendar year in which design was first recorded in design document or article was first made to design, whichever occurred first.

General reference should be made to Martindale-Hubbell England Law Digest, category Intellectual Property, topic Copyright and Designs.

17.04 TRADEMARKS:

The Trade Marks Act 1974, operative as of 1 July 1975, (``Trade Marks Act'') brought Bermuda Law closely into line with law provided for in provision of Trade Mark Act 1938 of U.K. Provision for registration of service marks was made by Trade Marks (Modification and Amendment) Act 1991.

The trademarks register (``Register'') is divided into two parts: Part A and Part B. For registration in Part A, mark must be inherently distinctive. Each mark must contain or consist of at least one of following particulars: (a) Name of company, individual, or firm represented in (b) signature of applicant; (c) invented word or words; (d) word or words having no direct reference to character or quality of goods, and not being geographical name; (e) any other distinctive mark. For registration in Part B, mark must be capable in relation to goods, of distinguishing goods with which proprietor is connected in course of trade from goods where no such connection exists. Regard is to be had to whether mark is inherently capable of distinguishing goods, and whether, by reason of use of mark or other circumstances, mark is capable of distinguishing goods.

Principle distinction between Part A and Part B, is that in all legal proceedings relating to mark registered in Part A, original registration is, after expiration of seven years, taken to be valid in all respects unless obtained by fraud or offending against certain provisions relating to deceptive, confusing or scandalous marks.

Registration will be refused if mark is likely to deceive, if use of which would be contrary to law or scandalous and may be refused if mark contain words ``Copyright'', ``By Royal Letter Patent'', ``Registered/Design'', ``To Counterfeit this is a forgery'', ``Registered'' or ``Royal'' or any representations of sovereign or member of Royal Family or of any of flags, arms and seals of Bermuda.

Registration operates for period of seven years, and is capable of renewal for periods of 14 years from expiry. Registration may be effected on parts of marks and of series of marks and Registrar may in certain circumstances require registration of marks as associated marks. There may be defensive registration of well known trade marks.

Assignment may be effected either in connection with goodwill of business or not. Marks may be removed from Register on grounds of non-use and in case where mark is in use, but not by its proprietor, registered user may be entered on Register to ensure that there is deemed use by that proprietor.

There are powers of correction and rectification of Register. Trade marks registered in U.K. may be registered in Bermuda and if accepted, are registered on same basis and subject to same conditions and limitations as in U.K.

There are prescribed forms and procedures for applications, oppositions and other matters under Trade Marks Act.

18 MORTGAGES

18.01 CHATTEL MORTGAGES:

Chattel mortgage should be deed in form of bill of sale conditioned to be void upon payment of principal and interest secured, and should be registered in Registrar General's Office (if charger is individual) or registered with Registrar of Companies (if charger is company), as priority in registration determines priority of charge. Chattel mortgages may be subject to ad valorem stamp duty.

In case of mortgage of stock in trade, Bulk Sales Act 1934 may apply. See category 3 Business Regulation and Commerce, topic 3.12 Sales. Also see category 2 Business Organizations, topic 2.02 Corporations, subhead Charges.

18.02 MORTGAGES:

Legal mortgages of interests in land are effected by transfer of legal title subject to proviso for redemption. Discharge of security must be by way of transfer back to borrower.

Equitable mortgages (which do not include transfer of legal title) of interests in land are recognised and all mortgages of land should be registered in Registrar-General's office as priority in registration determines priority of charge.

Overseas and exempted companies may hold mortgages on Bermuda real and personal property—if principal sum exceeds $50,000 prior consent of Minister of Finance and Minister of Labour, Home Affairs and Housing must be obtained—and if any overseas or exempted company enters into possession of any land in Bermuda as mortgagee, land shall be sold within five years or within such further period as Minister may from time to time sanction, and any land which is not sold within that time is liable to escheat.

Mortgages are subject to ad valorem stamp duty.

See also topic 18.01 Chattel Mortgages; categories 3 Business Regulation and Commerce, topic Interest; Debtor and Creditor, topic Assignments.

19 PROPERTY

19.01 ABSENTEES:

See categories 7 Debtor and Creditor, topics Garnishment, Bankruptcy; Estates and Trusts, topic Death.

19.02 ADVERSE POSSESSION:

See topic 19.07 Real Property; category 5 Civil Actions and Procedure, topic 5.04 Limitation of Actions.

19.03 CURTESY:

Right to Curtesy was abolished with respect to estate of any person dying after 1 Sept. 1974.

19.04 DEEDS:

Any estate or interest in land may be conveyed by deed, which should be signed, sealed and delivered by grantor in presence of one or more witnesses, who should attest execution thereof. See England Law Digest.

Ad valorem stamp duty is payable on deeds (conveyances) transferring title to real property, whether such transfers are made for full consideration or voluntarily. Special stamp duty rates apply when real property is transferred to trustees. Reference should be made to Stamp Duties Act 1976 as amended.

Where deed is executed by attorney, power should be recorded.

There is no system of land title registration.

19.05 DOWER:

Right of dower was abolished with respect to estate of any person dying after 1 Sept. 1974.

19.06 PERPETUITIES:

Perpetuities and Accumulations Act 2009 (``**Act**'') abolishes rule against perpetuities for all trusts formed after 1 Aug. 2009, other than trusts of land in Bermuda. Bermuda trust formed after 1 Aug. 2009, may be used to ``tie up'' property (except Bermuda land) indefinitely, permitting persons, including wealthy families, to establish perpetual dynastic Bermuda trusts that may be more beneficial from estate and tax planning perspective.

Abolition of perpetuity limitation makes Bermuda trusts more attractive for commercial applications where business purposes or objectives will last longer than 100 years.

Trusts of Bermuda land can only be established for maximum period of 100 years.

Act is not retrospective but does contemplate that trustee or other interested party may wish to apply to Bermuda courts to extend trust period of pre-Aug. 2009 trust to more than 100 years.

Individual who has already signed (executed) his or her will, will need to re-execute his or her will in order to benefit from Act.

19.07 REAL PROPERTY:

All tenure is direct of Crown and subject to provisions of Escheats Acts 1870 and 1871, but original stringencies have been greatly eased by repeal of certain provisions for escheat to Crown for want of heirs.

Any interest in land recognized by the common law and rules of equity may be created or pass by deed of grant under the seal of the grantor, or by will.

An estate tail (i.e., an estate limited to any of the heirs of the body) may be enlarged to an estate in fee simple by executing and recording a disentailing deed.

English legislation has not been followed to any great extent, and in particular the principal Conveyancing Acts, Land Transfer Acts, Settled Land Acts, and Law of Property Acts, have not been adopted in Bermuda. Agreements for sale and purchase of real property since 9 Feb. 1979 are not enforceable unless there is note or memorandum in writing signed by party to be charged; this has been re-enacted in Conveyancing Act 1983.

Conveyancing Act 1983 adopts certain provisions of English land law legislation although primarily to simplify conveyancing practice and to promote consistency in use of forms connected therewith.

No provision has been made for registration of title, or charges, other than mortgages.

In general 60 years title is good against the Crown and 20 years title against all others except persons under disability, remaindermen and reversioners.

Restrictive regulations with regard to development of land, erection of buildings, etc., are authorized by Development and Planning Act 1974, as amended by Development and Planning Amendment Act 1997.

Without licence under Bermuda Immigration & Protection Act 1956, aliens or Commonwealth citizens not possessing Bermudian status (see category 4 Citizenship, topic 4.03 Immigration) may not acquire land (including lease exceeding five years) inter vivos by inheritance or by devise.

See also topics 19.03 Curtesy, Deeds, Dower; categories 2 Business Organizations, topic Corporations; Citizenship, topics Aliens, Immigration; Civil Actions and Procedure, topic Limitation of Actions; Estates and Trusts, topics Descent and Distribution, Trusts, Wills; Family, topic Husband and Wife; Mortgages, topic Mortgages.

20 TAXATION

20.01 INTRODUCTION:

There are no income, profits, capital gains, or sale of goods taxes in Bermuda. Custom duties are one of chief sources of revenue, comprising approximately 23% of total annual public revenues of approximately $1008.9 million. Payroll tax accounts for approximately 34% of annual public revenues with balance of revenues being derived from international company tax (approx. 7%), land tax (approx. 4%), passenger tax (approx. 2%), hotel occupancy tax (approx. 1%), and Stamp Duties (approx. 5%).

Other than annual government fees paid by international businesses and annual tax paid by local companies, there are no corporate fees or taxes in Bermuda. Under Exempted Undertakings Tax Protection Act 1966, Minister of Finance is authorised to give assurance to exempted undertakings that “in the event of there being enacted in these Islands any legislation imposing tax computed on profits or income or computed on any capital asset, gain or appreciation, then the imposition of any such tax shall not be applicable to such entities or any of their operations”. In addition, there may be included assurance that any such tax “and any tax in the nature of estate duty or inheritance tax, shall not be applicable to the shares, debentures or other obligations” of such entities. This assurance may be for period not extending beyond 28 Mar. 2016; is applied for as matter of routine by Bermuda attorneys acting in connection with formation of exempted undertakings; and is invariably granted for full period. Application fee for this assurance is $160.

20.02 BUSINESS TAXES:

Annual government fee payable by exempted companies, and exempted partnerships follow graduated fee structure based on capital calculated as of 31 Aug. of preceding year on authorised share capital and share premium, in case of companies, and on fixed amount of

$2,235 in case of partnerships. Under graduated fee structure, exempted company with: Capital not more than $12,000 will pay annual fee of $1,995; capital more than $12,000 up to $120,000—$4,070; capital more than $120,000 up to $1,200,000—$6,275; capital more than $1,200,000 up to $12,000,000—$8,360; and, capital more than $12,000,000 up to $100,000,000—$10,455; capital more than $100,000,000 up to $500,000,000—$18,670; capital over $500,000,000—$31,120. This fee structure applies to all exempted companies (including insurance companies, mutual funds and public finance companies), except for exempted companies whose business includes management of unit trust schemes, which pay additional fee of $2,905 in respect of each unit trust scheme managed, and all exempted partnerships. If company or partnership is formed after 31 Aug. in any year then initial annual fee otherwise applicable will be reduced by one half.

Annual government fee of $1,995 is imposed on permit companies except for insurers, mutual funds and public finance companies which pay annual fee of $4,135. Also any permit company whose business includes management of unit trust schemes pays additional fee of $2,905 in respect of each unit trust scheme managed.

Annual business fee of $1,335 is payable by each exempted insurance company, insurance manager, insurance broker or insurance agent registered under Insurance Act 1978, except for Non-Resident Insurance Undertakings which are required to pay annual fee of $10,000. See category 16 Insurance, topic 16.01 Insurance Companies.

Annual fee is imposed on local companies by Companies Act 1981 based on issued capital varying between $650 for issued capital less than $50,000 and $18,410 for issued capital of $10,000,000 or more. Local companies not engaged in commercial enterprise for profit are excluded.

Annual fee of $280 in respect of each segregated account operated by company registered under Segregated Accounts Companies Act 2000, subject to maximum annual fee of $1,120 in aggregate, is imposed on segregated account companies under Companies Act 1981.

Annual government fees are payable in advance each Jan. except for local and permit companies whose fees are payable in Mar.

20.03 CUSTOMS DUTY AND TAX:

Import duties are imposed by Customs Tariff Act 1970 as amended on nearly all goods imported into Bermuda. Duties are imposed on ad valorem basis, except for duties on fuel, alcohol, tobacco and certain other products which are charged on specific, or per unit, basis. There is also export duty on liquors and other goods taken out of bond. Specific rates and other provisions are specified in such Act and Customs Tariff which is published on annual basis.

20.04 EMPLOYMENT TAXES:

Effective 1 Apr. 1995, provisions of Miscellaneous Taxes Act 1976, Miscellaneous Taxes (Rates) Act 1980 and respective amendments dealing with hospital levy and employment tax were repealed and replaced with Payroll Tax Rates Act 1995 and subsequently various Payroll Tax Amendment Acts. Standard rate of payroll tax is 14% though lesser rates from 9.75% apply to various classes of employers and self-employed persons, depending on type of business and size of payroll. Employer may recover from employee up to 4.75% of tax payable. Exempted undertakings may elect for all, but not some, of their employees deemed annual remuneration per employee of $66,000, subject to future annual adjustment with reference to Consumer Price Index.

20.05 INCOME TAX:

None.

See category 2 Business Organizations, topic 2.02 Corporations.

20.06 MISCELLANEOUS TAXES:

There are also taxes under Miscellaneous Taxes Act 1976 and Miscellaneous Taxes (Rates) Act 1980 as amended in respect of hotel occupancy (charged to hotel proprietor at 7¼% of "rack rate charge" for accommodation), betting transactions (on bets made, received or negotiated), timesharing scheme (timesharing occupancy tax charged to developing owner on sale or resale of timesharing interval and timesharing services tax charged to managing agent by purchaser of timesharing interval), and contract exchanges (on trading fee).

Currency Exchange Tax.

Foreign currency purchase tax of 0.50% on dollar is charged generally (there are important exemptions) whenever Bermuda resident buys foreign currency with Bermuda dollars from local bank, pursuant to Foreign Currency Purchase Tax Amendment Act 2007. This tax is also charged where foreign currency is purchased to pay non-Bermuda resident under will or intestacy of deceased Bermuda resident not possessing Bermudian status at time of death.

20.07 PROPERTY TAXES:

Annual land tax is levied under Land Valuation and Tax Act 1967, on private residential real estate on graduated scale by reference to deemed annual rental value and on commercial properties at single prescribed rate. With effect from 1 July 1994, 7% interest is charged on arrears of tax. Also licence fee on real estate sales to non-Bermudians is imposed at 22% (15% on condominiums) of sale price.

20.08 STAMP TAX:

Stamp duty is payable on certain legal instruments under provisions of Stamp Duties Act 1976. International businesses comprised of exempted undertakings (which include exempted companies, exempted partnerships and exempted unit trust schemes) and permit companies (see category 2 Business Organizations, topics 2.02 Corporations and 2.04 Partnerships) and international trusts are exempt from stamp duty otherwise imposed on instruments and documents under Stamp Duties (International Business Relief Act 1990, except for instruments relating to Bermuda property, however, local businesses and individuals, estates and trusts continue to be subject to stamp duties on wide range of transactions including transfers for value and voluntary dispositions including affidavits, share transfers, conveyances, leases, mortgages, appointment of trustees, and settlements.

20.09 TRANSPORTATION TAX:

Tax is imposed for passengers departing by air, under Miscellaneous Taxes Act 1976 arriving yacht passengers and cruise ship passengers.

20.10 TREATIES AND AGREEMENTS:

Bermuda—U.S. Mutual Legal Assistance Treaty signed Jan. 2009 provides law enforcement authorities cooperation and mutual legal assistance to request and aide each other in criminal investigations and prosecutions and related proceedings on matters such as money launderers, drug traffickers and terrorists.

Bermuda-U.S. Tax Convention signed in 1986 relating to mutual assistance in tax matters and U.S. Federal Income Taxes on business profits of Bermuda insurer and excise taxes on insurance premiums paid to insurer. Convention operative Dec. 1988. Federal income tax part effective for business profits of taxable years beginning 1 Jan. 1988. Excise tax part effective for premiums paid or credited from 1 Jan. 1986. Business profits of Bermuda insurer from insurance business not taxable in U.S. unless insurer trades in U.S. through "permanent establishment". If insurer does so trade, business profits attributable to permanent establishment may be subject to U.S. taxation. Convention applies to Federal excise taxes only where risks covered by insurance premiums are not reinsured with person not entitled to benefits of Convention or any other convention which applies to such taxes. Premiums must constitute income of Bermuda insurance company which is Controlled Foreign Corporation for purposes of §957(a) or (b) of U.S. Internal Revenue Code. Alternatively, premiums must constitute related person insurance income and Bermuda insurer must be Controlled Foreign Corporation subject to relevant provisions of §953(c) of Code. Excise tax exemption ceased effective 31 Dec. 1989. U.S. Government agreed Bermuda is within North American area for convention tax benefits of Code. Treaty provides for exchange of information between U.S. and Bermuda to assist in determining tax liability of taxpayer. This agreement later laid base for Organization for Economic Cooperation and Development (OECD) model on Tax Information Exchange Agreements (TIEAs) developed by OECD Global Forum Working Group on Effective Exchange of Information (``the Working Group'') of which Bermuda has been long standing member.

Bermuda has since continued to negotiate such agreements with multiple countries reflecting OECD model TIEA demonstrating their commitment to transparency and reduction of harmful tax practices. As of 8 Oct. 2009, Bermuda has 16 signed TIEAs with Australia, France, Germany, Ireland, Netherlands, Netherland Antilles, New Zealand, U.K., and Nordic Council (Denmark, Faroe Islands, Finland, Greenland, Iceland, Norway and Sweden). Negotiations are complete or near completion with Aruba, Canada, Japan, Mexico and Spain. TIEAs have small variations depending upon agreed terms. For example, recent negotiation and signing with Spain (1 Oct. 2009) added significant benefit for Bermuda with special corporate tax exemption on Spanish income earned on investment in Bermuda. Another brief sample of agreement is demonstrated below with Australia.

Bermuda—Australia Tax Information Exchange Agreement provides for full exchange of information on criminal and civil matters between Australia and Bermuda. TIEA came into force on 1 Jan. 2006 in regards to cases involving serious tax evasion for tax periods beginning on or after 1 Jan. 2006 and from 1 Jan. 2008 for all other tax matters covered by agreement. Treaty outlines protocol relating to effective exchange of information “relevant to the determination, assessment and collection of taxes, the recovery and enforcement of tax claims, or the investigation or prosecution of tax matters” as stated in Art. 1. Domestic enabling legislation which will give Agreement force is recently enacted International Cooperation (Tax Information Exchange Agreement) Act 2005.

21 TRANSPORTATION

21.01 AVIATION:

The Aircraft Register.

Governor of Bermuda is required, pursuant to The Air Navigation (Overseas Territories) Order 2001 (``AN [OT] O'') to maintain Register of Aircraft and to accept applications to register from qualified persons. Primary responsibility for maintenance and operation of Bermuda Register of Aircraft and Flight Crew (“Register”) rests with Department of Civil Aviation (“DCA”) of Bermuda Government and Director of Civil Aviation acts under powers delegated to him by Governor and Minister of Transport.

Qualified Persons.

Applications to register aircraft on Register must be made by qualified persons which include: bodies incorporated in some part of Commonwealth and having their principal place of business in any part of Commonwealth; Crown; British subjects; citizens of Republic of Ireland; British protected persons and firms carrying on business in Scotland. In practice, most aircraft registered on Bermuda Register are owned by Bermuda exempted companies and it is usual to incorporate Bermuda exempted company specifically for this purpose. Formal applications to register aircraft are made by Bermuda law firms and incorporate information relating to beneficial ownership, operations and crewing arrangements and technical information in connection with aircraft, usually provided by organization providing aircraft maintenance facility.

Certification.

DCA demonstrates flexibility in accepting aircraft, maintenance facilities and crew certified by most major international agencies including Federal Aviation Administration, Civil Aviation Authority and pursuant to Joint Airworthiness Requirements. Certain regulations and directives in connection with operation of Bermuda registered aircraft, modelled to large extent on U.K. requirements, are issued by DCA.

Civil Air Terminal is operated pursuant to provisions of The Civil Airports Act 1949. Radio and avionic installations subject to provisions of Order and Telecommunications Act 1986.

Operations.

All aircraft engineers signing certificates for Bermuda registered aircraft and all crew operating such aircraft must have their licenses validated by DCA and all operators of Bermuda Registered Aircraft must be approved by DCA, pursuant to provisions of AN(OT)O. Operation of aircraft on Bermuda Register with respect to airworthiness, flight operations and flight crew is regulated by DCA.

As general rule, all aircraft joining or leaving Register are subject to physical survey by DCA together with annual survey prior to renewal of Certificate of Airworthiness.

21.02 MOTOR VEHICLES:

General.

Licensing of motor vehicles and drivers are governed primarily by Motor Car Act 1951 as amended along with regulations made thereunder. General control and conduct of all motor vehicles on public roads is governed by Road Traffic Act 1947 as amended along with regulations made thereunder.

Horsepower and size of vehicles are restricted but Motor Car Amendment Act 2004 approved licensing of longer vehicles, exceeding 169 inches and up to maximum length of 175 inches (including spare wheel protrusion).

Motor Cars.

Wearing of seat belts in front seats of motor cars became mandatory in 2004. Children under age of 14 years are encouraged not to travel in front passenger seat of motor car. Children under age of one year and weighing under 20 pounds must travel in rear-facing child safety seat. Child over one year and weighing from 20 to 80 pounds must travel in forward-facing child safety seat. Booster seat used in conjunction with adult seat belt for child weighing from 40 to 80 pounds is permissible. Child under age of 14 whose weight is above 80 pounds must wear adult seat belt.

Ownership of motor cars is limited to one per household unless person is medical practitioner. Rental of motor cars is not permitted. Car dealerships and owners/operators of public garages are permitted to own and operate loaner vehicle service for use by its customers during such time when their customers' private motorcars, taxis or commercial vehicles are being repaired.

Personalised licence plates of motor cars are permitted upon payment of annual fee.

Minister responsible for licensing motorcars has authority to set approved emission standards which must be met with respect to motor cars imported into Bermuda. Minister can decline issuing of motorcar licence to vehicles which do not meet approved emission standards. As of June 2004, approved emission standards have not been set by Minister but are expected to come into operation before end of 2004.

Motorised Bicycles.

Wearing of crash helmet is mandatory when operating auxiliary or motorcycle. Ownership of motor-assisted bicycles is not restricted. Auxiliary cycles are available for rent.

Taxis.

Motor Car Amendment Act 2005 made it mandatory for all taxis to install GPS (Global Positioning by Satellite) systems, mobile data terminals, two-way radio and alarm devices.

Liability Insurance.

Minimum of third party insurance with approved insurance company is compulsory.

21.03 SHIPPING:

Hamilton, Bermuda is British Registry Port. Ownership, registration and operation of vessels is governed primarily by The Merchant Shipping Act 2002 (“2002 Act”) and Merchant Shipping (Registration of Ships) Regulations 2003 (“Regulations”).

Qualified Persons and Bermuda Connection.

Ownership qualification for registration is governed by Regulations which provide that following persons are qualified to own British ship registered in Bermuda: companies incorporated in Bermuda; companies incorporated in U.K. or in any relevant British possession; companies incorporated in EEA state; British citizens; non-U.K. nationals exercising their right of freedom of movement of workers or right of establishment; British Overseas Territories citizens; British Overseas citizens; persons who under British Nationality Act 1981 of United Kingdom are British subjects; persons who under Hong Kong (British Nationality) Order 1986 of the United Kingdom are British Nationals (Overseas); and European Economic Interest Groupings being groupings formed in pursuance of Art. I of Council Regulation (EEC) No. 2137/85 and registered in U.K.

Regulations also provide that there must be Bermuda connection and majority interest such that majority ownership interest must be by person resident in Bermuda. Companies incorporated or registered in Bermuda that carry on business from place of business maintained in Bermuda are treated as resident in Bermuda.

Mortgage Registration—Priority Notice.

Registration of title and mortgages is affected at Hamilton in same way as it is in English ports. 2002 Act provides that registered ship or share in registered ship may be made security for repayment of loan or discharge of any other obligations. 2002 Act also introduces new regime whereby prospective mortgagee would be permitted to give and register “priority notice” in respect of mortgage. Date of registration of priority notice will determine priority of interest to which notice relates. Once interest is recorded in Register, Registrar will register ship subject to that interest, or if mortgage has been by then executed and produced to Registrar, Registrar shall register ship subject to that mortgage.

Provisional Registration.

2002 Act also provides for provisional registration of vessels on Bermuda Register. Issuance of certificate of provisional registration will have effect as certificate of registry until expiration of three months from date of issue, ship's arrival in Bermuda (or port specified in certificate of provisional registration), or termination by Registrar on request from owner, which ever shall first occur.

Merchant Shipping (Demise Charter) Act 1994 provides for registration of vessels on Bermuda Demise Charter Register and vice versa.

Lloyds Register of Shipping and British Committees of Bureau Veritas, Det norske Veritas, Germanischer Lloyd and American Bureau of Shipping are all authorised to issue and renew certain of certificates required in relation to registration and it is not necessary for vessel to visit Bermuda in order to be registered. 2002 Act requires master of “strategic ship” to be national of EC or NATO country. Remaining officers must hold appropriate certificate issued by country which is signatory to IMO Conventions and party to STCW Convention and is identified in accordance with provisions of IMO White List and has satisfied Registrar that standards of Convention have been met. Minister may by order exempt vessels from these requirements.

Following are main International Maritime Conventions/Regulations incorporated into Bermuda law: For unification of certain rules of law relating to Bills of Lading, Brussels, 1924 (plus 1968 Protocol); For the Prevention of Pollution of the Sea by Oil, 1954; For the Safety of Life at Sea, 1974; Relating to the Intervention on the High Seas in cases of Oil Pollution and Collisions, 1972; On Civil Liability for Oil Pollution Damage, Brussels, 1969; On the Establishment of an International Fund for Compensation for Oil Pollution Damage, Brussels, 1971; on Load lines, 1966; Relating to the Carriage of Passengers and their Luggage by Sea, Athens, 1974 (plus Protocol 1976); On Limitation of Liability for Maritime Claims, London, 1976; Collision Regulations 1983 (U.K.); and, Tonnage Regulations (1969 Convention).

The Ports Authority is constituted under Marine Board Act 1962 (as am'd) with powers in relation to pilot service, berthing, etc. Under Oil Pollution Act 1973, it is offence to pollute territorial waters.

Under Supreme Court (Admiralty Jurisdiction) Act 1962, court has jurisdiction to hear wide variety of claims concerning ships and matters incidental thereto by actions both in personam and, where appropriate, in rem.

Under U.K. Maritime Conventions Act 1911 which applies in Bermuda, actions arising from collisions at sea must be brought within two years.

Under Carriage of Goods by Sea (Bermuda) Order, 1980, which brought into force Convention on Bills of Lading referred to above, both carrier and ship are discharged from all liability in respect of goods unless suit is brought within one year of their delivery or of date when they should have been delivered. In certain circumstances, action for indemnity against third person may be brought after expiration of this period.

22 TREATIES AND CONVENTIONS

22.01 TREATIES AND CONVENTIONS:

Bermuda is party to number of treaties and conventions to which U.K. is signatory. These have been extended to Bermuda by Order in Council. In addition, Bermuda has been recently elected Vice Chair of Steering Group Committee of Organization for Economic Cooperation and Development (OECD) Global Forum on Transparency and Exchange of Information for Tax Purposes. See also categories 12 Estates and Trusts, topic Trusts, subhead General; Introduction, topic United States Bases; Taxation, topic Taxes, subhead Bermuda-U.S. Tax Convention.

BOLIVIA LAW DIGEST

—Scope —

Revised for 2008 edition by

CURTIS, MALLET-PREVOST, COLT & MOSLE LLP, of New York.

(Abbreviations used are: C. C. for Civil Code; C. Family for Code of Family; C.C.A. for Code of Child and Adolescent; Com. Co. for Commercial Code; C.C.P. for Code of Civil Procedure; Sup. Dec. for Supreme Decree. All Codes are cited by articles thereof.)

Note: This revision incorporates legislation through Dec. 12, 2007.

1 INTRODUCTION

1.01 CURRENCY:

(Law 901 of Nov. 28, 1986 as am'd).

Monetary unit is “boliviano”. “Bs.” is applicable to designate “boliviano”, which is divided into 100 centavos.

1.02 GOVERNMENT AND LEGAL SYSTEM:

Constitution of Feb. 2, 1967 as amended in Law 2632 of Feb. 20, 2004.

Bolivia is constituted as unitary republic and all legislative power is vested in Congress. Congress is composed of Chamber of Senators, elected by universal and direct suffrage. (Art. 63). Chamber of Deputies shall be elected by universal and direct voting, by simple plurality of votes, and with proportional representation of minorities. (Art. 60). Senators and Deputies are elected for five years. (Arts. 60, 65). Executive power is exercised by president of republic together with ministers of state. (Art. 85). President is elected for five years and may not be elected again until after expiration of one presidential term. (Art. 87).

For administrative purposes, territory of republic is divided into departments, provinces, provincial sections, and cantons. (Art. 108). Government of a department is entrusted to a prefect who represents executive power, and subordinate to whom are subprefects in provinces and “corregidores” in cantons.

Constitutional Court is independent and subject to Constitution and to Law 1836 of Apr. 1, 1998 as amended and regulations of Jan. 26, 1999. Its jurisdiction extends over territory of Republic. It reviews habeas corpus right actions, resolves conflicts among public powers; it has original jurisdiction in certain matters, such as inconstitutionality of laws, decrees, treaties and international conventions.

There is a unified system of courts. See category 6 Courts and Legislature, topic 6.01 Courts.

1.03 HOLIDAYS:

(Sup. Dec. 21060 of Aug. 29, 1985).

Jan. 1 (New Year's Day); Mon., Tues. (Carnival)*; Good Friday*; May 1 (Labor Day); Corpus Christi*; Aug. 6 (Independence Day); Nov. 1; Dec. 25 (Christmas).

Regional holidays: July 16 (La Paz Day) celebrated only in La Paz; Sept. 14 (Cochabamba Day); Sept. 24 (Santa Cruz Day).

* These are movable holidays.

1.04 OFFICE HOURS AND TIME ZONE:

Bolivia's time zone is one hour later than Eastern Standard Time in the United States. That is -04:00 GMT. Office hours are generally from 8:30 a.m. to 12:30 p.m. and 2:30 p.m. to 6:30 p.m.

2 BUSINESS ORGANIZATIONS

2.01 AGENCY:

Agency may be express or tacit, if express it may be conferred by public instrument or private writing or orally. It may be general or special. General agency comprises only acts of administration; in order to compromise, alienate or mortgage agency must be express.

Agent must execute agency or else indemnify for damages and must render information and accounts to principal; when acting through substitute agent is liable to principal if he had no right to substitute or if he wrongfully selected substitute. Principal is obliged to pay agent necessary amounts to carry out agency, as well as interest on advances and due remuneration for services rendered. Principal is equally obliged to reimburse agent for losses suffered by reason of agency, if not due to agent's fault. Agency is terminated by: (1) Expiration of term or completion of agency; (2) revocation by principal; (3) resignation of agent; (4) death or incapacity of principal or agent. Principal may revoke agency at any time and compel agent to return documents concerning it. Agency may be irrevocable if specified for special transaction or limited time and if by lawful interest of parties or third person. Agent may resign by notifying principal and if such resignation causes damages to principal he must indemnify him. (C.C. arts. 804-830; Com. Co. arts. 1237-1293).

2.02 CORPORATIONS:

Organization.

(Com. Co. Arts. 195-442).

Corporation is designated with name which refers to its principal purpose, and must be accompanied by word “SOCIEDAD ANONIMA”, or abbreviation of these words (“S.A.”). Name must differ from any existing one. Corporate capital must be divided into shares, responsibility of shareholders being limited to value of their shares. Corporation may be organized as private or by public subscription. If subscription is private, charter must reflect following in addition to requirements established in Art. 127: (1) Minimum of three shareholders; (2) at least 50% of authorized capital must be subscribed; (3) at least 25% of each share value must have been paid-in; (4) by-laws have been approved by shareholders. If subscription is public, founders must submit corporate report for approval of corporation's management, containing: (1) Name, age, marital status, citizenship, profession, residence and identity card of each promoter; (2) type and value of shares; (3) number of promoter shares; (4) draft by-laws; (5) preferences reserved to promoters; (6) term of subscription; (7) contract between bank and promoters to achieve requirements set forth in Art. 224.

Art. 169 provides that in case of “sociedades” (corporations, limited liability companies, etc.) dividends may be paid only from net profits after deducting 5% per annum to set up reserve. Founders will open bank account with their monetary contributions. Property will be contributed to corporation after its organization and, in interim, must be placed in trust with designated bank for subscription. Once organization of corporation has been approved by general meeting of shareholders, all corporate documents must be published.

Shares.

Capital is divided into shares of same value. Par value is 100 bolivianos for multiples of 10. Corporations may not issue shares for price below their par value. Transfers of partly paid shares do not release assigners from liability for unpaid portion. Shares may be transferred freely unless charter establishes conditions (which cannot restrict alienation) on nominative shares.

Shares may be common or preferred. Common shares have right to vote in general stockholders' meetings. Preferred shares may only vote in special meetings, and cannot exceed one half of subscribed capital. Issuance of shares with multiple voting is forbidden. Corporation is prohibited from taking loans, advance payments or negotiations, with guaranty of its own shares.

Stockholders' Meetings.

Constitute primary means for expression of shareholders' will, and may be general or special; unless otherwise provided in by-laws, quorum for general meetings is one half of voting shares; for special meetings quorum is two-thirds. Decisions in general or special stockholders' meetings are taken by majority vote.

Management.

Corporation is administered by board of directors composed of minimum of three members elected by stockholders. By-laws may provide for higher number of directors, which, however, may not exceed 12. Directors need not be shareholders and their services may be remunerated. To guarantee their liability, directors, must produce fiduciary bond. Directors are liable for: (1) Malfeasance; (2) violation of laws, by-laws, regulations or resolutions of meetings; (3) damage caused by willful misconduct, fraud, gross negligence or abuse of power; (4) income distributions in violation of Art. 168. Annual balance sheet or report, indicating dividend payments must be prepared and published.

Internal financial control will be in hands of trustee or trustees (who may be shareholders), with duties indicated in Art. 335. Their services are remunerated and they are liable for noncompliance with their obligations.

Increase and Decrease of Capital.

By resolution of general extraordinary stockholders' meeting, corporate capital may be increased up to amount of authorized capital, with due regard for preemptive rights. Respective resolution must be registered with Commercial Registry. Voluntary decrease of capital must be done by resolution of general extraordinary stockholders' meeting, and must be approved by General Direction of Corporations. Decrease of capitol is obligatory if losses exceed 50% of corporate capital.

Dissolution and Liquidation.

Corporations are dissolved by: (1) Shareholders' agreement; (2) expiration of term; (3) happening of event upon which existence is conditioned; (4) achievement of its purposes or impossibility of attaining same; (5) total loss of capital; (6) declaration of bankruptcy; (7) consolidation or merger; (8) if there is only one stockholder, or less than three for S.A.; (9) in cases provided for in charter. Once corporation has been dissolved, it enters into liquidation.

Conversion, Merger.

Conversion into another form of enterprise requires unanimous consent of stockholders, absent provision to contrary in charter, in which case dissenting shareholders have right to withdraw from company. Resolution approving merger or consolidation must be registered with Commercial Registry and published in local newspaper.

Foreign corporations may obtain authorization of government to do business in Bolivia by filing certified copies, authenticated by Bolivian diplomatic or consular officer, of following documents: (1) Articles of incorporation; (2) by-laws; (3) minutes of organizational meeting setting forth names of directors and certification of amounts paid in on shares; (4) power of attorney of representative. Foreign corporations must establish domicile in Republic and be represented by director or fully authorized representative.

Foreign corporations are governed by laws of their countries of organization with respect to their form and legal existence, but their business operations in Bolivia are governed by Commercial Code and other applicable Bolivian laws.

Mixed economy corporations can be composed of two or more stockholders and are subject to Commercial Code regulations and governed by their by-laws. Private and public sectors of mixed economy companies are liable only up to amount of their subscribed capital and for their contractual obligations.

Limited Liability Companies.

(Com. Co. Arts. 195-216).

Shareholders' liability is limited to amount of subscribed capital, which is divided into shares called “quotas”, of 100 bolivianos or multiples of 10. May not have more than 25 members. It must be in name of one or more quotaholders, and must be accompanied by words “limited liability company” (or its abbreviation “Ltda.”), otherwise members will be jointly liable as partners. Corporate capital must be fully paid before commencing operations. Quotaholders may agree to increase capital by quotaholders representing 2/3 of capital. Administration of company is in charge of one or more managers elected by members. Meeting must be held at least once a year at which presence of quotaholders representing one half of corporate capital is required to reach legal quorum. Quotaholders have one vote per quota. Dividends may be paid only from net profits after deducting 5% per annum for reserve.

2.03 FOREIGN CORPORATIONS:

See topic 2.02 Corporations.

2.04 LIMITED LIABILITY COMPANIES:

See topic 2.02 Corporations.

2.05 LIMITED PARTNERSHIP:

See topic 2.06 Partnerships.

2.06 PARTNERSHIPS:

(Com. Co. 127; 378; 173-183; 184-194; 356-364; 365-371; C. C. 750-803).

Commercial partnerships are considered as legal entities. They are formed by a public instrument executed before a notary and recorded in the general registry of commerce.

Under supervision of government agency. Partnership agreement must contain: (1) Place and date where entered into; (2) name, age, marital status, citizenship, profession, residence and identity cards of promoters, and name, nature, citizenship and residence of legal entities integrating same; (3) name and address of partnership; (4) nature of business; (5) amount of capital; (6) amount contributed by parties; (7) duration; (8) method of administration and organization; (9) rules to distribute profits or losses; (10) legal reserve; (11) rights and obligations clauses of partners; (12) dissolution and liquidation clauses; (13) arbitration clause if decided upon; (14) other clauses referring to partners' meetings.

Partnership is dissolved by: (1) Decision of partners; (2) termination of its term or of purpose for which it was constituted; (3) happening of event upon which existence is conditioned; (4) total loss of capital; (5) declaration of bankruptcy; (6) merger; (7) if there is only one partner or less than three; (8) clauses set forth in certificate of constitution.

Unlimited partnership (sociedad colectiva) is partnership in usual form in which all partners have unlimited and joint liability. Resolutions require approval of majority of capital with voting rights unless otherwise provided in by-laws. Unless allowed by partnership, partners cannot on their own account engage in same business as partnership.

Limited partnership (sociedad en comandita) is partnership in which one or more of partners are not liable for debts and losses except up to amount of capital they have subscribed, and in which one or more of partners have unlimited and joint liability, whether or not they have subscribed capital. Capital may be divided into shares. Special partner cannot include his name in firm name under penalty of becoming jointly liable with general partners. Special partner cannot perform any act of management, even as attorney in fact of general partners.

Joint stock partnership is partnership in which managing partners have unlimited and joint liability, and special partners are only liable for amount of shares they have subscribed. Rules governing same are set forth in Commercial Code Arts. 356-364.

Accidental partnerships are merely temporary associations whose business is carried on in the name of one of the interested parties. They are not regarded as legal entities. (Com. Co. 365-371).

Civil partnership (sociedad civil) is one which is not formed for commercial purposes. It is governed by the rules of the Civil Code and is distinguished from a mercantile company by being regarded rather as an association of individuals. The partners are not jointly and severally liable for the debts of the partnership.

3 BUSINESS REGULATION AND COMMERCE

3.01 BANKS AND BANKING:

(Banks and Financial Entities Law 1488 of Apr. 14, 1993 t.o. 2002 as am'd, Sup. Dec. 25959 of Oct. 21, 2000).

Law regulates Superintendency of Banks and Financial Entities, organization of banks, capital, inspections of banks, administration of banks, reserves on deposits, liquidation, trust sections, and financial entities. Law contains formalities for establishment of bank and opening of branches of foreign banks. Foreign bank doing business in Bolivia is entitled to same rights and privileges and to same rules as domestic banks of same kind. No foreign bank may invoke rights of foreign citizenship in relation to its business in Bolivia. According to Law, financial entities are ones which receive money on deposit and use it, together with their own capital for loans and to purchase or discount promissory notes, drafts and bills of exchange among others.

3.02 BILLS AND NOTES:

(Com. Co. 491-738).

Bill of exchange must contain: (1) Indication that it is bill of exchange; (2) place and date of issue; (3) unconditional order to pay sum certain to drawer; (4) name of drawer; (5) name and address of drawer and place of payment; (6) maturity date; (7) signature of drawer, followed by name and address thereof. If any of above requirements is missing, instrument does not produce effects as bill of exchange, with exceptions provided in Code.

Bills payable at fixed date or at fixed period of time after date on sight must be paid on maturity date. Sight bills are payable upon presentment, which must be made within one year following date of bill. Drawer may extend term or prohibit presentment prior to given date but within indicated term.

Endorsements must contain: (1) Name of endorsee; (2) type of endorsement; (3) place and date thereof; (4) signature of endorser. Omission of above has effect as provided in Art. 523. Blank endorsements are valid if they contain signature of endorser. In case of nonacceptance or nonpayment, bills must be protested. Protest must be contained in notarial instrument. Protest for nonacceptance must be made within period established for presentment or before its maturity date; if it is protest for nonpayment, it must be made on third day following its maturity date. Protest should contain: (1) Literal text of bill, all acceptances and endorsements; (2) demand on drawee to accept or pay bill, indicating if such person was present or not at time; (3) grounds for nonacceptance or nonpayment; (4) signature of person to whom protest was made, or indication of impossibility of processing signature or refusal thereof; (5) place, date and hour of protest. Notary must sign protest once above formalities are accomplished.

Promissory notes must be drawn to order of named person. They create same obligations as bills of exchange, except that acceptance is not necessary. Promissory note must contain: (1) Statement that it is promissory note; (2) promise to pay sum certain; (3) name of payee; (4) maturity date or manner of determining same, and place of payment; (5) place and date of execution; (6) signature of maker.

Checks must contain: (1) Printed number and series or code or identification sign; (2) date and place of issue; (3) unconditional order to pay at sight sum certain; (4) name and address of bank; (5) statement whether check is made to order or to bearer; (6) signature of drawer. Checks must be presented for payment: (1) Within 30 days if drawn in Bolivia; (2) within three months if drawn outside of Bolivia and payable thereat. Special checks are: certified, cashiers, crossed, endorsed, checks for payment into account and travellers' checks.

3.03 COMMERCIAL REGISTRY:

Natural and juridical persons engaged in commerce must register with Registry. All acts by such persons related to their commercial activities must also be registered, such registration is mandatory and any violations are subject to fines running from 1 to 5% of their working capital. See also category 2 Business Organizations, topic 2.02 Corporations.

3.04 CONTRACTS:

Nature, form, objects and obligations concerning contracts are generally governed by Civil Code. Nevertheless there are other specific classes of contracts known as commercial or mercantile contracts which are governed by Commercial Code. Labor contracts are regulated by Labor Laws. In those cases, Civil Code acts as a supplement. (C. C. 450 to 954).

Civil Code defines a contract as an agreement by which one or more persons bind themselves to another person or persons to give, to do, or not to do, something. Essential elements of a contract are: consent of party to contract, an object, cause, and satisfaction of formalities which may be required. (Art. 452).

Only those persons having legal capacity may enter into contracts. Subsequent ratification of a contract has same effect as its previous authorization. Civil Code specifies which contracts must be formal and which may be informal. Certain contracts must be entered into in compliance with all formalities, such as in case of marriage, gifts, mortgages and company formation. In such cases a written contract is essential and cannot be replaced by any other kind of evidence.

Under Bolivian Commercial Code a contract is commercial or civil, depending on whether it is related to commercial or civil acts. Normally a commercial contract must be concluded by a merchant or between merchants. (Com. Co. arts. 802-1301). Principal commercial contracts are following: company formation, sales, exchange warranties, insurance, commissions and banking operations.

Public contracts are regulated by Sup. Dec. 27040 of May 16, 2003.

3.05 FRAUDS, STATUTE OF:

See category 9 Documents and Records, topic 9.03 Public Instruments.

3.06 INTEREST:

Legal rate is 6%, but parties may agree on any rate. In addition, various rates are prescribed for different credit institutions and specialized banks. Nominal rate must be posted in bulletin boards at financial entities and published periodically in local newspapers. Other rates may be agreed between parties or calculated by formula. (C. C. 414, 415, Regulation of Aug. 9, 2000).

3.07 MONOPOLIES, RESTRAINT OF TRADE AND COMPETITION:

Under Art. 134 of Constitution no form of private monopoly is allowed. State may, however, create monopolies so long as Executive Power obtains legislative approval for certain specified purposes such as exports, provided that needs of country so require. See category 19 Mineral, Water and Fishing Rights, topic 19.01 Mines and Minerals.

Local production is protected from unfair practices of international trade, by imposition of countervailing duties on import of foreign goods. Dumping and subvention are considered unfair practices. Dumping is defined as import of foreign goods at lower price than normal price of same or similar goods in place of origin; and subvention as direct or indirect incentives, subsidies, premium or assistance of any kind granted by foreign governments to producers, manufacturers, carriers, or exporters of goods in order to make them more competitive on international market. (Sup. Dec. 23308 of Oct. 22, 1992). Restrictive covenants implementing principles established by Multilateral Trade Negotiations, Uruguayan Round, are in effect. Local production is protected from massive import of same or similar products that may cause pecuniary loss. Temporary restrictive covenants are issued for up to 200 days while pending investigation is completed. Final restrictive covenants are issued for up to four years, subject to renewal for up to eight years. (Sup. Dec. 28524 of Dec. 10, 2005).

Decision 285 of Mar. 21, 1991 of Cartagena Commission is in force.

3.08 SALES (REALTY AND PERSONALTY):

(C. C. 584-650; Com. Co. 824-866).

A sale is perfected and title passes when the vendor and vendee have agreed on the thing sold and the price thereof, though neither has been delivered; but when merchandise is sold by weight or measure the objects sold remain for account of the vendor until weighed, counted or measured. Sales of real property must be recorded. The cost of the instrument of sale and other accessories thereof are for account of the vendee.

The vendor warrants the thing sold and the title thereto. Even if the title warranty be waived he is liable for the price unless the buyer knew the danger or bought at his risk. The vendor is not liable for defects which are visible or could have been ascertained by the buyer. He is liable for hidden defects, but may stipulate that he will not be liable for those not known to him.

If the price is not paid the vendor may ask that the sale be cancelled. The cancellation may be declared at once if the vendor is in danger of losing the thing sold and the price; otherwise the judge may grant the buyer a period for payment.

The right to repurchase cannot be reserved for a longer period than five years.

In sales of real estate rescission may be asked by the vendor within two years if it is found that the price received is less than one-half the value of the property. In such cases the buyer may elect to pay the difference in price and avoid rescission.

In commercial sales, order is considered accepted by vendor if latter does not reject same in ten days. Vendor has obligation to make bill which must contain: (1) Date of sale; (2) names of purchaser and vendor; (3) payment conditions; (4) amount, type, size and weight of merchandise; (5) value of each item; (6) expenses incurred with indication as to whether they are to be paid by purchaser or vendor; (7) number and elements of charter party (contrato de fletamento) and insurance contract if it exists; (8) date of delivery to carrier. Buyer can reject merchandise within ten days after delivery, or otherwise loses his right to make claim. Vendor is liable for hidden defects of merchandise, and can ask for rescission of contract or lowering of price. In any case, there is indemnification for damages suffered by buyer. Statute of limitations for such claim is one year.

3.09 STATUTE OF FRAUDS:

See category 9 Documents and Records, topic 9.03 Public Instruments.

4 CITIZENSHIP

4.01 ALIENS:

See category 16 Immigration, topic 16.01 Aliens.

5 CIVIL ACTIONS AND PROCEDURE

5.01 ACTIONS:

Limitation of.

See topic 5.04 Prescription.

See also category 12 Estates and Trusts, topic 12.03 Death, subhead Actions for Death.

5.02 JUDGMENTS:

Judgments do not constitute a lien on the property of the debtor except as to real property when they are recorded in the registry of real property.

5.03 LIMITATION OF ACTIONS:

See topic 5.04 Prescription.

5.04 PRESCRIPTION:

(C.C. 1492-1513; Com. Co. 589-591).

Rights are extinguished by prescription ("prescripción") when not exercised during period of time established by law.

Prescription period begins to run at time right can be enforced or at time exercise thereof has ceased.

Actions.

Prescriptive periods in which right to enforce obligations is lost vary according to nature of obligation. More important are: (1) Proprietary equity, five years, (2) indemnities, three years, (3) rents, salaries and interests, two years, (4) fees of professionals, two years, (5) salary of teachers, price of hotels, one year, etc.

If "executory actions," three years if against acceptor, and one year if in favor of payee.

See also category 22 Taxation, topic Taxes.

6 COURTS AND LEGISLATURE

6.01 COURTS:

Judicial Power consists of: (1) National Supreme Court of Justice, which hears certain classes of appeals from lower courts and has original jurisdiction in certain matters, such as accusations against high functionaries and questions arising out of government contracts; (2) Constitutional Court with jurisdiction over constitutional questions; (3) Superior District Courts, which decide appeals from superior judges of judicial districts and circuit judges and have original jurisdiction in special matters in which Government and departments are parties; (4) Courts and Judges of Instance, having jurisdiction over civil, family, labor, land, commercial and criminal cases; (5) other courts, judges and Judiciary Council. (Judicial Organization Law, 1455 of Feb. 18, 1993 as am'd).

6.02 LEGISLATURE:

Congress meets annually August 6 and remains in session from 90 to 120 days. Special sessions may be called.

6.03 STATUTES:

Principal codifications are: Civil Code (based largely on the Code Napoleon), Commercial Code, Family Code, Law of Judicial Organization, Code of Civil Procedure, Penal Code, Code of Criminal Procedure, Mining Code, Organic Municipal Law, General Railroad Law and Regulations, Law of Political Organization, Customs Law and Regulations, Labor Code and Social Security Code, Code of Labor Procedure, Aeronautic Code, Tax Code.

7 DEBTOR AND CREDITOR

7.01 ASSIGNMENTS:

Title to personal property and rights may be transferred either by public or private instrument. See categories 3 Business Regulation and Commerce, topic Sales (Realty and Personalty); Documents and Records, topic Public Instruments.

7.02 ASSIGNMENTS FOR BENEFIT OF CREDITORS:

An assignment for benefit of creditors may be made by a debtor who cannot pay his debts. It is voluntary when voluntarily accepted by the creditors, in which case the effects are those expressed in the contract. When made judicially its effect is to empower the creditors to sell the property and to receive the income therefrom until such sale. If the property assigned is insufficient to cover all the debts, the debtor continues liable for the balance. If the debtor is a merchant he is adjudged bankrupt. (C. C. 384-403; C.C.P. 584-590. See topic 7.04 Bankruptcy and 7.09 Insolvency.)

7.03 ATTACHMENT:

(C.C.P. 487; Com. Co. 456).

Attachments may be issued in summary actions based on instruments having executive force such as: (1) Public instruments; (2) acknowledgment of private documents before competent judges; (3) securities and other commercial documents; (4) acknowledgment of bills approved by judicial decisions; (5) credit documents for condominium maintenance fees; (6) credit documents for rent payments; (7) acknowledgment in judicial proceedings; (8) judgments no longer subject to appeal.

Provisional attachments may be granted in certain cases for judicial deposit of property in litigation. Essential elements of mercantile enterprise (as described in art. 449 of Com. Co.) cannot be attached individually by summary actions of creditors, attachment has to be issued on entire enterprise, appointing trustee who will also serve as auditor.

See also category 19 Mineral, Water and Fishing Rights, topic 19.01 Mines and Minerals, subhead Mines in General.

7.04 BANKRUPTCY AND INSOLVENCY:

(Com. Co. 1487-1692; C.C.P. 562-590).

(Law 2495 of Aug. 4, 2003 regulated by Sup. Dec. 27203 of Oct. 7, 2003 and Sup. Dec. 27384 of Feb. 20, 2004 as am'd).

Reorganization Process.

Any company registered at Registro de Comercio may apply for voluntary reorganization before Superintendencia de Empresas (Superintendencia). Once Superintendencia approves application it appoints trustee who negotiates agreement between parties. All pending actions and debt obligations are stayed for 90 days. Process of reorganization should not last more than 90 days, except when term is extended by creditor's agreement for another 90 days. Trustee must call creditors' meeting to notify creditors of their voting rights. Creditors will hold meeting to approve transaction agreement where they decide terms and conditions of reorganization or liquidation proceedings. If transaction agreement is approved by creditors' vote as indicated by law it must be registered and notified to proper authorities. If creditors and debtor agree on voluntary dissolution and liquidation of company, it shall be effective from date of registration of agreement if not company shall enter into bankruptcy proceedings according to Commercial Code.

Bankruptcy, which relates only to merchants, may be declared if debtor: (1) Defaults on any payment of obligations; (2) absconds; (3) closes his business for more than five working days without prior notice; (4) sells merchandise below market price or conceals same; (5) assigns assets to detriment of creditors; (6) suffers judicial voidance of preferences; (7) takes any fraudulent measure to process funds or avoid compliance with obligations; (8) has nonexistent or insufficient assets to attach; (9) requests insolvency proceedings when not permitted by law or when adjustment with creditors is not reached; (10) defaults on prior insolvency agreement. Bankruptcy is classified as: (1) Fortuitous; (2) with fault; (3) fraudulent.

Declaration of bankruptcy deprives bankrupt of administration and free disposition of his property with exceptions provided by Art. 1584.

A fraudulent bankrupt cannot be discharged and culpable bankrupts can be discharged only after serving their punishment. In order to be discharged bankrupts must show that they have complied with the agreements made with their creditors or have fully paid their obligations.

Insolvency proceedings (concurso de acreedores) are voluntary when requested by the debtor and necessary when demanded by creditors. The claims of the creditors are filed and if no agreement is made with the insolvent his property is sold and distributed.

7.05 EXECUTIONS:

When an order of execution has been issued and property attached, the court designates a day for a public auction. The sale is made on the basis of the appraised value of the property, no bid being accepted for less than three-fourths of such value. Each bidder must make a deposit of 5% of such value. If no bidder appears the appraisal is reduced 10% and there is new call for bids on this basis. If no bidder appears at that new call creditor takes property at 80% of final basis; third bid is called at 80% of last basis, if no bidder appears, creditor takes property at 80% of such final basis. There is no right of redemption. (C.C.P. 525-549).

7.06 EXEMPTIONS:

If debtor shows other assets enough to cover amount claimed, all assets part of commercial or industrial establishment or debtor's household are exempt from attachment and execution. Creditor cannot attach specific assets causing serious detriment to debtor if there exist other attachable assets. (C.C.P. 498).

7.07 FORECLOSURE:

See category 20 Mortgages, topic 20.03 Mortgages.

7.08 FRAUDULENT SALES AND CONVEYANCES:

Following acts of bankrupt executed up to two years prior to date on which he is deemed to be insolvent are void: (1) Gratuitous contracts or those which should be considered such in view of insufficient consideration; (2) payment of unmatured debts; (3) mortgages or privileges to secure earlier debts; (4) payments, acts or transfer made if debtor's insolvency was notorious or should have been known by transferee; (5) in case of bankruptcy of company any merger, transformation or any amendment to by-laws that could alter responsibility of shareholders. (Com. Co. 1591-1602).

7.09 INSOLVENCY:

See topic 7.04 Bankruptcy and 7.09 Insolvency.

7.10 LIENS:

Privileged credits in general are as follows in the order stated: (1) Judicial expenses; (2) salaries and wages for past and current year; (3) royalties or fees earned by writers, composers and artists during last 12 months.

The following are liens on specific property: (a) Rentals, as to current crop and personal property of tenant; (b) money lent for purchase of seeds, as to current crop, and money lent for purchase of farming utensils, as to such utensils; (c) unpaid purchase price, as to personal property sold, while in possession of debtor; (d) debts to innkeepers and carriers, as to objects brought into inn or carried; (e) debts secured by pledge, as to article pledged; (f) unpaid purchase price, as to real property sold; (g) money lent to buy real property, as to such property; (h) rights of coheirs, as to real property of estate; (i) debts to architects, builders, masons, etc., as to respective buildings or works. The liens under (f), (g), (h) and (i) above, must be recorded in the public registry. A consignee has a lien on the merchandise received by him for his disbursements on account thereof. (C. C. 1345-1352; M. C. 143-145; Law Nov. 15, 1887 regulated by Sup. Dec. 27957 of Dec. 24, 2004. See also topic 7.11 Pledges.)

7.11 PLEDGES:

Pledge contracts are not effective unless the pledged object is delivered to the creditor or to a third person agreed upon between the parties. In case of default the creditor may judicially demand that the pledged object be sold or that it be adjudged to him, after appraisal of experts, for account of the debt; any contractual clause exempting him from these formalities is void. If the pledge covers the fruits of real property it must appear in writing. (C. C. 1415-1435).

7.12 REDEMPTION:

See topic 7.05 Executions; category 20 Mortgages, topic 20.03 Mortgages.

8 DISPUTE RESOLUTION

—Scope —

(Law 1770 of Mar. 10, 1997 and its regulation Sup. Dec. 28471 of Dec. 6, 2005).

8.01 ARBITRATION:

Law distinguishes between domestic and international arbitration based on parties' domicile, place of performance and parties' agreement. Arbitration agreement must be in writing, in form of arbitration clause or in separate agreement. Arbitration is to resolve future disputes arising out of particular legal relationship or already existing dispute, whether or not judicial decision is pending. Evidence of arbitration agreement is any kind of document, or other means of communication that constitute record of agreement. Number of arbitrators should be three, unless parties agree on another number. Parties are free to establish place of arbitration and language used. Arbitrators have authority to grant provisional remedies. Award must be rendered within six months from installation of arbitral tribunal. Deposit of arbitrator's fees and estimated expenses must be in advance. No authorization is necessary to resolve by arbitration controversies in which Government and public entities are parties. Recognition or execution of foreign arbitral awards is according to international conventions and Code of Civil Procedure.

8.02 CONVENTION:

Convention on Recognition and Enforcement of Foreign Arbitral Awards, New York, 1958, Convention on the Settlement of Investments Disputes Between States and National of Other States, Washington, 1965, Interamerican Conventions in International Commercial Arbitration, Panama, 1975 and on Extraterritorial Validity of Foreign Judgments and Arbitral Awards, Montevideo, 1979.

8.03 MEDIATION AND CONCILIATION:

Dispute resolution by mediation or conciliation of controversies is allowed at any time, when dispute is pending arbitral decision. Parties are free to appoint mediators or conciliators.

9 DOCUMENTS AND RECORDS

9.01 ACKNOWLEDGMENTS:

The American system of acknowledgments is not followed. Formal documents are executed before a notary public who intervenes in the contract and retains the original, issuing certified copies. (See topics 9.02 Notaries Public, 9.03 Public Instruments). Instruments executed abroad are accepted if validly executed in accordance with the laws of the foreign country or if executed according to Bolivian law before a Bolivian diplomatic or consular officer. (C. C. 1294). Decree-Law 7458 of Dec. 30, 1965 regulates legalization of signatures of public officers and notaries.

9.02 NOTARIES PUBLIC:

(Notarial Law of Mar. 5, 1858 as am'd regulated by Sup. Dec. of Aug. 23, 1899).

Notaries are public officials and, while acting as notaries, are not permitted to exercise any other profession or hold other public office. They are appointed for periods of four years and must pass an examination. They are under the supervision of the courts of their district.

Instruments executed before a notary must be prepared with certain formalities. They must state the names of the parties, their age, occupation, residence and capacity to execute the instrument, also data as to the witnesses. At least two witnesses are required. The instrument must be signed in the presence of the notary and if the parties are unknown to him they must be identified by two witnesses. Notaries cannot act in connection with instruments in which their ascendants, descendants or collaterals to the fourth degree of consanguinity or affinity have any interest. The notary retains the original document and issues to the parties in interest formal certified copies which have the effect of originals and may be used in court. There are special notaries for mining and certain treasury matters.

Notaries must be shown a tax receipt proving that parties to contract, affidavit or other notarial act have paid their taxes before document is executed. (Sup. Dec. 3874, Nov. 11, 1954).

9.03 PUBLIC INSTRUMENTS:

Public instruments are documents executed with all legal formalities. Other documents are private instruments. Public instruments constitute full proof of facts stated therein, as between parties, and as against any party with respect to declarations favoring third persons. Law requires numerous contracts to appear in public instrument, e.g., articles of incorporation or partnership, all documents which are to be recorded in property registry, etc. (C. C. 398-402; C.C.P. 1287-1295).

9.04 RECORDS:

(Real Property Registry: Law Nov. 15, 1887 regulated by Sup. Dec. 27957 of Dec. 24, 2004; Mercantile Registry; Com. Co. 26-35; Sup. Dec. 25160 of Sept. 4, 1998 as am'd; Mining Registry: Mining Code; Civil Registry, Law Nov. 26, 1898 as am'd, regulated by Sup. Dec. 24247 of Mar. 7, 1996, as am'd, Law 1367 of Nov. 9, 1992).

In general all documents transferring, creating, declaring or limiting rights in real property, including leases for over five years, must be recorded in the public registry; also documents declaring bankruptcy or incapacity of person, and those limiting right to dispose of property. The recording of other documents, though not relating to real property, is permissible.

Registrars are semi-judicial officers who do not transcribe the entire document but only essential details. On receiving instrument they examine it to ascertain whether it is in legal form. If defects are found period of one year is allowed to cure them, but in some cases registration may be refused at once. From registrar's decision appeal lies to courts. Registrars are appointed by President and must give bond.

Besides registries of property, there are mining registries for mining titles, mercantile registries for recording articles of incorporation and partnership, powers of attorney and other mercantile documents, and civil registries for vital statistics.

9.05 SEALS:

Seals are not used in private matters. A document executed before a notary has most of the effects of a sealed instrument in the United States.

10 EMPLOYMENT

10.01 LABOR RELATIONS:

Constitution provides for right to work and a fair remuneration for said work to insure employee and his family proper means of subsistence. Right to social security is also provided for. (Art. 7).

Under General Labor Law of Dec. 8, 1942 as am'd regulated by Sup. Dec. of Aug. 23, 1943 as am'd by several laws, working hours may not exceed eight hours per day or 48 hours a week. Work by minors under 14 is prohibited, except for apprentices. (Arts. 39 to 55). Workers and employees in general are entitled to an annual vacation with full pay according to years of service. Employee's profit sharing is equal to lesser of 25% of employer's after-tax profits or one month of employee's average wage over last three months.

Compulsory social security system applicable to all activities is regulated by Law 1732 of Nov. 29, 1996 t.o. 2000 and its regulations Sup. Dec. 24469 of Jan. 17, 1997 as amended.

Women cannot be dismissed during pregnancy and one year after birth. (Law 975 of Mar. 2, 1988).

11 ENVIRONMENT

11.01 ENVIRONMENTAL REGULATION:

(Law 1333 of Apr. 27, 1992, Sup. Dec. 24176 of Dec. 8, 1995 as am'd).

Law establishes general rules for conservation, protection and improvement of environment to benefit quality of life and establishes principle that present needs should be satisfied by productive activities without compromising those of future generations. Law contains general rules for all productive sectors and considers environment and natural resources as national patrimony to be protected and conserved in social and public interest; and contains such principles as prevention and control of environmental pollution and reparation of damages. Within environmental protection are air, water, hazardous waste and noise pollution. Environmental impact assessments are mandatory for any activity that may damage environment. Entry of hazardous waste into country, whether actually or potentially dangerous and of radioactive waste is prohibited. Administrative or criminal penalties are imposed for violation of law. Criminal sanctions include fines and imprisonment as established by Criminal Code. Law imposes liability on those who cause environmental damage National Secretariat of Environment is responsible of enforcing law.

12 ESTATES AND TRUSTS

12.01 ADMINISTRATION:

See topic 12.06 Executors and Administrators.

12.02 CLAIMS:

See topic 12.06 Executors and Administrators.

12.03 DEATH:

An interested party may apply for a declaration of absence after two years from disappearance of absentee. Provisional possession of absentee's property may then be obtained by his heirs upon giving bond. Presumed death of absentee may be declared upon successor's request, five years after last notice of existence. (C.C. 31-51).

Deaths are recorded in the Civil Registry; and death certificates are obtainable from the Chief of the Civil Registry of the district where death occurred. Nominal fees are provided by local regulations.

Actions for Death.

There is no statute dealing with wrongful death actions. However, these could be supported under the few general provisions on torts contained in the Civil Code. Civil liability out of crimes is usually sought within the same criminal procedure. Civil actions out of tort are not usual though, as stated, could be supported under the general statutes on torts.

12.04 DECEDENTS' ESTATES:

See topics 12.05 Descent and Distribution, 12.06 Executors and Administrators, 12.09 Wills.

12.05 DESCENT AND DISTRIBUTION:

(C. C. 1000-1278).

Estates of decedents pass either by will or by operation of law. In default of testamentary provisions estate passes to descendants, ascendants, legal or natural spouse (“convivienta”), collateral kinsmen and state, in order and according to rules established in Civil Code.

(1) Descendants: children and descendants succeed in first order of precedence to inheritance, except as to that part which corresponds as matter of right to legal or natural spouse. Children inherit in equal parts; grandchildren and other descendants, per stirpes.

(2) Ascendants: succeed in absence of any surviving descendants.

(3) Spouse succeeds in event that no descendants or ascendants survive deceased. Natural or common law marriages, recognized under Constitution and Family Code give rise to similar inheritance rights as those created under legal marriage.

(4) Collateral kinsmen: They inherit in absence of surviving descendants, ascendants or spouse.

(5) State: In absence of any heirs State succeeds.

In any case, whether there is a will or not, a certain proportion of the estate goes to the heirs by operation of law. A testator may dispose freely of only one-fifth of his property; the other four-fifths must go to these obligatory heirs. In some special cases proportion will be two thirds.

Inheritances may be accepted expressly or impliedly or may be refused. If accepted the acceptance may be with benefit of inventory, in which case an inventory of the property is prepared and the heir is liable to creditors only up to the amount shown in such inventory, or it may be unconditional, in which case the heir is liable for all debts of the decedent. If there is no one appointed by a testator to make the partition the heirs make the partition themselves, minors and incompetents being represented by their guardians. In case of controversy the judge appoints the partitioner.

Family Code extinguishes difference between legitimate and natural children.

12.06 EXECUTORS AND ADMINISTRATORS:

(C. C. 1220-1278).

If there is no executor appointed by the testator the heirs jointly act as executors, and if they are unwilling or unable to act the executor is appointed by the judge. An executor must conclude his work within one year unless he obtains an extension.

When a person dies intestate his property passes immediately to his heirs and is administered by them. Heir who has accepted inheritance unconditionally is liable for all debts of decedent; if he has accepted with benefit of inventory he is liable only up to value of property received by him. When there are creditors heir who has demanded inventory can sell property of estate only under judicial auspices. Heirs must pay claims as filed insofar as they are liable. Partition is voidable when made under violence or fraud. Suit may be brought within three years from when violence ceased or fraud was uncovered.

12.07 INTESTACY:

See topic 12.05 Descent and Distribution.

12.08 TRUSTS:

(C. C. 1170, Com. Co. 1409-1427).

Testamentary trusts are prohibited. Trust may be created upon property of any kind. Trust intervivos must be by public deed and mortis causa, by will. To affect rights of third parties, trust must be recorded. Creditors of beneficiary can attach trust income only. In general, maximum term of trust is 30 years.

12.09 WILLS:

(C. C. 36, 443-541, 570-608, 659-661).

Wills may be made by all persons except males under 14 or females under 12 years of age and persons of unsound mind. Males who are of age may be witnesses except the following: Those mentally incapacitated; ascendants and descendants of testator; heirs and other relatives to the fourth degree.

There are two general classes of wills: Solemn wills, which are subdivided into closed and open wills, and privileged wills which require no formalities.

Closed wills are written by the testator or by another person for him and enclosed in an envelope which is delivered to a notary. The latter writes a statement on the envelope and the same is signed by the notary, the testator and seven witnesses, but if any witness cannot write another may sign for him. Deaf and dumb persons require one witness more.

Open wills may be made before a notary and three witnesses who are residents of the locality, or before five witnesses who are residents; if neither a notary nor five residents of the locality can be found, the will may be made before three witnesses who are residents or seven who are not. Blind persons may make open wills before a notary and five witnesses, or before eight witnesses of whom one must write out the will.

Privileged Wills.

Indians residing at over one league from their cantons may make wills with only two witnesses. Soldiers may make wills without witnesses if entirely in their handwriting; in time of war they may write on sand, earth or stone, but at least two witnesses must have seen them write.

Oral Wills.

Open wills and privileged wills of Indians may be oral, but the majority of the witnesses must give uniform testimony on all substantial points.

Revocation.

All codicils, changes and revocations must be made with the same formalities required for wills.

Testamentary Disposition.

The testator may dispose freely of his property only in so far as there are no obligatory heirs. (See topic 12.05 Descent and Distribution.) Legacies may be charged with conditions.

Foreign wills are valid in Bolivia if executed in accordance with the laws of the country where they were made. Aliens making wills in Bolivia in favor of other aliens with respect to property in their country or personal property in their possession or in Bolivia, may follow the law of their country, but if the will relates to real estate in Bolivia it must be in the Bolivian form.

13 FAMILY

13.01 ADOPTION:

(C.C.A. Arts. 57-93, Sup. Dec. 28023 of Mar. 4, 2005).

Minors less than 18 years of age may be adopted under conditions indicated by law, by local or foreign couples, with permanent residency in country for more than two years; physically, mentally, psychologically and morally fit; over 25 years and under 50 years of age. Adopting parties must be 15 years older than adopted party, and must have been taking care of party to be adopted for at least 15 days. Single persons may adopt in certain cases. Nonresidents may adopt if there are no spouses with permanent residency in country interested in adopting. Foreign persons may adopt if there exists adoption convention in force between Bolivia and their country of residence. Adopting party must personally appear before Court. Adoption extinguishes legal bonds between adopted person and natural family and it is irrevocable. Adopted persons maintain their nationality. Adopted persons have right to know who were their natural parents.

13.02 COMMUNITY PROPERTY:

See topic 13.04 Husband and Wife.

13.03 DIVORCE:

(C. Family Arts. 130-157, 399).

Divorce dissolves marriage. It may be granted for: (1) Adultery; (2) conviction of one spouse for having made an attempt against life of other; (3) prostitution of wife by husband, or of children by either spouse; (4) abandonment within six months after demand and refusal to obey judicial demand to return, or after return, new abandonment for two months; (5) cruel treatment; (6) voluntary separation for two years.

Divorce by mutual consent can be demanded only after two years of marriage. Parties must personally appear; judge attempts to reconcile them and if unsuccessful designates a date for another appearance six months later; there is a third hearing after still another six months period, and if parties persist in desiring divorce, same is granted.

Code does not provide any particular length of residence in order to bring an action for divorce.

Judge of last domicile of defendant has jurisdiction of divorce action. He determines amount of alimony to be received by spouse and who is to have provisional care of children. Wife is entitled to alimony unless she is found to be guilty party or unless she has sufficient property of her own. If parties cannot agree on custody of children judge decides; as a rule children under seven years are awarded to mother and others to father, or sons are awarded to father and daughters to mother.

Remarriage.

A divorced wife may remarry after 300 days from the provisional separation or after the birth of a child.

Separation may be granted for: (1) Any cause authorizing divorce; (2) habitual drunkenness, use or trafficking drugs; (3) insanity or chronic contagious disease; (4) mutual consent, but only after two years of marriage.

13.04 HUSBAND AND WIFE:

(C. Family 96-128).

Husband and wife have same rights and obligations. Both contribute to their common economic needs. Wife has social and economic function in home, protected by law. Community property ("comunidad de gananciales") is created at time of matrimony, as regulated by law. Private agreements with respect thereto are disallowed.

Certain types of property are excluded from community property; property owned at time of marriage, that received by succession, legacy or donation; property title of which passed before marriage; that received for services rendered before marriage; personal property acquired by subrogation, etc.

Spouses can freely and severally administer their individual property. Authorization of other spouse is required in order to effect donation thereof.

Community property ("Bienes comunes") is that property acquired during marriage by reason of work, income from separate property or discovery or by subrogation. Both spouses administer community property.

Community property ceases by death of one of spouses, annulment of marriage, divorce, separation and judicial separation of property.

Married woman of at least 18 years of age may engage in commercial acts, without her husband's authorization and becomes liable with personal property or with her community property. If husband and wife engage in commerce jointly, they will be considered merchants, unless one is dependent on other's commercial activities. (Com. Co. 17-18).

13.05 INFANCY:

(C. C. arts. 3-5 and C. Family 249-275).

Age of majority is 18. Infants are not competent to contract, being subject to parental authority. Parental authority includes custody, legal representation and administration of infant's real and personal property, with some exceptions. In absence of parents guardian is appointed. Parents and guardian have restricted powers of disposition.

13.06 MARRIAGE:

(Const. Arts. 193, 194; C. Family Arts. 42-67, 73-129).

The only marriage recognized by law and producing civil effects is the civil marriage, although the parties may thereafter marry by religious rite. The marriage is performed by an official of the civil registry.

The following cannot marry: (a) Males below 16 or females below 14 years of age; (b) ascendants and descendants; (c) collaterals to second civil degree. Parental consent is required for marriage of minors. Marriage by proxy is allowed.

The following are grounds annulling the marriage: (a) If it has not been celebrated by officer of Civil Registry; (b) fact that marriage was performed between two persons of same sex; (c) incapacity due to age, mental health, civil status, consanguinity, adoption, crime against previous spouse, etc.; (d) bigamy; (e) duress, etc. Marriages declared void nevertheless produce civil effects with respect to spouse and children, if they were contracted in good faith.

A marriage is dissolved by death or divorce. After the husband's death the widow cannot remarry until one year has elapsed. A divorced wife may remarry after 300 days from the provisional separation, or after the birth of a child.

13.07 MARRIED WOMEN:

See topics 13.04 Husband and Wife, 13.06 Marriage.

14 FOREIGN TRADE AND COMMERCE

14.01 CUSTOMS DUTIES:

See category 22 Taxation, topic Taxes, subhead Custom House Taxes.

14.02 EXCHANGE CONTROL:

(Sup. Dec. 21660 of July 10, 1987 as am'd).

Foreign exchange auction market is operated by Central Bank. There is one exchange rate that is used for all transactions fixed by Central Bank by auction, except purchase of foreign exchange for overdue loan payments, which are eligible for special rate. Contracts specifying foreign currency payment or with dollar equivalent clauses are permitted.

14.03 FOREIGN EXCHANGE:

See topic 14.02 Exchange Control.

14.04 FOREIGN INVESTMENT:

See category 22 Taxation, topic Taxes.

14.05 FOREIGN TRADE REGULATIONS:

See topic 14.02 Exchange Control.

15 HEALTH

15.01 HEALTH LAW:

Health Code.

Decree-Law 15629 of July 18, 1978 and its regulations Sup. Dec. 18886 of Mar. 15, 1982. Ministry of Health and Sports is in charge of regulating, planning, coordinating and controlling public and private activities related to health. Law regulates among others, supply of drinking water; practice of health-related professions; preventive medicine; disease control and vaccination; pharmacies; medical equipment and pharmaceutical products; registration of cosmetics, food products, plaguicides, medicines and drugs; donations and transplants of organs and blood banks; international sanitary protection; corpses; water pollution and sanctions for infringement of law.

National Health System.

Sup. Dec. 26875 of Dec. 21, 2002 organizes National Health System and determines functions and jurisdiction of Ministry of Health and Sports, of Departmental Health Service, municipalities and committees of supervision. Regulates levels of care; health networks; access to National Health System; social network; among others.

Medicines.

Law 1737 of Dec. 17, 1996 regulated by Sup. Dec. 25235 of Nov. 30, 1998 regulates preparation, importation, commercialization, quality control, sanitary registration, selection, acquisition, distribution, prescription and sale of medicines for human use, food, cosmetics, dental products, homeopathic and natural medicaments.

Donation of Organs.

Law No. 1716 of Nov. 5, 1996 regulates donation and transplant, for therapeutic purposes, of organs, cells, and tissues from living and deceased persons. It deals with authorization by National Secretariat for Health of Ministry of Health and Sports; prohibition of export of organs, tissues, and cells, licenses to hospital to carry out transplants; requirements for donation inter vivos; determination of brain death, principle of non-remuneration for donation; and establishes register of potential donors and recipients.

Blood Banks.

Law No. 1687 of Mar. 27, 1996 regulated by Sup. Dec. 24547 of Mar. 31, 1997. Law deals with role of National Secretariat for Health in standardizing, coordinating, supervising, controlling, and guiding practice of hemotherapy and promoting formation of voluntary blood donor associations or clubs. It establishes National Advisory Commission on Hemotherapy and Blood Banks, prohibits remuneration and commercialization of human blood and its components; authorization and control of establishments engaged in manufacture of blood products; offenses and sanctions, among others.

16 IMMIGRATION

16.01 ALIENS:

Aliens in general enjoy same civil rights as citizens. Foreign natural or juridical persons can not hold under any title, soil or subsoil within 50 kilometers of national boundaries, except in case of national necessity declared by law. (Const. arts. 18, 19, 23-25; Law 1243 of Apr. 11, 1991). Naturalized residents and resident aliens must register and obtain identity card. Aliens whose presence is disturbing may be expelled as well as aliens entering unlawfully; Decree 24423 of Nov. 29, 1996 as amended. At least 85% of personnel of any employer must be Bolivians. (Law Dec. 8, 1942).

See also categories 12 Estates and Trusts, topic Wills; Property, topic Real Property.

17 INTELLECTUAL PROPERTY

17.01 COPYRIGHT:

(Decision 351 of Dec. 17, 1993 of Cartagena Commission; Law 1322 of Apr. 13, 1992, regulated by Sup. Dec. 23907 of Dec. 7, 1994; Decree 24206 of Dec. 29, 1995 as am'd; Sup. Dec. 24582 of Apr. 25, 1997, Sup. Dec. 27938 of Dec. 20, 2004 as am'd. Law grants certain intellectual, moral and property rights to author, his successors or assignees, regarding scientific, literary and artistic works.)

Author is entitled to: (1) Recognition of his quality as author; (2) right to oppose deformation, mutilation or modification of his work; (3) delayed publication of his work even up to period of 50 years after his death.

Works Protected.

Protection is granted to literary, artistic or scientific work expressed in any form and by any means tangible or intangible, known or actually unknown. Law also protects translations, adaptations, musical arrangements and other transformation of private intellectual works; to protect these copyright works written authorization from original owner of work is necessary. Performers' rights are also protected. Author of computer program has right to authorize or prohibit exploitation, including among others, commercialization, licensing, reproduction, modifications. Use of computer programs must be object of license agreement.

Duration.

Copyrights remain in force: (1) For life and 50 years after author's death. Then, or before if there are no heirs, they become public domain; (2) in case of joint authors, 50-year period begins upon death of last survivor; (3) if author remains anonymous for 50 years from first publication; (4) in case of collective works, photographs, phonograms, radio programs, computer programs, 50 years from publication, exhibition, recording, transmission, or use; if it has not been published, 50 years from creation. After that time, works revert to national patrimony, as well as those art manifestations when their authors are unknown or when they are simply expressions of folklore.

Registration.

Registro Nacional de Derecho de Autor, in which are recorded works submitted by authors, agreements or contracts which in any manner confer, modify etc., patrimonial rights of authors, artists, performers, author's associations. Literary and artistic works, performances and other productions are protected by law without requiring registration.

Law contains provisions regarding publication, as well as for further reproduction and edition of intellectual works and their illegal use and reproduction.

Foreigners in Bolivia enjoy same rights of national authors.

By Decree-Law 6996 of Dec. 10, 1964, textbooks, scientific works and scientific periodicals in foreign languages not registered in Bolivia, can be translated into Spanish by authorization of government.

International Conventions.

Montevideo Convention of 1889, Buenos Aires Convention of 1910, Caracas Agreement of 1911, Washington Convention of 1946, Rome Convention of 1961, International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations, Rome, 1961, Stockholm Convention of 1979.

17.02 PATENTS:

(Decisions 486 of Sept. 14, 2000 and 345 of Oct. 29, 1993 of Cartagena Commission; Law of Dec. 2, 1916; Sup. Dec. 9673 of Apr. 19, 1971 only on matters not regulated by Decisions, Sup. Dec. 27938 of Dec. 20, 2004 as am'd).

Any invention of products or proceedings in any technology field which are novel, represent inventive step and are susceptible of industrial application. Invention is novel when it is not within state of art. Discoveries, scientific theories, mathematical methods; literary and artistic works; natural biological process, biological material as existing in nature or resulting from isolation, including genome or germplasm of any natural being, plan, rules and methods for pursuit of intellectual activities, games or economic-commercial activities, computer programs or software, as such, and forms of representing information, among others are not considered inventions. Inventions contrary to public policy, morals and against life or health of people or animals and environment; on animal species and races and biological procedures to obtain them, inventions related to nuclear substances, to pharmaceutical products listed by World Health Organization as essential medicines; and related substances composing human body are not patentable. Patent owner must exploit it, directly or by granting license in any member country of Andean Pact. Industrial production or commercialization of patented product, are considered exploitation of patent. Patent is granted for 20 years from filing date. Industrial designs, any new design which may be applied to industrial object may be registered as ownership of author if no publicity thereof in any form has been made before filing application. Registration is granted for ten years.

Utility models for new forms of objects or mechanism provided they have practical use are registrable. Registration term is ten years from filing date. Law also protects trade secrets and considers them as any confidential information that is valuable and provides competitive or economic advantages to owner. Information considered trade secret must be expressed in tangible form such as documents, microfilm films, laser discs or any other similar means.

Layout-designs of integrated circuits are protected when considered original and indicated by law. Application must be filed within two years from its first commercial exploitation in any part of world, and when it has not been exploited application must be filed within 15 years from last day of year of invention. Rights may be licensed, and compulsory license may be granted; they are also assignable and inheritable. Registration is granted for ten years from filing date or from last day of year of first exploitation.

Vegetal species are protected when they are novel, homogeneous, distinguishable and stable and generic designation has been assigned to them. When registered certificate of holder is issued for 15 to 25 years, depending on type of vegetal variety.

Provisions regarding patents are applicable to industrial designs and utility models.

International Conventions.

Montevideo Convention 1889, Buenos Aires 1910, Caracas Agreement 1911. Paris Convention for the Protection of Industrial Property, as reviewed and amended.

17.03 TRADEMARKS:

Those signs distinctive can be registered as marks. Trademark is any sign used to distinguish products or services produced or commercialized by one person from same or similar products or services produced or commercialized by another person. Following signs, among others, can be registered as marks: words or combination of words, pictures, figures, symbols, graphic elements, logotypes, monograms, portraits, labels, emblems, sounds, smells, letters and numbers, shape, packing and wrapping of products. Slogans are words, sentences or captions used as supplement to trademark.

The following cannot be used as trademarks: Letters, names or words peculiar to the state; national or foreign arms or flags; phrases or words in general use to describe the article; designs or expressions offensive to persons or institutions; pictures or names of persons without permission of such persons; usual form or color of products; marks which have become public property; those which may be confused with others previously registered; marks contrary to law, those against public policy, denomination of protected vegetal varieties, those identical or similar to registered trade slogans and trade names provided under circumstances public may be confused; those that are reproduction, imitation, translation or total or partial transcription of distinctive signs, locally or internationally, well known, without taking into consideration classification of goods or services concerned; or because of similarity to well-known trademark causes confusion to public independent of classification of goods and services for which registration is applied for. Registration of generic or descriptive terms, usual or common expressions, and individual color may be registered as mark provided owner of mark can prove that mark permits consumers to identify expression with its specific good or service. Statute of limitation for action to declare invalid registration of well-known mark registered by third party is five years from date owner becomes aware of unauthorized use; there is no limitation when it has been used in bad faith. Owner of well-known marks can request cancellation or amendment of registered domain name or e-mail address affecting its exclusivity rights. Term of registration is ten years extended for periods of ten years.

Producers or traders associations may register collective marks. Origin denominations belong to State who may grant right to use them for ten years, renewable. Buenos Aires Convention of 1910. Decision 486 of Sept. 14, 2000. Laws of Dec. 2, 1916 and Jan. 15, 1918 only on matters not regulated by Decision 486, Sup. Dec. 27938 of Dec. 20, 2004 as amended.

Trademarks can be cancelled for nonuse for consecutive three years by owner or licensee in any member country. Partial cancellation of trademark may be done when owner proves use of mark for some goods or services.

Tradename is any sign that identifies economic activity, enterprise or mercantile establishment. Commercial names are independent from company denomination, and both can coexist. Exclusive right is acquired by first used in commerce and terminates with activities of enterprise. Commercial names may be licensed.

Certification marks sign to be applied to products or services used by others whose quality or other specific characteristics have been certified by legal owner of mark, which shall be public or private entity. Infringement actions and unfair competition are regulated by law.

18 LEGAL PROFESSION

18.01 ATTORNEYS AND COUNSELORS:

(Law Decree 16793 of July 10, 1979, Sup. Dec. 26052 of Jan. 19, 2001 as am'd).

Lawyer must be of full age, holder of law degree from local university, and be sworn before proper authority. To practice as attorney-at-law, one must be of Bolivian citizenship, be in full exercise of civil and political rights, have no criminal record, be registered with “Colegio de Abogados” (Lawyers' Association), and have two years of legal practice.

19 MINERAL, WATER AND FISHING RIGHTS

19.01 MINES AND MINERALS:

(Law 1777 of Mar. 17, 1997 as am'd, Sup. Dec. 24780 of July 31, 1997, Sup. Dec. 29117 of May 1, 2007 as am'd, Law 3720 of July 31, 2007).

State is owner of all mineral substances, on soil and subsoil, whoever may be owner of surface, but State may grant concessions to work them in accordance with Mining Code. Mining concession constitutes right which is distinct from ownership of land, and is indivisible. State participates in operation of mines, through economically self-sufficient entity, Corporación Minera de Bolivia, prospects, explores, exploits, concentrates, melts, refines, commercializes all mineral substances and manages mining areas and may execute different kinds of contracts such as leasing, operations, service contracts, joint ventures or they may exploit them directly. Joint ventures contract must be granted by bid. Existing mining concessions are respected and concessionaries would keep their rights, but no new concessions are granted.

Neither foreign states nor Bolivian public officials enumerated in Code can hold any interest whatever in mining enterprises as provided by law. Foreign natural or juridical persons cannot hold mining rights within 50 kilometers of national boundaries, except in case of national necessity declared by law. Before engaging in mining operations, foreign companies are required to prove their legal existence in country of origin, to appoint fully empowered representative and to establish legal domicile in Bolivia.

Mines in General.

Mining concession grants holder right, for indefinite period of time, to prospect, explore, exploit, concentrate, melt, refine and commercialize all mineral substances within area. There are no commercial restrictions on mineral products which may be sold freely in national market or to foreign purchasers.

Mining rights though indivisible, may be leased and transferred with authorization of Government. All contracts concerning operations as well as changes in charter or bylaws of operating concern must be registered in Registro Minero. Exploitation concessions may be mortgaged, but mortgage ceases when concession terminates. Mining rights, as well as industrial installations and mine products are not subject to attachment; intervention is permitted instead.

Jurisdiction.

Petitions for mining concessions are granted by local Superintendent of Mines, one in capital of each Department, who also declares cancellations thereof. An appeal is provided from his decisions before Corte Nacional de Mineria.

Cancellations of Concessions.

Main causes of cancellation are nonpayment of amount due for “patente”, by rescission of contract, and by judgment in case of legal dispute. Concession becomes void when transferred to persons precluded by law to hold interest in mining operations.

Taxes.

(a) An annual “patente”, or surface tax, is levied on concessions. Payment is made one year in advance. (b) Tax on profits. (Law 843 of May 20, 1986 t.o. 2001 as am'd regulated by Sup. Dec. 24055 of June 29, 1995). Rate is 25% of annual net income of all companies in mining activity. Additional tax on extraordinary profits at rate of 25% on net sales value. Complementary Tax which rates vary between 1% and 6% on gross sale value. Companies operating in any mining activity are also subject to payment of taxes established by Law 843 of May 20, 1986 t.o. 2001 as am'd, excepting tax on presumed income and tax on transactions in case of local commercialization of minerals.

All equipment, edifices and materials become property of State at termination of concession.

Petroleum and Gas.

(Law 3058 of May 17, 2005 and its regulations, Sup. Decs. 28222 and 28223 of June 27, 2005 as am'd, Sup. Dec. 28324 of Sept. 1, 2005, Sup. Dec. 28797 of July 14, 2006; Decrees 24335 of July 19, 1996 as am'd, 24398 of Oct. 31, 1996, 24419 of Nov. 27, 1996, 24548 of Mar. 31, 1997, 24577 of Apr. 25, 1997 as am'd and 25049 of May 22, 1998 as am'd, Sup. Dec. 27310 of Jan. 9, 2004). Hydrocarbon deposits belong to State. Petroleum industry is public utility and of social interest enjoying preferential right to utilize surface with right to expropriation on payment of compensation. State alone has right to explore, exploit, commercialize, transport, storage, refining and industrialization hydrocarbons and their by-products. These activities are carried out by Yacimientos Petrolíferos Fiscales Bolivianos (YPFB), State owned corporation or by entering into share production, operation or association contracts for exploration, exploitation with private entities for certain period of time and under control of Government, national or foreign individuals or juridical persons for maximum period of 40 years, by concessions for commercialization, transportation, storage, refining and industrialization or by contracts for supplying local market. Contract rights may not be alienated, encumbered or rented, except when special permission is granted. At termination of contract all equipment and installation must be turned over to YPFB. Contracting companies may employ only 15% of foreign personnel. Contracts are subject to local law and disputes are subject to arbitration. For transportation and distribution of natural gas concessions are granted. There are special environmental protection regulations for contamination from hydrocarbons.

Taxes.

All enterprises or companies which contract with YPFB for exploration and exploitation as hereinabove described are subject to local royalty of 11%, national royalty of 1% and national of gross oil production of 6% at control point; to direct tax on hydrocarbons of 32% of total production at control point; to tax rate of 25% on net profits; additional tax on extraordinary profits at rate of 25% on net sales value; to value added tax, and to other taxes established by Law 843 of May 20, 1986 t.o. 2004. Refining, industrialization and commercialization are subject to regular tax regime. Investors may enter into contracts with government to enjoy legal stability related to tax laws and regulations applicable to investment for period up to ten years.

20 MORTGAGES

20.01 CHATTEL MORTGAGES:

There is no provision for chattel mortgages. See category 7 Debtor and Creditor, topics 7.10 Liens, 7.11 Pledges.

20.02 COLLATERAL SECURITY:

See category 7 Debtor and Creditor, topic 7.11 Pledges.

20.03 MORTGAGES:

(C.C. 1360-1397).

Mortgages can be legal, judicial or voluntary. They can affect any private real property, whatever is affixed thereto (which is also considered real property) and some recorded movable assets.

Mortgage must clearly state object and amount it secures. Property located in Bolivia can be mortgaged outside of country.

21 PROPERTY

21.01 ABSENTEES:

See category 12 Estates and Trusts, topic 12.03 Death.

21.02 ADVERSE POSSESSION:

See category 5 Civil Actions and Procedure, topic 5.04 Prescription.

21.03 CONVEYANCES:

See topic 21.05 Deeds; category 9 Documents and Records, topic 9.03 Public Instruments.

21.04 CURTESY:

There is no estate by curtesy.

21.05 DEEDS:

Transfers of title to real estate must be by public instrument (see category 9 Documents and Records, topic 9.03 Public Instruments) and contain a true statement of consideration. They must be recorded in registries of property. Both grantor and grantee must sign deed and both must therefore be present before notary at same time. If one is absent he must be represented by attorney in fact. Original deed, if executed in Bolivia, must remain in files of Bolivian notary, who gives to either party certified copy which has effect of original in courts of law.

21.06 DOWER:

There is no dower right.

21.07 ESCHEAT:

See category 12 Estates and Trusts, topic 12.05 Descent and Distribution.

21.08 REAL PROPERTY:

Real property includes land and all solid and liquid matter thereon, at whatever depth, as well as all things of a permanent character fixed to land. Personal property which has been made accessory to real property is also considered real property.

Ownership, possession, and administration of real property, as well as encumbrances thereon, and its transfer is governed by provisions of Civil Code.

Art. 22 of Constitution guarantees right of private property provided that its use is not prejudicial to public interest. Expropriation may be effected for reasons of public benefit or if private property does not fulfill its social purpose, must be authorized by law and must provide for payment of just compensation to owner.

Foreigners may not acquire or possess property located within 50 km. of borders, by means of any title to soil or subsoil, directly or indirectly, individually or as a company, except in cases declared by special law to be of national necessity.

22 TAXATION

22.01 BUSINESS TAX:

Tax Code.

(Law 2492 of Aug. 2, 2003, t.o. 2004 as am'd, regulated by Sup. Dec. 27310 of Jan. 9, 2004 and Sup. Dec. 27874 of Nov. 26, 2004). Code establishes general principles, proceedings and norms that regulate tax system and are applicable to national, department, municipal and university taxes. It comprises provisions for tax exonerations, surcharges on delinquent payments, penalties, collection procedures, appeals, statute of limitations and other regulations applicable to all taxes.

Tax on Financial Transactions.

(Law 3446 of July 21, 2006 regulated by Sup. Dec. 28815 of July 26, 2006). Credit and debit transactions, payments, transfers, fixed term deposits in banking and financial institutions and participations in investment funds are taxed at rate of 0.15%.

Tax on Transactions.

(Law 843 of May 20, 1986 t.o. 2004 regulated by Sup. Dec. 21532 of Feb. 28, 1987 t.o. 1995 as am'd). Tax is applied to individuals and juridical persons on basis of gross income obtained during fiscal year from any activity, except labor, exportation of goods, publishing companies, interest from savings accounts, among others. This tax measures economic capacity of taxpayers on basis of their gross income. Rate is 3% and resulting amount must be paid monthly.

22.02 CUSTOMS DUTY AND TAX:

Custom House Taxes.

Import tax is regulated by Sup. Dec. 21660 of July 10, 1987 as am'd. Import of goods are subject to customs duties at 10% rate on CIF value except capital goods on which customs duties are at rate of 5%. Bolivia adopted Uniform Classification for International Trade.

22.03 EMPLOYMENT TAX:

Social Security Tax.

Employers must pay to social security 13% of total salaries paid out to its employees. Employees contribute additional 12.5%. (Law 1732 of Nov. 29, 1996 regulated by Sup. Dec. 24469 of Jan. 17, 1997).

22.04 EXCISE TAX:

See topic 22.15 Value Added Tax and 22.04 Excise Tax.

22.05 FREE ZONES:

(Sup. Dec. 27937 of Dec. 20, 2004; Sup. Dec. 25706 of Apr. 14, 2000 as am'd). National or foreign individuals and juridical persons may be authorized to operate in free zones. Law regulates industrial free zones, commercial free zones and warehousing terminals, and temporary entry of goods and draw-back. Industrial free zones are created for manufacture of goods to be exported. Investments in industrial free zones are exempted from value added tax and excise tax and tax on transactions, tax on business net worth and from import duties. Commercial free zones and warehousing terminals are created for storage of goods for unlimited time. Investments in commercial free zones and warehousing terminals are exempted from same taxes and duties as industrial free zones. Temporary entry of goods is authorized for assembling, transforming or industrial production of merchandise to be exported. Concessions to operate free zones are granted for up to 40 years. Importation of goods is duty and tax free, but guarantee must be granted to cover payment of temporary exemption of taxes. All investments are subject to payment of contributions to state social security and to General Labor Law and its regulations.

22.06 GIFT TAX:

See topic 22.09 Inheritances and Gifts Tax.

22.07 INCOME TAX:

Tax on Corporate Income.

(Law 843 of May 20, 1986 t.o. 2004 regulated by Sup. Dec. 24051 of June 29, 1995). Tax is applied to corporations, whether stock or companies owned by sole individual, branches and subsidiaries of foreign companies on net annual profits of local sources, as per their financial statements prepared according to generally accepted accounting principles. Rate is 25%. Payments to non-domicile recipients are subject to withholding tax of 25% on 50% of amount paid.

Tax on Gross Income.

(Law 843 of May 20, 1986 t.o. 2004 regulated by Sup. Dec. 21531 of Feb. 28, 1987 t.o. 1995). Tax is assessed to individuals and undivided estates on their gross income deriving from Bolivian sources from rent, labor, capital or combination of both. Fixed rate is 13%. Value added tax paid may be taken as tax credit in computing this tax.

22.08 INHERITANCE TAX:

See topic 22.09 Inheritances and Gifts Tax.

22.09 INHERITANCES AND GIFTS TAX:

(Law 843 of May 20, 1986 t.o. 2004 and its regulations Sup. Dec. 21789 of Dec. 7, 1987). Tax is levied on transfers of personal or real property by inheritance or by gift subject to registration. Rates depend on recipient's relationship to deceased: 1% for ascendants, descendants and spouse; 10% for brothers and sisters and their descendants; and 20% for others and donees.

22.10 MINES, MINERALS AND FISHERIES TAXES:

Mining Taxes.

See category 19 Mineral, Water and Fishing Rights, topic 19.01 Mines and Minerals.

22.11 MOTOR VEHICLE TAXES:

(Law 843 of May 20, 1986 t.o. 2004 regulated by Sup. Dec. 24204 and 24205 of Dec. 23, 1995). Motor vehicles are subject to tax ranging from 1.5% to 5% of value determined as indicated by law.

22.12 PROPERTY TAXES:

Urban Real Property Tax.

(Law 843 of May 20, 1986 t.o. 2004 regulated by Sup. Dec. 24204 and 24205 of Dec. 23, 1995). All urban real property is subject to tax ranging from 0.35% to 1.5% of fiscal value. Real property used for hotel activities is taxed on 50% of fiscal value.

22.13 TAX INCENTIVES:

Investment Law.

(Law 1182 of Sept. 17, 1990). Law provides equal treatment to national and foreign capital, granting them guaranties including free trade, currency conversion with exception of those limitations established by law. Foreign investors have no restrictions for repatriation of capital or transfer abroad of profits; only requirement is prior payment of taxes. Disputes related to their investment can be subject to international arbitration except in case of joint ventures that are subject to Bolivian law and must be legally domiciled in Bolivia. All foreign and national investment is subject to tax regime and compliance with all labor and social security laws.

Foreign investment is subject to Decision 291 of Mar. 21, 1991 of Andean Pact on common regime of treatment of foreign capital and of trademarks, patents, licenses and royalties.

22.14 TREATIES AND AGREEMENTS:

To avoid double taxation of income with Argentina, Colombia, Ecuador, France, Germany, Peru, Spain, Sweden, U.K., Venezuela.

22.15 VALUE ADDED TAX:

See topic 22.15 Value Added Tax and 22.04 Excise Tax.

22.16 VALUE ADDED TAX AND EXCISE TAX:

(Law 843 of May 20, 1986 t.o. 2004 regulated by 21530 of Feb. 28, 1987 t.o. 1995). Value added tax is applied at rate of 13% to imports, sale of goods, rendering of services and execution of works. Complemented with excise tax which is applied to such goods as wines, beer, cigarettes, motor vehicles, etc. Rate ranges between 10 and 50%.

23 TRANSPORTATION

23.01 AIRCRAFT:

(Law 2902 of Oct. 29, 2004). Law deals with aircraft nationality, license and permits for operation, registration certificate, ownership, lease, manufacture, attachment, passengers and freight transportation, encumbrance of aircrafts and maximum carrier's liability in case of accidents and loss or damage to baggage and freight and penalties for infringement of Law. National aircraft must be registered and owners thereof must be domiciled in country. If owner is corporation, must be organized according to local laws.

23.02 MOTOR VEHICLES:

Transit Code, Decree-Law 10135 of Feb. 16, 1973 contains complete regulations governing motor vehicles and public ways, public and private transportation and transportation of passengers and freight. License plates are required for all motor vehicles and drivers must obtain license which must be renewed every five years. In case of traffic accidents, law provides for fines or imprisonment or both depending upon type of violation. National Registry of Motor Vehicles in which detailed information on vehicles and owners of all motor vehicles authorized to use public ways is kept. Registration is compulsory.

23.03 RAILWAYS:

General Law of Railways of Oct. 3, 1910 and Sup. Dec. 24179 of Dec. 8, 1995 regulate construction and exploitation of railways in national territory by government, municipalities or private national or foreign companies. Concession for maximum 99 years is granted. Law deals with right and duties of railway operators, tariffs, transportation of passengers and freight, schedules and penalties for violation of law.

23.04 SHIPPING:

Registration of vessels and navigating naval devices operating in international waters with Bolivian flag is regulated by Sup. Dec. 26256 of July 20, 2001 as amended.

24 TREATIES AND CONVENTIONS

24.01 TREATIES:

Multilateral: Treaty on Civil, Commercial and Procedural Law, signed at Montevideo on Jan 11, 1889; and on Patents and Trademarks of Jan. 16, 1889, approved by Bolivia by Law of Nov. 17, 1903, and ratified with respect to Procedural Law, by Law of Feb. 25, 1904; Convention relative to Rights of Aliens, signed on Jan. 29, 1902, ratified by Bolivia by Law of Feb. 26, 1904; Convention on Inventions, Patents, Designs and Industrial Models signed on Aug. 20, 1910, Buenos Aires; Convention for Protection of Commercial, Industrial, and Agricultural Trademarks and Commercial Names, signed on Aug. 20, 1910; Convention on Literary and Artistic Copyright, signed on Aug. 11, 1910, Buenos Aires; Convention on Pecuniary Claims, signed on Aug. 11, 1910, Buenos Aires; Bustamante Code of Private International Law, Havana, of Feb. 20, 1928 with reservations, ratified by Law of Jan. 20, 1932; International Convention on Telecommunications, Madrid, of Dec. 9, 1932, approved by Bolivia by R.S. of Jan. 23, 1934; South American Regional Agreement on Radiocommunications, Buenos Aires, of Apr. 10, 1935, approved by R.S. of Dec. 31, 1937. Revised by Agreement of Santiago, Chile, of Jan. 17, 1940, approved by D.S. of Mar. 31, 1942; Convention on International Civil Aviation, Chicago, Dec. 7, 1944, followed by Convention relating to Transit of International Air Services and a Convention on International Air Transportation, ratified by D.S. 722 of Feb. 13, 1947; Inter-American Convention on Rights of Author in Literary, Scientific, and Artistic Works, signed June 22, 1946; International Tin Convention, signed by Bolivia June 3, 1954, and Amendment to Paragraph 22 of Art. IV approved by International Tin Council in Oct. 1956, agreeing with Government of U.K. on reduction in taxes on assets, income, and other property of International Tin Council. Second International Tin Convention, signed in London Dec. 20, 1960, and approved by Bolivia by Law 131 of Dec. 15, 1961; Convention on Regulation of Inter-American Automotive Traffic, Washington 1943, Convention on Highway Transportation and Transportation by Automotive Vehicles, Geneva, 1949. Agreement on Importation of Objects of Educational, Scientific or Cultural Nature, New York 1950; Universal Copyright Convention, Geneva, 1952; Agreement on Andean Subregional Integration, signed at Bogota on May 26, 1969; Panama Treaty of 1975 on establishment of Latin American Economic System (SELA); Montevideo Treaty of 1980 on establishment of Latin American Integration Association (LAIA); effective Apr. 20, 1997, associate member of Asuncion Treaty creating common market “Southern Common Market” (MERCOSUR); Interamerican Convention on the legal regime of powers of attorney to be used abroad, Interamerican Convention on Letters Rogatory and Interamerican Convention on Commercial Arbitration, Panama, 1975; Interamerican Conventions on Support Obligations and on the International Return of Children, Montevideo, July 15, 1989; Convention on the Recognition and Enforcement of Foreign Arbitral Awards, New York, 1958; Multilateral Trade Negotiations, The Uruguay Round, Final Act, Marrakech, Apr. 15, 1994 and Agreement Establishing the World Trade Organization, Marrakech, Apr. 15, 1994.

Note: MERCOSUR, established in 1991, is regional trade market. Member countries are Argentina, Brazil, Paraguay, Uruguay and Venezuela. Member countries liberalize trade with one another while imposing common external tariff on goods imported from nonmember countries. MERCOSUR has extended its scope by entering into free trade agreements with Chile, Bolivia, Colombia, Ecuador and Peru.

1
BRAZIL LAW DIGEST

—Scope —

Revised for 2008 edition by

CURTIS, MALLET-PREVOST, COLT & MOSLE LLP, of New York.

(Abbreviations used are: Const. for Constitution; C. C. for Civil Code; C. Com. for Code of Commerce; C.P.C. for Civil Procedure Code. Constitution and all Codes arecited by articles thereof.)

Note: This revision incorporates legislation through Dec. 8, 2007.

1 INTRODUCTION

1.01 CURRENCY:

Monetary unit is Real, which is divided into 100 centavos. Only Central Bank may issue notes and these constitute legal tender for any obligation. (Law 8880 of May 27, 1994 and Law 9069 of June 29, 1995 as am'd).

1.02 GOVERNMENT AND LEGAL SYSTEM:

(Constitution of Oct. 5, 1988 as am'd).

Brazil is Federative Republic formed by union of States, Municipalities and Federal District, under democratic government.

All persons are equal before law without any distinction. Brazilians and foreigners resident in Brazil have guaranteed inviolability of rights to life, liberty, security and property.

Constitution deals with individual and collective rights and duties, social rights, nationality, political rights and political parties. It also regulates economic and financial order and structures financial system; and outlines basic principles of social order based in dignity of labor, and basic regulations on education, security, culture and sports, health, social works, family, childhood, adolescence, old age, Brazilian indians, science and technology, communications and environment.

Constitution establishes jurisdiction of Federative Republic, States, Municipalities, Federal District and Territories with basic general rules for their legislative powers and for imposition of taxes by each of them.

States have their own Constitution based upon Federal Constitution; supplementary laws and ordinary state laws which deal with matters not exclusively subject to Federal law. Municipalities established under Federal Constitution and Organic Law of Municipalities are recognized by state constitutions as territorial units with political, administrative and financial autonomy. Federal District and Territories are subject for their administration and judicial organization to special law.

Legislative power of Republic is exercised by a Congress formed by Chamber of Deputies and Federal Senate. Deputies are elected by direct popular vote in States, Territories and Federal District in proportion to population and Senators are elected, also by direct popular vote, three for each State. Executive Power is exercised by a President elected by direct popular vote. Term of election is four years. President acts with assistance of Ministers of State. Judicial Power is exercised by Supreme Federal Court, Superior Court of Justice, Federal Regional Courts and Federal Judges plus Military. Electoral, and Labor Courts. States have their own judiciary for State matters.

(Const., art. 57).

National Congress meets each year in Federal Capital, from Feb. 15 to June 30 and from Aug. 1 to Dec. 15; if sessions scheduled for these dates fall on Sat., Sun. or holiday, sessions are transferred to next working day.

1.03 HOLIDAYS:

Jan. 1 (New Year's); Apr. 21 (Tiradentes); May 1 (Labor Day); Sept. 7 (Independence Day); Nov. 2 (All Souls'); Nov. 15 (Proclamation of Republic); Dec. 25 (Christmas). (Law 662 of Apr. 6, 1949 as am'd).

1.04 OFFICE HOURS AND TIME ZONE:

Brazil's time zone is one hour later than Eastern Standard Time in the United States for Western Brazil and two hours later for Eastern, Northern and Southern Brazil (-04:00 GMT for Western Brazil; -03:00 GMT for Eastern, Northern and Southern Brazil). Office hours are generally from 9 a.m. to 5 p.m.

2 BUSINESS ORGANIZATIONS

2.01 AGENCY:

See category 21 Property, topic 21.06 Powers of Attorney.

2.02 ASSOCIATIONS:

(Const. art. 5 XVII-XXI; C.C., arts. 40-61).

Constitution grants full freedom of association for lawful purposes. No one can be compelled to become associated or to remain associated. Civil associations, foundations and commercial companies are legal entities of private law. Civil associations are nonprofit organizations legally established. They acquire juridical personality through recording of their articles of association in special record in civil registry and published entire or in summary form in official gazette of state in which its headquarters are to be located. Members do not have reciprocal rights and duties among them. Membership is non-transferable. There can be different categories of members. Members of the same category have equal rights. Articles of association shall state: name, purpose and domicile of association, requirements for admission, resignation and dismissal of members, source of income for maintenance, administration, amendment of articles and dissolution of association.

Law 9790 of Mar. 23, 1999 as amended, and its regulations Decree 3100 of June 30, 1999 regulates private nonprofit corporate entities to qualify as civil entities of public interest which are those that invest all profits to achieve their corporate objective which should be, among others, promotion of social assistance, free education, economic and social development, defense of national patrimony.

Collective Bargaining.

Professional associations organized under Cons. of Labor Laws, arts. 511-625 as am'd, have certain rights and duties, most important of which are to represent entire class before

Government and bargain collectively. (Const. art. 8 III).

2.03 CORPORATIONS:

(Law 6404 of Dec. 15, 1976 as am'd; C.C. arts. 1088, 1089). Corporations may be organized for any object or gain, not contrary to law, public order or good customs.

Organization.

Corporation is designated by name, that must be accompanied by word “companhia” or “sociedade anonima” or abbreviation of these words, except that word “Companhia” must not appear at end of name. Name of founder or other person who has contributed to success of enterprise may appear in corporate name and such name need no longer contain indication of its activity. At least two stockholders are necessary for organization and continued legal existence of corporation. Corporate capital must be divided into shares; responsibility of shareholders being limited to price of their shares. Law makes clear distinction between “open” and “closed” companies. “Open company” is one which has its shares traded in Stock Exchange or in over-the-counter market. “Closed company” is one whose shares are not traded in Stock Exchange or over-the-counter market. Before corporation may be constituted, entire capital must be subscribed, at least 10% of price of shares subscribed in money must be paid in, and part of capital subscribed in money must be deposited in Banco do Brasil, S.A. Subscription of capital may be public or private. If public, prior registration of issue with Securities Commission is required, and subscription must be made only through financial institution. After subscription is completed, founders must call organizational meeting which must arrange for appraisal of assets, if applicable, and decide on organization of corporation. Once legal formalities have been observed and there being no opposition from subscribers representing more than half of capital, founder presiding meeting must declare company organized, after which administrators must be elected. If subscription is private, corporation may be constituted by organizational meeting, as in case of public subscription, or through execution of notarial instrument.

To enable corporation to commence operating, its organizational constitution must be filed in Registry of Commerce and published. Registry of Commerce determines whether documents are in proper form and whether legal formalities have been observed, and in such case issues certificate which, with organizational documents of company, must be published in official newspaper. Any amendment of estatutos must be filed and published in like manner.

Corporate capital must be expressed in Brazilian currency and may comprise cash or any kind of property susceptible of valuation in money.

Shares.

Estatutos of company must determine number of shares into which capital is divided, and must stipulate whether shares are with or without par value. Shares may be common, preferred or usufructuary. Common shares of closed corporation as well as preferred shares of any corporation may have one or more classes. Preferred shares may be issued with or without voting rights. Up to 50% of issued stock may be composed of preferred shares, without right to vote or subject to restrictions on exercise of such right. Preferred shares may be accorded one of following minimum preferences: (1) priority in distribution of fixed or minimum dividend, (2) priority in reimbursement of capital, or (3) cumulative preferences and advantages (1) and (2). Preferred shares without voting rights or with restricted voting rights will acquire such rights if company, during period stipulated in estatutos, which cannot exceed three consecutive fiscal years, fails to pay fixed or minimum dividends, and will retain this right until payment, if dividends are not cumulative or until overdue cumulative dividends are paid. Shares are in nominative form. Estatutos may also authorize creation of “book shares”, representing all or part of shares, that will be maintained in deposit accounts in name of their holders, in given financial institution. No certificates are issued for such “book shares”. Company may issue at any time type of negotiable security, in nominative form, known as partes beneficiárias, with no par value, and no voting rights, which merely entitle their owners to participate in profits of company. Such participation cannot exceed 10% of net profits. Partes beneficiárias may be issued to founders, shareholders or third parties, as compensation for services rendered to company, or may be sold for cash.

Dividends.

Estatutos regulate policy of dividend distribution. Dividends may be expressed as percentage of net profits, as percentage of corporation's capital or on some other basis. In event that estatutos do not provide for compulsory dividend, stockholders will have right to one-half of net profits of fiscal year. Any amendment to estatutos on compulsory dividends, may not fix such dividends at level below 25% of net profits. In closed companies, stockholders by unanimous vote may approve distribution of dividend smaller than compulsory dividend, or may vote for retention of all profits in company and, if adverse financial situation occurs, declaration of compulsory dividend may be suspended. Such rules do not apply to payment of dividends to preferred stockholders.

Stockholder's meetings must be called by publication in official newspaper and in another newspaper of general circulation, with at least eight days notice in case of first call and five days for subsequent calls. Except in case of force majeure, such meetings must be held in offices of company, and in no case may be held in another city. Save in exceptional cases designated by law, at least one-fourth of corporate voting capital is required to constitute quorum at first call, but any number constitutes quorum on second call. Shareholders without right to vote may nevertheless attend and speak. Shareholders may be represented at meetings by proxy appointed within one year preceding meeting, who may be stockholder, member of administrative body or lawyer.

There must be annual stockholder's meeting to hear report of administrators, discuss accounts of company, vote on allocation of net profit of fiscal year and distribution of dividends, elect administrators and members of audit committee, when applicable, and approve adjustment of monetary expression of capital. At least one month before date of meeting administrators must announce by publication that documents to be considered are at disposal of stockholders and at least five days before meeting such documents must be published in newspapers. Copies of minutes of stockholders' meetings must be filed in Registry of Commerce and published.

Special meetings of shareholders for purpose of modifying estatutos require, at first call, quorum of two-thirds of capital entitled to vote, but any number appearing will suffice for second call. Approval of at least one-half of capital entitled to vote is required for increase in existing class without retaining proportionality with other classes, except if authorized by estatutos, creation of new and more favorable class, creation of partes beneficiárias, change in compulsory dividend, change in corporate purpose, or merger, consolidation or spin-off of company, dissolution of company or termination of liquidation status, or participation in group of companies. Changes in rights of preferred shares and issuance of new preferred shares require approval of affected shareholders.

Stockholders resident or domiciled abroad are required to appoint agent for service of process in Brazil for actions which arise under Corporation Law.

Bylaws may establish that resolution of disputes between shareholders and corporation or among shareholders may be resolved by arbitration.

Directors and Administrative Council.

Management of company will devolve upon board of directors and administrative council. Company must have board of directors and (voluntary) administrative council. In open companies and companies with authorized capital existence of administrative council is compulsory. Among others, administrative council has function of electing and removing directors, establishing policies for company, and supervising acts of directors. Administrative council is composed of minimum of three members elected by stockholders, according to law, for period of three years, but subject to removal at any time. All of its members must be stockholders. In election of members of administrative council, stockholders holding minimum of 10% of voting stock may request adoption of cumulative voting formula, by assigning to each share as many votes as there are members of administrative council to be elected.

Directors are empowered to represent company. Board of directors must be composed of at least two members. Up to one-third of members of administrative council may be elected as directors. Directors need not to be shareholders and will be elected and removed at any time by administrative council, or, in absence thereof, by stockholders.

Estatutos must establish rules for replacement of members of board and of administrative council and stockholders will establish their overall or individual remuneration.

Audit Committee.

Company must have audit committee composed of minimum of three, and maximum of five members, and equal number of alternates, who must be individuals resident in Brazil. Estatutos must provide for functioning of audit committee which, if not established on permanent basis, may depend, in each fiscal year, on request of shareholders representing at least 10% of voting stock or 5% of nonvoting stock of company.

Holders of preferred stock with nonvoting rights or with restricted voting rights are entitled to elect one member and his alternate of audit committee, same right being granted to minority stockholders holding 10% or more of voting stock. Majority stockholders are entitled to elect as many members as preferred and minority stockholders plus one. Members of audit committee must receive minimum remuneration of 10% of average remuneration paid to directors, excluding participation in profits. Audit committee, among other duties, must supervise administrators and issue opinion on annual report of administration as well as on proposals to amend stated capital, issuance of debentures, subscription bonus, investment plans, budget, distribution of dividends, conversion, merger, consolidation or spin off.

Increase of Capital.

Corporate capital may be increased by adjusting monetary expression of capital's value, through annual compulsory capitalization of monetary correction reserve, by issuance of shares within limits of authorized capital, by new subscription of shares, by conversion of debentures, partes beneficiárias, subscription bonus, stock options, and by capitalization of profits and reserves. Capital may be increased by new subscription after three-fourths of capital has been paid up. Shareholders shall have right of first refusal, in proportion to number of shares they hold, for subscription of capital increase. Estatutos may in certain cases preclude exercise of right of first refusal.

Fiscal Year and Financial Statements.

Company's fiscal year must last one year and closing date must be set in estatutos. By amendment to estatutos or upon organization, fiscal year may be given different duration.

At end of each fiscal year, board of directors must prepare, based on company's business record, balance sheet, accumulated profit and loss statement, statement of results of fiscal year ended, statement of sources and utilization of funds. Financial statement shall be supplemented by explanatory notes which must indicate among others, criteria adopted for appraisal of assets, investments in other companies, when relevant, increased value of assets resulting from revaluation, encumbrances created on assets, guaranties given to third parties and other liabilities, including rate of interest and maturity dates on long term obligations, number, types and classes of capital shares, eventual stock purchase options granted and exercised during year, adjustments from prior fiscal years, as well as any fact that occurred after closing of fiscal year which has, or may have, relevant effect on financial status and results of company.

Dissolution.

Corporations enter into dissolution: (a) On termination of their duration; (b) in cases provided in estatutos; (c) by resolution of general meeting of shareholders; (d) if there is only one stockholder, as evidenced at general meeting, if minimum of two is not re-established prior to following year's meeting, except when corporation's stock is totally owned by Brazilian company; (e) on cessation of authorization to act in cases where such authorization was required. Company enters judicial dissolution: (a) When its constitutive acts are annulled; (b) when shareholders representing at least 5% of corporate capital prove that company cannot fulfill its purposes; (c) in case of bankruptcy. Unless estatutos provide otherwise, general meeting of shareholders determines manner of liquidation and appoints liquidator and fiscal council who act during liquidation.

Bond Issues.

Corporations are authorized to issue debentures, nominative and with par value expressed in Brazilian or foreign currency. Monetary adjustment based on variation in exchange rate of foreign currency is permitted. Debentures may be converted into shares, and may assure their owners fixed or variable interest, monetary correction, participation in profits of company and refund premium. Debentures may also be guaranteed by mortgage or general lien on assets, be divested of right of preference or be subordinated to company's remaining creditors. General lien on assets assures debenture priority on company's assets, but does not preclude sale of properties which constitute such assets. Obligation not to transfer or encumber real property, or other properties subject to title registration, in instrument of indenture can be made binding on third parties, provided it is recorded in appropriate registry office. Indenture must specify majority required, which may not be less than half of outstanding debentures, to approve any modification in debenture's terms and conditions. Holder of debentures may be represented before company by “fiduciary agent”. Issuance of debentures abroad by Brazilian companies is conditioned upon prior approval of Central Bank.

Company with authorized but not fully paid up capital, may issue “subscription bonus” which entitles holder to preference in subscription of capital increases up to limit of authorized capital.

Conversion, Merger, Consolidation and Spinoff.

Conversion of corporation into another form of enterprise requires unanimous consent of stockholders, absent provision to contrary in estatutos, in which case dissenting shareholders have right to withdraw from company.

Merger (*incorporacão*), consolidation (*fusão*) and reorganization (*cisão*), are subject to approval by stockholders of companies involved and dissenting stockholder is entitled to withdraw from company, against reimbursement of value of his shares except in case of reorganization. Company with outstanding debentures must also obtain prior approval of debentureholders convened in meeting especially called for that purpose.

Mixed economy companies are subject to corporation law and to special federal laws, and are under jurisdiction of Securities Commission. Organization of mixed enterprise requires prior legislative approval and such company may engage only in activities stipulated in laws authorizing its organization. Mixed enterprises cannot be declared bankrupt but their assets are subject to attachment and garnishment and legal entity which controls said companies is subsidiarily liable for their obligations.

Securities Commission issued Ruling 358/2002 as amended requiring that information pertaining to acquisition of voting shares in publicly-held company be published in press.

Federal Supreme Court declared that mere presence of public funds in its capital is not sufficient to characterize company as “mixed-economy company”; enterprise must have been created by law.

Controlling, Controlled and Connected Companies.

Company is deemed to be controlled when controlling company, directly or through other controlled companies, owns number of shares which guarantees in permanent manner that it will prevail in corporate decisions and will have power to elect majority of administrators.

Companies are connected when one holds 10% or more of other's capital, without controlling it.

Annual reports and precise financial statements on connected and controlled companies are obligatory and, as general rule, reciprocal stock participation between company and its connected or controlled companies is prohibited.

Controlling corporation and its controlled companies may constitute group of corporations to carry out their respective objectives or towards participation in joint activities or ventures. Contract or agreement which sets up group of corporations must clearly define method for obtaining objectives of group and must be approved in accordance with rules for amending estatutos. Any dissenting stockholder is entitled to reimbursement of his shares. Group of corporations does not constitute legal entity per se, each company retaining its own legal identity and assets. Controlling company must be Brazilian company and must exercise, directly or indirectly, on permanent basis, control over controlled company.

Corporations and any other type of legal entity, whether or not under same control, may also establish consortium (consórcio) to carry out specific project. Consórcio, as group of corporations, does not constitute separate legal entity and rights and obligations of each member will be those spelled out in agreement. Agreement and any amendment thereto must be filed with Commercial Registry of place of consórcio's main office, and filing certificate must be published.

National Corporations.

(C.C., arts. 1126-1133). National corporations or companies are those organized under Brazilian law and with its headquarters located in country. Shares must be nominative when law requires that all or part of its stockholders must be Brazilian. Government may demand amendment of by-laws to those companies that require its authorization to operate.

Foreign Corporations.

(C.C., arts. 1134-1141). Foreign corporations or companies, whatever be their object, require authorization of Brazilian government to carry on business in country in their own name or through branches or agencies. They may, however, be shareholders of Brazilian companies except where otherwise provided by law. Petition for authorization must be accompanied by following documents: (a) proof that company is constituted in accordance with law of its country; (b) copy of its articles of incorporation and by-laws; (c) list of shareholders, giving names, professions, domiciles, and number of shares of each, except in case of shares to bearer; (d) copy of minutes of its shareholders' meeting which authorized business in Brazil and stated capital destined for operations in Brazil; (e) appointment of representative in Brazil who must be authorized to accept conditions under which authorization may be granted; (f) latest balance sheet. These documents must be duly legalized by Brazilian consul and accompanied by Portuguese translations made by official translator. Federal Government in granting authorization may establish such conditions as it may consider advisable in national interest.

Authorization having been granted, the decree of authorization and the documents on which it is founded must be published in the official newspaper and a copy of the paper must be filed in the Registry of Commerce where the company has its business. The company must also file a certificate of deposit of the part of its capital devoted to its operations in the country, which amount the government will designate in the decree of authorization. (A minimum capital for Brazil is required). Foreign corporations must use same name in Brazil which they had in their country, but may add words “of Brazil” or “for Brazil”. They must have permanent representative in country with full power to accept summons and decide any questions which may arise. Any changes in company's corporate documents require approval of Federal Government in order to take effect in Brazilian territory. Foreign companies must, under penalty of losing their authorization to do business, publish in official newspaper of Federal Government or of respective state of Brazil, publications which they are required to make under their national law with respect to accounts and acts of administration. Within 30 days after such publication, copy of official paper must be sent to government statistical service, under penalty of fine or imprisonment for representative of company. Federal Government may at any time withdraw authorization granted to foreign company if it violates law or its corporate objects, or acts in manner harmful to national economy.

Foreign corporations authorized to act in Brazil may, by authorization of the Government, become naturalized and transfer their domicile to Brazil. For that purpose they must file: (a) evidence that they are constituted according to the laws of their country; (b) their articles of incorporation and by-laws; (c) a list of their shareholders with full particulars; (d) their latest balance sheet; (e) proof of payment of their capital; (f) minutes of shareholders' meeting at which such naturalization was determined. The Federal Government may impose such conditions as it may consider advisable in the national interest.

Foreign corporations are subject to the same disabilities to which aliens in general are subject. (See category 4 Citizenship, topic 4.01 Aliens.) When authority to engage in banking operations is included in charter, it is advisable, in order to save time and expense, to file statement that no banking operations will be carried on in Brazil and to petition for registration as ordinary foreign corporation. Foreign participation in insurance companies is restricted to 50% of their total capital and third of their voting capital.

Limited Liability Companies.

See category 2 Business Organizations, topic 2.06 Partnerships.

Trading Companies.

(Decree-Law 1248 of Nov. 29, 1972 as am'd regulated by Decree 71866 of Feb. 27, 1973 as am'd).

Organization.

Must be organized as a company issuing shares of stocks. All shares with voting rights must be registered.

Trading company must be registered. Registration may be cancelled in event of nonobservance of law, or of fraudulent practices.

After registration, no transfers of registered shares and no change in capital structure are allowed without prior approval of corresponding governmental office.

Goods covered by law as being objects of trading companies seem to be only “manufactured products.” Goods, destined for exportation, will be sent directly by producer-seller to: (a) Port of embarkation to be shipped abroad, on order of trading company; (b) be deposited in special customs warehouses awaiting export by trading company.

Capital.

Minimum capital, is fixed by National Monetary Council. Fifty percent of minimum capital must be paid in by stockholders at time of registration, and rest within one year of registration date.

Trading company may be controlled by foreign capital although there are special financing arrangements applicable only to trading companies totally controlled by domestic capital.

For incentives granted, see category 22 Taxation, topic Taxes, subhead Income Tax, catchline Major Fiscal Incentives for Producer-Seller and Trading Companies, Under Trading Companies Law.

2.04 FOREIGN CORPORATIONS:

See category 2 Business Organizations, topic 2.03 Corporations.

2.05 LIMITED PARTNERSHIP:

See topic 2.06 Partnerships.

2.06 PARTNERSHIPS:

(C.C., arts. 981-1125).

Every partnership, whether Brazilian or foreign, in order to carry on business in Brazil, must be evidenced by a written agreement registered in Civil Registry of Juridical Persons, when partnership domicile is to be Federal District, or in local commercial registries when it is in any of states. No legal action may be brought against third person without such written evidence of partnership, but suit may be brought against persons as partners who have committed certain acts giving rise to legal presumption that they are partners.

General Partnership (Sociedade em Nome Coletivo).

Only physical persons may be partners of this partnership in which all partners have joint and unlimited liability for debts of partnership. Partners may limit their liabilities among them. Creditor of partner cannot collect from partner's quota before partnership has been dissolved. Partnership is administrated only by partners. Other provisions of Code regarding simple partnership are also applicable to these companies.

Limited partnership (Sociedade em Comandita Simples) has two kinds of partners: general partners, who have unlimited liability, and special partners, who are liable only for amount they contribute. Firm name may contain only names of general partners, or of some of them. Administration of limited partnership is undertaken by active partners and is subject to same norms as general partnerships. Silent partners may not interfere in business or act as agents of partnership, thereby incurring unlimited liability for all such acts, although they may examine books. Most of provisions relating to simple partnerships are applicable also to limited partnership.

Limited Partnership by Shares (Sociedade em Comandita por Ações).

Capital of partnership is divided into shares. Only shareholders may be administrators, and as such they are subsidiary and have unlimited liability for debts of partnership. Most provisions related to corporations are applicable also to limited partnership by shares.

Limited Liability Companies (Da Sociedade Limitada).

Liability of partners is limited to amount of their contribution, but all partners are jointly liable for payment of capital. Capital is divided into quotas of equal or different value. Participation is transferable. Company may be administrated by one or more managers, who may be partners or not. If administrators are not partners, their appointment must be made with approval of two-thirds of votes representing capital when capital is fully paid and by unanimous votes when capital is not fully paid. Supervision board may be appointed by annual meeting of partners; members of board may be partners and non-partners domiciled in country. Minority partners which represent less than 20% of social capital, have right to elect two members of supervision board and their deputies. Its name must be followed by words “Limitada”. Company must be registered at Registro Público de Empresas Mercantis. Provisions related to simple partnerships are also applicable to limited liability companies.

3 BUSINESS REGULATION AND COMMERCE

3.01 BANKS AND BANKING:

(Law No. 4595 of Dec. 31, 1964, as am'd). Financial institutions are those whose principal or secondary business is collection, brokering or investment of financial resources belonging to themselves or to third parties, in national or foreign currency, and custody of assets belonging to third parties. These financial institutions are controlled by Central Bank of Brazil.

3.02 BILLS AND NOTES:

Brazil approved the Geneva Conventions of 1930 and 1931 on forms, taxes and regulations of bills of exchange, promissory notes and checks. (Decree 57595 of Jan. 7, 1966, Leg. Decree 54 of Sept. 8, 1964 and Decree 57663 of Jan. 24, 1966).

Bill of exchange is an order of payment containing following requisites: (1) Word “letra” (bill); (2) order to pay a certain amount of money; (3) name of drawee; (4) time of payment; (5) place of payment; (6) name of payee who may be drawer, bearer, a third party or order; (7) date and place where bill is drawn; (8) signature of drawer.

Clause attempting to exclude or restrict responsibility of drawer will invalidate instrument as a bill of exchange. No effect will be given to a clause inserted in a bill of exchange providing for payment of interest unless bill is drawn at sight or at certain period after sight.

The holder is deemed authorized to fill in the date and place of drawing of a bill of exchange in which they are omitted. A bill may be drawn for payment at sight, on a day certain, a certain period after date or a certain period after sight. Bills failing to indicate the date of maturity will be payable at sight.

Title to a bill of exchange may be transferred by endorsement special or in blank. An endorsement “por procuracao” (with power of attorney) or “para cobranca” (for collection) confers upon endorsee powers for presentation, protest, collection, reendorsement or suit upon bill, subject to any restrictions which may be contained in endorsement. Partial endorsement is null and endorsement after maturity produces same effects as endorsement prior to maturity. Endorser is liable for acceptance and payment of bill unless he states otherwise. Endorser may forbid new endorsement and in this case he is not liable for payment to persons to whom bill is later endorsed.

Bills payable certain period after sight must be presented within one year from date of bill unless otherwise specified. Simple signature of bill by drawee will constitute acceptance. Drawee may limit acceptance to part of amount drawn. Any other modification in acceptance constitutes refusal to accept. Drawee is bound by acceptance to pay bill on due date.

Bill otherwise unmatured falls due (a) for want of acceptance, (b) for bankruptcy of drawee whether he has accepted bill or not, or (c) for bankruptcy of drawer when bill is not acceptable. However, maturity will be deferred until expressed maturity of bill upon acceptance by another person named in bill or upon acceptance for honor when bearer agrees with such acceptance.

Bill must be presented for payment at place therein designated therefor on day it is payable or on one of two following business days. A sight bill should be presented within one year after date of drawing if no other time is specified. Bearer is not obliged to accept payment before maturity. He must accept partial payment if tendered at maturity, but may protest for non-payment of the balance.

Protest is necessary as a means of proof and in order to preserve holder's right of recourse against drawer, prior endorsers and sureties, in following cases: nonacceptance, nonpayment; and refusal to redeliver bill tendered for acceptance or payment. Protest is necessary also to entitle holder to interest after maturity. Bill must be delivered for protest to proper official of place of payment on one of two business days following day on which bill is payable, in case of nonpayment; within same period fixed for presentation for acceptance, in case of want of acceptance. Protest official to whom bill has been delivered must protest it and execute notice of protest thereof in due form. Law 9492 of Sept. 10, 1997 as amended, regulates protest procedure by Negotiable Instruments Protest Office.

The holder of a protested bill must give advice of such protest to next prior endorser whose address is stated on bill, each endorser so notified to transmit such notice to next preceding endorser. Penalty for failure to give such notice is not loss of recourse against prior endorsers but liability for damages resulting from such failure, enforceable in ordinary action.

Protest may be waived if drawer or endorser inserts in bill a clause “without expenses,” or “without protest” or equivalent.

Law 6690 of Sept. 25, 1979 as am'd by Law 7401 of Nov. 5, 1985, provides for cancellation of protest by presentment of protested bill. After cancellation, neither protest nor cancellation will be recorded.

Promissory notes must contain: Words “Nota Promissoria” (promissory note), promise to pay a certain amount of money, time and place of payment, name of payee, date of and place where promissory note is made, and signature of maker. Provisions relating to bills of exchange mentioned above, except those dealing with acceptance, are applicable to promissory notes with necessary modifications, rights and obligations of maker of note are equivalent to those of acceptor of bill of exchange.

Checks must be presented within 30 days after date if payable in place where issued; 60, if issued in other places. Upon failure to make such presentation or to protest for want of payment holder loses his right of recourse in an exchange action against endorsers and sureties and also against drawer in case latter had funds available to meet check at time it should have been presented and such funds ceased to be so available through no cause attributable to drawer. (Law 7357 of Sept. 2, 1985).

“Duplicatas” (Duplicates).

Law 5474 of July 18, 1968 as amended provides that when both parties to sale on credit are domiciled in Brazil, seller may issue invoice in duplicate. Purchaser retains original, but must sign duplicate, formally undertaking to pay amount therein stated at specified time and place, and return it to seller. Duplicate, thus signed, is treated as promissory note.

Rural mortgage cedulas and rural notes and “duplicatas” are treated as negotiable instruments. See category 20 Mortgages, topic 20.01 Chattel Mortgages.

3.03 INTEREST:

(C.C., arts 406-416, 591; Decree 22626 of Apr. 7, 1933 as am'd; Law 1521 of Dec. 26, 1951 as am'd).

Legal rate, applicable to individuals and companies other than financial institutions, is same rate in force for late payment of taxes to Fazenda Nacional, which rate is floating rate. Compound interest is not allowed. Debtors may pay mortgage or pledge obligations before maturity but creditors may in this case require that payments be not less than 25% of original amount. Penal clauses are understood to serve purpose of indemnifying for judicial expenses and fees in collecting debts, and no penalty is demandable when collection is effected without judicial proceedings. Penal clauses in excess of value of obligation are void. Any simulation of rate of interest is considered usury and punishable by imprisonment and fine.

In obligations which are limited to the payment of a sum certain in money, damages for default are computed at the legal rate of interest unless otherwise stipulated.

3.04 MONOPOLIES, RESTRAINT OF TRADE AND COMPETITION:

(Federal Constitution art. 173, §4; Law 8884 of June 11, 1994 as am'd, Law 9019 of Mar. 30, 1995 as am'd, Decree 1488 of May 11, 1995 as am'd, Decree 1602 of Aug. 23, 1995; Decree 1751 of Dec. 19, 1995, 4732 of June 10, 2003 as am'd).

Constitution repressed abuse of economic power in form of acts intended to dominate domestic market, eliminating competition and arbitrarily increasing profits.

Antitrust law purpose is to restrain and prevent infringement of economic policy based on constitutional guarantees of free initiative, free competition, social functions of property, consumer's defense, and restraining abuse of economic power. Law is applicable to individuals and public or private juridical persons, associations of individuals or entities, de facto or legally organized, with or without legal representation, including foreign companies which operate in country through affiliates, agencies, branches, offices, establishments, agents or representatives. Infringement of economic order implicates joint responsibility of enterprise and of its administrators. All acts expressed in any form purpose of which is or may result in limitation or in any harm to free competition or to free initiative; domination of relevant market of goods or services; arbitrary increase of profits or practice of any form of abusive dominant position, constitute infringement of economic policy, regardless of negligence, even if final result is not obtained. Following are practices which are considered infringements of economic policy, among others; price arrangement between competitors, market division, combined bids, refusal to sell, underselling, dumping, imposition of resale prices on distributors, retailers and representatives, retaining of products or consumer goods, excessive increase in price or abusive profits.

Brazilian law is applied by Economic Law Office (SDE) in charge of investigations and by Administrative Board for Economic Defense (CADE) in charge of judicial procedure. Once enough evidence is collected CADE may order end of restrictive practice and also impose fine. Furthermore, all acts and agreements between enterprises are subject to registration and prior approval from CADE when they may limit or in any way jeopardize free competition, or result in domination of relevant market of goods and services.

Brazilian law does not blindly forbid existence of monopolies. Agreements between companies that may reduce market competition are valid if approved by CADE when their purpose is to increase productivity, improve quality or provide technological development.

By Decree 3602 of Sept. 18, 2000 Mercosur Protocol on Antitrust Rules entered into force. It is applicable to private or public entities, and individuals for acts affecting competition within area that may affect commercial relations among its member countries.

Antidumping.

Local production is protected from unfair practices of international trade by imposing antidumping and countervailing duties on import of foreign goods to compensate for damages caused to domestic economy by dumping or product subsidies. Dumping is considered unfair practice. Dumping is defined as import of foreign goods at lower price than normal value of similar or same product in origin or export place in normal commercial transactions. Normal value is determined according to method indicated by law. Law contains regulations and administrative procedure in conformity with use of antidumping and countervailing duties approved and adopted by General Agreement on Tariffs and Trade. Protective measures on importation of products may be issued to protect local production of same or similar products.

Chamber of Foreign Trade (CAMEX) is government entity in charge of fixing import and export tax rates, antidumping and countervailing duties, classification and registration of products, among others.

Consumer Protection Code.

(Law 8078 of Sept. 11, 1990 as am'd regulated by Decree 2181 of Mar. 20, 1997). Code deals with: Basic consumer rights; liability and obligations, health and consumer safety protection, misleading advertising, abusive practices, contractual protection and sanctions.

Law 7347 of July 24, 1985 as amended, regulated by Decree 92302 of Jan. 16, 1986 and Decree 1306 of Nov. 9, 1994, regulates legal actions and liability for damages caused to consumers, among others.

Law 10962 of Oct. 11, 2004 regulated by Decree 5903 of Sept. 20, 2006 deals with offers and fixing of prices for consumer's good and services.

3.05 NEGOTIABLE INSTRUMENTS:

See topic 3.02 Bills and Notes.

3.06 SALES:

(C.C., arts. 481-532).

A contract of sale, whereby one party agrees to transfer the title to specified goods in consideration of payment by the other party of a certain price in money, becomes binding as soon as the parties agree on the goods and the price. The determination of the price may be left to third parties or to market quotations at a specified time and place.

As a general rule, the transfer of title is effected upon delivery, actual or constructive. However, where the sale is made subject to the satisfaction of the purchaser, unless stipulated to be an absolute sale subject to revocation, title does not pass with delivery, and the purchaser holds the goods as bailee until he manifests his acceptance thereof or the period for such manifestation expires.

A sale by sample imports a warranty of quality corresponding to sample. A sale of goods which are customarily sampled, tested, weighed or measured before acceptance will be considered a sale to the satisfaction of the purchaser.

A contract of sale made with the intent on the part of the purchaser to resell or rent the goods for profit, where one of the parties to the sale is a merchant, or with the intent to use them as supplies in his business, is governed by the Commercial Code, which contains certain special provisions and unlike the Civil Code requires a judicial demand in order to place the purchaser in default. This code recognizes a conditional sales contract wherein title does not pass until performance of the condition. Besides sales by sample, the Commercial Code recognizes a sale by description of goods of standard qualities, questions as to the quality tendered to be decided by arbitration.

Special protection is accorded purchasers of lots on installments. Agreements to sell real estate may be recorded and the courts may adjudicate the property to the purchaser if the seller refuses to execute the final conveyance. (Decree-Law 58 of Dec. 10, 1937; Decree 3079 of Sept. 15, 1938). Likewise there is special protection for sellers of personal property on installments on conditional sales. (Decree-Law 1027 of Jan. 2, 1939).

4 CITIZENSHIP

4.01 ALIENS:

See category 16 Immigration, topic Immigration.

5 CIVIL ACTIONS AND PROCEDURE

5.01 ACTIONS:

Actions for Death.

See category 12 Estates and Trusts, topic 12.01 Death.

Limitation of.

See topic 5.03 Limitation of Actions.

5.02 JUDGMENTS:

Judgments for liquidated amounts are executed by executive mandate, issued by the judge. See category 7 Debtor and Creditor, topic 7.03 Executions.

Where it is necessary to reach goods of the judgment debtor in other judicial districts proceedings may be taken and execution issued in such other districts. An unliquidated judgment, before becoming capable of execution, must be liquidated by court proceedings or arbitration under court appointment.

Foreign Judgments.

Judgments of foreign courts are enforceable in Brazil under certain conditions and after they have been “homologated” by the Federal Supreme Court, which “homologation” can be granted only after hearing the parties and the attorney general. Opposition to the enforcement of a foreign judgment may be based on any uncertainty as to the authenticity or meaning of the instrument, that it is not a final judgment, was rendered by a court without jurisdiction, that the parties were not duly served or default not legally proved, or that the judgment contains some provision contrary to public order or law of Brazil. In no event can evidence be introduced respecting the basis of the issues involved. (Decree-Law 4657 of Sept. 4, 1942, C.P.C. art. 584).

5.03 LIMITATION OF ACTIONS:

(C.C., arts. 189-206).

Prescription does not run between husband and wife during the continuance of the marital union, between parent and child or guardian and ward during the continuance of the parental or tutelary power, against persons absolutely incapable civilly, against persons abroad on national, state or municipal service, or against those serving in the army or navy in time of war.

Prescription is interrupted by personal citation of the debtor or judicial protest (even before a judge not competent in the matter), presentation of claim against an estate, judicial act placing the debtor in default, or by any unequivocal act on the part of the debtor importing an acknowledgment of the cause of action.

After the prescription period has run, the defense may be waived by the debtor, if without prejudice to the rights of third parties, either expressly or by implication from an act incompatible with the claim being unenforceable.

Civil Actions.

Prescription periods may not be changed by agreement of parties. In general all actions prescriptive in ten years, unless law fixed shorter periods.

Among the more important provisions for prescription within a shorter period are the following:

Five years: collection of debts stated in public or private instrument; collection of professional fees.

Four years: any claims related to tutorship.

Three years: actions to recover rents of real property, temporary or permanent rents, recover interest dividends or any accessory obligation, payable for periods not longer than one year, unfair enrichment, damages; actions for violation of law or by-laws against incorporators, administrators and auditors of corporation; collection of credit instrument, claims on mandatory insurance protection.

Two years: child support and alimony.

One year: room and board, insurance contracts, collection of experts, arbitrators' appraiser's fees, claims of creditors against in case of liquidation of corporation.

Commercial Actions.

Actions founded on commercial obligations contracted by public or private instrument prescribe in 20 years except where a shorter period is fixed for particular classes of actions, among which are the following:

Five years: executive actions on negotiable instruments against the maker, drawer, acceptor and their sureties; action against former partners who are not liquidators of a dissolved partnership.

Four years: on debts provable by accounts stated or by accounts rendered to a merchant presumed solvent;

Two years: actions for performance of commercial obligations provable only by oral testimony:

One year: actions for wages, services or payments pursuant to contract, unless evidenced by written instruments, executive actions against endorsers of bills and notes:

An action to recover for merchandise entrusted to a merchant without a receipt signed by the defendant is barred in two years if the debtor resides in the same state in Brazil as the creditor, in three years if he resides in a different state and in four years if he resides outside of Brazil.

Actions against the Government.

In the case of debts owing by the Federal Government or by government corporations, prescription can be interrupted only once, and the period remaining can be only one-half the original period. (Decree-Law 4597 of Aug. 19, 1942).

5.04 PRESCRIPTION:

See topic 5.03 Limitation of Actions.

5.05 SEQUESTRATION:

(C.P.C., Arts. 813 to 825. See, however, category Courts and Legislature, topic Statutes.)

Precautionary measures may be taken to secure the interests of the parties in litigation: such as attachment (arresto) and sequestration (sequestro).

Attachment may be ordered by judge when: (a) Debtor without fixed domicile intends to leave or defaults on his obligations; (b) debtor who has domicile leaves or tries to alienate his property, movable or immovable.

In all cases there must be written proof of such debt.

Sequestration may be ordered by judge on: (a) Movable or immovable property if that property is in litigation; (b) gains of revindicated immovable property if defendant wastes them; (c) community property (bens do casal) in case of separation or annulment if spouse wastes it.

6 COURTS AND LEGISLATURE

6.01 COURTS:

(Const. arts. 92-126, Law 7746 of Mar. 30, 1989 as am'd).

The judicial system of Brazil comprises Federal Supreme Court, Superior Court of Justice, Regional Federal Courts and Federal Judges, military courts, labor courts, electoral courts and state courts.

Federal Supreme Court and Superior Courts have jurisdiction over entire territory and have their seat in Federal Capital.

Federal Supreme Court processes and adjudicates, originally among others; Direct actions of unconstitutionality of federal or state law or normative act, and requests for writ of prevention in direct actions of unconstitutionality; litigation between foreign State or international organization and Republic, State, Federal District or Territory; disputes and conflicts between Republic and States, Republic and Federal District, or between one another, including their respective indirect administration entities; extradition requested by foreign State; homologation of foreign court decisions and granting of “exequatur” to letters rogatory, conflicts of jurisdiction between Superior Court of Justice and any other courts, between Superior Courts, or between latter and any other court; and request for “habeas corpus” as indicated by Constitution. Adjudicates, at ordinary appeal level: “habeas corpus”, writs of mandamus, “habeas data” and writs of injunction decided in sole instance by Superior Courts, in event of denial; and political crimes; adjudicates, at extraordinary appeal level, cases decided in sole or last instance, when appealed decision: is contrary to provision of Constitution; declares unconstitutionality of treaty or federal law; and considers valid law or local government contested under Constitution.

Superior Court of Justice processes and adjudicates, originally among others: Writs of mandamus and “habeas data” against act of Minister of State or of Court itself; conflicts of jurisdiction between any courts, with some exceptions; criminal reviews of and rescissory actions for its decisions; and conflicts of authority between administrative and judicial authorities of Republic, States and Federal District. Adjudicates, at ordinary appeal level: “habeas corpus” decided by Federal Regional Courts, courts of States, of Federal District and Territories, when decision denies it; writs of mandamus decided in sole instance by Federal Regional Courts or by courts of States, of Federal District and of Territories, when decision denies it; and cases in which parties are foreign State or international organization on one part, and Municipality or person resident or domiciled in Brazil on other part. Adjudicates, at special appeal level, cases decided, in sole instance or last instance, by Federal Regional Courts or by courts of States, of Federal District and Territories, when appealed decision: is contrary to treaty or federal law or denies effectiveness thereof; considers valid law or act of local government, contested in view of federal law; or confers upon federal law interpretation different from that which has been conferred upon it by another court.

Federal Regional Courts process and adjudicate, originally: Federal judges of area of their jurisdiction, including those of Military Courts and of Labor Courts, in common crimes and in criminal malversion, and members of Federal Attorney General's Office, except for jurisdiction of Electoral Courts; criminal review of and rescissory action for their decisions or those of federal judges of region; writs of mandamus and “habeas data” against act of Court itself or of federal judge; “habeas corpus”, when constraining authority is federal judge; conflicts of jurisdiction between federal judges subordinated to Court. Adjudicate at appeal level, cases decided by federal judges and by state judges exercising federal authority in area of their jurisdiction.

Federal judges process and adjudicate among others: Cases between foreign State or international organization and Municipality or person domiciled or resident in Brazil; cases based on treaty or contract of Republic with foreign State or international organization; crimes set forth in international treaty or conventions, when, prosecution having commenced in Brazil, result has taken place or should have taken place abroad, or reciprocally; crimes against organization of labor and, in cases determined by law, against financial system and financial economic order; crimes committed aboard ships or aircraft, except for jurisdiction of Military Courts; crimes of irregular entry or stay of foreigner, execution of letters rogatory after “exequatur”, and of foreign court decision after homologation, cases referring to nationality, and to naturalization; and disputes over rights of indians.

Electoral Courts are Superior Electoral Court, Regional Electoral Court and Electoral Boards. Law shall provide for organization an jurisdiction of electoral courts, judges and boards. Decisions of Superior Electoral Court are unappealable, with exception of those which contravene Constitution and those denying “habeas corpus” or writ of mandamus. Decisions of Regional Electoral Courts may only be appealed when: Rendered against express provision of Constitution or of law; there is divergence in interpretation of law among two or more electoral courts; deal with ineligibility or issuance of certificates of election in federal or state elections; annul certificates of election or decree loss of federal or state elective offices; deny “habeas corpus”, writs of mandamus, “habeas data” or writs of injunction.

States Courts are organized observing principles established in Federal Constitution. Jurisdiction of courts is defined in Constitution of State.

Military courts decide cases concerning military crimes as defined by law.

Labor courts settle disputes between employees and employers. The highest court of labor disputes is the Tribunal Superior do Trabalho. (Consolidation of Labor Laws, arts. 643-910;

Decree-Law 5452 of May 1, 1943 as am'd).

6.02 LAW REPORTS, CODES:

See topic 6.04 Statutes.

6.03 LEGISLATURE:

See category 1 Introduction, topic 1.02 Government and Legal System.

6.04 STATUTES:

Civil Code became effective on Jan. 16, 2003. Commercial Code adopted in 1850 has been considerably amended and supplemented by number of special laws. Code of Civil Procedure (Law 5869 of Jan. 11, 1973 as am'd); Criminal Code (Decree-Law 2848 of Dec. 7, 1940); Code of Criminal Procedure (Decree-Law 3689 of Oct. 3, 1941); Consolidation of Labor Laws (Decree-Law 5452 of May 1, 1943 as am'd).

7 DEBTOR AND CREDITOR

7.01 ATTACHMENT:

(C.P.C., arts. 583-590, 731).

Attachment may be issued in executions based on judgments as well as on certain classes of privileged claims, which include among others following: (a) Debts represented by bills of exchange, promissory notes, checks and trade-bills; (b) debts acknowledged by public or private instruments attested by two witnesses; (c) debts secured by mortgages, pledges, warrants as well as certain insurance claims; (d) claims for leases; (e) tax debts. In such cases attachment will issue unless debtor pays within 24 hours after demand.

See also category 5 Civil Actions and Procedure, topic 5.05 Sequestration.

7.02 BANKRUPTCY:

(Law 11101 of Feb. 9, 2005 as am'd).

Law regulates out-of-court reorganization, judicial reorganization and bankruptcy of businessmen and business companies, except public entities, mixed capital companies, insurance companies, financial institutions, credit unions, and special savings companies, among others, which are regulated by special laws.

Reorganization.

Out of Court Reorganization.

Reorganization plan may be proposed and negotiated by debtor with creditors or group of creditors of same kind and subject to similar conditions of payment, under conditions established by law. In order to be bidding to creditors that approved and signed it, reorganization plan shall be ratified by court. Publication of notice calling all creditors to file oppositions to out-of-court reorganization plan is published in official paper and in nationwide circulation newspaper or newspaper where debtor is domiciled. If there is no opposition or opposition is denied, reorganization plan is ratified by court and plan is effective. If out-of-court reorganization plan was signed by creditors representing over 3/5 of all claims of each kind included in plan, debtor may further file ratification of out-of-court reorganization plan to bind all creditors, including those who did not approve nor signed it. For purpose of verification of quorum for ratification of out-of-court reorganization plan, credits in foreign currency are converted into local currency at exchange rate prevailing on day before signing date of out-of-court reorganization plan. Once ratified, out-of-court reorganization plan binds all creditors included therein, with respect to claims existing up to petition date for ratification. If plan is not ratified, debtor may file new petition for ratification of another out-of-court reorganization plan.

Judicial Reorganization may be petitioned for by debtor, surviving spouse, debtor's heirs, executor or remaining partner. Debtor, at time of petition, shall have been doing business regularly for over two years, and under conditions established by Law. All claims existing on date of petition are subject to judicial reorganization, including credits not due, in which case creditors preserve their rights and privileges. Debtor may file petition for reorganization with judge stating his financial conditions and reasons for his petition. Petition itself must comply with specific requirements of form and substance. Judge must rule on petition, either rejecting it for failure to meet procedural requirements or appointing receiver or reorganization committee, depending on complexity of reorganization. Judge also orders publication of notice to creditors and interested parties to appear, orders stay of execution against debtor on claims subject to reorganization. From that date on, all pending actions and debt obligations are automatically stayed. Debtor continues to manage business under supervision of receiver and creditors committee. Debtor may be dismissed if he fails to observe requirements of receivership. Dismissal of reorganization petition and declaration of bankruptcy may occur when debtor fails to file reorganization plan within 60 days after publication of notice. After notices of petition have already been published, debtor may withdraw petition for judicial reorganization with express authorization of creditors' meeting. Within 150 days from appointment of receiver, judge must call creditors' meeting to approve plan of reorganization. Creditors' meeting is composed by three classes of creditors: creditors with labor related claims, secured creditors and unsecured creditors with special and general privileges. As general rule, vote of creditors in creditors general meeting is proportional to amount of their credit; for this purpose credits in foreign currency are converted into local currency at exchange rate prevailing on day before creditors general meeting. Plan of reorganization must be approved by creditors' vote as indicated by law and must be registered and notified to proper authorities. Once reorganization decision is rendered, debtor shall continue under judicial reorganization until all obligations included in plan and falling due, up to two years after declaration of judicial reorganization, have been performed. Nonperformance of any obligation established in plan during this period shall convert reorganization into bankruptcy. Also, if agreement is not reached, judge shall decree debtor's bankruptcy. Rights and guarantees of creditors are reinstated under terms and conditions originally contracted; any amounts paid being deducted and valid acts performed within judicial reorganization are being held harmless. There is special judicial reorganization plan for micro enterprises and small companies.

Conversion of Judicial Reorganization into Bankruptcy.

Judge shall decree debtor's bankruptcy when debtor fails to comply with judicial reorganization plan as indicated above, if agreement is not reached by creditors or by resolution approved by over half total amount of claims represented at general meeting of creditors. Decree of bankruptcy of companies with unlimited liability partners also entails bankruptcy of its partners, who become subject to same legal effects produced in relation to bankrupt company, and they shall be served with process.

Bankruptcy petition may be filed by debtor, his surviving spouse, any heir or executor; partner or shareholder of debtor pursuant to law or company's articles of incorporation, or any creditor.

Grounds for bankruptcy are: (1) Failure to pay at maturity an indebtedness over amount equal to 40 minimum wages at date of petition or executed for any liquid amount, does not pay, deposit or appoint sufficient assets for attachment within legal term; (2) perform any following acts, unless they are part of judicial reorganization plan: (a) resorting to precipitate liquidation or fraudulent or ruinous methods to make payments; (b) transferring assets to third party, whether or not creditor; (c) contracting simulated debts, concealing or diverting property, retarding payments or defrauding creditors; (d) granting mortgages, pledges or other security, preference or privilege in favor of any creditor without retaining free and unencumbered property sufficient to pay all other debts; (e) absenting or concealing oneself without leaving representative to administer business and pay creditors, abandoning establishment or attempting to hide from his domicile, headquarters or his principal establishment; (f) failing to comply within legal term, any obligation assumed under judicial reorganization plan.

Creditors not domiciled in Brazil shall post bond to guarantee court expenses and payment of indemnity in case petition is dismissed. Judge grants ten days to debtor to answer petition to bankruptcy, with his reply, besides other defenses which may be offered, debtor may set up proposal for agreement with creditors to prevent bankruptcy (see subhead Reorganization, supra) although not yet in force or he may avoid proceedings by depositing amount due.

During proceedings for adjudication based upon any but first of grounds above enumerated, judge may order sequestration of books, correspondence and assets of alleged bankrupt, and may prohibit any alienation or disposal thereof. After citing alleged bankrupt and allowing legal period to answer, judge must either dismiss petition or adjudicate debtor bankrupt. Adjudication order names trustee in bankruptcy, designates period for proving claims, fixes legal term of bankruptcy (retroactive 90 days as of petition), order publication of notice containing full decision that decrees bankruptcy and list of creditors, and may provide for preventive detention of alleged bankrupt when requested by Attorney General with evidence of commission of crime punishable under bankruptcy law. General meeting of creditors may be called to form Committee of Creditors.

Appeal from bankrupt adjudication does not suspend its effect. Appeal also can be filed from decision dismissing petition in bankruptcy.

Upon adjudication, all debts of bankrupt and partners with unlimited and joint liability immediately mature except obligations subject to condition, latter being provable but payment being deferred until performance of condition. Bilateral contracts will not be annulled by bankruptcy of party, but may be carried out by trustee with authorization of Committee of Creditors, if to advantage of bankrupt estate. Failure to carry out such contracts will subject bankrupt estate to liability for loss and damage.

Acts specified below are revocable in an action by the bankrupt estate against the party contracting with the bankrupt, whether or not performed with knowledge of the financial condition of the debtor or with intent to defraud the creditors. These acts are: (1) Payment of unmatured debts within the legal period of bankruptcy; (2) satisfaction of matured debts within such legal period by any means other than as provided in the contract; (3) execution of mortgages or other real guaranties within legal period as security for debts contracted prior to such period; (4) donations made within two years preceding adjudication; (5) renunciation of devise, legacy or usufruct within two years preceding adjudication; (6) registration of mortgages, liens or transfers inter vivos effected after adjudication; (7) sale or transfer of business without obtaining consent of creditors; (8) any act performed by debtor with intention of prejudicing his creditors, provided there was fraud on part of other party also.

Trustee appointed in order of adjudication is charged with duty to administer, appraise and conserve bankrupt estate, liquidate perishable assets, present detailed report of bankruptcy, including balance sheet of bankrupt and list of all claims against estate; represent estate before courts, and furnish to interested parties information and extracts from books of bankrupt. Trustee is entitled to remuneration determined by judge.

Creditors may intervene in any action instituted by or against the bankrupt estate, examine the books and papers of the bankrupt and the administration of the estate, and institute proceedings tending to benefit the estate or promote the proper execution of the bankruptcy law, costs to be paid by the bankrupt estate when it derives benefit from such proceedings. Absent creditors may be represented by proxy or attorneys in fact, as indicated by law.

A creditor who fails to prove his claim within the period assigned may nevertheless, subject to loss of right to dividends meanwhile distributed, be admitted as a common creditor at any time before distribution of final dividends.

Claims are classified as follows: claims for damages resulting from accidents at work; other labor claims up to 150 minimum wages per creditor; secured claims; tax claims; except tax fines; other claims of fiscal nature; special privileged claims; claims with general privilege; unsecured claims; contractual penalties and fines for breach of criminal or administrative law, including tax related fines and subordinated claims. Labor related claims assigned to third parties shall be considered unsecured. Claims for costs and expenses incurred by estate shall be considered post petition claims and shall be paid with precedence over above mentioned ones.

Property sequestered or passing to trustee with bankrupt estate may be recovered by owner with proof of ownership or right based on contract. Recovery may be granted even though property has already been transferred by trustee; owner shall receive appraised amount of asset. Articles purchased on credit by bankrupt within 15 days prior to bankruptcy petition may also be recovered if they have not been transferred by bankrupt estate.

Trustee or any recognized creditor may bring action for exclusion, rectification, or reclassification of claims, basing such action upon falsity, fraud, deceit, essential mistake of fact, or documents unknown at time of verification of claim.

After hearing trustee and following advice of Committee of Creditor, if any, judge shall order disposal of assets in auction, by oral bidding, sealed bids or public proclamation. Publication of notice 15 days in advance in case of personal property, and 30 days in advance in case of disposal of company or of real property. Disposal shall be made for highest amount offered, even if less than appraisal value.

Once restitution is made, post-petition claims are paid, and general list of creditors is consolidated, amounts received by liquidation of assets shall be allocated to pay creditors, in accordance with their classification, as established by law.

Where bankruptcy proceeds to final liquidation, after distribution of final dividends and presentation of final report and accounts by trustee, judge will order formal closing of bankruptcy, which should be within two years after adjudication, if not extended for causes beyond control of trustee. Such order of judge does not have effect of discharging bankrupt of provable claims, and upon granting order judge will issue to creditors requesting it certificate setting forth record of proceedings and unpaid amount of debtor's claim as admitted in bankruptcy. Such certificate will entitle creditor, until debt is barred by statute of limitations (interrupted during bankruptcy proceedings) or until discharge (rehabilitation) of bankrupt to bring executive action for unpaid balance of debt if claim was not contested in bankruptcy, or, if so contested, to prosecute such action to recover unpaid balance as he might have instituted upon original debt.

Once all creditors are paid, if there is any balance amount, shall be returned to bankrupt.

Bankrupt may obtain order of discharge (rehabilitation) if he has paid his creditors in full both principal and interest.

If he pays more than 50% of unsecured claims beyond value of estate or after five years of formal closing of bankruptcy, if he is not convicted of crime. Ten years are required if he is convicted of crime. Discharge completely terminates effects of bankruptcy.

Fines and up to six years of imprisonment may be imposed to bankrupt for crimes committed against creditors.

7.03 EXECUTIONS:

(C.P.C. arts. 566-795).

After an order of execution has been issued and property attached, the attached property is appraised and thereupon offered for sale on notice published in press which shall also state that if property is not sold for amount superior to appraised value, it shall be sold at any price between tenth and 20th day thereafter. Judge can grant to creditor usufruct of property, if this diminishes burden upon debtor and debt can be effectively satisfied. Judge presides over sale. If property belongs to persons who lack capacity and not more than 80% of appraised value is offered, judge postpones sale for one year.

Before minutes of sale are signed, executing creditor may request that property be adjudged to him for amount of appraisal.

Before sale or adjudication, debtor may at any time redeem property, paying or depositing amount of debt plus interest, costs and attorney fees.

7.04 EXEMPTIONS:

(C.P.C. arts. 648-649).

Property which is considered by law not subject to attachment or garnishment and that which is inalienable, is exempt from execution, particularly: (a) Inalienable property and property voluntarily declared not subject to execution; (b) provisions and combustibles for maintenance of debtor and his family for one month; (c) wedding ring and family pictures; (d) remuneration of judges, teachers and public officers except for child support; (e) military equipment; (f) books and utensils necessary for profession; (g) all pensions necessary for support of debtor and his family; (h) materials necessary for work in progress; (i) life insurance.

7.05 HOMESTEADS:

(C.C., arts. 1711-1722).

Homestead exempt from attachment and execution, except for tax debts, comprises dwelling house and furniture, landscaping, equipment and machinery for professional use.

7.06 PLEDGES:

(C.C., arts. 1431-1437, 1467-1472).

A pledge may be effected by actual delivery of personal property to the creditor or his representative pursuant to a written instrument specifying the amount of the debt and the articles pledged.

In addition to pledges by agreement, Brazilian law recognizes liens or pledges by operation of law in favor of innkeepers with respect to the baggage, furniture, jewels and money of guests, and in favor of landlords with respect to furniture of tenants, the creditor in such cases being allowed to hold one or more articles up to the equivalent of the debt, thereupon beginning an action to collect the debt.

7.07 USURY:

See category 3 Business Regulation and Commerce, topic 3.03 Interest.

8 DISPUTE RESOLUTION

8.01 ARBITRATION:

(Law 9307 of Sept. 23, 1996; Decree 4719 of May 4, 2003).

Any dispute arising out of patrimonial rights is allowed to be submitted to arbitration. Arbitration may be de jure or in equity. Arbitration agreement must be in writing whether in form of arbitral clause in contract or in separate agreement. In case of adhesion contract, arbitration is valid only if adherent party initiates proceedings or expressly agrees to arbitration. Invalidity of contract does not extend to arbitration clause contained therein. Arbitration commitment is that to which parties agree to submit already existing dispute to arbitration. If any party refuses to sign arbitration commitment out of court, it can be compelled to do so in court. It can be one arbitrator unless parties have agreed on different uneven number. Deadline for arbitrators to issue award is six months counting from first hearing unless parties have agreed to different term. Foreign arbitral awards are recognized or executed in Brazil according to international conventions and this law; and are subject to homologation of Federal Supreme Court.

Dispute resolution arising out of international commercial relations between individuals and legal entities domiciled in member countries of southern common market MERCOSUR may be submitted to arbitration to Centre for Conciliation and Arbitration of International Arbitration Court for Mercosur.

Conventions.

Convention on the Recognition and Enforcement of Foreign Arbitral Awards, New York, 1958; Inter-American Conventions on International Commercial Arbitration, Panamá, 1975 and on Validity of Extraterritorial Judgments and Arbitral Awards, Montevideo, 1979; International Commercial Arbitration Agreement of Mercosur, Buenos Aires, July 23, 1998.

9 DOCUMENTS AND RECORDS

9.01 ACKNOWLEDGMENTS:

Certificates of acknowledgment in the form customary in the United States are not employed in Brazil. Certain instruments, such as deeds and mortgages, must be “public,” i.e., executed on the books of a notary; others may be “private.” (See topics 9.02 Notaries Public, Records; category 21 Property, topic 21.04 Deeds.) Latter are valid between parties, and constitute full evidence against them if signed by two witnesses, but have no effect as to third persons until recorded.

When instruments are executed before a notary, the equivalent of an acknowledgment is contained in a clause inserted in the body of the document, whereby the notary certifies that the parties are known to the two subscribing witnesses, and (if such be the case) to the notary himself, and that they executed the instrument before him. For a private instrument to be recorded, the signature of the maker must be “recognized” by a notary, i.e., the instrument must have endorsed thereon one of the following statements by a notary: (a) That he recognizes the signature of the maker, which necessitates having the maker's signature registered on the notary's books; or, instead of such “authentic” recognition, (b) by direct guarantee when he certifies that two witnesses personally before him vouch for the genuineness of the signature; or (c) by indirect guarantee when the notary recognizes the signatures of two persons who declare in writing that they recognize the genuineness of the signature in question.

If the document is to be used or recorded in a jurisdiction other than that of the notary who recognized the maker's signature, that notary's signature must in turn be recognized by a notary of such other jurisdiction.

Instruments executed abroad for use in Brazil must be authenticated by a Brazilian consul. This is usually accomplished by having the authority of the notary who takes the acknowledgment certified by the proper court or county clerk, whose signature is in turn certified by the Brazilian consul. Such documents must be translated into Portuguese and recorded. (Decree 84451 of Jan. 31, 1980).

9.02 NOTARIES PUBLIC:

(Const. art. 236, Law 8935 of Nov. 18, 1994 as am'd).

Notaries are commissioned by public competitive examination of tests and titles; they must be lawyers of Brazilian nationality with legal capacity and in good standing. Law regulates rights and duties of notaries, disciplinary rules and criminal responsibility. Their activity is supervised by Judicial Power. They keep books in which contracts, deeds, powers of attorney and wills are inscribed and signed, notary thereupon supplying parties with certified copies of document as executed, which copies have force of originals. These books are preserved indefinitely as public records.

Notaries also maintain a registry of signatures and certify, by comparison, the authenticity of signatures on documents. Notaries' records are open to public inspection.

See also topics 9.01 Acknowledgments, Records; categories 12 Estates and Trusts, topic Wills; Property, topics Deeds, Powers of Attorney.

9.03 RECORDS:

Many important documents must be in the form of “public instruments,” executed upon the books of a notary, which books are public records. In addition to the notarial archives, there are registries in charge of public officials (registrars) for the recording of deeds, mortgages and other documents for authentication and conservation and to establish their validity against third parties.

All deeds and mortgages should be registered, an “extract” being entered on the registrar's books, and many other instruments are sometimes registered, such as leases and powers of attorney.

Law 6015 of Dec. 31, 1973 as am'd regulates following registries: (a) Natural persons; (b) juridical persons; (c) deeds and documents; (d) real property. Detailed requirements are provided by law for each of said registries. Documents must strictly comply with legal provisions or will not be recorded by public officer.

Law 8934 of Nov. 18, 1994 as amended and Decree 1800 of Jan. 30, 1996 as amended regulate Public Registry of Commercial Companies which is in charge of archiving documents related to constitution, amendment, dissolution and liquidation of commercial enterprises and corporations organized according to local laws; and acts related to foreign commercial enterprises authorized to operate in Brazil, and update such information.

9.04 SEALS:

Neither individual nor corporate seals are used in Brazil.

10 EMPLOYMENT

10.01 LABOR RELATIONS:

(Const. arts. 6-11; C.C., arts. 593-609; Consolidation of Labor Laws, Decree-Law 5452 of May 1, 1943 as am'd; Law 7783 of June 28, 1989; Law 7998 of Jan. 11, 1990 as am'd; Law 8036 of May 11, 1990 as am'd).

Employees can opt between two kinds of regimes for protection under labor law, with regard to indemnification and unfair dismissal. Under first and older kind, when no specified term has been stipulated for duration of employment, industrial or commercial employees or workmen are entitled, on dismissal, to bonus of one month's salary for each complete year of work. This compensation as well as notice are required only when there is no just cause for dismissal. Unfaithfulness, carelessness, drunkenness, indiscretion, disobedience, lack of respect towards master and constant gambling are just causes for dismissal. No commercial or industrial employee or workman having more than ten years of employment may be dismissed without just cause proved in thorough inquiry. If employer closes his business for reason other than force majeure, he must pay double compensation. Second option available for employee is Guaranty Fund for Time of Service (FGTS) by virtue of which 8% of monthly salary of employee, which is deposited monthly in separate bank account by employer, can be withdrawn by employee upon unfair dismissal by employer. Upon such dismissal, employer must also pay further 40% of total of such amount to employee. Complementary Law 110 of June 29, 2001 establishes additional social contributions equal to 5% of monthly salary including 8% contribution to FGTS and in case of dismissal without just cause employers must pay amount equal to 10% of total amount deposit in Guaranty Fund for Time of Services.

All employees and workmen are entitled to 30 days vacation per year; duration of holiday's period of time is given in relation to days of absence from work, per year. All workers are guaranteed right to strike. Strike suspends employment contracts. Employers may not rescind such contracts. Payment in event of dismissal is guaranteed. Law requires notification to employers 48 hours in advance of any strike and 72 hours in advance if essential activities are involved.

Hours of labor are limited to eight per day and 44 per week, with certain exceptions. Restrictions are imposed on the employment of women and children. In case of pregnancy or adoption or guardianship of infants up to one year old, women have 120 days of maternity leave. There is also paternity leave. It is not permitted to pay alien more than Brazilian for same kind of work. Minors between 14 and 16 years old may only be employed as apprentice under conditions indicated by law. Employers must hire and register in special learning courses between five and 15% of employees performing services that require professional training. Infringement of law is subject to sanctions.

At least two-thirds of employees must be Brazilian when employers have more than three employees and their salaries must be equal to two-thirds of payroll. These rules do not apply to agricultural activities processing local produce and certain rural activities. For purpose of these rules, foreigners married to Brazilian or having Brazilian children with more than ten years of residence are considered as Brazilian. In case of lay off, foreign workers are laid off first. Law 10101 of Dec. 19, 2000 regulates profit sharing.

Law 7998 of Jan. 11, 1990 as am'd created unemployment insurance to provide temporary financial support to workers, who are unemployed on account of dismissal without just cause, or of total or partial paralyzation of employer's activities.

There are government pension and retirement funds which retire employees and disabled workmen, and on their death, pension their widows and minor children; employees and workmen must contribute certain amount of their salary to these funds and employers too. (Law 8213 of July 24, 1991 as am'd regulated by Decree 611 of July 21, 1992 as am'd, Decree 3048 of May 5, 1999 as am'd). Complementary Laws 109 of May 29, 2001 and Decree 4942 of Dec. 30, 2003 regulate voluntary and complementary private pension plan supervised by government.

Brazil has signed and ratified most of international conventions on subject prepared by International Labor Organization.

For collective bargaining and class representation, see category 2 Business Organizations, topic 2.02 Associations, subhead Collective Bargaining.

11 ENVIRONMENT

11.01 ENVIRONMENTAL REGULATION:

(Const. Art. 225, Law 6938 of Aug. 31, 1981 as am'd regulated by Decree 4297 of July 9, 2002, Law 7347 of June 24, 1985, Law 9008 of Mar. 21, 1995, Decree 1306 of Nov. 9, 1994, Law 9605 of Feb. 12, 1998 as am'd, Decree 3179 of Sept. 21, 1999 as am'd, Law 10650 of Apr. 16, 2003).

Constitution establishes legal framework for environmental legislation granting to all persons right to enjoy ecologically balanced environment, and duty to government and people to defend and preserve it for present and future generations. Among duties set forth for public authorities is preservation and reestablishment of essential ecological processes, definition of territorial areas to be protected, and prior analysis of conditions involving installation and development of any potential activity to determine environmental impact which may be caused. Federal legislation provides for general environmental protection while state and municipal law set forth more specific definition of activities which may be developed within that jurisdiction. Some activities are restricted to exploitation by government or by some state-owned companies, but may be developed by private companies by means of licensing contracts; among such activities are: mining, urban real estate development, transportation of dangerous material, chemical industry, nuclear energy, projects involving use of natural resources. As general rule, polluter has civil liability, independently of existence of fault; once damages are proven, it is enough to evidence its connection with action or omission by agent; not only is polluter subject to liability, but also other individuals and entities that participated in cause which generated environmental damage. Besides civil liability they may be held criminally liable. Federal, state and municipal authorities may impose penalties, such as fines, suspension of activities, cancellation of license to operate. Among main environmental authorities, which form Natural Environment System, are Environment Secretariat, National Council of Environment, Brazilian Institute of Environment and Renewable Natural Resources. Information on file in these environmental authorities is open to public.

12 ESTATES AND TRUSTS

12.01 DEATH:

When a person disappears a curator may be appointed for him with such powers as the court may determine. If the disappearance lasts one year, or three years if absentee left representative, interested parties may demand that he is declared absent and that his estate be provisionally distributed among his heirs or legatees, who must give bond. Ten years after decree of provisional distribution, or 80 years after birth of absentee if latest news of him dates back five years, application may be made for definitive settlement of estate and release of bonds. (C.C., arts. 22-39).

Deaths must be recorded in the office of the Civil Registry of the judicial district where death occurs. There are several such district offices in each of the larger cities. Death certificates may be obtained by applying to the office of the Civil Registry of the appropriate district. A small fee is charged, the amount being fixed by local regulations.

Actions for Death.

(C.C., arts. 927-954). Anyone who causes damages to another is liable. Compensation includes loss of profits, personal injury and moral damages. Code establishes rights of family members of deceased.

12.02 DECEDENTS' ESTATES:

See topics 12.03 Descent and Distribution, 12.07 Wills.

12.03 DESCENT AND DISTRIBUTION:

(Const. art. 5 XXX, XXI, C.C., arts. 1784-1864, 1897, Decree-Law 4657 of Sept. 4, 1942 as am'd).

Succession may be by testamentary disposition or by intestacy. A decedent survived by lineal descendants or ancestors may validly dispose by testament of only one-half of his individual estate. Order of intestate succession is as follows: (1) Descendants and surviving spouse, not judicially separated from decedent at time of his or her death; (2) ascendents and surviving spouse; (3) surviving spouse; (4) collaterals to fourth degree; (5) municipality, federal district or union. In case of common law spouses intestate succession is as follows: (1) surviving spouse inherits assets acquired during relationship based on same quota of common children; (2) descendants of deceased and surviving spouse, latter takes half of quota of each one; (3) other relatives, surviving spouse takes third of inheritance; (4) surviving spouse inherits total estate if there are no descendants and ascendants.

Succession among descendants is per stirpes, the right of representation inuring to those in direct line of descent, but not to those in line of ascent. Capacity to inherit is determined as of the time of the decedent's death. An inheritance may be renounced only expressly by public or judicial act but may be accepted expressly or impliedly. It cannot be accepted partially, conditionally or for a limited period, but a legatee who is also an heir may accept either the legacy or the inheritance, and refuse the other. Creditors prejudiced by renunciation of an inheritance may, with judicial authorization, accept the inheritance, in the name of the renouncing heir, in which case any balance, after satisfaction of the creditors, will be returned to the estate.

Heirs accepting the inheritance are liable for the debts of the deceased to the extent of the assets of the estate. If no inventory has been made, the burden of proof is on the heirs to show that the debts exceed the assets.

See also category 4 Citizenship, topic 4.01 Aliens.

12.04 FIDUCIARIES:

See topic 12.06 Trusts.

12.05 INTESTACY:

See topic 12.03 Descent and Distribution.

12.06 TRUSTS:

(C.C., arts. 803-813, 1951-1960).

Real property or money may be transferred by deed or will to provide for payment of income to beneficiary for specified period. In case grantee fails to pay, beneficiary may bring action to obtain installments in default and security for future installments under penalty of rescission of contract. More than one beneficiary may be named and provision may be made that survivors shall receive share of beneficiary who dies. Where conveyance is made by one person for benefit of another, payments are exempt from seizure under execution.

12.07 WILLS:

(C.C., arts. 1857-1990).

Maritime, aeronautic and military wills must be public or wills must be either public or sealed as described below. Joint wills are prohibited, whether simultaneous, reciprocal or otherwise dependent one upon the other.

Public will must be written by public official upon his records, pursuant to declarations made by testator in Portuguese before two witnesses, and read in presence of and signed by or for testator and by witnesses and official.

Sealed will must be written by testator or by another at his request, and signed by testator or, if he is not able to sign, by person who wrote will for him, and delivered by testator in presence of two witnesses to official (notary), testator declaring that it is his will and that he wishes it approved. Official must thereupon, in presence of all, draw up note of approval, which must begin immediately after last word of will, if space permits, and must be read by official and signed by him, witnesses, and testator if he is able, or for him by one of witnesses. Notary must then seal and stitch will after finishing instrument of approval and deliver it to testator. Sealed will may be in foreign language. Such will cannot be made by testator unable to read.

Private will must be written and signed by testator and read to and signed by three witnesses. It may be written in foreign language understood by witnesses. Three witnesses must be produced in order to probate private will.

By a codicil (which in Brazil means a mere memorandum of last wishes), written, dated and signed by the testator, without witnesses, he may make valid provision regarding his burial, charitable gifts of small amount, the disposition of personal furniture, clothing or jewelry of inconsiderable value, and may appoint or substitute executors; by codicil testator may appoint or substitute heirs.

A testator leaving lineal descendants, parents or grandparents cannot dispose of more than one-half of his estate, except in certain special cases, the other half passing to his descendants, or if none, to his other necessary heirs.

See also category 4 Citizenship, topic 4.01 Aliens.

13 FAMILY

13.01 ADOPTION:

(C.C., arts. 1618-1629, Law 8069 of July 13, 1990 as am'd, Decree 5491 of July 18, 2005).

Adoption of minors up to 18 years of age is regulated by this law.

Any individual over 18 years may adopt minor under 18 years of age or older if minor is already in custody or guardianship of adopting party; spouses and common law spouses may adopt when any one is over 18 years of age, and proof of permanent and normal family relation is filed. Adopting party must be 16 years older than adopted party. Adopting parties must have been taking care of minor for term fixed by court, according to each particular case. When adopting party is domiciled abroad, both parties must live locally together at least 15 days when minor is under two years of age and at least 30 days when minor is over two years of age.

Adopted party's consent is necessary when he is over 12 years of age. Adoption extinguishes legal bonds between adopted person and natural family. All adoption proceedings must be made before judge who declares adoption in final decision. Activities of foreign and national corporations of international adoption are regulated.

Convention: Inter-American Convention on Conflict of Laws Concerning the Adoption of Minors. Signed in La Paz, Bolivia on May 24, 1984.

13.02 ALIMONY:

See topic 13.04 Divorce.

13.03 COMMUNITY PROPERTY:

See topic 13.05 Husband and Wife.

13.04 DIVORCE:

(Const. art. 226, §6, C.C., arts. 1571-1590; Law 6515 of Dec. 26, 1977 as am'd). Marital societies terminate: (a) Upon death of one of spouses; (b) upon nullity or annulment of marriage; (c) upon judicial separation; and (d) upon divorce. Marriage is dissolved by death or divorce. Once marriage is dissolved, former spouse may use her married last name. Judicial separation may be filed by spouse that considers married life has turned impossible due to serious breach of duties by other spouse or by uncured mental illness. Married life considered impossible (1) in case of adultery of spouses; (2) attempt of either spouse against life of other; (3) cruelty; (4) abandonment for one continuous year; (5) conviction for serious crime; (6) dishonest conduct. Judicial separation ends obligations of cohabitation, fidelity and marital property regime. Separation can occur by mutual consent after one year of marriage.

Special procedure is provided to obtain decree of separation and divorce by mutual consent. (C.P.C., arts. 1120-1124-A).

Upon separation by mutual consent custody of children and visitation rights will be awarded in accordance with terms of parties' agreement. In case of divorce or judicial separation, if parties do not agree on children's custody, court shall grant custody to parent in best interest of children. Woman against whom decree of separation is issued cannot continue to use her husband's name. If she is innocent party right to use husband's name will be optional. Parties having been separated judicially, will have to contribute to support of their children, in proportion to their assets. Judicial separation becomes divorce after one year if declared by court and registered in Public Registry. After two years of de facto separation divorce proceeding can be initiated.

Law 5478 of July 25, 1968 as amended and Law 8971 of Dec. 29, 1994 regulate alimony actions.

13.05 HUSBAND AND WIFE:

(C.C., arts. 1639-1688).

An ante-nuptial agreement may be executed with respect to property, and such agreements must be executed on notarial deed and registered. By prenuptial agreements, spouses may agree as to property matters according to following regimes: partial ownership, universal ownership, final participation on aqüestos or property acquired during marriage, and separation of property. In absence or nullity of such agreement, property of husband and wife will be regarded as partial community ownership. Under this regime, property owned by spouses prior to marriage, or inherited individually after marriage, and in certain other cases, does not constitute community property. However, property acquired after marriage generally constitutes community property, regardless of under which spouses' name such property is registered. Community property will be equally divided when death, divorce or judicial separation terminates marital regime or relationship. Both spouses have administration of community property. Community property responds for debts incurred by either spouse. In universal ownership regime: most of assets present and future owned by spouses and their debts are included and spouses have its administration. Final participation in aqüestos regime: each spouse possesses its own patrimony, which includes all assets owned before marriage and acquired during marriage. Owner has exclusive administration of such assets, and owner can freely dispose of personal property each spouse may freely dispose of property brought to marriage by such spouse or acquired during marriage and of fruits of such property. Nevertheless property in possession of spouses at dissolution of marriage is considered community property, to be distributed equally among spouses, unless proved to have been brought to marriage by one of spouses or obtained by one of spouses by inheritance. Separation of property regime: owner keeps exclusive administration of property and can sell or encumbrance real property, but spouses must contribute with their assets and rents to expenses incurred during marriage, except agreement to contrary in prenuptial agreement.

13.06 INFANCY:

(C.C. arts. 2-12, 166-184, 1630-1638, 1723-1734).

The age of majority is 18. Contracts by minors under 16 are void and if over 16 and under 18 are voidable, except some by emancipated minors. Infants are subject to parental authority. Minors over 16 years acquire legal capacity by marriage, by working in civil service, by getting degree authorizing them to practice profession or occupation, or having their own business. Custodial rights expire or are lost by: death of parents or child, emancipation, adoption, judicial declaration of abandonment, child abuse, corruption of child, marriage of minor and by minor getting degree authorizing him to practice profession or occupation. Parental authority includes custody, legal representation and administration and enjoyment of minor's real and personal property with certain exceptions. In absence of parents guardian is appointed. Parents and guardian have restricted powers of disposition.

13.07 MARRIAGE:

(Const. art. 226; C.C., arts. 1511-1688, 1723-1727, Decree-Law 4657 of Apr. 9, 1942 as am'd).

Marriages may be performed by religious ceremony or by civil ceremony. Religious marriage performed according to code in order to have legal effect must be registered.

Annulment.

Marriages may be declared null if contracted with ascendants and descendants, by blood or by law; relatives in direct line; person already married; brothers and sisters; and relatives up to third degree; person guilty of death of one spouse, and surviving spouse; between adopted party and adopting parent and his or her children, and adopting parent with former spouse of adopted party; person mentally incapacitated.

Following should not get married: surviving spouse with children of deceased before inventory and distribution of estate's assets; widow or woman whose marriage was declared null before expiration of ten months from spouse's death or dissolution of marriage; divorced party before approval of distribution of community property; guardian or his descendants, ascendants, brothers and sisters, nieces and nephews and ward, before accounts of guardianship are approved.

Marriages are annullable within certain periods where contracted: by 16 year old minors without parental consent; by those induced by substantial error or duress; by minors under 16 years old; when performed by incompetent authority. Marriages cannot be annulled upon ground of lack of legal age where pregnancy of wife has ensued.

Upon the ground of substantial error concerning the person of the other spouse annulment may be demanded only by the spouse in error. Code recognizes as essential error, ignorance at time of marriage of: (1) Dishonor or bad reputation of other spouse, subsequent knowledge of which makes marital union insupportable; (2) conviction for crime before marriage which by its nature makes marital life insupportable; (3) irremediable physical defect or grave contagious or hereditary disease exposing to risk other spouse or children.

Both in the case of declaration of nullity and of annulment, the marriage, if contracted in good faith by both parties, produces all effects of valid marriage including legitimation of children, until such time as it is declared null or annulled. If contracted in good faith by one of parties, it is valid as to that one until annulled or declared null. If contracted in bad faith by both parties, it produces civil effects only to their children.

Marriages between uncle and niece or aunt and nephew are allowed on certain conditions. (Decree-Law 3200 of Apr. 19, 1941 as am'd, and Law 5891 of June 12, 1973).

13.08 MARRIED WOMEN:

See topics 13.04 Divorce, Husband and Wife, Marriage; category 21 Property, topic 21.05 Dower.

14 FOREIGN TRADE AND COMMERCE

14.01 CUSTOMS:

(Decree 4543 of Dec. 26, 2002, as am'd).

Decree regulates administration of customs activities, supervision, control and collection of tax on foreign trade activities.

Common External Tariff approved by member countries of southern common market (MERCOSUR) is in effect; each member country has list of goods excluded from common external tariff and subject to their own duty rates. Most goods traded among member countries are not subject to tariff or quota restrictions.

Trade with third countries is subject to common foreign tariff.

14.02 EXCHANGE CONTROL:

Federal Constitution entrusts Union with power to legislate on exchange, foreign trade and transfers of values from country. Laws, decrees and specific instructions bearing on exchange control are numerous. Basis of exchange system is found in Law 4595 of Dec. 31, 1964 as amended and Law 4131 of Sept. 3, 1962, as amended, regulated by Decree 55762 of Feb. 17, 1965.

Under Law 4595, National Monetary Council is entitled to (a) establish general rules of exchange policy, including sale and purchase of gold and of any transactions involving foreign currency; (b) grant to Central Bank monopoly to perform exchange transactions whenever there is a serious imbalance in balance of payments or when there are reasons to anticipate such a situation, and (c) regulate exchange transactions, establishing limits, rates, terms and other conditions. Agencies in charge of carrying out policies and resolutions laid down by National Monetary Council are Central Bank and Bank of Brazil.

All exchange transactions must be performed through duly authorized banks or institutions.

Exchange rate may be negotiated between parties, between limits set forth by Central Bank of Brazil for purchase and sale of foreign exchange.

14.03 FOREIGN EXCHANGE:

See topic 14.02 Exchange Control.

14.04 FOREIGN INVESTMENT:

(Const. Arts. 171, 222, Law 4131 of Sept. 3, 1962 as am'd and regulated by Decree 55762 of Feb. 17, 1965; Decree 365 of Dec. 16, 1991; Law 10610 of Dec. 20, 2002). Foreign investors may acquire shares or quotas in Brazilian companies or lend money to local borrowers. Foreign capital (belonging to companies or individuals domiciled abroad) may enter Brazil in form of cash, goods, machinery and equipment, patent and trademark rights and it shall receive same treatment as domestic capital under similar circumstances; any restrictions must be expressly provided for. Foreign capital participation is restricted in areas including transportation; insurance and communication media. Foreigners or naturalized Brazilian citizen for less than ten years are allowed to hold up to 30% stake in Brazilian radio, television and journalistic companies through legal entity organized in country and may not be appointed managers or directors of media companies. All foreign capital entering Brazil, whether in form of investment or loan, must be registered with Central Bank; as well as all contracts which require transfers of funds from Brazil, as dividends, interest amortizations, royalties, technical fees, etc., and all reinvestments of profits and remittances made from Brazil, including repatriation of capital. Registration of foreign capital must be applied for within 30 days of entering country. Companies or individuals desiring to transfer abroad profits, dividends, interest amortizations, royalties, technical fees, etc., must submit to Central Bank contracts and documents necessary to justify remittance. Remittances abroad also depend on registration of company with Central Bank and on proof of payment of any applicable income tax. Registration of foreign capital will be made in currency of country of origin and reinvestments in Brazilian currency, and also in currency of country to which profits could have been remitted. Registration of royalty contracts depends on proof of existence and validity of respective patents or trademarks both in Brazil and in country of origin. Deduction of royalties as operating expense is limited to 5% of gross income from product manufactured or sold. Technical fees may be deducted only during first five years of company's operation or of introduction of special production process. This period may be extended by further five years upon authorization from Conselho Monetario Nacional. Remittance of interest on loans must be at rate stated in contract registered with Central Bank. Any remittance in excess of said rate will be considered amortization of principal. Central Bank will not consider as interest that part in excess of rate obtaining for similar operations in financial market of its origin, at time of negotiation of loan.

Remittances of profits abroad are subject to following restrictions: (a) in case of capital applied in production of goods or services for sumptuary use, to be defined by Executive Decree, remittance will be limited to 8% per year of capital registered with Central Bank. In case of sharp imbalance of foreign trade, Central Bank may limit said remittances, for a temporary period of time, to 10% of registered capital, and stop repatriation of capital. Profits exceeding above limits, if remitted abroad will be considered repatriation of capital and will be deducted accordingly from corresponding registration for purposes of future remittances; (b) in all other cases, remittances will not be limited.

14.05 FOREIGN TRADE REGULATIONS:

See topic 14.02 Exchange Control.

15 HEALTH

15.01 HEALTH REGULATIONS:

Commercialization of Blood.

Law 10205 of Mar. 21, 2001 regulates obtaining of blood, protecting donor and donee, processing, storage, distribution and transfusion of blood, its components and derivatives, prohibit sale or any type of commercialization.

Pharmaceutical Products, Cosmetics and other Health Products.

Law 6360 of 23 Sept. 1976 as amended, and its regulations, Decree 79094 of 5 Jan. 1977 as amended, regulates production, packaging, import, export, storage and distribution of medicines, pharmaceutical items, cosmetics, hygiene products, perfumes and similar products, household cleaners, and other products subject to health control. Without prejudice of civil or criminal sanctions, penalties for infringement of sanitary laws are, among others, warnings, fines, forfeiture of product, destruction of product, suspension of sales and/or manufacture of product; cancellation of trade mark, prohibition of marketing; cancellation of company's permit to operate; cancellation of licensing charter of store. (Law 6437 of Aug. 20, 1977 as am'd).

Drugs, Medicines, Raw Materials for Pharmaceutical Products.

Law 5991 of Dec. 17, 1973 as amended, regulated by Decree 74170 of June 10, 1974 as amended, regulates sanitary control of commercialization of drugs, medicines, raw material for pharmaceutical products, homeopathic medicines; operation permits for establishments selling, representing, distributing, importing or exporting said products.

Commercialization of Baby Food.

Law 11265 of Jan. 3, 2006 as amended, regulates marketing, labeling and advertising of baby food.

Agrochemical, Their Components and Related Substances.

Law 7802 of July 11, 1989 as amended, and its regulations, Decree 4074 of Jan. 4, 2002 as amended, regulates research, experimentation, production, packing, labeling, transportation, storage, sale, advertising, use, importation, exportation, disposal, registration, classification, control, inspection and monitoring of agrochemicals and their components and related substances.

16 IMMIGRATION

16.01 ALIENS:

Aliens are assured equality with Brazilians in the acquisition and enjoyment of civil rights. (Const., art. 5).

All persons within Brazilian territory, whether Brazilians or aliens, are subject to Brazilian law. The civil capacity and family rights of an alien are governed by the law of his domicile, or, in the case of reciprocal property rights of husband and wife, by the law of the domicile of the couple, or, if they had different domiciles, by the law of their first domicile after marriage. Intestate and testamentary succession is governed by the law of the domicile of the deceased, except when the alien was married to a Brazilian or left children, in which case Brazilian law applies as to property in Brazil unless foreign law is more favorable to spouse or children. (Decree-Law 4657 of Sept. 4, 1942 as am'd).

Coastwise navigation for transportation of merchandise is restricted to national ships except in cases of emergency; owners, charterers and masters of national ships and at least two-thirds of crews must be Brazilians. (Const., art. 178).

Within 150 kilometers of Brazil's boundaries, alien may not acquire land without previous consent of National Security Council, as such land is considered of national security. Foreigners may be authorized to purchase frontier strip or maritime land, provided land is autonomous unit in condominium, located in urban zone and area sold does not exceed one third of total area. (Decree-Law 9760 of Sept. 5, 1946 as am'd).

Only Brazilians or foreigners resident in country may purchase rural land. Foreigners are considered to be resident when permanently in country. Law 5709 of Oct. 7, 1971 as amended regulated by Decree 74965 of Nov. 20, 1974, sets forth amount of land which may be purchased and Law 8629 of Feb. 25, 1993 as amended established that same limitations applied to acquisition of rural land are applied to leasing of rural property by foreigners. Foreign companies and local legal entities controlled by nonresidents may only purchase rural land for attending their purpose. Prior authorization is required in both cases.

Law 6815 of Aug. 19, 1980 as amended regulated by Decree 86715 of Dec. 10, 1981 as amended and Decree 840 of June 22, 1993 as amended, regulates status of aliens in Brazil and National Council of Immigration, related to Ministry of Labor and Administration, in order to direct, coordinate and inspect immigration issues. Law prohibits expulsion of foreigner married to Brazilian for more than five years, if not divorced or separated, or having Brazilian child under his responsibility or giving him economic support.

For purposes of Law, aliens are divided into transit, tourists, temporary residents, permanent residents, of courtesy, officials and diplomats. Transit visa may be granted to alien who must enter Brazilian territory, in order to reach his destination, for period of ten days. Tourist aliens may enter country for 90 days. No visas are required for foreigners whose country of origin grants reciprocity to Brazilians. Temporary residents are aliens living in Brazil for business or cultural reasons (foreign artists, athletes, technicians, professors and students are included). Permits are granted for period of 90 days, and in certain cases for time deemed necessary in their respective contracts. Permanent residents' permits will only be granted if aliens fulfill all requisites established by National Council of Immigration.

Temporary, permanent, and residents who were granted political asylum, are required to register with Federal Police within 30 days after their arrival. Latter will issue Alien Identification Card. Law also provides grounds for deportation, expulsion and extradition of foreigners. Entering or staying fraudulently in country are causes of deportation; imperiling national security, political or social order, public morals or economy are causes of expulsion, among others. Extradition may be granted to petitioner government if based on treaty or for reasons of reciprocity. Naturalization may be acquired after four years of continuous residency in country, provided that all requirements set forth in Art. 111 of Law, are fulfilled. Said term may be reduced to one, two or three years if applicant has Brazilian spouse and/or child; if recommended for his professional scientific or artistic skills or if he has ownership of real estate, industry or shares in corporation aimed at exploration of industrial or agricultural activities.

Law 7180 of Dec. 20, 1983 establishes proceedings to obtain permanent resident status for those foreigners who have temporary registration.

See also category 2 Business Organizations, topic 2.03 Corporations, subhead Foreign Corporations.

17 INTELLECTUAL PROPERTY

17.01 COPYRIGHT:

(Const. art. 5 XXVII, XXVIII; Law 9610 of Feb. 19, 1998, Law 9609 of Feb. 19, 1998 and Decree 2556 of Apr. 20, 1998, Decree 5244 of Oct. 14, 2004 as am'd).

Free expression of intellectual, artistic and scientific activities and communication is guaranteed by Constitution. Law grants moral and patrimonial rights to author regarding literary, artistic and scientific works. Moral rights include recognition of capacity as such, nonpublication of work, and modification of work. Such rights are inalienable and non-waivable. Patrimonial rights include exclusive right to exploit work personally or by authorized third party. Patrimonial rights remain in force for 70 years from Jan. 1st of year subsequent to author's death; however for audiovisual works and photographs, 70 years from publication date. Assignment of patrimonial rights, in absence of express provision, is deemed to be five years. Author has non-waivable and nontransferable right to receive at least 5% of difference between original sale price of work and its resale price. Protection is granted to literary, artistic, scientific, dramatic, sculpture, graphic design, musical, photographic, cinematographic works; computer programs, compendium of works such as encyclopedia, anthologies; adaptations, translations, database, among others. These works remain protected without registration. Protection of rights of performers, phonograph producers and broadcasting companies is for 70 years as provided by law. Infringement of copyright is sanction with fines and imprisonment up to four years. National Council to Combat the Piracy and Crimes Against Intellectual Property Rights is in charge of drafting rules at national level to combat piracy, tax evasion and crimes against intellectual property.

Computer programs and free commercialization and production of computer programs of national or foreign origin are protected for 50 years from Jan. 1st of year following publication or creation. Author has moral rights only to claim authorship and to oppose nonauthorized detrimental modifications. Use of computer programs must be object of license agreement. Agreement provisions limiting production, distribution or marketing, and exempting contracting parties from product liability or infringement of copyrights are void. Registration or enrollment is not required for protection. However, protection to nonresident foreigners is afforded provided country where computer program originates affords protection to Brazilians and to foreigners resident in Brazil. Brazilian or foreign computer programs must be enrolled with Secretaria Especial de Informática in order to be locally marketed. Imprisonment and fines are provided for infringement of computer programs rights. Contracts of transfer of technology of computer programs must be registered with National Institute of Industrial Property (INPI).

Conventions.

Berne Convention of 1886, last revision Paris July 24, 1971; Convention for the Protection of Producers of Phonograms Against Unauthorized Duplication of their Phonograms of Oct. 29, 1971; Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations Done at Rome on Oct. 26, 1961.

17.02 PATENTS:

(Const. art. 5 XXIX; Law 9279 of May 14, 1996 as am'd regulated by Decree 2553 of Apr. 16, 1998 and Decree 3201 of Oct. 6, 1999 as am'd).

Inventions.

Any invention, whether product or process, in all fields of technology, provided that it is new, involves inventive step and is capable of industrial application, is patentable. Invention is new when it is not within state of art. Inventions contrary to public policy, morals, public health; inventions related to nuclear substances, to plants and animals, except transgenic microorganisms, are not patentable. Patents are granted for 20 years from filing date, but never for less than ten years from granting date. Patent gives exclusive right of exploitation. Law recognizes prior bona fide user rights. Patent owner must exploit it, directly or by granting license. Compulsory license may be granted due to lack of exploitation by patent owner under limited conditions or in case of proof of owner's involvement in abusive practices of economic power.

Utility Models.

New forms of objects or mechanisms, are patentable provided they have practical use and are susceptible of industrial application.

Utility models are new when they are not within state of art. Patents are granted for 15 years from filing date, but never for less than seven years from granting date.

Industrial Designs.

Any new design or model which may be applied to industrial purpose may be registered by its author if it is not within state of art. Industrial designs contrary to public policy, morals, freedom of expression or religious beliefs among others, may not be registered. Registration is granted for ten years from filing date, renewable for three consecutive periods of five years each. Sanctions imposed for infringement of patents rights are imprisonment from three to 12 months or fines. Provisions regarding inventions are applicable to utility models and industrial designs.

Law also deals with unfair competition crimes.

Vegetal Species.

(Law 9456 of Apr. 25, 1997 regulated by Decree 2366 of Nov. 5, 1997).

Vegetal species are protected when they are novel, distinguishable, stable and homogeneous. When registered, certificate of holder is issued for 15 and 18 years, depending on type of vegetal variety. Rights are transferable inter vivos or causa mortis. Certificate gives holder exclusive rights of exploitation, but compulsory license may be granted in case of no exploitation during last three years from date of certificate.

See also category 3 Business Regulation and Commerce, topic 3.04 Monopolies, Restraint of Trade and Competition.

Conventions.

Convention for Protection of New Varieties of Plants, Paris, Dec. 2, 1961, as amended; Strasbourg Agreement Concerning the International Patent Classification, 1971 as amended; Patent Cooperation Treaty (PCT), Washington, June 29, 1970 as amended.

17.03 TRADEMARKS AND TRADENAMES:

(Const. art. 5 XXIX; Law 9279 of May 14, 1996 as am'd).

Those signs distinctive and susceptible of graphic representation can be registered as marks, except those prohibited by law. Following, among others, cannot be registered as marks: national, foreign or international denominations, signs and emblems; expression, figures, designs or any other sign contrary to morals and good habits, freedom of religion, etc.; names, signatures, family names and portraits of persons without their consent; title of literary, artistic or scientific works protected by copyright without permission of owner; technical names used in industry, science or art related to product or service to which such names refer; denominations describing products or services that are to be protected by trademarks or their qualities, nature, weight, value, etc., unless they are sufficiently distinctive; colors and their denominations unless they are combined in particular and distinguishing manner; geographical names if their use may suggest origin; imitation or reproduction of collective and certification marks; total or partial reproduction or imitation of trademarks, similar or related goods and services which may be confused or related to it. Protection of well-known registered mark in Brazil is extended to all classes even though there is no special declaration of notoriety. Protection is granted to international well-known marks not registered in Brazil. Law recognizes prior bona fide users right. Registration is granted for ten years from registration date and is renewable. Registration can be cancelled for nonuse for consecutive five year period as indicated by law. Sanctions imposed for infringement of law are imprisonment for three to 12 months or fines.

Conventions.

Paris Convention for the Protection of Industrial Property, as reviewed and amended; Nice Agreement Concerning the International Classification of Goods and Services for the Purposes of the Registration of Marks, 1957 as reviewed and amended.

Franchising.

(Law 8955 of Dec. 5, 1994).

Law regulates business franchising contracts which are defined as system by which franchisor assigns to franchisee right to use trademark or patent and right to exclusive or semi-exclusive distribution of products and services; and in some cases right to use business administration and implementation technology, owned or developed by franchisor without employment link. Assignment is for direct or indirect remuneration.

Information which must be contained in franchise offer is established by law.

18 LEGAL PROFESSION

18.01 ATTORNEYS AND COUNSELORS:

(Law 8906 of July 4, 1994 as am'd).

To practice law attorney must be registered with Ordem dos Advogados do Brazil (Association of Brazilian Lawyers). Requirements for registration are: civil capacity, law degree from local university, successful completion of bar exam, good conduct, no activities performed incompatible with legal profession, registered to vote, discharged from military service, be Brazilian, accept his duties before Conselho Federal da Ordem dos Advogados do Brasil. Attorney holding law degree from foreign university should also present proof of his law degree duly revalidated.

19 MINERAL, WATER AND FISHING RIGHTS

19.01 MINES AND MINERALS:

(Const. arts. 20 VIII, IX, 176; Mining Code, Decree-Law 227 of Feb. 28, 1967, am'd, and regulated by Decree 62934 of July 2, 1968 as am'd).

Mineral resources and potential hydraulic energy constitute separate property from land for purpose of exploitation and use. They belong to Federal Government which may grant authorizations or concessions to prospect, exploit or use them to Brazilian individuals or Brazilian legal entities.

Owner of land may use directly, under system of local license, deposits of mineral substances of immediate employment in civil constructions to be used in their natural state, alone or mixed with others or with stones or plasterlike substances, when not used as raw material for industrial transformation. Licensee may request later an authorization and concession. This is mandatory if use of minerals is not as stated.

Normally, minerals must be explored and exploited under an authorization and a concession.

Exploration rights may be granted only to Brazilian natural or Brazilian juridical person or to “mining concerns” by Ministry of Mines and Energy after certain proceedings followed by National Department of Mineral Products. Authorization lasts two years extendible for one more, in view of work done, results thereof and proof that exploration is on.

Minerals extracted during exploration may be taken out of area only for analysis and assays and not for sale. At end of exploration a detailed report must be submitted to Department of Mines. Each authorization must be limited to maximum areas established by regulations. Code of Mines requires registration of exploration licenses with National Department of Mineral Production (D.N.P.M.), also establishes appeal against refusal of exploration license.

Owners of land must be indemnified with a rent for use of land and indemnification for damages. Petitioner must file agreement with owner of land regarding rent and indemnity mentioned above. In its absence, Department of Mines sends record to Court of zone which, after making final determination, orders deposit of equivalent of two years of rent and a security bond for indemnification, after approval of which, Court will order landowner to permit exploration.

Exploration must begin within 60 days after publication of authorization in official newspaper or determination of rent and indemnity by Court, when necessary, and should be suspended for no more than three consecutive months or 120 nonconsecutive days. Any interruption or recommencement must be promptly notified to Department of Mines, as well as any finding of any mineral not included in authorization.

When final report of exploration is filed and approved, explorer has one year in order to request a concession of exploitation. After this period, Government may grant exploitation rights to other petitioners.

Exploitations must be object of a concession which may be granted only regarding an explored area with approved final report. Exploitation area must be adequate to technical and economic requirements of works of extraction and elaboration, always within borders of exploration area.

Only “mining concerns” (see supra, subhead Exploration and infra, subhead Mining Concern) may be concessionaires. There are no restrictions on number of concessions which may be held by one concern. Petition must contain detailed requirements.

Concessionaire must receive possession of mine from Department of Mines, within 90 days after publication of concession in official newspaper, paying fee established by law. Department of Mines will give possession, calling other concessionaires of bordering mines to be present in the act. Markings of limits of concessions must be placed on the points indicated in decree of concession and maintained visible and not changed, except with authorization from Department of Mines.

Concessionaire must commence exploitation works within six months from date of publication of decree in official newspaper, except in case of force majeure qualified by Department; he must work mine pursuant to plans, one of which must be affixed at place of mine; only mineral substance object of concession may be extracted and discovery of another substance must be communicated immediately to Department. Concessionaire must abstain from excessive exploitation which may make impossible further use of mine and he must maintain living quarters in sanitary conditions, prevent loss of waters, pollution of air and waters and comply with several other detailed obligations.

Once exploitation is commenced, works cannot be interrupted for more than six months, except for force majeure. An annual report of works must be filed.

Several concessions of same beneficiary and of same mineral substance, within area of one single deposit or mineral zone, may be joined in a single “mining group.” Concessionaire of a mining group when authorized by Department may concentrate his activities in one or several of concessions within the group, provided intensity of work is compatible with importance of total reserve of whole mine.

In zones of National Reserve or in case of a mineral subject to monopoly, Government may permit exploration and exploitation of other mineral substances if works are compatible with reserve or monopoly, under conditions established therefor. Concession may be assigned or encumbered only as a whole to a party with capacity to hold it. When a credit is guaranteed with concession, and this terminates, guarantee ceases but concessionaire continues being liable.

Easements in favor of exploration or exploitation are placed on land and sub-soil where same is located and on bordering lands, insomuch as necessary for construction of offices, installations, living quarters, rights of way, collection of water, conduction of electricity, and similar requirements. Owners of servient lands must be indemnified.

Sanctions may be imposed for failure to comply with obligations resulting from authorization of exploration or concession of exploitation, depending on seriousness of violation.

Authorizations of concessions granted in violation of law may be annulled on authority's own motion or at request of interested party under special proceedings established by law.

“Mining concern” is defined as a Brazilian firm or association or corporation domiciled in Brazil, whatever its legal structure, having within its purposes obtention of benefits from mineral deposits in national territory. Mining concerns need authorization of Ministry of Mines and Energy in order to exercise mining activities. Petition must be filed with Department of Mines, accompanied with legalized photocopy of registry of firm in Registry of Commerce, in case of individual firms; similar photocopy or second copy of document of organization with proof of registration, in case of limited liability companies and, in case of corporation, official newspaper where organization was published.

Mining syndicates (Consorcio de Mineraocao) may be organized by several concessionaires of neighboring mines, open or situated over same deposit or mineral zone. For this purpose they must request permit from Federal Government, showing that productivity of exploitations will be increased thereby. By-laws of proposed syndicate must be filed with plans of works to be realized and statement of benefits required from Government. Syndicate will be subject to conditions fixed by Government, proposed by a committee specifically appointed for purpose.

Special registry will be kept of internal or external trade of precious stones, noble metals and other minerals which may be included by regulations.

Radioactive minerals or materials which may produce nuclear energy may be permitted to be exploited together with other minerals only when latter are of an economic value much higher than former and, then, under special conditions.

Aerial geological prospecting may be made only by mining concerns authorized therefor which prove to have necessary means for the purpose, subject to specific provisions of the law and regulations.

Prior authorizations or concessions granted under prior law and still in effect continue being valid but subject to provisions of new Code.

Prospecting and exploitation on continental shelf and Brazilian waters are regulated by Decree 96000 of May 2, 1988.

Sole Tax on Minerals.

(Decree-Law 1038 of Oct. 21, 1969 as am'd and its regulations Decree 4544 of Dec. 27, 2002 as am'd). Tax is levied once on extraction, treatment, circulation, distribution, exportation and consumption of minerals. Tax rate ranges from 1% to 15%, depending on kind of mineral, and value of mineral based on value of metric ton set by Government.

See also category 14 Foreign Trade and Commerce, topic 14.04 Foreign Investment.

Petroleum and Natural Gas Deposits.

Law 9478 of Aug. 6, 1997 as amended and Decree 2705 of Aug. 3, 1998 as amended regulate exploration, production and processing of oil and natural gas. It also creates Brazilian Petroleum Agency regulated by Decree 2455 of Jan. 14, 1998 as amended. Agency grants by public bid concessions for refining, processing, importing, exporting and distributing of oil and gas to national or foreign entities organized under Brazilian laws, with headquarters and management in Brazil, private or public companies. Concession contract for exploration and exploitation contains: area under concession, term and conditions for renewal, work program, assignment of contract, dispute resolution, rescission, penalties for noncompliance and other matters. Company holding concession bears exploitation risks as agreed in contract. Government participation is: signature bonus, 5% to 10% of royalties, special government participation and payment for use of area.

20 MORTGAGES

20.01 CHATTEL MORTGAGES:

(C.C. arts. 1431-1472).

In chattel mortgage of personal property, title to property is transferred to creditor but debtor holds possession of same. Mortgage must be evidenced by written document which must be registered in special registry. In case of debtor's default, creditor may not retain property but may sell it and apply proceeds of sale to pay his credit delivering any remaining balance to debtor.

There are special provisions regulating chattel mortgages of agricultural implements, crops, farm cattle, motor vehicles and road building machines, and products of pork packing industry.

An agricultural chattel mortgage must be in writing, and to be valid against third parties must be inscribed in the real property registry. (C.C., arts. 1442, 1443; Law 492 of Aug. 30, 1937 as am'd; Decree-Law 2612 of Sept. 20, 1940; Dec. 1003 of Dec. 29, 1938).

A chattel mortgage on cattle is limited to a period of three years, which may be extended for like period. Other agricultural chattel mortgages are limited to period of two years but may be extended for two years. (C.C., arts. 1444-1446, Law 492 of Aug. 30, 1937 as am'd).

Mortgage of aircraft may be made under C.C., arts. 1473-1488, 1492-1505.

Rural Credit Cedulas.

Under Decree Law 167 of Feb. 14, 1967 as amended, in case of agricultural financing, debtor may issue documents of credit known under general name of “rural credit cedulas” which may be “pledge rural cedulas,” “mortgage rural cedulas” or “pledge and mortgage rural cedulas,” giving pledge or mortgage or both of rural property, products, machinery, vehicles, etc. used in agricultural endeavor. There are also “rural credit notes” and “rural duplicatas” used in sales of products, without pledge or mortgage but which have certain other privileges. All these documents are negotiable and must be recorded in special registry.

Industrial Credit Cedulas.

Under Decree Law 413 of Jan. 9, 1969 as amended, in case of industrial financing, debtor may issue documents of credit known as “industrial credit certificates” giving pledge, chattel mortgage (alienacao fiduciária) or mortgage of industrial buildings and constructions, raw material, machinery, products, vehicles and other items used in industrial enterprises. There are also “industrial credit notes” without pledge or mortgage but which have certain privileges. All these documents are negotiable and must be recorded in real property registry.

See also categories 3 Business Regulation and Commerce, topic Sales; Debtor and Creditor, topic Pledges.

20.02 COLLATERAL SECURITY:

See category 7 Debtor and Creditor, topic 7.06 Pledges.

20.03 MORTGAGES:

(C.C., arts. 1225-1227, 1473-1505).

Any real property susceptible of alienation may be mortgaged. Period may not exceed 30 years, but mortgage may be renewed and its prior lien retained by executing a new instrument upon expiration of first 30 years. Mortgages are public instruments drawn up on books of a notary who is charged with duty of seeing that all taxes have been duly paid. All mortgages must be inscribed in registry of place where mortgaged property is located.

Except when the mortgagor is insolvent, a second mortgage cannot be foreclosed, although due, until the maturity of the first mortgage, and failure to pay obligations secured by mortgages subsequent to the first will not cause the mortgagor to be deemed insolvent.

A mortgage may contain provisions for a penalty upon default and for interest at an increased rate thereafter. (See category 3 Business Regulation and Commerce, topic 3.03 Interest.) Such provisions are advisable, since expense of foreclosure proceedings is likely to be rather high.

Under Decree-law No. 70 of Nov. 21, 1966 as amended certain mortgage loans may be represented by “mortgage certificates.” Under Decree-law No. 167 of Feb. 14, 1967 in cases of agricultural financing, “rural mortgage cedulas” may be issued and recorded.

See also topic 20.01 Chattel Mortgages.

21 PROPERTY

21.01 ABSENTEES:

See category 12 Estates and Trusts, topic 12.01 Death.

21.02 CONVEYANCES:

See topic 21.04 Deeds.

21.03 CURTESY:

No tenancy by curtesy.

21.04 DEEDS:

(Law 7433 of Dec. 18, 1985 regulated by decree 93240 of Sept. 9, 1986).

Deeds conveying real property (unless of slight value) must be public instruments drawn up by notary on his books kept as official records, signed by parties, notary and two witnesses, and must be recorded or registered in public registry in order to be valid transfers.

See also category 13 Family, topic 13.05 Husband and Wife, subhead Husband's Consent.

21.05 DOWER:

Not recognized in Brazil.

21.06 POWERS OF ATTORNEY:

(C.C., arts. 115-137, 653-692, 710-721, Law 4886 of Dec. 9, 1965 as am'd by Law 8420 of May 8, 1992).

Whenever one person undertakes to act for another in Brazil he should have a formal power of attorney, since few acts can be performed without one. The scope of the powers conferred is strictly construed under Brazilian law, and an instrument in general terms confers only administrative powers, specific authorization being necessary for the attorney to perform many acts, such as to alienate, sell or mortgage property, settle claims, give receipts or releases, sign guaranties, draw, accept or endorse bills of exchange, execute or endorse promissory notes, organize or subscribe for stock in corporations, make loans, open credits, petition for bankruptcy, prove claims in bankruptcy, or substitute the power in favor of another.

Powers of attorney executed in a foreign country in the language and form there employed will be valid in Brazil if duly legalized before a Brazilian consul, and translated by a sworn public translator in Brazil. It is preferable, however, to put such powers in the form customarily used in Brazil.

Powers of attorney are executed in Brazil as public instruments entered by a notary on his books, or as private instruments signed by the grantor who must acknowledge his signature before a notary. See category 9 Documents and Records, topics 9.01 Acknowledgments, 9.02 Notaries Public.

Besides the purpose and extent of the powers conferred, a private instrument should specify the city and state where it is drawn up, the date, the name of the grantor and the name and description of the grantee.

A power of attorney “em causa propria” (i.e., coupled with an interest) is irrevocable.

When the power is granted to more than one person, it will be considered as a successive power, the second grantee being authorized only in case the first named fails to act, unless otherwise specified, i.e., that all are to act jointly, or that any one may act alone.

Agency agreements are governed by Law 4886. Although parties may freely stipulate terms of their agency contracts, provisions must be included on conditions and general requirements of representation, identification of products subject to representation, period of representation, whether definite or indefinite, terms and time of payment for carrying out representation, zone in which representation will be exercised, whether such exclusivity is partially or wholly guaranteed and for what period, and restrictions, if any, to zone exclusivity.

Provision for indemnity due to agent upon principal's terminating agreement without just cause is also required. This indemnity must not be less than one-twelfth of compensation earned during representation. Agency agreements may be terminated for just cause. Law 4886 defines just cause to be agent's negligence, agent's breach of contract, acts of agent damaging to principal and conviction of agent for serious criminal offense. Fixed term agreements terminate on date provided; indefinite term agreements are terminable even without just cause after first six months. In all cases, except when other provisions for termination have been agreed upon, service of notice prior to termination is obligatory. If principal fails to serve such notice, compensation is due agent amounting to one third of earnings accrued during last three months just prior to termination. Statute of Limitations for actions arising from this law is five years.

22 TAXATION

22.01 ADMINISTRATION:

(Const. arts. 145-162; National Tax Code, Law 5172 of Oct. 25, 1966 as am'd; Complementary Laws 104 and 105 of Jan. 10, 2001, Decree 3724 of Jan. 10, 2001).

Constitution and National Tax Code control power to raise and collect revenues by Republic, States, Municipalities and Federal District. Veil of bank secrecy may be lifted by tax authorities without need of court order. They allocate different kinds of taxes at each level. Republic has exclusive power to tax importation and exportation of goods, income and earnings of any nature, industrialized products, rural real property, large fortunes, transactions of credit, foreign exchange and insurance, transactions with instruments and securities. States and Federal District may tax property transfers "mortis causa", transactions related to circulation of goods, rendering of services of interstate and intermunicipal transportation and of communication, and ownership of motor vehicles. Municipalities may tax urban real property, "inter vivos" property transfer, and rendering service. Code describes taxes to be imposed by federal, state and municipal jurisdictions, and provides rates of procedure, tax administration and collection.

22.02 BUSINESS TAXES:

Tax on Financial Operations (I.O.F.).—(Decree 4494 of Dec. 3, 2002 as am'd). Federal tax levied on credit, insurance, exchange and securities transactions. Rates vary according to transaction.

Tax on Industrial Products.

(Const. art. 153, IV, Law 4502 of Nov. 30, 1964 as am'd, and regulations, Decree 4544 of Dec. 26, 2002 as am'd). This Federal tax is levied on numerous national and imported industrial products. Former are taxed upon leaving manufacturing plant; latter upon importation. Rate is ad valorem and varies according to product. There are many exceptions, among them, products for exportation. Tax credit equivalent to excise taxes applicable on exports is allowed against excise tax paid on domestic sales of industrial products. Rebate on income tax applicable to interest, paid abroad by exporter is also allowed. (Law 8402 of Jan. 8, 1992 as am'd).

Companies developing or producing computers and automation goods and services are exempted if they invest in research on information technology and development activities. (Law 8248 of Oct. 23, 1991 as am'd and Decrees 3800 and 3801 of Apr. 20, 2001). Tax exemptions are granted to software development companies and companies rendering information technology services whose 80% gross income is from export of goods and services. (Law 11196 of Nov. 21, 2005 as am'd, regulated by Decree 5798 of June 7, 2006).

22.03 CUSTOMS DUTY AND TAX:

Tax on Industrial Products.

See topic 22.02 Business Taxes, subhead Tax on Industrial Products.

22.04 INCOME TAX:

(Decree 3000 of Mar. 26, 1999 as am'd). Individuals residing or domiciled in Brazil, individual concerns, and associations and corporations domiciled in Brazil are taxed on their worldwide income. Said concerns and corporations must be registered in special registry kept by Income Tax Bureau and no industrial or commercial establishment may operate if not registered. Individual taxpayers are registered in "Cadaster of Individual Taxpayers." Persons and corporations residing or domiciled abroad not present in Brazil 12 months or residents who are absent for at least 12 months are taxpayers for Brazilian source incomes only. With income return, individual residents must file inventory of their personal and real property. Nonresidents are subject to income tax as residents when entering country with temporary visa to work under contract and remain in country for more than 183 days during one year period, from date of arrival, and those with permanent visa, in relation to events generated, as from arrival.

I. Individual.

Individuals are subject to tax on all income and capital gains. Tax becomes payable on monthly basis, as income and capital gains are received. Gross income does not include insurance and retirement payments, indemnifications, workers compensation, inheritance and donations, among others. Income tax is not collected from retirement gains (inactivity) up to limit when taxpayer is over 65 years of age.

Deductions are allowed monthly and annually; among monthly deductions for withholding tax are: alimony and child support, social security expenses; among annual deductions for calculating tax are: health and medical expenses, donations and charitable contributions, and monthly deductions. Instead of itemized deductions, taxpayers may elect to deduct 20% of their income up to certain amount.

Rates.

Tax on individuals is payable monthly at rates of 15% and 27.5% on net income.

Withholding.

Payors of salaries in excess of certain amount a month, commissions, brokerage fees and other remuneration for services rendered must withhold certain portions thereof and turn them over to Treasury. Payment will be a credit toward applicable taxes.

II. Juridical Persons and Individual Organized Concerns.

These entities, which include corporations, are subject to tax on gross income less admissible deductions.

Gross income does not include among others, income from certain real property notes of Banco Nacional de Habitacao and real property credit corporations; gains from readjustment of certain Treasury bonds and certain other readjustments; dividends and profits subject to tax in hands of distributing corporations, which then must be kept separate by distributee corporation.

Deductions include among others: taxes actually paid, except income tax; reserve for bad debts, severance pay and indemnities for workmen; certain scientific or technological expenses; payments of royalties; bonuses to employees; payments to private pension funds for employees; certain charitable contributions.

All corporations are required to create Guarantee Fund for severance payments equal to 8% of monthly remuneration paid to employees.

Official Determination.

In case of lack of accounts, or non-reliable accounts, Treasury may calculate profits by establishing percentage of gross income, which can never be lower than 15% of such income, as taxable profits. Such profits are subject to taxation at rate of 25% per trimester plus additional 10% rate as stipulated by law, applicable to profits earned over certain annual limit.

Other Rules.

There are special provisions for habitual sales of real property; parcellation of land; agricultural and livestock concerns; exploitation of foreign movie films; insurance and capitalization activities; sea and air transportation concerns and builders.

Social Contributions.

Deductible from taxable income is 18% social contribution.

Participation Fund.

Companies must deposit percentage of their annual gross income plus percentage of their income tax liability in fund administered by Federal Savings Bank.

Rates.

Income tax is calculated on actual or presumed profits as stipulated by law. Corporations and other juridical persons and individual organized concerns pay monthly 15%. Surtax is levied on profits exceeding certain amount at 10% rate, as stipulated by law.

Public utility companies, with profits not in excess of 12% of capital, pay 17%. Agricultural and livestock companies pay taxes at reduced rate of 6%. Certain other public utility companies, engaged in public transportation are also subject to lower 6% tax rate.

Investment Incentives.

For purposes of promoting economic development, country has been divided into several geographic regions, each under supervision of a separate autonomous governmental agency (Superintendencies), in order to implement resource utilization programs, including tax deductions and other incentives to industrial, agricultural, and other concerns operating in region, which are stipulated in laws embodying “development plans,” which are revised regularly. For each region, plan in force for particular years should be consulted.

Law grants tax incentives under industrial and technical development program to industrial companies involved in technical development activities and tax deductions for ten years to investments in motion picture productions.

Major Fiscal Incentives for Producer-Seller and Trading Companies, Under Trading Companies Law.

(Decree-Law 1248 of Nov. 29, 1972 as am'd regulated by Decree 71866 of Feb. 27, 1973 as am'd, and Decree 4543 of Dec. 26, 2002 as am'd). Departure of merchandise from producer-seller establishment under conditions stipulated in Art. 1 assures producer-seller right to tax benefits granted by law as an incentive to exportation. These incentives will be calculated using sales price of product, plus freight and insurance costs to warehouse, if producer-seller is responsible for such expenses.

If manufactured products being exported are insured by a Brazilian insurance company or transported by a Brazilian transportation company, cost of such insurance and transportation should be added to export price (thus increasing fiscal incentives given to trading companies).

(Art. 4, Para. 2). Decree-Law 1894 of Dec. 16, 1981 as amended grants tax incentives for trading companies that export manufactured products of Brazilian manufacture acquired on domestic market, against payment in convertible foreign currency, as follows: Credit for tax on manufactured products levied on acquisition of products and reimbursement of tax on manufactured products paid on domestic market.

Export Companies.

Law 11.196 of Nov. 21, 2005 regulated by Decree 5798 of June 7, 2006 grants tax incentives to qualifying export companies. Taxes on goods and services imported by companies that export software and information technology services with value over 80% of their annual gross income. Also acquisition of capital goods by export companies is exempted from payment of taxes on new machines, instruments, appliance, and equipment imported under conditions indicated by law.

Free Zone.

Manaus has been declared a free zone and enjoys exemption from import-export duties under Decree-Law 288 of Feb. 28, 1967 as amended and Regulations. Same Decree-Law creates SUFRAMA (Superintendency of Manaus Free Zone), governmental agency in charge of administration of installations and services in free zone. Complementary Law 124 of Jan. 3, 2007, creates Development Authority for Amazon Region (SUDAM) to promote development and integration of region to national and international economy. Complementary Law 125 of Jan. 3, 2007, creates Development Authority for Northeast (SUDENE) to promote development and integration of region to national and international economy.

Export Processing Zones.

(Law 11508 of July 20, 2007). Law authorizes establishment of export processing zones in less developed areas. Such zones are free-trade areas where companies operating there may sell 20% of their production at local market. Location of each zone depends on interest of States and Municipalities.

Infrastructure Projects.

(Law 11488 of June 15, 2007 regulated by Decree 6144 of July 4, 2007). Infrastructure projects in transportation, ports, energy, sanitation and irrigation may enjoy suspension of payment of contribution to Program for Social Integration and Formation of Patrimony of Public Servants (PIS/PASEP) and Contribution for the Financing of Social Security (COFINS) on local purchases and imports of new machinery, instruments, equipment, and construction materials for use in infrastructure works that will be included in their fixed assets, and for local purchases and imports of services destined for use in infrastructure projects under Regime Especial de Incentivos para o Desenvolvimiento da Infra-Estrutura (REIDI).

III. Individuals or Corporations Abroad.

In general a withholding tax of 15% applies to any taxable income paid or credited to Brazilian residents living 12 months or more abroad. Some income and capital gains earned by individuals or corporations residing or domiciled abroad are taxed at source at 15% or 25%, except when double taxation treaty provides for lower rate. Withholding tax is imposed on capital gains derived from sale of assets and rights in Brazil by nonresidents. Tax is collected by purchaser or his representative. Remittances abroad of payments for trademark licenses, commercial use of patents and transfer of technology are taxed for withholding income tax at 15% tax rate. Additionally, Law 10168 of Dec. 29, 2000 created Contribution on Royalties levied on amounts paid, credited, delivered, used or sent abroad every month to foreign entities domiciled abroad as payment of transfer of technology, including trademark licenses, exploitation of patents, technical assistance services, and supply of technology at rate of 10%. Therefore, now they are taxed at 25% rate.

Movie Films.

Revenues derived from exhibition of motion pictures are subject to withholding tax of 15%.

Branches.

In case of branches of foreign corporations, if income is reinvested in Brazil in their industry, increasing corporate capital, withholding tax is 15%.

IV. Interest paid by legal entities to individuals is subject to 15% withholding tax, when those interests exceed minimum designated amount per month, such tax being considered anticipation of tax to be due upon filing of income tax declaration. Rules for withholding and rates of withholding tax may vary depending on type, duration, amount and conditions of loan, in following cases: Income from fixed income securities; bills of exchange with acceptance of financial institutions, fixed from deposit certificates and debentures; interest received by individuals from Treasury Bonds and other public bonds, bank deposits with fixed maturity, debentures and certain other documents.

V. Interest, etc. from Registered Securities Payable to Resident of Country.

When recipient of income from registered documents is a corporation or legal entity, 15% withholding tax applies on distribution of profits and interest on founder's shares.

VI. Income in Foreign Money or in Kind.

Income in kind must be appraised in money as of date of receipt. Income in foreign money must be converted to national currency at rate in effect on date when paid or credited or at rate in which transaction was actually made.

See also category 14 Foreign Trade and Commerce, topic 14.04 Foreign Investment.

22.05 INHERITANCE TAX:

States have power to tax transfers of property causa mortis. States cannot establish tax in excess of 8% of value of real property being transferred.

22.06 LOCAL GOVERNMENT TAXES:

Tax on Distribution of Goods and Services.

(Const. art. 155-b; Decree-Law 406 of Dec. 31, 1968 as am'd). This State tax is payable at all stages of distribution, from manufacturer to final consumer; basis for assessment is added value with some exceptions. Tax is also payable for rendering of interstate and intermunicipal transportation and communications services. Decree-Law 406 establishes general rules applicable to tax. All states and territories within same economic region are required to agree upon uniform exemptions and tax concessions.

22.07 PROPERTY TAXES:

Real Property Transfer Tax.

Taxation of transfer of real property is attribution of States of Federative Republic of Brazil. Individual States must enact laws regulating this matter. Any acquisition of property or right is taxed at rate which varies from 0.5% to 4%. Tax is due from person acquiring property or right.

23 TRANSPORTATION

23.01 SHIPPING:

Law 9537 of Dec. 11, 1997 regulated by Decree 2596 of May 18, 1998 as amended establishes regulations for maritime traffic. Such Decree contains general principles governing ocean, river and lake shipping; it also contains regulations on navigation safety and security in Brazilian waters, penalties for infringement of law.

Law 8617 of Jan. 4, 1993 extends national sovereignty up to distance of 200 marine miles, measured from low tide marks. However, freedom of navigation and aeronavigation is not affected by dispositions of law.

Law 7652 of Feb. 3, 1988 as am'd regulates registration of maritime property for purposes of establishing nationality, validity, security and disclosure of ownership of vessels, among others. Law 9432 of Jan. 8, 1997 as amended, regulated by Decrees 2256 of June 17, 1997 and 5543 of Sept. 20, 2005 as amended, creates Registro Especial Brasileiro, in addition to Register of Maritime Ownership, for ship builders, maritime companies and Brazilian vessels, foreign vessels leased by Brazilian ship builders; establishes that captain, master engineer and two-thirds of crew members of Brazilian vessels must be Brazilian citizens. Brazilian vessels are those registered at Register of Maritime Ownership owned by Brazilian individual residents and domiciled in country or to Brazilian companies, and new vessels leased to Brazilian maritime companies, under condition of temporary suspension of flag in country of origin.

According to law all liens on Brazilian vessels must be registered in order to be valid against third parties.

24 TREATIES AND CONVENTIONS

24.01 TREATIES:

Double Taxation Treaties.

Brazil has signed various treaties for avoidance of double taxation. The National Revenue Code provides, in art. 98, that “the international treaties and conventions revoke or modify the internal tax legislation and must be observed by subsequent internal legislation”. Normative Ruling SFR 070 of Oct. 15, 1982 refers to applicability of double taxation treaties with reference to interest payments remitted abroad. Hence, such treaties prevail over internal rules. Treaties are in force with following countries:

Sweden, approved by Legislative Decree No. 33, of Aug. 2, 1966.

Japan, approved by Legislative Decree No. 43, of Nov. 23, 1967.

France, approved by Legislative Decree No. 87, of Nov. 27, 1971.

Belgium, approved by Legislative Decree No. 76, of Dec. 1, 1972.

Finland, approved by Legislative Decree No. 86, of Dec. 5, 1972.

Denmark, approved by Legislative Decree No. 90, of Nov. 28, 1974.

Austria, approved by Legislative Decree No. 95, of Nov. 10, 1975.

Spain, approved by Legislative Decree No. 62, of Aug. 7, 1975.

Italy, approved by Legislative Decree No. 77, of Dec. 5, 1979.

Luxembourg, approved by Legislative Decree No. 78, of Dec. 5, 1979 as am'd.

Norway, approved by Decree-86710 of Dec. 9, 1981.

Argentina, approved by Decree 87976 of Dec. 12, 1982.

Canada, approved by Legislative Decree No. 28, of Nov. 12, 1985.

Ecuador, approved by Legislative Decree No. 4, of Mar. 20, 1986.

Czech Republic and Slovakia, approved by Legislative Decree No. 11 of May 5, 1990.

Hungary, approved by Legislative Decree No. 13 of June 22, 1990.

Netherlands, approved by Legislative Decree No. 60 of Dec. 17, 1990.

Philippines, approved by Legislative Decree No. 198 of Oct. 1, 1991.

Republic of Korea, approved by Legislative Decree No. 205 of Oct. 7, 1991.

Republic of India, approved by Legislative Decree No. 214 of Nov. 12, 1991.

People's Republic of China, approved by Legislative Decree No. 85 of Nov. 24, 1992.

Portugal, approved by Legislative Decree No. 188 of June 8, 2001.

Chile, approved by Legislative Decree No. 331 of July 22, 2003.

Israel, approved by Legislative Decree No. 931 of Sept. 15, 2005.

Mexico, approved by Legislative Decree No. 58 of Apr. 17, 2006.

Ukraine, approved by Legislative Decree No. 66 of Apr. 18, 2006.

South Africa, approved by Decree No. 5922 of Oct. 3, 2006.

Treaties relating to Negotiable Instruments.

Brazil has adhered to Geneva Conventions on uniform laws governing negotiable instruments. (Approved by Legislative Decree No. 54, of Sept. 8, 1964.) There are three conventions which were signed by various States, including Brazil. They are: The Convention relating to the Uniform Law on Bills of Exchange and Promissory Notes; The Convention of Conflict of Laws in relation to Bills of Exchange and Promissory Notes; The Convention on Stamps on Bills of Exchange and Promissory Notes (this latter convention was also signed by U.K.).

Bustamante Code.

Brazil was signatory to Convention on Private International Law, known as Bustamante Code, which was approved by various American states in Havana, Cuba, on Feb. 20, 1928.

Extradition Treaties.

Brazil has signed following bilateral extradition treaties governing extradition of persons wanted for common crimes: Treaty with Bolivia (Decree No. 9,920, of July 8, 1942); Treaty with Chile (Decree No. 1,888, of Aug. 17, 1937); Treaty with Colombia (Decree No. 6,330, of Sept. 25, 1940); Treaty with Ecuador (Decree No. 2,950, of Aug. 8, 1938); Treaty with Italy (Decree 863 of July 9, 1993); Treaty with Lithuania (Decree No. 4,528 of Aug. 16, 1939); Treaty with Mexico (Decree No. 2,535, of Mar. 22, 1938); Treaty with Switzerland (Decree No. 23,997, of Mar. 13, 1934); Treaty with Belgium (Legislative Decree No. 26, of June 19, 1956); and Treaty with U.S.A. (Legislative Decree No. 13, of June 18, 1964).

Treaties relating to Aerial and Maritime Navigation.

Aerial Navigation.

Decree No. 80,977, of Dec. 12, 1977, which brought into effect Agreement on Air Transport with Government of Netherlands; Decree No. 80,486, of Oct. 4, 1977, which brought into effect protocol relating to amendment to Art. 56 of International Civil Aviation Convention, signed in Vienna on July 7, 1971; Decree No. 80,487, of Oct. 4, 1977, which brought into effect protocol relating to amendment to art. 48(a) of International Civil Aviation Convention, signed in Rome on Dec. 1, 1964; Decree No. 76,325, of Sept. 23, 1975, which gave effect to Rules and Recommendations of seventh edition of Schedule 9 of International Civil Aviation Convention, relating to air transport facilities; Decree No. 72,383, of June 20, 1973, which brought into effect Convention for the Repression of Illicit Acts against Security of Civil Aviation; Decree No. 70,218, of Feb. 29, 1972, which brought into effect Agreement on Regular Air Transport with Uruguay; Decree No. 69,210, of Sept. 16, 1971, which gave effect in Brazil to Amendment No. 7 to Schedule 9 of International Civil Aviation Convention, concerning facilities; Decree No. 68,237, of Feb. 15, 1971, which brought into effect Agreement on Air Transport with Switzerland; Decree No. 67,697, of Dec. 3, 1970, which brought into effect Agreement on Air Transport with Mexico; Decree No. 66,520, of Apr. 30, 1970, which brought into effect Convention relating to Offences and Certain Other Acts Committed on Board Aircraft, concluded in Tokyo on Sept. 14, 1963 and signed by Brazil on Feb. 28, 1969; Decree No. 66,237, of Feb. 19, 1970, which brought into effect Agreement on Air Transport with Denmark; Decree No. 66,238, of Feb. 19, 1970, which brought into effect Agreement on Air Transport with Norway; Decree No. 65,813, of Dec. 8, 1969, which brought into effect Agreement on Air Transport with Sweden; Decree No. 64,990, of Aug. 13, 1969, which brought into effect Amendment to Art. 50(a) of International Civil Aviation Convention; Decree No. 64,832, of July 16, 1969, which gave effect to Rules and Recommendations of sixth edition of Schedule 9 to International Civil Aviation Convention, relating to air transport facilities; Decree-Law No. 601, of May 29, 1969, which approved air agreements with Denmark, Norway and Sweden, signed in Rio de Janeiro on Mar. 18, 1969; Decree No. 60,868, of June 16, 1967, which brought into effect Regular Air Transport Agreement with France; Decree No. 60,967, of July 7, 1967, which brought into effect Complementary Convention to the Warsaw Convention for Unification of Certain Rules relating to International Air Transport Effected by Non-Contractual Carriers; Decree No. 60,908, of June 30, 1967, which brought into effect Agreement on Regular Air Transport with Argentine; Decree No. 54,203, of Aug. 24, 1964, which gave effect in Brazil to Rules and Recommendations contained in text of Schedule 9 to International Civil Aviation Convention which governs air transport facilities; Decree No. 54,173, of Aug. 21, 1964, which brought into effect Agreement on Regular Air Transport with Federal Republic of Germany; Decree No. 56,463, of June 15, 1965, which brought into effect Protocol amending Convention for the Unification of Certain Rules relating to International Air Transport; Decree No. 225 of Council of Ministers, dated Nov. 24, 1961, which gave effect in Brazil to Rules and Recommendations contained in Schedule 9 to International Civil Aviation Convention which governs air transport facilities; Decree No. 20,384, of Jan. 11, 1946, which brought into effect Provisional Agreement on International Civil Aviation, concluded in Chicago on Dec. 7, 1944 on occasion of International Conference on Civil Aviation, and signed by Brazil in Washington on May 29, 1945.

Maritime Navigation.

Decree No. 80,672, of Nov. 7, 1977, which brought into effect Convention for International Maritime Traffic facilities, signed in London on Apr. 9, 1965; Decree No. 80,106, of

Aug. 9, 1977, which brought into effect Agreement on Maritime Transport with Poland; Decree No. 80,068, of Aug. 2, 1977, which brought into effect Convention on International Regulations to Avoid Collisions at Sea, signed in London on Oct. 20, 1972; Decree No. 78,621, of Oct. 25, 1976, which brought into effect Convention on Maritime Transport with Uruguay; Decree No. 84,326 of Dec. 20, 1979, which brought into effect Maritime Agreement with France; Decree No. 74,600 of Sept. 24, 1974, which brought into effect Convention on the Entry of Nuclear Vessels into Brazilian Waters and their Stay in Brazilian ports, entered into with Federal Republic of Germany; Decree No. 72,676 of Aug. 22, 1973, which brought into effect Agreement on Maritime Transport with Soviet Union; Decree No. 66,103, of Jan. 22, 1970, which brought into effect International Convention on Cargo Lines, signed between Brazil and other countries in London on Apr. 5, 1966; Decree No. 65,441, of Oct. 13, 1969, which brought into effect Preliminary Protocol on Permanent Navigation on Bolivian and Brazilian Rivers Forming Part of Amazon River System; Decree No. 19,647, of Sept. 22, 1945, which brought into effect Agreement on Principles relating to Continuation of the Combined Control of the Merchant Navies, signed in London Aug. 5, 1944; Decree No. 351, of Oct. 1, 1935, which brought into effect International Convention for the Unification of Certain Rules relating to Maritime Guarantees and Mortgages, and appropriate Protocol, signed between Brazil and various countries in Brussels on Apr. 10, 1926.

Brazil is member of Multilateral Trade Negotiations, The Uruguay Round, Final Act, Marrakech, Apr. 15, 1994 and Agreement Establishing the World Trade Organization, Marrakech, Apr. 15, 1994.

It is also member of Latin American Integration Association (LAIA) 1980 and Latin American Economic System (SELA), created in Panama 1975. Brazil approved Inter-American Conventions: on legal regime of powers of attorney to be used abroad, on international commercial arbitration, on Letters Rogatory, Panama, Jan. 30, 1975. Inter-American Conventions on: proof of and information on foreign law, on conflicts of laws concerning commercial companies, on extraterritorial validity of foreign judgments and arbitral awards, on conflicts of laws concerning checks on Letters Rogatory and its Protocol, on Private International Law. Montevideo, May 8, 1979, Asunción Treaty, signed on Mar. 26, 1991 creating southern common market MERCOSUR, and its Protocol.

Note: MERCOSUR, established in 1991, is regional trade market. Member countries are Argentina, Brazil, Paraguay, Uruguay and Venezuela. Member countries liberalize trade with one another while imposing common external tariff on goods imported from nonmember countries. MERCOSUR has extended its scope by entering into free trade agreements with Chile, Bolivia, Colombia, Ecuador and Peru.

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BULGARIA LAW DIGEST

—Scope —

Revised for 2010 edition by

VASSIL BRESKOVSKI

(Abbreviations used are: CPC for Civil Procedure Code; FC for Family Code; CCS for Code on Commercial Shipping; CI for Code on Insurance; CPIL for Code on Private International Law; CSS for Code on Social Security; LA for Law on Advocates; LBD for Law on Biological Diversity, LBNBank for Law on Bulgarian National Bank; LBanks for Law on Banks; LCC for Law on Consumer Credit; LC for Law on Commerce; LCode for Labour Code; LConcessions for Law on Concessions; LCustoms for Law on Customs; LCPRT for Law on Consumer

Protection and Rules of Trade; LCRRs for Law on Copyright and Related Rights; LCIT for Law on Corporate Income Taxation; LG for Law on Gambling; LH for Law on Health; LI for Law on Inheritance; LICA for Law on Commercial Arbitration; LJPNCA for Law on Juridical Persons with Non-Commercial Aim; LMCI for Law on Medical Care Insurance; LN for Law on Notaries; LOC for Law on Obligations and Contracts; LP for Law on Property; LPatent for Law on Patents; LPP for Law on Public Procurement; LPUAL for Law on Property and Use of Agricultural Lands; LRD for Law on Religious Denominations; LSD for Law on State Debt; LSTD for Law on Scientific Titles and Degrees; LUR for Law on Underground Resources; DV for Durzhaven Vestnik.)

Bulgaria is member of EU. See also European Law Digest.

Note: This revision incorporates legislation through Sept. 6, 2009, unless it has been indicated otherwise in text.

1 INTRODUCTION

1.01 ADMINISTRATIVE LAW:

New Code of Administrative Procedure was adopted in 2006. Other statutes include Law on Administrative Contraventions and Penalties (“Zakon za administrativnite narushenija I nakazanija”) of 1969, as amended, Law on Supreme Administrative Court (“Zakon za vurhovnija administrativen sud”) of 1997, as amended. Special administrative courts have been launched on Jan. 1, 2007. Under Law on Administrative Service of Juridical and Physical Persons (“Zakon za administrativnoto obslushvane na juridicheskite i fizicheskite litsa”) of 1999, acts of public administration are subject both to administrative and judicial review.

State Administration.

Law on Administration (“Zakon za administracijata”) of 1998, as amended, contains provisions on structure of state administration. Following positions in administration exist: directors, experts, technical personnel. Central branch of executive includes: administration of Council of Ministers, ministries, state agencies, administration of state commissions, executive agencies. Territorial branch of executive includes: provincial administration and municipalities administration. At present there are about 80,000 civil servants.

State Servant.

Law on State Servant (“Zakon za durzhavnija sluzhitel”) of 1999, as amended. State servants ought to be politically neutral. Unified classification of all positions in public administration was introduced with ordinance by Council of Ministers. State servants are appointed upon competitive exams, except when they are provisionally employed for fixed term as substitutes. They must be Bulgarian citizens, must not be sentenced for intentional crime to imprisonment, must not be deprived of right to hold certain positions, must be in full legal capacity, possess necessary qualification and have university degree as well as relevant professional experience. Moreover, they cannot simultaneously hold positions of representatives in National Parliament or be counselors in municipalities councils, must not be merchants, directors or commercial agents of companies, must not be leaders or members of controlling bodies of political parties as well as must not have entered into other labour employment contract, except when they are also employed as lecturers in universities or as research associates in scientific institutes. Spouses, direct line relatives, collateral line relatives up to fourth degree as well as persons related by marriage up to fourth degree cannot be state servants when state service relationship creates direct hierarchical relationship of control and management. State servants take oath that they will observe and follow Constitution and laws of Republic. Provisions of laws state that in performing his/her tasks state servant ought to be guided by interest of state and ought to respect other citizens' rights. Law defines different ranks in hierarchy of state service. In general, persons employed by Ministry of Interior, Ministry of Defense, State Ministers and judges are not considered state servants under provisions of Law on State Servant. Their employment relationship is governed by separate laws. Law defines rights and obligations of state servant including: right to rest, right to strike, right to hold and express opinions, right to membership in trade unions and other associations, right to training, duty not to disclose official secrets. State servant social security contributions are entirely paid by funds allocated in budget of respective ministry or agency. State servant ought to make public all his/her assets as well as assets owned by his/her spouse and children under 18 and sign declaration to that effect. Law explicitly lists cases when state servant employment relationship can be terminated. All disputes including those for illegal dismissal are heard by Supreme Administrative Court or by district courts. State servants can be held liable for their negligent acts or omissions.

Disclosure of Property.

Law on Disclosure of Property Belonging to High Rank Public Officials (“Zakon za publichnost na imushstestvoto na lica zaemashti visshi durzhavni dluzhnosti”) of 2000, as amended, requires President, Vice-President, Members of Parliament, Prime Minister, Ministers and Deputy Ministers, constitutional court Judges and Supreme Court Judges, Mayors, Attorney General (“glaven prokuror”), directors of certain governmental agencies and other highly positioned public officials to disclose their holdings, income and expenses as well as holdings, income and expenses of their spouses and children under 18 and to submit declarations to that effect to General Accounting Office (“Smetnata palata”) (http://www.bulnao.government.bg/). Created register is open to public for inspection.

Conflict of Interests.

Law on Detecting and Prevention of Conflict of Interests (``Zakon za pazkrivane I predotvratiavane na conflict na interesi'') of 2008, as amended, entered into force in 2009. Public officials must refrain from having private interests in performing impartially their functions. Law defines private interest as any material or nonmaterial gain or benefit that has accrued to public official or related to him/her persons. In that relation, they must file declarations. Parliament keeps register of declarations of high rank public officials.

Ethics.

Code on Behaviour of State Servants (“Kodeks za povedenieto na sluzhitelite v durzhavnata administracija”) was adopted in 2004.

State Reserves.

Law on State Reserves and War-Time Reserves (“Zakon za durzhavnite reservi i voennovremennite zapasi”) of 2003, as amended, governs matter.

Police force was demilitarized under new Law on Ministry of Interior (“Zakon za ministerstvoto na vutreshinite raboti”) of 2006.

Electronic Government.

Law on Electronic Governance will enter into force on June 13, 2008. It regulates offering services over internet by central and local administration. See http://www.egov.bg/.

1.02 CURRENCY:

Legal currency of Bulgaria is lev. One lev is divided into 100 stotinki. Bulgarian National Bank has exclusive authority to issue currency notes and coins.

Coins in circulation are of following denominations: 1, 2, 5, 10, 20, 50 stotinki and 1 lev.

Currency notes in circulation are of following denominations: 2, 5, 10, 20, 50, 100 leva.

Exchange rate of Bulgarian lev to EURO is fixed according to provisions of Law on BNBank of 1997 and Law on Denomination of Lev of 1999. Fixed rate is EURO 1 ([Euro]) for 1.95583 Bulgarian lev (BGN).

Bulgaria is expected to adhere to Exchange Rate Mechanism II. It is also expected that upon minimum mandatory period of participation in exchange rate mechanism, Euro will be introduced.

1.03 GOVERNMENT AND LEGAL SYSTEM:

Brief Note on History of Bulgarian Law.

In different periods of ancient human history Bulgarian lands were part of Greek and Thracian civilizations, Macedonian and Roman Empires. In 681 AD nomadic Proto-Bulgarians, Slav and Thracian tribes formed union to South of river Danube and to west of Black Sea, and feudal state under name of Bulgaria was established at northern borders of Byzantine Empire. No written constitution. Christianity and Cyrillic alphabet were adopted in 9th century, and Byzantine laws, civil and ecclesiastical, commenced to be applied in country. Eclogue of Byzantine Emperors Leo 3rd and Constantine 5th, which was simplified version of Justinian's Code and which dated from 8th century, together with agricultural laws and Nomocanon were transplanted into new feudal kingdom. All or part of these laws were translated into Bulgarian and began to be applied as Bulgarian laws. Nomocanon was in force during most of Middle Ages under name of Kormchaya kniga. Eclogue and Nomocanon were used in drafting Bulgarian Law on Judging People ("Zakon soudni ludim") of 9th century. It is probable that during period of Byzantine rule (1018-1185) Byzantine laws, including Basilics, were applied on Bulgarian territory. During Second Bulgarian Kingdom (1185-1396), commerce flourished, and commercial links were established with Genoa, Venice, Dubrovnik. Bulgaria introduced its own currency, which was used along with Byzantine and other currencies. Several commercial treaties, which dealt with status of foreigners, were concluded by Bulgarian rulers, including: 716 Treaty with Byzantium, 1253 Treaty with Dubrovnik, and 1387 Treaty with Citizens of Genoa. Some Bulgarian Kings granted unilaterally privileges to merchants of Venice and Dubrovnik.

Under Ottoman feudal rule (1396-1878) statutes issued by sultans were in force on Bulgarian territory. Bulgarian Christian population was allowed to apply, however, customary rules of contract, family, succession and even penal law for minor crimes. During last period of Ottoman Empire Law on Lands of 1858 and Wakfs of 1867 were enacted.

Principality of Bulgaria was established to North of Balkan mountain by Treaty of Berlin of 1878. In 1879, Bulgaria adopted its first written constitution. Latter was modeled on Belgian Constitution. Her drafters were also influenced by Constitutions of neighbouring kingdoms of Serbia and Romania. However, in following decades, her application had been suspended on several occasions. Bulgaria was hereditary monarchy. Rules on primogeniture applied to succession to throne. Titles of nobility and slavery were prohibited. No orders of merit. All male subjects above 21 had right to vote and above 30 to be elected members of National Assembly. Primary education was proclaimed compulsory and free for all Bulgarian subjects. Military service was compulsory for all Bulgarian male subjects. Bulgarian National Bank, Bulgarian Post Office and other public institutions were established. Durzhaven Vestnik, as official gazette of Principality, was launched on July 28, 1879. Bulgarian currency was launched in May 1880. Bulgarian lev was pegged to French franc with its gold content being equal to 0.290326 g. In 1885, Principality of Bulgaria united with dependent territory of Eastern Roumelia. In 1888, first Bulgarian university was set up. New Bulgarian legislation was passed and promulgated. Law on Bulgarian Citizenship was passed in 1880. Customs Laws were enacted in 1880 and in 1884. Certain Ottoman civil laws, including Law on Lands and Madjalla, remained, however, in force.

Toward end of Second World War religious statutes had been governing laws in field of marriage. Ottoman civil laws were gradually replaced by new statutes, which followed French Code Civil and Italian Civil Code of 1865. First Bulgarian statute in field of inheritance entered into force in 1890. Males had priority over females in inheritance of agricultural lands. Shariah had remained governing law for Muslims. Metric system of measurements was introduced in 1889. In 1897, Law on Commerce was enacted, repealing Ottoman Commercial Code. Bulgarian Law on Commerce of 1897 followed provisions of German Commercial Code of 1861 and Hungarian Commercial Law of 1875. Austrian Law on Limited Liability Companies served as model for Bulgarian Law on Limited Liability Companies of 1924. Russian Code of Civil Procedure was used in drafting Bulgarian Code on Civil Procedure. Other relevant commercial legislation included: Law on Cooperatives of 1907, Law on Stock Exchanges of 1907, Law on Sea Trade of 1908, Law on Commercial Navigation of 1931, Law on Bankruptcy of 1932, Law on Market Places of 1883 etc. Since Dec. 25, 1894 Eastern European Time has been established along 30th meridian east of Greenwich. Ottoman Criminal Law, which was provisionally applied, was replaced by Bulgarian Criminal Law of 1896. Law on Criminal Procedure, which followed provisions of Russian and French statutes, was adopted in 1897. In 1889, Bulgaria joined Latin Monetary Union. Silver and gold coins were in circulation by end of 19th century. For short periods in 1898 and in 1907, Bulgaria made attempts to adhere to gold standard. In 1905, U.S.A. and Bulgaria established diplomatic relations. In 1908, Kingdom of Bulgaria formally proclaimed its independence. In 1916 Bulgaria introduced Gregorian calendar in place of Julian calendar and Mar. 31 was followed by Apr. 14. Codification council was launched with task to codify Bulgarian law.

Upon Balkan wars and First World War, in 1919 Bulgaria signed Treaty of Neuilly. Bulgaria joined League of Nations and was party to dispute heard by Permanent Court of Justice. In 1920 Bulgarian Parliament passed Law on Copyright, and in 1921 Law on Patents and Inventions. In 1925 Law on Aviation was enacted. Bulgaria became party to 1883 Paris Convention on Protection of Industrial Property, 1886 Bern Copyright Convention, 1919 Paris Air Navigation Convention etc. Social security legislation was passed. In 1937, only mothers were granted electoral rights. In 1928, Bulgarian lev was stabilized at 0.010870 g. gold. During Second World War, Bulgarian lev was pegged to German Reichsmark. Reform in Orthography was implemented in 1945.

Following legal changes occurred after Second World War and Paris Peace Treaties of 1947. People's Republic was established as result of referendum. New Constitution was adopted in 1947. Citizens above 18 were granted electoral rights. Both sexes acquired equal rights, civil marriage was introduced as only valid legal form of marriage, children born within and out of wedlock were granted equal rights. Agrarian reform was carried out and co-operative farming was set up as predominant way of cultivating land. Industry, mining, insurance, transport and banks were nationalized. Large town estates were expropriated, property acquired through profiteering was confiscated. Central planning of socialist property was introduced. Prices became subject to administrative control. Monetary reforms were introduced in 1947 and 1952. In 1952, gold content of 1 lev was fixed to 0.130687 g., and in 1962 to 0.759548 g. Initially, Bulgarian lev was pegged to US Dollar and later to Soviet ruble. Law on Commerce was repealed in 1951. Foreign trade became state monopoly. Bulgaria was member of 1959 Council of Mutual Economic Assistance trading bloc, which included Soviet Union and other social countries of Eastern Europe, and of Warsaw Military Pact. In 1955, Bulgaria became member of United Nations (http://www.un.org/). During Cold War period, Bulgaria joined number of international conventions, including: 1948 London Convention on Protection of Human Life at Sea, 1929 Warsaw Convention on International Carriage by Air, 1944 Chicago Convention on International Civil Aviation, 1952 Universal Copyright Convention etc. In 1971 new Constitution was voted.

Since 1990s, major political, economic and legal reforms have been carried out. Reforms included privatization of certain state property, restitution of nationalized property, liberalization of prices and of trade, as well as technological restructuring of industry and agriculture. Bulgaria joined International Monetary Fund (http://www.imf.org/) and World Bank (http://www.worldbank.org/) in 1991, World Trade Organization (http://www.wto.org/) in 1996, North Atlantic Treaty Organization (http://www.nato.int/) in 2004 and European Union (http://europa.eu/) in 2007. In 1994, Bulgaria accepted compulsory jurisdiction of International Court of Justice (http://www.icj-cij.org/).

Constitution.

Bulgaria's most recent Constitution was adopted by Grand National Assembly in 1991. (See http://www.parliament.bg/?page=const&lng=bg.) Constitution consists of following chapters: Fundamental Principles; Fundamental Rights and Duties of Citizens; National Assembly; President of Republic; Council of Ministers; Judiciary; Local Self Government and Local Administration; Constitutional Court; Amendment and Supplements to the Constitution, Adoption of New Constitution; Coat of Arms, Seal, Flag, Anthem and Capital; Interim and Concluding Provisions.

Fundamental Principles.

Bulgaria is republic with parliamentary system of government. Sovereignty is vested in people. No group, political party, or other organization, state institution, or individual may usurp right to exercise people's sovereignty. (Art. 1). Life, dignity, and rights of individual are guaranteed. (Art. 4[2]). Constitution declares that all people are born free and equal in dignity and rights and that all citizens are equal before law without discrimination on basis of race, nationality, ethnic affiliation, sex, origin, religion, education, beliefs, political affiliation, personal and social position, or property status. (Art. 6[2]). Constitution also declares principle of separation of powers between legislature, executive and judiciary. (Art. 8). Political life in Republic of Bulgaria is based on political pluralism and no single political party or ideology may be proclaimed or asserted as being that of State. (Art. 11). Freedom of religion is proclaimed. Religious institutions are separate from State. Eastern Orthodox religion is proclaimed traditional religion of Bulgaria. (Art. 13). Constitution and laws guarantee and protect labour rights, right to property and inheritance. Expropriation of property to meet important state and municipal needs must follow law and must be performed only when these state and municipal needs cannot be satisfied in other way. Compensation must be paid in advance. (Arts. 16-17). State is sole owner of all underground resources, coastal beaches, public roads, waters, forests and parks of national significance. State exercises sovereign rights over continental shelf and exclusive economic zone for research, development, preservation and management of biological, mineral and energy resources. State exercises sovereign rights over radio frequency spectrum and locations of geostationary orbit assigned to Bulgaria by international agreements. (Art. 18). Bulgarian economy is based on free economic initiative. Law prohibits abuse of monopolistic position and unfair competition in market, and protects consumers. (Art. 19). State provides conditions for free development of science, education and arts and supports them. (Art. 23).

Fundamental Rights and Duties of Citizens.

Freedom of conscience, thought, and choice of religion, either of religious or atheist views, are inviolable. (Art. 37). Freedom of press, speech, writing, information, association, assembly and demonstration, protection of privacy, residence, right to complaint are guaranteed. Exercise of some of these rights may be provisionally suspended either in certain emergency cases by law or upon official authorization by acts of judiciary. Constitution declares that individual rights of citizens, i.e. right to life, personal privacy and that of his/her family, honour, reputation, freedom of thought and conscience, and right to fair and speedy trial cannot be suspended by law upon declaration of war, martial law or other state of emergency. (Art. 57[3]).

Citizens have right to work, and everyone is free to choose his/her own profession and place of work. (Art. 48). Forced labour is explicitly prohibited. Constitution states that citizens have right to social security and assistance, to health insurance. Workers and employers have right to form unions and associations in order to protect their interests. (Art. 49).

Constitution declares right to education is universal. (Art. 53).

Parliament ("Narodno Subranie") (http://www.parliament.bg/).—Bulgarian Parliament consists of one chamber and is composed of 240 national representatives elected for four-year term. (Arts. 63-64). All Bulgarian citizens who are above 21 years of age, in legal capacity and who are not serving prison sentence are eligible to be elected representatives. (Art. 65). National representatives are elected by direct, universal suffrage and must represent not only their constituents but also entire nation. (Art. 67). Powers of National Assembly are enumerated in Art. 84 and include: It adopts, amends, repeals legislation; adopts budget and report of its implementation; imposes taxes and determines their amount; schedules elections for President of Republic; adopts resolutions on holding national referenda; appoints and dismisses prime minister and, on his/her proposal, Council of Ministers, makes changes in Council of Ministers as proposed by Prime Minister; creates, reorganizes, and dissolves ministries as proposed by Prime Minister; appoints and dismisses governors of Bulgarian National Bank and other institutions as regulated by law, e.g. members of General Accounting Office ("Smetnata Palata"), which monitors execution of budget, and members of Commission on Competition; approves state loans; decides on matters concerning declaration of war and making of peace; authorizes deployment and use of Bulgarian armed forces abroad, stationing of foreign armed forces on Bulgarian territory or passing of foreign armed forces through Bulgarian territory; declares martial law or any other state of emergency for entire or part of Bulgarian territory following proposals by President or Council of Ministers; grants amnesties; establishes orders of merit and medals; declares official holidays.

The President ("President") (http://www.president.bg/).—He/she is elected by direct popular vote for period of five years. President may be reelected only once. To be elected President of Republic, person must be of at least 40 years of age, be Bulgarian citizen by birth and have resided for last five years in Bulgaria. (Art. 93). In order to be elected President, candidate should have received more than one-half of valid ballots, provided that more than one-half of voters had participated in election. If no candidate has been elected, new election is held within next seven days. In second round, two candidates with greatest number of ballots must take part. Candidate for whom greater number of ballots was cast is elected President. Constitution provides for election of Vice President, who is elected together with President. He/she assists President in performance of his/her duties and assumes duties of President when latter submits his/her resignation to Constitutional Court; when latter is permanently incapacitated; upon death; and in case he/she is impeached by Parliament. (Art. 97). When Vice President cannot perform his/her function as President, Chairman of National Assembly becomes President. In this case election for President and Vice President is held within two months. (Art. 97[4]). Functions of President are as follows: schedules elections for National Assembly and for local self-governing bodies and sets date for holding national referenda when National Assembly has adopted resolution to that effect; issues appeals to people and to National Assembly; concludes international treaties in certain cases stipulated by law; promulgates legislation; upon proposal by Councils of Ministers, appoints ambassadors and permanent representatives of Republic to international organizations; grants asylum; grants, restores, revokes Bulgarian citizenship; grants pardon; cancels non-collectable state claims; designates sites of national importance and names populated areas; informs National Assembly concerning basic problems within limits of his/her authority; appoints and dismisses certain state officials, e.g. some of directors of Bulgarian National Bank. President is commander-in-chief of armed forces and appoints and dismisses high command of armed forces following proposal made by Council of Ministers. (Art. 100). President declares general and partial mobilization of armed forces upon proposal by Council of Ministers. When National Assembly is in recess, president may declare state of war in event of armed attack against Bulgaria or when there is need of urgent implementation of international obligations. President may declare martial law or any other state of emergency. In such cases, National Assembly must be convened immediately and vote on resolution. (Art. 100[5]). President may return bill to National Assembly for further debate, but must state his/her reasons for this act. (Art. 101). When National Assembly approves law for second time, promulgation is mandatory. In certain cases President may appoint caretaker government.

Former Presidents.

Law on Certain Privileges of Persons Who Were Presidents of Bulgaria was passed in 2003. Former presidents are entitled to receive remuneration equal to 60% of monthly salary of incumbent President as well as have right to use real estate and office owned by state for social purposes. They have right to use services of secretary, security guards and may use motor vehicle owned by state. They enjoy these privileges as long as they are involved in social activities for public benefit and are not employed under labour employment contract or are appointed as civil servants, judges, public prosecutors or are elected members of Parliament or members of Constitutional Court.

Government ("Ministerski suvet") (http://www.government.bg/).—Council of Ministers leads and implements domestic and foreign policy. (Art. 105). Prime minister and ministers must be Bulgarian citizens in full legal capacity and above 21 years of age. They must take oath before National Assembly. Council of Ministers may ask National Assembly to deliberate on vote on confidence. Council of Ministers must step down from office upon either vote on non-confidence voted by National Assembly, or Prime Minister or Council of Ministers resigns. Constitution does not contain provision with names and number of acting ministries and agencies. As of Aug. 2009, Council of Ministers consists of 15 ministries.

Judiciary ("Sudebna vlast").

Justice is administered in name of people. (Art. 118). Judiciary is independent and has separate budget. (Art. 117). 2003 amendment of Constitution states that judges, prosecutors and investigators are appointed and dismissed by Supreme Judicial Council. (http://www.vss.justice.bg/). After five years of professional activity judges, prosecutors and investigators pass attestation and upon decision by Supreme Judicial Council cannot be removed from their office. They must, however, leave office: at 65 years of age; upon retirement; when they were sentenced for intentional crimes to imprisonment; upon continuous impossibility to perform their duties for more than one year; upon continuous systematic nonperformance of their duties and upon performing acts that infringe on prestige of judiciary. Judges, prosecutors and investigators cannot be held responsible for activities done in performance of their office, unless they have committed intentional crimes of general character. Supreme Judicial Council consists of 25 members who are lawyers with high professional and moral integrity and of at least 15 years professional experience. National Assembly appoints 11 members of Supreme Judicial Council, while magistrates appoint other 11 members. President of Supreme Court of Cassation, President of Supreme Administrative Court and Prosecutor General (http://www.prb.bg/) are appointed and dismissed by President of Republic upon proposal by Supreme Judicial Council. They are ex-officio members of Supreme Judicial Council. (Art. 129). Minister of Justice presides over meetings of Supreme Judicial Council but has no right to vote.

Constitutional Court ("Konstitucionen Sud") (http://www.constcourt.bg/).—It provides mandatory interpretation of Constitution; decides on controversies relating to constitutionality of laws; on conflicts of jurisdiction between National Assembly, President, and Council of Ministers as well as between local self-governments and central executive bodies. It rules whether, prior to their ratification, international treaties signed by Bulgaria are consistent with Constitution, national laws, universally accepted standards of international law and international treaties signed by Bulgaria; issues opinions on controversies relating to constitutionality of political parties and associations; and whether president, vice president or national representative were elected in accordance with laws and Constitution. Constitutional court has jurisdiction over indictments against President and Vice President. (Art. 149). Constitutional court is composed of 12 judges elected as follows: One-third by National Assembly, one-third by President, and one-third by justices of Supreme Court of Cassation and

Supreme Administrative Court. Lawyers of high professional and moral integrity and of at least 15 years professional experience are eligible to be elected. Constitutional judges serve nine years in office and cannot be reelected. (Art. 147). Constitutional court takes its decisions by majority vote of more than one-half of all justices. (Art. 151). Decisions of Constitutional Court are published in Durzhaven Vestnik within 15 days of their adoption. When act is proclaimed unconstitutional, it becomes invalid on day of enactment of ruling. (Art. 151[2]).

Local Self-Government and Local Administration.

Bulgaria is unitary state. Bulgaria is divided in municipalities (“obshtini”) and provinces (“oblasti”). (Art. 135). Municipality is basic administrative unit. It is juridical person, has autonomous budget and owns real and movable property. Municipality council (“obstinski suvet”) is local self-governing body, which is elected by inhabitants of respective municipality for four-year term. (Art. 138). Mayor (“kmet”) is executive of municipality and is elected by inhabitants of municipality or municipality council for term of four years. (Art. 139). Municipalities' councils shall determine local taxes and charges. (See 2007 amendments to Constitution.)

Provinces are territorial units headed by governors who are appointed by Council of Ministers. (Art. 143).

Amendments to Constitution.

National Assembly may pass law which amends and supplements Constitution by majority of three-quarters of national representatives upon three rounds of balloting on three different days. When amendment proposal is approved by less than two-thirds of national representatives, proposal is submitted for consideration after two months, but before passage of five months. In any new debate amendment is adopted by at least two-thirds majority of national representatives. (Art. 155).

Under Art. 158 of Constitution, Grand National Assembly, consisting of 400 national representatives, has following functions: adopts new constitution; rules on changes of Bulgaria's borders and ratifies treaties stipulating such changes; decides on changes of form of government; decides on amendments of constitution related to direct effect of constitution and of international treaties; decides on issues concerning irrevocability of fundamental rights of citizen and their provisional suspension in time of war, martial law or other state of emergency; decides on amendments of constitution. At least one-half of national representatives and President have right to initiate debate on above issues. (Art. 159). National Assembly decides on issue for holding elections for Grand National Assembly with two-thirds majority of all national representatives. (Art. 160[1]). Grand National Assembly takes decisions with two-thirds majority of all national representatives on three successive resolutions on three different days. (Art. 161).

Ombudsman.

Law on Ombudsman of 2003. Must be Bulgarian citizen of high moral standing and be elected by Parliament for five-year term. Ombudsman acts as defender of citizens rights and liberties against activities and omissions of government, municipalities and persons performing public services. (http://www.ombudsman.bg/).

Electoral Laws.

Elections of President and Vice-President, national representatives and local representatives as well as referendums are governed by separate laws. Codification of all electoral laws is under discussion. As of 2009, Bulgarian electoral system is proportional with certain majoritarian element, and candidates of political parties and coalitions that have passed 4% barrier may enter National Assembly. Elections are conducted by secret ballot and are held on nonworking day. Every citizen over 18 years of age has right to vote except for mentally disturbed persons whose civil capacity was suspended in court proceedings and for persons serving prison sentence. Citizens generally exercise their electoral rights at their permanent address, i.e. address that they have chosen to be entered in register of population and that appears on their identity card, save for certain people including those residing in hospitals, sanatoria, sailors, non-professional soldiers, and students. Latter must submit application in order to vote at present address. Bulgarian citizens who have permanent residence abroad may participate in elections if they state their intention in advance. Members of armed forces have same voting rights as civilians. No possibility to vote by mail. Electronic voting has been experimented in certain electoral section in 2009 elections for Bulgarian Parliament.

EU citizens with permanent or long-term residence in Bulgaria, and who have lived for last ten months in municipality may participate in local elections. They may also be elected in municipalities' councils.

European Parliament.

Direct elections of members of European Parliament (http://www.europarl.europa.eu/) from Bulgaria are governed by separate law. Proportional voting system has been used. EU citizens who are not Bulgarian citizens and who have lived for last three months in Bulgaria or EU member state are entitled to vote as well. EU citizens who are above 21 years of age and who have no citizenship outside EU may also be elected as members of European Parliament from Bulgaria. First elections took place in May 2007. In June 2009, second elections were held. Voting is not mandatory. Bulgarian Parliament ratified EU Treaty of Lisbon on Apr. 28, 2008.

1.04 HOLIDAYS:

Following days are official holidays in Bulgaria: Jan. 1 (New Year's Day); Mar. 3 (National Holiday of Liberation); Easter; Easter Monday; May 1-2 (Labour Day); May 6 (St. George's Day and Day of Courage and Bulgarian Military); May 24 (St. Cyril & St. Methodius' Day and Day of Bulgarian Enlightenment, Culture and Slavonic Alphabet); Sept. 6 (Day of Unification); Sept. 22 (Independence Day); Nov. 1 (Day of People Awakeners, nonworking holiday only for educational institutions); Dec. 24 (Christmas Eve); Dec. 25-26 (Christmas).

Labour Code also contains provision that Council of Ministers may on ad hoc basis move and alter dates of certain nonworking holidays, declare certain nonworking holidays working days, and in certain year declare date official holiday. Holidays of Easter and Easter Monday follow Julian Calendar. Under provisions of Labour Code and Law on State Servant Council of Ministers issues annually decisions which define holidays for members of religious denominations other than Bulgarian Orthodox Church, i.e. Catholic, Muslim, Armenian, Buddhist, Jewish etc. Council of Ministers declares days of year as days for celebration of certain professions, e.g. librarians, economists, lawyers, miners and geologists, state servants etc.

When final days of performance of legal obligation fall on nonworking day/non-business day (“neprisustven den”) period of time is extended through following working day. (Art. 72 LOC). In civil process, when period expires on legal holiday, Sat. or Sun., this day is not counted, and period extends on next working day.

1.05 LANGUAGE:

Official language in Bulgaria is Bulgarian. (Art. 3 of 1991 Constitution). In court proceedings all documents in foreign language ought to be accompanied with translation in Bulgarian. Cyrillic alphabet is used in Bulgaria.

Transliteration.—Law on Transliteration (``Zakon za transliteratsiiata'') of 2009 contains rules on how to represent or spell Cyrillic characters and their combinations in Latin alphabet.

1.06 OFFICE HOURS AND TIME ZONE:

Bulgaria is in Eastern European time zone (+02:00 of Coordinated Universal Time [UTC]). During daylight savings time, which begins at 3:00 a.m. Eastern European Time on last Sun. of Mar. and ends at 3:00 a.m. Eastern European Time on last Sun. of Oct., clocks and watches are advanced by one hour. Daylight savings time was introduced with Decree by Council of Ministers in 1979. Its latest amendment is Decree N 94 of 13 Mar. 1997. Bulgaria's regulation is in harmony with EU Parliament and Council Directive on Summer Time Arrangement. Office hours are generally from 9 a.m. to 6 p.m. There is usually hour lunch break.

2 BUSINESS ORGANIZATIONS

2.01 AGENCY:

General provisions are contained in Law on Obligations and Contracts. (Arts. 36-43). Agency (“predstavitelstvo”) may be created either by law or by contract.

Power of attorney or appointment of agent (“upulnomostavane”) to enter into any contract, which under law requires formal deed, ought to be executed in same formal instrument. Thus, power of attorney to enter into contract which requires notarial form ought to be executed in written form with notarized signature of parties. Principal may at will revoke power of attorney and agent may always refuse to act as agent. Agent may not negotiate on behalf of principal with himself/herself or with any third person, who is also represented by same agent, unless principals have given their consent.

Contract under which agent and other person enter into any agreement to detriment of principal is void. (Art. 40 LOC).

Agency is generally terminated by: revocation by principal; renunciation by agent; death of either principal or agent who are physical persons, or their lack of legal capacity, or winding up of juridical persons of principal and of agent. Revocation and renunciation of agency may be done in any form. Agency termination does not affect rights of third parties who negotiated in good faith with agent, unless agency termination was subject to registration and was duly registered. (Art. 41 LOC).

Agent is bound to exercise his/her agency according to instructions given by principal. When several persons were authorized to act as agents, each one of them may perform. (Art. 39 LOC).

Persons who acted as agents without being duly authorized or acted beyond their power are liable for damages. Person on whose behalf contract was concluded may confirm it. (Art. 42 LOC). Confirmation ought to be executed in same form which is required for power of attorney.

Power of attorney may be issued for performance of specific acts or be general.

General power of attorney gives authority to transact all principal's business. However, general power of attorney cannot be used to alienate principal property. Special power of attorney is needed for that purpose.

Agent may appoint another person as agent only if either he/she was duly authorized for this purpose or appointment was necessary for preserving principal's interests. Re-appointment of new agent may be revoked by principal or by first agent. Agent must notify principal for appointment and provide all necessary information about new agent. If agent fails to do that, he/she may be held liable for acts of new agent. (Art. 43 LOC).

Commercial Agency.

See Law on Commerce which contains general provisions on commercial agency. (Arts. 21-52). Law defines three types of commercial agents: procurist, commercial representative, commercial assistant, commercial agent, commercial broker.

Procurist or commercial manager is natural person who has been appointed by principal to carry out merchant's business. Procurist and principal enter into contract under which procurist receives pay. Principal may appoint several persons to act as procurists. Procurist's power of attorney ought to be given in written form with notarized signature of parties and must be notified in commercial register together with signature of procurist. Procurists ought to sign documents by adding to name of company his/her name and “prokura”. Procurist has right to perform all acts and enter into transactions related to commercial activity, to appoint agents for performing specific acts, to represent merchant. However, procurist cannot appoint other person to act as procurist and is not permitted to alienate or mortgage real property, unless he/she has received specific power of attorney, Power of attorney has effect against third parties upon its entry into commercial register. Power of attorney terminates: upon revocation by merchant and upon note to that effect in commercial register. Power of attorney does not terminate upon death of principal or upon principal losing his/her legal capacity.

Commercial representative (“turgovski pulnomoshtnik”) is person appointed by merchant to perform certain acts, which were stated in his letter of attorney, against remuneration. Appointment is done in written instrument with notarized signature of principal. Commercial representative may conduct ordinary business of merchant, but in order to alienate and mortgage real property, to receive loans, to enter into bills of exchange obligations, to participate in legal proceedings, he/she needs specific authorization by principal. Commercial representative cannot transfer his/her rights to another person without principal's prior consent. Commercial representative ought to sign all documents by adding to his name and name of firm “pulnomoshtnik”.

Procurist and commercial representative cannot conclude commercial transactions on their own or others' accounts without prior consent of principal. Principal may either claim damages or declare that above commercial transactions were concluded on his/her account. Statute of limitation for above action is five years.

Commercial assistant (“turgovski pomoshtnik”) cannot trade on principal's expense. Merchant and commercial assistant ought to enter into contract. There exists prohibition for commercial assistant to compete with his/her employer.

Commercial agent (“turgovski predstavitel”) is merchant who cooperates with another merchant in his/her trade. Commercial agent and principal must enter into contract, which ought to be in written form. Commercial agent may be authorized to enter into commercial transactions either on behalf of merchant or on his/her behalf and on principal's expense. Commercial agent must act in good faith, take into account principal's interests and inform merchant for every concluded transaction. Principal is obliged to provide commercial agent with all relevant information for conclusion of transactions as well as to notify agent whether he/she binds himself/herself with transactions concluded without authorization. Commercial agent has right to remuneration for all transactions concluded by him/her or with his/her assistance during period when commercial agency contract was in force. When commercial agent has been offered to act exclusively on certain territory or to target certain clients, he/she may claim remuneration or commission for transactions which were concluded without his/her assistance. Commercial agent has right to receive fee for collecting debts on behalf of his/her principal as well as has right to ordinary expenses in carrying out principal's business. Commercial agent has right to remuneration or commission, which normally ought to be paid each month. When commercial agent undertakes obligation to be held personally liable for concluded transactions, e.g. failure of third party buyer to pay price of goods, del credere agent has right to additional remuneration, which must be stipulated in contract. Parties to del credere contract cannot agree that such remuneration is not due. (Art. 35 LC). Law on Commerce contains provision designed to protect commercial agent, including obligation for principal to pay compensation, when upon termination of commercial agency contract principal continues to profit from business created by agent. Amount of this compensation, when contract was not terminated because of agent's fault, is one year's commission (based on average for period of contract's duration). Commercial agency contract may be concluded for definite period or for indefinite period. In latter case each party may terminate it with one-month notice in first, second and third year, and with three-months notice—after third year. Agency contract concluded for definite period may be terminated by one of parties, but he/she must pay compensation to other party. Commercial agent cannot also represent other merchants, when they act as competitors to principal. (Art. 44 LC). Commercial agent that ceased to act as such must enter note in commercial register to that effect. In case of death or loss of legal capacity by agent, his/her heirs or guardian (if natural person is concerned) or court (if bankruptcy proceeding were concluded) must inform relevant court. Under Art. 41 of Law on Commerce upon termination of agency contract parties may agree on noncompetition contract or noncompetition clause, which must be concluded in written form and point to same commercial area and same goods and services. This noncompetition clause ought to be limited for period of maximum two years from termination of agency contract. Principal owes compensation for this period.

Commercial broker ("turgovski posrednik") is merchant whose occupation is to act as intermediary for conclusion of commercial transactions. (Art. 49 LC). Special rules apply to ship-brokers, insurance brokers and stock brokers, which can be found in following statutes: Law on Commercial Shipping, Law on Insurance and Law on Public Offering of Securities.

2.02 ASSOCIATIONS:

Non Profit Associations.

Law on Juridical Persons with Noncommercial Aim ("Zakon za juridicheskite litsa s nestopanska tsel") of 2000, as amended.

Activity of these legal entities, which are either associations or foundations, may be either for promotion of public welfare or of private welfare (interest). Their aim must be defined in their charter. Juridical person with noncommercial aim may carry out for-profit commercial activity only if this activity is related to main business and if profits derived are used to achieve objectives specified in its charter.

Juridical person with noncommercial purpose acquires status of legal entity upon registration with Register at district courts and with Register at Ministry of Justice (if its activity is for promoting public welfare). Decisions of Minister of Justice which refuse registration of juridical persons with noncommercial aim for promotion of public welfare are subject to appeal before Supreme Administrative Court. Juridical persons with not-for-profit aim must be registered with tax authorities as well.

Conflicts of law provisions of Law state that legal capacity, setting up, reorganization, governance, membership of juridical persons with not-for-profit aim are governed by law of country where they have their domicile. Setting up and closing down of branch is ruled by law of country where branch has its domicile.

Political Parties.

Under new Law on Political Parties of 2005, political parties are voluntary associations of Bulgarian citizens with electoral rights. Members of armed forces, state servants working for Ministry of Interior, criminal investigators, public prosecutors, judges cannot be members of political party.

Religious Associations.

Law on Religious Denominations (“Zakon za religioznite izpovedanija”) of 2002. Religious denominations are proclaimed free and equal. Religious institutions are deemed separate from state. (Art. 4 LRD). State bears responsibility to create conditions for this freedom to be exercised as well as to maintain respect and tolerance between different sects and devotees. Religious communities and institutions cannot be used for political purposes. Freedom of religion cannot be exercised against national security, public order, rights and freedoms of other persons. Religious communities may receive status of juridical persons upon registration with public register kept at Sofia City Court. Procedure to be followed is set up in Civil Procedure Code. State and municipalities may grant rights to use of real estate to religious denominations as well as offer them subsidies, tax exemptions, and other preferences and privileges. (Art. 23[3] LRD). Allocation of state subsidies to registered religious denominations must be carried out in accordance with annual law on state budget. Religious denominations which have obtained status of juridical persons may set up and participate in commercial partnerships and companies as well as create juridical persons with not-for-profit aim. (Art. 26 LRD). Communication between clergyman and penitent is privileged. (Art. 13 LRD).

Registered religious denominations may open social homes, schools and institutions for medical care and treatment. (Art. 30 LRD). Law contains provision for restitution of expropriated, confiscated or alienated property, which belonged to religious denominations. State policy in field of religion is implemented by special directorate at Council of Ministers. Employee-employer relationship between clergyman/woman and his/her religious institution is governed by religious institution charter, Bulgarian labour and social security legislation. (Art. 29 LRD).

Contract of Association according to Law on Obligations and Contracts.

(Arts. 357-364). Two or more persons may associate to jointly share efforts in achieving common objective. Such associations do not possess legal personality. Participants may be obliged to provide money or other property for aims of association. Unless otherwise agreed upon, participants decide common affairs unanimously. Participants' contributions or items acquired through execution of joint activity become co-property of all participants in equal shares, if agreement does not stipulate otherwise.

Professional Associations.

Regulation by statute of entire profession include, inter alia, advocates, judges, medical doctors, dentists, nurses, architects, engineers in investment planning, notaries public, teachers, university professors and scientists, private security guards, private executory judges, handicraftsmen/women, builders, pharmacists, mid-wives, etc. New Law on Recognition of Professional Qualifications of 2008 defines requirements and procedure to be followed by foreigners and EU citizens and relevant Bulgarian authorities that recognize professional qualifications acquired abroad. Law implements EU Directives 2005/36/EC, 2006/100/EC, 74/556/EEC, and 74/557/EEC.

2.03 ASSOCIATIONS OF MERCHANTS:

Holding company is defined as company whose aim is to participate in other companies and in their control and management. Law requires that at least 25% of its capital must be directly invested in companies whose stock it holds. (Art. 277 LC). Holding company may engage in following activities: acquisition, management, valuation, and sale of shares or stock in Bulgarian or foreign companies; acquisition, valuation, sale of patents and licence agreements; rendering financial services to companies, which holding company controls. Holding company cannot participate in entities which are not juridical persons; cannot acquire licences, which are not supposed to be used in controlled companies; cannot acquire real estate, which is not considered necessary for its business activity. However, holding company is permitted to acquire stock in companies dealing with real estate. (Art. 278 LC). Holding company may only extend credits to companies which it controls, and these credits cannot exceed 10% of its capital. (Art. 279 LC). Amount of controlled companies' and enterprises' deposits in holding company cannot exceed amount equal to three times of holding company's capital.

Consortium.

Law on Commerce defines consortium as voluntary association of merchants, based on contract, for conducting certain business activity. Consortium may be established either as civil partnership as defined in Law on Obligations and Contracts or in any form of commercial entity. (Arts. 275-276 LC).

2.04 COOPERATIVES:

Under Law on Cooperatives (“Zakon za kooperatziite”) of 1999, as amended, cooperative (“Kooperatsija”) is voluntary association of natural persons who conduct commercial activity in spirit of cooperation and mutual aid. It is juridical person with variable capital and variable number of members. Cooperatives and cooperative unions are exempt from registration fees, as well as from fees related to their transformations and termination of their activity. Agricultural cooperatives enjoy certain tax exemptions under Law on Value Added Tax.

2.05 CORPORATIONS:

Corporation in Form of “Aktzionerno druzhestvo” (“AD”) is stock company whose capital is divided into shares. Law on Commerce applies. (Arts. 158-252 LC).

Purposes.

Any lawful purpose, except activities expressly reserved by laws to other corporations.

Period of Corporate Existence.

No statutory limit of years exists.

Corporate Name and Incorporators.

It is freely chosen by founders. Name must be followed by “aktzionerno druzhestvo” or “AD”. One or more natural or juridical persons with Bulgarian or foreign nationality or residence.

Capital.

50,000 leva (since year 2000). Minimum capital for banks is ten million leva, for insurance companies—two million leva for life insurance and personal accident insurance; three million leva for property insurance; two million for reinsurance. No differentiation is made between “AD” seeking investment from public or other “AD”.

Articles of Incorporation and By-laws.

“Ustav” state: corporate name, registered headquarters, address where its seat of governance is located; purpose and term of existence; amount of capital, number and type of shares, par value of shares, share transfer restrictions, if applicable; governing bodies, their term of office and members; type and value of contributions in-kind, if applicable, persons who will make them and number of shares delivered to these persons; benefits which these persons will keep for themselves, if applicable; issue of redeemable shares, if applicable; how profits will be distributed; other issues.

Corporation in Form of Limited Liability Company “Druzhestvo s Ogranichena Otgovornost” (“OOD”).

Liability is limited to amount of members contributions in capital. Law on Commerce applies. (Arts. 113-157 LC). In 2009, required capital was reduced from 5,000 leva to 2 leva.

Limited Partnership with Shares in Form of “Komanditno Druzhestvo s Aktsii” or “KDA”.

(Arts. 253-260 LC). Unless otherwise provided, provisions concerning corporation in form of “AD” apply. There are two kinds of partners in “KDA”: with unlimited liability and with limited liability. Stock is issued for shares of partners with limited liability. Number of partners with limited liability shall be more than three. Rarely used form of corporation.

Corporate Name.

It is freely chosen by founders. Name shall contain “Komanditno Druzhestvo s Aktsii” or “KDA”.

Incorporators.

Founders are members with unlimited liability. They may choose shareholders among subscribers and prepare articles of association and by-laws.

Governance.

One-tier system of corporate governance as in “AD”.

Shareholders' meeting is composed of members with limited liability. Shareholders with unlimited liability have only deliberative vote.

Board of Directors.

Members are partners with unlimited liability.

Amendment of By-Laws and Dissolution.

Consent of members with unlimited liability is needed. “KDA” is not dissolved upon death or declared bankruptcy of partner with limited liability.

2.06 FIRM AND CORPORATE NAME:

Firm or corporate name is name used by merchant, partnership or corporate entity when doing business. (Arts. 7-11 LC). Under firm business entity lays down his/her signature. Certain elements must be always included in firm or corporate name. Firm may also include business entity's purpose, participating persons as well as freely chosen addendum. Firm or corporate name must be written in Bulgarian and may be written in any other foreign language. Meaning of name shall not be deceptive, shall not be against public policy and morals.

When business entity is in liquidation, firm must contain addition “in likvidatzija”. Branch offices use business entity's name plus addition “klon”.

Firm may be changed by merchant, partnership or corporate entity which have registered it. When firm contains name of leaving partner, latter's consent is necessary for not changing it.

Exclusiveness of Registered Firm.

Persons with interest may file action for damages against business using other firm.

2.07 FOUNDATIONS:

Foundation (“fondatsija”) is legal entity which is created by act of will or inter-vivos gift.

In case of inter-vivos act, act for setting up foundation and signature of person who established foundation must be certified by notary public. When real estate is transferred, act must be registered with regional court. Foundation has no members and can be governed by board or by one person. Its founding charter contains: name; domicile; aims, types of activities; property; governing bodies; branches; rules concerning its representation and its governance; period for which foundation has been set up. Foundation may be used for public and ideal purposes, including development and promotion of spiritual and human values, civil society, health care, education, culture, science, technology, sports; social care and aid of person with disabilities or socially weak persons; protection of human rights and environment etc. Foreign foundation may perform charitable activities in Bulgaria through registered branch when its activity is not contrary to public order and law. (Arts. 33-36 LJPNCA).

2.08 PARTNERSHIPS:

Collective Partnership (“Subiratelno druzhestvo”).

It is association of two or more natural or juridical persons to enter into and perform commercial transaction under name of joint firm. Partners are severally and jointly liable. Collective partnership is juridical person. It has standing to sue and be sued, to acquire rights and assume liabilities.

Limited Partnership (“Komanditno druzhestvo”).

It is set up by two or more juridical or natural persons to perform business activity under joint firm name. At least one partner has unlimited responsibility for debts of partnership, while other partners are liable up to amount based on agreed advance contribution. Law on Commerce related to collective partnership should be consulted as well. (Arts. 99-112 LC).

Civil Partnership (“Druzhestvo”).

Two or more persons decide to unite their efforts in order to achieve one common aim. Civil partnership is not juridical person. Partnership, as such, cannot acquire rights and assume liabilities and has no standing to sue or be sued. Law on Obligations and Contracts apply. (Arts. 357-364 LOC).

Dissolution.

Civil partnership can terminate: upon failure or achievement of purpose; upon expiration of term for which it was founded; upon timely and bona fide notice by partner; upon death or upon full incapacity of partner; upon court decision, when there exist serious reasons.

2.09 SMALL AND MEDIUM-SIZED ENTERPRISES:

Law on Small and Medium-Sized Enterprises (“Zakon za malkite i srednite predprijatija”) of 1999, as amended. Law contains definition of micro-enterprises as small enterprises with no more than ten members of personnel. Upon latest amendments of Law in 2006, small enterprises are defined as enterprises with personnel of up to 50 members, with annual turnover up to 19.5 million leva and value of long-term assets—up to 19.5 million leva, and which are independent. Medium-sized enterprises are defined as enterprises with personnel of up to 250 members, with annual turnover up to 97.5 million leva and value of long-term assets is up to 84 million leva, and are independent. Excluded from definition are joint-stock companies traded on stock exchanges, banks, stock-brokers, insurance companies, organizers of games of chance, producers of wine and spirituous liquors. Agency on Small and Medium-Sized Enterprises was set up as governmental agency for promotion of small and medium-sized enterprises. Agency's chairman/woman is appointed by Prime Minister. He/she prepares annual report which is submitted to Council of Ministers and to Parliament. Agency keeps register of small and medium-sized enterprises in Bulgaria.

3 BUSINESS REGULATION AND COMMERCE

3.01 ACCOUNTING:

Amendments to Law on Accountancy (“Zakon za schetovodstvoto”) of 2001, as amended, introduced International Accounting Standards (IAC) in Bulgaria. Auditing and accountants are regulated by Law on Independent Financial Audit (“Zakon za nezavisimija finansov audit”) of 2001, as amended. Public accountants are subject to licensing. Starting on Jan. 1, 2005, IAC are used in preparing financial statements for all business entities.

3.02 ANTI-TRUST LAWS:

See topic 3.19 Monopolies, Restraint of Trade and Competition.

3.03 BANKS AND BANKING:

Central Bank.

Bulgarian National Bank (BNBank) (“Bulgarska Narodna Banka”) (http://www.bnb.bg/) maintains stability of national currency, has exclusive right to issue notes and coins as well as regulates and supervises other banks' activities. BNBank capital is 20 million leva. Board of Governors consists of seven members, elected in office for term of six years, who must be Bulgarian citizens, of high moral standing and be prominent professionals in field of economics, finance and banking, must not be sentenced for intentional crimes with imprisonment and must not have been members of management or supervisory boards of bankrupt companies. Governor of BNBank is elected by National Assembly. Vice Governors, who are heads of issue, banking and bank supervision departments, are also elected by National Assembly upon proposal made by Governor. Governors and Vice Governors must not perform or engage in any other paid activity while in office. Other members of Board of Governors are appointed by President of Republic. Members of Board of Governors take oath that they will not break law, cooperate in order to realize BNBank functions as well as keep banking and commercial secrets. Under Law on Bulgarian National Bank: BNBank may not provide credit to State or to institutions owned by State other than credit for purchase of special drawing rights from International Monetary Fund following provisions established in Law (Art. 45 LBNBank); BNBank may not lend to commercial banks except in case of liquidity risk threatening to affect stability of banking system (Art. 33 LBNBank); BNBank may not deal in Bulgarian government bonds; BNBank may not issue currency notes in excess of amount of its gross international foreign currency reserves, including market value of cash and deposits in freely convertible foreign currencies, equity investment and quota in International Monetary Fund's special drawing rights, foreign public debt securities owned by BNBank, balances arising out of forward or buy-back transactions concluded between BNBank and other central banks or public international financial institutions, monetary gold valued at market value based on official London bullion market price (previously it was valued at DM 500/[Euro]255.64 per troy ounce) (see Art. 28 LBNBank); BNBank must prepare its financial statement and must submit it to Parliament in accordance with International Accounting Standards (Art. 46 LBNBank); BNBank acts as agent for public debts or for debts guaranteed by State. Since 1997, official exchange rate has been fixed at 1 lev per DM 1 and upon introduction of EURO at 1 lev per [Euro]1.95583. (Art. 29 LBNBank). BNBank invests its international currency reserves in accordance with reasonable investment principles and practice so that its investment in securities must be made only in liquid public debt securities, possessing one of two highest ratings awarded by two internationally recognized credit rating agencies. Accordingly, BNBank acts as central depositary of government bonds. (Art. 43 LBNBank). BNBank determines, publicly announces base interest rate for certain time period and publishes it in Durzhaven Vestnik. (Art. 35 LBNBank). Under Art. 42 LBNBank, BNBank must prepare Bulgaria's balance of payment. BNBank may perform following transactions: may buy and sell gold coins, bullion and other precious metals; may buy, sell and deal in foreign currencies; may open and keep accounts with international financial institutions, central banks and other foreign financial institutions; may open and keep accounts and may act as agent or correspondent with international financial institutions, central banks and other foreign financial institutions. (Art. 37 LBNBank). BNBank issues ordinance on required minimum reserves which must be deposited in BNBank by each bank operating in Bulgaria as well as other conditions and requirements for credit system's stability. Some other regulations include: ordinances on licences issued by BNBank; on bank's positions in foreign currencies; on issue, acquisition and payment conditions on government securities; on offered credit in Bulgarian levs by BNBank against security offered by banks; on bank's capital adequacy; on valuation of banks risky operations and on formation of reserves to cover those risks and incurred losses; internal audit of banks; on liquidity of banks; on payments with bank cards; on bank's investments in real estate, stock and shares in nonfinancial enterprises; on central credit register of banks.

Since Apr. 25, 2005 BNBank has participated as observer in European System of Central Banks. (http://www.ecb.eu/).

Guarantee of Deposits.

Under Law on Guarantee of Deposits in Banks ("Zakon za garantirane na depositite v bankite") of 1998, as amended, foreign and Bulgarian currency deposits in each licenced bank are guaranteed and insured up to amount of 100,000 leva. Deposit Guarantee Fund (http://www.dif.bg/) was established in 1998. Banks are required to make initial contributions of amount equal to 1% of their registered capital, but at least of 100,000 leva, and annual contributions of 0.5% of amount of all attracted deposits from previous year to Fund. In case of deficit Fund may enter into loan agreements with foreign banks and may receive funds from state budget upon decision of National Assembly. BNBank acts as depositary to Fund. Members of its board of directors are appointed in following manner: Its chairman/woman is appointed by Council of Ministers, its deputy chairman/woman—by Board of Governors of BNBank, one member—by representative organization of commercial banks, and two other members—by chairman/woman and deputy chairman/woman of Fund. Members are required to hold either degree in law or in economic science as well as to possess relevant professional experience in financial sector. Deposit Guarantee Fund can only make investment in following financial assets: securities issued and guaranteed by State, short-term deposits in commercial banks approved as primary dealers in state securities, deposits in BNBank.

Banks.

New Law on Credit Institutions ("Zakon za kreditnite institutzii") entered into force on Jan. 1, 2007. At present, most of banks active in Bulgaria are owned by foreign banking institutions.

Bankruptcy of Banks.

Law on Bankruptcy of Banks was passed by Parliament in 2002 and regulates concepts of insolvency of banks operating in Bulgaria, procedures aimed at prevention of bankruptcy and procedures for liquidating bank.

Unclaimed Deposits.

No statutory regulation.

Payment Services.—New Law on Payment Services and Payments Systems entered into force in Oct. 2009 and aligned Bulgarian legislation with EU rules.

3.04 BILLS AND NOTES:

Although Bulgaria is not signatory to 1930 Geneva Convention providing for Uniform Law for Bills of Exchange, Promissory Notes and to 1931 Geneva Convention providing for Uniform Law for Cheques, most provisions in Law on Commerce relating to commercial paper follow closely provisions of above international treaties.

Bill of exchange ("meniteInitsa") must contain: words "bill of exchange" in language in which bill is drawn; order to pay certain amount of money; names of drawer and drawee; date and place of payment; date and place of issuance, signature of drawer. (Art. 455 LC). Omission of some elements may result in nullity of bill of exchange, or document might not be considered bill of exchange. When there is no date of payment, bill is considered payable at sight. (Art. 456 LC). When there is no place of payment, bill is payable at place stated beside name of drawee, which place is also considered his/her domicile. When there is no place of issue, bill is deemed issued at place stated beside name of drawer. Bill of exchange may be drawn to drawer's order and for third party's account. When bill is signed by persons without capacity, or contains forged signatures or signatures of nonexistent persons, liability of other persons who signed bill is still valid. (Art. 461 LC). Inclusion of rate of interest in bill is void except in cases when bill is payable at sight or at term after sight and interest rate is clearly indicated. (Art. 459 LC). Person who signs bill of exchange without power of attorney assumes personal liability under bill. (Art. 462 LC). Drawer guarantees acceptance and payment of bill. He/she is always responsible for payment. (Art. 463 LC).

Any bill may be indorsed. Bill of exchange that contains expression "not to the order", written by drawer, is not endorsable. Endorsement may be made to any person, including drawer, drawee or third person. (Art. 466 LC). Partial endorsements are null and void. Indorsements made under condition are not permitted. (Art. 467 LC).

Bill of exchange may be presented to payee for acceptance on or before due date. (Art. 475 LC). Acceptance of bill must be unconditional, but payee may limit acceptance to smaller sum. (Art. 480 LC). Acceptance is indicated by signature alone of drawee and words "accepted" or other similar words. (Art. 479 LC). Payee may demand that bill be presented again for acceptance on following day. Drawer may state term of presentation for acceptance. Bill payable at certain date after sight must be presented for acceptance within a year. Drawer may lengthen or shorten this period. (Art. 477 LC).

Bill of exchange drawn at sight must be presented for payment within one year. Drawer may shorten or lengthen this period. (Art. 487 LC). Bill falling due on certain date or period after issue or at sight must be presented for payment on due date or on the two succeeding business days. Partial payment may not be rejected. (Arts. 491-492 LC). If bill is payable in currency which is not legal tender in place of payment, bill may be paid in local currency at due date exchange rate.

Failure to accept or pay must be established by protest. Protest must be made through written petition filed with notary public at place of payment or acceptance. Protest must contain: copy of bill of exchange with all endorsements and other notes on it; name of person in whose favor and against whom protest is made; demand to drawee or person liable to accept or pay, stating whether he/she was present or not, reasons for refusal or none was offered; place and date; signature and seal of notary. (Art. 502 LC). Drawer, or indorser or guarantor may insert clause "without protest" or "return without expenses" or similar phrase, which if signed relieves holder from protesting. (Art. 500 LC). Protest for nonpayment of bill of exchange due on term after date or sight must be made within two working days after date of dishonor and if at sight within term of presentation or if presented on last day, on following day. (Art. 498 LC). Protest for nonacceptance must be made within period for presentation for acceptance, but if first presentation was made on last day of term, protest may be made on subsequent day. (Art. 497 LC). Within four days of protest holder must send notice to his/her endorser, guarantor, and to drawer. Every endorser must notify his/her endorser within two working days upon receipt of notice. (Art. 499 LC).

When bill of exchange falls due and if it is not paid, holder may file return claims against indorsers, drawer and guarantors. (Art. 505 LC).

Law on Commerce contains provisions that bill of exchange may be issued in several numbered copies. (Art. 525 LC).

All actions against acceptor are barred by limitation period of three years from maturity. All actions of bearer against endorsers are barred by limitation period of one year from date of protest or from maturity. All actions of bearer against endorsers are barred by limitation period of one year from date of protest or from maturity, when bill of exchange contains "without expenses". Actions of one endorser against other endorser are barred by statute of limitation of six months from date of repayment of bill or from date of action against endorser. (Art. 531 LC). Unjust enrichment actions of bearer against drawer and payee of sum are barred by period of limitation of three years from date of loss of possibility to bring all other actions. (Art. 534 LC).

Payments arising out of bill of exchange may be guaranteed by aval as to whole or part of amount due. Aval may be given by third party or any endorser by signing face of bill after words good as aval/bon pour aval ("kato poruchitel", "kato avalist") or other equivalent phrase or by signing allonge. Aval must specify for whose account it is given. Giver of aval is bound in same manner as person for whom he/she has become guarantor. In line with Geneva Convention Law on Commerce regulates also intervention for honour. Drawer, endorser, or person giving aval may specify person who is to accept or pay in case of need. Bill may also be accepted or paid by person who intervenes for honour of any debtor against whom right of recourse exists. (See Arts. 516-524 LC.) Acceptance by intervention is possible in all cases where holder has right of recourse before maturity on bill capable of acceptance. Payment by intervention may take place where, before or after maturity, holder has right of recourse on bill. Payment must be made for whole amount. It must be made at latest on day following last day allowed for drawing up protest. Holder who refuses payment by intervention loses his/her right of recourse against any person who would have been discharged thereby. When bill has been accepted by persons intervening who are domiciled in place of payment, or if persons domiciled therein have been named as referees in case of need, holder must present bill to all these persons and, if necessary, have protest for non-payment drawn up at latest on day following last day allowed for drawing up protest. In default of protest within this period, party who was named referee in case of need or for whose account bill was accepted and subsequent endorsers are discharged of their obligation. Acceptor by intervention is liable to holder and to endorsers subsequent to party for whose honour he/she intervened in same manner as such party. Payment by intervention is certified by receipt given on bill of exchange. Person paying by intervention acquires rights arising out of bill against party for whose honour he/she has paid and against persons who are liable to latter on bill. Nevertheless, person paying by intervention cannot re-endorse bill.

Promissory notes ("zapis na zapoved") are subject to rules relating to bill of exchange insofar as they concern maturity, endorsement, payment, protest, rights and duties of holder, joint and several liability, statute of limitations. (Art. 537 LC). Promissory note must contain: words "promissory note (zapis na zapoved)" in language in which bill is drawn; unconditional promise by drawer to pay certain sum; names of drawer and drawee; date and place of payment; date and place of issuance, signature of drawer. (Art. 455 LC). Omission of one of above references, except place of issuance, time and place of payment may result in nullity of promissory note.

Cheque must contain: (1) word "cheque" or equivalent in language used; (2) unconditional payment order of determined sum; (3) name of drawee; (4) date and place of issuance; (5) place of payment; (6) signature of drawer. Omission of some elements may result in nullity of cheque, or document might not be considered to be cheque. When there is no place of payment, cheque is payable at place stated beside name of drawee, and if these designated places are more than one, cheque is payable at first designated place. When there is no other indicated place, cheque is payable at main domicile of drawee. When there is no date of issue, cheque is deemed issued at place stated beside name of drawer.

Cheques which are payable in Bulgaria can be drawn only on bank. (Art. 541 LC). Cheques may be drawn in favour of: specified person or without specific stipulation “on order”; specified person with stipulation “not to the order” or other similar clause; to bearer. (Art. 543 LC). No insertion of interest is to be made. (Art. 545 LC). Drawer cannot exempt himself/herself from liability. (Art. 547 LC).

Cheques must be payable at sight. (Art. 551 LC). In general cheques must be presented for payment within eight days from date of issue. (Art. 552 LC). At present there are no statutory provisions for presentation of cheques issued in other European country or outside Europe and payable in Bulgaria. Death or incapacity of drawer does not make cheque invalid. Rules governing liability of endorsers and drawers are same as those which govern bills of exchange. (See Art. 562 LC which refers to provisions related to bills of exchange.)

Endorsements of cheques are subject to rules similar to those applicable to bills of exchange, except that drawee cannot endorse cheque and endorsement in favor of drawee has effect only as invoice (see Art. 548 LC).

Law on Commerce contains provisions on crossed cheques (imprinted with two parallel lines) and cheques to be credited in account.

Protest must be made before time for presentation expires. (Art. 559 LC). When presentation is made on last day of period, protest must be made on following business day.

Actions brought by bearer against drawer, or endorser are barred after six months from date of presentation or from date of expiration of presentation period. (Art. 561 LC).

Conflicts of law rules related to bills and cheques. (See Arts. 563-572 LC.) Capacity of person to incur liability under bill or cheque is determined by law of person's nationality, unless such law declares another law to be applicable. Persons, who lack capacity, may incur liability if that person's signature is affixed in country whose law recognizes person's capacity.

As to form and content of bills and cheques lex loci is applicable, i.e. place where signature is affixed. If bill and cheque are invalid, but follow provisions of law where successive obligation has been undertaken, they are valid. (Art. 564/2/). Cheque's form and content suffices to follow form and content of place of payment.

Substantive law applicable to obligations of issuer of own bill of exchange and of acceptor of drawn bill of exchange is law of place of payment/performance.

Other obligations and rights, e.g. time of submitting return claims, are determined by law of place where bill was issued.

Law of place of performance rules as to whether bill may be accepted only in part and whether holder must accept partial payment. Law of place of payment is relevant as for measures which must be taken in case of loss or theft of bill or cheque.

Law of place where bill was issued determines time within which recourse must be taken, whereas form and periods for drawing up protest are ruled by law of country in which acts must be performed.

Law of place of cheque payment determines whether cheque must be issued at sight or may be issued to be paid in certain period upon presentation, time of presentation, possibility for cheque endorsement and acceptance, possibility for cheque to be barred, right of issuer to cancel cheque or to oppose payment.

3.05 CARRIERS:

Carriers are defined as merchants who transport persons or goods from one place to another. (Art. 367 LC). Law on Commerce lays down general rules on contract on transport while Law on Automobile Transport ("Zakon za avtomobilnija transport") of 1999, as amended, Law on Railway Transport ("Zakon za zhelezoputnija transport") of 2000, as amended, Law on Civil Aviation, Code on Commercial Shipping establish rules for specific types of contracts. Carriers are held liable for loss or damage of goods unless loss or damage have been caused by force majeure, or they are due to qualities of product or to packaging which may be considered inappropriate. Clauses in contracts which exclude liability are not deemed valid. (Art. 373[3] LC). Carrier has right to retain possession of goods he/she has carried until he/she has been paid his/her freight or charges. Lien is generally exercised by last carrier and is in existence until rights of all carriers prescribe. (Art. 375 LC). Claims for damages are subject to prescription period of one year. (Art. 378 LC).

Licence is needed for providing public services of railway or automobile transport.

3.06 CARTEL LAW:

See topic 3.19 Monopolies, Restraint of Trade and Competition.

3.07 COMMERCIAL LAW:

Most recent Bulgarian Law on Commerce was passed on June 18, 1991 and entered into force on July 1, 1991. (See http://www.vks.bg/vks_p04_05.htm.) In drafting Law on Commerce, provisions of commercial statutes of Germany, France, Spain, UK, Czechoslovakia, etc., as well as certain provisions of civil laws of Switzerland and Italy and relevant European Communities Directives were used. Law contained two chapters which included provisions on merchants, commercial agency (prokura); partnerships, limited liability companies, joint stock companies, consortiums, holdings.

In 1994, Chapter 4 "Bankruptcy" was added.

Chapter 3 "Commercial Transactions" was enacted in 1996.

Bulgarian law distinguishes between merchants and nonmerchants. Merchant, as defined in Law on Commerce, is either juridical or physical person who enters into commercial transaction as his/her regular occupation.

Merchants are commercial corporations, partnerships and cooperatives, except for house constructing cooperatives. Merchant is also every person who has formed enterprise and who ought to conduct his/her activity in commercial way. Following persons are not considered merchants: physical persons engaged in agriculture, craftsmen/women, persons performing services with their own labor or exercising free profession, except when their activity may be defined as enterprise, persons, performing hotel services by renting rooms in their own houses.

Merchant must keep business records in which are reflected movements of his/her enterprise's property, must draw up inventory in due time as required in Law on Accountancy, must prepare annual balance sheet and profit and loss statement, which shall be certified by certified accountant. All commercial books, which have been regularly kept, as well as notes in them may be used in evidence for establishing commercial transactions.

3.08 COMMERCIAL REGISTER:

Law on Commercial Register ("Zakon za turgovskija register") will enter into force on

Oct. 1, 2006. Commercial register is centralized computer database. (http://www.brra.bg/). Agency for Inscriptions with Minister of Justice is administrative authority which maintains register. Register is open to public. Agency has territorial branches located at district courts. Merchants and branches of foreign merchants must apply for registration within seven days after commencement of activity. They must record relevant circumstances and acts within seven days from date when event occurred. Annual financial report for previous year must be presented for registration up to June 30. Application must be made by merchant or legal representative. Recorded circumstance is deemed notified to third bona fide persons from moment of registration. Upon expiration of 15 day period from inscription recorded circumstance cannot be opposed to third persons who can provide evidence that it was impossible for them to obtain knowledge of that circumstance. Third bona fide persons may rely on circumstances recorded in Register. Applications for registration must include: name and domicile of applicant; date related to merchant or branch; circumstance which must be recorded; signature of applicant. Applicant must sign declaration concerning authenticity of recorded circumstance. Applications and attached documents must be submitted in one of EU official languages, but must be also accompanied by certified Bulgarian translation. Bulgarian translation has priority over document in foreign language. Applications and other documents may be also submitted in electronic form. Clerk with agency, who is state servant, verifies application and relevant documents as well as whether prescribed state fee has been paid. His/her decision is subject to appeal before district court within seven day period. Upon registration unified identity code is assigned to persons inscribed in register. Merchants and their representatives are liable to fines if they do not register or fail to declare circumstances, which are subject to recording. Under provisions of Law, merchants and branches or foreign merchants, which are registered in present commercial register with district courts, are obliged to re-register within three years from its entry into force. They do not need to pay state fees.

3.09 CONSUMER PROTECTION:

New Law on Protection of Consumers (“Zakon za zashtita na potrebitelite”) was passed on Nov. 24, 2005 and replaced Law on Consumer Protection and Rules of Trade of 1999. Law regulates disclosure of information, prohibits unfair and misleading practices, governs “distance” sales, provides safety requirements for products, establishes dispute procedure and defines consumer remedies, and allows for organization of consumer protection associations. State has power to impose fines for violations.

Consumer Credit.

Law on Consumer Credit (“Zakon za poterbitelskija kredit”) of 2006 prescribes general disclosure requirements concerning consumer credit contracts. There are disclosure requirements with respect to advertisements of consumer credit contracts. Consumers may file claims with Commission on Consumer Protection. (http://www.kzp.bg/).

3.10 CONTRACTS:

Law on Obligations and Contracts of 1950, as amended, (“Zakon za zadulzhenijata i dogovorite”) sets forth general provisions on contracts (“dogovori”) and specific provisions on following civil contracts: sale (“prodazhba”), exchange (“zamjana”), gift (“darenie”), rent (“naem”), loan (mutuum [“zaem”]), loan-service (commodatum [“zaem za posluzhvane”]), contract for deposit (depositum [“vlog”]), contract for production (“dogovor za izrabotka”), contract for commissioned order (mandatum [“poruchka”]), civil association (“druzhestvo”), settlement (“spogodba”), public promise to give award (“publichno obeshtanie za nagrada”). Part 3 of Law on Commerce contains general rules for commercial transactions as well as specific rules on following commercial transactions: sale (“prodazba”), leasing (“lizing”), commercial agency (“comisionen dogovor”), contract for transport or carriage of persons, luggage and goods, banking transactions (“bankovi sdelki”), licence, contract for deposit in public store, contract for control of commodities.

In case of lack of rules in Law on Commerce, provisions of Law on Obligations and Contracts and other civil law statutes must be applied and, if there are no rules in civil statutes, commercial usages and practices must be applied. When there exist differences in commercial usages, usages and practices of place of performance are to be applied. (Art. 288 LC).

Contract is defined as agreement between two or more persons in order to create, settle or cancel legal relationship between them. Persons utilize their rights in order to satisfy their private interests. Persons cannot, however, exercise their rights in manner that is contrary to society's interest. (Art. 8 LOC). Party to commercial contract is not permitted to exercise rights under contract only with intent to cause damage to other party. (See Art. 289 LC [Abuse of Rights].)

Parties are free to establish content of their contract as long as it is not contrary to mandatory rules of law and good morals. (Art. 9 LOC).

Law on Obligations and Contracts declares that contracts possess binding force of law between parties. (Art. 20a LOC). Contracts must be interpreted in accordance with real common will and intentions of parties. Clauses of contract must be interpreted in their mutual interdependence and as part of entire contract. Regard must be taken of contracts' purpose, as well as clauses, and contract must be interpreted in accordance with common usage and in good faith. (Art. 20 LOC).

Prior to 1999 Law on Obligations and Contracts contained provision that all contracts were to be concluded only in Bulgarian currency, except in cases determined by Law. At present, no such requirement exists.

Essentials of valid contract are: mutual consent; proper object (“predmet”) (object must be possible, lawful, not contrary to good morals, determined or determinable); parties competent to contract; cause (“osnovanie”) (this is economic reason or aim of contract which results in allocation of property or resources between parties. Cause is supposed to exist unless it can be proved otherwise. Cause must also be lawful.); form (“forma”) (oral, written, notarial or written form with signatures, certified by notaries public).

Contract performance and termination may be conditioned upon some future uncertain event. It is deemed that this event has happened when party with interest in its non-occurrence has acted in bad faith and prevented its coming into appearance. (Art. 25 LOC).

Offer and Acceptance.

Parties when conducting negotiations and entering into contract must act in good faith. Otherwise they are subject to pre-contractual liability for damages. (Art. 12 LOC). Offer stating period within which offeror will await reply is binding on offeror until period expires. Offer may be withdrawn when message which contains withdrawal reaches other party before or at latest together with offer. If no period was specified for acceptance, offers made in presence of another party or by telephone cease to bind if not accepted immediately. If no period was specified, written offers which are made to parties that are not present, cease to bind offeror if time expires in which offeror, in accordance with circumstances and normal course of events, would receive reply of acceptance without delay. Acceptance ceases to bind party, when its withdrawal reaches offeror before or together with acceptance. When acceptance was sent on time, but was received with delay, contract is deemed concluded, except when offeror immediately informs other party that he/she considers acceptance delayed. (Art. 13 LOC).

Contract is considered concluded at time when acceptance reaches offeror. Contract is considered concluded at place where offer was made. When one of parties becomes incompetent or dies after sending his/her acceptance, contract is considered concluded. (Art. 14 LOC).

In commercial contracts, person may receive offer to conclude contract in framework of his/her business by party with whom she/he have had continuous and stable commercial relations. If this person does not respond, it is to be regarded that he/she has accepted offer. (Art. 292[1] LC).

Commercial contracts may be concluded as result of public offer directed to unspecified number of persons and using mass media. This public offer must include period within which it must be accepted and must state quantity of goods offered. Commercial entity is bound with this offer until all goods are sold within specified period. (Art. 291 LC).

When offer includes general conditions, acceptance is valid if it contains written confirmation of general conditions. When discrepancies between inserted written conditions and general conditions exist, inserted conditions are considered valid even when general conditions are not deleted. In case of model contracts, which are customary and are with continuous performance, altering of general conditions are valid for other party only if she was informed in advance, and she has not stated explicitly that she does not accept them within specified time period. (Art. 16 LOC).

Commercial contract may be concluded under condition that third party will confirm it. Therefore, it becomes valid with its confirmation. Party that has obliged himself/herself to take care of confirmation must notify other party. When in period of three months upon conclusion of contract, other party does not receive notice of confirmation, she may avoid contract. (Art. 296 LC).

Under Art. 299 of Law on Commerce, parties may have agreed that third person will state certain clauses in contract. These clauses become obligatory to parties only when third person has stipulated them in accordance with aim of commercial contract, with rest of its content and with commercial usage. When third party does not perform or its performance is contrary to aim, content of contract and commercial usage, each party may demand that these clauses be stipulated by court.

Parties to commercial contract may agree that upon occurrence of certain event they will make addendum (additions) to their contract. When this event occurs and they cannot reach agreement, each party may demand court to decide on issue of controversy. Court must take into consideration aim and content of contract as well as commercial usage. (Art. 300 LC).

In event law stipulates that commercial contract has to be accompanied by decision (permission or confirmation) of state authority, contract becomes effective only as result of such decision. Person or entity, who has undertaken obligation to ask for such permission or approval, must perform with due diligence, incur necessary related costs, as well as inform other party of result. (Art. 295 LC).

Preliminary Contract.

Contract in which one or both parties bind themselves to enter into future contract, must define essentials of future promised contract (“predvaritelen dogovor”). (Art. 19[2] LOC). Each party to preliminary contract may bring action for conclusion of final contract. There is written formal requirement for preliminary contracts when final contract must be entered before notary public. Court proceedings for conclusion of final contract are governed of Civil Procedure Code and contract is deemed concluded at time when judgment enters into force.

Contract for Benefit of Third Person.

It is possible to negotiate and enter into contract for benefit of third person. Stipulation for benefit of third person cannot be withdrawn when third person has declared before both parties, i.e. promisor and stipulator, that she/he wishes to take advantage of it. Stipulator may retain right to alter third person or to annual stipulation for benefit of third person. (Art. 22 LOC). Promisor may raise objections against third person which are based on contract, but not objections based on other transactions between himself and stipulator.

When contract for benefit of third person is declared invalid upon action brought by creditors of stipulator, third person is only obliged to return amount given by stipulator. (Art. 22[3] LOC).

Party who has promised act or obligation of third person is obliged to compensate other party when third party refuses to be bound by this contract or does not perform promised act. (Art. 23 LOC).

Nullity of Contract.

Contract is void when it is either contrary to mandatory rules of law or circumvents them as well as contracts that infringe on good morals, including contracts upon unopened successions. Following contracts are also void: if they have impossible object; if consent is missing; when formal requirements are not observed; contracts which lack cause; fictitious ("prividen") contracts. (Art. 26[1][2] LOC).

However, secret contract in addition to publicly made contracts, when this secret contract has aim to annul, modify this public contract, i.e. "simulacia", is not necessarily void in all cases, e.g. gift was secret contract and sale or loan was public one. It is rule that third bona fide parties can acquire property rights from party to secret contracts, with exception of rights arising from contracts over real property when these real property rights were acquired after court registration of claim for declaring secret contract void. (See Art. 17 LOC.) See also category 8 Debtor and Creditor, topic 8.06 Fraudulent Sales and Conveyances.

No validation of void contract is possible unless provided by mandatory rules of law. Thus, contract is valid, if void terms may be replaced by mandatory rules of law, or when it could be presumed that contract would have been concluded without its null parts. (Art. 26[4] LOC).

Voidable Contracts.

Contract is voidable if, at time of execution, one of parties was legally incompetent to contract, or was concluded by representative without mandatory rules of law being followed as well as contracts concluded by mistake ("greshka"), fraud ("izmama"), or under duress ("zaplashvane"), or ultimate need ("krajna nuzshda"). (Art. 27 LOC).

Person whose interest was directly concerned and/or has suffered damage may bring action for annulment of voidable contracts within three-year prescription period. However, defendant in lawsuit for performance of voidable contract may demand annulment through counterclaim even after limitation period has expired. (Art. 32 LOC). Contracts entered into state of ultimate need (laesio enormis) ("krajna nuzda"), i.e. apparently unfair conditions of contract at time of its conclusion and state of need of one party, can be rescinded upon demand by injured party or its heirs and within one-year period from time of conclusion of contract. (Art. 33 LOC). Court cannot annul such contract only in part and for future. Annulment is not allowed when other party to contract entered into under state of ultimate need offers to repair damages caused. Voidable contract can be validated, if it is confirmed by party who has right to demand its annulment. Party must do this in written form and must state reasons why contract is voidable. Voidable contract may be also validated when damaged party voluntarily performs his/her obligation under contract with knowledge of reasons for annulment. Voidable contracts concluded under state of ultimate need cannot be validated. (Art. 35 LOC).

Commercial contracts are not voidable when they were entered in state of ultimate need and under apparently unfair terms. (Art. 297 LC).

Performance.

Parties to contract must fulfil their obligations with due diligence, with due exactness and according to requirements of law. Moreover, each party must not act in way that will prevent other party from performing his/her obligations in same diligent manner. (Art. 63 LOC). Obligations must generally be performed with care of good husband ("dobur stopanin"). In commercial contracts standard of due diligence, i.e., good merchant ("dubur turgovets"), is defined within framework and with consideration of professional character and requirements of specific commercial activity. (See Art. 302 LC.)

When debtor must deliver generic goods and their quality is not defined by appropriate regulations or by contract, debtor should deliver goods of at least average quality. (Art. 64 LOC).

Creditor cannot be forced to accept something different as substitute for what was agreed to in contract. (Art. 65 LOC). Creditor cannot be forced to accept partial performance even when obligation and performance could be divided into several parts. (Art. 66 LOC).

Third person may perform obligation of debtor, unless creditor has interest in personal performance. (Art. 73 LOC). Person who has fulfilled other person's obligations and who has possessed legal interest to have done this becomes creditor of latter. (Art. 74 LOC).

Debtors must perform their obligations either to their creditors, or to creditors' agents, or to other persons authorised by court or by law. Otherwise debtors' performance is only valid when creditor has confirmed it or has taken advantage of it. Debtors are released from their obligations when they performed diligently to person who on basis of unambiguous circumstances was authorised to receive performance. Real creditor has right to bring action against person, who received performance. Performance to incompetent creditor releases debtor, when it has benefited that creditor. (Art. 75 LOC).

Debtor, who has several obligations to certain creditor, when performing and when his/her performance is insufficient to extinguish them, may state which one of these obligations he/she wishes to be extinguished. When he/she does not state that clearly, it is deemed that most onerous of them is extinguished. In case of several burdensome debts, it is deemed that debt which fell due first in time had priority. (Art. 76 LOC). When payment is not sufficient to cover interest, costs and principal of debt, order to be followed is: costs, interest, principal.

Unless otherwise agreed, it is considered that costs of performance are to be paid by debtor, and higher costs incurred as result of change of place of performance are to be paid by party who caused them. (Art. 78 LOC).

If place of performance is not specified and does not appear from nature of obligation, from law or from contract, performance must be effected: in case of pecuniary obligation—at creditor residence at moment of payment; in case of delivery of certain item—at place where item is situated at moment when obligation was created; in all other cases—at debtor residence at moment when obligation was created. (Art. 68 LOC).

When time or date for performance is not defined or apparent from nature of obligation, it must be performed immediately or upon demand. If performance is to be determined by wish and means of debtor, regional court may provide debtor with appropriate and sufficient time for performance. (Art. 69 LOC).

Time limits or due dates are to be deemed stipulated in favour of debtor, unless it follows otherwise because of nature of obligation or because parties have agreed otherwise. Debtor may perform in advance, unless time limit or due date was stipulated in favour of creditor. In case of interest payment debtor may pay before due date and deduct interest for period until due date. (Art. 70 LOC).

Creditor may demand performance of obligation before due date, when debtor has become insolvent, or debtor's acts have diminished assurances given to creditor or when debtor did not provide creditor with promised assurances. (Art. 71 LOC).

Art. 303 of Law on Commerce states that when commercial contract does not stipulate date of performance, if commercial usage and practice and nature of transaction does not require otherwise, creditor may demand performance and debtor may perform at any moment during business hours at place of performance.

Persons entering into commercial contract may assume common obligation and are generally considered jointly and severely liable for its performance. (Art. 304 LC).

Nonperformance.

In case of defective performance aggrieved party may seek either specific performance and compensation for delay, or compensation for nonperformance. (Art. 79 LOC). When creditor seeks only compensation, debtor may offer to perform what was initially agreed and compensation for delay. In this case creditor must still have interest in debtor's performance. (Art. 79[1] LOC).

Creditor has right to demand authorization by court to act at debtor's expense, when obligation is act of strictly personal nature. When obligation is to refrain from certain act, creditor may demand authorization to cancel at debtor's expense act done in breach of obligation. (Art. 80 LOC).

Damages for breach of contract consist of sum equal to loss suffered and to foregone utility or profit, direct consequence of nonperformance or defective performance. Such damages may not exceed loss which party in breach foresaw or ought to have foreseen at time of conclusion of contract. But if party at fault is not diligent and acted in bad faith, she/he is to be liable for all direct damages suffered by aggrieved party. (Art. 82 LOC). When aggrieved party was also liable for nonperformance, court may either reduce compensation for damages or fully exonerate party at fault from liability. Party at fault cannot be held liable for damages which aggrieved party could have avoided acting diligently, with care of good husband (“dobur stopanin”). (Art. 83 LOC).

In case of nonperformance of pecuniary obligation, debtor is liable for damages in amount of legal rate of interest. When damages suffered exceed this amount, creditor may seek redress following general rules for damage compensation as set up in Law on Obligations and Contracts. (Art. 86 LOC).

When debtor to contract does not fulfil his/her obligations and he/she is at fault for breach of contract, other party may avoid contract upon providing debtor with notice that he/she will consider contract avoided after specified time period. Notice must be in written form when contract was concluded in written form. Requirement for notice does not apply: when performance has become impossible; when delay of debtor has rendered performance useless; when performance was due at strictly defined date. Contracts that transfer property rights over immovables must be avoided only upon court judgment. (Art. 87 LOC). Contract cannot be rescinded when part of obligation which was not performed was insignificant. Action for rescission of contract can be brought within five year time period (see Art. 87[3] LOC).

Contracts are deemed avoided for past unless we have contracts for periodic or continuous performance, which are avoided for future. Creditor has right to claim damages for nonperformance of contract. (Art. 88 LOC). Contracts that are subject to registration in court do not infringe on rights of third persons when acquired before registration of court's claim. (Art. 88[2] LOC).

In bilateral contracts, when obligation of one party is extinguished because it becomes for some reason impossible to perform, contract is deemed avoided by law. When it is possible to offer partial performance, other party may demand proportional reduction of her obligation or rescission of contract in court, but only when she does not have enough interest in partial performance. (Art. 89 LOC).

When there is danger that one of parties will not perform its obligation under contract, other party may also suspend its performance unless she receives adequate guarantees. When debtor has due claim arising from same legal relationship, he/she may withhold his/her performance until creditor does fulfil his/her obligation. In this case court will order both parties to perform simultaneously. (Art. 90 LOC).

Party has right to retain movable item or commodities, if she has due claim in relation to its or their keeping, maintenance, amendment or improvement or in relation to damages caused by it, until she is satisfied and compensated accordingly. Party must act in good faith. Right to retain is not permissible when party at default offers adequate assurance. (Art. 91 LOC).

Contract may contain clause stipulating liquidated damages (“neustojka”) in event of nonperformance or defective performance. (Art. 92 LOC). Courts customarily enforce such clauses without demanding that damages are to be proved. Creditor may demand compensation for greater amount of damages. Court can reduce stated amount of liquidated damages if they are manifestly unfair. This rule, however, is not applicable in case of commercial contracts between commercial entities (see Art. 309 LC).

Party to contract may also give something or certain amount to other party as guarantee for its performance and as evidence for contract formation (“zadatuk”). (Art. 93 LOC). If party, who has given amount, does not perform, other party may rescind contract and keep amount. However, if aggrieved party wishes that party at default performs, he/she may claim damages.

Clauses in contracts which limit or exclude debtor's liability for intentional or gross negligent acts or omissions are void. (Art. 94 LOC).

Creditor is considered in qualified delay, when, without justification, he/she evades acceptance of offer of performance or does not offer necessary assistance without which debtor cannot perform his/her obligation. (Art. 95 LOC). When creditor in delay, he/she assumes risk, and necessary expenses made because of delay. Debtor in delay is released from consequences of delay. (Art. 96 LOC). In case of delivery of item, debtor may place object of performance in deposit with regional court of place of performance. Money, securities and valuables may be deposited with bank at place of performance. Court authorization is not required in latter case. When item cannot be preserved for long time or its preservation causes inconvenience and considerable expenses to debtor, and when it cannot be deposited because of its nature, debtor, upon notice to creditor, may ask for authorization to sell item and to deposit received amount on creditor's account in bank. (Art. 97 LOC).

When obligation does not concern delivery of object and creditor refuses to accept performance and to assist debtor, latter may avoid contract and claim compensation for necessary expenses caused by creditor's delay. (Art. 98 LOC).

Excuses for Nonperformance.

Debtor is not held liable when there exists impossibility to perform due to cause (“prichina”) for which he/she is not responsible. (Art. 81 LOC). Incident, “Cas fortuit”, is understood as event that occurred despite debtor's due diligence. When debtor does not, however, possess pecuniary means to perform his/her obligation, he/she may be still held liable.

(See Art. 81[2] LOC.)

Law on Commerce defines force majeure, “vis majeure”, as extraordinary event which cannot be foreseen and prevented and which occurred after contract was concluded. (Art. 306 LC). When debtor is in delay, he/she cannot claim existence of force majeure. (Art. 306[1] LC). Debtor, who cannot perform his/her obligation because of force majeure, must provide his/her creditor with written notice within reasonable time about existence of force majeure and about its possible consequences upon performance. If debtor does not inform creditor, he/she may be held liable for damages. (Art. 306[3] LC). Performance is suspended while there exists force majeure. When force majeure has been in existence for some time, and when creditor does not have interest in performance, he/she may avoid commercial contract. Debtor may also avoid commercial contract. (Art. 306[5] LC).

Under Art. 307 (Clausula rebus sic stantibus “Stopanska neponosimost”) of Law of Commerce court may, upon demand of one of parties, alter or terminate contract, when there occurred such events, generally related to inflations which render currencies worthless, which parties could not have foreseen and were not obliged to foresee, and preservation of contract is contrary to justice and good faith.

When debtor is in delay, he/she owes compensation even if performance becomes impossible for reason he/she was not to be held liable. However, debtor will be released from liability when he/she proves that creditor would have suffered damages even if he/she performed on time. (Art. 85 LOC).

Distributorships, Dealerships and Franchises.

Bulgaria has no legislation or special rules governing formation and termination of these types of business arrangements.

Quasi-Contracts.

Unjust Enrichment (“Neosnovatelno obogatjavane”).

General rule is when person was enriched at another's expense without legal cause, person owes restitution equal to amount of impoverishment. (Art. 59 LOC). This rule may be used when there exists no other cause of action for person who was impoverished. (Art. 59[2] LOC).

Person who has received something either without cause or because of non-existent cause or cause that is no longer valid has obligation to return it. (Art. 55 LOC). Person who has consciously fulfilled his/her moral obligation cannot demand restitution of benefit. (Art. 55[2] LOC). Person who acted under mistake and has performed another's obligation may demand restitution of benefit from creditor, unless creditor has acted in good faith and has transferred either document or security verifying obligation. In latter case, person who has performed obligation assumes rights of creditor. (Art. 56 LOC).

When determinate item must be returned, person who has received it owes natural and civil fruits, including seeds, crops, rent and interest, derived from item, from moment of invitation. When item has perished after invitation or when person, who received it, has alienated it or has used it upon acquiring knowledge that he/she owes restitution, he/she must pay either its real value or price received for it, when price is higher than value. When item has perished or when person who received it has alienated it or has used it before invitation was sent, he/she only owes amount, which he/she has enriched herself/himself, save for fruits. (Art. 57 LOC). When restitution is due from person without capacity, he/she must return only amount, which was spent for his/her benefit. (Art. 58 LOC).

Looking after Another's Affairs without His/Her Authority (Negotiorum gestio)

("Vodene chuzda rabota bez pulnomostie").

Person who undertakes management of affair, for which he/she knows that it belongs to another, without latter's authorization, must conduct it and take care of it until moment when interested party may assume it. (Art. 60 LOC). Volunteer must take care of affair in such manner as if he/she were authorised. Person's liability may be limited in view of special circumstances, which existed at moment when he/she assumed to look after and take care of other person's affairs. When affair was properly looked after and was well managed in other's interest, interested party must perform obligations, assumed in his/her name, must compensate volunteer for personal obligations and for necessary and useful expenses, including payment of interest on these expenses from date they were incurred. (Art. 61 LOC). When affair was also undertaken in volunteer's own interest, interested party is only liable for amount of enrichment. Person who volunteers to look after another's affair contrary to latter's will is responsible for unjust enrichment. When interested party has approved manner in which affair was looked after, law of agency applies. (Art. 62 LOC).

3.11 FACTORS:

No specific statutory provisions. However, supplemental provisions of Law on Personal Income Taxation and of Law on Corporate Income Taxation defines factor contract ("factoring") as contract where under contract of cession person of factor, i.e. agent entrusted with possession of goods, purchases lump sum or periodic claims which result from delivery of commodities or from rendering of services and assumes risk of collecting receivable sums. Provision in Law on Banks also refers to factor contract as type of banking transaction.

3.12 FRANCHISES:

No specific statutory provisions. However supplemental provisions of Law on Personal Income Taxation and Law on Corporate Income Taxation contain definition of franchise as collection of industrial and intellectual property rights, including trademarks, industrial designs, know-how, patents, copyrights etc. Franchise contract ("franchising") is defined as contract where upon receiving direct or indirect fee franchiser grants franchisee right to use franchise for certain commodities or services.

3.13 GAMBLING:

Law on Gambling ("Zakon za hazarta") of 1999, as amended, contains provisions on requirements to be followed by organizers of lotteries and games of chance ("hazartni igri"), for participants in such games and for overseeing gambling. Game of chance ("hazart") is defined as game, in which there is stake, and there may be either winning or stake may be lost. (Art. 1 LG). Sporting games with fund prizes for winners, games in which skills and knowledge determines outcome, including minisoccer, table tennis, pool, bridge, quizzes and word games, which consist in answering questions, upon conditions that prizes are not covered by revenue, are explicitly excluded from definition.

Direct advertising of gambling through mass media is prohibited. Only persons in full legal capacity and above 18 may participate and play games of chance. Persons without capacity and under 18 may only receive lottery tickets as gifts.

State Commission on Gambling (http://www.dkh.minfin.bg/) is administrative body which grants permissions (licences) for organizers of games of chance. Commission consists of five members, appointed by Minister of Finance. All members of Commission must be Bulgarian citizens, and at least three of them must be lawyers. All employees of Commission must hold insurance coverage paid by state budget. Commission publishes monthly bulletin and keeps register of all granted licences, producers of gambling devices, samples of lottery tickets and gambling devices. Decisions of Commission are subject to appeal before Sofia City Court following procedure as set up in Code on Administrative Procedure.

Games of chance may be organized by Bulgarian commercial companies and partnerships and merchants. Juridical persons with not-for-profit aim may organize lotteries only in certain limited cases. Bulgarian state may organize games of chance only for assisting health care, sports, culture, education, social care. Foreign persons may organize gambling in following cases: when they have constructed hotels or have bought hotels with casino, such persons may also own shares in Bulgarian companies which organize games of chance in hotel's casino; foreign persons may organize games of chance when they have also invested sum in Bulgarian leva equal to ten million U.S. dollars and have provided employment to at least 500 persons. Law requires that stakes and prizes must be in Bulgarian currency, save for games of chance organized in casinos.

Law enumerates all types of permitted games of chance, including games organized through Internet and telephone, and requirements to be followed by organizers.

3.14 GIFT:

Law on Obligations and Contracts, Acts. 225-227 (“Darenie”).

Real property must be donated by notarial act, while gift of movables is valid when there is actual delivery. Gifts of certain movables require written form with signatures of parties authenticated by notary public. Gift can never include property to be acquired in some future moment. Promise of gift does not bind promisor and has no legal effect. Gifts contrary to law and good morals as well as gifts made with motives or considerations that are contrary to law and good morals are void. Gifts are revocable in following cases: when donee kills or attempts to kill donor, his/her spouse or children; when donee charges donor with crime punishable with imprisonment of more than three years; refusal to provide basic necessities to donor in need. Donor or his/her heirs may demand revocation within one year of date he/she acquires knowledge of reasons for revocation. In case of divorce spouse may demand revocations of gifts of considerable value that were made to other spouse during marriage. (Art. 105 FC). Revocation cannot be demanded in case of ordinary gifts.

See also category 13 Estates and Trusts, topic 13.04 Forced Heirship.

3.15 INFORMATION TECHNOLOGY, INTERNET AND NEW MEDIA:

Computer Programs.

They are object of copyright under Law on Copyright and Related Rights of 1993, as amended. Law implements EU Directive 91/250/EEC. Prerequisite for copyright protection is that program is considered to be creative and original work of author. Ideas and principles of computer programs are not subject to copyright. Commercial rights to computer programs produced by employee will belong to employer, save other agreement exists. See category 19 Intellectual Property, topic 19.01 Copyright.

Electronic Commerce.

Law on Electronic Commerce (“Zakon za elektronnata turgovija”) was passed on June 9, 2006. Law's provisions do not cover and address tax matters, protection of personal data, concerted practices and agreements under Law on Competition, notarial activity, process agency and gambling. Electronic commerce is defined as offering information services, which are usually for pay. Law sets forth certain rules for conclusion of contracts over Internet. Provisions also require information service provider to offer free, direct and permanent access of following information to consumers: name and permanent address or seat/address of its governance, registration in commercial or other public register, membership in professional associations, VAT registration etc. It is forbidden to send unsolicited commercial emails to consumers without their prior consent.

Commission on Regulation of Communications keeps register of email addresses of all juridical persons who do not like to receive unsolicited commercial emails. Internet service providers cannot, according to law, be held liable for hosting or linking to third party's information provided they did not know of illegal content of information. Legal requirements for starting activity as Internet service provider are governed by law of country where Internet service provider has its place of business activity, when in EU Member State.

Electronic signature.—It is regulated by Law on Electronic Document and Electronic Signature ("Zakon za elektronija document I elektronnija podpis") of 2001, as amended, which follows provisions of EU Directive 1999/93/EC.

Television and Radio Broadcasting.

No censorship. Law also guarantees freedom of expression, right to information, secrecy of sources of information. Television and radio programmes should not be contrary to good morals as well infringe intellectual property rights. Broadcasting must be generally performed in Bulgarian language. Council on Electronic Media (CEM) (http://www.cem.bg/) exercises supervision over broadcasting operators, who may be either commercial or non-profit (public), pursuant to Law on Radio and Television Broadcasting ("Zakon za radioto i televizijata") of 1998, as amended. Five members of CEM are elected by National Assembly and four members of CEM are appointed by President. All of them must be Bulgarian citizens who hold university degrees and with relevant professional experience. CEM issues licences and registers public television and broadcasting operators as well as appoints directors general of Bulgarian National Television and Bulgarian National Radio as public operators with national importance. Law contains provisions on Bulgarian National Television and Bulgarian National Radio. European works and programmes ought to be broadcast during at least 50% of radio and television time, which excludes news, games and advertising. Special provisions apply for advertising (including rules for minor and prohibitions on tobacco and alcohol) and sponsorships. Public television and radio broadcasting is financed by annual monthly fees (calculated as 0.6% of minimum monthly wage) and paid on basis of registered electrometers, but also by advertising. It receives subsidies from state budget.

Licences to radio and television broadcasting operators are issued for 15 years and may be extended to 25 years.

3.16 INTEREST:

Applicable interest ("lihva") is either legal interest or interest stipulated by agreement.

Usury.

Law on Obligations and Contracts contains provision that legal rate of interest is set up by Council of Ministers and that interest agreed to above that rate must be automatically reduced to legal rate. (Art. 10[2] LOC). 1994 Council of Ministers Decree No. 72, as amended sets up legal rate of interest as follows: for loans in Bulgarian legal tender—at Bulgarian National Bank base rate plus ten points and for loans in foreign currency—at three month LIBOR (London Interbank Offered Rate) plus ten points. Base rate is computed by generated average annual yield on three-month treasury bills' auction organized by Ministry of Finance. Base rate is declared by Bulgarian National Bank and is promulgated in Durzhaven Vestnik. In case of obligations to pay certain sum of money, damages caused by delay in payment consist only of legal interest. (Art. 86 LOC).

Interest on interest or compound interest is forbidden in relationships between physical persons but not between commercial entities.

Law on Interest Payments on Taxes, Duties and Other State Claims (“Zakon za lihvite vurhu danutsi, taksi I drugi durzhavni vzemanija”) of 1957, as amended in 2000, defines rate of interest to be paid on state claims at legal rate of interest. (Prior to 2000, rate of interest was BNBank's base rate plus 0.05% points.)

3.17 LICENCES, BUSINESS AND PROFESSIONAL:

Law on Limiting Administrative Regulation and Administrative Control of Economy (“Zakon za ogranichavane na administrativnoto regulirane and administrativnija kontrol na ikonomikata”) of 2003 was passed with aim to limit needed licences to conduct business in Bulgaria to list of activities which include: banking; insurance and activity as insurance broker; regulated market for trade in securities, investment intermediary, investment company as well as company with special investment purpose; supplementary voluntary and compulsory pension insurance; supplementary insurance for unemployment and/or professional qualification; medical care insurance; commodity exchange; customs agent; duty free trade; gambling; production, transport, trade and foreign trade with arms as well as commodities and technologies with possible dual usage; private business as security guards; production, import, trade, maintenance of technology for fire protection, activity as fire guards; production of compact discs; medical care institutions and homes for social aid; production, trade and import of medications; industrial growing and production of tobacco and tobacco products; technical supervision of high risk appliances and check of appliances serving for measurements; production of alcohol and alcoholic beverages; production and preparation of crop seeds, testing of plants which serve as seeds etc., public warehouses of grain; production, conservation of sperm, ova and transplants of embryo in veterinary medicine; production of veterinary products and active substances, trade with veterinary products; commercial shipping; trade with ferrous and non-ferrous metals waste; production of electric and thermal energy, transportation and supply of electric and thermal power and natural gas; distribution of electric power and natural gas, conservation of natural gas, transit transportation of natural gas and petroleum; activities related to nuclear facilities and nuclear material and other source of ionized radiation; supervision of construction works; railway carriers; domestic and international public transportation of persons and commodities by road; technical checks, repairs and technical services of motor vehicles; universal postal service or part of it rendered on Bulgarian territory; performance of activities as airport, as operator of air services or as carrier; technical services and repairs of aviation technology; production, import and/or distribution of radio broadcasting transmitters for civil purposes; radio and television broadcasting; telecommunication activities.

REGULATED PROFESSIONS

List of state regulated professions is adopted by Council of Ministers and is published in Durzhaven Vestnik.

Handicrafts.

Law on Handicrafts (“Zakon za zanajatite”) of 2001, as amended, regulates crafts and their organization in Bulgaria. Handicrafts are defined as activities for production of articles and rendering of services, which are listed in annex to law   National Chamber of Handicrafts was set up as organization of handicraftsmen/women in Bulgaria. It is juridical person. Among its tasks are included: it keeps central register of handicraftsmen/women, issues rules on awarding master and journeyman/woman certificates.

In order to become master, person must have practiced handicraft for three years as journeyman or must have completed secondary or higher education in respective field. Upon decision of Board of Governors of National Chamber of Handicrafts persons who have practiced handicraft abroad may receive permission to take master examination in Bulgaria. To qualify as master, person must have passed exam. National Chamber of Handicrafts organizes education of candidates who wish to take master examination.

Law sets up general rules and period of instructions of apprentices. Instruction must be between three to four years. Apprentice and owner of enterprise must enter into employment contract. Apprentice must be person above 16 who is not regular student in school or university. One master is not allowed to instruct more than two apprentices.

In order to qualify as journeyman/woman, person should have been: apprentice and have passed exam for journeyman/woman; have practiced for three years and have successfully passed exam for journeyman/woman; or have received second or third degree of professional qualification under Law on Professional Education and Instruction.

Collection Agents.

Under Law on Private Judicial Execution ("Zakon za chastnoto sudebno izpulnenie") of 2005 persons who act as private enforcement agents ("chastni sudebni izpulniteli") must be licensed, hold law degree, have compulsory insurance and follow other requirements as stated in Law. Chamber of Private Enforcement Agents (http://www.bcpea.org/) was set up.

Real Estate Brokers.

At present not subject to regulation.

Pawn Brokers.

Council of Ministers adopted Regulation in 2009. See DV 16 2009.

3.18 MONEY LAUNDERING:

Law on Measures Against Money Laundering ("Zakon za merkite sreshtu izpiraneto na pari") of 1998. Law establishes prohibition on banks, financial houses, persons performing bank transfers, exchange bureaux, pension and investment funds, privatization bodies, insurance companies, political parties, notaries public, post offices, trade unions, juridical persons with not-for-profit aim, public accountants, stock exchanges and stock exchange dealers and brokers working on secondary market, customs and tax authorities, persons performing transactions with precious gems and metals, art and high value dealers, sports associations, persons organizing public procurement orders or games of chance, Central Depositary, state and municipal authorities entering into concession contracts, leasing enterprises, merchant trading in petroleum and in arms, wholesale merchants, legal and tax consultants etc., to deal with anonymous parties and obligation to identify persons who open accounts or realize transactions exceeding amount of 30,000 leva or its equivalent in foreign currency (or exceeding 10,000 leva in cash).

Financial Intelligence Agency with Ministry of Finance is authority which handles information under law. (http://www.fia.minfin.bg/).

3.19 MONOPOLIES, RESTRAINT OF TRADE AND COMPETITION:

Competetion rules of EU are also relevant. (See EU Law Digest.) New Law on Protection of Competition ("Zakon za zashtita na konkurencijata")was passed by Parliament in 2008. (See DV 102 of 2008.) One of main purposes of Law is to harmonize Bulgarian with EU competition policy in applying Arts. 81 and 82 content of Amsterdam Treaty of European Union, including cooperation with EU Commission and other member states competition authorities. Law implements provisions of EU Regulations 1/2003, 139/2004.

Law is administered by Commission on Protection of Competition (http://www.cpc.bg/) which consists of seven members, lawyers and economists, elected for term of five years by Parliament. They must be Bulgarian citizens and must take oath before Parliament.

Concerted Practices.

Cartels are prohibited and are defined as agreements between enterprises, decisions of merged and linked enterprises as well as concerted practices which result in direct or indirect price fixing; market or supply source sharing; commitments to limit or control production, sale, technological development or investment; discrimination against customers; commitments to conclude tied sales or arrangements etc. See Arts. 15-18 LCompetition.

Monopolistic and Dominant Position.

Entrepreneur has monopolistic position when he/she has exclusive right to perform certain kind of business activity. Monopoly could be established only through act of Parliament and only in cases indicated in Constitution. All other measures that set up monopoly are null.

Dominant position exists if entrepreneur holds such share of market, financial means, market access, technological level that might distort competition. Following conduct is considered abuse of dominant position: charging unsound prices or imposing other unfair commercial terms; restricting production, trade and technological development; creating shortages; imposing tie-ins; resorting to economic constraints to cause other firms to dissolve, split, merge or transform. Abuses of dominant positions are prohibited. See Arts. 19-22 LCompetition.

Concentrations.

Concentrations or mergers exist when two or more businesses merge or when one or more persons who control one or more businesses acquire direct or indirect control over one or more enterprises through purchase of stocks, shares or property. Joint ventures are considered concentrations for purposes of Law. Enterprises must inform Commission of merger when total turnover of participants in preceding year on Bulgarian territory was above 25 million leva. Commission may authorize merger if it does not strengthen or lead to dominant position that would restrict competition in relevant market. Commission may authorize merger despite fact that it leads to dominant position if merger aims at modernizing production and economy as whole. See Arts. 22-26 LCompetition.

Unfair Competition.

Unfair competitive behaviour is conduct contravening bona fide commercial practices and capable of causing detriment to other competitors. Acts of comparative and misleading advertising, false claims which damage competitors reputation, imitation, unfairly attracting customers, misappropriation and revealing of production and trade secrets are prohibited. (Arts. 29-37 LCompetition).

Procedure.

Commission for Protection on Competition is authority which grants exemptions, approvals, prohibits mergers and decides whether there is abuse of dominant position or cartel. Proceedings before Commission for Protection of Competition result in final decision which is subject to appeal before Supreme Administrative Court. Commission on Protection of Competition may impose fines. (Arts. 38-98 LCompetition).

State Subsidies.

Law on State Aids (``Zakon za durzhavnite pomoshti'') was enacted in 2002. Law establishes procedural framework for control of state aids.

3.20 POSTAL SERVICES:

Law on Postal Services (“Zakon za poshtenskite uslugi”) of 2000, as amended, launched reform with aim to liberalise and modernize postal services, to create more commercial freedom and conditions for loyal competition. Under law main postal operator is joint-stock company “Bulgarian Posts EAD” (http://www.bgpost.bg/), which is wholly owned by state and which receives subsidy from state budget in case of proven deficit in its business activity. Bulgarian Post EAD holds individual licence and offers universal postal service throughout Bulgarian territory, involving daily delivery and collection of mail, i.e. packages up to two kg, parcels up to ten kg, printed materials up to five kg., secogrammes up to seven kg., money transfers as well as registered mail and mail with declared value, at uniform and affordable price. At present Bulgarians do not have possibility to make international postal money transfers and can receive postal money transfers from selected list of countries. Bulgarian Posts must follow acts adopted by Universal Postal Union and duly ratified by Bulgaria. Licencing is responsibility of Commission on Regulation of Communications. Licence is needed when operator wants to offer universal postal service. Parties must submit number of documents including petition, tax and court registration etc. Commission decision which refuse to grant licences are subject to appeal before Supreme Administrative Court. Individual licences are strictly personal and may only be transferred to third parties with prior approval by Commission. They are granted for period of 20 years, which period may be prolonged for up to 35 years. Operators pay initial and annual licence fees. Latter is determined as percentage of gross revenues from conveying universal postal service. Operators which offer postal services other than universal postal service are only required to register and to pay initial registration fee. No need for registration of registered operator in EU member state. In general prices of postal services are determined by market forces. However, price of universal postal service is regulated and computed in accordance with rules adopted by Council of Ministers. Under law provisions postal operators which offer universal postal service are responsible for lost and damaged registered mail or mail with declared value as well as for failure to pay postal money orders. Compensations are determined in accordance with Universal Postal Union acts and are limited to following sums: compensations for lost registered mail may not exceed amount in Bulgarian leva of 30 International Monetary Fund's Special Drawing Rights (SDRs) or pre-declared value of mail package, and in case of international parcels—40 SDRs of 4.5 SDRs per kilo. Claims for lost or damaged mail must be brought by sender or receiver within period of six months from date of sending. Postal operators must investigate claim and respond within three months. When operator's response to claim is negative, customer may bring action in court. Following items must not be inserted in postal packages: narcotics, poisons, arms and explosives, items with indecent content or content which is contrary to good morals, religious materials of banned or not registered religious sects or organizations, items which might endanger life and health of postal officers as well as items prohibited to be sent to country of destination. It is prohibited to include coins, banknotes, platinum, gold, silver, precious stones and other precious items, except for in postal packages with declared value. Law guarantees privacy of correspondence and contains provisions on issue of postal stamps as well as penalties for contravention of its rules.

3.21 PUBLIC PROCUREMENT:

New Law on Public Procurement (“Zakon za obshtestvenite poruchki”) was passed in 2004 which brought Bulgarian law closer to EU standards. This Law replaced Law on Public Procurement of 1999.

3.22 SALES:

General.

Bulgarian law distinguishes between civil sales contract and commercial sales contract. Relevant provisions are contained in Law on Commerce and Law on Obligations and Contracts. Sales are contracts, pursuant to which seller obliges himself/herself to transfer ownership of particular object or other property right and buyer obliges himself to accept object and to pay price. (Art. 183 LOC). Under Law on Commerce, sales for personal consumptions by buyers who are physical persons are not considered commercial sales. When at time of conclusion of contract, object had already been lost or destroyed, sale is deemed void. When only part of object was lost or destroyed, buyer may either avoid sales contract, or take remaining part of object and demand reduction of agreed price. (Art. 184 LOC). All expenses incurred at conclusion of sale contract as well as all other expenses related to transfer of ownership must be generally borne by seller. However, in sales of real property, parties must share expenses. All expenses incurred at delivery, including measuring item's weight, are paid by seller, while expenses incurred at acceptance—paid by buyer. (Art. 186 LOC).

Burden of risk from incidental loss or damage of generically defined commodities passes to buyer from moment when these commodities were defined by consent of parties or were delivered to buyer. In case of delivery to buyers living in other places—at moment of delivery of commodities to carrier or shipping agent, unless parties have agreed otherwise. (Art. 186a LOC).

Obligations of Seller.

Seller must deliver sold goods. Goods must be delivered in same state as they were at moment of conclusion of contract. Their fruits must be delivered as well. (Art. 187 LOC).

Seller is responsible for delivering good title, if third persons have ownership rights over goods. (Art. 188 LOC). If good was entirely owned by third person, buyer may avoid contract. In this case seller must return whole amount paid by buyer and pay all incurred expenses to sale contract. If good was partly owned by third person, buyer may demand rescission of contract and compensation; if circumstances justify presumption that he/she would not have entered into sales contract if he/she knew above fact. In any case, buyer may demand reduction in price and compensation for damages. (Art. 190 LOC). When buyer loses rights in goods, and their possession, buyer may demand value of fruits from seller as well as courts and attorneys' fees. Seller is not to be held responsible for buyer's loss of goods when he/she was not asked to participate in lawsuit and if he/she proves that there is no cause of action and case is dismissed. (Art. 191 LOC). When buyer was aware of third person's ownership rights at time of sales contract, he/she may only demand return of paid price. Although parties to sale contract may agree in advance that seller will not be held responsible for eviction, thus agreement will not be valid if seller did not reveal his/her knowledge of third person's ownership rights. (See Art. 192 LOC.) When buyer was aware of existence of third party's ownership rights at time of sales contract, in case of eviction he/she may only demand return of price.

Seller is responsible for defects which decrease price of commodity or diminish its fitness for its normal use or for use as stipulated in contract. Seller is not liable for defects known to buyer at time of conclusion of sales contract. Seller is liable even when he/she did not know of defect. Agreements that exonerate seller from liability for defects are void. (Art 193[3] LOC).

Obligations of Buyer.

Upon acceptance of commodity, buyer must inspect it for period of time, which is normally considered necessary to perform such inspection, and must inform seller of any noticed defects. If buyer does not inform seller, good is considered approved, unless defects, which could not have been noticed under ordinary inspection, were discovered later. (Art. 194 LOC).

Under art. 195(1), if delivered goods are defective, buyer may: (1) return goods and demand price back as well as all incurred expenses; (2) keep goods and demand reduction of price; (3) eliminate defects at seller's expense. Buyer may also demand compensation for damages following general rules set up for nonperformance of contracts. In case of generic goods, buyer may either exercise his/her rights under art. 195(1) and claim damages, or demand goods without defects and claim damages. Limitation period for buyer's action is: one year—in case of immovables; six months—in case of movables. If seller acted in bad faith, limitation period is three years. (Art. 197[1] LOC). Parties to sale contract may extend or shorten limitation period, which starts to run at moment of delivery. Buyer may exercise his/her rights under art. 195(1) if item was lost or damaged either because of cas fortuit or because of its defects. When buyer has contributed to item's loss or damage or when persons to whom item was transferred by buyer have contributed to item's loss or damage, buyer may only demand reduction of price and claim damages. (Art. 196 LOC).

Buyer must pay price at same time and place of delivery. (Art. 200[2] LOC).

In case of buyer's default in paying agreed price for purchase of delivered movable good, when delivery must be performed simultaneously with payment of price, or in case of buyer's default to appear and accept delivered good, when period for payment of price has not yet expired, seller may avoid sales contract. In both cases seller must notify buyer within seven days that he/she has rescinded contract. (Art. 210 LOC). When period has not been determined for payment of price and buyer has received item without payment, seller may demand item within 15 days of delivery if it is still in possession of buyer and its state has been preserved. (Art. 202 LOC). This latter right cannot be exercised to detriment of buyer's creditors, who have right to lien in item or item was pledged to them, without knowing that price was not paid.

Conditional Sales.

Sales on approval or with reservation of inspection are finalized upon buyer's acceptance of commodity. (Art. 204 LOC). Seller may avoid sales contract when he/she is in possession of item and buyer does not approve it either within time period agreed to in advance or, when such period was not agreed to, upon seller's invitation. Item is considered approved when it was delivered to buyer and he/she does not respond either within designated period or, when such period was not stipulated, upon seller's invitation.

In sales of movable goods by installments, seller may preserve ownership of sold commodity until he/she receives last payment or installment. If item is delivered, buyer must bear risk of accidental loss and damage from moment of delivery. Reservation of seller's ownership must be in writing and is effective against buyer's creditors only if document has certified date. (Art. 206 LOC). Seller may avoid sales contract, if buyer was in arrears of nonpayment of amount equal to more than 1/5 of item's price. When contract is voided because of buyer's nonperformance, seller may claim compensation for item's use as well as damages. Parties may not stipulate clause in sales contract that already paid installment may serve as compensation for damages. (Art. 206 LOC).

In case of sales contracts of periodic deliveries, price must be paid at each delivery in proportional amounts. (Art. 208 LOC). Time periods of delivery are deemed agreed in interest of both parties.

Under Bulgarian law sales contracts with stipulation to repurchase item are void. (Art. 209 LOC).

Sales contract of inheritance must be in written form and signatures of parties must be certified by notary. Sales contract of inheritance, which includes real estate, has effect against third parties only when it is registered with court. When seller has collected debt or transferred property rights, he/she must pay amount received to buyer. At same time, buyer must reimburse seller for amounts paid by latter concerning succession. (See Arts. 212-213 LOC.)

Commercial Sales.

Price of item must be determined by parties at moment of conclusion of contract. If parties have not agreed on price or on way in which price will be determined, it is presumed that parties have agreed on price, which is normally paid at time of conclusion of sales contract for same kind of commodity at similar circumstances. (Art. 326 LC). Buyer must pay price at delivery of item or documents, unless parties have agreed otherwise. When seller has undertaken obligation to ship commodity, he/she has right to demand that shipping be performed at same time with payment of price or upon evidence that price was paid. (Art. 327 LC). When parties have not agreed upon moment for delivery, buyer may demand delivery within reasonable time period. (Art. 319 LC). When parties have agreed that commodities will be accepted in seller's warehouse, they must stipulate how and when seller will notify buyer that commodities are ready for acceptance. If such period was not agreed upon, notification must be done three days before day of acceptance, and when parties are located in different places—at least five days before that day. (Art. 320 LC). Upon buyer's demand, seller must issue invoice, and upon both parties' consent, he/she must issue other document. (Art. 321 LC). Buyer to commercial sale must inspect item within period of time, which is necessary according to circumstances, and if item does not correspond to agreed requirements, must immediately notify seller. When buyer does not notify seller, item is considered approved, unless it has hidden defects. (Art. 324 LC). When commercial sales contract was avoided and in appropriate time period upon avoidance buyer has bought substitute commodity or seller has resold commodity, party that seeks compensation for damages may receive difference in prices paid at two latter transactions as well as compensation for damages. (Art. 323 LC). When buyer is in delay for acceptance of commodity, seller may: (1) deliver it to be stored; (2) sell it at market price or at public tender upon sending notice to buyer about place and time of public tender; (3) resell goods that cannot be preserved for considerable time without informing buyer. Buyer bears expense for storage and selling of commodities. (Art. 328 LC).

Parties to commercial sale may agree that seller will deliver goods as indicated by buyer to third person. Seller must notify buyer for shipment of commodity to third person by sending him/her copies of document accompanying item. Price may also be paid by this third person. (Art. 329 LC).

Expenses for shipment and carriage are borne by buyer, when commodity must be shipped to place, which does not coincide with place of delivery. There exists presumption that seller bears expenses for boarding and carriage in case of delivery at franco defined place which is different from place of delivery. Parties may adopt and refer to general conditions prepared by international or other institution, e.g., INCOTERMS of International Chamber of Commerce in Paris, as far as expenses of carriage, sending etc. are concerned. (Art. 330 LC).

Parties may stipulate time period within which buyer will specify object of sale. In case of buyer's delay, seller may either specify item or void sales contract. (Art. 331 LC). In case of commercial sales by installments, when parties have agreed that seller may perform in advance, amount given above what was due as previous installment may be deducted from total amount. (Art. 332 LC). Commercial sale with stipulation for repurchase must be in written form and parties must have agreed on time period within which right to repurchase must be exercised. Right to repurchase is extinguished if not exercised within stipulated period. (Art. 333 LC). Parties may stipulate in written form that price will be paid in advance. When seller does not deliver item, he/she must pay interest from time of price receipt. (Art. 334 LC). Law requires written form for commercial sales contract for sale by installments ("prodazhba na izplastane"). Seller may avoid sales contract, if buyer was in arrears of nonpayment of amount equal to more than 1/5 of item's price. When contract is avoided because of buyer's nonperformance, seller may claim compensation for item's use as well as damages. In case of commercial sale by transfer of bill of lading, seller is released from his/her obligation of delivery of item, when he/she delivers bill to buyer. Buyer is obliged to pay price at moment and place where documents were delivered, unless it was agreed otherwise. (Art. 336 LC).

Law on Commerce also contains provisions on public tender sales. (See Art. 337-341 LC.)

International Sale of Goods.

Bulgaria has ratified United Nations Convention on Contracts for International Sale of Goods of 1980. Convention is applicable in case of international sale contracts.

Prices:

At present, prices of goods and services ought to be determined by market forces and free competition. However, prices of electricity, water, and heating energy are determined by State Energy and Water Regulating Commission.

3.23 SCIENTIFIC RESEARCH:

Science.

Law on Promotion of Scientific Research (“Zakon za nasurchavane na nauchnite izsledvania”) of 2003. Law on Scientific Titles and Degrees (“Zakon za nauchnite stepeni i zvania”) of 1972, as amended, Law on Bulgarian Academy of Sciences (“Zakon za Bulgarskata akademia na naukite”) of 1991, as amended.

In 2003 Parliament passed Law on Promotion of Scientific Research, which envisages setting up fund for national scientific research as well as national register of scientists and scientific organizations. Open competition is to be held for allocation of funds. Council for Scientific Research, composed of representatives of universities, Bulgarian Academy of Sciences and ministries, prepares national strategy of scientific research, which is adopted by National Assembly upon Council of Minister's proposal. National strategy is to promote scientific research with proven international importance. Law states that scientific research must solve significant national problems: in field of economics, social processes and human resources; related to national identity, Bulgarian history and culture; related to development of engineering and innovations; creation of new scientific knowledge. Minister of Education is authority to implement above policy.

Academic Titles and Scientific Degrees.

Law on Scientific Titles and Degrees (“Zakon za nauchnite stepeni i zvanija”) of 1972, as amended, provides general framework and procedure of awarding academic titles and degrees by universities and academic institutions in Bulgaria. Law is administered by Supreme Commission on Attestation (“Visha atestacionna komisiaja”), specialized agency to Council of Ministers, (http://vac.acad.bg/) which is final authority that confers titles and degrees. Commission is composed of habilitated academics appointed by Council of Ministers for term of four years.

Bulgarian Academy of Sciences (BAS) (http://www.bas.bg/).—It was established in 1869. Under 1991 Law it is autonomous national organization for scientific research composed of academic institutes and independent laboratories as well as of community of academicians, correspondent members and foreign members. Its charter is published in Durzhaven Vestnik. Under charter, political parties, political organizations as well as military units belonging to or under control of Ministry of Defense and Ministry of Interior, cannot exist and perform activities within Academy. BAS cannot render services to political parties and organizations. Its governing bodies are general assembly, governing council, chairman and vice-chairmen and scientific secretary that are elected for four years. BAS publishes annual report of its financial and scientific activity. BAS's property consists of immovable and movable property, securities, intellectual and industrial property rights etc. National Assembly has granted property rights of ownership to Bulgarian Academy of Sciences. Real estate may be alienated only upon decision of BAS's general assembly and upon decision by National Assembly. BAS receives annual subsidy from state budget.

3.24 SECURITIES:

Law on Public Offering of Securities (“Zakon za publichno predlagane na tsenni knizha”) of 1999, as amended.

Law regulates public offering of securities, operation of intermediaries in selling securities and responsibility of those responsible of regulating market.

Law includes disclosure requirement, capitalization requirement, and rules governing insider trading, antimanipulation, takeovers, tender offers, and licensing of broker-dealers.

Law defines securities as transferable documents and rights that could be traded publicly. These documents could be shares; bonds; and other documents and rights related to bonds and shares. Investment contracts, as written contracts whereby person invests in common commercial enterprise with expectation of profits derived substantially from efforts of others and that are offered publicly, are explicitly included in definition.

State Commission on Financial Supervision (SCFS) (http://www.fsc.bg/) replaced Securities and Exchange Commission in control of activities of professional participants in securities market and insurance market. See Law on Commission on Financial Supervision ("Zakon za komisijata za finansov nadzor") of 2003. Commission on Financial Supervision stated purpose is to promote stability, transparency and confidence in financial markets, to protect interests of investors and insured persons. Financial supervision is defined as control of: regulated market of securities, activities of Central Depositary, of investment intermediaries, of investment companies, of physical persons who perform transactions with securities, of persons who provide services of investment consulting, of public companies and other issuers of securities under Law on Public Offering of Securities; activities of insurance companies, insurance brokers and agents under Law on Insurance; activities of companies whose activities are to provide complementary social assurance under Code on Social Security, Law on Medical Care Insurance and Law on Protection against Unemployment and Promotion of Employment. (Art. 1 LCFS). Commission is composed of seven members who are elected by Parliament. Their term of office is six years.

Stock exchange must receive licence from SCFS and be registered in District Court before it starts to operate. Stock exchange must be juridical person operating as joint-stock company with one-tier system of corporate governance (general meeting of shareholders, board of directors and executive officer) and minimum capital requirement of 100,000 leva. At least two-thirds of capital must be owned by participants in money, securities, or insurance markets or by state. No stockholder, including state, can possess more than 5% of shares.

Stock exchange must also set up clearing system of payments for transactions executed on its floor and arbitration court to solve potential disputes.

Bulgarian Stock Exchange internet address is: http://www.bse-sofia.bg/.

Law provides for licensing of intermediaries, brokers or dealers to engage in trade in securities. Intermediaries may be banks or joint stock companies and are subject to number of capital requirements defined by SCFS and published in Durzhaven Vestnik. Intermediary is held to standard of diligence of ordinary businessman in his/her dealings on behalf of investors.

Regulation of Offering of Securities.

Law contemplates system of public offering of securities under which every offering of securities to general investment public requires filing of prospectus, unless specific statutory exemption is available. Prospectus must include all information needed to make financial assessment of securities. Prospectus must contain information on issue, issuer, its management and main shareholders, business activities. Financial statement certified by public auditor and balance sheet from previous year must be included.

SCFS scrutinizes prospectus and may authorize or reject public offering. SCFS does not check whether information in prospectus is true and is not liable for any false statements.

However, it may ask issuer to provide proof that information is true. Issuer publishes announcement for public offering in two daily national newspapers. Issuer must report and update information contained in prospectus on regular basis every six months or when changes in information might have significant effect on price of securities.

When voting rights of holding held by one person exceed or fall below 5%, company, SEC and stock exchange must be notified.

Insider Trading.

Law Against Market Malpractices Related to Financial Instruments ("Zakon za pazarnite zloupotrebi s finansovi instrumenti") entered into force on Jan. 1, 2007. Prohibited malpractices are: manipulation of market in financial instruments and insider dealing. Aims of Law are: raising public trust in financial instruments market; securing full and timely disclosure of information to investors; and creating conditions for fair, transparent and efficient market for financial instruments. Financial instruments are securities, options, futures, derivatives and other instruments admitted to trading on regulated Bulgarian and European Economic Area member state regulated market.

According to Law's provisions, it is prohibited for insiders to use inside information to acquire, or to acquire instruments on own account or on account of third party. It is also prohibited for insiders to reveal inside information to third parties or to recommend to or persuade other party to buy financial instruments. (Arts. 8-9 LMMRFI).

Inside Information is particular information, which is not public and which is related to one or more issuers of financial instruments or to one or more financial instruments, and which if made public may significantly affect market price of these financial instruments. (See Arts. 4-5 LMMRFI.)

Insiders are persons who have knowledge of inside information in their capacity as members of management or supervisory boards, as participants in general meeting of shareholders, or in their employment or professional capacity. Secondary insiders are persons having access to information of insider facts.

Commission on Financial Supervision is authority responsible for compliance with provisions of Law. Commission exchanges information with EEA member states authorities for financial services.

Issuer must notify Commission on Financial Supervision about any inside information related to it. (Art. 12 LMMRFI). Issuer must also maintain register of insiders and closely related persons. (Art. 15 LMMRFI). Board members of issuer must report to Commission on Financial Supervision within five working days about any transactions with securities of issuer.

Provisions of Law contain also reporting requirements toward investment intermediaries in relation to insider trading.

Those who violate rules against insider dealing and manipulation are subject to administrative penalties.

Investment Companies.

Law provides for establishment of investment companies commonly known in other countries as mutual funds or investment trusts. These companies are formed for mutual investment of money in securities. SCFS defines minimum requirements for companies, which include minimum capital, capital structure, and liquidity.

Investment companies are registered as joint-stock companies. Investment companies can be also of "open-end" or "closed-end" type. Open-end company issues "redeemable" securities; that is, company must repurchase its securities from any owner of its securities who offers them to fund in period of 30 days. Closed-end company does not have such obligation, and its securities trade on stock exchange like securities of any other company.

Investment company must be licenced first by SCFS before registration by District Court.

3.25 STANDARDS:

Law on Technical Requirements for Products ("Zakon za tehniceskiete iziskvania kum produktite") of 1993, Law on National Standardization ("Zakon za nacionalnata standartizacia") of 1999, Law on Measurements ("Zakon za izmervaniata") of 2002.

Units used for measurement are those of international system SI. However, when there exist ratified and promulgated international agreements in maritime, air and railway transport, it is possible to use other units. National standards ("etaloni") are confirmed following procedure as stated in Law. Council of Ministers is authority that confirms standards upon proposal by Bulgarian Agency on Metrology and Technical Control. (http://www.damtn.government.bg/). Etalons must possess satisfactory degree of equality with international standards or with national standards used by signatory states to Convention on Meter. Law contains provisions on control and analysis of measuring equipment, on control of preliminary packing of products and bottles. Importers are subject to registration. Stated aim of law is protection of national interests, environment, life and health of people as result of inexact measurements.

Under Law on National Standardization, Bulgarian standards are compiled through process of reaching general consensus and define rules for general and repeated application. National standardization is based on principles of equality, voluntary participation, publicity and consensus of all persons with interest in development of Bulgarian standards. European and international standards are introduced in Bulgaria either as Bulgarian standards or through confirmation of their use by promulgating text in Bulgarian. Bulgarian standards enter into force upon promulgation of their name and number of registration in Official Bulletin of Bulgarian Institute on Standardization.

3.26 STATUTE OF FRAUDS:

Contracts for transfer of real property rights or interest in real property, preliminary contracts of contracts that require notarial form or form certified by notary, settlement agreements, leases of real property for more than one year, labor contracts, sales of inheritance, marriage, loans bearing interest, transfer of shares of company, insurance contracts must be in written form in order to be enforced. Oral testimony is not sufficient to prove civil contracts above 1,000 leva, except contracts between spouses, direct line relatives, relatives in collateral line up to fourth degree, brothers and sisters-in-law. (Art. 133 CPC). This rule does not apply either when parties to contract have agreed otherwise or document or deed is destroyed and party who wants to prove contract has no fault for destruction of document or deed.

Most commercial contracts may generally be in oral form in order to be valid (see Art. 293 LC). However, certain commercial contracts must be concluded in written form by law, e.g., sale by installments, sale with preliminary payment of price. In commercial transactions it is presumed that written form was followed when statement of intent or will of parties was technically recorded in form which provides opportunity to be reproduced. It is considered that written form was followed, if statement of intent was conveyed by telex and telecopier, and if those books and documents, which certify their proper functioning, preclude inexact reproduction of statement of intent. (Art. 293[5] LC). When commercial contract must be concluded in written form, such form must also be followed for its amendments or additions to it.

See topic 3.10 Contracts.

3.27 TELECOMMUNICATIONS:

Law on Telecommunications ("Zakon za dalek osuobshtenijata") entered into force at end of 2003 and launched liberalization of telecommunications market in line with Bulgaria's international commitments. Law is based and closely follows relevant EU directives in telecommunications sector. Law stated aims include: development of telecommunications market, creating fair conditions of non-discrimination between all operators, promoting competition; protecting interests of consumers; rendering of universal telecommunication service; protection of liberty and privacy of communication; efficient use of limited resources; protection of public interest and security.

Under Law telecommunication activities may be provided: (1) Without licence; (2) with general licence and registration; or (3) are subject to individual licences. Licence is granted either directly or by public tender depending on whether there are more operators wishing to get same radio frequencies and phone number. Individual licence is generally granted for period of 20 years and may be renewed. Licencing procedures for certain telecommunications services are relaxed with introduction of general licences open to registration. Commission on Regulation of Communications (http://www.crc.bg/) is administrative body which grants licences under Law. Its decisions are subject to review before Supreme Administrative Court. Commission keeps registers of all issued individual licences and certificates of general licences. Registers are open to public.

Commission on Regulation of Communications supervises competition in relevant market by determining which operators will have significant market power and imposes obligations on them. In general operator having more than 25% of relevant market may be determined to have significant market power. Nevertheless, any operator who controls considerable financial resources and who has ability to influence market conditions may be considered to possess significant market power.

Commission on Regulation of Communications is obliged to prepare annual report on state of telecommunication market and submit it to National Assembly.

At present Bulgarian cellular phone market is dominated by three operators providing cellular telecommunication services.

3.28 WAREHOUSEMEN:

Business of warehousemen is regulated by provisions of Law on Commerce (Contract of deposit in public warehouse "Dogovor za vlog v publichen sklad". (Arts. 573-586 LC). Warehouseman ("vlogopriemateliat") must keep deposited commodities and must return them to their owner or authorized by him/her person ("vlogodateliat"). Contract of deposit in public warehouse must be concluded in written form and must be registered with warehousemen's register. Warehouseman must insure commodities on behalf and on account of owner. Insurance must cover following risks: fire, earthquake and flood. However, owner may refuse insurance coverage. Warehouseman is obliged to provide owner of commodities with access to public warehouse so that latter can inspect them and take all necessary measures for their storage, packing, sorting etc. Unless it was agreed otherwise, warehouseman may mix substitute commodities of same kind and quantity. He/she must immediately inform owner for any apparent changes in commodities stored.

Upon demand warehouseman must issue warehouse receipt ("skladov zapis"). Form of receipt, conditions of its negotiability, protest and other matters are governed by specific provisions contained in Law on Commerce which also refer to provisions relating to bill of exchange in Law on Commerce. (See Arts. 577-581 LC.)

Person who receives commodities for storage in public warehouse has lien ("zalog") against them for amount equal to amount agreed upon for storage.

Law contains rules on termination of contract of deposit in public warehouse. When there exists danger for preservation of commodities stored or other important reason for termination of contract, warehouseman may demand termination of contract and that commodities are received by either last endorser or, when he/she is unknown, by person who deposited commodities. Warehouseman may sell commodities at market prices or in public auction upon sending written notice to owner.

Statute of limitation for bringing claims for damages caused by warehouseman is one year, and when these damages were caused with intent—three years.

4 CITIZENSHIP

4.00 IN GENERAL

Acquiring Bulgarian citizenship is governed by Law on Bulgarian Citizenship ("Zakon za bulgarskoto grazdanstvo") of 1998, as amended. Citizenship can be acquired by birth, if one of parents is Bulgarian citizen, and if by court recognition or determination of paternity, father/mother is Bulgarian citizen. Bulgarian citizenship can be acquired by any person who was born on Bulgarian territory, if he/she does not acquire other citizenship by birth or if his/her parents are unknown. Third way of acquiring Bulgarian citizenship is by naturalization.

NATURALIZATION.

Upon request foreigner can be granted Bulgarian citizenship provided that: (1) He/she has resided more than five years in Bulgaria with regularly issued permanent permit; (2) he/she was not sentenced for intentional crime by Bulgarian court; (3) he/she must prove knowledge of Bulgarian language; (4) he/she must possess enough income to support himself/herself; (5) he/she must be above 18 years of age. Foreigner may be exempt from some of above requirements, if he/she has married Bulgarian or if he/she has rendered exceptional services to Bulgaria.

Application for acquiring Bulgarian citizenship should be submitted to Minister of Justice. Council on Bulgarian Citizenship was established to render opinions on submitted applications. President issues decree. Bulgarian citizen who is also citizen of another country should be considered only Bulgarian citizen when Bulgarian legislation is applied and there is no treaty between Bulgaria and other country.

In Dec. 2005, Bulgarian Parliament ratified European Convention on Citizenship, which was signed in Jan. 1998 by Bulgaria, with reservations for application of Arts. 11, 12, 16, 17(1) of Convention.

Double and Multiple Citizenship.

At present Bulgarian national may also be national of any other country in world.

Foreign Marriage.

Celebration of dissolution of marriage between Bulgarian and alien or change of nationality by spouse during marriage does not automatically affect nationality of other spouse. Voluntary acquisition of nationality of other state or renunciation of Bulgarian nationality does not prevent retention of Bulgarian nationality by spouse of Bulgarian national. Bulgaria has ratified

UN Convention on Nationality of Married Woman of 1957.

Bulgarian Identity Documents.

Law on Bulgarian Identity Documents (“Zakon za bulgarskite dokumenti za samolichnost”) of 1999, as amended, provides for following identity documents issued to Bulgarian citizens and foreigners whose stay is longer than three months: to Bulgarian citizens: identity cards for persons above 14 (which contain following information: name, father's name and family name in Cyrillic and in Latin alphabet, place and date of birth, permanent address of citizen, colour of eyes and height), passports for traveling abroad, but may also be used for identification in Bulgaria, driving licence; to foreign residents: identity cards for foreign persons who are above 14; Bulgarian driving licence issued to foreigners. Bulgarian identity documents issued to foreigners are valid together with their national documents. Identity documents bear photographs. Both Bulgarian and English languages are used in identity documents. They give access to health services, voting rights (for Bulgarian citizens only), are needed for notarial, bank and post office transactions and must be presented to civil authorities when demanded. New passports with biometric data are expected to be issued in 2010 as meeting requirement for participation in US visa waiver program.

Bulgarians Living Abroad.

Law on Bulgarians Living Abroad (“Zakon za bulgarite zhiveeshti v chuzhbina”) of 2000 gives definition of Bulgarians living abroad as: persons one of whose ascendants is of Bulgarian origin; they possess Bulgarian national consciousness; they reside permanently or for long period on territory of another country. Bulgarian descent can be proved by means of any document issued by: Bulgarian or foreign state authorities; Bulgarian Orthodox Church; organization of Bulgarians living abroad duly recognized by Bulgarian state. Persons may also file petition with court. Bulgarians living abroad enjoy following rights: preferential treatment when they pay state fees related to their stay or residence in Bulgaria and when they apply for employment; they may launch business, participate in privatization process and may recover their property rights as well as receive inheritance on equal footing with Bulgarian citizens, except for property rights over land; they may study in Bulgarian state and municipal secondary and high schools without paying any fees as well as attend Bulgarian universities on equal footing with Bulgarian citizens; they pay same fees for civil status certificates as Bulgarian citizens. Bulgarians living abroad who wish to settle down and live in Bulgaria may apply for permits for permanent stay and follow special streamline procedure. When they settle in Bulgaria, they may be granted right to free use of land for period of three years. National Council of Bulgarians living abroad was established as authority responsible for state policy in this area. Its Chairman is elected by National Assembly. State Agency for Bulgarians Abroad: http://www.aba.government.bg/.

4.01 ALIENS:

See category 17 Immigration, topic 17.01 Aliens.

4.02 DISCRIMINATION:

Law on Protection Against Discrimination (“Zakon za zashtita ot diskriminatsija”) of 2003, as amended, prohibits direct and indirect discrimination on grounds of sex, race, nationality, ethnic origin, citizenship, religion and religious beliefs, education, beliefs, political affiliation, personal and social status, disability, age, sexual orientation, family status, property status, and all other grounds established by law or international treaty signed by Bulgaria. Harassment on above grounds, sexual harassment, acts inciting discrimination, racial segregation, as well as construction of structures, which inhibit access of persons with disabilities to public places, is considered discrimination. Law prescribes certain exceptions to prohibition against discrimination.

Commission on Protection Against Discrimination (http://www.kzdnondiscrimination.com/) was established as independent statutory authority to hear complaints. Commission also conducts research and publishes independent reports, keeps public register of all its guidelines and issued decisions. Law sets up procedure for redress for unlawful discrimination. Written complaints in Bulgarian or foreign language are submitted within three-year period from date when discrimination act occurred. Commission decisions are subject to appeal before Supreme Administrative Court. Persons may also bring their discrimination cases before regional courts.

4.03 DOMICILE:

No statutory definition. According to Law on Registration of Citizens ("Zakon za grazhdanskata registracija") of 1999, as amended, Bulgarian citizen and alien with permanent residence must have present and permanent address. Address connotes place, i.e., town, municipality, and street, where he/she lives or receives his or her correspondence. Permanent address is municipality where person chooses to be registered in population register. Permanent address is always on territory of Bulgaria. Person must have only one permanent and present address notwithstanding whether he/she lives in Bulgaria or abroad. Present and permanent address need not coincide. Present and permanent address of child coincide with address of his/her parents. When parents have different permanent addresses, they choose one of them for their child. When parents have different present addresses, present address of mother is child's present address. Present address of Bulgarian citizens living abroad is recorded in databases only with name of country of residence.

4.04 EDUCATION:

Law on Public Education ("Zakon za narodnata prosveta") of 1991, as amended, Law on the Degree of Education, General Educational Minimum and Educational Plan ("Zakon za stepenta na obrazovanie, obstoobrazovatelnia minimum i uchebnia plan"), Law on Higher Education ("Zakon za vissheto obrazovanie") of 1995, as amended, Law on Physical Education and Sports ("Zakon za fizicheskata kultura i sporta"), Law on Professional Education ("Zakon za profesionalnoto obrazovanie").

Education in General.

Law on Public Education of 1991, as amended. System of secondary public educations comprises kindergartens, schools and other institutions. Every Bulgarian citizen has right to education and may choose school and type of education. Parents and guardians exercise this right on behalf of their children under 14. No discrimination is permitted on base of race, ethnicity, sex, origin, religion and social status. Public education in Bulgaria is secular. Secondary education in state and municipal schools for Bulgarian citizens is free. Foreigners with permit for permanent stay as well as citizens of countries with which Bulgaria has signed international agreements are also exempt from payments fees. Every Bulgarian citizen is obliged to attend school until age of 16. In general, children start to attend school at age of seven and, in exceptional circumstances, when parents decide that child's intellectual and physical development permits—at age of six. Official language of instruction in kindergartens and schools is Bulgarian.

Kindergartens and schools are state, municipal and private. Private schools and kindergartens are opened upon proposals made by Bulgarian natural or juridical persons, and upon order issued by Minister of Education. Bulgarian kindergartens and schools with foreign participation may be opened upon request by registered in Bulgaria associations of Bulgarian and foreign juridical and physical persons and upon decision of Council of Ministers confirming proposal made by Minister of Education. Foreign schools may be opened in Bulgaria in accordance with international accords signed by Bulgaria. Religious institutions may open schools for children that have completed primary education and upon prior authorization given by Minister of Education. Education received in religious schools is recognized when it meets established state standards.

Teachers must receive their qualification within system of higher education. Under Law, teachers must not be convicted for intentional crimes punished with imprisonment, must not be deprived of their right to exercise their profession as well as must not suffer from diseases and disturbances that threaten life and health of their pupils. Foreigners may be teachers in Bulgarian schools upon fulfilling certain conditions. Teachers must not abuse rights of children, must not humiliate them, and must not use any force or violent methods. They must not remove children from classes.

Kindergartens' attendance is optional for children between three to six years of age, except for compulsory preparatory pre-school year. Kindergartens are maintained by state and municipalities. Parents pay monthly fees as determined by municipalities' councils and in accordance with Law on Local Taxes and Charges.

Bulgarian schools are primary, elementary and secondary (“gimnazii”). Secondary education is acquired upon 12 years of study and successful passing of two state exams (“matura”) on Bulgarian language and literature and on subject chosen by student.

State educational requirements and standards relate to: system of evaluation, educational content, pre-school education and preparation, degrees of education, general educational minimum and plan, educational content of textbooks, knowledge and command of Bulgarian language, vocational education and training, health treatment, scientific and library service, teachers' qualification and their pay. Students whose native language is not Bulgarian may also study and receive additional instruction and education in their native language.

There exists possibility for setting up juridical person with non-for-profit aim (“nastojatelstva”) to assist schools and kindergartens. Schools and kindergartens receive part of their revenue from state budget, from municipalities' budgets, and they may earn income from rents, agricultural land, forests, government bonds, gifts, from rendering services.

Fines may be imposed by mayor of municipality on guardians and parents that contravene law and do not send their children to schools. Fines are also imposed on persons who open schools without following requirements as set up in law.

National Programme.

On June 7, 2006, National Assembly adopted National Programme for development of secondary school education and pre-school instruction for period 2006-2015.

Higher Education.

Relevant legislation is Law on Higher Education of 1995, as amended. Higher secular education is proclaimed free from ideologies, religions and political doctrines and is realized in accordance with general human values and national tradition. Privileges and discrimination based on age, race, sex, ethnicity, social origin, political, and religious views are generally prohibited, except for those related to peculiarities of education and to future employments and professions, and these must be clearly stated in charter of school. Schools of Higher Education are state, public (“durzhavni”) and private (“chastni”). They may be universities, special schools and colleges. Both public and private schools of higher education are established as juridical persons upon decision of National Assembly. Public schools receive state property and annual state subsidy. Private schools may be set up upon petition by citizens and organizations. Latter are deemed founders and may be held liable for whole activity, management and finances of school. Foreign universities cannot open branches in Bulgaria, although under present law there exists possibility for setting up joint enterprises between Bulgarian and foreign institutions for higher education within structures of Bulgarian universities in accordance with international accords signed by Bulgaria.

National Evaluation and Accreditation Agency (http://www.neaa.government.bg/) was set up in order to monitor activities of universities.

Academic Autonomy.—Law defines academic autonomy as comprising of academic freedoms, academic self-governance and sanctity of territory of school in accordance with Bulgarian laws. Academic freedom includes following freedoms: to teach, to conduct scientific research, freedom to creative expression and freedom of education. Under law most university courses of lectures must be taught by habilitated academics. There exists possibility for inviting private and guest lecturers.

Universities.—State schools of higher education have following governing bodies: rector, academic council and general assembly elected for four year term by secret ballot. General assembly is composed of: representatives of habilitated and non-habilitated academic staff who have entered into permanent labour employment contracts with university (professors, docents, assistant professors etc.), representatives of university administration, representatives of students and of doctoral candidates. Moreover, 70% of all members of general assembly must be habilitated academics, and 15% of all members must be students. General assembly adopts university charter, elects rector and adopts annual rector's report. Academic council has following composition: representatives of academic staff, administration, students and doctoral candidates. Three fourths of its members must be habilitated academics. Academic council adopts annual budget, defines scientific and educational policies as well as process of selection and appointment of academic staff. Rector of Bulgarian state university must be habilitated academic. His/her function is to represent university, to enter into labour employment contracts, to decide as final authority all questions related to acceptance, transfer etc. of student and doctoral candidates. Universities are generally composed of faculties, institutes and departments.

Acts and decisions of state schools of higher education are subject to appeal before Bulgarian courts following procedures as set up in Code on Administrative Procedure.

Private schools of higher education are free to choose their governing structure.

All imports and gifts of books and other equipment used for scientific and educational needs of schools of higher education are exempt from customs duties, charges and value added tax.

Council of Ministers is authority which confirms: basic aims of higher education. It classifies areas and fields of higher education; state requirements for acquiring higher educations degrees as well as uniform state requirements (mandatory subjects to be covered and exams to be passed) for regulated professions, e.g., law, medicine, pharmacy, dentistry, veterinary medicine etc. Council of Ministers determines number of students and fees to be paid for education in state universities, including acceptance criteria and recognition of higher education diplomas.

Most universities receive annual subsidy from state budget. They may receive financial aid from municipalities as well as other property through donation or inheritance. They may also earn revenue through research, teaching or other related activities. Bulgarian students and doctoral candidates pay annual fees which must not exceed by 30% reduced rate adopted by Council of Ministers for covering study costs of one student. Foreign students must pay full fee and cover full costs of their study.

Scholarships for study in Bulgarian universities are awarded by universities, by Council of Ministers and by private and public donors.

Diplomas, bachelor and master degrees of higher education awarded by foreign universities are legalized by special commission at ministry of education. At present procedures are rather cumbersome. Bulgaria has been member of European Higher Education Area and has been part of Bologna process.

STUDENT LOANS:

Law on Student and Doctoral Students Credit (“Zakon za kreditirane na studenti I doktoranti”) of 2008.

On June 7, 2006, National Assembly adopted National Programme for development of secondary school education and pre-school instruction for period 2006-2015.

4.05 IMMIGRATION:

See category 17 Immigration, topic 17.02 Immigration.

4.06 NATIONAL SERVICE:

Since Jan. 1, 2008, military service has been only professional, i.e., no longer compulsory. New Law on Defense and Armed Forces was passed in 2009. (See DV 35 of 2009.) At present, number of Bulgarian armed forces is about 20,000.

Abroad.

Law on Sending and Use of Bulgarian Armed Forces Abroad (“Zakon za izprashtane i izpolzvane na bulgarski vuoruzheni sili izvun teritorijata na Republika Bulgaria”) was passed in Dec. 2005. National Assembly, Council of Ministers and Minister of Defense are relevant authorities who grant permission for sending Bulgarian troops abroad. Law regulates professional military service in foreign country, as well as general terms of sending Bulgarian armed forces abroad. Bulgarian professional soldiers and officers can participate in military operations or missions for period not longer than six months. Rules of conduct, which are based on international law and/or Bulgarian law, must be adopted in advance of every mission or operation abroad.

Law on Passing and Deployment of Allied and Foreign Armed Forces on Territory of Republic of Bulgaria (“Zakon za preminanavane prez i prebivavane na teritorijata na Republika Bulgaria na suozhnicheski i na chuzhdi vuoruzheni sili”) was enacted in Dec. 2005. It contains procedure of granting permission for deployment of foreign armed forces on Bulgarian territory, as well as status of allied and foreign armed forces while they are present in Bulgaria. National Assembly, Council of Ministers and Minister of Defense are relevant authorities who grant permission for foreign and/or allied armed forces to enter Bulgarian territory. Foreign and allied armed forces and their dependents are subject to Bulgarian laws and relevant international treaties, as well as to jurisdiction of Bulgarian courts. Allied and foreign armed forces must use zones, infrastructure and other means accordingly and are liable for damages caused. When foreign armed forces member or his/her dependent is detained, relevant authorities of his/her foreign state or/and of international organization must be immediately informed. Allied and/or foreign armed forces personnel is not allowed to carry and use arms, as well as to wear military uniform, except in designated areas and zones. Military, national or international driving licence of foreign and/or allied armed forces member is recognized in Bulgaria. Special procedure must be followed. Motor vehicles of foreign armed forces must have compulsory insurance coverage for non-fault “civil liability” insurance paid by sending foreign state. Armed forces personnel and their dependents have right to free medical aid in emergency cases, while additional costs of hospital treatment are covered by foreign person and/or by sending foreign state. Foreign armed forces personnel and their dependents, while in Bulgaria, cannot be employed or conduct any business activity.

4.07 SPORT:

Law on Physical Education and Sport (``Zakon za fizicheskoto vuzpitanie I sporta") of 2002, as amended. As of July 2009, Ministry of Sport is authority which implements government policy in field of sport. It maintains National Register of sport organizations and sport clubs. Minister of Sport grants licenses to sport federations and national sport organizations.

There exist special rules for sport activities and physical education in schools, universities, social tourism and high competitive professional and amateur sport. Students must be spent in sport activities at least three hours a week. Law contains provisions on financing of sport activities and relevant state support, on sport facilities and their management, on medical control.

Olympic Games.—Bulgaria participated in first modern Olympiad of 1896. Since 1923 Bulgarian Olympic Committee (http://www.bgolympic.org/) has been member of International Olympic Committee (http://www.olympic.org/uk/index_uk.asp).

5 CIVIL ACTIONS AND PROCEDURE

5.01 ACCORD AND SATISFACTION:

Part performance of obligation before or after breach, when expressly accepted by creditor and rendered pursuant to agreement for that purpose, may extinguish obligation. (See Arts. 107-109 LOC.)

By settlement (“spogodba”), which is not contrary to mandatory rules of law and good morals, parties may reach compromise and resolve matter and terminate lawsuit already begun or prevent future litigation by means of concessions or reservations made by one or both of them. (See Arts. 365-367 LOC.)

5.02 ACTIONS:

There has never been any distinction between law and equity in Bulgarian law. Relevant law is Code of Civil Procedure (CPC), which entered into force in 2008. See http://www.vks.bg/vks_p04_02.htm.

Action is commenced by filing petition to court of competent jurisdiction.

Parties.

Action can only be brought by one or several persons having interest. (Art. 124[1] CPC). No need for mandatory representation by advocate, except in certain cases.

Class Actions.

Recognized. See Arts. 379-399 CPC.

Intervention.

There are two types of interventions: voluntary and forced. Voluntary intervention occurs when any third person who has interest in dispute may intervene to assist one of parties. (Art. 218 CPC). Forced intervention occurs when party impleads third person whose presence and assistance is necessary to permit solution of dispute. (Art. 219 CPC). Forced intervention is possible only in first session of hearings. Third person can refuse to intervene but will be bound by motives of judgment.

Joinder of Causes of Actions (“Drugarstvo”).

Several causes of actions may be joined in same suit. Two or more persons whose rights and duties are based on same cause of action or who have common rights and obligations may join their claims in same suit. (Art. 215 CPC). Actions must be susceptible of same mode of trial.

Submission of Controversy.

It is possible to submit controversy to court on agreed statement of facts.

Objective Consolidation of Actions (“Obektivno Suediniavane na iskove”).

Two or more actions with different juridical basis and different questions at issue between same parties can be combined in one action by plaintiff, by defendant, and by order of judge when they are susceptible of same mode of trial.

Abatement (“Spirane”).—When case is not ready for judgment and trial has not been completed, court must suspend proceedings in case of: mutual agreement between parties (only once during whole trial); death of party; when it is necessary to appoint guardian to one party; when there is pending case, which is relevant to this one, before another court; when evidence of committed crime was discovered in civil proceedings and outcome of civil case depends on these circumstances. (Art. 182 CPC). Revival and continuance of suit is effected by court determination.

Termination (“Prekratiavane”).

Proceedings can terminate by discontinuance or refusal by plaintiff at any time before judgment or by acquiescence to claim by defendant; by peremption, when no proceeding has been held during six months in case of abatement of proceedings by mutual agreement between parties; by judicial settlement.

Appropriate Forum.

Appropriate venue or proper district in which to bring action is generally place of residence of defendant: for natural person his or her domicile, and for legal entity—place of seat, i.e. place where its executive office is located. Nevertheless, there are exceptions to general rule, and in certain instances venue might be proper in: judicial district where tort was committed; judicial district where real property that is subject of action is situated; judicial district where corporation's branch is located, if claim arose out of relations with branch.

Costs.

Losing party has to bear all costs, including lawyers' fees and reasonable expenses of winning party. Court fees and costs are fixed by statute and are in proportion to litigated sum. Persons with financial problems may apply for legal aid.

5.03 APPEAL AND ERROR:

Civil appeals of decisions of regional and district courts are governed by Civil Procedure Code.

Notice of Appeals (“Zhalba”).

Notice of appeal must specify: name and address of party taking appeal; designate judgment being appealed; designate what is demanded; errors of judgment; point out what new evidences must be collected; signature of party submitting appeal. Appellant must file copies of notice of appeal and other accompanying documents to be served to other party and must pay state fees with court that rendered judgment. Upon receipt of notice of appeal, court sends copy to other party, which may reply with written objections and point to supporting evidence within seven days. Upon expiration of the seven day period lower court must send notice of appeal and objections to upper court.

Timing of Appeal.

Notice of appeal must be filed within 14 days either from date when judgment was rendered or from date when party not present received notice that judgment was ready. (Art. 197 CPC).

Extent of Review.

Judgment is subject to appeal on legal and factual grounds. Appellant may submit new factual findings that he/she failed to present before lower court as well as to amend his/her errors. Upper court overturns lower court judgment when it was: irregular, i.e. when evidence was incomplete; ill-founded, e.g., there was discrepancy between different parts of decision, and court conclusions are contrary to common sense, experience and present state of science etc., or void, i.e., when party was prevented from filing his/her defence by fraud, or any other sufficient reason, and was condemned by default to appear or plead etc.

No security for appeal is required.

Cassation.

Supreme Court of Cassation considers only stated demands in claim and may dismiss cassation or reverse second instance court's decision in whole or in part and remand case to another panel of second instance court for reconsideration. Supreme Court of Cassation may overturn second instance court's decision and terminate case or may resubmit case to relevant court or authority. Supreme Court of Cassation's instructions on how law must be interpreted and applied are compulsory for lower court.

5.04 CONFLICTS OF LAWS:

Code on Private International Law ("Zakon za mezhdunarodnoto chastno pravo") of 2005, as amended. (http://lex.bg/bg/laws/ldoc/2135503651). Code proclaims as principle of applicable law in private law relations with international element, i.e. connected with two or more states, law of country with which relation has its closest connection. (Art. 2 CPIL). Code covers following issues: when Bulgarian courts are competent in international private relations with international element (Part 1); applicable law in private law relations with international element (Part 2); recognition and enforcement of foreign judgments in Bulgaria (Part 3). However, Code's provisions are not applicable when there exists international treaty or other international act, e.g. EU legislative act or convention, duly signed and ratified by Bulgaria or other relevant Bulgarian statutory provisions.

Jurisdiction (Art. 4-28 CPIL).

Code proclaims that Bulgarian courts have jurisdiction in majority of civil law proceedings and cases with international element. Thus, Bulgarian courts are competent when: defendant has his/her habitual residence, seat according to its bylaws or place of actual governance in Bulgaria; plaintiff is Bulgarian citizen or juridical person registered in Bulgaria. (Art. 4 CPIL). Bulgarian courts are also deemed competent in cases related to personal rights, in family cases, in cases related to recognition of children, in cases of adoptions, in cases of maintenance and when person seeking maintenance has his/her habitual residence in Bulgaria. There exists exclusive competence in cases concerning real property rights over items located in Bulgaria. Bulgarian courts are competent in cases related to copyrights when claimant has applied for defence on territory of Bulgaria. As far as industrial property rights are concerned, Bulgarian courts have exclusive jurisdiction, when patent is issued and registration was performed in Bulgaria. Bulgarian courts are competent in civil proceedings related to inheritance when deceased at time of his/her death had his/her habitual residence in Bulgaria or had been Bulgarian citizen, as well as when part of his/her property is located in Bulgaria. Bulgarian courts are competent when in civil claims related to contractual obligations when place of obligation performance was in Bulgaria or defendant has his/her basic place of activity in Bulgaria. Bulgarian courts are also competent in claims brought by consumer whose habitual residence is in Bulgaria. Bulgarian courts are also competent in labour cases, when employee or servant habitually works in Bulgaria. Agreement for choice of court is possible only after dispute arises. Bulgarian courts are also competent in cases of torts when tort was performed in Bulgaria or damages or part of them have occurred in Bulgaria. This competency also exists for direct suit that person who has suffered damages has against insurer of person who caused damage.

Under Code's provisions, when there is no exclusive jurisdiction, there exists possibility for written agreement between parties so that their dispute could be decided by foreign court. Parties to dispute may enter into agreement that their case is decided by Bulgarian court, except for cases concerning maintenance. If defendant appears in proceedings without pleading lack of jurisdiction in first session before Bulgarian court, he/she has voluntarily accepted that Bulgarian courts are competent in his/her case. (Art. 24 CPIL). Bulgarian courts are exclusively competent in execution proceedings and enforcement of judgments, when obligation has to be performed by person with habitual residence in Bulgaria or item is located in Bulgaria. Bulgarian courts are also competent when there exists change in circumstances to dispute. (Art. 27 CPIL).

Bulgarian courts have to examine ex officio whether they are competent to hear case.

Process (Art. 29-38).

Bulgarian courts and other institutions hear cases according to Bulgarian law. Burden of proof is determined by material law related to fact subject to proof. In certain cases, method of proof by witnesses is permitted when fact has occurred on territory of country whose law is applicable. (Art. 30[2] CPIL). Bulgarian court must evaluate all evidence obtained abroad and public documents in accordance with law of country where it was obtained. Serving of summons and other documents abroad is performed by Bulgarian diplomatic and consular representatives or by competent foreign authorities. Minister of Justice decides on rules how they can be approached by Bulgarian authorities. Party with known address in foreign country is summoned at this address. In summons statement is made that she must declare address in Bulgaria. When party has address in foreign country and unsuccessful attempt is made for service writ at known address, party may be summoned by note which is published in unofficial section of Durzhaven Vestnik one month before court session. When party does not appear for session, court must appoint him/her representative. (Art. 35 CPIL). Bulgarian court must terminate proceedings which have been started before it, when there is pending foreign court claim between same parties and it is expected that this case will be decided within reasonable time period. (Art. 37 CPIL). Upon request by foreign authorities, Bulgarian authorities must render them legal aid, unless request is contrary to Bulgarian public order. Requests for acts with legal significance may be demanded to be performed in accordance with Bulgarian law and, this is not problematic, with foreign law.

Applicable Law (Art. 39-116 CPIL).

When determining applicable law depends on deciding what is legal relation or what is factual background, Bulgarian law is used (lex fori). When legal concept or institute are unknown or do not exist in Bulgarian law and they cannot be defined by interpretation of Bulgarian law, foreign law must be taken into account for their qualification. When country, whose law is determined to be applicable one by rules of Code, consists of several territorial units with different legal systems, law of latter country determines which legal system is to be applied. When given country consists of several territorial units, and each of these units provides for regulation of contractual and other obligations, each territory will be considered separate country in determining applicable law. Bulgarian court is obliged to verify content of foreign law and request information from Ministry of Justice, experts and other institutions. Parties may present documents, which verify content of foreign law. In choice of foreign law court may oblige parties to assist her in verifying its content. Foreign law is interpreted and applied in same manner as it is applied in foreign country which created it. Non-application of foreign law as well as its wrong interpretation and application is reason that judgment may be subject to appeal. Foreign law may be applied in Bulgaria only when consequences of its application are not contrary to Bulgarian public order. (Art. 45 CPIL). Foreign law application does not depend on existence of reciprocity.

Legal Status and Legal Capacity of Physical Persons.

Governed by their national law (lex patriae). (Art. 48-55 CPIL). National law is defined as law of country of person's citizenship. (Art. 48 CPIL). National law of person with two or more citizenships is law of country where he/she has his/her habitual residence or, when habitual residence cannot be determined, country he/she has closest connection with. National law of person without citizenship, of refugee or of person to whom asylum was granted is country of his/her habitual residence. When it is difficult to prove habitual residence, law of country with which he/she has closest connection is to be applied. Under Code, habitual residence is defined as country where person has predominantly established himself/herself without necessity for permit or registration. For determining place of habitual residence circumstances of personal and professional character, which derive from permanent connection, hopes and intentions to create such connection with place, are to be taken into account. Name of physical persons is governed by their national law. (Art. 53 CPIL). Declaration of absentee and his/her death is governed by law of country of absentee's citizenship. Foreign citizen, who has habitual residence in Bulgaria, may be declared absent or dead by person who has reasonable interest. (Art. 55[3] CPIL). Capacity of person to enter into commercial transactions as sole trader or merchant is determined by law of country where person registers as merchant or by law of country where he/she has his/her main business. (Art. 52 CPIL).

Legal Status and Capacity of Juridical Persons.

Juridical persons, commercial companies, associations with not-for-profit aim, foundations, are regulated by country where they are registered (lex loci registrationis). When juridical person is registered in several countries, law of seat of its governance, according to its bylaws, is to be applied. (Art. 56[2] CPIL). When seat of its governance does not correspond with seat of its actual governance, law of country where its seat of its actual governance is relevant. As far as associations which are not legal persons, applicable law is law of country where they are set up or registered. (Art. 60 CPIL).

Agency.

Relations between principal and third persons are governed by law where agent has his/her main activity at time of performance of such acts (lex loci actus). (Art. 62 CPIL).

Prescription is governed by law of country which regulates such legal relationship. (Art. 63 CPIL).

Real Property Rights and Intellectual Property Rights.

Right to ownership, adverse possession and property rights over movables and immovables are governed by law of country where they are located (lex rei sitae). (Art. 64[1] CPIL). Whether items are moveable or immovable as well as type of property rights are determined by law of country where they are located. Intellectual property rights and industrial property rights are governed by law of country where protection is sought (lex loci protectionis).

Marriage and Family Relations.

Form of marriage is regulated by law of country where it shall be celebrated (lex loci celebrationis). (Art. 75 CPIL). Conditions for celebrating marriage shall be determined for each spouse according to law of country of his/her citizenship. Marriage celebrated in foreign country is recognized in Bulgaria, if prescribed form of local law was followed. (Art. 75[3] CPIL). Bulgarian citizen who wants to marry abroad may receive permission as required by Family Code, by Bulgarian embassy or consulate. When one of spouses is Bulgarian national or has his/her habitual residence in Bulgaria, marriage can be always celebrated, even if there exists impediment under relevant foreign law and under Bulgarian law this impediment is contrary to freedom to enter into marriage, by Bulgarian civil status official. (Art. 76[2] CPIL).

Personal and property relations between husband and wife are governed by their common national law. Personal and property relations of husband and wife with different citizenships are governed by law of their common habitual residence or law of country with which they have closest connection. Husband and wife may draw written accord, which shall be dated and contain their signatures, about applicable law that will govern their personal and property relations. This accord must be permitted by above determined law. (Art. 79 CPIL). When property relations between spouses are governed by chosen foreign law, these relations cannot violate rights of third bona fide parties.

Divorce of foreigners is governed by their common national law, by common habitual residence (when they do not have common national law), or by Bulgarian law (when they do not have common habitual residence). When applicable foreign law does not permit divorce, and at time of filing petition for divorce one of spouses is Bulgarian citizen or have habitual residence in Bulgaria, applicable law is Bulgarian law. (Art. 82[3] CPIL).

Descent of child born out of wedlock is regulated by law of country whose citizenship child has acquired at time of birth. However, following rules may apply, when they are more favourable to child: law of country of child's citizenship or his/her habitual residence at time of determination of his descent; law of country applicable between spouses at time of birth. Recognition of child is valid, if it is valid under national law of person performing it, or national law or habitual residence of child at time of recognition. (Art. 83 CPIL).

Adoption and its revocation is governed by national law of adopters and adoptee. When they do not have common national law, national laws of their relevant countries are to be applied. When adoptee is Bulgarian citizen, Minister of Justice shall give his/her consent. Foreign citizens with habitual residence in another country shall also fulfill prerequisites for being adopters in this respective country. (Art. 84 CPIL).

Personal relations between parents and children are governed by law of their common habitual residence or law of habitual residence or national law of children. (Art. 85 CPIL).

Guardianship and its revocation is governed by law of country where person to be placed under guardianship has his/her habitual residence. Obligation to accept guardianship is governed by national law of perspective guardian. (Art. 86 CPIL). Urgent measures may be taken under Bulgarian law when person and his/her movable and immovable property is on territory of Bulgaria.

Maintenance or alimony is regulated by law of country where person seeking maintenance has his/her habitual residence, unless his/her national law is more favourable. (Art. 87 CPIL). For obligation of maintenance arising out of divorce, applicable law is law that governs divorce. Applicable law determines amount and who may be entitled to maintenance, who must pay maintenance and for what period, how and when maintenance can be changed and cease, obligation of person who owes maintenance to compensate authority, who paid maintenance on his/her behalf. In determining amount of maintenance material circumstances of person who owes maintenance and actual needs of person seeking maintenance must always be taken into account, even when applicable law states otherwise.

Inheritance of movables is governed by law of country where deceased had his/her habitual residence at time of his/her death. Inheritance of immovables is governed by law of country where items are located. There exists also possibility for person to choose his/her national law as applicable law governing his/her succession. Choice of applicable law and its repeal must be expressed in will. (Art. 89 CPIL). Capacity of person to draw will is governed by above rules stated in Art. 89.

Will is valid when: its form follows rules of country where it was drawn; or when follows law of country whose citizen was deceased; or country where deceased had his/her habitual residence at time of drawing up of will or at time of death; or country where immovable is located. (Art. 90 CPIL). Thus, Bulgarian law provisions closely follow provisions of Hague Convention on Conflicts of Law relating to Form of Testamentary Disposition of 1961.

Contracts.

Parties are free to choose applicable law (lex voluntatis). When parties have not chosen applicable law, law of country with which contract is most closely connected applies. Provisions on contractual obligations follow closely Rome Convention of 1980.

In case of employment contracts, choice of law must not deprive employee or servant from defence afforded by imperative legal norms. When there is no choice, employment contract is governed by law of country where employee or servant habitually works.

Noncontractual Obligations.

Torts are governed by law of country where damages occurred (lex loci delicti). When person who caused damage and interested person who suffered damage have at time of damage habitual residence or place of activity in same country, law of this country shall be applied. When it can be deduced from circumstances that tort is more closely linked with another country, law of this country is to be applied. (Art. 105 CPIL).

Damages caused by defects of commodities are regulated by country where person who suffered damage has his/her habitual residence, unless person against whom claim was filed proves that commodity was introduced into market without his/her consent. (Art. 106 CPIL).

Unfair competition and restraints on competition provisions refer to law of country on whose territory interests of competitors or collective interests of consumers can be substantially infringed. (Art. 107 CPIL).

Person whose personal rights, e.g. reputation was damaged, were infringed by mass media, radio and television broadcasters, or newspapers have choice of applicable law: law of country of his/her habitual residence; law of country on whose territory damage occurred; law of country of habitual residence or place of activity of person bearing responsibility for damages. (Art. 108 CPIL). Right to counter statement is regulated by law of country where publication appeared or broadcasting was performed. (Art. 108[3] CPIL). Above rules are applicable in case of infringements related to personal data protection.

Environmental damages are governed by law where damage occurred, unless person who suffered damage has chosen law of country where act was performed. (Art. 109 CPIL).

Quasi-Contracts.

Unjust enrichment is governed by law of country where event occurred. When unjust enrichment occurred as result of another closely linked legal relationship, e.g. contract, between parties, applicable law is law that governs latter relationship. When at time of unjust enrichment parties had habitual residence or place of activity in same country, applicable law is law of this country. When unjust enrichment is more closely linked with another country, applicable law is law of that country. (Art. 111 CPIL).

Looking after another's affairs without his/her authority (Negotiorum gestio) is governed by law of country where interested party has his/her habitual residence or place of activity at time of performance of acts. When negotiorum gestio was undertaken as result of other closely linked legal relationship, e.g. contract, between parties, applicable law is law that governs this latter type of relationship. When obligation is related to protection of interests of physical person or certain property, applicable law is law of country where physical person has his/her residence or property has its location at time negotiorum gestio. When it can be deduced from circumstance that negotiorum gestio is more closely linked with another country, applicable law is law of that country. (Art. 112 CPIL).

Recognition and Enforcement of Foreign Judgments (Art. 117-124 CPIL).

Foreign court judgments and other acts of foreign public authorities are recognized and executed when: foreign court was competent under provisions of Bulgarian law, but not when sole reason for foreign court competency was citizenship of plaintiff or his/her registration in foreign court's country; defendant was served copy of claim, parties have been regularly summoned and basic principles of Bulgarian law were not contravened; no Bulgarian court judgment has entered into force between same parties and for same cause; there is no pending Bulgarian court proceedings between same parties, same cause and same claim which was initiated before foreign court case; recognition and enforcement is not contrary to Bulgarian public order. There is no requirement of reciprocity. Recognition and enforcement of foreign court judgment is performed by relevant Bulgarian authority. Sofia City Court is competent court in case of disputes concerning enforcement of foreign judgment.

5.05 DAMAGES:

General rules and principles related to damages are contained in Law on Obligations and Contracts of 1951, as amended (see Art. 45-54 [“Nepozvoleno uvrezhdane”] and Arts. 79, 82, 86 [Nonperformance of Contract] [“Neizpulnenie na dogovorite”] LOC).

Main purpose of adjudication of damages under Bulgarian civil law is to provide compensation for loss actually suffered. Adjudicating damages, therefore, has purpose of restoring economic state which existed before damage.

It is generally acknowledged principle of Bulgarian law that amount of damages adjudicated to injured person is limited to amount of damages actually suffered.

In case of tort and breach of contract courts in Bulgaria may also grant compensation for moral or non-property, personal (“moralni”) damages. (Art. 52 LOC).

Any person by whose fault is caused damage to another is obliged to repair damages. (Art. 45 LOC). Plaintiff must prove his/her injury, defendant's acts of omissions, and that damage sustained results directly from defendant's acts or omissions. Fault is presumed unless it can be proved otherwise. (Art. 45[2] LOC). Fault includes both intentional wrongs and negligence. Party at fault may be released from liability if she/he proves that damage resulted from force majeure. When damaged party contributed to damage, court may diminish compensation. (Art. 51[2] LOC). Damage caused by illegal act of person in state of ultimate defence (“neizbezhna otbrana”) with aim to save himself/herself and/or others from present danger or serious personal injury, must not be repaired. (Art. 46[1] LOC). However, person in ultimate need (“krajna nuzhda”) who caused damage must pay compensation. (Art. 46[2] LOC).

When damage is caused by act of person under supervision, e.g. employee, minor and person under 18 who live together with their parents, and incapacitated person who is in such state that he/she cannot understand and control his/her acts, there arises no-fault or strict (absolute) liability, and employer, parent or guardian must repair damages. (Arts. 47-48 LOC). However, supervisors must not be held liable when they cannot prevent occurrence of damage. When damage is caused by domestic animal or object, supervisor and owner are both held liable. (Art. 50 LOC).

Aircraft carriers bear strict liability pursuant to provisions of Law on Civil Aviation of

1972, as amended and to 1999 Montreal Convention on Unification of Some Rules for International Carriage by Air. Damages for passengers are limited according to 1999 Montreal Convention on Unification of Some Rules for International Carriage by Air.

See also categories, Business Regulation and Commerce, topics Sales and Consumer Protection, subhead Product Liability; Transportation, topics Motor Vehicles and Shipping.

Sovereign Immunity.

State is liable for damages caused by acts committed by its officers and officials. (Art. 7 of Constitution). Government or its agencies may be sued under provisions of Law on State's Liability for Damages Caused to Citizens (“Zakon za otgovornostta na durzhavata za vredi prichineni na grazhdani”) of 1988, as amended. Liability of State is strict and awarded compensation includes all direct and immediate injuries caused by acts and omissions of state agencies and officials in connection with performance of their duties. Plaintiff is exempt from paying any court fees.

Charitable Immunity.

Doctrine of charitable immunity does not exist in Bulgarian law.

5.06 DEPOSITIONS AND DISCOVERY:

It is general principle of Bulgarian law that hearsay is not admissible.

Examination Out of Court.

Only in some extraordinary cases, i.e. special social status, serious illness or upcoming travel of witness, may court delegate authority to one of its members to receive testimony of any person outside court. Parties must also be present and be allowed to ask any question relevant to case

Compelling Attendance of Witnesses.

When person duly summoned by subpoena to attend as witness or expert witness refuses to attend without serious excuse, court fines him/her orders his/her forced attendance. If any witness or expert witness refuses to be sworn or to answer any question without serious excuse, court fines him/her. If any third person who holds document or item duly asked to present them refuses to do it, court imposes fine and repeats its order. (See Arts. 85-86 CPC). Fines range from 50 to 300 leva.

Request for Admission of Facts.

Court may serve request to party, requesting that party appears in person before court and acknowledges for purposes of proceedings truth of fact or authenticity of document and answers questions with significance for cause of case. Request including these questions as well as reminder that perjury is criminal offence is served by order of court. (Art. 176 CPC).

Taking Evidence Abroad.

Normal procedure for obtaining evidence in Bulgaria from abroad is to send letter of request to Bulgarian Minister of Foreign Affairs and Minister of Justice. Latter is competent authority which decides on question of treaty or factual reciprocity between Bulgaria and foreign country and then transmits letters of request to competent local Bulgarian courts. Bulgaria is party to Hague Convention on Taking of Evidence Abroad in Civil or Commercial Matters of 1970, to Convention on Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters of 1965 and to Convention on International Access to Justice of 1980 and to European Agreement on Service of Requests for Legal Aid of 1996. Bulgaria has also signed number of bilateral treaties on legal assistance in civil and criminal matters.

5.07 EVIDENCE:

There are no limitations on what courts may consider as evidence in civil cases, i.e. witnesses, written documents and expert witnesses. Courts have authority to collect evidence as well. Admission by party or her representative is considered together with all other circumstances and evidence to case. Parties are not supposed to prove facts based on legal presumptions, e.g., in torts guilt is presumed. However, rebuttal of these legal presumptions is permissible in all cases, unless law indicates otherwise. (Art. 154 CPC). Court may accept certain facts as proved, when party has created obstacles for this evidence to be produced. (Art. 161 CPC).

Witnesses.

All persons may testify. Relatives, adopters, guardians and all persons who have interest in outcome and favour one of parties may act as witnesses, and their testimony may be considered by court, who takes into account, however, all other relevant evidence. Court decides whether to consider competent persons without legal capacity or mentally incapacitated persons. Nobody has right to refuse to testify, except: representatives and mediators in particular case, spouse, direct line relatives, brothers and sisters-in-law, brothers and sisters, ex spouse and common law spouse; persons whose testimony would cause direct injury, indictment or defamation to their relatives or themselves may refuse to answer concrete questions.

Communications between advocate and client are privileged and confidential. (Art. 30[5] of Constitution).

Judge reminds that perjury is criminal offense, punishable with up to five years imprisonment, to witness. Before testifying, witness must make solemn affirmation and promise to tell truth. (Art. 170[2] CPC). Witness may testify either in Bulgarian or in any other language with assistance of court appointed interpreter. Every witness must be examined and must testify separately. Parties attending proceedings must be present at examination and may ask questions. In case of discrepancy between testimony of two witnesses, they may be asked to testify together (“ochna stavka”). (Art. 174 CPC).

Documents.

Documentary or written evidence (“pismeni dokazatelstva”) is classified in: public or official documents (“oficialni dokumneti”) and private documents (“chastni dokumenti”). Validity of written evidence is determined by legal rules, which were in force at time and place of its production. (Art. 178 CPC). Court must evaluate written evidence containing defects, e.g., crossings, lines, missing parts etc., with all other relevant evidence. No such requirement for electronic documents. Private document, signed by person, constitute evidence that statements contained in it are made by this person. Documents in foreign language must be presented with their exact translation in Bulgarian. Public documents are in general produced by parties, but court may demand them from institution which issued them. Published materials are in general produced by parties. Business records evaluated by court, who takes into account their regularity, and together with other evidence. Third party which fails to produce document may be fined by court as well as may be held liable for damages. Interested party may challenge whether document is genuine no later than in session in which it was produced. Burden of proof is born by party that challenges truth of document. In case of challenge of private document, which does not bear signature of party which challenges it, burden of proof is born by other party. Court may order that document is examined and decides whether it is true or false. In latter case court excludes document from all relevant and valid evidence and sends it to public prosecutor.

Expert witnesses are appointed in order to clarify questions related to law suit when court does not possess relevant knowledge in field of science, arts and crafts. (Art. 195 CPC). Expert witnesses are selected from published list of experts witnesses in different fields. When case concerns complex issue, court may appoint panel of expert witnesses. Court has discretion in evaluation of expert witnesses' report Expert witness promises to render disinterested report

At request of one of parties or at her own initiative, court may allow inspection of movable and immovable items and examination of physical persons with or without participation of expert witnesses. (Art. 204 CPC). Inspection and examination may be considered either as examination of other relevant evidence or as evidence in its own right. Inspection can be performed by whole court panel, by duly authorized member of court or by duly authorized court.

At request of one of parties or at her own initiative, court may allow inspection of movable and immovable items and examination of physical persons with or without participation of expert witnesses. (Art. 162 CPC). Inspection and examination may be considered either as examination of other relevant evidence or as evidence in its own right. Inspection can be performed by whole court panel, by duly authorized member of court or by duly authorized court. (Art. 163 CPC).

Pretrial Evidence Proceedings (“Obezpechavane na dokazatelstva”).

When there exists risk that certain piece of evidence might be lost or producing it at later date might be rendered difficult, party may petition that it be produced beforehand. (Art. 207 CPC). Petition must be filed with court that will hear case or, in case of pretrial evidence, with regional court where witness has his/her residence or where real estate is located (when inspection of real property is requested). (Art. 208 CPC).

5.08 INJUNCTION:

Request for preliminary injunction, as preventive measure which guards against future injuries, may be made to court upon judgment. Court may grant interlocutory injunction to restrain any person from causing considerable and irretrievable damages to plaintiff or if execution would become impossible or very difficult. (c. 34 CPC).

Court may also grant preliminary injunction in cases of debt which is recognized by defendant or debt, which is based on official document. Court may order plaintiff to offer bond or security.

Court must order preliminary injunction in maintenance or labour compensation cases

Preliminary injunction is not possible when execution would cause irretrievable damage to defendant or damage cannot be exactly estimated in terms of money.

Preliminary injunction is not possible when execution would cause irretrievable damage to defendant or damage cannot be exactly estimated in terms of money.

5.09 JUDGMENTS:

Bulgarian courts may issue judgments or decisions (“reshenija”), with which they decide controversy, and definitions (“opredelenija”), which are given in course of suit on some intermediate object and does not decide dispute at issue upon its merits.

Court must render judgment when it decides that case has become clear from factual and legal point and upon conclusion of oral proceedings. Judgment must be rendered upon secret deliberation of judges and taken by majority of their votes. Judges cannot abstain from voting. Judge, who dissents from majority, must sign judgment and state his/her motives. Judgment must contain: date and place of issue; names of court, judges and secretary of court; case; what court has decided and ordered; who must bear costs of proceedings; whether decision is subject to appeal, before which court and in what time period; names and surnames of parties as well as residence, address, employment address and civil number of party against whom decision was rendered, signatures of judges. When judge cannot sign decision, court chairman or senior judge must state reasons for that in decision. Decision must also contain motives on which it is based

5.10 LEGAL AID:

Under Law on Legal Aid ("Zakon za pravnata pomosht") of 2005 National Legal Aid Board ("Bureau za pravna pomosht") (http://www.nbpp.government.bg/) was set up to administer scheme for rendering legal services to natural persons whereby payment of legal costs and, in particular, advocates' fees is made out of public funds allocated in annual state budget. There are various levels of service. They are: legal advice with view of reaching settlement before court proceedings have started; preparing papers for filing suit; legal representation in court proceedings; legal representation in case of detention by police under Law on Ministry of Interior.

Secretary of Advocates Society appoints advocates in emergency cases.

National Register on Legal Aid includes names of all advocates who offer legal services under law. Register is public and may be consulted on Internet. Council of Ministers decree determines fees received by advocates rendering legal aid.

Special rules, which will enter on Bulgarian accession to EU, exist for rendering legal aid in international civil and commercial disputes. International dispute involves party who is citizen or legal resident of EU Member State. In general, citizens of EU Member State receive legal aid when their property status does not exceed social aid level under Bulgarian Law on Social Aid. When property status is above social aid level, National Board takes into consideration petitioner's property, family status, occupation, health, age, as well as difference between minimum amount of life necessities in Bulgaria and in EU Member State.

5.11 LIMITATION OF ACTIONS:

Statute of limitations ("pogasitelna davnost") is defense that prevents claimant from initiating legal proceedings to enforce rights. However, statute of limitations does not extinguish obligation itself. Once period of limitation has passed, person against whom claim is made may refuse to fulfil claim, unless he/she voluntarily renounces to invoke statute of limitations.

Law on Obligations and Contracts prescribes period of limitation for various actions. General period of limitation in majority of cases for filing civil suit is five years. (Art. 110 LOC). However, limit on time for instituting legal proceeding involving many transactions of everyday life, e.g. rents, loans, remunerations, and claims for damages resulting from breach of contracts is only three years. (Art. 111[b] LOC). Social aid payments prescribe with three months limitation period.

It is not possible to renounce statute of limitation prior to expiration of limitation period. Agreements which extend or shorten limitation periods are void. (See Art. 113 LOC.) Limitation period starts to run from date when claim matures. When parties have agreed that claim becomes due upon invitation, limitation period starts to run from date, when claim arose. In torts limitation period starts to run from date where tortfeasor was discovered. (Art. 114 LOC).

Although prior to 1990 in certain limited cases it was possible to apply limitation periods ex officio, at present only parties to law suit may invoke statute of limitation. (Art. 120 LOC).

Limitation period may be suspended and interrupted. In case of interruption, new period starts to run. (Art. 117 LOC). Interruption occurs in following cases: with every act of enforcement of claim; with recognition of claim by debtor; with filing of suit before court. Limitation period is suspended and does not run: between spouses; between children and parents who exercise parental rights; between guardians and trustees and their wards; against trustee, e.g. executors, for claims of persons whose property or assets are managed under trust for period of this management; for claims of persons under 18 and under guardianship for period when they lack appointed legal representative and six months afterwards; for claims for damages of juridical persons against their managers or directors, while they are in office; while case is pending in court. When limitation period expires while creditor or debtor are called up to active military service, claim may be brought within six months upon their return to normal life. (See Art. 115 LOC.) When claim has been determined by court judgment, new limitation period is always five years. Debtor may perform his/her obligation upon expiration of limitation period, and he/she has not right to claim back what he/she has paid even when he/she did not know that limitation period has expired. (Art. 118 LOC). When main debt is extinguished, all other accessory debts, e.g. personal or other guarantees, mortgages, pledges, and claims are also considered extinguished although their limitation periods have not expired yet. (Art. 119 LOC).

Other laws contain other periods of limitation.

Bulgaria is signatory to United Nations Convention on the Limitation Period in the International Sale of Goods of 1974, although Bulgarian Parliament has not ratified it yet.

5.12 PARTITION:

See category 23 Property, topic 23.07 Partition.

5.13 PLEADING:

Governed by Civil Procedure Code. Court proceedings are oral and generally open to public.

Statement of Claim.

Action must be commenced by filing petition of statement of claim (“iskova molba”) to court. Petition must be written in Bulgarian and include: name of court; names, surnames and addresses of parties and/or their legal representatives; damages valued in terms of money, when claim may be valued; cause (“osnovanie”) of action; all relevant evidence and state all material facts upon which plaintiff must base his/her claim; signature of plaintiff. Copies of petition and all accompanying documents must be served to defendant together with writ of summons for first session of court proceedings.

Statement of Defence.

Defendant must answer claim and present all his/her written evidence and indicate all other relevant facts and circumstances upon which he/she bases his/her allegations. New facts may be alleged and new evidence presented by plaintiff in reply to defendant's allegation within time limits determined by court. In exceptional cases court may determine that parties may make allegations of new facts and circumstances in next session of proceedings.

Counterclaim (“nasreshten isk”).

Defendant may make counter-demand against plaintiff at first trial session as assertion of independent cause of action. It is necessary: that court possesses jurisdiction over counterclaim and either counterclaim is related or opposed to claim, or that it is possible to make compensation with plaintiff's claim. (Arts. 211 CPC). Defendant may also bring in third person, such as warrantors, who may be liable to him/her on principal demand. Latter person may also intervene to join with plaintiff, or defendant, or to oppose both; or party may cross-claim against co-party.

Amended Pleading.

Plaintiff may amend his/her claim without amending cause of action. (Art. 214 CPC).

5.14 PROCESS:

Writ of summons is prepared by secretary of court and must contain name of court that issued it; specify name and address of person summoned; whether he/she is defendant, plaintiff or witness; designate case number as approved by court; place and time of trial as well as what are legal consequences when person does not appear before court. Writ of summons must be signed by secretary of court and stamped with court's seal.

Service of writ ("prizovka") is effected by serving defendant personally, or by leaving copy at his/her address with person residing therein who agrees to convey writ of summons to defendant. Defendant or his/her representative must sign certificate which shows day and time of service. If defendant is not personally served, judicial clerk must certify with his/her own signature when, where and with whom authenticated copy was left. In case of family case, defendant must as rule be served personally.

In case of person without capacity who is under guardianship, service must be made upon guardian or upon his/her representative in case.

Merchants or juridical persons are served at latest address which appears in commercial or other register. If juridical person or corporation has changed its address without fulfilling its obligation to state this change in commercial or other register, all writs and notification are to be considered duly served. (Art. 50 CPC). In case of service to juridical persons, it is sufficient to leave copy with one of their officers, who must write down his/her name and position and sign return receipt.

Judge may authorize different mode of service such as by registered or certified mail, return receipt requested and in emergency case—by telecopier, telephone, telex, telegram, or electronic mail.

If permanent address of defendant is unknown judge may order publication of note in unofficial section of Durzhaven Vestnik. (Art. 48 CPC).

If circumstances so require, i.e., permanent address of defendant is unknown or writ of summons cannot be served at his/her permanent address for month and this failure is evidenced by at least one witness, judge may order publication of note in unofficial section of Durzhaven Vestnik. (Art. 50 CPC).

As rule, service is made by judicial clerk by registered mail with return receipt. Where there is no court, writ of summons is served by person designated by mayor or municipality. Upon request made by party, private executory judge may serve writ.

Long Arm Statutes.

Code on Private International Law of 2005 contains specific provisions on service of summons outside Bulgaria. Bulgaria is signatory to Hague Convention on Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters and to number of bilateral treaties on legal assistance.

Person who is without representative for case and who leaves country for more than 30 days must indicate address which can be used by court.

See topic 5.02 Actions.

5.15 REPLEVIN:

Possessory actions are those actions aimed to protect or regain possession of real or movable property. (See Arts. 75-76 of Law on Property and Arts. 356-361 CPC.) In case of real property or servitude there exists requirement for at least six months continuous possession by plaintiff. Action must be brought before local regional court within six months. Plaintiff cannot bring action for title while case for protection of possession is pending in court. In addition, possessor or tenant may take action against author of violent dispossession, even when plaintiff has not possessed property for six months, of movable or immovable item. (Art. 76 LP). Action must be brought before local regional court within six months from time of disturbance.

5.16 VENUE:

Parties may fix venue by written contract but this would not deprive courts of compulsory venue in case of claims related to real property rights, partition of real property, claims of possession of immovable property, preliminary contracts or contracts concerning real property. (See Art. 117 CPC.)

See topic 5.02 Actions.

6 COURTS AND LEGISLATURE

6.01 COURTS:

Bulgaria's court system consists of regional, district, military, appellate courts and Supreme Court of Cassation and Supreme Administrative Court. No religious courts exist in Bulgaria. No trial by jury. (See Law on Judicial Power ("Zakon za sudebnata vlast") of 1994, as amended. (http://www.vks.bg/vks_p04_06.htm).

Supreme Court of Cassation (http://www.vks.bg/) is highest judicial authority in affairs falling within competence of courts, with exception of matters decided on by Supreme Administrative Court. It supervises all courts, ensures uniform interpretation of laws by all courts and deals with appealed district court judgments and decides on appeal appellate court judgments. At present Supreme Court of Cassation has three chambers: civil, commercial and criminal.

Supreme Administrative Court (http://www.sac.government.bg/) is highest court for cases involving administrative decisions or acts and looks after uniform interpretation of laws from all courts. It acts as appellate court and decides whether administrative act is in accordance with law. It decides whether acts of Council of Ministers are in accordance with laws.

Courts of Appeal supervise and control activities of district courts. Courts of Appeal consist of three judges and act as appellate courts for judgments of district courts only.

District Courts consisting of three judges have exclusive jurisdiction as trial courts in matters in which amount of controversy exceeds 10,000 leva, except disputes for recovery of alimony, for protection of property rights over movables and immovables, labour disputes, certain matters concerning guardianship and family law and more serious felonies. District courts are appellate courts for decisions of regional courts.

Regional Courts are courts of first instance for civil and criminal cases (misdemeanours and minor felonies). Courts are composed of one judge and two lay assessors. Lay assessors are appointed upon municipalities' councils recommendations by general assemblies of district courts. They must be persons of integrity and good reputation and must not have been sentenced for intentional crimes to imprisonment.

Judges are appointed by Supreme Judicial Council. Only Bulgarian citizen, who has completed university legal education and post graduate court training and has passed judicial state exam may be appointed judge.

Enforcement of judgments and other court rulings is performed by special executive judges ("sudija-izpulnitel") working for regional courts or by private sheriffs ("chastni sudebni izpulniteli") under recently adopted Law on Private Enforcement of Judgments. Judgments of foreign courts are enforced in same way as judgments of Bulgarian courts.

Exclusive jurisdiction exists in matrimonial matters if one of spouses is Bulgarian citizen or Bulgarian resident, matters respecting adoption of Bulgarian citizen, matters concerning custody and guardianship over Bulgarian citizens, real property rights and possession of real property in Bulgaria, as well as matters relating to alimony if defendant is Bulgarian citizen. Domestic courts have jurisdiction to declare person of Bulgarian nationality presumably dead. See categories 13 Estates and Trusts, topic Death (Presumption of and Action of); Property, topic Absentees.

Lack of Jurisdiction.

Bulgarian courts do not have jurisdiction over foreign states. Diplomats enjoy full jurisdictional immunity. Nevertheless, there are exceptions to this rule. See category 5 Civil Actions and Procedure, topic 5.02 Actions.

6.02 LAW REPORTS, CODES:

Bulgaria is governed by statutory law. Some branches of law are codified in, inter alia, following codes: Labour Code, Family Code, Penal Code, Penal Procedure Code, Code on Administrative Procedure, Code of Commercial Shipping, Code on Insurance, Tax and Social Security Code, Civil Procedure Code, Code on Private International Law, and Social Security Code. Case law doctrines of precedent and stare decisis are unknown. However, certain decisions of Supreme Court of Cassation and Supreme Administrative Court are very important when they interpret provisions of laws and are binding on courts and on public administration. Decisions of higher courts are mandatory and must be followed by lower courts only in cases of appeal. There is official reporting of Supreme Court cases in Supreme Court of Cassation Bulletin. There are several unofficial reports that may be used in courts.

Custom.

Role of commercial custom is very limited and is subsidiary source of law in case of lack of provisions in commercial and civil statutes. When there exist differences in commercial customs, relevant custom at place of performance applies. (Art. 288 LC). Civil Procedure Code also refers to custom: "Court must decide according to strict sense of statutes in force and when these statutes are not clear, controversial and imperfect—according to their general meaning. Where no statute exists, court must decide according and general principles of law, custom and justice." (Art. 5 CPC).

Official Gazette.

Durzhaven Vestnik is Bulgarian official gazette. (See Law on Durzhaven Vestnik of 1995, as am'd.) As of July 1,2008, it can be freely consulted on: http://dv.parliament.bg. It is published twice a week, on Tues. and on Fri. by National Assembly. Durzhaven Vestnik has two sections: official and unofficial. Following acts are published in its official section: acts adopted through national referenda, Constitution, codes ("kodeksi"); laws ("zakoni"); decisions, National Assembly's declarations, President's decrees ("ukazi"); Constitutional Court's decisions; Council of Minister's regulations, ordinances, directives; ministers' regulations, ordinances and instructions; original texts and official translations of international treaties signed and ratified by Bulgaria; Supreme Administrative Court's decisions. Laws are published together with related President's decrees. Following acts are published in unofficial section of Durzhaven Vestnik: orders of chairman/woman of National Assembly; individual administrative acts of ministers and directors of state and municipal bodies; notices of ministries, academies, universities and scientific institutions, municipalities, certain courts' writs, courts' judgments, invitations to summon various meetings etc.

6.03 LEGISLATURE:

National Assembly holds regular sessions throughout calendar year in its buildings in capital of Sofia. Sessions are interrupted by three breaks: Easter holidays (ten days), summer holidays (Aug. 1-Aug. 31), and Christmas holidays (Dec. 22-Jan. 10). Plenary sessions are normally held on Weds., Thurs. and Fri. Draft laws (“zakonoproekti”) accompanied by written motives are submitted to chairman/woman of National Assembly and are recorded in special register. National Assembly's permanent commissions hold discussions and prepare opinions on submitted drafts. Draft laws are voted on two separate readings in two plenary sessions before they become laws (“zakoni”). Then, unless he/she does not return it for further deliberation, President issues decree and promulgates law in Durzhaven Vestnik. Plenary sessions are generally open to public and may be broadcast on television or on radio, except when National Assembly decides otherwise. Stenogrammes of plenary sessions may be consulted on . See Rules on Organization and Activity of 41st National Assembly (“Pravilnik za organizacijata i dejnostta na Narodnoto subranie” of 2009. See http://www.parliament.bg/?page=app&lng=bg&aid=6).

See also category 1 Introduction, topic 1.03 Government and Legal System.

Special or Extraordinary Sessions.

Power to call is vested with Chairman/Woman of National Assembly, President, Council of Ministers and one-fifth of all national representatives.

Referendum.

New Law on Direct Participation of Citizens in State Government and Local Self-Government (``Zakon za direktno uchastie na grazhdanite v durzhavnoto upravlenie I mestnoto samoupravlenie''). See DV 44 of 2009.

Lobbyists.

No regulation.

6.04 STATUTES:

At present Bulgaria has about 300 laws or statutes (“zakoni”) and about same number of implementing regulations (“pravilnici”). Ordinances (“naredbi”) are about 1,500 and decrees (“postanovlenija”) are about 1,600.

All normative acts must be formulated in clear and concise Bulgarian language, which is of general usage. (See Art. 9[1] of Law on Normative Acts [“Zakon za normativnite aktove”] of 1973, as am'd.) It is general principle that normative acts do not have retroactive effect but do have force only for future.

Loose-leaf paper multi-volume edition of consolidated Bulgarian laws and regulations Normative Acts (“Normativni aktove”) is published by National Assembly and Council of Ministers. Normative Acts is periodically updated. Unfortunately, it does not exist in digital format and cannot be consulted on internet yet.

Several commercial publishers of law books and legal materials have been active on Bulgarian market. Some of them offer unofficial translations of legal acts and legal materials. Bulgarian legal acts may be consulted on following sites: http://lex.bg/ or http://www.juen.bg/. Ministries, state agencies, courts, and non-governmental organizations also publish relevant normative acts on their websites.

Normative acts of municipalities' councils and mayors are normally published in local newspapers and in many cases may be consulted on Internet. Legal acts of Sofia municipality may be found on following site: http://www.sofia.bg/.

7 CRIMINAL LAW

7.01 CODES:

Governed by Penal Code (http://www.vks.bg/vks_p04_04.htm) and Penal Procedure Code (http://www.vks.bg/vks_p04_03.htm).

Penal Code of 1968, as amended ("Nakazatelen kodeks") defines criminal offence as act which endangers or injures person, civil rights of citizens, property or established by Constitution legal order and other interests protected by law.

Penal Code's chapters cover following subjects: general provisions and definition concerning criminal offence, including preparation, conspiracy, attempt, co-conspiracy; persons subject to criminal responsibility, i.e., persons above 18 years, and persons between 14 years and 18 years, when these persons could understand nature and significance of their acts and can control their acts; punishment, including rules for exculpation from criminal liability, prescription, amnesty, rehabilitation, pardon; special rules for minors.

Bulgarian Penal Code provisions are applicable to all crimes committed on territory of Republic of Bulgaria. It is applied to crimes committed by Bulgarian citizens abroad. As rule, Bulgarian citizens cannot be extradited to foreign country in order to be tried or to serve sentence. Bulgarian Penal Code provisions are applied to foreigners in following cases: when they have committed offence of general character that infringes interest of Republic of Bulgaria or of Bulgarian citizens; when they have committed crimes against humanity or war crimes and these crimes infringe interests of other countries and foreign citizens; when they have committed crimes abroad and there exists international agreement for that purpose. Under Vienna Conventions on Diplomatic and on Consular Relations, certain foreigners, e.g., diplomatic and consular agents, enjoy immunity from criminal prosecution.

Criminal offences covered by Penal Code include: (1) Crimes against Republic: high treason (punishable with maximum sentence of life imprisonment); treason; spying (punishable with maximum sentence of life imprisonment); sabotage (punishable with maximum sentence of 15 years imprisonment); terrorism; preaching fascist or other antidemocratic ideology or preaching change of established constitutional order by force (punishable with maximum sentence of three years imprisonment and fine); (2) crimes against person: murder (punishable with maximum sentence of life imprisonment); bodily injury (battery) (punishable with sentences of three to ten years imprisonment); unlawful deprivation of liberty; kidnapping (punishable with maximum sentence of six years imprisonment); revealing other person's secrets; insult (punishable with fine); sexual crimes (punishable with maximum sentence of 15 years imprisonment); traffic of persons (punishable with maximum sentence of ten years and with maximum fine of 10,000 leva); (3) crimes against civil rights of citizens: crimes against national and racial equality; crimes against freedom of conscience; crimes against political rights of citizens; crimes against inviolability of home, premises or motor or other vehicles (punishable with maximum sentence of five years imprisonment); crimes against inviolability of correspondence (punishable with maximum sentence of two years imprisonment); crimes against labour rights of citizens; crimes against intellectual property (punishable with maximum sentence of five years imprisonment and fine); crimes against freedom of meetings and demonstrations; (4) crimes against marriage, family and youth (punishable with maximum sentence of two years imprisonment); (5) crimes against property: theft (punishable with maximum sentence of ten years imprisonment); robbery (punishable with maximum sentence of 15 years imprisonment); misappropriation (punishable with maximum sentence of 15 years imprisonment); blackmail (punishable with maximum sentence of eight years imprisonment); fraud, abuse of trust (punishable with maximum sentence of three years imprisonment); destruction and causing damage; (6) economic crimes: crimes against creditors (punishable with maximum sentence three years imprisonment or with fine of 5,000 leva); crimes against customs and foreign trade regime (smuggling) (punishable with maximum sentence of 20 years imprisonment and maximum fine of 300,000 leva or confiscation of part or whole property); crimes against financial and credit systems (punishable with maximum sentence of 15 years imprisonment); (7) crimes against public administration and public organizations: crimes against civil order; crimes committed in performance of activity as civil servant; crimes against justice or slander (punishable with maximum sentence of ten years imprisonment); bribe (punishable with maximum sentence of ten years imprisonment and fine of 10,000 leva); (8) forgery of documents and other crimes related to documents (punishable with maximum sentence of eight years imprisonment); (9) computer crimes (punishable with maximum imprisonment of three years or fine); (10) crimes of general danger: crimes committed in way causing general danger or injury or by means which are of general danger; crimes against means of transport and communications; crimes against public health and environmental crimes; crimes committed by means of use of atomic energy; other crimes; (11) crimes against defense of Republic: dissemination of state secrets; crimes against performance of military service or performance of alternative service; (12) military crimes: against subordination and military honour; other crimes; (13) crimes against peace and humanitarian crimes: crimes against peace; against customs and laws of conducting war; genocide and apartheid (punishable with maximum sentence with life imprisonment without substitution).

Punishments.

Bulgarian Penal Code provides for following punishments: life imprisonment, imprisonment, probation, mending labour (“popravitelen trud”) without imprisonment, confiscation of property, fine, disfranchisement of rights to hold government or public office, disfranchisement of rights to exercise certain occupation or profession, disfranchisement of rights to certain orders of merit and honourary titles, disfranchisement of military rank, public censure. Capital punishment was abolished in 1998.

Prescription.

Under Penal Code in respect to crimes, following prescription periods apply: crimes punished with life imprisonment and with imprisonment of 35 years for killing two or more persons—20 years; crimes punished with imprisonment of more than ten years—15 years; crimes punished with imprisonment of more than three years—ten years; crimes punished with imprisonment of more than one year—five years; in all other cases—two years. There exist no time limits for bringing action for war crimes or crimes against humanity. Period of prescription runs from date when crime was committed, and in case of attempt and conspiracy—from date when last act was performed. Prescription period stops running when criminal prosecution depends on solving some preliminary question resulting from judicial act that has entered into force. Prescription period is interrupted with every act taken by investigators and prosecutors in prosecution of offence. This act must also be undertaken against prosecuted person. However, despite interruption of prescription period, criminal prosecution is precluded when such period has passed exceeding one and half times above mentioned prescription periods.

Penal Procedure.

New Penal Procedure Code (“Nakazatelno protsesualen kodeks”) entered into force in Apr. 2006. Law is divided in seven parts and 36 chapters: Part I. General Rules: Code's Purposes and Limits; General Principles; Commencement, Termination and Abatement of Penal Proceedings; Court; Public Prosecutor; Investigating Bodies; Accused; Part II. Proof: General Provisions; Material Evidence; Means of Proof; Methods of Proof; Service of Writs, Notices and Papers, Periods and Expenses; Part III. Pre-Trial Proceedings: General Provisions; Investigation; Acts of Public Prosecutor Upon End of Investigation; Part IV. Trial: Preparatory Acts For Hearing Case in Court; Court Session; Appeal; Proceedings Before Appeal Court for Inspection of Court's

Determinations and Orders; Cassation; Part V. Special Rules: Fast-Track Proceedings; Instant Proceedings; Hearing Case in Court Upon Accused Person's Petition; Shortened Court Investigation in First Instance Proceedings; Release from Criminal Responsibility and Imposing Administrative Penalty; Deciding Case By Reaching Settlement; Special Rules for Hearing Cases Concerning Offences Committed By Minors; Special Rules For Cases Heard by Military Courts; Part VI. Execution of Entered Into Force Courts Acts, Re-Commencement of Penal Cases: Execution of Entered Into Force Courts Acts; Re-Commencement of Penal Cases; Part VII. Special Proceedings: Compulsory Medical Measures; Rehabilitation; Proceedings Related to Execution of Punishments; Proceedings Related to International Cooperation in Penal Matters.

Penal proceedings pass two phases—pretrial and trial. Preliminary proceedings are commenced in presence of legal cause and sufficient data regarding committed crime. Under Bulgarian law, proceedings are initiated by public prosecutor who receives report from police and decides whether case should be started. If so, case is then investigated by investigator, whose function is to collect all evidence. Public prosecutor exercises guidance and supervision over investigator. Former is authority who decides whether case should be sent to trial, and, if so, in which court. Investigators and prosecutors are currently considered part of judicial branch. Offences punished with imprisonment of less than five years are heard by single judge, offences punished with imprisonment of more than five years are heard by court composed of one judge and two lay assessors, offences punished with imprisonment of more than 15 years—two judges and three lay assessors. Trial is adversarial, although court plays active role in collection of evidence.

Constitutional rights of accused includes that everyone has right to be secure against unreasonable search and seizure. Anyone arrested and detained has right to be informed of reasons, to retain and instruct advocate from moment of detention. Secrecy of communications between advocate and accused is guaranteed by Constitution. Courts must issue ruling whether such detention is legal within 24 hours of detention. Accused has right to be tried within reasonable time, to be presumed innocent. He/she cannot be forced to plead guilty and to be sentenced exclusively on self-incrimination. Unconstitutionally obtained evidence must as rule be excluded. Arrested persons may be released without conditions or with conditions (on bail). Except where accused is charged with serious indictable offences, accused must be released unless prosecutor shows cause why accused must remain in custody. Constitution declares person's residence and home inviolable. Justice may issue search warrant only on being satisfied by information and report that evidence relating to crime is in building.

Witness Protection.—Law on Protection of Endangered Persons in Connection with Penal Proceedings (“Zakon za zashtita na litza zastrasheni vuv vruzka s nakazatelno proizvodstvo”) entered into force in May 2005. Program is administered by Ministry of Justice and is not limited to witnesses only but encompasses all kinds of threatened persons.

Confiscation of Property.—Law on Confiscation of Property Acquired Through Criminal Activity (“Zakon za otnemane v polza na durzhavata na imushtestvo pridobito chrez prestupna deinost”) of 2005. Special proceedings may be launched when it has been established that natural person has acquired property of considerable value, i.e. above 60,000 leva, and when reasonable assumption could be made that property was acquired through crime. It is necessary that criminal proceedings have commenced against person for committed crime, as established in Penal Code. Law contains lists of all these crimes, which range from terrorism to money laundering, smuggling, etc.

7.02 EXTRADITION:

Law on Extradiction (“Zakon za ekstraditziata”) entered into force in 2005. Law contains provisions on conditions and procedure of extradition and on execution of EU arrest order.

Treaties.—Bulgaria has signed number of bilateral treaties on extradition and is party to

European Convention on Extradition. New Extradition Treaty between U.S. and Bulgaria was signed in 2007 and entered into force 2009. It superseded previous treaties of 1924 and 1934 and is in conformity with U.S.-EU Agreement on Extradition of 2003.

7.03 TRAFFIC OF PERSONS:

Law on Traffic of Persons (“Zakon za trafika na hora”) of 2003, as amended, contains definition of traffic of persons, exploitation, victims and groups under risk, including women and children. National Commission on Prevention of Traffic (http://antitraffic.government.bg/) is authority to implement law. Hostels for accommodation and centers for assistance are established. Council of Europe Convention on Traffic of Persons of 2005 was ratified by Bulgarian Parliament in 2007.

7.04 COMPENSATION TO CRIME VICTIMS:

Law on Financial Aid and Financial Compensation to Crime Victims (“Zakon za podpomagane i finansova kompensatzija na postradalite ot prestuplenija”) entered into force in 2007 and implemented EU Directive 2004/80/EC. It provides scheme on compensation of victims of violent intentional crimes. Compensation is available in national as well as cross border situations, i.e. regardless of country of residence of victim in which member state crime was committed. Minister of Justice is authority on receiving and deciding on applications of foreigners.

7.05 PRISONERS:

New Law on Execution of Punishments and Detainment Under Arrest (``Zakon za izpulnenie na na nakazanijata I zadurzhaneto pod strazha''). (DV 25 of 2009). Prisons are of closed and opened type and are administered by Ministry of Justice. No private prisons. Separate prisons for women as well as for young persons. Foreigners without permission for permanent stay serve prison sentence in special prisons designated by Minister of Justice. Prisoners serve their sentence in closest proximity to their permanent address.

Rights of prisoners include: free subsistence; right to personal bed, cover sheets, shoes, free clothes; right to receive and read books, periodicals and newspapers, to study foreign languages; and right to have at least eight hours of sleep. Right of complaint is guaranteed.

Prisoners are not allowed to: exchange, sell and buy their personal property, and use alcohol and narcotic substances. Persons under 18 are not permitted to smoke. There exists prohibition to gamble; to receive and own printed and other materials with pornographic content as well as materials preaching nationalistic, ethnic, racial and religious hatred; and to organize meetings and protests. There are 13 prisons in Bulgaria.

7.06 AMNESTY:

Latest Law on Amnesty (``Zakon za amnistiia'') was passed by Parliament in 2009.

8 DEBTOR AND CREDITOR

8.01 ASSIGNMENTS:

Rights, claims and demands may be assigned by contract. Certain claims are not subject to assignment because of their nature, e.g. rights related to personality of debtor, membership rights, accessories to rights, etc. Assignment must not be forbidden by law. (Art. 99 LOC). Assignment of claim includes all accessory rights, i.e. mortgage, pledge, preference, guaranty.

Assignment of rights and claims is effected by notarial or informal deed and transfer of papers followed by notice of transfer to debtor. However, debtor consent is not required. Unless assignment is made without consideration, assignor warrants existence of title, its amount and its accessories before assignee at time of assignment, but assignor is not liable for debtor solvency. (Art. 100 LOC).

Written assignments of interest in real property may be recorded in register of regional court where property is situated. If not recorded such assignments are void against subsequent assignees.

8.02 ATTACHMENT:

Attachment may be granted to attach any real or personal property, including debts, rents, shares, bonds, currency of defendant whether due or accruing due or in possession of any third person. Plaintiff prior, at or after commencement of court proceedings and before judgment and as incident of claimed relief, may apply for attachment order which court will grant either when claim is supported by written evidence showing good cause of action or when bond is offered by plaintiff in amount determined by court. Court may decide to order bond or security even in cases where claim is supported by written evidence. Thus, plaintiff may prosecute without delay. However, defendant may claim damages resulting from attachment order if plaintiff fails to recover judgment.

Upon application by plaintiff, which must contain: type of attachment, i.e., “ipoteka” or “zalog”, exact property subject to attachment and value of claim, court issues order. Upon application of one party court may decide to change one type of attachment to another. In case of claim calculated in terms of money, but not concerning real property, defendant may unilaterally replace attachment of movable and immovable property with attachment of money, shares, bonds or other securities. Thus, defendant may retain or regain possession of attached property. Bailiff (“sudijaizpulnitel”) must attach, hold, evaluate and otherwise deal with property as directed by court order.

8.03 BANKRUPTCY:

Part 3 Bankruptcy (“Nesustojatelnost”) of Law on Commerce.

Bankruptcy proceedings can be brought by or against state enterprise, as well as private business, but not against individuals in their noncommercial capacity. Law applies to all commercial entities except for certain state monopolies, such as defense plants, banks, insurance companies, State Savings Bank. (Art. 612 LC).

Bulgarian bankruptcy regime follows generally established standards in permitting cases to be started by debtor or creditors. (Art. 625 LC).

Debtor or creditors may initiate proceedings by filing petition in relevant district court where debtor has domicile. (Art. 613 LC). No special bankruptcy courts exist in Bulgaria.

Debtors must file for bankruptcy within 15 days of being insolvent, i.e. becoming unable to make payments. (Art. 626[1] LC). If debtor fails to do that, debtor can be held liable for damages caused to creditors because of delay. (Art. 627 LC). Debtor must supplement petition with number of documents including list of creditors, debtor's obligations towards each one of them and estimate of debtor's assets. (Art. 628[1] LC).

Creditor must support petition with evidence showing debtor's insolvency. (Art. 628[2] LC).

Court holds hearing in order to decide whether debtor is insolvent and whether to institute bankruptcy proceedings. Decision is publicized through court's register and publication in Durzhaven Vestnik. (Art. 622 LC).

First meeting of creditors is held on date, defined by court. Meeting elects Creditors' Committee and syndic (trustee) and proposes syndic's appointment to court. (Art. 672 LC). Physical person who is not sentenced for intentional crime may be appointed as syndic. Other requirements include: he/she must not be spouse or be in direct line relationship, in collateral line relationship—up to sixth degree, and in relationship by marriage—up to third degree with debtor or creditors; he/she must not be creditor in this bankruptcy proceeding; he/she must not have been declared bankrupt; he/she must hold degree in law or in economic science and at least three years of professional experience; he/she should have successfully passed qualification exam and her/his name has been included in special list of persons who may act as syndics, which list has been promulgated in Durzhaven Vestnik; he/she has not lost legal capacity and was not placed under guardianship while acting as syndic. Syndics are obliged to make annual pecuniary contributions towards bettering their professional qualification.

Syndic is responsible for compiling inventory of bankrupt estate and for general management and representation of enterprise under bankruptcy for which syndic receives remuneration. Syndic's obligations are listed in Art. 658 of Law. Syndics are also supposed to perform their duties with due diligence. (Art. 660 LC). They must take insurance coverage.

Creditors are given 30 days after publication of court's decision for commencing bankruptcy proceedings to file claims. (Art. 685 LC). Syndic has seven days to prepare list of all creditors and their claims. (Art. 686 LC). He/she publishes note in Durzhaven Vestnik that list and accountant reports are ready.

Bulgarian law places less emphasis on reorganization than bankruptcy law of U.S. does. In this respect, law follows European tradition and even contains provisions allowing court to declare bankruptcy immediately after bankruptcy proceedings have started. (See Art. 630[2] LC.)

Law does not have extensive reorganization provisions.

Law gives definition of restructuring plan, which may include rescheduling of debts, reorganization of enterprise, way of distribution of assets etc. Such plan can be proposed to court, by debtor, by syndic, by secured creditors holding more than one-third of secured debts, by unsecured creditors holding more than one-third of unsecured debts, by 20% of employees, or by shareholders holding one-third of capital in enterprise. (Art. 697 LC). Plan is considered accepted by class of creditors if more than 50% percent have voted in favour. Court approves plan if it has been accepted by at least two classes of creditors. (Art. 705[2] LC).

While bankruptcy proceedings are in process, debtor and creditors may conclude compromise agreement, restoring debtor's solvency and terminating whole proceeding. (Art. 740 LC).

If restructuring plan has not been proposed or proposed plan has not been approved, court declares debtor bankrupt. (Art. 710 LC). Declaration of bankruptcy has following effects: control and right to dispose of assets is transferred to syndic; legal proceedings related to liquidation are to be started.

Syndic carries out liquidation pursuant to recently enacted provisions of c. 46 of Law on Commerce.

If bankrupt's estate is liquidated, proceeds, left after satisfaction of secured creditors' claims, are distributed in following order of priority: (1) Expenses incurred in administration of bankruptcy proceedings, including state bankruptcy tax, fees for syndic, determined support for bankrupt and his/her family etc.; (2) payments accruing from labor relations; (3) unpaid support of third parties; (4) back taxes, duties or other payments due to State and municipalities; (5) other unsecured claims. (See Arts. 722 to 732 LC.)

In case of foreign court's decision declaring bankruptcy, Bulgaria recognizes such decision on basis of reciprocity, if it has been issued by court in country where debtor has domicile. (Art. 757 LC). Syndic appointed by foreign court has rights under law of country where bankruptcy proceedings has started as far as his/her rights are not contrary to public order of Republic of Bulgaria. (Art. 758 LC). Upon petition filed by debtor, foreign syndic or creditor Bulgarian court may open auxiliary bankruptcy proceedings for company or merchant declared bankrupt by foreign court, if he/she has considerable holdings and assets in Bulgaria. Bulgarian court decision has effect only for debtor's property located in Bulgaria. (Art. 759 LC).

In 2004 Law on Guaranteed Claims of Employees and Servants in Case of Employer's Bankruptcy (“Zakon za garantiranite vzemanija na rabotnitsite i sluzhitelite pri nesustojatelnost na rabotodatelja”) was passed by Parliament.

8.04 EXECUTIONS:

Process whereby special execution judge (“sudija-izpulnitel”) is directed by way of appropriate judicial writ or execution order to seize and sell so much of debtor's non-exempt property as is necessary to satisfy judgment. (Part 5 CPC). Execution writ is issued by court in which judgment has been entered into force upon duly filed petition by creditor. In case of bills of exchange and notarial deeds—regional court where defendant has his/her residence is competent. It is possible successive and several writs to be issued. Court's determination (“opredelenie”) to issue writ is subject to appeal.

Execution order is filed with execution judge in whose area debtor's movable and immovable property is located. Execution judge sends order to execution plaintiff and provides him/her with seven-day period for voluntary performance. Execution acts are performed within 30 days from date of petition when petition is filed. Heirs, co-debtors, persons who provided surety may pay debt and demand execution upon issued execution order.

Execution may be stayed upon application submitted and approved by court showing defect in execution order or other legal ground. Stay of execution is possible when debtor, who is natural person, deposits 30% of amounts stated in all execution orders and declares in written form that he/she will contribute monthly, 10% of due amounts. Stay of execution is not possible when item is under pledge or is mortgaged and forms part of property of sole merchant.

Exemptions under 2006 Code of Tax and Social Security Procedure.

(1) Items for everyday use for debtor and his/her family, necessary food, heating, working cattle and items used by debtor to exercise his/her occupation or activity; (2) debtor's only home. When home exceeds 30 square meters per member of debtor's family, and when this home may be subject to partition, difference above debtor's necessities may be subject to public sale; (3) bank deposits in amount above 250 leva per debtor's family member; (4) agricultural lands—up to one-fourth of owned by debtor, but at least three decares, which must be cultivated by debtor or member of his/her family, as well as necessary items; (5) working wage, compensation received under employment relationship, pension, or scholarship—in amount of up to 250 leva per month. (Art. 213 CTSSP).

Exempt from executions are also: social security compensations, including unemployment benefits; social aid offered from municipalities' and state budget; gifts offered by natural and juridical persons and received by handicapped persons, by persons with above 50% decreased working capacity etc.; court determined alimony claims.

See category 6 Courts and Legislature, topic 6.01 Courts.

8.05 EXEMPTIONS:

General principle is that all property of debtor is attached as security for his/her creditors.

Objects of attachment which cannot be seized include: personal items for everyday use by debtor and his/her family, included in list of items adopted with regulation by Council of Ministers of May 26, 2003. Some mentioned items in this list are: (a) items for personal use (one winter coat, one raincoat, two suits or two tailored suits, one hat, used shoes and underwear, working clothes); (b) all children's clothes and accessories; (c) items for family use (one bed, two pairs of sheets and covers for each person, one wardrobe, one kitchen cupboard, normal tables and chairs; necessary heating and cooking devices; one washing machine, one refrigerator, one telephone, one radio set, kitchen appliances and accessories necessary for everyday use, common cutlery); (d) spectacles, artificial organs or limbs, dentures, and means of assistance used by disabled or injured persons, medications and means and materials for health treatment; (e) study aids, including books and musical instruments, used for professional and general education by debtor and his/her family; (f) domestic animals or pets; (g) family and personal orders of merit and distinctions. Other items which are not subject to attachment include: necessary food for one month and necessary fuels used for heating, cooking and lights for three months for debtor and his/her family; tools, books or other items used by debtor to exercise his/her occupation or profession. There exist special provisions for farmers, which exempt certain items from seizure, i.e., agricultural land up to certain limits, farm machinery, seeds and fertilizers for one year, poultry, cattle and small farm animals as well as necessary food for cattle for one season, bee hives up to certain limits. Only home of debtor and his/her family can be fully seized only by his/her mortgage creditor and can be partly seized by his/her other creditors when its space exceeds necessities of debtor and members of his/her family. Exemptions concerning only home of debtor and those concerning farmers are not applicable in cases of obligations arising out of torts, of financial defalcations and of maintenance. Salaries, pensions and other royalties from labour may partly be seized only if they exceed minimum monthly wage and depending on whether there are children supported by debtor. Following sums upon payment of taxes and social security contributions may be seized: when debtor receives up to 300 leva per month, 1/4 of this sum in case he/she has no children to be looked after and 1/5 of this sum—he/she has children; when debtor receives between 300 and 600 leva per month, 1/3 of this sum in case he/she has no children to be looked after and 1/4 of this sum—he/she has children; when debtor receives between 600 and 1,200 leva per month, 1/2 of this sum in case he/she has no children to be looked after and 1/3 of this sum—he/she has children; when debtor receives above 1,200 leva per month, sums above 600 leva, if he/she has no children and sums above 800 leva, if she/he has children. Above exemptions do not apply to claims for alimony and child support. Scholarships can only be seized when there are obligations to pay alimony and child support. Debtor cannot refuse protection from seizure provided by provisions of Civil Procedure Code and his/her prior refusal is void.

Amounts accumulated from life and accident insurance policies and compensations paid from civil liability insurance policies are exempt from execution in accordance with Law on Commerce. (Art. 393 LC). Compensations from property insurance are subject to seizure only if execution could be directed against insured property.

See category 6 Courts and Legislature, topic 6.01 Courts.

8.06 FRAUDULENT SALES AND CONVEYANCES:

All conveyances of property to any other person other than bona fide purchaser for value are voidable as well as all acts of debtor that cause damage to creditor with knowledge of that damage. (See Art. 135 LOC.) Intent to defraud is supposed when third person is spouse, descendant, ascendant, brother and sister.

Creditor may act and exercise property rights on behalf of debtor, when debtor's behaviour or inactivity threatens to cause detriment to creditor's interest. However, creditor cannot exercise rights of personal nature. (Art. 134 LOC).

8.07 GARNISHMENT:

Debts owed to defendant by third persons may be attached by plaintiff after judgment that has entered into force and upon issue of executory order by court. Third person receives attachment order, which informs him/her about execution and orders him/her not to pay certain sum to debtor. Third person (garnishee) must within three days appear before bailiff and declare: whether he/she admits his/her liability as reasonable and whether he/she is ready to pay such sum; whether there are other creditors to this liability; whether there exist other attachments to this debt. If garnishee admits his/her liability, he/she must pay sum to bailiff's special account.

Salaries and other royalties may be garnished. Present and future employers must not discharge employee from garnishment. Garnishee must always inform bailiff of his/her employment.

8.08 HOMESTEADS:

Principal and only home of debtor, when debtor and members of family residing with debtor do not own other house, is exempt from execution proceedings. It does not matter whether debtor resides in his/her home. Gardens and vineyards up to five decares (5,000 square metres) and farmland up to 30 decares (30,000 square metres) are exempt from execution proceedings. In Dobrudzha Region—farmland up to 50 decares (50,000 square metres) is exempt from execution proceedings.

Conveyance and Encumbrance.

Married person may not sell or encumber his/her home without written consent of his/her spouse. This consent must be duly certified by notary public.

8.09 INSOLVENCY:

Insolvent merchant (“neplatezhosposoben turgovets”) is: (1) Merchant who is not in capacity to pay due obligations arising out of commercial transactions, or (2) when merchant is unable to meet obligations to state and municipalities which are linked to commercial activity. Merchant is insolvent when merchant has ceased paying current obligations ascertained and subject to administrative act or court judgment. There exists presumption for insolvency when debtor has not performed pecuniary obligations within 60 days of date of maturity as well as when merchant has paid not whole sum and has paid it to some but not all creditors. (See Art. 608 LC.)

8.10 LIENS:

Debtor with mature claim may refuse to perform his/her obligation until creditor performs his/her obligation. Debtor's claim and obligation must arise from same legal relationship. Court orders that creditor and debtor must perform simultaneously. In certain circumstances when there exists danger that one of parties to contract will not perform, other party may refuse to perform until she was given security.

Whoever has acted in good faith and either incurred expenses for preservation, maintenance, repairs or improvements to other's movable property, or has suffered damages caused by these movables has also right of retention (“pravo na zadurzshane”) of this property pending full payment of his/her claim. Creditor with right of retention of commodities may hold such quantity of these commodities which is necessary for his/her full satisfaction. Right of retention is not permitted when debtor provides creditor with security. Creditor retaining movable property has benefit of priority on sales price in case of seizure and sale of movable property before mortgage, pledge and other creditors when he/she has incurred expenses for

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preservation, repair and improvement of movable property.

Commercial right of retention, provided for in Law on Commerce, applies to commercial transactions between merchants. (See Art. 315 LC.) Movables and securities owned by debtor and held by creditor are subject to retention. Right to retention also exists: when title of ownership was transferred to creditor, but he/she had obliged herself to transfer it back; when title was transferred to third person for debtor by creditor, but he/she was obliged to transfer it back to debtor. Commercial right of retention, unlike regular liens, is also effective against third parties. Right of retention does not exist when either debtor had ordered otherwise before delivery of movables or securities, or when creditor had obliged himself/herself to perform in specific way. In general right of retention serves as security for mature claims. However, creditor with claim which has not matured has right to retain property of debtor in event of unsuccessful execution proceedings against debtor or in event when debtor is in state of insolvency proceedings. Creditor may not execute his/her right of retention after he/she receives reasonable security. Creditor obtains satisfaction from retained property pursuant to regulations on executions over movables as well as has priority before certain creditors.

8.11 PLEDGES:

Bulgarian law distinguishes between civil and commercial pledge (“zalog”).

Civil Pledge.—Civil pledge may be established on movables and on transferrable claims. (See Arts. 156-165 LOC.) In order to be enforceable against third parties, contract of civil pledge on movable which secures claims exceeding five leva must be in written form with true, certified (“dostoverna”) date. Object of pledge must be delivered to creditor or deposited with third person whom parties have stipulated. Creditor is not allowed to use pledged movable unless parties have agreed otherwise. Creditor with pledge on transferrable claim has right to collect due interest and principal on debt. He/she must take all possible measures to preserve claim. Contract of civil pledge on transferrable claim must be established in written form with date certified by notary public.

Commercial Pledge.—Commercial pledge may be established by operation of law or commercial contract. (Arts. 310-314 LC). In general commercial pledge may be established without special formalities. With respect to commercial pledge, movables or intangible assets (e.g. receivables and shares) must be in possession of creditor or deposited with third person. When parties have agreed beforehand in written contract of commercial pledge with true, certified date and when pledged property has market or stock exchange price, pledgee may sell pledged property without court proceedings in case of default. Pledgee may also sell pledged property without court proceedings when property is subject to speedy deterioration. Law on Commerce provides rules for number of statutory pledges or liens. They are established in favour of commission agent, (“komisioner”), shipping agent (“speditor”), carrier (“prevozvach”), warehousemen (“vlogopriematel v publichen sklad”).

Non-Possessory Pledges.—Law on Uncommon (Non-Possessory) Pledges (“Zakon za osobenite zalozi”) of 1996, as amended, allows for chattel to remain in possession of pledgor and be used by pledgor. Pledgor is obliged to exercise due care and preserve pledged asset as well as to use it according to its purpose. Pledgor must notify creditor for any acts or circumstances which might diminish value of pledged assets and must provide creditor with access in order to inspect movables.

In general persons who may utilize non-possessory pledge agreements must be either merchants or agricultural producers, free-lance professionals. Shareholders need not to be merchants in order to pledge their shares.

Non-possessory pledge contract may be established over: receivables; any movable assets, except for ships and airplanes; shares in companies; collection of receivables, machines and other assets; commercial enterprise, as collection of rights, obligations and factual relations. There exists possibility to pledge future assets or assets described in generic terms, such as agricultural products from current and following year. 2003 amendments to Law introduced possibility to pledge industrial property rights, i.e., patents, utility models, registered trademarks, industrial designs etc. Contract of pledge of commercial enterprise and contract of pledge of company's shares must be in written form with parties' signatures certified by notary public. Public register of non-possessory pledges was established with Ministry of Justice. Pledge over commercial enterprise must be registered in records of relevant commercial register, while pledges over industrial property rights must be registered with Bulgarian Patent Office register. Registration in public register of non-possessory pledges is valid for five years and acts as public notice to third parties.

Enforcement proceedings start with statement by creditor which is registered in central register. Creditor must advise pledgor and has following rights: to take possession of chattel; to notify third party indebted persons, if enforcement proceedings commence against receivables of pledgor; to take measures for preserving chattel. Creditor may sell pledged property two weeks after registration and creditor's enforcement statement. Creditor must exercise standard of “good merchant” in sale and then transfer proceeds from sale to trustee. Latter is appointed by creditor, and must be accountant. Trustee's duty is to prepare list of creditors to be satisfied by sold property and to perform distribution of proceeds from sale. In case of pledge over securities, creditor has right to sell it. (Art. 44).

Enforcement proceedings over commercial enterprise which is pledged as security also start with notice by creditor. Creditor must specify whether creditor wants to be satisfied from commercial enterprise as collection of rights, obligations and factual relations or from specific parts of it. (Art. 46). In first case, manager-trustee will be appointed who would take over management of enterprise.

9 DISPUTE RESOLUTION

9.01 ARBITRATION AND AWARD:

Law on International Commercial Arbitration (“Zakon za mezshdunarodnija turgovski arbitrazsh”) is applicable to international commercial arbitration, which is based on arbitration agreement, when place of arbitration is on territory of Bulgaria. 1988 Law on International Commercial Arbitration accepts principles and generally follows provisions of United Nations Commission on International Trade Law (UNCITRAL) Model Law.

State and state agencies may also enter into arbitration agreement. (Art. 3 LICA).

There exist two types of arbitration: ad hoc and institutional.

Arbitration agreement can take form of arbitration clause in contract or separate agreement. Arbitration agreement can be entered into before any dispute has arisen or after such dispute has arisen. Agreement to arbitrate must be in writing and can be result of simple exchange of letters, telexes, telegrams or other means of communication or be contained in document signed by parties.

Arbitration agreement is to be deemed separate from and independent of contract in which it is contained. This autonomy of arbitration clause means that if main contract is null and void this does not prevent arbitration and arbitration clause remains valid.

Arbitration tribunal may be composed of one or more arbitrators, whose number can be determined by parties either in arbitration clause or in subsequent agreement. If parties did not determine number of arbitrators, their number must be three. Parties can agree on procedure of constituting arbitral tribunal. They may also submit arbitration to procedural law of their choice. When such agreement is missing and when three-member tribunal is to be constituted, Law provides that each party appoints arbitrator, and two arbitrators appoint third arbitrator. When party fails to appoint arbitrator within 30 days from receipt of other party's request or when two arbitrators do not reach agreement on appointment of third arbitrator, Chairman of Bulgarian Chamber of Commerce and Industry is to appoint arbitrator upon request by one of parties. (Art. 12 LICA). Person who is not citizen of Republic of Bulgaria can also be appointed arbitrator. (Art. 11 LICA).

Before his/her appointment, prospective arbitrator has duty to disclose any facts or circumstances, which might call into question and raise doubts as to arbitrator's impartiality and independence. Arbitrator has such duty of disclosure even after his/her appointment. (Art. 13 LICA).

Grounds for challenge under Law are as follows: partiality, lack of independence, and inadequate qualifications as specified by parties. (Art. 14[1] LICA).

Parties can agree on procedure for challenge of arbitrator. When there is no such agreement, for challenge to be admissible, it must be sent to tribunal by party within 15 days from date when party was informed either of arbitral tribunal formation, or of facts and circumstances on which challenge is based. (Art. 15 LICA). Challenge of arbitrator, whether for alleged lack of independence or otherwise, is made by submission to arbitration tribunal of written statement specifying facts and circumstances on which challenge is based. (See Art. 15[3] LICA.) When arbitral tribunal does not grant challenge on any grounds that it deems appropriate, party may petition Sofia City Court within seven days. In its decision Sofia City Court follows speedy streamline procedure of Civil Procedure Court, introduced in 1999, and its decision is final. (Art. 16 LICA).

When arbitrator is not in position to fulfil his/her functions or declines to act he/she may be disqualified. If arbitrator does not resign or parties do not reach agreement for his/her disqualification, each party may petition Sofia City Court whose decision is final and not subject to appeal. (Art. 17 LICA).

Parties are free to choose rules governing arbitral proceedings. When they have failed to agree on rules of procedure, arbitral tribunal shall follow procedure which it deems appropriate. Whatever procedure is chosen, arbitral tribunal shall assure equal treatment of parties and shall provide parties with equal opportunities to defend their rights. Parties to arbitration may also settle place of arbitration and language or languages of arbitration. When parties have failed to agree on these issues, arbitral tribunal decides taking into account facts and circumstances of case and what is convenient for parties. Parties may also choose that arbitration should be based on written evidence and arguments. Unless it was agreed otherwise arbitral tribunal may grant conservatory measures if requested by one of parties. These measures can be subject to receipt of adequate security from requesting party. (Art. 21 LICA).

Arbitration tribunal must apply law designated by parties as applicable to substance of dispute. Failing such designation by parties, arbitral tribunal must apply law determined by conflict of laws rule which it considers applicable. In all cases, arbitration tribunal must decide in accordance with terms of contract and must take into account usages of trade applicable to transaction. (Art. 38 LICA).

Arbitration award is final and must state reasons. If parties reach settlement, case is terminated and settlement will be recorded in form of arbitral award. (See Art. 40 LICA.) Law does not contain provisions on rendering of partial awards by arbitral tribunal.

When arbitral tribunal is composed of more than one arbitrator, award is given by majority decision, unless parties have agreed otherwise. If there is no majority, award shall be made by Chairman of arbitral tribunal. Award must contain place and date and must be signed by all arbitrators. It is sufficient that award is signed by majority of arbitrators, but arbitrators must state reason for missing signature of their colleague. When parties are notified of award, it enters into force and is subject to enforcement.

Award terminates jurisdiction of arbitration tribunal with respect to dispute which it decides.

Arbitration tribunal may rectify errors in computation, any typographical or clerical errors and material omissions in award. Tribunal does this upon demand by one of parties or on its own initiative. Each party may request interpretation of award. Demand for correction or interpretation of award must be made within 60 days upon receipt of award by parties unless parties have not agreed on other period. Arbitration tribunal must render correction or interpretation of award within 30 days from demand. (Art. 43 LICA).

Under Art. 47 of Law on International Commercial Arbitration international awards may be set aside by Supreme Court of Cassation on six limited grounds: (1) when party that requests setting aside proves that she lacked capacity at time when arbitration agreement was concluded; (2) when arbitration agreement was invalid according to law chosen by parties, and when such law was missing—according to Law on International Commercial Arbitration; (3) when dispute cannot be resolved by arbitration or arbitration award is contrary to public order or public policy of Republic of Bulgaria; (4) when party has not been duly informed of appointment of arbitrator or of arbitration proceedings, or when she could not take part in arbitration proceedings because of important reasons; (5) arbitration award resolves dispute outside scope of arbitration agreement, or contains referrals to questions outside matter of dispute; (6) if arbitral tribunal was irregularly composed or agreed arbitral procedure was not followed.

Limitation period for action of setting aside of arbitration award is three months which starts to run from date when applicant received award. (Art. 48 LICA).

9.02 MEDIATION:

Civil, commercial, labour, family and administrative disputes etc. may be subject to mediation. Mediation may be used on voluntary basis by parties to dispute. Court may propose that dispute be resolved through mediation. Mediators are physical persons included in Register of Mediators with Minister of Justice. Mediators may form associations. (See Law on Mediation ["Zakon za mediatziata"] of 2004.)

10 DOCUMENTS AND RECORDS

10.01 ACKNOWLEDGMENTS:

Document Prepared Abroad.

Public documents issued by courts or civil authorities abroad must be acknowledged by Bulgarian consular officer, which may legalize document only in case document is certified by Ministry of Foreign Affairs of respective country. In 2000 Bulgaria joined Hague Convention of 1961 on abolishing requirement of legalization for foreign public documents and "apostille" issued pursuant to this convention is sufficient for purposes of Bulgarian law. Following countries have concluded bilateral treaties on legal aid in civil matters which contain provisions on abolishing requirements for legalization of public documents: Austria, Azerbaijan, Algeria, Armenia, Vietnam, Georgia, Yemen, Cyprus, North Korea, Cuba, Kuwait, Libya, Macedonia, Mongolia, Poland, Romania, Russian Federation, Syria, Yugoslavia, Hungary, France, Czechoslovakia.

Document Prepared in Bulgaria for Use Abroad.

Notaries perform verification and acknowledgment of original documents. Acknowledgment of certain public documents may be done by municipal or other authorities. Ministry of Justice is designated for providing apostille for documents issued by judicial authorities and notaries. Ministry of Foreign Affairs is designated for providing apostille in other cases.

10.02 AFFIDAVITS:

Facts, personal status or qualities within knowledge of interested person may be stated by means of declaration signed before officer entrusted to receive relevant document, notary public, court's clerk, consul etc. Written declaration on facts and on law witnessed and within knowledge of person, with his/her signature duly authorised may be used in legal proceedings, but is considered with all other evidence.

10.03 NOTARIES PUBLIC:

Law on Notaries ("Zakon za notariusite") of 1996, as amended.

Qualification.

Notaries must fulfill following requirements: (1) person of full juridical capacity; (2) below 60 years of age; (3) Bulgarian citizen; (4) legal education; (5) required legal training in order to be qualified as lawyer; (6) three years of legal practice as judge, prosecutor, advocate, in-house legal counselor, law lecturer etc.; (7) she/he must be person who has not been sentenced for intentional crime to imprisonment; (8) she/he must not be disbarred either as advocate or as notary or debarred from exercising commercial activity; (9) she/he must not be under insolvency proceedings or have been sentenced for bankruptcy. Notaries must not engage in any other activity. They cannot hold positions of members of Parliament, ministers, advocates, merchants and company or cooperative directors, or be employed or be hired under labor contracts. Notaries public are appointed upon open competition announced by Ministry of Justice and upon examination by specially appointed Commission. They are required to take oath that they will obey Constitution and laws of Republic of Bulgaria, will diligently, fairly and impartially perform their professional duties, will be worthy of trust and respect to which profession is entitled, will not disclose secrets made known to them in exercise of their professional duties, and will always be aware of their responsibility before law. For any misconduct in performance of powers by them or their employees, notaries are to be held liable for all damages sustained by them. Thus, they are also required to be insured. Notaries must be registered with Chamber of Notaries. (http://www.notary-chamber.org/). Notaries are independent in exercising their functions. They must perform their duties diligently and must not disclose privileged information. Their archives are immune from seizure and inspection and nobody can consult them without their prior authorization.

Powers.

Notaries are engaged in drafting, registering, and safeguarding wills, safeguarding papers and documents, drafting and serving protests, certificates or invitations, administering estates, supervising transfer of title to real property and certain kinds of movable property, authenticating documents, signatures, certifying powers of attorney.

Seal.

Official acts of notaries must be attested by their proper signature, by readable appearance of their proper names and by clear and legible appearance of their stamp or seal. Seal must contain: their territorial extent of powers, i.e. name of regional court, their number at Chamber of Notaries and Republic of Bulgaria.

Territorial Extent of Powers.

Qualified notary acts within territory of one regional court. (Art. 3 of LN). There must be at least one notary public per 10,000 inhabitants in territory of each regional court.

Loss of Powers.

Upon his/her written request sent to Chamber of Notaries; upon death and loss of legal capacity; upon obstacle which acts as legal impediment for performance of his/her duties as notary public.

Fees.

Council of Ministers approved Tariff on Notarial Fees, which was adopted by Chamber of Notaries. Fees rose in 2009.

10.04 RECORDS:

There are number of public registers created by special laws, including:

Land Register.

Any transfer of title and charges to real property may be registered with land register. Register is open to public inspection. See category 23 Property, topic 23.10 Real Property. So far, Bulgaria has adhered to system which makes searches in land register against name of person deemed to be owner of estate or who has been party to deed rather than against geodetic map of estate. (See Regulation on Registration [“Pravilnik za vpisvanijata”] of 1951, as am'd.)

Law on Cadastre and Land Register (“Zakon za kadastura i imotnija register”) was adopted in 2000 and replaced Law on Unified Cadastre of People's Republic of Bulgaria of 1979.

Agency on Cadastre (http://www.cadastre.bg/) was established as executive agency to Ministry on Regional Development and Public Works in 2001. Its proclaimed aim is to prepare complete cadastre of Bulgaria. Under law persons who perform land surveys must be licensed, hold Bulgarian citizenship and relevant higher education. Their names are included in public register.

Agency on Land Registration (http://www.registryagency.bg/) to Ministry of Justice was established in 2004 whose purpose is to prepare and maintain registers of legal estates in land. Cadastre and land register are interconnected through allocated identification number of estate. Main data for land register is received from cadastre. It is planned that all data included in land register and in cadastre will be processed by computers.

Land register of each estate contains five parts: description of estate, its location, type, boundaries and size; name and address of proprietor, whether state, municipality, juridical or natural person, and recognition and transfer of right to ownership; establishment of other property rights and registration of other relevant circumstances, save for mortgages and restrictive covenants; mortgages; and restrictive covenants.

All entries in land register should be authorized by judge responsible for registration at regional court.

Archives.

New Law on National Archives Fund (“Zakon za natzionalnija arhiven fond”) into force in 2007. State Agency Archives (http://www.archives.government.bg/) is responsible for law implementation.

Civil Status Register and Population Register.

Kept at every municipality. National Database Population (http://www.grao.bg/) consists of all municipalities registers. Every person subject to registration has his/her personal file which contains following data: name, pseudonym and/or names used abroad, sex, date of birth, civil number of Bulgarian citizen or personal number of alien, citizenship, place of birth, birth certificate, permanent address, family status, marriage certificate, spouse, judicial decision granting divorce, children, mother, father, brothers/sisters, identity documents, legal restraints, death certificate indicating date and place of death. Personal file is created upon; certificate of birth, certificate of Bulgarian citizenship, petition by person who chooses permanent address in this municipality. Foreigners must file petition that they choose municipality for their permanent address. Personal file is created upon: certificate of birth, certificate of Bulgarian citizenship, petition by person who chooses permanent address in municipality. Foreigners must file petition that they choose municipality for their personal address. Personal file is kept for period of 130 years and then passes to State Archives. There are separate registers for Bulgarian citizens, for foreigners, for deceased, for persons who have changed their permanent address. See Law on Registration of Citizens of 1999, as amended.

Vital Statistics.

Birth, marriage, divorce and death certificates relating to citizen are entered in register where she/he chooses to be registered, regardless of place of birth (see Law on Registration of Citizens of 1999, as amended). Copies of birth, death and marriage certificates may be obtained from register office at municipality where event occurred. Fees range from one to two leva. Alternatively, it is possible to receive copies of above certificates upon payment of expedition fee guaranteeing return of certificate by post.

Personal Data Protection.

Privacy of persons is protected by Law on Protection of Person Data of 2001. Law is similar in its content to some other EU countries statutes on protection of personal data. Law applies both to state controlled and non-state information systems and data administrators. Personal data can be collected only for specified legal purposes and processed in conformity thereto. Personal data is defined as any information which reveals natural person's physical, psychological, mental, economic, cultural and social identity. Law contains provision that personal data revealing racial and ethnic origin, political opinions, religious and philosophical beliefs, membership in political parties, organizations, trade-unions, as well as personal data related to health condition and sexual life may be collected only with explicit written permission of person, subject to certain exceptions. Commission on Protection of Personal Data (http://www.cpdp.bg/) is agency that implements law. It submits annual report to Parliament.

10.05 SEALS:

In general there exists no necessity to place seals on private instruments. Only public authorities, including President, National Assembly, Council of Ministers, ministries, courts, public prosecutors, municipal and provincial authorities and notaries public use seals, which bear Bulgarian coat-of-arms. Minister of Justice acts as official keeper of Bulgarian State Seal. (See Law on Bulgarian State Seal and National Flag of Republic of Bulgaria [“Zakon za bulgariskija natsionalen pechat and nationalen flag na Republika Bulgaria”] of 1998, as am'd.)

Corporate Seals.

Juridical persons and corporations may use their own seals.

10.06 TRANSLATIONS:

Duly licenced translation agencies offer translation services of official and of private documents to be used in Bulgaria and abroad. Translations are performed by sworn translators who must fulfil certain requirements under Law. List of all sworn translators is kept with Ministry of Foreign Affairs. Bulgarian consulates offer translation services as well.

11 EMPLOYMENT

11.01 LABOR RELATIONS:

Labour Code ("Kodeks na truda") of 1986, as amended (http://lex.bg/bg/laws/ldoc/1594373121), and other statutory regulations.

Employment Contracts.

Since Jan. 1, 2006 their registration is with National Agency on Public Revenue. In period 1996-2002 Labour Code contained provision, that employer-employee type of relationship may also arise when employer has accepted employee and latter has commenced to perform his/her duties.

Employment contract with trial period must be concluded for period not exceeding six months. During trial period parties to employment contract have same rights and obligations as under ordinary employment contract. (Art. 70 LCode).

Categories and Classification of Professions and Employees.

New Classification entered into force in 2006 and replaced 1996 National Classification of Professions. National Classification generally follows International Labour Organization Classification internationale type des professions of 1988. There also exists unified classification of civil servant positions and offices in government adopted with 2000 Council of Minister's Decree, as amended.

Hours of Labor.

Normal working week is 40 hours per week, eight hours per day. (Art. 136 LCode). Working day must be interrupted by one or several breaks. Employee must receive at least half-hour eating period. Employer may extend working hours in certain days, but must reduce them in other days. In such cases working day may be extended up to ten hours and is allowed for period not exceeding 60 working days in one calendar year, but not more than 20 consecutive working days. This reduction and compensation of overtime hours of work must be ordered by employer within period not exceeding four months. If employer fails to perform his/her obligation and to compensate overtime hours, employee has right to determine period in which he/she will shorten his/her working time. (Art. 136a LCode).

Reduced working time is established for employees under 18 years of age who perform work under dangerous health conditions or under specific conditions as stated in Decree issued by Council of Ministers. (Art. 137 LCode).

Night Labour is subject to specific regulation.

Extraordinary labour is generally prohibited, subject to certain exceptions.

Annual paid vacation must be at least 20 working days. (Art. 155 LCode). Employee is entitled to such vacation upon eight months of service. More favourable conditions for vacation may be established in collective bargaining agreement or in employment contract. (Art. 156a LCode). Employees are entitled to additional vacations when they work in conditions which are considered dangerous to their health or when they perform work during irregular working time. Employees can, under specific conditions, take leaves of absence for certain family events, maternity, training, education etc.

Notice of Termination.

Employer is required to give written notice ranging from 30 days to three months depending whether labour contract was concluded for definite or indefinite period. (Art. 326 LCode). Labour Code contains statutory provisions when labour contract may be terminated with written notice by employer, i.e.: when company or part of it is wound up; when there is interruption of work for more than 15 working days; when employee lacks necessary education and professional qualifications for his/her job; when employee refuses to join company, which is moving to another domicile; when employee must leave his/her position because of return of employee from compulsory military service; when employee has right to pension because of his/her age and social security experience (for university professors—age is 65 years); when changes were introduced in position requirements and employee does not fulfil these new requirements; when there is objective impossibility for performance of labour contract. (Art. 328 LCode). Company manager's contract may also be terminated with written notice when there is new contract for company management. (Art. 328[2] LCode).

Employer can offer termination of contract to employer and offer him/her indemnity. When employee does not respond in writing to offer, it is presumed that offer is not accepted. When employee accepts offer, he/she is entitled to indemnity of at least four monthly salaries, unless there exists other stipulation in labor contract. (Art. 331 LCode).

Special guarantees against dismissals exist for pregnant women, mothers with infant children, spouses of men that perform their compulsory military service, trade union leaders, sick employees or employees that have been offered specific type of employment because of their state of health. (Art. 333 LCode).

Wages.

Discrimination on base of sex is prohibited. General minimum working wage is fixed by Council of Ministers. As of 2009, it is 240 leva 0 leva per month and 1.42 leva per hour. Employer is obliged to pay wages every month in two instalments, unless other stipulation is present in contract. Wages must be paid in money. Assignment of wages is prohibited save to certain exceptions. Art. 245 of Labour Code guarantees payment of at least minimum working wage when employee performs diligently his/her duties. Unpaid amount of wage remains due and must be paid including interest equal to base interest rate for this period.

Child Labor.

Minors under 16 years of age cannot be employed. Exemption is available for minors between 15 and 16 who may be employed in certain jobs which are light and not harmful or dangerous to their health and to their normal physical, mental and moral development. Minors under 15 may take part in theatre and film productions or may hold certain positions in circuses. Their employment conditions must be privileged and in accordance with established requirements for their normal physical, mental and moral development. Latter conditions are determined by Council of Ministers. (Art. 301 LCode).

Minors under 16 years must be accepted for their particular employment upon thorough medical examination and upon special permission issued by regional inspectorate on labour. (Art. 302 LCode).

Employees under 18 must be offered positions upon thorough medical examination and health certificate that contains statement about his/her readiness to perform certain work and upon permission issued by regional inspectorate on labour on case-by-case basis. (Art. 303 LCode). Labourers under 18 are not allowed to be employed in positions: which are beyond their physical and psychological capabilities; which are related to dangerous exposure to biological, physical and chemical agents causing genetic and hereditary injuries; which expose them to radiation; to very low or high temperatures; to risks of occurrence of labour accidents, where there exists presumption that these accidents cannot be avoided by employee because of his/her immaturity and lack of experience. (Art. 304 LCode). Minister of Labour and Social Policy and

Minister of Health issue list of all positions prohibited for employment of persons below 18. Working time for employees under 18 years of age is 35 hours per week, seven hours per day. Employers are obliged to provide all necessary information about existing hazardous risks to employees under 18 and to their parents or guardians as well as all information about safety measures. Minors under 18 benefit from special treatment by employers, who must also provide for their practical training. (Art. 305[1] LCode). They are entitled to paid vacations of at least 26 days. (Art. 305[4] LCode).

Female Labor.

Labour Code contains provisions that prohibits female employees to perform activities heavy or harmful to their health and to their activities as mothers. List of such activities is adopted by Minister of Labour and Social Policy and Minister of Health and is subject to revision at least once every three years. (Art. 307 LCode). Female employees have right to maternity leave of 135 days during pregnancy and after child's delivery (leave of 45 days must be used before delivery). (Art. 163 LCode). They have right to additional paid maternity leave for raising up infants until first child, second child and third child reach two years of age, and successive children six months of age. (Art. 164 LCode). Mothers have also right to unpaid maternity leave of six months per year until their children reach eight years of age. Additional paid maternity leave and unpaid maternity leave can be taken by each parent and by parents' parents, when they work under employment contract. Mother's consent is required. Period of employee's pregnancy and parental leave is included in calculation of length of employment. When this is stipulated in collective bargaining agreement, mothers have right to additional paid maternity leave of two days per year until their children reach 18 years of age.

Discrimination.

Labour Code explicitly prohibits any direct and indirect discrimination of those who seek employment or are employed on account of race, religion, colour, national origin, age, sex, political and religious beliefs, membership in trade union or other organization, social, family or property status, or disability. (Art. 8 LCode).

Workers Councils.

Law on Informing and Consulting with Workers and Employees in Transnational Enterprises and Societas Europeas (“Zakon za informirane i konsultirane s rabotnitzite i sluzhitelite v transnatzionalnite predprijatija i evropeiski druzhestva”) entered into force on Jan. 1, 2007 and implements provisions of following EU Directives: 94/45/EC, 2001/86/EC, 2003/72/EC.

Labor Unions.

Employees have right to become members and to leave upon their discretion any labour union organization. (Art. 4 LCode).

Collective Bargaining Agreements.

This type of agreement is concluded between different union organizations of employees and employers on different industrial levels, including communities. (See Art. 51 LCode.) Under Labour Code drafts of collective bargaining agreements must be prepared by trade union organizations. Agreement must be in written form and copy of agreement must be registered with respective inspectorate on labour where employer has his/her establishment. Collective bargaining agreements are considered concluded for one year, unless parties have not agreed on other period, but period of agreement cannot exceed two years. Individual labour contract which is contrary to collective bargaining agreement is void.

Labor disputes are generally heard by regional courts which follow rules as set up in Civil Procedure Code. Plaintiffs do not pay court or state fees. Limitation periods are as follows: one month—for limited liability of employee; two months—for termination of employment relationship and for alternation character and place of employment; three years—for all other disputes. (Art. 358 LCode). Labour disputes between employees, who are foreign citizens and foreign employers or joint ventures with domicile in Bulgaria are subject to jurisdiction of court where employer has its domicile, unless parties have agreed otherwise. (Art. 361 LCode). Labour disputes between Bulgarian citizens working abroad and Bulgarian employers abroad are subject to jurisdiction of relevant Sofia regional court. When employee is defendant, relevant court is court, where employee has his/her residence in Bulgaria. (Art. 362 LCode).

Strikes.

Law on Settlement of Collective Labour Disputes (“Zakon za kolektivnite trudovi sporove”) of 1990, as amended, governs matter.

Workers' Compensation Law.

See subhead Employers' Liability, infra.

Occupational Diseases and Accidents at Work.

List of occupational diseases adopted with Regulation 175/2008 by Council of Ministers.

Employers' Liability.

If accident at work or occupational disease has caused injury to employee and latter was provisionally or permanently disabled or died, employer is held strictly liable without regard that other employer's servant, employee or his/her body was at fault for accident. (Art. 200 LCode). Employer is held liable in case of force majeure and when accident occurred when employee performed work in relation to his/her occupation or any kind of work without being ordered which was in employer's interest as well as during time for rest spent within company. Amount of compensation is equal to sum difference between damages suffered (material and nonmaterial) and received compensation or pension from social security. Employer is not held liable when employee has acted with intent in causing himself/herself injury. Employer's liability can be decreased when employee has acted with gross negligence and caused himself/herself injury. (Art. 201 LCode). Employer can recover compensation, which was paid to injured employee or his/her heirs, from employees whose faulty behaviour caused injury. (Art. 202 LCode).

Employee's Liability.

Employee or servant held liable for any damage which he/she caused to employer by negligence or in connection with and in course of performance of his/her work duties. (Art. 203 LCode). This type of liability for property damages arises and may be applied independently of any disciplinary, administrative or criminal liability. Employee is held responsible for amount of damage, but his amount cannot exceed his/her agreed monthly wage. (See Art. 206 LCode.) When damage was caused by manager-employee or supervisor in connection with performance of his/her managerial duties, liability is also in amount of damage, but cannot exceed total amount of three monthly wages received by him/her. Employer must issue order, in which reason and amount of damages caused by employee are determined. Within one month period, employee may dispute order before his/her employer. Then, employer may start case in court.

In event of crime, intentional wrong, employee's liability is determined in accordance with provisions of general civil law (see category 5 Civil Actions and Procedure, topic 5.05 Damages). Employee is not liable for property damages, which were result of ordinary production-business risk. Amount of damage is determined at day of its occurrence or its discovery and includes only incurred losses, but not foregone utilities. (See Art. 205 LCode.)

Labour Code contains rules on joint liability for damages caused by servants or employees.

Unemployment Compensation.

In accordance with provisions of Code on Social Security of 1999, as amended, employees that have lost their jobs and have made compulsory social insurance contributions for nine months during 15 months long period have right to unemployment benefits. Amount of compensation is 60% of employee's average social insurance income during latest nine months. Law on annual budget of Compulsory Social Insurance determines minimum and maximum amount of unemployment compensation every year. Employee is entitled to receive unemployment compensation for period depending on his/her work experience during which he/she has made social security contributions and is as follows: four months, when he/she has work experience of up to three years; six months in case of work experience between three and five years; eight months—in case of work experience between five and ten years; nine months—in case of work experience between ten and 15 years; ten months—in case of work experience between 15 and 20 years; 11 months—in case of work experience between 20 and 25 years; 12 months—in case of work experience of more than 25 years.

Social Security.

In 2003 Code on Compulsory Social Security ("Kodeks za zadulzhitelno obshtestveno osigurjavane") of 1999, as amended, was renamed to Code on Social Security and new chapter on supplementary voluntary pension insurance was added to it. Insured social risks include: temporary employment disability; disability; motherhood; unemployment; old age; and death. Persons insured for all social risks have right to indemnities, pecuniary assistance or pensions. Persons insured for accidents at work and occupational diseases have right to pecuniary indemnities and pensions as well as pecuniary assistance. Persons insured for general sickness, old age and death have right to pensions and pecuniary assistance. Code contains provision on categories of employees subject to insurance for all or for certain social risks. Employees falling under first and second employment category, e.g., who perform underground work in mining industry, or work under hazardous conditions in nuclear plants, in heavy industry etc., railway workers, drivers of certain motor vehicles, sailors, etc., must be insured for all social risks.

Pensions.

Bulgaria has replaced its previous pension system, which was based solely on generation solidarity (also known as pay-as-you-go system) with multipillar system: compulsory pension insurance based on generation solidarity; compulsory pension insurance based on individual capitalized savings; and voluntary pension insurance based on individual capitalized savings.

Under Code on Social Security, social security contributions for pensions are compulsory. Eligibility for pensions for old age and length of social security participation is acquired on basis of system of points as sum of age and years of participation in national social security system (each year of age and each year of social security payments bring one point). Persons, whose occupation or profession falls within third employment category, may retire: in 2009—in case of men, if their minimum age is 63 and have 100 points, and in case of women, if their minimum age is 60 years and have 94 points (see Art. 68 CSS). Persons of both sexes above 65 years of age are also eligible to receive pensions when they have participated for 15 years in compulsory social security system, of which 12 years are of actual service.

Code also contains provisions on pensions for disability and sickness, on pensions which may be acquired by succession, and on pensions not related to labour activity, including eligibility criteria, their amount etc.

All pensions are subject to periodic yearly updates having regard to social security income growth and consumer price index. Decisions are taken by Supervisory Board of National Social Security Institute.

Under Code on Social Security certain employees, i.e., employees born after Dec. 31, 1959 and employees working under conditions of first and second categories of employment without regard to their age, are also subject to supplementary compulsory social security and must make social contributions for additional pension for old age and death. Employees and employers should make those contributions in universal and/or professional pension funds, where contributed sums are accumulated and capitalized in individual accounts.

Bulgarian law fixes upper limit of amount of pension for old age and length of service, amount of social pension.

Labor disputes are heard by Bulgarian regional courts or by tribunal specified in employment contract.

Law on State Fund for Guaranteeing Stability of State Pension System. (DV 98 of 2008).

Social Security Conventions.

Bulgaria has signed bilateral social security agreements and conventions with following countries: Albania, Austria, Belgium, Croatia, Cyprus, Germany, Greece, Hungary, Israel, Libya, Luxembourg, Macedonia, Moldova, Netherlands, Poland, Portugal, Romania, Russian Federation, Serbia, Slovakia, Spain, Switzerland, Turkey, Ukraine, Yugoslavia. Upon Bulgaria entry into EU, Regulation 1408/71 on coordination of social security systems and Reg. 547/72 have been applied.

11.02 SOCIAL AID:

Under Law on Social Aid ("Zakon za sotsialnoto podpomagane") of 1998, as amended, social aid is defined as providing assistance in money and in other goods and rendering services which meet basic human needs of citizens, when they cannot receive them through their own labour or through property owned by them. Declared aims of law are: assistance to citizens, who cannot without others' assistance meet their basic needs; promoting social solidarity in difficult life situations; development of entrepreneurship in social sphere through rendering social services by physical and juridical persons. Bulgarian citizens, their families and their co-habitants, foreigners with duly issued permit for permanent stay, foreigners who have been granted asylum, refugee status or humanitarian status have right to social aid. Monthly social assistance payments are conditioned upon exercise of labour activities, save for cases of motherhood or when health condition and age of person does not permit him to work.

Agency for Social Aid (http://www.asp.government.bg/) is executive agency to Minister of Labour and Social Policy, whose function is to implement governmental policy in field of social aid work. Agency monitors how social aid services are rendered, keeps register of natural and juridical persons (merchants) providing such services, grants licenses for opening specialized institutions for social aid services.

Council of Ministers decides on monthly amount of guaranteed minimum income which serves as basis for determining social aid payments. Implementing regulation determines conditions and procedure for granting social assistance. Unemployed persons, who meet requirements for receiving social aid, are included in employment programmes. Following persons are not obliged to be included in such programmes: persons taking care of children under three, including single mothers (adopters) and trustees, pregnant women after 3rd month of pregnancy, persons with serious disabilities, persons who care for member of his/her family or for their direct line relatives up to 2nd degree, who are in need of permanent assistance, persons who suffer from serious mental disturbances.

12 ENVIRONMENT

12.01 ENERGY:

Law on Energy Efficiency ("Zakon za energiinata efektivnost") of 2004, as amended, and Law on Energetics ("Zakon za energetikata") of 2003, as amended, are main statutes which launched liberalization and privatization of Bulgarian electricity and energy market. Segregation of generators of electricity and distributors was implemented. Prices of electricity and heating energy are regulated by State Agency on Energy and Water Regulation (http://www.dker.bg/) and their rise was considerable in recent years.

In 2009, Bulgaria signed intergovernmental agreement concerning construction of Nabucco natural gas pipeline. Bulgarian Parliament also ratified Agreement on construction of South Stream natural gas pipeline on July 28, 2009. Under inter-governmental agreement for construction of Bourgas—Alexandroupolis oil pipeline, signed in 2007, works are expected to be started in Oct. 2009. Belene Nuclear Power Plant as second Bulgarian nuclear power plant has been under construction for some time. In 2009, new government has pledged further privatization of energy sector, including Bulgarian Energy Holding Company and breaking up of gas monopoly.

Nuclear.

Law on Safe Use of Nuclear Energy ("Zakon za bezopasno izpolzvane na jadrenata energia") of 2002 replaced Law on Use of Nuclear Energy for Peaceful Purposes of 1985.

Under Law government regulates safe use of nuclear energy and ionizing radiation, safe disposal of radioactive waste and used nuclear fuel, rights and duties of persons who are involved in providing nuclear safety and protection from harmful radiation. Agency for Nuclear Regulation (ANR) (http://www.bnra.bg/), specialized agency within executive branch of government, is responsible to realize above objectives. It acts as coordinator of Bulgaria's international obligations to number of international treaties. It must also provide objective information to public. Chairman and Vice Chairman of Agency are appointed by Council of Ministers for five-year term. Agency must submit annual reports on nuclear safety to Council of Ministers. Law contains provisions on planning and measures to avoid nuclear accidents, ways of alarm when such accidents occur, first aid measures as well as on penalties in contraventions of rules on nuclear safety.

Law requires licences for number of activities including: operation of nuclear equipment, use of ionizing radiation, production of sources of radiation, transport of nuclear radioactive waste, imports and exports of sources of ionizing radiation and as well as permits for planning and construction of nuclear sites, transport, import and export of nuclear material. Under Law Chairman of ANR is authority that grants licences and issues permits to juridical persons to conduct above activities upon open tenders under conditions of transparency and equality.

Liability for damages caused by operator of nuclear power plant follows provisions as set up in 1963 Vienna Convention on Civil Liability for Nuclear Damage. Liability is not based on fault, i.e. it is objective. Bulgarian law limits liability to 96 million leva. (Previously it was limited to 15 million IMF's Special Drawing Rights.) Liability insurance is mandatory. Following claims for damages arising out of nuclear accidents have priority: claims for death and for bodily injury. Period of limitation of bringing civil suit for damages is five years. When insurance coverage is not sufficient, Bulgarian state must pay rest of compensation within limit of 96 million leva. State also has right to return claim against operator. When radioactive substances are used for medical treatment, law refers to general provisions for torts in Law on Obligations and Contracts. Bulgarian courts are competent courts unless Vienna Convention prescribes otherwise. Claims must be brought before Sofia City Court. Bulgarian citizens do not pay any state and court fees, while foreigners are treated according to principle of reciprocity.

Oil Reserves.

Law on Compulsory Reserves of Oil and Oil Products (“Zakon za zadulzhitelnite zapasi ot neft I neftoprodukti”) of 2003 governs matter.

Alternative Sources and Biofuels.

Law on Alternative Sources of Energy and Biofuels (``Zakon za alternativnite iztochnitsi na energija I biogorivata'') of 2007, as amended.

Treaties.—Bulgaria has ratified 1994 Energy Charter Treaty and its Protocol.

12.02 ENVIRONMENTAL REGULATION:

Constitution states that it is duty of government to protect environment and to assure reasonable use of natural resources.

Law on Protection of Nature of 1967, as amended, and Law on Protection of Environment of 1991, as amended, establish general framework of environmental protection while specific laws set forth more concrete definitions of areas and activities (on forests, waters, clean air, underground resources, agricultural lands, protected areas, hunting and wild animals, etc.). Environmental regulation includes, inter alia, following statutes: Law on Protection of Environment (“Zakon za zashtita na prirodata”) of 2002, as amended, Law on Protection of Soil (“Zakon za opazvane na pochvata ot zamursiavane”) of 1963, as amended, Law on Protected Territories (“Zakon za zashtitenite teritorii”) of 1998, as amended, Law on Herbal and Medicinal Plants (“Zakon za lechebnite rastenia”) of 2000, as amended, Law on Waters (“Zakon za vodite”) of 1999, as amended, Law on Forests (“Zakon za gorite”) of 1997, as amended, Law on Clean Air (“Zakon za chistotata na atmosfernia vuzduh”), of 1996, as amended. Laws establish civil liability and, in certain cases, criminal liability for environmental damages. Polluters are liable for negligent conduct. General supervision is exercised by: Ministry of Environment and Waters. (http://www.moew.government.bg/).

Law on Liability for Avoidance and Prevention of Ecological Damages (“Zakon za otgovornostta za predotvratjavane i otstranjavane na ekologichni shteti”) was adopted in 2008 and introduced provisions of EU Directive 2004/35. Law is based on following principles: polluter must pay and sustainable development. Public register is set up with information about commercial entities engaged in activities that might cause environmental harm. Operators must take preventive measure. Minister of Environment submits reports to EU Commission on implementation of Law. Administrative measures must be taken by authorities when potential danger for environment is present.

Biological Diversity.

Law on Biological Diversity (“Zakon za biologicheskoto raznoobrazie”) of 2002, as amended. Biological diversity is defined as diversity of all living organisms in all forms of their natural organization, their co-habitats, of ecosystems and processes that take place within ecosystems. Biological diversity is deemed part of natural heritage and its preservation is priority and duty of all state and municipal authorities as well as of all citizens. Stated aims of Law are as follows: preservation of natural habitats which are representative as well as habitats of endangered and endemic plants and animals within National Ecological Network; preservation of protected species of flora and fauna; preservation of genetic resources and diversity of species out of their natural environment; introduction of foreign species and reintroduction of local species in Bulgaria; regulation of trade with endangered species; preservation of centuries old and important trees. (Art. 2 LBD). C. 2 of Law deals with national ecological network. State is responsible for construction of national eco-network, which includes protected zones, protected territories and buffer zones. Aims are: long-term preservation of biological, geological and landscape diversity; securing places for reproduction, feeding and rest of wild animals; creating conditions for genetic exchange between separated populations and species; participation of Bulgaria in European and world ecological networks. List of protected zones is adopted upon public discussion. National Council on Biological Diversity is established to take part in list's preparation. List is approved by Council of Ministers and is promulgated in Durzhaven Vestnik. C. 3 of Law contains provisions on protection of wild animal and plant species listed in several annexes. All birds are subject to protection and control of their populations. (Art. 45 LBD). It is possible to carry out action plans in following instances: when species are endangered; when population is not considered in favourable status; when imported alien species have negative impact on natural habitats. State register of protected trees and register of protected territories are kept by Ministry of Environment and Waters.

Licence is needed to open zoo in Bulgaria. Ministry of Environment keeps register of all organizations and persons who own collections of wild foreign and local species. Persons have obligations to keep and classify their species, to allow public access and to perform educational activities. (Art. 58 LBD). State is deemed owner of genetic resources of Bulgarian natural flora and fauna. (Art. 66[1] LBD). Introduction and import with aim of breeding of alien animal and plant species is subject to licence. (Art. 67[1] LBD).

Law contains provisions on trade with endangered species of wild flora and fauna included in annexes to Convention on International Commerce with Endangered Species of Wild Flora and Fauna (CITES).

Genetically Modified Organisms.

Law on Genetically Modified Organisms (“Zakon za genetichno modifitsiranite organismi”) entered into force on June 1, 2005.

Noise.

Law on Protection From Noise in Environment (“Zakon za zashtita ot shuma v okolnata sreda”) of 2005 provides protection against noise pollution which may be harmful to human health and environment. Under law, strategic maps on noise pollution are in preparation. Law lays down action plans.

Waste.

Law on Treatment of Waste (“Zakon za upravlenieto na otpadutzite”) of 2003 regulates waste collection, transport and treatment of waste.

Air.

Law on Clean Air sets norms and indicators of air quality. Regulations by Minister of Environment set limitations of emissions. Producers and importers of liquid fuels with sulphur content of more than 1% pay ecocharge. Law lays down sanctions on polluters.

Water.

Law on Waters contains rules on water pollution control and water management. EU Directive 2000/60/EC has been implemented by Law. Permission is required for release of biocides in market.

Toxic Substances.

Law on Harmful Effect of Chemicals (“Zakon za vrednoto vuzdeistvie na himicheskite veshtestva”) of 2000, as amended, contains definition of dangerous chemical substances, their packaging, labelling and notification requirements.

Protected Territories.

These are reserves, parks and protected sites. Minister of Environment and Waters is authority who declares and manages protected territories.

Oil Pollution.

Law on Obligations Toward International Fund for Compensation on Oil Pollution Damage of 2005 implements 1971 Convention (1992 Protocol, FUND'92).

12.03 PROTECTION OF ANIMALS:

Law on Protection of Animals (``Zakon za zashtita na zhivotnite'') (DV 13 of 2008) contains provisions on protection of animals and their humane treatment. Law defines acts of cruelty against animals. Animal fighting is strictly prohibited. Acts of cruelty can be punished with imprisonment and with a fine up to 1,000 leva. Euthanasia can be performed only in specific cases. There exists prohibition on import, sale and ownership of apes, primate and wild cats.

Animal Welfare.—Law contains provisions on well-being of abandoned animals or animals without owners and on animal companions.

Treaties.—Following Council of Europe Conventions entered into force in 2005: European Convention on Protection of Animals Raised for Agricultural Purposes of 1976 (ETS 87); European Convention on Protection of Animals During Their Killing Through Slaughtering of 1979 (ETS 102); European Convention on Protection of Vertebrates Used for Experiments and other Scientific Purposes of 1986 (ETS 123); European Convention on Protection of Animal Companions of 1987 (ETS 125); European Convention on Protection of Animals During Int'l Transport of 2003 (ETS 193) (entered into force on Aug. 3, 2006).

13 ESTATES AND TRUSTS

13.01 DEATH (PRESUMPTION OF AND ACTION OF):

After five years from date of latest intelligence concerning absentee, court declares him/her dead. Declaration of death creates presumption that absentee has died. Special proceedings laid down in Civil Procedure Code. (c. 51 CPC).

When person has disappeared in war or other event which provides reasonable ground to believe that he/she is dead, death may be declared after two years from end of war or from date of other event. Court determines date and, if possible, hour of death.

In absence of other data, moment of death is presumed to be date of latest intelligence about absentee. Successors are entitled to have heirship recognized. Marriage of declared dead is terminated by court when other spouse has filed application to that effect.

Declaration of death judgment may be amended or annulled when absentee reappears or actual date of his/her death is different.

When person declared dead reappears, he/she may demand: all his/her property from his/her heirs, all his/her property alienated without consideration, all property acquired through transfer of his/her property for consideration as well as price due from third persons, all property which was transferred for consideration to third persons when at date of transfer third persons knew that person declared dead was alive and did not act in good faith. He/she may demand also performance of duties and obligations which prescribe with his/her death, i.e. pensions, maintenance etc. However, marriage remains dissolved when there's court judgment to that effect.

Survivorship.

No statutory provisions.

Action for Death.

See topic Damages.

Death Certificates and Inheritance Certificates.

Issued at place where event occurred by civil status official at local municipality.

13.02 DESCENT AND DISTRIBUTION:

Law on Inheritance of 1949, as amended ("Zakon za nasledstvoto").

Heirs.—Statutory heirs are grouped in following orders: (1) Children and descendants; (2) surviving spouse; (3) parents; (4) grandparents and ascendants of second and higher degree; brothers and sisters; (5) collateral relatives up to sixth degree of kinship, i.e., second cousins; (6) State. Certain persons, including those who were sentenced for murder or attempted murder of deceased, his/her spouse or children or who maliciously and falsely charged deceased with committing crime subject to imprisonment or submitted evidence in that respect to public official are excluded from succession and are considered not deserving to inherit. (Art. 3 of LI). Law also designates as not worthy to inherit persons who either forged, changed or destroyed valid will, or used nonvalid will as well as persons who used fraud or duress to force deceased to make or change his/her will.

Children of intestate inherit in equal shares. (Art. 5 LI). No right to primogeniture. Predeceased child is replaced by child's descendants in all degrees per stirpes. If intestate leaves no descendants, parents of intestate inherit in equal shares or whole inheritance goes to parent who is alive. (Art. 6 LI). If intestate leaves no descendants or parents, his/her brothers or sisters inherit in equal shares. Law differentiates between full and half-blood brothers and sisters, i.e. full-blood brothers and sisters receive two-thirds, while half blood brothers and sisters—one-third of estate. If intestate leaves ascendants of second or higher degree, i.e. grandparents and great-grandparents, and brothers and sisters, the former receive one-third, while the latter—two-thirds of estate. If intestate leaves not descendants, ascendants, brothers and sisters and their descendants, estate passes to relatives in collateral line. Nearest relative in kinship and his/her descendant exclude distant ones. (Art. 8[4] LI).

Surviving spouse (after marital property allocation) inherits per capita with children and receives share equal to that of each child. If surviving spouse inherits with ascendants and with brothers and sisters or their descendants, she/he receives half of whole estate, when spouses have been married for period not exceeding ten years, and two-thirds, when they have been married for more than ten years. (Art. 9 LI). When intestate leaves only spouse, whole estate goes to him/her.

Distribution.—Distribution is made per stirpes in following way: Deceased descendants of deceased or such heirs that do not merit to inherit are represented or substituted by their descendants. Deceased brothers and sisters are represented or substituted only by their children and grandchildren. (Art. 10 LI).

Adopted Children.

See category 14 Family, topic 14.01 Adoption.

Illegitimate Children.

Law makes no distinction between children born outside marriage and inside marriage.

Posthumous Heirs.

Law contains provision on posthumous heirs, i.e. heirs begotten before but born after death of intestate take as though born in intestate's lifetime and survived intestate. (Art. 2 LI).

Heir, e.g. surviving spouse, who lived with deceased and who took care of him/her receives household objects and furniture.

Escheat.

Where any person dies intestate and leaves no lawful heirs, any property of such person escheats to State.

13.03 EXECUTORS AND ADMINISTRATORS:

No one is bound to accept succession. Acceptance may be unconditional or subject to inventory. Prior to 1992 there existed requirement that heirs must accept succession within five years of date of opening of inheritance, i.e. date of death. Currently, there is no such requirement. Person with interest in succession may demand from regional court to determine period within which other heir must accept or refuse succession. (Art. 51 LI). When person does not respond within period, he/she loses his/her right to succession. Persons with unknown address may be summoned through publishing notes in unofficial section of Durzhaven Vestnik. Refusal to accept succession must be made in writing and registered with clerk of regional court where deceased had residence at time of death. Share of heirs who refused to accept succession or who lost right to succession is distributed among other heirs. (Art. 53 LI). Heir who refused to accept succession of his/her ascendant may be represented by his/her descendants. Heir may also accept inheritance with benefit of inventory, in which case special procedure as set in Civil Procedure Code is followed. (Art. 63 LI). Thus, heirs are not charged with debts of estate greater than their distributive shares. (Art. 60[2] LI). Acceptance of succession with benefit of inventory must be done within three months from date when heir realizes that succession procedure commences. State, public organizations and persons without legal capacity must accept succession with only benefit of inventory. Acceptance must be registered with regional court. Heir with benefit of inventory must diligently manage accepted estate and may not alienate immovable property for period of five years and movables for period of three years except with permission of regional judge. (Art. 65 LI).

If they do not accept succession with benefit of inventory heirs are deemed to have accepted it unconditionally, in which case they must bear all estate's liabilities, as well as estate creditors may move against their other assets. (Art. 60[1] LI).

Administration is in hands of heirs, but when none are known to exist, are with unknown domicile or have not taken administration of property, regional judge where estate procedure was opened may appoint provisional administrator. (Art. 59 LI). Administrator must prepare inventory of estate. He/she must ask permission from judge for payment of all liabilities, legacies and for sale of estate.

Testator may appoint executor or executors who must be persons in full capacity and competent. (See Arts. 45-47 LI.) Executor may refuse to accept appointment. Executor must prepare inventory of all property and invite all legatees and heirs to be present at its performance. Executor enters in possession of all property and administers it as long as his/her acts are necessary to execute heir's will. Executor has not power to alienate real property. His/her powers are similar to those of testator's agent.

13.04 FORCED HEIRSHIP:

Certain portions of person's property cannot be given away by him/her either by transfer inter vivos or by will. (See Arts. 28-29 LI.) This reserve portion (“zapazena chast”) amounts to: (1) One-half of his/her property, if deceased leaves child or his/her descendants, but not spouse; (2) two-thirds of his/her property, if deceased leaves two or more children or their descendants, but not spouse; (3) one-third of his/her property, if deceased leaves parents or parent.

Reserve portion of surviving spouse amounts to: one-half of deceased person's property when surviving spouse inherits alone; one-third when deceased has also left parents. Reserve portion of spouse is equal to reserve portion of each child and is: one-third of deceased person's property, when deceased leaves one child; one-fourth of deceased person's property when deceased leaves two children; one-sixth of deceased person's property if deceased leaves three or more children. No statutory provisions when spouse inherits with deceased brothers and sisters.

Disposition of property made in contravention of these rules must be reduced to reserve portions stated in Law on Inheritance. Only heir benefiting from forced heirship may demand reduction of conveyance inter vivos and reduction of dispositions by will or legacies. In order to determine disposable part all property is fictitiously included in estate and valued at moment of death with exception of donations, which are valued as of date of gift for movables and as date of death for immovables. Debts and liabilities of deceased are valued and deducted from estate. Life and accident insurance payments in favour of heir are not included in estate. Legacies are reduced pro rata without distinction between heirs and legatees unless testator requests otherwise. Gifts are reduced only upon exhaustion of all legacies. Law requires that it must be started from latest donations.

Ordinary Substitution.

Testator designates second heir in place of first heir, when latter either dies before testator, or does not, or cannot accept succession. (Art. 21[1] LI). Necessary prerequisites are: designation must be made in favour of persons who are alive at time of testator's death.

Fideicommissary Substitution.

No statutory provisions. Bulgarian customary and statutory law have never recognized it. (Art. 21[2] LI). However, testator may designate person who will have right to usufruct of his/her property for life while second person will become owner of testator's property.

13.05 TRUST:

Concept of trust does not exist in Bulgarian law. Dispositions of property whereby donee or legatee is obliged to keep property intact and upon his/her death to transfer it to third person are void. (See Art. 21[2] LI.)

Bulgaria is not signatory to 1985 Hague Convention on Law Applicable and on Recognition of Trusts.

See also category 2 Business Organizations, topics 2.02 Associations and 2.07 Foundations.

13.06 WILLS:

Capacity.—Person of sound mind, i.e., able to know and understand nature of his/her acts, and who is above 18 years of age may dispose of all or part of his/her property by will (“zaveshtanie”).

Mutual wills or wills executed in one instrument by two or more persons are invalid. (Art. 15 LI).

Forms of Will.—Bulgarian law recognizes only two kinds of wills: holographic and notarial.

Holographic will must be entirely handwritten in Bulgarian or in any other language, dated (date must be clearly indicated) and signed by testator. (Art. 25 LI). Signature must appear at end of will. If there is no clear date indicated, date must be deduced and proved by internal or external elements. Holographic will may be kept by testator himself/herself, by any third person or handed in sealed envelope to notary public. In latter case notary prepares protocol on envelope, which is signed by testator and notary. Notary records these acts in special register.

Notarial will is executed in presence of notary and two witnesses. (Art. 24 LI). Testator states orally his/her will to notary who writes it word for word without any alteration. Then notary reads will to testator and to witnesses. Will is signed by testator, and countersigned by notary and witnesses. Requirements for witnesses and interpreters are same as those of notarial proceedings contained in Civil Procedure Code. (Art. 480 CPC). They must be in full capacity and have reached age of majority, not be illiterate in Bulgarian language, and must not be deaf, mute or blind. No citizenship requirement for witnesses. Legatee, testator, notary himself, direct line relative of legatee, testator and notary, as well as their relatives in collateral line up to fourth degree, their brother or sister-in-law spouse, their guardian or ward, their adopter or adoptee, clerk of notary or court registrar cannot be witnesses to notarial will. No requirement exists that territorial powers of notary public who prepares notarial will or keeps holographic will, must coincide with last domicile or location of property of testator.

Probate.—Bulgarian law does not provide for probate proceedings as envisaged in U.S. law. Upon death of testator any person with interest may demand that will, either holographic or notarial, be opened and declared by notary. This demand must be addressed to regional court where succession was opened. Upon declaration of will notary draws protocol which is signed by notary and person who presented will. Declared wills must be registered with court register at place where deceased had his/her last domicile. Copy of will ought to be communicated to statutory heirs.

Legatees, just like heirs with benefit of inventory, are not liable for payment of debts and charges of succession. Legatee may enforce his/her rights against heirs, except for amount of reserved portion.

Revocation.—Will can be revoked by any subsequent will which expressly revokes prior one or by specific notarial act of revocation. Last will which does not contain express revocation clause cancels in prior will only such provisions as are incompatible with those contained in subsequent will. Revoked will does not have legal effect even when subsequent will itself is without legal effect. (Arts. 38-40 LI).

Contest.—Will may be declared void or be annulled by court if demanded by any party who has interest. Will is void when: it lacks required legal form; will is contrary to law, public order or good morals as well as its expressed motive; when condition imposed by testator is impossible. (Art. 42 LI). Grounds for annulment are: testator was not in capacity to draw will; will was drawn under error, fraud, or coercion. (Art. 43 LI). Interested party may demand annulment within three years from date plaintiff received notice of disposition mortis causa and ground for invalidity and in any event ten years from day of opening of will. (Art. 44 LI). Objections are not subject to any statute of limitation. Law does not make distinction between defendant in bad and in good faith.

Division of Estate by Act of Will or Gift (``Delba chrez zaveshtanie ili darenie'').—Person may divide his/her whole estate or part of it between heirs while he/she is still alive by act of will or gift. Division is not valid if heir with reserved portion has not been included. (Arts. 77-78 LI). Heirs who have been damaged in their portion may demand compensation from other heirs. Forms of execution are same as for wills or for gifts. Division by gift of real estate must be executed in notarial form.

Treaties.—Bulgaria is not party to 1961 Hague Convention on Conflicts of Law relating to Forms of Testamentary Disposition.

14 FAMILY

14.01 ADOPTION:

Adoption ("osinovjavane") is governed by Family Code of 2009. (DV 47 of 2009). Bulgarian law distinguishes between full adoption (adoption plena) and partial adoption (adoption minus plena). Partial adoption gives rise to rights and obligations between adopter and adoptee and his/her issue, while rights and obligations between adoptee, and his/her issue, and natural parents' relatives are preserved. Natural parents owe support to child in case adopter cannot provide it. Natural parents cannot inherit from adoptee. Law requires full adoption: when adoptee is child of unknown parents; when adoptee was left in specialized public house with prior natural parents' consent to be fully adopted; when adoptee was left in specialized public house for certain period and parents did not take adoptee within six months upon expiration of that period. Adoptee must be under 18 years. No possibility for adults to be adopted. Adopter must be person of full legal capacity who has not been deprived of parental rights. Law requires 15 years age difference between adopter and adoptee except when adopters are spouses and when person adopts native child of his/her spouse. Adoption is prohibited between direct line relatives and between brothers and sisters. Grandparents may adopt only if grandchild was not born in wedlock or when one or both parents are dead. Court must conduct hearings and take opinion of other grandparents. Twins must be adopted together. National Register of children which may be subject to full adoption is maintained by Agency on Social Aid. It is electronic database. Agency also maintains National Register of persons who would like to fully adopt child.

Consent Required.

Adoptee, parents of adoptee, spouse of adopter and spouses of adoptee, adoptee above 14 years age must consent. Adoptee under 14 must be heard following provisions of Law on Protection of Child. Natural parents must give their consent when they are under 18. Consent of natural parents of adoptee is not required when they are under 14, when they are fully incapacitated. Persons must also provide declaration certified by notary public that adoption does not procure them material profit. Guardian or tutor, as well as parents under 14, partially disabled parents or parents deprived of parental rights must render only their opinion before court.

Court may dispense with consent of parent who does not take care of child, does not pay alimony or instructs child in way that causes harm to child's development or of parent who has deserted child in order to be raised in specialized institution and has not asked for child for six months.

Parent may withdraw consent at any time prior to commencement of adoption proceedings before court. He/she must do it in written form with signature certified by notary public and addressed to branch of Agency for Social Aid.

Persons willing to adopt children must be included in National Register with Agency for Social Aid. They must file petition with regional branch of agency, where their permanent address is. Social worker conducts investigation whether person is fit to become adopter. Branches of Agency on Social Aid issue permits for adoption valid for two years. Decisions granting adoption permits are subject to review under Code on Administrative Procedure.

Proceedings.

Petition is filed with regional branch of Agency for Social Aid. Then, within 14 days, petition must be transmitted to district court. Court proceedings are not open to public. Public prosecutor must participate in hearings. Petitioner must satisfy court that adoption is in interest of adoptee. District court judgment subject to appeal by adopter, natural parents, adoptee over age of 14 years, and public prosecutor before appellate court within seven days. Appellate court judgment is final.

Name.

Adoptee assumes adopter's name and surname and any given first name. Court orders that new birth certificate be issued by officer at municipality where adopter has his/her permanent address.

Effect of Adoption.

In case of full adoption, adoptee bears same relation to adoptive parents and their kindred as if he/she were natural child of such parents. Adoptee, his/her issue and his/her kindred takes by intestate succession from adoptive parents, their issue and kindred. Adopted child is no longer considered child of natural parents. However, this does not apply to prohibitions for marriage. In case of partial adoption, adopted children do not inherit from their natural parents, but legal relationship between adoptees, their kindred and natural relatives are preserved. Adoptee, his/her issue and kindred takes by intestate succession from adoptive parents and from natural relatives.

Setting Aside Adoption.

Adoption may be terminated in following instances: when adopter dies; when adopter and adoptee have agreed on setting aside adoption; when deep breakdown of relationship between adopter and adoptee exists. No application to set aside judgment of adoption can be commenced after expiration of one year, when there is fault in required consent. Period starts from day when adopter and natural parents have acquired knowledge of this fact and when adoptee has completed 18 years or has acquired knowledge of fact. In certain cases, public prosecutor must take part in proceedings.

Information contained in registers as well as all records in adoption cases are not open to public for inspection and are protected under Law on Protection of Personal Data. Upon request adopters receive information about adoptee's natural parents from branch of Agency on Social Aid. Adoptee above 16 has right to receive information about her/his natural parents when there exist important reasons. Hearings are conducted behind closed doors with participation of natural parents and public prosecutor, who renders opinion. Branches of Agencies for Social Aid must monitor how adoptee is raised for two years upon court decision. Family Code explicitly prohibits any commercial activity related to adoption.

International Adoptions and Conflicts of Laws.

Special rules are found in Family Code. (See Arts. 110-121 FC.) Minister of Justice is authority that grants permissions for adoption of children with habitual residence in Bulgaria by persons with habitual residence abroad. Adopters must pay fee, as determined by Council of Ministers. Sofia City Court has jurisdiction over international adoption proceedings. Intermediaries for international adoptions must be non-for-profit organization for public welfare, which must be registered and licenced by Ministry of Justice. Ministry of Justice keeps also following registers: of children that may be adopted by persons with habitual residence abroad, register of persons with habitual residence abroad who would like to be adoptees of children with habitual residence in Bulgaria, persons with permanent residence in Bulgaria who would like to adopt children with habitual residence abroad.

Treaties.—Bulgaria is signatory to 1993 Hague Convention on Protection of Children and Co-operation in Field of International Adoption. Bulgaria has been defined as exporter country of adopted children to developed countries and U.S.

14.02 ALIMONY:

Alimony is governed by provisions found in Family Code of 2009. Only persons who cannot maintain themselves by their property and cannot work, i.e. are incapable to support themselves by their labour (“netrudosposobni”), have right to claim alimony or maintenance (“izdruzhka”). (Art. 139 FC). Person who has right to maintenance may claim it from following persons and in following order of priority: from spouse or ex-spouse; from children; from parents; from grandchildren and great-grandchildren; from brothers and sisters; from grandparents and other ascendants. (See Art. 140 FC.) Person has duty to provide maintenance to following persons and in following order of priority: to children, spouse, ex-spouse; to parents; to grandchildren and great-grandchildren; to brothers and sisters; to grandparents and to other ascendants. (Art. 141 FC).

Parents, whether married or divorced, are obliged to support and to provide maintenance to their children under 18. (Art. 143 FC). Unless it does not cause them considerable difficulties, they must also provide maintenance and support to their children above 18 but under 20 who pursue studies in secondary schools and children under 25 who pursue studies in universities. (Art. 144 FC). Amount of maintenance is determined by court taking into consideration needs of children and conditions of parents. Minimum amount is set at one fourth of minimum wage. (Art. 142[2]).

Alimony compensation may be demanded only from spouse who bears fault for breakdown of marriage. (Art. 145 FC). Unless spouses have agreed on longer period, alimony is due for period of three years from termination of marriage. Court may prolong period for providing alimony when ex-spouse is in very difficult situation and other spouse is in position to pay it. Right to alimony prescribes when ex-spouse enters into marriage.

As rule, pecuniary alimony and maintenance is paid in monthly installments. (Art. 146 FC). Refusal to receive alimony or maintenance in future is void. (Art. 147 FC). Maintenance may be demanded for no more than year from date of filing suit. (Art. 149 FC). Other claims cannot be compensated with obligations for alimony and maintenance. (Art. 148 FC). Person who has seriously offended person with duty to provide maintenance cannot claim alimony or maintenance. Person who has seriously offended spouse, descendants and ascendants of person with duty to provide support cannot claim maintenance. (Art. 151 FC).

Claims for alimony and support are ranked on same level with employees' claims for wages etc. and have priority over state claims and other debts. (Art. 136 LOC). Execution proceedings cannot be initiated against claims for alimony or maintenance. Court grants attachment to alimony claims without general requirements and following formalities as stated in Law. Under present regulation when person with specific maintenance obligation does not perform, there exists possibility for creditor to claim maintenance from State. In turn, State can demand payments made from persons who have been in default of maintenance payments. (Art. 152 FC). Annual Law on State Budget determines maximum amount of maintenance for year.

14.03 DESERTION:

No special statutory provisions. See topics 14.05 Divorce; 14.08 Husband and Wife.

14.04 DISSOLUTION OF MARRIAGE:

See topic 14.05 Divorce.

14.05 DIVORCE:

Marriage may be terminated: by death, annulment or divorce. Legal separation or divorce a mensa et thoro, as known in some other countries, is not regulated by Bulgarian law. Divorce (“razvod”) may be granted only by court. There exist two types of divorce: divorce due to breakdown of marriage and divorce by mutual consent. Spouses may demand divorce on grounds of deep and irretrievable breakdown of marriage (“dulboko i nepopravimo razstroistvo na braka”). Family Code does not define deep and irretrievable breakdown of marriage and does not contain list of absolute grounds for granting divorce. Court decides issue of which party is responsible for divorce only if one of spouses has demanded this. Court does not state which party is at fault when both spouses demand no-fault divorce and when they submit settlement accord covering their rights and duties as parents, their personal relations, support of their children, all their property relations and use of family name. Social aid officer may render opinion before court.

Divorce by mutual consent has been reintroduced in 1968. Spouses may petition divorce by mutual consent express their serious and irreconcilable intent before court. Court does not investigate motives for divorce and parties do not indicate reasons for divorce. Spouses must agree and submit to court settlement accord covering, inter alia, exercise of parental rights, personal relations, including property rights, support of children, use of family home, alimony between spouses as well as family name. When settlement accord is incomplete and interests of children are not well protected, court returns preliminary accord to spouses in order to be amended and filed again within indicated period. (Art. 51 FC). When spouses do not fulfill requirements within this indicated period, court dismisses petition.

Proceedings.

Governed by special section in Civil Procedure Code. Proceedings are not public. Spouses must appear in person for first session. When petitioner fails to appear without serious excuse, court must terminate proceedings. Failure of defendant to appear is not considered obstacle for court to decide on petition for divorce. However, court may always decide that defendant appear in person. Court must conduct hearings concerning causes for filing petition for divorce. Hearings include oral explanations of parties. Court must explain negative consequences that divorce may bring to spouses, to their children and to society and must ask them to reconcile. Court may also decide on conducting second hearing with aim to reconcile parties. Reconciliation proceedings may not be conducted when there exist serious difficulty or impediment, e.g. absence, lack of civil capacity etc. Petitioner must state in petition and before end of oral proceedings all causes for deep and irretrievable breakdown of marriage. Upon demand by parties, court may decide on preliminary measures concerning alimony, use of family home, care and support for children. Petition for divorce cannot be filed by spouse whose wife is pregnant or whose child is under 12 months without his wife's consent. All family actions may be consolidated and united by plaintiff as well as by defendant.

Costs of judicial proceedings must be borne by party at fault for breakdown of marriage or by party that did not act in good faith. When both parties are liable for breakdown, costs are borne by party which has incurred them.

When spouses file petition for divorce by mutual consent (“razvod po vzaimno suglasie”), they must appear in person and must express explicitly before judge their will to be divorced. When one spouse does not appear without serious excuse, court proceedings are terminated. Court grants divorce and approves settlement accord. Court judgment granting divorce by mutual consent is not subject to appeal.

Name.

Spouse may return to surname or family name which spouse had before marriage. (Art. 53 FC).

Remarriage.

No special provisions and prohibitions for remarriage upon entry into force of judgment for divorce.

Parental Rights.

Court must always decide issues: which spouse will exercise parental rights and custody over common child, personal relations between children and other parent, alimony. Children above ten participate in court proceedings and state their opinion before court. Social Aid Officer and third parties also state their opinion. If required by circumstances and in child's interest, and upon child's consent, court may order parental authority to vest with grandparents, relatives, accepting family or specialized institution.

Family Home.

Court orders which spouse will have right to use family home, which cannot be used by both spouses. Courts takes into consideration child's interest and spouses lodging needs. Court always decides on issue of right to use family home when there is child under 18. When there is child under 18 and family home is owned by one of spouses, court may order that home is used by other spouse, who exercises parental rights, for period while that spouse exercises these rights. When there is child under 18 and family home is owned by close persons to one of spouses, court may order that home is used by other spouse, who exercises parental rights, for up to year. Right to use family home is terminated when his/her lodging need no longer exists and when he/she enters into another marriage. (Art. 56 FC). When spouses are co-owners or joint users of family home, court takes into account interest of child under 18, their state of health and other circumstances. Upon entry into force of court decision that grants right to use of family home to spouse, latter must pay rent to other spouse. Lease may be registered in real property register. Amount of rent may be determined by court at request of one of parties. (Art. 57 FC).

Revocation of Gifts, Wills and Intestate Succession.

Upon divorce spouses lose right to be successors to each other. Gifts of considerable value made in connection or during marriage may be revoked unless revocation is contrary to morals.

Divorce may be demanded only by spouses. However, heirs may step in and continue divorce proceedings that have been started by deceased spouse in order that fault of surviving spouse be determined.

Antenuptial and Postnuptial Contracts.

In 2009 they were recognized.

Separation Agreements.

Private Agreements between parties without legal proceedings are not recognized.

14.06 DOMESTIC VIOLENCE:

Law on Protection Against Domestic Violence (“Zakon za zashtita sreshtu domashno nasilie”) entered into force in 2005. Law provides for application to designate court for emergency protection order to protect victims of domestic violence. Normally this court is regional court where pretended victim lives.

14.07 GUARDIAN AND WARD:

Bulgarian law distinguished between guardianship, tutelage (“nastoinichestvo”) and trusteeship (“popechitelstvo”). Guardianship is established over infants (“maloletni”) under 14 years of age, whose parents are unknown, dead, or whose parental rights were terminated. Guardianship is established over persons under full disability, i.e., lunatics etc. Trusteeship is established over minors above 14 years, but under 18 years of age, whose parents are unknown, dead or whose parental rights were terminated as well as over person under limited disability.

Guardian, deputy guardian and two advisors are designated and chosen among relatives of minor or infant by officer of guardianship. Officer of guardianship is municipality mayor or appointed by him/her officer. Guardianship council is composed of guardian, deputy guardian and two advisors. All actions of mayor or appointed by him/her officer are subject to appeal before regional court by interested persons or by public prosecutor.

Eligibility and Competency.

Office of Guardian is honorary. Guardians and members of guardianship council must be natural persons in full capacity, capable of exercising parental rights. They must not be sentenced for major intentional crimes.

Duties.

Guardian takes care of minor or infant, administers his/her property with due care and in his/her interest and represents him/her before third persons. Guardian is bound to deposit money in bank account bearing name of infant. (Art. 165 FC). He/she may alienate real and movable property, offer property as security or draw money from bank accounts of infant with permission of regional court of their residence. Opinion of guardianship council is also needed. (Art. 118 FC).

Infant under guardianship must live with his/her guardian, unless important reasons do not require otherwise. (Art. 163 FC).

Guardian is bound to render account of his/her administration before guardianship council every year, upon release of his/her duties, or upon request made by guardianship officer. Upon demand trustee must render account of his/her administration before trusteeship council.

Under Bulgarian law director of orphanage performs duties of guardian of minor with unknown parents.

Under Bulgarian law, spouse in full capacity is guardian of spouse under full disability or trustee of spouse under limited disability. (Art. 173). If there is no spouse, parental rights and duties are performed by his/her parents.

Civil Procedure Code contains provisions on commencing court proceedings for setting person under full or limited disability, which may be initiated with written petition by spouse, close relatives, public prosecutor and everybody with legal interest.

Register of Guardians.—It is maintained by mayor at permanent home of person under guardianship or trusteeship.

14.08 HUSBAND AND WIFE:

New Family Code (“Semeen kodeks”) of 2009 contains provisions as to relations between spouses. (Arts. 13-43). Code states that husband and wife have equal rights and obligations. Their relationship and union is based on mutual respect, joint care for family and understanding. Each spouse is free to choose his or her professional activity. Spouses are obliged through common effort and according to their means, income and property to take care of family and to take part in upbringing and education of children. Spouses must have common residence unless there are important reasons that force them to live separately.

Disability of Married Women.

All disabilities removed.

Bulgarian law provides three regimes of property rights between spouses: separation of property, community of property and matrimonial agreements. Bulgaria is not signatory to 1978 Hague Convention on Law Applicable to Matrimonial Regimes.

Separation of Property.

Each spouse retains and administers his or her property. (Arts. 33-36 FC).

Each spouse retains ownership of property and bank deposits owned at time of marriage or acquired during marriage either by inheritance or gift as well as other personal property such as clothing, small objects of personal use and objects that serve him/her to exercise his/her occupation. (Arts. 22 FC). Royalties, lottery tickets, securities, insurance payments, life insurance policies, pensions, wages, intellectual property rights are likely to be considered personal property, while prizes are likely to be considered common property. Items are considered personal property if acquired by sole merchant during marriage and serve his/her commercial activity. Items which are acquired during marriage using personal property are also considered personal property. (Art. 23 FC). Spouse cannot dispose of matrimonial home, even if it is his/her property, without consent of other spouse. Court may authorize such disposal only if it does not cause damage to children and family.

Community of Property.

All property and property rights over movables or immovables and bank deposits acquired by spouses during their marriage as result of common effort and contribution belong to both spouses. Property acquired either in name of or on behalf of one spouse is considered common property. Investments in labour or in other means, care for children and household work are to be regarded as common contribution. Common contribution is supposed unless proved otherwise by party. (Art. 21 FC). Common property may be managed by any one of spouses but neither spouse can dispose of his/her share that he/she would receive upon dissolution of common property. All acts of transfer of title of immovables and movables which are under regime of community property require consent of both spouses.

Community of property is rendered inapplicable by: death of either spouse; divorce or annulment of marriage; judicial separation of property, if important reasons exist for this kind of separation. Community of property may be terminated during marriage, if spouses conclude marriage contract or choose regime of separation of property. (See Art. 27 FC). Upon dissolution of community of property, spouses have equal shares. In case of divorce, court may allocate larger share of common property to spouse who will educate and bring up children who are under age of majority. In case of divorce, court may allocate larger share of common property to spouse whose contribution has been in considerable degree greater than other spouse's contribution. (Arts. 28-29 FC).

Civil Procedure Code contains rules on execution against movables and immovables under regime of community property, and how spouse who is not in debt could protect himself/herself or may become owner of movable and immovable object.

Matrimonial Agreements.

Agreements must be executed before notary public and must be certified for their content and spouses' signatures. (Arts. 37-43 FC). Special electronic register is established with Agency for Insciptions. Register is open to public inspection and may be consulted upon payment of fee. Matrimonial agreements regulate only property issues between spouses and include provisions for division of property and spousal support in event of divorce. Matrimonial agreements are not allowed to regulate issues relating to custody or access to children. Agreement enters into force at time of marriage, if it was concluded before it. Marriage agreement which transfers title to real estate must be inscribed into Real Estate Register.

Agreement is terminated: by mutual consent of spouses; upon demand of one spouse, if agreement seriously endagers his/her interest, children under age of majority and family; in case of termination of marriage, save for clauses which regulate end of marriage. Marriage agreement may also be terminated in court proceedings, as prescribed by Law on Obligations and Contracts, if this is not contrary to morals and law.

Cohabitation Agreements.

No legal effect. No statutory provisions for property arrangements between unmarried couples.

Actions.

Spouse may sue or be sued. Joinder of other spouse not necessary. Spouse may sue other spouse in contract or in tort.

Agency.

One spouse may act as agent or attorney in fact for other.

Conveyance or Encumbrance of Property.

No necessity of joinder of one spouse in deed and mortgage of other.

See topic 14.10 Marriage.

14.09 INFANTS:

Name of Bulgarian citizens, as it appears in his/her birth certificate, identity card and passport, consists of three parts: personal name, father's name (“bashtino ime”) and surname or family name (“familno ime”). Personal name is usually of one part. There is no custom, although there currently exists possibility to include middle personal names. Personal name is chosen by his/her parents. Civil status administrator at local municipality decides on name when parents have not reached consensus. In certain cases administrator may refuse registration of personal name chosen by parents. Under current provisions of Law of Citizens' Registration father's name (“bashtino ime”) and surname (“familno ime”) in child's name usually bear suffix -ov or -ev for males and -ova, -eva for females, unless family, ethnic or religious traditions of parents provide otherwise. Child who is born in wedlock or out of wedlock but recognized by his/her father takes his/her father's surname, which may be personal name of grandfather from his/her father line or father's family name. Child born out of wedlock and not recognized by his/her father takes his/her mother's name as his/her father's name and his/her mother's surname. Grandfather from maternal line may agree to give his personal name as father's name of child. (See Law on Citizens' Registration of 1999, as am'd). Person's name may be changed when important reasons exist for such request. Petition ought to be filed with regional court, and in certain cases with administrative authorities. Law contains provisions on possibility and proceedings how persons whose names were changed by force may change their name.

Legal Capacity of Children.

Persons under 14 year of age are called infants (“maloletni”). Persons under 18 and above 14 are called minors (“nepulnoletni”). Minors perform legal acts upon prior authorization of their parents or guardians. Gifts, loans, waiver of rights, giving security and guarantees by minors are void. However, minors may perform legal acts to meet his/her everyday needs or dispose of property acquired by them through work. (See Law on Persons and Family of 1949 [“Zakon za licata i semeistvoto”].) Age of majority (“pulnoletie”) is 18 for both sexes. Age of majority is 18 to marry, execute will, vote, enter into contract. Upon marriage, persons under 18 obtain full emancipation and may enter into any contract, save contracts concerning real property, which require permission of regional court. Minimum age at which children may be charged with criminal offence is 14. Children below 14 are subject to special juvenile legal proceedings and educational measures under Law on Struggle Against Antisocial Behaviour of Infants and Minors (``Zakon za protivoobshtestveni proiavi na maloletni I nepulnoletni'') of 1959, as amended.

Father and mother exercise their rights and duties together and separately. In case of dispute, regional court decides matter upon hearing both parents and, if necessary, child. (Art. 123 FC). Children have obligation to respect and to assist their parents. In case of dispute between child and parent, child may ask assistance from Social Aid Officer, and if child is above 14 and issue is of importance, case may be decided in court. (Art. 124 [4]). Children below 18 live together with their parents unless important reasons exist. If parents cannot reach agreement how to exercise parental rights and about child's home, court at present address of child decides. (Art. 127 FC). Children above 18 are required to take care of their parents, who have reached old age, are disabled or are sick. (Art. 124[5] FC). Each parent may represent his/her infant child and give authorization for legal acts of minors. Parents may perform acts of alienation of property belonging to minors only upon prior permission of regional court and when there is need and obvious benefit for children. (Arts. 120-130 FC). Parents must maintain their children until they reach age of majority. Parent or parents may be restrained and deprived of parental rights when his/her behaviour endangers education, person and property belonging to child. Claim may be brought by public prosecutor or by other parent. Lay assessors must participate in proceedings. See also category 5 Civil Actions and Procedure, topic 5.05 Damages.

Rights of Child.

Under Law on Protection of Child ("Zakon za zashtita na deteto") of 2000, as amended, rights of child are explicitly stated and include protection against violence, right of expression, right to access information and right to receive counselling. Child has right to personal contact with his/her grandparents. (Art. 128 FC). Children under 14 form their religious beliefs under guidance of their parents or guardians. Children between 14 and 18 form their religious beliefs with consent of their parents. Child may file petition/claim with assistance of relevant authorities under Law before regional court. Child above ten has right and must be heard in administrative and judicial proceedings concerning his/her rights and interests. All facts and other evidence obtained in administrative and court proceedings cannot be made public without consent of parents, and if child is above ten—without his/her consent. Law lists measures for protection of child, including placing of child out of his/her family in so called hosting family. State Agency on Protection of Child (http://www.stopech.sacp.government.bg/) and National Council on Protection of Child implement governmental policy in area.

Treaties.—Bulgaria is party to Hague Convention on Civil Aspects of International Abduction of Children. Petition is filed with Sofia City Court. Proceedings are open to public. Participants include interested parties, public prosecutor and Minister of Justice. Court may decide on provisional measures but not decide issue who will exercise parental rights. Sofia City Court decision is subject to appeal before Sofia Court of Appeal. Bulgaria is party to 1996 Hague Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Cooperation in Respect of Parental Responsibility and Measures for Protection of Children. Bulgaria has not signed Council of Europe Convention on Exercise of Children Rights of 1996.

Children Born Out of Wedlock. Acknowledgment ("Pripoznavane").

Parent in full legal capacity and above 16 may acknowledge his/her child. He/she must either appear in person and must submit written declaration to civil status official, or must submit declaration with signature certified by notary public to civil status official. (Art. 65 FC). Civil status official must notify acknowledgment to other parent, if he/she is known, and to child, if he/she is above 14. Other parent and child may oppose acknowledgment with written statement to civil status official within three months of notification. (Art. 66 FC). Then, upon receiving notification to that effect parent may file action for establishing descent/parenthood within three months.

Child under age of majority may oppose acknowledgment within one year from date when he/she reached majority or from date when he/she learned about act of acknowledgment. (Art. 66[4] FC). Person who has acknowledged child may demand that acknowledgment be annulled because of mistake, fraud or duress within one year from event.

Establishment of Descent (Affiliation) ("Ustanovjavane na proizhod").

Descent is established with birth certificate, with legal presumption, i.e. mother's spouse is presumed child's father, when child was born during marriage or within 300 days from date of termination of marriage, or with acknowledgment of paternity/maternity. Action for establishment of certain descent cannot be brought and acknowledgment cannot be made before existing descent is not challenged. Child born out of wedlock may file action for establishment of descent from mother and from father, e.g. DNA test. Action for establishment of descent from father may be brought within one year from date of reaching majority by child. (Art. 62[4] FC). Spouse of mother may challenge descent within one year from being notified. Mother may contest fatherhood within one year from birth. See Art. 62 FC.

14.10 MARRIAGE:

Only kind of marriage ("brak") recognized by Bulgarian law is civil marriage between male and female. No restrictions on marriage with foreigner. In addition, spouses may marry thereafter in any kind of religious ceremony. Required age for both sexes to enter into marriage is 18 years. In exceptional circumstances, persons of at least 16 years of age may be allowed to marry. Permission is given by chairman of regional court who takes into consideration opinions of guardian or parents of future spouse. (Art. 6 FC).

Obstacles to Marriage.

(1) Relative (Impendimenta Relativa).

Marriage is prohibited between all ascendants and descendants in direct line; in collateral line—between brother and sister, aunt and nephew or uncle and niece, and between first cousins. Marriage is also prohibited between full and half blood relatives in above mentioned degrees of affinity and between persons where adoption has created direct line affinity or affinity of brothers and sisters. Under present law no explicit restriction for marriage with ex-spouse sister, ex-spouse brother, ex-spouse mother or father.

(2) Absolute (Impendimenta Absoluta).

Existence of another marriage; lack of age of majority; fully incapacitated persons or mental illness that constitutes full incapacitation; illness that endangers health and life of other spouse or to future generations, e.g. AIDS, tuberculosis, or venereal disease etc. Nevertheless, spouses may consent to marry when they are fully informed of their respective state of health.

Preparatory Procedure.—Parties must submit medical certificates and declaration that there exist no obstacles to marriage to local municipality. Spouses are free to choose municipality where marriage is to be celebrated.

Medical Examinations.—Required.

Waiting period.—No statutory provisions.

Ceremony.—It is performed by civil status official at place designated by mayor, unless they prove that it is unreasonable for them to go to marriage hall. Official asks spouses whether they are ready to enter into marriage. Upon affirmative answers official issues act for entering into marriage. Act must be signed by official, spouses and two witnesses. Act must contain information concerning elected regime of property rights between spouses. When such regime has not been elected, official must inscribe in act statutory regime of community of property.

Spouse's Family Name.

Spouse may select other spouse's family name as his/her family name, may add other spouse's family name to his/her family name, or keep his/her family name prior to marriage.

Proxy Marriages.

Not authorized.

Marriages by Written Contract.

Not authorized.

Common-law marriage and co-habitation have no legal effect in Bulgaria, although Supreme Court of Cassation ruled that in certain instances common-law spouse may claim damages upon death of his/her partner.

Annulment of Marriage.

Marriage is voidable by one of spouses if other spouse was already married and his/her previous marriage has not been dissolved by divorce or death, or marriage was celebrated despite existence of legal obstacle to marriage. In addition, marriage is subject to annulment, if one spouse was induced to marry through threat to his/her life, health, honor or to life, health and honor of his/her close relatives. Public prosecutor and spouse may demand annulment in first case while threatened spouse in latter one. (Arts. 47-48 FC).

Consequences of annulment are same as in divorce. Children born during voidable marriage are considered as children born in marriage.

Record.—See Category Documents and Records, topic Records, subhead Vital Statistics.

Antenuptial and Postnuptial Contracts.—See topic Husband and Wife.

15 FOREIGN TRADE AND COMMERCE

—Scope —

Bulgaria joined World Trade Organization (WTO) in 1996. Bulgaria is EU member and EU regulations are directly applicable. Customs tariff is based on Brussels nomenclature.

15.01 AGRICULTURE:

Main statutes that govern matter include, inter alia; Law on Preservation of Corn and Trade in Corn (“Zakon za suhranenie i turgovijata sus zurno”) of 1998, as amended; Law on Sowing-Seeds and Seedlings (“Zakon za posevnija o posaduchnija material”) of 2003, as amended; Law on Bee-Keeping (“Zakon za pchelarstvoto”) of 2003, as amended; Law on National Center on Agricultural Sciences (“Zakon za Natsionalnija centur za agrarni nauki”) of 2003, as amended; Law on Associations for Watering (“Zakon za sdruzhenijata za napojavane”) of 2001, as amended; Law on Stock-Breeding (“Zakon za zhivotnovudstvoto”) of 2000; Law on Fodder (“Zakon za furazhite”) of 1999, as amended; Law on Plants' Protection (“Zakon za zashtita na rastenijata”), as amended; Law on Veterinary Activity (“Zakon za veterinarno meditzinskata dejnost”) of 2005; Law on Registration and Control of Agricultural and Forest Machinery (“Zakon za registratcija i control na zemedelskata i gorskata tehnika”) of 1998, as amended; Law on Census of Agricultural Farms in Bulgaria (“Zakon za prebrojavane na zemedelskite stopanstva v Bulgaria") of 2003, as amended; Law on Tobacco and Tobacco Products ("Zakon za tjutjuna I tjutjunevite izdelija") of 2001, as amended; Law on Rendering Support to Agricultural Producers ("Zakon za podpomagane na selskostopanskite proizvoditeli") of 1998, as amended; Law on Surplus Reserves of Agricultural and Sugar Products (``Zakon za svruh zapasite ot selskostopanski I zaharni producktl") of 2006, as amended.

Special Decree of 2003 issued by Minister of Education regulates requirements for acquiring professional qualification of farmer. Under Bulgarian law farmers who are physical persons are not considered merchants.

Subsidies.

State Fund "Agriculture" was set up as juridical person to provide assistance to duly registered agricultural producers with public register at Ministry of Agriculture and Forests. Fund performs functions of SAPARD Agency. Board of Governors consist of nine members and is chaired by Minister of Agriculture. One deputy Minister of Economy, one deputy Minister of Social Policy, one deputy Minister of Finance and one deputy Minister of Environment and Waters are also members of Fund. Fund grants subsidies, including payment of interest on agricultural producers' loans. It also offers credit lines and guarantees, including personal guarantees. It also intervenes on markets for agricultural produce and grants export subsidies. Total amount of all subsidies is at least 50% of annual budget transfers to Fund. Public auctions are held for awarding export subsidies to traders. Export licenses are granted to exporters.

Corn.

Under Law on Preservation and Trade in Corn, National Agency on Corn and Fodder was established as specialized administrative agency to Minister of Corn and Forests. Its functions include: licensing of public warehouses for corn; registers corn warehouses; controls licensed public warehouses for corn and registered corn warehouses; registers and controls traders in corn; issues certificates for import and export of corn and corn products; checks quality and quantity of corn when state intervenes on market. Under law corn is defined as wheat, maize, barley, rye, oats, sunflower and rice. Provisions of law define what is considered strategic reserve of corn, which reserve is managed by State Agency "State Reserves and Military Time Stock Piles". Law regulates public warehouses of corn, which in general are limited liability companies or joint-stock companies with task preservation of corn and issuance of warehouse receipts. Minister of Agriculture issues licenses for public warehouse in corn which are registered as traders under Law on Commerce. Minimum capital for public warehouse for corn is 100,000 leva. Public warehouse ought to have minimum volume of 1,500 tons. Public warehouse ought to deposit or offer irrevocable bank guarantee of ten leva per ton in favour of Minister of Agriculture and Forests. Deposited corn ought to be insured. Law contains also provisions on corn traders, who are juridical or natural persons, registered as merchants under Law on Commerce. Corn traders ought to be registered with Minister of Agriculture and Forests too. Corn traders are obliged annually to renew their registration with Ministry.

Sugar.

State Fund Agriculture decides on annual quotas for sugar and isoglucose production. Quotas are allocated among registered producers. Producers who produce quantities exceeding allocated quotas are obliged to export excess quantities.

Stock-Breeding.

Law on Stock-Breeding regulates organization and management of stock-breeding, selection and reproduction as well as quality control and trade with animals. Minister of Agricultural implements state policy in this area while Executive Agency on Selection in Stock-Breeding implements state policy in selection and reproduction of cattle. Under law stock-breeding associations are not-for-profit associations. Places for breeding of cattle and poultry, targeted for sale, ought to be registered with public register, which is established and kept at Provincial Directorates "Agriculture and Forests" at Ministry of Agriculture. Stock-breeding farms may be only merchants which are juridical persons.

Domestic animals must be identified and registered; earmarks, electronic transponders and passports are used. Special rules, approved by European Commission, apply identification of bulls used for bull-fightings. National Veterinary Service is authority which maintains computer database of domestic animals, their owners and registered farms.

Veterinary Practitioners.

Under Law on Veterinary Activity, foreign citizens may practice as veterinary doctors, when: (1) They have diploma from state, which has signed treaty for mutual recognition of educational degrees with Bulgaria, and this diploma has been duly legalized in Bulgaria; (2) have permit for permanent stay in Bulgaria; (3) they were successful in passing examination in accredited Bulgarian institution in accordance with adopted curriculum and plan. Special provisions apply to EU citizens. Bulgarian Veterinary Union (http://www.bvsbg.com/) was set up under Law on Corporate Organization of Veterinarians (``Zakon za suslovnata organizatsia na veterinarite'') of 2007, as amended.

EU Common Agricultural Policy.

State Fund Agriculture (http://www.dfz.bg/) has been designated as Payment Agency for implementing EU Common Agricultural and Fisheries Policies. Law on Application of Common Organization of Markets for Agricultural Products of European Union of 2006, as amended, implements relevant EU Regulations.

Treaties.—2007 Agreement on Tropical Timber. In 2007, Bulgarian Parliament ratified 2001 Cacao Agreement and 2001 International Coffee Agreement. Bulgaria is not party to International Cotton Advisory Committee. As EU member, Bulgaria is member of International Sugar Organization and International Grains Council.

15.02 CONCESSIONS:

New Law on Concessions ("Zakon za kontsesiite") of 2006 entered into force in May 2006. Concessions is defined as right to exploitation over items of public interest ceded to merchant, who has obligation to construct or/and maintain item at his/her risk. (Art. 2 LConcessions). Concessions are of following types: concession for construction, concession for service, concession for exploitation of natural resources. (Art. 2[3] LConcessions). Concessions for exploitation of minerals is granted following procedure as set up in Law on Underground Treasures ("Zakon za podzemnite bogatstva"). Concessions may be granted for term not exceeding 35 years. Under present law, there is no possibility for renewal of concessions. Granting of concessions includes: preparatory acts; procedure, which may be open procedure, limited procedure or competitive dialogue, for determination of concession holder; and conclusion of concession contract.

15.03 CUSTOMS:

See topic 15.07 Foreign Trade Regulation.

15.04 EXCHANGE CONTROL:

In general, profits, interests, dividends can be repatriated without limitations.

Foreign citizens may open bank accounts in Bulgarian or in foreign currency. Foreign currency may be purchased by Bulgarian bank for transfer abroad. All taxes have to be paid and one of following conditions must be satisfied: profit must be earned in leva from investment; income must be from sale or liquidation of investment; payments must be in compensation for expropriated property; amount of Bulgarian money received from execution on claim in foreign currency secured by pledge or mortgage.

15.05 FOREIGN EXCHANGE:

Law on Currency ("Valuten zakon") of 1999, as amended. All transactions and payments between residents and nonresidents are generally permitted unless subject in certain cases to prior approval or registration. Residents are defined as all physical persons who have their residence in Bulgaria or who possess permit for temporary stay for more than six months in Bulgaria. Residents are also juridical persons that are domiciled in Bulgaria. Branches, local offices of foreign companies are considered residents for purposes of Law.

Transactions between residents and nonresidents are subject to prior registration with Bulgarian National Bank if they involve: (1) securities traded on currency market, if issued by nonresidents; (2) securities traded on capital market, if issued by nonresidents; (3) shares of nonresident companies; (4) financial credits between residents and nonresidents; (5) opening of bank accounts by residents in nonresident banks; (6) granting guarantees by residents to secure transactions between nonresidents or between residents and nonresidents.

Transactions and transfers abroad exceeding sum of 5,000 leva between residents and nonresidents must be declared for balance of payments purposes. Moreover, all transfers and remittances abroad must be executed only through commercial banks upon declaring reason for transfer.

Resident and nonresident physical persons may import and export unlimited amounts of Bulgarian and foreign currency in cash and must submit to rules as: amounts above 8,000 leva which must be declared before customs authorities are defined in ordinance; as far as sums above 25,000 leva or their equivalent in foreign currency, physical persons which are residents and nonresidents must fill in customs declaration stating sum and its origin as well as submit tax certificate that they do not owe any sums to tax authorities. It is prohibited to export or import cash through post, save for packages with declared value (2003 amendments to Law on Currency).

Persons who are not commercial banks and who are involved in mining and transactions with precious stones, gold, silver and platinum must register with Ministry of Finance. Imports and exports of precious stones, gold, silver and platinum must be declared before customs authorities, when they exceed following minimum amounts: 37 grammes of gold and platinum; 60 grammes of gold and platinum jewelry; 300 grammes of silver and silver articles.

Currency control is exercised by Ministry of Finance, Bulgarian National Bank and postal offices. Law contains provisions on liability of persons who do not follow provisions of law or decrees issued by Minister of Finance, Bulgarian National Bank etc.

15.06 FOREIGN INVESTMENT:

Foreign persons may engage in economic activity and acquire shares in companies in same manner as Bulgarian citizens. There is no limit to degree of foreign participation in newly formed or existing companies. Nevertheless, foreign natural person must be permanent resident in order to register as merchant, member of cooperative, partnership or member of unlimited liability in partnership.

Permission (licence) is required, if foreign person or company controlled by foreign persons wants to engage in: production and trade in weapons; engaging in banking and insurance activity; acquisition of real estate in certain geographic areas; exploration, development or extraction of natural resources from territorial sea, continental shelf or exclusive economic zone. Licences are granted by Council of Ministers or by Board of Governors of Bulgarian

National Bank in case of banking activity.

Minister of Economy is authority in charge of governmental policy in area of foreign investments. Invest Bulgaria Agency (http://www.investbg.government.bg/) was established under law. Its task is to assist minister in implementation of policy.

Foreign investors receive preferential treatment when they serve to acquire long term assets with aim to launch new and modernize and expand old production facilities of goods and services which create jobs. Period of return on investment must be up to three years. Following foreign investors are not granted preferences under present law: investments in banks and insurance companies, investment intermediaries, pension and medical care insurance funds and companies, controlling companies and companies with special investment purposes, investors in lotteries and games of chance, investors who have participated in privatization process and have entered into privatization contracts. Foreign Investments are grouped into three classes: (1) Investments above 100 million leva; (2) investments between 50 million and 100 million leva; (3) investments between 10 million and 50 million leva. Investors who have received first and second class certificates are offered personalized administrative service from Agency for Investment which assists them in receiving all necessary licences and permits from state and municipal authorities. First class investors may apply for state subsidies targeted to infrastructural improvements. They may also acquire rights over private state and municipal property without tenders.

Law contains provision for priority of international treaties, if they provide for more favourable conditions for economic activity of foreign persons.

Treaties.

Bulgaria has signed bilateral treaties protecting foreign investments with Albania, Algeria, Argentina, Armenia, Austria, Belarus, Belgium, China, Croatia, Cuba, Cyprus, Czech Republic, Denmark, Egypt, Finland, France, Georgia, Germany, Greece, Hungary, India, Iran, Israel, Italy, Kazakhstan, Korea, Kuwait, Litva, Latvia, Lebanon, Libya, Luxembourg, Malta, Moldova, Mongolia, Morocco, the Netherlands, Nigeria, Pakistan, Poland, Portugal, Qatar, Romania, Russia, Singapore, Slovakia, Slovenia, Spain, Sudan, Sweden, Switzerland, Syria, Thailand, Tunisia, Turkey, Ukraine, United Kingdom, U.S., Uzbekistan, Vietnam, Yugoslavia etc. Agreements provide for national and most favored nation treatment and contain provisions against expropriation or other unreasonable state action by guaranteeing full and effective compensation in hard currencies.

Bulgaria is party to Washington Convention on the Settlement of Investment Disputes between States and Nationals of other States of 1965.

15.07 FOREIGN TRADE REGULATION:

Law on Customs of 1998, as amended ("Zakon za mitnicite") and Council of Ministers implementing regulations set general rules for conducting foreign trade. Provisions and procedures are aligned with EU Customs Code.

National Customs Agency is state agency under Ministry of Finance and is composed of central office and regional customs directorates with regional head offices and number of customs points. National Customs Agency Internet address is: http://www.customs.bg. Law prescribes necessary requirements for customs officers: they must be Bulgarian citizens in full capacity, who have not been sentenced for intentional crime of general character, and who must not enter in any other labour employment contract, except when they act as university lecturers or scientific researchers.

Goods which enter or leave Bulgaria may be assigned to one of three customs destinations: placement under customs regime; admission to free zone; reexportation from Bulgarian territory. Customs regime is either definitive (importation, exportation or trade in goods for personal use) or duty suspensive (transit, bonded warehousing, inward processing, processing under customs control, temporary admission and outward processing).

Safeguards, Antidumping and Counterveiling Duties.

Relevant EU Regulations.

15.08 INVESTMENT PROTECTION:

Law on Foreign Investment provides for protection of foreign investments from expropriation. Expropriation may happen only by law. Law must be motivated and state important national needs that cannot be met otherwise. In case of expropriation, compensation equal to market value of property must be paid beforehand. See topics 15.06 Foreign Investment and 15.04 Exchange Control.

15.09 TOURISM:

Law on Tourism (``Zakon za turisma'') of 2002, as amended. National Tourist Register was set up with Ministry of Economy, Energetics and Tourism. Tour operators and tour agents, hotel and restaurant keepers are subject to registration and follow rules, as stated in Law. Law contains also provisions on organized package tours. Since 1976, Bulgaria has been member of World Tourist Organization. (http://www.unwto.org/).

16 HEALTH

16.01 GENERAL:

Law on Health (“Zakon za zdraveto”) entered into force on Jan. 1, 2005 and regulates social relations related to health care of citizens. Health is defined as state of complete physical, psychic and social welfare.

National Health Care System.

Minister of Health is authority who manages National System of Health Care and oversees number of activities related to health control. Minister submits annual report on state of citizens' health to National Assembly. Higher Medical Council was set up as to provide council to Minister.

State Health Control is realized by chief health inspector, regional inspectorates and National Center on Radiobiology and Radiation Protection.

Opening sites of places with social purpose and requirements to be followed is regulated with ordinance issued by Minister of Health. Requirements to be followed concerning products, goods, activities with relevance to human health as well as maximum levels living environment factors are contained in ordinances of Minister of Health. Special rules are to be followed and laid down for persons working in kindergartens, special institution for children and adults, water supply sites, enterprises producing and trading with food, hair-dressers.

Control of Infectious Diseases.

Rules for health border control are laid down in ordinance issued by Council of Ministers. Minister of Health is authority who decides on urgent anti-epidemic measures on territory of Bulgaria.

Rights of Patients.

Patients have right to choose their medical practitioner and health care institution. Patients rights include getting access to medical file, right to privacy, right to information. Any medical treatment, scientific or other tests without prior written consent of person are prohibited.

Patients have following rights: his/her civil, political, economic, social, cultural and religious rights are to be respected; to receive more than one expert opinion concerning diagnosis, treatment and outcome of illness; protection of personal data related to his/her health; explanation of his/her health condition and treatment in clear and plain language. While placed in hospital, patient has right to be visited by his/her personal medical doctor and doctor upon whose request he/she was hospitalized; to receive and refuse visitors; to be attended by psychoanalyst, lawyer and priest; to receive information about price of every single medical treatment, operation and medication. Patient must give his/her written informed consent in case of any chirurgical intervention, use of general anaesthesia and other methods and thus either exposing life and health of patient to higher risk or lead to temporary change in his/her consciousness. Patient, or his/her appointed guardian, parent, or substitute decision maker on his/her behalf, may refuse to receive medical treatment and must sign medical documentation to that effect. When patient refuses to sign medical documents, fact is certified by signature of medical doctor and witness. When guardian, parent, or substitute decision maker refuse medical aid on behalf of patient, head of hospital may decide on life-saving treatment. (Art. 90 LH). Medical aid may be rendered against patient's will only in cases stipulated by law. (Art. 91 LH). For purposes of law substitute decision maker include parent, guardian or appointed by court close relative. In absence of close relative court appoints representative who works for municipal health service or designated by mayor person to express patient's informed consent. In Bulgaria euthanasia is prohibited. (Art. 97 LH). Law on Rights of Patients has been pending in Parliament.

Medical Treatment in Emergencies.

State organizes and covers all expenses for medical treatment and aid in emergencies targeted to avoid death and grave and irreversible morphological and functional injuries to person's vital systems and organs, to complications in women in child-birth. Health institutions are obliged to perform all necessary medical treatment to patient in state of emergency independent of his/her citizenship, address or medical care insurance status. (Art. 100[2] LH).

Medical Expertise (Arts. 101-113 LH).—It is performed in order to establish degree of decreased working capacity and to confirm occupational disease. Council of Ministers issues ordinances laying down rules related to medical expertise. National Expert Medical Commission, territorial expert medical commissions, and medical counselling commissions are authorities who decide on temporary loss of working capacity and permanent loss of working capacity. Decisions of expert medical commissions are subject to appeal before court following rules in Law on Administrative Procedure.

Protection of Children Health.

Within framework of approved educational plans in schools children must receive instruction on personal hygiene, healthy nutrition, healthy environment and way of life, protection against infectious diseases, sexual behaviour, protection against sexually transmitted diseases and AIDS and protection against undesired pregnancies, risks to health from smoking tobacco, from drinking of alcohol and from use of narcotic substances, first aid to injured persons.

Non-conventional Methods Having Impact on Individual Health (Arts. 166-173).—Law lists all these methods, which are not prohibited, including homoeopathy, dietetics and medical starvation, acupuncture, auricular methods or methods which observe human pulse or iris, use of non-medical drugs of organic origin etc.

Reproductive Health.

Law defines reproductive health as health related to person's ability to generate offspring.

Genetic Health and Genetic Research.

Protection of genetic health is secured by activities aimed at: prophylactic and diagnostic research for classification of genetic diseases; dispensarization of persons with higher risk for development of genetic diseases, treatment of genetic diseases, identification of parent and genetic indications. (Arts. 137-144).

Assisted Reproduction.

It is performed upon informed consent of persons who desire offspring and upon thorough medical examinations. (Arts. 129-136 LH).

Psychic Health.

State, municipalities and non-governmental organization promote protection of psychic health of following groups with higher risk: children, students, adults in advanced age, persons resident in social homes, persons serving military service, detained persons or persons serving prison sentence. Law defines persons with psychic disorder who need special medical care, including those suffering from psychoses or serious personal disorder, mentally retarded persons and persons suffering from dementia.

Persons whose mental disorders have been proved and whose condition directly endangers their health and life or lives and health of third persons may be subject to temporary physical restraint measures. Latter measures may be ordered by medical doctor for period no longer than six hours. Person must be under constant medical observation. Rules to be followed are contained in joint ordinance issued by Minister of Health and Minister of Justice.

Medical Education.

Law states that master, bachelor degrees in professional areas of: medicine, stomatology, pharmacy and public health are received in approved and accredited faculties and colleges under Law on Higher Education. Upon graduation all medical doctors and stomatologists take Hippocratic Oath, whose text is adopted by Higher Medical Council. European Union Member State citizens shall be provided to take suitable in form and content Hippocratic Oath. Upon Minister of Health's proposal Council of Ministers adopts uniform state requirements for higher education in regulated professions of medicine, stomatology, pharmacy and public health. Post Diploma and continued education is right to all magisters, doctors, bachelors and specialists working within National Health Care Network and is carried out in approved institutions. Professional Associations of Medical Doctors and Stomatologists enter into contracts for continued education of medical doctors and stomatologists with approved institutions. Minister of Health annually determines seats for post-diploma education and specialties, which are subsidized by State in accordance with priorities of National Health Strategy. Minister of Health issued ordinances for professional competency of persons working in National Health Care System and who have been educated with degrees in psychology, biology, biochemistry, microbiology, molecular biology, kinaesthesia-therapy and rehabilitation.

16.02 ALCOHOL AND TOBACCO:

Alcohol.

It is prohibited to sell alcohol: to young people under 18 as well as to persons who are not in sober condition; in schools, educational and health institutions as well as in certain shops; in youth clubs, during sports games and entertainments. Law also prohibits direct advertising of all types of alcoholic beverages. Indirect advertising of alcohol must not be targeted to persons under 18; must not be associated with sports achievements or sports records or with driving motor vehicle; must not present soberness and moderate use of alcohol in negative light. Broadcasting of indirect advertisements of spirituous beverages is prohibited before 10:00 p.m.

(See Arts. 55 and 58 of Law on Health [“Zakon za zdraveto”] of 2004.) Under Law on Wine and Spirituous Drinks of 1999, as amended, producers and traders with alcoholic drinks are subject to registration with National Chambers of Vine Growers and Wine Producers or with National Chamber of Spirituous Drinks Producers (previously they were subject to licencing). Producers of spirituous drinks can only be merchants and who must also be registered with Ministry of Economy, Energetics and Tourism. Register is open to public for inspection. Under law physical persons who are vine growers may process up to 1,000 kg of grapes for production of spirituous liquors or of wine which can be consumed only by their families. Law prescribes minimum requirements for quality of wines and spirituous liquors which are offered on market, i.e. maximum content of sulphur dioxide etc.

Tobacco.

It is prohibited to smoke in public places and offices, including public transport, except for certain designated rooms for smokers. Law on Tobacco and Tobacco Products of 1993, as amended, governs production, industrial processing and sale of tobacco and tobacco products in Bulgaria. Tobacco growers are subject to registration. Traders of raw tobacco are persons who perform industrial processing of tobacco and who are duly licenced by Council of Ministers. Council of Ministers sets up minimum purchase prices of tobacco. Producers of tobacco products are subject to licencing. Licences are issued by Council of Ministers. Persons that are engaged in cigarettes and tobacco products trade must be licenced. Small retailers are also subject to licencing by mayor of municipality. It is prohibited to sell cigarettes and tobacco products to persons under 18, in kindergartens and schools. There exists general prohibition to advertise tobacco and tobacco products. Law establishes maximum contents of tar, nicotine and carbon oxide in cigarettes and prescribes their gradual reduction in line with EU standards.

16.03 COSMETICS:

2005 Ministry of Health Ordinance lays down requirements for production, packaging, labelling and advertising requirements for cosmetics offered on Bulgarian market. Labels must contain readable information about seat of governance of producer and its representative or seat of governance of importer and producer of imported products, net quantity, expiry dates, list of ingredients, special instructions for use etc.

Upon duly issued permission by chief health inspector producers and importers may not indicate one or more of cosmetic product's ingredients with aim of preserving commercial secret for period of five years.

Producers and importers of new cosmetic product must file notification with regional inspectorate on Protection and Control of Public Health.

16.04 DISABLED PERSONS:

Law on Integration of Persons with Disabilities (“Zakon za integratzija na hora s uvrezhdanija”) of 2004, as amended. Law defines disability as loss or disruption in anatomy, physiology or psyche of person. Agency on Persons with Disabilities (http://ahu.mls.government.bg/) implements state policy in field. Agency keeps database of persons with permanent disabilities. Integration includes rehabilitation of persons with disabilities, their education, professional instruction, and employment. Direct and indirect discrimination of persons with disabilities is prohibited.

Employers who hire persons with disabilities enjoy certain social security and other preferences. Council of Ministers decides on goods and services, whose production can be ordered to specialized enterprises and cooperatives of persons with disabilities under Law on Government Procurement.

State and municipal authorities must create accessible life and architectural environment to persons with disabilities, i.e. in public transport, everyday aids etc.

Persons with disabilities enjoy certain tax exemptions and deductions, have right to monthly supplements for transport services, information and telecommunication services, education, balneotherapy, medicines etc. They may also receive assistance for purchase of specialized motor vehicle, which serves disabled persons needs, reconstruction of their home, etc.

War Invalids.

Law on War Invalids and War Victims ("Zakon za voenno invalididite I voennopostradalite") of 2005. War invalids are defined as Bulgarian citizens with permanent diminished working capacity caused by accident or illness while on occasion of serving military service. War victims are surviving spouse, children and parents of Bulgarian citizen who died while serving military service, or surviving spouse and children of deceased war invalids, or spouse and children of war invalids. Minister of Defense keeps register of war invalids and war victims. Law sets forth rights of war invalids and war victims including allowances for medicines, use of public transport and telephone services. Associations of war invalids and war victims enjoy tax preferences.

16.05 FOOD AND DRUG REGULATION:

Food.

See Law on Foods ("Zakon za hranite") of 1999, as amended. Food is defined as substance or product which is object of human consumption and which may be in raw state, may be processed or semi-processed. Following products are excluded from definition: animal food, live animals, crops before being harvested, medicines, psychotropic substances and precursors, alcoholic drinks, tobacco and tobacco products, cosmetic products, remains and pollutants, unbottled mineral and drinking water. Law and implementing ordinances prescribe requirements for foods offered on Bulgarian market, including maximum amounts of pollutants and additives requirements. Law and implementing ordinances also specify packaging requirements. Details of any nutritional claim, direction for use, expiry date and manufacturer's domicile and address must be stated on labels. Labels and advertising of any food product must not misrepresent nature, qualities or origin of product and must not be misleading. All products must contain labels in Bulgarian. Production and selling of food must be carried out in premises which are registered under law. New food and food ingredient may be launched only upon prior permission issued by Minister of Health. Imports of mineral waters are also subject to licencing. Minister of Health keeps public register of all new foods.

Food producers and traders are liable when they do not follow provisions of laws and are subject to fines. National Council on Food Safety at Council of Ministers is main authority that coordinates and supervises activities related to food safety. Other governmental authorities include state sanitary control agencies and state veterinary control agencies.

Rules for release on market of new foods, new food ingredients and genetically modified foods follow provisions of EU Regulations 258/97 and 1829/2003.

Medicines.

New Law on Medicinal Products ("Zakon za meditzinskite produkti v humannata meditzina") of 2007 regulates use, manufacture, clinical tests, import, export and sale of medicines. Executive Agency issues regulations and licenses. Medicines must be licensed under provisions of Law or under EU Regulation 726/2004. State regulation of prices of medicines in relation to lowest prices in EU. Parallel imports of medicines by licensed merchants, registered in EU or EEA member state.

Pharmacies.

Retail Trade in medicines is carried out by pharmacists, registered as merchants in EU and EEA. They must be present in pharmacies.

Medical Plants.

Law on Medical Plants ("Zakon za lechebnite rastenija") of 2000 regulates herbs preservation and use. Minister of Environment and Waters is authority that oversees public policy in preservation and sustainable use of herbal plants.

16.06 HEALTH CARE:

Vaccinations.

Regulation on Different Types of Vaccination of 2000 by Minister of Health Care approved Bulgarian calendar for compulsory and optional (recommended) vaccinations. Vaccinations against hepatitis B, diphtheria, tetanus, polio, tuberculosis, whooping cough, measles, parotitis are compulsory. They must be performed periodically and are based on strict schedule depending on age of child and person. There exists number of recommended vaccinations for specific persons related to age, occupation, or for those exposed to higher risks of number of viral and bacterial infections. Compulsory vaccinations are free for Bulgarian citizens and for foreigners with permanent residence in Bulgaria.

Maternal and Child Protection, Abortion.

Mothers receive sums at time of birth of their first, second child etc. They also receive monthly sums ("detski nadbavki") for their children who are under 18. (See Law on Family Aids for Children ["Zakon za semeinite pomoshti za detza"] of 2004.)

Abortion is regulated by Ordinance. As rule it can take place within 12 weeks after conception and can only take place in approved medical centers.

Transplants.

Law on Transplants of Organs, Tissues and Cells ("Zakon za transplantacijata na organi, tukani i kletki") was passed by Parliament in Sept. 2003. Under Law, Bulgarian citizens and foreigners with long term or permanent residence in Bulgaria may express their wish in writing that they would like their organs to be removed for transplantation after their death. This informed consent must be given before their general practitioner who must write it in their health booklet. All potential donors are included in National Register of Executive Agency on Transplantation. When deceased have failed to give his/her prior consent, his/her close relatives, i.e. spouse, parent, brother, sister, children in age of majority, may express their consent that deceased organs are used for transplantation. In general spouse or relatives in direct line or in collateral line up to fourth degree may act as inter-vivos donors of organs. Their consent should be given in written form certified by notary public. In exceptional cases, partner who has lived with recipient for more than two years may act as donor. In Bulgaria it is prohibited to advertise buying and selling of organs. Any commercial dealings in human organs and tissue for transplant purposes are considered criminal offence.

Blood Transfusion.

Law on Blood, Blood Donation and Blood Transfusion ("Zakon za kruvta, kruvodarjavaneto i kruvoprelivaneto") of 2003. Blood donation is considered gratuitous and voluntary act of human solidarity and philanthropy. Any commercial transactions in human blood are prohibited except in following cases: when there exists emergency and proven deficit of required blood groups; for productions of vaccines, immunoglobines and serums; for scientific research and for diagnostics. Donors of blood may be persons in full legal capacity between 18 and 65 years of age and who are in good health. It is offence to advertise buying and selling of blood. Ministers of health, of education, of defence, Bulgarian Red Cross are authorities or organizations who may promote and advertise acts of blood donation. National Centre for Hematology and Blood Transfusion keeps register of all blood donors and other relevant information. Informed consent of patient is needed for blood transfusion save for in emergency cases.

16.07 HEALTH PROFESSIONALS:

Medical Doctors.

Under 2004 Law on Health medical doctors must be Bulgarian citizens, who have completed their medical education in officially recognized medical school in Bulgaria or have completed medical education in foreign country and their diplomas have been legalized in Bulgaria. Medical education and medical qualifications acquired in EU Member State are recognized in Bulgaria. Council of Ministers adopts decrees on procedure and rules for recognition of medical professions' diplomas issued in EU Member States. Foreign medical doctor's qualification may also be recognized in Bulgaria either when foreign country and Bulgaria have concluded international treaty for mutual recognition of diplomas and qualifications, or on basis of reciprocity.

Under Law on Professional Associations of Medical Doctors and Stomatologists (“Zakon za suslovnite organizacii na lekarite i stomatolozite”) of 1998 practicing medical doctors are organized in Bulgarian Medical Association (http://www.blsbg.com/), that adopts Code on Professional Ethics for Medical Doctors. List of all practising medical doctors is annually published in Durzhaven Vestnik. Dentists have also adopted Code on Professional Conduct and Ethics.

Medical Doctors' Liability.

Medical doctors must keep secret all facts and information related to health condition of their patients, unless Law stipulates that they must inform some state institutions. Medical doctors and other medical specialists are liable for systemic misconduct, negligent acts, gross errors, immoral acts, abuse of position and may be punished with fines and deprivation of rights to exercise their profession for period of up to two years. In certain grave cases, it is possible to raise criminal liability. Patients may also bring civil suits.

Nurses.

Law on Professional Associations of Nurses, Mid-Wives and Other Health Care Specialists (“Zakon za suslovnite organizatcii na meditzinskite sestri, akusherkite i profilnite meditzinski specialisti”) entered into force in 2005.

Pharmacists:

Under Law on Professional Association of Pharmacists (“Zakon za profesionalnata organizacija na farmatzevtite”) of 2006, pharmacists are united in Bulgarian Pharmaceutical Union. (http://www.bphu.eu/).

16.08 MEDICAL CARE INSURANCE:

Compulsory Medical Care Insurance.

Law on Medical Care Insurance (“Zakon za zdravnoto osigurjavane”) of 1998, as amended. Medical care insurance is defined as activity of collecting medical care insurance contributions and premiums, management of accumulated funds and their spending for medical care activities, services and products as defined in Law, in national medical care framework contract and in voluntary medical care insurance contracts. (Art. 2[1] LMCI). Law distinguishes between compulsory and voluntary medical care insurance. Compulsory medical care insurance provides medical care package, which is guaranteed by budget of special fund named National Medical Care Insurance Savings Bank: http://www.nhif.bg/. Its monopoly is expected to be broken in near future. As of Sept. 2009, there has been more than 1 million persons without compulsory health insurance.

European Health Insurance Card.

It is valid throughout EU for one year.

Voluntary Medical Care Insurance.

In addition persons may insure themselves and receive additional medical care and services which are not covered by compulsory medical care insurance package. Registered joint stock companies are licenced to offer voluntary medical care insurance by Commission on Financial Supervision. Voluntary medical care insurance companies must have minimum subscribed capital of 500,000 leva and must increase their capital to minimum of two million leva within three years from receiving licence. (Art. 93 LMCI). Local or foreign physical or juridical persons who acquire 10% or more of medical care insurance company's stock must report to Vice Chairman/woman of Commission on Financial Supervision within 14 days from date of acquisition. Medical care insurance contracts may be signed by physical or juridical persons and by voluntary medical care insurance company. Contracts must be in written form. Provisions of Law on Commerce apply. Insurance companies must invest their medical care reserves in following assets and in following proportions: treasury bills and securities—without limitations; real estate which has not been mortgaged—up to 10% of amount of medical care insurance reserves; bonds issued and guaranteed by municipalities—up to 5% of their reserves; shares and bonds issued by commercial companies and accepted for trading on stock exchanges—up to 30% of reserves, but not more than 10% of shares and bonds of single company; bank deposits —up to 50% of their reserves, but not more than 25% in single bank; mortgage bonds—up to 25% of their reserves. (Art. 90d LMCI).

17 IMMIGRATION

17.01 ALIENS:

Aliens have same rights and obligations as Bulgarian citizens except for voting rights, holding certain offices, and exercising certain employments. Aliens may sue and be sued as well as be tried in criminal matters.

Refugees.

Law on Asylum and Foreigners ("Zakon za ubezhisteto i chuzdencite") of 2002. Under Law, President is authority who grants asylum to foreigners prosecuted for their beliefs or activities in defense of internationally recognized human rights and liberties. Chairman of State Agency on Refugees (http://www.aref.government.bg/) grants refugee status and humanitarian status under Convention on Status of Refugees of 1967 and other international acts. Law lays down provisions on how application must be filed, and procedure to be followed. It explicitly states reasons for refusal to grant asylum (i.e. person has committed war crimes, grave crimes of non-political character committed outside Bulgarian territory, or there exist serious reason to suppose that person's activity is against aim and principles of United Nations), judicial review before district courts and Supreme Administrative Court. Foreigners that have received status of refugees enjoy same rights and have same obligations as Bulgarian citizens. However, they cannot: participate in elections, be members of political party, hold government or other office for which there exists requirement for Bulgarian citizenship, serve in army. They can also acquire real property rights following rules applicable to foreigners.

17.02 IMMIGRATION:

Visitors may enter Bulgaria with valid passport and Bulgarian visa. Visas can be obtained at Bulgarian embassies and consulates or at border. Visa is defined as permit for entry, residence or transit passing through territory of Bulgaria. Amendments to Law on Foreigners and Ordinance on Conditions and Procedure of Issuance of Visas, Council of Minister's Regulation No. 82 (DV 44 of 2008) aligned Bulgarian rules with relevant EU Regulations. Foreign citizens who are also Bulgarian citizen and hold Bulgarian identity card and passport do not need visas in order to enter into Bulgaria. Visas are of following types: transfer, transit, short-term, group, long-term stay. Under Law on Foreigners ("Zakon za chuzshdentsite") of 1998, as amended, following persons are considered inadmissible, and relevant authorities may refuse them visa or entry into Bulgaria: persons whose activities have endangered national security or interests or there exists information that they act against national security; persons who have damaged reputation or dignity of Bulgarian state and people; persons for whom data exists that they are members of criminal organizations, or are engaged in terrorist activities, persons involved in illegal traffic of persons, smuggling, trading arms, in products with possible dual usage, in narcotics and precursors; persons suffering from infectious disease or lacking vaccination and it may be supposed that their entry will endanger public health; persons unable to support themselves or lacking compulsory insurance coverage for their stay; certain offenders of Bulgarian tax, penal or administrative laws with unclean record; persons previously deported; persons included in data base compiled by Ministry of Foreign Affairs and Ministry of Interior containing list of persons who are considered inadmissible etc. Foreigner who holds double citizenship must declare at port of entry citizenship and relevant passport that he/she will use during his/her stay. Airlines and other transportation companies are obliged to check whether persons wishing to enter Bulgaria hold valid documents and visas. As rule, within 48 hours of entry in Bulgaria, aliens must register with Agencies for Administrative Control on Foreigners and declare address of their abode.

Foreign nationals generally need residence permits to live in Bulgaria. If foreigner intends to work in Bulgaria as employee, granting of residence permit depends on issuance of work permit by Ministry of Labor and Social Policy. In general, foreigners must apply for residence permit at Bulgarian Consulate General in their home country or at Agencies for Administrative Control of Foreigners in Bulgaria.

Residence permits can be granted for following periods: (1) Short term (for up to 90 days); (2) long term (for up to one year); (3) permanent stay (for indefinite period). Permits for long term stay are granted to employees, students, those seeking medical treatment, business representatives or entrepreneurs, spouses of Bulgarian citizens or foreign residents, journalists, free lance professionals, persons who have sufficient funds to support themselves, close family members of foreigners who have received permit for long term stay etc. Selection of permanent residents is determined in accordance with strict rules and permits may be granted to: foreigners of Bulgarian nationality; foreigners married to Bulgarian citizens or permanent residents and upon period of two years residence; unmarried children under 18 of Bulgarian citizens or permanent residents; parents of Bulgarian citizen who provide him/her with legal support; persons who have been legal residents for five consecutive years; persons who have invested in Bulgaria amounts of more than U.S.$500,000 following rules as prescribed by law; certain persons who were born in Bulgaria and who have lost their Bulgarian citizenship and who would like to settle permanently in Bulgaria; persons who have rendered exceptional services to country. Law requires that residents must be physically present in Bulgaria for at least six months every year. Law on Foreigners contains list of administrative measures, including expulsion, ban on entry or leave, deprivation of right of abode in Bulgaria. They are imposed by orders, which are subject to appeal before Minister of Interior and to judicial review.

Residence permits for long term stay are granted to following foreigners: those who conduct business activities in accordance with Law on Foreign Investment; members of management boards of foreign companies registered with Bulgarian Chamber of Commerce, regular students at Bulgarian Universities and schools, those married to Bulgarian citizens, and those going through long term health treatment in Bulgarian hospitals or sanatoria etc. Foreigners must prove that they have sufficient means of support.

EU, EEA and Swiss Citizens.

Law on Entry, Residence and Leave of Republic of Bulgaria of Citizens of EU and Members of their Families ("Zakon za vlizaneto, prebivavaneto i napuskaneto na Republika Bulgaria na grazhdanite na Evropeiskija sujuz i chlenovete na tehnite semejstva") of 2007. They do not need visa or residence permit to enter and stay in Bulgaria for three months. For longer periods, residence permits are granted by police. In near future, Bulgaria is expected to join Schengen borderless zone, which currently consists of 25 European states.

18 INSURANCE

18.01 OVERVIEW:

New Insurance Code ("Kodeks za zastahovaneto") entered into force on Jan. 1, 2006. (http://lex.bg/bg/laws/ldoc/2135514184). Code is divided in seven parts and 28 chapters:

Part 1. General Provisions.

Part 2. Insurance and Re-Insurance: Section 1. Conditions for Performing Activity. Chapter 1: Insurers and Re-Insurers with Seat of Governance in Bulgaria; Chapter 2: Issue and Suspension of Licences of Insurers and Re-Insurers with Seat of Governance in Bulgaria; Chapter 3: Performing of Activity in Third Country by Insurance Company with Seat of Governance in Bulgaria. Performing of Activity in Bulgaria by Insurance Company with Seat of Governance in Third Country; Chapter 4: Performing of Activity in European Union Member State by Insurance Company with Seat of Governance in Republic of Bulgaria. Performing of Activity in Republic of Bulgaria by Insurance Company with Seat of Governance in European Union Member State; Section 2. Requirements Towards Activity of Insurance and Re-Insurance Companies. Chapter 5: Governance, Structure and Organization of Activity, Internal Control; Chapter 6: Financial Requirements; Chapter 7: Revealing Conflict of Interests. Insurance Secret; Chapter 8: Actuary Service. Audit; Chapter 9: Organization of Activity in Settlement of Insurance Claims; Chapter 10: Transfer of Insurance Portfolio; Section 3. Transformation and Termination of Insurers. Chapter 11: Transformation of Insurer; Chapter 12: Liquidation and Bankruptcy.

Part 3. Insurance and Re-Insurance Intermediaries. Chapter 13: General Provisions; Chapter 14: Insurance Broker; Chapter 15: Insurance Agent; Chapter 16: Requirements Towards Activity of Insurance Intermediaries; Chapter 17: Performing Activity by Insurance Broker and Insurance Agent from Republic of Bulgaria in Other European Union Member State. Performing Activity by Insurance Broker and Insurance Agent from Other European Union Member State.

Part 4. Contract of Insurance. Chapter 18: General Part; Chapter 19: Property Insurance; Chapter 20: Civil Liability Insurance; Chapter 21: Life Insurance and Accident Insurance; Chapter 22: Applicable Law For Insurance Contracts Within European Union and European Economic Area.

Part 5. Compulsory Insurance. Chapter 23: General Provisions; Chapter 24: Compulsory Insurance Civil Liability for Motor Vehicles; Chapter 25: Compulsory Accident Insurance for Passengers in Public Transport; Chapter 26: National Office of Bulgarian Insurers and Guarantee Fund.

Part 6. Current Supervision. Compulsory Administrative Measures. Chapter 27: Current Supervision; Chapter 28: Compulsory Administrative Measures.

Part 7. Administrative Penalties. Supplementary Provisions. Transitory and Concluding Provisions.

Export Insurance.

Law on Export Insurance (“Zakon za eksportnoto zastrahovane”) of 1998, as amended, provides general legal framework for insurance and reinsurance of credits, guarantees and financial losses related to production and to export of Bulgarian commodities, services and investment abroad. Law contain definitions of market, commercial and noncommercial risks. Bulgarian Agency on Export Insurance (http://www.baez-bg.com/) was set up as joint-stock company in which state held 95% of its stock.

18.02 INSURANCE COMPANIES:

Regulated by Insurance Code of 2005.

Supervision.

Commission on Financial Supervision.

Insurance Contract.

Regulated by Insurance Code.

Agents, Brokers.

Regulated and licenced under Insurance Code. Brokers must be included in special register kept by Commission on Financial Supervision. Brokers and agents must have professional liability insurance valid throughout European Union and European Economic Area.

Upon Bulgaria's entry into European Union insurance broker and agent, which have been registered in EU Member State, may carry out business in Bulgaria either by way of establishment, or by way of freedom to provide services. Foreign insurance broker and agent must notify relevant authority in foreign state of origin.

Foreign Insurance Companies.

Insurance company with its seat of governance outside European Union needs to have licence issued by Commission on Financial Supervision.

Upon Bulgaria's entry into European Union, insurance company, which was licenced by supervisory authority of EU Member State where it has its seat of governance, may carry out business in Bulgaria either by way (of right) of establishment or by way of freedom to provide services. Insurer must notify its own supervisory authority. Upon this notification insurance company is allowed to establish branch office or to provide its services from its seat of governance in EU Member State.

Licence Requirements.

Licenced by Commission on Financial Supervision upon proposal of Vice-Chairman/woman subject to certain specific requirements.

Taxation.

Governed by Law on Corporate Income Taxation.

Direct Action Against Insurer.

Injured third person may bring action directly against insured, insurer or both.

19 INTELLECTUAL PROPERTY

19.01 COPYRIGHT:

Law on Copyright and Related Rights of 1993, as amended ("Zakon za avtorskoto pravo i srodnite mu prava").

Copyright arises at moment of creation of work. Object of copyright may also be part of work as well as preparatory drawings, plans etc. Copyright applies to following works of literature, science or arts, which are result of creative activity and which have been expressed in whatever way or in whatever objective form: (1) literary works, including works of science and technology, political journalism, computer programmes; (2) musical works; (3) drama, musicals, choreographic, pantomime works; (4) films and audiovisual works; (5) works of fine arts, applied arts, design and folk handicrafts; (6) works of architecture; (7) photographic works and works created in way analogous to photographs; (8) sketches, maps, plans and other which pertain to geography, topography, architecture, museology, urban and rural zoning and planning, and to other parts of science and technology; (9) graphic design of literary works; (10) state topographic maps. Derivative works are also protected, i.e., translations and new editions of existing works and folk works; arrangements of musical works and folk works; periodicals, encyclopedias, anthologies, databases, which include two or more works and materials. (Art. 3 LCRRs). Following works are explicitly excluded from copyright protection: legal statutes, acts and regulations of state agencies, as well as their official translations; ideas and concepts; folklore works; news, facts, data. (Art. 4 LCRRs).

REGISTRATION.

There is no registration requirement or any other formality for commencement or enforcement of copyright.

Organizations for collective management of copyright are subject to registration with Ministry of Culture.

Production of optical discs with audio and video copyrighted material is subject to licensing by Minister of Economy. Reproduction of copyrighted material on optical discs is subject to registration with Ministry of Culture. Minister of Culture also certifies every transaction related to production of optical discs containing audio and video recorded copyrighted material. See Law on Administrative Regulation of Production and Trade in Optical Discs of 2005.

Compulsory Deposit.

Under Law on Compulsory Deposit of Copies of Printed and Other Materials of 2000 certain number of copies of following works are subject to deposit: printed works (books, newspapers, magazines, pamphlets) published by Bulgarian physical and juridical persons; sound recordings whose producers are Bulgarian persons; works in electronic format; dissertations and habilitation works whose authors are Bulgarian citizens; orders of merit, coats-of-arms, produced in Bulgaria and ordered by Bulgarian institutions; Bulgarian banknotes and coins; Bulgarian postal stamps. Printed works in Bulgarian or concerning Bulgaria, when they are imported in quantities showing intent for commercial or other wide circulation in country, and works created and published abroad, when ordered and commissioned by Bulgarian physical and juridical persons, are also subject to legal deposit. National Library is designated as deposit library for printed materials; National History Museum as deposit institution for orders of merit, banknotes and coins; Ministry of Transport and Communication—for stamps; National Film Archives—for films; National Sound Recordings Archive—for sound recordings.

Duration of Copyright.

Protection is granted for author's life and 70 years thereafter. For joint authorship, copyright runs from death of last author who survived. (Art. 27 LCRRs). In case of work published anonymously or under pseudonym, length of copyright protection is 70 years from date of work's initial dissemination to public, and when during this period author becomes known, general rule of Art. 27 applies. Copyright over computer programs and databases lasts 70 years from its first public dissemination; over films or other audiovisual works—70 years after death of last survivor among following persons: director, script-writer, cameraman, authors of dialogue and original soundtrack, over collections of original works—70 years upon their first publications.

Related rights of producers, performing artists, radio and television broadcasting organizations are protected in following manner: sound recording and films—50 years from year of their first publication; sound and television broadcasts and cablecasts—for 50 years from their first transmission; performances of artists—50 years from year following year when performance was recorded; databases—15 years from year following year when database was created.

Moral Rights.

Authors enjoy non-proprietary (moral) rights, including: to decide whether work may be disseminated or published and on time, place and manner of dissemination and publication; to demand recognition of their authorship; to decide whether work may be disseminated anonymously or under pseudonym; to demand that their names or pseudonyms appear each time when their works are used; to demand that integrity of work is preserved and counter every attempt or act to introduce amendments as well as all acts that infringe on their legal interests and dignity; to amend their work unless these changes infringe on rights acquired by third persons; to have access to their work and to cease using work because of change in their beliefs. (Art. 15 LCRRs). Right to demand recognition of authorship and right to demand that their name, pseudonym or other sign appears each time upon dissemination of work are of personal nature and cannot be transferred or alienated by author. (Art. 16 LCRRs). Upon author's death and during period of copyright protection, moral rights are exercised by his/her heirs.

Proprietary Rights.

Authors enjoy also proprietary rights: right to reproduction; dissemination; public presentation; broadcasting; transmission through cable or wireless transmission, including through satellite; public display of work of fine arts or photographs; translation into other languages; modification; realization of architectural project; import or export of copies of work in commercial quantities. (Art. 18 LCRRs). Author has right to receive royalties for specific use of work and for each subsequent use of work. (Art. 19 LCRRs). First sale or other transaction on territory of European Union, which transfers property right over original work, performed by owner of copyright leads to termination of right to dissemination, save right to grant permission for its further rental. (Art. 18a LCRRs). Upon each subsequent sale of original work of fine arts through agent or in public auction, author has right to receive royalty in amount of 5% of sale price, unless parties have not agreed on higher percent. (Art. 20[1] LCRRs). Agent or organizer of sale must inform author within two months about sale and must pay him/her royalties as well as provide information about price which was paid for work.

Law's c. 7 contains specific provisions governing use, public representation or performance, publishing, publishing in periodicals and audiovisual and film production contracts. As rule, assignment of copyright may comprise either whole or part of copyright and can be subject to limitations. It must be in writing and signed by or on behalf of copyright holder.

Law on Copyright expressly defines cases when reproduction of protected works is permissible without requirement for payment of royalties and without permission by author: temporary reproduction of transitory or occasional character, which does not have independent significance and constitute essential part of technical progress; use of citations from disseminated or published works in reviews and critique materials; use of parts of published works within scope necessary for carrying out analysis, commentary or other kind of scientific inquiry; use of speeches, reports etc. as current information in mass media; use by mass media of already published articles on economics, politics and religion, unless their use was not explicitly prohibited; reproduction of works related to current events by means of photographic, cinematographic or other means in order to be used by mass media in limited manner; use of works which are permanently displayed on streets, squares or other public places; public display or performance of published works in schools or other educational institutions when pecuniary income is not received and royalties are not paid to participants; reproduction of disseminated works through braille characters; giving access to works, which are part of library, educational, museum collections with educational aim; use of works for purpose of national security in court and administrative proceedings as well as in Parliament; use of works during religious ceremonies or during official ceremonies organized by public authorities; use of building, which is work of architecture or plan of such building with aim of reconstruction. (Art. 24 LCRRs). User must generally designate author and source when he/she uses work. Works may be used freely upon payment of compensation when reproduction concerns printed works and is done for noncommercial purposes as well as when reproduction concerns works stored in any manner and is done by physical persons for their personal use. (See Art. 25 LCRRs.) Law contains provisions on how compensation is determined in case of free use of works.

Copyright of works created by persons who are employees belong to authors. (Art. 41[1] LCRRs). Employer has only exclusive right to use work for his/her purposes without permission and without payment of royalties, unless parties to employment contract have agreed otherwise. Nevertheless, author may demand additional compensation when his/her salary or wage has proved disproportionate to proceeds from works publication. In case of databases and computer programmes, copyright belongs to employer, unless parties have not agreed otherwise. (Art. 14 LCRRs).

Contract assigning use of copyright to all future works of author is void. (Art. 37[1] LCRRs).

Holder of copyright may sue for civil damages in case of copyright violation. (Art. 94 LCRRs). He/she may also ask for attachment measures to be taken by court. Relevant courts are district courts. Holder of copyright may also demand from customs authorities to take into custody commodities for which there exists enough evidence to suppose that they infringe rights protected under Law. Law also contains provisions for administrative sanctions which are imposed by Minister of Culture.

Applicable Law.

Bulgarian copyright law is applicable to: works, whose authors are Bulgarian citizens or citizens with permanent address in Bulgaria without taking into consideration where work was first published; works, whose authors are EU citizens or persons with permanent residence in EU member state without taking into consideration where work was first published; works, whose authors are citizens of state, with which Bulgaria has signed international treaty in field of copyright or persons with permanent address in that country notwithstanding where work was published for first time; works, which were published for first time or realized as architectural projects on territory of Bulgaria or on territory of state, with which Bulgaria has concluded international treaty in field of copyright independently of citizenships of authors; works which are first published on territory of state with which Bulgaria has not bound herself with international treaty in field of copyright, but simultaneously or within 30 days period were published on territory of Bulgaria or on territory of other state, with which Bulgaria has signed international treaty. When this law is applicable for works created by citizens of foreign countries or for works published for first time in foreign country, owner of copyright is determined by relevant foreign law. In case of works created by foreign citizens or in case of works published for first time in foreign country, duration of copyright is determined by relevant foreign country law, if that law determines periods of copyright protection less than those contained in Bulgarian copyright law. (Art. 99 LCRRs).

Bulgarian law on copyright is applicable to performing artists who are citizens of Bulgaria or who have permanent address in Bulgaria, notwithstanding fact where performance was realized, as well as to foreign artists and performers whose productions were realized on territory of Bulgaria. Bulgarian law is applicable to recordings, films, programmes realized by Bulgarian citizens or by persons with permanent address in Bulgaria, by EU citizens or by permanent residents in EU member state, or by juridical persons whose domicile is on territory of Bulgaria without regard to where they were realized as well as to recordings, realized or simultaneously published for first time by foreign persons on territory on Bulgaria or on territory of EU member state.

Bulgarian law is applicable to producers of databases, when they are Bulgarian citizens or have permanent address in Bulgaria, or are EU citizens or are permanent residents of EU member state. Bulgaria law is relevant in case of juridical persons which were set up in accordance with Bulgarian laws and which have domicile, central seat of governance or perform their main business activity on territory of Bulgaria. When juridical person has its place of domicile only in Bulgaria, it is required that its activity has real connection with her economy. (Art. 101a LCRRs). Rights of artists, producers of sound recordings, radio and television broadcasters, film and database producers are protected in accordance with international treaties signed by Bulgaria. (Art. 102 LCRRs).

Treaties.

Bulgaria is party to Berne Convention for the Protection of Literary and Artistic Works (Paris Act 1971) and Universal Copyright Convention (1952), Rome Convention for Protection of Performers, Producers of Phonograms and Broadcasting Organizations of 1961 and Geneva Phonograms Convention of 1973. Bulgaria is member to World Intellectual Property Organization (WIPO) and has ratified 1996 WIPO Copyright Treaty and 1996 WIPO Performance and Phonograms Treaty.

19.02 INDUSTRIAL DESIGN:

Industrial design protection is governed by Law on Industrial Design ("Zakon za industrialnija dizain") of 1999, as amended. Any object which is not patentable may be protected as industrial design if it has unique shape or form or surface design (including color scheme) or ornaments which distinguishes it from other similar products. Industrial design must be new, original and consistent with principles of public morality. Law states that protection is not granted to industrial designs which only derive from technical purpose of product. Industrial design is considered new if, up to filing date or priority date, it is not identical to another product that has been known to public in Bulgaria or abroad. Industrial design can be concurrently protected under copyright law, if sufficiently original.

Law distinguishes between author of industrial design and owner of design. Author of design or person to whom such right has been transferred may apply for registration of design. Upon registration of design applicant is entered as owner of industrial design into Industrial Design Register of Patent Office. Exclusive rights to industrial design are evidenced by certificate issued by Patent Office.

Law regulates submission of application for registration and stipulates that foreign applicants that wish to register their industrial design in Bulgaria may act either on their own or submit their application through authorised intermediaries, patent agents, in case they do not have domicile or permanent establishment in Bulgaria. Petition for registration of industrial design includes name and full address of applicant, photo or graphic representation of industrial design, list of products to which industrial design is to apply, together with appropriate fee. All documents should be translated into Bulgarian. Bulgarian Patent Office requires appropriate investigation to be completed before registering industrial design. Patent Office decisions are subject to appeal before Sofia City Court. Law provides for acknowledgment of priority of application based on previously submitted applications in country which is member state of Paris Convention for Protection of Industrial Property or World Trade Organization. Term of priority is six months. Duration of industrial design registration is ten years from date of filing petition for registration. It may be renewed three times, each time for period of five years.

International Registration.

It can be obtained by application to Bulgarian Patent Office or to International Bureau of WIPO at Bern under Hague Convention on International Registration of Industrial Designs of 1925 (1960 revision).

Community Design.

It is registered for whole EU. It can be obtained by application to Bulgarian Patent Office or Communities Trademark & Design Office at Alicante, Spain under provisions of EU Regulation 6/2002/EC.

Rights to industrial design may be transferred or licenced to other parties. Transfer and licensing agreement must be in writing and registered with Patent Office; otherwise they lack validity in respect to third parties.

Treaties.

Bulgaria is signatory to Hague Convention on International Registration of Industrial Designs and Locarno Agreement on International Industrial Design Classification.

19.03 INDUSTRIAL PROPERTY RIGHTS:

Industrial property covers topographies of microelectronic semiconductor products, new varieties of plants and animals, patents, industrial designs, trademarks, appellations of origin.

Topographies of Microelectronic Semiconductor Products.

Law of 1999 provides protection for original topographies of semiconductors if they (1) demonstrate intellectual effort and (2) are unknown in field of semiconductors. Protection starts upon first public commercial use of topography, provided that application for registration is filed within two years thereafter with Patent Office or on day of filing with Patent Office, if topography has not been commercially used in public earlier or has been used secretly. Protection expires ten years from end of calendar year when protection was established.

Rules concerning registration and investigation of topography, civil and criminal liability are similar to those contained in Law on Industrial Design and Law on Trademarks.

New Varieties of Plants and Breeds of Animals.

Law on New Varieties and Breeds of Animals of 1996, as amended, applies to economically important varieties and genera of plants and animals.

19.04 PATENTS:

Law on Patents and Registration of Utility Models ("Zakon za patentite I registratziia na poleznite modeli") of 1993, as amended, protects inventions, which are new and which can be industrially applied. Excluded from patent protection are: discoveries, scientific theories, mathematical methods; esthetic design creation; plans, rules and processes for mental activities, for games, for business activity and computer programs; reproduction of information. Patents must not be granted for: invention whose commercial use would violate public order and good morals; for processes of surgical and therapeutic treatment and for diagnostic processes; for plant varieties and animal species as well as biological methods for their creation, with exception to microbiological processes and products made by such processes.

Duration.—Duration of patent is 20 years from filing date of application. (Art. 16 LPatent). Patent can only be declared null and void on grounds specifically enumerated in Art. 26(3): lack of patentability; court has decided patent holder did not have right to patent; insufficient disclosure of invention; subject matter of patent goes beyond its application. Patent expires after 20 years from date on which application was filed, or if patent holder renounces patent in writing, or in case of nonpayment of annual fee six months after due date. Patent holder has exclusive right to use invention for commercial purposes in Bulgaria. (Art. 19 LPatent)

Patent Office (http://www.bpo.bg/) has sole authority to grant patents. It maintains patent register.

Procedure Before Patent Office.

Application for patent may be filed by any person, whether citizen or alien, who claims to be true and first inventor of invention, either alone or jointly with another person; legal representative of deceased inventor; employer of inventor or person to whom patent has been assigned. (Art. 13 LPatent). Application must be in writing in form prescribed by rules supported by statutory declaration. Application must be accompanied by drawings and description of invention. If applicant does not in first instance deliver complete specification, he or she must do this within three months. This period may be extended for period not exceeding three months on payment of prescribed fee.

Priority to right to receive patent is determined as of date of filing of application in Patent Office, except in following situation: according to international treaties to which Bulgaria is party, foreign citizens and legal persons have priority to receive patent in Bulgaria as determined by date when they first filed in other country. For that end, they have to file application, and within two months to present declaration of date and country they first filed, and to pay certain fee. They must prove priority to right to receive patent within period of three months after application was filed in Patent Office. (Art. 44[2] LPatent).

If application has been accepted and has been published in Official Bulletin of Patent Office, invention is provisionally protected. (Art. 18 LPatent).

European Patent.—European patent is patent granted following provisions of European Patent Convention. Application for European Patent can be filed either with Bulgarian Patent Office or with European Patent Office (http://www.epo.org/) in Munich or its branch in The Hague using one of languages indicated in Art. 14 of European Patent Convention. Patentee cannot hold national patent and European patent for same subject matter. National patent with identical filing date, or with same priority date, becomes ineffective as soon as corresponding European patent is definitely granted.

Licences.—Licences to use or deal with patent or application for patent can be negotiated with proprietor in ordinary way. Thus, patent holder can licence another party to use invention. According to Art. 31(2), there are four types of licence agreements: exclusive, non-exclusive, full and limited. In case of exclusive licence, granting of licence does preclude ability of patent holder to use patent or grant other licences. Licencee may grant sublicence if he obtains permission from patent holder. Unless specified otherwise, licensor is obligated to give licencee all technical experience necessary for use of patent (full licence). Written licence agreement registered with Bulgarian Patent Office is valid against third parties from date of registration. (Art. 31[4]). There is system of compulsory licensing. Under latter, any interested person may at any time after three years from grant or four years from filing of application apply to Patent Office for compulsory licence. Possible grounds for application are: invention is not being used at all or to fullest extent to meet demands of national market, or declared national emergency situation. (Art. 32[1]). Compulsory patent can only be non-exclusive. Multilateral or bilateral treaties to which Bulgaria is party can contain other grounds for granting of compulsory licence.

Treaties.—Bulgaria is signatory to Paris Convention for Protection of Industrial Property, Patent Cooperation Treaty, Strasbourg Agreement on International Patent Classification and 1973 European Patent Convention (Munich Act of 2000) and Treaty of Budapest on International Recognition of Deposit of Microorganisms for Purposes of Patent Procedure.

19.05 TRADEMARKS:

Law on Trademarks and Geographic Names (“Zakon za turgovskite marki i geografskite oboznachenija”) of 1999, as amended, provides that any sign capable of distinguishing goods and services can be registered as trademark in Bulgaria. Trademark may be words, including names, letters, numerals, figures, drawings, shape of goods or their design, sounds or combination of above. Law on Trademarks and Geographic Names defines precisely when trademark is not considered subject to registration.

Application for registration may be filed with Bulgarian Patent Office by any natural person or legal entity either directly or indirectly using local patent agent, in case applicant does not have permanent business establishment or domicile in Bulgaria. Law states that exclusive rights to trademark are valid from date application for registration of trademark has been received by Patent Office. Petition for registration of trademark includes name and full address of applicant, representation of trademark, list of goods and services to which trademark is to apply, together with appropriate fee. All documents should be translated into Bulgarian. Bulgarian Patent Office requires appropriate investigation to be completed before registering trademark. Patent Office decisions are subject to appeal before Sofia City Court. Duration of trademark registration is ten years which may be renewed for indefinite number of additional ten year periods. Law provides for acknowledgment of priority of application based on previously submitted applications in country which is member state of Paris Convention for Protection of Industrial Property or World Trade Organization. Term of priority is six months.

Registered trademarks and information regarding such trademarks can be found in State Register of Patent Office. Register is open for inspection to public.

Trademark exclusive right may be transferred to other parties upon registration in State Register of Patent Office. Licensing agreement for use of trademark may also be signed between proprietor and other parties.

Trademark infringement may consist of unlawful copying, affixing or using of trademark; imitating of someone else's registered trademark in connection with same or similar goods and services so as to create confusion in minds of customers; or knowingly holding, handling, selling, or offering for sale goods and services under infringing mark. Suit may be commenced together with request for seizure of articles bearing infringing mark; it may be prosecuted either in criminal or civil action, and criminal penalties are provided for in addition to civil remedies.

Community Trademark.

It is valid for whole of EU. It can be obtained by filing application to Bulgarian Patent Office or Communities Trademark and Industrial Designs Office (http://oami.europa.eu/)at Alicante, Spain under Regulation 40/94/EC. Registration is for period of ten years.

Treaties.

Bulgaria is signatory to following conventions: Paris Convention for Protection of Industrial Property; Madrid Convention on International Registration of Trademarks, Stockholm Act (1967); Nice Agreement Concerning International Classification of Goods and Services for

Purposes of Registration of Marks; Lisbon Convention on Protection of Appellations of Origin, Stockholm Act (1967); Singapore Treaty on Law of Trademark (2006).

20 LEGAL PROFESSION

20.01 ATTORNEYS AND COUNSELORS:

New Law on Advocates was passed in 2004 and replaced old Law on Advocates of 1991.

No person except registered member in one of advocate's societies (“advokatska kolegii”) who has taken oath may practise law (practise as advocate, junior advocate). Bulgarian law does not differentiate between barristers and solicitors.

Eligibility.

To practise law in Bulgaria as advocate person must be Bulgarian citizen in full juridical capacity.

Admission and Membership Requirements.

(1) Graduation from approved law faculty of Bulgarian university; (2) qualification as lawyer; (3) at least two years of juridical practice; (4) to be of good moral character; (5) to have passed admission exam, except when he/she holds scientific decree of doctor of laws or when he/she has juridical experience of more than five years. State servants, merchants and managers of commercial companies, persons working under labour contracts, except for law lecturers and legal researchers as well as members of Parliament, cannot be registered as members of advocate's society.

List of all practicing advocates is annually published in Durzhaven Vestnik.

Foreign Advocates.

Following provisions will enter into force on Jan. 1, 2007. Foreign advocates who are not Bulgarian citizens and who are admitted to practise in another jurisdiction may be admitted for occasional court appearance for particular case only if accompanied by Bulgarian advocate on basis of duly ratified treaty of legal aid and on basis of reciprocity. Minister of Justice is authority who decides whether there exists reciprocity between Bulgaria and foreign country. Foreign advocate must file petition with Supreme Bar Council(“Vish advokatski suvet”).

Special provision applies to citizens of European Union Member States who are qualified to practise as advocates in their home country. (See Art. 13 LA.) They may be admitted to represent clients and either to appear on occasional basis in courts or on more permanent basis. EU advocates must file petition with Higher Advocates Council and attach: document certifying that he/she is advocate in EU Member State; document certifying that he/she is in command of Bulgarian language (to that effect he/she must pass exam); written statement of Bulgarian advocate who will accompany candidate when court appearance is needed or when client must be represented before state authorities, before physical and juridical persons. Higher Advocates Council issues licence to EU advocate who may practise under professional title of home country where he/she is qualified as advocate.

Upon three years of uninterrupted legal practise under his/her home state professional title, or upon successful passing examination on Bulgarian law foreign advocates may ask to be registered as practising under host title with same rights as Bulgarian advocates. (Art. 15 LA). Advocates Council with Law Society (“advokatska kolegija”) issues decision and advocate must take oath as Bulgarian advocate.

As alternative, foreign advocate who has studied law in EU Member State for at least five years and holds law degree, may sit for exam on Bulgarian law before being admitted to practise in Bulgaria. (Art. 18 LA).

Junior Advocates and Clerks.

Persons who are qualified as lawyers but do not possess two years of juridical experience may practise as junior advocates. Junior advocates may represent clients only in first instance cases heard by regional courts and on their appeal in district courts. Junior advocate must associate with senior advocate in order to represent client in first instance cases heard by district courts. Advocates may hire clerks who generally are employed under labour employment contracts and who must be registered with advocate's society.

License.

Advocate may not practise without card duly issued by Law Society. Advocates card must be certified every year on payment of certain fee.

Insurance.

New law requires that all advocates, including foreign ones, to be covered by professional liability insurance. Minimum amount of insurance coverage is determined by Higher Advocates Council.

Associations.

Advocates may establish professional associations or partnerships for purpose of practicing law. Unless indicated otherwise, rules on civil partnership contained in Law on Obligations and Contracts apply. District courts keep registers of professional associations of advocates. Every partner is personally liable for any damages caused to clients. Partnerships must enter into contracts of professional liability insurance on behalf of its members.

Advocates and partnerships of advocates may enter into contracts with other advocates or partnerships of advocates. (Art. 76 LA).

Fees and Contingent Fees.

Advocates fees must be reasonable and must not fall below certain minimum amounts as determined by Supreme Bar Council. Except in criminal cases and in civil cases with nonmaterial interest, advocates may enter into contingent fee agreements with clients. Advocates may offer legal aid to persons who may claim maintenance, persons in financial distress, their relatives, other lawyers.

Advertising.

Advocates are prohibited to use advertising in their activity or to attract clients using methods contrary to rules of advocates' ethics. He/she may not use intermediaries to attract clients.

Code of Ethics and Professional Conduct.

There exists advocate-clients privilege. No time limit on advocate's obligation to keep secrets of his/her client. Regional Advocates Disciplinary Tribunals have power to issue reprimand, to impose fines or to suspend advocate of membership and legal practise for period of up to 18 months.

Lien.

No statutory provisions, but probably it is possible for advocates to exercise. They also have right to ask court for executive order ("izpulnitelen list") to recover their fees and expenses.

Professional Bodies.

These are regional advocates' societies ("advokatski kolegii") whose governing bodies are general meetings of all member advocates, who elect advocates council, controlling council, disciplinary tribunal and president.

General meeting of all Bulgarian advocates elects Supreme Bar Council ("Vish advokatski suvet") who adopts rules and Ethical Code of Advocates. Supreme BarCouncil keeps uniform register of advocates, junior advocates and foreign advocates. Contact Address: Tzar Kaloyan 1A, Sofia-1000. (http://www.vas.bg/).

21 MINERAL, WATER AND FISHING RIGHTS

21.01 FISH AND GAME:

Persons are required take certain courses, to pass exam and to hold licence in order to hunt. (See Law on Hunting and Preservation of Game [``Zakon za lova i opazvane na divecha''] of 2000, as amended.) Foreigners' licenses valid in their own are recognized. Persons are required to hold licence in order to fish. No need for licence in order to fish in Black Sea. (See Law on Fishing and Aquacultures ["Zakon za ribolova i akvakulturite"] of 2001, as amended.) Permit required for commercial fishing.

21.02 MINES AND MINERALS:

Bulgarian mining industry has undergone profound restructuring changes in last 20 years. Considerable number of mines has been closed. State is exclusive owner of all mineral and fossil substances and underground resources. Law on Underground Treasures ("Zakon za podzemnite bogatstva") of 1999, as amended, establishes general legal framework of geological research, exploration and exploitation of underground resources on Bulgarian territory, continental shelf and exclusive economic zone, and their preservation and rational use. (Art. 1 of LUR).

Permits for surveys and exploration are issued by Minister of Environment and Waters upon Council of Ministers approval. Exploitation of underground resources requires grant of concession rights. Minister of Environment keeps register of permits and concessions.

Treatment of Mining Waste.—Law implements EU Parliament and Council Directive 2006/21/EU. Rights for treatments of waste are granted by Minister of Environment and Waters.

Safeguarding of Employees.—Special Decree issued by Ministry of Labour and Social Policy of 1997, as amended, has general rules on safety in mines. Persons working in underground mines are subject to early retirement and early statutory right to pension following provisions of Social Security Code. Labour Code requires all employers maintain reasonable safe employment and place of employment.

Inspection of Mines.—Under c. 5 of LUR Minister of Environment is authority that controls mineral exploitation.

Treaties.—Bulgaria is party to 1959 International Lead and Zinc Study Group, but has not joined International Copper Study Group yet.

22 MORTGAGES

22.01 CHATTEL MORTGAGES:

Equivalent of chattel mortgage in Bulgaria is most frequently used in buying high priced consumer goods such as large appliances and denotes lien on personal property as security for payment of money, or for performance of some other act.

In order to secure credit by banks, pledge on behalf of bank may be instituted on moveable goods purchased by pledgor. Moveable item remains in possession of pledgor or third person. Contract should be in written form with true date, certified by notary public.

Mortgage may also be established on ships. It should be entered in ship register. Maritime mortgage contracts owned by private persons must be in written form and signatures of parties must be certified by notary.

See also category 3 Business Regulation and Commerce, topic 3.22 Sales, subhead Conditional Sale.

22.02 MORTGAGES OF REAL PROPERTY:

Mortgage (“ipoteka”) may be based either on contract, or on law. Mortgage is accessory right, cannot be divided, and survives only as long as obligation whose performance it secures continues to exist. Mortgage based on law is established in favour of person who transfers real property in order to secure his/her claim arising from contract, and in favour of party to partition proceedings who is creditor to other parties. (Art. 168 LOC).

Mortgage deed must be in notarial form. It must indicate names, residence and occupation of creditor and debtor, must describe property as well as amount and nature of debt, when debt becomes due, interest, if stipulated. In case of non-pecuniary debt, mortgage deed must clearly indicate pecuniary amount for which mortgage is established. Mortgage must be recorded in real estate register for district where property is located. Ranking of mortgages depends on date and time of registration with real estate register. Recording has effect for ten years and may be renewed prior to date of first recording. In case of failure to renew within this prescribed period, mortgage must be recorded again. (Art. 172 LOC).

Creditors with claim secured by mortgage or pledge have priority (“privilegia”) right on proceeds received from public sale of property following execution proceeding before other creditors, i.e., employees and servants with claims arising out of labour employment relations and contracts; creditors exercising right of retention, with exception of creditors' claims for preservation and improvement of retained real property; State, except for its claims for fines etc. However, claims for expenses which secure execution proceedings as well as for creditors' suits under arts. 134 and 135 of LOC (see category 8 Debtor and Creditor, topic 8.06 Fraudulent Sales and Conveyances), and claims of state arising out of real property taxes have priority over mortgage creditors. (Art. 136 LOC). Mortgage creditor has also right to collect revenue of real estate from date when execution proceedings were started. Purchaser of property sold at public auction may preserve mortgage over real property with consent of mortgage creditor and thus may assume debt.

Mortgage is cancelled by notarial instrument upon satisfaction of creditor or at his/her discretion. Mortgagee or creditor must file petition. Cancellation is recorded in real estate register. Mortgage may also be cancelled by entered into force court judgment. (Art. 179 LOC).

23 PROPERTY

23.01 ABSENTEES:

Definition.

When person has disappeared or whose whereabouts are unknown and upon petition by persons with legal interest, court, where person has his/her latest residence, may appoint agent. In lack of latest residence, competent court is court where person lived before his/her disappearance. Court orders that intelligence is collected from his/her close persons, from municipality, from national police etc. Then, agent is preferably appointed within circle of his/her relatives and persons having close relationship with him/her. Agent has right to manage his/her property and to take every action in defense of missing person's interests. When missing person has legal representative or guardian, agent is not appointed. When missing person has granted power of attorney to person or has appointed agent, agent is appointed only for matters not covered by power of attorney.

When absence has continued for period longer than one year, upon petition of public prosecutor and person with interest, regional court declares missing person absent.

Care of Property.

Persons who are successors of absentee at time when latest knowledge or intelligence of his/her whereabouts exists may petition court for order to enter into temporary possession of his/her property. Upon court's determination any previous agency and power of attorney are terminated. Those persons may manage absentee's property as well as receive revenue derived from it but cannot alienate, mortgage or pledge, except in cases of need and in cases of obvious benefit for absentee. Latter acts must be performed upon due care and upon permission granted by regional court. Legatees and persons who have rights related to death of absentee may ask to benefit and exercise temporarily these rights. When it turns out that absentee is alive, persons who entered into possession of his/her property must refund only revenue to absentee. Determination for declaration of absence is cancelled.

Upon five years from date when latest knowledge about missing person exists and upon petition filed by public prosecutor and person with interest, court declares his/her death. Declaration of death may or may not be proceeded by declaration of absence.

Process Agent.

Following persons may be designated by natural person, juridical persons, trade unions and act as agents for service and as representatives in court proceedings: advocates; children, parents, spouse; in-house legal counsellors or other servants with legal educations working for juridical persons, cooperatives etc. It must be done in writing or executed orally before court. Law differentiates between general and specific power of attorney. Specific power of attorney is needed for settlements, for acts which amend or revoke claim, civil status claims, etc. Revocation of power of attorney is possible at any time during proceedings. Court must be notified for revocation. Court takes always into consideration revocation of power of attorney and may postpone proceedings.

Person with unknown residence is represented in court proceedings by specially designated court agent.

See also category 13 Estates and Trusts, topic Death (Presumption of and Action of).

23.02 ADVERSE POSSESSION:

Movables and immovables may be subject to adverse possession which is called acquisitive prescription (“prodobivna davnost”) in Bulgaria. It is regulated by provisions in Law on Property (“Zakon za sobstvenostta”). Possession must be continuous, open, exclusive, adverse, hostile. (See Arts. 68-81 LP and Art. 115 LOC). Law differentiates between possession in good and in bad faith.

Duration of Possession.—Action for recovery must be brought within ten years for immovable property, and five years for movable property. However, immovable property may be acquired after five years adverse possession in good faith.

State Property.—Title or interest in real property belonging to state or to municipality cannot be acquired by adverse possession.

23.03 CULTURAL HERITAGE:

Law on Cultural Heritage (``Zakon za kulturnoto nasledstvo'') was passed in 2009. (See DV 19 of 2009.) Law defines intangible and tangible movable and non-movable heritage as objects with scientific and cultural value. Minister of Culture is authority which implements governmental policy in this area.

Intangible Cultural Heritage.—It is defined as: oral traditions and forms of expressions, including language; customs; festivities; skills related to traditional crafts. Minister of Culture keeps register of intangible heritage.

Tangible Cultural Heritage.—It consists of movable and immovable cultural values. Cultural heritage may fall into one of following categories: Values with world significance; values with national significance; values with local significance. Immovable values may be classified as endangered or at risk. Movable cultural heritage may fall in one of following categories: Archaeology; ethnography; history; arts; technology; archives; manuscripts and books; literature.

Preservation.—Process of preservation of immovable values consists of: identification, declaration and registration. Ministry of Culture keeps register of immovable cultural values. Movable values are subject to identification and registration. Law defines collections as well as rights and obligations of owners and users. Provisions that require official documents to prove ownership of movable values that are national heritage proclaimed unconstitutional. Immovable values may be subject to concession. Transactions with movable cultural values are subject to registration. Commercial entities which perform such activity are subject to registration with Minister of Culture. Law has provisions concerning export and temporary export of movable values. Permit and certificate for export are needed. Movable values considered national treasures which were illegally exported must be returned to Bulgaria in conformity with EU Regulations 3911/1992 and 752/93. Bulgarian state may file suit against possessor of such movable treasures. Prescription period is one year after requesting country has acquired knowledge about possessor of treasure, but not later than 30 years.

Archeological Cultural Heritage.—It is public state property. Permit needed for archaeological excavations.

Conservation and Preservation.—Restoration experts are subject to registration. Register is open to public. Permit required for restoration of movable values considered national treasures.

Reproduction and Dissemination.—All reproductions of cultural values must be performed by duly registered restoration and conservation experts.

Penalties.—Fines range from 500 to 100,000 leva.

Treaties.—2001 UNESCO Convention on Underwater Heritage; 2003 UNESCO Convention for Safeguarding Intangible Cultural Heritage; 2005 UNESCO Convention on Promotion and Protection of Diversity of Cultural Expressions.

Libraries.

Law on Public Libraries (``Zakon za obshtestvenite biblioteki'') of 2009. (DV 42 of 2009).

Minister of Culture keeps register of all public libraries. Law contains provisions related to National Library St. Cyril and Methodius, regional libraries, municipal libraries, reading libraries. Libraries provide main and specialized services to public. Main services, including internet access, must be offered free of charge. All libraries are united in national network. Book collections are open to public and are considered state or municipal property. Penalties for contravention of law include fines.

23.04 DEEDS:

Notarial Act.

It is authentic proof against all persons of juridical acts its sets forth and of declarations of parties. Notarial act must be used for all transactions of transfer of real property rights, save for certain cases. Notary must verify that seller/donor is owner of real property. Notary must also verify identity of parties, status of mortgages and liens at moment of sale.

Notarial deed must contain: date, and when necessary hour, place, name of notary public, name, father's name and family name of parties as well as their addresses, signature of parties and notary public. Deed must bear notary public's seal. Statement must be included about certificates presented and that owner does not owe any taxes and charges (Tax certificate with description of property must be presented to that effect, which indicates property's tax value; Sketch with description of real estate issued by technical service at municipality must be presented as well). However, when these elements are missing, notarial act is not void. Price of real property must also be included as well as its description.

No statutory form of notarial deed, but deed must follow certain requirements as to text, i.e. it must be readable, without abbreviations, all numbers must be written with words. Notarial deeds were handwritten in past, but at present all acts are typed.

Notary public reads notarial act to parties, who must approve and sign it in his/her presence. There is no need for presence of witnesses, except when they verify ownership or possession in special proceedings of inspection of circumstances. Copy of notarial act is included in special file by notary. Notary must inscribe deed with real estate register at regional court where real property is located. Failure to register leaves instrument valid as between parties, but enables third bona fide purchaser to obtain good title to property. First person to register among several claiming under deeds from last registered owner acquires good title.

Notarial and Recording Fees.

Recording fees are 0.1% of price stated in deed.

Notaries charge for preparation of deeds. Charges depend on material interest involved in transaction.

Notarial fees are either fixed, ranging from 10 to 15 leva when deed concerns agricultural land or forest or proportionate, depending on certified material interest involved in transaction. This interest usually coincides with tax value of property concerned.

Other Deeds.—Sale of succession or motor vehicle requires written form with parties signatures certified by notary public. Transfer of ownership and property rights where one of parties is State or municipality requires only written form.

23.05 DOWER:

Dower as right of wife in real estate of deceased husband does not exist in Bulgarian law. See categories 14 Family, topic Husband and Wife, subhead Community of Property;

Estates and Trusts, topic Descent and Distribution.

23.06 LANDLORD AND TENANT:

There are very general provisions contained in Law on Obligations and Contracts and Law on Commerce.

Commercial Lease (Leasing).

It is governed by Law on Commerce (Arts. 342-327), which also makes reference to rules in Law on Obligations and Contracts. At least one of parties must be commercial entity. No time limit for term of contract.

Residential and Professional Leases.

See Law on Obligations and Contracts. (Arts. 228-239). Lease ("naem") cannot be concluded for more than ten years, save for commercial transaction. Persons that act solely as managers of property cannot enter into lease contracts with duration of more than three years.

Leases for term longer than one year must be registered with regional court's register.

Lessor has generally obligation of delivering property in decent state, while tenant must diligently use property and in accordance with contractual stipulations. Lessee is liable for loss or deterioration of property unless he/she proves that loss or deterioration occurred for reason not ascribable to him.

Subleasing must usually be authorised by lessor.

In case of transfer of real property buyer of heir remains bound by lease when contract was registered with court. Contract of lease with true date ("dostoverna data"), e.g. certified by notary public, concluded before transfer of real property, is compulsory for new owner for period agreed in lease contract, but not for period longer than one year. When contract of lease lacks true date and lessee or tenant is in possession of real property, contract is deemed compulsory for new owner as if it were contract of lease for indefinite period. Law states that lessor owes compensation to lessee when latter cannot use leased real property before expiration of leased property and this was due to transfer. (Art. 237 LOC).

Lessor and tenant may terminate lease, which is concluded for indefinite period, at any time with one month notice. If upon termination of lease for specified period lessee is left in possession of property, lease is deemed to have been renewed for indefinite period. Rent can be fixed freely by parties.

Agricultural Leases.

Governed by Law on Lease of Agricultural Land of 1996, as amended ("Zakon za arendata"). Contract on lease of agricultural land must be concluded in written form with notarized signatures of parties. It must be included in relevant notarial books as well as be registered with relevant agricultural land commission. Minimum term of agricultural land lease is fixed at four years. Currently, Law does not prescribe any maximum term, although Law contained provision, which was repealed, that maximum term should be 50 years. There is no limit on amount of agricultural land that may be leased. Previous bill envisaged maximum amount of 6,000 hectares of agricultural land to be leased by one person. Payment of rent may be negotiated in money and/or in agricultural products. Amount of rent must be negotiated on basis of: (1) Market rent; (2) rent, which includes yearly depreciations and interest on capital, invested in movables and immovables. Unless it was agreed otherwise, contract of lease on agricultural land remains valid for heirs of lessee. Heirs are obliged to notify fact of succession to lessor. In case of transfer of agricultural land, buyer remains bound by contract, when it was registered. When contract was not registered, it remains valid for two years.

When, upon conclusion of agricultural land lease, circumstances or conditions which caused parties to enter into it have permanently changed and they have lead to obvious disproportion between parties' obligations, each party may demand amendments to contract. Regional court decides on disputes between parties.

23.07 PARTITION:

Proceedings to compel partition (“delba”) of estate may be commenced by action of any co-owner of property to regional court where property or land is located. (Arts. c. 29 CPC). Court may order partition or division of lands or order sale and division of proceeds among parties entitled, according to their respective interests. Interested parties can bid at such sales.

Partition of succession estate may always be demanded by heirs, although deceased had ordered otherwise. (Art. 69 LI). Each heir may demand his/her share in immovable or movable property and, if his/her share cannot be totally satisfied, demand pecuniary compensation. Immovable items that cannot be appropriately parted are to be offered for public sale. Partition of succession estate is void when some heirs have not taken part in it.

23.08 PERPETUITIES:

In general power of alienating property cannot be restricted. No possibility to create estates vesting in future. Accumulation of income as in trusts not permitted. See category Business, Organizations, topics Associations and Foundations.

23.09 PRIVATIZATION AND RESTITUTION:

Privatization, which began in 1992, has important consequences to Bulgaria's transition toward market economy. Law on Privatization and Post-Privatizational control of 2002, as amended, has been second statute that governs matter. Its stated goal is creating conditions for transparent, quick and economically efficient privatization without discrimination between investors, as well as promoting economic growth and competitiveness of privatized companies. Privatization is defined as transfer through sale of shares or stock owned by State or municipalities, portion of property of commercial entities with more than 50% state or municipal ownership, etc. either to Bulgarian natural and juridical persons in which State or communities possess less than 50% share in capital or to foreign persons. Law does not apply to privatization of hospitals or other health-care institutions. Excluded from privatization are also certain companies included in so called negative list, i.e., post office, airports, seaports, nuclear plant, some water supply utilities, etc. Agency on Privatization and local municipalities are authorities in charge of privatization process. Agency on Post-Privatization Control monitors whole privatization process. Under Art. 32 of Law, following methods are used by Agency on Privatization or local municipal councils: stock of companies are privatized through public offer, public tenders, publicly announced competition, central public tender, acceptance of commercial offer under Law on Public Offering of Securities, while shares in limited liability companies are privatized through public tenders or publicly announced competition. Transfers of registered by name shares are effected through endorsement. There is no requirement for registration of this type of transfer with book of stock holders who own registered by name stock. Transfer of payable to bearer stock must be registered with Central Depository. Transfer of shares in commercial companies must be performed in written form. There is no requirement for notarial certification of signatures. Transfer of real property rights must be done in written form. Law contains provisions on administrative liability of persons who did not follow rules on disclosure of information on conflict of interests and of persons who did not diligently prepare or used information related to privatization process. Agency on Privatization and municipal councils publish in Durzhaven Vestnik data relevant to privatization process. They also keep up-to-date public registers on privatization process. Under Law, 90% of revenue from privatization process of state-owned enterprises generally goes to state budget, while other 10% covers costs of privatization.

Privatization in agriculture has not involved direct sales of estates. Instead, restitution programme was implemented, and nationalized or collectivized agricultural land was returned to its former owners and their heirs. See Law on Agricultural Land Ownership and Use of 1991 ("Zakon za sobstvenostta i polzvaneto na zemedelskite zemi"). Compensation bill system has been used as part of restitution programme with land being auctioned to compensation bill holders.

Other relevant legislation on restitution of property includes: Law on Restitution of Property over Forests and Forest Land of 1997 ("Zakon za vustanoviavane na sobstvenosta vurhu gorite i zemite ot gorskia fond"); Law on Restitution of Property over Shops, Workshops and Warehouses of 1991 ("Zakon za vustanoviavane na sobstvenostta vurhu niakoi magazini, rabotilnici, skladove i atelieta"); Law on Restitution of Nationalized Real Property ("Zakon za vustanoviavane na sobstvenostta vurhu odurzhaveni nedvizhimi imoti") of 1992; Law on Compensation of Owners of Nationalized Real Property of 1997 ("Zakon za obeshtetiavane na sobstvenicite na nedvizhimi imoti"); Law on Restitution of Property belonging to Citizens of Turkish Origin of 1992 ("Zakon za vustanoviavane na sobstvenostta na grazhdanite ot turski proizhod").

23.10 REAL PROPERTY:

Law on Property ("Zakon za sobstvenostta") of 1951, as amended, declares that property may be owned by state, municipalities, cooperatives, juridical persons, and citizens. (Art. 2 LP). Property belonging to state and municipalities may be public and private. Law on State Property of 1996, as amended, and Law on Municipalities' Property of 1996, as amended.

According to Law on Property of 1951, property may be classified into two types: movable items ("dvizshimi veshti") and immovable items ("nedvizshimi veshti"). Immovables are: land, plants, buildings, structures and everything that is naturally or by man's activity attached in stable and durable way to earth and to structures. Movables are all items that are not considered immovables as well as energy. (Art. 110 LP).

Law declares that juridical and natural persons may acquire ownership over all kinds of property except property which Constitution proclaims as exclusive state property.

Co-ownership or Tenancy in Common ("Susobstvenost").

Every co-owner may use item which is in co-ownership according to its purpose and in way that does not hinder other co-owners to use item according to their shares and rights. Property in co-ownership must be used and be managed in conformity of will of co-owners who own more than 50% share of property in co-ownership. (Art. 32 LP). When majority cannot be formed or when decision of majority may cause damage to item in co-ownership, regional court decides issue upon petition of interested parties and appoints governor of item.

Co-owner may sell his/her part of real property to third person only when he/she presents written evidence to notary public that he/she has offered to other co-owners to purchase his/her part on same conditions and declares in written form that nobody has accepted his/her offer. (Art. 33 LP). When either declaration is false, or third person buys part in co-ownership under secret conditions which cause damage to other co-owners, interested co-owner may purchase this part under conditions which were actually agreed. Action must be brought within two months from sale. (Art. 33[2] LP).

Voluntary partition of movables, whose value exceeds 50 leva, and immovables must be performed in written form and signatures of parties must be notarized. (Art. 35 LP). Permission of regional court is necessary when persons without legal capacity take part in proceedings as well as when there are absent owners.

Every co-owner may demand partition of property in co-ownership, unless law stipulates otherwise, or partition is contrary to nature and purpose of property.

See also topic 23.07 Partition.

Easements and Servitudes.

They may be established by operation of law or by contract. Scarce provisions exist in current Law on Property of 1951 under title Constraints on Ownership ("Ogranichenia na sobstvenosta"). Owner of real estate may not perform acts in his/her property which hinder proper use of neighboring real property. (Art. 50 LP). Owner must also allow access to his/her real estate when works must be performed in another real estate and there is no other possibility for performance of such works. It is not allowed to plant trees at distance of less than three meters, 1.5 meters or one meter, depending on tree height, from neighbouring real property. Neighbour may petition mayor to issue him/her permission to cut branches or roots spreading over or entering into his/her real property. (Art. 52 LP).

Property rights over property belonging to another may be acquired to contract, succession, accession and prescription.

Contract of servitudes for liberty of passing through real estate belonging to another as well as servitudes for passage of networks and other technical equipment through real estate belonging to another must be in written form with signatures of parties notarized by notary public. Contract must be entered in real estate register as well. In certain cases, when agreement between parties cannot be reached, servitudes may be created by order issued by mayor of municipality. (See Law on Zoning of Territory of 2001, as amended, ["Zakon za ustroistvo na teritoriata"].)

Under Law on Waters ("Zakon za vodite") of 1999 servitudes related to waters may be created by operation of law, either in public or in private interest, or by contract. They may be acquired by adverse possession of ten years. Water servitude created by contract prescribes: upon expiration of term of contract; when it is not exercised for more than ten years; when there exists objective impossibility for it being exercised; when two estates merge.

Rights to Property of Another.

Right to use and usufruct ("polzvane") includes right to use property according to its destination and right to use income and fruits flowing and derived from it. It is defined in art. 56 of Law on Property. User ("polzovateljat") may not transfer and alienate property as well as his/her right to use. User is obliged to pay incurred expenses, including taxes and fees, as well as to keep item in same conditions at time when he/she accepted it. He must insure property on owner's behalf and for his/her benefit and to pay insurance premiums unless it was agreed otherwise. Right to use may be established for life or shorter fixed term. (Art. 59 LP). Thus, it expires with death of user and cannot be inherited. When right to use was established in favour of juridical person, it expires with winding up of juridical person, if parties have not fixed other term. Right to use prescribes when item is not used for more than five years. Inventory is made at beginning of use. (Art. 57 LP). In absence of inventory, there exists presumption that property is delivered in good condition.

Right to surface ownership over structures ("sobstvenost vurhu postroika" or "superficia") may be acquired by contract concluded with owner of land or by voluntary partition. (Art. 63 LP). Owner of structure may use land only as far as this use is necessary to use structure in accordance with its destination. Ownership over surface structures may be established for certain term. Law does not contain maximum mandatory period for which rights to surface ownership may be granted. Owner of surface structure may sell it to third person only upon presentation to notary public evidence that he/she had offered structure to land owner on same conditions and upon declaration that latter did not accept offer. Right to construction is not subject to prescription when structure or building was destroyed, unless parties did not agree otherwise. Right to construct building over real estate of another prescribes in favour of land owner in five year period. Right to construction and ownership may also be granted for underground structures.

Condominiums or Co-ownerships of Apartments ("Etazhna sobstvenost").

Special rules, contained in Arts. 37-49 of Law on Property apply. New Law on Condominium Property (``Zakon za etazhnata sobstvenost'') entered into force in May 2009. When floors or part of floors are owned by different owners, following property is generally considered common: land upon which building was constructed, courtyard, foundation, outer walls, inner dividing walls between separate parts, columns, cross-beams, staircase, ceiling, chimneys, outer doors of building, walls between attic and underground premises, floor slabs, main lines of all installations as well as their central devices, main elevators, porter's lodge and everything, which because of its nature and destination is for common use. Owners may agree that parts of building, which serve only certain floors or parts of these floors, to be common only for owners who use them. Common parts of buildings are not subject to partition. Owners may partition common building and each of them may own floor or part of floor. Owners may also partition common building following court procedure, when separate floors or parts of floors may be used on their own without considerable reconstructions and without causing major inconveniences. Share of each owner in common parts is proportionate to value of premise he/she owns at time of setting up of apartment ownership. Each owner in accordance with his/her share must participate in necessary expenses for maintenance or reconstruction of building or in any other works which general assembly of apartment ownership has decided upon. Common parts of building in apartment ownership are managed by general assembly and elected governor. General assembly and governor supervise that all inhabitants perform diligently their obligations. General assembly takes its decisions only when three quarters of owners are present or participate by proxy. It takes its decisions by simple majority of owners that are present. Lessees may participate in general assembly when questions are discussed concerning their interests or internal order in building.

Owner in apartment ownership may be compelled to leave building and dispose of his/her ownership upon decision by general assembly when: he/she uses or gives permission for use of his/her premises in way that puts building in danger of fire or of other considerable damages; systematically does not follow and breaks regulation and decisions of general assembly concerning internal order or good morals. General assembly may take decision to compel owner to leave building only when owner has received written notice by governor. Decisions of general assembly are subject to appeal before regional court.

Governor of condominium represents other owners in performance of all acts, including court action and court proceedings, which are related to ordinary governance of condominium ownership. Governor must be explicitly authorised by general assembly to represent owners in all acts that go beyond ordinary acts of governance.

EXPROPRIATION.

Title to real estate belonging to natural or juridical persons may be expropriated only following procedure set up by Law on State Property of 1996, as amended, (Arts. 32-42) and by Law on Municipalities' Property of 1996, as amended, (Arts. 21-33). Expropriation may be carried out only for satisfaction of important state or municipal needs which cannot be met otherwise and only upon fair and equitable pecuniary compensation or compensation with another real estate, which has same value.

REGISTRATION OF TRANSFER.

Every creation or transfer of real property interest by contract must be by notarial deed registered with real estate register held at local regional court. (See category 10 Documents and Records, topic 10.04 Records.) Following acts are subject to registration: deeds of sale, gift, all deeds that create, transfer, amend or terminate real property rights as well as deeds which recognize real property rights; contracts for transfer of succession; deeds by which are renounced real property rights; contracts for partitions of real property; petition of creditors of deceased or of heirs by will for separation of real estates of deceased; lease contracts for term longer than one year; settlements on dispute that concern deeds subject to registration; court judgments that have entered into force and which replace deeds that create, transfer or terminate real property rights; copies of declared wills that concern real property or real property rights. Petitions that demand revocation, annulment of above deeds, petitions for conclusion of final contract creating or transferring real property rights must also be registered.

Failure to register enables acquisition by third party bona fide purchasers or loss of priority to subsequent transferee who first registers.

Transfer of state property and property belonging to municipality must be performed only in written form. Notarial form is not required. (Art. 18 LP).

Lost and Found Movables.

Finder of lost movable property must restore it to owner upon deduction of sum equal to award and expenses. (Arts. 87-91 LP). When owner or loser is not known, finder must immediately deliver it and deposit it with municipality council. Owner or loser may demand his/her movable property and must pay award in amount equal to 10% of value of lost property plus expenses incurred in keeping it in storage and preserving it. Court may decide on lesser amount of award taking into consideration property status of owner or loser or when award is considered too high. When owner or loser cannot be found and does not show up to claim his/her property, title of lost movable property vests with municipality. Finders do not have rights to acquire property by adverse possession.

Movables that are buried, walled in or hidden in other manner become state property. Person that found them has right to receive award in amount of 25% of their value. (Art. 91 LP).

ZONING AND PLANNING.

Law on Structure of Territory (“Zakon za ustristvo na teritorijata”) of 2001, as amended. Bulgarian territory is divided into: urbanized territory (zones), agricultural zones, forests, protected zones (natural parks, beaches, and archeological reserves), damaged zones for recultivation, including mines, landslides, garbage depot, etc.

Detailed structure plans are adopted by municipalities councils. Building activities are permitted only upon entry into force of detailed structure plan.

Constructions require permits issued by municipality and chief architect upon duly approved investment project.

Law and implementing regulations contain rules on building activity.

Extensive construction activities on Black sea coast and in capital of Sofia have been subjected to special laws.

Foreign Ownership.

In general, foreigners and foreign juridical persons may own land. 2005 amendments to Constitution state that foreigners and foreign juridical persons may acquire land under conditions as stated in EU Treaty of Accession or under provisions of international treaty.

24 TAXATION

24.01 ADMINISTRATION:

New Tax and Social Security Procedure Code ("Danuchno-osiguritelen protsesualen kodeks") entered into force on Jan. 1, 2006. Law regulates procedures for determining tax and social security obligations, as well as for collection of public claims. Code contains nondiscrimination clause and clause on priority of international tax treaties signed and ratified by Bulgaria over Code's provisions. Code contains following 29 chapters: Section I. General: Competent Bodies; Parties and Participants in Proceedings; Persons with Obligations; Periods; Notices; Abatement, Re-Initiation, Termination of Proceedings; Evidence; Tax and Social Security Information; Other Provisions; Section II. Administrative Proceedings: Registration; Declarations; Determination of Tax and Social Securities' Contributions; Tax and Social Security Control; Special Proceedings; Section III. Appeal: General Provisions; Administrative Appeal of Audit Act; Judicial Review of Audit Act; Section IV. Collection of Public Claims: General Provisions; Performance; Postponement and Deferment; Competition Between Execution Proceedings; Attachment; Execution; Public Sale; Section V. Administrative Provisions: Administrative Sanctions; Proceeding for Determination of Offences and for Imposing Sanctions.

COLLECTION.

National Agency on Public Revenue (http://www.nap.bg/) has been established to administer collection of taxes and social security contributions. (See Law on National Agency on Public Revenue ["Zakon za Nacionalnata agencija po prihodite"] of 2003.)

PAYMENT.

Under Law on Personal Income Taxation taxpayers file their annual returns with territorial tax directorate where they have their permanent address by Apr. 30. There exists 5% discount for filing through internet with digital signature. Foreign persons file their returns with tax directorate at address of their residence in Bulgaria. As of 2005, spouses may file joint-tax return. Under Law on Corporate Income Taxation legal entities file their tax statements by Mar. 31. Persons registered under Law on Value Added Tax file annual and monthly tax returns.

Time for payment of income tax is Apr.30. 5% discount for payment of personal income tax by Feb.10. Time for payment of corporate tax is Mar. 30. Time for payment of local taxes and charges is Apr.30, June 30, Sept.30, and Oct. 30. Discount for payment by Apr.30. Social security contributions must be paid by 10 of each month. Laws prescribe various penalties for failure to file returns or for filing returns with incomplete or false information. Fines range from nil to several thousand leva. Tax evasion and non-payments of taxes in great amounts may be punished with imprisonment.

For late payment, see topic Interest.

PENALTIES.

Laws prescribe various penalties for failure to file returns or for filing returns with incomplete or false information. Fines range from nil to several thousand leva. Non-payment of taxes in gross amount can be punished with imprisonment.

Public or state claims ("durzhavnite vzemanija"), i.e. taxes, customs duties, excises, social security payments and contributions prescribe with five years limitation period. In any case, state cannot recover her claims after ten years from date when claims arose.

State Debt.

Law on State Debt (“Zakon za durzhavnija dulg”) of 2002 sets up general rules for incurring debts by Bulgarian state as well as for how Bulgarian state may issue guarantees, types of debts and who may act as agent to state in connection with its debts. State debt is defined as all financial liabilities assumed on behalf and on account of Bulgarian state following requirements as established in Constitution. State debt may be assumed in following cases: to finance budget deficits; to finance investment projects and special programmes approved by National Parliament; to refinance state debts in circulation; to secure payments of mature state guarantees; to support balance of payments. (Art. 5[1] LSD). State debt may be negotiated, issued and paid in Bulgarian and/or in foreign currency. Law proclaims that payments of state debt's interest and principal are priority in execution of republican budget. (Art. 7 LSD). Moreover, under Art. 15 of Law on Budget, which is annually adopted, Minister of Finance must allocate incoming revenue in following manner: payments which go for service of state debt; transfers to social securities funds and to municipalities; subsidies to judiciary; subsidies to non-financial enterprises. Each year law on state budget defines: maximum amount of new state debt and state guarantees, which may be assumed during fiscal year. (Art. 8 LSD). Proportion of unpaid consolidated state debt to forecasted gross domestic product at end of each budget year must not exceed same proportion from previous year, and this proportion must not exceed 60%. (Art. 10 LSD). When there exists danger that requirements of Art. 10 will not be met, Council of Ministers may propose as to limit issue of debt by municipalities and social securities funds in law on state budget. (Art. 11 LSD).

Minister of Finance prepares annual report on status of state debt. Report is deliberated by Council of Ministers and then is submitted to Parliament as part of report on execution of state budget. Minister of Finance prepares tri-annual strategy of state debt management, which is adopted by Council of Ministers. Minister of Finance signs state loans as well as issues state securities.

Debts of Bulgarian National Bank, of municipalities and of social securities funds, which include state social security fund, teachers' social security fund, national medical care insurance savings bank, are not guaranteed by state and do not constitute liability of Council of Ministers, except when there exists guarantee issued by Bulgarian state. (Arts. 28-30 LSD). Law defines as private debt all financial liabilities assumed by local persons (“mestni lisa”) when they do not act on behalf of Bulgarian state, municipalities and social securities funds. (Art. 31 LSD). Bulgarian National Bank registers and monitors financial liabilities of local persons.

Bulgarian National Bank acts as agent for state and state guaranteed debts. (Art. 34 LSD). Ministry of Finance may conclude contract of agency with other local and foreign persons. While acting as agent, BNBank: organizes tenders and auctions for sale of state securities; registers all issues of state securities and transactions with state securities on secondary market; together with Ministry of Finance selects primary dealers with state securities; issues licences to investment intermediaries. (Art. 35 LSD).

Ministry of Finance keeps official register of debt assumed by Bulgaria and of all debts guaranteed by Bulgarian state. Official information of consolidated state and state guaranteed debt is published in special bulletin and on world wide web: See http://www.minfin.bg.

Municipalities' Debt.

Law on Municipalities' Debt (“Zakon za obshtinskija dulg”) was passed in 2005.

24.02 ALCOHOL, BEVERAGES AND TOBACCO TAXES:

See topic 24.04 Excise Taxes.

24.03 BUSINESS TAXES:

New Law on Corporate Income Taxation (“Zakon za korporativnoto podohodno oblagane”) entered into force on Jan. 1, 2007. Residents, including corporations set up under EU regulation 2157/2001 and cooperations set up under EU Regulation 1435/2003 are taxed on their world wide income, while nonresidents are taxed on their income from Bulgarian sources.

Law covers following business taxes: corporate tax, including tax on profits; withholding tax at source of income; tax on costs; alternative taxes of corporate tax, including gambling tax; tax on revenue of budget enterprises, and tax on operation of ships. Tax year is calendar year.

Rate.

General rate of corporate tax is 10%.

Avoidance of Double Taxation.

Tax treaties ratified by Bulgaria have priority over Law. In absence of treaty, taxpayers have right to tax credit under law's provisions. Taxpayers have right to tax credit for amount of tax paid abroad on amount of income from dividends, interest, royalties and license fees, technical services, and rent. Tax credit is determined for each country and is limited to amount of Bulgarian tax on profits and income.

Prevention of Tax Evasion and Transfer Pricing.

Transactions between associated persons, as defined in additional provisions of Tax and Social Security Code, must be reevaluated for purposes of assessing correct tax amounts. Transactions concluded under conditions, which lead to tax evasion, must be neglected in determining tax. Law lists number of cases of tax evasion, including loans bearing interest differing from market rate, payments and compensations for services not rendered, free use of tangible and non tangible assets, etc.

Treatment of Expenses for Tax Purposes.

Gifts up to 10% of adjusted accounted profits before tax are deductible when they are made to hospitals, homes for children without parents, kindergartens, schools and universities, registered religious denominations, orphans, handicapped, socially weak persons, energy efficiency fund, drug addicted persons, scholarships for pupils and students studying in Bulgarian schools and universities, etc. Law explicitly lists expenses which are not deductible.

Carrying Forward of Losses.

Losses may be carried forward for five years.

Payment of Tax.

Taxpayers make advance tax payments each month or every three month period.

Special rules exist for dividends within European Union as well as for transformation of companies and cooperations and transfer of enterprise.

Withholding Tax at Source.

It is levied on income from dividends and liquidation shares paid by local juridical persons to foreign and local juridical persons. Tax rate is 7%. However, foreign juridical persons pay withholding tax on income, e.g. license fees and royalties, franchise and factoring fees, and rental income earned in Bulgaria at rate of 10%.

Tax Upon Costs.

Following costs are subject to this tax: non-pecuniary social costs (fringe benefits) offered to employees, including voluntary pension and health insurance as well as life and unemployment insurance premiums, if related to investment fund; costs related to motor vehicles used by managers; and representative costs related to business. Rate of tax is 10%.

Gambling Tax.

Licensed organizers of games of chance pay gambling tax. Tax rates are specific and range from 10% to 12% depending on type of games. (See c. 32 of 2006 Law on Corporate Income Taxation.)

Tax on Revenue of Budget Enterprises.

Revenue of dependent on state budget enterprises which arises out of commercial transactions, including leases of movables and immovables is subject to this tax. Rate of tax is 3%. Municipalities pay 2% tax. State universities and state research institutes enjoy 50% tax relief. (See c. 33 of 2006 Law on Corporate Income Taxation).

Tax on Operation of Ships.

Taxable persons are performers of sea shipping that are registered under Law on Commerce or are with permanent establishment for tax purposes in EU or EEA member state. They must operate their own or leased ships. Crew must be composed of EU or EEA citizens. At least 60% of net tonnage must be ships sailing under Bulgarian or EU or EEA member state flag. Rate of tax is 10%. Taxable base is determined per day and depends on net tonnage of ship. Taxable persons file declaration by Mar. 31. (See c. 34 of 2006 Law on Corporate Income Taxation).

Tax Incentives.

Collective investment schemes as well as licensed investment schemes of closed type, corporations with special investment purpose, and Bulgarian Red Cross are exempt from corporation tax. There exists tax relief for enterprises that hire unemployed persons as well as enterprises that hire persons with disabilities. Agricultural producers, State enterprise “Air Traffic Management” enjoy 60% tax relief. Social and health insurance funds enjoy 50% tax relief upon condition that profit is reinvested next year. Special rules apply to state aids for regional development and to state aids for encouragement of employment. Requirements of EU Regulation 2204/2002 must also be met.

24.04 EXCISE TAXES:

New Law on Excise Taxes and Warehouses (“Zakon za aktsizite i danuchnite skladove”) entered into force in 2006. Excise duties have continued their rise and are levied on following goods: alcohol and alcoholic beverages, tobacco products, energy products, coffee and its extracts, motor vehicles. Excise taxes are administered by customs authorities. Since 2007, electricity has been subject to excise tax; however, households have been exempt.

24.05 FREE ZONES:

Free zones were established in 1987. At present there are six free zones in Bulgaria. They are regulated by Law on Customs of 1998, as amended, and Decree on Free Zones of 1987, as amended. Exemptions from excises and value added tax do not apply for alcohol, tobacco products and liquid fuels. Retail trade is not permitted in free zones. Foreign made liquid fuels may be introduced and kept in free zones under various customs regimes. Locally made liquid fuels may be introduced into free zones and may not be subject to operations aimed at their export.

24.06 GASOLINE AND SPECIAL FUELS TAXES:

See topic 24.04 Excise Taxes.

24.07 GIFT TAX:

Gift tax is regulated by Law on Local Taxes and Charges and applies to domestic and foreign property if either donor or donee is Bulgarian resident at time of date of gift or if real property is located in Bulgaria. 2004 changes to Law, which entered into force on Jan. 1, 2005, introduced following new rates: Spouses and relatives in direct line—nil rate; brothers and sisters and their children—0.7%; unrelated persons—5%. Law states that gift tax must be paid prior to transfer of real property to local tax authorities and in certain cases in a month period. Following transactions are exempt from gift tax: if donee is Bulgarian State or municipality, Bulgarian Red Cross, Bulgarian health, educational, cultural or scientific organization supported by public revenue, national organization of handicapped persons, funds which support victims of natural disasters, fund for restoration and protection of historical and cultural monuments. Donations for health treatment of Bulgarian citizens, to juridical persons with not-for-profit aim registered with Ministry of Justice for promoting public welfare, to persons with disabilities and to socially weak persons, to libraries, ordinary gifts, gifts which serve performance of statutory obligations (e.g. maintenance, tort), non-pecuniary contributions to stock of cooperative, corporation or partnership are tax exempt. Foreign state does not pay gift tax when reciprocity between Bulgaria and that other state exists. Gift tax is paid by donee, unless otherwise stipulated by parties. Tax value of real property subject to gift tax is determined by local tax authorities, who must follow provisions of Law on Local Taxes. Law contains provision that judges, notaries, mayors and other officers must not perform or certify transaction or deed before they have ascertained that gift tax had been paid.

24.08 INCOME TAX:

New Law on Personal Income Taxation (“Zakon za danutzite vurhu dohodite na fizitzeskite litza”) entered into force on Jan. 1, 2007. It is progressive direct tax levied on income of Bulgarian residents earned worldwide and foreign residents for their income earned from sources in Bulgaria. Tax year is calendar year. Bulgarian residents are defined as persons: with permanent address in Bulgaria, or who reside in Bulgaria for more than 183 days in calendar year, or persons whose center of vital interests is in Bulgaria.

Tax Exempt Income.

Income from sale of one's own dwelling, income from sale or exchange of one's own movables, excluding motor vehicles, works of art, etc., income from transactions with shares of publicly traded companies on regulated market, income from compulsory insurance in Bulgaria and abroad, income from interest on local bank deposits, income from Bulgarian state and municipal bonds, scholarships from study abroad and in Bulgaria, insurance and other compensations, income from lotteries and games of chance, proceeds from rent of agricultural land, income from sale of property acquired through inheritance or through restitution, etc.

Income from Employment.

Taxable income is employment compensation. Value of free food and working clothes is not included in taxable income. Annual tax base is formed as taxable income is decreased by social security and health insurance payments.

Income from Business as Sole Merchant.

Taxable income is profit under Law on Corporate Income Taxation. Taxable income is decreased by paid insurance premiums under Code on Social Security and Law on Health Insurance.

Income from Other Business Activity as Farmers, Inventors, Freelance Professionals, etc.

Income from sale of produced agricultural products, from license fees and royalties, including inventions, works of art, and science, income from sale of forest and fisheries products is decreased by 40% costs. Income from freelance professions—by 25% costs. Taxable base is formed as taxable income is decreased by paid social security and health insurance premiums.

Income from Rent.

Taxable income is decreased by 10% costs. Taxable base is formed as taxable income is decreased by compulsory health insurance contributions.

Income from Transfer of Rights and Property.

Taxable income is reduced by 10% costs.

Final Tax.

Final tax of 5% is levied on dividends and liquidation shares received by residents and nonresidents. Nonresidents are taxed at 10% for their income from royalties, license fees, franchise and factoring fees, technical services fees, management contracts, scholarships for study in Bulgaria and abroad, compensations, rents, etc. Final tax of 10% is also levied on income from complementary voluntary insurance, voluntary health insurance, and 5% on income from life insurance received by both residents and nonresidents.

Tax Rate.

Flat rate of 10%. Sole merchants pay 15%.

Tax Incentives and Relief.

Persons with limited labour capacity may have their taxable base decreased by two times annual nontaxable base. Taxpayers may deduct up to 10% from their annual tax base their personal contributions to voluntary health insurance and life insurance premiums. Residents have right to tax relief for children. Taxable base may be decreased by gifts of up to 5% to hospitals, kindergartens, schools and universities, religious denominations, Bulgarian Red Cross, handicapped, socially weak persons, orphans, scholarships for students in Bulgarian schools and universities, energy efficiency fund, drug addicted persons, registered not-for-profit juridical persons, by gifts up to 15% for culture, by gifts up to 50% for treatment of children fund center.

Applicable Law.

Law contains provision on priority of international tax treaties signed and ratified by Bulgaria. Law transposes provisions of EU Directive 90/434/EEC and EU Directive 2003/48/EU.

Social Security and Medicare Taxes:

In 2009, persons which are insured for all social risks pay 26.5% social security contributions and 8% medicare contributions. Reduction of social security contributions is expected.

24.09 INHERITANCE TAX:

Governed by provisions Law on Local Taxes and Charges of 1997, as amended. Inheritance tax (“danuk nasledstvo”) is imposed on transfer of decedent estate. Decedent gross estate means all movable and immovable property and property rights, debts and claims of deceased Bulgarian citizens situated in Bulgaria and abroad, and all movable and immovable property and property rights, debts and claims of deceased foreign citizens situated in Bulgaria. For purposes of law certain property transfers to third persons on occasion of death of property owner and which are based on contract concluded by latter are also subject to inheritance tax, e.g., life insurance. Heirs or their legal representatives must file inheritance tax declaration with regional tax authorities where deceased had his/her last residence within six months of death. When deceased had has/her residence abroad, inheritance tax declaration must be filed with regional tax authorities where greater part of decedent property is located. Property included in gross estate is valued at market prices at time of opening of succession, i.e., at time of death of person. However, immovable property is included with its tax assessed value, foreign currency and precious metals are included and valued at daily rates determined by Bulgarian National Bank, securities—at their market value, or when this is accompanied with considerable expenses —at their face value, motor vehicles—at their insurance value, enterprises and shares in commercial companies or cooperatives—at market value or when this is accompanied with considerable difficulties, accountant data is taken into consideration. Funeral expenses up to certain amount, debts of deceased, claims that heirs have transferred to state and municipalities may be subtracted from amount of gross estate. Creditors' claims whose time limits for bringing civil actions have elapsed and which have not been performed within six months from date of death are not subtracted from gross estate. Inheritance tax and share to be paid by each heir or legatee is determined by tax authorities. For purposes of Law taxpayers are divided into three classes: (1) Spouses and heirs in direct line; (2) heirs in collateral line; (3) other heirs. In 2004 Parliament introduced major changes to inheritance tax. Since Jan. 1, 2005 spouses and heirs in direct line do not pay any tax. Brothers and sisters and their children pay 0.7% tax for every share in succession above 250,000 leva. Other heirs pay 5% tax for share in succession above 250,000 leva.

Following heirs enjoy full relief from payment of inheritance tax: state, Bulgarian Red Cross, municipalities, public libraries, registered religious organizations, and other juridical persons which are not merchants, save for juridical persons which are considered to promote private welfare. Private book collections, musical instrument, ordinary household items are not subject to this tax, when they are inherited by relatives in direct line, spouse, brothers and sisters. Works of art created by deceased, by his/her heir or their direct line relative, or by collateral line relative up to fourth degree are not taxed. Inheritance tax is not imposed on property of persons who died for Republic, or whose death occurred while performing their public duty, in occupational accident and during natural disasters. Certain tax relieves for real estate acquired by succession one to three years before date of death.

Tax must be paid within two months from receiving notice by tax authorities.

24.10 LOCAL GOVERNMENT TAXES:

Regulated by Law on Local Taxes and Charges ("Zakon za mestnite danutsi i taksi") of 1997, amended, and include following: real property tax, inheritance tax, gift and property transfer tax, motor vehicle tax, road tax (repealed in 2005), patent tax (since 2008). All local taxes are contributed to municipalities' budgets.

Under Law on Local Taxes and Charges, charges ("taksi") are collected for providing following services by municipalities: for households waste disposal; for use of space in marketplaces, fairs and other locations; for use of kindergartens, camps, social homes and other social services; for extraction of building and other material from quarries; for technical and administrative services; pet dogs charge (repealed); for purchase of right to use graves in cemeteries; tourist charge; charge for protection of agricultural estates (repealed); other charges as determined by law.

24.11 MEDICAL CARE INSURANCE BUDGET:

Law on Budget of National Health Insurance Savings Bank for 2009.

I. Revenue.

2,402,493,000 leva, including Medical Care Insurance Contributions—1,664,000 leva.

II. Expenditure.

2,071,181,000 leva.

III. Transfers.

738,493,000 leva.

24.12 MOTOR VEHICLE TAXES:

Tax paid every year by proprietors of motor vehicles, ships and planes registered in Bulgaria. Tax is proportionate to power of car engine and to age of motor vehicle, which falls in one of three bands.

24.13 PATENT TAX:

It is annual tax paid by traders, as listed in Law on Personal Income Taxation, who have annual turnover not exceeding 50,000 leva and who are not registered under Law on Value Added Tax. It is flat tax paid by following traders: restaurant and hotel keepers; small dealers engaged in retail trade; storehouse keepers for big retailers; producers of food and other products as well as providers of following services: carpenters, smiths, hair-dressers, fur and leather traders, tailors, auto mechanics, newspaper and booksellers, bookbinders, real estate brokers; plumbers, watchmakers, providers of photo services, electricians and persons who repair household and other appliances, pawnbrokers, taxi drivers, persons providing transport services etc. Tax depends on location of trade, highest rate is in capital. For purposes of Law, Bulgaria is divided into different zones.

24.14 PROPERTY TAXES:

Owners or users of real property pay tax regulated by provisions in Law on Local Taxes and Charges. Real property is indirect tax levied annually by municipalities. Tax varies according to type and location of real estate and is 0.15% of assessed tax value of real estate. Agricultural lands and forests are not subject to this tax, except when premises were constructed. There exists discount for prepayment of tax. Following entities are exempted from tax: municipalities for property which serves public purposes, state for property serving public purposes, except when real estate was offered to be used by other entity, libraries, museums, galleries, premises duly recognized as monuments of culture when they are not used for commercial purposes, parks, sports grounds and other real estate serving public interest, premises for prayer owned by religious denominations, premises of universities and academies serving education, certain certified premises under Law on Energy Efficiency, premises of farmers used for agricultural purposes etc. Taxpayers enjoy 50% tax relief for their main residence. Handicapped persons enjoy 75% tax relief.

24.15 PROPERTY TRANSFER TAX:

It is charged on sales and transfers of immovable and movable property, property rights, securities or money. Tax is computed as follows: 2% of higher amount between sales price and assessed tax value of property transferred. In case of exchange property, transfer tax is computed on basis of assessed value of property which has higher value.

24.16 ROAD TAX:

Repealed as of Jan. 1, 2005. Vignette charge (“vinetna taksa”) was introduced for use of republican roads.

24.17 SOCIAL SECURITY BUDGET:

Law on Budget of State Social Security for 2009.

I. Revenue.

6,363,238,000 leva: Social Security Contributions—4,293,618,600 leva, including, inter alia, employers' social security contributions for their employees—2,548,424,000 leva.

II. Expenditure.

7,571,503,400 leva: Pensions—6,564,371,900 leva, Social Aid and Compensations—851,449,500 leva.

III. Transfers (subsidies).

2,069,619,900 leva.

IV. Financing.

2,588,700 leva, which are payments to World Bank loans.

Social Security Income.

Minimum of 260 leva, maximum of 2,000 leva; for agricultural producers and tobacco growers—130 leva.

Pension for Age and Social Security's Participation.

Minimum of 124.84 leva.

24.18 STAMP TAX:

In Bulgaria stamp duty takes form of fixed duty or of ad valorem duty and is payable on licences, on court claims, on certain applications and registration of transactions and deeds with courts register, on execution of judgments, on translation of documents, on issue of identity cards, passports, visas, on driving motor vehicle tests and on licences, on participation in competitions for state servants, on checks and on measurements of gold and silver works etc. See Law on State Duties (“Zakon za durzhavnite taksi”) of 1952, as amended, and Tariffs of number of governmental agencies. Petitions to Parliament, President, Council of Ministers; documents and papers concerning labour and employment relations and contracts; claims concerning employment contracts; alimony claims; registration of vital statistics certificates and acts; all documents and papers related to penal proceedings, to guardianship cases, to acquiring pension rights; all documents concerning primary and secondary education are exempt from payment state duties.

24.19 STATE BUDGET:

Law on State Budget of Republic of Bulgaria (“Zakon za durzhavnija bjudzet na republika Bulgaria”) for 2009.

Revenue.

I. Total - 20,955,014,600 leva: (1.) Tax Revenue—18,916,010,400 leva; (1.1.) Corporate Tax—2,460,730,300 leva; (1.2.) Taxes Upon Dividends, Liquidation Shares and Income of Residents and Nonresidents—156,269,700 leva; (1.3.) Natural Person's Income Tax—2,286,513,500 leva; (1.4.) Value Added Tax—9,320,500,000 leva; (1.5.) Excises—4,260,300,000 leva; (1.6.) Customs Duties—215,000,000 leva; (1.7.) Other Taxes—216,696,900 leva; (2.) Non-tax Revenue—1,899,577,000 leva; (2.1.) State Fees—1,899,577,000 leva; (2.2.) Revenue from Ownership—1,030,096,000 leva; (2.3.) Fines, Sanctions and Interest—94,111,200 leva; (2.4.) Other Nontax Revenue—73,712,000 leva; (3.) Aid—139,426,000 leva.

I. Expenditures, Net Transfers and Contribution to European Union Budget.

20,466,088,500 leva, including expenditures of 11,275,834,900 leva, net transfers of 8,258,458.5 leva, and contribution to EU Budget of 931,795,100 leva.

II. Expenditure.

11,275,834,900 leva; (1.) Current Expenditures—8,035,215,100 leva; (1.1.) Salaries of Personnel—2,327,986,000 leva; (1.5.) Maintenance—2,709,688,000 leva; (1.3.) Interest on Loans—632,395,100 leva; (2.) Capital Expenditures—2,569,837,800 leva; (3.) Net Growth of State Reserve—80,782,000 leva; (4.) Reserve for Emergencies—590,000,000 leva.

III. Net Transfers (Subsidies).

8,258,458,500 leva; (1.1) Municipalities—2,452,493,600 leva; (1.2) State Social Security —3,267,887,300 leva; (1.3) National Health Insurance Bank—773,492,600 leva; (1.4) Judiciary—352,173,000 leva; (1.5) Parliament –58,560,000 leva; (1.6) Bulgarian National Radio—58,025,000 leva; (1.7) Bulgarian National Television—76,803,200 leva; (1.8) State Universities—420,298,300 leva; (1.9) Bulgarian Academy of Sciences—95,772,400 leva; (1.10) National Fund to Ministry of Finance – 385,799,000 leva; (1.11) Agriculture State Fund—337,390,000 leva, etc.

IV. Contributions to EU Budget.

931,795,100 leva.

Budget Balance.

488,926,100 leva. It shall be financed in following manner: 1. Foreign borrowing—682,340,200 leva; 2. Internal Borrowing–1,405,287,700 leva; (3) State Investment Loans with Beneficiary Commercial Entity—9,021,400 leva; 3. Privatization Revenue—225,000,000 leva.

State Debt.

In end of 2009, it must not exceed 11.8 billion leva.

24.20 TREATIES AND AGREEMENTS:

Bulgaria has tax treaties with following countries: Albania, Algeria (not promulgated), Armenia, Austria, Belarus, Belgium, Canada, China, Croatia, Cyprus, Czech Republic, Denmark, Egypt, Estonia, Finland, France, Georgia, Germany, Greece, Hungary, India, Indonesia, Iran (not promulgated), Ireland, Israel, Italy, Japan, Jordan, Kazakhstan, Korea, Kuwait, Latvia, Lebanon, Luxembourg, Macedonia, Malta, Moldova, Mongolia, Morocco, Netherlands, North Korea, Norway, Poland, Portugal, Romania, Russia, Singapore, Slovakia, Slovenia, South Africa, Spain, Sweden, Switzerland, Syria, Thailand, Turkey, Ukraine, U.K., United Arab Emirates, Uzbekistan, Vietnam, Yugoslavia, Zimbabwe. Bulgaria and U.S.A. signed treaty for avoidance of double taxation in 2007. Two additional Protocols were signed later. Treaty entered into force in Dec. 2008. International tax treaty, as rule, preempts provisions of Bulgarian tax law.

24.21 VALUE ADDED TAX:

New Law on Value Added Tax ("Zakon za dobavenata stoinost") entered into force on Jan. 1, 2007. Value added tax (VAT) is charged on value of supplies made by registered merchant or professional and extends to both supply of goods and services. VAT is administered by customs and revenue authorities. Liability to account for VAT also arises on value of goods imported into Bulgaria from sources outside European Union as well as from sources inside EU.

Registration.

All taxable persons, including professionals and companies, making taxable supplies exceeding 50,000 leva per year are required to register. Importers of goods from EU member state traders must also register if supplies exceed 20,000 leva per year. Possibility for voluntary registration.

Rates of VAT.

Standard rate has remained at 20%. Special reduced rate of 7% applies to services rendered by hotel-keepers when these services are part of organized tour package.

Zero-Rating.

Zero-rated supplies include exports of goods to third countries, international transport of passengers and goods, supplies related to international transport, supplies of bullion to EU member state central bank, and supplies related to duty free trade.

Exempt Supplies.

Supplies of medical services under Law on Health as well as supply of human organs, tissues, cells, blood, dental prostheses, transportation of sick persons; supplies of social services under Law on Social Aid; providing compulsory and voluntary health insurance; supplies of educational services, including private lessons, as well as services related to sports and physical education; supplies related to culture, including sales of tickets by museums, galleries and concert hall; supplies by religious denominations; supplies of financial and insurance services; gambling; postal stamps and services; sale of land or granting of lease to occupy land; importation of electricity and natural gas, of investment gold, etc.

Special Schemes.

Tourist services; investment gold; supplies of services through electronic means by persons located outside EU; investment projects; supplies of works of art, second hand goods, antiques, supplies of collectors' items.

Tax Relief.

Relief can be obtained for input tax (tax paid when obtaining goods and services for purposes of trader's business) suffered, either by setting that tax against output tax due or by repayment. Where registered trader makes both exempt supplies and taxable supplies there may be some restrictions in amount of input tax which can be recovered.

25 TRANSPORTATION

25.01 AUTOMOBILES:

See topic 25.03 Motor Vehicles.

25.02 AVIATION:

Law on Civil Aviation (``Zakon za grazdanskoto vuzduhoplavane'') of 1972, as amended, sets forth in detail major aspects of civil aviation, including aerial regulation, nationality and ownership of civil aircraft, registration, airworthiness, crew members and personnel, civil airports as well as contracts of carriage by air of luggage and passengers, liability of carrier for damages.

Administration and regulation of air transport is responsibility of Ministry of Transport and Communications. Civil Aviation Administration (http://caa.gateway.bg/) was established, which is subject to Ministry of Transport and Communications control and supervision.

Law applies to all Bulgarian civil aircraft. Civil aircraft inscribed in Register of Civil Aircraft fly under Bulgarian national marks and signs. Register is maintained by Civil Aviation Administration, which issues certificates of registration. Any transaction of transfer of title or constituting of property or security rights must be in written form and can be asserted against third parties only if recorded in National Register of Civil Aircraft. Conflicts of laws provisions of Law on Civil Aviation, as far as transfer of property rights in civil aircraft is concerned, refer to law of country where civil aircraft is registered. Form and validity of contract of transfer of title is determined by laws of country where contract is concluded.

Law contains requirement that crew members and personnel must be Bulgarian citizens and must hold regular Bulgarian licence. Minister of Transport is authorized to issue permits to foreigners to be employed as crew members in Bulgarian aircraft. Foreign licences to fly are recognized on basis of reciprocity. No such permit is necessary for EU and EEA citizens.

Operation of regular international airlines is subject to licence granted by Ministry of Transport.

Aviation claims against airlines for losses and damages arising out of international and national air carriage may be prosecuted pursuant to provisions of Law. Law sets up general statute of limitations of such claims at two years. Airlines liability for damages, death and injury is established in accordance with international conventions, which Bulgaria has ratified, and with Bulgarian law.

Safety requirements for flights, airport charges, investigation of accidents and other matters are laid down in orders issued by Ministry of Transport.

Treaties.—Bulgaria is party to 1944 Chicago Convention on International Air Navigation, 1963 Tokyo Convention On Infringements and Other Acts Committed on Board of Aircraft, 1971 Montreal Convention against Illegal Acts that Infringe on Safety of Civil Aviation and its 1988 Protocol Against Illegal Acts of Violence on Airports, Convention for Unification of Some Rules for International Carriage by Air signed on 28 May 1999 in Montreal.

25.03 MOTOR VEHICLES:

Law on Road Traffic ("Zakon za dvizhenie po putishtata") of 1999, as amended. Upon Bulgarian accession to EU, Law was harmonized with relevant EU Regulations and Directives.

Owner must register motor vehicle in accordance with formalities laid down by law and decree issued by Minister of Interior and upon payment of certain fee. Registration certificates may be of indefinite and temporary validity. Foreign vehicle must be registered in Bulgaria following rules of decree adopted by Ministry of Interior. Foreigner must submit: motor vehicle for identification; written petition for registration; identity card issued by Ministry of Interior; customs documents for import or document for acquiring ownership in country with duly issued permission by Ministry of Finance; receipt for paid motor vehicle fee; insurance certificate; plates. Members of diplomatic corps and employees of international organizations are entitled to special registration.

Driver licence is issued upon payment of prescribed fee by agencies for traffic control of Ministry of Interior in accordance with formalities laid down in decree issued by Ministry of Interior. Driver licences are valid for period determined in law. Proficiency and medical examination and in certain cases psychological examinations are required. Required age for different categories of motor vehicles is: 16 (for moped), 17 (for motorcycle under 125cc), 18 (automobiles, motorcycles), 20 (lorry with trailer), 21 (for tram, trolleybus). Driving licences issued outside Bulgaria is valid on Bulgarian territory for same category of motor vehicle in following cases: when country that issued licence is contracting party to 1968 Vienna Convention on Road Traffic and permit is in accordance with formal requirements as laid down by Convention; when country that issued licence is contracting party to North Atlantic Treaty Organization relating to status of their armed forces; when licence was accompanied by legalized translation into Bulgarian; when licence is international and follows formal requirements of Convention on Road

Traffic. Bulgarian citizens may drive motor vehicles with valid foreign licence within three months from entry into Bulgaria. Foreigners with permit for long term stay in Bulgaria may drive motor vehicles with valid foreign licence up to a year from date of entry. Foreign driving licence is then replaced with Bulgarian driving licence without examination if country that issued licence is contracting party to Convention on Road Traffic. Driving licences issued in EU, EEA member state or in Switzerland are recognized without formality in Bulgaria.

Driver must always carry with himself/herself and present upon demand registration certificate, driver licence, certificate of insurance.

Ownership of motor vehicle is transferred by contract in written form with notarized signatures of parties. Within period of two weeks seller must present copy of contract to agency responsible for registration of motor vehicles and as well as all relevant data concerning buyer.

Motor vehicles are subject to annual inspections for their conformity with safety and traffic rules and standards. These inspections are performed by juridical entities specially authorized by Ministry of Interior.

Under provisions of law, persons under 18, intoxicated or drugged persons as well as persons who have above certain alcohol content in their blood must not operate motor vehicle.

Seat Belts and Mobile Phones.

Driver and passengers must wear seat belts subject to certain exceptions, e.g. pregnant women and persons with disabilities. Special seats for small children required. Driver is not allowed to use mobile or cellular phone while driving, unless he/she is in possession of device and can use mobile phone without his/her hands.

Speed Limits.

Maximum speed limits are fixed for different categories of motor vehicles and in general are as follows: in town—50 km/h; out of town—80 km/h. Law also sets up minimum speed limits.

Accidents.

Participants in accidents must stop, call police and wait until arrival of police officer as well as render all necessary assistance, including transportation to hospital, to persons who have suffered injuries. Participants must make every effort to preserve traces of accident. Participants must fill protocol with statement of property damages which occurred as result of accident. When they cannot reach agreement on content of protocol, they must wait for arrival of police officer. Upon request they must give their name and certificate of insurance. Law includes provision on cases when police officer must attend accident, including: when motor vehicle with foreign registration was involved in accident, when there have been injured persons, etc.

Liability of Owner and Driver.

Owner of motor vehicle is strictly liable for loss or damage to any person caused by operation of vehicle unless it was, at time, in possession of person other than owner and it was operated without his/her consent.

National Bureau of Bulgarian Automobile Insurers. (http://www.nbbaz.bg/)

Under Insurance Code it is set up as association with not-for-profit aim with seat in Sofia. (Art. 282 CI). It is representative bureau in Bulgaria which participates and provides assistance for functioning of green card system as well as compulsory motor vehicle insurance in European Union Member States. In certain cases it may also provide compensation if someone has been injured in motor accident.

Guarantee Fund. [(http://guaranteefund.org/bg/?page_id=95)](http://guaranteefund.org/bg/?page_id=95)

It was set up as juridical person with seat in Sofia. Its governing bodies are: council, board of directors and executive director. All insurance companies which offer compulsory motor vehicle insurance and compulsory accident insurance to passengers in Bulgaria must make contributions. Contributions are annually determined by Commission of Financial Supervision. Minimum amount of Fund's assets is three million leva. Fund pays compensations under compulsory civil liability motor insurance for property and non-property damages when someone was injured or killed in following cases: wrongdoer cannot be identified; wrongdoer is not insured; wrongdoer's motor vehicle has not been duly registered in Bulgaria.

No-fault (Absolute Liability) Insurance.

Under no-fault “civil liability” insurance contract, insurer is obliged to indemnify within limits stipulated by contract insured person's liability for damages caused to third parties. (Art. 257 CI).

Subject to amount and conditions of insurance contract, third parties may directly demand compensation for damages from insurer. Insurer is strictly responsible to third party even when insured has caused damages, if acting with intent, to third party.

As motor vehicle insurance is compulsory in Bulgaria, tourists entering country must either present international insurance valid for Bulgaria or subscribe to insurance policy issued at frontier. Green card certificate is sufficient for purposes of Bulgarian law.

25.04 SHIPPING:

Since 2003 Bulgarian maritime and Danube river navigation law have been found in Code on Commercial Shipping (“Kodeks za turgovskoto koraboplavane”) of 1970, as amended, which contains rules relating to legal status of ships, charter parties, bills of lading, shipowners, sale and lease of ships, salvage and general average, maritime insurance, carriage of goods and passengers by sea, fishing etc.

General conflict of laws rule is that Bulgaria exercises its jurisdiction over ships which sail under its flag. Following ships can sail under Bulgarian flag: (1) Ships owned by Bulgarian state; (2) ships owned by Bulgarian physical or juridical person; (3) ships in which Bulgarian physical or juridical person's share exceeds 50%; (4) ships which are owned by physical or juridical person from EU Member State and upon condition that Bulgarian natural or juridical person or EU Member State natural or juridical persons with establishment in Bulgaria, i.e. physical persons with permit for permanent stay or with employment permit issued by Ministry of Labour and Social Policy or juridical person registered under Law on Commerce have been authorized to fulfil Bulgarian technical and legal requirements; (5) ships which was leased under bareboat charter by Bulgarian or EU Member State physical or juridical person. Law provides for priority of international treaties and conventions over domestic law.

Carriage of cargo and persons as well as other services between Bulgarian ports may be performed by licenced carrier sailing under EU Member State flag under public procurement contracts entered with Minister of Transport. (Art. 6[3] CCS. Law also contains safeguard clause in case of serious disturbances in internal market as result of such liberalization.

Bulgarian ships must be recorded in one of ships registers kept at Bulgarian ports. Registers are maintained by Executive Maritime Agency (http://www.marad.bg/), which issues certificates of nationality. Title of property must be transferred and mortgage may be effected in written form with notarized signatures of parties. Any transaction may be asserted against third parties only if recorded in one of registers. Registers are open to public for inspection. Mortgages are valid for period of five years. Mortgage duly effected on ship bought or built abroad before it has become Bulgarian property may be recognized in Bulgaria if mortgage is based on contract and is duly recorded in Bulgaria along with ship's registration.

There are provisions on seaworthiness of ships. Periodic checks are carried out by Executive Maritime Agency which issues certificates of seaworthiness and safety of ships. Crew must be composed of Bulgarian citizens and of aliens, who are citizens of EU Member State and who possess internationally recognized professional qualification. There is requirement that all crew members have command of one common language. Master and chief mechanic must be either EU, or Swiss, or EEA member states citizens. Minister of Transport may issue licences to foreigners and may issue regulations for their hire. Master of ship may act as pre-criminal investigator as well as registrar of births, marriages and deaths taking place on board.

Rules relating to bills of lading follow 1924 Brussels Convention on bills of lading (Hague –Visby Rules) despite fact that Bulgaria has not ratified it yet. Rules of marine insurance are rather different from general provisions on insurance in Law on Commerce and apply as long as parties to insurance contract have not agreed upon other terms. Law contains provisions on limited liability of ship owner, collision of ships and statute of limitation, which is two years in case of marine insurance and collision of ships, one year in case of contracts of carriage and lease.

Bulgaria applies 2004 York Antwerp Rules on General Average, although they have not been incorporated in Code.

Maritime Areas and Ports.—Law on Maritime Spaces, Internal Waterway and Ports (``Zakon za morskite prostranstva, vutreshnite vodi I pristanishta'') of 2000, as amended. Bulgaria has ratified and incorporated 1982 UNCLOS. Bulgaria has ratified Statute and Agreement on Privileges and Immunities of International Tribunal for Law of Sea (http://www.itlos.org/).

Danube—Executive Agency Exploration and Maintenance of Danube—Rousse (http://www.appd-bg.org/) performs works of maintenance of waterway and ports to ensure safety of shipping in Bulgarian stretch of river Danube.

Treaties.—Bulgaria is party to: Brussels Convention on Salvage and Collision (1910), 1965 London Convention on Facilitating International Shipping, ISM Code of UN Maritime Organization, Convention for Prevention of Maritime Pollution by Dumping of Wastes and Other Matter (1972), Convention on Civil Liability for Transportation of Nuclear Materials by Sea (NUCLEAR), 1974 Convention for Safety of Life at Sea, as amended by 1988 Protocol (SOLAS), 1973 Convention for Prevention of Pollution from Ships, 1978 and 1997 Protocols (MARPOL), 1972 Convention on International Regulation for Preventing Collisions at Sea (COLREGS), 1966 Convention on Land Lines (LOAD LINES), 1990 Convention for Training and Cooperation in Countering Oil Pollution (OPRC), 1989 Convention on Salvage, 1979 Convention for Search and Rescue at Sea, 2001 Convention on Civil Liability for Damage Caused by Bunker Oil Pollution, European Agreement concerning International Carriage of Dangerous Goods by Inland Waterways (ADN), 2001 Convention on Control of Harmful Antifouling Systems on Ships, 1999 Convention on Arrest of Ships. Law on Obligations toward International Fund for Compensation for Damages caused by Oil Pollution was enacted in 2005.

26 TREATIES AND CONVENTIONS

26.01 TREATIES AND CONVENTIONS:

Law on International Treaties (“Zakon za mezhdunarodnite dogovori”) of 2001 governs preparation, signing, execution, registration and deposit of international treaties. In Bulgaria, constitutional authority to enter into treaties is vested in Council of Ministers and President. Art. 85(1) of Constitution states that in cases of treaties of military and political character, in cases of treaties that relate to Bulgaria's participation in international organizations or to changes of country's borders, or contain financial obligations for Bulgaria, or envisage participation of Bulgaria in arbitration or judicial proceedings for settlement of international disputes, or relate to basic human rights, or concern law and its implementation or require measures of legislative character for treaties' execution or explicitly require ratification must be ratified by National Assembly that passes law. Law on International Treaties requires that international treaty which has entered into force must be published in Durzhaven Vestnik. All international treaties which have been ratified and which have entered into force are part of domestic law. In case of conflict between treaty and internal legislation, treaties have priority. (Art. 5[4] of Constitution). All original and certified copies of international treaties to which Bulgaria is party are kept by Ministry of Foreign Affairs.

Bulgaria is party or member, inter alia, to following multilateral conventions or international organizations:

General.

United Nations (UN) (http://www.un.org/); International Monetary Fund (IMF) (http://www.imf.org/); International Bank for Reconstruction and Development (http://www.worldbank.org/); World Trade Organization (http://www.wto.org/); International Finance Corporation (http://www.ifc.org/); Multilateral Investment Guarantee Agency (http://www.miga.org/); UN Food and Agricultural Organization (FAO) (http://www.fao.org/); World Health Organization (WHO) (http://www.who.int/); World Meteorological Organization (http://www.wmo.int/pages/index_en.html); World Intellectual Property Organization (WIPO) (http://www.wipo.int/portal/index.html.en); International Civil Aviation Organization (ICAO) (http://www.icao.int/); Universal Postal Union (http://www.upu.int/); UN Educational, Scientific and Cultural Organization (UNESCO) (http://portal.unesco.org/); International Organization for Migration (http://www.iom.int/); World Customs Organization (http://www.wcoomd.org/); European Bank for Reconstruction and Development (EBRD) (http://www.ebrd.com/); Council of Europe (http://www.coe.int/); International Maritime Organization (IMO) (http://www.imo.org/); International Telecommunication Union (http://www.itu.int/); International Organization for Satellite Telecommunication (INTELSAT) (http://67.228.58.85/dyn4000/itso/tpl1_itso.cfm?location=&id=1&link_src=HPL&lang=english);European Charter for Regional Self Governance (1985); North Atlantic Treaty Organization (NATO); International Criminal Court (http://www.icc-cpi.int/Menus/ICC/Legal+Texts+and+Tools/); Vienna Convention on Law of Treaties (1969); European Telecommunication Satellite Organization (EUTELSAT) (http://www.eutelsatigo.int/en/eutelsat.php); United Nations Industrial Development Organization (http://www.unido.org/); International Criminal Police (Interpol) (http://www.interpol.int/); Organization for Security and Cooperation in Europe (http://www.osce.org/); Organization of Black Sea Economic Cooperation (http://www.bsec-organization.org/); Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations (1986).

Environment.

UN Framework Convention on Climate Change (1992), Vienna Convention for Protection of Ozone Layer (1985) and Montreal Protocol (1987), Convention on Long Range Trans-Boundary Air Pollution (1979), International Convention for Prevention of Pollution from Ships (MARPOL) (1973), Bern Convention on Conservation of European Wildlife and Natural Habitats (1979), Convention on Preservation of Black Sea from Pollution (1992), Kyoto Protocol to the United Nations Framework Convention on Climate Change (1998); Convention on the prohibition of military or any other hostile use of environmental modification techniques; Convention on the Territorial Sea and the Contiguous Zone (1958); WHO Framework Convention on Tobacco Control (2003).

Nuclear Energy.

Statute of International Atomic Energy Agency (1956), Vienna Convention on Nuclear

Safety (1994), Vienna Convention on Early Notification of Nuclear Accident (1986), Convention on Aid in Case of Nuclear Accident and Nuclear Danger (1986), Vienna Convention on Physical Protection of Nuclear Material (1979), Treaty on Prohibition of Nuclear Tests in the Atmosphere, Space and Under the Water (1963), Treaty on Non-Proliferation of Nuclear Weapons (1968), Treaty on Prohibition of Disposal of Nuclear and Other Weapons for Mass Destruction at Sea and Ocean Bottom (1971), Convention on Prohibition of Development, Production and Piling of Stock of Biological and Toxic Weapons and Their Destruction (1971), Vienna Convention on Civil Liability for Nuclear Damage (1963); Protocol for Joint Application of Vienna Convention on Civil Liability for Nuclear Damage and Paris Conventions on Third Party Liability in Field of Nuclear Power (1988); Convention Establishing European Organization for Nuclear Research (CERN) (1954).

Human Rights and Humanitarian Law.

Convention on Prevention and Punishment of Crime of Genocide (1948), Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity (1968), Convention on Elimination of All Forms of Discrimination Against Women (1979), Optional Protocol to Convention on Elimination of All Forms of Discrimination Against Women (2000), UN Convention on Rights of Child (1989), Optional Protocol to Convention on Rights of Child on Involvement of Children in Armed Conflict (2002), Optional Protocol to Convention on Rights of Child on Sale of Children, Child Prostitution and Child Pornography (2002), UN Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (1987), Convention for Prevention and Punishment of Crime of Apartheid, Convention on Elimination of All Forms of Racial Discrimination (1966), Convention on Citizenship of Married Woman (1957), Convention on Status of Refugees (1951) and Protocol (1967), European Convention Against Terrorism, International Covenant on Economic, Social and Cultural Rights (1966), International Covenant on Civil and Political Rights (1966) and Protocol (1966), European Convention for Protection of Human Rights and Fundamental Freedoms (1950) and its Protocols, Hague Convention on Protection of Children and Co-operation in Field of International Adoption (1993), Geneva Convention for Ameliorating Conditions of Wounded and Sick in Armies in Field (1949), Geneva Convention for Ameliorating Conditions of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (1949), Additional Protocols on Protection of Victims of Military Conflicts (1977), Geneva Convention Regarding Treatment of Prisoners of War (1949), Geneva Convention on Protection of Civilians in Time of War (1949) (see http://www.icrc.org/), Hague Convention on Civil Aspects of International Child Abduction (1980).

International Transport.

Chicago Convention on International Civil Aviation (1944), Convention on Contracts for International Carriage of Goods by Road—CMR (1956), European Convention Concerning International Carriage of Dangerous Goods by Road (1957), Customs Convention on International Transport of Goods under Cover of Tir Carnets—TIR (1959), Agreement on International Railway Transport—COTIF (1980), European Agreement on Main International Traffic Arteries—AGR (1975), Convention on Law of the Sea, Montego Bay (1982), Convention of International Regulation for Preventing Collisions at Sea (1972), Tokyo Convention of Infringements and Other Acts Committed on Board Aircraft (1963), Convention on Road Signs and Signals, Convention Relating to Arrest of Sea-Going Ships (1952), Convention on Securing Aviation "EUROCONTROL" (1960), Convention on Salvage at Sea (1989), Brussels Conventions on Salvage & Collision (1910), European Agreement on Most Important Sea Routes with International Importance (1996), Danube Convention on Shipping (1948), its Protocols, Vienna Convention on Road Traffic (1968), International Convention on Tonnage Measurement of Ships —TONNAGE (1969).

International Cooperation in Legal Matters.

European Convention on Mutual Assistance in Penal Matters (1959) and its Protocols (1959, 1978, 2001), Convention on Transfer of Sentenced Persons (1983), European Convention on Extradition (1957) and its Protocols (1978), European Convention on Information on Foreign Law (1968) and its Protocols (1978).

Labour.

International Labour Organization (http://www.ilo.org/global/lang--en/index.htm) conventions Nos. 1, 3, 4, 6, 8, 9, 11, 12, 13, 14, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 29, 30, 32, 34, 35, 36, 37, 38, 39, 40, 43, 44, 45, 49, 52, 53, 54, 55, 56, 57, 58, 59, 60, 62, 68, 69, 71, 72, 73, 75, 77, 78, 79, 80, 81, 87, 94, 95, 98, 100, 105, 106, 108, 112, 113, 116, 120, 122, 123, 124, 127, 138, 144, 146, 147, 156, 163, 164, 166, 173, 178, 179, 180, 181, 182, 183.

Outer Space.

Treaty on Principles of Activity of States in Research and Use of Outer Space (1967), Agreement on Rescue of Astronauts (1968), Convention on International Liability for Damages Caused by Outer Space Objectiles (1972), Convention on Registration of Objectiles Launched in Outer Space (1974), Agreement on Setting up the International System and Organization for Outer Space Telecommunications “Intersputnik” (1971).

Consular and Diplomatic.

Vienna Convention on Diplomatic Relations (1961), Optional Protocol to Vienna Convention on Diplomatic Relations Concerning Compulsory Settlement of Disputes (1961), Vienna Convention on Consular Relations (1963), Optional Protocol to Vienna Convention on Consular Relations Concerning Compulsory Settlement of Disputes (1963), Optional Protocol to Vienna Convention on Consular Relations concerning Acquisition of Nationality (1963).

Weights and Measures.

Convention on the Meter (1875).

Antarctica.

Since 1988, Bulgaria has maintained serious presence in Antarctica and at moment has permanent research station St. Kliment Ohridski on Livingston Island, which is part of South Shetland Islands. Bulgarian scientists conduct geological, biological and meteorological research. Since 1990s, Bulgarian Presidents have issued decrees and named geographical sites on Livingston. In 2005, Bulgarian President and several ministers visited research station. In 2005, Bulgaria issued postal stamp to commemorate its presence there. In 2007, Parliament adopted Declaration concerning International Polar Year and global warming. Provisions related to Antarctica are contained in Law on Waters, Law on Geodesy and Cartography, Law on Transliteration and in Customs Regulations. Special Regulation implemented Antarctic Environmental Protocol. In 1978, Bulgaria acceded to 1959 Antarctic Treaty and in 1988 became consultative member. At present she makes no territorial claim. Bulgaria ratified 1980 Convention for Conservation of Antarctic Marine Living Resources, and 1991 Antarctic-Environmental Protocol in 1998. In 2003, Bulgarian Parliament ratified Measure One for setting up Antarctic Treaty Permanent Secretariat (http://www.ats.aq/). In 2004, Parliament passed law which ratified Annex Five to Antarctic-Environmental Protocol. Bulgaria has recently signed bilateral Antarctic cooperation treaties with Chile and Spain.

CAN
CANADA LAW DIGEST

—Scope —

Revised for 2010 edition by

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Preliminary Note.—Following is digest of federal laws of Canada. Laws of provinces of Canada are separately digested hereafter under names of several provinces. Where digest heading is missing, reference should be had to appropriate digest of provincial law.

(Citations, unless otherwise indicated, refer to chapters (c.) of the Revised Statutes of Canada, 1985 as am'd. Annual Statutes of Canada are cited by year and chapter number. C.R.C. means Consolidated Regulations of Canada, 1978 as am'd; SOR followed by year and numbers refers to the Regulation as published in the Canada Gazette, Part II.)

1 INTRODUCTION

1.01 CURRENCY:

Monetary unit of Canada (CDN $) is dollar and cents, cent being one hundredth of dollar pursuant to Currency Act (c. C-52). (§3[1]).

See also category 15 Foreign Trade and Commerce, topic 15.01 Exchange Control.

1.02 GOVERNMENT AND LEGAL SYSTEM:

Canada was established under Constitution Act, 1867 (formerly British North America Act, 1867) passed by U.K. Parliament. Act united Provinces of Canada, Nova Scotia and New Brunswick. Act created four provinces: Ontario (formerly province of Upper Canada), Quebec (formerly province of Lower Canada), Nova Scotia and New Brunswick. Subsequently, other provinces and territories were admitted to the federation. Canada is now comprised of ten provinces (Alberta, British Columbia, Manitoba, New Brunswick, Newfoundland, Nova Scotia, Ontario, Prince Edward Island, Quebec, and Saskatchewan) and three territories (Northwest Territories, Nunavut, and Yukon). U.K. Parliament ceased to have legislative authority over Canada except by consent pursuant to Statute of Westminster, 1931. Canada Act, 1982, which was proclaimed in force on Apr. 17, 1982, formally terminated U.K. Parliament's authority over Canada and provided power to Canada to amend its Constitution. Constitution of Canada, which is comprised of Constitution Acts 1867-1982, is supreme law of Canada and any law which is inconsistent with provisions of Constitution is, to extent of inconsistency, of no force and effect.

Constitution binds all governments, both federal and provincial, including executive branch: see Operation Dismantle Inc. v. The Queen (1985) 1 S.C.R. 441 and Reference re: Secession of Quebec (1998) 2 S.C.R. 217.

Second session of 40th Parliament began on Jan. 26, 2009 and 40th General Election took place on Oct. 14, 2008. Dates for beginning and end of sessions announced during session.

Federal Parliament.

Parliament consists of Sovereign, Senate and House of Commons. Sovereign appoints Governor General who is Sovereign's representative in Canada. In practice, Sovereign merely formalizes appointment of Governor General who is selected by Prime Minister, leader of governing party.

Senate consists of fixed number of senators who hold office until age 75 as prescribed in Constitution Act, 1867. Each government appoints members to Senate. Senate has technically same powers as House of Commons but it is accepted that role of appointed Senate is subordinate to elected House of Commons.

House of Commons consists of elected representatives of each of provinces and territories. Prime Minister is leader of political party having support of majority of members in House of Commons. Where none of parties forms majority in House of Commons, control of House of Commons may be obtained by one of major parties cooperating with one of minor parties. Prime Minister selects members from House of Commons to form Cabinet and advises Governor General to appoint them as Cabinet Ministers. Cabinet Ministers formulate and carry out all executive policies and administer all government departments.

Constitution Act, 1867 provides that there shall be Queen's Privy Council for Canada to aid and advise government. Cabinet Ministers are all appointed to Privy Council. Since appointments to Privy Council are for life, Privy Council may consist of ministers of past governments. Privy Council also includes persons of distinction who are appointed as an honour. In practice, whole Privy Council does not meet regularly or conduct government business.

Federal Judiciary.

See category 6 Courts and Legislature, topic 6.02 Courts.

Provincial Governments.

Each province has Lieutenant Governor who is nominal Head of State and represents Sovereign in province. Constitution Act, 1867 provides that Lieutenant Governor shall be appointed by Governor General in Council. Lieutenant Governor is actually selected by federal government but Lieutenant Governor is not in practice agent of federal government. Lieutenant Governor acts on advice of provincial Cabinet.

Each province also has Executive Council. Leader of governing political party is President of Executive Council and Premier of Province. Premier makes formal recommendations to Lieutenant Governor on appointment of Cabinet Ministers who comprise Executive Council. Cabinet Ministers head each of departments of government.

Each province's Legislature consists of Lieutenant Governor and Legislative Assembly (in Quebec, known as National Assembly of Quebec) which is composed of all elected representatives of constituencies in province.

Jurisdiction of Federal Parliament.

By Constitution Act, 1867, exclusive legislative jurisdiction over specific subject matters was assigned to Dominion Parliament and Provincial Legislatures. Dominion Parliament has also residuary power to make laws for peace, order and good government of Canada in relation to all matters not coming within classes of subjects assigned exclusively to Provincial Legislatures.

Exclusive legislative authority of Parliament of Canada extends to following classes of subjects: (1) Public debt and property; (2) regulation of trade and commerce; (2a) unemployment-insurance; (3) raising of money by any mode or system of taxation; (4) borrowing of money on public credit; (5) postal service; (6) census and statistics; (7) militia, military and naval service and defence; (8) fixing of and providing for salaries and allowances of civil and other officers of government of Canada; (9) beacons, buoys, lighthouses and Sable Island; (10) navigation and shipping; (11) quarantine and establishment and maintenance of marine hospitals; (12) sea coast and inland fisheries; (13) ferries between province and any British or foreign country or between two provinces; (14) currency and coinage; (15) banking, incorporation of banks, and issue of paper money; (16) savings banks; (17) weights and measures; (18) bills of exchange and promissory notes; (19) interest; (20) legal tender; (21) bankruptcy and insolvency; (22) patents; (23) copyrights; (24) Indians (Natives), and lands reserved for Indians; (25) naturalization and non-citizens; (26) marriage and divorce; (27) criminal law, except constitution of courts of criminal jurisdiction, but including procedure in criminal matters; (28) establishment, maintenance and management of penitentiaries; (29) such classes of subjects as are expressly excepted in enumeration of classes of subjects by this act assigned exclusively to Legislatures of Provinces.

Parliament of Canada also has power to make laws in relation to old age pensions and supplementary benefits, but no such law affects operation of any law made by provincial legislature governing old age pensions and supplementary benefits.

Parliament of Canada has concurrent powers of legislation with Provincial Legislatures in matters relating to agriculture and immigration into Province. Any law of Provincial Legislatures governing agriculture or immigration is effective as long as it is not repugnant to any statute of Parliament of Canada. Where there is conflict or inconsistency between statute of Parliament and statute of Provincial Legislature, it is federal law that prevails.

Bill of Rights.

On Aug. 10, 1960, Federal Parliament enacted Canadian Bill of Rights (Appendix III to R.S.C.) that affirms rights of individual in society of free citizens and free institutions. All Acts passed by Parliament of Canada are subject to rights and freedoms recognized and declared in this Bill.

Discrimination and Human Rights.

By An Act to amend the Canadian Human Rights Act, S.C. 1996, c. 14 amending c. H-6, race, national or ethnic origin, religion, age, sex, marital status, family status, disability, conviction for which pardon has been granted, and sexual orientation are prohibited grounds of discrimination. (§3).

Person discriminated against may institute complaint before Canadian Human Rights Commission or Tribunal appointed by it, under Part III of Act. If complaint substantiated, Commission may order cessation of discriminatory practice or order compensation for complainant. (§53). Commission may also order special compensation up to CDN $20,000 on punitive basis be paid to complainant. (§53[3]).

Each of Provinces has similar statute to federal Canadian Human Rights Act. Federal Act and federal Commission have jurisdiction over federal undertakings only.

Canadian Charter of Rights and Freedoms.

Canadian Charter of Rights and Freedoms (Schedule B to Constitution Act, 1982) sets out those rights and freedoms protected by Canadian constitution. Rights protected include: fundamental freedoms (§2); democratic rights (§3); mobility rights (§6); legal rights (§§7-14); equality rights (§15); and minority language educational rights (§23). Charter also establishes French and English as official languages of Canada. These languages have equality of status and equal rights and privileges as to their use in all institutions of parliament and government of Canada. (§§16-22).

Charter applies to federal and provincial law and laws inconsistent with its provisions are to extent of inconsistency of no force or effect. (§52). Persons whose rights or freedoms, as guaranteed by Charter, are infringed may apply to court of competent jurisdiction to obtain remedy. (§24). Parliament or legislature of province may avoid provisions of Charter relating to fundamental freedoms or legal rights if legislation expressly declares that it shall operate notwithstanding such provisions. (§33[1]). Notwithstanding anything in Charter, rights and freedoms referred to in it are guaranteed equally to male and female persons. (§28).

Adoption of Charter, to significant extent, has transformed Canadian system of government from system of parliamentary supremacy to one of constitutional supremacy: see

Reference re: Secession of Quebec (1998) 2 S.C.R. 217.

Rights of Aboriginal Peoples of Canada.

Constitution Act, 1982 recognizes and affirms “existing” aboriginal and treaty rights of aboriginal peoples. (§35; See R. v. Sparrow, [1990] 1 S.C.R. 1075 and Delgamuukw v. British Columbia, [1997] 3 S.C.R. 1010; and R. v. Marshall [1999] 3 S.C.R. 533.) Further, Charter guarantees that aboriginal rights and freedoms are not affected by Charter. (§25).

Constitutional Amendment.

Under general amending formula, Parliament has power to amend Constitution of Canada where such amendment is authorized by: (1) Resolutions of Senate and House of Commons, and (2) accepted by two-thirds of provinces where such provinces have, in aggregate, at least 50% of population of all provinces.

Amendments affecting rights or privileges of legislature of province require support by majority of members of each of Senate, House of Commons and legislative assemblies. Where legislative assemblies express their dissent to such amendments by resolution supported by majority of its members, amendment will not have effect in that province.

On Feb. 2, 1996, An Act Respecting Constitutional Amendments came into force, adding further requirement for federal government's exercise of its constitutional amendment authority. Under Act, no amendment may be proposed without consent of Ontario, Quebec, British Columbia, two or more of Atlantic provinces and two or more of Prairie provinces. (S.C. 1996, c. 1; See also Reference re: Secession of Quebec, [1998] 2 S.C.R. 217.)

Unanimous consent, meaning by resolutions of Senate and House of Commons and legislative assembly of each of provinces, is necessary to amend Constitution in relation to certain specific matters, including: (1) Office of Queen, Governor General and Lieutenant Governor of province; (2) use of English or French language; and (3) composition of Supreme Court of Canada.

Jurisdiction of Provincial Legislatures.

Exclusive legislative authority of Provincial Legislatures extends to following classes of subjects: (1) Amendment of Constitution of province, except as regards office of Lieutenant Governor; (2) direct taxation within province in order to raising of revenue for provincial purposes; (3) borrowing of money on sole credit of province; (4) establishment and tenure of provincial offices and appointment and payment of provincial officers; (5) management and sale of public lands belonging to province and of timber and wood thereon; (6) establishment, maintenance, and management of public and reformatory prisons in and for province; (7) establishment, maintenance and management of hospitals, asylums, charities and eleemosynary institutions in and for province, other than marine hospitals; (8) municipal institutions in province; (9) shop, saloon, tavern, auctioneer and other licences in order to raising of revenue for provincial, local or municipal purposes; (10) local works and undertakings other than such as are of following classes: lines of steam or other ships, railways, canals, telegraphs, and other works and undertakings connecting province with any other or others of provinces, or extending beyond limits of province; lines of steamships between province and any British or foreign country; such works as, although wholly situate within province, are before or after their execution declared by Parliament of Canada to be for general advantage of Canada or for advantage of two or more of provinces; (11) incorporation of companies with provincial objects; (12) solemnization of marriage in province; (13) property and civil rights in province; (14) administration of justice in province, including constitution, maintenance and organization of provincial courts, of both civil and criminal jurisdiction, and procedure in civil matters; (15) punishment by fine, penalty, or imprisonment for enforcing any law of province made in relation to any matter enumerated above; (16) education; (17) generally all matters of merely local or private nature in province; (18) exploration for nonrenewable natural resources and development, conservation and management of nonrenewable natural resources, forestry resources and facilities for generation and production of electrical energy; (19) export from province to another part of Canada of primary production from nonrenewable natural resources, forestry resources, and production from facilities for generation of electrical energy in province provided that such laws may not authorize or provide for discrimination in prices or in supplies exported to another part of Canada.

Yukon Territory, Northwest Territories, and Nunavut Territory are governed by Commissioner and elected council (in Nunavut, elected legislative assembly) with respect generally to those matters elsewhere within jurisdiction of provincial governments. Yukon Act (c. Y-2), Northwest Territories Act (c. N-27), and Nunavut Act (S.C. 1993, c. 28) provide for government of territories and list classes of subjects in relation to which Commissioner-in-Council may make ordinances. Nunavut Territory (in eastern Arctic region) was severed from Northwest Territories in Apr., 1999. It has structure and jurisdiction similar to those of other Territories. See category 22 Property, topic 22.03 Public Lands.

1.03 HOLIDAYS:

Following statutory holidays are observed by provinces and territories of Canada: New Year's Day; Good Fri. (or Easter Mon. for Quebec); Victoria Day (known as National Patriot's Day in Quebec) (excluding New Brunswick, Newfoundland and Labrador, Nova Scotia, P.E.I., Quebec); Canada Day, July 1st (known as Memorial Day in Newfoundland and Labrador); Labour Day, 1st Mon. in Sept.; Thanksgiving, 2d Mon. in Oct. (excluding New Brunswick, Newfoundland and Labrador, Nova Scotia and P.E.I.); Remembrance Day, Nov. 11th (excluding Ontario and Quebec) (Manitoba and Nova Scotia have special Remembrance Day legislation); Christmas Day.

Further, following provinces and territories observe these additional holidays: Alberta observes Alberta Family Day, 3d Mon. in Feb.; British Columbia observes British Columbia Day, 1st Mon. in Aug.; Manitoba observes Louis Riel Day, 3d Mon. in Feb.; New Brunswick observes New Brunswick Day, 1st Mon. in Aug.; Ontario observes Boxing Day, Dec. 26; and Family Day, 3d Mon. in Feb.; Saskatchewan observes Family Day, 3d Mon. of Feb.; and Saskatchewan Day, 1st Mon. in Aug.; Northwest Territories observes National Aboriginal Day, June 21st; and Civic Holiday, 1st Mon. in Aug.; Nunavut observes Easter Mon.; Nunavut Day, July 9th; Civic Holiday, 1st Mon. in Aug.; and Boxing Day, Dec. 26th; Yukon observes Discovery Day, 1st Mon. in Aug.; and Quebec observes National Holiday, June 24th.

Legality of Transactions on Holidays.

In general, transactions are not invalidated because done on a holiday or Sun.

See digests of laws of the several provinces.

1.04 OFFICE HOURS AND TIME ZONE:

Canada is in the Pacific (GMT -08:00), Mountain (GMT -07:00), Central (GMT -06:00), Eastern (GMT -05:00), Atlantic (GMT -04:00) and Newfoundland (GMT -03:30) time zones. Office hours are generally from 9 a.m. to 5 p.m.

2 BUSINESS ORGANIZATIONS

2.01 AGENCY:

See digests of the laws of the several provinces.

2.02 COMPANIES:

See topic 2.03 Corporations.

2.03 CORPORATIONS:

Canadian corporations may be created either by certificate of incorporation issued pursuant to Canada Business Corporations Act (c. C-44) which Act contains general legislation governing corporations, or in special cases by Act of Parliament. Companies incorporated under Part I of Canada Corporations Act (R.S.C. 1970, c. C-32) which did not apply for continuance before Dec. 15, 1980 were automatically dissolved as of that date. Companies without share capital with objects of national, patriotic, religious, philanthropic, charitable, scientific, artistic, social, professional or sporting character subject to Part II or Part III of Canada Corporations Act continue to be governed by that Act.

General supervision of incorporation and administration of Canada Business Corporations Act and Canada Corporations Act is performed by Minister of Industry Canada.

Canadian or Provincial Incorporation.

Companies whose operations are to be confined to one province should be incorporated under laws of that province. Companies which carry on business throughout country or in several provinces or in foreign countries should be incorporated under federal laws. Canadian companies are entitled to carry on business throughout country, and no province has constitutional power to impair this right by discriminatory legislation. They are, however, subject to provincial laws of general application, and may be required to obtain extra provincial corporation licences, and licences in mortmain, when operating and owning land in a province which demands such licences.

Canada Business Corporations Act came into force on Dec. 15, 1975.

Part I. Interpretation and Application.

Application.

Act will apply to every corporation incorporated and every body corporate continued as corporation under Act that has not been discontinued under Act.

“Corporation” as defined in Act means body corporate incorporated or continued under Act and not discontinued under Act. “Body corporate” as defined in Act means body corporate wherever or however incorporated.

Exceptions.

Act does not apply to body corporate that is bank, cooperative credit association, insurance company, trust company or loan company.

Purposes of Act.

Purposes of Act are to revise and reform law applicable to business corporations incorporated to carry on business throughout Canada, to advance cause of uniformity of business corporation law in Canada and to provide means of allowing orderly transference of certain federal companies incorporated under various Acts of Parliament to Act.

Part II. Incorporation.

Incorporators.

One or more individuals not one of whom: (a) is less than 18 years of age, (b) is of unsound mind and has been so found by court in Canada or elsewhere, or (c) has status of bankrupt, or one or more bodies corporate may incorporate corporation by signing articles of incorporation in prescribed form.

Certificate of Incorporation.

Upon receipt of articles of incorporation in prescribed form Director must issue certificate of incorporation and corporation comes into existence on date shown in certificate of incorporation. Incorporation under Act is matter of right rather than privilege accorded pursuant to government prerogative. However, Director has power to refuse to issue certificate of incorporation if it has received notice indicating that corporation, if it came into existence, would not be in compliance with Act.

Publication of Name.

Corporation must set out its name in legible characters in all contracts, invoices, negotiable instruments and orders for goods or services issued or made by or on behalf of corporation.

Other Name.

Corporation may carry on business under or identify itself by name other than its corporate name, unless such name is as prescribed, prohibited or deceptively misdescriptive or reserved for another corporation.

Reserving Name.

Director may, upon request, reserve for 90 days name for intended corporation or for corporation about to change its name.

Designating Number.

If requested to do so by incorporators or corporation, Director must assign to corporation as its name designating number determined by him followed by word “Canada”.

Personal Liability under Pre-incorporation Contracts.

Subject to certain exceptions including express provision in written contract negating personal liability, person who enters into, or purports to enter into, written contract in name of or on behalf of corporation before it comes into existence is personally bound by contract and is entitled to benefits thereof.

Pre-incorporation and Pre-amalgamation Contracts.

Corporation may, within reasonable time after it comes into existence, by any action or conduct signifying its intention to be bound thereby, adopt written contract made before it came into existence in its name or on its behalf and upon such adoption: (a) corporation is bound by contract and is entitled to benefits thereof as if corporation had been in existence at date of contract and had been party thereto; and (b) person who purported to act in name of or on behalf of corporation ceases, except as court may order on application by any party to contract, to be bound by or entitled to benefits of contract.

Part III. Capacity and Powers.

Capacity of a Corporation.

Corporation has capacity and, subject to Act, rights, powers and privileges of natural person and may carry on business throughout Canada.

Extra-territorial Capacity.

Corporation has capacity to carry on its business, conduct its affairs and exercise its powers in any jurisdiction outside Canada to extent that laws of such jurisdiction permit.

Part IV. Registered Office and Records.

Registered Office.

Corporation must at all times have registered office in Province in Canada specified in its articles and notify Director within 15 days of any change of address of its registered office.

Corporate Records.

Corporation must prepare and maintain, at its registered office or at any other place in Canada designated by directors, records containing: (a) articles and by-laws, and all amendments thereto, and copy of any unanimous shareholder agreement; (b) minutes of meetings and resolutions of shareholders; (c) copies of all notices of directors or notices of change of directors; and (d) securities register in prescribed form. Such records may be kept outside Canada if corporation makes available for inspection by computer at registered office or other designated place in Canada.

Access to Corporate Records.

Shareholders and creditors of corporation, their agents and legal representatives and Director may examine these records during usual business hours of corporation, and may take extracts therefrom, free of charge, and, where corporation is distributing corporation, any other person may do so upon payment of reasonable fee. Affidavit is required for inspection of distributing corporation's securities register.

Directors Records.

Corporation must prepare and maintain at its registered office or at such other place as directors think fit adequate accounting records and records containing minutes of meetings and resolutions of directors and any committee thereof which records must be open to inspection by directors at all reasonable times.

Retention of Accounting Records.

Subject to other legislation providing for longer retention period, corporation shall retain its accounting records for period of six years.

Shareholder Lists.

Any person, upon payment of reasonable fee and upon sending to corporation or its transfer agent affidavit in prescribed form may upon application require distributing corporation as defined in Act or its agent to furnish within ten days from receipt of affidavit list setting out names of shareholders of corporation, number of shares owned by each shareholder and address of each shareholder as shown on records of corporation.

Use of Shareholder List.

List of shareholders or information obtained from securities register shall not be used by any person except in connection with: (a) effort to influence voting of shareholders of corporation;

(b) offer to acquire shares of corporation; or (c) any other matter relating to affairs of corporation.

Form of Records.

All registers and other records required by Act to be prepared and maintained may be in bound or looseleaf form or in photographic film form, or may be entered or recorded by any system of mechanical or electronic data processing or any other information storage device that is capable of reproducing any required information in intelligible written form within reasonable time.

Corporate Seal.

Corporation may, but need not adopt corporate seal. Instrument or agreement executed on behalf of corporation by director, officer or agent of corporation is not invalid merely because corporate seal is not affixed thereto.

Part V. Corporate Finance.

Shares.

Shares of corporation must be in registered form and must be without nominal or par value.

Transitional.

Where body corporate is continued under Act, share with nominal or par value issued by body corporate before it was so continued is, for purpose of Act, deemed to be share without nominal or par value.

Class of Shares.

Articles may provide for more than one class of shares and, if they so provide, there shall be set out therein rights, privileges, restrictions and conditions attaching to shares of each class. Where corporation has only one class of shares, rights of holders are equal in all respects.

Class Voting.

Articles must provide for at least one class of shares holders of which are entitled: (a) to vote at all meetings of shareholders except meetings at which only holders of specified class of shares are entitled to vote; (b) to receive any dividend declared by corporation; and (c) to receive remaining property of corporation upon dissolution.

Issue of Shares.

Subject to articles, by laws and any unanimous shareholder agreement, shares may be issued at such times and to such persons and for such consideration as directors may determine.

Shares Nonassessable.

Shares issued by corporation are nonassessable and holders are not liable to corporation or to its creditors in respect thereof.

Consideration.

Share must not be issued by directors until it is fully paid in money or in property or past services that is fair equivalent of money that corporation would have received if share had been issued for money.

Consideration Other than Money.

In determining whether property or past services is fair equivalent of money consideration, directors may take into account reasonable charges and expenses of organization and re-organization and payments for property and past services reasonably expected to benefit corporation.

Property.

For purposes of these provisions, “property” does not include promissory note or promise to pay that is made to person to whom share is issued, or person who does not deal at arm's length with person to whom share is issued.

Stated Capital Account.

Corporation must maintain separate stated capital account for each class and series of shares issued, and consideration received by corporation for each share issued must be added to stated capital account maintained for shares of that class or series.

Restriction.

Corporation must not reduce its stated capital or any stated capital account except in manner provided in Act.

Shares in Series.

Articles may authorize issue of any class of shares in one or more series and may to fix number of shares in and to determine designation, rights, privileges, restrictions and conditions attaching to, shares of each series, or may authorize directors to fix number of shares, rights, etc.

Series Participation.

If any cumulative dividends or amounts payable on return of capital in respect of series of shares are not paid in full, shares of all series of same class participate rateably in respect of accumulated dividends and return of capital.

Restrictions on Series.

No rights, privileges, restrictions or conditions attached to series of shares authorized under these provisions may confer upon series priority in respect of dividends or return of capital over any other series of shares of same class that are then outstanding.

Pre-emptive Right.

If articles so provide, no shares of class (other than shares to be issued: (a) for consideration other than money; (b) as share dividend; or (c) pursuant to exercise of conversion privileges, options or rights previously granted by corporation) may be issued unless shares have first been offered to shareholders holding shares of that class and those shareholders have pre-emptive right to acquire offered shares in proportion to their holdings of shares of that class, at such price and on such terms as those shares are to be offered to others.

Options and Rights.

Corporation may issue certificates, warrants or other evidences of conversion privileges, options or rights to acquire securities of corporation.

Transferable Rights.

Conversion privileges, options and rights to acquire securities of corporation may be made transferable or nontransferable, and options and rights to acquire may be made separable or inseparable from any securities to which they are attached.

Reserved Shares.

Where corporation has granted privileges to convert any securities issued by corporation into shares, or into shares of another class or series, or has issued or granted options or rights to acquire shares, if articles limit number of authorized shares, corporation must reserve and continue to reserve sufficient authorized shares to meet exercise of such conversion privileges, options and rights.

Corporation Holding Its Own Shares.

Except as provided in Act, corporation must not hold shares in itself or in its holding body corporate and shall not permit any subsidiary corporation to acquire shares of corporation. Corporation shall cause subsidiary body corporate that holds shares of corporation to dispose of them within five years from date became subsidiary or date of continuance under Act.

Corporation may in capacity of legal representative hold shares in itself or in its holding body corporate unless it or holding body corporate or subsidiary of either of them has beneficial interest in shares.

Corporation may hold shares in itself or in its holding body corporate by way of security for purposes of transaction entered into by it in ordinary course of business that includes lending of money. Corporation may permit its subsidiary bodies corporate to acquire shares of corporation through issuance of those shares by corporation to subsidiary body corporate if certain prescribed conditions are met.

Acquisition of Corporation's Own Shares.

Subject to Act and to its articles, corporation may purchase or otherwise acquire shares issued by it.

Limitation.

Corporation may not make any payment to purchase or otherwise acquire shares issued by it (other than to satisfy claim of shareholder who dissents following certain actions by corporation or order of court) if there are reasonable grounds for believing that (a) corporation is, or would after payment be, unable to pay its liabilities as they become due; or (b) realizable value of corporation's assets would after payment be less than aggregate of its liabilities and stated capital of all classes.

Alternative Acquisition of Corporation's Own Shares.

Notwithstanding foregoing but subject to its articles, corporation may purchase or otherwise acquire shares issued by it to: (a) settle or compromise debt or claim asserted by or against corporation; (b) eliminate fractional shares; or (c) fulfil terms of non-assignable agreement under which corporation has option or is obliged to purchase shares owned by director, officer or employee of corporation; unless there are reasonable grounds for believing that (i) corporation is, or would after payment be, unable to pay its liabilities as they become due, or (ii) realizable value of corporation's assets would after payment be less than aggregate of its liabilities and amount required for payment on redemption or in liquidation of all shares holders of which have right to be paid prior to holders of shares to be purchased or acquired, to extent that amount has not been included in corporation's liabilities.

Redemption of Shares.

Subject to Act and to its articles, corporation may purchase or redeem any redeemable shares issued by it at prices not exceeding redemption price thereof stated in articles or calculated according to formula stated in articles.

Corporation must not make any payment to purchase or redeem any redeemable shares issued by it if there are reasonable grounds for believing that: (a) corporation is, or would after payment be, unable to pay its liabilities as they become due; or (b) realizable value of corporation's assets would after payment be less than aggregate of (i) its liabilities, and (ii) amount that would be required to pay holders of shares that have right to be paid, on redemption or in liquidation, ratably with or prior to holders of shares to be purchased or redeemed, to extent that amount has not been included in corporation's liabilities.

Other Reduction of Stated Capital.

Corporation may by special resolution reduce its stated capital for any purpose including: (a) extinguishing or reducing liability for amount unpaid on any share; (b) distributing to holder of issued share of any class or series amount not exceeding stated capital of class or series; and (c) declaring stated capital to be reduced by amount not represented by realizable assets, unless with regard to (a) and (b) above there are reasonable grounds for believing that (i) corporation is, or would after reduction be, unable to pay its liabilities as they become due; or (ii) realizable value of corporation's assets would thereby be less than aggregate of its liabilities.

Adjustment of Stated Capital Account.

Upon purchase, redemption or other acquisition by corporation under Act of shares or fractions thereof issued by it, corporation must deduct from stated capital account maintained for class or series of shares purchased, redeemed or otherwise acquired amount equal to result obtained by multiplying stated capital of shares of that class or series by number of shares of that class or series or fractions thereof purchased, redeemed or otherwise acquired, divided by number of issued shares of that class or series immediately before purchase, redemption or other acquisition.

Cancellation or Restoration of Shares.

Shares or fractions thereof issued by corporation and purchased, redeemed or otherwise acquired by it shall be cancelled or, if articles limit number of authorized shares, may be restored to status of authorized but unissued shares.

Repayment.

Debt obligations issued, pledged, hypothecated or deposited by corporation are not redeemed by reason only that indebtedness evidenced by debt obligations or in respect of which debt obligations are issued, pledged, hypothecated or deposited is repaid.

Acquisition and Reissue of Debt Obligations.

Debt obligations issued by corporation and purchased, redeemed or otherwise acquired by it may be cancelled or, subject to any applicable trust indenture or other agreement, may be reissued, pledged or hypothecated to secure any obligation of corporation then existing or thereafter incurred, and any such acquisition and reissue, pledge or hypothecation is not cancellation of debt obligations.

Enforceability of Contract.

Corporation shall fulfil its obligations under contract to buy shares of corporation, except if corporation can prove enforcement would put it in breach of Act.

Commission for Sale of Shares.

Directors acting honestly and in good faith with view to best interests of corporation may authorize corporation to pay commission to any person in consideration of his purchasing or agreeing to purchase shares of corporation from corporation or from any other person, or procuring or agreeing to procure purchasers for any such shares.

Dividends.

Corporation must not declare or pay dividend if there are reasonable grounds for believing that: (a) corporation is, or would, after payment be, unable to pay its liabilities as they become due; or (b) realizable value of corporation's assets would thereby be less than aggregate of its liabilities and stated capital of all classes. Corporation may pay dividend in money or property or by issuing fully paid shares of corporation.

Shareholder Immunity.

Shareholders of corporation are not, as shareholders, liable for any liability, act or default of corporation except for any money, property or benefits received by them as result of improper reduction of stated capital, any money or property that was received by them as result of improper issuance of share, liabilities for breach of their duties as directors as result of unanimous shareholders agreement and judgment against them in representative action brought against them as class.

Part VI. Sale of Constrained Shares.

Part VI regulates sale and transfer of shares that are constrained in order to assist corporation or any of its affiliates or associates to attain specified level of Canadian ownership. Corporation can sell constrained shares to further purposes of constraint upon compensating previous shareholder in form of trust fund comprised of proceeds of sale. Accepted purposes of constraining shares are governed by this Part.

Part VII. Security Certificates, Registers and Transfers.

Part VII of Act represents attempt to achieve two goals: (i) to consolidate in one Part of Act all of rules relating to security registers, dealing with security holders and security transfers, and (ii) to introduce concept of Article 8 of Uniform Commercial Code which has effect of making properly endorsed security certificates negotiable instruments between registration dates. Concept of negotiability between registration dates results in security certificate being not merely evidence of legal rights and privileges but embodiment of those rights and privileges which are transferred when security certificate is transferred. Concept of registration assures bona fide purchaser that registered holder is owner of security and gives such purchaser assurance that when registered his ownership of security cannot be impugned.

Negotiable Instruments.

Except where its transfer is restricted and noted on security in accordance with Act, security is negotiable instrument and in case of any conflict with Bills of Exchange Act of Canada, Part VII of Act prevails.

“Security”.

“Security” or “security certificate” for purposes of this Part of Act is defined to mean instrument issued by corporation that is: (a) in bearer or registered form, (b) of type commonly dealt in upon securities exchanges or markets or commonly recognized in any area in which it is issued or dealt in as medium for investment, (c) one of class or series or by its terms divisible into class or series of instruments, and (d) evidence of share, participation or other interest in or obligation of corporation.

Registered Form.

Security is in registered form if: (a) it specifies person entitled to security or to rights it evidences, and its transfer is capable of being recorded in securities register; or (b) it bears statement that it is in registered form.

Bearer Form.

Security is in bearer form if it is payable to bearer according to its terms and not by reason of any endorsement.

Rights of Holder.

Every security holder is entitled at his option to security certificate that complies with Act or non-transferable written acknowledgment of his right to obtain such security certificate from corporation in respect of securities of that corporation held by him.

Restrictions.

No restriction, charge, agreement or endorsement described below is effective against transferee of security issued by corporation or by body corporate before body corporate was continued under Act who has no actual knowledge of restriction, charge, agreement or endorsement unless it is referenced on security certificate: (a) restriction on its transfer other than restraint on constrained share corporation, (b) charge in favour of corporation, (c) unanimous shareholder agreement, or (d) endorsement that shareholder is dissenting shareholder under Act.

Securities Records.

Corporation must maintain securities register in which it records securities issued by it in registered form, showing with respect to each class or series of securities: (a) names, alphabetically arranged, and latest known address of each person who is or has been security holder; (b) number of securities held by each security holder; and (c) date and particulars of issue and transfer of each security.

Place of Register.

Central securities register must be maintained by corporation at its registered office or at any other place in Canada designated by directors, and any branch securities registers may be kept at any place in or out of Canada designated by directors.

Dealings with Registered Holder.

Corporation or trustee under trust indenture may as rule treat registered owner of security as person exclusively entitled to vote, to receive notices, to receive interest, dividend or other payments in respect of security, and otherwise exercise all rights and powers of owner of security.

Title of Purchaser.

Upon delivery of security purchaser acquires rights in security that his transferor had or had authority to convey, except that purchaser who has been party to any fraud or illegality affecting security or who as prior holder had notice of adverse claim does not improve his position by taking from later bona fide purchaser. Bona fide purchaser, in addition to acquiring rights of purchaser, also acquires security free from any adverse claim.

Part VII of Act like Part VI of Business Corporations Act of Ontario contains elaborate set of provisions governing dealings in corporate securities. Sections in this Part are designed to provide system which would permit fast and reliable securities transactions with minimum of title investigation by securities purchaser. It is anticipated that this rather technical portion of Act would affect comparatively few day-to-day business decisions.

Part VIII. Trust Indentures.

Part VIII of Act sets out specific rules relating to: (a) trust indentures under which debt obligations are issued by corporation in distribution to public and (b) qualifications of trustees appointed under those indentures. Provisions require compliance with expressed statutory standards relating to trustee qualifications, conflict of interest, rights of debenture holders to obtain information, rights of trustee to demand information from issuing corporation and duties of trustee. These statutory standards will apply irrespective of any contradictory or exculpatory clauses in trust indenture. These provisions are substantially same as corresponding provisions of Part V of Business Corporations Act of Ontario although there are number of drafting differences which may be found to be of importance.

Part IX. Receivers and Receiver-Managers.

Part IX of Act sets out statutory standards or delegates to court discretion concerning qualifications, functions, rights, powers and duties of receiver and receiver-manager, including his standing with respect to directors, liquidator or trustee in bankruptcy. Provisions of this Part require receiver to submit financial statements in form that directors would have been required to submit to shareholders which reflects fact that receiver-manager assumes management of business and affairs of corporation.

Part X. Directors and Officers.

Subject to any unanimous shareholder agreement, directors must manage, or supervise management of, business and affairs of corporation.

Corporation must have one or more directors but distributing corporation, any of issued securities of which remain outstanding and are held by more than one person, must have not fewer than three directors, at least two of whom are not officers or employees of corporation or its affiliates.

Affiliated Corporations.

One body corporate is affiliated with another body corporate if one of them is subsidiary of other or both are subsidiaries of same body corporate or each of them is controlled by same person, and if two bodies corporate are affiliated with same body corporate at same time, they are deemed to be affiliated with each other.

Deemed Control.

For purposes of Act, body corporate is deemed to be controlled by person if shares of body corporate carrying voting rights sufficient to elect majority of directors of body corporate are held, directly or indirectly, other than by way of security only, by or on behalf of that person.

Qualifications of Directors.

Following persons are disqualified from being director of corporation: (a) anyone who is less than 18 years of age; (b) anyone who is of unsound mind and has been so found by court in Canada or elsewhere; (c) person who is not individual; or (d) person who has status of bankrupt.

Further Qualifications.

Unless articles otherwise provide, director of corporation is not required to hold shares issued by corporation.

Residency.

At least 25% of directors of corporation must be resident Canadians. However, if corporation has less than four directors, at least one must be resident. Note exception for corporation in prescribed business sector, where majority must be resident.

“Resident Canadian”.

“Resident Canadian” is defined in Act to mean individual who is: (a) Canadian citizen ordinarily resident in Canada, (b) Canadian citizen not ordinarily resident in Canada who is member of prescribed class of persons or (c) permanent resident within meaning of Immigration Act, and ordinarily resident in Canada, except permanent resident who has been ordinarily resident in Canada for more than one year after time at which he first became eligible to apply for Canadian citizenship.

Election of Directors.

Subject to cumulative voting provisions in articles of corporation, shareholders of corporation must, by ordinary resolution at first meeting of shareholders and at each succeeding annual meeting at which election of directors is required, elect directors to hold office for term expiring not later than close of third annual meeting of shareholders following election. It is not necessary that all directors elected at meeting of shareholders hold office for same term.

Appointment of Directors.

Directors may, if articles so provide, appoint one or more directors until next annual meeting of shareholders provided that total number of directors so appointed does not exceed one-third of number of directors elected at previous meeting.

Election or Appointment as Director.

Individual elected or appointed as director does not hold such office unless: (a) he was present at meeting when election or appointment took place and did not refuse to hold office; or (b) if he was not present at meeting and (i) consent was given in writing before meeting or within ten days after it or (ii) he acted as director pursuant to election or appointment.

Cumulative Voting.

Articles may provide for cumulative voting at election of directors.

Filling Vacancy.

Subject to articles, quorum of directors may fill vacancy among directors, except vacancy resulting from increase in number or minimum number of directors or from failure to elect number or minimum number of directors required by articles.

Meeting of Directors.

Unless articles or by-laws otherwise provide, directors may meet at any place, and upon such notice as by-laws require.

Quorum.

Subject to articles or by-laws, majority of number of directors or minimum number of directors required by articles constitutes quorum at any meeting of directors, and, notwithstanding any vacancy among directors, quorum of directors may exercise all powers of directors.

Canadian Majority.

Directors, other than directors of holding corporation earning less than 5% of its gross consolidated revenues in Canada must not transact business at meeting of directors unless at least 25% of directors present are resident Canadians. Note exception for corporation in prescribed business sector, where majority of directors present must be residents.

Participation by Telephone.

Subject to by-laws, director may, in accordance with regulations (if any), and if all directors of corporation consent, participate in meeting of directors or of committee of directors by means of telephone, electronic or other communication facility that permits all participants to communicate adequately with each other. Director in such meeting by such means is deemed for purposes of Act to be present at that meeting.

Delegation.

Directors of corporation may appoint from their number managing director who is resident Canadian or committee of directors and delegate to such managing director or committee subject to limitations set forth in Act, any of powers of directors.

Resolution in Lieu of Meeting.

Resolution in writing, signed by all directors entitled to vote on that resolution at meeting of directors or committee of directors, is as valid as if it had been passed at meeting of directors or committee of directors.

Directors' Liability.

Directors of corporation who vote for or consent to resolution authorizing issue of share for consideration other than money are jointly and severally, or solidarily, liable to corporation to make good any amount by which consideration received is less than fair equivalent of money that corporation would have received if share had been issued for money on date of resolution. Director is not liable if he proves that he did not know and could not reasonably have known that share was issued for consideration less than fair equivalent of money that corporation would have received if share had been issued for money. Director not liable if exercises care, diligence and skill of reasonably prudent person.

Further Directors' Liabilities.

Directors of corporation who vote for or consent to resolution authorizing: (a) purchase, redemption or other acquisition of shares contrary to §§34-36 of Act, (b) commission contrary to §41 of Act, (c) payment of dividend contrary to §42 of Act, (d) payment of indemnity contrary to §124 of Act, or (e) payment to shareholder contrary to §196 or §241 of Act; are jointly and severally, or solidarily, liable to restore to corporation any amounts so distributed or paid and not otherwise recovered by corporation. Director not liable if exercises care, diligence and skill of reasonably prudent person.

Liability of Directors for Wages.

Directors of corporation are jointly and severally liable to employees of corporation for all debts not exceeding six months wages payable to each such employee for services performed for corporation while they are such directors respectively. Director not liable if exercises care, diligence and skill of reasonably prudent person.

Disclosure of Interested Director Contract.

Director or officer of corporation must disclose in writing to corporation or request to have entered in minutes of meetings of directors nature and extent of any interest that he has in material contract or material transaction, whether made or proposed, if director or officer (a) is party to contract or transaction, (b) is director, officer, or individual acting in similar capacity, of party to contract or transaction, or (c) has material interest in party to contract or transaction.

Time of Disclosure for Director.

Disclosure required by director must be made: (a) at meeting at which proposed contract or transaction is first considered; (b) if director was not then interested in proposed contract or transaction, at first meeting after he becomes so interested; (c) if director becomes interested after contract or transaction is made, at first meeting after he becomes so interested, or (d) if person who is interested in contract or transaction later becomes director, at first meeting after he becomes director.

Time of Disclosure for Officer.

Disclosure required by officer who is not director must be made: (a) immediately after he becomes aware that contract, transaction, proposed contract or proposed transaction is to be considered or has been considered at meeting of directors; (b) if officer becomes interested after contract or transaction is made, forthwith after he becomes so interested; or (c) if person who is interested in contract later becomes officer, forthwith after he becomes officer.

Time of Disclosure for Director or Officer.

If material contract or material transaction, whether entered into or proposed, is one that, in ordinary course of corporation's business, would not require approval by directors or shareholders, director or officer must disclose in writing to corporation or request to have entered in minutes of meetings of directors nature and extent of his interest immediately after director or officer becomes aware of contract or proposed contract.

Voting After Disclosure.

Director must not vote on any resolution to approve such contract or transaction unless contract or transaction is: (a) relating primarily to his remuneration as director, officer, employee or agent of corporation or affiliate; (b) for indemnity or insurance under §124 of Act; or (c) with affiliate.

General notice to directors declaring that director or officer is to be regarded as interested, for any of following reasons, in contract or transaction made with party, is sufficient declaration of interest in relation to any contract or transaction: (a) that director/officer is interested party; (b) that he/she has material interest; or (c) that there has been material change in his/her interest.

Avoidance Standards.

Contract or transaction for which disclosure is required is not invalid, and director or officer is not accountable for any profit realized from contract or transaction, because of director's or officer's interest in contract or transaction or because director was included in count to determine whether quorum existed at meeting where contract or transaction was considered, if director or officer disclosed his interest in accordance with Act and contract was approved by directors or shareholders and it was reasonable and fair to corporation at time it was approved.

Duty of Care of Directors and Officers.

Every director and officer of corporation in exercising his powers and discharging his duties must: (a) act honestly and in good faith with view to best interests of corporation; and (b) exercise care, diligence and skill that reasonably prudent person would exercise in comparable circumstances, except to extent that his powers are restricted by unanimous shareholder agreement.

Duty to Comply.

Every director and officer of corporation must comply with Act, regulations, articles, by-laws and any unanimous shareholder agreement.

No Exculpation.

No provision in contract, articles, by-laws or resolution relieves director or officer from duty to act in accordance with Act or regulations or relieves him from liability for breach thereof.

Defence-Reasonable Diligence.

Director is not liable under above provisions if director exercised care, diligence and skill that reasonably prudent person would have exercised in comparable circumstances, including good faith reliance on: (a) financial statements of corporation represented to him by officer of corporation or in written report of auditor of corporation fairly to reflect financial condition of corporation; or (b) report of person whose profession lends credibility to statement made by him.

Defence-Good Faith.

Director has complied with his above duty of care if he relied in good faith on: (a) financial statements of corporation represented to him by officer of corporation or in written report of auditor of corporation fairly to reflect financial condition of corporation; or (b) report of person whose profession lends credibility to statement made by him.

Indemnification.

Corporation may indemnify director or officer of corporation, former director or officer of corporation or person who acts or acted at corporation's request as director or officer, or individual acting in similar capacity, of another entity, against all costs, charges and expenses, including amount paid to settle action or satisfy judgment, reasonably incurred by him in respect of any civil, criminal, administrative, investigative or other proceeding in which he is involved because of that association with corporation as other entity if: (a) he acted honestly and in good faith with view to best interests of corporation; and (b) in case of criminal or administrative action or proceeding that is enforced by monetary penalty, he had reasonable grounds for believing that his conduct was lawful.

Corporation may advance moneys to director, officer or other individual for costs, charges and expenses of proceeding referred to above. Individual must repay moneys if he or she did not fulfil conditions of (a) and (b) above.

Corporation may with approval of court indemnify person referred to in foregoing paragraph, or advanced moneys, in respect of action by or on behalf of corporation or other entity to procure judgment in its favour, to which he is made party because of his association with corporation or other entity (as described above), against all costs, charges and expenses reasonably incurred by him in connection with such action if he fulfils conditions set out in clauses (a) and (b) above.

Right to Indemnify.

Notwithstanding anything contained above, corporation must indemnify any such person who is subject to any civil, criminal, administrative, investigative or other proceeding by reason of his or her association with corporation or other entity (as described above) if person seeking indemnity was not judged by court of other competent authority to have committed any fault or omitted to do something that should have been done and fulfils conditions set out in clauses (a) and (b) above, against all costs, charges and expenses reasonably incurred by him in respect of such action or proceeding.

Directors' and Officers' Insurance.

Corporation may purchase and maintain insurance for benefit of any such person against any liability incurred by him in his capacity as director or officer of corporation or his capacity as director or officer, or similar capacity, of another entity.

Part XI. Insider Trading.

Prohibition of Short Sale.

Insider must not knowingly sell, directly or indirectly, security of distributing corporation or any of its affiliates if insider selling security does not own or has not fully paid for security to be sold, unless he owns another security convertible into security sold or option or right to acquire security sold and, within ten days after sale, he: (a) exercises conversion privilege, option or right and delivers security so acquired to purchaser; or (b) transfers convertible security, option or right to purchaser.

Insider in this provision means: (a) director or officer of distributing corporation (as defined in regulations); (b) director or officer of subsidiary of distributing corporation; (c) director or officer of body corporate that enters into business combination with distributing corporation; and (d) person employed or retained by distributing corporation.

Call and Puts.

Insider must not, directly or indirectly, buy or sell call or put in respect of share of corporation or any of its affiliates.

Insider Trading-Compensation.

Insider who purchases or sells security with knowledge of confidential information that, if generally known, might reasonably be expected to affect materially value of any securities of corporation, is liable to compensate any person for any damages suffered by person as result of purchase or sale, unless insider establishes that: (a) insider reasonably believed that information had been generally disclosed, or (b) info was known, or ought reasonably to have been known, by that person; and adds liability provisions for tipping.

“Insider” in this provision means: (a) corporation; (b) affiliate of corporation; (c) director/officer of corporation or of person in (b) (d) or (f); (d) person who beneficially owns more than prescribed percentage; (e) person employed or retained by corporation; (f) person in business with corporation; (g) person who received material confidential information from person herein described; (h) prescribed person.

For purposes of this provision if body corporate becomes insider of corporation, or enters into business combination with corporation, director or officer of body corporate is deemed to have been insider of corporation for previous six months or for such shorter period as he was director or officer of body corporate; and if corporation becomes insider of body corporate, or enters into business combination with body corporate, director or officer of body corporate is deemed to have been insider of corporation for previous six months or for such shorter period as he was director or officer of body corporate.

In paragraph above, “business combination” means acquisition of all or substantially all property of one body corporate by another or amalgamation of two or more bodies corporate “or any similar reorganization between two or more bodies corporate”.

Part XII. Shareholders.

Place of Meetings.

Meetings of shareholders of corporation must be held at place within Canada provided in by-laws or, in absence of such provisions, at place within Canada that directors determine.

Meeting Outside Canada.

Meeting of shareholders of corporation may be held outside Canada if place is specified in articles or all shareholders entitled to vote at that meeting so agree.

Meeting by Electronic Means.

Unless by-laws provide otherwise, any person entitled to attend meeting of shareholders may participate in meeting (in accordance with regulations) by means of telephonic, electronic or other communication facility that permits all participants to communicate adequately with each other. Person participating in meeting by such means is deemed to be present at meeting. Directors or shareholders that call meeting, may determine that meeting shall be held entirely by means of telephonic, electronic or other communication facility.

Calling Meetings.

Directors of corporation: (a) must call annual meeting of shareholders not later than 18 months after corporation comes into existence and subsequently not later than 15 months after holding last preceding annual meeting but no later than six months after end of corporation's preceding financial year; (b) may at any time call special meeting of shareholders; and (c) may fix in advance (within prescribed period) date as record date for purpose of determining shareholders (i) entitled to receive notice of meeting of shareholders, (ii) entitled to receive payment of dividend, (iii) entitled to participate in liquidation distribution, (iv) entitled to vote at meeting of shareholders; or (v) for any other purpose.

All business transacted at special meeting of shareholders and all business transacted at annual meeting of shareholders, except consideration of financial statements, auditor's report, election of directors and reappointment of incumbent auditor, is deemed to be special business.

Notice of Business.

Notice of meeting of shareholders at which special business is to be transacted must state: (a) nature of that business in sufficient detail to permit shareholder to form reasoned judgment thereon; and (b) text of any special resolution to be submitted to meeting.

Shareholder Proposal.

Registered holder or beneficial owner of shares entitled to be voted at annual meeting of shareholders may: (a) submit to corporation notice of any matter that he proposes to raise at meeting, (hereinafter referred to as "proposal"); and (b) discuss at meeting any matter in respect of which he would have been entitled to submit proposal. Note that this provision specifies who is eligible to make proposal, and information to be provided in proposal.

Information Circular.

Corporation that solicits proxies must set out proposal in management proxy circular or attach proposal thereto and, if so requested by shareholder, must include in management proxy circular or attach thereto statement by shareholder of not more than 200 words in support of proposal, and name and address of shareholder.

Nomination for Director.

Proposal may include nominations for election of directors if proposal is signed by one or more holders of shares representing in aggregate not less than 5% of shares or 5% of shares of class of shares of corporation entitled to vote at meeting to which proposal is to be presented, but this provision does not preclude nominations made at meeting of shareholders.

Corporation is not required to set out proposal or supporting statement of shareholder in management proxy circular or attach proposal thereto if: (a) proposal is not submitted to corporation at least prescribed number of days before anniversary date of notice of meeting sent to shareholders in connection with previous annual meeting of shareholders; (b) it clearly appears that primary purpose of proposal is to enforce personal claim or redress personal grievance against corporation or its directors, officers or security holders; (b.1) it clearly appears that proposal does not relate in significant way to business or affairs of corporation; (c) corporation, at shareholder's request, included proposal in management proxy circular relating to meeting of shareholders held within two years preceding receipt of such request, and shareholder failed to present proposal, in person or by proxy, at meeting; (d) substantially same proposal was submitted to shareholders in management proxy circular or dissident's proxy circular relating to meeting of shareholders held within two years preceding receipt of shareholder's request and proposal was defeated; or (e) rights conferred by this provision are being abused to secure publicity.

Notice of Refusal.

If corporation refuses to include proposal in management proxy circular, corporation must, within prescribed period after day on which it receives proposal, notify person submitting proposal of its intention to omit proposal from management proxy circular and reasons for refusal.

Shareholder Application in Court.

Upon application of person claiming to be aggrieved by corporation's refusal to include proposal in management proxy circular, court may restrain holding of meeting to which proposal is sought to be presented and make any further order it thinks fit.

Shareholder List.

Corporation must prepare list of shareholders entitled to receive notice of meeting arranged in alphabetical order and showing number of shares held by each shareholder.

Examination of List.

Shareholder may examine list of shareholders: (a) During usual business hours at registered office of corporation or at place where its central securities register is maintained; and (b) at meeting of shareholders for which list was prepared.

Quorum.

Unless by-laws otherwise provide, holders of majority of shares entitled to vote at meeting of shareholders present in person or by proxy constitute quorum.

One Shareholder Meeting.

If corporation has only one shareholder, or only one holder of any class or series of shares, shareholder present in person or by proxy constitutes meeting.

Right to Vote.

Unless articles otherwise provide, each share of corporation entitles holder thereof to one vote at meeting of shareholders.

Voting.

Unless by-laws otherwise provide, voting at meeting of shareholders shall be by show of hands except where ballot is demanded by shareholder or proxyholder entitled to vote at meeting.

Resolution in Lieu of Meeting.

Except where written statement is submitted by (a) director who: (i) resigns, (ii) receives notice or otherwise learns of meeting of shareholders called for purpose of removing him from office or (iii) receives notice or otherwise learns of meeting of directors or shareholders at which another person is to be appointed or elected to fill office of director, whether because of his resignation or removal or because his term of office has expired or is about to expire, and submits to corporation written statement giving reasons for his resignation or reasons why he opposes any proposed action or resolution; or (b) by auditor who (iv) resigns, (v) receives notice or otherwise learns of meeting of shareholders called for purpose of removing him from office, (vi) receives notice or otherwise learns of meeting of directors or shareholders at which another person is to be appointed to fill office of auditor, whether because of resignation or removal of incumbent auditor or because his term of office has expired or is about to expire, or (vii) receives notice or otherwise learns of meeting of shareholders at which resolution dispensing with auditor is to be proposed, and submits to corporation written statement, giving reasons for his resignation or reasons why he opposes any proposed action or resolution; (1) resolution in writing signed by all shareholders entitled to vote on that resolution at meeting of shareholders is as valid as if it had been passed at meeting of shareholders; and (2) resolution in writing dealing with all matters required by Act to be dealt with at meeting of shareholders and signed by all shareholders entitled to vote at that meeting satisfies all requirements of Act relating to meetings of shareholders.

Requisition of Meeting.

Holders of not less than 5% of issued shares of corporation that carry right to vote at meeting sought to be held may requisition directors to call meeting of shareholders for purposes stated in requisition.

Court Review of Election.

Corporation or shareholder or director may apply to court to determine any controversy with respect to election or appointment of director or auditor of corporation.

Pooling Agreement.

Written agreement between two or more shareholders may provide that in exercising voting rights shares held by them shall be voted as therein provided.

Unanimous Shareholder Agreement.

An otherwise lawful written agreement among all shareholders of corporation, or among all shareholders and one or more persons who are not shareholders, that restricts, in whole or in part, powers of directors to manage or supervise management of business and affairs of corporation is valid. Where person who is beneficial owner of all issued shares of corporation makes written declaration that restricts powers of directors, declaration deemed to be unanimous shareholder agreement.

If reference to unanimous shareholder agreement is conspicuously noted on share certificates, transferee of shares subject to unanimous shareholder agreement is deemed to be party to agreement.

To extent that unanimous shareholder agreement restricts powers of directors to manage, or supervise management of, business and affairs of corporation, parties to unanimous shareholders agreement who are given such powers have all rights, powers and duties of director of corporation, including any defences available to directors and directors are relieved of their rights, powers, duties and liabilities to same extent.

Part XIII. Proxies.

Part XIII of Act contains substance of proxy rules of Canada Corporations Act.

Appointing Proxyholder.

Shareholder entitled to vote at meeting of shareholders may by means of proxy appoint proxyholder or one or more alternate proxyholders who are not required to be shareholders, to attend and act at meeting in manner and to extent authorized by proxy and with authority conferred by proxy.

Mandatory Solicitation.

Management of corporation must concurrently with giving notice of meeting of shareholders send form of proxy in prescribed form to each shareholder who is entitled to receive notice of meeting unless corporation is not distributing corporation and has 50 or fewer shareholders entitled to vote at meeting, two or more joint holders being counted as one shareholder.

Soliciting Proxies.

Person must not solicit proxies unless: (a) in case of solicitation by or on behalf of management of corporation, management proxy circular in prescribed form, either as appendix to or as separate document accompanying notice of meeting, or (b) in case of any other solicitation, dissident's proxy circular in prescribed form stating purposes of solicitation; is sent to auditor of corporation, to each shareholder whose proxy is solicited and, if solicitation other than by or on behalf of management, to corporation. Despite this provision, person may solicit proxies, other than on behalf of management if: (i) total number of shareholders whose proxies are solicited is 15 or fewer, or (ii) in prescribed circumstances, solicitation conveyed by public broadcast, speech or publication.

Copy to Director.

Person required to send management proxy circular or dissident's proxy circular must send concurrently copy thereof to Director together with statement in prescribed form, form of proxy and any other documents for use in connection with meeting and, in case of management proxy circular, copy of notice of meeting.

Upon application of interested person, Director may make order on such terms as he thinks fit exempting such person from any of requirements of Act respecting proxy solicitation which order may have retrospective effect.

Attendance at Meeting.

Person who solicits proxy and is appointed proxyholder must attend in person or cause alternate proxyholder to attend meeting in respect of which proxy is given and comply with directions of shareholder who appointed him.

Duty of Intermediary.

Shares of corporation that are registered in name of Intermediary or his nominee (usually broker) and not beneficially owned by registrant must not be voted unless Intermediary forthwith after receipt thereof sends to beneficial owner: (a) copy of notice of meeting, financial statements, management proxy circular, dissident's proxy circular and any other documents other than form of proxy, sent to shareholders by or on behalf of any person for use in connection with meeting; and (b) except where Intermediary has received written voting instructions from beneficial owner, written request for such instructions.

Restriction on Voting.

Intermediary, or proxyholder appointed by intermediary, must not vote shares intermediary does not beneficially own and that are registered in name of intermediary or nominee unless he receives voting instructions from beneficial owner.

Instructions to Intermediary.

Intermediary shall vote or appoint proxyholder to vote any such shares in accordance with any written voting instructions received from beneficial owner.

Part XIV. Financial Disclosure.

Annual Financial Statements.

Directors of corporation must place before shareholders at every annual meeting: (a) comparative financial statements prepared in accordance with Canadian GAAP, or for SEC registrant in accordance with U.S. GAAP and as otherwise may be prescribed by Act; (b) report of auditor, if any, prepared in accordance with Canadian GAAP, or for SEC registrant, in accordance with U.S. GAAP and as otherwise may be prescribed by Act; and (c) any further information respecting financial position of corporation and results of its operations required by articles, by-laws or any unanimous shareholder agreement.

Exemption.

Director may, on application of corporation, authorize corporation to omit from its financial statements any item prescribed, or to dispense with publication of any particular financial statement prescribed, and Director may, if he reasonably believes that disclosure of information therein contained would be detrimental to corporation, permit such omission on such reasonable conditions as he thinks fit.

Consolidated Statements.

Holding corporation may prepare financial statements referred to in Act in consolidated or combined form as prescribed, and in any case corporation shall keep at its registered office copies of financial statements of each subsidiary body corporate.

Examination.

Shareholders of corporation and their personal representatives may upon request therefor examine above statements during usual business hours of corporation and may make extracts therefrom free of charge unless upon application to court, court is satisfied that such examination would be detrimental to corporation or subsidiary body corporate and bars such right or makes any further order it thinks fit.

Approval of Financial Statements.

Directors of corporation must approve financial statements and approval must be evidenced by manual signature of one or more directors or facsimile of the signatures reproduced in statements.

Copies to Shareholders.

Corporation must not less than 21 days before each annual meeting of shareholders or before signing of shareholders' resolution in lieu of annual meeting, send copy of financial statements, report of auditor, if any, and any other information required by articles, by-laws or any unanimous shareholders agreement to each shareholder, except to shareholder who has informed corporation in writing that he does not want copy of those documents.

Copies to Director.

Distributing corporation, any of issued securities of which remain outstanding and are held by more than one person, must before each annual meeting of shareholders or forthwith after signing of shareholders' resolution in lieu of annual meeting, send copy of financial statements, report of auditor, if any, and any other information required by articles, by-laws or unanimous shareholders agreement.

Qualification of Auditor.

Unless granted exemption by court order, person is disqualified from being auditor of corporation if he is not independent of corporation, any of its affiliates, or directors or officers of any such corporation or its affiliates.

Appointment of Auditor.

Shareholders of corporation by ordinary resolution, at first annual meeting of shareholders and at each succeeding annual meeting must appoint auditor to hold office until close of next annual meeting unless corporation is eligible to dispense with appointment of auditor or obtains exemption order.

If auditor is not appointed at meeting of shareholders, incumbent auditor continues in office until his successor is appointed.

Remuneration of auditor may be fixed by ordinary resolution of shareholders or, if not so fixed, may be fixed by directors.

Dispensing with Auditor and Exemptions.

Shareholders (including shareholders not otherwise entitled to vote) may unanimously resolve not to appoint auditor unless corporation is distributing corporation.

Removal of Auditor.

Shareholders of corporation may by ordinary resolution at special meeting remove from office auditor other than auditor appointed by court.

Filling Vacancy.

Subject to articles of corporation, directors must forthwith fill vacancy in office of auditor.

Right to Attend Meeting.

Auditor of corporation is entitled to receive notice of every meeting of shareholders and, at expense of corporation, to attend and be heard thereat on matters relating to his duties as auditor.

Right to Information.

Upon demand of auditor of corporation, present or former directors, officers, employees or agents of corporation must furnish such: (a) information and explanations, and (b) access to records, documents, books, accounts and vouchers of corporation or any of its subsidiaries; as are, in opinion of auditor, necessary to enable him to make examination and report required under Act and that directors, officers, employees or agents are reasonably able to furnish.

Audit Committee.

Unless dispensed with by order of Director, corporation any of issued securities of which are or were part of distribution to public and any other corporation may have audit committee composed of not less than three directors of corporation, majority of whom are not officers or employees of corporation or any of its affiliates. Auditor of corporation is entitled to receive notice of every meeting of audit committee and, at expense of corporation, to attend and be heard thereat.

Duty of Committee.

Audit committee must review financial statements of corporation before such financial statements are approved by directors.

Error in Financial Statements.

If auditor or former auditor of corporation is notified or becomes aware of error or misstatement in financial statement upon which he has reported, and if in his opinion error or misstatement is material, he must inform each director accordingly.

Duty of Directors.

When auditor or former auditor informs directors of error or misstatement in financial statement, directors must: (a) prepare and issue revised financial statements; or (b) otherwise inform shareholders and, if corporation is one that is required to file its financial statements with Director, it must inform Director of error or misstatement in same manner as it informs shareholders.

Qualified Privilege (Defamation).

Any oral or written statement or report made under Act by auditor or former auditor of corporation has qualified privilege for purpose of law of defamation.

Part XV. Fundamental Changes.

Amendment of Articles.

Articles of corporation may by special resolution be amended to change its name; change province in which registered office is located; restrictions on business; number, classes, designations, rights, privileges and restrictions on its shares; stated capital (if it is set out in articles); number of directors (subject to right of incumbent directors and cumulative voting provisions); restrictions on transfer of shares and any other provision that is permitted by Act to be set out in articles.

Constraints on Share Transfers.

Subject to class voting provisions and reduction of stated capital provisions of Act, distributing corporation, any of issued shares of which remain outstanding and are held by more than one person, may by special resolution amend its articles to constrain issue or transfer of its shares in accordance with regulations and for specified reasons.

Proposal to Amend.

Directors or any shareholder entitled to vote at annual meeting may make proposal to amend articles. Notice of meeting of shareholders at which proposal to amend articles is to be considered shall set out proposed amendment and where applicable, shall state that dissenting shareholder is entitled to be paid fair value of his shares in accordance with Act, but failure to make that statement does not invalidate amendment.

Class Vote.

Holders of shares of class or, of series (if such series is affected by amendment in manner different from other shares of same class) are, unless articles otherwise provide in case of amendment referred to in (a), (b) or (e) below, entitled to vote (whether or not shares of such class or series otherwise carry right to vote) separately as class or series upon proposal to amend articles to: (a) increase or decrease any maximum number of authorized shares of such class or increase any maximum number of authorized shares of class having rights or privileges equal or superior to shares of such class; (b) effect exchange, reclassification or cancellation of all or part of shares of such class; (c) add, change or remove rights, privileges, restrictions or conditions attached to shares of such class; (d) increase rights or privileges of any class of shares having rights or privileges equal or superior to shares of such class; (e) create new class of shares equal or superior to shares of such class; (f) make any class of shares having rights or privileges inferior to shares of such class equal or superior to shares of such class; (g) effect exchange or create right of exchange of all or part of shares of another class into shares of such class; or (h) constrain issue or transfer of shares of such class or extend or remove such constraint.

No amendment to articles affects existing cause of action or claim or liability to prosecution in favour of or against corporation or its directors or officers, or any civil, criminal or administrative action or proceeding to which corporation or its directors or officers is party.

Amalgamation.

Two or more corporations, including holding and subsidiary corporations, may amalgamate and continue as one corporation. Each corporation proposing to amalgamate must enter into agreement setting out terms and means of effecting amalgamation.

Shareholder Approval.

Directors of each amalgamating corporation must submit amalgamation agreement for approval to meeting of holders of shares of amalgamating corporation of which they are directors.

Each share of amalgamating corporation carries right to vote in respect of amalgamation agreement whether or not it otherwise carries right to vote.

Amalgamation agreement is adopted when shareholders of each amalgamating corporation have approved of amalgamation by special resolutions of each class or series of such shareholders entitled to vote thereon.

Vertical Short-form Amalgamation.

Holding corporation and one or more of its subsidiary corporations may amalgamate and continue as one corporation without entering into amalgamation agreement and without obtaining shareholder approval if amalgamation is approved by resolution of directors of each amalgamating corporation; all of issued shares of each amalgamating subsidiary corporations are held by one or more of other amalgamating corporations, and resolutions provide that: (a) Shares of each amalgamating subsidiary corporation shall be cancelled without any repayment of capital in respect thereof; (b) except as may be prescribed, articles of amalgamation shall be same as articles of amalgamating holding corporation, and (c) no securities shall be issued by amalgamated corporation in connection with amalgamation.

Horizontal Short-form Amalgamation.

Two or more wholly-owned subsidiary corporations of same holding body corporate may amalgamate and continue as one corporation without entering into amalgamation agreement and without obtaining shareholder approval if amalgamation is approved by resolution of directors of each amalgamating corporation and resolutions provide that: (a) Shares of all but one of amalgamating subsidiary corporations shall be cancelled without any repayment of capital in respect thereof, (b) except as may be prescribed, articles of amalgamation shall be same as articles of amalgamating subsidiary corporation whose shares are not cancelled, and (c) stated capital of amalgamating subsidiary corporations whose shares are cancelled shall be added to stated capital of amalgamating subsidiary corporation whose shares are not cancelled.

Effect of Certificate of Amalgamation.

On date shown in certificate of amalgamation: (a) amalgamation of amalgamating corporations and their continuance as one corporation become effective; (b) property of each amalgamating corporation continues to be property of amalgamated corporation; (c) amalgamated corporation continues to be liable for obligations of each amalgamating corporation; (d) existing cause of action, claim or liability to prosecution is unaffected; (e) civil, criminal or administrative action or proceeding pending by or against amalgamating corporation or its directors or officers may be continued to be prosecuted by or against amalgamated corporation or its directors or officers; (f) conviction against, or ruling, order or judgment in favour of or against, amalgamating corporation or its directors or officers may be enforced by or against amalgamated corporation or its directors or officers; and (g) articles of amalgamation are deemed to be articles of incorporation of amalgamated corporation and certificate of amalgamation is deemed to be certificate of incorporation of amalgamated corporation.

Continuance (Import).

Body corporate incorporated otherwise than by or under Act of Parliament may, if so authorized by laws of jurisdiction where it is incorporated, apply to Director for certificate of continuance.

Effect of Certificate of Continuance.

On date shown in certificate of continuance: (a) body corporate becomes corporation to which Act applies as if it had been incorporated under Act; (b) articles of continuance are deemed to be articles of incorporation of continued corporation; and (c) certificate of continuance is deemed to be certificate of incorporation of continued corporation.

Rights Preserved.

When body corporate is continued as corporation under Act: (a) property of body corporate continues to be property of corporation; (b) corporation continues to be liable for obligations of body corporate; (c) existing cause of action, claim or liability to prosecution is unaffected; (d) civil, criminal or administrative action or proceeding pending by or against body corporate or its directors or officers may be continued to be prosecuted by or against corporation or its directors or officers; and (e) conviction against, or ruling, order or judgment in favour of or against body corporate or its directors or officers may be enforced by or against corporation or its directors or officers.

Issued Shares.

Share of body corporate issued before body corporate was continued under Act is deemed to have been issued in compliance with Act and with provisions of articles of continuance irrespective of whether share is fully paid and irrespective of any designation, rights, privileges, restrictions or conditions set out on or referred to in certificate representing share; and continuance under this provision does not deprive holder of any right or privilege that he claims under, or relieve him of any liability in respect of, issued share.

Continuance (Export).

Corporation may, if it is authorized by special resolution of shareholders, if it establishes to satisfaction of Director that its proposed continuance in another jurisdiction will not adversely affect creditors or shareholders of corporation and if certain statutory prerequisites are satisfied, apply to appropriate official or public body of another jurisdiction requesting that corporation be continued as if it had been incorporated under laws of that other jurisdiction.

Right to Vote.

Each share of corporation carries right to vote in respect of continuance whether or not it otherwise carries right to vote.

Prohibition.

Corporation may not be continued as body corporate under laws of another jurisdiction unless those laws provide in effect that: (a) property of corporation continues to be property of body corporate; (b) body corporate continues to be liable for obligations of corporation; (c) existing cause of action, claim or liability to prosecution is unaffected; (d) civil, criminal or administrative action or proceeding pending by or against corporation may be continued to be prosecuted by or against body corporate; and (e) conviction against, or ruling, order or judgment in favour of or against corporation or its directors or officers may be enforced by or against body corporate.

Borrowing Powers.

Subject to articles, by-laws or any unanimous shareholder agreement, directors of corporation or any director, committee of directors or officer to whom power is delegated, may without authorization of shareholders: (a) borrow money upon credit of corporation; (b) issue, reissue, sell or pledge debt obligations of corporation; (c) give guarantee on behalf of corporation to secure performance of obligation of any person; and (d) mortgage, hypothecate, pledge or otherwise create security interest in all or any property of corporation, owned or subsequently acquired, to secure any debt obligation of corporation.

Extraordinary Sale, Lease or Exchange.

Sale, lease or exchange of all or substantially all property of corporation other than in ordinary course of business of corporation requires approval of shareholders.

Right to Vote.

Each share of corporation carries right to vote in respect of such sale, lease or exchange whether or not it otherwise carries right to vote.

Shareholder Approval.

Such sale, lease or exchange is adopted when holders of each class or series entitled to vote thereon have approved of sale, lease or exchange by special resolution.

Right to Dissent.

Holder of shares of any class of corporation may dissent if order is made under Act permitting dissent or if corporation resolves to: (a) amend its articles to add, change or remove any provisions restricting or constraining issue or transfer of shares of that class; (b) amend its articles to add, change or remove any restriction upon business or businesses that corporation may carry on; (c) amalgamate, otherwise than amalgamate with holding corporation and one or more of its wholly-owned subsidiaries; (d) be continued under laws of another jurisdiction or another Act of Parliament; (e) sell, lease or exchange all or substantially all its property; or (f) carry out a going private transaction or squeeze-out transaction.

Payment for Shares.

In addition to any other right he may have, shareholder who complies with this provision is entitled, when action approved by resolution from which he dissents or order becomes effective, to be paid by corporation fair value of shares held by him in respect of which he dissents, determined as of close of business on day before resolution was adopted or order made.

Objection.

Dissenting shareholder must send to corporation, at or before any meeting of shareholders at which resolution referred to above is to be voted on, written objection to resolution, unless corporation did not give notice to shareholder of purpose of meeting and of his right to dissent.

Notice of Resolution.

Corporation must send to each shareholder who has filed objection notice that resolution has been adopted.

Demand for Payment.

Dissenting shareholder must send to corporation written notice containing: (a) shareholder's name and address; (b) number and class of shares in respect of which shareholder dissents; and (c) demand for payment of fair value of such shares.

Suspension of Rights.

After sending notice demanding payment, dissenting shareholder ceases to have any rights as shareholder except to be paid fair value of shares as determined under this provision except where: (a) dissenting shareholder withdraws notice before corporation makes offer to purchase shares at fair market value; (b) corporation fails to make offer and shareholder withdraws notice; or (c) directors revoke resolution to amend articles, terminate amalgamation agreement or application for continuance, or abandon sale, lease or exchange, in which case shareholder's rights are reinstated as of date notice sent.

Offer to Pay.

Corporation must send to each dissenting shareholder who has sent demand for payment to corporation: (a) written offer to pay for shares in amount considered by directors of corporation to be fair value thereof, accompanied by statement showing how fair value was determined; or (b) notification (see catchline Limitation, infra) that it is unable lawfully under Act to pay dissenting shareholders for their shares.

Same Terms.

Every offer made for shares of same class or series must be on same terms.

Corporation Application to Court.

Where corporation fails to make offer, or if dissenting shareholder fails to accept offer, corporation may, within 50 days after action approved by resolution is effective or such further period as court may allow, apply to court to fix fair value for shares of any dissenting shareholder. If corporation fails to apply to court, dissenting shareholder may apply to court for same purpose within further period of 20 days or such further period as court may allow.

Powers of Court.

Upon such application to court, court may determine whether any other person is dissenting shareholder who should be joined as party, and court must then fix fair value for shares of all dissenting shareholders. Court may in its discretion appoint one or more appraisers to assist court to fix fair value for shares of dissenting shareholders.

If corporation may not make payment to shareholder under Act, dissenting shareholder may: (a) withdraw his notice of dissent, in which case corporation is deemed to consent to withdrawal and shareholder is reinstated to his full rights as shareholder; or (b) retain status as claimant against corporation, to be paid as soon as corporation is lawfully able to do so or, in liquidation, to be ranked subordinate to rights of creditors of corporation but in priority to its shareholders.

Limitation.

Corporation must not make payment to dissenting shareholder under these provisions if there are reasonable grounds for believing that: (a) corporation is or would after payment be unable to pay its liabilities as they become due; or (b) realizable value of corporation's assets would thereby be less than aggregate of its liabilities.

“Reorganization” Defined.

In following provisions, “reorganization” means court order made under: (a) relief from oppression provisions of Act, (b) Bankruptcy and Insolvency Act of Canada approving proposal, or (c) any other Act of Parliament that affects rights among corporation, its shareholders and creditors.

Powers of Court.

If corporation is subject to court order made under Part XX of Act with respect to oppressive or unfairly prejudicial act by corporation or its directors, under Bankruptcy and Insolvency Act of Canada approving proposal or any other federal legislation affecting rights among corporation, its shareholders and creditors, its articles may be amended by such order to effect any change that might lawfully be made by amendment of articles under §173 of Act.

If court makes order referred to above, court may also: (a) authorize issue of debt obligations of corporation, whether or not convertible into shares of any class or having attached any rights or options to acquire shares of any class, and fix terms thereof; and (b) appoint directors in place of or in addition to all or any of directors then in office.

Articles of Reorganization.

After such order has been made, articles of reorganization in prescribed form shall be sent to Director together with other documents required by Act, if applicable.

Effect of Certificate.

Reorganization becomes effective on date shown in certificate of amendment and articles of incorporation are amended accordingly.

No Dissent.

Shareholder is not entitled to dissenting shareholders' appraisal remedy if amendment to articles of incorporation is effected under this provision.

“Arrangement” Defined.

Includes amendment to articles, amalgamation of two or more corporations, amalgamation of body corporate with corporation that results in amalgamated corporation, division of business, transfer of all or substantially all property of corporation to another body corporate in exchange for money, property or securities, exchange of securities of corporation for property, money or other securities of this or another body corporate, going private transaction or squeeze-out transaction, liquidation and dissolution of corporation and any combination of foregoing.

Powers of Court.

Corporation may apply to court for order approving proposed arrangement. Court may make any order including order determining notice to be given or dispensed with, order appointing counsel to represent shareholders, order requiring corporation to call, hold and conduct meeting of security, options and rights holders, order permitting shareholder to dissent, order approving arrangement as proposed or amended.

Articles of Arrangement.

After such order made, articles of arrangement in prescribed form shall be sent to Director. Arrangement becomes effective on date shown in certificate of arrangement.

Part XVI. Going-Private Transactions and Squeeze-Out Transactions.

This Part provides requirements which must be met before any going private or squeeze-out transaction is done.

Going-Private Transactions.

Corporations may carry out going-private transaction. However, if there are any applicable provincial securities laws, corporation may not carry out going-private transaction unless corporation complies with those laws.

Squeeze-Out Transactions.

Corporation may not carry out squeeze-out transaction unless, in addition to approval by holders of shares required by Act or articles, transaction is approved by ordinary resolution of holders of each class of shares affected by transaction, voting separately, whether or not shares otherwise carry right to vote. However, following do not have right to vote on resolution: (a) affiliates of corporation; (b) holders of shares that would, following squeeze-out transaction, be entitled to consideration of greater value or to superior rights than those available to other holders of shares of same class.

Part XVII. Compulsory and Compelled Acquisitions.

Part XVII of Act contains rules for compulsory acquisitions.

Take-over bid in this part means offer made by offeror to shareholders of distributing corporation at approximately same time to acquire all of shares of class of issued shares, and includes offer made by distributing corporation to repurchase all of shares of class of its shares.

Right to Acquire.

If within 120 days after date of take-over bid, bid is accepted by holders of not less than 90% of shares of any class of shares to which take-over bid relates, other than shares held at date of take-over bid by or on behalf of offeror or affiliate or associate of offeror, offeror is entitled, upon complying with provisions of this Part, to acquire shares held by dissenting offerees.

Payment.

Offeror must pay or transfer to offeree corporation amount of money or other consideration that offeror would have had to pay or transfer to dissenting offeree if dissenting offeree had elected to accept take-over bid.

Application to Court.

If dissenting offeree has elected to demand payment of fair value of his shares, offeror may, within 20 days after it has paid money or transferred other consideration, apply to court to fix fair value of shares of that dissenting offeree.

Powers of Court.

Upon application to court, court may determine whether any other person is dissenting offeree who should be joined as party, and court must then fix fair value for shares of all dissenting offerees.

Part XVIII. Liquidation and Dissolution.

Part XVIII of Act contains detailed provisions concerning substantive and procedural law on liquidation and dissolution of corporation which is not insolvent within meaning of Bankruptcy and Insolvency Act of Canada. This Part governs, among other things, revival of corporation dissolved under Act, dissolution of corporation that has not commenced business and making of proposal for voluntary liquidation and dissolution of corporation. Revival and dissolution by directors' provisions apply to corporation which is insolvent within meaning of Bankruptcy and Insolvency Act.

Dissolution by Director.

Director may dissolve corporation by issuing certificate of dissolution if corporation: (a) has not commenced business within three years after date shown in its certificate of incorporation, (b) has not carried on its business for three consecutive years, (c) is in default for period of one year in sending to Director any fee, notice or document required by Act; or (d) does not have any directors. Alternatively, Director may apply to court for order dissolving corporation.

Grounds for Dissolution.

Director or any interested person may apply to court for order dissolving corporation if corporation has: (a) failed for two or more consecutive years to comply with requirements of Act with respect to holding of annual meetings of shareholders, (b) carried on any business or exercised any power that it is restricted by its articles from carrying on or exercising, (c) denied access to corporate records to persons authorized under Act to have access to same, (d) failed to comply with certain of financial disclosure requirements of Act, or (e) procured any certificate under Act by misrepresentation.

Court may order liquidation and dissolution of corporation or any of its affiliated corporations upon application of shareholder: (a) if court is satisfied that in respect of corporation or any of its affiliates (i) any act or omission of corporation or any of its affiliates effects result, (ii) business or affairs of corporation or any of its affiliates are or have been carried on or conducted in manner, or (iii) powers of directors of corporation or any of its affiliates are or have been exercised in manner; that is oppressive or unfairly prejudicial to or that unfairly disregards interests of any security holder, creditor, director or officer; or (b) if court is satisfied that (i) unanimous shareholder agreement entitles complaining shareholder to demand dissolution of corporation after occurrence of specified event and that event has occurred, or (ii) it is just and equitable that corporation should be liquidated and dissolved.

Application for Supervision.

Application to court to supervise voluntary liquidation and dissolution under this Part must state reasons, verified by affidavit of applicant, why court should supervise liquidation and dissolution.

Part XVIII outlines powers of court upon application to liquidate and dissolve corporation and in connection with dissolution or liquidation and dissolution of corporation.

Appointment of Liquidator.

When making order for liquidation of corporation or at any time thereafter, court may appoint any person, including director, officer or shareholder or any other corporation, as liquidator of corporation.

Part XVIII outlines duties, powers and responsibilities of liquidator in connection with liquidation of corporation under Act.

Continuation of Actions.

Notwithstanding dissolution of corporation under Act: (a) civil, criminal or administrative action or proceeding commenced by or against corporation before its dissolution may be continued as if corporation had not been dissolved; (b) civil, criminal or administrative action or proceeding may be brought against corporation within two years after its dissolution as if corporation had not been dissolved; and (c) any property that would have been available to satisfy any judgment or order if corporation had not been dissolved remains available for such purpose.

Reimbursement.

Notwithstanding dissolution of corporation, shareholder to whom any of its property has been distributed is liable to any person claiming in above civil, criminal or administrative action or proceeding to extent of amount received by that shareholder upon such distribution, and action to enforce such liability may be brought within two years after date of dissolution of corporation.

Part XIX. Investigation.

Shareholder or Director may apply, ex parte or upon such notice as court may require, to court having jurisdiction in place where corporation has its registered office for order directing investigation to be made of corporation and any of its affiliated corporations.

Grounds.

If, upon application, it appears to court that: (a) business of corporation or any of its affiliates is or has been carried on with intent to defraud any person, (b) business or affairs of corporation or any of its affiliates are or have been carried on or conducted, or powers of directors are or have been exercised in manner that is oppressive or unfairly prejudicial to or that unfairly disregards interests of security holder, (c) corporation or any of its affiliates was formed for fraudulent or unlawful purpose or is to be dissolved for fraudulent or unlawful purpose, or (d) persons concerned with formation, business or affairs of corporation or any of its affiliates have in connection therewith acted fraudulently or dishonestly; court may order investigation to be made of corporation and any of its affiliated corporations.

Powers of Court.

In connection with investigation, court may make any order it thinks fit.

Copy of Report.

Inspector appointed by court must send to Director copy of every report made by inspector under this Part.

Power of Inspector.

Inspector has powers set out in order of court appointing him.

Provisions of this Part of Act are designed to protect public interest rather than to resolve individual shareholder's grievances.

Part XIX.1. Apportioning Award of Damages—Interpretation and Application.

Part XIX.1 sets out regime of modified proportionate liability in relation to claims for financial loss arising out of error, omission or misstatement in respect of financial information required by Act. This Part will only apply where court has found more than one defendant or third party responsible for financial loss.

Degree of Responsibility.

Every defendant or third party who has been found responsible for financial loss is liable to plaintiff only for portion of damages that corresponds to their degree of responsibility for loss unless defendant or third party acted fraudulently or dishonestly.

Individual or Personal Body Corporate.

Defendants and third parties are jointly and severally, or solidarily, liable for damages awarded to plaintiff who is individual or personal body corporate and who (a) had financial interest in corporation on day that error, omission or misstatement in financial information concerning corporation occurred, or acquired financial interest in period between day that error, omission or misstatement occurred and day, as determined by court, that it was generally disclosed; and (b) has established that value of plaintiff's total financial interest in corporation was not more than prescribed amount at close of business on day that error, omission or misstatement occurred or at close of business on any day that plaintiff acquired financial interest in period referred to in paragraph (a). Personal body corporate means body corporate that is not involved in any financial, commercial or industrial business and that is controlled by individual or group of individuals, each member of which is connected by blood relationship, adoption or marriage or by cohabiting with another member in conjugal relationship.

Part XX. Remedies, Offences and Penalties.

Commencing Derivative Action.

Complainant may apply to court for leave to bring action in name and on behalf of corporation or any of its subsidiaries, or intervene in action to which any such body corporate is party, for purpose of prosecuting, defending or discontinuing action on behalf of body corporate, except that no action may be brought and no intervention in action may be made unless court is satisfied that: (a) complainant has given notice to directors of corporation or its subsidiary of his intention to apply to court not less than 14 days before bringing application, or as otherwise ordered by court, if directors of corporation or its subsidiary do not bring, diligently prosecute or defend or discontinue action; (b) complainant is acting in good faith; and (c) it appears to be in interest of corporation or its subsidiary that action be brought, prosecuted, defended or discontinued.

“Complainant” means: (a) registered holder or beneficial owner, and former registered holder or beneficial owner, of security of corporation or any of its affiliates, (b) director or officer or former director or officer of corporation or of any of its affiliates, (c) Director, or (d) any other person who, in discretion of court, is proper person to make application under this Part.

Powers of Court.

In connection with such action, court may at any time make any order it thinks fit including, without limiting generality of foregoing: (a) order authorizing complainant or any other person to control conduct of action; (b) order giving directions for conduct of action; (c) order directing that any amount adjudged payable by defendant in action shall be paid, in whole or in part, directly to former and present security holders of corporation or its subsidiary instead of to corporation or its subsidiary; (d) order requiring corporation or its subsidiary to pay reasonable legal fees incurred by complainant in connection with action.

Oppression Remedy.

Complainant may apply to court for order under following provision.

Grounds.

If upon application by complainant to court for order, court is satisfied that in respect of corporation or any of its affiliates: (a) any act or omission of corporation or any of its affiliates effects result, (b) business or affairs of corporation or any of its affiliates are or have been carried on or conducted in manner, or (c) powers of directors of corporation or any of its affiliates are or have been exercised in manner; that is oppressive or unfairly prejudicial to or that unfairly disregards interests of any security holder, creditor, director or officer, court may make order to rectify matters complained of.

Powers of Court.

In connection with such application, court may make any interim or final order it thinks fit.

Duty of Directors.

If such order made by court directs amendment of articles or by-laws of corporation: (a) directors shall forthwith send articles of amendment in prescribed form and other documents required by Act in connection therewith to Director; and (b) no other amendment to articles or by-laws shall be made without consent of court, until court otherwise orders.

Evidence of Shareholder Approval Not Decisive.

Application made or action brought or intervened in under this Part must not be stayed or dismissed by reason only that it is shown that alleged breach of right or duty owed to corporation or its subsidiary has been or may be approved by shareholders of such body corporate but evidence of approval by shareholders may be taken into account by court in making order for liquidation or dissolution of corporation, order in connection with derivative action or order concerning oppressive or unfairly prejudicial conduct of corporation.

Court Approval to Discontinue.

Application made or action brought or intervened in under this Part must not be stayed, discontinued, settled or dismissed for want of prosecution without approval of court given upon such terms as court thinks fit and, if court determines that interests of any complainant may be substantially affected by such stay, discontinuance, settlement or dismissal, court may order any party to application or action to give notice to complainant.

Application to Court to Rectify Records.

If name of person is alleged to be or to have been wrongly entered or retained in, or wrongly deleted or omitted from, registers or other records of corporation, corporation, security holder of corporation or any aggrieved person may apply to court for order that registers or records be rectified.

Powers of Court.

In connection with such application, court may make any order it thinks fit.

Application for Directions.

Director may apply to court for directions in respect of any matter concerning his duties under Act and on such application court may give such directions and make such further order as it thinks fit.

Appeal from Director's Decision.

Person who feels aggrieved by decision of Director referred to in (a) to (g) below may apply to court for order, including order requiring Director to change decision: (a) to refuse to file in form submitted to him any articles or other document required by Act to be filed by him, (b) to give name, to change or revoke name, or to refuse to reserve, accept, change or revoke name under Act, (c) to refuse to grant exemption under Act and regulations, (d) to refuse to permit continued reference to shares having nominal or par value, (e) to refuse to issue certificate of discontinuance under Act, (f) to issue, or refuse to issue, certificate or revival, or decision with respect to terms of revival, (f.1) to correct, or refuse to correct, articles, notice, certificate or other document, (f.2) to cancel, or refuse to cancel, articles and related certificate of corporation where prescribed circumstances have been met, or (g) to dissolve corporation under Act. Court may make any order it thinks fit.

Restraining or Compliance Order.

If corporation or any director, officer, employee, agent, auditor, trustee, receiver, receiver-manager or liquidator of corporation does not comply with Act, regulations, articles, by-laws or unanimous shareholder agreement, complainant or creditor of corporation may, in addition to any other right he has, apply to court for order directing any such person to comply with, or restraining any such person from acting in breach of, any provisions thereof, and upon such application court may so order and make any further order it thinks fit.

Offences with Respect to Reports.

Person who makes or assists in making report, return, notice or other document required by Act or regulations to be sent to Director or to any other person that: (a) contains untrue statement of material fact, or (b) omits to state material fact required therein or necessary to make statement contained therein not misleading in light of circumstances in which it was made; is guilty of offence and liable on summary conviction to fine not exceeding CDN $5,000 or to imprisonment for term not exceeding six months or to both.

If person guilty of such offence is body corporate, then, whether or not body corporate has been prosecuted or convicted, any director or officer of body corporate who knowingly authorizes, permits or acquiesces in such failure is also guilty of offence and liable on summary conviction to fine not exceeding CDN $5,000 or to imprisonment for term not exceeding six months or both.

Immunity.

No person is guilty of any such offence if person did not know, and in exercise of reasonable diligence could not have known, of untrue statement or omission.

Offence.

Every person who contravenes provision of Act or regulations for which no punishment is provided is guilty of offence punishable on summary conviction.

Order to Comply.

Where person is guilty of offence under Act or regulations, any court in which proceedings in respect of offence are taken may, in addition to any punishment it may impose, order that person to comply with provisions of Act or regulations for contravention of which he has been convicted.

Part XX.1. Documents in Electronic or Other Form.

Part XX.1 facilitates corporation's ability to employ new and emerging communications technologies when providing documents to required persons. All shareholders would still have right to receive everything in paper based form. Regime in structured in terms of general principles that would permit corporations and others to employ new and emerging communications technologies as they are developed. Electronic document means (except where statutory declaration or affidavit is required under Act or regulations) any form of representation of information or of concepts fixed in any medium in or by electronic, optical or other similar means and that can be read or perceived by person or by any means.

Use Not Mandatory.

Nothing in Act or regulations requires person to create or provide electronic document.

Consent and Other Requirements.

Requirement under Act or regulations to provide person with notice, document or other information is not satisfied with provision of electronic document unless (a) addressee has consented, in manner prescribed, and has designated information system for receipt of electronic document; and (b) electronic document is provided to designated information system, unless otherwise prescribed.

Creation and Provision of Information.

Requirement under Act or regulations that notice, document or other information be created or provided, is satisfied by creation or provision of electronic document if (a) by-laws or articles of corporation do not provide otherwise; and (b) regulations, if any, have been complied with.

Creation of Information in Writing.

Requirement under Act or regulations that notice, document or other information be created in writing is satisfied by creation of electronic document if, in addition to general conditions above, (a) information in electronic document is accessible so as to be usable for subsequent reference; and (b) regulations pertaining to this provision, if any, have been complied with.

Provision of Information in Writing.

Requirement under Act or regulations that notice, document or other information be provided in writing is satisfied by provision of electronic document if, in addition to general conditions above, (a) information in electronic document is accessible by addressee and capable of being retained by addressee, so as to be usable for subsequent reference; and (b) regulations pertaining to this provision, if any, have been complied with.

Signatures.

Requirement under Act or regulations for signature or for document to be executed (except with respect to statutory declaration or affidavit) is satisfied if, in relation to electronic document, prescribed requirements pertaining to this provision, if any, are met and if signature results from application by person of technology or process that permits following to be proven: (a) signature resulting from use by person of technology or process is unique to person; (b) technology or process is used by person to incorporate, attach or associate person's signature to electronic document; and (c) technology or process can be used to identify person using technology or process.

Part XXI. General.

Notice to Directors and Shareholders.

Notice or document required by Act, regulations, articles or by-laws to be sent to shareholder or director of corporation may be sent by prepaid mail addressed to, or may be delivered personally to: (a) shareholder at latest address as shown in records of corporation or its transfer agent; and (b) director at latest address as shown in records of corporation or in last notice of directors or notice of change of directors.

Notice to and Service Upon a Corporation.

Notice or document required to be sent to or served upon corporation may be sent by registered mail to registered office of corporation shown in last notice of registered office.

Certificate of Corporation.

Certificate issued on behalf of corporation stating any fact that is set out in articles, by-laws, unanimous shareholder agreement, minutes of meetings of directors, committee of directors or shareholders, or in trust indenture or other contract to which corporation is party may be signed by director, officer or transfer agent of corporation.

Filings with Director.

Where notice or document is required to be sent to Director under this Act, Director may accept photostatic or photographic copy. Director may by order exempt such notices or documents or classes of notices or documents containing information similar to that contained in notices or documents required to be made public pursuant to any other Act of Parliament to any legislature of Province as are specified in order.

Regulations.

Governor in Council may make regulations: (a) prescribing any matter authorized or required by Act to be prescribed; (a.1) defining anything, as required by Act; (b) requiring payment of fee with respect to filing, examination or copying of document; (c) respecting fees to be paid; (c.1) prescribing manner to determine number of shares required to submit proposal; (d) prescribing minimum support required with respect to submitting second proposal; (e) prescribing rules with respect to exemptions; (f) prescribing standards for accounting body; (g) prescribing rules with respect to use of electronic documents; (h) prescribing rules with respect to participation in meetings by electronic or other such means; and (i) prescribing manner of voting by electronic or other such means.

Annual Return.

Every corporation must on prescribed date, send to Director annual return in prescribed form.

Inspection.

Person who has paid required fee is entitled during usual business hours to examine document required by Act or regulations to be sent to Director, except report sent to him by inspector appointed under Part XIX and to make copies of or extracts therefrom.

Authorizing Continuance.

Shareholders of body corporate incorporated by or under Act of Parliament may: (a) by special resolution, authorize directors of body corporate to apply under Act for certificate of continuance; and (b) by same resolution, make any amendment to Act of incorporation or letters patent of body corporate that corporation incorporated under Act may make to its articles.

No Dissent.

Shareholder is not entitled to dissent in respect of amendment made under this provision.

Insolvency and Receivers.

See category 8 Debtor and Creditor, topic 8.02 Bankruptcy.

Close Corporations.

Provisions applicable to close corporations include requirement for only one director where securities not distributed to public; certain insider trading provisions do not apply; proxy solicitations not mandatory if less than 15 shareholders; financial statements need not be filed with Director nor is auditor required unless it has distributed its securities to public; take-over bid rules generally do not apply if less than 15 shareholders; trust indenture provisions apply only where debt issued as part of distribution to public; signed resolutions may be used instead of meetings; and shareholders may enter unanimous shareholders agreement restricting power of directors.

Foreign Corporations.

There are no Dominion licensing requirements applicable to foreign corporations per se, but where business to be carried on is one which may not be purpose of a Dominion company incorporated under Canada Corporations Act, then foreign corporation is subject to statutes governing incorporation for such purposes, for example Insurance Companies Act, or Trust and Loan Companies Act. Foreign companies desiring to carry on business in Canada must obtain a licence in each Province where operations are to be carried on. Fee payable depends upon amount of capital to be employed and corresponds to fee chargeable for incorporation in particular province. See the provincial law digests.

Foreign Investment.

Investment Canada Act (R.S.C., c. 28, [1st Supp.]) sets out circumstances in which investments by non-Canadians in new Canadian businesses or acquisitions of control of Canadian businesses will be subject to notice and/or review requirements of Act. For detailed discussion of Act, see category 15 Foreign Trade and Commerce, topic 15.03 Foreign Investment.

Taxation.

See category 23 Taxation, and in provincial law digests.

The Small Loans Act (c. S-11) provides for regulation of companies lending money on promissory notes or other personal security and chattel mortgages.

Income tax on corporations, see category 23 Taxation, topic 23.07 Income Tax.

3 BUSINESS REGULATION AND COMMERCE

3.01 BANKS AND BANKING:

Banks are governed by Bank Act (S.C. 1991, c. 46, as am'd), federal statute which regulates incorporation, management and manner in which banks may operate.

On Apr. 20, 2007, legislation was promulgated to reflect results of Canadian Government's regular five-year review of legislative framework governing banks and other financial sector entities. This legislation represented effort to update and make technical changes to Bank Act and other financial sector legislation, without overhauling, in any material manner, current legislative framework. In general, this legislation resulted in changes to: (a) Enhance interests of consumers, (b) increase legislative and regulatory efficiency, and (c) adapt legislative framework to new developments, such as electronic cheque imaging and ownership requirements.

Banking Corporations.

Minister of Finance may, on application, issue letters patent incorporating bank. (§22). Letters patent incorporating bank shall not be issued to certain bodies, including where bank thereby incorporated would be foreign bank subsidiary, if application is made by foreign bank not controlled by World Trade Organization (“WTO”) member resident, unless treatment as favourable for banks to which Bank Act applies exists or will be provided in jurisdiction in which foreign bank principally carries on business of banking. (§24). Bank has capacity, and subject to

Bank Act, rights, powers and privileges of natural person. (§15[1]). Bank shall not commence business of banking until Superintendent has, by order, approved commencement and carrying on of business. (§48[1]).

Interest.

Criminal interest rate provisions may apply to interest or discount on loans or advances made by Bank. See topic 3.06 Interest, subhead Criminal Code. (c. C-46, §347).

Loans and Advances and Security Therefor.

Bank may not carry on any business other than business of banking and business appertaining thereto. Business of banking includes providing any financial service, acting as financial agent, providing investment counselling and portfolio management services, and issuing and operating payment, credit or charge card plan. (§409). Except as authorized by or under Bank Act bank shall not deal in goods, wares or merchandise or engage in any trade or other business. (§410[2]). Directors of bank must establish and bank must adhere to investment and lending policies, standards and procedures that reasonable and prudent person would apply in respect of portfolio of investments and loans to avoid undue risk of loss and obtain reasonable return. (§465). Bank may lend money and make advances on security of hydrocarbons or minerals. (§426). Bank may lend money and make advance to any wholesale or retail purchaser or shipper of, or dealer in, agriculture, aquaculture, forest, quarry and mine, and sea, lakes or river products, or goods, wares or merchandise, on security of such products; to person engaged in business as manufacturer on security of goods manufactured or procured for manufacture by him; to aquaculturist on security of aquacultural stock, equipment or implements, aquatic broodstock or seedstock, pesticides, feed, veterinary drugs, biologicals or vaccines and aquatic plants or animals; to farmer on security of crops, seed grain and seed potatoes, fertilizer, livestock, feed, agricultural implements or equipment; to fisherman on security of fishing vessels, equipment and supplies or products of sea, lakes or rivers; to forestry producer on security of fertilizer, pesticide, forestry equipment, implements or forestry products. (§427). Rights and powers of bank in respect of security obtained under §427 are void against creditors unless notice of intention in prescribed form is registered in appropriate agency of Bank of Canada not more than three years before security was given. (§427[4]).

Deposits.

Bank may accept deposits from any person whether or not person is qualified by law to enter into contracts. Bank may pay deposit to such person unless claimed by some other person in any action to which bank is party and bank has been duly served in respect thereof, or unless prohibited pursuant to injunction made by court. Bank not bound to see to execution of trust, whether express or arising by operation of law, of any deposit. (§437). Where person who made deposit dies, receipt by bank in form satisfactory to it of affidavit in writing signed by or on behalf of person claiming entitlement to deposit and reasons therefor, or where claim based on will or other document of like import, authenticated copy under seal of court or authority having jurisdiction in Canada or elsewhere, or receipt of notarial will or authenticated copy, is sufficient justification for discharge of obligation of bank provided bank is satisfied with such documentation. (§460).

Unclaimed Deposits.

Where deposit payable in Canada in Canadian currency exists at branch of bank in Canada where no transaction has taken place and no statement has been requested or acknowledged by customer for period of ten years, or where cheque, draft or bill of exchange payable in Canada in Canadian currency has been issued, certified or accepted by bank at branch in Canada and no payment has been made in respect thereof for period of ten years, bank shall pay amount that would be owing in respect of debt or instrument to Bank of Canada, and such payment discharges bank. Claimant may then demand payment from Bank of Canada which must pay out appropriate amount together with interest for period not exceeding ten years. (§438).

Foreign Banking.

Status.

Except with consent of Governor-in-Council or if business in Canada is by authorized foreign bank, foreign banks may not directly or indirectly undertake any banking business in Canada or maintain branch in Canada for any purpose unless authorized to do so under Insurance Companies Act (Canada) or, except as permitted by Bank Act, establish, maintain or acquire for use in Canada automated banking machine or accept data therefrom. (§§510 and 522.17). Foreign bank may establish representative office in Canada with approval of Superintendent. Foreign bank may also establish subsidiary in Canada (“foreign bank subsidiary”) or locate its head office in Canada. (§522).

Reciprocity.

If application is made by foreign bank not controlled by WTO member resident, foreign bank subsidiary may not be established in Canada unless parent country offers reciprocal banking arrangements to Canadian banks. (§24).

Commencement of Business.

No bank may carry on business until Superintendent has, by order, approved commencement and carrying of business by bank. (§48[1]).

Rights and Powers.

Foreign bank subsidiaries have all powers of Canadian bank subject to following restrictions. Except for bank controlled by WTO member resident, beyond head office and one branch, additional branches may be opened with permission of Minister of Finance. (§422.2). At least one-half of directors must be “resident Canadians” (§159[2]).

Authorized Foreign Bank Branch.

Minister may make order permitting foreign bank to establish branch in Canada or carry on business in Canada (“authorized foreign bank”) if treatment as favourable for Canadian banks exists or will be provided in jurisdiction in which authorized foreign bank principally carries on business (if application is made by foreign bank not controlled by WTO member resident), applicant is bank under laws of incorporating jurisdiction and is regulated in acceptable manner and applicant's principal activity is provision of services permitted by Canadian banks. (§524). Authorized foreign bank shall at all times have principal office located in province specified in Minister's order (§535) and employee ordinarily resident in Canada who is principal officer (§536). Authorized foreign bank shall only carry on business of banking in Canada and any other business generally that appertains to business of banking; provided that it may carry on other activities permitted under Bank Act. (§538). Authorized foreign bank may establish either full-service branch or lending branch. (§524[2]). Full-service branches may accept deposits greater than CDN $150,000 only. (§546[1]). Lending branches may not accept deposits. (§540[1]). If carrying on business of full-service branch, authorized foreign bank shall maintain on deposit with Canadian financial institution assets equal to greater of CDN $5,000,000 or 5% of liabilities of authorized foreign bank in respect of its business in Canada and if carrying on business of lending branch, such deposit shall be CDN $100,000. (§582[1]).

World Trade Organization Agreement.

Foreign bank subsidiaries controlled by WTO member residents may open additional branches in Canada without prior approval of Minister. (§422.2).

The Bank of Canada was incorporated in 1934 by Act of Parliament to function as central bank in and for Canada. Bank is managed by board of directors appointed by Minister of Finance with approval of Governor-in-Council. See Bank of Canada Act, c. B-2.

Canada Deposit Insurance Corporation ("CDIC") was incorporated in 1967 by Act of Parliament (c. C-3) insuring Canadian dollar deposits in member institutions up to CDN $100,000. Membership in CDIC is mandatory for deposit-taking banks and federally-owned loan and trust corporations, and optional for provincially-incorporated loan and trust corporations. However, CDIC may allow bank to opt-out of CDIC if sum of all deposits held by bank less than CDN $150,000 payable in Canada is less than 1% of sum of all deposits held by bank payable in Canada.

Business Development Bank of Canada ("BDBC") was continued in 1995 as successor to Federal Business Development Bank. Purpose of BDBC is to support Canadian entrepreneurship by providing financial and management services and by issuing securities or otherwise raising funds or capital in support of those services. BDBC must give particular consideration to needs of small and medium-sized enterprises. BDBC is agent of Crown and directors are appointed by Designated Minister with approval of Governor in Council. All property, rights and obligations of former Federal Business Development Bank are vested in BDBC. (S.C. 1995, c. 28). See also Farm Credit Canada Act (S.C. 1993, c. 14) and Export Development Act (c. E-20).

Trust companies may be incorporated by letters patent. Trust company has capacity and, subject to Trust and Loan Companies Act (S.C. 1991, c. 45), rights, powers and privileges of natural person (§14[1]). Trust company may not carry on any business other than business generally appertaining to business of providing financial services. This includes acting as trustee, financial agent, receiver, liquidator or sequestrator, providing investment counselling services and portfolio management services, and issuing and operating payment, credit or charge card plan. (§409). Directors of trust company must establish and trust company must adhere to investment and lending policies, standards and procedures that reasonable and prudent person would apply in respect of portfolio of investments and loans to avoid undue risk of loss and obtain reasonable return. (§450). See Trust and Loan Companies Act, S.C. 1991, c. 45.

Savings Banks.

Save as to certain provincial government savings banks (see provincial law digests) there are no savings or industrial banks operating in Canada, functions of such banks being performed generally by chartered banks.

3.02 BILLS AND NOTES:

Bills of exchange, promissory notes and cheques (other than depository bills and notes discussed below) are governed throughout Canada by Bills of Exchange Act. (c. B-4). Generally, Act is similar to U.S. Uniform Commercial Code provisions relating to negotiable instruments and is based on U.K. Bills of Exchange Act, 1882.

Days of Grace.

In the case of bill or note not payable on demand three days' grace are allowed, unless bill or note otherwise provides. When last day of grace falls on legal holiday or Sat. note becomes due next following juridical day. (§41).

Liability of Drawee.

A bill of exchange is not an assignment of funds in hands of drawee and drawee is not liable to holder unless he accepts. (§126).

Interest.

Where interest is payable under bill or note but no rate is fixed by agreement or law, rate is 5% per annum. See Interest Act, c. I-15, §3.

Judgment Notes.

Clause in note providing for confession of judgment thereon if not duly paid is not enforceable, but inclusion of such clause does not invalidate note.

Consumer Bills and Notes.

Rights of holder of such bills and notes, which must be marked "Consumer Purchase", subject to any defence or right of setoff that purchaser of goods would have had in action by seller of goods. (§§188-192).

In case of dishonour the drawer and any endorsers are released from liability unless notice of dishonour has been given and in the case of a foreign bill or note a formal notarial protest is also necessary. Notice of protest or dishonour is sufficient if addressed to the particular party at his address if given, or if not, then at place where instrument is dated. Notice of dishonour or protest must be given not later than next following juridical day. (§§95-125).

Patent Rights.

Every bill or note, the consideration of which consists in whole or part of the purchase price of a patent right, must have upon the face thereof the words "given for a patent right." Without these words the instrument is void except in the case of a holder in due course without notice of such consideration. (§13).

Inland/Foreign Bills.

Rules of common law of England, including law merchant, apply to bills of exchange, promissory notes and cheques in Canada except where such rules are inconsistent with Bills of Exchange Act. (§9). Where bill or note presented for acceptance or payable out of Canada is protested, notarial copy of protest and of notice of dishonour and notarial certificate of service of notice shall be received in courts as prima facie evidence of protest, notice and service. (§11). Holder may treat bill as inland bill unless contrary appears on face of bill. Inland bill is one which is or on face purports to be: (a) both drawn and payable within Canada or (b) drawn within Canada upon some person resident therein. (§24). Where foreign bill appearing to be such has been dishonoured by nonacceptance, it must be duly protested for nonacceptance. And if not previously dishonoured by nonacceptance but is dishonoured by nonpayment, it must be duly protested for nonpayment, and if accepted only as to part, it must be protested as to balance. Unless these provisions are complied with, drawer and endorsers are discharged. (§111). Inland bills need not be noted or protested in order to have recourse against drawer or endorsers. (§112).

Depository bills and notes were created as class of securities under legislation, Depository Bills and Notes Act (S.C. 1998, c. 13). Depository bill or note is instrument that is intended to be held by clearing house and traded in book-entry system operated by clearing house. Purchasers of depository bill or note are provided same legal rights as purchaser of bill or note under Bills of Exchange Act, even though depository bill or note is not physically delivered to purchaser.

3.03 CONTRACTS:

See digests of the laws of the several provinces.

Distributorships, Dealerships and Franchises.

Canada has no legislation or special rules governing formation and termination of these types of business arrangements, as they are subject to provincial jurisdiction. See also category 3 Business Regulation and Commerce, topic Franchises in Alberta Law Digest and Ontario Law Digest.

International Contracts.

See topic 3.11 Sales.

3.04 FRAUDS, STATUTE OF:

See digests of the laws of the several provinces.

3.05 INFORMATION TECHNOLOGY, INTERNET AND NEW MEDIA:

See digests of laws of various provinces.

Personal Information Protection.

Canadian Personal Information Protection and Electronic Documents Act, S.C. 2000, c. 5, Part 1, ("PIPEDA") protects information about identifiable individuals ("personal information") that is collected, used or disclosed by private sector organizations in course of commercial activities. Organizations engaged in activities to which PIPEDA applies are required to comply with ten "fair information" principles. These requirements apply to applicable activities of: (a) Federally-regulated private sector; (b) provincially-regulated private sector when activity involves movement of personal information outside province; and (c) provincially-regulated private sector in each province, except to extent that province has enacted personal information protection laws determined by federal government to be substantially similar to PIPEDA. Alberta, British Columbia, Quebec, and in matters relating to health care, Ontario, have passed personal information protection laws that have been found substantially similar to PIPEDA, although other provinces have such laws. Exemption from application of PIPEDA may apply to organization or class of organization, activity or class of activity. However, PIPEDA continues to apply to applicable activities of federal works, undertakings or businesses in these provinces, and to movement of personal information outside these provinces where it occurs in course of commercial activity.

Electronic Documents for Federally Regulated Activities.

Personal Information Protection and Electronic Documents Act, S.C. 2000, c. 5, Part 2, provides for use of electronic documents where federal laws contemplate use of paper to record or communicate information or transactions. Provisions relate to dealings with federal government, and do not apply to general contract law matters or dealings with provincial governments, which are within exclusive jurisdiction of provincial legislatures. Provisions only apply to federal laws specifically listed in schedules to legislation. Federal Real Property and Federal Immovables Act, Federal Real Property Regulations, and Canada Labour Code are currently only laws specified.

Secure Electronic Signatures.

Secure Electronic Signature Regulations, SOR/2005-30, came into force Feb. 1, 2005. Definition of "secure electronic signature" applies to both Personal Information and Protection of Electronic Documents Act and Canada Evidence Act. Regulations outline process by which secure digital signature created (§2) involving use of valid digital signature certificates (§3) issued by certification authorities. If process followed, presumption arises that document was signed by person identified through signature. (§5). In order to be approved as certification authority, person or entity must establish that they can issue digital signature certificates in secure and reliable manner. Recognized certification authorities listed on website of Treasury Board Secretariat. (§4).

Electronic Evidence in Federal Proceedings.

Canada Evidence Act, c. C-5, §§31.1-31.8, provides for use of electronic records in evidence in federal legal proceedings if there is sufficient evidence of their authenticity and integrity. Those provisions do not affect any rule of law relating to admissibility of evidence, except rules relating to authentication and best evidence. Accordingly, use of electronic records in evidence is still subject to hearsay rule and its statutory and common law exceptions. Most provinces have enacted similar electronic evidence laws applicable to provincial legal proceedings.

Internet Advertising.

In Canada, advertising is regulated by provisions of Criminal Code of Canada, c. C-46, Competition Act, c. C-34 and provincial consumer protection and business practices statutes. Generally, those laws prohibit advertising and other marketing practices that are false, misleading, unfair or deceptive, and require claims regarding performance, efficacy or durability of product to be substantiated by adequate and proper testing. Those laws also impose specific requirements regarding certain marketing practices, such as contests and multi-level marketing plans, and prohibit or regulate other practices.

Canadian Competition Bureau issued Information Bulletin on the Application of the Competition Act to Representations on the Internet. Bulletin is not law, but sets out Bureau's approach in applying Competition Act to Internet advertising, and provides useful guidance and practical advice to persons engaged in Internet advertising.

Criminal Law.

(a) Unauthorized use of computer service or system: Criminal Code of Canada §§342.1 and 342.2 make it offence to use computer in unauthorized manner or to possess instrument or device for that purpose. Offences are directed primarily to what is now commonly known as “computer hacking”. Criminal Code of Canada §342.2 also makes it offence to make, possess, sell or distribute any instrument or device that has been or is intended for use in computer hacking; (b) mischief to data: Criminal Code of Canada §430 (1.1) makes it offence to commit mischief in relation to computer data. Offence does not require proof that computer data is secret or confidential, or that there has been any deprivation to data owner. Criminal Code of Canada §430 (5.1) also makes it offence to wilfully do act, or omit to do act that one is under duty to do, if act or omission is likely to result in mischief in relation to data. Offence is punishable by imprisonment for term not exceeding five years; (c) interception of communications: Criminal Code of Canada §184 (1) makes it offence, subject to certain exceptions, to wilfully intercept private communication. Exceptions permit manager of computer system to intercept private communication originating from, directed to or transmitting through computer system, if interception is reasonably necessary for: (i) Managing quality of service of computer system as it relates to system performance and data integrity, or (ii) protecting computer system against unauthorized access or mischief to data. There are restrictions regarding manner in which intercepted communications may be used and disclosed.

Tax Law.

Electronic commerce facilitates delivery of goods and services across tax jurisdiction borders, including delivery of digitized goods that previously could only be supplied in tangible form and provision of services from remote locations that previously required physical presence of personnel at customer's site. Those aspects of electronic commerce raise several interpretive issues concerning administration of Canadian Goods and Services Tax/Harmonized Sales Tax (“GST/HST”).

Canada Revenue Agency ("CRA") released GST/HST Technical Information Bulletin B-090 entitled: GST/HST and Electronic Commerce. Bulletin sets forth CRA's views regarding application of GST/HST to electronic commerce transactions, and provides numerous examples and illustrations. Bulletin does not replace law found in Excise Tax Act, c. E-15, or its regulations, but provides useful guidance regarding CRA's administrative policies. GST/HST registrants claiming input tax credits can confirm registration and business numbers of suppliers from whom they are purchasing goods and services, Excise Tax Act, c. E-15 (§295[6.1]). Confirmation is possible on publicly accessible Web-based GST/HST registry, made available on CRA Website since Apr. 3, 2006. Effective Jan. 1, 2008, rate of GST is 5% and HST is 13%; for more information, see GST/HST Notice 22b.

3.06 INTEREST:

Except as otherwise provided by Act of Parliament, any rate of interest may be contracted for. (Interest Act, c. I-15, §2).

Banks.

See topic 3.01 Banks and Banking, subhead Interest.

Criminal Code (c. C-46, §§347 and 347.1) establishes as criminal rate of interest effective annual rate that exceeds 60% on credit advanced. Interest includes all charges and expenses (except certain insurance and official fees) payable by or for borrower for advancement of credit. Any person who receives or arranges to receive interest at criminal rate is guilty of: (a) Indictable offence and liable to imprisonment for five years, or (b) summary conviction offence and liable to fine of up to CDN $25,000 or to imprisonment for six months or to both. Exceptions permit "payday loans" at higher rates of interest made by persons other than certain "financial institutions" under Bank Act (S.C. 1991, c. 46) if: (a) Amount advanced is $1,500 or less and term of agreement is 62 days or less, and (b) person is licensed in designated Canadian province.

Judgment Interest.

Under §50 of Supreme Court Act, (c. S-26) unless otherwise ordered by Supreme Court of Canada, judgment thereof bears interest at rate and from date of judgment in same matter in court of original jurisdiction.

Mortgages.

As to interest on mortgages, see category 21 Mortgages, topic 21.01 Mortgages.

See also category 2 Business Organizations, topic 2.03 Corporations; see also Digests of laws of various provinces.

3.07 LICENSES, BUSINESS AND PROFESSIONAL:

Licensing of professions and most commercial activities is under provincial or municipal jurisdiction. See digests of laws of the several provinces, category Business Regulation and Commerce, topic Licenses, Business and Professional.

Commercial activities subject to federal licensing include: aeronautics (c. A-2); agriculture (c. 20, [4th Supp.]); banking (S.C. 1991, c. 46); broadcasting (S.C. 1991, c. 11); fisheries (c. F-14); insurance (S.C. 1991, c. 47; also under provincial jurisdiction); radio (c. R-2); railways (S.C. 1996, c. 10); telecommunications (S.C. 1993, c. 38); telephones (c. R-2; also subject to provincial regulation in some parts of Canada); television (S.C. 1991, c. 11); transportation (S.C. 1996, c. 10); trust and loan companies (S.C. 1991, c. 45). See also: Nuclear Energy Act, c. A-16; Bankruptcy and Insolvency Act, c. B-3; Boards of Trade Act, c. B-6; Bridges Act, c. B-8; Canada Grain Act, c. G-10; Canada Lands Surveyors Act, S.C. 1998, c. 14; Electricity and Gas Inspection Act, c. E-4; Excise Tax Act, c. E-15; Explosives Act, c. E-17; Feeds Act, c. F-

9; Fertilizers Act, c. F-10; Fish Inspection Act, c. F-12; Fisheries Act, c. F-14; Health of Animals Act, S.C. 1990, c. 21; Meat Inspection Act, c. 25, (1st Supp.); Pilotage Act, c. P-14; Plant Breeders' Rights Act, S.C. 1990, c. 20; Railway Safety Act, c. 32, (4th Supp.); Timber Marking Act, c. T-11; Trade Unions Act, c. T-14.

Import and export of certain goods is subject to licensing and permit requirements under various statutes such as Export and Import Permits Act (c. E-19).

See also topic 3.06 Interest; categories 15 Foreign Trade and Commerce, topic Foreign Trade Regulation, subhead Export and Import Permits Act; Insurance, topic Insurance Companies; Intellectual Property, topics Copyright, Patents, Trademarks and Designs; Taxation; Transportation, topic Shipping.

3.08 MONOPOLIES, RESTRAINT OF TRADE AND COMPETITION:

Section numbers refer to Competition Act, c. C-34.

Horizontal Arrangements.

Currently in Force Until Mar. 12, 2010

It is indictable offence (crime) to conspire, combine, arrange or agree: (a) to limit unduly facilities for transporting, producing, manufacturing, supplying, storing or dealing in any product; (b) to prevent, limit or lessen, unduly, manufacture or production of product, or to enhance unreasonably price thereof; (c) to prevent, or lessen, unduly, competition in production, manufacture, purchase; barter, sale, storage, rental, transportation or supply of product, or in price of insurance on persons or property; or (d) to otherwise restrain or injure competition unduly, punishable upon conviction by imprisonment for term not exceeding five years or fine not exceeding CDN $10,000,000, or both. (§45).

This does not apply to: exchange of statistics; defining of product standards; exchange of credit information; definition of terminology used in trade, industry or profession; cooperation in research and development; restriction of advertising or promotion, other than discriminatory restriction directed against member of mass media; sizes or shapes of containers in which article is packaged; adoption of metric system of weights and measures; or measures to protect environment unless conspiracy has lessened or is likely to lessen competition in respect of prices, quantity or quality of production, markets or customers, or channels or methods of distribution or if conspiracy has restricted or is likely to restrict any person from entering into or expanding business in trade, industry or profession. This also does not apply to conspiracies that relate only to export of products from Canada unless it has resulted in or is likely to result in reduction or limitation of real value of exports of product; restricted or is likely to restrict any person from entering into or expanding business of exporting products from Canada; or prevented or lessened or is likely to prevent or lessen competition unduly in supply of services facilitating export of products from Canada. In establishing that conspiracy, combination, agreement or arrangement is in violation of §45 it is not necessary to prove conspiracy, combination, agreement or arrangement, if carried into effect, would or would be likely to eliminate, completely or virtually, competition in market to which it relates or that it was object of any or all of parties thereto to eliminate, completely or virtually, competition in that market. (§45).

To Come Into Force Mar. 12, 2010—Hard Core Cartel Activity

It is indictable offence (crime) to conspire, arrange or agree: (a) To fix, maintain, increase or control price for supply of product; (b) to allocate sales, territories, customers or markets for production or supply of product; or (c) to fix, maintain, control, prevent, lessen or eliminate production or supply of product, and is punishable upon conviction by imprisonment for term not exceeding 14 years or fine not exceeding CDN $25,000,000, or both. In prosecution under this offence court may infer existence of conspiracy, agreement or arrangement from circumstantial evidence, with or without direct evidence of communication between or among alleged parties to it, but, for greater certainty, conspiracy, agreement or arrangement must be proved beyond reasonable doubt. (§45).

However, this does not apply if it can be established that, on balance of probabilities, agreement or arrangement is (a) ancillary to broader or separate agreement or arrangement that includes same parties; (b) is directly related to, and reasonably necessary for giving effect to, objective of that broader or separate agreement or arrangement; and (3) broader or separate agreement or arrangement, considered alone, does not contravene above criteria. (§45).

Also, no person shall be convicted under this offence if alleged conspiracy, agreement or arrangement relates only to export of products from Canada, unless it has (a) resulted in, or is likely to result in reduction or limitation of real value of exports of product; (b) has restricted or is likely to restrict any person from entering into or expanding business of exporting products from Canada; or (c) is in respect only of supply of services that facilitate export of products from Canada.

Similarly, no person shall be convicted if conspiracy, agreement or arrangement (a) is entered into only by companies each of which is, in respect of every one of others, affiliate (as defined in §2 of Act); or (b) is between federal financial institutions as described in Act.

To Come Into Force Mar. 12, 2010—Other Competitor Collaborations

If, on application by Commissioner, Tribunal finds that agreement or arrangement—whether existing or proposed—between persons two or more of whom are competitors prevents or lessens, or is likely to prevent or lessen, competition substantially in market, Tribunal may make order (a) prohibiting any person—whether or not party to agreement or arrangement—from doing anything under agreement or arrangement; or (b) requiring any person—whether or not party to agreement or arrangement—with consent of that person and Commissioner, to take any other action §90.1.

In deciding whether to make such finding Tribunal shall not only consider concentration of market share held by party but also factors such as (a) extent to which foreign products or foreign competitors provide or are likely to provide effective competition to businesses of parties to agreement or arrangement; (b) extent to which acceptable substitutes for products supplied by parties to agreement or arrangement are or are likely to be available; (*c*) any barriers to entry into market, including tariff and non-tariff barriers to international trade, interprovincial barriers to trade, and regulatory control over entry; (d) any effect of agreement or arrangement on such barriers; (*e*) extent to which effective competition remains or would remain in market; (*f*) any removal of vigorous and effective competitor that resulted from agreement or arrangement, or any likelihood that agreement or arrangement will or would result in removal of such competitor; (*g*) nature and extent of change and innovation in any relevant market; and (*h*) any other factor that is relevant to competition in market that is or would be affected by agreement or arrangement §90.1.

Exceptions exist where agreement or arrangement is determined to bring about gains in efficiency (not mere redistribution of income) based on factors such as whether or not gains will result in significant increase in real value of exports or significant substitution of domestic products for imported products §90.1.

Moreover, above provisions do not apply to agreements or arrangements (1) entered into only by companies each of which is, in respect of every on of others, affiliate (as defined in §2 of Act); (2) between federal financial institutions as described in §49(1); (3) that constitutes merger or proposed merger under *Bank Act, Cooperative Credit Associations Act, Insurance Companies*

Act, *Trust and Loan Companies Act*, or under §53.2(7) of *Canada Transportation Act* (4) *relating* solely to export of products from Canada (with certain exceptions) §90.1.

Foreign Directives.

Any corporation, wherever incorporated, that carries on business in Canada and that implements, in whole or in part in Canada, directive, instruction, intimation of policy or other communication to corporation or any person from person in country other than Canada who is in position to direct or influence policies of corporation, which communication is for purpose of giving effect to conspiracy, combination, agreement or arrangement entered into outside Canada that, if entered into in Canada, would have been in violation of §45, is, whether or not any director or officer of corporation in Canada has knowledge of conspiracy, combination, agreement or arrangement, guilty of indictable offence (crime) and is liable on conviction to fine in discretion of court. (§46).

Bid-rigging.

Bid-rigging is (a) agreement or arrangement between or among two or more persons whereby one or more of those persons agree or undertakes not to submit bid or tender in response to call or request for bids or tenders, or agrees or undertakes to withdraw bid or tender submitted in response to such call or request; or (b) submission, in response to call or request for bids or tenders, of bids or tenders that are arrived at by agreement or arrangement between or among two or more bidders or tenderers. Every one who is a party to bid-rigging is guilty of indictable offence (crime) and is liable on conviction to fine in discretion of court or to imprisonment for term not exceeding 14 years or to both. This does not apply in respect of agreement or arrangement that is made known to person calling for or requesting bids or tenders at or before time when any bid or tender is made or that is entered into. Similarly, this does not apply to submission that is arrived at only by companies each of which is, in respect of every one of others, affiliate as that relationship is defined in §2. (§47).

Conspiracy in Relation to Professional Sports.

Every one who conspires, combines, agrees or arranges with another person (a) to limit unreasonably opportunities for any other person to participate, as player or competitor, in professional sport or to impose unreasonable terms or conditions on those persons who so participate, or (b) to limit unreasonably opportunity for any other person to negotiate with and, if agreement is reached, to play for team or club of his choice in professional league, is guilty of indictable offence (crime) and is liable on conviction to fine in discretion of court or to imprisonment for term not exceeding five years or to both. (§48).

Misleading Advertising.

It is indictable or summary conviction offence (crime), for purpose of promoting, directly or indirectly, supply or use of product or for purpose of promoting, directly or indirectly, any business interest, by any means whatever, to knowingly or recklessly make representations, or permits representation to be made, to public that is false or misleading in material respect and is punishable by fines and/or imprisonment. Moreover, to establish these offences it is not necessary to prove that (a) any person was deceived or misled; (b) any member of public to whom representation was made was within Canada; or representation was made in place to which public had access. Also, in prosecution under this section general impression conveyed by representation as well as its literal meaning shall be taken into account in determining whether or not representation is false or misleading in material respect. (§52).

Alternatively, Commissioner of Competition may elect to prosecute misleading advertising as matter reviewable by Competition Tribunal (see subhead Deceptive Marketing Practices and Reviewable Matters, infra).

Making false or misleading representations through interactive telephone communication (deceptive telemarketing) for purpose of promoting, directly or indirectly, supply or use of product or any business interest, including charities, is offence (crime). Similarly, no person who engages in telemarketing shall (a) make representation that is false or misleading in material respect; (b) conduct or purport to conduct contest, lottery or game of chance, skill or mixed chance and skill, where delivery of prize or other benefit to participant in contest, lottery or game is, or is represented to be, conditional on prior payment of any amount by participant, or adequate and fair disclosure is not made of number and approximate value of prizes, of area or areas to which they relate and of any fact within person's knowledge, that affects materially chances of winning; (c) offer product at no cost, or at price less than fair market value of product, in consideration of supply or use of another product, unless fair, reasonable and timely disclosure is made of fair market value of first product and of any restrictions, terms or conditions applicable to its supply to purchaser; or (d) offer product for sale at price grossly in excess of its fair market value, where delivery of product is, or is represented to be, conditional on prior payment by purchaser. Offences are punishable on indictment by fine in discretion of court and/or imprisonment for term of up to 14 years or, on summary conviction, by fine not exceeding CDN $200,000 and/or imprisonment for up to one year. (§52.1).

It is also indictable or summary conviction offence (crime), punishable by fines and/or imprisonment, to send or cause to be sent by mail or any other means, document or notice which gives general impression that recipient has won, will win, or will, on doing particular act, win prize or other benefit, and if recipient is asked or given option to pay money, incur cost or do anything that will incur cost. This does not apply where adequate and fair disclosure is made, prizes or benefits are distributed without unreasonable delay, and participants selected and prizes distributed are done randomly or on basis of participants' skill. This also does not apply where person exercised due diligence to prevent commission of offence. (§53). Act also imposes certain disclosure requirements for persons engaged in telemarketing.

Under Act, no person shall supply product at price that exceeds lowest of two or more prices clearly expressed by him or on his behalf, in respect of product in quantity in which it is so supplied and at time at which it is so supplied (a) on product, its wrapper or container; (b) on anything attached to, inserted in or accompanying product, its wrapper or container or anything on which product is mounted for display or sale; or (c) on in-store or other point-of-purchase display or advertisement (``Double ticketing''). Double ticketing is offence (crime) under Act and is punishable by fine of CDN $10,000 or imprisonment for up to one year or to both. (§54).

Under Act, no person may establish, operate, advertise or promote scheme of pyramid selling. (§55.1). Pyramid selling is offence (crime) under Act and is punishable (a) on conviction on indictment, to fine in discretion of court or to imprisonment for up to five years or to both; or (b) on summary conviction, to fine up to $200,000 or to imprisonment for up to one year, or to both.

Under Act, no person may make representations relating to compensation under multi-level marketing plan without full disclosure. (§55). This is offence (crime) under Act and is punishable (a) on conviction on indictment, to fine in discretion of court or to imprisonment for up to five years or to both; or (b) on summary conviction, to fine up to $200,000 or to imprisonment for up to one year, or to both.

Conviction.

A person convicted of any of offenses in Part VI (§§45-61) may, from time to time within three years following conviction, be required to make disclosure information with respect to his business to court before which he was convicted. Any person failing to comply with order of court requiring such disclosure is liable to fine in discretion of court or to maximum of two years imprisonment. (§35).

Damages.

Any person who has suffered damage or loss as result of conduct contrary to Part VI of Act or failure of any person to comply with order of Competition Tribunal, or another court, made under Act, may sue for, and recover from person who engaged in conduct or failed to comply, amount equal to loss or damage proved to have been suffered by him, together with any additional amount that court may allow, not exceeding full cost to him of any investigation in connection with matter of proceedings under this section. (§36).

Any action instigated under above is subject to two year limitation period which, for offences under Part VI of Act, begins from whichever is later of (a) day on which conduct was engaged in; or (b) day on which any criminal proceedings relating thereto were finally disposed of. For actions based on failure of any person to comply with order of Competition Tribunal or another court, no proceedings may be brought after two years from whichever is later of (a) day on which order of Competition Tribunal or court was contravened; or (b) day on which any criminal proceedings relating thereto, were finally disposed of. (§36).

Evidence from any record of prior proceedings in which person was convicted of offence under Part IV under Act, or convicted or punished for failure to comply with order of Competition Tribunal, or another court, under Act, is in absence of any evidence to contrary, proof that person against whom action is brought, engaged in conduct contrary to these above mentioned offences. (§36).

Injunctions may be obtained by Attorney General of Canada or Attorney General of The Province to restrain anyone convicted of one of above (see subhead Damages, supra) mentioned offences from continuing or repeating offence or doing any act directed toward continuation or repetition of offence. Additionally, in proceedings commenced by information of Attorney General of Canada, or attorney general of province, injunctive relief may be granted by superior court of criminal jurisdiction where it appears that person has done, or is likely to do any thing constituting or directed toward commission of offence under Part IV of Act. (§34).

Deceptive Marketing Practices and Reviewable Matters.

Misleading Advertising.

Person engages in reviewable conduct who, for purposes of promoting, directly or indirectly, supply, or use of product or for purpose of promoting, directly or indirectly, any business interest by any means whatever, (1) makes representations to public that are false or misleading in material fact; (2) makes representations to public as to performance, efficacy or length of life of product that are not based on adequate proper test thereof; (3) makes representation to public in form that purports to be warranty or guarantee of product, or promise to replace, maintain or repair article if form of which is materially misleading or if there is no reasonable prospect that it will be carried out (§74.01); and (4) makes representations to conducting contests without making fair and adequate disclosure of facts that materially affect chances of winning (§74.06) may be prosecuted by Commissioner of Competition before Competition Tribunal or Court and may result in administrative penalty such as fines of $750,000 and $10,000,000 for first time offence of individuals and corporations respectively. (§74.10). This penalty is also applicable if product is advertised at bargain price but no reasonable quantities available (§74.04); or product is supplied at price higher than advertised (§74.05).

Refusal to Deal.

Where, on application by Commissioner of Competition or person granted leave under §103.1, Competition Tribunal finds that: (a) Person is substantially affected in his business or is precluded from carrying on business due to his inability to obtain adequate supplies of product anywhere in market on usual trade terms; (b) such person is unable to obtain adequate supplies of product because of insufficient competition among suppliers of product in market; (c) such person is willing and able to meet usual trade terms of supplier or suppliers of such product; (d) product is in ample supply; and (e) refusal to deal is having or is likely to have adverse effect on competition in market, it may order that one or more suppliers of product in market accept person as customer within specified time on usual trade terms. (§75).

Price Maintenance.

On application by Commissioner or person granted leave under §103.1, Tribunal may make order prohibiting person from continuing to engage in offending conduct or requiring them to accept another person as customer, if Tribunal finds that (a) person directly or indirectly (i) by agreement, threat, promise or any like means, has influenced upward, or has discouraged reduction of, price at which person's customer or any other person to whom product comes for resale supplies or offers to supply or advertises product within Canada, or (ii) has refused to supply product to or has otherwise discriminated against any person or class of persons engaged in business in Canada because of low pricing policy of that other person or class of persons; and (b) conduct has had, is having or is likely to have adverse effect on competition in market. For purposes of above section, order may be made against person who (a) is engaged in business of producing or supplying product; (*b*) extends credit by way of credit cards or is otherwise engaged in business that relates to credit cards; or (*c*) has exclusive rights and privileges conferred by patent, trademark, copyright, registered industrial design or registered integrated circuit topography. (§76).

Exclusive Dealing and Tied Selling.

Where, on application by Commissioner or person granted leave under §103.1, Competition Tribunal finds that exclusive dealing or tied selling, because it is engaged in by major supplier of product in market or because it is widespread in market, is likely to: (a) impede entry into or expansion of firm in market; (b) impede introduction of product into or expansion of sales of product in market; or (c) have any other exclusionary effect in market, with result that competition is or is likely to be lessened substantially, Competition Tribunal may make order directed to all or any of such suppliers prohibiting them from continuing to engage in such exclusive dealing or tied selling and containing any other requirement that, in its opinion, is necessary to overcome effects thereof in market or to restore or stimulate competition in market. (§77).

Market Restriction.—Where, on application by Commissioner or person granted leave under §103.1, Competition Tribunal finds that market restriction, because it is engaged in by major supplier(s) or because it is widespread in relation to product, is likely to substantially lessen competition, Competition Tribunal may make order, directed at all or any of subject suppliers, prohibiting market restriction. (§77).

Abuse of Dominance.

Where, on application by Commissioner, Competition Tribunal finds that: (a) One or more persons substantially or completely control class or species of business in Canada; (b) they have or are engaging in practice of anti-competitive acts, including those defined in §78; and (c) practice has or is likely to substantially lessen competition, Competition Tribunal may make order prohibiting such acts. Where Competition Tribunal makes order, under above provisions, against entity it may also order them to pay, in any manner that Tribunal specifies, administrative monetary penalty in amount not exceeding $10,000,000 and, for each subsequent order under either of those subsections, amount not exceeding $15,000,000. (§79).

Specialization Agreements.

Specialization agreement is agreement under which each party thereto agrees to discontinue producing article or service that he is engaged in producing at same time agreement is entered into on condition that each other party to agreement agrees to discontinue producing article or service that they are engaged in producing at time agreement is entered into, and includes any such agreement under which parties also agree to buy exclusively from each other articles or services that are subject of agreement.

Where Competition Tribunal finds persons to have freely entered into such agreement that is likely to bring gains in efficiency that will offset lessening of competition, and that no attempt has been made by any party or prospective party, to agreement to coerce any person to become party to agreement, Competition Tribunal may allow and register agreement. (§§85-90).

Sections 45 and 77 as it applies to exclusive dealing do not apply in respect of specialization agreement, or any modification of such agreement, that is registered.

To Come Into Force on Mar. 12, 2010

Sections 45, 77 as it applies to exclusive dealing, and 90.1 do not apply in respect of specialization agreement, or any modification of such agreement, that is registered.

Mergers.

Where on application by Commissioner, Competition Tribunal finds that merger or proposed merger prevents or lessens, or is likely to prevent or lessen competition substantially in (a) industry, trade or profession, (b) sources of products, (c) sales outlets, or (d) otherwise, Competition Tribunal may dissolve or prevent merger or require disposal of assets or shares designated by Competition Tribunal in such manner as it may direct. Tribunal in deciding, shall not find that merger prevents, lessens, or is likely to prevent or lessen competition substantially solely on basis of evidence of concentration or market share, but shall consider factors listed in §93 of Act and gains in efficiency. (§92).

No application may be brought under this section in respect of merger more than one year after merger has been substantially completed nor shall Tribunal make order under this section in context of Joint Ventures. (§97, §95).

Leave to Make Application.

Competition Tribunal may grant person leave to make application under §§75, 76 or 77 if (1) no more than one year has passed since practice that is subject of application has ceased; (2) matter is not subject of inquiry by Commissioner or was not subject of inquiry that has been discontinued because of settlement; or (3) is not subject of application already submitted to Competition Tribunal by Commissioner, and Competition Tribunal has reason to believe that applicant was directly and substantially affected in business by any practice referred to in one of those sections that could be subject to order under that section. (§103.1).

If leave granted, Commissioner may intervene in proceedings. (§103.2).

Interim Ex Parte Order.

Competition Tribunal may, on *ex parte* application by Commissioner in which Commissioner certifies that inquiry is being made under §10(1)(b), issue interim order to (a) prevent continuation of conduct that could be subject of order under any §§75 to 77, 79, 81 or 84, or (b) to prevent taking of measures under §82 or 83, if it finds that conduct or measures could be of type described in (a) or (b) and that, in absence of interim order (i) injury to competition that cannot be adequately remedied by Competition Tribunal is likely to occur, (ii) person is likely to be eliminated as competitor, or (iii) person is likely to suffer significant loss of market share, significant loss of revenue or other harm that cannot be adequately remedied by Competition Tribunal. (§103.3).

Interim Order.

Where application has been made for order under this Part (Part VIII), other than interim order under §§100 or 103.1, Tribunal, on application by Commissioner or person who has made application under §§75 or 77, may issue such interim order as it considers appropriate, having regard to principles ordinarily considered by superior courts when granting interlocutory or injunctive relief. (§104).

Customs Duties.

Whenever it appears to satisfaction of Governor-in-Council that competition in respect of any article has been prevented or lessened substantially and prevention or lessening of competition is facilitated by customs duties imposed on article, or any like article, or can be reduced by removal or reduction of duties so imposed, Governor-in-Council may remove or reduce such customs duties. (§31).

Patents, trademarks, copyrights or registered integrated circuit topographies, may be declared void in whole or in part by Federal Court of Canada where they are used to restrain or injure trade or commerce or to restrict competition unduly. (§32).

Investigations.

Any six persons, resident in Canada, who are not less than 18 years of age and who are of opinion that offence under Act has been or is about to be committed, that person has contravened or failed to comply with order made under Act, or that grounds exist for making of order under Part VII.1 or VIII (matters reviewable by Competition Tribunal) of Act, may apply for inquiry by Commissioner of Competition. Such inquiry may also be instituted by Commissioner or Minister of Industry. (§§9 and 10).

Provisions are made for sworn returns, seizure of documents, orders for production of documents, oral examinations and search warrants in course of such inquiries. (§§11-15). Commissioner may discontinue inquiry if he considers further inquiry to be unjustified. If Commissioner feels that gathered evidence discloses violation, he may inform Attorney-General for consideration of such action as Attorney General may wish to take (§23) or apply to Competition Tribunal. Procedure of Competition Tribunal is governed by Competition Tribunal Act, S.C. 1986, c. 26, and associated Competition Tribunal Rules.

3.09 NEGOTIABLE INSTRUMENTS:

See topic 3.02 Bills and Notes.

3.10 RESTRAINT OF TRADE:

See topic 3.08 Monopolies, 3.10 Restraint of Trade and Competition.

3.11 SALES:

See Digest of laws of the several provinces.

Sales of goods and services are generally regulated by provincial law.

United Nations Convention on Contracts for the International Sale of Goods.

Applicable to contracts of sale of goods between parties whose places of business are in different states if (a) those states have adopted Convention, or (b) rules of private international law lead to application of law of state that has adopted Convention, unless parties expressly agree otherwise. (S.C. 1991, c. 13).

3.12 SECURITIES:

Issue and trade of securities, registration of investment advisers, securities dealers, underwriters, take-over bids, insider trading, proxy solicitations and financial and other disclosure by publicly traded corporations are generally regulated by provincial law. However, take-over bids, insider trading, proxy solicitation and financial disclosure by federally incorporated issuers are also governed by Canada Business Corporations Act, c. C-44. See category 2 Business Organizations, topic 2.03 Corporations.

4 CITIZENSHIP

4.01 NON-CITIZENS:

Status of Persons in Canada.

Under Citizenship Act (c. C-29) every person who, under enactment of Commonwealth country other than Canada, is citizen or national of that country, has in Canada status of citizen of Commonwealth. (§32). For purposes of any law in force in Canada that refers to status of British subject, status so described refers to status of Canadian citizen or citizen of Commonwealth or both as intent of such law may require. Any law of Canada and any regulation made thereunder, unless it otherwise provides, has effect in relation to citizen of Ireland who is not citizen of Commonwealth in like manner as it has effect in relation to citizen of Commonwealth. (§33).

Subject to following provisions: (a) real and personal property of every description may be taken, acquired, held and disposed of by person who is not Canadian citizen in same manner in all respects as by Canadian citizen; and (b) title to real and personal property of every description may be derived through, from or in succession to person who is not Canadian citizen in same manner in all respects as though through, from or in succession to Canadian citizen. (§34).

Lieutenant Governor in Council of province is authorized to prohibit and annul or in any manner restrict taking or acquisition directly or indirectly of, or succession to, any interest in real property located in province by persons who are not Canadian citizens or by corporations or associations that in opinion of Lieutenant Governor in Council are effectively controlled by persons who are not Canadian citizens. Lieutenant Governor in Council of province may make regulations applicable in province for purposes of determining: (a) what transactions constitute direct or indirect taking or acquisition of any interest in real property located in province; (b) what constitutes effective control of corporation or association by persons who are not Canadian citizens; and (c) what constitutes association. (§35).

These provisions do not operate so as to authorize or permit Lieutenant-Governor in Council of province to make any decision or take any action that: (a) prohibits and annuls or restricts taking or acquisition directly or indirectly of, or succession to, any interest in real property located in province by permanent resident ordinarily resident in Canada; (b) conflicts with any legal obligation of Canada under any international law, custom or agreement; (c) discriminates as between persons who are not Canadian citizens on basis of their nationalities, except insofar as more favourable treatment is required by any legal obligation of Canada under any international law, custom or agreement; (d) hinders any foreign state in taking or acquiring real property located in province for diplomatic or consular purposes; or (e) prohibits and annuls or restricts taking or acquisition directly or indirectly of any interest in real property located in province by any person in course or as result of investment that Minister is satisfied is likely to be of net benefit to Canada under Investment Canada Act. (§35[3]).

Person who is not Canadian citizen is triable at law in same manner as if he were Canadian citizen. (§39).

Non-citizen does not: (a) qualify for any office or for any municipal, parliamentary or other franchise; (b) qualify to be owner of Canadian ship; (c) qualify to take, acquire, hold or dispose of any property that under or pursuant to any Act of Parliament of Canada may be taken, acquired, held or disposed of only by Canadian citizens; or (d) become entitled to any right or privilege as Canadian citizen except such rights and privileges in respect of property as are expressly given to him. Citizenship Act does not affect any estate or interest in real or personal property to which person has or may become entitled, either mediately or immediately, in possession or expectancy, in pursuance of any disposition made before 4th day of July, 1883, or in pursuance of any devolution by law on death of any person dying before that day. (§38).

As to who are citizens, see topic 4.02 Citizenship.

Corporations Owned or Controlled by Non-Citizens.

See Broadcasting Act, S.C. 1991, c. 11; Bank Act, S.C. 1991, c. 46; Insurance Companies Act, S.C. 1991, c. 47; Trust and Loan Companies Act, S.C. 1991, c. 45.

Also see category 23 Taxation, topic 23.07 Income Tax, subhead Nonresidents.

See also category 2 Business Organizations, topic 2.03 Corporations, subhead Foreign Investment.

Naturalization is governed by provisions of Citizenship Act, c. C-29.

Person may obtain certificate of Canadian citizenship from Minister following application for that purpose to citizenship judge, who hears and determines application. Either Minister or alien may appeal decision to Federal Court-Trial Division within 60 days. Decision of that Court is final.

Citizenship granted to applicant who: (a) is 18 years of age or over; (b) has been lawfully admitted to Canada for permanent residence and has within four years immediately preceding date of application accumulated at least three years residence in Canada calculated as follows: (i) for every day during temporary residence in Canada authorized by possession of appropriate temporary status (i.e. employment authorization, student authorization, etc.) before lawful admission to Canada for permanent residence deemed ½ day of residence; (ii) for every day during residence in Canada after lawful admission to Canada for permanent residence deemed one day of residence; (c) has adequate knowledge of French or English language; (d) has adequate knowledge of Canada and responsibilities and privileges of citizenship; (e) is not under deportation order; and (f) is not subject of declaration by Governor in Council that he should not be granted citizenship because there are reasonable grounds to believe that he will engage in activity that constitutes threat to Canadian security or that is part of pattern of planned and organized criminal activity in furtherance of Commission of indictable offence. (§5[1]).

Citizenship Act does not define “residence” to mean physical presence. As result, there is great uncertainty as some citizenship judges and Federal Court justices define “residence” as physical presence and others define it as “ordinary resident”.

Minister may in his discretion waive on compassionate grounds: (i) in case of any person, requirements (c) or (d) above; (ii) in case of any person under disability, requirement respecting age set forth in (a) above, requirement respecting length of residence in Canada set forth in (b) above, or requirement that person take oath of citizenship. (§5[3]).

Citizenship also granted to person who: (a) has been lawfully admitted to Canada for permanent residence and is minor child of citizen if application for citizenship is made to Minister by person authorized by regulation to make application on behalf of minor child. (§5[2]).

In order to alleviate cases of special and unusual hardship or to reward services of exceptional value to Canada, and notwithstanding any other provision of Act, Governor in Council may, in his discretion, direct Minister to grant citizenship to any person and, where such direction is made, Minister must forthwith grant citizenship to person named in direction. (§5[4]).

Transitional provisions regarding delayed registration of birth abroad and facilitated grant of citizenship contained in Citizenship Act under §§5(2)(b) and 4(3) expired on Aug. 14, 2004. Before 1977, child born abroad only had claim to Canadian citizenship if father was Canadian or if child was born to unmarried Canadian mother. Citizenship Act included transitional provision (§5[2][b]) allowing children born abroad to married Canadian mother to apply for Canadian citizenship. This provision was recently changed to allow children born abroad to unmarried Canadian father to apply for Canadian citizenship. Similarly, before 1977, child born abroad to Canadian could obtain Canadian citizenship only if birth was registered before child's second birthday. Citizenship Act included transitional provision (§4[3]) allowing children born abroad between 1947 and 1977 who were not registered by their parents to register themselves.

Until recently, person who lost his or her status under §18(1) of former Citizenship Act or citizens who lost their Canadian citizenship status as minors when their “responsible parent” acquired citizenship of another country were required to first become permanent resident and reside in Canada for one year immediately before making application for citizenship. This was amended on May 2, 2005 when Bill S-2 (S.C. 2005, c. 17) received Royal Assent. This Act eliminates that need for persons who ceased to be Canadian citizens before Feb. 15, 1977 because parent of that person ceased to be citizen as result of: (1) Acquiring nationality or citizenship other than that of Canada, or (2) renouncing his or her citizenship. Bill C-37 (S.C. 2008, c. 14), which came into force on Apr. 17, 2009, amended Citizenship Act to: 1) Permit certain persons who lost their Canadian citizenship for specified reasons to have their citizenship restored from time it was lost (§3[1][f]); 2) permit certain persons who, born outside of Canada to Canadian parent, did not acquire Canadian citizenship for specified reasons to become Canadian citizens from time of their birth (§3[1][g]); 3) provide that certain persons born outside Canada to Canadian parent who was him or herself born outside of Canada do not acquire Canadian citizenship (§5[3]); and 4) provide for grant of citizenship, on application, to persons who have always been stateless and meet other specified conditions (§5[5]).

Canadian citizen, whether or not born in Canada, is entitled to all rights, powers and privileges and is subject to all obligations, duties and liabilities to which person who is citizen under above provisions is entitled or subject and has like status of such person. (§6).

4.02 CITIZENSHIP:

Governed by provisions of Citizenship Act (c. C-29), proclaimed in force Feb. 15, 1977. Person is Canadian citizen if, after Feb. 14, 1977: (a) He was born in Canada; (b) he was born outside Canada and at time of his birth one of his parents, other than parent who adopted him, was citizen; (c) he has been granted or acquired citizenship pursuant to Act and, in case of person who is 14 years of age or over on day that he is granted citizenship, he has taken oath of citizenship; (d) he was citizen immediately before coming into force of Act; or (e) he was entitled, immediately before coming into force of Act, to become citizen under certain provisions of former Act; (f) he ceased to be citizen before coming into force of paragraph for any reason and did not subsequently become citizen except if (i) renounced citizenship under certain provisions or (ii) citizenship was revoked under certain provisions for false representation, fraud or concealment of material circumstances or (iii) failed to make application under previous §8 to maintain citizenship or was denied; (g) he was born outside Canada before Feb. 15, 1977 to parent who was citizen at time of birth and he did not become citizen before coming into force of paragraph; (h) he was granted citizenship under previous §5 and would, but for grant, be citizen under paragraph (g), and has taken oath of citizenship if required; (i) he was citizen other than by way of grant, ceased to be citizen for any reason other than in subparagraphs (f)(i)-(iii), was subsequently granted citizenship under certain provisions before this paragraph came into force, he has taken oath of citizenship if required; (j) under prior legislation he was citizen other than by way of grant, he ceased to be citizen for reason other than in subparagraphs (f)(i)-(iii), he resumed citizenship (§3[1]); (a) above does not apply to person if, at time of his birth, neither of his parents was citizen or lawfully admitted to Canada for permanent residence and either of his parents was: (1) Diplomatic or consular officer or other representative or employee in Canada of foreign government or employee in service of such person; or (2) officer or employee in Canada of specialized agency of United Nations or officer or employee in Canada of any other international organization to whom there is granted, by or under any Act of Parliament of Canada, diplomatic privileges and immunities certified by Secretary of State for External Affairs. (§3[2]). With few exceptions, Act limits citizenship by descent to one generation born outside Canada. (§3[3]). Children born to Canadian parents in first generation outside Canada will only be Canadian if one parent was born in Canada or one parent was naturalized. All children born to Canadian parent who is working outside Canada for Canadian federal or provincial governments or serving in Canadian Forces will be Canadian, regardless of generation in which they were born outside Canada. (§3[5]).

Bill C-14, in force Dec. 22, 2007, and Bill C-37, in force Apr. 17, 2009, amended Citizenship Act to reduce distinctions in eligibility for citizenship between adopted foreign born children and children born abroad of Canadian parents. Minister shall, on application, grant citizenship to person who was adopted by citizen after Jan. 1, 1947, while person was minor child if adoption: 1) Was in best interests of child; 2) created genuine relationship of parent and child; 3) was in accordance with laws of place where adoption took place and laws of country of residence of adopting citizen; and 4) was not entered into primarily for purpose of acquiring status or privilege in relation to immigration or citizenship. (§5.1[1]).

Person is deemed to be born in Canada if he is born on Canadian ship as defined in Canada Shipping Act, on air-cushion vehicle registered in Canada under that Act or on aircraft registered in Canada under Aeronautics Act and regulations made thereunder.

Person who is lawfully present and entitled to permanently reside in Canada is deemed to have been lawfully admitted to Canada for permanent residence.

Citizenship may be renounced only in accordance with loss of status provisions in Act. Renunciation is accepted only where: (1) citizen is or will become citizen of another country upon renunciation; (2) citizen is of age of majority; (3) citizen is mentally competent; (4) citizen is not subject to declaration of Governor-in-Council that his application for renunciation should be refused because there are reasonable grounds to believe that he will engage in activity that constitutes threat to Canadian security or that is part of pattern of planned and organized criminal activity in furtherance of commission of indictable offence; and (5) citizen does not reside in Canada. Renunciation of citizenship must be by way of application to Minister on prescribed form and is effective in accordance with issued Certificate of Renunciation. (§9).

Subject to judicial review, citizenship may be revoked on notice where permanent resident status or citizenship status prior to naturalization was obtained by false representation, fraud or knowing concealment of material circumstances. (§10).

See also topic 4.01 Non-Citizens, subhead Naturalization.

4.03 IMMIGRATION:

See topic 4.01 Non-Citizens; also category 17 Immigration.

4.04 NATURALIZATION:

See topic 4.01 Non-Citizens, subhead Naturalization.

5 CIVIL ACTIONS AND PROCEDURE

5.01 ACTIONS:

See digests of the laws of the several provinces.

5.02 APPEAL AND ERROR:

To Supreme Court of Canada.

By Supreme Court Act, c. S-26, Supreme Court exercises appellate, civil and criminal jurisdiction within and throughout Canada. (§35). Appeal lies to Supreme Court from decision of Federal Court of Appeal in case of controversy between Canada and province or between two or more provinces. (§35.1). Appeals lie to Supreme Court of Canada from matter which is referred by Lieutenant Governor in Council of province to court of final result in that province. (§36). Appeal to Supreme Court lies with leave of highest court of final resort in province from final judgment of that court where, in opinion of that court, question involved in appeal is one that ought to be submitted to Supreme Court for decision. (§37). Appeal lies to Supreme Court from final judgment of Federal Court of Appeal where Federal Court of Appeal has granted leave. (§37.1). Appeal to Supreme Court lies on question of law alone with leave of Supreme Court, from final judgment of Federal Court or of court of province (other than highest court of final resort therein) judges of which are appointed by Governor-General, pronounced in judicial proceeding where appeal lies to Federal Court of Appeal or to highest court of final resort of province, if consent in writing of parties or their solicitors, verified by affidavit, is filed with Registrar of Supreme Court and with registrar, clerk or prothonotary of court from which appeal is to be taken. (§38). No appeal to Supreme Court lies under §§37, 37.1 or 38 of Supreme Court Act (as described above) from judgment in criminal cause, in proceedings for or on (a) writ of habeas corpus, certiorari or prohibition arising out of criminal charge; or (b) writ of habeas corpus arising out of claim for extradition made under treaty. (§39). Appeal lies to Supreme Court from any final or other judgment of Federal Court of Appeal or of highest court of final resort in province, or judge thereof, in which judgment can be had in particular case sought to be appealed to Supreme Court, whether or not leave to appeal to Supreme Court has been refused by any other court, where with respect to particular case sought to be appealed, Supreme Court is of opinion that any question involved therein is, by reason of its public importance or importance of any issue of law or any issue of mixed law and fact involved in such question, one that ought to be decided by Supreme Court or is, for any other reason, of such nature or significance as to warrant decision by it, and leave to appeal from such judgment is accordingly granted by Supreme Court. (§40[1]). Supreme Court has jurisdiction as provided in any other Act conferring jurisdiction. (§41). All applications to Supreme Court for leave to appeal are made in writing and determined by quorum of three judges after reading or further oral hearing if they feel it is warranted. (§43).

Procedure in Appeals.

Proceedings on appeal must, when not otherwise provided for by this Act, or by Act providing for appeal, or by general rules and orders of Supreme Court, be in conformity with any order made, upon application by party to appeal, by Chief Justice or, in his absence, by senior puisne judge present. (§56).

Time for Appeal.

Excluding month of July in calculation of time periods for appeals, applications for leave to appeal must be filed within 60 days after date of judgment appealed from. Where no leave is required, or where leave has been granted, notices of appeal must be filed within 30 days after date of judgment appealed from or granting of leave to appeal, except where different periods are provided for (see for example Criminal Code, Canada Elections Act and Winding-up Act appeals). (§58). Time periods for appeals to Supreme Court may be extended under special circumstances. (§59).

Notice of Appeal and Security.

Appeal is brought by (a) serving notice of appeal on all parties directly affected, and (b) depositing with Registrar security to value of CDN $500 that appellant will effectually prosecute appeal and pay such costs and damages as may be awarded against him by Supreme Court within time prescribed. Where appeal is not properly perfected, as required by Rule 26, responding party may move for dismissal of appeal.

Notice of appeal with evidence of service thereof must be filed with Registrar and copy of notice must be filed with clerk or other proper officer of court appealed from within 21 days from time prescribed. (§60).

Whenever error in law is alleged, proceedings in Supreme Court must be in form of appeal. (§61).

Court must be provided with copies of party's record and each party must further provide copies of a factum containing arguments to be advanced.

Stay of Proceedings.

Upon the perfecting of security, execution is stayed, except that in certain cases execution will not be stayed until security is given by the appellant that the judgment appealed from will be complied with in case the said judgment is affirmed. (§65).

Extent of Review.

The appeal is in the nature of a review of the judgment pronounced and no new evidence may be produced except after successful motion to introduce new evidence. (§62[3]).

General.

Proceedings in Supreme Court are governed by Rules of Supreme Court of Canada. (SOR/2002-156).

Courts of Appeal.

See digests of the laws of the several provinces. See also category 6 Courts and Legislature, topic 6.02 Courts, subhead Federal Court of Canada.

5.03 CHARITABLE IMMUNITY:

See digests of the laws of the several provinces.

5.04 DAMAGES:

See digests of the laws of the several provinces.

5.05 DEPOSITIONS AND DISCOVERY:

See category 10 Documents and Records, topic 10.01 Affidavits.

Compelling Attendance of Witnesses.

Subpoena requiring person to attend as witness and which is issued by provincial court judge or out of superior court of criminal jurisdiction, court of appeal, appeal court or court of criminal jurisdiction has effect anywhere in Canada according to terms of subpoena. See Criminal Code, c. C-46, §702. In Federal Court, leave of Court will be required in order to issue subpoena to compel appearance of someone who lives further than 800 km from place where witness will be required to attend. (Federal Court Rules, 1998, §41).

5.06 EVIDENCE:

Witnesses.

Canada Evidence Act, c. C-5 applies to all criminal proceedings and to all civil proceedings and other matters respecting which Parliament of Canada has jurisdiction. (§2). See also digests of laws of the several provinces.

Husband and Wife.

By Canada Evidence Act, no husband is compellable to disclose any communication made to him by his wife during their marriage and no wife is compellable to disclose any communication made to her by her husband during their marriage. Nonetheless wife or husband of person charged with offence against certain sections of Criminal Code where complainant or victim is under age of 14 years is competent and compellable witness for prosecution without consent of person charged. But where wife or husband of person charged with offence may at common law be called without consent as witness, common law applies. (§4).

Self-Incrimination.

No witness shall be excused from answering any question on ground that answer may tend to criminate him or may tend to establish his liability to civil proceeding at instance of Crown or any person. Where witness objects to answer on ground that may tend to criminate him, or may tend to establish his liability to civil proceeding at instance of Crown or any person, and if but for Criminal Code or any provincial Act, witness would have been excused from answering question, then answer given will not be used or be admissible in evidence against witness in any criminal trial or other criminal proceeding against that witness except for prosecutions for perjury or for giving contrary evidence. (§5). No objection to any question asked or giving of any answer need be made to attract this protection. Right not to have incriminating evidence used against witness is constitutionally protected under Canadian Charter of Rights and Freedoms. (§13, Part I of Constitution Act, 1982, being Schedule B to Canada Act 1982 [U.K.], 1982, c. 11).

See also category 10 Documents and Records, topic 10.01 Affidavits.

5.07 JUDGMENTS:

See digests of the laws of the several provinces.

5.08 LIMITATION OF ACTIONS:

Federal limitation periods are governed by particular statutes. There is no federal equivalent to provincial statutes of limitations. Examples of federal limitation periods: prosecution under Bankruptcy and Insolvency Act, c. B-3, within five years of commission of offence if by way of indictment, within three years if by summary conviction; actions and offences under Canada Business Corporations Act, c. C-44, within two years; complaints under provision of Criminal Code relating to summary convictions, in respect of offence under Income Tax Act, c. 1 (5th Supp.) within eight years; offences under Canada Water Act, c. C-11, within two years; application for order in respect of abuse of dominant position under Competition Act, c. C-34, within three years from date practice has ceased; in Federal Court, for cause of action not arising in province, six years (c. F-7); Criminal Code prosecutions by summary conviction, six months (c. C-46). Certain proceedings against Federal Crown require written notice within seven days. (c. C-50). See also Digests of laws of the several provinces.

5.09 PRACTICE:

See topic 5.02 Appeal and Error; category 6 Courts and Legislature, topic 6.02 Courts.

5.10 PRESCRIPTION:

See digests of the laws of the several provinces, category Civil Actions and Procedure, topic Limitation of Actions.

5.11 PROCESS:

See digests of the laws of the several provinces.

6 COURTS AND LEGISLATURE

6.01 ADMIRALTY:

See category 24 Transportation, topic 24.03 Shipping.

6.02 COURTS:

Supreme Court of Canada.

Supreme Court of Canada is constituted by Supreme Court Act, c. S-26 and exercises appellate jurisdiction both civil and criminal throughout Canada. Supreme Court of Canada has exclusive ultimate appellate civil and criminal jurisdiction. (§35). It consists of chief justice and eight puisne judges. (§4). It holds three sessions yearly commencing in Jan., Apr., and Oct. at Ottawa. (§32). Procedure is governed by Rules of Supreme Court of Canada, SOR/2002-156.

See also category 5 Civil Actions and Procedure, topic 5.02 Appeal and Error.

Federal Court of Canada.

Effective June 1, 1971, court of law, equity and admiralty in Canada which existed previously under name Exchequer Court of Canada is continued under name of Federal Court of Canada. (See Federal Courts Act, c. F-7.) Court has civil and criminal jurisdiction. Court consists of two divisions called Federal Court of Appeal (also referred to as Court of Appeal) (§3) and Federal Court (formerly known as Federal Court—Trial Division) (§4). Federal Court Rules regulate practice and procedure in Federal Court of Appeal and Federal Court. Principal office of court in Ottawa. Other offices for court in Halifax, Montreal, Toronto, Winnipeg, Regina, Saskatoon, Calgary, Edmonton, Vancouver, Quebec City, Fredericton, Charlottetown, St. John's, Saint John, Whitehorse and Yellowknife.

Federal Court of Appeal consists of Chief Justice and 12 other judges. Federal Court consists of Chief Justice and 32 other judges, as well as six Prothonotaries. (§5.1).

Jurisdiction.

(A) Federal Court: generally, jurisdiction is in respect to: (1) claims against Crown (§17[1]); (2) claims by Crown where parties consent to jurisdiction (§17[3]); (3) civil claims by Crown (§17[5][a]); (4) claims against or concerning officers or servants of Crown (§17[5][b]); (5) relief by way of injunction, declaration, or writs of certiorari, prohibition, mandamus or quo warranto against federal board, commission or other tribunal (§18[1]); (6) review of decisions of certain federal boards, commissions or other tribunals (§18.1); (7) references from certain federal boards, commissions or other tribunals to determine question of law, jurisdiction or practice (§18.3); (8) interprovincial and federal-provincial controversies (§19); (9) generally industrial property matters (§20) under Copyright Act, c. C-42; Industrial Design Act, c. I-9; Patent Act, c. P-4; Trademarks Act, c. T-13; Integrated Circuit Topography Act, S.C. 1990, c. 37; (10) citizenship appeals (§21); (11) admiralty matters (concurrent jurisdiction) (§22); (12) in all cases where claim for relief made under Act of Parliament and coming within these subjects: bills of exchange and promissory notes where Crown a party, interprovincial works and undertakings, aeronautics (§23); (13) in any case where relief sought under laws of Canada and no other court has jurisdiction (§25); (14) appeals under certain Federal Acts; (B) Federal Court of Appeal: generally, jurisdiction is in respect to: (1) appeals from Federal Court (§27); (2) review of decisions of certain federal boards, commissions or other tribunals as set out in Federal Courts Act (§28[1]); (3) reference by certain federal boards, commissions or other tribunals to determine question of law, jurisdiction or practise (§28[2]); (4) appeals from Tax Court of Canada (§27[1.1]).

Appeal lies to Supreme Court of Canada from judgment of Federal Court of Appeal, (1) where Federal Court of Appeal has granted leave (§37.1, Supreme Court Act); (2) where Supreme Court grants leave, whether or not Federal Court of Appeal has refused leave (§40, Supreme Court Act); (3) in case of controversy between Canada and province or between two or more provinces (§35.1, Supreme Court Act). See also category 5 Civil Actions and Procedure, topic 5.02 Appeal and Error.

Commencement of Proceedings.

Proceedings in Federal Court by subject as between subject and subject and by Crown are commenced by filing originating document (statement of claim, statement of defence and counterclaim, third party claim or notice of application). It should be noted that Notice of Appeal is also originating document. (Rules 61; 62 of Federal Court Rules). Action against Crown instituted by filing in Registry of Court document set out in Schedule to Act. (§48). Crown Liability and Proceedings Act gives provincial courts concurrent jurisdiction in actions against Crown in right of Canada except where Federal Court has exclusive jurisdiction. In all actions regular pleadings then follow and provision is made for discovery and production of documents. Parties to monetary claim not exceeding CDN $50,000 will proceed by way of simplified action. (R. 292[a] and [b]). Any party to action may apply at any time to have action specially managed. (R. 384).

Tax Court of Canada.

Constituted as court of record. (Tax Court of Canada Act, c. T-2). Court consists of Chief Justice, Associate Chief Justice, and not more than 20 other judges. (§4). Principal office of Court is in Ottawa. Court sits throughout Canada as necessary. (§24).

Jurisdiction.

Has original jurisdiction on appeals on matters arising from Income Tax Act, Part IX of Excise Tax Act, Canada Pension Plan, Old Age Security Act, Employment Insurance Act, and under certain other statutes. (§12). It has powers, rights and privileges of superior court of record. (§13).

Commencement of Proceedings.

Appellants may elect informal or general procedure depending on circumstances. (§§17, 18). Informal procedure has relaxed rules of evidence and procedure. General procedure follows general rules of practice and procedure. (§§17.1-17.8). Appeals shall be in writing, setting out reasons for appeal and relevant facts. (§18.15). Appeal under general procedure lies to Federal Court of Appeal. (§17.7).

See also category 5 Civil Actions and Procedure, topic 5.02 Appeal and Error.

See also digests of laws of several provinces.

6.03 LAW REPORTS, CODES:

See topics 6.05 Reports, 6.06 Statutes.

6.04 LEGISLATURE:

See category 1 Introduction, topic 1.02 Government and Legal System.

6.05 REPORTS:

Decisions of Supreme Court are reported in Canada Supreme Court Reports cited “S.C.R.” Federal Court decisions are reported in Canada Federal Court Reports cited “F.C.” Prior to 1971 Canada Law Reports reported Exchequer Court decisions (cited “Ex.C.R.”) and Supreme Court of Canada decisions (cited “S.C.R.”). Decisions which were appealed to Judicial Committee of Privy Council (before appeals to Privy Council were discontinued) are reported in British Law Reports Appeal Cases series cited “A.C.”

Other publications of judicial opinions include: Canadian Bankruptcy Reports; Canadian Criminal Cases; Canadian Tax Cases; Dominion Law Reports; Insurance Law Reporter; Dominion Tax Cases; Western Weekly Reports; Canadian Patent Reporter; Labour Arbitration Cases; Land Compensation Reports; Criminal Reports; Reports of Family Law.

Digests: Canadian Abridgment.

6.06 STATUTES:

Most recent compilation, Revised Statutes of Canada, 1985, came into force on Dec. 12, 1988. Revised Statutes of Canada, 1985 are public general statutes of Canada as of Dec. 31, 1984. Four supplementary volumes contain amendments which came into force from Jan. 1, 1985 through Dec. 12, 1988. Fifth supplement, in force Mar. 1, 1994, contains Income Tax Act. Subsequent statutes are published in annual volumes of Statutes of Canada.

Regulations made under authority of Statutes are consolidated in Consolidated Regulations of Canada, 1978 with amendments published in Canada Gazette, Part II.

See also category 1 Introduction, topic 1.02 Government and Legal System.

7 CRIMINAL LAW

7.01 CRIMINAL LAW:

Federal Competence.

Criminal law and procedure is within exclusive federal competence. Constitution of criminal courts and administration of justice are within exclusive provincial competence. Provincial Attorney Generals' departments generally conduct prosecutions. Public Prosecution Service of Canada, federal government agency, conducts prosecutions under all federal statutes other than Criminal Code.

Criminal Statutes.

Criminal Code, c. C-46. Recent amendments include S.C. 2001, c. 32, providing protections to public officers involved in administration of justice, and extending application of proceeds of crime, offence-related property and organized crime provisions; S.C. 2001, c. 37, relating to alcohol ignition interlock programs; S.C. 2002, c. 13, relating to criminal harassment, home invasion and sexual exploitation of children; S.C. 2003, c. 8, relating to modernization of Firearms Act; S.C. 2003, c. 21, broadening basis for convicting organizations, including corporations, of crimes; S.C. 2004, c. 3, creating new criminal offences of insider trading and of threatening or retaliating against employees who are “whistle-blowers”; S.C. 2004, c. 10, creating national sex offender database; S.C. 2004, c. 12, creating new offences relating to placing trap or device likely to cause bodily harm and permitting use of reasonable force to prevent damage to aircraft or passengers; S.C. 2004, c. 15, creating new offence of communication of false information that terrorist activity is occurring; S.C. 2005, c. 10, modifying certain anti-terrorist measures introduced in 2001; S.C. 2005, c. 22, making amendments to assessment order provisions under §672; S.C. 2005, c. 25, extending child pornography provisions and adding participation in criminal organization to list of "primary designated offences" under §487.04; S.C. 2005, c. 32, relating to protection of children and other vulnerable persons; S.C. 2005, c. 40, relating to offences dealing with cultural property; and S.C. 2005, c. 43, creating specific offences for trafficking in persons; S.C. 2006, c. 114, creating new offence for street racing at §249.2; S.C. 2007, c. 9, creating concept of criminal interest rate for short-term loans; S.C. 2007, c. 13, implementing U.N. Convention on Corruption; S.C. 2008, c. 6, creating new firearms offences, amending bail provisions and sentencing laws, raising age of consent for sexual activity, and increasing penalties for impaired driving; S.C. 2008, c. 12, creating new offences in respect of cruelty to animals; S.C. 2008, c. 18, amending some procedural provisions; S.C. 2009, c. 22, to provide that any murder in connection with criminal organization is first degree murder and to create new offence of intentionally discharging firearm while being reckless as to life or safety of another person.

Criminal Code is main federal legislation governing criminal law. It creates most substantive offences and provides for criminal procedure in all provinces and territories, including in criminal courts created by provinces which are venue for almost all criminal prosecutions. Criminal Code codifies criminal law and is based on English criminal law. All common law offences are abolished except for contempt of court. (§9). Common law defences generally remain. Recently, limits on common-law defence of duress have been struck down. ([2001] 1 S.C.R. 687).

Other statutes containing criminal law include: Bankruptcy and Insolvency Act, c. B-3; Controlled Drugs and Substances Act, S.C. 1996, c. 19 (SOR/2005-235 moving methamphetamine to Schedule 1); Food and Drugs Act, c. F-27; Firearms Act, S.C. 1995, c. 39; Competition Act, c. C-34 (see category 3 Business Regulation and Commerce, subhead Monopolies, Restraint of Trade and Competition); Customs Act, R.S.C., c. 1, (2nd Supp.); Excise Act, c. E.14; Proceeds of Crime (Money Laundering) and Terrorist Financing Act, S.C. 2000, c. 17 (am'd by Anti-Terrorism Act, S.C. 2001, c. 41 and S.C. 2006, c. 12) and Consumer Packaging and Labeling Act, R.S.C., c. C-38. Recent amendments include amendments to Competition Act by S.C. 2009, c. 2, §410, amending offence of conspiracy in relation to competition.

Indictment or Information.

Criminal Code creates indictable, summary conviction and hybrid offences. Summary conviction offences are generally less serious and proceedings are commenced by laying of information under oath before justice of peace. Trial is generally before provincial court judge alone. Proceedings for indictable offences may be commenced by laying of information or by direct indictment preferred by Attorney General. Except for certain offences, accused can elect trial by provincial court judge or preliminary inquiry followed by trial by superior court judge alone or with jury. Hybrid offences may be prosecuted on summary conviction or indictment at Crown's election.

Constitutional Rights of Accused.

Canadian Charter of Rights and Freedoms provides that everyone has right to be secure against unreasonable search and seizure. (§8). Anyone who is arrested or detained has right to be informed promptly of reasons therefore, to retain and instruct counsel without delay and to be informed of that right, and to challenge detention by way of habeas corpus. (§10). Police must inform of availability of legal aid or duty counsel. ([1994] 3 S.C.R. 173 followed at [1997] 1 S.C.R. 217). Unconstitutionally obtained evidence can be excluded if its admission would bring administration of justice into disrepute. (§24). Accused has, inter alia, right to be tried within reasonable time, not to testify at trial, to be presumed innocent, and, where facing five years' prison or more, to trial by jury. (§11). Accused has right to disclosure of all relevant information in possession of Crown. ([1991] 3 S.C.R. 326, [1998] 1 S.C.R. 244, [1997] 1 S.C.R. 1113).

Bail.

Criminal Code Part XVI governs arrest and judicial interim release (bail). Arrested persons may be released by police with appearance notice or summons, with or without conditions. (§§497-503). Person detained in custody must be brought before justice within 24 hours or as soon as possible. (§503[1]). Except where accused is charged with certain serious indictable offences, accused must be released on undertaking without conditions unless prosecutor shows cause why accused should remain in custody or be subject to conditions. Onus is reversed in certain cases.

Search and Seizure.

Criminal Code Part XV. Justice satisfied by information on oath that evidence relating to offence is in building or place may issue search warrant. (§487). Search can include computer systems and data. Provincial court judge satisfied by information on oath of commission of “designated offence” and finding of bodily substance may issue DNA warrant (§487.05) authorizing plucking hairs, buccal swabs, or taking of blood by pricking skin (§487.06). Other statutes contain special investigative powers, e.g. Controlled Drugs and Substances Act, Competition Act.

Young Offenders.

The Youth Criminal Justice Act, S.C. 2002, c. 1, repealed and replaced Young Offenders Act on Apr. 1, 2003, and applies to persons between 12 and 18. Youth Court has exclusive jurisdiction to try young offenders, with provisions for transfer to ordinary court in certain circumstances for serious crimes.

7.02 EXTRADITION:

Law respecting extradition is governed by Extradition Act, S.C. 1999, c. 18 and amended by S.C. 2000, c. 24. These amendments relate to Crimes Against Humanity and War Crimes Act, S.C. 2000, c. 24, and involves surrendering of accused to International Criminal Court or any other criminal court and removes any accused's right to immunity under common law or statute from arrest under Extradition Act. (§6.1).

Extradition treaties exist between Canada and most principal foreign states. (List is contained at Schedule of Act.) List of designated extradition partners may be modified by Minister of Foreign Affairs with approval of Minister of Justice. (§9). Person may be extradited from Canada for prosecution or imposing of sentence by another country under certain circumstances; generally, that offence for which extradition is sought is serious offence in requesting country and conduct underlying that offence would constitute serious offence in Canada. (§3). Request for extradition or provisional arrest must be made to Minister. (§11). If Minister is convinced that request follows guidelines in Act, he will authorize Attorney General to apply for provisional arrest warrant or committal, which can then be issued ex parte by judge. (§§12-13 & 15). Warrant may be requested by Attorney General for province in which fugitive is believed to be. (§16). Certain sections of Criminal Code are still applicable.

Judge, following arrest of person and request from Attorney General, shall hold extradition hearing. (§24). Judge is required to commit person to await surrender to requesting state if there is evidence on each element of offence upon which reasonable jury, properly instructed, could base conviction. (§29).

Minister is required to refuse surrender order from another party if Minister is satisfied, among other things, that surrender would be unjust or made for purpose of prosecution or punishment on discriminatory grounds (§44[1]) or for political offence (§46). Minister has discretion to refuse to surrender person who has been committed for surrender if he is satisfied that offence for which extradition is sought is punishable by death in requesting state.

Under Extradition Act, Minister of Justice may make extradition request to another party with which it has extradition agreement for purpose of prosecution, imposing or enforcing sentence, or making or enforcing disposition under Young Offenders Act, although repealed. (§78).

Prisoner Transfers.

Where there exists treaty on transfer of prisoners between Canada and foreign state, under International Transfer of Offenders Act, 2004, c. 21, (which repealed The Transfer of Offenders Act, c. T-15), Canadian citizens imprisoned in foreign states may apply to complete their sentence in Canada and foreign citizens imprisoned in Canada may apply to complete their sentences in foreign state. These requests must be made to Minister. Transfer must be approved by offender, foreign entity and Canada. (§8).

8 DEBTOR AND CREDITOR

8.01 ASSIGNMENTS FOR BENEFIT OF CREDITORS:

See topic 8.02 Bankruptcy.

8.02 BANKRUPTCY:

Law is uniform throughout Canada and is governed by Bankruptcy and Insolvency Act ("BIA"). (c. B-3). Extensive amending legislation enacted by Parliament of Canada (S.C. 2005, c. 47 and S.C. 2007, c. 36) received Royal Assent respectively on Nov. 25, 2005 and Dec. 14, 2007. Certain amendments came into force on July 7, 2008. Remaining amendments came into force on Sept. 18, 2009.

Applicability of BIA.

BIA applies to persons, including individuals, partnerships, unincorporated associations, cooperative societies, organizations and corporations incorporated under laws of Canada or province and foreign corporations having office or property in Canada or carrying on business in Canada, except those corporations which are incorporated banks, savings banks, loan companies, railway companies, trust companies and insurance companies. (§2). Persons whose principal occupation and means of livelihood is farming, fishing, or tillage of soil and wage earners earning less than CDN $2,500 a year and who do not on their own account carry on business, although not subject to provisions regarding involuntary bankruptcy, may make authorized assignments. (§48).

Jurisdiction.

Superior courts of original jurisdiction of the various provinces and territories have jurisdiction in bankruptcy matters with appeal to appellate courts of provinces and territories. BIA provides for assignment of special judges, registrars, clerks and other officers in bankruptcy in each province or territory to deal with bankruptcy matters. (§§183-186).

Insolvent person is person (see subhead Applicability of Act, supra) who is not bankrupt, who resides, carries on business or has property in Canada, whose unsecured liabilities to creditors amount to CDN $1,000 and who (a) is unable to meet his obligations as they generally become due; (b) has ceased paying his current obligations in ordinary course of business; or (c) aggregate of whose property is not, at fair valuation, sufficient to pay all his due and accruing due obligations. (§2).

Acts of Bankruptcy.

A debtor commits an act of bankruptcy if he: (1) Makes assignment of his property to trustee for benefit of his creditors generally; (2) makes fraudulent transfer of his property; (3)

makes any transfer or charge of his property which would be void under BIA as fraudulent preference; (4) leaves or stays out of Canada with intent to defeat or delay his creditors; (5) permits execution to remain unsatisfied within five days before date fixed for sheriff's sale or 15 days after seizure; (6) exhibits to meeting of creditors statement of assets and liabilities which shows him to be insolvent or presents written admission to meeting of inability to pay his debts; (7) assigns, removes, secretes or disposes of or attempts or is about to assign, remove, secrete or dispose of his property with intent to defraud, defeat or delay any creditor; (8) gives notice to creditor that he has suspended or is about to suspend payment of his debts; (9) defaults in any proposal made under Act, or (10) ceases to meet his liabilities generally as they become due. (§42).

Involuntary Bankruptcy.

If debtor commits act of bankruptcy, unsecured creditor or creditors that are owed CDN $1,000 may present application for bankruptcy order within six months after such act. Secured creditor may present such application if it states his willingness to give up his security for creditor's benefit if bankruptcy order is made or if it gives estimate of value of his security to be CDN $1,000 less than amount owing to him. Where application is granted by court, bankruptcy order is made. (§43).

Voluntary Bankruptcy.

Any insolvent person may, before bankruptcy order is made against him, make assignment of all his property for general benefit of his creditors. (§49).

Priorities.

Bankruptcy orders and assignments under Act take precedence over all judicial or other attachments, executions, garnishments, judgments and other process against bankrupt's property unless completely executed by payment. Bankruptcy orders and assignments are subject to secured creditors' rights. (§70). Upon bankruptcy order being made or assignment being filed, property of bankrupt becomes vested in bankruptcy trustee subject to Act and to secured creditors' rights. (§71).

Assignments of wages and amounts receivable as payment, commission or professional fees for services rendered executed by natural person before bankruptcy are of no effect in respect of such amounts earned or generated after bankruptcy. (§68.1).

See also infra, subhead Proofs of Claims.

Proposals.

Proposal may be made by insolvent person, receiver in relation to insolvent person, liquidator of insolvent person's property, bankrupt or trustee of estate of bankrupt. Special provisions apply to proposal made by consumer debtor (see subhead Consumer Proposals, infra). Proposal must be approved by creditors or if made in respect of bankrupt, inspectors (§50[3]), and by court. Proposal must be made to creditors having claims provable in bankruptcy generally, either as mass or separated into classes as provided in proposal, and may also be made to secured creditors in respect of all secured claims of any class or classes of secured claim. Secured claims are included in same class if interests of secured creditors are sufficiently similar to give them commonality of interest. Court may determine appropriate classes of secured claims and class into which any particular secured claim falls. (§50[1.5]). Creditors respond to proposal by filing proofs of claim with trustee in manner provided for unsecured creditors and secured creditors. (§§50[1]-[1.7]).

Insolvent person must lodge with licensed trustee, copy of proposal setting out its terms and any proposed security or sureties and statement showing financial position at proposal date.

(§50[2]). When filing proposal with official receiver, trustee must also file projected cash flow statement on at least monthly basis, prepared by person filing proposal with report by trustee as to reasonableness of statement and report by person making proposal containing representations as to preparation of statement. (§50[6]). Creditors may obtain copy of statement from trustee unless court orders otherwise. Trustee is not liable for loss resulting in reliance on statement if acted in good faith and took reasonable care in reviewing statement. Trustee under proposal monitors insolvent person's business and financial affairs during period from filing of proposal until court approval of proposal. Trustee must file report on state of business and financial affairs and send report containing trustee's opinion as to reasonableness of decision, if any, to include in proposal provision that sections 95 to 101 of BIA do not apply in respect of proposal at least ten days before creditor's approval meeting. (§50[1][b]f).

Trustee must call creditors' approval meeting to be held within 21 days after filing proposal. (§51[1]). At meeting, creditors may refuse or accept proposal. (§54[1]). Where creditors refuse proposal, assignment in bankruptcy is deemed to have been made and trustee shall forthwith call meeting of creditors of bankrupt estate. (§57). If proposal is accepted by creditors, trustee must apply for court approval and send notice to every creditor who has proved claim in proposal. (§58).

All proposals must provide that Crown claims for amounts subject to demands under §224(1.2) of Income Tax Act (assessed employee deductions for income tax and Canada Pension Plan and unemployment insurance premiums) be paid in full within six months after court approval of proposal, unless Crown otherwise consents. (§60[1.1]). Court may either approve or refuse to approve proposal. If approved by court, proposal is binding on unsecured creditors and on each class of secured creditors which accepted proposal by majority in number and 2/3 in value of class of secured creditors voting on acceptance resolution. (§62[2]).

Court may annul proposal upon default in performance of any provision, unless default is waived by creditors or remedied by insolvent person within prescribed time. Upon annulment order being made, debtor is deemed to have made assignment in bankruptcy. (§§62.1, 63). Upon filing proposal or notice of intention to make proposal stay of proceedings is in effect (see subhead Stays of Proceedings, infra). (§69).

Any time between filing notice of intention to file proposal and proposal debtor may disclaim commercial leases if debtor cannot make viable proposal without disclaiming lease. Landlord may challenge disclaimer of commercial lease. (§65.2).

Insolvent person may file with official receiver notice of intention to make proposal. Within prescribed time, insolvent person must prepare and file projected cash flow statement and related reports of trustee and insolvent person. If insolvent person fails to file this statement or if proposal is not filed with official receiver within prescribed time, insolvent person is deemed to have made assignment in bankruptcy. Trustee must without delay file prescribed report with official receiver and must send notice of first meeting of creditors of bankrupt estate. (§50.4).

After notice of intention is filed, court may grant limited extensions of time to file proposal on notice to any interested persons that court may direct if satisfied on each extension application that insolvent person has acted and is acting in good faith and with due diligence and would likely be able to make viable proposal if extension granted and that no creditor would be materially prejudiced if extension granted. (§50.4[9]). Court may terminate period for filing proposal if satisfied that insolvent person has not acted or is not acting in good faith and with due diligence or will not likely be able to make viable proposal before period expires or will not be able to make proposal before period expires that will be accepted by creditors or if creditors as a whole would be materially prejudiced. (§50.4[11]).

Consumer Proposals.

Consumer proposal may be made by consumer debtor where aggregate debts, excluding debts relating to principal residence, do not exceed CDN $250,000 or other prescribed amount. Administrator assists consumer debtor in preparing proposal and within prescribed time must prepare report to be sent to every known creditor and official receiver, setting out prescribed information including investigation of debtor's financial affairs and administrator's opinion as to reasonableness of proposal. Meeting of creditors may be requested by official receiver or any creditor. If no request for meeting is made, consumer proposal is deemed to be accepted by creditors. If meeting held, creditors vote to accept or refuse proposal and may request Administrator to apply to court for acceptance of proposal; otherwise, consumer proposal is deemed to be approved by court. Once accepted, or deemed accepted by creditors and approved or deemed approved by court, proposal is binding on creditors. Administrator must distribute monies payable to creditors in accordance with terms of consumer proposal. If default occurs, consumer proposal may be annulled by court or deemed annulment occurs where payments are in default to extent of three months or more. Assignment of wages made by consumer debtor before filing consumer proposal is of no effect in respect of wages earned after proposal filing date. Certificate is issued when consumer proposal is fully performed. (§§66.11-66.41).

Stays of Proceedings.

On filing by insolvent person of notice of intention to make proposal (see subhead Proposals, supra), all remedies, actions, executions or other proceedings for recovery of claim provable in bankruptcy are stayed until filing of proposal or insolvent person becomes bankrupt. On filing by insolvent person of proposal, all remedies, actions, executions or other proceedings for recovery of claims provable in bankruptcy are stayed until trustee has been discharged or insolvent person becomes bankrupt. Stay will not (a) prevent secured creditor who has taken possession of secured property before filing of proposal or notice of intention from dealing with property, or (b) prevent from enforcing security, secured creditor who has given notice of intention to enforce security at least ten days before notice of intention to make proposal or proposal is filed by insolvent person (see subhead Secured Creditors, infra) unless secured creditor consents to stay, or unless insolvent person consented to enforcement action. Stay will also not prevent creditor who holds security on aircraft objects under agreement with insolvent person from taking possession of equipment if creditor satisfies statutory requirements under BIA to repossess aircraft objects. Provisions of security rendering insolvent person unable to deal with secured property on insolvency or on filing of notice of intention to make proposal or on default under security are not enforceable. (§69).

Where proposal or notice of intention to make proposal has been filed in respect of insolvent person, no person may terminate, amend or claim accelerated payment under any agreement with insolvent person, including security agreement, by reason only of insolvency or that notice of intention or proposal has been filed or, if agreement is lease or licensing agreement, that insolvent person has not paid rent, royalties or other payments of similar nature for period preceding filing of notice of intention or proposal. No public utility may discontinue service to insolvent person by reason only of insolvency or that payment for services rendered or material provided has not been made before filing of notice of intention or proposal. However, creditor may require immediate payment for goods, services, use of leased or licensed property or other valuable consideration provided after filing of notice of intention or proposal, and creditor is not required to make further advances of money and credit. Contractual provisions contrary to these statutory requirements are not enforceable. (§65.1).

These requirements do not apply to “eligible financial contracts” (``EFC''). EFCs defined in regulations to include ``derivative agreements'', which are defined to mean financial agreement whose obligations are referenced on one or more underlying reference items. Reference items listed in regulations include credit obligations, interest rates, currencies, and commodities. Derivative agreements listed in regulations include swap agreements, futures agreements and option agreements. Other agreements listed as EFCs include agreements to borrow or lend securities or commodities, clear or settle securities or act as depository for securities. These requirements do not prevent member financial institutions from ceasing to act for insolvent person as clearing agent or group clearer under by-laws and rules of The Canadian Payments Association Act. Stay will not prevent netting or setting off or compensation of obligations between insolvent person and other parties to EFC and any dealing with ``financial collateral'' (including setting off or compensation of financial collateral or application of proceeds or value of financial collateral) where EFC entered into before filing of notice of intention to make proposal or proposal. (§65.1[9]). Financial collateral includes cash or cash equivalents, securities, securities account, securities entitlement or right to acquire securities. (§2). Court prevented from making orders which would have effect of preventing creditor from realizing or otherwise dealing with financial collateral. (§§69.2[5], 69.3[2.1]). Court also prevented in bankruptcy or proposal to make order under BIA if order would have effect of subordinating financial collateral. (§88). If proposal is made to class of secured creditors who vote for refusal of proposal or if proposal is not made to secured creditor in respect of particular security, affected secured creditor is not stayed from enforcing security. (§69.1[5] and [6]). More limited stay of proceedings exists in cases of consumer proposals. (§69.2). Stay of proceedings also extends to certain obligations of directors of insolvent corporations. (§69.31).

Upon bankruptcy of debtor, all remedies, actions, executions or other proceedings for recovery of claim provable in bankruptcy are stayed until trustee has been discharged. However, bankruptcy will not prevent secured party from realizing or otherwise dealing with security, unless court otherwise orders. (§69.3[1-2]). Any creditor affected by any stay of proceedings may apply to court which may order that stay no longer operates in respect of creditor, if continued operation of stay would likely materially prejudice creditor or if it would be equitable on other grounds to so order. (§69.4).

Examinations of Bankrupt and Others.

Bankrupt is examined under oath by Official Receiver as to bankrupt's conduct, causes of bankruptcy and disposition of property. (§161). Bankruptcy trustee may examine under oath on creditors' request, or on request of any other interested person, bankrupt, officers, employees, agents of bankrupt and any person reasonably thought to have knowledge of bankrupt's affairs. (§163). Evidence of any person examined under these provisions shall, if transcribed, be filed in court. (§163[3]).

Duties of Bankruptcy Trustee.

Trustee must keep books and deposit money as directed under Act in separate trust account in name of estate (§§25, 26); must declare and pay dividends to creditors from time to time as required by inspectors (§148); must prepare statement of receipts and disbursements before making final dividend payment (§152); is not bound to accept appointment but having done so, must perform duties until discharged or replaced (§14.06); and must provide, or provide for, counselling of individual bankrupt (§157.1).

Powers of Bankruptcy Trustee.

Trustee has wide powers and may, among other things, do any of following: (a) sell or otherwise dispose of property of bankrupt by public or private sale; (b) carry on business of bankrupt as necessary for beneficial administration of bankruptcy; (c) bring, institute or defend any action or other legal proceeding relating to property of bankrupt; (d) employ solicitor or other agent to take any proceeding or to do any business sanctioned by inspectors; (e) accept purchase money payable in future as consideration for sale of any property; (f) borrow money and give security on property of bankrupt in priority to claims of unsecured creditors; (g) compromise debts, claims and liabilities; (h) divide or distribute any assets in existing form among creditors; (i) lease real property (§30); in exercising any of these powers, trustee requires permission of inspectors, or if no inspectors appointed, requires court authorization (§30[4]); (j) compel person to deliver or produce property of bankrupt or relevant document concerning estate of bankrupt. (§164).

Environmental Liability of Bankruptcy Trustee.

Notwithstanding any federal or provincial legislation respecting protection or rehabilitation of environment, trustee is not personally liable for any environmental condition or damage that arose before or during his appointment except as resulted from trustee's gross negligence or wilful misconduct. Reference to “trustee” in this section of Act means trustee in bankruptcy or proposal and includes interim receiver or receiver under Part XI of BIA. Trustee may have duty under other legislation to report environmental condition or damage. (§14.06).

Interim Receivers.

Where court is satisfied that secured creditor has or is about to send to insolvent person notice of intention to enforce security (see subhead Secured Creditors, infra), court may appoint licensed trustee as interim receiver over all or any part of debtor's property that is subject to security to which secured creditor's notice of intention relates, until earliest of (a) receiver taking possession of debtor's property over which interim receiver appointed, (b) trustee taking possession of debtor's property over which interim receiver appointed, and (c) expiry of 30 days after day on which interim receiver was appointed or of any period specified by court. Court must be satisfied that interim receiver is necessary to protect debtor's estate or interests of secured creditor. Interim receiver may be ordered to (a) take possession of debtor's property; (b) exercise control over that property and debtor's business; (c) take conservatory measures; and (d) summarily dispose of property that is perishable or likely to depreciate rapidly in value.

Court may also appoint interim receiver where insolvent person has filed notice of intention to file proposal or has filed proposal (see subhead Proposals, supra), where satisfied that interim receiver is necessary for protection of debtor's estate or interests of one or more creditors or of creditors generally. Where trustee is already named in proposal, court may appoint such trustee, another trustee or trustee under proposal and another trustee jointly, as interim receiver. (§47.1).

Court may, if it is shown to be necessary for protection of estate of debtor, at any time after filing of application and before bankruptcy order is made, appoint licensed bankruptcy trustee as interim receiver of property and direct him to take immediate possession thereof. Interim receiver may, under direction of court, take conservatory measures and summarily dispose of property that is perishable or likely to depreciate rapidly in value and exercise such control over business of debtor as court deems advisable. (§46).

Upon bankruptcy order being made court appoints licensed bankruptcy trustee as trustee of property of bankrupt having regard to wishes of creditors. (§43). Trustee is, in relation to and for purpose of acquiring or retaining possession of property of bankrupt, in same position as if he were receiver of property appointed by court. (§16[4]).

Meeting of Creditors.

Bankruptcy trustee must, within five days of his appointment (unless time is extended by official receiver), call meeting of creditors, to be held within 21 days of trustee's appointment, to consider affairs of bankrupt and confirm appointment of trustee and seek appointment of inspectors. One creditor or representative entitled to vote constitutes quorum for meeting of creditors. Subject to provisions of BIA, all questions at meeting of creditors shall be decided by resolution carried by majority of votes. Votes to be calculated by counting one vote for each dollar of every claim of creditor that is not disallowed. (§§102-115).

Inspectors.

Meeting of creditors must appoint from one to five inspectors to supervise administration by trustee, or agree not to appoint any inspectors. (§§116-120).

UNPAID WAGE AND PENSION CLAIMS

Where there is bankruptcy or receivership, claim of clerk, servant, travelling salesperson, labourer or worker who is owed wages, salaries, commissions or compensation by bankrupt/person who is subject to receivership for services rendered during period beginning on day, that is six months before date of initial bankruptcy event/date on which there was receiver is secured, as of date of bankruptcy/receivership, to extent of $2,00.—less any amounts paid for those services by trustee or receiver, by security on bankrupt's/debtor's current assets on date of bankruptcy/date of receivership. Additional amounts available to travelling salespersons for disbursements. Security ranks above every other claim, right, charge or security against bankrupt's/debtor's current assets, except rights of unpaid suppliers (§81.1), rights of farmers, fishermen and aquaculturists (§81.2) and amounts owing for employee income tax, Canada Pension Plan and Employment Insurance source deductions that are deemed to be held in trust (§67[3]). No officer or director of bankrupt/debtor entitled to have secured claim. (§§81.3 and 81.4).

Where there is bankruptcy or receivership, if bankrupt/debtor is employer who participated or participates in prescribed pension plan for benefit of employees, following amounts that are unpaid on date of bankruptcy/date of receivership to fund established for purpose of pension plan are secured by security on all of assets of bankrupt/debtor: (a) Amount equal to sum of all amounts that were deducted from employees' remuneration for payment to fund; (b) amount equal to normal cost that was required to be paid by employer to fund; and (c) amount equal to sum of all amounts required to be paid by employer to fund under defined contribution provision. Security ranks above every other claim, right, charge or security against bankrupt's/debtor's assets, regardless of when that other claim, right, charge or security arose, except rights of unpaid suppliers (§81.1), farmers, fishermen and aquaculturists (§81.2), amounts for employee income tax, Canada Pension Plan and Employment Insurance source deductions deemed to be held in trust (§67[3]) and security for unpaid wages and pension contributions (§§81.3-81.6).

Provable Claims.

All debts and liabilities present or future of bankrupt at date of bankruptcy or filing of proposal or to which bankrupt may become subject before discharge by reason of any obligation incurred before date of bankruptcy or filing of proposal including contingent or unliquidated claims and certain family support claims are claims provable. (§§121, 122, 135).

A creditor may prove a debt not payable at date of bankruptcy, but in that case must deduct interest at 5% per annum from declaration of a dividend to date when debt would have become payable. (§§121[3], 122).

Proofs of Claims.

Bankruptcy trustee examines proofs of creditors' claims and may disallow them in whole or in part. Trustee's decision may be appealed to court within 30 days. (§135). Subject to rights of secured creditors, claims are paid in following order of priority: (1) funeral expenses, if bankrupt deceased; (2) fees and expenses of trustee or other person administering estate of bankrupt and legal costs; (3) levy of Superintendent in Bankruptcy; (4) amount of any wages, salaries, commissions, compensation or disbursements referred to in §§81.3 and 81.3; (5) amounts equal to difference secured creditor would have received but for operations of §§81.3-81.6 and amounts actually received; (6) municipal taxes; (7) to landlord for three months arrears of rent and three months accelerated rent if lease so provides; (8) one solicitor's bill of costs to creditor who has first attached property of bankrupt; (9) for bankruptcies occurring before proclamation date of 1992 Act, indebtedness under any Workers' Compensation Act or Unemployment Insurance Act or under any provision of Income Tax Act creating obligation to pay amounts that have been deducted or withheld; (10) claims resulting from injuries to employees to which Workers' Compensation Acts do not apply; (11) for bankruptcies occurring before proclamation date of Nov. 30, 1992, claims of Crown in right of Canada or any Province; (12) ordinary unsecured debts. Subject to Act, all proven claims are paid rateably. Claims in categories (1) to (12) are considered preferred claims. (§136).

Claims of silent partners for moneys loaned are also postponed. (§139).

Claims of certain close relatives by blood or marriage of individual bankrupt, or officers or directors of bankrupt corporation are not preferred in respect of wages, salary or compensation for work done. (§§138 and 140).

Repossession Right of Unpaid Supplier.

If purchaser of goods supplied for use in purchaser's business is bankrupt or if there is receiver in relation to purchaser, unpaid supplier of goods may, at supplier's expense, have access to and repossess goods by presenting written demand to purchaser, trustee or receiver in prescribed form within 15 days after purchaser's bankruptcy or appointment of receiver, in respect of goods delivered no later than 30 days before bankruptcy or appointment of receiver. (§81.1). Goods must (a) be in possession of purchaser, trustee or receiver, (b) be identifiable as goods sold, (c) be in same state as they were on delivery, and (d) not have been resold or be subject to agreement for sale at arm's length. Purchaser, trustee or receiver must pay entire amount owing for goods, or release goods to supplier. If portion of goods has been paid for, supplier may repossess portion of goods relating to unpaid amount or may repossess all of goods upon repayment of partial payment to purchaser, trustee or receiver. Repossession right expires if not exercised within 15 days after purchaser's bankruptcy or appointment of receiver. However, this period may be extended before its expiry by trustee, receiver or court. Supplier's repossession right ranks above every other claim or right against purchaser in respect of goods other than right of bona fide subsequent purchaser of goods for value without notice of supplier's demand for repossession. Supplier who repossesses goods under these provisions is not entitled to be paid for them. (§81.1). There are also special rights for unpaid suppliers who are farmers, fishermen and aquaculturists who deliver products to purchaser within 15 days before purchaser's bankruptcy or appointment of receiver in relation to purchaser. Farmer, fisherman or aquaculturist has statutory charge on all purchaser's inventory for unpaid amounts in respect of such products. (§81.2).

Crown Claims.

With some exceptions, all claims of Crown in right of Canada or province, or of any body under Act respecting workers' compensation, rank as unsecured claims. Exceptions are claims secured by security or charge that may be taken by persons other than Crown pursuant to any federal or provincial legislation which does not have as its sole or principal purpose establishing means of securing Crown claims. Other secured Crown claims are valid in relation to bankruptcy or proposal only if security is registered under prescribed system of registration before date of initial bankruptcy event. (§§86-87).

Secured Creditors.

Subject to restrictions on rights in proposal and stay of proceedings provisions of Act (see subheads Proposals, Stays of Proceedings, supra), secured creditors are generally unaffected by bankruptcy and may (a) realize their security and prove in bankruptcy for balance due after deducting net amount realized or (b) surrender their security and prove whole debt in bankruptcy. (§127). Trustee may require secured creditor to file proof of security upon 30 days' notice. Proof must give full particulars of security, including date on which it was given and its value as assessed by secured creditor. If proof is not filed within 30 days after trustee serves notice requiring proof, trustee may, with leave of court, sell or dispose of secured property, free of secured creditor's security interest. Secured creditor is entitled to receive dividend only on excess liability owing to it over assessed value. Trustee may redeem security on payment of assessed value. (§§128-131).

Secured creditor who intends to enforce security on all or substantially all of inventory, accounts receivable or other business property of insolvent person must send notice of intention to enforce security to insolvent person, and must not enforce security until expiry of ten days after sending such notice, unless, after notice is sent, insolvent person consents to earlier enforcement of security. There is no notice obligation where there is already receiver in respect of insolvent person or in other specified circumstances. (§244).

Receivers.

Within ten days after appointment, receiver in respect of property of insolvent person or bankrupt must send prescribed form of notice of appointment to Superintendent in Bankruptcy, to insolvent person and to all creditors of insolvent person that receiver, after making reasonable efforts, has ascertained. In case of bankrupt, notice of appointment must also be sent to trustee. (§245). Immediately after taking possession or control of property of insolvent person or bankrupt, receiver must prepare statement containing prescribed information relating to receivership. Receiver must also prepare interim reports relating to receivership and upon completion of duties as receiver must prepare final report and statement of accounts in prescribed forms, and must provide copies of all statements and reports to Superintendent in Bankruptcy, to insolvent person and, in case of bankrupt, to trustee and to any creditor of insolvent person or bankrupt who requests copy at any time up to six months after end of receivership. (§246). Receiver must act honestly and in good faith and deal with property of insolvent person or bankrupt in commercially reasonable manner. (§247). Court may make any order with respect to performance of statutory duties relating to receiverships by secured creditor, receiver or insolvent person or bankrupt, if satisfied that duties are not being performed. (§§244-247, 248).

Preferences.

Transfer of property made, provision of services made, charge on property made, payment made, obligation incurred or judicial proceeding taken by insolvent person in favour of creditor dealing at arm's length with insolvent person with view to giving creditor preference over another creditor is void as against bankruptcy trustee, if transaction occurred three months before insolvent person become bankrupt. (§95[1][a]). If creditor is not dealing at arm's length, transaction is void if occurred 12 months before insolvent become bankrupt. (§95[1][b]).

If effect of transaction is to give creditor preference, it is presumed, in absence of evidence to contrary, to have been made with view to giving creditor preference.

Transfer at Undervalue.

On application by trustee, court may declare transfer at undervalue void as against trustee. Court also authorized to order party to transfer or any other person privy to transfer, to pay to estate difference between value of consideration received by debtor and consideration given by debtor, if party was dealing at arm's length with debtor, transfer occurred within one year before bankruptcy, debtor was insolvent at time of transfer or was rendered insolvent by it, and debtor intended to defraud, defeat or delay creditor. (§96[1][a]). If party not dealing at arm's length with debtor, transfer must have occurred within one year before bankruptcy. (§96[1][b][i]). Period is extended to five years if debtor was insolvent at time of transfer or was rendered insolvent by it or debtor intended to defraud, defeat, or delay creditor. (§96[1][b][i]).

Discharge.

In respect of first-time individual bankrupt, unless opposed by Superintendent, trustee or creditor, or bankrupt is required to make surplus income payments, bankrupt is automatically discharged on expiry of nine months after bankruptcy date. If bankrupt required to make surplus payments, bankrupt eligible for automatic discharge 21 months after bankruptcy date, unless opposition filed. (§168.1[1][a]). Bankrupts who have refused to attend mandatory counselling will not be eligible for automatic discharge. (§157.1[3]). First-time individual bankrupts with more than

$200,000 in personal income tax debt that makes up 75 percent or more of their total unsecured debt will not be eligible for automatic discharge. (§172.1[1]). Such bankrupt must apply to court for discharge. Court may suspend or refuse discharge or may impose conditions. (§172.1[3]). Trustee must give at least 15 days prior notice of impending discharge to Superintendent, bankrupt and every creditor who has proved claim in bankruptcy. If discharge is opposed, notice of intended opposition before automatic discharge would take effect unless matter is to be dealt with by mediation under §170.1. (§161.2[1]). Bankrupt may apply earlier for discharge. (§168.1). Making of bankruptcy order against, or assignment by, any person (except corporation) operates as application for discharge. (§169[1]). Otherwise trustee, before proceeding to discharge and not earlier than three months or later than one year after bankruptcy, must apply to court on five days notice to bankrupt for appointment for hearing of application by court. Bankruptcy trustee must prepare and file in court before discharge hearing, prescribed report as to affairs of bankrupt. (§170). Corporation may not apply for discharge unless it has satisfied claims of its creditors in full. (§169[4]).

If bankrupt has committed any offence under BIA a discharge can be refused, suspended or granted on conditions. (§172). Court may either refuse or suspend discharge or grant discharge on conditions if assets are not of a value equal to 50¢ on dollar or if bankrupt among other things: (1) has not kept proper books; (2) has continued to trade after becoming aware of being insolvent; (3) has failed to account satisfactorily for losses or deficiency of assets; (4) has neglected his affairs or speculated; (5) has given undue preferences; (6) has been previously adjudged bankrupt or made proposal to creditors; (7) has been guilty of fraud or fraudulent breach of trust; (8) has put creditors to unnecessary expense by frivolous defence to proper action; (9) has, within three months prior to bankruptcy, incurred unjustifiable expense by bringing frivolous action; (10) failed to perform his duties under Act; (11) committed offence under Act or other statute in connection with his property in bankruptcy; (12) chose bankruptcy over viable proposal to creditors; (13) failed to comply with any order of court. (§173).

Orderly Payment of Debts.

Insolvent debtor (except corporation) residing in certain provinces and territories (Alberta, British Columbia, Manitoba, Nova Scotia, Prince Edward Island, Northwest Territories and Saskatchewan), may apply to clerk of court having jurisdiction where they reside for order consolidating payment of claims, demands and judgments not exceeding CDN $1,000 (or greater amount if creditor consents). (§§217-242). These provisions do not prevent debtor from being put into bankruptcy or from making assignment in bankruptcy. (§§217-242).

Companies' Creditors Arrangement Act.-(S.C. 1997, c. 12).

Where compromise or arrangement is proposed between debtor company (i.e., company, incorporated under laws of Canada or any province of Canada or having assets or doing business in Canada, which is bankrupt or insolvent whether or not proceedings have been taken under BIA unless proposal has been filed under Act or Winding-up and Restructuring Act) or affiliated debtor companies that has aggregate indebtedness, both secured and unsecured, in excess of CDN $5,000,000 and its secured or unsecured creditors or any class of them, court may on application of company, of any such creditor, of trustee in bankruptcy or of liquidator of company, order meetings of such creditors and shareholders of company. (§§4, 5). If majority in number representing two-thirds in value of creditors, class of creditors, present and voting in person or by proxy at meeting or meetings, agree to any compromise or arrangement at any such meeting, court may sanction such compromise or arrangement, which is then binding on all creditors, or such class of creditors, and on company or on trustee in bankruptcy or liquidator and contributories of company, as case may be. (§6).

8.03 EXECUTIONS:

See digests of the laws of the several provinces.

8.04 EXEMPTIONS:

See digests of the laws of the several provinces. Also see category 23 Taxation, topic 23.07 Income Tax, subhead Exemption from Tax.

8.05 INSOLVENCY:

See topic 8.02 Bankruptcy.

8.06 RECEIVERS:

See topic 8.02 Bankruptcy; also category 2 Business Organizations, topic 2.03 Corporations, subhead Part IX. Receivers and Receiver-Managers.

8.07 STAY OF EXECUTION:

See topic 8.02 Bankruptcy; category 5 Civil Actions and Procedure, topic 5.02 Appeal and Error.

9 DISPUTE RESOLUTION

9.01 ARBITRATION AND AWARD:

See digests of the laws of the several provinces. Also see Expropriation Act, c. E-21.

Canada has adopted United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards. (S.C. 1986, c. 21). Various Canadian provinces and Federal government have also adopted the UNCITRAL Model Law on International Commercial Arbitration.

Labour Arbitration.

Workplace disputes within unionized workplaces are routinely resolved through arbitration. Each of federal and provincial jurisdictions legislatively regulate process to some degree. See category 11 Employment; topic 11.01 Labour Relations. Also see digests of laws of the provinces.

10 DOCUMENTS AND RECORDS

—Scope —

Generally, laws of evidence of province in which proceedings are taken apply, subject to Canada Evidence Act (c. C-5) and other provincial Evidence Acts. (§40).

10.01 AFFIDAVITS:

As to affidavits generally see digests of laws of several provinces. Affidavits may be made on oath or by solemn affirmation, and each is of same force and effect. Solemn affirmation is made in words, "I,......, duly solemnly affirm, etc."

Statutory Declarations.

By Canada Evidence Act (c. C-5), provision is made for taking of statutory declaration in attestation of execution of any writing, deed or instrument or truth of any fact or of any account rendered in writing. Such statutory declarations may be taken before any provincial court judge, notary public, justice of peace, police or stipendiary magistrate, recorder, mayor or commissioner authorized to take affidavits for use in provincial or federal courts or any other functionary

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authorized by law to administer oath in any matter, and are used in connection with extra-judicial matters. (§41).

Oaths, affidavits, solemn affirmations or declarations may also be administered outside Canada by (a) officers of Her Majesty's diplomatic or consular services, (b) officers of Canadian diplomatic, consular and representative services, (c) Canadian Government Trade Commissioners, Assistant Canadian Government Trade Commissioners, (d) honorary consular officers of Canada, while exercising their functions anywhere outside of Canada, (e) judicial officials in foreign countries in respect of oaths, affidavits, etc. that official is authorized to take and (f) persons locally engaged by Deputy Minister of Foreign Affairs. (§§52; 53).

Form

Statutory Form:

I, A.B., solemnly declare that (state the fact or facts declared to), and I make this solemn declaration conscientiously believing it to be true, and knowing that it is of the same force and effect as if made under oath.

Declared before me at

. . . . this.......... day of

. . . . 20. . .   }

. . . .

10.02 STATUTORY DECLARATIONS:

See topic 10.01 Affidavits.

See also Federal Court Act, c. F-7.

11 EMPLOYMENT

11.01 LABOUR RELATIONS:

Canada Labour Code (c. L-2).—Jurisdiction over labour relations primarily falls within provinces' jurisdiction by virtue of Constitution Act, 1867, §92(13). However, where employment is within federal workplace, undertaking, or business, it comes within federal jurisdiction. Examples of federal work, undertaking or business include: navigation, shipping, railways, ships, air transportation, broadcasting, banks, or work or undertaking declared by Parliament to be for advantage of two or more provinces.

Part I—Industrial Relations.

Basic Freedoms.

Every employee is free to join union of his choice and to participate in its lawful activities.

Canada Industrial Relations Board.

Board consists of Chairperson, two or more full-time Vice-Chairpersons, any part-time Vice-Chairpersons that Governor-in-Council considers necessary, not more than six other full-time members (of which not more than three represent employees and not more than three represent employers), and any other part-time members that Governor-in-Council considers necessary. Board has broad powers which include right to establish rules of procedure of its hearings. Board's authority extends to determination of units appropriate for collective bargaining, certification or decertification of unions as bargaining agents for employees, conduct of representation votes and determination of evidence as to union membership.

Application for Certification.

Trade union may apply to Board for certification as bargaining agent for unit considered appropriate for collective bargaining. If union demonstrates it has support among majority of employees in appropriate unit, Board must certify union as bargaining agent. Where there is between 35% and 50% support, Board must order representation vote. Application may be made during certain time periods. Certification may be sought at any time if no collective agreement exists and where no union has been certified to represent proposed unit, provided there is no strike or lockout.

Determination of Bargaining Unit.

Board has exclusive jurisdiction in determining whether or not unit of employees is appropriate for collective bargaining and may include or exclude any employees from unit proposed by union. “Unit” means two or more employees.

Representation Vote.

Board has duty to certify union if Board has determined that proposed unit is appropriate and if Board is of opinion that as of date of filing of application for certification, majority of employees in bargaining unit wish to have union represent them as bargaining agent. To find out if employees wish to be represented by particular union, Board can order representation vote.

Successor Rights.

Where employer sells its business: (a) union that is bargaining agent for employees continues to represent them, (b) union that applied for certification before sale may be certified by Board to represent employees, and (c) person to whom business is sold is bound by any collective agreement in force at time of sale.

Notice to Bargain.

Union certified for bargaining unit has exclusive authority to represent employees in unit. If bargaining agent has been certified but no collective agreement exists, bargaining agent may give employer notice to commence collective bargaining, or vice versa, for purposes of entering into collective agreement.

Duty to Bargain in Good Faith.

Where notice to bargain has been given, bargaining agent and employer, or their representatives, shall meet within 20 days after receipt of such notice and shall begin to bargain in good faith, making every reasonable effort to reach agreement.

Conciliation/Mediation.

Conciliation services are available upon written request of either party where notice to bargain has been given and (a) collective bargaining has not commenced within time fixed; or (b) parties have bargained but have failed to enter into or revise collective agreement.

Term of Collective Agreement.

If not specified, or if specified as less than one year, collective agreement shall be deemed to have term of one year from date on which it comes into force.

First Collective Agreement.

When employer and bargaining agent are negotiating first collective agreement and they have informed Minister that they are at impasse, Minister may, if considered advisable or necessary, direct Board to inquire into dispute and if advisable settle terms and conditions of first collective agreement between parties. Employer may not dismiss nor discipline employee without just cause during period between certification and date first collective agreement is entered into.

Arbitration.

During term of collective agreement all disputes between parties concerning interpretation, application, administration or alleged violation of collective agreement shall be submitted to arbitration or otherwise for final settlement. Powers of arbitrator or arbitration board include right to (a) determine procedure, (b) exercise power of Canada Industrial Relations Board in summoning witnesses, compelling testimony, and administering oaths, and (c) determine whether matter referred is arbitrable. Arbitrator or arbitration board shall, however, give parties full opportunity to present evidence and make submissions.

Strikes and lockouts are prohibited while collective agreement is in force. No union should declare or authorize strike unless union has served notice to bargain collectively, negotiations have failed to produce or revise collective agreement, conciliation procedures have failed, and 21 days have elapsed after date on which Minister notified parties of his or her intention not to appoint conciliation officer, commissioner or board, or notified parties that conciliation officer has reported, or released copy of report, or is deemed to have reported. Replacement workers are prohibited for purpose of undermining union's representational capacity.

Unfair Labour Practices.

No employer shall participate in or interfere with formation or administration of union or representation of employees by union, or contribute financial or other support to union. Employer shall not refuse to employ, suspend, transfer, lay off, intimidate, threaten or otherwise discipline any person because that person participates in promotion, formation or administration of union, because person has been expelled from membership in union for reasons unrelated to payment of dues, because that person has testified under Act, or because that person made disclosure or co-filed complaint under Act. Board may certify union despite lack of evidence of majority support where employer committed unfair labour practices and but for unfair labour practice majority support could reasonably have been expected.

Union Duty of Fair Representation.

Union and its representatives shall not act in manner that is arbitrary, discriminatory, or in bad faith in representation of any employees in bargaining unit with respect to rights under collective agreement applicable to them.

Complaints.

Written complaints of failure to comply with foregoing provisions may be made to Board not later than 90 days from date complainant knew or, in opinion of Board, ought to have known, of action or circumstances giving rise to complaint.

Part II—Occupational Health and Safety.

Both employers and employees have duties under Act with respect to ensuring health and safety at work.

DUTIES OF EMPLOYERS.

Every employer must ensure that health and safety of every person employed by employer is protected. Duties of employers are set out extensively in Act. For example, employers must ensure that all permanent and temporary buildings and structures meet prescribed standards; install guards, guard rails, barricades and fences in accordance with prescribed standards; investigate, record and report all accidents, occupational diseases and other hazardous occurrences known to employer; ensure hazardous substances in workplace are stored and handled in manner prescribed, etc. There are also specific regulations set out by industry, e.g. coal mines.

DUTIES OF EMPLOYEES.

Duties of employees include use of any safety materials, equipment, devices and clothing that are intended for employee's protection; taking reasonable and necessary precautions to ensure health and safety of employee, other employees and any person likely to be affected by employee's acts or omissions; complying with all instructions from employer concerning health and safety of employees, etc.

REFUSAL TO WORK IN DANGER.

Employee may refuse to use or operate machine or thing, to work in place or to perform activity, if employee has reasonable cause to believe that condition exists that constitutes danger to employee.

PREGNANT AND NURSING EMPLOYEES.

Employee who is pregnant or nursing may cease to perform her job if she believes that, by reason of pregnancy or nursing, continuing any of her current job functions may pose risk to her health or to that of foetus or child.

VIOLENCE PROTECTION IN WORKPLACE.

On May 8, 2008, new regulation on prevention of violence in workplace came into effect and amended Canada Occupational Health and Safety Regulations. Federal employers are required to provide safe, healthy and violence-free workplace and develop and post workplace violence prevention policy. Employers must assess potential for workplace violence. Thereafter, employer must develop and implement systemic controls to eliminate or minimize workplace violence. This must be done within 90 days of risk of workplace violence assessment. At least once every three years, employer must review effectiveness of workplace violence measures.

DISCIPLINARY ACTION.

No employer shall dismiss, suspend, lay off or demote employee, impose financial or other penalty on employee, or refuse to pay employee remuneration because employee (*a*) has testified or is about to testify in proceeding taken or inquiry held under this Part; (*b*) has provided information to person engaged in performance of duties under this Part regarding conditions of work affecting health or safety of employee or of any other employee of employer; or (c) has acted in accordance with this Part or has sought enforcement of any of provisions of this Part.

COMPLAINTS WHEN ACTION AGAINST EMPLOYEES.

Employee who alleges that employer has taken disciplinary action against employee in contravention of this Part may make complaint in writing to Board not later than 90 days after complainant knew of action giving rise to complaint. Complaint may not be referred to arbitration or adjudication.

POLICY HEALTH AND SAFETY COMMITTEES.

Every employer who normally directly employs 300 or more employees must establish policy health and safety committee and select and appoint its members.

HEALTH AND SAFETY REPRESENTATIVES.

Every employer must, for each workplace controlled by employer with fewer than 20 employees or for which employer is not required to establish workplace committee, appoint person as health and safety representative for that workplace.

OFFENSES AND PUNISHMENT.

Every person who contravenes provision of this Part is guilty of offense and liable (*a*) on conviction on indictment, to fine of not more than $1,000,000 or to imprisonment for term of not more than two years, or to both; or (*b*) on summary conviction, to fine of not more than $100,000.

Part III—Standard Hours, Wages, Vacations and Holidays.

Hours of Work.

Standard hours of work are eight hours a day, 40 hours a week and employers must not permit employee to work longer than these hours. Where necessary hours may be averaged over period of two or more weeks. Each employee must have one full day of rest a week. Overtime rate of wages must be not less than 1 ½ times regular rate.

Minimum Wage.

Every employee 17 and over must be paid minimum hourly rate or its equivalent, if wage is paid on basis other than hourly, which is fixed by legislature of province where employee is usually employed. Persons under 17 may be employed only in occupations specified by regulation and at minimum rate established by regulation.

Equal Wages.

Male and female employees employed in same industrial establishment who are performing similar jobs under similar working conditions requiring similar skill, effort and responsibility must receive equal pay.

Vacations.

Employee is entitled to annual vacation with pay of at least two weeks after each completed year of work with same employer, and after six consecutive years, of at least three weeks with vacation pay in respect of every year of employment by that employer. If any federal work, undertaking, or business is transferred from one employer to another, employee's employment shall be deemed to be continuous. Vacation pay is defined as 4% or, after six consecutive years of work with same employer, 6% of wages during year of employment in which employee is entitled to vacation.

General Holidays.

Every employee is entitled to holiday with pay on each of general holidays falling within any period of employment. General holidays include New Year's Day, Good Friday, Victoria Day, Canada Day, Labour Day, Thanksgiving Day, Remembrance Day, Christmas Day and Boxing Day and includes any day substituted for such holiday.

Maternity and Parental Leave.

Employee who has completed six consecutive months of continuous employment with employer is entitled to leave of absence for pregnancy upon presentation of medical certificate and written application submitted at least four weeks before absence is to commence. Period of maternity leave shall consist of period not exceeding 17 weeks and which must end not later than 17 weeks following confinement of employee to give birth. Act also provides that employee who has completed six months of continuous service with employer is entitled to leave of absence for child care purposes up to maximum of 37 weeks, which may only be taken during 52-week period following day child is born or comes into care of employee.

Bereavement Leave.

Employee is entitled to three days of leave immediately following death of member of immediate family. Employee is entitled, after three months of continuous service, to bereavement leave with pay for working days that fall within three days following day of death. If employee has not completed three months of continuous employment, entitled to three days of leave without pay.

Sick Leave.

No employer shall dismiss, suspend, lay off, demote or discipline employee because of absence due to illness or injury if: Employee has three months of continuous service; and period of absence does not exceed 12 weeks. If requested by employer, employee must produce medical certificate within 15 days following return to work. Employee who returns from absence and is unable to perform duties may be assigned to different position, with different terms and conditions. Benefits continue during sick leave.

Compassionate Care Leave.

Employee is entitled to up to eight weeks of compassionate care leave to provide care or support to family member who has serious medical condition with significant risk of death. Certificate is required from medical practitioner indicating significant risk of death within 26 weeks from date of certificate. There is no notice requirement. Family member includes: Spouse or common-law-partner; child of employee or child of employee's spouse or common-law partner; parent of employee or spouse or common-law partner of parent; and any other person listed in definition of ``family member'' in *Employment Insurance Act*.

Notice of Termination.

Act provides that employer must give either two weeks notice of termination in writing, or two weeks wages at regular rate in lieu of such notice where employee has completed three or more continuous months of work and termination is not by way of dismissal for just cause.

Severance Pay.

Under Act, employer who terminates employment of employee who has completed 12 consecutive months of continuous employment by employer shall, except where termination is by way of dismissal for just cause, pay to employee greater of: (a) two days wages at employee's regular rate of wages for regular hours of work in respect of each completed year of employment; and (b) five days wages at employee's regular rate at wages for regular hours of work.

Group Termination.

Notice to Minister of Labour required to be given in writing at least 16 weeks before date of termination of group of employees if group consists of 50 or more employees. Copy of notice must also be given to Minister of Employment and Immigration, Canada Employment and Immigration Commission, and to any union representing affected employees. Notice shall contain information prescribed by regulation.

Sexual Harassment.

Every employer must make every reasonable effort to ensure that no employee is subjected to sexual harassment. Every employer must also issue policy statement concerning sexual harassment.

Employment Equity Act (S.C. 1995, c. 44).—Act establishes process to achieve equality in workplace based solely on ability and to correct conditions of disadvantage in employment experienced by women, aboriginal peoples, disabled persons and persons of visible minority. Act provides that employer must prepare employment equity plans at least every three years and timetable to implement employment equity.

Employment Insurance Act (S.C. 1996, c. 23).—Act and regulations establish contributory system of employment insurance and provide for payment of benefits to persons in insurable employment and self-employed persons engaged in fishing.

Under Act, insurable employment means employment in Canada by one or more employers under an express or implied contract of service or apprenticeship. Contract may be written or oral. Employment earnings may be received from employer or some other person and may be calculated by time or by piece, or partly by time and partly by piece, or otherwise. Insurable employment also includes employment in Canada by federal government, service in Canadian Forces or in any police force and employment included in insurable employment by regulation.

Employment in Canada (a) under Her Majesty in right of a province, (b) by government of country other than Canada and (c) by international organization are all excluded from coverage. In addition, Act does not apply to certain employment of casual nature, employment that constitutes exchange of work or services, or employment that is excepted by regulation.

Labour Adjustment Benefits Act (c. L-1).—Act establishes payment of benefits to laid-off employees of designated industries where employee has been employed in relevant designated industry for at least ten years in 15 years immediately preceding date of his or her lay-off.

See also Fair Wages and Hours of Labour Act, c. L-4.

See also category 23 Taxation, topic 23.03 Employment Taxes, subhead Unemployment Compensation Tax.

11.02 UNEMPLOYMENT COMPENSATION:

See category 23 Taxation, topic 23.03 Employment Taxes, subhead Unemployment Compensation Tax.

See also topic 11.01 Labour Relations, subhead Employment Insurance Act.

12 ENVIRONMENT

12.01 ENVIRONMENTAL REGULATION:

Federal regulation of all aspects of environment, in addition to extensive provincial regulation. Jurisdiction of governments determined according to constitutional law division of powers. Major federal statutes include Transportation of Dangerous Goods Act, S.C. 1992, c. 34 and regulations applicable to all inter-provincial and trans-border shipments of regulated dangerous goods, including hazardous wastes. Labelling, shipping, registration and notification requirements. Canadian Environmental Protection Act, 1999 (“CEPA”), S.C. 1999, c. 33 provides federal government with extensive authority over toxic substances, international air and water pollution and biotechnology. CEPA also includes provisions to implement pollution prevention, improved and more frequent opportunities for public participation in environmental measures, increased enforcement powers and new provisions respecting fuels and motor emissions. CEPA also sets out extensive penalties, including liability for officers and directors. Regulations under CEPA include regulations to implement criteria for persistence and bioaccumulation (SOR/2000-107), regulations which outline notice format for export of substances on CEPA's Export Control List (SOR/2000-108), and regulations which govern import or manufacture of new substances (SOR/2005-247, SOR/2005-248, SOR/2005-286 and SOR/2002-374). The Hazardous Products Act, c. H-3 governs importation, selling or supplying of controlled products as defined in regulations. Labelling and information disclosure provisions; penalties including liability for officers and directors. The Canada Labour Code, c. L-2, has special worker information and training provisions in relation to hazardous materials. Exemptions from some information disclosure provisions under Hazardous Materials Information Review Act, 3rd Supp., c. 24. The Bankruptcy and Insolvency Act, c. B-3, contains provisions affecting trustees in bankruptcy in respect of environmental liability. Canadian Environmental Assessment Act, S.C. 1992, c. 37, codifies requirements for federal environmental assessments and replaces former Environmental Assessment and Review Process Guidelines Order.

Other federal legislative sources of environmental regulation include Canada Shipping Act, 2001, S.C. 2001, c. 26; Fisheries Act, c. F-14; Canada Water Act, c. C-11; Navigable Waters Protection Act, c. N-22; Nuclear Liability Act, c. N-28; Nuclear Safety and Control Act, S.C. 1997, c. 9. Canada Wildlife Act (c. W-9); Wild Animal and Plant Protection and Regulation of International and Interprovincial Trade Act (1992, c. 52); Migratory Birds Convention Act, 1994 (1994, c. 22); Species at Risk Act (2002, c. 29); International Boundary Waters Treaty Act (c. I-17); International River Improvements Act (c. I-20); Dominion Water Power Act (c. W-4); Northwest Territories Waters Act (1992, c. 39); Mackenzie Valley Resource Management Act (1998, c. 25); Arctic Waters Pollution Prevention Act (c. A-12).

Information on environmental protection and government restrictions available from Environment Canada, Ottawa, Canada. Transportation of dangerous goods information from Transportation of Dangerous Goods Directorate, Transport Canada, Ottawa.

13 ESTATES AND TRUSTS

13.01 DEATH:

See digests of the laws of the several provinces.

13.02 DESCENT AND DISTRIBUTION:

See digests of the laws of the several provinces.

13.03 EXECUTORS AND ADMINISTRATORS:

See digests of the laws of the several provinces.

13.04 WILLS:

See digests of the laws of the several provinces.

14 FAMILY

14.01 DIVORCE:

Subject matter of marriage and divorce is one of subjects which by Constitution Act, 1867 is assigned exclusively to Parliament of Canada, subject to solemnization of marriage being assigned to Provinces.

Divorce throughout whole of Canada is governed by Divorce Act, R.S.C., c. 3, (2nd Supp.).

Jurisdiction.

Appropriate court in province has jurisdiction in divorce proceeding where either spouse is ordinarily resident in province for at least one year preceding commencement of proceeding. (§3). Jurisdiction in corollary relief proceeding arises where court has granted divorce to either or both former spouses (§4), and in variation proceeding if (a) either former spouse is ordinarily resident in province at commencement of proceeding; or (b) both former spouses accept court's jurisdiction (§5).

Divorce.

Court of competent jurisdiction may, on application by either or both spouses, grant divorce on ground that there has been breakdown of their marriage which is established only if (a) spouses lived separate and apart for at least one year immediately preceding determination of divorce proceeding and living separate and apart at commencement of proceeding; or (b) spouse against whom divorce proceeding brought has, since marriage began, committed adultery or treated other spouse with physical or mental cruelty of such kind as to render intolerable continued cohabitation of spouses. (§8). For purposes of calculating one year's separation, period of renewed cohabitation of less than 90 days in length may be ignored, where reconciliation is primary purpose of cohabitation. Subject to certain special circumstances, divorce has legal effect throughout Canada and dissolves marriage of spouses on 31st day after day judgment granting divorce is rendered. (§§12-14). *Note:* Civil Marriage Act, S.C. 2005, c. 33, received Royal Assent on July 20, 2005. This Act extends definition of marriage for civil purposes to lawful union of two persons to exclusion of all others. Several federal statutes have been amended to reflect this change, including Divorce Act, which has been changed to reflect that "spouse" in subsection of that Act now means either of two persons who are married to each other. (§8).

Corollary Relief.

Court of competent jurisdiction may, on application by either or both spouses, make order or interim order for: Support—payment of support for other spouse in amount court thinks reasonable (§15); payment of support for any or all children of marriage in accordance with Federal Child Support Guidelines, in force May 1, 1997, which make payments from higher income earning spouse to other spouse non-tax deductible. Quantum of support is determined using table which is solely based on payor's income; table amounts were updated effective May 1, 2006; custody—respecting custody of and/or access to any or all children of marriage (§16); or variation—order varying, rescinding, or suspending, prospectively or retroactively: (a) support order or any provision thereof, or (b) custody order or any provision thereof (§17). Division of property governed by laws of particular provinces. Act to amend Divorce Act, S.C. 1990 c. 18, provides for judicial sanctions against individuals who withhold religious divorce to gain advantage in civil divorce proceedings.

Enforcement.

Corollary relief orders effective throughout Canada and may be registered and enforced according to laws of particular province (§20). To this end, there exists both federal and provincial legislation providing for release of information to assist in locating defaulting spouses, and to assist in enforcement of support orders by garnishment and attachment of moneys payable by either level of government.

Appeals.

From any judgment or order under Act, whether final or interim, as provided by §21.

14.02 GUARDIAN AND WARD:

See digests of the laws of the several provinces.

14.03 MARRIAGE:

See digests of the laws of the several provinces.

15 FOREIGN TRADE AND COMMERCE

15.01 EXCHANGE CONTROL:

There are at present no restrictions.

15.02 FOREIGN EXCHANGE:

See topic 15.01 Exchange Control.

15.03 FOREIGN INVESTMENT:

Foreign Investment Review Act, S.C. 1973-74, c. 46 was repealed effective June 30, 1985, day upon which Investment Canada Act, R.S.C., c. 28, (1st Supp.), came into effect.

Purpose of Act is set forth in §2 as follows: ``Recognizing that increased capital and technology benefits Canada, and recognizing the importance of protecting national security, the purposes of this Act are to provide for the review of significant investments in Canada by non-Canadians in a manner that encourages investment, economic growth and employment opportunities in Canada and to provide for the review of investments in Canada by non-Canadians that could be injurious to national security''.

Under Act, ``Canadian'' means: (a) Canadian citizen; (b) permanent resident within meaning of Immigration Act who has been ordinarily resident in Canada for not more than one year after time at which he first became eligible to apply for Canadian citizenship; (c) Canadian government, whether federal, provincial or local, or agency thereof; or (d) entity that is Canadian-controlled, as determined pursuant to §26, and not determined to not be Canadian-controlled. ``Non-Canadian'' means individual, government or agency thereof or entity that is not Canadian. ``Entity'' means corporation, partnership, trust or joint venture.

``Canadian business'' means business carried on in Canada that has: (a) Place of business in Canada; (b) individual or individuals in Canada who are employed or self-employed in connection with business; and (c) assets in Canada used in carrying on business. ``New Canadian business'', in relation to non-Canadian, means business that is not already being carried on in Canada by non-Canadian and that, at time of establishment, (a) is unrelated to any other business being carried on in Canada by that non-Canadian; or (b) is related to another business being carried on in Canada by that non-Canadian but falls within prescribed specific type of business activity that, in opinion of federal cabinet is related to Canada's cultural heritage or national identity.

Foreign investment transactions are dealt with in various ways under Act. Certain transactions, set out in §10, are exempt from both review and notice requirements of Act. Those transactions which involve investments by non-Canadians in new Canadian businesses or non-reviewable acquisitions by non-Canadians of Canadian businesses are notifiable only, unless ``cultural heritage or national identity'' exception applies, in which case there is reserve power to review transaction. There are also those transactions which are subject to full review under Act and which must pass ``net benefit to Canada'' test. Finally, pursuant to new provision in Act, review may be required for any investment by non-Canadian that is potentially injurious to national security.

Investments requiring review are all ``direct'' acquisitions by non-Canadians of Canadian businesses with assets of CDN $5,000,000 or more, all ``indirect'' acquisitions of control of Canadian businesses with assets of CDN $50,000,000 or more and indirect acquisitions of control (see discussion of ``control'' below) of Canadian businesses with assets between CDN $5,000,000 and CDN $50,000,000 where assets of Canadian businesses represent more than 50% of value of total international transaction. As result of Canada's commitments pursuant to World Trade Organization General Agreement on Trade in Services, effective Jan. 1, 1995, aforementioned thresholds for review of direct transactions involving WTO investors acquiring or divesting control of Canadian businesses has been set for year 2009 at CDN $312 million. As result of recent amendments, which will come into force by future order of Governor-in-Council, threshold for review will be raised to 600 million in enterprise value. Threshold will continue to increase over four year period to enterprise value of one billion, following which, threshold will be annually adjusted on formula basis. Calculation of enterprise value has yet to be prescribed. Industry Canada, which administers Act, has made policy decision not to review indirect investments involving WTO investors in respect of acquisitions or divestitures. Preferential rules do not apply in respect of investments to acquire control of Canadian business that is cultural business.

Control of Canadian business may be acquired through (i) acquisition of majority of voting shares or voting interests of business, (ii) acquisition of more than one-third, but less than majority, of voting shares of business unless it can be established that control in fact is not acquired, and (iii) acquisition of all or substantially all assets of business or group of assets which is considered to be capable of being operated as separate business. “New business” is established where there are employees, place of business and assets used in carrying on business.

Non-Canadians must file notice under Act regarding all non-reviewable transactions or establishments of new Canadian businesses prior to implementation or within 30 days thereafter. Once complete notice has been filed, receipt bearing certified date will be issued to foreign investor. Receipt must advise foreign investor either that investment proposal is unconditionally non-reviewable or that proposal will not be reviewed so long as notice of review is not issued within 21 days of date certified under receipt, pursuant to §15 of Act. Section 15 gives federal cabinet authority to order review of prescribed investments that are related to Canada's cultural heritage or national identity.

If investment is related to Canada's cultural heritage or national identity, it is reviewable if federal cabinet, where it considers it in public interest, on recommendation of Minister, issues order for review within 21 days after certified date on which notice of investment was received under §13. To date only types of business activities which have been prescribed by regulation as related to Canada's cultural heritage or national identity deal largely with publication, film and music industries. Act enables Minister to determine, in cultural heritage and national identity sectors, that entity is not Canadian even though entity otherwise meets required terms in Act on this issue.

Reviewable acquisitions are subject to test of “net benefit to Canada” rather than “significant benefit to Canada” test under previous legislation. Minister responsible under Act for administration of Act and management and direction of Investment Canada determines whether reviewable investment is likely to be of “net benefit” to Canada under Act. Where investment is reviewable non-Canadian investor will be required by §17(1) to file application containing information prescribed by regulation. Generally, favourable decision must be received before investment is implemented. Investment may be implemented prior to decision where Minister permits on basis that delay would cause undue hardship to investor or would jeopardize operation of Canadian business, where investment is indirect or where government determines to review investment in Canadian business having prescribed activities as noted above.

Once application has been filed, receipt will be issued to applicant, certifying date on which it received application. For incomplete applications deficiency notice will be sent to applicant, and if not done within 15 days of receipt of application, it is deemed to be complete as of date it was received.

Within 45 days after complete application has been received Minister must notify investor under §21(1) that he is satisfied that investment is likely to be of net benefit to Canada. If within such 45 day period he is unable to complete his review, Minister has additional 30 days to complete his review, unless applicant agrees to longer period. Within such additional period, Minister must advise either he is satisfied or he is not satisfied that investment is likely to be of net benefit to Canada. If time limits have elapsed, Minister is deemed to be satisfied that investment is likely to be of net benefit to Canada.

Factors to be taken into account by Minister in assessing whether investment is likely to be of net benefit to Canada are as follows: (a) effect of investments on level and nature of economic activity in Canada, including without limiting generality of foregoing, effect on employment, resource processing, utilization of parts, components and services produced in Canada and on exports from Canada; (b) degree and significance of participation by Canadians in Canadian business or new Canadian business and in any industry or industries in Canada of which Canadian business or new Canadian business forms or would form part; (c) effect of investment on productivity, industrial efficiency, technological development, product innovation and product variety in Canada; (d) effect of investment on competition within any industry or industries in Canada; (e) compatibility of investment with national, industrial, economic and cultural policies, taking into consideration industrial, economic and cultural policy objectives enunciated by government or legislature of any province likely to be significantly affected by investment; and (f) contribution of investment to Canada's ability to compete in world markets.

See also categories 2 Business Organizations, topic Corporations, subhead Foreign Investment; Citizenship, topic Non-Citizens, subhead Corporations Owned or Controlled by Non-Citizens; Mineral, Water and Fishing Rights, topic Mines and Minerals, subhead Oil and Gas.

15.04 FOREIGN TRADE REGULATION:

World Trade Organization.

Canada is signatory to Marrakesh Agreement establishing the World Trade Organization as well as several Multilateral and Plurilateral Trade Agreements. Canada has enacted legislation giving effect to its WTO commitments in World Trade Organization Agreement Implementation Act, S.C. 1994, c. 47.

North American Free Trade (Agreement).

Canada-United States Free Trade Agreement Implementation Act (S.C. 1988, c. 65) which gave effect to Canada-United States Free Trade Agreement (“CFTA”) between Canada and U.S., and came into force Jan. 1, 1989 has been suspended as result of enactment to North American Free Trade Agreement Implementation Act (S.C. 1993, c. 44) (“NAFTA Implementation Act”) effective Jan. 1, 1994. NAFTA Implementation Act amends domestic Canadian legislation and provides for preferential treatment for U.S. and Mexican and “North American” origin goods and investment. Readers from jurisdictions other than Canada, U.S. or Mexico should note that NAFTA establishes preferential trade and investment regime with respect to goods, services and investment (including government procurement). Special rules apply and preferential treatment may be accorded to NAFTA investors, goods and services. In some circumstances non-NAFTA investors can qualify as NAFTA investors through establishment of local presence in NAFTA country, and in addition, non-NAFTA goods may qualify as of NAFTA origin after reprocessing in North America. Substantive provisions of NAFTA have been incorporated into Canadian law and reference also should be made to specific topics. NAFTA has been modelled on prior CFTA, and like CFTA, contemplates gradual elimination of duties and non-tariff barriers as between Canada, U.S. and Mexico. While many provisions of NAFTA are similar to CFTA they are not identical in all respects and new legislation must be referred to. NAFTA provides for gradual elimination of tariffs on goods either immediately or (depending on category) over five or ten or 15 year periods (see category 23 Taxation, topic 23.02 Customs Duty and Taxes, subhead Customs Duties).

Canada has also entered into bilateral free trade agreements with Israel, Chile, Costa Rica, Peru and European Free Trade Association (Iceland, Liechtenstein, Norway, Switzerland).

Export and Import Permits Act.

Pursuant to Export and Import Permits Act (c. E-19) Canada controls certain imports and exports. Canadian government has established export control list of goods ("Export Control List") (§3), "an export control list of countries" ("Area Control List") (§4), "an Automatic Firearms Country Control List" ("Automatic Firearms Country Control List") (§4.1) and "an import control list of goods" ("Import Control List") (§5). Goods and countries listed in these lists vary considerably from time to time and must be updated frequently. Under Export and Import Permits Act Canadian government has established export controls over several categories of goods including natural resources to encourage further processing in Canada, to limit export of goods in circumstances of oversupply or depressed prices, to ensure that there is adequate supply and distribution of certain goods, to give effect to intergovernmental arrangements or commitments, and to ensure that military or strategic goods are not exported to destinations representing strategic threat to Canada.

Under this Act Canada also maintains certain import controls in order to achieve certain objectives including to ensure adequate supply and distribution of goods that are scarce in world markets or in Canada; to give effect to Canada's supply management policies in agricultural sector; to restrict importation of certain dangerous arms, ammunitions etc. and to give effect to intergovernmental arrangements or commitments.

Goods which are regulated under Export and Import Permits Act require import permit prior to importation or export permit prior to export. Generally, goods identified on Import Control List or Export Control List cannot be imported/exported without appropriate permit. Goods cannot be exported or imported to countries on Area Control List without permit. Special rules may apply with respect to countries with which Canada has free-trade agreement. (§5 and following).

Area Control List regulates export of all goods to certain listed countries. As of July 2009, Burma (Myanmar) and Belarus are only countries on Area Control List. Goods which are exported directly or indirectly to these countries require export permit and may, depending on goods in question, be prohibited. Certain types of weapons and related devices (including their component parts) are not eligible for export permit unless (i) prohibited weapons etc. are being exported to country identified on Automatic Firearms Country Control List and (ii) prohibited weapons etc. have been authorized for import by government of that country.

Foreign Extraterritorial Measures Act ("FEMA") (c. F-29) permits Canadian government to limit production and disclosure of documents and to block extraterritorial application of foreign legislation or trading directives in circumstances where Canadian trading interests are adversely affected or Canadian sovereignty is infringed; further it enables Canadian government to restrict application of foreign antitrust law.

Where in opinion of Attorney General of Canada, foreign tribunal has exercised, is exercising or is proposing or is likely to exercise, jurisdiction or powers of a kind or in manner that has adversely affected or is likely to adversely affect significant Canadian interests in relation to international trade or commerce involving business carried on in whole or in part in Canada or that otherwise has infringed or is likely to infringe Canadian sovereignty, Attorney General may by order prohibit or restrict production or disclosure of records to foreign tribunal where such documentation is in possession or in control of Canadian citizen or of person resident in Canada. (§§3-5). Attorney General of Canada can thus block application of subpoenas or other orders to produce evidence by foreign tribunals. Under FEMA orders can be made in circumstances where a foreign state or foreign tribunal has taken or is proposing or is likely to take measures affecting international trade or commerce of a kind or in manner that has adversely affected or is likely to adversely affect significant Canadian interests in relation to international trade or commerce involving business carried on in whole or in part in Canada or that otherwise infringe or are likely to infringe Canadian sovereignty. Concurrence of Minister of Foreign Affairs is required to make such order. (§5). Contravention of these provisions of FEMA renders person liable to conviction of indictable offence and/or fine not exceeding CDN $1,500,000 for corporations or CDN $150,000 for individuals or to imprisonment for term not exceeding five years or to both or to conviction of offence punishable on summary conviction and liable to fine not exceeding CDN $150,000 for corporations or CDN $15,000 for individuals and/or to imprisonment for term not exceeding two years or both. (§7).

Pursuant to FEMA Canada can restrict application of foreign antitrust laws in Canada. Where foreign court or tribunal has rendered judgment instituted under foreign antitrust law, and Attorney General is of opinion that recognition or enforcement of that judgment in Canada has adversely affected or is likely to adversely affect significant Canadian interest in relation to international trade or commerce involving business carried on in whole or in part in Canada, or otherwise has infringed, or is likely to infringe, Canadian sovereignty, he may declare that judgment will not be recognized or enforceable in Canada. (§8). Where judgment is for specified amount of money, Attorney General may declare that, for purposes of recognition and enforcement of that judgment, amount of that judgment will be deemed to be reduced by amount specified in order. FEMA also enables Canadian individual or corporation to bring action in Canada to recover from person who has obtained foreign judgment which is subject of subsequent order by Attorney General prohibiting or limiting enforcement in Canada of foreign judgment. (§9).

Pursuant to FEMA, Canadian Government promulgated Foreign Extraterritorial Measures (United States) Order, 1992 which blocks extraterritorial application in Canada of U.S. Cuban Assets Control Regulations or similar legislation. This Order requires Canadian companies to notify Attorney General of Canada of any directive, instruction, intimation of policy or other communication relating to “extraterritorial measure of the United States” from person who is in position to direct or influence policies of Canadian corporation in Canada. Extraterritorial measure is broadly defined to include Cuban Assets Control Regulations as well as any statute, regulation, policy, etc. which has trade restricting effect or intent on trade or commerce between Canada and Cuba. Compliance with such intimations of policy by Canadian corporation (including officers, directors and senior management) is prohibited.

United Nations Act.

Pursuant to United Nations Act (c. U-2) federal government has necessary authority to implement sanctions imposed by United Nations. Countries that are subject of UN sanctions change frequently and thus must be updated regularly. As of July 2009, regulations pursuant to UN Act are enforced against Côte d'Ivoire, Iran, Iraq, Liberia, Lebanon, North Korea, Sierra Leone, Somalia and Sudan. Typically, these Regulations restrict export of certain or all products to states named in regulations and reflect position taken at UN Security Council. In 2001, federal government also passed regulations to give effect to United Nations Suppression of Terrorism Regulations. Regulations enacted pursuant to United Nations Act with respect to each of Al-Qaida and Taliban, Côte d'Ivoire, Democratic Republic of the Congo, Liberia, North Korea, Sierra Leone and Sudan tend to be sector specific (e.g. arms, aircraft parts, equipment that is of military application) and relate to political unrest in these jurisdictions. Any exports from Canada to jurisdictions subject of UN sanctions and, in some instances, imports, must be carefully reviewed in order to ensure that such actions do not violate United Nations Act.

Special Economic Measures Act.

Sanctions can also be imposed from time to time pursuant to Special Economic Measures Act (S.C. 1992, c. 17) (see category 23 Taxation, topic 23.02 Customs Duty and Taxes, subhead Customs Duties). As of July 2009, Regulations pursuant to Special Economic Measures (Burma) Regulations are enforced against Burma (Myanmar).

16 HEALTH

16.01 FOOD, DRUGS, NATURAL HEALTH PRODUCTS, COSMETICS AND MEDICAL DEVICES:

The Food and Drugs Act (c. F-27) (“Act”) and its regulations set standards for all food (including water), drugs, cosmetics and medical devices sold in Canada, whether produced domestically or imported. On Apr. 8, 2008, Canadian government introduced Bill C-51, Act to amend Food and Drugs Act and to make consequential amendments to other Acts. Among other things, Bill C-51 would create new offenses relating to food, therapeutic products (new term used in Bill that includes drugs) and cosmetics, require licenses for importing food and for inter-provincial trade in food, and make amendments to licensing of therapeutic products. Bill did not pass and has not been reintroduced in current session of Parliament.

No food, drug, cosmetic or device may be advertised (§3[1]) or sold (§3[2]) to general public as treatment, preventative or cure for any diseases, disorders or abnormal physical states listed in Schedule A to Act (e.g. arthritis, cancer, diabetes, heart disease). Act prohibits advertising of contraceptive device or drug manufactured, sold or represented for use in prevention of conception otherwise than as authorized by regulation. (§3[3]). No food (§4[e]), drug (§8[a]) or cosmetic (§18) may be sold if manufactured, prepared, preserved, packaged or stored under unsanitary conditions. No food (§4[b]), cosmetic (§16[a]) or device (§19) may be sold if it may cause injury to health under customary use. Act prohibits labelling, packaging, treatment, processing, sale or advertising of any food (§5[1]), drug (§9[1]) or device (§20[1]) in false, misleading or deceptive manner. Act contains inspection and enforcement provisions (§§22-27) and provides for fines and imprisonment for contravention (§§31-36).

In respect of inspection of food, Act and regulations are administered by Canadian Food Inspection Agency and Agriculture and Agri-Food Canada. For all other purposes, Act and regulations are administered by Health Canada, Health Products and Food Branch Inspectorate.

Food.

Act governs manufacturing, production, marketing, labelling, importing, exporting and sale of foods. According to Act, “food” includes any article manufactured, sold or represented for use as food or drink for humans, chewing gum and any ingredient that may be mixed with food. (§2). Regarding specific agricultural food products, reference should also be made to Canada Agricultural Products Act (R.S.C. 1985, c. 20, [4th Supp.]) and Agricultural Products Marketing Act (R.S.C. 1985, c. A-6) and Regulations under each.

Canada's Food and Drug Regulations (C.R.C., c. 870, ``FD Regulations'') have been amended (``Amendments'') in conjunction with Dairy Products Regulations (SOR/79-840, ``DP Regulations'') to revise existing cheese identity and compositional standards.

“FD Regulations” impose labelling requirements on most prepackaged foods. Subject to certain exemptions, labels of prepackaged foods must display Nutrition Facts table. FD Regulations establish new criteria for nutrient content claims and introduce provisions that permit certain diet-related health claims.

Food Additives.

FD Regulations have been amended to include neotame as permissible high intensity sweetener. Table IX to §B.16.100 of FD Regulations has been amended to list foods neotame may be put on or mixed with and maximum level of neotame which may be used in specified foods. Conditions for use of claim ``low calorie'', in English, on labels of sweeteners have also been amended.

Compliance Deadline.

General deadline for compliance was Dec. 12, 2005. Manufacturers with gross revenues less than CDN $1,000,000 from food sales in Canada have until Dec. 12, 2007 to comply with Amendments.

Note that certain food labels and advertisements must be in compliance now. These are those that bear: (i) Particular nutrient content claims related to fat, trans fatty acids, omega-3 poly-unsaturated fatty acids or omega-6 poly-unsaturated fatty acids; (ii) any health claim as set out in Amendments; or (iii) term “nutrition facts”, “valeur nutritive” or “valeurs nutritives”.

Mandatory Standardized Nutrition Labels.

Nutrition Facts table must appear in standardized vertical format and conform to size and formatting requirements with respect to font and spacing. (§B.01.454[2]). Alternative formats are permitted if available display surface does not permit use of standard vertical format. (§B.01.454[3]). Table may be omitted in certain situations if product has less than 100 cm2 of available display surface subject to limited exceptions. Nutrition Facts table must declare energy value (calories) and 13 core nutrients according to prescribed methods. (§B.01.401[1]). Other specified nutrients may be voluntarily declared in table. (§B.01.402[1]). Additional declarations will be triggered in certain circumstances. All three groups of fatty acids (monounsaturates, omega-6 and omega-3 polyunsaturates) must be declared if any one is mentioned on label. (§B.01.402[3]). Any vitamin or mineral nutrient added to food must be declared, as must any nutrient that is subject of claim.

Although certain prepackaged food products may be exempt from displaying Nutrition Facts table (§B.01.401[2]), certain prepackaged food products may be prohibited from containing Nutrition Facts table or phrase “nutrition facts”, “valeur nutritive” or “valeurs nutritives”. Amendments must be reviewed for each product.

Nutrition Content Claims.

Nutrition content claim is statement or claim that describes amount of nutrient content in food (e.g., “reduced calorie”). Amendments list permitted nutrient content claims and set out specific labelling and advertising requirements that apply if such claims are made. Manufacturers may only make nutrient content claims if food meets prescribed criteria. (§B.01.503[1]). Amendments pertaining to nutrient content claims apply to all foods, whether prepackaged, and whether sold at retail, to trade or at food service establishments.

Diet-Related Health Claims.

Diet-related health claim is statement or claim that describes characteristics of diet associated with reduced risk of developing particular disease or condition. Amendments permit prescribed diet-related health claims on foods that meet certain criteria. (§B.01.601[1]). Manufacturers may only make health claims pertaining to: (a) Sodium, potassium and hypertension; (b) calcium, vitamin D and osteoporosis; (c) saturated fat, trans fat and heart disease; (d) vegetables and fruit and some types of cancer; and (e) chewing gum, hard candy, breath-freshening product and tooth decay.

Drugs.

Act governs manufacturing, production, marketing, labelling, importing, exporting and sale of drugs. According to Act, "drug" includes any substance or mixture of substances manufactured, sold or represented for use in: (i) Diagnosis, treatment, prevention of disease, disorder or abnormal physical state, or its symptoms, in humans or animals; (ii) restoring, correcting or modifying organic functions in humans or animals; or (iii) disinfection in premises in which food is manufactured, prepared or kept. (§2).

FD Regulations under Act impose various labelling and licensing requirements for drugs. Certain drugs such as mercuric chloride tablets, aminopyrine and dipyrone, coated potassium salts, antibiotics, chloramphenicol, veterinary drugs and contraceptives are dealt with specifically in FD Regulations. FD Regulations should be consulted with regard to these drugs. (§§C.01.071-C.01.625). FD Regulations have been amended to add 11 medicinal ingredients, in alphabetical order, to Part I of Schedule F of FD Regulations. New medicinal ingredients are Abatacept, Deracobix, Entecavir, Erlotinib and its salts, Histrelin and its salts, Lutropin alfa, Pregablin and its salts and derivatives, Resocortol and its derivatives, Solifenacin and its salts, Sunitinib and its salts, and Trospium chloride.

Drug Identification Number ("DIN").

Subject to limited exceptions, drug cannot be sold in dosage form without DIN assigned to it and displayed on inner and outer label. (§C.01.014).

Tablet Disintegration Times.

Subject to limited exceptions, drug cannot be sold for human use in form of tablet unless compliant with disintegration times for uncoated tablet, plain coated tablet or enteric coated tablet set out in FD Regulations. (§C.01.015).

Adverse Drug Reaction Reporting.

Drug cannot be sold unless manufacturer reports existence of any adverse drug reaction and serious adverse drug reaction. (§C.01.016).

Limits of Drug Dosage.

Drugs listed in this section cannot be sold for human use unless in compliance with labelling requirements in FD Regulations. (§C.01.021).

Cautionary Statements and Child Resistant Packages.

Inner and outer label of drug containing certain prescribed ingredients must contain cautionary statements set out in FD Regulations. (§§C.01.028-C.01.032).

Colouring Agents.

Manufacturer of drug may only use prescribed colouring agents. (§C.01.040.2).

Establishment licence is required to fabricate, package/label, distribute, import or wholesale certain drugs or perform certain tests on same. (§C.01A.004).

Good Manufacturing Practices.

Distributor or importer may not sell drug unless fabricated, packaged/labelled, tested and stored according to good manufacturing practices as outlined in FD Regulations. (§C.02.003).

Natural Health Products.

Natural Health Product Regulations ("NHP Regulations") under Act (SOR/2003-196) set out requirements for manufacturing, packaging, labelling, storing, importing, distributing and selling natural health products ("NHPs"). Sale of NHPs by retailers is not covered by NHP

Regulations but rather sale of NHPs for purposes of manufacturing, packaging, labelling, distributing, importing or use in clinical trials. NHPs are new category previously classified as either food or drug under Act and FD Regulations. Some sections of FD Regulations continue to apply to certain NHPs. NHP Regulations and FD Regulations must be referred to with reference to specific product. NHP Regulations are administered by Natural Health Products Directorate, Health Products and Food Branch, Health Canada. FD Regulations have been amended to exempt NHPs from certain labelling and advertising prohibitions under §3 of Act.

Definition.

NHP is substance or combination of substances set out in Schedule 1 to NHP Regulations (including plant or plant material, alga, bacteria, fungus or non-human animal material, certain vitamins, amino acid, essential fatty acid, mineral or probiotic), homeopathic or traditional medicine, manufactured, sold or represented for use in: (i) Diagnosis, treatment, mitigation or prevention of disease, disorder or abnormal physical state or its symptoms in humans; (ii) restoring or correcting organic functions in humans; or (iii) modifying organic functions in humans. (§1[1]).

Product Licencing.

Subject to limited exceptions, NHP may not be sold unless product licence is issued. (§4[1]). Transition period allowed is six years for NHPs with valid DIN to obtain product licence under NHP Regulations. (§108).

Site Licencing.

Subject to limited exceptions, NHP may not be manufactured, packaged, labelled or imported for sale without site licence. (§27[1][a]). Transition period allowed is two years for those currently manufacturing, packaging, labelling or importing NHP to comply with site licence requirements of NHP Regulations. (§113).

Good Manufacturing Practices.

NHP may not be sold unless manufactured, packaged, labelled, imported, distributed or stored in accordance with good manufacturing practices as set out in NHP Regulations (or equivalent for imports). (§43).

Clinical Trials involving Human Subjects.

Authorization is required for sale or import of NHP for purposes of clinical trial involving human subjects and requirements set out in NHP Regulations must be complied with. (§65).

Cosmetics.

Act governs manufacturing, packaging, labelling, advertising and sale of cosmetics. According to Act, “cosmetic” includes any substance or mixture of substances manufactured, sold or represented for use in cleansing, improving or altering complexion, skin, hair or teeth, and includes deodorants and perfumes. (§2).

Cosmetic Regulations under Act (C.R.C., c. 869) impose certain packaging, labelling and sales requirements with respect to cosmetics. Inspectors given broad powers regarding cosmetics under Cosmetic Regulations. Products other than those regulated under FD Regulations or NHP Regulations must have list of ingredients displayed on outer label with each ingredient listed according to its INCI (International Nomenclature Cosmetic Ingredient) name. (§§1.4, 21.1-21.2). Ingredients without INCI names must be displayed by their chemical names. (§21.3). Cosmetics with immediate containers or outside packages that are too small for label to comply with requirements must list ingredients on tag, card or tape affixed to container or package. (§21.5).

Sales.

Restrictions imposed by Cosmetic Regulations with respect to sale of following cosmetics: those with statement implying cosmetic has been compounded in accordance with prescription (§12), those used for removing stains from teeth (§13), those used in eye area (§14) and those containing chloroform (§15[1][a]), estrogenic substance (§15[1][b]), mercury or salt or derivative thereof (§15.1). Cosmetic Regulations should be referred to regarding these.

Labelling.

Inner label of cosmetic must show name of manufacturer and address of principal place of business and identity of cosmetic in terms of common or generic name or in terms of function, unless identity is obvious. (§20). Manufacturer may not make claims on label or in advertisement regarding ability of cosmetic to influence chemistry of skin, hair or teeth (§21[1][a]) or regarding product formulation, manufacture or performance that would imply user will not suffer injury to health unless manufacturer possesses evidence validating such claim (§21[1][b]). Certain labelling requirements must be met regarding: hair dye (§22), cosmetics containing mercury or sale or derivative thereof as preservative (§22.1), deodorant intended for use in genital area (§23) or cosmetic presenting avoidable hazard (§24) as outlined in Cosmetic Regulations.

Pressurized Containers.

Inner and outer label must contain certain prescribed information as outlined in Cosmetic Regulations. (§25).

Security Packaging.

Mouthwash for human use must be contained in security package as outlined in Cosmetic Regulations. (§28.1). Certain labelling requirements required respecting certain cosmetics (e.g. containing certain amounts of sodium bromate or acetonitrile).

Notification.

Every manufacturer of cosmetic must, within ten days from day of first sale of cosmetic, furnish Minister with notification in prescribed form. (§30).

Medical Devices.

Act governs packaging, labelling, treatment, processing, advertising and sale of devices. According to Act, “device” means any article, instrument, apparatus or contrivance, including any component, part or accessory thereof, manufactured, sold or represented for use in: (a) Diagnosis, treatment, mitigation or prevention of disease, disorder or abnormal physical state, or its symptoms, in human beings or animals; (b) restoring, correcting or modifying body function or body structure of human beings or animals; (c) diagnosis of pregnancy in human beings or animals; or (d) care of human beings or animals during pregnancy and after birth of offspring, including care of offspring. (§2).

Medical Devices Regulations under Act (SOR/98-282 “MD Regulations”) apply to sale and advertising for sale of medical device and importation of medical device for sale or for use on individuals, other than importation for personal use. According to MD Regulations, “medical device” means device within meaning of Act but does not include devices intended for use in relation to animals. MD Regulations set out classification system for medical devices. Medical Devices Bureau of Therapeutic Product Directorate of Health Canada is national authority that monitors and evaluates safety, effectiveness and quality of diagnostic and therapeutic medical devices in Canada.

Manufacture.

Manufacturer must ensure that medical device meets safety and effectiveness requirements and must keep objective evidence to establish same. (§9).

Labelling.

Following prescribed information must be set out on label of device in legible, permanent and prominent manner in easily understood terms: name of device, name and address of manufacturer, identifier of device, contents not readily apparent, word "Sterile" if intended to be sold in sterile conditions, expiry date, medical conditions and purposes and uses unless obvious, directions for use unless not required and any special storage conditions. (§21).

Licence is required for import, sale or advertising of Class II, III or IV medical device (as defined in MD Regulations). (§§26 and 27).

Establishment Licence.

Subject to limited exceptions, medical device may not be imported or sold unless establishment licence has been obtained. (§44).

Miscellaneous.

MD Regulations impose requirements respecting distribution records to be maintained, complaint handling, mandatory problem reporting, recall and implant registration.

Custom-made and Special Access (emergency use) Devices.

Authorization must be obtained prior to import or sale of Class III or IV custom-made device or medical device for special access. (§70). Such devices must be labelled with name of manufacturer, name of device and specify whether device is custom-made or imported or sold for special access. (§75). Certain requirements are set out particular to these devices respecting distribution records, incident reporting and implant registration.

Medical Devices for Investigational Testing Involving Human Subjects.

Subject to certain limited exceptions as set out in MD Regulations, medical device may not be imported or sold for this purpose. (§80). When permitted, certain requirements are imposed including those respecting records, authorization, labelling and advertising among others.

16.02 HEALTH INSURANCE:

Canada Health Act (c. C-6) is federal policy and funding legislative enactment. It imposes upon provinces criteria to be met by provincial health insurance programs in order for provinces to qualify for full cash contribution from federal government under Federal-Provincial Fiscal Arrangements Act. (c. F-8). Provincial health insurance plans must meet five criteria: public administration, comprehensiveness, universality, portability and accessibility. (Canada Health Act, §7). Canada Health Act provides that "medically required" services rendered by medical practitioners are to be insured by provincial health programs. (§2). It also provides that health insurance plans must insure certain hospital services if they are "medically necessary for the purpose of maintaining health, preventing disease or diagnosing or treating an injury, illness or disability". (§2). Subject to certain procedural requirements, Canada Health Act entitles federal government to decrease transfers to province if its health insurance plan does not meet requirements of Act. (§15).

16.03 MEDICAL USE OF CONTROLLED SUBSTANCES:

No one may possess controlled drug listed in Schedules of the Controlled Drugs and Substances Act (S.C. 1996, c. 19, §4), except in accordance with regulations. Act provides that

Minister may exempt person or class of persons or any controlled substance from application of Act or Regulation if in opinion of Minister, exemption is necessary for medical or scientific purpose or is otherwise in public interest. (Controlled Drugs and Substances Act, §56).

Authorization to possess marihuana must be issued by Federal Minister of Health if requirements set out in Marihuana Medical Access Regulations are met. (Marihuana Medical Access Regulations, SOR/2001-227, §11). Requirements for application for Authorization to Possess are set out in regulations. (§§4-10). Authorization to Possess expires 12 months after date of its issue or after shorter period if shorter period is specified in application. (Marihuana Medical Access Regulations, §13). Minister of Health must issue Personal-Use Production License if requirements set out in Marihuana Medical Access Regulations are met. (§29). Applications for Personal-Use Production Licenses are only considered if applicant is holder of Authorization to Possess or is applying for Authorization to Possess. (Marihuana Medical Access Regulations, §26). Holders of Personal-Use Production License are authorized to produce and keep marihuana in accordance with license for medical purpose of holder. (§24). Production License expires 12 months after date of issue or date of expiry of holder's Authorization to Possess marihuana. (Marihuana Medical Access Regulations, §33). Regulations also provide for Designated-Person Production Licence. (§§35-42). Holder of Production License may only produce marihuana at production site authorized in license. (§52). Person must ordinarily reside in Canada to receive Authorization to Possess or Production License. (§§3, 25[1], 35). Authorization to Possess or Production License shall be revoked by Minister of Health if circumstances set out in Regulations are met. (§62). Pharmacist may provide marihuana produced by licenced dealer to holder of authorization to possess. (§70.3). Where marihuana is produced under contract with Crown or under Designated-Person Production Licence (§2), it is exempt from application of Food and Drugs Act and its regulations. (Marihuana Exemption [Food and Drugs Act] Regulations SOR/2003-261).

16.04 RADIATION DEVICES:

No one may possess or operate radiation device which contains more than exempted quantity of nuclear substance, except in accordance with licence issued by Canadian Nuclear Safety Commission. (Nuclear Safety and Control Act, S.C. 1997, c. 9, §26; General Nuclear Safety and Control Regulations, SOR/2000-202, §20; Nuclear Substances and Radiation Devices Regulations, SOR/2000-207, §1). Standards for radiation devices are set out in Nuclear Safety and Control Act and its Regulations. Exempted quantities are set out in Nuclear Substances and Radiation Devices Regulations. (SOR/2000-207, Schedule).

Standards for x-ray equipment are set out in Radiation Emitting Devices Regulations. (C.R.C., c. 1370; Radiation Emitting Devices Act, c. R-1).

16.05 REPRODUCTIVE TECHNOLOGIES:

Assisted Human Reproduction Act, (S.C. 2004, c. 2) (“Act”) is federal legislation respecting assisted human reproduction (“AHR”) and related research. Legislation creates two broad categories of activities; prohibited (§§5-9) and controlled (§§10-12).

Prohibited activities under §5 include reproductive and therapeutic human cloning; creating in vitro embryos for any purpose other than creating human being or improving or providing instructions in AHR; creating embryo from cell or part of cell of embryo or fetus for purpose of creating human being, or transplanting embryo so created into human being; maintaining embryo for more than 14 days outside body of female person, minus any time during which its development is suspended; sex selection, except for prevention, diagnoses and treatment of sex-linked disorders or disease; germ line genetic alteration; transplanting sperm, ovum, embryo or fetus of non-human into human being; using any human reproductive material or in vitro embryo previously in non-human for purposes of creating human being; creating chimera or transplanting chimera into either human being or non-human life form (chimera is embryo into which cell of any non-human life form has been introduced, or embryo containing cells of more than one embryo, fetus or human being); and creating hybrids for purposes of reproduction or transplanting hybrid into either human being or non-human life form. Act prohibits commercial surrogacy and makes it offence to pay, offer to pay or advertise to pay “consideration” to female to be surrogate. (§6). This section does not affect validity of surrogacy agreements under provincial law. Act also prohibits purchase, offer to purchase or advertising for purchase of sperm or ova, in vitro embryos, or any human cell or gene for purposes of creating human being, and sale, offer to sale and advertising for sale of in vitro embryos. (§7). Under §8, Act requires written consent for use of human reproductive material or in vitro embryos. Requirements of written consent for different circumstances are detailed in consent regulation. (SOR/2007-137). Finally, §9 prohibits obtaining or using any sperm or ova from donor under 18 years of age, except for purposes of preserving them or for purpose of creating human being to be raised by donor.

Under §§10-12 it is offence for anyone to carry out controlled activities unless carried out in accordance with regulations and licence. Controlled activities include alteration, manipulation or treatment of any human reproductive material for purpose of creating embryo or in vitro embryo; acquisition, storage, transfer, destruction, import or export of sperm or ova for purpose of creating embryo or in vitro embryo; combination of any part or proportion of human genome specified in regulations with any part of genome of another species mentioned in regulations; reimbursement of expenses incurred by sperm or ova donors, in relation to transplantation of in vitro embryo or to surrogate mothers in relation to their surrogacy without receipts.

Act goes on to contemplate collection of and access to personal information as well as reporting obligations, and creation of personal health information registry. Act creates Assisted Human Reproduction Agency of Canada (“the Agency”), and assigns Agency responsibility of fostering principles set out in Act and administering Act. Majority of sections concerning role and responsibilities of Agency came into force Jan. 12, 2006. (§§21-39). Agency is also given responsibility for issuing, amending, renewing, suspending or revoking licences in connection with controlled activities. Agency may appoint inspectors for purpose of enforcing Act, and offences are punishable by broad range of fines or imprisonment. Many of these administration and enforcement provisions (§§40-59) remain unproclaimed.

16.06 WARRANT FOR BLOOD SAMPLES:

Justice of Peace may issue warrant authorizing police officer to require physician to cause to be taken samples of blood of person if sample is necessary to enable proper analysis to determine concentration of alcohol or drug in person's blood. Justice of Peace may issue such warrant if he or she is satisfied that there are reasonable grounds to believe that person has within preceding four hours committed offence of operating vehicle, vessel, aircraft or railway equipment while impaired by alcohol or drug and person was involved in accident resulting in death of another person or bodily harm to self or another person. Warrant may only be issued if in opinion of qualified medical practitioner person from whom blood sample is to be taken is unable to consent to taking of samples of his or her blood by reason of consumption of alcohol or drugs or as result of accident and taking of samples of blood from person would not endanger life or health of person. (Criminal Code, §256). Criminal Code also provides that failure by physician to have blood sample taken does not constitute offence. (Criminal Code, §257).

17 IMMIGRATION

17.01 IMMIGRATION:

Immigration into Canada is governed by Immigration and Refugee Protection Act, S.C. 2001, c. 27 (“IRPA”), in force June 28, 2002, and by regulations promulgated thereunder (Immigration and Refugee Protection Regulations [“IRPR”]). IRPA is framework legislation that repealed and replaced former Immigration Act, c. I-2.

On Apr. 13, 2004, regulations came into force providing that paid representatives must be authorized in order to conduct business on behalf of clients when dealing with Government of Canada in immigration and refugee matters, or to provide immigration advice or assistance. Purpose of these amendments is to protect public from unscrupulous immigration consultants and to encourage immigration consulting industry to self-regulate. Authorized, paid representatives may only be: (i) Immigration consultants who are members in good standing of Canadian Society of Immigration Consultants; (ii) lawyers who are members in good standing of Canadian law society and students-at-law under their supervision; and (iii) notaries who are members in good standing of Chambre des Notaires du Québec and students-at-law under their supervision. Individuals who have applications or proceedings commenced as of Apr. 13, 2004, may continue to use services of paid representative if he or she is not member of one of organizations listed above until Apr. 13, 2008.

Foreign national means person who is not Canadian citizen or permanent resident, and includes stateless person (“étranger”). (§2[1]). Foreign national becomes temporary resident if officer is satisfied that foreign national has applied for that status, has established that he or she holds required status document, if any, and will leave Canada by end of period authorized for foreign national's stay and is not inadmissible. (§22[1]).

Foreign nationals who comply with IRPA and regulations may be admissible to Canada except following inadmissible classes, including their dependents (§42): Persons who engage in act of espionage or subversion by force of any government, terrorism; acts of violence that would or might endanger lives or safety of persons in Canada; are members of organization that there are reasonable grounds to believe engages, have engaged or will engage in acts of espionage, subversion, or terrorism or are danger to security of Canada are inadmissible on grounds of security (§34); persons who have committed act outside Canada that constitutes offence referred to in §§4 to 7 of Crimes Against Humanity and War Crimes Act; are prescribed senior officials in service of government that engages or has engaged in terrorism, systemic or gross human rights violations, or genocide, war crime or crime against humanity or whose entry into Canada is restricted pursuant to decision, resolution or measure of international organization of states, of which Canada is member, that imposes sanctions on country against which Canada has imposed or has agreed to impose sanctions in concert with that organization are inadmissible on grounds of violation of human or international rights (§35); persons who have been convicted of certain criminal offences are inadmissible on grounds of criminality or serious criminality (§36); persons who are members of organization that is believed on reasonable grounds to be or to have been engaged in organized crime (§37); persons whose health condition is likely to be danger to public health, is likely to be danger to public safety, or might reasonably be expected to cause excessive demand on health or social services is inadmissible on health grounds (§38); persons unable or unwilling to support themselves and their dependents are inadmissible for financial reasons (§39); persons who misrepresent or withhold material facts relating to relevant matter that induces or could induce error in administration of IRPA are inadmissible on grounds of misrepresentation (§40); persons who fail to comply with Act are inadmissible for noncompliance with IRPA (§41). In certain instances, Minister of Citizenship and Immigration may, by permit, authorize certain persons otherwise inadmissible to enter or remain in Canada.

Foreign national may not work or study in Canada unless authorized to do so under IRPA. (§30[1]). Except in limited cases, certain entrepreneurs, such as intra-company transfers (§§199) and business persons authorized to work without Work Permit (IRPR, §§186-187), job confirmation (i.e., positive labour market opinion) from Human Resources Development Canada (``HRDC'') is precondition to obtaining Work Permit. Numerous exceptions to requirement for possession of Work Permit are created by IRPR.

IRPR specifies countries whose citizens are exempt from normal requirement for foreign national to obtain Temporary Resident Visa in order to gain entry into Canada as visitor or otherwise. (§190[1]). Visitor status is not normally granted at port of entry for more than 180 days.

As result of North American Free Trade Agreement (“NAFTA”) and Canada Chile Free Trade Agreement (“CCFTA”), expedited and preferential treatment has been given to citizens of U.S., Mexico, and Chile for business related entries into Canada.

IRPA sets out three broad classes of immigrants and their essential characteristics: (1) Family Class members are required to have specified relationship to Canadian citizen or permanent resident in order to be sponsored to become permanent residents; (2) Refugees, including convention refugees and persons in similar circumstances; and (3) Economic Class members selected on basis of their ability to become economically established in Canada.

Economic Class includes Skilled Workers, Business Immigrants, and Live-in Caregivers. Skilled Worker Class includes Federal Skilled Workers, Quebec Skilled Workers, Provincial Nominees, and Canadian Experience Class. Members of Federal Skilled Worker Class are selected on basis of education attainment, proficiency in Canada's two official languages, work experience, age, arranged employment in Canada, and adaptability. Canadian Experience Class (CEC) was introduced on Sept. 17, 2008 and is designed to facilitate transition from temporary to permanent residence for certain temporary foreign workers and foreign students in effort to attract and retain qualified workers. Selection is based on pass/fail system and not points system, as under Federal Skilled Worker Program. Similarly, members of Quebec Skilled Worker Class and Provincial Nominee Class are selected on basis of their ability to become economically established in Canada although these programs are designed to encourage immigrants to settle in certain provinces so as to benefit their respective economies.

Business Immigrants are classified as Investors, Entrepreneurs and Self-Employed Persons. Investors are selected on basis of business experience, minimum net worth of CDN $800,000 and investment in Canada of at least CDN $400,000. Entrepreneurs are selected on basis of their business experience, minimum net worth of CDN $300,000 and their ability to own and actively manage business in Canada. Entrepreneurs are subject to conditions upon arrival in Canada such that businesses they establish must contribute significantly to Canadian economy and create jobs for Canadian and Canadian permanent residents within three years of becoming permanent residents. Self-Employed Persons are selected on basis of their intention and ability to create their own employment and to contribute to cultural or athletic life of Canada. Self-Employed Persons may also create their own employment by purchasing and managing farms in Canada. IRPA was amended as part of Budget Implementation Act (Bill C-50) to authorize Minister of Citizenship and Immigration to give instructions with respect to processing of certain applications and requests in order to support attainment of immigration goals established by Government of Canada. Ministerial instructions published on Nov. 29, 2008 set out processing priorities for applications and requests made on or after Feb. 27, 2008. Applications from Federal Skilled Workers with offer of arranged employment, who are foreign nationals that have been residing legally in Canada for at least one year as temporary foreign workers or international students, or skilled workers with evidence of experience in one of 38 specified occupations will be placed into processing immediately upon receipt. Unless Minister otherwise instructs, Federal Skilled Worker applications that do not meet above assessment criteria will not be processed and processing fee will be returned.

Residency obligations for permanent residents are based on being physically present in Canada two years in every five-year period. In specified instances, permanent residents may be deemed to be physically present in Canada despite prolonged absences from Canada. Officers are empowered to override any breaches of residency obligations on basis of humanitarian and compassionate considerations and best interests of child. (§28). Permanent residents and protected persons to receive status documents as proof of their status unless officer determines otherwise. Permanent residents outside of Canada who do not have status documents may be issued travel documents if they comply with certain requirements. (§31). Permanent residents will lose their status under following conditions: (a) when they become Canadian citizens; (b) once final determination has been made on decisions outside Canada that they have not met residency obligations; (c) once removal order comes into force; (d) in case of refugees, when their status has been finally determined to be vacated; and (e) in case of temporary residents, when authorized period of time in Canada expires, when condition of stay has been violated or when permit is cancelled.

18 INSURANCE

18.01 INSURANCE COMPANIES:

Regulated by Insurance Companies Act (S.C. 1991, c. 47) which provides for incorporation and regulation of Canadian companies, including fraternal benefit societies, for regulation of foreign companies and for provincial companies licensed under predecessor federal insurance legislation. Foreign company can operate through Canadian subsidiary. Company seeking federal incorporation must apply to Minister of Finance for letters patent. No person can acquire control of company incorporated or continued under Act without approval of Minister. Company must obtain order from Superintendent before commencing business. Before order can be obtained, certain requirements of Act must be fulfilled including satisfying capital and liquidity standards. Minister of Finance must approve transfer of substantial or control blocks of shares as well as transfer of any business or any reinsurance arrangement (other than ordinary course of business reinsurance). Loans, investments and transactions with related parties are regulated.

Supervision by Office of Superintendent of Financial Institutions and Financial Consumer Agency of Canada (re consumer provisions) which are presided over by Minister of Finance; Superintendent of Financial Institutions is deputy head of Office; Commissioner of Financial Consumer Agency of Canada has rank and powers of deputy head of department.

Annual return must be filed with Superintendent within 60 days of financial year end (105 days for reinsurers). Superintendent can require additional returns and information and conducts annual investigation of business and affairs of each company including foreign companies. Companies, including foreign companies, must provide Commissioner with requested information.

Policies, rebates, distribution, liens on policies, agents, brokers, trade practices, etc. are regulated by provincial insurance legislation.

Foreign insurance companies must also obtain order from Superintendent before commencing business. Foreign company can operate through foreign branch. Before order can be obtained, foreign company must appoint chief agent ordinarily resident in Canada as well as Canadian auditor and actuary. Chief agent must have power of attorney. Minister of Finance must be satisfied that applicant foreign company will be able to contribute to Canada's financial system and that Canadian insurers will be treated as favourably in home jurisdiction of applicant. Additional information that must accompany application for approval order includes (a) evidence that applicant is authorized under its home jurisdiction to insure risks, (b) resolution of its Board establishing prudent investment and lending portfolio policy, (c) copy of constating documents, (d) evidence of solvency and financial condition, (e) evidence that notice of intention to apply for approval order was published in Canada Gazette as well as in newspaper in general circulation at or near place of proposed chief agency. Except for foreign companies licensed under predecessor federal insurance legislation, new foreign companies cannot insure both (a) risks falling within class of life insurance and (b) risks falling under any other class of insurance, other than certain types of insurance, including accident and sickness insurance and loss of employment insurance. “Grandfathered” foreign insurer transacting life insurance and other classes of insurance must maintain separate fund for certain classes of insurance. Foreign companies are confined to certain kinds of investments and must maintain in Canada prescribed amounts and kinds of assets to meet Canadian liabilities, and such assets must be vested in trust with Canadian financial institution under form of trust deed approved by Superintendent. Foreign company must process and maintain certain records in Canada and Superintendent's consent is required for processing of Canadian records outside Canada.

Breach of Act.

Any individual found guilty of offence under Act will be liable on summary conviction to fine of up to CDN $100,000 or imprisonment for term of 12 months or both, on conviction on indictment, to fine of up to CDN $1,000,000 or imprisonment for term of up to five years or both. In case of company, maximum fine on summary conviction is CDN $500,000, and maximum fine on conviction on indictment is CDN $5,000,000. Court may also issue order requiring person to comply with Act. If offender derived monetary benefit as result of any breach, additional fine in amount equal to three times court's estimate of monetary benefit can be levied.

See Digests of laws of the various provinces.

See also categories 23 Taxation; Transportation, topic Shipping, subhead Admiralty Law, catchline Marine Insurance.

19 INTELLECTUAL PROPERTY

19.01 COPYRIGHT:

Copyright in Canada is regulated by Copyright Act. (c. C-42). Amendments to Act bringing Act into conformity with Canada's obligations under Agreement Establishing the World Trade Organization (WTO) came into force in Jan. 1996. “Phase II” amendments to Act concerning neighbouring rights, home copying and exceptions to use of works without authorization or remuneration were tabled in 1996 and are now in force. Canada's Act is now largely compatible with Rome Convention. Amendments grant to broadcasters certain rights in their broadcast signals, as well as limited ephemeral recording exemption. Distributors of books have been granted protection against parallel importation of books into Canada. Certain provisions relating to parallel book importation are currently in effect. (§27.1). Phase II amendments have also implemented regime where levy is imposed on all blank sound recording audio media. This regime is intended to address problem of private copying of sound recordings. Amendments carve out certain exemptions for educational institutions, libraries, archives and museums. Persons with perceptual disabilities are granted certain exemptions. Amendments will eliminate perpetual copyright term of unpublished works. Under certain circumstances, term of protection of photograph has been changed from making of photograph plus 50 years to life of author plus 50 years. Phase II amendments provide for statutory damages which allow court to award damages within specified monetary range. Amendments also introduce wide injunction remedy and means of proceeding with action by summary procedure.

Copyright subsists in every original literary, dramatic, musical and artistic work if author was at date of making of work, citizen or subject of, or person ordinarily resident in foreign country that is Berne Convention or Universal Copyright Convention (UCC) country or WTO member (§5[1]); and if, in case of published work, work was first published in country that is Berne Convention or UCC country or WTO member; but in no other works except so far as protection conferred by Act is extended to foreign countries to which Act does not extend (§5[1] and [1.2]).

Minister may certify by notice that any country which is not Berne Convention or UCC country or WTO member and grants or has undertaken to grant to citizens of Canada benefit of copyright on substantially same basis as to its own citizens is thereafter for purpose of rights conferred by Act treated as if it were a country to which Act extended. (§5[2]).

Copyright means sole right to produce or reproduce, to perform in public or to publish, work or any substantial part, and includes right to produce, reproduce, perform or publish any translation, to convert dramatic work into nondramatic work or nondramatic work into dramatic work, to make record, cinematograph film or other contrivance for delivery of work, to reproduce, adapt and publicly present original work by cinematograph, to communicate work by telecommunication, to present at public exhibition, for purpose other than sale or hire, certain artistic works, to rent out computer program or sound recording, and to authorize any such acts. (§3). Performer of work has sole right to communicate performer's live performance by telecommunication, to fix performer's performance in material form, to reproduce fixation if made without consent and to rent out sound recordings of performance. (§15[1]).

Act was amended to address emerging technology of Internet-based retransmission and to protect interests of broadcasters and copyright holders in digital environment. Amendments specify that, according to current law, retransmitters who use Internet would not be able to hold compulsory license. These retransmitters will have to negotiate copyright with all rights holders in order to obtain authorization to broadcast their respective works. This clarification will protect interests of broadcasters and copyright holders in digital environment. (§§2.4[3], 31[1]—[3]).

Maker of sound recording has copyright in sound recording, consisting of sole right to publish it for first time, to reproduce it in any material form, to rent it out and to authorize any such acts. (§18[1]).

Copyright Act provides for computer programs to be protected as literary works. (§2). Computer program is defined as set of instructions or statements, expressed, fixed, embodied or stored in any manner, that is to be used directly or indirectly in computer in order to bring about specific result. (§2). Act permits owner of authorized copy of computer program to reproduce copy by adapting, modifying or converting it, or by translating it into another computer language, if reproduction is essential for compatibility of program with particular computer, if reproduction is solely for person's own use, and reproduction is destroyed when person ceases to be owner of copy of program. In addition, owner of authorized copy of program may make single reproduction for back-up purposes if reproduction is destroyed forthwith when person ceases to be owner of copy. (§30.6).

Copyright is not infringed by fair dealing with any work for purposes of private study, research or for criticism, review or newspaper summary if source and name of author, performer, maker or broadcaster are mentioned. (§§29, 29.1, 29.2). There are also exceptions for educational institutions (§§29.4-29.9) and libraries, archives and museums (§§30, 30.1-30.3). It is not infringement to make copy of musical recording for private use and levy in favour of copyright owners has been instituted on blank recording media. (Part VIII).

Copyright subsists regardless of registration by holder, though there is provision for registration. (§54).

Term.

With certain exceptions copyright subsists for the life of the author and for a period of 50 years from end of calendar year in which author dies. (§6). For certain types of works and works made by corporations in certain circumstances, term of protection is 50 years from end of year in which work was made. Examples of such works include, cinematographic works, sound recordings, performers performances and communications signals.

Offenses.

Copyright Act provides for substantial penalties for certain acts of copyright infringement.

Specifically, any person who knowingly makes for sale or hire, sells or lets for hire, distributes for purpose of trade, exhibits in public, or imports for sale or hire into Canada, any infringing copy of work, is guilty of offence and is liable: (a) on summary conviction, to fine not exceeding CDN $25,000 or to imprisonment for term not exceeding six months, or to both, or (b) on conviction on indictment, to fine not exceeding CDN $1,000,000 or to imprisonment for term not exceeding five years, or to both. Such penalties may also be imposed against person who knowingly makes or possesses any plate for purpose of making infringing copies of any work in which copyright subsists, or who for private profit, causes any such work to be performed in public without consent of copyright owner. (§42).

Moral Rights.

Author of certain types of works has right to protect integrity of work and, in certain circumstances to be associated with work as its author. Moral rights may not be assigned but may be waived. Assignment of copyright in work does not constitute waiver of moral rights in such work. (§14.1).

Copyright and Industrial Design.

Copyright Act provides that it is not infringement of copyright to reproduce design applied to useful article where article is reproduced in quantity of more than 50 if reproduction is made by making article or drawing or reproduction in any material form of article. However, this exemption does not apply to artistic work that is used for such purposes as graphic or photographic representation applied to face of object, trademark or label, material having woven or knitted pattern used for piece goods or wearing apparel, architectural work of art that is building or model of building, representations of real or fictional beings applied to article, and other artistic works as set forth in regulations to Act. (§64). It is also not infringement of copyright in work to apply to useful article features that are dictated solely by utilitarian function of article, to make drawing or reproduction of any features of article that are dictated solely by such utilitarian function or to use any method or principle of manufacture or construction. (§64.1). The Industrial Design Act, c. I-9, governs application of designs to useful articles more generally.

Integrated Circuit Topography Act, S.C. 1990, c. 37, protects topographies defined as design, however expressed, of disposition of interconnections and elements for making integrated circuit product or making customization layer or layers to be added to integrated circuit product in intermediate form. (§2[1]). Employer or party contracting for creation of topography is deemed to be creator of topography. (§2[4]). Registration under Act gives creator of topography exclusive right to reproduce topography and to manufacture, import or commercially exploit topography and any integrated circuit product incorporating topography for term of ten years commencing on filing date of application for registration. (§3, 5). Conditions of registration include originality, application for registration before first commercial exploitation in Canada or within two years thereafter and creator's status as Canadian national or individual or legal entity with real and effective establishment for creation of topographies. (§4[1]). Topographies of nationals and legal entities of convention countries, WTO members, countries with real and effective establishments for creation of topographies and countries certified by Minister will also qualify for registration. (§4[1]). Infringement consists in reproduction, manufacture, importation or commercial exploitation of registered topography or integrated circuit product containing registered topography without consent of owner (§6[1]); but there is no infringement by various acts of “fair dealing” (§6[2], [3]). Topographies may be transferred (§7[1]) or licensed (§7[2]).

Administration.

Copyright office is attached to Patent Office and is administered by Commissioner of Patents and Registrar of Copyrights. (§§46, 47). Governor-in-Council is empowered to take such action as may be deemed necessary to secure adherence of Canada to Paris Act of 1971 and Rome Convention of 1961. (§91).

See also Cultural Property Export and Import Act, c. C-51. Act authorizes establishment of Canadian Cultural Property Export Control List which may include, regardless of their places of origin, any objects or classes of objects described in Act, export of which is deemed by Governor in Council to be necessary to control in order to preserve national heritage of Canada. General or specific permit to export objects included in Control List may be issued under Act.

See also Status of the Artist Act, S.C. 1992, c. 33. Act recognizes rights of artists to freedom of association and expression and establishes Canadian Artists and Producers Professional Relations Tribunal to certify artists' associations and govern relations between artists and producers.

19.02 PATENTS:

Effective Jan. 1990, Canada satisfied Parts I and II of Patent Cooperation Treaty whereby one form of application filed in Canadian Patent Office gives applicant option of having application deemed to have also been filed in such other member countries as applicant may elect. Amendments to Act to bring it into conformity with Canada's obligations under Agreement Establishing the World Trade Organization came into force in Jan. 1996. These amendments extend treaty benefits to all WTO members. Amendments to Patent Act and Patent Rules effective Oct. 1, 1996, affect priority dates and requests for priority, requests for examination, patents on amino acid sequences, and abandonment.

All communications concerning patents are to be addressed to The Commissioner of Patents, Ottawa, Canada. It is now possible to file certain documents electronically through Canadian Intellectual Property Office website. (Rule 5). Every applicant for patent who does not appear to reside or carry on business at specified address in Canada, must nominate as representative person or firm residing or carrying on business at specified address in Canada. (§29).

Invention is defined as any new and useful art, process, machine, manufacture or composition of matter, or any new and useful improvement thereof. (§§2, 32). Patent claims are allowable for foods and medicines without being limited to process. In 2002, Supreme Court of Canada held that higher life form (or multicellular differentiated organism), including transgenic animal, is not patentable because it is not “manufacture” or “composition of matter” within meaning of “invention” in §2.

Entitlement.

Major amendments to Patent Act came into effect on Oct. 1, 1989, and provide two sets of criteria which govern entitlement to patent. Further changes came into effect on Oct. 1, 1996.

Applications Filed Prior to Oct. 1, 1989.

Patent granting exclusive property in invention may be obtained and maintained for invention that was not known or used by any other person prior to date of invention, not described in any patent or in any publication printed in Canada or in any other country more than two years before presentation of petition, and not in public use or on sale in Canada for more than two years prior to application in Canada. Generally, priority is given to first inventor.

Applications Filed After Sept. 30, 1989 and before Oct. 1, 1996.

Patent granting to applicant exclusive property in invention may be obtained and maintained for invention unless patent application describing same invention was filed in Canada by any other person before earlier of date of filing Canadian application or its priority date (generally date of filing foreign application within one year before filing in Canada), patent application describing same invention filed in Canada has earlier priority date, invention was disclosed so as to become available to public prior to earlier of application date or priority date, or invention was disclosed by or through applicant so as to become available to public more than one year before application date. Generally, priority is given to first applicant to file rather than to first to invent. Absolute novelty is required with grace period of one year for disclosures directly or indirectly by applicant which become available to public. Public inspection is available 18 months after Canadian or priority filing.

First-to-File System of Entitlement.

Major amendments to Patent Act came into effect on Oct. 1, 1989, changing entitlement from first-to-invent to first-to-file system. Further amendments effective Oct. 1, 1996 established priority date for each claim in application.

For applications filed prior to Oct. 1, 1989, patent granting exclusive property in invention may be obtained and maintained for invention that was not known or used by any other person prior to date of invention, not described in any patent or in any publication printed in Canada or in any other country more than two years before presentation of petition, and not in public use or on sale in Canada for more than two years prior to application in Canada. Generally, priority is given to first inventor.

For applications filed between Sept. 30, 1989 and Sept. 30, 1996, patent granting to applicant exclusive property in invention may be obtained and maintained for invention unless patent application describing same invention was filed in Canada by any other person before earlier of date of filing Canadian application or its priority date (generally date of filing foreign application within one year before filing in Canada), or invention was disclosed so as to become available to public prior to earlier of application date or priority date, or invention was disclosed by or through applicant so as to become available to public more than one year before application date. Generally, priority is given to first applicant to file rather than to first to invent.

For applications filed as of Oct. 1, 1996, patent granting to applicant exclusive property in invention may be obtained and maintained for invention unless subject matter of claim in patent application has been previously disclosed by or through applicant so as to become available to public more than one year before filing date (date of receipt by Commissioner of request for patent combined with description of invention), by another person so as to become available to public before claim date (filing date unless previous application disclosing subject matter of claim has been filed in last 12 months in Canada or in treaty or convention country), or in application filed by another person before claim date of pending application. Priority is determined on basis of subject matter of particular claim rather than entire application. Nonobviousness is expressly required. Public inspection is available 18 months after Canadian filing.

Generally.

Invention is defined as any new and useful art, process, machine, manufacture or composition of matter, or any new and useful improvement thereof. (§§2, 32). Every applicant for patent who does not appear to reside or carry on business at specified address in Canada, must nominate as representative person or firm residing or carrying on business at specified address in Canada. (§29). Complete application must contain petition and specification. (§27[2]). Specification must correctly and fully describe invention. (§27[3]). Models need only be furnished when required by Commissioner. (§38). Every model so required shall be of convenient size exhibiting its several parts in due proportion. Biological material may be deposited and form part of patent application. (§38.1, Rules 103-110). No patent may issue for invention which has illicit object in view or for any mere scientific principle or abstract theorem. (§27[8]). Commissioner may refuse to grant patent whenever he is satisfied that applicant is not by law entitled thereto. (§40). Applicant is allowed to answer Commissioner's objection, or appeal to Federal Court within six months. (§41).

Patent Amendment Act, S.C. 1993, c. 2, provides full term protection to newly patented pharmaceuticals. Compulsory licenses are abolished retroactive to Dec. 20, 1991. Compulsory licenses granted after that date expire on coming into force of legislation but licenses previously in existence are unaffected. Patented Medicine Prices Review Board continues and is empowered to review and control excessive prices. (§§79-90). Compulsory license may be issued in respect of other patents when patentee abuses exclusive rights. (§65). (See subhead Abuse, infra).

Term.

The term limited for the duration of patent, application for which was filed prior to Oct. 1, 1989, is 17 years from date of issue (§45) and of patent, application for which was filed after Oct. 1, 1989, is 20 years from filing date. (§44).

Assignment.

Every invention or patent therefor is assignable in law either as to the whole interest or as to any part thereof by an instrument in writing which shall be registered in Patent Office. (§50). Unregistered assignment is void against any subsequent assignee who registered first. (§51).

Abuse.

It is abuse of exclusive rights under patent to fail to meet demand in Canada to adequate extent and on reasonable terms; prejudice trade by refusal to grant licence on reasonable terms if it is in public interest that such licence should be granted; or otherwise unfairly prejudice trade in Canada. (§65). Any person may, after expiration of three years from grant of patent, apply to Commissioner alleging that there has been abuse as aforesaid, and if Commissioner is satisfied that case of abuse has been established he may compel grant of licence to applicant or order patent to be revoked. See also category 3 Business Regulation and Commerce, topic 3.08 Monopolies, 3.10 Restraint of Trade and Competition.

Fees.

Most government fees are halved for small entity. Effective June 2, 2007, definition of “small entity” (individual, university or enterprise with fewer than 50 employees) was amended to exclude (a) entity controlled directly or indirectly by another entity, other than university, that employs more than 50 employees; and (b) entity that has transferred or licensed or has obligation, other than contingent obligation, to transfer or license any right in invention to entity, other than university, that employs more than 50 employees. Also, entitlement to small entity status is determined once for life of patent based on status of original applicant as of date of filing of regular application (i.e. non-PCT application) or date of national phase entry of PCT application. Provision has also been added to provide relief in case of mistaken small entity payment. Specifically, Patent Office may grant extension of time to pay proper fee where applicant of patent states that, to best of its knowledge, small entity fee was paid in good faith and request for time extension is being filed without undue delay.

Government Owned Patents.

Provision is now made for assignment of all benefits arising from certain types of inventions or patents therefor to Minister of National Defence as agent of Crown. This assignment takes place upon requisition by Minister and in case of certain other inventions vital to national defence, order may be made by Governor-in-Council that invention, application, etc., shall be treated as if it had been assigned to Minister as above. This latter provision is intended to apply to certain inventions, etc. placed before Atomic Energy Control Board. Persons divulging knowledge of these patents or inventions commit breach of The Official Secrets Act. (§20).

Plant Breeders' Rights Act, S.C. 1990, c. 20, allows plant breeders of new, distinct, uniform and stable varieties to hold exclusive right in such varieties. (§4). Holder of right in variety has exclusive right to produce and sell reproductive material of variety; to use repeatedly variety to produce another variety; to use ornamental plants or parts commercially as propagating material in production of ornamental plants or cut flowers; and to license others to do so. (§5[1]). Duration of right is 18 years, commencing on day certification of registration is issued. (§6). Entitlement to apply for plant breeders' rights requires that breeder did not sell or concur in sale of variety either before prescribed period or before effective date of application inside or outside Canada. (§7[1]). To be eligible to apply for rights, person must be citizen or resident of, or have registered office in, Canada, Union or agreement country. (§8). Priority will be allowed to Union or agreement applicant if application is made under §7 within 12 months of application for same variety in Union or agreement country. (§11[1]). Applicant must claim priority and provide certified documentation of Union or agreement application within three months of application. (§11[2]). Compulsory licences may be granted to ensure that holder of right does not abuse right. (§32[1]). Act and regulations conform to 1978 International Convention for the Protection of New Varieties of Plants. Species (categories) of plants become eligible for protection through regulation. (SOR/91-594, §3). Currently there are 40 categories protected by regulation. Current fees are for filing application, CDN $250; examination of application, CDN $750; registration of grant, CDN $500.

19.03 TRADEMARKS AND DESIGNS:

Trademarks are governed by Trademarks Act, c. T-13. Communications should be addressed to The Registrar of Trademarks, Ottawa. Act was amended in Jan. 1996 to bring it into conformity with Canada's obligation under Agreement Establishing the World Trade Organization.

Trademark Defined.

Trademark means: (1) mark used by person to distinguish wares or services manufactured, sold, leased, hired or performed by that person from those of others; (2) certification mark, which is mark used to distinguish wares or services that are of defined standard with respect to their quality or working conditions, class of persons or area within which they have been produced or performed; (3) distinguishing guise, which is shaping of wares or their containers or mode of wrapping or packaging wares, appearance of which is used by person to distinguish that person's wares or services from those of others; or (4) proposed trademark, which is mark that is proposed to be used by person for purposes mentioned in (1) supra. (§2).

Prohibited Marks.

Prohibited marks include use of marks suggesting royal, vice-regal or governmental approval or patronage, Red Cross, United Nations' name or emblem, emblem or mark of any of Armed Forces, university or public authority, name of, or symbols relating to, Royal Canadian Mounted Police, international distinctive sign of civil defence, or any matter which may falsely suggest connection with any living individual, is prohibited, unless consent of proper person has been obtained. (§9). No person may use in way likely to mislead any mark that is recognized in Canada as designating kind, quality, quantity, destination, value, place of origin or date of production of any ware or service. (§10). Nor may denomination used to designate plant variety under Plant Breeders' Rights Act be adopted as trademark in association with plant variety. (§10.1).

Protected Geographical Indications.

Geographical indication is defined as indication identifying wine or spirit as originating in territory of WTO member where characteristic of wine or spirit is attributable to geographic origin and is protected by law of WTO member, except for indication identifying wine or spirit originating in Canada. (§2).

Protected geographical indication means geographical indication kept on prescribed list. (§2). Mechanisms are provided for placement of geographical indication on list, for publication and for objection. (§§11.12, 11.13).

Adoption of protected geographical indication in connection with business as trademark or otherwise is prohibited. There are exceptions for use of personal names and in comparative advertising except on labels or packaging. (§11.16).

Use by Canadian of geographical indication is allowed if protected geographical indication was used continuously in good faith before Apr. 15, 1994 or for at least ten years before that date. (§11.17). Use of indication which is common name for wine or spirit or for grape variety is also allowed. Staggered phase out of 22 indications for wines and 15 indications for spirits that were deemed ``common name'' and were not protected before 2004 is ongoing. After second stage of phase-out (implemented on Dec. 31, 2008) only five indications for wines and 13 indications for spirits remain unprotected. (§11.18[3] to §11.18[5]).

Registrable Marks.

A trademark is registrable if it is not: (1) the name of an individual who is living or has died within 30 years; (2) clearly descriptive or deceptively misdescriptive in the English or French languages of the character or quality of the wares or services; (3) the name in any language of the wares or services; (4) confusing, as defined in the Act, with a registered trademark; (5) prohibited mark; or (6) protected geographic indication for wine or for spirits, in whole or in part. Trademark may be registered notwithstanding (1) and (2) if it has been so used in Canada as to have become distinctive, as defined in Act, on date of application. (§12). Distinguishing guise is registrable only if it has been so used in Canada as to have become distinctive at date of filing and if its exclusive use by applicant is not likely unreasonably to limit development of any art or industry. No registration of distinguishing guise interferes with use of any utilitarian feature embodied in distinguishing guise. (§13).

Persons Entitled to Registration.

Any person may register trademark: (1) which that person has used or made known in Canada in association with wares or services; (2) or which that person has duly registered in his or her country of origin (being member country of Union for the Protection of Industrial Property, as defined in Act, including WTO member and has used in association with wares or services; (3) or any proposed trademark. Registration is permitted in above situations unless, in case of mark previously used in Canada, at date on which that person or his or her predecessor in title first used trademark, or, in case of trademark previously used in foreign country or proposed trademark, at date of application, it was confusing with (1) trademark that had been previously used in Canada or made known in Canada by any other person; (2) or trademark in respect of which application had been previously filed in Canada by any other person; or (3) trade name previously used in Canada by any other person. (§16).

Effect of Registration.

The registration of trademark gives to the owner the exclusive right to its use throughout Canada in association with wares or services for which it is registered, and right to prevent use of confusingly similar trademarks. Some limited rights exist under Act (§7) and at common law with respect to unregistered trademarks. (§§19, 20).

Certification Marks.

A certification mark may be adopted and registered only by a person who is not engaged in the manufacture, sale, leasing or hiring of wares or the performance of services such as those in association with which the certification mark is used. (§23).

Applications.

The Registrar of Trademarks, Ottawa, keeps a register of trademarks, transfers, etc. Applicant for registration of trademark must file with Registrar application containing: (1)

statement of wares or services in association with which mark has been or is proposed to be used; (2) date from which applicant has used trademark in Canada or from which it has been made known in Canada and used in country of Union; (3) date of registration in another country of Union; (4) in case of proposed trademark, statement that applicant intends to use trademark in Canada; (5) address of applicant's principal office or place of business in Canada, if any, and, if applicant has no place of business in Canada, address of his principal office or place of business abroad and name and address in Canada of some person or firm to whom any notice may be sent and upon whom service may be made; (6) a drawing of the trademark; (7) statement that applicant is satisfied that he is entitled to use trademark in Canada in case of design mark. (§30). Trademark applications may be filed electronically.

Foreign Applications and Registrations.

Trademark which applicant has registered in his country of origin, if that country is member of Union, may be registered in Canada if: (1) it is not confusing with registered trademark; (2) it is not without distinctive character; (3) it is not contrary to morality or public order or of such nature as to deceive public; or (4) it is not prohibited mark. (§14). Certified copy of foreign registration must be filed. (§31). Date of filing application in foreign country will be taken as date of filing in Canada in certain circumstances if application in Canada is made within six months of the foreign application. (§34). Such trade-marks are vulnerable to expungement if they are not used in Canada. (§45).

Terms and Renewals.

Any registration made or renewed under the present Trademarks Act is subject to renewal 15 years from date of registration or last renewal, and, unless renewed within that period, or following grace period, will be expunged from register. (§46). Provision is made for expunging trademarks for nonuse. (§45). After expiration of five years from date of registration, no registration shall be expunged or amended or held invalid on grounds of previous use or making known (§17[1]), unless it is established that person who adopted registered trademark in Canada did so with knowledge of that previous use or making known.

Transfer.

A trademark, whether registered or unregistered, is transferable, and deemed always to have been transferable, either in connection with or separately from the goodwill of the business and in respect of either all or some of the wares or services in association with which it has been used. (§48).

Licensees.

Use of trademark by licensee will have same effect as use by trademark owner provided licence gives owner direct or indirect control of character or quality of wares or services. (§50).

Tradenames.

See digests of the laws of the several provinces. See also Quebec Law Digest, category Intellectual Property, topic Trademark and Designs.

20 MINERAL, WATER AND FISHING RIGHTS

20.01 MINES AND MINERALS:

Mines and minerals within provinces may be subject to both provincial and federal jurisdiction. See category 1 Introduction, topic 1.02 Government and Legal System, subhead Jurisdiction of Provincial Legislatures.

Licences and leases for mining concessions in Northwest Territories, Yukon, Nunavut, Canadian Arctic and under territorial waters are available and may be granted by Government on application. See category 22 Property, topic 22.03 Public Lands. Mining and control of uranium and certain other nuclear substances under jurisdiction of appointed Minister. See Nuclear Energy Act (c. A-16).

Administration and disposition of minerals in Canada, except minerals situate in any province or in Yukon Territory, is governed by Canada Mining Regulations under Territorial Lands Act (c. T-7), as administered by either Department of Indian Affairs and Northern Development or Department of Energy, Mines and Resources, depending on specific geographic location of minerals. See also Yukon Surface Rights Board Act (S.C. 1994, c. 43) re dispute resolution.

Oil and Gas.

Production safety, environmental and employment matters subject to provincial and federal regulation. See Canada Oil and Gas Operations Act. S.C. 1992, c. 35. See also Oceans Act, S.C. 1996, c. 31 and regulations thereunder re offshore oil production and oil and gas installations. Licence issued by National Energy Board required for exports and for imports of natural gas. Under Energy Administration Act, (c. E-6), Government has power to regulate prices of Canadian crude oil and natural gas that enters international or interprovincial trade. Land tenure in northern and offshore Canada is subject to Canada Petroleum Resources Act, 2nd Supp. (c. 36), as amended. Various coastal provinces also claim jurisdiction over offshore exploration and federal government is also party to agreements with such provinces.

Administrative and legislative jurisdiction over oil and gas transferred to Yukon Territory, now analogous to power of province. Power of administration and control over oil and gas may be regained by Government of Canada if necessary for settlement of aboriginal land claim, Canada-Yukon Oil and Gas Accord Implementation Act. (S.C. 1998, c. 5).

See category 15 Foreign Trade and Commerce, topic 15.03 Foreign Investment.

Taxes.

Income Tax Act contains provisions relating specifically to exploration and development expenses, falling under headings: Canadian Exploration Expenses; Canadian Development Expenses; and with respect to Flow-through Shares. There are also specific provisions that provide for capital cost allowance (essentially, tax depreciation on new or expanded mines, oil sands mines and in-situ projects). Deduction is allowed for actual provincial and other Crown royalties and mining taxes paid. Corporations incurring qualifying mineral exploration expenditures can receive tax credit at rate of 15%. Energy Administration Act levies special charges on domestic petroleum and amends Excise Tax Act provisions applicable to natural gas. Canada Mining Regulations impose royalty payable to Government calculated on sliding scale based on value of output of mine.

See also Petroleum and Gas Revenue Tax Act. (c. P-12).

21 MORTGAGES

21.01 MORTGAGES:

Under Interest Act (c. I-18), except in case of real estate mortgages, where interest is made payable at rate by day, week, month or any period less than a year, no rate exceeding 5% may be recovered unless equivalent rate per annum is stated in contract. Where principal or interest secured by mortgage on real estate is made payable on sinking fund plan or so that payments of principal and interest are blended, or on plan that involves allowance of interest on stipulated repayments, no interest whatever is recoverable unless mortgage contains express statement showing amount of such principal money and rate of interest, calculated yearly or half-yearly, not in advance (§6). No fine or penalty or rate of interest can be exacted on any arrears of principal or interest secured by mortgage on real estate which has effect of increasing charge on any such amount beyond rate of interest on principal not in arrears. (§8). Wherever principal or interest secured by mortgage on real estate is not payable until after five years from date, mortgagor may at any time after five years, tender, in full discharge, amount due up to date of payment together with three months interest. (§10[1]). This, however, does not apply to mortgage on real estate given by corporation or a corporation debenture secured by mortgage on real estate. (§10[2]).

Farm Mortgages.

Farm Credit Canada may grant mortgage credit to farmers. Purpose of Corporation is to enhance rural Canada by providing specialized and personalized financial services to farming operations including family farms and to those businesses in rural Canada, including small and medium-sized businesses, that are related to farming. (Farm Credit Canada Act, S.C. 1993, c. 14). Corporation has power to make loans or guarantee loans made to persons or bodies for number of purposes. (§4[2]). For protection of income of producers of agricultural products, federal government may enter into agreement with one or more provinces to set up any of following programs: (i) net income stabilization account program; (ii) gross revenue insurance program; (iii) revenue insurance program; and (iv) crop insurance program. (Farm Income Protection Act, S.C. 1991, c. 22).

Ship Mortgages.

See category 24 Transportation, topic 24.03 Shipping.

See also digests of the laws of the several provinces.

22 PROPERTY

22.01 ABSENTEES:

See digests of the laws of the several provinces.

22.02 ESCHEAT:

See digests of the laws of the several provinces. See also category 3 Business Regulation and Commerce, topic 3.01 Banks and Banking, subhead Unclaimed Deposits.

22.03 PUBLIC LANDS:

Minister of Public Works and Government Services has administration of all federal real property and federal immovables except those under administration of any other Minister, board or agency of Government of Canada or any corporation. See Department of Public Works and Government Services Act. (S.C. 1996, c. 16).

Minister of Indian Affairs and Northern Development has the administration of all lands situated in Yukon Territory, Northwest Territories and Nunavut belonging to Her Majesty in right of Canada except those lands that were immediately before Oct. 1, 1966 under management, charge and direction of any minister, department, branch or agency of Government of Canada other than Minister of Northern Affairs and Natural Resources or Department of Northern Affairs and Natural Resources. See Department of Indian Affairs and Northern Development Act. (c. I-6).

Governor in Council has power by Territorial Lands Act (c. T-7) over lands in Yukon, Northwest Territories or Nunavat that are vested in Crown or of which Government of Canada has power to dispose, with regards to land management zones; sale or lease of territorial lands;

mining rights; reservation from grants; timber; slides, streams and lake fronts; and trespass.

Pursuant to Nunavut Act, S.C. 1993, c. 28 lands in Nunavut acquired with funds of Northwest Territories or controlled by Commissioner of Northwest Territories will be appropriated to Commissioner of Nunavut, subject to laws made by Legislature of Nunavut.

Acquisition, administration and disposition of federal real property by Government of Canada is governed by Federal Real Property and Federal Immovables Act. (S.C. 1991, c. 50).

For information on subject of public lands communications should be addressed to Department of Indian Affairs and Northern Development.

See Department of Indian Affairs and Northern Development Act, c. I-6; Department of Public Works and Government Services Act, S.C. 1996, c. 16; Territorial Lands Act, c. T-7; Federal Real Property and Federal Immovables Act, S.C. 1991, c 50.

22.04 REAL PROPERTY:

See digests of the laws of the several provinces.

23 TAXATION

23.01 ADMINISTRATION:

Federal Parliament has power to raise money by any mode or system of taxation. It imposes customs duty, which is not dealt with in this summary, and various taxes and duties which are discussed hereinafter. Provincial legislatures have authority to impose direct taxes within Province in order to raise revenue for provincial purposes.

All provinces and Federal Government have enacted legislation imposing income tax. All provincial income taxes are collected by Federal Government on behalf of provinces except corporation tax in Ontario (for years ending before Jan. 1, 2009) and Alberta and personal and corporation tax in Quebec. Federal Government grants tax credits in respect of provincial income taxes.

Penalties.

Income Tax Act.

Where amount of tax paid is less than amount payable, interest at prescribed rate (which is adjusted quarterly to reflect prevailing interest rates from previous quarter) is payable on difference of two amounts. (§161[1]). In case of tax evasion, taxpayer is liable on summary conviction to pay additional amount of not less than 50% and not more than 200% of tax sought to be evaded or both fine as described and imprisonment for term not exceeding two years. (§239). For failure to file annual return when required, penalty equal to aggregate of 5% of tax unpaid, and 1% of tax unpaid for each complete month (up to 12 complete months). (§162[1]). For failure to complete information in annual return, penalty is CDN $100 for each such failure. (§162[5]). Failure to file return by trustee in bankruptcy and others will result in penalty of CDN $10 for each day of default, up to maximum of CDN $50. (§162[3]). By §238 fine of not less than CDN $1,000 and up to CDN $25,000 or both fine and imprisonment for term not exceeding 12 months can be imposed on conviction for failure to file return, except that §162 penalty is not then payable, unless penalty was assessed before information or complaint giving rise to conviction was laid. (§239[3]).

For penalties in other taxing statutes, see topics infra and statutes.

23.02 CUSTOMS DUTY AND TAXES:

Customs Duties.

Are determined and primarily imposed under two federal Acts, Customs Tariff and Customs Act. Regard must also be had to Special Import Measures Act and Canadian International Trade Tribunal Act.

Customs Act (R.S.C., c. 1, [2nd Supp.]) sets out basic regulatory framework and requirements for importation or exportation of goods to and from Canada. Customs Tariff (S.C. 1997, c. 36) governs tariff classification and rates of customs duties payable on goods entering Canada.

Part II (§§11-43) of Customs Act imposes certain obligations on importers, including requirement to report goods at customs, declare goods entering Canada and to pay any duties payable. Duties are defined (§2[1]) as including any duties or taxes levied on imported goods under Customs Tariff, Excise Act, 2001, Excise Tax Act, Special Import Measures Act or any other law relating to customs. Actual duties and taxes payable are not set out in Customs Act, only requirement to report all goods that are imported (§12) and to pay such duties and taxes as set out (§17). Product marking and proof of origin requirements have been enacted pursuant to Customs Act. (§§35.01 and 35.1).

Part III (§§44-72.1) of Customs Act sets out calculation and value for duty provisions and appeal rules. Value for duty provisions set out in Customs Act (§§44-56) provide for establishment of dollar value of imported goods upon which duty and tax rates are imposed. Valuation provisions of Customs Act are based on transaction value system set out in Agreement on the Implementation of Article VII of the General Agreement on Tariffs and Trade 1994. Primary basis of valuation is transaction value. (§§47 and 48). Transaction value is price paid or payable for goods, as adjusted, when sold for export to Canada. It represents aggregate of all payments made or to be made by purchaser in Canada, whether directly or indirectly, to benefit of vendor. Alternative bases for valuation exist when transaction value cannot be used. These include deductive value calculation and computed value calculation. (§§51 and 52). Origin of imported goods is determined in accordance with §16 of Customs Tariff. (§57.1). Origin of good will determine what tariff rate is applicable. (See separate discussion below with respect to North American Free Trade Implementation Act, consequential amendments to Customs Act and Customs Tariff and special rules of origin.)

Tariff classification and value for duty decisions may be appealed in first instance to customs officer and in second instance to President of Canada Border Services Agency (``CBSA'') (formerly known as Canada Customs and Revenue Agency). (§§58-66). Decision of President can be appealed to Canadian International Trade Tribunal ("CITT") (§67); this decision can in turn be appealed to Federal Court of Appeal and thereafter Supreme Court of Canada.

Part IV of Customs Act contains special provisions which deal with abatements and refunds. (§§73-81).

Minister may grant abatement in whole or in part of duties and taxes to be paid on imported goods where goods have suffered damage or deterioration during shipment or loss of volume or weight while in bonded warehouse. (§73). Refunds of duties and taxes after they have been paid (as distinguished from abatements before duties are payable) may be obtained when goods have been damaged during shipment, when quantity released is less than quantity upon which duties and taxes were paid, or goods are of inferior quality. (§74).

Under Part V of Customs Act goods exported from Canada must be reported. (§§95-97.2). In addition under Export and Import Permits Act special provisions apply with respect to export of certain goods and reexport of U.S. origin goods from Canada. (See discussion subhead Export and Import Permits Act under category Foreign Trade and Commerce, topic Foreign Trade Regulation.)

Part VI of Customs Act sets out enforcement and offences provisions. (§§98-163.3). These include powers of search and seizure and forfeiture. In addition contravention of Customs Act is punishable either by way of summary conviction and fines up to CDN $50,000 or by imprisonment for term not exceeding six months or by both fine and imprisonment; or, punishable by way of indictable offence and liable to fines up to CDN $500,000 or by imprisonment for term not exceeding five years or by both fine and imprisonment. Enforcement and offence provisions of Customs Act are used also to enforce other Acts including Customs Tariff. (§160).

Customs Tariff.

New, simplified Customs Tariff (S.C. 1997, c. 36) came into force on Jan. 1, 1998. Customs Tariff governs tariff classification and rates of customs duties payable on goods entering Canada. It must be read in conjunction with Customs Act which imposes obligation to pay customs duty. Customs Tariff is administered by CBSA. Customs Tariff contains detailed rules of origin, categories of tariff rates and in its schedule sets out tariff items under which goods must be classified and specific rates of duty applicable to such goods. Effective Jan. 1, 1988, Canada adopted in Customs Tariff the Harmonized Commodity Description and Coding System of tariff classification. (§10). Harmonized System of tariff classification for duty purposes is internationally recognized system of tariff classification. Canadian Customs Tariff is governed by Harmonized System General Rules for Interpretation of Nomenclature, which includes six international rules and three Canadian rules.

Rules of origin determine rate of duty applicable, for example: Most-Favoured-Nation Tariff; United States Tariff; Mexico Tariff; Mexico-United States Tariff; General Preferential Tariff; Least Developed Country Tariff; Chile Tariff; Canada-Israel Agreement Tariff; Costa Rica Agreement Tariff; Iceland Tariff; Norway Tariff; Switzerland-Liechtenstein Tariff and Peru Tariff. Special tariff treatment also exists with respect to goods originating in Australia, New Zealand and Commonwealth Caribbean Countries. (§§29-50).

In Customs Tariff special provision is made for Governor-in-Council to promulgate orders which permit Canada to retaliate against actions of other countries which adversely affect Canadian trade in goods and in services, and for imposition of surtaxes and surcharges. (See §54 and following.) Special bilateral arrangements with respect to agricultural goods, U.S. origin goods, Mexican origin goods, Mexican-U.S. origin goods, Chile origin goods, Israel origin goods, Costa Rica origin goods, Iceland origin goods, Norway origin goods, Switzerland-Liechtenstein origin goods, Peru origin goods, fresh fruits and vegetables and textiles and apparel are given effect to in Customs Tariff. (§§69-76). Customs Tariff and Customs Act also make provision for marking of origin of products imported into Canada. (§§19 and 35.01 and following, respectively). Provision is also made in Customs Tariff for duty deferral, refunds and drawbacks (see §80 and following).

In Oct. 2002, Administrative Monetary Penalty Systems (AMPS) came into effect in Canada. AMPS is civil penalty regime that will apply to contraventions of Customs Act, Customs Tariff and Special Import Measures Act (SIMA), as well as contraventions of terms and conditions of licensing agreements and undertakings. Penalties are graduated and reflect compliance behaviour of importer where there has been failure to accurately report importations.

North American Free Trade Agreement Implementation Act (S.C. 1993, c. 44; Schedule Parts A-D, S.C. 1993, c. 44) establishes separate trade and investment regime with respect to goods, services and investments that originate in Canada, U.S. and/or Mexico or deemed to so originate.

Effective Jan. 1, 1994, Canada, U.S. and Mexico have created free trade zone between their respective territories. While NAFTA does not affect external tariff of each NAFTA country, and each of Canada, U.S. and Mexico continue to apply tariff rates negotiated under GATT or other bilateral or multi-lateral agreements to goods imported from third countries, special and different regime applies with respect to goods that are deemed to "originate" within North American Free Trade zone. These rules are detailed in Customs Act and Customs Tariff and regulations enacted pursuant thereto. Rules of origin are complex and must be reviewed with respect to each product to determine whether or not product qualifies as of NAFTA origin within NAFTA rules.

Pursuant to Customs Tariff (§16) and Customs Act (§164[1.1]), NAFTA Rules of Origin Regulations have been enacted. These Regulations reflect Canada's NAFTA commitments with respect to determination of origin of products wholly provided or particularly produced in Canada, U.S. and/or Mexico. Regulations have been developed jointly by the three NAFTA countries. NAFTA, Regulations and Uniform Rules establish three principal "rules of origin". If a good or product qualifies as of NAFTA origin, preferential duty rates (and in limited circumstances, quota allowances) apply.

Goods wholly obtained or produced entirely in territory of one or more of NAFTA countries qualify as of "NAFTA origin". With respect to manufactured or processed goods, rule of origin is based on changes in tariff classification and/or regional value content. Where each of non-originating materials used in production of a good which undergoes applicable change in tariff classification (as set out in Annex 401 to NAFTA text as incorporated into NAFTA Rules of Origin Regulations) as result of production occurring entirely in territory of one or more of NAFTA countries, or where good otherwise satisfies requirements set out in Annex referenced and no change in tariff classification is required and good satisfies all other requirements under NAFTA Rules of Origin Regulations good will qualify as of "NAFTA origin". Good that is produced entirely in territory of one or more of NAFTA countries exclusively from originating materials also qualifies as of "NAFTA origin". Except for certain textile and apparel items, if good is produced entirely in one of NAFTA countries but one or more of non-originating materials provided for as parts under Harmonized System that are used in production of good does not undergo tariff classification because (a) good was imported into NAFTA territory in unassembled or disassembled form but was classified as assembled good pursuant to General Rule of Interpretation under the Harmonized System, or (b) heading for good provides for and specifically describes both good itself and its parts and is not further subdivided into subheadings or subheading then, provided that specified regional value content of good is not less than 60% where "transaction value method is used" or is not less than 50% where "net cost method is used", that good will qualify as of "NAFTA origin". NAFTA rules of origin are supported by simplified customs procedures including de minimus rule, advance rulings and speedy appeals with respect to NAFTA origin of goods. NAFTA preferential tariff regime is supported through use of certificates of origin which must be supplied.

NAFTA Rules of Origin are supported by Determination of Country of Origin for the Purposes of Marking Goods (NAFTA countries) Regulations. These Marking Rules determine whether or not a good is a good of NAFTA country for marking purposes and accordingly will qualify for preferential tariff treatment. These rules are in addition to existing marking rules. Canada has limited use of these marking rules for tariff preference purposes to agricultural and textile and apparel goods.

Canada has entered into free trade agreements with Israel, Chile and Costa Rica which were implemented in Canada by Canada-Israel Free Trade Agreement Implementation Act (S.C. 1996, c. 33), Canada-Chile Free Trade Agreement Implementation Act (S.C. 1997, c. 14) and Canada-Costa Rica Free Trade Implementation Act (S.C. 2001, c. 28), respectively. In 2009, Canada entered into two new free trade agreements, European Free Trade Association (EFTA, which comprises of Norway, Iceland, Switzerland and Liechtenstein) and Peru. These agreements entered into force with *Canada-EFTA Free Trade Agreement Implementation Act* (S.C. 2009, c. 6), and *Canada-Peru Free Trade Implementation Act* (S.C. 2009, c. 16). In 2008, Canada completed free trade agreements with Colombia and following year it completed free trade agreement with Jordan. Neither are in force yet.

Special Import Measures Act.

Pursuant to Special Import Measures Act (SIMA) (c. S-15) proclaimed in force in Canada on Dec. 1, 1984, Canada may impose antidumping and countervailing duties on goods imported into Canada. SIMA replaces Anti-dumping Act and countervailing duty regulations previously enacted pursuant to Customs Tariff. When first enacted, SIMA reflected Canada's obligations under 1979 GATT Codes on antidumping and subsidies and countervailing duties. Today, SIMA gives effect to Canada's commitments under NAFTA and agreements negotiated under Uruguay round of multilateral trade negotiations including Agreement on Subsidies and Countervailing Measures and Agreement on the Implementation of Article VI of the General Agreement of Tariffs and Trade 1994.

SIMA is administered by CBSA. Domestic producers can file complaint with CBSA alleging that dumped or subsidized imports have caused or are threatening to cause material injury or retardation. (§31). When CBSA determines that complaint should be investigated, it will refer matter to CITT who will determine, within 60 days, if there is reasonable indication of injury. (§34). Concurrent with that investigation, CBSA will investigate to decide, within 90 days (with possibility of extension for further 45 days), whether there is reasonable indication that subject goods are being dumped or subsidized. (§38).

If, as result of either investigation, CBSA or CITT is of opinion that there is insufficient evidence of dumping or subsidizing, margins of dumping or amount of subsidies is insignificant, actual or potential volume of dumped or subsidized goods is negligible or evidence does not disclose reasonable indication that dumping or subsidization has caused injury or retardation or is threatening to cause injury, investigation must be terminated. (§35). Insignificant or negligible has been defined as margin of dumping of less than 2% of export price or amount of subsidy of less than 1% of export price. Volume of dumped goods generally is defined to be negligible if volume is less than 3% of total of like goods exported to Canada from all countries. (§2).

Where CITT makes preliminary determination of injury and CBSA makes preliminary determination of dumping or subsidization, provisional duties are imposed. (§8). Matter is then referred to CITT who conducts investigation into whether dumping or subsidization has caused injury or retardation or is threatening to cause injury. (§42).

If CITT determines that no injury has occurred, such provisional duties are subject to refund and where CITT finds injury, duties that have been collected in amount greater than final assessment, partial refund will be made. Further, SIMA provides for undertakings by exporters to cease dumping which permits investigations to be terminated. (§49).

SIMA provides for review of findings within five years of last finding or order. CITT decides whether to conduct expiry review. (§76.03). If CITT decides to initiate review, CBSA then determines whether there is likelihood of continued or resumed dumping or subsidizing of goods if order or finding expires. If CBSA determines that such likelihood exists, CITT conducts inquiry into likelihood of injury or retardation to Canadian domestic producers.

Two-tiered structure for appeals is set out in SIMA pertaining to whether goods are subject to antidumping or countervailing duties or in what amount. Decisions of President of CBSA may be appealed and goods subject to antidumping or countervailing duty orders or findings of CITT or Governor-in-Council made under Act can be appealed.

Special provisions apply as result of North American Free Trade Agreement

Implementation Act (S.C. 1993, c. 44, Schedule Parts A-D) to goods imported from Mexico or U.S. to Canada. These include provision that Mexican or U.S. Government as well as Mexican or U.S. producers, manufacturers or exporters may appeal in relation to Mexican or U.S. origin goods, as appropriate, whether or not Canadian importer appeals. Such appeals must address one of following issues: whether imported goods are in fact subject to anti-dumping or countervailing orders; what is proper normal value pertaining to dumped goods or amount of subsidy pertaining to subsidized goods; and proper export price pertaining to dumped goods or amount of export subsidy pertaining to subsidized goods. Appeal to CITT must be made within 90 days after date of President's decision. Decisions of CITT can be appealed to Federal Court of Canada.

Under North American Free Trade Agreement Implementation Act special provisions apply with respect to goods originating in Mexico and U.S. These include that certain decisions of President, such as final determinations of dumping or subsidization as well as decisions of CITT, including material injury findings may be reviewed by Bi-National Panel established under c. 19 of North American Free Trade Agreement. Jurisdiction of Panel is limited to determining whether or not decision being reviewed was made in accordance with applicable laws. Decision of panel itself can be appealed by way of extraordinary challenge. Appeal grounds are limited to errors of law or bias on part of member or members of Panel whose decision is being appealed.

Parties may seek judicial review of decision of either CITT or CBSA to Federal Court of Canada.

Canadian International Trade Tribunal.

CITT was established under Canadian International Trade Tribunal Act. (R.S.C., c. 47, [4th Supp.]). Main legislative framework governing work of CITT is aforementioned Act and its regulations, special rules and procedures, and Special Import Measures Act, Customs Act, Excise Tax Act, North American Free Trade Agreement Implementation Act and World Trade Organization Agreement Implementation Act. CITT acts as administrative court in connection with appeals from CBSA rulings and in connection with injury findings and anti-dumping and countervailing duty cases. CITT also has advisory role with powers to conduct research, find facts, hold public hearings and report on broad range of trade-related matters. These programs relate to various import safeguard inquiries and generally inquiries into trade and tariff matters.

Where imported goods are imported in increased quantities and under conditions which cause or threaten serious injury to domestic producers of like or directly competitive goods, safeguard action can be taken under CITT Act. (§22 and following). There is no requirement that imported goods must be dumped or subsidized prior to safeguard action being instituted. Action can be commenced by filing complaint with CITT which, if it determines that complaint is properly documented, will then conduct inquiry. (§§22-37). Complainant must establish and CITT must find that goods subject to complaint are being imported in such increased quantities and under such conditions as to be principal cause of serious injury, or threat thereof to domestic producers of like or directly competitive goods. CITT Act requires that in order for import of goods to be principle cause of serious injuries, it must determine that increased importation of goods is important cause and not less important than any other cause. (§§26 and 27). Where CITT determines that increased volume of imported goods is not principal cause of serious injury or that no serious injury actually exists, then inquiry is terminated. Where serious injury is found, then CITT must report to Governor-in-Council and Minister of Finance. Ministry and Cabinet may impose appropriate remedy such as additional customs duties, import quotas or surtaxes. (§§29-30).

Pursuant to recently enacted provisions in CITT Act, surtax or limitation on import volumes can be imposed on goods originating in The People's Republic of China when they are imported in such increased quantities or under such conditions as to cause or threaten to cause market disruption to domestic producers of like goods. (§§30.21-30.22). Market disruption is interpreted to mean rapid increase in importation of goods that compete with domestically produced goods, so as to be significant cause of material injury, or threat of material injury. These measures cease to have effect on Dec. 11, 2013. (§30.26).

Canada's federal government procurement practices are subject to review under NAFTA, WTO-Agreement on Government Procurement (WTO-AGP), Agreement on Internal Trade (AIT), and Canada-Chile Free Trade Agreement (CCFTA). Pursuant to WTO-AGP, signatories to that plurilateral agreement may review Canada's federal government procurement practices where value of goods are: CDN $217,400 for contracts for goods; CDN $217,400 for contracts for services and CDN $8,300,000 for construction contracts. These amounts are in effect from Jan. 1, 2008 to Dec. 31, 2009.

Pursuant to these trade agreements, federal government, and in some cases provincial and municipal governments, must undertake procurements in manner which respects principles of fairness, “national treatment” and “non-discrimination”. Where federal government has been conducted in manner which is contrary to one of agreements, CITT can make recommendation to procuring government entity that it bring its procurement practices into alignment with applicable trade agreements. In some cases, CITT can, for example, recommend that contract be cancelled and redone or that contract be awarded to complaining party. CITT can award costs, including compensation for lost profits and lost opportunity.

23.03 EMPLOYMENT TAXES:

Unemployment Compensation Tax.

Employment Insurance Act, S.C. 1996, c. 23, provides for insurance against unemployment of certain classes of employed persons, with certain exceptions. Both employers and employees are generally required to make contributions based on weekly earnings of employees.

Employers must deduct each employee's contribution from his wages and make a contribution equal to 1.4 times employee's contribution to scheme. Employers must deduct and remit employees' premiums and remit employers' premiums together with information return to Receiver General of Canada.

23.04 ESTATE TAX:

See topic 23.07 Income Tax, subhead Capital Gains. See also digests of laws of the several provinces, category Taxation, topic Inheritance Tax.

23.05 EXCESS PROFITS TAX:

No excess profits tax in effect.

23.06 GIFT TAX:

See topic 23.07 Income Tax, subhead Capital Gains.

23.07 INCOME TAX:

Income Tax Act in effect. (R.S.C., c. 1, [5th Supp.]).

Liability for Tax.

(Part I, Div. A). Following, among others, are subject to tax: every person resident in Canada at any time in the year; every person who was employed in Canada, carried on a business in Canada, or disposed of taxable Canadian property at any time in the year or a previous year. "Person" includes any body corporate and politic and heirs, executors, administrators and legal representatives of such person but does not include partnership unless specifically provided. "Resident" includes among others: Persons who sojourned in Canada more than 183 days; members of Canadian Forces; corporations incorporated in Canada after Apr. 26, 1965; corporations incorporated in Canada before Apr. 27, 1965 and resident or carried on business in Canada in fiscal year or any preceding fiscal year of corporation ending after Apr. 26, 1965. Residents of Canada pay income tax on worldwide taxable income. Nonresidents pay income tax on taxable income earned in Canada. Taxable income is income less deductions allowed.

Exemption from Tax.

(Part 1, Div. H). There are 38 specific scenarios under which exemptions are granted to taxpayers. Some of more significant entities that are exempt from Canadian income tax include: corporations at least 90% or more of capital of which is owned by government of Canada or government of province; Canadian municipal corporation; wholly-owned subsidiary of above-described corporation; trusts established in connection with certain registered savings plans; pension trusts and corporations; registered charities; not for profit organizations (other than charities); mutual insurance corporations and others.

Members of Armed Forces not exempt from income tax but certain travelling and separation allowances received under service regulations as members of Canadian Forces are not included in calculation of income.

Officers or Servants of Foreign Governments.

Officials and some members of their families will be exempt from Canadian income tax provided that Canada has reciprocal agreement with foreign government employing particular official.

Computation of Income.

(Part I, Div. B, Subdivision a). Income of taxpayer from office or employment includes: Salary, wages or other remuneration, gratuities; value of board, lodging (except reasonable allowances at "special work site"), most allowances received from employers for personal or living expenses, and other benefits received or enjoyed in course of such office or employment; directors or other fees; amounts allocated under employees profit sharing plan, amounts received in respect of loss of income pursuant to sickness, disability or income maintenance insurance plans; reasonable standby charge for automobile; benefits from salary deferral arrangements and employee benefit plans or trusts; certain loans to officers, employees and shareholders; and stock option benefits.

Deductions from Income from Office or Employment.

(Part I, Div. B, Subdivision a). As follows: Certain amounts if taxpayer member of clergy, teacher, employee of railway company, salesperson, transport employee; legal expenses incurred to collect or establish right to salary or wages; annual dues for membership in professional, union, or public servant organization; interest on borrowed money used to purchase automobile used in performance of duties of employment and that portion of its capital cost as permitted; contributions payable under registered pension fund or plan with limitations; and in certain circumstances amounts in respect of work space in home.

Capital gains realized after Dec. 31, 1971 are taxable in part. (Part I, Div. B, Subdivision c). Taxable capital gains for year are equal to ½ of capital gains. Taxable capital gains included in income. Allowable capital losses for year are equal to ½ of capital losses for year. Allowable capital losses are deductible in computing income to extent of taxable capital gains. Allowable capital losses can be carried back three years and forward indefinitely. Capital gain arises on actual or deemed disposition of property. Deemed dispositions include, among others, following events: taxpayer makes gift; taxpayer dies; taxpayer gives up Canadian resident status. Individuals resident in Canada may claim cumulative exemption of up to CDN $750,000 for capital gains realized from qualified small business corporation shares and qualified farm property. For property held on Jan. 1, 1972, in order to not tax capital gains accrued prior thereto, taxpayer's cost base may be measured by either: (1) Fair market value on valuation day, or (2) tax free zone method. Valuation day for publicly traded securities is Dec. 22, 1971, for other property, Dec. 31, 1971.

Other Sources of Income (Part I, Div. B, Subdivision d).—Also included in income of taxpayer are following, among others; superannuation or pension benefit; retiring allowance; death benefit; benefit under Unemployment Insurance Act or Employment Insurance Act; under certain social assistance or financial assistance programs; certain worker's compensation payments; support payments received pursuant to court order or written agreement; annuity payments; proceeds received on cancellation of annuity contract; amounts received under unemployment benefit plan, registered retirement savings plan, home buyers' plan, deferred profit sharing plan; certain amounts received if insurance interest disposed; legal costs awarded in connection with assessment of income tax or decision of Canada Employment and Immigration Commission, or Canada Employment and Insurance Commission; amounts received for research to extent exceeding expenses incurred; amounts received as repayments of scholarship grants and bursaries; payments from educational savings plans; and earnings supplements.

Deductions in Computing Income (Part I, Div. B, Subdivision e).—Following, among others, may be deducted in computing taxpayers' income; Capital element of each annuity payment included in computing taxpayer's income; support payments (other than child support amounts) paid pursuant to court order or written agreement; premium paid under registered retirement savings plan or registered retirement income fund for taxpayer or spouse; lump-sum payments to various retirement savings plans if amount was included in income; fees incurred in appealing assessment under Income Tax Act, Canada Pension Plan or decision of Canada Employment and Immigration Commission, or Canada Employment and Insurance Commission; certain moving expenses within Canada; certain child care expenses; attendant care expenses; certain allowances as allowed by regulation in respect of oil, gas well, mine or timber limit; certain special exploration and development expenses incurred by principal-business corporations (corporation carrying on business of production, refining and marketing, petroleum or natural gas, mining or exploring minerals, fabricating metals, operating pipeline, or producing or marketing sodium chloride or potash or business which includes manufacturing products which involve processing sodium chloride or potash); certain exploration and development expenses incurred by individual or corporation other than principal-business corporation.

Tax credits permitted to individual (Part I, Div. E) in computing tax payable. Amounts noted below are 2008 amounts and most are indexed. Personal tax credits include: Basic personal credit of CDN $1,440. If supporting common-law or married spouse credit of CDN $1,440, no longer subject to reduction if based on spouse's income. If no spouse or does not support or live with spouse and is not supported by spouse, spousal credit is available for supported child or certain other dependant living with person. Credit for mentally or physically infirm dependant of CDN $614, subject to reduction if dependant has income over CDN $5,810. Credit for persons over 65 of CDN $791, subject to reduction if person has income over CDN $31,524. Credit of up to CDN $310 for certain pension income. Medical expense credit of 15.25% of expenses in excess of lesser of CDN $1,962 and 3% of income. Employment credit of 15.25% of lesser of CDN $1,000 and individual's employment income. Disability credit of CDN $1,053. Tuition fees credit of 15.25% of eligible tuition fees paid to qualified institution. Credit of 15.25% of unemployment insurance premiums and Canada pension plan contributions. Charitable donations credit of 15.25% of lesser of CDN $200 (unindexed) and individual's total charitable gifts for year plus 29% of total charitable gifts in excess of CDN $200.

Income of taxpayer from business or property (Part I, Div. B, Subdivision b) is taxpayer's profit therefrom for year calculated in accordance with ordinary commercial practice, except where specific statutory rules provide otherwise. Individuals generally are taxable on income from property (such as dividends, rents and royalties). Profits from business may be calculated on cash or accrual basis for fishermen and farmers; all other taxpayers calculate profits from business on accrual basis.

Nonresidents pay tax under Part I (Div. D) or Part XIII. Generally, tax is paid under Part I on nonresident's income from duties or offices and employment performed in Canada, and income from businesses carried on in Canada; taxable capital gains from dispositions of taxable Canadian property. Taxable Canadian Property refers to property with significant nexus to Canada. Examples of taxable Canadian property include real property situated in Canada; property used in business carried on in Canada; shares of private corporation resident in Canada; capital interest in trust resident in Canada as well as partnerships, public corporations resident in Canada, nonresident corporations and nonresident trusts that satisfy certain Canadian asset requirements. If nonresident disposes of any taxable Canadian property, nonresident is required to file notice with Minister setting forth name and address of proposed purchaser, description of property, estimated amount of proceeds and, amount of adjusted cost base (i.e., generally, if depreciable property, capital cost thereof or cost to taxpayer as adjusted under §53) to taxpayer of property. After tax paid or security furnished Minister will issue certificate. Nonresidents subject to tax under Part I generally compute their tax liabilities (on tax base described above) in same manner specified for Canadian residents. Under Part XIII, nonresidents are liable for 25% tax on gross amount of several types of payments received from Canadian residents including: management or administration fee, dividends, estate or trust income, rents, royalties, certain superannuation or pension benefits and registered retirement savings plans. Part XIII tax must generally be withheld and remitted by Canadian resident payor. Rate of 25% may be reduced by applicable tax treaty.

Part-time residents are taxed in accordance with §114 which restricts taxpayer's ability to claim certain tax deductions and credits that are typically available under Part I. Part-time residents may deduct from tax otherwise payable certain taxes paid to country other than Canada. (§126).

Rates of tax applicable to individuals on taxable income earned in Canada are graduated. Top marginal rate of federal taxation is 29% on taxable income in excess of CDN $120,887 (indexed for inflation). Provincial income taxes (except Quebec) are calculated as percentage of federal taxable income. Territorial income taxes are calculated as percentage of federal tax. Provincial and territorial income tax systems (except Quebec's) are administered by federal government.

Rate of tax applicable to corporations on taxable income earned in province is 19% federal tax plus prevailing provincial tax rate. Active business income, manufacturing and processing income and certain investment income is taxed at preferential rates. There is no federal capital tax. Tax not deductible in computing income.

Basic rate of tax applicable to inter vivos trusts on taxable income or taxable income earned in Canada is 29%. In many circumstances trusts can reduce taxable income by distributing or allocating income to beneficiaries.

Returns to be filed with Minister in prescribed form without notice or demand; in case of corporation, within six months from end of their fiscal year except for registered charities; in case of individual on or before Apr. 30 in year following previous calendar year except where individual dies after Oct. and before Apr. 30, then six months after date of death by legal representative; in case of estate or trust, within 90 days of year end. Others as required by notice. (§150).

Payment.

Persons paying certain amounts to taxpayers must deduct and withhold prescribed amount and remit to Receiver General of Canada. (§153). Amounts subject to this rule include salary, wages or other remuneration, superannuation or pension benefit, retiring allowance, payment out of registered retirement savings plan or registered retirement income fund, amount payable on termination payment, or after death in recognition of service, benefit under Employment Insurance Act, amount under supplementary unemployment benefit plan, annuity payment, fees, commissions or other amounts for services, payment under deferred profit sharing plan, or prescribed benefit under government assistance program. Generally, others must pay on or before Mar. 15, June 15, Sept. 15, and Dec. 15 in year amount equal to 1/4 estimated tax for such year. (§156). If estimated tax payable by individuals in present and two previous taxation years did not exceed CDN $2,000, installment payments are not required. (§156.1). Corporations must pay during 15 months period ending three months after close of their fiscal year either: (1) 1/12 estimated tax before last day of each of first 12 months of such period, (2) 1/12 of its installment base for immediately preceding fiscal year before last day of each of first 12 months of such period, or (3) 1/12 of its installment base for second fiscal year preceding before last day of each of first two months in present year and 1/10 of amount remaining before last day of each of ten months remaining; and remainder before end of third month following end of year if corporation entitled to small business deduction, otherwise end of second month following end of year. (§157). Third party civil penalties also exist.

Penalties.

Persons failing to make a return liable to penalty ranging from 5% of tax unpaid to 200% of tax unpaid if wilfully evading payment.

Refunds may be made without application on any overpayment of tax with interest at a prescribed rate. (§164).

Objections and Appeals.

Taxpayers other than individuals may, within 90 days of mailing notice of assessment, serve Minister with notice of objection to assessment in prescribed form. Individuals may within later of 90 days of mailing notice of assessment or day that is one year after balance due day for individual for taxation year, serve Minister with notice of objection to assessment in prescribed form. Appeals are to Tax Court of Canada with right of appeal to Federal Court of Appeal and limited right of appeal to Supreme Court of Canada.

23.08 INHERITANCE TAX:

See digests of the laws of the several provinces.

23.09 SALES AND USE TAXES:

See also digests of laws of various provinces.

Goods and Services Tax (GST)/Harmonized Sales Tax (HST).

The Excise Tax Act (c. E-15). GST/HST is form of value added taxation (“VAT”) and resembles in many respects VAT applied in most OECD countries.

GST/HST is multi-stage tax levied at each stage in production and distribution chain in respect of most goods and services in Canada. Tax is imposed on recipient of supply and is generally collected from recipient by supplier where supplier is GST/HST supplier registrant. Most persons who make taxable supplies in Canada in course of commercial activities are required to become registrants and collect GST/HST. Taxable supply and commercial activity are defined very broadly on value of consideration for supply. HST is calculated at rate of 13% and applies in participating provinces (Newfoundland and Labrador, Nova Scotia and New Brunswick) and consists of blend of GST and provincial sales tax formerly separate in those provinces.

GST is calculated at rate of 5%. Registrants may be entitled to claim offset (referred to as "input tax credit") against tax collected by it for GST paid by it on any property and services used in its commercial activities. Difference between tax collected by registrant and registrant's input tax credits for reporting period is referred to as "net tax". If positive (i.e. tax collected exceeds tax paid) net tax is required to be remitted to Receiver General. Conversely, net tax is refunded to registrant where input tax credits exceed tax collected in reporting period. Purpose of input tax credit mechanism is to ensure that GST/HST applies only on value of final consumer sales and that all business inputs are relieved from tax.

Nonresidents who provide taxable goods or services in Canada must register for and collect GST if they carry on business in Canada. Nonresidents who register must post security for tax collected unless nonresident conducts business from permanent establishment.

GST generally also applies to importation into Canada of goods and certain services and intangible property for use in Canada. GST payable by registrant on imports is eligible for input tax credit mechanism discussed above.

There are two significant categories of transactions which do not attract GST. No GST is payable by purchaser of "exempt supplies". Supplier of exempt supply, however, is not entitled to claim input tax credits in respect of GST paid by it on its purchases to extent that they relate to making of exempt supplies. On "zero-rated supplies" again no GST is payable by purchaser but supplier of zero-rated supply is entitled to claim input tax credits in respect of GST paid on purchases used to provide zero-rated goods or services. Exempt supplies include sales of used residential property, health care services, educational services, child and personal care services, legal aid services, most financial services and certain supplies made by charities and public sector bodies. Zero-rated supplies include prescription drugs, medical devices, basic groceries, certain agricultural and fishing products, exports, certain travel and transportation services, and certain financial services.

Rebates of GST are payable in certain circumstances.

23.10 TREATIES AND AGREEMENTS:

Foreign Tax Agreements.

Canada-United States Income Tax Convention (1980) makes provision for avoidance of double taxation and prevention of fiscal evasion of income taxes. Conventions or Agreements of similar nature have been signed with United Kingdom and Northern Ireland, Algeria, Argentina, Armenia, Australia, Austria, Azerbaijan, Bangladesh, Barbados, Belgium, Brazil, Bulgaria, Cameroon, Chile, China, Colombia (not in force), Croatia, Cyprus, Czech Republic, Denmark, Dominican Republic, Ecuador, Egypt, Estonia, Finland, France, Gabon, Germany, Greece (not in force), Guyana, Hungary, Iceland, India, Indonesia, Ireland, Israel, Italy, Ivory Coast, Jamaica, Japan, Jordan, Kazakhstan, Kenya, Korea, Kuwait, Kyrgyzstan, Latvia, Lebanon (not in force), Lithuania, Luxembourg, Malaysia, Malta, Mexico, Moldova, Mongolia, Morocco, Netherlands, New Zealand, Nigeria, Norway, Oman, Pakistan, Papua New Guinea, Peru, Philippines, Poland, Portugal, Romania, Russia, Senegal, Singapore, Slovak Republic, Slovenia, South Africa, Spain, Sri Lanka, Sweden, Switzerland, Tanzania, Thailand, Trinidad and Tobago, Tunisia, Turkey (not in force), Ukraine, United Arab Emirates, Uzbekistan, Venezuela, Vietnam, Zambia and Zimbabwe.

24 TRANSPORTATION

24.01 AIRCRAFT:

Regulation of Civil Aviation.

Control of aerial navigation throughout and beyond Canada comes under provisions of Aeronautics Act (c. A-2), and Canadian Aviation Regulations (SOR/96-433). Administration of Aeronautics Act and Air Regulations is responsibility of Department of Transport (also known as Transport Canada) under leadership of elected Minister of Transport.

Commercial Air Carriage.

Canadian Transportation Agency (formerly known as National Transportation Agency) is empowered to inquire into matters relating to transportation, to report thereon, and to make recommendations to Minister of Transport. In particular, Canadian Transportation Agency considers commercial air carriage licence applications and is empowered to approve, reject, cancel or reinstate such licenses. Canada Transportation Act also implicitly allows air carriers to contract with reference to their tariffs for terms to conditions of carriage. Final decisions of Canadian Transportation Agency may be appealed to Federal Court of Appeal on questions of law or jurisdiction; and Governor in Council may vary or rescind any order of Agency on petition of any party or on own motion. (Canada Transportation Act, S.C. 1996, c. 10).

International Air Carriage.

Pursuant to Carriage by Air Act (c. C-26) Canada has adopted as law, with some qualification, provisions of 1929 Convention for the Unification of Certain Rules Relating to International Carriage by Air (“Warsaw Convention”), as amended by Hague protocol of 1955. Warsaw Convention addresses, among other things, enforcement of rights and limits of liability in international commercial air carriage. Canada is also signatory of 1944 Chicago Convention on International Aviation (which addresses regulation of international civil air carriage), and is member state of International Civil Aviation Organization (ICAO). In addition, Canada has concluded bilateral agreements with approximately 60 other countries each providing terms of mutual commercial aviation access.

Aviation Claims.

Passenger claims against airlines for losses arising out of international air carriage may be prosecuted pursuant to provisions of Carriage by Air Act. While such claims may be prosecuted in Federal Court of Canada, it is more efficacious and certainly more common for such claims to be prosecuted in superior courts of provinces. Aviation claims arising out of domestic air carriage are not governed by Carriage by Air Act, and are prosecuted in superior courts of provinces.

Aviation Safety and Accident Investigation.

Canadian Transportation Safety Board is established to advance aviation safety in Canada. Board, which is independent from Transport Canada, is responsible for investigating aviation occurrences; where necessary, holding public hearings into contributing factors and causes of aviation occurrences; reporting publicly on results of such investigations; and making recommendations to Minister of Transport on matters relating to aviation safety. Board must submit annual report to Parliament. (Canadian Transportation Accident Investigation and Safety Board Act, S.C. 1989, c. 3).

24.02 MOTOR VEHICLES:

See digests of the laws of the several provinces.

24.03 SHIPPING:

See in particular Canada Shipping Act, 2001 (S.C. 2001, c. 26), which came into force on July 1, 2007 and replaced former Canada Shipping Act (R.S.C. 1985, c. S-9, as amended). See also Marine Liability Act (S.C. 2001, c. 6), Federal Courts Act (R.S.C. 1985, c. F-7) and Canada Marine Act (S.C. 1998, c.10).

Comprehensive body of federal statutes, regulations and case law, known as ``Canadian maritime law'', governs shipping in Canada. Canadian maritime law is uniform throughout Canada. Derived from maritime law of England (including both civil law and common law elements), it has been incorporated into Canadian law and is not law of any province. There is no referential incorporation of provincial law. (See ITO-International Terminal Operators Ltd. v. Miida Electronics Inc. [1986] 1 S.C.R. 752; Q.N.S., Paper Co. v. Chartwell Shipping Ltd. [1989] 2 S.C.R. 683; Ordon Estate v. Grail [1998] 3 S.C.R. 437; Isen v. Simms [2006] 2 S.C.R. 349.)

Ship Purchase.

Vessels or shares therein may be acquired by construction, by purchase or by capture in war. Canada Shipping Act, 2001, Part 2, provides for registration of vessels in Canadian Register of Vessels if they are not registered, listed or otherwise recorded in foreign state and are wholly owned by ``qualified persons'' (i.e. Canadian citizens or permanent residents or corporations incorporated under laws of Canada or province thereof). (§§2, 46[1] and 47[a]). Vessels owned by foreign corporations may also be registered in Canada under certain conditions. (§47[b]). Changes of ownership in Canadian vessels or shares therein are registered. (§73). In some cases, on application of interested person, Federal Court or another court whose rules provide for in rem procedure may order sale of Canadian vessel or share to ``qualified person'' if unqualified person acquires it (§74), or may deal with vessel or share for specified period (§75).

Ship Registration.

For purposes of registration, property in vessel is divided into 64 shares. (§53[1]). Fractions of share cannot be registered. (§53[7]). No more than five persons may be registered as joint owners of vessel or share thereof. (§53[5]). Particulars to be entered on certificate of registry: (1) Name and description of vessel; (2) official number; (3) name and address of owner or owners and of authorized representative; (4) name and address of authorized representative for qualified foreign corporation as owner; and (5) name and address of qualified bareboat charterer. (§54[2]). Vessels under construction in Canada may be temporarily recorded in Register as being built in Canada. (§49).

Ship Mortgages, Maritime Liens and Statutory Liens.

Owner of registered vessel (including vessel recorded as being built in Canada) or share therein may offer vessel or share concerned as security for mortgage, which may be registered. (§65[1]). Mortgagee is not, by reason of mortgage, deemed to be owner of vessel, except to extent required to make vessel or share available as mortgage security, nor is mortgagor deemed to have ceased to be owner. (§68). Registered mortgages have priority according to date registered (§67[1]), unless all mortgagees file written consent with Chief Registrar to change priorities. (§67[2]). Every mortgagee has absolute power to sell vessel or any share therein, subject to any limitation set out in registered mortgage. (§69[1]). Subsequent mortgagee may not sell vessel or share therein, except by court order, without agreement of all prior mortgagees. (§69[2]). Mortgages are not affected by bankruptcy of mortgagor, and mortgage is preferred to claims of other creditors of bankrupt or of their trustee or agent. (§70). Transfers of mortgages must be registered. (§71[1]).

Maritime liens include those in respect of bottomry and respondentia bonds, seamen's and masters' wages, salvage, damage, and disbursements of master on behalf of ship. Maritime liens permit arrest of ship through action in rem. They rank higher than most other maritime claims, notably ship mortgages, and survive sale of ship (other than judicial sale).

Under amendments to Marine Liability Act, S.C., 2001, c. 6, §139(2), in force Sept. 21, 2009 (S.C. 2009, c. 21), there is now statutory maritime lien for any person carrying on business in Canada, against foreign vessel for claims that arise in respect of goods, materials or services wherever supplied to foreign vessel for its operation or maintenance, including stevedoring and lighterage (§139[2][a]), and for claims arising out of a contract relating to the repair or equipping of the foreign vessel (§139[2][b]). Subject to section 251 of Canada Shipping Act, 2001 (regarding action in rem for claim in respect of stevedoring for bare-boat charterer), for purposes of §139(2)(a), with respect to stevedoring or lighterage, services must have been provided at request of owner of foreign vessel or person acting on owner's behalf.

Statutory liens (also called ``statutory rights in rem'') are conferred by federal statute (in particular Federal Courts Act, R.S.C. 1985, c. F-7, §22), and generally rank lower in priority to maritime liens and ship mortgages. Statutory liens permit arrest of ship through action in rem, but only if beneficial ownership of ship has not changed between arising of cause of action and commencement of action in rem (Federal Courts Act, §43[3]). Statutory liens for providing necessaries to ship (e.g. supplies, repairs, towage, etc.) also require personal liability of shipowner on necessaries claim when cause of action arises.

Limitation of Liability.

Shipowners (also including charterers, ship managers and operators, salvors and insurers) may limit their liability for various maritime claims pursuant to provisions of Convention on Limitation of Liability for Maritime Claims, 1976, as amended by Protocol of 1996, to which Canada gave effect by Part 3 of Marine Liability Act, S.C. 2001, c. 6. Limitations of liability (in Special Drawing Rights) are based on sliding scale, related to type of claim (loss of life/personal injury or other) and tonnage of ship. Limitations may be broken on proof by claimant that loss resulted from personal act or omission of party seeking limitation, committed with intent to cause loss or recklessly with knowledge that such loss would probably result. Special limitations are provided for ships under 300 tons and for owners of docks, canals and ports.

Liability for Ship-Source Pollution.

Part 6 of Marine Liability Act sets out rules on civil liability and compensation for ship-source pollution in Canadian waters, including Canada's Exclusive Economic Zone. Owners are strictly liable for oil pollution damage, clean-up expenses and reasonable environmental reinstatement measures, subject to limited defences, but may invoke special limitation of liability amounts. Limitation may be broken on proof by claimant that oil pollution damage resulted from owner's personal acts or omissions, committed with intent to cause damage or recklessly with knowledge that damage would probably result. Actions must be taken within three years from damage or six years from occurrence, depending on circumstances. Canada has implemented International Convention on Establishment of International Fund for Compensation for Oil Pollution Damage, 1992, and International Convention on Civil Liability for Oil Pollution Damage (``Civil Liability Convention''),1992, as amended by resolution of Oct. 18, 2000. Key provisions of these conventions are now incorporated as schedules to Marine Liability Act as amended by S.C. 2009, c. 21. That same Act as amended also provides legislative basis for coming into force of Protocol of 2003 to International Convention on Establishment of International Fund for Compensation for Oil Pollution Damage, 1992 (``Supplementary Fund Protocol'') and International Convention on Civil Liability for Bunker Oil Pollution Damage, 2001 (``Bunkers Convention'').

Supplementary Fund Protocol provides additional tier of compensation to that provided by International Oil Pollution Compensation Fund, for damages resulting from spill of persistent oil from tankers. Current level of compensation for oil pollution damage caused by tankers in Canada will thus be increased from about $405 million to average of $1.5 billion per incident. Bunkers Convention addresses oil pollution caused by bunkers of ships other than tankers, bunker fuel being any fuel used for propulsion or operation of motorized vessels. Convention includes compulsory insurance provisions, as means of ensuring that shipowners have necessary coverage in event of bunker oil spills. Relevant provisions of Supplementary Fund Protocol and Bunkers Convention, annexed to Marine Liability Act, will come into force for Canada on date to be fixed by order of Governor in Council. Canada has also implemented International Convention on Salvage, 1989 and International Convention on Oil Pollution Preparedness, Response and Co-operation, 1990.

On June 28, 2005, An Act to Amend Migratory Birds Convention Act, 1994 and Canadian Environmental Protection Act, 1999, S.C. 2005, c. 23, became law in Canada. Amending statute significantly increases maximum fines for polluting Canada's marine environment, establishes minimum fines, and enables ships' officers, directors/officers of corporations, and others to be held personally accountable, as well as provides enforcement powers of arrest, entry, search and seizure in Canada's Exclusive Economic Zone and in high seas in cases of hot pursuit.

Act to amend Arctic Waters Pollution Prevention Act, S.C. 2009, c. 11, was assented to and came into force Aug. 1, 2009. §1 of statute as amended replaces definition of ``arctic waters'' (Arctic Waters Pollution Prevention Act, R.S.C., 1985, c. A-12, §2) by increasing outer limit of Canada's Exclusive Economic Zone from 100 nautical miles to 200 nautical miles from baselines of territorial sea of Canada, in area enclosed by 60th parallel of north latitude and 141st meridian of west longitude. Where international boundary between Greenland and Canada is less than 200 nautical miles from baselines of territorial sea of Canada, outer limit of Canada's Exclusive Economic Zone shall be international boundary. This legislation is designed to permit Canada to exercise jurisdiction to prevent and combat marine pollution in its Arctic waters, within full 200-nautical mile limit of its Exclusive Economic Zone, as permitted by United Nations Convention on Law of Sea 1982, to which Canada is party.

Act to amend certain Acts that relate to environment and to enact provisions respecting enforcement of certain Acts that relate to environment, S.C. 2009, c. 14, received Royal Assent on June 18, 2009 and will come into force by order of Governor in Council. It amends nine federal environmental and wildlife protection statutes. Fines for serious offences committed by individuals may range from $5,000 to $1 million, while corporations may be fined $25,000 to $6 million. Minimum fines are also introduced. Enforcement officers are granted new powers to investigate cases, and courts are granted new sentencing authorities, depending on seriousness of offence. Amendments expand authority to deal with polluters by specifying aggravating factors such as damage to protected area or to unique or vulnerable environment or species, doubling fine ranges for repeat offenders and authorizing suspension and cancellation of licenses, permits or other authorizations of convicted offenders. Corporate offenders must report convictions to shareholders, and public registry is established for reporting corporate offences. Fines imposed by courts will go to ``Environmental Damages Fund'', which provides funding to local environmental improvement initiatives.

Ship Safety.

Canadian Transportation Accident Investigation and Safety Board investigates marine occurrences and is granted powers pursuant to Canadian Transportation Accident Investigation and Safety Board Act (S.C. 1989, c. 3) to conduct investigations into marine occurrences. Its powers include right to seize property. Board also may hold public inquiries and make recommendations to Minister of Transport of Canada on matters relating to marine safety.

Carriage of Goods.

International Convention for Unification of Certain Rules Relating to Bills of Lading, dated Brussels Aug. 25, 1924, as amended by Protocol signed at Brussels on Feb. 23, 1968, and Protocol signed at Brussels on Dec. 21, 1979, governs liability related to carriage of cargo by water, and these provisions are commonly referred to as Hague-Visby Rules. These Rules have been incorporated by reference pursuant to Part 5 of Marine Liability Act and they apply to carriage of goods by water within Canada as well as to international carriage.

Carrier must exercise due diligence to make ship seaworthy before and at beginning of voyage and must properly and carefully load, handle, stow, carry, keep, care for and discharge goods carried. Carriers may be exonerated wholly or partly for cargo loss or damage by any of 17 exceptions to liability enumerated in Rules. But carrier may not reduce or lessen liability by contract otherwise than as Rules permit.

Carrier's liability for loss or damage to or in connection with goods is limited to higher of: 666.67 Special Drawing Rights (``SDR's'') per package or unit or two SDR's per kilogram of gross weight of goods lost or damaged, unless higher limits have been declared before shipment and inserted in bill of lading. Limitations may be broken on proof that damage to goods resulted from act or omission of carrier committed with intent to cause damage or recklessly with knowledge that such damage would probably result.

Consignee must give written notice of loss or damage to goods upon their delivery. Where loss or damage is not apparent, written notice must be given within three days of receipt by consignee.

Action respecting carriage of goods must be commenced within one year of when goods were delivered or should have been delivered. Indemnity actions against third persons must be brought within time allowed by law of court seized of case, but not less than three months from settlement of claim or service of process on party bringing indemnity suit.

Admiralty Law.

The Federal Court has general jurisdiction in admiralty matters. (Federal Courts Act, c. F-7). Court's jurisdiction is found in §22(1) and (2) and expressly includes: (1) Claims as to title, possession or ownership of ship or proceeds of sale; (2) claims of co-owners as to possession, employment, earnings, of ship; (3) claims respecting mortgage or charge on ship; (4) claims for loss of life or personal injury occurring in connection with operation of ship; (5) claims respecting loss, damage to goods, baggage, personal effects during transit on ship; (6) claims for towage or pilotage; (7) claims for goods, materials or services supplied to (including construction and repair of) ship; (8) claims by crew for remuneration arising out of employment; (9) claims respecting marine insurance; (10) claims respecting dock, canal, harbour, tolls; (11) claims respecting general average contribution; (12) claims for disbursements or advances made on account of ship; (13) claims for salvage; (14) claims arising from agreements or charter party of ship; (15) claims for damage, loss of life or personal injury caused by ship in collision or otherwise.

Federal Court and British Columbia Supreme Court are only courts that permit in rem actions. Canadian Maritime Law includes right of sister ship arrest. Under §43(8) of Federal Courts Act, R.S.C. 1985, c. F-7, as amended in its English version, with effect from Sept. 21, 2009, by amendment to Marine Liability Act made by S.C. 2009, c. 21, in rem action may be brought in Federal Court against any ship that, at time action is brought, is owned by beneficial owner of ship that is subject of action. Action in rem may be brought against ship, aircraft or other property that is subject of action. ``Other property'' includes bunkers, cargo, or freight payable. (See Kremikovski Trade v. Phoenix Bulk Carriers, 2006 FCA 1 and affirmed by 2007 SCC 13.) Actions in rem may also be brought against proceeds of sale of ship paid into court.

Federal Court's jurisdiction is applicable in relation to all ships, whether Canadian or foreign, regardless of residence or domicile of shipowners; in relation to all claims, whether arising on high seas or within waters of Canada or elsewhere; in relation to all mortgages or charges by way of security on a ship, registered or not, equitable or legal, created under foreign law or not. Jurisdiction of Federal Court of Appeal, in appeal and in judicial review, is set forth in §§26, 27 and 28 of Federal Courts Act.

Canada is party to Civil Liability Convention (``CLC'') on marine oil pollution liability and compensation. Where foreign judgment has been rendered in another CLC state, judgment creditors may apply to Federal Court to have foreign judgment registered. On application, Federal Court may order that judgment be satisfied.

Provincial Superior Courts have concurrent jurisdiction with Federal Court in maritime matters, but apart from British Columbia Supreme Court, they do not possess statutory in rem jurisdiction. As courts of original jurisdiction they also possess jurisdiction for those areas where Federal Courts Act does not grant jurisdiction to Federal Court. Mareva injunctions can be obtained in Federal Court and Provincial Superior Courts to prevent ships and other marine property from leaving jurisdiction where there is likelihood of ship or other marine property being taken out of jurisdiction otherwise than in normal course of business and shipowner has insufficient assets within jurisdiction to respond to claim.

Marine Insurance.

Federal Marine Insurance Act, S.C. 1993, c. 22, was implemented in 1993. It is largely similar to English Marine Insurance Act, 1906. Every province has its own marine insurance legislation, including, in some cases, Marine Insurance Acts based upon 1906 statute, but these provisions have likely been rendered unconstitutional by Supreme Court of Canada's 1998 decision in Ordon Estate v. Grail, (1998) 3 S.C.R. 437. (See also Zavarovalna Skupnost Triglav [Insurance Community Triglav Ltd.] v. Terrasses Jewellers Inc., [1983] 1 S.C.R. 283.) New Brunswick, for example, repealed its Marine Insurance Act in 2005. (See S.N.B. 2005, c. 20.)

Pursuant to amendments made to Part XIII of Insurance Companies Act, S.C. 1991, c. 47, by S.C. 2007, c. 6, as of Jan. 1, 2010, foreign insurers that ``insure in Canada'' marine risks must have that class of insurance listed in order issued by Office of Superintendent of Financial Institutions (OSFI) authorizing them to do business in Canada. Foreign insurers concerned must therefore apply to OSFI for necessary amendment to their orders. Special arrangements have been made for protection and indemnity clubs.

Carriage of Passengers

Part 4 of Marine Liability Act gives effect in Canada to Athens Convention relating to Carriage of Passengers and their Luggage by Sea, Athens, Dec. 13, 1974, as amended by Protocol signed at London on Mar. 29, 1990. In Canada, Convention applies to owners of all ships, whether seagoing or not, and extends to Canada's inland waters. Carrier is liable for death or personal injury to passengers and loss or damage to their luggage occurring during carriage due to fault or neglect of carrier or his servants or agents acting in scope of their employment. Such fault is presumed (rebuttably) where death, injury or damage to cabin luggage arose from shipwreck, collision, stranding, explosion, fire, or defect in ship. Carriers' liability limitations, unless expressly agreed with passenger in writing, are: 175,000 SDRs per carriage for passenger death or personal injury; 1,800 SDRs per passenger per carriage for loss or damage to cabin luggage; 2,700 SDRs for loss or damage to other luggage; and 10,000 SDRs per vehicle per carriage for loss or damage to vehicles, including luggage carried therein. Carrier is not liable for loss or damage to valuables, unless they are deposited with carrier for safekeeping, in which case limitation is 2,700 SDRs unless higher limit is agreed. Carrier and passenger may agree on deductibles up to 300 SDRs for vehicle damage and 135 SDRs per passenger for loss or damage to other than cabin luggage. Carrier's limitations may be broken on proof that damages resulted from act or omission of carrier done with intent to cause damage or recklessly with knowledge that damage would probably result. Carrier may be exonerated wholly or partly where death, injury or damage is caused by fault or neglect of passenger. Carrier is liable for acts and omissions of performing carrier to whom all or part of carriage is entrusted, and those of servants or agents of performing carrier in scope of their employment. Carrier and performing carrier, where both are liable, are jointly and severally liable, subject to rights of recourse as between them.

Passenger must give written notice of apparent loss or damage to cabin luggage before or at time of disembarkation and before or at redelivery for other luggage; and within 15 days from disembarkation or redelivery (or when redelivery should have occurred) for non-apparent damage or loss of luggage.

Time limitation for actions is two years, with possibility of extension by written declaration of carrier or written agreement of parties after cause of action arises. Suspension and interruption of time-bars are subject to law of court seized, but are not permitted beyond three years from disembarkation or date it should have occurred, whichever is later. Provincial time bars are inapplicable. (See Russell v. Mackay, [2007] 284 D.L.R. [4th] 528 [N.B. C.A.] and Frugoli v. Services Aériens des Cantons de l'Est inc., 2007 QCCS 6203 [Que. S.C.], appeal dismissed 2009 QCCA 1246 [Que. C.A.].)

Marine Liability Act, Part 4, does not apply to ``adventure tourism activity'' that (a) exposes participants to aquatic environment; (b) normally requires safety equipment and procedures beyond those normally used in carriage of passengers; (c) exposes participants to greater risks than passengers are normally exposed to in carriage of passengers; (d) entails risks that have been presented to participants and they have accepted in writing to be exposed to them; and (e) meets any condition prescribed by Governor in Council by regulation (Marine Liability Act, §37.1, added by S.C. 2009, c. 21, in force Sept. 21, 2009).

24.04 GENERAL LIMITATION PERIOD:

Three-year limitation period is established for all proceedings under Canadian maritime law in any matter coming within class of navigation and shipping, except as otherwise provided in Marine Liability Act or any other Act of Parliament (Marine Liability Act, as amended by S.C. 2009, c. 21), §140, in force Sept. 21, 2009.

25 TREATIES AND CONVENTIONS

25.01 TREATIES AND CONVENTIONS:

Canada, federal state, is party to Vienna Convention on Law of Treaties and conducts its treaty-making practice accordingly. Treaty-making is prerogative of Crown and may be done without any involvement of federal Parliament or provincial legislatures. In practice, only federal government may conclude treaties with foreign states as provincial governments generally lack international recognition. Federal government's competence in this area exists regardless of internal division of powers between federal and provincial governments, governed by §91 (federal powers) and §92 (provincial powers) of Constitution Act, 1867.

Most treaties concluded by Canada do not require implementation because they do not purport to affect domestic law. Without implementing domestic legislation, treaties concluded by Canada have effect in domestic law only insofar as unimplemented treaties may be viewed as indicative of customary international law by domestic courts. Treaties may also have indirect effects through interpretive presumption that enactments are not intended to violate international law. Canadian courts strive to interpret domestic legislation (whether implementing or not) in conformity with Canadian treaty obligations and international law more generally.

For those treaties requiring domestic legislation, implementation is subject to division of powers under §§91 and 92 of Constitution Act, 1867. Most domestic legislation implementing treaty obligations is enacted at federal level, but some treaties require implementation by federal Parliament and each of ten provincial and three territorial legislatures. This complexity sometimes delays, but rarely prevents, Canada's ratification of treaties. Many treaties contain “federal state” clause stating that treaty does not seek to disturb internal distribution of legislative power. Treatyimplementing legislation is not subject to any formal requirement. It may occur by primary legislation or regulation. It may refer to treaty explicitly or not at all.

Canada is party to array of multilateral and bilateral treaties ranging from World Trade Organization Agreements and North American Free Trade Agreement to Convention on the Recognition and Enforcement of Foreign Arbitral Awards to plethora of treaties entered into under auspices of various international organizations touching such diverse matters as taxation, extradition, human rights, labour standards, fisheries, intellectual property, mutual legal assistance, refugees, defence, armed conflict and more. Most Canadian treaties concluded since 1919 may be found in government publication, Canada Treaty Series. See federal government's Canada Treaty Information website at http://www.treaty-accord.gc.ca/. Detailed enquiries may be addressed to federal treaty custodian c/o Department of Foreign Affairs and International Trade, Treaty Section, 125 Sussex Drive, Ottawa K1A 0G2 or to government department responsible for subject matter covered by treaty (e.g. Canada Revenue Agency for tax treaty enquiries). Some additional general information is available at Department of Foreign Affairs and International Trade website (http://www.dfait-maeci.gc.ca).

See also categories 9 Dispute Resolution, topic Arbitration and Award; Foreign Trade and Commerce, topic Foreign Trade Regulation; Intellectual Property, topics Copyright, Patents, Trade-marks and Designs; Taxation; Treaties and Agreements.

1
CAYMAN ISLANDS LAW DIGEST

—Scope —

Revised for 2009 edition by

WALKERS, Attorneys-at-Law in the Cayman Islands.

Note: Except where noted otherwise, this revision is as of Oct. 16, 2007.

1 INTRODUCTION

1.01 CURRENCY:

Cayman Islands Monetary Authority was established by legislation in 1996 and commenced operations in Jan. 1997, assuming functions previously carried out by Financial Services Supervision Department and Currency Board. Principal objects of Authority are to regulate and supervise financial services industries, issue and redeem notes and coin, to promote and maintain solid financial system and to advise Government on banking and monetary matters.

Currency of Cayman Islands is Cayman dollar which is divided into 100 cents. Current parity of Cayman dollar is equivalent to $1.20 in currency of USA.

See also category 13 Foreign Trade and Commerce, topic 13.01 Exchange Control.

1.02 GOVERNMENT AND LEGAL SYSTEM:

Cayman Islands are administered as British Overseas Territory, but by its 1972 Constitution (U.K. Statutory Instrument No. 1101 of 1972), as subsequently amended, it has significant degree of internal self-government. Governor is appointed by U.K. and he presides over meetings of Cabinet whose advice he normally takes except for reserved matters of defence, external affairs, internal security, police and civil service.

Governor in Cabinet consists of Governor together with Cabinet which is made up of three official members appointed by him: Attorney General, Chief Secretary and Financial Secretary and five Ministers elected from elected members of Legislative Assembly. Governor assigns responsibilities to each Minister. All Cabinet members are bound by collective responsibility unless otherwise authorised by Governor.

Legislative authority is vested in Governor in Cabinet and Legislative Assembly. Legislative Assembly consists of 15 members elected on roughly per capita basis from the six districts of Islands for fixed term of four years. Governor must dissolve Legislative Assembly within four years after its first meeting unless it has been dissolved sooner. General election must be held within two months of dissolution. There are presently two political parties with Leader of Government Business and Cabinet from ruling People's Progressive Movement and United Democratic Party official party in opposition.

Legislative Assembly meets minimum of four times in each session (session being a year which currently runs from end of Apr.). Those dates are set at beginning of each session. Dates are subject to change. If necessary, special meetings can be called.

Legislative Process.

Most new legislation is initiated by Governor in Cabinet, although private members motions are sometimes introduced by Members to make amendment to laws and to address specific issues.

Throne Speech.

Read by Governor upon reconvening of Legislative Assembly in New Year. Speech outlines Government policy and legislative programme for year and is then debated by Legislative Assembly.

Judicial Authority.

See category 6 Courts and Legislature, topic 6.01 Courts.

1.03 OFFICE HOURS AND TIME ZONE:

Cayman is in Eastern Standard (GMT -05:00) time zone and does not convert to Daylight Savings Time during summer months. Office hours are generally from 8:30 a.m. to 5 p.m., Mon. to Fri.

2 BUSINESS ORGANIZATIONS

2.01 AGENCY:

Common Law rules apply. Generally principal is responsible for acts of his duly authorised agent. Competent person may grant power of attorney to another person to act as his agent until power revoked by express act of revocation or by principal becoming incompetent.

2.02 CAYMAN ISLANDS STOCK EXCHANGE:

Cayman Islands Stock Exchange (``CSX'') was established in Jan. 1997 to provide, among other facilities, stock exchange listing facility and trading for specialist debt securities, derivative warrants, depositary receipts, Eurobonds, mutual funds, hedge funds and international and domestic equity. CSX operates in remote environment with electronic trading system and NAV reporting which CSX monitors centrally. Listings on CSX and trading information can be accessed from CSX's dedicated pages on Bloomberg Network and on CSX's Internet Website.

CSX is able to offer lower cost and speedier listing alternative among other advantages as listing facility when compared to certain European Stock Exchanges and other convenience listing exchanges. CSX is not bound by any European Union listing directives or other third party regulations, which allows exchange to adopt (where necessary) flexible approach to listing innovative new products. CSX is affiliate member of International Organisation of Securities Commissions (IOSCO).

2.03 CORPORATIONS:

General.

Companies Law (2007 Revision) ("Companies Law") governs incorporation, management, administration and winding up of limited liability companies in Cayman Islands.

Incorporation.

Any one or more persons form company by signing and delivering to Registrar of Companies Memorandum of Association containing certain prescribed information together with Articles of Association. In absence of Articles of Association submitted to Registrar of Companies with incorporation documents, Standard Table A to Companies Law will be deemed to constitute Articles of Association.

Doctrine of ultra vires has been abolished by Companies Law which provides that no act of company or disposition of property is invalid by reason only that company was without capacity or power. In view of this, long-form objects clauses in Memoranda of Association are not required.

Companies Law provides for incorporation of resident companies, nonresident companies, exempted companies, exempted limited duration companies, companies limited by guarantee and segregated portfolio companies. There are certain restrictions on use of names connoting connection with Government or Crown or conduct of licensed activities.

Exempted companies, segregated portfolio companies and exempted limited duration companies (collectively "Exempted Companies") are incorporated for offshore business where operations of company are to be conducted mainly outside Cayman Islands and are entitled to receive tax-free undertaking from Government of Cayman Islands for period of 20 years, renewable for additional ten years on expiry.

Exempted Companies.

Most common form of company formed for conduct of offshore business. Liability of shareholders is limited to amount of unpaid capital on shares. Exempted companies are not permitted to trade in Cayman Islands other than in furtherance of business carried on outside Cayman Islands and are prohibited from making any invitation to public in Cayman Islands to subscribe for their securities unless listed on Cayman Islands Stock Exchange.

Exempted Limited Duration Companies ("LDC").

LDCs are similar to U.S. "limited life" companies, which can feature tax transparency for shareholders, with resultant treatment in other jurisdictions (e.g., U.S.) as "partnerships" for tax purposes. LDCs are exempted limited liability companies that have at least two members, where duration of company is limited to period not exceeding 30 years and name of company includes "LDC" or "Limited Duration Company". Articles of Association of LDC may provide that transfers of shares or other equity interests of members requires unanimous approval of all other members. Articles of Association of LDC may also provide that management of LDC is vested in members of LDC either equally per capita or in proportion to their share or other ownership interest, or in such other manner specified in Articles of Association, in which case members are considered to be directors but with power, if provided in Articles of Association, to delegate management to board of directors.

LDC is deemed to have commenced voluntary winding up when period fixed for duration of LDC expires; if members pass special resolution to wind up LDC; on termination of any period or happening of any event prescribed in Memorandum or Articles of Association; and subject to any contrary provision in its Memorandum and Articles of Association, on expiry of 90 days from: (1) death, insanity, bankruptcy, dissolution, withdrawal, retirement or resignation of member; or (2) redemption, repurchase or cancellation of all shares of member; or (3) occurrence of any event which under terms of Memorandum or Articles of Association, terminates membership of member; unless there remain at least two members of company and they resolve unanimously to continue it in existence.

Segregated Portfolio Companies ("SPC").

Exempted Company may apply to be registered as SPC. Once registered as SPC number of segregated portfolios with statutory segregation of assets and liabilities can be created and operated.

Management and Directors.

Business of Exempted Companies (and LDCs if election to appoint board of directors has been made), is managed and conducted by board of directors consisting of at least one person or such number in excess of one as may be specified in Articles of Association or as shareholders may determine in general meeting. There is no requirement for Exempted Company to have Caymanian director. LDC companies are not required to appoint board of directors and may be managed by members of company in accordance with Articles of Association, unless members elect to appoint board of directors. Articles of Association may provide for meetings of Directors to be held electronically by conference call and for resolutions to be passed by unanimous written resolution of Directors.

Articles of Association are amended by special resolution of shareholders in general meeting or, if authorised by Articles of Association which may be passed by unanimous written resolution of shareholders.

Licence to do Business.

Exempted Companies, SPCs and LDCs do not need licences to carry on business unless they are classified as: (1) open ended mutual fund, or mutual fund administrator, and are licensed under Mutual Funds Law (2007 Revision), (2) carrying on business of company management and are licensed under Companies Management Law (2003 Revision), (3) carrying on banking business or trust business and are licensed under Banks & Trust Companies Law (2007 Revision), (4) carrying on insurance business, and are licensed under Insurance Law (2007 Revision), (5) running local office and are licensed under Trade and Business Licensing Law (2007 Revision), (6) carrying on securities investment business and are licensed under Securities Investment Business Law (2004 Revision).

No local company can carry on business in Cayman Islands unless at least 60% of its shares are owned by Caymanians, and at least 60% of its directors are Caymanians unless licence has been issued pursuant to Local Companies (Control) Law (2007 Revision).

Paid In Capital Requirements.

There are no minimum share capital requirements for Cayman Islands companies other than issue of shares to subscribers in accordance with Memorandum of Association. Minimum paid up on share capital of banks and trust companies licensed under Banks & Trust Companies Law (2008 Revision), and insurance companies licensed under Insurance Law (2007 Revision), will be subject to relevant statutory requirements.

Share Capital.

Shares may be issued in any one or more currencies, with or without fixed nominal or par value, and in fractions but companies are not permitted to divide their share capital into both shares of fixed amount and shares without nominal or par value. Where capital of company is divided into shares of more than one class, Memorandum of Association may specify that liability of members holding shares of particular class shall be unlimited. If permitted by its Articles of Association, company may purchase its own shares and issue shares which are redeemable at option of company or shareholder. Dividends may be paid out of profits or, subject to solvency test, share premium.

Shareholder Liabilities.

Liability of shareholders of companies to company or creditors of company (other than banks) is normally limited to amount for time being unpaid on shares respectively held by them.

Reports and Registers.

All companies must file annual return with Registrar of Companies containing limited prescribed information as at Jan. 1 together with requisite annual fee. Only companies licensed under Banks & Trust Companies Law (2007 Revision), Mutual Funds Law (2007 Revision), Securities Investment Business Law (2004 Revision) or Insurance Law (2008 Revision) are required to prepare and file audited financial statements. There is no requirement for annual general meetings of shareholders.

Dissolution.

Companies are wound up under Companies Law. Court having jurisdiction over winding up is Grand Court of Cayman Islands. Company may be wound up voluntarily if special resolution is passed for that purpose; by passage of time or occurrence of event specified in Articles of Association and adoption of ordinary resolution of shareholders; or by expiration of fixed term or occurrence of event on which Companies Law or Memorandum of Association provides company is to be dissolved in case of LDCs. Company may also be wound up by or subject to supervision of Grand Court, on application by company or by any creditor or shareholder, or as otherwise prescribed, in number of different circumstances including, inter alia, on it being proved to satisfaction of Grand Court that company is unable to pay its debts, or Grand Court is of opinion that it is just and equitable that it should be wound up. In addition, Registrar of Companies has statutory authority to dissolve company which he reasonably believes is no longer carrying on business or is not in operation.

Transfer of Jurisdiction.

Exempted companies may deregister in Cayman Islands and transfer by way of continuation to another jurisdiction whose laws allow or do not prohibit transfer. Similarly, company incorporated in foreign jurisdiction may register by way of continuation as Exempted Company in Cayman Islands.

Charges.

Every limited company is required to maintain at its registered office register of all mortgages and charges affecting property of company open to inspection by any creditor or member of company at reasonable times. There is no public register of charges. Charges generally rank according to date of creation and not date of registration subject to certain exceptions where Cayman Islands domestic principles apply. Unregistered charges are not void for want of registration.

Government Fees.

There is no stamp duty payable to Cayman Islands Government by Exempted Companies and LDCs on issue of shares or on transfer of shares of Exempted Companies and LDCs. Annual government fees are based on authorised share capital and range from US$573 for companies with authorised capital of US$50,000 or less up to maximum of US$2,400 per annum for authorised capital in excess of US$2,000,000.

Real Property.

Pursuant to Companies Law foreign companies and companies empowered to issue bearer shares are prohibited from owning land in Cayman Islands, unless otherwise authorised by Financial Secretary of Cayman Islands.

2.04 FOREIGN CORPORATIONS:

Foreign companies incorporated outside Cayman Islands that establish place of business or commence carrying on business within Cayman Islands must be registered as foreign companies under Companies Law.

See topic 2.03 Corporations; category 4 Citizenship, topics 4.01 Aliens, 4.03 Immigration.

2.05 MUTUAL FUNDS:

Mutual Funds Law (2007 Revision) regulates all open ended funds established in or operating from Cayman Islands (except those specifically excluded from regulation) and those who administer mutual funds in or from Cayman Islands. Company, unit trust or partnership that issues equity interests that are redeemable at option of investor for purpose of pooling of investor funds must be licensed by or registered with Cayman Islands Monetary Authority unless exemption applies. There are three tiers of mutual fund regulation, each offering different degree of licensing and administrative supervision and designed essentially to protect application of funds received from investors: (1) direct licensing of mutual fund; (2) registration where mutual fund contracts with licensed Mutual Fund Administrator to provide its principal office in Cayman Islands; and (3) registration where minimum equity interest purchasable by investor is US$100,000 or whose equity interests are listed on approved stock exchange. Principal exemption from registration is where mutual fund has 15 or fewer investors, majority of whom are capable of appointing and removing directors, trustee, or general partner. Each regulated mutual fund is required to submit to Cayman Islands Monetary Authority, and keep current, copy of its most recent prospectus or offering document describing equity interests offered to investors in all material respects, arrange annual audit and filing of its accounts within six months of end of mutual fund's financial year and pay prescribed annual registration fee. Mutual Funds Law also provides for enforcement and supervision of Mutual Funds Law by Cayman Islands Monetary Authority.

2.06 PARTNERSHIPS:

Partnerships may be either: (1) ordinary partnerships, which are governed by The Partnership Law (2002 Revision); or (2) exempted limited partnerships, which may be formed for any lawful purpose, and which are governed by Exempted Limited Partnership Law (2007 Revision) and The Partnership Law.

General Partnerships.

There is no limit on number of persons constituting partnership. Each partner impliedly confers on his partners authority to incur debts on behalf of partnership and to bind all partners and is liable jointly with other partners for debts and obligations of firm incurred while he is partner. Partnership has no distinct legal personality and can sue or be sued in its firm name.

Subject to any agreement between partners, every partnership is dissolved by retirement, death or bankruptcy of any partner and may be dissolved by court in certain specified cases. Mutual rights and duties of partners may be varied by unanimous consent which may be express or inferred from course of dealing.

Exempted Limited Partnerships ("ELP").

ELP is formed by one or more limited partners, who are not liable for debts or obligations of ELP save as provided in partnership agreement and unless they take part in conduct of business of ELP or receive distributions in insolvency situation, and one or more general partners who are jointly and severally responsible for all debts and obligations of partnership. ELP is not separate legal person under Cayman law and must therefore enter into contracts and act through General Partner. At least one General Partner must be resident in Cayman Islands (if individual), or be incorporated under Companies Law, or be registered as foreign company under Companies Law, or be another ELP. ELP is entitled to apply for tax undertaking from Cayman Islands Government valid for period up to 50 years. Limited Partners may vote on certain matters and give guidance to General Partner but must not take part in conduct of business of ELP. Limited Partner that takes part in conduct of business of ELP will lose protection of limited liability. General Partner must maintain Register of Partnership Interests (open to public inspection) at ELP's registered office in Cayman Islands. ELP dissolves automatically upon withdrawal or insolvency of last remaining General Partner but Limited Partners may unanimously elect to continue ELP within 90 days.

3 BUSINESS REGULATION AND COMMERCE

3.01 BANKS AND BANKING:

Banking business in Cayman Islands is primarily regulated by Banks and Trust Companies Law (2007 Revision) ("Banking Law"). Banking Law provides that no banking business may be transacted from within Cayman Islands, whether or not such business is carried on in Cayman Islands, except by person who is in possession of valid licence granted by Governor authorising him to carry on such business. "Banking business" is defined as "the business of receiving (other than from a bank or trust company) and holding on current, savings, deposit or other similar account money which is repayable by cheque or order and may be invested by way of advances to customers or otherwise". Banking Law also provides that no corporate body may carry on trust business from within Cayman Islands (whether or not such business is carried on in Cayman Islands) unless it is duly licensed to carry on trust business. Restriction on carrying on trust business only applies to corporations. Licence may be granted to carry on banking business or to carry on trust business (or both). Main types of licence are:

Category "A" Banking Licence.

This permits carrying on of local and overseas banking business. Cayman Islands Monetary Authority will normally require applicant granted this type of licence to maintain fully staffed office in Cayman Islands. Category "A" licence will normally only be granted to branch or subsidiary of major international bank.

Category "B" Banking Licence (Unrestricted).

This permits carrying on of banking business anywhere in world. Licensee may carry on such business in Cayman Islands for clients from outside Cayman Islands. However, activities in Cayman Islands must only be in furtherance of licensee's offshore activities. Category "B" Unrestricted Licence is normally only granted to branch, subsidiary or affiliate of existing bank with substantial net worth, usually in region of US$50,000,000, and operating in well regulated jurisdiction. "B" licensee is prohibited from: (1) taking deposits from residents of Cayman Islands, other than another licensee, or exempted or ordinary nonresident company not carrying on business in Cayman Islands; (2) investing in any asset representing claim on any resident of

Cayman Islands, except: (a) loan to exempted or ordinary nonresident company not carrying on business in Cayman Islands, (b) mortgage loan to staff member or person possessing Caymanian status for purchase or construction of residence to be owner-occupied, (c) transaction with another licensee, or (d) purchase of bonds or other securities issued by Cayman Islands Government or any statutory body or company owned or substantially owned by Government; (3) carrying on any business in Cayman Islands other than that described in licence application, without written approval of Governor.

Category "B" Banking Licence (Restricted).

This is restricted form of "B" licence and limits licensee to conducting banking business for few named clients (usually not more than six) outside Cayman Islands. This category of licence is often obtained to undertake particular financing transactions or transactions with related companies.

Trust Licence.

This permits carrying on of trust business from within Cayman Islands without restriction. Trust Licence is normally only granted to branch, subsidiary or affiliate of existing trust company operating in well regulated jurisdiction.

Restricted Trust Licence.

This is restricted form of Trust Licence. It permits carrying on trust business from within Cayman Islands only for few named clients (usually not more than six). Clients sometimes form Restricted Trust Licensee to administer trusts for their own families. There is no restriction on formation of such Private Trust Companies other than that beneficial owners must be persons of highest character. Private Trust Company may open its own office in Cayman Islands or use facilities of existing Cayman trust company.

Capital Requirements.

Cayman Islands Monetary Authority imposes guidelines set by Basle Committee for Bank Regulation and Supervisory Practices for calculation of capital adequacy ratios (risk-asset ratios). Monetary Authority requires subsidiaries to maintain minimum risk-asset ratio of 12% and privately owned banks are required to maintain minimum of 15%. In addition, Banking Law requires minimum net worth for each category of licence. These are as follows (though greater sums may be required by Cayman Islands Monetary Authority):

"A" Banking Licence

- CI$400,000 (US$480,000)

"B" Banking Licence (Unrestricted)

- CI$400,000 (US$480,000)

Restricted "B" Banking Licence

- CI$ 20,000 (US$ 24,000)

Trust Licence

- CI$400,000 (US$480,000)

Restricted Trust Licence

- CI$ 20,000 (US$ 24,000)

(Private Trust Company)

Supervisory Guidelines.

Supervision of banks and trust companies in Cayman Islands is conducted by Cayman Islands Monetary Authority. Cayman Islands Monetary Authority has issued following Supervisory Guidelines for commercial lending: Total loans to any one customer (or group of related customers) should not normally exceed percentage of total capital as set out below: (i) 10% for medium to long term loans usually with collateral; (ii) 25% for short term (less than or equal to 180 days) self-liquidating loans (e.g., trade finance secured by supporting documentation) or loans with cash collateral; (iii) 50% for loans fully backed by cash provided that deposit and loan are made in same country and currency with matching maturities. In addition, valid and binding right of set off must exist between deposit and loan.

Total capital is defined as sum of Tier 1 and Tier 2 capital, i.e. same figure as is used in calculation of risk-asset ratio. Detailed definition is given in paper “International Convergence of Capital Measurement and Capital Standards” issued by Basle Committee on Banking Regulation and Supervisory Practices.

External Official Consents.

For financial institution wishing to establish branch or subsidiary bank or trust company in Cayman Islands, Cayman Islands Monetary Authority will require evidence of knowledge of appropriate regulatory authorities in applicant's own jurisdiction of application. This applies even if there is no obligation in applicant's own jurisdiction to obtain consent for such application. However, this requirement does not apply in case of Restricted Trust Licences.

Returns.

Licensed banks are required to submit quarterly financial statements, including statements of maturity analysis, within 15 days of end of each calendar quarter. Audited annual accounts are required to be submitted within three months of end of financial year. Holder of Restricted Trust Licence will normally only be required to submit semiannual or annual financial statements. Cayman Islands Monetary Authority normally requires that representative of management of each licensee visit Islands at least annually.

Confidentiality.

Banking Law expressly provides that information provided to Cayman Islands Monetary Authority be treated as confidential and Confidential Relationships (Preservation) Law (1995 Revision) makes it criminal offence for professional persons (which includes public or government officials, banks and trust companies) to disclose confidential information without consent of principal except under certain restricted circumstances.

Shareholders.

All shareholders holding more than 10% of licensee's issued shares must be approved by Cayman Islands Monetary Authority. No shares of company which is licensee can be issued and neither legal nor beneficial interest in any issued shares can be transferred or disposed of in any manner without prior approval of Cayman Islands Monetary Authority.

Directors.

Licensee must at no time have less than two directors. All directors and senior corporate officers must be approved by Cayman Islands Monetary Authority prior to appointment. Directors must be fit and proper persons. Regard must be had to all circumstances including such person's honesty, integrity and reputation, competence and capability, and financial soundness.

Other relevant legislation affecting licensed banks and trust companies include: Companies Law (2007 Revision); Trusts Law (2007 Revision); Fraudulent Dispositions Law (1996 Revision); Mutual Legal Assistance (United States of America) Law (1999 Revision); Proceeds of Criminal Conduct Law (2007 Revision); Misuse of Drugs Law (2000 Revision) and Criminal Justice (International Cooperation) Law (2004 Revision).

3.02 BILLS AND NOTES:

Bills of exchange are governed by Bills of Exchange Law (1997 Revision), which largely adopt law of England. Rules of Common Law, including law merchant, save insofar as inconsistent with express provisions of Bills of Exchange Law, continue to apply to bills of exchange, promissory notes and cheques.

3.03 COMMERCIAL REGISTER:

See category 2 Business Organizations, topic 2.03 Corporations.

3.04 CONTRACTS:

There must be agreement between parties with intention to create legal relationship based on offer and acceptance with consideration moving between promisee and promisor. Gratuitous promise is not enforceable even if in writing, unless it is executed in form of deed. Promise, whether written or oral, may be enforced if consideration is given for it, which consideration may take form of benefit accruing to promisor, or forebearance, responsibility or loss given, undertaken or suffered by promisee.

Privity.

Person who is not party to contract cannot normally sue upon it even if it is for his benefit save in limited circumstances, e.g. where he is beneficiary under trust, principal suing on contract made by his agent, and third party claims against insurers.

Excuses for Nonperformance.

Contract will be frustrated, i.e. not capable of performance thereby excusing further performance, in circumstances where: (i) based on nature of contract and surrounding circumstances it appears that parties have contracted on basis that some fundamental fact will continue to subsist or that some future event which forms foundation of contract will take place, and (ii) before breach performance becomes impossible or only possible in manner very different from that originally contemplated without default of either party. To excuse nonperformance, impossibility must be physical or legal in nature. Impossibility referable solely to ability or circumstances of promissor is not sufficient to excuse nonperformance. Act of God or of Queen's enemies may also excuse nonperformance.

Mistake.

Contract entered into under fundamental mistake of fact is void, while less fundamental mistake will render contract voidable. Written contract entered into by reason of mistake common to contracting parties may be rectified by court so as to carry out true intentions of parties.

Illegality.

In certain circumstances contract may be unenforceable on basis of being contrary to statute or public policy. Illegality may be as to formation, i.e., contract cannot be performed in accordance with its terms without commission of illegal act or it may be illegal as to its performance, i.e. one or both parties may intend to perform contract in illegal manner. Contracts falling within category of illegality include: (1) contracts of unlawful gaming; (2) contracts which are injurious to good government; (3) contracts injurious to proper working of justice; and (4) contracts in restraint of trade.

Misrepresentation.

Fraudulent or negligent statement of existing or past fact made by one party to other before or at time of creation of contract constitutes misrepresentation. If misrepresentation is fraudulent, innocent party may rescind or repudiate contract. If misrepresentation is made negligently, misled party may have claim in negligence, and if misrepresentation was made innocently, contract may be rescinded by court order.

Rescission.

Contract even if performed, may be rescinded by party induced to enter into it by misrepresentation made by other party. Damages in lieu of rescission may be ordered by court and damages in addition to rescission may also be available where misrepresentation was negligently or fraudulently made.

Applicable Law.

Express choice of law made in contract will be upheld as proper law of contract provided choice is bona fide and there is no reason for avoiding choice of law on ground of public policy. In absence of express choice of law, courts will decide proper law by assessing factors surrounding contract to establish implied choice of law, and where this is not possible courts will choose law which has closest and most real connection with transaction.

3.05 FRANCHISES:

In general, franchises etc. are not prohibited under Cayman Islands law.

3.06 FRAUDS, STATUTE OF:

English Statute of Frauds, 1677, does extend to Cayman Islands. Registered Land Law (2004 Revision) provides that contracts for disposition of land be in writing.

3.07 INFORMATION TECHNOLOGY, INTERNET AND NEW MEDIA:

E-commerce activity is subject to general laws including contract, trust and tort. Electronic Transactions Law (2003 Revision) ("Electronic Transactions Law") gives electronic transactions same status as paper based transactions under Cayman Islands Law. Computer Misuse Law, 2000 ("Computer Misuse Law") prohibits unauthorised use of material stored on computers.

Electronic Transactions Law creates media neutral environment for e-commerce transactions. Based largely upon UNCITRAL Model Law on Electronic Commerce: Electronic Transactions Law also refined to meet specific technical concerns of e-commerce specialists and concerns of legal experts. Careful note taken of equivalent legislation in other countries so as to create best possible legislative framework for e-commerce in Cayman Islands. Result is rules which create functional equivalent of existing environment for paper based transactions.

Main features may be summarised as follows: (1) No information to be denied legal effect or validity solely on ground that it is in form of electronic record or referred to in electronic record; (2) any statutory requirement of writing or delivery may be met by electronic record, including electronic signature as long as it passes functional equivalence test set out in Electronic Transactions Law; (3) where general law requires document to be an original, that requirement can be met by electronic document, subject again to functional equivalence requirement; (4) where documents are required by law to be retained, they may be retained in electronic form if functional equivalence test is met; (5) contracts may be made by electronic record (formal codification of preexisting common law in Cayman Islands); (6) rules laid down to determine to whom electronic record may be attributed by law, and to determine time and place of sending and receipt of electronic records; (7) provision for regulation of Internet Security Service Providers ("ISSPs") with specific reference to provision of electronic certificates by trusted third party ISSPs.

Encryption/Digital Signatures.

No restrictions on use of encryption or digital signatures in Cayman Islands; nor any requirement that private keys be held in central escrow database. § 38 of Electronic Transactions Law specifically provides that nothing in that law confers power to impose key escrow requirement. Electronic Transactions Law specifies criteria for determining whether electronic signature can be treated as equivalent of paper signature. Also provisions establishing register of approved Information Security Service Providers.

Privacy/Data Protection.

Electronic Transactions Law provides for Governor-in-Cabinet to make regulations prescribing standards for processing of personal data whether or not personal data originates inside Cayman Islands. No regulations yet made under these provisions. Good practice to insert statement of privacy policy upon any web site, notwithstanding that it is not required by law.

Evidence.

Information stored electronically treated as documentary evidence in proceedings in Cayman Islands Courts. Accordingly electronic records admissible in broadly same circumstances that other documentary records admissible in Cayman Islands. Statement in document produced by computer admissible as evidence of any facts or data therein of which direct oral evidence would be admissible, if certain requirements met as to regular use of computer to store information of kind to be given in evidence and proper operation of computer over relevant period. These requirements can be met by provision of certificate signed by person occupying responsible position in relation to operation of computer or activities in relation to computer.

In proceedings under Computer Misuse Law, or proceedings for related offence (such as conspiracy to commit offence under Computer Misuse Law) any relevant computer output admissible in evidence of any facts stated therein if shown that (a) no reasonable ground for believing that output is inaccurate because of improper use of computer and no reason exists to doubt or suspect truth or reliability of output; or (b) at all material times computer was operating properly, or if not, any respect in which not operating properly or out of operation was not such as to affect production of output or accuracy of contents.

Certificate signed by person occupying responsible position in relation to operation of computer can be adduced as prima facie evidence that evidential requirements under Computer Misuse Law have been met.

Unauthorised Use of Electronic Information.

Computer Misuse Law targets unauthorised access of material stored upon computer and makes it criminal offence. Principal offence of unauthorised access to computer material punishable by fine not exceeding US$5,000 or by imprisonment for term not exceeding two years or both. Fine can be increased to US$20,000 and period of imprisonment to five years where damage exceeding US$10,000 caused to computer in course of offence. Related conduct also criminalised—including unauthorised modification of computer material and unauthorised use or interception of computer service or output. Also offence for person to engage in unauthorized conduct causing computer to cease to function, whether permanently or temporarily. Computer Misuse Law expressed to have effect in relation to any person outside as well as within Cayman

Islands. Specific powers of arrest and procedure provided to police in Computer Misuse Law in order to enhance enforceability.

Restrictions on Web Activity.

Criminal law places restrictions upon types of activity which may be carried on from Cayman Islands based web site. Principal offences are gambling and pornography. Under Gambling Law (1996 Revision) it is criminal offence in Cayman to gamble, or to publish any proposal for purposes of gambling. Penal Code (2007 Revision) makes it criminal offence, inter alia, to produce and/or distribute pictures or images which are obscene or which would tend to corrupt public morals. Penal Code also makes it offence to carry on or take part in any business (whether public or private) concerned with any such matters or things or to distribute any such thing publicly.

Advertising.

No general statute in Cayman Islands governing content of advertisements. Nevertheless statutes such as The Gambling Law (1996 Revision) and provisions in Criminal Code which prevent publication of obscene material might affect certain forms of advertisement on Internet.

Regulation.

On 17th May 2002 provisions of Information and Communications Technology Law came into force. Statute establishes Information and Communications Technology Authority to oversee provisions of ICT networks and ICT services in Cayman Islands. Under Information and Communications Technology Law licence is required to operate ICT network or to provide ICT services. ICT service includes any information technology service, telecommunications service, electronic media and broadcast service, Internet service, digital library and commercial information service, network-based information service and related specialised professional service provided by electronic means and any other similar service.

3.08 LICENCES, BUSINESS AND PROFESSIONAL:

These are required for many activities including following: To carry on banking business, securities investment business, trust business, insurance, sell intoxicating liquors, conduct street trading, drive motor vehicle, or marry. Individuals and companies carrying on business in Cayman Islands must be licensed under Trade and Business Licensing Law, (2007 Revision). Non-Caymanian owned companies carrying on business in Cayman Islands must be licensed under Local Companies (Control) Law (2007 Revision). Term also used to describe certain contractual arrangements, e.g. relating to copyright, patents, trademarks and occupation of land.

See also categories 2 Business Organizations, topic Corporations; Citizenship, topic Aliens.

3.09 MONOPOLIES, RESTRAINT OF TRADE AND COMPETITION:

There is no statutory regulation of monopolies and common law rules apply. It is monopoly and against public policy for any person or group of persons, to secure sole exercise of any particular trade throughout Cayman Islands. Permitted monopolies may be created by Government licence or statute; e.g. Post Office. Agreement may be void as being monopoly or otherwise as being in restraint of trade at common law. Agreement may be illegal at common law if by causing control over trade or industry to pass into hands of individual or group of individuals it creates monopoly calculated to enhance prices to unreasonable extent. Such agreement is merely unenforceable; it is not illegal in criminal sense, nor does it give any cause of action to third party. Agreements in restraint of trade (including restrictions on employment with competitors) are illegal to extent that they are unreasonable.

3.10 NEGOTIABLE INSTRUMENTS:

See topic 3.02 Bills and Notes.

3.11 SALES:

Sales are regulated by Sale of Goods Law (1997 Revision) ("SGL").

Seller of goods is deemed to be unpaid seller when (a) whole of price has not been paid or tendered; or (b) negotiable instrument has been received as conditional payment and condition has not been fulfilled by reason of dishonour of instrument or otherwise.

Unpaid seller also has right, if property in goods has not passed, to withhold delivery. If property in goods has passed to buyer, unpaid seller has: (a) lien on goods or right to retain them for price while he is in possession of them; (b) in case of insolvency of buyer, right of stopping goods in transit after he has parted with possession; (c) right of resale as limited by SGL.

Stoppage In Transit.

Goods are deemed to be in course of transit from time when they are delivered to carrier (by land or water) or other bailee or custodian (for purpose of transmission to buyer) until buyer or his agent takes delivery from such carrier, other bailee or custodian.

Unpaid seller may exercise his right of stoppage in transit either by taking actual possession of goods or by giving notice of his claim to carrier or other bailee having possession of goods. Such notice may be given either to person in actual possession of goods or to his principal or agent. Notice must be given in sufficient time and under such circumstances that principal, by exercise of reasonable diligence, may communicate it to his servant or agent in time to prevent delivery to buyer.

Where document of title to goods has been lawfully transferred to any person as buyer or owner of goods, and that person transfers document to third party who takes it in good faith, without notice and for valuable consideration, then if that transfer was by way of sale unpaid seller's right of lien or stoppage in transit is defeated; if transfer was by way of pledge or other disposition for value, unpaid seller's right of lien, or retention or stoppage in transit can only be exercised subject to right of transferee.

Warranties.

SGL implies following conditions in contracts for sale of goods: (1) seller has right to sell goods, and that goods are and will remain free from any charge or encumbrance not disclosed or known to buyer; (2) when sale is by description (as defined in SGL), that goods correspond with description; (3) where goods sold in ordinary course of business, that goods supplied are of merchantable quality except in relation to defects brought to buyer's attention before contract or where buyer examines goods before contract is made, all defects which that examination ought to reveal; (4) where goods sold in ordinary course of business, that goods are reasonably fit for purpose for which they are required (provided that buyer impliedly or expressly makes known to seller purpose for which goods are required) except where circumstances show that buyer did not rely, or that it would be unreasonable for him to rely, on seller's skill or judgment; (5) where sale is by sample, that bulk corresponds with sample in quality; that buyer should have reasonable chance of comparing bulk with sample; and that goods are free from any defect, rendering them unmerchantable, which would not be apparent on reasonable examination of sample.

Implied conditions relating to sale by description, merchantability, fitness for purpose and sale by sample cannot be excluded by parties to contract in case of consumer sale or in any other case where such exclusion would be unfair or unreasonable in accordance with guidelines laid down by SGL. Seller can never exclude warranty of good title.

Applicable Law.

See topic 3.04 Contracts, subhead Applicable Law.

4 CITIZENSHIP

4.01 ALIENS:

See category 14 Immigration, topic 14.01 Aliens.

4.02 CAYMANIAN STATUS:

See category 14 Immigration.

4.03 IMMIGRATION:

See category 14 Immigration, topic 14.02 Immigration.

5 CIVIL ACTIONS AND PROCEDURE

5.01 ACTIONS:

Civil actions may be brought in Summary Court (where jurisdiction is limited to claims for CI$20,000 [US$23,809.50] or less) and in Grand Court (which has no jurisdictional limit). Actions may be brought by any person against any defendant subject to jurisdictional rules which require service of defendant within jurisdiction or, generally, leave of Court in appropriate cases to serve defendant outside jurisdiction. Practice and procedure is governed in Grand Court by Grand Court Rules, 1995 (Revised) (as am'd) (``GCR''). There are four forms of commencing proceedings, namely by writ, originating summons, petition, or motion. Appropriate form in any given case is specified by GCR and depends on nature of claim and means by which it is to be proved. Nature and form of evidence is determined by legislation and by GCR, as are questions of admissibility, competence and compellability of witnesses and documents and mode of trial (which in civil cases is almost always before judge sitting alone). Foreign law, if applicable, must be pleaded and proved as matter of evidence, and is usually given by properly qualified experts. Grand Court has extensive powers to order preemptive freezing, seizure and tracing of assets to prevent their dissipation, which are often used. Unsuccessful party in action will normally be ordered to pay proportion of costs (including attorneys' fees) of successful party (although in practice costs are usually subject to taxation if they cannot be agreed or to fixed limits and amount to be paid by unsuccessful party is often significantly lower than successful party's total costs). Plaintiff who is resident out of jurisdiction may be required to give security for defendant's costs in case plaintiff's action fails. Grand Court will usually assist foreign courts to obtain both documentary and oral evidence for purposes of foreign civil proceedings provided nature and reason for requesting such evidence is clearly specified. Witnesses must apply to Grand Court for directions under provisions of confidentiality legislation before giving evidence if proceedings concern confidential information belonging to third party.

5.02 DEPOSITIONS AND DISCOVERY:

Under GCR, Grand Court has power to order that evidence be given by way of deposition by any person, including where such person is out of jurisdiction, but use of depositions at trial is limited to certain specific circumstances prescribed by GCR. Grand Court will generally assist in taking of evidence by deposition for purposes of foreign court proceedings. Discovery in cases before Cayman Islands courts is generally confined to documentary discovery. Parties to action are required to list and produce for inspection all documents in their possession, custody, or power relating to any matter in question between them. Grand Court may order any party to produce to Grand Court any document. Discovery by oral examination is limited to parties and may be conducted only if ordered by Court. Documents may be withheld from production on grounds of privilege. It may also be necessary to apply to Grand Court for directions if any documents contain confidential information as defined under confidentiality legislation.

5.03 JUDGMENTS:

Grand Court may give judgments for all recognised forms of relief including debts, damages, specific performance and other equitable relief and declarations. Exemplory damages are very unusual and confined to special circumstances. Interest may be awarded on judgment sums and judgment may be given in foreign currency if appropriate. In most cases, summary judgment is available when plaintiff can show that defendant has no defence to claim or defendant can show plaintiff has no prospect of success. Order for interim payment on account of any damages which defendant may be held liable to plaintiff may be made in appropriate case.

Foreign Judgments.

There are no provisions for reciprocal registration of foreign judgments (with exception of judgments from courts of Australia). However, foreign judgments for specific sum of money may be enforced by action and subsequent summary judgment, provided that defendant was properly subject to jurisdiction of foreign court by presence there or submission to its jurisdiction. Enforcement may also be refused on public policy grounds. Grand Court will also, in some circumstances, recognise foreign judgments which are not for specific sum of money.

5.04 LIMITATION OF ACTIONS:

The Limitation Law (1996 Revision) provides for various time limits within which proceedings must be brought. Limitation period applicable to particular action depends on nature of claim and other circumstances. Most common limitation period for most types of action is six years from date when cause of action arose. For personal injury action normal limitation period is three years although in certain types of fatal accident actions period may be only one year. No foreclosure action in respect of mortgaged personal property and no action to recover money due under mortgage on real property or to recover proceeds of sale of real property may be brought after 12 years. Generally no action may be brought to recover title to any real property after 12 years from date on which right of action accrued. There are detailed provisions with respect to specific types of claim and Court is given discretion to extend limitation periods in certain circumstances, particularly with respect to personal injury claims. There are also provisions for postponement of limitation periods in cases of fraud, concealment or mistake.

5.05 PRESCRIPTION:

See topic 5.04 Limitation of Actions.

6 COURTS AND LEGISLATURE

6.01 COURTS:

Summary Court.

Summary Court deals with minor civil and criminal matters. Its civil jurisdiction is limited to claims not exceeding CI$20,000 (US$23,809.50) and its criminal jurisdiction is confined to relatively minor summary offences. Cases are usually heard by single professional Magistrate sitting without jury or by panel of Justices of Peace. Appeals are to Grand Court.

Grand Court.

Grand Court has unlimited civil and criminal jurisdiction. Criminal trials take place before single judge usually with jury of seven persons (12 in case of murder). Civil cases are heard by single judge sitting alone as there are no juries in civil cases (except in defamation cases with leave of Court). Judges may (and frequently do) sit in their private rooms (Chambers) to hear civil applications, but for trials sit in open Court which general public and press may attend. Urgent matters may be and often are heard at short notice, particularly when preemptive applications (injunctions freezing assets, urgent discovery of assets, etc.) are involved. Grand Court deals with wide range of civil cases varying from matrimonial, probate and personal injury matters to complex corporate, insolvency, commercial and trust cases arising from Cayman Islands' status as major offshore international financial centre. Appeals are to Cayman Islands Court of Appeal.

Court of Appeal.

Cayman Islands Court of Appeal hears both criminal and civil appeals from Grand Court and consists of three judges selected from panel of four. Court usually sits for three annual two-three week-long sessions but can and does sit on additional occasions if necessary. Panel consists of experienced appellate judges from Caribbean and elsewhere. Appeals from Court of Appeal are to Privy Council in London.

Judicial Committee of Privy Council.

This Court, which sits in London, comprises five judges selected from panel comprising eminent judges from House of Lords (final court of appeal in England) and from other courts of appeal in U.K., its overseas territories and other Commonwealth jurisdictions.

6.02 LAWS, LAW REPORTS, CODES, ETC.:

In addition to common law, sources of Cayman Islands law are principally legislation (Laws) passed by Cayman Islands Legislative Assembly, certain Acts of Parliament of U.K. which have been applied to Cayman Islands, Orders-in-Council relating to Cayman Islands (in practice made by U.K. Government) and Regulations made by Governor of Cayman Islands himself or in conjunction with Executive Council of Cayman Islands Government. Laws enacted by Cayman Islands Legislative Assembly and Regulations are published with Cayman Islands Gazette, which is official Government newspaper.

Reports of significant cases decided by Cayman Islands Courts are published in Cayman Islands Law Reports which cover period from 1952 to date. Reports of some Cayman Islands cases are also published in West Indies Law Reports, Law Reports of the Commonwealth, Wills and Trust Law Reports and other more specialist law reports, particularly those relating to banking, trusts and corporate law.

Cayman Islands law is not generally codified, with exception of substantial codification of criminal offences (Criminal Code).

6.03 LEGISLATURE:

See category 1 Introduction, topic 1.02 Government and Legal System.

7 DEBTOR AND CREDITOR

7.01 ASSIGNMENTS:

Cayman Islands law draws distinction between legal and equitable assignment. The Property (Miscellaneous Provisions) Law (2001 Revision) requires legal assignment of chose in action (whether of equitable or legal right) to be absolute assignment (i.e. not by way of charge only) in writing signed by assignor and on written notice to debtor. For equitable assignment all that is required is for creditor to inform assignee that he is transferring his chose in action to assignee or to instruct debtor to discharge obligation to assignee. Consequently, assignment which may not constitute effective legal assignment may nonetheless be valid equitable assignment. Equitable assignee (but not legal assignee) must sue in name of assignor.

7.02 ASSIGNMENTS FOR BENEFIT OF CREDITORS:

See topic 7.04 Bankruptcy.

7.03 ATTACHMENT:

Various forms of attachment are available to enforce judgments of Cayman Islands Courts. Prejudgment attachment of assets by way of injunction may be available to prevent defendant from removing assets from jurisdiction or otherwise dealing with them to defeat potential judgment. Such injunctions may in some cases extend to assets outside Cayman Islands if controlled by defendant within Cayman Islands. As ancillary to such injunctions Court may order disclosure of assets, which obligation may extend to third parties. Injunctions are also available to secure assets or other property which are subject of proprietary claim. In shipping related claims it is possible to arrest ship which is within Cayman Islands territorial waters.

See topic 7.05 Execution.

7.04 BANKRUPTCY:

Corporate Bankruptcy.

See topic Insolvency.

Individual Bankruptcy.

Individual bankruptcy law is constituted by Bankruptcy Law (1997 Revision). This law is complex and involves bankruptcy petition to Grand Court by creditor, appointment of trustee in bankruptcy and ultimately distribution of assets of bankrupt amongst creditors on pari passu basis. Certain debts are required to be paid in priority. Procedure is not frequently used.

7.05 EXECUTION:

Grand Court judgments are enforceable in accordance with Grand Court Rules (“GCR”). GCR regulates enforcement of various types of judgment including judgments for possession of real property, for delivery of goods, etc. as well as payment of damages or other debts. Judgments may also be enforced by means of charging orders over real estate, shares (stock) in companies, by garnishee proceedings by appointment of receiver and sequestration. Most appropriate form of execution will depend upon nature of judgment, type of defendant and assets available to execute against.

Certain forms of execution may not be used without prior leave of Court, particularly where significant time has elapsed since date of relevant judgment or order. Failure to comply with Court Order requiring party to do or to abstain from doing something constitutes contempt of Court which may result in fine, committal to prison or both.

Appeal against judgment or order does not automatically operate as stay of execution. Application to Grand Court for stay pending appeal is required. Stay of execution will usually be granted where otherwise appeal would be rendered ineffective.

7.06 FRAUDULENT SALES AND CONVEYANCES:

Fraudulent or preferential disposals of property may be declared void under Bankruptcy Law in case of individual or under Companies Law in case of company. Any transfer of assets by company made within six months of its winding up (liquidation) may be deemed to be preference and consequently invalid.

The Fraudulent Dispositions Law (1996 Revision) provides that every disposition of property made with intention of defeating obligation owed to creditor and at undervalue is voidable at instance of creditor prejudiced as result. No action may be brought under this Law unless commenced within six years of date of relevant disposition.

7.07 GARNISHMENT:

Grand Court Rules ("GCR") enables person holding judgment for payment of sum of money to attach debt due by third party to judgment debtor by garnishee proceedings. In first instance garnishee will be required to show cause. If garnishee does not attend or does not dispute debt Court will order garnishee to pay judgment creditor amount of debt due by garnishee to judgment debtor. Dispute as to garnishee's liability to pay debt may be resolved summarily or be tried as may be necessary.

7.08 INSOLVENCY—CORPORATE:

Insolvent company (corporation) may be wound up either voluntarily by its members (shareholders) or compulsorily by Court. Voluntary winding up may subsequently be made subject to supervision of Court. Under Companies Law creditor may petition Grand Court to wind up (liquidate) Cayman Islands company which is unable to pay its debts as they fall due (cashflow test). Inability to pay debts will be deemed if company fails to make payment following 21-day Statutory Demand in writing. Official liquidator of company in liquidation (usually Cayman Islands accountant with liquidation experience) will be appointed by Court. Court may appoint provisional liquidator to effect stay of proceedings against financially distressed company to enable corporate restructuring or refinancing. In international cases court will enable liaison with foreign insolvency/bankruptcy courts. Liquidator assumes complete management and control of company's affairs with duty to collect company's assets and ultimately to distribute them on pari passu basis to creditors who have proved their debts. Liquidator has power to examine in Court persons involved in or with information concerning affairs of company or in possession of its property. Liquidator also has power to sue in name of company. No legal proceedings may be brought against company in liquidation without leave of Court. In urgent cases Court may appoint provisional liquidator to preserve assets of company. Certain transactions by or with company prior to its liquidation may be subject to challenge, e.g. fraudulent preferences and fraudulent dispositions. Creditors of company may file claims (proofs of debt) with liquidator in respect of almost all types of claim, including contingent and unliquidated claims. Any undistributed property of dissolved company passes to Crown (Cayman Islands Government).

7.09 LIENS:

Cayman Islands common law recognises certain types of specific lien, being right to retain possession of property until payment due to possessor is made. Examples are attorney's lien or banker's lien. Similar rights may be created by contract.

7.10 PLEDGES:

Personal property may be pledged in security for debt or performance of some lawful obligation by delivery or possession of personal property. Pledgee will usually acquire right of sale (but not foreclosure) on default. General law of contract is applicable to pledges.

See topic 7.09 Liens; category 17 Mortgages, topic 17.01 Chattel Mortgages.

8 DOCUMENTS AND RECORDS

8.01 NOTARIES PUBLIC:

Notaries Public are appointed by Clerk of Grand Court under Notaries Public Law (2006 Revision). To be eligible, applicant must apply in writing to Attorney General and obtain Governor's authorisation of appointment.

9 EMPLOYMENT

9.01 LABOUR RELATIONS:

Labour Law (2007 Revision) (“Labour Law”), provides broad framework for employer-employee relationships, including specific requirements as to vacation leave, sick leave, hours of work, health safety and welfare at work and termination of employment. Labour Tribunals are established for purpose of hearing complaints from employers and employees if those complaints cannot be resolved by Director of Labour through informal negotiations. All employers, other than employers of casual or domestic employees, are required within ten working days of hiring to furnish employee with written statement of conditions of employment which statement is required to contain, inter alia, brief statement of general responsibilities and duties of employee, hours of work, rate of remuneration, period of employment (if other than indefinite) period of probation (if any), holiday entitlement, sick leave entitlement, and length of notice which employee is obliged to give and is entitled to receive upon termination of contract of employment. Employer who fails to furnish this statement of working conditions within seven days of being requested in writing by employee is guilty of offence.

Pensions.

National Pensions Law (2000 Revision) (“Pensions Law”), which came into effect June 1st 1998, requires employers to establish pension plans for all employees full and part time. Pensions Law prescribes contribution of 10% of employee's compensation (of which employee must contribute up to maximum of 5% and employer remainder up to 10% maximum), up to level of CI$60,000 (US$75,000).

Health Insurance.

Health Insurance Law (2005 Revision) (“Health Insurance Law”) which came into effect on July 1st 1998 establishes compulsory health insurance for all persons resident in Islands subject to certain limited exceptions. Pensions Law and Health Insurance Law, while mandatory in nature, are not Government run schemes, and employers have ability to choose “approved provider” from amongst several private sector companies approved by Government to provide such services.

Labour Unions.

There are no major trade or labour unions in Cayman Islands.

Workers' Compensation.

Workmen's Compensation Law (1996 Revision) imposes liability upon employers to pay limited compensation for death or injury of employees arising out of and in course of employment.

10 ENVIRONMENT

10.01 ENVIRONMENTAL REGULATION:

Basic Statutes.

Public Health Law (2002 Revision) covers removal and disposal of garbage, prevention and suppression of disease, disposal of human remains and other environmental nuisances.

Water Authority Law (1996 Revision) constitutes body corporate called Water Authority to exercise functions assigned to it by that Law. Water Authority is responsible for control of water resources including distribution of water supply and water pollution control as well as sewerage and sewage disposal. Marine Conservation Law (2007 Revision) provides for system of marine parks and restrictions on activities conducted in adjacent waters, including establishment of environmental zones. There are criminal penalties for contravention of Marine Conservation Law. Development and Planning Law (2008 Revision) empowers Central Planning Authority to enforce cleanup of dilapidated, ruinous, or contaminated property.

11 ESTATES AND TRUSTS

11.01 DEATH:

Law presumes person to be dead if nothing has been heard from him for period of seven years by those persons with whom he is likely to have communicated, but in every case it is considered question of fact. Records of death (and of births and marriages) are maintained by office of Registrar General and deaths are required to be registered. Death certificates may be obtained on application to office of Registrar General.

11.02 DESCENT AND DISTRIBUTION:

Succession Law (2006 Revision) ("Succession Law") governs succession to real and personal estate of intestate person. Duly probated will governs distribution of estate of testate individual. There are no forced heirship provisions under Cayman Islands law.

11.03 EXECUTORS AND ADMINISTRATORS:

Succession Law and Succession Law (Probate and Administration) Rules govern grants of probate of wills and grants of letters of administration. No person acting otherwise than as agent of necessity may take possession or administer any part of estate of deceased person unless and until he has obtained from Grand Court grant of probate of will or grant of letters of administration of estate of deceased person.

Executors and administrators must be at least 18 years of age and where there is more than one person interested, grant of probate or letters of administration cannot be granted to more than four persons jointly. Grant of probate of will is deemed to take effect from time of death of deceased whereas grant of letters of administration takes effect from time grant is made. Application for grant of probate of will or letters of administration must be made within six months of death of deceased or within two months of determination of any dispute concerning right to such probate or letters of administration. If time limits are not met, application for leave to apply out of time must be made to Grand Court before application is submitted for grant. Personal representatives have one year within which to administer estate, and inventory of estate together with general accounting showing receipts and distribution along with appropriate affidavit must be filed with Clerk of Court. Such accounts are open to persons beneficially interested in estate.

Where court of probate outside Cayman Islands has granted probate or letters of administration it may be extended to Cayman Islands by application to Grand Court for resealing of grant. In considering such resealing applications court may require adequate security for payment of debts due from estate to public or private creditors who reside in Islands.

11.04 TRUSTS:

General.

Cayman Islands law relating to trusts is amalgam of English common law, certain pre-1728 English statutes having application in Islands, certain post-1728 English statutes expressly made applicable to Islands, and local statutes. Principal local statute is Trusts Law (2007 Revision) ("Trusts Law") originally passed in 1967 as consolidating statute.

Cayman is not party (by extension or otherwise) to Hague Convention (relating to law applicable to trusts and their recognition). Part VII of Trusts Law, originally enacted as Trusts (Foreign Elements) Law 1987, addresses issues of law governing capacity of settlor, any aspect of validity of trust or disposition or interpretation or effect thereof, administration of trust and existence and extent of powers, and also gives statutory recognition to concept of import or export of trust with consequential change of governing law. In addition, Part VI excludes foreign heirship rights and rights conferred by reason of personal relationship to settlor.

The Banks and Trusts Companies Law (2007 Revision) prohibits companies from carrying on trust business in or from within Islands without valid Trust Licence (either Restricted or Unrestricted) issued by Cayman Islands Government. Trust Companies are supervised by Cayman Islands Monetary Authority.

Exempted Trusts.

If trust does not, and is not likely to, have any beneficiaries resident or domiciled in Islands, it can be registered as Exempted Trust under § 74 of Trusts Law. Registration fee and annual fee are payable and trust can obtain tax exemption undertaking from Government for period of up to 50 years.

Where proposed trust satisfies requirements of § 74 in relation to beneficiaries and is also submitted in draft form to Registrar of Trusts under § 82 of Trusts Law, it can receive pre-execution approval of Government for registration. If trust is subsequently created and filed for registration within 28 days after such pre-execution approval, provisions of § 83 of Trusts Law shall apply to trust so that rights and remedies of beneficiaries of trust will vest in Registrar. This means, inter alia, that no beneficiary will be entitled to bring any action against trustees or have any right to receive information concerning trust.

Special (STAR) Trusts (Including Non-Charitable Purpose Trusts).

Special trusts created under Special Trusts (Alternative Regime) Law, 1997 ("STAR Law") (now Part VIII of Trusts Law) can be for purposes (charitable or non-charitable), persons or both. At least one of trustees of STAR trust must be Cayman Islands licensed trust company. STAR trust must have at least one enforcer. Enforcer(s) is only person with right to enforce trust. Beneficiaries who are not enforcers have no right to enforce trust or obtain information concerning trust. STAR trust can be perpetual. STAR law provides for reform of STAR trust in event of problems relating to uncertainty, impossibility etc. Subject to limited exceptions, STAR trust is not permitted to hold land or any interest in land in Cayman Islands.

Investment.

§ 35(a) of Trusts Law permits trustees to invest "in any securities in which trustees in England are for the time being authorised by the law of England to invest trust funds", so that investments authorised by English Trustee Act 2000 are automatically authorised under Cayman Islands law. § 110(2) of Trusts Law (which is equivalent of § 69[2] of English Trustee Act 1925) permits settlor to grant wider (or narrower) investment powers in trust instrument.

Perpetuities.

Common law rule against perpetuities (that interest must vest in possession within life-in-being plus 21 years) has been superseded by Perpetuities Law (1999 Revision). Maximum perpetuity period under new Law is 150 years except for STAR trusts, which may be perpetual. New Law also introduced "wait and see" rules.

Remuneration.

In absence of express provisions in trust instrument, trustees are not entitled to be remunerated except with express authority of Grand Court.

Variation of Trusts.

Grand Court may, on behalf of certain specified classes of persons, approve any arrangements varying or revoking trust of real or personal property or enlarging trustees powers of administration or management. Trusts Law expressly permits settlor of trust to reserve or grant power to revoke, vary or amend trust in whole or in part. STAR law permits STAR trusts to contain terms which provide for resolution of any uncertainty and reform of trust in event it becomes impossible or impracticable, unlawful or contrary to public policy or obsolete, failing which Grand Court has power to resolve uncertainty or reform trust cy-près.

Reserved Powers.

Part III of Trusts Law provides presumption of immediate effect if instrument not expressed to be will or codicil or take effect on death of settlor. Also permits settlor to reserve substantial powers without affecting validity of trustees' powers to direct investment of trust fund.

11.05 WILLS:

Any person over age of 18 male or female and of sound mind may make will. Infant cannot make will, unless soldier in actual military service or mariner or seaman at sea. Will must be in writing and signed by testator or by some other person in his presence and by his direction and such signature requires to be made or acknowledged by testator in presence of two or more witnesses present at same time who attest and subscribe will in presence of testator and of each other. Will should not be witnessed by person taking benefit thereunder and such gift to witness will be null and void, but will is not otherwise invalidated. Will can be revoked by burning, tearing or otherwise destroying same by testator or some person in his presence and by his direction with intention of revoking will. Will is also revoked by marriage subsequent to making of will (unless will expressly made in contemplation of marriage) or by subsequent will executed in proper form.

12 FAMILY

12.01 DIVORCE:

Jurisdiction.

By Matrimonial Causes Law (2005 Revision) (“Law”) general jurisdiction in dissolution of marriage, nullity of marriage, judicial separation, and presumption of death of spouse was granted to Grand Court.

Domicile or Residence Requirements.

Court has jurisdiction over persons where, at time of filing of suit, or at material time with reference to suit and within one year of presentation of petition, either of parties to suit was domiciled in Islands; or party filing suit, being female, has been ordinarily resident in Islands for at least two years immediately preceding presentation of petition.

Grounds for Decree of Dissolution of Marriage.

By § 10 it is provided that decree of dissolution may be pronounced on grounds that since celebration of marriage: (a) respondent has committed adultery and petitioner finds it intolerable to live with respondent; (b) respondent has behaved in such way that petitioner cannot reasonably be expected to live with respondent; (c) respondent has deserted petitioner for continuous period of at least two years immediately preceding presentation of petition; (d) parties to marriage have lived apart for continuous period of at least two years immediately preceding presentation of petition and respondent consents to decree being pronounced; or (e) parties to marriage have lived apart for continuous period of at least five years immediately preceding presentation of petition. Court will pronounce decree of dissolution if upon inquiry it is satisfied that grounds have been established, marriage has broken down irretrievably and there are no material impediments under Law to making decree.

Annulment of Marriage.

By § 8 it is provided that marriage will be void if: (a) it was celebrated in Cayman Islands and (i) it is within prohibited decrees of consanguinity or affinity, or (ii) it is void under law in force for time being in Islands relating to marriage; (b) it is bigamous; or (c) parties were not voluntarily consenting thereto by reason of duress, fraud or incapacity of mind.

Decree of nullity may be pronounced by Court in respect of any marriage or purported marriage on grounds that: (a) such marriage is void; (b) one of parties thereto was, at time of marriage, physically incapable of consummating marriage and remained so incapable; (c) marriage has not been consummated by reason of willful refusal of respondent to consummate marriage; (d) either party to marriage, was at time of marriage of unsound mind, mentally defective or subject to recurrent fits of insanity or epilepsy; (e) respondent was at time of marriage suffering from venereal disease in communicable form; or (f) respondent was at time of marriage pregnant by some other person than petitioner: provided that (save in case of void marriage) petitioner was ignorant of facts alleged and instituted proceedings within one year from date of marriage and in respect of (d) to (f) marital intercourse with consent of petitioner has not taken place since discovery by petitioner of existence of grounds of decree.

Recognition of Foreign Decree.

Overseas decree, order of foreign court or other legally effective proceeding relating to marital status will be recognised in Cayman Islands if at date of proceedings either spouse was (a) habitually resident in that country or (b) national of that country or (c) domiciled in that country under law relating to domicile there, and court is satisfied that foreign court was competent.

12.02 HUSBAND AND WIFE:

Married woman is capable of acquiring, holding and disposing of any property as if unmarried and is similarly liable in respect of tort, contract, debt or obligation and capable of suing and being sued, as well as subject to law relating to bankruptcy and to enforcement of judgments and orders, as if she were unmarried.

12.03 INFANTS:

Age of Majority Law, (1999 Revision) provides that age of majority for each sex is 18 years.

12.04 MARRIAGE:

Marriage Law (2007 Revision) ("Marriage Law") governs marriages. Requisites for valid marriage are: (1) ceremony must be performed by duly appointed marriage officer in presence of two credible witnesses; (2) either after publication of banns or certificate for marriage by registrar or by licence of Governor; (3) that each of parties should be at least 16 years of age and as regards mental capacity and otherwise be capable of contracting marriage; (4) that they should not be within prohibited degree of consanguinity or affinity; (5) that there should not be valid subsisting marriage of either of parties with any other person; (6) that parties, understanding nature of contract, should freely consent to marry one another; (7) that forms and ceremonies prescribed by Marriage Law should be observed unless there is no person authorised to give such consent resident in Cayman Islands.

In case of any person under 18 years of age, not being widower or widow, consent of father, or if father is dead, lawfully appointed guardian, or if there is no such guardian, mother, if unmarried, must be obtained.

Annulment.

See topic 12.01 Divorce.

12.05 MARRIED WOMEN:

See topics 12.01 Divorce, Husband and Wife, Marriage; categories 11 Estates and Trusts, topics Descent and Distribution, Executors and Administrators, Trusts, Wills.

13 FOREIGN TRADE AND COMMERCE

13.01 EXCHANGE CONTROL:

There is no exchange control in Cayman Islands.

See also categories 2 Business Organizations, topic Corporations; Introduction, topic Currency.

13.02 FOREIGN EXCHANGE:

See category 1 Introduction, topic 1.01 Currency.

13.03 FOREIGN TRADE REGULATIONS:

See topic 13.01 Exchange Control; categories 2 Business Organizations, topic Corporations; Citizenship, topic Immigration; Introduction, topic Currency.

13.04 TRADE:

See categories 2 Business Organizations, topic Corporations; Citizenship, topic Immigration.

Trade Unions.

See category 9 Employment, topic 9.01 Labour Relations.

14 IMMIGRATION

14.01 ALIENS:

Holders of Caymanian status under Immigration Law (2007 Revision) whether such status is acquired by birth or grant have unrestricted right to reside and work in Cayman Islands. Non-Caymanians may not hold elected office and except in certain limited circumstances, e.g. Government employees. Non-Caymanians wishing to work in Cayman Islands, must hold valid work permit issued by Work Permit Board or Business Staffing Plan.

No company may carry on business in Cayman Islands without licence issued pursuant to The Local Companies (Control) Law (2007 Revision) (“LCCL”) unless: (a) it is Caymanian controlled; (b) at least 60% of its shares are beneficially owned by Caymanians; and (c) at least 60% of its directors are Caymanian. Only exceptions to this are companies licensed under: (a) Banks and Trust Companies Law (2007 Revision); (b) Mutual Funds Law (2007 Revision); (c) Securities Investment Business Law (2004 Revision); or (d) companies operating under franchise granted by Government. Exempted company may not carry on business in Cayman Islands except in furtherance of its offshore activities (which does not require LCCL Licence) but must first apply for and obtain offshore trade and business licence under Trade and Business Licensing Law (2007 Revision).

There are no general restrictions on foreign ownership of property in Cayman Islands. However, ownership of real estate which is income producing, for example apartment building, is considered carrying on business and will require LCCL Licence and Trade and Business Licence. Further, non-Cayman companies can not own property in Cayman unless they are first registered as Foreign Company pursuant to Companies Law (2007 Revision).

See categories 14 Immigration, topic Immigration; Property, topic Real Property.

14.02 IMMIGRATION:

Residence.

It is unlawful for any person other than one who possesses Caymanian status (see subhead Caymanian Status, infra) or is special category person (mainly Government employee) or is bona fide visitor to enter and reside in Cayman Islands without grant of residency from Chief Immigration Officer. Applicants for such permission will be required to furnish references as to character and means, police clearance, medical certificate, etc. Bona fide visitors must be in possession of return air ticket on arrival in Cayman and most visitors are allowed to remain in Islands for periods not exceeding six months, permission being required for longer period.

Employment.

It is unlawful for non-Caymanians, including non-Caymanian spouse of Caymanian, to engage in gainful occupation (which is widely construed) without holding work permit. Work permit is obtained by way of application to Work Permit Board or Business Staffing Plan and applicants are required to produce references, police clearances, medical records and evidence of qualifications.

Grant of Caymanian Status is governed by Immigration Law (2007 Revision) and is acquired either: (i) At birth based on parentage; (ii) by grant from Work Permit Board or Business Staffing Plan based on close connection to Islands, long residency etc.; (iii) by Chief Immigration Officer (mainly persons born in Cayman Islands or British Overseas Territories); or (iv) by special grant of Governor.

See also topic 14.01 Aliens; categories 2 Business Organizations, topic Partnerships; Property, topic Real Property.

15 INSURANCE

15.01 INSURANCE COMPANIES:

Governing Statutes.

(i) Companies Law (2007 Revision) generally and Part XIV specifically in relation to segregated portfolio insurance companies, (ii) additional specific requirements of Insurance Law (2008 Revision), which extend to all insurers, insurance managers and insurance brokers.

Supervision by Cayman Islands Monetary Authority.

Conditions of Licence.

Insurer must display and maintain applicable minimum net worth requirements, and premium to capital ratios.

Class of Insurance Licence.

There are three categories of Insurer Licence which can be sought, depending on structure, shareholders and scope of business. Class "A"—Permits local/external insurer to carry on insurance business generally in or within Cayman Islands; Unrestricted Class "B"—Permits exempted insurer to carry on insurance business other than domestic business from within Cayman Islands; Restricted Class "B"—Permits exempted insurer to accept nondomestic insurance business from its members/specifically approved persons. Additionally licences are required for insurance agents, insurance brokers, insurance subagents, insurance managers and principal representatives.

General and Long-Term Business.

Insurer carrying on general business only must have minimum net worth of at least CI$100,000. Insurer carrying on long-term business only must have minimum net worth of at least CI$200,000. Insurer combining both classes of business must have minimum net worth of at least CI$300,000.

Insurance Manager.

Every insurer (unless exempted from such requirement) must appoint and maintain insurance manager licensed and resident in Cayman Islands and maintain at principal designated office (normally within Cayman Islands) full and proper records of its business activities.

Accounting Provision.

Every insurer must prepare annual accounts in accordance with generally accepted accounting principles, audited by insurer's approved auditors. Holders of Class "A" Insurer Licences and Unrestricted Class "B" Insurer Licences carrying on long term business must also prepare additional actuarial valuations and financial statements annually.

Solvency Margin.

Current law does not specify exact premium to capital ratios or ratios for individual risk exposure to total capital, and these are set for each insurer in discussion and with approval of Cayman Islands Monetary Authority. Generally, as guidelines, premium to capital ratio should be between 3 and 5 to 1 and "industry rule" of each individual risk not exceeding 10% of company's capital should be observed.

Long Term Business.

Separate accounts must be kept. All receipts in respect of long term business must be credited to separate long-term business fund. No payment may be made directly or indirectly from this fund for any purpose other than for conduct of insurer's long-term business, except to extent that this is shown as surplus, certified by approved actuary to be available otherwise than to policyholders.

Mutual Insurance Companies.

These companies may register in same manner as other companies. Mutual companies will have insurance and reinsurance business as their principal objects. They must maintain same net worth requirements as limited companies. Additionally Cayman Islands Monetary Authority has recently permitted "conversion" of limited liability insurers to "mutual" insurers (by means of transfer of all undertakings, assets and liabilities and licensing of new Mutual Company to continue insurance business).

Segregated Portfolio Insurers.

In 1998 Cayman Islands had originally introduced concept of “Segregated Portfolios” for Unrestricted Class “B” insurers. Companies Law (2007 Revision) made this of general application and permits insurers to establish separate “portfolios” with their liabilities and assets segregated and protected from those of other portfolios and general assets and liabilities of insurer. Existing or new insurers can take advantage of mechanism to permit separate “cell” holdings of assets and liabilities structured for individual/groups of shareholders or types of insurance business conducted.

16 INTELLECTUAL PROPERTY

16.01 COPYRIGHT:

The United Kingdom Copyright Act 1956 (as amended) and 1966 Universal Copyright Convention have been extended to Cayman Islands and provide for copyright in original, literary, dramatic, artistic and musical works and in sound recordings, cinematograph films, broadcast and published editions of such works similar to that which exists in U.K. on all classes of works and subject matter in which copyright subsists under Universal Copyright Conventions.

(See topic 16.02 Patents and Trademarks.)

16.02 PATENTS AND TRADEMARKS:

Patents and trademarks are governed by Patents and Trademarks Law (2007 Revision) which permits owner of patents and trademarks registered in United Kingdom and European Community to extend such rights to Cayman Islands. There is no original registration of patents or trademarks not already registered in U.K. or European Union.

17 MORTGAGES

17.01 CHATTEL MORTGAGES:

Chattel mortgage required to be deed in form of bill of sale conditioned to be void upon payment of principal and interest secured, and should be registered in Public Records Office within 90 days of making or giving of such bill of sale (Bills of Sale Law (2000 Revision)). Chattel mortgages of moveable property situated in Islands will be subject to ad valorem stamp duty with maximum of CI$500 in case of security given by exempted company, ordinary non-resident company, exempted trust or body corporate incorporated outside Islands (Stamp Duty Law [2007 Revision]).

See category 3 Business Regulation and Commerce, topic 3.11 Sales. Also see category 2 Business Organizations, topic 2.03 Corporations, subhead Charges.

17.02 MORTGAGES OF REAL PROPERTY:

There is registered land system in Cayman Islands and mortgages of interests in land are effected by way of legal charge in form prescribed by Registered Land Law (2004 Revision) and registered against title of property. Discharge of legal charge must be by way of discharge of charge in form prescribed.

Equitable mortgages of interests in land are not recognised and all mortgages of land should be registered at Registrar of Lands as priority in registration determines priority of charge (subject to tacking and consolidation provisions made in charge document and placed on Land Register respectively).

Exempted companies may hold mortgages on Cayman Islands real and personal property provided that such company obtains consent of Financial Secretary and complies with requirements of Companies Law (2007 Revision), relating to prohibition of bearer shares in land owning company. In case of overseas company, such company is required to register as foreign company.

Mortgages are subject to ad valorem stamp duty currently 1% to 1.5% of sum secured.

See also topic 17.01 Chattel Mortgages; categories 7 Debtor and Creditor, topic Assignments; Property, topic Real Property.

18 PROPERTY

18.01 ABSENTEES:

In absence abroad, person may generally delegate authority to any person of full capacity, usually by power of attorney. Save in respect of power of attorney granted in regard to real property, which must be in form prescribed by provisions of Registered Land Law (2004 Revision) and registered at Cayman Islands Land Registry, it is not necessary to file power of attorney with government agency or authority.

See topic 18.02 Real Property; categories 7 Debtor and Creditor, topics Garnishment, Bankruptcy; Estates and Trusts, topic Death.

18.02 REAL PROPERTY:

The Registered Land Law (2004 Revision) ("RLL") provides comprehensive registered land system, which covers all real property in Cayman Islands.

Registrar of Lands maintains land register in respect of all parcels of land, developed and undeveloped, including condominiums, which registers are open to public inspection. No disposition of real property may be made save pursuant to provisions of RLL. All transfers of land must be effected using prescribed transfer of land form executed in accordance with provisions of RLL. Mortgages over real property are effected by way of legal charge in prescribed form registered on title.

Ad valorem stamp duty at rates between 0% and 7.5% depending on location of property and whether buyer is Caymanian citizen are chargeable upon all transfers of land.

Charges of real property will attract ad valorem at rate of 1% of sum secured where sum secured is CI$300,000 or less, and at rate of 1.5% where sum secured is more than CI$300,000.

Absentee may grant power of attorney in prescribed form, which must be registered at Land Registry to be effective.

There is no general prohibition against ownership of real property by foreigners, although carrying out of development of real property and ownership of certain types of commercial property may be subject to provisions of Local Companies (Control) Law (2007 Revision) and Trade and Business Licencing Law (2007 Revision). Further, non-Cayman companies can not own property in Cayman unless they are first registered as Foreign Company pursuant to Companies Law (2007 Revision).

See also categories 2 Business Organizations, topic Corporations; Citizenship, topics Aliens, Immigration; Civil Actions and Procedure, topic Limitation of Actions; Mortgages.

19 TAXATION

19.01 TAXES:

There are no income, profits, capital gains, sale of goods, death, or inheritance taxes in Cayman Islands. Customs and stamp duties are chief source of revenue, comprising approximately 45% of total annual public revenues of approximately $300 million.

Within category of duties, custom duties account for approximately 35% of total government revenues with over half of customs collections being in miscellaneous category.

As percentage of annual Government revenue significant customs duties are collected on: Motor vehicles (approximately 4%); gasoline and diesel (approximately 6%); alcoholic beverages (approximately 5%) and tobacco products (approximately 1%).

Stamp duties on land transfers and other stamp duties account for approximately 10% of annual government revenues.

Licences account for approximately 8% of annual government revenue, with largest sub categories being Banks and Trust Licences and telecommunications (code and wireless) each accounting for approximately 3%.

Fees account for approximately 20% of total annual government revenue with company fees (approximately 7%) and work permit fees (approximately 6%) being largest sub categories.

Taxes, cumulatively account for 8% of annual government revenue, largest sub categories being tourist accommodations tax (approximately 4%), cruiseship departure tax (approximately 2%) and motor vehicle tax (approximately 2%).

Sale of postal stamps accounts for approximately 1% of annual government revenue.

20 TRANSPORTATION

20.01 AVIATION:

Aircraft Register.

The Cayman Islands Aircraft Register (“Cayman Register”) is maintained by Civil Aviation Authority of Cayman Islands (“CAA”) on behalf of Governor of Cayman Islands, pursuant to The Air Navigation (Overseas Territories) Order 2007 (“Order”). Applications to register aircraft are accepted from qualified persons as defined by Order. Cayman Register complies with provisions of Order and standards and practices laid down by International Civil Aviation Organisation and has been designated category 1 status by US FAA.

Ownership.

Qualified persons entitled to hold legal or beneficial interest in aircraft on Cayman Register include bodies incorporated in some part of Commonwealth and having their principal place of business in any part of Commonwealth; Crown; Commonwealth citizens; citizens of Republic of Ireland; British protected persons and firms carrying on business in Scotland. In practice, most aircraft registered on Cayman Register are owned by Cayman Islands exempted companies incorporated specifically for this purpose. Registration process involves making of formal application to register aircraft (normally by Cayman Islands law firm) and provision of technical information in relation to aircraft by aircraft manufacturer or maintenance facility.

Certification.

CAA demonstrates flexibility in accepting aircraft, maintenance facilities and crew certified by most major international agencies including Federal Aviation Administration, U.K. Civil Aviation Authority and pursuant to Joint Airworthiness Requirements. Regulations and directives are issued by CAA in connection with operation of aircraft on Cayman Register and to large extent are modeled on U.K. provisions. All airports are operated pursuant to provisions of The Civil Aviation Authority Law (2005 Revision). Radio and avionics installations subject to provisions of Order and Information and Communications Technology Law (2006 Revision). Provisions thereof are designed to make Cayman Islands Register more attractive and flexible while maintaining full international standards.

Operations.

Licences of all aircraft engineers signing certificates for aircraft on Cayman Register and all crew operating such aircraft must be validated by CAA, pursuant to Order. Operation of aircraft on Cayman Register with respect to airworthiness, flight operations and flight crew is regulated by CAA. As general rule, all aircraft joining or leaving Cayman Register are subject to physical survey by CAA together with annual survey prior to renewal of Certificate of Airworthiness.

20.02 MOTOR VEHICLES:

Motor vehicles and drivers are licenced and subject to general control pursuant to Traffic Law (2003 Revision). There are no horsepower or size of vehicles restrictions other than for public and private transport buses and some heavy equipment. Crash helmets are mandatory for persons on motorcycles and motorbikes. There are no restrictions on rental of cars or motor scooters.

Liability Insurance.

Third party insurance with approved insurance company is compulsory pursuant to Motor Vehicle Insurance (Third Party Risks) Law (2007 Revision).

20.03 SHIPPING:

Cayman Islands Shipping Register ("CISR") is maintained under authority of Maritime Authority of Cayman Islands. Ports of Registry are George Town, The Creek and Bloody Bay which are British Ports of Registry. Ownership, registration and operation of vessels is governed primarily by Merchant Shipping Law (2008 Revision) ("Merchant Shipping Law").

Ownership qualification for registration in Cayman Islands is governed by Merchant Shipping Laws. Qualified persons include body corporate, incorporated in and having its principal place of business in Cayman Islands, U.K., any member of European Union or any British overseas territory and any other approved country, which means those countries listed under Third Schedule of the Money Laundering Regulations (2008 Revision). Under Shipping Laws, Governor has power to direct Registrar of Shipping to refuse to register or to remove from register, any ship if, having regard to safety of ship and safety, health and welfare of seamen employed therein, it is detrimental to interests of International Merchant Shipping for ship to be registered in Cayman Islands.

Vessels may be registered by demise charter pursuant to Shipping Laws and provision is made for demise charter registration of Cayman Islands vessels on other registers.

Registration procedures are quite flexible and it is not necessary for vessel to visit Cayman Islands. Surveys may be carried out by Marine Survey Department or by Lloyds Register of Shipping and British Committees of Bureau Veritas, Det Norske Veritas, Registro Italiano Navale, Germanischer Lloyd, Nippon Kaiji and American Bureau of Shipping (all may be authorised to issue and renew certain certificates required in relation to registration and ongoing surveys). Shipping Laws require officers of commercial vessels to have EC, NATO or Commonwealth qualifications, however Director of Shipping may vary or exempt certain vessels from these requirements.

Vessel title and mortgage registration is effected at George Town.

Most of main International Maritime Conventions/Regulations to which UK is party have been incorporated into Cayman Islands law including MARPOL (1973 & 1978 Protocol); SOLAS (1974 & 1978); ILO (92 & 133) for crew accommodation; STCW; Load Lines, (1966 Convention) and Tonnage Regulations (1969 Convention).

Port Authority is constituted under The Port Authority Law (1999 Revision) with powers in relation to pilot service, berthing, etc.

Under Grand Court Law (2008 Revision) Grand Court has jurisdiction to hear wide variety of claims concerning ships and matters incidental thereto by actions both in personam and, where appropriate, in rem.

21 TREATIES AND CONVENTIONS

21.01 TREATIES AND CONVENTIONS:

As U.K. Dependent Territory Cayman is party to number of treaties and conventions to which U.K. is signatory. These have been extended to Cayman by Order in Council. See also categories 11 Estates and Trusts, topic Trusts, subhead General; Intellectual Property, topic Copyright.

1

OMAN LAW DIGEST

—Scope —

Revised for 2009 edition by

CURTIS, MALLET-PREVOST, COLT & MOSLE LLP, of Muscat, Oman.

Note: This revision incorporates legislation through Jan. 2009.

1 INTRODUCTION

1.01 CURRENCY:

Official currency is Omani Rial which is divided into 1,000 Baizas. Omani courts and tribunals will enforce judgments in foreign currency.

1.02 GOVERNMENT AND LEGAL SYSTEM:

On 23 July 1970, His Majesty Sultan Qaboos bin Said acceded to throne of Sultanate of Oman and launched radical reforms in government administration and judicial system. His Majesty established modern government structure and introduced major development programmes to build infrastructure of country and for building prosperous future for people of Oman.

In Nov. 1996, Basic Statute, Oman's first written constitution, was issued by Royal Decree 101/96. It prescribes legal framework for governance and codifies legal order of Oman. It provides rules for royal succession, principles guiding state policies, functions of different authorities, individual's rights and structure of Government.

Basic Statute characterizes country as independent, Arab, Islamic, fully sovereign state with Muscat as its capital and sets political, economic, social, cultural, and security principles of state policies.

Political principles are stated to be: (i) Preserving State's independence and sovereignty, and defending it against all forms of aggression; (ii) reinforcing cooperation and ties with all countries on mutual respect, common interest, non-interference in internal affairs and in compliance with generally recognised principles of international law for promotion of world peace and security; (iii) laying foundations for establishment of Shura consultation, based on national heritage and Shariah; and (iv) establishing good administrative system that guarantees justice, peace and equality for citizens, ensures public order and safeguards interests of state.

Basic Statute provides for independent judiciary and right to fair trial. It guarantees to individuals right to life and liberty and freedom of speech and expression within limits of law. It recognises principle of due process of law and guarantees right to defence in court of law.

Government structure comprises His Majesty the Sultan as head of State, council of ministers, functioning as cabinet consists of ministers appointed by Sultan. Bicameral parliament or “Majlis Oman” comprises Shura council “Majlis Al Shura” or Consultative Council and “Majlis Al Duwlah” or State Council. Members of State Council are appointed by His Majesty. Shura council is representative council and its members are elected by people and it has mandate to review legislation pertaining to economic and social development prior to its becoming law.

Basic Statute contemplates establishment of higher council to oversee running of courts and auxiliary bodies. Court system comprises courts of first instance, courts of appeal, and Supreme Court.

Legislation consists of primary legislation and secondary legislation. Primary legislation is issued by and known as Royal Decree (“RD”) and published in fortnightly Official Gazette. RD may be amended by RD only. Secondary or interstitial legislation is issued by Ministerial Decision (“MD”), Decisions and implementing regulations by relevant executive body or Ministry which are also published in Official Gazette.

Oman has civil law jurisdiction. All laws are required to be in conformity with Basic Statute. Laws become effective from date of publication in Official Gazette.

In 1975, Diwan of legislation was formed to review all laws and to draft Royal Decrees, international agreements and government contracts. Ministry of Legal Affairs was established in 1994 which is responsible for preparation of RD and for reviewing all draft laws, regulations and MD before they are promulgated and published in Official Gazette. It issues Official Gazette and gives legal opinion and advice to government on interpretation of RD and laws.

RD 75/08 promulgated the State of Emergency Law authorizing declaration of an emergency when the state’s security or public order is threatened by war, internal disturbance, general crisis or spread of epidemic. RD 76/08 promulgated the General Mobilization Law authorizing announcement of mobilization upon outbreak of war or of its revocation by Royal Orders.

1.03 HOLIDAYS:

Hejira calendar is official calendar of Oman. Based on this, there are five official holidays: Eid Al-Fitr, Eid Al-Adh'ha, Milad-Un-Nabi, new Heira year and Al Isra and Al Miraj. In addition, based on Gregorian calendar, official holidays are also declared on 23 July—Renaissance Day marking His Majesty's ascendance to throne and National Day which falls on 18 Nov.

1.04 LANGUAGE:

Official language is Arabic. All documents, correspondence, agreements submitted to government and its instrumentalities must be in Arabic. Omani courts and tribunals will consider and construe only documents submitted in Arabic or in Arabic translation as translated by duly licensed translator. Although unofficial English translations of many Omani regulations are available, authoritative text thereof is Arabic text. Omani court proceedings must be in Arabic. However, parties may agree any other language for arbitration.

1.05 OFFICE HOURS AND TIME ZONE:

Oman is in GMT +04:00 hours. Office hours vary widely by business, but in general are from 8:00 AM to 1:30 PM Sat. through Thurs. and 4 PM to 6:30 PM Sat. through Wed. In 2008, on recommendation of Oman Chamber of Commerce and Industry, many companies adopted five- day week of Sun. through Thurs. with official hours of business increased by one hour on week days. Official working hours for government offices are from 7:00 AM to 2:00 PM Sat. through Wed. Banks are open to public from 8 AM to 1 PM from Sun. to Thurs.

2 BUSINESS ORGANIZATIONS

2.01 AGENCY:

Foreign natural or juridical persons must engage in commercial activities through locally registered commercial agent in Oman. Accordingly, foreign manufacturers or suppliers who do not have legal presence in Oman must appoint local agent to sell, promote or distribute product or commodity or to provide service.

Relationship between foreign principal and commercial agent in Oman is governed by Law of Commerce (RD 55/90) and Commercial Agencies Law (RD 26/77 as am'd).

Law of Commercial Agencies defines commercial agency as agreement whereby foreign producer or supplier who has no legal presence in Oman assigns to one or more Omani natural or corporate persons right to sell, promote or distribute commodity or product or to provide service for profit or commission. Law does not draw distinction between commercial agent, representative, distributor or any other intermediary.

Agent may be natural or juridical person. If agent is natural person, he must be Omani national and resident of Oman; if juridical entity, Omani shareholding must be more than 51% and commercial agency must be stated as business object of agent following Oman's accession to WTO, companies with up to 70% shareholding are permitted to be commercial agents. Agencies may be non-exclusive and more than one agent may be engaged by foreign principals.

Agency agreement must be in writing and registered with Agency Registrar at Ministry of Commerce and Industry (MD 11/85 as am'd). Agreements signed abroad must be duly legalised by Omani embassy. If agency agreement is not in Arabic, duly authenticated Arabic translation must be provided for registration of agency. Approximate government fee for agency registration is US$400 which includes cost of registering agency with Ministry of Commerce and Industry and with Oman Chamber of Commerce and Industry. Registration must be renewed every three years.

Except in respect of goods for Ministry of Defence, principal cannot sell products directly to customer without involvement of agent. Duly appointed agent is entitled to commission even if principal has resorted to direct selling products or services to customer in contravention of law and agency agreement.

Products manufactured abroad may be imported by customers without intermediary or agent for private use which is not intended for commercial purpose.

2.02 CORPORATIONS:

Commercial Companies Law (RD 4/74 as am'd) provides for formation, regulation, merger, conversion, liquidation and dissolution of general partnerships, limited partnership, joint ventures, closed joint stock companies, public joint companies, holding companies and limited liability companies. Subject to licensing and other restrictions, foreign natural and juridical persons can invest in joint venture, closed or public joint stock company and Limited Liability Company. Foreign investment in local companies is authorized pursuant to Foreign Capital Investment Law (RD 102/94).

Joint venture is unincorporated association in nature of consortium of two or more commercial entities usually to execute project. There is no registration requirement but foreign company participating in joint venture must be licensed entity. In its functioning, joint venture can be considered to be de facto general partnership between participants on such joint venture. Entities in joint venture must have written agreement on sharing of profit and other common issues.

Limited Liability Company must have at least two natural or juridical shareholders referred to as partners or members. Share capital must be at least RO 20,000 if shareholders are Omanis and RO 150,000, if there is one or more foreign partner. Capital is divided into shares of equal nominal value that are not available for public subscription. Members' liability is restricted to shareholding in capital. It cannot engage in business of banking, insurance, financial guarantees, or commercial aviation.

Shareholders have effective right of preemption and right of first refusal before shareholder sells its shares to third party. Shares confer equal voting rights. Share certificates are not issued and shareholding is evidenced by incorporation documents including contract of incorporation called constitutive contract. Company must keep membership register giving names of members and other relevant particulars. Any proposed shareholders' action which increases financial liability requires unanimous approval of shareholders.

Management of Limited Liability Company is entrusted to one or more managers or board of managers. Manager may perform acts for company's objects unless restricted by constitutive contract or law. Accounts must be maintained and audited in accordance with international accounting standards. Companies with capital of over RO 50,000 or having more than ten shareholders, or so required by contract of incorporation, must have internal auditor.

Joint Stock Company with at least three shareholders must have authorized and issued share capitals. Memorandum and Articles of Association must be approved by Ministry of Commerce and Industry (“MCI”) before incorporation. Joint stock companies may be—public or closed.

Public Joint Stock Company is authorized to issue stocks to public and must have minimum share capital of RO 2,000,000. It is subject to code of corporate governance and other regulations issued by Capital Market Authority (“CMA”). Besides MCI, registration must also be made with CMA, Muscat Security Market (“MSM”) and Muscat Depository and Securities Registration Company SAOC (“MDSRC”). Share transfers must be effected through MSM.

Closed joint company is not permitted to offer shares to public. It must have minimum share capital of RO 500,000. Registration with MCI which is relevant authority for its corporate matters is mandatory for commencement of business. Share transfer must be effected through MSM.

Nominal value of share in public or closed joint stock company should not exceed RO 1 and at least half of nominal value must be paid up on subscription and full value, within three years from date of incorporation.

Joint stock companies cannot be established without prior authorization from MCI. Application for authorization must be signed by at least three founder members.

Founder members of public joint stock company must subscribe for not less than 30% but not more than 60% of shares and no single shareholder may own more than 20% of shares without prior authorization from CMA.

Management of Joint Stock Company must be entrusted to board of directors comprising at least three directors for closed and five, for public, who must draft bylaws for management, business and personnel affairs within one year of registration of company. Board of directors of company must be elected by shareholders for renewable term of three years according to rules for electing board issued by MCI or CMA as case may be.

Board may perform all functions except selling all or substantial parts of company's assets; mortgaging company's assets; guaranteeing third party debts; or making donations which require authorisation from shareholders or Articles of Association.

Holding company may be limited liability or joint stock company exercising financial and administrative control over one or more companies in which it has at least 51% shareholding. Share capital must be at least RO 2 million. Its objectives should be to manage its subsidiaries; invest funds in stocks; provide loans, guarantees etc., to subsidiaries; and acquire patents, trademarks, concessions and other intangible assets.

Pursuant to recent amendment to Law of Income Tax on Companies (Royal Decree 47/81 as am'd), companies with up to 70% foreign shareholding are charged income tax at rate of 12% similar to wholly Omani-owned companies.

Omani law on accountancy and auditing professions provides that accounts of companies must be prepared according to International Accounting Standards (now the International Financial Reporting Standards) (IFRS) are to be used.

Incorporation of banks and insurance companies require additional approvals from Central Bank of Oman and CMA respectively. They are required to be incorporated as joint stock companies.

2.03 FOREIGN CAPITAL INVESTMENT:

In order to do business in Oman, it is necessary for foreign natural or juridical person to comply with laws governing foreign business activity, which includes Foreign Capital Investment Law (RD 102/94) (“FCIL”), Commercial Register Law (RD 3/74 as am'd), Commercial Agencies Law (RD 26/77 as am'd), Commercial Companies Law (RD 4/74 as am'd) and Law of Commerce (RD 55/90).

According to FCIL, foreign companies seeking to do business in Oman are required to form locally registered company local equity participation of at least 55%. Foreign capital investment licence is granted by MCI to foreign entities upon satisfying capital and other requirements. Licence permits foreign company to have shareholding in local registered company.

Although FCIL restricts foreign ownership in Omani companies to 45%, pursuant to Oman's accession to WTO in 2002, foreign shareholding up to 70% in all sectors is permitted without need for approval from cabinet or council of ministers. 100% foreign ownership is permitted for certain type of business in Oman such as brokerage services and for projects which are deemed by Council of Ministers to contribute to development of national economy. Minimum capital requirement for such companies is RO 500,000.

Minimum capital requirements for different types of companies with foreign equity participation are (i) Limited liability company, 150,000 although Oman had committed to abolish this requirement as of Jan. 2001; (ii) closed joint stock company, RO 500,000; (iii) public joint stock company, RO 2,000,000.

There is no restriction on repatriation of foreign funds. There are no foreign exchange controls. Omani Rial is pegged to US Dollar at fixed rate of US$2.59/RO1.

Branch Office: Foreign company may establish branch office for purpose of performing government or quasi government (including partly owned government companies) contract. Tenure of branch office is restricted to term of contract and may be extended for additional terms if contract is extended for further period or there is another government or quasi government contract for longer duration. Branch cannot do business other than performance of contract for which it is established. Branches are subject to high rate of taxation starting from 30% on taxable income of over RO 30,000.

Representative Office: Foreign company may form representative office for limited purpose of marketing and promotion of products. It is prohibited from directly engaging in sale or doing any other activity deemed to be commercial activity. It is authorized to recruit employees.

Pursuant to Free Trade Agreement (“FTA”) between Oman and U.S.A. effective 1 Jan. 2009, American investors will be accorded preferential treatment in business. U.S. companies seeking to conduct business in Oman will get unprecedented level of openness and access to Omani services market. FTA guarantees national and most favoured nation treatment for services including production, distribution, marketing and sale of service and includes benefits for service providers across range of fields, including banking, insurance, securities, and asset management. FTA also offers comprehensive dispute resolution mechanism. MCI has issued MD 102/08 on registration of branches of American establishments and companies. Similarly, Omani companies seeking to do business with U.S. will now have open access to world’s largest economy. Details of how it will work in practice are still emerging. It remains to be seen how current Omani procedures will adapt to provisions of FTA, but it is clear that FTA will encourage strong economic relations between U.S. and Oman.

Additional provisions provide for state of art protection of intellectual property, as well as protections for environment and domestic labour laws. U.S. has FTA with only one other GCC country (Bahrain), although more are expected in upcoming years.

3 BUSINESS REGULATION AND COMMERCE

3.01 COMMERCIAL LAW:

Law of Commerce (issued by RD 55/90) regulates commercial activities in Oman. Law covers all aspects of business including sale, purchase, agency, lease, insurance, charge and guarantee.

Law defines “commercial act” as act effected by person with entrepreneurial intent even if he is not merchant and gives non-comprehensive list of commercial acts which includes sale and purchase of goods; lease of equipment; contracts of supply; public and private banking; commercial agency; transactions involving negotiable instruments; incorporation of commercial companies and sale and purchase of securities; extraction of natural resources; insurance; carriage of goods by land, sea and air; construction contracts; maritime and aerial navigations.

Sale of immoveable property, sale of business, agency, real estate lease, and mortgage are required to have formal written contracts and require registration. Sale and purchase contracts of moveable property do not require registration.

Non-Omani persons cannot engage in commerce unless appropriately authorized by law.

In sale and purchase transactions, parties must agree on goods and price and principle of caveat emptor would apply. Consideration must be in proportion to prevailing standards in trade. All types of sale including sale of business, sale by delivery on board, sale at port, Cost, Insurance and Freight (CIF) and Free on Board (FOB) are covered by this law.

Commercial agency is defined as contract whereby principal assigns to another person task of carrying out specific legal act for remuneration unless it is agreed to be gratuitous. If remuneration is not agreed in writing then it must be according to prevailing trade standards.

Merchants are required to maintain two types of commercial books—day books in which all day-to-day transactions must be entered and inventory books which must be updated at least once a year.

In private sector transactions, negotiable instruments may be prepared and negotiated in English.

Bills of exchange must contain (i) Term “bill of exchange” written in text of instrument; (ii) unconditional order to pay specified sum; (iii) name of drawee; (iv) name of payee; (v) date of maturity; (vi) place of payment; (vii) date and place of making and (viii) signature of drawer.

Bills of exchange may be drawn payable at sight or on specified date or specific time from making or from sight. Endorsements must be unconditional and partial endorsements are void. Endorsement to holder shall be deemed to be endorsement in blank. Holder may fill blank with his name or that of another person; further endorse in blank to another person; or deliver it to another person without completing or endorsing it.

Acceptance of bill of exchange shall evidence that provision for payment is held by acceptor which cannot be rebutted by drawee or holder. If bill of exchange is not accepted, burden of proof will be upon drawer to prove that drawee held provision for payment on date of maturity.

Cheques must contain (i) term “cheque”; (ii) unconditional order to pay specified sum; (iii) name of drawee; (iv) place of payment; (v) date and place of making; (vi) name of person to whom or to whose order payment is made; and (vii) signature of maker.

Cheques must be drawn on bank, and may be expressed to be payable to bearer. Cheque made payable to person is negotiable by endorsement. Issuance of cheques without sufficient funds on account is criminal offence.

Cheques drawn in Oman must be presented for payment within six months but, in practice, these limitations are not strictly adhered to.

Law also contains provisions on crossed and account payee cheques.

Order Promissory notes must contain (i) Terms “Order Note” written in text of note; (ii) unconditional promise to pay specified sum; (iii) date of maturity; (iv) place of payment; (v) name of payee; (vi) date and place of making; and (vii) signature of maker.

Provisions in respect of bill of exchange in relation to endorsement, maturity, payment, recourse by reason of non-payment, prohibition on granting of time for payment, conservatory attachment, protest, calculation of time limits and working days, recourse by drawing, payment by way of intervention and extinctive prescription are expressed to be applicable to order promissory notes as well.

Demand order promissory notes must be presented for payment within one year after date of making it.

Unified Industrial Organisation Law for GCC Countries issued by RD 61/08 is applicable to companies undertaking industrial activities. Law ratifies GCC policy on industrialization to further regional economic development plans and programs and emphasizes use of local raw materials; installation of modern technology most suited to local industrial environment; and recruitment and training of local manpower and deals with health, safety and environment standards and standards approved by WTO for trade and export.

3.02 COMMERCIAL REGISTER:

Every natural or corporate person conducting business in Oman must register with Commercial Register at MCI. Under Commercial Register Law (RD 3/73 as am'd), certificate of registration would include commercial registration number, registrant's name, its legal form, principal office address, registered activities, name of manager(s) and directors and date and place of registration. Information registered in Commercial Register is available for public inspection.

3.03 CONSUMER PROTECTION:

Consumer Protection Law (RD 81/02) entitles consumer to obtain correct information about purchased commodity which must contain label listing particulars in relation to price, dates of production and expiry, country of manufacture, conditions and instructions of application, basic components, degree of effectiveness and after sale service.

Consumer is entitled to guarantee of quality and agreement depriving consumer of guarantee is void. Price must be reasonable. Except perishable commodity, defective items must be replaced but within ten days of purchase. All guarantees passed on by original manufacturer must be passed on to consumer. Maximum penalty for violation of law is fine of RO 5,000.

Food Safety Law issued by RD 84/08 deals with various aspects of food products including quality, safety, transportation, import and export. Ministry of Regional Municipalities and Water Resources will be issuing executive regulations for law.

3.04 CONTRACTS:

Attainment of majority, soundness of mind and no infirmity in relation to intended commercial transaction are stated to qualify a person for entering into commercial transactions. Persons declared insolvent or convicted of fraud, theft, cheating, breach of trust, forgery, etc. are disqualified from entering into contracts.

There is sufficient latitude to agree to terms of contract if purpose of contract is lawful.

Contracts are binding on parties and if not in writing, may be proved by any means. If there is no valid contract, provisions of law would apply. If law does not address specific aspect of commercial transaction then custom, Shari'a or principles of equity in that order would prevail.

Electronic Transactions Law issued by RD 69/08 validates electronic transactions agreed by parties to be conducted electronically. Electronic transaction includes contracts performed or concluded wholly or in part by electronic messages. It excludes from its purview certain transactions such as those pertaining to personal law; court proceedings like service of summons etc.; and documents required to be attested by Notary Public.

Damages.

Proven direct damages are awarded for breach of contract. Indirect or consequential damages are not excluded as matter of law but have limited applicability. There must be nexus between loss suffered and damages claimed. Secondly, there must be degree of foreseeability i.e. damage must not be too remote. Consequential loss is generally contractually excluded but Omani courts are known to assess and award loss of profit.

Excuse for Non-performance.

Force majeure and impossibility of performance and, in some projects, government risk events are recognised grounds for non-performance.

Applicability of Foreign Law.

Contracts may be subject to application of foreign law. However, Omani court would generally construe and apply only Omani law. However, foreign law applicability if supported by arbitration clause enhances its enforceability in Omani court as Oman is a signatory to 1958 New York convention on enforcement of arbitral awards and written agreements providing for arbitration for dispute resolution exclude jurisdiction of Omani court. Pursuant to Arbitration Law (RD 47/97), Omani court enforce validly issued arbitral award.

Government Contracts.

Contracting with government is subject to Tender Law and its Regulations. New Tender Law was issued by RD 36/08 repealing and replacing old law (RD 86/84 as am'd). It defines public, international and local tenders and regulates public bid requirements, direct purchases, bid submission rules, contract award rules and also specifies Tender Board functions. Standard forms of pubic works contracts are used for government and quasi-government contracts. These include Standard Conditions for Construction of Building and Civil Work; Standard Condition for Mechanical and Electrical Works; and Standard Conditions for Civil Consultancy Works. These contracts are modelled on standard FIDIC contracts. Financial signing authorities of ministers and government officials in relation to government contracts are stipulated in RD 48/76 as amended.

Public sector companies or quasi-government where their Articles of Association provides so have internal tender committees, or executive committees for awarding contracts up to RO 250,000. Contracting parties require bid, performance and, where applicable, advance payment guarantees issued by approved local banks.

Oman is not signatory to Convention on International Sale of Goods.

3.05 INTEREST:

Commercial Banks and other enterprises routinely charge interest. Pursuant to Banking Law (RD 114/00), CBO has power to regulate interest rates in banking transactions. Periodic circulars are issued by Government on commercial interest rates. CBO sets interest rates chargeable by banks. Omani courts have consistently upheld payment of interest in commercial suits. Number of laws and regulations specifically refer to interest being chargeable and enforceable including Law of Commerce (RD 55/90), Banking Law (RD 114/00), Civil and Commercial Procedure Law (RD 29/02) and Law of Commercial Companies (RD 4/74). Interest rates and currency hedging arrangements are recognised and commonly used in project financings in Oman. Forward transactions are permitted under Omani law provided they are not purely for speculative purposes. Ministry of Commerce and Industry periodically issues decision on maximum interest rate chargeable for commercial loans.

3.06 INVESTMENT REGULATIONS:

Capital Market Authority ("CMA") was established pursuant to Capital Market Law (Royal Decree 80/98 as am'd). It is empowered to regulate all matters relating to public joint stock companies and securities activities in Oman including offering of securities, information requirements in prospectus for offering securities for public subscription, activities of MSM (established by RD 53/88), investment service, broker activities, and investment companies' activities. Pursuant to Royal Decree 90/04, CMA also has jurisdiction over insurance matters.

Securities of public and closed joint stock companies are traded through MSM.

Muscat Depository and Securities Registration Company SAOC was established by Royal Decree 82/98 as sole service provider for registration and transfer of ownership of securities and safe keeping of ownership documents (depository).

CMA has issued various rules in relation to public joint stock companies and securities including Code of Corporate Governance (CMA Circular 11/02), Rules for Election of Board of Directors, Rules on Disclosure and Rules for placement of funds in Non-Omani securities.

3.07 MONEY LAUNDERING:

Money Laundering Law (RD 34/02) requires banks and financial institutions and other natural and juridical entities involved in financial dealings to conduct "Know Your Customer" checks and verify their customers' identity and address before opening accounts, taking securities for safe custody, granting safe deposit facilities or engaging in any other business dealings. Banks and financial institutions are required to develop internal systems to combat money laundering through (i) development and enforcement of internal policies, systems and procedures, including appointment of qualified senior officers at senior management level to enforce such policies, systems and procedures; (ii) development of ongoing training programmes for officers to keep them informed of new techniques used in money laundering transactions and improving their abilities to identify such transaction for combating same. Banks and financial institutions are required to (a) retain records of transactions for minimum period of ten years; (b) adopt precautionary measures to uncover and prevent money laundering transactions, and (c) assist in criminal prosecution for violations.

3.08 MONOPOLIES, RESTRAINT OF TRADE AND COMPETITION:

Law of Commerce (RD 55/90) and Law of Commercial Trademark, Data, Trade Secrets and Protection Against Unfair Competition Law (RD 38/00) prohibits dissemination of misleading information or information inconsistent with facts in relation to origin or nature of goods or any other trade matter, with intention to draw away clientele of competitor. Other sector specific laws have related provisions on restraint of trade and competition. Consumer Protection Law (RD 81 of 2002) requires government to curtail monopolies or overdominance in market but does not specify what action must be taken and vests discretion in relevant Minister to formulate rules. Law also requires issuance of rules for controlling excessive price increase and prohibits suppliers from hoarding commodities which would result in artificial price rise. Although there is no separate competition authority in Oman, Law is implemented by Ministry of Commerce and Industry.

3.09 TOURISM:

Depletion of energy reserves has accelerated pursuit of alternate sources of revenue and Oman's endowment with varied landscapes unmatched in region has pushed tourism to forefront.

To promote market and develop tourism in Oman, Ministry of Tourism was carved out of MCI following issuance of Law of Tourism (RD 33/02) and Executive Regulations (MD 91/03). Responsibilities of Ministry include (i) making comprehensive evaluation of Oman's tourism potential and developing it as alternate source of revenue to oil and gas; (ii) drafting national five year plans and programmes for development of tourism; (iii) reviewing new tourism projects, attracting foreign investments and recommending tax and other exemptions for tourism projects; (iv) assistance in identifying and allotment of land for tourism and setting up tourism projects in accordance with Land Law (RD 5/80), Usufruct Law (RD 5/81), Foreign Capital Investment Law (RD 102/94); (v) determining fees and granting licence for tourism related services; and (vi) monitoring and controlling prices for services offered by hotels and tourist establishments.

Natural or corporate person engaging in tourism related commercial activity must obtain relevant licence from Ministry. Fine of up to RO 3,000 may be imposed and/or licence may be revoked for violating provisions of law.

Licence is required for establishing or utilising tourist resorts, construction of hotel or tourist establishment, operating travel and tourism office, establishing time sharing resorts, bringing foreign performing artists from abroad, etc. Appendices attached to Executive Regulations specify details regarding fee payable for each licence, duration of licence, bank guarantees required for licence, time regulations for foreign performing artists.

Law lays down criteria for classification of hotels and tourist establishments and allotting grades which may be altered if found necessary during technical and administrative inspection.

Applicants for licence as tourist guides must appear for tests to be conducted in knowledge of history, culture, ancient monuments, heritage, geography, social science, Arabic and at least one foreign language. Based on location of practice, tourist guide may be granted licence as general tourist guide or regional tourist guide.

Many projects in integrated tourist areas are underway. This has also led to law on freehold real estate rights to foreigners in these areas (RD 12/06) permitting non-Omani individuals and companies to own land and built units for residential and investment purposes in areas designated by Government as Integrated Tourist Complexes (“ITC”). Pursuant to this law, Government grants usufruct rights to real estate developers over ITC land and obligations of developers are recorded in development agreement. Most ITC projects have well defined tourism, commercial and housing components..

3.10 TRADE NAMES:

Law requires every business to have trade name which must be different from other registered names. It must not misrepresent nature of business. According to internal regulations of MCI on name, commercial names must consist of meaningful Arabic words. Foreign names are permitted for companies with foreign shareholders having similar registered names abroad and for companies with recognized international names. Trade names must be registered in Commercial Register. If trade name is used by competing business, interest party may seek ban on such usage and claim compensation.

Usage of names of countries and places such as Muscat and Oman, and terms such as “Financial”, “investment” has minimum capital requirements.

Trade names and commercial and municipality registration numbers must be displayed on front of commercial premises. All stationery and trade documentation must contain trade name and commercial registration number.

4 CITIZENSHIP

4.01 ALIENS:

In general, aliens have same civil rights as citizens. Aliens are subject to Omani court jurisdiction as residents of Oman or if cause of action arose in Oman. Non-Omani natural or corporate person cannot engage in commercial activity without obtaining licence.

Foreign natural persons must obtain visa to enter and must obtain permit to reside in country. Visas for some nationalities are granted upon arrival. Others must obtain visas in advance. Local sponsorship is required for employment, family-joining, short term visit visas. Local employer must obtain labour clearance from Ministry of Manpower before employing foreign employee. Based on labour clearance, employment visa is granted to employees to enter Oman. Applications for visas for employee's spouse and children must be routed through employer for sponsorship.

4.02 CITIZENSHIP:

Omani citizenship may be gained (i) by birth, if both parents are Omanis; (ii) by descent, for child of Omani father, regardless of child's country of birth; and (iii) by naturalization, to women through marriage to Omani, and by special decree for men. Foreigners may be granted citizenship by Sultan for outstanding service to state over number of years.

Foreign woman who marries citizen of Oman is granted citizenship by registration after few years of marriage and residency in country. Foreign man who marries citizen of Oman is not eligible for Omani citizenship. Child of Omani mother and unknown or stateless father, and child of unknown parents are granted citizenship. Dual citizenship is not recognized but law does not specifically forbid acquisition of second citizenship but exercise of rights and privileges of second citizenship may result in divestment of Omani citizenship. Voluntary renunciation of Omani citizenship is permitted by law.

5 CIVIL ACTIONS AND PROCEDURE

5.00 GENERALLY

Civil cases are governed by Civil and Commercial Procedure Law (RD 29/02). Omani citizens and residents are able to file cases in Omani court. Judicial Authority Law (RD 90/99) vests authority to administer courts systems in Ministry of Justice with exception of Administrative and State Security Courts. Jurisdiction for deciding commercial disputes was earlier vested in authority called The Authority for the Settlement of Commercial Disputes (ASCD). RD 13/97 designated the Authority as Commercial Courts. Judicial Authority Law (RD 90/99) which established Supreme Court stipulates hierarchy of courts. Supreme Court has appellate jurisdiction over all other courts. It has authority to review legal principles, review decisions of lower courts, and supervise judges in application and interpretation of law. Historical development in 2008 was issuance of Evidence Law for Civil and Commercial Transactions for first time by RD 68/08.

There are six appellate courts and 45 primary courts. Primary and appellate courts have commercial, civil, criminal, Shariah and labour circuits. Courts of first instance constitute lowest rung of judicial hierarchy.

Pursuant to Conciliation and Settlement Law (RD 98/05), parties to disputes may voluntarily seek mediation by conciliation committees before approaching court for redress.

Criminal Cases.

RD 92/99 established independent Prosecution Service and Public Prosecutor's office in accordance with Basic Law. Public prosecutor's office operates independently. With exception of appeals to Supreme Court, all appeals in criminal cases must be filed within 30 days. Criminal circuit of appellate court also hears cases of felonies. Primary Court hears appeals from rulings made by court of first instance in cases relating to misdemeanor. Appeals over appellate or primary courts' decisions are heard by five judge bench of Supreme Court. In case of death or life sentence, final petition for clemency may be made to His Majesty.

Under current system, Public Prosecutions has offices in regional headquarters which brings cases before criminal courts. There are two prisons in Oman, where those convicted of serious crimes are sent. Prison Law (Royal Decree 48/98) requires that education and vocational training are required to be given to prisoners and wages paid to those who are capable of work. Before release, prisoners who have served four years or more of their sentence are given rehabilitation training to reintegrate them into society.

Juvenile Accountability Law was introduced by RD 30/08 to deal with juveniles committing acts punishable by law. Law requires juveniles (aged between nine and 18 years) to be tried in special circuits of Primary Court in designated locations and convicted juveniles to be sent to reformatory.

Extradition.

RD 4/00 stipulates handing over of criminal to country demanding extradition. Extradition of person granted political asylum in Oman is excluded. Omani citizens are not permitted to be extradited.

Death Penalty.

Law of Criminal Procedures mandates that Courts of Appeals must refer to Grand Mufti for religious opinion before awarding death sentences.

Administrative Court is administered by Diwan of Royal Court to review appeals against government and quasi-government administrative decisions. It has authority to nullify administrative decisions and to award compensation. Appointments to administrative court are subject to approval of Administrative Affairs Council, with exception of posts of court president and court deputy president, who are appointed pursuant to Royal Decree.

State Security Court exercises jurisdiction over cases involving national security and criminal matters that require expeditious or especially sensitive handling. Security court procedures mirror closely that applicable elsewhere in criminal system.

Stare decisis became feature of Omani law after issuance of Judicial Authority Law (RD 90/99).

5.01 JUDGMENTS:

Foreign Judgment.

Civil and Commercial Procedure Law (RD 29/2002) requires that no order for enforcement of foreign judgments in Oman must be made only if certain conditions are satisfied: (i) Foreign court which issued judgment had jurisdiction to issue it in accordance with rules of jurisprudence of that country; (ii) judgment is final pursuant to law of that country; and (iii) it is not issued pursuant to fraud. Omani court must also ascertain that (i) defendant was notified of case and duly represented; (ii) judgment is not inconsistent with any law in force or judgment or order issued by Omani court or with public policy; and (iii) courts of where judgment/award is issued accept enforcement of Omani judgments pursuant to rule of reciprocity. In practice, due to strictness of conditions, foreign judgments may be of evidentiary value only and matters may have to be litigated de novo in Omani court.

6 COURTS AND LEGISLATURE

6.01 LEGISLATURE:

See category 1 Introduction, topic 1.02 Government and Legal System.

Juvenile Accountability Law (RD 30/08) requires establishment of special circuits of Primary Court in designated locations.

To settle disputes regarding jurisdiction of courts and enforcement of conflicting judgments, Law of Conflict of Jurisdiction and Provisions Authority Law was issued by RD 88/08.

7 DEBTOR AND CREDITOR

7.01 BANKRUPTCY:

Under Law of Commerce (RD 55/90), commercial entity may be declared, by competent court, as bankrupt or insolvent if (i) its financial state is in disorder; and (ii) it has ceased to discharge its commercial debts. Bankruptcy may be ordered by court, suo motu, or upon application by commercial entity or by undischarged creditor. Court may appoint administrator for debtor's assets pending disposal of bankruptcy application.

Under Commercial Companies Law (RD 4/74 as am'd), company may be liquidated if it has been declared bankrupt or there is loss of all or most of share capital. Court is empowered to appoint liquidator upon application by commercial entity or undischarged creditor.

Judgment on declaration of bankruptcy must be made public by publishing summary of judgment in Official Gazette within two weeks from date of judgment and by entering it in Commercial Register at MCI within 30 days following date of judgment. Interested party may appeal against judgment within 15 days from publication.

After declaration of bankruptcy, set off of rights and liabilities in respect of individual creditors is not permitted unless there is connection between them. Connection may be established if such entitlements and liabilities are attributable to one cause or in relation to one current account.

All expenses of administrator/liquidator, including compensation must be paid from assets of judgment-debtor before any distribution is made to creditors by administrator pursuant to Law on recovery of government debts (RD 32/94) which ranks creditors in order of priority as (i) government; (ii) employees; (iii) secured creditors; (iv) unsecured creditors; and (v) subordinated creditors.

As general rule, secured and unsecured private debts are subordinate to debt owed to government even if latter debt arose later and is not secured. Government is generally known to give up its priority ranking in favour of employees.

Enforcement is stated in law to be by way of judicial sale or public auction which will transfer title to purchaser.

8 DISPUTE RESOLUTION

8.01 ARBITRATION:

Oman is signatory to New York Convention of 1958 on enforcement of arbitral awards (ratified by RD 36/98). Pursuant to Law of Arbitration (RD 47/97), jurisdiction of Omani court is excluded in matters covered by written agreement for arbitration. Arbitral awards issued in or outside Oman (including those issued pursuant to rules of international bodies such as ICC and UNCITRAL) are final and enforceable in Oman pursuant to writ issued by Primary Court upon application for enforcement.

Omani court may nullify arbitration award if: (i) There is no arbitration agreement or if such agreement is null or rescindable or has lapsed by limitation; (ii) one of parties to agreement is incapacitated or incompetent to enter into agreement; (iii) one of parties was not represented by reason of not being notified of arbitration or of appointment of arbitrator; (iv) arbitrator has not applied law agreed by parties; (v) arbitration is conducted or arbitrators are appointed in manner contrary to Omani law or agreement between parties; (vi) arbitrator decides on issues not included in arbitration agreement or exceeds jurisdiction.

9 DOCUMENTS AND RECORDS

9.01 ACKNOWLEDGMENTS:

Documents executed in foreign jurisdiction for official purpose in Oman must be duly notarised by notary public and authenticated by relevant foreign affairs department in that country and by Omani embassy. Non-Arabic document must be translated by officially approved translator in Oman before submission to government authority.

9.02 NOTARIES PUBLIC:

Pursuant to Notary Public Law (RD 40/03), persons holding bachelor's degree in Sharia or law from government recognized institution are qualified for appointment as notaries public. Notaries are well versed in Shari'ah. Notaries are civil servants appointed by and under supervision of Ministry of Justice.

10 EMPLOYMENT

10.01 EMPLOYMENT:

Omani labour law comprises Labour Law (RD 35/03) and various regulations issued as MD by Ministry of Manpower (“MOM”) (together “Law”). Recent significant amendments (RD 74/06) include permission for formation of trade unions and regulations for strikes.

Both Omani and expatriate employments in private sector are regulated by Law. Law provides for employment of Omanis to maximum possible extent. For employing foreigner, employer must obtain prior labour clearance from MOM which is subject to conditions—(i) qualified Omanis are not sufficiently available for relevant post; and (ii) employer has achieved minimum Omanisation percentage specified for sector.

Foreign employee must satisfy certain conditions—(i) must be professionally competent with requisite qualifications for post; (ii) must comply with Foreigners Residence Law (RD 16/95); (iii) must be medically fit; (iv) must have contract with employer who has licence to do business; and (v) must have work permit.

Prescribed fee (currently, RO 100) for labour clearance is used for funding vocational training programmes for Omani employees. Sector-wise long term Omanisation targets were introduced by series of MDs in 2003. These are regarded as mandatory and exceeding target percentage entitles employers to preferential treatment in expediting process of getting labour permits for other foreign employees and in other dealings with Government authorities.

Minimum benefits in Law must be accorded to employees. Employer may provide more benefits but in case of conflict in interpretation of benefit, superior benefit prevails.

Employment contract is required to be in writing and must include names of employer and employee, employee's date of birth, qualification, place of residence and nationality, job description, salary, notice period. In addition, employee must undertake in contract (i) to abide by terms and conditions of contract; (ii) to respect Islam, laws of country, customs and traditions; and (iii) to refrain from interfering in any activities prejudicial to security of country.

If contract does not provide for duration, it is deemed to be for indefinite term. For non-Omani employees, term of work permit (i.e. two years) would be deemed to be contract term. Law permits but does not require probationary period which may not exceed three months. Either party may terminate contract during probation period by serving seven-day notice to other party prior to intended date of termination. Where contract is for indefinite term, any party may terminate by serving 30-day notice (if wage is paid on monthly basis) to other party specifying reasons. Notice may be waived if compensation equivalent to employee's wage for notice period is paid by party waiving notice.

Upon termination, employer must pay end of service benefit calculated on basis of half month's last earned basic salary for each year of first three years of service and one month's basic salary for each of following years.

Employee must not work for more than nine hours per day nor 48 hours per week. Actual working hours will be decreased during Ramadan for Muslim employees to six hours per day or 36 hours per week. Employee is entitled to annual vacation of 15 days upon completion of first year of service and 30 days for each year thereafter.

Law also regulates employment of women and juveniles, employment in mines and quarries, industrial safety, medical facilities, resolution of labour disputes, representative committees, transfer of employees, and penalties for violation of Law.

Human Trafficking Law issued by RD 126/08 seeks to control human trafficking offences including intentional exploitation, illegal transportation, shelter or recruitment by coercion deception or undue influence which carry sentence of up to 15 years imprisonment and/or fine of up to RO 100,000. National committee to tackle human trafficking will be constituted. Independent Human Rights Commission was established pursuant to RD 124/08.

11 ENVIRONMENT

11.01 ENVIRONMENT:

Environment and pollution control are responsibility of Ministry of Environment and Climate Affairs which recently bifurcated from Ministry of Regional Municipalities, Environment and Water Resources pursuant to RD 90/07.

UN Environment Programme has cited Oman as country with good record in environmental conservation and pollution control. Oman has whole body of environmental laws, principal among them being Law for Protection of Environment and Combating Pollution (RD 114/01). Law imposes strict penalties for release of environmental pollutants and discharge of effluents in land and marine territory of Oman.

Environment regime regulates, among other things, circulation and use of chemicals (RD 46/95); marine pollution (RD 34/1974); air pollution from stationary sources (MD 5/1986); management of solid non-hazardous waste (MD 17/1993); management of hazardous waste (MD 18/1993); noise pollution in the work place (MD 80/1994); occupational health and industrial safety precaution (MD 19/1982); noise pollution in public environment (MD 79/1994); disposal of commercial waste materials (MD 8/1984); disposal of liquid effluents into the marine environment (MD 7/1984); waste water re-use and discharge (MD 145/93). Petroleum Law (RD 42/74) and Mining Law (RD 27/03) stipulate environmental standards for items covered by it and Civil Defence Law (RD 76/91) contains provisions relating to fire safety and environment.

Petroleum Law stipulates that prior approval must be obtained to explore, exploit, extract, store or distribute oil and gas resources and to construct or install, wells, extracting facilities, plants, separators, refineries, processing plants, pipelines, storage facilities, facilities for water supplies including boring for water, offshore platforms or other installations, sea and submarine loading facilities including facilities to or from mainland, pumps and pumping stations, lighting and other facilities or works. Exemptions from this Law could only be effected by Royal Decree. Concessions are granted to companies by Royal Decrees for oil and gas exploration. Law for Control of Marine Pollution (RD 34/74) prohibits discharge or release of pollutant from ship, shore location or oil transport facility in Pollution Free Zones. RD 39/08 ratifies Oman’s accession to International Convention on Oil Pollution, Preparedness, Response and Cooperation 1990 which deals with emergency plans, reporting procedures, and national, regional and international response systems.

All industrial projects must obtain preliminary environmental licence before commencing activity. Environmental impact study must be conducted on site and all measures to minimise pollution must be undertaken. Final environmental licence is granted after commencement of project upon being satisfied that project is compliant with all environmental regulations.

Oman has ratified many international treaties on environment including Basel Convention on Transport of Waste and its cross border disposal, UN Convention of Law of Sea, UN Framework Agreement on Climatic Change, Agreement on Biological Diversification, Convention on Marine Pollution, and UN Agreement on Prevention of Desertification in Countries Facing Severe Arid Conditions.

12 INSURANCE

12.01 INSURANCE COMPANIES:

Insurance in Oman is regulated by Insurance Companies Law (RD 12/79 as am'd) and Executive Regulations (MD 5/80) (together, “Law”). Jurisdiction of insurance was transferred from MCI to CMA (RD 90/04). Since taking over functions of insurance, CMA has issued (1) Code of Corporate Governance for Insurance Companies and (2) Code of Practice for Insurance Business.

For conducting insurance business in Oman, insurance company must satisfy certain conditions: (i) It should be commercially registered in Oman; (ii) minimum capital should not be less than that prescribed for insurance companies; (iii) it should be joint stock company; (iv) it should be licensed by CMA to carry on all or some classes of insurance business specified by Law; (v) it should deposit requisite guarantees and maintain required margin of solvency.

Licensed companies, both local and foreign, must comply with reporting requirements and must establish and maintain reserves and deposits as required by Law.

For foreign insurance companies operating through agents, branch offices or other local service units, Law stipulates (i) all policies covering risks situated in Oman and/or originating in Oman and/or connected with property in Oman or long term policies insuring Omani residents against risks must be issued in Oman; (ii) record of all policies issued with respect to Oman must be maintained in local office; (iii) accounts of local office should be audited annually by independent auditor; (iv) parent company should have been established in accordance with laws of country of origin; (v) local office is subject to tax laws of Oman; (vi) RO 150,000 must be deposited with CMA for doing business in any class of insurance and not less than RO 300,000 for more than one class; (vii) amount not exceeding 25% of each insurance policy issued in Oman must be reinsured with national insurance company; and (viii) provisions of Law in respect of margin of solvency, principal manager, actuary and accounts are applicable.

Except life insurance, law prohibits insurance contracts with foreign companies which are not commercially registered in Oman. This prohibition is applicable to government, public authorities, public sector companies and natural and juridical entities registered with commercial register for doing business in Oman. Insurance companies may reinsure part of risk with offshore insurance companies and are required to maintain transparency in reinsurance placements. Customers may be involved in negotiations with brokers and underwriters. Insurance companies underwriting business must retain at least small portion of total risk on its net account.

Following CBO Circular BM 908 issued by Central Bank of Oman (“CBO”) dated 21 Jan. 2001, licensed banks are authorized to collaborate with licensed insurance companies, broker and agents, to sell insurance products subject to conditions: (i) Banks must be diligent in selecting insurance companies for association; (ii) formal agreements must be concluded; (iii) banks must assume no liability for acts of insurance companies; (iv) all terms of agreement should be fair and transparent and diligence should be exercised in respect of related party transaction; and (v) core business of banking should not be affected by insurance business. CMA issued decision amending Executive Regulations of Insurance Companies Law increasing solvency margin for insurance companies.

12.02 MOTOR VEHICLE INSURANCE:

It is compulsory for all vehicles in Oman to have third party insurance which must cover death, bodily injury and material damage to third parties.

12.03 SOCIAL INSURANCE:

Pursuant to Social Insurance Law (RD 72/91 as am'd), subscription to social security system is mandatory for all employers employing Omani employees, who must subscribe on behalf of them and pay subscription premium of 10.5% of basic salaries of Omani employees towards social insurance and employees have to contribute 6.5% of basic salary. Social insurance is administered by Public Authority for Social Insurance. Employers cannot contract out of this liability. Contributions are made by employer, employee and government to cover death, disability, old age, occupational hazards (injuries and illnesses caused by work). This law is amended periodically to specify percentage of basic wage contributable to social insurance and to set limits on basic pay to be used for determining employer and employee contribution.

13 INTELLECTUAL PROPERTY

13.01 COPYRIGHTS:

Copyright and Related Rights Law issued by RD 37/2000 was repealed by RD 65/08 which secures rights of authors of literary, artistic and scientific works. Copyright works include: (i) Computer programs (complying with TRIPS requirement for protecting computer programs like literary works); (ii) audio and audio-visual works; (iii) literary works and drawings; (iv) dance, drama, musical and motion picture productions and (v) lectures and speeches. Law provides for: (i) Exclusive rights for authors of copyrighted works; (ii) civil and criminal proceedings for violation of law; and (iii) precautionary measures including injunction, seizure of infringing materials and closure of premises used for copyrights infringement.

13.02 TRADE NAMES:

See category 3 Business Regulation and Commerce.

13.03 TRADEMARKS:

Law on Trademarks, Trade Secrets and Protection against Illegal Competition (RD 38/00) and laws relating to Industrial Designs, Topographic Designs, Geographical Indications and Patents (RDs 39/00, 40/00, 41/00 and 82/00) have been repealed by Law of Industrial Property Rights (RD 67/08). This Law provides for protection and registration of trademarks, patents, industrial designs, topographic designs and inventions. Upon registration of industrial property rights, owner gets full protection of law and exclusive rights. Unregistered trademarks get limited protection under Law of Commerce (RD 55/90) which prohibits deception, fraud and dissemination of misleading information in relation to sale of products. Law regulating Production of Compact Discs and Accessories was introduced by Royal Decree 66/08.

14 LEGAL PROFESSION

14.01 ATTORNEYS AND COUNSELORS:

Pursuant to Advocacy Law (RD 108/96 as am'd), persons practicing advocacy must be independent; ensure delivery of justice; and uphold rule of law by safeguarding rights of clients. Lawyers must register in lawyers' register at Ministry of Justice and obtain relevant licence. Legal practice includes: (i) Appearing before courts, arbitration panels, and administrative committees; and (ii) providing legal advise. Lawyers may practice individually or in association with other lawyers. Only Omani lawyers are permitted to practice in courts. Omani lawyers may form among themselves or with non-Omani lawyers, law firms as juristic entities. Names of such entities may be derived from names of partners. Persons holding public office or attached to companies are not permitted to practice. Extensions were granted periodically for compliance with legal requirements relating to bar on non-Omani lawyers practicing in courts and on Omani lawyers practicing in courts for holding public posts or being attached to companies. RD 78/08 extended deadline for compliance to 31 Dec. 2008. However, RD 140/08 restored status quo ante by extending time for compliance by vesting discretion on Council of Ministers to announce future date.

15 MORTGAGES

15.01 MORTGAGES:

Under Omani law, mortgages, liens, pledges are valid and enforceable only if they are registered with appropriate Ministry. Although government debts and employees' dues take priority over all other credits, registered mortgagees as secured creditors rank in priority after them.

Commercial Mortgage: Law of Commerce (RD 55/90) and Regulations for registration of commercial mortgages (MD 5/80 issued by MCI) regulate commercial mortgages. Commercial mortgage is creation of charge over tangible and intangible fixed and/or floating commercial assets, such as, all moveable properties, raw materials, machinery, equipment, receivables, trademarks and other intellectual property rights and insurance policies. More than one charge may be created over commercial assets with consent of previous priority charge holder. Commercial mortgages must be registered with MCI.

Legal mortgage is charge created over real estate property and is regulated by Land Law (RD 5/80), Usufruct Law (RD 5/81), Real Estate Registration Law (Royal Decree 2/98), Regulations for registration of legal mortgages (MD 5/80 issued by Ministry of Housing Electricity and Water). Registration with Ministry is evidenced by recording charge as notation on Mulkhiya or title deed of real estate property. Charge may also be created over usufruct rights, i.e., rights to utilize and develop land and lease.

Ship Mortgage is also permitted under Omani law. Maritime Law (Royal Decree 35/81) provides for creation, registration and enforcement of mortgage. Ship mortgage must be registered with Ministry of Transport and Communication.

16 PROPERTY

16.01 PROPERTY:

Ownership of real property is evidenced by Mulkhiya or title deeds. Real estate records of ownership, transfer, usufruct rights, legal mortgage are kept in real estate register at Ministry of Housing (MOH).

Land registration is maintained by MOH by virtue of Land Law (RD 5/80), MD 5/91 (issued by MOH) and Land Register Law (RD 2/98). Legal provisions and supporting legislation set up Real Estate Register which is designed to act as record of land interests. Independent page in Land Register should be assigned for each separate real estate unit which should include salient particulars of property (MD 29/99). Real Estate Register is only available for inspection by parties with interest in land. Under MD 5/91, MOH has authority to levy fees for registration of interests in land.

Omani nationals are entitled to freehold and leasehold real estate rights. Wholly Omani-owned companies and public joint stock companies with 51% Omani shareholding may own real estate. Pursuant to MD 43/98 issued by MOH, corporate ownership of real estate is restricted to holding it for administrative office, staff accommodation, warehouses, showrooms and similar special purpose premises in relation to achieving company's objectives and should not be for investment purpose, unless it is land development company with specific land development object. Companies acquiring land for administrative and other purposes are prohibited from disposing of real estate within two years of acquisition.

Pursuant to Law Regulating the Ownership of Real Estate by GCC Nationals (Royal Decree 21/2004), right to own land in Oman has been extended to GCC nationals and wholly GCC owned companies. Previous law issued by Royal Decree 20 of 2000 restricted GCC entity's right to own land to not more than 3,000 square metres.

This law entitles GCC natural persons and wholly GCC owned juridical entities to own land or constructed property for purposes of residence or investment in Oman in accordance with Omani law. This law seeks to give similar land ownership rights to GCC nationals as Omani nationals. However, GCC national purchasing vacant plot of land is legally obliged to develop within four years from registering it. If land is not developed within stipulated time, government may dispose of property but with due compensation.

Government may acquire land from owners but for public use and pursuant to Royal Decree. Owner of land must be duly compensated for expropriation. (RD 64/78).

Usufruct Law (RD 5/81 as am'd) provides for usufruct rights that may be granted by Government to third party to utilise and develop real estate. Usufruct is real right to exploit and benefit from land granted pursuant to written agreement. Usufruct of real estate may be held for initial term of 50 years and may be renewed for additional terms. Beneficiary of usufruct is entitled to use land as its own for term. Real estate reverts to owner upon termination or on expiry of usufruct agreement.

Usufruct rights over land are granted by government (MOHEW) to public utility and infrastructure projects that are considered as contributing to development of national economy.

It is also possible to sub-usufruct usufruct rights.

Owners may lease real estate which must be registered with local municipality. (RD 6/89). Lease of over seven years must be registered with MOH also. This interest is strictly contractual and amounts to tenancy agreement which is to be registered with relevant municipality. Lease does not provide any actual real rights in real estate but it is right granted by contract for payment of rental to occupy land and buildings built upon land.

Law for ownership of real estate by foreigners in integrated tourist complexes was issued by RD 12/06. This law allows non-GCC foreign nationals and companies to own registered freehold title to Omani land provided that land is situated in area designated as integrated tourist development area.

Specific rights that are granted to development company over area of project land are recorded in development agreement. Development agreement sets out rights and obligations of developer and obligations of government in relation to supporting project.

Rights granted to property developers in these areas are heavily controlled by government. Developer has to satisfy government that its project is beneficial to country and will deliver good quality and successful project.

Issues relating to transfer of title, succession and applicable laws, permanent residence in Oman, etc. are addressed in recently issued Ministerial Decision 191/07 issuing Executive Regulations to the Law.

Law regulating Tenancy of Residential, Commercial and Industrial Premises issued by RD 6/89 was recently amended by RD 72/08 bringing about significant changes to curb rising rents.

17 TAXATION

17.01 TAXATION:

Personal income is not subject to tax in Oman. Tax is payable by companies and establishments if they have permanent establishment in Oman. Tax is charged on income, from all sources, which is realised or has arisen in Oman. All allowable deductions, such as business costs or depreciation are defined in Law of Income Tax on Commercial Companies (RD 47/81 as am'd) ("Tax Law"). Permitted depreciation rates are set out in Tax Law. In practice, tax is charged on what is substantially profit calculation. Tax regime is administered by Secretariat General of Taxation under Ministry of Finance.

Tax Rate depends upon legal status of entity. All companies registered in Oman, wholly Omani-owned or with up to 70% foreign participation and branches of wholly GCC-owned companies are subject to uniform rate of 12% on taxable income over RO 30,000. Other entities, including branches of foreign companies, are taxed as follows:

Taxable Income	Tax Rate
0 - 5,000	Nil
5,001 - 18,000	5%
18,001 - 35,000	10%
35,001 - 55,000	15%
55,001 - 75,000	20%
75,001 - 100,000	25%
100,001 and above	30%

For branches of foreign companies, allowable deductions include corporate headquarters expenses that are attributable to branch.

Tax Exemptions.

Companies may apply for tax exemption under Tax Law or FCIL. Generally, exemptions are obtainable for initial period of five years extendable for further five years. Exemptions are granted if (a) income is realised from carrying out exportation of locally manufactured or processed products; and (b) main activity is activity specified for which exemption in Tax Law or FCIL such as manufacturing, agriculture, fishery, tourism, public utility or infrastructure project. It is not permissible for company to benefit from more than one exemption where there might be several applicable exemptions. Loss incurred during exempted period may be carried forward until it is set off against taxable income.

Withholding Tax is payable by foreign companies which do not have permanent establishment in Oman (and are not, therefore, subject to income tax law) but which derive income in Oman from (a) royalties (as one-off or series of payments); (b) management fees; (c) lease of machinery or equipment; (d) payment for transfer of technical expertise; and payments for research and development (RD 89/96). Uniform rate of 10% is charged on gross amounts paid to offshore company that does not have permanent establishment in Oman. Local business entity making payment is responsible for deducting withholding tax and paying it to Tax Department. This must be done within 14 days of end of month in which tax is deducted or payment is due or is made to foreign entity.

Customs Duty.

Pursuant to Unified Economic Agreement by Gulf Cooperation Council States and Doha Declaration issued by GCC Supreme Council for establishment of Customs Union of AGCC States, among GCC States provides for (a) unified customs tariff for non-GCC goods; (b) unified customs union; and (c) similar customs regulations and procedures.

Customs duty exemptions may be granted on application under FCIL for import of plant and machinery for public utility or infrastructure projects.

Customs duty of 5% is chargeable on most products except tobacco, alcohol, etc.

Double Taxation Treaty: Oman has double taxation treaties with many countries including Canada, China, Egypt, France, India, Italy, Lebanon, Mauritius, Pakistan, Singapore, South Africa, Thailand, Tunisia, Turkey, United Kingdom and Yemen. In 2008, double taxation treaties were entered with Moldova, Bangladesh, Vietnam, Brunei Darussalam and Belgium.

18 TREATIES AND CONVENTIONS

18.01 TREATIES AND CONVENTIONS:

Oman acceded to World Trade Organisation in 2000 and is in process of discharging its liberalisation commitments. Oman is signatory to double taxation treaties with number of countries. It has entered into investment protection agreements with several countries. It is signatory to International Centre for Settlement of Investment Disputes 1965; 1958 New York Convention on Recognition and Enforcement of Foreign Arbitral Awards; Convention on Elimination of All Forms of Discrimination Against Women 1979; Convention on Eradication of Racial Discrimination; UN Agreement on Registration of Ships; Paris Convention for Protection of Industrial Property; Berne Convention for Protection of Literary and Artistic Works 1971 and 1979; International Convention for the Prevention of Pollution from Ships, 1973, as modified by Protocol of 1978; World Intellectual Property Organisation Conventions.

United States of America and Oman entered into Free Trade Agreement (“FTA”) on 19 Jan. 2006 as part of US's strategy to create Middle East Free Trade Area (MEFTA) by 2013. It is comprehensive pact designed to eliminate tariffs and barriers and expand trade between both countries. Oman is the fifth Middle Eastern country to have negotiated FTA with United States. Effective 1 Jan. 2008, the U.S.-Oman Free Trade Agreement came into force. All consumer and industrial products traded between U.S. and Oman will now be tax free. As result, residents in Oman can expect lower prices on U.S. consumer and industrial products. Similarly, Omani companies seeking to do business with U.S. will now have open access to world’s largest economy. In addition to eliminating its tariffs on U.S. products, Oman will provide substantial market access across its entire services regime, provide secure, predictable legal framework for U.S. investors operating in Oman, provide for effective enforcement of labour and environmental laws, and protect intellectual property. U.S. has FTA with only one other GCC country (Bahrain), although more are expected in upcoming years. It remains to be seen how current Omani procedures will adapt to provisions of FTA, but it is clear that FTA will encourage strong economic relations between U.S. and Oman. Oman's accession to World Trade Organization in 2000 and 2004 U.S. - Oman bilateral Trade and Investment Framework Agreement (TIFA) paved way for robust economic dialogue on promoting closer economic ties, freer trade, greater openness, stronger investment climate, and economic reforms. FTAs were also signed by US with Jordan, Morocco and Bahrain in Middle East.

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CHILE LAW DIGEST

—Scope —

Revised for 2008 edition by

CURTIS, MALLET-PREVOST, COLT & MOSLE LLP, of New York.

(Abbreviations used are: C. C.—Civil Code; C. C. P.—Code of Civil Procedure; C. Com.—Code of Commerce; L. C.—Labor Code; L. J. O.—Law of Judicial Organization;D. F. L.—Decree with Force of Law)

Note: This revision incorporates legislation through Dec. 10, 2007.

1 INTRODUCTION

1.01 CURRENCY:

Monetary unit is Peso, which is divided into 100 centavos. (Decree-Law 1123 of July 30, 1975 as am'd). Only Banco Central may issue notes and these constitute legal tender for any obligation. (Law 18840 of Oct. 4, 1989, as am'd).

1.02 GOVERNMENT AND LEGAL SYSTEM:

Decree 1150 of Oct. 21, 1980 as amended approved and promulgated Constitution in effect. State of Chile is unitary; its territory is divided into regions. Law will endeavor to get decentralized administration. Government of Chile is democratic republic. Chileans are: Those born in territory of Chile, except children whose foreign parents are serving their government; children of Chilean father or mother born in foreign territory; foreigners may obtain letters of naturalization according to law, upon express renunciation of former nationality. However, renunciation of foreign nationality shall not be required from persons born in foreign country which, by virtue of international treaty, grants same right to Chilean. Chilean nationality is lost: By renunciation and naturalization in foreign country; by cancellation of letters of naturalization and by lending aid during war to enemies of Chile or their allies. Chileans who have attained 18 years of age and have not been sentenced to imprisonment for certain time and their citizenship rights have not been suspended, are citizens with right of suffrage. Same applies to foreigners residing in country for more than five years. Citizenship is lost in case nationality is lost and also when person is sentenced for certain crimes.

C. III of Constitution contains constitutional guaranties and bill of rights. C. IV regulates Executive Power and Ministers of State as well as general bases for administration of state and state of emergency in case of war, emergency or public calamity. C. V contains powers and limitations of National Congress which is composed of two branches: House of Representatives and Senate. Former is composed of members elected by electoral districts by direct vote and in manner prescribed by electoral law. It is renewed every four years. Latter is composed of members elected by direct ballot for each regional group. Each group is entitled to elect two senators, which will be elected for eight years and renewed every four years. Congress alone has power to legislate. Judicial Power shall be vested in Supreme Court of Justice and in such lower courts established by law. Independently there are special courts such as: Constitutional Court, Elections Court, and Military Courts. C. XII provides that Central Bank, technical and independent agency, is prohibited from extending loan guaranties to financial public or private institutions. Republic of Chile is divided for governmental purposes into regions. These into provinces, these into communes. Executive head in region is Intendente, in province Governor, in commune Major and Communal Council. Each region will have council for regional development provided by Intendente and composed of Governors of respective Provinces. C. XIV contains special provisions for amendment of Constitution.

1.03 HOLIDAYS:

Jan. 1 (New Year's); Good Friday*; May 1 (Labor Day); May 21 (Navy Day); Corpus Christi**; June 29 (St. Peter & St. Paul)**; July 16 (Virgin of El Carmen); Aug. 15 (Assumption of the Virgin); Sept. 18-19 (Independence Day)***; Oct. 12 (Columbus Day)**; Nov. 1 (All Saints); Dec. 8 (Immaculate Conception); Dec. 25 (Christmas). (Law 2977 of Jan. 28, 1915 as am'd and Law 19668 of Mar. 8, 2000 as am'd).

*These are movable holidays.

**When fall on Tues., Wed. or Thurs. are celebrated previous Mon., and when fall on Fri. are celebrated following Mon.

***When fall on Tues. and Wed. or Wed. and Thurs., Sept. 17 and 20 are holidays.

1.04 OFFICE HOURS AND TIME ZONE:

Chile is in the same time zone as Central zone in U.S. (-05:00 GMT). Office hours are generally from 9 a.m. to 12 noon and from 2 p.m. to 6 p.m.

2 BUSINESS ORGANIZATIONS

2.01 AGENCY:

(C. C. arts. 2116-2173; C. Com. arts. 233-247, Law 20190 of May 17, 2007).

An agency may be written or verbal, but for most purposes powers of attorney should appear in public instruments executed before a notary and should be detailed and explicit regarding the powers conferred. Powers of attorney should be drawn up with great care and the authority of the person granting the same must clearly appear.

Agency of Credits or Guarantees is collective agency contract between two or more creditors who appoint one agent to represent them in enforcing all rights related to their credits. Appointment of agent must be expressly accepted by debtor.

General power of attorney merely covers acts of administration. In order to buy, alienate or encounter real estate, make compromises or perform any other act outside the ordinary course of administration, the power to do so must be specifically granted. An agency is not perfected until accepted, but the acceptance may be express or tacit. An agent is required to adhere strictly to the instructions of the principal. He may delegate his powers if not expressly prohibited from doing so, but is liable for the acts of the substitute if there was no authority to make the delegation or if his appointee is notoriously incompetent.

The principal must reimburse the agent for his expenses, pay him the stipulated or customary compensation and indemnify him for losses suffered by reason of the agency. The agent may retain goods of the principal as a pledge for such payments.

Powers of attorney are terminated by: (1) The expiration of the term or business for which the power was granted; (2) revocation by the principal; (3) resignation of the agent; (4) death, bankruptcy, insolvency or loss of civil rights of principal or agent; (5) marriage of female agent; (6) cessation of powers of principal if the agency was constituted by virtue of such powers. In case of resignation the agent must continue acting for a reasonable time until the principal can make other arrangements.

Persons presuming to act for others without authority place themselves in the position of an agent but they are entitled to no compensation and are liable for damages if their administration is bad.

2.02 ASSOCIATIONS:

Benevolent associations are governed by special provisions of Civil Code. They must be authorized by a special law or have approval of President of Republic. (C. C. arts. 545-564 Decree 110 of Jan. 17, 1979 as am'd). Special laws govern workmen's associations (Labor Code) and cooperative associations. (D.F.L. 5 Sept. 25, 2003 regulated by Decree 101 of Apr. 7, 2004).

2.03 CORPORATIONS:

Corporations are governed by Laws 18046 of Oct. 21, 1981 as amended, 18045 of Oct. 21, 1981 as amended and its Regulations, Decrees 587 of Aug. 4, 1982 as amended, Decree-Law 251 of May 20, 1931, as amended.

Corporations may start operations after extract of public instrument executed before notary public containing charter and by-laws are registered at Registry of Commerce and published in official gazette. Any amendment of by-laws must be filed and published in like manner.

Corporations are formed without special governmental authorization. Corporations dedicated to banking, insurance, reinsurance, mutual funds, stock exchange, and other corporations regulated by special laws require governmental authorization.

Organization.

Corporations are designated by name accompanied by words “Sociedad Anónima” or abbreviation “S.A.” At least two stockholders are required for organization and continued legal existence of corporation. There is no restriction as to nationality or residence of incorporators. Foreigners who act as incorporators, must appear in person before notary, unless they are represented by duly empowered agent. Chilean corporations may be organized outside of Chile. Corporate capital is divided into shares. Responsibility of shareholders is limited to their shares.

One third of authorized capital shall be subscribed and paid in on incorporation. Unless subscription and payment of capital balance is made within three years, capital is reduced by operation of law to amount paid-in. There are "open" and "closed" corporations. "Open corporations" are: (1) Those which have their shares traded in Stock Exchange; (2) have 500 or more stockholders; (3) at least 10% of their subscribed capital belongs to 100 stockholders, excluding those who individually own, directly or indirectly, more than 10% of subscribed capital. Open corporations should be registered at National Securities Registry, are supervised by "Superintendencia de Valores y Seguros" and comply with special regulations. "Closed corporations" are those which do not fulfill any of above requirements, but must be registered with Registro de Valores if elect to be ruled as open corporations and they are supervised by "Superintendencia de Valores y Seguros". Open corporation will continue as such even when they no longer comply with law requirements, unless stockholders meeting agrees by vote of two thirds of stocks with right to vote to become closed corporation, in such case absent or dissenting stockholder may enforce right to withdraw.

Documents of incorporation should contain: (1) Name, profession, and domicile of incorporators; (2) name and domicile of corporation, if domicile is omitted, place of incorporation is considered as domicile of corporation; (3) object; (4) duration; (5) capital, kind, number, value of shares, manner and time of payment and value given to consideration given for stock if other than money; (6) organization, administration and control by stockholders; (7) time when inventory and balance sheet should be drawn and regular meetings of stockholders held; (8) distribution of dividends; (9) liquidation; (10) arbitration; (11) temporary board of directors; (12) and any other agreement such as management, eligibility, liability and powers of directors, stockholder's meetings, etc.

Personal Liability.

Stockholders are liable for unpaid portion of their stock. In case corporation is declared null and void stockholders are jointly liable. Joint owned stock results in joint liability of owners.

Management.

Corporations are managed by board of directors. Board of closed corporations must have minimum of three directors. Board of open corporations must have minimum of five directors who are elected by stockholders for maximum period of three years. Directors may be reelected indefinitely and need not be shareholders. Absent and/or incapacitated directors are replaced by their deputies. In case vacancy cannot be filled by deputy new board of directors should be appointed. Attendance to meetings may also be by means of telecommunication system approved by "Superintendencia de Valores y Seguros". Directors may be remunerated as provided in by-laws. Matters in which directors have personal or third party interest should be called to attention of board and resolutions taken must be reported to next annual meeting of stockholders. Board of directors and manager, if appointed, represent corporation. Directors of open corporations cannot be managers. Stockholders' meetings are ordinary or extraordinary, and should be held at corporate domicile. Ordinary meetings are held at least once a year within four months of balance sheet date. Ordinary meetings should receive report of inspectors and auditors, discuss accounts of corporation, vote on allocation of net profit for fiscal year, distribute dividends and elect board of directors. Extraordinary meetings may be held at any time to decide on matters specially enumerated by law, such as modification of articles of incorporation, dissolution, issuance of bonds, sale of corporation's business, etc. Stockholders' meetings are called by board of directors. Notice must be published as stipulated in by-laws. In open corporations mail notice should be given to Superintendency of Values & Securities and to all stockholders within 15 days before meeting. Notice must contain agenda or statement of matters to be discussed. These requisites may be omitted if all shares are represented. Stockholders may be represented by proxies.

Superintendency of Values & Securities investigates open corporations and may send representative to stockholder's meetings. Subject to certain legal limitations dissident stockholders have right to withdraw from corporation. Stockholders may bring derivative actions.

Stock.

Capital and numbers of shares must be specified, and whether shares are with or without par value. Shares may be common or preferred. Preferred shares may be issued with or without voting rights or restricted voting rights. Otherwise, each share has one vote. All shares must be nominative. If any share is paid for otherwise than in money, such contribution must be evaluated by experts and submitted to stockholders' meeting for approval. Portions of shares not fully paid can be registered and shall be transferred by recording in stockholders' registry. If corporation acquires its own shares, those shares cannot be voted nor receive dividends, and should be sold on stock market within a year, otherwise capital is reduced by operation of law, except as authorized by law. Amount of corporate capital and value of shares may be increased or reduced by modification of articles of incorporation; also, corporation can modify its capital through stockholders' meeting approval of its balance sheet. Corporations are authorized to issue debentures which may be converted into shares or into promises to issue shares.

Fiscal Year and Financial Statements.

At annual meeting of stockholders of “closed corporation” two inspectors of accounts should be appointed to examine corporation's accounts, inventories, financial statement, and to file report at next stockholders' meeting. “Open corporations” shall appoint independent external auditors to examine corporation's accounts, inventories, financial statement and report at next stockholders meeting. Dividends may be declared only from profits shown by inventories and balance sheets approved by meeting of stockholders. Open corporations must distribute dividends in cash and at least 30% of profits, except when there is stockholders' agreement to contrary. In case of closed corporations dividends are distributed in accordance with by-laws.

Corporation's fiscal year ends Dec. 31, unless otherwise provided in by-laws. At end of each fiscal year, board of directors is required to submit to annual stockholders' meeting statement of results for fiscal year then ended, balance sheet, profit and loss statement and report filed by external auditors or inspectors. Financial statements of open corporations must be published before such meeting.

Dissolution.

Corporations are dissolved: (1) By expiration of term; (2) when all shares are owned by one person; (3) by resolution of stockholders; (4) by judicial order; (5) by governmental order; (6) by provision of by-laws. After declaration of dissolution, liquidation of corporate assets is entrusted to liquidators appointed by stockholders' meeting.

Controlled and Connected Corporations.

Corporation may be controlled (filial-matriz) directly or through another corporation, more than 50% of whose capital is owned by controlling corporation or when controlling corporation has power to elect majority of directors. Corporations are connected (coligadas) when, in absence of control one corporation holds 10% or more of other's capital. Controlled and connected corporations are required to prepare annual consolidated financial reports. Corporations that are controlled or connected cannot buy stock of controlling or connecting corporation.

Corporations of Reciprocal Guarantee.

They are regulated by corporations law and by Law 20179 of May 10, 2007. Their exclusive purpose is to grant personal guarantees to creditors of their beneficiaries with purpose of secured beneficiaries' obligations of deliver, do, not to do, related to their activities. Beneficiaries may be individuals or juridical persons who execute contract of reciprocal guarantee with corporation where rights and duties are stipulated. Name of corporation must be followed by

S.A.G.R., minimum capital is established by law.

Foreign Corporations.

Foreign corporation may be authorized to do business in Chile through registered branch upon compliance with following requisites: (a) Agent or representative must appear before notary public and incorporate into public document, following documents: (1) proof that corporation was constituted in accordance with laws of its country of origin, and certificate of its continued existence, (2) copy of by-laws, (3) power of attorney appointing and authorizing agent to act for corporation, accept judicial service and exercise full powers in connection with litigation, also it shall include proof of authority of corporate representative granting power. All documents must be legalized and translated into Spanish; (b) when appearing before notary agent must declare: (1) name under which corporation will act in Chile and its object, (2) that corporation is acquainted with Chilean laws and regulations which are to govern its agencies, acts, contracts, and obligations, (3) that corporation's property is subject to Chilean laws, (4) that corporation shall have enough assets in Chile to respond for its obligations, (5) amount of capital set aside for branch in Chile and date and form of payment thereof, (6) address of principal office. Extracts of public documents should be recorded in Registry of Commerce and published in official gazette. Branches of foreign corporations must publish annually branch balance sheet.

See also category 14 Foreign Trade and Commerce, topic 14.01 Exchange Control.

2.04 FOREIGN CORPORATIONS:

See topic 2.03 Corporations.

2.05 LIMITED PARTNERSHIP:

See topic 2.06 Partnerships.

2.06 PARTNERSHIPS:

(C. C. arts. 2053-2115; C. Com. arts. 348-446, 470-511; Law 3918 of Mar. 7, 1923 as am'd).

Partnerships are considered as legal entities and may be formed by two or more persons. Before a mercantile partnership can do business, the partnership agreement must be drawn up in a public instrument executed before a notary, and within 30 days an abstract thereof must be recorded in the registry of commerce.

Unlimited Partnerships.

An unlimited partnership (“sociedad colectiva”), is a partnership in the usual form in which all partners have unlimited and joint liability. Such a partnership must act under a firm name which must include the names of all the partners, or of one of them followed by the words “y Compañía,” generally abbreviated to “y Cía.” The name of no person not a partner, can appear in the firm name.

The partnership agreement must express: (1) The name and domicile of the parties; (2) the firm name; (3) the names of the managing partners who may use the firm name; (4) the amount of the capital contributed by each partner; (5) the nature of the firm's business; (6) the share of profits and losses pertaining to each partner; (7) when the partnership is to begin and end; (8) the amount annually allowed each partner for his private expenses; (9) the manner of liquidation and division; (10) whether differences between the parties are to be submitted to arbitration and, if so, how the arbitrators are to be appointed; (11) the domicile of the firm, if domicile is omitted, place of organization is considered as domicile of partnership; (12) any other lawful agreements.

The management of the business may be placed in the hands of one or more partners; otherwise, all may use the firm name. The use of the firm name may also be granted by power of attorney to a third person. Partners cannot on their own account engage in the same kind of business as the partnership.

Closed Stock partnerships (“sociedad por acciones”), incorporated by one or more individuals who decide how to manage it. Incorporation may be in public instrument or private instrument protocolized by notary, and must include bylaws that contain name of partnership followed by SpA, mercantile purpose, capital and number of nominative shares, administration structure and duration, if not indefinite; extract of such document must be published in official gazette; document must be registered at Commerce Registry. Liability of shareholders is limited to their participation; preferred stock may be issued. It may be converted by operation of law into open corporation after 90 days of complying with legal requirements of open corporations. Any disputes arising among partners, between partners and partnership, or administrators must be resolved by arbitration as stipulated by law.

Limited partnerships (“sociedad en comandita”), is a partnership in which one or more of the partners are subject to unlimited and joint liability for the partnership obligations, and one or more are not responsible for debts and losses except up to the amount of the capital they have subscribed.

The name of a special partner cannot appear in the firm name. The firm name is generally followed by the words “Sociedad en Comandita,” commonly abbreviated to “S. en C.” The special partners have no participation in the management of the company and cannot be attorneys in fact of the same, but they may attend the meetings of the other partners and express their opinion. The capital belonging to the special partners may be represented by shares. Many of the provisions relating to unlimited partnerships are applicable to limited partnerships.

Limited company (“sociedad con responsabilidad limitada”), is generally subject to the rules applying to unlimited partnerships, except that the liability of all members is limited. The number of members cannot exceed fifty and the firm name must be followed by the words “Limitada.”

Civil partnership (“sociedad civil”), is one which is not formed for commercial purposes. It may have the form of an unlimited or limited partnership or of a corporation. It is governed by the rules of the Civil Code and is distinguished from a commercial company by being regarded rather as an association of individuals: thus, an obligation assumed by an unlimited civil partnership does not render the partners jointly liable, unless they have all subscribed to it in person or by attorney in fact.

Foreign partnerships may do business in Chile upon registering and publishing their partnership agreements in the same manner as Chilean partnerships. For tax purposes they may set aside a limited amount of capital for the use of their business in Chile.

Individual Limited Liability Enterprise.

(Law 19857 of Jan. 24, 2003). Any individual may organize enterprise by public instrument (see category 9 Documents and Records, topic 9.03 Public Instruments) that must contain name and personal data of owner, name of enterprise related to its purpose, followed by words “Empresa Individual de Responsabilidad Limitada” or “E.I.R.L.”, purposes, domicile, capital allocated to it and whether in cash, or other than money which must be transferred to enterprise in same act stating their value, period of duration, if not indefinite, name of manager who may be owner, and period of his appointment if not permanent. Enterprise shall be terminated by owner's will, expiration of term, merger, bankruptcy, death of owner. Other provisions also regarding dissolution and liquidation. Owner may withdraw only net profits and shall be liable with property of enterprise only.

3 BUSINESS REGULATION AND COMMERCE

3.01 BILLS AND NOTES:

(C. Com., arts. 620-781; Law 18092 of Dec. 23, 1981 as am'd).

Bills of exchange must show following: (1) Statement that document is bill of exchange in same language as entire document; (2) place and date of issue; if place is not indicated, domicile of drawer will be considered as place of issue; (3) unconditional order to drawee to pay certain amount of money; (4) name of payee; (5) name and address of drawee; (6) place and date of payment; if place is not indicated payment must be done at domicile of drawee; if date of payment is not indicated, bill is payable at sight; (7) signature of drawer. If bill lacks any of these requisites it is considered as simple promise to pay. If bill contains phrase “value received” consideration is understood to have been cash.

Endorsements must set forth signature of endorser and may have place and date and name of endorser. Endorsement with statement “value in collection” is merely collection fee. Endorsement in blank, with or without date, transfers ownership and authorizes endorsee to fill in requirements of endorsements. Additional clauses aimed to encumber legal effects of endorsements are invalid. Endorsement of matured drafts has effect of mere assignment.

Drafts at period after sight must be presented for acceptance within one year. Drafts drawn for payment within fixed period after date must be presented for acceptance within such period. Those in which payment date is designated also need to be presented for acceptance before designated date.

Acceptance is signified by writing the words “I accept” or “Accepted” or similar words, with the signature of the acceptor, or the mere signature, and if payable at a period after sight the date of acceptance must be added. Acceptance may be for a smaller amount not less than one-half the par value of the draft, but if a conditional acceptance is admitted, the holder assumes all the risks of the draft. Acceptance imposes on the acceptor the obligation of paying at maturity unless he proves that the bill was a forgery. If acceptance is refused, the bill must be protested.

Bills whether accepted or not must be presented for payment on their due date, or if that be holiday, Sat. or Dec. 31, on following working day. There are no days of grace.

In case of nonacceptance, bills must be protested. In case of nonpayment they must also be protested, even though previously protested for nonacceptance. The obligation to protest is not removed by the death, interdiction or bankruptcy of the drawee. In case of his bankruptcy protest may be made before the due date.

Upon protest, the holder, by the first or second mail, must advise his assignor of the protest. Such assignor in turn must advise his assignor, and so on until the drawer is reached. The holder must demand payment or acceptance from the person designated by the drawer or endorsers. Failure to protest causes the holder to lose his rights against the drawer and endorsers, unless the drawee or acceptor becomes bankrupt before the date of maturity.

The proper time for making protests is before 3 P. M. on the day following that on which acceptance or payment was refused. The protest will be cancelled if the amount of the draft and the expenses of the protest are paid before sunset on the same day. A protest must be made before a notary public and must appear on back of document or in additional paper. Protested drafts bear interest at current rate from day of protest provided there is not agreement in matter.

Promissory notes, payable to order, should contain: (1) Statement that document is promissory note in same language as entire document; (2) unconditional promise of payment of certain amount; (3) place and date of payment; (4) name of payee; (5) place and date of issue; (6) signature of maker. They are generally subject to law governing bills of exchange. If not payable to order they are subject to rules of Civil Code regarding transfer of credits.

Checks, in addition to stating whether they are to bearer or drawn to order of particular person, may contain only: (1) Name of drawee; (2) date and place where drawn; (3) amount in words and figures; (4) signature of drawer. They must be presented within 60 days if drawn in place where they are payable, within 90 days if drawn elsewhere in Chile, and within three months if drawn outside country. Failure to present within these periods causes holder to lose right of action against endorsers, and also against drawer if payment becomes impossible through fault of drawee. After said periods drawee may refuse to honor check. Duplicate checks are forbidden, unless payable abroad. In case of loss of check, holder must notify drawee, publish loss in newspaper for three days and advise drawer and endorser, or apply to court and give bond. Checks may be crossed and in that case are payable only to bank. Checks may be protested for non-payment, in which case an executory suit and criminal action may be brought thereon within one year after protest; otherwise, payment can be enforced only by ordinary suit. (D. F. L. 707 of July 21, 1982 as am'd).

3.02 COMMERCIAL REGISTER:

See category 9 Documents and Records, topic 9.04 Records.

3.03 FRAUDS, STATUTE OF:

See category 9 Documents and Records, topic 9.03 Public Instruments.

3.04 INFORMATION TECHNOLOGY, INTERNET AND NEW MEDIA:

(Law 19223 of May 28, 1993, Decree 81 of June 10, 1999 and Law 19628 of Aug. 18, 1999 as am'd).

Protection of personal data: Processing and use of personal data is protected by law, as well as use of data of commercial, financial or banking nature and criminal records. Law penalizes those who maliciously destroy, disable, intercept, or interfere with database and illegally access, change and destroy information contained therein or maliciously reveal or publicize data contained in information system.

Use and validity of electronic documents and digital signatures by government agencies is regulated by law which creates specific mechanism for issuance of digital signature by government authorities.

Electronic Documents, Electronic Signature and Certification.

(Law 19799 of Mar. 25, 2002 as am'd, regulated by Decree 181 of July 9, 2002). Law regulates Internet payments methods, confidentiality policies, security, consumer rights, legalizes electronic signatures, electronic date and confers upon digital documents same legal validity as those printed. Certification service is also subject to provisions of Consumers' Protection Law (Law 19496 of Feb. 7, 1997 as am'd) and to Privacy Protection Law (Law 19628 of Aug. 18, 1999). Certification services may be provided by domestic or foreign private or public companies. Certification providers may be licensed or unlicensed. License is issued by Under Secretary of Economy, Promotion and Reconstruction. Electronic signatures may be certified by standard certification or by advanced certification. For advanced certification identity of person whose signature is certified is determined by personal appearance before certification provider or notary public. Advanced certification is required for public documents. If certification provider is domiciled out of country, its certification must be confirmed by local provider. Electronic signature certificate must identify provider, owner of signature, unique code and term of validity.

3.05 INTEREST:

Parties may agree to any rate not exceeding 50% of current banking interest, as determined every month by Central Bank. (C. C. arts. 2205-2209; Law 18010 of June 23, 1981 as am'd).

3.06 MONOPOLIES, RESTRAINT OF TRADE AND COMPETITION:

(D. F. L. 1 of Oct. 8, 2004 as am'd, Law 20169 of Feb. 2, 2007).

Law is based on concept of free competition and market structure. It promotes and protects free competition, prohibits monopolistic practices and any other unfair practice that may limit economic freedom. Law is applied to individuals and private juridical persons engaged in economic activities. Law prohibits any practices, arrangements or agreements that limit or restrict free competition such as manipulation of production or distribution of goods; economic concentration leading to domination of part or whole market; abuse of dominant position in market. Acts restricting free competition are permissible in principle where they are necessary for stability of growth of national investment. Fines and imprisonment may be imposed for infringement of law and dissolution of juridical persons can be declared.

Law defines acts of unfair competition as any conduct contrary to good faith or honest practices which by illegal means attract competitors' clients, among them, misleading public with respect to enterprise or its activities, products and services offered by such enterprise; false statements or unjustifiable allegation that discredits, or is likely to discredit, another person's enterprise or activities, damage goodwill or reputation, create confusion with respect to another company or activities.

Surcharges as protective measures may be issued to protect local production from import of same or similar products that threaten to or that caused pecuniary loss to local producers. They are issued temporarily while investigation takes place and definitive for periods up to one year, which can be extended. (D. F. L. 31 of Oct. 18, 2004, Decrees 575 of Aug. 20, 1993 and 909 of June 17, 1999).

Consumers' Protection Law (Law 19496 of Feb. 7, 1997 as am'd, Decree 18 of Jan. 13, 2006) deals with consumers' rights and obligations, suppliers' obligations, adhesion contracts, contracts for sale of homes and for time sharing of real estate, education and health care services, electronic contracts, general representation and guaranties, products liability, lack of performance, services, credit operations, special regulations for advertisement and promotion, class actions, anti-spam rule, consumer's right to repeal contract, penalties for infringement of law and general regulations on subject. There is public agency in charge of supervising enforcement of law. Judgments for infringement of law are recorded in registry created by law.

3.07 NEGOTIABLE INSTRUMENTS:

See topic 3.01 Bills and Notes.

3.08 SALES (REALTY AND PERSONALTY):

(C. C. arts. 1793-1896; C. Com. arts. 130-160).

A sale is perfected and binding when the vendor and vendee have agreed upon the thing sold and the price thereof, though neither has been delivered; except that the sale of real property and rights and of an inheritance is not perfect until a public instrument is executed, but this exception does not apply to the sale of trees and pending fruits, building materials, etc. The determination of the price cannot be left to one of the parties.

The fiscal fees and the expenses of execution of the instrument of sale are payable by the vendor unless agreed otherwise. Sales of real property must be recorded. In the absence of an agreement to the contrary, the vendor warrants the thing sold and the title thereto; and in any case he is liable for hidden defects in the thing sold if known to him and not called to the buyer's attention. If the buyer does not pay the price at the time stipulated, the vendor may institute suit for the price or may, within four years after the date of the contract, ask for the rescission of the same.

In private sales of real property rescission may be asked within four years by the vendor if it is found that the price received is less than one-half the just value of the property, and by the buyer if the value is less than one-half the price paid. If a sale of real property is made at a certain price for a unit of area, the vendor must, if the area is found to be less than that stipulated, make up the difference or refund part of the price paid; if the area is found greater, the buyer must pay more; but in either cases if the difference exceeds 10% the sale may be annulled.

In commercial sales if the vendor does not deliver the goods at the time stipulated, the buyer may demand the fulfillment or rescission of the contract with damages in either case. He is not obliged to receive part of the merchandise purchased, but if he accepts partial delivery, the sale is consummated with regard to the goods received. If the purchaser refuses without just cause to receive the goods bought the vendor may demand the rescission of the sale, with damages, or the payment of the price and interest, but in the latter case he must deposit the merchandise to the order of the court for sale at public auction for account of the buyer.

Sales of bonds and shares for future delivery are prohibited.

Instalment Sales.

See category 20 Mortgages, topic 20.01 Chattel Mortgages.

International Sale of Goods.

United Nations Convention on Contracts for the International Sale of Goods, in force on Mar. 1, 1991. See category 24 Treaties and Conventions, topic 24.01 Treaties and Part V, Selected International Conventions.

3.09 STATUTE OF FRAUDS:

See category 9 Documents and Records, topic 9.03 Public Instruments.

4 CITIZENSHIP

4.01 ALIENS:

See category 16 Immigration.

5 CIVIL ACTIONS AND PROCEDURE

5.01 ACTIONS:

Limitation of.

See topic 5.04 Prescription, subhead Actions.

5.02 JUDGMENTS:

Judgments do not constitute a lien on the property of the judgment debtor as against third persons, except as to real property, when they are recorded in the registry of property.

Foreign Judgments.

Foreign judgments have the force provided by treaty or, in the absence of treaty provisions, the force which in the foreign country is given to Chilean judgments. If the courts of the foreign country refuse to carry out Chilean judgments, the judgments of that country have no force in Chile. If the foregoing rules cannot be applied, the foreign judgment will be enforced in Chile if: (1) It contains nothing contrary to the laws of Chile; (2) it does not conflict with national jurisdiction; (3) it was not rendered by default; (4) it is in form ready for execution, in accordance with the laws of the country where rendered. The Supreme Court decides whether or not a foreign judgment should be executed by the courts of Chile. (C. C. P. arts. 231-251).

5.03 LIMITATION OF ACTIONS:

See topic 5.04 Prescription.

5.04 PRESCRIPTION:

(C. C. arts. 2492 to 2524; C. Com. arts. 761 to 764, 822, 1313 to 1318).

The acquisition of property or rights by virtue of possession and the extinction of obligations by failure to require performance is called prescription. Prescription can be expressly or tacitly waived as far as it has run, but no waiver can be made of future prescriptive periods.

In order to acquire by prescription, possession must be uninterrupted. Natural interruption exists: (1) When possession of the property becomes impossible by a natural cause, as by inundation, in which case the period of interruption is deducted; or (2) when a third person enters upon the property, in which case the entire previous prescriptive period is not counted unless possession is regained by legal proceedings. Civil interruption is produced by judicial demand.

Against a title recorded in the registry of property the prescriptive period does not run except by virtue of another recorded title. Ordinary prescriptive period is five years for real property and two years for personal property. Prescriptive period is suspended in favor of persons who are minors, demented, deaf and dumb, wards or married women; it is always suspended between spouses.

Real property can be acquired by extraordinary prescription by possession for ten years; in such case no title need be shown and there are no suspensions in behalf of incapacitated persons.

Actions.

Prescriptive periods in which right to enforce an obligation is lost vary according to nature of action. More important are: (1) Actions to recover an inheritance, ten years; (2) ordinary suits in actions in which no special period is fixed, five years; (3) executory suits in actions in which no special period is fixed, three years; (4) actions between drawers and acceptors of bills of exchange, actions based on marine loans or insurance, four years; (5) actions to recover compensation due to attorneys, physicians, teachers and other professional men, two years. There are also special provisions for actions that prescribe in a shorter period of time.

Many of the above periods of prescription of actions are suspended in favor of incapacitated persons, but after ten years no suspension is taken into account.

Prescription of actions is interrupted by express or tacit recognition of the debt by the debtor and by judicial demand.

6 COURTS AND LEGISLATURE

6.01 COURTS:

Justice is administered by: (1) Law judges, at least one in each department, with original jurisdiction in civil, commercial, mining, and treasury matters whatever amount involved, and in family, criminal and labor matters; (2) courts of appeals, each with appellate jurisdiction in appeals from law judges and arbitrators, and administrative supervision over judges of their territory; (3) Supreme Court at Santiago, which hears appeals for errors of law from decisions of courts of appeals. (Law 7421 of Judicial Organization of June 15, 1943 as am'd).

6.02 LAW REPORTS, CODES:

See topic 6.04 Statutes.

6.03 LEGISLATURE:

(Const., arts. 42 and 52, Law 18918 of Jan. 26, 1990 as am'd).

Congress, which is composed of Senate and Chamber of Deputies, meets in regular session annually from May 21 to Sept. 18, but it may be called in special session by President or by President of Senate on request of majority of either house.

6.04 STATUTES:

Most of legal provisions are codified. First code, Civil Code, took effect Jan. 1, 1857, and is based largely on Spanish laws and on Civil Codes of France, Austria and Louisiana. Other important codifications, most of which have been extensively amended, are Code of Commerce which took effect Jan. 1, 1867; Penal Code, effective Mar. 1, 1875; Law of Judicial Organization, promulgated June 15, 1943; Code of Civil Procedure, effective Mar. 1, 1903; Code of Penal Procedure, effective Mar. 1, 1907; Labor Code, Law 18620 of May 27, 1987 as amended; Code of Waters, D. F. L. 1122 of Aug. 13, 1981; Municipal Law, Law 18695 of Mar. 29, 1988 as amended; Customs Ordinances of Oct. 13, 1982 t.o. 1993 as amended; Fiscal Code, Decree-Law 830 of Dec. 27, 1974 as amended; Aeronautic Code, Law 18916 of Jan. 19, 1990 as amended.

7 DEBTOR AND CREDITOR

7.01 ASSIGNMENTS:

Title to personal property may be transferred either by public or private instrument. See categories 3 Business Regulation and Commerce, topic Sales (Realty and Personalty); Documents and Records, topic Public Instruments; Property, topic Deeds.

7.02 ASSIGNMENTS FOR BENEFIT OF CREDITORS:

A debtor who is not merchant may assign all his property for payment of his debts if conditions are not such as to warrant declaration of bankruptcy. If there is but one creditor assignment is made to him; if there are more, it is made to official receiver of district. The creditors may object and if their objections are sustained by court, debtor is declared bankrupt. (C. C., arts. 1614-1627; Law 18175 of Oct. 13, 1982 as am'd, arts. 241-255).

7.03 ATTACHMENT:

Attachments are granted only in the summary actions known as executory actions or in the execution of judgments, but the following “precautionary measures” are available in other suits: (1) The judicial deposit of personal property which is the object of the suit and which is in danger of being lost; (2) the appointment of supervisors for real or other property and the retention of the income therefrom, if there is danger that the rights of the plaintiff may be injured; (3) the retention of monies or personal property if the defendant has insufficient property to guaranty the results of the suit or there is reason to believe that he will conceal his assets; (4) the prohibition to act or contract with respect to property which is the object of the suit, or in other cases when the assets of the defendant are insufficient to guaranty the results of the suit. (C. C. P. arts. 290-302).

7.04 BANKRUPTCY AND INSOLVENCY:

(C. Com. Book IV).

Bankruptcy.

Person may be declared bankrupt on his own behalf or on application of creditor. Person dedicated to commercial, industrial, mining or agricultural activities has duty of filing bankruptcy petition within 15 days after defaulting in payment of mercantile obligation. Creditors may make application: (a) When debtor is person dedicated to commercial, industrial, mining or agricultural activities and defaults in payment of any mercantile obligation; (b) when debtor against whom three or more overdue documents are outstanding on which summary executive actions might be based and against whom two such actions have actually been instituted, does not within four days satisfy claims; (c) when debtor has absconded; and (d) when settlement made by him with his creditors is annulled.

There are official receivers appointed by Government. Upon declaration of bankruptcy local receiver takes charge of assets and business, collects sums due bankrupt and notifies creditors to file their claims in 30 days; foreign creditors have additional time designated in notice. Receiver reports on such claims and makes list of creditors. Meetings of creditors are held on dates and times fixed by first creditors' meeting and when requested by receiver, bankrupt, or creditors representing one-fourth of liabilities. On declaration of bankruptcy all debts of bankrupt fall due. Receiver makes distribution of assets whenever sums available amount to 5% of liabilities.

Bankruptcy may be: (1) Fortuitous; (2) culpable; or (3) fraudulent. In latter two cases bankrupt is subject to criminal prosecution and cannot be discharged until he has served his sentence and unless all his liabilities are paid.

The bankruptcy proceedings are suspended when the assets are insufficient to pay the costs of the proceedings; during the period of suspension the creditors may bring individual actions against the debtor. Bankruptcy proceedings are terminated and the debtor is discharged: (a) Upon agreement of the creditors; (b) when all claims are paid or bond is given for their payment; (c) upon the expiration of two years after approval of the final report of the receiver, provided the bankruptcy was fortuitous and the debtor has not been convicted of fraud.

Out of Court Settlements and Judicial Agreements.

Debtor may execute Out of Court Settlements with one or more creditors before bankruptcy is declared. Judicial agreements may be: (a) Composition agreement to prevent bankruptcy (convenio judicial preventivo) and (b) simple judicial agreement (convenio simplemente judicial). (a) Composition agreement to prevent bankruptcy that may be proposed by debtor before bankruptcy is declared. Bankruptcy is declared if Court denies debtor's petition. Creditors may also request Court to order debtor to submit draft of composition agreement within certain term; if no draft is submitted or Court dismisses creditor's petition, Court shall declare bankruptcy of debtor. If debtor submits draft agreement, Court shall appoint receivers who evaluate draft agreement. Creditors' meeting is held to discuss composition agreement. If agreement is not approved within term stipulated by law, Court must declare bankruptcy of debtor. (b) Simple judicial agreements that are proposed in bankruptcy proceedings in order to conclude them. Creditors or bankrupt may propose simple judicial agreement in any stage of bankruptcy proceedings. Simple judicial agreements are approved by debtor's consent and by vote of minimum two thirds of creditors representing three fourths of total debts, according to law. Agreement is binding to all creditors. Simple judicial agreements may be declared void in case of fraud; statute of limitations is one year from date agreement enters into force. Statute of limitation in case of noncompliance with agreements, is six months. After court resolution, declaring agreement voided or noncompliance of agreement is final. Court shall declare bankruptcy of debtor at its own instance.

See also topic 7.08 Fraudulent Sales and Conveyances.

7.05 EXECUTIONS:

(C. C. P. arts. 231-241, 434-544).

Judgments for payment of money are carried into effect by attaching property of the debtor. Personal property is sold at auction by a public auctioneer and commercial securities are sold by a broker. Real property is valued, unless a valuation has been agreed upon, and advertised for sale. The sale is held by the judge.

Bidders must file a bond for 10% of the valuation of the property. No bid is accepted which is less than two-thirds of the valuation. If there are no bidders, the creditor may ask for the adjudication of the property to him at two-thirds of the valuation, or request that a new sale of the property be advertised with the valuation reduced by not over one-third. If still no bid is obtained, the creditor may ask for adjudication to him at two-thirds of such new valuation, or for a third sale at any valuation the court may fix, or for the delivery of the property to him to collect and apply the income. In the last case, there may at any time be a further sale of the property at the request of the creditor or debtor, or the debtor may redeem the property. After any sale there is no equity of redemption.

Third parties may intervene to allege preferential rights, but the sale is not stayed unless the intervenor claims ownership based on a public instrument of earlier date than the execution.

7.06 EXEMPTIONS:

The following are exempted from attachment and execution: (1) Salaries and pensions paid by the state and municipalities, except that for maintenance ordered by a court one-half of such salaries and pensions may be attached; (2) social benefit funds of laborers and employees; wages and salaries, including commissions, participations, etc., but only up to a monthly amount not exceeding six monthly cost-of-living salaries. In cases of support and maintenance, of fraud, embezzlement or larceny, etc. against the employer, and of failure of the employer to pay his employees or laborers only an amount equal to three monthly cost-of-living salaries is exempt; (3) maintenance allowances required by law; (4) periodical income due to the liberality of another, so far as necessary for the maintenance of the debtor and his family; (5) deposits exempted under the national savings bank law; (6) life insurance policies and payments, but no premiums; (7) sums paid to contractors for public works while the work is going on, unless the suit was instituted by workmen or laborers or by creditors for materials supplied for the respective work; (8) beds and clothing of the debtor, his wife and children; (9) and (10) professional books and instruments up to 900 pesos; (11) uniforms and equipment of military men; (12) objects required for the work of artists and artisans and animals and equipment required by farmers, up to 400 pesos; (13) household utensils and food and fire material required by the debtor and his family for one month; (14) property held in a fiduciary capacity; (15) rights entirely personal, such as use and habitation; (16) real property donated or bequeathed as not attachable up to the valuation made at the time of delivery; (17) properties required for a public service but not the income therefrom; (18) other properties declared exempt by special laws. (C. C. P. art. 445).

7.07 FORECLOSURE:

See category 20 Mortgages, topic 20.03 Mortgages.

7.08 FRAUDULENT SALES AND CONVEYANCES:

(C. C. arts. 2465-2470; C. Com. Book IV, arts. 74-79).

Acts and contracts executed in bad faith to defraud creditors may be rescinded provided action is brought within one year.

Gifts are void as against creditors if made after the cessation of payments or within ten days prior to such cessation, or one hundred and twenty days if made to relatives to the fourth degree. In case of a merchant the following are also void if executed after the cessation of payments or within ten days before such cessation: (1) Payments of debts in advance of maturity; (2) payments of matured debts if made otherwise than as stipulated, but payment in merchandise is considered equivalent to payment in money; (3) mortgages or pledges to secure debts arising before the said ten days. Other payments and contracts made between the cessation of payments and the declaration of bankruptcy may be annulled if the third party was aware of the cessation of payments. Mortgage registrations made after the tenth day prior to the cessation of payments may be set aside if the time between the date of the mortgage and its registration is over fifteen days plus an additional period allowed for the distance to the place of recording.

7.09 GARNISHMENT:

See topics 7.03 Attachment, 7.05 Executions, 7.06 Exemptions.

7.10 INSOLVENCY:

See topic 7.04 Bankruptcy and 7.10 Insolvency.

7.11 LIENS:

(C. C. arts. 2465-2491; C. Com. arts. 218, 1084-1135).

Credits are divided into five classes: (1) Those for judicial costs in matters favoring all creditors, necessary funeral expenses, expenses of sickness beyond six months to amount under control of judge, salaries of employees and workers and family allowances, taxes and payments of social security agencies and accrued withholding or surcharge taxes, necessary family subsistence items, for last three months, legal and contractual labor indemnification of employees and workers, other taxes including accrued municipal taxes; (2) those of innkeepers, carriers and pledgees, which are liens on property brought by guest into inn and articles carried or pledged; (3) those of mortgage creditors, which are liens on property mortgaged; (4) those of government against tax collectors and administrators, of municipalities, churches and educational and charitable establishments, against collectors and administrators of their funds, married woman for her property administered by husband, as against his property, and of children and wards for their property administered by parents, guardians or curators as against properties of such persons; and (5) those of common creditors. If among them some credits are subordinated to other credits, original credits are paid before subordinated credits.

The credits of the second and third class constitute a lien on the specific properties to which they refer. In case of insolvency, however, those of the first class are preferred to all others if the other property of the debtor is not sufficient to pay them. See also category 3 Business Regulation and Commerce, topic Sales (Realty and Personalty).

In commercial matters the consignee has a lien similar to that of the carrier against the articles received by him. Likewise, in maritime matters the provisions of law relating to average designate the classes of credits which constitute a lien against the vessel.

Mechanics' Liens.

There are no special provisions corresponding to mechanics' liens.

7.12 PLEDGES:

(C. C. arts. 2384-2406; C. Com. arts. 813-819; Law 4287 of Feb. 22, 1928 as am'd; Law 20190 of May 17, 2007).

Pledge contracts are not effective unless the object pledged is delivered to the creditor or, in the case of commercial contracts, to the creditor or a third party agreed upon by debtor and creditor. Except in case of bank pledges, the document constituting the pledge must be a public instrument or a private instrument protocolized by a notary, and must contain a description of the objects pledged so that the creditor may have a privilege above other creditors. If payment is not made at maturity, the creditor may ask that the object pledged be sold at public auction under judicial auspices.

Law 20190 regulates pledge only when object pledged is not delivered to creditor. Personal property and intangibles, present or future, secure debt and give pledge creditor preferential right to be paid with price of pledged article. Document constituting this type of pledge must be public instrument executed before notary public or private instrument protocolized by notary and must contain name of parties, secured obligations, description of objects pledged, and secured amount; extract of such document must be published in official gazette; document must be registered at Registry of Pledges without Delivery. On maturity of obligation, creditor may demand public sale of pledge as regulated by law.

As to agrarian and industrial pledges, see category 20 Mortgages, topic 20.01 Chattel Mortgages.

7.13 USURY:

See category 3 Business Regulation and Commerce, topic 3.05 Interest.

8 DISPUTE RESOLUTION

8.01 ARBITRATION AND AWARD:

(L.J.O. arts. 222-243, C. C. P. 628-644).

Arbitration.

All disputes arising of economic or property matters may be submitted to arbitration, except dispute related to alimony, separation of marital property, or involving minors or incompetents and their legal representatives where Public Prosecutor must render opinion. Arbitration is compulsory, among others, in liquidation of property held jointly by husband and wife, general or limited partnership, or associations. There are three types of arbitration: de jure arbitration (arbitraje de derecho), ex aequo et bono arbitration or amiable composition (arbitraje de equidad) and mixed arbitration, where parties authorize de jure arbitrators to act as amiables compositeurs in procedure matters, but remain bound to apply law in rendering award. In ex aequo et bono arbitration arbitrators are not bound to decide on basis of rules of law other than rules of law chosen by parties, in absence of designation, they may do so according to what they consider reasonable and equitable. Arbitration agreement shall be in writing. Arbitrators must be appointed by unanimous consent of all parties, failing consent of parties, by court. Number of arbitrators should be two or more. Arbitration award must be rendered within two years from acceptance of appointment.

International Commercial Arbitration.

(Law 19971 of Sept. 10, 2004). Law on international commercial arbitration considers arbitration as international when parties are domiciled in different countries at time of execution of agreement or when parties have same domicile but have selected different country as domicile for arbitration, place of performance substantial duties of parties or location of subject of dispute are in another country. Arbitration agreement must be in writing, in form of arbitral clause or in separate agreement. Evidence of arbitration agreement is any kind of document or by other means of communication that constitutes record of agreement. Number of arbitrators should be three, unless parties agree on another number. Parties are free to establish place of arbitration, language used, arbitration rules. Arbitrators have authority to grant provisional remedies when arbitration proceedings are located in Chile. Arbitral award is enforceable by local courts without exequator. Recognition or execution of foreign arbitral awards is according to international conventions and this law.

Conventions.

Convention on the Recognition and Enforcement of Foreign Arbitral Awards, New York, 1958; Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, Washington, 1965; Inter-American Convention on International Commercial Arbitration, Panama, 1975.

9 DOCUMENTS AND RECORDS

9.01 ACKNOWLEDGMENTS:

(L. J. O. 419-421, C. C. 1699, C. C. P. 345).

According to the system in force generally where the civil law prevails, contracts, deeds and other documents which require authentication by a public official are prepared by a notary or other authorized officer and made a part of his protocol; that is to say, the original documents are kept in an official registry in the office of the notary or official. (See topics 9.02 Notaries Public and 9.03 Public Instruments.) However, private documents may be acknowledged before a notary. Documents executed abroad, in conformity with law of country where executed, are entitled to recognition in Chilean courts with same force as in country where executed, if duly authenticated by consular or diplomatic agent of Chile or of country where executed, and authentication is certified to by Minister of Foreign Affairs of Chile. Legal effect which in U.S. is secured by seals and acknowledgments is obtained in Chile by having document executed before notary in form known as public instrument.

9.02 NOTARIES PUBLIC:

(L. J. O. arts. 399-445).

Notaries are public officials whose duties are more important than those of notaries under the American law. They are appointed on examination and must be lawyers, but while acting as notaries can practice law only in personal affairs. They must give bond and cannot leave the town of their residence without leave of absence from the proper judge or from the President of the Republic. They are under the supervision of the courts of appeals having jurisdiction over the respective departments.

Instruments executed before notaries must be prepared with certain formalities. Name, status, nationality, occupation, identification or passport number and residence of parties must be stated; unless parties agree otherwise notary must read instrument to them; and instrument must be signed in his presence. If parties are unknown to notary their identity must be certified under oath by two witnesses known to him. All public instruments executed before notary must have at least two witnesses. Notary retains original document and issues to parties in interest formal certified copies which have effect of originals and may be presented in court. At intervals records of notaries are forwarded to keeper of archives of department. Notaries may legalize signatures to private documents.

9.03 PUBLIC INSTRUMENTS:

(C. C. arts. 1698-1711; C. C. P. arts. 342-355).

A public instrument is one written by a notary in his protocol book from which he issues certified copies. Private documents may be given the effect of public for certain purposes by acknowledgment of its signatures before a notary.

As towards third parties a private instrument is considered as executed only from the death of one of the signers or from the date on which it was recorded or inventoried by a competent official or on which it was presented in court or acknowledged.

The law designates numerous acts or contracts which must appear in a public instrument, among them being the conveyance of real property and easements, the creation and assignment of mortgages, marriage settlements, contracts modifying a public instrument, powers of attorney for most purposes, promises to contract, the emancipation of minors and others.

9.04 RECORDS:

(C. C. arts. 686-697; L. J. O. arts, 361-388; Real Property Registry Regulations of June 24, 1857; C. Com. arts. 20, 21; Commercial Registry Regulations of Aug. 1, 1866; Civil Registry D. F. L. 1 of May 16, 2000 as am'd, Registry of Pledges without Delivery Law 20390 of May 17, 2007).

The following must be recorded in the registry of properties: documents conveying or declaring the ownership of real estate and real rights; documents constituting, conveying, modifying or renouncing rights of usufruct, mortgage and certain other rights in real estate; and judgments declaring the ownership of real property, the definitive possession of the property of absent persons, the loss of civil rights, the rehabilitation of demented persons and spendthrifts, and the separation of property of married persons. Until such documents are presented for record the tradition of the property is not deemed affected. Other documents relating to real property or rights therein, such as leases, attachments, etc., may be recorded so as to constitute notice to third parties.

The registrars are semi-judicial officers who do not transcribe the entire document but only the essential details. On receiving an instrument they examine it to ascertain whether it is in legal form and whether the grantor is the owner of record and his right to execute the document appears sufficiently. If defects are found, a period of time is allowed to cure them, and in some cases registration may be refused at once. From the decision of the registrar a summary appeal lies to the courts. Registrars are appointed by the President and must give bond. Their fees are reasonable and are fixed by law.

Besides registry of real property, there are commercial registries where certain instruments and data relating to merchants, corporations, etc., must be recorded; mining registries for recording of mining titles, mortgages and transfers; and civil registries for recording of births, marriages, deaths and other personal data, pledge registries for recording of pledges with delivery and pledges without delivery. Notarial records are also preserved.

9.05 SEALS:

Seals are not used in private matters. Public instruments executed before notaries have most of the effects of sealed instruments in the United States.

10 EMPLOYMENT

10.01 LABOR RELATIONS:

(Const. art. 19, §16, Labor Code, Law 19728 of Apr. 30, 2001 regulated by Decree 250 of Dec. 12, 2001).

Constitution provides for right to work of individuals and right to strike and to organize trade unions. Labor relations are regulated by Labor Code that guarantees workers equitable working conditions, limited working day, paid days for rest and vacation, fair salaries and equal pay for equal service, welfare of family and its access to decent housing. Labor Code contains special regulations for minors under 18 years. In case of pregnancy, women have 18 weeks of maternity leave, and men have four days of paternity leave in case of birth or adoption. Private and collective labor contracts must always be in writing. When employer has more than 25 employees at least 85% must be Chileans. In case of dismissal without cause, workers are entitled to indemnification equal to one month's salary for every year of service, up to certain limit. In general, termination of contracts by dismissal with just cause, subjects employer to payment of severance equal to one month's salary or 30 days advance notice. Workers compensation insurance is compulsory and paid by employer. Unemployment insurance is compulsory and it is financed by percentage paid by employer, employee and Government.

11 ENVIRONMENT

11.01 ENVIRONMENTAL REGULATION:

(Const. art. 38, §8, Basic Environmental Law, Law 19300 of Mar. 1st, 1994 as am'd, Regulations 86 of May 8, 1995, 93 and 94 of May 15, 1995; Decree 30 of Mar. 27, 1997 as am'd; Decree 90 of May 30, 2000).

Law regulates right to live in nonpolluted environment, environmental protection, preservation of nature and conservation of environmental patrimony. Law contains basic principles for interpretation of existing environmental regulations and for development of implementation laws. Environmental impact statements are mandatory for projects having environmental impact, such as, dams, thermoelectric and hydroelectric plants, nuclear plants, mining, oil, gas, airports, highways and roads, ports, real estate developments in congested areas, water pipelines, manufacturing plants, forestry projects, sanitary activities; production, storage, recycling toxic, inflammable and hazardous substances, among others. Other projects must file sworn environmental impact declaration that project or activity does not affect environment and does not violate environmental legislation. All projects must be approved by regional or national environmental commission. Law imposes liability to those who knowingly or negligently cause environmental damage. Liability includes payment for clean-up of environmental damage and indemnification according to law. Failure to comply with obligation to prevent damage to environment, clean-up plans and with legal provisions are sanctioned with warnings, fines, temporary or permanent closure of facilities or immediate suspension of activity causing damage.

12 ESTATES AND TRUSTS

12.01 ADMINISTRATION:

See topic 12.06 Executors and Administrators.

12.02 CLAIMS:

See topic 12.06 Executors and Administrators.

12.03 DEATH:

Death of a person is presumed from his disappearance without knowledge of his whereabouts. Such presumption must be declared by judge of last domicile in Chile, upon proof that, after due efforts made, there has been no knowledge of whereabouts of person for at least five years, or six months in case of disappearance in loss of ship or aircraft and one year in earthquake. (C. C. arts. 80-94).

Deaths must be recorded in the Civil Registry. Death certificates are issued by the official in charge of the Civil Registry upon payment of the tax for stamped paper and a nominal local fee.

Actions for Death.

There is no specific wrongful death statute but the corresponding action may be supported by the general language of provisions on torts (C. C. 2314 et seq.). Some court decisions have granted damages for wrongful death to relatives who had a right to be supported or who were actually supported by decedent. Action is limited to four years.

12.04 DECEDENTS' ESTATES:

See topics 12.05 Descent and Distribution, 12.06 Executors and Administrators, 12.10 Wills.

12.05 DESCENT AND DISTRIBUTION:

(C. C. arts. 951-1385; Law 19903 of Sept. 9, 2003).

Estates of decedents pass either by will or by operation of law. The rights are transmitted from the moment of the decedent's death. The law designates various acts which render guilty parties incapable of inheriting, such as having committed crime against deceased, etc.

In default of testamentary provisions the bulk of the estate passes to the following in the order named: (1) Descendants; (2) ascendants; (3) brothers and sisters; (4) spouse; (5) collaterals to sixth degree; (6) state. In first three cases spouse has varying interest. Shares of descendants and of brothers and sisters may pass to their heirs per stirpes. Distribution of estates is made by proceedings before Servicio de Registro Civil e Identificación.

Only part of the decedent's estate may be disposed of freely by will; a certain portion goes to the heirs by operation of law. Such “asignaciones forzosas” or “forced legacies” are: (1) The support owed by the decedent to certain persons; (2) “legítimas” or “legal portions” pertaining to obligatory heirs; and (3) “mejoras” or “betterments.”

Obligatory heirs are spouse, descendants and ascendants. One-half of estate must be divided among them in accordance with rules relating to intestate succession; this half makes up legal portions. If there are no descendants, testator may freely dispose of remaining half. If there are spouse, ascendants and descendants he must give one-fourth of his estate known as “betterments” to spouse or to one or more descendants and may freely dispose of only remaining fourth. Obligatory heirs may be disinherited for certain reasons, such as having committed crime against testator, etc.

In order to be entitled to the inheritance, the heir must accept the same, and the acceptance may be unconditional or subject to the making of an inventory. If some heirs desire an inventory and others do not, all are obliged to accept subject to inventory. Acceptance may be express or implied. In the case of an unconditional acceptance the heir is liable for all the debts of the decedent, not only out of the estate which he accepts but also out of his own property. An acceptance with benefit of inventory or after the making of a formal inventory renders the heir responsible for the debts of the decedent only to the extent of the amount which he inherits and does not affect his own property.

If a testator has not appointed anyone to partition the estate the partition may be made by the heirs when all of them are capacitated to dispose of their property. Otherwise the partitioner is appointed by the judge. The partitioner must effect the partition within two years.

12.06 EXECUTORS AND ADMINISTRATORS:

(C. C. arts. 1222-1385; C. C. P. arts. 858-888).

A testator may appoint one or more executors. The office of executor cannot be held by various classes of persons whose disabilities or occupations might interfere with their duties, such as minors, incapacitated persons, illiterates, blind or dumb persons, persons of notorious bad conduct, persons residing out of the country, priests and military men in active service. A married woman may be an executrix with the consent of her husband or the authorization of a court. The office is voluntary, but the executor who declines or resigns without serious cause loses whatever legacy or bequest may have been made him, except such as pertain to him as an obligatory heir.

With the consent of the heirs present, an executor may sell personal property at a public sale and also real property, if there is not sufficient ready money to pay the debts or legacies, but the heirs may prevent the sales by advancing the necessary money. The testator may provide that all or part of the estate be taken in custody by the executor. The heirs or legatees may ask that the executor be required to give bond.

The executor must conclude his labors within the time determined by the testator, or, if no time is determined, within one year, but the period may be extended by the judge. His compensation is such as may be determined by the testator or, in default of such determination, by the judge. If for any reason there is no executor the heirs are charged with the execution of the testator's wishes.

Upon the death of a decedent, whether testate or intestate, any party in interest may ask that the personal property of the estate be taken into custody. If within fifteen days the estate or part of the same has not been accepted by the heirs and there is no executor designated to take over the estate, the judge may, upon the petition of an interested party, appoint a curator for the estate. The heirs obtain the administration of the estate as and when they accept the inheritance.

Creditors.

Executors are obliged to publish notices to creditors and upon a partition of the estate, set aside a sufficient amount to pay the known debts.

Creditors of decedents have the right to exact payment of their claims, but the period to enforce the right and the extent of the right depend on whether there has been an unqualified acceptance of the estate by the heirs or an acceptance subject to the benefit of inventory. (See topic 12.05 Descent and Distribution.)

In case of unqualified acceptance, the creditor may present his claim at any time within the period of limitations. In this case the heir is obliged to pay all debts and charges on the property he inherited, not only out of the accepted inheritance but also out of his own property; he is, however, liable only for his proportionate share of such debts and charges. In case of acceptance subject to the benefit of inventory, the heir is obliged to pay the debts of the decedent only up to the value of the property inherited.

Creditors may at any time demand the separation of the inherited property from the other property of the heir, so that their credits may have preference as against such inherited property over the other debts owing by the heir. Such separation can be demanded at any time within the period of limitations unless the creditor has already recognized the heir as debtor or the property inherited has been alienated by the heir or becomes confused with his other property.

12.07 FIDUCIARIES:

See topics 12.06 Executors and Administrators, 12.09 Trusts.

12.08 INTESTACY:

See topic 12.05 Descent and Distribution.

12.09 TRUSTS:

Trusts as developed by the common law are unknown to the law of Chile. The freedom of contract which exists in Chile makes it possible as a practical matter to constitute a relationship substantially the same as in the case of a trust, and various such similar relationships are expressly recognized in the Civil Code. (C. C. arts. 732-763, 1079, 1164-1166). A similar result may also be obtained under the banking laws, since mortgage and commercial banks are authorized to act as trustees and to perform the duties of agents, bailees, receivers in bankruptcy, executors, administrators and the like. (D.F.L. 3 of Nov. 26, 1997 as am'd).

12.10 WILLS:

(C. C. arts. 999-1316).

Wills may be made by all persons, except those under the age of puberty, mentally incapacitated, civilly dead, or unable to express their will clearly. Wills are opened and published in the court of the last domicile of the testator.

Forms.

With respect to form, wills are either (a) solemn or (b) privileged. Solemn wills are: (1) Open, also called nuncupative or public; (2) closed or secret. Privileged wills are: (1) Oral; (2) military; or (3) naval.

Witnesses.

The following cannot be witnesses to solemn wills executed in Chile: Minors below 18, persons mentally incapacitated, or blind, or deaf, or dumb, or convicted of certain crimes, clerks of the officiating notary, foreigners not domiciled in Chile and persons not understanding the testator's language. At least two witnesses must be residents of the Department, and one in three or two in five must know how to read and write.

In cases of privileged wills, any person of sound mind over eighteen who sees, hears and understands the testator can be a witness, provided he has not been convicted of certain crimes and can read and write.

Open Wills.

Open wills are executed before a notary and three witnesses or before five witnesses. They must express the name, birthplace, nationality and residence of the testator, and that he is of sound mind, the names of the persons whom he has married and of his children, stating whether they are living or dead, the names and residences of the witnesses, the name of the notary, and the place and date of execution of the will. The will must be read aloud by the notary or a witness, to the parties assembled, and all must sign. Blind or deaf-mute persons can execute only open wills.

Closed Wills.

Closed wills are privately prepared and signed by the testator and enclosed in a sealed envelope which the testator must, in the presence of a notary or judge of first instance, declare to contain his will. On the envelope the notary makes a minute of such declaration and the same must be signed by all the parties assembled. Persons who cannot understand or be understood in conversation can make only closed wills.

Oral Wills.

Oral wills may be made in the presence of three witnesses by a person in imminent danger of death. They are not valid if the testator survives for over 30 days, or if not reduced to writing by the witnesses before a judge of first instance within 30 days after the testator's death.

Military Wills.

Military wills may be made in time of war by military men, hostages, and prisoners, before certain army officers.

Naval Wills.

Naval wills may be made on the high seas before the commander or lieutenant commander of a Chilean man of war or before the captain, mate or pilot of a Chilean merchant vessel.

Revocation.

Wills validly executed are rendered invalid by revocation by the testator. Revocation may be total or partial. A later will which does not expressly revoke a former will leaves in force all the provisions of the former will which are not in conflict with the later one.

Testamentary Disposition.

The testator may dispose freely of his property only in so far as there are no forced heirs. (see topic 12.05 Descent and Distribution). Legacies may be charged with conditions. Testamentary provisions are void if made in favor of the notary or witnesses before whom the will is signed, or in favor of their wives, ascendants, descendants, brothers or sisters, brothers or sisters in law, or servants.

Foreign Wills.

Foreign wills are valid in Chile if executed in accordance with the laws of the country where made. Wills may be made abroad in the form provided by the Chilean law for solemn wills, if: (1) The testator is a Chilean or a foreigner domiciled in Chile; (2) the witnesses are Chileans or domiciled in the city of execution; (3) the will is executed before a Chilean diplomatic official or consul; and (4) the signature of the Chief of the Chilean Legation appears on the will, if open, or the envelope, if closed.

13 FAMILY

13.01 ADOPTION:

(Law 19620 of July 26, 1999 as am'd regulated by Decree 944 of Nov. 18, 1999 as am'd).

Minors less than 18 years of age may be adopted under conditions indicated by law, by local or foreign spouses, married for at least two years; with permanent residency in country; physically, mentally, psychologically and morally fit; over 25 years and under 60 years of age. Adopting parties must be 25 years older than adopted party. Widows, widowers and single persons may adopt in certain cases. Nonresidents in country may adopt if there are no spouses with permanent residency in country interested in adopting. Servicio Nacional de Menores is government agency in charge of administration of adoption programs; for this purpose it has two lists, one of couples wishing to adopt and one of children to be adopted.

Adoption extinguishes legal bonds between adopted person and natural family. Adoption is irrevocable but may be declared invalid by court sentence at adopted party's request after reaching 18 years of age. Statute of limitation is four years. Adoption proceedings must be made before judge of same domicile as adopting parties.

Conventions.

Convention for the Protection of Children and Cooperation in International Adoption, Hague, May 29, 1993; Inter-American Convention on Conflict of Laws Concerning the Adoption of Minors, La Paz, Bolivia, May 24, 1984.

13.02 COMMUNITY PROPERTY:

See topic 13.05 Husband and Wife.

13.03 DESERTION:

See topic 13.04 Divorce.

13.04 DIVORCE:

(Law 19947 of May 7, 2004).

Marriage bond is dissolved by: (1) Death of spouse, (2) court decision declaring spouse's presumed death, (3) court decision declaring marriage void and (4) divorce. Divorce may be filed by any spouse for fault of other one, provided that it constitutes grave violation of obligations imposed by matrimony, or of obligations towards issue, which makes intolerable life in common. Causes for divorce, among others, are: (a) Attempt against life or physical or mental abuse against spouse, or of any issues; (b) reiterated violation of duties coexistence, assistance and faithfulness inherent to matrimony. Continued and reiterated abandonment is violation of matrimonial obligations; (c) conviction for crime or offense against family order and against public morality, or against persons as stated in Book II, Titles VII and VIII of Criminal Code, that involves rupture in matrimonial harmony; (d) homosexuality; (e) alcoholism or drug addiction; and (f) attempt to prostitute spouse or their issue. There is no statute of limitations for causes of divorce.

Separation of spouses may be in fact or judicial separation. When separated in fact spouses may by mutual consent get to agreement in connection to alimony and distribution of property, child support and visitation rights according to law. Judicial separation may be demanded by any spouse when matrimonial duties are not complied by other spouse that renders sharing life intolerable or when cohabitation has ceased. When spouses are separated in fact by mutual consent adultery cannot be invoked as cause for separation.

Separation by mutual consent may be requested and parties must file written agreement relating to custody of children, responsibility for their support, alimony and disposition of their property.

The competent court is the court of the domicile of the defendant.

The marriage bond will be definitely dissolved if one of the spouses has disappeared for 15 years, or has disappeared for five years and would be seventy years old or older. (D. F. L. 2-95 of Sept. 21, 1995).

13.05 HUSBAND AND WIFE:

(C. C. arts. 131-178, 1715-1792; C. Com. 11-17; Decree 2200 of Apr. 29, 1949).

The husband and wife are obliged to live together and mutually help each other.

Unless otherwise provided in a prenuptial agreement, marriage is considered as a copartnership covering the following property: (1) Salaries and compensation of all kinds earned by each spouse during the marriage; (2) the fruits and revenues of all the property of the marriage partnership and of each spouse; (3) money or personal property contributed by either spouse to the marriage partnership, but with the obligation to restore the value of the same; (4) all property acquired by either spouse for a valuable consideration during marriage. Property belonging to either spouse before marriage and not contributed to marriage partnership continues to be separate property of such spouse. Money, credits and similar property are presumed to belong to community unless proved to be separate property.

The marriage partnership property is liable for: (1) Pensions and interest owing by partnership or either spouse and originating during marriage; (2) debts and obligations contracted during marriage by husband, or by wife with authorization of husband or court, unless they are personal as, for instance, debts contracted to set up children of a former marriage; (3) personal debts of either spouse, debtor being obligated to compensate partnership for amounts so taken; (4) maintenance charges of property of either spouse; (5) maintenance of spouses, maintenance, education and establishment of children and other family charges.

The husband is chief of the marriage partnership and as such may fully administer the community property and the separate property of his wife, but the wife may administer the proceeds of her professional or industrial labor. Third persons may regard the community property as though it formed part of the husband's patrimony and it is therefore liable for his debts, though he is considered obligated to compensate the marriage partnership to that extent. Debts made by the wife with the husband's consent are regarded as debts of the husband. The wife's property is not liable for any such debts unless shown to have been contracted for the personal benefit of the wife, as for the payment of debts existing before marriage. The husband cannot alienate or encumber the separate property of the wife except with her consent or judicial authorization, if she is unable to express her will; judicial approval is always required in the case of the sale of real estate. The husband cannot, without the wife's consent or judicial authorization, lease the wife's rural real property for over eight years nor her urban real property for over five years.

In case of the husband's incapacity or his prolonged absence, the wife may be appointed curator of her husband, or of his property and, in such case, she has the administration of the community property. She cannot, however, alienate or encumber real property forming part of community property without judicial authorization, and restrictions on her right to lease are similar to those of husband with respect to lease of wife's property.

The marriage partnership is dissolved by dissolution or annulment of the marriage, by permanent divorce, by the presumption of death of one of the spouses, or by an agreement of separation of property. Upon such dissolution there is a liquidation and division of the community property.

Separation of property during the marriage may be determined by agreement of the parties, or in certain cases by provision of law, or decreed by the judge in case of the insolvency or fraudulent administration of the husband. In such case the wife may dispose of her property and appear in court without her husband's consent. It may also be stipulated that the wife may freely dispose of specified sums. Persons married in a country where the laws do not provide for marriage community property, who become domiciled in Chile, are considered as married with separation of property unless they agree on it and register their marriage in Chile.

Parties may agree on regime of participation of increase of value of their property. During marriage separation of property of parties is maintained, each spouse administers, enjoys and freely disposes of his property. When this regime ends either by death or presumption of death of either spouse, declaration of annulment of marriage, divorce or separation judgment or separation of property judgment, increased value of their property is divided into equal parts.

Married woman may freely engage in business or follow profession or employment. In such cases husband and wife are considered separated as to property in connection with her business and its proceeds, and her acts do not affect husband nor is her separate business property liable for his debts unless his obligation was contracted for her benefit and that of family. However, while under 21 years of age she requires judicial authorization to alienate or encumber real property.

13.06 INFANCY:

(C. C. arts. 26, 219-292, 338-544, 1447, 1682; D.F.L. 1 of May 16, 2000; 16618 of Mar. 8, 1967 as am'd, and Decree 2531, Dec. 24, 1928 as am'd).

The age of majority is 18. Contracts by males under 14 or females under 12 are void and if over those ages are generally voidable. Minors are subject to parents' custody. Father or mother, exercises parental authority over nonemancipated minor. Parental authority includes legal representation, administration and enjoyment of usufruct of infant's real and personal property, with certain exceptions. Minors not under parental authority are given guardian who has administration of property and may have custody. Parents and guardians have restricted powers of disposition.

13.07 MARRIAGE:

(D. F. L. 2-95 of Sept. 21, 1995; C. C. arts. 98-130; Law 19947 of May 7, 2004 regulated by Decree 673 of Aug. 27, 2004).

Following persons cannot marry if they are: (1) Already married; (2) minors under 16 years old; (3) unable to express their will clearly in word, writing or sign language; (4) with mental or physical illness; (5) lacking sufficient judgment or discernment to understand and to undertake essential rights and obligations of matrimony.

The following cannot contract marriage with each other: (1) Ascendants and descendants by consanguinity or affinity; (2) collaterals by consanguinity to the second degree; (3) the surviving spouse and the principal or accomplice in the murder of the deceased spouse.

The authorities are not allowed to perform the marriage ceremony for a widower unless a curator has been appointed for the property of his children by the former marriage, nor for a woman previously married before the birth of her child if she was pregnant, or before 270 days have elapsed since the dissolution or annulment of the former marriage, but the latter period may be shortened upon proof that she was separated from her husband. Minors under 18 years require consent of their father, mother, ascendant or curator. Minors marrying without such consent may be disinherited and, in case of intestate succession, have their shares reduced by one-half. There is no action for breach of promise to marry, such promise being regarded as entirely matter of honor and conscience.

Marriage recognized by law and producing civil effects is civil marriage, and marriage by religious entities with legal status of juridical person of public law. Persons desiring to marry must apply to any official of civil registry of domicile or residence during last three months of either of parties, and present two witnesses to prove facts stated in their application. Marriage ceremony may be performed at any time within 90 days thereafter. It is performed by official of civil registry or head of religious entity in presence of two witnesses, and recorded in civil registry.

Marriages performed in foreign country in accordance with laws thereof are valid in Chile, if spouses are male and female, it will have same effect as if performed in Chile. Effects of marriages performed in Chile are regulated by Chilean law even when parties are aliens and not residing in Chile.

Annulment.

The following marriages may be annulled: Forbidden marriages (see supra); marriages not performed in presence of two witnesses; and marriages in which free consent was lacking by reason of error, duress or abduction.

The action of nullity may be brought by the parties, but action founded on error or duress must be brought by party suffering error or duress. In case of death-bed marriages, action of nullity may be brought by heirs of deceased spouse.

13.08 MARRIED WOMEN:

See topics 13.05 Husband and Wife, Marriage; categories 12 Estates and Trusts, topic Executors and Administrators; Property, topic Dower.

14 FOREIGN TRADE AND COMMERCE

14.01 EXCHANGE CONTROL:

(Law 18840 of Oct. 4, 1989 as am'd).

Banco Central de Chile regulates export and import trade and foreign exchange transactions, including commissions, insurance, freight balances, profits etc. earned abroad. Export and import trade are free, except when forbidden or restricted by general provision of Treasury Department. Banco Central is empowered to reject imports under certain conditions.

Foreign capital coming to Chile can also be registered under Decree 600, of July 11, 1974 (see topic 14.03 Foreign Investment), as am'd, called Foreign Investment Statute.

Rules regarding foreign exchange operations issued by Central Bank are to be taken into consideration.

14.02 FOREIGN EXCHANGE:

See topic 14.01 Exchange Control.

14.03 FOREIGN INVESTMENT:

Decree 600 compiled by Decree 523 of Sept. 9, 1993 as amended governs foreign investments, and prohibits discrimination as between foreign and local investor.

Foreign investment is defined as any investment made with freely-convertible foreign exchange; new and used foreign capital goods; various forms of capitalized technology and credits related to foreign investment. Foreign investors can negotiate guarantees against changes in tariffs and indirect taxes on importation of capital equipment and machinery, during amount of time it takes to set up investment viz.: (A) Three years extended up to eight years in investment over US$50,000,000, (B) eight years in mining, extended to 12 years upon application to Foreign Investment Committee.

Remittance of Profits.

Convertibility of profits will be made at most favorable exchange rate prevailing.

Repatriation of Capital.

Will be tax-free up to amount of original investment. Companies can liquidate assets and repatriate original capital investment.

Tax Regime.

Investors have following choices: 42% corporate income tax; or 40% rate on normal income but if profits remitted abroad exceed 40% of average capital level invested during preceding five years, additional 30% must be paid; both choices have ten year stability period extended up to 20 years in investments over US$50,000,000, or rate paid by Chilean firms (48%) with no guarantees of stability. Mining companies are also subject to income tax on mining operations at 0.5% to 5% rate on sales over 12,000 metric tons of fine copper. Investors with investments on mining projects of US$50,000,000 and over may enter into tax stability contract with government according to law.

Approval of Foreign Investment Committee (CIE) is necessary for investments over $5,000,000 and involving media, public services or other activities normally carried out by government or participation by foreign government or public entity. If less than that sum, investments will only require approval of committee's executive secretary.

Foreign Capital Investment Funds.

Law authorizes establishment of foreign capital investment funds to be used for purchase of long-term securities and financial instruments issued in Chile. Such funds must be administrated by Chilean corporation. Capital can be repatriated after five years and profits are taxed at 10%.

14.04 FOREIGN TRADE REGULATIONS:

See topic 14.01 Exchange Control.

15 HEALTH

15.01 HEALTH CODE:

D.F.L. 725 of Dec. 11, 1967, as am'd and its Regulations.

All matters related to promotion, protection and rehabilitation of health are regulated by Code, which include, among others, sanitation and safety of work place, international sanitary protection, pharmaceutical products, cosmetics and food products, practice of medicines and related professions.

Transplant and Donation of Organs (Arts. 145-154 of Health Code, Law 19451 of Mar. 29, 1996 and Decree 656 of July 5, 1996).

Law regulates donations and transplants of organs; removal of organs and body parts, from dead and living persons, death certification, import and export of organs. “Comisión Nacional de Transplante de Organos” is in charge of advising “Ministerio de Salud” on this matter.

Decree 195 of May 16, 2003 regulates registration, importation, production, storage, possession, any sale or distribution, publicity and promotion of cosmetic products.

Decree 25 of Feb. 14, 2005 regulates preparation, distribution, commercialization, importation and exportation of pharmaceutical products for veterinary use.

Decree 1358 of Dec. 22, 2006 regulates legal possession of chemical substances used in preparation of controlled drugs. Mandatory registration of individuals and legal entities that legally use drugs for preparation of controlled drugs and distribute controlled substances to be used by others. Only registered individuals or legal entities may import, export, produce, manufacture, and distribute controlled substances; they must keep inventory and records of activities related to controlled substances; report in advance importation and exportation of such products. Their facilities are subject to inspection. Fines are imposed for infringement of Decree.

16 IMMIGRATION

16.01 ALIENS:

Foreigners need passport with visa for entering in Chile, but tourists need no visa and are permitted to remain up to 90 day period, renewable once. There are special visas for “residents under contract”, “resident students”, “temporary residents”, and “political refugee residents”. There are besides diplomatic and official visas. There are special provisions for sailors and persons in tourist ships. Undesirable foreigners or foreigners entering illegally are subject to deportation. Permanent residence may be obtained after determined period of stay or residence, according to category of applicant. Immigrants may apply for permanent residence after two years.

Immigrants must have Immigration Card. All foreigners over 18, except tourists, must hold “Personal Identification Card” and request registration within 30 days after arrival in Special Registry of Foreigners kept by Service of Investigation.

There are numerous laws governing these matters, including D. F. L. 69 of Apr. 27, 1953 as amended, Decree-Law 1094 of July 14, 1975 as amended, Decree 597 of Nov. 24, 1984 as amended.

17 INTELLECTUAL PROPERTY

17.01 COPYRIGHT:

(Code of Intellectual Property, Law 17336 of Aug. 28, 1970 as am'd; regulated by Decree 1122 of May 17, 1971 as am'd).

Copyrights may cover any form of intellectual expression, whether scientific, artistic or musical. Books, pamphlets, articles, lectures of any kind including encyclopedias, dictionaries, and all type of digests are included in law. Plays, either dramatic or musicals, choreographies, ballets, photographs, lithographs, movie scripts, architectural projects, maps (of any type), paintings, sculptures, videos, software, “diaporama”, and any other manifestation of intellectual production are covered by provisions set forth in sections of law. Owner of intellectual property has exclusive right to reproduce it in any manner; such ownership remains in his control for life and then to his heirs, legatees or assignees for 50 years only. However, in case of surviving spouse, or single or widowed daughters, right to ownership will also be for lifetime.

After that time, works revert to national patrimony, as well as those art manifestations when their authors are unknown or when they are simply expressions of folklore such as legends, dances and popular songs.

In case of several authors, 50 year term starts to run after death of last surviving co-author.

Works must be recorded in National Register of Intellectual Property, in case of sculptures, engineering projects, paintings, etc., a photograph of same is sufficient provided it accurately shows its details, attached to a writing specifying personal data of author, co-authors, collaborators, authors using pseudonyms, if any, etc. Regarding motion pictures or plays, it is enough to deposit copy of plot, scenario and script.

Law also contains detailed provisions regarding first publication, as well as for further reproduction and editions of intellectual works and their illegal use and reproduction.

17.02 INDUSTRIAL PROPERTY:

(D. F. L. 3 of Mar. 9, 2006 as am'd regulated by Decree 236 of Aug. 25, 2005, Decree 82 of Dec. 1, 2005).

Law on Industrial Property Rights regulates patents, utility models and industrial designs, layout-designs of integrated circuits, trade secrets, trademarks, commercial names and slogans, geographic indications and origin denominations, infringement actions and unfair competition. Industrial Property Department of Ministry of Economy, Promotion and Reconstruction is in charge of processing applications, oppositions and cancellation, and granting registrations. Industrial Property Right may be transferred by inheritance and may be licensed, assigned, encumbered and attached. License and assignment of industrial property rights must be made in writing and recorded in respective registry.

Invention Patents.

Any invention, whether product or process, in all fields of technology, considered being new, which results from inventive activity and is susceptible to industrial application, is patentable in accordance with terms of law. Invention is new when it is not within state of art. Economic, financial or commercial systems or plans, scientific theories and mathematical methods; inventions related to plants and animals, except microorganisms, among others, are not patentable. Patents cannot be granted, among others, for inventions already existing in theory or nature, items against morality, law and public policy. Novelty of invention is not lost by disclosure of invention made within 12 months prior to filing date in cases indicated by law.

Patents are granted for 20 years from filing date. Within six months from granting date, term may be extended at applicant's request for period equal to unjustified delay in patent prosecution due to Register's fault, for pharmaceutical product as indicated by law. Patent gives exclusive right of exploitation, but compulsory license may be granted in case of declared emergency or national security reasons, and to guarantee free competition and avoid abuse of dominant position in market. Compulsory licenses must be granted in case of monopoly abuse as determined by Government. Patent owner must exploit it, directly or by granting license. Industrial production or commercialization of patented product, are considered exploitation of patent. Law contains provisions on penalties in case of illegal use of patents. Patented product or its container must be marked with “P.I.” and patent number in order to enforce criminal actions for infringement of rights.

Industrial Designs and Utility Models.

Any new design or model, which may be applied to industrial object, may be registered in ownership of author if no publicity thereof in any form has been made before filing application. Registration grants exclusive rights for ten years. Utility models for new forms of objects or mechanism may be registered, provided they have practical use. Registration term is ten years from filing date. Rights are assignable and inheritable. Utility models and industrial designs must be marked “M.I.” and “D.I.” and registration number, respectively, in order to enforce criminal actions for infringement of rights. Provisions regarding patents are applicable to designs and models.

Layout-designs of integrated circuits are protected when considered original as indicated by law. Application may be filed before exploitation or within two years from its first commercial exploitation. Registration is granted for ten years from filing date or from first exploitation anywhere. Layout-designs of integrated circuits must be marked “T” in circle, in order to enforce criminal actions for infringement of rights. Provisions regarding patents are applicable to layout-designs of integrated circuits.

Trade Secrets.

Law also protects trade secrets and considers them as any confidential information that is valuable and provides competitive or economic advantages to owner. Information considered trade secret must be expressed in tangible form such as documents, microfilm films, laser discs or any other similar means. Information filed before sanitary authorities related to composition of products to obtain authorization required to commercializing product has same protection as trade secret as stipulated by law.

Trademarks, Commercial Names and Slogans.

Those signs visible and sufficiently distinctive can be registered as marks. Trademark is any sign used to distinguish industrial or commercial establishment's products or services produced or commercialized by one person from same or similar products or services produced or commercialized by another person. Following signs, among others, can be registered as marks: names, letters and numbers, words or combination of words, symbols, graphic elements, and colors, and their combination. Slogans are words, sentences or captions used as supplement to trademark. Item registered may be sufficiently distinctive. Among others, following cannot be registered as trademarks: (1) Flag or coat-of-arms, names or signs of any country, international organization or government public services; (2) scientific or technical denominations, name of vegetal species; (3) name, picture or signature of individual without his consent or that of his heirs, except names of historic personages 50 years after their death; (4) common expressions indicating nature, origin or qualities of article; (5) misleading expressions; (6) marks similar to others already registered; (7) form or color of article or its containers; (8) expressions commonly used to designate article; (9) marks showing medals or diplomas granted; (10) marks contravening morals or public order; (11) marks similar to registered trade slogans and trade names, provided under circumstances public may be confused; (12) those that are reproduction, imitation, translation, or total or partial transcription of distinctive signs, locally or internationally, well known, without taking into consideration classification of goods or services concerned; or because of similarity to well-known trademarks causes confusion to public independent of classification of goods and services for which registration is applied for. Statute of limitation for action to declare invalid registration of mark registered by third party is five years from registration; there is no limitation when it has been used in bad faith. Registration of generic or descriptive terms, usual or common expressions, and individual color may be registered as mark provided owner of mark can prove that mark permits consumers to equate expression with specific good or service.

Registration of trademark lasts ten years, but it may be renewed for ten-year periods indefinitely and may be owned jointly according to law. Stamping words “Marca Registrada” or letters “M. R.” gives notice of registration.

Geographic indications and origin denominations may be declared at government's initiative or at petition of interested party. Authorization to use them may be granted for unlimited time. Provisions regarding trademarks are applicable to geographic indications and origin denominations.

Vegetal species are protected when they are novel, distinguishable, homogenous and stable and generic designation has been assigned to them. When registered at Registry of Protected Varieties, certificate of holder is issued for 18 years for trees and vines, and 15 years for other species. (Law 19342 of Oct. 17, 1994 regulated by Decree 373 of Dec. 28, 1996).

17.03 TRADEMARKS AND TRADENAMES:

See topic 17.02 Industrial Property.

Conventions.

Berne Convention for the Protection of Literary and Artistic Works, as reviewed and amended; Paris Convention for the Protection of Industrial Property, as reviewed and amended; Nice Agreement Concerning the International Classification of Goods and Services for the Purposes of the Registration of Marks, 1957 as reviewed and amended; International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations, Rome, 1961; International Convention for the Protection of Vegetal Species, Paris, 1961, as amended; Convention for the Protection of Producers of Phonograms Against Unauthorized Duplication of Their Phonograms, Geneva, 1971; Inter-American Treaty on Copyright, Washington, 1946; Agreement on Trade-Related Aspects of Intellectual Property Rights, Marrakech, Apr. 15, 1994; WIPO Copyright Treaty, Geneva, 1996; WIPO Performances and Phonograms Treaty, Geneva, 1996; Association Agreement with European Community, Brussels, Nov. 18, 2002; Free Trade Agreement with United States of America, Miami, June 6, 2003.

18 LEGAL PROFESSION

18.01 ATTORNEYS AND COUNSELORS:

(Law 7421 of June 15, 1943 as am'd).

Supreme Court grants attorney degree, which requires having law degree from local university, being more than 20 years old, with no criminal record, of good behavior and having completed six months of professional practice.

19 MINERAL, WATER AND FISHING RIGHTS

19.01 MINES AND MINERALS:

(Mining Code, Law 18248 of Sept. 26, 1983 as am'd and its regulations Decree 1 of Jan. 3, 1986 as am'd, Law 18097 of Jan. 7, 1982 on mining concessions as am'd.)

The state is owner of all mineral and fossil substances, whoever may be owner of surface, but private persons may obtain concessions to work them in accordance with Mining Code. Such concessions are transferable, mortgageable and irrevocable and are regulated by same civil law rules that regulate real estate and fixed assets. Mine is property distinct from that of surface and its owner may occupy as much of surface as is necessary, upon payment of proper indemnity.

Prospecting is allowed on any lands not cultivated or enclosed and right to prospect on other lands can also be obtained. All persons except certain government officials and incapacitated persons may obtain mining concessions. Exploration concessions are granted for two years which may be extended for two years; maximum area allocated for each concession is 5,000 hectares. Exploitation concessions do not have fixed time period and area allocated per concession is limited to maximum of ten hectares. Discoverer of mine makes his application to law judge of department, who orders publication; applicant must erect location monument, file plan and demand survey; there is another publication and official survey; such survey when approved and recorded constitutes title of mine. Law establishes that mining assets are not subject to attachment.

Mines may be owned by individuals or by companies formed under general law or under special rules of mining code. When mine is registered as belonging to more than one individual mining company is deemed to exist, with capital stock of 100 shares, and whose shareholders are not personally liable.

Petroleum.

(Const. art. 19). State reserves to itself exploitation of petroleum wherever situated.

Hydrocarbon deposits may not be subject of concession for exploration or exploitation.

Pursuant to D. F. L. 2 of Dec. 4, 1986, State may enter into special operation agreements (contratos especiales de operación) which are those by virtue of which contractor binds by itself private individual or legal entity national or foreign to carry out, on behalf of State, exploration, exploitation and processing activities on hydrocarbon deposits.

Contractor commits himself to turn over to State total output of hydrocarbons obtained. According to Art. 1, consideration received by contractor as compensation for his services may be arranged for in national or foreign currency. If payment is stipulated in foreign currency, Central Bank of Chile shall grant required currencies for which effect operation agreement must register with said institution. State is authorized to pay all or part of consideration in hydrocarbons, which may be exported without being subject to regulations for controlling exports.

State guarantees contractor free use of foreign currency obtained as result of hydrocarbon exports received in payment.

Upon expiration of agreement, contractor, in addition to turning over to National Petroleum Company oil wells and related facilities, must transfer to said enterprise equipment, tools, machinery, etc. purchased during last five years of contract's enforcement, with prior payment of its residual value.

Art. 9 provides for specific oil work agreement whereby contractor of special operation agreement engages third party as subcontractor for carrying out determined service on specific work.

Said contractor is subject to tax assessed directly on value of consideration as defined above, equivalent to 50% of said consideration or, as elected by President of Republic, tax regime of income tax law (Ley de la Renta) may be applicable. Nevertheless, President of Republic is empowered to grant tax deductions, irrespective of tax system chosen, ranging from 10% to even 100% when circumstances so warrant it: e.g., nonexistence of double taxation agreements between two countries involved. Law provides for further tax exemptions.

State is required to withhold and deduct amount due for taxes upon payment of agreed consideration.

Copper.

Law 17450 of July 15, 1971 nationalized large copper mining enterprises (Gran Minería del Cobre). Law 19137 of May 6, 1992 authorizes copper exploration and exploitation by government enterprise in joint venture with private interest.

Taxes.

Mines pay annual tax per hectare. In case of failure to pay tax concession is offered at public auction, at which each bidder must deposit amount of unpaid tax and no bid of less than such amount is admissible. Purchaser receives mine with outstanding liens. Owner of mine cannot be bidder but may avoid sale by paying double amount of tax. Any surplus over tax due and costs is paid to former owner. Sale does not include buildings and accessories of mine unless former owner fails to remove them within one year. If there is no bid concession becomes void. It also becomes void if for any reason sale was not held and tax has not been paid for two years. See also category 22 Taxation, topic Taxes, subhead Some Special Tax Provisions and Treatment.

20 MORTGAGES

20.01 CHATTEL MORTGAGES:

In general, mortgages may be placed only on real property and real estate rights. Personal property such as machinery, pictures, statuary, etc., is included in mortgage on realty when it forms inherent part of realty.

20.02 COLLATERAL SECURITY:

See category 7 Debtor and Creditor, topic 7.12 Pledges.

20.03 MORTGAGES:

(C. C. arts. 2407-2434, C. Com. 839-881).

Mortgages must be executed before a notary in the form of a public instrument (q. v.) and recorded in the mortgage registry. Their date and effect are counted only from the date of recording. Mortgages made in foreign countries on property in Chile are valid if recorded in the proper registry in Chile. Each party must be present before the notary. The instrument should describe the property in detail and state at what amount the parties value each parcel mortgaged.

Only real property possessed under ownership or usufruct title can be mortgaged. The mortgage covers movable property permanently belonging to the soil, such as machinery, implements and animals on farms, etc., as well as the increases or improvements of the mortgaged property, unharvested crops and unpaid rents and insurance, unless there is an agricultural lien. Mortgages are foreclosed by an executory suit.

Ship mortgages are governed by Code of Commerce.

21 PROPERTY

21.01 ABSENTEES:

See category 12 Estates and Trusts, topic 12.03 Death.

21.02 ADVERSE POSSESSION:

See category 5 Civil Actions and Procedure, topic 5.04 Prescription.

21.03 CONVEYANCES:

See topic 21.05 Deeds.

21.04 CURTESY:

No such right.

21.05 DEEDS:

(C. C. 686, 1801-1807, L. J. O. 403-439).

All transfers of title to real estate must be by public instrument (q. v.) and must contain a true statement of the consideration, since the state tax on transfers of title is based on the real consideration involved. The tax must be paid at the time the document is executed before the notary, or, if executed in a foreign country, at the time it is authenticated in Chile. Deeds must be recorded in the registries of property.

Both grantor and grantee must sign the deed and both must therefore be present before the notary at the same time. If one is absent he must be represented by an attorney in fact. The original deed, if executed in Chile, must remain in the files of the Chilean notary who gives to either party a certified copy which has the effect of an original in courts of law. If the deed is executed abroad, it must be authenticated by a Chilean consul or diplomatic agent.

21.06 DOWER:

No dower right.

22 TAXATION

—Scope —

Taxation Code providing for administration, supervision and payment of taxes, except Custom House duties, was enacted by Decree-Law 830 of Dec. 27, 1974, as amended and Decree 824 of Dec. 27, 1974 as amended.

22.01 EMPLOYMENT TAXES:

Salaries and Payroll Taxes.

Salaries and wages are subject to several taxes, some of them for social benefits.

22.02 FREE ZONES:

(D.F.L. 2 of Apr. 18, 2001 as am'd). Ministry of Finance is empowered to decide where to establish free zones and to execute contracts with private juridical persons for their administration and exploitation. All types of industries, trading centers and services are allowed to operate there. They are exempt from taxes on sales and services and from income tax with respect to their activities within free zones. Mining, fishing, banking, financial and insurance enterprises may operate in free zones but they do not enjoy tax incentives. Importation of machinery, equipment, parts and fuel are exempt from import duties, taxes and formalities. Tax of 3% is levied on value of imported merchandise.

22.03 GIFT TAX:

See topic Inheritance and 22.03 Gift Tax.

22.04 INCOME TAX:

(Decree-Law 824 of Dec. 27, 1974 as am'd). Any person domiciled (residence plus intention to stay, C.C. art. 59) or residing (more than six months) in Chile is subject to tax on incomes derived from sources within or outside country. Nonresidents are taxed on income from Chilean sources. However, if foreigner takes domicile in Chile, he will be subject to tax on income from Chilean sources only, during first three years, which term can be extended by fiscal authority. Payments for severance or retirement, living allowances and pensions even from foreign sources are not treated as income. Undivided estates are taxed for no more than three years as if deceased were alive. Descendants must file their separate returns after that term has elapsed.

Basic Tax.

Incomes are divided in two categories: First Category: Income of capital and enterprises: all incomes, except salaries and some professional fees, are first category income, and are taxed at general rate of 16%, including any income of corporations; income from real property, it being presumed that a house inhabited by its owner renders 7% of its fiscal value, with some exceptions, income from invested capital such as interest, annuities, certain dividends (see infra catchline Tax on Dividends), it being presumed that noncommercial credits or credits secured with mortgage, pledge or collateral signature earn at least 10%; income from commerce and industry, including mining, fishing and other extractive activities; fees of brokers, commission merchants, auctioneers, builders, custom house agents, shippers and other agents intervening in maritime commerce and nonindividual insurance agencies; income of small artisan miners, street merchants, owners of artisan workshops; and Second Category: Salaries and professional fees not included above. It imposes tax according to graduated scale on all income over ten monthly tax units ("unidad tributaria"). To avoid double taxation of income of foreign source, tax credit is granted to First Category taxpayers on accrued or remitted income by permanent establishments located abroad, on foreign dividends or profit distributions, royalties and technical assistance fees received as stipulated by law.

Rates.

See also subhead Adjustment of Rates, infra.

Individuals and associations are subject to (a) 16% on income of first category; (b) at progressive rate of from 5% to 40% on salaries including gratuities per diem and other similar payments on second category income.

Corporations are subject to 17% first category income tax.

Complementary Tax.

This tax applies to individuals having domicile or residing in Chile on sum of their incomes, including dividends in cash or property. Rate is progressive, first ten yearly tax units are exempted, it being 5% on amounts up to 30 yearly tax units; 10% on any excess up to 50 yearly tax units; and so on until rate is 40% on excess over 120 yearly tax units. Credit is granted at same rate as dividends were taxed at corporate level for dividends paid out of income already subject to corporate tax. Ocean freights, commissions or participations in ocean freights originating or destined to Chilean ports and other income for services to ships and cargo at local or foreign ports which must be rendered to maritime transport, also are subject to this complementary tax. Rate is 5% and it taxes shipowners, agents, consignees and forwarders. Tax is not applicable when income is generated by foreign ships, provided that countries where those ships are registered, do not have similar tax, or if they have it, exemptions are granted to Chilean shipping companies.

Tax on Dividends.

Dividends distributed to registered shareholders by corporations subject to tax are not taxable as category income (but see catchlines Complementary Tax, supra, and Additional Tax, infra); dividends of foreign corporations not doing business in Chile are taxable when distributed to shareholders residing or with domicile in Chile. Dividends paid to resident legal entities by Chilean corporations or limited partnerships are exempted from taxes.

Additional Tax.

Tax of 35% called "additional" applies, among others, to: (1) Foreign individuals with no residence or domicile in Chile and to corporations organized abroad and having establishment, branch, agent or representative in Chile, on all incomes received from Chilean sources; (2) dividends or profits distributed by Chilean corporations or "sociedades en comandita" to nonresidents without domicile in Chile, regardless of nationality, except if in form of stock dividends or increases of par value of outstanding shares or distribution of stock of company formed with part of assets of distributing company, and except also in case of liquidation of company. Credit is granted at same rate as dividends were taxed at corporate level for dividends paid out of income already subject to corporate tax. For copyrights exploitation, patents of invention, utility models, industrial drawings and designs, sketches or topographies of integrated circuits and new vegetal varieties, computer programs, rate is 15%. Rate is 30% for: Royalties, participations or other similar amounts paid to recipients with no domicile or residence in Chile for use of trademarks, patents, know-how, or similar items; certain royalties and technical assistance, qualified as unproductive or not necessary for national development, are subject to tax rates up to 80%; interest paid to creditors with no domicile or residence in Chile, except, (a) if paid to international banks or foreign public finance institutions, (b) interest on bonds or debentures issued by Chilean corporations for improvement of production or increase of capitalization, and (c) interest payable by reason of imports with deferred payments, (d) interest on local bank deposits and bank accounts on foreign exchange. Rate is 4% on interest under (a) and (c) when Central Bank authorized them; any compensation for services rendered abroad payable to nonresidents, except for freight, commissions, insurance and similar services and for melting or refining or other processes to which Chilean products are subjected abroad. Tax when applicable, is sole tax on said royalties, interest or compensations, in spite of name “additional”.

Rate shall be 20% for wages or salaries originating exclusively from skilled or unskilled labor of natural foreign persons and only when these have been realized in Chile in connection with scientific, cultural or sportive activities.

All Chileans not domiciled in Chile shall pay an additional tax of 35% upon aggregate of their taxable income derived from different categories.

Simplified Regime.

Individuals and Individual Limited Liability Enterprises with gross income up to certain amount per quarter, which calculate their taxable income on complete accounting records and comply with requirements established by law may be subject to simplified regime. Taxpayers are subject to First Category Tax and Complementary Global Tax or Additional, on difference between all receipts and expenses, without considering their source or whether they are taxable or exempt under other income tax rules. Tax must be paid monthly according to each category.

Capital Gains.

Gains are taxed as ordinary income. In addition decree also provides exclusive list of gains and benefits which unless derived from habitual activities are to be excluded from income. Among excluded gains and benefits are those derived from alienation or assignment of shares in corporation, alienation of bonds and debentures, inheritance awards, etc.

Capital gains are not subject to other income taxes except when distributed by corporations to residents or domiciliaries, who must declare them for complementary tax purposes.

Tax Treaties.

Effective with Argentina, Brazil, Canada, Croatia, Denmark, Ecuador, France, Mexico, New Zealand, Norway, Peru, Poland, South Korea, Spain, Sweden and United Kingdom.

Adjustment of Rates.

When payments are made by installments, tax is readjusted to reflect 100% of variation of consumer price index.

22.05 INHERITANCE AND GIFT TAX:

(D. F. L. 1 of May 16, 2000). Inheritances and gifts are subject to sliding scale tax, depending on relationship and amount involved.

Rates applicable to inter vivos gifts or transfers by inheritance, legacy or bequest to spouse, and first degree relatives or ascendants or descendants are 1% on amounts of corresponding share up to 80 yearly minimum salaries; 2.5% on excess up to 160 salaries; 5% on excess up to 320 salaries and so on until rate is 25% on amounts in excess of 1,200 minimum salaries. For collaterals of 2d, 3d, and 4th degree same rate applies with surcharge of 20% of tax; more remote relatives and strangers are subject also to same rate, with surcharge of 40%.

Property situated abroad is taxable but if the decedent or donor is a foreigner its inclusion takes place only regarding property acquired with resources obtained from Chilean sources. The foreign tax is a credit but this cannot effect a reduction of the tax otherwise applicable to Chilean assets alone.

Gifts made during life are includable as part of estate but gift tax constitutes a credit against inheritance tax.

Shares of stock transferred during life of the holder who dies before registration in the corporation register is petitioned, may not be registered without consent of Director of Internal Revenue who will scrutinize the transaction.

22.06 INHERITANCE TAX:

See topic Inheritance and 22.03 Gift Tax.

22.07 PROPERTY TAXES:

Real Estate Tax.

D. F. L. 1 of July 7, 1998 as amended established single rate of 1% for rural property, 1.2% for urban property used for residence with value up to certain amount and 1.4% for urban property used for residence with value over certain amount and for all other urban property of assessed value of real property as overall national and municipal territorial taxes, including charges for public light, pavement of streets and certain municipal loan services. Value assessments are made every five years. There is surcharge on unimproved urban land. Many properties enjoy tax exemption up to 100%.

Real Estate Transfer Tax.

See topics 22.09 Stamp Tax, subhead Stamp Taxes; and Inheritance and 22.03 Gift Tax.

22.08 SALES TAX:

Sales and Services Tax.

By Decree-Law 825 of Dec. 27, 1974 t.o., Decree-Law 1606 of Dec. 3, 1976 as amended and its regulations, Sup. Decree 55 of Feb. 2, 1977 as amended, sale of personal tangible property is subject to tax as well as services rendered in national territory, regardless of other laws which impose special taxes on sale, production or import of goods or performance of services. General tax rate is 18% on total value of sale or service. There are many exemptions, such as sale of raw material for goods to be exported, certain types of investments and corporations which do business in areas of communication, transportation and education.

22.09 STAMP TAX:

Stamp taxes are payable by the use of stamped paper on which certifications, documents, receipts proceedings, etc. must be written or by affixing revenue stamps to same.

Some documents, acts or contracts pay a percentage in consideration to value involved. Other documents as in case of checks, promissory notes, bills of exchange, etc., pay a fixed rate. Incorporation of companies, shares of stock, transfer of patents and licenses are also subject to stamp taxes. Such fixed rates vary frequently. (Decree 3475 of Aug. 29, 1980 as am'd).

22.10 TAX INCENTIVES:

Some Special Tax Provisions and Treatment.

Under Law 18480 of Dec. 19, 1985 as amended, exporters may apply for refund of percentage of charges affecting cost of inputs used in manufacturing national products, farming, breeding and extracting minerals. Under Law 18708 of May 11, 1988, charges and customs duties paid on import of raw materials, parts, spare parts and unfinished products used for production of goods to be exported are refunded, if such goods are exported within 18 months from date of importation of materials. Services rendered abroad, according to law, are treated as exports. Both laws mutually exclude one another.

D.F.L. 341 of Apr. 25, 1977, compiled text D.F.L. 2 of Apr. 18, 2001, regulates organization and operation of free zones and deposits. Assembly operations are regulated by D.F.L. 2 of Nov. 12, 1997.

Decree-Law 889 of Jan. 30, 1975 as am'd regulated by Sup. Decree 274 of Apr. 14, 1975 establishes special tax incentives to promote economic development of northern and southern regions of country. Law 18392 of Jan. 10, 1985 as am'd grants income tax and import duties exemption up to 50 years to industrial and mining companies; companies dedicated to exploitation of sea resources, and transportation and tourist companies located in southern part of country.

Decree-Law 3059 of Dec. 21, 1979 as am'd grants tax exemptions to national companies dedicated to navigation, lighter service and docks.

Law 16624 of May 15, 1967 as am'd establishes that large copper mining enterprise is one producing blister, fire refined or electrolytic copper in amounts not less than 75,000 metric tons a year, mixed mining enterprise is any with government participation over 25% and small mining enterprise is any concern dedicated to mining belonging to individual owners or to mining company (sociedad minera), excepting some corporations.

Assembly operations are regulated by D.F.L. 2 of Nov. 12, 1997.

Mining industry is subject to income tax law. (D.L. 824 of Dec. 27, 1974 as am'd).

See also category 14 Foreign Trade and Commerce, topic 14.03 Foreign Investment.

23 TRANSPORTATION

23.01 AIRCRAFT:

Aircraft.

(Law 18916 of Jan. 19, 1990 as am'd). National aircraft must be registered and owners thereof must be Chilean citizens. If owner is corporation, majority of corporate capital must belong to Chileans and president and majority of board of directors must be Chileans. Lease and encumbrance of aircrafts and maximum carrier's liability in case of accidents and loss or damage to baggage and freight is fixed. Aircraft flying over Chile must have navigation certificate from home country, registration certificate and certain other documents relating to crew, passengers and cargo. Only in case of necessity can aircraft alight elsewhere than at national or private airfields. Decree 71 of July 26, 2006 regulates National Registry of Aircrafts. Chile has ratified Pan American Commercial Aviation Convention signed at Havana in Feb. 2, 1928, and International Aerial Navigation Convention signed at Paris Oct. 13, 1919.

23.02 AUTOMOBILES:

See topic 23.03 Motor Vehicles.

23.03 MOTOR VEHICLES:

(Law 18290 of Jan. 30, 1984 as am'd).

Law contains complete regulations governing motor vehicles and public ways. License plates are required for all motor vehicles and drivers must obtain license, which is granted for indefinite period of time, while all requirements fulfilled. Minors between 18 and 21 years of age may get driving license of type indicated by law. In case of traffic violations, including driving while intoxicated, law provides for fines and suspension or cancellation of driving license, depending upon type of violation. Tourist may drive with driving licenses issued in foreign country. All motor vehicles, with local or foreign license plates, must have insurance policy up to certain coverage amount with local insurance company.

License tax on automobiles for benefit of respective municipalities and surcharge for state's treasury is collected annually.

23.04 SHIPPING:

Principal provisions with regard to shipping are to be found in Navigation Law (Decree-Law 2222 of May 21, 1978 as am'd), and in Book III of Code of Commerce. Owners of Chilean vessels must be Chilean citizens or companies. For purposes of registration are considered Chilean companies those which principal domicile and real and effective seat is Chile, its chairman, manager and majority of directors are Chileans and majority of its capital belongs to Chilean individuals or entities. Crew of Chilean vessels must be Chilean citizens. Chilean vessels must be registered in office known as “Registro de Matrícula”. Captains must be Chileans. Coastwise traffic is restricted to Chilean vessels.

There are special laws for national and foreign fishing vessels.

24 TREATIES AND CONVENTIONS

24.01 TREATIES:

Bilateral Treaties.

With European Countries:

Belgium.—Agreements Concerning Commercial Air Services of Nov. 5, 1966.

Denmark.—Treaty of Commerce and Navigation, of Feb. 4, 1899; Additional protocol of Nov. 30, 1905.

Germany, Federal Republic of.—Basic Agreement on Economic and Technical Cooperation, Oct. 18, 1968.

Hungary.—Commercial Agreement, Nov. 10, 1967.

Korea, Republic of.—Free Trade Agreement, Seoul, Feb. 25, 2003.

Norway.—Treaty of Commerce and Navigation and Additional Protocol, Feb. 9, 1927; Agreement Amending Treaty of Commerce and Protocol of Aug. 5 and 26, 1937.

Romania.—Commercial Agreement, Oct. 21, 1968.

Spain.—Commercial and Payments Agreement of Aug. 9, 1950; Commercial Air Transport Agreement, Santiago, Dec. 17, 1974.

Sweden.—Treaty of Commerce and Navigation of Oct. 30, 1936; Commercial Agreement of May 28, 1950.

Switzerland.—Treaty of Commerce, Oct. 31, 1897.

Yugoslavia.—Commercial and Payments Agreement, Aug. 2, 1954.

With American Countries:

Argentina.—Labor Agreement, Antofagasta, Oct. 17, 1971; Treaty for Judicial Solution of Disputes, Buenos Aires, Apr. 5, 1972.

Bolivia.—Treaty of Economic Complementation of Jan. 31, 1955; Supplementary Protocol to Treaty, and Clarifying Exchange of Notes, of Oct. 14, 1955.

Brazil.—Treaty of Commerce and Navigation of Mar. 1, 1943; Additional Protocol to Treaty of Commerce and Navigation of July 4, 1947; Agreement on Brazilian Coffee, of Apr. 13 and May 3, 1954; Agreement on Maritime Transport, Brasilia, Apr. 25, 1974; Agreement on Technical and Scientific Cooperation, Santiago, June 19, 1974.

Canada.—Free Trade Agreement of Dec. 5, 1996.

Colombia.—Treaty of Commerce and Navigation of Dec. 27, 1936; Agreement on Technical and Scientific Cooperation, Bogota, May 8, 1971.

Cuba.—Agreement Relating to Commercial Air Transport Services, Feb. 25, 1971.

Dominican Republic.—Basic Agreement on Technical and Scientific Cooperation, Santo Domingo, Sept. 12, 1975.

Ecuador.—Commercial Agreement, of Aug. 4, 1949.

Mexico.—Free Trade Agreement, Santiago, Apr. 17, 1998.

Paraguay.—Agreement to Establish in Antofagasta a Free Deposit and Free Trade Zone for Exports and Imports through Paraguay, Aug. 19, 1968; Free Zone Agreement, Santiago, Sept. 19, 1974.

United States.—Free Trade Agreement, Miami, June 6, 2003; Air Transport Agreement and Exchange of Notes, signed at Santiago, May 10, 1947; Agreement Relating to Investment Guaranties under Mutual Security Act of 1954, as am'd, Exchange of notes at Santiago July 29, 1960.

Uruguay.—Basic Agreement on Scientific and Technical Cooperation, Santiago, Sept. 20, 1975; Agreement on free transit of tourists, Santiago, Sept. 20, 1975; Agreement on economic, scientific and technological cooperation, Santiago, Sept. 20, 1975.

Venezuela.—Agreement on Promotion and Reciprocal Protection of Investments and its Protocol, Santiago, Apr. 2, 1993.

With Asian Countries:

China, People's Republic of.—Commercial Agreement, Apr. 20, 1971; Agreement on merchandise credit, Peking, June 8, 1972.

Fiji.—Agreements on Air Transport Services, Santiago, July 9, 1973.

Conventions for Avoidance of Double Taxation.

Argentina.—Signed in Santiago, Nov. 13, 1976. Amendment Protocols No. 1 and No. 2. Signed in Santiago, Apr. 23, 2003.

Brazil.—Signed in Santiago, Apr. 3, 2001.

Canada.—Signed in Santiago, Jan. 21, 1998.

Mexico.—Signed in Santiago, Apr. 17, 1998.

Brazil.—Signed in Santiago, Apr. 3, 2001.

Norway.—Signed in Santiago, Oct. 26, 2001.

South Korea.—Signed in Seoul, Apr. 18, 2002.

Ecuador.—Signed in Quito, Aug. 26, 1999.

Peru.—Signed in Santiago, June 8, 2001. Amendment Protocol. Signed in Lima, June 25, 2002.

Spain.—Signed in Madrid, July 7, 2003.

Poland.—Signed in Santiago, Mar. 10, 2000.

Denmark.—Signed in Copenhagen, Sept. 20, 2002.

Croatia.—Signed in Zagreb, June 24, 2003.

United Kingdom and Northern Ireland.—Signed in London, July 12, 2003.

New Zealand.—Signed in Wellington, Dec. 10, 2003.

Sweden.—Signed in Stockholm, June 4, 2004.

Conventions on International Transportation.

Panama.—Signed in Panama, June 5, 1996.

Uruguay.—Montevideo, Mar. 23, 1992.

Paraguay.—Signed in Santiago, Oct. 20, 1992.

U.S.A.—Signed in Santiago, Dec. 4, 1990.

Singapore.—Signed in Singapore, Jan. 24, 1991/Santiago, July 24, 1991.

Colombia.—Signed in Santiago, Mar. 19, 1970.

France.—Signed in Santiago, Dec. 1, 1977.

Federal Republic of Germany.—Signed in Santiago, Feb. 2, 1977.

Multilateral Treaties.

Agreement on Waterborne Transportation of LAFTA, Dec. 10, 1966, at Montevideo; Protocol for Settlement of Disputes, Dec. 2, 1966, at Montevideo; Protocol on Transit of Persons, Dec. 12, 1966, at Montevideo; Andres Bello Agreement on Educational, Scientific and Cultural Integration of Andean Region, Bogota, Jan. 31, 1970; Uniform Regime of Multinational Enterprises, Dec. 18, 1971.

Convention on the Recognition and Enforcement of Foreign Arbitral Awards, New York, June 10, 1958; Convention on Transit Trade of Landlocked States, New York, July 8, 1965; Intergovernmental Council of Copper Exporting Countries, June 8, 1967; Agreement on Road Signs, Vienna, Nov. 8, 1968; Conservation of Vicuna, La Paz, Aug. 16, 1969; Universal Postal Union, Vienna, July 10, 1964, and Tokyo, Nov. 14, 1969; Convention for Suppression of Unlawful Seizure of Aircraft, The Hague, Dec. 16, 1970; Convention on International Trade in Endangered Species of Wild Fauna and Flora, Washington, Mar. 3, 1973; Inter-American convention on conflict of laws concerning bills of exchange, promissory notes, and invoices, Panama, Jan. 30, 1975; Inter-American convention on conflict of laws concerning checks, Panama, Jan. 30, 1975; Inter-American convention on international commercial arbitration, Panama, Jan. 30, 1975; Inter-American convention on letters rogatory, Panama, Jan. 30, 1975 and its protocol; Inter-American convention on taking of evidence abroad, Panama, Jan. 30, 1975; Inter-American convention on legal regime of powers of attorney to be used abroad, Panama, Jan. 30, 1975; Interamerican Conventions on conflicts of law concerning checks and on proof and information of foreign law. Signed at Montevideo on May 8, 1979; Interamerican Convention on Conflicts of Law concerning Adoption of Minors, La Paz, May 24, 1984; Free Trade Agreement with Costa Rica, El Salvador, Guatemala, Honduras, and Nicaragua. Guatemala, Oct. 19, 1999.

Convention on Private International Law (Bustamante Code) Havana 1928, Asuncion Treaty, signed on Mar. 26, 1991 creating common market “Southern Common Market” (MERCOSUR), Montevideo Treaty, 1980 (Latin American Integration Association); United Nations Convention on Recognition and Enforcement of Foreign Arbitral Awards, 1958; Multilateral Trade Negotiations, The Uruguay Round, Final Act, Marrakech, Apr. 15, 1994 and Agreement Establishing the World Trade Organization, Marrakech, Apr. 15, 1994. See category 17 Intellectual Property, topic 17.01 Copyright.

Note: MERCOSUR, established in 1991, is regional trade market. Member countries are Argentina, Brazil, Paraguay, Uruguay and Venezuela. Member countries liberalize trade with one another while imposing common external tariff on goods imported from nonmember countries. MERCOSUR has extended its scope by entering into free trade agreements with Chile, Bolivia, Colombia, Ecuador and Peru.

International Sale of Goods.

United Nations Convention on Contracts for the International Sale of Goods, in force on

Mar. 1, 1991. See category 3 Business Regulation and Commerce, topic Sales (Realty and Personalty) and Part V, Selected International Conventions.

1

PEOPLE'S REPUBLIC OF CHINA LAW DIGEST

—Scope —

Revised for 2009 edition by

LEHMAN, LEE & XU, of Beijing, Shanghai, Shenzhen, Hong Kong, Macao and Mongolia.

[Glossary of Select Terms: People's Republic of China (PRC); National People's Congress (NPC); Renminbi (RMB); People's Bank of China (PBC); Communist Party of China (CPC); Supreme People's Court (SPC); Central Military Commission (CMC); and State Administration of Industry and Commerce (SAIC)]

Note: This revision incorporates legislation through Mar. 30, 2009.

1 INTRODUCTION

1.00 MODERN CHINA

Modern China.

Mao Zedong founded People's Republic of China (PRC) in Oct. 1949 liberating China from foreign interference and establishing Chinese sovereignty since abdication of Qing emperor in 1912. Mao's rule from 1949 until his death in 1976 was marked by misguided attempts to modernize China and to develop Communist regime: e.g., Anti-Rightist Campaign (1957-58 improvident rectification movement), Great Leap Forward (1958-60 creating mass starvation), and Cultural Revolution (1966-76 abolishing legal system and unleashing reign of terror).

Modern China owes its existence and success to leadership of Deng Xiaoping who assumed power in 1978. He introduced principle of “one country, two systems” initially meaning socialism on mainland and capitalism and democracy in Hong Kong and Macao. However, Xiaoping launched series of profound economic and social reforms in China, policies that continue today to evolve consistent with “Deng Xiaoping Thought”. He created China's socialist market economy.

From 1978 until 1997, when Xiaoping died, China experienced average annual growth rate of 9.8% (19 years). His successors continue to develop his reforms. From 2001-2005, growth rates varied between 8.1% and 10.1% annually. For period 2006-2010, 11th Five-Year plan forecasts annual growth rate of 7.5% for national economy. China's GDP ranks approximately 4th in world, trailing only US, Japan, and Germany, though per capita GDP is still meager. China is poised to become world's 3rd largest economy early in 21st century, behind US and Japan. China leads world in foreign trade and has second largest foreign currency reserves behind Japan. China is rich in natural resources and has huge domestic market whose consumption potential expected to constitute next phase in economic growth.

Foreign Direct Investment (FDI) in China accounts for approximately 25% of all FDI in developing world. Vehicles of foreign investment enterprises (FIE) include joint ventures and wholly owned foreign enterprises.

China's economic and political importance is symbolized by: membership in United Nations (1971, also holding seat on Security Council); World Trade Organization (2001); and selection of Beijing as host of 2008 Olympics. Membership in WTO has and expected to continue to substantially impact market and legal system.

Population of China is about 1.3 billion. Sheer size requires sophisticated administrative apparatus. China is organized in hierarchical structure consisting of several levels: (1) central level; (2) provincial authorities (23 provinces, including Taiwan), 4 special municipalities—Beijing, Shanghai, Tianjin, Chongqing—and five autonomous regions—Guanxi, Inner Mongolia, Ningxia, Xinjiang, Xizang (Tibet); (3) prefectures (about 143); (4) counties (about 1,919); and (5) townships (more than 56,000). Due to China's size, provincial level has important role in administration and management of state affairs (N.B. some provinces exceed 100 million in population). In addition, China has two Special Administrative Regions: Hong Kong (1997 from United Kingdom) and Macao (1999 from Portugal).

1.01 CURRENCY:

See category 3 Business Regulation and Commerce, topic 3.03 Banks and Banking.

Currency: unit is Renminbi (RMB) (literally People's Currency) or Yuan, and comes in denominations of 100, 50, 20, 10, 5, 2, 1, 0.50, 0.20, 0.10, 0.05, 0.02 and 0.01. RMB issued by People's Bank of China; local currency issued with special permission of Central Government. (Art. 2).

Since 2005, China unpegged RMB from US dollar (immediate value increase of modest 2%) and has pegged current value to basket of currencies. As of March 2007, USD/RMB exchange rate was 1/7.75. China does not yet let its currency float.

With de minimis exceptions for tourists, it is prohibited to take RMB out of China. In Shenzhen Special Economic Zone, Hong Kong currency and other non-Chinese currencies may be used in ordinary purchases and sales. Commercial transactions of international type are normally handled with hard currency such as U.S. dollars, Japanese yen, Swiss francs, English pounds, EUROs, etc. Foreign currency bank accounts and domestic currency bank accounts are permitted for foreign companies, and individuals frequently in or resident in China.

Measures Forbidding State Currency (RMB) to move Cross Border promulgated Mar. 6, 1951 remain in force.

Select Currency Laws—Ren Min Bi (RMB).

Consultation System of Currency Policy Committee of People's Bank of China (promulgated by PBC on Aug. 19, 1997); Regulations of Currency Policy Committee of PBC (promulgated by PBC on Apr. 15, 1997); Temporary Regulation on the Currency Issuance System by the PBC (promulgated on Mar. 30, 1988); Regulation on the Cash Deposit of the Commercial Banks (promulgated by PBC on Dec. 9, 1985); Cash Regulation Measures (promulgated by State Council on Sept. 8, 1988). Regulations for Management of Renminbi, promulgated by State Council, Feb. 3, 2000, providential People's Bank (central bank) shall issue Renminbi, coins and paper currency (Art. 1); manage Renminbi (Art. 5).

1.02 GOVERNMENT AND LEGAL SYSTEM:

Preliminary Note.

To achieve Xiaoping's economic reforms and objectives, PRC had to construct legal system to protect property rights, enforce contracts, and develop channels for foreign investment.

In other words, PRC had to make an internationally acceptable commercial and business legal regime. Subsequent to 1978, PRC enacted thousands of laws and regulations, and adopted fourth Chinese Constitution in 1982, marking sharp departure from extreme political nature of preceding Constitutions, subjecting state organs to constitutional legal procedures.

While PRC gradually has moved to system based on rule of law, particularly with its accession in 2001 to WTO, legal system of PRC serves economic and political objectives of Communist Party of China (CPC). It is against this backdrop that government and legal system must be understood. CPC and State are fused. Legal system serves two main objectives: public security and economic reform. Tolerance of dissent is limited as evidenced by 1989 Tiananmen Square.

China divides its law into two main branches: procedural and substantive law. Procedural law contained in: Criminal Procedural Law (1979, rev'd 1997); Law of Civil Procedure (1991); and Administrative Litigation Law (1990). Substantive law divided into branches: criminal, civil and economic, and administrative. General Principles of Civil Law (1986) is foundation of civil and economic law, important legal area. Other major pieces are: Unified Contract Law (1999); Company Law (2006); Marriage Law (2001), and Succession Law (1985). Of interest to foreign investors are specific laws and regulations governing joint ventures, wholly foreign owned enterprises and protection of intellectual property.

Government.

Constitution.

PRC is governed by 1982 Constitution, amended 1988, 1993, 1999, and 2004 embodying significantly “Deng Xiaoping Thought”. See, http://english.people.com.cn/constitution/constitution.html, for electronic copy of consolidated constitution. Constitution is not self-implementing and requires enabling legislation. Without enabling legislation, PRC citizens lack means to enforce constitutional rights.

Constitution identified main task of nation: build socialism with Chinese characteristics. Preamble states, Constitution “is fundamental law of state and has supreme legal authority.” It also recognized role of private sector economy; 1983 amendments promoted faster economic reform and 1999 amendment stated “The People's Republic of China shall be governed according to the law and shall be built into a socialist country based upon the rule of law.”

On Mar. 14, 2004, National People's Congress amended Constitution, Art. 22, to provide that state protects lawful incomes, savings, real and other property rights of citizens; further protects rights of private property of citizens to inherit property. Art. 11 was amended to include protection of private enterprise and encourages non-public economy to develop. Art. 33 was amended to provide for equality of all citizens before law; and state protecting human rights.

State Structure.

PRC has seven major institutions at central level seated in Beijing: (1) National People's Congress (NPC), (2) NPC Standing Committee, (3) President, (4) State Council, (5) Supreme People's Court, (6) Supreme People's Procuratorate, and (7) Central Military Commission. State structure does not rest upon conventional separation of powers and constitutes single unified system of government. Central structure is mirrored at provincial and local levels.

NPC is highest organ of PRC, deputies elected for five year terms and required to meet once per year. It is unwieldy organization, having more than 3,000 deputies. Deputies elected by 34 constituencies: people's congresses of provinces, autonomous regions, municipalities directly under central government, and by People's Liberation Army. (Const. Arts. 57-60). NPC has power to amend Constitution, promulgate laws, supervise enforcement of laws and Constitution, select Premier of State Council, upon recommendation of Central Committee of CPC, and to select other members of State Council, upon recommendation of Premier. NPC also has power to elect President of SPC and Chief Procurator of Supreme People's Procuratorate, as well as authority to examine and approve state budget, decide on questions of war and peace, etc. (Art. 62). NPC makes and amends basic laws (difficult to define) concerning criminal offenses, civil affairs, structure of state, etc. (Art. 60[3]).

NPC Standing Committee is second highest state institution whose members elected by NPC based on list approved by China Communist Party (CPC). Professional body consisting of about 155 members that works full-time for NPC, divided into groups and specialized committees. Standing Committee Council of Chairmen is powerful core of NPC. However, within Council of Chairmen, resides Party core: NPC Chairman, NPC Secretary General, and NPC Vice-Chairman. Party core is executive government of PRC. Art. 67 of Constitution sets forth powers of NPC Standing Committee, nearly equivalent to those of NPC. Standing Committee enacts and amends non-basic laws (Art. 67[2]) and partially amends and supplements basic laws enacted by NPC when latter not in session (Art. 67[3]).

State Council defined by Art. 65 of Constitution as “highest organ of state administration” operates all critical internal and external matters of PRC. It consists of Premier, vice-Premiers, state councilors, ministries, governor of central bank and auditor general, and secretary general. State Council and entities under its supervision manage economic and government affairs of PRC. Though third in line, it is more powerful than NPC and Standing Committee. It also produces bulk of legislation.

President of PRC defined at Art. 79 of Constitution is largely ceremonial office.

Central Military Commission (CMC) (Art. 93) commands armed forces and consists of Chairman, Vice-Chairman and other positions. These positions do not have term restrictions like other posts. Chairmanship of CMC is influential position.

Supreme People's Court (SPC) highest judicial organ, supervising work of all other courts. Court responsible to NPC and Standing Committee. (Const. Arts. 127, 128). Constitution specifies that courts “shall exercise judicial authority independently according to... law and are not subject to interference by administrative organs, public organizations or individuals.” (Const. Art. 126). While higher courts exercise administrative supervision over lower courts (Const. Art. 127), and courts at each level are responsible to congress of same level (Const. Art. 128), courts to be independent in their decision-making. Pursuant to Constitution, NPC Standing Committee, which supervises work of SPC (Const. Art. 67[6]), has authority to amend orders, administrative rules, statutes and decisions of State Council and provincial level authorities that contravene Constitution, or state laws or decrees (Const. Art. 67[7], [8]). No laws, decrees or statutes may contravene Constitution. (Const. Art. 5).

Supreme People's Procuratorate ensures observance of Constitution and law by all departments under State Council, local organs, personnel of state and ordinary citizens. Supervises work of local people's procuratorates. Responsible to NPC and Standing Committee, while local people's procuratorates, like local people's courts, responsible to and accountable to local people's congresses. (Art. 130). Pursuant to Constitution, Supreme People's Procuratorate exercises authority independently, according to law, and is not subject to interference by any administrative organization or individual. (Const. Art. 131).

Communist Party of China (CPC) is referred to in Preamble to Constitution as having under its leadership formed “... a broad patriotic united front... composed of democratic parties and people's organizations... ” embracing all patriots who support socialism and all socialist working people. (Art. 2). Constitution states that: “All power in..... China belongs to the people,” and said power is exercised through National People's Congress and local congresses. (Art. 2). Constitution states China is socialist state. (Art. 1).

CPC is political party, not state institution. However, when CPC exercises its power through Constitution its actions are legitimated. Structure of CPC set forth in its 1982 Constitution, amended 1999. Formal organization simulates state structure. Leading organs are National Party Congress and Central Committee. Latter governed by Politburo. Inner circle of Politburo consisting of about four to six members constitute powerful core and elite. Top post in party is General Secretary of Central Committee. Current General Secretary is Hu Jintao. CPC has about 60 million members. CPC is not only political party in China; there are eight others known as united front parties. In addition, Chinese People's Political Consultative Conference (CPPCC) composed of representatives of CPC, eight parties, ethnic minorities, social organizations, non-party individuals, Taiwan, Hong Kong, Macao and returned oversees Chinese, perform important advisory role.

Legal System: China has positivist legal system; there are no natural rights. Rather rights and duties are created by lawmaker. Legal system is derivative of economy and serves its ends and those of Communist Party. China is moving toward “rule of law” system, but China intends to keep its Chinese characteristics and differentiate itself from Western jurisprudence.

Law on legislation: Promulgated, Mar. 15, 2000 by NPC sets forth basic principles of legislation process. Applies to all laws, administrative regulations, local regulations, regulations of self-governing districts, legal revisions, and cessation of effect of legal statutes. (Arts. 2, 3). Laws must be in accord with Constitution and socialist norms, etc. (Art. 3). Legislation should be based on factual matters, scientific analysis, etc. (Arts. 5, 6). Basic legal matters concerning criminal, civil and other fundamental rights of citizens shall be enacted by National People's Congress; Standing Committee of the People's Congress has right to propagate all other legislation. (Art. 7). State Council can be entrusted to undertake certain legislative acts, particularly administrative law matters, but not with regard to criminal matters and matters related to rights of citizens. (Art. 9). Law clarifies division of authority between NPC and Standing Committee; noteworthy is PRC courts have no power to determine whether law is unconstitutional or to interpret constitution. That power belongs to NPC and its organs.

Special Administrative Region.

State may establish Special Administrative Region (SAR). Systems to be instituted in Special Administrative Region shall be prescribed by law enacted by NPC. This was mechanism used to re-unite Hong Kong and Macao with China.

Rule of Law: Constitution is paramount law of land, and all organs of state, armed forces, all political parties, public organizations, enterprises and institutions abide by Constitution and law; no organization or individual enjoys privileges transcending law or Constitution. (Const. Art. 5).

All citizens of China equal before law. (Const. Art. 33). Right of citizens to criticize any organ of state or functionary, to complain, appeal or report any transgressions of law or neglect of duty by any organ of state or functionary, unless by deliberately false charges, protected by Constitution. (Const. Art. 41). No one may suppress such appeals, complaints or reports, or retaliate against citizens making them. (Const. Art. 41). People suffering loss through infringement of their rights as citizens by organs of state, or functionaries, have right to compensation according to provisions of law. (Const. Art. 41). Freedom of person held inviolable (Const. Art. 37), as are homes of citizens (Const. Art. 39), and as is privacy and freedom of correspondence (Const. Art. 40). Arrest of citizen can be made only by decision of court or sanction of procuratorate. (Const. Art. 37). Extralegal detention, restraints on freedom of person, and searches prohibited. (Const. Art. 37).

Organizations denominated Democratic Parties exist in China and play small role in political process. Since Constitution provides that CPC is leading organ of politics, these organizations have smaller role to play. Nevertheless, organizations such as Chinese Democratic League, Revolutionary Committee of the Chinese Kuomintang, China Association for Promoting Democracy, China Democratic National Construction Association, Chinese Peasants and Workers Democratic Party, China Zhi Gong Dang, Jiusan Society, Taiwan Democratic Self-Government League and All-China Federation of Industry and Commerce all play some small role in political process. Constitution, while stating China is socialist state (Const. Art. 1), no longer states Communist Party core of leadership of whole Chinese people. Role of Communist Party de-emphasized, except in Preamble to Constitution. These so-called democratic parties have members elected to various people's congresses at all levels and to Chinese People's Political Consultative Congress (“PPCC”) at all levels.

1.03 HOLIDAYS:

Decision to Modify the Provision Regarding Employee Working Schedule adopted by 8th Plenary Session of State Council, Feb. 17, 1995. State organs and institutions follow unified working schedule. Weekly non-working days are Sat. and Sun. Enterprises and other institutions which cannot follow above-mentioned schedule may arrange weekly non-working days. (Art. 3).

Rule of National Holiday and Anniversary promulgated by Government Affairs Council, amended for first time on Sept. 18, 1999 in accordance with Decision of the State Council on Amending the Regulation on Public Holidays for National Annual Festivals and Memorial Days, and amended for second time on Dec. 14, 2007 in accordance with Decision of the State Council on Amending the Regulation on Public Holidays for National Annual Festivals and Memorial Days: (1) Jan. 1—New Year (one day); (2) Spring Festival—Chinese Lunar Calendar New Year (three days); (3) Tomb-sweeping Festival—The Lunar Tomb-sweeping Day (one day); (4) May 1—International Labor Day (one day); (5) Dragon Boat Festival—the Dragon Day of the lunar year (one day); (6) Mid-Autumn Festival—the Mid-Autumn Day of the Lunar Year; and (7) Oct. 1,2,3—National Day (three days); (Art.2) Where festival having holiday for all citizens happen to be on Saturday or Sunday, compensatory time off must be taken on work day. (Art.6).

1.04 OFFICE HOURS AND TIME ZONE:

China is in +08:00 GMT time zone. Office hours are generally from 8:30 a.m. to 5:30 p.m.

2 BUSINESS ORGANIZATIONS

2.01 ASSOCIATIONS:

Two primary business associations exist in PRC: (1) foreign chambers of commerce, and (2) profit making business organizations.

Foreign Chambers of Commerce.

Several nations have established chambers of commerce in China. Provisional regulations concerning administration of foreign chambers of commerce were promulgated on June 14, 1989. Foreign chambers of commerce refer to nonprofit entities established in China by foreign business organizations and individuals. Foreign chambers of commerce in China shall not engage in business. (Art. 2).

China Foreign Economic and Trade Bureau has regulatory supervision and authority over foreign chambers of commerce. Registration with that office is required as well as compliance with current regulations and measures.

Profit Making Associations.

Organized by social institutions and subject to laws and regulations ordinarily governing business entity. Association may be formed at various levels of government, e.g., local, provisional, and national.

2.02 BUSINESS ENTITIES:

Overview.

PRC has regulatory framework for business entities including: (1) Sole proprietorships, (2) partnerships, (3) corporations, and (4) special purpose vehicles designed for foreign investment, such as equity and cooperative joint ventures, and wholly owned foreign enterprises. Each business form is subject to registration, legal requirements, and administrative measures. Landmark legislation is Company Law, effective 1994, amended 2006. In addition, foreign company may establish representative office or establish branch in China.

2.03 CORPORATIONS:

Representative Office: Foreign or multi-national company is authorized to establish representative office in China to make business contacts, provide information, and limited range of services; but it cannot conduct business. This form usually is first step to forming business establishment in China.

Branch: Foreign or multi-national company may establish branch office in China. But, this form is unpopular due to high capitalization requirements and parent company is responsible for all debts of branch or branches.

Registration.

Business entities in China must be registered with appropriate authority. Principal, but not sole, agency responsible for registration of state enterprises, collectively owned enterprises, private enterprises, jointly operated enterprises, enterprises having foreign investment in China (including foreign corporation, Chinese-foreign joint venture, and wholly foreign owned enterprises) is State Administration of Industry and Commerce (SAIC) at central level or one of local administrative units (AICs) (1988 Registration Regulations Art. 4). SAIC regulates and supervises all industrial and commercial activity in PRC and can issue business licenses to all lawful enterprises. No enterprise can start operation without licenses from AIC or SAIC. (Art. 2). Note that measures governing registration and licensing are subject to frequent amendment and change.

Other measures related to registration of enterprises: (1) Regulations on Registration of Enterprise were adopted on May 13, 1988 (SAIC responsible agency and has 30 days from receipt of application to render decision), (2) Regulations for Registration of Enterprises Having Foreign Investment (specifying documents required for application to conduct business, to register branch or office, open bank accounts, for example, Arts. 35-51), (3) Temporary Regulations for Administering Approval Conditions and Registration of Legal Representatives promulgated by SAIC on Dec. 24, 1996 (making it illegal for one person to be legal representative of two enterprises and disqualifying certain persons from serving as representative, Arts. 9-10), (4) Regulations Governing the Administration of the Registration of Enterprise Name approved by State Council on May 6, 1991 and promulgated by State Administration for Industry and Commerce on July 22, 1991, effective Sept. 1, 1991 (specifying name regulations for enterprises such as no enterprise can use “China” or “International” unless operation is nationwide, Art. 13; names required to be in Chinese language with appropriate translation, Art. 8, special rules provided for branches; Art. 14 and diverse articles [Arts. 7, 17, 18, 19, 26, and 27 provide specific rules for explicit situations and sets forth penalties for violation]), and (5) Regulation Governing the Registration of Resident Office of a Foreign Enterprise approved by State Council on Mar. 5, 1983, effective Mar. 15, 1983 (specifying SAIC as responsible agency in Art. 4 and empowering

SAIC to establish documentary requirements, approval procedures and provisions for closure).

Regulation of Enterprise Registration Fee Standards and Range, promulgated by SAIC, Ministry of Finance and State Price Authority on Dec. 22, 1988. Registration fee for commercial business is 0.1% of all registered capital. If this amount is greater than RMB 10 million, 0.05% of sum exceeding RMB 10 million must be paid. If this amount exceeds RMB 100 million, registration fee is not levied on sum exceeding RMB 100 million. Registration fee shall not be less than RMB 50. State Administration of Industry and Commerce will stipulate fee for change of registration and annual examination. (Art. 1[1]).

Sanctions.

Registration authority may administer sanctions, depending on circumstances, for violation of regulations, including but not limited to admonishment, fine, notification to enterprise's bank to cease payments, temporary closing of business for modifications, permanent closing of business, revoking business license, confiscating all illegal income, etc. (Art. 66). Violations include for example, commencing business without proper authorization; concealing factual circumstances or blatant deception upon registration; other violations are set forth in Art. 66. In cases of criminal law violations, violator must be sent to judicial branch for punishment. (Art. 68).

Hong Kong, Macao, Taiwan enterprises and enterprises of overseas Chinese and compatriots from Hong Kong, Macao and Taiwan who establish either joint ventures or enterprises operated exclusively with their own capital also subject to registration regime. (Art. 72).

On Dec. 25, 1996, SAIC revised steps for implementation. This revision outlined sanctions for violations of regulations. Punishments include fines or revocation of business license for serious violations.

Company Law adopted by NPC on Dec. 29, 1993, effective July 1, 1994. Revised as follows: Dec. 25, 1999, as adopted by Decision of Thirteenth Session of Standing Committee of Ninth NPC; Aug. 28, 2004 by Eleventh Session of Standing Committee of Tenth NPC; Eighteenth Session of Tenth NPC on Oct. 27, 2005, effective Jan. 1, 2006. See also category 3 Business Regulation and Commerce, topic 3.17 Securities, subhead Securities Market of PRC.

Company Law enacted to achieve two goals: (1) restructure state-owned enterprises (SOE) sustaining chronic losses and operating improvidently, and (2) jump start private enterprise to support state planned economic goals. Law provides two forms in Art. 2: (1) limited liability company (LLC), similar to close corporation, and (2) joint stock company, or company limited by shares (CLS). Former for smaller organizations; latter for larger enterprises. Both treated as legal persons. (Art. 3).

LLC and CLS are limited liability enterprises limiting shareholder risk. (Art. 3). Company has legal protection for its property and enjoys civil rights, and may assume liabilities. (Art. 4). LLC and CLS are established by meeting application, registration and licensing requirements; law other than company law may apply to receive certain approvals for scope of business activity. (Art. 6). Date of issuance of company business license is deemed to be date of company establishment. (Art. 7). Arts. 8 through 19 specify, among other things, method of establishment, options to branch or create subsidiaries, and obligations under labour and health and safety laws to protect workers, including ability to form trade unions. Organization of Chinese Communist Party may, in accordance with Charter of Chinese Communist Party, be established in companies to carry out activities of Chinese Communist Party. (Art. 19).

Formation.

LLC shall meet following requirements: (1) Number of shareholders must be at least one (subject to below section) and not more than 50; (2) minimum amount of registered capital must be at least RMB 30,000. Where laws and/or regulations provide otherwise, such provisions shall apply; (3) shareholders jointly formulate articles of association; (4) LLC has suitable name in which words “limited liability” shall be included and organizational set-up complying with legal requirements; and (5) company has domicile. (Arts. 8, 23, 24, 26).

Special Provisions on One-person Limited Liability Companies.

“One-person limited liability Company” refers to LLC with only one natural person shareholder or legal person shareholder. (Art. 58). Arts. 59 through 64 set forth provisions specific to this enterprise.

CLS shall meet following requirements: (1) There should be at least two promoters and not more than 200, half of which must have domiciles in China; (2) minimum amount of registered capital of CLS is RMB 5,000,000. Where laws and/or regulations provide otherwise, such provisions shall apply; (3) issuance of stocks and relevant preparatory matters conform to provisions of law; (4) articles of association are formulated by promoters and adopted by establishment meeting; (5) CLS has name which shall clearly indicate CLS and organizational set-up meeting requirements of law; and (6) CLS has domicile. (Arts. 8, 77, 79, 81).

Method of Capitalization.

Shareholders of LLC shall make registered capital contribution, either in lump sum or through installments. Minimum amount of first payment must be 20% within 90 days of business license issuance, remainder to be paid within two years of issuance of business license. Investment companies shall have five years to pay in all registered capital. (Art. 26). Shareholders may satisfy investment requirements through non-cash contributions such as industrial property rights and other assets amenable to valuation. (Art. 27). Cash contribution must be minimum 30% of total registered capital. (Art. 27). Arts. 25 through 30 specify treatment of cash and in-kind contributions.

CLS may capitalize through promotion or public offering. (Art. 78). Promoters shall be responsible for public offer preparation of CLS, as well as sponsor's agreement to clarify rights and obligations during incorporation. (Art. 80). Arts. 83 through 87 set forth requirements of promoters to raise capital through public offering.

Articles of Association.

Both LLC and CLS must formulate articles of association which bind company, shareholders, directors, supervisors and managers. (Art. 11). For LLC, its articles of association shall clearly specify following: (1) Name and address of LLC; (2) scope of business; (3) registered capital of company; (4) names of shareholders; (5) method, amount and time of capital contributions by shareholders; (6) organization of company, its method of establishment, powers, and rules of procedure; (7) legal representative of company; and (8) other matters deemed necessary by shareholders. (Art. 25). Shareholders shall sign and seal articles of association. (Art. 25).

For CLS, its articles of association must define following items: (1) Name and address of CLS; (2) scope of business; (3) method of establishment; (4) total shares, par value of each share and amount of registered capital; (5) names of promoters and shares subscribed by them, and form and time of their capital contribution; (6) composition of board of directors, its authorities, term, and rules of conducting business; (7) its legal representative; (8) composition, powers and functions, term of office and rules of procedures of board of directors; (9) method for company profit distribution; (10) grounds for dissolution and liquidation method; (11) method of issuing public notices or announcements; and (12) other matters deemed necessary by shareholders' meeting. (Art. 82).

Shareholders' Meeting.

For LLC and CLS shareholders' meeting is supreme organ of business entity and exercises powers consistent with functions for LLC set forth in Art. 38. (Art. 38). Resolutions on increase or decrease of registered capital, merger, division, dissolution, change of corporate form or revisions in articles of association shall be adopted by two thirds vote or more by shareholders with voting rights. (Art. 44). Shareholders exercise voting rights in proportion to their investment in LLC. (Art. 43). Shareholders' meetings include regular meetings and irregular meetings. Irregular meetings may be convened by shareholders representing one-tenth or more of voting rights or by one-third or more of directors, or supervisors. (Art. 40).

For CLS, shareholders' meetings (Arts. 99-100) are supreme authority. (Art. 99). Shareholders' meetings include annual meetings and interim meetings. Interim meeting shall be held within two months of occurrence of following situations: (1) Number of directors is less than that prescribed by law or two-thirds of number of directors required by articles of association; (2) uncovered losses reach one-third of total share capital; (3) request of shareholders holding 10% or more of total share capital; (4) board of directors deems necessary; (5) at request of supervisory board; or (6) other circumstances provided for in articles of association. (Art. 101). Every share has vote at shareholders' meetings. Resolutions regarding amendment of articles of association, increase or decrease of registered capital, merger, division or dissolution must be adopted by two-thirds or more of voting rights by shareholders present at meeting. (Art. 104). Shareholders may adopt cumulative voting system. (Art. 106). Shareholder may attend meeting through proxy, who shall hold written statement evidencing right to act as proxy. (Art. 107).

Board of Directors.

LLC shall have board of directors consisting of three to 13 persons. (Art. 45). Chairman of board of directors may be legal representative of LLC, as indicated in articles of association. (Art. 13). Board of directors exercises following powers and functions: (1) Convene and report work to shareholders' meeting; (2) execute resolutions adopted by shareholders' meeting; (3) decide on business operation and investment plans; (4) formulate annual financial budget and finance accounts; (5) formulate profit distribution and loss recovery plans; (6) formulate plans regarding registered capital increase or decrease; (7) draft plans regarding merger, division, change of corporate form and corporate dissolution; (8) decide on organizational set-up; (9) appoint or dismiss manager or deputy manager and financial officers according to recommendation by manager and decide on their remuneration; (10) formulate basic management systems; and (11) exercising other powers stipulated by articles of association. (Art. 47). Term of office for directors shall be specified in articles of association and their maximum length shall not exceed three years. (Art. 46). Directors may be re-elected to serve another term upon expiration of prior term. (Art. 46). Chairman convenes and presides over meeting of board of directors. (Art. 48). Should Chairman be unable or does not perform his/her duty, vice-chairman shall convene and preside over meetings; if vice-chairman is unable or does not perform his duty, director elected by more than half of directors will convene and preside over meeting. (Art. 48). Meeting of board of directors may be convened upon motion by at least one-third of directors. (Art. 40). Method of discussion and procedures for voting at meeting of board of directors shall be defined in articles of association except otherwise provided for by law. (Art. 49). Board of directors shall keep minutes of meetings which directors present should sign. (Art. 49).

CLS must have board of directors consisting of five to 19 members. (Art. 109). Term of office for directors must be specified in articles of association, maximum length of which shall not exceed three years. (Art. 109). Directors may serve another term of office upon reelection after expiration of former term. (Art. 109). Meeting of board of directors shall be held at least twice a year. (Art. 111). All directors shall be notified of meeting ten days before meeting. (Art. 111). Meeting of board of directors shall be held only when more than half of directors are present, and resolutions of board require approval of more than half of directors. (Art. 112). Board of directors shall maintain minutes of meetings for decisions on matters discussed, and directors present at meeting and person recording minutes shall sign minutes. (Art. 113). Functions and powers of board of directors of limited liability company shall apply to that of board of directors of joint stock limited company. (Art. 109). Board of directors must have one chairman and may have one or two vice-chairmen, who must be elected by majority vote of directors. (Art. 110). Powers and functions of chairman are as follows: (1) Preside over shareholders' meeting and convene and preside over meetings of board of directors; and (2) supervise implementation of resolutions of board of directors. (Art. 110). Vice-chairman must assist chairman of board of directors. Should chairman be unable to perform his/her duty, he/she may designate vice-chairman to act on his/her behalf; if vice-chairman is unable or does not perform his duty, director elected by more than half of directors shall act on chairman's behalf. (Art. 110).

Manager.

LLC must have manager, subject to appointment or dismissal by board of directors. (Art. 50). Manager is responsible to board of directors and exercises following powers: (1) direct business operation and management, and organize implementation of resolutions of board of directors; (2) implement annual business operations and investment plans; (3) formulate internal organizational system; (4) formulate basic management system; (5) formulate detailed rules and regulations; (6) nominate and recommend dismissal of deputy managers and financial officers; (7) appoint or dismiss management officers other than those required to be appointed or dismissed by board of directors; and (8) other powers authorized by articles of association and board of directors. (Art. 50).

CLS, powers and functions of manager are identical to LLC. (Art. 119). Arts. 57, 58, 60, and 123 set disqualifying criteria for manager, provide for duties of manager and scope of authority, and establish penalties for violations of law.

Supervisory Board.

LLC with relatively large scale operations must have supervisory board consisting of at least three members, and LLC with relatively small number of shareholders and small operations may simply have one or two supervisors. (Art. 52). Supervisory board must include representatives of shareholders and certain proportion of representatives from staff, which must be specified in articles of association. (Art. 52). Directors, managers and financial officers must not concurrently serve as supervisors. (Art. 52). Term of office for supervisor is three years, and supervisor may be re-elected and serve another term upon expiration of prior term. (Art. 53). Supervisors must attend meetings of board of directors as nonvoting members. (Art. 54). Supervisory board exercises following powers and functions: (1) Review of financial affairs; (2) supervise activities of directors and managers which violate laws and regulations or articles of association; (3) request directors and managers to remedy their activities whenever such activities harm interests of their company; (4) propose interim shareholders' meeting; and (5) other powers authorized in articles of association. (Art. 54).

CLS shall have supervisory board consisting of at least three supervisors. (Art. 124).

Directors, managers and financial officers may not serve concurrently as supervisors. (Art. 124). Supervisory board must include representatives of shareholders and appropriate proportion of representatives from workers and staff which must be specified in articles of association. (Art. 124). Term of office and powers and functions of supervisory board are identical with that of LLC. (Arts. 125, 126). Supervisors faithfully must perform their duties according to law and articles of association. (Art. 128).

Financial Affairs and Accounting.

LLC and CLS must establish internal financial and accounting systems. (Art. 164). Company must submit financial and accounting reports at end of each fiscal year, subject to examination and verification. (Art. 165). Financial and accounting report shall contain following accounting statements and schedules: (1) balance sheets; (2) profit and loss statement; (3) statement of financial changes; (4) statement of financial conditions; and (5) statement of profit distribution. (Art. 165). LLC must submit financial and accounting report to shareholders within time limit prescribed in articles of association and CLS must file financial and accounting statements at said CLS for inspection by shareholders at least 20 days prior to annual shareholders' meeting. (Art. 166). CLS created through public offering must make public its financial and accounting statements through announcement. (Art. 166). In distributing each years' post-tax profits, company must set aside 10% as statutory reserve funds until aggregate balance of account is 50% or more of company's registered capital and 5 to 10% as statutory public welfare funds. (Art. 167). Where aggregate balance of statutory reserve funds is insufficient to cover losses sustained in previous years, current year's profit shall be used to cover losses before statutory reserve funds and statutory public welfare funds are set aside. (Art. 167). Company may set aside discretionary common reserve funds subject to resolution of shareholders' meeting when it has set aside statutory reserve funds from post-tax profits. (Art. 167). Profits remaining shall be distributed to shareholders proportionate to their capital contribution in LLC or number of shares held by shareholders in CLS, when losses have been covered and statutory reserve and statutory public welfare funds have been set aside. (Art. 167). Should shareholders' meeting or board of directors distribute profits before losses are recovered and statutory reserve and statutory public welfare funds are set aside, distributed profits must be returned to company. (Art. 167). Premium obtained by CLS by offering shares at price over par value and any other income designated by competent financial department of State Council must be allocated to company's capital common reserve funds. (Art. 168). Company's common reserve funds must be used to recover for losses, expand production and operations or transfer as capital increases. (Art. 169). Statutory public welfare funds should be used for collective welfare of workers and staff. (Art. 180). Company may not maintain accounting books and records other than those provided for by law and assets of company may not be deposited in accounts opened under individual's name. (Art. 172).

Merger and Division.

Merger or consolidation is subject to resolution adopted by shareholders' meeting. (Art. 173). Merger or division of CLS must have approval of competent department authorized by State Council or provincial level government. (Art. 180). Merger may take place by acquisition, whereby one entity acquires the other, or by two entities merging to establish new enterprise. (Art. 173). Merger agreement must be executed by and between parties concerned and balance sheets and list of assets must be compiled. (Art. 174). Companies concerned shall notify their creditors within ten days from date when merger resolutions are adopted and announce in newspaper within 30 days. (Art. 184). Creditors are entitled to request payment of debts or corresponding guarantees within 30 days after they receive notification or within 90 days from date of first announcement should they not have received notification. (Art. 184). Merger may not be carried out without clearing debts or providing guarantees. (Art. 184). Survival companies after merger or newly-created companies shall bear credits and debts of parties to merger. (Art. 184). In case of division, assets of company shall be divided accordingly (Art. 185), company shall compile balance sheet and list of assets, and notify creditors within ten days from date when resolutions of division are adopted and announce in newspapers at least three times within 30 days. Art. 185 protects creditors' rights. Division of company may not be carried out without clearing debts or providing guarantee. (Art. 185). Debts of company before division shall be borne by companies after division according to their prior agreement. (Art. 185). In case of merger or division, company must change its registration with registration authority, should there be changes in registered items; cancel registration should company be dissolved; or register for new company should new company be created. (Art. 188).

Transfer of Stock Right of Limited Liability Company.

Stock rights of shareholders of LLC can be transferred among shareholders. (Art. 72). Where shareholder intends to transfer stock rights to any non-shareholder, more than half of existing shareholders must consent. Art. 72 specifies details of exercise of pre-emptive rights. In following circumstances, shareholder, who votes against resolution of shareholders' meeting, may request company to purchase its stock rights at reasonable price: (1) Company has not distributed any profit to shareholders for five consecutive years, but it has made profits for five consecutive years and conforms to profit distribution conditions as prescribed in this law; (2) merger, split-up, or transfer of main properties of company; and (3) business term as specified in articles of association expires or other reasons for dissolution as prescribed in articles of association occur, shareholders' meeting makes company continue existing by adopting resolution on modifying articles of association. (Art. 75). With death of natural person shareholder, his lawful inheritor inherits shareholder's qualifications. (Art. 76).

Issuance and Transfer of Shares of CLS.

Where company intends to issue new stocks, it must, under its articles of association, make resolution about matters through shareholders' assembly or board of directors set forth in Art. 134. After capital is raised, registration is modified and public announcement is made. (Art. 137). Issuance of shares must comply with principle of fairness and impartiality. Shares of same class must have same rights and benefits. Stocks issued at same time must be equal in price and must be subject to same conditions. Price of each share purchased by any organization or individual must be same. (Art. 127). Stocks may be issued at price equal to or in excess of par value, but not below par value. (Art. 128).

Transfer of Shares.

Transfer of registered stock must be effected by stockholder's endorsement or by any other means prescribed by relevant laws or administrative regulations. After transfer, company must record name and domicile of transferee in register of shareholders. Within 20 days before assembly of shareholders is held, or within five days prior to benchmark date decided by company for distribution of dividends, no modification registration may be made to register of shareholders as mentioned in preceding paragraph. However, if any law provides otherwise for modification registration of register of shareholders of listed companies, latter must prevail. (Art. 140). Shares of company held by promoters of this company must not be transferred within one year after date of establishment of company. Directors, supervisors and senior managers of company must declare to company shares held by them and changes thereof. During term of office, shares transferred by any of them each year must not exceed 25% of total shares of company he holds. (Art. 142). Art. 143 specifies when company may re-purchase shares. Listed company must, in pursuance of laws and administrative regulations, publicize its financial status, business operations and important lawsuits, and must publish its financial reports once every six months in each fiscal year. (Art. 145).

Bankruptcy, Dissolution and Liquidation.

(N.B. PRC enacted new Enterprise Bankruptcy Law on Aug. 27, 2006, effective June 1, 2007. See category Bankruptcy.) Prior law summarised below.

Should company become insolvent, court may declare bankruptcy according to law and organize liquidation group composed of shareholders, relevant departments and specialized professionals that administer liquidation of assets. (Art. 189). Art. 190 states when company may voluntarily dissolve, e.g. merger. Art. 192 specifies when company is mandated to dissolve. Liquidation group manages affairs of business during liquidation period, notifies creditors, and formulates liquidation plan for submission to shareholders meeting or competent authority for approval. (Arts. 193, 194, 195). Where assets of company are sufficient to pay debts, assets shall be used respectively to pay liquidation fees, wages and labour insurance fees of workers and staff, overdue taxes and debts of company. (Art. 195). Remaining assets after liquidation will be distributed to shareholders proportionate to their investment in LLC or shares held. (Art. 195). Upon completion of liquidation, liquidation group shall formulate liquidation report and submit to shareholders' meeting or competent department for approval, and submit to registration authority for cancellation of registration and make public announcement regarding termination of company. (Art. 197). Otherwise registration authority may revoke its business license and make public announcement regarding revocation. (Art. 197). Members of liquidation group shall be loyal to their duties and perform their liquidation duties according to law. (Art. 198). Members of liquidation group shall not take advantage of powers and functions to accept bribes or other illegal income or convert property of company into their own. (Art. 198). Members of liquidation group shall compensate losses suffered by liquidated company or creditors due to their deliberate acts or serious negligence. (Art. 198).

Foreign Company.

Companies incorporated outside China under laws of foreign countries are “foreign companies”. (Art. 199). Foreign companies may set up branches to engage in production and business operation inside China according to law. (Art. 199). Foreign companies are legal persons of foreign countries and their branches are not legal persons in China. (Art. 203). Foreign companies shall assume civil liabilities for business activities of their China branches. (Art. 203). In establishing branch, foreign company must file application with Chinese competent department and produce its articles of association, registration certificate issued by original country of registration and other relevant documents. (Art. 200). Foreign company must appoint representative or agent in charge of branch in China and appropriate necessary funds compatible with its business operations. (Art. 201). Branch of foreign company shall follow law of China and shall not harm social and public interests. (Art. 204). Legal rights and interests of branch of foreign company shall be protected by law of China. (Art. 204). Before closing its branch in China, foreign company shall clear debts of its branch according to law and conduct liquidation. (Art. 205). It shall not transfer assets of branch out of China before debts are fully paid. (Art. 205).

This regulation was abolished.

Investment Companies by Foreign Investors.

Regulations on Establishment of Investment Companies by Foreign Investors (ICFI) promulgated by Ministry of Commerce on Nov. 17, 2004. Supplementary Provisions were adopted on May 17, 2006. Investment Company functionally equivalent to holding company.

Investment Company allows foreign investor to centralize ownership and management of China company group into single entity. ICFI holds equity positions in all foreign investment enterprises (FIE) in China. Has valuable treasury function for intra-company loans and asset transfers.

Minimum asset value is 400 million USD in year prior to application; 10 million in registered capital in existing FIEs; and three proposals for future FIEs approved; or minimum 10 FIEs already established with registered capital of 30 million USD. Art. 10 specifies range of permitted business activity.

ICFI can be Joint Venture or Wholly Foreign Owned Enterprise. All ICFIs approved by MOFCOM (previously MOFTEC). As explained below, all JVs must have 25% foreign capital invested.

2.04 JOINT VENTURES:

See topic 2.03 Corporations; categories 3 Business Regulation and Commerce, topics Sales, Statistics, Standards and Quality Control; Taxation, Foreign Trade and Commerce, topic Trade Zones; topic Taxes.

Law on Equity Joint Ventures Using Chinese and Foreign Investment (“EJV Law”) was adopted by National People's Congress on July 1, 1979, and amended on Apr. 4, 1990 by 2nd Session of 5th National People's Congress, and on Mar. 9, 2000 by 4th Session of 9th

National People's Congress, and permits foreign companies to enter into joint ventures with Chinese companies or other entities, subject to authorization by Chinese government. (Art. 1). Art. 2 protects assets of JV from expropriation, except where provided by law and subject to extraordinary circumstances; compensation paid. Parties to joint venture shall apply to appropriate authorities of foreign economic relations and trade for approval of agreements and contracts between parties, and articles of association. (Art. 3). Commission has three months to reject or approve these documents, and if approved, joint venture shall register with SAIC and pursuant to license obtained, commence operations. (Art. 3). Law has been supplemented by Regulations for the Implementation of the Law on Equity Joint Ventures Using Chinese and Foreign Investment ("EJV Regs."), promulgated by State Council on Sept. 23, 1983, and on Jan. 15, 1986 by State Council, and on July 22, 2001 by State Council. Pursuant to said EJV Regs., joint venture is normally subject to approval of Ministry of Foreign Economic Relations and Trade (renamed "Ministry of Commerce") ("Examination and Approval Authority"), which issues certificate of approval. (EJV Regs. Art. 6). However, Examination and Approval Authority can and does designate government organizations of provinces, autonomous regions, and municipalities directly under central government, or relevant ministries or bureaus under State Council, to examine and approve establishment of joint ventures complying with certain specific conditions. Applicant must submit following documents to Examination and Approval Authority who will have three months to approve or disapprove project: (1) Application for establishment of joint venture; (2) feasibility study report jointly prepared by participants; (3) joint venture agreement, contract and articles of association signed by representatives and authorized by participants; (4) list of candidates for chairman, vice-chairman and directors appointed by participants; and (5) other documents stipulated by Examination and Approval Authority.

Joint Venture Is Limited Liability Company.

In general foreign partner must contribute not less than 25% of registered capital. (EJV Law, Art. 4). Investment of party may be cash or in-kind; if technology and equipment constitute contribution, then contribution "shall be truly advanced and appropriate to China's needs." (EJV Law, Art. 5). If one party to joint venture assumes position of board chairman, then vice-chairman of board of directors shall be assumed by other party (Art. 6), thus no longer requiring Chinese party to be chairman of board. Board is empowered to discuss and take action, pursuant to articles of association, on all venture's fundamental issues. (EJV Law, Art. 6). President, vice-president(s), general manager and assistant-general manager(s) shall be chosen from among parties to venture. (Art. 6). Within scope of joint venture contract, articles of association, and Chinese laws and decrees, joint venture has right to do business independently. (EJV Regs. Art. 7). However, governmental department in charge of Chinese participant in joint venture will be in charge of joint venture and responsible for guidance and assistance, and will exercise supervision over joint venture. (EJV Regs. Art. 6).

Length of Term of Joint Venture.

Parties may specify in contract duration of joint venture, or may decide not to specify term. If JV is established with time duration, it may be extended by application. (EJV Law, Art. 13). Pursuant to Interim Provisions governing length of terms of Joint Venture (promulgated by Ministry of Foreign Economic Relations and Trade on Oct. 22, 1990), parties to joint venture, which falls under lines of business or circumstances set forth in Art. 14, shall prescribe in their contract, through consultation, contract period in accordance with provisions of relevant laws and regulations of State.

Labour Relations.

Contract between parties shall, pursuant to law, cover employment and discharge of workers and staff members. (EJV Law, Art. 6).

Net Profit of Equity Joint Venture.

Net profits of equity joint venture shall be distributed between parties to venture in proportion to their respective shares in registered capital, after paying joint venture income tax on gross profits pursuant to China's tax laws, and after deducting, as stipulated in articles of association, monies for reserve funds, bonus and welfare funds and expansion funds. (EJV Law, Art. 8). Joint venture may enjoy preferential treatment in form of tax exemption and reduction allowed by law, and apply for restitution on portion of taxes paid by foreign entity in respect of its reinvested share of profits in China. (EJV Law, Art. 8). Art. 71 of EJV Regs. sets forth when JV may be exempt from customs duty and Industrial and Commercial Consolidated Tax on certain imported materials.

Settlement in Foreign Currency.

Law of the People's Republic of China on Commercial Banks, promulgated Dec. 27, 2003 and amended Feb. 1, 2004. Commercial bank may undertake foreign exchange settlement and selling businesses after being approved by People's Bank of China. (Art. 3).

Regulations on Control of Foreign Exchange Settlement, Sale and Payment by People's Bank of China, promulgated June 20, 1996. Every bank which carries on business of foreign exchange shall, pursuant to these regulations and within its business scope be approved by People's Bank of China and State Administration of Foreign-Exchange Control. (Art. 2).

Law on Contractual Joint Ventures ("CJV Law") was enacted and promulgated at First Conference of Seventh Session of National People's Congress on Apr. 13, 1988, and amended by 18th session of standing committee of 9th National People's Congress on Oct. 31, 2000, and became effective as of date of promulgation. Law has been supplemented by Regulations for Implementation of Law on Cooperative Joint Ventures Using Chinese and Foreign Investment ("CJV Regs.") on Sept. 4, 1995. Contractual JV ("CJV") is more flexible form. For example, equity joint venture required to distribute profits in proportion to shareholders' contributions; CJV is not subject to same restrictions. (CJV Regs., Art. 43). CJV may take form of contractual relationship, partnership or LLC. (CJV Law, Art. 4). These agreements must be approved by relevant examination and approval authority within 45 days of receipt of application (CJV Law, Art. 5); modification requires same approval procedure as does assignment. Board of directors or management committee shall be established to manage venture pursuant to contract and/or articles of association. (CJV Law, Art. 12). Hiring and firing of staff shall be specified in contracts with said employees (CJV Law, Art. 13) though union can be established (CJV Law, Art. 14). Contractual joint ventures permit foreign parties to recover their investment on priority basis prior to payment of income tax, provided such is approved by financial and tax authorities. (CJV Law, Art. 21).

One of major developments of Regulations is that, pursuant to CJV Regs., contractual joint ventures include both entities which acquire Chinese legal person status and those which are not qualified. (Art. 4). Contractual joint venture, which does not have Chinese legal person status, and its contracting parties shall undertake civil liabilities prescribed in Chinese law. (Art. 50).

In addition, contractual joint venture acquiring Chinese legal person status operates as LLC. Unless otherwise stipulated in joint venture contract, each party shall be liable for joint venture and liability shall be limited to its investment plus other contributions provided. Joint venture shall be liable for debts of company up to its total assets. (Art. 14).

It should be noted that Regulations expressly state that Chinese law applies to establishment, validity, interpretation, and execution of joint venture contract, as well as disputes arising therein. (Art. 55).

Approval Process of Joint Venture: (1) preliminary approval by supervisory department of Chinese partner and by appropriate level approval authorities, (2) final approval by relevant authorities, (3) issue of business license by administration authorities. Three groups of approval authorities: (1) supervisory department, foreign investment and economic planning authorities, and (3) industrial administration authorities.

At central level, approval authorities are: (1) State Development and Reform Commission, and (2) MOFCOM (latter approves JV application, contract, articles of association, and ancillary documents), and (3) SAIC. Where license and approval are finally vindicated depends upon amount of investment. Local authorities have jurisdiction over JVs involving less than 30 million USD; Central authorities have jurisdiction over JVs where investment exceeds 30 million USD, and State Council has jurisdiction over JVs where investment exceeds 100 million USD. Key document is feasibility study to show how JV will satisfy all economic requirements and achieve its economic goals. Document supported by financial forecasts, profitability analysis and expected return on investment.

Two most important documents for JV: (1) contract setting forth terms of parties, and (2) articles of association constituting basic constitution of new business venture. No business starts without license from SAIC or AIC.

Accounting Regulations for Joint Ventures Using Chinese and Foreign Investment (hereinafter “Accounting Law”) were promulgated on Mar. 4, 1985, amended by Ministry of Finance on July 1, 1992. These regulations, applicable to all Chinese-foreign joint ventures established in China (Art. 2), can be supplemented by public finance bureaus of provinces, etc. (Art. 3). Joint ventures must have separate accounting offices; if large or medium size, controller and auditor are to fulfil their responsibilities with care, make accurate calculations, and strictly supervise all economic transactions. (Art. 8).

Accounting Law requires various enterprises to carry out requirements beginning July 1, 1993. Method of accounting should be constant in different periods. Enterprises should adopt debit and credit double entry bookkeeping. (Art. 12). Foreign enterprises must use RMB as currency for bookkeeping, but can also use foreign currency if they wish to do so concurrently. (Art. 13). Books of account and accounting statements are to be prepared accurately and promptly and are to be kept in Chinese language or in both Chinese and foreign language if enterprise wishes to do so concurrently. (Art. 14). Enterprise should keep three kinds of main account books including daily account, general account, and particular and other accounts. (Art. 16). Current assets include cash, deposits, securities, accounts receivable, accounts payable in advance, stocks, etc. (Art. 19). Nonphysical assets of enterprise including industrial rights, intellectual property and technology rights, land use rights and other nonphysical assets should be listed as individual items on balance sheet. (Art. 36).

Notice on Regulations of Several Problems Associated with New Accounting Laws in Foreign Invested Enterprises (hereinafter “Notice”).

Pursuant to Notice, enterprises can adopt accounting standards depending on status as determined pursuant to Accounting Law. Accounting report should be submitted to all relevant departments, authorities and accounting bank. Accounting method for low-value and nondurable goods and packing materials should be in accordance with relevant regulations. Profit or loss incurred by foreign enterprise should be accounted separately under item “Profit of Investment”. All stocks which have balance due or loss in settlement should be accounted for as management expenses pursuant to “New Rule”. Term “Right of Investors” is changed to “Right of Owners”. Enterprises engaged in real estate business should set up necessary accounting items pursuant to “Accounting Regulations on Real Estate Developing Enterprises”. Enterprises engaged in leasing or finance should set up necessary accounting items pursuant to “Accounting Regulations on Financial Enterprises”. Enterprises engaged in commodity transaction business should set up necessary accounting items pursuant to “Accounting Regulations on Commodity Transaction Businesses”.

Law on Wholly Foreign Owned Enterprise.

Sixth National People's Congress of China adopted Law on Wholly Foreign Owned Enterprises on Apr. 12, 1986 which was amended on Oct. 31, 2000 to encourage international economic cooperation and technological exchange and promote development of China's national economy. State Council also adopted Implementing Rules of the Law of China on Wholly Foreign Owned Enterprises (“WFOE Rules”) on Oct. 28, 1990 which was amended on Apr. 12, 2001. Under these regulations, China permits foreign enterprises and other economic entities or individuals (foreign investor) to establish wholly foreign owned enterprise within China and protect its legal rights and interests. (Art. 1).

Wholly foreign owned enterprise means enterprise, excluding branches, established in China in accordance with relevant laws of China, capital of which is wholly invested by foreign investors. (Art. 2).

Establishment of wholly foreign owned enterprise must be beneficial to development of China's national economy. State encourages enterprises which have either of following: (1) Enterprise is to adopt advanced technology and equipment, engage in development of new products, conserve energy and raw materials, involve upgrading of products and replacement of old products with new ones which can be used in place of similar imported goods; and (2) most or all of goods produced are exported. (WFOE Rules Art. 3).

No foreign capital enterprise shall be approved in any of following circumstances: (1) China's sovereignty or public interest would be harmed; (2) China's state security would be jeopardized; (3) China's laws and regulations would be violated; (4) requirements for development of China's national economy would not be satisfied; or (5) environmental pollution might be caused. (WFOE Rules Art. 5). State Council shall stipulate those areas in which WFOEs are forbidden or restricted. (Art. 3).

Arts. 4, 5 and 6 protect foreign investment, profits and companies rights under law.

Approval authority is Ministry of Foreign Economic Relations and Trade (renamed “Ministry of Commerce”) (“Examination and Approval Authorities”), that has 90 days from date of application to approve or disapprove. (Art. 6). Where amount of investment is lower than that set by Standing Committee, non-central authorities may approve applications. (WFOE Rules Art. 7).

Split-up, merger, or other important changes of wholly foreign owned enterprise shall be submitted to authorities for examination and approval and shall go through procedures of administrative authorities of Industry and Commerce for change in registration record. (Art. 10).

Art. 15 specifies content of written application.

WFOEs that meet requirements regarding legal persons under laws of China shall obtain status of Chinese legal person. (Art. 8). Liability shall be limited to capital contributions to WFOE. (WFOE Rules Art. 18).

WFOE must meet certain registered capital contributions stipulated by State, failure of which will result in cancellation of business license. (WFOE Rules Art. 30). “Registered capital” represents that capital investment which must be registered with Administration for Industry and Commerce. Registered capital must correspond to scale of business and ratio between registered capital and total investment must conform with other relevant regulations. (WFOE Rules Art. 20).

Rules of acceptable capital contribution set forth in Arts. 25-30.

WFOE shall be free to purchase machinery, equipment, raw materials, fuel, spare parts, accessories, components, devices, means of transportation, office articles, etc. for their own use either in China or abroad. (WFOE Rules Art. 42). WFOE may sell their products in China or export abroad; China encourages export of products. (WFOE Rules Arts. 43, 44).

In case that foreign capital enterprise employs workers and staff members within China, both enterprise and workers and staff shall, in accordance with Chinese law and regulation, sign labor contract and such matters as employment, dismissal, salaries, and wages, welfare, labor protection and labor insurance shall be clearly stated in contract. (WFOE Rules Art. 67).

WFOE fiscal year commences on Jan. 1 and ends on Dec. 31. (WFOE Rules Art. 57). WFOE must file balance sheet and profit and loss statements annually, audited by licensed audit company. (WFOE Rules Art. 60). WFOEs may not distribute profits until losses from preceding fiscal years have been made up, and allocations to reserve fund, stated in articles of association, which shall not be less than 10% of pre-tax profits; after reserve fund is 50% of registered capital no further contributions need to be made. (WFOE Rules Art. 58).

Lawful profits and other lawful income obtained by foreign investor from enterprise and funds they receive may be remitted abroad. Salary and other lawful income of foreign staff and workers may be remitted abroad after payment of individual income tax according to law. (Art. 19).

Employees of enterprise shall have right to set up grass-roots trade union, organize and carry out trade union activity in accordance with provisions of Trade Union Law of China. (WFOE Rules Art. 69).

All items of insurance on enterprise shall be insured with insurance company within China. (Art. 16).

Special Provision for Foreign Enterprises Engaging Jointly with Chinese Firm in Offshore Exploration, Extraction, and Development of Petroleum Resources: Law on Exploitation of Offshore Petroleum Resources in Cooperation with Foreign Enterprises.

On Jan. 13, 1982, Standing Committee of State Council promulgated Regulations for Joint Exploitation of Offshore Petroleum Resources, permitting foreign enterprises to participate in exploitation of Chinese offshore petroleum resources. (Art. 1). Government of China protects foreign investments, foreign shares of profit, and other legitimate rights in these cooperative enterprises. (Art. 3). State shall not requisition investment and income of foreign enterprises participating in cooperative exploration of offshore petroleum resources. Under special circumstances, State may, according to needs of public interest, requisition portions or all of petroleum due to foreign enterprises in cooperative exploration according to legal procedures and shall make appropriate compensation. (Art. 4).

Department designated by State Council shall determine forms of cooperation, demarcate areas of cooperation in accordance with zones and surface areas of cooperation designated by State, design plan for exploration of offshore petroleum resources in cooperation with foreign enterprises consistent with long-term State economic plans, formulate operations and management policies for cooperative exploitation of offshore petroleum resources, and examine and approve overall development program for offshore oil (gas) fields. (Art. 5). China National Offshore Oil Corporation ("CNOOC") shall have overall responsibility for work of exploration offshore petroleum resources in PRC in cooperation with foreign enterprises.

Foreign investor normally provides investment, operations, and bears all exploration risks. Upon discovery of commercially viable oil or gas field, both CNOOC and foreign contractor will jointly invest in development of field. While foreign contractor is initially responsible for development and production operations, after time period specified in contract, CNOOC takes over production and operations. Foreign contractor recovers its investment and expenses out of production, and receives remuneration out of petroleum product. (Art. 8). Foreign contractor may export petroleum due to it and petroleum it purchases, and may also remit abroad, in accordance with law, investment it recovers, its profits and its other legitimate income. (Art. 9).

Taxes must be paid by foreign corporation and its employees to PRC (Art. 10), but equipment and materials imported to implement petroleum contract either exempt from customs duty or duty levied at reduced rate (Art. 11). Foreign contractor shall abide by Regulations on Foreign Exchange Control of the PRC and other provisions related to foreign exchange control when opening bank account and transaction of other foreign exchange matters. (Art. 12). Foreign contractor must promptly and accurately report to CNOOC on petroleum operations; and must acquire, complete, and accurately date, records, samples, vouchers and other original data with respect to petroleum operations, including technological, economic, accounting, and administrative reports, and regularly submit them to CNOOC. (Art. 14).

Foreign corporation must give preference to Chinese labour in all aspects of operation, abide by all applicable law, for example, environmental law and international law governing the sea. (Art. 22). Dispute settlement provided for in Regulations by mediation or arbitration. (Art. 24).

Department designated by State Council shall set deadline for correction and issue warning of violations. If correction not made prior to specified deadline, order may issue to stop petroleum operations. All economic losses borne by responsible party. (Art. 25).

2.05 LIMITED PARTNERSHIP:

See topic 2.06 Partnerships; categories 2 Business Organizations, topic Business Entities; Civil Actions and Procedure, topic Civil Code.

2.06 PARTNERSHIPS:

Partnership Enterprise Law, originally promulgated Feb. 23, 1997, amended Aug. 27, 2006 (Standing Committee of NPC), effective June 1, 2007. Civil Code of China ensures legal status of partnerships. (Arts. 30-35). Partnership Enterprise Law sets forth definitions, formation and registration requirements, dissolution, winding-up, and permitted activities. It also permits two new forms: Special General Partnership Enterprise and Limited Liability Partnership Enterprise. Salient features explained below.

In former partnership law, only natural persons could be partners, partnership taxed as enterprise, partners taxed on total income, no limited liability, and bankruptcy rules were unclear. Amended Partnership Enterprise Law addresses these issues by providing favourable advantages.

Revised Partnership Law clarifies and provides: (1) range of legal entities, not only natural persons, can be partners, e.g. foreign entities (Art. 2); (2) degree of limited liability is available to partnership; (3) clear rules for bankruptcy (Art. 92); taxed on pass-through basis (Art. 6), that is, partnership no longer taxed as enterprise; (4) introduction of two new forms: Special General Partnership Enterprise (SPG) significant for professional service firms (Arts. 55-59), and Limited Liability Partnership Enterprise (LP) (Arts. 61 et seq.) expected to attract venture capital, on-shore investment funds, and private equity. Under LP, there is at least one general partner with managerial authority and unlimited individual, and if applicable, joint liability, and at least one limited partner whose liability is limited to investment. LP has 50 or less members. Law contains provisions for protection of minority parties. Main benefit is flexibility.

Establishment of partnership should meet following requirements: (1) there are more than two partners, who take responsibility pursuant to Law; (2) partnership agreement in writing; (3) actual capital contributed from each party; (4) there is name for partnership; (5) there is address for partnership and necessary conditions for partnership incorporation are met. (Art. 8). Partnerships cannot use identifications such as “ltd.” or “Co. Ltd.” in name or their enterprise. (Art.

5).

Administrative Provisions for Registration of Partnerships were promulgated on Nov. 19, 1997 by State Council, effective same date. Partnerships must register with State Administration of Industry and Commerce (SAIC). (Art. 4). Registering party must file following documents: completed registration form; proof of partners' status; documents indicating legal representative of each partner and/or all partners; partnership agreement; proof of types of investment; and other documents as required by SAIC. (Art. 8). All documents must be presented within 30 days of filing application. (Art. 9). SAIC has 30 days to render decision to approve. Alterations of business application are governed by Arts. 11-13.

Art. 57 regulates dissolution of partnership; Arts. 14-17 regulate details of procedure. Partnerships may establish subsidiaries. (Art. 18). Establishment of subsidiary requires filing of application, and approval, of SAIC. Partnership provides annual report for inspection within prescribed time limit, and is subject to inspection consistent with requirements of government office where partnership was registered. (Art. 21). Organ of registration must carry out inspection of report in order to determine whether to allow business to keep its operating status. (Art. 22). Violations of regulations can result in loss of business license. (Arts. 26-35).

2.07 SOLE PROPRIETORSHIP:

Sole Proprietor Enterprise Law adopted 11th Session of Standing Committee 9th Congress NPC. Sole proprietorship is business entity established in China with capital of single natural person (Art. 8) and assets owned personally by sole proprietor bearing unlimited liability to extent of assets (Art. 2). Main place of business is sole proprietor's domicile. (Art. 3). Chapter Two sets forth establishment and registration requirements. Sole proprietor manages business unless by written contract, management is delegated to agent. Chapter Four governs dissolution and liquidation and sets priority of creditors. (Arts. 26-32). Chapter Five (Arts. 33-46) sets forth “legal liability” provisions of sole proprietorship, e.g. submission of false documents (Art. 33), engaging in unlicensed business activity (Art. 37).

3 BUSINESS REGULATION AND COMMERCE

3.01 ACCOUNTING:

See category 2 Business Organizations, topic Joint Stock Companies.

China has amended its national accounting standards to harmonize them with International Financial Reporting Standards (IFRS) in effort to open market, provide transparency, promote investor confidence, and submit domestic enterprises to market discipline. Main law is Accounting Law of PRC (“Accounting Law”); it has priority over other measures regulating accounting. Accounting Law adopted by NPC on Jan. 21, 1985, effective May 1, 1985. First amended by NPC on Dec. 29, 1993, amendments effective Jan. 1, 1994; further amended by NPC on Dec. 31, 1999, amendments effective as of July 1, 2000. Law is applicable to state organs, state-owned enterprises, institutions, and individual household enterprises.

Chinese Ministry of Finance (MOF) is agency principally responsible for regulating accounting matters. Numerous other legal measures exist, e.g.: Financial Accounting and Reporting Rules for Enterprises, Chinese Accounting Standards for Business Enterprises, Accounting System for Business Enterprises, Accounting System for Small Business Enterprises, Accounting System for Financial Institutions, Accounting Guidelines for Enterprises within Specialised Industries, and ad hoc accounting pronouncements. Various accounting standards make adjustments in main rules for each business activity. ASBE are among most important innovations in Chinese national accounting standards.

Accounting Rules.

Leaders of business entities are responsible for authenticity and completeness of accounting practices and accounting documentation of entities. (Accounting Law, Art. 4). Every unit must set up accounting books in accordance with law and ensure that they are authentic and complete. (Art. 3). Art. 10 sets forth items subject to audit. Where computers are used in accounting process, applicable software, accounting documentation, accounting books, accounting statements, and other data generated by software shall meet requirements of MOF. (Art. 13). Original vouchers must be submitted to accounting departments for check and verification and verified original voucher used to maintain accounts. Any guaranty provided by entities and any pending suit shall be included in accounting report. (Art. 19). Language used for accounting records is Chinese. Foreign-invested enterprises, foreign enterprises and other foreign organizations within China can simultaneously use another foreign language. (Art. 22). Period for which records must be kept and procedures for destroying records determined by MOF together with relevant departments. (Art. 23). Fiscal year begins Jan. 1 and ends on Dec. 31 on Gregorian Calendar. (Art. 11). Reporting currency shall be Renminbi. (Art. 12). Where entity mainly uses foreign currency in their routine receipts and payments, it may choose one foreign currency as reporting currency, however foreign currency must be converted into Renminbi in compiling accounting statements. (Art. 12).

Special Regulations on Company or Enterprise Accounting Practice.

Art. 26 of Accounting Law specifies violations of accounting rules and provides for penalties.

Accounting Supervision.

All entities must establish effective internal accounting supervision system. (Accounting Law, Art. 27). Accounting department has obligation to abide by law and applicable rules, regardless of instruction from superiors of enterprise, and has obligation to report and demand investigation of any irregularities. (Arts. 28-29). Any institution or person has right to report any activity violating this law or State uniform accounting system to competent authorities. (Art. 30). MOF carries out accounting supervision of entity to determine: (a) Whether or not accounting book is lawfully established; (b) whether or not accounting documentation is true and complete; (c) whether or not accounting supervision is in accordance with this law and state uniform accounting system; (d) whether or not accounting personnel possess professional qualifications. (Art. 32). Accounting departments and their staff that undertake accounting supervision of relevant entities are responsible to keep secret any state or commercial secrets known from these supervision activities. (Art. 34).

Accounting Departments and Accounting Personnel.

All entities shall set up accounting departments or appoint accounting personnel in relevant departments. Business entity may outsource accounting services. (Art. 36). Large and medium sized state-owned enterprises or enterprises where state-owned assets occupy controlling or leading position must appoint chief accountant. (Art. 36). Accounting department should establish auditing system. (Art. 37). Cashiers shall not concurrently take charge of auditing, maintain accounting records or register income, expenses, credits and liabilities. (Art. 37). Accounting personnel should possess Accountant's Operational Certificate. Head of accounting department must possess certified accountant's qualification or at least three years, experience as accountant. (Art. 38).

Penalties.

Criminal liability imposed on activities constituting forgery or alteration of accounting voucher or accounting books and for falsifying records. Criminal liability shall be imposed for concealing or deliberately destroying accounting voucher, accounting books, or accounting reports. In other cases, fine of between RMB 5,000 to RMB 100,000 imposed on entity, fine of between RMB 3,000 to RMB 50,000 imposed on responsible accounting personnel. Personnel involved may also have Accountant's Operational Certificate revoked. (Art. 43-44). Other activities that violate this law may require fine of RMB 2,000 to RMB 50,000 or revocation of Accountant's Operational Certificate.

Enterprises Accounting.

Accounting Standards for Enterprises-Basic Standards approved by State Council and promulgated by Ministry of Finance Feb. 15, 2006, effective Jan. 1, 2007, applicable to all enterprises created in China.

Enterprise must prepare settlement accounts and financial statements for different accounting periods, which may be classified into annual and interim accounting periods. (Art. 7). Accounting recognition, measurement and report of enterprise shall be made on accrual basis. (Art. 9). Enterprise shall adopt debit-credit bookkeeping method. (Art. 11).

Assets.

“Asset” refers to all resources which are formed by past transactions or events of enterprise, owned or controlled by enterprise, and expected to bring economic benefit to enterprise. (Art. 20).

Liabilities.

“Liability” refers to current obligations which are formed by past transactions or events and which are expected to cause economic benefits to flow out of enterprise. (Art. 23).

Equity.

“Equity” refers to surplus rights and interests after deducting liabilities from assets of enterprise. (Art. 26).

Income.

“Income” refers to total inflow of economic benefits which are formed by routine activities of enterprise, which will result in increase of equity, and which are irrelevant to capital investment. (Art. 30).

Expenses.

“Expenses” refers to total outflow of economic benefits which are incurred in routine activities, which will result in decrease of equity and which are irrelevant to profits to be distributed to owners. (Art. 33).

Profits.

“Profits” refers to operating results of enterprise within certain accounting period. Profits include net amount after deducting expenses, and gains and losses which are directly included in profits of current period. (Art. 37).

Accounting Measurement.

When enterprise records accounting elements, which meet recognition conditions, in accounts and list them in accounting statements, it shall make measurements according to accounting measurement attributes.

Accounting measurement attributes mainly include (Art. 42): (1) Historical costs; (2) replacement costs; (3) net realizable value; (4) present value; and (5) fair value.

When enterprise measures accounting elements, generally it shall adopt historical costs. If it adopts net realizable value, present value or fair value, it must ensure that amount of accounting elements it determines can obtain reliable measurement results. (Art. 43).

Financial Accounting Statements.

Term “financial accounting statements” refers to documents enterprise offers to outside to reflect financial status of enterprise on particular date, operating results and cash flow during certain accounting period. Financial accounting statements include accounting statements and their annotations, and other relevant information and materials that shall be disclosed in financial accounting statements. Accounting statements shall at least include balance sheets, profit statements and cash flow statements. (Art. 44).

Chartered Accountants Law was adopted by National People's Congress on Oct. 31, 1993, effective as of Jan. 1, 1994. Law replaced Chartered Accountants Regulations promulgated by State Council on July 3, 1986. Law sets forth qualifications for candidates, defines scope of services, provides for partnership formation, regulates presence and establishment of foreign firm in joint venture or otherwise, and provides penalties for violation. Candidates must pass qualifying examination administered by China Chartered Accountants Association, and have two or more years' relevant business experience. (Arts. 7-9). Arts. 14-20 specify scope of permitted services.

Provisional Rules on Management of Resident Offices of Overseas Public Accounting Firms issued Jan. 4, 1996 by Ministry of Finance.

Establishing representative offices of accounting firms from outside China must be permitted by Ministry of Finance (MOF). (Art. 1). MOF authorizes China Association of Certified Public Accountants (CACPA) as administrative institute. CACPA can authorize provincial CPA association to administer and supervise representative offices outside of Beijing. (Art. 2). CACPA should deny or grant representative office's application within two months of receipt of application. MOF will issue certificate if application is approved. (Art. 4). Arts. 5 through 13 specify business regulations on representative offices.

Circular on Permitting International Accounting Firms to Admit Multiple Member Firms in China issued Jan. 22, 1996 by Ministry of Finance.

International accounting firms' China members (“Member Firms”) refers to Chinese accounting firms which act as members of international accounting firms according to agreement with international accounting firms with permission of MOF. Member Firms should abide by Chinese laws and regulations. Member Firms can employ foreign CPAs or relevant experts of international accounting firms with MOF's permission. (Art. 1). Local firms must privatize before becoming Member Firms. (Art.2). Each Chinese firm may be member of only one international firm. (Art. 4). After international firm has admitted Chinese firm as member office, its representative office in same location should be closed. (Art. 5). Agreements which make Chinese accounting firms members of international accounting firms must be approved by CACPA in advance. International accounting firms should register potential members with CAPCA. (Art. 6). International firms may establish correspondent relationship with local firms as transitional measure to admitting them as Member Firms. (Art. 7).

International firm can hold investment stake of up to 33% in each Member Firm for first five years of membership. Foreign experts obtaining domestic CPA certificate can become partners of Member Firms. (Art. 8). Member Firms remain operationally independent but are permitted to use name of international firm. Member Firms of same international group are encouraged to integrate into one unified nationwide firm. (Art. 9). International firms may have multiple Chinese member firms. (Art. 10).

Interim Provisions on Foreign Institutions of Property Assessment Doing Property Assessment Business Within the Territory of China was promulgated on May 19, 1997 by State Administration of State Property.

Foreign institutions of property assessment doing property assessment business within territory of China shall temporarily hold license for doing property assessment business within territory of China (hereinafter referred as to “License”) issued by State Administration of State Property, abide by Chinese Law and Regulations, and accept supervision and administration of China Property Assessment Association. (Art. 1).

Provisional Rules on Management of Sino-Foreign Joint Venture Certified Accounting Firms issued Mar. 28, 1996 by Ministry of Finance.

To establish JV, foreign party must have annual income of at least US$20 million, employ at least 100 professional staff, and have advanced professional skills and goodwill; domestic party must have annual income of at least RMB 10 million, employ at least 100 professional staff, and be qualified to conduct security business. (Art. 6). Sino-foreign accounting JVs are independent legal entities and shall not conduct business under names of either party. (Art. 8). Domestic auditing reports should be signed by Chinese CPAs, while auditing reports signed by foreign CPAs for foreign underwriters and security houses are valid only outside of China. (Art. 10). Sino-foreign accounting JVs must take positive and effective steps to speed up conversion of JV into Member Firm of international party. JVs established prior to issue of regulations must disband within five years to become member of firms of international accounting groups. (Art. 19). JVs may establish branches in other locations upon approval. (Art. 20).

Norms of Accounting—Relationship Between Relevant Parties and Disclosure of Their Transactions, effective as of Jan. 1, 1997.

3.02 ADVERTISING:

See category 1 Introduction, topic Sales.

Foreign Invested Advertising Companies.

Supervisory Regulations on Foreign Invested Advertising Enterprises promulgated by General Administration of Industry and Commerce (GAIC) on Mar. 2, 2004. Regulation was abolished by Order of the State Administration for Industry and Commerce and the Ministry of Commerce, and amendments promulgated on Aug. 22, 2008 and came to effect as of Oct 1, 2008.

Term “Foreign Invested Advertising Enterprises” means Sino-foreign equity joint ventures, Sino-foreign cooperative enterprises handling advertising business pursuant to laws, or foreign-invested advertising enterprises. (Art. 2).

Foreign Invested Advertising Enterprise also must comply with following to satisfy establishment requirements: Sino-Foreign Joint Ventures Law, Sino-Foreign Cooperative Enterprises Law, Foreign-Invested Enterprises Law, Advertising Law, Advertising Supervisory Rules,,etc. (Art. 3).

Business plan, relevant required reports, articles of association and contracts, approved by MOF at central level and AIC at provincial level. (Art. 4).

Foreign invested advertising enterprise may engage in design, production, publication, and various advertising businesses; specific business scope approved by at central and provincial levels as specified by relevant law. (Art. 5).

Foreign investors may entrust qualified agency to handle application procedures. (Art. 18). All documents for approval shall be in Chinese. (Art. 19). Investment in advertising industry through merger with local advertising enterprise shall be handled pursuant to these regulations on foreign investor's purchase and merger with local enterprises. (Art. 20). Investors from Hong Kong, Taiwan, Macao, and FIEs subject to same rules. (Arts. 21-22) Regulations are subject to interpretation by SAIC, Ministry of Commerce. (Art. 23).

3.03 BANKS AND BANKING:

See category 1 Introduction, topic 1.01 Currency.

Overview.

China has Central Bank, 4 State-Owned Banks, private banks, urban and rural cooperative banks, nation-wide commercial banks and foreign banks. Central bank is People's Bank of China (PBC); prior to 2005, central bank functions were outsourced to US due to peg of RMB to dollar. Chinese banking regulator is China Banking Regulatory Commission (CBRC).

Most important development in banking sector is China's 2001 accession to WTO, principally due to GATT obligations. 2006 was landmark year for foreign banks, with Regulations on Foreign Banks issued on Nov. 11, 2006 and effective Dec. 11, 2006, primarily removing geographic restrictions, and allowing foreign banks to become involved in RMB-denominated banking services.

Chinese enterprises continue to rely overwhelmingly on commercial banks for their financing needs. The Big Four—ICBC, China Construction Bank (“CCB”), Bank of China (“BoC”) and Agricultural Bank of China (“ABC”)—currently provide 70% of commercial bank financing. Each is Fortune Global 500 company and each is ranked among top fifty world banks. BoC recently became largest bank in Asia, after large capital injection by Beijing and has 560 overseas offices in 25 countries and regions. ICBC is China's largest bank by assets and it recently completed Hong Kong IPO, worth $19 billion, world's biggest IPO. CCB, which focuses on infrastructure, recently pulled off successful $9.2 billion IPO, world's largest ever for bank at the time. Meanwhile, activities of foreign banks in China have been limited in order to protect and nurture Big Four and 12 offices. For example, ICBC has some thirty-seven thousand branches and sub-branches across country, while HSBC, foreign bank with largest presence in China, has only 13 branches and 13 sub-branches.

International Department of BoC governs relationship with numerous correspondent banks and Joint Operations Department of Bank coordinates foreign exchange earnings retained by local governmental units, including provinces and enterprises. It recommends to General Administration of Exchange Control amounts of foreign exchange available for use by local authorities. Clearing house of BoC is foreign exchange department, responsible for daily balancing of international accounts, transferring funds between accounts, raising funds from abroad, buying and selling foreign exchange, etc. Credit department of bank handles project financing in China. There are other departments, most important of which is banking department, which handles banking transactions.

Under State Council, PBC formulates and implements monetary policy, prevents and resolves financial risks, and safeguards against financial instability. CBRC primarily concerned with supervision of banking institutions by: (1) Authorizing establishment of banking institutions; (2) enforcement of various banking rules; (3) compile and publish reports on banking industry; and (4) having responsibility for administration of supervisory boards of major State-owned banks.

Banking Laws and Related Legislation.

With development of China's financial system reform, series of statutes, regulations, and rules have been adopted and promulgated by both State Council and Central Bank (PBC). Following is list of relevant laws related to banking in China:

Financial Entity Laws.

Temporary Regulations on Supervisory Committees of State-owned Non-foreign Invested Commercial Banks (promulgated by People's Bank of China on Oct. 20, 1997); Methods on Administration of the Urban United Cooperative Agencies of Trust (promulgated by People's Bank of China in 1998); Regulations on Administration of Countryside Cooperative Agencies of Trust (promulgated by People's Bank of China on Sept. 15, 1997); Methods on Administration of Urban Cooperative Agencies of Trust (promulgated by People's Bank of China on Sept. 4, 1997); Regulations on Administration of Urban Cooperative Banks (promulgated by People's Bank of China on June 23, 1998); Commercial Bank Law of People's Republic of China (promulgated by National People's Congress on May 10, 1995); Negotiable Instrument Law of People's Republic of China (promulgated by National People's Congress on May 10, 1995); Law of People's Republic of China on People's Bank of China (promulgated by National People's Congress on Mar. 18, 1995); The Temporary regulations on the People's Bank of China (promulgated by State Council on Jan. 7, 1986); Regulations of China Governing the Administration of Foreign-Invested Financial Entities (promulgated by State Council on Feb. 25, 1994); Regulations of China Governing the Administration of Financial Entities (promulgated by People's Bank of China on Aug. 5, 1994); Measures on the Administration of the State Treasury in the People's Bank of China (promulgated by State Council on July 27, 1985); Temporary Regulation of the Verification of People's Bank of China (promulgated by People's Bank of China on July 5, 1985); Notice Regarding the Assets Balance System Regulation in the Commercial Banks (promulgated by People's Bank of China); Regulations of the Urban Credit Unions (promulgated by People's Bank of China on July 17, 1986); Temporary Regulation on the Credit Union in the Countryside (promulgated by People's Bank of China on Oct. 12, 1990); Temporary Regulation on the Financial Trust & Investment Entities (promulgated by People's Bank of China on Apr. 26, 1986); Notice Regarding the Regulation on Pawn-Brokering (promulgated by People's Bank of China on Aug. 19, 1993).

Financial Transaction Laws.

Instructive Principles on Classification of Risks of Loaning (trial version) (promulgated by People's Bank of China in Apr., 1998; Procedures of Accounting Process under Reform of People's Bank on System of Deposit Proceeds (promulgated by People's Bank of China in Mar., 1998); Temporary Regulations on Preventing and Handling Payment Risks of Financial Institutions (promulgated by People's Bank of China on Feb. 10, 1998); Notice Regarding Improvement of Administration on Scale of Loans by State-owned Commercial Banks (promulgated by People's Bank of China on Dec. 24, 1997); Notice Regarding Administration of Operational Risks Associated with International Settlement of Long Term Letter of Credit by Commercial Banks (promulgated by People's Bank of China on Oct. 20, 1997); Temporary Methods on Loans by Financial Groups (promulgated by People's Bank of China on Oct. 10, 1997); Methods of Settlement of Payment (promulgated by People's Bank of China in Sept., 1997); Implementing Methods on Administration of Commercial Papers (promulgated by People's Bank of China on Aug. 21, 1997); Methods of Settling Domestic Letter of Credit (promulgated by People's Bank of China on Aug. 1, 1997); Procedures of Accounting Verification of Letter of Credit (promulgated by People's Bank of China on Aug. 1, 1997); Temporary Regulations on Repurchase of Bonds between Banks (promulgated by People's Bank of China in June, 1997); Provisional Measures on Cashing, Discounting and Further Discounting on Commercial Promissory Notes (promulgated by People's Bank of China on May 22, 1997); Measures on Administration of Negotiable Instruments and Important Bank Certificates (promulgated by People's Bank of China on May, 1997); Provisional Measures on Administration of Individual's Housing Mortgage Loans (promulgated by People's Bank of China on Apr. 28, 1997); Temporary Regulations on Administration of Open Market Operation and First Class Securities Underwriters (promulgated by People's Bank of China on Mar. 29, 1997); Provisional Measures on Further Discounting on Promissory Notes by Headquarters of State-owned Commercial Banks (promulgated by People's Bank of China on Mar. 5, 1997); Measures on Administration of Establishment of Overseas Industrial Investment Funds (promulgated by People's Bank of China on Sept. 6, 1995); Guaranty Law of People's Republic of China (promulgated by National People's Congress on June 30, 1995); Temporary Regulation on Credit Loans (promulgated by People's Bank of China on Feb. 15, 1994); Temporary Regulation on Commercial Banks (promulgated by People's Bank of China on Mar. 3, 1993); Temporary Regulation on the Assets of the Trust & Investment Entities (promulgated by State Council on Dec. 24, 1986); Regulation on Deposits (promulgated by State Council on Dec. 11, 1992); Measures on Loan Contracts (promulgated by State Council on Feb. 28, 1985); Temporary Regulation on Banking Interest (promulgated by People's Bank of China on Dec. 11, 1990); Regulation System Regarding the Credit Loan on Special Projects (promulgated by People's Bank of China on Dec. 24, 1980); Regulation on the Use of the International Business Loan (promulgated by State Council on Jan. 12, 1989); Measures on the Inter-Bank Loans (promulgated by People's Bank of China on Mar. 8, 1990); Regulation on Working-Capital Loans to State-Owned Industry and Transportation Entities by the Industry and Commercial Bank of China (promulgated on Aug. 25, 1986); Loan Legislation by the Agricultural Bank of China (promulgated on Jan. 23, 1990); Regulation on Short-Term Foreign Exchange Loans by the Bank of China (promulgated on Aug. 30, 1980); Regulation on Loans to Foreign Invested Enterprises by the Bank of China (promulgated on Apr. 24, 1980); Regulation on Bank Accounts (promulgated by People's Bank of China on Dec. 9, 1994); Penalty Measures on Violations of the Banking System (promulgated by People's Bank of China on Oct. 9, 1994); Law of the People's Republic of China regarding People's Bank of China; Law of the People's Republic of China on Commercial Banks (Detailed information described hereinafter).

Foreign Exchange Laws.

Regulations on Administration of Foreign Exchange Accounts in China (promulgated by People's Bank of China on Oct. 7, 1997); Procedures of State Foreign Exchange Administration on Inspection of Violation of Foreign Exchange Policies (promulgated by State Foreign Exchange Administration on Apr. 8, 1997); Regulations of People's Republic of China on Administration of Foreign Exchange (promulgated by State Council on Jan. 29, 1996, and amended on Jan. 14, 1997); Regulations on Administration of Settlement, Sales and Payments of Foreign Exchange (promulgated by People's Bank of China on June 20, 1996); The Detailed Penalty Rules on Violations Related to Foreign Exchange (promulgated by State Administration on Foreign Exchange on Jan. 11, 1993); Regulations on the Foreign Exchange Transaction in the Non-Banking Financial Entities (promulgated by State Administration on Foreign Exchange on Jan. 1, 1993); Notice on Further Control of Foreign Exchange System (promulgated by People's Bank of China on Dec. 28, 1993).

Gold and Silver.

Regulation on Gold and Silver (promulgated by People's Bank of China on June 15, 1983); Regulation on Import and Export of Gold and Silver (promulgated by People's Bank of China and China General Customs on Feb. 1, 1984).

Policy Banks.

Chinese companies also borrow at favourable rates from China's policy banks. China formed three policy banks in 1999 as a part of the restructuring of its banking system: China Development Bank (“CDB”) focuses on infrastructure and financing; China EXIM specializes in trade finance; and Agricultural Development Bank provides funds for rural development. Policy banks accounted for 14 percent of banking assets at end of 2003. Despite primary policy mandates, policy banks have also entered international financing arena. Both CDB and China EXIM have committed to providing easier credit for enterprises going global. CDB provides some projects, such as those that employ Chinese workers or use domestic equipment, with even lower interest lending rate.

In Nov. 2004, NDRC and China EXIM announced that China EXIM would target special portion of bank's budget for ODI in some key overseas projects together with at least two percent interest rate discount. China EXIM may also extend loan period, reduce, or even exempt guarantee funds (generally required to make sure companies will repatriate their profits back to China) for those enterprises. In 2005, China EXIM received substantial capital injection to support bank. Where project is supported by government, China EXIM may receive interest subsidies from its direct parent, Ministry of Finance, for loans extended below its own cost of funding—which is more explicit support than that provided to any of SOCBs or other policy banks.

Well-established companies such as Huawei and newer companies, such as Qirui Automobile Co. Ltd. (which plans to enter US automobile market under name Chery) have benefited from direct form of Chinese financial support. CDB has also formed strategic partnership agreements with number of SOEs and has committed to provide $8.6 billion in loans for 17 overseas investment projects. Despite increasing independence and commercialization of SOCBs, policy banks are ready to step in and continue to promote globalisation on favourable terms.

Regional Banks.

By 2006, China had 11 Joint Stock Commercial Banks and 118 City Commercial Banks.

People's Bank of China.

Law of People's Republic of China on People's Bank of China was promulgated by National People's Congress on Mar. 18, 1995, effective as of date of its promulgation. Modified by Standing Committee of National People's Congress on Dec. 27, 2003, effective since Feb. 1, 2004. PBC is central bank of banking regulatory organ of State Council (Art. 2) and is under direction of State Council (Art. 3). It must perform following functions: (1) Promulgating and implementing orders and regulations in relation to its functions; (2) formulating and implementing monetary policies in accordance with law; (3) issuing Renminbi (RMB) and control its circulation; (4) supervising inter-bank borrowing or lending markets and inter-bank bonds markets; (5) administering foreign exchange, and supervising inter-bank foreign exchange market; (6) supervising gold market; (7) holding, controlling and managing state foreign exchange reserve and gold reserve; (8) managing state treasury; (9) maintaining normal operation of systems for payments and settlements of accounts; (10) directing and disposing anti-money-laundering work of financial industry, being responsible for capital supervision and measurement over anti-money-laundering; (11) being responsible for statistics, investigation, analysis, and forecasting of financial industry; (12) undertaking relevant international banking operations as central bank of state; and (13) other functions assigned to it by State Council. (Art. 4). PBC must report its decisions concerning annual supply of bank notes, interest rates, foreign exchange rates and other major issues specified by State Council for approval before implementation, while other decisions on matters concerning monetary policies must be immediately implemented by PBC. (Art. 5). PBC must submit report on monetary policies and operation of financial industry to Standing Committee of NPC. (Art. 6). PBC must independently implement monetary policies, exercise its functions and carry on its operation according to law. (Art. 7). Entire paid-up capital of PBC allocated by State and owned solely by State. (Art. 8). State Council must establish financial supervision and administration coordination mechanism, and must formulate specific measures. (Art. 9).

Institutional Structure.

PBC must have one governor and number of deputy governors. Person for Governor must, nominated by Premier of State Council, be decided upon by NPC; and when NPC is not in session, determined by NPC Standing Committee and appointed or removed by President of PRC. (Art. 10). Deputy governors shall be appointed and removed by Premier of State. (Art. 10). Governor, deputy governors and other staff must refrain from holding posts concurrently in any other financial institutions, enterprises or foundations (Art. 14) and must keep secrets of State, financial institutions and clients under their supervision and control (Art. 15). PBC must establish monetary policy committee (Art. 12) and its branches as its representative organs (Art. 13).

Business Operation.

Aim of monetary policy is to maintain stability of currency, control inflation, and thereby promote economic growth. (Art. 3). PBC may apply following monetary policy measures: (1) Demand that banking institutions deposit reserve fund in required ratio; (2) fix basic interest rates; (3) handle rediscounting for banking institutions, which have opened accounts in PBC; (4) provide loans for commercial bank; (5) conduct open market operations; and (6) issue other monetary policy instruments defined by State Council. (Art. 23).

PBC acts as fiscal agent for State. (Art. 24). PBC may not provide State with overdraft facilities, may not directly subscribe, and underwrite state bonds and other government bonds (Art. 29); and may not provide loans to local governments or governmental departments at all levels, or to financial institutions other than banks, other organizations or individuals, except special financial institutions other than banks to which People's Bank may provide loans as determined by State Council. PBC cannot provide guarantee for any institutions or individuals. (Art. 30).

Supervision over Financial Institutions.

PBC approves establishment, changes, termination and business scope of financial institution. (Art. 31). PBC has right to inspect and supervise following acts of financial institutions, other entities or individuals: (1) Acts of implementing relevant provisions on management of reserve against deposit; (2) acts in relation to special loans of PBC; (3) acts of implementing provisions on Renminbi control; (4) acts of implementing relevant provisions on management of inter-bank borrowing or lending markets and inter-bank bonds markets; (5) acts of implementing relevant provisions on foreign exchange control; (6) acts of implementing relevant provisions on gold management; (7) acts on behalf of PBC of managing state treasury; (8) acts of implementing relevant provisions on settlement management; and (9) acts of implementing relevant provisions on anti-money-laundering. (Art. 32). PBC has wide ranging authority to order regulatory measures and to require submission of data. (Arts. 34-36).

Financial Accounting.

PBC must exercise independent control over its financial budget, and budget must be incorporated into central budget. (Art. 38). PBC surrenders to central budget its net profit each accounting year after making general provisions at level set by fiscal authority. Losses must be covered by fiscal appropriation from central budget. (Art. 39). Receipts and payments of funds and accounting practice must comply with laws, administrative rules and regulations and State's unified accounting standards, and be subjected to separate auditing and supervision in accordance with law by auditing and fiscal authorities under State Council respectively. (Art. 40). PBC must, within three months after end of each accounting year, compile its balance sheet, income statement and relevant financial statements, prepare its annual report and publish them in accordance with relevant regulations of State. Accounting year begins on first day of Jan. and ends on 31st day of Dec. of Gregorian calendar. (Art. 41).

Legal Liabilities.

Penalties for violating law include detention of no more than 15 days, fine of RMB 10,000-500,000, giving administrative sanctions and, if case constitutes crime, being investigated for criminal responsibilities. (Arts. 42-51).

Commercial Banks.

Commercial Banking Law of PRC was promulgated by NPC on May 10, 1995, effective July 1, 1995. Amended by sixth session of Standing Committee of Tenth NPC of PRC on Dec. 27, 2003. Effective Feb. 1, 2004. Commercial banks refer to corporate legal persons established in accordance with this law and Company Law of PRC to receive money deposits from public, extend loans, provide settlement services and do other relevant businesses. Arts. 2-10 specify permitted activities of commercial banks, that do depart significantly from role of commercial banks in developed foreign countries.

Establishment and Organization.

Establishment of commercial bank requires examination and approval by CBRC. No organization or individual can receive money deposits from public or do any business of commercial bank or use title of “bank” without approval of banking regulatory organ of State Council. (Art. 11). Establishment must satisfy following requirements: (1) Having its articles of association in compliance with this law and Company Law; (2) having minimum registered capital defined by this law; (3) having directors and senior management personnel with professional knowledge for holding post and work experiences; (4) having complete organization and management system; and (5) having up-to-standard business site, safety measures and other facilities relevant with business. Other sound conditions must also be met for establishment of commercial bank. (Art. 12). Minimum amount of registered capital for establishing national commercial bank is RMB 1,000,000,000. Minimum amount of registered capital for establishing city commercial bank is RMB 100,000,000, and for rural commercial bank, minimum amount of registered capital is RMB 50,000,000. Banking regulatory organ of State Council can adjust minimum amount of registered capital upon requirements for sound supervision, but amounts thereof must be no less than that as prescribed in preceding paragraph. (Art. 13). Approved applicants must register and obtain business licenses from Industrial Commercial Administration Department. (Art. 16).

Company Law is applicable to form and structure of organization of commercial bank. (Art. 17). Special rules apply to banks wholly owned by State. (Arts. 18-22)

When commercial bank or its branch has not started for over six months from date of being granted business license or has automatically suspended operation for over six consecutive months after starting its operation, banking regulatory organ of State Council must revoke its banking permit and make public announcement. (Art. 23). Managerial positions filled only by candidate meeting legal requirements. (Arts. 27-28).

Protection of Depositors.

No depository insurance scheme; protection provided by legal mandates to give right to depositor to withdraw deposit on demand, pay applicable interest rates, protect account data, except as provided by law, and require bank to take legal steps to comply with law so as to reduce risk of insolvency.

Basic Principles for Loans and Other Businesses.

Set forth in Arts. 35-37.

Commercial bank in its loan business must abide by regulations on ratios of assets and liabilities listed below: (1) Capital adequacy rate must not fall short of 8%; (2) ratio of outstanding balance of loans to that of deposits must not exceed 75%; (3) ratio of outstanding balance of liquid assets to that of liquid liabilities must not fall short of 25%; (4) ratio of outstanding balance of loans to one borrower to that of capital of bank must not exceed 10%; and (5) other stipulations of banking regulatory organ of State Council. (Art. 39). Commercial bank must not extend unsecured loans to connected persons and must not provide connected persons with secured loans on conditions more favourable than those to borrower of similar loan. Connected persons refer to: (1) Members of board of directors, member of board of supervisors, managerial personnel and staff of credit business department of commercial bank, and their close relatives; and (2) companies, enterprises or other economic organization wherein aforesaid persons having made investment or assumed senior managerial positions. (Art. 40). Commercial bank has right to refuse any organization's or individual's demand for loan or guarantee. (Art. 41).

No commercial bank can undertake businesses of trust and investment and securities dealing business, nor can they invest in non-self-use real property or non-bank financial institutions and enterprises, unless it is otherwise prescribed by state. (Art. 43). Commercial bank, in handling settlements such as acceptance, remittance and collection, must make timely cashing and entries pursuant to relevant provisions without detaining bills or instruments, nor dishonouring them in violation of regulations. Relevant provisions for time limit for bill acceptance and entries in accounting books should be made public. (Art. 44).

Commercial bank must apply for approval for issuing financial bonds or seeking loans outside China in accordance with law and administrative regulations. (Art. 45). Commercial banks must observe provisions of PBC when making inter-bank borrowing or lending. No capital borrowed may be used for granting loans on fixed assets or for investment. It is prohibited to use call money to extend loans on fixed assets or to make investment. Call money for lending must be only idle fund after depositing required reserve, leaving adequate stand-by reserve and repayment of loans falling due to banking regulatory organ of State Council. Call money for borrowing must be used to meet position shortage in interbranch settlement and interbranch remittance, and temporary needs for working capital. (Art. 46). Commercial bank must not receive money deposits or extend loans by raising or lowering interest rates or by other unjustifiable means in violation of regulations. (Art. 47).

Enterprise or institution may open principal account with commercial bank of its own choice for day-to-day transfer and settlement of accounts and cash receipt and payment, but it cannot open two or more principal accounts. (Art. 48). Commercial bank must charge handling fees as prescribed when handling business or providing services. Charging items and standards must be formulated by banking regulatory organ of State Council or People's Bank of China according to their respective functions or jointly with departments in charge of price under State Council. (Art. 50). Staff of commercial bank must not commit following wrongs: (1) Taking advantage of their positions to demand or accept bribes, or accept commissions or service fees under any pretext; (2) taking advantage of their positions to commit graft, embezzlement or unlawful possession of funds of banks or of customers; (3) providing loans or guarantees to relatives or friends in violation of regulations; (4) holding positions concurrently in other economic institution(s); (5) other acts in violation of law, administrative regulations, and rules of business management (Art. 52); and (6) disclosing State or commercial secrets which come into possession during their tenure of office. (Art. 53).

Financial Affairs and Accounting.

Commercial bank must truthfully record and comprehensively reflect its business activities and financial position, produce its annual financial accounting report, and timely submit its financial statements to banking regulatory organ of State Council and treasury department. Commercial bank must not establish accounting books other than those legally specified. (Arts. 54-55). Commercial bank must publish its business results and audit report of previous fiscal year within three months after end of every fiscal year in accordance with regulations of banking regulatory organ of State Council. (Art. 56). Commercial bank must retain reserve against bad and doubtful accounts and write off bad debts pursuant to relevant State regulations. (Art. 57).

Takeover and Termination.

When commercial bank is in or is likely to be in credit crisis, thus seriously threatening interest of depositors, banking regulatory organ of State Council may assume control over such bank. (Art. 64). Banking regulatory organ of State Council must determine takeover and organize its implementation. (Art. 65). Banking regulatory organ of State Council may determine to prolong takeover, but term must not exceed two years. (Art. 67). Takeover may be terminated: (1) Term or prolonged term of takeover expires, (2) prior to expiration of term of takeover, commercial bank has recovered its capacity of normal operation, or (3) prior to expiration of term of takeover, commercial bank has been merged or declared bankrupt. (Art. 68). Commercial bank must be dissolved with approval from banking regulatory organ of State Council. When commercial bank is incapable of repaying its mature debts, it may, with consent of banking regulatory organ of State Council, be declared bankrupt by People's Court. People's Court may organize banking regulatory organ of State Council and other relevant departments and personnel to form liquidation group to conduct liquidation. (Art. 71). At time of bankrupt liquidation, commercial bank must give priority to paying principal and interest of savings deposits after paying liquidation fees and its staff wages and labour insurance fees in arrears. (Art. 71).

Legal Liabilities.

Penalties for violating law include confiscation of illegal income, fines of RMB 50,000, RMB 200,000, revocation of business license and cessation of business operation, depending on severity of case, and if case constitutes crime, being investigated for criminal responsibilities. (Arts. 73-86).

Foreign Banks.

Since China opened its door to outside world in 1979, many foreign banks have opened branches in China. Most are opened in five special economic zones and eight coastal cities. Shanghai in Dec. 1996 and Shenzhen in Dec. 1998 have been formally opened for Renminbi business to foreign-funded financial institutions. On Dec. 1, 2004, China authorized foreign banks to do Renminbi business in five new cities: Beijing, Kunming, Xiamen, Xi'an and Shenyang. Foreign banks previously limited to Chengdu, Chongqing, Dalian, Fuzhou, Guangzhou, Jinan, Nanjing, Shanghai, Shenzhen, Tianjin, Qingdao, Wuhan and Zhuhai. CRBC opened up Xi'an and Shenyang, one year ahead of schedule, showing compliance with commitments it made to WTO. Total number of cities where foreign banks are permitted to conduct business increased from thirteen to eighteen. CRBC's application for foreign banks wishing to do business in China requires at least three years of previous operations in China and profits for two consecutive years. Majority of 24 branches currently in Beijing satisfy those conditions.

Term “foreign capital financial institutions and Chinese-foreign equity joint financial institutions” denotes following institutions: (1) Foreign-capital banks with their head offices established in Shanghai (foreign bank); (2) branches of foreign banks established in Shanghai (foreign branch bank); (3) banks established in Shanghai with joint capital and operation by foreign financial institutions and Chinese financial institutions (joint bank); (4) financial companies established in Shanghai with joint capital and operation by foreign financial institution and Chinese financial institution (joint financial company). (Art. 2).

PBC is competent authority in charge of examining and approving, administering, and supervising foreign-capital financial institutions and Chinese foreign joint financial institutions.

Regulations on Real Name System Applicable to Individual Deposit Accounts adopted by State Council on Apr. 1, 2000 and effective same date.

Regulations apply to financial institutions within China and individuals who are opening individual deposit accounts with these financial institutions. (Art. 2). Financial institutions refer to institutions which are established within China and which operate individual deposit business according to Chinese laws. (Art. 3). Individual deposit accounts refer to RMB and foreign currency deposit accounts opened by individuals with financial institutions, including current accounts, fixed deposit accounts, and current/fixed deposit accounts. (Art. 4). Real name refers to name applied in identification papers in accordance with laws, administrative rules and other relevant regulations. Following identification papers are deemed as real name identification papers: (1) Resident's Identification Card or Temporary Resident's Identification Card for Chinese citizens residing in China; (2) resident booklet for Chinese citizens under 16 residing in China; (3) Soldier's Identification Certificate for Chinese People's Revolution Army soldiers and Armed

Policeman's Identification Certificate for Chinese People's Armed policemen; (4) Hong Kong and Macao Resident's Entry of China Mainland Permission for Hong Kong and Macao residents and Taiwan Resident's Entry of China Mainland Permission for Taiwan residents; (5) in case of foreigners, their passport. (Art. 5).

When agent opens individual deposit account on behalf of principal, identification papers of both agent and principal must be shown. (Art. 6).

Financial institutions and their staff are responsible to keep secret information pertaining to holders of individual deposit accounts. Financial institutions are not permitted to provide any information about individual deposit accounts to any entity or individual. They are also entitled to refuse any entity or individual who inquires about, freezes or detains funds in individual deposit account, except where laws stipulate otherwise. (Art. 8).

Financial institutions violating Art. 7 of Regulations will be warned by PBC and fine of between RMB 100 to RMB 5,000 will be imposed. In cases of serious violations, financial institution's business license will be revoked; and staff directly involved will be punished with disciplinary measures. Should cases be serious enough to constitute crime, criminal liability will be imposed. (Art. 9).

Regulations of People's Republic of China on Administration of Foreign-funded Banks, adopted at 155th Executive Meeting of State Council on Nov. 8, 2006, and effective Dec. 11, 2006. Regulations formulated for purpose of meeting needs of opening up to outside world and economic development. (Art. 1). “Foreign-funded bank” defined as following institutions approved to be established within China: (1) Wholly foreign-funded bank funded by foreign bank or jointly with any other foreign financial institution; (2) Chinese-foreign joint venture bank jointly funded by foreign financial institution with Chinese company or enterprise; (3) branch of foreign bank; or (4) representative office of foreign bank.

Establishment.

Establishment of foreign-funded bank and its branch shall be subject to examination and approval by CBRC. (Art. 7). Minimum registered capital for wholly foreign-funded bank or Chinese-foreign joint venture bank is RMB 1 billion. (Art. 8). For wholly foreign-funded bank or Chinese-foreign joint venture bank branch established in China, branch must receive from parent bank non-callable allocation of not less than RMB 100 million as its operating capital. Branch of foreign bank must receive from its parent bank non-callable allocation of not less than RMB 200 million as its operating capital. (Art. 8). Shareholder of proposed wholly foreign-funded bank or Chinese-foreign joint venture bank, and foreign bank planning to establish branch or representative office must satisfy following requirements: (1) Have consistent profit earning capacity and good reputation; (2) experience in engaging in international financial activities; (3) have in place effective systems for anti-money laundering; (4) under effective supervision by financial supervisory authority of its home country or region, and application thereof is approved by financial supervisory authority of its home country or region; and (5) other requirements prescribed by CBRC. (Art. 9). Shareholder of proposed wholly foreign-funded bank or Chinese foreign joint venture bank shall be financial institution and satisfy requirements provided for below: (1) Be commercial bank; (2) maintain representative office within territory of China for at least two years; (3) total assets of not less than US$10 billion at end of year prior to submission of application; and (4) have capital adequacy ratio that meets requirements prescribed by financial supervisory authority of its home country or region and CBRC. (Arts. 10 and 11). Foreign bank planning to establish branch shall satisfy following requirements: (1) Have total assets not less than US$20 billion at end of year prior to submission of application; (2) have capital adequacy ratio that meets requirements prescribed by financial supervisory authority of its home country or region and CBRC; and (3) have maintained representative office within China for at least two years where foreign bank applies to establish its first branch. (Art. 12).

Scope of Business.

Wholly foreign-funded bank or Chinese-foreign joint venture bank may, in accordance with scope of business approved by CBRC, engage in part or all of following foreign exchange and RMB businesses (Art. 29): (1) Receive deposits from general public; (2) grant short-term, medium-term and long-term loans; (3) handle acceptance and discount of negotiable instruments; (4) buy and sell government bonds and financial bonds, buy and sell foreign currency securities other than stocks; (5) provide letter of credit services and guaranty; (6) handle domestic and foreign settlement; (7) buy and sell foreign exchange and acting as agent for purchase and sale of foreign exchange; (8) act as agent for insurance companies; (9) engage in inter-bank lending; (10) engage in bank card business; (11) provide safe deposit box services; (12) provide credit information services and consultancy services; and (13) other businesses approved by CBRC.

Branch of foreign bank may, in accordance with scope of business approved by CBRC, engage in part or all of following foreign exchange and RMB businesses provided to customers other than Chinese citizens within China (Art. 31): (1) Receive deposits from general public; (2) grant short-term, medium-term and long-term loans; (3) handle acceptance and discount of negotiable instruments; (4) buy and sell government bonds and financial bonds, buy and sell foreign currency securities other than stocks; (5) provide letter of credit services and guaranty; (6) handle domestic and foreign settlement; (7) buy and sell foreign exchange and acting as agent for purchase and sale of foreign exchange; (8) act as agent for insurance companies; (9) engage in inter-bank lending; (10) provide safe deposit box services; (11) provide credit information services and consultancy services; and (12) other businesses approved by CBRC.

3.04 BILLS AND NOTES:

See topics 3.17 Securities; 3.15 Negotiable Instruments Law.

Bills of exchange, promissory notes, and checks are generally referred to as negotiable instruments. Negotiable Instruments Law of PRC was adopted by 13th Session of Standing Committee of the NPC on May 10, 1995, effective Jan. 1, 1996. Revised at 11th session of Standing Committee of the 10th NPC of the PRC on Aug. 28, 2004.

Law applies to all transaction activities in negotiable instruments within territory of PRC. (Art. 2). Drawer signature required for valid instruction to bank to pay; drawer may authorize agent to sign. (Arts. 4-5). Invalid signature or seal does not lead to ineffectiveness of rest of signatures or seals on negotiable instrument. (Art. 6). Corresponding consideration is required in exchange for negotiable instrument, except if negotiable instrument was acquired by tax, inheritance or gift. (Art. 11). In case of loss of negotiable instrument, person who loses it may notify payer to refuse payment on lost instrument. (Art. 15). Owner of lost negotiable instrument must, within three days of issuing notice for suspending payment due to lost instrument, or immediately after negotiable instrument is lost, apply for public summons with people's court or indict with people's court. (Art. 15-[2]). Holder's right to negotiable instrument will not be protected if holder does not exercise its rights within statutory term: term for drawer's and acceptor's right to negotiable instrument is two years from due date; term for bill of exchange or promissory note payable at sight is two years from date of issue; term for right of drawer of check is six months from date of issue; term for recourse to predecessor is six months from day when payment was refused; and term for second recourse to predecessor is three months from day of payment or day when case was brought in court. (Art. 17).

Enforcement Regulations on Management of Negotiable Instrument (hereinafter “Regulation”) was approved by State Council of PRC on June 23, 1997 and issued by PBC (“PBC”) on Aug. 2; Regulations are effective as of Oct. 1, 1997.

Authority: Regulations are promulgated according to Negotiable Instruments Law (Art. 1) and apply to management of negotiable instruments within China (Art. 2). PBC is responsible for management of negotiable instruments (Art. 3); parties concerned shall use unified forms of negotiable instruments which stipulated by PBC (Art. 5). Regulations govern bank drafts, promissory notes, checks, and guarantees.

Issue of Bills of Exchange.

Divided into bank and commercial drafts and governed by Arts. 19 through 25.

Issue of Promissory Note.

Promissory note is instrument written and issued by drawer, promising to pay unconditionally fixed amount of money to payee or holder at sight of instrument. (Art. 73). Drawer should have reliable capital sources to ensure payment. (Art. 74).

Issue of Check.

Following items must be recorded on check: word “check” or the like, entrustment of payment without any conditions, fixed amount of money, name of payer, date of issue, and signature or seal of drawer. (Art. 84-[A]). Amount of money drawn on check cannot be more than monetary total in checking account. (Art. 88).

Endorsement.

Negotiable instrument is transferable unless drawer writes Chinese characters meaning “Not Transferable” on draft. (Art. 27). Holder's endorsement is required for transferring negotiable instrument. (Art. 27). Endorsement must include signatures or seals of endorser and endorsee, and date of endorsement. (Arts. 27, 29). Every successor of negotiable instrument should make sure that contents of its direct predecessor's endorsement are true. (Art. 32). Endorsement with any kind of condition is ineffective, and endorsement by which money is only partially transferred or money is transferred to two or more persons is also ineffective. (Art. 33).

Acceptance.

Provisions on acceptance apply only to bills of exchange and require holder to present for honour. (Arts. 38, 81, 94).

Warranty.

Provisions on warranty apply only to bills of exchange and promissory notes. (Arts. 45, 81). Following items must be recorded on bill or note: words like “bill of exchange” or “promissory note”, name and domicile of warrantor, name of warrantee, date of warranty, and signature or seal of warrantor. (Art. 46). Warranty cannot be attached with any conditions, and any condition attached to warranty will not affect liability of warranty. (Art. 48). Warrantor and warrantee share joint and several liability to holder of bill or note. (Art. 50). After discharging debt, warrantor has recourse to warrantee and its predecessors.

Payment.

Holder of bill of exchange payable at sight should present bill of exchange to payer and ask for payment within one month, and holder of other bills of exchange should make presentment within ten days after due date. (Art. 53). Payer must pay fully on day of holder's presentment. (Art. 54). Drawer of promissory note must pay holder, not more than two months after date holder presents promissory note. (Art. 78). Holder of promissory note will be deprived of recourse to all predecessors except drawer if it does not present promissory note according to this law. (Art. 80). Check is payable at sight and any payment date included is ineffective. (Art. 91). Holder of check should present check to payer and ask for payment within ten days from date of issue. (Art. 92). After payment, negotiable instrument should go to payer. (Art. 55). Before payment, payer should examine endorsements, holder's legal identification or other effective certificates. (Art. 57). After payment, all liabilities of negotiable instrument are canceled. (Art. 60).

Recourse.

If past due negotiable instrument is dishonoured, holder can have recourse against endorser, drawer, and other debtors of negotiable instrument. (Art. 61). Holder should provide protest or other documents verifying protest. (Art. 62).

Applicable Law of Negotiable Instruments Involving Foreign Elements.

Negotiable instrument involving foreign elements refers to negotiable instrument where some of elements—issue, endorsement, acceptance, warranty and payment—take place in China and some in foreign country. (Art. 95). Where there are conflicts between this law and treaties which China has concluded or acceded to, provisions of treaty will prevail, unless reservations to treaty have been made. (Art. 96). If there are no provisions in either this law or treaties to which China is party, then customary international practice will be applicable. (Art. 96). Arts. 97 through 101 specify applicable law governing civil capacity, required items recorded on instrument, endorsement, recourse, and terms of presentment, dishonour and protest.

Supplementary Provisions.

Terms in this law should be calculated according to provisions in General Rules of Civil Law. (Art. 107). PBC provides unified forms, printing procedures, and management procedures of negotiable instruments. (Art. 108). Rules for Implementation of the Negotiable Instruments Law will be made by People's Bank of China and approved by State Council. (Art. 109).

3.05 COMMERCIAL CODE:

No commercial code exists per se: commercial transactions governed by laws applicable type of transaction; Civil Code contains important provisions.

3.06 COMMERCIAL REGISTER:

See categories 2 Business Organizations, topics Corporations, Joint Stock Companies; Citizenship, topic Aliens.

Measures for Implementation of Management of Enterprise Name Registration has been revised by decision of Administration Affairs Meeting of General Administration of Industry and Commerce (GAIC), effective as of July 1, 2004.

Chapter One.

General Principles.

Measures are formulated in accordance with Regulations for Management of Enterprise Name Registration, relevant laws, administrative regulations. (Art. 1).Measures are applicable to names of corporate legal persons registered by GAIC and those enterprises not legal persons. (Art. 2). Enterprise is entitled to right of name as of date of incorporation. (Art. 3). All levels of AIC should verify name of registered enterprise pursuant to laws. (Art. 4). SAIC with power to verify registration of foreign invested enterprises shall verify name of foreign invested enterprises. (Art. 5).

Chapter Two.

Enterprise Name.

No other legal person's name shall be used in corporate legal person's name. (Art. 6). Another enterprise's name shall not be comprised in enterprise name. Branch of enterprise shall be named as its superior enterprise. (Art. 7). Enterprise name should employ Chinese characters that comply with national standard; no Chinese pinyin letters or Arabic numbers shall be used. Enterprises may translate, pursuant to literal translation principles, their enterprise names that need to be translated into foreign language. (Art. 8). Enterprise name should be composed in orders of administrative region, name, industry, form of organization, unless otherwise provided by laws, administrative regulations, these measures. (Art. 9).

Except for enterprises established by decision of State Council, no enterprise name shall include words like “China”, “Chinese”, “National”, “State”, “International”. Words like “China”, “Chinese”, “National”, “State”, “International” used in enterprise name shall only be employed as words that define industry. Solely-invested foreign enterprises, foreign-invested enterprises that use name of foreign (region) in their name may use word “(China)” in their enterprise names. (Art. 10).

3.07 CONSUMER PROTECTION:

Provisional Regulations Governing Inspection and Testing of Import and Export Commodities were promulgated as of Jan. 3, 1954. State Council replaced said Regulations on Jan. 28, 1984 with Regulations on Inspection of Import and Export Commodities. These latter regulations were also later replaced by Laws on Inspection of Import and Export Commodities, adopted on Feb. 21, 1989, effective Aug. 1, 1989.

Goods sold by state organizations, as well as those imported, are subject to inspection by Import and Export Commodity Inspection Bureau. There are 29 bureaus in all provinces except Taiwan, municipalities directly under central government (Beijing, Shanghai, Tianjin) and autonomous regions. Role of Bureau is to undertake inspection of goods being exported and imported to ensure quality control, so that goods meet national standards and conform to contractual specifications. Other bureaus provide protection: Bureau of Weights and Measures, Animal and Plant Quarantine Center for quarantine of imported plants and animals, Ministry of Health responsible for inspecting imported food-stuffs and drugs, Ship Inspection Bureau responsible for inspecting ships, etc., and Import and Export Commodity Bureau with right to inspect certain commodities specified in “List of Commodities Subject to Inspection”, 196 in number, as well as right to inspect animal products and foodstuffs subject to inspection.

State Council will establish Inspection of Import and Export Commodities Department. (Art. 2). Violators of regulations fined by Commodity Inspection Organization; in cases resulting in serious loss, responsible party will be penalized according to Art. 187 of Criminal Code. (Art. 26). Work of National Bureau of Standards is being expanded to include development of standards at each level of production pursuant to Regulations Governing Standardization promulgated by State Council on July 31, 1979.

Product Quality Law adopted by NPC Feb. 22, 1993, effective Sept. 1, 1993. Amended by Standing Committee of NPC on July 8, 2000.

General Provisions.

Producer or seller must establish and improve internal product quality management system and implement job quality specifications, quality liability and connected assessment measures strictly. (Art. 3). Product must be genuine and conform to description. (Art. 5). State Council's supervisory department for product quality is in charge of product quality supervision work throughout country.

Product Quality Supervision.

Product quality is inspected and must be acceptable; nonconforming product may not be passed off as acceptable product. (Art. 12). State adopts policy of spot checking products. Supervisory spot check work is planned and organized by State Council's supervisory department for product quality. Local supervisory departments for product quality at or above county level may also organize supervisory spot check within their respective administrative areas. If any other law provides otherwise on supervisory inspection over product quality, provisions of said law govern. (Art. 15). No producer or seller may refuse supervisory inspection imposed on product quality according to law. (Art. 16).

If quality of product fails to pass supervisory spot check imposed according to provisions of this law, supervisory department for product quality which imposes supervisory spot check orders producer or seller to make corrections within given time limit. Failure to comply results in public announcement. If quality fails to pass re-inspection after announcement, producer is ordered to suspend for rectification within given time limit; and if quality still fails to pass re-inspection at expiry of given time limit, his business license is revoked. Where any product is found through supervision and random inspection to be seriously defective in quality, producer or seller shall be penalized in accordance with relevant provisions. (Art. 17). Consumers have right to make inquiries to producers and sellers about product quality; and to make complaints to supervisory departments for product quality, administrative departments for industry and commerce and relevant departments. Departments, which accept complaints, must be responsible for handling. (Art. 22).

Producer's Liability and Commitment for Product Quality.

Producers liable for quality of products and warrant the following: (1) Free from unreasonable damages to personal or property safety and conforming to national and or sector standards for safeguarding health, personal or property standards; (2) possession of properties and functions for use that they ought to possess; (3) conform to product standards marked on product or on package and to quality conditions indicated by way of product directions and physical sample. (Art. 26). Every identification on product or on package must be authentic and has to have certificate showing that product has passed quality inspection, name of product and name and address of manufacturer factory in Chinese language, specifications and grade of product and date of production and period of safe use, product which may cause damage to product itself or endanger person or property safety due to improper use shall bear either warning mark or warning instructions in Chinese. (Art. 27).

Sellers' Liability and Commitment for Product Quality.

Sellers must set up and implement acceptance inspection system when they receive products and examine quality certificate and other identifications of products. (Art. 33).

Liability for Damage.

Seller liable for repair, replacement, refund, and for personal injury if product causes damage to consumer. Seller may have recourse against up-stream producer or supplier, but latter have defenses. (Arts. 40-46).

Penalty Provisions.

Any seller or producer who acts against Articles of Production law can be fined exceeding 50% but not exceeding three times of value amount of product illegally produced or sold, monetary fined from RMB 10,000 to 100,000 or revocation of business license. (Arts. 49-72).

Provisions on the Handling of Appeals on Product Quality.

Provisions were enacted pursuant to Product Quality Law of People's Republic of China on Mar. 12, 1998 by State Technology Supervision Bureau and became effective as of same day.

Product Liability Law of PRC enacted by NPC on Feb. 22, 1993, effective on Sept. 1, 1993. Seller is liable for repair, exchange, and return of goods sold, or injuries or damages caused by goods sold, if no direction of use was included, or goods failed standard printed on package, or were not consistent with sample displayed to show intended quality. (Art. 28). Seller may subsequently seek recovery from manufacturer or another seller from whom it purchased goods for resale. (Art. 31). Victim of bodily injuries or property damages caused by defective products may pursue liability from either manufacturer or seller. Seller shall undertake liability if it cannot identify producer or supplier of defective goods. (Art. 30). Statute of limitations for product liabilities is two years, starting from date when victim knew or should have known of infringement of its interest. (Art. 33).

Consumer's Right of Protection Law of PRC was enacted by NPC on Oct. 31, 1993, effective as of Jan. 1, 1994. Consumers are granted right to safe commodities or services (Art. 7), right to know true condition of goods purchased or used, and service accepted (Art. 8), right to choose at discretion goods or services (Art. 9), right to fair trade (Art. 10), right to recovery for injuries or damages caused by goods or service (Art. 11), etc. On other hand, seller is obligated to offer goods or services which satisfy requirements for safety (Art. 18), obligation to disclose to customers true information, especially price, of goods without misrepresentation or misleading inducement (Art. 19), obligation to provide invoices or receipts (Art. 21), obligation not to make unreasonable disclaimer of its liabilities (Art. 24), etc. In order to solve disputes with sellers, customers may resort to reconciliation with sellers, mediation by Consumer Protection Association, adjudication by relevant administrative agencies, arbitration under arbitration provision in contract, or litigation by court. (Art. 34).

Dispute Settlement.

Consumers may resolve their disputes in following manner: (1) Discuss with operators; (2) apply for mediation to Consumers Association; (3) complain to relevant administrative departments; (4) submit to arbitration tribunal in accordance with arbitration agreement; and (5) initiate litigation in court of law. (Art. 34). Where consumers suffer injuries to their legal rights and interests in purchasing or using commodities, they are entitled to claim damages against sellers. (Art. 35). Should liabilities be attributable to manufacturers or other sellers at upper level, they may have recourse against manufacturers or other sellers at upper level. (Art. 35). Where consumers or other victims suffer injuries to body or property due to defective commodities, they may claim damages against sellers or manufacturers. (Art. 35). Should manufacturers compensate consumers first and sellers are found liable, they may have recourse against seller or vice versa. (Art. 35). Arts. 36-39 provide relief for specific situations.

On Mar. 15, 1997, State Administration of Industry and Commerce promulgated Implementing Measures for Offices of Administration of Industry and Commerce on Handling Complaints Brought by Consumers. AIC has jurisdiction over consumers' complaints. (Art. 3). For simple complaints, consumer can make oral report and AIC can record complaint and make report. (Art. 6). In dispute, both sides can go to AIC for hearing. (Art. 6). If AIC finds that retailer violated regulations, AIC can dispense punishment based on law if case is under its jurisdiction. (Art. 11). If it is not in AIC's jurisdiction, case should be turned over to organization with proper legal jurisdiction.

3.08 CONTRACTS:

Contract Law of the People's Republic of China.

On Mar. 15, 1999 Ninth National People's Congress of People's Republic of China adopted Contract Law of the People's Republic of China. This contract law became effective as of Oct. 1, 1999 and replaced old Economic Contract Law, Law of the People's Republic of China on Economic Contracts Involving Foreign Interests and Law of the People's Republic of China on Technology Contracts. This Contract Law introduces principle of respect for will of contracting parties and many other new features.

Unified Contract Law (UCL) heavily influenced by Convention on International Sale of

Goods (CISG) of which China is signatory. As UCL does not differ substantially from internationally accepted contract principles, and detailed discussion follows. It is available on the Internet at http://www.chinadaily.com.cn.

Formation of Contracts.

(1) Form of Contract.

Parties may conclude contract in written, oral or other form. Where laws or administrative regulations require contract to be concluded in written form, contract shall be in written form. Written form of contracts include forms which can show described contents visibly, such as written contractual agreement, letters, and data-telex (including telegram, telex, fax, EDI and e-mails). (Art. 11). Contract Law expanded to meet needs of economic and technological development.

(2) Offer and Acceptance.

Contract Law introduces traditional concepts of offer and acceptance. (Arts. 14-33).

(3) Standard terms are clauses which are prepared in advance for general and repeated use by one party and which are not negotiated with other party when concluding contract. Where standard terms are adopted in concluded contract, party which supplies standard terms shall define rights and obligations between parties abiding by principle of fairness, and request other party to note exclusion or restriction of its liabilities in reasonable ways, and explain standard terms according to requirements of other party. (Art. 39). Where standard terms are as stipulated in Arts. 52 and 53 of this law (see below), or party which supplies standard terms unreasonably or unfairly exempts itself from its liabilities, regulates liabilities of other party, or excludes rights of other party, terms shall be null and void. (Art. 40). If dispute over meaning of standard terms occurs, it shall be interpreted according to its usual meaning. Where there are two or more interpretations, interpretation unfavourable to party supplying standard terms shall be preferred. Where standard terms are inconsistent with nonstandard terms, latter shall be adopted. (Art. 41).

(4) Faults in Concluding Contracts.

Party shall be liable for damages if it is concluded under one of following circumstances party caused losses to other party: (a) When disguising and pretending to conclude contract, and negotiating in bad faith; (b) when deliberately concealing important facts relating to conclusion of contract or deliberately providing false information; (c) when performing other acts which violate principle of good faith. (Art. 42). Any business secret related to party while concluding contract shall not be disclosed or unfairly used, regardless of whether contract is established or not. Party who causes other party to suffer loss due to disclosure, or unfair use, of business secret shall be liable for damages. (Art. 43).

Effectiveness of Contracts.

(1) Void Contracts.

Provisions contained in Art. 52.

(2) Revocable and Alterable Contracts.

Party shall have right to request court, or arbitration institution, to modify or revoke following contracts: (a) Those concluded as result of serious misunderstanding; (b) those that are obviously unfair at time of conclusion of contract. If contract is concluded by one party against other party's true intent through use of fraud, coercion or exploitation of other party's unfavourable position, injured party shall have right to request court, or arbitration institution, to modify or revoke it. Where party requests modification, court or arbitration institution, may not revoke contract. (Art. 54). This clause embodies principle of respect for will of contracting parties. Right to revoke contract shall be lost under any of following circumstances: (a) Where party having right to revoke contract fails to exercise right within one year from day that it knew or should have known of circumstances allowing revocation; (b) where party having right to revoke contract explicitly expresses or conducts act to waive right after it is aware of circumstances allowing revocation. (Art. 55).

(3) Consequences of Void or Revoked Contracts.

If contract is null and void, revoked or terminated, it shall not affect validity of dispute settlement clause which exists independently in contract. (Art. 57). Any property acquired as result of such contract shall be returned after contract is determined to be null and void or has been revoked; where property cannot be returned or its return is unnecessary, party shall be reimbursed with its estimated price. Party at fault shall compensate other party for losses incurred as result therefrom. If both parties are at fault, each party shall be liable for their respective faults. (Art. 58). If parties have maliciously concluded to damage interest of State, collective or third party, property thus acquired shall be turned over to State or returned to collective or third party. (Art. 59).

Performance of Contracts.

Rights of Defense.

Contract Law stipulates three kinds of rights of defense. If both parties have obligations under concluded contract towards each other, and there is no order of priority in respect of performance of such obligations, parties shall perform obligations simultaneously. Party has right to reject other party's request for performance before other party's performance. Party also has right to reject other party's corresponding request for performance if other party's performance does not meet terms of contract. (Art. 66). This is first right of defense. Where both parties have obligations towards each other and there is order of priority in respect of performance, and party which shall render its performance first has not rendered that performance, then party which may render its performance subsequently has right to reject other party's request for its performance. Where party which shall render its performance first violates terms of contract while fulfilling its obligations, party which may render its performance subsequently has right to reject other party's corresponding request for performance. (Art. 67). This is second right of defense. Party required to perform its obligations first may suspend its performance if it possesses conclusive evidence establishing that other party is in any of following circumstances: (i) Its business has seriously deteriorated; (ii) it has engaged in transfer of assets or withdrawal of funds for purpose of evading debts; (iii) it has lost its business credibility; (iv) it is in any other circumstance which will or may cause it to lose its ability to perform its obligations. Where party suspends performance without possessing conclusive evidence, it shall be liable for breach of contract. (Art. 68). This is third right of defense. If party suspends its performance, it shall notify other party in timely fashion. If other party gives appropriate assurance with respect to its performance, party shall resume performance. After performance is suspended, if other party fails to regain its ability to perform and fails to give appropriate assurance within reasonable period, suspending party may terminate contract. (Art. 69).

(2) Subrogation and Limitation.

Provisions contained in Art. 73.

(3) Right to Cancel Manifestly Unreasonable Act.

Where obligor has waived its creditor's right against third person or assigned property without reward, thereby harming obligee, obligee may petition People's Court for cancellation of obligor's act. Where obligor has assigned property at low price which is manifestly unreasonable, thereby harming obligee, and assignee is aware of situation, obligee may also petition People's Court for cancellation of obligor's act. Scope of this cancellation right is limited to extent of obligee's right to performance. Necessary expenses for obligee's exercise of its cancellation right shall be borne by obligor. (Art. 74). Cancellation right shall be exercised within one year, commencing on date when obligee became, or should have become, aware of cause for cancellation. Cancellation right is expired if not exercised within five years, such period commencing on date of occurrence of obligor's act. (Art. 75).

Modification and Transfer of Contract.

Obligee may assign its rights under contract in whole or in part to third person, except where such assignment is prohibited: (i) In light of nature of contract; (ii) by agreement between parties; (iii) by law. (Art. 79). Where obligee is to assign its rights, it shall notify obligor. Such assignment is not binding upon obligor if notice was not given. Notice of assignment of rights given by obligee may not be revoked, except where consent of assignee has been obtained. (Art. 80). Where obligor delegates its obligations under contract in whole or in part to third person, such delegation is subject to consent of obligee. (Art. 84).

Termination of Contracts.

(1) Conditions for Discharge of Rights and Obligations.

Provisions contained in Art. 91.

(2) Right to Terminate Contract.

Provisions contained in Arts. 94-95.

(3) Escrow.

Where any of following circumstances renders performance difficult, obligor may place subject matter in escrow: (i) Where obligee has refused to take delivery of subject matter without good cause; (ii) where obligee cannot be located; (iii) where obligee is deceased or incapacitated, and heir or guardian is not determined; (iv) where any other circumstance provided by law has occurred. Where subject matter is not suitable for escrow, or escrow expenses will be excessive, obligor may auction or liquidate subject matter and place proceeds in escrow. (Art. 101). Once subject matter is in escrow, obligor shall timely notify obligee or his heir or guardian, except where obligee cannot be located. (Art. 102). Obligee may take delivery of subject matter in escrow at any time, provided that if obligee is required to provide performance for obligor and that performance is due, then prior to obligee's performance or giving of assurance, escrow agent, at request of obligor, shall reject obligee's demand for delivery of subject matter in escrow. Right of obligee to take delivery of subject matter in escrow is extinguished if not exercised within five years, such period commencing on date when subject matter was placed in escrow. After deduction of escrow expenses, subject matter in escrow shall revert to state where right to take delivery is extinguished. (Art. 104).

Liabilities for Breach of Contracts.

(1) Damages.

Arts. 113-114 state general rule that party recovers actual loss; recovery cannot exceed that which was not foreseeable by breaching party at time of conclusion of contract. Liquidated damages are allowed.

UCL also provides special rules for particular contracts: (1) Sales contract, (2) Power supply contract, (3) Gift contract, (4) Contracts for loan of money, (5) Leasing contract, (6) Financial leasing contract, (7) Work-for-Hire contracts, (8) Construction contracts, (9) Transportation contract, (10) Technology contract, (11) Safekeeping contract, (12) Warehousing contract, (13) Agency appointment contract, (14) Trading Trust contract, and (15) Brokerage contract.

3.09 FACTORS:

No private commission merchants function publicly. State stores provide outlets for citizens' used items, particularly antiques, jewelry and precious metals.

3.10 FRAUDS, STATUTE OF:

See topic 3.08 Contracts; category 23 Property, topic 23.11 Real Property.

Contracts generally need not be in written form UCL provides that contracts may be in written, oral or other forms. However, law or regulation may require writing. (Art. 10). Writing includes any medium in which communication or data is recorded, stored and retrievable. (Art. 11). Following contracts must be in written form: technological contracts, foreign economic contracts, house-lease contracts, contracts for land and real estate transfer, construction, installation engineering contracts, contracts for storage and safekeeping, mortgage contracts, insurance contracts and loan contracts.

Notary must certify certain contracts: where title to buildings, or where building rights are conveyed. These contracts also require registration. Normally all international commercial contracts are evidenced by writing as matter of practice.

3.11 INFORMATION TECHNOLOGY, INTERNET AND NEW MEDIA:

Electronic Signatures Law adopted State Council on Aug. 28, 2004, effective as of Apr. 1, 2005.

This law is made in order to regulate electronic signatures, to validate legal effect of electronic signatures, to protect legal rights of involved party. (Art. 1). A reliable electronic signature has same effect as signature made by hand or seal. Electronic signatures refer to data included, attached in electronic data for identification of signer, for proof that signer agrees with included contents. (Art. 2). Electronic data refers to information created, sent, received, preserved via electronic, optical, magnetic tools or similar media. (Art. 2). For contracts or other files such as documents, certificates of civil activities, parties may agree to use or not to use electronic signatures, electronic data. If parties agree to use contracts with electronic signatures, electronic data, legal effect of contracts may not be denied solely because of electronic form of signatures or of data.

Law excludes legal documents concerning personal relationships such as matrimony, adoption, inheritance; concerning trade of immovable estates such as land, domiciles; concerning termination of public services such as supply of water, heat, gas, electricity; concerning other inapplicable situations regulated by law or administrative regulations. (Art. 3).

“Electronic signer” refers to person holding data that created electronic signatures, implementing electronic signatures for oneself or on behalf of others; “Party dependent on electronic signatures” refers to person undertaking relevant activities on basis of trust, reliance in certificate of verified electronic signatures, electronic signatures; “Certificate of verified electronic signatures” refers to electronic data or other electronic records that can verify relationship between electronic signer and data that created electronic signatures; “Data that created electronic signatures” refers to data of characters, codes that reliably associate electronic signatures with electronic signer in process of signing; “Verifying data of electronic signatures” refers to data used for verifying electronic signatures, including codes, passwords, algorithms, public keys. (Art. 34).

Electronic data is considered transmitted by sender when any of following conditions applies: transfer of electronic data is authorized by sender; electronic data are automatically transferred by sender's information system; receiver verifies electronic data according to method approved by addresser. (Art. 9).

Electronic signatures are considered reliable, when all of following conditions are satisfied: data that create electronic signatures are owned only by signer when being used for electronic signatures; data that create electronic signatures may only be controlled by electronic signer at time he is creating signatures; any alteration made to electronic signatures after signing is discernable; any alteration made to contents and format of electronic data is discernable. Parties may also choose to use electronic signatures that satisfy their own reliability requirements. (Art. 13). Legal effect of reliable electronic signatures is same as that of signatures made by hand or seal. (Art. 14).

Signer of electronic signatures shall keep custody of data that creates electronic signatures. If electronic signer learns that data that created electronic signatures are already deciphered or might be deciphered, he shall inform every involved party in timely manner and terminate use of data. (Art. 15). When electronic signatures need verification from third party, such verification services shall be provided by lawful electronic verification service providers. (Art. 16).

Providers shall satisfy following conditions in order to be able to provide electronic verification services: proof of adequate technical and administrative staff for provision of electronic verification services; sufficient capital and business sites appropriate for providing electronic verification services; equipped with technologies and facilities meeting national safety standards; possession of documentary proof from State Encryption Management Committee authorizing use of passwords. (Art. 17).

Application is submitted to agency appointed by State Council for approval. Agency is that in charge of information services. Decision taken within 45 days from submission of application. If approved, agency sends Permit of Electronic Verification Services to applicant; or written notice of rejection. Applicant begins business registration procedures with AIC by presenting Permit of Electronic Verification Services.

Electronic verification service providers who are deemed qualified to provide verification services shall publish information such as their name, permit number on Internet pursuant to requirements of agency in charge of information industries under State Council. (Art. 18).

Electronic verification service provider shall guarantee completeness, accurateness of certificate of verified electronic signatures during period of validity, shall guarantee that contents conveyed by certificate and other issues are verifiable, understandable to party dependent on electronic signatures. (Art. 22).

Electronic verification service provider shall keep custody of information relevant to verification for at least five years beyond expiration date of certificate of verified electronic signatures. (Art. 24).

Agency in charge of information industries under State Council shall draft detailed administrative measures for electronic verification services industry, shall enforce oversight, management of electronic verification service providers. (Art. 25).

With approval by agency in charge of information industries under State Council pursuant to relevant protocols or with principle of reciprocity, certificates of verified electronic signatures issued abroad by foreign electronic verification service providers have same legal effect as those issued by electronic verification service providers authorized by this law. (Art. 26).

Person using electronic signature may be liable in damages to relevant parties if error causing damage is attributable to action or omission of person using electronic signature. (Art. 27). If fault is due to provider, provider may be liable in damages. (Art. 28)

If electronic verifications service provider fails to report to agency in charge of information industries under State Council 60 days prior to when services are temporarily discontinued or terminated, agency in charge of information industries will impose fine of between RMB 10,000 and 50,000 on chief manager who has direct responsibility. (Art. 30). Licence may be revoked for other reasons as specified in Art. 31.

Those who forge, imitate, or misappropriate electronic signatures of others may be criminally responsible; or civilly liable if damages are incurred by others. (Art. 32).

3.12 INTEREST:

Interest is charged by BoC and all other Chinese banks on loans they extend, and interest is given to those maintaining savings accounts with relevant banks in China. Chinese organizations borrowing money from foreign banks likewise pay interest, often at commercial rates.

3.13 LICENSES, BUSINESS AND PROFESSIONAL:

See topic 3.08 Contracts; categories 2 Business Organizations, topics Corporations, Joint Stock Companies; Intellectual Property, topic Patents.

3.14 MONOPOLIES, RESTRAINT OF TRADE AND COMPETITION:

Tobacco Monopoly.

Chinese government monopolises tobacco industry. The Tobacco Monopoly Law of China, adopted at 20th Session of the Standing Committee of the NPC on June 29, 1991. Tobacco monopoly includes cigarettes, cigars, pipe tobacco, flue-cured tobacco, tobacco leaf, cigarette paper and filters, cigarette manufacturing equipment, etc. (Art. 2). Regulations for Implementation of Tobacco Monopoly Law of China were promulgated by State Council on July 3, 1997. “Tobacco monopoly” means that State shall exercise monopoly operation and uniform management over production, sale, import and export of tobacco monopoly commodities. (Art. 2).

State monopolises production, sale, import and export of tobacco industry. It carries out licensing system for tobacco monopoly. (Art. 3). Tobacco Monopoly Administration Management Bureau under State Council is responsible for work of tobacco monopoly on national level. (Art. 4). Enterprises, foreign and domestic, seeking to engage in any aspect of production, import or sale, wholesale and retail, of tobacco are subject to licensing and registration requirements. It is prohibited to broadcast or print any advertisement involving tobacco products. (Art. 19) and government dictates tar and nicotine content.

To obtain special license for tobacco monopoly operation, enterprise shall satisfy following four conditions: (1) Possess capital adapted to tobacco monopoly operation; (2) possess fixed business place and necessary professional personnel; (3) comply with rational distribution of business operation of foreign tobacco monopoly; (4) comply with other conditions stipulated by department of tobacco monopoly administration under State Council. (Art. 10).

To obtain special license for tobacco monopoly operation, and engage in import and export of tobacco products and purchase and sale of foreign tobacco products, enterprise shall apply to department of tobacco monopoly administration at provincial level. Department of tobacco monopoly administration at provincial level shall issue comments and then submit to tobacco monopoly administration under State Council for approval. (Art. 15).

Cigarettes and cigars sold in China should mark “the content of tar” and “smoking is hazardous to health” in Chinese on individual packages and whole packages. (Art. 29).

Economic Combination and Socialist Competition.

Provisional Regulations Concerning the Promotion of Economic Combination, adopted by State Council on July 1, 1980, designed to encourage certain types of economic combination. These Regulations, particularly applicable to state enterprises, encourage voluntary participation in economic combinations. Combination of various enterprises not restricted by trades, territory or ownership, or relationship of subordination. (Prov. Regs. Promotion Economic Combination, Art. 1).

However, Provisional Regulations Concerning the Development and Protection of Socialist Competition, adopted by State Council on Oct. 17, 1980, are designed to promote competition. To that end, these Regulations provide that enterprise must be granted greater power to make its own decisions (Art. 2) without interference of local authorities or departments in rights to which enterprise entitled by law, particularly regarding production, supply and marketing, personnel, finance and materials. Agreements and contracts between enterprises must be honored by both parties and protected by laws of state. While Regulations give priority to production for Plan targets, enterprises may market products in excess of Plan targets for those allocated for state use. (Art. 4). Departments not permitted to forbid sale of outside products in own locality or department, and regional monopoly should be restrained. (Art. 6). Compensation should be made for transfer or possession of important technological achievements to encourage technological innovation and inventions. (Art. 7).

Anti-monopoly Law was adopted by National People's Congress on Aug. 30, 2007, effective Aug. 1, 2008. Purpose of Law is to guard against and curb monopolistic conduct, protect fair market competition, enhance economic efficiency, maintain consumer interests and public interests, and promote healthy development of socialist market economy. (Art. 1).

Law regulates monopolistic conduct within territory of China, and monopolistic conduct outside territory of China that has effect of eliminating or restricting competition on domestic market. (Art. 2).

Term “monopolistic conduct” includes: (1) Monopoly agreements reached between business operators; (2) abuse of dominant market status by business operators; and (3) concentration of business operators that may have effect of eliminating or restricting competition. (Art. 3).

Term “business operator” refers to natural person, legal person, or any other organization that engages in production or business of commodities or provides services. (Art. 12).

State Council will establish Anti-monopoly Committee, which will be responsible for organizing, coordinating and guiding anti-monopoly work and performing following functions: (1) Studying and drafting relevant competition policies; (2) organizing investigation and assessment of overall competition situations, and releasing assessment reports; (3) formulating and releasing anti-monopoly guidelines; (4) coordinating anti-monopoly administrative law enforcement; and (5) other functions assigned by State Council. (Art. 9).

Business operators are prohibited from reaching any of following monopoly agreements with each other: (1) Fixing or changing price of commodities; (2) restricting production quantity or sales volume of commodities; (3) dividing sales market or raw material procurement market; (4) restricting purchase of new technology or new facilities or development of new technology or new products; (5) conducting boycott transactions; or (6) other monopoly agreements as determined by Anti-monopoly Law Enforcement Agency under State Council. (Art. 13).

Generally, term “monopoly agreements” refers to agreements, decisions or other concerted behaviours that eliminate or restrict competition. (Art. 13).

Exceptions can be obtained in following situations: (1) For purpose of improving technologies, researching and developing new products; (2) for purpose of upgrading product quality, reducing costs, improving efficiency, unifying product specifications or standards, or carrying out professional labor division; (3) for purpose of enhancing operational efficiency and reinforcing competitiveness of small and medium-sized business operators; (4) for purpose of realizing public interests such as conserving energy, protecting environment and providing disaster relief, etc.; (5) for purpose of mitigating severe decrease of sales volume or obviously excessive production during economic recessions; (6) for purpose of protecting justifiable interests in foreign trade or foreign economic cooperation; or (7) other circumstances prescribed by law or State Council. (Art. 15).

Business operators with dominant market status are prohibited from committing any of following abusive acts of dominant market status: (1) Selling products at unfairly high prices or buying products at unfairly low prices; (2) selling products at prices below cost without any justifiable cause; (3) refusing to trade with trading party without any justifiable cause; (4) restricting their trading party so that it may conduct deals exclusively with themselves or with designated business operators without any justifiable cause; (5) implementing tie-in sales or imposing other unreasonable trading conditions at time of trading without any justifiable cause; (6) applying discriminatory treatments on trading prices or other trading conditions to their trading parties with equal standing without any justifiable cause; or (7) other forms of abusing dominant market status as determined by Anti-monopoly Law Enforcement Agency under State Council.

Term “dominant market status” refers to market status held by business operators that can control price or quantity of commodities or other trading conditions in relevant market or can block or affect entry of other business operators into relevant market. (Art. 17).

Term “relevant market” refers to commodity scope or territorial scope within which business operators compete against each other during certain period of time for specific commodities or services (hereinafter referred to as “commodities”). (Art. 12).

Dominant market status shall be determined according to following factors: (1) Market share of business operator and its competitive situation in relevant market; (2) ability of business operator to control sales market or raw material procurement market; (3) financial and technical conditions of business operator; (4) extent of reliance on business operator by other business operators in transactions; (5) degree of difficulty for other business operators to enter relevant market; and (6) other factors relevant to determination of dominant market status of said business operator. (Art. 18).

Business operators may be presumed to have dominant market status in following: (1) Market share of one business operator accounts for ½ or more in relevant market; (2) joint market share of two business operators accounts for 2/3 or more in relevant market; or (3) joint market share of three business operators accounts for ¾ or more in relevant market.

Under circumstance prescribed in Item 2 or 3 of previous paragraph, if any of business operators has market share of less than 1/10, that business operator shall not be considered to have dominant market status. (Art. 19).

“Concentration of business operators” refers to any of following circumstances: (1) Merger of business operators; (2) business operator acquires control over other business operators by acquiring their equities or assets; or (3) business operator acquires control over other business operators or is able to exert decisive influence on other business operators by contract or any other means. (Art. 20).

Business operators shall declare in advance concentration reaching threshold of declaration prescribed by State Council to Anti-monopoly Law Enforcement Agency, and otherwise, they shall not implement concentration. (Art. 21).

To make concentration declaration to Anti-monopoly Law Enforcement Agency under State Council, business operators shall submit following documents and materials: (1) Declaration paper; (2) explanations on effects of concentration on relevant market competition situations; (3) concentration agreement; (4) financial and accounting reports for previous fiscal year of business operators involved in concentration, as audited by accounting firm; and (5) other documents and materials as required by Anti-monopoly Law Enforcement Agency under State Council. (Art. 23).

Anti-monopoly Law Enforcement Agency under State Council shall, within 30 days upon receipt of documents and materials submitted by business operators, conduct preliminary examination of declared concentration of business operators, make decision on whether to conduct further examination or not, and notify business operators of that decision in written form. Business operators shall not implement concentration until Anti-monopoly Law Enforcement Agency under State Council makes such decision. (Art. 25).

Where Anti-monopoly Law Enforcement Agency under State Council decides to conduct further examination, it shall, within 90 days from date of decision, complete examination, make decision on whether to prohibit concentration, and notify business operators concerned of decision in written form. If Anti-monopoly Law Enforcement Agency under State Council decides to prohibit concentration, it shall explain reasons. Business operators shall refrain from implementing concentration within period of examination. (Art. 26).

Following factors shall be taken into account in examination of concentration of business operators: (1) Involved business operators' market share in relevant market and their controlling power over that market; (2) degree of market concentration in relevant market; (3) impact of concentration of business operators on market access and technological progress; (4) impact of concentration of business operators on consumers and other business operators; (5) impact of concentration of business operators on national economic development; and (6) other factors that may affect market competition and shall be considered as deemed by Anti-monopoly Law Enforcement Agency under State Council. (Art. 27).

Where concentration of business operators will or may eliminate or restrict competition, Anti-monopoly Law Enforcement Agency under State Council shall make decision to prohibit concentration. However, if business operators concerned can prove either that favorable impact of concentration on competition obviously exceeds adverse impact, or that concentration is in harmony with public interests, Anti-monopoly Law Enforcement Agency under State Council may decide not to prohibit concentration. (Art. 28).

Penalties for violation of Law are as follows: (1) Monopoly agreement: stop order of violation, confiscate illegal gains and impose fine of 1% to 10% of sales revenue in previous year. Where monopoly agreement has not been carried out, fine of less than RMB 500,000 may be imposed (Art. 46); (2) abuse of dominant market status: stop order of violation, confiscate illegal gains, and impose fine of 1% to 10% of total sales volume in previous year on them (Art. 47); and (3) concentration: stop order for concentration, dispose of shares or assets, transfer business or adopt other necessary measures to restore market situation before concentration within time limit, and may impose fine of less than RMB 500,000 (Art. 48).

Anti-unfair Competition Law was adopted by National People's Congress on Sept. 2, 1993, effective as of Dec. 1, 1993. Said law requires business operators to firmly adhere to principles of voluntariness, equality and fairness, honesty, keeping one's word and observing commonly accepted commercial ethics in conducting business transactions. (Art. 2).

Unfair Competition.

Unfair Competition refers to acts by operator which contravene provisions of law, damage lawful rights and interests of other operators, and disturb social-economic order. Operators are legal person, economic organization or individual engaging in trading of goods or profit-making services. Business operators are not allowed to employ unfair means that harm competitors in conducting market transactions as specified in Arts. 5-15.

Penalties.

Business operator must pay compensation when it has caused damage to other operators due to committing unfair competition and if damages are incalculable, amount of profits obtained by infringer during period of infringement should be paid, with reasonable fees arising from investigation. (Art. 20). Grounds for legal action and damages are specified in Arts. 21-30.

3.15 NEGOTIABLE INSTRUMENTS LAW:

See topic 3.04 Bills and Notes.

3.16 SALES:

See Contracts; category Taxation, topic Taxes.

Sales generally covered by contract law.

Price Law of People's Republic of China enacted by NPC on Dec. 29, 1997, became effective on May 1, 1998. “Price” defined to include both commodity price, which is referred to as price of tangible goods and intangible assets, and service price, which is price of all kinds of service for fees. (Art. 2). With certain exceptions, market determines prices. (Art. 3). Bank interest, exchange rates, insurance premiums, securities and price of futures are subject to other laws and regulations, and Price Law does not apply. (Art. 47).

State Council promulgated Provisional Regulations for the Administration of Commodity Prices (July 7, 1982), providing for regulations for administration for prices under State Council policies and plans. Prices established for certain industrial, agricultural commodities, and transportation. (Art. 4).

Unless there are other regulations to contrary, administration of imported and exported commodities as well as those commodities of joint venture enterprises with foreign firms, enterprises with foreign investment, and whose sold to foreigners, overseas Chinese and Hong Kong and Macao compatriots are all governed by these regulations. (Art. 26).

Advertising.

Advertisements Law of China was adopted by National People's Congress on Oct. 27, 1994, effective as of Feb. 1, 1995. Advertisements must be true and lawful and comply with principle of spiritual civilization. Advertisements must not have any false information and not mislead or defraud consumers. Advertisers, advertising agents and advertisement publishers engaged in advertising activities must follow principles of fairness, honesty and good faith. (Art. 5). “Advertiser” refers to any legal person, other economic entity or individual that designs, produces and publishes advertisements by itself or acting through agents for purpose of selling commodities or services. “Advertising agent” means any legal person, other economic entity or individual acting as agent in designing and production of advertisement. “Advertisement publisher” refers to any legal person or other economic entity publishing advertisements on behalf of advertiser or advertising agent. (Art. 2).

Advertising Guidelines.

Contents of advertisement specified in Arts. 7 through 13.

Advertisement must not belittle goods or services of other manufacturers or operators. (Art. 12).

Advertisements for Specific Products.

Advertisements relating to pharmaceuticals, medical apparatus and instruments, agricultural chemicals, tobacco subject to special regulation.

Advertising Activities.

Advertisers, advertising agents and advertisement publishers must, in their advertising activities, enter into written contracts, stipulating explicitly each party's rights and obligations. (Art. 20). No advertiser, advertising agent or advertisement publisher may resort to unfair competition of any form in their advertising activities. (Art. 21). Advertiser must, in commissioning design, production and publication of advertisements, appoint qualified and lawfully established advertising agent or advertisement publisher. (Art. 23).

Advertising charges must be reasonable and made known to public. Charge standards and measures must be registered with administrative departments in charge of price and industry and commerce authorities for record. Advertising agents and advertisement publishers must make public their charging standards and measures. (Art. 29). Advertising publishers must provide true information on media coverage, audience rate and circulation to advertisers and advertising agents. (Art. 30).

Penalties.

Art. 37 specifies powers of advertising supervision authorities to take action, including civil and criminal liability, against person that has created false and misleading publicity on goods or services.

Where publication of false and misleading advertisement affects consumers, thereby causing damages to their lawful rights and interests, advertiser has civil liabilities to consumers that are harmed. Advertising agent and publisher, who had knowledge of or should have had knowledge of falsity of contents of advertisement, are jointly liable according to law. Social organization or other organizations that recommend goods or services to consumers in false and misleading advertisement, and consequently cause damage to consumers, bear joint liabilities. (Art. 38).

Arts. 39 and 40 apply to violations of mandatory provisions of law and specify authority of advertising supervision authorities.

Additional penalties and remedies for violations. (Art. 41-44).

Methods for Examination of Qualification for Advertising Operators were promulgated by State Administration of Industry and Commerce on Nov. 3, 1997, and became effective as of Jan. 1, 1998.

International Sale of Goods.

China has ratified United Nations Convention on Contracts for the International Sale of Goods ("Sales Convention") which is now in force and effect as of Jan. 1, 1988. China had two reservations to "Sales Convention", namely Art. 1(b), which permits application of treaty beyond Contracting States via operation of law; and pursuant to Art. 96 have reserved provisions of Arts. 11, 29 or Part II that give effect to sales contracts other than in writing.

3.17 SECURITIES:

See category 2 Business Organizations, topics 2.03 Corporations, Joint Stock Companies.

Securities Market of PRC.

Two stock exchanges exist in mainland China: Shanghai Stock Exchange (SSE) and Shenzhen Stock Exchange. SSE established in 1990 as non-profit organisation and regulated by China Securities Regulatory Commission (CSRC) is largest mainland China stock exchange. It has "A" and "B" shares. "A" shares generally are restricted to domestic investors and denominated in RMB, except in 2002 foreign investors can trade in "A" shares under Qualified Institutional Investor system; "A" shares also include government issued shares. "B" shares open to all investors denominated in RMB but subscribed for in US dollars on SSE and Hong Kong dollars on Shenzhen.

SSE trades equity and debt shares, including government, corporate and convertible, and funds. In 2004, SSE had total market capitalisation of 2.6 trillion RMB. Shenzhen is second and smaller stock exchange on mainland.

Third and largest Chinese stock market is Hong Kong Stock Exchange. It has stringent listing and disclosure requirements. "H" shares also are traded on HKSE; these are shares in Chinese companies issued in China under Chinese Law. These shares are denominated in Hong Kong dollar, and trade like any other share.

In recent years, state owned companies have been encouraged to issue shares overseas. This attitude has led to creation of H & N Shares which are shares that may be held only by foreign investors and are listed on foreign stock exchanges (H shares are listed on Hong Kong Stock Exchange, and N shares are listed on New York Stock Exchange).

By approval of China Securities Regulatory Commission ("CSRC"), there are 142 law firms, 74 accounting firms and 82 asset appraisal firms which are authorized to be involved in securities business in China. These agencies of securities industry provide necessary protection for regular operation of holding companies and issuance and trading of securities.

Securities Regulations.

Laws and Rules Securities.

Framework Law governing securities in China is 1999 "Securities Law of the People's Republic of China", adopted by Sixth Session of Ninth NPC Standing Committee on Dec. 29, 1998, effective Jan. 1, 1999. It was nested within PRC Company Law. See category 2 Business Organizations, topic 2.03 Corporations, subhead Company Law.

Law was amended and adopted at 18th Meeting of Standing Committee of 10th National People's Congress of People's Republic of China on Oct. 27, 2005. Effective Jan. 1, 2006. Securities Law has 12 chapters and 240 articles. It regulates conduct in securities market including issuance of securities, securities trading, continuous disclosure, prohibited behaviour in securities trading, and takeovers. It also contains provisions relating to stock exchanges, securities companies, securities registration and settlement institutions, and securities trading service institutions, as well as provisions relating to associations of securities industry and securities regulatory institution.

General Provisions.

Parties involved in any issuance or transaction of securities must have equal legal status and must uphold principles of free will, compensation, and uprightness and creditworthiness. (Art. 4). Divided operation and management must be applied to industries of securities, banking, trust and insurance. Securities companies and business organs of banks, trust, and insurance must be separately established. (Art. 6). Under centralized and unified supervision and administration of state regarding issuance and trading of securities, securities industrial association must be established according to law, which must adopt self-regulating administration. (Art. 8). Auditing organs of state must carry out auditing supervision of securities exchanges, securities companies, securities registration and clearing institutions, and securities regulatory bodies. (Art. 9).

Issuance of Securities.

Public issuance of securities must meet requirements of relevant laws and administrative regulations, and must be reported to securities regulatory authority under State Council or any department as authorized by State Council for examination and approval according to law. Without any examination and approval according to law, no entity or individual can make public issuance of any securities. (Art. 10). Application for public offer of stocks as well as following documents must be reported to securities regulatory authority under State Council. Arts. 13, 14, 16, specify content of application that do not significantly differ from disclosure regimes. Under any of following circumstances, no more public issuance of corporate bonds may be carried out: (1) Where corporate bonds as issued in previous public issuance haven't been fully subscribed; (2) where company has any breach relating to corporate bonds as publicly issued or any other debts, or has postponed payment of relevant principal plus interests, and such situation still exists; or (3) where company violates present law by altering purpose of use of funds raised through public issuance of corporate bonds. (Art. 18). Securities regulatory authority must, within three months as of accepting application for securities issuance, make decision on approval or disapproval according to statutory requirements and procedures, but time for issuer to supplement or correct its application documents for issuance according to relevant requirements must not be calculated in aforesaid term for examination and approval. (Art. 24).

Where securities company underwrites any securities, it must conclude agreement with relevant issuer on sale by proxy or exclusive sale, which must indicate items identified in Art. 30. Any false record, misleading statement or major omission is made, no sales activity may be carried out. Any securities that have been sold out under foregoing circumstances, relevant sales activity must be immediately terminated and measures for correction must be taken. (Art. 31). When total face value of securities as issued to non-specified objects exceed RMB 50 million, securities must be underwritten by underwriting syndicate. (Art. 31). Public offer of stocks through sale by proxy, when term of sale by proxy expires and if number of stocks fails to reach 70% of planned number in public offer, it must be deemed as failure. Relevant issuer must refund issuing price plus interests as calculated at bank deposit rate for contemporary period of time to subscribers of stocks. (Art. 35).

Trading of Securities.

Fee charge for securities trading must be reasonable. Relevant administrative department of State Council must uniformly formulate charging items, rates, and administrative measures of securities trading. (Art. 46). If anyone who holds more than 5% of shares of listed company, sells stocks of company as held within six months after purchase, or purchases any stock as sold within six months thereafter, proceeds as generated therefrom must be incorporated into profits of relevant company. (Art. 47).

Joint stock limited company that applies for listing of its stocks must meet following requirements: (1) Stocks must have been publicly issued upon approval of securities regulatory authority under State Council; (2) total amount of capital stock of company must be no less than RMB 30 million; (3) shares as publicly issued must reach more than 25% of total amount of corporate shares; where total amount of capital stock of company exceeds RMB 0.4 billion, shares as publicly issued must be no less than 10% thereof; and (4) company must not have any major irregularity over last three years and there is no false record in its financial statements. (Art. 50). Document must be submitted to stock exchange. (Art. 52). Company that has concluded listing agreement has to announce following: (1) Date when stocks have been approved to be listed in stock exchange; (2) name list of top ten shareholders who hold largest number of shares in company as well as amount of stocks they hold; (3) actual controller of company; and (4) names of directors, supervisors and senior managers of company as well as relevant information on stocks and bonds of company they hold. (Art. 54). Company can be suspended, when company has been operating at loss for last three consecutive years (Art. 55) and must be terminated, when company fails to publicize its financial status according to relevant provisions or has any false record in its financial statements, and refuses to make any correction, company has been operating at loss for last three consecutive years and fails to gain profits in last year. (Art. 56). Company must, when applying for listing of corporate bonds, meet following requirements: (1) Term of corporate bonds must be more than one year; (2) amount of corporate bonds to be actually issued must be no less than RMB 50 million; and (3) company must meet statutory requirements for issuance of corporate bonds when applying for listing of its bonds. (Art. 57). Company has to report documents to stock exchange. (Art. 58). Company can be suspended from listing, when company has been operating at loss for latest two consecutive years (Art. 60) and terminated when fails to eliminate relevant consequences. (Art. 61). Any company, which is dissatisfied with decision of stock exchange on disapproving, suspending or terminating its listing, may apply to review organ as established by stock exchange for review. (Art. 62).

On-going Disclosure of Information.

Company whose shares or bonds have been listed for trading must, within two months as of end of first half of each accounting year, submit to securities regulatory authority under State Council and stock exchange midterm report indicating following contents and make public announcement for it: (1) Financial statements and business situation of company; (2) major litigation company is involved in; (3) particulars of any change concerning shares or corporate bonds thereof it has already issued; (4) important matters as submitted to general assembly of shareholders for deliberation; and (5) any other matter as prescribed by securities regulatory authority under State Council. (Art. 65). In case of major event that may considerably affect trading price of listed company's shares and that is not yet known to investors, listed company must immediately submit temporary report regarding said major event to securities regulatory authority under State Council and stock exchange, and make announcement to general public as well. (Art. 67).

Prohibited Trading Acts.

Any insider who has access to any insider information of securities trading or who has unlawfully obtained any insider information is prohibited from taking advantage of insider information he holds to engage in any securities trading. (Art. 73). Where any insider trading incurs any loss to investors, actor must make compensations. (Art. 76). When stock exchanges, securities companies, securities registration and clearing institutions, securities trading service organizations as well as their functionaries discover any prohibited activities in securities trading, they must report such activities to securities regulation body in timely manner. (Art. 84).

Acquisition of Listed Companies.

Investor may purchase listed company by means of tender offer or agreement as well as by any other legal means. (Art. 85). When investor, through securities trading at stock exchange, comes to hold individually or with any other person 5% of shares as issued by listed company by means of agreement or any other arrangement, investor must, within three days as of date when such shareholding becomes fact, submit written report to securities regulatory authority under State Council and stock exchange, notify relevant listed company and announce fact to general public. (Art. 86). Where investor holds individually or with any other person 30% of stocks as issued by listed company by means of agreement or any other arrangement through securities trading at stock exchange and continues purchase, he must issue tender offer to all shareholders of said listed company to purchase all of or part of shares of listed company. (Art. 88). Terms and conditions of acquisition, offer must apply to all shareholders of target company. (Art. 92). Upon expiration of term for acquisition, where share distribution of target company fails to meet requirements of listing, listing of stocks of said listed company must be terminated. Shareholders that still hold shares of target company have right to sell their shares in light of equal terms as stipulated in relevant tender offer, and purchaser must make purchase. When acquisition is concluded, if target company fails to meet requirements for remaining joint stock limited company anymore, its form of enterprise must be altered according to law. (Art. 97). Where acquisition is concluded, purchaser must, within 15 days, report acquisition to securities regulatory authority and must make announcement. (Art. 100).

Stock Exchanges.

Term “stock exchange” refers to legal person that provides relevant place and facilities for concentrated securities trading, organizes and supervises securities trading and applies self-regulated administration. (Art. 102). Constitution must be formulated for establishment of stock exchange. Formulation and revision of constitution of stock exchange must be subject to approval of securities regulatory authority under State Council (Art. 103) and words “stock exchange” must be indicated in name of stock exchange (Art. 104). Investor must conclude entrustment agreement with securities company on securities trading, open securities trading account in securities company and entrust securities company, in written form, by telephone or any other means, to purchase or sell securities on its behalf. (Art. 111). Stock exchange must guarantee fair centralized trading, announce up-to-minute quotations of securities trading, formulate quotation tables of securities market on basis of trading days, and make announcements for it. Without permission of stock exchange, no entity or individual may announce any up-to-minute quotations of securities trading. (Art. 113). Stock exchange must withdraw certain proportion of funds from transaction fees, membership fees and seat fees it has charged to establish risk fund (Art. 116) and must deposit its risk fund into special account of its opening bank. (Art. 117).

Securities Companies.

Establishment of securities company must be subject to examination and approval of securities regulatory authority under State Council. No entity or individual may engage in any securities operations without approval of securities regulatory authority. (Art. 122). Establishment of securities company must meet following requirements: (1) Having corporation constitution that meets relevant laws and administrative regulations; (2) major shareholders having ability to make profits continuously, enjoying good credit standing, and having no irregular or rule-breaking record over last three years, and its net asset being no less than RMB 0.2 billion; (3) having registered capital that meets provisions of present law; (4) directors, supervisors and senior managers thereof having qualification for assuming such posts and its practitioners having qualification to engage in securities business; (5) having complete risk management system as well as internal control system; (6) having qualified business place and facilities for operations; and (7) meeting any other requirement as prescribed by laws and administrative regulations as well as provisions of securities regulatory authority under State Council, which have been approved by State Council. (Art. 124). Securities company may undertake some or all of following business operations upon approval of securities regulatory authority: (1) Securities brokerage; (2) securities investment consultation; (3) financial advising relating to activities of securities trading or securities investment; (4) underwriting and recommendation of securities; (5) self-operations of securities; (6) securities asset management; and (7) other business operations concerning securities. (Art. 126). Where securities company engages in business operation as prescribed in item (1), (2) or (3) of Art. 125 of present law, its registered capital must be RMB 50 million at least. Where securities company engages in any of business operations as prescribed in item (4), (5), (6) or (7) therein, its bottom-line registered capital must be RMB 100 million. Where securities company engages in two or more business operations as prescribed in item (4), (5), (6) or (7) therein, its bottom-line registered capital must be RMB 500 million. Registered capital of securities company must be paid-in capital. (Art. 127). Securities regulatory authority under State Council must formulate provisions on risk control indicators of securities company such as net capital, ratio between net capital and liabilities, ratio between net capital and net assets, ratio between net capital and operational scale of self-operation, underwriting and asset management, ratio between liabilities and net asset, as well as ratio between current assets and current liabilities.

Securities company must not provide any financing or guaranty for its shareholders or any related person thereof. (Art. 130). Securities company must withdraw trading risk reserve from its annual after-tax profits to cover any possible loss from securities trading. Specific proportion for withdrawal must be prescribed by securities regulatory authority. (Art. 135). Securities company must establish and improve internal control system, adopt effective measures of separation so as to prevent any interest conflict between company and its clients or between different clients thereof. (Art. 136). Trading settlement funds of clients of securities company must be deposited in commercial bank and be managed through separate accounts as opened in name of each client. (Art. 139). Securities company must not make any promise to its clients on proceeds as generated from securities trading or on compensating loss as incurred from securities trading by any means. (Art. 144). Where any practitioner of securities company violates trading rules by implementing instructions of his securities company or taking advantage of his post in any securities trading, relevant securities company must bear all liabilities as incurred therefrom. (Art. 146). Security company must keep materials of its clients regarding account opening, entrustment records, trading records and internal management as well as its business operations in proper manner. No one may conceal, forge, alter or damage any of aforesaid materials. Term for keeping aforesaid materials must be no less than 20 years. (Art. 147). Where net capital or any other indicator of risk control of securities company fails to satisfy relevant provisions, securities regulatory authority under State Council must order it to correct in prescribed period. Where securities company fails to correct within prescribed period or any act thereof has injured sound operation of securities company or has damaged legitimate rights and interests of its clients, securities regulatory authority under State Council may take following measures in light of different circumstances: (1) Restricting its business operations, ordering it to suspend some business operations and stopping approval of any new operations thereof; (2) stopping approval for establishing or taking over any business branch; (3) restricting its distribution of dividends, restricting payment of remunerations to or provision of welfare for its directors, supervisors or senior managers; (4) restricting any transfer of property or setting of any other right to its property; (5) ordering it to alter its directors, supervisors and senior managers or restricting right thereof; (6) ordering controlling shareholders to transfer their stock rights or restricting its shareholders from exercising shareholders' rights; and (7) revoking relevant business license. (Art. 150). During period when securities company is ordered to suspend its business for rectification, or is designated for trusteeship, or is being taken over or liquidated, or where any major risk occurs, following measures may be adopted to directors, supervisors, senior managers or any other person of securities company as held to be directly responsible, upon approval of securities regulatory authority under State Council: (1) Notifying exit administrative organ to prevent him from exiting Chinese territory; and (2) requesting judicial organ to prohibit him from moving, transferring his properties or disposing of his properties by any other means, or setting any other right to his properties.

Securities Registration and Clearing Institutions.

Securities registration and clearing institution is non-profit legal person that provides centralized registration, custody and settlement services for securities trading. (Art. 155). Establishment of securities registration and clearing institution must meet following requirements:

(1) Its self-owned capital must be no less than RMB 0.2 billion; (2) it must have place and facilities as required by services of securities registration, custody and settlement; (3) its major managers and practitioners must have securities practice qualification; and (4) it must meet any other requirement as prescribed by securities regulatory authority under State Council and words “securities registration and clearing” must be indicated in name of securities registration and clearing institution. (Art. 156). Securities registration and clearing institution must perform following functions: (1) Establishment of securities accounts and settlement accounts; (2) custody and transfer of securities; (3) registration of roster of securities holders; (4) settlement and delivery for listed securities trading of stock exchange; (5) distribution of securities rights and interests on basis of entrustment of issuers; (6) handling of any inquiry relating to aforesaid business operations; and (7) other business operations as approved by securities regulatory authority under State Council. (Art. 157). Securities registration and clearing institution must take following measures to guarantee sound operation of its business: (1) Having necessary service equipment and complete data protection measures; (2) having established complete management systems concerning operation, finance and security protection; and (3) having established complete risk control system. (Art. 161). Securities registration and clearing institution must keep original voucher of registration, custody and settlement as well as relevant documents and materials in proper manner. Term for keeping aforesaid materials must be no less than 20 years. (Art. 162). Securities clearing risk fund must be deposited into special account of designated bank and must be subject to special management. (Art. 164). Investor who entrusts securities company to undertake any securities trading must apply for opening securities account. Securities registration and clearing institution must, according to relevant provisions, open securities account for investor in his own name. Investor who applies for opening account must hold legitimate certificates certifying his identity of Chinese citizen or its qualification of Chinese legal person, unless it is otherwise provided for by state. (Art. 166). Clearing funds and securities as collected by securities registration and clearing institution according to operational rules must be deposited into special account for settlement and delivery. Settlement and delivery that can only be applied to securities trading as concluded according to operational rules and must not be enforced compulsorily. (Art. 168).

Securities Trading Service Institutions.

Staff of investment consulting institution, financial advising institution or credit rating institution who engage in securities trading services must have special knowledge of securities as well as work experience in securities business or securities trading services for more than two years. Standards for recognizing securities practice qualification and measures for administration thereof must be formulated by securities regulatory authority. (Art. 170). Investment consulting institution or credit rating institution that engages in securities trading services must charge commissions for services it provides according to rates of or measures for fee charging as formulated by relevant administrative department of State Council. (Art. 172). In case of any false record, misleading statement or major omission in documents it has formulated or issued, which incurs any loss to any other person, relevant securities trading service institution must bear several and joint liabilities together with relevant issuer and listed company, unless securities trading service institution has ability to prove its faultlessness. (Art. 173).

Securities Industrial Associations.

Securities industrial association is self-disciplinary organization for securities industry and is public organization with status of legal person. Securities company must join securities industrial association. Organ of power of securities industrial association is general assembly of its members. (Art. 174). Securities industrial association must perform following functions and duties: (1) Educating and organizing its members to observe laws and administrative regulations on securities; (2) safeguarding legitimate rights and interests of its members and reporting suggestions and demands of its members to securities regulatory body; (3) collecting and sorting out securities information and providing services for its members; (4) formulating rules that must be observed by its members, organizing vocational training for practitioners of its member entities and carrying out vocational exchanges between its members; (5) holding mediation over any dispute regarding securities operation between its members or between its members and clients; (6) organizing its members to do research on development, operation, etc. of securities industry; (7) supervising and examining acts of its members and, according to relevant provisions, giving disciplinary sanction to any member that violates any law or administrative regulation or constitution of association; and (8) performing any other functions and duties as stipulated by constitution of industrial association. (Art. 176).

Securities Regulatory Bodies.

Obligations of supervision, examination, rule-making power, and administration set forth in Art. 179. Powers of enforcement set forth in Art. 180.

Regulatory Authorities.

Under Securities Regulations, Securities Commission of State Council ("Securities Commission") is authority in charge of securities markets within PRC, and it exercises complete supervision over securities markets in accordance with relevant PRC laws and regulations. CSRC is executive arm of Securities Commission, and it administers and supervises all activities relating to issuance and trading of securities. CSRC performs functions similar to SEC in US. It formulates policies, laws and regulations concerning markets, including futures contracts; supervises issuing, trading, custody and settlement of all shares, whether debt, equity or investment funds; and regulates investment firms and governs listing trading and settlement of futures exchanges and futures contracts.

Legal Liabilities.

Violations of Securities Law is fined with RMB 30,000 to RMB 600,000 depending on case, return of funds it has raised and fine of 1% up to 5% of funds it has illegally raised. Business license can be suspended or revoked. (Arts. 188-235).

Legal Redress Available.

There are two options open to shareholders in disputes arising from stock listing and trading. They may submit their disputes to arbitral tribunals for mediation and/or arbitration provided that they have written agreements. (Int. Regs., Art. 79). They may commence legal action in court to settle disputes: Regarding B-shares, any dispute occurring in China concerning B-shares listing and B-shares trading will be governed by relevant Chinese laws and regulations and settled in territory of China. (Shanghai Rules, Art. 23; Shenzhen Rules, Art. 26).

Securities dealers and Stock Exchange, in disputes arising from stock issuance or stock trading, must submit their disputes to arbitral tribunals establishing or designated by State Securities Commission for mediation and/or arbitration. (Int. Regs., Art. 80). Securities dealers and Stock Exchange may not use court action to settle disputes among them.

Futures.

Chinese futures exchange began in 1992, with establishment of futures exchange for agricultural products in Zhenzhou. As of Aug. 1993, China has 12 national markets engaged in futures trading, with ten in eastern coastal areas. Key indexes for these national markets will be listed on world market. Nanjing Oil Exchange in Jiansu province has already released its quotation to world via Associated Press (AP) and Reuters. Shanghai Metals Exchange presents timely reporting of New York and London market quotations and members undertake international futures metal trading via Exchange. Preparation is underway to build 30 national futures markets primarily in coastal areas.

Rules on the Administration of Futures Trading ("Rules").

General.

The Interim Rules for Administration of Futures Trading (“Rules”) was ““enacted on May 25, 1999, by eighteenth standing meeting of State Council, and came into effect as of Sept. 1, 1999, The Regulation on the Administration of Futures Trading, which was adopted at 168th executive meeting of State Council on Feb. 7, 2007, is hereby promulgated and came into force as of Apr. 15, 2007, govern engagement in trading in futures trading, including trading based on commodities contracts, financial futures and options contracts, and other relevant activities. (Art. 2). Fraud, inside trading, control of futures price and other wrongdoing are forbidden. (Art. 3). Futures shall be traded in Futures Exchanges; trading outside Exchanges are prohibited and it is prohibited to carry out futures trading in any disguised form. (Art. 4). Futures regulatory institution of State Council must supervise and administer futures markets in centralized manner. (Art. 5).

Futures Exchanges.

Establishment of futures exchange shall be examined and approved by futures regulatory institution of State Council. (Art. 6).

No futures exchange may directly or indirectly participate in futures transactions. No futures exchange may, without passing examination of futures regulatory institution of State Council and being approved by State Council, make trust investments, stock investments, investments in non-self-use real property, or engage in any other business irrelevant to its duties. (Art. 10).

Future Dealer Companies.

Applicant satisfies stipulations of Company Law and stipulations of these Rules (Art. 16); futures dealer business license issued by futures regulatory institution of State Council is required (Art. 15). Futures company must be subject to licensing system. Futures regulatory institution of State Council must grant it permit according to business type such as commodity futures and financial futures. Besides domestic futures brokerage, futures company may apply for engaging in overseas futures brokerage, futures investment consultation and other futures businesses as prescribed by futures regulatory institution of State Council. No futures company may engage in any activity which has nothing to do with business of futures, unless it is otherwise provided for by any law, administrative regulation, or by futures regulatory institution of State Council. No futures company may engage in any self-operation business of futures or do so in any disguised form. No futures company may provide financing service to its shareholders, actual controllers or other affiliated parties, or provide guaranty to outsiders. (Art. 17).

Basic Rules for Futures Trades.

Arts. 24 through 46 contain rules.

Supervision and Administration.

Futures exchanges, futures companies, other futures institutions, as well as institution monitoring safe custody of futures margin must submit to futures regulatory institution of State Council their financial statements, operation materials, and other relevant materials. (Art. 52). Futures regulatory institution of State Council performs its duties such as carrying out supervision and inspection or making investigation. (Art. 53). Futures regulatory institution of State Council must adopt qualification administration system for directors, supervisors, senior managers, and other futures practitioners of futures exchanges, futures companies, other futures institutions, as well as of institutions monitoring safe custody of futures margin. (Art. 57).

Fine.

Rules impose some fines for illegal activities in futures trade.

Futures Companies

Interim Rules Concerning Administration of Futures Brokerage Companies Registration were promulgated by State Industrial and Commercial Bureau on Apr. 28, 1993. Revised by China Securities Regulatory Commission on July 1, 2002. The Administrative Measures for Futures Companies were adopted and deliberated at 203rd chairmen's meeting of China Securities Regulatory Commission on Mar. 28, 2007, are promulgated and came into force as of Apr. 15, 2007. Futures companies established within territory of People's Republic of China must be governed by these Measures. (Art.2).

Requirement of Registration.

To apply for establishing futures company, applicant must satisfy following requirements besides those as prescribed in Art. 16 of the Regulation on the Administration of Futures Trading: (1) Having at least 15 persons with futures practicing qualifications and (2) having at least three senior managers with qualifications for assuming their posts. (Art. 6).

The CSRC and its dispatched institutions must supervise and administer futures companies and their branches in pursuance of law. China Futures Association and futures exchanges must conduct self-disciplinary administration on futures companies in pursuance of law. (Art. 5).

Rights and Obligations.

Set forth in Art. 34, 47, 52, 66, 69, and 76 specifies prohibited activities of futures companies.

Penalties.

Futures company must regularly submit its annual reports, monthly reports, and other relevant materials as required. Directors, senior managers, and financial person-in-charge of futures company must sign annual reports for confirmation. Legal representative, key person-in-charge of business management, or financial person-in-charge must sign monthly reports for confirmation. Those who sign annual reports and monthly reports of futures company must promise that contents of such reports are genuine, accurate, and complete. If any of them has any objections, he must indicate his own opinions and grounds. (Art.77). From Art. 91 to Art. 95 stipulated specific legal liabilities.

General Provisions.

The CSRC and its dispatched institutions must supervise and administer futures companies and their branches in pursuance of law. China Futures Association and futures exchanges must conduct self-disciplinary administration on futures companies in pursuance of law. Institutions monitoring safe custody of futures margin must monitor safety of margin in accordance with law. (Art.5).

Requirements, Alteration, Establishment,

To apply for establishing futures company, applicant must satisfy following requirements besides those as prescribed in Regulation on the Administration of Futures Trading: (1) Having at least 15 persons with futures practicing qualifications and (2) having at least three senior managers with qualifications for assuming their posts. (Art.6).

Where futures company changes its equities under any of following circumstances, it must be subject to approval of CSRC: (1) Equities held by single shareholder increase to 5% or more, or aggregate equities held by shareholders as affiliated parties increase to 5% or more and (2) any shareholder holding 5% or more of equities accepts equities transferred to it or shareholders as affiliated parties holding 5% or more of equities in aggregate accept equities transferred to them. (Art.14).

Where futures company applies for establishing business department, it must satisfy following conditions: (1) It is not being investigated due to illegal business operations, nor has it been given any administrative punishment or criminal punishment due to illegal business operations during recent one year; (2) conforming to risk supervisory indicators of futures company during three mos. prior to date of application; (3) conforming to provisions on protection of clients' assets and on safe custody of futures margin; (4) conforming to and effectively using relevant provisions on corporate governance and internal control systems; (5) candidate person-in-charge meets qualifications for assuming post and working personnel have qualifications for practitioners; (6) business posts commensurate to business plan of business department, duties are clear and division of wok is reasonable; (7) having business place and facilities which can meet needs of futures business; and (8) other conditions as prescribed by CSRC according to principle of prudent supervision. (Art.24).

Basic Rules for Futures Business.

Futures company must fully disclose to its clients risks of futures trading, prepare relevant regulations on futures trading, and business rules of futures exchange, and publicize operating procedures for futures brokerage, qualifications, certifications of relevant practitioners, and other materials at its business place for consultation by clients. Futures company must, in contracts on futures brokerage, on its website, and at its business place, remind clients that they may consult publicized information about qualifications of practitioners through website of China Futures Association. (Art.53).

Ordinary Regulation.

. Futures company must reasonably set up business departments and arrange their functions, work out rules on responsibilities of trading, clearing, risk management, and financial posts, lay emphasis on control of key posts and operations, and ensure that front-office operations, mid-office operations, and back-office operations separate from one another. Trading, clearing, and financial operations of futures company must be conducted by different departments and employees. (Art.45).

Where futures company retains or dismisses accounting firm, it must, within five working days after it makes such decision, report it to local institution dispatched by CSRC. If it dismisses accounting firm, it must state grounds. If institution dispatched by CSRC has justifiable reason to think that it is improper for accounting firm to conduct audit business of futures exchange, it may require futures to replace it with new one. (Art.81).

The CSRC may organize its dispatched institutions to periodically or aperiodically carry out on-the-spot inspections on futures companies or business departments. Institution dispatched by CSRC may carry out on-the-spot inspections on futures companies or business departments under its jurisdiction. (Art.84).

Treatment of Crisis of Security Deposit Fund.

If crisis of security deposit refund occurs or may occur to futures company and seriously affects interests of investors, CSRC gives special treatment to that company as specified in Arts. 55, 57, and 58.

Interim Provisions on Fund for Investment in Securities was issued on Nov. 5, 1997, by State Council, amended by The Measures for the Administration of Securities Investment Fund Management Companies, which were deliberated and adopted at 98th office meeting of chairman of China Securities Regulatory Commission on June 29, 2004, and approved by State Council on Aug. 12, 2004, are promulgated, and came into force as of Oct. 1, 2004. “Securities investment fund management company” refer to enterprise legal person, which is established within territory of People's Republic of China upon approval of China Securities Regulatory Commission ("CSRC") and undertakes securities investment fund management business. (Arts. 2). Following requirements must be met for establishment of fund management company (Art.6): (1) Shareholders must meet requirements of Securities Investment Fund Law and provisions of present Measures; (2) having articles of association complying with Securities Investment Fund Law, Company Law, and provisions of CSRC; (3) registered capital must be no less than RMB hundred million Yuan, and shareholders must actually pay capital in currency, and overseas shareholders must make capital contribution in convertible currency; (4) having appointed senior management personnel complying with laws, administrative regulations, and provisions of CSRC and personnel who undertake such businesses as research, investment, appraisal and marketing, etc., and appointed senior management personnel and business personnel are no less than 15 persons and must have obtained fund practicing qualification; (5) having business place, safeguarding and precautious facilities meeting requirements, and other facilities relating to business; (6) having set up organizations and work post with reasonable division of work and clear functions; (7) having such internal monitoring systems as supervision and audit and risk control, which meet provisions of CSRC; and (8) other conditions as prescribed by CSRC upon approval of State Council.

3.18 STATE ENTERPRISES:

See category 8 Debtor and Creditor, topic 8.03 Bankruptcy.

State Owned Enterprises.

China is communist state and therefore most business entities are State-Owned Enterprises (SOEs). (Const., Art. 7). PRC through the CPC plans and implements national economic objectives and drives economic development. Certain SOEs have become internationally significant entities; e.g., The China State Shipbuilding Corp., China National Offshore Oil Corp., and The China Automotive Industry Corp. SOEs are undergoing change to become profit making sustainable enterprises. (Regarding Revised Methods of Subjecting Profits of State Enterprises to Tax [Trial Implementation] effective Jan. 1, 1983).

Audit Law of China was adopted at ninth session of Standing Committee of Eighth National People's Congress of China on Aug. 31, 1994 and entered into force on Jan. 1, 1995. Amended by Standing Committee of 10th National People's Congress of the People's Republic of China on Feb. 28, 2006. Effective June 1, 2006. According to this law, State practices system of supervision through auditing. State council and local people's government must establish audit institutions. (Art. 2). National Audit Office of State Council takes charge of audit work throughout country under leadership of Premier of State Council. (Art. 7). Audit institutions of local government must be in charge of audit work within their respective administrative areas. (Art. 8). Auditors are protected by law in performing their functions in accordance with law. No organization or individual may refuse or obstruct auditors from performing their functions, or retaliate against them. For appointment and dismissal of person in-charge of local auditing organ at any level, it is necessary to solicit opinions of auditing organ at next higher level in advance. (Art. 15). Auditors must withdraw from performing audits if they have interest in auditees or audit items. (Art. 13). Auditors have obligations to keep State secrets and auditees' trade secrets in performing functions. (Art. 14).

National Audit Office must exercise supervision through auditing over implementation of budget of central government, and revenues and expenditures of central bank. (Arts. 17, 18). Audit institutions exercise supervision through auditing, including: (1) Financial revenues and expenditures of public institutions of State and other public organizations that use fiscal capital; (2) enterprises and financial institutions; (3) budget implementation and final settlement of accounts relating to construction projects that are invested or mainly invested by government; (4) financial revenues and expenditures of social security funds, funds from public donations and other relevant funds and capital managed by government department or by any other entity on commission of government department; and (5) main principals of state organs and other entities subject to audit supervision of auditing organ for their fulfillment of economic liabilities of government revenues and expenditures, financial revenues and expenditures and other economic activities for their respective regions, departments or entities during course of holding posts. (Arts. 19, 22, 23, 24, 25). Auditing organ must be entitled to require entity under audit to submit, in accordance with provisions of auditing organ, budget or plan on financial revenues and expenditures, budget implementation, final settlement of accounts, financial accounting reports, electronic data on government or financial revenues and expenditures stored and disposed by computers and necessary computer technical documents, conditions about account opening at financial institution, audit report issued by social audit institution as well as other materials about government or financial revenues and expenditures. (Art. 31).

State Enterprise Reform.

China has started “State Enterprises Reform” from Fifteenth National Meeting of China Communist Party. As to reform of small state enterprises, State Economic & Trade Committee, Ministry of Finance and PBOC issued Notice about Several Opinions on Sale of Small State Enterprises (“Notice”) on Feb. 11, 1999. Notice stipulated “the reforms on small state enterprises include reorganization, union, merger, lease, contract, co-operation by shareholding and offer to sell”; it must be deterred to transfer small state enterprises to others free of charge or at half price in name of “offer to sell”; it must be deterred to escape debts to banks, taxes and job rearrangement of workers and staff during sale. (c. 1 of Notice). Sale of small state enterprises means to sell small state enterprises to non-state-owned economic organizations or to individuals; sale to foreigners must observe related state regulations. (c. 2 of Notice). Sale of small state enterprises is subject to approval from competent government authorities. (c. 3 of Notice). Seller relies on evaluation institute for value of business, and must produce evidence of ability to purchase. Rules additionally provide for protection of creditors.

Interim Rules for Board of Supervisors for State Enterprises (“Rules”) promulgated and enacted on Mar. 15, 2000 by State Council. State Council determines list of large state enterprises that require boards of supervisors, and assign supervisors responsible to State Council for administration of state assets for these large state enterprises. (Art. 2). Supervisors will administer financial activities and management of enterprises by senior management, and are independent from business itself and management of enterprises. (Arts. 3 and 5). Board of Supervisors examine enterprise once or twice a year, and may undertake examination at any time. (Art. 6). Board drafts supervision report after each examination and report to State Council. (Arts. 9, 10). Chief supervisor shall be senior public officer assigned by State Council. (Art. 15). Member of board of supervisors that presents erroneous examination report is withdrawn from position and may be subject to criminal sanctions. (Art. 24).

4 CITIZENSHIP

4.01 ALIENS:

See category 17 Immigration.

4.02 IMMIGRATION:

See category 17 Immigration, topic 17.01 Aliens.

4.03 MILITARY SERVICE:

China has adopted Military Service Law.

4.04 NATIONALITY:

See category 17 Immigration, topic 17.01 Aliens.

The Nationality Law of the People's Republic of China (Nationality Law) was adopted at Third Session of the Fifth NPC, promulgated by Order No. 8 of Chairman of Standing Committee of NPC and became effective as of Sept. 10, 1980.

Nationality Law is applicable to acquisition, loss and restoration of Chinese citizenship. (Art. 1). Law specifies that PRC is unitary multiracial state. PRC does not recognize dual nationality for Chinese nationals. (Art. 3).

Person born in China or abroad is Chinese national if at least one parent is Chinese national. (Art. 5). Person born in China whose parents are stateless or of uncertain nationality but who have resided in China have Chinese citizenship. (Art. 6). However, if one has acquired foreign nationality at birth, and his or her Chinese parents have settled in another country, such person shall not be considered Chinese national. (Art. 5).

Foreign nationals or stateless persons who are willing to abide by China's Constitution and laws, and who meet one of following conditions, may be naturalized upon approval of application: (1) Close relative of Chinese nationals; (2) settled in China; or (3) other legitimate reasons. (Art. 7). Naturalization applicants become Chinese citizens upon approval of their applications. After naturalization, naturalized citizens forfeit foreign nationality. (Art. 8).

Chinese national who has become another country's citizen automatically loses Chinese nationality. (Art. 9). Chinese national who meets one of following conditions may renounce Chinese nationality: (1) is close relative of foreign nationals; (2) has settled abroad; or (3) has other legitimate reason. (Art. 10). One loses Chinese nationality upon approval of renunciation application. (Art. 11). However, state functionaries and military personnel on active service cannot renounce Chinese nationality. (Art. 12).

Foreign nationals who once held Chinese nationality may apply for restoration of Chinese nationality if they have legitimate reasons. No foreign nationality shall be retained after restoration of Chinese nationality. (Art. 13).

Persons who wish to acquire, renounce or restore Chinese nationality, with exception of cases of automatically losing Chinese nationality, shall go through formalities of application. Applications of persons under age of 18 may be filed on their behalf by their parents or legal representatives. (Art. 14). Public Security Bureau of municipality or county where applicant resides shall decide nationality applications filed in China. China's diplomatic representative agencies or China's consular offices shall decide nationality applications filed abroad. (Art. 15). Naturalization applications, renunciation or restoration applications are subject to Ministry of Public Security of China's examination and approval. (Art. 16).

Nationality status of persons who have acquired or lost Chinese nationality before Sept. 10, 1980 shall remain same. (Art. 17).

Hong Kong.

Explanations of Questions by Standing Committee of National People's Congress Concerning Implementation of Nationality Law of People's Republic of China (PRC) in Hong Kong Special Administrative Region (HKSAR) (hereinafter referred to as “Explanations”) were promulgated on May 16, 1996. Nationality Law of PRC came into force in Hong Kong as of July 1, 1997. (Basic Law on HKSAR, Art. 18 and Appendix 3). According to Explanations, all Hong Kong residents who meet requirements provided in Nationality Law of PRC are Chinese citizens. All Hong Kong compatriots, regardless of whether possessing British Dependent Territory Citizen passport or British Citizen (overseas) passport, are Chinese citizens. From July 1, 1997, above Chinese citizens can continue to use travel certificates issued by British government to tour other countries or districts, but cannot enjoy British consular protection in HKSAR or other areas of

PRC. All Chinese citizens residing in Hong Kong who have obtained British citizen identity and British Residence Right from British government, will not have their British citizen identity recognized by Chinese government and cannot enjoy British consular protection right in HKSAR or other areas. HKSAR's Chinese citizens who also possess residence right in countries other than China can use relevant certificates issued by that country to tour other countries or districts, but cannot enjoy foreign consular protection right in HKSAR and other areas of PRC. When nationality of Chinese citizen in HKSAR changes, said citizen can apply with appointed unit with valid certificates. Hong Kong Immigration Affairs Office is appointed to be organization that accepts and decides nationality according to Nationality Law of PRC and Explanations.

5 CIVIL ACTIONS AND PROCEDURE

5.01 ACTIONS:

See topics 5.10 Libel, Torts, Civil Code; categories 3 Business Regulation and Commerce, topic Contracts; Dispute Resolution, topic Arbitration and Award; Environment, topic Environmental Regulation; Foreign Trade and Commerce, topic Foreign Trade; Intellectual Property, topic Trademarks.

Citizens' rights to lodge administrative complaints against malfeasance or to initiate legal proceedings to protect their rights are safeguarded by Constitution (Art. 41) and Administrative Law. In addition, international contracts may specify tribunal having jurisdiction over dispute, normally arbitration tribunal, and law that will govern any disputes. Agreement on Trade Regulations signed on July 7, 1979 between U.S. and China specifically provides that arbitration is permitted and provides that competent authorities in each jurisdiction will enforce arbitration awards. Treaty also expresses intent of parties to be bound by customary international trade practices.

In addition, China International Economic and Trade Arbitration Commission (“CIETAC”) provides for arbitration of disputes arising from foreign trade. Arbitration Law (adopted at Fourth Meeting of Standing Committee of Eighth National People's Congress on Aug. 31, 1994, promulgated by Order No. 31 of President of People's Republic of China on Aug. 31, 1994, and effective as of Sept. 1, 1995). Obviously, this tribunal's jurisdiction depends initially upon agreement between parties. Participants may select among large list of arbitrators, some of whom are foreign nationals.

Art. 8 of Environmental Protection Law, adopted on Sept. 13, 1979, further amended by Standing Committee of the Seventh National People's Congress and came to effect on Dec. 26, 1989, all units and individuals must have right to report on or file charges against units or individuals that cause pollution or damage to environment. (Art.6). Organic Law of People's Courts promulgated on July 1, 1979 (c. I, Art. 5) does not specify that foreigners have access to courts, or do not have access to courts. In practice, foreigners have filed legal actions in courts and Chinese courts have accepted jurisdiction over proceedings. Furthermore, Code of Civil Procedure, Part IV, and Administrative Law, provide that foreigners have access equal to Chinese citizens to courts for purposes of civil and commercial litigation.

Code of Civil Procedure, promulgated initially in 1982, revised effective Apr. 9, 1991 (“Civ. Pro. Code”), and revised according to Decision of the Standing Committee of the National People's Congress on Amending the Civil Procedure Law of the People's Republic of China as adopted at 30th Session of the Standing Committee of the 10th National People's Congress, and came to effect as of Oct. 28, 2007, containing 268 articles covering major areas of civil procedure. Part IV, Arts. 235-268 contains Special Regulations of Civil Procedure Concerning Foreign Matters. Focus here concerns foreign matters.

Part IV. Special Regulations on Civil Procedure Concerning Foreign Matters.

General Principles.

Civil litigation concerning foreign matters in China follow regulations of this law. If regulations of this law do not govern disputes, other relevant provisions of statute will govern dispute. (Art. 235).

Foreign persons, organizations, or international organizations, involved in civil litigation, but exempt from legal process, are subject to courts according to laws of China, treaties entered into by China, or regulations provided in international conventions entered into by China. (Art. 237). Where treaties of China or international agreements to which China is signatory have provisions different from those provided in this statute, provisions of international agreement should be applied, except where China has reserved its rights in provision of said agreement. (Art. 236).

When court tries case concerning foreign matters, Chinese language is used, except party, at own expense, may request interpreter. (Art. 238). Foreign nationals, stateless persons, foreign enterprises and organizations that bring or respond to suits, and those who need to entrust attorneys to represent them in litigation, must employ attorneys of China. (Art. 239). Foreign nationals or stateless persons who do not reside in China and foreign enterprises and organizations who entrust attorneys to represent them in litigation, must have powers of attorney notarized in country where they reside and obtain Chinese embassy or consulate attestation. Alternatively, party may obtain verification through procedures provided in relevant treaty between China and foreign entity's country of origin. (Art. 242).

Regarding disputes arising from contract or other property rights and interests in which respondents not domiciled in China, where contract is signed or performed in China, or subject matter of suit located in China, or respondents have property in China which may be distrained, or respondents have resident representative office in China, People's Court may exercise jurisdiction where contract signed or performed, subject matters of suit located, property which may be distrained located, infringing act committed, or resident representative office located. (Art. 241). Parties to disputes involving foreign contract or other property rights, may agree in writing to choose litigation forum. Where parties choose Chinese court as forum, mandatory provisions concerning jurisdiction by court hierarchy and exclusive jurisdiction of Code shall be observed. (Art. 242). Where respondents do not file opposition regarding jurisdiction of People's Court and respond to suit, respondents deemed recognizing People's Court jurisdiction. (Art. 243). Suits arising from dispute involving performance of Chinese-foreign equity joint ventures, contractual joint ventures and Chinese-foreign cooperative exploration and development of natural resources, under jurisdiction of People's Court. (Art. 244).

Where final judgment, or order rendered by foreign court requires recognition and (or) enforcement by Chinese court, party may directly apply to Intermediate People's Court having jurisdiction for recognition and (or) enforcement, or may request foreign court apply to People's Court for recognition and (or) enforcement in accordance with provisions of international treaties concluded or acceded to by China and country where judgment or order rendered, on reciprocity principle. (Art. 265). Where People's Court deems judgment order does not violate fundamental principles of Chinese law, national sovereignty, security and social interest, it shall order recognition of validity of judgment or order, and issue execution order, which will be enforced according to relevant code provisions. (Art. 266). Regarding award rendered by foreign arbitral tribunal requiring recognition and enforcement of Chinese court, parties shall apply directly to Intermediate People's Court where person against whom award will be enforced has domicile or property is located. Chinese court shall handle enforcement in accordance with international treaties concluded or acceded to by China or on reciprocity principle. (Art. 267). Since China is signatory to 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards, foreign arbitral awards are presumptively valid and enforceable in China, except for reasons specified in Convention.

Opinions Regarding Several Questions on Enforcing Law of Civil Procedure was promulgated by Supreme People's Court July 14, 1992. C. XVIII, Arts. 304-320 contains special provisions of civil procedure involving foreign matters. Foreign parties to civil procedure may entrust citizens of home country or attorneys of home country to appear in court without utilizing attorney's title, as agent ad litem. (Art. 308). Officials from foreign embassy, consulate to China may personally act as agent ad litem (i.e. at law) on behalf of citizens of their countries, however they do not enjoy diplomatic privileges and immunities. (Art. 308). Where nationals of foreign countries are parties to suit and do not reside in China they may, under name of diplomatic personnel retain Chinese attorneys or Chinese citizens as agents ad litem for nationals of foreign countries. (Art. 309).

5.02 APPEAL AND ERROR:

See category 6 Courts and Legislature, topic 6.03 Courts.

5.03 CIVIL CODE:

General Principles of Civil Law ("Civil Law") were adopted by Sixth NPC on Apr. 12, 1986, effective as of Jan. 1, 1987. Civil activities must be conducted voluntarily and fairly, compensation must be given for equal value, and must be conducted in good faith. (Art. 4). Law of People's Republic of China shall apply to civil activities within People's Republic of China, except as otherwise stipulated by law. Stipulations of this law as regards citizens shall apply to foreigners and stateless persons within People's Republic of China, except as otherwise stipulated by law. (Art. 5). Citizens must comply with law and not harm public interest or disrupt social economic order. (Arts. 7, 8). Civil activities which occur in People's Republic of China are subject to laws of PRC, except where other laws apply. This law applies to foreigners and stateless persons in territory of PRC, except where other laws apply. (Art. 8). Opinion of Supreme Court adopted on Jan. 26, 1988 provides details regarding Civil Law. See subhead Opinion of Supreme Court on Several Problems of Enforcing General Rules of Civil Law (Trial Implementation), infra.

Civil Rights and Capacity of Natural Persons.

All citizens have equal capacity for civil rights and must assume civil obligations. (Arts. 9, 10). Citizens age 18 and over are adults with full capacity for civil conduct; individuals 16 or over but under 18, whose main source of income is own labour has full capacity for civil conduct. (Art. 11). Minors aged ten or older have limited ability for civil conduct and may engage in civil activities appropriate to his age and intellect, as may mentally ill. (Arts. 12-14).

Residence of person is place where household registration is maintained, unless they frequently reside elsewhere. (Art. 15).

Guardianship.

Parents are guardians of children unless deceased or lacking capacity, in which case guardians are grandparents, elder siblings and other close relatives or friends willing to undertake guardian roles; latter requiring consent of unit or resident or village committee of infant. (Art. 16). Person from following categories shall act as guardian for mentally ill persons without or with limited capacity for civil conduct: (1) spouse; (2) parent; (3) adult children; (4) close relatives; and (5) other relatives or friends willing to undertake guardian roles, latter requiring consent of unit or resident or village committee of mental patient. (Art. 17). Guardian shall fulfil duties of guardianship and protect person, property and other lawful rights and interests of his or her ward. Guardian shall not handle property of his or her ward unless it is in ward's best interests. (Art. 18).

Absentees.

If person's whereabouts unknown for two full years, those concerned with his interests may apply to court to declare him missing person, except during time of war, when said time is to be computed from time war ends. (Art. 20). Property for missing persons will be managed by one's spouse, parent, adult children or other close relatives. (Art. 21). When person declared missing reappears or whereabouts are known, People's Court must recall missing person declaration according to application by person or other interested party. (Art. 22). If person's whereabouts not known for four years, or for two years from occurrence of accident, he may be declared dead by application by person concerned with his interests, to court. (Art. 23). When person declared dead reappears or is known to be alive, People's Court must recall declaration of death according to application by person or other interested party. Civil activities of person during period of declared death are effective. (Art. 24).

Person referred to in recall of declaration of death has right to apply for return of property. Person or committees who received property according to inheritance law must return original, or pay compensation if original does not exist. (Art. 25).

Principal and Agent.

Agent may within scope of its authority undertake legal act in name of its principal. (Act. 63). Agents include those entrusted with certain acts, statutory agents and designated agents. Designated agents are those designated either by courts or designating unit. (Art. 64). Where agent is entrusted with specific acts, document shall specify agent's name, items upon which he will act, limits of his authority and time period within which document has effect. (Art. 65).

If document authorizing agency of entrustment is unclear then principal and agent shall have joint liability to third parties (Art. 65); principal is only responsible for acts exceeding document granting agency if he retroactively ratified or acknowledges said acts, or, if principal knows another is acting in his name, and does not renounce said act such scheme shall be deemed to be consented to (Art. 66). Agent is liable for acts he is entrusted with if he knows said acts are in violation of law. (Art. 67). Where agent entrusted with task must in turn entrust another person, he must obtain consent of his principal (Art. 68), else, save in emergency, agent shall be liable for acts of subsequent agent (Art. 68). If agent lacks power of agency, oversteps power of agency, or concludes contract in principal's name knowing that power of agency has expired, and other party to transaction has reason to believe that agent has power of agency, act shall be effective against principal.

Termination of agency of entrustment occurs where either principal or agent dies, or either principal or agent terminate agency, or agent loses his capacity to act civilly or period of agency expires or acts to be performed by agent are completed. (Art. 69).

Relation of statutory or designated agents with their principal terminates if either dies, agent loses its capacity to act civilly, principal on whose behalf agent acts loses capacity to act civilly or court or organization designating agent cancels appointment. (Art. 70).

Creditor's Rights.

Debt is specific relationship of rights and obligations created between parties pursuant to contract or by law. (Art. 84). Person enjoying such rights is creditor, person having obligation is debtor, and creditor has right to demand debtor's performance pursuant to contract or provisions of law. (Art. 84).

Parties to contract should fully perform their obligations in accordance with contractual terms (Art. 88); where terms of contract are not clear and parties cannot reach agreement through negotiations regarding quality, time limits, location or cost then as to: (1) Quality, contract will be performed in accordance with national quality standards, but if there are none then pursuant to usual standards; (2) time limit, debtor can perform at any time and creditor can demand performance at any time, giving debtor necessary time to prepare performance; (3) location of performance, if payment is money, party making payment shall make it in location where party receiving payment is located; if payment is other than money, performance shall be effected at seat or place of residence of parties fulfilling obligations; and (4) cost, if not clearly specified, payment shall be made pursuant to state specified prices, or if there are none then with reference to market prices or standard prices for similar type goods or remuneration for similar work (Art. 88).

Art. 89 provides for procedures to guarantee debts, specifying obligation of guarantor.

Creditor may assign his or her rights only after notifying debtor of planned assignment. If creditor assigns his or her rights of debt to third party without notifying debtor in advance, assignment will not be effective. (Contract Law, Art. 80). If obligor fails to timely exercise its due creditor's right, thus damaging interest of obligee, obligee may request People's Court for subrogation in its own name. Subrogation shall be exercised within scope of creditor's right of obligee. Necessary expenses caused to obligee by exercising subrogation shall be borne by obligor. (Contract Law, Art. 73).

If person is unjustly enriched without lawful basis and causes losses to others, he shall return said unjust enrichment to person suffering said loss. (Art. 92). Where person undertakes services or management without legal obligation to do so, to prevent loss to others, he shall be entitled to obtain repayment from beneficiary for necessary expenditures. (Art. 93).

Intellectual Property.

Copyright, patent, trademark and discoveries are all protected by law. (Arts. 94, 95, 96, and 97).

Personal Rights.

Citizens enjoy right to life and health (Art. 98), right to one's given name and surname, and to change said name pursuant to law and to forbid others to interfere with one's name (Art. 99); citizen's likeness shall not be used for profitable purposes without citizen's consent (Art. 100); and citizens and legal persons enjoy right to their reputation and honor (Art. 102); and right to choose their own spouse (Art. 103); and women enjoy equal rights with those of men (Art. 105).

Main ways of bearing civil liability are: (1) Ceasing infringing act; (2) exclusion of hindrance; (3) removing impediment; (4) returning property; (5) restitution; (6) repair or replacement; (7) compensating for damage; (8) damages for breach of contract; (9) elimination of effects, rehabilitation of reputation; (10) expression of apology. (Art. 134).

Statute of Limitations.

Civil case to enforce civil rights must be brought within two years unless otherwise specified in law. (Art. 135). Following cases have one year statute of limitations: (1) Where there is demand for compensation for bodily injury; (2) where commodities, not up to standard, are sold without notice of said fact; (3) where there is delay or refusal to pay rents; and (4) where property in storage has been lost or damaged.

Calculation of commencement of (Art. 136) running of statute of limitations commences from time infringement of rights was or should have been known (Art. 137). Where there is agreement to perform obligations which are subject of suit, period of limitations shall be suspended and only commence again if there is failure to perform. (Art. 140).

Civil Relations Involving Foreign Parties.

If treaty is applicable its provisions apply; in absence of treaty, customary international practice resolves issue. (Art. 142).

Parties are free to choose applicable law to their contract (Art. 145), but if dispute involves immovable property, law of country where property is located applies. In absence of choice of law clause, closest link test is used. (Art. 144). (Art. 145).

For torts, law where conduct producing injury occurred applies. (Art. 146), Where Chinese law does not deem act occurring outside its territory as tortious act, it shall not be determined as tort. (Art. 146).

For marriage between citizen of China and foreigner, law of country where marriage is concluded shall be applicable (Art. 147) and as for divorce law of country where court handles said case shall be applicable (Art. 147). For adoption law having closest link with person being raised shall apply. (Art. 148).

For inheritance of property, laws of country of residence upon deaths of testator or intestate shall be applicable to movable property and laws of country where immovable property is located, shall be applicable to immovable property. (Art. 149).

Where foreign or international law is applicable pursuant to this chapter it shall not violate social or public interest of China. (Art. 150).

Supplementary Principles and Definitions.

Force majeure referred to herein refers to objective circumstances which are unforseeable, irrevocable, and unsurmountable. (Art. 153).

Periods referred to in this Civil Law shall be computed pursuant to hour, day, month and year of Gregorian calendar. (Art. 154).

Opinion of Supreme Court on Several Problems of Enforcing General Rules of Civil Law (Trial Implementation) was adopted on Jan. 26, 1988. It contains 200 articles providing substantial details regarding Civil Law matters.

5.04 CONFLICTS OF LAW:

See topic 5.03 Civil Code; categories 2 Business Organizations, topic Joint Stock Companies; Business Regulation and Commerce, topic Contracts.

Parties to international contracts may law to govern particular transaction; where they fail to specify, law of country most closely related to transaction applies, unless otherwise provided in Chinese law, e.g. contracts pursuant to Joint Venture Law are by statute governed by Chinese law. (Contract Law, Art. 126). Inheritance of property within China is governed by Chinese law; however, wills may be governed by law of decedent's domicile. Some of these conflicts questions have yet to be resolved in statutory law or by judicial fiat, but contracts themselves can specify governing law except when in conflict with Chinese laws or regulations.

5.05 DAMAGES:

See topic 5.03 Civil Code; categories 3 Business Regulation and Commerce, topic Contracts; Dispute Resolution, topic Arbitration and Award; Environment, topic Environmental Regulation; Transportation, topic Shipping.

Concept of damages for breach of contract is known, understood and not infrequently explicated in Chinese contracts, including international contracts which may have penalty clauses or clauses that call for compensation for breach thereof. In addition, certain statutes provide for damages. Where one party fails to perform contractual duties or performs them in manner which does not conform with agreement, they shall compensate non-breaching party and pay compensation in amount of losses by other party, with damages not to exceed that which could not be foreseen by breaching party at time of contract formation. (Art. 113).

Parties may agree on liquidated damages, however, if amount stipulated with regard to actual loss, is excessively high or low, then either party may apply to court or arbitration for re-adjustment. (Art. 114).

In event of force majeure, liability in whole or in part should be exempted. However, if force majeure commences after breach will not affect existing damages due. (Art. 117).

Non-breaching party must use reasonable efforts to mitigate effect of loss. Reasonable costs incurred in mitigation shall be reimbursed. (Art. 119).

5.06 DEPOSITIONS AND DISCOVERY:

See category 7 Criminal Law, topic 7.01 Criminal Law.

Deposition in Civil Proceedings.

Pursuant to Law of Civil Procedure, testimony of witnesses and statements by parties are classified as evidence. Such evidence must be verified before it can be taken as fact. (Art. 63). If party and counsel are unable to collect evidence and court considers evidence necessary for trial of case, court shall investigate and collect evidence. (Art. 64). Court has right to investigate and collect evidence from relevant units or individuals, such units or individuals may not refuse to provide information or evidence. (Art. 65). When it is difficult for witness to appear in court, he may, with consent of court, submit written testimony. Any person who is incapable of expressing his will freely shall not give testimony. (Arts.70).

Depositions in Administrative Procedures.

Pursuant to Code of Administrative Procedure, testimony of witnesses and statements by parties are classified as evidence. Such evidence must be verified before it can be taken as basis for ascertaining fact. (Art. 31). Court shall have right to make investigation and collect evidence from relevant units and individuals. (Art. 34).

Deposition in Criminal Proceedings.

Pursuant to Criminal Procedure Law, testimony of witnesses, statements of victim, and statement and explanation by defendant or suspect are classified as evidence, and must be verified before they can be taken as fact. (Art. 42). Court, prosecutor or public security organ may investigate and collect evidence from any unit or individual. (Art. 45).

As for verification of deposition, Art. 46 of Criminal Procedure Law provides that all cases shall be based on evidence, investigation and research. If only statement of defendant is introduced and there is no other evidence, defendant cannot be convicted. If statement of defendant has not been collected, but there is other evidence sufficient to prove crime, defendant may be convicted. Art. 47 of Law provides that, statements of witnesses should be cross-examined and verified between prosecutor and victim, and defendant and his counsel. Statements of witnesses shall be heard and verified before they are taken as fact.

5.07 EVIDENCE:

Rules of Supreme Court on Evidence in Civil Litigation was adopted at 1201st Meeting of Judicial Committee of Supreme Court 6 Dec. 2001, effective as of Apr. 1, 2002.

Rules were established pursuant to regulations of laws such as Civil Procedure Law of

China (hereinafter referred to as “Civil Procedure Law”), experience in civil adjudication, actual facts to ensure that courts can hold facts of case correctly, determine civil case fairly, timely; parties can perform litigious rights according to law.

Burden of Proof.

Rules specify which party bears burden of proof depending on nature of claim. If burden of going forward is met, other party has right to provide evidence to rebut claim. Court shall explain to any party requirement, legal consequence of producing evidence to urge that evidence shall be produced in active, comprehensive, correct, honest manner within reasonable period. One party may apply to court for investigation, collection of evidence, which cannot be collected by oneself owing to objective reasons. (Art. 3).

Evidence provided to court by party shall be original; or copy or duplicate thereof verified true by court if original evidence cannot be produced. (Art. 10). Evidence produced by one party to court established out of China shall be proved by notary organization of host country, attested by Chinese Embassy in that country or go through procedures of proof provided by relevant agreement concluded between China and above country. Evidence produced by one party to court established in Hong Kong, Macao or Taiwan shall go through relevant procedures of proof. (Art. 11). Chinese translation shall be provided for documentary evidence or expository material in foreign language produced by one party to court. (Art. 12). For facts neither party disputes but involving state, public interests, others' legal rights, interests, court may order one party to provide relevant evidence. (Art. 13). One party shall provide evidence signed, sealed, sorted, numbered with brief description of its source, object, content of proof, with presenting date, in copies pursuant to number of other party's participants. Court shall issue receipt signed or sealed by handling person, for evidence received, indicating its name, number of copies and pages, and receiving time. (Art. 14).

Investigation and Collection of Evidence by Court.

“Evidence considered necessary by court for hearing a case” provided by Civil Procedure Law, Art. 64 refers to following circumstances (Art. 15): (i) Involving facts which might damage state, public interests, and others' legal rights and interests; (ii) involving procedural matters which are irrelevant to material dispute, such as adding parties, discontinuing or terminating action and withdrawing, pursuant to functions and powers.

Except for circumstances provided by Art. 15 of Rules, investigation and collection of evidence by court shall be made upon application of party. (Art. 16). Under following circumstances, one party may file application with court to obtain evidence, such as: (i) Evidence maintained by departments regarding courts action, such archives materials; (ii) materials concerning state secrets, business secrets, individual privacy; (iii) evidence parties by themselves cannot obtain owing to objective reasons. (Art. 17).

Arts. 18 through 29 specify procedure for party or that party's attorney to request production, preservation or appraisal of evidence.

Court shall approve one party's application, based on sufficient evidence to oppose, for reappraisal of conclusion made by relevant department authorized by other party at his will. (Art. 28). Judicial officer shall examine whether appraisal certificate issued by appraising person covers following aspects: (i) Name or title of client; content authorized to appraise; (ii) material authorized to appraise; (iii) basis of appraisal, scientific and technological method applied; (iv) description of appraising process; (v) definite conclusion of appraisal; (vi) description of appraising person's qualification for appraisal; (vii) signature, seal of appraising person, appraising agency. (Art. 29).

Record shall be kept for investigation of material evidence or scene by court, stating time, location, process, results of investigation, on-site investigator, persons on scene, including their signature or seal. Sketch of scene shall contain contents such as drawing time, direction, drawer's name identification. (Art. 30). Excerpts of document, material by relevant organizations concerning facts of case shall contain source, seal of producing or reserving organization, signature or seal of excerpting person and other investigators. Excerpts of document, material shall keep integrality in content, not quoting out of context. (Art. 31).

Time Limit for Producing Evidence, Exchange of Evidence.

Defendant shall provide written pleadings before expiration of time limit, stating his opinion on plaintiff's claim, facts and reasons serving as foundation of said claim. (Art. 32). Court shall provide notice of producing evidence to one party at time when notice of acceptance and that of responding to action are served, containing principle, requirements of distribution of burden of proof, circumstances under which one party may apply to court for evidence investigation, collection, time limit provided by court pursuant to facts of case, legal consequence for evidence produced overdue. (Art. 33).

Time limit for producing evidence shall be determined by both parties through consultation, subject to approval by court, or shall be specified by court, which shall not be less than 30 days from date when parties receive notice of court acceptance. (Art. 33). Court shall not arrange cross-examination of evidence submitted exceeding time limit, unless other party agrees to such arrangement. One party shall add or alter claims or institute countersuit before time limit for producing evidence expires. (Art. 34). In proceedings where one party holds nature of legal relationship, validity of civil acts different from court's determination, Art. 34 of Rules shall not control; court shall provide notice that he may alter his claims. Court shall provide new time limit for producing evidence where one party changes his claims. (Art. 35). Court may properly extend time limit upon application by one party that cannot submit evidence on time within limit. Party that cannot submit evidence within extension may file another application to postpone, which shall be decided by court. (Art. 36).

Court may upon one party's application, arrange evidence exchange before hearing deciding case. For case complex, difficult or with more evidence, court shall arrange evidence exchange after time limit for pleadings expires, before court is held. (Art. 37). Time of exchanging evidence shall be determined by parties through consultation or specified by court. For evidence exchange arranged by court, time limit for producing evidence expires when evidence is exchanged. For one party's application for extension of time limit for producing evidence approved by court, time of exchanging evidence shall be postponed accordingly. (Art. 38). Evidence exchange shall be managed by judicial officers. In process of exchanging evidence, facts, evidence that neither party opposes shall be recorded by judicial officers; evidence in opposition shall be recorded, sorted with reasons for opposition under category of facts to be proved. Major problems disputed by both parties shall be made clear through evidence exchange. (Art. 39).

“New evidence” provided in Civil Procedure Law, Art. 125, Item 1 refers to following circumstances: (i) New evidence in procedure of first instance includes: evidence found newly by one party after time limit for producing evidence in first instance expires; evidence which cannot be provided within time limit owing to objective reasons and extension approved by court; (ii) new evidence in procedure of second instance including: evidence found newly after hearing of first instance is concluded; evidence application for investigation, collection of which is declined before time limit for producing evidence in first instance expires, but approved to be investigated, collected upon one party's application by court of second instance. (Art. 41). Law sets specific time limits for production of new evidence.

Cross-Examinations.

All evidence shall be presented in court. Any evidence that has not been cross-examined shall not be used as basis to determine facts of case. (Art. 47). Evidence admitted by both parties in exchanging evidence shall be recorded and used as basis to determine facts of case after being explained by judicial officers in court trial. (Art. 47). Evidence involving state secrets, business secrets, individual privacy shall not be cross-examined in public. (Art. 48). One party has right to ask for presentation of original evidence when documentary or material evidence, audio-visual material is cross-examined, except for one of following circumstances: (i) Presentation of copy or duplicate approved by court if there is difficulty in producing original; (ii) copy or duplicate proved to be same with original which is already not in existence. (Art. 49). Arts. 50 through 62 set forth extensive and detailed rules governing cross-examination.

Examination, Judgment of Evidence.

Court shall make judgment pursuant to facts proved by evidence. (Art. 63). Judges shall, on basis of logical reasoning, daily life experiences, make judgments independently on whether evidence has probative value. Judges must explain reasons for accepting evidence. (Art. 64).

Arts. 66 through 79 provide detailed regulation of manner in which judge evaluates and accepts or rejects evidence.

Others.

Art. 80 sets forth penalties for deliberate interference with collection of evidence or taking of testimony.

5.08 JUDGMENTS:

See categories 6 Courts and Legislature, topic Courts; Dispute Resolution, topic Arbitration and Award.

Enforcement of Foreign Judgments, Court Orders, etc.

On basis of treaties or international conventions to which People's Republic of China is signatory, on principle of reciprocity Chinese and foreign courts can mutually entrust each other to undertake certain litigation action. Where matter foreign court wishes to entrust is incompatible with sovereignty or security of PRC, it should be rejected; where it is not within scope of authority of court, reasons should be clearly explicated and matter returned to foreign court. (Civ. Pro. Code, Arts. 260-263). Chinese courts have discretion to enforce foreign judgment in China.

Where court of PRC is presented with judgment having legal effect, or definitive decision of arbitration tribunal and petitioner wishes to compel enforcement thereof, and said petition involves property which is not in Chinese territory, court can, pursuant to treaties or international conventions to which China party, or in accordance with principles of mutuality, entrust foreign court to assist in execution of said judgments, etc. (Civ. Pro. Code, Arts. 264-267). With regard to judgments and final arbitral decisions which foreign courts authorize Chinese courts to enforce, Chinese courts should, according to treaties and international conventions to which China signatory, or on basis of principle of mutuality, commence examination of said judgment and if they consider it does not violate basic principles of laws of People's Republic of China or China's social interests, and ascertain that said decision has validity, execute judgment according to procedures provided in this statute. If these conditions not met, then matter should be referred back to foreign court. (Civ. Pro. Code, Arts. 264-267).

Documents of foreign courts entrusting courts of PRC to assist in execution, or to represent said foreign court in delivery, and documents entrusting Chinese court to undertake specific legal action, must have appended Chinese translation. Documents of courts of China entrusting foreign court to represent it in serving papers or assist in execution of Chinese decree, etc. and document wherein China entrusts foreign court to undertake specific legal action, must have appended foreign language translation. (Civ. Pro. Code, Arts. 264-267).

China became signatory on Dec. 2, 1986 to Convention on the Recognition and Enforcement of Foreign Arbitral Awards, agreed to in New York on June 10, 1958. See category 9 Dispute Resolution, topic 9.02 Arbitration and Award.

5.09 JURISDICTION:

Court generally has jurisdiction where defendant is resident; if dwelling place of defendant and domicile differ, then jurisdiction lies in courts situated where defendant usually resides. (Civ. Pro. Code, Art. 22). In cases involving legal person, court has jurisdiction where legal person is located. (Civ. Pro. Code, Art. 22).

Where several defendants have different dwelling places and residences, thus being within jurisdiction of two or more courts, each court has authority to assume jurisdiction. (Civ. Pro. Code, Art. 22).

Where contractual disputes give rise to litigation, court where defendant is located and where contract was executed have jurisdiction to hear case. (Civ. Pro. Code, Art. 24).

Parties to contract may by agreement posit jurisdiction with court where defendant resides, where contract was signed, where contract was executed, where plaintiff resides, where object of dispute is located, and other permissible choice of jurisdiction clauses. Specification must not infringe upon regulations governing level and exclusive jurisdiction. (Civ. Pro. Code, Art. 25).

Where insurance contract dispute gives rise to litigation court where defendant is located and where insured property is located have authority to assume jurisdiction. (Civ. Pro. Code, Art. 26).

Where disputes over payment of bills give rise to litigation, court where bills were to be paid and where defendant resides have authority to assume jurisdiction. (Civ. Pro. Code, Art. 27).

Where litigation concerns acts which infringe or violate civil rights, court in area where alleged violation took place or where defendant is domiciled has jurisdiction. (Civ. Pro. Code, Art. 29).

Arts. 30 through 35 specify jurisdiction with regard to other litigation.

5.10 LIBEL:

See topic 5.03 Civil Code; category 7 Criminal Law, topic 7.01 Criminal Law.

Intentional false criminal accusations, even if made against criminal, are prohibited by Criminal Code. (Art. 243). Pursuant to Criminal Procedures Law, those injured by criminal acts can make civil claims during criminal proceedings against criminal defendant. (Art. 77). Court has authority to enforce civil judgment against defendant's assets. (Civ. Pro. Code, Art. 207).

5.11 LIMITATION OF ACTIONS:

See topic 5.03 Civil Code; category 7 Criminal Law, topic 7.01 Criminal Law.

5.12 PRESCRIPTION:

See topic 5.11 Limitation of Actions; category 23 Property, topic 23.10 Property Ownership.

5.13 PROCESS:

Return of service required in service of process in civil case. Person being served with process must record date of receipt and sign name, or affix his seal, on document. Date of service is date recipient signed return of service. (Civ. Pro. Code, Art. 77). Where court serves papers involving litigation, it should directly deliver them to party to be served, or if said party not present they should be delivered to adult member of said person's family who resides with such person, for signature and receipt. Where person to be served already appointed agent for service of process, then said agent should be served and should sign return of service. (Civ. Pro. Code, Art. 78).

If person to be served resists service of process, process server should request representative of relevant basic level organization or other person to come to place of service, explain circumstances and on return of service record reasons for refusal of service and date. Process server and witness should sign their names or affix their seals, and document to be served should be left at residence of person to be served. These acts regarded as service of process. (Civ. Pro. Code, Art. 79).

Where direct service of process encounters difficulties, other courts may be entrusted to represent trial court in serving process or process can be served by mail, which must be registered, return receipt. Date of receipt will be date of service. (Civ. Pro. Code, Art. 80). If whereabouts of person to be served unknown or use of other methods of service provided in this section will be of no effect, then service can be effected by formal government proclamation. Service will be completed within 60 days of date of said proclamation. Reasons for service by proclamation must be recorded in case file. (Civ. Pro. Code, Art. 84).

5.14 SEQUESTRATION:

Court, on its own initiative or on request of party, may take measures to assure availability of property of defendant to satisfy potential judgment.

5.15 TORTS:

See topics 5.05 Damages, Libel, Civil Code; categories 7 Criminal Law, topic Criminal Law; Introduction, topic Government and Legal System.

Tortious Conduct.

Those who trespass on state, collective or other property should return said property and, failing to do so, compensate owner at market price. (Art. 117). Similarly, those who damage property shall either repair it or compensate injured party at market prices for damage. (Art. 117). For other special losses as result of trespass tortfeasor shall make compensation for loss suffered. (Art. 117).

If plagiarism, infringement, and like occur with regard to copyright, patents, trademark or discoveries then injured party may demand cessation of such tortious conduct and compensation for loss. (Art. 118).

Where there is battery, tortfeasor must pay medical costs, income loss, funeral expenses if death ensued and support those who were dependent upon deceased. (Art. 119).

Where there has been infringement of use of person's name, image, or defamation, then person has right to stop such tortious conduct, eliminate its effect, obtain apology and demand compensation for loss. (Art. 120).

Where persons or property have been damaged by product's quality not meeting standards, manufacturer and distributor of product are both liable for damages. Where storage or transportation groups are responsible for damage product manufacturer and distributor have right to demand compensation from these parties. (Art. 122).

Those who violate environmental protection regulations shall have civil liability pursuant to law. (Art. 124).

Those who properly defend themselves are not liable for damages unless defense goes beyond necessary limits causing injuries. (Art. 128). Where person to avoid dangerous situation caused by others, cause damage, person creating dangerous situation shall be liable. (Art. 129).

If two or more parties commit tort they have joint liability (Art. 130) and if injured party contributed to damage then defendant's liability will be proportionately reduced (Art. 131).

One can collect from courts for tortious injury. General Rules of Civil Law make provision for obtaining restraining orders and recovering damages for tortious conduct. If said tortious act is result of criminal wrong, Criminal Code (Art. 77) provides for civil legal redress, such as compensation. Those who damage or make off with private or public property must return it and make compensation.

6 COURTS AND LEGISLATURE

6.01 ADMINISTRATIVE LITIGATION LAW:

Administrative Litigation Law of China was adopted on Apr. 4, 1989 at second session of Seventh National People's Congress. Since citizens have right to sue government, this statute ensures courts to try administrative cases correctly and promptly, so as to protect legitimate rights of citizens, legal persons and other organizations that have standing, and ensure administrative organizations to exercise their authorities in accordance with law.

Aliens, stateless persons, foreign enterprises and organizations within China may bring administrative actions except those actions governed by other laws. (Art. 70). Aliens, stateless persons, foreign enterprises and organizations enjoy same rights and obligations as those of citizens and organizations of China in administrative proceedings. (Art. 71).

Citizens, legal persons or other enterprises and organizations have rights to compensation when their legitimate rights are infringed upon and they suffer loss as result of actions by administrative organizations or staff. In proceedings only for compensation, disputes shall be decided first by administrative organizations. Litigants contesting decision rendered by administrative organizations may bring actions against administrative organizations. Mediation may be used in proceedings for compensation. (Art. 67).

This law contains 11 chapters, 75 Articles and became effective as of Oct. 1, 1990.

6.02 ADMINISTRATIVE REGULATIONS:

Regulations on Procedure for Formulation of Administrative Regulations was promulgated by State Council and became effective on Jan. 1, 2002. Names of administrative regulations generally are called “ordinances”, also may be called “measures” or “rules”, etc. Rules formulated by departments under State Council, local governments shall not be called “ordinances”. (Art. 4). State Council draws up working plan of legislation at beginning of each year. (Art. 6). State Council organizes and drafts administrative regulations. (Art. 10).

Abolishment of Some Administrative Regulations Issued at End of 2000.

(Decree of State Council of China, No. 319).

To adapt to reform, open up and perfect system of socialist market economy, and to meet requirement of new circumstances with China's entry to WTO; State Council completely cancelled 756 existing administrative regulations by end of 2000. For example, (I) 71 administrative regulations that did not accord with newly established or revised laws, guidelines or policies of Party or state were abolished. (II) 80 administrative regulations became void as application period expired or adjustment object disappeared; they were declared not longer in force. (III) 70 administrative regulations issued between 1994 and 2000 were abolished by explicit orders and declared void.

Important regulations abolished are as follows: Regulations of China on Reform through Labor; Regulations of China on Arbitration of Economic Contracts; Regulations on Purchase-and-Sale Agreement on Industrial and Mineral Products; Rules for Implementation of Law of China on Technology Contract; Regulations on Administrative Reconsideration; Measures on Marriage Registration; Provisional Regulations of China on Foreign Exchange Control.

Maritime courts established in 1984 in Shanghai, Qingdao, Tianjin and Dalian, are regarded as intermediate level courts and take cognizance of domestic and foreign maritime cases. Civil Procedure Law applies to maritime courts.

Substantive laws applicable to maritime courts are: General Principles of Civil Code, Law of Maritime Traffic Safety, Law of Maritime Environment Protection, Fishing Law, Regulations Controlling Prevention of Pollution of Sea Areas by Vessels, Regulations Concerning Control of Dumping of Waste at Sea, Regulations Concerning Environmental Protection in Offshore Oil Exploration, etc. Maritime Law of China was adopted by National People's Congress on Nov. 7, 1992, and became effective as of July 1, 1993. Said law with 278 articles governs all major areas of admiralty.

Abolishment of Some Administrative Regulations Issued on year of 2008.

(Decree of State Council of the People's Republic of China, No. 516).

In order to better adapt to requirements of accelerating construction of government under rule of law and comprehensively promote administration according to law, State Council has comprehensively cleared up current 655 administrative regulations that were promulgated by end of 2006. On basis of clear-up, The State Council decides that: (1) 49 administrative regulations whose major contents have been replaced by new law or administrative regulations must be abolished and (2) 43 administrative regulations have actually become invalid due to expiration of their application period or elimination of their adjustment objects, therefore they are announced invalid. Decree promulgated and came into effect on date of Jan. 15, 2008.

Judges Law.

Comprehensive law governing judicial office; enacted in 1995, rev'd 2001, and supplemented by Code of Conduct issued by Ministry of Justice in 2005. Law and Code set forth: (1) Obligations of judges as to duty to try cases, observe law and national interest, and maintain impartiality, (2) rights to refuse interference, compensation, training, provision for rewards, (3) qualifications, (4) process of appointment and removal, (5) grading and appraisal, (6) punishment for violation of law or code, and (7) redress against action taken against judicial officer.

Qualifications for Judge.

Judge must possess following qualifications: (1) To be of nationality of People's Republic of China; (2) to have reached age 23; (3) to endorse Constitution; (4) to have fine political, professional qualifications, to be of good conduct; (5) to be in good health; (6) legal workers who are either law graduates or non-law graduates with professional legal knowledge are required to have two years' working experience in law profession; three years required of judges in High Court or Supreme Court. Legal workers who are law postgraduates or non-law postgraduates with professional legal knowledge are required to have one year working experience in profession, two years' working experience is required of judges of High Court or Supreme Court.

6.03 COURTS:

PRC Constitution (Art. 123) provides that the people's courts are state judicial organs having powers of adjudication. Courts are not co-equal branches of government, but subordinate to people's congresses at each level. At national level, NPC occupies top of hierarchy; beneath are three subordinate institutions: State Council, Supreme People's Court, and Supreme People's Procuratorate.

Constitution (Art. 126) provides that people's courts are independent state organs. However, “independence” is qualified; Constitution (Art. 128) states that SPC is “responsible to and reports to” NPC and Standing Committee; likewise, lower level courts answer to institutions that created them. Constitution and organic Law of the People's Court (1979, am'd 1983) provides that NPC appoints and removes president of SPC. NPC Standing Committee, upon recommendation of SPC, appoints or removes other judicial officers. Judges do not have life tenure and terms are limited.

NPC funds court system. Several speciality courts exist: military, railway, maritime, that are funded by respective corresponding institutions—People's Liberation Army, Ministry of Railway and Ministry of Transport. Speciality courts are divided into numerous individual courts with various geographical locations. SPC also may influence courts in cases of national interest raising vital policy issues.

Structure: PRC has four levels of courts. Basic (trial), intermediate (appellate), high people's court (supreme) and Supreme People's Court (highest court of final resort). This structure, absent SPC, exists in every province, autonomous region, special cities (Beijing, Tianjin, Shanghai, and Chongqing). As mentioned, there are specialty courts to handle with jurisdiction over specific matters. To provide citizens access to courts in country size of China, there are more than 3,000 basic people's courts at county level; these courts have established 30,000 subordinate institutions, called people's tribunals, in towns and villages below county level. Above sit intermediate courts in cities, prefectures within provinces; in addition, in provinces, autonomous regions, and special cities, there are 32 high level people's courts. Top court is SPC in Beijing.

Two trials may be needed to complete case, as intermediate courts have review power of law and facts and can effectively re-try case or remand for re-trial. Judgement of court of first instance generally appealable to intermediate court; but cases of first instance tried by SPC are final dispositions.

Jurisdiction: People's courts' jurisdiction divided into four major areas: criminal, civil, economic and administrative. Certain high people's courts in certain cities have established specific division for intellectual property cases. Distinction between civil and economic cases is that former deals with individual generic matters such as, inheritance, housing, labour and torts, while latter (economic) raise issues affecting an economic sector and may involve enterprises more than individuals. Administrative courts permit individuals to file claims objecting to legality of government action.

Basic People's Courts' Jurisdiction: Art. 21 of OLPC governs jurisdiction. Original jurisdiction over ordinary civil and criminal cases. Excluded from jurisdiction are: (1) Death penalty, (2) life imprisonment, and (3) important cases with foreign related element. Court has authority to settle cases and to transfer to mediation.

Intermediate People's Courts: Art. 25 of OLPC governs jurisdiction. Original jurisdiction over cases of first instance that are provided by law; over cases of first instance transferred from lower court, and appeals of lower court judgments. Also has power to request important case be transferred to a higher court. Art. 19 of Law of Civ. Pro. provides further scope of jurisdiction. Intermediate courts have jurisdiction over major cases involving foreign element, over cases that are significant and likely to have probable important results, and cases under SPC. Art. 14 of Administrative Law grants further area of jurisdiction. Finally, Art. 20 of Crim. Pro. Law (1996) gives intermediate court original jurisdiction over counter-revolutionary cases, death penalty or life imprisonment cases, cases where foreigner has committed offense or where Chinese citizen has committed offense against foreigner.

High Peoples' Court: Art. 28 of OLPC governs jurisdiction. First instance court where law provides, and where cases transferred to it from lower court. Jurisdiction over appeals of certain lower court judgments, and appeals by procuratorates. Art. 20 of Civ. Pro. Code gives jurisdiction over major cases within ordinary powers of jurisdiction; further Art. 21 of Crim. Pro. Code gives jurisdiction over criminal cases affecting large. Finally, Art. 15 of Administrative Law gives jurisdiction over serious and complicated cases brought under administrative regulations.

Supreme People's Court: Art. 32 of OLPC governs jurisdiction: (1) Cases of first instance provided by law, (2) cases of first instance deemed sufficiently important for decision, (3) appeals over lower and speciality courts, (4) appeals by Supreme People's Procuratorate, and (5) cases whether civil, criminal, administrative or otherwise affecting whole country. SPC is supervisory court of entire judicial system. It also issues legal interpretations, though its power to do is not explicit.

Decision Making Process: Generally, bench consisting of odd number of judges try cases of first instance and appeal. Exceptions exist at first instance for simple cases or those directed to mediation. These cases heard by one. At lower courts, bench may not consist of all judges, but at higher levels bench consists only of judges. In contrast to US, cases are adjudicated with substantial speed. Judgment in criminal case rendered in six months from filing case; civil cases are decided six months from time of docket. Party has only one appeal as of right.

Chinese judicial system has adjudication committee that may play important role in certain cases. Art. 11 of OLPC provides for rules on committee that consists of president and judges appointed by relevant Standing Committee. Purpose is to review difficult or complicated cases to make certain they are decided correctly; adjudication committee may advise or, in some cases, render a judgment effectively making the trial a formality.

Procuratorate: organ is responsible for proper and correct administration of criminal justice system. It is co-equal in rank to court. Supervises activities of public security organs and approves arrests, etc. It supervises work of courts in criminal cases through exercise of right of appeal and protest against judgments deemed wrongly decided.

Re-opening Judgments: In certain instances provided by law, judgment of first or second instance may be re-opened for correction after it has been entered and become effective. Relevant laws provide statute of limitations, but period exists when judgment potentially remains open to additional review.

6.04 LAW REPORTS, CODES:

See topic 6.03 Courts; category 1 Introduction, topic 1.02 Government and Legal System.

There are compilations of law decisions and judgments made by each court and general compilations of law decisions that have been circulated domestically among those in legally related positions, but not circulated for public distribution. With advent of new legal system and consequent activity, future of law reports has not been clarified, but at least domestic circulation among specialists will likely continue. Publication of all statutes and administrative regulations as revised may be accomplished after their compilation.

All laws promulgated by Central Government or local governments are published either in State Council Bulletin if national regulation, or in local newspapers if local law.

Legislative Affairs Commission of Standing Committee of National People's Congress of China has published laws in Chinese and English which were adopted by Congress or its standing committee from 1979 to 1999, and thereafter. Supreme Court has commenced publication of Supreme Court Bulletin, which includes regulations, instructive cases, and reports of work. National Congress and many localities have their own official bulletins to make legislation public.

6.05 LEGISLATURE:

See category 1 Introduction, topic 1.02 Government and Legal System.

6.06 STATUTES:

See categories 15 Foreign Trade and Commerce, topic Trade Zones; Introduction, topic Government and Legal System.

Statutes are classified as follows: (1) Constitution; (2) normative legal documents enacted by highest organ of authority; (3) administrative regulations and other normative legal documents enacted by highest administrative organ; (4) normative legal documents enacted by Central Military Commission; (5) local regulations and other normative documents enacted by local state organ; (6) regulations enacted by autonomous regions; (7) normative legal documents enacted by special economic zones; and (8) international treaty which People's Republic of China has entered with other countries, or which PRC has joined.

7 CRIMINAL LAW

7.01 CRIMINAL LAW:

Code of Criminal Procedure was amended by 8th National People's Congress Mar. 17, 1996. Code of Criminal Procedure grants defendant rights to employ lawyer when he is interrogated or his personal liberty is restrained. With Code of Criminal Procedure amended, Supplementary Decision on Re-education of Offenders Through Labor, and Regulation of Arrest were repealed.

No special privileges are granted to any person and law is equally applicable to all persons. (Art. 6). Cases normally will be adjudicated in public. (Art. 11). Procedural safeguards are guaranteed, and litigant and other participants in criminal proceedings have right to bring complaint against personnel in judicial, prosecutorial, or investigative organizations who violate their procedural rights. (Art. 14).

Jurisdiction for Investigation.

Unless law provides otherwise, criminal cases are investigated by Public Security Bureau. (Art. 18). Corruption, criminal dereliction of duty by government workers, or violations of citizens' rights by government institutions should be investigated by People's Procurator. (Art. 18).

Jurisdiction.

Criminal cases are normally tried in first instance at basic court level. (Art. 19). Middle level court has original jurisdiction for counter-revolutionary crimes, crimes endangering State security, crimes where death penalty or life imprisonment is asked for, and crimes committed by foreigners. (Art. 20). Major criminal cases affecting entire province, self-governing area (provincial equivalent) or city directly under central government are handled by high courts as courts of first instance. (Art. 21). For crimes affecting entire nation, Supreme Court can be trial court. Normally venue is located in area where crime was committed, although if more convenient it can be located at defendant's residence. (Art. 24).

Refusal.

Code makes provision for withdrawal or removal of judges, assessors, prosecutors, and investigators who might be prejudiced by prior relationship. (Art. 28). Code gives parties right to seek withdrawal of such persons. (Arts. 28, 31).

Counsel.

Code provides that aside from attorney, other individuals may assist defendant or suspect, such as those recommended by people's organization, defendant's unit, or relative or guardian of defendant or suspect. Defendant may employ lawyer when public security bureau transfers its file to prosecutor for public prosecution. (Art. 33). Person interrogated by investigation bureau or when his personal liberty has been restrained, may employ lawyer to provide legal consultation and represent him, to raise complaints and appeal to relevant authorities about illegal acts by investigating department. (Art. 96).

When case is transferred to public prosecutor, defense lawyer may: (a) Apply for trial; (b) read, take notes or copy relevant documents prepared by security organ or prosecutor; (c) conduct separate investigation and apply to prosecution organ and court for seizure of evidence collection; (d) meet with clients and communicate with them in person, and in writing.

In court hearings lawyer may: (a) Apply for withdrawal of members of judicial panel, court clerk, public prosecutor, expert witnesses or interpreters; (b) with permission from client and judge, query witnesses or expert witnesses; (c) express his opinion as to material evidence, transcripts of testimony of witnesses, transcripts of inspection; (e) argue on behalf of his client.

Lawyer may file and appeal for his client. (Arts. 36, 37, 96, 154, 155, 157, 159, 160).

Bail.

Term “Bail” is not used in Code. It is called “awaiting trial out of custody or living at home under surveillance and under guarantee”, conditions of which are set forth in Art. 51. Defendant or suspect suffering from serious illness or who is pregnant woman or nursing her infant child may apply “bail”. (Art. 60). Art. 52 provides that suspect or lawyer may apply for bail, and provides rules for guarantee of bail.

Evidence examined for probity in order to be admitted as evidence. (Art. 42). Prosecutors must prove their case with objective evidence, obtained strictly according to legal procedures. Use of torture, threat, enticement, deceit, or other illegal methods of obtaining evidence is prohibited. (Art. 43). Public security organ's warrant of arrest, prosecutor's indictment and court's decision, all must be based on fact. If there is deliberate concealment of factual matters, persons responsible should be investigated and punished. (Art. 44). Court, prosecutor, and public security organ all have authority to obtain evidence from all government agencies, enterprises, service organizations, communes, people's organizations, and citizens. (Art. 45). In all cases emphasis must be placed on evidence, investigatory material, and oral testimony. (Art. 46). If only testimony is that of defendant, and there is no other evidence, then defendant cannot be convicted of crime. (Art. 46). If there is solid evidence of guilt, defendant need not testify for conviction. Evidence of witnesses must be presented in public prosecution. Injured party, defendant and counsel have right to examine testimony, evaluate evidence, and only thereafter is it admissible. (Art. 47). Anyone with knowledge of facts of case has duty to testify. (Art. 48).

Criminal Code was first promulgated by 5th National People's Congress on July 1, 1979, and took effect on Jan. 1, 1980. Between 1981 and 1995, National People's Congress amended Code 23 times. 8th National People's Congress substantially revised Code in 1997 in order to keep pace with effects of China's reforms. Number of articles increased from 192 to 452. It was passed on Mar. 14, 1997, and became effective on Oct. 1, 1997. Between 1999 and 2006, Code was amended further six times.

Criminal Responsibility.

If one knows that his or her acts will result in social harm, and furthermore hopes for, or does not interfere with, this type of act, and as result, crime is committed, then one commits intentional crime. (Art. 14). Code also provides that certain negligent criminal conduct bears criminal responsibility if specified by special statutory provision. (Art. 15). If injury is caused without intent or criminal negligence, and one could not foresee consequences of his or her act, then one is not criminally responsible. (Art. 16). Persons who are 16 years of age bear criminal responsibility for their acts. (Art. 17). Persons who are age 14, but not yet age 16, bear responsibility for serious crimes such as murder, rape, arson, etc. (Art. 17). Persons between ages of 14 and 18 should receive comparatively light sentences. (Art. 17). In case of person who is less than 16 years of age, head of household of said youth can be ordered to increase his supervision and education, or government can undertake education of said youth. (Art. 17). Persons who are mentally ill and unable to control themselves while committing harmful acts are not criminally responsible for their acts but may be subject to increased supervision. (Art. 18). Persons who are temporarily insane must bear responsibility for their criminal acts which were committed during their normal condition. (Art. 18). Persons under influence of alcohol are responsible for their acts. (Act. 18).

Forms of Punishment.

Various forms of punishment for criminal acts are provided by Code, including death penalty, life imprisonment, imprisonment for fixed periods, limited detention, public supervision, fines, confiscation of property, loss of political rights and, for foreigners, deportation. (Arts. 33-35). Criminals can be required to compensate victims for economic loss. (Art. 36). Minor offenses can result in admonishment, or order to: (1) Provide written undertaking of responsibility and repentance, (2) make apology, (3) make compensation for losses suffered, or (4) be subject to administrative sanctions by responsible department. (Art. 37).

Statute of Limitations.

Code also has statute of limitations (Art. 87) applicable to penalties for offense. Thus, prosecution is prohibited: (1) After five years, for offenses carrying maximum prescribed penalty less than five years imprisonment; (2) after ten years, for offenses carrying maximum prescribed penalty of not less than five but no more than ten years imprisonment; (3) after 15 years, for offenses carrying maximum prescribed penalty of not less than ten years imprisonment; and (4) after 20 years, for offenses carrying prescribed penalty of life imprisonment or death, unless Supreme Procuratorate approves extension of 20-year period. (Art. 87).

Categories of Crime.

Code provides for several categories of crime. Revised Code increased number of categories and altered name and content of others. For example, “Anti-Revolutionary crimes” became “Endangering Public Security”. “Sabotaging Socialist Economic Order” is now “Sabotaging Socialist Market's Economic Order”. Revised Code added following categories: “Endangering National Interest”, “Corruption and Bribery”, and “Serviceman Duty Violation”. Code provides range of punishment for offenses in Arts. 101 through 383.

7.02 SECURITY ADMINISTRATION PUNISHMENT LAW:

Security Administration Punishment Law adopted by 17th conference of Standing Committee of 10th State Council on Aug. 28, 2005, effective as of Mar. 1, 2006, replace prior Security Administration Punishment Law.

General Provisions.

Law formulated to safeguard social security order, protect public security, protect lawful rights, interests of citizens, legal persons, other organizations, normalize and ensure performance of public security administration duties by public security organ and police. (Art. 1). Violation of law results in civil or criminal liability depending on nature of action. (Art. 2).

Public security organs may use mediation to settle disputes, property damage in civil matter, and other minor acts violating Security Administration. If parties reach agreement through mediation, they are not punished; otherwise, parties are subject to decision of public security organs and instructed to file civil litigation at people's court. (Art. 9).

Types and Application of Punishments.

Arts. 10, 15, 19 and 20 specify range of punishments for various offenses, including sanctions applied to foreigners.

Acts Against Security Administration, Punishments for Violating Administration.

Art. 23 specifies acts warranting issuance of warning.

8 DEBTOR AND CREDITOR

8.01 ASSIGNMENTS:

See category 5 Civil Actions and Procedure, topic 5.03 Civil Code.

Chinese law at present does not prohibit assignments of claims of creditor to another person, unless contrary to contractual provisions.

8.02 ATTACHMENT:

See category 5 Civil Actions and Procedure, topic 5.03 Civil Code.

Once civil proceedings are commenced, party can make application to have its claim secured prior to issuance of judgment, and courts presently have authority to attach property to secure civil claim. (Code of Civil Procedure, Arts. 92, 93).

Attachment can be commenced by application of one of parties prior to court adjudicating claim if there is reason to believe that it will be difficult or impossible to make execution after adjudication because of acts of one of parties or for some other reason. Normally, court would be concerned with sale, transfer or secreting of property in question. Under extraordinary circumstances court should provide written decision within 48 hours from party's application for preservation of certain property, and should commence immediate execution on said property. Application to preserve property in question, provides scope of relief that may be granted, unless it is property which is subject matter of litigation in which case said property determines scope of relief. If after application for relief, party is not satisfied with decision, application can be made for reconsideration, but during reconsideration original decision stands.

Court can use numerous means of preserving property including: Attaching or sealing property, distraining property or freezing asset. (Civ. Pro. Code, Arts. 94, 251-256). Latter form of freezing asset is normally applied to monies or property in bank, or cooperative trust, etc. Sealing involves placing notice of sealing where property is located or property can be moved to another location. If property is distrained, said property can be placed in other persons hands for safe keeping or if property is perishable it can be sold.

In addition court can request guarantee such as deposit of money in bank, bond, etc.

In disputes involving foreign property or foreign parties, courts have same authority to act on petition of party to preserve property. Provisional attachment is available where monetary claims or claims for property are made, or claims are made that can be converted into monetary claims.

Courts in which litigation is taking place, normally basic level courts, or economic trial courts of intermediate level courts, have jurisdiction to act on provisional attachments, etc. If property to be attached, distrained or sealed is not in courts jurisdiction, court where property is located, at behest of trial court, shall act to attach property pursuant to order of trial court.

8.03 BANKRUPTCY:

New Law.

On Aug. 27, 2006, Standing Committee of NPC adopted Enterprise Bankruptcy Law, effective Jun. 1, 2007, that repeals 1986 law. It consists of 12 Chapters, comprising 136 articles. Law establishes unified framework for all enterprises, whether state or privately owned, provides procedures for insolvent institutions to re-organise, or to go into liquidation.

General.

Law is formulated for purposes of regulating procedures for enterprise bankruptcy, fairly resolving settlement of debts and credits, safeguarding legitimate rights and interests of creditors and debtors, and maintaining market order of socialist economy. (Art. 1). Bankruptcy proceeding shall be governed by people's court where relevant debtor domiciled. (Art. 3). Procedures for hearing bankruptcy proceeding shall, in absence of relevant provisions in present Law, be governed by relevant provisions of Civil Litigation Law. (Art. 4).

Procedures for bankruptcy under Law shall have binding effect over debtor assets beyond Chinese territory and where foreign judgment have been made with regards to assets in China they will be enforced according to international treaties to which China is party where it does not violate basic principles of laws, does not damage sovereignty, safety or social public interests of state, and does not damage legitimate rights and interests of creditors within territory. (Art. 5).

When enterprise legal person fails to settle its debt as due, and if its assets are not enough to pay off debts or if it is obviously incapable of clearing off its debts, it may file application with people's court for rectification, compromise or bankrupt liquidation. (Arts. 2 and 7) Within five days of creditor filing, court will inform debtor; debtor has seven days to reply; court has ten days thereafter to decide. Except for circumstances previously described, court has 15 days to make initial ruling, with extension of 15 days on ruling by higher court. (Art. 10). Notice of acceptance served on parties by court within five days of decision. Applicant has ten days to appeal. (Arts. 11 and 12).

Bankruptcy Administrator.

Bankruptcy administrator shall be appointed by court. (Art. 13). Relevant creditors shall be notified within 25 days by court. (Art. 15).

Administrator may decide to cancel all contracts; where it decides to continue performance, other party may require guarantee. (Art. 18). Any ongoing proceeding involving debtor shall be suspended until such time as assets taken over by administrator. (Art. 20). All creditor proceedings shall be consolidated into bankruptcy proceedings. (Art. 21).

As per Supreme Court rules, people's court will appoint bankruptcy administrator who shall attend creditors' meeting, report performance of its duties and functions and answer relevant inquiries. (Art. 23). Liquidation group or law firm, accounting firm, or bankruptcy liquidation firm that have been established according to law may act as administrator.

Bankruptcy administrator is to perform following functions: (1) Take over assets, seals and account books and debtor's documents; (2) investigate financial status of debtor and formulate financial statements; (3) decide on internal management of debtor; (4) decide on daily expenditure and other necessary expenditures of debtor; (5) decide on, before first creditors' meeting, whether to continue or suspend debtor's business; (6) manage and dispose of debtors' assets; (7) participate in actions, arbitrations or any other legal procedures on behalf of debtor; (8) propose creditors' meetings; and (9) perform any other function or duty that court believes it should perform. (Art. 25). Remuneration of bankruptcy administrator to be decided by court, and if creditors' meeting has any different opinion, it may file objection with court. (Art. 28). Bankruptcy administrator may not quit post without any justifiable reason, and will be subject to approval of court. (Art. 29).

Debtor's Assets.

Debtor's assets refers to all assets belonging to debtor when application for bankruptcy accepted, and assets obtained by debtor between when application for bankruptcy is accepted and when bankruptcy procedures concluded. (Art. 30). For any of following which occur within one year before people's court accepts application for bankruptcy, bankruptcy administrator has right to plead court to revoke: (1) Transferring assets free of charge; (2) trading at obviously unreasonable price; (3) providing guarantee to those debts which did not have guarantees; (4) paying off debts not due, in advance; or (5) giving up creditor's right. (Art. 31). Following acts involving debtor's assets shall be deemed as invalid: (1) Concealing or transferring assets in order to avoid debts; or (2) fabricating any debt. (Art. 33).

Declaration of Creditor's Right.

People's court shall, after accepting application for bankruptcy, decide on term of creditor to declare its right, and must be between 30 days to 3 months. (Art. 45). Any creditor's right not due will be deemed as due when application for bankruptcy accepted. Interest on any creditor's right shall be stopped when application for bankruptcy accepted. (Art. 46). In declaring its right, creditor must make written statement on amount of right and whether there is any security and submit relevant evidence. (Art. 49). Where bankruptcy administrator rescinds contract according to Law, contracting party may declare creditor's right on basis of right to compensation for damages. (Art. 53). If creditor fails to claim its creditor's right within time limit, it may make up its declaration before final distribution of assets. (Art. 56).

Creditors' Meeting.

Creditor declaring its creditor's right is member of creditors' meeting and has right to attend creditors' meeting and vote. Creditors' meeting shall be attended by debtor's employees and labor union representatives, who may air their views on relevant issues. (Art. 59). Chairman of creditors' meeting shall be designated by court from among creditors with right to vote, who will preside over creditors' meeting. (Art. 60). Creditors' meeting shall exercise following functions: (1) Examine creditor's right; (2) apply to court for alteration of bankruptcy administrator and examining expenses and remunerations of bankruptcy administrator; (3) supervise bankruptcy administrator; (4) select members of creditors' meeting; (5) decide whether to continue debtor's business operations; (6) decide whether to adopt rectification plan; (7) decide whether to adopt compromise; (8) decide whether to adopt management plan for debtor's assets; (9) decide whether to adopt conversion plan for insolvent assets; (10) decide whether to adopt distribution plan for insolvent assets; and (11) exercise any other functions court deems creditors' meeting shall exercise. Meeting minutes shall be kept on matters deliberated at creditors' meeting. (Art. 61).

First creditors' meeting shall be held within 15 days of expiration of term for declaration of creditor's right. Subsequent creditors' meetings may be held when court deems necessary or where bankruptcy administrator, creditors' committee, or any creditor representing ¼ or more of total creditor's right proposes chairman to hold meeting. (Art. 62). Notice must be provided 15 days in advance. (Art. 63). Resolution may be adopted upon consent of ½ or more of creditors that attend meeting and have right to vote and which representing ½ or more of aggregate amount of creditors' right free of guarantee. (Art. 64).

Creditors' Committee.

Creditors' meeting may decide to establish creditors' committee, comprised of creditor representatives selected at creditors' meeting and employee representative or representative of labor union, which is not to be more than nine persons. (Art. 67). Creditors' committee shall perform following functions: (1) Supervise management and disposal of debtor's assets; (2) supervise distribution of insolvent assets; (3) propose to hold creditors' meeting; and (4) perform other functions as entrusted by creditors' meeting. Where bankruptcy administrator or debtor refuses to accept supervision, creditors' committee has right to plead that court make order on supervision within five days. (Art. 68). Where bankruptcy administrator conducts any of following acts, it must report to creditors' committee in timely manner: (1) Transfer of rights and interests of real property such as land and buildings; (2) transfer property rights such as right to mine, and intellectual property right; (3) transfer of all inventory or business operations; (4) loans; (5) making of property guarantees; (6) transfer of creditors' right and securities; (7) performance of any contract that has not been fully performed by debtor; (8) waiver of rights; (9) withdrawal of pledge; and (10) any other property disposal that has important impact on creditor's interests. In event that there is no such creditors' committee, bankruptcy administrator must report it to court in timely manner. (Art. 69).

Formulation and Approval of Rectification Plan.

Debtor or bankruptcy administrator may, within six months as of date court approves application for bankruptcy, submit draft reorganization plan to court and creditors' meeting. On expiry of this term, court may, upon request of debtor or bankruptcy administrator, and on justifiable grounds, permit extension of three months. Where debtor or bankruptcy administrator fails to submit draft reorganization plan according to schedule, court shall order termination of reorganization procedures and announce debtor bankrupt. (Art. 79). Court shall, within 30 days of date draft reorganization plan is received, hold creditor's meeting so as to vote on draft. Where ½ or more of creditors in voting group at creditors' meeting agree to draft reorganization plan, representing 2/3 or more of total amount of creditor's rights, it shall be deemed as adoption of plan. (Art. 84). Within ten days of adoption of reorganization plan, creditor or bankruptcy administrator shall file application with court for approving reorganization plan. Where court deems, upon examination, that application complies with Law, it must, within 30 days as of date application is received, grant approval, terminate relevant procedures for reorganization and make announcement. (Art. 86).

Composition.

Debtor may, according to Law, apply for composition with court. Where debtor applies for composition, it shall put forward draft of composition agreement. (Art. 95). Where court deems that composition application complies with provisions of Law, it shall rule on it, announce it and hold creditors' meeting so as to discuss draft. (Art. 96). Adoption of resolution of composition at creditors' meeting requires consent of ½ or more of creditors with right to vote who attend meeting, representing 2/3 or more of total creditor's rights free from guarantees. (Art. 97). Where composition adopted at creditors' meeting, court shall decide whether to confirm it, terminate procedures for compromise and announce it. (Art. 98). Debtor shall pay off its debts according to conditions as prescribed in relevant composition deed. (Art. 102). Where debtor is unable or fails to implement composition deed, court shall, upon request of creditor in composition, rule to terminate implementation of composition deed, and announce debtor bankrupt. (Art. 104).

Announcement of Bankruptcy.

Where court announces debtor bankrupt according to Law, it shall, within five days from date of decision, serve it on relevant debtor and bankruptcy administrator, and shall, within ten days from date of decision, notify creditors and make announcement. Before any bankruptcy is announced, under any of following, court will decide to terminate bankruptcy procedures: (1) Where third party provides any guarantee for all debts or pays off all debts as due for debtor; or (2) where debtor has paid off all due debts. (Art. 108).

Conversion and Distribution.

Bankruptcy administrator must draft conversion plan of assets and submit it to creditor's meeting for discussion.

Bankruptcy administrator shall, according to conversion plan adopted by creditor's meeting, sell assets by means of conversion at proper time. (Art. 111). Sale of assets by bankruptcy administrator shall be conducted through auction, except for different resolution by creditor's meeting. Insolvent enterprise may be wholly or partially sold by means of conversion. Where enterprise is sold by means of conversion, intangible assets and other assets thereof may be solely sold by means of conversion. (Art. 112).

Assets shall, after deduction for costs of bankruptcy proceedings and community liabilities, be liquidated according to following sequence: (1) Wages and basic social insurance; (2) social insurance and taxes other than those in item 1; and (3) common creditors. Where assets are not sufficient in sequence set out, it shall be distributed according to proportion. (Art. 113).

Bankruptcy administrator shall formulate distribution plan of assets in timely manner, and submit it to creditor's meeting for discussion. Distribution plan must indicate following: (1) Names and domiciles of creditors; (2) amount of creditor's rights that are involved in distribution of insolvent assets; (3) amount of assets available for distribution; (4) sequence, proportion and amount of assets subject to distribution; and (5) measures for distributing assets. After distribution plan is adopted by creditors' meeting, bankruptcy administrator must submit it to court for confirmation. (Art. 115).

Conclusion of Procedures for Bankruptcy.

Bankruptcy administrator shall, within ten days of date procedures for bankruptcy are concluded, handle formalities for write-off with organ originally in charge of registration of bankrupt. (Art. 121).

Legal Liabilities.

Where director, supervisor or senior manager violates his obligations of truthfulness and diligence and thus leads to enterprise bankruptcy, he shall be subject to relevant civil liabilities according to law. (Art. 125). Where debtor violates Law by refusing to submit any required material to court or submit thereto any fraudulent financial statements, list of debts, list of creditor's rights, or payment statements of employees' wages or social insurance, court may impose fine upon directly liable person according to law. (Art. 127).

8.04 EXECUTIONS:

Pursuant to Trade Agreement between U.S. and China certain foreign arbitral awards and judgments embodying said awards can be enforced in Chinese courts. See category 9 Dispute Resolution, topic 9.02 Arbitration and Award.

Legally effective judgments or rulings of civil cases and parts of judgments or rulings related to property in criminal cases must be enforced by people's court of first instance or people's court at same level where property that is to be enforced is located. (Civ. Pro. Code 201). Courts having jurisdiction can also enforce arbitral awards. (Civ. Pro. Code, Art. 213). If property to be executed upon is outside jurisdiction of court, court where property is located can be entrusted with execution of said judgment, which should commence within 15 days of receipt of petition and should not be refused. (Civ. Pro. Code, Art. 206).

Enforcement must be carried out by enforcement officer. (Civ. Pro. Code, Art. 205). Where notarial offices have legal authority and undertake execution on behalf of creditors they may do so but if there is resistance to execution, application to basic level court can be made for enforcement of said document reflecting indebtedness. (Civ. Pro. Code, Art. 214).

If person to be enforced fails to fulfill obligations specified in legal documents instructed by enforcement notice, people's court must have power to withhold or withdraw portion of his income to fulfill his obligation. However, court must leave necessary living expenses for person and his dependent family members. People's court must make ruling to withhold or withdraw person's income and issue notice for assisting enforcement. Unit for which person to be enforced works, banks, credit unions, or other units that deal with savings deposits must comply with notice. (Civ. Pro. Code, Art. 219). Where courts distrain, confiscate, freeze or sell-off property of defendant pursuant to execution, they should not levy on essential tools needed by said person and his family for his livelihood. (Civ. Pro. Code, Art. 220).

Party upon whose property execution is to take place by sealing or distraint should be notified or adult of his family should be notified to appear at location of execution. Their failure to appear will not delay execution. In addition work unit and basic governmental organization where property is located should also send representative to location. List of property executed upon must be made and one on location should sign or put his seal on list, and thereafter said list should be given to person upon whose property execution has taken place. (Civ. Pro. Code, Art. 221).

If there is execution on realty (land or buildings), then person on whose property execution is to take place should be given notice, and if he fails to perform within that time marshall should use compulsory process to compel performance. (Civ. Pro. Code, Arts. 226).

Tools needed for work and goods and income needed for essential livelihood of individual and his family are exempt from execution. Individual himself is also exempt.

8.05 FRAUDULENT SALES AND CONVEYANCES:

Sale concluded under influence of fraud is generally regarded by Chinese legal authorities as revocable, except where it affects interests of State, with wrongdoer being required to return what was received under contract. (See categories 3 Business Regulation and Commerce, topic Contracts; Civil Actions and Procedure, topic Civil Code; Criminal Law, topic Criminal Law.) Details of Chinese concepts of fraudulent sales will be further explicated in Civil Code when said draft is promulgated.

8.06 GARNISHMENT:

See categories 5 Civil Actions and Procedure, topic Civil Code; Family, topic Divorce.

In certain cases, such as marital disputes, Marriage Law calls for various means for enforcing payment of maintenance and child support, and requires cooperation of other agencies including, presumably, those paying spouse who is in arrears, his or her salary. Presumably under such circumstances said salary could be garnished. (See category 7 Criminal Law, topic 7.01 Criminal Law.) Courts also have power to tailor their judgments so as to garnish salary in civil and criminal cases.

Civil Procedure Code (Arts. 222, 223) provides that if various forms of property do not meet debts of debtor, then salary of debtor can be garnished, but sufficient funds for essential livelihood of debtor and his family must be allowed debtor.

8.07 GUARANTY LAW:

General.

Guaranty Law was promulgated on June 30, 1995, effective as of Oct. 1, 1995. Guaranty Law supplemented by Interpretation by the Supreme People's Court on Several Issues Regarding the Application of the Guarantee Law on Sept. 29, 2000 (“Guaranty Law Interpretation”). Guaranty agreement and subsequent changes should be in writing with consent of all related parties, pursuant to principles of fairness and good faith, whereby third-party guarantor may ask creditor for counter-guaranty. (Arts. 3, 4, 13, 38, 64, 90). Guaranty agreement becomes void as main contract becomes unenforceable. (Art. 5). Law covers 3rd party guaranty (Arts. 6-14), foreign related guaranty contract (Arts. 5-6), general provisions (Arts. 17-31), mortgages (Arts. 33-54), liens (Arts. 82-87), pledge (Arts. 63-75), and down payment (Arts. 89-91).

Rules Governing External Guarantee Supplied by Domestic Institution.

Issued Sept. 25, 1996 by People's Bank of China. Effective Oct. 1, 1996. “External Guarantee” refers to Domestic Institutions (hereinafter “Guarantor”), issuing external guarantee by guarantee document, stand-by L/C, promissory note and draft, providing external mortgage, external liens with legal chattel, in which domestic institution promises to external institution and resident foreign financial institution (hereinafter “creditors”), that when debtors have not paid debts according to contract, guarantor will pay obligation. External guarantees including: (1) Loan guarantee; (2) financial lease guarantee; (3) performance guarantee for compensation trade; (4) debt guarantee for external project contract; and (5) other guarantees which involve external debts. (Art. 2).

People's Bank of China authorizes State Foreign Currency Administration Bureau (SFCAB) and its sub-institutions to act as authority for external guarantees. Responsible for review, approval, administration, and registration of external guarantees. (Art. 3). State and institutional organs are prohibited from providing external guarantees. (Art. 4). Total amount of external guarantee, domestic foreign currency guarantee and foreign currency debts of financial institution cannot exceed 20 times its own capital. External guarantees provided by nonfinancial enterprise legal person cannot exceed 50% of its net asset and cannot exceed its foreign currency income for last year. (Art. 5). Domestic enterprises can only provide external guarantees to its direct subsidiaries for external debts according to its investment percentage in joint venture. Percentage of net assets and total assets of domestic trading enterprises cannot be lower than 15% when it provides external guarantee. That of non-trading domestic enterprise cannot be lower than 30%. (Art. 6). Arts. 7-8 specify circumstances where guarantee is prohibited. SFCAB examines external guarantees provided to external trading enterprises and to external contract enterprises. Additional articles define authority of SFCAB to ratify, approve, and receive information and reports related to guarantees.

8.08 HOMESTEADS:

See categories 5 Civil Actions and Procedure, topic Civil Code; Property, topic Property Ownership.

Families may, and most do, construct privately owned dwellings and farm buildings. Private plots are allocated to farmers and product of this land may be consumed or sold by said farmers.

8.09 INSOLVENCY:

See topic 8.03 Bankruptcy.

8.10 LIENS:

See topics 8.02 Attachment, Executions, Guaranty Law; categories 14 Family, topic Husband and Wife; Property, topic Property Ownership.

8.11 PLEDGES:

See topics 8.07 Guaranty Law, Liens; category 5 Civil Actions and Procedure, topic 5.03 Civil Code.

9 DISPUTE RESOLUTION

9.01 ALTERNATIVE DISPUTE RESOLUTION:

Various means of dispute resolution exist in China: mediation, both institutionalized and Court ordered and supervised. Arbitration and adjudication are widespread means of dispute resolution.

9.02 ARBITRATION AND AWARD:

Arbitration Law of China was adopted by NPC on Aug. 31, 1994, effective as of Sept. 1, 1995.

Scope of Arbitration.

Contract disputes and other disputes regarding property rights and interests between civil subjects with equal status, including individuals, legal persons and other entities, may resort to arbitration. (Art. 2). Disputes concerning marriage, adoption, guardianship, fosterage and inheritance, and administrative disputes handled by administrative agencies are not arbitrable. (Art. 3). Arbitration is based on consent of parties.

Without parties' consent, Arbitration Commission lacks jurisdiction. (Art. 4) If arbitration agreement exists, court must reject any filing of claim by party, unless arbitration contract is invalid (Art. 5) Parties select Arbitration Commission. (Art. 6) Awards are final, binding and not subject to judicial review. (Art. 9)

Arbitration Commission.

Arbitration commissions may be established in centrally directed municipalities, and in cities that are seats of People's Government of provinces or autonomous regions. Other cities, if deemed necessary, may also have arbitration commissions. (Art. 10). Arbitration commissions must register with judicial administrative authorities. (Art. 10).

Art. 12 specifies number of arbitrators and their qualifications. Arbitration commission should have list of arbitrators in different specialties. (Art. 13). Arbitration commissions must be independent from administrative authorities; they must not be subordinate to administrative authorities nor to each other. (Art. 14).

China Arbitration Association is social association having legal person status. All arbitration commissions are its members. Articles of Association of said association should be adopted by national conference of said association. China Arbitration Association is self-disciplinary organization of arbitration commissions. It is empowered to exercise supervision over malpractice of arbitration commissions and their members as well as arbitrators according to its articles. China Arbitration Association should formulate arbitration rules in accordance with law.

(Art. 15).

Requirements of Arbitration agreement specified in Arts. 16, 17, and 19. Art. 20 sets forth conditions to contest competence of tribunal or arbitrability. Requirements generally follow internationally accepted standards and practices.

Application and Acceptance.

Arts. 21-29 set forth required documents to be submitted with petition to apply for arbitration, and specifies obligations of arbitration commission to inform applicant of decision.

Arbitration Tribunal.

Arts. 30-33 set forth possible compositions of tribunal and procedure of appointment, including default rules.

Tribunal Session.

Arbitration conducted through sessions before tribunal, but parties may waive. (Art. 39). Arbitration tribunal sessions are closed to public. Where parties agree that tribunal sessions should be open to public, tribunal session may so order, provided dispute does not involve State secrets. (Art. 40).

Arts. 41-43 specify rules regarding tribunal sessions, such as postponement, effect of failure to appear, and evidentiary procedures.

Parties have right to argue for their own claims.

Awards.

Arbitration tribunal may settle dispute by mediation before making award. Tribunal should mediate dispute if parties are willing to do so. Arbitration tribunal should make award promptly if mediation fails. Arbitration award should be made according to majority vote of arbitrators. Dissenting opinions of minority arbitrators may be recorded in minutes. If there is no majority opinion on arbitrated issue, arbitration award should be made according to chief arbitrator's opinions. (Art. 53). Claims for arbitration, facts, reasons for arbitration, result of arbitration, payment of arbitration fees, and date for making award should be included in arbitration award. If parties concerned agree, facts and reasons for arbitration award may be omitted from award. Arbitration award should be signed by arbitrators and bear seal of arbitration commission. Those arbitrators who hold dissenting opinions on arbitration award may sign document at their own discretion. (Art. 54). Arbitration award will take effect immediately after it is made. (Art. 57).

Annulment of Arbitration Award.

Where parties concerned provide evidence and show that arbitration award was made under one of following circumstances, they may submit application to intermediate court at location of arbitration commission for annulment of arbitration award: (1) There exists no arbitration agreement; (2) issues arbitrated are beyond scope of arbitration or beyond jurisdiction of arbitration commission; (3) composition of arbitration tribunal and arbitration procedure are against procedure stipulated by law; (4) evidence on which arbitration award is made is fabricated; (5) one party has concealed evidence, which is serious enough to affect fair arbitration; or (6) arbitrators have done such malpractice as asking for and taking bribes or obtaining personal gains.

Court should organize collegiate bench to investigate whether arbitration award is related to one of circumstances mentioned above. If one of above circumstances is involved, court should set aside award. If court decides that arbitration award is against public interest, it should also set aside award. (Art. 58). Parties should submit application for annulment of arbitration award within six months from date they received arbitration award. (Art. 59). Court should make decision whether to set aside award or reject application within two months from date when application was received. (Art. 60).

Execution of Awards.

Parties concerned should perform arbitration award. One party may apply to court for execution of award in line with provisions of Civil Procedure Law, in event other party does not perform award. Court accepting such application should enforce award. (Art. 62). Where respondent provides evidence and shows that arbitration award involves one of circumstances prescribed by Art. 217 of Civil Procedural Code, collegiate bench organized by court should reject execution of award after examination and verification. (Art. 63). When one party applies for execution of arbitration award while other party applies for revocation of award, court should suspend execution of award. Court should terminate execution of arbitration award, if it has already made ruling to revoke award. If court rejects application for revocation of award, it should resume execution of award. (Art. 64).

Arbitration Involving Foreign Interests.

Foreign arbitration commission must be organized by Chinese Chamber of International Commerce. It must have one chairperson, several deputy chairpersons and several members, as may be engaged by Chinese Chamber of International Commerce. (Art. 66). Foreign arbitration commissions may select arbitrators from foreign personnel possessing knowledge of law, economy and trade, and science and technology. (Art. 67). Where any party to arbitration involving foreign interest applies for preservation of evidence, arbitration commission should submit such application to intermediate people's court having jurisdiction over area where evidence is located. (Art. 68). Foreign arbitration commissions may keep minutes of their tribunal sessions or just keep record of key points of sessions. Record of key points may be signed or sealed by parties and other participants. Where parties provide evidence and show that arbitration awards involve one of circumstances specified in Art. 260 of Civil Procedure Law, collegiate bench of court may revoke such awards after examination and verification. (Art. 70). Where parties concerned apply for execution of arbitration award with legal effect made by foreign-related arbitration committee, they should directly apply to foreign court concerned for recognition and execution of arbitration award if person subject to execution or his or her property is outside territory of China. (Art. 72). Arbitration rules may be made by Chinese Chamber of International Commerce in accordance with law. (Art. 73).

Largest and most widely used arbitration commission in China is China International Economic and Trade Arbitration Commission (“CIETAC”), also known as Court of Arbitration of the China Chamber of International Commerce. CIETAC adopted new Arbitration Rules on Jan. 11, 2005, effective May 1, 2005. CIETAC accepts cases involving: (1) International or foreign-related disputes; (2) disputes related to Hong Kong Special Administrative Region or Macao Special Administrative Region or Taiwan Region; and (3) domestic disputes. (Art. 3).

Where parties have stated, in writing, that they select China Council for the Promotion of International Trade/China Chamber of International Commerce or by Arbitration Commission or Court of Arbitration of the China Council for the Promotion of International Trade/China Chamber of International Commerce, parties shall be deemed to have unanimously agreed that arbitration shall be administered by CIETAC. (Art. 2).

See also category 11 Employment, topic 11.01 Labor Relations, subhead Labor Disputes.

9.03 MEDIATION:

See topic 9.02 Arbitration and Award; categories 6 Courts and Legislature, topic Courts; Family, topic Divorce; Foreign Trade and Commerce, topic Foreign Trade.

Mediation is preferred means of resolving civil and commercial disputes in China. Organizations that handle mediation are numerous. Departments responsible for certain work are encouraged to mediate. Courts have responsibility to attempt to mediate prior to undertaking formal civil litigation or granting divorce. Mediation was locally organized in 1949 and on Feb. 25, 1954 Government Administrative Council promulgated Provisional General Rules for Organization of People's Mediation Committees, providing unified principles of organization and work for entire nation's mediation tribunals. Pursuant to decision of People's Congress, Standing Committee, reaffirming validity of laws and decrees enacted since founding of People's Republic of China, following laws were republished in Dec. 1979: Provisional General Rules for Organization of People's Mediation Committees (“Mediation Committee's Rules”), Organic Rules of Urban Neighborhood Offices (“Neighborhood Office Rules”), Organic Rules of Urban Residents' Committees (“Urban Residents' Committees' Rules”), and Provisional Organic Rules of Public Security Committees (“People's Security Committees' Rules”). Part of stated reason for reemphasis on these rules and organizations according to report of National People's Congress Standing Committee of Aug. 26, 1980, is to reactivate and strengthen grass roots organizations and implement mass basis for maintenance of good public order.

Provisions on Administrative Conciliation of Contractual Disputes, promulgated Nov. 3, 1997 by SAIC. Both parties must be willing to submit contract dispute to conciliation. (Art. 3). Any business contractual dispute between following persons may be submitted to SAIC for conciliation: legal person, individual partnership, rural contractor or other business organization. (Art. 6). In following situations, dispute may not be submitted to conciliation: suit already filed with People's Court; application for arbitration already made; and one of parties does not agree to submit case to conciliation. (Art. 8). After receipt of application for conciliation of contract dispute one or two mediators shall be appointed to handle case. (Art. 11). If one party is unwilling to continue conciliation, conciliation shall be terminated. (Art. 17). If conciliation is successful, both parties should sign agreement of conciliation or sign new contract. (Art. 19). If conciliation fails or if either party does not perform terms of agreement, SAIC should give notice that application for arbitration or suit may be made by aggrieved party. (Art. 20). SAIC has responsibility to explain these provisions. (Art. 23).

Organization of Mediation Committees is designed to handle private disputes. (Mediation Committees Rules, Art. 1). Mediation committees are organizations of masses and they operate under direction of basic level people's government and court. (Mediation Committees Rules, Art. 2). Normally these committees, composed of three to nine members, operate in district police or public security offices or in street units and, in countryside, in village units. (Mediation Committees Rules, Art. 4). Pursuant to clarification of Art. 4 of Mediation Committee Rules by Ministry of Justice on Jan. 16, 1980, in view of changes in rural administrative districts since 1954, in rural areas mediation committees can be set up in large production brigades, or in areas of lesser population in production teams. Work of mediation committees must follow principles set forth in Rules 6, 7, 8, 9 and 10.

Ministry of Justice promulgated Several Rules of the Ministry of Justice for the Works of People's Mediation on Sept. 26, 2002 to supplement Regulations on the Organization of People's Mediation Committee. (Art. 1). Rules provide that written mediation agreement to be submitted to people's court for record and enforcement. (Art. 38).

China Chamber of International Commerce (“CCOIC”) and China Council for the Promotion of International Trade (“CCPIT”) promulgated Conciliation Rules 2005, which are applicable to disputes submitted to CCOIC and CCPIT centers for mediation based on either conciliation agreement/clause or through consent of parties. (Art. 11).

10 DOCUMENTS AND RECORDS

10.01 ACKNOWLEDGMENTS:

See topic 10.04 Notaries Public.

10.02 AFFIDAVITS:

Affidavits in China must have signatures acknowledged by notaries public.

10.03 AUTHENTICATION:

Regulations on Authentication and Ratification were promulgated by State Council on Sept. 3, 2003, effective Nov. 1, 2003. Regulations Governing Authentication of Production Quality, promulgated on May 7, 1991, were abolished simultaneously. Authentication refers to process of evaluating quality of products, services and systems of management.

10.04 NOTARIES PUBLIC:

See categories 13 Estates and Trusts, topic Descent and Distribution; Property, topic Property Ownership.

On Apr. 13, 1982 State Council promulgated Interim Regulations of People's Republic of China Concerning Notarization (hereinafter “Regulations”), consisting of six chapters and 30 articles, it was amended by The Notarization Law and promulgated and came into force as of Mar. 1, 2006. Upon request of natural person, legal person, or any other organization, notarial office must perform notarial acts for following matters: (1) Contract; (2) inheritance; (3) authorization, declaration, bestowal, and will; (4) distribution of property; (5) bidding and tendering auction; (6) marriage status, kindred relationship, and adoption relationship; (7) birth, existence, death, identity, experience, education background, degree, job title, professional technical title, and having or not having illegal and criminal record; (8) articles of association; (9) preservation of evidence; (10) signature, seal and date as indicated in document, duplicate or photocopy of document conforming with original document; and (11) other matters that natural person, legal person, or any other organization voluntarily requests for notarization. (Art.11). In addition, upon request of natural person, legal person, or any other organization, notarial office may handle following affairs: (1) Affairs that must be registered by notarial office under any law or administrative regulation; (2) preservation of evidence; (3) preservation of will, heritage or other property, articles and documents relating to notarization affair; (4) making legal documents relating to notarization matter instead of others; and (5) providing legal consultation services relating to notarization. (Art. 12).

Notaries are Chinese citizens who have passed national judicial examination, Being 25–65 years old, and having acted as intern in notarial office for two or more years, or having three or more years of experience of another legal profession and having acted as intern in notarial office for one year or more, and having passed evaluation. (Art.18). Where person who was engaged in teaching and research of law and has senior professional technical title, where person who was civil servant or lawyer, has university diploma or above and has full ten years of experience in adjudication, procuratorial work, legal affairs or legal service, if he has left his post and has passed evaluation, he may take up job of notary. (Art.19). Notaries should not handle notarial applications of close relatives. (Art. 23). Notaries must examine applicant's status and capacity, truthfulness of facts and factual and legal basis of documents. (Art. 18). Notary must observe disciplines and law, strictly abide by professional ethics, perform his notarial duties, keep confidential secrets he has access to in his practice. Notary has right to resign from his job, to file complaint or bring charge. He must not be dismissed from his post or be punished unless there is statutory reason or unless statutory procedures have been completed. (Art.22).

Where anyone needs to use notarial certificate outside China, if country where notarial certificate is utilized requires certification in advance, it must be subject to certification of Ministry of Foreign Affairs of the People's Republic of China or its authorized institution and China-based embassy (consular office) of relevant country. (Art.33) Where interested party of party concerned or of notarized matter considers that there is any mistake in notarial certificate, it may propose notarial office that performed notarial act to review it. If content of notarial certificate is illegal or contrary to fact, notarial office must revoke notarial certificate and publish announcement, and notarial certificate must be invalidated from very beginning. If there is any other mistake in notarial certificate, notarial office must correct it. (Art.39). Where party concerned or interested party of notarized matter has any different opinion in respect to content of notarial certificate, it may lodge civil lawsuit in people's court. (Art 40).

Measures for Administration of Practice of Notaries Public (hereinafter, "Measures"), were promulgated Mar. 14, 2006 by Ministry of Justice, simultaneously repealing Measures for Administration of Notaries Public of June 2, 1995. These measures formulated for purpose of strengthening post holding management and practice supervision of notaries and regulating practices of notaries. (Art. 1). Notaries public are practitioners who meet requirements of Notarization Law and must follow all procedural tasks accordingly. (Art. 2). Notary has right to obtain labor remunerations, enjoy insurance and welfare treatments, file application for resignation, appeal or accusation, and shall not be dismissed or punished except for statutory causes and after going through statutory procedures. (Art. 3). Notaries must maintain confidentiality, abide by relevant laws and ethics, and must join local and national notarization associations. (Art. 4).

Administration of Practice Certificates of Notaries Public stipulate Ministry of Justice has main administrative control of notaries. (Art. 18). If notary's practice is suspended, he must turn over practice certificate to local judicial administrative department during court of practice suspension. (Art. 20).

Legal Liabilities.

If notary violates Notarization Law, provincial, regional, municipality district under central government or districted municipality must impose punishment accordingly. (Art. 29). Notaries association has same right. (Art. 32). Where any judicial administrative organ or any of its functionaries abuses its/his power, neglects its/his duty, practices favoritism or intervenes with lawful practice of notaries during appointment of notaries, administration of practice certificates of notaries as well as supervision and check of practice of notaries, relevant liable persons shall be subject to administrative liabilities. Where any crime is constituted, violator shall be subject to criminal liabilities according to law. (Art. 35).

Supplementary Provisions.

Specific measures for annual assessment of practice of notaries must be formulated by judicial administrative department of province, autonomous region or municipality directly under central government.

Rules of Deposit Notarization were promulgated by Ministry of Justice on June 2, 1995.

Deposit notarization means debtor or guarantor entrusts object or collateral (or substitute of collateral) of debt on behalf of creditor to care of notary office. Notary office maintains object or collateral pursuant to legal conditions and procedures and hands it over to creditor when conditions are met. Debtor or guarantor is called depositor; creditor of deposit debt is called deposit drawer. (Art. 2). Deposit notarization for purpose of paying debt has legal effect of elimination of debt and transferring risk of loss to creditor. Deposit notarization for purpose of guaranty has legal effect of guaranteeing debtor's performance and replacing other forms of securities. If deposit does not satisfy legal conditions or if depositor removes deposit object, deposit notarization has no legal effect. (Art. 3). Notary office where debt occurs has jurisdiction over deposit notarization. Notary office located in guarantor's residence or debtor's residence has jurisdiction over deposit notarization for purpose of guaranty or when it is difficult to apply for deposit notarization in place where debt occurs. (Art. 4).

Arts. 5, 6, and 7 specify authority of notary to dispose or retain deposit, and specify types of assets that may be deposited.

10.05 SEALS:

In 1986 memorandum titled “Regarding Enforcement of Economic Contracts” was issued by Supreme Court of China. While meant only to be document for discussion, this memorandum has influenced courts' practice. It generally requires seal of organization be placed on economic contracts. In addition, as noted below, certain statutes provide that seal is mandatory.

Provincial regulations such as Regulations of Guangdong People's Government Regarding the Execution of Economic Contracts provide certificate of legal representative which must contain organization's seal or certificate of entrustment of authority of legal person, latter of which also normally requires seal of organization. At time of signing economic contract these documents, in original, must be exchanged between parties, otherwise, prior to actual commencement of performance, contract is not enforceable. If contract has been partially performed, regulations do not specify what will occur if there is dispute and document has not yet been exchanged. Different judges appear to have different opinions. E.g. in San Shui County court of Guangdong province—judges disagreed as to need for these documents after contract was partially performed and dispute arose thereafter.

Art. 5 of Regulations on Contracts for Lending of Money (promulgated by State Council and effective as of Apr. 1, 1985) provides loan contracts must be signed by legal representatives of both parties or by legal person who was entrusted to sign contract. Organization seal must be placed on contract. (Art. 5).

Regulations on Contracts for Purchase of Industrial and Mine Products (approved by State Council on Jan. 23, 1984) state that legal representative must sign (by using his personal seal) and seal of organization must be placed on contract for it to be legally executed. (Art. 4).

Regulations on Construction, Survey and Design Contracts (issued by State Council on Aug. 8, 1983) provide that legal representatives or other authorized persons must sign contract and also place organization's seal on such contract to have it executed.

Similarly, Regulations on Property Insurance Contracts (released by State Council and effective as of Sept. 1, 1983) provide that insurance contract is effective on insurer's seal for execution. (Art. 5).

In summary, seals of organizations and signatures of organizations' legal representatives are mandatory under several statutes. Even when not specified, custom and practice frequently require them as means of executing contracts. Signatures of organization's legal representative or parties may execute certain contracts, yet document entrusting this authority to such legal representative itself contains organization seal.

11 EMPLOYMENT

11.01 LABOR RELATIONS:

See categories 2 Business Organizations, topics Associations, Joint Stock Companies; Citizenship, topic Aliens; Foreign Trade and Commerce, topic Trade Zones; Introduction, topic Government and Legal System.

Labor Law of China.

Labor Law of People's Republic of China, promulgated in 1994 by 8th National People's Congress, applies to all enterprises in China, including foreign-invested enterprises such as joint ventures. (Art. 2). Law has provisions regarding child labor (Art. 15), labor contracts (Arts. 16-35), eight-hour work per day and 44 hour work per week (Art. 36), overtime (Art. 41), salary (Arts. 46-51), safety conditions (Art. 53), job related injuries (Art. 57), female workers and maternity leave (Arts. 60-62), restrictions on minors (Art. 64), job training (Arts. 67-68), insurance (Arts. 70, 73-74), labor disputes (Arts. 77-84) and other legal responsibilities of employers and employees (Arts. 89-105). Labour laws generally protect worker and appear similar to labour law in former Soviet Union and parts of Europe.

Labor contract between employees and employer must be concluded when labor relationship is to be established. (Art. 16). Labor contract must be concluded in writing and include terms specified in Art. 19. Duration of labor contract must be divided into fixed term, indefinite term, and certain term for finishing particular assignments. (Art. 20). Parties may agree on other optional terms in labor contract, such as probation period which must not be longer than six months, and obligation of employees to keep trade secrets of employers. (Arts. 21, 22). Labor contract can be terminated upon expiry of contract term, or when conditions of termination agreed by parties present. (Art. 23). Labor contract may be revoked by agreement between parties through consultation. (Art. 24).

Employer may revoke labor contract without notice only as specified in Arts. 25-27. Law is extremely protective of labourer.

Employers are forbidden to dismiss employees: (1) Employees incapable of work due to occupational disease or industrial accidents; (2) during recovery period for sickness or nonindustrial injuries; (3) women employees during pregnancy, childbirth or breast-feeding period; and (4) other situations stipulated by law and administrative rules and regulations. (Art. 29). Employees can request unilaterally to revoke labor contract with 30 days prior written notice (Art. 31), or at any time in following cases: (1) During probation; (2) under forced labor due to employers using force, oppression, or illegal imprisonment; and (3) employer failing to pay remuneration or to provide working conditions according to labor contract (Art. 32). Labor contract will be void in following situations: (1) Contract concluded in violation of laws or administrative regulations and (2) contract concluded by resorting to such measures as cheating and intimidation. (Art. 18).

Collective Contract.

Employees may conclude collective contract with enterprise on matters relating to remuneration, working hours, rest and vacations, occupational safety and health, and insurance and welfare.

Working Hours, Rest and Vacations.

Labor Law prescribes standard working hours: no more than eight hours a day and no more than 44 hours a week. (Art. 36). In Mar. 1995, State Council promulgated Provisions on Work Hours for Staff and Employees, which changed 44-hour work week to 40 hours. Labor Department and Personnel Department also promulgated implementation rules. Under these rules, 40 hours a week is prescribed for state organs, institutions and social organizations, starting from May 1, 1995, but no later than Jan. 1, 1996. Same requirement applies to enterprises located in China, starting from May 1, 1995, no later than May 1, 1997.

Total overtime in month must not exceed 36 hours. (Art. 41). Employers must pay employees remuneration for overtime work as follows: (1) No less than 150% of normal wages if extension of working hours is arranged; (2) no less than 200% of normal wages if extended hours are arranged on rest days and employees cannot receive additional day off for compensation;

and (3) no less than 300% of normal wages if extended hours are arranged on statutory holidays. (Art. 44).

Employer must guarantee that its employees have at least one day off a week. (Art. 38). State must practice system of annual vacation with pay; employees who have worked for one year and more are entitled to annual vacation with pay. (Art. 45).

Holidays.

See category 1 Introduction, topic 1.03 Holidays.

Remuneration.

Employer must independently determine its form of wage distribution and wage level according to law and based on characteristics of its production and business and economic results. (Art. 47). State is to implement system of guaranteed minimum wages. Specific standards on minimum wages are determined by governments of provinces, autonomous regions or municipalities directly under control of central government and be reported to State Council for record. (Art. 48). Wages must be paid monthly to employees in form of currency. (Art. 50). Employer must pay wages according to law to employees who observe statutory holidays, take leaves during periods of marriage or funeral, or participate in social activities in accordance with law. (Art. 51).

Labor Protection.

Employer must strictly comply with rules and standards of State on safety and health at work (Art. 52), and provide employees with safety and health conditions in accordance with provisions of State and necessary articles of labor protection (Art. 54). Employees have right to refuse to operate if management personnel command operation in violation of rules and regulations or force employees to take risk. State provides female employees and juvenile employees with special protections. (Art. 58).

Social Insurance and Welfare.

According to Labor Law, employees must enjoy social insurance benefits under following circumstances: (1) Retirement; (2) sickness or injury; (3) disability due to industrial accident or occupation disease; (4) unemployment; and (5) childbearing. Survivors of insured worker are entitled to subsidies for survivors. (Art. 73). State set up social insurance funds, and sources of social insurance funds are determined according to categories of insurance; employer and employees must participate in social insurance and pay premiums. (Art. 72). State encourages employer to set up supplementary insurance for employees and employees to maintain savings accounts as personal insurance. (Art. 75). State develops social welfare projects, constructs public welfare facilities, and provides employees with conditions for taking rest, recuperation and rehabilitation. (Art. 76).

Labor Disputes.

In 1993, State Council reissued Regulation Governing the Settlement of Labor Disputes in Enterprises. According to Labor Law, if labor disputes arise, parties concerned may apply to labor dispute mediation committee of their unit for mediation; if mediation fails or one party requests arbitration, that party may apply to labor dispute arbitration committee for arbitration. Either party may also directly apply for arbitration. Reply of Supreme People's Law on How to Determine Start of Application Period for Arbitration of Labor Dispute on Termination of Labor Contracts was issued, effective as of July 29, 2004.

In event that employer has dispute with laborer on termination of labor contract pursuant to Art. 25 of Labor Law, period for laborer to apply to Commission for Labor Dispute Arbitration for arbitration should be calculated as of date when written notice of termination of labor contract was received.

If one party is not satisfied with arbitration decision, party may file lawsuit. (Art. 79). Labor dispute mediation committee may be established within employer's place of business and should be composed of representatives of employees, representatives of enterprises, and representatives of trade union. (Art. 80). Labor dispute arbitration committee must be composed of representatives of labor administration department, representatives of trade union, and representatives of employer. (Art. 81). Party that requests arbitration must file written application with arbitration committee within 60 days from date of occurrence of labor dispute; arbitration committee should make decision within 60 days. (Art. 82). If one party is not satisfied with arbitration decision, it may bring lawsuit in court within 15 days from date of receiving decision. If one party does not comply with arbitral decision nor file lawsuit within time limit stipulated by law, other party may apply to court for compulsory implementation. (Art. 83).

Foreign Investment Enterprise Labor Management Regulations.

This set of regulations was promulgated by Labor of Ministry and Ministry of Foreign Trade and Economic Cooperation on Aug. 11, 1994. It applies to Chinese-foreign equity joint ventures, Chinese-foreign cooperative joint ventures, wholly foreign-owned enterprises, and Chinese-foreign companies limited by shares, and their staff and employees. (Art. 2).

Preference given to Chinese labour market. Non-Chinese personnel require justification. Enterprise should establish occupational training system; staff and employees who will be engaged in technical work or be required to possess special technical skills must receive training and be certified before assuming posts. (Art. 7). Labour contracts are written. (Art. 8).

Law provides for termination in Arts. 11, 12 and 13.

Labor Contract Law.

Labor Contract Law was adopted by National People's Congress on June 29, 2007, effective Jan. 1, 2008.

Law formulated to improve labor contract system, specify rights and obligations of parties to labor contracts, protect legitimate rights and interests of workers, and build and develop harmonious and stable employment relationships. (Art. 1).

Scope of Law covers establishment, conclusion, performance, amendment, revocation and termination of labor contracts between employees and organizations such as enterprises, individual economic organizations and private non-enterprise units in China (“Employers”). Also covers relationship between employees and state authorities, institutions or social organizations. (Art. 2).

Formulations, amendments and decisions made by Employers on rules on labor compensation, working hours, leave and rest, occupational safety and hygiene, insurance and welfare, training, work discipline or work quota management, etc., which have direct impact on employees' immediate rights and interests, or other material matters, shall be presented to and discussed with employee representative congress or all employees, and proposal and advice thereof shall be determined after consultation with labor union or employee representative on basis of equality. (Art. 4).

Employment relationship between employer and employee shall commence on date employee commences work. (Art. 7).

Written labor contract shall be concluded when establishing employment relationship. Where employment relationship has been established without conclusion of written labor contract, written labor contract shall be concluded within one month from date employee commences work. (Art. 10).

Labor contracts are divided into fixed-term labor contracts, open-ended labor contracts and labor contracts that terminate upon completion of certain task. (Art. 12).

Labor contract shall include following items: (1) Name, domicile and legal representative or person in-charge of employer; (2) name, residential address and number of resident ID card or other valid identity document number of employee; (3) term of labor contract; (4) scope and place of work; (5) working hours, rest and leave; (6) labor compensation; (7) social insurance; (8) labor protection, working conditions and protection against occupational hazards; and (9) other issues required by laws and regulations to be included in labor contract. (Art. 17).

Employer and employee may agree to include other matters in labor contract such as probation period, training, confidentiality, supplementary insurance and welfare, etc. (Art. 17).

Labor contracts with term of over three months to less than one year may have probation period of one month; labor contracts with term of one year to less than three years may have probation period of two months; labor contracts with term of three years and open-ended labor contracts may have probation period of six months. (Art. 19).

Employer and employee may include in labor contract confidentiality provisions for employer's trade secrets and other confidential matters. Employer may contract with worker to include non-competition provisions in labor contract or confidentiality agreement, and must agree to pay financial compensation to employee on monthly basis during non-competition period after termination or revocation of labor contract. If employee breaches non-competition provisions, he shall pay liquidated damages to employer in accordance with stipulated terms. (Art. 23).

Personnel subject to non-competition obligations limited to employer's senior management, senior technicians and other individuals with confidentiality obligations. Scope, geographical limitations and term of non-competition obligations must be agreed upon by employer and employee, and must not violate laws and regulations. Non-competition period limited to two years. (Art. 24).

Employer shall strictly implement work quota standards, and shall not force or in disguised manner force any worker to work overtime. (Art. 31).

Refusal of employee to perform dangerous tasks is not breach of contract if he is forced to do so by management staff or if instructions are in violation of regulations. Employees have rights to criticize, report to authorities or bring charges against employers for working conditions that endanger their lives and health. (Art. 32).

General rule is employee may terminate labor contract with 30 days' prior written notice. If during probationary period, employee may terminate with three days' prior notice. (Art. 37).

Collective Contracts.

After consultation, enterprise employees through its labour union or employee representative and employer may conclude collective contract on matters such as labour compensation, working hours, rest, leave, work safety and hygiene, insurance, benefits, etc. (Art. 51).

In areas below county level, industry-based or area-based collective contracts may be concluded between labour union and representative of enterprise in industries such as construction, mining, catering services, etc. (Art. 53).

Collective contract concluded in accordance with law shall be binding upon employer and employees. Industry-based or region-based collective contract shall be binding upon employers and employees in industry or in area in locality concerned. (Art. 54).

Work Placement.

Staffing firms must be established in accordance with relevant provisions of Company Law and have registered capital of not less than RMB 500,000. (Art. 57).

Staffing firms are employers as referred to in this Law and shall perform employer's obligations toward its employees. Staffing firms shall conclude fixed term labour contract not less than two years with employees placed, and pay remuneration on monthly basis. During periods when there is no work for employees, staffing firms shall pay remuneration on monthly basis at minimum wage rate as prescribed by people's government in place where staffing firm located. (Art. 58).

Work placement shall generally be implemented in respect of job positions of temporary, auxiliary or substitute nature. (Art. 66).

Part-time Labour.

“Part-time labour” refers to form of labour for which remuneration is mainly calculated on hourly basis, and employee's average daily working hours do not exceed four hours and aggregate working hours per week do not exceed 24 hours for same employer. (Art. 68).

Both parties may conclude oral agreement. (Art. 69).

Employee who engages in part-time labour may conclude labour contracts with more than one employers, but subsequently concluded labor contract shall not affect performance of previously concluded labour contract. (Art. 69).

No probationary period in part-time labour contract. (Art. 70).

Either party may notify other party at any time to terminate employment. Upon termination of employment, employer will not have to pay severance to employee. (Art. 71).

Part-time labourers shall be paid not longer than every 15 days. (Art. 72).

Legal Liability.

Employers who make work rules which directly affect immediate interests of employee and are in violation of laws or regulations, or fails to include mandatory clauses in labour contract will be ordered to remedy violation and issued warning; and will be liable for damages for any damage caused to employee by such rules. (Art. 80).

Employers who conclude written labour contract with employee more than one month but less than one year after date on which employee has started work, employer shall, each month, pay to employee twice his wage. (Art. 82).

Employers who fail, in violation of this Law, to conclude open-ended labour contract with employee, shall, each month, pay to employee twice his wage, starting from date on which open-ended labour contract should have been concluded. (Art. 82).

If probationary period violates Law, labour administrative department shall order remedy. If such probationary period has been carried out, employer shall pay compensation to employee according to time worked during specified probation which should have been outside statutory probationary period, at rate of worker's monthly wage following completion of probation. (Art. 83).

If employer fails to make payment within time limit set out in Law, employer shall be ordered to pay damages to employee at rate of between 50% to 100% of amount payable. (Art. 85).

If employee terminates labour contract in violation of Law or breaches confidentiality or non-competition obligations in labour contract, he shall be liable for damages caused to employer as result of such violation or breach. (Art. 90).

Labour contracts concluded in accordance with law before implementation of Law and continuing to exist on implementation date of Law shall continue to be performed. If employment relationship is established prior to implementation of Law without written labour contract, such contract shall be concluded within one month from implementation of Law. (Art. 97).

Trade Union Law was adopted at Fifth Session of the Seventh National People's Congress on Apr. 3, 1992 amended according to Decision on Amending Trade Union Law of People's Republic of China on Oct. 27, 2001.

New Trade Union Law in 2001 applies to enterprises, official organs and institutions within Chinese territory. Under new Trade Union Law, all laborers who are wage earners in China, regardless of nationality, race, sex, profession, religion, education, have right to organize and join trade unions. (Art. 3).

Local trade union committee may be established in enterprise, institution, or organization in which there are 25 or more members of trade union, and if there are less, committee may be established separately or with another organization. (Art. 10). Different levels of general trade union may be established in counties, municipalities, and provinces. National or local industrial unions may be established in same industries or related industries. All China Federation of Trade Unions was established nationwide. (Art. 12).

All China Federation of Trade Unions, local general trade unions and industrial unions are entitled to status of legal persons. Local trade union meeting requirement of legal person under General Principles of Civil Law may obtain status of legal person as social organization. (Art. 14).

Trade unions may represent employees and staff members to conclude collective contracts with administration of enterprises and institutions. (Art. 18).

When state-owned enterprise holds meeting discussing worker and staff matters, such as employees' wages, welfare, safety, production, labor insurance, etc., there must be representative from trade union. (Art. 32).

Enterprises and public institutions shall listen to views of trade unions when studying important issues relating to operational management and development; and participation of trade union representatives is necessary in meetings convened to discuss matters, such as wages, welfare, labor safety and hygiene, and social insurance, which involve personal rights and interests of employees. (Art. 382).

Labor Insurance Regulations promulgated Feb. 26, 1951, and Jan. 2, 1953, by Government Administrative Council, applied initially to state, joint state-private, private, or cooperatively owned factories and mines employing more than 100 employees and staff; railway, water, air transport, post, telecommunications enterprises; capital construction units of factories, mines and transport enterprises, and state-owned building companies. Management, or owners

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of enterprises, must bear in full various labor insurance expenses. (Art. 7). Said management, or owners of enterprises, must pay to labor insurance fund each month amount equal to 3% of total payroll of employees and staff members of enterprise concerned, which must not be separately collected from staff members or employees. (Art. 8). Payment to be made to All-China Federation of Trade Unions in first two months. Commencing from third month, 30% to be deposited in account of All-China Federation and 70% to People's Bank of China. (Art. 9). People's Bank of China entrusted by aforesaid Federation to take custody of all labor insurance funds (management of labor insurance fund was stopped from 1969). (Art. 11).

If worker is injured or disabled while at work, he must be treated at clinic or hospital of enterprise concerned, or one designated by enterprise; if enterprise unable to provide treatment, worker must be sent to another hospital. Management provides all expenses for treatment, including meals and travel expenses, and wages must be paid in full throughout period of treatment. Employees or staff members disabled as result of injuries sustained while at work must be paid monthly allowances from labor insurance fund, depending on circumstances. Thus, e.g., worker with partial disability paid between 10% and 30% of his wages prior to being disabled but total, together with his new wages, must not exceed wages prior to being disabled. Worker completely disabled and needing persons to take care of him will receive life pension amounting to 75% of his wages. (Art. 12).

In case of sickness, injury or disablement not sustained at work, enterprise still responsible for total cost of treatment, operation, hospitalization and ordinary medicines. Expensive medicines, meals and traveling expenses must be borne by patient. However, if such worker is in financial straits, allowance may be obtained from labor insurance fund. Those absent from work due to illness or injury not sustained at work will, according to duration of employment in enterprise, be paid by management of enterprise from 60% to 100% of original wages, providing period of absence does not exceed six consecutive months. (Art. 13). For periods exceeding six months, similar relief benefits to be paid from labor insurance fund. Lineal dependents of worker or staff member also partially covered for up to half cost of operation fees and ordinary medicines and may receive free treatment at clinic. (Art. 13).

Death benefits, including funeral expenses, provided for in labor insurance regulations (Art. 14), and provisions made for old-age pensions (Art. 15). Old-age pensions range from 50% to 70% of wages, depending on length of time worked, normally calculated after 25 years employment. (Art. 15). Male employees may retire once have attained age of 60, worked five years for enterprise concerned and 25 years in all. Female employees, upon attaining age of 50 and having worked 20 years, including five years in enterprise concerned, entitled to old-age pension. (Art. 15). Special provisions made for early retirement by those working in mines or certain dangerous extracting or manufacturing industries. (Art. 15[c][d]).

On Mar. 14, 1981 State Council enacted provisional regulations concerning wages of staff members during home leave. These regulations, of substantial importance, apply to persons living away from parents or spouses whom they cannot visit on prescribed holidays. (Art. 2).

Work Safety.

China also has statutes regulating safety at work, e.g., Industrial Factories Safety and Health Regulations. The Production Safety Law of the People's Republic of China has been adopted at 28th meeting of Standing Committee of the Ninth People's Congress on June 29, 2002, and is hereby promulgated for implementation as of Nov. 1, 2002. Law has been enacted for purpose of strengthening supervision and administration of production safety, preventing and reducing safety accidents, defending safety of life and property of masses, and promoting development of economy. (Art.1).

The Law of the People's Republic of China on the Prevention and Treatment of Occupational Diseases has been adopted at 24th meeting of Standing Committee of the Ninth

People's Congress of the People's Republic of China on Oct. 27, 2001, and is hereby promulgated and came into force on May 1, 2002. This Law is enacted in accordance with Constitution in order to prevent, control and eliminate harm of occupational diseases, to prevent and treat occupational diseases, to protect health and relevant rights and interests of laborers, and to promote economic development. (Art.1).

Training.

Regulations for Employee Training promulgated by Labor Bureau and State Ministry of Foreign Trade, Oct. 30, 1996. Effective on date of promulgation. These regulations include general principles, responsibilities of employer, enterprise and employee, length of training, penalties, and supplementary articles. Employee training refers to employer's responsibility to develop employees' thought, political belief, morality, knowledge, technical skill, and career potential. (Art. 3).

Regional Laws.

Provinces, municipalities, and special economic zones have also promulgated regulations on labor relations.

Violations.

Regulations Concerning Punishment for Violations of Labor Laws promulgated by Ministry of Labor, Sept. 27, 1996, effective Oct. 1, 1996. Labor Administrative Department shall execute administrative punishment on basis of labor law, regulations, and rules. (Art. 3). Punishments include: warning, fine, confiscation of unlawful income, order to suspend production or business, rescission of license. (Art. 5).

Regulations for Hearing Procedure Regarding Punishment for Violations of Labor Laws of China promulgated by Ministry of Labor, Sept. 27, 1996, effective Oct. 1, 1996. Labor Administration Department shall inform party of right to hearing before decision concerning punishment. (Art. 3). All hearings shall be held in public except those involving state, business or personal secrets. (Art. 12). Rights of party include: (1) Withdrawal of application; (2) representation; (3) cross-examination; (4) defense; (5) right to make final statement. (Art. 8). Duties of party include: (1) Appearing before scheduled hearing; (2) accurately responding to inquiries during hearing; (3) obeying order form hearing. (Art. 9).

12 ENVIRONMENT

12.01 ENVIRONMENTAL REGULATION:

See categories 2 Business Organizations, topic Joint Stock Companies; Foreign Trade and Commerce, topic Trade Zones.

Constitution provides that State protects and improves environment, ecology, prevents and controls pollution and other hazards to public. State organizes and encourages people to grow and protect forests. (Const. Art. 26). Also provides that State protects places of scenic or historical interest and cultural relics, etc. (Const. Art. 22).

China has promulgated series of regulations on environmental protection since 1979, such as Standing Committee of Fifth National People's Congress' adoption, pursuant to Art. 11, of Environmental Protection Law for Trial Implementation in 1979, Marine Environmental Protection Law in 1982, Law on the Prevention and Control of Water Pollution in 1984, Law on the Prevention and Control of Air Pollution in 1987, Regulations for the Prevention of Pollution of Sea Areas by Ships in 1983, Regulations for the Management and Protection of Environment for the Exploration and Exploitation of Offshore Petroleum in 1983, Law on Water and Soil Conservation in 1991.

Amendments and revisions to Law on the Prevention and Control of Water Pollution and Law on the Prevention and Control of Air Pollution were added in 1995 and 1996 respectively to strengthen environmental protection of Water and Air. Regulations on the Prevention and Control of Noise Pollution, promulgated in 1989, were replaced by Law on the Prevention and Control of Noise Pollution in 1996.

On Dec. 26, 1989, 11th Session of Standing Committee of Seventh National People's Congress of China adopted revised Environment Protection Law. Purpose of law is to protect and improve living environment and ecological environment, prevent and control pollution and other public hazards, safeguard human health and promote development of socialist modern construction. (Art. 1). This law is applicable within China and sea areas under jurisdiction of China. (Art. 3). Term “environment” is broadly defined by statute to include air, water, oceans, land, and mineral resources, forests, grasslands, wild organisms, natural historical remains, relics of civilization, natural preservation regions, scenic and historical spots, cities and rural village, etc. (Art. 2).

Administrative department of State Council in charge of environmental protection shall implement unified supervision and administration of environmental protection work in entire nation, including quality standards. (Arts. 7-9). Items not included in national standards may be directly formulated by people's governments of provinces, autonomous regions and municipalities according to their standards and reported to competent administrative department of State Council for environmental protection for record. (Art. 9).

Environmental impact report for construction projects must make appraisal of pollutants and effects on environment by construction project, and formulate measures for prevention and control, and, after advance review by department in charge of project and in accordance with stipulated procedures, shall be submitted to administrative departments in charge of environmental protection for approval. Planning departments may only approve design task report of construction projects after approval of environmental impact report. (Art. 13). Contractor complies with all applicable law.

Urban planning must include targets and tasks for protecting and improving environment. (Art. 22). In urban and rural construction, vegetation, waters and natural landscape must be protected and attention must be paid to construction of gardens, green land and historic sites and scenic spots in cities in light of special features of local natural environment. (Art. 23).

Enterprises causing environmental pollution and other forms of pollution must incorporate environmental protection work into their plans, establish responsibility system for environmental protection, and adopt effective measures to prevent and control pollution and harm to environment by waste gas, waste water, waste residue, dust, foul-smelling gases and radioactive materials, as well as noise, vibration and electromagnetic radiation engendered in course of production and construction or other activities. (Art. 24). Newly-built industrial enterprises and existing enterprises on technological transformation must use facilities and processes that effect high rate of utilization of resources and low rate of discharge of pollutants, and economical and rational technology for comprehensive utilization of waste materials and treatment of pollutants. (Art. 25).

Pollution prevention and control facilities in construction projects must be designed, constructed and commissioned at same time as principal project. Pollution prevention and control facilities must have been inspected and found to be qualified by original administrative department in charge of environmental protection that examined and approved environmental impact report before such construction projects may start up production or use. (Art. 26).

Administrative departments in charge of environmental protection or other departments that exercise administrative authority for environmental supervision in accordance with provisions of law shall impose fines on enterprises and institutions that cause environmental pollution in violation of provisions of this Law in accordance with harmful consequences caused; when circumstances are relatively serious, administrative sanctions shall be imposed on relevant responsible personnel by their units or government authorities in charge. (Art. 38).

When international treaties concerning environmental protection concluded or joined by China have different provisions from laws of China, provisions of international treaties shall apply, with exception of articles to which China has expressed reservation. (Art. 46).

Industrial Wastes and Pollutants.

Pursuant to National Standard GBJ4-73, effective Jan. 1, 1974, amended 1984, 1987, trial standards enacted for release of three industrial wastes, which standards designed to prevent pollution caused by industrial gas, water and water residues. (Art. 1). All factories, mines and other enterprises required to diminish or eliminate these three pollutants. Industrial noxious water and gas which cannot be re-used must proceed to purification and recovery treatment pursuant to national standards of release. (Art. 3). All plans for new construction, expansions or reconstruction projects for factories, mines or other enterprises must incorporate purification installations for three waste products. Such installations must meet national standards and be put into operation concurrently with primary project. Existing factories, mines and other enterprises causing pollution must provide plan of elimination of said pollution within approximately five years, depending on severity of pollution. (Art. 4). All relevant industrial departments required, pursuant to standards of these draft regulations, to lay down design criteria for enterprises and administrative norms for consumption of raw materials and fuels, as well as water to be discharged. (Art. 5).

Seas and Oceans.

On Aug. 23, 1982 Standing Committee of State Council promulgated Law of Environmental Protection of the Seas and Oceans; revised at 13th Meeting of the Standing Committee of the Ninth National People's Congress on Dec. 25, 1999 and promulgated by Order No. 26 of the President of the People's Republic of China on Dec. 25, 1999.

Jurisdiction.

This Law came into force as of Apr. 1, 2000 (Art. 48), this Law applies to internal waters, territorial seas, contiguous zones, exclusive economic zones and continental shelves of the People's Republic of China, and all other sea areas under jurisdiction of People's Republic of China. (Art. 2). All units and individuals engaged in navigation, exploration, exploitation, production, tourism, scientific research, or other operations in sea areas under jurisdiction of People's Republic of China, or engaged in operations in coastal land areas which have impact on marine environment must comply with this Law. (Art. 2). This Law must also apply to pollution to sea areas under jurisdiction of People's Republic of China originating from areas beyond sea areas under jurisdiction of People's Republic of China. (Art. 2).

Pesticide Registration.

Provided by Regulations Governing Pesticide, promulgated by State Council on May 8, 1997, effective on date of promulgation, and revised on Nov. 29, 2001, requiring registration for production and importation of pesticide. (Art. 6).

“Pesticide” refers to any substance or mixture of substances chemically synthesized or originating from biological and other natural substances and formulations made from these substances used for preventing, destroying or controlling diseases, pests, weeds and other harmful organisms inimical to agriculture and forestry and for regulating growth of plants and insects. (Art. 2).

Regulations prohibit production, distribution or use of pesticide without registration. Even pesticide used for demonstration purposes must apply for temporary registration. (Art. 7).

Comprehensive program to reduce pollution and protect environment announced by Environmental Protection Bureau in Nov. 1982 so that by turn of century: Industrial dust pollution at 8.5 million tons (62% reduction), total sulphur dioxide discharge controlled at 23.5 million tons; over 80% factory water recycled; sewage treatment rate over 75%; utilization rate of industrial residue over 50%; forests enlarged to 20% of Chinese territory (now 12%); garbage and human faeces purified and utilized; soil erosion and desertification brought under control.

Forest protection provided by statute, National Forestry Law (1984) amended in Apr., 1998, and Detailed Regulations for Carrying Out National Forestry Law (2000); including local regulations—e.g. Provincial Methods for Protection and Management of Forest Resources in Beijing Rural Areas, promulgated by Beijing Standing Committee Municipal People's Congress, effective Mar. 1, 1984. Regs. prohibit livestock grazing and fuel gathering in young forests, forests of special economic value, and those on hillsides set aside for natural propagation. Banned activities include timber felling, hunting, wasteland reclamation, excavating sand and earth, etc. Trees for personal use around dwellings, on spare land or hillsides are private property and can be inherited, though other trees property of state.

Law to Prevent Air Pollution, promulgated on Apr. 29, 1995, and revised on Apr. 29, 2000, provides that State Council and government at each level must, in accordance with national plans, prevent air pollution. Pollution protection programs must be included in economic and development plans. (Art. 2). Administrative department of environmental protection under State Council must establish national standards for atmospheric environmental quality. (Art. 6). Environmental protection departments of local governments at district level and above, are required to supervise enforcement of plans for protection and elimination of air pollution. (Art. 4). All units and individuals have obligation to protect atmospheric environment and have right to report or file charges against units or individuals that cause pollution to atmospheric environment. (Art. 5). Individuals and organization projects including construction projects must conform to regulations concerning air pollution. Environmental impact report should be prepared including specification of measures for protection against pollution and approval must be granted by related environmental protection agencies. Prior to commencement of production of projects examination must be conducted by relevant environmental protection agency; if not meeting environmental standards, production cannot commence. (Art. 11). No industrial production facilities that cause environmental pollution may be built within scenic spots or places of historical interest, natural reserves, areas close to historical or cultural sites under protection and other places that need special protection. (Art. 16). Enterprises should use environmental friendly and low energy systems. (Art. 19).

Pollution by Burning of Coal.

(Art. 26).

Pollutants by Motor-driven Vehicles and Vessels.

(Arts. 32-34).

Pollution by Waste Gas, Dust and Fetor.

(Arts. 36-39).

Places with concentration of population and other special areas cannot have factories for leather shoes, pitch, rubber, asphalt, garbage, poison or noxious projects; airports should not be constructed in these districts. (Art. 41). Fines are provided for violations of RMB 10,000 to RMB 100,000. Restrictions as to time to cure problems must be met, but regulations as to time to cure and sanctions shall be provided by State Council. (Art. 48).

12.02 RENEWABLE ENERGY LAW:

Renewable Energy Law adopted by 14th conference of Standing Committee of 10th State Council of People's Republic of China on Feb. 28, 2005, effective as of Jan. 1, 2006. (Art. 33). Law promulgated to promote development, utilization of renewable energy, improve energy structure, diversify energy supplies, safeguard energy security, protect environment, realize sustainable development of economy, society, Law is major initiative to help environment and diversify energy sources. (Art. 1). Renewable energy in this Law refers to non-fossil energy of wind energy, solar energy, water energy, biomass energy, geothermal energy, ocean energy, etc. Law contains extensive regulations governing responsibility of state organs and private enterprises, and establishes regulations for power grids.

Application of this Law to hydropower shall be regulated by energy authorities of State Council, approved by State Council. This Law does not apply to direct burning of straw, firewood, dejecta, etc. on low-efficiency stove. (Art. 2). This Law applies to territory, and territorial seas. (Art. 3).

13 ESTATES AND TRUSTS

13.01 DECEDENTS' ESTATES:

See topics 13.02 Descent and Distribution, Executors and Administrators; category 5 Civil Actions and Procedure, topic 5.03 Civil Code.

13.02 DESCENT AND DISTRIBUTION:

See categories 5 Civil Actions and Procedure, topic Civil Code; Property, topic Property Ownership.

Law of succession found in marriage law, Constitution, GPCL and inheritance law. Art. 24 of Marriage Law, as amended on Apr. 28, 2001, provides that husband and wife have right to inherit each other's property, and that parents and children have right to inherit each other's property. (Art. 6, para. 2), states that if one inherits patent rights and thereby is entitled to awards, then these awards shall be given to those so inheriting. State Council notified Ministry of Justice on Mar. 29, 1958 that, with regard to private property of members of agricultural cooperatives who die, if they have wills property passes pursuant to will and if not, property becomes that of cooperative. Thus, there are two means of inheritance by law in China, intestate succession and by will.

Art. 10 of General Principles of Civil Law states that all citizens have equal civil rights, and Art. 76 states that citizens have right to inherit property. These two Articles provide Chinese citizens with equal rights to inherit property.

Inheritance Law was passed by People's Congress on Apr. 10, 1985 effective as of Oct. 1, 1985. Supreme Court Opinion on Several Problems of the Inheritance Law, issued on Sept. 11, 1985 deals with statute (hereafter “Opinion”). Property that citizens may inherit includes real property (houses, buildings), household articles, funds, woods, animal husbandry, poultry, art objects, books, legally owned materials, tools for production, rights to authorship, economic benefit of patents, and other lawful property (Art. 3), including securities, and creditor's right toward property (Opinion Art. 3).

Inheritance can be by will or bequest or by intestate succession. (Art. 5). Art. 7 sets forth circumstances where inheritance right is lost or forfeited.

Statute of limitations: disputes concerning matters of inheritance limited to two years from time party knew or should have known of infringement of his rights but in any case not more than 20 years from occurrence of event of inheritance. (Art. 8). Male and female have equal rights to inherit (Art. 9); order of interstate succession is: First order: spouse, children, parents; second order: brothers, sisters, grandparents. If those in first order inherit then no one in second order will inherit. Children are defined to include those born in and out of wedlock and adopted children and stepchildren reared by parent. (Art. 10). Similarly, parents are defined to include biological parents and parents. Formalities of will include one testator-written will, which should be signed and dated; if prepared by others, two or more witnesses must attest to will, all of whom together with scrivener and testator must sign will. Oral wills which also require at least two witnesses in times testator is in danger. (Art. 17). Those to whom bequest is directed cannot be witnesses. (Art. 18). Will should consider those lacking in ability to labor or who have no source of livelihood. (Art. 19). Wills made by persons with no capacity or limited capacity, those made under duress or as result of fraud as well as forged wills will be void. (Art. 22).

Estate shall be inherited in following order: firstly, spouse, parents (natural parents and adoptive parents, step-parents who supported or were supported by decedent) and children (legitimate children, illegitimate children, adopted children, stepchildren who supported or were supported by decedent); secondly, brothers and sisters (blood brothers and sisters, brothers and sisters of half blood, adopted brothers and sisters, step-brothers and step-sisters who supported or were supported by decedent), paternal grandparents, and grandparents. First category of successor(s) shall inherit to exclusion of second category and only if none in first category can second category inherit. (Art. 10). If decedent survives his child, direct lineal descendants of predeceased child must inherit in subrogation. Descendants who inherit in subrogation generally must take only share of estate their father or mother was entitled to. (Art. 11).

Persons who have special difficulties or lack ability to labor given preferential treatment. (Art. 13).

Citizen may, by means of will made in accordance with law, dispose of property he owns and appoint testamentary executor. (Art. 16).

If foreign matters of inheritance are involved, then matters of personal property will be determined by law of domicile of decedent or law of his last residence. (Opinion Art. 63).

13.03 EXECUTORS AND ADMINISTRATORS:

Testator may appoint executor of his estate by will, but if one dies intestate, then where necessary court will make disposition of estate pursuant to law. If will fails to name executor, court may appoint one. See topic 13.02 Descent and Distribution.

13.04 INTESTACY:

See topic 13.02 Descent and Distribution.

13.05 TRUSTS:

See category 3 Business Regulation and Commerce, topic 3.17 Securities.

Trust Law of China was adopted at 21st Session of Standing Committee of 9th National Congress on Apr. 28, 2001, effective on Oct. 1, 2001, by creating options for asset, wealth management.

“Trust” in Law refers to trustor's act of entrusting his property right to trustee, on basis of his trust to latter, who will manage or dispose property in his own name pursuant to trustor's desire to seek profits for beneficiary or for other special purposes. (Art. 2). This Law shall be applied to trustor, trustee and beneficiary (hereinafter referred to as parties to trust) performing civil, business and public trust activities in China. (Art. 3).

Trust must be created with legitimate purpose of trust. (Art. 6). Definite trust estate legally possessed by trustor is required for creation of trust. (Art. 7). Trust to be created in written form. (Art. 8). Registration procedures must be handled for creation of trust, if relevant laws, relevant regulations so require. (Art. 10). Under following circumstances trust is void (Art. 11): (i) Purpose of trust violates laws, administrative regulations or damage public profits; (ii) trust estate cannot be determined; (iii) trustor entrusting illegal properties or properties not allowed to entrust by this Law; (iv) trust created for litigation or demanding payment of debt or loan; (v) beneficiary or scope of beneficiary cannot be determined; (vi) other circumstances provided by laws and administrative regulations. Creditor has right to file petition to court against trust created to impair his rights. (Art. 12). Right to apply will be extinguished if creditor does not exercise within one year of date in which he had knowledge or should have knowledge. (Art. 12).

Property acquired by trustee in assuming trust is trust estate. Property prohibited to market by laws and administrative regulations not to be trust in estate. (Art. 14). Trust estate is different from trustor's other property not entrusted. (Art. 15). Trust estate is different from trustee's properties completely owned by him (hereinafter referred to as “permanent property”), shall not be attributed to trustee's permanent property or part of it. (Art. 16).

Credit resulting from trustee's managing, using, disposing trust estate shall not be set-off from debt to his permanent property. Credit, debt owing from trustee's management, use, disposition of different trustors' estates shall not be eliminated. (Art. 18).

Trustor shall be natural person with complete civil capacity or legal person or other organizations established according to law. (Art. 19). Trustee shall be natural person with complete civil capacity or legal person. (Art. 24). Trustee performs trust activities for beneficiary's maximum benefit. (Art. 25). Trustee must not seek personal benefit from trust estate, apart from his remuneration. (Art. 26). Trustee must not transfer trust estate to his permanent property. (Art. 27). Trustee must not transact business between his permanent property, trust estate or in trust estates of different trustors, except otherwise provided by trust documents, transacted at fair market prices. (Art. 28).

Two trustees in same trust are joint trustees. (Art. 31). Joint trustees shall assume joint, several liabilities for satisfaction in handling trust affairs for debts to third party. Matters expressed by third party to one of joint trustees shall be effective for other trustees. (Art. 32). Trustee shall assume obligation of secrecy for conditions, information on trustor, beneficiary, trust affairs. (Art. 33). Trustee shall assume obligation of paying trust profits not exceeding trust estate to beneficiary. (Art. 34). Expenses paid by trustee to handle trust affairs, debts to third party shall be assumed by trust estate; for those paid with his permanent property first, trustee shall enjoy option to receive indemnity. (Art. 37). Trustee may assign from trust created with approval of trustor, beneficiary. (Art. 38). Beneficiary, person with right to trust profits in trust, may be natural person, judicial person or other organizations established according to law. (Art. 43). Trustor may be beneficiary, only beneficiary in same trust. Trustee may be beneficiary but never only beneficiary in same trust. Beneficiary may waive his right to trust profits. (Art. 46).

Trust estate in public trust's profits must not be used for nonpublic purposes. (Art. 63). Trust supervisor shall be established in public trust. (Art. 64). Trustee must not resign from public trust without approval of administration of public trusts. (Art. 66).

13.06 WILLS:

See topic 13.02 Descent and Distribution.

14 FAMILY

14.01 ADOPTION:

Marriage Law of People's Republic of China was adopted on Sept. 10, 1980 at 3rd Session of 5th National Congress, revised pursuant to Decision on Amendment of Marriage Law of People's Republic of China made at 21st Session by Standing Committee of National Congress on Apr. 28, 2001.

Art. 26 of Marriage Law of People's Republic of China, promulgated on Sept. 10, 1980, effective as of Jan. 1, 1981, provides for adoption of children and considers adopted child to have same rights and duties in adopted home as natural child. Legal relationship with natural home is considered terminated upon adoption. Arts. 26 & 27 of Marriage Law provide for protection of adopted children.

See topic 14.05 Infants; category 5 Civil Actions and Procedure, topic 5.03 Civil Code.

Adoption Law was adopted at 23rd session of Standing Committee of Seventh National People's Congress on Dec. 29, 1991, and revised in accordance with Decision on Revising Adoption Law of People's Republic of China adopted at fifth Session of Standing Committee of Ninth National People's Congress on Nov. 4, 1998. Adoption Law was enacted to protect lawful adoptive relationships and to safeguard rights of parties involved in adoptive relationships. (Art. 1).

Adoption shall be in interest of upbringing and growth of adopted minors, and shall protect lawful rights and interests of adopters and adoptees, in conformity with principles of equality and voluntariness, and not contravene social morality (Art. 2) nor contravene laws and regulations on family planning (Art. 3).

Minors under age of 14, enumerated below, may be adopted: (1) Orphans bereaved of parents; (2) abandoned infants, or children whose biological parents cannot be ascertained or found; or (3) children whose biological parents are unable to rear them due to unusual difficulties. (Art. 4).

Following citizens or institutions shall be entitled to place children for adoption: (1) Guardian(s) of orphan; (2) social welfare institutions; or (3) biological parents unable to rear their children due to unusual difficulties. (Art. 5).

Adopter shall simultaneously meet following requirements: (1) Shall be childless; (2) shall be capable of rearing and educating adoptee; (3) shall not have any disease that prevents him/her from adopting children according to medical science; and (4) shall have reached age of 30. (Art. 6).

Child's collateral relative descending from his/her great grandparents and belonging to his/her parents' generation may adopt him/her without having to abide by restrictions provided for by Arts. 4, § 3, 5, § 3, and 9. In addition, child may be older than 14 years of age. (Art. 7).

Adopter may adopt only one child. Orphans, disabled children, or abandoned infants and children being brought up by social welfare institution whose biological parents cannot be found, may be adopted irrespective of restrictions that adopter shall be childless, and he/she shall adopt only one child. (Art. 8).

Where male person without spouse adopts female child, age difference between adopter and adoptee shall be no less than 40 years. (Art. 9).

Where biological parents intend to place child for adoption, they must act in concert. If one parent cannot be ascertained or found, other parent may unilaterally place child for adoption. Where person with spouse adopts child, husband and wife must adopt child in concert. (Art. 10).

Adoption of child and placing of child for adoption shall both take place on voluntary basis. Where adoption involves minor of age ten or older, consent of adoptee shall be obtained. (Art. 11).

If biological parents of minor are persons without full civil capacity, guardian(s) of minor may not place minor for adoption, except when biological parents may impose serious harm upon minor. (Art. 12).

Guardian(s) of minor orphans shall obtain approval of supporter for placing orphan for adoption. When supporter does not agree on adoption and fails to provide adequate support, guardian can be changed pursuant to Civil Code. (Art. 13).

Stepfather or stepmother may adopt stepchild with permissions given by stepchild's biological parents irrespective of restrictions that adoptee has not reached age 14 and that adopter shall adopt only one child as well as of those restrictions delineated in Arts. 4, § 3, 5, § 3 and 6. (Art. 14).

Adoption shall be registered with Civil Affairs Department at county level or above. Adoptive relationship is effective on date of registration. Where adoptee is abandoned infant or child whose biological parents cannot be found, relevant Civil Affairs Department shall make public announcement regarding matter prior to registration. If so willing, adopter and person placing child for adoption may execute adoption agreement. Adoption shall be notarized if either adopter or person placing child for adoption requires such notarization. (Art. 15).

After adoptive relationship has been established, relevant Public Security Authority shall conduct registration for residence for adoptee according to relevant regulations. (Art. 16).

Orphans, or children whose parents are unable to rear them, may be supported by relatives or friends of parents. Adoptive relationship shall not apply to relationship between supporter and supported. (Art. 17).

Where spouse places minor child for adoption after death of other spouse, parents of deceased spouse shall have priority in rearing child. (Art. 18).

Persons having placed child for adoption may not bear any more children, bearing of which would violate regulations on family planning. Placing child for adoption terminates one's freedom to have any more children. (Art. 19).

It is strictly forbidden to buy or sell child outright, or to do so under guise of lawful adoption. (Art. 20).

Foreigners may adopt Chinese children in PRC. Adoption by foreigner in People's Republic of China shall be examined and approved, pursuant to laws of his/her country, by competent authority of country of which said foreigner is citizen. Papers certifying certain particulars regarding adopter, such as age, marital status, profession, property, health and record of past criminal convictions and punishments, issued by competent authority of country of which adopter is citizen, shall be provided. Such certifying papers shall be authenticated by authority of foreign affairs or competent authority entrusted by authority of foreign affairs of country of which adopter is citizen. Such authentication shall be authenticated by Embassy or Consulate of People's Republic of China located in that country. Adopter shall execute written agreement with person placing child for adoption, register adoption agreement in-person with Chinese Civil Affairs Department at Province level. If either adopter or person placing child for adoption requires notarization, said notarization shall be handled by qualified notary organ capable of handling notarization relating to foreign matters and is admitted by judicial administrative authority of State Council. (Art. 21).

When adopter and person placing child for adoption wish to keep adoption strictly confidential, other persons shall respect their wishes and shall not make disclosure thereof. (Art. 22).

Rights and duties pursuant to relationship between adopted child and biological parents and other close relatives shall terminate simultaneously with establishment of adoptive relationship, to which new relationship they will apply. (Art. 23).

Adopted child may adopt adoptive father's or adoptive mother's surname, and may also retain original surname, if agreed pursuant to consultation between parties concerned. (Art. 24).

Any act of adoption in contravention of Adoption Law and Art. 55 of General Principles of Civil Law shall have no legal affect. Invalidity of act of adoption which is deemed invalid by People's Court shall date back to commencement of act. (Art. 25).

No adopter may terminate adoptive relationship before adoptee reaches age of majority except when adopter and person having placed child for adoption agree to terminate relationship. If adopted child reaches age of ten or more, child's consent shall be obtained. Where adopter fails to perform duties of rearing adoptee, or engages in mistreatment, abandonment, or other acts which encroach upon lawful rights of minor adopted child, person having placed child for adoption shall have right to demand termination of adoptive relationship. Where adopter and person having placed child for adoption fail to reach agreement, suit may be brought in People's Court. (Art. 26).

Where relationship between adoptive parents and adult adopted child deteriorates to such degree that their living together in same household becomes impossible, they may terminate adoptive relationship by agreement. In absence of agreement, suit may be brought in People's Court. (Art. 27).

Adoptive relationship may be terminated by mutual agreement of parties and subsequent registration of such termination at Civil Affairs Department. (Art. 28).

Upon termination of adoptive relationship, rights and duties pursuant to relationship between adopted child and adoptive parents and close relatives shall also terminate. Rights and duties pursuant to relationship between child and biological parents and close relatives shall be restored automatically. However, with respect to rights and duties in relationship between adult adopted child and biological parents and close relatives, restoration may be decided upon pursuant to consultation between parties. (Art. 29).

Upon termination of adoptive relationship, adult adopted child who has been reared by adoptive parents shall provide money to support adoptive parents who have lost ability to work and are left with insufficient source of income. If adoptive relationship is terminated on account of mistreatment or desertion of adoptive parents by adult adopted child, adoptive parents may demand appropriate amount of compensation from biological parents of adopted child for living and education expenses paid during period of adoption. However, if adoptive relationship is terminated on account of mistreatment or desertion of adopted child by adoptive parents, no compensation may be demanded. (Art. 30).

Whoever abducts child or engages in illegal trafficking of children, under guise of legal adoption, shall be investigated to determine their possible criminal liability according to laws. Whoever abandons infant shall pay fine imposed by Public Security organ. If it constitutes criminal action, offender shall be investigated for his criminal liability according to law. Whoever sells his or her biological child shall have his/her illegal income confiscated and be fined by competent Public Security organ. If it constitutes criminal action, offender shall be investigated for his/her criminal liability according to law. (Art. 31).

Said Decision on Revising shall be effective as of Apr. 1, 1999. Prior to date of effectiveness, establishment or termination of adoptive relationship, according to Adoption Law of People's Republic of China, shall not be registered. Adoption Law of People's Republic of China shall be re-promulgated after corresponding amendments according to said Decision on Revising.

On Aug. 30, 1984 Supreme Court issued Opinion Related to Several Problems of Enforcing the Civil Law. Adoption relationship agreed upon by biological parents and foster parents having gone through legal formalities shall be legally protected. (para. 27).

Where either of biological parents refuses to give up child for adoption no adoption can take place; but when one biological parent knows that other is sending their child to be adopted, and says nothing, their consent will be implied.

Where one of adopting parents does not, at time of adoption, agree with adoption, but relationship persists during prolonged period, adoption shall receive legal recognition.

Where legal procedures have not been followed at time of adoption, but relationship generally acknowledged, testified to by relevant person, and subsisted for long time it should be treated as if had gone through proper legal procedures. (para. 28).

Where either natal or foster parents attempt to alter adoption, Court shall examine record and decide on basis of best interests of adopted child. Adoption of someone as grandchild is lawful.

Where foster parents discover that their adopted children had physiological defects or diseases and ask to terminate adoption, this will not be permitted, unless biological parents deliberately withheld information on child's infirmity. (para. 30).

14.02 DISSOLUTION OF MARRIAGE:

See topic 14.03 Divorce.

14.03 DIVORCE:

See category 5 Civil Actions and Procedure, topic 5.03 Civil Code.

Consensual divorce may be granted if both parties agree. (Art. 31). Divorce shall be granted if mediation fails, under any of following circumstances: (i) Bigamy on part of one party or by other acts in breach of monogamy system; (ii) use of domestic violence or maltreating or deserting family members; (iii) failure to reform after persistent counseling to refrain from bad habits of gambling and drug taking by one party; (iv) separation up to two years as result of inharmonious affection; or (v) other circumstances which cause loss of affection between husband and wife. Divorce shall be granted if one party is declared missing and other party starts divorce proceedings. (Art. 32). Husband may not apply for divorce when wife is pregnant, within one year after giving birth or within six months after terminating gestation. This restriction does not apply when wife also applies for divorce. (Art. 34). Relationship between parents and children does not terminate due to divorce of parents, as children remain children of both parties who have right and obligation of upbringing their children. (Art. 36). Children during lactation must be brought up by their mother after divorce of parents. (Art. 36). After divorce, father or mother not having direct custody of children shall have right to access children, other party has duty to assist. (Art. 38). Where husband and wife have made agreement in writing providing for several ownership of property under subsisting contract of marriage, one party may ask for compensation from other party if party asking has made more efforts to bring up children, look after aged, or assisted other party in their work. (Art. 40).

Anyone committing bigamy or employing domestic violence or maltreating or deserting family members so as to constitute crime shall be prosecuted for criminal responsibility. Victims may institute private prosecution pursuant to relevant regulations of Criminal Procedure Law to court; public security organizations shall make investigations according to law; prosecutor's office shall present public prosecution according to law. (Art. 45). In divorce resulting from any of following circumstances, party without fault has right to request remedy for losses: (i) Bigamy on part of one party; (ii) acts in breach of monogamy system; (iii) use of domestic violence; (iv) mistreating or deserting family members. (Art. 46). One party may raise action in court after divorce to request new partition of common property if other party is found concealing, transferring, selling off, or damaging community property, or fabricating debts to occupy property of other party in divorce. (Art. 47). Court will employ coercive execution when decree or judgment on cost of maintenance, alimony, payment for support of parents, grandparents, property distribution, inheritance, visitation of parent, are carried out. Concerned individuals or organization shall bear responsibility of assisting in enforcement. (Art. 48).

Divorce Registration.

Pursuant to Regulations on Marriage Registration promulgated on July 30, 2003, to divorce voluntarily, Mainland residents shall both attend together divorce registration in marriage registration unit at one party's place of domicile. To divorce voluntarily between Chinese citizen and foreigner, Hong Kong resident, Macao resident, Taiwan resident or overseas Chinese, both parties shall attend together divorce registration in marriage registration unit in Mainland resident's place of domicile. (Art. 10). Mainland resident shall provide following documentary evidence: (1) Household registration book and ID card; (2) marriage certificate; (3) divorce agreement signed by both parties. Divorce agreement shall state declaration of will on voluntary divorce, settle issues about upbringing of children, property and debt. (Art. 11). Registration unit shall refuse to accept application of divorce registration in following circumstances: (1) No divorce agreement; (2) any party is person who lacks civil disposition capacity or person of limited capacity; or (3) marriage registration is not registered in mainland China. (Art. 12). Marriage registration unit shall examine certificate and documentary evidence provided by both parties for divorce registration and enquire into relevant state of affairs. Unit shall approve and issue divorce certificate on the spot, provided both parties meet divorce conditions. (Art. 13).

14.04 HUSBAND AND WIFE:

See category 4 Citizenship, topic 4.01 Aliens.

Husband and wife have equal status in home. (Marriage Law, Art. 13). Both husband and wife have right to use their family names. (Marriage Law, Art. 14). Both husband and wife have freedom to work, study and participate in social activities, and neither is permitted to restrain or interfere with other. (Marriage Law, Art. 15). Both husband and wife are under duty to practice family planning. (Marriage Law, Art. 16). Said duty is encouraged by benefits that accrue to those who adhere to state policy of having only one child per family. Normally individual receives cash award, plus medical care.

Property acquired during marriage is joint property, unless there is agreement between parties to contrary. Husband and wife enjoy equal rights to possession and management of said property. (Marriage Law, Art. 17).

Husband and wife have duty to support and assist each other. (Marriage Law, Art. 20). If one party fails to support and assist party in need, then party in need has right to legally demand such support and assistance (Marriage Law, Art. 20), which demand can be enforced by court (Marriage Law, Art. 21). Both husband and wife have duty to rear and educate their children, and children duty to support and assist parents. (Marriage Law, Art. 21). Where parents do not perform their duties relating to rearing of their children, children who are minors and incapable of maintaining themselves can demand that their parents pay for their care (Marriage Law, Art. 21), and where children do not perform their duties relating to supporting their parents,

parents who have lost ability to work or have difficulties in providing for themselves, have right to demand that their children pay for their support (Marriage Law, Art. 21). Parents have right and duty to protect their children and subject them to discipline. When children who are minors cause harm to state, collective or other person, parents must make compensation for economic loss. (Marriage Law, Art. 23). Property in any of following circumstances shall be property of either husband or wife: (i) Property possessed by one party before marriage; (ii) medical payments acquired as result of personal injuries of one party or living allowance of handicapped; (iii) property inherited under will or donated under contract to one party; (iv) items for living exclusively used by one party; or (v) other property which shall belong to one party. (Marriage Law, Art. 18). Husband and wife may reach agreement in writing providing for joint or several ownership or partly joint, several ownership of all or part of prenuptial property or of property under contract of marriage. Where it has been agreed between husband and wife that prenuptial property or property under contract of marriage shall be severally owned, where third party knows of agreement, debt owing by either husband or wife shall be repaid by property of husband or wife who owes debt. (Marriage Law, Art. 19).

14.05 INFANTS:

See topics 14.01 Adoption, Husband and Wife; categories 5 Civil Actions and Procedure, topic Civil Code; Criminal Law, topic Criminal Law; Estates and Trusts, topic Descent and Distribution.

Children may adopt either their father's or their mother's name. (Marriage Law, Art. 22). Children born out of wedlock enjoy same rights as children born in wedlock and father of said child is responsible for part or all of cost of child's support until child is self-supporting. (Marriage Law, Art. 25). Adoption relationships protected by State, are governed by same laws that govern relationships between parents and children they conceived. (Marriage Law, Arts. 26, 27). Rights and duties in relationship between adopted children and their biological parents are terminated upon adoption. (Marriage Law, Art. 26). When parents are deceased or incapacitated grandparents or older brothers or sisters having capacity to bear relevant costs are responsible for support of said children. (Marriage Law, Arts. 28, 29).

14.06 MARRIAGE:

Marriage status exists in Chinese law after issuance of marriage license (Marriage Law, Art. 8) which is issued when marriage is registered. Marriage can be registered if registration office finds proposed marriage to be in conformity with provisions of Marriage Law. (Art. 8). Marriage Law requires that marriage be based on complete willingness of parties (Marriage Law, Art. 5), that it not be contracted before man has reached 22 years of age and woman 20 years of age (Marriage Law, Art. 6); it is prohibited where man and woman are lineal relatives by blood or collateral relatives by blood (up to 3d degree of relationship) (Marriage Law, Art. 7[1]); and is prohibited where one party is suffering from leprosy or from such other disease regarded as rendering person unfit for marriage by medical science (Marriage Law, Art. 7[2]).

Marriage Registration.

Regulations on Marriage Registration were passed by State Council on July 30, 2003, effective as of Oct. 1, 2003. Regulations on Governing of Marriage Registration were abolished simultaneously.

General Principles.

Civil administration department of people's government at county level or people's government at town (township) level are registration units for Mainland resident. Department of civil affairs in province, autonomous region government or unit picked by department of civil affairs in province or autonomous region government is registration unit for people between Chinese citizen and foreigner, mainland resident and Hong Kong resident, Macao resident, Taiwan resident or overseas Chinese. (Art. 2).

Marriage Registration.

Mainland residents shall attend together for marriage registration to registration unit of one party's place of domicile. For marriage between Chinese citizen and foreigner, Hong Kong resident, Macao resident, Taiwan resident or overseas Chinese, both parties shall attend together for marriage registration to registration unit of Mainland resident's place of domicile. (Art. 4). Mainland resident shall provide documentary evidence: (1) Household registration book and ID card; (2) signed personal statement of no consort, no lineal blood relation and no collateral blood relation in three generations with opposite party. Hong Kong, Macao, or Taiwan resident shall provide documentary evidence: (1) Valid passport and ID card; (2) personal statement of no consort, no lineal blood relation and no collateral blood relation in three generations with opposite party, notarized by notary office at residence. Overseas Chinese shall provide documentary evidence: (1) Valid passport; (2) personal statement of no consort, no lineal blood relation and no collateral blood relation in three generations with opposite party, which is issued by notary office in country of residence and authenticated by Chinese embassy or consulate; or, certificate of no blood relation nor collateral blood relation in three generations with opposite party, which is issued by Chinese embassy or consulate. Foreigner shall provide following documentary evidence: (1) Valid passport or other valid international travel certificate; (2) personal statement of no consort issued by notary office in country of residence, authenticated by Chinese embassy or consulate in country; or certificate of no consort issued by host country's embassy or consulate in China. (Art. 5). Registration unit shall refuse to register in following circumstances: (1) Under legal age for marriage; (2) non-voluntary marriage application; (3) one party or both parties have spouse; (4) lineal blood relation or collateral blood relation in three generations; (5) disease which is considered to bar marriage by medical science. (Art. 6). Registration unit shall examine certificate and documentary evidence provided by both parties for marriage registration and enquire into relevant state of affairs. Unit shall approve and issue marriage certificate on the spot if both parties meet marriage conditions; refuse to register but explains reasons if not. (Art. 7).

See category 5 Civil Actions and Procedure, topic 5.03 Civil Code.

14.07 MARRIED WOMEN:

See topics 14.03 Divorce, Husband and Wife, Marriage; category 13 Estates and Trusts, topic 13.02 Descent and Distribution.

15 FOREIGN TRADE AND COMMERCE

15.01 CUSTOMS (DUTY):

State Council establishes General Customs Administration that exercises unified administration of customs offices throughout country. State has set up approximately 247 ports of entry to China open to foreign countries; in addition, State Council establishes other regions and places with concentrated duties of supervision and control. All cargo and vessels must pass through Customs and be released by Customs when entering or exiting from China. Foreign trade organs issue import and export licenses against which Customs officials check cargo, including incident of damage. Cargo examined at warehouses, wharves and the like under Customs control, or at ultimate destination of cargo if Customs so permits. Customs officials have responsibility for preventing smuggling or illegal transportation of precious metals and foreign currency. Customs officials have authority to confiscate goods brought into China illicitly, to impose fines, not exceeding value of said goods, and/or to send offender to judicial authorities for punishment.

Customs Law was adopted at 19th Session of Standing Committee of Sixth National People's Congress on Jan. 22, 1987 and became effective as of July 1, 1987; was amended on

July 8, 2000. China has agreed to reduce tariffs substantially pursuant to its agreements to enter WTO.

Customs Office is state organization responsible for supervision and control over everything entering and leaving territory. Under this and other relevant law and regulations, Customs Office supervises and controls means of transport, goods, travellers, luggage, postal items and other articles entering or leaving territory, collects customs duties, and other taxes and fees, uncovers and suppresses smuggling, works out customs statistics, and perform other customs duties. (Art. 2). Importer and exporter of goods declares taxable value; duties paid by declaration enterprise registered with customs or by enterprise entitled to engage in import and export business. (Art. 9).

Required Declarations: Person in charge of transportation, whether inbound or outbound, makes declaration to Customs Office and submits papers for examination (Art. 14); declaration includes information as to goods and passengers (Art. 17.).

Inward and Outward Goods.

All import goods, export goods and all transit, trans-shipment and through goods are subject to Customs control. (Art. 23). Consignee or consignor, depending upon import or export, is person responsible for declaration, submission of licenses, and relevant papers. Declaration of import goods must be made to Customs Office by consignee within 14 days of declaration of arrival of means of transport, declaration of export goods must be made by consignor 24 hours prior to loading. (Art. 24). Import and export goods must be released upon customs endorsement only after payment of duties or provision of guarantee. (Art. 29). If receiver fails to declare import goods to Customs Office within three months of arrival, goods may be confiscated and sold off by Customs Office. (Art. 30). Customs must protect intellectual property rights related to imported or exported goods. (Art. 44). Importation of goods in violation of intellectual property rights are confiscated, and importer subject to civil and criminal penalties. (Art. 91).

Payers of Customs Duty: Payer of customs duty is consignee on import of goods, consignor on export of goods, and owner of inward and outward articles. (Art. 54).

Duty-paying value of import item is normal CIF price. If approved by customs, duty-paying value of export items is normal FOB price, minus export duty. (Art. 55).

Art. 56 specifies items subject to reduction of or exemption from payment of duties. (Art. 56).

Duty reduction or exemption may be granted for import and export goods of SEZ and other specially designated areas; specific enterprises, such as Chinese-foreign equity joint ventures, Chinese-foreign contractual joint venture and wholly foreign-owned enterprise; goods devoted to specific purposes; and material donated for use for public welfare undertaking. (Art. 57).

Exhibits.

Regulations on the Importation of Exhibits were promulgated by Ministry of Trade and Economic Cooperation (Renamed “Ministry of Commerce”) on Feb. 14, 1997. Effective Mar. 1, 1997. Replaced by Administrative Measures of the Customs of the People's Republic of China for Goods Temporarily Imported or Exported, which were deliberated and adopted at executive meeting of General Administration of Customs on Feb. 14, 2007, are promulgated and came into force as of May 1, 2007.

“Goods temporarily imported or exported” include: (1) Goods for display or use at exhibitions, fairs, meetings, or similar events; (2) articles for performance or competition in cultural or sports exchange activities; (3) apparatus, equipment, and articles used for making news report or producing film or TV program; (4) apparatus, equipment, and articles used for carrying out scientific research, teaching, or medical treatment activities; (5) transport tools and special types of vehicles used in such activities as listed in Items (1) to (4) of this paragraph; (6) samples of good; (7) apparatus, equipment, and articles used in charity activities; (8) apparatus and tools used for installation, debugging, testing, and repair of equipment; (9) containers for containing goods; (10) self-driving transport tools and articles for use in traveling; (11) equipment, apparatus, and articles used in construction of projects; and (12) other goods temporarily imported or exported upon approval of customs. Goods temporarily imported under any ATA Carnet for the Temporary Admission of Goods ("ATA carnet") must be limited to goods as prescribed in international conventions on temporary admission of goods to which China has acceded. (Art. 3). Importation or exportation application for goods temporarily imported or exported must be subject to examination and approval of customs office directly under General Administration of Customs, or subject to examination and approval of customs office authorized by customs offices directly under General Administration of Customs. (Art. 6). Goods temporarily imported or exported must be re-exported or re-imported within six mos. as of date of importation or exportation. Where it is necessary to extend time limit under special circumstance, ATA carnet holder or consignee or consignor of goods temporarily imported or exported under non-ATA carnet may file extension application with local competent customs office. Time limit may be extended upon approval of customs office directly under General Administration of Customs for three times at most, but each extension must not exceed six months. At expiry of extended time limit, goods must be re-exported or re-imported or import or export formalities must be handled. With regard to goods temporarily imported or exported under important projects of state or under scientific research projects of state, as well as Articles to attend exhibitions for period of 24 mos. or longer, if it is still necessary to extend time limit after expiry of 18-month-extension period, customs office directly under General Administration of Customs must report it to General Administration of Customs for examination and approval. (Art.7)Any exhibits imported must, during non-display period, be kept in surveillance area designated by customs. Such exhibits must not be moved out without approval of customs office. If it is really necessary to move them out, approval of local competent customs office directly under General Administration of Customs must be required. (Art.22). Customs office only accepts ATA carnets filled out in Chinese or in English. (Art. 29).

Regulations Governing Import and Export Tariff of China was promulgated by State Council on Mar. 7, 1985, amended and promulgated by State Council on Sept. 12, 1987. Second amendment was promulgated by State Council on Mar. 18, 1992; replaced by Regulations of the People's Republic of China on Import and Export Duties, which were adopted at 26th executive meeting of State Council on Oct. 29, 2003, are promulgated and implemented as of Jan. 1, 2004.

Goods permitted for import and export by State shall be subject to levy of customs duties on imports and exports according to Regulations of the People's Republic of China on Import and Export Duties. (Art.2)

The Customs Tariff Commission must be established by State Council. It is responsible for readjusting and interpreting tariff items, tariff nomenclature heading numbers and tariff rates in Tariffs and the Import Tariff Rates for Entry Articles, which must take effect upon approval of State Council; it decides on goods subject to temporary tariff rates, tariff rates and time limit; it decides on rate of tariff quota, imposition of antidumping duties, countervailing duties, duty under safeguard measures, retaliatory duties; decides on implementation of other measures relating to customs duties and application of tariff rates under special circumstances, and exercises other functions as provided for by State Council. (Art. 4).

Import tariffs consist of most-favoured-nation tariff rate, conventional tariff rate, preferential tariff, general tariff rate, and quota tariff rate, etc. Temporary tariff rates may be applied to import goods within certain time limit. Export tariff rates are set up in export duties. Temporary tariff rates may be applied to export goods within certain time period. (Art.9).

Obligatory duty payer must, in accordance with table of contents, stipulations, general principle of classification, category notes, chapter notes, subheading notes, and any other classification notes, classify import or export goods that it declares, and put them under corresponding tariff nomenclature heading numbers. Customs must examine and determine commodity classification of goods in accordance with law. (Art. 31).

Tonnage dues on foreign vessels, Chinese vessels under foreign charter and Chinese or foreign vessels chartered by joint foreign-Chinese corporations and calling at Chinese ports are levied by Customs officials under Provisional Rules Governing Levying of Tonnage Dues of Customs, approved by Financial and Economic Committee of Government Administrative Council on Sept. 16, 1952, effective as of Sept. 29, 1952. Vehicle and shipping license fees are not required. Tonnage fees vary with tonnage and fees are valid for three-month periods, with certain exceptions. (Arts. 2-3). Certain vessels used by diplomatic missions, entering solely for purpose of shelter or repair, vessels under charter to central or local people's government and vessels exempt by Art. 27 of Provisional Customs Laws, are exempt from tonnage dues. (Art. 11).

Civil aircraft are governed by certain Customs rules promulgated by Ministry of Foreign Trade on Oct. 1, 1974 entitled “Rules Governing the Supervision and Control of International Civil Aircraft by the Customs Agency”. Term “international civil aircraft” is defined to include any civil aircraft entering or leaving Chinese territory while engaged in international air traffic, except any special plane carrying heads of state or other governmental leaders. (Art. 2). Said aircraft must notify Customs two hours prior to landing or take-off. (Art. 3). Loading and discharging of cargo, mail, luggage, etc., and embarking or disembarking of passengers all require permission, supervision and control of Customs authorities. (Art. 4). Pilot must present passenger and cargo manifest and crew list to Customs (Art. 5), including crew's list of personal effects, currencies and gold and silver (Arts. 5, 6) upon landing or take-off. International aircraft are subject to Customs inspection. (Art. 9). Passengers, their luggage and articles entering or leaving China, must first pass through Chinese formalities (Art. 11) as must crew members (Arts. 17, 18, 19). Customs also has authority to examine and seal fuel, oil, spare parts, equipment, stores, gold and silver, foreign currencies and other articles on board aircraft.

Import duties on passenger baggage are governed by Rules Governing Levying of Import Duty on Articles in Passengers' Baggage and Personal Postal Parcels approved by State Council on June 16, 1978 and promulgated by Ministry of Foreign Trade on Aug. 1, 1978. These rules provide for ad valorem duties, assessed on c.i.f. value, or where not ascertainable, domestic price (Art. 5), and run as high as 100% on foodstuffs, beverages, clothing made of cotton or linen, radio sets and record players (Art. 3). Wristwatches, tobacco, wine, spirits, and cosmetics are taxed at 200%. (Art. 3). Passengers entering China as tourists or for brief visits are not subject to these levies pursuant to regulations, unless they are carrying unusually large quantity of items beyond what appears to be normal personal usage. See Provisional Customs Regulations for Supervision and Control over Baggage and Articles Accompanying Incoming and Outgoing Overseas Chinese and Other Passengers, promulgated by Ministry of Foreign Trade on Apr. 5, 1978. See also Customs Guide for Passengers Entering and Leaving China, which provides that articles and baggage carried by incoming passengers, in reasonable quantities for personal use, shall be released duty free, but there are limits on certain articles, e.g. wristwatches, bicycles and radios, which are to be limited normally to one per person.

See also topic 15.11 Trade Zones.

Import and Export Commodity Inspection.

China's State Council has established Administration for Import and Export Commodity Inspection, which performs inspection of import and export commodities throughout country in accordance with Law of China on Import and Export Commodity Inspection, adopted at sixth session of Standing Committee of Seventh National People's Congress on Feb. 21, 1989, and effective as of Aug. 1, 1989; and revised on Apr. 28, 2002.

State Administration for Import and Export Commodity Inspection (SAIECI) formulates, adjusts and publishes list of Import and Export Commodities subject to inspection by Commodity Inspection Authorities (hereinafter "List of Commodities"). (Art. 4). Inspection of imports and exports by Commodity Inspection Authorities covers: (1) Inspection of import and export commodities included in list of commodities; (2) hygiene inspection of foods for exports; (3) testing and inspection of performance and use of packages and containers for dangerous export goods; (4) cargo worthiness inspection on such means of transportation as vessels, holds and containers for carrying perishable foods and frozen goods for exports; (5) inspection of imports and exports to be contacted by Commodity Inspection Authorities according to relevant international treaties; etc.

No permission will be granted for sale or use of import commodities specified in List of Commodities until they have undergone inspection; and no permission will be granted for export of commodities specified in List of Commodities until they have been found to be up-to-standard through inspection. (Art. 5). Arts. 6 and 7 specify details of inspection.

Inspection of Import Commodities.

Arts. 11 and 13 set forth requirements for consignee.

Inspection of Export Commodities.

Arts. 15 and 16 set forth requirements for consignor.

Foreign Currency.

Regulations on the Entry and Exit of Foreign Currency were promulgated by National Foreign Exchange Bureau and General Customs Administration on Dec. 31, 1996. Effective on Feb. 10, 1997.

Entry and exit person shall declare to customs when carrying following amount: (1) Nonresidents carrying foreign cash over USD 5,000; (2) residents carrying foreign cash over USD 2,000. (Art. 3). Exit person is not required to declare foreign currency when carrying amount that does not exceed amount declared on entry record. (Art. 4).

15.02 EXCHANGE CONTROLS:

Rules of People's Republic of China on Foreign Exchange Control ("Rules") promulgated by State Council on Jan. 29, 1996, amended Jan. 14, 1997 and effective Apr. 1, 1996. Amended at 20th executive meeting of State Council on Aug. 1, 2008, is promulgated and came into force as of date of Aug. 5, 2008. Foreign exchange is defined as assets and instruments of payment expressed in foreign currency used to make international payments: (1) Foreign currencies, including bank notes and coins; (2) foreign currency payment instruments, including negotiable instruments, bank deposit certificates and postal saving certificates, etc.; (3) foreign currency marketable securities, including government bonds, corporate bonds and shares, etc.; (4) Special Drawing Rights; and (5) other foreign exchange assets. (Art. 3).

State Council Foreign Exchange Administration Department and its branch offices are in charge of exchange control. (Art. 2). This Rules must apply to foreign exchange income and expenditure and foreign exchange business operations of Chinese institutions and individuals, and foreign exchange income and expenditure and foreign exchange business operations conducted within territory of People's Republic of China by overseas institutions and individuals. (Art. 4). State must not control or restrict payment and transfer of foreign exchange for current

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international transactions. (Art. 5).

Domestic Organisations or individual: Foreign exchange income of domestic institution or individual may be transferred back into territory of People's Republic of China or deposited overseas. (Art. 9). Domestic institution or individual that makes direct investment or issues or trades negotiable securities or derivative products overseas must handle registration formalities at foreign exchange administrative department of State Council. (Art. 17).

Foreign Organisation, Individuals: Overseas institution or individual that makes direct investments in territory of People's Republic of China must handle registration formalities at foreign exchange administrative organ upon approval of competent department. Overseas institution or individual that issues or trades negotiable securities or derivative products in territory of People's Republic of China must abide by market access provisions of state and handle registration formalities at foreign exchange administrative department of State Council. (Art.16).

Institution must apply to foreign exchange administrative organ before providing foreign guarantee. Foreign exchange administrative organ must make decision of approval or disapproval according to asset-liability situation of institution. (Art. 19).

Banking financial institutions may directly provide commercial loans to overseas parties within their approved scope of business. Any institution providing commercial loan to overseas party must handle registration formalities in accordance with relevant provisions of foreign exchange administrative department of State Council. (Art. 20).

For foreign-funded enterprise which is terminated according to law, after accounts are settled and taxes paid in accordance with relevant state provisions, Renminbi owned by foreign investor may be used for buying foreign exchange from any financial institution operating foreign exchange sale or settlement business. (Art. 22).

Financial institution must get approval of foreign exchange administrative organ before operating or terminating foreign exchange sale or settlement business. Before operating or terminating any other foreign exchange business, financial institution must get approval of foreign exchange administrative organ or financial regulatory organ, depending on division of duties and functions between them. (Art. 24).

Exchange rate of Renminbi must be subject to floating rate system regulated based on market supply and demand. (Art. 33).

Violations of law and regulations governing foreign exchange subject to detailed set of sanctions appropriate to offense. (Arts. 39-50).

If party, subject to sanction, disagrees with penalty decision imposed by foreign exchange control authority, party may, within 15 days of receiving notice of penalty decision, apply to foreign exchange control authority at next higher level for review of case. Foreign exchange control authority at next higher level will, within two months of receiving review application, make decision on review of case. If party concerned still disagrees with review decision, that party may file suit with People's Court in accordance with law. (Art. 51).

Swap Centers.

PBC and State Administration of Foreign Exchange jointly issued circular in late Oct. of 1998, announcing that all foreign exchange swapping business is to cease operation from Dec. 1, 1998. All foreign exchange transactions for enterprises with foreign investment will be conducted by authorized banks.

Administration of Foreign Exchange in Bonded Areas.

Administrative Measures on Foreign Exchange Control in Bonded Areas promulgated on Dec. 18, 1995 by State Administration of Foreign Exchange; amended and came into force as of Oct. 1, 2007.

State Administration of Foreign Exchange Control and its subsidiaries (hereinafter referred to as "Foreign Exchange Bureaus") are authorities responsible for foreign exchange control in bonded areas. (Art. 3).

Bonded area enterprise must, after obtaining business license, handle formalities for foreign exchange registration at foreign exchange bureau of place where it is located as required. (Art. 4).

Assets obtained by foreign investor for liquidation of inside institution may be remitted abroad or reinvested in China upon approval of foreign exchange bureau, while assets obtained by Chinese investor must be transferred back to corresponding domestic outside area in timely manner and handled pursuant to relevant provisions. (Art.15). Where domestic outside enterprise purchases goods from inside enterprise, it may pay price of goods to inside enterprise upon strength of valid vouches and business papers, directly pay price of goods to overseas or make payment to another domestic outside enterprise entitled to goods. Domestic outside enterprise entitled to goods must, after receiving foreign exchange paid by aforesaid domestic outside enterprise, handle verification and writing-off formalities upon strength of credit advice or foreign exchange settlement voucher. (Art. 13).

Administrative Measures of Foreign Exchange Guarantee issued by Resident Institution in China, Administrative Measures on Securities Given to Foreign Parties by Domestic Institutions promulgated on Sept. 25, 1996, effective Oct. 1, 1996, by PBC regulate this subject matter. Foreign securities defined to include: (1) Financial securities; (2) financial lease securities; (3) securities under counter-trade projects; (4) securities for contracted overseas engineering projects; (5) securities for other matters which have nature of foreign debt.

Security provider is not permitted to provide foreign securities in form of liens or deposits. Securities given to foreign-funded financial institutions within territory of China will be regarded as foreign securities.

PBC authorizes State Administration of Foreign Exchange and its branches and subbranches (referred to in these Measures as foreign exchange departments) to be administrative organs in charge of foreign securities and to be responsible for examination, approval, administration and registration of foreign securities. (Art. 3).

Security providers as stipulated in these Measures are: (1) Financial institutions authorized to conduct foreign security business (not including foreign-funded financial institutions); (2) nonfinancial institutions, including domestic-funded enterprises and foreign investment enterprises, with corporate status and ability to repay debts on behalf of another.

State organs and public institutions are not permitted to provide foreign securities, except for use of loans from foreign governments or international economic organizations to grant further loans with approval of State Council. (Art. 4).

Combined amounts outstanding of foreign securities provided by financial institution and domestic foreign exchange securities provided by financial institution plus amount of its foreign debts must not exceed 20 times amount of its foreign exchange funds.

Amount outstanding of foreign securities provided by nonfinancial institution with corporate status must not exceed 50% of its net assets nor may it exceed that institution's foreign exchange revenue derived in preceding year. (Art. 5).

Domestic-funded enterprise may only provide foreign securities in relation to those foreign debts which correspond to Chinese parties' investment in direct subsidiary company or mutual shareholding company of that domestic-funded enterprise.

When domestic trade-type enterprise provides foreign security, its proportion of net assets to overall assets must, in principle, not be lower than 15%.

When domestic non-trade-type enterprise provides foreign security, its proportion of net assets to overall assets must, in principle, not be lower than 30%. (Art. 6).

Security provider must not provide foreign securities for enterprises which incur operating losses. (Art. 7).

Art. 10 provides provisions governing reporting, examination and approval requirements; Art. 14 specifies registration procedures with local foreign exchange department.

Foreign Exchange Settlement under Current Account Items.

Arts. 3 through 13 provide extensive rules governing reporting settlement, collection, and opening of foreign exchange accounts.

All net income gained through settlement of types of foreign exchange mentioned above must be sold to designated foreign exchange banks by deadline prescribed. (Art. 7).

Foreign exchange to be used for overseas payments in accordance with provisions of donation, sponsorship or aid contracts may be retained upon approval by foreign exchange control bureaus. (Art. 8).

Following foreign exchange may be retained: (1) Foreign exchange possessed by foreign diplomatic missions in China, resident representative offices of international organizations and other overseas legal persons stationed in China; (2) foreign exchange owned by individual residents and persons coming to China. (Art. 9).

Foreign exchange income under current account items of foreign investment enterprise may be retained up to maximum amount specified by foreign exchange control bureau. Portion in excess of specified amount must be sold to designated foreign exchange bank or through foreign exchange adjustment centre. (Art. 10).

Sale and Payment of Foreign Exchange under Current Account Items.

Foreign exchange used for making trade and non-trade operational payments by domestic organisations drawn from their foreign exchange accounts or may be converted and paid at designated foreign exchange bank upon presentation of valid commercial documents which correspond to payment method and valid documents specified in Art. 13. Foreign exchange used for trade and non-trade operational payments by domestic organisations first be paid or converted and paid from their foreign exchange accounts at banks which operate foreign exchange business based on detailed account of payments provided by customers; this will then be verified and examined according to provisions of Art. 14.

Foreign exchange used for external payments by domestic organisations must be paid from exchange accounts or converted and paid at designated foreign exchange banks following verification of authenticity of relevant transaction by foreign exchange control bureaus pursuant to provisions of Art. 15.

For payments of interest on foreign exchange loans taken out in China from Chinese-funded financial institutions, domestic organisations must make these payments from their foreign exchange accounts or effect conversion and payment at designated foreign exchange banks by presenting Foreign Exchange (Transferred) Loan Registration Certificate, loan contract and creditor's interest payment notice. (Art. 16).

Foreign exchange used, outside financial budget, for following nonoperational purposes by domestic organisations paid from foreign exchange accounts or converted and paid at designated foreign exchange banks by presenting following valid documents specified in Art. 18.

Foreign exchange to be used for nonoperational purposes other than those listed in above mentioned items (1) to (6) will be paid from their foreign exchange accounts or converted and paid at designated foreign exchange banks following verification of authenticity of transaction by foreign exchange control bureaus. (Art. 18).

Individual residents, after settling overseas, may effect conversion of following legitimate RMB earnings at designated foreign exchange banks as authorised by foreign exchange control bureaus by presenting their identification papers and specified valid documents: (1) For interest on deposits of RMB, statements for interest on RMB deposits must be presented; (2) for rents derived from lease of real estate, lease contracts and statements issued by administrative departments in charge of leased properties must be presented; (3) for other earnings derived from other assets, relevant supporting materials and income statements must be presented. (Art. 20).

Remittances of after-tax profits or dividends of foreign investors in foreign investment enterprises, after taxes have been paid in accordance with law, can be made from their foreign exchange accounts or converted and paid at designated foreign exchange banks by presenting written resolutions of board of directors concerning profit distribution.

Foreigners, overseas Chinese, Hong Kong, Macao and Taiwanese staff and employees of foreign investment enterprises may, after tax has been paid in accordance with law, effect conversion of their RMB wages and other legitimate earnings at designated foreign exchange banks by presenting supporting materials. (Art. 21).

For payments of dividends which must be made in foreign currency pursuant to regulations, payments can, after taxes have been paid in accordance with law, be made from their foreign exchange accounts or conversion and payment effected at designated foreign exchange banks by presenting written resolutions of board of directors concerning profit distribution. (Art. 22).

Foreign organisations stationed in China and persons coming to China may effect conversion and payment of their legitimate RMB earnings at designated foreign exchange banks as authorised by foreign exchange control bureaus by presenting supporting materials and fee collection statements when such earnings are required to be remitted overseas. (Art. 23).

For RMB proceeds derived from sales of articles for their own use, equipment and utensils brought from abroad or purchased in China, foreign organisations stationed in China and persons coming to China may effect conversion and payment of proceeds that need to be remitted overseas at designated foreign exchange banks as authorised by foreign exchange control bureaus by presenting industrial and commercial registration certificates or personal identification papers and proof of sale. (Art. 24).

Foreigners, overseas Chinese and compatriots from Hong Kong, Macao or Taiwan coming to China temporarily may, when leaving, convert unused RMB for taking out of China by presenting their passports and original conversion memos (valid for period of six months). (Art. 25).

Foreign Exchange Settlement relating to Capital Account Items: Following foreign exchange of domestic organizations is not permitted to be settled without approval of foreign exchange control bureaus: (1) Foreign exchange remitted inward as investment in China by overseas legal persons or natural persons; (2) foreign exchange derived from foreign loans and issuance of bonds or shares denominated in foreign currency; (3) other foreign exchange relating to capital account items approved by State Administration of Foreign Exchange Control.

No settlement is permitted in respect of domestic foreign exchange loans of Chinese-funded enterprises which take out international commercial loans other than those in connection with negotiation of export bills. (Art. 27).

Foreign exchange earnings derived from sale of real estate and other assets overseas by domestic organisations must be sold to designated foreign exchange banks except those within amount prescribed in Art. 10 of these Regulations. (Art. 28).

Sale and Payment of Foreign Exchange Relating to Capital Account Item.

Repayment of principal of foreign exchange loans taken out by domestic organisations from Chinese-funded financial institutions in China must be made from their foreign exchange accounts or by conversion and payment effected at designated foreign exchange banks by presenting Foreign Exchange (Transferred) Loan Registration Certificate, loan contract and notices of repayment of loan principal issued by creditor institutions. (Art. 29).

Art. 30 provides regulations for listed payments of foreign exchange relating to capital account items, applicable to domestic organisations.

Where there is increase, assignment or disposal by other means of foreign exchange capital of foreign investment enterprise, payment can be made from enterprise's foreign exchange account by presenting resolution of board of directors following approval by foreign exchange control bureau or conversion and payment will be effected at designated foreign exchange bank by presenting notice of foreign exchange purchase issued by foreign exchange control bureau.

Investment-type foreign investment enterprise which invests foreign exchange capital funds in China or foreign investor in foreign investment enterprise using its profit share of that enterprise to increase its capital or to reinvest in China will be handled based on approval document issued by foreign exchange control bureau. (Art. 31).

Supervision and Administration of Foreign Exchange Settlement, Sales and Payments.

Foreign investment enterprises may settle or sell foreign exchange at designated foreign exchange banks or buy or sell foreign exchange at adjustment centres. Other domestic organisations, individual residents, foreign organisations stationed in China and persons coming to China may settle or sell foreign exchange only at designated foreign exchange banks. (Art. 32).

In order to carry out foreign exchange settlements and sales, designated foreign exchange bank will determine its purchasing price and selling price of foreign exchange for clients according to middle exchange rates for renminbi announced daily by People's Bank of China and within prescribed margin of price difference between purchase and sale. (Art. 35).

Payments for import under barter trade may not be made with purchased foreign exchange or from foreign exchange accounts unless otherwise approved by foreign exchange control bureaus. (Art. 38).

Domestic organisation will select bank which operates foreign exchange business in place where it is registered with which to open foreign exchange account and carry out settlement, purchase and payment of foreign exchange in accordance with these Regulations. To open foreign exchange accounts elsewhere in China or abroad, domestic organisations must apply to foreign exchange control bureaus.

For foreign exchange earnings related to current account items, foreign investment enterprise may, upon approval, select bank which operates foreign exchange business with which to open foreign exchange settlement account. (Art. 40).

These Regulations took effect from July 1, 1996.

Notice of State Administration of Foreign Exchange of Relevant Issues on Normalizing Management of Residents' Personal Foreign Exchange Settlement has been promulgated providing: (1) Individual resident's legal foreign exchange income may be settled at bank pursuant to relevant regulations. Bank should verify authenticity of foreign exchange settlement suggested by residents themselves in strict compliance with regulations; (2) individual resident's one-off settlement of foreign exchange below $10,000 (including $10,000) shall be handled by authentic identity certificate; one-off settlement of foreign exchange amounted above $10,000 to less than $50,000 (including $50,000) shall be handled by bank in accordance with provisions in Art. 10 of Provisional Measures for Management of Domestic Resident's Personal Foreign Exchange after resident's personal authentic identity certificate, legal foreign exchange source certification materials are examined, verified; for one-off settlement of foreign exchange amounted above $50,000, individual resident shall supply above materials, after local foreign exchange administration authorities verify their authenticity, handle settlement at bank with documents verified by local foreign exchange administration authorities.

Foreign Exchange Employed Overseas by Insurance Companies.

Provisional Measures for Management of Overseas Use Insurance Funds in Foreign Currency.

Chinese-invested insurance companies, foreign insurance companies, jointly-invested insurance companies, branches of foreign companies approved by China Insurance Regulatory Commission (CRIC) are governed by these regulations.

Foreign currency insurance funds means total funds in cash, accumulation funds, undistributed profits, reserves, deposited guaranty, calculated in foreign exchange. (Art. 2).

Insurance companies handling insurance funds in foreign currency and employing them overseas shall follow principles of security, liquidity, profitability, cautious investment. (Art. 3).

Insurance companies employing foreign currency insurance funds outside China must comply with laws on foreign exchange management, administrative regulations. (Art. 4).

CRIC, SAFE exercise supervision of overseas use of insurance funds in foreign currency. (Art. 5).

Chapter Two.

Qualifications and Conditions.

Insurance companies use insurance funds in foreign currency outside China must: (1) Possess permit for handling foreign exchange business; (2) have total assets at end of prior year not less than RMB 5 billion; (3) have foreign currency funds at end of last year not less than $15 million; (4) have solvency quota complying with relevant regulations of CRIC. (Art. 6).

Overseas use of foreign currency insurance funds shall not exceed 80% of company's foreign currency funds at end of prior year. (Art. 10).

In event that overseas entrusted party who manages foreign currency insurance funds violates relevant regulations, CRIC or SAFE may require insurance company to change overseas entrusted party. (Art. 36).

15.03 EXPROPRIATION:

Constitution, Art. 10 provides that state may, in public interest, requisition land for its use in accordance with law. Law of Sino-Foreign Equity Joint Ventures says that State shall not nationalize or requisition any equity joint venture; however, under special circumstances, when public interest requires, equity joint ventures may be requisitioned through legal procedures and appropriate compensation shall be made. (Art. 2). Law of Wholly Foreign Owned Enterprises provides that expropriation should take place only under special circumstances and when public interest requires, and appropriate compensation should be made.

15.04 FOREIGN INVESTED INVESTMENT COMPANIES:

See Business Associations, Foreign Invested Companies,.

15.05 FOREIGN INVESTMENT:

See topic 15.07 Foreign Trade.

Foreign-Invested Telecommunications Enterprises.

Provisions on Administration of Foreign-Invested Telecommunications Enterprises.

In compliance with commitments of China for entry into WTO, revised provisions were adopted at 49th regular meeting of State Council on Dec. 5, 2001, and were implemented as of Jan. 1, 2002, amended according to Decision of the State Council on Amending the Provisions on the Administration of Foreign-funded Telecommunications Enterprises on Sept. 10, 2008.

Foreign-invested telecommunications enterprises refer to enterprises that operate telecommunication businesses jointly established in accordance with law by foreign and Chinese investors in China in form of Chinese-foreign equity joint ventures. (Art. 2). Foreign-invested enterprises may engage in basic telecommunications businesses and value-added telecommunications businesses. (Art. 4). Registered capital requirements are as follows: (1) If enterprise is engaged in basic telecom business in whole country or involving more than one province, autonomous region or municipality must have registered capital of not less than RMB 1 billion; if it is engaged in value-added telecom businesses, it must have registered capital of not less than RMB 10 million; (2) if enterprise is engaged in basic telecom business within province, autonomous region or municipality, it must have registered capital of not less than RMB 100 million; if it is engaged in value-added businesses, it must have registered capital of not less than RMB 1 million. (Art. 5). Capital contribution ratio of foreign investor in foreign-invested telecommunications enterprise operating basic telecommunications business (other than wireless paging business) shall ultimately not exceed 49%. Capital contribution ratio of foreign investor in foreign invested telecommunications enterprise operating value-added telecommunications business (including basic telecommunications business of wireless paging) shall not exceed 50%. (Art. 6). Principal foreign investor of foreign-invested telecommunications enterprise operating value-added telecommunications business shall have good record, and operating experience in value-added telecommunications business. (Art. 10). To operate international telecommunications business, foreign-invested telecommunications enterprise must be approved by Supervisory Department for Information Industry under State Council, operate through

International Telecommunications Exit, Access Bureau established with approval of Supervisory Department for Information Industry under State Council. (Art. 17). If foreign-invested telecommunications enterprise violates Telecommunications Regulations or other relevant laws, administrative regulations in operations of telecommunications businesses, it shall be punished by relevant authorities according to law. (Art. 21). These provisions shall apply by reference to companies, enterprises of Hong Kong Special Administrative Region, Macao Special Administrative Region, Taiwan Area investing in telecommunications businesses in mainland China. (Art. 22).

15.06 FOREIGN INVESTMENT IN COMMERCIAL ENTERPRISE:

Measures for Management of Foreign Investment in Commercial Areas, was promulgated by Ministry of Commerce on Apr. 6, 2004 and effective June 1, 2004. On Jan. 9, 2006; Supplementary Provisions on the Measures for the Administration of Foreign Investment in the Commercial Sector (II), which have been adopted by Ministry of Commerce on Aug. 21, 2006, are promulgated, and came into force as of Dec. 1, 2006. The Supplementary Provisions to the Measures for the Administration of Foreign Investment in the Commercial Sector (III), which have been adopted by Ministry of Commerce, are promulgated, and came into force as of date of Nov. 5, 2007; Supplementary Provisions to the Measures for the Administration of Foreign Investment in the Commercial Sector (?), are promulgated, and came into effect as of Feb. 5, 2009. Supplementary Provisions on Administration of Foreign Investment in Commercial Enterprises were promulgated with aim of promoting Mainland/Hong Kong and Mainland/Macao closer economic partnership, and encouraging Hong Kong and Macao service providers to establish commercial enterprises on Mainland. Said provisions became effective as of same date. Law regulates: compliance measures, range of permitted activities, minimum registered capital, documents for submission to authorities, and in some instances, limitation on amount of foreign investment.

15.07 FOREIGN TRADE:

See topics Customs (Duty), Trade Zones, World Trade Organization; categories 2 Business Organizations, topics Corporations, Joint Stock Companies; Business Regulation and Commerce, topics Advertising, Contracts; Dispute Resolution, topic Arbitration and Award; Intellectual Property, topic Copyright; Taxation, topic Taxes.

Foreign Trade Law was promulgated and adopted by National People's Congress on May 12, 1994, and became effective on July 1, 1994; revised on Apr. 6, 2004 with effect on July 1, 2004.

Significance.

As viewed from domestic perspective, for more than 40 years in China, foreign trade has been chiefly administered by direct administrative measures. This method was necessary for planned economy and was effective as China's foreign trade was then limited. However, after several decades of reform and opening up to other countries, enormous change has taken place in foreign trade.

General Principles.

Foreign Trade Law is enacted for purpose of broadening opening to outside world, developing foreign trade, maintaining order of foreign trade, protecting lawful rights and interests of foreign trade business operators, and promoting healthy development of socialist market economy. (Art. 1).

“Foreign trade” in this Law means import and export of goods and technologies, and trade in international services. (Art. 2).

State Council's competent Department of Foreign Economic Cooperation and Trade is in charge of whole country's foreign trade business. (Art. 3).

China will promote and develop foreign trade relationships with other countries and regions under principle of equality and reciprocity. (Art. 5).

Foreign Trade Operator.

“Foreign trade operator” refers to legal persons or entities or natural persons engaging in foreign trade according to law. (Art. 8).

Foreign trade operator must be registered (no longer required to obtain permit, merely registration) with department in charge of foreign trade under State Council. (Art. 9).

Establishment and business operation of international trade enterprises and organizations engaged in international service trade shall obey this law and other relevant laws and shall administer other administrative regulations. (Art. 10).

State may employ administration of State-run trade to import and export of some goods that can be managed by authorized enterprises only. (Art. 11). Foreign business operator may accept entrustment of other people and handle foreign trade businesses on their behalf within its scope of business. (Art. 12).

Foreign trade operator shall submit related files and materials in foreign trade business operation to concerned department. Concerned department shall keep business operations secret. (Art. 13).

Import and Export of Goods and Technologies.

China allows free import and export of goods and technologies, unless otherwise provided by Law. (Art. 14).

China may restrict import or export of goods or technologies if: (1) Necessary to maintain state security, social public good or public morality; (2) necessary to protect human health or security, protect life or health of any animal or plant, or protect environment; (3) necessary to implement measures relating to import or export of gold or silver; (4) necessary to restrict export to conserve exhaustible natural resources that are in short supply or subject to effective protection; (5) necessary to restrict export due to limited market capacity of destination country or region; (6) necessary to restrict export due to serious disorder of export business management; (7) necessary to restrict import for purpose of establishing or accelerating establishment of particular domestic industry; (8) necessary to restrict import of any form of product in agriculture, animal husbandry, or fishing industry; (9) necessary to restrict import for purpose of safeguarding international financial status of state or of international balance of payments; (10) necessary to restrict or forbid import or export under any other circumstance as provided for in any other law or administrative regulation; (11) necessary to restrict or forbid import or export under any other circumstance as provided for in any international treaty or agreement that China is party. (Art. 16).

Goods whose import or export is restricted are subject to quota or license control. Technologies whose import or export is restricted are subject to license control. (Art. 19). Goods and technologies subject to quota or license control can be imported or exported only when approval is obtained from department in charge of foreign economic cooperation and trade or together with other concerned departments under State Council. (Art. 19). Import and export quotas must be allocated by department in charge of foreign economic cooperation and trade or together with other concerned departments under State Council within their authority on basis of principles of efficiency, justice, and open and fair competition. (Art. 20).

Cultural relics, wild animals, plants and their products, whose import or export are restricted or banned pursuant to other laws and regulations, must be restricted or banned accordingly. (Art. 23).

International Services Trade.

China grants market access or national treatment to other parties with whom China has jointly acceded or entered into international treaties and agreements. (Art. 24).

China may restrict or prohibit international services trade due to following reasons: (1) Safeguarding national security or public interest; (2) protecting of ecological environment; (3) safeguarding smooth or accelerated development of particular services trade domestically; (4) ensuring national balance of international payments; or (5) other grounds as provided for by Chinese law; and (6) other grounds as provided for by international treaty or agreement in which China is party. (Art. 26).

State Council's competent Department of Foreign Trade and concerned departments of State Council can manage international services trade pursuant to this Law and other applicable laws and relevant regulations. (Art. 28).

Foreign-Trade-related Intellectual Property Protection.

State protects intellectual property relating to foreign trade in accordance with relevant laws and administrative regulations. (Art. 29). Where any import goods violates any intellectual property right and endangers foreign trade order, foreign trade department of State Council may prohibit import for certain period of time. (Art. 29).

Foreign Trade Order.

No one may implement any act of monopolization against relevant anti-monopolization laws or administrative regulations. (Art. 32).

Foreign Trade Investigation.

In order to maintain foreign trade order, foreign trade department of State Council may investigate: (1) Impact of import or export of goods or technology or international service trade on domestic industries and competitiveness thereof; (2) trade barriers of relevant countries or regions; (3) matters that must be investigated for purpose of determining whether it is necessary to take such foreign trade relief measures as anti-dumping, countervailing, or safeguard measures; (4) evasion of trade relief measures; (5) matters of foreign trade that concern security or interest of state; (6) matters that must be investigated for purpose of protecting IP rights, market order, and national treatment of Chinese exports; (7) any other matter that needs to be investigated into as result of affecting foreign trade order. (Art. 37).

Foreign Trade Relief.

State may take appropriate trade relief measures according to result of foreign trade investigations. (Art. 40).

Foreign Trade Promotion.

China will set up and improve special financial institutions to serve foreign trade, and establish foreign trade development fund and risk fund. (Art. 52).

China will employ various promotional measures to develop foreign trade including issuance of import/export credits and setting up of export refunds. (Art. 53). Foreign trade operators may establish or participate in any import/export chamber of commerce lawfully established. (Art. 56).

Organization for Promotion of International Trade will develop foreign trade relations, hold exhibitions, provide information and consulting services, and engage in other foreign trade promotional activities according to articles of association. (Art. 57).

China supports and promotes small and medium-sized enterprises (Art. 58) and national autonomous regions and economically underdeveloped areas in order to develop foreign trade (Art. 59).

Others.

Separate customs territory in People's Republic of China is not controlled by this Law. (Art. 69).

Quota Elimination.

WTO rules bar quotas and other quantitative restrictions. China agreed to eliminate these restrictions with phase-ins limited to five years. China eliminated existing quotas upon accession for top USA priorities (e.g., fibre optic cable). It phased out remaining quotas between 2003 and 2006. Quotas grew from former trade level at 15% annual rate in order to ensure that market access increased progressively and reduced effect of quantitative restrictions. Auto quotas are to be phased out in 2006. In interim, base level quota will be USA$6 billion (level prior to China's industrial auto policy) and this will grow by 15% annually until elimination. Trading rights and distribution were major priority of manufacturing sector. Distribution rights were provided even for China's most restricted distribution sectors such as wholesale, transportation, maintenance and repair. On trading rights, USA-China agreement ensured that both foreign-owned importers located in China and foreign companies exporting into China would be permitted trading rights.

Textile Agreements.

In 2005 U.S. and China reached agreement on multiyear trade deal that would limit surging imports of Chinese textiles. Under deal, China would be permitted only 3.8% more exports by end of 2008 than if current temporary limits had remained in place. Agreement covered products already limited and 20 additional categories, such as towels and wool suits. Agreement ended global quota system for textile trade which limited amount of textile products countries could sell to USA and EU, forcing retailers to spread their purchases around world. Agreement began on Jan. 1 and will last through 2008 allowing imports of most major textile and apparel products from China to increase by 8 to 10%.

Investment guarantees was subject matter of Agreement between U.S. and China effected by Exchange of Notes signed in Beijing on Oct. 30, 1980, and related Letter and Statement signed in Beijing on Oct. 7, 1980. Agreement relates to investment insurance, including reinsurance, and investment guarantees administered by Overseas Private Investment Corporation (OPIC). Coverage for loss from political risks on any investment guarantee provided by OPIC for projects in China is subject matter of Agreement. (Art. 1). Agreement provides that insofar as OPIC makes payment to any American investor, Chinese government shall recognize said payment, and succession of OPIC to rights, title, claim and cause of action of said investor. (Art. 3[a]). While OPIC cannot assert right greater than investor, U.S. reserves right to assert claim in its sovereign capacity under international law. (Art. 3[b]). Government of China also agreed to make appropriate arrangements for another entity to succeed to rights of American investor if OPIC cannot pursuant to law acquire any interest in property in China. (Art. 4). Disputes under Agreement, not resolvable by negotiation shall be resolved by arbitration, where each government selects arbitrator and two arbitrators select third-country president of said tribunal. (Art. 6). Constitution permits foreign investment and economic cooperation by foreign persons pursuant to Chinese law, and protects these lawful foreign rights and interests. (Const. Art. 18).

In July, 1980 legislation authorizing OPIC operations in China was passed. On Aug. 8, 1980 President Carter determined that it was in national interest for OPIC to do business with China. Agreement of Oct. 30, 1980 provides final link in preliminary procedures necessary for OPIC to commence activity regarding China projects; thus, OPIC has now started its China activity. OPIC insurance, loan guarantees, direct loans, pre-investment assistance, construction insurance and insurance for contractors' guarantees are all theoretically available for China projects. In addition, Ex-Im Bank has full authority to institute its programs in China, but will only finally approve project after it has been approved by Bank of China. Treaty on investment protection still under discussion between U.S. and China although China has signed treaties on promotion and protection of investment with Sweden, Belgium, West Germany, Luxemburg and Romania.

Atomic Energy.

On Jan. 1, 1984 China became member of International Atomic Energy Agency (IAEA) after admission by resolution adopted at 27th Conference of IAEA on Oct. 11, 1983 and depositing of acceptance of organization's statute with depository state, U.S. government. China's Agreement with U.S. on nuclear energy is entitled: “Agreement for Cooperation between the Government of the United States of America and the Government of the People's Republic of China concerning peaceful uses of Nuclear Energy” signed in Washington July 23, 1985 during Pres. Li Xiannian's visit to U.S. See http://www.fas.org/nuke/control/npt/text/npt2.htm.

Statement of Intent (SOI), signed on Jan. 12, 2004 in Beijing, between U.S. Department of Energy (DOE) and CAEA (China Atomic Energy Authority), establishes process for cooperation with each other and collaborating with International Atomic Energy Agency (IAEA) on range of nuclear nonproliferation and security activities. Activities include efforts to strengthen export controls, international nuclear safeguards, physical protection of nuclear materials and facilities, nuclear emergency management, and radioactive source security by setting up information exchanges and training programs.

On June 29, 1998 China signed Agreement on Co-operation Concerning Peaceful Uses of Nuclear Technologies between Department of Energy of United States and State Development Planning Commission of People's Republic of China. This agreement remained in force for five years and was automatically renewed for further five-year periods. Agreement covers following areas: (1) Current and advanced light-water nuclear power reactor technologies; (2) prevention and treatment of radiation occupational disease, and application of radiation technology and radioactive isotopes to medicine; (3) radiation protection; (4) environmental remediation, radioactive and chemical waste management, and spent fuel management; (5) export control of nuclear and nuclear related materials, equipment and technologies; (6) nuclear materials protection, control and accounting; physical security of nuclear materials, equipment and technologies; and technological development of enhancement of international nuclear safeguards; and 82 other areas which may be determined by Parties. Co-operation under this agreement can be attained through information exchange, organisation of, and participation in, seminars, workshops, and other meetings, exchange of specialists, transfer of nuclear materials or equipment, short-term visits of facilities by specialist teams or individuals, use of other Party's facilities, and joint projects. Joint Co-ordinating Committee was established to supervise and co-ordinate implementation of this agreement. Agreement provides that, pending entry into force of related international convention on compensation for nuclear damage, Party in whose territory nuclear incident occurs must be solely responsible for and deal with compensation for legal liability for nuclear damage to third parties.

Assessment of Foreign-Invested Property.

Regulations Governing Assessment of Foreign-Invested Property was issued by State Administration of Import and Export Commodity Inspection and Ministry of Finance on Mar. 18, 1994, effective as of May 1, 1995, governing assessment of properties invested in or bought in China by foreign (including Hong Kong, Macao and Taiwan) companies, enterprises, economic entities, individuals (foreign businesses); foreign-invested enterprises in China; and foreign investors involved in compensatory trade or trustees of foreign-funded firms. (Art. 2). State Administration of Import and Export Commodity Inspection (SAIECI) is responsible for assessment of foreign-invested properties in China. Local branch of SAIECI is responsible for assessment of foreign-invested properties in locality. (Art. 3). Ministry of Finance is in charge of capital verification of foreign-invested properties in China and their related financial affairs. (Art. 4). Assessment of foreign-invested properties includes appraisal of variety, quality, quantity, value, and losses of properties invested in by foreign businesses. Assessment of variety, quality, and quantity involves check-ups on name, model, quality, quantity, specifications, trademark, condition, date of production, country of production and producer of such properties. (Art. 6). Local administrative organs of Import and Export Commodity Inspection issue property assessment certificates to investors after conclusion of property assessment. Certificates are effective documents certifying value of property invested by parties concerned. (Art. 7).

Assessment of foreign-invested properties should adhere to principle of being authentic, fair, scientific and feasible. Assessment process should be in line with methods and standards stipulated by State, with proper regard to international conventions. (Art. 5). Assessment should be conducted in light of realistic conditions of such properties, time already used, functions, technical indicators, cost of replacement and profit earning capacity. (Art. 10). Assessment of foreign-invested properties should proceed in following order: (1) Applicant files application for property assessment; (2) assessment agency conducts preliminary examination of relevant materials and accepts application; (3) appraiser compiles assessment program; (4) assessment agency examines papers and information provided by applicant and conducts related investigation of both home and overseas market; (5) assessment agency makes on-the-spot survey; (6) assessment agency chooses correct approach to conclude final assessment; and (7) assessment agency issues property assessment certificate to applicant. (Art. 15). When applicant files application for assessment of foreign-invested property, it should fill out application form, stating purpose, objects and requirements of such assessment, as well as submitting related property list, customs declarations, contracts, invoices, insurance policy, maintenance cost report, technical documents of related equipment and other relevant information. (Art. 16).

BOT Project.

In Aug. 1995, Notice Concerning Relevant Issues on the Management of the Examination and Approval of the Trial Set-up of Foreign Invested Concession Projects was adopted by State Planning Commission, Ministry of Electricity and Ministry of Transportation.

Notice declares that infrastructure facilities with foreign investment may be set up in BOT (Build-Operate-Transfer) structure. Concession Projects shall be: (1) Thermal power plant whose total generation will be more than 2 × 300,000 KW; (2) hydroelectric power plant whose total generation will be more than 250,000 KW; (3) high-grade highway 30 km-80 km in length; (4) independent bridge or tunnel 1,000m in length; (5) urban water supply projects. (Art. 4). Feasibility requirements and other documents submitted to State Planning Commission. (Art. 5). Arts. 6-7 govern tenders and winning bidder.

The Interim Regulations of Concession Projects with Foreign Investment are being made by State Planning Commission. China has taken new initiatives to build, operate, and transfer (BOT) infrastructure projects. This is especially so after new policies were introduced in late 1996 when first State-approved BOT project, USA $650,000,000 2 × 350 MW coal-fired Laibin B Power Plant (Laibin B), was awarded. These include competitive tendering process and 100% foreign ownership of operating company. International survey on risk management of BOT projects in China was conducted to seek views of practitioners. Objectives of survey were: (1) To identify unique or critical risks associated with China's BOT projects; (2) to evaluate effectiveness of measures for mitigating these risks; (3) to examine key contract clauses used in Laibin B's concession agreement; and (4) to provide risk management framework for investing in future BOT projects in China.

Military Embargo.

After June 4, 1989, Presidential Directive was issued embargoing sales of all military equipment to China and effectively terminating military cooperation between two countries, since then there has been some relaxation of this provision.

Antidumping and Antisubsidy Regulations promulgated by State Council on Nov. 26, 2001 and amended according to Decision of the State Council about Amending the Antidumping Regulation of People's Republic of China on Mar. 31, 2004. Effective date June 1, 2004 to protect civil industries from foreign trade and competition. (Art. 1). This law applies to imported products that have been improperly dumped or subsidized in China market, threatening existence of civil industries. (Art. 2).

Notice Concerning Administration of Tax Refund (Exemption) on Export Commodities in Accordance with Classification of Enterprises (hereinafter referred to as "Notice No. 95") promulgated by State Administration of Taxation (SAT) on June 8, 1998 and became effective on July 1, 1998.

Notice No. 95 provides new measures to speed up export tax refund processes. Such measures include simplifying application documentation for export tax refunds and administering export tax refunds/exemptions according to new classification system for enterprises. Under Notice No. 95, export enterprises will be classified as A, B, C and D classes, according to nature of their production, annual foreign exchange earnings, their history of tax fraud, their available capital and adequacy of their accounting procedures.

Enterprise may fall into Class A if it: (1) Is production enterprise with permission to operate import and export business, and manufactures ships or complete sets of large mechanical and electrical equipment; (2) has annual foreign exchange earnings exceeding US$30 million; (3) has never been involved in tax fraud, has sufficient capital available for use as security for repayment in case tax fraud is later discovered or tax has been refunded by mistake; and (4) has sound accounting procedures. (Art. 1.1).

Class A enterprises will enjoy advance tax refund/exemption treatment. That is, their taxes will be refunded or exempted before all required documents for export tax refunds/exemptions are collected and presented to tax authorities. Specifically, tax refunds or exemptions may be carried out through following procedures: (1) Submission by Class A enterprise to relevant taxation authority of Export Contract and Detailed Accounting Chart on Sale or Purchase; (2) filing quarterly Production Enterprise Declaration Form for Tax Exemption, Deduction or Refund for Self-managed (Entrusted) Export Commodities or Production Enterprise Declaration Form for Tax Refund (Exemption) for Export Commodities; (3) examination and verification of document accuracy by responsible taxation authority and approval for refund and exemption; and (4) final account for refunds/exemptions will be cleared after all relevant documents on export tax refunds/exemptions have been submitted by enterprises. (Art. 2).

Enterprise, which earns foreign exchange over US$30 million annually in previous two consecutive years, processes sufficient capital available for use as security for repayment in case of tax fraud or for tax refund by mistake, and has sound accounting procedures, will be classified as Class B enterprise. (Art. 1.2).

Simplified documentation requirements will be applied to Class B enterprises in tax refund/exemption process. Procedures for tax refunds and exemptions may be summarized as follows: (1) After their commodities have been exported, Class B enterprises may apply for export tax refunds/exemptions by submitting Customs Declaration Form for Export Commodities and the

Receipt of Payment for VAT Levy; (2) other supplementary documents (such as Form for Verification and Clearance of Export Exchange Earnings, Invoices for VAT, and Export Invoices, etc.) need not be submitted on monthly basis, but are required to be kept for examination; and (3) if responsible taxation authority for export tax refunds is satisfied with accuracy of documents, approval decision will be made for tax refunds/exemptions. (Art. 3).

Enterprise classified as Class A or B, however, will lose its favored treatment, be reclassified as Class D enterprise and be punished if it is found to have been involved in tax fraud. (Art. 8).

Export enterprises that have not been involved in tax deception in past three years and have sound accounting system will be classified as Class C enterprises. (Art. 1.3). Class C enterprises must submit all required documents before their claims for export tax refunds/exemptions may be processed.

Export enterprises with history of tax deception in past three years will be classified as Class D enterprises. (Art. 1.4). Strict examination and approval procedures will be applied to claims for export tax refunds/exemptions by Class D enterprises. Once export enterprise is classified as Class D, it cannot be reclassified as Class A, B or C enterprise in following three years. (Art. 9). Any taxation authority that deliberately and falsely classifies Class D enterprise into another class will be penalized by SAT. (Art. 10).

Clearly, Notice No. 95 along with increase of export tax refund rate indicates that Chinese government is attempting to encourage Chinese exporters to be more competitive in market already buffeted by falling currency rates.

Notice to Regulate Export Trade and Tax Refund Procedures so as to Prevent and Crack Down on Export Tax Refund Fraud (hereinafter referred to as “Notice 84”) jointly promulgated by SAT and MOFTEC on 9 June 1998 and became retroactively effective as of June 1, 1998.

Notice No. 84 was issued with objective to prevent and crack down on tax fraud. It also strictly prohibits any export enterprise from engaging in so-called “voucher selling” business, that is, export enterprises with foreign trade operation rights which abuse their positions as agents for foreign trade. In this practice, such enterprises, in name of acting as trade agents, sell their Customs Declaration Forms to their “clients” or “brokers” then use these forms to claim export refunds or exemptions without any trade actually being conducted. Notice No. 84 also harshly punishes illegal and criminal activities in export tax refunds. Under Notice, once export enterprise is found to have engaged in “voucher selling”, entitlement of enterprise to tax refunds will be suspended for at least half a year, or, in serious cases, will be revoked by MOFTEC or other authorities. Those responsible for fraud will be convicted in court of law and punished severely.

Therefore, Notice No. 84 assumes role of ensuring that important revenue resources are not lost or misallocated.

Notice Regarding Adjustment in Export Reform Rate for Certain Commodities (hereinafter referred to as “Notice No. 90”) jointly issued by Ministry of Finance and State of Administration of Taxation on June 19, 2007 and became effective on July 1, 2007.

China's ballooning foreign trade surplus has caused Chinese government on June 19, 2007 to announce major downward adjustments to export VAT refund rates. Changes came into force on July 1, 2007. This major adjustment reflects Beijing's continuing use of VAT export refund measures as important tool in implementing governmental policies.

VAT export tax refund has been completely repealed for 553 “high energy consuming, high polluting, and scarce resource-consuming” products. This means that there will be no refund of VAT paid on inputs. For these commodities, output VAT will be required despite they are being exports.

Further, Notice No. 90 reduces VAT export refund rate from 2268 commodities likely to trigger trade disputes including but not limited to clothing, shoes and hats, toys, plastics, some electronic machinery, certain chemical products, etc. These products will have their VAT export refund rates slashed by percentages ranging from 2% to 8%.

VAT export tax refund has been completely repealed for ten items, but their export sale will still be VAT exempt. These items include but not limited to oil paintings, peanut kernels, engraved plagues, etc.

15.08 FOREIGN TRADE REGULATIONS:

See topic 15.07 Foreign Trade.

15.09 INTELLECTUAL PROPERTY CUSTOMS PROTECTION:

Regulations Governing Customs Protection of Intellectual Property Rights, adopted at 30th executive meeting of State Council on Nov. 26, 2003 and came into force on Mar. 1, 2004. Former regulations were repealed simultaneously. (Art. 33).

15.10 INVESTMENT INCENTIVES:

See topic 15.11 Trade Zones; categories 2 Business Organizations, topic Joint Stock Companies; Taxation, topic Taxes.

Regulations for Encouragement of Investment were promulgated by State Council on Oct. 11, 1986.

These regulations covered corporations whose products are primarily for export, which have net foreign exchange surplus, or which have advanced technology supplied by foreign investor to develop new products or upgrade existing products to either increase foreign exchange or act as import substitutes. (Art. 2). Companies meeting these standards are termed Export Enterprises or Technically Advanced Enterprises. Regulations provide exemption of said enterprises from certain subsidies payable to staff (Art. 3), special land use fees outside busy urban centers, e.g. 5-20 RMB per square meter per year where development and end use fee are computed together, and not more than 3 RMB per square meter per year where development fee is chargeable on one time basis. (Art. 4). Exemption from said fees may also be granted. (Art. 4).

Said enterprises are also given priority in obtaining utilities and communication and transportation facilities and fees are to be same as local enterprises (Art. 5), as well as priority for short term loans for working capital, bank loans and credit (Art. 6). Remittance of profits abroad are exempt from income tax (Art. 7), and after period for reduction or exemption of enterprise income tax Export Enterprise exporting 70% or more of products in one year may pay enterprise income tax at one half rate specified. Where said tax in SEZ is 15%, it shall be reduced to 10%. (Art. 8). Similarly after period for reduction or exemption of enterprises income tax Technically Advanced Enterprises may extend for three years payment of enterprise income tax at half specified rate. (Art. 9).

Export products of enterprises, except for crude oil or oil products, are exempt from Consolidated Industrial and Commercial Tax. (Art. 11). Equipment, raw materials, vehicles etc. used in production by these enterprises are exempt from requirement for import licenses. (Art. 13).

Ministry of Finance on Jan. 31, 1987 promulgated Method of Carrying Out Provision for

Preferential Tax Treatment ("Method"), pursuant to State Council Regulations for Encouragement of Investment.

Method does not apply to joint oil exploration agreements and major natural resource enterprises. (Art. 6). Method permits corporations with foreign investment to enjoy tax benefits of either export company or advanced technology enterprise but not both at once. (Art. 5). Though after enjoying three year tax benefits as being advanced technology enterprise, corporation can then apply for export corporation tax benefits. For period of at least five years after which foreign enterprise may take its profit and proceeds of profit. (Art. 4).

15.11 TRADE ZONES:

Also see categories 2 Business Organizations, topic Corporations; Business Regulations and Commerce; Taxation.

Special geographical areas marked for economic reform and opening have been important in China, although abolishment of tax benefits has been debated since 1995. These zones fall into following main categories: Special Economic Zones (SEZs), Coastal Open Cities, Economic and Technological Development Zones (ETDZs), Special Development Zones, Coastal Economic Open Areas, Border Open Areas, Border Open Cities, Border Economic Cooperation Zones, Inland Open Cities, High-Technology and New-Technology Development Zones (HTNTDZs), Taiwan Investment Zones, Bonded Zones, Rural Reform Experiment Areas, Central and Western Development Regions, and Special Administrative Regions (SARs). Accession to WTO may diminish or alter importance of trade zones. Certain are mentioned.

Special Economic Zones (SEZs).

SEZs are key enclaves for foreign investment with most liberal policies for tax incentives, foreign ownership and management autonomy. Currently SEZs include: Shenzhen, Zhuhai and Shantao in Guangdong Province; Xiamen in Fujian Province; Hainan Province; and Tianjin Harbour Free Trade Zone. SEZs function as Free Trade Zones and Export Processing Zones, designed to develop foreign oriented trade economy, combining industries with trade and distribution functions of "windows" and "bases" to facilitate China's plans to open its markets to outside investment.

Coastal Open Cities.

Fourteen cities (including four SEZs) have been declared open to foreign trade with flexible economic policies: Dalian, Qinghuangdao, Tianjin, Yantai, Zingdao, Lianyuangang, Nantong, Shanghai, Ningbo, Wenzhou, Fuzhou, Guangzhou, Zhanjiang, and Beihai.

Economic and Technological Development Zones (ETDZs).

In 2005 there were 54 designated ETDZs in China: Beijing, Changchun, Changsha, Chengdu, Chongqing, Dalian, Dongshan, Fuqing Rongqiao, Fuzhou, Guangzhou, Guangzhou Nansha, Guiyang, Hainan Yangpu, Hangzhou, Harbin, Hefei, Hohhot, Huizhou Dayawan, Kunming, Kunshan, Lanzhou, Lhasa, Lianyungang, Nanchang, Nanjing, Nanning, Nantong, Ningbo, Ningbo Daxie, Qingdao, Qinghuangdao, Shanghai Caohejing, Shanghai Hongqiao, Shanghai Jinqiao, Shanghai Minhang, Shenyang, Shihezi, Suzhou Industrial Park, Taiyuan, Tianjin, Urumqi, Weihai, Wenzhou, Wuhan, Xi'an, Xiamen Haicang, Xiaoshan, Xining, Yantai, Yinchun, Yingkou, Zhanjiang, and Zhengzhou.

ETDZs differ from SEZs in four respects: (1) SEZs are relatively independent administrative divisions, whereas ETDZs are Open Zones directly administered by municipality where ETDZ is located; (2) SEZs facilitate comprehensive outside-oriented economy with industry as main force, and combine industry with trade, while ETDZ is geared towards industrial production and scientific research and depends on tertiary industries in city where it is located; (3)

foreign investment enterprises may enjoy 15% preferential income tax rate in SEZs regardless of production or nonproduction function; however, only foreign investment enterprises with scientific and technological emphasis may enjoy preferential tax treatment in ETDZ; and (4) most consumption goods for livelihood and means of production imported into SEZs have reduced duty or are duty exempt, while only restaurant materials related to tourism industry have reduced duty or duty exemption in ETDZs. Preferential policies and regulations in ETDZs include reduced tax rates, such as two-year Enterprise Income Tax reduction for certain enterprises scheduled to operate for period of ten years or more. Reduced tax rates of 10% are available for additional years for certain high-tech industries. Preferential loans and credit programs for infrastructure projects are also available. In addition, provincial People's Congresses for provinces where there is one or more ETDZ have all passed “Administrative Regulations on Economic and Technological Development Zones”, which serve as legal basis for operation of EDTZs. Most EDTZs have simplified examination and approval procedures for investment projects.

High-Technology Development Zones (HTDZs).

As of 2005, there were 54 national HTDZs largely located around university areas.

Set of national regulations regarding HTDZs drafted by central departments promulgated early 1991. Requirements and Methods Regarding Confirmation of High Technology and New Technology Enterprises in State HTDZs (hereinafter “Requirements”) and Interim Provisions Regarding Several Policies of State HTDZs (hereinafter “Interim Provisions”) promulgated by State Science Commission on Mar. 6, 1991. Provisions Regarding Tax Policies In State Approved HTDZs (hereinafter “Provisions”) promulgated by State Tax Bureau Mar. 6, 1991. Enterprises engaged in areas of High Technology and New Technology (HTNT), scheduled to operate no less than ten years should meet requirements to enjoy relevant preferences for high technology and new technology enterprises (HTNTE). Main requirements include: scientific and technical personnel having received college education comprise 30% of total staff in said enterprises and scientific and technical personnel engaged in research and development of HTNT products comprise 10% of total staff. (Requirements, Art. 5). Funds for HTNT and research and development shall comprise 3% of total income of said enterprise. (Requirements, Art. 5). Incomes derived from HTNT products and technological services should comprise 50% of total income of said enterprise. (Requirements, Art. 5). Preferences afforded to HTDZs substantially same as ETDZs.

HTDZs differ from SEZs and ETDZs in four respects: SEZs and most ETDZs located in coastal or border areas whereas HTDZs located in cities where State Council deems necessary requirements satisfied; any enterprise located in SEZs may enjoy corresponding preferences, whereas only high technology and new technology enterprise confirmed by competent authority may enjoy preferences in HTDZs. HTDZs administrative system differs from SEZs, but is similar to ETDZs; secondary and tertiary industries main elements in SEZs and ETDZs, while high technology and new technology industries main forces in HTDZs.

Technology Import and Export Contracts.

Revised Regulations on Administration of Technology Import and Export were adopted by State Council and came into force on Jan. 1, 2002. Technology transfer includes transfer of patent rights, right to apply for patents, licensing implementation of patent, technology know-how, technological services. (Art. 2). Authorized departments of foreign trade-economy under State Council in charge of administration of national technology imports and exports. (Art. 6). State encourages importing advanced, applicable technology (Art. 7), exporting well-developed industrialized technology (Art. 30).

15.12 WORLD TRADE ORGANIZATION:

Chinese government filed formal application to resume status of contracting party in GATT on July 10, 1986. U.S. and China subscribed to bilateral WTO agreement on Nov. 15,

1999. China concluded bilateral WTO agreements respectively with EU on May 15, 2000 and 35 WTO members eventually; China became member of WTO on Sept. 17, 2001.

Legal instruments of accession include: Accession of People's Republic of China, Protocol on Accession of China (Prot.) and it Annexes (Att.), and Report of Working Party on Accession of China (Rep.).

General Principles.

China will repeal and cease to apply all existing laws, regulations and/or measures whose effect is inconsistent with WTO rules. (Rep. Arts. 22, 23). Foreign individuals, enterprises, foreign-funded enterprises shall be accorded treatment no less favorable than accorded to domestic individuals, enterprises. (Prot. Part I 3). All foreign individuals, enterprises, including those not investing in or registered in China, shall be accorded treatment no less favorable than that accorded to enterprises in China with respect to rights to trade. (Prot. Part I 5.2). Foreign individuals, enterprises, foreign-funded enterprises shall be accorded treatment no less favorable than accorded to domestic individuals, enterprises in respect of distribution of import, export licenses, quotas. (Prot. Part I 8.2). China shall allow prices for traded goods, services in every sector to be determined by market forces, multi-tier pricing practices for such goods, services shall be eliminated. (Prot. Part I 9.1). Price controls will not be used for purposes of affording protection to domestic industries or services providers. (Rep. Art. 62). China shall eliminate all subsidy programs falling within scope of Art. 3 of SCM Agreement upon accession. (Prot. Part I 10.3). China shall not maintain or introduce any export subsidies on agricultural products. (Prot. Part I 12.1).

Agriculture.

Significant cuts in tariffs will be completed by Jan. 2004, overall average for agricultural products will be 17.5%. (Att. §I).

Elimination of Quotas and Licenses.

WTO rules bar quotas and/or quantitative restrictions. China has agreed to eliminate these restrictions with phase-ins limited to five years. (Att. §I-B).

Industrial Products.

Tariffs to be cut average of 8.9% overall. (Att. Annex II).

Services.

Telecommunication Services.

Foreign service suppliers will be permitted to establish joint venture enterprises, without quantitative restrictions, provide services in, between specific cities. (Att. Annex 9).

Insurance.

Foreign nonlife insurers will be permitted to establish presence in China as branch or as joint venture with 51% foreign ownership. Within two years after China's accession, foreign nonlife insurers will be permitted to establish wholly-owned subsidiary; i.e., with no form of establishment restrictions. Upon accession, foreign life insurers will be permitted 50% foreign ownership in joint ventures with partner of their choice. (Att. Annex 9).

Banking.

For foreign currency business, there will be no geographic restriction upon accession. For local currency business, geographic restriction will be limited to specific cities. Within five years after accession, all geographic restrictions will be removed. (Att. Annex 9).

16 HEALTH

16.01 HEALTH REGULATIONS:

Standing Committee of National People's Congress adopted Food Hygiene Law on Oct. 30, 1995. Law applies to all food products, food additive, food containers and packaging materials, tools, equipment, detergent and disinfectant for food as well as premise, infrastructure and environment for manufacturing or selling food. (Art. 4). Food products should be, according to this law, nontoxic, harmless, up to relevant sanitation standard provided by laws and regulations. (Art. 6). State Council, through administrative department, approves and promulgates national hygiene standards, hygiene control regulations, and inspection procedures for food. (Art. 14). Foods declaring special hygiene function must be approved and recognized by government. (Art. 22). Manufacturers, dealers and vendors of food must apply to government for Sanitation Permit prior to its business registration. (Art. 27). Import and export of food should be subject to inspection of governmental food hygiene and epidemic inspection authorities, after which customs office releases goods. (Arts. 30 & 31).

17 IMMIGRATION

17.01 ALIENS:

Regulations Governing Entry, Exit, Transit, Residence and Travel of Aliens originally promulgated by State Council in China on Apr. 13, 1964. Law on Control of Entry and Exit of Aliens was adopted by Standing Committee of Sixth National People's Congress on Nov. 22, 1985, effective Feb. 1, 1986. Aliens, pursuant to these latter regulations, must have prior permission of competent Chinese authorities in order to enter, transit or reside in China. (Art. 2). Ministry of Public Security, Ministry of Foreign Affairs and their authorized local organs are Chinese Government's agencies in China to handle aliens' applications for entry, transit, residence and travel. (Art. 25).

Diplomatic counselors and other officials of foreign diplomatic and consular missions who apply for entry, transit or exit from China are processed by Ministry of Foreign Affairs or local bureaus of foreign affairs.

Visas are generally required by aliens to enter, exit and transit in China except when they are covered by agreements between states for mutual exemption from visas. (Art. 6). Visas are not required for aliens in immediate transit on connected international flights if aliens hold passenger tickets and stay for no more than 24 hours in China entirely within airport boundaries. (Art. 6). Residency in China requires application and residence registration, normally with local public security organs. (Art. 13). Aliens, who are defendants in criminal cases, or criminal suspects confirmed by public security organ, procurator or court, or who through court notification are involved in unresolved civil cases can be denied exit from China. (Art. 23).

Regulations Governing Aliens Traveling in China promulgated on Oct. 9, 1982 by Ministry of Public Security.

General Ministry of Staff of Foreign Affairs and State Travel Bureau classifies areas into four groups. First group includes 29 cities where aliens can travel without credentials or any advance notice. They are Beijing, Tianjing, Shanghai, Qinhuangdao, Taiyuan, Shenyang, Changchun, Haerbin, Nanjing, Suzhou, Wuxi, Hangzhou, Jinan, Qingdao, Zhenzhou, Kaifeng, Luoyang, Wuhan, Changsha, Guangzhou, Foshan, Zhaowing, Nanning, Guilin, Xian, Chengdu, Chongqing, Kunming, Lunan. Second group includes areas that are opened to aliens or where aliens may travel with travel permits routinely granted. Third group includes non-open areas where aliens may go with travel permits only for investigation, scientific exchange, construction or similar purposes. Traveling in areas not included in above mentioned three groups is not permitted until host organization obtains permission from destination province's government, autonomous region's government or military command, and makes application to security authority for traveling permit.

Provisions for Registration of Marriage Between Chinese and Foreign National Regulations on Registration Procedures for Marriage between Chinese Citizen and Alien Citizens were promulgated on Aug. 26, 1983. If wedding takes place on Chinese soil and complies with Marriage Law of China, approval of marriage is generally granted within one month after filing of marriage application. Both parties must in person go to institutions that register marriages, fill out application forms and respond to inquiries of said institutions. When filing application, alien partner must present valid passport, residence permit and notarized evidence of his or her marital status as single from alien's home state. Local health examination report is usually required for registration of said marriage. There are stricter requirements for Chinese diplomat, public security or military personnel, for those involved in confidential or important work and for those serving prison sentences or receiving labor reform reeducation. Special regulations also exist for persons from Hong Kong and Macao who are of Chinese origin and who marry Chinese citizens in China.

Provisions Governing Employment of Aliens in China were promulgated by Ministry of Labor on Jan. 22, 1996, effective May 1, 1996. These provisions apply to aliens and their employers except for those who have diplomatic immunity. (Art. 3). Employers have burden of applying for Alien Employment Permission for their alien employees. (Art. 5). Position offered to qualified alien employees must require special skills for which no Chinese applicant is qualified. (Art. 6). Generally employer cannot employ aliens for entertainment purposes. (Art. 3). Art. 7 specifies requirements of aliens seeking employment. Aliens seeking employment in China should enter Chinese border with professional visas. After entry aliens shall obtain Alien Employment Certificate. (Art. 8). Those who meet one of following requirements can apply for Employment Permit and Employment Certificate: (1) Foreign technical and administrative personnel employed by Chinese government directly or those who possess Foreign Expert Certificate issued by Foreign Expert Bureau; (2) foreign laborers possessing permission for aliens to be engaged in ocean petroleum job; and (3) aliens possessing Temporary Permission for Entertainment Performance issued by Culture Bureau. (Art. 9). Those who meet one of following requirements can apply for Employment Certificate with their professional visa and other relevant documentation: (1) Working in China under international exchange program; (2) chief representative of foreign enterprise's China office. (Art. 10). Aliens with Employment Certificate shall apply to Public Security Authorities for Certificate of Residence within 30 days of entry. (Art. 17). Employer must sign employment contract with its employees. Duration of such contract cannot exceed five years, but can be renewed upon expiration. (Art. 18). Aliens who are permitted to extend employment period or change employment area or unit must go to Public Security Authorities to extend their Certificate of Residence and Employment Certificate. (Art. 20). Employee's wages shall meet local minimum wages. (Art. 22). Work break and holidays, working hours, labor security and social insurance of aliens employed in China shall be executed according to relevant regulations. (Art. 23). When public security authorities due to violation of Chinese laws nullify alien's Residence Certificate, alien's employer shall revoke labor contract and labor departments shall revoke alien's Employment Certificate. (Art. 25). Disputes between employers and employed aliens shall be resolved according to Labor Law of PRC and Provision on Handling Enterprise Labor Disputes of PRC. (Art. 26). Labor Administrative Department examines aliens' Employment Certificates at least once every year. (Art. 27). Penalties for violating these Provisions include nullifying Residence Certificate, deportation, confiscation of illegal income, fines of RMB 10,000-100,0000, administrative sanction, and criminal liability. (Arts. 28-31).

Interim Provisions of the People's Republic of China on the Administration of

Resident Representative Office of Foreign Enterprises were promulgated by State Council on Oct. 30, 1980. (Provisions) Several Government Agencies in China have authority to approve these applications. Ministry of Foreign Trade handles applications from foreign trading companies, transportation companies, factories, etc. (Art. 4[1]), while insurance companies apply to Bank of China (Art. 4[2]). Within 30 days of approval, resident representative offices must register with Office of General Administration for Industry and Commerce (OGAIC). (Art. 5). Said enterprises' employees must apply to local Public Security Office for residence permits. (Art. 6).

Subsequent to promulgation of Provisions, various local governments promulgated detailed procedures to implement Provisions. On May 11, 1981 Guangdong province published Procedures for Registration of Foreign Corporations on Long Term Basis in Guangdong and on July 21, 1981 Bureau of Labor of Guangzhou City published Procedures for Hiring Local Personnel by Resident Representative Office of Foreign Enterprises.

Implementations of Provisions were passed on Feb. 2, 1998. Implementations provide that foreign representatives must register with OGAIC. Registration application, foreign enterprise's Certificate of Incorporation and letter of authorization signed by foreign enterprise's chairman or general manager to prove applicant is authorized representative are required documents for registration. (Art. 12). Foreign representatives must be citizens of other countries, residents of Hong Kong, Taiwan or Macao, permanent residents of other countries or Chinese citizens employed by foreign legal entities. (Art. 29).

Regulations Governing Foreign Journalists and Permanent Offices of Foreign News Agencies were adopted by State Council on Jan. 11, 1990, promulgated by State Council on Jan. 19, 1990 and became effective as of date of promulgation. Purpose of above Regulations is to promote international communications and dissemination of information.

Consular Relations Agreement of Jan. 31, 1979 between China and U.S. provides that U.S. citizens who have already obtained visas to China are ensured consular access and protection. (Art. 3). Similarly, if American citizen is arrested in China, consular or embassy notification must be sent without delay. (Art. 5).

18 INSURANCE

18.01 INSURANCE COMPANIES:

See category 3 Business Regulation and Commerce, topic 3.08 Contracts.

China Insurance Regulatory Commission (“CIRC”) was established on Nov. 18, 1998, to administer insurance industry, which is directly under State Council. Per authorization of State Council, CIRC supervises national insurance market.

CIRC draws up guidelines for development of insurance industry, programs and strategies for development of industry; draft laws and regulations related to supervision of insurance industry; prepare rules of industry, examines and approves establishment of insurer and its branches, insurance group and insurance holding company, establishment of representative offices, merger, division, alternation, disbandment of insurance organization, take-overs acquisitions, bankruptcy and liquidation of insurer.

Insurance Law was adopted by National People's Congress on June 30, 1995, effective as of Oct. 1, 1995, and amended on Oct. 25, 2002. This law applies to all insurance activities within territory of China, as well as to establishment of insurance companies with foreign investment, or branch companies of foreign insurance companies within territory of China. (Art. 3). All insurance business must be handled by insurance companies created according to this law. (Art. 5). If legal persons and other entities located in China need to purchase insurance in

China, they must do so through insurance companies within China. (Art. 6).

Foreign-Invested Insurance Companies.

Regulations on Administration of Foreign-Invested Insurance Companies ("Foreign-Invested Insurance Regulations") were promulgated by State Council on Dec. 12, 2001 and came into force on Feb. 1, 2002.

Foreign-invested insurance company is defined as having three forms: (i) Insurance equity joint venture; (ii) wholly foreign-owned insurance company; (iii) branches of foreign insurance companies. (Art. 2). China Insurance Regulatory Commission (CIRC) in charge of supervision of all foreign-invested insurance companies. (Art. 4). Establishing foreign-invested company must be approved by CIRC. (Art. 5). Minimum registered capital for insurance equity joint venture, wholly foreign-owned insurance company is RMB 200 million or equivalent in freely convertible currency. Branches of foreign insurance companies must have operating funds equivalent to RMB 200 million in freely convertible currency allocated by head office, without payment of compensation. (Art. 7).

Foreign insurance company that applies to establish foreign-invested insurance company must (i) Have at least 30 years of experience in carrying on insurance business; (ii) have established representative office in China for at least two years; (iii) have year-end assets for year preceding application of at least US$5 billion. (Art. 8). Foreign-invested insurance company shall deposit security bond, which is 20% of registered capital or operating capital, into CIRC appointed bank, security bond shall not be put to use except on liquidation or paying off debts. (Art. 13). Foreign-invested insurance company can totally or partially operate property insurance, personal insurance, large commercial risk insurance including warranty insurance, within approved scope of insurance coverage. (Art. 15).

Specific regulations control types of insurance business company may engage in. (Arts. 16, 26 and 39).

Insurance contract is agreement defining rights and obligations between insurer and insured. (Art. 9). Insured must have insurable interests towards subject matter of insurance, or insurance contract will be invalid. (Art. 11). It should be made in writing, including insurance policy, other insurance certificate and other written documents. (Art. 12). It must include following minimal terms: (a) Name and domicile of insurer; (b) name and domicile of insured, and name and domicile of beneficiary to life insurance; (c) subject matter; (d) liabilities of insurance and their exemptions; (e) insurance period and commencement of insurance liability; (f) insurable value; (g) insured amount; (h) premium and its method of payment; (i) insurance compensation and its payment; (j) liabilities for breach of contract and dispute settlement; and (k) time of execution of contract. (Art. 18).

Insurer may assign in part its insurance business that it has underwritten to other insurers, which is called "reinsurance". At request of reinsurer, assigner must disclose to reinsurer relevant information about original insurance and its obligations. (Art. 28). Reinsurer must not request insured of original insurance to pay premium. Insured or beneficiary of original insurance contract must not claim insurance compensation against reinsurer. (Art. 29). Assigner must not refuse to perform or defer to perform original insurance liability under excuse that reinsurer has not performed reinsurance obligations. (Art. 29). Insurer or reinsurer must keep confidential relevant information about business and property of insured or assigner. (Art. 31). When insurer has disputes over contents of insurance contract with insured or beneficiary, court and arbitration commission must make interpretations favorable to insured or beneficiary. (Art. 30).

Property Insurance Contract.

Subject matter of property insurance contract must be property and its relevant interests.

(Art. 32). If subject matter is transferred, insured must notify insurer. If insurer agrees to continue to underwrite new subject matter, contract must be modified, with exception of carriage of goods insurance contract, or insurance contract provides otherwise. (Art. 33). In insurance contracts regarding carriage of goods and voyage of transport vehicles, if insurance liabilities have started, parties must not discharge contract. (Art. 34). Insured should comply with regulations on fire prevention, safety, production and operation, and labor safety, and maintain safety of subject matter. (Art. 35). As per contract provisions, insurer may check and inspect safety conditions of subject matter, and put forward written proposal regarding non-safety factors. (Art. 35). Should insured fail to perform such safety obligations toward subject matter, insurer may request insured to increase premium or discharge contract. (Art. 35). In order to maintain safety of subject matter, insurer may, after obtaining consent from insured, adopt preventive measures. (Art. 35). Should degree of danger of subject matter increase during term of contract, insurer may request insured to increase premium or discharge contract. (Art. 36). Should insured fail to notify insurer of foregoing increased danger, insurer must not assume liability of compensation for insurance accident which occurred due to increased danger. (Art. 36). If degree of danger of subject matter substantially reduces or insurable value markedly decreases, insured may request insurer to reduce premium or refund relevant premium. (Art. 37).

Arts. 41 through 47 specify obligations of insurer when claim is filed.

Life Insurance Contract.

Subject matter of life insurance contract must be life and body of human being. (Art. 51). Insurance purchaser has insurable interest towards following persons: (1) Self, (2) spouse, children and parents, and (3) other family members and close relatives. In addition, if insured agrees to have insurance purchaser to purchase life insurance for him or her, it is deemed that purchaser has insurable interests toward insured. (Art. 52). If age of insured disclosed by insurance purchaser is not true, and actual age does not conform to age restriction as specified in contract, insurer may discharge contract and refund premium after deduction of various costs, within two years from execution of contract. (Art. 53). Should foregoing untrue age result in less premium paid by insurance purchaser, insurer may request foregoing purchaser to make up balance. (Art. 53). Insurance purchaser must not purchase life insurance on persons without civil competence contingent upon insured's death, and insurer must not underwrite such insurance. (Art. 54). However, parents may do so for their minor children. (Art. 54). Life insurance contract contingent upon death must not be valid unless insured has agreed in writing and confirmed insured value. (Art. 55). Policy of foregoing insurance must not be transferred or mortgaged in absence of written consent of insured. (Art. 55). After execution of contract, purchaser may pay premium by one lump sum or by instalments as specified in contract. (Art. 56). Insurer must not resort to litigation to request purchaser to pay premium of life insurance. (Art. 59). Beneficiary may be designated by insured or purchaser. When purchaser designates beneficiary, consent must be obtained from insured. (Art. 60). Should insured be person without civil competence, or with limited competence, person's guardian may designate beneficiary for insured. (Art. 60). If death, injury, or disease of insured is caused by wilful act of beneficiary or purchaser, insurer shall be exempted from insurance liabilities. If purchaser has paid premium for two years or more, insurer may refund cash value of policy to other beneficiaries. (Art. 64). For contract contingent upon death, should insured commit suicide, insurer will be exempted from insurance liabilities, but must refund premium paid by purchaser. (Art. 65). However, if such contract has reached two years or more, insurer must pay insurance compensation as specified in contract, despite insured's suicide. (Art. 65). Should insured's intentional crime result in death or injuries of insured, insurer must not assume insurance liabilities. (Art. 66). If purchaser has paid in full premium for two years or more, insurer must refund its cash value as specified in contract. (Art. 66).

Insurance companies must take one of following forms: (1) Corporations limited by shares and (2) wholly state-owned companies. (Art. 69). Insurance company must be subject to approval of financial supervision department. (Art. 70). To create insurance company, following requirements must be met: (1) Articles of association in conformity with insurance law and company law; (2) minimum registered capital as required by insurance law; (3) senior officers having professional knowledge and practical experiences; (4) having complete organizational set-up and management system; and (5) having business sites in conformity with requirements and other necessary facilities. (Art. 71). Minimum registered capital of insurance company must be RMB 200 million. (Art. 72). In applying for insurance company, following documents and materials must be submitted to financial supervision authorities: (a) Application specifying name, registered capital and scope of business for prospective company; (b) feasibility study report; and (c) other documents and materials as required by financial supervision authorities. (Art. 73). Financial supervision authorities must decide on approval or disapproval within six months from receipt of foregoing materials. (Art. 75). Upon approval of financial supervision authorities, insurance company may establish branches at home and abroad. Branches do not have separate legal identity; civil liability must be borne by head company. (Art. 79).

If any of following circumstances occurs, insurance company must secure approval from financial supervision authorities: (1) Change in name; (2) change in registered capital; (3) change in business sites of insurance companies and their branches; (4) adjustment in scope of business; (5) merger or division; (6) amendments to articles of association; (7) change of capital investors or shareholders holding 10% of shares or more; and (8) other changes as provided by financial supervision authorities. (Art. 81). Organizational set-up must be governed by company law. (Art. 82). If insurance company becomes insolvent, court may declare bankruptcy, after obtaining consent from financial supervision authorities. (Art. 86).

Life insurance company cannot be dissolved but can be divided or merged with another company. (Art. 84).

When life insurance company is legally cancelled or declares bankruptcy, life insurance contracts and reserves must be transferred to another life insurance company. If transfer agreement with another life insurance company cannot be reached, financial supervising authority will designate life insurance company for transfer. (Art. 87).

When insurance company is declared legally bankrupt, after payment of bankruptcy fee, moneys owed shall be paid by company's remaining assets in following order: (1) Staff salary and labor insurance fees owed; (2) compensation or performance of insurance money; (3) tax owed; (4) payment of company's debts. (Art. 88).

When property is not enough for payment of above, it will be paid on pro rata basis.

Guidelines for Insurance Operation.

Scope of business of insurance company is: (1) Property insurance business including property damage insurance, liability insurance, credit insurance, etc.; and (2) life insurance including life insurance, health insurance, accidental injuries insurance, etc. One insurance company is not allowed to engage in both property insurance and life insurance. (Art. 91).

Upon approval of financial supervision authorities, insurance company may engage in reinsurance business. (Art. 92). Apart from life insurance, other insurance businesses must set aside liability reserve funds from retained premium of insurance company, which must be equivalent to 50% of retained premium. For life insurance, liability reserve funds must be equivalent to net value of all valid life insurance policies. (Art. 93). Arts. 94-103 set out reserve and capital requirements and set ratios. Funds of insurance company must be confined to bank deposits, government bonds, financial bonds and other uses as provided by State Council. Funds of insurance company must not be used to create securities dealer or to invest in enterprises. (Art. 104).

Supervision and Administration.

Basic terms and conditions of primary commercial insurances and rate of premium formulated by financial supervision authorities in conjunction with insurance company. (Art. 106).

Agent and Broker.

Agent must represent insurer within authority as entrusted by insurer and charge fees from insurer. (Art. 122). Broker must represent insurance purchaser, enter into contract on behalf of purchaser, and charge commission from said purchaser. (Art. 123). Insurer will be liable for acts of agents. Life insurance agent must not represent two or more insurers at same time. (Art. 124). If insurance purchaser and insured suffer any losses due to fault of broker, broker must assume liability of compensation. (Art. 125). Agent and broker must not take advantage of administrative authority, or favorable position of profession, and not resort to undue means to coerce or lure others to enter into insurance contract. (Art. 126). Agent and broker must have their own business sites and accept supervision of financial supervision authorities. (Art. 128). Insurance company must have book listing its agents. (Art. 129).

Implementation Rules of the Regulation of the People's Republic of China Governing Foreign Funded Insurance Firms (“Rules”), promulgated May 13, 2004 and effective June 15, 2004. Rules designed to clarify both Insurance Law and Foreign-Invested Insurance Regulations.

General.

Foreign funded insurance firms are permitted to establish equity joint venture insurance firms with Chinese companies or enterprises to conduct life insurance operations inside China; foreign investment cannot directly or indirectly account for more than 50% in total shares of relevant companies. (Art. 3).

Clarified Requirements of Foreign Operators.

Foreign funded insurance firms must possess prudent terms and conditions in addition to those listed in Foreign-Invested Insurance Regulations, including: (1) Reasonable corporate governance structure; (2) stable risk management system; (3) complete internal control system; (4) effective information management system; and (5) sound operational status and no record of major illegal or rule-breaking acts. (Art. 11).

Clarified Requirements of Chinese Joint Venture Partners.

Art. 16. Unless otherwise specified in laws or administrative regulations or approved by State Council, Chinese applicant shall meet following requirements: (1) Company or enterprises having legal person status; (2) joint venture having been approved by administrative competent authority of enterprise or shareholders' meeting of enterprise; (3) having sound operational status and having made profit during fiscal year prior to date of application; and (4) in case of contributing with self-owned capital, source of capital is lawful.

Trial Regulations on Administration of Insurance Agents, promulgated by People's Bank of China on Nov. 30, 1997 and effective as of date of promulgation.

Agents include full-time limited liability agent corporations specializing in insurance, part-time insurance agent companies and individual agents. (Arts. 2, 18, 40). Persons who wish to engage in insurance sales must obtain insurance agent qualification certificate. (Art. 8).

Business of full-time limited liability agent corporation includes acting as agent of property insurance corporation and single life insurance corporation. (Art. 19). Business scope includes acting as agent to promote and sell insurance products, collecting insurance premiums, assisting insurance cooperative in investigation and settlement of claims. (Art. 21). With respect to capital composition of full-time limited liability agent corporation, capital invested by one corporation cannot exceed 10%, total sum of capital invested by individuals cannot exceed 30%, and 5% for individuals. (Art. 21). Government organs at any level, government departments, judicial associations, banks or insurance corporations are not allowed to invest in insurance agent cooperative. (Art. 22).

Part-time insurance agent company can only sell insurance products that are relevant to business in which it is engaged. (Art. 45).

Individual agents cannot sell business of enterprise property insurance and group life insurance and cannot work part-time. (Arts. 52, 53).

Trial Regulations on Administration of Insurance Brokers promulgated by People's Bank of China on Feb. 16, 1998. Insurance brokers are limited liability corporations. (Art. 2). Insurance brokers include Chinese insurance brokers, foreign insurance brokers and joint venture insurance brokers. (Art. 4). Reinsurance brokers are limited liability corporations representing original insurer, providing agency services of assigned business and accepting business from other corporations for original insurer and reinsurer, and charging commission. (Art. 3).

Requirements for establishing insurance brokerage corporation (Art. 16): (1) Currency capital of at least RMB 10 million; (2) staff numbering no less than 30, among which number of qualified agents are no less than half; etc.

Additional requirements for foreign party establishing foreign insurance brokerage corporation and joint venture include following: (1) Must be creditworthy and must not have received grave sanctions by supervising authority or judiciary of home country in last three years; (2) must have been engaged in insurance brokerage business for over 20 years; (3) business income of last three years no less than US$100 million before filing application; (4) must have had representative office in China for more than two years; (5) must be based in country with complete insurance supervisory system; etc. (Arts. 17, 18).

Additional requirements for Chinese investor applying for joint venture (Art. 18): (1) Must be creditworthy, not punished gravely by supervising authority or judicial department in China in last three years; (2) must have made profit for last three consecutive years before filing application; (3) must have no less than RMB 50 million in capital preceding filing of application; etc.

Establishment of insurance brokerage corporations is subject to approval by People's Bank of China, and approval will be published in newspaper designated by People's Bank of China. People's Bank of China will issue insurance broker permit, which is valid for three years, and specifies range of operations. (Arts. 29 & 30).

Joint venture insurance brokerage corporations and foreign insurance brokerage corporations may only engage in insurance brokerage business for foreign investment enterprises. (Art. 32).

Insurance brokerage corporations may only bargain and insure directly with insurance corporation in same place as insured subject matter. (Art. 44).

Insurance brokerage corporations shall choose only one state-owned commercial bank and open separate premium and expense accounts. (Art. 49).

Reinsurance business of insurance brokerage corporations must, according to provisions of Insurance Law, offer priority to domestic corporations. (Art. 55).

Insurance brokerage corporations shall not arrange statutory reinsurance business.

(Art. 56).

Insurance brokerage corporations or individual brokers, if acting in violation of laws and regulations, may be penalized by People's Bank of China with fines, or revocation of individual brokerage practice or qualification certificates, or reduction of business scope for insurance brokerage corporation, or suspension of corporation, or revocation of operation permit. (Art. 61).

When insurance brokerage corporation files bankruptcy, is annexed or dissolved because of bad management, principal of corporation will be unable to hold post of senior administrator in financial organ in China for ten years. (Art. 78).

19 INTELLECTUAL PROPERTY

—Scope —

See category 3 Business Regulation and Commerce, topic 3.14 Monopolies, Restraint of Trade and Competition.

19.01 COPYRIGHT:

See category 5 Civil Actions and Procedure, topic 5.03 Civil Code.

PRC has enacted comprehensive legislation governing intellectual property since 1978. Accession to WTO and adherence to TRIPS likely to strengthen degree of protection and to modify law.

Chinese copyright law was enacted in Sept. 7, 1990 effective as of June 1, 1991, revised in accordance with Decision on Amendment of Copyright Law of China adopted at 24th Session of Standing Committee of Ninth National People's Congress on Oct. 27, 2001.

Term “works” includes works of literature, art, natural science, social science, engineering technology and the like which are expressed in following forms: (1) Written works; (2) oral works; (3) musical, dramatic, quyi, choreographic and acrobatic works; (4) works of fine art and architecture; (5) photographic works; (6) cinematographic works and works created by virtue of analogous method of film production; (7) drawings of engineering designs, and product designs; maps, sketches and other graphic works and model works; (8) computer software; (9) other works as provided for in laws and administrative regulations. (Art. 3).

Copyright owners, copyright-related right holders may authorize organization for collective administration of copyright to exercise copyright or any copyright-related right. (Art. 8).

“Copyright” shall include following personality rights, property rights: (i) Right of publication; (ii) right of authorship; (iii) right of alteration; (iv) right of integrity; (v) right of reproduction; (vi) right of distribution; (vii) right of rental; (viii) right of exhibition; (ix) right of performance; (x) right of showing; (xi) right of broadcast; (xii) right of communication of information on networks; (xiii) right of making cinematographic work; (xiv) right of adaptation; (xv) right of translation; (xvi) right of compilation; (xvii) any other rights copyright owner is entitled to enjoy. (Art. 10).

Art. 22 lists cases where work may be exploited without permission, and without payment of remuneration to copyright owner. Many listed cases are similar to concept of “fair use”.

Book publisher has exclusive right to publish work delivered to him by copyright owner for publication. Exclusive right to publish work enjoyed by book publisher specified in contract shall be protected by law. (Art. 30). Publisher has rights to license or prohibit any other person to use typographical arrangement of books or periodicals he published. Term of protection for rights provided for in preceding paragraph shall be ten years, and expires on 31 Dec. of tenth year after first publication of books or periodicals using typographical arrangement. (Art. 35). Copyright owner or owner of copyright-related right may institute legal proceedings if evidence exists showing likelihood of infringement to cause irreparable harm. (Art. 49).

Art. 50 deals with evidence preservation, if likely to be lost or destroyed.

Regulations on Protection of Computer Software were promulgated on Dec. 20, 2001 by State Council of People's Republic of China and came into force on Jan. 1, 2002. Computer software stated in these regulations shall refer to computer programs and their related documents. (Art. 2).

Chinese citizens and units shall be entitled to copyright of software that they develop in accordance with these regulations, without regard to whether or where such software has been issued.

Foreigners are entitled to copyright protection in accordance with these regulations if their software is first issued in China.

Software issued outside China by foreigners entitled to copyright protection in accordance with agreements concluded between their respective countries and China or international treaties that their respective countries have entered into with China shall be protected by these regulations. (Art. 5). See subhead Conventions, catchline Foreign Works, infra.

Software copyright owner is entitled to right of publication, authorship, revision, duplication, publishing, lease, dissemination on information networks, translation and other rights. (Art. 8).

Software copyright protection period starts day of completion of development. For software copyright of natural person, term of protection is lifetime of natural person and 50 years after his death, ending on 31st of Dec. of 50th year after death of natural person; where software is jointly developed, 50th year after death of last natural person. For software copyright of legal person or other organization, term of protection is 50 years, ending on 31st of Dec. of 50th year after first publication of software, however, these regulations will no longer protect software if it hasn't been published within 50 years since completion of development. (Art. 14).

As for developer's right of disclosing his identity, there is no limitation for such protection period. (Art. 15).

Arts. 18, 19, 20 govern right to license software.

Infringement results in civil liability. Art 23 provides non-exhaustive list of acts of infringement.

Amount of compensation for infringement of software copyright is determined according to Art. 48 of Copyright Law of PRC. (Art. 25).

If publisher, manufacturer of software copies cannot prove that publication or manufacturing has been legally authorized, or releaser or leaser of software copies can't prove that copies released or leased have legal sources, they shall bear legal responsibilities. (Art. 28).

If holder of software copies does not know and there is no rational reason for it to know that software is infringing copy, holder shall bear no responsibilities for compensation; however, it shall stop using and destroy that infringing copy. (Art. 30).

Disputes concerning software copyright infringement may be settled through mediation. In case mediation fails, or one of parties repudiates agreement reached through mediation, suit may be filed with People's Court. (Art. 31).

Regulations on Administration of Audio and Video Products were promulgated by State Council on Dec. 25, 2001, effective as of Feb. 1, 2002. Regulations include rules for publication, reproduction, importation, wholesale and retail sales, renting, and display of music and video products. Penalty provision and supplementary articles provided. Regulations apply to magnetic tapes, video tapes, gramophone records, laser records, and laser discs. (Art. 2).

State administers music and video products through different departments and by classifying products into various grades. News Publication and Administration Department of State Council is responsible for publication, reproduction, and importation of music and video products throughout China. Cultural Administration Department of State Council and Broadcast Film Television Administration Department are responsible for content examination of music and video products. Cultural Administration Department of State Council is responsible for wholesale and retail sales, renting, and display of music and video products. (Art. 4).

State adopts license system for publication, reproduction, importation, wholesale and retail sales, renting, and display of music and video products. (Art. 5).

Measures for Administration of Import of Audio and Video Products were promulgated by Ministry of Culture and General Administration of Customs on Apr. 17, 2002, effective as of June 1, 2002. New Measures replaced Administrative Regulations of Apr. 30, 1999.

Music and video products refer to content-laden tapes, videotapes, discs, laser discs and laser videodiscs. (Art. 2). Regulations apply to all aforementioned products imported from foreign countries, and from Hong Kong, Macao and Taiwan for purpose of (1) being used for publication by audio and visual publishing house, (2) direct sale, (3) being used for reference in research and teaching and (4) being used in other special circumstances. (Art. 3). China executes licensing system for business of music and video products importing. (Art. 7). Music and video publishing units and selling units, which import music and video products, shall obtain music and video product permit. Music and video products approved for import or for publishing are prohibited from being imported or sold directly within three months of approval date. (Art. 28).

Regulations for Protection of Map Compilations and Publications promulgated by State Council, July 10, 1995. Effective Oct. 1, 1995. Regulations cover general principles, administration of map compilation, administration of map publication, legal responsibility, and supplementary articles. Regulations apply to compilation and publication of various ordinary public maps and special subject maps. (Art. 2).

Regulations on Administration of Publications were promulgated by State Council on Dec. 25, 2001, effective as of Feb. 1, 2002.

Regulations cover general principles, establishment and administration of publication units, publishing, printing, reproduction and distribution of materials, insurance and award, legal responsibility and supplementary articles.

Provisions on Book Quality were promulgated by General Administration of Press and Publication on Dec. 24, 2004, and effective as of Mar. 1, 2005.

Regulations cover general principles, classification and standard of book quality, administration of book quality, award and punishment, and supplementary articles.

Administrative Regulations of Printing Trade promulgated by State Council, Mar. 8, 1997, effective May 1, 1997.

Publication Printing Administrative Regulation promulgated by News Publication Bureau, Aug. 18, 1997. Effective on date of promulgation. State issues license.

Administrative Regulations of Publication Standard promulgated by News Publication Bureau, Aug. 8, 1997. Effective on date of promulgation.

Administrative Regulation Requiring that Important Book, Magazine, Video Product, and Electric Publication be filed with State promulgated by News Publication Bureau, Oct. 10, 1997, effective on date of promulgation. Publication unit that seeks to publish "important" issue contained in book, magazine, video or electronic publication must file that issue with News Publication Bureau prior to publication. Without filing, issue cannot be published. (Art. 2).

Administrative Regulations of Internal Data Publication promulgated by News Publication Bureau; effective Jan. 1, 1998. Regulations apply to printing of internal data publication. Internal data publication refers to unsold printed matters used to direct work or exchange information in one system, one trade, or one publication unit, not include information data of simple report of organ official document.

Regulations Concerning the Publication of Electronic Materials.

Promulgated by News Publication Bureau, Dec. 30, 1997. Effective on Jan. 1, 1998. Regulations cover use of FD, CD-ROM, CD-I, Photo-CD, DVD-ROM IC Card, and other mediums maintained by News Publication Bureau.

Administrative Regulations of Foreign-Related Copyright Agency.

Promulgated by State Copyright Bureau and State Administration of Industry and Commerce, Apr. 15, 1996. Effective on date of promulgation. Foreign-Related Copyright Agency is responsible for licensing copyrighted material for foreign-related copyrights.

Administrative Regulations for Copyright Mortgage Contract Registration.

Promulgated by Copyright Bureau, Sept. 23, 1996. Effective on date of promulgation. These regulations refer to rights and responsibilities of debtor and creditor in relation to mortgage of copyrighted property. If debtor does not satisfy debt, creditor has right to compensation by monetary compensation or from proceeds from sale of copyrighted property.

Rules for Implementation of Copyright Administration Punishment were promulgated by China Copyright Office on July 24, 2003, effective as of Sept. 1, 2003.

State Copyright Bureau and copyright authorities of local government are responsible for imposing disciplinary sanctions for illegal activities regarding copyrights provided by: Art. 46 of Copyright Law; Art. 30 of Protection Rule for Computer Software; Art. 36 of Administration Rule of Music and Video Products; and other related laws and regulations (Arts. 2, 3).

Disciplinary sanctions include: warning; penalty; stopping production and distribution; confiscation of illegal income, equipment and machinery used for publication. (Art. 4). Limitation period for disciplinary sanctions is two years and begins date illegal activity ceased. (Art. 11).

Enforcement Regulations of Administrative Punishment of Publication

Management promulgated by News Publication Bureau, Dec. 30, 1997, effective Jan. 1, 1998. Regulations cover general principles, jurisdiction, placing case on file, investigation and obtaining evidence, hearing, decision-making and execution of supplement.

Conventions.

China joined Berne Convention for the Protection of Literary and Artistic Works and Universal Copyright Convention on July 1, 1992, pursuant to decision of Standing Committee of National People's Congress, effective Oct. 1, 1992. China also acceded to Geneva Convention for Protection of Producers of Phonograms Against Unauthorized Duplication of their phonogram. Works of foreigners from countries acceded to above-mentioned conventions to enjoy corresponding protection under Chinese Copyright Law in accordance with conventions. American works shall also enjoy copyright protection under Chinese Copyright Law in accordance with Memorandum Concerning Intellectual Property Protection concluded by and between governments of U.S.A. and China Jan. 1992.

Foreign Works.

On Sept. 25, 1992, Provision on the Implementation of International Copyright Treaties was promulgated by Decree No. 125 of State Council of People's Republic of China. This provision, which became effective on Sept. 30, 1992, covers protection of foreign works.

19.02 PATENTS:

In 1984 China signed Paris Convention for the Protection of Industrial Property and in 1983 joined World Intellectual Property Organization. China was accepted as International Examining Authority under patent cooperation treaty in 1994.

On Mar. 12, 1984 Standing Committee of People's Congress promulgated China's Patent Law (“Law”), effective Apr. 1, 1985. Chinese patent law was amended Sept. 4, 1992 by National People's Congress. *Note:* Revisions to Patent Law were promulgated on Aug. 23, 2001. State Council's Patent Administrative Board, responsible for management of all patent work in China. Provincial, self-administrative districts and cities directly under central government are responsible for administrative work regarding patents in their locality. Patent Law, Art. 6 has been amended to strengthen right of individual's ownership of patent; when work was done for organization and/or organizations' technology and materials employed, without agreement, patent will belong to organization; but prior contractual agreement as to ownership will bind parties. Patent Law has been amended to require contract to assign rights to patent, which must be registered with patent agency under State Council. Effective date of assignment is date of registration. (Arts. 9, 10). Foreigners must employ agents in China designated by State Council to register their patent.

On Jan. 19, 1985 State Council promulgated Implementing Regulations of the Patent Law (“Regs.”) by Decree No. 306 of State Council on June 15, 2001, effective as of July 1, 2001. Detailed Rules for Implementation of Patent Law approved by State Council on Dec. 12, 1992, promulgated by Patent Office of China on Dec. 21, 1992 was repealed at same time.

Inventions, utility models and exterior designs may be patented. (Law. Art. 2).

Invention is defined as any new technical solution relating to product, process or improvement thereof (Regs. 2); utility model is any new technical solution relating to shape, structure, or both, of product fit for practical use (Regs. 2); and design means any new design of shape, pattern, color or their combination, of product, which creates aesthetic feeling and is fit for industrial application (Regs. 2).

Unpatentable subject matters include: (1) Scientific discoveries; (2) rules and processes of mental activities; (3) methods of diagnosis or treatment of diseases; (4) animal and botanical varieties; (5) substances derived by means of nuclear transformation. (Law Art. 25). However, processes of item (4) are patentable. (Law Art. 25). All chemical inventions including pharmaceutical and agricultural chemicals, whether products or processes, are patentable under new patent code.

Microbiological processes, products thereof and microorganisms will be patentable (Regs. 25 and 26), and computer software while not clearly excluded by statute, is said by some officials to be covered by forthcoming legislation and if software is closely related to operation of hardware for which patent application is made then software may now be patentable. Any assignment of right to apply for patent or of patent right, by Chinese entity or individual, to foreigner shall be approved by competent department for foreign trade and economic affairs of State Council in conjunction with science technology administration department of State Council. (Art. 14).

Authority to examine patent applications and issue patents is held by Patent Office. (Art. 3). China has established Patent Office, which is reported to have staff of several hundred persons, including attorneys, examiners and administrators. This office has headquarters in Beijing and offices throughout China. By end of 1992, China established approximately 500 patent agencies, trained and registered 5,000 agents, and assembled library of 30 million patent documents from 20 countries. Patent application by nonresident foreigners or foreign businesses without offices in China is to be made either to Patent Agency of China Council for the Promotion of International Affairs, Hong Kong based China Patent Agent (HK) Ltd. or Shanghai Patent Office. Foreign persons resident in China can make patent application through local patent offices where they have residence. Chinese have also established offices in New York and California to assist in registration in China.

Patent Office shall maintain Patent Register (Regs. Art. 80) and publish Patent Gazette (Regs. Art. 81) containing abstract of invention or utility model, and information on all proceedings by Patent Office regarding application, e.g. approval, registration, request for examination, etc.

Within six months of first application for exterior design, and 12 months of first application for invention or utility model in foreign countries, applicant may enjoy preemptive right for application in China for same subject matter under Chinese patent code in accordance with international treaties concluded or acceded to by China and said foreign countries or on principal of reciprocity. (Law Art. 29). Within 12 months of first application for invention or utility model in China, applicant may enjoy preemptive right for its application for same subject matter in China. (Law Art. 29).

Said inventions and utility models must have characteristics of newness, originality and practicality. (Law Art. 22). Newness is defined as when prior to date of patent application no identical invention or practical new model has been published in foreign or Chinese publications or otherwise made known to public in China. Originality of utility model means it must have substantial features and represent improvement, while originality of invention is defined as it having substantial distinguishing features and representing marked improvement over prior inventions. Practicality is defined to mean utility model or invention can be made on use to produce effective results. Any exterior design to be patentable, must not be identical with or similar to any design published in foreign or Chinese publications or publicly used in China prior to date of application. (Law Art. 23).

No other entity or individual may exploit patent after issuance of patent without authorization of patentee. Patent marking can be placed on patented products.

From third year of application for patent of invention where application has not yet been granted, applicant must commence paying maintenance fee. In addition, once patent has been issued annual fee shall be paid. (Regs. Art. 86).

Where two or more applicants file applications for patents for identical inventions, utility models or exterior designs, patent right shall be granted to applicant whose application was first filed, though if both file on same day inventors may negotiate mutual agreement as co-inventors. Exhibition of patentable product, six months prior to date of filing at international exhibition sponsored or recognized by Chinese government, at prescribed academic or technical meeting or disclosure without consent of applicant, shall not result in loss of novelty. Receipt of priority shall be counted from date above events occurred for patent on invention or utility model. Where foreign applicant filed application in China within 12 months from first filing in foreign country (or within six months for exterior design) pursuant to reciprocity or treaty, date for establishing priority in China is date application was first made in foreign country. Claim of priority by filing in foreign country requires applicant within 15 months from said filing to submission of relevant materials concerning priority of earlier applications to Patent Office.

Entity capable of exploiting invention or utility model failing to obtain license from patent holder with reasonable terms and conditions within reasonable time, Patent Office may issue compulsory license for invention or utility model at request of entity. (Law Art. 51). Person receiving compulsory license cannot license others and shall not have exclusive right to exploitation of patent. (Law Art. 56). Award of compulsory license can be appealed to courts within three months of notification of decision.

Patent Office, within 18 months of date of filing of patent for invention, or earlier at request of applicant, if after preliminary examination finds application in conformity with law, shall publish application. (Law Art. 34). Substantive examination can be made within three years from date of filing, provided that request is made by applicant; failure of applicant without justified reason to make such request in three year period will result in application having been deemed withdrawn. Patent Office can on its own initiative proceed to examine any application of invention for substance. (Law Art. 35). If, in application for patent for utility model or exterior design, Patent Office upon preliminary examination finds it in conformity with patent law, it shall immediately so announce.

Within six months following patent granting, any entity or individual deeming patent not in conformity with patent code may apply to Patent Office to revoke patent. (Law Art. 41). Patent Office examines application and decides whether to maintain or reject patent. (Law Art. 42). Applicant and patentee may appeal to Patent Re-examination Board which decides to maintain or revoke patent. (Law Art. 43). Applicant or patentee may file suit with court of law against decision within three months from receipt of decision (Law Art. 43), however decision of Board regarding utility model and exterior design are final (Law Art. 43).

Applications must be submitted in duplicate. Invention and utility model applications require abstract on main points, description and claims and title, name of inventor, name and address of applicant and description in manner sufficiently clear to permit person skilled in relevant technology to carry it out. Where necessary, drawings should be provided. Applications for exterior design require drawings or photographs of design; statement as to class to which product belongs shall also be included. Relevant materials about priority of earlier applications should be included. In course of examination of request for invalidation, patentee for patent for invention or utility model concerned may amend its or his claims, but may not broaden scope of patent protection. (Regs. Art. 68). Patent Reexamination Board may, at request of parties concerned or in accordance with needs of case, decide to hold oral hearing in respect of request for invalidation. (Regs. Art. 69). Person requesting invalidation may withdraw his request before Patent Reexamination Board makes decision on it. (Regs. Art. 71). Reward, remuneration of inventors or creators of service inventions-creations are increased. (Regs. Arts. 74, 75, 76).

Normally as to invention or utility model following should be provided: Title, technical field, description of relevant prior art, task it is to perform, its merits compared to prior art, description in drawings, best mode for carrying it out, claims in clear and precise manner explaining protection sought, dependent or independent nature of claim, if involving microbiological process or product thereof, deposit sample shall be provided.

Drawings or photographs that must be submitted shall be no longer than 15 cm by 22 cm and no smaller than 3 cm by 8 cm. Where necessary Patent Office may require application for patent design to submit sample or model of product incorporating design, and if design seeks protection of colors drawing or photograph in color and black and white shall be submitted.

Inventor or creator may apply for patent as individual or entity or if discovered in course of duty or during work entrusted to said person by entity for whom he works, then entity may make application. Right to apply for patent can be assigned, pursuant to written contract, though assignment of right to apply by Chinese entity or individual to foreigner must be approved by relevant Chinese government authorities.

Duration of patent for inventions is 20 years and patent for utility model and exterior design is ten years from date patent application filed with Patent Office. (Law Art. 42). Patentee shall pay annual fee from year granted. (Law Art. 43).

Any of following is act of passing off patent of another person as one's own: (i) Without authorization, indicating patent number of another person on product or on package of that product made or sold by him or it; (ii) without authorization, using patent number of another person in advertisement or in any other promotional materials of his or its product, to mislead other persons to regard technology concerned as patented technology of another person; (iii) without authorization, using patent number of another person in contract entered into by him or it, so as to mislead other persons to regard technology referred to in contract as patented technology of another person; (iv) counterfeiting or transforming any patent certificate, patent document or patent application document of another person. (Regs. Art. 84). Any of following is act of passing non-patented product off as patented product or passing non-patented process off as patented process; (i) making or selling non-patented products which are affixed with patent marking; (ii) continuing to affix patent marking on products that are made or sold after patent right concerned has been declared invalid; (iii) passing any non-patented technology off as patented technology in advertisements or in any other promotional materials; (iv) stating any non-patented technology as patented technology in any contract entered into by him or it; (v) counterfeiting or transforming any patent certificate, patent document or patent application document. (Regs. Art. 85).

Patent Administration Department under State Council receives international patent applications filed under Patent Cooperation Treaty in accordance with provisions of Art. 20 of Patent Law. (Regs. Art. 99). Any international application which has been accorded international filing date in accordance with Patent Cooperation Treaty, which has designated China shall be deemed as application for patent filed with Patent Administration Department under State Council, and said filing date shall be deemed as filing date referred to in Art. 28 of Patent Law. (Regs. Art. 100). Where applicant claims one or multiple priorities in international phase, such claims remain valid at time when application enters Chinese national phase, applicant shall be deemed to have submitted written declaration. (Regs. Art. 107).

Patent Agency.

Regulations on Patent Commissioning promulgated by Decree No. 76 of State Council of People's Republic of China on Mar. 4, 1991, and effective as of Apr. 1, 1991. These regulations contain all chapters, 28 articles.

Adjudication of Patent Disputes.

Measures of Patent Administrative Authorities on Adjudicating Patent Disputes have been implemented effective as of Dec. 4, 1989, however, have now been repealed.

See category 5 Civil Actions and Procedure, topic 5.03 Civil Code.

Patent Mortgage Contracts.

Regulations Concerning Patent Right Mortgage Contract Registration promulgated by State Patent Office, Sept. 19, 1996. Effective Oct. 1, 1996.

State Patent Authority is registration and administration bureau of patent right mortgage contracts. (Art. 2). Mortgagor and mortgagee must register with State Patent Authority. Mortgage contract will become effective after registration. (Art. 3).

Application to Hearing Patent Dispute Cases.

Several Rules of Supreme Court for Application of Law to Hearing Patent Dispute Cases were adopted on June 19, 2001 and became effective July 1, 2001.

Intellectual Property Tribunals of court will receive following patent dispute cases: (i) Disputes of right to apply for patent; (ii) disputes of patent ownership; (iii) disputes of contract for assignment of rights to apply for patent or patent rights; (iv) disputes of patent infringements; (v) controversy of counterfeiting patent; (vi) disputes of fee for exploitation of patent; (vii) controversy of rewards, remuneration of service inventions to inventors and designers; (viii) stopping infringement of patent rights before instituting legal proceedings, attachment cases; (ix) disputes of qualification of inventors, designers; (x)-(xv) patent administrative cases; (xvi) other disputes of patent. (Art. 1).

Intermediate court of place where provincial, autonomous region and municipal governments are located, intermediate court appointed by Supreme Court have jurisdiction in first instance over patent disputes. (Art. 2).

Lawsuit brought on acts of patent infringement shall be under jurisdiction of court of place where infringement is committed or where defendant has domicile. (Art. 5).

Courts where manufacturing takes place have jurisdiction for action raised by plaintiff against manufacturer, not involving sales, of infringing products distributed to places other than producing area; court of area of sales has jurisdiction for action, with manufacturer and seller as joint defendants.

Courts of area of sales have jurisdiction for action raised by plaintiff in area of sales against manufacturer of infringed product for its producing and selling acts, with seller being subsidiary of manufacturer. (Art. 6).

Plaintiff in action against infringement of patent of utility models shall provide inspection report produced by Administrative Department of State Council for Patent when raising action. (Art. 8). Court shall submit to Administrative Department of State Council for Patent, notice to assist in enforcement when adopting attachment procedures. Time limit to attach goods for patent action shall not exceed six months. (Art. 13).

Losses by patent owner resulting from infringement may be determined by quantity of sales of patented products less costs multiplied by, reasonable profit of each patented product; for those sales volume costs that cannot be determined, losses shall be calculated by total sales and reasonable profit for each patented product. Infringer's profit from infringement may be determined by multiplying total sales of infringing products by their reasonable profit; infringer's profit from infringement is generally determined pursuant to one's business profit; for those entirely in profession of infringement, marketing profit will do. (Art. 20). Limitation of actions against infringement of patent is two years, starting from day when patent owner or interested person knew or should have known of tortuous act. (Art. 23).

19.03 TRADEMARKS:

Trademark Law & Implementation Regulations.

On Aug. 23, 1982, new Trademark Law was promulgated by Standing Committee of National People's Congress, which took effect on Mar. 1, 1983, superseding prior 1963 legislation. New Trademark Law was amended by Standing Committee of National People's Congress on Feb. 22, 1993 and took effect on July 1, 1993. Trademark Law was further revised at 24th Session of Standing Committee of Ninth National People's Congress on Oct. 27, 2001.

Implementation Regulations of Trademark Law were promulgated and became effective as of Mar. 10, 1983 by State Council pursuant to Trademark Law. New Implementation Regulations promulgated by State Council on Jan. 3, 1988 and revised by State Council on July 15, 1993, and further revised on Sept. 15, 2002.

Relevant International Conventions in which China Participates.

Convention Establishing World Intellectual Property Organization; Paris Convention for Protection of Industrial Property; Madrid Agreement concerning International Registration of Marks and related Protocol; Nice Agreement concerning International Classification of Goods and Services for Purpose of Registration of Marks; TRIPS (Agreement on Trade-related Aspects of Intellectual Property Rights).

Trademark Law and Implementation Regulations seek to protect trademarks, service marks, collective marks and certification marks. (Rule 6 of Implementation Regulations). Service marks enjoy same protection as trademarks. (Art. 4).

Procedures for Registration and Administration of Collective Marks and Certification Marks (hereinafter referred to as “Procedures”) were promulgated on Dec. 30, 1994 by State Administration for Industry and Commerce and became effective as of Mar. 1, 1995. (Decree No. 22), and revised by State Administration for Industry and Commerce on June 1, 2003.

Collective mark refers to mark registered in name of society, association or other organization for use in commercial activities by its members and for indication of membership of users. (Art. 3). Certification refers to mark controlled by organization with ability of supervision over particular goods or service and applied to goods or service by unit or individual other than said organization, in order to certify origin, material, mode of manufacture, quality or other particular features of goods or service. (Art. 3). Association and defensive marks are currently absent from Chinese trademark system.

According to provisions of Trademark Law and Implementation Regulations, Trademark Office of State Administration for Industry and Commerce of People's Republic of China (TO of SAIC) is responsible for registration and administration of trademarks throughout country. SAIC shall set up trademark review board to be responsible for handling trademark disputes. (Art. 2).

Right to exclusive use of trademark is established through registration. Any foreign individual or enterprise intending to apply for registration of trademark in China shall file application in accordance with agreements concluded between China and country to which applicant belongs, according to international treaty to which both countries are parties, or on basis of principle of reciprocity. (Art. 17).

Interim Provisions on Claims for Priority in Applying for Registration of Trademarks.

Approved by State Council Mar. 15, 1985, adopts provisions in Art. 24 of Trademark Law and governs acceptance of priority of trademark registration applications in other countries. Claims for Priority in Applying for Registration of Trademarks, which were approved by State Council on Mar. 15, 1985. In 1998, Trademark Office used these provisions in accepting priority of trademarks of European Committee Trademark Directories. Trademark Law states any applicant for registration of trademark who files application for registration of same trademark for identical goods in China within six months from date of filing first application for trademark registration overseas may enjoy right of priority in accordance with any agreement concluded between China, country to which applicant belongs, or according to international treaty to which both countries are parties, or on basis of principle whereby each acknowledges right of priority of other. Anyone claiming right of priority according to preceding paragraph shall make statement in writing when filing application for trademark registration, and submit, within three months, copy of application documents first filed for registration of trademark; where applicant fails to make claim in writing or submit copy of application documents within time limit, claim shall be deemed not to have been made for right of priority. (Art. 24). Where trademark is first used for goods in international exhibition sponsored or recognized by Chinese Government, applicant for registration of trademark may enjoy right of priority within six months from date of exhibition of goods. Anyone claiming right of priority according to preceding paragraph shall make claim in writing when filing application for registration of trademark, submit, within three months, documents showing title of exhibition in which goods were displayed, proof that trademark was used for goods exhibited, date of exhibition; where claim is not made in writing, or proof of documents not submitted within time limit, claim shall be deemed not to have been made for right of priority. (Art. 25).

Foreign individuals or enterprises shall entrust all trademark applications and other trademark matters to trademark agencies specified by State Administration for Industry and Commerce (SAIC) (Art. 18 & Rule 7 of Implementation Regulations) and shall submit Power of Attorney authorizing such entrustments (Implementation Regulations, Rule 7).

In processing trademark registration applications, TMO of SAIC adopts principle of first to file instead of first to use. (Art. 29). Use is considered when similar trademark registration applications are filed by different applicants on same day. (Art. 29). After application passes formalities and substantial examinations of China Trademark Office, it will be preliminarily approved and published in official Trademark Gazette. Any person may, within three months from day of publication, file opposition against trademark. (Art. 30).

Any word, device, or combination of both which is used as trademark shall be so unique as to be differentiated from other marks. (Art. 9). In trademark, following words or devices shall not be used: (1) Those identical with or similar to state name, national flag, national emblem, military flag, or medals of People's Republic of China; (2) those identical with or similar to state names, national flags, national emblems or military flags of foreign countries; (3) those identical with or similar to flags, emblems, or names of international intergovernmental organizations; (4) those identical with or similar to symbols or names of Red Cross or Red Crescent; (5) those relating to generic names or designs of goods to which trademark applies; (6) those having direct reference to quality, main raw materials, function, use, weight, quantity and other features of goods to which trademark applies; (7) those implying discrimination against any nationality; (8) those using exaggeration and/or false information to advertise goods; (9) those detrimental to socialist morals or customs, or having other ill influences upon society.

Names of administrative divisions at or above county level in China and well known foreign geographical names shall not be used as trademarks; however, if trademark using any of former has been approved and registered, it shall continue to be valid. Geographical names having meanings other than designation of place can be used as trademarks. (Art. 10).

Where trademark in respect of which application for registration is filed for use for identical or similar goods is reproduction, imitation or translation of another person's well-known trademark not registered in China, likely to cause confusion, it shall be rejected for registration and prohibited from use. Where trademark in respect of which application for registration is filed for use for non-identical or dissimilar goods is reproduction, imitation or translation of well-known mark of another person that has been registered in China, misleads public, is likely to create prejudice to interests of well-known mark registrant, it shall be rejected for registration and prohibited from use. (Art. 13).

Trademarks approved for registration by Trademark Office are registered trademarks, which include trademarks, service marks, collective marks, certification marks (Art. 3) where two or more natural persons, legal entities or other organizations may jointly file application for registration for same trademark with Trademark Office, jointly enjoy benefits of exclusive use, legal protection. (Art. 5). Registered trademarks are valid for period of ten years from date of registration (Art. 37) and can be extended for another ten-year period upon application six months prior to termination of validity. If no such application is submitted within said period, grace period of six months may be allowed. If approved, registration will be effective for another ten years. (Art. 38). Registered trademark can also be assigned.

Trademark users are responsible for quality of commodities bearing trademarks, and administrative authorities for industry and commerce must supervise quality for said commodities, in order to prevent acts that deceive consumers. (Art. 7).

Symbols of registration (R), or words “registered trademark” should accompany registered trademarks. (Art. 9 & Rule 37 of Implementation Regulations).

Protection of Registered Trademarks.

Following actions are deemed as infringements upon exclusive right of use of registered trademarks (Art. 52): (1) Using trademark that is identical with or similar to registered trademark and applying it to same or similar goods without authorization of registered trademark's registrant; (2) knowingly selling goods bearing counterfeited registered trademark; (3) without authorization, counterfeiting, making or selling representations of registered trademark of another person; (4) replacing registered trademark of another person and putting those goods back into market without authorization of trademark's registrant; (5) harming in any other manner exclusive right of registrant of registered trademark.

Rule 50 of Implementation Regulations clarifies Term 5 of Art. 52 of Trademark Law: (1) Using any word or device identical with or similar to registered trademark of another person as designation or decoration of identical/similar goods, thereby seeking to mislead public; and (2) intentionally providing any person who infringes upon exclusive right of trademark registrant with such facilities as storage, transportation, post service and concealment.

Actions against infringement are initiated by filing complaint with administrative authorities for industry and commerce or with courts.

Supplementary Provisions Concerning Punishment of Crimes of Counterfeiting Registered Trademarks were adopted according to Art. 59 of Trademark Law on Feb. 22, 1993 and took effect on July 1, 1993. These Provisions were included in new Criminal Law in 1997. According to these Supplementary Provisions, serious acts listed in Art. 52 of Trademark Law are deemed criminal acts. If guilty, criminal can be sentenced to up to seven years in prison and/or required to pay fine. Entity crimes and dual punishments (punishments upon entity as well as directly responsible person) are included in these Provisions.

Administrative authority for industry and commerce has power to investigate, handle any act of infringement of exclusive right to use registered trademark according to law; where case is so serious as to constitute crime, it shall be transferred to judicial authority for handling.

(Art. 54). Amount of damages shall be profit that infringer has earned because of infringement in period of infringement or injury that infringee has suffered from infringement in period of infringement, including appropriate expenses of infringee for stopping infringement. Where it is difficult to determine profit that infringer has earned because of infringement in period of infringement or injury that trademark owner has suffered from infringement in period of infringement, court shall impose amount of damages of no more than RMB 500,000 according to circumstances of infringement. (Art. 56).

Anyone who sells goods not knowing it has infringed exclusive right to use registered trademark, is able to prove that it obtained goods legitimately, indicates supplier thereof, shall not bear liability for damages. (Art. 56). Where trademark registrant or interested party who has evidence to show that another person is committing or will commit infringement of right to use this registered trademark, that failure to promptly stop infringement will cause irreparable damages to legitimate rights, interests, one may file application with court to order cessation of relevant act, take measures for property preservation before instituting legal proceedings in court. (Art. 57). To stop infringing acts, any trademark registrant or interested party may file application with court for preservation of evidence before instituting legal proceedings in court where evidence will probably be destroyed or lost or difficult to be obtained again in the future. Court must make adjudication within 48 hours after receipt of application; where it is decided to take preservative measures, measures shall be executed immediately. Court may order applicant to provide bond; where applicant fails to provide bond, application shall be rejected. Where applicant institutes no legal proceedings within 15 days after court takes preservative measures, court shall release measures taken for preservation. (Art. 58).

Procedures of Recording Trademark License Contracts were promulgated in 1997 by SAIC (Decree No. 39) according to which trademark license contract should be recorded in Trademark Office within three months from conclusion of contract. (Art. 4).

Rules for Appraisal of Trademark Reviews.

(Decree No. 20).

Trademark Review and Adjudication Board of State Administration for Industry and Commerce (hereinafter referred to as TRAB of SAIC) is parallel authority to Trademark Office under SAIC. TRAB tries matters concerning trademark reviews through review of written documents, primarily, with exception of those instances set out in Implementation Regulations Rule 33. (Clause 4). TRAB may review Trademark Office's objections of trademark registration applications, trademark oppositions, trademark assignments, trademark renewals, Trademark Office's decision to cancel registered trademark, disputes over registered trademark, request for cancellation of trademarks whose registration is considered improper and other trademark reviews as provided for by law or regulations. (Clause 2).

TRAB shall reexamine its decision if either party of review provides evidence to prove that: (1) Matter subject to decision is beyond scope of TRAB's jurisdiction; (2) review procedures are against provisions of Trademark Law and its Implementation Regulations; (3) evidence upon which decision was based was counterfeited by counter party; (4) counter party withheld evidence capable of influencing just decision.

However, TRAB's decision shall be effective and enforced, until, if applicable, it makes new decision. Unsatisfied party may, using evidence, appeal within one year of review decision's enforcement. (Clause 34).

Recording Procedures of Pawning Exclusive Right of Use of Registered Trademarks, promulgated on May 6, 1997 recognized trademark as type of property. SAIC is recording authority. (Clause 2). To pawn exclusive right of use of trademark, registrant should submit evaluation report of evaluation agent designated by SAIC. (Clause 5).

Regulations on Recognition and Protection of Famous Marks issued on Apr. 17, 2003. Trademark office of SAIC is responsible for identifying and protecting famous marks. “Well-known trademark” refers to trademark which relevant general public is very well aware of and which enjoys high prestige. “Relevant general public” includes consumers who use products or services bearing trademark, merchants who produce above-mentioned products or furnish service and relevant sellers and employees concerned in their business channels. (Art. 2). In determining well-known trademark, following factors will be considered: (1) Degree of knowledge of trademark by members of Relevant General Public; (2) length of use of trademark; (3) length, degree and geographical areas of any publicity of trademark; (4) record for protection of trademark as well-known trademark; and (5) other factors. (Art. 14, Trademark Law). Following documentation may be used as evidence to establish well-known status of trademarks: (1) Documentation to prove extent to which relevant general public is aware of trademark, (2) documentation to prove duration of use of trademark, including history and scope of use and registration of trademark, (3) documentation to prove duration, geographical area and extent to which knowledge of trademark covers, (4) documentation showing record of trademark protected as well-known trademark, in China or other countries and regions, (5) other documentation to prove well-known status of trademark, including output, sales volume, sales income, profit and taxes paid as well as sales areas and so forth of principal products bearing trademark. (Art. 3).

If holder of well-known trademark, whether or not registered in China, determines that others' preliminarily approved or published trademark may cause confusion with its mark, they may file opposition with Chinese Trademark Office and submit evidential documents to prove well-known status of trademark involved. If holder of well-known mark determines that other's registered trademark may cause confusion with its mark, they may request TRAB to cancel registered trademark. (Art. 4 and Art. 13, Trademark Law).

When Trademark Office, Trademark Review and Adjudication Board and local administration for industry and commerce provide protection to well-known trademark, it must consider prominence of trademark and degree to which it is well-known. (Art. 11).

SAIC shall reject any registration application of trademark that is identical with or similar to famous trademark, even if application is filed for goods in different classes. (Art. 13, Trademark Law). Where holder of well-known trademark is of opinion that another person has used mark in registration of enterprise name, and may deceive or confuse public, he may apply to authorities in charge of registration to cancel registration of name of that enterprise. (Art. 13).

Provisions of State Intellectual Property Office on Electronic Patent Application.

State Intellectual Property Office Order No. 35. For purpose of normalizing procedures, requirements for making patent application via Internet in form of electronic files (Electronic Patent Application), these regulations are formulated in accordance with Art. 3, Paragraph 2, Art. 16 of Detailed Rules for Implementation of Patent Law. (Art. 1). To make electronic patent application, Electronic Patent Application System User Registration Agreement (User Agreement) should be signed with State Intellectual Property Office in advance. These provisions are subject to interpretation by State Intellectual Property Office. (Art. 11).

When process of international patent application pursuant to Paragraph 2, Art. 99 of Detailed Rules for Implementation of Patent Law enters into national stage in China, electronic form may be employed for submission of files specified in Art. 101 of Detailed Rules for Implementation of Patent Law. These provisions are not applicable to international patent application made pursuant to Paragraph 2, Art. 99 of Detailed Rules for Implementation of Patent Law at State Intellectual Property Office. (Art. 3).

20 LEGAL PROFESSION

20.01 ATTORNEYS AND COUNSELORS:

See category 5 Civil Actions and Procedure, topic 5.03 Civil Code.

Lawyers Law.

On May 15, 1996 Standing Committee of Eighth People's Congress promulgated “Lawyers Law”, effective Jan. 1, 1997. First amended by 25th session of Ninth Standing Committee on Dec. 29, 2001, effective on Jan. 1, 2002. Further amended by 30th session of Tenth Standing Committee on Oct. 28, 2007 and will take effect on Jan. 1, 2008.

Lawyer as mentioned in this Law refers to practitioner who has acquired lawyer's practicing certificate according to law and accepts authorization or appointment to provide legal services for client. (Art. 2). In practicing law, lawyer must observe Constitution and laws and adhere to professional ethics and practice disciplines of lawyers. In practicing law, lawyer must accept supervision of state, public and client. (Art. 3). Those who support PRC Constitution and meet following requirements may apply for attorney license: (a) Pass uniform national judicial examination; (b) one year of practice in law firm; and (c) good behaviour. Certificate of lawyer qualification acquired before adoption of uniform national judicial examination is equally authentic. (Art. 5). Following people are ineligible to apply for attorney license: (a) Those who have not yet reached age of civil capacity or are mentally incompetent; (b) those who have received criminal penalty, except for criminal negligence; and (c) those who have been discharged from public employment or whose attorney license has been previously revoked. (Art. 7). Lawyer may only practice law in one law firm. Where lawyer changes his firm of practice, he shall apply for replacement of lawyer's practicing certificate. (Art. 10). Person who has not acquired lawyer's practicing certificate may not be engaged in legal service practice as lawyer. (Art. 13).

Law firm should conform to following specifications: (a) Have its own name, office and bylaws; (b) have lawyers consistent with provisions of this Law; (c) promoter must be lawyer with certain practicing experience and does not suffer penalty of cessation of practice within three years; and (d) have assets in amount as provided for by justice administrative authority of State Council. (Art. 14). To form partnership law firm, there must be three or more partners, and promoter must be lawyer with practicing experience of three or more years. (Art. 15). Law partnership may be formed as general partnership or limited liability partnership. Partners of partnership law firm will be liable for debts of law firm as partnership. (Art. 15). To form sole proprietorship law firm, in addition to satisfying conditions of Art. 14, promoter must be lawyer with practice experience of five or more years. Promoter will be liable for debts of law firm. (Art. 16). To form law firm, application must be lodged with justice administrative authority of people's government of city or municipality directly under Central Government, and authority accepting application shall examine application and submit its examination opinions and all application materials to justice administrative authority of province, autonomous region or municipality directly under Central Government within 20 days as of date of acceptance. Justice administrative authority of province, autonomous region or municipality directly under Central Government shall review submissions and make decision on approving or disapproving formation of law firm within ten days as of receiving submissions. (Art. 18). Partnership law firm that has been formed for three years and has 20 or more practicing lawyers may form branch.

For lawyer to undertake practice, law firm must uniformly accept client's authorization and enter into written authorization agreement with client, and uniformly charge fees and enter them into accounts according to provisions of state. Law firm and its lawyers shall pay taxes according to law. (Art. 25). Law firm may not be engaged in business operations other than legal services. (Art. 27).

Personal rights of lawyer in practicing law shall not be infringed upon. Representation or defense opinions presented in court by lawyer shall not be subject to legal prosecution, except statements compromising national security, maliciously defaming others or seriously disrupting court order.

Lawyer must maintain national secrets and trade secrets discovered through practice of law, and may not divulge any confidential information of client, except facts and information on crime compromising national security or public security or seriously endangering bodily safety or property of person, which client or other person prepares to commit or is committing. (Art. 38). Lawyer may not represent both parties in same case, and may not represent client in which he or any close relative has any conflict of interest. (Art. 39).

Following conduct forbidden: establishment of attorney-client relationship outside sponsorship of law firm; exploitation of attorney representation for personal profit; meeting with judges, public procurator or arbitrators involved in attorney's current case, bribing or solicitation of judges, public procurator or arbitrator; presenting false evidence; and disturbing order of court. (Art. 40).

Lawyers who have been judges or prosecutors cannot serve as process attorney or defender for two years following their departure from People's Court or People's Procuratorate. (Art. 41).

Penalties for violating law governing firms include confiscation of illegal income, fines of not more than RMB 100,000, suspension of business or revocation of business license. (Art. 47). Firms damaging clients due to illegal practices or professional negligence must compensate client. Firm involved may then seek compensation from attorney involved. Attorneys and law firms cannot avoid or limit their liability due to illegal practices or professional negligence. (Art. 54).

Attorney Association is social organization as legal person and self-binding organization of attorneys themselves. (Art. 43). Professional code and disciplinary rules made by lawyers' association shall not conflict with relevant laws and administrative regulations and rules. (Art. 46).

Foreign nationals, foreign enterprises and foreign organizations seeking counsel to represent them in litigation in China must employ attorney of PRC, or can entrust private persons to represent them. Foreign lawyers meeting criteria specified in Civil Procedure Law may represent foreign parties in China's courts.

Foreign attorneys recognized by Chinese arbitral law, etc. and in practice foreign firms have been permitted to utilize their counsel in China during business negotiations. American attorneys have offices in Beijing, Shanghai and Guangzhou, etc. Certain American law firms have agreements with local Chinese law firms, which are approved by Provincial Bureau of Justice, for cooperation in legal matters both in China and elsewhere.

Legal Aid.

Rules on Legal Aid were passed by State Council on July 16, 2003, effective on Sept. 1, 2003.

Citizens who meet conditions of Rules can gain legal advice, representation and criminal defense without compensation. (Art. 2). Judicial administrative department of State Council supervises national legal aid work. All Lawyer's Association and local lawyer's associations in China shall assist implementation of these Rules according to constitution of lawyer's associations. (Art. 4). Each judicial administrative department in city or county government determines legal aid organization in its administrative area. Legal aid organization takes responsibilities of examining application of legal aid, assigning or arranging professionals to provide legal aid services to citizens. (Art. 5). Lawyer shall perform legal aid obligation according to Rules and Lawyer's Law. Lawyer shall provide standard legal service, vindicate legal interests of recipient and accept supervision from lawyer's association and judicial administration department. (Art. 6).

Citizen may apply for legal aid to legal aid organization if poor to: (1) Claim state compensation; (2) seek treatment for social security or minimum guarantee of living; (3) claim survivor's pension or relief payment; (4) claim maintenance payment, aliment and cost of support; (5) claim labor compensation; (6) claim civil interests for doing what is righteous. (Art. 10). Citizen may apply to legal aid organization for following items in criminal proceeding: (1) After criminal suspect is questioned first time by investigation unit or is subject to compulsory measures, if suspect cannot afford attorney; (2) from date of removal of case from examining prosecutor, for public prosecution cannot afford attorney; (3) from date of acceptance by court, private prosecutor or its legal agent in private prosecution and cannot afford attorney. (Art. 11). If defendant is blind, deaf or dumb or juvenile has no defender, or defendant has possibility of being sentenced to death and has no defendant who can assist, when designated defendant by court, legal aid organization shall provide aid and it is not necessary in these cases to examine economic condition of defendant by legal aid organization. (Art. 12).

Arts. 17-24 provide provisions specifying qualifying criteria to receive legal aid, designation of attorney, and payment of fees to attorney when case is completed.

Provisions Governing Foreign Law Firms Establishing Offices in China promulgated by Ministry of Justice and State Industrial and Commercial Administration May 26, 1992. Where foreign country permits Chinese law firm to establish office in its territory, in reciprocity China allows foreign law firm from said country to establish office in China according to provisions. (Art. 6). Office of foreign law firm including its members shall observe Chinese laws and regulations, and shall not injure national security of China, social interest and legal interest of Chinese citizens and legal persons. (Art. 4). Provisions have been amended by WTO admission provisions and CEPA regulations for Hong Kong firms.

Establishment and Termination.

Foreign law firm shall file with Ministry of Justice written application directly or refer to Ministry of Justice through Judicial Department (Bureau) at provincial level where prospective office to be located. (Art. 7). Ministry of Justice shall examine application, decide within 60 days whether to approve or reject application and notify applicant. (Art. 7). Applicant shall obtain Certificate of Approval in place and time designated by Ministry within 60 days following date applicant received notice. (Art. 9). Applicant shall register with State Industrial and Commercial Administration within 30 days when Certificate of Approval has been issued. (Art. 9). Where applicant fails to register within designated period, Certificate of Approval shall automatically be nullified. (Art. 9). Office of foreign law firm shall be titled as XX Law Firm XXX (name of city) Office. (Art. 10). Duration of foreign law firm office shall be five years commencing from date when registration certificate is issued, which may be renewed after expiration if approval is given. (Art. 11). Foreign law firm shall assume immediate liability for taxes and debts of its Chinese office. (Art. 14).

Scope of Services.

Foreign law firm, including its members, may render three categories of service (Art. 15): (1) Consultation to clients on law of country where admitted to practice law and relevant international custom and practices; (2) entrustment of legal work by clients or Chinese law firms undertaken in country where admitted to practice law; (3) act as agent for foreign client, and employ Chinese law firms to handle legal affairs in China. Office of foreign law firm including its members shall not act as agent in Chinese legal affairs, interpret Chinese laws and regulations for clients and perform other services that Chinese law prohibits foreigner to engage in. (Art. 16). Pursuant to WTO accession agreement foreign law firms can provide information to clients on Chinese legal environment. Foreign law firm shall not employ Chinese attorneys. (Art. 17). Legal fees for services rendered in China shall be settled in China. (Art. 18). Standard legal fees and billing methods shall be filed with approval authority and registration authority. (Art. 18).

China's agreements with USA and European Union regarding WTO broadened role foreign lawyers may play in providing advice on Chinese law, and expanded number of offices foreign firms may have in China.

Penalties.

Ministry of Justice and its authorized departments (bureaus) of provincial levels may impose warnings, cessation of practice or revocation of approval, etc. in light of seriousness of offense. (Art. 23). State Industrial and Commercial Administration and its authorized local authorities may impose fines, confiscation of illegal income or revocation of registration etc. according to relevant laws and regulations regarding industry and commerce administration. (Art. 23).

21 MINERAL, WATER AND FISHING RIGHTS

21.01 FISHING ZONE:

In 1977 Chinese government announced that it intended to establish 200 nautical mile economic and fishing zone, now, according to PRC Law of Exclusive Economic Zone and Continental Shelf promulgated on June 26, 1998, policy has been implemented. Chinese have given support to present Convention on Law of Sea and if said convention eventuates, that would naturally affect their policy toward this fishing and economic zone. Within South China Sea, Chinese lay claim to large area, including Paracel Islands and much of Spratly Archipelago, consisting of approximately 33 islands, etc. permanently above sea level, over area of 180,000 sq. km. Latter claim is disputed in part by Hanoi, and more recently by Philippines and Malaysia. China's basis for this claim is Chinese presence since Sung dynasty. Nevertheless, Chinese have done little to enforce their claim. Potential petroleum resources in shallow waters of this area make it source of potential dispute.

Fishery Law of People's Republic of China was adopted on Jan. 20, 1986 and came into effect on July 1, 1986, revised on Oct. 31, 2000, and again on Aug. 28, 2004.

Persons regularly engaged in business of breeding or catching aquatic animals and hydrofoils and all other fishery productive activities in inland waters, sand beaches, territorial waters and all other sea areas of People's Republic of China must observe this Law. (Art. 2). State encourages fishery science and technology research. (Art. 4). Foreigners and foreign fishery ships that enter into water areas administered by People's Republic of China and carry on fishery productive activities or fishery resource research activities must obtain permission from State Council's relevant administrative department, must obey this Law, other relevant laws and regulations and treaties and conventions of which Chinese government is party. (Art. 8).

21.02 MINES AND MINERALS:

See category 23 Property, topic 23.10 Property Ownership.

Mineral resources are owned by state (Const., Art. 9) and are exploited by state enterprises or jointly with foreign enterprises.

Taxation of mining activities, see category 24 Taxation, topic Taxes, subhead Resource Tax.

China Mineral Resources Law (hereinafter “Mine Law”) adopted Mar. 19, 1986. Effective Oct. 1, 1986, and amended on Aug. 29, 1996. Mine Law was promulgated to govern exploration and mining of resources in China and within seas areas under its jurisdiction. (Art. 2).

State Council has mine resources ownership as representative of State. State permits reasonable mining. One must apply separately for exploration right and mining right and register these rights before exploring mine resources. Exploration and mining of resources by company must be in accord with stipulated conditions. (Art. 3). State protects legal interests of mining enterprises. (Art. 4). Exploration right and mining right cannot be transferred, except: (1) Exploration right owner can transfer exploration right to another after approval upon completion of stipulated lowest exploration investment; (2) mining enterprises merge or jointly-invest, cooperate with other companies, or sell properties or change equity in any way, and this will cause change of ownership of mining right, mining enterprises can, pursuant to law, transfer mining right to other parties. It is forbidden to sell exploration right and mining right for interest. (Art. 6). State will develop unified plan for exploration and mining, distribute general exploration rights for reasonable mining and general use. (Art. 7). State Geology and Mineral Administration Department (SGMAD) supervises exploration and mining of national mineral resources; district geology and mineral administration departments supervise exploration and mining of district mineral resources. (Art. 11). State sets unified regional registration policy for mine exploration. SGMAD responds to this registration policy. (Art. 12). To set up mining enterprise, qualifications must meet State requirements. Examination and approval organization will examine enterprise on its scope of mining-area, mine design or mining scheme, technology, safety measures and environmental protection measures. If qualified, it will be approved. (Art. 15). Mining enterprises must apply for mining permits. (Art. 16). No enterprise or individuals can mine without SGMAD's approval. (Art. 17). Regional geology investigation shall be carried out according to State unified plan. (Art. 23). Mining enterprises must observe laws and regulations of labor, safety, hygiene and environmental protection. (Arts. 31, 32). Any enterprise assigned by State Council as explorer, cannot sell minerals to non-assigned enterprises. (Art. 34). Law also stipulates related legal obligations for violations. (Arts. 39-49). Foreigners investing in mineral exploration and mining, shall observe laws and regulations. (Art. 50). State Council will stipulate details for implementation of Mineral Law. (Art. 52).

Regulations Concerning the Safety of Mines promulgated by Labor Bureau, Oct. 11, 1996. Effective on date of promulgation. Regulations include general principles, safe construction of mines, handling of mine accidents, legal responsibility and supplementary articles.

China Coal Law (hereinafter “Coal Law”) promulgated Aug. 29, 1996. Effective Dec. 1, 1996. Coal Law governs production of coal and operating activities of coal mines in China. (Art. 2).

Coal resources are owned by State. (Art. 3). States principle of unified planning, rational geographical distribution and comprehensive utilization of coal. (Art. 4). State Coal Administration Department (“SCAD”) is authorised to supervise management of national coal fields. (Art. 12). SCAD organizes compiling and execution of coal development plan in accordance with national mineral resources plan. District coal administration departments of Provinces, self-governed zones and cities directly governed by State Council organize compiling and execution of district's coal development plan and report to SCAD. (Art. 15). Application to SCAD for setting up coal enterprise must be made. Geology and Mineral Administration Department will issue mining permit to coal enterprises approved by SCAD. (Art. 19). No enterprise can produce coal without production license. (Art. 22). Coal production permit cannot be transferred to others. (Art. 25). Coal production permits will not be issued for same mining area. (Art. 26). State protects mining of special or rare coals which are important to national economy. (Art. 28). Coal products quality shall be classified by State standard or industry standard. (Art. 30).

Coal enterprises which have been issued coal production permit are entitled to sell coal which they produced. (Art. 46). Other enterprise shall apply for business license from administration for industry and commerce before engaging in coal sales. (Art. 48). Coal mining enterprises must sell to consumer directly. (Art. 50). State Price Administration Department, SCAD and related departments supervise price of coal. (Art. 52). Import and export of coal shall be managed in accordance with State Council stipulations through system of unified control. (Art. 56).

Coal administration departments and related departments control and supervise execution of Coal Law and regulations for coal enterprises. (Art. 63). Above departments are entitled to require coal enterprises to correct violations. (Art. 66). Coal Law stipulates punishments for violation of above regulations. (Arts. 67-80).

21.03 OFFSHORE OIL EXPLOITATION:

See categories 2 Business Organizations, topic Joint Stock Companies; Taxation, topic Tax Incentives and Exemptions.

22 MORTGAGES

22.01 MORTGAGES:

Both Shenzhen and Guangzhou have enacted legislation to provide procedures for mortgages on real property. Guangzhou City Law on Handling of Mortgages of Real Property, enacted and effective as of June 6, 1990 provides regulations for handling mortgages in City of Guangzhou (Canton); and requires domestic mortgage lender to be licensed by central bank. (Art. 2). Mortgages and mortgage agreements must be notarized and registered with city land bureau.

See category 8 Debtor and Creditor, topic 8.07 Guaranty Law, subhead Mortgage.

See also category 8 Debtor and Creditor, topic 8.10 Liens.

Mortgages on real property are now available throughout China; have greatly facilitated home ownership by citizens of China.

23 PROPERTY

23.01 ABSENTEES:

See category 5 Civil Actions and Procedure, topic 5.03 Civil Code.

23.02 CURTESY:

This institution is unknown in law of China.

23.03 DEEDS:

See topic 23.10 Property Ownership.

Chinese use of official seals, individual seals and organizational seals on documents, including conveyances, is common, generally required as only effective means of making document, like conveyance, legally binding.

23.04 DOWER:

This institution is unknown in contemporary Chinese law.

23.05 ESCHEAT:

See category 13 Estates and Trusts, topic 13.02 Descent and Distribution.

23.06 LANDLORD AND TENANT:

See category 5 Civil Actions and Procedure, topic 5.03 Civil Code.

In past, most urban citizens obtained local housing from government or entity-owned units at fixed rentals which were quite low. In past ten years, this has substantially changed with many urban Chinese purchasing homes for personal use or rental. Private owners of dwellings or apartments may lease them. Foreigners, previously limited to housing approved for foreign use, are now free to rent homes for personal residence. Foreign diplomats and consuls obtain premises through negotiations, with approval and assistance of relevant Foreign Affairs offices and Ministry of Foreign Affairs. Foreign commercial entities lease offices through individual negotiations with private parties.

Property Lease.

See topic 23.11 Real Property.

Contract Law of People's Republic of China was adopted at 2nd Session of Standing Committee of 9th National People's Congress on Mar. 15th, 1999, effective as of Oct. 1, 1999.

Lease Contract.

Period of lease must not be more than 20 years. Parties may renew lease after expiry of initial term. Renewed lease must not be more than 20 years. (Art. 214). Contract must be in writing if lease period is longer than six months. (Art. 215). Lessor shall transfer property to lessee and ensure it is fit for use in accordance with lease contract. (Art. 216). Lessor has duty to maintain and repair property unless parties have agreed otherwise. (Art. 220). Lessee shall use property in way according to lease agreement. (Art. 217). Lessee bears no liability on natural wear and tear. (Art. 219). Lessee may sublease property with lessor's permission. Lessee is liable to lessor for loss and damages caused by sublessee. (Art. 224). Lessee may enjoy profit from leased property. (Art. 225). Transfer of ownership shall not terminate lease. Landlord shall give tenant sufficient notice before sale of leased real property. Tenant has preemptive right to purchase on same conditions. (Art. 230). Tenancy at will may be terminated with reasonable notice. (Art. 232). If defect in leased property impairs lessee's safety and health, lessee may terminate lease even if lessee signed lease with knowledge about defects. (Art. 233). If tenant dies during period of lease, cohabitant on same property may continue to use real property in accordance with original lease contract. (Art. 234).

23.07 PERPETUITIES:

No limitation on disposition of property comparable to common law rule against perpetuities exists in China. Land usage can be assigned in perpetuity or for fixed term of years. When time limit for land usage is expired, it may be extended.

23.08 PERSONAL PROPERTY:

See topic 23.10 Property Ownership.

23.09 POWERS OF ATTORNEY:

See category 5 Civil Actions and Procedure, topic 5.03 Civil Code.

Representation by agent is generally permitted and some standard form Chinese contracts are drafted with agent as executing entity. Agent may not be bound if he clearly is not principal to contract. Power of attorney must be in writing and may have to be notarized at times before Chinese entity like embassy or consulate.

Power of Attorney.

To entrust another to represent one in litigation, one must present written power of attorney to court, containing signature or seal of individual entrusted. Power of attorney must specify matter and scope and time limit of such authority. Specific authority required for attorney in fact to confirm, relinquish, or modify claim or to reach compromise or to file counterclaim or appeal. (Civ. Pro. Code, Art. 59). Power of attorney to represent citizens of China living out of China must be attested to by Chinese embassy or consulate in that country or, if none, by patriotic overseas Chinese organization. (Civ. Pro. Code, Art. 59). Parties required to inform court in writing of any change to or revocation of power of attorney and court will in turn inform other parties. (Civ. Pro. Code, Art. 60). Divorce cases require presence of parties even though power of attorney issued, unless special circumstances. (Civ. Pro. Code, Art. 62). Foreign nationals or stateless persons not residing in China who mail Chinese attorneys powers of attorney must have said power of attorney notarized by notary public in their country and authenticated by local Chinese embassy or consulate. (Civ. Pro. Code, Art. 242).

23.10 PROPERTY OWNERSHIP:

See categories 5 Civil Actions and Procedure, topic Civil Code; Introduction, topic Government and Legal System.

PRC promulgated landmark Property Law (PL) on Mar. 16, 2007, effective Oct. 1, 2007. Law protects rights in rem: ownership, usufructary, and security rights. It consists of 5 volumes comprising 247 articles.

PL confirms three main types of ownership in China: (1) State ownership of real property and public parts of the economy, (2) collective ownership, and (3) individual private ownership. Art. 3 provides, “During the initial stage of socialism, the state upholds a basic economic system in which the public ownership system has primacy and multiple ownership systems develop in tandem.” Significantly, Art. 6 further provides, “The creation, change, transfer, and extinguishing of rights in rem over immovable property shall be subject to registration in accordance with the law. The creation and transfer of rights in rem over movable property shall be delivered in accordance with the law.” Basic division of ownership and respective rights protected by PRC Constitution.

Arts. 45 through 52 specify assets owned by State; Arts. 58 and 59 specify assets owned collectively, and (3) Arts. 64 and 65 specify assets owned by private individuals. State protects right of succession and other lawful rights and interests of individuals according to law. (Art. 65). Property of collective organizations including land, forests, mountain ranges, pastures, wasteland and beaches specified in law to be collectively owned; including buildings, reservoirs, farms and water conservancy facilities and facilities for education, science, culture, hygiene and physical education. Collectively owned land is that collectively owned by villagers and farmers and operated and managed by village committees or village agricultural production cooperatives. State owns mineral reserves, watercourses, territorial seas, land in urban areas, natural resources, wild flora and fauna, radio spectrums, cultural relics, national defence assets, and all essential infrastructure.

Property may be owned by two or more citizens or legal persons. Two types of joint ownership are joint ownership pursuant to shares and common joint ownership. Where joint ownership is pursuant to shares person enjoys rights and benefits of that ownership relative to respective shares owned, and has right to subdivide or transfer said shares, though other joint owners have preemptive rights on same terms and conditions offered third parties.

Private ownership of stock in joint venture corporations and assets of other business ventures by foreigners is protected by statute, e.g. Joint Venture Law, treaty, e.g. Trade Agreement between U.S. and China, and by contract and guarantees of government entities or

Bank of China, e.g. compensation trade agreements guaranteed by Bank of China, and Const. Art. 10; Amendment to Const. 1988, Art. 2. Various localities in China are now selling foreign entities right to use land for specific periods e.g. 50 years.

In addition, long term interests in use of land, including perpetual interests in said use can be acquired by individuals for their homes and collective unit for collective purposes, as well as by urban organizations. In countryside farmers are protected in farming private plots of land (Const., Art. 8; Amendment to Const. 1993, Art. 6, Amendment to Const. 1999, Art. 15); in keeping livestock in pastoral areas for their own need (Const. Art. 8; Amendment to Const. 1993, Art. 6, Amendment to Const. 1999, Art. 15); and in engaging in household sideline production (Const., Art. 7; Revised Const. Art. 9). Additionally, pursuant to central directive #75 issued on Sept. 29, 1980, on Progressively Strengthening and Improving Agricultural System of Responsibility, Chinese agriculture policy has devolved greater responsibilities on individuals and households for piece of land, which although owned by State or collective, nevertheless was contracted to farmer for increasingly lengthy periods of time. Free market in agriculture is now quite extensive throughout China.

General Provisions of Criminal Code (Art. 2) state that it protects rights of ownership of citizens to their lawful property. Art. 36 of Code states that those whose criminal acts cause economic loss to persons, aside from criminal punishment, will be required, according to circumstances, to make compensation for said loss.

23.11 REAL PROPERTY:

See topic 23.10 Property Ownership; categories 5 Civil Actions and Procedure, topic Civil Code; Foreign Trade and Commerce, topic Trade Zones.

Land Administration.

Land Administration Law was adopted at 16th Session of Standing Committee of Sixth National People's Congress on June 25, 1986; amended at Fifth Session of Standing Committee of Seventh National People's Congress on Dec. 29, 1988; amended at Fourth Session of Standing Committee of Ninth National People's Congress on Aug. 29, 1998, effective as of Jan. 1, 1999; and amended at 11th Session of Standing Committee of Tenth National People's Congress on Aug. 28, 2004. It provides that land in China adopts social public ownership policy, namely, ownership by all people and by collectives. (Art. 2). State Council exercises right of land ownership for PRC.

PRC Property law 2007, supra, specifies rights: state, collective, and individual. LAL must be read in conjunction with this law.

State may, in public interest, expropriate or requisition land owned by collectives under law, but must pay compensation accordingly.

Right of use of land owned by State and collectives may be transferred legally. State shall devise system for paid use of land owned by State. (Art. 2).

Land Administration Department under State Council is subject to Government for State-owned land. (Art. 5). State adopts controlled land use system, classifying land into agricultural land, land for construction and unused land. Using agricultural land for construction purpose is strictly limited. (Art. 4).

Interim Regulations Governing Assignment and Transfer of Right to Use of State-Owned Land in Urban Areas were promulgated by State Council on May 19, 1990. See http://www.fdi.gov.cn/pub/FDI_EN/Laws/GeneralLawsandRegulations/AdministrativeRegulations/P020060620321751714470.pdf.

Interim Measures for Administration of Foreign-Invested Development and Management of Tracts of Land were promulgated by State Council on May 19, 1990 to attract foreign investment for development and management of tracts of land (hereinafter “tract development”).

Law of China concerning Administration of Urban Real Estate was adopted by National People's Congress on July 5, 1994, effective as of Jan. 1, 1995, and amended at 29th Session of Standing Committee of Tenth National People's Congress on Aug. 30, 2007, effective on same day.

Granting of Land Use Rights.

State may grant rights to use State-owned land to users for certain period, and land users must pay State fees for using land. (Art. 8). Collectively owned land within urban planning zones can be granted to land users for fee after it has been requisitioned and turned into State-owned land. (Art. 9). Grant of land use rights must comply with overall land use plan, urban plan and annual construction land use plan. (Art. 10).

Allocation of Land Use Rights.

Refers to act of, upon approval of people's government at or above county level according to law, providing user with land to use, with or without payment of fees as compensation or resettlement. (Art. 23). Land use rights obtained by allocation must not be subject to definite term unless otherwise provided by laws and regulations. People's government at or above county level may allocate land use rights for following construction lands: (1) Land used by State organs or military; (2) land used for construction of urban infrastructures and public utilities; (3) land used for construction of key State-supported energy, communications, and water projects; and (4) land used for other purposes as stipulated by laws and regulations. (Art. 24).

Real estate development must be undertaken in strict compliance with city plan and principle of balancing economic, social and environmental results, and policy of overall planning, rational layout, comprehensive development and balanced construction of all necessary coordinate facilities. (Art. 25). Those who acquire land use rights through granting must develop land in accordance with contract. If they fail to start development more than one year after commencement date as specified in contract, idle land fee of less than 20% of land use right grant fee may be levied; if they fail to start for two years after commencement date, land use rights may be recovered without any compensation, penalties will not apply if delays are caused by force majeure or acts of government, or necessary preparatory work. (Art. 26). Design and construction of real estate development project must comply with State standards and guidelines. No project may be put into use without inspection after completion. (Art. 27).

Real estate development enterprise refers to enterprise engaged in development and operation of real estate for purpose of profit. To establish real estate enterprise, following requirements must be satisfied: (1) Having own name and organization; (2) having fixed site for business operations; (3) registered capital is in conformity with provisions of State Council; (4) sufficient professionals and technical personnel; and (5) other requirements as may be provided by laws and regulations. (Art. 30).

Ratio between registered capital and total investment of real estate development enterprise must be in conformity with relevant provisions of State. If project is developed in stages, amount of investment for each stage must match scale of that stage, and such funds must be put into construction according to schedule specified in contract. (Art. 31).

Real Estate Conveyance.

Refers to act by which right holder transfers his real estate to others by sales, gift, or by other means. (Art. 37). Real estate may not be assigned if: (1) Land use rights obtained through grant, and does not meet requirements for assignment as specified below; (2) rights restricted by rulings of judicial organs or administrative authorities; (3) land use rights which have been recovered according to law; (4) there is no written consent from other right holders of share real estate; (5) ownership and title at issue; (6) certificates of ownership and registration have not been granted; and (7) there are other conditions, as specified in laws and regulations. (Art. 38).

Land use rights obtained through grant may be assigned if: (1) Prices of land use rights grant fee has been paid in full and land use right certificate has been issued; and (2) in case of investment development, if housing construction project, total development investment volume has reached at least 25% or if tract land development project, conditions for industrial use or other construction purposes have been met. (Art. 39).

Written contract must be executed for conveyance. (Art. 41). When real estate is transferred, all rights and obligations explicitly specified in land use rights grant contract will be transferred accordingly. (Art. 42). If land use rights obtained by grant, term of land use rights after transfer is remainder of original term less period used by original land user. (Art. 43).

Real Estate Mortgage.

Ownership right of premises legally acquired and land use rights within limits of use may be mortgaged. Land use rights obtained through grant may be mortgaged. (Art. 48). Mortgage must be subject to written contract. (Art. 50). After execution of mortgage contract, buildings subsequently added to land must not be subject to mortgage. If it is necessary to sell mortgaged property, said new buildings may be sold at same time according to law, however, mortgagee enjoys no priority right to proceeds resulting from sale of said buildings. (Art. 52).

Property Leasing.

Lessor and lessee must enter into written contract which specifies term of lease, purpose, rental, responsibility for maintenance as well as other rights and obligations. Lease contract must be filed with housing administration department for record. (Art. 54). Residential lease is subject to policies of State and urban people's government in place where premises is located. Rental for commercial lease is subject to negotiation between lessor and lessee. (Art. 55).

Real Estate Registration.

Land use rights and premises ownership are subject to registration. For land use right acquired through grant or allocation, application must be filed at land administration department of local people's government at or above county level. People's government at same level will issue certificate. (Art. 61). Real estate mortgages are also subject to registration with local people's government at or above county level. (Art. 62).

Regulations Governing Real Estate Development and Operation in Urban Areas were promulgated by State Council on July 20, 1998, effective as of same day.

Enterprise of Estate Development.

Establishment of real estate development enterprise must meet following: (1) More than RMB 1,000,000 registered capital; (2) more than four full-time technicians in real estate or construction with qualification certificates; and (3) more than two full-time accountants with qualification certificates. Local governments of provinces, autonomous regions and municipalities directly under central government may adopt their own regulations prescribing higher minimum limit on registered capital and numbers of technicians and accountants. (Art. 5).

Relevant authorities determine rank of enterprises' qualification based upon assets, performance and technicians. Enterprises undertake real estate development according to their qualifications. (Art. 9). Setting up foreign-capital or joint venture real estate development enterprise requires formalities in accordance with Chinese laws and regulations relevant with foreign investment. (Art. 6).

Real Estate Development.

Land for real estate development must be obtained by grant unless it may be obtained by allocation according to laws or regulations. (Art. 12).

During real estate development, capital fund shall be no less than 20% of entire investment. (Art. 13).

Enterprise must record progress of real estate development and file reports with relevant authorities for reference. (Art. 19).

Real Estate Management.

Transfer of real estate development project is regulated by Arts. 38 and 39 of Law of China on Administration of Urban Real Estate. (Art. 20).

Enterprise must fulfill following conditions before presale of commercial real property: (1) Enterprise has paid fee for land use rights and obtained certificate of land use right; (2) enterprise has obtained certificate of construction plan permit and certificate of construction permit; (3) investment of construction of commercial real property for sale in advance is more than 25% of total investment of whole construction and construction period and date of completion have been determined; and (4) enterprise has registered for presale and obtained permit. (Art. 23). To obtain presale permit, enterprise must prepare following documents: (1) Business license; (2) construction contract; (3) floor chart of commercial real property for sale in advance; and (4) presale plan. (Art. 24).

Contract of sale of commercial real property must be in writing. (Art. 28). Enterprise must provide quality guarantee and instruction for users. (Art. 31). If inspection by quality supervision authority determines that main structure of sold property does not meet quality standard, buyer may demand refund. Enterprise must pay for any other damage caused by defects in main structure. (Art. 32).

Regulations Governing Usage in Rural Land.

Law on contracting rural land was promulgated at 29th Session of Standing Committee, Ninth National People's Congress Aug. 29, 2002, effective as of Mar. 1, 2003.

Rural land refers to cultivated land, woodland, grassland and other land for agricultural purposes owned by collectives or State and exploited by agricultural economic collectives. (Art. 2). State practices system of contracting for operation of rural land. (Art. 3). Contracting of rural land is done with households within economic organizations of collectives. Other rural land such as ditches, waste hills, waste valleys and waste beaches, which are not suitable for household contracting, may be contracted by bid, auction or public negotiations. (Art. 3). State protects long-term stability of relationship of contracting of rural land, but nature of ownership of land must not be changed, and contracted land must not be sold during contracting period. (Art. 4). State protects legal, free and compensatory transference by land contractors' right of managerial authority on contracted land. (Art. 10).

Collectively owned land by village farmers can only be let by collective economic organization of village, villager's committees. (Art. 12).

Contract-issuing party has following rights: (i) Letting rural land owned by collective units or State; (ii) supervision of contracting party to reasonably utilize, and protect land in accordance with contract; (iii) prohibition of contracting party to do harm to contracted land or agricultural resources; and (iv) other rights prescribed by laws or administrative regulations. (Art. 13).

Contract-issuing party undertakes following obligations: (i) maintenance of contractors' managerial authority on contracting of land, prohibition of modification and termination of contract illegally; (ii) holding contractors' right of productive and managerial authority in estimation, prohibition of interference of contractors' legal production activities; (iii) providing services of production, technology and information in accordance with contract; (iv) execution of county and township's general planning on utilization of land, organization of agricultural infrastructure construction within spheres of collective economic unit itself; (v) other obligations prescribed by laws or administrative regulations. (Art. 14).

Party undertaking contracting by household must be farmer of collective economic unit itself. (Art. 15).

Contract-undertaking party has following rights: (i) Enjoying rights of using and making profit from contracted land, transferring contracted management rights on contracted land, having rights to organize operation and production and handle products; (ii) enjoying right to reasonable compensation if contracted land is lawfully requisitioned or used for non-agricultural construction; and (iii) other rights prescribed by laws or administrative regulations. (Art. 16).

Contract-undertaking party undertakes following obligations: (i) Maintaining agricultural purposes of contracted land; (ii) protecting and using contracted land legally and reasonably; and (iii) other obligations prescribed by laws or administrative regulations. (Art. 17).

Contracting of land must comply with following principles: (i) Members of collective economic unit have equal right to contract land or abandon right of contracting of land voluntarily; (ii) contract must be undertaken through democratic consultation, fairness and reasonableness; (iii) projects for contracting must be agreed to by more than two-thirds of members of villagers' assembly or of representatives of villagers of collective economic unit; and (iv) contracting procedures must be lawful. (Art. 18).

Contracting term of cultivated land is 30 years; contracting term of grassland is 30 to 50 years. Contracting term of woodland is 30 to 70 years. (Art. 20). Local people's government at or above county level is responsible for issuing certificate of right to contracted land and certificate of forest right to contract-undertaking party, and make registration of such certificates. (Art. 23).

After contract becomes effective, contract-issuing party shall not modify or terminate contract because of change of person in charge of contract or of separation or merger of collective economic units. (Art. 24).

Neither State organizations nor its staff may take advantage of their authority to interfere in contracting of rural land or modify and terminate contracts. (Art. 25).

Contract-issuing party may not reclaim contracted land during term of contract. (Art. 26). Rights to operate land gained from household contracts may be leased, exchanged, sub-contracted, transferred or circulated in other forms. (Art. 32). Contract-issuing party must not terminate contract unilaterally. (Art. 35). Parties may settle with each other through consultation, or through mediation by villager's committee or township people's government when disputes occur. If consultation or mediation fails, parties may apply for arbitration or file action in court directly. (Art. 51).

24 TAXATION

—Scope —

See categories 2 Business Organizations, topic Joint Stock Companies; Foreign Trade and Commerce, topics Trade Zones, Investment Incentives; Property, topic Property Ownership; Transportation, topic Aircraft.

24.01 INTRODUCTION:

New Legislation.

As early as 1992, China took major step to unify its tax system adopting Law Concerning Tax Administration (hereinafter "Tax Law") on Sept. 4, 1992, effective as of Jan. 1, 1993; Regulations for Implementation of Tax Law (hereinafter "Tax Regs.") were promulgated by State Council on Aug. 4, 1993, effective as of date of its promulgation. All taxes collected by tax authorities, including levying, cessation of levying, reduction, exemption, refund and payment of overdue taxes are governed by Tax Law and Tax Regs., with exception of customs duty, vessels tonnage and other taxes collected by customs. (Tax Admin. Law, Arts. 2, 3, and 58; Tax Regs., Art. 2).

Income Tax (Individual and Enterprise).

Noteworthy changes were witnessed in income tax law. National People's Congress amended Law of China Concerning Individual Income Tax (hereinafter "Individual Tax Law") of Sept. 10, 1980, on Oct. 31, 1993, effective Jan. 1, 1994, for second time on Aug. 30, 1999 and for third time on Oct. 27, 2005. In accordance with amendment, Individual Tax Law applies to both Chinese and foreign taxpayers. It supersedes Interim Regulations Concerning Individual Income Readjustment Tax promulgated by State Council on Sept. 25, 1986; and Interim Regulation Concerning Income Tax for Urban and Rural Individual Industrial and Commercial Households promulgated by State Council on Jan. 7, 1986, which applied solely to Chinese taxpayers. On Jan. 28, 1994, State Council promulgated Implementing Regulations of Individual Income Tax Law (hereinafter "Individual Tax Regs."), and amended on Dec. 19, 2005.

In addition, State Council promulgated Interim Regulations concerning Enterprise Income Tax (hereinafter "Enterprise Tax Regs. 11") on Dec. 13, 1993, effective as of Jan. 1, 1994. Enterprise Tax Regs. apply to all enterprises within territory of China regardless of their ownership, excluding foreign funded enterprises and foreign enterprises. It supersedes Regulations Concerning Income Tax on State Owned Enterprises (Draft), Rules Concerning Readjustment Tax for State Owned Enterprises promulgated by State Council on Sept. 18, 1984, Interim Regulations of China Concerning Tax on Collective Enterprises promulgated by State Council on Apr. 11, 1984, and Interim Regulations Concerning Income Tax on Private Enterprises promulgated by State Council on June 25, 1988. Enterprises supplying heating were given exemption from taxes on land use, house property taxes from Jan. 1, 2004 to Dec. 31, 2005.

On Mar. 16, 2007, new Enterprise Income Tax Law was adopted at 5th Session of 10th National People's Congress of PRC, and will take effect on Jan. 1, 2008. New Law will supersede Enterprise Tax Regs. 11, and Income Tax Law for Enterprise with Foreign Investment and Foreign Enterprises. Law will unify dual tax system and treatment of domestic and foreign businesses, removing many of benefits enjoyed by foreign companies in China.

Turnover Tax.

Radical changes were made in turnover tax. On Dec. 13, 1993, State Council promulgated package of turnover tax regulations, i.e., Interim Regulations of China Concerning Value-added Tax (hereinafter "Value-added Tax Regs."), Interim Regulations of China Concerning Land Value-added Tax (hereinafter "Land Tax Regs."), Interim Regulations of China Concerning Business Tax (hereinafter "Business Tax Regs.") and Interim Regulations of China

Concerning Consumption Tax (hereinafter "Consumption Tax Regs."), which were put into effect on Jan. 1, 1994. These regulations apply to all taxpayers. In addition, National People's Congress adopted Decision Concerning Application of such Interim Regulations Regarding Tax as Value-added Tax Regs., Consumption Tax Regs. and Business Tax Regs. to Foreign Funded Enterprises and Foreign Enterprises (hereinafter "NPC Decision") on Dec. 29, 1993, effective as of its promulgation. According to NPC decision, foreign taxpayers are governed by Regulations specified above; therefore Regulations Concerning Uniform Industrial and Commercial Constituted Tax (Draft) promulgated by State Council on Sept. 13, 1958, were repealed. Subsequent to promulgation of foregoing regulations, Ministry of Finance formulated and released detailed rules on Dec. 25, 1993, for implementation of these regulations i.e. Detailed Rules for the Implementation of Value-added Tax Regs. (hereinafter "Value-added Tax Rules"), Detailed Rules for Implementation of Business Tax Regs. (hereafter "Business Tax Rules") and Detailed Rules for Implementation of Consumption Tax Regs. (hereinafter "Consumption Tax Rules"). State Tax Bureau issued Provisions Concerning Use of Special Invoices for Value-added Tax (for trial implementation), which was put into effect on Jan. 1, 1994. Ministry of Finance and State Administration of Taxation jointly issued "Notice on Adjustment of Consumption Tax Policy" on Mar. 20, 2006 ("Consumption Tax Notice"), designed to control consumption of energy and natural resources and to narrow gap between rich and poor in China.

24.02 BUSINESS TAXES:

Taxpayers.

Any entity or individual providing certain category of services, or transferring certain intangible assets or selling immovable property, must pay business tax. (Business Tax Regs., Art. 1). Services which are subject to business tax include: communication, transportation, construction, banking, insurance, postal services, telecommunication, cultural and sporting events, entertainment, and service trades including, but not limited to, agency, hotels, catering, tourism, storage, leasing and advertising business. (Business Tax Regs., Art. 2, Business Tax Schedule). Foreign funded enterprises and foreign enterprises engaged in activities specified above must also pay business tax. (Business Tax Regs., Art. 15, NPC Decision, Art. 1).

Tax Rate.

Flat tax rate is employed by business tax but specific tax rate varies from trade to trade. (Business Tax Regs., Art. 2). For communication, transportation, construction, post and telecommunication, and culture, sports, tax rate is 3%. As to banking, insurance, service trades, transfer of intangible assets and sale of immovable property, tax rate is 5%. Business tax rates for entertainment industry are higher, ranging from 5% to 20%. Business Tax Regulations empower governments in provinces, autonomous regions and municipalities directly under central government to formulate specific tax rates within prescribed range for various entertainment trades. (Business Tax Regs., Art. 2). Should taxpayer deal in two or more taxable items, business volume of different category of taxable items must be separately calculated. If business volume is not separately calculated, highest tax rate, of whichever item must be applied. (Business Tax Regs., Art. 3).

Tax Calculation.

Business tax is based on business volume multiplied by relevant tax rate. (Business Tax Regs., Art. 4). Business turnover is calculated in local currency, i.e. RMB. Should taxpayer conduct its business in foreign currencies, it must be converted into RMB according to exchange rate prevailing in foreign exchange market. (Business Tax Regs., Art. 4). Taxpayer is entitled to choose either exchange rate of day when business volume occurs or that of first day of same month. (Business Tax Rules, Art. 16). Selected exchange rate must be used for one year. (Business Tax Rules, Art. 16). Taxable business volume of taxpayer shall include total business costs incurred and fees collected from providing taxable services, transferring intangible assets and selling immovable property. (Business Tax Regs., Art. 5). In principle, no deductions are allowed for business volume, however, under following circumstances, deductions are allowed: (1) Where transportation or travel entity transports goods or carries passengers or arranging for tours originating from China to destinations outside of China and engages another entity in transporting those goods or carrying those passengers outside China, taxable business volume will be total amount for entire transaction minus those fees paid to latter carrier; (2) where contractor subcontracts its project to others, taxable business amount will be remaining sum of total price of contract minus fees paid to subcontractors; (3) for sub-loan business, taxable business volume will be remaining sum of interest on loan minus interest paid to prior lenders; (4) for buying and selling foreign exchange, securities, futures trading, taxable business will be sum remaining of selling price after deducting purchase price; (5) other circumstances provided by Ministry of Finance.

Tax Exemption.

Should taxable business volume of taxpayer fall below minimum business tax threshold, it will be exempt from business tax. (Business Tax Regs., Art. 8). Business Tax Regs. specify six categories of services which will be exempt from tax (Business Tax Regs., Art. 6), namely: supporting services provided by nurseries, kindergartens, organizations for disabled and aged, services provided by disabled, medical services by hospitals, clinics and other medical institutions, educational services by schools and other education institutions, agricultural services and revenues from entrance tickets of public welfare organizations. Should taxpayer deal in two or more tax exempt or tax-reduced items, taxable business volume of each item must be separately calculated, otherwise no tax exemption or tax reduction will be permitted. (Business Tax Regs., Art. 7).

Tax Authority.

Business tax will be collected by tax authority. (Business Tax Regs., Art. 10). Where taxpayer provides taxable services, it must pay tax to local competent tax authority where services are rendered. (Business Tax Regs., Art. 12). If taxpayer engages in transportation, it must pay tax to local competent tax authority where its organization is located. Where taxpayer sells land use rights, it must pay tax to local competent tax authority where land is located. Where taxpayer transfers other intangible assets, it must pay taxes to competent tax authority where its organization is located. Where taxpayer sells property, it must pay tax to competent tax authority where immovable property is located. (Business Tax Regs., Art. 12).

Invoice.

Regulations for Control of Invoice promulgated by Ministry of Finance, Dec. 23, 1993. Effective on date of promulgation. At same time, interim Regulations for the Control of Invoices were repealed. Detailed Rules for Implementation of the Regulations for Control of Invoice Management were issued Dec. 28, 1993. Effective on that date.

Invoice Control Measures provides that, term Invoice refers to certificates of payment or receipt of money made out or received in purchase and sale of goods, provision or acceptance of services, and in other business activities. (Art. 3).

State Administration of Taxation takes overall responsibility for control of invoices. Branches of State Administration of Taxation and local tax bureau of provinces, autonomous regions and municipalities must make joint efforts to maintain control of invoices in their respective administrative regions. (Art. 4).

Invoices shall be printed by enterprises appointed by tax authorities of province, autonomous regions and municipalities. Special invoice for value-added tax shall only be printed by State Administration of Taxation. Printing, forgery and revision of invoices without permission is prohibited. (Art. 7).

All units and individuals who perform tax registration according to law shall, upon receiving tax registration certificate, apply to acquire three invoices from respective tax authorities. (Art. 15).

Units and individuals engaged in sale of goods, provision of services and other business activities must issue invoices to payers when collecting payment for business activities. However, under some special circumstances, payers can issue invoices to payees. (Art. 20). Units and individuals engaged in production and business activities should obtain invoices from purchasers for payments made in purchasing commodities, accepting services and taking part in other economic activities. Upon receipt of invoice, they should not ask for alteration of name of article and amount of payment. (Art. 22). Invoices and all duplicates must be issued column by column, in strict accordance with time limits stipulated in regulations and be stamped with unit's stamp of financial department or special stamp for invoices. (Art. 23). No unit or individual can lend, transfer or issue invoices on other units or individual's behalf. Without prior approval from tax authorities, they cannot use invoice by tearing invoice books apart, nor expand scope of usage of special invoices. Illegal sales or purchasing of invoices, stamps for supervision of printing of invoices and anti-forgery devices for invoices are prohibited. (Art. 25).

Units and individuals issuing invoices shall establish system for use and registration of invoices, prepare invoice register and report to respective tax authorities on use of invoices at regular intervals. (Art. 29). Units and individuals issuing invoices should, in accordance with regulations of tax authorities, store and keep invoices and not destroy invoices without authorisation. Stubs of invoices should be kept for five years. Upon completion of period, invoices may be destroyed after examination by relevant tax authorities. (Art. 30).

24.03 CONSUMPTION TAXES:

Taxpayers.

Any entity or individual producing, manufacturing on commission basis or importing consumer goods prescribed by Consumption Tax Regulations (hereinafter “taxable consumer goods”), must pay consumption tax. (Consumption Tax Regs., Art. 1). Same applies to foreign-funded enterprises or foreign enterprises engaged in activities specified above. (Consumption Tax Regs., Art. 17; NPC Decision, Art. 1).

Taxable Consumer Goods and Tax Rate.

Taxable consumer goods are divided into 14 categories with approximately 35 products. (Consumption Tax Regs., Art. 2). Most of these items are subject to ad valorem tax and only nine products are subject to specific tax. Consumption Tax Notice added five new items: (1) Golf balls and golf equipment (10%); (2) luxury watches (20%); (3) yachts (10%); (4) disposable wooden chopsticks (5%); and (5) solid wood flooring (5%). (Consumption Tax Notice, c. I, Art. 1). Gasoline and diesel removed as main categories and made sub-items in addition to new five sub-items under refined oil products, added as new taxable item. (Consumption Tax Notice, c. I, Art. 2). Skin care and hair care products no longer subject to consumption tax. (Consumption Tax Notice, c. III). Most consumer goods are subject to ad valorem tax and only four products are subject to specific tax. Specific tax is applied to: (1) Millet wine (RMB 240/ton); (2) beer (RMB 220/ton); (3) gasoline (RMB 0.2/liter); (4) diesel oil (RMB 0.1/liter); (5) naphtha (RMB 0.2/liter); (6) solvent oil (RMB 0.2/liter); (7) lubrication oil (RMB 0.2/liter); (8) fuel oil (RMB 0.1/liter); and (9) aviation kerosene (RMB 0.1/liter). Tax rates are: RMB 240/ton of millet wine, RMB 220/ton of beer, RMB 0.2/liter of gasoline and RMB 0.1/liter of diesel oil. As to ad valorem tax, tax rate ranges from 3% to 45%. Consumption tax rates on some existing products have been adjusted. (Consumption Tax Notice, c. IV). Tax rates on tobacco remain: regarding cigarettes, tax rates are respectively: (1) 45%, for class A cigarettes, including all imported cigarettes; (2) 40% for class B cigarettes; (3) 40% for cigars; and (4) 30% for cut tobacco. Tax rates on alcoholic drinks and alcohol are: other liquor and alcohol, tax rates are respectively: (1) 2025% for cereal spirits (formerly 25%), plus RMB 0.5/500g or ml; (2) 2015% for potato spirits (formerly 15%), plus RMB 0.5/500g or ml; (3) 10% for other liquors; and (4) 5% for alcohol. (Consumption Tax Notice, c. IV, Art. 4). Tax rate for cosmetics remains at 30%. Tax rate for skin, hair care products is 17%. For valuable jewelry, stones and jade, tax rate remains at 10%. For fire crackers or fireworks, tax rate remains at 15%. Tax rate for automobile tires is 3% (formerly 10%). (Consumption Tax Notice, c. IV, Art. 3). Tax rate is 10% for auto, motorcycle tires. New tax rate for motorcycles with cylinder capacity of 250 ml or less has been reduced to 3% (formerly 10%) whereas tax rate for those with cylinder capacity of more than 250 ml remains at 10%. (Consumption Tax Notice, c. IV, Art. 2). Sub-items of saloon cars, cross-country vehicles and minibuses and vans removed and replaced by passenger cars and medium and light commercial buses under taxable item of compact cars. For cars, tax rate is 3-8% for sedans depending on their cylinder capacity, 3-5% for cross-country vehicles depending on their cylinder capacity and 3-5% for minibuses depending on their cylinder capacity. New tax rates for passenger cars vary from 3% to 20% depending on their cylinder capacity. Medium and light commercial buses are taxed at 5%. (Consumption Tax Notice, c. IV, Art. 1).

Tax Calculation.

Consumption tax on taxable consumer goods will be levied when goods are sold. (Consumption Tax Regs., Art. 4). Should taxpayer use taxable consumer goods produced by itself for further manufacturing of taxable consumer goods, it will be exempted from taxes. Should taxpayer use them for any other purposes, it will pay tax when goods are transferred for other use. (Consumption Tax Regs., Art. 4). For taxable consumer goods manufactured pursuant to commission order, agent must collect and withhold tax when agent delivers goods to principal. (Consumption Tax Regs., Art. 4). For imported consumer goods, consumption tax will be levied when goods are declared at customs. (Consumption Tax Regs., Art. 4).

Sum of consumption tax is sum of taxable sales amount multiplied by tax rate. (Consumption Tax Regs., Art. 5). Sales amount includes total sales price and fees that taxpayer obtains from selling taxable consumer goods. (Consumption Tax Regs., Art. 6). Sales are calculated in local currency, i.e. RMB. Should sales be conducted in foreign currency, it must be converted to RMB according to prevailing exchange rate on foreign exchange market. (Consumption Tax Regs., Art. 5). Taxpayer is entitled to choose either exchange rate of day when sales volume occurs or that of first day of same month. (Consumption Tax Rules, Art. 15). Selected exchange rate must be used for one year. (Consumption Tax Rules, Art. 15).

Tax Authority.

Consumption tax will be levied by tax authority; but for imported goods it will be levied by customs. (Consumption Tax Regs., Art. 12). Unless otherwise provided by state, taxpayer must pay tax for taxable consumer goods produced by it to competent tax authority where its business accounting is carried out. (Consumption Tax Regs., Art. 13). For taxable consumer goods manufactured pursuant to commission order, tax must be paid to competent tax authority where agent is located. For imported taxable consumer goods, importer or its agency must pay tax to customs office where goods are declared. (Consumption Tax Regs., Art. 13).

24.04 FOREIGN INVESTMENT TAXES:

Income Tax Law for Enterprise with Foreign Investment and Foreign Enterprises governing joint ventures between Chinese and foreign investment was adopted by Fifth National People's Congress on Sept. 10, 1980. Law provided that income tax rate on Joint Venture was 30%. In addition, a local surtax of 10% of assessed income tax was levied. Income Tax Law Governing Foreign Enterprise was adopted by Fifth National People's Congress on Dec. 13, 1981. It provided that income tax on foreign enterprises must be assessed at progressive rate for amount in excess of specific amount of taxable income. Tax rates ranged from 20% to 40%. In addition, local income tax of 10% of same taxable income was levied. Under these two tax laws, foreign investment enterprises paid income tax at range of tax rate of 30-50%. In order to make foreign investment in China more attractive and to bring China's taxation in line with other countries, Seventh National People's Congress adopted Income Tax Law of the People's Republic of China for Enterprises with Foreign Investment and Foreign Enterprises (hereinafter “New Tax Law”) on Apr. 9, 1991. New Tax Law, which introduces unified foreign investment tax regime, came into effect on July 1, 1991. The Detailed Implementing Rules Relating to the Income Law of the People's Republic of China for Enterprise with Foreign Investment and Foreign Enterprises (hereinafter “Implementing Rules”) were promulgated by State Council on June 31, 1991 and came into effect on same date as New Tax Law.

Application.

New Tax Law applies to all “foreign investment enterprises” and all “foreign enterprises” in China, as defined under New Tax Law. “Foreign investment enterprises” include all equity and co-operative joint ventures as well as wholly foreign-owned enterprises established in China. “Foreign enterprises” is defined as foreign companies and organizations which have establishments in China and engaged in production or business operations, and which, though with no establishments in China, derive income from China, (New Tax Law, Art. 2), or whose income sources derived from overseas. Foreign investment enterprises with head office in China must pay income tax on income derived from sources inside and outside China. Foreign enterprises shall pay income tax on income derived from sources in China. (New Tax Law, Art. 3).

Tax Rate.

Enterprises with foreign investment, and foreign enterprises with establishments in China shall be levied at rate of 33% on their taxable income, which comprises 30% national tax and 3% local tax. (New Tax Law, Art. 5). Taxable income shall be gross income in tax year after deduction of costs, expenditures and losses in that year. (New Tax Law, Art. 4).

Tax Preference.

Although tax holidays and incentives are available to majority of foreign companies in China, they may be eliminated once China unifies its complicated corporate tax policies. Enterprises with foreign investment established in Special Economic Zones, foreign enterprises with establishment in Special Economic Zones engaged in production and business operations, and enterprises with foreign investment established in economic and technological development zones engaged in production, are entitled to reduced rate of 15% on their taxable income.

Enterprises with foreign investment engaged in production and established in Coastal Open Economic Zones or in old urban distributes of Special Economic Zones, or in Economic and Technological Development Zones, are entitled to reduced tax rate of 24% on their taxable incomes. (New Tax Law, Art. 7).

Enterprises with foreign investment established in economically open zones along sea coast, in old city areas of cities in Special Economic Zones, in economic and technological development zones or in other areas designated by State Council, engaged in energy, communication, harbor, wharf or other projects encouraged by State may be allowed to have reduced tax rate of 15% on their taxable incomes. Specific measures related thereto shall be provided by State Council. (Art. 7).

“Special Economic Zones” refers to Special Economic Zones in Shenzhen, Zhuhai, Shantou, Xiamen and Hainan which are established in accordance with law or with approval of State Council. “Economic and Technological Development Zones” refers to economic and technological development zones established in coastal port cities with approval of State Council. (Implementing Rules, Art. 69). “Coastal Open Economic Zones” refers to cities, counties and districts approved by the State Council to be established as coastal open economic zones.

(Implementation Rules, Art. 70).

"Enterprises with foreign investment engaged in production" refers to enterprises with foreign investment engaged in following lines: (1) Machine-manufacturing and electronic industries; (2) energy industry (not including oil and natural gas exploitation); (3) metallurgical, chemical and building materials industries; (4) light, textile and package industries; (5) medical apparatus and pharmaceutical industries; (6) agriculture, forestry, animal husbandry, fishery and water conservancy; (7) construction industry; (8) communication and transportation industries (not including passenger transportation); (9) development of science and technology, geological survey and industrial information consultancy directly at service of production and maintenance and repair services for production equipment and precision instruments; (10) other lines specified by competent department of taxation under State Council. (Implementing Rules, Art. 72).

Reduced tax rate of 15% on taxable incomes applies to following: (1) Production-oriented enterprises with foreign investment, established in old urban districts of Coastal Open Economic Zones, Special Economic Zones, and Economic and Technological Development Zones, and engaged in following: (i) Technology-intensive or knowledge-intensive projects, (ii) projects with foreign investment of US$30 million and over, and with a long payback period, (iii) energy, transportation and port construction projects; (2) Chinese-foreign joint ventures engaged in port and dock construction; (3) foreign banks, banks with Chinese and foreign investment and other financial institutions established in Special Economic Zones and other areas approved by State Council with foreign capital investment of US$10 million or more, and with operation period of ten years or more; (4) production-oriented enterprises with foreign investment, and enterprises with foreign investment engaged in construction, energy and transportation projects such as airports, ports, railways, highways and power stations established in Shanghai Pudong New Area; (5) recognized high-technology foreign invested enterprises established in high and new technology industrial development zones approved by State Council and recognized new technology foreign invested enterprises established in Beijing New Technology Industrial Development Experimental Zone; and (6) enterprises with foreign investment engaged in projects encouraged by State and established in other areas designated by State Council.

Enterprises with foreign investment engaged in projects listed in Item (1) in preceding paragraph shall, upon approval by State Administration of Taxation pay their corporate income tax at reduced rate of 15%. (Implementing Rules Art. 73).

Enterprise with foreign investment with operating period of ten years or more of production nature shall be exempted from corporate income tax in first two profit-making years, and entitled to a 50% reduction in income tax in third to fifth years, with exception of projects relating to petroleum, natural gas, rare metals, precious metals and such other exploitation projects, which are regulated separately, by State Council. Enterprises with foreign investment shall pay back income tax that has been exempted or reduced if its actual operation period is under ten years.

If duration of preferential treatment in respect of exemptions from or reductions of income tax granted to energy, communication, harbor, wharf and other major productive or nonproductive projects under regulations promulgated by State Council before execution of this law is for period longer than those provided in preceding paragraph, it will remain applicable after implementation of this law.

Enterprises with foreign investment engaged in agriculture, forestry and animal husbandry or established in remote and economically under-developed area may, upon approval by appropriate tax authorities of State Council of application filed by enterprise, be allowed reduced income tax rate of 15% to 30% on their taxable incomes for period of another ten years following expiration of term for exemption and reduction specified in preceding two paragraphs. (New Tax Law Art. 8).

"Regulations promulgated by the State Council before the execution of this Law" mentioned above refers to following regulations: (1) Chinese-foreign joint ventures engaged in port and dock construction, operation period of which exceeds 15 years, may be allowed exemption from enterprise income tax from first to fifth profit-making years, and reduction of 50% from sixth to tenth years; (2) enterprise with foreign investment established in Hainan Special Economic Zone and engaged in construction of infrastructure projects such as airports, ports, docks, railways, highways, power stations, coal mines, water conservancy or in development and operation of agriculture, operation period of which exceeds 15 years, may be allowed exemption from enterprise income tax from first to fifth profit-making years, and reduction of 50% from sixth to tenth years; (3) enterprises with foreign investment engaged in construction of energy and transportation projects such as airports, ports, railways, highways, power stations, operation period of which exceeds 15 years, may be allowed exemption from enterprise income tax from first to fifth profit-making years, and reduction of 50% from sixth to tenth years; (4) enterprises with foreign investment established in Special Economic Zones and engaged in service industries with foreign investment exceeding US$5 million, with operation period of ten years or more, may be allowed exemption from enterprise income tax for first profit-making year and reduction of 50% for second and third years; (5) foreign banks, banks with Chinese and foreign investment and other financial institutions established in Special Economic Zones or other areas approved by State Council, with foreign capital investment of US$10 million or more and with operation period of ten years or more, may be allowed exemption from enterprise income tax for first profit-making year and reduction of 50% for second and third years; (6) Chinese-foreign joint ventures which are recognized to be high and new technology enterprises and established in high and new technology industrial development zones of State approved by State Council, operation period of which is ten years or more, may be allowed exemption from enterprise income tax for first and second years. For enterprises with foreign investment established in Special Economic Zones ("SEZ") and Economic and Technological Development Zones (ETDZ), preferential provisions of SEZ and ETDZ shall apply. For enterprises with foreign investment established in Beijing New Technology Industrial Development Experimental Zone, preferential tax provisions of Beijing New Technology Industrial Development Experimental Zone shall apply; (7) export-oriented enterprises established with foreign investment may, upon expiration of exemption or reduction period be allowed reduction of 50% on their enterprise income tax in accordance with tax rate stipulated by Tax Law, if value of their export products for that year reaches 70% or more of total value of products for same year. However, corporate income tax for export-oriented enterprises established in SEZ or ETDZ or other export-oriented enterprises which have paid their enterprise income tax at rate of 15%, shall be levied at rate of 10% if they meet above requirements; (8) technologically advanced enterprises established with foreign investment may, upon expiration of exemption and reduction period be allowed to pay their enterprise income tax at same rate as provided in Tax Law for further three and a half years if they continue to be technologically advanced enterprises; and (9) provisions relating to exemptions and reductions on enterprise income tax in other regulations promulgated or approved to be promulgated by State Council.

Foreign investors who reinvest their share of profits in foreign venture to increase registered its capital, or in other enterprises with operation period of not less than five years as capital contribution may, with approval of tax authorities obtain refund of 40% of income tax paid on reinvested amount or enjoy other preferential treatment as stipulated by State Council. Investors who withdraw their reinvested funds before expiration of five years shall pay back tax refund. (New Tax Law, Art. 10).

Tax Deduction.

Amount of income tax already paid outside China by enterprise with foreign investment for income derived from sources outside China may be deducted from total amount of tax payable on its taxable income in China. Amount of such reduction must, however, not exceed amount of tax payable on taxable income derived from sources outside China as stipulated by this law.

Withholding Tax.

14.5% income tax shall be levied on income obtained from profits, interest, rentals, royalties and other sources in China by foreign enterprises which have no establishment in China, or by foreign enterprise with establishments in China but collect income which is not connected to their China establishment.

For payment of income tax in accordance with provisions in preceding paragraph, foreign enterprise which earns income shall be taxpayer, and paying unit shall be withholding agent. Taxes withheld on each payment by withholding agent shall, within five days, be turned over to State Treasury and income tax returns submitted to local tax authorities.

Income tax will be reduced or exempted on following income: (1) Income tax on profits obtained by foreign investor from enterprise with foreign investment shall be exempted; (2) income tax on interest from loans granted to Chinese government or Chinese state banks by international financial institutions shall be exempted; (3) income tax on interest on any loan granted to Chinese state banks at favorable lending rates by foreign banks is exempted; (4) income tax on royalties obtained from provision of proprietary technology for scientific research, energy development, development of communications, agriculture, forestry and animal husbandry or development of important technology may, with approval by appropriate tax authorities of State Council, be levied at reduced income tax rate of 10% and, where technology is advanced or conditions are preferential, income tax may be exempted. (New Tax Law, Art. 19).

Payment of income tax under this Law shall be computed in Renminbi. All foreign currency income shall be assessed according to exchange rate quoted by State Administration of Foreign Exchange Control and be taxed in Renminbi. (New Tax Law, Art. 21).

Tax Administration.

If taxpayer or withholding agent fails to pay or turn over tax withheld within prescribed time limit, tax authorities, in addition to setting new time limit for such payment, shall impose surcharge on late payment of 0.2% of overdue tax for every day in arrears, starting from first day of delay in payment. (New Tax Law, Art. 22).

In case of disputes with tax authorities about tax payment, enterprises with foreign investment, foreign enterprise or withholding agent must pay tax in accordance with relevant regulations first before applying to higher tax authorities for reconsideration within 60 days after receipt of application for such reconsideration. If taxpayer or withholding agent does not accept decision made after such reconsideration, it can bring matter before local People's Court within 15 days after receipt of such decision on reconsideration.

If taxpayer does not accept penalty imposed by tax authorities, it may apply to higher tax authorities for reconsideration within 15 days after receipt of notice of such penalty. If taxpayer does not accept decision on such reconsideration, it may bring matter before People's Court within 15 days after receipt of decision on reconsideration. Taxpayer may also bring matter directly before People's Court within 15 days after receipt of notice of such penalty. If taxpayer neither applies for reconsideration nor brings matter before People's Court, but refuses to pay penalty within time prescribed, authorities that decide penalty may apply to People's Court for enforcement. (New Tax Law, Art. 26).

Non-retrospective Application.

For any enterprise with foreign investment already set up before promulgation of this law, relevant laws and provisions of State Council that were in force at that time shall apply within its approved term of venture in respect of its income tax which would otherwise be subject to higher tax rates or enjoy less preferential treatment of tax exemptions or reductions in accordance with this law. For any enterprise with foreign investment without fixed operational term, relevant laws and provisions of State Council that were in force before promulgation of this law shall apply within period stipulated by State Council. (New Tax Law Art. 27).

Other Tax Incentives.

Besides provisions governing incentives stated by Income Tax Law for enterprises with foreign investment and foreign investment and foreign enterprises, there are other provisions governing tax incentives according to relevant laws and regulations. See subheads on tax incentives infra.

Agreement for the Avoidance of Double Taxation and the Prevention of Tax Evasion with Respect to Taxes on Income ("Tax Agreement") signed on Mar. 21, 1984 between U.S. and China further strengthens this provision of law. This Tax Agreement specifically applies to income tax on joint ventures, income tax on foreign enterprises and local income tax. (Art. 2[i][a], [ii], [iii], [iv]).

Tax Agreement defines "permanent establishment" as fixed place of business through which business wholly or partly carried out, including branch, place of management, office, factory, workshop, mine, oil or gas well, quarry, building site or construction site, assembly or installation project, or supervisory activities in connection therewith if such project or activities continue for more than six months; installation drilling rig or ship used for exploration of natural resources only if used for period of more than three months; furnishing of services, including consulting services, where such activities continue for period or periods aggregating more than six months in any 12 month period. (Art. 5[i], [2], and [3]). "Permanent establishment" does not include: Mere storage, display, or delivery facilities for goods belonging to enterprise or maintenance of goods for said purposes, or maintenance of goods solely for processing goods of another enterprise, or maintenance of fixed place of business for purpose of carrying on work of preparatory nature. (Art. 4). Acting through agent or broker of independent status, providing they are not acting wholly or almost wholly for said enterprise in non-arms-length transactions, should not be construed as having permanent establishment. (Art. 5[6]). Where person other than agent of independent status habitually exercises authority to conclude contracts in name of enterprise, that enterprise deemed to have permanent establishment. (Art. 5).

Profits of enterprise of U.S.A. taxable in China only if American enterprise conducts business in China through permanent establishment and only to extent that such profits can be attributable to that permanent establishment. (Art. 7[i]). In determining profits of permanent establishment, deductions allowed for expenses incurred for that establishment, including executive and general administrative expenses so incurred, whether in China or elsewhere (Art. 7[3]), except those paid to head office of enterprise or any of its other offices, by way of royalties or similar payments, or by way of interest on money lent to permanent establishment. (Art. 7[3]).

Dividends paid by company resident in China may be taxed in U.S. and China, but tax in China should not exceed 10% of gross amount of dividends (Art. 9[1], [2]), except if company paying dividends has permanent establishment in China, or performs independent professional services from fixed base and dividends paid are connected with such permanent establishment or fixed base (Art. 9[4]), then unless fixed base regularly available for purpose of performing activities for period exceeding 183 days in calendar year (Art. 13[1]), there should be no taxes on said dividends in China and said dividends should only be taxed in China to extent attributable to that permanent base (Arts. 7[i] and 9[5]).

Interest paid to U.S. resident from entity in China may be taxed in China in amount not exceeding 10% (Art. 10[2]), except debt claims directly or indirectly financed by government which should be exempt from tax (Art. 10[2]). However, if said business in which interest arises is conducted through permanent establishment in China or from fixed base for independent professional services and said debt is connected thereto, then provisions of Art. 13 or Art. 7 apply.

Royalties treated in fashion similar to dividends and interest. (Art. 11). Gains derived by U.S. resident from alienation in China of ships or aircraft operated in international traffic, and of movable personal property pertaining to operation of such ships or aircraft should only be taxed in U.S. (Art. 12[3]).

U.S. residents and citizens allowed credit against U.S. tax on income for income tax paid to China (Art. 22[2][a]) and where U.S. company owns at least 10% of voting rights in company resident in China from which U.S. company receives dividends, credit allowed for income tax paid to China by distributing company with respect to profits out of which dividends paid (Art. 22[2][b]).

There are "most favored nation" provisions in Tax Agreement. (Art. 23). Protocol to Tax Agreement permits U.S. to impose its social security tax, personal holding company tax and accumulated earnings tax notwithstanding any provision of Agreement. (Art. 3 of Prot.).

Interim Provisions on Handling Income Taxes Resulting from Realignment of Business Through Consolidation, Separation, Realignment of Stock Rights, Transfer of Assets in Foreign-Invested Enterprises, were promulgated by General Taxation Bureau on Apr. 28, 1997.

Application.

Interim Provisions apply to taxation on income from realignment of business through consolidation, separation, realignment of stock rights, transfer of assets in foreign invested enterprises, including determination of constant business operation, calculation of capital, tax preference and carrying forward of loss, etc. (Art. 1).

Consolidation.

Value of all kinds of capital, liabilities and stockholder equities of post-consolidation enterprises shall be calculated according to book historical cost of enterprise before consolidation. (Art. 1.1).

Post-consolidation enterprise, whose business satisfies stipulations on preferential treatment in respect of periodic exemptions and reductions of income tax, shall be eligible for preferential treatment in following ways: (1) Post-consolidation enterprise shall not enjoy preferential treatment upon expiration of period of preferential treatment of all constituent enterprises before consolidation. (Art. 1.2). (2) Post-consolidation enterprises shall continue to enjoy preferential treatment until expiration of period of preferential treatment, if constituent enterprises before consolidation are within period of preferential treatment stipulated by law and regulations, and remaining periods of preferential treatment of those enterprises before consolidation are same. (Art. 1.2). (3) If remaining periods of preferential treatment of those enterprises before consolidation are different, or one of those enterprises before consolidation is not entitled to periodic preferential treatment, taxable income of enterprise after consolidation shall be calculated separately. Taxable incomes which correspond to different remaining periods of preferential treatment shall separately enjoy preferential treatment until expiration of remaining period. Taxable income which corresponds to business before consolidation which shall not enjoy preferential treatment, will not also enjoy preferential treatment after consolidation. (Art. 1.2).

Preceding losses of each enterprise before consolidation shall be made up by income of enterprise after consolidation within remaining periods of making up loss according to Art. 12 of Income Tax Law for enterprise with foreign investment and foreign enterprises (hereinafter "ITLEFI"). (Art. 1.4).

Separation.

Post-separation enterprises shall, according to their business situations and related tax laws and regulations, be subject to reduced tax rates and continue to enjoy preferential treatment of enterprise before separation in following ways: (1) If business of post-separation enterprises satisfies stipulations of preferential treatment, and period of preferential treatment of enterprise before separation has not expired, post-separation enterprises can enjoy preferential treatment until expiration of preferential treatment. If period of preferential treatment of enterprises before separation has expired, post-separation enterprises will not continue to enjoy preferential treatment. If business of enterprises before separation was not eligible for preferential treatment while changed business of post-separation enterprise is eligible for preferential treatment, post-separation enterprise is eligible for preferential treatment for remaining period of preferential treatment which is calculated from first profit-making year of enterprise before separation. (Art. 2.2). (2) If business of enterprise after separations does not satisfy stipulations of preferential treatment, enterprise may not enjoy preferential treatment. (Art. 2.2).

Preceding losses which have not been made up by enterprise before separation should, according to amount agreed by each enterprise in separation agreement, be made up by income of post-separation enterprises in further subsequent years within remaining period for making up loss according to Art. 12 of ITLETI. (Art. 2.3).

Realignment of Shares.

Foreign investors in enterprises with foreign investment who reinvest their dividends from enterprise by buying additional shares of same enterprise or other enterprises, preferential treatment of reinvestment is not available. (Art. 3.4).

Business of enterprise after realignment of shares should be deemed as continued business of enterprise before realignment of shares. Preceding losses which have not been made up by enterprise before realignment of shares shall, within remaining period for making up loss according to Art. 12 of ITLETI, be made up by income of enterprise after realignment of shares in further subsequent years. (Art. 3.4).

Transfer of Assets.

After transfer of assets, both transferor and transferee continue their tax treatment as before. (Art. 4.3).

Either transferor or transferee shall no longer be eligible for preferential treatment if transfer results in changing transferor or transferee's business into business which is not eligible for preferential treatment. If changed business is eligible for preferential treatment, either transferor or transferee can enjoy preferential treatment for remaining period of preferential treatment which is calculated from first profit-making year of enterprise. (Art. 4.3).

Whether assets are transferred in whole or in part, preceding losses of transferor and transferee shall not be carried forward between each other. Preceding losses shall be made up separately by income of each enterprise according to Art. 11 of ITLETI. (Art. 4.4).

Enterprises after consolidation or separation or realignment of shares shall be taxed according to laws and regulations which are applied to domestic enterprises unless law stipulates otherwise, if proportion between shares of foreign investor and domestic investor does not satisfy requirement of proportion stipulated by related laws. (Art. 5).

24.05 INCOME TAX:

Individual Income Tax.

Taxpayers.

Like most countries, China employs rule of fiscal residence and source of income when determining tax jurisdiction. Any individual domiciled in China or having resided in China for one or more years, but not domiciled in China must pay taxes on his income sources inside and outside of China. (Individual Tax Law, Art. 1). Those individuals not domiciled and not residing in China or residing in China for less than one year in absence of domicile, must pay taxes only on income sourced inside China. (Individual Tax Law, Art. 1).

Taxable Income.

Incomes falling within any of following categories must be taxed (Individual Tax Law, Art. 2): (1) Wages and salaries; (2) incomes of individual industrial and commercial households from production and business operations; (3) income from contracting or leasing enterprises and institutions; (4) remuneration for labor services; (5) income from author's remuneration; (6) income from royalties; (7) income from interest, dividends, or bonuses; (8) income from leasing property; (9) income from property transfers; (10) occasional income; and (11) other income determined to be taxable by financial department of State Council. All income is calculated in RMB. If taxpayer obtains earnings in foreign currency, it will be converted into RMB according to exchange rate quoted by State Administration of Foreign Exchange. (Individual Tax Law, Art. 10). Exchange rate is rate quoted last day of preceding month before tax payment receipt is issued. (Individual Tax Regs., Art. 41).

Tax rate for individual income tax in China is divided into progressive tax rate and flat tax rate. (Individual Tax Law, Art. 3). Progressive tax rate of 5-45% is applied to wages and salaries. Progressive tax of 5-35% is applied to income of individual industrial and commercial households, and income from contract management or leasing enterprises or institutions. Flat tax rate of 20% is applied to income from author's remuneration, and 30% deduction on taxable amount is permitted. With regard to labor service remuneration, flat tax rate of 20% is applied. Where specific amount of service remuneration is excessively high, marginal tax may be levied and detailed rules must be formulated by State Council. Flat tax rate of 20% is applied to royalties, income from interest and dividends, income from property transfers, income from leasing property, occasional income and any other income.

Tax Exemption.

There are ten categories of income which are exempt from tax (Individual Tax Law, Art. 4): (1) Awards in science, education, technology, culture, health, physical sports, environmental protection granted by provincial government, ministries or commissions under State Council and units of People's Liberation Army at or above army level and by foreign and international organizations; (2) interest on treasury bonds and financial bonds issued by State; (3) subsidies and allowances granted in accordance with uniform standards of State; (4) welfare benefits, pensions for disabled or family of deceased, and relief payment; (5) insurance indemnities; (6) military severance pay and demobilization pay for soldiers of armed forces; (7) settling in pay, severance pay, retirement wages, living allowances for retired cadres and staff granted in accordance with uniform standard of State; (8) salaries of diplomatic officials, consular officials, other personnel of foreign embassies and consulates in China that are exempt from tax under Chinese law; (9) income that is exempt from tax as stipulated in international conventions acceded to by China and bilateral agreements concluded by China; and (10) other income to be exempted from tax with approval of financial department under State Council.

Scope of Deductions.

Individual Tax Law specifies expenses and fees to be deducted from taxable income for each category of income. (Individual Tax Law, Art. 6). With regard to wages and salaries, fixed monthly deduction of RMB 1,600 is permitted. Regarding income of individual industrial and commercial households, expenses, costs and losses may be deducted from gross annual income prior to taxation. As to income from contract management or leasing management of enterprises or institutions, reasonable expenses may be deducted from gross annual income. With respect to income from author's remuneration, income from labor services, royalties and incomes from property leasing, if each individual payment is less than RMB 4,000, fixed amount of RMB 800 may be deducted; if each payment exceeds RMB 4,000, 20% may be deducted as expenses. As to income from property transfer, original value of property and reasonable expenses can be deducted. No deduction is allowed for income from interest, bonuses, and dividends, occasional income and other income. Where individual donates his income to education and public welfare, donation may be deducted from taxable income in accordance with relevant regulations to be promulgated by State Council.

Where taxpayer having no domicile in China obtains wages and salaries in China, and where taxpayer having domicile in China obtains wages and salaries outside of China, additional deduction for expenses calculated in light of his average living standard, income standard and variation of exchange rate may be deducted from taxable income. Scope and standard of additional deduction will be formulated by State Council.

Avoidance of International Double Taxation.

Method of tax credit: By end of 1991, China concluded bilateral tax agreements with 32 countries to facilitate its open door policy and to avoid international double taxation. China adopted method of limited tax credit to avoid double taxation on individuals. Where taxpayer obtains income outside China, individual income tax paid outside China may be offset against taxes payable. However maximum credit may not exceed taxable amount for that part of income sourced outside China, calculated in accordance with provisions under this law. (Individual Tax Law, Art. 7).

Enterprise Income Tax.

Taxpayers.

All enterprises within territory of China, excluding foreign funded enterprises and foreign enterprises must pay tax on global income from production and business operation and on any other income. (Enterprise Tax Regs., Art. 1). Foreign-funded enterprises and foreign enterprises are governed by separate tax regime entitled Law of China Concerning Income Tax on Foreign Funded Enterprises and Foreign Enterprises (hereinafter “Foreign Enterprises Tax Law”) adopted by National People's Congress on Apr. 9, 1991. Enterprises or organizations subject to Enterprise Tax Regs. are: (1) State owned enterprises; (2) collective enterprises; (3) private enterprises; (4) joint venture enterprises; (5) joint stock enterprises; and (6) other entities obtaining income from production and business operations.

Taxable income refers to gross income less deductions. (Enterprise Tax Regulations, Art. 4). Gross income of taxpayers includes any of the following categories (Enterprise Tax Regulations, Art. 5): (1) Income from production and business operations; (2) income from property transfer; (3) income from interest; (4) income from leasing; (5) income from royalties and license fees; (6) income from dividends; and (7) any other income.

Scope of Deductions.

Costs, expenses and losses related to income of taxpayers are deductible. (Enterprise Tax Regs., Art. 6). Deductible items include: (1) Actual interest paid to financial entities by taxpayer during period of production and business operations. Where interest is paid to nonfinancial entity, deductible amount should not exceed that which financial entity would have charged for same type of loan during same period; (2) salaries paid to employees by taxpayer. Detailed standards for deductible salaries must be formulated by governments of provinces and autonomous regions and municipalities directly under central government, within limits prescribed by Ministry of Finance; (3) employees' trade union funds, employees, employees' welfare funds and education funds paid by employer, deductible amount will be 2%, 14% and 1.5% of deductible salaries respectively; (4) with respect to donations for public welfare and relief, deductible amount will be 3% or less of annual taxable income. In addition, other items may be deducted in accordance with laws, regulations and other tax provisions.

Tax Rate.

All taxpayers are subject to unified tax rate of 33% of their taxable income. (Enterprise Tax Regs., Art. 3). Foreign-funded enterprises are subject to tax rate of 30% plus 3% local income tax, except those in Special Economic Zones, Coastal Open Cities, Economic and Technological Development Zones, Special Development Zones, Coastal Economic Open Areas, Border Open Areas, Border Open Cities, Border Economic Cooperation Zones, Inland Open Cities, High-Technology and New-Technology Development Zones, which fall under their favorable tax incentive programs.

Avoidance of International Double Taxation-Method of Tax Credit.

Where taxpayer obtains income outside of China, taxes paid on that income abroad may be used to offset taxes in China for that part of income. However, deductible amount may not exceed tax otherwise payable calculated in accordance with Chinese tax law. (Enterprise Tax Regs., Art. 12).

New Enterprise Income Tax Law, adopted on Mar. 16, 2007, effective Jan. 1, 2008. All enterprises and other organizations (partnerships and sole proprietorships excluded) that obtain income within People's Republic of China (“Enterprises”) must pay enterprise income tax in accordance with provisions of Law.

Taxpayers.

Enterprises are divided into Resident Enterprises (enterprises established in territory of China, or established in another country but whose actual management organization is located within territory of China) and Non-resident Enterprises (enterprises established in foreign country whose actual management organization is located outside China but with organizations or establishments within China or without organizations or establishments in China but which have income derived from China). (Art.2). Resident Enterprises must pay income tax on its income derived from both within and outside China. Non-resident Enterprises with organizations or establishments within China must pay income tax on its income derived from within China as well as income derived from outside China but which, in fact, is related to such organizations or establishments. (Art. 3).

Tax Rate.

Enterprise income tax will be levied at rate of 25%. With regards to income of Non-resident Enterprises, applicable tax rate will be 20%. (Art. 4).

Taxable Income refers to gross income of enterprise in taxable year after deducting tax-free income, tax-exempt income, other deductible items and permitted carry-forward losses of previous year(s). (Art. 5). Total income of enterprise shall consist of monetary and non-monetary income derived from various sources, including: (i) Income from sale of goods; (ii) income from provision of labor services; (iii) income from transfer of property; (iv) dividend, bonus and other equity investment proceeds; (v) interest income; (vi) rental income; (vii) income from royalties and licenses; (viii) income from accepted donations; and (ix) other incomes. (Art. 6).

Following income from total income shall be tax-free incomes: (i) Fiscal appropriations; (ii) administrative charges for fiscal administration and government funds in accordance with law; and (iii) other tax-free incomes as prescribed by State Council. (Art. 7). Following items shall not be deductible when computing taxable income: (i) Dividends, bonuses and other equity investment proceeds paid to investors; (ii) enterprise income tax payments; (iii) surcharge on overdue tax payments; (iv) penalties, fines and losses from confiscated property; (v) expenditures for donations other than those prescribed in Art. 9 hereof; (vi) sponsorship fees; (vii) unverified reserve expenditures; and (viii) other expenses incurred not for purpose of earning income. (Art. 10).

Tax Calculation.

Income tax payable shall be balance of taxable income multiplied by applicable tax rate minus tax deductions and exemptions as provided for by provisions related to preferential tax treatment of this Law. (Art. 22). Enterprise is entitled to credit its tax payable by amount of taxes already paid overseas in current period on incomes listed below; credit is limited to tax otherwise payable in accordance with provisions hereof; any excess credit that cannot be used in current period can be used within following five years: (i) Taxable income derived from outside China by Resident Enterprise; (ii) taxable income derived from outside China by Non-resident Enterprise which is actually connected with its organizations or establishments within China. (Art. 23).

Tax Preference and Exemption.

Preferential tax treatment may be granted to industries and projects whose development is supported and encouraged by State. (Art. 25). Following incomes of enterprise shall be tax-free incomes: (i) Interest income from government bonds; (ii) dividends, bonuses and other equity investment proceeds distributed between qualified Resident Enterprises; (iii) dividends, bonuses and other equity investment proceeds which Non-resident Enterprise with organizations or establishments within China receives from Resident Enterprise and which have actual connection with such organizations or establishments; and (iv) incomes of qualified non-profit organizations. (Art. 26).

Enterprise income tax on following incomes may be deducted or exempted: (i) Income from projects in agriculture, forestry, animal husbandry and fishery; (ii) income from major public infrastructure investment projects supported by State; (iii) income from qualified environmental protection, and energy and water conservation projects; (iv) income from qualified transfer of technology. (Art. 27). Enterprise income tax for small-scale enterprises that meet prescribed conditions shall be levied at reduced rate of 20%. Enterprise income tax for State-encouraged high and new technology enterprises shall be levied at reduced rate of 15%. (Art. 28). Deductions shall be allowed for following expenditures incurred by enterprise: (i) Research and development expenses incurred for development of new technology, new products and new techniques; and (ii) salaries paid to disabled employees and other personnel whom State encourages to offer assistance to. (Art. 30).

Special Tax Adjustment.

For non-arm's length business transactions between enterprise and its affiliate which result in reduced taxable income for such enterprise or affiliate, tax authority is entitled to make adjustments based on reasonable methods. (Art. 41). If enterprise wishes to enter into advance pricing arrangement, it may furnish tax authority with pricing principles and computation methods it adopts. (Art. 42). When enterprise files its annual income tax returns with tax authority, it must enclose annual report on related party transactions during year. When tax authority conducts investigation on related party transactions, enterprise and its affiliates as well as other enterprises related to such investigation shall provide relevant information in accordance with relevant regulation. (Art. 43).

For enterprise established by Resident Enterprise or jointly controlled by Resident Enterprise and Chinese resident and located in country (region) where actual tax burden is significantly lower than tax rates herein, and which fails to distribute profits or distributes less profits than it should for cause not attributable to reasonable operational needs, portion of such profits attributed to resident enterprise shall be included in its income of current period. (Art. 45). When ratio of debt to equity that enterprise receives from its affiliates exceeds prescribed standard and results in interest payments, such payments may not be deductible when computing taxable income. (Art. 46).

Tax Assignment.

Generally, Resident Enterprise shall pay tax at place where it is registered. If registered address is outside of China, enterprise shall pay tax at place where its management organization is located. Non-resident Enterprises with establishment in China must pay taxes at place where organization or establishment is located. Non-resident enterprise without establishment in China must pay tax at place where withholding agent is located. (Art. 51).

Enterprise income tax shall be calculated on calendar year, commencing Jan. 1 and ending on Dec. 31. If enterprise commences or terminates its operational activities within tax year, part of operational period shall constitute tax year. Enterprise income tax paid in accordance with this Law shall be calculated in Renminbi. Income calculated in other currencies shall be converted into Renminbi and taxed accordingly. (Art. 56).

24.06 MINES, MINERALS AND FISHERIES TAXES:

Resource Tax.

Provisional Regulations of the People's Republic of China on Resource Tax (hereinafter “Resource Tax Regulations”) promulgated by State Council, Dec. 13, 1993. Effective Jan. 1, 1994. Regulations replace Draft Regulations of the PRC on Resource Tax and Draft Regulations of the PRC on Salt Tax promulgated by State Council, Sept. 18, 1984, repealed Jan. 1, 1994. On Dec. 30, 1993, The Implementation Rules of the Provisional Regulations of the PRC Resource Tax were issued by Ministry of Finance. Effective Jan. 1, 1994.

All units and individuals engaged in exploitation of mineral products or salt products as prescribed by Regulations, within territory of China, are taxpayers of Resource Tax. (Art. 1).

Tax Payable.

Resource Tax shall be computed in accordance with assessable volume of taxable product, and prescribed unit tax amount. Formula for computing tax payable equals Assessable Volume times Unit Tax amount. (Art. 5).

Assessable Volume for Resource Tax is determined as follows: (1) For taxpayers exploiting or producing taxable products for sale, sales volume shall be assessable volume; and (2) for taxpayers exploiting or producing taxable products for their own use, volume personally used shall be assessable volume. (Art. 6).

Unit Tax Amounts are as follows: (1) Crude oil, 8–30 RMB/ton; (2) natural gas, 2–15 RMB/1000 cubic meters; (3) coal, 0.3–5 RMB/ton; (4) other nonmetal ores, 0.5–20 RMB/ton or cubic meter; (5) ferrous metal ores, 2–30 RMB/ton; (6) nonferrous metal ores, 0.4–30 RMB/ton; (7) salt; solid salt, 10–60 RMB/ton; and liquid salt, 2–10 RMB/ton.

Pursuant to Art. 7 of Resource Tax Regulation, Resource Tax will be reduced or exempted under any one of following circumstances: (1) Crude oil used for heating or repairing wells in course of exploiting crude oil shall be exempt; (2) for taxpayers sustaining huge losses due to accidents or natural disaster in course of exploiting or producing taxable products, tax reduction or exemption shall be determined at discretion of government of provinces, autonomous regions or municipalities directly under central government; and (3) other tax reduction or exemption items as stipulated by State Council.

For taxpayers selling taxable products, time at which tax liability arises shall be day on which payment sum is received or documented evidence of right to collect sales sum is obtained. For self-produced taxable products for personal use, time at which tax liability arises shall be day on which products are removed for use. (Art. 9).

24.07 PROPERTY TAXES:

Provisional Regulations of the People's Republic of China Concerning Deed Tax, effective as of Oct. 1, 1997. Interim Provisions of Deed Tax, which were promulgated by State Council of Central People's Government of Apr. 3, 1950, was annulled on Oct. 1, 1997.

Taxpayers.

Any entity or individual, which transfers land and houses within territory of China, must pay deed tax in accordance with these provisions. (Art. 1).

As used in these provisions, transfer of land and houses refers to following deeds: (1) Assignment of right to use state-owned land; (2) transfer of right to use land, including sale, donation and exchange (not including transfer of right to management contracts of rural collective land); (3) sale of houses; (4) donation of houses; (5) exchange of houses.

Tax Rate.

Deed tax rate is 3-5%. Applicable rate of deed tax shall be determined by government of provinces, autonomous regions and municipalities under central government in line with local conditions within scope of catchline taxpayers, and shall be submitted for record to General Taxation Bureau. (Art. 3).

Tax Base.

(1) Transaction prices for leasing of rights to use State-owned lands, sales of land use rights and house trading; (2) prices set by tax authorities according to market prices of sales of land use rights and house trading for donation of land use rights or houses; (3) price imparities during exchanges of land use rights or houses. (Art. 4).

Tax Deduction or Exemption.

(1) Transfer of land or houses to State organs, institutions, social groups and military entities to be used as offices, teaching, medical treatment, science and research and military installations shall be exempt from deed tax; (2) purchases of public houses for first time by urban workers or staff members in accordance with related stipulations shall be exempt from deed tax; (3) deed tax for purchases of new houses where former houses were destroyed by force majeure shall be reduced or exempted according to actual conditions of case; and (4) other cases stipulated by Ministry of Finance.

Tax Authority.

Taxpayers must, within ten days of obligation to pay tax, file returns at deed tax collection department in place where land and houses are located, and pay deed tax within prescribed time as determined by tax authorities. (Art. 9).

Property tax is levied on value of real property at time of construction at annual rate of 1.2% and covers factories, silos, buildings, residences, etc. There are also land use fees that are under jurisdiction of Real Estate Administration Bureau that are paid per square meter of land use and depend on value or quality of land.

See also category 15 Foreign Trade and Commerce, topic 15.11 Trade Zones.

24.08 TAX INCENTIVES AND EXEMPTIONS:

Tax Incentives for Interest on Loans.

(1) Interest income from loans to Chinese government or to China's state banks by international financing organizations will be exempted from income tax. Interest income from loans provided at preferential interest rate by foreign banks to China's state bank will also be exempted from income tax. (2) Interest income of foreign banks derived from deposits with China's state banks and from loans provided to China's state banks at normal interest rates will be subject to income tax. However, reciprocal exemption from income tax will be granted to those foreign banks from countries which exempt China's state banks from income tax on interest income from deposits and loans. (3) Income tax on interest derived from loans, advances and deferred payments under credit contracts or trade contracts before end of 1990 by foreign companies, enterprises and other economic organizations with China's companies or enterprises may, during effective period of contract, be taxed at reduced rate of 10%. (4) Following items of interest income may be exempted from income tax: (i) Interest income from loans to China's state banks by foreign banks at international interbank offer rates. Stipulations in preceding clause may also be applied to trust and investment companies which are authorized by State Council to engage in foreign exchange business; (ii) interest income from loans to China National Offshore Oil Corporation by foreign banks at interest rates not higher than interbank offer rates; (iii) in case of seller's credit provided by foreign party's state bank for import of technology, equipment and commodities by China's companies, enterprises or institutions, interest on deferred payments paid by Chinese party to be received in turn by seller at interest rate not higher than that on Chinese party's buyer credit; (iv) interest received by foreign banks and individuals from deposits with China's state banks when interest rate on such deposits is lower than interest rate on deposits in home country of depositing bank or depositor; (v) cases where equipment and technology are provided to China's companies or enterprises and in consideration, Chinese side uses methods such as buy-back or delivery of products to repay principal and interest, or uses processing fees or assembly fees to offset principal and interest.

Tax Incentives for Exploitation of Offshore Petroleum.

(1) If foreign enterprise engaged in cooperative exploitation of offshore petroleum resources holds two contract areas, loss incurred in one contract area, owing to termination of operation or other causes, shall be allowed to offset proceeds of other contract area. Taxable income shall be computed by combining results of two contract areas. (2) In order to encourage Chinese-foreign cooperative exploration of offshore petroleum, following imported goods for offshore operation shall be exempted from Industrial and Commercial Unified Tax (ICCT): (i) Machinery, equipment, spare parts and materials to be directly used in exploration; (ii) machinery, equipment, spare parts and materials to be directly used in development; (iii) parts, components, and materials that are required to be imported for manufacturing machinery and equipment in China for exploitation of offshore petroleum (including prospecting, well drilling, well cementing, well logging, oil extracting, work-over etc.). (3) Local surtax shall be exempted when ICCT is levied on crude oil income derived from Chinese-foreign cooperative exploitation of offshore petroleum. (4) Reasonable exploration expenses incurred by foreign enterprises in contract area, regardless of tangible or intangible costs, shall be capitalized and then amortized from revenues derived from any oil (or gas) field within same contract area that has gone into commercial production, but time limit of such amortization shall not be less than one year. Any subsequent exploration expenses incurred after commencement of commercial production shall be accumulated on yearly basis and amortized in chronological order against income of following year, but time limit of such amortization of annual exploration expenses shall not be less than one year. (5) For enterprises which are engaged in exploitation of offshore petroleum resources, all investments at development period shall be counted as capital expenditure with oil (or gas) field as unit, and depreciation shall be calculated from month when oil (or gas) field begins commercial production, but time limit of depreciation shall not be less than six years.

Tax Incentives for Know-how Fees.

Foreign companies, enterprises, and other economic organizations that do not have establishment in China shall pay income tax at reduced rate of 10% on know-how fees obtained from provision of following proprietary technology for use in China. Income tax may be exempted where technologies are advanced or terms are preferential. (1) Fees received from providing proprietary technology in development of agricultural, forestry, fishery and animal husbandry industries, including proprietary technology provided for improvement of soil or green pasture; development of barren hills and for full utilization of natural conditions; proprietary technology provided for new breeds of animals and plants and for production of highly effective, low toxication agricultural chemical; and proprietary technology provided in such areas as conduct of scientific management of agricultural, forestry, fishery and animal husbandry production, maintenance of ecological balance and enhancement of ability to defend against natural disasters; (2) know-how fees received from proprietary technology for conduct of scientific research or scientific experiments provided to China's academies of science, institutes of higher education and other scientific research units, or working in cooperation with China's scientific research units in conduct of scientific research; (3) know-how fees received from proprietary technology provided to China's key construction projects in development of energy and transportation; (4) know-how fees received from proprietary technology provided in areas of energy conservation, and prevention and control of environmental pollution; (5) know-how fees for following proprietary technology provided for development of China's important technological spheres: (i) Technology for production of major advanced mechanical and electrical equipment; (ii) nuclear energy technology; (iii) technology for production of large-scale integrated circuits; (iv) technology for production of optical integration, microwave semiconductors, and microwave integrated circuits as well as technology for manufacture of microwave electronic tubes; (v) technology for production of super speed computers and microprocessors; (vi) technology for photo-conductive communication; (vii) technology for long-distance super-high pressure direct-current transmission; (viii) technology for liquification, gasification and comprehensive utilization of coal.

Tax Incentive in Economic and Technological Development Zones.

15% preferential enterprise income tax shall be allowed for income derived from production, business operations and other sources from joint ventures, cooperative enterprises or foreign enterprises of productive nature operating in economic and technological development zones of the 14 coastal port cities of Dalian, Qinhuangdao, Tianjin, Yantai, Qingdao, Lianyungang, Nantong, Shanghai, Ningbo, Wenzhou, Fuzhou, Guangzhou, Shanjian, and Beihai. Those with contract life of ten years or longer shall enjoy two-year tax holiday commencing from first profit-making year followed by 50% reduction in third to fifth year.

Foreign investors of joint ventures in development zones are exempted from enterprise income tax when repatriating their share of profits from enterprise.

After expiration of reduction and exemption period of enterprise income tax in accordance with relevant provisions of export enterprise in development zone exporting 70% or more of their production; in terms of value, in any one year, may pay enterprise income tax at reduced rate of 10% for that year.

After expiration of reduction and exemption period of enterprise income tax in accordance with relevant provisions of state, technologically advanced enterprises in development zones may pay enterprise income tax at reduced rate of 10% for another three years.

10% preferential income tax shall be levied on dividends, interest, rentals, royalties and other income sources in development zones by overseas investors who do not have establishments in China, except in cases where tax exemption is provided under law. Where terms and conditions for provision of funds or equipment are preferential or technology transferred is advanced, it is necessary to grant additional tax reduction or exemption, matter shall be decided by people's government of municipalities where development zones are located.

Reduction and exemption of local income tax for development zones enterprises shall be decided by people's government of municipalities where development zones are located.

ICCT shall be exempted on building materials, production equipment, raw materials, spare parts and accessories, components, means of transport and office supplies imported by development zone enterprise for their own use.

ICCT shall be exempted for products manufactured and exported by development zone enterprise with exception of crude oil, processed oil and other goods for which state has separate provision.

Tax Incentives for Leasing.

Income tax on leasing fees, after deducting equipment price, obtained by foreign leasing companies from supply of equipment and related articles to China's companies or enterprises through leasing arrangements entered into before end of 1990 may, during effective period of contract, be paid at reduced tax rate of 10%.

Where interest is included in leasing fees, if loan agreement or contract and documents and vouchers for interest payment are sufficient to prove that interest rate conforms to seller's or buyer's credit interest rate, income tax shall be levied at rate of 10% on amount remaining after deduction of interest.

Leasing fees obtained by foreign leasing companies through such methods as buy-back or delivery of products may be exempt from income tax.

Tax Incentives for Export Enterprises and Technologically Advanced Enterprises.

After expiration of period allowed for reduction or exemption of enterprise income tax in accordance with provisions of State, export enterprise exporting 70% or more of their products, in terms of value, in any particular year may pay their enterprise income tax at half of existing tax rate for that year. If resultant tax rate after 50% reduction of enterprise income tax payable is below 10%, income tax shall be levied at rate of 10%.

After expiration of period allowed for reduction or exemption of enterprise income tax in accordance with provisions of State, technologically advanced enterprises may enjoy three-year tax reduction on existing rate. Technologically advanced enterprises which do not qualify for such tax reduction or exemption may pay enterprise income tax at half of existing rate in first three profit-making years. If resultant tax rate after 50% reduction of enterprise income tax is below 10%, enterprise income tax shall be levied at rate of 10%.

Profits remitted abroad by foreign investors of export enterprises and technologically advanced enterprises with Chinese and foreign investment shall be exempted from income tax.

Foreign investors who reinvest profits distributed by enterprise to establish or expand export enterprise or technologically advanced enterprise for period of not less than five years shall receive full refund of enterprise income tax already paid on amount of reinvestment.

Tax Incentives in Old City Districts of 14 Coastal Port Cities and Delta Regions.

Production enterprises with foreign investment which are established in old city district of 14 coastal port cities, or in municipalities or towns are within three delta regions (hereinafter referred to as “the old city and open economic zone enterprises”). If enterprise is engaged in technology-intensive, or know-how intensive projects, or in projects in which foreign investor invests US$30 million or more and have long pay back period, or in energy, transportation, harbor construction projects, approved by Ministry of Finance, enterprise income tax shall be levied at reduced rate of 15%.

Subject to approval of Ministry of Finance, tax shall be paid at 80% of enterprise income tax as prescribed in tax law for those enterprises which are not entitled to tax reduction as prescribed in preceding paragraph but are engaged in following industries: (1) Machine building, electronic industry; (2) metallurgy, chemicals, building materials; (3) light industry, textile and packaging; (4) medical apparatus, pharmaceutical; (5) agriculture, forestry, animal husbandry, agriculture and their related processing industries; (6) building and construction.

Reduction and exemption of local income tax of enterprise in old cities and open economic zone shall be decided by provincial or municipal people's government.

10% preferential income tax shall be levied on dividends, interest, rentals, royalties and other income sources in old city districts and open economic zone by overseas investors who do not have establishment in China, except in case where tax exemption is provided under law. Where terms and conditions for provision of funds or equipment are preferential, or technology transferred is advanced, such that it is necessary to grant additional tax reduction or exemption, matter shall be decided by provincial or municipal people's government.

ICCT shall be exempted for products manufactured and exported by old city and open economic zone enterprise with exception of crude oil, processed oil and other goods for which state has separate provisions.

ICCT shall be exempted for production equipment, office or business equipment and building material imported as part of investment and additional investment of old city and open economic zone enterprise as well as for vehicles and office supplies imported for enterprise's own use.

ICCT shall be exempted for raw materials, spare parts, and accessories, components and packaging materials imported by old city and open economic zone enterprises for manufacturing of export products.

Tax Incentives for Permanent Representative Offices of Foreign Enterprises.

Permanent representative offices of foreign companies, enterprises and other economic organizations in China (“permanent representative offices”) engaged in such activities as conducting market surveys, providing business information, business liaison, consultation and other services on behalf of their head offices, shall be exempt from Industrial and Commercial Unified Tax (“ICCT”) and Enterprise Income Tax, provided they do not receive business or service income for their activities.

Permanent representative offices appointed by Chinese enterprises to act as their agents to promote their goods outside territory of China shall be exempt from ICCT and enterprises income tax on their commission income, rebates and handling fees, etc.

Commissions, rebates or handling fees received by permanent representative offices for acting as agents or intermediaries shall be subject to ICCT at reduced rate of 5%.

15% deemed profit rate which was originally assessed on permanent representative office which cannot substantiate its costs and expenses in order to calculate its actual taxable income is now reduced to 10%. Income tax shall be payable on taxable income which shall be calculated on deemed basis based on representative office's business revenue.

Where China offices of foreign law firms or accounting firms charge their clients on time cost basis, out of pocket expenses incurred on behalf of clients may be excluded from taxable income in calculating ICCT.

Tax Incentives in Special Economic Zones.

Chinese government continues to discuss eventual elimination of preferential taxes in SEZ and development areas. Income tax is levied at reduced rate of 15% on income derived from production, business and other sources by joint ventures, cooperative ventures or enterprises with foreign investment (hereinafter referred to as "special zone enterprises") operating in Shenzhen, Zhuhai, Shantou and Xiamen.

For special zone enterprises engaged in industry, communications and transportation, agriculture, forestry and animal husbandry, which have contract period of ten years or longer, two-year tax holiday commencing from first profit-making year shall be allowed followed by 50% reduction in third to fifth year.

For special zone enterprises engaged in service industry, with overseas investment exceeding US$5 million and contract period of ten years or longer, income tax shall be exempt in first profit-making year followed by 50% reduction in second and third year.

Foreign investors in joint ventures in special economic zones shall be exempted from enterprise income tax when repatriating profits distributed from enterprise.

After expiration of reduction or exemption period of enterprise income tax in accordance with relevant provisions of state, export enterprises within special economic zones exporting 70% or more of their products, in value terms, in any one year, may pay enterprise income tax at reduced rate of 10% for such years.

After expiration of initial reduction or exemption period of enterprise income tax in accordance with relevant legal provisions, technologically advanced enterprises shall pay enterprise income tax at reduced rate of 10% for another three years.

Dividends, interest, rentals, royalties and other kinds of income sourced in special economic zones and derived by foreign investors which have no establishments in China are subject to income tax at reduced rate of 10% except cases where tax exemption is provided under law. Where terms and conditions for provision of capital and equipment are preferential or technology transferred is advanced such that it is necessary to grant additional tax reductions or exemptions, matter shall be decided by government of special economic zones.

Reduction or exemption of local income tax for special zone enterprises shall be decided by government of special economic zones.

Export products of special zone enterprises shall be exempt from ICCT except for crude oil, processed oil or those for which state has separate provisions.

Special zone enterprises shall be exempt from ICCT for importation of machinery, equipment, raw materials, spare parts and accessories, means of transportation. For imported mineral oils, cigarettes, wines and other articles of daily use, ICCT shall be levied at half of tax rate prescribed in law.

Business income of branches of Hong Kong, Macao and foreign bank established in special economic zones shall be exempt from ICCT for certain specified period.

Interest income received by foreign, Hong Kong or Macao bank for loans made to branch office of foreign bank in special economic zones at inter-bank offer rates shall be exempt from withholding tax.

Interest income received by Hong Kong, Macao or overseas depositor from branch office of foreign bank in special economic zones shall be exempt from withholding tax or individual income tax.

Interest income received by branch office of foreign bank to its head office on working capital borrowed shall be exempt from withholding tax provided that interest rate is not higher than international inter-bank rates.

Tax Incentives in Hainan Island.

Enterprise income tax shall be levied at rate of 15% on income derived from production, business and other sources by enterprises established in Hainan Island (with exception of State banks and insurance companies). In addition, local income tax of 10% of assessed income tax shall be levied.

Enterprises engaged in development and operation of infrastructural facilities such as ports, harbours, airports, highways, railways, power states, coal minings, irrigation, etc., and enterprises engaged in agriculture, which have contract period of 15 years or more, shall be exempt from income tax in first to fifth profit-making years followed by 50% reduction in sixth to tenth years.

Enterprises engaged in industry, communications and transportation, which have contract period of ten years or more, two-year tax holiday commencing from first profit-making year shall be allowed followed by 50% reduction in enterprise income tax in third to fifth year. Where enterprise is confirmed by Government of Hainan Province as technologically advanced, income tax may be reduced by 50% during sixth to eighth years.

After expiration of reduction and exemption period of enterprise income tax in accordance with relevant provisions, enterprises engaged in industry or agriculture exporting 70% or more of their products in value terms in any one year may pay enterprise income tax at reduced rate of 10% for that year.

For enterprises engaged in service industry with total amount of investment exceeding US$5 million or RMB 20 million and contract life of ten years or more, shall be exempt from enterprise income tax in first profit-making year followed by 50% reduction in second and third years. Reduction or exemption from local income tax for enterprises in Hainan Island shall be decided by government of Hainan Province.

Dividends, interest, rental, royalties and other kinds of income sourced in Hainan Island and derived by foreign investors which have no establishment in Hainan Island shall be subject to income tax at rate of 10% except in cases where tax exemption is provided by law. Where necessary to grant tax reduction or exemption, matter shall be decided by government of Hainan Province.

Enterprises in Hainan Island importing machinery, equipment, raw materials, spare parts and accessories, means of communication and transportation, other goods and materials and office supplies are required for enterprises own construction and production purposes shall be exempt from customs duties, product tax or value-added tax.

Customs duties, product tax or value-added tax shall be reduced by 50% for goods imported by enterprises in Hainan Island for sale in Hainan market.

Products manufactured by enterprises in Hainan Island and sold in Hainan market shall be exempt from product tax or value-added tax, except for mineral oils, cigarettes, wines and few other products specified by government of Hainan Island which shall be subject to product tax or value-added tax at half of existing tax rates.

Foreign investors repatriating profits distributed from enterprise to overseas locations shall be exempt from income tax on amount of remittance.

Foreign investors or enterprises in Hainan Island which reinvest their shares of profits distributed from Hainan enterprises for period of not less than five years may obtain refund of 40% of income tax paid on amount of reinvestment. Where reinvestment is for construction of infrastructure in Hainan Island, or is used in agricultural enterprises, export-oriented enterprises or technologically advanced enterprises, total amount of income tax already paid on reinvested portion shall be refunded.

24.09 TREATIES AND AGREEMENTS:

Tax Agreement.

On Mar. 21, 1984, U.S. and China initiated Agreement for Avoidance of Double Taxation and Prevention of Tax Evasion with Respect to Taxes on Income. This treaty was signed on Apr. 30, 1984 and on July 24, 1986 approved by Senate, together with protocol to prevent treaty shopping. Provisions effective as of Jan. 1, 1987. This Agreement also applies to individual income tax. (Art. 2). Income derived by individual resident in U.S. for professional services, if he has fixed base regularly available to him in China for purposes of performing his activities, or is present in China for period or periods exceeding in aggregate 183 days in calendar year concerned, may be taxed for income attributable to that fixed base or time period. (Art. 13[1]). Salaries, wages and similar remuneration derived from employment exercised in China by U.S. resident, insofar as derived from said employment, may be taxed in China (Art. 14[1], provided recipient present in China for period in excess of 183 days in calendar year (Art. 14[2][a]), and employer has permanent establishment or fixed base in China (Art. 14[2][c]) and employer also resident in China (Art. 14[2][b]). However, except for activities exercised in accordance with special programs for cultural exchange, income derived by American resident from personal activities in China by entertainer, musician or athlete is taxable in China. (Art. 16[1]). Teachers and research specialists at accredited educational or scientific institutions in China exempt from income tax for period not exceeding three years in aggregate for said work in China (Art. 19), as are students during their studies for reasonable period of time necessary to complete their education, for payments received from U.S. for maintenance and study, for grants and awards and for income for personal services performed in China in amount not in excess of US$5,000 (Art. 20). Tax Agreement also provides for elimination of double taxation, by providing credits for income tax paid in China by American resident or citizen. (Art. 22[2][a]). Diplomatic agents and consular officers retain their privileges. (Art. 26).

24.10 VALUE ADDED TAX:

Taxpayers.

Any entity or individual selling goods or providing services for processing, repairing and replacement, and importing goods in China must pay value-added tax. (Value-added Tax Regs., Art. 1). Foreign funded enterprises and foreign enterprises engaging in activities specified above must pay value-added tax. (Value-added Tax Regs., Art. 27; NPC Decision, Art. 1).

Tax Rate.

Value-added tax rate is flat tax rate, falling into four types. (Value-added Tax Regs., Art. 2). For sale or import of most goods, tax rate is 17%. However, sale or import of following goods are subject to 13% tax rate: (1) Food grains and edible vegetable oils; (2) tap water, central heating, air conditioning, hot water, gas, natural gas, liquefied petroleum gas, marsh gas and coal products for household use; (3) books, newspapers, magazines; (4) feed, chemical fertilizer, pesticide, farm machinery; (5) other goods as decided by State Council.

Unless otherwise provided by State Council, there are no taxes on goods that are exported. For provision of services of processing, repairing and replacements, tax rate is 17%.

State Council may readjust tax rates specified above. (Value-added Tax Regs., Art. 2). Where taxpayer deals in two or more kinds of goods or taxable services which are subject to different tax rates, sales volume of goods or taxable services within different tax rate must be calculated separately, otherwise, higher tax rate will apply. For small scale taxpayers, standards of which are separately regulated by Ministry of Finance, tax rate is 6% for sale of goods or taxable services. (Value-added Tax Regs., Arts. 11, 12). Tax rate may be readjusted by State Council. (Value-added Tax Regs., Art. 12).

Tax Calculation.

Taxes are calculated at each stage of commercial transaction. Sum of tax to be paid by taxpayer for sale of goods or taxable services is amount of tax remaining at sales level by offsetting tax at purchase level at that time. (Value-added Tax Regs., Art. 4). If amount of tax at sales level is not enough to offset tax at purchase level at that time, deficiency may be transferred to next stage for continual offset. (Value-added Tax Regs., Art. 4). Amount of tax at sales level is sum of sales volume multiplied by tax rate. (Value-added Tax Regs., Art. 5). Tax at purchase level refers to sum of value-added tax paid by or borne by taxpayer when it purchases goods or accepts taxable services. (Value-added Tax Regs., Art. 8). Amount of tax at purchase level deductible from tax at sales level, but is limited to sum of value-added tax indicated in special invoice for value-added tax issued by seller or tax payment receipts issued by customs office. (Value-added Tax Regs., Art. 8). For agricultural products free of tax, deductible tax at purchase level is sum of purchase price multiplied by uniform deduction rate of 10%. (Value-added Tax Regs., Art. 8). Where taxpayer fails to obtain and maintain certificate of value-added tax deduction or certificate fails to indicate sum of value-added tax or other related items, tax at purchase level may not be deducted from tax at sales level. (Value-added Tax Regs., Art. 9). As to small scale taxpayers, amount of tax is sum of sales volume multiplied by tax rate, i.e. 6% (Value-added Tax Regs., Art. 13). Tax at purchase level may not be deducted. (Value-added Tax Regs., Art. 13).

With regard to imported goods of taxpayer, tax to be paid is sum of composite assessable price multiplied by tax rate. (Value-added Tax Regs., Art. 15). Composite assessable price is sum total of customs dutiable value plus customs duty plus consumption tax. (Value-added Tax Regs., Art. 15). Sales volume of taxpayer for sale of goods or taxable services must include total price plus fees paid by buyer. (Value-added Tax Regs., Art. 6). Tax on sales level must be excluded from sales volume. Sales volume is calculated in local currency, i.e. RMB. (Value-added Tax Regs., Art. 6). If sales volume of taxpayer is in foreign currency, it must be converted into RMB according to exchange rate prevailing on foreign exchange market. (Value-added Tax Regs., Art. 6). If price taxpayer charges for selling goods or providing services is obviously low without justified reason, competent tax authority may readjust price. (Value-added Tax Regs., Art. 7).

Tax Exemption.

Where sales volume of taxpayer falls below minimum taxable sales volume set by Ministry of Finance, no value-added tax levied. (Value-added Regs., Art. 18). Some goods specified in Art. 16 of Value-added Tax Regs. are exempted from value-added tax. These goods include: (1) Self-produced agricultural products sold by producers; (2) contraceptives; (3) antiquated books; (4) imported devices and equipment for purpose of scientific research, experiment, education; (5) imported materials and equipment gratuitously given by foreign governments or international organizations; (6) imported equipment or machinery for compensation trade, contract processing and contract assembly; (7) articles imported directly by organizations for disabled and used specially for disabled; and (8) selling of one's own used articles.

In addition, only State Council can add new VAT exempt items or reduce tax rate on certain goods. No department or local government may decide items for tax exemption and tax reduction. (Value-added Regs., Art. 16). Where taxpayer deals in two or more items that are entitled to tax exemption or tax reduction, sales volume of each item must be separately calculated (Value-added Tax Regs., Art. 17), otherwise there will be no tax exemption or tax reduction.

Tax Authority.

Value-added tax will be levied by tax authority and value-added tax on imported goods will be levied by customs. Regular taxpayer must pay tax to competent tax authority in place where its organization is located. (Value-added Tax Regs., Art. 22). Where head office and branch are located in different counties (cities), tax must be paid to respective competent tax authority where they are located. Upon approval of State Tax Bureau or its authorized authorities, organization may pay value-added tax for all of its branch offices to competent tax authorities in place where head office is located. Where regular taxpayer sells goods in other counties (cities), taxpayer must obtain outbound business activities tax administration certificate from and pay tax to competent tax authority in home country where establishment is located. If taxpayer fails to obtain certificate specified above, taxpayer reports and pays tax to competent tax authority where sales activities take place. Taxpayer without fixed base must pay tax to local authority where sales activities take place. (Value-added Tax Regs., Art. 22). As to imported goods, value-added tax must be paid by importer or agent to customs where goods are declared. (Value-added Tax Regs., Art. 22).

Land Value-added Tax.

Taxpayers.

Any entity or individual who obtains income from assignment of right to use State-owned land, buildings and attached facilities thereon must pay land value-added tax. (Land Tax Regs., Art. 2). If foreign-funded enterprises and foreign enterprises are engaged in activities specified above, they must pay land value-added tax. (NPC Decision, Art. 3). Where taxpayer fails to pay land value added tax, land administration and housing administration will reject title transfer application of taxpayer. (Land Tax Regs., Art. 12).

Taxable Value-added Increments and Scope of Deductions.

Taxable income from transfer of State-owned real estate refers to all income obtained in such transactions including income in cash, in kind and other forms. (Land Tax Regs., Art. 5). According to Art. 6 of Land Tax Regs., following items are deductible: (1) Lease price paid for use of land; (2) costs and expenses of land development; (3) costs and expenses of new buildings and their coordinate facilities, or appraisal price of used houses and buildings; (4) taxes, charges related to assignment of real estate; and (5) other deductible items prescribed by Ministry of Finance.

Where taxpayer conceals or falsifies prices of real estate transactions, provides false appraised items or sells real estate at prices lower than appraisal price without justified reason, it will be taxed according to appraisal price. (Land Tax Regs., Art. 9).

Tax Rate.

Progressive tax rate is employed. (Land Tax Regs., Art. 7). If taxable sum of value of real estate transaction does not exceed 50% of deducted amount, tax rate is 30%; where it is in excess of 50% but does not exceed 100% of deducted amount, tax rate is 40%; where it is in excess of 100% but does not exceed 200% of deducted amount, tax rate is 50%. For sum of added value in excess of 200% of deducted amount, tax rate is 60%.

Tax Exemption.

If taxpayer builds residence of ordinary standard for sale and added value does not exceed 20% of deducted amount, he is exempt from value added tax. Should real estate be recalled or requisitioned by State according to law for construction purposes it will be exempt from such value-added tax. (Land Tax Regs., Art. 8).

Stamp Tax.

Tax is paid on contracts, pursuant to Stamp Tax Law, effective Oct. 1, 1988, that involve transfer of property, and stamps are then attached to contract. There have been recent efforts to ensure enforcement, whereby Tax Bureau requires that all levels of local taxation authorities should strengthen management of stamp tax dutiable documents, and that taxpayers uniformly set up stamp tax dutiable documents registration books and ensure timely, accurate, complete registration of all types of dutiable documents. Companies with large quantities of dutiable documents or with many internal departments signing dutiable documents with external parties are required to formulate measures for dutiable documents registration management in light of actual situation of companies. If conditions permit, taxpayers should appoint specific department or specific personnel to be responsible for management of dutiable documents. Rates of stamp duty on documents varies from 0.5 part of 10,000 on loan documents, to five parts of 10,000 on sale of property, to one part of one thousand on leases, to five RMB on licenses, and to one part of one thousand on insurance contracts.

25 TRANSPORTATION

25.01 AIRCRAFT:

U.S. and China entered into agreement relating to civil air transport on Sept. 17, 1980 and agreement relating to reciprocal issuance of visas to crew members of aircraft and vessels on Jan. 7, 1981. On Mar. 5, 1982 U.S. and China agreed to mutual exemption from taxation of transportation income of shipping and air transport enterprises. Income and profits derived from operation of ships or aircraft, including rental income of those operated in international traffic (Art. II[1][b]); rental income incidental to operation of ships or aircraft in international traffic (Art. II[1][c]); income and profits from rental or use of containers (Art. II[1][d]) and related equipment for transportation of containers (Art. II[1][d]) taxable only by contracting state (Art. I). Salaries of crew members of said vessels operated in international traffic exempt from tax in other contracting state. (Art. V). International traffic defined in Agreement to mean any transport by ship or aircraft except that solely between places in other contracting state. (Art. I[2]).

China acceded on Sept. 10, 1980 to Convention Concerning the Checking of the Illegal Hijacking of the Aircraft, the Hague Convention; and Convention Concerning the Checking of Illegal Acts that Jeopardize Civil Aviation Safety, the Montreal Convention; both of which became applicable to China on Oct. 10, 1980. On Feb. 28, 2005 China became signatory to 1999 Montreal Convention.

Civil Aviation Law was adopted by Standing Committee of National People's Congress on Oct. 30, 1995, effective as of Mar. 1, 1996. Law sets forth in detail major aspects of civil aviation, including nationality of civil aircraft, rights of civil aircraft, airworthiness management of civil aircraft, airmen, civil airport, air navigation, public air transport enterprise, public air transport, general aviation, search, rescue and accident investigation, liability for damages to third parties on surface, special provisions governing foreign civil aircraft, application of law to foreign-related matters, legal liability, etc.

Liability for Damage to Third Parties.

Law also provides chapter on liabilities for damage to third parties on surface. Any person on surface (including water surface) who suffers death or personal injury or damage to property caused by civil aircraft in flight or by any person or thing falling therefrom shall be entitled to compensation. Nevertheless, person who suffers damage shall have no right to compensation if damage is not direct consequence of incident giving rise thereto, or if damage results from mere fact of passage of civil aircraft through airspace in conformity with air traffic regulations concerned of State. (Art. 157).

Application of Law to Foreign Matters.

Law of State in which (1) Nationality of civil aircraft is registered shall be applicable to acquisition, transference and extinction of ownership of civil aircraft; (2) nationality of registered civil aircraft shall be applicable to mortgage of civil aircraft; (3) law of location of court which takes up case shall be applicable to civil aviation liens; (4) parties to contract of civil air transport may choose law applicable to contract unless otherwise provided by law. In case parties to contract have made no such choice, law of State most closely related to contract shall apply; (5) law of place where act of tort occurred shall be applicable to indemnity for damage caused by civil aircraft to third parties on surface. Law of location of court which takes up case shall be applicable to indemnity for damage caused by civil aircraft over high seas to third parties on surface. (Arts. 185, 186, 187 and 189). Application of foreign laws or international practices in accordance with provisions of this Chapter shall in no way violate public interest of People's Republic of China. (Art. 190).

Interim Provisions Concerning Compensation of Personal Injuries of Passengers on Domestic Airways was initially promulgated by State Council on Jan. 3, 1989, and amended by State Council on Nov. 29, 1993. Domestic air passenger transportation refers to transportation where place of departure, agreed stops and destination are in territory of China. (Art. 2). Carrier shall compensate losses of passengers' death or injuries sustained on board aircraft or in course of getting on or off board. (Art. 3). Maximum compensation shall be RMB 70,000. (Art. 6). If carrier proves that death or injuries of passengers are caused by force majeure or their own health condition, liability shall be exempted. If death or injury caused by negligence or willful acts of passengers, liability may be mitigated or exempted. (Arts. 5, 6). If passengers purchase insurance against personal injury in air transport from insurance company, they are entitled to get insurance compensation without prejudice to their compensation from carrier. (Art. 7). Compensation received by foreigners, overseas Chinese and compatriots from Hong Kong, Macao and Taiwan may be converted into foreign currency of their respective country or region according to official exchange rate of China on date on which compensation is paid. (Art. 8).

Regulations of People's Republic of China on Civil Aircraft Rights, Registration were promulgated by State Council on Oct. 21, 1997.

To effect registration of ownership in, or possession of or mortgage in civil aircraft, holder of such right must fill in application form for registration and submit relevant documents required by Arts. 5-7 to competent civil aviation department under State Council. To effect registration of civil aircraft lien, creditor of such lien must, within three months from last date of rescue or custody, fill in application form for registration according to relevant regulations and submit documents sufficient to prove its legal identity and relevant evidence of creditor's rights to competent civil aviation department under State Council. (Art. 4).

When registered rights of civil aircraft change, obligee of civil aircraft holding relevant certificate of registration and documents evidencing such change must apply to competent authority under State Council to amend registration. (Art. 15).

In any of following cases, obligee of civil aircraft holding relevant certificate of registration of right and supporting documents must apply to competent civil aviation authority under State Council for cancellation of registration: (1) Transfer of civil aircraft's ownership; (2) destruction or loss of civil aircraft; (3) termination of lease of civil aircraft or cessation of possession of civil aircraft; (4) discharge of creditor's rights guaranteed by mortgage of civil aircraft; (5) discharge of civil aircraft lien; and (6) other circumstances stipulated by competent civil aviation department under State Council. (Art. 17).

Regulations of People's Republic of China on Civil Aircraft Nationality Registration were promulgated by State Council on Oct. 21, 1997.

Following civil aircraft shall register for nationality according to these Regulations: (1) Civil aircraft of State Organ of PRC; (2) civil aircraft of legal person of enterprise established according to Chinese Law. If registered capital of enterprise involves foreign share, proportion of foreign share shall not exceed 35% of registered capital or paid-in capital, and right to vote of representative of foreign investor shall not exceed 35% in board of directors and general meeting; and chairman of board of directors shall be Chinese citizen; (3) other civil aircraft which is permitted to register by civil aviation department under State Council. (Art. 2).

25.02 MARITIME LAW:

Maritime Law of China adopted by National People's Congress Nov. 7, 1992, effective July 1, 1993. Law sets forth in detail all major aspects of admiralty, including vessels, mariners, marine cargo transport contract, passenger transport contract, charter, collision at sea, marine towage, marine salvage, general average, limitation on maritime damages claim, marine insurance contract, prescription and applicable law. Where international treaties concluded or acceded to by China contain provisions different from Chinese law, treaties shall prevail, unless otherwise reserved by China. (Art. 268). Where there are no relevant provisions in Chinese law and international treaties concluded or acceded by China, international custom and practices may be applied. (Art. 268).

Vessel.

Law governs all ocean vessels and other moving installations at sea, excluding vessels for military or public service purposes, and small vessels of less than 20 gross tons. (Art. 3). Acquisition, transfer and loss of ownership of vessel must be registered at vessel registration authority. Acquisition, transfer or loss of ownership will not act against third party if not registered. (Art. 9). Transfer of vessel ownership must be transacted through written contract. (Art. 9). Vessel owner or designated persons of vessel owner may mortgage vessel to mortgagee for debts, and in case mortgagor fails to honor debts falling due, mortgagee may apply to auction off vessel and use proceeds to satisfy debts with priority according to law. (Arts. 11, 12). Vessel mortgage must be established through written contract and jointly registered by both mortgagor and mortgagee with vessel registration authorities; where registration is absent, mortgage will not act against third party. (Arts. 12, 13). Vessels under construction may be mortgaged; vessel-building contract must be filed with vessel registration authority. (Art. 14).

Regarding maritime claims arising out of any and all of following situations, maritime lien, which is right of claimant to take priority in compensation, will be applicable: (1) Salaries, other labor remuneration, crew repatriation, and social insurance fees of Captain, mariners and other staff pursuant to administrative rules, labor law or labor contracts; (2) damages for personal injuries or loss of life due to vessel operation; (3) claims for vessel's tonnage dues, pilotage dues, port dues and other statutory fees; (4) salvage proceeds of marine salvage; (5) compensation for loss of or damage to property due to tortious act during voyage of vessel. (Arts. 21, 22, 25). Maritime lien is enforced through court of law by distraining vessel. (Art. 28).

Carriage of goods by sea contract defined is contract under which carrier charges freight fee and transports cargo from one port to another. (Art. 41). Carrier or consignor may request contract be formulated in writing. However, voyage charter must be in written form. (Art. 43). Telegram, telex and facsimile have effect of written documents. (Art. 43). Contract of carriage of goods by sea or Bill of Lading (B/L) or other documents, evidencing such contract must not contain clauses in violation of provisions of this law. (Art. 44). Partial invalidity does not affect validity of remaining parts. (Art. 44). Clauses that assign benefit of insurance of goods in favor of carrier are null and void. (Art. 44).

Shipper may rescind contract before vessel leaves loading port. However in such instance, shipper must pay half of freight fee to carrier, where cargo has been loaded on board, shipper bears costs of loading, discharge, and other relevant fees, unless otherwise provided in contract. (Art. 89). Both parties may rescind contract and be exempted from liabilities to each other, in cases where contract could not be performed before ship leaves port of loading due to force majeure or causes not attributable to carrier or shipper. (Art. 90). Unless otherwise provided in contract, carrier shall refund freight fee to shipper where fee paid; shipper must bear loading or discharge expenses if goods have already been loaded; shipper must return B/L to carrier if B/L already issued. (Art. 90). Where vessel cannot discharge goods as provided for in contract at designated destination due to force majeure or other cause not attributable to carrier and shipper, Captain entitled to unload cargo at safe port or point near to port of destination and contract will be deemed honored, unless otherwise provided in contract. (Art. 91).

Responsibilities of Carrier set forth in Arts. 46-65.

Bill of Lading.

Provisions found in Arts. 71, 72, 73 and 79.

Delivery of Cargo.

Arts. 81, 82, and 86 govern delivery.

Collision at Sea.

Where one vessel collides with another, Captain of each colliding vessel must with best endeavors rescue other vessel and people on board, provided it does not endanger safety of his vessel and crew. (Art. 166). Captain of each colliding vessel must, so far as possible, notify counterparty with name of vessel, port of registration, port of departure and destination. (Art. 166). In cases where collision due to force majeure, or other causes not attributable to either party or causes not identifiable, neither party is liable to other. (Art. 167). Where one party at fault, such party is liable for damages. (Art. 168). Where both parties at fault, each party shall assume liabilities proportionate to respective faults; where respective faults are equal, or proportion of respective faults is not determinable, liabilities apportioned equally. (Art. 169). Damages to properties of third parties due to collision where both parties culpable, each party bears liability proportionate to respective faults; where loss of life or personal injury is caused to third party due to collision and is attributable to both parties, each assumes joint and several liability. (Art. 169).

Marine salvage contract formulated when salvor and salvaged reach agreement concerning terms and conditions of marine salvage operations. (Art. 175). Captain of vessel in distress may enter into salvage contract on behalf of vessel owner, and Captain or owner of vessel in distress may enter into salvage contract on behalf of owner of property on board. (Art. 175). Where contract is formulated under undue influence or influence of danger and terms of contract obviously unfair; or payment under contract is obviously higher or lower than salvage services actually rendered by salvor, any party may apply to court or arbitration organization to modify contract. (Art. 176). Salvor must carry out salvage with due care and prevent or reduce environmental pollution. (Art. 177). Salvor may seek assistance from other salvors where reasonably necessary. (Art. 177). Law adopts old and widely accepted principle of “NO CURE, NO PAY”, where salvor is not entitled to payment if salvage operation has not useful result. (Art. 179). Salvage reward is paid by owners of salvaged vessel and owners other property in proportion to respective salvaged value. (Art. 183). Salvor of human life may not claim compensation from salvaged people, however, may obtain reasonable proportion of payment given to salvors for saving vessel or other properties, or preventing or reducing environmental pollution. (Art. 185). After completion of salvage operations, salvaged must provide reasonable guarantee for salvage reward and other charges at request of salvor, and owner of salvaged vessel must try to cause owners of property to, prior to release of property, provide reasonable guarantee for their share of payment. (Art. 188).

General Average.

Where vessel, cargo and other property are involved in common perils on same voyage, special sacrifices or expenditures reasonably and intentionally made or incurred due to reasonable measures deliberately adopted for common safety are defined as General Average. (Art. 193). Contribution in General Average to be shared by beneficiaries, in proportion to respective Allocation Value. (Art. 199). Allocation Value of cargo is value of cargo at time of shipment including insurance premium and freight by deducting any damage that does not come under General Average and carrier's freight at risk; in cases where cargo is resold before arriving at destination port, Allocation Value is net income plus amount of General Average. (Art. 199). Allocation Value of freight also governed by Art. 199. Baggage and personal belongings of passengers not included in Allocation Value. (Art. 199).

Marine Compensation Responsibilities Limitation.

Vessel owner including charterers, vessel operators, and salvors may limit liability for: (1) Personal injuries or damages to or losses of properties on board or related to vessel operation or salvage operation; (2) compensation claims in respect of loss caused by late delivery of cargo or delay in arrival of passengers and their baggage; (3) compensation claims in respect of loss caused by infringement of non-contractual rights related to vessel operation or salvage operation; and (4) further loss resulting from measures taken by persons to avoid or reduce damages caused by liable parties whose liability for compensation may be limited according to law. (Arts. 204, 207). Person may not limit his liability for following maritime claims: (1) Salvage payment or contribution in General Average; (2) compensation claims for oil pollution damage pursuant to International Convention on Civil Liabilities for Oil Pollution Damage acceded to by China; (3) compensation claims for nuclear damages pursuant to International Convention on Limitation of Liability for Nuclear Damages, acceded to by China; (4) compensation claims against vessel owners for nuclear damage caused by nuclear vessel; and (5) claims by servants of vessel owners or salvors not entitled to limit liability or entitled to only partially limit liability under law governing contract of employment. (Art. 208). Person may not limit liability if loss is caused by intentional or reckless act or omission and with knowledge that such loss would probably occur. (Art. 209). Law sets out different bases for calculating limitation of liability for maritime claims for loss of life, personal injury, and other claims, adopting standards of International Convention on Limitation of Liability of Vessel Owner. (Art. 210).

Marine Insurance.

According to Maritime Code of the People's Republic of China, with marine insurance contract is contract under which insurer undertakes to indemnify loss to subject matter insured and liability of insured caused by perils insured against. Definition of maritime “perils” is to be agreed upon by insurer and insured. Perils include those occurring on inland rivers or on land which are related to maritime adventure. (Art. 216).

Subject matter of marine insurance includes (1) Ship; (2) cargo; (3) income from operation of ship, including freight, charter lines and passenger fares; (4) expected profit on cargo; (5) crew wages and other remuneration; (6) liabilities to third parties; (7) other property that may sustain losses from maritime peril and liabilities and expenses arising therefrom. (Art. 218).

Insurer may reinsure insurance of subject matter. In such case, original insurance is not entitled to benefit of subsequent insurance unless specifically agreed to in contract. (Art. 218).

Insurer and insured determine insurable value of subject matter insured. If no insurable value has been agreed upon, it is calculated in following manners: (1) For ship. Value of ship at time when insurance liability commences. This includes total value of ship's hull, machinery, equipment, fuel, stoves, gear, provisions and fresh water as well as insurance premium; (2) Goods. Aggregate of invoice value of cargo or actual value of non-trade commodities at place of shipment, plus freight and insurance premium when insurance liability begins; (3) Freight. Sum of freight value, payable to carrier, and insurance premium when insurance liability commences; (4) Other subject matter. Aggregate of actual value of insured subject matter and insurance premium when insurance liability commences. (Art. 219).

If insured amount exceeds value of subject matter, portion in excess is negated. (Art. 220).

Marine insurance contract comes into being when insurer agrees to accept proposal presented by insured and both insurer and insured reach agreement on terms and conditions of insurance. (Art. 221). Contract must include names of insurer and insured, subject matter insured, insurance value, insured amount, perils insured against and perils excluded, insurance period and premium. (Art. 217).

When insured accident takes place, insurer may request insured to produce evidence and materials to ascertain nature of peril and degree of damage before payment of indemnity. (Art. 251). Where loss or damage to subject matter within coverage is caused by third party, right to claim from third party will be transferred from insured to insurer from date indemnity is paid (Art. 252); insured obliged to provide necessary documents and other information and try to assist insurer to recover damages from third party (Art. 252). Where insured waives right to claim against third party without permission of insurer, or through its own fault makes recovery from third party impossible, insurer may deduct corresponding amount from indemnity. (Art. 253). Insurer may deduct corresponding amount already paid by third party to insured from indemnity when effective payment and insurer must return excess to insured if compensation received by insurer from third party exceeds indemnity already paid. (Art. 254). Insurer may waive his rights subject matter and pay indemnity in full to relieve itself from obligations under contract when peril insured against occurs. (Art. 255). Where insured subject matter suffers total loss, insurer acquires full right to subject matter if full insured amount is paid. (Art. 256). Where insured amount is less than insured value, insurer acquires partial right to subject matter in proportion that insured amount bears to insured value. (Art. 256).

Applicable Law of Relationship Involving Foreign Interest.

Unless otherwise provided by law, parties to contract may choose governing law for contract; where parties fail to choose, law most closely connected with contract applies. (Art. 269). For acquisition, assignment and extinction of vessel ownership and vessel mortgage, law of flag of ship applies. (Arts. 270, 271). For maritime liens, law of court where case is accepted applies. (Art. 272). For damage claims arising from vessel collision, law of location where tortious act committed applies (Art. 273); where collision occurs on high sea, law of court where case accepted applies; where collision occurs between vessels of same nationality, law of flag applies (Art. 273). For General Average adjustment, law of country where adjustment conducted applies. (Art. 274). For limitation of liability for maritime claims, law of court where case is accepted applies. (Art. 275). Application of foreign laws or international customs and practices must not harm social interests of China. (Art. 276).

Supervisory Regulations on Foreign Investment in International Maritime Industry were enacted for purpose of normalizing foreign business establishment of foreign invested enterprises to handle international sea transportation business within China; these regulations are formulated in accordance with Regulations on International Sea Transportation. (Art. 1).

These regulations are applicable to foreign businesses that invest in international sea transportation business within territory of China, international sea transportation related auxiliary business. (Art. 2).

Ministry of Communications, Ministry of Commerce, and their authorized authorities are in charge of approval, administration of foreign investors' making investment in establishing, running foreign-invested enterprises in international sea transportation industry within China. (Art. 3).

Foreign investors are allowed to invest in international sea transportation business in following forms: establishing Sino-foreign joint-investment, Sino-foreign cooperative enterprises to deal in businesses of international ship transportation, international ship consignment, international ship management, international sea transported goods loading, international sea transportation container stations, yards; establishing Sino-foreign joint-invested, Sino-foreign cooperative, foreign solely-invested enterprises to deal in international sea transported goods storage business; establishing Sino-foreign joint-invested, Sino-foreign cooperative, foreign solely-invested enterprises to provide daily business services for ships owned or operated by investors. (Art. 4).

25.03 MOTOR VEHICLES:

Consuls, long term business representatives and other foreign residents in China may purchase automobiles from abroad and bring them to China for use and take them out of China or sell them in China when they wish. Duties that must be paid, if any, and ease of obtaining access depend in part on location of one's home or office, since regulations vary in different localities even within same city. Additionally, vehicles can now be driven from Hong Kong into China, to Guangzhou and Shenzhen, etc., in Guangdong province but procedures, including Hong Kong procedures, are as yet cumbersome. Temporary Tax Regulations for Licenses to Use Vehicles and Boats promulgated Sept. 13, 1951 by State Council and were repealed on Jan. 1, 2007.

25.04 SHIPPING:

Chinese ports are under general jurisdiction of China's Ministry of Communications. Harbor Superintendents and Port Affairs Bureaus at major ports are under jurisdiction of Ministry. China entered into agreement with U.S. on Maritime Transport with exchange of letters signed and effective as of Sept. 17, 1980. Regulations Governing Supervision and Control of Foreign Vessels were approved by State Council on Aug. 22, 1979. Master or owner of vessel must submit required documents to Harbor Superintendency Administration for completion of entry formalities week prior to vessel's expected arrival at port, and report 24 hours in advance, estimated time of arrival fore and aft drafts on arrival through port agent. (Art. 3). Vessel may not enter or leave port, or navigate or shift berths in port without pilot appointed by Harbor Superintendency Administration. (Art. 4). Vessels must submit entry reports and ship's papers and other relevant documents on arrival for examination and be subject to inspection, and departure report and other relevant forms of clearance examination prior to leaving port. (Art. 5). Vessels navigating or berthing in Chinese port areas or coastal waters must by day hoist national flag of country of registry, and on entering or leaving port or shifting berths shall additionally display signal-letters and relevant signals prescribed by Harbor Superintendency Administration. (Art. 23).

Management Regulations for Cross-Strait Shipping within the Taiwan Strait.

Ministry of Communications of People's Republic of China issued Management Regulations for Cross-Strait Shipping within the Taiwan Strait. Effective Aug. 20, 1996. Regulations apply to passenger and cargo shipping between Chinese mainland ports and Taiwan province ports (hereinafter “cross-Strait shipping”). (Art. 2). Ministry of Communications of PRC (hereinafter “Ministry of Communications”) is responsible authority for cross-Strait shipping. (Art.

4).

Shipping companies registered in mainland China and Taiwan province that meet following requirements, and are ratified by Ministry of Communications, can conduct cross-Strait shipping with their own ships and managed ships: (1) China mainland or Taiwan province owned shipping companies; and (2) China mainland or Taiwan province joint investment shipping companies. (Art. 5).

Local shipping companies which are registered in Mainland China, which apply to conduct cross-Strait shipping must be examined by responsible communications bureau of province, autonomous region, or city directly under State control, where they are located; application will then be transferred to Ministry of Communications for approval. Shipping companies belonging to various departments of State Council must be examined by relevant bureau; application will then be transferred to Ministry of Communications for approval. Shipping companies which have registered in Taiwan province shall entrust their agent on Mainland to submit applications. Examination is conducted by responsible communications bureau of province, autonomous region, or city directly under state control where agent company is located; application will then be transferred to Ministry of Communications for approval. (Art. 6).

Shipping companies and ships approved to conduct cross-Strait shipping will receive shipping permit and operating certificate of Taiwan Strait. Certificates will be valid for one year. (Art. 9).

Foreign shipping companies must not operate cross-Strait passenger or cargo shipping in Taiwan Strait without approval of Ministry of Communications. (Art. 10). Harbor Administration Bureau shall not arrange entry and exit harbor visa, nor load goods. Shipping agent companies shall not arrange companies to conduct cross-Strait shipping without approval of Ministry of Communications. (Art. 12).

Shipping and Importation of Trash.

Regulations on the Shipping and Importation of Trash were promulgated by Ministry of Communications of People's Republic of China on Aug. 9, 1996. Effective Aug. 20, 1996.

In order for carrier to accept order, shipper, consignor, or agent must do following: (1) Provide documents of import trash approval signed by Environmental Protection Bureau of PRC; (2) provide certifying documents, signed by Chinese inspection bureau, or other inspection bureau appointed by Chinese Commodity Inspection and Testing Bureau before import trash is loaded; (3) provide copy of original trade contract, serial number, or written confirmation of consignee; and (4) provide name and address of consignee. (Art. 3).

See also category 15 Foreign Trade and Commerce, topic Customs (Duty).

26 TREATIES AND CONVENTIONS

26.01 TREATIES:

See categories 9 Dispute Resolution, topic Arbitration and Award; Foreign Trade and Commerce, topic Foreign Trade; Introduction, topic Consuls.

See also Part V of this volume, for selected conventions to which U.S. and China are parties.

Finance.

Agreement relating to investment guaranties. Entered into force Oct. 30, 1980. (32 UST

4010, TIAS 9924).

Joint Statement of People's Republic of China and United States of America, Oct. 29, 1997.

(1) Agree to establish direct communication between Beijing and Washington and to visit each other's capitols periodically; (2) agree to cooperate in areas of energy and environment, including working together on energy projects utilizing pure energy resources and agree to transfer of such technology; (3) China agrees to reduce import and export duties and to attempt to join Convention on Information Technology as soon as possible; (4) both agree to negotiate to reduce import barriers; (5) agree to negotiate regarding opening of markets in China, including service industry and agricultural markets; reducing tariff barriers and implementing principles of WTO; (6) agree to promote Convention Prohibiting Nuclear Testing and promise not to supply materials to non-U.N.-supervised nuclear projects; (7) agree to consult and discuss their differences in area of human rights, on basis of equity and mutual respect; (8) agree to cooperate in areas of international drug trafficking, organized crime, illegal immigration, counterfeit money and money laundering; (9) agree to establish joint liaison group on enforcing law and to negotiate towards agreement on mutual legal assistance; (10) agree to establish Sino-U.S. joint liaison group on legal communication, including exchange of legal experts and training of judges and lawyers; (11) agree to strengthen legal information systems, legal materials, and commercial law and arbitration; (12) agree to negotiate in effort to strengthen safety on seas for military forces; and (13) agree to communicate in areas of education, culture and science and technology.

Industrial and Technological Cooperation.

Memorandum of understanding on the protection of intellectual property. Entered into force Jan. 17, 1992. (TIAS).

Taxation.

Agreement with Respect to Mutual Exemption from Taxation of Transportation Income of Shipping and Air Transport Enterprises was entered into force on Sept. 28, 1993. (TIAS 100884). Agreement for Avoidance of Double Taxation was entered into force on Nov. 21, 1986. (TIAS).

Trade and Commerce.

Agreement on Trade Relations. Entered into force Feb. 1, 1980 (31 UST 4651; TIAS 9630).

World Trade Organization.

China, after executing agreements with U.S.A., European Union, and all other members of World Trade Organization, completed all procedures for entry into World Trade Organization in Sept., 2001; it is member state of W.T.O.

1
COLOMBIA LAW DIGEST

—Scope —

Revised for 2008 edition by

CURTIS, MALLET-PREVOST, COLT & MOSLE LLP, of New York.

(Abbreviations used are: C. C. for Civil Code; C. Com. for Commercial Code; C. P. C. for Civil Procedure Code; F. C. for Fiscal Code; L.C. for Labor Code; C. I. A. for

Code of Infancy and Adolescence. All Codes are cited by articles thereof.)

Note: This revision incorporates legislation through Dec. 9, 2007.

1 INTRODUCTION

1.01 CURRENCY:

Monetary unit is peso. Banco de la República is only bank authorized to issue notes, which are legal tender. (Law 31 of Dec. 29, 1992).

1.02 GOVERNMENT AND LEGAL SYSTEM:

(Const. of July 18, 1991 as am'd).

Colombia is democratic republic with representative form of government.

Legislative power is vested in a Congress composed of a Senate and House of Representatives. Number of senators and representatives is determined on basis of population and are elected by direct popular vote for four years. Executive power is vested in President. President is elected by direct popular vote for four years and can be reelected for another term. Deputy President is elected by popular vote at same time as President.

In administrative area, President is officially empowered to organize public credit, recognize national debt and arrange its service; regulate international exchange and foreign commerce and regulate customs duties, tariffs and charges. Exercise of these powers, however, is subordinate to laws passed by Congress.

Judicial power resides in Supreme Court of Justice and other Courts established by law, State Council and Constitutional Court. Supreme Court of Justice, State Council and Constitutional Court members are elected for eight years and cannot be reelected. Country is divided into departments, districts, municipalities and Indian territories.

1.03 HOLIDAYS:

Jan. 1 (New Year's); Jan. 6 (Epiphany); Mar. 19 (St. Joseph); Maundy Thursday*; Good Friday*; May 1 (Labor Day); Ascension Day*; Corpus Christi*; June 29 (SS. Peter and Paul); July 20 (Independence Day); Aug. 7 (Battle of Boyacá); Aug. 15 (Assumption); Oct. 12 (Columbus Day); Nov. 1 (All Saints); Nov. 11 (Independence of Cartagena); Dec. 8 (Immaculate Conception); Dec. 25 (Christmas). (Labor Code, art. 177).

* These are movable holidays.

1.04 OFFICE HOURS AND TIME ZONE:

Colombia is in the +05:00 GMT Eastern Standard time zone. Office hours are generally from 8 a.m. to 12 noon and 2 p.m. to 5:30 p.m.

2 BUSINESS ORGANIZATIONS

2.01 AGENCY:

See category 21 Property, topic 21.07 Powers of Attorney.

2.02 ASSOCIATIONS:

Associations are permitted if not against morals or public policy. Their organic documents are subject to registration. They constitute legal entities and their members are not liable for their debts, unless expressly so stipulated or the character of the association implies such liability. Unless otherwise provided in the by-laws a majority of members constitutes the deliberative body of the association and the vote of the majority is decisive. (Const., Art. 38; C. C. 633-652).

2.03 CORPORATIONS:

Formation (C. Com. 98-121, 373-376).—Articles of incorporation must state: (1) Name, nationality and domicile of shareholders, which cannot be less than five; (2) domicile of company; (3) business to be pursued and principal activities specifically stated; (4) capital, type and nominal value of shares and how and when they are to be paid up, which period cannot exceed one year; (5) when inventory and balance are to be prepared and dividends declared and proportion of profits withheld for reserve; (6) when and how shareholders' meetings are to be convoked and conducted; (7) method of administration, rights and powers of directors and stockholders; (8) duration; (9) manner of liquidation; (10) when and how differences must be submitted to arbitration; (11) name, domicile, rights and duties of managers or legal representatives of company; (12) powers and duties of fiscal auditor; and in general, any other lawful agreements. Name of corporation shall always be followed by words “sociedad anónima” or letters “S.A.”.

Copy of articles of incorporation must be recorded in Mercantile Register of Chamber of Commerce of municipality of company's domicile and in any other municipality where company does business. (For registration fees and tax, see categories 3 Business Regulation and Commerce, topic Commercial Register; Taxation, topic Taxes, subhead Stamp Taxes.) Before corporation can start doing business, it must also obtain permission to function from Superintendent of Corporations. Request for permission must be accompanied by (1) Notarized copy of articles of incorporation and (2) certificate from a Colombian Bank stating that account has been opened in name of corporation and paid-in capital has been deposited.

Administrators are jointly and severally liable for damages caused by fraud or negligence to company, shareholders or third parties.

Stock and Stockholders (C. Com. 377-418).—Shares of stock may be registered. Shares are indivisible, so when one share is owned by several persons, they must designate one person to exercise rights of shareholders. Preferred shares are permitted if authorized by plural vote of shareholders representing no less than 75% of all subscribed shares, and if first offered to existing shareholders who may buy them proportionally to number of shares owned.

Each shareholder (which cannot be less than five) has right to: (1) Participate and vote in general meetings; (2) receive a proportional amount of profits; (3) freely transfer shares, unless other shareholders or company have preference to buy; (4) inspect books of corporation for 15 days prior to shareholders' meetings which examine company balance at end of fiscal year; and (5) receive a proportional amount of company assets at time of liquidation. Preferred shareholders, in addition to these rights, may have preference to be reimbursed up to nominal value of their shares at time of liquidation or any other exclusively economic prerogative. They may not have multiple votes or any rights that infringe on rights of common shareholders. There may be shares to compensate for services, work, technological contributions, etc. which merely carry a right to a proportional part of profits and, at time of liquidation, accumulated reserves.

Shares not subscribed for in articles of incorporation must be offered in accordance with rules of subscription. Except for preferred shares, and unless otherwise provided for in statutes or bylaws, board of directors shall approve rules of subscription. Rules of subscription must state: (1) Number of shares offered; (2) proportion and manner of acquisition; (3) duration of offer, which may last between 15 days up to three months; (4) price at which shares are being offered which cannot be less than nominal value; and (5) period allowed in which to pay for shares. When purchase of shares in installments is allowed, one-third of value of shares must be paid for upon subscription, and balance must be fully paid within one year. Shareholders have preference to buy new shares in proportion to shares they owned on date subscription was approved. Offer of shares without authorization by Superintendent of Corporations results in fines.

Companies cannot purchase their own shares except with consent of general shareholder's meeting by vote of at least 70% of shares; purchase must be made from profits and shares must be fully paid. Shares must be issued within one month after Superintendent of Corporations grants permit to corporation to do business. In case of loss or theft of shares, new certificates will be issued to owner upon his giving guarantee. Executives of corporation cannot buy or sell shares without authorization by two-thirds vote of board of directors or majority vote of shareholders.

Shareholders' Meetings (C. Com. 419-433).—They are necessary at least once a year, to examine condition of corporation, decide reserve levels beyond what is legally needed, appoint and remove directors and take other action required for corporation's interest. Meetings should take place at principal domicile of corporation, but may be convened at any place if all shares are represented, by any means of simultaneous or successive communication, or by written expression of shareholder's consent. Minutes of meeting must be kept and sent within 15 days after meeting to Superintendent of Corporations. Any action of meeting in contravention of law is void.

Directors (C. Com. 434-444).—Their powers and duties are expressed in bylaws. There must be at least three directors. They are appointed for stated periods and subject to removal. For each director, one substitute must be elected. There cannot be a majority of persons on board of directors that are related within third degree of consanguinity or second of affinity or by marriage. Unless otherwise provided for in bylaws, directors have power to do any act or execute any contract within social purpose of corporation. Directors must submit reports to shareholders' meetings with a statement of amounts and inventory for each fiscal period, reasonable information on financial position of company, and intended distribution of profits.

Balance and Dividends (C. Com. 445-456).—At end of every accounting period and at least once a year (Dec. 31) corporations must produce inventories and balance sheets of their business. Directors and legal representative must present to shareholder's meeting, balance of each accounting period, plus following documents: (1) Complete statement of gains and losses; (2) distribution of profits; (3) directors' financial report, with statement of salary expenses, fees to independent contractors, and advertising expenses, list of foreign assets and debts, and current investments in other companies; (4) recommendations on administration of corporation by legal representative; and (5) report of auditor. These documents, plus company books, must be made available to shareholders 15 days before shareholders' meeting.

Corporations whose shares are traded on stock market must have their balance sheets audited by public accountant and published in newspaper wherever markets operate.

Dividends can be distributed only from net profits justified by inventories and balances, approved at shareholders' meetings. No dividends may be distributed until required reserve has been set aside and taxes paid. Corporations must have a “reserve fund” amounting to at least one-half of subscribed capital, formed with 10% of profits. Whenever reserve fund goes below 50%, corporation must again appropriate 10% of profits until reserve is at legal level. Dividends may be paid in money or, if 80% of shareholders represented at meeting approve, in shares repurchased by corporation.

Merger, Consolidation, and Spin-off.

Merger, consolidation or spin-off of same or different types of companies may be effected, and must be approved as provided for in amended bylaws of involved companies.

Shareholders dissenting from decision approving merger, consolidation or spin-off of company have appraisal rights.

Dissolution and Liquidation (C. Com. 457-460).—Corporation must, among other grounds, be dissolved when period of its duration has expired; when its business purpose is no longer possible to be pursued; when losses occur which reduce its net worth to less than 50% of its subscribed capital; or when 95% of its shares are owned by one person. When net worth of corporation is reduced below 50% of subscribed capital, directors must immediately convoke a shareholders' meeting, which may take action within six months to reestablish net worth of company or may declare its dissolution. Once dissolution has been properly decided, liquidators must present to shareholders reasonable statements regarding its process, its balance sheet, and inventory. Following words must be added after corporate name: “in liquidation.” Liquidators are personally liable in case of omission.

Government Supervision (C. Com. 266-293).—It is exercised by Superintendent of Corporations to ascertain whether corporation is carrying out its corporate purposes, keeping necessary reserves, and books and records as provided by law, etc. Powers of Superintendent include general supervision of corporations, convoking shareholders' meetings, withdrawing shares from stock market, and suspending permission to conduct business.

Neither Superintendent nor his employees can own or acquire stock in companies being supervised.

Superintendent can suspend permission to do business when corporation (1) Is not fulfilling or is exceeding business purpose; (2) is not keeping its books and minutes in proper manner; (3) does not have legally-required reserves; (4) is unjustifiably distributing profits; and (5) is not fulfilling other legal obligations. Superintendent can order dissolution of corporation when it (1) Has not obtained permission to do business or to continue doing business; (2) has not corrected, in time allowed by Superintendent, irregularities which lead to suspension of permission to do business; (3) has a net worth below 50% of subscribed capital and has taken no steps to reestablish it; and (4) should be dissolved but shareholders cannot or do not dissolve it.

Foreign Corporations (C. Com. 469-497).—If they desire to do permanent business in Colombia they must (1) Register with a notary in place of its future domicile, copies of its articles of incorporation, bylaws, act or resolution which stipulates its establishment in Colombia, and documents that authorize existence of corporation and position and authority of its representatives; and (2) obtain permission from Superintendent of Corporations to do business in country. Act or resolution stipulating establishment of corporation should state: (1) Business to undertake; (2) amount of capital allotted to subsidiary and other sources of financing it; (3) place of future domicile; (4) duration of its business in Colombia and reasons for its termination; (5) designation of general agent, with one or more substitutes, to represent corporation in all business in Colombia and empowered to act in any way to further business goals; and (6) designation of auditor, who must be a permanent resident of Colombia.

Permanent business activities are following: (1) Opening commercial establishments or business offices, even if of only a technical or consulting business; (2) labor or service contracts; (3) any handling or investment of private funds; (4) any aspect of an extractive industry; (5) obtaining concession from Colombia or participating in any way in exploitation of same; and (6) functioning of shareholder meetings, board of directors, or management within Colombian territory.

To establish a subsidiary in Colombia, foreign corporation must vouch before Superintendency that capital allotted by principal corporation is covered. Foreign corporation doing permanent business in Colombia must maintain sufficient reserves and comply with all laws that govern national corporations.

Documents granted to corporation in foreign country will be authenticated by Colombian consul, or consul of friendly nation, in that country. Consul will show that corporation exists and conforms to laws of foreign country. Superintendent of Corporations can impose successive fines upon foreign persons who engage in activities violating law, as well as upon their representatives. Superintendent has same powers over foreign and domestic corporations. Corporations must register in chamber of commerce of its domicile (see category 3 Business Regulation and Commerce, topic 3.03 Commercial Register) copy of amendments to its articles of incorporation, bylaws and acts designating or removing its representatives from country. Corporation may increase its capital in country without restriction but cannot reduce it except in accordance with law, and must keep, in books registered with chamber of commerce of its domicile, accounting of business done in Colombia. Corporations must file, at least at end of each year, balance sheet with Superintendency and chamber of commerce.

Financial accountants must inform Superintendency of irregularities which could cause suspension or revocation of corporation's permit to do business. When foreign corporation does not invest its allotted capital in activities within scope of its business purpose, Superintendency will impose successive fines on legal representative until capital is properly invested. When permit to do business is revoked, corporation must liquidate its business in Colombia. Profits obtained by subsidiary of foreign corporation must be liquidated in accordance with final balance sheet, approved by Superintendency. Consequently, subsidiary cannot make advances or turnover of capital to principal in part payment of future profits.

2.04 FOREIGN CORPORATIONS:

See topic 2.03 Corporations.

2.05 LIMITED LIABILITY COMPANIES:

See topic 2.07 Partnerships.

2.06 LIMITED PARTNERSHIP:

See topic 2.07 Partnerships, subhead Limited Partnership.

2.07 PARTNERSHIPS:

Partnerships are considered legal entities. Before a mercantile partnership can do business partnership agreement must be drawn up in a public instrument executed before a notary. An extract therefrom, certified by notary, must be filed with Chamber of Commerce, recorded in local registry office and published in a newspaper in localities where partnership is to do business.

General Partnership (“Sociedad Colectiva,” C. Com. 294-322).—Partners are jointly and unlimitedly liable for company's obligations; any agreement to contrary is void; however, partners are only liable to company's creditors after payment has been demanded from company and it has refused to pay.

Any type of companies and/or corporations, can be members of partnerships, if so decided with unanimous approval of members or in shareholders' meetings.

Any partner must request express authorization from his co-partners if he wishes to total or partially assign his interest in firm; to delegate to third party his rights to administer and/or to control company; to establish under his own name or by means of an agent, same type of business as partnership; and if he wishes to be a member or a shareholder in companies or corporations doing same type of business as partnership. Code contemplates specific sanctions in case of violation of obligations mentioned above.

Firm name can have name of one of partners followed by “and company,” “brothers,” “and sons” or any other similar expression to indicate that it is a partnership. If third person allows his name to be used in that manner, he is liable to creditors as if he were a partner. In case of death of a partner whose name has appeared in firm name, his heirs can continue using it, if after that, following words are included “and heirs.”

All partners are allowed to administer company. However, they can delegate such function to other partners or even to third parties; in such case partners who have delegated such function cannot intervene in company's administration. Administration of company implies faculty to do all type of business in company's name if related to its purposes. Each partner is allowed to have one vote; therefore, assignment of parts of interest, administration, admission of new partners, as well as any other type of amendments to its rules shall be possible if unanimous consent of partners is given, unless otherwise provided in its statutes. Special causes for dissolution are: Death of one or more of partners (if company cannot continue with his heirs or with remaining partners), incapacity, bankruptcy, sale of interest, and resignation of partners, or if other partners do not wish to continue operations.

Limited Partnership (“Sociedad en Comandita,” C. Com. 323-342).—In this partnership, one or more partners are subject to unlimited liability for partnership's obligations, and one or more partners are only responsible up to amount of capital subscribed, or contributed to company. Name of special or limited partner cannot appear in firm's name. Firm name is generally followed by words “sociedad en comandita” or its abbreviation “S. en C.”. Special partners have no participation in management of company, although can attend meetings and express opinion.

Limited Partnership Issuing Shares (“Sociedad en Comandita por Acciones,” C. Com. 343-352).—This type of company is unknown in American law. It has characteristics of general partnership regarding those partners who are jointly liable for company's obligations, and it is similar to corporations as to those special partners whose contributions are represented by shares. Company cannot do business with less than five shareholders. Capital of company must be represented by shares of equal value, and shares must be registered until they have been totally paid in. When company is formed, at least 50% of shares representing authorized capital must be paid in and at least one-third of value of each share must also be paid in. It is forbidden to state authorized capital without also announcing subscribed and paid-in capital. In many cases, in shareholders' meetings, rules established for corporations must be followed. However, decisions must be taken by unanimous vote of general partners and by majority of votes representing shares of special partners. A “reserve fund” must be created which shall be at least 50% of subscribed capital, and at least 10% of net profits of each fiscal year must be set aside in order to integrate it. Once 50% of said subscribed capital has been reached, company does not have to continue increasing it; if it diminishes, same procedure must be followed until reserve fund receives necessary amount. If 50% of subscribed capital is lost, company must be dissolved.

Limited Liability Company (“Sociedad de Responsabilidad Limitada,” C. Com. 353-372).—Members are only liable up to amount of their contribution to company. However, in bylaws it can be stipulated that all or some members shall have greater liability or other type of consideration or additional guarantee, if nature, amount, duration, etc. are specified. Capital must be paid in toto when company is formed. It shall be divided into shares “of equal value” which can be assigned if conditions required in law or bylaws are fulfilled. Members are jointly liable if contributions are given in species. Members cannot exceed 25 in number; otherwise company is void. However, if during its existence number of members exceeds 25, within two months following that fact, it can be transformed into other type of company, or otherwise its members have to be reduced. Name of company must be followed by word “Limited,” or “Ltda”; in absence of such requisite, members shall be jointly liable to third parties. Administration of company belongs to all and each one of its members who, aside from general rights and duties attributable to board of directors and/or shareholders' meetings, must undertake: To decide admission of new members as well as assignments of quotas; to decide exclusion of members; to demand from them additional consideration if necessary; to start proceedings against administrators or other officers of company, regarding nonfulfillment of their obligations towards it; and finally, to elect and to remove officers. In members meetings each member must have as many votes as quotas he holds in company. Decisions must be taken by plural number of members representing majority of quotas into which capital of company is divided. (By-laws can provide for greater majority.) Company must keep book of members, registered in Chambers of Commerce, in which shall be set forth names, nationality, domicile, identification documents and number of quotas that each member holds, as well as attachments, liens, and assignments of quotas. Members may assign their quotas; any stipulation to contrary is void.

Civil partnership (“sociedad civil”, C.C. 2079-2141) is a partnership not formed for commercial purposes. A civil partnership may have form of an unlimited or limited partnership or of a corporation. Such partnerships are governed by rules of Civil Code and are distinguished from a commercial company by being regarded rather as an association of individuals; thus an obligation assumed by an unlimited civil partnership does not render partners jointly liable unless they have all subscribed to it in person or by attorney in fact.

3 BUSINESS REGULATION AND COMMERCE

3.01 BANKS AND BANKING:

(Law 45 of July 19, 1923, General Banking Law, Law 31 of Dec. 29, 1992).

General Banking Law regulates commercial banks, development banks, savings banks, mortgage banks and rural banks. Government supervises through Superintendencia Bancaria that requires banks to comply with regulations set down by Law 45 of July 19, 1923. Banco de la República regulated by Law 31 of 1992 is in charge of: monetary policy and administration of monetary reserves, and it is issuing bank.

See also category 14 Foreign Trade and Commerce, topic 14.02 Exchange Control.

3.02 BILLS AND NOTES:

Bills of exchange (C. Com. 671-708) must contain following: Unconditional order to pay a specified amount of money, name of drawee, date of payment and indication if it is payable to bearer or to order. It can contain clauses related to interest and rates of exchange, if fixed at a proper amount. Bill of exchange can be drawn: at sight, at specified date or dates (if in installments), and at a certain date after date or sight. It can also be drawn to order of drawer, who in this case, has same obligations as an acceptor. If bill is payable at a certain time after sight, it must be presented for acceptance within one year of its date unless drawer extends such term or forbids its presentation before a certain time. Bill must be presented for acceptance in place and address designated on document. If such place is not indicated presentment must be made in drawee's residence; if bill mentions several places, holder can choose any of them.

Acceptance must be placed on document, using words “accept” or any other equivalent, and signature of drawee; his signature alone is enough to consider bill accepted. Acceptance must be unconditional, but he can pay a lesser amount than one indicated in bill. Any other indication introduced by drawee is equivalent to a refusal to accept.

Bill of exchange must be presented for payment when due or within eight following days. Presentation for payment of a bill of exchange drawn at sight must be made within a year of date of issuance. Holder cannot refuse partial payment, but he does not have to receive payment before maturity, unless otherwise agreed.

Protest is only necessary when drawer or any holder inserts clause “with protest” on document. Said act must be performed before a notary public in place indicated in document. Notary public must record in his books following: Literal reproduction of entire bill, fact that drawee or acceptor was requested to accept or pay it and reasons for refusal, and signatures of persons witnessing act.

Promissory notes (C. Com. 709-711) in general, are governed by all provisions regarding bills of exchange. However, in addition to requirements above specified they must contain name of payee, indication if it's payable to order or to bearer and date of payment. Maker has same rights and duties as acceptor of a bill of exchange.

Checks (C. Com. 712-751) can only be drawn in special forms issued and printed by banks; if drawn on other types of paper they are not negotiable instruments. Checks must contain following: Name of drawee bank and indication if it is payable to order or to bearer. Maker must have sufficient amount of funds in bank; reception of checks from drawee bank is prima facie evidence of funds. Checks are always payable at sight; any indication to contrary is considered void. In case of a post-dated check it is payable upon presentment. Checks must be presented for payment: Within 15 days after issuance if payable at same place; within one month if payable in same country of issuance, but at a different place; within three months if issued in a Latin-American country and payable in any other Latin-American country, and within four months if also issued in any Latin-American country and payable outside that area. Holder can refuse partial payment; however, if he accepts it, bank must insert on check amount paid and must return it to holder. Maker can revoke checks, and once bank has received a “stop payment order,” it cannot pay them. Death or incapacity of maker does not exonerate bank of payment. In case of bankruptcy, judicial or administrative liquidation of maker's assets, drawee bank can refuse payment as of date of publication.

Banks must return to maker, together with proper balance statements, all checks drawn by him.

Other provisions in code regulate special checks such as “crossed checks” and travelers' checks. Either maker or holder can demand from drawee bank to certify existence of necessary funds in account; once check has been certified, maker and all endorsees are released from liability. However, certification cannot be partial and cannot be extended on bearer checks. Provisions regarding travelers' checks require that persons who pay or receive such checks must verify authenticity of signature of holder and must compare it to one signed before drawee-bank.

3.03 COMMERCIAL REGISTER:

(C. Com. 26-47, 1210) must keep records of licenses granted to do business, commercial establishments, and their branches and subsidiaries, and it must also record all acts, books and documents when such formality is necessary. Registry is public, any person can examine books, files, and can take notes or copies of information recorded.

Chamber of Commerce is in charge of Registry, but Superintendency of Industry and Commerce exercises supervision and gives instructions on books, files, etc.

Following must be recorded in Commercial Registry: Merchants and agents such as commission merchants, agents representing national or foreign corporations; liquidations of community property when one of spouses is a merchant; attachments against merchants when prohibition to do business is necessary consequence, bankruptcy and composition agreements, name of trustee in bankruptcy; authorizations to minors to do business; corporate books and registries of shareholders, minute books of shareholders meetings; amendments or changes and liquidation of commercial companies and names of liquidators, agricultural and industrial pledges (Prenda agraria e industrial), etc.

Contracts and documents must be recorded in Chamber of Commerce with jurisdiction in place where they were granted and they must also be recorded in place of execution if different.

Registrar usually only records a summary of document unless interested parties demand otherwise. Chambers of Commerce can issue certificates establishing that documents are duly recorded. In case of public instrument regarding incorporation of commercial enterprises and subsequent amendments, following procedure is necessary: Certified copy of certificate of incorporation must be filed in Chamber of Commerce of principal domicile in a special book which must contain name, domicile number of public instrument, information of notary public before whom it was signed, etc. Same procedure must be followed in case of designation of legal representatives, liquidators and other persons in charge of liquidation. Commercial enterprises pay annual fee according to gross assets. Separate registration fees are collected from subsidiaries or affiliates conducting business in more than one jurisdiction of Chamber of Commerce. Merchants register at Mercantile Registry and private entities domiciled in country, should register address with Chamber of Commerce, including electronic address, for service of process. Service is valid if made to any of addresses. (C. P. C. Art. 315).

Registration is subject to stamp tax. See category 22 Taxation, topic Taxes, subhead Stamp Tax.

3.04 CONDITIONAL SALES:

See topic Sales (Realty and Personalty).

3.05 CONTRACTS:

(C. C. 1494-1624, C. Com. 1-9, 20-25, 48, 74).

Nature, form, objects and obligations of contracts are governed generally by Civil Code. Nevertheless there is definite class of contracts known as commercial or mercantile contracts concerning which provisions of Civil Code are supplemented by Commercial Code. Civil Code, except as modified by Commercial Code, however, governs mercantile contracts.

To constitute contract there must be offer and acceptance express or implied. Offer is void if offeror dies or becomes incapacitated before acceptance is received. Offers may be retracted any time before acceptance if offeror has not renounced his rights to retract. Verbal offers must be accepted immediately. Modification of offer in acceptance constitutes new offer. Offeree may retract his acceptance any time before it reaches offeror. If offeree has accepted in ignorance of retraction by offeror or of his death or incapacity, he is entitled to reimbursement for all losses suffered by him and expenses incurred.

Only those persons having legal capacity may enter into contracts but only incapacitated person, his representative and third parties affected may have contract nullified because of incapacity. Ratification of contract made in one's name has same effect as previous authorization.

Objects of contract must be definite or subject to definite determination. Future inheritances and future hereditary rights cannot be object of contract.

Form of contract is determined by place where executed. If executed by various parties in different places, formalities are governed by law of place most favorable to its validity. According to Civil Code following contracts, except when executed at public auction, must be in form of public instruments (see category 9 Documents and Records, topics 9.03 Notaries Public and 9.04 Public Instruments): Contracts regarding real property; extrajudicial partition of inheritances; contracts of incorporation or partnership and extensions of same or when part of capital is real property; contracts of marriage and dower; life annuities; transferring, repudiation or renunciation of hereditary rights; general and special powers of attorney for use in court, for administration of property or which concern public instrument or execution of one; adjustments with regard to real property; transfer of rights arising from transfer of public instruments; acts accessory to contracts which are in form of public instruments, and payments of obligations originating in public instruments, with exception of partial payments, interest and rent.

Contract which should be in form of public instrument but which is drawn up as private document, constitutes obligation to reduce same to public instrument. Same rule applies to verbal contracts. Penalty clauses in contracts are enforceable.

As stated above, civil law is supplemented by Commercial Code in respect to mercantile contracts. In general, law of contracts set forth above is generic and applies to all contracts whether mercantile or otherwise. Matters falling within scope of Commercial Code are those relating to transfer of personal property for purposes of obtaining profit from same whether in its form when transferred or after changing its form, operations of exchange, banking or brokerage, negotiations with regard to bills of exchange, checks or other endorsable paper, operations of factories, commercial agents, warehouses and transportation; suretyship and corporate transactions, freight, construction, purchase or sale of vessels, their equipment, provisioning and everything relative to maritime commerce, operations of factors, bookkeepers and other employees of merchants concerning their employers, agreements with regard to salaries of clerks and other employees of merchants; letters of credit, bonds, pledges etc. and other matters especially treated of in Code of Commerce. If contract is commercial as to one party, it is deemed commercial as to all parties. Commercial contracts may be evidenced by public instruments; by notations of mercantile agents and certificates of contents of their books; by private documents signed by parties or witness in contractor's name; by correspondence, telegrams, books of merchants, admission of parties, by witnesses and by presumptions. All blank spaces and amendments in mercantile contracts must be authenticated by signature of parties. Telegrams have same force as letters. Words are understood in their general sense. In case of ambiguity intention of parties must be sought and when found outweighs literal sense. Customs of business are taken into account in interpreting contract. In general, it may be said that contracts governed by Commercial Code are made with much less formality than those which depend solely on Civil Code and methods by which their existence and scope are proved are more numerous. Moreover, in many of classes of commercial contracts, such as bills of exchange, checks, partnership agreements, etc. special rules are provided in Commercial Code to govern their effect and operation. (See topic 3.02 Bills and Notes; category 2 Business Organizations, topics 2.03 Corporations, 2.07 Partnerships.)

Public Contracts: Law 80 of Oct. 28, 1993 as amended, Decree 2251 of Nov. 11, 1993 and Decree 313 of Feb. 4, 1994 regulate contracts with Government and Public entities.

3.06 FRAUDS, STATUTE OF:

See category 9 Documents and Records, topic 9.04 Public Instruments.

3.07 INFORMATION TECHNOLOGY, INTERNET AND NEW MEDIA:

E-Commerce Law.

Law 527 of Aug. 18, 1999 regulated by Decree 1747 of Sept. 11, 2000, Law 588 of July 5, 2000. Law defines and regulates access and use of data messages, e-commerce and digital signatures, certification process related to data messages and enforceability of acts performed by electronic means. Electronic messages are enforceable as written documents. It establishes that in contract law, offer and acceptance can be communicated by electronic, optic or similar means, except express agreement of parties. Digital signature has same legal effect and value as handwriting signature when used according to law. Data message is defined as information generated, sent, received, stored or communicated by electronic, optic or similar means. Digital signature is defined as numeric value affixed to data message and by mathematical procedure, is linked to code of originator and text of message, allowing recipient or certifying authority to determine that above value has been obtained exclusively with code of originator and that initial message has not been modified after transmission. Superintendent of Industry and Commerce is in charge of authorizing and supervising certification authorities. Notary publics and consuls can transmit by data messages, electronic, optic and similar means to other notary publics and consulates: copies, certifications of documents in file, private document to other notary publics, consuls, individuals or legal entities. Certifications issued by foreign certifying entities non-domiciled in country are recognized under certain conditions.

3.08 INTEREST:

Legal rate is 6% but the parties may agree on any other rate. However, if the rate agreed upon exceeds by one-half the rate current at the time of the loan, the judge may reduce it to the current rate. Compound interest is prohibited. (C. C. 1617, 2231, 2235).

In commercial matters, parties may fix rate of interest for term of obligation, but rate cannot exceed current banking rate. This rate applies in absence of agreed rate. Interest on overdue amounts may not exceed twice the banking rate. This rate applies in absence of agreed rate. (C. Com. 884). Compound interest is prohibited except after one year of interest is overdue, and then only after an action is commenced, or by agreement of parties entered after maturity. (C. Com. 886).

3.09 MONOPOLIES, RESTRAINT OF TRADE AND COMPETITION:

(Const. Art. 336, Law 155 of Dec. 24, 1959 as am'd, Decree 2444 of Oct. 17, 1990, Decree 809 of Apr. 21, 1994 as am'd, Decree 299 of Feb. 10, 1995 as am'd by Decree 991 of June 1, 1998, Law 256 of Jan. 15, 1996).

National Constitution provides that no monopoly may be established except as arbitrio rentistico (that is, one which produces revenue for State) and by virtue of law. No law which establishes monopoly shall be enforced until full compensation has been paid to individuals who are thereby deprived of operation of lawful industry. Constitution also states that only privileges that may be granted are those relating to useful inventions and to means of communications.

Most important monopolies of State are postal service, telecommunications, and radio broadcasting.

Law 155 of Dec. 24, 1959 enacted certain provisions containing limitations and prohibitions against restrictive commercial practices. Art. 1 prohibits any agreement or convention which is directly or indirectly aimed at limiting production, supply, distribution, or consumption of domestic or foreign raw materials, products, commodities or services, and in general any practices, procedures, or systems tending to limit free competition, for purpose of fixing or maintaining inequitable prices to detriment of consumers and of producers of raw materials.

Government, however, may authorize signing of agreements or conventions which in spite of their limiting free competition are for purpose of protecting stability of basic sector of production of goods or services important to general economy.

Enterprises which produce, supply, distribute, or consume specific article or service and which have capacity to determine market prices due to quantity of respective article or service they control, shall be subject to supervision by State under provisions of this law. Government may intervene in fixing standards for weights and measures, quality, packing and classification of products, raw materials, and articles or commodities, with view to protecting interests of consumers and producers of raw materials.

Enterprises engaging in same producing, supplying, distributing or consuming activity in relation to given article, raw material, product, commodity, or service whose individual or joint assets amount to more than 50,000 × minimum monthly legal wage or control 15% or more of market are required to report to Government operations they intend to carry out with respect to mergers, consolidation, or integration, regardless of form this shall take. Government shall oppose such operations if they would tend to produce undue restriction of free competition. If Government has not submitted its objection within 30 days after information was presented by enterprise concerned, operation may be undertaken.

Industrial enterprises which establish or which have already established direct distribution systems for their products or through independent or affiliated commercial enterprises may not sell their articles, goods, or products by procedures involving unfair competition against independent merchants selling same articles or products.

Commercial enterprises may not employ practices, procedures, or systems that tend to monopolize distribution, or engage in unfair competition to prejudice of other merchants.

Whenever industrial enterprise fixes sales prices to public, neither that enterprise, directly or through branches or distributors, nor independent merchants may sell at prices different from those fixed by producer, under penalty of incurring punishments prescribed for cases of unfair competition.

Law defines unfair competition as any act contrary to commercial good faith or honest and normal conduct of industrial, commercial, artisan, or agricultural activities.

Acts of unfair competition include any that are defined as such in international treaties and conventions, and particularly following: (a) Methods or systems designed to create confusion with competitor, his commercial establishment or his products or services; (b) methods or systems designed to discredit competitor, his commercial establishments, or his products or services; (c) methods or systems designed to disorganize competitive enterprise or to obtain its trade secrets; (d) methods or systems designed to drive away customers from competitor by acts other than normal and fair application of law of supply and demand; (e) methods or systems designed to create general disorganization of market; (f) false indications of origin or of quality and mention of false honors, prizes or medals; (g) engaging in activities of same kind as enterprise to which they belong, by partners, directors, and employees if such activities are detrimental to enterprise because they are contrary to good faith or to honest and normal conduct of business in market.

Any damages caused to third parties by practices, procedures, or systems prohibited by this law or by acts of unfair competition give right to legal action in regular courts.

Ministry of Economic Development, directly or upon denouncement by any person, may ask Superintendency of Banks, Superintendency of Corporations, or Superintendency of Cooperatives to investigate violations of law. In event that enterprise is not subject to control of any of foregoing agencies, investigation will be conducted by Ministry of Economic Development. Denouncement must be accepted by Ministry if reasons are duly presented, accompanied by summary evidence. Investigation shall be strictly confidential but may make use of reports on production, importations, use of domestic and foreign raw materials, and distribution and sales systems.

Investigated enterprise will be given period up to 30 days in which to answer charges, after which Ministry of Economic Development will render its decision. With recommendation of Council on Economic Policy and Planning, penalties imposed may be withdrawal of shares from public securities market, or in event of repetition of offense, prohibition against operating. In addition, fine may be imposed, according to seriousness of offense. Appeal may be taken to Ministry itself, after which administrative channels are exhausted.

State may adopt following measures: (a) Fix peremptory period by which prohibited practices, procedures or systems must cease; (b) subject enterprise whose practices are investigated to supervision by pertinent agency entrusted with control, for specified time, with respect to policies of production, costs, distribution and prices, and solely for purpose of ascertaining that enterprise does not continue restrictive commercial practices that brought about investigation; (c) impose fines; and (d) close businesses.

All agreements, conventions or operations prohibited by Law No. 155 are absolutely void as having unlawful purpose.

Decree on unfair foreign trade practices protects local production from unfair practices of international trade imposing countervailing duties on import of foreign goods. Dumping and subvention are considered unfair practices. Dumping is defined as import of foreign goods at lower price than normal price in place of origin, and subvention as direct or indirect incentives, subsidies, premiums or assistance of any kind granted by foreign governments to producers, manufacturers, or exporters of goods. Decrees on antidumping and compensatory duties contains regulations and administrative procedure in conformity with Agreement on Implementation of Article VI of General Agreement on Tariffs and Trade.

Protective measures on importation of products may be issued to protect local production of same or similar products, as indicated by law.

Consumer Protection Law.

Colombia also has law on Consumer Protection. (Law 73 of Dec. 3, 1981 and its regulations; Decree 3466 of Dec. 4, 1982 as am'd). In accordance with such law, Government has right to control production, distribution and sale of services and goods in defense of consumers. Enforcement of warranties and products liability are regulated by law.

See category 14 Foreign Trade and Commerce, topic 14.04 Foreign Investments.

3.10 NEGOTIABLE INSTRUMENTS:

See topic 3.02 Bills and Notes.

3.11 REGISTRIES:

Registry of Public Instruments (Real Property Registry) (Decree 1250 of July 27, 1970 as am'd).—Following must be registered: All documents and judicial or arbitral decisions pertaining to property rights on real estate and motor vehicles (except assignment of mortgages or pledges) and documents cancelling above registrations. Decree 208 of Feb. 13, 1975, as am'd, determines that powers of attorney (general and special) and open and closed wills must also be registered in this Registry.

Registrars are semi-judicial officers who, in most cases, do not transcribe entire document but only essential details. They refuse to record document if it is not in proper form.

Registry of Civil Status (Decrees 1260 of July 27, 1970, as am'd and supplemented) for records of births, marriages, deaths, acknowledgment of children and adoption.

See also topic 3.03 Commercial Register.

3.12 SALES (REALTY AND PERSONALTY):

(C. C. 1547; 1849-1954).

A sale is perfected and binding when the vendor and vendee have agreed upon the thing sold and the price thereof though neither has been delivered; except that the sale of real property and rights and of an inheritance is not perfect until a public instrument is executed, but this exception does not apply to the sale of trees and pending fruits, building materials, etc. The determination of the price cannot be left to one of the parties.

The expenses of execution of the instrument of sale are divisible between the vendor and the vendee unless otherwise stipulated. In the absence of an agreement to the contrary the vendor warrants the thing sold and the title thereto; and in any case he is liable for hidden defects in the thing sold if known to him and not called to the buyer's attention. If the buyer does not pay the price at the time stipulated the seller may institute suit for the price or ask for rescission of the contract. The parties may agree that in case of nonpayment of the price the contract shall be considered rescinded but such agreement cannot extend beyond four years.

Chattels may be sold under condition that title shall not pass until payment, but if buyer alienates unpaid-for chattel his seller is limited to an action in personam against him.

In private sales of real property rescission may be asked within four years by the vendor if it is found that the price received is less than half the just value of the property, and by the buyer if the value is less than half the price paid. If a sale of real property is made at a certain price for a unit of area the vendor must, if the area is found less than that stipulated, make up the difference or refund part of the price paid; if the area is found greater the buyer must pay more; but in either case if the difference exceeds 10% the sale may be annulled.

Commercial Code (C. Com. 905-967) contains similar provisions regarding subject. Price is essential element of this contract; if parties do not stipulate it or if it is impossible to determine it, sale is void; however, if buyer receives goods it is presumed that parties agree on price effective on date and place of delivery. If parties in order to determine price agree that it must be one quoted on markets, stock exchange, or similar establishments, it is understood prices quoted on date and place of signature of contract. Seller must deliver merchandise within term agreed upon. If nothing has been stipulated on subject, merchandise must be delivered within 24 hours after signature of contract unless nature of goods requires a longer period of time for delivery.

Normally, seller guarantees that goods have been sold without hidden defects, buyer must inform seller within 30 days after discovery of same, if malfunctioning occurs within period of time covered by guarantee. In any event in absence of any special period, statute of limitations is two years which runs from date of contract. Seller must prove that buyer knew or should have known hidden defects in merchandise sold at moment of contract.

Buyer must receive goods in place stipulated in contract and may demand from seller a receipt containing indication of merchandise sold, price, conditions of payment, etc. If no objections arise against contents of bill of sale, within three days after receipt, it is understood that its provisions were accepted.

3.13 STATUTE OF FRAUDS:

See category 9 Documents and Records, topic 9.04 Public Instruments.

4 CITIZENSHIP

4.01 ALIENS:

See category 16 Immigration.

5 CIVIL ACTIONS AND PROCEDURE

5.01 ACTIONS:

Limitation of.

See topic 5.07 Prescription, subhead Actions.

5.02 DEPOSITIONS AND DISCOVERY:

Testimony in civil cases is usually reduced to writing. Judges may commission other judges or officials to take such testimony. Letters rogatory to foreign countries are sent through the Ministry of Foreign Affairs. (C. P. C. 213-232, 298-299).

5.03 EVIDENCE:

See topic 5.02 Depositions and Discovery.

5.04 JUDGMENTS:

(C. P. C. 302-339, 693-697).

Final judgments rendered in a litigation are considered “res judicata,” provided that new litigation is based upon same issue and cause of action as former, and that legal identity of parties is same in both litigations.

Foreign judgments have the force provided by treaty or, in the absence of treaty provisions, the force which in the foreign country is given to Colombian judgments. If the courts of the foreign country refuse to carry out Colombian judgments, the judgments of that country have no force in Colombia. If the judgment is comprised among those valid in Colombia according to the foregoing rule it will be enforced if: (1) It was rendered in a personal action; (2) it does not affect Colombian jurisdiction and is not contrary to public order or good customs; (3) it was duly rendered and is not subject to appeal in the country where it was rendered and its authenticity is proved by certificates of the Departments of Foreign Affairs of the foreign country and of Colombia.

5.05 LIMITATION OF ACTIONS:

See topic 5.07 Prescription.

5.06 PARTITION:

See category 21 Property, topic 21.08 Real Property.

5.07 PRESCRIPTION:

(C. C. 2512-2545; and several articles of C. Com.).

Acquisition of property or rights by virtue of possession and extinction of obligations by failure to require performance is called prescription. Prescription may be expressly or tacitly waived as far as it has run but no waiver can be made of future prescriptive periods.

In order to acquire by prescription, possession must be uninterrupted. Natural interruption exists: (1) When possession of property becomes impossible by a natural cause, as by inundation, in which case period of interruption is deducted; or (2) when a third person enters upon property, in which case entire previous prescriptive period is not counted unless possession is regained by legal proceedings. Civil interruption is produced by judicial demand.

Against a title recorded in registry of property prescriptive period does not run except by virtue of another recorded title. Ordinary prescriptive period as against persons living in Colombia is five years for real property and three years for personal property; as against persons living in foreign countries these periods are doubled. Prescriptive period is suspended in favor of persons who are minors, demented, deaf and dumb, wards, and in favor of estates while there is no executor or known heir; it is always suspended between spouses.

Real property can be acquired by extraordinary prescription by possession for ten years. In such case no title need be shown and there are no suspensions in behalf of incapacitated persons.

Actions.

Prescriptive periods in which right to enforce an obligation is lost vary according to nature of action. More important are: (1) Actions to recover an inheritance, ten years; (2) ordinary suits on rights of action in which no special period is fixed, ten years; (3) executory actions in which no special period is fixed, five years; (4) actions based on marine loans, three years; (5) actions to annul or rescind contracts in which legal requisite is lacking, actions to enforce right to repurchase, actions to annul sales of real estate in certain cases of disproportion of price and value, actions to recover salaries or wages of workmen or compensation for labor accidents, four years; (6) actions to recover compensation due to attorneys, physicians, teachers and other professional men, three years; (7) actions for compensation to storekeepers, artisans, innkeepers and others paid occasionally or regularly, two years; (8) actions on warranties of real property, one to one and one-half years; (9) actions based on incorrect descriptions in sales of real property, actions for advances for construction or repair of vessels and payment of their crews, one year; (10) actions on warranty of personal property, actions to recover payments due for passage money, freight and general average, six months.

Most of above periods of prescription of actions are suspended in favor of incapacitated persons but after ten years no suspension is taken into account.

Prescription of actions is interrupted by express or tacit recognition of debt by debtor and by judicial demand.

5.08 SEQUESTRATION:

Persons claiming personal property which is in danger of alienation or dissipation may request sequestration of same. Bond is required before order of sequestration can issue.

6 COURTS AND LEGISLATURE

6.01 COURTS:

Law 270 of Mar. 7, 1996 as amended.

The judicial system consists of (a) ordinary courts having jurisdiction over civil, family, labor, land, commercial and criminal cases; (b) administrative courts having jurisdiction over administrative matters; (c) Constitutional Court with jurisdiction over constitutional questions; (d) Justice of Peace with peace jurisdiction; and (e) authorities of indigenous territories with jurisdiction on indigenous communities.

The ordinary courts comprise: (1) A Supreme Court, which decides appeals on errors of law and has original jurisdiction in certain proceedings against high functionaries, in certain admiralty matters, in controversies between departments and in controversies relating to government contracts; (2) superior district courts, which decide appeals from superior judges of judicial districts and circuit judges and have original jurisdiction in special matters in which the Government and the departments are parties; (3) judges having jurisdiction in civil, criminal, labor, family, land and other specialized areas. Annulment of religious marriages and divorce thereunder are under jurisdiction of ecclesiastical courts. (C. P. C. 7-43, 141-148).

The administrative courts comprise: (1) a Council of State, and (2) departmental administrative courts. In general, the Council has original jurisdiction over certain admiralty cases and river navigation matters; jurisdictional conflicts between the departments and the municipalities and between any of them and the national government; public lands concessions; cancellation of naturalization papers; appeals from certain decisions of the national government; etc. It also reviews appeals from departmental administrative courts and some national officials. The departmental courts hear cases regarding departmental ordinances, municipal resolutions, decisions of departmental and municipal executives; tax matters; etc.

Constitutional Court reviews for constitutional validity laws approved by legislative power and some decrees issued by executive power; and it is also responsible for decisions related to tutelar actions which protect rights of those accused of criminal offenses against abuses of public administration including judicial system.

6.02 LEGISLATURE:

Congress meets from July 20 to Dec. 16 and from Mar. 16 to June 20 in ordinary sessions. (Const., Art. 138).

See also category 1 Introduction, topic 1.02 Government and Legal System.

6.03 STATUTES:

Legislation of Colombia is codified but codes are subject to frequent amendments. Principal codifications are Civil Code which is based on Chilean Code; Commercial Code; Fiscal Code; Penal Code; Civil Procedure Code; Mining Code; Political and Municipal Code; Labor Code; and Customs Law.

7 DEBTOR AND CREDITOR

7.01 ASSIGNMENTS:

The assignment of a credit is not effective without the delivery of the document, if any, evidencing the right transferred. The assignment produces no effect against the debtor or third persons until the debtor has been notified by the assignee or has acknowledged the assignment. The assignment of a credit carries with it the securities or privileges thereof but not the personal defenses of the assignor. The assignor guarantees the existence of the credit but not the solvency of the debtor unless expressly stipulated. (C. C. 1959-1972).

7.02 ASSIGNMENTS FOR BENEFIT OF CREDITORS:

Assignment for benefit of creditors may be made by a debtor who in consequence of unavoidable accidents is unable to pay his debts. At request of any creditor he must prove that situation is not due to his fault. Assignment must cover all property except such as is not subject to attachment. Its effect is to extinguish debts to amount which can be obtained from property assigned; any balance remaining due must be satisfied from later acquired property. Assignment does not vest creditors with title to property but only with right to dispose of same or of its fruits until their credits are paid. Creditors may permit debtor to continue administering property and make agreements with him, with approval of a majority of creditors appearing. Merchant making an assignment for benefit of creditors is considered a bankrupt. (C. C. 1672-1683).

7.03 ATTACHMENT:

Attachment of property of the defendant may be requested if the plaintiff can present evidence of his claim and the debtor is in bad financial circumstances, or has disappeared or may elude payment. A bond is required before an order of attachment can issue. If a third person claims to be the owner of attached property, it is left with such person as depositary. Any attachment may be raised by giving bond.

Certain documents, such as judgments, public instruments and commercial documents, authorize immediate attachment. Interventions are decided in a brief summary proceeding. (C. P. C. 513-520, 579-580, 681-698).

7.04 BANKRUPTCY AND INSOLVENCY:

(Law 1116 of Dec. 27, 2006, Decree 2179 of June 12, 2007).

Insolvency Regime.

Law regulates insolvency with purpose of protecting credit and recuperation and conservation of enterprises as economic exploitation units and source of employment through reorganization process and judicial liquidation proceedings. Subject to insolvency regime are merchant and juridical persons, as indicated by law, who perform permanent private or mixed business in national territory, branches of foreign companies and autonomous estates. Proceedings for insolvency are before Superintendencia de Sociedades (Superintendencia) in case of corporations, individual enterprises and branches of foreign companies and before civil judge of principal domicile of debtor for other cases.

Reorganization Process.

Petition for reorganization process may be filed by debtor, one or more creditors, by representative of foreign insolvency process, by Superintendencia or civil judge under conditions established by law. Order of initiation of process: calls for meeting to appoint Trustee, orders classification and appraisal of credits and rights to vote, publication announcing initiation of process, among others. From that date on, all pending actions and debt obligations are automatically stayed. Contracts executed with debtor alleging initiation of reorganization process may not be terminated. Draft of classification and appraisal of credits and rights prepared by Trustee and inventory of assets filed by debtor may be attacked by creditors, as indicated by law; once approved, reorganization plan is prepared by Trustee. Creditors will hold meeting to approve plan of reorganization, which should be confirmed by judge in charge of proceedings. However, if agreement is not reached or judge refuses to confirm reorganization agreement, judge initiates adjudication proceedings ordering extinction of juridical person and recordation at mercantile registry. Trustee must present to judge creditors' adjudication agreement for his confirmation. If no agreement is reached or judge refuses to confirm adjudication agreement, debtor's assets are adjudicated according to law. Creditors may execute out of court reorganization agreement with express authorization of debtor. Any party may request approval from competent court. Reorganization and adjudication plans must be aproved by creditors' vote as indicated by law and must be confirmed by judge, registered and notified to proper authorities. Reorganization agreements terminate by compliance with agreed obligations. In case of declaration of termination of reorganization process by noncompliance of any obligation, by nonpayment of pensions, social security payments and other administrative expenses, judge orders initiation of judicial liquidation process.

Judicial liquidation process starts by noncompliance with reorganization agreement and by causes of immediate judicial liquidation, such as debtor's petition, when debtor abandons business, by petition of debtor and creditors holding no less than 50% of credits, when Superintendencia considers convenient to start proceeding after evaluation of reorganization petition, by authority or representative of foreign insolvency process, among others. Commencement of judicial liquidation process causes dissolution of juridical person, removal of administrators, termination of labor contracts, interruption of statute of limitations, among others.

Trustee is appointed by judge and debtor is removed from administration of assets. Trustee prepares inventory of debtor's assets and classification of credits and proceeds to immediate sale of debtor's assets, directly by private bid. Assets not sold by Trustee are adjudicated to creditors by judge. Adjudication agreement must be approved by creditors and confirmed by judge. Trustee must present his final report and accounting after last assets have been sold. Once it has been established by judge that proper and complete liquidation has taken place, all creditors are declared paid in full and judicial liquidation proceeding is declared closed. Such declaration may be appealed only be proving that there are new assets of debtor subject to attachment by court. Judicial liquidation ends upon adjudication or by execution of reorganization agreement. Administrators are jointly liable to shareholders and third parties if assets are insufficient for payment of debts because of their fault, and shareholders are liable if assets are insufficient when corporation was used to default creditor.

Reorganization Agreement Within Judicial Liquidation Process.

Once inventory of debtor's assets and classification and appraisal of credits and right to vote is determined, Trustee or creditors that represent no less than 35% of admitted right to vote, may propose celebration of reorganization agreement. Judge calls meeting for approval of reorganization agreement. Pertinent regulations on reorganization process, above, are applied to this agreement. Violation or noncompliance with reorganization agreement within judicial liquidation process shall result in restarting judicial liquidation process.

Cross-Border Insolvency.

Purpose of Law is to provide effective mechanisms for dealing with cases of cross-border insolvencies; promoting cooperation between competent local authorities and other competent foreign authorities involved in cases of cross-border insolvency; protecting interests of all creditors and other interested persons, including debtor; protecting and maximizing value of debtor's assets; facilitating rescue of financially troubled businesses, protecting investment and preserving employment. Law is applicable to following cases: when foreign court or foreign representative requests assistance in connection with foreign proceeding; when assistance is requested in foreign country in connection with proceeding under Colombian insolvency law; when simultaneous foreign and local insolvency proceeding with respect to same debtor are taking place; when creditors or other interested persons in foreign country have interest in requesting commencement or participating in proceeding under Colombian insolvency law.

There are two types of foreign proceedings: main proceeding and non-main proceeding. Main proceeding is insolvency proceeding pending in country where debtor has center of its main interests which is presumed to be place where it has its office, or residence in case of individual; and non-main proceeding in insolvency proceeding pending in country where debtor has establishment.

Foreign representative is entitled to apply to commence insolvency proceeding before local court. Foreign creditors have same rights, as local creditors, regarding commencement or participation in, insolvency proceeding under Law. After recognition of foreign main proceeding, insolvency proceeding may be commenced only if debtor has assets in Colombia; effects of that proceeding shall be restricted local assets.

Upon court recognizes foreign representative and foreign insolvency proceeding, petitioner is eligible to obtain ability to operate debtor's business and manage and sell its assets and give opportunity for foreign representatives to preserve and recover value for benefit of foreign debtors. Petition filed by representative of foreign insolvency process of parent or controlling company, of branch established in Colombia, shall cause reorganization process of local branch. In general, creditor who has received part payment with respect to its claim in insolvency proceeding according to insolvency law in foreign country may not receive payment for same claim in proceeding under insolvency Law regarding same debtor, so long as payment to other creditors of same class is proportionately less than payment already received by creditor.

See also topic 7.08 Fraudulent Sales and Conveyances.

7.05 EXECUTIONS:

Judgments for payment of money are carried into effect by attaching property of debtor. Property is advertised for sale and sale is held by judge. Bidders must deposit 40% of estimated value and lowest bid receivable at first auction is 70% of such value. Single executor or secured creditor may request execution if credit's value is at least 20% of property's estimated value, if not he shall deposit difference of value. At auction person in charge shall announce price offered by bidders after at least two hours and shall adjudicate property to higher bidder. There is no equity of redemption. (C. P. C. 523-539).

7.06 EXEMPTIONS:

Among items exempted from attachment and execution are following: (1) Pensions, with some exceptions and limitations; (2) minimum wage plus 80% of excess thereof, but for amounts due to co-operative corporations or for family support and maintenance only, 50% is exempt; (3) life insurance policies and sums payable to beneficiaries other than insured; (4) payments to public works contractors while work progresses other than in actions for amounts owing workmen or purveyors; (5) certain properties such as railroads and waterworks on which service could not be interrupted without public inconvenience, but revenue therefrom can be attached; (6) beds and clothing of debtor and family; (7) machinery and instruments used for working; (8) uniforms and equipment of military men; (9) food and combustibles required by debtor and family for one month; (10) property held in fiduciary capacity; (11) rights entirely personal such as use and habitation; (12) articles used in religious rites. (C. C. 1677; C. P. C. 684).

7.07 FORECLOSURE:

See topic 7.05 Executions; category 20 Mortgages, topic 20.03 Mortgages.

7.08 FRAUDULENT SALES AND CONVEYANCES:

In cases of bankruptcy following acts and contracts of bankrupt may be annulled: (1) Acts relating to his property executed after declaration of bankruptcy; (2) acts executed within six months before cessation of payments to injury of creditors, if connivance between parties is proved; (3) following acts executed after cessation of payments; (a) gifts after such cessation or one year prior thereto, (b) payment of unmatured debts, (c) payment of matured debts otherwise than with money or commercial effects, (d) contracts with wife, partner, or relatives in second degree of affinity or fourth of consanguinity, (e) contracts of partnership, or fusion or alienation of mercantile establishments, (f) security bonds, (g) any acts of ownership or administration if other contracting party knew of cessation of payments. In general, contracts made in bad faith to prejudice of creditors may be set aside within one year. (C. Com. 1965-1972).

7.09 HOMESTEADS:

(Law 258 of Jan. 17, 1996 as am'd, Law 861 of Dec. 26, 2003 regulated by Decree 1762 of June 2, 2004).

Law considers homestead property bought by either spouse, before or after marriage, used as family home. It can be transferred, mortgaged or changed in condition only by both spouses or by court authorization. Condition of homestead expires by death or declaration of death of either spouse. It is not subject to attachment except by secured creditor. Only property that belongs to female head of family, according to law, is created as homestead in favor of her minor children and not subject to attachment.

7.10 INSOLVENCY:

See topic 7.04 Bankruptcy and 7.10 Insolvency.

7.11 LIENS:

Credits are divided into five classes: (1) Those for judicial costs in matters favoring all creditors, necessary funeral expenses, expenses of last sickness to an amount under the control of the judge, salaries deriving from labor contracts, maintenance of the debtor and family for the last three months to an amount under the control of the judge, national and municipal taxes; (2) those of innkeepers, carriers and pledgees, which are liens on the property brought by the guest into the inn and the articles carried or pledged; (3) those of mortgage creditors, which are liens on the property mortgaged; (4) those of the Government against tax collectors and administrators, of municipalities and public charitable and educational institutions against collectors and administrators of their funds, of a married woman for her property administered by the husband as against his property, and of children and wards for their property administered by parents, guardians or curators as against the properties of such persons; and (5) those of common creditors.

The credits of the first, second and fourth class are considered preferred. Those of the second and third class constitute a lien on the specific properties to which they refer. In case of insolvency, however, those of the first class are preferred to all others if the other property of the debtor is not sufficient to pay them.

In commercial matters the consignee has a lien similar to that of the carrier against the articles received by him. Likewise in maritime matters the provisions of law relating to average designate the classes of credits which constitute a lien against the vessel. (C. C. 2488-2511; C. Com. 981-1035; 1555-1569).

Mechanics' Liens.

There are no special provisions corresponding to mechanics' liens in the United States of America.

7.12 MECHANICS' LIENS:

No special provision.

7.13 PLEDGES:

(C. C. 2409-2431; C. P. C. 554-560).

A pledge requires delivery of pledged property to creditor.

Pledges are foreclosed by summary action in manner in which judgments are executed. If there is no sale, a new valuation is made and same procedure is followed; if no bid is received creditor may demand an award of a participation in property up to amount of his credit. See topic 7.05 Executions.

Under C. Com. 1200-1220 all types of chattels can be object of commercial pledges which can be executed with or without delivery of them to creditor.

Pledge with delivery of chattels is considered concluded from agreement of parties, but creditor will have his lien on personal property when it is delivered to him or to a third person designated by parties. If not delivered to creditor, he can judicially request specific performance. Once chattel has been given in pledge, same cannot be object of a second one, until former has been totally paid. Debtor must reimburse creditor, or third party for all expenses that storage of goods demands. Statute of limitations is four years which runs from time obligation accrued.

Other type of pledge allows debtor to keep possession of chattels, when used in an economic exploitation and necessary for it. Document in which this pledge is recorded must contain at least following: Name and domicile of debtor and creditor, date, nature and value of obligation being guaranteed plus interest if any, date of maturity and information regarding chattels given in pledge, such as brands, models, numbers, quantity, in case of machinery; and quantity, sex, race, and weight in case of animals; and quality, quantity, etc. in case of seeds, fruits or crops; place in which goods are kept and indication and value of insurance contracts, if any. Contract must be recorded in commercial registry of place in which chattels are kept; pledges regarding motor vehicles are governed by special regulations. Debtor, who is allowed to keep goods has same obligations and responsibilities of a bailee. Statute of limitations is two years and runs from time obligation accrued.

7.14 REDEMPTION:

See topic 7.05 Executions; category 20 Mortgages, topic 20.03 Mortgages.

8 DISPUTE RESOLUTION

—Scope —

(Decree 1818 of Sept. 7, 1998; Laws 446 of July 7, 1998 as am'd, 640 of Jan. 5, 2001 regulated by Decree 2771 of Dec. 20, 2001).

8.01 ARBITRATION:

All matters on which compromise may be reached are allowed to be submitted to arbitration. Arbitration agreement (pacto arbitral) may be in form of arbitral clause (cláusula compromisoria) concluded with regard to future disputes arising out of particular legal relationship, or in form of submission (compromiso), separate agreement to submit already existing dispute to arbitration. Decree recognizes enforceability of both and both have effect of waiver of right to assert cause of action before judges. Arbitration agreement can be evidenced by any kind of document, even by telex, fax or other means of communication which constitute record of agreement. Arbitrators may be empowered by parties to decide according to rules of law (en derecho), in equity or based on technical principles (técnico).

Number of arbitrators should be three unless parties have agreed on different uneven number.

Parties are free to establish place of arbitration. Arbitrators have authority to grant provisional remedies. Award must be rendered within six months from installation of arbitral tribunal. Deposit of arbitrator's fees and estimated expenses must be in advance.

Law distinguishes between domestic and international arbitration based on: parties' domicile, place of performance of duties, parties' agreement, and matters of dispute involving foreign trade.

8.02 CONCILIATION:

Judicial or extrajudicial dispute resolution by conciliation of controversies arising out of matters subject to settlement, to waive and those expressly indicated by law. Conciliation is allowed at any time, even when dispute is pending court decision. Judicial conciliation takes place during judicial process, and extrajudicial before or outside of judicial process. Extrajudicial conciliation may be in law or in equity. Dispute resolution by extrajudicial conciliation in law is mandatory prior to submitting dispute to litigation in civil, family and labor matters and in action under administrative law, with exceptions indicated by law. Notary publics, specially created conciliation centers and public officials act as conciliators in extrajudicial conciliation in law. Dirección de Centros de Conciliación, Arbitraje y Amigable Composición dependency of Ministry of Internal Affairs and Justice is authority in charge of supervision of Centros de Conciliación, Arbitraje y Amigable Composición. Judicial conciliation proceedings are confidential.

Decree 2511 of Dec. 10, 1998 regulates conciliation of controversies arising out of administrative and labor matters.

Conventions: On Recognition and Enforcement of Foreign Arbitral Awards, New York, 1958; on International Commercial Arbitration, Panama 1975 and on Extraterritorial Validity of Foreign Judgments and Arbitral Awards, Montevideo, 1979.

9 DOCUMENTS AND RECORDS

9.01 ACKNOWLEDGMENTS:

Private Documents may be acknowledged before a notary public or competent judge. (C. P. C. 252). See topics 9.03 Notaries Public, 9.04 Public Instruments.

Documents prepared in conformity with law of country where executed, are entitled to recognition in Colombian courts with same force as in country where executed, if they are duly authenticated; but when Colombian law requires a public instrument (q. v.) document must have force of such an instrument. Powers of attorney and other documents issued abroad to be used in Colombia must be authenticated by a consular or diplomatic agent of Colombia, whose signature must be certified by Ministry of Foreign Relations or by apostille. (C. C. 21, 22; C. P. C. 188, 259-261).

9.02 COMMISSIONS TO TAKE TESTIMONY:

See category 5 Civil Actions and Procedure, topic 5.02 Depositions and Discovery.

9.03 NOTARIES PUBLIC:

Notary must be attorney and have exercised profession for certain number of years depending upon notarial categories and responsibilities. In some districts it is necessary to have been working with Public Instruments Register Office for at least four years, or to have been law professor for six or practicing attorney for ten years. Notaries are appointed for five years; however, they can be reelected indefinitely, if compliance with provisions of law are always met; they are subject to supervision by Ministry of Justice. Office is incompatible with any other public office.

Instruments executed before notaries require certain formalities. Original instrument is written and signed in record book (protocolo) of notary which is retained by him as a permanent record; however, from time to time these records are sent for definitive filing in official office. Detailed system of indexes also has to be kept. Notaries must issue to parties formal certified copies (testimonios) which have effect of originals and may be presented in court. (Decrees 960 of June 20, 1970 as am'd, 1250 of July 27, 1970, 2148 of Aug. 1, 1983 as am'd).

9.04 PUBLIC INSTRUMENTS:

A public document or instrument is written by a notary in his own record book and signed by parties. Notary issues certified copies from book. Public records, certified copies thereof and other documents issued by public officials are authentic documents. Instruments executed by private individuals and not authenticated by a notary or judge are private writings. (See topic 9.01 Acknowledgments.)

Public instruments constitute full proof of fact and date of their execution and, as between parties, of facts stated therein. As towards third persons a private instrument is considered as executed on which it was presented in court or acknowledged before notary, or since appearance of new fact which allows judge to be certain of its existence.

Law designates numerous acts and contracts which must appear in a public instrument, among them being facts relating to alienation or encumbrance of real property, marriage settlements, acknowledgments of children and in general all contracts which limit property rights in real estate. (C. C. 1757, 1760, 1766; D. L. 960 of June 20, 1970 as am'd; C. P. C. 251-293).

9.05 RECORDS:

See category 3 Business Regulation and Commerce, topic 3.11 Registries.

9.06 SEALS:

Seals are not used in private matters. Public instruments executed before notaries have most of effects of sealed instruments in U.S.

9.07 VITAL STATISTICS:

See category 3 Business Regulation and Commerce, topic 3.11 Registries.

10 EMPLOYMENT

10.01 LABOR RELATIONS:

(Const. arts. 25, 39, 48, 53-57, Labor Code).

National Constitution guarantees workers equitable working conditions, limited working day, paid days for rest and vacation, fair salaries and equal pay for equal service. Right of labor to organize trade unions and strike is also guaranteed by Constitution. Other Constitutional provisions protect welfare of family and its access to decent housing. Labor relation exists when one individual obligates himself to perform duties or services for another under direct supervision of another for payment of salary or some compensation. Labor Code contains special regulations for women and minors under 18 years. Private contracts may be oral or written, for fixed or indefinite term. If contract is for indefinite period of time it is subject to termination by either party without expression of cause. Employer may terminate contract with just cause when employee during working time insults, assaults or defames employer or coworkers, steals or damages employer's property, violates trade secrets, does not follow safety rules, refuses to follow instructions, compromises security of workplace, ignores employer's corrections and cheats on his qualifications. However, in general, termination of contracts by dismissal without due cause, subjects employer to payment of “severance assistance” determined in accordance with years of service and salary earned by employee in case of contract with no fixed term and for fixed term contract, indemnity is equal to amount of salaries that employee would have earned from actual termination to termination fixed in contract. Social security is compulsory and is financed by employee, employer and government. Law 789 of Dec. 27, 2002 created regime for unemployment payments to provide temporary financial support to workers, who are unemployed due to country's economic problem. There are government pension and retirement funds for retired or disabled workers, and on their death, pension to their widows and minor children. Workers and employers must contribute funds. Internship contracts are regulated and all companies with more than 15 employees must hire trainees for activities that require academic or professional formation in their economic area or pay monthly contribution as indicated by law.

11 ENVIRONMENT

11.01 ENVIRONMENTAL REGULATION:

(National Code of Renewable Natural Resources and Environmental Protection, Decree 2811 of Dec. 18, 1974 as am'd and its regulations, Law 99 of Dec. 22, 1993 as am'd regulated by Decree 1180 of May 10, 2003, Decree 1728 of Aug. 6, 2002, Decree 948 of June 5, 1995, as am'd, Decree 1220 of Apr. 21, 2005 as am'd, Decree 4741 of Dec. 30, 2005, Law Decree 2150 of Dec. 5, 1995 regulated by Decree 1421 of Aug. 13, 1996, Law 430 of Jan. 16, 1998 regulated by Decree 1443 of May 4, 2004).

National Code of Renewable Natural Resources and Environmental Protection grants to each person right to enjoy healthy environment and governs environmental regulatory process which includes environmental protection, natural resources conservation and sanctions. Environmental laws are considered of public interest and therefore claims are not subject to settlement. Law contains list of activities which are considered to potentially damage environment; creates Ministry of the Environment whose main function is environmental policy formulation. Law defines violations against environmental laws, establishes its sanctions and preventive, punitive and corrective measures to repair damages caused. Within environmental protection are air, water, waste and noise pollution.

Air.

Stationary and mobile sources of emissions of pollutant elements must control emissions to maintain them within maximum permissible levels. Facilities with stationary source of emission must obtain operating license, which contains mandatory conditions.

Water.

Handling, treatment and disposal of waste water is regulated. Special permit is required to discharge pollutants to any body of water including municipal sewer system. Mandatory conditions include discharge limits.

Waste is considered hazardous when it is toxic or radioactive. Registration must be obtained before generating or handling waste. Generator is responsible for its disposal, including final treatment. There are requirements for locations and containers for storing waste and recycling. Importation of hazardous waste is prohibited.

Noise.

Stationary and mobile sources of noise must control production to maintain them within maximum permissible levels. Permissible levels vary within each zone. Facilities with stationary source of noise must comply with operating schedule for zone.

Environmental impact statements are required for activities such as oil, mining, chemical industry, nuclear energy generation, and infrastructure construction. Regulations which implement laws set forth requirements, procedures, conditions and limits that must be complied with. Administrative or criminal penalties are imposed for violations of laws. Sanctions include fines, temporary or permanent closure of facility, revocation of permits, depending on gravity of offense and prior violations.

12 ESTATES AND TRUSTS

12.01 ADMINISTRATION:

See topic 12.05 Executors and Administrators.

12.02 DEATH:

The presumption of death of a person may be judicially declared two years after his disappearance. The date of presumptive death is the last day of the second year from the date of disappearance. Two years after such judicial declaration, temporary possession of an absentee's property may be granted. Definitive possession may be granted when, at least two years after the presumptive death, 70 years have elapsed from the date of the absentee's birth or 15 years from the date of disappearance. (C. C. 96-109).

Deaths must be recorded in the Registry of Civil Status of the district where death occurs. Death certificates may be obtained from the Chief of the Registry of Civil Status. Fees, nominal in amount, are fixed by local regulations.

Actions for Death.

There is no specific provision of law creating these actions, but they may be supported under the general provisions (C. C. 2341 et seq.) to effect that any damage out of fault of one person to another is a tort. Some decisions have granted relief to relatives of deceased for damages by them suffered, when real and concrete and not speculative.

12.03 DECEDENTS' ESTATES:

See topics 12.04 Descent and Distribution, 12.05 Executors and Administrators, 12.08 Wills.

12.04 DESCENT AND DISTRIBUTION:

Estates of decedents pass either by will or by operation of law. The rights are transmitted from the moment of the decedent's death. The law designates various acts which render guilty parties incapable of inheriting, such as having committed a crime against the deceased, etc.

In default of testamentary provisions bulk of estate passes to following in order named: (1) Descendants; (2) adopted children; (3) ascendants; (4) adopting parents; (5) brothers and sisters; (6) children of brothers and sisters; (7) spouse; (8) Instituto Colombiano de Bienestar Familiar. Only part of decedent's estate may be disposed of freely by will; certain portion goes to heirs by operation of law.

“Asignaciones forzosas” or “forced legacies” are: (1) The support owed by the decedent to certain persons; (2) the conjugal portion pertaining to the surviving spouse who has insufficient means, which participation varies but never exceeds one-fourth of the estate; (3) the “legítimas” or legal portions pertaining to the obligatory heirs; and (4) the “mejoras” or betterments.

Obligatory heirs are the descendants and ascendants. One-half of the estate must be divided among them in accordance with the rules relating to intestate succession; this half makes up the legal portions. If there are no descendants testator may freely dispose of remaining half. If there are such descendants he must give one-fourth of his estate as betterments to one or more descendants and may freely dispose of only remaining fourth. Obligatory heirs may be disinherited for certain reasons, such has having committed crime against testator, etc.

In order to be entitled to the inheritance the heir must accept the same, and the acceptance may be unconditional or subject to the making of an inventory. If some heirs desire an inventory and others do not, all are obliged to accept subject to inventory. Acceptances may be express or implied. In the case of an unconditional acceptance the heir is liable for all the debts of the decedent, not only out of the estate which he accepts but also out of his own property. An acceptance with benefit of inventory or after making a formal inventory renders the heir responsible for the debts of the decedent only to the extent of the amount which he inherits and does not affect his own property. Partition of inheritance can be carried out by judge or by notary public.

The Colombian heirs of an alien dying intestate and leaving property in Colombia have the same rights in said property as they would have in the intestate estate of a Colombian. They may ask that their share in all the alien's property be adjudicated to them out of the property in Colombia. (Const. Art. 42, C. C. 250, 284, 1008-1054, 1226-1269, 1279-1410, Law 902 of May 10, 1988 as am'd).

12.05 EXECUTORS AND ADMINISTRATORS:

(C. C. 1279-1442).

The office of executor cannot be exercised by blind, dumb, demented, incompetent, bankrupt or notoriously wicked persons, minors, illiterates except parents in certain cases, persons not domiciled in Colombia and persons who have been subject to certain legal penalties or guilty of certain moral lapses. The office is voluntary but an executor who declines or resigns without serious cause loses whatever legacy or bequest may have been made him except such as pertain to him as obligatory heir.

Although the testator may have entrusted the executor with the payment of debts, creditors may sue the heirs if the executor is tardy in making payment. With the consent of the heirs present an executor may sell personal property at a public sale and also real property if there is not sufficient ready money to pay the debts or legacies, but the heirs may prevent the sales by advancing the necessary money. The testator may provide that all or part of the estate be taken in custody by the executor. The heirs or legatees may ask that the executor be required to give bond.

The executor must conclude his labors within the time determined by the testator, or, if no time be determined, within one year, but the period may be extended by the judge. His compensation is such as may be determined by the testator, or, in default of such determination, by the judge. If for any reason there is no executor the heirs are charged with the execution of the testator's wishes and partition may be made by the heirs if all have capacity to dispose of their property; otherwise the judge appoints a partitioner who must effect partition within a year.

Upon the death of a decedent whether testate or intestate, any party in interest may ask that the personal property of the estate be taken into custody. If within fifteen days the estate or part of the same has not been accepted by the heirs and there is no executor designated to take over the estate, the judge may, upon the petition of an interested party, appoint a curator for the estate. The heirs obtain the administration of the estate as and when they accept the inheritance.

Claims.

Executors must publish notices to creditors and upon a partition of the estate set aside a sufficient amount to pay the known debts.

Creditors of decedents have the right to require payment of their claims, but the period to enforce the right and the extent of the right depend on whether there has been an unqualified acceptance of the estate by the heirs or an acceptance subject to the benefit of inventory. (See topic 12.04 Descent and Distribution.)

In case of unqualified acceptance the creditor may present his claim at any time within the period of limitations. In this case the heir is obliged to pay all debts and charges on the property he inherited not only out of the accepted inheritance but also out of his own property; he is, however, liable only for his proportionate share of such debts and charges. In case of acceptance subject to inventory the heir is obliged to pay the debts of the decedent only up to the value of the property inherited.

Creditors may at any time demand the separation of the inherited property from the other property of the heir, so that their credits may have preference as against such inherited property over the other debts owing by the heir. Such separation can be demanded at any time within the period of limitations unless the creditor has already recognized the heir as debtor or the property inherited has been alienated by the heir or become confused with his other property.

12.06 INTESTACY:

See topic 12.04 Descent and Distribution.

12.07 TRUSTS:

(C. C. 793-822, C. Com., 1226-1244).

Two types of trusts are allowed by law: inter vivos, which must be made in public instrument (i.e., notarial deed), and mortis-causa, which must be made in a will. Only credit institutions and trust societies (sociedades fiduciarias) duly authorized by Superintendency of Banks, can be trustees. Property in trust must be kept separate from other trustees' assets, and subject only to obligations derived from trust. Secret trusts are forbidden and also those on behalf of several persons in succession. Except for trusts for benefit of incapacitated persons or charitable institutions, duration is limited to 20 years.

12.08 WILLS:

(C. C. 1055-1278).

Wills may be made by all persons except those under age of puberty, mentally incapacitated or unable to express their will clearly. Wills are opened and published in court of latest domicile of testator.

Testamentary Disposition.

Testator may dispose freely of his property only in so far as there are no heirs at law. (See topic 12.04 Descent and Distribution). Legacies may be charged with conditions. Testamentary provisions are void if made in favor of notary or witnesses before whom will is signed, or in favor of their wives, ascendants, descendants, brothers or sisters, brothers-in-law or sisters-in-law or paid servants.

Forms.

With respect to form wills are either solemn or privileged. Solemn wills are: (1) Open, also called nuncupative or public; (2) closed or secret. Privileged wills are: (1) Oral; (2) military; (3) naval.

Open wills are executed before a notary and three witnesses or, where there is no notary, before five witnesses. They must express name, birthplace, age and residence of testator, and that he is of sound mind, names of persons whom he has married and of his children, stating whether they are living or dead, names and residences of witnesses, name of notary and place and date of execution of will. Will must be read aloud by notary or a witness to parties assembled and all must sign. Blind persons can execute only open wills.

See also category 3 Business Regulation and Commerce, topic 3.11 Registries.

Closed wills are privately prepared and signed by testator and enclosed in a sealed envelope which testator must declare to contain his will, before a notary and five witnesses. A public instrument is then executed, setting forth details of act, and is signed by all persons assembled. Persons who cannot understand or be understood in conversation can make only closed wills. See also category 3 Business Regulation and Commerce, topic 3.11 Registries.

Oral wills may be made in presence of three witnesses by a person in imminent danger of death. They are not valid if testator survives for over 30 days or if not reduced to writing by witnesses before a circuit judge within 30 days after testator's death.

Military wills may be made in time of war by military men, hostages and prisoners before certain army officers.

Naval wills may be made on the high seas before the commander or lieutenant commander of a Colombian man-of-war or before the captain, mate or pilot of a Colombian merchant vessel.

Witnesses.

Following cannot be witnesses to solemn wills executed in Colombia: minors below 18, persons mentally incapacitated or blind, or deaf or dumb or convicted of certain crimes, clerks of officiating notary, foreigners not domiciled in Colombia, persons not understanding testator's language, spouse, near relatives of testator or of notary, servants of testator or of such relatives or of any other witnesses or of an heir or legatee, father confessor of testator, or any person having an interest under will. At least two witnesses must be residents of place where will is made and one in three or two in five must know how to read and write.

In cases of privileged wills, any person of sound mind over 18 who sees, hears and understands the testator can be a witness, provided he has not been convicted of certain crimes and can read and write.

Revocation.

Wills validly executed are rendered invalid by revocation by testator. Revocation may be total or partial. A later will which does not expressly revoke a former will leaves in force all provisions of former will which are not in conflict with later one.

Foreign wills are valid in Colombia if executed in accordance with laws of country where made. Wills may be made abroad in form provided by Colombian law for solemn wills if: (1) Testator is a Colombian or a foreigner domiciled in Colombia; (2) witnesses are Colombians or domiciled in city of execution; (3) will is executed before a Colombian minister or secretary of legation or consul or minister of a friendly nation; (4) signature of chief of Colombian legation and seal of legation or consulate appears on will, if open, or on envelope if closed; (5) a copy of will or of minute on envelope is immediately sent to Minister of Foreign Affairs of Colombia.

13 FAMILY

13.01 ADOPTION:

(C. I. A. Arts. 61-76, 121-128).

Minors less than 18 years of age may be adopted under conditions indicated by law, by adopting party; physically, mentally, psychologically and morally fit and over 25 years old and at least 15 years older than adopted party. Colombian families domiciled and nondomiciled in country have preference over foreign families to adopt. There are special requirements for foreign adopting parties. Adoption is irrevocable and extinguishes legal bonds between adopted party and natural family, it must be approved by judge. Adoption gives adopted person identical status with that of natural child, creating lines of kinship between adopted person and adoptive parents' family. Instituto Colombiano de Bienestar Familiar is government agency in charge of administration of adoption.

Decree 2263 of Oct. 4, 1991 regulates authorization and operation of institutions for adoption.

Conventions.

Inter-American Convention on Conflict of Laws Concerning Adoption of Minors, signed in La Paz, Bolivia on May 24, 1984; Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption, Hague, May 29, 1993.

13.02 ALIMONY:

See topic 13.05 Divorce.

13.03 COMMUNITY PROPERTY:

See topic 13.06 Husband and Wife.

13.04 DESERTION:

See topic 13.05 Divorce.

13.05 DIVORCE:

Actions for nullity and separation in case of religious marriages are under exclusive jurisdiction of religious courts, in accordance with canon law, and judgments of these courts produce civil effects, but civil effects of religious marriages are ceased by divorce decree of family court. Ordinary courts hear actions for divorce and separation of persons married by civil ceremony, but in any case ordinary courts may adopt necessary preliminary measures, such as to designate where wife is to live during proceedings, determine who is to have provisional custody of children and award alimony and counsel fees to wife. Divorce dissolves marriage. Following are causes of divorce: (1) Extramarital sexual relations of either spouse; (2) habitual drunkenness; (3) absolute abandonment by either spouse of his or her respective duties; (4) insults, cruelty and physical abuse; (5) habitual use of drugs; (6) insanity or serious illness; (7) attempt to corrupt; (8) judicial or de facto separation for period over two years; and (9) mutual consent. Divorce by mutual consent and termination of civil effects of religious marriages by mutual consent may be agreed by public deed before Notary Public. (C. C. 152, 154-168; C. P. C. 427-446, art. 34 Law 962 of July 8, 2005 regulated by Decree 4436 of Nov. 28, 2005).

13.06 HUSBAND AND WIFE:

(Const. Arts. 42 and 43; C. C. 176-212, 1771-1841).

Except for just cause, husband and wife are obliged to live together and mutually help each other.

Each spouse has the free administration and disposal of the property owned by such spouse when contracting the marriage and of all property acquired by such spouse during the marriage; but on dissolution of the marriage, or in any case in which according to the rules of the Civil Code a liquidation of community property is to be made, the spouses are considered as having been governed by the system of community property, and a liquidation is made accordingly.

Each spouse is liable for debts personally contracted, except debts made for the ordinary needs of the household or the support, education or establishment of the children, as to which the spouses are jointly liable to third persons and proportionately to each other.

Irrevocable gifts between the spouses are void, as well as contracts relating to real property, except the contract of general or special agency.

Property acquired by common law spouses during time they live together as indicated by law is governed by community property system. (Law 54 of Dec. 28, 1990 as am'd).

13.07 INFANCY:

(C. C. Arts. 34, 250-268, 288-317, 339-345, 428-632, 1504, 1527, 1740-1741, C. I. A. 17-37).

Age of majority is 18, but minor may be emancipated by his parents, or by marriage, and in certain cases by judicial decree. Contracts by males under 14 or females under 12 are void, and contracts by minors over those ages are voidable, except some by emancipated minors. Parental authority includes legal representation and administration and enjoyment of usufruct of infant's property, with some exceptions.

Law 75 of Dec. 30, 1968 as amended and its regulations Decree 398 of Feb. 20, 1968. Law is favorable to infants as to presumptions of legitimacy, investigations of paternity, paternal recognition, support and rights of succession. Penal sanctions are provided to enforce child's right to proper care and support. Law 75 also created public entity, Colombian Institute of Family Welfare (Instituto Colombiano de Bienestar Familiar), for protection of minors and promotion of stability and general welfare of Colombian families. Institute will administer all appropriations which are allocated to those purposes and has power to pass such resolutions as are necessary to carry out its programs.

Code of Infancy and Adolescence recognizes special rights of children under 18 years old, among them right to life, quality of life and healthy environment, freedom and personal security, identity, health, education and information. Instituto Colombiano de Bienestar Familiar is government agency in charge of supervising enforcement of law. There are family and criminal judicial systems specializing in minors and adolescents matter.

13.08 MARRIAGE:

(Const. Art. 42).

Marriage may be either by religious ceremony or by civil ceremony. Either party can be represented by special agent appointed by public deed before notary public. (Law 57 of Dec. 28, 1990). If by religious ceremony capacity of parties is determined by canon law. Religious marriages can be annulled only by religious courts whose judgments in such matters produce civil effects.

Males and females above 18 may marry by civil ceremony; if below that age they require consent of their parents or guardians. Ceremony is performed after an edict has been posted for 15 days.

Civil marriages are null in the following cases: (1) Error as to the person, but this can be alleged only by the party suffering the error and provided such party does not continue marital life after learning thereof; (2) age less than 14 in the male and 12 in the female; (3) lack of consent; (4) duress, to be alleged by the party suffering the same; (5) marriage between an adulteress and her accomplice if adultery was proved in court; (6) if one of the parties killed former spouse; (7) relationship by consanguinity in direct line or by affinity in first degree of direct line; (8) between brothers and sisters; (9) between adopter or wife and person adopted; (10) existing marriage; (11) if not performed before judge and witnesses. The nullity of religious marriages is determined by canon law.

Marriages between a guardian or his descendants and his ward are forbidden before the ward reaches 18 years unless the accounts of the guardianship have been approved and likewise marriages of a widower unless an inventory has been made of the property which his children inherited from their mother. (C. C. 110-151).

Aliens may be married by the diplomatic agent or consul of their country. (Law 266 of Nov. 16, 1938).

13.09 MARRIED WOMEN:

See topics 13.06 Husband and Wife, Marriage; category 12 Estates and Trusts, topic 12.05 Executors and Administrators.

14 FOREIGN TRADE AND COMMERCE

14.01 CUSTOMS DUTIES:

See topics 14.02 Exchange Control, 14.04 Foreign Investments.

14.02 EXCHANGE CONTROL:

(Const. Arts. 371 and 372, Law 9 of Jan. 17, 1991 as am'd, Decree 1092 of June 6, 1996 am'd by Decree 1074 of June 26, 1999, Decree 2080 of Oct. 18, 2000 as am'd, Resolutions of Junta Monetaria: 8 of May 5, 2000 and 9 of June 2, 2000).

Foreign exchange market is used for transactions related to importation and exportation of goods, foreign investment, Colombian investment abroad, private debts, avals and securities in foreign currency, among others. Personal services, sales and services to tourists and gifts or donations or any other amount under certain limits or regulated by law which can be negotiated freely. Foreign exchange transactions must be done by commercial bankers, finance firms, stock brokerage companies and exchange houses. Exchange rate is determined by supply and demand. Export proceeds must be turned over to Banco de la Republica. Colombians can hold foreign exchange accounts abroad.

Exports.

(Decree 1144 of May 31, 1990). Exportation of national products is free, but it must be declared to Ministerio de Comercio Exterior. Ministerio de Comercio Exterior may establish quality standards and degree of processing required for export goods, or may limit or prohibit exportation of certain products when demand of national market so requires.

Imports are subject to license. All imports require registration with Instituto de Comercio Exterior and license by same. Temporary admission of raw materials and parts for export goods is regulated by Decrees 2666 of Oct. 26, 1984 as am'd.

Import Tax.

Andean Group common external tariff is in force. Rates are 5%, 10%, 15%, 20% and up to maximum of 35%. Import tariff is based on Brussels Nomenclature.

Foreign capital investments are direct investment of foreign capital and investment of portfolio made by nonresident individuals or legal entities. Direct foreign capital investment includes: acquisition of participation, stock, quotas or bonds to be convertible in stock from local enterprises, including nonprofit organizations and cooperatives; acquisition of fiduciary rights deriving from trust agreements for purpose of developing such enterprises; acquisition of real estate property, participation quotas in construction projects or through real estate funds, by public or private bid; transfer of technology. Investment of portfolio includes investment in stock, bonds to be convertible into stock and other securities recorded in local stock register. Investment of foreign capital may be accomplished by: importation of foreign currency for investments in local currency; importation of tangible goods, such as machinery, equipment and other assets, as non-refundable capital contributions; contribution to capital in intangible property such as, technology, trademark and patents; reinvestment of profits and royalties from registered contracts; funds in local currency, with right to be sent abroad, such as principal and interests of foreign credits, supplementary investments assigned to branch's capital.

Investments of foreign capital require registration with Banco de la República. Additional investments and remittance of profits must also be registered. Registration of investments gives right to: (a) Remit profits; (b) repatriate investment and reinvestments of profits therefrom which could have been sent abroad.

14.03 FOREIGN EXCHANGE:

See topic 14.02 Exchange Control.

14.04 FOREIGN INVESTMENTS:

(Const. Arts. 100, 335; C.C. art. 1519; Law 9 of Jan. 17, 1991, Res. 51 CONPES of Oct. 22, 1991 as am'd, Decree 2080 of Oct. 18, 2000 as am'd, Law 963 of July 8, 2005 regulated by Decree 2950 of Aug. 29, 2005).

Foreigners within Colombian territory enjoy same guarantees as are granted to nationals. Colombian Government policy toward foreign investment has been traditionally favorable.

Decision 291 of Commission of Cartagena Agreement on Common Regime for Treatment of Foreign Capital and of Trademarks, Patents, Licenses and Royalties is in force.

Direct foreign investment is authorized in all economic activities, except: National defense and processing and disposal of toxic waste of foreign origin. Direct foreign investment on sea and air transport insurance; and on financial and banking entities has special regulations. Companies are classified as follows: (a) National company where more than 80% of its capital belongs to national investors; (b) mixed company where between 51% and 80% of its capital belongs to national investors; (c) foreign company where less than 51% of its capital belongs to national investors.

Direct foreign investment is authorized for establishment of branches by foreign companies. It is also authorized to participate in existing national or mixed companies to increase their capital. Foreign investors can acquire shares or equity held by national investors. Foreign investors may invest in exploration and exploitation of hydrocarbons and in projects involving refining, transportation and distribution of hydrocarbons or in services inherent to hydrocarbons sector under special regulations. Foreign oil companies need not bring into country foreign currency earned in export of crude oil, except when required to pay their own expenses.

Foreign investors may acquire shares, quotas or bonds convertible in shares (bonos convertibles en acciones) of Colombian financial institutions (primarily banks, financial corporations, savings and housing corporations, leasing corporations, general deposit warehouses, insurance and reinsurance companies and trust companies).

Incorporation or organization of any financial institution by foreign investors requires approval of Superintendencia Bancaria.

Foreign investors may invest through investment funds of foreign capital organized either in Colombia or abroad with subscriptions of either foreign individuals or entities for purpose of investing in stock market.

Investment Funds are authorized to invest in: (i) shares or bonds convertible into shares of Colombian companies, or of entities in which country or Fondo de Garantías de Instituciones Financieras participates; (ii) bonds issued by national companies, by country, its departments, municipalities, special districts and decentralized entities, paper issued by Fondo Nacional del Café, paper or securities issued or guaranteed by Colombian financial institutions which are subject to Superintendencia Bancaria; and (iii) any other paper or securities authorized by Comisión Nacional de Valores.

Repatriation of investments and of profits of investments in oil and financial sectors (except for foreign oil companies entitled to export crude) or through Investment Funds, is subject to rules applicable to foreign investment in general.

Foreign investors are entitled to re-export their invested capital plus any capital gains when they sell their shares, participations or rights to national investors or when company is liquidated or company reduces its capital. Sales of shares, participations or rights to another foreign investor must be registered at Banco de la República. Foreign investors must register their original investments, capitalizations and reinvestments with Banco de la República, as stipulated by law. Yearly profits may be remitted abroad in foreign currency. All investment disputes are subject to Colombia law and jurisdiction. Foreign investors must have agent in Colombia.

Foreign and national investors may enter into contracts with government to enjoy legal stability related to laws and regulations applicable to investment and identified by parties in contract. Contract period may be up to 20 years for extension of existing investments or new investments over certain amount, on areas such as tourism, industry, agriculture, export processing zones, petroleum, telecommunications, construction, among others, except investment in portfolio. Investors shall pay fee equal to 1% of investment value made each year and 0.5% during non-productive years.

14.05 FOREIGN TRADE REGULATIONS:

See topic 14.02 Exchange Control.

15 HEALTH

15.01 HEALTH CODE:

Law 9 of Jan. 24, 1979 and its regulations. Ministry of Public Health is in charge of regulating, planning and coordinating public and private activities related to health. Law regulates among others, foodstuffs, drugs, manufacture, bottling, or packaging, storage, transporting, and selling of medicines and cosmetics, donations and transplants of organs, health related professions, building and sanitation, supply of drinking water, burial and exhumation, disease control, use and handling of pesticides, importation and exportation of animals and animal products for veterinary use and consumption and air pollution. Decree 3050 of Sept. 1, 2005 regulates sale of prescription medicines. Decree 3249 of Sept. 18, 2006 regulates preparation, commercialization, packing, labeling, registration, advertisement, quality control, sanitary control, importation of dietary supplements. Decree 3554 of Oct. 28, 2004 as amended, regulates sanitary registration, sanitary surveillance and control of homeopathic medications for human use. Decree 1737 of May 27, 2005 regulates preparation, commercialization, distribution, labeling, packing, prescription and sales of homeopathic medication, and homeopathic pharmacies.

Decree 4725 of Dec. 26, 2005 as amended regulates manufacture, packing, storage, maintenance, commercialization, use, importation, exportation, registration of medical dispositives for human use.

16 IMMIGRATION

16.01 ALIENS:

(Const. Art. 100, Labor Code Arts. 74-75, Decree 2107 of Oct. 8, 2001 as am'd, Decree 4000 of Nov. 30, 2004 as am'd).

Aliens in general have the same civil rights and duties as citizens. Law may impose special conditions or deny some civil rights to aliens for public order purpose. Aliens enjoy guarantees granted to nationals, with some limitations established by law or Constitution. Political rights are reserved to nationals, but law may extend right to vote in local elections to resident aliens.

Not more than 10% of workmen nor more than 20% of certain employees, including management and those in positions of trust, may be aliens. Nationals have a right to salaries equal to the aliens for the same work. Under the Petroleum Code at least 80% of personnel must be of Colombians and at least 75% of the salaries paid to them. Percentages may be increased by authorization of Ministry of Labor and Social Security.

Aliens may enter Colombia with business, immigrant, tourism, temporary or resident visas. Government keeps registry of aliens. Aliens cannot change residency without advising authorities accordingly. Resident visa is granted to foreigners who intend to establish themselves permanently in country; said status is lost for absence from Colombia of more than two years. Decree establishes sanctions for aliens or national employers who do not comply with legal requirements and focuses on expulsion and deportation of foreigners from country.

17 INTELLECTUAL PROPERTY

17.01 COPYRIGHT:

(Const. Art. 61).

Scientific, literary and artistic works as defined by law are protected. Law also protects performers in their rights. Copyrights include all kinds of intellectual (including software), scientific, literary and artistic creations reproduced by any means. Moreover, law protects as “independent copyright works”, translations, adaptations, musical arrangements and other transformations on private intellectual works. To protect these copyright works written authorization from original owner of work is necessary. Law grants certain intellectual, moral and property rights to author, his successors or assignees. Right remains in force during life of author and for 80 years thereafter. When copyrights are owned by judicial persons period of protection is 50 years from publication. Rights of artists, performers, phonogram producers and radio transmission organizations are protected 50 years from first performance, publication of phonograms or transmission.

Only scientific works to be copyrighted may be registered in National Copyright Registry. Literary and artistic works, performances and other productions are protected by law without requiring registration. Assignments of copyright must be made in public instrument and likewise recorded. Registration of copyright must be effected within two months after publication; if not made in this period work is not protected until registered. Any act or contract related to copyright must be registered.

Letters are the property of the addressee, but they can be published only by the author except in case of litigation. Letters of a deceased person cannot be published for 80 years without the consent of the surviving spouse, or the children, the father or mother or other specified relatives of the author. National and foreign associations for the protection of authors' rights are recognized. Infringement of copyrights are subject to prison and fines, and illegal publications subject to seizure. (Law 23 of Jan. 28, 1982 as am'd by Law 44 of Feb. 5, 1993; Decree 3116 of Dec. 21, 1984 as am'd; Decree 1360 of June 23, 1989; Decision 351 of Dec. 17, 1993 of Cartagena Commission; Decree 460 of Mar. 16, 1995; Decree 162 of Jan. 2, 1996).

Certain provisions of Commercial Code regulate publishing contracts.

Colombia is a party to Convention on literary and artistic copyright, (Buenos Aires, 1910, revised Havana, 1928), to Inter-American convention on rights of author in literary, scientific and artistic works (Washington, 1946), to Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organization (Rome, 1961), to Convention of the Protection of Literary and Artistic Works (Berne, 1886) Revised 1971, to Universal Copyright Convention (Geneva, 1952) Revised 1971, Agreement on Trade-Related Aspects of Intellectual Property Rights, Marrakesh, Apr. 15, 1994, WIPO Copyright Treaty, Geneva 1996, WIPO Performances and Phonograms Treaty, Geneva 1996.

17.02 PATENTS:

(Const. Arts. 150, §24, and 189, §27, C. Com. 534-583, Res. 0582 of Mar. 30, 1990; Decision 486 of Sept. 14, 2000 of Cartagena Commission, and Decree 533 of Mar. 8, 1994 as am'd, Decree 2591 of Dec. 13, 2000 as am'd).

Patents.

Any invention of products or proceedings in any technology field which are novel, represent inventive step and are susceptible of industrial application. Invention is novel when it is not within state of art.

Among others, discoveries, scientific theories and mathematical methods; literary and artistic works; natural biological process, biological material existing in nature or resulting from isolation, including genome or germplasm of any natural being, plan, rules and methods for pursuit of intellectual activities, games or economic-commercial activities, computer programs or software, as such, and forms representing information are not considered inventions. Inventions contrary to public policy, morals and against health or life of person and animals, to preserve vegetation or environment; on animal species and races and biological procedures to obtain them; and related to substances composing human body are not patentable.

Petition must contain following: Personal information of petitioner; name of invention and complete description of it, accompanied by drawings and symbols or words, if that is the case, plus statement defining purpose and use of invention. Patent is granted to person that first petitions for it or to his heirs; if several persons have invented or discovered it, right is granted to all in common. In case petitioner is domiciled outside Colombia, petition must be accompanied by power of attorney. Patent owner must exploit it, directly or by granting license in any country member of Andean Pact. Industrial production or importation, distribution and commercialization of patented product, are considered exploitation of patent. If patent has not been exploited in country, compulsory license is granted to anyone who requests it under conditions indicated by law and by Resolution 17585 of May 25, 2001 of Superintendence of Industry and Commerce. Applications for foreign patents should be filed within one year after filing of application in first country. First patent application filed in any Andean Group Country gives priority right during one year in order to file in any other member country.

Patents are granted for 20 years from filing date.

Petitioner or owner of a patent can grant to third persons a license to exploit such invention by means of a written agreement called “contractual license.” Compulsory licenses must also be granted in cases indicated by law. Either owner of patent, or licensee can start all necessary judicial proceedings for protection of rights granted by patent, including criminal proceedings in case of unauthorized use or usurpation by third parties.

Utility models for new forms of configuration, or arrangement of elements, of any device, tool, instrument, mechanism or other object or its part that improves its operation, use or manufacture, provided they have practical use, are registrable. Registration term is ten years from filing date.

Industrial designs are registrable if new. Industrial designs are defined as particular appearance of product as result of any arrangement of lines or combination of colors, or any two dimensional or three dimensional external shape, line, outline, material or texture, without changing its purpose. Rights are assignable and inheritable. Registration confers right of exclusive use for ten years, nonrenewable. Applications are published and oppositions can be filed.

Decree 259 of Feb. 12, 1992 regulates trademark, patents and other transfer of technology contracts.

Trade Secrets.

Law also protects trade secrets and considers them as any confidential information that is valuable related to nature, characteristics or purposes of products, production methods or processes, distribution, commercialization of products or rendering of services that provides competitive or economic advantages to owner. Information considered trade secret must be expressed in tangible form such as documents, microfilm films, laser discs or any other similar means.

Layout-designs of integrated circuits are protected when considered original as indicated by law. Application must be filed within two years from its first commercial exploitation in any part of world, and when it has not been exploited application must be filed within 15 years from last day of year of invention. Rights may be licensed, assigned and inherited; compulsory license may be granted. Registration is granted for ten years from filing date or from last day of year of first exploitation.

Vegetal species are protected when they are novel, homogeneous, distinguishable and stable and generic designation has been assigned to them. When registered certificate of holder is issued for 20 and 25 years, depending on type of vegetal variety.

See also topic 17.03 Trademarks and Tradenames; category 14 Foreign Trade and Commerce, topic 14.02 Exchange Control, subhead Foreign Capital Investments.

17.03 TRADEMARKS AND TRADENAMES:

(Const. Art. 150, §24; C. Com. 584-618, Res. 0582 of Mar. 30, 1990, Decision 486 of Sept. 14, 2000 of Cartagena Commission, Decree 2591 of Dec. 13, 2000 as am'd).

Trademarks and Slogans.

Those signs visible and sufficiently distinctive can be registered as marks. Trademark is any sign used to distinguish products or services produced or commercialized by one person from same or similar products or services produced or commercialized by another person. Following signs, among others, can be registered as marks: words or combination of words, pictures, figures, symbols, graphic elements, logotypes, monograms, portrait labels, emblems, sounds, smells, letters and numbers, shape, packaging and wrapping of products. Slogans are words, sentences or captions used as supplement to trademark. Any person or corporation may apply for registration of trade names or slogans employed or to be employed in relation to economic activities. Item registered may be sufficiently distinctive. Among non-registrable are:

usual or necessary shapes of products or denominations and color thereof; shapes which provide functional or technical advantages to product or service concerned; signs or indication that may designate or describe quality, quantity, species, destination, value, place of origin, or any other characteristic data or information on goods or services on which they are to be used; marks contrary to law, those that are against public policy or that are intended to deceive consumers regarding nature, origin, type of manufacture, characteristics or aptitude to use products or services; those that reproduce or imitate coats of arms, emblems, phrases, of any State or of any international organization, without appropriate permit; title of literary, artistic or scientific works protected by copyright without permission of owner, denomination of protected vegetable varieties, those identical or similar to registered trade slogans and trade names, provided under circumstances public may be confused; those that are reproduction, imitation, translation, or total or partial transcription of distinctive signs, locally or internationally, well known, without taking into consideration classification of goods or services concerned; or because of similarity to well-known trademarks causes confusion to public independent of classification of goods and services for which registration is applied for. Statute of limitation for action to declare invalid registration of well-known mark registered by third party is five years from date owner becomes aware of unauthorized use; there is no limitation when it has been used in bad faith. Owner of well-known marks can request cancellation or amendment of registered domain name or e-mail address affecting its exclusive rights. Registration of generic or descriptive terms, usual or common expressions, and individual color may be registered as mark provided owner of mark can prove that mark permits consumers to equate expression with specific good or service.

Collective Marks.

Any sign that distinguishes origin or any other common characteristic of products or services of different enterprises which use marks under control of its owner.

Commercial Names.

Any sign that identifies economic activity, enterprise or mercantile establishment. Commercial names are independent from company denomination, and both can coexist. Exclusive right is acquired by first use in commerce and terminates with activities of enterprise. Commercial names may be licensed.

Certification marks sign to be applied to products or services used by others whose quality or other specific characteristics have been certified by legal owner of mark, which shall be public or private entity.

Registration of trademark lasts ten years, but it may be renewed for ten year periods indefinitely if evidence is filed of use of mark in any Andean Group Country if applied for within last six months from date of expiration. Owner of trademark may grant license to use or exploit it.

Trademarks and commercial names can be cancelled for nonuse for consecutive three years by owner or licensee in any member country of Andean Pact. Partial cancellation may be done when owner proves use of mark for some goods or services. Infringement actions and unfair competition are regulated by law.

Origin denominations may be declared at government's initiative or at petition of interested party. Authorization to use them may be granted for ten years, renewable.

Contracts for trademarks are registered according to Decree 259 of Feb. 12, 1992.

Law 14 of Mar. 5, 1979, forbids use of foreign words in names of products, services, companies and commercial establishments and in new trademarks registered after enactment of legislation.

Conventions.

Convention for the Protection of Industrial Property, Paris, Mar. 21, 1883, Stockholm Revision of July 14, 1967 as am'd on Sept. 28, 1979; General Inter-American Convention for Trademark and Commercial Protection, Washington, Feb. 20, 1929; Patent Cooperation Treaty, Washington, D.C., June 19, 1970 as am'd; Agreement on Trade-Related Aspects of Intellectual Property Rights, Marrakesh, Apr. 15, 1994.

Penalties for infringement of intellectual property rights were increased by Law 1032 of June 22, 2006 which amended Criminal Code. By Decree 4540 of Dec. 22, 2006 customs controls are established for protection of intellectual property rights.

See also topic 17.02 Patents; category 14 Foreign Trade and Commerce, topic 14.02 Exchange Control, subhead Foreign Capital Investments.

18 LEGAL PROFESSION

18.01 ATTORNEYS AND COUNSELORS:

(Decree 196 of Feb. 12, 1971 as am'd and its regulations).

To practice law, attorney must be registered with “Consejo Superior de la Judicatura”. For that purpose, he must hold law degree from local university. Attorney holding law degree from foreign university may be registered if such degree is considered equivalent to local degree after complying with evaluation proceedings before proper authority.

Attorneys must comply with duties imposed by disciplinary code; in case of noncompliance their registration may be suspended or canceled, depending on seriousness of violation.

19 MINERAL, WATER AND FISHING RIGHTS

19.01 MINES AND MINERALS:

(Const. Arts. 332 and 360).

(Mining Code Law 685 of Aug. 15, 2001 as amended, regulated by Decree 136 of Jan. 15, 1990 and Decree 2390 of Oct. 24, 2002 and Decree 2653 of Sept. 22, 2003).

Mining Code governs all mining related activities of nonrenewable natural resources located on surface or underneath, either inland or offshore except hydrocarbons.

All natural resources in surface or underneath belong to State which may undertake exploration and exploitation by itself or concession contracts related to such activities to private parties.

Mining activity is regarded as being of public interest. All individuals or juridical persons, domestic or foreign with legal capacity may enter into concession contracts under condition indicated by Code. Foreign governments may engage in mining activities through private companies in which they have an economic interest, provided such companies waive diplomatic protection. Foreign juridical persons must establish branch if they want to be permanently engaged in mining activities. Exploration and exploitation rights may be transferred and encumbered to secure mining credits. Such rights are inheritable. Mining rights can be relinquished at any time.

Preliminary surface exploration is free except to restricted areas. Law distinguishes mining ventures according to volume of minerals extracted during determined period of time as small, medium and large. Annual extraction volume allowable to small, medium and large mining ventures is geared to four different groups of minerals: Metals and precious stones, coal, construction materials and others.

Mining Contracts.

Can be executed by Ministry of Mines and Energy or by decentralized agencies of said Ministry. Contracts executed by Ministry of Mines and Energy are concession contracts. Concession contracts grant concessionaire exclusive right to explore and exploit minerals specifically indicated in contract as well as minerals mixed therewith. Concession contract is registered ten days after environmental license is issued. Term of contract is up to 30 years from registration date and renewable for up to 30 years. When extension term expires, contractor has priority right to enter into new concession contract in same area. Concessionaires must establish pledge, bank or insurance guaranty in favor of government for 10% of estimated production for first two years.

Code establishes causes for termination of concession contracts. Fines may also be imposed in certain cases. At termination of contract, contractor must transfer to State free of charge real property and facilities built in for transportation and shipment of minerals which cannot be removed without damaging mine, and when mining authority considers those assets as infrastructure for public transportation and shipment or that they may be used by local community. In case of contracts executed before enactment of new Code, contractor may agree with mining authority to pay for assets instead of transferring them; in case of discrepancy as to value of assets, parties may submit it to arbitration as set forth in Code.

Exploration and exploitation activities may be made through companies, corporations or “cooperativas” formed under Commercial Code or under rules of Mining Code. Holder of mining rights must prioritarily supply local market with exploited mining products; buy locally manufactured machinery, equipment and materials; and contract locally technical assistance. Colombian employees must share in at least 70% of total amount paid to specialized or qualified personnel and in at least 80% of total amount paid to blue collar personnel. Law indicates titles, licenses, contracts and liens related to mining activities which must be registered with Mining Registry.

State is entitled to receive from persons enjoying mining rights to annual amount equal to one minimum daily wage per hectare for areas under 2,000 hectares, to two minimum daily wages for area over 2,000 hectares and under 5,000 hectares, and for area over 5,000 and up to 10,000 hectares three minimum daily wages, to be paid in advance. Investments of mining exporting companies on forestry projects for export equal to 5% or more of FOB value of exporting goods are exempted from payment of taxes for 30 years.

Mining Code contains several provisions to protect workers involved in this activity.

Petroleum.

Under Decree 1056 of Apr. 20, 1953 (Petroleum Code) as am'd, and Law 20 of Dec. 22, 1969, regulated by Decree 1994 of Sept. 4, 1989, special concession contracts were made with Government for petroleum exploration and exploitation in lands where Government owns mineral deposits.

Agencia Nacional de Hidrocarburos, ANH is in charge of administration of hydrocarbons reserves owned by Government and carry on explorations and exploitations by itself or through third parties under service, joint venture or other contracts under terms and conditions agreed. Ecopetrol S.A. is commercial and industrial enterprise owned by Government in charge of exploration and exploitation of hydrocarbons; refining, processing, distributing, transporting and storing hydrocarbons locally and abroad; and commercializing, locally and internationally, natural gas, petroleum and petroleum products. (Decree 1760 of June 26, 2003 as am'd).

Conservation.

To prevent waste of resources and environmental pollution, Decree 1895 of Sept. 15, 1973 established extensive technical safeguards of mandatory observance in exploration and exploitation of petroleum and gas. In respect to certain operations, concessionaires must obtain special permit and file frequent reports in official agencies. Heavy fines are imposed for infringement of these regulations.

Surface Tax.

During exploration and exploitation periods an annual surface tax is payable. During period of exploitation surface tax is same rate paid during last year of exploration by concessionaire. Surface tax is payable for whole extension of mine even though part of it belongs to private owner.

Royalties.

On production of petroleum or of natural gas in lands where Government owns minerals, royalties are payable in money or in kind.

Portions surrendered to Government at expiration of first year of exploitation, or lost by failure to pay royalties or taxes, or by renunciation or termination before 20 years of exploitation, are to be sold by Government to best bidder.

20 MORTGAGES

20.01 CHATTEL MORTGAGES:

There is no provision for chattel mortgages. See category 7 Debtor and Creditor, topic 7.13 Pledges.

20.02 COLLATERAL SECURITY:

See category 7 Debtor and Creditor, topic 7.13 Pledges.

20.03 MORTGAGES:

(C. C. 653, 662, 2432-2457; Law 52 of 1920 as am'd; C. P. C. 554-560).

Mortgages must be executed before a notary in the form of public instrument (q.v.) and recorded in the mortgage registry. Their date and effect are counted only from the day of recording. They must describe the property in detail. Each party must be present before the notary. Mortgages made in foreign countries on property in Colombia are valid if recorded in the proper registry in Colombia. Mortgages made in Colombia must be recorded within 90 days; those made abroad within 180 days.

Only real property possessed under ownership or usufruct title and ships can be mortgaged. The mortgage covers movable property permanently attached or belonging to the soil such as machinery, implements and animals on farms.

Mortgages are foreclosed by summary action in the manner in which judgments are executed and pledges are foreclosed. See category 7 Debtor and Creditor, topics 7.05 Executions, 7.13 Pledges.

21 PROPERTY

21.01 ADVERSE POSSESSION:

See category 5 Civil Actions and Procedure, topic 5.07 Prescription.

21.02 CURTESY:

There is no estate by curtesy.

21.03 DEEDS:

All transfers of title to real estate as well as all encumbrances must be done by public instrument (escritura pública). Such document has all characteristics of a deed and must contain accurate details regarding parties and real property involved.

Deeds must be prepared before a Notary Public who is a public official whose duties and responsibilities are more important than those under American Law. See category 9 Documents and Records, topic 9.03 Notaries Public.

Deeds must be written in Spanish; however, if parties do not know language sufficiently enough to understand transactions involved, they must be attested to by an interpreter who must also sign deed before Notary. Printed forms can be used, provided blanks are filled in carefully and without omissions; quantities must be expressed in numbers and in words; in case of doubt, words will prevail. Grantor and grantee must sign deed and both must be present at same time. If one is absent, an attorney in fact can represent him. Notaries will not authenticate a deed of transfer or encumbrances without proof that all taxes are paid. (Decree 960 of June 20, 1970 as am'd, Decree 1250 of July 27, 1970; Decree 2148 of Aug. 1, 1983 as am'd).

21.04 DOWER:

There is no provision for dower.

21.05 ESCHEAT:

See category 12 Estates and Trusts, topic 12.04 Descent and Distribution.

21.06 PERPETUITIES:

Property cannot be prevented from vesting for a period exceeding 30 years, unless death of beneficiary be event which is to terminate period. (C. C. 800, 829, 1145).

21.07 POWERS OF ATTORNEY:

(C. C. 2142-2199; C. Com. Arts. 331-424).

An agency may be written or verbal, but for most purposes powers of attorney should appear in public instruments executed before a notary and should be detailed and explicit regarding powers conferred. Authority of person granting same must clearly appear.

A general power of attorney merely covers acts of administration. In order to buy, alienate or encumber real estate, make compromises or perform any other act outside ordinary course of administration, power to do so must be specifically granted. An agency is not perfected until accepted, but acceptance may be express or tacit. An agent must adhere strictly to instructions of principal. He may delegate his powers if not expressly prohibited from doing so, but is liable for acts of substitute if there was no authority to make delegation or if his appointee is notoriously incompetent.

Principal must reimburse agent for his expenses, pay him stipulated or customary compensation and indemnify him for losses suffered by reason of agency. Agent may retain goods of principal as a pledge for such payments.

Powers of attorney are terminated by: (1) Expiration of the term or business for which the power was granted; (2) revocation by principal; (3) resignation of agent; (4) death, bankruptcy, insolvency or loss of civil rights of principal or agent; (5) cessation of powers of principal if agency was constituted by virtue of such powers. In case of resignation agent must continue acting for a reasonable time until principal can make other arrangements.

Under C. Com. Arts. 331-424 similar provisions are contained regarding subject. Agent undertakes to execute gratuitously or for payment, one or more commercial activities in name of principal and to report about its performance. Once agency is expressly or tacitly accepted agent must execute or else is liable for damages. Agent is responsible for safekeeping and maintenance of merchandise unless damage or loss is due to force majeure or inherent defect or merchandise. He also must spread upon record, legally, damage or loss of merchandise and inform principal about it. Agent cannot pledge merchandise to fulfill his own obligations. He may act in his own name or in name of principal, in latter case only principal is obligated with respect to third persons and when he acts through another he is liable to principal if he wrongfully selected substitute.

Commercial Agency.

In Commercial Agency, agents are as follows: (1) Purchasing agents; (2) selling agents; (3) agents of transportation; (4) agents to execute banking operations. They have corresponding obligations regulated in Code.

21.08 REAL PROPERTY:

Real property includes articles permanently attached to realty as well as articles permanently devoted to use and cultivation of realty, such as machinery, drain pipes, mining and agricultural utensils, fertilizer, animals placed on property for its cultivation or improvement, etc. Products of real estate are considered personalty for purpose of granting rights therein.

Property may be held in common in which event each co-owner is liable for his portion of expenses and entitled to his portion of benefits. Any co-owner may ask for partition of property, which partition will preferably be made in kind unless property be of such nature that it cannot conveniently be divided. (C. C. 656-661; 2322-2340).

Condominiums are regulated by Law 675 of Aug. 3, 2001.

22 TAXATION

22.01 FREE ZONES:

Free Trade Zones.

(Law 1004 of Dec. 30, 2005, Decree 383 of Feb. 12, 2007). Free trade zones are privately exploited and administered under concession from government authority. Any national or foreign, natural or legal entity may operate in free trade zones. Companies located outside Free Trade Zone may qualify to benefit from Free Trade Zone regime and operate as Special Free Trade Zones if they comply with requirements as stipulated by law. Free trade zones may be permanent or temporary. Authorization to operate or use Permanent Free Trade Zones may be granted for up to 30 years term, renewable once. Users of Permanent Free Trade Zones are: Operating Users, Industrial Goods Users, Industrial Services Users and Commercial Users. Merchandise passed through free zone for importation into Colombia is subject to all importation requirements. Profits of foreign investment in free zones remitted abroad are tax exempted. Income derived from operation in free zone by Operating, Industrial Goods and Industrial

Services Users is taxed at 15%. Commercial Users are subject to full income tax rate. Dirección de Impuestos y Aduanas Nacionales is in charge of authorizing operation of Free Trade Zones and enforcement of law. Fines are imposed for violation of law.

Special Economic Export Zones.

Law 677 of Aug. 4, 2001 as amended regulated by Decree 1227 of June 12, 2002 and Decree 2484 of Sept. 2, 2003 grants special treatment to industrial project for production of goods and services to be exported from Special Economic Export Zones created in certain areas of country. National and foreign entities which activity is exportation of goods and services may enter into admission contracts with government agency to operate in these zones. Local or foreign legal entities which activities are city planning, construction and infrastructure for basic services, technological and urban works; and entities dedicated to train specialized personnel, are considered users of those zones. Contract terms are from five to 20 years, which may be extended. Minimum new investment is US $2,000,000. Investment must be done during first quarter of project. Investors should comply with number and type of jobs to be created, use of state of art technology and other conditions according to characteristics of project. Benefits are: interest and payments for technical services remitted abroad are exempted from income tax and tax on remittance; income from infrastructure projects is exempted from income and complementary taxes. Bond must be filed as guarantee of exempted taxes for importation of goods, raw materials, spare parts, consumer goods and final products to be used within zones. Such export operations grant right to obtain certificate for tax reimbursement. Labor contracts within zones are regulated by special rules: working hours may not exceed nine hours per day and 18 hours per week; for companies with two or more working shifts, working periods may not exceed six hours per day and 36 hours per week, excluding overtime for evening work and for Sun. or holiday work; contributions to Colombian Institute for Family Welfare, National Service for Learning and Employees' Families Welfare, are paid at 50% rate stated in labor law.

22.02 INCOME TAX:

(Decrees 624 of Mar. 30, 1989 as am'd, 868 of Apr. 26, 1989, 2075 of Dec. 23, 1992 and 433 of Mar. 10, 1999).

I. Under “Income Tax” are included: (A) Basic income tax; (B) capital gains tax; (C) remittance tax. Taxes under (B) and (C) are called “complementary taxes.”

II. Taxpayers.

(1) Individuals, national or foreign, Colombian residents for more than six continuous months within taxable year, or six continuous months ending within it, and nationals who reside abroad but have their families or principal place of business in Colombia, are subject to taxes (A) and (B) (I, supra) in respect to income and capital gains from Colombian or foreign sources. Foreign nationals residing in Colombia are exempt from tax on income and capital gains from non-Colombian sources during first five years of residency. Nonresident individuals are subject to above taxes only in respect to income and capital gains from Colombian sources and to assets situated in Colombia. (See also subhead V. Remittance Tax.)

(2) Decedents' estates, when last domicile of decedent was in Colombia, are subject to same taxes levied on individuals (supra), from decedent's death to date of distribution, in respect to personal (“muebles”) property, and to date of registration in respect to real property.

(3) Other taxpayers (juridical persons) are subject to taxes (A) and (C) (I, supra). Capital gains are taxed as regular income. (a) Corporations (“sociedades anónimas”), limited liability partnerships issuing shares of stock (“comanditarias por acciones”) and irregular companies with similar features, respectively, to each of above, government enterprises industrial or commercial and national mixed capital companies are subject to basic income tax (A) (I, supra) on income from Colombian or foreign sources, without prejudice of their stockholders,

subscribers, quota holders, etc. paying tax on dividends or profits. (See also subhead V. Remittance Tax.) (b) Limited liability companies (“sociedades de responsabilidad limitada”), partnerships (sociedades colectivas”), limited liability partnerships not issuing shares (“comanditarias simples”), mining ventures known as “ordinary” mining companies, irregular companies with similar features to those above, “organized communities”, corporations and associations for profit and private foundations, are subject to basic income tax (A) (I, supra) on income from Colombian or foreign sources, without prejudice of their partners, quota holders, etc. paying tax on profits. (c) Foreign corporations. Unless exempt under international treaties or Colombian laws, foreign corporations and other foreign entities of any kind, are subject to basic income tax (A) (I, supra) on income from Colombian sources. For purposes of this law, term “foreign” applies to juridical persons organized under laws of foreign country and having their principal domicile abroad. (See also subhead V. Remittance Tax.) (d) Nonprofit corporations and associations and foundation of public or social interest are taxed under special regulations. Nonprofit organizations are exempted if they are dedicated to health, sports, cultural, scientific, ecological protection or environmental activities of general interest and earnings are reinvested for their own purpose. Mutual funds for investments, cooperatives and others are also exempted under conditions stipulated by law.

(4) Exemptions.

State and government dependencies, local governments, municipalities, and other denominations recognized by government, are exempt from basic income tax and complementary taxes (A)-(C) (I, supra). Also exempt are, for salary received, members of foreign diplomatic and consular services and their foreign office and domestic employees, and members of international organizations who, under agreements or treaties are entitled to this exemption. However, any of above receiving income from Colombian sources or who own property in Colombia are subject to tax in respect of such income and property.

As a way to facilitate filing of tax returns law authorizes presentation of exhibits thereto in magnetic tape. Individuals and decedent's estates do not need to file annual income tax return in cases indicated by law.

III. Basic Income Tax.

Gross receipts are total of ordinary and extraordinary income received. Gross receipts less refunds and discounts equal net receipts. Gross income is total net receipts less costs to produce income.

Rules on certain incomes. (A) Dividends and profits.

(1) Income of shareholders of corporations and assimilated entities (II, 3a, supra) arising from distributions of dividends or profits, in money or in kind of: (a) Preceding year or accumulated profits of several years, except when they are paid out of income that has been reported by distributing entity; (b) extraordinary distributions at transformation of corporation; and (c) extraordinary distributions at liquidation of corporation made to shareholders not individuals or decedents' estates in amount exceeding their investments. (2) Income of partners or quota holders (“socios, comuneros, asociados”) of limited liability companies, and assimilated entities (II, 3b, supra): (a) From ordinary annual distributions of profits: their share, in proportion to their respective investment, in company's net income, after deducting income tax and legal reserve, except when they are paid out of income that has been reported by distributing entity. If company had losses, partner or quota holder must share them in same proportion. If portion of income comes from sale of fixed assets owned by company for more than two years, and partners or quota holders are individuals or decedents' estates, distribution is taxed as capital gains; (b) from distributions in money or in kind at liquidation of company: taxpayer's share in profits of last taxable year, plus his share in reserve and any excess over his investment (reimbursement of investment, plus his share in accumulated profits of years prior to that of liquidation are not

taxable income). When partner or quota holder is individual or decedent's estate, any amount received in excess over his investment and profits is taxed as capital gains. Above rules apply, when not incompatible, to distributions at transformation of companies. Constructive dividends. Any payments made by corporations or any other juridical entities (II, 3a, b, supra) to individuals or decedents' estates which are "economically vinculated" to taxpayer (i.e. individual who himself or whose spouse or close relative owns 50% or more of company's capital) is presumed distribution of profits.

(B) Income from maritime, air or river transportation services received by foreign companies or by nonresident individuals is held as "mixed" income, and taxed on portion derived from services originating in Colombia, subject to special rules for its determination.

(C) Royalties of rentals from exploitation of motion picture received by nonresident individuals and foreign corporations are taxed on 60% of total received and those from exploitation of computer programs are taxed on 80% of total received.

(D) Royalties for use of patents and trademarks or know-how, and services rendered in Colombia for technical assistance, are held as Colombian income and taxed accordingly. But salaries, commissions, fees, etc. paid for services abroad are not subject to tax.

(E) There are special rules for income of insurance companies, for income from trusts, etc.

Net income is gross income less authorized deductions, as follows: (A) Expenses necessary for production of income: (1) Repairs of real property up to 1% of capital valuation, or its cost, if higher, (2) interest, total amount if paid to entities under supervision of Superintendency of Banks; if to other entities, deduction is up to amount due at highest bank rate during taxable year. Interest on loans for payment of taxpayer's house, if lender is under supervision of Superintendency of Banks or loan is guaranteed by mortgage, (3) 80% of taxes on land, motor vehicles, registration and stamp, (4) personal services: salaries, workmen's social benefits, professional fees, commissions, etc. (5) social security, pensions, contributions to mutual funds for investment, etc. In case of salaries, fees, commissions, etc., which constitute income from work to recipient, and in payments of interests, royalties (See also "expenses abroad," B[5], below) or any other which constitute income from capital to recipient, deduction is not permitted unless taxpayer identifies recipient.

(B) Other deductions: (1) Amortization (within five years) of "necessary investments", meaning others than in land, such as in organization and installation of business, cost of acquisition or exploitation of mines and exploration and exploitation of petroleum, gas and other natural resources, depletion. Ministry of Mines shall determine term for amortization of investments under its jurisdiction; (2) depreciation; (3) bad debts written off; (4) losses of assets assigned to production, and business losses, which can be carried over eight years without exceeding 25% annually of fiscal loss according to law; (5) expenses abroad up to 10% of taxpayer's net income, provided taxpayer substantiates same and identifies recipient at time of filing tax return and withholds tax when so required. Royalties for use of trademarks, patents and know-how are not deductible unless there is officially approved licensing agreement. No deduction is permitted for royalties paid by subsidiary to parent company abroad.

(C) Special exempt incomes: (1) Workers' benefits: indemnifications for accidents and sickness, maternity benefits, life insurance (sic), burial expenses (sic), unemployment, travel expenses, dividends when they are paid out of income reported by distributing entity, etc.; (2) interest from bonds and other government obligations issued prior to Sept. 30, 1974. Local production of computer programs is exempted until Dec. 31, 2012.

Presumptive net income for all taxpayers, is no less than 3% of net capital worth (“patrimonio”) as of last day of preceding taxable year, as indicated by law.

Tax Rates.

(1) Individuals, national or foreign, Colombian residents, decedents' estates of Colombian nationals and of foreign nationals whose last domicile was in Colombia, and income derived from property donated or assigned for special purposes, are subject to progressive rate ranging from 19% to 33% on net incomes over 4,100 UVT (Unidad de Valor Tributario). (2) Foreign nationals nonresidents. Income from Colombian sources is subject to fixed tax rate of 35%, if taxpayer has no agent (“apoderado”) in Colombia. Same rate applies to their decedents' estates in Colombia. If foreign national has duly appointed agent in Colombia, progressive tax rate (above) applies. (3) Corporations and assimilated entities (II, 3a, supra) are subject to fixed rate of 33%. (4) Limited liability companies and assimilated entities (II, 3b, supra) are subject to fixed tax rate of 33%. (5) Foreign corporations (II, 3c, supra) are subject to fixed tax rate of 33%. Capital gains not reinvested are fully taxable subject to varying rates.

Surcharge.

Taxpayers are subject to surcharge of 10% of net income tax.

Withholding tax: On nonresidents: On payments of any income other than dividends, withholding tax fluctuates between 1% and 33% of gross payment.

Withholding on Salaries.

Rates for withholding purposes with respect to salaries 19%, 28% and 33% on salaries over 360 UVT.

Tax credits: (1) Individuals (II, 1, supra), national or foreign, Colombian residents, decedent's estates and companies have following deductions: percentage of tax refund certificates received for promotion of export of goods and services. (2) Donations: up to 30% of net income may be deducted. (3) Taxes paid abroad may be deducted up to amount of tax due in Colombia on same income.

IV. Capital gains tax is levied on net gains received by individuals and decedents' estates from: (1) Sale of fixed assets held for two years or more, gain being difference between sale price and cost of asset. Sale of assets held less than two years are taxed as income; (2) monetary corrections in construction-financing paper known as “UPAC”; (3) liquidation of corporations or of any other entities (II, 3, supra), in excess of invested capital, when such gain should not be distributed as dividends or profits; (4) amount actually received from inheritances, legacies, gifts, life insurance, lotteries and other prizes. If inheritance, legacy, or donation is other than in money, capital gains are value of such property shown in last income tax return of decedent or donor after deducting inheritance and gift taxes. If decedent or donor acquired said property within taxable year, its value cannot be less than that shown in last income tax return of former owner; (5) sale of fixed assets held for more than two years by limited liability companies and assimilated entities; (6) workmen compensations; (7) scientific, artistic and literary prizes.

Special Rules on Certain Capital Gains.

Gains from sale of fixed assets (IV, 1, supra). In sale of taxpayer's own house or apartment, 10% of gain per year of habitation since acquisition date is tax free. Gains from monetary corrections of paper “UPAC” (IV, 2, supra) are taxed on 60% of amount actually received on excess over 7% annually only. Gains from inheritances and legacies (IV, 4, supra) are taxed on 80% of amount actually received; 20% balance is exempt from income and capital gains taxes up to 1,200 UVT. Gains from lotteries and other prizes are taxed at 20%.

Net Gains and Losses.

From above capital gains taxpayer shall deduct losses to determine net gains or losses.

Tax rate is same as for basic income tax table for individual taxpayers of basic income tax (supra).

Special Exemptions and Deductions.

Spouse and decedents with right to certain portion of inheritance ("legitimarios") are entitled to exemption of first 1,200 UVT from capital gains tax.

V. Procedural rules for claims relating to income and sales taxes are contained in Decree 624 of Mar. 30, 1989. Statute of limitations for claiming overdue taxes is five years, for imposing penalties and for correcting returns by Internal Revenue Office, is two years. Taxpayer's corrections must be done within two years from filing return.

VI. Integral Monetary Correction.

Taxpayers required by law to keep accounting books must adjust yearly monetary values of their financial statements in accordance with variable percentage registered by index of consumer prices as determined yearly by Departamento Administrativo Nacional de Estadística (Dane).

Tax on Assets.

Individuals, juridical persons and informal corporations subject to income tax are also subject to tax on net assets at rate of 1.2%, according to law.

22.03 MINES, MINERALS AND FISHERIES:

Surface Tax.

See category 19 Mineral, Water and Fishing Rights, topic 19.01 Mines and Minerals, subhead Surface Tax.

22.04 PROPERTY TAXES:

Real Estate Tax (Law 44 of Dec. 18, 1990).—Municipalities are authorized to create taxes of up to 16% of cadastral value of plots.

22.05 SALES TAX:

(Decree 624 of Mar. 30, 1989 as am'd, regulated by Decree 45 of Jan. 8, 1991 and Decree 380 of Feb. 27, 1996 as am'd). Levied on sale or importation of goods (movables) and services.

Exemptions.

Foodstuffs not specifically taxed, schoolbooks, drugs, personal computers, insecticides, herbicides and like, seeds and fodders, fertilizers, heavy industrial machinery if not manufactured in Colombia, temporary importation of goods, electric energy, and export goods, among others, are exempt.

Tax basis is total value of sale including expenses such as financing and freight. In imported goods, value includes customs duties. If transfer is for free, or goods are for purchaser's own consumption, basis is commercial value of goods.

Rates.

Progressive rates ranging from 0% to 35%.

Taxpayers.

Manufacturers, importers, merchants and individuals or corporations who render services pay this tax. In exported goods (which are exempt) only exporter may obtain reimbursement of tax previously paid.

22.06 STAMP TAX:

Decree 624 of Mar. 30, 1989 as am'd. Tax is levied on public and private documents at 1% rate of amount involved, as indicated by law.

Surtax for Custom Services.

Tax is levied at rate of 1.2% on FOB value of imported goods.

Tax on Financial Operations.

(Decree 624 of Mar. 30, 1989, as am'd). Tax is levied on credits and debits of checking and savings accounts in banking institutions, including Central Bank, and issuance of cashier's checks is taxed at 0.4% rate. Tax is not deductible for income tax purpose.

23 TRANSPORTATION

23.01 AIRCRAFT:

(C. Com. 1773-1909).

Commercial Code contains detailed provisions regarding subject. Government exercises general supervision over aviation and aircraft. Code guarantees freedom of aero-navigation over national territory provided specific regulations of law are strictly complied with. Code sets forth necessary requisites to register aircraft. Colombian enterprises must have at least 90% of Colombian workers; same provision is applicable to foreign companies having agent or branch in Colombia regarding personnel working in country.

Captain of aircraft is responsible for crew and passengers and is principal authority of same. Airports are divided into civil and military; former are public or private. All of them are subject to provisions of commercial code and regulations issued by aeronautical authority from time to time. In case of accident, injured person has right to receive indemnification and he must only prove that damages were caused by aircraft or by a person or thing related to it. Amount of damages varies, according to type and weight of aircraft and also to seriousness of injuries. Statute of limitations is two years, which runs from moment of accident. Aeronautical authority must regulate and classify services, routes, permits, and registration, of all aircraft in order to guarantee efficient and safe transportation. Code also regulates transportation by air of passengers as well as merchandise and luggage.

Aircraft registered in Colombia can be mortgaged. Those under construction can also be mortgaged if so stated in public instrument which must also contain characteristics of same. Other provisions contemplate attachment, sequestration and insurance of aircraft.

23.02 SHIPPING:

(C. Com. 1426-1772).

Principal provisions with regard to shipping are found in Commercial Code, and several decrees and regulations, especially Decree 994 of Apr. 29, 1966, Decree 1208 of July 21, 1969 as am'd by Decree 2324 of Sept. 18, 1984 as amended regulated by Decrees 1423 of June 30, 1989, and 586 of Mar. 16, 1990, Decree 3111 of Dec. 30, 1997, Decree 804 of May 8, 2001 as amended. In National enterprises participation of foreign capital cannot exceed 40% of total amount. All acts or contracts related to ownership or mortgages must be executed in public instrument. Code divides ships into two categories, those whose tonnage exceeds 25 tons and those under that figure. All ships registered in Colombia are considered of Colombian nationality and, therefore, must carry Colombian flag. Foreign ships in Colombian ports can only be subject to attachment for credit if same was granted in country. Auction of ships has to be held according to rules of Civil Procedure Code, but auction must also be announced with notices posted on ship and in Custom House of port where same is located. All foreign ships arriving at Colombian ports must have maritime agent authorized to represent them in country. Only Colombian citizens can be owners of commercial ships registered in Colombia; ships can belong to several owners under common or joint tenancy. If maritime agent is corporation, at least 60% of its corporate capital must belong to Colombian citizens, said agent must be registered in national maritime authority and, to do so must present information on ships, sureties, and certain affidavits concerning activities to be performed.

Captain is principal authority and crew and passengers must follow his instructions. Captain is also subject to certain obligations, such as to keep registration documents, patent of navigation, certificate of navigability, list of crew, passengers as well as bills of lading and insurance documents. Code sets forth in detail regulations regarding mortgages, transportation of passengers and cargo, “charter party contracts,” sales, leases of ships and insurance contracts as well.

Law 730 of Dec. 31, 2001 regulates registration of vessels dedicated to maritime transportation and commercial and/or industrial fishing.

24 TREATIES AND CONVENTIONS

24.01 TREATIES:

Colombia is a party, among others, to following:

Multilateral.

Convention on private international law (Bustamante Code), Havana, 1928; Montevideo treaty, 1980 (Latin American Integration Association); Cartagena Agreement, 1969 (Andean Common Market); Inter-American conventions: on proof of and information on foreign law and on execution of preventive measures, Montevideo, 1979; on international commercial arbitration, Panama, 1975; Multilateral Trade Negotiations, The Uruguay Round, Final Act, Marrakech, Apr. 15, 1994 and Agreement Establishing the World Trade Organization, Marrakech, Apr. 15, 1994; Convention establishing the Multilateral Investment Guarantee Agency (MIGA) with annexes and schedules. Seoul, Oct. 11, 1985; Convention abolishing requirement of legalization for foreign public documents, The Hague, Oct. 5, 1961; United Nations Convention on Contracts for the International Sale of Goods. Signed in New York on Apr. 11, 1980.

MERCOSUR, established in 1991, is regional trade market. Member countries are Argentina, Brazil, Paraguay, Uruguay and Venezuela. Member countries liberalize trade with one another while imposing common external tariff on goods imported from nonmember countries. MERCOSUR has extended its scope by entering into free trade agreements with Chile, Bolivia, Colombia, Ecuador and Peru.

United Nations Convention on Recognition and Enforcement of Foreign Arbitral Awards of 1958, approved by Law 39 of Nov. 20, 1990.

See also Selected International Conventions section.

1
COSTA RICA LAW DIGEST

—Scope —

Revised for 2008 edition by

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(C. C. indicates Civil Code; C. Com. indicates Code of Commerce; C. C. P. indicates Code of Civil Procedure; C. Family indicates Code of Family; L. C. indicates Labor Code. Numbers in code references indicate articles.)

Note: This revision incorporates legislation through Dec. 11, 2007.

1 INTRODUCTION

1.01 CURRENCY:

(Law of Banco Central 7558 of Nov. 27, 1995 as am'd).

Monetary unit is colon, divided into 100 céntimos. That currency, in coins or represented by notes of Central Bank, constitutes legal tender for any kind of obligations payable in Costa Rica.

See also category 14 Foreign Trade and Commerce, topic 14.01 Exchange Control.

1.02 GOVERNMENT AND LEGAL SYSTEM:

The legislative power is vested in a Congress having a single chamber. Congressmen are elected for four years. The President of the Republic is elected for four years and cannot be reelected for the following term.

The Republic is divided into provinces, these into cantons, and the cantons into districts. In each province there is a governor appointed by the President. The cantons are administered by municipal councils with limited local powers. (Constitution of Nov. 7, 1949 as am'd).

1.03 HOLIDAYS:

Jan. 1 (New Year's); Apr. 11; Maundy Thursday*; Good Friday*; May 1 (Labor Day); July 25*; Aug. 2; Aug. 15*; Sept. 15 (Independence Day); Oct. 12 (Columbus Day)*; Dec. 25 (Christmas). (L. C. 148).

*These are movable holidays.

1.04 OFFICE HOURS AND TIME ZONE:

Costa Rica is in the same time zone as the Central Standard Zone in the U.S. (-06:00 GMT). Office hours are generally from 8 a.m. to 11:30 a.m. and 1:30 p.m. to 5:30 p.m.

2 BUSINESS ORGANIZATIONS

2.01 AGENCY:

(C. C. 1251-1300; C. Com. 235, 273-295, 314-322, 367-374).

An agency may be conferred by public or private instrument and orally, but can be proved only in accordance with legal rules of evidence. A general as well as an all-embracing power of attorney must appear in a public instrument (q. v.) and be recorded in the proper registry. A general power of attorney (poder general) covers acts of administration, including the right to lease for one year. An all-embracing power of attorney (poder generalísimo) covers all powers which the principal might exercise, including the power to alienate and encumber property, and excluding only acts which according to law must be performed by the owner in person or for which a special power of attorney is required.

The agent may delegate his powers if expressly authorized to do so, but is liable for the acts of his substitute if the latter is notoriously incompetent. The principal must reimburse the agent his reasonable expenses and for losses sustained through the agency if not due to the agent's fault and must pay him the stipulated or usual compensation. The agency terminates by: (a) Discharge of its object; (b) expiration of term; (c) revocation; (d) resignation of agent; (e) death, bankruptcy, insolvency or interdiction of principal or agent; (f) cessation of powers of principal if agency was conferred by virtue of such powers.

Commission merchant is a professional agent who normally acts for undisclosed principals and when he so acts becomes personally liable before other contracting parties who have no rights or duties toward principal. If he acts disclosing his principal's name the contract is between the latter and the other parties. He may be authorized orally or in writing. He may have a lien on certain assets for his fee and disbursements. Death of principal does not terminate the commission.

Factor is an attorney in fact of a merchant, holding very wide powers recorded in Mercantile Registry. Whenever he acts within ordinary course of business of establishment he binds owner as well as in any other case but with order of principal or his ratification, implied or apparent, and also even against orders or breach of trust, if within his power or in the ordinary course. Revocation of powers must be express or implied from the sale of the business and it is effective against third parties from recording in proper Registry.

An accountant is a keeper of the books and documents, correspondence and other papers, especially regarding accounts of a merchant. He may perform other acts of agency entrusted to him. His annotations in the accounts are binding on his principal.

A dependent is an employee acting within the establishment of a merchant. If he deals with public he represents the business in acts of which he is in charge and may receive the price paid in the act, unless public notices indicate to pay to the cashier. An employee authorized by circulars sent to correspondents by the principal to do certain acts binds the principal, but authority to draw against a current account must be in writing.

Representatives of foreign firms are specifically regulated by Code of Commerce Arts. 359-366, Law 6209 of Mar. 9, 1978 as amended, Decree 2937 of Apr. 10, 1973 as amended, Decree 8599 of May 5, 1978. All foreign firms may freely act in Costa Rica through representative of foreign firms duly established and may also act directly, occasionally, obtaining permit from proper authorities.

Law regulates rights and duties of local agents of foreign corporations, branches, and subsidiaries doing business in country. Agent can be any natural or juridical person, who continuously and independently prepares, and promotes sale of merchandise or services of foreign enterprises to local companies.

If principal chooses to terminate contract, without legal cause, he must indemnify agent with amount calculated on equivalent of four months of gross earnings for each year or practice during time of employment. However, value of indemnity cannot exceed total corresponding to amount calculated on more than nine years of employment time. Law defines concepts of agents, representatives, distributors and manufacturers of foreign firms. Causes for termination of representation or distributorship agreements, with liability for foreign corporation doing business in country are: offenses against property and goodwill of representative, distributor or manufacturer. Discontinuance of activities except if due to force majeure; unjustified restrictions on sales resulting in reduction in volume of transactions carried out by its representative, distributor or manufacturer; lack of due payment of commissions or fees; appointment of new representative, distributor or manufacturer, when affected party has exercised representation, distribution or manufacturing exclusively; any unilateral modification of contract and breach of contract. Causes for termination of representation, distribution or manufacturing contract, without liability for foreign corporation are: offenses against property and goodwill of foreign corporation by distributor or by manufacturer; judicially declared inability of or negligence by representative, distributor or manufacturer, as well as decrease or prolonged and substantial stagnation of sales, due to causes attributable to representative, distributor or manufacturer; infringement or violation by representative, distributor or manufacturer of trade secrets and confidentiality agreements by disclosing facts, know-how or techniques acquired during business relations; any other serious breach committed by representative, distributor or manufacturer with respect to its duties and contractual or legal obligations.

2.02 CORPORATIONS:

(C. Com. 102-219, 235, 245).

Corporation may be formed by public subscription or simultaneous organization but its articles of incorporation must always appear in a public instrument (see category 9 Documents and Records, topic 9.03 Public Instruments) which must be recorded in Mercantile Registry and must state: (1) Name preceded or followed by the expression “Sociedad Anónima” or “S.A.” which may be registered in Industrial Property Registry; (2) minimum of two members; (3) 25% of each subscribed share must be paid in, but shares which are to be paid in kind have to be fully paid in; (4) number of shares of stock and par value of same, classes if two or more; (5) other agreements regarding matters stated below.

Shares of Stock.

Capital is divided into shares and shareholders are responsible to pay only value of their shares. Share is title to prove and transfer shareholder status. Common or ordinary shares grant same rights, represent equal parts of social capital and shall be nominatives. Nonpar value shares are prohibited. All common and preferential shares and any other patrimonial title may be issued in local or foreign currency. Articles may require authorization of board of directors for transfer of registered shares and then notation must appear in share certificate, except in those corporations where shares are registered at Registro Nacional de Valores e Intermediarios and are negotiated at stock market.

Under one provision of law (art. 121) articles or amendments thereto may allow issuance of other classes of shares, with different denominations, preferences, privileges, restrictions and limitations as well as establishment of other terms and conditions regarding profits, corporate assets or specific business or any other corporate aspect. Under another provision (art. 145), voting rights of shares which are not common may be restricted or denied, but never for special meetings convened to modify corporate purpose, duration, transformation or merger or to change the domicile to a place out of Costa Rica. Any elimination of any preference of a class of stock must be approved by said class in special meeting.

A corporation may buy its own shares of stock under conditions specified by Code. While belonging to corporation, said shares cannot be represented at stockholders' meetings.

Shareholders' meetings are general and special; general meetings are ordinary and extraordinary. One ordinary meeting must be held at least once a year for approval or rejection of balance sheet after hearing administrator's report; distribution of profits; appointment or dismissal of members of council of administration, when necessary, and supervisors or auditors; and any other matters not reserved to extraordinary meeting, and proposed in agenda. Extraordinary meetings convene for amendment to articles of incorporation or bylaws; issuance of other classes of shares not provided in by-laws and for other purposes when so required by law or document of incorporation. Shareholders representing 25% of capital may request that meeting be called. Meetings may be held out of Costa Rica when so provided by articles. Quorum for ordinary meeting on first call shall be constituted by one-half of the shares with right to vote, and for extraordinary meetings by 75% unless higher number is required in articles of incorporation. Resolutions are formed by more than one-half of votes present at ordinary meetings and at extraordinary meetings by more than one-half of total number of shares with right to vote. On second calls any attendance constitutes quorum and more than one-half of votes present decides. Shareholders' meeting has all powers which law or articles of incorporation do not grant to another organ. Minority rights are protected.

Management.

Corporation is managed by a council of administration of no less than three members who need not be shareholders. Unless otherwise provided, council member first mentioned shall be president. He legally represents corporation, as well as other members specified in charter; they may delegate all or some of their powers to other members of council if charter permits, and appoint one or more managers. One-half of the number of council members is required for meetings and a majority of those present to form a resolution, the president having two votes in case of a tie. Meetings may be held at a place designated out of Costa Rica when articles of incorporation so provide. Council members and administrators of corporations are severally and jointly responsible with their immediate predecessors for their wrongdoing, if council members do not denounce irregularities to authorities in writing when they become aware of wrongdoings.

Supervision.

Supervision of the corporation business shall be exercised as provided in articles of incorporation but when organized by public subscription one or more supervisors or auditors, shareholders or not, must be appointed, who have specific duties provided by law, among them, to request monthly balance sheets; report about yearly balance; call meetings of shareholders; be present at council and shareholders' meetings; receive complaints from shareholders and report on them to the council of administration.

Limited Liability Companies (C. Com. 19, 75-101), may be organized by a public instrument which must be rendered in Mercantile Registry, with a capital divided in “quotas” of 100 colones, or multiples thereof, having one vote each. Name must contain addition of expression “Sociedad de Responsabilidad Limitada” or “Limitada” or “S.R.L.” or “Ltda.” which must appear in invoices, documents, advertisements, etc. Liability of members is limited to contributions. Unanimous consent is required to permit transfer of quotas, but document of incorporation may reduce to minimum vote of 75%, and members have preference to take quotas offered, under same proposed transfer conditions and also company may purchase them, with profits, but said shares have no vote while in company's possession. One or more managers are administrators. Members must hold meeting per year to which they may appoint attorney in fact or proxy, even by letter. Legal reserve of 10% must be formed with 5% of profits. No distribution of dividends may be made unless out of profits.

Individual Limited Liability Concerns.

(C. Com. 9-16).

An individual may, by a public instrument (see category 9 Documents and Records, topic 9.03 Public Instruments) create an entity with juridical personality, with a name related to its object and not of a person, followed by the words "Empresa Individual de Responsabilidad Limitada" or "E.I. de R.L.," domicile, capital allocated to it and whether in cash, or in effects or property which must be transferred to the concern in the same act stating their value; object; period of duration; name of manager who may be owner, and period of his appointment if not permanent. Owner may withdraw only established profits and shall be liable with the property of the concern only. The concern may be sold. Winding up of the concern before lapse of its term is subject to special requisites for protection of creditors.

Foreign Branches of Corporations, Companies or Individual Concerns.

(C. Com. 226-233, 360-366).

A foreign organization, whether an individual concern, partnership, corporation, etc., which wants to have a branch or agency in Costa Rica must appoint and maintain an agent with the widest powers for the management of the business of the same. Document granting the power must state: (a) Purpose of branch and capital allotted thereto; (b) object of the principal, and capital, duration and names of representatives and administrators; (c) submission of agency or branch and its representatives to the laws and courts of Costa Rica regarding acts to be executed there including waiver of laws of the principal domicile; (g) proof of authority of the person appearing to grant the power. The standing of a partnership, corporation or company and the power of representation of their administrators may be proved by a certificate issued by Consul of Costa Rica or of a friendly nation, in his absence, that it is organized and authorized to act by laws of its principal domicile and that it is in good standing. Those documents and a document of the appointed agent accepting the power must be recorded in Mercantile Registry. Agents acting without those requisites being fulfilled are jointly liable with corporation for obligations contracted.

A foreign corporation which under its laws may transfer its principal offices to other countries may transfer it to Costa Rica filing the following, properly legalized, with Mercantile Registry: (a) Incorporation document and amendments; (b) consular certificate as mentioned above; (c) certificate of corporate resolution of transfer; (d) list of council members and legal representatives. Governing law continues to be law of incorporation except in what violates public policy. A later retransfer is permissible.

For one single act or business any foreign corporation or partnership or company may give a power of attorney, without need of registration of a branch or agency, stating authority of grantor and its representative to give it.

2.03 FOREIGN CORPORATIONS:

See topic 2.02 Corporations.

2.04 LIMITED LIABILITY COMPANIES:

See topic 2.02 Corporations.

2.05 LIMITED PARTNERSHIP:

See topic 2.06 Partnerships.

2.06 PARTNERSHIPS:

(C. C. 1196-1250; C. Com. 17-74; 243-245).

Commercial partnerships are considered legal entities. They are formed by public instrument executed before a notary and recorded in the mercantile registry; an extract from such instrument must be published in the official newspaper.

General partnership (sociedad en nombre colectivo) is a partnership in the usual form in which all partners have unlimited and joint liability among them but subsidiary to that of the partnership. Name must comprise the name of one or more of the partners, those omitted being covered by an additional reference. A person who tolerates inclusion of his name in name of a firm of which he is not a member becomes liable to third persons to same degree as the partners. A partner may not on his own account engage in same business as the partnership or have an interest in another company engaged in a similar business, unless authorized by his partners.

Limited partnership (sociedad en comandita) is a partnership in which there are one or more members with unlimited liability, who may but need not contribute capital, and limited liability partners who contribute capital and whose name must not appear in the partnership's name, which must be followed by the expression "y Compañía, Sociedad en Comandita" or "S. en C." Capital of limited members may be cash, property, invention patents, trade marks or scientific or artistic secrets, without personal work. Limited partner may not manage or administrate or act with power of attorney, but in case of death of manager if there is no provision in articles of association, he may act on urgent matters with limited liability if no unlimited liability member is available.

Civil company (sociedad civil) is one which is not formed for commercial purposes. It is governed by the rules of the Civil Code and is distinguished from a mercantile company by being regarded rather as an association of individuals. The partners are not jointly or severally liable for debts of the company unless it is so stated in the obligation and the obligation was contracted by all the partners or under power of attorney from them.

Participating association (asociación en participación) is not strictly speaking a partnership and does not constitute a legal entity. It exists when merchants or companies grant others a participation in all or some of their business. It is similar to a joint venture. (C. Com. 663-666).

Foreign partnership may do business subject to some of the rules which apply to a foreign corporation. See topic 2.02 Corporations.

3 BUSINESS REGULATION AND COMMERCE

3.01 BILLS AND NOTES:

(C. Com. 727-840).

Bill of exchange must state: (1) Title "bill of exchange" within its text; (2) unconditional order to pay a certain amount; (3) name of drawee who may also be drawer; (4) date of payment; or whether it is payable at sight or on a certain term after sight, in which cases interest may be agreed, otherwise interest clauses are invalid; if no rate is specified there can be no interest; interest runs from issuance date unless otherwise specified; if no maturity term is given it is payable at sight; (5) place of payment, otherwise it will be deemed payable at place mentioned near name of drawee which shall also be considered to be his domicile; bill may be made payable at domicile of a third person; (6) name of payee or to the order of whom payment must be made; (7) date and place of issue; if none appears it will be deemed issued at place mentioned near name of drawer; (8) name of drawer.

Drawer warrants acceptance and payment and may not contract away the latter warranty.

Bills of exchange even if not to order are endorsable in full, with no conditions. In case of blank endorsements holder may fill blank, reendorse bill or simply deliver it as bearer document. If not otherwise stated, any endorser warrants acceptance and payment; he may forbid new endorsement and then he is not liable to subsequent endorsees.

Defendant in an action on a bill cannot use personal defenses he may have against drawer or prior holders except when plaintiff acts knowingly to the prejudice of debtor. An endorsement after maturity is valid but if after protest for nonpayment or after lapse of the term for protest it only effects an assignment. Undated endorsements are presumed made in time, subject to rebuttal.

Acceptance may be required by the holder and it is necessary when bill is payable at a term after sight, and in this case it must be presented within one year of issuance unless the term is extended or limited by drawer or limited by endorsers. Drawee may request second presentation on the following day and holder then is not obliged to deliver the bill. Acceptance may be limited to a portion of the amount but any other qualifying statement amounts to refusal to accept, though such acceptance binds acceptor.

Failure to accept or pay a bill must be established by a notarial act of protest, made within presentation term and one extra day when presented on the last day if for nonacceptance or if for nonpayment in case of a sight bill and within eight days after maturity in other cases of nonpayment. Protests have detailed requisites. Duly protested bills give right to immediate attachment and sale of assets of the liable parties. Protest may be waived by words “return without expenses” or “without protest” or others similar, written and signed, but this does not dispense either presentation or the notices which must be given to holder's endorser and to drawer within four days after protest or after presentation if protest is waived. A notified endorser must notify his antecessor in line within two days.

Acceptor is liable for payment to the holder. Drawer, endorsers and guarantors of a bill are jointly liable to holder for principal and agreed interest and for 6% after maturity plus expenses, unless the bill is prejudiced for lack of presentation for acceptance when necessary or for payment or of the required protest. However, if failure to present or to protest is due to vis major of a general character, the terms are extended, but notice must be given to the proper parties and a note written on the bill. If the preventing force lasts more than 30 days the holder's action may be then exercised without those requisites.

An accommodation endorsement or guarantee in the same bill or on a supplementary paper constitutes the signer thereof as a jointly liable party for the drawer or for endorser for whom he gives it, even if the bill or the liability of said party is null for any cause which is not a defect of form. The words “for aval” and the signature are sufficient to constitute the joint guarantee.

Promissory notes must contain that title within the text and statement of maturity date and most of the requisites of bills of exchange, with no drawee. The rules applicable to bills of exchange apply to notes.

Checks must be written in forms supplied by drawee bank to drawer and must contain (1) Name of drawee; (2) place and date of issue; (3) name of person to whom or to whose order it is payable; (4) unconditional order to pay certain amount spelled out and with figures or written with protecting machine; (5) signature of issuer or agent. Bank may permit use of certain special protected forms. Checks are endorsable but if issued to bearer they are negotiable by delivery. Checks may be endorsed only once for deposit on banking or financial institution. Nonendorsable checks are: checks drawn to juridical persons, check with word banco crossed in front of checks. Endorsements may be restrictive, such as for collection, to credit on certain account or limit or amend drawer's liability or even state specific purpose for use of sum.

The transferor of a bearer check who does not endorse it warrants its legitimacy but not payment. Drawee bank must pay a valid check upon presentation regardless of date of issuance. Unpaid checks with a note of the cashier of the bank that it has not been wholly or partially paid gives a right to immediate attachment and execution against assets of the parties liable for amount due plus 25% for damages. Drawer and any payee who is an accessory to a fraud are subject to criminal liability. Payment may be stopped by drawer at his own risk by a written order in cases of theft, loss or duress and the check may be revalidated by a new statement on its reverse. A holder may also stop payment but only for four days. Crossed checks are legal. Checks may be certified and then are not subject to stop order unless returned to bank. No protest is required but a certificate of nonpayment must be obtained from the bank and notice given to endorsers within five days; otherwise the actions are lost against them.

Checks must be presented within one month if payable in the same place; three months if within Costa Rica and six months if issued abroad to be paid in Costa Rica. Neglect to present in time releases endorsers' liabilities.

Payments made by check are conditional to the check being honored upon presentation and otherwise the intended payment is null and void. “Traveler checks” may be issued by banks and must be paid by same bank, its branches and correspondents listed as such, within period of limitations. Refusal to pay gives immediate attachment rights and action for amount plus damages which never shall be less than 25%. “Traveler checks” of foreign banks sold in Costa Rica are subject to laws of place of issuance but seller is liable for their validity.

3.02 COMMERCIAL REGISTER:

See category 9 Documents and Records, topic 9.04 Records.

3.03 CONTRACTS:

(C. C. 1007-1044).

Their nature, formalities and capacity to enter into same, are generally governed by Civil Code. There are other legal rules applicable to contracts depending on whether contract falls within scope of commercial law, labor law, or administrative law.

To enter into a contract there must be an offer and acceptance. Offers may be retracted at any time before acceptance. Oral offers may be accepted immediately. A modification of offer in acceptance constitutes a new offer. Conditions necessary for validity of contracts are: capacity, object, “cause”, consent and specific formalities when these are required by law.

Object of a contract must be definite or subject to definite determination. Formalities of contracts which will have effect in Costa Rica may be subject either to Costa Rican law or to law of place of execution. However, if Costa Rica law requires that a contract be executed in a public deed, a private document executed abroad shall have no legal effect in Costa Rica, regardless of whether such private document complied with laws of place of celebration. In civil contracts joint and several liability must be expressly stipulated by parties. However, such liability is presumed by law in case of commercial contracts, unless it is otherwise stipulated by parties. Commercial obligations are payable on day indicated in contract.

Civil Code permits to declare null and void specified clauses considered onerous to purchasers or to parties to sales contract, especially in latter case if contract is proforma or adhesion contract. In such case petition may be filed even by consumers protection organizations. Among specified clauses appear: Right to modify contract by seller; long period established by seller to accept; submission to foreign law in order to avoid local law; exclusion of right to sue in Costa Rican courts and many others relating to substance of contract.

Contracts with Government and with its agencies are regulated by Law 7494 of May 3, 1995 as amended regulated by Decree 33411-H of Sept. 27, 2006 as amended. Concession contract for public works and public services are regulated by Law 7762 of Apr. 15, 1998 as amended regulated by Decree 27098 of June 16, 1998 as amended.

3.04 FACTORS:

See category 2 Business Organizations, topic 2.01 Agency.

3.05 FRAUDS, STATUTE OF:

See topic 3.03 Contracts; categories 9 Documents and Records, topic Public Instruments; Employment, topic Labor Relations.

3.06 INFORMATION TECHNOLOGY, INTERNET AND NEW MEDIA:

Electronic Documents.

Law 8454 of Aug. 30, 2005 regulated by Decree 33018-MICIT of Mar. 20, 2006 on certificates, digital signatures and electronic documents is applicable to all public or private transactions and juridical acts, except when prohibited by law. Electronic messages are enforceable as written documents. Digital signature has same legal effect and value as handwriting signature when used according to law. Dirección de Certificados de Firma Digital, dependency of Ministry of Science and Technology is in charge of authorizing and supervising certification authorities. Certifications issued by foreign certifying entities non-domiciled in country are recognized under certain conditions.

3.07 INTEREST:

(C. C. 1162-1166; C. Com. 497).

Legal interest is equal to interest paid by Banco Nacional de Costa Rica for six months' certificates of deposit. Contractual interest may be freely fixed by parties. Bank loans are subject to special rules. Central Bank of Costa Rica will determine maximum rate of interest for loans granted by official institutions.

3.08 MONOPOLIES, RESTRAINT OF TRADE AND COMPETITION:

Costa Rica Constitution (Art. 46) prohibits monopolies of a private nature and any act, even if grounded in law, which threatens or restricts freedom of commerce, agriculture or industry. Under Law 18 of June 9, 1915 (Law to Protect Freedom of Commerce) any act which is intended to restrict or does in fact restrict or hinder free trade, commerce, industry or agriculture in country or in relation with foreign countries is prohibited. Violators are subject to penalties.

Central American Regulations on Unfair Trade Practices of Apr. 24, 2007 and Central American Regulations on Restrictive Covenants of Apr. 24, 2007, implement principles established by Agreements of World Trade Organization.

Central American governments may issue restrictive covenants to protect temporarily local production from massive import of same or similar products that may cause pecuniary loss to local producers.

Law protects consumers' rights and promotes market freedom by preventing and prohibiting monopolies, monopolistic practices and other restrictive practices and regulations on economic activities. Any monopolistic practice, limitation, restriction or exclusivity in manufacturing and commercialization of goods and rendering of services is prohibited. Acts of monopoly include price fixing, limiting or controlling technical development of production of goods or services, limiting distribution, making exclusive rights agreements to tied-purchasing agreements and fixing resale price below or over cost. All agreements and collusive practices impeding, distorting or limiting competition are also prohibited, as well as abusive exploitation of dominant position in domestic market. There is “dominant position” when person for determined product is only one who offers or demands it in national market or where there is no competition. Law deals with consumers' rights to be informed; general representation and guaranties, products liability, credit operations, lack of performance, services, penalties for infringement of law and general regulations on subject. There are special regulations for advertisement of goods and services and for repression of unfair competition. Law is flexible policy instrument that Government can modulate according to needs of market. For this purpose Law has created public agency in charge of supervising enforcement of laws. (Law 7472 of Dec. 20, 1994 as am'd, regulated by Decree 25234 of Jan. 25, 1996 as am'd and Decree 28712 of May 26, 2000 as am'd).

3.09 SALES (REALTY AND PERSONALTY):

(C. C. 480-483; 1049-1123; C. Com. 438-489).

Between parties a sale is perfected and title passes when an agreement is reached on the thing to be sold and the price, independently of record in the registry or delivery. There are exceptions, as when fungible goods are sold by weight, count or measure, in which case title does not pass until the goods are weighed, counted or measured.

The seller is not obliged to deliver the thing sold until the price is paid, unless a term was granted for payment, nor even in this event if the buyer becomes insolvent. If real estate is sold by measure, any difference between the true area and that designated in the contract gives rise to a proportional increase or decrease of the price. If the property was sold as a whole, no change can be demanded in the price unless the difference in area exceeds one-tenth. If the area is found greater, the buyer may either pay the additional price or rescind the sale; if it is less, he may demand an additional area or a reduction in price, but he cannot rescind the sale unless the property, by reason of the smaller area, is found unserviceable for the purpose for which it is bought.

The right to repurchase cannot be reserved for longer than five years. A sale cannot be cancelled for hidden defects unless otherwise stipulated or unless they involve error annulling consent. The owner of stolen chattels may recover them within three years, unless the possessor purchased them at public sale or from a merchant selling similar articles; in such event the price paid must be reimbursed.

Commercial sales are defined and regulated by Code of Commerce. Some real property sales may be within its provisions. A bona fide purchase in a store of goods ordinarily dealt with in it cannot be object of replevin. If buyer examines his purchase he cannot claim later for defect of quality or quantity, but if he receives it as wrapped parcel or bale he may claim in writing in five days or in ten if the defects were hidden. Seller may demand immediate examination with no further claim. If express warranty of functioning is given, notice of failure must be given within 30 days of discovery of defect. There are provisions regarding sales subject to tasting or to testing, or by samples or known qualities.

Sales by installments of identifiable property may be made with condition subsequent of termination for nonpayment and this condition binds third parties if contract is recorded in Registry of Personal Property. Seller must return price received but is entitled to indemnity for use and deterioration of the property.

Conditional sales (with reservation of ownership) are permitted for a period not exceeding three years, but buyer must keep seller informed of any change of address or of anything which might modify price of the purchased property; if buyer fails to inform, the obligation shall be due and payable.

Sales of establishments and bulk sales are subject to special rules for the protection of creditors, including publications, deposit of price, call of creditors' meeting and others, under penalty of nullity in favor of third parties.

4 CITIZENSHIP

4.01 ALIENS:

See category 16 Immigration, topic 16.01 Aliens.

4.02 IMMIGRATION:

See category 16 Immigration, topic 16.02 Immigration.

5 CIVIL ACTIONS AND PROCEDURE

5.01 ACTIONS:

Actions for Death.

See category 12 Estates and Trusts, topic 12.02 Death.

Limitation of.

See topic 5.04 Prescription, subhead Actions.

5.02 JUDGMENTS:

(C. C. P. 705-708).

Judgments are executed by means of a summary executory proceeding. A judgment does not constitute a lien on the property of the debtor, except with respect to property attached in the course of execution. A levy on real property must be recorded in a registry of properties.

Foreign judgments or arbitral awards to be enforced must comply with following requirements: document must be duly authenticated; judgment debtor must have been duly summoned, represented, or declared in default, according to laws of country where claim was originally filed and he must have been duly notified of judgment or decree; claim is not one in which exclusive jurisdiction is granted to local courts; there is no pending proceeding or final judgment regarding same issue in Costa Rica which would result in res judicata; judgment is enforceable in country of origin; and judgment is not contrary to public policy. Petitions for enforcement of judgments and arbitral awards, decrees of attachment, court summons, taking evidence, and for any other resolution issued by foreign courts are presented before First Chamber of the Supreme Court.

5.03 LIMITATION OF ACTIONS:

See topic 5.04 Prescription.

5.04 PRESCRIPTION:

(C. C. 26, 850-883; C. Com. 795, 968-986; Maritime Section of Code of Commerce of 1853 932-940).

The acquisition of property or rights by virtue of possession and the loss of rights by

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failure to enforce them is called prescription. Prescription may be waived, but only after it has run. Prescription is interrupted by recognition of the rights of the real owner or of the creditor, and by law suit, and it does not run against certain persons, as between parents and minor children, between guardians and their wards, and against soldiers in war time, or against domestic servants with respect to their wages, while they continue in the employment.

Ownership is acquired by positive prescription, the elements of which are: (1) A conveyance of the property, but in case of personal property, possessory rights and easements, mere possession raises a presumption of conveyance; (2) good faith; (3) continuous, public and quiet possession. Real property and rights are acquired by prescription in ten years from the time of recording. The right to possess is acquired in one year. Personal property is acquired in three years.

Actions.

Rights are lost by negative prescription. The prescriptive period in which the power to enforce rights is lost varies according to the nature of the right.

Period of limitation of actions not otherwise specified is ten years in general and four years for commercial transactions. Some of the specified periods follow: (1) Actions for materials supplied to construct or repair ships and for maritime insurance, five years; (2) actions arising from bills of exchange or promissory notes, four years; (3) actions to annul resolutions of a corporation or commercial company, for liability of administrators and directors of corporations or companies, for interest and rents resulting out of commercial transactions, salaries and professional fees payable in commerce, actions for price of commercial sales, one year, but interest, rent and pensions payable by semesters or more and for salaries and professional fees which are not out of commerce, are limited to three years; (4) tort actions, variable terms, depending on nature.

When there is a document in writing or a judicial decision recognizing the debt, the shorter term normally does not apply and the longer terms of ten years in general and four years for commercial transactions, begin to run.

6 COURTS AND LEGISLATURE

6.01 COURTS:

Justice is administered by: (a) Supreme Court of Justice formed by chambers which hears appeals on questions of law and fact in cases where judges acted as courts of original jurisdiction, action or proceedings for relief and habeas corpus; they also have certain administrative functions with respect to administration of justice; (b) Superior Courts; (c) Collegiate Courts (Tribunales Colegiados); (d) judges who have civil, criminal, labor or family jurisdiction in all except minor matters and hear appeals from minor judges (alcaldes); actuaries and arbitrators; (e) minor judges (alcaldes). (Judiciary Law 7333 of May 5, 1993 as am'd).

6.02 LEGISLATURE:

Congress meets from May to July and from Sept. to Nov. in ordinary meetings, and in extraordinary meetings whenever it is called by Executive Power. (Const., art. 116).

6.03 STATUTES:

Most of the legal provisions are codified. The principal codifications are: Civil Code; Code of Family; Code of Commerce; Code of Civil Procedure; Penal Code; Code of Criminal Procedure; Organic Judiciary Law; Organic Notarial Law; Fiscal Code; Regulations of the Public Registry; Mining Code.

7 DEBTOR AND CREDITOR

7.01 ASSIGNMENTS:

Assignment of right is effected by delivery of document evidencing right. However, unless document is payable to bearer or subject to transfer by endorsement generally, assignment has no legal effect as to debtor until he is notified thereof, by notary or by registered letter or other authentic admissible manner, nor against third parties unless assignment was made by public instrument or by private document if they had actual notice thereof or from: (a) Death of one of the signers, (b) presentation of document to public officer to form part of some proceeding or (c) presentation of document to notary for authentication of date. Notified debtor must advise creditor within three days, about any defenses not appearing from document losing them if he fails to do so. In assignment of credit documents not subject to endorsement assignor warrants only legal existence of credit and his own capacity to assign but not solvency of debtor unless otherwise stipulated. (C. C. 483, 1104-1116; C. Com. 490-494).

7.02 ASSIGNMENTS FOR BENEFIT OF CREDITORS:

There is no specific provision for such assignments. If the assets of a debtor are sufficient to cover his liabilities, he may make any assignment or other arrangement to which his creditors may agree; if the assets are insufficient to cover the liabilities he may be declared insolvent or bankrupt. (C. C. 884-888).

7.03 ATTACHMENT:

(C. C. P. 272-281, 438-447).

An attachment may be requested in order to prevent a debtor from evading a judgment by concealing or disposing of his assets. A bond must be given unless the creditor presents a document which under the law would authorize a summary action. In case of such attachment suit must be brought within one month, otherwise the plaintiff is liable for damages.

The following documents authorize a summary action of execution and an attachment without bond: (a) copies of public instruments duly certified by notary or other public officer, or certification from public registry that instrument is pending registration; (b) certifications from public registry; (c) private documents acknowledged before competent judge or declared acknowledged by default; (d) acknowledgments made in court or considered made by default; (e) any documents, as, for example, bills of exchange, on which law specifically authorizes summary action to be brought.

7.04 BANKRUPTCY AND INSOLVENCY:

(C. Com. arts. 851-967; C. C. 884-980; C. C. P. 30, 709-795).

Administration and Reorganization under Judicial Supervision.

Process of administration and organization of company under judicial supervision may be requested by any physical or juridical person in difficult financial or economic situation provided no bankruptcy or “concurso civil” has been declared and reorganization agreement is not pending. Judge will issue order taking into consideration number of dismissed employees and number of suppliers and creditors affected. Petition may be submitted by debtor or any creditor, and in case of public offering companies “Comisión Nacional de Valores” may also submit petition. Petition must include all interested parties, physical and juridical persons who by right have same economic interest, and entities who carry on activities outside country, independently of their nationality and legal form. Petition itself must comply with specific requirements of form and substance. Debtor must include administration plan with petition and notify creditors of his petition. Court may reject or admit petition. Petition is rejected when Court considers economic and financial situation is not critical or if there is no possibility of recovery, in which case bankruptcy is declared. Court's resolution granting petition decides among other matters: administration of debtor's business by judicial intervention, appointment of supervisor, designation of two representatives of creditors, day and time for general meeting of company's employees, removal of company's administrators, date when company's economic crisis began which can be retroactive up to six months, day and time from creditor's meeting. This Court's resolution accelerates payment of shareholder's debts for quotas or subscription of shares, stops payment of dividends until end of proceedings, if no bankruptcy or concurso civil is declared. Administration plan is submitted to creditors and supervisor for discussion before being approved by Court. Administration plan is binding on all creditors and it may be amended by Court at any time. Process of administration and reorganization under judicial supervision should not last more than three years, unless consented to in writing by three fourths of creditors; it may be terminated early by supervisor and creditors' agreement. Plan is executed as agreed under compulsory control of supervisor and under court's supervision and direction.

Reorganization agreement (concurso preventivo) may be proposed by debtor who finds himself in economic and financial crisis or in situation which, according to law, allows him to submit to collective execution, as long as he has not been declared bankrupt or in concurso civil or proceedings of administration and reorganization under judicial supervision are not pending. Reorganization agreement may be requested by debtor by filing petition with Court with proof of company's economic and financial crisis. Petition itself must comply with specific requirements of form and substance. Order opening reorganization process must appoint receiver who is responsible for analyzing debtor's business activity and preparing report for creditors' meeting. Once creditors have qualified as such, meeting is held with debtor to discuss reorganization agreement. Approval of reorganization agreement is binding on all creditors.

Bankruptcy applies to merchants and corporations or commercial partnerships or associations. A debtor may petition to be adjudged bankrupt. Any creditor may also petition when he has one or more unpaid matured credits or the debtor has ceased in the payment of his obligations to others or debtor absconds or absents himself leaving no representative to make payments or without reason closes his place of business or assigns all his assets for the benefit of one or more creditors or it is established that he is engaged in ruinous, fraudulent or false schemes or when other facts prove that he is unable to pay. A decedent may be adjudged bankrupt if he died after having ceased payment of his obligations. A decedent's estate may also become bankrupt for failure to pay commercial obligations. Mortgagees and pledges may not petition for debtor's bankruptcy unless the in rem guarantee proves insufficient.

A bankruptcy declared abroad does not detract from rights of local creditors over assets in the country nor annul acts or contracts of the bankrupt, but branches of a foreign bankrupt are wound up if so requested by the foreign court. An insolvent branch of a foreign concern may be adjudged bankrupt even if its principal is not and then local creditors have priority over foreign creditors who had contracted with the branch.

Court may determine the date of cessation of payments up to three months back, but the appointed receiver may petition to extend its retroactivity to six months. Court notifies criminal court which then determines whether bankruptcy is excusable, culpable or fraudulent.

Receiver and alternate receiver (“curador”) are appointed by court. They have multiple duties, among them, collection of debts in favor of bankrupt and its legal representation in court; reporting to creditor's meeting on pending claims; taking possession of assets, selling them and proposing plan of distribution whenever amount of 25% of liabilities is available; appearing in criminal proceedings, etc.

Declaration of bankruptcy terminates obligation to pay interest, past or present, and renders all obligations of bankrupt due and payable. Credits are classified and paid in following order: with privilege on specific property, workers' credits, credits against the bankruptcy and common credits. Trustee may sell property given in mortgage or pledge guarantee even when debt guaranteed thereby is not due, but with proceeds he must pay principal, interest and expenses covered by the guarantee and withhold any balance. Unpaid balances of such debts become common credits.

Proceeds from realization of assets of bankrupt are distributed in payment of principal which is cancelled only pro tanto, the balances remaining due and payable immediately. However, if bankruptcy is not found to constitute a crime debtor is not to be sued for said balances during three years after distribution, statutes of limitations beginning to run at end of said period.

When the bankruptcy is not fraudulent it may cease by a composition. But no bankrupt who has not honored a prior composition may enter into another. If bankruptcy is due to fault, but not to fraud, the only composition acceptable to stop the bankruptcy is promise to pay all debts in full. No agreement with only one or some creditors is valid and, if made, those creditors lose their rights in the bankruptcy which then is adjudged as due to fault of bankrupt.

Bankrupt who was not adjudged culpable or fraudulent may be rehabilitated and the prohibitions and limitations against him vacated immediately after distribution of all his assets, but only after complying with the penalty imposed therefor and payment of all outstanding balances or fulfillment of the composition promises when adjudged culpable, and if fraudulent, only when three years have elapsed after complying with the penalty imposed and payment of all debts in full.

Bankruptcy of a partnership does not cause bankruptcy of its members but all their property is attached for payment of partnership's debts concurrently with members' separate creditors and if administrators are found guilty of tortious or fraudulent bankruptcy, any creditor may cause bankruptcy of its members. Bankruptcy of a corporation or other limited liability companies does not cause that of its members.

Administrators of corporations or partnerships or companies are liable as individual merchants but criminal penalties are applied only to those who intervened in wrongful acts to detriment of the creditors.

Insolvency proceedings are very similar to bankruptcies but apply to non-merchants. Any creditor may petition for declaration of insolvency which will be granted if court considers economic situation of debtor justifies such proceedings. Debtor may petition for composition with creditors provided he has not been declared insolvent within last five years and has kept accounts for one year, if required by law, and has not been found guilty of crimes against property or public trust. Composition may also be arrived at in insolvency proceedings. When proceedings terminate, insolvent shall be free of claim for unpaid balances during five years after declaration of insolvency, except as otherwise agreed in composition. Thereafter creditors may claim said balances. However, if in criminal proceedings, insolvency is found to be fraudulent, creditors may disregard agreement and enforce their claims immediately on new property, provided allowance is made for insolvent and his family's maintenance.

7.05 EXECUTIONS:

When an order of execution has been issued and property attached, an appraisal is made of the property. A public auction under court auspices is then advertised. Bidders must deposit an amount equal to 15% of appraisal, unless relieved therefrom by party carrying on execution. If no bid is made, creditor may ask within one month for award of property at sale price or creditor may demand that new sale be held with reduction of 25% in appraised value and bidders must deposit 30% of appraisal value. If again there is no bidder, creditor may ask for award of property at one-half original appraisal or that third sale be held at which any bid is received, but if bid is less than one-half original appraisal, debtor is given short period to find another bidder. For third sale to be held bidders must deposit amount equal to 50% of appraisal value. After approval of sale, there is no right of redemption. (C. C. P. 647-659).

7.06 EXEMPTIONS:

(C. C. 981 and 984).

Following property of debtor is exempt from attachment: (1) Monthly salary portions exempted by Labor Code; (2) labor fringe benefits and alimentary pensions; (3) house furnishing and necessary clothing of debtor, his wife and children living with him; (4) books, machinery and tools of debtor, necessary for his work; (5) machinery and tools of craftsmen and farmers, necessary for individual workman and his children; (6) food for debtor's family for one month; (7) personal rights such as habitation of real property and property donated to debtor with prohibition of attachment by creditors, except improvements made by debtor. Items in (3), (4) and (5) may be attached by pledgee if pledge is registered, but those under (3) may be attached only for purchase price of same.

Labor Code, Art. 172, exempts minimum salaries. Salaries higher than minimum may be attached up to 1/8 of excess up to three times minimum salary and ¼ for excess, but all salaries are attachable up to 50% for alimentary pensions.

7.07 FORECLOSURE:

See category 20 Mortgages, topic 20.02 Mortgages.

7.08 FRAUDULENT SALES AND CONVEYANCES:

(C. C. 900-911).

The following acts of the bankrupt or insolvent executed after the date as of which he is to be deemed insolvent are void: (1) Gratuitous contracts or those which should be considered such in view of insufficient consideration; (2) mortgages or privileges to secure earlier debts; (3) payment of unmatured debts; (4) payment of matured debts otherwise than in cash or commercial documents. Creditors may demand the annulment of other acts executed within the same period, such as the sale of real property, cancellation of mortgages, cancellation of unmatured credits and constitution of pledges, if the other party does not prove the actual payment of the consideration. The period is extended to two years before the insolvency declaration in the case of members of the family by consanguinity and affinity unless the other party proves payment and circumstances showing that he was unaware of the debtor's intention to defraud. Gratuitous acts or contracts executed within two years prior to the declaration of insolvency in favor of the spouse, ascendants, descendants, brothers and sisters, brothers- and sisters-in-law, sons- and daughters-in-law, fathers- and mothers-in-law, are void.

Creditors may demand annulment of simulated acts and contracts, of alienations when the grantee was aware of purpose to impair creditors' rights and of judgments obtained by connivance in order to defraud creditors.

7.09 HOMESTEADS:

(C. Family Arts. 42-47).

Homestead may be constituted for spouse or common law spouse, ascendants or minor descendants. Homestead cannot be alienated or encumbered without consent of both spouses or court authorization; and it is exempted from attachment except for debts or obligation contracted by both spouses.

7.10 INSOLVENCY:

See topic 7.04 Bankruptcy and 7.10 Insolvency.

7.11 LIENS:

Privileged credits in general comprise: (1) National and municipal taxes; (2) funeral expenses of debtor and members of his family; (3) medical services, medicines and food furnished during month preceding the insolvency; (4) salaries and wages for three months preceding insolvency. With respect to specific property, the following are liens in the order stated: (1) National and municipal taxes for one year prior to insolvency; (2) debts secured by mortgage or pledge; (3) rentals, which have a lien on the fruits of the property and on the furniture and other objects placed on the property by the lessee; (4) debts owing to creditors who have exercised the right of retaining the property for debts pertaining thereto. Creditors having such right of retention comprise: (a) Lessors, who as security for the payment of rental may retain the fruits of the property and the objects placed thereon by the lessee; (b) carriers, who as security for freight and expenses may retain the objects carried; (c) persons who have done work on objects of personal property, who may retain such objects until paid; and (d) commission merchants for fees and expenses. (C. C. 989-996, 1143, 1182, 1195; C. Com. 292, 336g).

7.12 PLEDGES:

Pledge contracts are governed by the chattel mortgage law. See category 20 Mortgages, topic 20.01 Chattel Mortgages.

For vehicular pledges, see Traffic Law 7331 of Apr. 4, 1993 as am'd.

7.13 REDEMPTION:

See topic 7.05 Executions; category 20 Mortgages, topic 20.02 Mortgages.

8 DISPUTE RESOLUTION

8.01 ALTERNATIVE DISPUTE RESOLUTION:

(Law 7727 of Dec. 9, 1997 regulated by Decree 32152 of Oct. 27, 2004).

Arbitration.

Any dispute arising out of patrimonial rights may be submitted to arbitration. There are two types of arbitration: de jure and in equity. Arbitration agreement must be in writing, whether in form of arbitral clause or in separate agreement, with regard to future disputes arising out of particular legal relationship or to submit to arbitration already existing dispute, whether or not judicial decision is pending. Arbitration agreement can be evidenced by any kind of document, even by fax, telex or other means of communication which constitute record of agreement. Number of arbitrators should be three, unless parties agree on another number. Foreign arbitral awards are recognized or executed in Costa Rica according to international conventions and Code of Civil Procedure.

Mediation and Conciliation.

Judicial or extrajudicial dispute resolution by mediation or conciliation of controversies arising out of patrimonial matters is allowed at any time, even when dispute is pending court decision. At any stage of judicial procedure judge may propose conciliation, in which case, he may act as conciliator. Parties are free to appoint mediators or conciliators. Extrajudicial mediation and conciliation agreements homologated by judge and judicial mediation and conciliation agreements are res judicata.

Conventions.

Convention on the Recognition and Enforcement of Foreign Arbitral Awards, New York, 1958; Inter-American Convention on International Commercial Arbitration, Panama, Jan. 30, 1975; Inter-American Conventions on Extraterritorial Validity of Foreign Judgments and Arbitral Awards, Montevideo, 1979.

9 DOCUMENTS AND RECORDS

9.01 ACKNOWLEDGMENTS:

Documents requiring notarial authentication are executed as public instruments before notaries, who retain the original in their records and issue certified copies. However, any private document's signature may be acknowledged before a notary and then it substitutes for a public document unless this is specifically required. See topic 9.02 Notaries Public, also topic 9.03 Public Instruments.

Documents executed abroad for use in Costa Rica will be accepted if (a) they are executed in accordance with the laws of the place of their origin and (b) the signature of the official certifying the document is duly authenticated. (C. C. P. 374). Authentication may be obtained from Costa Rican consular officer. Such documents may also be executed before Costa Rican consular officers acting as notaries. (Art. 14, Law 7764 of Apr. 17, 1998).

9.02 NOTARIES PUBLIC:

(Notarial Code, Law 7764 of Apr. 17, 1998).

Notaries are public officials authorized to act and supervised by Dirección Nacional de Notariado, dependency of Judicial Power. Notaries must hold law degree and be specialized in Notarial and Registral Law and be admitted to practice law. Foreign attorneys admitted to practice in country may be authorized as notaries if they comply with legal requirements and if Costa Rican notaries enjoy same rights in their country of origin. Notaries hold office indefinitely. They may act anywhere in Republic or outside country. In places where there is no notary, judge or alcalde acts as such.

Instruments executed before a notary must be prepared with certain formalities. They must be in Spanish and state the date, names of the parties, their age, profession, domicile, and whether married or single, also data as to witnesses. The notary must declare that he knows the parties or that they were identified by witnesses.

The notary retains the original document in a protocol and furnishes the parties with formal certified copies which have the effect of originals in court.

Notaries may issue certificates taken from Registry and public offices. Photocopies certified by notaries may be used.

9.03 PUBLIC INSTRUMENTS:

Public instruments are documents executed with the legal formalities before a notary public (q. v.) or a public officer or issued by a public office. Other documents are private instruments. A public instrument constitutes proof of its execution and of the facts set forth therein with respect to the object of the agreement. The law requires numerous contracts to appear in public instruments, e.g., articles of incorporation or partnership, mortgages, etc., and no documents conveying or encumbering real estate can be recorded unless they are executed as public instruments. The date of a private writing is counted against third persons only from the death of the signer or from the time when the document was submitted to a public official or to a notary. A writing is required to prove an obligation of over 250 colones. Photo reproductions of official documents must bear certificate by official who authorizes them that they are true copies of originals, and official seal. (C. C. 28, 732-758).

9.04 RECORDS:

Law 5695 of May 28, 1975 as am'd is called “Law of the National Registry”, regulated by Decree 26771 of Feb. 18, 1998 as am'd. National Registry is formed by following registries: Real Property, mortgages, persons, mercantile and associations. Following documents must be registered: Real property titles, restrictions, attachments, leases and cooperative apartments and similar real property documents; organization of commercial companies, their amendments, dissolution, merger and similar documents; and documents related to Registry of Persons. Registrar shall determine whether documents fulfill legal requirements and harmonize with prior data of Registry.

There is Registry of Pledges of Moveable Property regulated by Decree 26883-J of Apr. 20, 1998 as amended.

There is Civil Registry for births, marriages and deaths.

Vessels are registered under Law 12 of Oct. 22, 1941 as amended regulated by Decree 1958 of Sept. 10, 1971 and Decree 23178 of Apr. 18, 1994 and aircraft under Law 5150 of May 14, 1973 as amended, regulated by Decree 4440 of Jan. 3, 1975 as amended.

9.05 SEALS:

Seals are not used in private matters. A document executed before a notary has most of the effects of a sealed instrument in the United States.

9.06 VITAL STATISTICS:

See topic 9.04 Records.

10 EMPLOYMENT

10.01 LABOR RELATIONS:

(Const. art. 50-75, Labor Code).

National Constitution provides for right to work of individuals. Furthermore, Constitution guarantees workers equitable working conditions, a limited working day, paid days for rest and vacation, fair salaries and equal pay for equal service. Right of labor to organize trade unions and strike is also guaranteed by Constitution. Other Constitutional provisions protect (art. 50 to 75) welfare of family and its access to decent housing.

Labor relations are regulated by “Labor Code”. Labor relation exists when one individual obligates himself to perform duties or services for another under direct supervision of another for payment of salary or some compensation. Arts. 87 to 100 of Labor Code, contain special regulations for women and minors under 18 years. Equal opportunity employment is guaranteed by law, discrimination at workplace for age, race, gender or religion is prohibited. In case of proved discrimination employers are forced to reinstate employee and pay him damages equal to 12 times minimum salary for that position. Private contracts may be oral only in following cases: agricultural labor and stock raising, domestic service, temporary work not exceeding 90 days, work for specific undertaking (por obra determinada) if amount involved is not over certain amount. Collective labor contracts must be always in writing.

If contract is for an indefinite period of time it is subject to termination by either party without an expression of cause, so long as prior written notice is given to other party. In certain cases a worker is entitled to an indemnification equal to one month's salary for every year of service. However, in general, termination of contracts by dismissal without due cause, subjects employer to payment of “severance assistance” (auxilio de cesantía) determined in accordance with years of service. Payments in lieu of advance notice and severance assistance are governed by Arts. 30 to 35. Employer may terminate contract with just cause when employee during working time insults, assaults or defames employer or coworkers, steals or damages employer's property, violates trade secrets, does not report to workplace for two consecutive days or three days in same month, does not follow safety rules, refuses to follow instructions, compromises security of workplace, ignores employer's corrections and cheats on his qualifications. Arts. 203 to 261 of said law regulate occupational risks. Social security is compulsory and in some cases risk insurance is also compulsory.

Law 7983 of Feb. 16, 2000 as amended on worker's protection creates labor capitalization fund, compulsory complementary pension plan, voluntary savings and complementary pension plan and regulates operating companies of pension funds and labor capitalization.

11 ENVIRONMENT

11.01 ENVIRONMENTAL REGULATION:

(Const. art. 50, Law 7554 of Oct. 4, 1995, Decrees 24715 of Oct. 6, 1995, 25084 of Mar. 15, 1996 and 28113 of Sept. 10, 1999 as am'd, Decrees 27001 of Apr. 29, 1998 and 28113 of Sept. 10, 1999 as am'd).

Constitution establishes legal framework for environmental legislation granting to each person right to enjoy healthy and balanced environment. Law contains general rules for all productive sectors and considers environment and natural resources as national patrimony whose protection and conservation are public and social interest. Law contains such principles as prevention and control of environmental pollution, reparation of damages, environmental impact assessments and land use planning. Within environmental protection are air, noise, water, soil and waste. Entry of hazardous waste into country, whether actually or potentially dangerous, and of radioactive waste is prohibited. Administrative or criminal penalties are imposed for violation of law. Administrative sanctions include fines, partial or total, temporary or permanent closure of facility and cancellation of operating license. Criminal sanctions include fines and imprisonment as established by Criminal Code. Environmental liability is regulated by general principles of Civil Code which create obligation to indemnify for damages caused or to restore environment to previous state. Environmental Administrative Court is responsible for enforcing law. Environmental impact assessments are regulated by Decree 31849 of May 24, 2004, as amended and Decrees 32966 and 32967 of Feb. 20, 2006.

12 ESTATES AND TRUSTS

12.01 ADMINISTRATION:

See topic 12.05 Executors and Administrators.

12.02 DEATH:

(C. C. 67-78).

An interested party may apply for declaration of absence after two years from disappearance of absentee, unless absentee left attorney-in-fact in which case application may not be made until after ten years. These periods may be reduced by one-half if last report was that absentee was gravely ill or otherwise in danger of death. Presumption of death may be declared when his absence continues 20 years after disappearance or ten years after declaration of absence or if 80 years have elapsed from birth of absentee.

Death records are kept by Civil Registry. Death certificates may be obtained from Chief of Civil Registry of district where death occurred upon payment of stamp tax and nominal local fee.

Actions for Death.

Among few provisions of Civil Code on torts, art. 1048, par. 6, provides that when tort has been committed, if decedent was under legal duty to support relative who loses his pension by reason of death, said relative has right of indemnification equivalent to lost pension. Court may, at its discretion, determine lump sum instead.

12.03 DECEDENTS' ESTATES:

See topics 12.04 Descent and Distribution, 12.05 Executors and Administrators, 12.08 Wills.

12.04 DESCENT AND DISTRIBUTION:

(C. C. 24, 520-576; C. Family arts. 229-233).

In absence of testamentary dispositions decedent's estate passes to following in order named: (1) Children, parents and spouse but (a) spouse cause of legal separation has no right to inherit and spouse separated de facto loses right to property acquired by other after separation; (b) spouse who receives community property inherits only amount required to complete share due spouse without community property; (c) common law spouses have right to inherit each other's property acquired during period of living together, if both are single and have been publicly living together for at least three years; (d) father inherits from his out of wedlock child, only when such child has been duly acknowledged or supported for at least two years; (2) grandparents and other ascendants; (3) brothers and sisters; (4) nieces and nephews; (5) parents; aunts and uncles; and (6) local boards of education with regard to decedent's local assets. Right of representation exists only in favor of descendants and nephews and nieces.

Certain persons are excluded from testate or intestate succession, as for example person who committed grave offense against person or honor of decedent, his parents, spouse or children, or who by fraud or violence induced decedent to make will or prevented him from making one.

Inheritances must be expressly accepted or may be refused. If they are accepted, heir is liable for debts up to value of estate received by him. Acceptance may be unconditional or with benefit of inventory; in former case heir who is sued by creditor of estate is liable, unless he proves assets are insufficient to pay debt; in latter case the creditor must prove that there are assets besides those inventoried.

Inheritance rights of common law spouses are regulated by law.

12.05 EXECUTORS AND ADMINISTRATORS:

(C. C. 541-567; C. C. P. 30, 876-927).

There can be but one executor or administrator, with substitute in cases where he cannot act. If there is no executor appointed by will, heirs and surviving spouse by majority vote elect administrator; in case of tie judge decides. Until executor or definitive administrator takes office judge may appoint temporary administrator, preferring surviving spouse or parent of decedent.

The following cannot be executors or administrators: (1) Persons who cannot obligate themselves; (2) blind or deaf persons; (3) those under sentence for certain offenses; (4) those who have been guilty of fraud in administration of property of others. Incumbent may be removed at any time by interested parties, but if testamentary executor is removed without cause, he is entitled to his full commissions.

Estate vests in heirs immediately on death of decedent, but executor or administrator has administration thereof while inventory is being prepared. Creditors may be paid as they appear, if privileged creditors are paid before expiration of six months, they must guarantee that they will return payment they may receive if creditor with priority right enforces his right within six months. As to liability of heirs for debts, see topic 12.04 Descent and Distribution.

12.06 INTESTACY:

See topic 12.04 Descent and Distribution.

12.07 TRUSTS:

(C. Com. 633-662; C. C. 292, 336, 582, 981 and 1396).

By a trust, which may be created by contract or by will, settlor dedicates certain property to specific purposes, delegating realization of said purposes to trustee (administrator) who may be natural or juridical person. Document of creation must contain description of corpus, rules of administration, unless left to discretion of trustee, indication of person or persons who are beneficiaries, after administration expenses and trustee's fees are paid. Trustee must give guarantee if so requested in document of creation. It may also determine to whom must pass remainder after termination of trust, otherwise it reverts to settlor or his estate. No limitations or encumbrances may be placed by trustee on trust property. Trust may be created on assets securing debt of settlor with beneficiary. In case of nonpayment trustee may sell assets according to contract.

Following are forbidden: (a) Secret trusts; (b) trust for benefit of successive beneficiaries if substitution is to take place upon death of one of them; (c) trusts for more than 30 years in favor of juridical persons, unless beneficiary is state or charitable institution; (d) trusts assigning to trustee benefit, commission or economical advantage in excess of fee granted. If no fee is fixed it will be determined by judge. Trust ends by realization of its purpose or its becoming impossible; by happening of subsequent condition; by express agreement between settlor and trustee; and by revocation by settlor.

Under general provisions of law, usufruct (similar to an estate for life or years) may not be established in favor of two or more persons to enjoy alternatively or successively; grant by last will and testament may not be left to be enjoyed by beneficiary in substitution for another grantee, except in case when latter cannot or refuses to accept it. In general, and except as valid trust, gifts cannot be made subject to reversion or remainder rights, but donor may provide for some limitations to free disposition for up to ten years or until donee reaches age of 25 and that corpus be exempt from attachment for same period.

12.08 WILLS:

(C. C. 28, 45, 577-595, 734).

Wills may be made by all except persons mentally incapacitated or under 15 years of age. The witnesses must have the qualifications required for witnesses to documents executed before notaries. (See category 9 Documents and Records, topic 9.02 Notaries Public.) Wills are either open or closed.

Open wills may be made: (a) Before a notary and three witnesses, but if the will is written by the testator himself, only the notary and two witnesses are required; or (b) before four witnesses, without a notary, if the will is written by the testator himself or before six witnesses if it is not written by the testator. The will must state the place, date and hour where signed; be read before the witnesses by the testator or by a person he may designate, or by the notary; and be signed by the testator, notary and witnesses. If the testator cannot sign, the will must so declare. If the will is in a foreign language, two interpreters are required if it is made before a notary, or all the witnesses must know the foreign language if it is made only before witnesses.

Privileged open wills may be made by soldiers in time of war, before an officer and two witnesses, or by persons at sea before the captain and two witnesses, but if the testator writes the will himself, only the two witnesses are required. Such a will is valid only if the testator dies in the situation in which he made it or within thirty days thereafter.

Closed will need not be written by the testator but must be signed by him. The will, enclosed in a sealed envelope, must be presented to a notary who makes a note on the envelope stating: (a) That it was presented to him by the testator; (b) declarations of the testator as to the number of pages in his will, as to whether it was written and signed by him and whether it contains any erasures or corrections. This note must be signed by the notary, testator and two witnesses. Envelope with will is then returned to testator. Illiterate persons cannot make closed wills.

Testamentary Dispositions.

Testator may freely dispose of his estate but he must set aside sufficient to support his children until their maturity or during their lives if they are invalids; also his parents and also his wife; but if such persons have sufficient property he need leave nothing for their support. Not over 10% can be left to religious institutions, and following persons and their near relatives are excluded from taking by will: (1) Guardian of unemancipated minor testator, unless he has rendered his accounts or is testator's ascendant or brother; (2) teachers or custodians of minor testator; (3) physician or confessor who attended testator in his last illness; (4) accomplice of adulterous spouse; (5) notary or clerk who acted in making of will; nevertheless in cases (2) and (3) remunerative legacies are valid, as well as provisions in favor of persons who would be legal heirs of testator.

Foreign wills are given effect if valid according to the laws of the country where made, or if made in accordance with the Costa Rican laws.

13 FAMILY

13.01 ADOPTION:

(C. Family 100-126).

Person over 25 years of age of good reputation and moral standing, with good economic and social standards, in full exercise of his civil rights may adopt minor or incapacitated minor or adult; in any case adopting party must be 15 years older than adopted party. There are special requirements for foreign adopting parties. Consent must be obtained from parents and court except when adopted person is adult. Husband or wife may also adopt provided consent of other spouse is given.

Adoption gives adopted person identical status with that of natural child, creating lines of kinship between adopted person and adoptive parents' family. Adoption extinguishes legal bonds between adopted person and his natural parents and family.

13.02 ALIMONY:

See topic 13.04 Divorce.

13.03 COMMUNITY PROPERTY:

See topic 13.05 Husband and Wife.

13.04 DIVORCE:

(C. Family 48-63).

Divorce dissolving marriage bond may be granted for: (1) Adultery of spouses; (2) attempt of either spouse against life of other; (3) attempt of one spouse to prostitute other one; (4) cruelty; (5) at request of either spouse when spouses have been judicially separated one year; (6) by mutual consent, but only after three years of marriage; (7) legal declaration of absence of either spouse; (8) separation in fact for at least three years. If separation or divorce is filed on (2), (3) and (4) causes, innocent party may also claim damages.

The law specifies no particular period of residence in order to institute action for divorce but the initial pleading in every civil action must indicate a domicile within the jurisdiction. (C. C. P. 175).

The divorce action must be brought within one year after the cause came to the notice of the innocent party, and even if such party dies it may be continued by the heirs. When a divorce action is brought the judge may authorize the wife to leave the family home or order the husband to leave it. He may also allow the wife alimony if her income is insufficient, and decide as to the provisional custody of the children. In the judgment of divorce the judge may grant alimony to the innocent spouse sufficient to preserve the pecuniary position which such spouse had during the marriage. The children are awarded to the innocent spouse unless the judge orders otherwise, but children below five years are as a rule left with the mother. A guilty spouse loses any right to community property derived from the assets of the other spouse.

Separation may be granted for: (1) Any cause authorizing a divorce; (2) voluntary and malicious abandonment; (3) refusal of one spouse to support the other and children; (4) mutual consent; (5) insanity of either spouse for period over year, or other illness or serious changes in conduct of one spouse; (6) grave insults; (7) separation in fact for one year occurring after second year of marriage; (8) sentencing of one spouse to prison for three or more years for nonpolitical crime. Action may be brought only if person sentenced has remained prisoner for at least two consecutive years. Separation by mutual consent may be requested only after two years of marriage and parties must file written agreement relating to custody of children, responsibility for their support, alimony to be paid wife if her separate income is insufficient for her needs and disposal to be made of their property. If separation is asked on any other ground, same provisional measures are taken as in divorce. Reconciliation of spouses voids judgment, and in certain cases such reconciliation may be presumed.

13.05 HUSBAND AND WIFE:

(C. Family 33-47, 229-233; C. C. 595).

Spouses owe each other fidelity and assistance. Husband has responsibility to support family, but wife must contribute to it when she has her own assets.

Spouses may by duly recorded instrument make prenuptial agreement as to property matters, which agreement may be modified after marriage. If there is no such agreement, each spouse may freely dispose of property brought to marriage by such spouse or acquired during marriage and of fruits of such property. Nevertheless property in possession of spouses at dissolution of marriage is considered community property, to be distributed equally among spouses, unless proved to have been brought to marriage by one of spouses or obtained by one

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of spouses for valuable consideration.

In case of intestate succession, surviving spouse is entitled to same share as child, but this share is diminished by value of any community property. In case of testate succession, surviving spouse is entitled to such support as may be required; if surviving spouse has sufficient property, there is no right to additional support.

Husband and wife may contract with each other and wife requires no authorization from her husband to contract or appear in court.

Alimony rights of common law spouses are regulated by law.

13.06 INFANCY:

(C. C. arts. 37-41, 835-836; C. Family 69-150; Law 7739 of Jan. 6, 1998, as am'd).

The age of majority is 18. Contracts by minors under 15 are void and if over 15 voidable, except when emancipated. Children under 18 are ordinarily subject to parental authority of both parents in case of conflict by Court decision at request of either parent; out of wedlock ones are subject to mother's. Parental authority includes education, supervision, moderate reprehension, custody, legal representation and administration, without obligation to account for income from minor's property, with certain exceptions. In absence or incapacity of parents guardian is appointed. Parents and guardians have restricted powers of disposition. Code on Childhood and Adolescence recognizes rights and duties to minors and youngsters. National Council on Childhood and Adolescence is in charge of supervising enforcement of Code.

13.07 MARRIAGE:

(C. Family 10-47; C.C. 27, 29).

Following marriages are legally impossible: (1) Of person already married; (2) between ascendants and descendants; (3) between brothers and sisters; (4) between person guilty, as principal or accomplice, of death of one spouse, and surviving spouse; (5) between adopted child and adopting parent and their children; (6) between persons of same sex; and (7) of person under 15 years old. Following marriages may be annulled: (1) Those induced by error or duress; (2) of person mentally incapacitated; (3) of impotent person, provided defect be perpetual, incurable and arising prior to marriage; (4) when performed before unauthorized official.

The following marriages are forbidden: (1) Of a person under 18 years without consent of parent or guardian; (2) of a woman before expiration of 300 days counting from dissolution or annulment of a previous marriage, unless a birth occurs in that period; (3) between a guardian or his descendants and ward, before accounts of guardianship are approved, unless deceased parents expressly authorized such marriage; (4) marriages without previous publications or dispensation of publications. Such forbidden marriages, if performed, are nevertheless valid, but delinquents are subject to punishment.

Marriages may be performed by Roman Catholic ceremony or by civil ceremony before official of civil registry or before notary public and two witnesses. Marriages by proxy are allowed.

Courts may of their own motion declare the nullity of legally impossible marriages and of marriages not performed by qualified functionaries or performed without the attendance of two qualified witnesses, and in the case of voidable marriages the annulment must be demanded by the party to whom said right is reserved. A marriage contracted with the legal solemnities and in good faith produces civil effects in favor of the spouse and children, even though later annulled.

14 FOREIGN TRADE AND COMMERCE

14.01 EXCHANGE CONTROL:

Transactions with foreign exchange are subject to regulations to be issued from time to time by Central Bank of Costa Rica as provided by Law 7558 of Nov. 27, 1995 as amended.

Central Bank of Costa Rica publishes daily intervention buying and selling exchange rate of foreign exchange for transactions with authorized entities and daily reference buying and selling exchange rate of foreign exchange for payment of foreign currency obligations which may be paid locally by delivery of national currency at this rate of exchange. Such rate is determined by Central Bank according to formula. Yearly remittances in dollars of interest and dividends are free.

14.02 FOREIGN TRADE REGULATIONS:

See topic 14.01 Exchange Control.

15 HEALTH

15.01 FOOD AND DRUG REGULATION:

Decree 31595 of Dec. 2, 2003 as amended, on notification, registration and importation of food and raw materials for preparation of food, regulates among others, production and preparation of food; registration of food products, food additives and raw materials; classification of food; analysis of food.

Notification, import and control of cosmetic products are regulated by Decree 30060 of Nov. 30, 2001 as amended. Registration, control, import and advertising of drugs are regulated by Decree 28466 of Feb. 8, 2000 as amended, Decree 29968 of June 9, 2001 and Decree 32470 of Feb. 4, 2005. Registration, labeling, advertising and control of veterinary medicines are regulated by Decree 28861 of Aug. 12, 2000 as amended. Law 7664 of Apr. 8, 1997 as amended, regulated by Decree 26921 of Mar. 20, 1998 as amended, deals among others with phytosanitary protection, certification of organic agriculture, inspection of plants, control and eradication of plant diseases, control of facilities and products of agricultural use, phytosanitary regulations related to foreign trade, infringement and sanctions. “Servicio Fitosanitario del Estado” is in charge of enforcing law. Decree 33495 of Oct. 31, 2006 regulates registration, use and control of formulated synthetic plaguicides.

Law 7409 of May 12, 1994 and Decree 24605 of Aug. 30, 1995 regulate donations and transplants of organs; removal of organs and body parts, from dead and living persons, death certification, import and export of organs. “Comisión Reguladora de Transplantes de Organos y Materiales Anatómicos Humanos” is in charge of advising “Ministerio de Salud” on this matter.

15.02 PUBLIC HEALTH LAWS:

General Health Law 5395 of Oct. 30, 1973 as amended, considers health as public interest. Ministry of Health is in charge of regulating, planning and coordinating public and private activities related to health. Law regulates among others, right and duties related to public health; practice of health related professions, pharmacies, clinic laboratories, sanitation and safety of workplace; medical equipment and pharmaceutical products; import of drugs; health institutions; beauty parlors and gyms, disease control; international sanitary protection; cemeteries, burial and exhumation, solid waste, water pollution and sanctions for infringement of Law. Production, preparation, prescription, sale, import, export and illegal traffic of controlled substances is regulated by Decree 33245 of May 9, 2006 as amended.

16 IMMIGRATION

16.01 ALIENS:

Aliens in general enjoy same civil rights as citizens; they cannot elect or be elected to public post and are subject to payment of taxes and social security contributions. Aliens must deposit amount according to their immigration status. Aliens authorized to stay in country must give notice to immigration authorities of change of domicile and they must designate place for service of process with judicial circuit of San José or electronic address. Aliens are deported for entering country illegally, when convicted for drug dealing, for sex offenses and for smuggling illegal immigrants, for submitting false documents, and at expiration of authorized stay. (Law 1155 of Apr. 29, 1950 as am'd; Law 8487 of Nov. 22, 2005 and its regulations Decree 19010 of May 11, 1989, as am'd; and Decree 26334 of Sept. 11, 1997; Law 8 of Apr. 21, 1941). See topic 16.02 Immigration; category 23 Transportation, topic 23.03 Shipping.

16.02 IMMIGRATION:

(Law 8487 of Nov. 22, 2005 and its regulations; Decree 21975 of Feb. 15, 1993 as am'd, Decree 33955 of July 18, 2007).

Law regulates admission and deportation, entrance, stay, registry, control and information of exit and re-entrance of alien to country and their rights and duties. For purposes of law aliens may enter country as: (1) Nonresidents; (2) permanent residents; and (3) temporary residents. Among nonresident aliens are: tourist, those in transit for less than 24 hours, crews of international transportation companies, commercial agents, business persons, artists, and special visitors. Among permanent residents are aliens that are first degree relatives of local citizen or when his or her spouse and first degree relatives have enjoyed temporary residence status for three consecutive years. Temporary residents may stay in country more than 90 days and less than two years, among them are: investors, retired with own income, athletes and professionals. There are special status aliens, among them are students, refugees with political asylum, temporary workers, etc. To apply for resident status, application must be filed before immigration authorities if applicant is in country or before diplomatic or consular agent if he is out of country. Residents retired and with own income shall have minimum income established by law and are exempted from payment of income tax, and duty-free importation of personal effects is granted once. Law establishes sanctions for foreigners or national employers who do not comply with legal requirements and focuses on expulsion and deportation of foreigner from country. There is special proceeding for visas for personnel of companies registered with Dirección General de Migración y Extranjería according to Decree 32918 of Dec. 9, 2005. Visas for multiple entries are granted to businessmen for up to five years.

17 INTELLECTUAL PROPERTY

17.01 COPYRIGHT:

(Law 6683 of Oct. 14, 1982 as am'd regulated by Decree 24611-J of Sept. 4, 1995 as am'd, Decree 23485-MP of July 5, 1994, Law 8039 of Oct. 12, 2000).

Author is entitled to: (1) Recognition of his quality as author, (2) delayed publication of his work even up to period of 70 years after his death, (3) right to oppose deformation, mutilation or modification of his work and any action detrimental to same or to author's honor and reputation, (4) withdrawal from market of his work at any time, (5) right to use and exploit work.

Works Protected.

Protection is granted in respect to literary, scientific, didactic, musical, choreographical, pictorial, architectural, photographic and cinematographic works and any other works which, by analogy, can be regarded as artistic or intellectual productions and as long as they are expressed in form of writing, engraving, or in any other objective and durable form capable of reproduction or communication to public by any means; arrangements, compendiums, translations, versions, graphic characteristics, etc. authorized by their authors. Articles on current events may be reproduced unless prohibited by special or general reservation. In all cases, when reproduced, source must be given.

Duration.

Copyrights remain in force: (1) For life and 70 years after author's death. Then, or before if there are no heirs, they become public domain, (2) in case of posthumous works, term is 70 years from last day of year of first publication, (3) if author remains anonymous for 70 years from first publication, right passes into public domain, (4) in case of joint authors, 70-year period begins upon death or last survivor, (5) in case of works owned by State, public entities and municipalities, duration is 50 years.

Registration.

Copyright Register, in which are recorded works submitted by authors, agreements or contracts which in any manner confer, modify etc. patrimonial rights of author, powers of attorney. Applicants must submit copies of work produced, published or reproduced. In case of moving pictures, copies of plot and shooting-script and photographs of principal scenes suffice or photocopies in case of pictures, sculptures, and similar works.

Foreigners in Costa Rica enjoy same rights of national authors. Publishing contracts are regulated by law.

Conventions.

International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations, Rome, 1961; Berne Convention for the Protection of Literary and Artistic Works, Paris, 1971, as amended, 1979; WIPO Copyright Treaty, Geneva, Dec. 20, 1996; WIPO Performances and Phonograms Treaty, Geneva, Dec. 20, 1996.

17.02 ENFORCEABILITY OF INTELLECTUAL PROPERTY RIGHTS:

(Law 8039 of Oct. 12, 2000, Decree 30363 of May 2, 2002).

Law regulates administrative procedure to be used by owners of intellectual property rights to enforce their rights in addition to existing provisions regarding civil and criminal actions and unfair competition. Precautionary measures may be issued by courts and by Copyright Register and by Industrial Property Register. Law creates Tribunal Registral Administrativo as highest authority on administrative matters related to intellectual property rights. Sanctions for infringement of rights are imprisonment up to three years, compensation for damages, withdrawal from commercial channels, seizure and destruction of goods, among others.

17.03 PATENTS:

(Law 6867 of Apr. 25, 1983 as am'd and its Regulations, Decree 15222 of Dec. 12, 1983, as am'd by Decree 17602 of May 11, 1987, Law 8039 of Oct. 12, 2000).

Invention.

Law defines invention as any creation of human mind susceptible of industrial application. Invention is novel when it is not within state of art.

Patents may be obtained for products, machines, tools or manufacturing processes considered new and of industrial use. Law considers inventions among others, discoveries, scientific theories, mathematics programs, computer program considered separately, literary and artistic works, economic plans, principles and methods used in business, games and mental exercises. Surgical, therapeutic or diagnostic treatment methods, plants and animals, biological process for production of plants or animals, among others, are not patentable. Patents are granted for 20 years from filing date. Patent gives exclusive right of exploitation but compulsory license may be granted in case of declared emergency or national security reasons, unfair competition practices and when patent has not been exploited during first three years from granting date or four years from application date. Patent rights are transferable.

Industrial Designs and Utility Models.

Any new design or new model which may be applied to industrial object may be registered as owned by author. Industrial designs are registrable if no publicity thereof has been made in any form. Utility models are new forms of objects or mechanism, that are registrable if they have practical use. Registration term is ten years from filing date. Provisions regarding patents are applicable to industrial designs and utility models.

Trade Secrets.

(Law 7975 of Jan. 4, 2000). Law protects trade secrets and considers them as any confidential information of industrial or commercial application that provides competitive or economic advantages to owner. Information considered trade secret must be expressed in documents, electronic or magnetic means, laser discs, microfilms, films or similar means.

Integrated Circuit's Designs.

(Law 7961 of Dec. 17, 1999 regulated by Decree 32558 of Mar. 8, 2005). Law protects integrated circuit's designs when considered original as according to law. Application for registration must be filed within two years from its commercial exploitation. Registration is granted for ten years from filing date. Registration will expire after 15 years from last date of year that it was designed. Rights may be licensed, assigned and transferred inter vivos or mortis causa.

Conventions.

Convention for the Protection of Industrial Property, Paris, Mar. 21, 1883, Patent Cooperation Treaty (PCT) Washington, June 19, 1970, Stockholm Revision of July 14, 1967 as am'd on Sept. 28, 1979; Agreement on Trade-Related Aspects of Intellectual Property Rights, Marrakech, Apr. 15, 1994.

17.04 TRADEMARKS AND TRADENAMES:

(Law 7978 of Jan. 6, 2000 as am'd, regulated by Decrees 30233 of Feb. 20, 2002 as am'd, and 33743 of Mar. 14, 2007, Law 8039 of Oct. 12, 2000).

Trademarks.

Those signs or combinations of signs sufficiently distinctive and susceptible of identifying goods and services can be registered as marks. Mark is any sign used to distinguish products or services produced or commercialized by one person from same or similar products or services produced or commercialized by another person. Combinations of colors, letters and numbers, shapes and wrapping of goods may be registered as marks. Use and registration of marks for commercialization of goods and services is optional. No registration may be granted to marks, denominations, signs and emblems of State or its agencies, or international organizations; to usual or necessary shapes of products or denomination and color thereof; common words or their equivalent in common languages or descriptive denominations; marks which may be confused with others registered or pending registration; geographical names if their use may suggest origin; names of dead persons, or names of historical personalities; title of literary, artistic or scientific works protected by copyright; marks contrary to law, those against public policy, denomination of protected vegetal varieties, those identical or similar to registered slogans and commercial names provided under circumstances by which public may be confused; those that are reproductions, imitations, translations or total or partial transcriptions of distinctive signs, locally or internationally, well known, without taking into consideration classification of goods or services concerned; or because of similarity to well-known trademarks causes confusion to public independent of classification of goods and services for which registration is applied for. All words part of mark in foreign language must be translated into Spanish. Application may be amended or divided, maintaining original application date. Registration of trademark grants ownership thereof and exclusive right to use it during ten years from granting date, renewable, if applied for within last 12 months; grace period of six months is granted by payment of surcharge. Registrations may be divided, maintaining original registration date. Owner of trademark may grant license to use or exploit it. Licenses must be registered. Trademarks and commercial names can be cancelled: for nonuse for consecutive five years by owner or licensee, unless nonuse is due to just cause, or because it reproduces, imitates or translates well-known trademark, independently of classification of goods and services which registration is for.

Commercial Names.

Those signs used to identify individuals or juridical persons regarding their economic activity are protected by law without requiring registration. Exclusive right to use of commercial name ends with closing of establishment or termination of industry covered by name. Registration is granted for indefinite period. Provisions regarding trademarks are applicable to commercial names.

Collective Marks, Certification Marks and Origin Denominations.

Any sign that distinguishes origin or any other common characteristic of products or services of different enterprises. Provisions regarding trademarks are applicable to collective names. Private or public enterprises, governmental bodies or international organizations may register certification marks. Registration is granted for ten years, but granted to governmental body registration is for indefinite period of time. It cannot be encumbered or subject to attachment. Origin denominations may be registered for indefinite period of time.

Slogans are words, sentences or captions used as supplement to trademark. Any person or corporation may apply for registration of slogans employed or to be employed in relation with economic activities. They must be distinctive. Slogans are registered for indefinite term as long as trademark used in conjunction therewith remains valid. Law prohibits unfair competition and penalizes violators.

Conventions.

Convention for the Protection of Industrial Property, Paris, Mar. 21, 1883, Stockholm Revision of July 14, 1967 as amended on Sept. 28, 1979; Nice Agreement Concerning the International Classification of Goods and Services for the Purposes of the Registration of Marks, 1957 as reviewed and amended; Lisbon Agreement for the Protection of Appellations of Origin and their International Registration, Lisbon, 1958, revised at Stockholm, 1967, and amended in 1979; Vienna Agreement Establishing an International Classification of the Figurative Elements of Marks, 1973 as amended; Agreement on Trade-Related Aspects of Intellectual Property Rights, Marrakech, Apr. 15, 1994.

18 LEGAL PROFESSION

18.01 ATTORNEYS AND COUNSELORS:

(Law 13 of Oct. 28, 1941 as am'd).

To practice law, attorney must be registered with “Colegio de Abogados”. For that purpose, law degree from local university is necessary. Attorney holding law degree from foreign university may be registered if such degree is considered equivalent to local degree after complying with lengthy and complicated evaluation proceedings before proper authority. Board of Directors of Colegio de Abogados has disciplinary power; it may suspend attorney from practicing law for any deceit, malpractice or other criminal or gross misconduct for period of one month up to 12 years.

19 MINERAL, WATER AND FISHING RIGHTS

19.01 MINES AND MINERALS:

(Const. art. 6, arts. 19, 145, 121, §14, art. 140, §19, L. 6797 of Oct. 4, 1982 as am'd and its Regulations, Decree 29300 of Feb. 8, 2001 as am'd, Decrees 14264 and 14265 of Feb. 4, 1983; Law 7399 of May 3, 1994 as am'd, regulated by Decree 24735 of Sept. 29, 1995 as am'd).

Mining in General.

State is owner of all geological resources within its territory and its exclusive economic zone. Mining activity is regarded as public interest. State may undertake exploration and utilization of mineral resources itself or it may grant such rights to individual, private entities, local or foreign, with exception of heads of foreign States and their relatives, certain government officials and their relatives. Foreign states may participate in exploration and exploitation of mineral resources only as partners of Costa Rican Government.

State may reserve any zones for its exploration or exploitation. Petroleum and other hydrocarbons, and all energy resources are reserved to State, but special titles may be granted according to law and under conditions stated by Congress. Law establishes causes for expiration or cancellation of mining titles, when mining deposits become vacancies, available by direct request of any person. All mining activities and disputes are subject to Costa Rican law and jurisdiction. Foreign, natural or juridical persons not domiciled in Costa Rica must have agent and be recorded in Public Registry in order to apply for exploration permit or exploitation concession. Mining titles constitute jus ad rem, distinct from surface, although both may be possessed by same owner. They may not be alienated, encumbered or rented, except when special permission is granted. On termination of concession, all installations must be transferred to Government. Exploration permits are granted for maximum period of three years, which may be extended for two years. Area allocated for each permit varies in accordance with type of mineral, location and technical and economic capacity of applicant; but maximum allocated to any one individual or legal entity is 20 square kilometers.

Exploitation concessions are granted for maximum period of 25 years, which may be extended for period not to exceed ten years and in special cases may be extended with authorization of Congress. Area allocated to exploitation concession varies from one to ten square kilometers per applicant, depending on type of mineral and location.

Administrative sanctions consisting in fines and cancellation of exploration permits and concessions, and up to five years of imprisonment is imposed to holders of mining rights for noncompliance with duties and obligations imposed by law.

Taxation.

Exploration permits and exploitation concessions are subject to all taxes as indicated by Arts. 52 and 54 of Law 6797 including income tax. Duty-free importation of capital goods and raw materials necessary for exploration, exploitation, manufacture, refining, transportation, or any other related activity are granted.

Petroleum.

State is owner of all petroleum deposits and any other hydrocarbon substances within its territory. Hydrocarbon activity is regarded as public interest enjoying preferential right to utilize surface with right to expropriation on payment of compensation. State may undertake exploration and exploitation of hydrocarbons itself or may enter into association, operation, service or concession contracts or any other kind of contracts with national or foreign individuals or companies through public bidding. Foreign companies domiciled abroad must open branch in order to execute contracts. All activities and disputes are subject to local law and jurisdiction. Contracting parties must post warranty to guarantee performance of contracts. Law establishes causes for termination of contracts. At termination of contract all equipment and installations must be turned over to State. Failure to perform may result in fines. Assignment of contracts requires prior authorization. Contracts for exploration or exploitation limited to maximum of 1.8 million hectares onshore and 1.2 million hectares offshore. Exploration may last three years renewable for three periods of one year each; exploitation may last up to 20 years, but when exploitation starts before end of exploration period, exploitation period is extended up to 26 years. Contractors may export whatever exportable surplus is left once local demand is satisfied. Contracting company must implement training programs. All contractors must file environmental protection program before starting operations, and contracts are subject to condition of approval of said program. Contracting companies pay income tax and are exempted from any other direct or indirect tax. Duty-free importation of capital goods and raw materials necessary for performance of contract, during exploration period and first ten years of exploitation period.

20 MORTGAGES

20.01 CHATTEL MORTGAGES:

(C. Com. arts. 530-581).

Personal property not exempt from attachment may be given in guarantee of any obligation. Pledged articles may be delivered to creditor or to third person or remain in custody of debtor. Pledge on chattel mortgage of motor vehicles, aircraft and vessels must be in public instrument; other kinds of personal property may be in private document acknowledged before notary and must be recorded in Registry of Pledges in order to be binding upon third parties if possession is retained by debtor.

Livestock products may be pledged for one year only; farm products harvested or not may be encumbered within the agricultural year of the contract; wood only if already cut; raw materials, elaborated or manufactured articles, at any stage, may also be pledged. Shares of stock, securities, mortgage cedulas and credits may be pledged but this, besides the recorded writing, requires delivery to creditor who acts as depositary, who cannot be authorized to appropriate and apply them to his credit although he may sell them through the court at public auction or through a broker when so authorized under certain procedural rules. Sale of other articles at public auction may be made through court or, when authority is granted, through a third person.

Basis for sales may be agreed upon.

Debtor who holds agricultural products may sell them when in season or ready for sale following certain procedure. If creditor makes opposition debtor may sell and deposit proceeds in court or with a bank under penalty of arrest until compliance.

Documents of pledge may be transferred by endorsement to a specified endorsee to whom endorser is jointly liable with debtor, unless words of limitation are inserted. Endorsement of a pledge document and any novation, extension or partial change must be in writing and has to be recorded, if the object remains in debtor's possession, and notice of the transfer given to him.

Pledge may be cancelled at any time by payment. If partial payment is accepted it must be noted in the document and recorded.

Foreclosure action is summary.

See also topic 20.02 Mortgages.

20.02 MORTGAGES:

(C. C. 409-440, 471; C. C. P. 660-691).

Mortgages must be executed in form of public instruments and may refer only to real property. They cover fruits pending when compliance with obligation is demanded and all improvements and natural additions to property. However, under provisions of Code of Commerce (see topic 20.01 Chattel Mortgages) machinery is not affected by mortgage of real property except when expressly included, and any duly recorded prior chattel mortgage on said machinery prevails over real property mortgage. In case of fruits chattel mortgage prevails even if recorded after land mortgage but before foreclosure action on latter is commenced.

Their lien includes three annuities of interest prior to foreclosure. If various parcels are mortgaged to secure same debt, amount for which each parcel is liable must be designated. Whenever debtor makes a payment he may demand reduction of mortgage.

Foreclosure follows the general rules of execution of judgments. The original debtor and the then owner of the property are summoned and notice is given to all mortgage creditors. In case of the foreclosure, property is sold free of liens and amount obtained is distributed among creditors according to their priority rights. In mortgage instrument parties may waive usual rules of execution, and in such case judicial sale is immediately held. After sale under foreclosure there is no right of redemption.

Re Vessels see topic 20.01 Chattel Mortgages.

21 PROPERTY

21.01 ABSENTEES:

See category 12 Estates and Trusts, topic 12.02 Death.

21.02 ADVERSE POSSESSION:

See category 5 Civil Actions and Procedure, topic 5.04 Prescription.

21.03 DEEDS:

Conveyances of real estate to be recorded must be by public instrument and contain true statement of consideration, since state tax on transfers of title is based on real consideration. Deeds must bear stamps depending on amount involved and they must be recorded in registry of property. Both grantor and grantee must sign deed and must be present before notary at same time in person or by attorney in fact. Original deed executed in Costa Rica remains in files of notary, who gives to either party certified copy which has effect of original in courts of law. See category 9 Documents and Records, topics 9.02 Notaries Public, 9.03 Public Instruments.

21.04 DOWER:

No dower right. See categories 12 Estates and Trusts, topic Descent and Distribution; Family, topic Husband and Wife.

21.05 REAL PROPERTY:

(C. C. 24, 264 to 519).

Civil Code provides that laws of Costa Rica shall govern all matters concerning real property located in Costa Rica even when they belong to foreigners. Real property includes objects permanently attached to realty as well as buildings and other structures. Everything which is attached to land, in fixed, permanent manner, including buildings and structures, is real property by operation of law.

Law 7933 of Oct. 28, 1999 as amended and its regulations Decree 32303 of Mar. 2, 2005 regulates condominiums. Decree 31022 of Feb. 12, 2003 as amended regulates time shared contracts.

22 TAXATION

22.01 CONSUMPTION TAXES:

Consumers Tax.

(Decree 14616 of June 10, 1983 as am'd and regulated by Decree 14617 of June 10, 1983 as am'd). This tax applies to transfers of merchandise included in list prepared by executive power. Items must be of ultimate consumption and not raw materials or intermediate products and not essential or indispensable. They must also be nationally produced. Tax also applies to import of merchandise included in above mentioned list. Items exported by merchants are exempt. Rates are variable and are determined in above mentioned list.

22.02 FREE ZONES:

Free zones (Law 7210 of Nov. 23, 1990 as am'd regulated by Decree 29606 of June 18, 2001 as am'd). All types of industries, trading companies and services are allowed to operate there. They are exempt among others from import and export taxes; tax on remittance abroad; ten years exemption from municipal taxes; real property tax and transfer of property tax for ten years as of date of starting operations; income tax exemption varies according to area or location of free zone. When established in free zones in less developed areas, companies may enjoy, for five years, bonus equal to certain percentage of amount paid in salaries during previous year. Dividends paid or credited to nonresident individuals or juridical persons are not exempt if they are taxed in their country of domicile and get credit for tax paid in Costa Rica. No restrictions exist for entering into and exiting from free zones of goods, negotiable instruments, local and foreign money.

22.03 INCOME TAX:

(Law 7092 of Apr. 21, 1988 as am'd and its regulations, Decree 18445 of Sept. 9, 1988 as am'd).

“Income Tax” includes: Tax on profits of companies, tax on salaries and pensions of individuals domiciled in Costa Rica and tax on remittance abroad.

Tax on profits is applicable to all juridical entities, including branches or permanent establishments, and individuals doing business or domiciled in country, undivided estates and trusts on all income obtained from Costa Rican sources.

Exemptions.

State, municipalities and government agencies, decentralized government entities, religious institutions, cooperatives, nonprofit organizations among others. Gross income is all revenues from activities as indicated by law. Net income is gross income minus deductions authorized by law. Unless proven otherwise loans evidenced in writing are deemed to yield interest at annual rate indicated by Central Bank or at average annual highest rates of banks of Sistema Bancario Nacional.

Deductions include: All necessary expenses to produce income, among them: salaries and bonuses; interest; bad debts; reasonable depreciation of machinery and other personal property of business; compensations to directors and members of other directive and advisory boards acting abroad; fees or compensations for technical-financial or similar advice from abroad, as well as royalties from patents, formulas, trademarks, franchises, etc. paid out of country; gifts to state and certain official agencies and charitable, scientific or educational organizations; travel expenses of owners, employees or technicians brought from abroad, necessary for production.

Professionals not keeping correct records or who do not normally issue receipts for their fees are presumed to have minimum annual net income as follows: (i) Physicians, dentists, architects, engineers, lawyers, notaries, public accountants, economists and real estate brokers, equal to 335 minimum salaries. (ii) Land surveyors, experts, private accountants, technicians not indicated in (i) above, equal to 250 minimum salaries.

Taxpayers owning living, recreation, summer or similar houses must include amount established by law as presumed income therefor.

Local branches, agencies and other permanent establishments of foreign companies or persons domiciled abroad are deemed to have following minimum annual net taxable income (unless proven otherwise): when engaged in transportation and communication, 15% of gross income; reinsurance, 10.5% of net value of reinsurance and of insurance provisions except life insurance; film production and distribution, 30% of gross income and international news, 30% of gross income.

Tax Rates.

For juridical persons rate is 30% of net taxable income, for small enterprises rate is either 10% or 20% of net taxable income, depending on annual gross income; non-active juridical persons are taxed at fixed amount. Individuals are exempt when annual net taxable income is less than 2,074,000 colones. Annual net taxable income in excess of 2,074,000 colones is taxed at rates ranging from 10% to 25%.

Tax Credit for Individuals.

Taxpayers may subtract annually from amount to be paid 15,720 colones for spouse; 10,560 colones for each child. Child must be either minor, totally supported by taxpayer; unable to work or student not over 25.

Dividends payable by stock corporations are subject to withholding tax of 15%. However, if stock corporation is registered with bolsa de comercio officially recognized and stockholder acquired stock through such bolsa de comercio withholding is only 5%.

Tax on Income from Work and Pensions.

Individuals who sell their services as employees or workers or receive pensions and who are locally domiciled are taxed monthly on income indicated by law. Income of workers, employees and retired persons is exempt when less than 68,000 colones per month. Income in excess of said amount is subject upon payment to withholding tax at rate of 10% and 15%. Taxpayers may subtract from tax to be paid 1,130 colones per month for spouse and 880 colones per month for each minor child, totally supported by taxpayer, unable to work or student under 25.

Tax on Remittance Abroad.

Following payments to recipients domiciled abroad are subject to following withholding taxes only: (a) Interest paid to banks and financial institutions recognized by Central Bank is exempt. Interest paid to other parties domiciled abroad is subject to withholding tax of 15%; (b) income from production, distribution or other activities related to movie or television films or videotapes, 20%; radio novels and telenovels, 50%; salaries, 10%; commissions or any work compensation for services abroad to concerns in Costa Rica, 15%; for technical, financial, administrative or similar advice, 25%; reinsurance premiums, 5.5%; (c) income from news served by international agencies; production, distribution and activities related to phonograph records, short story tapes, photonovels and similar sound items, 20%; patents formulae, trademarks, franchises and royalties, 25%; (d) any kind of compensation paid to members of boards of directors, councils or similar organizations, 15%; (e) transportation and communications, 8.5%; (f) any other income remitted abroad different than above, 30%.

Dividends, profits, interests, commissions, royalties, remittances, premiums, and service compensations paid abroad (subject to 15%) may be wholly or partially exempted if proved that recipient gets no credit or deduction or these are for smaller amounts, against tax abroad. This does not apply when income is not taxed there.

In some communities, small municipal tax is payable each year, based on income, in addition to general income tax.

Tax on Non-Domiciled Banks and Financial Entities.

(Law 8114 of July 4, 2001 regulated by Decree 29643 of July 10, 2001). Banks and financial entities non-domiciled in country which are part of local financial group, or linked to bank or financial entities domiciled in country, as indicated by law are subject to tax equal to $125,000 per year. These entities are not subject to payment of tax on remittance abroad.

Temporary Imports.

Temporary duty free import of merchandise to be exported after repaired, reconditioned or assembled is allowed. Earned income is subject to income tax.

22.04 MORTGAGES:

Registry tax is payable for recording of real property conveyances and mortgages, powers of attorney, articles of incorporation and partnerships, etc. General rule is that rate is determined by amount involved, tax is 5 colones for each 1,000. There are special tables for cancellation of mortgages and for mortgages representing part of price of real estate. When there is no amount, or document comprises acts falling in both categories, there is a fixed tax or combination of both. (Law 4564 of Apr. 29, 1970 as am'd).

22.05 PROPERTY TAXES:

Real estate tax is payable to municipalities on assessed value of all real property of same taxpayer at rate of 0.25%. (Law 7509 of May 9, 1995 as am'd regulated by Decree 27601 of Jan. 12, 1999).

Tax on Transfer of Real Property.

(Law 6999 of Sept. 3, 1985 as am'd and its regulations Decree 21743 of Nov. 17, 1992 as am'd). All transfers of real property are subject to this tax, except: (a) Transfers of house and land under colones 1,200,000, and any other transfer under colones 400,000; (b) inheritance distributions of real property, under same condition stated in (a); (c) transfers to individuals for public housing purposes; (d) transfers for less than colones 1,200,000 for family abode or rural property for supporting same; (e) several others of public interest. Tax rate is 1.5%.

22.06 SALES TAX:

(Law 6826 of Nov. 8, 1982 as am'd and regulated by Decree 14082-H of Nov. 29, 1982 as am'd). This tax is levied on: (a) Sales effected in Costa Rica (except sales of real estate and of merchandise for exportation. Also exempted are among others most foodstuffs, medicines, veterinary drugs, fertilizers, and other items listed in art. 9 of law); (b) services rendered by hotels, restaurants, bars, night clubs, dry cleaning, automobile repair and paint shops, real estate agencies, custom brokers, international moving companies, publishing companies; (c) imports, made by nonregistered persons; (d) telephone, telex and cable and similar services, some insurance policies, car washing; and (e) film development and photocopies. General rate is 13%.

22.07 STAMP TAX:

Stamped paper and revenue stamps are required for most documents used in courts or public offices and for many private transactions, such as deeds, mortgages, etc. Revenue stamps must likewise be affixed to many other documents. The amount depends on the nature of the document and the sum involved. In general most contracts and all shares of corporations require revenue stamps. Any corporation and subsidiary of any foreign corporation are required to pay Education and Culture stamp tax for registration in Mercantile Register and annual tax on capital stock of corporation. (Fiscal Code, arts. 238-248, 251, 252, 255-289; Law 3245 of Dec. 3, 1963 as am'd and Law 5923 of Aug. 5, 1976 as am'd).

22.08 TAX INCENTIVES:

Tourist Promotion (Law 6990 of July 15, 1985 as am'd and its regulations Decree 24863 of Dec. 5, 1995 as am'd). Law grants incentives to hotel services, rental of vehicles to tourists, air and water transportation of tourists and some activities performed by tourist agencies. Benefits depend on activity, in general import duties on import goods which are not produced in Central America, and taxes on local purchases necessary for operation and expansion of installations, accelerated depreciation, tax exemption for limited period on real property tax for properties outside metropolitan area. Instituto Costarricense de Turismo is government agency in charge of granting tax benefits.

23 TRANSPORTATION

23.01 AIRCRAFT:

(Law 5150 of Mar. 14, 1973 as am'd, regulated by Decree 4203 of Oct. 9, 1974 as am'd). General Law of Civil Aviation deals with aircraft nationality, ownership, lease, manufacture, encumbrance, registration certificate, license and permit for operation, passengers and freight transportation; and maximum carrier's liability in case of accidents and loss or damage to baggage and freight; and penalties for infringement of Law.

23.02 MOTOR VEHICLES:

(Law 7331 of Apr. 4, 1993 as am'd, Decree 31686 of Feb. 9, 2004). Law regulates circulation of motor vehicles in public and private ways, parking lots and beaches; public and private transportation and transportation of passengers and freight; license plates and driver licenses. All motor vehicles must have insurance policy up to certain coverage amount with public insurance company. All documents related to motor vehicles should be recorded at public registry of motor vehicles. Transfer of motor vehicles should be in public deed. Law provides for fines and suspension of driver license in case of infringement of law and for criminal and civil action in case of accident.

23.03 SHIPPING:

Costa Rican vessels may be owned by anyone who under general laws of Republic is authorized to acquire property. Costa Ricans are permitted to acquire and navigate foreign vessels as if such vessels had always been national vessels. Alien cannot be captain of Costa

Rican vessel unless he gives bond for amount of at least one-half value of vessel. At least 75% of crew of Costa Rican vessels must be Costa Rican citizens. Coastwise traffic is subject to concession by Government. (Maritime Section of Code of Commerce of 1853, arts. 530-940; Law 2220 of June 20, 1958; Decree 66 of Nov. 4, 1960 as am'd; Decree 28742 of June 19, 2000).

Law 6267 of Aug. 29, 1978 as amended and its regulations Decree 20554 of June 25, 1991 regulate activities of foreign fishing vessels within 200 miles of seashore, requiring registration and fixing fees and applicable fines.

Costa Rican vessels in international trade need have only 10% of Costa Ricans in their crew and are subject to no taxes other than annual tonnage taxes. (Law 12 of Oct. 22, 1941 as am'd and Decrees 1958 of Sept. 10, 1971, 7974 of Jan. 27, 1978 and 12568 of Apr. 30, 1981).

24 TREATIES AND CONVENTIONS

24.01 TREATIES:

Legislative-Decree 4448 of Oct. 17, 1969 approves Agreement with U.S.A. regarding U.S. investments guaranties signed in City of San Jose on Nov. 22, 1968.

Pursuant to said Agreement, governments of Costa Rica and U.S. agree to consult each other and to exchange information regarding projects for investment in Costa Rica. U.S. Government shall not guarantee investment in Costa Rica unless Government of Costa Rica approves activities to which investment refers to. In case of controversy regarding interpretation or applicability of Agreement same shall be subject to negotiations by the two governments and, if possible shall be solved immediately. If within three months after starting negotiations both governments cannot reach a satisfactory agreement, controversy shall be sent to an arbitrator selected by mutual agreement of parties and his judgment shall be final and binding pursuant to applicable principles of international law. If arbitrator cannot be selected within three months after such request, then President of International Court of Justice shall appoint arbitrator. Extradition Agreement with U.S.A., ratified by Law 7146 of Apr. 30, 1990. Agreement on Exchange of Tax information with U.S.A., ratified by Law 7194 of Aug. 29, 1990.

Inter-American Conventions signed in Panama on Jan. 30, 1975 on: Conflict of Laws concerning bills of exchange, promissory notes and invoices; Conflict of Laws concerning checks; International Commercial Arbitration; Letters Rogatory; The Taking of Evidence Abroad and The Legal Regime of Powers of Attorney to be used abroad; Inter-American Conventions on the International Return of Children and on Support Obligations, Montevideo, July 15, 1989.

Central American Agreement on Tariff and Customs Regime and its Annexes establishes common regime that includes: Import tariff based on Brussels Nomenclature and ad valorem duties, law on customs value of merchandise and its regulations, uniform customs code and its regulations, regulations on tax exemptions.

Party to Multilateral Trade Negotiations, The Uruguay Round, Final Act, Marrakech, Apr. 15, 1994 and Agreement Establishing the World Trade Organization, Marrakech, Apr. 15, 1994; Convention on Pacific Settlement of International Disputes, Hague, 1917; Inter-American Convention on Extradition, 1981.

1
CUBA LAW DIGEST

—Scope —

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(Abbreviations used are: Const.—Constitución de la República de Cuba [1976], amended in 1992 and 2002; C.C.—Código Civil Ley No. 59 [1987]; C.T.—Código de Trabajo Ley No. 49 [1984]; C.F.—Código de Familia Ley No. 1289 [1975]; Trademark Law—Decree Law No. 68 on Inventions, Scientific Discoveries, Industrial Models, Trademarks, and Denominations of Origin, of May 14, 1983; Decree-Law 160—In Respect of Patent Applications Concerning the Pharmaceutical and Chemicals Products for the Agriculture [1995]; Decree-Law 203—In Trademarks and Other Distinctive Signs [2000]; Law 77—Ley de la Inversión Extranjera [1995]; Cuban Dignity Act—Cuban Dignity and Sovereignty Act [1996]; Law 65—Ley General de la Vivienda [1988], amended by Decree Law 233—Decreto Ley No. 233, Que Modifica Artículos de la Ley No. 65, Ley General de la Vivienda [2003, am'd 2004]; Law 83—Ley de la Fiscalia General de la República [1997]; Law 51—Ley del Registro Civil [1998]; Law 7—Ley de Procedimiento Civil, Administrativo y Laboral [1977]; Notary Law—Ley No. 50, Ley de las Notarias Estatales [1984]; Law 72—Ley Electoral [1992]; Law 14—Ley del Derecho de Autor [1977]; Resolution No. 23/2003—Reglamento sobre el Régimen Laboral en la Inversión Extranjera [2003]; Resolution No. 11/2004—Reglamento sobre el Ejercicio del Trabajo por Cuenta Propia [2004]; Resolution No. 253/2003—Reglamento del Impuesto sobre Utilidades [2003]; Resolution No. 203/2003—Reglamento para la Oficina para la Tramitación de Asuntos Regístrales Inmobiliarios y Mercantiles para la Inversión Extranjera [2003]; Decree Law 234—Decreto-Ley No. 234, de la Maternidad de la Trabajadora [2003, am'd 2004]; Resolution No. 247/2003—Normas para la Inscripción de los Inmuebles, Títulos y derechos Reales en el Registro de la Propiedad [2003], amended by Resolution No. 249/2005—Normas y Procedimientos Para la Nueva Organización y Funcionamiento del Registro de la Propiedad [2005]; Resolution No. 20/2004; Resolution No. 617/2003—Reglamento para las Permutas [2003]; Resolution No. 49/2004—Reglamento sobre la Reserva para Pérdidas y Contingencias [2004]; Resolution No. 379/2003—Reglamento del Impuesto sobre Utilidades [2003]; C.N. Feb.—Casas Particulares Licenses Suspended, Cuba News, Feb., 2003 at 13.; C.N. Mar.—Euro to Circulate in Eastern Cuba Resorts, Cuba News, Mar., 2003 at 5.; C.N. Oct.—Castro Government Agrees to Drop Visa Requirement for Cuban Exiles, Cuba News, Oct., 2003 at 9; Resolution No. 22/2004 [Customs]—Aduana de Depósitos y Ferias [2004]; M.H. June—Foreign Investors Being Booted Out of Cuba, The Miami Herald, June 7, 2005; Resolution No. 77/2004—Ministro de Economía y Planificación [2004]; Resolution 65/2004—Transportation [2004]; Resolution 20/2004—Reglamento Sobre el Regimen Laboral en las Zonas Especiales de Desarrolo y el Contrato de Prestación de Servicios [2004]; Resolution 22/2004 [Labor]—Reglamento de las Relaciones Laborales de las Personas con Discapacidad [2004]; Resolution 413/2004—Instituto Nacional de la Vivienda [2004]; Resolution 80/2004—Banco Central de Cuba; Resolution 1/2005—Reglamento para la Actividad Laboral Durante el Paso a la Situación de Guerra [2005]; Resolution 15/2004—Reglamento Para el Tratamiento Laboral y Salarial Especial Aplicable a los Trabajadores Disponibles como Consequencia de las Medidas de Reestructuración de la Agroindustria Azucarera [2004]; Resolution 231/2004—Comercio Exterior [2004]; Resolution No. S-1/2004—Superintendencia de Seguros [2004]; Ruling Nov. 24, 2004—Consejo de Ministros [2004]; Resolution 10/2005—Finanzas y Precios [2005]; Instruction 16/2005—Finanzas y Precios [2005]; Resolution 71/2004—Rules Relative to Supervision of Collaborations [2004]; Instruction No. 7/2004—Aclaraciones Sobre la Nueva Legislación para la Maternidad de la Trabajadora [2004]; Resolution 9/2005—Reglamento Sobre el Ejercicio del Trabajo por Cuenta Propia [2005]; Resolution No. 8/2005—

Reglamento General Sobre Relaciones Laborales [2005]; Resolution No. 54/2005—Finanzas y Precios [2005]; Resolution No. 71/2005—Banco Central de Cuba [2005]; Resolution No. 346/2005—Reglamento Sobre El Arrendamiento de Viviendas, Habitaciones o Espacios [2005]; Resolution No. 339/2005—Instituto Nacional de la Vivienda [2005]; Resolution No. 12/2006—Nuevo Reglamento Para Las Permutas [2006]; Resolution No. 14/2006—Reglamento Complementario a la Ley General de la Vivienda [2006]; Resolution No. 15/2006—Normas Para la Colaboración Economica Que Cuba Recibe [2006]; Resolution No. 91/2006—Indicaciones Para el Proceso Inversionista [2006]; Decree-Law 254—Declarando Como Feriados los Días 31 de Diciembre y 2 de Enero [2007]; Decree-Law 173—Sobre los Bancos e Instituciones Financieras No Bancarias [1997]; Resolution No. 76/2000—Procedimiento Para la Apertura de Cuentas Para Operaciones en Moneda Libremente Convertible por Personas Juridicas [2000]; Resolution No. 245/2008—Normas Bancarias Para los Cobros y Pagos [2008]; L.T.P.—Ley de los Tribunales Populares [1997]; C.P.—Código Penal [1987]; Resolution No. 9/2008—Reglamento Generál Sobre las Formas y Sistemas de Pago [2008]; Resolution No. S-1/2008—Superintendencia de Seguros [2008]; Resolution No. S-3/2007—Superintendencia de Seguros [2008]; Decree-Law 263—Del Contrato de Seguro [2008]; L.M.—Ley de Migración [1976]; MFP Resolution 42/2006—Sobre Utilidades de los Establecimientos Permanentes en Cuba de Personas Jurídicas Extranjeras [2006]; MINVEC Instruction Letter 5-2161/2007—Con Respecto a la Aplicación de la Resolución 20/2007 del Banco Central de Cuba; MTSS Resolution 33/2007—Régimen Laboral del Personal Contratado Para Prestar Servicios en las Sucursales y Representaciones de Compañías Extranjeras en Cuba [2007]; Resolution No. 68/2008—Procedimiento Para la Concesión, Modificación y Cancelación de Facultades de Comercio Exterior, Asi Como la de Nomenclaturas de Productos Autorizados, a las Empresas Estatales y Sociedades Mercantiles de Capital 100 % Cubano [2008]; Resolution No. 15/2007—Aduana General de la República [2007]; Law 104—Del Presupuesto del Estado Para el 2009 [2008]; Resolution No. 39/2007—Bases Generales de la Seguridad y Salud en el Trabajo [2007]; Resolution No. 13/2007—Ministerio Para la Inversión Extranjera y la Colaboración Económica [2007]; and Decree-Law 250—De la Corte Cubana de Arbitraje Comercial Internacional [2007].)

Note: This revision incorporates legislation published in Gaceta Oficial de la República de Cuba through Mar. 31, 2009.

1 INTRODUCTION

1.01 CONSTITUTION AND GOVERNMENT:

Constitution promulgated on Feb. 24, 1976 and revised in 1992 and 2002.

Official name of country is Republic of Cuba. It is union of 14 provinces. Havana, its national capital, is located in province of Havana.

National Assembly of Popular Power is only organ with legislative power in Republic Deputies of National Assembly of Popular power are elected by direct and secret vote of citizens for term of five years. Counsel of Ministers reports to National Assembly of Popular Power. Council of Ministers is highest administrative and executive organ of Government of Republic. Number, denomination, and functions of central ministries and organizations that comprise Council of Ministers is determined by law.

Council of Ministers is composed of chief of state and government, who is president, first vice president, rest of vice presidents, ministers, secretaries, and rest of members determined by law. President, first vice president, vice presidents, and other members of Council of Ministers, chosen by president, make up its executive committee. Executive committee can decide questions, matters, and disputes submitted to Council of Ministers during periods between sessions of entire Council of Ministers.

Council of Ministers meets for two ordinary sessions each year. Extraordinary sessions may be solicited by at least one third of members or arranged by Council of State. In order for session to be held, at least one half of council members must be present. All sessions are open to public unless council decides it is in best interest of State to keep session closed.

Hierarchical structure of Government is as follows: (1) President; (2) first vice president; (3) vice presidents; (4) ministers of government; and (5) 31 organizations from central administration of State, which include 27 ministries and four institutes. (Const.).

1.02 CURRENCY:

Currency in Cuba had been peso and, until recently, United States dollars (USD) in full circulation throughout Cuba. However, as of Nov. 8, 2004 new currency is convertible peso; value of convertible peso is equal to that of one USD. All entities, including tourism enterprises, prohibited from accepting USD in commercial transactions; application of this measure extends to Cuban citizens and foreigners. Entities may now accept convertible peso, as well as other currencies, including EURO. Citizens may still possess unrestricted amounts of USD and freely convertible pesos. Purchase of convertible peso using USD subject to 10% tax. Exchange of all other forms of currency for convertible pesos remains exempt from taxation. Certain banking limitations exist in regard to USD. (Resolution 80/2004).

1.03 ELECTIONS:

To vote in Cuba, one must: (1) Be at least 16 years of age; (2) be permanent resident of Cuba for period of at least two years; (3) be registered in municipal electoral registry and in reports corresponding to electoral rolls of one's domicile; and (4) present one's identification card to Electoral College. Following individuals cannot vote: (1) Those who are mentally incapacitated; and (2) those who are imprisoned.

Any Cuban who is in full enjoyment of his political rights, and who possesses adequate level of instruction will be eligible to be elected as: (1) Delegate to Municipal Assembly for term of two years, provided he has reached 16 years of age, has his domicile registered, and has been nominated; (2) President or Vice President of Municipal Assembly, provided he has been elected previously as delegate to assembly; (3) Delegate to a Provincial Assembly for term of five years, provided he has reached 16 years of age, is resident of corresponding province, and has been previously nominated as candidate for Municipal Assembly of that province; (4) President and Vice President of Provincial Assembly, having been previously elected delegate to that Assembly; (5) Representative to National Assembly for term of five years, provided he has reached 18 years of age and has been previously nominated as candidate for Municipal Assembly; (6) President, Vice President, and Secretary of National Assembly, provided he has been previously elected as Representative to National Assembly; (7) Member of Council of State, provided he has been previously elected Representative to National Assembly.

Municipal Assembly consists of minimum of 30 delegates, one delegate per electoral district. Each delegate is elected by people who reside in such delegate's area. Provincial Electoral Commission determines total number of electoral districts as proposed by respective Municipal Electoral Commission of each district, taking into account number of inhabitants in each municipality.

Each delegate to Provincial Assembly is elected by votes of residents of municipality from which such delegate has been nominated. Provincial Assembly has minimum of 75 delegates.

National Assembly consists of one representative elected for every 20,000 inhabitants of municipality. If population of municipality is between 20,000 and 30,000, two representatives are elected. Representatives are elected by votes of people residing in their respective municipality. (Law 72).

1.04 HOLIDAYS:

Jan. 1 (Anniversary of Revolution); Jan. 2; Jan. 28 (Birth of national hero, José Martí); Feb. 24 (Grito de Baire); Mar. 8 (International Day of Women); Mar. 13 (Revolutionary Attack on Presidential Palace); Apr. 16 (Military Day); Apr. 19 (Bay of Pigs Victory); May 1 (International Day of Workers); May 17 (Day of Agrarian Reform); July 25; July 26 (Day of National Rebellion); July 27; July 30 (Fall of Frank País; Day of Martyrs of Revolution); Aug. 12 (Victory against Machado Tyranny); Oct. 8 (Fall of Commander Ernesto ``Che'' Guevara; Day of Heroic Guerrilla); Oct. 10 (Beginning of Wars of Independence); Oct. 28 (Disappearance of Commander Camilo Cienfuegos); Nov. 27 (Execution of Medical Students; Day of Student Mourning); Dec. 2 (Day of Disembarkation of Granma Expedition; Day of Revolutionary Armed Forces); Dec. 7 (Fall of Lieutenant General Antonio Maceo Grajales and Day of Fallen in Wars of Independence); Dec. 25; and Dec. 31. (C.T. 83 to 87) and (Decree-Law 254).

1.05 PUBLIC PROSECUTOR, OFFICE OF:

General Office of Public Prosecutor of Republic is organ of State that controls and preserves strict fulfillment of Constitution, laws, and other dispositions by organisms of State, economic and social organizations, and citizens. This office also represents State in prosecution of criminal actions. Office of Public Prosecutor is subordinate only to National Assembly of the Popular Power and to Council of State. Office of Public Prosecutor has certain objectives and functions that help it achieve these goals. Office is structured in following form: (1) General Office of the Public Prosecutor; (2) Provincial Offices of the Public Prosecutor; (3) Municipal Offices of the Public Prosecutor; (4) Judge Advocate's Office.

To be chosen for position of public prosecutor, individual must (1) Be qualified for exercise of right or confirmed by university or authorized official institution; (2) be Cuban citizen; (3) have good morals and enjoy good public opinion; (4) have reached 30 years of age for position of General Prosecutor or 21 years of age in other cases.

Following individuals cannot be chosen as public prosecutors: (1) Those whose physical or mental capacity are not apt to exercise adequately functions of public prosecutor; (2) those who have been convicted or punished while not being rehabilitated; (3) those who are subject to penal process.

Public prosecutor's exercise of his functions ceases in following cases: (1) Revocation; (2) separation; (3) resignation; (4) death; (5) items (1) or (2) in previous paragraph; (6) fulfillment of other duties or functions; (7) retirement. (Law 83).

2 BUSINESS ORGANIZATIONS

2.01 ASSOCIATIONS:

Cuban law recognizes following types of associations: (1) State entities; (2) cooperatives; (3) political associations; (4) other entities formed in compliance with laws; (5) nonprofit foundations; and (6) non-state entities with specific government permission to carry out their activities.

Associations are is governed in accordance with their organizational documents. Any

State-owned or governed entity is subject to provisions of Constitution of the Republic of Cuba.

Negligence attributable to association will also be attributable to association's governing persons. (C.C. 39 to 42).

Partnerships are also recognized under Cuban law, provided there is approval by Government and written partnership agreement. (C.C. 396 to 397).

See topic 2.02 Corporations.

2.02 CORPORATIONS:

Corporation may be formed with permission of Government by partners committing themselves, in writing, to contribute money, goods, or their labor, to reach objectives consistent with social interests of country.

Corporation acquires distinct legal personality upon its inclusion in public registry. By-laws, capital contributions of partners, terms of duration, and classification of corporation are regulated by special requirements. (C.C. 396).

Any joint ventures, national and foreign investors who are parties to international contracts, and companies with any level of foreign capital must, before inception, register with Cuban Chamber of Commerce. Within 90 days after end of their fiscal year, these companies must present annual report of their operations to Ministry of Foreign Investment and Economic Cooperation. These companies must also provide information to Ministry of Finance and Prices, corresponding tax administration, and any other entities established for other purposes. (Law 77).

Further, as part of their internal controls all associations allowed under C.C. 39, including all State enterprises, both private and joint ventures, are required to develop comprehensive accounting policies and procedures in accordance with Resolution No. 54/2005, Cuban Accounting Standards and Governmental Accounting, modified from time to time, including by Resolution No. 9/2007. Resolution No. 9/2007 adopts specific accounting norms for transactions in foreign currency or convertible pesos and revises financial reporting standards.

Policies and procedures must contain statement establishing accounting basis, as well as detailed information regarding association's accounting procedures and form of financial statements. Policies and procedures also must contain recordkeeping and retention policies. Financial records including work papers must be retained for five years from fiscal year end. Longer retention periods may apply to financial statements and annual reports. (Resolution No. 54/2005).

2.03 FOREIGN CORPORATIONS:

See category 14 Foreign Trade and Commerce, topic 14.04 Foreign Investment.

3 BUSINESS REGULATION AND COMMERCE

3.01 BANKS AND BANKING:

Banking system consists of government-owned banks, including Central Bank of Cuba, and subsidiaries, branches and offices of foreign banks. (Decree-Law 173).

Banking services include checking and savings accounts, facilitation of payment services, and making of loans. Legal persons allowed to maintain accounts in freely convertible currency with license from Central Bank of Cuba. (Resolution No. 76/2000).

Diplomatic missions, both consular and commercial, their officials, and foreign journalists accredited by Republic of Cuba may hold bank accounts in freely convertible currency and convertible pesos subject to bank regulations. (Resolution No. 71/2005).

Person who has savings account can arrange for portion of balance to be turned over to designated person (beneficiary) upon his or her death,, up to legal limit. Portion that beneficiary receives does not constitute part of his inheritance. In individual account containing funds accumulated during marriage, account holder can only dispose of half of balance, unless his spouse consents to designation of beneficiary. (C.C. 444 to 447).

Following payment methods are acceptable for sales of goods or services: (1) Cash; (2) bank transfers; (3) checks; (4) payment orders; (5) credit cards; (6) local letters of credit; (7) letters of exchange; and (8) promissory notes.

Electronically transferred payment is legally recognized upon acceptance by receiving bank.

Checks must be printed by Cuban banks to be accepted by bank branches. Bank account holders must maintain minimum balance or otherwise face penalties imposed by banks.

Vendors may grant commercial credit and come to agreement with buyers on interest rate where transactions demand payment in more than 30 days. Maximum interest rates are set by Central Bank of Cuba.

Permissible payment method is determined on basis of transaction value. Legal entities must receive authorization to transact in Cuban pesos, convertible pesos, or convertible currency. (Resolution No. 245/2008).

3.02 CONDITIONAL SALES:

See topic Sales (of Realty and Personalty).

3.03 CONTRACTS:

Legal relationship is established or modified or terminated by means of contract. (C.C. 309). Subject to certain limitations, contract may be written or oral. (C.C. 50 and 51).

Where terms of contract are vague or unclear, parol evidence may be used to establish intent of parties. (C.C. 52).

Contract may be entered into through representative. (C.C. 56 to 66).

For contract to be enforceable there must be mutual assent between parties to enter into agreement. Mutual assent exists if there was offer and acceptance of offer with regard to object of contract. Parties may establish covenants, clauses and conditions that they have agreed upon, unless contrary to law. (C.C. 310 to 312). Promise to enter into bargain made by means of offer obligates offeror not to revoke or modify it during term specified in offer.

Acceptance made by mail becomes effective for offeree upon mailing, but offeror is not bound until he receives it. (C.C. 317).

Contract is void if: (1) it is against public or State interests; (2) parties are not duly authorized to enter into agreement; (3) it is result of duress; (4) it relates to illegal act; (5) it does not satisfy legal formalities; (6) it is not intended to be binding; (7) it is meant as front for other types of actions or agreements; or (8) it is against respective corporate purposes of parties. (C.C. 67).

Rescission of contract allowed under certain circumstances, including mistake, fraud, or duress of one or more parties. (C.C. 69 to 80).

Ministry of Foreign Trade and Foreign Investment has established model clauses to be used, whenever possible, in connection with purchase contracts for importation of equipment. (Resolution No. 358/2006).

See topic 3.04 Frauds, Statute of.

3.04 FRAUDS, STATUTE OF:

Any act of corporation or association must be in writing. In addition, any contract for sum greater than 500 Cuban pesos must be in writing. (C.C. 51).

Civil Code also provides that purchase and sale of real estate must be evidenced by public documentation. (C.C. 339).

3.05 FRAUDULENT SALES AND CONVEYANCES:

See topic 3.03 Contracts.

3.06 INTEREST:

See topic 3.07 Loans.

3.07 LOANS:

Loan is obligation of one party to repay sum of money within set time period. Law does not allow private parties to charge interest. Interest may only be charged by banks at rates set by law. (C.C. 233 to 242).

3.08 LODGING:

Hotels, inns, and similar establishments are required to offer temporary lodging to user upon corresponding payment. These rooms must be maintained in appropriate conditions of hygiene, comfort, and security. User must use room and services in accordance with establishment's regulations and return goods provided him in appropriate condition. Lodging establishment may retain luggage and other property of user until payment is made. Lodging establishments are responsible for theft, loss, destruction, or damage to user's property, but are not responsible for theft or loss of users' objects, jewels, or money not entrusted to establishment for safekeeping. Lodging establishment is not responsible where loss or damage was caused by user or due to force majeure. (C.C. 438 to 443).

Private homes licensed by Government for foreign rental may also provide temporary lodging. Landlords are subject to taxation. (C.N. Feb.).

3.09 LOSS RESERVES:

State enterprises, associations, corporations, joint ventures, parties to international economic association contracts, and companies with totally foreign capital are obligated by law to establish and maintain reserves for losses and contingent obligations. Amount of loss reserves is set by law and depends on type and size of enterprise and size of profits. (Resolution No. 49/2004).

3.10 SALES (OF REALTY AND PERSONALTY):

Sales contract is perfected once seller and buyer agree upon goods being sold and price though neither has been delivered. Price is usually set forth in government-issued price lists. If goods being sold are not of category included in government price lists, then parties may agree on price.

Seller of goods is obligated to: (1) Warn purchaser of hidden defects goods may have; (2) keep property being sold in good condition until proper delivery takes place; and (3) guarantee legal and peaceful possession of goods sold. If dispossessed of all or part of goods acquired, buyer has right to demand from seller, refund of purchase price plus any incidental or consequential damages. (C.C. 335 to 345).

4 CITIZENSHIP

4.01 ALIENS:

See category 15 Immigration, topic 15.01 Aliens.

4.02 MIGRATION:

See category 15 Immigration, topic 15.02 Migration.

5 CIVIL ACTIONS AND PROCEDURE

5.01 LIMITATION OF ACTIONS:

See topic 5.02 Prescription.

5.02 PRESCRIPTION:

Prescription is method of acquiring right or extinguishing obligation through lapse of time. In general, civil claims prescribe after period of five years, if law has provided no other period.

Prescription term starts to run at time cause of action accrues. Actions not subject to prescription include those exercised by State or its grantee to recover real property, actions to recover bank account deposits, and inheritance claims. In case of disability (i.e., insanity, infancy), applicable period of prescription is tolled until disability is removed or ended. (C.C. 114 to 124).

Limitation of Actions.

Following actions are barred in periods designated: Five years: All civil actions unless otherwise indicated below. Three years: Actions relating to personal property. One year: Actions to recover possession of goods; actions to declare inefficacy of revocable legal transaction; actions arising out of insurance contracts, unless otherwise provided in contract; indemnification of damages and damages derived from illicit acts; actions regarding illegal enrichment; and actions to demand damages and damages produced in activities that generate risk. Six months: Actions regarding indemnification or warranty of sold personal property; warranty actions related to personal property purchased in commercial establishments; and actions derived from deficient performance of services. Three months: Action demanding periodic benefits.

Terms of prescription cannot be altered by agreement of parties, except for such cases as may be authorized in law. Certain actions are not subject to prescription time. (C.C. 114 to 124).

5.03 TORTS:

Person who tortuously causes harm or prejudice to another is liable. Indemnification for civil liability may take form of: (1) Restoration of property; (2) indemnification for damages; (3) indemnification for injury; and (4) indemnification for pain and suffering.

Restitution must be made of same property, including payment for deterioration or damage, when possible, if bona fide purchaser has not acquired it. Indemnification for material damages may take form of payment either for value of property or for damage thereto.

In case of indemnification for harm, consequential and incidental damages may be awarded. If several parties are liable, each will be responsible depending on degree of party's participation in tort. Parties are jointly and severally liable.

Parents or guardians are liable for damages caused by minors or incapacitated persons under their custody.

Owner of animal is liable for damages it causes, even if animal escapes from owner's control.

Legal entities are liable for damages and injuries caused to others by torts committed by their employees while engaged in job-related activities.

Constructors are liable for damages caused by building's total or partial collapse, and for detachment or defects of any of its parts, unless construction rules have been followed.

Tort of unjust enrichment is recognized and requires restitution in such cases.

Damages and injuries do not generate civil liability when perpetrator acts in self-defense, in fulfillment of duty, or while performing legal act with due diligence. In addition, there is no liability for perpetrator in cases of force majeure or acts of God, or when perpetrator acts while in state of mental derangement, transitory mental disorder, or is driven by insuperable fear. (C.C. 81 to 107).

6 COURTS AND LEGISLATURE

6.01 COURTS:

Court system is composed of municipal courts, provincial courts, and Supreme Court.

Municipal courts have jurisdiction over minor civil cases (not to exceed 1,000 Cuban pesos), family cases (including alimony), probate actions, and criminal cases with maximum penalty of one year and limited fines.

Provincial courts have jurisdiction over major civil cases (amount at issue greater than 1,000 Cuban pesos), marriage annulment cases, termination of parental rights, and appeals from municipal courts. (Law 7). Exception to 1,000 Cuban pesos jurisdictional requirement exists for domestic and foreign entities that must meet 5,000 Cuban pesos minimum (except for suits involving letters of credit or promissory notes). (Instruction No. 182/2006).

Supreme Court is highest appellate level court and has jurisdiction over constitutional issues and cases relating to enforcement of foreign judgments in Cuba. (Law 7) and (L.T.P. 15).

Decisions are made by three-judge panels in municipal and provincial courts (two lay judges and one professional judge who serves as president of panel), and by five judge panel in Supreme Court (two lay judges and three professional judges, one of whom is president). (L.T.P 23, 35, and 38).

6.02 JUDGES:

There are two types of judicial posts in Cuba: professional judges and lay judges.

Following are required to be elected to professional judicial post: (1) Degree earned from authorized official university or institution; (2) Cuban citizenship; and (3) enjoyment of good public opinion and possession of good morals. In addition, to qualify to be judicial candidate, it is necessary to have practiced as lawyer or as professor at school of law at one of country's universities for: (1) Ten years, if election is for Supreme Court; (2) five years, if election is for provincial court; (3) two years, if election is for municipal court.

In case of candidate for judge for military hall of Supreme Court, active military service is required in addition to above requirements.

President of Supreme Court may nominate candidates to electing body, waiving time periods listed above when circumstances do not permit observance of those requirements.

Following is required to serve as lay judge: (1) Maintenance of good attitude on job or project; (2) possession of adequate level of education, good morals and public opinion. In addition to these requirements, to be elected lay judge, it is necessary to be: (1) 30 years old, if election is for Supreme Court; (2) 25 years old, if election is for provincial court; (3) 21 years old, if election is for municipal court. In case of candidacy for lay judge for military hall of Supreme Court, active military service is required in addition to above requirements.

Following individuals may not be elected to judicial post: (1) Mentally or physically incapacitated; (2) those who have been sentenced for crime; and (3) those who are being charged with crime. (L.T.P. 42 to 44).

6.03 LEGISLATURE:

See category 1 Introduction, topics 1.01 Constitution and Government; and 1.03 Elections.

7 CRIMINAL LAW

7.01 SANCTIONS-PENAL CODE:

Sanctions for crimes committed are classified as principal or accessory. Principal sanctions include death, freedom deprivation, correctional work, fines, and reprimands. Accessory sanctions for accessory crimes include deprivation of rights, prohibition of practice of profession, suspension of licenses, prohibition to frequent certain places, and exile. Sanctions and terms are specified for each crime.

Death penalty is reserved by courts for most extreme cases and cannot be applied to minors under 20 years of age or pregnant women.

Deprivation of freedom can be perpetual or temporary. Temporary sanctions of freedom cannot exceed 30 years, but this term can be extended in certain cases. During incarceration, prisoners are expected to work, but may not be subjected to corporal punishment or humiliation. (C.P. 28 to 30).

8 DEBTOR AND CREDITOR

8.01 ASSIGNMENTS OF DEBTS:

In Cuba, creditor may assign debt owed to him without debtor's consent. For assignment to be effective, written agreement is generally required. Some debts may not be assigned. For example, those considered to be substantially connected to creditor, such as alimony or personal liability claims, may not be assigned.

Assignment is only effective against debtor as of date debtor is notified of assignment.

Assignor must deliver to assignee all documents evidencing assigned right(s). All accessories and attached rights, including liens, are transferred with assigned credit. Any assignment is with recourse to assignor.

Debtor may also assign debt obligation, but only with consent of creditor. Any assignment attempted without consent of creditor is null and void. (C.C. 256 to 265).

8.02 ATTACHMENT:

See topic 8.04 Creditor Rights.

8.03 COLLATERAL SECURITY:

See topic 8.09 Pledges.

8.04 CREDITOR RIGHTS:

Creditor is authorized to demand total or partial fulfillment of obligation. Where no term is specified, creditor can demand fulfillment at any time. Such demand must be met within 15 days.

Cause of action upon failure to perform exists at moment debtor knew or should have known of inability to perform. Law provides for default place of performance in absence of stipulation by parties.

Obligation can be fulfilled at any time prior to end of specified term. Generally, reciprocal or bilateral obligations must be fulfilled at same time.

When debtor owes several debts to same creditor and does not specify to which debt particular payment applies, creditor has right to apply such payment as he chooses, unless debtor objects immediately. Otherwise, law specifies method for determining to which debt payment applies.

Joint and several creditor receiving fulfillment of obligation must reimburse other creditors their respective pro rate portions of obligation. Debtor can fulfill payment obligation to any one of joint and several creditors. Such payment extinguishes obligation with respect to others, in total or to extent of payment.

Monetary obligations must be paid in national currency, unless otherwise authorized by Government.

Creditor cannot refuse to accept payment or satisfaction of obligation without legitimate reason. Upon creditor's delay, debtor may credit amount of payment to debt owed and thereby be freed of debt. Consignment may also occur where creditor is absent or disabled when payment is due, creditor's address becomes unknown, or evidence of obligation is lost. Creditor must compensate debtor for damages caused by creditor's delay.

Debtor who defaults must pay additional fee to creditor.

Debtor may pledge, in writing, personal property to collateralize debt. Personal property of third-party may also be pledged on behalf of debtor, with third-party's consent. Creditor may not use property pledged and must conserve it. Where debtor fails to pay creditor, however, creditor may sell on property pledged through auction.

Creditor has right to retain or withhold goods belonging to debtor, until such time as debt is satisfied. Where State exercises this right as creditor, in event of default, State may proceed to sell goods via State's commercial network. Where State is creditor, debtor may guarantee payments by arranging that specified amounts be withheld from his wages.

Third-party, as surety, may agree, in writing, to satisfy debtor's obligations, up to full amount owed, if debtor defaults. Creditor may not ask third-party surety to make payment without first requesting same of debtor. Third-party surety who satisfies debtor's obligation then retains original creditor's rights against debtor. Surety's obligation is extinguished if creditor does not demand that debtor make payment within three months of stipulated deadline. (C.C. 233 to 285).

See topic 8.01 Assignments of Debts.

8.05 GUARANTY; BOND:

By virtue of guaranty, person agrees to satisfy payment obligation of debtor if debtor defaults. Guaranty agreement must be in writing. Creditor may not request payment from guarantor unless demand has first been made to debtor. Guaranty agreement is considered separate agreement and promise collateral to principal obligation (between creditor and debtor).

When debtor fails to perform, guarantor must do so and becomes subrogated in creditors' rights against debtor. The creditor must deliver to guarantor all documents evidencing principal obligation. Termination of principal obligation terminates collateral guaranty agreement. Also, guaranty agreement terminates if creditor does not claim performance during three months following due date of obligation. (C.C. 266 to 285).

8.06 HOMESTEADS:

See topic 8.07 Housing.

8.07 HOUSING:

Housing laws promote construction and repair of housing by: micro brigades, State-owned entities, agricultural cooperatives, and individuals. Laws allow population to have second home in vacation area. Other than that exception, no one is allowed to have more than one home.

National Housing Institute is government agency in charge of issues and policy relating to urban and rural housing. (Law 65).

Micro Brigades.

Government organizes micro brigades of workers to construct and repair housing. Workers involved in construction of houses are entitled to receive certain percentage of houses built at price set by National Housing Institute. Remaining housing goes to National Housing Institute for distribution. (Law 65).

State-owned Entities.

State-owned housing will be distributed by National Housing Institute in manner consistent with government housing policy. One government-owned bank (Banco Popular del Ahorro) handles sale and financing of government-owned housing. National Housing Institute may also lease housing to public. (Law 65).

Individuals.

National Housing Institute may turn over barren lots that belong to State to individuals for construction of housing. Those individuals have perpetual right to surface of lots. Terraced roofs may also be used to construct housing. Once individual has finished building new house, any existing house he may have must be sold to Government, if individual already owns permanent residence. Any construction project by individual must be approved by National Housing Institute.

Government banks may provide financing for conservation, remodeling, and expansion of individual housing and multifamily buildings, construction of new housing or buildings, and acquisition of barren lots or roofs. Repayment of such loans is subject to such terms and conditions as may be set by bank, but generally require repayment through withholding of salary. (Law 65).

Housing Exchange.

Proprietors may exchange his house for that of another with approval of Municipal Director of Housing. This is known in Cuba as ``permuta.'' Exchange of homes must be approved by National Housing Institute, through Municipal Directors of Housing. Exchange may be voluntary or compulsory and bilateral or multilateral. (Law 65). These exchanges may only occur: (1) Between housing proprietors; (2) between parties where one is lessee or usufructuary; (3) when party is solicited with intention of ending co-ownership of home or granting independence to co-occupants; (4) when initiated by lessee of State home, to grant independence to co-occupants, as long as result is solution of humanitarian or social problem.

Special provisions for exchange vary by municipality. Parties interested in exchanging housing must present application before official designated by Municipal Director of Housing along with other required documentation. (Law 65). Parties soliciting exchange are also required to provide sworn declaration including: (1) General party information; (2) whether or not any construction was performed on home without prior approval; (3) composition of family occupying real estate to be exchanged and where said occupants will reside after exchange, specifying presence of any disabled, minor, or chronically ill individuals; (4) reasons for housing exchange; (5) whether or not proprietor intends to leave country permanently within four years. Municipal Director of Housing must analyze application and verify accuracy prior to approval. Decision is rendered within 30 days. If approved, Municipal Director of Housing issues Certification for Exchange, which is valid for 60 days after issue. Municipal Director of Housing maintains registry of exchanges.

Exchange of homes is not authorized under following circumstances: (1) Motive for exchange lucrative in nature; (2) misrepresentation exists; (3) results in negative effects to co-occupants; (4) one proprietor is permanent lessee due to illegal actions, except for cases in which humanitarian reasons render said action recommendable and state patrimony remains unaffected; (5) one proprietor expresses intention to leave country permanently and housing to be obtained through exchange is of equal value or lesser to current housing and no humanitarian reasons render said action recommendable.

Administrative Exchange.

Proprietor who exchanges home for State housing will be credited against price for home received for payments on current home, minus corresponding depreciation. If amount of payments made exceeds price of State housing received, exchange is granted without right to reimbursement for difference. If amount of payments made is less than price of State housing, proprietor is required to pay State for difference. (Law 65).

Compulsory Exchange.

Housing exchange may be compulsory in nature when intended to end existence of shared title or when proprietor or lessee of home decides to become independent of co-occupants. Compulsory exchange may be requested by one party and becomes compulsory to other party upon approval of Municipal Director of Housing. (Resolution No. 12/2006). (Law 65).

Inheritance.

Houses in urban areas may be inherited under following certain circumstances: (1) Testamentary or legal heir lives in house at time of decedent's death; and (2) house would remain empty upon death of decedent because he was sole occupant. If Government decides that house is of social interest, Government may, under certain circumstances, take house and provide heir or beneficiary with substitute. (Law 65). If substitute is of lesser value than original, State will pay heir or beneficiary amount of difference. If substitute is of greater value, heir or beneficiary is not obligated to pay difference. (Resolution No. 14/2006). If decedent dies intestate, house may be inherited under certain other circumstances. (Decree Law 233).

Donation of Housing.

Transfer of housing in urban areas by donation may be processed through Notary Public with prior approval of Municipal Directors of Housing of corresponding territory. (Decree Law 233). Approval will only be granted in cases where recipient is donor's spouse, was donor's spouse for minimum of two years, had child while married to donor, is relative up to fourth degree of consanguinity or roommate for over ten consecutive years. (Resolution No. 14/2006).

Buying and selling of housing is prohibited between private parties. In all cases of proposed sale only possible for Municipal Directors of Housing to acquire housing on behalf of State. Proprietor is paid price legally established by Government less any amount owed to Government by seller. (Decree Law 233). Proprietors who wish to sell housing may submit declaration of intent orally or in writing to Municipal Office of Housing. (Resolution No. 14/2006).

Proprietors of vacant land who are unable to utilize property for construction of private home may seek exchange for similar State-owned vacant land through Municipal Office of Housing. If exchange is not possible or proprietor rejects proposed property, Municipal Office of Housing will offer to purchase vacant land on behalf of State. Proprietor of vacant land may also donate or sell such property to another private party with approval of Municipal Director of Housing. (Resolution No. 14/2006).

Proprietors may lease use of roof of home, with or without payment, by another private party for construction of housing subject to following conditions: (1) Construction is possible; (2) no urban restrictions obstructing action exist; (3) action is approved by Provincial Office of Housing; (4) lessees are selected to build own housing. Interested parties may file application for approval with Municipal Director of Housing. (Resolution No. 14/2006).

There are specific provisions under law for ownership and maintenance of housing in rural areas, including provisions regarding sale, exchange and inheritance of housing and farms in rural areas. (Law 65).

8.08 LIENS:

See topic 8.07 Housing.

8.09 PLEDGES:

Pledge consists of security interest in personal property to secure performance of obligation and its priority payment right. If obligation is not performed at maturity, creditor may foreclose on security interest and have pledged property sold at public auction. Proceeds from sale are set for repayment of debt. Remaining proceeds must be delivered to debtor.

Pledges are effective if in writing, and must state name and domicile of parties, value and description of property, location, duration of agreement, and obligation being secured by pledge. No registration is required. Creditor has obligation to maintain and guard pledged property, but may not use it. (C.C. 270 to 274).

See topic 8.04 Creditor Rights.

9 DISPUTE RESOLUTION

9.01 ARBITRATION AND AWARD

Where commercial agreement is governed by Foreign Investment Act, parties may designate any forum of their choosing in relevant constituting documents, including foreign courts and foreign arbitral bodies, for resolution of contractual disputes. (Law 77) and (Decree-Law 250). Parties may agree to substantive law applicable to commercial disputes heard by Cuban Court of International Commercial Arbitration. (Decree-Law 250).

Cuba is party to New York Convention of 1958 on recognition and Enforcement of Foreign Arbitral Awards, ratified Dec. 1974. Process of enforcement and nullification of Cuban and foreign arbitral awards is governed by Law on Civil, Administrative, Labor and Economic Procedures, as amended by Decree-Law 241.

9.02 MEDIATION

As alternative to resolution of commercial conflicts by Cuban Court of International Commercial Arbitration, Cuban Chamber of Commerce offers voluntary and free mediation services. Agreement reached in mediation may be binding where agreement represents effective resolution of conflict. (Resolution No. 13/2007).

10 DOCUMENTS AND RECORDS

10.01 NOTARIES:

Individual may be notary if he is: (1) Cuban citizen; (2) attorney-at-law; (3) of good moral character and reputation; and (iv) approved by Ministry of Justice. Notary Law provides detailed description of duties and functions of notary in Cuba, as well as methods for notarizing documents. (Law 50).

10.02 RECORDS:

Cuba maintains records and registries regarding vital statistics, citizenship, formation and dissolution of associations, intellectual property rights, real property, maritime property, aircraft, motor vehicles, and cattle. (C.C. 108; Law 51).

See categories 14 Foreign Trade and Commerce, topic Foreign Investment; Property.

10.03 SEALS:

Cuba has eight official seals. Most consist of same general design with captions reading ``República De Cuba … Sellado Oficialmente.''

11 EMPLOYMENT

11.01 EMPLOYMENT CONTRACTS:

Minimum age required to be employed is 15 years. Entities permitted to directly establish labor contract with individuals at least 17 years of age. In exceptional cases, Director of Municipal Labor may authorize employment of 15 or 16 year old who fulfills certain prerequisites. (Resolution No. 8/2005). Employment of those under 18 years of age prohibited when job entails exposure to certain risks. Students may seek employment only as authorized by law. (C.T. 27).

Labor relations formalized through labor contract coordinated by employer and laborer. (C.T. 22). Contracts for employment may be for: (1) indeterminate amount of time; (2) predetermined amount of time or completion of specific job or task; (3) domicilio; or (4) apprenticeship. (Resolution No. 8/2005).

Employer may subject employee to period of probation not to exceed 30 days. Probation period may, however, be extended for additional 30 days when occupation involved requires mid-level or superior skill. In exceptional cases authorized by State Committee of Labor and Social Security, probation period may be up to 180 days. For maritime workers, probation period may extend up to duration of first campaign or journey. During probation period, either party may terminate labor agreement. At end of period, if neither party desires to terminate relationship, they may draft employment contract. (C.T. 34 to 36).

Employee may transfer from one workplace to another, either temporarily or permanently, within employer.

Employment ends in any of following cases: (1) Agreement of parties; (2) initiative of either party; (3) military service; (4) expiration of employment contract; (5) completed performance of work that was agreed to in employment contract; (6) retirement; (7) death; or (8) dissolution of employer.

Employer may terminate employee for any of following reasons: (1) Employee's ineptitude; (2) lack of capacity or fitness to perform job; (3) employee's unwillingness to accept responsibility for required tasks; (4) partial invalidity; (5) lack of discipline; (6) imprisonment; or (7) failure to return from maternity leave.

At termination of employment contract, employee has right to collect salary for labor he has completed and corresponding pay for vacation time he has accumulated up to that time. (C.T. 22 to 60).

Persons may also be self-employed if approved by Government and person conducts business as set forth in law. Generally, to be self-employed: (1) Work must complement State activities; (2) person may only offer products or services to individuals; and (3) person must carry appropriate license.

Legally approved self-employment activities are determined by Municipal Directors of Labor upon evaluation of employment situation and services offered in corresponding municipality. License for self-employment is granted only for individuals who are Cuban citizens or permanent residents at least 17 years of age and who (1) are retired for any reason, (2) disabled, (3) display diminished capacity for labor, (4) housewives, or (5) have been discharged from their place of employment. Furthermore, no person will be allowed to be self-employed unless all possibilities for government employment have been exhausted. Self-employed individuals are prohibited from hiring additional employees, except family members. (Resolution 9/2005).

License issued by Municipal Directors of Labor is valid for two years from date of concession and may only be used to conduct business in approved area for which license was granted. Self-employed individual is responsible for payment to Municipal Administration Council for utilization of assigned area. Self-employed individuals are prohibited from offering products or services to any entities, including those owned by State and those associated with Foreign Investment. (Resolution No. 11/2004).

Self-employed individuals are subject to minimum monthly tax established by Municipal Administration Council depending on activity. (Resolution No. 253/2003).

Disabled persons are permitted to participate in labor force on voluntary basis. Employment of such individuals is regulated and supervised by Program of Employment for Disabled Persons. Labor relation must be formalized by contract between administration of employing entity and worker. (Resolution 22/2004 [Labor]).

Special provisions have been adopted for sugar industry workers unemployed due to structural changes. (Resolution 15/2004).

All rules concerning labor and employment may change during time of war. (Resolution No. 1/2005).

Exemptions from tax imposed on use of Cuban workforce are available for certain foreign diplomatic or consular officers, among others. (Resolution No. 198-2006).

11.02 LABOR RELATIONS:

Decree Law No. 132 of Apr. 9, 1992, established dispute-resolution body called Base Organization of Labor Justice (Organos de Justicia Legal de Base, OJLB). OJLB consists of five members, representative of workplace administration, union representative, and three workers elected in general assembly. Generally, OJLB resolves disputes within ten days of filing written or oral complaint with board member. In most cases, OJLB decisions cannot be appealed. Only when sanction includes firing or permanent transfer is decision subject to appeal in courts. However, workers' rights cases may always be appealed.

Labor laws contain provisions regarding worker safety, women's rights, discipline of workers and workplace safety and hygiene. (C.T. 146 to 219) and (Resolution No. 39/2007).

Those contracted by concessionaires or hired to work in areas deemed ``special development zones'' must have approval from corresponding government employing entity. Labor relation between aforementioned workers and employers must be formalized contractually. (Resolution 20/2004).

Time for Work and Rest.

Normal workday is eight hours, and normal workweek is 44 hours. These specifications can be adapted for cyclical or seasonal activities. Days of work can be reduced for: (1) Employees who experience prolonged exposure to conditions that affect their health; (2) adolescents; and (3) partially disabled employees. Work schedule is established in centralized manner by State Committee of Work and Social Security and provincial governments.

Overtime must be approved by management of employer and corresponding union organization.

Employees may not be forced to work overtime hours, except in following cases of social interest: (1) To complete urgent tasks in defense of country; (2) to prevent or to eliminate consequences of public catastrophe or accident; (3) to make urgent repairs of buildings, when those structures place health or life of workers or population in danger; (4) to avoid paralysis of production or services; (5) to complete jobs designed to reestablish public services or repair consequences of natural disasters that affect those services; (6) to replace unexpected absence of employees whose work cannot be interrupted; and (7) intense seasonal work that must be fulfilled by certain date.

Notwithstanding foregoing, employees may not be forced to work more than four overtime hours every two consecutive days, more than two shifts in a row every week, or more than 160 extra hours every year. Law establishes guidelines for overtime pay.

Employees may take, within each day of work, 30 personal minutes for rest and necessities. Break of 30 minutes is also allowed for lunch.

Employees have right to weekly rest of minimum of 24 uninterrupted hours. This day of rest is generally Sunday. Where production cannot be interrupted, required weekly rest period will be given any other day of week. In exceptional cases where employee must work more than one week straight, employee has right to enjoy accumulated weekly rest when period of uninterrupted labor is completed.

On holidays and days of national commemoration, all work ceases, with exception of sugar harvesting and other urgent agrarian industries, other industries of continual production, transportation services, hospitals, pharmacies, gas stations, funeral homes, hotels, radio and television transmission, lodging services, recreation centers, tourist attractions, and other basic public services.

Employees have right to month of paid vacation per every 11 months of effective employment. For purposes of this law, month consists of 30 days. Employees who have not worked 11 months still have right to paid vacation, duration of which is proportional to time of employment. (C.T. 66 to 98).

Law specifies rights of female workers and requirements for eligibility in regard to maternity leave and assistance; these rights also applicable to adoptive parents for all matters concerning children. Generally, mother must begin period of six weeks leave during 34th week of gestation and is allowed up to 12 weeks leave after giving birth. Only mothers who have completed no fewer than 75 working days, as defined by State, during 12 months prior to taking leave are eligible for economic assistance. During entire period of maternity leave, mother receives economic assistance from Social Security equal to average weekly salary of previous 12 months. In cases where mother was not employed for previous 12 months was receiving aid for reasons of illness or accident, amount of economic assistance is determined by salary level that would have been paid if mother had been working. Upon expiration of post partum leave, mother may opt to return to work or care for child until one year after birth. During this period mother may receive social assistance upwards of 60% of amount of assistance rewarded during maternity leave. Parents of children who have physical, mental, or sensory disability are entitled to unpaid leave until child reaches three years of age. In case of mother's death during post partum leave, father receives all rights granted to mother, including period of leave and assistance upon meeting same requirements. If for just reasons father cannot assume responsibility, he may designate maternal or paternal grandparents or sibling as beneficiary of rights in order to care for child up to one year after birth. (Decree Law 234 am'd 2004, Instruction No. 7/2004).

11.03 SALARIES:

Salaries are determined according to principles of socialist distribution for each capacity in every job. Employees receive same salary for same work without regard to racial, sexual, age, or cultural distinctions. State guarantees every employee who completes his work a minimum monthly salary. Those who work less receive minimum salary proportional to amount of time spent working.

Average salary is paid to employees when they fulfill social and State obligations on certain days, including days of national commemoration, and that salary is calculated according to procedure established by specific legislation.

Salary depends on complexity of job, performance rendered, conditions of job, and other factors. Forms of payment include job-based or performance-based salaries. Salary is paid in national currency at least once a month. (C.T. 99 to 107).

Supplementary merit-based compensation for all workers employed by State entities is permitted. Merit-based compensation may be unlimited, where evaluation of performance may be directly linked to results of production (i.e., finished goods) or services (i.e., completed service). Where merit indicators are not directly tied to production or services, merit-based compensation supplement is limited to 30% of base compensation. (Resolution No. 9/2008).

Employees who work at night receive higher salaries than those who work during other shifts. In some occupations, rate of pay is established for years of service.

Employers are obligated to pay their employees base salaries, salary increases, and other required payments. When employees' work is interrupted due to causes outside of their control, employees are guaranteed part of their wages.

Employees receive wages when they take leave of absence to: (1) Serve as deputy, delegate of power, or judge; (2) participate as delegate or invitee at conference or congress that honors Government; (3) answer summons from court or Office of the Public Prosecutor or any other organ of investigation; (4) fulfill one's military duty; (5) participate in properly authorized sports or cultural activities; (6) attend to death of parent, spouse, sibling, son, or daughter; (7) undergo medical examinations by their supervising administration or to donate blood; (8) be detained or imprisoned when accused is not punished; or (9) fulfill any other obligation that law foresees. (C.T. 108 to 129).

11.04 SOCIAL SECURITY:

State guarantees protection of worker, his family, and general population through Social Security. Law determines who is protected on case-by-case basis. Employers contribute to Social Security expenses without withholding from its employees. (C.T. 268). Social Security contribution for 2009 is set at 14% for most employers, including State entities, production cooperatives, and political organizations. (Law 104). Failure of employer to pay worker's Social Security contributions does not deprive worker or his family of right to Social Security. Social Security protects those who are sick, victims of some common or work-related accident, maternity, invalidity, old age, or death.

Benefits of Social Security include: (1) Medical assistance; (2) physical, psychological, or labor rehabilitation; (3) funeral services.

Nonmonetary benefits include: (1) Medication and food during worker's stay at hospital; (2) orthopedic and prosthetic devices in cases of work-related accidents or illnesses; (3) medication in cases of work-related accidents or illnesses when worker does not require hospitalization.

Monetary benefits include: (1) Subsidies for illnesses or accidents; (2) economic benefits for maternity; (3) pensions for total or partial invalidity; (4) pensions for age; (5) pensions for death of worker or someone else receiving pension. These monetary benefits can reach 90% of worker's average salary. (C.T. 266 to 295).

12 ENVIRONMENT

12.01 NATURAL RESOURCES:

Ministry of Science, Technology and Environment regulates use of natural resources to ensure proper use and preservation. This institution dictates environmental regulations.

Endangered species are subject of special protection by State, including establishment of mechanisms for regulation to guarantee conservation.

Ministry of Science, Technology, and Environment also works with Ministry of Agriculture to study and investigate effects of introducing foreign species or resources to island.

Both Ministries are responsible for establishing regulations for import-export of species and natural resources.

Landscaping resources are also object of preventative and protective measures. Areas regulated in connection with landscaping resources include design of avenues and roads, lines of communication of electricity, facilities of production or transport of energy, airports and seaports, and forest activities. Corrective measures can be ordered to remedy any damages.

Certain regulations regarding pollution from certain shipping vessels have been implemented in connection with International Convention for Prevention of Pollution from Ships (MARPOL) Convention. (Instruction DSIM No. 12/2006).

13 ESTATES AND TRUSTS

13.01 DEATH:

Disappearance of person from his domicile where there is no information as to his whereabouts for period of more than one year gives rise to presumption of absence. Person declared absent is represented by spouse or other relative as may be determined according to law. Upon three years of person's disappearance, individual may be declared presumed dead.

Persons believed to have been involved in aircraft, marine or natural disaster may be presumed dead within six months of date of such event. If such event was military in nature, period is one year.

Upon presumption of death, any interested parties can move to exercise any rights to which they would be entitled upon such individual's death. (C.C. 33 to 36).

13.02 DECEDENTS' ESTATES:

See topics 12.03 Descent and Distribution; Executors and Administrators; Wills; category 8 Debtor and Creditor, topic 8.07 Housing.

13.03 DESCENT AND DISTRIBUTION:

Intestate succession takes place when person dies without having executed will or will is declared judicially void or invalid.

In case of intestacy, net estate is distributed to surviving family members according to their relationship to decedent, as follows: (1) First to direct descendants; (2) second to parents; (3) third to surviving spouse; (4) fourth to grandparents; and (5) last to brothers and sisters of decedent. If decedent is not survived by any of foregoing persons, his estate escheats to State. (C.C. 466 to 475 and 509 to 541).

Direct descendants include children who inherit in their own right and other descendants who inherit by right of representation. Among children, inheritance is divided in equal parts without prejudice to rights of spouse and parents who are economically dependent upon decedent.

Parents inherit in equal parts, without prejudice to right of surviving spouse. Parents economically dependent upon decedent have equal rights with descendents and surviving spouse, and must inherit portion equal to theirs.

Surviving spouse has equal share to that of children and to parents economically dependent upon decedent. If decedent has no descendants or parents, surviving spouse inherits entire estate.

See category 3 Business Regulation and Commerce, topic 3.01 Banks and Banking.

13.04 ESCHEAT:

See topic 12.03 Descent and Distribution.

13.05 EXECUTORS AND ADMINISTRATORS:

See topic 12.03 Descent and Distribution.

13.06 INTESTACY:

See topic 12.03 Descent and Distribution.

13.07 WILLS:

Estate is created either by will or by operation of law. Former is called testamentary and latter, intestate. Heir is successor of all or part of assets, rights, and obligations of testator. Legatee may only inherit specific assets or rights, but not obligations.

All persons may inherit except those guilty of serious offenses against testator or another heir or beneficiary of inheritance. Conclusive abandonment of country is also grounds for incapacity to be heir or legatee. Will cannot be made by means of legal representative or third person.

Will may be revoked in whole or in part with same formalities as those required for its formation. Subsequent will is deemed to revoke previous one, except when testator has expressed otherwise.

Any person or legal entity may be designated as heir or legatee. Designations of legatees cannot be made subject to conditions or terms.

Wills may be ordinary or special. Notarial wills, handwritten wills and those given before consular official are ordinary. Notarial will requires two legal competent witnesses. Testator may manifest his will verbally or in writing. Notary then drafts will, conforming it to terms stated or written by testator.

Handwritten will must be written and signed entirely by testator's own hand, indicating date on which it is executed. If testator cannot sign with his own hand, due to sickness or other physical impediment, any witness to execution may do so at testator's request, in which case signor shall indicate reason that impedes testator from signing will.

If will is executed before consular official, testator remits authenticated copy to State Department for purpose of having it inscribed in appropriate registry.

Special wills are those executed by: (1) Cuban travelers and crew members on Cuban ships or aircraft on long trips, when they are in imminent danger of death, made before commander thereof and two witnesses; (2) soldiers on campaign in time of war, and citizens who live in territories where combative actions are taking place, made before highest ranking officer; and (3) person in imminent danger of death. Special will expires if testator does not die during special situation and 30 days have passed since he has had opportunity to make will in ordinary form.

Freedom to make will is limited to half of inheritance when there are protected heirs. Surviving spouse, children, and ascendant relatives are considered protected heirs if not able to work and economically dependent upon testator. Protected heirs inherit in equal parts.

Execution of will is made either by heirs appointed therein or by executor entrusted by testator. (C.C. 476 to 508).

14 FAMILY

14.01 ADOPTION:

Adoption creates same parental tie between adopter and adoptee as between parent and child. Adoption relationship gives rise to same rights and duties, including rights to inheritance.

In order to qualify to adopt, adopter must be: (1) At least 25 years of age; (2) in full enjoyment of his civil rights; (3) in situation to meet adoptee's economic needs; and (4) of good moral character and have ability necessary to fulfill duties parent has towards child. Adoption by married couple is only situation in which more than one person can adopt child. Adopter(s) must be at least 15 years older than adoptee.

Only children who are younger than 16 years of age and who meet any of following criteria, can be adopted: (1) Child's parents are unknown; (2) child's parents have abandoned him; (3) child, for whatever reason, is in state of abandonment and does not receive proper care from family or other capable persons; (4) child's parents have died or have been deprived of parental authority; or (5) child's parents have given him or her up for adoption.

Persons including child's grandparents, aunts and uncles, or any older siblings who act as guardians for child may, under certain circumstances, oppose adoption. (C.F. 99 to 116).

14.02 ALIMONY:

Alimony (also referred to as support or maintenance) includes that which is necessary for person to live: sustenance, housing, clothing, and in case of minor children, education, recreation and development. Any alimony or support payment is proportional to economic ability of obligor. Parties entitled to demand alimony and maintenance include spouses, minor children, and any other person who is rightful dependant by virtue of being impeded from supporting himself due to age or incapacity. (C.F. Title III).

See also topic 13.04 Divorce and Annulment.

14.03 COMMUNITY/MARITAL PROPERTY:

Following marital property is deemed to be community property: (1) All salaries, wages, pensions, and other forms of income that either spouse earns during marriage as product of work or social security; (2) property acquired during marriage; (3) fruits, profits, or interest collected or earned from marital property.

Following types of property are deemed not to constitute marital property: (1) Chattel acquired by each spouse before marriage; (2) chattel acquired during marriage by each spouse through inheritance or through exchange or substitution of one's private goods; (3) chattel acquired by each spouse with his own money; (4) sum of what each spouse charges or collects during times of debt during marriage that corresponds to amount or credit constituted in his favor before marriage payable in installments; and (5) chattel of exclusive personal use.

Spouses together are financially responsible for following: (1) Maintenance of family and expenses that are incurred in education and formation of children; (2) all debts and obligations incurred during marriage, by either spouse, except in cases where consent from both spouses is necessary to incur debt; (3) profits and interest earned during marriage from obligations to which each spouse subjected his private goods and goods of community; (4) minor repairs or conservation of chattels made during marriage.

Debts incurred by one spouse before marriage do not become obligation of both spouses.

Spouses are joint administrators of their chattels, although each individually may act in such capacity and acquire assets for use and consumption of family. Neither spouse may exert act of dominion over marriage chattels without prior consent of other spouse, except in very limited circumstances. (C.F. 30-37).

See topics 13.05 Husband and Wife and 13.04 Divorce and Annulment.

14.04 DIVORCE AND ANNULMENT:

Divorce can be obtained through judicial ruling or notarized document. Divorce will be effective upon spouses' mutual accord or at such time as court verifies that marriage has lost its purpose for spouses and children. Either spouse can file for divorce.

Divorce results in: (1) Dissolution of marriage on day of spouses' agreement or ruling comes into effect; (2) separation of marital assets; and (3) termination of right of inheritance between spouses.

If spouses have lived together for more than one year or procreated during marriage, court shall grant alimony in following cases: (1) For spouse who has no employment and other means of support, alimony will be temporary while spouse finds employment and will be paid by other spouse for period of up to (i) six months if no children are under care and guardianship, or (ii) one year, if any children exist; (2) for spouse who, due to incapacity, age, illness, or some other insurmountable impediment, is disabled and cannot work and, in addition, lacks other means of support, this alimony will be maintained while impediment persists.

In divorce ruling, court will determine custody of and visitation rights for children. Court may also terminate parental rights. Court will establish amount of child support payments to be made in proportion to needs of children and income of parents.

Law also contains provisions on seeking and granting of marriage annulments in certain circumstances.

There are also provisions for divorces and annulments granted abroad.

In divorce or annulment, marital property is divided in half between spouses or, in case of death, between survivor and heirs of decedent. Either of spouses can renounce all or part of his rights to marital property in writing.

When no agreement can be reached by spouses for division of marital property, court can appraise and liquidate assets. If parties do not seek intervention of court within one year of dissolution of marriage, each spouse will remain sole owner of chattels in his possession. Court will also determine which marital assets it considers necessary or convenient for education and development of children and award those marital assets to spouse having custody of children. (C.F. 45 to 64).

14.05 HUSBAND AND WIFE:

Law provides that spouses should live together, remain loyal, considerate, and respectful of one another, and help each other. Spouses are obligated to care for their family and to cooperate with one another in education, formation, and direction of their children consistent with principles of socialist ethics. (C.F. 25 and 26).

See also topics 13.07 Marriage and 13.03 Community/Marital Property.

14.06 INFANCY:

Age of majority is 18 years of age or any age under 18 years of age if individual is married. (C.C. 29.1).

14.07 MARRIAGE:

Marriage is voluntary legal union of male and female and is based on equality of rights and duties of spouses.

To marry, male and female must be at least 18 years of age. In exceptional cases, and for just reasons, minors below age of 18 may get married, but female must be at least 14 years of age and male 16 years of age. One of following must consent to marriage of minor: parents, or one of them if that individual has parental authority, or if other parent has died; adoptive parents; tutor or professor of minor; maternal or paternal grandparents, with preference for those who live with minor; one of individuals authorized or empowered to give consent if other individual is unable to do so; court, if, for reasons contrary to principles and norms of socialist society, authorization from any of above was denied.

Marriages involving following persons are invalid: (1) Those lacking necessary mental capacity to consent; (2) those already married; and (3) males under 16 years of age and females under 14 years of age.

Marriages between following are forbidden: (1) Relatives in direct lineage, or person and his descendent, or siblings; (2) adopter and adoptee; (3) professor/tutor and student; (4) persons convicted as perpetrators; or (5) perpetrator and accomplice in murder of spouse of either criminal.

Marriages may be conducted by government registrars and notary publics. Consuls and vice-consuls may conduct marriages of Cubans abroad. Common law marriage is recognized by law if such marriage is validated by court of competent jurisdiction.

Marriage is terminated by any of following events: (1) Death of either spouse; (2) judicial declaration of presumption of death of either spouse; (3) annulment declared by firm ruling; or (4) firm ruling of divorce or instrument of divorce granted by notary public.

If marriage has been terminated for any reason, male and female may marry again. (C.F. 2 to 64).

14.08 MARRIED WOMEN:

See topics 13.05 Husband and Wife; 13.07 Marriage.

14.09 PARENTAL RIGHTS:

Certain circumstances give rise to presumptions of legitimacy and paternity of children. There are also provisions regarding establishment of paternity.

Parents have joint parental rights over their children. Parents have numerous rights and duties with respect to their children, including: (1) Care for children; (2) attend to children's education in accordance with their aptitude and good of society; and (3) direct children's development as socialist citizens.

Parental rights may be terminated under certain circumstances, including abandonment and abuse of child. (C.F. 65 to 98).

15 FOREIGN TRADE AND COMMERCE

15.01 CUSTOMS DUTIES:

Payment of customs tariffs, duties, and other fees must be paid in convertible currency, even in cases where amount is expressed in national currency. Passengers may bring personal effects not exceeding value of 250 Cuban pesos, without regard to items that are otherwise exempt. (Decree-Law 178). Specific weight limitations apply to miscellaneous items. Miscellaneous items include shoes, clothing, food, toiletries, perfumes and similar items but do not include electronic equipment. (Resolution No. 28/2006). Items classified as Miscellaneous that are imported for non-commercial purposes and are to be received by natural person are subject to tariff of ten pesos per kilogram. (Resolution No. 15/2007).

Merchandise of any kind (excluding automobiles) imported or exported for commercial purposes declared legally abandoned or confiscated by Customs may be claimed by importer or intended recipient upon payment of 40% of invoiced value or value determined by Customs if no invoice is available. Upon expiration of ten-day period established for claiming of such merchandise, it will be given to various government institutions according to type of merchandise involved. Noncommercial merchandise exported or imported and declared legally abandoned or confiscated (excluding automobiles and automotive parts), regardless of origin, must be given or sold to government institutions charged with commercializing them. (Resolution No. 12/2006 as supp'd by Resolutions No. 26/2006 and 27/2006).

No prior approval is required for importation for personal use of various communications equipment, including conventional wireless telephones, fax machines, and cellular telephones. Various other communications equipment and components (e.g., wireless fax machines, routers and switches) require prior approval and license or permit for importation from Ministry of Information and Communications. (Resolution No. 10/2006).

Customs concessions granted to Caribbean Community (CARICOM) by Protocol dated June 15, 2001 were put into effect by Ministry of Foreign Trade and Foreign Investment and Ministry of Finance and Prices. (Resolution No. 3/2006).

See also category 21 Taxation, topic 21.02 Taxation.

15.02 EXPORT-IMPORT INDUSTRY:

Ministry of Foreign Trade and Foreign Investment regulates export-import activity. Ministry regulates which Cuban enterprises are allowed to export and import goods. Authorization to import and export goods may be granted on temporary or permanent basis. Enterprise may request modification of its list of authorized classes of goods only after one year has passed since last Resolution issued by Ministry with respect to that enterprise's list. (Resolution No. 68/2008). After company has been approved, it must then register with Cuban Chamber of Commerce. Chamber maintains registry of all approved export-import companies.

Entities involved in export and import activities are subject to regulations relating to ensuring quality and quantity of goods to be imported or exported. All goods must meet requirements of Government as well as applicable purchase and sale agreements to which such goods are subject. These requirements include procedures for government inspections by variety of government agencies as detailed in Resolution No. 231/2004.

Export activities are subject to regulation of use and management of natural resources. Ministry of Foreign Trade works with Ministry of Science and Technology to ensure compliance with applicable commercial and environmental policies.

Import of automotive vehicles by foreign entities or foreign citizens are subject to requirements in Decree-Law 162-Customs, including specific registration requirements. Head of Customs for Deposits and Markets (Jefe de la Aduana de Depositos y Ferias) authorized to confiscate any vehicle failing to meet these requirements. (Resolution No. 22/2004 [Customs]).

Fairs and expositions must adhere to regulation regarding organization, promotion and execution as established by ruling from Council of Ministers. Requirements include need for approval of Ministry of External Commerce and Ministry of Economy and Planning. Fairs and expositions must be coordinated by Cuban Chamber of Commerce. Excluded from this ruling are tourism conventions and fairs or expositions that are noncommercial or promote artistic, cultural or literary development (Ruling Nov. 24, 2004).

15.03 FOREIGN EXCHANGE:

See category 1 Introduction, topic 1.02 Currency.

15.04 FOREIGN INVESTMENT:

Foreign investment is defined as capital input by foreign investors in any of form stipulated by law. Foreign investments must adopt one of three forms: (1) Joint venture; (2) international economic association contract; or (3) company with totally foreign capital.

Resolution No. 91/2006 contains detailed requirements/criteria for analysis by Government of viability of foreign investments. This resolution also details requirements for investment process and management of investment by Government. (Resolution No. 91/2006).

Law permits foreign investment in any sector except institutions of armed forces and public services of health and education. All three forms of foreign investment are subject to prior approval of Government, which is granted by Ministry of Foreign Commerce. Approval stipulates conditions under which foreign investment may be made and period of time granted for investment in question.

Joint venture is Cuban commercial company considered as entity independent from State, which adopts form of registered-share corporation. In joint venture, Government participates with one or more foreign investors as stockholders. Generally, Government maintains majority stockholdings. Establishment of joint ventures takes form of public notarized document, including annexes such as agreement of economic association (fundamental pacts between partners), bylaws governing company and authorization of Ministry of Foreign Commerce. Joint ventures acquire legal status after registration is executed at Registry maintained by Cuban Chamber of Commerce.

In international economic association contracts, parties agree to carry out profitable activity for their respective benefit. International economic association contracts do not require formation of legal entity separate from those of contracting parties. Contracting parties are free to stipulate anything they deem to be in accordance with their objectives and interests, as long as they do not violate conditions of approval from Ministry of Foreign Commerce. Contract must be in writing and notarized in order to be approved and goes into effect once it is included in Registry maintained by Cuban Chamber of Commerce.

Third legal form of investment, totally foreign capital company, is commercial entity with foreign capital, without presence of any national investor. Totally foreign investments are included in Registry of the Cuban Chamber of Commerce. Foreign investor manages company, enjoys all rights derived from it, and is liable according to obligations described in authorization of Ministry of Foreign Commerce. Foreign investor may act as individual or corporation. In other words, investor may carry on its business either through creation of foreign company owned by investor, or by acting independently.

Under Act, investors are guaranteed full protection of their investments by Government, except in limited circumstances. Thus, investors have right to transfer abroad any profit and capital, and have option of selling their part of business at any time. If not reclaimed by investor, however, all equipment or inventory existing upon termination of entity must be sold back to State or other foreign entity. (M.H. June). Investors may also arrange loans in foreign currency, either with banks abroad or with Cuban bank.

All equipment (excluding automobiles), accoutrements and materials proceeding from any State enterprise that can be reutilized for economic purposes of State may only be acquired and sold by Ministry of Internal Commerce. (Resolution No. 77/2004).

All employees of foreign investment vehicles must be Cubans or foreigners permanently residing in Cuba, except for those positions that require special degree of technical skills. In those cases, foreign administrative and technical personnel may be freely contracted. Employees not permanently residing in Cuba must possess work permit, except in exceptional cases authorized by specific legislation. (Resolution No. 23/2003).

Branch offices of foreign entities in Cuba may not contract with Cuban employees directly. Employment entity contracts with workers, and pays those workers their wages in Cuban currency. Foreign entity contracts with Government employment entity, paying for services of workers in freely convertible currency. (MTSS Resolution 33/2007).

Foreign entity must also indemnify employment entity in freely convertible currency for any additional compensation that is paid to employees (e.g., as result of termination or dissolution of foreign entity).

Cuban citizens and permanent residents employed by employment entity receive salary based on salary schedule approved for each occupation by Ministry of Labor and Social Security. (Resolution No. 23/2003).

Other duties of employment entity include recruiting employees and securing labor and Social Security rights. At worksite, contracting entity is responsible for job training, work conditions, and supervision, among other functions.

Labor relations between employment entity and employee are formalized through contract signed by administration of employment entity and employee. Employees must complete trial period lasting between 30 and 180 days during which they must demonstrate necessary skills. Contracting entity may choose to reject employee at end of trial period when unable to fulfill job demands.

Employment entity will compensate employee terminated after completion of trial period. Amount of compensation is based on current salary and corresponds to years of service by employee. Total amount of compensation is paid at one time and ranges from one month up to one year of salary. (Resolution No. 23/2003).

Any economic collaboration with foreign party subject to supervision by Ministry of Foreign Investment and Economic Collaboration may require compliance with certain reporting obligations as detailed in Resolution 71/2004.

Credit agreements between international economic association and foreign entity in amount exceeding $300,000 requires prior authorization of Sponsoring Body, which presents credit proposal to Minister of Foreign Investment and Economic Cooperation, National Bank of Cuba, or Banco Exterior de Cuba. (MINVEC Instruction Letter 5-2161/2007).

In order to contract employees, contracting entity must provide employment entity with information relating to its labor force needs, including duration of employment, number of employees and necessary skills. Contracting entity and employment entity enter into Contract for Provision of Labor Force. Cuban citizens and permanent residents may not provide services to contracting entity until Contract for Provision of Labor Force is signed by participating entities. (Resolution No. 23/2003).

In case of international economic association contract, Cuban party contracts all employees in accordance with Cuban employment law. Cuban party is also responsible for remuneration of employees in national currency and securing Social Security rights. With relation to labor force, other parties are responsible for supplying employees with necessary equipment and for assuming portion to be paid in freely convertible currency in accordance with schedule of salaries set forth by Ministry of Labor and Social Security.

Joint ventures and parties to international economic association contract are subject to income tax (30% of net taxable income); tax covering use of labor force and contributions to social security; customs duties, if any; and land transportation tax. However, partners and parties are exempted from paying taxes on personal income.

Every foreign investment entity, regardless of form adopted, must establish reserves to cover contingencies that may arise during period of operation. In addition, entity should acquire insurance, for protection of goods, properties, and against risks.

Conflicts that arise between parties in all cases will be resolved in accordance with their respective founding agreements. However, Supreme Court has jurisdiction over any litigation regarding execution of economic contracts between any foreign investment entity and State enterprise or other national entities.

Decree Law 165 (adopted in 1996) created and provides for development of free trade zones to encourage foreign investment.

Office for Proceedings relating to Registration of Real Estate and Mercantile Interests of Foreign Investors was established in July 2003. Duties of this office include (1) Conducting research on real estate titles; (2) handling of records and certifications in corresponding public registries; (3) handling registration of mercantile corporations in Mercantile Registry; (4) conducting searches of documents and information relating to mercantile and commercial corporations. (Resolution No. 203/2003). Further, in 2004, Registry of Real Estate Ownership in Relation to Foreign Investment created to handle registration of real estate interests related to foreign investments. Any such ownership of real estate by foreign parties requires Government approval. (Resolution No. 20/2004).

All foreign juridical persons that have established subsidiary or representative office in Cuba and whose activities generate profits are required to present accounting books, registries, and documentation, in line with legally established accounting guidelines, confirming operations in country to Ministry of Finances and Pricing. Such entities are obligated to produce technical report of financial state pertaining to each fiscal year; report will be issued by independent auditors authorized by Ministry of Finances and Pricing. Profits attributable to such permanent establishments, including those from sale of goods and merchandise or other commercial activities realized in Cuba through foreign company's head office, will be considered in calculating taxable base for Profit Tax if such goods and merchandise are identical or similar to those sold by permanent establishment. (Resolution 10/2005) and (MFP Resolution 42/2006). Such establishments must also at minimum produce registries and documentation confirming uses of profits and expenses in Cuba, according to accounting guidelines in force, issue State of Results for these operations, and present Sworn Declaration of Profit Tax (Declaración Jurada del Impuesto Sobre Utilidades). (Instruction 16/2005). Exempt from resolution and instruction are subsidiaries or offices in Cuba whose sole purpose is to coordinate activities with Cuban entities directly carried out by headquarters for which no profits are generated. (Resolution 10/2005).

Note: Business by U.S. persons with Cuba or Cuban nationals is restricted by United States Trading With Enemy Act and implementing regulations of Office of Foreign Assets Control of the U.S. Department of the Treasury.

15.05 RECEIPT OF FOREIGN ECONOMIC ASSISTANCE:

Resolution No. 15/2006 sets forth requirements and criteria for receipt of foreign economic assistance by Government of Cuba. Covered foreign economic assistance includes goods, commodities, and cash. Acceptance or rejection of foreign economic assistance in form of donation or credit subject to following standards: (1) Reject conditions of economic, political, or social nature that aid in interfering with internal matters or are against Cuban revolutionary principles; (2) be fundamentally directed toward furthering government priorities and in no case favor certain sectors of population for ethnic, religious, or nationalistic reasons; (3) prohibit creation of systems of social service or distribution resources obtained as foreign economic assistance, parallel to those established by State; (4) all personnel required to execute collaborative projects are guaranteed payment of salary, fees, and travel allowances by Cuban counterpart in national currency; (5) Cuban counterparts guarantee fulfillment of obligations with regard to human, material, and financial resources during execution of project and after cessation of external financing; (6) foreign economic assistance for specific projects may only be used to carry out approved project objectives; (7) legally established Cuban entities, public and social organizations, associations, civil societies and foundations may only develop collaborative projects according to pre-authorized social function or fundamental activity. (Resolution No. 15/2006).

Importation of merchandise for purposes of donation, humanitarian assistance, or of official development to Government or related entities, political organizations, or institutions relating to teaching, science, culture, sports or health are exempt from customs duties as prescribed by law. (Resolution No. 319/2006).

16 IMMIGRATION

16.01 ALIENS:

Aliens, or non-Cuban citizens, entering Cuba must fulfill certain statutory requirements under Law of Migration and carry with them, at all times, certain specified forms of identification, obtained within 24 hours of their entrance into Cuba, or valid passport or equivalent document registered with Government within 24 hours of their entrance into Cuba. Aliens who do not present their documentation when requested will be fined. Resolution No. 3/2006 establishes new identification card for foreigners.

Entry into Cuba falls under following classifications: Tourists, Passers-by, Guests of State Organizations and Social Organizations, and Temporary Residents. Rights and obligations vary by classification.

While in Cuba, aliens classified as Tourists, Temporary Residents, or Guests of State Organizations or Social Organizations may, upon obtaining permission, travel within Cuba as provided in their itinerary. Temporary Resident must notify Government of any permanent change of address at least ten days prior to such change. Aliens classified as Passers-by must ask for permission prior to transferring to place other than the one in which they were authorized to remain.

Military aliens who arrive in Cuba pursuant to any international agreements are free to remain in Cuba in accordance with certain government regulations.

Government determines which areas may lodge permanent nonresident aliens. At any time, Government may expel any alien or person without citizenship it deems undesirable and change classification of aliens or non-Cuban citizens.

16.02 MIGRATION:

To leave or enter country, Cuban citizens must possess one of following documents issued in their name: (1) Diplomatic passport; (2) passport of service; (3) official passport; (4) current passport; or (5) marine passport. Those who have current passports should, in addition, obtain corresponding permit of entry or exit granted by Ministry of the Interior.

Ministry of the Exterior issues diplomatic passports and passports of service, and Ministry of the Interior issues official, current, and marine passports.

Diplomatic passports are issued for leaders, authorities and officials of Communist party and Government. Likewise, diplomatic passports are issued to diplomatic officials and consuls of republic, commercial, cultural, press, military, aerial, and naval advisors and aggregates, officials and messengers of Ministry of the Exterior, delegates to international congresses or conferences, or international diplomats. Ministry of the Exterior can also issue diplomatic passports for family members of persons related to above-mentioned officials and advisors.

Passports of service are issued to permanent administrative, technical, or auxiliary personnel of Cuban embassies, missions, or consulates, and to any individuals from any agency or office in exterior, as soon as his respective family joins him.

Official passports are issued to individuals who do not fall under above categories, but who require them because of official nature of their foreign trips.

Current passports are issued to Cuban citizens who request to travel abroad for particular business, as well as to those who reside permanently outside of Cuba. In latter case, heads of diplomatic missions or Cuban consul offices abroad can be authorized to issue current passports.

Ministry of the Exterior previously required that Cuban citizens living abroad obtain visas when returning to Cuba. As of Mar. 2004, Cuban citizens living abroad who hold valid passports may visit Cuba without purchasing visas. (C.N. Oct.).

Marine passports will be issued to those Cubans who make up crew of maritime vessels that travel internationally.

To enter or leave country, foreigner or non-citizen should possess valid document issued in his name, and corresponding entry visa or exit permit, unless he is from country that, by virtue of agreement signed by Cuba, is free from fulfilling this requirement.

Foreigners and non-citizens entering country are classified as one of following: (1) Visitors (tourists, transients, passengers in transfer or in transit, and crew members); (2) diplomats (agents, diplomats, and consuls, and their families, including officials from United Nations and other accredited international organizations, and organizations with headquarters in Cuba, and their families, in official functions, foreign government officials on official missions in

Cuba); (3) invitees (party and government leaders, party, government, and parliament delegation members, other public figures invited by Central Committee of the Communist Party and Revolutionary Government, and other foreigners invited by State and social organizations and Cuban people); (4) temporary residents (technicians, scientists, and other persons hired to work); and (5) permanent residents (foreigners admitted to establish their definitive domicile).

Individual who enters country without authorization to establish his permanent residence in Cuba, in addition to fulfilling established requirements in above-mentioned provisions, should have necessary visas to return to his country of origin, or to continue his trip to third country (e.g., corresponding tickets or deposit in National Bank of Cuba and guaranty of money sufficient to cover one's expenses). Ministry of the Interior can grant exceptions to this latter requirement. The National Bank of Cuba will refund guaranty when individual obtains authorization to reside permanently in Cuba, or when individual acquires ticket when his exit from country has been authorized.

Ministry of the Interior may inspect, at all ports and airports of Republic, maritime and aerial vessels that enter or exit country. It may also inspect passengers and crew.

Transporting enterprises whose maritime and aerial vessels arrive in Cuba with passengers who have not fulfilled all requirements imposed by law, except in cases involving visas to return to country of origin or enter third country, are responsible for re-embarkation and for costs associated with their retention and custody. Ministry of the Interior can impose fine on transporting enterprise for any violations of these requirements.

Stowaways on aerial or maritime vessels who arrive in Cuba without passport, visa, or some type of permit, cannot step foot onshore and must remain onboard vessel under supervision of captain. If stowaway succeeds in fleeing and entering country, Ministry of the Interior may impose fine on transporting enterprise. (L.M.).

17 INSURANCE

17.01 INSURANCE COMPANIES:

Insurer must indemnify or provide benefits according to insurance contract upon occurrence of event triggering coverage. Insured must pay premium calculated according to established regulations. Law regulates both voluntary and mandatory insurance.

Insurance contract or policy must be in writing and contain name of insurer and insured; sum or value of policy; amount of premium; covered risks or event to which indemnification or benefit applies; dates marking beginning and end of term of policy; other stipulated provisions. Policy must also contain text of general and special conditions.

Following are subjects that may be covered in insurance contract or policy: total losses or damages caused to certain goods; personal insurance regarding death or incapacity caused by accident; death, injury, or loss caused to other persons or their goods. Value of policy or contract cannot exceed actual value of goods insured. Exception exists for merchandise intended for international trade, in which case value of policy can exceed actual value by 10%.

Insured or other interested party must notify insurer of claim within specified term, but term must not be shorter than 30 days. Claim must contain sufficient data regarding basis for claim. Insurer is under no duty to indemnify or provide benefit where loss or damage was intentionally caused or instigated by insured. Insurer can recover amount of indemnification or benefits if it discovers, after payment, that loss or damage was intentionally caused. Motor vehicle insurers need not indemnify driver under influence of alcohol or drugs.

Life insurance policy must specify intended beneficiaries, which can be modified during life of policy or contract. Benefits recovered under life insurance policy are not deemed to be marital property. Where policy names several beneficiaries, distribution of property is presumed to be equal, unless policy otherwise provides. Where no beneficiary is named, insured's heirs may recover. (C.C. 448 to 465).

Joint ventures, foreign and national investors who are parties to international contracts, and companies with foreign capital should obtain insurance policies from companies authorized by Ministry of Finance and Prices to operate in country. These policies should cover goods, properties, operations and any other activities or risks. Industries, tourism, or other installations or lands leased by State enterprises or other national organizations should be insured by lessee in favor of lessor. (Law 77).

Unless otherwise agreed, claims arising from insurance contract are valid for two years from date of incident or from date of entry of judgment by competent popular tribunal, except for cases of personal insurance, where period is five years from date of entry of judgment, and in maritime cases, where period is one year. (Decree-Law 263).

Insurance agents or brokers may operate with approval of Superintendent of Insurance. Insurance agents are subject to regulation by Superintendent of Insurance, including requirements relating to disclosures to insured and information provided to insurance companies. Application process to become licensed insurance agent is administered by Superintendent of Insurance. (Resolution No. S-1/2006). Insurance agents must maintain updated registry or database available for review by Superintendent of Insurance. (Resolution No. S-3/2007).

Entities engaged in insurance-related activities required to provide details regarding their business three times per year to Ministry of Finance and Prices. (Resolution No. S-1/2008).

18 INTELLECTUAL PROPERTY

18.01 COPYRIGHTS:

Copyright protection applies to original works of authorship. Protection is available for literary and audio-visual works. (Law 14).

18.02 INTELLECTUAL PROPERTY TREATIES:

Cuba is party to following intellectual property treaties:

Convention that established World Industrial Property Organization (1967), since 27 Mar. 1975; Paris Convention on Protection of Industrial Property (1892), since 17 Nov. 1904; Stockholm Act (1967), since 8 Apr. 1975; Madrid Arrangement on Repression of False or Tricky Indications or Origin or Products (1891), since 1 Jan. 1905; Lisbon Act (1958), since 11 Oct. 1964; Stockholm Additional Act, since 7 Oct. 1980; Madrid Arrangement on International Trademarks Registration (1981)—Stockholm Act (1967), since 6 Dec. 1989; Protocol of the Madrid Arrangement on International Trademarks Registration, since 26 Dec. 1995; Nice Arrangement on International Classification of Goods and Services for International Trademarks Registration, since 26 Dec. 1995; Lisbon Arrangement on Protection of Origin Denomination and their International Registration (1958), since 25 Dec. 1996; Stockholm Act, since 8 Apr. 1975; Patent Cooperation Treaty (PCT) (1970), since 16 July 1996; Strasbourg Arrangement on International Patents Classification (1971), since 9 Nov. 1996; Vienna Agreement on International Classification of Trademark Figurative Elements (1973), since 8 July 1997; Budapest Treaty on International Acknowledgment of Micro-organisms Deposits Related to Patent Procedures (1977), since 19 Feb. 1994; Nairobi Treaty on Protection of the Olympic Symbol, since 21 Oct. 1984; Locarno Arrangement on International Classification of Industrial Designs and Models, since 9 Oct. 1998; Berne Convention with effect from 20 Feb. 1997.

18.03 PATENTS:

Patent provides owner with exclusive right to prevent others from making, selling, or using patented invention for up to 15 years. Patentable subject matter includes: (1) Equipment, methods, procedures, substances and products, and new uses for equipment; (2) plant varieties and animal species; (3) measures for preventing disease, diagnostics and cures for animal and plant diseases; (4) parts of microorganisms. (Trademark Law—Decree Law No. 68 - Art. 37).

Patent available for technical solution of problem in any branch of economics, defense, science or technology that has novelty, inventiveness and industrial unity. (Trademark Law—Decree Law 68 - Art. 22). Certificates of Invention are issued to inventors who produce invention while performing duties within scope of their government employment. Government owns these inventions and has right of enforcement.

Inventor, assignee or successors in interest may apply for patent. Using one of several recognized firms, Cuban Chamber of Commerce shall submit application on behalf of foreign entities. Application for patent must include: (1) Petition or request for patent; (2) summary of invention; (3) description of embodiment; (4) claims; (5) drawings, if required; (6) other documents required by inventors guide.

18.04 TRADEMARKS:

Trademark is any sign, figure, word, name, or material means, regardless of its kind, form, or color that identifies and distinguishes objects or services from others of same kind. Among those that cannot be registered as trademarks are: Designs composed solely of coats of arms, flags, signs, official hallmarks, insignia, decorations of governments or organizations, without proper consent; names or likenesses of official persons or of popular individuals without proper consent of such person; denominations and designs that reproduce or imitate official awards; designs that contain official reproductions of money, or titles issued by corresponding government bodies; portraits of living persons without their consent; deceptive signs and shapes constituting false indications of nature, origin, components, or qualities of goods or services they are intended to protect; denominations and designs liable to be confused with other commonly known marks if used for identical or similar goods; generic denominations or their graphic representation, established denominations used to indicate type, class, price, etc., qualifying adjectives, and descriptive words; denominations and designs that are contrary to socialist morality or law; denominations phonetically identical or similar to others already registered for same or similar goods and liable to constitute unfair competition, or those so similar to other trademarks that error might be induced.

Trademark owner can file civil action against any infringers and request judge to order injunction of infringing actions, prevention of importation of goods bearing mark, seizure of goods, and damages for infringement.

Persons and legal entities may apply to register trademark. Foreigners may apply on basis of international treaties to which Cuba is member or on basis of reciprocity. Note that foreigners shall appoint Cuban Chamber of Commerce as agent. Applications are filed with National Office of Inventions, Technical Information and Marks. Marks in foreign language must be accompanied by Spanish translation.

Registration grants right of exclusive use of mark for period of ten years counting from filing date, and is renewable. Marks are published following grant of registration. Mark must be used within three years following registration, otherwise right to use lapses, and registration is subject to invalidation by third parties or by Intellectual Property Office ex-officio.

Same formalities used for registration of trade names. (Decree-Law 203).

19 MINERAL, WATER AND FISHING RIGHTS

19.01 MINES AND MINING:

Subject to Law of Mines. Regulated by National Office of Mineral Resources. Law of Mines provides for granting and regulation of mining concessions.

See also categories 20 Property; and Environment, topic Natural Resources.

20 MORTGAGES

20.01 MORTGAGES:

See categories 20 Property and Debtor and Creditor, topic Housing.

21 PROPERTY

21.01 AGENCY:

Mandate (Power of Attorney): Mandate is contract whereby person is obligated to carry out legal action or to handle one or more transactions on behalf of another. (C.C. 398). Mandate may be special, when agent must perform one act, or general, when agent is empowered to carry out several transactions. Agent must execute mandate pursuant to principal's instructions. However, agent may depart from instructions received if it becomes necessary in interest of principal and there is no opportunity to request new instructions or receive response in time. Agent must inform principal of any progress and of any substitution or delegation of power that takes place.

Mandate is deemed terminated in following circumstances: (1) Revocation; (2) agent's resignation; (3) object for which it was granted has been achieved; (4) expiration of term or termination of basic relationship that led to its occurrence. Mandate may be revoked or waived at any time, but party who revokes or waives without just cause, is liable to other and possibly to third parties for damages. (C.C. 409).

Powers of attorney executed abroad for use in Cuba and those executed in Cuba to be effective abroad must be authenticated.

21.02 LANDLORD AND TENANT:

Proprietors seeking to rent homes, rooms, or spaces to others must submit application for permission to corresponding Municipal Director of Housing. Rooms are defined as spaces in homes that are utilized as dormitories, provide access to bathroom, kitchen, hallway, living room and dining area, and meet appropriate hygienic and sanitary standards. Space is defined as area intended to serve as living area, dining room, courtyard, garden, roof, terrace, swimming pool, or other area considered part of home. Whenever spaces or rooms in homes are rented, common areas used by all occupants should be included as part of rental property. (Resolution No. 346/2005).

Parties may agree to terms of lease and should create written contract when rental period is for more than 30 days. Contract should include: (1) Full name of lessee(s) and permanent identification number or passport; (2) address of home; (3) full names and identification numbers or passports of those accompanying lessee; (4) period of rental; (5) effective date; and (6) any other items of interest to parties. (Resolution No. 346/2005).

Rental of homes or spaces is never authorized in following situations: (1) By those who permanently reside outside Cuba; (2) by those whose property was assigned to them by State after July 1, 2001; (3) by those who after July 1, 2001 constructed new home or who within last three years increased capacity of home by means of construction; (4) by those whose conduct is not in accord with morals and good practices of community or workplace; (5) cases where proprietor or other occupant of home has criminal history, is currently within judicial process, or commits crime that mars public opinion of persons' morality; (6) when lessor seeks to rent homes using foreign currency; (7) those who seek to rent more than two rooms in single home; (8) lessors or lessees who committed one of infractions or violations stipulated in current housing code, or are being processed for said violations; (9) when rental is per room and lessor seeks to rent all rooms in home; (10) when rental causes reduction of space and lessor's family is left with less than ten square meters per person; (11) those who have had previous rental permits cancelled due to lessors or lessees carrying out illicit or anti-State activities of any kind on property, or cancellation was found to be recommendable due to location, circumstances, opinion of social organization, or popular opinion; (12) those who have had permit for rental cancelled less than one year before applying for additional permit; (13) when rental of home renders lessor's family homeless; (14) if lessor or any of his cohabitants have had self-employment license revoked for illegal acts; (15) when rental involves payment in two types of currency; (16) within three months of having solicited cancellation of rental permit; (17) when lessor commits fraud, misrepresents facts or circumstances, or is deceptive in process to secure rental permit. (Resolution No. 346/2005).

Rental of home in its entirety is only possible for those permanently residing in Cuba. In these cases, when lessor and family will reside in another location within Cuba, it is necessary to include information regarding other home in application to Municipal Director of Housing. Any change in lessor's residence should be communicated to Municipal Director of Housing and included in rental record. (Resolution No. 346/2005).

Permits granted are reviewed one year after issue by Municipal Director of Housing. If all requirements are met permit remains in effect without need for further action. If all requirements are not met, permit is cancelled.

Lessor is required to maintain Lessor's Registry, form which is obtained from Municipal Director of Housing. If lease is to be paid in freely convertible currency, Lessor's Registry must also reflect complete list of all visitors to lessee. Once Registry is complete, it must be submitted to Municipal Director of Housing who will maintain Registry records for five years. (Resolution No. 346/2005).

Lessor's main obligations are to: (1) Deliver property to lessee; (2) make, at lessor's expense, major and urgent repairs that property requires; (3) ensure property's peaceful enjoyment throughout lease; (4) guarantee against eviction or hidden defects; (5) provide inspectors with full access to home whenever necessary; (6) rent single rooms to no more than two persons; (7) prohibit lessees from disrupting order, lifestyle, and tranquility of citizenry; (8) prohibit lessees from conducting illicit activities (if unable to stop such illicit activity, required to report activities and accepts responsibility for such activities). (Resolution No. 346/2005).

Lessee's main obligations are to: (1) Pay rent on terms agreed; (2) use leased property with due care and for agreed purposes; (3) notify lessor of any major or urgent repair that property requires; (4) carry out, at lessee's expense, any small and standard repairs; (5) return property upon termination of lease in same condition in which it was received, subject to normal wear and tear. (C.C. 389 to 395).

When inspector from Municipal Office of Housing or any other organization finds infraction stipulated in current legislation has been committed, in addition to imposing corresponding fine, inspector will notify Municipal Director of Housing who will decide whether or not to cancel permit. In all cases, lessor's permit is revoked until fine is paid. (Resolution No.

346/2005).

Lessor may solicit cancellation of permit for rental at any time. Municipal Directors of Housing are authorized to cancel permits for rental under following conditions: (1) Lessor is found to have committed any violation set forth in current housing legislation; (2) lessor is abroad for over three months, is found to reside abroad, or initiates emigration process; (3) lessor fails to meet obligations set forth in current housing legislation; (4) cancellation is found to be recommendable due to location, circumstances, opinion of social organization, or popular opinion; (5) after issuance of permit, lessor is found to be ineligible; (6) lessors or lessees carry out illicit or anti-State activities of any kind on property; (7) description in title does not match actual building; (8) it is detected that lessee is member of Diplomatic Mission, Consulate, International Organization, or Press Agency accredited in Cuba. (Resolution No. 346/2005).

Proprietors who oppose measures imposed by Municipal Director of Housing may submit in writing reasons for disagreement along with all necessary evidence within five days of notification of decision. Provincial Director of Housing will then either ratify, modify, or annul measure imposed by Municipal Director of Housing. Special provisions exist for residents of Special Municipality Isla de la Juventud. (Resolution No. 346/2005).

If, upon expiration of lease, lessee or his heirs continue to use leased property without opposition from lessor, contract is deemed to have been renewed for term equal to original. However, either party may revoke extension of time by notifying other with notice equivalent to at least half of its term. Subleasing is permitted but requires express authorization of lessor.

It is prohibited to rent homes or spaces to following: (1) Representatives of firms, organizations, entities or foreign countries accredited in national territory; (2) corporate entities; (3) any person or entity intending to carry out lucrative activities of commercial or industrial nature, or to perform services; and (4) those associated with Diplomatic Missions, Consulates, International Organizations or Press Agencies accredited in Cuba. (Decree Law 233, am'd 2004, Resolution 413/2004).

Housing built by State or any that remains available for any reason may be assigned to selected persons for rental. (Resolution No. 339/2005).

Law permits government confiscation of homes under certain circumstances. (Resolution No. 346/2005).

21.03 PRINCIPAL AND AGENT:

See topic 20.01 Agency.

21.04 REAL PROPERTY:

Property rights are based upon socialist ownership by all people of means and instruments of production. Law recognizes property rights of State, political organizations and masses, cooperatives, small agriculturalists, and other entities.

State owns: (1) Subsoil, mines, natural and living maritime resources within economic zone of Republic, land that does not belong to small farmers, forests, waters, and channels of communication; (2) sugar mills, factories, means of transportation, and those businesses, banks, and real estate that have been nationalized and expropriated from imperialists and large land owners; and (3) factories, businesses, and economic, social, cultural, and sports installations developed or acquired by State.

Political organizations and masses own: all other buildings and means of transportation.

Cooperatives own: (1) Land and other means of production, housing, cultural, and recreational buildings; and (2) animals, farms and forests.

Small agriculturalists are allowed to own land any buildings, equipment, animals, crops, and trees located thereon. Small agriculturalists are subject to specific provisions of law.

Those who own rights, wish to transfer rights, or are legitimately interested in securing rights to real property, are required to register property interests in Property Registry of corresponding territory. (Resolution No. 247/2003). Property Registry also contains record of titles and description of rights conferred to registrants and title holders. Property Registry includes following types of instruments and documents: (1) Documents regarding nationalization and confiscation of property; (2) documents reflecting State-owned real estate; (3) instruments reflecting contribution of real property by State to international economic association; (4) instruments and documents reflecting ownership or rights over real property relating to investments by foreigners; (5) judicial orders regarding rights and real property; (6) documents relating to platting real property; (7) agreements for purchase of homes; (8) certifications and other documents issued by Municipal Housing Directors; (9) any administrative resolution recognizing right over real property; (10) certification and documents relating to ownership of farms and rural homes; (11) judicial orders regarding incapacity of persons and allowing for administration of their property; (12) mortgages; (13) surface and subsurface rights; (14) easements, water, and mineral rights; (15) rights to use roofs for housing; (16) leases and other types of property registrations. (Resolution No. 247/2003 am'd 2005, Resolution No. 249/2005).

Most instruments and documents must be registered within 60 business days of occurrence. In certain circumstances Registrar may require registration within 30 days. Specific details and requirements with respect to registration set forth in Resolution No. 249/2005.

Those who oppose decision of Registrar may seek remedy within 30 days of notification of decision by appeal to Provincial Director of Justice or to Special Municipality Isla de Juventud in corresponding cases. Decision of Director of Justice or Special Municipality Isla de Juventud in corresponding cases may be appealed to Director of Property, Commercial, and State Registries within 20 days of notification of decision. Any individual affected by decision of Registrar, by virtue of legitimate interest, may also seek remedy by appeal without having intervened in registration process. (Resolution No. 247/2003 am'd 2005, Resolution No. 249/2005).

Law recognizes personal property rights, but these rights are limited to individual's right to own his salary, savings, house, and instruments required for one's work.

Law recognizes joint ownership, including ownership by married couples, under certain circumstances. (C.C. 128 to 169).

Law recognizes principles of adverse possession in very limited circumstances. (C.C. 184).

Use of property is limited to such use as will not disturb enjoyment of neighboring properties. (C.C. 171).

Civil Code contains provisions regarding right of way, encroachment, easements, and nuisance relating to real property. (C.C. 170 to 177).

21.05 TAKINGS:

Takings of land may only be carried out for reasons of public utility or social interest. Expropriated owner of land must receive just compensation.

22 TAXATION

22.01 INHERITANCE TAX:

See topic 21.02 Taxation.

22.02 TAXATION:

In 1994, Law 73 established taxation system regulated by Ministry of Finance and Prices and Oficina Nacional de Administración Tributaria (``ONAT'').

Following taxes may apply to foreigners: (1) Corporate tax (at 30 to 35% of net income attributable to permanent establishments of business in Cuba); (2) personal income tax (due on Cuba-source income); (3) taxes for use of labor (up to 25% of employees' salaries); and (4) taxes for exploitation of natural resources. Permanent establishments of business in Cuba include, but are not limited to, following: (1) Headquarters, branches, factories, and other establishments in Cuba; (2) projects within Cuba lasting longer than one year; (3) all Cuban ventures involving natural resources. (Resolution No. 379/2003).

Entities and individuals subject to tax are required to register as taxpayers through Municipal Office of ONAT and complete prescribed ONAT applications as provided for in Resolution No. 23/2006. Entities must present various legal documentation including proof of registry in Cuban Chamber of Commerce and notarized resolution or power of attorney appointing person to appear at ONAT office as its legal representative.

Cuban corporate entities are subject to 35% tax on profit based upon worldwide income.

There are also sales taxes, taxes on public services (such as telephone and electricity), and documentary taxes. Businesses are also required to contribute to Social Security system on behalf of their employees.

In cases of national interest, Executive Committee of the Council of Ministers can exempt all or part of tax on net income that is reinvested in country. When exploitation of renewable or nonrenewable natural resources is involved, Executive Committee of the Council of Ministers may raise income tax rate up to as high as 50%. Company whose capital is foreign must pay taxes for duration of its operations. Special exemption from income tax exists for transportation of passengers and cargo by Bolivian airlines under Agreement for Application of Bolivarian Alternative (ALBA) Convention. (Resolution No. 317/2006).

Persons of Cuban-origin living abroad may hold bank accounts in Cuban banks and any interest accrued thereon is free of taxation. Life insurance proceeds collected by Cuban resident-beneficiaries are also free of taxes. (Cuban Dignity Act).

There are no estate taxes on inherited homes.

Tariff exemption of 100% on all goods whose country of origin is Bolivarian Republic of Venezuela. (Resolution No. 9/2008).

23 TRANSPORTATION

23.01 LOAD TRANSPORT:

Carrier transporting cargo is obligated to transport property to its determined destination upon appropriate payment by user of service. Cargo carrier's duties include: providing appropriate level of security; transporting perishable goods within necessary time; sending bills of lading or shipment notice expressing appropriate tariffs and regulations; retaining responsibility for loss of goods entrusted to carrier.

Duties of user of such cargo service include: producing goods to be transported in condition amenable to transport; filing objections, in writing, in bill of lading or shipment notice, if it wishes to reserve corresponding actions regarding carrier's responsibility; returning bill of lading or shipment notice once transported goods have been received; notifying cargo carrier of any misleading statements in bill of lading or shipment notice. (C.C. 435 to 437).

23.02 TRANSPORT OF PASSENGERS (CARRIER SERVICE):

Carrier is obligated to transport passenger to determined destination upon appropriate payment in accordance with effective tariffs. Carrier's duty extends to transportation of passenger's luggage. Carrier's duties include: adhering to schedule and established itinerary; providing adequate security and hygiene during transportation; and providing appropriate comfort commensurate with type of transport.

Carrier is responsible for loss, failure of delivery or damage to luggage entrusted to it if carrier did not act with due diligence. Carrier is not responsible for damage to passenger's luggage caused by passenger's recklessness or negligence. (C.C. 429 to 437).

23.03 VESSELS:

All boats of Cuban registry embarking on international trips must be registered in Continuous Synoptic Registry and may be inspected at any time. (Resolution 65/2004). Simplified procedures exist for Cuban marinas ship's chandler to supply provisions to recreational vessels engaged in international maritime that provide that purchases not exceeding 100 convertible pesos do not require prior customs approval. Purchases exceeding 100 convertible pesos require customs approval and may be subject to further inspection. Ship's chandler must inform Customs if any employees are hired to perform services aboard recreational vessel. (Resolution No. 20/2006).

As member state of International Maritime Organization (IMO), Cuba adopted Code of Safe Practice for Solid Bulk Cargo issued by IMO in 2004. (Resolution No. 7/2006).

24 TREATIES AND CONVENTIONS

24.01 TREATIES AND CONVENTIONS:

The Arrangement of Nice for the International Classification of Goods and Services of June 15, 1957 (Nice Union); The Arrangement of Madrid for the International Registration of Marks (Madrid Agreement); International (Paris) Industrial Property Convention; WIPO Convention; CMEA Convention (Protection of inventions, industrial designs and commercial trademarks); Lisbon Agreement; General Agreement on Tariffs and Trade (GATT); International Convention for Safety of Life at Sea, adopted Nov. 1, 1974 (SOLAS); International Convention for Prevention of Pollution from Ships (MARPOL) as modified by Protocol of 1978; United Nations Convention on the Law of the Sea, ratified 15 Aug. 1984; Caribbean Community (CARICOM) Trade and Economic Co-operation Agreement; Agreement for Application of Bolivarian Alternative for Peoples of our America and Trade Agreement among Venezuela, Bolivia and Cuba (ALBA) of Apr. 29, 2006; and Agreements for Reciprocal Promotion and Protection of Investments (APPRI) with various countries.

1
CYPRUS LAW DIGEST

—Scope —

Prepared for 2010 edition by

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Cyprus is member of EU. See also European Union Law Digest.

Note: This revision incorporates legislation through Oct. 13, 2009.

1 INTRODUCTION

1.01 CURRENCY:

Unit of currency of Republic of Cyprus is euro (EUR), divided into 100¢. Notes and coins currently in circulation are: Notes: [Euro]500, [Euro]200, [Euro]100, [Euro]50, [Euro]20, [Euro]10, [Euro]5. Coins: [Euro]2, [Euro]1, 50¢, 20¢, 10¢, 5¢, 2¢, 1¢.

Cyprus joined Eurozone on 1 Jan. 2008. Adoption of the Euro Law, passed in Mar. 2007, put in place detailed structure required to enable transition from Cyprus pound (CYP) to euro. Exchange rate between euro and Cyprus pound fixed at 1 EUR = 0.585274 CYP. Monetary amounts in existing laws are converted at the official rate, thus giving rise to odd amounts.

1.02 GOVERNMENT AND LEGAL SYSTEM:

Independent, sovereign republic, which came into existence on 16 Aug. 1960 under Treaty of Establishment signed on that date.

President of Republic elected by universal suffrage for five-year term of office. Exercises executive power through Council of Ministers appointed by him.

Legislative authority is House of Representatives, with 80 seats. According to Constitution, as amended on 5 July 1985, 56 representatives are elected for term of five years under proportional representation system by Greek Cypriot community and 24 by Turkish Cypriot community, separately, but Turkish Cypriot seats not occupied since 1964.

House of Representatives meets on fifteenth day next following general election and thereafter in each year on corresponding day in such year without summons for its ordinary session. Ordinary session of House of Representatives lasts for period of three to six months in each year, as House of Representatives may determine. House of Representatives shall be summoned to extraordinary session by President or Vice President of House on request of ten Representatives addressed to both President and Vice President of House.

Judicial system consists of Supreme Court, Assize Courts, District Courts, Military Courts, Industrial Disputes Courts, Rent Control Courts and Family Courts.

1.03 HOLIDAYS:

Jan. 1, Jan. 6, 1st Mon. of Lent*, Mar. 25, Apr. 1, Good Friday*, Easter Monday*, Easter Tuesday*, May 1, Pentecost*, Aug. 15, Oct. 1, Oct. 28, Dec. 25 and Dec. 26.* According to the Greek Orthodox calendar

1.04 OFFICE HOURS AND TIME ZONE:

Office hours generally from 8 a.m. to 1 p.m., and from 3 to 6 p.m. Monday to Friday.

Banks open from 8.30 a.m to 1.30 p.m Monday to Friday. Government offices open from 8 a.m. to 2 p.m. Monday to Friday. Cyprus is two hours ahead of London.

2 BUSINESS ORGANIZATIONS

2.01 AGENCY:

Governed by Contract Law (c. 149) which reflects common law principles. Generally principal is responsible for acts of duly authorized agent or of agent acting with apparent authority. Agent acting for undisclosed principal is personally liable. Agent acting outside authority is liable on action for breach of warranty of authority.

Relationship between principal and agent is regulated by contractual principles and by legislation, namely Law to Regulate the Relationship between the Commercial Agent and the Principal (Law 51[1] of 1992).

2.02 ASSOCIATIONS:

Governed by Associations and Foundations (Law 57/1972), every association must register with Registrar of Associations to have legal personality. For registration, association must submit following documents to Registrar of Associations: (i) Lawyer's written affirmation of compliance with Law; (ii) Y.E.1 application form; (iii) names and addresses of Board members; (iv) Articles of Association signed by at least 20 members of association; (v) emblem of association and (vi) description of moveable property and real estate of association at time of submission of application signed by Board Members.

Once satisfied that provisions of Law are fulfilled, Registrar of Associations will issue Certificate of Registration. By said issue of Certificate, Association acquires legal personality.

2.03 CORPORATIONS:

Companies limited by shares regulated by Companies Law (c. 113) as amended, and divided into private and public companies. No minimum share capital, but each subscriber to memorandum must subscribe for at least one share.

Private company is company which: (a) Restricts right to transfer its shares, (b) generally limits number of its members to 50, (c) prohibits any invitation to public to subscribe for its shares or debentures, and (d) prohibits issue of bearer shares. Private company may have only one shareholder. If it has only one director, that person may not also be secretary unless there is only one shareholder. (Law 70[I] of 2003). If there is only one shareholder, Part III of Table A of Companies Law applies in place of its Articles of Association. (Law 70[I] of 2003). Private companies not deemed to be of "small size" must have annual financial accounts audited by independent auditors. (Law 167[I] of 2003).

Public company is company which does not qualify as private company and to which following provisions apply: (a) Must have at least seven members, (b) must have at least two directors, (c) if directors are appointed by articles of association, their consent must be filed on incorporation, (d) must obtain trading certificate from Registrar of Companies before starting business, (e) must hold statutory meeting, (f) directors must make statutory report to its members, (g) it alone has power to issue share warrants, (h) must have minimum share capital of [Euro]25,629.02 (Law 70[I] of 2003), (i) must have annual financial accounts audited by independent auditors (Law 167[I] of 2003), and (j) name must end with "public ltd" or "public company ltd" or ``plc'' (Law 24[I] of 2005).

Exempt company must fulfil all requirements of private company, as well as following conditions: (a) No corporate body holds any of its shares or debentures unless it is itself exempt private company registered in Cyprus, (b) number of debenture holders does not exceed 50, (c) no corporate body is director of it, (d) nobody other than holder has any interest in any of its shares or debentures and (e) neither company nor directors are privy to any agreement whereby company policy is determined by persons other than its shareholders and directors.

As name implies, exempt company is not subject to following provisions of Companies Law, namely: (a) Need not file financial statements with annual return to Registrar of Companies, (b) auditors need not be qualified under §155 of Companies Law, (c) need not print special resolutions to be filed with Registrar of Companies and (d) may give loans and guarantees to directors.

Foreign company with branch in Cyprus whose management and control is outside Cyprus must be registered with Registrar of Companies but branch income is exempt from Cyprus taxation.

Company must register its Memorandum and Articles of Association with Registrar of Companies. Memorandum contains: (a) Name, (b) limited liability clause, (c) capital clause, (d) association clause, and (e) objects clause, which sets out activities it is authorized to carry on. Any other activity is ultra vires and void ab initio. Articles are rules governing internal regulation of company which generally follow Table A in Companies Law and can be altered by special resolution provided that minority of shareholders is not oppressed or defrauded or any statutory provision breached.

Every company must make annual return to Registrar of Companies, to provide regular consolidation of information for anyone wishing to inspect company's file. Return must be made up to 14th day after annual general meeting and must, unless company is exempt private company, include certified copies of balance sheet, profit and loss account and directors' and auditors' reports. Failure to do so may result in fine, or striking off of company.

Every charge by Cyprus-registered company, or company incorporated outside Cyprus that establishes place of business inside Cyprus, giving security over its property anywhere, will be void and thus unenforceable against liquidator and any creditor, unless prescribed particulars are registered with Registrar of Companies within 21 days of creation. Charge executed outside Cyprus over property outside Cyprus must be registered within 21 days of date on which it could have been registered in due course and with due diligence in Cyprus. Absence of registration does not affect enforceability of charge as between parties to it.

Capital structure of company can be reorganized, either under §198 or under §270 of Companies Law. Under §201 shares of minority dissenting from scheme or contract approved by majority may be acquired.

Under §198, arrangement may be made between company and either its creditors or any class of them or its members or any class of them or any combination of those two. It requires sanction of court. It enables company to agree to compromise with some creditors that may then be imposed on all creditors, and to vary class rights.

§270 relates only to members' voluntary winding up, and enables company to be reconstructed or amalgamated by sale or transfer. Dissenting members may require liquidator either to desist or to buy their interests.

§201 enables company that has made takeover bid accepted by at least 90% of holders of target shares to acquire shares of dissenting members on same terms. Public Takeovers Law of 2007 transposing European Takeover Bids Directive (Directive 2004/25/EC) into domestic law includes new “squeeze out” and “sell out” provisions.

§354A enables Cyprus registered company to transfer its registered office to another country or jurisdiction, and foreign company to transfer its registered office to Cyprus, without affecting their legal standing as bodies corporate or legal persons. (Law 124[I] of 2006).

2.04 PARTNERSHIPS:

Under Partnerships and Business Names Law (c. 116), as amended, there are two forms, general or limited partnerships.

In general partnership, each partner is jointly and severally liable without limit for all debts and obligations of partnership incurred while partner. After death, liability devolves to his estate subject to payment of his separate debts.

Limited partnership consists of at least one general partner liable for all debts and obligations of partnership and at least one limited partner, who when joining partnership must contribute stated amount to its capital. Beyond this amount, limited partner not liable for debts and obligations of partnership.

Either form may exist between two to 20 natural or legal persons, carrying on business in common with view to profit. Has no legal personality distinct from members, but partners can sue and be sued in firm name.

3 BUSINESS REGULATION AND COMMERCE

3.01 BILLS AND NOTES:

Bills of Exchange Law (c. 262), as amended by Laws 16 of 1986, 32 of 1997 and 96 of 2003, defines and regulates bills of exchange, cheques and promissory notes.

3.02 COMMERCIAL REGISTER:

See categories 2 Business Organizations, topic Corporations; Intellectual Property, topics Patents and Trademarks and Tradenames, subhead Tradenames.

3.03 CONTRACTS:

Gratuitous promises not enforceable unless made by deed under seal. Otherwise must be agreement based on offer and acceptance, with consideration. Consideration need not be adequate but must be sufficient, and may be past. Under Contract Law (c. 149), agreement made without consideration is void, unless made between persons connected by very close relationship, or is promise to compensate wholly or in part person who has already voluntarily done something for promisor, or something which promisor was legally compellable to do, or is in form of deed under seal.

Privity.—Person not party to contract cannot sue on it even if it is for his own benefit unless person is either principal suing on contract made for him by his agent or assignee of debt or chose in action suing original debtor or holder for value of bill of exchange who can sue prior parties and acceptor.

Excuses for Nonperformance.

Apart from performance, contract may be discharged by: (a) Agreement, provided it is supported by consideration, (b) frustration, if it becomes impossible to perform by reason of: (i) destruction of subject matter, (ii) inability to provide personal services, (iii) non-occurrence of event, (iv) government interference or (v) supervening illegality, or (c) breach, either actual or anticipatory, which may give innocent party right to treat contract as discharged and claim damages for loss or wait until time for performance arrives and then sue.

Rescission.

Misrepresentation of fact inducing contract entitles injured party to rescind contract and/or claim damages, provided he has not affirmed contract.

Unfair Terms.

Courts have invoked doctrine of fundamental breach, holding that some breaches of contract are so serious that they cannot be prevented by means of exclusion clause, either because term of contract is so important that liability for its breach cannot be excluded or because breach is so important that it destroys whole contract.

The Unfair Terms in Consumer Contracts Law (Law 93 of 1996) was enacted to implement EU Directive on unfair terms in consumer contracts (93/13/EEC). Defines as unfair, and therefore unenforceable, any term which, contrary to requirement of good faith, causes significant imbalance in rights and obligations of parties to contract to detriment of consumer, taking into account circumstances surrounding contract, nature of subject-matter and other terms. In determining element of good faith, regard must be had to strength of bargaining positions of parties, any inducement received by consumer, supply of goods or services to special order of consumer and extent to which seller or supplier has dealt fairly with consumer. Unless term in consumer contract is plain and intelligible, it will be given interpretation most favourable to consumer. This law does not apply to contracts relating to employment, succession rights, family law matters or incorporation and organization of companies or partnerships.

Applicable Law.

Parties may expressly choose proper law of contract, which will govern its interpretation and effect and their rights and obligations, and courts will hold parties to their choice, provided it is bona fide and legal and there is no reason for avoiding choice on ground of public policy. In absence of express choice, intention is to be inferred from terms of contract and surrounding circumstances; if intention cannot be inferred, proper law will be law with which transaction has closest and most real connection. Procedural matters relating to remedies under contract are usually governed not by proper law, but by law of country in which action is brought.

Government Contracts.

Normal contract law governs all business and commercial activities of Government, i.e. Government treated like any legal entity or Cypriot citizen. However, when contract relates to governmental project such as public utility or supplies, Coordination of the Procedures for the Conclusion of Public Supplies, Works and Services Contracts and Related Matters Law of 2006 requires Government or other public authority to use tender procedure to select contracting party, inviting local tenders for small projects and international bidders as well for large projects. Procedure includes performance bonds and bank guarantees. Public Tenders Laws 1997-2004 apply only to tenders relating to matters which are deemed to be of classified nature or relate to matters of highest importance to national security.

CISG.

United Nations Convention on Contracts for International Sale of Goods (CISG), as of July 2008, had been ratified by 71 countries that account for significant proportion of world trade. Cyprus harmonized its contract law with international law by ratifying CISG, and it is effective from 1 Apr. 2006.

3.04 LICENCES, BUSINESS AND PROFESSIONAL:

Licence is required to conduct insurance or insurance intermediary business, conduct betting office, fly aircraft, possess firearm, sell alcohol, conduct street trading, drive motor vehicle on public road, fish, kill game or marry. Non-Cypriots who are also non-EU nationals require residence and work permits, and since 31 Mar. 2005 Cypriots, EU nationals and nationals of EU-applicant countries have priority over them for permits to work in Cyprus. Non-Cypriots also require licences to buy real property, but EU nationals only require such licence for second homes until 1 May 2009 when five-year transitional period concerning purchase of such homes expires. Investment firms incorporated in Cyprus may provide investment services in Cyprus, once licensed by Cyprus Securities and Exchange Commission (CYSEC), and such firms may now operate in other EU states. Firms from other EU states may provide investment services in Cyprus if licensed by equivalent authority. Investment services means dealing in financial instruments (e.g. shares, securities and futures swaps), management of portfolios or underwriting of issues. Details of proposed enterprise must be submitted to CYSEC, and minimum share capital, dependent on services provided, must be fully paid up. Capital requirements must reflect risks and exposures. Employees must pass examinations.

3.05 MONEY LAUNDERING:

Cyprus ratified United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (Vienna Convention) in 1990, Council of Europe Convention on Laundering, Search, Seizure and Confiscation of Proceeds from Crime (Strasbourg Convention) in 1995 and Council of Europe Convention on Laundering, Search, Seizure and Confiscation of Proceeds from Crime and on Financing of Terrorism in 2007. In May 1996, domestic legislation enacted, namely Prevention and Suppression of Money Laundering Activities Law (Law 61[I]of 1996), 40 Recommendations of Financial Action Task Force on Money Laundering and relevant EU Council Directives. In 2007, Law 61(I) of 1996 was repealed and replaced by Prevention and Suppression of Money Laundering Activities Law 2007.

Unit for Combating Money Laundering (MOKAS) established under Law 61(I) of 1996 in Dec. 1996; became operational in Jan. 1997. Law requires mandatory reporting of suspicious transactions to MOKAS and obligation to take appropriate preventive measures (e.g. identification of customers - Know Your Client procedures, record keeping, and mandatory reporting) applied to all persons who are engaged in commercial business, including lawyers and accountants. MOKAS engaged in policy issues in area of anti-money laundering measures. MOKAS, as law enforcement authority, cooperates and exchanges information with International Police (INTERPOL) and European Police (EUROPOL).

3.06 MONOPOLIES, RESTRAINT OF TRADE AND COMPETITION:

To align Cyprus law with EU competition law (particularly Arts. 81 and 82), Protection of Competition Law was enacted in 1989 and amended in 1999 and 2000. Law repealed and replaced by Protection of Competition Law of 2008. It prohibits agreements that prevent, restrict or distort competition, with exceptions for agreements that improve production or distribution of goods or promote technical or economic progress. It also prohibits abuse of dominant position, e.g. by imposing unfair prices or other trading conditions, limiting production or markets or applying dissimilar conditions to equivalent transactions. It does not apply to acts or undertakings of state or those regulated by special legislation, to employment agreements or to mergers.

Control of Concentrations Law of 1999 applies to concentrations where combined turnover of at least two participants exceeds [Euro]3.4 million and at least [Euro]3.4 million of turnover of all relates to products or services within Cyprus.

Competition Committee, established under Protection of Competition Law, can enforce its provisions by ordering injunctions and imposing fines. There are also procedures for notification of agreements and applications for exemption and negative clearance.

3.07 SALES:

Sales are regulated by Sale of Goods Law (Law 10[I] of 1994), as amended.

Apart from rights of unpaid seller by action, he also has right, if title to goods has not passed, to withhold delivery. If title has passed, seller has: (a) Lien on goods while in his possession, (b) in case of insolvency of buyer, right to stop goods in transit after he has parted with possession and (c) right of resale as limited by 1994 Law.

Applicable Law.

See topic 3.03 Contracts, subhead Applicable Law.

1994 law offers consumer protection to buyers of prepacked goods from self-service shops that subsequently prove to be defective; buyers do not lose right to reject goods because they did not have chance to inspect them before they came into their possession. Consumer Protection (Sale of Consumer Products and Relevant Guarantees) Law (Law 7[I] of 2000) places seller of goods under obligation to supply consumer with goods in accordance with terms of contract; Law also requires any guarantee offered to be explained in simple and understandable language and to include clear statement that consumer's legal rights are not affected by guarantee.

Stoppage in Transit.

Goods deemed to be in transit from time when handed over to carrier for delivery to buyer until buyer or his agent takes delivery. Unpaid seller may regain possession of goods or give notice to carrier to prevent delivery to buyer.

Trade Description Law (Law 5 of 1987), as amended, provides criminal sanctions for applying inaccurate trade description to goods or for supplying or offering to supply goods to which inaccurate trade description has been applied.

Warranties.

Statements made in relation to description of goods are either conditions or warranties, depending on intention of parties and circumstances. Failure to perform warranty does not go to root of contract. Aggrieved party will only be entitled to damages and will not be entitled to reject goods. Sale of Goods Law inserts following guarantees or implied terms in all consumer contracts: (i) Seller has right to sell goods; (ii) goods are free of undisclosed charges or encumbrances and buyer will have and enjoy possession of goods undisturbed; (iii) goods must be fit for purpose and of merchantable quality; (iv) goods sold on basis of description or sample must correspond to description or sample. Any consumer contract which excludes above implied terms is void.

For exclusion clauses, see topic 3.03 Contracts, subhead Unfair Terms.

4 CITIZENSHIP

4.01 ALIENS:

See category 12 Immigration, topic 12.01 Aliens.

4.02 DOMICILE:

As in English law, matters of personal status are regulated by law of person's country of domicile (lex domicilii), being place where he intends to reside permanently. Under Continental law, such matters are referred to law of person's nationality (lex patriae). Domicile of origin may be replaced by domicile of choice. If domicile of choice abandoned, domicile of origin revived by operation of law unless and until another domicile of choice acquired.

4.03 IMMIGRATION:

See category 12 Immigration, topic 12.02 Immigration.

4.04 MILITARY/NATIONAL SERVICE:

Under National Guard Law, all male citizens of Republic of Cyprus on completion of 18th year of age, as of first of Jan. each year, and up to age of 50, are under obligation to carry out national military service as conscripts and reservists. Maximum duration of national service is 25 months. Persons exempt from national service include naturalized persons, clergy and those judged as unsuitable for medical reasons.

In 1997, Civil Defense (General) Regulations enacted aiming at reinforcement of Civil Defense system of Republic. Female citizens of Republic over 18 years of age trained for two years to deal with natural disasters or other state of emergency.

4.05 NATIONALITY:

Under Population Archives Law (Law 141[I] of 2002) Cypriot citizenship acquired: (a) As of right by child at birth to parents of whom at least one is Cypriot citizen, (b) by foreign spouses of Cypriot citizens if they live harmoniously in Cyprus with their Cypriot spouses for at least three years, are of good character and intend to continue to live in Cyprus. Other foreign nationals may acquire Cypriot citizenship by registration if they have resided in Cyprus for total of four years out of previous eight years, and in Cyprus continuously for past 12 months, prior to making of application.

Any adult Cypriot citizen in full possession of mental faculties may renounce Cypriot citizenship if nationality of another state is acquired. Council of Ministers may deprive Cypriot citizen of citizenship on public interest grounds but only if it was acquired by registration.

5 CIVIL ACTIONS AND PROCEDURE

5.01 ACTIONS:

Civil proceedings begin with issue of originating process (writ of summons, application for originating summons or petition), stating nature and extent of claim made or remedy or relief sought.

Evidence is either oral testimony, documentary evidence or real evidence.

Under Evidence (Amendment) Law of 2004, courts are free to admit hearsay evidence in any civil or criminal case unless court believes that it is not in interests of justice to admit such evidence.

Leave of court is needed before service can be effected on defendants not resident in Cyprus.

Principles of forum non conveniens are applied in Cyprus. Courts start with assumption that plaintiff is entitled to invoke jurisdiction of court selected for litigation, whether against local or foreign defendant.

Class action governed by Civil Procedure Rules. When there is common claim or interest or significant common legal issue in cause of action which would make it desirable to try cases together, court can order for ``representative action'' to take place to unite actions and try them together in single action. Requirement for power of attorney signed by all parties to be represented, empowering attorney to sue or defend parties on their behalf. Discretion of court to order separate trials if it considers representative action would not be favorable to any party represented.

5.02 COSTS:

Contingency fees banned. In contentious matters, lawyer may make written agreement with client, fixing amount and mode of payment of all or part of costs and disbursements; in this event, costs not subject to taxation.

Where costs for contentious work not fixed by agreement, they are controlled by Rules of Court. If client is dissatisfied with bill, he can apply to Registrar of Court for taxation. Losing party usually has to pay own and opponent's costs.

Rate charged by each lawyer for non-contentious work negotiable with client. Bar Council Rules provide minimum charging rate.

5.03 DEPOSITIONS AND DISCOVERY:

No jurisdiction to force nonresident parties or witnesses to give evidence before Cyprus courts, but Cyprus has various bilateral agreements with several countries whereby mechanism for obtaining evidence abroad exists. Letter of request is addressed to competent authority asking that commission for taking evidence abroad be issued. Cyprus courts may also invoke EU Council Regulation 1206/2001 for taking of evidence in civil and commercial cases where witness situated in another EU member state. Cyprus also signatory to Hague Evidence Convention.

5.04 FOREIGN JUDGMENTS:

See topic 5.05 Judgments.

5.05 JUDGMENTS:

Courts have powers to enforce compliance by parties who fail to obey judgments and orders made against them, by means of bankruptcy proceedings, charging order, committal for breach, garnishee proceedings, writ of delivery, writ of movables, writ of possession or writ of sequestration.

Arbitration awards enforceable by registration and recognition as court judgment, effected by application by summons.

Courts generally assist in enforcement of foreign judgments, provided that: (a) Judgment was given by court having jurisdiction in accordance with Cyprus rules in conflict of laws, (b) enforcement is not contrary to Cyprus public policy, (c) judgment was made on merit and not according to procedure, (d) judgment was not obtained by fraud, (e) proceedings which led to judgment were not contrary to natural justice, and (f) more than 15 years not elapsed since date judgment became enforceable.

No unified system for enforcement of foreign judgments. May be enforced by action or counterclaim at common law or under statute, or recognized as defence to action or as conclusive of issue in action. Since 1 May 2004, judgment given by court of member state of EU enforceable against defendant resident in Cyprus and vice-versa.

Judgment creditor cannot enforce foreign judgment at common law by direct execution, but must bring action on foreign judgment.

Foreign judgment may be enforceable under statute by registration in District Court either where debtor resides or where property to which judgment relates is situated if: (a) Final and conclusive between parties, (b) money is payable under it which is not for tax or similar charge or for fine or penalty, (c) application for enforcement is made within six years of judgment or decision on appeal, (d) judgment is unsatisfied, at least in part and (e) it can be executed in original foreign court.

Foreign judgment may be recognized as defence to action in Cyprus on basis of doctrine of estoppel per rem judicatam, namely that plaintiff's claim has been determined adversely by foreign court, if: (a) Judgment relied on was issued by competent court and was final, conclusive and on merits and (b) parties and issue in present action are same as those in earlier action.

All methods of execution of Cyprus court judgments are available.

5.06 PRESCRIPTION:

The Motor Vehicles (Third Party Insurance) Law (Law 96(I)/2000), as amended by Laws 97(I)/2003, 156(I)/2003, 168(I)/2006, and 69(I)/2007, sets limitation period of three years from date of accident for all traffic accident claims.

However, aside from traffic accident claims, there has been suspension of all limitation periods in respect of actions instituted on or after 21 Dec. 1963 under Law of Suspension of Limitation of Actions (Law 57 of 1964). Clauses in commercial agreements concerning time limits not affected by this law. Under Law 110 of 2002, which came into effect on 1 June 2005, Law 57 of 1964 was repealed, but the Limitation of Actions Law, Cap. 15 remains suspended until 31 Mar. 2010. Suspension of time-bars will continue to exist in respect of actions concerning movable or immovable property situated in territory of Republic under Turkish occupation.

6 COURTS AND LEGISLATURE

6.01 COURTS:

Two tiers of courts, Supreme Court and subordinate courts. Six types of subordinate courts, namely District Courts, Assize Courts, Family Courts, Industrial Disputes Courts, Rent Control Courts and Military Courts.

6.02 LAW REPORTS, CODES:

See topic 6.04 Statutes.

6.03 LEGISLATURE:

See category 1 Introduction, topic 1.02 Government and Legal System.

6.04 STATUTES:

Substantive part of Cyprus criminal law is in Criminal Code (c. 154) as amended, containing all major offences and criminal responsibility existing at common law.

Other branches of law were effectively codified in 1959, e.g. Civil Wrongs Law (c. 148), Contract Law (c. 149), Criminal Procedure Law (c. 155), and Sale of Goods Law (c. 267), with subsequent amendments.

Remaining parts of law consist of Constitution, statutes enacted by House of Representatives, subsidiary legislation, English laws specifically adopted when Cyprus became independent in 1960 and judicial precedents. Cyprus applies English common law principles where no Cyprus legislation is in force. Since EU accession on 1 May 2004 EU law takes precedence over domestic law. Following 2005 case in which Supreme Court effectively ruled that Cyprus Constitution must take precedence over EU law, Cyprus Constitution was amended in 2006 to make it clear that EU law should prevail.

Laws passed by House of Representatives are published in Official Gazette of Republic of Cyprus.

7 CRIMINAL LAW

7.01 EXTRADITION:

Extradition of criminal suspects between Cyprus and EU member states is regulated under provisions of European Arrest Warrant. In respect of third countries, extradition subject to existence of applicable bilateral extradition treaty. Cyprus signed extradition treaty with government of United States of America in 1996.

8 DEBTOR AND CREDITOR

8.01 ASSIGNMENTS:

No express provision in Contract Law. Courts rely on English equitable principles. Debt considered as legal chose in action that may be assigned in equity. Liabilities may not be assigned. Equitable assignment of debt need not be in particular form and is deemed complete even if no notice given to debtor.

8.02 ATTACHMENT:

Any party to action may seek attachment of any other party's property until final trial. Application should be supported by affidavit demonstrating prima facie case and risk of unsatisfied judgment if attachment order not granted. Order usually granted on condition that applicant lodges security to indemnify respondent against losses sustained by issue of order if found to be unreasonable or mala fide.

Courts have jurisdiction to issue Mareva injunctions to freeze respondent's assets within Cyprus and usually grant them if there is justifiable cause of action, good case and real risk that assets will be dissipated before enforcement of judgment.

Under Civil Procedure Law (c. 6) creditor can register judgment at District Lands Office against any immovable property in which debtor has interest. Registration remains in force for six years and can be prolonged by court order.

8.03 BANKRUPTCY:

Courts can adjudicate bankrupt any individual debtor who at time of act of bankruptcy was: (a) Personally present in Cyprus, (b) ordinarily resident or had place of residence in Cyprus, (c) carrying on business in Cyprus personally or by agent or manager or (d) member of firm or partnership which carried on business in Cyprus. (Bankruptcy Law, c. 5).

Proceedings start with filing petition by creditor, where debt must be at least [Euro]854 and liquidated sum payable immediately or at specified time, or by debtor, where total debts must exceed [Euro]8543, be unsecured and be liquidated sums payable immediately or on agreed dates.

If petition is accepted, receiving order will be issued, appointing official receiver who will control debtor's financial affairs. Within three days of order, if petition filed by debtor (seven days if filed by creditor), debtor must provide statement of affairs.

If debtor is adjudicated bankrupt, property will vest in official receiver until trustee in bankruptcy is appointed. Trustee will distribute property among creditors.

Voluntary conveyances and fraudulent preferences made by debtor before act of bankruptcy are voidable by trustee if made within three months of presentation of bankruptcy petition.

8.04 EXECUTIONS:

Unsatisfied domestic judgment, and foreign judgment taking effect as domestic judgment, can be enforced by writ of movables or fieri facias whereby debtor's goods and chattels of sufficient value to cover judgment debt and costs and costs of enforcement are seized and sold. Basic necessities including clothing, basic domestic effects and tools of debtor's trade may not be seized.

8.05 FRAUDULENT SALES AND CONVEYANCES:

Under Fraudulent Transfers Avoidance Law (c. 62) gift, sale, pledge, mortgage or other transfer or disposal of any property to hinder or delay creditors may be deemed fraudulent, treated as invalid as against them and set aside by court. Such property may be seized and sold to satisfy judgment debt.

8.06 GARNISHMENT:

Civil Procedure Law (c. 6) also provides for execution by attachment of movable property. Where debtor beneficially interested in movable property in custody or under control of third party within jurisdiction or third party owes money to debtor, creditor may apply to court after judgment for writ of attachment or garnishee order, requiring third party to appear and be examined about such property and meanwhile not to part with possession of it. Property is answerable for satisfaction of judgment debt from time of service of writ on third party. Court may order any part of attached property to be paid to debtor or sold in satisfaction of debt.

8.07 INSOLVENCY:

Under Companies Law, winding up of company can be compulsory by court or voluntary, either by members or creditors.

Winding up by court occurs if: (a) Company has so resolved, (b) default in delivery of statutory report or holding of statutory meeting, (c) company does not commence business within a year of incorporation or suspends business for a year, (d) number of members of public company is reduced below seven, or (e) company cannot pay its debts in one of three specified situations and court considers it just and equitable to wind up company. Petition for winding up can be filed by company, Official Receiver, contributory or creditor. If winding up order made, control and management of company's property and affairs vests in liquidator, who must collect and realize company's assets and distribute proceeds.

Voluntary winding up starts with resolution by company. In members' winding up, directors must make full inquiry into company's affairs and conclude that company can pay debts in full plus interest, and liquidator must account for winding up at final meeting. In creditors' winding up, company considered insolvent and creditors control procedure; directors must provide statement of company's affairs at creditors' meeting, which may appoint liquidator and establish Committee of Inspection.

8.08 LIENS:

Lien is right to retain possession of goods belonging to another to protect debt due to retainer. Personal right, existing only in respect of goods rightfully received, and cannot be transferred. In absence of statute confers no right of sale.

Equitable and maritime liens give rights to creditors to have certain specific property applied in satisfaction of demands.

Lien may be general or particular, and may arise through subrogation. Lost by: (a) Discharge of debt, (b) tender of debt, or (c) taking security for debt in circumstances inconsistent with its continued existence.

8.09 PLEDGES:

Pledge of personal chattels is transfer by delivery of immediate possession thereof as security for advance, past or present. Pledger remains owner, but pledgee acquires right to sell if advance not repaid on due date.

9 EMPLOYMENT

9.01 LABOUR RELATIONS:

Labour law is amalgam of common law and statute law. Employment relationship governed primarily by ordinary contract law principles and supplemented by statutory rights and obligations.

Industrial Relations Service of Ministry of Labour and Social Insurance provides mediation and conciliation assistance and tries to prevent or settle collective bargaining controversies. If dispute is submitted to arbitration, Service arranges appointment of arbitrator.

Art. 27 of Constitution safeguards right of every employee to strike except where safety of state, constitutional or public order, or security is in danger.

Trade Unions Law (Law 71 of 1965), as amended, regulates trade unions.

Annual Holidays with Payment Law (Law 8 of 1967), as amended, provides mandatory annual holidays for persons employed under contract of service.

Termination of Employment Law (Law 24 of 1967), as amended, covers redundancy and arbitrary dismissal of employees and sets basis of compensation. Qualifying periods of employment are 104 weeks and 26 weeks respectively. Dismissal is unfair if employer terminates employment for reason other than one stated in Law. Burden of proof is on employer.

Safety and Health at Work Law (Law 89[I] of 1996) protects right to safe and healthy working conditions for workers and persons who may be affected by activities of other people at work. Qualified inspectors make regular visits to workplaces.

Industrial Disputes Courts have exclusive jurisdiction in all cases arising out of industrial conflict, including unfair dismissal, annual holiday claims, wage claims and pregnancy-related issues. Appeals lie without leave to Supreme Court on point of law only.

All forms of discrimination, including sex discrimination, are generally prohibited by Art. 28 of Constitution. Discrimination between men and women in respect of remuneration for equal work prohibited by Law 177 of 2002. Discrimination on ground of sex prohibited by Equal Treatment Between Men and Women at Work and Professional Training Law. (205[I] of 2002). Maternity leave is statutory right. Social Insurance Laws (Laws 78 of 1982 and 41 of 1980), as amended, regulate obligation to make social insurance contributions by employers, employees and self-employed and conditions for receiving payments from fund.

General Framework for Information and Consultation of Employees Law (Law 78[I] of 2005) requires employers or businesses that employ 30 or more employees to inform and consult with employees regarding business activities or actions that may impact employment or employees of said business.

10 ESTATES AND TRUSTS

10.01 DEATH:

Under Population Archives Law (Law 141[I] of 2002), as amended, death is certified and registered by Registrar of Births and Deaths of district where death occurred.

Wills and Succession Law (c. 195) enables person to be declared dead by court order if disappeared or missing for ten years and no news received that he is alive, provided that he would by then have reached age 28. If he would have reached age 70, period is reduced from ten to five years. Special provisions for fighting members of armed forces, passengers on ships or aircraft missing during voyage.

If several persons have died in common peril, or there is dispute as to which of two or more persons died first, rebuttable presumption that they all died simultaneously.

Under Administration of Estates Law (c. 189) on death of person all causes of action subsisting against or vested in him survive against or for benefit of his estate, except right to claim damages for bereavement.

10.02 DESCENT AND DISTRIBUTION:

“Statutory portion” is part of estate at death which person may be unable to dispose of by will; remainder is “disposable portion”. If person dies leaving spouse and child, or spouse and descendant of child, or no spouse but child or descendant of child, statutory portion is three quarters of net value of estate. If he leaves spouse or father or mother but no child or descendant of child, statutory portion is one half. If he leaves none of these, there is no statutory portion.

Rules about statutory portion do not apply to will of person who, or whose father, was born in U.K. or in country which is member of Commonwealth, or to disposition by will of movable property of alien, irrespective of whether or not such person or alien was domiciled in Cyprus.

If person leaves spouse and child or descendant of child, share of statutory and disposable portions to which spouse is entitled is same as share of each child. If no child or descendant but ancestor or descendant within third degree of kindred, share of spouse is one half of portions. If no child, descendant, ancestor or descendant within third degree, but ancestor or descendant within fourth degree, share is three-quarters of portions. If no child, descendant, ancestor or descendant within fourth degree, share is whole of portions.

On intestacy, after deduction of share of surviving spouse (calculated as above) remaining property is distributed in manner prescribed by First Schedule (Succession of the Kindred) and Second Schedule (Table of Degrees of Kindred) to Wills and Succession Law.

Under Convention on the Legal Status of Children born out of Wedlock (Ratification) Law 1979, illegitimate child has same right of succession to estates of father and mother and members of their families as if it were legitimate.

10.03 WILLS:

Adult of sound mind, memory and understanding can make will. Will must be in writing and signed by testator or some other person on his behalf, in his presence and by his direction. Signature must be made or acknowledged by testator in presence of two or more witnesses present at same time who must attest and sign will in presence of testator and in presence of each other. If will consists of more than one sheet of paper, each sheet must be signed or initialled by or on behalf of testator and witnesses. Legacy to witness or to spouse or child of witness is void, but validity of will not thereby affected. Absence of attestation clause renders will void. Obliteration, interlineation or other alteration invalid unless executed in same way as will.

Probates (Re-Sealing) Law (c. 192) covers grants of probate or letters of administration issued in U.K. or British Dominions or any country member of Commonwealth.

11 FAMILY

11.01 ADOPTION:

Adoption is regulated by Adoption Law. (Law 19[I] of 1995). Application may be made by: (a) Both spouses for joint adoption, (b) natural father with his wife or natural mother with her husband, jointly, (c) mother's husband or father's wife or (d) unmarried person if there are special reasons.

Consent must be given by parents or guardian, spouse of applicant if married and child if its age and mental condition permit.

Adoption order extinguishes all rights and obligations of natural parents or guardian and transfers them to adopter(s). Every obligation arising out of agreement, will or court decision for payment of child's maintenance or other parental duty is also terminated. Child will be considered for all purposes as legal and natural child of adopter(s) and no other person, but marriage between child and natural parent or blood relative is prohibited and sexual relationship between child and such person would be incestuous. Marriage between child and adoptive parent is not permitted. Adoption except in accordance with Adoption Law is invalid.

11.02 DIVORCE:

Regulated principally by Law 95 of 1989 (amending Art. 111 of Constitution), Laws 21 (Civil Marriage Law), 22 (Attempt to Compromise and Spiritual Dissolution of Marriage Law) and 23 (Family Courts Law) of 1990, as amended, and Law 46(I) of 1999 (Family Courts [Amendment] Law). Before Family Courts established in 1989, only ecclesiastical courts had jurisdiction to dissolve marriages.

Grounds are (a) those set out in Charter of Greek Orthodox Church of Cyprus which include desertion for two years, behaviour which is immoral, disgraceful or otherwise inexcusable, persistent refusal to have child, lunacy, cruelty and adultery, and (b) irretrievable breakdown of relations between spouses through fault of one or both so that continuation of cohabitation becomes intolerable for petitioner, as evidenced by adultery, desertion, cruelty, breach of obligations of cohabitation and conjugal faith, acts affecting personality of other spouse, character differences or separation for at least five years.

In ecclesiastical divorce (only), petitioner must send to respondent formal invitation through Bishop to return to matrimonial home and this request must be produced to ecclesiastical court.

Proceedings have three stages, namely: (a) Reaching compromise before Bishop (in church marriages), (b) procedure in Family Court and (c) spiritual dissolution of marriage (church marriages). Petitions instituted before expiration of three month period for reaching compromise are deemed void.

Courts have jurisdiction if one spouse has been domiciled in Cyprus for at least three months.

By Law 63 of 1982 Cyprus is signatory to Hague Convention on the Recognition of Divorces and Legal Separations.

Maintenance orders between spouses generally governed by Property Relations between Spouses and Other Related Matters Law (Law 232 of 1991) which deals with circumstances in which maintenance can be claimed and in which court can refuse to grant it and how much should be paid.

11.03 HUSBAND AND WIFE:

Generally there is separation of property between husband and wife, but on dissolution of marriage it is subject to claims of contribution and unjust enrichment. All property acquired by spouses during marriage and not constituting dowry taken into account, but any gift by one spouse to other is deducted. Claim for participation is connected with fault which may cause claim to be lost.

Use of matrimonial home during separation is governed by principles set out in Family Courts Law. They are based on equity and take into account circumstances of each spouse, financial, physical and mental, including any fault, and welfare of children. Rights of ownership are irrelevant. Any protection of occupation relates to duration of interruption of marital life and does not affect position after dissolution of marriage.

On separation, movables are distributed between spouses according to ownership unless equity requires otherwise. Movables belonging to both spouses are distributed according to personal needs of each spouse.

11.04 INFANTS:

Age of majority is 18 for both sexes.

11.05 MARRIAGE:

Age of consent to marry is 16 for both sexes. Consent of parents or guardians is also required for marriages where either party is under 18.

Every intending spouse must give notice of intention to marry, addressed to Officer of Marriages of municipality of choice.

Law distinguishes between void and voidable marriages. Void marriage has no legal effect and no court decision is required to declare it as such. Voidable marriage is valid unless and until decree of annulment is obtained from competent court on petition of either party. If avoided, consequences of both are same, namely retrospective annulment of marriage and retrospective disappearance of its effects.

Marriage is void ab initio if, for example: (a) Parties are within prohibited degrees of relationship, (b) either party is under age 16 or (c) either party is already lawfully married.

Prohibited degrees are: persons related in direct line and up to fifth degree in collateral lines, relatives by marriage in direct line and up to third degree in collateral lines, adopters and descendants with adoptees and descendants, godfathers and their parents and children with children of godchild, children born out of wedlock with fathers acknowledging them or their blood relatives.

Marriages in breach of Charter of Greek Orthodox Church regarded as void or voidable by that Church. If treated as voidable, defect may be cured, for example, marriage to minor which has continued after majority is deemed valid and marriage induced by mistake, duress or threat will be validated if spouse so induced does not seek annulment of, or ratifies, marriage.

Marriage is voidable if contracted without free consent of one spouse or by mistake, duress, force or threat.

12 FOREIGN TRADE AND COMMERCE

12.01 EXCHANGE CONTROL:

Movement of Capital Law (Law 115 of 2003) came into effect on 1 May 2004.

No exchange control restrictions on investments by natural or legal persons from EU countries. However, in banking sector nonresident participation is restricted to 50% of equity capital. Restrictions on acquisitions of property, establishment of radio and television stations and provision of utilities.

Non-EU investors may invest freely in companies quoted on Cyprus Stock Exchange or acquire shares in Cyprus registered companies. For some investments, certain restrictions apply depending on sector e.g. applications regarding non-EU participation in banks, insurance companies and other financial services assessed on case-by-case basis. Applications for real estate development, tertiary education or offices servicing airlines at airports normally rejected outright.

Since year 2000 citizens of Cyprus allowed to make direct investments abroad without restriction so long as Central Bank is satisfied that it is genuine direct investment involving at least significant participation in management of enterprise and not portfolio investment, namely equity holding of less than 10% of share capital of enterprise involved.

Cyprus commercial banks may operate branches in EU countries subject to giving adequate notice and relevant information stipulated in Banking Law (Law 66 of 1997, as am'd) to Central Bank before commencement. Commercial banks based in EU countries may also establish branches in Cyprus, subject only to various reporting requirements that apply to domestic banks.

National legislation implementing European Markets in Financial Instruments Directive has been enacted under Law 144(I)/2007 and came into force on 1 Nov. 2007. Law establishes comprehensive regulatory framework for execution of transactions on behalf of investors by stock markets, alternative trading systems and investment firms and implements “single passport” for investment firms, banks and stock markets which enables such institutions to offer their services on cross-border basis throughout Europe on strength of home-country authorisations, granted on basis of uniform criteria in all Member States. New law replaces and repeals the Investment Firms Law of 2002.

12.02 FOREIGN EXCHANGE:

See topic 11.01 Exchange Control; category 1 Introduction, topic 1.01 Currency.

12.03 FOREIGN INVESTMENT:

See topic 11.01 Exchange Control.

12.04 FOREIGN TRADE REGULATIONS:

In general, imported goods subject to customs duty or value added tax at various rates. Import of agricultural products, food, animals, explosives and certain drugs subject to controls. Export of certain antiques and antiquities prohibited.

EU's common external tariff applies to all imports from non-EU countries. Tariffs or quotas on EU imports have been abolished.

13 IMMIGRATION

13.01 ALIENS:

Position of aliens governed by Aliens and Immigration Law (c. 105), as amended. Aliens, or foreigners, are persons who are not native Cypriots, but all persons are equal under law. Protection and security afforded by Cyprus, as well as all rights and freedoms enjoyed by Cypriots, are also afforded to and enjoyed by aliens while in Cyprus or under its jurisdiction.

As of 1 May 2004 nationals of EU Member States need only produce for inspection their passports or EU identity cards to gain access to island from any airport or seaport. EU nationals may reside for indefinite period if they can demonstrate that they have sufficient funds to support themselves. Aliens and Immigration (Amending) Law 2007 gives EU and third country nationals who have lived in Cyprus for five years right to apply for permanent residence in line with EU Directives.

Corporations Owned or Controlled by Aliens.

Foreign-owned companies, including international companies (ex-IBCs), are eligible to employ third country nationals in Cyprus provided certain conditions, including minimum investment level and minimum remuneration rates are fulfilled. Family members of qualifying persons may also obtain residence permits.

13.02 IMMIGRATION:

Temporary residence or work permits may be granted to aliens subject to proof of offer of employment by locally based business or proof of sufficient monetary means to sustain themselves during stay in Cyprus.

14 INTELLECTUAL PROPERTY

14.01 COPYRIGHT:

Law is contained in Right of Intellectual Property Law, Law 59 of 1976, as amended by Laws 63 of 1977, 18 of 1993, 54(I) of 1999, 12(I) of 2001, 128(I) of 2002, 128(I) of 2004, 123(I) of 2006 and 181(I) of 2007.

Copyright is property and consists of exclusive right to do or authorize others to do certain acts in relation to work, e.g. copy, publish, perform, film or record material. Anyone doing such acts without licence infringes copyright.

Copyright exists in: (a) Original literary, dramatic, musical and photographic works, software and databases and lasts for author's life and 70 years thereafter, (b) cinematographic films for 70 years from date of death of last surviving co-creator, (c) recordings for 50 years from date of recording, (d) broadcasts for 50 years from date of broadcast. No copyright in idea as such.

Initially copyright belongs to author (or his employer), producer, publisher or director as appropriate. No provision is made in above law for registration of copyrights.

Law provides remedies for infringement. For criminal offences listed in Law, penalties include fine or imprisonment for up to two years; in addition, court may order copies of work to be destroyed or delivered to owner. Civil remedies include damages, destruction or delivery of infringing copies and equipment by which made, account of profits and injunction.

Law protects authors who are: (a) Physical persons and Cypriot citizens or ordinarily resident in Cyprus, (b) legal persons registered under Cyprus laws, (c) citizens of EU member state.

Protection also extended by Law to works of non-Cyprus or EU origin eligible under international treaties or conventions such as Berne Convention and Universal Copyright Convention.

Designs.

Protection of Industrial Designs and Samples Law (Law 4[I] of 2002) as amended by Laws 70(I) of 2003 and 119(I) of 2006 regulates and protects designs in accordance with EU standards.

14.02 PATENTS:

Governing statute is Patents Law, Law 16(I) of 1998, as amended by Laws 21(I) of 1999, 153(I) of 2000, 163(I) of 2002 and 122(I) of 2006.

Invention not patentable unless new, involves inventive step and capable of industrial application. Excluded inventions are: (a) Discoveries, scientific theories and mathematical methods, (b) aesthetic creations, (c) schemes, rules or methods for performing mental acts, playing games, and (d) presentations of information.

Application filed with Patent Registrar, followed by search at European Patent Office.

After registration, anyone who manufactures, sells, imports or commercially exploits either patented product or product obtained by patented process may be sued for infringement. Most important grounds for defence are that: (a) Patent is not for invention within meaning of law, (b) invention is not novel, (c) is obvious, (d) is incapable of industrial application, (e) belongs to excluded category, (f) claims of complete specification are ambiguous, (g) complete specification is insufficiently explicit and (h) application for patent not in order. Relief available to successful plaintiff is injunction and/or damages.

Patent is generally valid for 20 years from date of filing application, subject to payment of annual renewal fee.

Licences to use or deal with patented inventions usually granted for royalties, either percentage of net sales price or fixed sum per article processed or manufactured.

14.03 TRADEMARKS AND TRADENAMES:

Trade Marks (Amendment) Law 2000 (Law 176[I] of 2000) amended earlier legislation (which began with Trade Marks Law, c. 268) and implemented EU Directive 89/104/EEC of 1988. New Law created single register to replace Parts A and B of old register. Registration starts on filing application with Trade Marks Registrar. If mark not registrable, Registrar can object or impose conditions. Applicant may present arguments before Registrar determines application and if he refuses it, applicant can apply for judicial review of decision. Registered mark has initial validity for seven years from filing, renewable on application for period of 14 years.

New Law lowers threshold for registration, enabling shapes of goods, packaging and other sensory marks to be registered. Sign must be capable of being represented graphically and of distinguishing goods or services of one undertaking from those of another. May also consist of words, including personal names, designs, letters or numerals. Registration refused if: (a) Sign incapable of functioning as trademark, (b) trademark devoid of distinctive character, (c) consists exclusively of signs or indications which in trade may designate kind, quality, quantity, intended purpose, value, geographical origin, time of production of goods or rendering of services or signs or indications which have become customary in current language or in bona fide and established practices of trade, (d) sign consists solely of shape which results from nature of goods themselves, which is necessary to obtain technical result or which gives substantial value to goods, (e) trademark contrary to public policy or accepted principles of morality or of such nature as to deceive public, (f) sign does not satisfy prescribed requirements, (g) trademark refused or invalidated under Paris Convention for Protection of Industrial Property, (h) trademark contains religious symbol or (i) application for trademark made in bad faith.

Infringement of registered mark occurs if identical sign is used in course of trade for goods or services identical with those within specification; not necessary to show any likelihood of confusion. New Law widens scope of infringement action to cover: (a) Use of registered trademark on similar goods and nearly resembling mark on goods or services within registration, when plaintiff must prove likelihood of confusion on part of public, including likelihood of association with trademark, and (b) doctrine of dilution, confined to 'invented' words that have become so well known as to deserve protection against use on goods other than those traded in by registered proprietor; where trademark has acquired reputation in Cyprus, use of identical or similar sign for goods or services which takes advantage of, or is detrimental to, distinctive character or repute of mark constitutes infringement. Usual relief granted is injunction and/or inquiry as to damages. If infringement on large scale, court may order delivery up of spurious marks for destruction or tendering of account of profits made from infringement.

Tradenames registrable under Partnerships and Business Names Law (c. 116) by Registrar of Companies, who may refuse to register business name comparatively similar to existing one or considered to be misleading or confusing. No statutory remedies for misuse. Only redress is action for passing off, for which remedies are damages and/or injunction. Tradename remains on register until application for removal is filed.

15 LEGAL PROFESSION

15.01 ATTORNEYS AND COUNSELORS:

Legal profession fused, so that person admitted to local Bar may practice as advocate and legal consultant. Many lawyers specialize either in litigation or in non-contentious work.

To be admitted to local Bar, person must have law degree from recognized university which meets specified requirements, and must have satisfactorily completed one year as pupil-advocate with Cyprus law firm and passed legal examinations conducted by Cyprus Legal Council.

Foreign lawyers who obtained their professional title from EU member state can practice legal profession permanently in Cyprus once they register with Legal Board. To register, following documents must be submitted by foreign lawyer to Legal Board: (i) Certificate verifying lawyer's nationality; (ii) certificate of clean criminal record; (iii) certificate of registration as lawyer from home state. Once foreign lawyer registers, must practice for three years before foreign lawyer considered fully qualified to represent clients before Cyprus courts.

16 MINERAL, WATER AND FISHING RIGHTS

16.01 MINES AND MINERALS:

Exploitation of mines and minerals are regulated under Immoveable Property (Tenure, Registration, Valuation) Law Cap. 224, Mine and Quarry Law Cap. 270 (περι ρυθιση[Final Sigma] ετλλειων κι λτοειων) and Mines Regulations Law Cap. 271. Law states that any minerals, ground waters, etc. belong to Republic of Cyprus. Minerals defined as every substance of economic value originating from Earth's crust for example natural gas, tar and mineral oil. Silvan (forestal) products or carbon are not considered minerals. Holder of license to conduct survey can, with consent of owner, enter private property or state-owned property and undertake geological survey. Extraction must be authorized by Council of Ministers. Quarrying requires authorization of

District Officer or Council of Ministers.

No offshore oil or gas exploitation currently undertaken in Cypriot Exclusive Economic Zone or territorial waters. However, reported existence of oil and natural gas reserves off coast of Cyprus has prompted Republic of Cyprus to introduce modern legislation to regulate oil and gas sectors and to claim Exclusive Economic Zone of island in accordance with United Nations Law of Sea Convention. In this respect, Contiguous Zone Law of 2004 and Exclusive Economic Zone Law of 2004 enacted. Republic of Cyprus has jurisdiction within exclusive economic zone over exploration and exploitation of all natural resources, waters, sea bed and sub-sea bed as well as production of energy.

Bilateral agreement between Republic of Cyprus and Arab Republic of Egypt on Delimitation of Exclusive Economic Zone ratified in 2003. In May 2006, Cyprus and Egypt signed agreement on joint development of hydrocarbon sources straddling demarcation line which separates exclusive economic zones of two countries. Republic of Cyprus currently negotiating similar bilateral agreements concluded with Egypt with other neighbouring countries.

17 MORTGAGES

17.01 CHATTEL MORTGAGES:

Chattel mortgages executed by limited companies require registration under Companies Law. Mortgages of ships, governed by Merchant Shipping (Registration of Ships, Sales and Mortgages) Law (Law 45 of 1963) as amended, require registration with Registrar of Cyprus Ships.

17.02 MORTGAGES OF REAL PROPERTY:

Immovable Property (Transfer and Mortgage) Law (Law 9 of 1965) as amended regulates mortgages of immovable property and sales of mortgaged property.

18 PROPERTY

18.01 ABSENTEES:

In absence abroad, authority may generally be delegated to any person of full capacity, usually by power of attorney, limited or general. Trustee Law (c. 193) sets out circumstances in which trustees may delegate their duties.

18.02 DEEDS:

Corporation or company executes deed in manner provided by articles of association.

Stamp Duty.

Stamp Duty (Amendment) Law of 2002 (a) exempts from stamp duty transactions made under reorganization, such as merger, demerger, spin-off, contribution of assets and exchange of shares, and (b) abolishes exemption from stamp duty of trading contracts made by international business companies.

18.03 PERPETUITIES:

No statutory equivalent to English Perpetuities and Accumulations Act 1964. Old English equitable principle of 21 years plus period of life or lives in being applies to trusts and other areas of law, but international trust may remain in force for up to 100 years, notwithstanding statutory provision to contrary, and purpose and charitable trusts may continue without limitations.

18.04 REAL PROPERTY:

Acquisition of Immovable Property (Aliens) Law (c. 109) as amended deals with ownership of real property by non-Cypriots. Apart from following general rules relating to acquisition of real property, non-Cypriots must obtain licence for purchase from Council of Ministers and are restricted in amount of property they may acquire; normally permission given to buy one flat or one house or one piece of land not exceeding 4,000 square metres in area. Requirement for EU nationals to obtain licences for second homes terminated in May 2009 when five-year transitional period granted to Cyprus expired. All prospective purchasers of real property in northern part of Cyprus occupied by Turkey since 1974 are advised to check vendor's title very carefully.

Contract for sale and purchase of real property must be in writing and signed by seller and buyer whose signatures must be witnessed. Buyer must deposit contract at Land Registry within two months of its date to be entitled to invoke remedy of specific performance. Transfer fee payable, based on value of property or contract price.

19 TAXATION

19.01 ADMINISTRATION:

Assessment and collection of taxes governed by Assessment and Collection of Taxes Law (Law 4 of 1978) as amended and administered by Director of Inland Revenue. All taxation imposed by House of Representatives and collected either by addition or deduction at source of taxable payment or directly from taxpayer or by Customs and Excise officials at ports and airports.

19.02 CAPITAL GAINS TAX:

Introduced in 1980 by Capital Gains Tax Law (Law 52 of 1980), as amended, to tax gains from disposal of property, i.e. immovable property in Cyprus and shares in companies whose assets include such immovable property, which are not subject to income tax as trading activity. Base date for calculation of acquisition cost is Jan. 1, 1980. Certain exceptions, for individuals and for disposal of agricultural land, dwelling house and property outside Cyprus. Any gains from disposal of securities are exempt. Losses can be offset against gains of same year and unrelieved losses can be carried forward.

19.03 CORPORATION TAX:

Since Jan. 2003, all companies registered, managed and controlled in Cyprus, whether local or international are taxed on profits at 10%.

Since Jan. 1, 2003, companies have had to pay 2% of employees' wages to Social Cohesion Fund used to subsidize pensioners.

Dividends paid to Cyprus tax residents are subject to 15% withholding tax, based on deemed distribution of 70% of after-tax profit. Dividends paid to foreign corporations and foreign individuals, inter-company dividends, and dividends receivable from nonresident companies are exempt from withholding tax. Dividends in hands of nonresident shareholders are tax-free. Interest taxed at 10% for companies resident in Cyprus, and nonresident companies are exempt. Royalties taxed at 10% but where intellectual or industrial property right is granted for use outside Cyprus royalty will be tax-exempt.

19.04 EMPLOYMENT TAXES:

Social Insurance Scheme was introduced in 1980. As of 1 Apr. 2009, contributions are 17.9% of earnings, of which 6.8% is payable by employee, 6.8% by employer and 4.3% by

Government. Contribution paid by self-employed also increased to 16.9% of which 12.6% is payable by individual and 4.3% by Government. Upper earnings limit is [Euro]48,048 per year for employees and self-employed. Employers are also required to contribute 1.2%* of employee earnings to Redundancy Fund; 0.5%* to Industrial Training Fund and 2%** to Social Cohesion Fund.

*Subject to upper earnings limit of [Euro]48,048 per year. ** no upper earnings limit.

19.05 ESTATE DUTY:

Levied under Estate Duty Law (Law 67 of 1962) on estate of person dying between 1 Dec. 1942 and 31 Dec. 1999. Abolished on deaths on or after 1 Jan. 2000.

19.06 PERSONAL INCOME TAX:

Taxable Income.

Taxation of worldwide income for residents in Cyprus and of Cyprus-source income for nonresidents. Individual considered resident in Cyprus if present for more than 183 days during particular tax year (tax year is calendar year). Days of arrival count as days in Cyprus: days of departure count as days outside. For companies U.K. rule followed, company resident where its management and control is.

Taxation of Personal Income.

For 2008, personal income is chargeable to tax as follows:

Income bands ([Euro])	**Tax rates percent**
- 19,500	(nil),
19,501 - 28,000	(20),
28,000 - 36,300	(25),
36,300 upwards	(30).

Personal allowances and deductions abolished, except reliefs allowed for life insurance premiums and contributions to pension funds and Social Security and Welfare Funds.

19.07 PROPERTY TAX:

Immovable Property Tax.

Annual tax levied on market value of immovable property (defined as land and buildings, trees and plantations, rivers, wells and all rights relating to land and buildings) assessed on 1 Jan. 1980. Rate of tax is nil on first [Euro]170,860, 0.25% on next [Euro]256,290 (cumulative tax [Euro]641), 0.35% on next [Euro]427,150 (cumulative tax [Euro]2,136) and 0.4% from [Euro]854,300 and above. Immovable property owned by government, local authorities, Church or foreign countries and farmland exempt. Immovable property also subject to municipal or village rates, sewerage fees and refuse collection charges which are unlikely to exceed [Euro]200 per annum per rate.

Property Transfer Fees.

On transfer of immovable property, fees payable by buyer on purchase price or, under certain circumstances, on current market value, at rate of 3% to [Euro]85,430, at 5% on next [Euro]85,430 and at 8% on any balance above [Euro]170,860.

19.08 VALUE ADDED TAX:

Payable on supply of goods or services in Cyprus, import of goods to Cyprus and notional provision in Cyprus of services received from abroad. Any person whose turnover exceeds [Euro]15,377 per annum must register.

Registered person can reclaim input tax (VAT paid) on goods or services supplied to him except where his business makes exempt supplies.

If supply zero-rated, no VAT chargeable but treated in all other respects as taxable supply and input tax can be reclaimed.

Standard rate is 15%. Reduced rates of 5% and 8% apply to certain goods and services.

20 TRANSPORTATION

20.01 MOTOR VEHICLES:

Registration document is provided by Inland Transport Department for each new or transferred vehicle, and each transfer must be duly notified.

Vehicle licence must be taken out and receipt for motor tax displayed. Annual tax depends on engine size, type and weight of vehicle and whether petrol or diesel fuelled. Tax payable annually or twice yearly.

Person under age 16 may not operate any motor vehicle. Person over 16 may operate moped, over 17 motor car or motorcycle.

Visitors may drive in Cyprus if they possess either international driving licence or national licence valid for class of vehicle they wish to drive.

Double yellow lines prohibit parking at any time, single lines during normal business hours. Some parking regulated by meter.

Testing of vehicles compulsory for vehicles over four years old. All vehicles that pass this test must display relevant documentation (similar to tax disc) on their windshield. Vehicles need to be re-tested every two years.

If involved in accident causing damage or injury to any person or vehicle, driver must stop, give particulars required and report accident to police, preferably by calling them to accident scene.

Insurance.

Under Motor Vehicles (Third Party Insurance) Law (Law 96[I] of 2000), which harmonizes obligatory insurance of motor vehicles with EU position, anyone using, or causing or permitting another to use, motor vehicle on road must be insured against liability for death or bodily injury to third persons and passengers and damage to property or goods. Cover extends to any other state which is party to Multi Guarantee Agreement. Driver's liability is covered, even if he does not hold licence to drive particular vehicle. Insurer obliged to satisfy judgment not satisfied by insured provided that insurer receives written notice of start of proceedings before or within seven days of their commencement.

Motor Insurers' Fund.

Fund, comprising all motor insurers in Cyprus, has agreed with Ministry of Finance to indemnify victims of road accidents who would otherwise receive no compensation because driver liable for accident is uninsured or unknown or policy is void or voidable or insurer is insolvent. Conditions precedent to Fund's liability are that: (a) Written notice is given within seven days of commencement of proceedings, (b) copy of writ or statement of claim is given to Fund, (c) where claim includes damage to property, notice is given immediately after accident and before property is repaired and (d) if judgment is paid by Fund, plaintiff must assign benefit of judgment to Fund.

20.02 SHIPPING:

Ownership, mortgages, registration, construction and safety are covered by Merchant Shipping (Registration of Ships, Sales and Mortgages) Law (Law 45 of 1963) as amended.

For certain small matters, District Courts deal with shipping litigation. Otherwise, Supreme Court, Admiralty Division, single judge at first instance, and full bench on appeal.

Bilateral agreements with certain countries provide for cooperation in employment, improvement of conditions of work and welfare of seamen on each other's vessels and particularly for most favoured nation treatment of vessels, crew and passengers while in territorial waters of other party. Compliance with ISM and ISPS Codes mandatory for Cyprus ships and any ships entering Cyprus waters. Cyprus recognizes certificates of competency of many countries.

Cyprus adopted two EU block exemptions, PI 210/97 concerning liner conferences and PI 211/96, as amended by PI 99/2002, concerning liner consortia, both limited to international scheduled cargo services.

Non-discriminatory and favourable tax treatment of shipping activities, especially tonnage tax system.

Liens.

Recognized maritime liens for bottomry, salvage, wages, disbursements and liabilities and damage. Statutory lien only attaches when vessel is arrested in action in rem. Repairer has possessory lien which has priority over mortgage.

21 TREATIES AND CONVENTIONS

21.01 CONVENTIONS:

Cyprus adopted European Convention on Recognition and Enforcement of Decisions concerning Guardianship of Infants and on Restoration of Guardianship of Infants (European Convention) by Law 36 of 1986, United Nations Commission on International Trade Law (UNCITRAL) Model Law on International Commercial Arbitration by Law 101 of 1987 and Convention on International Kidnapping of Children (Hague Convention) by Law 11(III) of 1994.

See also Part V of this volume, for Selected Conventions to which Cyprus is party.

21.02 TREATIES:

Cyprus is party to many treaties with other countries to avoid double taxation. Tax payable on income arising in treaty country allowed against tax payable on that income in Cyprus, provided that: (a) Person claiming relief against tax is resident of Cyprus in year of assessment and (b) credit does not exceed tax payable. In computing foreign income, amount received in Cyprus must be grossed up by amount of foreign tax.

Cyprus has double taxation treaties with following countries: Austria, Belarus, Belgium, Bulgaria, Canada, China, Czech Republic, Denmark, Egypt, France, Germany, Greece, Hungary, India, Ireland, Italy, Kuwait, Kyrgyzstan, Lebanon, Malta, Mauritius, Moldova, Norway, Poland, Romania, Russia, San Marino, Singapore, Seychelles, Slovakia, South Africa, Sweden, Syria, Tajikistan, Thailand, Ukraine, U.K., U.S.A., Uzbekistan, Serbia and Montenegro.

Treaties are under negotiation, or awaiting ratification, with following countries: Algeria, Armenia, Bangladesh, Brazil, Estonia, Finland, Indonesia, Iran, Jordan, Kazakhstan, Latvia, Libya, Lithuania, Malaysia, Netherlands, Portugal, Qatar, Slovenia, Spain, Sri Lanka, Vietnam.

Multilateral.

Cyprus is signatory to two multilateral treaties relating to foreign investment, Convention Establishing the Multilateral Investment Guarantee Agency and Convention on the Settlement of Investment Disputes between States and Nationals of Other States, ratified by Law 64 of 1966.

Bilateral.

Cyprus is also signatory to bilateral treaties for promotion and reciprocal protection of investments with following countries: Armenia, Belarus, Belgium, Bulgaria, Czech Republic, Egypt, Greece, Hungary, Israel, Lebanon, Luxembourg, Poland, Romania, Russia, Seychelles, U.S.A. and is negotiating similar treaties with many other countries. Under treaty with U.S., investments situated in Cyprus and owned by American nationals may be guaranteed by Government of U.S. Cyprus will recognize any payment made by Government of U.S. under such guarantee and consequent subrogation of U.S. in respect of any claim or cause of action by investor concerned.

The Bilateral Agreement on Legal Cooperation between the Republic of Cyprus and the Greek Republic on Matters of Civil, Family, Commercial and Criminal Law Convention was ratified by Law 15 of 1984.

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CZECH REPUBLIC LAW DIGEST

—Scope —

Revised for 2010 edition by

ZEINER & ZEINER, Prague, Czech Republic.

Czech Republic is member of EU. See also European Union Law Digest.

Note: This revision incorporates legislation through Aug. 9, 2009.

Abbreviations used are: OSR, obcansky soudni rad (code of civil procedure) (Act no. 99/1963 Sb., full wording Act no. 62/1996 Sb., am'd by Act nos. 142/1996 Sb., 269/1996 Sb., 202/1997 Sb., 227/1997 Sb., 15/1998 Sb., 91/1998 Sb., 165/1998 Sb., 326/1999 Sb., 360/1999 Sb., 2/2000 Sb., 27/2000 Sb., 30/2000 Sb., 46/2000 Sb., 105/2000 Sb., 130/2000 Sb., 155/2000 Sb., 204/2000 Sb., 220/2000 Sb., 227/2000 Sb., 367/2000 Sb., 370/2000 Sb., 120/2001 Sb., 137/2001 Sb., 213/2001 Sb., 271/2001 Sb., 276/2001 Sb., 317/2001 Sb., 451/2001 Sb., 491/2001 Sb., 501/2001 Sb., 151/2002 Sb., 202/2002 Sb., 226/2002 Sb., 309/2002 Sb., 320/2002 Sb., 476/2002 Sb., 88/2003 Sb., 120/2004 Sb., 153/2004 Sb., 201/2004 Sb., 237/2004 Sb., 257/2004 Sb., 340/2004 Sb., 436/2004 Sb., 555/2004 Sb., 59/2005 Sb., 170/2005 Sb., 205/2005 Sb., 216/2005 Sb., 342/2005 Sb., 377/2005 Sb., 383/2005 Sb., 413/2005 Sb., 56/2006 Sb., 57/2006 Sb., 79/2006 Sb., 112/2006 Sb., 113/2006 Sb., 115/2006 Sb., 133/2006 Sb., 134/2006 Sb., 135/2006 Sb., 216/2006 Sb., 164/2006 Sb., 189/2006 Sb.,308/2006 Sb., 315/2006 Sb., 296/2007 Sb., 104/2008 Sb., 123/2008 Sb., 126/2008 Sb., 129/2008 Sb., and 259/2008 Sb.); ObchZ, obchodni zakonik (commercial code) (Act no. 513/1991 Sb., am'd Act nos. 264/1992 Sb., 591/1992 Sb., 600/1992 Sb., 286/1993 Sb., 156/1994 Sb., 84/1995 Sb., 94/1996 Sb., 142/1996 Sb., 77/1997 Sb., 15/1998 Sb., 165/1998 Sb., 356/1999 Sb., 27/2000 Sb., 29/2000 Sb., 30/2000 Sb., 105/2000 Sb., 367/2000 Sb., 370/2000 Sb., 120/2001 Sb., 239/2001 Sb., 353/2001 Sb., 501/2001 Sb., 15/2002 Sb., 125/2002 Sb., 126/2002 Sb., 151/2002 Sb., 308/2002 Sb., 309/2002 Sb., 312/2002 Sb., 476/2002 Sb., 87/2003 Sb., 88/2003 Sb., 437/2003 Sb., 85/2004 Sb., 257/2004 Sb., 360/2004 Sb., 484/2004 Sb., 499/2004 Sb., 554/2004 Sb., 179/2005 Sb., 216/2005 Sb., 377/2005 Sb., 413/2005 Sb., 56/2006 Sb., 57/2006 Sb., 79/2006 Sb., 81/2006 Sb., 308/2006 Sb., 269/2007 Sb., 296/2007 Sb., 36/2008 Sb., 104/2008 Sb., 126/2008 Sb., 130/2008 Sb., 230/2008 Sb., and 344/2008 Sb.); OZ, obcansky zakonik (civil code) (Act no. 40/1964 Sb., full wording Act no. 47/1992 Sb., am'd by Act nos. 264/1992 Sb., 267/1994 Sb., 104/1995 Sb., 118/1995 Sb., 89/1996 Sb., 94/1996 Sb., 89/1997 Sb., 277/1997 Sb., 91/1998 Sb., 165/1998 Sb., 159/1999 Sb., 363/1999 Sb., 27/2000 Sb., 103/2000 Sb., 227/2000 Sb., 367/2000 Sb., 229/2001 Sb., 317/2001 Sb., 501/2001 Sb., 125/2002 Sb., 135/2002 Sb., 136/2002 Sb., 320/2002 Sb., 476/2002 Sb., 88/2003 Sb., 37/2004 Sb., 47/2004 Sb., 278/2004 Sb., 480/2004 Sb., 554/2004 Sb., 359/2005 Sb., 56/2006 Sb., 57/2006 Sb., 107/2006 Sb., 115/2006 Sb., 160/2006 Sb., 264/2006 Sb., 315/2006 Sb., 443/2006 Sb., 264/2006 Sb., 296/2007 Sb., and 230/2008 Sb.); Sb., Sbirka zakonu (collection of laws); TZ, trestni zakon (criminal code) (Act no. 140/1961 Sb., full wording no. 65/1994 Sb., am'd by Act nos. 152/1995 Sb., 19/1997 Sb., 103/1997 Sb., 253/1997 Sb., 92/1998 Sb., 112/1998 Sb., 148/1998 Sb., 167/1998 Sb., 96/1999 Sb., 191/1999 Sb., 210/1999 Sb., 223/1999 Sb., 238/1999 Sb., 305/1999 Sb., 327/1999 Sb., 360/1999 Sb., 29/2000 Sb., 101/2000 Sb., 105/2000 Sb., 121/2000 Sb., 405/2000 Sb., 120/2001 Sb., 139/2001 Sb., 144/2001 Sb., 256/2001 Sb., 265/2001 Sb., 3/2002 Sb., 137/2002 Sb., 285/2002 Sb., 482/2002 Sb., 218/2003 Sb., 276/2003 Sb., 362/2003 Sb., 52/2004 Sb., 91/2004 Sb., 537/2004 Sb., 587/2004 Sb., 692/2004 Sb., 411/2005 Sb., 413/2005 Sb., 70/2006 Sb., 115/2006 Sb., 135/2006 Sb., 161/2006 Sb., 227/2006 Sb., 253/2006 Sb., 267/2006 Sb., 314/2006 Sb., 320/2006 Sb., 343/2006 Sb., 178/2007 Sb., 271/2007 Sb., 296/2007 Sb., and 122/2008 Sb.); ZP, zakonik prace (labour code) (Act no. 262/2006 Sb., am'd by Act No. 585/2006 Sb., 181/2007 Sb., 261/2007 Sb., 296/2007 Sb., 357/2008 Sb., 362/2007 Sb., 116/2008 Sb., 121/2008 Sb., and 126/2008 Sb.).

1 INTRODUCTION

1.01 CURRENCY:

Legal currency is Czech Crown (Kc), divided into 100 hellers or “halere”. Czech National Bank has exclusive right to issue bank notes and to mint coins.

Powers and duties of Czech National Bank are detailed in Act no. 6/1993 Sb., am'd by Act nos. 60/1993 Sb., 15/1998 Sb., 442/2000 Sb., 278/2001 Sb., 482/2001 Sb., 127/2002 Sb., 257/2004 Sb., 377/2005 Sb., 57/2006 Sb., 62/2006 Sb., 230/2006 Sb., 160/2007 Sb., 36/2008 Sb., 124/2008 Sb., and 254/2008 Sb. Czech National Bank is central authority within scope of foreign exchange laws.

Czech Republic has not joined Exchange Rate Mechanism ERM II and no precise date has yet been set.

See also category 14 Foreign Trade and Commerce, topic 14.03 Foreign Exchange.

1.02 GOVERNMENT AND LEGAL SYSTEM:

Preliminary Note.

Czech Republic (CR), which was part of Czech and Slovak Federative Republic (CSFR) until Dec. 31, 1992, is sovereign independent state as result of Jan. 1, 1993 division of Federation into two separate states. By virtue of Constitutional Act no. 4/1993 Sb., legal acts of former CSFR remain in force in territory of Czech Republic. Furthermore, also by virtue of same act, Czech Republic has succeeded to all rights and duties of former CSFR arising out of international law, with exception of duties connected with territory that is not under sovereignty of Czech Republic.

Czech Republic is member of Council of Europe and member of European Union from May 1, 2004.

Czech Republic came into existence on Jan. 1, 1993, after division of former Czech and Slovak Federative Republic into Czech Republic and Slovak Republic, respectively.

Constitution (Constitutional Act no. 1/1993 Sb.) states that CR is sovereign, united, and democratic State respecting rule of law and based on respect of rights and freedoms of man and citizen. Part and parcel of Constitutional order (“ustavniho poradku”) is List of Fundamental Rights and Freedoms inspired by International Covenant on Civil and Political Rights and by International Covenant on Economic, Social and Cultural Rights.

Parliament is composed of two chambers: House of Representatives (Poslanecka snemovna) and Senate (Senat). House of Representatives has 200 deputies elected for four years terms. Senate has 81 senators elected for six years terms, one third of whom are elected every two years. Head of state is president, elected for five years at common session of both chambers of Parliament.

Art. 99 of Constitution stipulates that CR is composed of municipalities which are basic territorial self-governing entities. Higher territorial self-governing entities are regions (kraje).

Constitutional Act no. 4/1993 Sb. stipulates that constitutional Acts, Acts and other legal prescriptions of Czech and Slovak Federative Republic remain in force on territory of CR. (Art. 1/1). According to this constitutional act, CR has taken over rights and duties of Czech and Slovak Federative Republic, arising out of international law, with exception of duties connected with territory which is not under sovereignty of CR. (Art. 5/2). By virtue of this provision, CR is now contracting state of international treaties mentioned in this digest by which Czech and Slovak Federative Republic was bound.

Political parties are entitled to receive public subsidies, if they have acquired, in view of results of last election, at least 3% of cast votes. Right to compensation includes electoral expenses, up to level stated by law. (Act no. 424/1991 Sb., am'd by Act nos. 468/1991 Sb., 68/1993 Sb., 189/1993 Sb., 117/1994 Sb., 296/1995 Sb., 322/1996 Sb., 340/2000 Sb., 98/2001 Sb., 104/2001 Sb., 120/2001 Sb., 151/2002 Sb., 501/2004 Sb., 556/2004 Sb., 342/2006 Sb., and 296/2007 Sb.).

Sessions of both chambers shall be permanent. Session of Assembly of Deputies shall be convened by President of Republic so that it is opened no later than on 30th day after day of elections. Session of chamber may be interrupted by resolution, with total time of interruption not exceeding 120 days in a year. During interruption of session, chairman of Assembly of Deputies or of Senate may convene chamber to meet before end of stipulated term of interruption. Session of Assembly of Deputies shall end by lapse of electoral period or by dissolution.

1.03 HOLIDAYS:

Act no. 245/2000 Sb. (am'd by Act nos. 101/2004 Sb. and 129/2006 Sb.) on State Holidays, Days of Labour Calm, Memorial and Significant Days.

Legal Holidays are: Jan. 1 (New Year's Day); Easter Monday; May 1 (Labour Day); May 8 (Victory Day); July 5 (Day of Slavic Creed Messengers—Cyril and Methodej); July 6 (Memory of Jan Hus); Sept. 28 (Czech Statehood Day); Oct. 28 (Independence Day); Nov. 17 (Democracy and Freedom Day); Dec. 24, 25, 26 (Christmas Days).

1.04 OFFICE HOURS AND TIME ZONE:

Czech Republic is in the Central European (GMT +01:00) time zone. Office hours are generally from 8 a.m. to 5 p.m.

2 BUSINESS ORGANIZATIONS

2.01 AGENCY:

Representation by agent is permitted in CR (except some cases i.e. concerning family law). (OZ, §§22-33). Representation by agent establishes rights and duties directly in name of principal. Person who does not have legal capacity for specific matter, or person whose interests conflict with those of principal cannot be agent. Representation comes into being on basis of law, by decision of state authority (statutory representation), or on basis of power of attorney. Agent must act on behalf of principal personally or can appoint other agent if allowed by law or participants agree. Power of attorney must be in writing if it includes more than specific juridical act, or if act to be performed must be in writing.

Principal generally appoints agent on basis of power of attorney, which must contain extent of agent's authorisation. In case of legal person, right to act on behalf of principal arises from power of attorney given from statutory body. Power of attorney terminates upon: (1) Realisation of object of power; (2) revocation by principle; (3) revocation by agent; (4) death of agent; (5) dissolution of legal person.

If entrepreneur is physical person, he acts personally or by means of agent. Legal person acts by means of its statutory body or agent who is registered at commercial register.

Procura.

ObchZ recognises various types of powers of attorney, one of which is “Procura”. (ObchZ, §§14-16). Entrepreneur can appoint procurist to carry out all legal acts for which special power of attorney is necessary. Procura allows authorisation to sell or burden real estate, only in case specifically mentioned. Restrictions on powers of procurist made by means of internal instructions have no legal effect on third parties. Procura is effective from entry into commercial register. It must contain name and residency of procurist with sample signature. If more than one procurist is authorized, ability to act independently or jointly must be detailed. Procura survives death of entrepreneur if not specified as being valid only for time of entrepreneur's life. After death of entrepreneur, procurist is authorized to act only within standard scope of business and is obliged to file request for registration of restriction of powers with court.

2.02 ASSOCIATIONS:

Associations of Citizens.

Citizens have right to freely associate for legal purposes without any permission by state authority. On basis of law of associations, citizens may found societies, unions, movements, clubs and trade union organisations. (Act no. 83/1990 Sb., am'd by Act nos. 300/1990 Sb., 513/1991 Sb., 68/1993 Sb., 151/2002 Sb., 230/2006 Sb., 342/2006 Sb., and 33/2008 Sb.). Legal persons may be members of associations. State authorities may interfere with position and activity of associations only within framework of law.

Associations are not allowed if objective is to deny or restrict personal, political or other rights; they seek to achieve objectives by means in contradiction with constitution and law; or they are armed or have armed components (other than those possessing or using fire arms for sport purposes or for legal hunting).

Associations are legal persons, founded by registration. Preparatory committee of at least three people submits request for registration, one of which has to be older than 18 years. Articles of association must be annexed to request for registration and must indicate: (1) Name of association; (2) legal seat; (3) objectives of its activity; (4) bodies of association, methods of their establishment and officials entitled to act on their behalf; (5) provisions concerning organisation units, if established; (6) principles of economic management.

Request for registration is submitted to Ministry of Interior. If request is complete, it will register within ten days from day of submission. No formal decision on registration of association is issued, it will be only taken as notice and ratified copy returned to applicant. Association ceases to exist by voluntary dissolution, merger with other association or by decision of ministry on dissolution.

Associations may conclude between themselves written agreements on cooperation. (Act no. 83/1990 Sb.).

Organisations with International Element.

Conditions for activities of organisations with international element are governed by Act no. 116/1985 Sb., in wording of Act nos. 157/1989 Sb. and 161/2006 Sb. Organisation with international element is defined as international nongovernmental organisation or special organisation to represent Czech interests in international organisation. These organisations can be established, carry out activities and have seat in CR only on basis of permission issued in conformity with above mentioned law.

Contract of Association According to OZ.

In conformity with OZ, §829, several persons may associate in form of oral or written agreement to jointly share efforts in achieving agreed objective. Such associations do not possess rights and obligations, as they are not legal persons. Agreement may require participant to develop activity for achievement of agreed objective and refrain from activity which would render achievement of objective more difficult or impossible. (OZ, §830). Additionally, participants may be obliged to provide money or other things for purposes of association. (OZ, §831).

Participants' contributions or items acquired through execution of joint activity become co-property of all participants, in equal shares, unless agreement does not stipulate otherwise. Participants are obliged jointly with respect to obligations to third persons. (OZ, §§834, 835). Unless agreement stipulated otherwise, participants make decisions concerning common affairs unanimously. (OZ, §836). Participant has right to obtain information of economic situation of association. Any agreement provisions in contradiction with this right are invalid. (OZ, §837). Participant may withdraw from association, but not at time which would result in detriment to other participants. Participants may be expelled from association for serious reasons, upon unanimous decision of other participants, unless agreement stipulates otherwise. (OZ, §838).

See also topic 2.03 Corporations.

2.03 CORPORATIONS:

Introductory Note.

For better understanding, please note following difference in Czech legal terminology. Under ObchZ, §56, corporation (business company) is juristic person founded for purpose of undertaking business activities. Czech law recognises following “business companies” (obchodní spolecnosti): General commercial partnership (verejná obchodní spolecnost); limited partnership (komanditní spolecnost); limited liability company (spolecnost s rucením omezenym); joint stock company (akciova spolecnost). In this regard, it should be noted that American notion of corporation would not cover general commercial partnership and limited partnership as they exist under Czech law.

Following EU directives from field of company law have been implemented: 68/151/EEC, 77/91/EEC, 78/855/EEC, 78/660/EEC, 82/891/EEC, 83/349/EEC, 89/666/EEC, 89/667/EEC, and 2005/56/EEC.

Verejna Obchodní Spolecnost (General Commercial Partnership).

(ObchZ, §§76-92). Entity in which at least two persons (juristic or natural) carry on business activities under common business name (including designation “v.o.s.”) and bear joint and several liability for obligations of company with all their property. Partners' rights and duties are governed by partnership contract which must include: Business name and seat of general commercial partnership; details of partners (business name and seat of juristic person and name and address of natural person); scope of business activities.

Partners' monetary and capital investments become property of partnership. Profits or losses are divided equally, unless partnership contract specifies differently. Distribution of profits or losses is based upon annual financial statement, with profit payable within three months from day of approval of annual financial statement, unless agreed otherwise in partnership contract.

Partners are subject to ban on competitive conduct unless other partners consent. Each partner is considered statutory body, unless partnership contract stipulates that partners act jointly. Partner may withdraw provided at least two partners remain, but shall remain liable for obligations arising before his withdrawal. Death of partner is ground for dissolution, unless partnership contract states otherwise. In this event, heirs may succeed deceased partner or claim proportionate settlement share of partnership property.

Komanditní Spolecnost (Limited Partnership).

(ObchZ, §§93-104). Entity in which one or several limited partners bear limited liability for firm's obligations up to amount of unpaid parts of registered investments (limited partners —“komanditisté”) and one or several general partners bear unlimited liability (general partners —“komplementári”).

Partnership contract includes, at minimum, following: Business name (including designation “k.s.”) and seat of partnership; designation of partners including business name plus seat of legal entity, and name plus residence of individual; scope of activities; designation of which partners are general and limited partners; amount of each limited partner's investment (minimum 5,000 Kc); provisions governing rights and duties of partners. In event name of partnership includes name of limited partner, this partner will bear liability for partnership obligations as general partner.

Only general partners are entitled to manage partnership, other matters are decided jointly by general partners and limited partners according to simple majority, unless partnership contract stipulates otherwise. General partners form statutory body of partnership. Each general partner is entitled to act on behalf of firm, unless partnership contract provides otherwise. Consent of all partners is required to amend partnership contract. Limited partners are entitled to check accounting documents and to receive annual financial statement. Limited partners are not subject to ban on competitive conduct, unless partnership contract stipulates otherwise.

Profits are divided into two portions—one payable to general partners, other payable to limited partners; these portions are equal, unless partnership contract stipulates otherwise. General partners divide their parts equally and limited partners in proportionate shares according to paid in investment, unless partnership contract shares otherwise.

Death of limited partner, limitation of his legal rights, or declaration of bankruptcy concerning his property are not reasons for dissolution of limited partnership. If participation of all limited partners is terminated, general partners may agree to transform their limited partnership into general commercial partnership without liquidation. In event limited partnership is dissolved and dissolution is connected with its liquidation, all partners shall be entitled to proportionate parts of their paid investment, with limited partners having preference. Any surplus liquidation balance is distributed in same ratio as profits.

Spolecnost S Rucením Omezenym (Limited Liability Company).

(ObchZ, §§105-153). Entity whose registered capital is made up of members' investments, agreed in advance. Company is liable for breach of its obligations with its entire property, with member's liability limited to any unpaid amount of his pledged investment. Limited liability company may be founded by one person (not limited liability company with only one member), with maximum number of members being 50. Minimum amount of registered capital is 200,000 Kc, with minimum amount of members investment at 20,000 Kc. In case of nonmonetary contribution, value must be determined by expert opinion.

Memorandum of association must contain: Business name (including designation “s.r.o” or “spol. s r.o.”) and seat of company; information about members, i.e., business name plus seat of legal entity and name and residence of individual; scope of business activities; amount of registered capital, amount of each member's initial investment and manner and time limit for contributing pledged investment; name of first executives and manner in which they will represent company; names and residences of members of first supervisory board, if established; information about administrator of investment; and provisions governing rights and duties of members.

No less than 30% of every pledged investment must be paid up prior to submission of petition asking for incorporation into commercial register, with total paid up investment being minimum 100,000 Kc. Any balance of pledged investment must be paid under conditions and within period set by memorandum of association or articles of association, but always within five years following incorporation into commercial register.

Ownership interest represents rights and duties of member and corresponding participation in company. Members are entitled to part of profits proportionate to paid-up investments, unless memorandum of association states otherwise. Upon its incorporation, it is obligatory for company to establish reserve fund at level and according to procedures stipulated in memorandum of association and law. (ObchZ, §124).

Company bodies are general meeting, executives, and supervisory board (optional). Unless agreed otherwise or stipulated by law, amendment to memorandum of association normally requires consent of all members. Amount of registered capital and amount of each member's investment may never be reduced below minimum legal levels. Executives are obliged to publicise reduction of registered capital within 15 days of resolution and again within 30 days from first notice.

Each member is entitled to only one ownership interest. Member may transfer interest to another member or third party on basis of written contract, subject to approval of general meeting, unless memorandum of association provides otherwise. Member may propose that court cancel his participation if he cannot be justly required to remain in company any longer. Member can be expelled from company if he substantially neglects duties. Members may ask court to wind up company for any reasons and under any conditions stipulated in memorandum of association or allowable under law. (ObchZ, §§151, 152).

Limited Liability Company may participate in formation of Societas Eeropaea (``SE'') by means of formation of holding SE pursuant to Council Regulation (EC) no. 2157/2001.

Akciová Spolecnost (Joint Stock Companies).

(ObchZ, §§154-220). Entity requiring minimum capital of 2,000,000 Kc (20,000,000 Kc for company being formed for public offer) divided among certain number of shares of certain nominal value. Shares may either be registered in name of shareholder, or bearer shares. Transfer of registered share becomes effective upon entry of transfer into shareholders list. Shares with preference rights concerning dividends may be issued, but total nominal value must not exceed 50% of capital stock. Debentures may be issued, subject to special regulations.

Company is not allowed to subscribe for shares of its own capital stock and may redeem issued shares only under limited circumstances.

Joint stock company may be founded by one party, if juristic person (entity); otherwise by two or more. Register court incorporates joint stock company into commercial register upon submission of founding agreement, resolution approving articles, protocol of constituent meeting, expert valuation of nonmonetary capital contributions, and articles of association including: Business name (with designation “a.s.”), seat of company and business activities; proposed amount of capital stock; number of shares and nominal value; subscribed investments of individual founders (if founded on basis of call to subscribe, specific additional details must be included); provisions governing internal matters. (§173). Furthermore, company must comply with following requirements prior to registration: Proper constituent General Meeting has been held, in event that such meeting is required by statutes of company; subscribers have subscribed capital stock in full and have paid up no less than 30% of capital stock in form of monetary investments company's articles of association have been approved; members of company bodies have been elected. Company is obliged to create and contribute to reserve fund.

Government permission is required for formation of joint stock company in some instances, i.e., if company will engage in banking, investment or insurance business.

Corporation is managed by board of directors, consisting of no fewer than three members, elected for maximum of five years by general meeting. Articles of association may stipulate that members of board of directors will be elected and recalled by supervisory board. Supervisory board consists of no fewer than three members elected for maximum of five years, two thirds of whom are elected by general meeting, and one third by employees of company, provided there are more than 50 full-time employees at time of election.

Joint stock company may form SE by means of merger, formation of holding SE and transformation pursuant to Council Regulation (EC) no. 2157/2001.

Cooperatives.

(ObchZ, §§221-260). Organisation of unspecified number of members, founded either to undertake business activities, or to satisfy economic, social or other requirements of its members. Cooperative is juristic person liable for breach of its obligations with all of its property. Members, numbering at least five, unless two or more are legal entities, do not bear liability for obligations of cooperative. Registered basic capital cannot be less than 50,000 Kc, with no minimum investment of members specified by law. It is formed upon holding of first members meeting, at which amount of basic capital and individual capital contributions are determined, statutes are approved and election of officers is held. Notarial deed, copy of statutes, and verification of payment of at least one half of capital are submitted for incorporation into commercial register.

Upon its incorporation, cooperative is bound to create indivisible fund, amount of which will be not less than 10% of registered basic capital. Cooperative has following bodies: Members assembly (highest body of cooperative); board (charged with managing cooperative); auditing commission (entitled to check all activities of cooperative); other bodies established under statutes.

Foreign Corporations.

Foreign person's authorisation to conduct business activities on territory of CR is established on day person, or person's organisational unit, is incorporated into commercial register. (ObchZ, §21). (Incorporation into commercial register is not necessary for individuals who have residential address in Member State of EU or in some other state of European Economic Area if such individuals carry on business activity in Czech Republic.) Foreign person (physical or juristic), via his enterprise or organisational unit on territory of CR, is authorized to conduct scope of business activities as specified in entry in commercial register. Trade license must be issued for such business activities (see category 3 Business Regulation and Commerce, topic 3.06 Licenses, Business and Professional). Same conditions apply to relocation of foreign entity registered office to CR, however such relocation of registered office must be allowed by international treaty, EU law or special act. (ObchZ, §26).

See category 4 Citizenship, topic 4.01 Aliens.

2.04 EXCHANGES:

Stock Exchange.

Must be formed as joint stock company or limited liability company, governed by provisions of ObchZ applied with variations stipulated in Act no. 256/2004 Sb., amended by Act nos. 635/2004 Sb., 179/2005 Sb., 377/2005 Sb., 56/2006 Sb., 57/2006 Sb., 62/2006 Sb., 70/2006 Sb., 159/2006 Sb., 287/2006 Sb., 120/2007 Sb., 296/2007 Sb., 29/2008 Sb., 104/2008 Sb., 126/2008 Sb., 216/2008 Sb., and 230/2008 Sb. License granted by Czech National Bank is required.

Disputes arising out of on-exchange trading are resolved by arbitration court of respective stock exchange according written agreement of parties unless they agree otherwise.

Commodity Exchange.

Legal entity sui generis, governed otherwise by provision on limited liability company of ObchZ, if Act no. 229/1992 Sb. (am'd by Act nos. 216/1994 Sb., 105/1995 Sb., 70/2000 Sb., 285/2005 Sb., 444/2005 Sb., 296/2007 Sb., and 230/2008 Sb.) or Articles of Association do not have other provisions (see topic 2.03 Corporations). License granted by Ministry of Industry and Trade or Ministry of Agriculture depending on type of commodity is required. Founders must be registered in commercial register. Further members accepted by exchange chamber must be licensed for production, processing, trading or granting services regarding commodities traded on exchange. There is no additional limitation for aliens. Disputes arising out of on-exchange trading may be resolved by arbitration court of exchange according written agreement of parties, otherwise by normal courts. Under Commodity Exchange Act (no. 229/1992 Sb.) procedure of Arbitration Act (no. 216/1994 Sb.) (see category 8 Dispute Resolution, topic 8.02 Arbitration and Award) shall apply.

2.05 JOINT STOCK COMPANIES:

See topic 2.03 Corporations.

2.06 PARTNERSHIPS:

See topic 2.03 Corporations.

3 BUSINESS REGULATION AND COMMERCE

3.01 BILLS AND NOTES:

Though CR has never ratified either Geneva Convention on Bill of Exchange signed on June 7, 1930 or Geneva Convention on Checks signed on Mar. 19, 1931, both Conventions were in fact incorporated into legal system by Act no. 191/1950 Sb., am'd by Act no. 29/2000 Sb., and 296/2007 Sb.

There are two types of bills—"drawn bill of exchange" (cizi smenka) corresponding to Anglo-American bill of exchange and "own bill of exchange" (vlastni smenka) corresponding to Anglo-American promissory note. Latter is treated as kind of former.

Essential requirement given by law, i.e., statement to effect that instrument is bill of exchange, must be respected, otherwise instrument will be invalid. Bill may be drawn on issuer or on account of third party. Bill may come due at sight, at certain time after sight, at certain time after day of issuance or on specified date.

Issuer of bill is liable for its acceptance and payment, although his liability for acceptance can be limited. Default of acceptance or of payment must be evidenced by protest levied by certain authorities.

Bill is transferable by unconditional endorsement unless it expressly states "not to order".

Checks.

To fulfill requirements given by law, must contain statement indicating that instrument is check. Acceptance written on check has no legal effect. Check is payable at sight and may be drawn on indicated person with provision "to order", on indicated person with provision "not to order", or to bearer. Checks drawn "to order of the issuer" are allowed. Check with no indication is considered check to bearer. Check drawn on indicated person may be transferred by endorsement, even if not having provision "to order".

Check drawn and payable in same country must be presented for payment within eight days after issuance. Check drawn in country different than place of payment must be presented for payment within 20 days, if drawing and payment places are on same continent, otherwise in 70 days.

Action against person whose liability is based on bill/check can be made in simplified process (OSR, §175), result of which is decision called "Bill of Exchange/check payment order".

Conflict of laws rules are included in Act no. 191/1950 Sb., am'd by Act no. 29/2000 Sb. on bills of exchange and on checks. Capacity of person to incur liabilities under bill or check is determined by law of his nationality, unless such law declares another law to be applicable. Liability incurred by person is, however, binding if incurred in country, according to law of which liability would be valid. As to form of obligations, lex loci is applicable; but obligations of Czech nationals towards other Czech nationals incurred abroad, need only comply with requirements of Czech law. Substantive law applicable to obligations of issuer of "own bill of exchange" and of acceptor of "drawn bill of exchange" is law of place of performance. Other obligations under bill and obligations under check are ruled by law of place where signatures were affixed. Law of place of performance also rules as to whether bill may be accepted only in part and whether holder must accept partial payment, and for measures which must be taken in case of loss or theft of bill. Law of place where bill was issued determines time within which recourse must be taken, whereas form and limitation of action for protestation are ruled by law of country in which protest is taken.

Checks may be drawn on person on whom checks may be drawn according to law of place of performance.

3.02 COMMERCIAL REGISTER:

Commercial register ("obchodni rejstrik") is public list kept by each of Register Courts ("rejstrikovy soud") containing data and documents regarding entrepreneurs and enterprises as stipulated by ObchZ. Data to be found in register includes: Business name and seat; identification number ("identifikacni cislo" abbr. ICO); scope of business activities; legal form; name of statutory bodies; amount of registered capital; and other facts and documents required by law, together with all changes of previously registered facts and documents. (ObchZ, §35). Legal persons begin their existence only upon their entry into commercial register.

Following persons are incorporated into commercial register: (1) Business companies and partnerships (also organisation units of foreign persons); (2) cooperatives and other legal persons, if so stipulated by law; (3) foreign persons according to ObchZ, §21 (foreign person, legal as well as physical, is authorized to carry on enterprise on territory of CR on basis of registration into commercial register); (4) physical persons, citizens of CR or another EU country or persons residing in CR or another EU country: (a) His/her average income (reduced by VAT) was CZK 120 million for two successive accounting periods and (b) upon his/her request.

Procedure.

Application for registration, with officially verified signature of authorized person and declaration that there are no impediments to his/her ability to do business, are filed using official form together with following documents: Memorandum of association (or notarial deed); certification of contribution of basic capital; signature specimen of those authorized to act on behalf of entity; power of attorney if applicable; trade authorisation; documents proving legal title of use of premises where seat is situated; other documents confirming facts to be registered. Residence permit is not required in case of citizens from member countries of EU.

As long as any factual data are not recorded in commercial register, they are not effective notice to third parties relying in good faith on facts appearing in register. (ObchZ, §29).

3.03 CONTRACTS:

OZ, §§43-51 sets forth fundamental and special provisions on contracts, however, these provisions apply to commercial matters only in cases when ObchZ does not regulate individual type of contract. ObchZ, §§409-755 provides provisions of law regulating contracts concluded between commercial parties.

Contract is concluded at moment offer to conclude contract is accepted. Silence or inactivity by themselves do not manifest acceptance. (OZ, §44/1). Contract may be concluded by writing, orally or in silence with manifestation of intent. Written contract signed by parties is necessary if explicitly required by law, particularly if contract relates to property transfer. (OZ, §46). In event law stipulates contract has to be accompanied by decision of certain authority, contract becomes effective only as result of such decision. (OZ, §47/1). ObchZ, §§269-288 provides special conditions for contracts between commercial parties, including public offers and tenders.

Repudiation.

Contract may be repudiated only in instances stipulated by law or upon agreement of contracting parties. Repudiation renders agreement void from inception, unless legal regulations or parties stipulate otherwise. (OZ, §48). One-sided repudiation is possible in case party has concluded contract under duress and under extremely disadvantageous conditions. Legal act does not have force if made in error arising from fact decisive for realisation of legal act and person to whom act is addressed has either caused its provocation or must have known about it. Act is also invalid if error was intentionally provoked by said person. Act remains valid in case of error in motive. (OZ, §49a). In cases of fundamental breach of contract between commercial parties, party may repudiate if he informs other party without undue delay. In case of non-fundamental breach, additional reasonable period must be provided before repudiation. (ObchZ, §§345, 346).

Agreement to Conclude Future Contract.

Concluded by parties in form of writing committing to enter into contract within specified time, provided that essential provisions of contract have been agreed upon. Obligation to conclude future contract extinguishes if circumstances which parties took into account when establishing obligation changed to such extent that obliged party cannot be reasonably required to conclude future contract. Should contract not be concluded within agreed period, expression of intention of party may be replaced by decision of court, if requested within period of one year. (OZ, §50a). Similar provisions apply to commercial contacts. (ObchZ, §§289-292).

Excuses for Nonperformance.

Person who fails to perform duty arising out of obligation in commercial relations is liable to compensate for losses of injured party, unless failure to perform is due to circumstances precluding liability. (ObchZ, §373). Obstacles which occur independently, beyond will and control of party and which prevent performance of duty, are considered as circumstances precluding liability unless it cannot be reasonably assumed that party would prevent or overcome obstacle or its consequences and that party would foresee obstacle at time of establishment of obligation. Liability will not be precluded by obstacle which occurred when party was already in default or which is due to economic situation of party. Effects precluding liability are limited only to time of duration of obstacle with which effects are connected. (ObchZ, §374). In commercial relations arising from international trade, lack of official license necessary for performance of duties of party is not considered as circumstance precluding liability. (ObchZ, §736).

Applicable Law.

Conflict of law rules are contained in Act no. 97/1963 Sb., amended by Act nos. 158/1969 Sb., 234/1992 Sb., 264/1992 Sb., 125/2002 Sb., 37/2004 Sb., 257/2004 Sb., 361/2004 Sb., 377/2005 Sb., 57/2006 Sb., 70/2006 Sb., 233/2006 Sb., 296/2007 Sb., 123/2008 Sb., and 7/2009 Sb. According to §9 of this act, parties can make choice of applicable law for their relations. Choice can also be decided from conduct of parties (per facta concludentia) but there must not be doubt about expression of will of parties. Conflict rules of selected law are not regarded, unless otherwise stipulated by parties. In case applicable law has not been selected by parties, §10 of act provides that relations of parties are regulated by law which corresponds to reasonable settlement of applicable contractual relation. Act no. 97/1963 Sb., as amended, provides following guides, as a rule: (1) Contracts of sale and contracts of work are governed by law of place of seat (residence) of seller or of provider of work at time of conclusion of contract; (2) contracts concerning immovable,—by law of place where immovable is situated; (3) contracts concerning transport,—by law of place of seat or residence of carrier or of forwarding agent at time of conclusion of contract; (4) contracts of insurance,—by law of place of seat of insurer at time of conclusion of contract; (5) contracts of commission and similar contracts,—by law of place of seat of person executing commission at time of conclusion of contract; (6) commercial representative contracts and brokerage contracts,—by law of place of seat of person for whom commercial representative or broker executes activity at time of conclusion of contract; (7) contracts concerning multilateral barter transactions,—by law application of which corresponds best to settlement of relations in their entirety.

Contracts not enumerated above are regulated, as a rule, by law of state in which both parties have their seat. If parties do not have seat in same state, contract is regulated by law of place where contract was concluded. If contract was concluded between absent parties, it is governed by law of place of seat of acceptor.

Provision of international treaties binding CR are not affected. CR is contracting state of Vienna UN Convention on Contracts for the International Sale of Goods, of Apr. 11, 1980 (with reservation according to Art. 95, that CR is not bound by subparagraph [1] [b] of Art. 1 of this Convention) and of number of international treaties concerning international transport. CR is also contracting state of Rome Convention on Law Applicable to Contractual Obligations of June 19, 1980. (See category 23 Treaties and Conventions, topic 23.01 Treaties.)

3.04 FRAUDS, STATUTE OF:

CR has no statute of frauds, but see generally topic Contracts.

3.05 INFORMATION TECHNOLOGY, INTERNET AND NEW MEDIA:

Computer Programs.

Protected as literary works if program is result of author's creative intellectual activity. Ideas and principles upon which any element of computer program is based, including those ideas and principles that can lead to its linking to another program are not protected. (§65 of Act no. 121/2000 Sb., on Copyright am'd by Act nos. 81/2005 Sb., 61/2006 Sb., 186/2006 Sb., 216/2006 Sb.,168/2008 Sb., and 41/2009 Sb.).

Author has exclusive right to use computer program, particularly to reproduce, distribute, lease, lend, display and communicate it to public. Author may grant permission to exercise rights to use by contract. Copyright is not infringed by authorized user of copy of particular computer program if: (a) User reproduces, translates, treats, adapts or otherwise changes program, if necessary for use of authorized copy upon installation, operation or rectification of errors; (b) otherwise reproduces, translates, treats, adapts, or otherwise changes program if necessary for use of authorized copy in compliance with its purpose; (c) user makes backup copy, if necessary for use of program; (d) user studies or examines functioning of program for purpose of establishing ideas and principles on which it is based, if done upon installation, storing in computer memory, during display, operation or transmission; (e) reproduces or converts code if such reproduction or conversion is necessary to obtain data for establishing functional connection with other computer programs, provided that such data is not otherwise easily accessible and activity is restricted to those parts of program essential for making functional connection. Commercial and property rights in program created during fulfillment of duties arising from employment relationship are exercised by employer. Computer programs are regarded as works created by employees if they are created to order.

E-Commerce.

Providing E-commerce services, if done for purpose of making profit, requires standard business license. (See topic 3.06 Licenses, Business and Professional.)

E-commerce is regulated to some extent by §§52-57 of OZ as consumer contract. Purchase (and some other) contracts between supplier and consumer may be concluded by means of distant communication (e.g., e-mail or tele-shopping). When using distant communication, potential consumer must be informed before conclusion of any contract of following: (a) Supplier's commercial name and identification number, registered office or residential address (in case of individual), information on entry in commercial register or similar evidence and contact information; (b) information on respective control body; (c) designation or main characteristics of goods and services; (d) price of goods and services, including any related charges; (e) cost of delivery; (f) method of payment, supply or performance; (g) advice about right of withdrawal from contract; (h) costs of use of means of distant communication; (i) period or validity of offer or price. Consumer is generally entitled to cancel contract within 14 days of taking delivery of performance, however right of consumer to cancel contract is excluded in cases of: (a) Provision of specific service if consumer gave consent to commencement of performance prior to expiry of 14-day time-limit; (b) supply of goods or services whose price is dependant on fluctuations on financial market; (c) supply of goods modified or personalized according to consumer's wish, perishable goods, goods seriously affected by wear and tear; (d) supply of audio or video recordings and/or computer programs, if consumer opens original packaging; (e) subscription for newspaper, periodical or journal; (f) game of chance or lottery.

Database Protection.

Databases can be subject to protection according to Copyright Act no. 121/2000 Sb., amended by Act nos. 81/2005 Sb., 61/2006 Sb., 186/2006 Sb., 216/2006 Sb., 168/2008 Sb., and 41/2009 Sb. (§§2, 5, 88 et seq.). Protection differs for databases subject to copyright and other databases that are subject to protection sui generis.

If database is result of author's original creative intellectual activity because of manner of selection or arrangement of contents, it is considered as collected work subject to general rules of copyright. Protection is granted for 70 years after death of its author.

Database that represents set of independent works, data and other elements, systematically or methodically arranged and individually accessible by electronic or other means is subject to protection sui generis. Special rights to database belong to compiler of database as long as it represents qualitatively or quantitatively essential input with regard to its compilation, testing or demonstration of contents. Compiler of such database has exclusive right to recopying and utilizing of entire contents of database or its qualitatively or quantitatively essential parts and right to grant other party authorization to exercise such right. Right of database compiler that was made accessible to public in any manner is not infringed by authorized user who recopies qualitatively or quantitatively unessential parts of database or its part for any purpose, provided that such user uses database in customary and appropriate manner, and not repeatedly or systematically, without detriment to database compiler or author. Special right of compiler of database lasts for 15 years from date of compilation. However, if within this period database is made accessible to public, special right of compiler to database terminates 15 years from date such database was first made accessible to public.

Digital Signature.

Act no. 227/2000 Sb. on Electronic Signature, amended by Act nos. 226/2002 Sb., 517/2002 Sb., 440/2004 Sb., 501/2004 Sb., 635/2004 Sb., 444/2005 Sb., 110/2007 Sb., 124/2008 Sb., and 190/2009 Sb. has been implemented in order to allow identification of originator of electronic message and to guarantee safety thereof. Digital signatures are issued by accredited certification providers that have been licensed by Czech Office for Data Protection. Digital signature may be used to legally sign certain forms in tax matters provided that such forms were published in electronic form. Digital signature may also be used for various submissions to judicial and state authorities, however in some cases written confirmation of such submissions is required.

Telecommunication.

Requirements for establishment and operation of telecommunication facilities and networks, as well as for providing of telecommunication services, are regulated by Act no. 127/2005 Sb., amended by Act nos. 290/2005 Sb., 361/2005 Sb., 186/2006 Sb., 235/2006 Sb., 310/2006 Sb., 110/2007 Sb., 261/2007 Sb., 304/2007 Sb., 124/2008 Sb., 177/2008 Sb., 189/2008

Sb., 247/2008 Sb., and 384/2008 Sb.

Television and Radio Services.

Act no. 231/2001 Sb., amended by Act nos. 309/2002 Sb., 274/2003 Sb., 341/2004 Sb., 501/2004 Sb., 626/2004 Sb., 82/2005 Sb., 127/2005 Sb., 348/2005 Sb., 235/2006 Sb., 160/2007 Sb., 296/2007 Sb., 304/2007 Sb., 124/2008 Sb., 384/2008 Sb., 196/2009 Sb., and 41/2009 Sb., requires either license or registration issued by Czech Council for Television and Radio Broadcasting for television and radio broadcasting. Generally, license is required for TV and radio broadcasting via transmitters, while broadcasting via satellite or cable requires less formal registration.

3.06 LICENSES, BUSINESS AND PROFESSIONAL:

Trading licenses are required for any business involving practice of trade. (Act no. 455/1991 Sb., am'd by Act nos. 231/1992 Sb., 591/1992 Sb., 273/1993 Sb., 303/1993 Sb., 38/1994 Sb., 42/1994 Sb., 136/1994 Sb., 200/1994 Sb., 237/1995 Sb., 286/1995 Sb., 94/1996 Sb., 147/1996 Sb., 19/1997 Sb., 49/1997 Sb., 61/1997 Sb., 79/1997 Sb., 217/1997 Sb., 280/1997 Sb., 15/1998 Sb., 83/1998 Sb., 157/1998 Sb., 167/1998 Sb., 356/1999 Sb., 358/1999 Sb., 360/1999 Sb., 363/1999 Sb., 27/2000 Sb., 29/2000 Sb., 121/2000 Sb., 122/2000 Sb., 123/2000 Sb., 124/2000 Sb., 149/2000 Sb., 151/2000 Sb., 158/2000 Sb., 247/2000 Sb., 249/2000 Sb., 258/2000 Sb., 362/2000 Sb., 409/2000 Sb., 458/2000 Sb., 61/2001 Sb., 100/2001 Sb., 120/2001 Sb., 164/2001 Sb., 256/2001 Sb., 274/2001 Sb., 477/2001 Sb., 478/2001 Sb., 501/2001 Sb., 86/2002 Sb., 119/2002 Sb., 289/2002 Sb., 308/2002 Sb., 476/2002 Sb., 88/2003 Sb., 130/2003 Sb., 162/2003 Sb., 224/2003 Sb., 228/2003 Sb., 274/2003 Sb., 354/2003 Sb., 438/2003 Sb., 38/2004 Sb., 119/2004 Sb., 167/2004 Sb., 257/2004 Sb., 326/2004 Sb., 499/2004 Sb., 635/2004 Sb., 695/2004 Sb., 58/2005 Sb., 95/2005 Sb., 127/2005 Sb., 215/2005 Sb., 253/2005 Sb., 358/2005 Sb., 428/2005 Sb., 444/2005 Sb., 62/2006 Sb., 76/2006 Sb., 109/2006 Sb., 115/2006 Sb., 131/2006 Sb., 161/2006 Sb., 165/2006 Sb., 179/2006 Sb., 186/2006 Sb., 191/2006 Sb., 212/2006 Sb., 214/2006 Sb., 225/2006 Sb., 310/2006 Sb., 315/2006 Sb., 160/2007 Sb., 269/2007 Sb., 270/2007 Sb., 296/2007 Sb., 130/2008 Sb., 189/2008 Sb., 230/2008 Sb., 254/2008 Sb., and 274/2008 Sb.).“Trade” is defined as systematic independently managed activity, conducted by natural or legal person in his own name and at his own liability for purpose of making profit under conditions stipulated by law. License is required for each activity.

For obtaining license or concession certain qualifications must be proved (specialised education and experience of certain duration according to kind of activity, etc.). Only in cases of so-called “free trades” registration suffices without proof of education and experience. General conditions are age over 18 years, capacity to make legal acts and integrity (lack of criminal record or bankruptcy). Individual must offer proof of his/her lack of criminal record by submission of relevant documents from state of which person is citizen.

Legal persons and individuals who do not fulfill specific conditions for exercising trade must nominate responsible representative who fulfills conditions required. Foreign entrepreneur, physical as well as legal person, may start exercising trade after entry into commercial register (not applicable to individual with permanent address in member state of EU or EEA).

Relevant trade licensing office may propose fines for practice of trades without license or failure to comply with provisions of Act.

Special permits are required for certain business activities, e.g., in fields of banking and insurance.

See topic 3.02 Commercial Register; category 4 Citizenship, topic 4.01 Aliens.

3.07 MONOPOLIES, RESTRAINT OF TRADE AND COMPETITION:

Abuse of economic competition is either unfair competitive behaviour (unfair competition) or unpermitted restriction of economic competition. Former is generally regulated by ObchZ (§§41-55), latter is governed by Act no. 143/2001 Sb. (am'd by Act nos. 340/2004 Sb., 464/2004 Sb., 484/2004 Sb., 127/2005 Sb., 361/2005 Sb., 436/2005 Sb., 71/2007 Sb., 296/2007 Sb., and 155/2009 Sb.), on protection of economic competition.

Unfair Competition.

Conduct within economic competition that is contrary to good practise of competition and is qualified as being able to cause detriment to other competitors or consumers is prohibited.

Following are regarded as unfair competition: (1) False advertising; (2) deceitful description of goods and services; (3) contributing toward mistaken identity; (4) exploitation of competitor's reputation; (5) bribery; (6) discrediting; (7) unauthorised disclosure of business secrets; (8) endangering consumers' health or environment; (9) comparative advertising. Persons whose rights were violated or endangered by unfair competition may demand: That perpetrator abstain from his infringing acts and remove offending situation; appropriate satisfaction; compensation for damage and forfeiture of unjustified gains. (ObchZ, §§44-52).

Final judgment on such claim, rendered even to only one plaintiff, is applicable towards other entitled persons. Court may entitle winning plaintiff to publicise decision at cost of guilty party.

Trade Restraints.

Act no. 143/2001 Sb. (am'd by Act nos. 340/2004 Sb., 464/2004 Sb., 484/2004 Sb., 127/2005 Sb., 361/2005 Sb., 436/2005 Sb., 71/2007 Sb., 296/2007 Sb., and 155/2009 Sb.) applies to all doing business in CR, having enterprise or permanent residence in its territory, and also to acts outside country if they effect domestic market. Acts effecting foreign markets are governed by this act only if stipulated so by international treaties binding CR.

Cartels.

Defined as agreements between competitors, decisions by associations of competitors or concerted practices that result or may result in distortion of competition. Cartels are prohibited and invalid, unless special Act provides otherwise, or unless Office for Protection of Competition (“OPC”) grants exemption from prohibition.

Following types of agreements or practices are prohibited: (a) Direct or indirect fixing of prices or other business terms and conditions; (b) limitation or control of production, sales, research and development or investments; (c) division of markets or sources of supply; (d) making conclusion of contract subject to acceptance of further performance which by its nature or according to commercial usage and fair business practices has no connection with subject of contract; (e) application of dissimilar conditions to identical or equivalent transactions with other competitors thereby placing them at competitive disadvantage; (f) obligation of parties to refrain from trading or other economic cooperation with entities not being party to agreement, or to otherwise harm same (group boycott). Agreements between competitors operating at same market level are considered horizontal agreements, while agreements between competitors operating at different market levels are considered vertical agreements. Mixed agreements between competitors operating at same horizontal level, as well as at different vertical levels, shall be deemed to constitute horizontal agreements; in case of doubt, such mixed agreements shall be deemed to be horizontal agreements.

Prohibition does not apply to agreements that: (a) Achieve improvement of production and distribution of goods or furthers technical or economical advancements and reserve to consumers fair share of arising advantages; (b) do not impose limitations to consumers that are not necessary to purposes mentioned in subpar.a; (c) do not allow consumers to avoid competition on substantial part of market of goods supply or sale of which is object of agreement.

Mergers.

Merger of competitors is subject to approval by OPC if (a) Aggregate net turnover of all parties concerned for last accounting period in Czech market exceeds 1.5 billion Kc and at same time at least two of parties concerned achieved net minimum turnover 250 million Kc for last accounting period, or (b) net turnover achieved in Czech market for last accounting period in case of merger in form of (i) transformation of two or more parties previously acting separately in market (ii) in form of acquisition of enterprise of acquiring party (iii) acquisition of control of party (iv) joint control of at least one of parties forming jointly controlled enterprise, exceeds 1.5 billion Kc and at same time aggregate net turnover achieved for the last accounting period by other merging party exceeds 1.5 billion Kc. Approval shall not be granted if merger will significantly impede competition on relevant market. OPC may revoke approval where it finds that merger approval was based on information and documents that turn out to be partially or fully false or incomplete or where approval was obtained by deceit or where parties do not follow conditions, restrictions and obligations attached to decision. OPC may initiate proceedings for revocation of approval within one year of discovery of facts above-mentioned, but no later than five years after such facts have occurred.

Monopolistic and Dominant Position.

One or more competitors jointly (joint dominance) are deemed to have dominant position on relevant market, if their market power enables them to behave independently of other undertakings or consumers to significant extent. OPC measures market power by formulation of ascertained volume of supplies or purchases on relevant market for goods in question (market share), achieved by relevant competitor or competitors in joint dominant position during period examined, and pursuant to other indices, in particular economic and financial power of parties, legal or other barriers to entry into market by other parties, vertical integration level of undertakings, market structure and size of market shares of their immediate competitors. Unless proven otherwise by means of indices pursuant above, competitor or competitors in joint dominance shall be deemed not to be in dominant position, if share on relevant market achieved during examined period is below 40%.

Abuse of dominant position to detriment of other competitors or consumers is prohibited. Abuse of dominant position consists particularly of: (a) Direct or indirect enforcement of unfair conditions in agreements with other participants in market, especially enforcement of performance which is at time of conclusion of contract conspicuously inadequate to counter-performance provided; (b) making conclusion of contracts subject to acceptance by other party of supplementary performance which by its nature or according to commercial usage has no connection with subject of such contracts; (c) application of dissimilar conditions to identical or equivalent transactions with other trading parties, thereby placing them at competitive disadvantage; (d) termination or limitation of production, sales or research and development to prejudice of consumers; (e) consistent offer and sale of goods for unfairly low prices resulting in distortion of economic competition; (f) refusal to grant other entities access to distribution networks or other infrastructure for reasonable consideration, which are owned or used on basis of another legal title by dominant entity, whereby such other entities are unable for legal or other reasons to compete on same market as dominant entities without being able to jointly use such networks or infrastructure, and such dominant entities fail to prove that such joint use is unfeasible for operational or other reasons or that they cannot be reasonably requested to enable same. This also applies for refusal to grant other entities access to intellectual property or access to networks, which are owned or used on basis of another legal title by dominant entity, whereby such use is necessary for participation in economic competition on same market as dominant entity of other market.

In event that OPC ascertains in proceedings held in above-mentioned matters abuse of dominant position has occurred, it shall state this fact in its decision and shall simultaneously prohibit such action by its decision pro futuro.

3.08 SALES:

ObchZ (§§409-470) contains principal provisions on sale of goods. Purchase contract must contain individual description of goods or at least kind, purchase price or at least method of determining price later, unless parties manifest their will to conclude contract without determining price. (ObchZ, §§409). In event parties manifest will to conclude contract without price, seller may demand payment of purchase price for which such goods, or comparable goods, were, as rule, sold at time when contract was concluded under terms similar to those of contract. (ObchZ, §448).

Seller is obliged to deliver goods to buyer, to pass over documentation related to goods, and to enable buyer to take title to goods in accordance with contract and law. (ObchZ, §411).

Transfer of Title.

Buyer acquires title to goods as soon as delivered goods are passed to buyer. (ObchZ, §443/1). Parties may agree in writing that buyer takes title later. (ObchZ, §445). Unless contract, as regards transfer of title, implies otherwise, it is presumed that buyer takes title when purchase price has been fully paid. (ObchZ, §445). Should parties agree in writing, buyer may acquire title before delivery, provided that contract concerns goods determined individually or determined according to kind, and that at time of transfer of title, such goods are sufficiently marked so as to be differentiated from other goods. (ObchZ, §444). Buyer acquires ownership rights even in event that seller is not owner of sold goods, unless at time when buyer was to acquire title, buyer knew that seller was neither owner, nor authorised to sell goods. (ObchZ, §446).

Seller undertakes to deliver goods in quantity, quality and presentation stipulated in contract and must arrange for goods to be packed and made ready for forwarding in manner stipulated in contract. (ObchZ, §420). Should contract quantity be only approximated, seller is entitled to determine exact quantity of goods to be delivered, deviation may not exceed 5% of quantity stipulated in contract. (ObchZ, §421).

Defects.

Seller is liable for defects in goods until moment when risk of damage passes to buyer, even when such defect becomes apparent only afterwards. (ObchZ, §425/1). Buyer is obliged to inspect goods as soon as possible upon transfer of risk of damage and is obliged to notify buyer of defects without delay, immediately after buyer has detected or should have detected such defects. (ObchZ, §427).

In event contract is fundamentally breached by delivery of defective goods, buyer may demand: (1) Removal of defects either by substitution for defective goods, providing missing goods or by removing legal defects; (2) removal of defects in goods by repair, if repairable; (3) adequate discount from purchase price; (4) repudiation of contract. (ObchZ, §436/1). Buyer has choice of demands, provided that he notifies seller of choice without undue delay. Once buyer has asserted certain claim, this claim cannot be changed without seller's consent. In addition to remedies stipulated in §436/1, buyer is entitled to compensation for damage or to contractual penalty, if agreed.

In event that delivery of defective goods constitutes non-fundamental breach, buyer may demand either delivery of missing goods and removal of remaining defects of goods, or discount of purchase price. (ObchZ, §437/1). If buyer demands removal of defects, additional reasonable period must be provided to seller. During this additional period, buyer cannot exercise rights flowing from defects in goods, except for claim for damage and contractual penalty.

(ObchZ, §437/3). If seller fails to remove defects in goods within reasonable period, buyer may claim discount from purchase price or repudiate contract, provided that he informs seller of intention when determining additional reasonable period or within reasonable time prior to repudiation of contract. (ObchZ, §437/5).

Risk of Damage.

Risk of damage to goods passes to buyer upon delivery, or, if failing to do so in time, at time when seller enables buyer to dispose of goods and buyer breaches contract by not taking delivery of goods. (ObchZ, §455).

If, under contract, seller is to hand over goods to certain carrier at fixed place for forwarding to buyer, risk of damage passes upon handing over goods to carrier at that place. Damage to goods which occurred after passing of risk to buyer has no effect on buyer's obligation to pay purchase price, unless damage occurred due to breach of obligation by seller. (ObchZ, §461/1).

Warranties.

By issuing warranty for quality of goods in writing, seller undertakes obligation to deliver goods which will be fit to be used for agreed or customary purpose for fixed period or which will retain agreed or customary properties for fixed period. Obligation for warranty can be contained in contract or in declaration of seller, especially in form of letter of guaranty. (ObchZ, §§429-432).

International Sale of Goods.

CR is contracting state of UN Convention on Contracts for the International Sale of Goods of Apr. 11, 1980, and of Convention on the Limitation Period in International Sale of Goods, New York, June 14, 1974.

See topic 3.03 Contracts.

4 CITIZENSHIP

4.01 ALIENS:

See category 16 Immigration, topic 16.01 Aliens.

4.02 IMMIGRATION:

See category 16 Immigration, topic 16.02 Immigration.

5 CIVIL ACTIONS AND PROCEDURE

5.01 ACTIONS:

Commencement of Proceedings.

Rights and duties resulting from proceedings are regulated by OSR. Legal and physical persons commence proceedings by written submission to court of first instance, normally district courts. Proceedings may be commenced orally, recorded by any court and then transferred to proper court, in order to keep effect of submission as of date record was made. Actions may be submitted via cable, but it is necessary to make written record of such submission no later than three days after sending cable.

Appropriate Forum.

Regulated by OSR, §§84-89a. Generally for venue, court with subject matter jurisdiction located at place of legal seat of defendant. In case where district court has subject matter jurisdiction, court seated in district where citizen is domiciled, where entity has its seat or where event on which claim is based occurred, should state be defendant. For subject matter jurisdiction, see category 6 Courts and Legislature, topic 6.01 Courts.

OSR, §87 stipulates competence of court which plaintiff may select instead of local forum. OSR, §88 regulates competence of courts other than local forum which must be selected by plaintiff in order to submit action.

Action against foreign entity is submitted to court with subject matter jurisdiction seated in district of CR in which defendant has representative or other body authorised to manage its affairs. Participants of proceedings concerning business matters may make written agreement stipulating competence of court other than usual first instance, unless law stipulates exclusive competence. (OSR, §89a).

Parties.

Pursuant to proposal of participant, court may allow other parties to take part in proceedings. Consent is required if party will act as co-plaintiff. Substitution of parties is allowed upon agreement of parties. (OSR, §92). Individual who has legal interest in result of action may take part either on side of plaintiff or defendant in position of by-participant, except in action involving divorce or marital status. (OSR, §93).

Evidence.

From investigation of matter, particularly examination of witnesses, expert opinions, records, documents and examination of participants may serve as proof. If method of providing proof is not prescribed, it is decided by court. (OSR, §125). Evidence has to be presented in manner that preserves state, economic, commercial and official secrets. (OSR, §124). Legal regulations published or announced in Collection of Laws of CR do not require any proof. If according to conflict of law rules, choice of law agreed by parties to contract included, law of foreign state is to be applied, court is obliged to take all necessary measures to ascertain foreign law. Should it be necessary, court can request opinion of Ministry of Justice or expert opinion. (§53, Act no. 97/1963 Sb., am'd by Act nos. 158/1969 Sb., 234/1992 Sb., 264/1992 Sb., 125/2002 Sb., 37/2004 Sb., 257/2004 Sb., 361/2004 Sb., 377/2005 Sb., 57/2006 Sb., 70/2006 Sb., 233/2006 Sb., 296/2007 Sb., 123/2008 Sb., and 7/2009 Sb.). In such cases, court must apply foreign law ex officio.

Costs.

Court awards remuneration of costs to winning party. In case of partial success, costs are divided proportionally or court may decide none of participants are entitled to costs. Costs include court fee, lost earnings of participants, cost of proof, interpretation and lawyers fees. (OSR, §137). Remuneration of lawyers fees is limited to amounts stipulated by Act no. 484/2000 Sb. Plaintiff pays court fee when submitting action. Amount is stipulated by Act no. 549/1991 Sb., amended by Act nos. 271/1992 Sb., 273/1994 Sb., 35/1995 Sb., 118/1995 Sb., 160/1995 Sb., 15/1997 Sb., 209/1997 Sb., 227/1997 Sb., 103/2000 Sb., 155/2000 Sb., 241/2000 Sb., 255/2000 Sb., 451/2001 Sb., 151/2002 Sb., 309/2002 Sb., 192/2003 Sb., 555/2004 Sb., 628/2004 Sb., 357/2005 Sb., 72/2006 Sb., 112/2006 Sb., 115/2006 Sb., 159/2006 Sb., 189/2006 Sb., 296/2007 Sb., 123/2008 Sb., 216/2008 Sb., and 7/2009 Sb. Generally, fee is 4% of requested damages, or not less than 600 Kc. If subject of action does not involve action for damage, fee is 1,000 Kc unless otherwise stipulated by law.

5.02 DEPOSITIONS AND DISCOVERY:

CR is party to Hague Convention on the Taking of Evidence Abroad in Civil or

Commercial Matters of Mar. 18, 1970. (No. 129/1976 Sb.). Normal procedure for obtaining evidence under convention is to send necessary information, including exact questions, if desired, to Ministry of Justice (designated as Central Authority according to convention), which then transmits Letters of Request to competent local Czech court. See Part V of this volume for Convention and forms.

In cases not covered by Hague Convention, Letter of Request will be sent, as case may be, on basis of Hague Convention on Civil Procedure of Mar. 1, 1954 (No. 72/1966 Sb.), or of Hague Convention on Civil Procedure of July 17, 1905 (No. 3/1927 Sb. and No. 84/1930 Sb.), or of bilateral treaty binding on CR; otherwise Letter of Request will be executed on condition of reciprocity and must be submitted through diplomatic channel. It cannot be sent directly, unless international treaty provides otherwise.

If court which is to execute letter is not known, it need not be specified. It is advisable, even if court is designated, to add words “or other appropriate authority” in order to avoid delays.

Counsel may appear at examination of witness. Letter of Request will be executed according to Czech law of procedure. Nevertheless, if requested by foreign authority and if not contrary to Czech public order, Letter of Request can be executed according to foreign law of procedure (e.g., in form of deposition taken upon oath). (§57, Act no. 97/1963 Sb., on Private International Law and Law of International Procedure, am'd by Act nos. 158/1969 Sb., 234/1992 Sb., 264/1992 Sb., 125/2002 Sb., 37/2004 Sb., 257/2004 Sb., 361/2004 Sb., 377/2005 Sb., 57/2006 Sb., 70/2006 Sb., 233/2006 Sb., 296/2007 Sb., 123/2008 Sb., and 7/2009 Sb.).

Evidence in a Foreign Country.

Can be taken upon request of Czech court made under respective international treaty or, if no such treaty, through appropriate diplomatic channel. Evidence is effective if it satisfies requirements of Czech law, even if not in accordance with foreign law. Evidence abroad can be taken also by Czech diplomatic or consular office authorized by Ministry of Foreign Affairs, if not contrary to law of respective foreign state.

5.03 JUDGMENTS:

Judgments of Czech courts against which no further appeal lies are enforceable by way of execution.

Recognition and execution of foreign judgments is regulated by Act no. 97/1963 Sb., amended by Act nos. 158/1969 Sb., 234/1992 Sb., 264/1992 Sb., 125/2002 Sb., 37/2004 Sb., 257/2004 Sb., 361/2004 Sb., 377/2005 Sb., 57/2006 Sb., 70/2006 Sb., 233/2006 Sb., 296/2007 Sb., 123/2008 Sb., and 7/2009 Sb. on international private law and law of international procedure. For recognition of foreign judgments, two basic conditions must be met: Judgment must be definitive (final) judgment having force of law and it must be recognisable by Czech authorities.

Main groups of foreign judgments regulated by law are foreign decisions in property matters and foreign decisions in matters of civil status. For latter, if Czech citizen is concerned, conditions of recognition are more severe and form of recognition is prescribed by law.

Recognition of Foreign Judgments.

Foreign judgments in marital matters and matters of determination of paternity, in case at least one participant in proceedings was Czech citizen, are governed by special requirement that foreign decision be recognised by decision of Supreme Court after hearing of general prosecutor. If all participants were aliens and nationals of state in which decision was issued or foreign decision is recognised in home state of all participants, foreign decision will be recognised without further proceedings.

Foreign judgments can be neither recognised nor enforced, if: (1) Czech legal provision on competence of Czech courts applied to foreign countries would not admit case to be heard by courts or authorities of foreign state, or if matter lies within exclusive jurisdiction of Czech courts; (2) Czech authority has already issued final decision on same legal action or foreign decision has been previously recognised; (3) participant of proceedings against whom foreign judgment is to be recognised was denied possibility of defending his rights and to take part in proceedings, especially if respective order to appear before court or motion to open proceedings was not served properly; (4) foreign judgment is in contradiction to public order; (5) it is proved that similar decisions by Czech authorities are not recognised in respective foreign state if foreign judgment is directed against Czech physical or legal person.

Execution of Foreign Judgments.

Distinction between recognition and execution of foreign judgment in property matter must be made. Recognition will be realised without special decision, i.e., Czech authority takes regard of foreign judgment as in case of Czech judgment in same matter. Execution of foreign judgment in property matter must be ordered by decision of Czech court. (decision exequatur).

It is always necessary to justify ordering of execution, but examination of foreign judgment as to substance in merits of matter is not allowed. Otherwise, execution of foreign judgment according to general prescriptions is realised in same manner as execution of domestic judgments with respect to property rights.

CR is party to number of multilateral and bilateral treaties dealing with this subject. Multilateral treaties include The Hague Convention of Apr. 15, 1958 on Recognition and Enforcement of Decisions Relating to Maintenance Obligation in Respect of Children; The Hague Convention of Oct. 2, 1973 on Recognition and Enforcement of Decision Relating to Maintenance Obligations; The Geneva Convention of Sept. 26, 1927 on Enforcement of Foreign Arbitral Awards; New York Convention of June 10, 1958 on Recognition and Enforcement of Foreign Arbitral Awards.

Conditions for recognition and execution of judgments in civil or commercial matters issued in EU member states are further regulated by Council Regulation No. 44/2001.

For bilateral treaties, see category 23 Treaties and Conventions, topic 23.01 Treaties.

See also category 7 Debtor and Creditor, topic 7.05 Executions.

5.04 LIMITATION OF ACTIONS:

Provided right has been statute-barred by expiration of terms of prescription mentioned below, debtor is entitled to plead prescription. If debtor raises prescription, court is prevented from according statute-barred right to creditor. Court regards prescription only if debtor raises issue, which debtor may do at any time within course of proceedings. (OZ, §100). Right of prescription may not be disclaimed.

Term of prescription commences on date it was possible to assert right for first time. All rights are subject to prescription with exception of right of ownership. General term of prescription is three years. (OZ, §101). Rights concerning deposits on bank accounts may not be statute-barred as long as deposit relations still exist. (OZ, §100).

Special provisions control following rights: (1) Term concerning right to compensation for damage is two years and commences on day when injured party learned of damage and discovered who was responsible, but at latest three years, unless damage was caused intentionally, in which case ten year term applies from day when damage occurred (OZ, §106); (2) term concerning right to demand return of unjust enrichment is two years and commences on date when injured party learned of unjust enrichment and discovered party liable for act, but at latest three years, or in case of intentional unjust enrichment, ten years latest from day when intentional act occurred (OZ, §107); (3) claims against carrier and forwarding agent are barred after one year with exception of compensation for damage from transport of persons (OZ, §108); (4) rights corresponding to easement become barred unless they are executed within period of ten years (OZ, §109); (5) right adjudicated by final decision of court or other administrative body is barred ten years after day performance should have been made on basis of decision (OZ, §110); (6) right acknowledged by debtor in writing as to its grounds and amount is barred ten years after day acknowledgment was made, unless term of performance was indicated in acknowledgment, in which case right is barred ten years from expiration of indicated term (OZ, §110); (7) ten year term applies to separate instalments arising on basis of decision or acknowledgment, with term for individual instalment beginning on day it becomes payable (OZ, §110); (8) interest and recurrent performances are barred after three years, except in case of rights adjudged by final court decision or written acknowledgment, in which case this term applies only to interest or recurring performance arising after decision or acknowledgment. (OZ, §110).

Change in person of debtor or creditor has no effect on running of term of prescription. Term of prescription does not run during period debtor is asserting right before court or other appropriate body. (OZ, §112). Term does not begin nor run with regard to rights among spouses, minors or persons required to have statutory representative on one hand, and statutory representative on other hand, unless concerning interest or recurrent performance. Term related to persons who are obliged have statutory representative commences after representative is appointed. (OZ, §§113, 114).

Regarding matters exclusively governed by ObchZ.

General term is four years. (ObchZ, §397). Regulation of periods of prescription in ObchZ is for most part parallel with Convention on Limitation Periods in International Sale of Goods, New York, June 14, 1974, to which CR is contracting state.

See topic 5.01 Actions.

5.05 PRESCRIPTION:

See topic 5.04 Limitation of Actions.

5.06 SEQUESTRATION:

Court may order, only as interlocutory injunction, property placed in custody of Court. (OSR, §76).

See category 7 Debtor and Creditor, topic 7.05 Executions.

6 COURTS AND LEGISLATURE

6.01 COURTS:

In conformity with Art. 81 of Czech Constitution, judicial power is executed by independent courts on behalf of Republic.

Constitutional Court, composed of 15 judges appointed for ten years by President of Republic with consent of Senate, decides issues specified by Art. 87 of Constitution. Decision of Constitutional Court is executable as soon as it has been promulgated as specified by law, unless court specifies otherwise. Executable decisions of this court are binding on all authorities and persons.

System of courts in CR is set forth in Art. 91 of Constitution, along with Act no. 6/2002 Sb., amended by Act nos. 151/2002 Sb., 228/2002 Sb., 349/2002 Sb., 192/2003 Sb., 441/2003 Sb., 626/2004 Sb., 349/2005 Sb., 413/2005 Sb., 79/2006 Sb., 221/2006 Sb., 233/2006 Sb., 264/2006 Sb., 267/2006 Sb., 342/2006 Sb., 397/2006 Sb., 184/2008 Sb., 314/2008 Sb., 7/2009 Sb., and 41/2009 Sb. System is formed by Supreme Court (Nejvyssísoud), Supreme Administrative Court (Nejvyssí správní soud), Superior Courts (Vrchní soudy), Regional Courts (Krajské soudy) and District Courts (Okresní soudy).

Supreme Court is highest judicial authority in affairs falling within competence of courts, with exception of matters decided on by Constitutional Court or Supreme Administrative Court. Supreme Court decides on appeals on decisions made by Superior Courts acting as courts of appeal and decides on recognition and enforceability of foreign judgments. Supreme Court also decides disputes concerning competence between courts. Superior Courts decide on appeals on decisions made by Regional Courts as courts of first instance.

Regional Courts are composed of president, vice-presidents, and further judges and assessors. Decisions are made by tribunals. Regional Courts are competent to decide matters in first instance as defined in OSR, §9. They decide on appeals of decisions made by District Courts.

District Courts are competent to hear all proceedings in first instance, unless Regional Court has competence according to OSR, §9.

Within sphere of administrative justice, courts review legality of decisions made by public administrative authorities on basis of claims or appeals. Regional Courts are competent to revise such decisions, if law does not stipulate otherwise.

Supreme Administrative Court decides in last instance on administrative decisions.

6.02 LAW REPORTS, CODES:

Official reports of decisions are issued approximately quarterly by Supreme Court, considered as important source of law, but no decision is binding for future cases.

Publishing of Commercial Bulletin is based on Decree No. 503/2000 Sb., am'd by Decree Nos. 408/2003 Sb., 511/2005 Sb., and 127/2007 Sb. Commercial Bulletin includes all information which is to be published according to ObchZ, together with court decisions in commercial cases provided that court approves publishing.

Ministry of Finance periodically publishes among its decrees list of maximum prices for items such as medicines, optical goods and energy.

Laws of CR are codified, appearing in Sbirka zakonu (collection of laws) as they are enacted.

6.03 LEGISLATURE:

See category 1 Introduction, topic 1.02 Government and Legal System.

6.04 STATUTES:

See topic 6.02 Law Reports, Codes.

7 DEBTOR AND CREDITOR

7.01 ASSIGNMENTS:

Assignment of Claim.

Creditors may transfer claims and all rights and obligations connected therewith to third parties without consent of debtors, however debtor must be notified. Written form is required for assignment. Claims which cease to exist on death of creditor, claims whose contents would change with change of creditor and claims which are not subject to execution cannot be assigned. It is not possible to assign claim, if in contradiction with agreement with debtor. Debtor retains objections against claim. (OZ, §§524-530).

Assignment of Debt.

Third persons may, upon agreement with debtor, assume obligation of debtor, if creditor consents, thereby releasing original debtor. Creditor may provide consent to original debtor or to person assuming debt. Person assuming debt by agreement with creditor without agreement of debtor will become co-debtor. Agreement on assignment of debt must be written. Objections or defences which debtor has against creditor may also be asserted by person taking over debt or by co-debtor. Contents of obligation do not change with assignment, but guarantee of debt provided for by third persons continues only if guarantor consents to change in person of debtor. (OZ, §§531, 532). In case of sale of enterprise, debts pass to buyer without consent of creditor, but seller has position of surety as to debts passing to buyer. Buyer is obliged to notify creditors of assignment of debts and seller is obliged to notify debtors of assignment of claims. (ObchZ, §477).

Assignment of Property, Real or Personal.

See category 3 Business Regulation and Commerce, topic 3.08 Sales.

7.02 ASSIGNMENTS FOR BENEFIT OF CREDITORS:

See topics 7.01 Assignments and 7.04 Bankruptcy.

7.03 ATTACHMENT:

In Czech law, there is no equivalent for attachment as conceived in American Law. It is possible in form of interlocutory injunction only. Interlocutory injunction is permissible in case it is necessary to temporarily regulate relations of parties or if there is concern that execution of judgment would be endangered. Specific circumstances where interlocutory injunctions may be issued are: (1) Payment of alimony; (2) child custody; (3) to provide partial remuneration for work, if case involves labour relations and plaintiff does not work for serious reasons; (4) deposit of money or property to custody of notary; (5) to prevent disposal or use of property or rights; (6) to order act, refrain act. (OSR, §76).

7.04 BANKRUPTCY:

Czech law defines bankruptcy as situation in which debtor has more than one creditor, is overburdened with debts and is not able to fulfill its' financial obligations. (Act on Bankruptcy and Methods of Settlement [Insolvencni zakon] no. 182/2006 Sb., am'd by Act nos. 312/2006 Sb., 108/2007 Sb., 296/2007 Sb., 362/2007 Sb., 458/2008 Sb., 7/2009 Sb., and 163/2009 Sb. subsidiary application: OSR).

Proposal for bankruptcy proceedings can be made by debtor or creditor. Legal persons and individual enterpreneurs, their statutory representatives, authorized representatives, and liquidators of legal entities in liquidation have obligation to propose bankruptcy proceedings. Individual who does not fulfil this obligation will be responsible for damages caused to creditors. Bankruptcy court is regional or municipal court within whose jurisdiction debtor's seat or residence is located.

Petition made by creditor must be supplemented with documentation supporting claim, as well as evidence demonstrating that debtor is bankrupt. Creditor must also prove that it has tangible debt. Debtor may request three month protection period, which may be extended by additional 30 days. Court may appoint preliminary administrator for purpose of securing assets.

If court accepts petition, it issues decision on declaration of bankruptcy. This decision includes invitation of creditors to file their claims and appointment of administrator.Term for filing claims is from 30 to 60 days from day on which bankruptcy was declared. Decision can also include decision on manner of solution of bankruptcy (otherwise must be issued within 30 days from decision on declaration of bankruptcy).

Effects of Declaring Bankruptcy.

Management of estate is taken over by administrator; legal actions concerning bankrupt's property taken by him are null and void in relation to his creditors (see topic 7.06 Fraudulent Sales and Conveyances); pending claims and liabilities related to bankrupt's assets become mature; action on claims may be filed only against administrator; bankrupt's proxies, unaccepted offers for contracts are terminated; bankrupt's shared matrimonial property rights become invalid. (§140). Company may continue activities after issuance of bankruptcy declaration, subject to control of creditors.

Reviewing of Claims.

Subject of review hearing is list of debtor's assets and liabilities, as well as list of bankrupt's estate compiled by administrator; bankrupt and creditors may dispute validity and amount of all submitted claims. Claim is considered identified if approved by administrator and not contested by any creditors. Bankrupt's contest is irrelevant as to identification of claim.

Creditors, whose claims are contested, may bring action against administrator. Claim is then argued before court. If administrator contests claim submitted by creditor, creditor must file action on claim within 30 days or claim will be barred.

Special claims may be satisfied during bankruptcy proceeding: i.e., claims seeking to exclude item from assets; claims related to expenses and remuneration of administrator; claims related to administration of assets; claims related to expenses and remuneration of liquidator or remuneration of proxy for activities performed after declaration of bankruptcy; taxes, social security and health insurance; claims of creditors arising from agreements signed with administrator after consent of committee of creditors; claims for return of object arising from agreements which were withdrawn from in accordance with Act; statutory alimony claims,; claims seeking separate satisfaction (secured by lien, pledge or mortgage); employee claims specified by Act.

First claims to be satisfied are unsatisfied following special claims: claims related to expenses and remuneration of administrator; claims related to administration of assets; claims related to expenses and remuneration of liquidator or remuneration of proxy for activities performed after declaration of bankruptcy; taxes, social security and health insurance; claims of creditors arising from agreements signed with administrator after consent of committee of creditors; claims for return of object arising from agreements which were withdrawn from in accordance with Act; statutory alimony claims; and employee claims. After full satisfaction of above, other claims are satisfied.

Involuntary Composition.

Court will issue decision on adjudication of bankruptcy (involuntary composition) if reorganization and discharge are excluded according to Act. Administration of bankrupt's estate is entrusted to Court appointed administrator who will secure and collect bankrupt's estate and elaborate distribution schedule upon which all identified claims are proportionally satisfied.

Voluntary Composition.

If debtor is enterpreneur he may propose plan of reorganization. This proposal can be also made by creditor. In case of reorganization, claims are subsequently satisfied without interruption of operation of enterprise. Reorganization is not admissible if debtor is legal person in liquidation or broker on stock or commodity exchange. Reorganization must be approved by assembly of creditors.

Debtor who is not enterpreneur may propose resolution of bankruptcy by discharge (along with proposal for declaration of bankruptcy). Discharge can be performed by liquidation of bankrupt's estate or by payments. Manner of discharge must be approved by assembly of creditors.

7.05 EXECUTIONS:

General Courts are competent for ordering and realisation of execution through methods specified in OSR or via use of private court executor. (Act no. 120/2001 Sb., am'd by Act no. 6/2002 Sb., 279/2003 Sb., 360/2003 Sb., 53/2004 Sb., 257/2004 Sb., 284/2004 Sb., 499/2004 Sb., 501/2004 Sb., 377/2005 Sb., 57/2006 Sb., 70/2006 Sb., 79/2006 Sb., 133/2006 Sb., 253/2006 Sb., 296/2007 Sb., 347/2007 Sb., 259/2008 Sb., 274/2008 Sb., 7/2009 Sb., 41/2009 Sb., and 183/2009 Sb.). Executions can be ordered upon judgment, court settlements, certain enforceable documents set up before Public Notary, decisions of administrative authorities and arbitral awards.

Execution of decision imposing payment of pecuniary amount can be realised by wage deductions, assignment of claim (príkazem k výplate z úctu u penezního ústavu), sale of movable assets, sale of real estate, sale of enterprise or establishment of lien on real estate.

Execution of decision imposing obligation other than payment of pecuniary amount conforms to nature of obligation imposed and can be realised by evacuation, removal of thing, division of joint thing and execution of work and operations.

Executions can only be ordered upon motion of entitled person. It is necessary to annex copy of decision marked with writ of execution to motion. Writ of execution is indicated on decision by first instance court.

With respect to execution of decision concerning support of minors, president of tribunal makes written request to debtor to comply with decision or court settlement. If this is unsuccessful, president of tribunal gradually imposes fines on obliged person; individual fines must not exceed 100,000 Kc. Fines do not affect right to claim damages.

Exceptions.

Executions cannot be enforced upon movable assets and real estate whose sale is prohibited by special prescription or which are not subject to execution in conformity with special prescriptions. Executions cannot be enforced upon items which are in propriety of debtor, if debtor needs these items for satisfaction of his personal material needs, needs of his family, for fulfillment of his labour or enterprise tasks, as well as items whose sale would be in contradiction with morality.

Execution of Foreign Judgments.

Foreign judgment has effect in CR if it is final and has been recognised by Czech courts. (Act no. 97/1963 Sb., on Private International Law and Law of International Procedure, in wording of Act nos. 158/1969 Sb., 234/1992 Sb., 264/1992 Sb., 125/2002 Sb., 37/2004 Sb., 257/2004 Sb., 361/2004 Sb., 377/2005 Sb., 57/2006 Sb., 70/2006 Sb., 233/2006 Sb., 296/2007 Sb., 123/2008 Sb., and 7/2009 Sb. [§§63-68]). Foreign judgment can be neither recognised nor enforced if: (1)

Matter lies within exclusive jurisdiction of Czech courts, or if Czech legal provisions on competence of Czech courts applied to foreign country would not admit case to be heard by courts or authorities of given foreign state; (2) Czech authority has already issued final decision on same matter or foreign decision from third country has been already recognised in CR; (3) participant of proceedings against whom foreign judgment is to be recognised, was denied possibility of defending his rights and to take part in proceedings, especially if respective order to appear before court or motion to open proceedings was not served properly; (4) foreign judgment is contrary to public order; (5) reciprocity is not granted (reciprocity is not required if foreign decision is not directed against Czech citizen or Czech legal person). Execution of foreign judgment must be ordered by decision of Czech court. Examination of foreign judgment as to substance in merits of matter is not admitted.

See category 5 Civil Actions and Procedure, topic 5.03 Judgments.

7.06 FRAUDULENT SALES AND CONVEYANCES:

Acts performed by debtor, which defraud creditor's valid claims are voidable in relation to creditor if debtor has undertaken such acts in previous three years with intention to defraud creditor (animus fraudandi), provided intent was known to other party (creditor has burden of proof); as well as acts in previous three years, which defraud creditor, between debtor and person close to debtor (generally defined as family member, see OZ, §116) or performed by debtor for benefit of same persons; in this case creditor's intent and knowledge of close persons are assumed, with exception of case that other party, despite exercising all due care, could not have recognised debtor's intention to defraud creditor (OZ, §42a).

Action for avoiding fraudulent act is to be brought against person who benefited from debtor's act. Effect of successful action is that defrauding act is ineffective against creditor, i.e., creditor may seek satisfaction of his claim from what was removed from debtor's assets by debtor's act. If this is not possible, creditor is entitled to compensation from person who benefited from defrauding act.

In case of bankruptcy, right to bring action belongs to creditors and administrator. (Act no. 182/2006 Sb., am'd by Act nos. 312/2006 Sb., 108/2007 Sb., 296/2007 Sb., 362/2007 Sb., 458/2008 Sb., 7/2009 Sb., and 163/2009 Sb.).

See also topic 7.04 Bankruptcy.

7.07 GARNISHMENT:

Used in two methods of execution: Deduction of wages and assignment of claim, i.e., in procedure of execution of enforceable decision of court and as interlocutory injunction. Regarding deduction of wages, it is not possible to garnish so called “basic amount” as defined by Regulation no. 595/2006 Sb. Pursuant to this regulation, sum of 62% of minimum subsistence amount plus “normative housing expenses” per month must remain for debtor, with additional exemption of 25% of minimum subsistence amount for each person whom debtor supports. For husband/wife of debtor, sum of 25% of minimum subsistence amount is exempted, even if he/she has independent income. In case deduction of wage is executed against both husband and wife, exempted sum of 25% of minimum subsistence amount is applied jointly for their dependants. Above amount of minimum subsistence amount plus amount of “normative housing expenses”, deduction of wage may be made without limitation.

See topic 7.05 Executions.

7.08 HOMESTEADS:

Czech legal system does not recognise homestead.

7.09 INSOLVENCY:

See topic 7.04 Bankruptcy.

7.10 LIENS:

OZ, §§551-558, provides that parties may agree to secure claim by written agreement for deduction of wages or income, contract creating lien, assignment of debt or transfer of right.

Contractual Penalty Under OZ.

If parties agree on contractual penalty, party who breaches obligation is bound to pay penalty, even if entitled party has not sustained any damage due to breach. Contractual penalty must be concluded in writing with specification of amount of penalty or manner of determination. Debtor is obligated to fulfill secured obligation after paying penalty, unless agreement holds otherwise. Debtor is not obliged to pay contractual penalty if he did not cause breach of obligation, unless agreement determines otherwise. (OZ, §§544, 545).

Guarantee Under OZ.

Established on basis of written declaration. Creditor is obliged to inform guarantor of amount of claim. Guarantor may refuse to render performance if debtor was not able to satisfy obligation due to creditor's fault. In case guarantor satisfies claim, he may raise against creditor all defences which debtor would have against creditor. Acknowledgment of obligation by debtor is effective against guarantor only if he consented in acknowledgment. Guarantor has right of indemnification from debtor after satisfying obligation. (OZ, §§546-550).

Other liens under OZ are acknowledgments, garnishment, pledges and mortgages, all of which are addressed in individual topics of this digest.

ObchZ presents special provisions on liens applicable to contractual relations arising from commercial matters. (ObchZ, §§303-322).

Contractual Penalty Under ObchZ.

Court is authorized to reduce disproportionately high penalty to amount of actual damage, taking account of value and matter of secured claim. Withdrawal from or repudiation of contract has no effect on claim of payment penalty. (ObchZ, §§300-302).

Guarantee Under ObchZ.

May be applicable to future or conditional obligation. Creditor is entitled to seek satisfaction from guarantor only if debtor has not fulfilled due obligation after creditor made written request to debtor to do so, unless request is impossible or futile. If several guarantors exist, each is liable for entire debt. Guarantor has position of co-debtor in relation to his co-guarantors. Guarantor, who has performed his obligation assumes rights of creditor against debtor. Guarantee terminates with extinguishment of secured obligation, but not if due to debtor's incapacity to perform obligation for reason of dissolution of legal person being debtor. (ObchZ, §§303-312).

Bank Guarantee Under ObchZ.

Established by written undertaking of bank in letter of guarantee, stating that bank will pay creditor if third party fails to fulfill obligation and if other conditions stipulated in letter are met. If bank guarantee is confirmed by another bank, creditor may seek satisfaction from any of banks. Bank which confirmed and fulfilled obligation has right to claim performance from bank which requested confirmation. In contrast to ordinary guarantee, creditor is not obliged to ask debtor to fulfill obligation first, bank may be requested in writing directly, unless letter of guarantee stipulates otherwise. Bank may seek satisfaction from debtor. Legal relationship between bank and debtor is regulated according to mandate contract. (ObchZ, §§313-322).

Financial Collateral Agreements.

Detailed provisions on financial collateral agreements in sense of EC Directive 2002/47/EC have been inserted into ObchZ. (§323a-323i).

See also topic 7.11 Pledges; category 19 Mortgages, topic 19.02 Mortgages.

7.11 PLEDGES:

Under provisions of OZ, pledge is security claim on real estate, moveables, enterprise or another collective thing, set of things, claim or other property right, flat or nonresidential premises, business share, securities or specific industrial property right created on basis of written contract, decision of court or administrative body, approved testament or by law. In case of nonperformance of secured claim, creditor is entitled to seek satisfaction of claim from pledge. (OZ, §§152, 153 and 156).

In case of moveables, contract comes into effect by delivery of thing to creditor or to custody of third party or upon registration of pledge in Registry of Moveables maintained by Chamber of Notaries. Contract must also specify object which is encumbered and that debt is secured. Pledge may be established for purpose of securing obligation to arise in future. (OZ, §155). Time of establishment is decisive for determining priority of satisfaction. (OZ, §165).

Creditor must take due care of encumbered property and protect it from damage, loss or destruction. Use is possible only with consent of debtor. Debtor is obliged not to do anything which impairs value of property. If value of encumbered property is depreciated to extent that security for debt becomes insufficient, creditor has right to ask debtor to supplement security. In case debtor does not do so, portion of debt not secured immediately matures. (OZ, §163).

Creditor is authorized to seek satisfaction from encumbered property if secured claim is not satisfied duly and in time, even if secured claim has become statute-barred. (OZ, §170).

Pledge of Claim.

Existence of pledge of claim is established by written contract unless it is agreed otherwise in contract. Pledge of claim is effective against sub-debtor only if debtor notifies in writing or if establishment of pledge is proven to him by creditor. (OZ, §159).

Sub-lien.

Established if claim secured by lien is encumbered by pledge. Consent of owner of property is not required, but sub-pledge may be asserted against owner only if he has been notified of its establishment. If pledged claim is not satisfied to holder of sub-pledge on maturity, he may seek satisfaction from property secured by sub-lien, having same status and rights as creditor. (OZ, §§173-174).

For pledges and mortgages in relation to commercial parties regulated by ObchZ, see category 19 Mortgages, topic 19.02 Mortgages.

8 DISPUTE RESOLUTION

8.01 ALTERNATIVE DISPUTE RESOLUTION:

See topic 8.02 Arbitration and Award.

8.02 ARBITRATION AND AWARD:

Commercial disputes arising out of foreign and domestic trade relations may be referred by parties to arbitration on territory of CR as well as outside CR. (Act no. 216/1994 Sb. as am'd by Act nos. 245/2006 Sb., 296/2007 Sb., and 7/2009 Sb.).

Arbitration court established in 1949 by Czechoslovak Chamber of Commerce and Industry continues to operate in CR, rules for which were issued by former Federal Ministry of Foreign Trade. (Regulation no. 14/1988 Sb., novelised by Reg. no. 136/1990 Sb. and Reg. no. 391/1992 Sb.).

Every arbitration agreement must be in writing or by mutual exchange of letters, telexes, telegrams or other writings. Procedure, including selection and involving of arbitrators or arbitration court, as well as other aspects connected with awards is described in Act on Arbitration. (Act no. 216/1994 Sb.).

Foreigner may be appointed as arbitrator if having full legal capacity.

Parties, experts and witnesses can be heard only if they appear of their own free will. Only individuals presented by one of parties are considered as evidentiary. Arbitrators cannot render preliminary measures, but parties may apply for such measures before appropriate State court. If arbitrators apply, court can take emergency compulsory measures which arbitrators are not allowed to take.

Entering arbitration action has same legal consequence as bringing action before normal court. Arbitral awards are final and enforceable. Action for annulment of award can be brought at competent court in specific cases itemised in law. Execution is made by court in accordance with stipulations of OSR.

Foreign Arbitral Awards.

CR is party to following international arbitration conventions: New York Convention on Recognition and Enforcement of Foreign Arbitral Awards, dated June 10, 1958 (see Part V of this volume); Geneva Convention on Enforcement of Foreign Arbitral Awards, dated Sept. 26, 1927; Geneva European Convention on International Commercial Arbitration, dated Apr. 21, 1961; Convention on the Settlement of Investment Disputes between States and Nationals of other States, Mar. 18, 1965. CR is also bound by provisions of Geneva Protocol on Arbitration Clauses dated Sept. 24, 1923 and by number of bilateral treaties.

See category 2 Business Organizations, topic 2.04 Exchanges.

9 DOCUMENTS AND RECORDS

9.01 ACKNOWLEDGMENTS:

Document Prepared Abroad.

Public documents issued by courts or authorities abroad must be acknowledged (legalized) by Czech consular officer, which may legalise document only in case document certified by Ministry of Foreign Affairs of respective country. CR is party to Hague Convention of Oct. 5, 1961 on abolishing requirement of legalization for foreign public documents (Act no. 45/1999 Sb.) and “apostille” made pursuant to this convention is sufficient for purposes of Czech law. CR has concluded bilateral agreements on regarding legal services, including recognition of acknowledgments, with Bulgaria, Hungary, Poland, Romania, Belgium, France, Cyprus, Greece, Spain, Switzerland, Italy, Austria, Tunisia, Finland, Slovakia, Yemen, Peoples Republic of Korea, Syria, Vietnam, Algeria, Afghanistan, Cuba, Mongolia, Yugoslavia, Albania, Portugal and Ukraine.

Document Prepared in CR for Use Abroad.

Acknowledgment of document copies and signatures may be done by municipal authorities, district authorities, post offices and Czech Chamber of Commerce. (Act no. 21/2006 Sb., am'd by Acts no. 165/2006 Sb., 189/2008 Sb., and 301/2008 Sb.). Public notaries perform verification and acknowledgment of original documents. (Act no. 358/1992 Sb., am'd by Act nos. 82/1998 Sb., 30/2000 Sb., 370/2000 Sb., 120/2001 Sb., 317/2001 Sb., 352/2001 Sb., 501/2001 Sb., 6/2002 Sb., 349/2002 Sb., 476/2002 Sb., 88/2003 Sb., 18/2004 Sb., 237/2004 Sb., 284/2004 Sb., 554/2004 Sb., 628/2004 Sb., 216/2005 Sb., 344/2005 Sb., 377/2005 Sb., 70/2006 Sb., 81/2006 Sb., 308/2006 Sb., 296/2007 Sb., 126/2008 Sb., 254/2008 Sb., and 7/2009 Sb.). In event notary or authorized person does not understand language in which document is written, it must be first translated and verified by translator. Ministry of Justice is designated for providing apostille for documents issued by judicial authorities, including notary. Ministry of Foreign Affairs is designated for providing apostille in other cases.

See topic 9.03 Notaries Public.

9.02 AFFIDAVITS:

Affidavits are not permitted as substitute evidence in court proceedings. Exception to general rule involves administrative proceedings according to Administrative Proceedings Act (Act no. 500/2004 Sb., am'd by Act no. 413/2005 Sb.) which provides for use of “Declaration of Honour” instead of documentary evidence if allowed by special law.

Exception in court proceedings involves affidavits by request of foreign court or administrative office. (§57, Act no. 97/1963 Sb., am'd by Act nos. 158/1969 Sb., 234/1992 Sb., 264/1992 Sb., 125/2002 Sb., 37/2004 Sb., 257/2004 Sb., 361/2004 Sb., 377/2005 Sb., 57/2006 Sb., 70/2006 Sb., 233/2006 Sb., 296/2007 Sb., 123/2008 Sb., and 7/2009 Sb.).

See topic 9.01 Acknowledgments; category 5 Civil Actions and Procedure, topic 5.02 Depositions and Discovery.

9.03 NOTARIES PUBLIC:

Regulated by Act no. 358/1992 Sb., am'd by Act nos. 82/1998 Sb., 30/2000 Sb., 370/2000 Sb., 120/2001 Sb., 317/2001 Sb., 352/2001 Sb., 501/2001 Sb., 6/2002 Sb., 349/2002 Sb., 476/2002 Sb., 88/2003 Sb., 18/2004 Sb., 237/2004 Sb., 284/2004 Sb., 554/2004 Sb., 628/2004 Sb., 216/2005 Sb., 344/2005 Sb., 377/2005 Sb., 70/2006 Sb., 81/2006 Sb., 308/2006 Sb., 296/2007 Sb., 126/2008 Sb., 254/2008 Sb., and 7/2009 Sb. Notaries are appointed by Minister of Justice pursuant to recommendation of Chamber of Notaries. Notaries must be citizens of CR, have university degree in law, complete apprentice period and notarial examination. Notary is appointed for one of district courts, but is entitled to execute activity anywhere in territory of CR.

Activity of notaries is governed by Chamber of Notaries under supervision of Ministry of Justice.

Notaries are entitled to offer following legal assistance: (1) Provide legal advice; (2) represent physical or legal person in proceedings with state or other authorities, except for adoptions and marriage; (3) issue documents; (4) perform property administration; (5) perform function of administrator in bankruptcy and settlement proceedings.

Notaries perform following functions in capacity of judicial commissioner: (1) Settlement of inheritance; (2) deposit of testaments, securities and other documents; (3) verification of authenticity of signatures and authenticity between copy and original of document; (4) certification of minutes of meetings; (5) certification of declarations of persons made in his presence; (6) issuance of bill protests and other documents.

On basis of notarial authorisation, some activities may be executed by notarial candidate or other notarial employee.

Notarial records and documents on certification are public documents.

See also category 12 Estates and Trusts, topic 12.02 Descent and Distribution.

9.04 RECORDS:

See category 6 Courts and Legislature, topic 6.02 Law Reports, Codes.

10 EMPLOYMENT

10.01 LABOUR RELATIONS:

Labour relations are ruled generally by Labour Code (Zakonik prace [ZP], new Labor Code no. 262/2006 Coll. effective from Jan. 1, 2007), am'd by Act nos. 585/2006 Sb., 181/2007 Sb., 261/2007 Sb., 296/2007 Sb., 362/2007 Sb., 357/2007 Sb., 116/2008 Sb., 121/2008 Sb., 126/2008 Sb., 294/2008 Sb., 305/2008 Sb., and 306/2008 Sb., but also by other acts and collective labour agreements. Social security and trade union activities, both regulated by law, constitute important part of labour relations.

Discharge.

Written notice delivered to other party required to terminate employment. Organisation can only give notice to employee for reasons expressly indicated in ZP, §52. General notice period of at least two months is same for organisation and employee.

Organisation must not give notice to employee during so called “protection period” (ZP, §53), i.e.: When employee is recognised to be temporarily disabled; in time of service in military forces; when worker is on long-term leave of absence for execution of public service; when employee is pregnant or when female employee or single parent is permanently taking care of at least one child under three years of age; when employee working at night is recognized on basis of medical report as being temporarily disabled for night work.

Immediate termination is only possible exceptionally and in case: Employee has been finally sentenced for intentional criminal offence with imprisonment for over one year, or for at least six months, if intentional criminal offence was committed during fulfilment of labour obligations; or if employee is guilty of gross breach of obligations arising from legal regulation pertaining work performed.

Hours of Work.

Fixed at maximum 40 hours per week. Shifts for workers younger than 18 years can not be longer than eight hours. Overtime work may be ordered by employer only under specific circumstances in amount of eight hours per week and 150 per calendar year. (ZP, §93). Scheduling of working hours are responsibility of management within guidelines of ZP, §§81-99.

Wages.

Minimum wage for one hour worked by employee is 48.10 Kc or 8000 Kc per month. (Decree no. 567/2006 am'd by Decree No. 249/2007). In case of employee with partial disability pension 50% of above amounts or in case of worker aged between 15-18 years, 80% of above amounts. Wage compensation is paid after monthly period worked unless labour contract or collective agreement stipulates otherwise.

Child Labour.

Labour competency starts when citizen reaches 15 years of age. However, organisation may not negotiate labour contract in which day of starting work would be prior to finishing of obligatory school attendance by citizen.

Female Workers.

(ZP, §§238-242). Women must not be employed in underground extraction of minerals or in excavations of tunnels, with exception of managing functions or nonmanual work, health care and social services, practice during studies and nonmanual work connected with supervisory, control or study activities. Ministry of Health determines workplaces in which women or pregnant women are prohibited from working. Pregnant or nursing female employee or female employee within nine months after childbirth is not allowed to perform work she is not capable of performing according to medical opinion. Pregnant women doing prohibited work or work which endangers pregnancy must be temporarily transferred by organisation to more suitable work without loss of earnings. Pregnant women and employee taking care of children under eight years of age may be sent to work outside municipality of their work place or domicile only with their consent. Organisations are required to consider needs of women caring for children when allocation workers for shifts. Maternity leave of between 28 weeks to three years is allowed.

Annual Leave.

(ZP, §§221-223). Employees who have worked for at least 60 days during calendar year for same employer are entitled to annual leave or proportionate part if duration of employment has been less than one calendar year. Generally leave will be four weeks. Higher amounts of leave may be agreed upon in collective agreements.

Discrimination.

ZP stipulates that employers are obligated to ensure equal treatment of employees as regards work conditions, remuneration and providing of other financial benefits or benefits of financial value, education and opportunities for career advancement. Any kind of discrimination is prohibited. Different approach based on grounds resulting from nature of work is not to be considered discriminatory if these grounds represent substantial and decisive requirement for performing work.

Harassment and Sexual Harassment.

ZP stipulates that harassment on basis of sex, sexual orientation, race or ethnic origin, handicap, age or religion is prohibited.

Labour Unions.

In case legal prescriptions in existence prior to 1990 gave rise to authorisation for trade union movements, such authorisations now relate to trade union organisations created on basis of free trade union association. (Act no. 120/1990 Sb., am'd by Act nos. 3/1991 Sb., 309/2002 Sb., and 264/2006 Sb.). If in employer's organisation multiple trade union organisations exist, employer must, in cases involving all employees, and when generally binding acts require negotiations with or consent of trade unions, fulfill these obligations with respect to all trade unions involved, if not mutually agreed otherwise.

Labour Disputes.

In conformity with Act no. 2/1991 Sb., amended by Act nos. 519/1991 Sb., 118/1995 Sb., 155/1995 Sb., 220/2000 Sb., 151/2002 Sb., 199/2003 Sb., 255/2005 Sb., 112/2006 Sb., 264/2006

Sb., and 189/2006 Sb., labour disputes are disputes concerning conclusion of collective agreements and disputes concerning respect of obligations set forth by collective agreements, which do not give rise to rights of individual employees. In case of dispute, parties may agree on selection of mediator. In absence of agreement, Ministry of Labour designates mediator on motion by either contracting party. In case of dispute concerning conclusion of collective agreement, such motion can be submitted only after lapse of 60 days from presentation of written proposal for conclusion of such agreement. Proceedings before mediator are considered unsuccessful if dispute is not resolved within 20 days from day mediator has been informed of substance of dispute. If proceedings before mediator are unsuccessful, contracting parties may demand arbitrator to decide dispute. In case collective agreement is not concluded after proceedings before mediator and contracting parties do not request arbitrator, strike may be declared as last resort in dispute concerning conclusion of collective agreement.

Workers Compensation.

If worker suffers injury or dies while fulfilling labour tasks or in direct connection therewith, organisation with whom worker had labour relation at time of accident is held responsible for damages so caused. Organisation is obliged, within extent to which it is responsible for loss, to provide compensation for wage loss (average wage prior to accident), pain, diminished social usefulness, reasonable expenditures connected with medical treatment and material damage. If worker died as consequence of accident at work or occupational disease, organisation is obliged to provide, within extent of its responsibility, compensation of reasonable expenditures connected with treatment, appropriate expenditures connected with funeral, expenditures connected with support of survivors, lump-sum compensation of survivors: 240,000 Kc to child and spouse; 240,000 Kc to parents if they lived with employee in common household and material damage.

Unemployment Compensation.

In conformity with Employment Act no. 435/2004 Sb., amended by Act nos. 168/2005 Sb., 202/2005 Sb., 253/2005 Sb., 350/2005 Sb., 382/2005 Sb., 413/2005 Sb., 428/2005 Sb., 444/2005 Sb., 495/2005 Sb., 109/2006 Sb., 112/2006 Sb., 115/2006 Sb., 161/2006 Sb., 165/2006 Sb., 264/2006 Sb., 159/2007 Sb., 181/2007 Sb., 213/2007 Sb., 379/2007 Sb., 261/2007 Sb., 362/2007 Sb., 57/2008 Sb., 124/2008 Sb., 129/2008 Sb., 382/2008 Sb., 479/2008 Sb., 158/2009 Sb., and 306/2008 Sb., individuals have right to employment, which is defined as right of person who wants and is able to work to be employed, to seek employment and to be provided with other services as stipulated by Employment Act. From day of submission of written application, applicant is entitled to be provided with material assistance in case he/she fulfilled all conditions stipulated by Employment Act. Material assistance is provided to applicant who worked at least 12 months in last three years before submitting application, if regulation does not determine shorter period. Material assistance is provided to applicant of age up to 50 years for five months, to applicant of age 50-55 years for eight months and to applicant of age above 55 for 11 months. Level of material assistance is 65% of average net wage earned by applicant in his last employment, paid for period of first two months, and at least 45% of this wage thereafter, if regulation does not fix other rate.

Foreign Workers.

Foreigners who are employed in CR are generally subject to laws of CR; they can only be employed if they hold residency permission in CR, as well as permission for employment. Other than individuals who are citizens of EU member states, permission for employment is not required for employment in following cases: (1) Individual with recognised refugee status; (2) individual was awarded permission for permanent residence in territory of CR; (3) individual is family member of member of diplomatic corps, consular office or family member of employee of international governmental organisation with headquarters in territory of CR, if mutuality is guaranteed by international treaty; (4) who will work in territory of Czech Republic for no longer than seven consecutive calendar days or total of 30 days in calendar year, provided that he/she is performing artist, teacher, academic employee of university, scientific employee participating in symposium, student up to age of 26, sportsman or individual involved in supply of goods or services in Czech Republic or who supplies such goods or carries out assembly work on basis of commercial contract, or who does servicing work within warranty period or repair work; (5) who is exempt from requirement of obtaining work permit under international agreement binding on Czech Republic; (6) who is member of rescue team and provides assistance on basis of intergovernmental agreement on mutual assistance in natural disasters and in cases of humanitarian assistance; (7) who is employed in international mass transport; (8) who is accredited media representative; (9) who is member of armed forces or civilian services of sending country; (10) who performs work within preparation for future occupation at schools and educational institutions; (11) who has been posted to Czech Republic in terms of providing services by employer seated in another Member State of EU; (12) who was awarded permission for long-term residence for purpose of common family life with foreigner mentioned in (1) and (3); (13) who resides in CR on basis of long-term residence permission granted by another EU Member State, after passing of 12 months from grant of permission.

11 ENVIRONMENT

11.01 ENVIRONMENTAL REGULATION:

Act no. 17/1992 Sb., am'd by Act nos. 123/1998 Sb. and 100/2001 Sb. defines basic terms and principles in field of environmental protection, basic duties in regard to environmental protection, as well as basic provisions for environmental impact assessment. Principals and provisions of this act are further developed in implementing legislation, as follows:

Act No. 167/2008 Sb. on Prevention and Remedying of Environmental Damage implements Directive 2004/35/EC and incorporates ``polluter pays'' principle for environmental damage. Act stipulates responsibility for all environmental damage caused by occupational activities defined by law (particularly waste handling, activities including use of dangerous chemicals, pollution of land water and air, GMO handling) and for all instances of environmental damage caused by polluter.

Scope of regulation does not include environmental damage caused by armed conflict, natural disaster, activities securing national or international defense, and matters regulated by international treaties listed in Act.

If polluter fails to take appropriate measures preventing threatening or remedying incurred environmental damage, Czech Environmental Inspection Office may impose obligations on polluter to take preventive or remedial steps. If polluter does not timely fullfill such obligations, action will be done at cost of polluter.

Act no. 185/2001 Sb., am'd by Act nos. 477/2001 Sb., 76/2002 Sb., 275/2002 Sb., 320/2002 Sb., 356/2003 Sb., 167/2004 Sb., 188/2004 Sb., 317/2004 Sb., 7/2005 Sb., 106/2005 Sb., 444/2005 Sb., 186/2006 Sb., 222/2006 Sb., 314/2006 Sb., 34/2008 Sb., 383/2008 Sb., 9/2009 Sb., and 157/2009 Sb. defines waste, special waste, dangerous waste, producers of waste, handling waste and its neutralisation, together with stipulating rights and duties of authorized bodies of State administration and duties of producers and transports of waste. Powers and responsibilities of authorized bodies are detailed in Act no. 185/2001 Sb., as am'd.

State administration is executed by Ministry of Environment, Czech Inspection of Environment and district authorities.

Based on Act no. 185/2001 Sb., as am'd, every legal or physical entity authorized to do business in CR, which produces waste, is obliged to keep records of waste as specified in this Act. Furthermore, Act no. 185/2001 Sb., as am'd requires that producers of over 1,000 tons of waste per year or 10 tons of dangerous waste per year are required to develop programmes on waste handling.

Duties of waste producer are: (1) To make program for waste handling in accordance with Act no. 185/2001 Sb. as amended; (2) to keep different waste separately; (3) to keep dangerous waste separately; (4) to report character, quantity, as well as ways of using and neutralisation of special waste to authorized authority; (5) to use produced waste as resource, secondary raw material or energy source; (6) to assure neutralisation of waste, in case it is not possible to reuse or to transfer waste to person authorised for neutralisation of pertinent kind of waste; and (7) to keep records on kinds and quantity of produced waste, as well as ways of storing, usage or neutralisation. Penalties ranging from 10,000 to 10,000,000 Kc are levied for breaching duties.

Act no. 254/2001 Sb., am'd by Act nos. 76/2002 Sb., 320/2002 Sb., 274/2003 Sb., 20/2004 Sb., 413/2005 Sb., 444/2005 Sb., 186/2006 Sb., 222/2006 Sb., 342/2006 Sb., 25/2008 Sb., 167/2008 Sb., 181/2008 Sb., and 157/2009 Sb. stipulates basic duties in use and regulation of waters; cases when approval of relevant authorities are necessary to deal with waters; duties to protect water; and conditions on release of waters into municipal sewage. Act no. 254/2001 Sb. as amended defines responsibilities of relevant State administrative authorities as regards supply, administration, processing and usage of water.

Act no. 200/1990 Sb., am'd by Act nos. 332/1992 Sb., 344/1992 Sb., 359/1992 Sb., 62/1993 Sb., 124/1993 Sb. (in full wording), 290/1993 Sb., 134/1994 Sb., 82/1995 Sb., 237/1995 Sb., 289/1995 Sb., 112/1998 Sb., 168/1999 Sb., 360/1999 Sb., 29/2000 Sb., 121/2000 Sb., 132/2000 Sb., 258/2000 Sb., 361/2000 Sb., 370/2000 Sb., 52/2001 Sb., 164/2001 Sb., 254/2001 Sb., 265/2001 Sb., 273/2001 Sb., 274/2001 Sb., 312/2001 Sb., 6/2002 Sb., 62/2002 Sb., 78/2002 Sb., 216/2002 Sb., 259/2002 Sb., 285/2002 Sb., 311/2002 Sb., 320/2002 Sb., 218/2003 Sb., 274/2003 Sb., 362/2003 Sb., 47/2004 Sb., 436/2004 Sb., 559/2004 Sb., 586/2004 Sb., 95/2005 Sb., 379/2005 Sb., 392/2005 Sb., 411/2005 Sb., 57/2006 Sb., 76/2006 Sb., 80/2006 Sb., 115/2006 Sb., 134/2006 Sb., 181/2006 Sb., 213/2006 Sb., 216/2006 Sb., 225/2006 Sb., 226/2006 Sb., 215/2007 Sb., 376/2007 Sb., 344/2007 Sb., 129/2008 Sb., 274/2008 Sb., 309/2008 Sb., 484/2008 Sb., and 52/2009 Sb. defines and regulates offenses in area of environmental protection of forests, agricultural and water resources.

12 ESTATES AND TRUSTS

12.01 DEATH (PRESUMPTION OF AND ACTIONS FOR):

Legal capacity of physical person to have rights and duties originates with moment of birth and terminates upon death. Court declares physical person dead, in case death is not possible to show by prescribed manner and court establishes death by other manner. Court also declares death in case of missing physical person, if it is possible with regard to all circumstances to reach conclusion that person is no longer alive. (OZ, §7). Death is evidenced by death certificate or by declaration of death.

Application for declaration of death may be filed by anyone possessing legal interest in declaration of death. (OSR, §195). Declaration of death of Czech citizen can be issued only by Czech court. Declaration of death with regard to alien can be issued by Czech court with legal effects for persons with permanent residence in CR and for property situated in CR. (§43, Act no. 97/1963 Sb., on Private International Law and International Procedure, am'd by Act nos. 158/1969 Sb., 234/1992 Sb., 264/1992 Sb., 125/2002 Sb., 37/2004 Sb., 257/2004 Sb., 361/2004 Sb., 377/2005 Sb., 57/2006 Sb., 70/2006 Sb., 233/2006 Sb., 296/2007 Sb., 123/2008 Sb., and 7/2009 Sb.).

See topic 12.02 Descent and Distribution.

12.02 DESCENT AND DISTRIBUTION:

Inheritance is acquired upon death. (OZ, §460). In case of intestate death, heirs under law are entitled to inherit. Same applies if testament concerns only part of estate. (OZ, §461). Inheritance not acquired by heir devolves to state. (OZ, §462).

Intestate succession is divided into following order: First—Decedent's children and spouse or partner, each of them acquiring equal share. If any of children shall not inherit, their share is acquired by their descendants per stirpes (OZ, §473); Second—should decedent's descendants not inherit, then spouse or partner, parents of decedent and those who lived with decedent at least one year before his death in common household and, who, for that reason took care of common household or were dependent on decedent for their subsistence. Heirs of second order inherit equal shares, however spouse or partner always inherit at least one half of estate (OZ, §474); Third—should neither decedent's spouse, partner, nor his parents inherit, then siblings of decedent and those who lived with decedent at least one year before his death in common household and, who, for that reason took care of common household or were dependent on decedent for their subsistence. Should one of decedent's siblings not inherit, his/her share is acquired by his/her children per stirpes (OZ, §475); Fourth—should none of heirs of third order inherit, then grandparents of decedent inherit in equal parts. Should one of decedent's grandparents not inherit, his/her share is divided among his/her children per stirpes. (OZ, §475a).

Probate.

Some rights are not transferable to heirs, these are terminated with death, i.e., individual purely personal rights, some rights flowing from Family Code, etc. Transfer of rights and duties upon death is regulated by inheritance law. Right to property transfers from deceased to heirs at moment of death. Conditions of transfer to heir are: (1) death of physical person; (2) legal right of inheritance;(3) capacity of heir to inherit; (4) will of heir to accept inheritance.

Heir can refuse inheritance by oral declaration in court or by written declaration sent to court. Refusal can be made within one month from day when heir was informed about inheritance. (OZ, §§463-468).

Probate proceedings are commenced by court of last domicile of decedent. Court appoints notary seated in district of court to execute each act on testate proceedings. Notary prepares all documents necessary for issuance of court decision. Court confirms: (1) Inheritance by single heir; (2) that estate not acquired by heirs devolves to state; (3) approval of agreement on settlement between heirs; (4) inheritance pursuant to intestate shares, should there be no agreement among heirs. (OZ, §§481-484).

Should general interest require, court may appoint administrator for all or part of estate for duration of court proceedings.

Legitimate Shares and Disinheritance.

See topic 12.05 Wills.

Applicable Law.

Legal relations of inheritance are governed by law of state which decedent was citizen at time of death. Ability to institute and cancel testament is governed by law of state which person was citizen at time of expression of will. Testament form is governed by law of state which person was citizen at time when testament was made, but form prescribed by law of place where testament was made is sufficient. (§§17, 18, Act no. 97/1963 Sb., am'd by Act nos. 158/1969 Sb., 234/1992 Sb., 264/1992 Sb., 125/2002 Sb., 37/2004 Sb., 257/2004 Sb., 361/2004 Sb., 377/2005 Sb., 57/2006 Sb., 70/2006 Sb., 223/2006 Sb., 296/2007 Sb., 123/2008 Sb., and 7/2009 Sb.).

Jurisdiction.

In case of real estate on territory of CR left by deceased alien, court proceedings as to this real estate must be taken at competent Czech court. Regarding movable property on territory of CR left by deceased alien, court proceedings must be taken at competent Czech court if: State of alien's nationality does not reciprocate with CR in inheritance of Czech citizen in such state; if foreign state refuses to dispose of movable property of deceased or does not answer; or in cases when deceased alien had his residence in CR and heir with residence in CR applies. In other cases, Czech court takes only necessary measures to safeguard property, which will be passed to competent authority in native state of deceased. (§45, Act no. 97/1963 Sb., am'd by Act nos. 158/1969 Sb., 234/1992 Sb., 264/1992 Sb., 125/2002 Sb., 37/2004 Sb., 257/2004 Sb., 361/2004 Sb., 377/2005 Sb., 57/2006 Sb., 70/2006 Sb., 223/2006 Sb., 296/2007 Sb., 123/2008 Sb., and 7/2009 Sb.).

Dispositions of international agreements are not affected.

12.03 EXECUTORS AND ADMINISTRATORS:

Function of executor is not provided for by Czech law. Process of administering estate is done by court and notary public, with possibility of delegation of some simple tasks to court officers under supervision of court. Court may appoint administrators under special circumstances, see topic 12.02 Descent and Distribution.

12.04 TRUSTS:

Trusts within meaning of equity are not known to Czech Law.

12.05 WILLS:

Testament must be made by one testator only, indicating day, month and year and be signed by testator, otherwise it is not valid.

Testament Forms.

(1) Written and signed in own hand (OZ, §476a); (2) signed in presence of two witnesses, with express declaration in presence of two witnesses that document is last will and testament (OZ, §476b); (3) testator who cannot read or write, expresses testament in presence of three witnesses. Document is prepared and read and signed by attendant witnesses. Other specific formalities apply (OZ, §476c); (4) in form of notarial record (OZ, §476d).

Only legally competent persons may act as witnesses. Testamentary or statutory heirs or persons close to them, may not act as witnesses, writers, readers or interpreters for purpose of execution of testament. (OZ, §§476d, 476f).

Testator designates heirs in testament and may specify their shares or assets and rights which will accrue to them. Unless testament stipulates otherwise, all shares are understood to be equal. (OZ, §477). Testator may establish foundation in testament, provided testament contains founding statutes of said foundation. (OZ, §477). Conditions attached to testament shall be of no legal consequences. (OZ, §478).

Legitimate Share.

Minors are entitled to minimum share corresponding to their intestate share. Adults are entitled to minimum share representing one half of their intestate share. Should testament contradict legitimate shares, applicable provisions will be invalid. (OZ, §479). Same is not valid in case of disinheritance of said heirs.

Disinheritance.

Testator may disinherit descendant if: (1) Descendant did not provide testator with necessary aid in illness, old age and other important cases; (2) descendant does not show permanent and real concern about testator; (3) descendant has been sentenced for intentional criminal offence resulting in imprisonment for at least one year; and (4) descendant continuously leads improper life-style. (OZ, §469a).

Testator must explicitly indicate grounds for disinheritance in document on disinheritance, which must fulfil same formalities as testament and must indicate if disinheritance shall concern disinherited person's descendants. (OZ, §469a).

Cancellation and Amendment of Testament.

Later testament cancels former to extent it is inconsistent with former. Testator may revoke his testament, which revocation has to be written in same form as testament. (OZ, §480).

Applicable Law.

Ability to make and cancel testament, as well as consequences of defects in testament and its expression are governed by law of state testator was citizen of at time of manifestation of will. Same applies for identification of other kinds of dispositions done in case of death. Form of testament is governed by law of state testator was citizen of at time of making testament, however it is sufficient if testament corresponds to law of state in whose territory testament was made. Same applies for form of cancellation of testament. (§18, Act no. 97/1963 Sb., am'd by Act nos. 158/1969 Sb., 234/1992 Sb., 264/1992 Sb., 125/2002 Sb., 37/2004 Sb., 257/2004 Sb., 361/2004 Sb., 377/2005 Sb., 57/2006 Sb., 70/2006 Sb., 223/2006 Sb., 296/2007 Sb., 123/2008 Sb., and 7/2009 Sb.).

13 FAMILY

13.01 ADOPTION:

Basic provisions on adoptions are contained in Family Code. (Act no. 94/1963 Sb., in full wording Act no. 66/1983 Sb., am'd by Act nos. 234/1992 Sb., 72/1995 Sb., 91/1998 Sb., 210/1998 Sb., 360/1999 Sb., 301/2000 Sb., 109/2002 Sb., 320/2002 Sb., 321/2002 Sb., 315/2004 Sb., 383/2005 Sb., 112/2006 Sb., 115/2006 Sb., 134/2006 Sb., 227/2006 Sb., 342/2006 Sb., 259/2008 Sb., and 41/2009 Sb.). CR is member of Convention on the Rights of Children. (no. 104/1991 Sb.).

Relationship established by adoption has same legal effects as between natural parents and children. Upon adoption, rights and duties between natural parents and adoptee are terminated and adoptee receives family name of adopter along with rights and duties arising from family relations. Person may adopt minor if: (1) He has legal capacity to act; (2) he will provide way of life which guarantees benefit for adoptee and society; (3) appropriate difference of age between adopter and adoptee exists; (4) consent of husband or wife of adopter, if applicable; (5) consent of natural parents, legal representatives or court appointed guardian under certain circumstances (§§64-68); (6) consent of minor if able to comprehend consequences of adoption, unless purpose of adoption would be frustrated.

District court in district of adoptee's address is competent to hear adoption action. Adoptee has to be under care of adopter at least three months before court's decision. In addition to above mentioned requirements, court considers if state of health of adopter and adoptee is convenient for purpose of adoption.

Setting Aside Adoption.

May occur if adopter or adoptee bring court action. Important reasons are required. Legal relationship between natural parents and adoptee is reestablished. (§73).

Inviolable Adoption.

Adoption where adopter is entered in “Register of Birth” instead of true parents. Adoptee must be minor person over one year. Other conditions required. (§§74-77).

13.02 ALIMONY:

See topics 13.03 Divorce, 13.05 Infants.

13.03 DIVORCE:

Divorce is regulated by Family Code, Act no. 94/1963 Sb., as amended. Marriage is dissolved solely upon court decision. Act does not specify reasons leading to divorce, but leaves court to decide whether to grant divorce, provided relations between spouses are irretrievably broken and continuation of matrimonial coexistence cannot be expected. Court must take into consideration interests of minor children. (§24). Court considers reasons leading to breakdown of marriage, but does not include specific reasons in decision. If duration of marriage is over one year; spouses have lived separately for over six months, spouses submit agreement on division of joint property and, if appropriate, alimony; and both spouses sign divorce petition, court considers conditions for granting of divorce fulfilled.

District court seated in place of last common domicile of spouses has jurisdiction. Action for divorce includes action on rights and duties as to minor children born in marriage. As such, divorce decree includes decision on custody and support of minor children.

Divorced spouse unable to support him/herself (in judicial practice, in case of illness or in case support of minor children) is entitled to claim support. Court considers circumstances of parties and reasons causing divorce. Claim for support ceases to exist if spouse concludes new marriage, otherwise claim shall be without period of limitation.

Joint property division may be decided by court only on basis of separate proposal submitted after divorce comes into force.

Aliens.

If neither spouse is Czech citizen, jurisdiction of Czech court is applied if at least one spouse has residence in CR and decision of court would be recognised in states both spouses are citizens of, or if at least one spouse has long-term residence in CR. (§38, Act no. 97/1963 Sb., am'd by Act nos. 158/1969 Sb., 234/1992 Sb., 264/1992 Sb., 125/2002 Sb., 37/2004 Sb., 257/2004 Sb., 361/2004 Sb., 377/2005 Sb., 57/2006 Sb., 70/2006 Sb., 233/2006 Sb., 296/2007 Sb., 123/2008 Sb., and 7/2009 Sb.).

Divorce is governed by law of state spouses are citizens of at moment of filing action. Czech law applies only in cases when foreign law which normally should have applied would not allow divorce or would allow it under extremely difficult circumstances, provided at least one spouse resides in CR for extended period. (§22, Act no. 97/1963 Sb., am'd by Act nos. 158/1969 Sb., 234/1992 Sb., 264/1992 Sb., 125/2002 Sb., 37/2004 Sb., 257/2004 Sb., 361/2004 Sb., 377/2005 Sb., 57/2006 Sb., 70/2006 Sb., 233/2006 Sb., 296/2007 Sb., 123/2008 Sb., and 7/2009 Sb.).

Foreign court decision on divorce regarding Czech citizen may be recognised by Supreme Court in special procedure. If both spouses were citizens of state which decision arises from at time of court decision, or if decision of foreign court is recognised by both states spouses are citizens of, decision is recognised by CR without further procedure. (§§67-68, Act no. 97/1963 Sb.). International agreement provisions obligatory for CR are not affected.

In addition to number of bilateral international agreements (see category 23 Treaties and Conventions, topic 23.01 Treaties) Hague Convention on the Recognition of Divorces and Legal Separation of June 1, 1970 (Act no. 131/1976 Sb.) is binding for CR.

See also topic 13.04 Husband and Wife.

13.04 HUSBAND AND WIFE:

Spouses are entitled to represent each other in common matters. Act of one spouse regarding common matters binds both jointly and severally. Other matters require consent of both spouses, otherwise legal act is not valid. (OZ, §145).

Property owned by one spouse before marriage remains separate property during and after marriage. All property acquired by one spouse during marriage is jointly owned, with exception of inherited or restituted property, gifts and things for personal needs. (OZ, §143). Notarized agreement signed by both spouses may alter extent of ownership of joint property stipulated by law or may postpone commencement of joint property relationship until date of end of marriage. (OZ, §143a). Prenuptial agreements are valid if made in form of notarized agreement.

Joint property of married couple dissolves upon end of marriage or during marriage for important reasons upon decision of court. (OZ, §148).

Parties may agree upon settlement on division of joint property. Settlement proceeds on principle that shares of both spouses are equal. (OZ, §§149, 150). Needs of minor children are of primary importance. Judicial practice prefers material division of joint property, financial settlement is in case full material settlement is not possible.

Conflict of Laws.

Personal and property relations of spouses in marriage with foreigner and among foreigners are governed by law of state in which spouses are citizens. Should they be citizens of different states, above relations are governed by Czech law. Agreement on matrimonial property rights is considered pursuant to rights decisive for property relations of spouses at time agreement was effected. (§21, Act no. 97/1963 Sb., am'd by Act nos. 158/1969 Sb., 234/1992 Sb., 264/1992 Sb., 125/2002 Sb., 37/2004 Sb., 257/2004 Sb., 361/2004 Sb., 377/2005 Sb., 57/2006 Sb., 70/2006 Sb., 233/2006 Sb., 296/2007 Sb., 123/2008 Sb., and 7/2009 Sb.).

See also topic 13.03 Divorce.

13.05 INFANTS:

Age of majority is 18 years. Minors are represented by guardians, normally parents. Minor may reach majority by concluding marriage (see topic 13.06 Marriage). If both parents of infant are dead, have been deprived of parental rights or have no competence to make legal acts, court appoints curator for infant. Physical person, preferably relative of infant, or state body may be appointed curator. Curator is subordinated to court supervision. Should guardian manage property of infant, approval of court is necessary for disposal provided it does not concern common matter. In case of conflict of interest between guardian or curator on one side and infant on other side, court appoints special curator.

Persons under 15 years have no criminal liability, from 15 years through 18 years are treated preferentially under criminal law and labour laws.

Parents are obliged to support their children. Normally duty ceases to exist at end of 18 years, sooner if child is able to support him/herself, later in cases of illness or continuous education. Children who are able to support themselves are obliged to provide their parents sufficient sustenance if parents require. Law does not make distinction between children born in or out of marriage.

Concerning care of infant, competent court is district court in district in which infant is domiciled.

Conflict of Laws.

Relations between parents and children are regulated by law of state of which child is citizen. If child is living in CR, Czech law can be applied if this application is in interest of child. Maintenance claims of parents towards children are regulated by law of state of which respective parent is citizen. (§24, Act no. 97/1963 Sb., am'd by Acts no. 158/1969 Sb., no. 234/1992 Sb., 264/1992 Sb., 125/2002 Sb., 37/2004 Sb., 257/2004 Sb., 361/2004 Sb., 377/2005 Sb., 57/2006 Sb., 70/2006 Sb., 233/2006 Sb., 296/2007 Sb., 123/2008 Sb., and 7/2009 Sb.).

Provisions of international treaties binding CR are not affected.

CR is member of following international agreements concerning infants and minors: Hague Convention on the Recognition and Enforcement of Decision Relating to Maintenance Obligations in Respect of Children of Apr. 15, 1958 (no. 14/1974 Sb.) and Hague Convention on the Recognition and Enforcement of Decisions Relating to Maintenance Obligations of Oct. 2, 1973 (no. 132/1976 Sb.).

13.06 MARRIAGE:

Marriage is governed by Family Code, Act no. 94/1963 Sb., as amended. Furthermore, CR is contracting party to New York Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriage of Dec. 10, 1962.

Marriage is concluded by declaration of consent of man and woman before state authority in presence of two witnesses or by declaration of consent before dignitary of state recognised church. Should citizen of foreign state conclude marriage in CR, submission of certificate of legal capacity to conclude marriage issued by respective authority of foreign state is required. No limitation exists on conclusion of marriage between foreigner and citizen of CR. Marriage ceases to exist upon decision of divorce, on death of spouse or after certification of death of spouse.

Both spouses are obliged to satisfy needs of family pursuant to their means and abilities. Spouses decide family matters mutually, are considered equal and have same rights and duties.

Capacity to enter into marriage and conditions of validity of marriage are governed by law of state person is citizen of. Form of marriage is governed by law of place marriage was concluded. (§§19, 20, Act no. 97/1963 Sb., am'd by Act nos. 158/1969 Sb., 234/1992 Sb., 264/1992 Sb., 125/2002 Sb., 37/2004 Sb., 257/2004 Sb. and 361/2004 Sb., 377/2005 Sb., 57/2006 Sb., 70/2006 Sb., 233/2006 Sb., 296/2007 Sb., 123/2008 Sb., and 7/2009 Sb.).

Prohibited Marriages.

Prohibitions include: Marriage between married man and married woman; among relative of direct lineage; between siblings; between relatives by adoption provided adoption is still valid; marriage between minors, i. e, persons under 18 years, however court may allow marriage with minor older than 16 years for important reason.

13.07 PARTNERSHIP:

Act no. 115/2006 Sb. amended by Act nos. 261/2007 Sb., 362/2007 Sb., 239/2008 Sb., and 41/2009 Sb. on Registered Partnership allows possibility for two persons of same sex to enter into permanent union (partnership). Rights and duties of partners are specified in Act.

See also topics 13.03 Divorce, 13.04 Husband and Wife, 13.05 Infants.

14 FOREIGN TRADE AND COMMERCE

14.01 CUSTOMS:

From date of accession of Czech Republic (5/01/2004) to EU, customs regulations fall within exclusive competence of European Community.

See also European Union Law Digest.

14.02 EXCHANGE CONTROL:

See topic 14.03 Foreign Exchange;

No restrictions on repatriation of foreign funds invested locally.

14.03 FOREIGN EXCHANGE:

Foreign exchange laws in CR impose limited obligations primarily on residents. (Act no. 219/1995 Sb., am'd by Act nos. 159/2000 Sb., 362/2000 Sb., 482/2001 Sb., 126/2002 Sb., 257/2004 Sb., 354/2004 Sb., 444/2005 Sb., and 254/2008 Sb.). Foreign exchange authorities are Czech National Bank and Ministry of Finance. Breach of foreign exchange regulations can result in penalties ranging from fines to forfeiture. Major offences may also result in criminal liability.

Resident Legal Entity or Individual.

(1) Have duty to report to authorities receivables and debts towards nonresidents or residents abroad, on direct investments, bank credits, foreign securities and related payments from and to non-residents or residents abroad, financial market operations, bank account and property interests abroad, in extent set forth by Czech National Bank regulation; (2) is entitled to open foreign exchange account with approved bank and use funds freely, except for circumstances set forth by law; (3) may invest directly abroad.

Nonresident Individual or Entity.

(1) Entitled to open accounts in foreign or local currency with approved bank and have free disposal of such accounts for all transactions (except of trading foreign exchange resources); (2) is free to export or transfer abroad foreign exchange resources if not acquired in CR illegally; (3) may acquire ownership rights to real estate in CR if law does not stipulate otherwise (see category 20 Property, topic 20.05 Real Property); (4) is under no duty to offer any foreign exchange resources for exchange; and (5) have duty to report to authorities on facts mentioned in previous paragraph if information relates to business activities in Czech Republic.

14.04 FOREIGN INVESTMENT:

Basic legal regulation governing direct business activity of foreign persons in CR is contained in Commercial Code. (ObchZ, §§21-26).

Foreign persons may develop business activity in territory of CR under same conditions and to same extent as Czech persons, if law does not stipulate otherwise. “Foreign Person” means physical or legal person having domicile or seat outside territory of CR. (ObchZ, §21). Carrying on business activity in territory of CR means engagement of person in business activity, if it has enterprise or organisational unit located in territory of CR. Authorisation of foreign person to engage in business activity in territory of CR becomes effective from day of registration of this person, or its organisational unit, into commercial register, within extent of its scope of activities entered into commercial register. (ObchZ, §21). Apart from registration in commercial register, foreign person developing business activity in CR through organisational unit must also comply with conditions defined by Trade Act. (Zivnostenský zákon, Act no. 455/1991 Sb., am'd by Act nos. 231/1992 Sb., 591/1992 Sb., 273/1993 Sb., 303/1993 Sb., 38/1994 Sb., 42/1994 Sb., 136/1994 Sb., 200/1994 Sb., 235/1995 Sb., 286/1995 Sb., 94/1996 Sb., 147/1996 Sb., 19/1997 Sb., 49/1997 Sb., 61/1997 Sb., 79/1997 Sb., 15/1998 Sb., 83/1998 Sb., 157/1998 Sb., 167/1998 Sb., 159/1999 Sb., 356/1999 Sb., 358/1999 Sb., 360/1999 Sb., 363/1999 Sb., 27/2000 Sb., 29/2000 Sb., 121/2000 Sb., 122/2000 Sb., 124/2000 Sb., 149/2000 Sb., 151/2000 Sb., 158/2000 Sb., 159/2000 Sb., 247/2000 Sb., 249/2000 Sb., 258/2000 Sb., 362/2000 Sb., 409/2000 Sb., 558/2000., 61/2001 Sb., 100/2001 Sb., 120/2001 Sb., 164/2001 Sb., 256/2001 Sb., 274/2001 Sb., 477/2001 Sb., 478/2001 Sb., 501/2001 Sb., 86/2002 Sb., 119/2002 Sb., 320/2002 Sb., 476/2002 Sb., 88/2003 Sb., 130/2003 Sb., 162/2003 Sb., 224/2003 Sb., 228/2003 Sb., 274/2003 Sb., 354/2003 Sb., 438/2003 Sb., 38/2004 Sb., 119/2004 Sb., 167/2004 Sb., 257/2004 Sb., 326/2004 Sb., 499/2004 Sb., 635/2004 Sb., 695/2004 Sb., 58/2005 Sb., 95/2005 Sb., 127/2005 Sb., 215/2005 Sb., 253/2005 Sb., 358/2005 Sb., 428/2005 Sb., 444/2005 Sb., 62/2006 Sb., 76/2006 Sb., 109/2006 Sb., 115/2006 Sb., 131/2006 Sb., 161/2006 Sb., 165/2006 Sb., 179/2006 Sb., 186/2006 Sb., 191/2006 Sb., 212/2006 Sb., 214/2006 Sb., 225/2006 Sb., 310/2006 Sb., 315/2006 Sb., 160/2007 Sb., 269/2007 Sb., 270/2007 Sb., 296/2007 Sb., 130/2008 Sb., 189/2008 Sb., 230/2008 Sb., 254/2008 Sb., and 274/2008 Sb.).

Foreign person may, for purpose of developing business activity, take part in establishment of Czech legal entity or take part in existing Czech legal entity as member or partner. Foreign person may also found Czech legal entity or become only associate of Czech legal entity, if allowed by law. (ObchZ, §24).

Property of foreign person connected with business activity in CR and property of legal entity with foreign capital participation can be expropriated or ownership rights restricted only on basis of law and in public interest, which cannot be otherwise satisfied. Appeal against such decision may be submitted to court. In taking such measures, compensation corresponding to full value of property affected must be provided without delay. Such compensation is freely transferable abroad in foreign currency. (ObchZ, §25). Provisions of international treaties are not affected.

Legal entity founded under law of foreign state for purpose of developing business activity and having its seat abroad, can relocate its seat to territory of CR, provided that this is permitted by international agreement (law of state in which such legal entity has its seat, and if legal entity has been founded under law of another state, also by this law). Such relocation becomes effective from day of registration of respective legal entity in commercial register. (ObchZ, §26).

CR is bound by Washington Convention on resolving disputes arising from investment between states and citizens of other states concluded on Mar. 18, 1965 and by Washington Convention on multilateral agency for investment guarantees concluded on Oct. 11, 1985.

See categories 2 Business Organizations, topic Corporations; Business Regulation and Commerce, topic Licenses, Business and Professional; Citizenship, topic Aliens; Taxation, topic Taxes, category 23 topic Conventions on Protection of Investment.

14.05 FOREIGN TRADE REGULATIONS:

Organisation can engage in foreign trade in conformity with scope of business activity registered in commercial register.

Czech Republic is member of European Community, therefore foreign trade regulation is subject to common commercial policy of European Community on basis of Art. 133 EC.

Export of objects of historical, artistic or cultural value requires export certificate.

Indirect regulation of foreign trade is realised by customs prescriptions, as well as by foreign exchange prescriptions.

See topic 14.03 Foreign Exchange.

15 HEALTH

15.01 ADMINISTRATION:

Highest administrative body in area of health protection is Ministry of Health (http://www.mzd.cz) and in area of food control Ministry of Agriculture (http://www.mze.cz). Further, state bodies responsible for health protection and food control are State Agricultural and Food Inspection, Central Agricultural and Testing Institute, State Healthcare Institute, State Institute on Control of Pharmaceuticals, District Sanitary Inspections, State Veterinary Inspection, and District Veterinary Inspections.

Biomedical Research:

Czech Republic is party to Council of Europe Treaty on Human Rights and Biomedicine concluded in Oviedo, 1997, which stipulates conditions of research on humans in Art. 16. Use of human tissues and blood is regulated by Act. No. 20/1966 Sb.; §26 of cited Act defines conditions for acquisition and use of blood samples, human tissues, and parts of human body. See also Topic Organ Donations.

Food And Drug Regulation And Control:

Responsibility for regulating and controlling importation, exportation, manufacture, advertisement, distribution, storage and sale of foods, drugs, medicaments and chemical substances or preparations is vested in Ministry of Health, Ministry of Agriculture, State Agricultural and Food Inspection and State Veterinary Administration. This topic is specifically regulated by: Act no. 110/1997 Sb. on Food and Tobacco Products, as amended by Act nos. 166/1999 Sb., 119/2000 Sb., 306/2000 Sb., 146/2002 Sb., 274/2003 Sb., 94/2004 Sb., 316/2004 Sb., 558/2004 Sb., 392/2005 Sb., 444/2005 Sb., 229/2006 Sb., 296/2007 Sb., and 120/2008 Sb.; by Act no.378/2007 Sb. on Medicaments as amended by Act Nos. 124/2008 Sb., 296/2008 Sb., and 141/2009 Sb.; by Act no. 167/1998 Sb. on Addictive Substances, as amended by Act nos. 354/1999 Sb., 117/2000 Sb., 132/2000 Sb., 57/2001 Sb., 185/2001 Sb., 407/2001 Sb., 320/2002 Sb., 223/2003 Sb., 362/2004 Sb., 466/2004 Sb., 228/2005 Sb. 74/2006 Sb., 124/2008 Sb., 41/2009 Sb., and 141/2009 Sb.; by Act no. 258/2000 Sb. on Protection of Public Health as amended by Act nos. 254/2001 Sb., 274/2001 Sb., 13/2002 Sb., 76/2002 Sb., 86/2002 Sb., 120/2002 Sb., 320/2002 Sb., 274/2003 Sb., 356/2003 Sb., 362/2003 Sb., 167/2004 Sb., 326/2004 Sb., 562/2004 Sb., 125/2005 Sb., 253/2005 Sb., 381/2005 Sb., 392/2005 Sb., 444/2005 Sb., 471/2005 Sb., 59/2006 Sb., 74/2006 Sb., 186/2006 Sb., 189/2006 Sb., 264/2006 Sb., 342/2006 Sb., 110/2007 Sb., 296/2007 Sb., 378/2007 Sb., 124/2008 Sb., 130/2008 Sb., 274/2008 Sb., and 41/2009 Sb.; by Act no. 40/1995 Sb. on Regulation of Advertisement, as amended by Act nos. 258/2000 Sb., 231/2001 Sb., 256/2001 Sb., 138/2002 Sb., 320/2002 Sb., 132/2003 Sb., 217/2004 Sb., 326/2004 Sb., 480/2004 Sb., 384/2005 Sb., 444/2005 Sb., 25/2006 Sb., 109/2007 Sb., 160/2007 Sb., 36/2008 Sb., and 296/2008 Sb.; by Act no. 379/2005 Sb. on Measures for Protection against Damage caused by Tobacco, Alcohol and Other Addictive Drugs as amended by Act. nos. 225/2006 Sb., and 274/2008 Sb.; by Act no. 356/2003 Sb. on Chemical Substances and Chemical Preparations, as amended by Act nos. 186/2004 Sb., 125/2005 Sb., 345/2005 Sb., 222/2006 Sb., and 371/2008 Sb.

Foods.

Commencement of manufacture of foods must be announced to competent Czech Agricultural and Food Inspection Office. (§2/par. 4 of Act no. 110/1997 Sb., as am'd). Certain foods, for example, those made from genetically modified products not containing genetically modified organisms, which fall under different legal regime, may only be sold and distributed with permission of Ministry of Health. Manufacture and importation of certain supplementary, additive and aromatic substances is subject to approval of Ministry of Health. (§3a). Labelling of any foods must indicate following information at minimum (§6): (a) Name of producer or importer; (b) name of product; (c) quantity of product; (d) date of expiry or "best before" indication in case of products other than non-durable foodstuff; (e) composition, listed according to raw materials, additives and aromatic substances; (f) manner of storage (if appropriate to product); (g) manner of use (if appropriate to product); (h) indication of intention for specific nutrition requirements (if appropriate to product); (i) batch number; (j) description of possible adverse influences on human health (if appropriate to product); (k) indication that product has been irradiated or ionised (if appropriate to product); (l) nutritive value (if appropriate to product); (m) quality class. It is prohibited to release into circulation foods that are: (a) Dangerous to human health; (b) deceitfully marked; (c) deceitfully offered for consumption; (d) with expired date of use; (e) of unknown origin; (f) exceeding maximum limit of contamination by radio-nuclides as specified by regulation. (§10).

Administrative penalties include fines up to 50 million Kc. Advertisement of alcoholic beverages is generally allowed, but must meet legal requirements. (§4 of Act no. 40/1995 Sb.). Intentional sale, production or supply of foods or products whose consumption or use for their usual purpose is dangerous to human health can result in criminal liability under §156 or 157 of TZ.

Tobacco.

Only rough or processed tobacco and substances specified by law may be used for manufacture of tobacco products. (§12 of Act no. 110/1997 Sb., as am'd). Tobacco products may not be advertised except in premises of specialized tobacco shops or other shops that are designated for sale of tobacco products, in periodicals and printed or electronic materials intended exclusively for professionals in area of trade with tobacco products, and except motorsport competition sponsorship. Use in advertisement of logo, trade name or trademark of producer of tobacco products is not considered to be tobacco advertisement if used for non-tobacco products and manner of advertisement is clearly distinguishable from manner of advertising tobacco products. (§3 of Act no. 40/1995 Sb., as am'd).

Tobacco products may not be sold to persons under age of 18. Smoking is prohibited in following places: (a) Public places, i.e. enclosed areas accessible to public, mass transport vehicles, platforms, waiting rooms with exception of separate premises reserved for smoking; (b) schools; (c) restaurants where separate area for smokers is not available; (d) at entertainment centres, e.g. cinemas, exhibition and concert halls and sport halls; in working places with exception of separate premises reserved for smoking; (e) health facilities with exception of psychiatric wards or other detoxification facilities.

Drugs.

Any disposition of addictive substances, opiates and psychotropic substances and preparations and antecedents thereof ("drugs") listed in Act no. 167/1998 Sb. such as, research, manufacture, procession, extraction, storage, use, purchase and sale, requires permission of Ministry of Health (§3), if not otherwise stipulated by law. (§§5-6). Individual export or import of drugs requires permission of Ministry of Health, if not stipulated otherwise. (§§20-21). Cultivation of cannabis containing more than 0.3% of tetrahydrocannabinol and of coca is prohibited. Extraction of opiates from poppy seed and of resins or tetrahydrocannabinol from cannabis is prohibited. Administrative penalties include fines up to 10 million Kc. Unauthorised production or possession of narcotic and psychotropic substances and poisons can result in criminal liability under §§283-286 of TZ.

Medicaments.

Act on Medicaments No. 378/2007 Sb. implements Directive 2001/83/EC. Only registered medicaments may be prescribed, distributed and used for medical and veterinary care, with exception of those named in law. (§8[3] of Act. no. 378/2007 Sb.). Advertisement of medicaments and medical devices is generally allowed, provided that it meets legal requirements. (§5 of Act no. 40/1995 Sb., as am'd).

Smoking Regulations:

See Topic Tobacco.

16 IMMIGRATION

16.01 ALIENS:

Though several definitions of “alien” exist under Czech law, usual meaning is person without CR citizenship.

In field of personal and property rights, aliens generally hold same rights as Czech citizens. (§32, Act no. 97/1963 Sb., am'd by Act nos. 158/1969 Sb., 234/1992 Sb., 264/1992 Sb., 125/2002 Sb., 37/2004 Sb., 257/2004 Sb., 361/2004 Sb., 377/2005 Sb., 57/2006 Sb., 70/2006 Sb., 233/2006 Sb., 296/2007 Sb., 123/2008 Sb., and 7/2009 Sb.). They can engage in entrepreneurial activity on same conditions and in same scope as citizens of CR, unless specifically provided otherwise by law. (ObchZ, §21).

Aliens generally do not have voting rights; they generally need residential and working permits (this does not apply to EU citizens); they may only own real estate in accordance with exchange control laws.

Individual having citizenship of two or more states, one of which is CR, is treated as Czech citizen.

See also topic 16.02 Immigration; categories 2 Business Organizations, topic Corporations; Employment, topic Labour Relations; Foreign Trade and Commerce, topic Foreign Exchange; Taxation, topic Taxes.

Corporations Controlled or Owned by Aliens.

See categories 2 Business Organizations, topic Corporations; Foreign Trade and Commerce, topic Foreign Investment.

16.02 IMMIGRATION:

Czech Republic is party to Schengen Agreement, conditions for entering Czech Republic are subject to Schengen acquis. See European Law Digest.

Aliens with exception of those from EU Member States require visa for entering CR. There are bilateral treaties excepting citizens of numerous states and U.S. from this obligation for 30 to 90 day periods.

Aliens may obtain short term residence visa valid for maximum period of 90 days. Visa for long term stay is granted for period necessary to reach applicants aim, maximum of one year; this may be renewed upon request. (Act no. 326/1999 Sb., am'd by Act nos. 140/2001 Sb., 151/2002 Sb., 217/2002 Sb., 222/2003 Sb., 436/2004 Sb., 501/2004 Sb., 539/2004 Sb., 559/2004 Sb., 428/2005 Sb., 444/2005 Sb., 112/2006 Sb., 136/2006 Sb., 161/2006 Sb., 165/2006 Sb., 230/2006 Sb., 170/2007 Sb., 379/2007 Sb., 124/2008 Sb., 129/2008 Sb., 140/2008 Sb., 274/2008

Sb., 382/2008 Sb., 41/2009 Sb., 47/2009 Sb., and 197/2009 Sb.). Permanent residence permit is granted under stipulations of Act no. 326/1999 Sb. as amended, especially because of humanitarian reasons.

Acquiring Czech citizenship is governed by Act no. 40/1993 Sb., am'd by Act nos. 272/1993 Sb., 337/1993 Sb., 140/1995 Sb., 139/1996 Sb., 194/1999 Sb., 320/2002 Sb., 357/2003 Sb. 413/2005 Sb., and 124/2008 Sb. Generally, citizenship can be acquired by birth, if one parent is Czech citizen, or if at least one parent, who is stateless person, has permanent residence in CR and child was born in territory of CR; by adoption by Czech citizen; by recognition or determination of paternity if father is Czech citizen; by discovery of child under 15 years of age in territory of CR; and by naturalisation.

Upon request alien can be awarded Czech citizenship provided that: (1) He has been granted permanent residence in CR for at least five consecutive years preceding date of application and he is present on territory of Czech Republic during most of this period of time; (2) he can prove surrender or loss of any other citizenship; (3) he was not sentenced for intentional criminal offence in past five years; (4) he proves knowledge of Czech language; and (5) he proves performance of duties arising from act regulating residence of aliens and acts governing health insurance, social security, retirement income, insurance and taxes and other fees.

Aliens classified as refugees under Act no. 325/1999 Sb., am'd by Act nos. 2/2002 Sb., 217/2002 Sb., 320/2002 Sb., 519/2002 Sb., 222/2003 Sb., 436/2004 Sb., 501/2004 Sb., 539/2004 Sb., 559/2004 Sb., 57/2005 Sb., 350/2005 Sb., 444/2005 Sb., 112/2006 Sb., 136/2006 Sb. 165/2006 Sb., 170/2007 Sb., 343/2007 Sb., 379/2007 Sb., 129/2008 Sb., 140/2008 Sb., 274/2008 Sb., 41/2009 Sb., and 197/2009 Sb. have same status as citizens with exceptions enumerated in Act. Alien, entering or staying on territory of CR illegally, may be expelled or deported. (§118 and following, Act no. 326/1999 Sb., as am'd).

For working permits see category 10 Employment, topic 10.01 Labour Relations.

See also topic 16.01 Aliens.

17 INTELLECTUAL PROPERTY

17.01 COPYRIGHT:

Copyright is regulated by Act no. 121/2000 Sb. (am'd by Act nos. 81/2005 Sb., 61/2006 Sb., 186/2006 Sb., 216/2006 Sb., 168/2008 Sb., and 41/2009 Sb.) on literary, scientific and artistic works, and by Act no. 231/2001 Sb. (am'd by Act nos. 309/2002 Sb., 274/2003 Sb., 341/2004 Sb., 501/2004 Sb., 626/2004 Sb., 82/2005 Sb., 127/2005 Sb., 348/2005 Sb., 444/2005 Sb., 57/2006 Sb., 189/2006 Sb., 264/2006 Sb., 531/2006 Sb., 160/2007 Sb., 296/2007 Sb., 304/2007 Sb., 124/2008 Sb., 384/2008 Sb., 41/2009 Sb., and 196/2009 Sb.) on radio and television broadcasting.

CR is bound by following conventions and treaties: Bern Convention on Protection of Literary and Artistic Works of Sept. 9, 1886 (amended version signed in Paris July 24, 1971); Universal Convention on Copyright of Sept. 8, 1952 signed in Geneva (amended version signed in Paris July 24, 1971); International Convention for Protection of Performers, Producers of Phonograms and Broadcasting Organisations signed in Rome Oct. 26, 1961; Convention for Protection of Producers of Phonograms against Unauthorised Duplication of their Phonograms signed in Geneva Oct. 29, 1971; Convention on International Entry of Audio-visual Works signed in Geneva Apr. 18, 1989; Convention on Establishment of World Organisation for Intellectual Property signed in Rome July 14, 1967 (amended version signed in Paris July 24, 1971); WIPO Performance and Phonograms Treaty (Dec. 20, 1996).

Literary, scientific and artistic works are protected if result of creative activity of author. Translations, treatment of works, collected and combined works as well as film works and works of co-authors are protected. Computer programs are subject to copyright.

Right to work originates at moment when such is expressed in words, in writing, by drawing, sketch or in any or perceptible form. Copyright relates both to work as whole and to its individual parts. No registration is needed.

Author is entitled: (1) To protection of authorship, in particular to inviolability of work and, if work is used by another person, to have work used in manner which does not detract from its value; (2) to dispose of work, in particular to decide on publication and to authorise use; (3) to be remunerated for use of creative work.

Right to protection of authorship is not transferable. Work may only be used with author's permission, unless authorisation is provided directly under law. Authors grant their permission to use works by contract, including contracts on lending and renting copies of original work.

Copyright is not violated by using theme to create new, original work. Author's permission is not required nor is remuneration required in limited instances given by Copyright Act, i.e., reproduction or imitation of work which has been published for personal need, if marked “copy” or “imitation”; in case of quoting excerpts from published works, if listing author and title of work; or if used by organisation in reporting timely event by photography, film, radio or television, if work performed or displayed during such event is used to justified extent.

Legitimate owner of copy of computer programs is not required to demand permission and to pay remuneration to make reproduction or adaptation for purpose of operation of computer itself, for archive purpose, for replacement of legitimately acquired copy that was lost, destroyed or otherwise impaired.

If author of work being created within scope of employment, for employer whose activities include publishing or other publication, refuses to give consent without serious reason, employer may seek court ordered consent.

Economic rights arising from copyright generally last throughout author's lifetime and 70 years after death. In case of works of co-authors and of combined works, 70 years after death of co-author who survived other. Special duration applies for following: Anonymous works and works created under pseudonym, where identity of author is unknown, 70 years after publication; film works, 70 years after death of director, script writer or composer. Economic rights arising from copyright pass to heirs. If one co-author has no heirs, share accrues to other co-authors.

Acquisition of original is not automatically connected to right to dispose of work. Author who transferred original against payment may demand reasonable settlement from any acquirer who has obtained unjustified material benefit from further transfer of ownership to work unless waived in advance.

Author whose copyright was violated may demand: (1) That violation of his right will be prohibited; (2) that consequences of violation be removed; (3) appropriate satisfaction; (4) compensation for damage. Violation of copyright is punishable under §32 of Act no. 200/1990 Sb., as am'd on Offences, and under §§270 and 271 of TZ.

17.02 INDUSTRIAL PROPERTY RIGHTS:

Industrial property covers patents on inventions and industrial designs (see topic 17.03 Patents), rights to marking (see topic 17.04 Trademarks and Trade Names), utility designs, appellations of origin, topographies of microelectronic semiconductor products, new varieties of plants and breeds of animals.

Utility Designs.

Technical solutions, which are new, beyond mere specialist's skill and which are susceptible of industrial application. (Act no. 478/1992 Sb., am'd by Act nos. 116/2000 Sb., 501/2004 Sb., and 221/2006 Sb.). Act stipulates further conditions as to what may be subject to utility design protection. First-to-file system similar to patents is used. Compulsory license may be granted by Industrial Property Office under circumstances given by law. Utility design is valid for four years beginning on day of filing prior invention/patent application regarding same subject. Duration may be extended twice, each time for three years. Special register for utility designs within Patent Office. Violation results in civil liability and criminal liability under §269 of TZ.

Topographies of Microelectronic Semiconductor Products.

Product of creative activity of author and which are unusual in semiconductor industry, are protected by Act no. 529/1991 Sb., amended by Act nos. 116/2000 Sb., 500/2004 Sb., and 221/2006 Sb. Under this Act, parts of topography, which may be used independently, as well as portrayal used for manufacturing of topographies are protected. Protection starts upon first public use of topography, provided that application for registration is filed within two years thereafter with Industrial Property Office or on day of filing with Office, if topography has not been used in public earlier. Protection expires ten years from end of calendar year when protection was established. If not filed with Office, or if not publicly used, right to protection expires 15 years after topography created. Other rules, including registration with Office and compulsory license generally correspond with provisions on patents. Violation can result in civil liability or criminal liability under §269 of TZ.

New Varieties of Plants

Governed by Act nos. 408/2000 Sb. (am'd by Act nos. 147/2002 Sb., 149/2002 Sb., 219/2003 Sb., 377/2005 Sb., 444/2005 Sb., 554/2005 Sb. and 184/2008 Sb.), which applies to economically important varieties and genera of plants. Ministry of Agriculture registers and grants cultivators' certificates, which confirm: (1) Cultivation of variety; (2) name with designation of kind/genus; (3) authorship; (4) right of owner of certificate to commercial use of variety; (5) duration of protection of rights towards variety. Authorship originates in moment of creation of variety, and cannot be transferred to another person. Name of author must be designated in application. If meeting legal conditions, Ministry of Agriculture may grant compulsory license. Certificate is valid from day of filing with Ministry and its duration is: (1) for variations of hop, wine grapes, fruit, decorative and forest woods—30 years; (2) other variations—25 years. Violation of rules set by law is regarded as offence and is, along with civil liability, punishable by fine up to 500,000 Kc.

See topics 17.03 Patents; 17.04 Trademarks and Trade Names.

17.03 PATENTS:

Patents are regulated by Act no. 527/1990 Sb., am'd by Act nos. 519/1991 Sb., 116/2000 Sb., 207/2000 Sb., 173/2002 Sb., 501/2004 Sb., 59/2005 Sb., 413/2005 Sb., 221/2006 Sb., and 378/2007 Sb. on Inventions, Industrial Designs and Rationalisation Proposals and by following conventions, to which CR is party: Paris Convention of Mar. 20, 1883 for Protection of Industrial Property; Strasbourg Agreement on Int'l Patent Classification of Mar. 24, 1971; Patent Co-operation Treaty signed in Washington, D.C. June 17, 1970; Budapest Treaty of Apr. 28, 1977 on Int'l Recognition of Deposit of Micro-organisms for Purpose of Patent Procedure; European Patent Convention (Oct. 5, 1973).

Patents are granted and other registrations are done by Industrial Property Office in accordance with Act no. 14/1993 Sb., amended by Act no. 417/2004 Sb.

Only inventions which are new, which involve inventive step and which are susceptible of industrial application are subject to protection. Following are not considered as inventions: (1) Discoveries, scientific theories and mathematical methods; (2) mere appearance of products; (3) schemes, rules and methods for performing mental acts, playing games or exercising business activity; (4) programs for computers (see topic 17.01 Copyright) and (5) mere presentations of information. Patents are not granted for: (1) Inventions contrary to public interest, particularly principles of humanity and morality; (2) methods of prevention, diagnosis and treatment of diseases of human or animal body and (3) plan or animal varieties and biological processes for production and improvement of plants and animals (with exception of industrial microorganisms serving for production and biotechnological process and products thereof, which are patentable).

Right to patent belongs to inventor or his successor in title. Inventor is person who created invention by means of his own creative work. Coinventors are entitled to patent in proportion in which they participated in creation of invention. Where inventor created invention within employment relationship, right to patent passes to employer, unless otherwise agreed in contract. Inventor is entitled to appropriate remuneration for invention.

Owner of patent has exclusive right to: (1) Use invention; (2) grant consent for use by other persons; (3) pass patent to others; (4) appropriate remuneration from any person who uses subject of patent application after it has been published, and, in case of international application, after translation into Czech language has been published.

Duration is 20 years beginning on day of application. Patent protection lapses: (1) On expiration of its term; (2) if corresponding administrative fees were not paid in time by owner of patent; (3) on relinquishment by owner, in such case patent shall terminate as from date on which office receives written declaration by owner.

Office annuls patent if it ascertains, after granting, that conditions for granting laid down by law were not met. If grounds for annulment concern only part of patent, it will be annulled in part. Annulment has retroactive effect to date of its validity. Request for annulment may be filed even after lapse of patent, if person making demand proves his legal interest.

Patent owner may offer licenses to use patent, if offer is registered with Office. In such case administrative fees payable by owner to maintain patent are reduced to one half. Compulsory license can be granted by Office where no agreement is reached in conclusion of license contract in case owner of patent does not use his patent at all, or uses it insufficiently and cannot give legitimate reasons for his failure to act or where important public interest is endangered by nonuse. Compulsory license may not be granted prior to expiration of four years as from filing date of patent application or three years as from date of grant of patent, whichever period expires last. Compulsory license is not exclusive license and it does not effect patent owner's right to compensation in respect of value of license.

Priority right begins with filing application. Priority right under international treaties must be claimed in application and further proved, otherwise will not be taken into consideration. Application is published by Office 18 months after it has been filed. Afterwards, any person may submit objections to patentability of invention. Further application for “full examination” must be filed within 36 months from filing date and may not be withdrawn. Office has to carry out full examination immediately after request has been filed. Office may also carry out full examination ex officio. Applicant is entitled to answer examiner's objections and amend patent application. Grants of patents are published in Patent Bulletin.

Industrial Design.

Appearance of product that is new and susceptible of industrial application may be registered. Law indicates in particular what is not considered as industrial design. Office will register if not contrary to public interest, particularly principles of humanity and morality. Rules applicable to industrial designs are more or less same as those that apply to patents. Validity of industrial design is five years from filing. Validity may be extended by office for period of five years repeatedly, up to maximum of 25 years from filing.

Rationalisation Proposals.

Technical improvements of manufacturing or operational nature and any solution to problem of safety, protection of health at work or protection of environment, if no patent or industrial design already exists are protected. Applicant must offer proposal to his employer if it concerns scope of employer's activities. Right to freely dispose of rationalisation proposal if employer does not conclude agreement for acceptance of offer and for corresponding remuneration within two months from receipt of offer.

In case of violation of all above rights, inventors, authors of industrial designs and rationalisation proposal creators are entitled to: (1) Prohibition of infringement; (2) removal of consequences; (3) compensation for damages and (4) appropriate satisfaction. Violation of these rights results to liability under §269 of TZ.

17.04 TRADEMARKS AND TRADE NAMES:

Trade Names.

Deemed as designation under which entrepreneur (enterprise) enters into legal relations when conducting business activities. (ObchZ, §§8-12). They must be distinguishable from other trade names. To distinguish between two similar trade names of legal entities, provision of name with different geographic location is sufficient unless these entities conduct activities in same line of business, or in such lines of business which may be confused in course of economic competition. To distinguish between two corresponding trade names of natural persons, statement in respect of different location of business activity is sufficient.

Trade name of natural person is created by his/her name and surname, and may include distinguishing addendum specifying further person of entrepreneur or his/her line of business. Trade names of legal persons include addendum specifying legal form, and are registered, along with further information on legal entity, with commercial register (see category 3 Business Regulation and Commerce, topic 3.02 Commercial Register). Where legal entity is not registered with commercial register, its trade name is name under which it was established.

Transfer of trade name without simultaneous transfer of enterprise is not allowed. Should only part of enterprise be transferred to new owner, transfer of trade name is allowed if remaining part of original enterprise conducts its business activities under another trade name, or if it is liquidated.

If right to trade name is infringed, holder is entitled to demand: (1) Prohibition of further infringement; (2) removal of consequences; (3) appropriate satisfaction; (4) compensation for damages; (5) that decision be published at cost of guilty party. Criminal liability is regulated by §268 of TZ.

Trademarks.

Trademark is sign that may consist of any sign capable of being represented graphically, particularly words, including personal names, colors, designs, letters, numerals, shape of goods or their packaging, provided that such sign is capable of distinguishing goods or services of one undertaking from those of another undertaking and which is registered in Trademark Register. (Act no. 441/2003 Sb., am'd by Act nos. 501/2004 Sb., 221/2006 Sb., and 296/2007 Sb.). Following trademarks are protected in Czech Republic: (1) Trademarks registered in Register of trademarks maintained by Czech Industrial Property Office ("national trademarks"); (2) trademarks registered with effect for Czech Republic in Register maintained by International Bureau of World Intellectual Property Organization on basis of international application within meaning of Madrid Agreement ("international trademarks"); (3) trademarks registered in Register maintained by Office for Harmonization in Internal Market on basis of Council Regulation on Community trademark ("Community trademarks"); (4) trademarks which are well known on territory of Czech Republic within meaning of Art. 6bis of Paris Convention for the Protection of Industrial Property ("well known trademarks").

Following may not be generally registered: (1) Sign which is not capable of serving as trademark; (2) sign which is devoid of any distinctive character; (3) sign which consists exclusively of signs or indications which may serve, in trade, to designate kind, quality, quantity, intended purpose, value, geographical origin or time of production of goods or of rendering of services, or other characteristics of goods or services; (4) sign which consists exclusively of signs or indications which have become customary in current language or in bona fide and established practices of trade; (5) sign which consists exclusively of shape which results from nature of product itself or which is necessary to obtain technical result or which gives substantial value to product; (6) sign which is contrary to public policy or to accepted principles of morality; (7) sign which is of such nature as to deceive public, mainly as to nature, quality or geographical origin of goods or services; (8) sign applied for wines or spirits which contains geographical indication, and such wines or spirits do not have such geographical origin; (9) sign which contains signs protected by virtue of Art. 6ter of Paris Convention without authorization of competent authorities; (10) sign which contains badges, emblems and escutcheons other than those mentioned in Art. 6ter of Paris Convention, if their use is subject of special public interest, unless competent authority has given consent; (11) sign which contains elements of high symbolic value, mainly religious symbols; (12) sign use of which is contrary to obligations of Czech Republic ensuing from international treaties and (13) if it is obvious that application for registration of trademark has not been filed in good faith.

Two types of trademarks: Individual and collective. Former serves to mark goods or services of entity/person in whose name trademark is registered; latter serves to mark goods or services of entities/persons associated in exercise of economic activity. Written agreement on filing and utilisation must be attached to application for registration of collective mark. Collective mark may only be used in conjunction with individual mark, or failing such mark, in conjunction with name of legal person or with forename and surname of natural person in such way that origin of goods or services thus marked shall be clear.

During application procedure, applicant may transfer by written application for registration for all or some of goods or services stated in application to another entity/person who fulfils conditions laid down in law. Applicant may divide application, which contains several products or services until time of entry in Register, retaining priority from original application. Trademark may be provided as security.

Rights to trademark begin on day trademark is registered with Register of Trademarks, held by Industrial Property Office (Úrad Prumyslového Vlastnictví, http://www.upv.cz in Prague.

Priority begins with filing of application. Priority based on international treaties must be claimed in application for registration and proof of right must be furnished within period of three months as from filing; failing that, Office will not take claimed priority of application into account.

Applicant has right to answer objections of Office and to amend and clarify his application. If application meets formal requirements of Act, it is announced in Bulletin of the Industrial Property Office, following which eligible parties have three month period in which to file objections to registration of announced mark.

Term of protection is ten years as from filing date of application for registration. At request of owner term may be extended for ten years periods.

Trademarks can be both transferred and licensed with effect to third persons upon registration of transfer or licence into Trademark Register.

In case of violation of rights, owner may require: (1) Prohibition of infringement of rights; (2) suppression of consequences, namely withdrawal of infringing products from market and destruction of products and instruments for their production; and (3) compensation for damages, return of unjust enrichment and satisfaction for immaterial damages in form of monetary satisfaction. Violation also results is criminal liability under §268 of TZ.

Designation of Origin of Goods.

Geographical designation of country, region or location, which is commonly known as information on where product originates, quality or distinction of which is specially given by geographical environment, including natural or human consideration. Industrial, handicraft, agricultural and natural products are regarded as eligible products. (Act no. 452/2001 Sb., am'd by Act nos. 131/2003 Sb., 501/2004 Sb., 221/2006 Sb., and 375/2007 Sb.).

Protection starts by registration with Register of Designation of Origin, held by Industrial Property Office, and is unlimited in time. Registered designation may be used by any person producing goods of respective quality or characteristics on given territory, licenses are not permitted and designation must not be used as designation of sort of goods. If meeting conditions of previously registered designation, further user may apply for registration regarding its products.

In case of violation of rights registered user may request following: (1) Prohibition of infringement; (2) suppression of consequences; (3) compensation for damage; (4) adequate satisfaction for non-monetary damage. Criminal liability by §268 of TZ.

CR is party to Paris Convention of Mar. 20, 1883 for Protection of Industrial Property; Stockholm Convention of July 14, 1967 establishing World Intellectual Property Organisation; Madrid Convention on International Registration of Trademarks, Apr. 14, 1891, Stockholm wording of July 14, 1967; and Lisbon Convention of Nov. 31, 1958 on Protection of Appellations of Origin.

18 LEGAL PROFESSION

18.01 ATTORNEYS AND COUNSELORS:

Provision of legal services and practice of advocacy is regulated by Act no. 85/1996 Sb., am'd by Act nos. 210/1999 Sb., 120/2001 Sb., 6/2002 Sb., 228/2002 Sb., 349/2002 Sb., 192/2003 Sb., 228/2003 Sb., 237/2004 Sb., 284/2004 Sb., 555/2004 Sb., 205/2005 Sb., 79/2006 Sb., 312/2006 Sb., 296/2007 Sb., 254/2008 Sb., and 314/2008 Sb. Act also establishes Czech Chamber of Advocates, which is responsible for regulation of profession. Membership in Chamber of Advocates is compulsory, except in cases of in-house lawyers.

General requirements for membership in Chamber of Advocates are graduation from Czech law school; practice at articles for at least three years; and passing of advocate exam.

Foreign lawyers are allowed to become members of Chamber of Advocates upon proving their qualification as lawyer, good standing in another jurisdiction and passing of recognition exam. Practice of foreign members of Chamber of Advocates is limited to providing legal services related to international law and jurisdictions in which they are fully qualified.

Lawyers from member countries of EC or EEA are authorized to provide legal services on territory of Czech Republic either as guest European attorney or as settled European attorney. Guest European attorney may provide legal services in Czech Republic only occasionally or temporarily and does not have to be registered with Czech Chamber of Advocates. Settled European attorney may provide legal services on territory of Czech Republic permanently and must be registered with Czech Chamber of Advocates.

Act no. 177/1996 Sb., amended by Act nos. 235/1997 Sb., 484/2000 Sb., 68/2003 Sb., 618/2004 Sb., and 276/2006 Sb. regulates fees for provision of legal services in cases where they are not contractually agreed.

See also category 9 Documents and Records, topic 9.03 Notaries Public.

Mineral, Water And Fishing Rights

Mines And Minerals:

On basis of Act No. 44/1988 Sb. on Protection and Utilisation of Mineral Resources, as amended, and Act No. 61/1988 Sb. on Mining Activities, Explosives, and State Mining Administration, economically important minerals defined by cited acts are in ownership of Czech Republic. Exploration and exploitation of minerals is possible only upon approval of District Mining Office. Appellate and Control body for District Mining Office is Czech Mining Office in Prague. Exploitation of economically important minerals defined by law is subject to payment of fee in maximum amount of 10% of market price of minerals mined. Persons allowed to conduct exploitation of minerals are obliged to deposit financial resources for restoration of mining site.

19 MORTGAGES

19.01 CHATTEL MORTGAGES:

See category 7 Debtor and Creditor, topics 7.10 Liens, 7.11 Pledges.

19.02 MORTGAGES:

General provisions on mortgages are included in OZ, §§152-174. Under these provisions, mortgage is derivative of lien used to secure debt and its accessories. In case of nonperformance, secured creditor is entitled to seek satisfaction of claim from pledged immovable. Contract under which immovable is pledged must be written and entered into real estate register in order to be effective. (Act nos. 265/1992 Sb., 344/1992 Sb., 210/1993 Sb., 89/1996 Sb., 90/1996 Sb., 27/2000 Sb., 30/2000 Sb., 103/2000 Sb., 120/2001 Sb. 59/2005 Sb., 186/2006 Sb., and 296/2007 Sb.). In case of multiple mortgages, time of creation is decisive as to priority.

Mortgage may be established on basis of debenture, issued according to special regulations, if it is noted in debenture that claims are secured by mortgage of certain real estate (mortgage bond). (OZ, §§152-174). Claims secured by mortgage bonds must be registered in real estate register. Person entitled to claim rights from registered mortgage bond has status of mortgagee.

Judicial mortgage is established by order of execution and must be registered in real estate register. (OSR, §§338a, 338b). Execution of judicial mortgages may be ordered if it is proved that immovable is owned by debtor. Claims covered by judicial mortgages are executable by sale of immovable.

See category 7 Debtor and Creditor, topic 7.10 Liens.

20 PROPERTY

20.01 ABSENTEES:

During absence abroad, person may generally delegate authority to any person, subject to provisions of law regarding power of attorney; see category 2 Business Organizations, topic 2.01 Agency.

For purposes of legal proceedings, court may appoint curator for person who is absent from his place of domicile or if place of domicile is unknown. (OSR, §29 and OZ, §29). Curator appointed in course of court proceeding represents absentee and protects his/her interests. (OSR, §29). Any documents delivered to curator are considered to be delivered to absentee. Curator may act in name of absentee only in cases concerning respective matters heard by court and may not enter into any legal transactions exceeding framework of case heard by court.

Court may appoint curator for absentee in proceedings concerning declaration of death. (OSR, §195/2).

Czech court may appoint curator for foreigner in case that service of process on his known address in foreign country was unsuccessful. (OSR, §29).

20.02 CONVEYANCES:

See topic 20.03 Deeds.

20.03 DEEDS:

Deeds, in common law form, do not exist in CR. To transfer ownership of real property, duly executed contract of sale or transfer or decision of court is recorded in real estate register.

See also categories 13 Family, topic Husband and Wife; Mortgages, topic Mortgages.

20.04 POWERS OF ATTORNEY:

See category 2 Business Organizations, topic 2.01 Agency.

20.05 REAL PROPERTY:

Within framework of laws on personal ownership of apartments (Act no. 72/1994 Sb., am'd by Act nos. 273/1994 Sb., 280/1996 Sb., 97/1999 Sb., 103/2000 Sb., 229/2001 Sb., 451/2001 Sb., 320/2002 Sb., 437/2003 Sb., 171/2005 Sb., 179/2005 Sb., and 296/2007 Sb.),apartments and non-dwelling spaces are considered to be independent real estate. Buildings are not part of land. However, trees and other plants are integral part of land, if special prescriptions do not stipulate otherwise.

Ownership and other rights concerning real estate must be registered with real estate register. (Act no. 265/1992 Sb., am'd by Act nos. 210/1993 Sb., 90/1996 Sb., 27/2000 Sb., 30/2000 Sb., 120/2001 Sb., 59/2005 Sb., 186/2006 Sb., and 296/2007 Sb.). Entry into real estate register is necessary for acquisition and transfer of rights on real estate.

In conformity with Art. 14 of Charter of Fundamental Rights and Freedoms, foreigners and foreign legal entities can acquire ownership and other property rights under conditions determined by law. State guarantees them equal protection of ownership and other property rights, in compliance with stipulations of Charter of Fundamental Rights and Freedoms.

Acquisition of domestic real estate by foreigners in CR depends on their legal position under Foreign-Exchange Act no. 219/1995 Sb., am'd by Act nos. 159/2000 Sb., 362/2000 Sb., 482/2001 Sb., 126/2002 Sb., 257/2004 Sb., 354/2004 Sb., 444/2005 Sb. and 254/2008 Sb., and Act no. 229/1991 Sb., am'd by Act nos. 42/1992 Sb., 93/1992 Sb., 39/1993 Sb., 183/1993 Sb., 131/1994 Sb., 166/1995 Sb., 29/1996 Sb., 30/1996 Sb., 139/2002 Sb., 320/2002 Sb., 253/2003 Sb., 354/2004 Sb. and 131/2006 Sb. Individuals and legal persons who are not citizens of EU Member States and residents of CR may only acquire residential land under very limited circumstances, primarily inheritance, or if special law stipulates so. Provisions of OZ set forth no stipulation which would limit rights of foreigners to inherit real estate in CR, regardless of fact whether deceased was resident or nonresident. Special laws which enable foreign-exchange nonresidents to acquire ownership of real estate are: Act no. 403/1990 Sb., am'd by Act nos. 458/1990 Sb., 528/1990 Sb., 137/1991 Sb., 264/1992 Sb., 115/1994 Sb. and 320/2002 Sb., which enables foreign-exchange nonresidents to acquire real estate by restitution, provided compensation for such real estate has not been covered by international treaties; Act no. 427/1990 Sb. on so-called small-scale privatisation, which enables, in limited cases, individuals who are Czech citizens or were Czech citizens after Feb. 25, 1948, or legal entities composed exclusively of such physical persons, to acquire certain real estate by means of auction and in case of repeated auction also foreign person; Act no. 92/1991 Sb. on so-called large-scale privatisation entitles foreign citizens and foreign legal entities to acquire ownership to privatised property under same conditions as Czech citizens and Czech legal entities.

21 TAXATION

—Scope —

All Czech tax residents, both local and foreign, are subject to these taxes. Where there is double tax treaty, tax relief may apply (see category 23 Treaties and Conventions, topic 23.01 Treaties).

21.01 ADMINISTRATION:

Income tax advances payable: quarterly if previous year's tax liability exceeds 150,000 Kc or; bi-annually if previous year's tax liability between 30,000 Kc and 150,000 Kc. Annual tax return filing deadline for companies and individuals generally Mar. 31 of following year, with three-month extension available for taxpayers using registered tax adviser, or whose accounts are subject to statutory audit. (Act no. 337/1992 Sb., am'd by Act nos. 35/1993 Sb., 157/1993 Sb., 302/1993 Sb., 315/1993 Sb., 323/1993 Sb., 85/1994 Sb., 225/1994 Sb., 59/1995 Sb., 118/1995 Sb., 323/1996 Sb., 61/1997 Sb., 242/1997 Sb., 91/1998 Sb., 168/1998 Sb., 29/2000 Sb., 159/2000 Sb., 218/2000 Sb., 227/2000 Sb., 367/2000 Sb., 492/2000 Sb., 120/2001 Sb., 271/2001 Sb., 320/2001 Sb., 226/2002 Sb., 320/2002 Sb., 322/2003 Sb., 354/2003 Sb., 438/2003 Sb., 440/2003 Sb., 479/2003 Sb., 19/2004 Sb., 237/2004 Sb., 254/2004 Sb., 436/2004 Sb., 501/2004 Sb., 554/2004 Sb., 179/2005 Sb., 215/2005 Sb., 381/2005 Sb., 413/2005 Sb., 444/2005 Sb., 56/2006 Sb., 62/2006 Sb., 70/2006 Sb., 79/2006 Sb., 115/2006 Sb., 230/2006 Sb., 267/2006 Sb., 270/2007Sb., 296/2007 Sb., 122/2008 Sb., 254/2008 Sb., 305/2008 Sb., 7/2009 Sb., 41/2009 Sb., and 158/2009 Sb.). Where applicable, tax must be withheld at source by entity or individual making certain types of payments for management fees, licensing fees, interest, leasing and dividends. Czech entities or branches of foreign entities have obligation to advise local Financial Office of contract which may result in creation of permanent establishment of foreign entity.

21.02 ALCOHOL, BEVERAGE AND TOBACCO TAXES:

Paid on production or import of tobacco products, spirits, wine, beer. (Act no. 353/2003 Sb., am'd by Act nos. 479/2003 Sb., 237/2004 Sb., 313/2004 Sb., 558/2004 Sb., 693/2004 Sb., 179/2005 Sb., 217/2005 Sb., 373/2005 Sb., 377/2005 Sb., 379/2005 Sb., 545/2005 Sb., 575/2006 Sb., 261/2007 Sb., 270/2007 Sb., 296/2007 Sb., 37/2008 Sb., 124/2008 Sb., 254/2008 Sb., 309/2008 Sb., and 87/2009 Sb.). All tobacco and spirit products sold in CR must bear tax stamps.

21.03 BUSINESS TAXES:

All legal entities, with exception of general commercial partnership, are subject to corporate income tax. (Act no. 586/1992 Sb., am'd by Act nos. 45/2006 Sb. full wording, 56/2006 Sb., 57/2006 Sb., 109/2006 Sb., 112/2006 Sb., 203/2006 Sb., 223/2006 Sb., 264/2006 Sb., 189/2006 Sb., 267/2006 Sb., 29/2007 Sb., 67/2007 Sb., 159/2007 Sb., 179/2007 Sb., 261/2007 Sb., 296/2007 Sb., 362/2007 Sb., 126/2008 Sb., 482/2008 Sb., 2/2009 Sb., and 87/2009 Sb.). Legal entities with permanent place of business in CR are taxed on both local and foreign income. Legal entities without permanent place of business in CR are taxed only on their income derived from sources in CR. Net profit is taxed at rate of 19% in 2010. Special tax rates apply for income from management fees, licensing fees, interest, leasing and dividends arising from source in CR paid to legal and natural persons without permanent seat in CR. (See category 23 Treaties and Conventions, topic 23.01 Treaties.). Tax is to be withheld at source in preceding instances.

21.04 EMPLOYMENT TAX:

Contributions to system of national health insurance and social security fund are required for all individuals employed in CR and their employers. Level of insurance premiums is 13.5% of monthly gross wages, of which 4.5% is paid by employees and 9% by employers. Contributions payable to Social Security Fund (comprising old-age/retirement fund and unemployment fund) are at rate of 26% of gross wage for employer and 8% for employee.

21.05 GASOLINE AND SPECIAL FUELS TAXES:

Paid on production or import of hydrocarbon fuels and lubricants, aviation fuels, diesel oils, light heating oils, etc. (Act no. 353/2003 Sb., am'd by Act nos. 479/2003 Sb., 237/2004 Sb., 313/2004 Sb., 558/2004 Sb., 693/2004 Sb., 179/2005 Sb., 217/2005 Sb., 373/2005 Sb., 377/2005 Sb., 379/2005 Sb., 545/2005 Sb., 575/2006 Sb., 261/2007 Sb., 270/2007 Sb., 296/2007 Sb., 37/2008 Sb., 124/2008 Sb., 245/2008 Sb., 309/2008 Sb., and 87/2009 Sb.).

21.06 GIFT TAX:

Imposed on gratuitous acquisition of property other than by death. Beneficiary liable for tax, except in case gift is donated abroad, in which case donor is liable for tax. For purpose of computation of gift tax, persons are divided in three categories according to relationship of taxpayer to donor. Rate varies from 1 to 40% depending on above-mentioned category and value of gift. (Act no. 357/1992 Sb., as am'd under Act nos. 95/1995 Sb., 232/1996 Sb. full wording, 151/1997 Sb., 203/1997 Sb., 227/1997 Sb., 169/1998 Sb., 27/2000 Sb., 103/2000 Sb., 132/2000 Sb., 340/2000 Sb., 364/2000 Sb., 117/2001 Sb., 120/2001 Sb., 148/2002 Sb., 198/2002 Sb., 320/2002 Sb., 420/2003 Sb., 669/2004 Sb., 179/2005 Sb., 342/2005 Sb., 186/2006 Sb., 230/2006 Sb., 245/2006 Sb., 261/2007 Sb., 270/2007 Sb., and 476/2008 Sb.).

21.07 INCOME TAX:

Physical person pays tax on income arising from dependant activity, entrepreneurial activity, capital property or leasing less allowable expenses and deductions. (Act no. 586/1992 Sb., am'd by Act nos. 45/2006 Sb. full wording, 56/2006 Sb., 57/2006 Sb., 109/2006 Sb., 112/2006 Sb., 179/2006 Sb., 189/2006 Sb., 203/2006 Sb., 223/2006 Sb., 245/2006 Sb., 264/2006 Sb., 267/2006 Sb., 29/2007 Sb., 67/2006 Sb., 159/2007 Sb., 261/2007 Sb., 296/2007 Sb., 362/2007 Sb., 126/2008 Sb., 482/2008 Sb., 2/2009 Sb., and 87/2009 Sb.). Insurance proceeds, credits, inheritance and prizes are not treated as income. Employee benefits such as company car used for private purposes are taxable as income. Foreign individuals present in CZ more than 183 days in calendar year are subject to tax on world-wide income. Rate is 15%.

21.08 INHERITANCE TAX:

Payable in case of acquisition of property by inheritance. For purpose of computation of inheritance tax, persons are divided in three categories according to relationship of taxpayer to descendent. Rate varies from 1 to 40% depending on above-mentioned category and value of inheritance. (Act no. 357/1992 Sb., as am'd under Act nos. 232/1996 Sb. full wording, 151/1997

Sb., 203/1997 Sb., 227/1997 Sb., 169/1998 Sb., 95/1999 Sb., 27/2000 Sb., 103/2000 Sb., 132/2000 Sb., 340/2000 Sb., 364/2000 Sb., 117/2001 Sb., 120/2001 Sb., 148/2002 Sb., 198/2002 Sb., 320/2002 Sb., 420/2003 Sb., 669/2004 Sb., 179/2005 Sb., 342/2005 Sb., 186/2006 Sb., 230/2006 Sb., 245/2006 Sb., 261/2007 Sb., 270/2007 Sb., and 476/2008 Sb.).

21.09 MOTOR VEHICLE TAXES:

Road motor vehicles, wheel-tractors and trailers and semi-trailers if having registration number plate and used for business purposes are subject to this tax. (Act no. 16/1993 Sb., am'd by Act nos. 302/1993 Sb., 243/1994 Sb., 143/1996 Sb., 239/1996 Sb., 61/1998 Sb., 190/1998 Sb., 241/2000 Sb., 303/2000 Sb., 492/2000 Sb., 493/2001 Sb., 207/2002 Sb., 102/2004 Sb., 635/2004 Sb., 545/2006 Sb., 270/2007 Sb., 296/2007 Sb., and 246/2008 Sb.). Road tax must be paid by owner of vehicle as stated in vehicle registration document. Fiscal period is calendar year. In case of vehicles, used in international transport, fiscal period is period during which vehicle was within CR territory. Tax rates are calculated according to engine cylinder capacity in case of personal vehicles and according to number of axles and weight in case of trucks.

21.10 PROPERTY TAXES:

Companies and individuals who own real property are subject to separate taxes on real property and improvements on real property. (Act no. 338/1992 Sb., am'd by Act nos. 315/1993 Sb., 242/1994 Sb., 174/1995 Sb., 248/1995 Sb., 65/2000 Sb., 492/2000 Sb., 239/2001 Sb., 483/2001 Sb., 576/2002 Sb., 237/2004 Sb., 669/2004 Sb., 179/2005 Sb., 215/2005 Sb., 217/2005 Sb., 377/2005 Sb., 441/2005 Sb., 545/2005 Sb., 112/2006 Sb., 186/2006 Sb., 261/2007 Sb., 296/2007 Sb., and 1/2009 Sb.). Basis for calculation of taxes is area of land and buildings, with rates varying depending on district in which property is located.

21.11 TAX INCENTIVES:

Corporate tax relief is offered for up to ten years in total, in five year periods for certain investments. Relief provided annually in form of targeted subsidy equal to value of reported corporate income tax liability for respective tax year. Conditions for qualification for tax incentives are: (1) investment of minimum of equivalent of ten million USD in fixed assets; (2) investment must be manufacturing sector with at least 50% of production line (in terms of costs) consisting of machinery listed under Czech-government approved list of high-tech machinery; (3) at least 60% of total investment must be for machinery; (4) investment must be made for construction of new production plant (greenfield) or for purchase or lease of existing production facilities to launch new production activity (brownfield) (Acquisitions are not eligible); (5) proposed production must meet all Czech environmental standards; and(6) amount of investment in long-term assets must reach minimum of 100,000,000 CZK, half of which has to be covered by shareholders capital of investor. Minimum investment volume may be reduced if investment located in area with above-average unemployment rate.

21.12 TREATIES AND AGREEMENTS:

See category 23 Treaties and Conventions.

21.13 VALUE ADDED TAX:

Obligation to register and to collect this tax comes into effect if individual has yearly turnover in excess of 1,000,000 Kc. (Act no. 235/2004 Sb., am'd by Act nos. 238/2004 Sb., 635/2004 Sb., 669/2004 Sb., 124/2005 Sb., 215/2005 Sb., 217/2005 Sb., 377/2005 Sb., 441/2005 Sb., 545/2005 Sb., 109/2006 Sb., 230/2006 Sb., 319/2006 Sb., 172/2007 Sb., 261/2007 Sb., 270/2007 Sb., 296/2007 Sb., 124/2008 Sb., and 126/2008 Sb.). If desired, voluntary registration is possible if this amount is not met. VAT tax rates are: basic rate 19%; reduced rate 9% on certain services or goods (e.g., most food stuff, books, medical instruments,regular mass transportation services). Basic VAT tax period is one month. If turnover achieved in previous calendar year was lower than ten million Kc, tax period is quarterly. Foreign individuals can receive refund of VAT on goods purchased in CR under certain conditions. (§84).

22 TRANSPORTATION

22.01 MOTOR VEHICLES:

License is necessary for driving of motor vehicles in CR. Condition for issuing of driving license is minimum age 18 years and passing of driving exams. License is valid for lifetime and must be produced to police on demand. Vehicles up to 12 tons weight driven on motorways must bear sticker indicating payment of user fee of between 220 CZK and 8,000 CZK depending on weight of vehicle and validity period. (Act no. 13/1997 Sb., am'd by Act nos. 281/1997 Sb., 259/1998 Sb., 146/1999 Sb., 102/2000 Sb., 132/2000 Sb., 489/2001 Sb., 256/2002 Sb., 259/2002 Sb., 320/2002 Sb., 358/2003 Sb., 186/2004 Sb., 80/2006 Sb., 186/2006 Sb., 311/2006 Sb., and 342/2006 Sb.). Vehicles over 12 tons of weight are subject to road-toll paid by means of electronic system according to emission class of vehicle and distance travelled.

Alien may drive motor vehicle in CR on basis of international driving license (valid one year from entry into CR). Drivers in CR use right hand side of road.

Motor vehicles driven in CR must be insured for liability. Act no. 168/1999 Sb., am'd by Act nos. 307/1999 Sb., 56/2001 Sb., 320/2002 Sb., 47/2004 Sb., 410/2004 Sb., 377/2005 Sb., 57/2006 Sb., 296/2007 Sb., and 137/2008 Sb. on Insurance is related to responsibility for damage of owner and driver of motor vehicle, which is in register of motor vehicles of CR or which is registered abroad, if motor vehicle comes in territory of CR and damage is caused in territory of CR.

Unless driver has international card of motor vehicle insurance, valid in territory of CR and for subject motor vehicle, duty to have Czech insurance starts from day of entry of motor vehicle in territory of CR. Insurance must be paid for whole period of residency of alien, at minimum for one month.

Motor vehicles used for entrepreneurial activity or for other activity in direct connection with enterprising are subject to road tax. (Act no. 16/1993 Sb., am'd by Act nos. 302/1993 Sb., 243/1994 Sb., 143/1996 Sb., 61/1998 Sb., 190/1998 Sb., 241/2000 Sb., 303/2000 Sb., 492/2000 Sb., 493/2001 Sb., 207/2002 Sb., 102/2004 Sb., 635/2004 Sb., 545/2005 Sb., 270/2007 Sb., 296/2007 Sb., and 246/2008 Sb.). Tax is paid on motor vehicles with Czech or foreign registration.

23 TREATIES AND CONVENTIONS

23.01 TREATIES:

On Jan. 1, 1993, Czech Republic succeeded Czech and Slovak Federative Republic in all international obligations into which latter entered. Consequently, CR is party to, inter alia, following international Conventions:

General.

International Monetary Fund and International Bank for Reconstruction and Development—IMF (Bretton Woods, July 22, 1944); Charter of the United Nations and Statutes of the International Court of Justice (June 26, 1945/Dec. 20, 1965); Constitution of the Food and Agriculture Organisation of the UN.—F.A.O. (Oct. 16, 1945); Constitution of the U.N. Educational, Scientific and Cultural Organisation—UNESCO (Nov. 16, 1945); Constitution of the World Health Organisation—WHO (July 22, 1946); Constitution of International Labor Organization included in Treaty of Versailles (June 28, 1919); General Agreement on Tariffs and Trade—GATT (Oct. 30, 1947); Articles of Agreement of the International Finance Corporation (May 25, 1955); Statutes of the International Atomic Energy Agency (Oct. 26, 1956); Articles of Agreement of the International Development Association—IDA (Jan. 26, 1960); Constitution de l'Union Postale Universelle—UPC (Oct. 9, 1874); Convention on International Civil Aviation Organisation (Dec. 7, 1944); Convention on the Establishment of the World Meteorology Organisation (Oct. 11, 1947); Convention on the Establishment of the World Tourism Organisation (Sept. 27, 1970); International Covenant on Civil and Political Rights (Dec. 16, 1966); International Covenant on Economic, Social and Cultural Rights (Dec. 16, 1966); Convention on the Law of Treaties (May 23, 1969); Convention Internationale Des Telecommunications (Nov. 12, 1965); Convention Establishing the World Intellectual Property Organisation (July 14, 1967); Convention on the International Maritime Consultation Organisation—IMCO (Mar. 6, 1948); Vienna Convention on Diplomatic Relations (Apr. 18, 1961); Convention on the establishment of International Organisation for Legal Metrology (Paris, Oct. 10, 1955); Convention on the Exchange of official publications and governmental documents between States (Dec. 3, 1958); Convention on International Exchange of Publications (Dec. 3, 1958); Agreement on the Establishment of the Organisation for Co-operation in Iron Metallurgy—INTERMETAL (Moscow, July 15, 1964); Convention on the Establishment of Council for Customs Co-operation (Brussels, Dec. 15, 1950); Convention on Privileges and Immunities of International specialised agencies (Nov. 21, 1947); Convention on Privileges and Immunities of IAEA (Vienna, July 1, 1959); Convention on Establishment of the Secretarial of the Conference on Security and Co-operation in Europe and on Privileges and Immunities of this Secretarial and further institutions of the CSCE (Paris, Dec. 11, 1990); European Agreement on Work Vehicles' Teams in International Road Transport (Geneva, July 1, 1970); Convention on Patent Co-operation (Washington, June 19, 1970); ILO Conventions Nos. 142, 77, 78, 124, 136, 159, 160, 161, 95, 148, 164, 102, Association agreement with European Union (Oct. 4, 1993); Constitution of the World Trade Organisation (WTO) (Apr. 15, 1994); Accession to Statutes of Council of Europe (June 30, 1993); Civil Law Convention on Corruption (Nov. 4, 1999); Framework Convention on Climate Change (New York, May 9, 1992); Kyoto Protocol to United Nations Framework Convention on Climate Change (Dec. 11, 1997); Europol Convention (Brussels, July 26, 1995); International Convention on the Suppression of the Financing of Terrorism (New York, Dec. 9, 1999).

Conventions on Diplomatic and Consular Relations.

Vienna Convention on Diplomatic Relations (Apr. 18, 1961); Vienna Convention on Consular Relations (Apr. 24, 1963).

Multilateral International Conventions on Legal Assistance and Enforcement of Judgments.

Hague Convention related to court Procedure in Civil Matters (July 17, 1905); Hague Convention related to Procedure in Civil Matters (Mar. 1, 1954); New York Convention on the Recovery Abroad of Maintenance (June 20, 1956); Hague Convention on the Recognition and Enforcement of Decisions Relating to Maintenance Obligations in Respect of Children (Apr. 15, 1958); Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters (Nov. 15, 1965); Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters (Mar. 18, 1970); Hague Convention on Recognition of Divorces and Legal Separations (June 1, 1970); Hague Convention on the Recognition and Enforcement of Decisions Relating to Maintenance Obligations (Oct. 2, 1973); Hague Convention on Abolishing the Requirement of Legalization for Foreign Public Documents (Oct. 10, 1961).

Conventions Unifying Choice of Law Rules.

Hague Convention on the Law Applicable to Traffic Accidents (May 4, 1971); Hague Convention concerning International Administration of the Estates of Deceased Persons (Oct. 2, 1973); Rome Convention on Law Applicable to Contractual Obligations (June 19, 1980).

Conventions Relating to Arbitration.

Geneva Protocol on Arbitral Clauses in Commercial Matters (Sept. 24, 1923); Geneva Convention on the Enforcement of Foreign Arbitral Awards (Sept. 26, 1927); New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (June 10, 1958); European Convention on International Commercial Arbitration (Geneva, Apr. 21, 1961).

Convention in Field of International Transport.

Convention on International Transport by Railway—COTIF (May 9, 1980); Convention on International Transport by Railroad of Merchandise (SMGS); Convention on International Direct Associated Transport Railroad—Water (Sofia, Dec. 14, 1959); Convention on International Transport of Persons (SMPS); Convention for Unification of Certain Rules Relating to International Carriage by Air (Warsaw, Oct. 12, 1929); Convention for Unification of Certain Rules Relating to International Carriage by Air (Sept. 9, 1955); Supplementary Convention to Warsaw Convention for Unification of Certain Rules Relating to International Transport by Air Performed by Person Other Than Contracting Carrier (Guadalajara, Sept. 18, 1961); Convention on Contract for International Carriage of Goods by Road (CMR) (Geneva, May 19, 1956); Convention on general conditions of International transportation of persons by buses (Berlin, Dec. 5, 1970); Convention on International Maritime Organisation (IMO) (Geneva, Mar. 6, 1948); European Convention on protection of animals during international transport (Dec. 13, 1968); Convention for Unification of Certain Rules for International Carriage by Air (Montreal, May 28, 1999); Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation (London, Mar. 9, 1988); International Air Services Transit Agreement (Chicago, Dec. 7, 1944).

Conventions in Field of Protection of Copyright and Industrial Rights.

Paris Convention, for the Protection of Industrial Property Rights (Mar. 20, 1983); Berne Convention for Protection of Literary and Artistic Works (Sept. 9, 1988); Rome Convention for Protection of Performers, Producers of Phonograms and Broadcasting Organizations (Oct. 26, 1961); Strasbourg Agreement on International Patent Classification (Mar. 24, 1971); Patent Co-operation Treaty signed in Washington, D.C. (June 17, 1970); Budapest Treaty on International Recognition of Deposit of Micro-organisms for Purpose of Patent Procedure (Apr. 28, 1977); European Patent Convention (Oct. 5, 1973); Trademark Law Treaty (Oct. 27, 1994); WIPO Copyright Treaty (Dec. 20, 1996); WIPO Performance and Phonograms Treaty (Dec. 20, 1996).

Conventions in Field of Penal Law.

Convention on Offences and Certain other Acts Committed on Board Aircraft (Sept. 14, 1963); European Convention on Extradition (Dec. 13, 1957); European Convention on Mutual Assistance in Criminal Matters (Apr. 20, 1959); European Convention on Transfer of Penal Proceedings (May 15, 1972); European Convention on Suppression of Terrorism (Jan. 27, 1977); European Convention on Transfer of Sentenced Persons (Mar. 21, 1983); European Convention of the Supervision of Conditionally Sentenced or Conditionally Released Offenders (Nov. 30, 1960); Criminal Law Convention on Corruption (Jan. 27, 1999).

Conventions on Protection of Investment.

Agreements on Protection of Investments have been concluded with following countries: Albania, Argentina, Australia, Austria, Belarus, Belgium, Bosnia and Herzegovina, Bulgaria, Canada, Chile, China, Croatia, Cyprus, Denmark, Egypt, El Salvador, Estonia, Ethiopia, Finland, France, Germany, Greece, Guatemala, Hungary, India, Indonesia, Ireland, Israel, Jordan, Kazakhstan, Kostarica, Kuwait, Latvia, Lebanon, Lithuania, Luxembourg, Macedonia, Malaysia, Malta, Mauritius, Moldavia, Mongolia, Monte Negro, Morocco, Netherlands, Nicaragua, North Korea, Norway, Panama, Paraguay, Peru, Philippines, Poland, Portugal, Rumania, Russian Federation, Singapore, Slovakia, Slovenia, South Africa, South Korea, Spain, Sweden, Switzerland, Syria, Tadzikistan, Thailand, Turkey, Tunisia, UAE, United Kingdom, Ukraine, Uruguay, USA, Uzbekistan, Venezuela, and Vietnam. Czech Republic is also party to Convention on the Solution of Disputes Arising from Investments between States and Citizens of Other States

(Mar. 18, 1965).

Conventions on Avoidance of Double Taxation.

Most of these treaties follow model drafted by OECD. Conventions have been concluded with following countries:

Albania, Algeria, Australia, Austria, Azerbaijan, Belarus, Belgium, Bosnia and Herzegovina, Brazil, Bulgaria, Canada, China, Croatia, Cyprus, Denmark, Egypt, Estonia, Ethiopia, Finland, France, Georgia, Hungary, India, Indonesia, Iraq, Ireland, Island, Israel, Italy, Japan, Jordan, Kazakhstan, Kuwait, Latvia, Lebanon, Lithuania, Luxembourg, Macedonia, Malaysia, Malta, Moldavia, Mongolia, Monte Negro, Morocco, Netherlands, New Zealand, Nigeria, North Korea, Norway, Philippines, Poland, Portugal, Rumania, Russian Federation, Serbia, Singapore, Slovakia, Slovenia, South Africa, Spain, Sri Lanka, Sweden, Switzerland, Tadzikistan, Thailand, Turkey, Tunisia, UAE, United Kingdom, Ukraine, USA, Uzbekistan, Venezuela, and Vietnam.

Conventions Regulating Only International Legal Assistance.

Convention on Legal Assistance in Civil Matters concluded with the United Kingdom of Great Britain and Northern Ireland of Nov. 11, 1924 with additional amendments (contracts); Agreement on Mutual Legal Assistance in Civil and Commercial Matters concluded with Swiss Confederation of Dec. 21, 1926; Agreement on Mutual Legal Assistance in Commercial Matters concluded with Portugal, of Nov. 23, 1927; Agreement on Mutual Relations in Court of Civil and Commercial Matters concluded with Turkey, of Aug. 22, 1930; Agreement on Mutual Legal Relations, Documents and Legal Information with Final Protocol concluded with Austria of Nov. 10, 1961; Contract on Legal Assistance in Civil, Family and Commercial Matters concluded with Belgium of Oct. 15, 1984.

Conventions Regulating Only Recognition and Enforcement of Judgments.

Convention on Recognition and Enforcement of Judgement concluded with Swiss Confederation of Dec. 21, 1926; Convention on Recognition and Enforcement of Judgement concluded with Portugal of Nov. 23, 1927.

Conventions Regulating International Legal Assistance Including Recognition and Enforcement of Judgments.

Convention on Legal Assistance in Civil and Commercial Matters recognition and enforcement of judgments and extradition concluded with Tunisia, of Apr. 12, 1979; Convention on Legal Assistance in Civil and Penal Matters concluded with Afghanistan of June 24, 1981; Convention on Legal Assistance in Civil and Penal Matters concluded with Cyprus, of Apr. 23, 1982; Convention on Legal Assistance in Civil and Penal Matters concluded with Greece, of Oct. 22, 1980; Convention on Legal Assistance in Civil, Family and Penal Matters concluded with Algeria, of Dec. 9, 1983; Convention on Legal Assistance, Recognition and Enforcement of Judgments in Civil Matters concluded with Spain, of May 4, 1987; Convention on Legal Assistance and Regulation of Legal Relation in Civil, Family, Labour and Penal Matters concluded with Poland, of Apr. 3, 1989; Convention on Mutual Legal Assistance in Civil, Family and Penal Matters concluded with People's Democratic Republic of Korea, of July 17, 1989; Convention on Legal Assistance and Regulation of Legal Relations in Civil, Family and Penal Matters concluded with the People's Republic of Hungary, of Mar. 28, 1989; Convention on Legal Assistance in Civil and Penal Matters concluded with People's Democratic Republic of Yemen, of Jan. 19, 1989; Convention on Legal Assistance in Civil and Penal Matters concluded with Italy, of Dec. 6, 1985; Convention on Legal Assistance, Recognition and Enforcement of JUDGMENTS in Civil, Family and Commercial Matters concluded with France, of May 10, 1984; Convention on Legal Assistance in Civil, Family and Penal Matters, concluded with Syria, of Apr. 18, 1984; Convention on Legal Assistance in Civil, Family and Penal Matters, concluded with Romania, of

Oct. 25, 1958; Convention on Legal Assistance and Legal Relations in Civil, Family and Penal Matters, concluded with the former Soviet Union, of Aug. 12, 1982; Convention on Legal Assistance and Legal Relations in Civil, Family and Penal Matters, concluded with Bulgaria, of Nov. 25, 1976; Convention on Legal Assistance in Civil, Family and Penal Matters, concluded with Yugoslavia, of Jan. 20, 1964; Convention on Legal Assistance in Civil, Family and Penal Matters, concluded with Albania, of Jan. 16, 1959; Convention on Legal Assistance in Civil Matters concluded with Romania of July 11, 1994; Convention on Legal Assistance in Civil Matters concluded with Ukraine of May 28, 2002.

Money Laundering.

Duties aimed at prevention of money laundering are set forth by Act no. 253/2008 Sb. on Certain Measures against Money Laundering and Financing of Terrorism.

Entities and persons bound by Act are: banks and other financial institutions; Czech National Bank; operators of casinos, betting shops and lotteries; persons authorized to trade in real estate; persons who buy debts and trade therein; persons who intermediate savings, credits or loans; persons who intermediate conclusion of insurance contracts; auditors, tax advisors, accountants; judicial executors; advocates and notaries, when offering safe custody of money, securities or any other assets of client or if services requested by client consist of acting on client's behalf or on client's account; persons authorized to trade in used goods, cultural items or items of cultural value or to intermediate such transactions or to accept such things to pledge; entrepreneurs other than aforementioned, if accept cash payment in amount exceeding EUR 15,000 in single transaction.

Duties of obliged persons include: (1) Identification of parties to transactions listed, (2) keeping of information, (3) reporting duties, and (4) confidentiality duty.

Criminal Law

Economic Crimes:

TZ divides economic crimes into several groups (§§233-271), including: (1) Breach of duty to state concerning business activities (unlawful business activities, breach of special regulations e.g. regulations of import, distortion of information about business activities, evading taxes, etc.); (2) breach of rules of competition (unfair competition, copyright, patent, design or trademark infringement, harm to creditor, and breach insolvency proceeding regulations); and (3) harm to consumers.

Only individual can be liable for commission of crime. Legal entity can only be subject of administrative penalty. Person acting on behalf of legal entity would be liable for committing of economic crime.

Extradition:

TR allows extradition of persons to foreign countries only under following conditions: (1) Act must be crime in both states (requesting and requested); (2) if issue between states is not regulated by treaty, requesting state has to give warranty that it will act same way in similar case; (3) act for which extradition is requested is crime according to TZ and maximum sentence of imprisonment is at least one year; (4) length of punishment or deprivation of personal liberty that should be executed for act is at least four months; (5) requesting state has to apply for extradition at Ministry of Justice (formal elements in §384, par. 2); and (6) person can be prosecuted or punished only for act for which extradited.

Extradition is impermissible mainly if: (1) Person is Czech citizen; (2) person has right of asylum; (3) act is no longer punishable or person is not liable according to Czech law; (4) act has political or military character; and (5) act can be punished by death penalty in requesting state or state is requesting extradition for execution of death penalty.

Special provisions apply for transfer of person between states of EU. (§§403-422).

Czech Republic is especially bound by European Convention on Extradition of Dec 13, 1957; with its Additional Protocols, 1975, 1978, and European Convention on Suppression of Terrorism of Jan 27, 1977.

1
DENMARK LAW DIGEST

—Scope —

Revised for 2010 edition by

Gorrissen Federspiel, Law firm of Copenhagen and Aarhus. Søren Fogh, partner.

Denmark is member of EU. See also European Union Law Digest.

Note: This revision incorporates legislation through Oct. 30, 2009.

1 INTRODUCTION

1.01 CURRENCY:

The Danish Central Bank (Danmarks Nationalbank) holds monopoly on issuing of Danish money: Danish “krone” (DKK) and “oere” (1/100 krone). Denmark elected not to join European Monetary Union on its coming into force on Jan. 1, 1999. However, Danish krone is tied very closely to EURO.

There are no currency regulations in Denmark. Strict money laundering and tax disclosure rules apply to Danish companies, Danish branches of foreign companies and Danish residents wanting to maintain cash or security deposits abroad.

1.02 GOVERNMENT AND LEGAL SYSTEM:

Denmark is constitutional Kingdom with full democracy. Kingdom consists of country of Denmark and of Greenland and Faeroe Islands, two latter parts of Kingdom having high degree of internal rule on domestic affairs. This means that, although laws of Greenland and Faeroe Islands are similar to those of Denmark, differences may exist which are not pointed out in this Digest. Danish constitution is based on Montesquieu's principle of separation of power into three parts. Under constitution in force since 1849 and latest amended in 1953, “Parliamentarism” is established by statute i.e. ministers are subject to vote of confidence by Parliament. Danish law is part of Nordic family of legal systems characteristic in not having any major codes as most other continental European legal systems but rather having some smaller codes, statutes and number of areas regulated only by case law.

Legislative power is vested in one chamber Parliament, “Folketinget”, consisting of 179 members elected by full electorate (anyone over age of 18 years) by proportional election method. Parliament meets on first Tues. in Oct. and is in session until first Tues. of Oct. following year. From beginning of June until first Tues. in Oct. members of Parliament are on holiday, but can be called in, as they are still formally in session. This always happens in Sept. when preparatory work for annual budget begins.

Executive power is vested in Queen (H.M. Queen Margrethe II) who exercises this power through ministers. Throne is inherited by oldest child of sovereign. According to Constitution, Lutheran Protestant Church is state church of which 82.5% (Jan. 1, 2009) of population is member. Discrimination on religious basis is prohibited by special legislation and by Criminal Code.

Judiciary power is vested in judges appointed by Queen for lifetime upon recommendation from Ministry of Justice which bases itself on nomination by Judge Appointment Council consisting of Supreme Court Judge, High Court Judge, City Court Judge, attorney appointed by Danish Bar Association, member nominated by County and Municipal Councils Associations and member nominated by Danish General Education Council. Mandatory retirement age of 70 years of age is in operation. Judges on their appointment become independent of administration and legislature and, as consequence, they may decide that statute passed by Parliament is in violation of Constitution.

1.03 HOLIDAYS:

Legal Holidays are Suns., New Years Day, Easter Holidays (3), Ascension Day, Prayers Day, Whitsun Monday, Christmas Day and Boxing Day. Furthermore, pursuant to Act on Retail Shopping, Act No. 606 of 24 June 2005, retail shops must be closed on Dec. 24 and on June 5 (Constitution Day). Said Act furthermore requires retail shops with turnover exceeding DKK 27.1 million including VAT to be closed from Sat. 17:00 hours to Mon. 06:00 hours. Certain exceptions exist. In practice many shops close somewhat earlier on Sats. Pursuant to Consolidated Holiday Act, No. 407 of May 28, 2004 as amended, all employees have right to five weeks holiday per year with full pay or using up holiday allowance of 12.5% of gross salary. Union agreements often call for longer holidays of up to seven weeks.

1.04 OFFICE HOURS AND TIME ZONE:

Denmark is in the GMT +01:00 time zone. Office hours are generally from 9 a.m. to 4:30 p.m. Mon. to Fri.

2 BUSINESS ORGANIZATIONS

2.01 AGENCY:

Representation by agent is permitted. Any employee of business entity has certain ostensible authority to bind employer scope of which depends on tasks undertaken by employee. Special higher form of representation in commercial matters is so-called “prokura” which transfers to representative (“prokurist”) all same rights of disposal as principal has, except right to sell or mortgage real estate. Rules in this respect are found in Business Enterprise Act, Consolidated Act No. 651 of June 15, 2006, as amended.

Trade Agents.

Act No. 272 of May 2, 1990 on Trading Agents and Travelling Salesmen implements EU Directive 86/653 into Danish law and contains certain mandatory rules protecting agent. Thus termination may only take place with notice of one month per year or fraction of year of relationship up to maximum of six months. Agent may be awarded compensation upon termination equivalent of up to one year's commission.

2.02 ASSOCIATIONS:

Association may be formed for any legal purpose without intervention of public authorities and is in certain legal areas recognised as legal person.

2.03 CORPORATIONS:

Corporations in Denmark exists in two types of limited liability companies, namely public limited liability company (aktieselskab, short: “A/S”) (see Consolidated Act No. 649 of June 15, 2006, as amended on Public Limited Liability Companies) and private limited liability company (“anpartsselskab”, short “ApS”) (see Consolidated Act No. 650 of June 15, 2006, as subsequently amended on Private Limited Liability Companies). Two Acts will, in 2010, be combined in one new act, Act No. 470 of 12 June 2009. It has not yet been published, when Act will enter into force. New Act will impact on Danish corporate law on number of points of practical nature, which are too detailed to describe in few lines. Presentation below incorporates relevant changes.

Main difference between two forms of companies is that public limited liability company is required to have minimum paid in share capital of DKK 500,000 whereas private limited liability company is required to have minimum paid in capital of DKK 125,000. Under new Act, minimum capital for private limited company has been decreased to DKK 80,000. Both types of companies may be founded by one founder, who must be domiciled within EU. When incorporating documents have been prepared, they must be registered with Commerce and Companies Agency (“Erhvervs- og Selskabsstyrelsen”). Otherwise companies may be purchased from law firms “off-the-shelf”, i.e. already incorporated and ready for use.

In public limited company, two-tier board consisting of supervisory board elected by shareholders and management board appointed by supervisory board is mandatory. Supervisory board has certain obligations in connection with management of company, such as monitoring that company has sufficient capital for its expected needs. Under new Act, it will be possible in public limited companies to have supervisory board that has no obligations in respect of management of company, but solely to monitor management board. In private limited company, company may elect to have only one layer of management, be it supervisory board or one or more directors. This is unchanged under new Act. All individuals appointed to boards as well as auditors of company must be registered with Commerce and Companies Agency. No fees are charged by Agency for any registrations. In public as well as private limited companies, supervisory board must call general shareholders' meeting within six months if equity of company is below 50% of its nominal share capital. Under new act, it is now for private limited company requirement to act if it falls below 50% of nominal share capital or DKK 62,500, whichever is higher.

If company has had more than 35 employees on average for past three years, employees are entitled to elect minority of supervisory board members. Limited liability companies must file their audited accounts for each 12 month period with Commerce and Companies Agency within five months after end of accounting year and in case of listed companies within four months.

By far most common approach to doing business in Denmark for foreign corporation is to establish or purchase limited liability company.

Business Enterprise Act, Consolidated Act No. 651 of June 15, 2006, as amended also allows for creation of cooperative societies with limited liability which in accordance with Act must be registered with Commerce and Companies Agency and which must file annual accounts as limited liability companies. Cooperative societies are mainly used for smaller businesses, cooperative purchasing organisations and the like.

Foreign corporations may operate only to very limited extent in Denmark without establishing branch and/or becoming liable to Danish corporation tax. Branch may be established by filing certain documents with Commerce and Companies Agency.

2.04 JOINT STOCK COMPANIES:

Distinction between joint stock companies and corporations is not known in Danish law. Most comparable entities to both corporations and joint stock companies are limited liability companies as described under topic Corporations.

2.05 PARTNERSHIPS:

Partnerships may be formed by two or more physical persons or limited liability companies. It may be done informally without written agreement but written and signed agreement is recommended. Pursuant to Business Enterprise Act, Consolidated Act No. 651 of June 15, 2006, as amended, partnership has sole right to use name “partnership” (“interessentskab” short “I/S”). Partnerships only between limited liability companies must be registered with Commerce and Companies Agency.

Limited liability partnerships also exist allowing for limited partners to have liability limited to nominal amount provided that partnership has at least one fully liable partner, who must pursuant to Public Limited Companies Act, Consolidated Act No. 649 of June 15, 2006, as amended, have managerial and financial authority in limited partnership. If all fully liable partners of limited liability partnership are limited liability companies, limited liability partnership must be registered with Commerce and Companies Agency. Under Business Enterprise Act limited liability partnerships have sole right to use name “limited liability partnership” (“kommanditselskab”, short “K/S”). Limited partnerships have in recent years found quite widespread use as they allow limited partners transparent tax depreciation without full liability of normal partnership.

3 BUSINESS REGULATION AND COMMERCE

3.01 BILLS AND NOTES:

Mortgages.

See category 18 Mortgages, topic 18.01 Mortgages.

Bills of Exchange.

Rules in Consolidated Act No. 559 of Aug. 25, 1986 on Bills of Exchange (“veksler”) incorporate rules of 1930 Geneva Convention into Danish law.

Bonds enjoy widespread use to finance Government administration and acquisition of real property, both on domestic Danish market and in so-called Eurobond market. Bonds issued for purpose of financing real property are issued by mortgage credit institutions subject to Mortgage Credit Act, Act No. 898 of Sept. 4, 2008, as amended. Many bonds are quoted on Copenhagen or other stock exchange. All bonds quoted on Copenhagen Stock Exchange are registered in dematerialised form in Danish Securities Centre (“Vaerdipapircentralen”) and many bonds quoted on other stock exchanges are similarly registered in dematerialised form in clearing centres such as Euroclear and Cedel.

Cheques.—Consolidated Act No. 558 of Aug. 25, 1986 incorporates into Danish law rules of 1931 Geneva Convention. Cheque issued and payable in Denmark must be presented for payment within 20 days from date of issue. Cheque issued in another European country or in country bordering on Mediterranean must likewise be presented within 20 days from date of issue. Cheque issued outside this area must be presented within 70 days from date of issue.

Debt Instruments.

Consolidated Act No. 669 of Sept. 23, 1986 as subsequently amended on debt instruments provides for debt instruments to be either negotiable or nonnegotiable. Negotiable bonds may be transferred with full protection against transferor's creditors without notifying debtor under instrument. Nonnegotiable debt instruments may only enjoy such protection against transferor's creditors provided that debtor is notified of transfer.

See also category 18 Mortgages, topic 18.01 Mortgages.

Bills of lading are subject to rules of Merchant Shipping Act, Consolidated Act No. 538 of June 15, 2004 as subsequently amended. Act incorporates Hague-Visby Rules into Danish law.

3.02 COMMERCIAL REGISTER:

For public information and statistical purposes, Act on Central Business Undertaking Register, Consolidated Act No. 653 of June 15, 2006, requires all legal entities, i.e. company or state, county or municipal entity, and all employers to register certain general information (e.g. legal entity type, name, address, fax and phone number, number of employees, etc.) with Register. Limited Liability Company Acts and Business Enterprise Act require certain business organisations to register more detailed information with Commerce & Companies Agency. See category 2 Business Organizations.

3.03 CONDITIONAL SALES:

See topic 3.14 Sales.

3.04 CONSUMER PROTECTION:

Marketing Act, Consolidated Act No. 839 of Aug. 31, 2009, as amended, applies to all business transactions (with exception from certain transactions within financial entities) whether between professionals and consumers or professionals and professionals. Act contains general duty to observe “good marketing conduct” which has been defined more closely in extensive case law. More specifically, Act contains prohibitions against inter alia misleading marketing, price draws and restricts unsolicited approach to certain customers.

As supplement to Marketing Act, Consolidated Act No. 451 of June 9, 2004 as subsequently amended on Certain Agreements with Consumers prohibits cold calling in person or over telephone to consumers. Prohibition does not apply to e.g. sale of books, newspapers, magazines and insurance. Failure to comply with Act allows consumer to unilaterally cancel any agreement or contract.

In addition, Private Agreements Act, Consolidated Act No. 781 of Aug. 26, 1996 provides inter alia that standard terms will be interpreted against business party if contract has been made with consumer, and that special rules in Private Agreements Act will apply to choice of law provision in contract.

Furthermore, Sale of Goods Act, Consolidated Act No. 237 of Mar. 28, 2003 contains separate chapter providing certain extended remedies and certain mandatory protective rules in favour of consumers.

Finally, to minimize conflicting interests of business and consumers Act on Treatment of Personal Data, Act No. 429 of May 31, 2000 as amended, contains very strict and complicated rules regarding collection, storing and handling of and access to information about natural as well as legal persons.

See also topic 3.08 Information Technology, Internet and New Media, subhead E-commerce.

3.05 CONTRACTS:

Contracts are equally binding whether they are made orally or in writing, cf. Law book of 1683, book 5, clause 1, (para 2). Exceptions exist under Private and Public Limited Companies Acts in respect of contracts that are not ordinary and are made between private or public limited company and its sole shareholder and under special rules also applies to agreements between spouses under Act on Legal Effects of Marriage, Consolidated Act No. 37 of Jan. 5, 1995 as amended. Under Act No. 227 of Apr. 22, 2002 on Services in the Information Society Including Certain Aspects of E-commerce, it is possible to enter into contracts through exchange of electronic messages.

Excuses for Nonperformance.

Force majeure is generally accepted in case law under Sale of Goods Act but requirement of evidence of actual force majeure is quite strict. Invalidity in reference to physical or mental duress or fraud may also be invoked as excuse for nonperformance. Furthermore, Private Agreements Act, Consolidated Act No. 781 of Aug. 26, 1996 allows courts to vary or set aside agreement that is unreasonable or against proper conduct. Case law suggests that it is only used between business parties in extreme cases.

Applicable Law.

Act No. 188 of May 9, 1984 as subsequently amended on Implementation of Convention on the Choice of Law on Contractual Obligations incorporates June 19, 1980 Rome Convention between EU countries into Danish law. Principles of convention enjoy general application irrespective of whether parties or laws concerned are within EU or not. General rule of convention is that parties are free to choose law applicable to their contract. In absence of choice of law provision, law to which contract has its closest connection will govern. Presumption exists that law of country of party that has to provide most characteristic performance (usually goods as opposed to payment of money) will apply.

Special act, Consolidated Act No. 722 of Oct. 24, 1986 on Choice of Law in International Purchases of Chattels still applies to international non-consumer sales of chattel incorporating the 1955 Hague Convention into Danish law. The basic rule of the Act is freedom for the parties to choose the law, but in the absence of a choice, the law of the Seller will apply. Furthermore, the Merchant Shipping Act contains various choice of law rules, particularly in respect of bills of lading.

Government Contracts.

No specific contract law rules govern government contracts. But if contract amount exceeds certain thresholds, it will be subject to EU tender rules as incorporated into Danish law.

Dealerships and Franchises.

No statutes regulate contract aspects of these types of business arrangements but comprehensive case law exists. Termination notices towards distributors have been granted usually up to six but sometimes up to 12 months and some case law suggests that compensation must be given to distributor upon termination of distributorship agreement. Special statutory rules apply to gasoline distributors. Competition Act, Consolidated Act No. 1027 of Aug. 21, 2007, as subsequently amended, as well as EU Treaty and number of EU directives and regulations, contain restrictions on which contract provisions may be contained in contracts dealing with these types of business arrangements.

3.06 FRANCHISES:

See topic 3.05 Contracts, subhead Dealerships and 3.06 Franchises.

3.07 FRAUDS, STATUTE OF:

Denmark has no statute of frauds. Under Private Agreements Act, Consolidated Act No. 781 of Aug. 26, 1996 declaration of intention is not binding on person making such declaration if person was induced to make it by person to whom it was made by fraud or if latter realized or ought to have realized that it was induced by fraud on part of third party.

3.08 INFORMATION TECHNOLOGY, INTERNET AND NEW MEDIA:

Computer programs are copyright protected as literary works under Copyright Act, Consolidated Act No. 587 of June 20, 2008. Only requirement is that computer programs are intellectual creation of owner. Generally, protection follows that of ordinary literary works, i.e. only owner may modify, grant license to copy and distribute originals of computer programs. Exceptions apply for backup copying and reverse engineering. Employer acquires rights to computer programs created by employee during work time or due to instructions from employer.

Telecommunication.

Several acts cover telecommunications. Most important acts are Consolidated Act on Telecommunications, Act No. 501 of June 22, 1995, as subsequently amended, which liberated Danish telecommunications sector, and Consolidated Act No. 780 of June 28, 2007, as subsequently amended, on competition within telecommunications sector. Purpose of latter Act is to ensure efficiency of Danish telephone communications system, freedom for consumers to choose telecommunications providers and providers of telecommunications services access to telecommunication lines, networks and other facilities. Consolidated Act No. 680 of June 23, 2004, as amended, governs mobile telephone communications. Purpose of Act is by and large same as Consolidated Act No. 780 of June 28, 2007. Telecommunications subject is too complicated to give account of here.

Digital Signature.

The Digital Signature Act No. 417 of May 31, 2000, aims to secure safety of electronic communication by setting down rules for digital signatures and so-called “keycentres” (issuers of digital signatures), so that electronic messages can only be read by proper recipient and that sender of message can be identified. Act does not set standards for digital signatures or for when digital signature must be used.

E-commerce.

Act No. 227 of Apr. 22, 2002, on Services in the Information Society Including Certain Aspects of E-commerce does not govern all issues in regard to e-commerce, but in particular sets out what minimum information provider of electronic services must give to purchaser about his business, on how agreement will be electronically entered into and what relevant non-statutory rules he must observe, and about how service provider must give commercial information. Further, according to Act, electronic service provider established in European Union but outside Denmark offering his services on Danish market does not have to comply with Danish legislation (with few exceptions) on electronic services and services providers. Vice versa, electronic service provider established in Denmark must comply with Danish legislation even if he only offers his services outside Denmark (but inside European Union).

Marketing Act, Consolidated Act No. 839 of Aug. 31, 2009, as subsequently amended, prohibits traders from approaching anyone to offer goods, real property or services by electronic message, automatic calling system or fax without their prior request.

Additionally, Act No. 451 of June 9, 2004, as subsequently amended on Certain Agreements with Consumers, sets down rules on so-called “distance agreements” including agreements between traders and consumers made over Internet or by e-mail. According to Act, certain information regarding trader and services or goods offered must be given to consumer. Further, Act provides for unilateral cancellation right for consumer 14 days after consumer received goods/services or mandatory information - whichever is later. If agreement regards services, cancellation can be made 14 days after consumer received notice that agreement was made or abovementioned mandatory information. Further, unless otherwise agreed, trader must perform within 30 days from date consumer made offer or consumer accepted offer.

3.09 INTEREST:

Pursuant to Interest Act, Consolidated Act No. 743 of Sept. 4, 2002, as amended, parties to contract are free to agree that interest for late payment is to be paid and at what rate. In absence of agreement, legal interest is nonetheless paid from time payment was due if it was fixed in contract or in alternative 30 days after debtor has been invoiced or reminded of payment obligation. In absence of agreement on interest rate, rate of seven percentage points above official lending rate of Danish Central Bank (Danmarks Nationalbank) will apply. In transactions with consumers, agreed interest rate for late payment may not exceed this rate.

For capital gains taxation purposes legal minimum interest rate is fixed semiannually by Customs and Taxation Directorate on basis of general level of Danish kroner bond interest. If lower direct rate than one thus fixed is used, this may have tax consequences for lender and/or borrower.

3.10 LICENCES, BUSINESS AND PROFESSIONAL:

There are no general requirements to obtain license to operate business nor generally to register with any authority outside cases described above under category Business Organizations, topics Corporations and Partnerships. However, number of special rules apply to special trades where various licenses must be obtained to comply with special legislation. In other instances, special requirements need to be fulfilled in order to exercise certain type of business, but no license is actually required. For most business activities, operator must, however, be registered for Danish VAT purposes.

3.11 MONOPOLIES, RESTRAINT OF TRADE AND COMPETITION:

Competition Act, Consolidated Act No. 1027 of Aug. 21, 2007, as subsequently amended, contains notification system for mergers and purchase of businesses requiring notification of mergers, purchases and other amalgamations of businesses whose combined annual turnover is at least DKK 3.8 billion to Danish Competition Council. Notification requirement does not apply to intra-group transactions. Sanction for non-notification is fine. If merger etc. is carried out without required approval, Competition Council may issue order to de-merger or to otherwise reduce business of merging etc. parties. Purpose of notification system is to enable Danish Competition Council to police prohibitions against anticompetitive agreements, arrangements and concerted practices and abuse of dominant position as set out in Competition Act. Other than these rules and rules in very special fields, there are no provisions to prevent acquisition of control of Danish company by foreign investors.

There are certain exceptions to prohibition in Competition Act against anti-competitive agreements, arrangements and concerted practices. These exceptions include: (a) Agreements between companies within same group of companies, (b) agreements between companies with aggregate annual turnover of less than DKK 1 billion and market share of less than 10%, (c) agreements entered into between parties with aggregate turnover of less than DKK 150 million, provided that agreement does not contain provisos on binding resale prices and provided that parallel agreements do not provide effect which will restrict competition in market with turnover exceeding threshold, (d) agreements covered by EU group exemptions, (e) agreements covered by individual EU exemption, (f) agreements covered by Danish group exemptions which reproduce EU group exemptions mutatis mutandis with one addition, namely group exemption for retail trade agreements, and (g) agreements covered by exemption granted by Danish Competition Council.

3.12 NEGOTIABLE INSTRUMENTS:

See topic 3.01 Bills and Notes.

3.13 RESTRAINT OF TRADE:

See topic 3.11 Monopolies, 3.13 Restraint of Trade and Competition.

3.14 SALES:

In absence of contrary agreement between parties, Sale of Goods Act, Consolidated Act No. 237 of Mar. 28, 2003 applies. Act is supplemented by extensive case law.

In case of nonconforming delivery, or belated delivery, buyer must give notice immediately, if buyer wants to terminate on basis of nonconformity. Buyer has burden of proof as to notice being given, but no particular form is required. Special rules apply in respect of consumers which are granted higher protection.

Conditional Sales.

Property may be retained in accordance with rules laid down in Act No. 157 of Feb. 25, 2009, as subsequently amended, on Credit Agreements, provided that: (i) it is agreed upon before surrender of merchandise to purchaser, (ii) purchase price exceeds DKK 2,000, (iii) agreement does not contain agreement of floating interest on loan amount.

In consumer sales, 20% of cash price of merchandise must be paid up front in cash.

Applicable Law.

See topic 3.05 Contracts, subhead Applicable Law.

Product Liability.

Consolidated Act No. 261 of Mar. 20, 2007, as amended, on Product Liability, implements EU Directive 85/374 into Danish law. Rules of Act are mandatory. Product liability claims must be raised within three years of claimant acquiring knowledge of damage and in any event within ten years after day manufacturer sold product. General rules of liability established in court practise applies concurrently with Act.

Competition.

See topic 3.11 Monopolies, 3.13 Restraint of Trade and Competition.

International Sale of Goods.

Act No. 733 of Dec. 7, 1988 on International Sales of Goods, incorporates into Danish law 1980 United Nations Convention on International Sales of Goods. Denmark made reservation upon ratification of Convention, excluding its application between parties residing in Denmark, Finland, Iceland, Norway and Sweden and excluding application of Part 2 of Convention dealing with entering into agreements.

3.15 STATUTE OF FRAUDS:

See topic Frauds, Statute.

4 CITIZENSHIP

4.01 ALIENS:

See category 15 Immigration, topic 15.01 Aliens.

4.02 IMMIGRATION:

See category 15 Immigration, topic 15.02 Immigration.

5 CIVIL ACTIONS AND PROCEDURE

5.01 ACTIONS:

Right to sue is not restricted to cases covered by certain “actions”, like in English or Roman law. Generally any human interest fit for legal protection can be maintained by law suit. Pursuant to Administration of Justice Act, Consolidated Act No. 1069 of Nov. 6, 2008, as subsequently amended, claimants resident outside European Economic Area Denmark may be asked to deposit security for costs.

Limitation of.

See topic 5.03 Limitation of Actions.

5.02 DEPOSITIONS AND DISCOVERY:

Denmark has ratified 1970 Hague Convention on Collection of Evidence Abroad Concerning Civil and Commercial Issues. Consequently, applications regarding examination of witnesses or revision of documents must be forwarded through diplomatic channels to Danish Ministry of Justice. Requests must be in Danish language.

There are no prohibitions against taking voluntary depositions in Denmark without assistance from courts. However, there are no possibilities of swearing in witnesses. Similarly, oaths have been abolished.

Foreign judgments can be executed in Denmark only after reexamination and approval of material outcome in Danish court. However, Denmark is signatory to EU Convention on Civil Jurisdiction and Judgments allowing direct enforcement of judgments rendered by courts in other EU countries. Denmark has opted out of Council regulation No. 44/2001 dated Dec. 22, 2000 on jurisdiction and recognition and enforcement of judgments in civil and commercial matters, which incorporated EU Convention on Civil Jurisdiction and Judgments as part of Community law. Convention therefore still applies between Denmark and other signatories to Convention.

Similarly, Denmark is signatory to Nordic Convention on the Enforcement of Judgments pertaining to Civil Claims allowing enforcement in Denmark of such judgments rendered by courts in Sweden, Norway, Finland and Iceland. Furthermore, Denmark is signatory to New York Convention of June 10, 1958. See category 8 Dispute Resolution.

5.03 LIMITATION OF ACTIONS:

Various laws can provide for specific periods of limitation. Under rules of Limitation Act, Consolidated Act No. 522 of June 6, 2007, principal period of limitation of actions three years. Furthermore, there is absolute period of limitation of ten years. This absolute period of limitation is often curtailed by specific law.

5.04 PRESCRIPTION:

See topic 5.03 Limitation of Actions.

5.05 REPLEVIN:

No statutes exist covering replevin. Any person having right to possession of certain goods may ask Bailiff's Court to assist in obtaining possession.

It is strictly forbidden and criminal act to take back goods by one's own means.

5.06 SEQUESTRATION:

Sort of sequestration may be obtained ancillary to proceedings leading to forced auction of real property. Otherwise closest remedy is “arrest” (attachment).

6 COURTS AND LEGISLATURE

6.01 COURTS:

Judicial system in Denmark consists of (a) 24 City Courts at which almost all civil cases and all criminal cases are heard in first instance, (b) two High Courts for Eastern and Western Circuits located in Copenhagen and Viborg respectively, dealing with appeals from City Courts as well as (as first instance) cases with issues of principle that have been referred to High Courts by City Courts, (c) Maritime and Commercial Court in Copenhagen which hears maritime and commercial cases, either directly or after referral from City Courts, and (d) Supreme Court in Copenhagen which deals with appeals of cases heard in first instance by High Courts or Maritime and Commercial Court in Copenhagen and with cases heard in first instance by City Courts. Leave to appeal to Supreme Court cases having started in City Courts is granted by Process Authorisation Board and only if case pertains to issues of principle not previously decided. Thus, as rule, cases can only be tried in two instances. Furthermore, appeal of any case from City Courts where sum in dispute is less than DKK 10,000 is excluded unless that case deals with matters of principle.

6.02 LAW REPORTS, CODES:

See topic 6.04 Reports.

6.03 LEGISLATURE:

See category 1 Introduction, topic 1.02 Government and Legal System.

6.04 REPORTS:

Official printed reports of all decisions do not exist, but most important decisions are reported in Danish Law Weekly, “Ugeskrift for Retsvaesen”, as well as in certain specialised reporters dealing with e.g. tax law, torts law, family law and property and construction law.

7 DEBTOR AND CREDITOR

7.01 ASSIGNMENTS:

Assignments, property and proprietary rights to monetary and other claims can be freely assigned, see further category Business Regulation and Commerce, topics Bills and Notes, Debt Instruments. Assignor is responsible only for claim being “verum” and generally not for claim being “bonum”. It is possible for debtor to enter into voluntary composition with his creditors. This however requires that all creditors agree to scheme or that main creditors agree to pay out disagreeing minor creditors.

7.02 ATTACHMENT:

Under rules of Administration of Justice Act, Consolidated Act No. 1069 of Nov. 6, 2008, as subsequently amended, Bailiff's Court (division of every City Court) may attach (“arrest”) property of debtor. Attachment may take place before judgment has been obtained, but it is general requirement that there is pertinent risk that assets to be attached are likely to be transferred out of jurisdiction. Furthermore, Act gives Bailiff possibility of requiring full indemnity before proceeding. Legal proceedings to justification writ must be issued within seven days to confirm attachment. Attachment (arrest) of person is very seldom used. When used, it is usually to force debtor to appear before Bailiff's Court and reveal whether he owns any assets and where they are located. See also topic 7.05 Executions.

7.03 BANKRUPTCY:

Bankruptcy Act, Consolidated Act No. 1259 of Oct. 23, 2007, as subsequently amended, is applicable to all physical persons, estates of deceased physical persons, and limited liability companies. Partnership can only be declared bankrupt if all partners have already been declared bankrupt and limited partnership can be declared bankrupt only if fully liable partner(s) has(have) been declared bankrupt.

Bankruptcy may be declared when insolvency of debtor has been established which in Act has been defined as inability to fulfil obligations as they fall due, which is in effect liquidity test rather than asset/liability test. Bankruptcy may be declared at request of debtor or request of creditor. Creditor will usually be asked to put up security for costs of bankruptcy in amount of typically DKK 20,000 depending, however, on case in question in order for bankruptcy petition to be furthered. Costs will be paid in priority from any assets of estate. On bankruptcy being declared, inventory of all property and books of debtor is taken. By notice in Official Gazette, creditors are asked to file their claims with trustee appointed by Bankruptcy Division of City Court handling bankruptcy.

Creditors are paid in order established in Act with preference given to costs of bankruptcy proceedings and any costs of averting bankruptcy as well as to any salaries or wages due to employees of bankrupt business and certain levies payable to customs and tax authorities. Thereafter all trade creditors are paid on pro rata basis allowing interest to be included only to date of bankruptcy or such other earlier date as Bankruptcy Act may fix.

If debtor believes that reconstruction of its business is possible, it may declare suspension of payments and register this decision with Bankruptcy Division of local City Court. Court will appoint supervisor of debtor's business and supervisor will have to approve all material dispositions. Suspension of payments is not publicised in Official Gazette, but on request court will give information about it. Suspension of payments may last up to 12 months, first period being for three months and subsequent extensions being granted at three months' intervals. In event of subsequent bankruptcy, assets and liabilities as of date of registration of suspension of payments will be decisive. Indebted physical person may ask Bankruptcy Division of local City Courts to reorganise his debt so that generally only fraction is repaid over period fixed by Court and remainder of debt eliminated.

Another way of reconstruction of business might be through forced composition. Such solution requires consent from large proportion of creditors, both in numbers and amounts, and requires minimum payment to creditors of 25% of their claim.

7.04 COLLECTIONS:

Collections are handled by most lawyers. Collection fees are generally on time spent basis or in case of large number of collections on basis of generally agreed fee. Courts will allow collection from debtor of certain fee even if debtor has made full payment of original debt before matter reaches Court. Collections under mortgages and other debt instruments that have been made directly enforceable in accordance with Administration of Justice Act may be commenced directly in Bailiff's Court under City Court of debtor.

7.05 EXECUTIONS:

Judgments of Danish courts will generally be enforceable if they are not appealed within two weeks of judgment. Enforceable judgment may be executed through Bailiff's Court of City Court of debtor against any property of debtor. It is not possible to attach part of debtor's salary.

7.06 EXEMPTIONS:

Debtor is entitled to exemption from execution of all assets necessary to maintain modest home and modest standard of living for himself and his family. Extent of “modest home and modest standard of living” must be decided according to general understanding of these terms which is standard that changes with time.Exemption, however, does not apply to real estate. Also debtor is entitled to exemption from all assets up to value of DKK 3,000 when such assets are necessary for his or his family's business, earnings or education. Unearned wages or salaries are exempt from execution and paid out wages and salaries are exempt for seven days after period in which they were earned. Assets in pension schemes and pension funds are also exempted from execution.

7.07 FRAUDULENT SALES AND CONVEYANCES:

Under Bankruptcy Act, transactions giving undue preference to any one creditor may be set aside in proceedings started by trustee handling bankruptcy estate, if transactions have been made within certain period before bankruptcy.

7.08 GARNISHMENT:

See topic 7.05 Executions.

7.09 INSOLVENCY:

See topic 7.03 Bankruptcy.

7.10 LIENS:

Right to retain goods belonging to another exists based on case law in respect of goods delivered for transportation, repairs, storage etc. until payment for such service has been made. Lawyer has right to retain his client's papers; similarly hotel keeper has right to retain guest's belongings until being paid.

7.11 PLEDGES:

See categories 3 Business Regulation and Commerce, topic Bills and Notes; Mortgages, topic Mortgages. Other than pledge of chattels by mortgage, it is possible to make “pledge in hand” (“haandpantsaetning”) whereby pledgee or third party holds pledged assets, typically securities in bearer form pending repayment of sum pledge is securing.

8 DISPUTE RESOLUTION

8.01 ARBITRATION AND AWARD:

Act No. 553 of June 24, 2005 on Arbitration, as subsequently amended, provides very limited framework for arbitration in Denmark. Generally parties are free to submit their disputes to arbitration. Arbitration clauses are frequently found in businesses of building and construction, shipping, commodity trade and increasingly in mergers and acquisitions. Danish Arbitration Institute in Copenhagen (sometimes also referred to as “Copenhagen Arbitration”) enjoys widespread use for institutional arbitrations.

Denmark is signatory to 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, and Act and Government order issued pursuant to it provides rules allowing for enforcement of foreign arbitral awards. Enforcement may, provided that translation into Danish of award is available and that conditions of Convention are complied with, be made directly through Bailiff's Court of City Court of debtor under award.

9 DOCUMENTS AND RECORDS

9.01 ACKNOWLEDGMENTS:

There are very few requirements that documents should in any way be witnessed or notarised. Real property deeds and mortgages must be signed before two ordinary witnesses or one attorney or notary public. It is recommended but not required by law that wills be signed before notary public. When documents are signed abroad for use in Denmark it is recommended that signature be legalised by Danish diplomatic or consular officer or notary public. This may be requirement for documents for public registrations, but failure to obtain notarisation or legalisation will not under Danish law render document illegal or invalid.

9.02 AFFIDAVITS:

See category 5 Civil Actions and Procedure, topic 5.02 Depositions and Discovery. Sworn statements of facts made out of court e.g. before notary public are unknown in Danish law and are inadmissible as evidence if objection is made.

Expert witnesses must be totally independent of both parties and are appointed by Court as Court's own expert to answer questions put before expert witness by parties.

9.03 NOTARIES PUBLIC:

Local City Court judge acts as notary public. In Copenhagen, City Court has special official acting as notary public. No other persons may act as notary public.

9.04 RECORDS:

Real property deeds and mortgages must be registered to ensure protection against creditors and bona fide acquirers of title of transferor or other creditors of pledgor. Registration is not prerequirement to validity inter partes. Similarly bills of sale in respect of vessels and aircrafts must be registered in Ships- and Aircraft Registers. Furthermore there are registers for both marriages, births and deaths kept by local state churches.

9.05 SEALS:

Company seals are not used in Denmark and seals are generally only used in very special cases by public authorities. Affixing of seals to documents is never requirement for their validity.

10 EMPLOYMENT

10.01 LABOUR RELATIONS:

Salaried employees working in offices and shops (White Collar Employees) are protected by rules of Salaried Employees Act, Consolidated Act No. 81 of Feb. 3, 2009, as subsequently amended. Unless probational period of not more than three months has been agreed (in which case employee can be terminated with two weeks notice), notice period between one and six months will apply, depending on length of service. Salaried Employees Act furthermore contains rules regarding e.g. compensation, remuneration for competition and customer clauses, bonus payments, etc.

Contract of employment of workers and other employees that are not salaried employees (Blue Collar Employees) are generally regulated by agreements between employers' associations and unions. Danish labour market is highly unionised. In such agreements notice periods generally range from one to eight weeks depending on length of service.

Specific rules regulate requirements for minimum notice periods as well as information to and negotiation with employees in event of termination of employment contracts for more than: (i) Ten persons in companies with 20 to 100 employees; (ii) 10% of employees in companies with 100 to 300 employees; and (iii) at least 30 people in companies with more than 300 employees (“mass dismissal”), in accordance with Act No. 414 of June 1, 1994, as subsequently amended.

Certain employees are protected against dismissal, such as shop stewards and pregnant women on maternity leave.

Everyone is entitled to five weeks of vacation per year pursuant to Consolidated Holiday Act No. 407 of May 28, 2004 as amended. According to Consolidated Act No. 734 of June 28, 2006, on equal treatment of men and women with respect to employment and maternity leave, female employees are entitled to maternity leave from four weeks prior to estimated date of birth to 14 weeks after actual birth. Furthermore, either parent is as general rule entitled to 32 weeks of parental leave. Additional leave is possible according to specific rules. While on leave, welfare payments will be made by State, however, only for 46 weeks or at reduced rate. Number of union agreements call for employer to increase this welfare payment so that in fact employee on leave is receiving full salary during leave.

Employers are legally required to ensure against work related accidents as per Workers Injuries Act, Consolidated Act No. 154 of Mar. 7, 2006, as subsequently amended. Furthermore, rules on work environment are in Act No. 268 of Mar. 18, 2005 on Work Environment, as subsequently amended.

Consolidated Act No. 1011 of Aug. 15, 2007 governs employers’ duty to inform employee of terms and conditions for employment. Employment exceeding average of eight weekly hours during period exceeding one month requires contract of employment. If employer fails to supply employer with contract of employment including all essential conditions within one month after commencement of employment, employee can be awarded compensation.

11 ESTATES AND TRUSTS

11.01 ADMINISTRATION:

See topic 11.05 Executors and Administrators.

11.02 DEATH:

Person absent and unheard from for five years is presumed dead. In special cases, person absent and unheard from for six months is presumed dead; for example, ship or aircraft on which person travelled is missing. Presumption of death must be established by court proceedings in accordance with Consolidated Act No. 766 of Aug. 4, 2005 on Missing Persons. Spouse, children or heirs may petition for judgment declaring missing person dead. Court will appoint lawyer to represent missing person.

Official death certificate may be obtained by writing to Probate Court (“skifteretten”) in local City Court where person died.

Actions for Death.

Any person who intentionally or negligently causes death of another may be held liable in damages to those who have thereby lost provider. Compensation amounts are fixed by

Compensation in Torts Act, Consolidated Act No. 885 of Sept. 20, 2005, as subsequently amended. Compensation levels are low on general international scale. Act also allows compensation for reasonable funeral expenses. If Danish law applies, Act will also apply to foreigners.

11.03 DECEDENTS' ESTATES:

See topics 11.04 Descent and Distribution, 11.05 Executors and Administrators, 11.07 Wills.

11.04 DESCENT AND DISTRIBUTION:

Rules in this respect follow from Inheritance Act, Act No. 515 of June 6, 2007,as amended. After payment of debts, succession duty, taxes and other duties, estate of deceased, or if there is surviving spouse any excess over share of spouse, is distributed to living members of following classes: (1) Children and descendants of deceased children; (2) parents and descendants of deceased parents; (3) grandparents and their children. Act No. 515 of June 6, 2007 increases inheritance of spouse to half of estate and gives deceased possibility to limit inheritance to descendants to DKK 1,000,000. Spouse will be entitled to whole estate if aggregate of estate and his or her own means does not exceed DKK 600,000.

Estate is distributed in entirety to living members of highest class before it is distributed to subordinate class.

Illegitimate children inherit from their mother as though legitimate, and if born after Jan. 1, 1938 they also inherit from their father in same way.

Obligatory Heirs.

See topic 11.07 Wills, subhead Testamentary Disposition.

Liability of Heirs.

Main rule is that heirs are not liable for debts of deceased unless they make declaration to this effect in which case they become jointly liable for all debts of deceased and not merely to extent of assets of deceased.

Escheat.

In case none of aforementioned persons survived deceased and no will has been made, state inherits estate.

11.05 EXECUTORS AND ADMINISTRATORS:

Executors are appointed by will of deceased, but appointment must be approved by authorities. Executors must be Danish residents.

Executor must, by insurance policy or some other satisfactory manner, give security to authorities in amount equal to value of estate, and act under rather severe control from public authorities.

Executor is entitled to possession and control of all property and to receive rents, interest, and other profits thereof.

When no executor is appointed, Probate Court of local City Court (“Skifteretten”) or heirs jointly have jurisdiction of administration of estate.

If deceased did not appoint executor, heirs may settle and distribute estate among themselves provided that all heirs are of age and are present either personally or by proxy and agree to private settlement. In case heirs are unable to agree upon settlement, estate is handled by Probate Court.

11.06 TRUSTS:

Danish law does not know trusts of type known in Anglo-American jurisdictions.

Appointment of person as trustee can be arranged but is very seldom done in Denmark.

11.07 WILLS:

Will cannot be made by person who has not attained age of 18 years, or who is not mentally competent.

Testamentary Disposition.

Person may dispose of such part of his property by will as law does not obligate him to leave to his heirs.

Statutory heirs are spouse and descendants who are entitled to one quarter of estate. Other three quarters may be disposed of by will.

Execution.

Will can be signed in presence of two witnesses, whose signatures must be written beneath signature of testator, but it is recommended, if possible, to sign will in presence of notary public.

Foreign Wills.

Will made in foreign country is, as rule, valid in Denmark if executed in accordance with formalities required in country where executed.

12 FAMILY

12.01 DIVORCE:

In accordance with Consolidated Act No. 38 of Jan. 15, 2007, as subsequently amended, on Entering into and Dissolution of Marriage, divorce may be had after separation of one year or after six months, if both parties agree. Divorce may also be obtained on usual reasons: Adultery, desertion, confinement for infamous crime punishable by imprisonment for two years or more, bigamy, insanity etc.

Separation as to bed and board may be had by mutual consent and on usual reasons: Cruelty, lack of support, adultery, and so forth.

Remarriage.

See topic 12.04 Marriage.

12.02 HUSBAND AND WIFE:

Alien who marries Dane does not acquire Danish nationality. This follows from Consolidated Act No. 808 of July 8, 2008, as amended, on Danish Citizenship. Conjugal right of foreign spouse will be determined by Act, which generally allows spouse to take up residence in Denmark provided he or she is at least 24 years of age and that Danish spouse is able to support him or her and possesses abode of reasonable size. Rules are under review due to recent decision by European Court of Justice.

All that parties own at moment of marriage or subsequently acquire is part of their community property unless special arrangement is established. Each party has right, inter vivos, to dispose of what each has brought into community with exception of house in which they are living and furniture in house, which cannot be sold or mortgaged without consent of both.

Registered Partnership.

By Consolidated Act on Registered Partnership, Act No. 938 of Oct. 10, 2005, as subsequently amended, it is allowed for persons of same sex to register their partnership with public authorities and thus, with few exceptions, acquire same legal status as married persons.

Marriage settlement may reserve ownership to and right to dispose of and administer real or personal property for each of parties to marriage.

Generally such arrangement may be made to apply only in event of divorce and not upon death or alternatively in both instances.

12.03 INFANTS:

It follows from Act No. 1015 of Aug. 20, 2007, as amended, on Guardianship that persons under age of 18 are infants. Contracts entered into with infant cannot be enforced against him even after he has reached his 18th year. After his 18th birthday, he may ratify contracts entered into prior to his reaching that age, in which case such contract will be fully binding on him.

12.04 MARRIAGE:

Under Consolidated Act No. 38 of Jan. 15, 2007, as subsequently amended, on Entering into and Dissolution of Marriage, persons must be 18 or older to marry. Exemption may be given, particularly if bride is pregnant.

12.05 MARRIED WOMEN:

See topics 12.02 Husband and Wife, 12.04 Marriage.

13 FOREIGN TRADE AND COMMERCE

13.01 CUSTOMS:

Main rules in force are found in Customs Act, Consolidated Act No. 867 of Sept. 13, 2005 as subsequently amended. Rules deal mainly with practical administration of EU customs set-up.

See also category 1 Introduction, topic 1.01 Currency.

13.02 EXCHANGE CONTROL:

See category 1 Introduction, topic 1.01 Currency.

13.03 FOREIGN INVESTMENTS:

Right of foreigners to invest capital in Denmark is in principle unlimited. However, see restrictions on real estate in category Citizenship.

Returns on capital invested in Denmark by foreigners may without difficulty be remitted to foreign countries subject to applicable Danish withholding taxes. See categories 1 Introduction, topic Currency; Taxation, topic Withholding Taxes; Dividends.

13.04 FOREIGN TRADE REGULATIONS:

Denmark is member of EU and foreign trade regulations including embargoes on certain countries generally follow those of EU.

14 HEALTH

14.01 DRUGS:

Act No. 1180 of Dec. 12, 2005, as subsequently amended, governs drugs for medical purposes. Most drugs may only be sold to consumers through authorised pharmacy headed by pharmacist. Most drugs are prescription drugs. Drugs may not be produced, imported, exported, stored, sold, distributed, handed out or packaged without permission from Drugs Agency. Agency monitors and sets down rules for technical management and operations of businesses that are granted such permission. Clinical tests must be reported to Agency. Drugs may only be advertised if they are not prescription drugs, euphoriants or should only be used under guidance from physician and advertisement of drugs may not exaggerate qualities of drug or be otherwise misleading. Only drugs may be advertised as having medical properties.

Regulation of medical utensils such as hearing aids, pacemakers, colostomy bags, respirators and some contraceptives is set down in Act No. 1046 of Dec. 17, 2002, as amended, on Medical Utensils.

Narcotics and Drugs for Doping.

Possession of narcotics is generally prohibited by Consolidated Act No. 748 of July 1, 2008, as subsequently amended, on Euphoriants and possession of drugs for doping such as testosterone, growth hormone, EPO and anabolic steroids generally prohibited by Act No. 232 of Apr. 21, 1999, as subsequently amended, but both acts allow possession of such drugs under certain circumstances particularly if for medical purposes. Possession of narcotics is punished with up to two years imprisonment, possession of drugs for doping up to two years.

14.02 FOODSTUFFS:

Production, handling, marketing and marking of foodstuffs are governed by Act on Foodstuffs, Act No. 526 of June 24, 2005, as subsequently amended. General purpose of Act is to secure healthy and good condition of foodstuffs and to regulate food chain from land or sea to dinner table. Production of foodstuffs is subject to strict rules on hygiene and prohibitions on impurity in and pollution of foodstuffs. Additives can only be used if authorities grant permission or if prohibition on use is not issued six months after authorities have been notified of use of additive. Permission is granted taking consumer and producer interests into consideration. Primary production of foodstuffs such as farming and fishing is subject to specific rules. Any other business with production of foodstuffs, e.g. supermarkets, greengrocers, restaurants, kiosks, must have authorisation from public authorities. Producers of foodstuffs are obliged to inform authorities about their business. Authorities perform control visits and can at their discretion make public result of tests of foodstuff producer's business. Marking and marketing of foodstuffs may not be done in manner likely to mislead consumer as to product's properties. It is prohibited to market or mark product so as to give impression that it is endowed with particular qualities if all products of like type have such qualities. Several other prohibitions as to marking and marketing apply.

14.03 STATE HEALTH INSURANCE:

According to Consolidated Act No. 95 of Feb. 7, 2008, as subsequently amended, on

Health, person resident in Denmark is entitled to free medical treatment at hospital. Person not having his place of residence in Denmark is entitled to such treatment if he or she is in condition that requires immediate treatment. Person resident in Denmark is entitled to free medical care from physician. Drug expenses are partially covered by Public Health Insurance dependant on type of drug and person's economy and character of illness.

14.04 TOBACCO SMOKING:

Act No. 1021 of Oct. 21, 2008 generally prohibits marketing of tobacco and pursuant to Act No. 1022 Oct. 21, 2008 which incorporates EU rules on marking of tobacco packaging, tobacco packaging must be marked with particular signs such as “Smoking causes cancer” of specified minimum size on specified places.

Act No. 512 of June 6, 2007 on Smoke Free Environment, with some exceptions, forbids smoking in indoor public places. Employer is required to set down smoking policy regarding work place.Primary school children are not allowed to smoke on school premises. In state premises it is generally prohibited to smoke, but exceptions apply e.g. for single person offices and rooms dedicated to smoking. On Aug. 15, 2007, Act is to be replaced by Act No. 512 of June 6, 2007 on Smoke Free Environment, which, with some exceptions, forbids smoking in indoor public places.

15 IMMIGRATION

15.01 ALIENS:

In accordance with Consolidated Act No. 422 of June 7, 2004, as amended, on Citizenship, citizenship in Denmark is granted by birth in accordance with rules of Act, or through Act of Parliament pertaining to each specific new citizen.

Consolidated Act No. 808 of Aug. 7, 2008, as subsequently amended, on Aliens, regulates entry into and residence in Denmark of aliens i.e. persons who are not Danish citizens. Acquisition of citizenship other than granted by birth, requires as minimum that relevant person has stayed in Denmark for nine years.

Citizens from Finland, Iceland, Norway and Sweden are free to enter and stay in Denmark.

Citizens from other EU countries are free to enter for nonprofessional stay not exceeding three months or six months if in search of employment. EU-citizens are free to remain in Denmark, if they obtain employment, and may also remain in Denmark upon retirement, provided requirements of EU regulations in this respect are complied with. In principle, visa is required for citizens from all other countries. However, number of bilateral agreements and treaties provide for visa exemptions for shorter stays, typically up to three months, whether for professional or nonprofessional purposes. This applies e.g. to USA, Canada, Japan, Singapore, Switzerland.

Transitional arrangement has been made for new EU countries: Estonia, Latvia, Lithuania, Hungary, Slovenia, Czech Republic, Slovakia, Poland, Bulgaria, and Romania. Citizens of these countries are free to enter Denmark for non-professional stay not exceeding three months. If stay exceeds three months, registration certificate is needed. If employment is sought, work permit and residence permit are required.

Special rules apply to refugees.

Legal position of aliens is in general same as that of Danish citizens, provided they enjoy legitimate residency in Denmark. However, according to Act No. 566 of Aug. 28, 1986, as subsequently amended, on Acquisition of Real Property, citizens not resident in Denmark and not having been so at earlier time for at least five years can only acquire real property on approval by Ministry of Justice. In case of acquisition by way of inheritance or matrimony, approval from Ministry of Justice is not required. Approval is not required for corporations and citizens of EU-countries, when purpose of acquiring real property is to establish business in Denmark or to take up employment in Denmark. Permission to acquire summer houses, i.e. houses in particular zoning areas typically close to coast will never be given to non-Danish citizens that are not resident in Denmark.

Corporations Owned or Controlled by Aliens.

Danish limited liability companies will be treated same irrespective of whether shareholders are Danish citizens and/or residents. Foreign corporations may be required to register branch and to pay taxes and may not be allowed to purchase real property as described above. See category 2 Business Organizations, topic 2.03 Corporations.

15.02 IMMIGRATION:

In accordance with Consolidated Act No. 808 of July 8, 2008, on Aliens, as subsequently amended, residence and work permit must be obtained prior to entering Denmark. Both types of permits are extremely difficult to get for persons arriving from outside Nordic countries and EU-countries. Generally, permits will only be given based on specialist qualifications not otherwise available in Denmark or based on marriage or in exceptional cases other family relations.

16 INTELLECTUAL PROPERTY

16.01 COPYRIGHT:

Copyright Act, Consolidated Act No. 587 of June 6, 2008, protects copyright of author, composer, photographer, architect, etc. to work in writing, in mechanical or chemical reproductions on stage, including cinema through medium of instruments by recitations etc.

Protection includes ballets, pantomimes, musical compositions, mathematical, e.g. software (source codes), geographical or topographical productions, paintings, sculptures and other works of art and drawings of architects. Protection period is lifetime of author, composer, etc. plus 70 years. Designs and utility models may be protected for professional use through registration, subject to Act No. 89, Jan. 28, 2009.

16.02 PATENTS:

In accordance with Consolidated Act No. 91 of Jan. 28, 2009 on Patents, as subsequently amended, anyone may apply for patent protection and, provided requirements of Act are met, patent will be granted valid for 20 years. Fees for applying for Danish patent are basic fee of DKK 3,000 plus additional fee of DKK 300 for each patent claim above ten (i.e. patent claim No. 11 is additional 300 DKK and so on). Fee for international patent application is DKK 6,320. Fee for granting patent is ("patent meddelelses-gebyr") DKK 2,850. Fee for filing complaint against decision of Danish Patent Directorate is DKK 8,000. Number of other special fees for various applications and services apply. Within 20 year validity of patent annual fee ranging from DKK 500 to DKK 5,100 is paid.

16.03 TRADEMARKS AND TRADENAMES:

Pursuant to Consolidated Act No. 90 of Jan. 28, 2009 on Trademarks, as subsequently amended, anyone may apply to register trademark. Characteristic marks may be registered as trademarks for all sorts of goods. Trade names can be registered only for goods specified in connection with registration. High Court judgment has widened limits concerning trade name registrations and difference between trademarks and trade names has thus been reduced. Fee for applying for registration of trademark or trade name is DKK 2,350 plus DKK 600 for each class of goods applied for over and above three first classes. Foreigners wishing to register trademark in Denmark may be requested to appoint representative who is resident in EU. As rule it is of no consequence whether trademark has been registered in country of owner. Danish Patent Directorate uses international classification of goods and services. Nonuse of trademark through period of five years creates risk that trademark may be attacked or lost.

17 LEGAL PROFESSION

17.01 ATTORNEYS:

Profession of lawyer in Denmark is unified (no barrister/solicitor distinction) and exercised only by persons fulfilling requirements to be attorney (“advokat”). In order to practice as attorney, person must hold law degree and must have practised with another lawyer for three years and passed exam to be admitted to Bar. Such admittance will be confirmed by Danish Ministry of Justice. All activities of attorneys are regulated by Administration of Justice Act, Consolidated Act No. 1069 of Nov. 6, 2008, as subsequently amended. Attorneys must be solvent, of age and good character in order to be appointed to or remain in Bar. Attorneys must be members of Danish Bar Association, are bound by ethical rules of Association and subject to review by its complaints board, appointed in accordance with Administration of Justice Act and consisting of attorneys, judges and representatives of government, business and consumers. All attorneys operating in Denmark must have professional indemnity insurance with minimum coverage fixed by Danish Bar Association. Multi-disciplinary partnerships are not permitted.

If deemed feasible considering nature of case, attorneys from other Scandinavian countries may be allowed to appear in Danish courts. Under EU Directive 77/249, implemented by Executive Order No. 1429 of Dec. 11, 2007, as amended, lawyers admitted to bar in another EU country are entitled to market their services in Denmark and are allowed to appear in Danish courts if seconded by Danish attorney admitted to court in question. All court hearings are indispensably conducted in Danish language. Courts or Bar Association, subject to appeal to courts, can disbar attorney in case of violation of Administration of Justice Act or collegial rules laid down by Danish Bar Association regarding entrusted funds, criminal offences, professional misconduct or like or if attorney has substantial unsettled debt to state. Danish Bar Association does not undertake to establish direct contact with specific attorneys within jurisdiction.

17.02 COUNSELORS:

See topic 17.01 Attorneys.

18 MORTGAGES

18.01 MORTGAGES:

Mortgage is required for pledging of real property, vessels, aircraft and under certain circumstances for chattels. In order to enjoy protection against other creditors of issuer, mortgages must be registered in Land Registry, Ships Registry, Aircraft Registry or Chattel Mortgage Registry, respectively. Registration is not prerequirement to validity inter partes. Land Registry Act, Consolidated Act No. 158 of Mar. 9, 2006, as subsequently amended, requires certain forms of mortgages to be used. Registration of mortgages on real property carry registration duty of 1.5% of mortgage sum plus DKK 1,400. The Merchant Shipping Act, Consolidated Act No. 538 of June 15, 2004 as subsequently amended also sets out certain forms of mortgages that must be used. Mortgages on vessels carry registration duty of one per mille. Likewise Air Traffic Act, Consolidated Act No. 731 of June 21, 2007, as subsequently amended, requires specific form of mortgages to be used. Mortgages on aircraft carry registration duty of one per mille of mortgage sum. For aircraft with take off weight less than 5,700 kilograms duty is

1.5%. Land Registry Act also contains rules about chattel mortgages requiring such mortgages to be on special forms. Mortgages on chattels carry registration duty of 1.5% of mortgage sum plus DKK 1,400. In all instances, nonpayment of registration duty will lead to rejection of document from registry but will not affect inter partes validity of document.

19 PROPERTY

19.01 ABSENTEES:

See category 11 Estates and Trusts, topic 11.02 Death.

19.02 CONVEYANCES:

See topic 19.04 Deeds.

19.03 COURTESY:

In Denmark certain form of courtesy exists giving surviving spouse right to continue in possession of joint property for rest of his or her life as long as he or she does not remarry. This right cannot be exercised if children of deceased were not also children of surviving spouse.

19.04 DEEDS:

Property deeds (“skoeder”) are used only for transferring title to real estate, ships and aircraft. Deeds must be recorded in Land Registry (or Ships Registry or Aircraft Registry) in order to protect acquirer against creditors and bona fide acquirers of transferor. Real property deeds carry registration duty of 0.6% calculated on purchase price or public evaluation whichever is higher. Furthermore nominal fee of DKK 1,400 must be paid for filings in land registry. Ships and aircraft deeds carry registration duty of one per mille of purchase/sale price.

19.05 DOWER:

Nothing corresponding to dower exists in Denmark.

19.06 POWER OF ATTORNEY:

Power of attorney can be issued in any language. When signed abroad, it is recommended that signature be legalised by Danish diplomatic or consular officer.

19.07 REAL PROPERTY:

Buyers of real estate intended to be used as private residence have period of six business days from signing of initial contract to cancel contract against payment of penalty of 1% of purchase price to seller, cf. Act No. 1142 of Sep. 28, 2007, as amended.

20 TAXATION

—Scope —

Note: It is impossible in few lines to explain contents of Danish tax laws which are very complicated and must be studied carefully.

20.01 ADMINISTRATION:

Rules setting out structure of tax authorities and regulating administration of tax system in Denmark are set forth in Tax Administration Act, Consolidated Act No. 1126 of Nov. 24, 2005, as subsequently amended. Tax assessment of physical persons and companies is done by Tax

Office of each of 98 municipalities. Assessment is subject to complaint to Tax Appeals Board, and further to National Taxation Court (administrative agency, despite the name). General administration of tax system and general planning of assessment nationwide is conducted by Customs and Taxation Directorate, which also operates regional customs and taxation offices. Directorate is guided in its administration by politically appointed Assessment Council.

20.02 ALCOHOL, BEVERAGES AND TOBACCO TAXES:

Pursuant to Act No. 1239 of Oct. 22, 2007, as subsequently amended, alcohol is currently taxed at DKK 150 per litre.

Pursuant to Act No. 890 of Aug. 17, 2006, wine is currently taxed at DKK 3.90 to 9.20 per litre. Beer is taxed at DKK 50.90 per 100 litres pure alcohol.

Pursuant to Act No. 1392 of Dec. 20, 2004, as subsequently amended, cigarettes are taxed at DKK 0.6366 per cigarette, and further tax of 13.61% of retail price.

In all instances value added tax will be added; see topic 20.21 Value Added Tax.

20.03 BUSINESS TAXES:

Pending decision by local municipality and pursuant to Consolidated Act No. 724 of June 26, 2006, as amended, on Taxation of Property as subsequently amended, business property may be taxed by up to 10 per mille of value exclusive of land value as established for all properties by tax authorities.

20.04 CONSUMPTION TAXES:

A lot of special consumption taxes exist on such diverse items as e.g. batteries, CFC gasses, chocolate, coal, compact discs, electricity, flight tickets, gas, ice cream, mineral and soda water, perfumery, plastic bags, pleasure craft insurance, refuse, sugar, sewage water, third party motor insurance, video tapes, water, and number of other items.

20.05 CUSTOMS DUTY AND TAX:

Denmark follows general customs set-up of EU; see category 13 Foreign Trade and Commerce, topic 13.01 Customs.

20.06 DEPRECIATION:

Tax Depreciation Act, Consolidated Act No. 1191 of Oct. 11, 2007, as subsequently amended, contains rules on tax depreciation rates, which may contain incentive. Rates are hereafter per year as follows: For plant and machinery: 25%; plant and machinery not costing more than DKK 12,300 (2010): 100%;certain large production facilities: 15%; certain ships: 12%; infra structure plants: 7%; buildings: 4%; and office buildings: 0%. Rate of 15% on certain large production facilities is to be gradually introduced from 2008 to 2016.

Furthermore, advance depreciation is possible on ships and certain new property and machinery before delivery of 15% per year and maximum of 30% in total before delivery, and only on part of expenditure exceeding DKK 1,406,800 (2010). Advance depreciation on property and machinery is only possible if agreement of delivery is entered before or on Oct. 3, 2000. Physical persons and companies may carry forward trading losses without time limitation.

20.07 EMPLOYMENT TAX:

All employers pay mandatory annual contribution to labour market's supplementary pension scheme of DKK 3,240 for each full-time employee. Number of other minor contributives are required according to specific rules and depending on number of employees. Businesses whose products or services are not subject to value added tax are subject to payroll tax amounting to 9.13% for banks and other financial businesses, and 3.08% on most other businesses. In both instances tax is levied on payroll, but in latter case also adjusted to take into consideration taxable profits.

20.08 ESTATE TAX:

See topic 20.14 Inheritance Tax.

20.09 EXCISE TAXES:

See topic 20.05 Customs Duty and Tax.

20.10 FOREIGN INVESTMENT TAXES:

No discriminatory taxes are levied on foreign investments in Denmark.

20.11 GASOLINE AND SPECIAL FUELS TAXES:

Act on Mineral Oil Duties, Consolidated Act No. 297 of Apr. 3, 2006, imposes taxes ranging from DKK 4.03 to DKK 4.71 (2010) per litre of gasoline, and DKK 1.95 to DKK 2.94 (2010) per litre of diesel.

20.12 GIFT TAX:

Pursuant to Consolidated Act No. 1159 of Oct. 4, 2007, as subsequently amended on taxation of estates and gifts, gifts between spouses are with few exceptions not subject to gift fee, gifts exceeding DKK 58,700 (2010) attract gift tax of 15% between parents and children, and from grandparents to grandchildren. In respect of gifts to sons- and daughters-in-law threshold attracting tax is DKK 20,500 (2010), whereas in respect of gifts from grandchildren to grandparents threshold is DKK 58,700 (2010), but gift tax is 36.25%. Gifts to all other recipients are subject to income tax.

20.13 INCOME TAX:

Individuals.

Income tax is levied on all residents and estates on personal income and income from capital irrespective of source or origin of income or location of assets. Personal income is taxed progressively up to 51.5% on income left after contribution to social funds. Contributions to social funds amount to 9% of gross personal income, including 1% compulsory payment to labour market's supplementary pension scheme. 1 % is temporarily suspended in 2008. Employer is under duty to withhold relevant tax payment, thus paying only net after-tax salary to employee.

Income from capital is taxed progressively up to 37.3%. Special lower taxation rates apply to dividends from companies and capital gains on shares, provided certain conditions as inter alia total shareholding and ownership time of shares are complied with.

Legal Entities.

Companies and certain foundations and other legal entities pay 25% on all kinds of taxable income if tax is paid on account which most companies do. Capital gains on shares are tax-free if shares have been owned for three years or more. Furthermore, dividends received by Danish company from company anywhere in world in which Danish company holds more than 20% of share capital, are tax-free provided that subsidiary does not fall within definition of Danish CFC Rules (controlled foreign corporation) i.e. provided that foreign subsidiary does not have “CFC-income”, i.e. which includes e.g. royalties, dividends, interests, leasing income, etc., which constitutes more than one-third of its total income and provided that income of subsidiary is not subject to corporate taxation which is less than three-quarters of Danish corporate tax calculated in accordance with Danish tax rules.

Expatriates working in Denmark for period of more than six months, but not exceeding three years within ten year period are granted partial tax relief, reducing their tax to flat rate of 25%. Minimum salary of DKK 60,100 (2007) per month is required unless expatriate is publicly approved scientist. After expiry of three year period, expatriate can stay in Denmark under normal tax rules for residents of Denmark. Instead of reducing tax to flat rate of 25 % in period not exceeding three years, expatriate has possibility of tax flat rate of 33 % in period not exceeding five years.

20.14 INHERITANCE TAX:

Inheritance tax is called estate tax ("boafgift") and is imposed by Consolidated Act No. 1159 of Oct. 4, 2007, as subsequently amended, on Taxation of Estates and Gifts, as subsequently amended. If heirs are spouses or certain charitable trusts, no tax is payable. If heirs are offspring, parents, cohabitant for more than two years or divorced spouses, flat rate of 15% is levied on proportion of estate exceeding DKK 264,100 (2008). In case of other heirs, inheritance tax of 36.25% is levied on proportion of estate exceeding DKK 264,100 (2008).

20.15 LOCAL GOVERNMENT TAXES:

Income tax payable to one of 98 municipalities and to one of five regions, is included in income of 51.5%; see topic 20.13 Income Tax. Local taxes are fixed locally, but absolute ceiling of 51.5% must be complied with.

20.16 MOTOR VEHICLE TAXES:

Pursuant to Registration Duty Act, Consolidated Act No. 631 of June 25, 2008, as subsequently amended, registration of cars in Denmark, i.e. obtaining of number plates for cars, is contingent on payment of tax of 105% of first DKK 64,500 (2010) of purchase price, and 180% of remainder. Furthermore, trucks are subject to semiannual road tax, calculated on basis of fuel economy of vehicle, other motor vehicles are subject to tax based on weight of vehicle.

20.17 PROPERTY TAXES:

Pursuant to Property Taxation Act, Consolidated Act No. 724 of June 26, 2006, as subsequently amended, properties are subject to municipal property taxation, fixed locally, of between 16 and 34 per mille on value of land only. Value is fixed by tax authorities for each property in Denmark. Properties are further subject to 10 per mille tax to counties, similarly calculated on basis of land value.

Furthermore, persons owning real property, whether in Denmark or abroad, and being taxable in Denmark, must in accordance with Real Property Value Taxation Act, Consolidated Act No. 912 of Aug. 8, 2008, as subsequently amended, pay tax of 10 per mille of first DKK 3,040,000 (2007) and 30 per mille of remainder.

Property tax amounts are not tax deductible and must be paid from taxed money.

20.18 SALES TAX:

See topic 20.21 Value Added Tax.

20.19 STAMP TAX:

Stamp Duty Act, Consolidated Act No. 1209 of Nov. 28, 2006, contains rules on stamp duties on insurance policies. Furthermore, registration of deeds and mortgages attracts registration duties; see categories 18 Mortgages; Property, topic Deeds.

20.20 TREATIES AND AGREEMENTS:

Denmark currently has double taxation treaties with Argentina, Australia, Austria, Bangladesh, Belgium, Brazil, Bulgaria, Canada, Chile, China, Croatia, Cyprus, Czech Republic, Egypt, Estonia, EU, Faeroe Islands, Finland, France, Georgia, Germany, Great Britain, Greece, Greenland, Holland, Hong Kong, Hungary, Iceland, India, Indonesia, Iran, Ireland, Israel, Isle of Man, Italy, Jamaica, Japan, Jordan, Kenya, Kirgizstan, Korea, Kuwait, Latvia, Lebanon, Lithuania, Luxembourg, Macedonia, Malaysia, Malta, Mexico, Morocco, New Zealand, Norway, Pakistan, Philippines, Poland, Portugal, Romania, Russia, Serbia/Montenegro, Singapore, Slovak Republic, Slovenia, SNG, South Africa, Spain, Sri Lanka, Sweden, Switzerland, Tanzania, Thailand, Trinidad and Tobago, Tunisia, Turkey, Uganda, Ukraine, USA, Venezuela, Vietnam, Yugoslavia and Zambia.

Note: “SNG” is name of old double taxation treaty for USSR, still used by many former USSR Republics.

Denmark has entered into Convention on the Elimination of Double Taxation in Connection with the Adjustment of Profits of Associated Enterprises. (90/436/EEC).

20.21 VALUE ADDED TAX:

General value added tax on practically all goods and services of 25% of sale price applies. Value added tax must be included in price displayed.

20.22 WEALTH TAX:

Denmark does not have any wealth tax.

21 TRANSPORTATION

21.01 AUTOMOBILES:

See topic 21.02 Motor Vehicles.

21.02 MOTOR VEHICLES:

Motor vehicles are subject to very high registration tax of up to 180% of sale price; see category 20 Taxation, topic 20.16 Motor Vehicle Taxes. As general rule, Danish residents may only use vehicles carrying Danish license plates. Speed limits are 50 km/h in cities, 80 km/h on highways and 110 km/h or 130 km/h on freeways. Limit for drunk driving is 0.5 per mille blood alcohol. All motor vehicles are subject to compulsory liability insurance, plates of motor vehicle being removed if insurance premium has not been paid. Furthermore, motor vehicles are subject to annual user's tax.

21.03 SHIPPING:

Merchant Shipping Act, Consolidated Act No. 538 of June 15, 2004, as subsequently amended, is central statute incorporating Hague-Visby Rules and number of other conventions into Danish law as well as codifying Danish maritime law. The Merchant Shipping Act sets out when commercial vessel can and must be registered in Danish Ships Registry: namely, when owned by Danish citizens (special rules apply to EU citizens) and when owned by limited liability company whose supervisory board consists of two-thirds Danish citizens. Furthermore, Consolidated Act No. 273 of Apr. 11, 1997 as subsequently amended allows for registration of foreign owned vessels under Danish flag. Certain tax rules in respect of crew's wages also make it advantageous for Danish owned vessels to be registered in this registry.

22 TREATIES AND CONVENTIONS

22.01 TREATIES AND CONVENTIONS:

Denmark is member of EU. In order to avoid double taxation large number of treaties have been entered into. See category 20 Taxation, topic 20.20 Treaties and Agreements.

Denmark is party to: (a) Convention on Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters (Ratified July 21st, 1969 and in force as of Oct. 1st, 1969); (b) Convention on Taking Evidence abroad in Civil or Commercial Matters; (c) United Nations Convention on Recognition and Enforcement of Foreign Arbitral Awards; (d) Convention between the Government of the United States of America and the Government of the Kingdom of Denmark for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Estates, Inheritances, Gifts and certain other Transfers.

Denmark is not party to Convention Abolishing the Requirement of Legalisation for Foreign Public Documents.

International Sale of Goods.

United Nations Convention on Contracts for the International Sale of Goods in force on Mar. 1st, 1990 and applies to contracts entered into after this date. However, Convention does not apply to settlement of conflicts between parties residing in Denmark, Finland, Iceland, Norway and Sweden. See category 3 Business Regulation and Commerce, topic 3.14 Sales and Part V, Selected International Conventions.

1

DOMINICAN REPUBLIC LAW DIGEST

—Scope —

Revised for 2008 edition by

CURTIS, MALLET-PREVOST, COLT & MOSLE LLP of New York.

(C. C. indicates Civil Code; M. C. indicates Minor Code; C. Com. indicates Code of Commerce; L.C. indicates Labor Code; C. C. P. indicates Code of Civil Procedure; E. O. indicates Executive Order. Numbers in Code references indicate articles.)

Note: This revision incorporates legislation through Dec. 5, 2007.

1 INTRODUCTION

1.01 CURRENCY:

Monetary unit is the peso oro, divided in 100 cents. Only Central Bank may issue bank notes, which are legal tender. (Const. art. 111; Law 183-02 of Nov. 21, 2002).

See also category 14 Foreign Trade and Commerce, topic 14.01 Exchange Control.

1.02 GOVERNMENT AND LEGAL SYSTEM:

Government is republican, democratic and presidential. Republic is politically divided into a National District where capital city is and provinces, each of these being subdivided into municipalities.

Power is divided among executive, legislative and judicial branches. Congress is composed of two houses. Members of Congress are elected by direct majority vote for four year period and may be reelected. President and Vice President are elected by direct vote for term of four years and may be reelected for additional period. Judicial power is vested in Supreme Court of Justice and in other courts forming judicial system. President appoints governors of provinces. (Constitution of July 25, 2002).

1.03 HOLIDAYS:

Jan. 1 (New Year's); Jan. 6 (Epiphany)*; Jan. 21 (Day of La Altagracia); Jan. 26 (Duarte Day)*; Feb. 27 (Independence Day); Holy Thursday; Good Friday; May 1 (Labor Day)*; May 16 (Election Day)*; Corpus Christi; Aug. 16 (Restoration Day)*; Sept. 24 (Our Lady of Mercy); Nov. 6 (Constitution of Dominican State)*; Dec. 25 (Christmas). (Law 139/97 of June 19, 1997).

* When fall on Tues. or Wed. are celebrated previous Mon., and when fall on Thurs. and Fri. are celebrated following Mon.

1.04 OFFICE HOURS AND TIME ZONE:

Dominican Republic is in the Eastern Standard (GMT +5:00) time zone. Office hours are generally from 8 a.m. to 12 p.m. and 2 p.m. to 6 p.m.

2 BUSINESS ORGANIZATIONS

2.01 AGENCY:

Relationship between local agents or distributors of foreign firms and their principals is regulated by Law 173 of Apr. 6, 1966, as am'd; and Law 622 of Dec. 23, 1973. Agency contract cannot be terminated at will by principal without payment of due compensation, unless for “just cause” as defined in this law. Compensation includes actual value of all investments and expenses agent incurred in establishing and operating business, value of inventory, value of agents' lost profits; principal may also be required to pay amount equivalent to five years gross earnings; if contract is less than five years, additional compensation is equal to five times average annual profit during actual number of years. Agency agreement must be registered with International Department of Central Bank in order to enjoy benefits of law.

Law 173 does not apply to contracts executed with U.S. companies after entry into force Free Trade Agreement between U.S., Central America and Dominican Republic (CAFTA) unless contract explicitly provides for its application. Contracts with U.S. companies are regulated by contract principles of Civil Code, by Law 424 of Nov. 20, 2006 and by CAFTA. Disputes arising from contracts covered by Law 173 and registered with Central Bank according to law may be resolved by arbitration and amount of indemnity for termination shall be no greater than amount available to claimant under Civil Code.

2.02 ASSOCIATIONS:

(Law 122-05 of Apr. 8, 2005).

Associations are nonprofit organizations that can be organized by five or more natural or juridical persons. Charter must contain name, domicile, purpose, duration, duties and rights of its members and manner of administration. Charter and by-laws must be submitted to Executive Power for registration. On approval extract giving name, purposes, officers, duration, etc. of association must be published in local newspaper. Associations are classified according with their purpose and are empowered to sue and be sued, to execute contracts and hold real and personal property, to make loans, to lease, transfer and mortgage its assets. Meetings of members are called in cases provided in by-laws or at request of members. Association may be dissolved by resolution of three fourths of its members or by expiration of term. Transfer of its assets to another nonprofits association shall be decided by resolution of majority of its members, if no agreement is reached, government distributes assets among associations with similar purpose. Associations may be dissolved at request of state's attorney in case their activities are contrary to public order or morals. Nonprofit associations organized abroad shall be registered in order to operate in country. Special authorization is required to provide its services. Associations are subject to supervision by government organization. Nonprofit associations are exempted of national and local taxes.

2.03 CORPORATIONS:

(C. Com. 31-46, 56-63; Laws 3-02 of Jan. 18, 2002 and 173-07 of July 17, 2007).

Corporations may be constituted by seven or more persons and do not require governmental authorization. Their name must begin or end with the words "Compañía por Acciones", "Sociedad Anónima" or "Compañía Anónima" or the letters "C. por A.", "S. A." or "C. A." and mention the object of the activities or the name of a member thereof. They must be constituted by written agreement. Within one month, incorporation documents must be filed with Chamber of Commerce and Production, in charge of Mercantile Registry of place where it is established, to obtain Certificate of Commercial Registry. Incorporation documents must be filed with Internal Tax Office (DGII) to obtain National Taxpayer Registration (RNC) of company. Commercial Registry must be renewed every two years, and notice must be given of any changes in business or in articles of incorporation, also of annual ordinary meetings. At least one-tenth of authorized capital must be subscribed and all subscriptions paid up before corporation can be constituted. If company's activity is to be manufacturing, it must also obtain certificate of industrial registration from State Secretariat of Industry and Commerce. Both mercantile registrations and industrial registrations carry fixed fee, according to authorized capital.

Shares may be to bearer or registered. Preferred shares are permitted. Shareholders are not liable beyond the value of their shares. Nominal value of shares may not be less than account fixed by law.

Directors need not be shareholders unless the by-laws so provide. The by-laws may require directors to give bond. When the by-laws require directors to be owners of a certain number of shares, such shares are inalienable during their term of office and must be registered and deposited in the treasury of the company as a guarantee. Directors may delegate their powers if the by-laws permit but are liable to the company for the acts of the persons to whom they delegate. They are regarded as attorneys-in-fact of the shareholders and are liable only as such.

Shareholders' meetings must be held annually. The by-laws designate the number of shares necessary in order to participate in the meetings and the number of votes to which shareholders are entitled, but at the first meeting any shareholder may participate, with a maximum of ten votes. Ordinarily shareholders representing one-fourth the capital constitute a quorum, and if no quorum is obtained, another meeting may be called to be held with any number appearing; but at the first meetings and at all meetings to change the by-laws or extend or curtail the term of the company, the quorum consists of shareholders representing one-half the capital. The shareholders appoint one or more financial inspectors to report at the next annual meeting.

Reserve.

At least one-twentieth of the annual profits must be set aside as a reserve until such reserve amounts to one-tenth of the capital.

After establishing the reserves specified in the law or the by-laws further sums may be set aside as reserves if a dividend of 8% has been declared. (art. 57).

Dissolution.

If three-fourths of the capital is lost the directors must call a shareholders' meeting to decide whether the company should be dissolved and such decision must be published. One year after the number of shareholders is reduced to less than seven, the corporation may be dissolved on the petition of any interested party.

Government Authorization.

All persons and companies desiring to engage in commercial or industrial activities must obtain government authorization. For that purpose application must be filed giving data as to partners or stockholders and governmental certificate must be obtained.

Foreign corporations require authorization of government to establish themselves in country. For that purpose they must file copy of their articles of incorporation and by-laws and power of attorney of their representative empowered to request authorization. Commercial and industrial enterprises must also set forth, on forms obtained from State Secretariat of Industry and Commerce, information relating to nationality and residence of partners, managers, directors and shareholders; later changes in officials and shareholders must likewise be reported. Foreign corporations have in practice been required to give only names, nationality and addresses of their directors and principal shareholders, as appearing in Company's books. Registration in Mercantile Registry of place where corporation will operate must be made within two months.

Remittances Abroad.

See category 14 Foreign Trade and Commerce, topic 14.01 Exchange Control.

Corporate Fees.

The costs payable in connection with the incorporation of a company comprise notarial fees depending on the amount involved, registration fees, and a proportional tax on the authorized capital. (Law 173-07 of July 17, 2007).

2.04 FOREIGN CORPORATIONS:

See topic 2.03 Corporations.

2.05 LIMITED PARTNERSHIP:

See topic 2.06 Partnerships.

2.06 PARTNERSHIPS:

(C. Com. 18-55; C. C. 1832-1873).

Partnerships may be formed by notarial instruments or private instruments. A notarial copy, if the partnership was formed before a notary, or a duplicate, if formed by private instrument, must be filed in the court of the places where the partnership is established and an extract must be published in the newspapers. If the capital of a limited partnership is represented by shares, additional data must be filed regarding the subscription of the capital.

General partnership (compañía en nombre colectivo) is one in which the partners have unlimited liability for the engagements of the partnership.

Limited partnership (compañía en comandita) is one in which there are partners not liable beyond their contribution to partnership. Special partner can have no part in management even under power of attorney. Capital of limited partnerships may be represented by shares, in which case limited partnership is called “compañía en comandita por acciones.” Face value of such shares cannot be less than DR$5 per share. (art. 51).

Government Authorization.

All persons and companies desiring to engage in commercial or industrial activities must obtain an authorization from the State Secretariat of Labor. For that purpose application must be filed giving data as to partners or stockholders and governmental certificate must be obtained.

Civil partnership (sociedad civil) is one constituted for other than mercantile purposes and is governed by the rules of the Civil Code. One partner cannot obligate the others without a power of attorney and in dealing with third persons the contracting partners are liable for equal amounts, unless otherwise stipulated.

3 BUSINESS REGULATION AND COMMERCE

3.01 BILLS AND NOTES:

(C. Com. 110-189).

Bill of exchange must be dated and must state: (1) Amount payable; (2) name of drawee; (3) date when and place where payable; (4) value received in money, in merchandise, on account, or otherwise. It must be drawn to the order of a third person or the order of the drawer and must state whether it is first, second, third, etc., of exchange. When fictitious names or places are mentioned it is considered only as a contractual promise.

The drawer and endorsers are jointly liable for its acceptance and payment. On notice of protest for nonacceptance the drawer and endorsers must give bond to guarantee payment. Acceptance may not be conditional but may be limited to a certain amount. If so limited the bearer must protest the bill as to the difference. A bill must be accepted within 24 hours from presentation and if it is not returned within that time either accepted or not, whoever retained it is liable for damages to the bearer.

In case of protest for nonacceptance the bill may be accepted by a third person acting for the drawer or any endorser. Such third person must without delay notify the person for whom he acted. The bearer, however, retains all his rights against drawer and endorsers.

A bill of exchange may be drawn: (1) At sight; (2) at one or more days, months, or “usos” (periods of 30 days) after sight; (3) at one or more days, months or “usos” from date; (4) at a certain day after date, etc. A bill at sight is payable on presentation. The maturity of a bill payable at a certain period after sight is determined by the date of acceptance or of the protest for nonacceptance. A bill payable on a holiday must be paid the day before. There are no days of grace.

The ownership of a bill is transferred by endorsement which must be dated and set forth value received and the name of the endorsee; without such data the endorsement is a mere power of attorney.

Drawers, acceptors and endorsers of a bill are jointly liable to the bearer.

The “aval” is a guarantee by one who is not a party to the bill. It may be made on the bill or by a separate document.

In the absence of special agreements, the bearer of a bill drawn abroad and payable in the Republic at sight or a certain time after sight, must demand payment or acceptance within the following periods: three months from its date if drawn in the United States or the Antilles; four months if drawn on the American continent from the Rio Grande to the Orinoco; five months if drawn elsewhere in South America; six months if in Europe or elsewhere. Bills drawn in the Republic for payment abroad must be presented in the same respective periods.

In case of nonpayment of a bill it must be protested on the day after maturity, or if that be a holiday on the following day. Protest is required although there was a protest for nonacceptance and although the drawee has died or become bankrupt. Protest is made through two notaries, or a notary and two witnesses, or a bailiff and two witnesses. In the event of failure to protest, the bearer loses his rights against the endorsers, and also against the drawer if he made provision of funds. In case of protest of drafts drawn in the Republic and payable abroad, actions against drawers and endorsers residing in the Republic must be brought within the same respective periods mentioned above for presentation of drafts drawn abroad and payable in the Republic.

Notes to order must be dated and state: (1) Amount; (2) payer; (3) maturity; (4) value received in money, merchandise, on account, or otherwise. They are in general governed by the same rules as bills of exchange, except as to the need of acceptance.

Checks must state (a) the word “check” in the text of the document, (b) order to pay a specific sum expressed in words and figures, or only in figures if printed with perforating machine, (c) name of drawee, necessarily a bank, and place of payment, but if place not expressed it is presumed to be the place shown next to name of drawee, (d) date and place where drawn, but if place not shown it is presumed to be placed next to name of drawer. Most provisions elsewhere applicable to checks are in force. Checks may not bear interest. Endorsements guarantee payment unless otherwise stated, but endorsements after protest or expiration of time for presentation are mere assignments of a credit. Checks are payable at sight; if issued payable in the Republic they must be presented for payment within two months after date, if issued abroad, within four months, otherwise the holder loses his special rights. In case of nonpayment the holder must protest and notify his endorser. Not replacing fund within two business days after notification is considered act of bad faith. Drawer of check with insufficient funds has committed fraud and shall be punished according to Criminal Code with fine no less than amount of check and no higher than double amount of check. In case of company's checks, its legal representative, manager or administrator is held criminally responsible. Crossed checks are allowed. (Check Law No. 2859 of Apr. 30, 1951 as am'd).

3.02 COMMERCIAL REGISTER:

See category 2 Business Organizations, topic 2.03 Corporations.

3.03 FRAUDS, STATUTE OF:

A private or notarial document is required for all obligations involving over 5,000 pesos. Authentic documents are those executed before notaries or other qualified public officers; they are proof of their contents as between the parties and their successors. Private writings, when acknowledged, have the same force between the parties as authentic documents, but as to third persons their date is counted only from the date of their registration or from the death of one of the signers or from the day on which they are listed in a document prepared by a public official. Private documents containing mutual agreements are not valid unless executed in as many originals as there are interested parties, but a single original is sufficient if all parties have the same interest. If they carry an obligation to pay a sum of money, they must be in the handwriting of the obligor or he must add to his signature a statement, in his handwriting, of the amount due; except when such documents are issued by merchants, artisans, workmen or servants. (C. C. 1317-1348).

3.04 INFORMATION TECHNOLOGY, INTERNET AND NEW MEDIA:

E-Commerce Law, Digital Documents and Signatures.

(Law 126-02 of Aug. 14, 2002, regulated by Decree 335-03 of Apr. 8, 2003). Law defines and regulates access and use of data messages, e-commerce and digital signatures, certification process related to data messages and enforceability of acts performed by electronic means. Electronic messages are enforceable as written documents. It establishes that in contract law, offer and acceptance can be communicated by electronic, optic or similar means except express agreement of parties. Digital signature has same legal effect and value as handwriting signature when used according to law. Data message is defined as information generated sent, received, stored or communicated by electronic, optic or similar means. Law establishes rules for determining time and place that data message will be deemed issued and received, as well as rules regarding acknowledgments of receipt. Digital signature is defined as numeric value affixed to data message and where, by mathematical procedure, is linked to code of originator and text of message, allowing to determine that above value has been obtained exclusively with code of originator and that initial message has not been altered after transmission. Instituto Dominicano de las Telecomunicaciones (INDOTEL) authorizes and supervises entities providing electronic certification services, and requirements for certification entities to be authorized, and imposes sanctions to certification entities for noncompliance with their obligations under law. Electronic certification issued by foreign entities, non-authorized in country has same legal value and effect as local certifications when its validity is guaranty by local certification entity.

Cybernetic Crimes.

(Law 53-07 of Apr. 23, 2007). Law deals with protection of informatics, prevention and sanction of malware and criminal activity that occur on computer and Internet, including hacking, infringements of copyrights, computer-facilitated fraud, child pornography, terrorism and other illicit cyber activities. Offences against confidentiality, integrity and availability of computer data and systems as well as use of data of commercial, financial or banking nature and criminal records. Law penalizes those who maliciously destroy, disable, intercept, or interfere with database and illegally access, change and destroy information contained therein or maliciously reveal or publicize data contained in information system.

3.05 INTEREST:

Legal interest is 12%. No higher rate can be stipulated except that pawn establishments may charge as high as 4% a month. If over 12% is collected the excess is applied first to interest then due, balance to principal; if the debt has been cancelled the creditor may be required to restore such excess collections with legal interest. Habitual usury is punishable by fine and imprisonment. Commercial interest rate for any type of transaction shall be freely determined by market. (C. C. arts. 1905-1909; Law 183-02 of Nov. 21, 2002).

3.06 LICENSES, BUSINESS AND PROFESSIONAL:

(Law 16-95 of Dec. 8, 1995 as am'd regulated by Decree 380-96 of Aug. 28, 1996 as am'd). Transfer of technology agreements must be approved by Centro de Exportación e Inversión de la República Dominicana (CEI-RD) before registerd them with Central Bank in order to get foreign currency to pay royalties and commissions to licensor. There are no restrictions on terms and condition of agreement and on amount of royalties or commissions to be paid.

3.07 MONOPOLIES, RESTRAINT OF TRADE AND COMPETITION:

(Const. art. 8, §12, Law 1-02 of Jan. 18, 2002). Constitution guarantees freedom of enterprise, commerce and industry. Monopolies may only be created by law and on behalf of State or its institutions. Law considers national interest protection of local production from unforeseen increase of imports of any product which is causing, or which is likely to cause, serious injury to industry. Dumping and subvention are considered unfair practices of international trade. Dumping is defined as import of foreign goods at lower price than normal value of similar or same product in origin or export place in normal commercial transactions. Normal value is determined according to method indicated by law. Subvention is defined as financial assistance from government or public organization in country of origin or exporting country to producer or exporter, such as direct or indirect incentives, premiums, repayment or similar advantages in order to make them more competitive on international market. Law contains regulations and administrative procedure in conformity with Agreement on Implementation of Article VI of General Agreement on Tariffs and Trade, Agreement on Subsidies and Countervailing Measures and Agreement on Safeguards.

Comisión Reguladora de Prácticas Desleales de Comercio y Medidas de Salvaguardia is national authority in charge of investigating and imposing countervailing duties or compensatory measures on import of foreign goods to protect local production of same or similar products, as indicated by law.

General Law of Protection of Consumers' Rights.

(Law 358-05 of Sept. 5, 2005). Law deals with consumers' rights to be informed; general representation and guaranties, products liability, credit operations, freedom of contracting, fair price, lack of performance, services, unsolicited goods, offers, labeling of product. It also deals with consumers' and suppliers' obligations, electronic commerce, quality control, adhesion contracts, parts, shipping and technical services, advertisement and promotion of goods and services, dispute resolution by conciliation and arbitration, civil liability and penalties for infringement of law. Instituto Nacional de Protección de los Derechos del Consumidor, government agency in charge of enforcement of law. Law is of public order and consumers' right may not be waived. General statute of limitations is two years.

3.08 NEGOTIABLE INSTRUMENTS:

See topic 3.01 Bills and Notes.

3.09 SALES (REALTY AND PERSONALTY):

A sale is perfected when the parties have agreed on the object and the price, although neither has been delivered. The seller guarantees the title and warrants against hidden defects unless otherwise stipulated. The right to repurchase cannot be reserved for over five years; if a longer period is designated it is reduced to five years. (C. C. 1582-1701; C. Com. 109). See also category 7 Debtor and Creditor, topic 7.01 Assignments.

Conditional sales of personalty possible of identification, under condition that title shall remain in vendor until payment of price or fulfilment of some other condition, must be recorded by vendor in special registry within 30 days. Such record creates lien but it may be cancelled by owner at any time or by purchaser if he proves he has acquired ownership of property sold. If condition is not fulfilled, vendor may cancel sale and seize object. In such cases parties, by mutual agreement or through experts, must liquidate accounts, taking into consideration condition of object, amount payable for its use, sums paid on account and other factors. Vendors must obtain special permit to engage in business. Each transaction subject to ½ % tax on price. (Law 483 of Nov. 9, 1964, as am'd).

Conditional sales of realty must specify proportion of consideration to be returned by vendor if sale is canceled, which proportion cannot be less than 60% of amounts paid. In case of cancellation, vendor may acquire improvements erected on property by vendee, at discount of 20% from their value at time of cancellation. (Law 596 of Oct. 31, 1941 as am'd).

Administration with Promise of Sale.

Realty and personalty may be delivered for administration with option to purchase. Contract need not be recorded, but signatures require notarial certification. (Law 4969 of Aug. 7, 1958).

Public Contracts.

(Decree 490-07 of Aug. 30, 2007, Law 340-06 of Aug. 18, 2006 as am'd). Contracts executed with Government and decentralized institutions are subject to special rules.

4 CITIZENSHIP

4.01 ALIENS:

See category 16 Immigration, topic 16.01 Aliens.

5 CIVIL ACTIONS AND PROCEDURE

5.01 ACTIONS:

Actions for Death.

See category 12 Estates and Trusts, topic 12.02 Death.

Limitation of.

See topic 5.04 Prescription, subhead Actions.

5.02 JUDGMENTS:

(C. C. 2123, 2134; C. C. P. 116-165, 545-556).

A judgment constitutes a judicial mortgage in favor of the creditor, which is, however, not effective against third persons until recorded in the public registry.

Foreign judgments can be executed only if their execution has been ordered by a court of the Republic, unless otherwise determined by treaty.

5.03 LIMITATION OF ACTIONS:

See topic 5.04 Prescription.

5.04 PRESCRIPTION:

(C. C. 1304, 2219-2279; C. Com. 189, 430-434).

The acquisition of property or rights by virtue of possession and the extinction of obligations by failure to require performance is called prescription. Prescription may be waived as far as it has run, but it cannot be waived in advance. Prescription must be specifically pleaded and may be alleged at any time unless circumstances show that it has been waived. Prescription may run against the state, public establishments and municipalities.

In general, in order to acquire by prescription it is necessary to possess continually, uninterruptedly, quietly, publicly, unmistakably and as owner. Possession originating in violence is not deemed to begin for prescriptive purposes until the violence ceases. Natural interruption occurs when the possessor is deprived of the enjoyment of the property for over a year by the former owner or by a third person; civil interruption occurs in case of the institution of a suit at law. Ownership of real property is acquired by possession with title and in good faith in five years if the real owner is a resident of the judicial district where the property is located and in ten years if he lives outside of the district; and it may be acquired in 20 years without title or good faith. Possession of personal property is equivalent to title but the real owner may recover it in three years.

Actions.

The prescriptive periods in which rights of action are lost vary according to the nature of the action. Some of the more important are: (1) All real and personal actions for which no other period is designated, 20 years; (2) actions to annul or rescind contracts, actions of wards against guardians, actions relating to bills of exchange or acts of commerce, five years; (3) actions of lawyers for fees, two years; (4) actions of physicians, druggists, bailiffs, merchants (for goods sold to nonmerchants), teachers, and servants under yearly contract, actions for maritime freight, sailors' wages, supplies and materials advanced for ships, and work done on ships, and actions for delivery of merchandise carried, one year; (5) actions of teachers for monthly lessons, by innkeepers and workmen, some tort actions, and actions on unpaid checks, six months.

6 COURTS AND LEGISLATURE

6.01 COURTS:

Justice is administered by: (1) A Supreme Court which hears appeals for errors of law, appeals for unconstitutionality, and ordinary appeals in matters arising in the courts of appeals, has original jurisdiction in accusations against certain high officials and in questions between the state and municipalities, and exercises a general supervision over the courts; (2) nine courts of appeals which hear appeals from lower courts and have original jurisdiction in accusations against certain functionaries; (3) superior administrative court having jurisdiction over complaints against governmental administrative acts; (4) land courts; (5) courts of first instance having civil and criminal jurisdiction; (6) judges of instruction who have functions of committing magistrates; (7) justices of peace; (8) juvenile courts; (9) labor courts. (Const., arts. 63-77; Law 821 of Nov. 21, 1927, as am'd; Labor Code).

6.02 LEGISLATURE:

Congress meets in regular session twice a year, on Feb. 27 and on Aug. 16, for 90 days period each, which may be extended for 60 days. (Const., art. 33).

See also category 1 Introduction, topic 1.02 Government and Legal System.

6.03 STATUTES:

Codes of Dominican Republic are Civil Code; Code of Civil Procedure; Code of Commerce; Penal Code; Code of Criminal Procedure; Tax Code and Labor Code. Current laws are published in government paper, “Gaceta Oficial.”

7 DEBTOR AND CREDITOR

7.01 ASSIGNMENTS:

The assignment of a credit, right or action is perfect as between the parties from the moment there is agreement as to the thing assigned and the price, even before there is tradition. Tradition is effected, as between assignor and assignee, by delivering the document evidencing the debt or right. As regards third persons the assignee will not be protected until the debtor is notified of the assignment or accepts it. The assignment of a credit carries with it the accessories thereof such as securities. The assignor of a credit or other incorporeal right guarantees its existence even though no guaranty be expressed, but he does not warrant the solvency of the debtor unless expressly stipulated and only up to the amount of the price received. (C. C. 1583, 1689-1694).

7.02 ASSIGNMENTS FOR BENEFIT OF CREDITORS:

A debtor who is unable to pay his debts may assign all his assets to his creditors. Such assignment may be made by agreement with the creditors or under judicial order. When the assignment is by agreement the terms thereof govern; when under judicial order the creditors may sell the assets and apply the proceeds to the payment of their claims. Should the proceeds be insufficient to meet all claims the debtor remains liable for the unpaid balance. (C. C. 1265-1270).

7.03 ATTACHMENT:

Attachment may issue on behalf of creditors holding written evidences of indebtedness, but unless the action is prosecuted promptly the attachment will be dismissed. Even without written evidence of indebtedness a creditor may, with the permission of the court, attach property: (1) of a transient debtor which is found in the commune where the creditor resides, and (2) in urgent situations where the collection of an apparently good credit is imperiled. Attachment in an action similar to replevin may be ordered only by courts of first instance. (C. C. P. 557-651, 822-831).

7.04 BANKRUPTCY:

(C. Com. 437-614).

A merchant who suspends payments is considered in a state of bankruptcy. Bankruptcy may be of three kinds: (1) Inability in the ordinary course of business, to meet obligations; (2) caused by imprudent or dissipated conduct of the bankrupt; (3) involving fraudulent acts of the bankrupt. In the last two cases the bankrupt may be punished under the Penal Code. A deceased merchant may be declared bankrupt within one year after his death. Bankruptcy may be declared by the court on the petition of the bankrupt or of one or more creditors or on its own motion. On the declaration of bankruptcy by the court the bankrupt loses the administration of all his property, his debts fall due and his unsecured debts cease to bear interest. One or more temporary receivers are appointed and a meeting of creditors is called; permanent receivers are then appointed. Receivers may sell perishable goods and continue the business on order of the court. The bankrupt may be placed under arrest in certain cases or required to give a bond conditioned on his appearance whenever called.

Creditors who have failed to file their claims at the time of the appointment of permanent receivers are notified by publication in the newspapers and by letters mailed by the clerk of the court, to file such claims within 20 days from the date of publication. Creditors residing outside of the Republic have a longer period; claims of persons residing in the United States must be filed within two months from such publication. On expiration of these periods the credits are verified, and thereupon a meeting of creditors is called to consider composition offers. A composition requires the vote of a majority of the creditors who at the same time represent three-fourths of the total of claims allowed and verified and claims allowed conditionally. Objections to the composition may be filed by creditors as well as by the receivers and are determined by the court. A fraudulent bankrupt cannot make a composition with his creditors. No distribution of assets may be made among creditors residing in the Republic without first setting aside funds for the payment of a corresponding portion of the dividend to creditors residing abroad. A bankrupt may be discharged from bankruptcy on petition to the Supreme Court of Justice if all sums owing by him have been paid in full with interest together with all expenses. A bankrupt who has acted fraudulently cannot be discharged.

No bankruptcy proceeding may be brought in court without a previous attempt at an amicable settlement, upon petition by a creditor or the debtor, made to the State Secretariat of Industry and Commerce through Chamber of Commerce of debtor's domicile. (Law 4582 of Nov. 3, 1956).

See also topic 7.07 Fraudulent Sales and Conveyances.

7.05 EXECUTIONS:

By virtue of a judgment, property may be attached. The form of attachment and manner and time of sale depend on the kind of property involved. In the case of personal property, the period between the attachment and sale may be brief, and such property is sold to the highest bidder, but silver cannot be sold below its real value and jewelry not below the amount of appraisal by experts. In the case of real property, the attachment is recorded in the public registry, extensive notifications must be given to the owner of the property and other interested persons, and publications must be made in the newspapers. The creditor may stipulate that bidders must make a deposit. The property is sold to the highest bidder, or if there are no bids, it is awarded to the creditor for the amount designated by him beforehand. Within eight days after the sale other persons may make a new bid at least 20% higher than the amount for which the property was awarded and in consequence of such new bid another sale is held. Once the property is definitely adjudged, the debtor has no right of redemption. (C. C. P. 545-748).

7.06 EXEMPTIONS:

The beds of the debtor and children living with him and their clothing cannot be attached for any kind of credits. The following are also exempt from attachment: (a) Articles which have become real property by destination, but they may be attached as part of such real property; (b) professional books to the value of 300 pesos; (c) machinery and apparatus for teaching and for the practice of science and arts, to the value of 300 pesos; (d) equipment of soldiers; (e) workmen's utensils; (f) foodstuffs for the maintenance of the debtor and his family for one month; (g) one cow, three sheep or two goats, with their sustenance for one month. The foregoing may, however, be attached in certain actions such as actions on vendor's liens, leases of lands where the objects were used, etc.

There can be no garnishment of salaries or wages paid by a municipality, nor, with certain exceptions, of advances for aliments or of legacies or gifts designated by the grantor as not subject to attachment. (C. C. P. 580-582, 592). Salaries, wages and pensions of a private employee may not be garnished beyond one-third of their amount. (L.C. 200). No garnishment may be levied on salaries, wages or pensions owing by State or government agencies or on obligatory savings accounts.

Law 1024 of Oct. 24, 1928 am'd by Law 5610 of Aug. 25, 1961 creates the family homestead not subject to attachment or execution. Under Law 472 of Nov. 2, 1964, property allotted by National Housing Institute is considered as family homestead.

7.07 FRAUDULENT SALES AND CONVEYANCES:

The following acts or payments after the date determined by the court as the date of cessation of payments or within ten days before such date, are void: Gratuitous transfers of property; payment of unmatured debts; payments of matured debts otherwise than in money or merchandise; mortgages for debts previously contracted. Other payments made or acts done after cessation of payments may be annulled if the other contracting party had notice of such cessation. The registration of mortgages effected after a date ten days before the cessation of payments may be annulled if over 15 days elapsed between the date of the mortgage and the date of registration, these periods being subject to extension if the place of registration is distant from that of the execution of the mortgage. Creditors may attack any act executed by the debtor to defraud them. (C. Com. 446-449; C. C. 1167).

7.08 GARNISHMENT:

See topic 7.06 Exemptions.

7.09 HOMESTEADS:

See topic 7.06 Exemptions.

7.10 INSOLVENCY:

See topic 7.04 Bankruptcy.

7.11 LIENS:

(C. C. 2092-2113; C. Com. 546-548).

The following are privileged credits with respect to all personal property: (a) Judicial costs; (b) funeral expenses; (c) expenses of last illness; (d) wages of servants for the past and current year; (e) debts for maintenance of debtor and his family incurred in last six months when owing to retail merchants and incurred during last year when owing to wholesale merchants and boarding house keepers.

The following credits enjoy a privilege with respect to specific chattels: (a) Rentals, with respect to the fruits and crops of the property and its furnishings; (b) pledge credits, with respect to the article pledged; (c) expense of preserving property, with respect to such property; (d) unpaid purchase price, with respect to the article or while it remains in possession of the buyer, except in case of bankruptcy; (e) debts owing to innkeepers, with respect to guests' effects; (f) transportation costs, with respect to articles transported.

The following credits enjoy a privilege on specific real property: (a) Unpaid purchase price; (b) amounts advanced for purchase; (c) rights of co-heirs to secure their share in the partition; (d) sums due to architects, masons, workmen, etc.; (e) amounts advanced to satisfy claims of workmen. Such privilege on real property must be recorded in the public registry.

7.12 PLEDGES:

(C. C. 2071-2084; C. Com. 91-93, 109; Law 249 of Apr. 8, 1943 and Law 6186 of Feb. 12, 1963).

Pledge normally requires delivery of pledged object to the creditor or to a third person and a written document duly recorded, and if the pledge is placed on a nonnegotiable credit, it requires also notice to debtor. Creditor may not dispose of pledged property nor appropriate it even if authorized by the contract, but he may request appraisal made by two experts appointed by court and have it sold there at public auction or given to him for payment pro tanto.

Pledge given to secure a commercial transaction may be constituted and proved by any evidentiary means, including a written document, correspondence, entries in books of accounts and even witnesses, if court rules them admissible. Pledge of a negotiable instrument may be constituted by an endorsement in guarantee; if of a registered share of stock, by transfer in guarantee recorded in books of the corporation; if a nonnegotiable credit as stated above for noncommercial transactions. Delivery of the pledged article or document is a requisite. In case of default and after eight days notice given to pledgor, sale of the pledged property may be made at public auction through exchange agents or brokers or by other officers if designated by the court.

“Pledge without delivery” may be established under Law 6186 upon agricultural products, harvested or not, livestock and products therefrom and on equipment and machinery in general, the guarantee being limited to 70% of the objects pledged. This pledge requires a document before Justice of the Peace, in duplicate and must be recorded with Justice of the Peace of domicile of the debtor. These contracts are negotiable and may be transferred by endorsement. Debtor acts as depositary and must place the objects at disposal of the court for sale upon requirement unless he pays immediately.

Merchandise deposited in warehouses, under authority of the same Law 6186, may not be transferred or pledged but warrants or certificates issued by the warehouse may be so affected by endorsement.

Banks and agricultural associations may grant credits to groups of farmers, with certain limitations as to amounts, with a "universal pledge" regulated by the same Law 6186.

7.13 USURY:

See category 3 Business Regulation and Commerce, topic 3.05 Interest.

8 DISPUTE RESOLUTION

—Scope —

(C.C.P. 1003-1040, Law 50-87 of June 4, 1987).

8.01 ARBITRATION:

Any individual is allowed to submit to arbitration any dispute related to rights of free disposition, unless law provides otherwise. Arbitration agreement may be in document executed before arbitrators already chosen or in public deed before notary public or private document. Arbitration agreement must include subject matter of dispute and name of arbitrators; unless indicated in agreement, arbitration term is three months. Parties are free to agree on number of arbitrators and on procedure to be followed in arbitration. Arbitration and Conciliation Council, Chamber of Commerce and Industry of National District, can act as arbitrator for dispute resolution arising between individuals and companies. Decision of Council is final and enforceable.

Convention.

Convention on the Recognition and Enforcement of Foreign Arbitral Awards, New York, 1958.

9 DOCUMENTS AND RECORDS

9.01 ACKNOWLEDGMENTS:

Certificates of acknowledgment in the form customary in the United States are unknown in the laws of the Republic. Documents which in the United States would ordinarily require a certificate of acknowledgment are executed before a notary public who certifies in the instrument itself to the facts which are usually contained in a certificate of acknowledgment. The original executed instrument is kept by the notary and forms part of his record. (See topic 9.02 Notaries Public.) However, instruments executed in accordance with land registry law may merely be acknowledged before notary public or judge.

Documents executed in the United States for use in the Republic may be acknowledged in the usual manner; the notary's signature should be authenticated by a competent official; and the latter's signature should be legalized by a Dominican consular or diplomatic officer. In general it is better to execute such documents in the Spanish language and Dominican form or in the English language but following the Dominican form. (Law 716 of 1944).

9.02 NOTARIES PUBLIC:

Notaries are appointed by Supreme Court for life, one or more for each commune according to population. Appointee must have degree as lawyer or notary and must be members of Colegio Dominicano de Notarios. Certain documents executed before notary must have two witnesses, residents in commune. Notary cannot act in documents in which relatives of notary by consanguinity or affinity in direct line or to fourth degree in collateral line are parties; neither can his employees be witnesses to wills executed before him. (C. C. 975). Notary retains original document as part of his notarial record and delivers to interested parties certified copies which have force of originals. (Law 301 of June 18, 1964 as am'd, Law 89 of Feb. 24, 2005).

9.03 RECORDS:

Real Estate Registry.

(Law 108-05 of Mar. 23, 2005 as am'd). Law regulates registry of rights and liens on real property, proceedings for first registration of title, transfer of title, eviction of illegal possessor, partition and distribution of real property.

Mercantile Registry.

(Law 3-02 of Jan. 18, 2002). Authorization, renewal and registration of books, acts and documents related to industrial, commercial and services activities performed by individuals or juridical entities engaged in commerce are regulated by this law.

Vital Statistics.

There is “registry of the civil status” for recording births, marriages and deaths.

9.04 SEALS:

Seals are not used in private contracts. Notarial instruments have most of the effects of sealed instruments in the United States.

9.05 VITAL STATISTICS:

See topic 9.03 Records.

10 EMPLOYMENT

10.01 LABOR RELATIONS:

(Const. art. 8, §11, Labor Code; Decree 258-93 of Oct. 1, 1993 as am'd). National Constitution provides for right to work of individuals and guarantees workers limited working day, minimum wages, paid days for rest and vacations, social security, right of labor to organize trade unions, right to strike and profit sharing.

Labor relations are regulated by Labor Code which presumes that in all personal labor relations, labor contract exists unless there is provision to contrary. Labor contracts may be oral or written; in case of written contracts all amendments must be in writing. Labor contracts can be for indefinite period, for certain period for specific service or work. In any company or establishment at least 80% of workers must be Dominicans who earn at least 80% of total payroll. Positions of administrators, managers, directors and any other executive position shall be filled preferably by Dominicans. Eight hour working day is in effect with maximum of 44 hours per week with resting period of 36 hours per week. Certain exceptions are allowed. Overtime is limited by law. Workers are allowed vacation of 14 days when they have been working for at least one year up to five years and of 18 days after five years. Minors over 14 can enter into labor contracts with parent or guardian authorization. Working legal age is 16 years.

Employers must participate with 10% net annual profits to all employees under contract for indefinite period of time. Employers must also pay employees Christmas bonus.

Workmen's compensation is payable in case of labor accidents and occupational diseases as indicated by law. To protect employees, employers must secure from insurance company bond to guarantee up to four months of payroll payments in event of insolvency.

Contract for indefinite period of time is subject to termination by mutual consent, or by either party, as long as prior written notice is given to other party. When employer exercises right of termination, employer must pay employment compensation to employee. In case notice is not given, employer must also pay severance. Labor Code indicates causes of dismissal without any responsibility to employer. If employer cannot prove legal cause for dismissal, employer must pay unemployment compensation, severance and amount equal to salaries which employee could have earned during pending case for court decision, limited to six months.

Labor Code contains special regulations for minors under 16 years and for women. Pregnant women cannot be dismissed during pregnancy and up to three months after delivery; dismissal between three and six months after delivery must be authorized by State Secretariat of Labor. In case of legal dismissal of pregnant women employer must pay damages equal to five months regular wages, plus other benefit payments she is entitled to.

Law 87-01 of May 9, 2001 as amended, regulated by Decrees 548-03 of June 6, 2003 provides protection to employees in case of incapacity, retirement and accidents in work place. Pension fund system is created through individual savings and employer contribution.

11 ENVIRONMENT

11.01 ENVIRONMENTAL REGULATION:

(Law 64-00 of Aug. 18, 2000).

Law establishes legal framework for environmental legislation granting to each person right to enjoy healthy and balanced environment. It considers environment and natural resources as national patrimony whose protection and conservation is public interest. Law contains such principles as prevention and control of environmental pollution, management and disposal of residues of any nature and noise pollution, reparation of damages and environmental impact assessments. Environmental impact assessments are mandatory for any activity that may damage environment. Compliance bond equal to 10% of value of project must be deposited in order to get environmental permit or license. Entry of hazardous waste and of radioactive waste into country is prohibited. Administrative or criminal penalties are imposed for violation of law, which include fines up to 20,000 minimum salaries and imprisonment up to three years. Environmental liability is regulated creating obligation to indemnify for damages caused and to restore environment to previous state. Law includes environmental protection for areas such as mining, waters and forestry. Law grants tax incentives to investor for reducing environmental pollution, which include exemption of import duties and added value tax, accelerated depreciation. Secretaria de Estado de Medio Ambiente y Recursos Naturales is government body in charge of natural resources and national environmental policies and enforcing this law.

12 ESTATES AND TRUSTS

12.01 ADMINISTRATION:

See topic 12.05 Executors and Administrators.

12.02 DEATH:

When a person has disappeared for four years, interested parties may apply to court to have him declared an absentee. Such declaration may not be made until one year after the decree ordering the investigation. If the absentee left an attorney-in-fact, he may not be declared an absentee until ten years after his disappearance. Thereupon, provisional possession of his estate may be granted to his heirs and 30 years thereafter, or 80 years after the date of his birth, any security given for the administration of his estate may be canceled by court order. (C. C. 112-143).

Death certificates may be obtained from the official of the Registry of the Civil Status, a nominal fee being charged.

Actions for Death.

There is no wrongful death statute specifically providing for actions of this kind. However, said actions may be supported under the general language of the few provisions of Civil Code on torts (C. C., art. 1382 et seq.). Dominican Republic recognizes as a source of authority French jurisprudence under which damages have been granted to a decedent's close relatives, especially when they were found to have a right to support.

12.03 DECEDENTS' ESTATES:

See topics 12.04 Descent and Distribution, 12.05 Executors and Administrators, 12.08 Wills.

12.04 DESCENT AND DISTRIBUTION:

(C. C. 718-892; C. C. P. 907-1002).

In the absence of testamentary dispositions, a decedent's estate passes to the following, in the order named: (a) Descendants; (b) parents and brothers and sisters; (c) ascendants; (d) collaterals to the twelfth degree; (e) surviving spouse; (f) the state. When the estate goes to ascendants and collaterals, it is divided into two parts, of which one goes to the relatives on the father's side, and the other to the relatives on the mother's side.

Aliens have the same inheritance rights as Dominicans. In case of a division of an estate between alien and Dominican co-heirs, the latter are entitled to receive from the property in the Republic a part equal to the value of property located abroad from which they are excluded for any reason.

Even though there be a will, a part of the estate goes to certain heirs by operation of law. (See topic 12.08 Wills, subhead Testamentary Disposition).

The following are excluded from testate or intestate succession: (a) Persons who murdered or attempted to murder the author of the inheritance; (b) persons who made slanderous accusations against him; (c) an heir who being of age and hearing of the decedent's death by violence, does not lay the matter before the courts.

An inheritance may be accepted expressly or impliedly or it may be refused. Acceptance may be unconditional or with benefit of inventory. In the latter case, an inventory of the inheritance is made and the heir is liable to creditors only up to the amount shown in such inventory. If acceptance is unconditional, the heir is liable for the debts of the decedent in the proportion of his shares of the estate. Creditors may demand that property of the deceased be kept separate from that of the heir.

If the heirs are all present and of age, they may make the partition in the manner they consider advisable; otherwise the partition is made under judicial auspices. The court decides controversies and may appoint a partitioner.

12.05 EXECUTORS AND ADMINISTRATORS:

(C. C. 870-882, 1025-1034; C. C. P. 907-1002).

A testator may appoint one or more executors and empower them to take possession of all or part of the personal property, but this right cannot extend beyond one year and one day. If the testator has not granted such right it cannot be exercised and in any case the heir may obtain the property by paying the executor the amount necessary for the bequests. Executors have the duty of seeing to the preparation of an inventory of the estate, and execution of the will, and must render accounts within one year. The following cannot be executors: (a) Persons incompetent to obligate themselves; (b) minors.

When a person dies, his property passes immediately to his heirs. As to liability of heirs for debts, see topic 12.04 Descent and Distribution.

12.06 INTESTACY:

See topic 12.04 Descent and Distribution.

12.07 TRUSTS:

Trusts as developed in the common law are unknown. Testamentary trusts are prohibited, but property may be given or left to children or to brothers or sisters with the provision that it shall pass to their children, or given or left to a third person until the testator's children reach majority. (C. C. 896-898, 1048-1058).

12.08 WILLS:

(C. C. 893-930, 967-1074).

All persons of sound mind may make wills. Minors under 16 are subject to restrictions, and those over 16 may dispose of only half of the property of which an adult might dispose. Wills are (1) holographic, (2) by public act or (3) secret. Witnesses must be of age, Dominican citizens and in possession of their civil rights.

Holographic will is one entirely in the handwriting of the testator.

Will by public act is made before one or two notaries and two witnesses. It is written out by one of notaries, read to testator in presence of witnesses and signed by those present, but in country districts only one witness need sign if there are two notaries, or two witnesses if there is one notary. Legatees cannot be witnesses, nor their relatives to fourth degree, nor clerks of notary.

Secret will is written by the testator himself or by another for him and signed by him and enclosed in a sealed paper. In the presence of six witnesses the testator presents it to the notary, who writes a minute on the envelope which all sign.

Special wills may be made by soldiers, or on board vessels, or in case of epidemics.

Foreign Wills.

Dominican abroad may make holographic will or will in form which is legal in foreign locality. Wills made abroad cannot affect property in Republic until they are registered at testator's last known residence in Republic. If they contain provisions relating to real estate in Republic they must also be recorded in locality where such real estate is situated.

Testamentary Dispositions.

The testator may dispose freely of only such part of his estate as is not by law reserved to his heirs. The part of which he may so dispose is one-half if he leaves one legitimate child or descendants thereof, or both paternal and maternal ascendants; one-third if two children; one-fourth if three or more children; three-fourths if ascendants in only single line. Reserved part goes to children or ascendants. If he leaves neither descendants nor ascendants, he may dispose freely of entire estate.

13 FAMILY

13.01 ADOPTION:

(M.C. arts. 111-169).

There is only full adoption (adopción privilegiada). Full adoption gives adopted person identical status with that of natural child, creating lines of kinship between adopted person and adoptive parent's family. Consent is required from spouse of adopting party, from adopted party who is over 12 years old, from parents if adopted party is under their “patria potestad” or where parents are curators. Minors less than 18 years of age may be adopted under conditions indicated by law, by local or foreign spouses, married for at least two years; with permanent residency in country; physically, mentally, psychologically and morally fit; over 30 years and under 60 years of age. Adopting parties must be 15 years older than adopted party. Widows, widowers and single persons may adopt in certain cases. Nonresidents in country may adopt if there are no spouses with permanent residency in country interested in adopting. There are special requirements for foreign adopting parties. Consejo Nacional para la Niñez y Adolecencia (CONANI) is government agency in charge of administration of adoption. Adoption is irrevocable and extinguishes legal bonds between adopted party and natural family, must be approved by judge. Adoption may be declared invalid by court decision.

Conventions.

Convention for the Protection of Children and Cooperation in International Adoption, Hague, May 29, 1993.

13.02 ALIMONY:

See topic 13.04 Divorce.

13.03 COMMUNITY PROPERTY:

See topic 13.05 Husband and Wife.

13.04 DIVORCE:

(C. C. 227-267).

Divorce dissolving the marriage bond may be demanded in the courts of the Republic only by persons married by civil ceremony, or by Catholic ceremony prior to Aug. 6, 1954. It may be granted for: (1) Mutual consent; (2) incompatibility of character, but only after five years of marriage and provided there are no children; (3) formal declaration of absence, after an absence of four years; (4) adultery; (5) sentence for crime, except for political offenses; (6) cruel treatment or grave insults; (7) abandonment of the home for two years; (8) habitual drunkenness or immoderate use of narcotics.

The competent court is that of the domicile of the defendant if resident of the Republic, otherwise the domicile of the plaintiff. Domicile is considered to be bona fide residence in the Republic. In case address of wife is unknown, filing of divorce suit must be announced in advance in a daily newspaper. Public prosecutor must be heard in all divorce actions. Judgments of divorce must be recorded in civil registry within two months after expiration of time for appeal, otherwise they become inoperative; in case of divorce by mutual consent, judgment must be recorded within eight days after its date.

The court may assign alimony pendente lite to the wife and determines where she is to live during the proceedings. The judgment determines who is to have custody of the children, the following rules being observed: (1) Children are distributed as agreed by the parties; (2) if there be no agreement (a) children under four years remain in the custody of the mother unless the divorce was granted for causes (4), (5), (6) or (8) above mentioned (b) children over four years old go to the spouse obtaining the divorce unless the court orders otherwise. In any case both parents preserve the right to look after the maintenance and education of the children and are obliged to contribute thereto in proportion to their resources.

Divorce by mutual consent is not allowable before the expiration of two years after the marriage nor after 30 years of married life, nor when the husband is 60 years old or over and the wife 50 years old or over. Before applying to the court the parties must make an inventory of their property, agree on the custody of the children and determine where the wife is to live during the proceedings and her alimony pendente lite. The parties appear before the judge who designates a date not less than 30 nor more than 60 days later for a hearing, and gives judgment eight days after the hearing.

A divorced wife cannot marry again for ten months after the divorce unless it be the same husband. The spouse guilty of any of the causes (4) to (8) above mentioned loses all advantages derived from the other spouse through the marriage.

The dissolution or annulment of Catholic marriages is reserved to ecclesiastical courts of Catholic Church. Their judgments are registered in civil registry.

Law allows foreigners, even if not residents of country, to obtain divorce by mutual consent provided one spouse is physically present before court and other one is represented by special attorney. In this case, court, after short period of time, and previous approval of public ministry, must grant divorce. Judgment is recorded in civil registry and summary of same is published in local newspaper.

Separation, not dissolving the marriage bond, may be demanded by persons married by Catholic ceremony. It is granted for: (1) adultery; (2) sentence for crime, except for political offenses; (3) cruel treatment or grave insults; (4) abandonment of home for one year; (5) habitual drunkenness; (6) formal declaration of absence. Procedure follows that provided for divorce. Separation involves separation of property and returns to wife free disposal of her property. Children are awarded to innocent spouse or to Catholic spouse if they are not of same faith, unless judge decides otherwise taking into consideration welfare of child and its Catholic education. Spouses may by mutual consent request annulment of separation decree.

13.05 HUSBAND AND WIFE:

(Const., art. 8, §15, C. C. 203-226, 1387-1581; C. Com. 7; Law 2125 of 1949).

Spouses have the joint obligation of supporting and educating their children. The husband may choose the family residence but the wife may appeal to court if he abuses this right. The husband must support the wife, but if she has property of her own she must contribute to the household expenses. A married woman has the same civil rights as a single woman. She may freely engage in any business or profession, but the husband may object and appeal to court if the interests of the home would suffer.

Unless there is a premarital contract providing otherwise, a marital community is deemed to exist with respect to the property of the spouses. The community property comprises: (a) All personal property owned by the spouses when contracting the marriage and everything which they receive during the marriage as a gift or bequest, unless the grantor provided otherwise; (b) all income and revenue received by the spouses during the marriage; (c) all real property acquired during the marriage. The marital community is dissolved by death, divorce, separation, and separation of property by judicial decree. Husband and wife are administrators of community property and may alienate and mortgage it with other's consent and both may dispose by will only of his or her share therein.

13.06 INFANCY:

(Const. art. 8, §15, C. C. arts. 371-488, 1123-1125, 1304-1314).

The age of majority is 18. Contracts by minors are voidable. Minors are subject to parental authority of parents. Parental authority carries with it enjoyment of usufruct of minor's real and personal property, with certain exceptions, until emancipation or until minor reaches 18 years of age. Parents are legal guardians of minor, and as such have powers of custody legal representation and administration. In absence of parents guardian is appointed. Parents and guardians have limited powers of disposition.

Rights of minors are protected by Minor's Code which created National Protection System, which includes all governmental and private organizations for protection of rights of minors. It created National Council for Children and Adolescents as responsible for formulation, approval, evaluation, monitoring, coordination and follow-up of public policies regarding children and adolescents; Technical Advocacy for Boys, Girls and Adolescents; and Special Public Ministry for Boys, Girls and Adolescents. Code guarantees minor's basic rights such as nationality and name, and imposes duties to them. (Law 136-03 of Aug. 7, 2003 as am'd).

13.07 MARRIAGE:

(C. C. 63-76; Law 14 of Apr. 22, 1994 as am'd).

Marriages are of two kinds: (1) by Catholic ceremony, which are governed by rules of the Catholic Church and should be recorded in the civil registry within five days; (2) by civil ceremony. Civil marriages are performed by the officials having charge of the civil registry, or, if they are not available, by a local justice of the peace. Ministers of religion other than Catholic are forbidden to perform a marriage ceremony unless the civil ceremony has been performed.

Males below 16 years of age and females below 15 cannot marry without a dispensation from the judge of first instance. Persons below 18 require the consent of parents, grandparents or the family council.

Marriages are prohibited: (a) Between ascendants and descendants, legitimate or natural, by consanguinity or affinity; (b) between an adopter and the person adopted or the surviving spouse of the person adopted; (c) between persons convicted as authors or accomplices of the death of the spouse of either; (d) between legitimate or natural brothers and sisters; (e) when either party is demented; (f) between persons already married by a still subsisting civil or Catholic marriage.

A marriage performed in a foreign country between Dominicans, or between a Dominican and an alien, is valid if performed in accordance with the law of that country, if the provisions of the Dominican law have not been violated.

13.08 MARRIED WOMEN:

See topics 13.05 Husband and Wife, 13.07 Marriage.

14 FOREIGN TRADE AND COMMERCE

14.01 EXCHANGE CONTROL:

(Monetary and Finance Law 183-02 of Nov. 21, 2002).

There is no control of foreign exchange. Foreign exchange market free of government intervention and regulations. There is free possession, redemption and transfer abroad of foreign currency. Prevailing exchange rate shall be determined by supply and demand. Central Bank frequently publishes exchange rate for legal and accounting purposes. Exporters may keep foreign exchange proceeds. No export license is required. Monetary Board may temporarily restrict entry of short term capitals to country. Transaction may be agreed in local or foreign currency, debts shall be paid in currency agreed in parties.

See also topic 14.03 Foreign Investment; category 22 Taxation, topic Taxes.

14.02 FOREIGN EXCHANGE:

See topic 14.01 Exchange Control.

14.03 FOREIGN INVESTMENT:

(Law 16-95 of Dec. 8, 1995 as am'd regulated by Decree 380-96 of Aug. 28, 1996 as am'd).

Foreign investors have same rights and duties as national investors, except as expressly indicated in this law and in special laws.

Direct foreign investment is authorized in all economic activities, except: Public health, environment, disposal of toxic waste of foreign origin; and national security and defense which require prior authorization of competent authority.

Foreign investment is defined as foreign source contribution made by individuals or juridical persons. Direct foreign investment may be effected in form of freely convertible foreign currency, assets, capitalization of profits, investment of profits entitled to repatriation, equity contributions of intangibles or in intangible technological contributions, such as marks, industrial models, technical assistance. Direct foreign investment is authorized for establishment of new companies and to participate in existing companies; acquisitions of real estate and financial assets, subject to special rules.

In general, no prior authorization is required for foreign investment. However, foreign investment must register with Centro de Exportación e Inversión de la República Dominicana (CEI-RD) in order to get Certificate of Registration of Foreign Investment. Such registration allows investors to repatriate capital and profits abroad. See also topic 14.01 Exchange Control; category 22 Taxation, topic Taxes. Dominican Republic is member of Multilateral Investment Guarantee Agreement (MIGA).

14.04 FOREIGN TRADE REGULATIONS:

See topic 14.01 Exchange Control.

15 HEALTH

15.01 HEALTH REGULATIONS:

General Health Law 42-01 of Mar. 8, 2001 as amended. All matters related to promotion of health, preventive medicine, protection and rehabilitation are regulated by Law. Law regulates Sistema Nacional de Servicios de Salud, rights and duties related to public health; environmental health, construction and operation of industrial establishments, disease control, international sanitary protection, sanitation and safety of work place, practice of health related professions, health institutions, pharmacies, clinic laboratories, controlled drugs, cosmetics and food products, medical equipment and pharmaceutical products, cemeteries, burial and exhumation and sanctions for infringement of Law. Secretaría del Estado de Salud Pública y Asistencia Social is in charge of regulating, planning and coordinating public and private activities related to health. Decree 249-06 of June 19, 2006 regulates health information system. Registration, control, import and advertising of drugs and narcotics are regulated by Law 50-88 of May 30, 1988, as amended. Law 329-98 of Aug. 11, 1998 regulates donations and transplants of organs; removal of organs and body parts, from dead and living persons, death certification, import and export of organs. Decree 246-06 of June 9, 2006 as amended regulates preparation, quality control, supply, distribution, commercialization, information, publicity, import, storage, prescription, registration and donation of medicines.

16 IMMIGRATION

16.01 ALIENS:

An alien has the same civil rights as are granted to Dominicans by the treaties of the country to which he owes allegiance. After obtaining the government's permission to establish his residence in the Republic and during such residence he enjoys all civil rights. Except in mercantile matters a transient alien plaintiff must give bond for costs and damages, unless he possesses sufficient real property in the Republic. (C. C. 11-16).

Decree 3768 of June 7, 1969 requires prior authorization from executive power for aliens to acquire real property for purpose of constructing family housing, conducting commercial or industrial activities, developing urban areas or constructing buildings to promote tourist industry.

In any business at least 80% of employees must be Dominicans and at least 80% of payroll must go to Dominicans. Executive and managerial positions must preferably be filled by Dominicans. (Labor Code).

Law 171-07 of July 19, 2007 grants tax exemptions to foreign or national individuals retired or with own income from foreign sources. In order to enjoy special tax treatment they must have minimum income and comply with requirements established by law.

16.02 RIGHTS AND OBLIGATIONS:

Law regulates admission, entrance, stay, registry, control and information of exit and re-entrance of alien to country and their rights and duties. Aliens may enter country as residents and nonresidents; residents may be permanent residents or temporary residents. Nonresidents may enter country and stay there up to one year, renewable for another year. Temporary residents may enter country for purpose of performing temporary authorized activity and stay until done. Permanent residents are those who enter country with intention to stay there and are duly authorized to do so. Children of nonresidents born in country are not considered of Dominican nationality. Fines equal to 35 minimum salaries are imposed to employers that hire foreign employees without authorization to work; employer also bears cost of deportation. Imprisonment and administrative sanctions are imposed for facilitation of illegal entrance and exit to country. To apply for resident status, application must be filed before immigration authorities if applicant is in country or before diplomatic or consular agent if he is out of country. (Law 285-04 of Aug. 15, 2004).

See also category 12 Estates and Trusts, topic 12.04 Descent and Distribution.

17 INTELLECTUAL PROPERTY

17.01 COPYRIGHT:

(Const. art. 8, §14, Law 65-00 of Aug. 21, 2000 as am'd regulated by Decree 362-01 of Mar. 14, 2001).

Law protects rights of authors with respect to all intellectual work of creative nature, whether literary, scientific or artistic in character, whatever their kind, form of expression, merit or destination, including literary works, musical compositions, paintings, sculptures, photographs, computer programs and audiovisual works and phonograms. Copyright in works produced in collaboration belong to co-authors in common. Unless agreed otherwise, copyright in works produced for individual or juridical person under service contract belong to such individual or juridical person. Author or co-authors are entitled to their agreed fee only. Translations, adaptations, transformations, or arrangements of other works with authorization of author of original work, constitute personal creations and are deemed to be intellectual works distinct from original works. Law also protects performers and entertainers. Author of intellectual work, by sole fact of its creation, possesses right with respect to work which includes moral and property rights protected by law without need of deposit, registry or other formality. Moral rights are unassignable and unlimited in time, they include right to make work known publicly, to use name or pen name, to assert paternity of work or keep it in anonymity, to oppose plagiarism, defamation or mutilation. Property rights entitle author to enjoyment of pecuniary benefits from use of his works. They include rights of reproduction, translation, adaptation or modification, performance and broadcasting, sale and any other manner, known or unknown, for disposition, utilization or exploitation thereof. Property rights are assignable and transferable upon death.

As general rule, property rights are protected under Law during life of author plus 70 years after his death or death of last surviving co-author, if there are no heirs, patrimonial rights belong to State until 70 years period expires, at which time, work becomes of public domain. However, nonresident foreign authors are protected for above period of time or for period of time afforded by country where work has been first published or protected, whichever is shorter. Audiovisual works are protected 70 years from first publication or presentation; photographs are covered for 70 years from first publication or public exhibition; collective works and computer programs are protected for 70 years from publication, if works are not published within 50 years from creation, works are protected for 70 years from creation; anonymously works are protected for 70 years from first publication, if works are not published within 50 years from creation, works are protected for 70 years from creation, unless author is revealed, where general rule applies. Phonograms are protected for 70 years from Jan. 1 of following year of publication, if work is not published within 50 years from creation, work is protected for 70 years from creation. Radio broadcasting is protected for 70 years from Jan. 1 of following year of transmission. State may decree, by reason of public utility or social interest, that work becomes of public domain at any time prior to expiration of above periods. In these instances author is entitled to fair compensation. Law applies only to nationals and to persons domiciled in countries which are parties of copyright conventions and treaties where Dominican Republic is party. Law also contains detailed provisions regarding transfer of rights, reproduction of works, publishing contracts, representation contracts and author's associations. Violation of author rights constitutes felony punished by prison and fines. All acts related to copyrights must be registered at National Registry of Copyright.

Conventions.

Inter-American Convention on rights of author in literary, scientific and artistic works (Washington, 1946), Berne Convention for the Protection of Literary and Artistic Works revised in Paris on July 24, 1971 as am'd.

17.02 PATENTS:

(Const. art. 8, §14, Law 20-00 of May 8, 2000 as am'd regulated by Decree 599-01 of June 1, 2001 as am'd).

Invention.

Law defines invention as any idea, creation of human mind, invention susceptible of industrial application. Invention is novel when it is not within state of art. Law does not consider inventions among others, discoveries, scientific theories, mathematics programs, economic plans, principles and methods used in business, games and mental exercises, computer program, surgical, therapeutic or diagnostic treatment methods. Plants and animals, biological process for production of plants or animals, among others, are not patentable. Patents are granted for 20 years from filing date. Term may be extended at applicant's request for period up to three years for unjustified delay of more than three or five years in patent prosecution due to Register's fault; for pharmaceutical products when authorization to commercialize product is granted after two years and six months from request filing date. Patents may be divided, maintaining original patent date. Patent gives exclusive right of exploitation but compulsory license may be granted in case of declared emergency or national security reasons, unfair competition practices and when patent has not been exploited during first three years from granting date or four years from application date. Patent rights are transferable. Classification of patents is according to Strasbourg Agreement Concerning the International Patent Classification, 1979.

Utility Models and Industrial Designs.

Utility models are new forms of objects, tools, instruments or mechanisms, that are registrable if they have practical use. Registration term is 15 years from filing date. Any new design or new model which may be applied to industrial object may be registered as ownership of author. Industrial designs are registrable if no commercialization, use or publicity thereof has been made in any form before application filing date, except as indicated by law. Registration term is five years from filing date, renewable for two additional terms. Provisions regarding patents are applicable to utility models and industrial designs. Classification of industrial designs is according to Locarno Agreement Establishing an International Classification for Industrial Designs, 1968 as am'd.

Vegetal Species.

(Law 450-06 of Dec. 6, 2006). Vegetal species are protected when they are novel, distinguishable, homogeneous and stable. When registered, certificate of holder is issued for 20 and 25 years, depending on type of vegetal variety. Annual fee must be paid in order to keep protection in force. Rights are transferable. Certificate gives holder exclusive rights of exploitation, but compulsory license may be granted in case of public interest. Fines and imprisonment are imposed for infringement of rights.

Conventions.

Convention for the Protection of Industrial Property, Paris, Mar. 21, 1883, Convention for the Protection of New Varieties of Plants, Paris, Dec. 2, 1961, as amended; Stockholm Revision of July 14, 1967 as amended on Sept. 28, 1979; Patent Cooperation Treaty, Washington, June 19, 1970, as amended; Budapest Treaty on the International Recognition of the Deposit of Microorganisms for the Purposes of Patent Procedure, Budapest, Apr. 28, 1977, as amended. Agreement on Trade-Related Aspects of Intellectual Property Rights, Marrakech, Apr. 15, 1994.

17.03 TRADEMARKS AND TRADENAMES:

(Law 20-00 of May 8, 2000 as am'd regulated by Decree 599-01 of June 1, 2001 as am'd).

Trademarks.

Mark is any sign used to distinguish products or services produced or commercialized by one person from same or similar products or services produced or commercialized by another person. Words, names, denominations, slogans, letters, numbers, monograms, labels, pictures, trimmings, combinations of colors, shapes and wrapping of goods, sounds and odors, among others, may be registered as marks. Among others, no registration may be granted to marks, denominations, signs and emblems of State or its agencies, or international organizations; to usual or necessary shapes of products or denomination and color thereof; common words or their equivalent in common languages or descriptive denominations; marks which may be confused with others registered or pending registration; geographical names if their use may suggest origin; marks contrary to law, those against public policy, denomination of protected vegetal varieties, those identical or similar to registered commercial names provided under circumstances in which public may be confused; those that are reproduction, imitation, translation or total or partial transcription of distinctive signs, locally well known, without taking into consideration classification of goods or services concerned; or because similarity to well known trademarks causes confusion to public independent of classification of goods and services for which registration is applied for. Registration of trademark grants ownership thereof and exclusive right to use it during ten years from granting date, renewable, if applied for within last six months; grace period of six months is granted by payment of surcharge, proof of use of trademark must be filed with renewal application. Registrations may be divided, maintaining original registration date. Owner of trademark may grant license to use or exploit it. Licenses must be registered. Trademarks can be cancelled: for nonuse for consecutive three years, unless nonuse is due to just cause. Class of goods and services is according to Nice Agreement Concerning the International Classification of Goods and Services for the Purposes of the Registration of Marks, 1957 as reviewed and amended.

Collective Marks, Certification Marks and Origin Denominations.

Provisions regarding trademarks are applicable to collective names. Private or public enterprises, governmental bodies or international organizations may register certification marks. Registration is granted for ten years. They cannot be encumbered or subject to attachment. Any sign that distinguishes origin or any other common characteristic of products or services of different enterprises may be registered for indefinite period of time as origin denomination, as regulated by law.

Commercial Names and Slogans.

Those signs used to identify individuals or juridical persons regarding their economic activity are protected by law without requiring registration. Registration is granted for ten year period, renewable. Slogans are words, sentences or captions used as supplement to trademark. Any person or corporation may apply for registration of slogans employed or to be employed in relation with economic activities. They must be distinctive. Slogans are registered for ten year period, renewable as long as trademark used in conjunction therewith remains valid. Provisions regarding trademarks are applicable to commercial names and slogans.

Unfair Competition and Trade Secrets.

Law prohibits unfair competition related to industrial property and penalizes violators. Law protects trade secrets and considers them as any confidential information with commercial value, including information required by law in order to grant permits for commercialization of new pharmaceutical products and chemical products used in agriculture, as stipulated by law.

Conventions.

Convention for the Protection of Industrial Property, Paris, Mar. 21, 1883, Stockholm Revision of July 14, 1967 as amended on Sept. 28, 1979, Agreement on Trade-Related Aspects of Intellectual Property Rights, Marrakesh, Apr. 15, 1994.

See also Part V of this volume.

18 LEGAL PROFESSION

18.01 ATTORNEYS AND COUNSELORS:

(Law 821 of Nov. 21, 1927 as am'd).

To practice as attorney-at-law, one must be of Dominican nationality, of full age, holder of law degree from local university, have no criminal record, have exequatur (permission) of Executive Power to practice law, be sworn before Supreme Court of Justice and be registered with Court of First Instance. Supreme Court of Justice, Courts of Appeals and Court of First Instance have disciplinary power and may suspend attorneys from practicing law.

19 MINERAL, WATER AND FISHING RIGHTS

19.01 MINES AND MINERALS:

(Const. art. 103, Law 146 of May 12, 1971 as am'd and its Regulations 207-98 of June 3, 1998).

State is owner of all mineral and fossil substances. Private persons may own land surface and may obtain concessions to work substances in accordance with mining laws.

Mining Law applies to all natural mineral substances except mineral water, hydrocarbons, gravel and sand, and radioactive minerals, mining matters are under jurisdiction of General Department of Mining.

Exploration.

Surface surveys may freely be made throughout the Republic except in areas covered by exploration permits or mining concessions. Permission must first be obtained from private property owners to explore their land. If such permission is denied, appeal may be made to General Director of Mining. Mining claims may be filed with General Department of Mining as a result of discoveries made during these surveys. Three year permits, renewable for up to two additional years, may also be obtained for more extensive exploration in specific areas from State Secretariat of Industry and Commerce. Holder of exploration permit has exclusive option of obtaining exploitation permits within area covered by exploration permit. No one person or entity may obtain permits covering areas totalling more than 30,000 mining hectares. One mining hectare is defined as area 100 meters square and of unlimited depth. If no work has been accomplished in area within three months after permit is issued, State Secretariat may declare permit forfeited. Other causes of forfeiture include suspension of work for periods in excess of six months.

Mining concessions may be obtained from State Secretariat of Industry and Commerce, with favorable report from General Department of Mining, by any foreign or domestic persons or entities, but foreign governments may not own any concessions or hold rights therein. Foreign companies who desire to obtain exploitation or treatment concessions must incorporate locally. Local registration is sufficient to obtain exploitation permits. Concessionaires shall have right to exploit, process and dispose of all mineral substances extracted from within perimeter of its concession for period of 75 years. One person or entity may not hold concessions covering more than total of 20,000 mining hectares.

It is not necessary to hold exploitation concession to obtain treatment concession and build a processing plant for mineral substances if such substances are to be acquired from third parties, but in such case prior authorization must be obtained from above-mentioned department.

Exploitation and treatment concessionaires may obtain expropriation of such land as is required for mining purposes. Easements for easier extraction of minerals may also be obtained. They may also construct such facilities as may be necessary for transportation, pumping, power and other related purposes. Exploitation and processing plant concessionaires must begin operations within one year of grant of concession. Failure to do so may result in loss of concession, as may suspension of work for periods in excess of two years.

Concessions and other mining rights may be transferred (see suspension of certain transfers, under subhead Exploration, supra), pledged or otherwise encumbered to third parties who could have been granted concession initially. Such transferences must be registered in Public Registry of Mining Rights in order to be effective against third parties.

General Department of Mining maintains a public registry of corporate charters of concessionaires, permits and concessions, transfers or leases thereof, easement contracts and expropriation proceedings resulting from mining activities. Residues from exploitations and treatment shall be deposited in proper places and liquid and gaseous discharges shall be free of contaminating substances which may endanger animal or vegetable life. Concessionaires may be liable for damages caused by pollution.

Exploitation and exploration concessionaires must pay annual license fees per mining hectare, depending on total area held by concessionaire.

Failure to comply with Mining Law 146 may result in fines and confiscation of all installations and extracted minerals.

Mining companies are subject to income tax law.

Sand, gravel and rock concessions are governed by special regulations. (Law 123 of Mar. 2, 1971).

Petroleum.

Under Petroleum Law 4532 of 1956 as am'd by Law 4833 of 1957, deposits of petroleum, asphalt, naphtha and other hydrocarbons may be explored, exploited and beneficiated only under contracts with Executive subject to such conditions as may be approved. Exploitation rights are granted for unlimited time and on such area as may be agreed upon. Such contracts are submitted to Congress and after approval may not be modified without consent of both parties. They may be granted only to Dominican individuals or companies, or to foreign individuals or companies submitting themselves to Dominican laws. Foreign governments may not have any participation in petroleum concessions nor hold shares of companies owning such concessions. Concessionaires are entitled to such tax exemptions as may be specified in their contracts. If not prohibited by contract, they may assign it to others and encumber it for financial purposes. Government must be notified of transfers or encumbrances before contracts are definitely made. Concessions may be cancelled for violations of law or concession, cancellation likewise affecting transfers and encumbrances.

20 MORTGAGES

20.01 CHATTEL MORTGAGES:

Chattel mortgages may be given and must be registered under the name of pledges without delivery or “universal pledges,” described under category Debtor and Creditor, topic Pledges.

20.02 COLLATERAL SECURITY:

See category 7 Debtor and Creditor, topic 7.12 Pledges.

20.03 MORTGAGES:

(C. C. 1244, 2114-2203).

Mortgages are of three kinds: (1) By act of law, such as those of minors on the property of their guardians and those of the state on the property of officials administering its revenues; (2) judicial, resulting from court judgments; (3) conventional, established by agreement of parties. They can be imposed only on real property and its accessories and usufruct.

Conventional mortgages must be constituted before two notaries or before one notary and two witnesses. They cannot be constituted by an instrument executed abroad unless so provided by treaty or special law. The property must be described and the amount of the mortgage must be specified. Mortgages have preferences as against other creditors only from the date of their record except as to certain mortgages by act of law, but in these cases the mortgage debtor is obliged to record the mortgage at once and is subject to criminal liability if he imposes another lien without announcing the existence of the mortgage. The courts may in their discretion grant the debtor additional time for the payment of the debt. Mortgage records are effective indefinitely; other mortgage records are effective for ten years and may be renewed. Mortgages are foreclosed according to the procedure provided for executions levied on real property. See category 7 Debtor and Creditor, topic 7.05 Executions.

21 PROPERTY

21.01 ADVERSE POSSESSION:

See category 5 Civil Actions and Procedure, topic 5.04 Prescription.

21.02 DEEDS:

Conveyance of real property in order to be recorded at Real Estate Registry may be in public instrument or private document which must contain true statement of consideration, since tax on transfers of title is based on real consideration. In public instrument both grantor and grantee must sign and be present before notary at same time in person or by attorney-in-fact. Notary retains original document and delivers to interested parties certified copy which has effect of original in courts of law. Private document very simple form, which must be acknowledged before notary or judge and recorded. Transfer tax and recording fees are reasonable. (Law 108-05 of Mar. 23, 2005 as am'd). See also category 9 Documents and Records, topic 9.02 Notaries Public.

21.03 DOWER:

No dower right. See category 12 Estates and Trusts, topic 12.04 Descent and Distribution, also Family, topic Husband and Wife.

21.04 POWERS OF ATTORNEY:

A power of attorney may be given by notarial document or by private writing and may be oral in matters of 30 pesos or less. A general power of attorney grants only powers of administration. Power to alienate, mortgage, or perform other acts of ownership must be specifically conferred. An agent appointing a substitute is liable for the acts of the latter if he was not empowered to appoint the substitute or if the substitute was notoriously incompetent. An agency terminates by (a) revocation, (b) resignation of the agent or (c) death, incompetency or insolvency of principal or agent. The appointment of a new agent for the same matter implies a revocation as to the previous agent from the time the latter was notified thereof. Commission merchants have a lien for their expenses on the merchandise consigned to them. (C. C. 1984-2010; C. Com. 94, 95).

22 TAXATION

22.01 ADMINISTRATION:

(Tax Code, Law 11-92 of May 15, 1992 as am'd and regulations 139-98 and 140-98 of Apr. 13, 1998 as am'd, 79-03 of Feb. 4, 2003).

Tax Code includes general provisions, proceedings and sanctions; tax on payments; income tax; tax on transfer of manufactured products and services; and consumers tax.

22.02 BUSINESS TAXES:

Tax on Payments.

Tax is levied on electronic and checks payments at (1.5 per thousand) 0.15% rate.

22.03 CUSTOMS TAXES:

Customs duties are paid on basis of CIF value of goods in local currency at 0.3%, 8%, 14% and 20% rates; among exempted goods are personal computers and samples. (Law 14-93 of Aug. 26, 1993 as am'd).

22.04 EXCISE TAXES:

Tax on Transfer of Manufactured Products and Services.

Tax is levied on transfer and importation of manufactured products, lease of personal property and services. Among exempted products are animals, foodstuffs, books, newspapers, medicines, petroleum, fertilizers, insecticides; and among services exempted are ground transportation, electricity and water supply, health. Taxed services are telecommunications, lodging, restaurant, night clubs, leasing, among others. Rate is 16%.

Consumer Tax.

Tax is levied on transfer of some locally produced goods at manufacturer's level, and import of some goods, and services. Transfers made for consideration, or disposal of merchandise by owners for any purpose are taxed. Exempted are products for personal use, samples, temporary imports. Imported wines, tobacco, toiletries, rugs, carpets, precious stones, jewelry, domestic appliances, motor vehicles among others are taxed at rates ranging from 10% to 130%. Services are taxed: national and international telecommunications at 10%.

22.05 FREE ZONES:

(Law 8-90 of Jan. 15, 1990 as am'd regulated by Decree 366-97 of Aug. 29, 1997 as am'd). National or foreign individual or legal entity may establish and manage free zones, and operate in free zones by special authorization. Free zones are created for manufacture of goods and services for export. All types of industries, trading centers and services are allowed to operate there, with few exceptions. They are exempted from income tax, import and export taxes and duties, consumers tax and tax on transfer of manufactured products and services, for 20 years when located in border area and for 15 years when located in any other part of country. Companies are allowed to sell in domestic market up to 20% of their production, and unlimited amount of goods if they contain at least 25% of local inputs, subject to payment of import duties. They are also allowed to buy from local suppliers raw materials and semi-elaborated goods and services, exempted from import duties, with some exceptions. Law has special provisions for termination of operations in free zones. Infringement of law can carry cancelation of authorization to operate or to export, or imposition of fine.

Law 84-99 of July 20, 1999 as amended regulated by Decree 213-00 of May 22, 2000 and Decree 1108 of Nov. 1, 2001 establishes tax incentives for export of products and also regulate temporary duty-free import. To enjoy benefits granted by this law, exporters must obtain

Exporter Registration from Centro de Exportación e Inversión de la República Dominicana (CEI-RD).

Law 532 of Dec. 12, 1969 as am'd, was enacted to promote investment in agriculture and ranching. Tax exemption is given for importing agricultural and fishing machinery and equipment, fencing wire, automatic milking machines and similar equipment, for imports of cattle, fertile eggs, veterinary medicines and concentrated feed products. Regulations provide for extension of roads, electrical networks, new schools, insurance and availability of financing from government. Such financing is not obtainable by aliens or foreign corporations.

Industrial Mining Free Zones.

(Decree 47-01 of Sept. 19, 2001). Companies engaged in exploitation and transformation of some minerals may establish in these zones and operate and enjoy all benefits granted under Law 8-90.

22.06 GAMBLING AND ENTERTAINMENT TAXES:

Tourism.

Organic Law of Tourism is contained in Law 541 of Dec. 31, 1969. Its purposes are to promote foreign and national tourism within Republic. Foreign tourist agencies must obtain authorization from Department of National Tourism (“Dirección Nacional de Turismo”) to maintain offices or engage in activities within country. Jurisdiction of Department comprises hotels, restaurants, tourist guides, chauffeurs, souvenir stores and entertainment enterprises.

Law 542 of Dec. 31, 1969, created Hotel and Tourist Incentive Corporation (“Corporación de Fomento de la Industria Hotelera y Desarrollo del Turismo”). Its purposes are to promote acquisition, construction and conservation of hotel and tourist services. Loans are obtainable from Corporation to finance projects if specified prerequisites are complied with. Maximum period of 20 years for repayment is exacted, except for unusual circumstances. Loan itself may not exceed 40% of value of property pledged as collateral.

Law 158-01 of Oct. 9, 2001 as amended regulated by Decrees 1125-01 of Nov. 20, 2001 as amended and 74-02 of Jan. 29, 2002 on Promotion of Tourism Development grants incentives to tourist activity in certain areas not fully developed.

See also category 19 Mineral, Water and Fishing Rights, topic 19.01 Mines and Minerals.

22.07 GIFT TAX:

See topic 22.08 Inheritance and Gift Taxes.

22.08 INHERITANCE AND GIFT TAXES:

Inheritance tax rate is 3% of estate's net value. Gift rate is 25% of gift's value. If beneficiary resides abroad tax is paid with 50% surcharge. (Law 2569 of Dec. 4, 1950, as am'd). Archives, libraries and certain book collections owned by private individuals, when dedicated to promotion of culture on non-lucrative basis, are exempt from this tax. (Law 473 of Nov. 2, 1964).

22.09 INHERITANCE TAX:

See topic 22.08 Inheritance and Gift Taxes.

22.10 INCOME TAX:

Subject to tax are: individuals, juridical persons resident or domiciled in Dominican Republic, and undivided estates of decedents whose last domicile was in Dominican Republic, all income from local sources and foreign income from investment and financial profits. Nonresidents or non-domiciled individuals and juridical persons are taxed on income from Dominican Republic sources. Law distinguishes among income from local sources: income from capital investment property or rights, situated or economically used in country; from commercial, industrial, mining, and similar activities; from personal services; from exploitation of industrial property or know-how; from technical assistance; from lease; from loans; income from export and import as determined by law.

Presumed Income.

In case of foreign transportation companies operating in country to other countries presumed income is 10% of gross amount of fares and freight; for insurance companies domiciled or not, presumed income is 10% of gross premium received; producer, for distributors or agents of foreign films presumed income is 15% of price paid; for communication companies, presumed income is 15% of gross income; forestry, agricultural and cattle activities, presumed income is 10% of real estate value as determined by law.

Exempt Income.

Among income exempted from tax is: income received by State and its subdivisions, by chambers of commerce and production, by religious and charitable institutions, by sport associations; salaries under certain amount, workers compensation, severance, unemployment, life insurance proceeds, alimony, inheritance and donations; stock dividends paid by corporation; amounts received by companies for increases of capital; interest received by individuals from financial institutions established in country.

Gross Income includes: salaries, fees, commissions, prizes, gains from transfer of goods, pensions, interests, rents, royalties.

Among deductions permitted: expenses necessary to produce income, interest, taxes and fees, risk insurance premiums, casualty losses due to Acts of God or force majeure, bad debts; donations to charity institutions, funds for research, losses; contributions to pension and retirement plans; depreciation calculated according to law.

No deduction is allowed for personal expenses of owner, partner or manager, profits used to increase capital, income tax, fines and interest paid for noncompliance with tax laws, losses caused by illegal activities; general expenses unless of trustworthy documents or vouchers; payment of profits or salary or any remuneration or compensation to owner, partner, shareholder or to his spouse or relative in excess of normal payments for services rendered, and without effective proof of performance of duty.

Capital gains from transfer of personal property as well as gains derived from transfer of real property are subject to tax as provided by law.

Rates.

Individuals are taxed at rates of 15%, 20% and 25%. Juridical persons and undivided estates are taxed at 25% rate. Permanent establishment of foreign companies are taxed at 25%. Individuals and juridical persons must pay tax in advance in 12 monthly payments calculated according to law.

Withholding Tax.

Payments to nonresident or non-domiciled persons are subject to withholding tax of 25% with certain exceptions, including interest at 10%. Payments to resident individuals and undivided estates are subject to withholding tax of 10% for rents, 10% for fees for personal service; 15% for prizes; 5% for payments made by government and its agencies in contracts for purchase of goods or rendering of services other than salaries; 10% for any other payments except dividends. Payments of dividends to individuals or juridical persons, residents or not, domiciled or not are subject to withholding tax of 27%.

Advance Payments.

Employers shall pay every month taxes retained from previous month from employees and independent contractors. Corporations and sole business owners whose annual income is over certain amount must make monthly advance payments calculated according to formula. Individuals and undivided estates shall make payments as specified by law.

Tax Credits.

Taxpayers may deduct on their returns income tax paid abroad, withholdings, advance payments of tax. Employers are taxed at 25% on value of additional compensation paid to employees, such as education, life and health insurance premiums, rent, car, salaries of domestic personnel, discounts.

Tax on Assets.

Individuals and juridical persons subject to income tax are also subject to tax on net assets at rate of 1%, according to law.

22.11 PROPERTY TAXES:

Real Estate Transfer Tax (Law 288-04 of Sept. 28, 2004 as am'd).—All transfers, including conditional sales and expropriations, of real estate are subjected to 3% on value of transaction.

Tax on Real Estate, Luxury Houses and Urban Vacant Lots.

(Law 18 of Feb. 5, 1988 as am'd and regulations of Oct. 6, 1993). Tax is levied on luxury houses and real estate used by individuals for commercial activities and worth over DR$5,000,000 and all urban vacant lots. Tax rate is 1%, except for luxury houses occupied by owners over 65 years of age having occupied dwelling for more than 15 years and is owner's only property.

22.12 STAMP TAX:

(Law 2254 of Feb. 14, 1950 as am'd). Most contracts and transactions are subject to this tax. Amounts depend on nature of documents and sum involved, general rate for most contracts is 0.2% of contracted value, but special rates apply to numerous other documents.

22.13 TAX INCENTIVES:

Law 28-01 of Feb. 1, 2001 regulated by Decree 539-05 of Sept. 28, 2005 grants tax incentives to any type of companies to be established or operating in frontier line. Exemption for 20 years of internal taxes, custom duties and any other tax on raw materials, equipment and machinery; 50% off any other tax or fee in force and 50% off airport taxes. Consejo de Coordinación de la Zona Especial de Desarrollo Fronterizo is in charge of enforcement of law.

Law 57-07 of May 7, 2007 grants tax incentives to any project on renewable energy resources.

23 TRANSPORTATION

23.01 AIRCRAFT:

Law 491-06 of Dec. 22, 2006 regulates civil aviation, including airports, registration of aircraft; transfer, lease contracts, mortgage and encumbrance of aircrafts, training schools, national and international commercial aviation, airmen, air transportation contract, liability for injuries to individuals and damage to property, search, rescue and accidents investigation, permits, infringement and penalties. National aircraft must be registered and owners thereof must be domiciled in country.

Dominican Republic is party to Convention for Unification of Certain Rules relating to International Carriage by Air signed at Warsaw on Oct. 12, 1929; Convention on Commercial Aviation signed at Havana, Feb. 15, 1938 and Conventions on International Aviation signed at Chicago, Dec. 7, 1944.

23.02 MOTOR VEHICLES:

Law 241 of Dec. 28, 1967 as am'd, which contains complete regulations governing motor vehicles and public ways, revokes all previous laws except Law 16 of Oct. 16, 1963 and Law 502 of Nov. 24, 1964.

Director of Internal Income must keep a registry of all motor vehicles authorized to use public ways, and in which detailed information on vehicles and owners thereof is to be filed.

Minors between 16 and 18 years of age are permitted to operate motor vehicles in special circumstances: if they are emancipated by marriage or if their parents present affidavit in which they accept responsibility for fines said minors may incur and for damages which they may cause.

In case of traffic accidents, code provides for fines or imprisonment or both depending upon seriousness of injuries inflicted upon persons involved.

License plates are required for all motor vehicles, and drivers must obtain license which must be renewed annually.

Tourist may, upon filing an application, bring his motor car into country free of custom duties for maximum period of 90 days provided said vehicle will be used solely for personal and not commercial purposes. After 90 day period has elapsed, owner must pay custom duties required to import motor vehicles into country.

23.03 SHIPPING:

National vessels are: Those matriculated as such in port captaincies and those seized in war or by court action. Dominican vessels navigating between foreign ports must visit Dominican port at least every six months. Dominican persons or companies owning Dominican vessels may sell them or change flag on payment of 1% of their value. They may purchase foreign vessels abroad and obtain certificate from Dominican consul authorizing vessel to proceed to Dominican port and be examined and registered. Nationals and foreigners, in order to serve in merchant marine, must be registered in port captaincy. (Coast Guard Law No. 3003 of July 12, 1951). Maritime contracts and liens, rights and duties of captains and crews and other admiralty matters are regulated in Code of Commerce (arts. 190-436), provisions of which are similar to those of French law. Republic has adopted international conventions relating to Maritime Collisions and Assistance, approved in London in 1948 and in Brussels in 1910 and 1921.

24 TREATIES AND CONVENTIONS

24.01 TREATIES:

Dominican Republic is a party, among others, to following:

Multilateral.

Convention on private international law, Havana, 1928 (Bustamante Code); Inter-American Convention of Conflict of Laws concerning bills of exchange. Signed in Panama on Jan. 30, 1975; Inter-American Convention on legal regime of powers of attorney to be used abroad. Signed in Panama on Jan. 30, 1975; Inter-American Convention on the Taking of Evidence Abroad. Signed in Panama on Jan. 30, 1975; Multilateral Trade Negotiations, The Uruguay Round, Final Act, Marrakech, Apr. 15, 1994 and Agreement Establishing the World Trade Organization, Marrakech, Apr. 15, 1995.

Bilateral.

With U.S.A.: Agreement of May 2, 1962, on investment guaranties (13 UST 440, TIAS 5005). United States of America-Dominican Republic-Central America Free Trade Agreement. Signed Aug. 5, 2004, Washington, D.C. See also category 17 Intellectual Property, topics 17.01 Copyright, 17.02 Patents, 17.03 Trademarks and Tradenames. With Canada: Convention of Aug. 6, 1976 for avoidance of double taxation and prevention of fiscal evasion with respect to taxes on income and on capital. United States of America-Dominican Republic-Central America Free Trade Agreement. Signed Aug. 5, 2004, Washington, D.C.

See also Part V of this volume.

1
ECUADOR LAW DIGEST

—Scope —

Revised for 2008 edition by

CURTIS, MALLET-PREVOST, COLT & MOSLE LLP, of New York.

(Abbreviations used are: C. C., Civil Code; C. C. A., Code of Childhood and Adolescence; C. Com., Code of Commerce; C. C. P., Code of Civil Procedure; L. C., Labor Code. Numbers refer to articles of these codes.)

Note: This revision incorporates legislation through Dec. 10, 2007.

1 INTRODUCTION

1.01 CURRENCY:

Monetary unit is the U.S. dollar, divided in 100 cents. Obligations in foreign money payable in Ecuador are paid in U.S. dollars. (Law on Monetary Regime and Bank of State, Codification 2005-022 of Dec. 13, 2005 as am'd).

1.02 GOVERNMENT AND LEGAL SYSTEM:

(Constitution of June 5, 1998 as am'd). Republic of Ecuador is social State of law, is unitary, sovereign, independent, and democratic; its government is republican, representative, elective, responsible and alternating. Official language is Spanish. Native languages are official languages of native people. Capital of Republic is city of Quito.

Legislative function is exercised by National Congress which is composed of representatives elected by national balloting. National Congress appoints four legislative committees, each one of them having five representatives. Members of National Congress hold office for four years and can be reelected.

Executive power is exercised by President of Republic who represents all States, shall hold office for four years. President is elected by absolute majority of suffrage in direct, universal and secret balloting. Constitution grants special powers and duties to President, among others, to execute and enforce Constitution, laws, decrees and international agreements; to authorize, promulgate or veto laws passed by National Congress; to maintain internal order; to appoint and freely remove ministers of state, governors of provinces and other administrative officials; to contract and authorize loans; to be chief of police forces; to declare state of emergency and then exercise extraordinary powers.

Constitution also contains special sections regarding Vice President, Ministers of State and judicial functions.

Civil Rights.

Foreigners have same rights as nationals with limitations established by law and Constitution, but they do not have political rights. Government guarantees its inhabitants following rights, among others: Inviolability of life; personal integrity and right to its total development; right to express thought and opinions freely, provided civil and criminal responsibility are shown. Capital punishment is not allowed, also forbidden is any discrimination for reasons of race, color of skin, language, religion or political opinions; there is equal protection before law, inviolability of home and correspondence, freedom of labor, commerce and industry and freedom to meet and associate together for pacific purposes; freedom to travel in territory of Republic, to change domicile, to leave and return to country; right to keep political and religious convictions secret; personal freedom and safety. Government protects family as fundamental unit of society. Government promotes culture, artistic creativity and scientific research. Education is duty of Government.

Court of Constitutional Control has jurisdiction over territory of Republic and resolves habeas corpus recourses and right of information action. (Law of June 18, 1997).

1.03 HOLIDAYS:

Jan. 1 (New Year's); Good Friday*; May 1 (Labor Day); May 24** (Battle of Pichincha); Aug. 10** (Independence Day); Oct. 9** (Guayaquil Independence); Nov. 2 (All Souls); Nov. 3 (Cuenca Independence); Dec. 25 (Christmas). (L. C. art. 65; Decree 1487 of May 4, 2001).

* This is movable holiday.

** When falls on Tues., Wed., or Thurs., is celebrated next Fri.

1.04 OFFICE HOURS AND TIME ZONE:

Ecuador is in the Eastern Standard time zone (-05:00 GMT). Office hours are generally from 8 a.m. to 12 noon and 2:30 p.m. to 6:30 p.m.

2 BUSINESS ORGANIZATIONS

2.01 AGENCY:

Agency may be conferred by public or private instrument or orally. Acceptance may be express or implied. General power of attorney covers only acts of administration; in order to alienate, encumber, etc., power must be specifically granted. Agent may delegate his powers if not forbidden to do so, but if he was not expressly authorized he is liable for acts of his substitute. Principal must reimburse agent for his expenses and for any loss he may suffer by reason of agency if not due to agent's fault. Agency terminates by: (1) Discharge of business of agency; (2) expiration of term; (3) revocation; (4) renunciation; (5) death of principal or agent; (6) bankruptcy or insolvency; (7) judicial interdiction of either; (8) cessation of powers of principal if agency was given by virtue of such powers.

Commercial factors and employees must state that they act in the name of their principals. If they fail to do so they are personally liable. They are understood to have acted for their principals if: (1) The contract was of a kind made in the ordinary course of business; (2) they contracted by order of the principal although the operation was not in the ordinary course of business; (3) the principal ratified the contract; (4) the result of the agent's action is beneficial to the principal. In all such cases third parties may proceed either against the principal or the agent. Factors and commercial employees cannot delegate their powers without notice to or consent of the principal.

A commission merchant is an agent of an undisclosed principal, assuming the liability of his contracts. The other parties have no claim or duty with respect to principal. If he acts disclosing his character and name of principal then the rights and liabilities are between principal and contracting parties. He has lien for his fees and expenses on property in his possession. (C. C. 2020-2076; C. Com. 117-139; 374-409).

2.02 CORPORATIONS:

(Codification in Law of Oct. 5, 1999 as am'd).

Organization and Authorization.

Corporation may be formed by public subscription, subject to detailed rules, specially as to appraisal of property contributed and approval of same and to first meeting of subscribers and document of organization and it must also comply with the requisites of a simultaneous corporate organization. Corporation may also be formed by simultaneous organization, in a public document containing articles of incorporation, which then must be submitted to Superintendencia de Compañías who approves them and orders document to be recorded in Registry of Commerce. Same procedure is required for any amendment, extension or dissolution before end of term. Document containing articles of incorporation must state: (1) Place and date of execution; (2) nationality and domicile of incorporators, who must be two or more; (3) corporate object specifically stated; (4) name, which must refer to principal object and to which words “Compañías Anónima” or “Sociedad Anónima,” or initials “C.A.” or “S.A.” respectively, must be added and term of duration which must be for limited period of time; (5) corporate capital; number of shares of stock and par value of each share; classes, if several; (6) total subscription of capital; and 25% paid in cash or in property and value attributed to latter; (7) domicile of corporation (corporations and other companies constituted in Ecuador must have their principal domicile in Ecuador); (8) form of administration and power of administrator; (9) time and form for calls to stockholders' meetings; (10) form to elect administrators and statement as to who will be officer having legal representation; (11) rules for distribution of profits; (12) cases in which corporation may be dissolved before its term lapses; and (13) how liquidators will be elected. Articles of incorporation must also be published. Corporations are under supervision of Superintendency of Corporations. Authorization granted to corporation may be revoked by violation of law or by-laws. Upon revocation corporation is dissolved and liquidated.

Corporation may be transformed into company of mixed public and private ownership (compañías de economia mixta) and into solely-owned limited liability company (Empresa Unipersonal de Responsabilidad Limitada).

Foreign and domestic companies, supervised by Superintendencia de Compañías must pay annual contribution to offset that institution's expenses. That amount is determined by value of company's assets. In case of foreign companies, only assets within Ecuador are considered. Contribution will not exceed .1% of value of assets per year. Mixed public-private enterprises and public utility companies pay 50% of normal contribution. Penalty interest is levied on delayed payments.

Each year, a company must supply to Superintendency the following: (a) annual general balance; (b) statement of profits and losses; (c) annual report; (d) names of administrators and legal representatives; (e) names of stockholders, recorded in stock book; (f) financial movements of goods and services; (g) other specified data. Superintendency may furnish government officials final report on information submitted by companies doing business with government or its agencies.

Companies which do not supply necessary information, and thereby call into question their legal status, may be divested of all legal rights. Superintendency may initiate liquidation proceedings and designate a stockholder's meeting for naming of liquidators. Five years from date of dissolution, Superintendent will notify Registrar of Commerce (Registrador Mercantil) of termination of company's existence.

Management.

Corporation is managed by administrators who need not be shareholders. They are subject to removal and their services may be remunerated. They are regarded as agents. Office of administrator cannot be held by company's bankers, constructors, lessees or purveyors of material. Administrators cannot perform for corporation any transaction falling outside its purpose; they cannot transact any business with company for their personal account and, unless authorized, they cannot delegate their administrative duties, but may appoint attorneys in fact for special matters. They are severally liable for truth of original stock subscriptions and payments, existence of dividends declared, existence and accuracy of corporation's books, compliance with stockholders meeting's resolutions and duties required by law or corporate documents, and any damage suffered through their fault.

Dividends can be paid only out of collected earnings. At least 10% of annual net profits must be set aside for a legal reserve fund until same amounts to at least 50% of capital. 50% of annual net profits must also be set aside for payment of dividends to shareholders, unless unanimous resolution to contrary taken in a general shareholders meeting.

Shareholders' meetings must be held at least once a year. Quorum for different purposes is determined by by-laws, but at least one half of paid-in capital must be represented at first call; if a smaller amount appears, a second call is issued, whereupon any amount of capital constitutes a quorum. Shareholders may be represented by addressing letter to administrator, or power of attorney, unless otherwise provided by articles of incorporation. Administrators cannot represent shareholders. Shareholders appoint auditors to examine books and operations of corporation. Minority of 25% of shareholders may appeal to courts against decisions of majority.

If capital diminishes by one half or more, corporation must be liquidated unless shareholders prefer to make up difference or reduce capital to the actual figure, provided it is enough to attain corporation's objectives and not less than minimum.

Stock.

To constitute a corporation it is necessary that the entire capital be subscribed by at least two stockholders and that at least one fourth of capital be paid in. Shares may be divided in classes with preferences and must be registered; shares may be paid in cash or in property, provided latter is suitable for purposes of corporation and if it consists in credits transferor must warrant its existence and legality and solvency of debtor. Shareholders are liable only for unpaid portion of their stock. Until fully paid in, subscribers of shares are liable for amount subscribed even though they assign shares. Shares are registered, but while not fully paid no definitive certificate may be issued.

Foreign companies require authorization to do business in Ecuador: corporations and limited partnerships issuing shares of stock must secure approval of Superintendencia de Compañías, others of local judge. To obtain such approval they must file a copy of their corporate documents and a certificate of Ecuadorean consul that company is duly constituted and authorized to act in country of its domicile and that it is empowered to do business abroad, and certificate of bank deposit in capital integration account for total amount appointed for activities in country which would never be less than legal minimum. Said fund can only be reduced by same rules governing reductions of capital. All companies, both national and foreign must have a fully authorized representative in Ecuador registered with Registry of Commerce to carry out all business and especially to answer claims and fulfill all obligations. If representative is a foreigner he must be a resident of country. Power of attorney of said representative must also be recorded. All foreign companies in order to contract with government must be domiciled in country.

Financial corporations must be incorporated as Sociedades Anónimas (S. A.), except savings and loans associations for housing and savings and credit cooperatives. Prior authorization of Superintendencia de Bancos is required and may be organized by public subscription. Capital must be paid in cash, but Superintendencia may authorize payment of capital by capitalization of credits. At least 50% of authorized capital must be subscribed and 50% of subscribed capital must be paid at time of starting to operate. Shares may be divided in classes and must be registered. (Codification in Law of Jan. 10, 2001 as am'd).

Insurance companies (Law 74 of Mar. 26, 1998 regulated by Decree 1510 of June 15, 1998) are subject to strict regulations and supervision. Among principal requirements, insurance business must be carried out only by duly organized corporation or branches of foreign companies organized according to law, with prior authorization from Bank Superintendency; sole purpose of such organization must be to carry on insurance business; required reserve fund must be no less than 50% of its paid-in capital, which is to be formed with no less than 10% of each year's profit until completion of such amount. Also insurance companies are required to invest in certain bonds and securities. Foreign companies authorized to do business in Ecuador must deposit certificates of such investments in Banco Central or other banks established in Ecuador. Lives of persons residing in Ecuador, property located in Ecuador and ships and aircraft under Ecuadorean registration cannot be insured by companies not authorized to do business in country, except when authorized companies cannot provide such insurance.

Foreign companies must file application with Superintendente de Bancos, supplying among other data and documents name of duly empowered agent in Ecuador and statement that parent company is vicariously liable for acts of his agent and this liability is secured with its foreign and local assets.

See also category 14 Foreign Trade and Commerce, topic 14.03 Foreign Investments.

Corporate Fees and Taxes.

Articles of incorporation and their amendments require payment of registry fee that is paid when documents are recorded in Commercial Registry.

See category 22 Taxation, topic Business Taxes.

2.03 FOREIGN CORPORATIONS:

See topic 2.02 Corporations.

2.04 LIMITED PARTNERSHIP:

See topic 2.05 Partnerships.

2.05 PARTNERSHIPS:

(C. C. 1957-2019; Codification in Law of Oct. 20, 1999).

Commercial partnerships are considered as legal entities. They are formed by a public instrument (q.v.) executed before a notary; an extract therefrom must be recorded in the registry of commerce and published in the newspapers.

General partnership (compañías en nombre colectivo) is partnership formed by two or more individuals to undertake business under firm name. Firm name must comprise names of partners or name of one or more of them followed by words “y Compañías” unless partnership is successor of former partnership, in which case former name may be retained but it must be followed by word “sucesores”. Partners must pay their subscribed contribution, participate in company's losses, and compensate company for damages due to their actions in case of exclusion and they cannot on their own account engage in same business as partnership, and unless allowed by other partners, they cannot have interest in another company formed for same kind of business. Their rights are: to participate in profits, in discussions, to vote on resolutions and appointment of administrators, control the administration and appeal to court for removal of administrators for incompetence or fraud.

Limited partnership (compañías en comandita) is a partnership in which one or more partners are not liable beyond amount of capital they have subscribed. At time of organization, at least 50% of subscribed capital must be paid. Name of special partner cannot be included in firm name which must always be followed by words “Compañías en comandita”, or its abbreviated form “C. en C.” Nor can special partners perform any act of management, even as attorney in fact of general partners. Many provisions relating to corporations are applicable, including requirement of judicial approval.

Limited Liability Companies (Compañías de Responsabilidad Limitada).—These companies are formed by two or more members who are liable only up to their individual contributions and carry out commercial activities under firm name which must always be followed by words “Compañías Limitada” or its abbreviated form “C. Ltda.” Its capital cannot be represented by negotiable certificates and is divided into equal, cumulative and undivided participations. Local juridical persons, with exception of banks, insurance, savings and investment companies, may be members of limited liability companies. Foreign corporations of any kind cannot be members. Capital must be entirely subscribed and at least 50% of each participation paid in; balance must be paid within 12 months. Unanimity is necessary for transfer of participations and for admission of new members. Said agreement requires public instrument which must specify rights of members as to company's administration and must be recorded in Mercantile Registry. But each member has right to participate in adoption of resolutions, with one vote for each participation, and to participate in profits. No member may be compelled to increase his contribution and in case of capital increase or transfer of any member's participations the others have preemptive rights. In certain cases one or more members has right to request General Meeting for removal of managers or administrators. General Meeting is company's highest authority and convenes at least once a year. Its resolutions are adopted by majority vote representing more than 50% of members present. It appoints and removes managers and administrators; approves balance sheet; decides distribution of profits; approves transfer of participations; decides increase or reduction of capital and extension of company's term or dissolution of company before its term expires.

Solely-Owned Limited Liability Company.

(Law 2005-27 of Jan. 17, 2006). Any individual may organize company by public instrument that must be recorded at Commercial Registry, and contains name and personal data of owner; name of company related name of owner or his initials, followed by words “Empresa Unipersonal de Responsabilidad Limitada” or “E.U.R.L.”, it may mention its purpose; purposes, domicile, capital allocated to it in cash, must be transferred to company in same act and may not lower that amount established by law; period of duration; name of manager-owner and monthly amount to be received for his services. Company shall be terminated by expiration of term, bankruptcy, transfer abroad of domicile, fulfillment of its purpose or impossibility of performance, total loss of reserves or more than half of its capital, owner's death, among others. Other provisions also regarding dissolution and liquidation. Owner shall be liable with property of company only.

Civil company (sociedad civil) is one which is not formed for commercial purposes. It is governed by the rules of the Civil Code and is distinguished from a mercantile company by being regarded rather as an association of individuals; thus, unless otherwise expressed in the company instrument, the partners are not jointly and severally liable for debts of the company, but each is liable for his proportionate part and for part of the liability of an insolvent partner. A civil company may have the form of a general partnership in which all partners are managing partners or jointly select an attorney in fact to act for them; or of a limited partnership, in which one or more partners are liable only for the amount they contribute; or of a corporation, in which case the rules governing mercantile corporations apply.

3 BUSINESS REGULATION AND COMMERCE

3.01 BANKS AND BANKING:

(General Law of Institutions of Financial System Codification of Jan. 10, 2001 as am'd, Law on the Monetary Regime and Bank of State, Codification 2005-22 of Dec. 13, 2005 as am'd).

Components of financial system are Central Bank, public and private financial institutions and other institutions controlled by Superintendency of Banks. Central Bank regulates entire banking and credit system, and it is highest policy making body within financial system. Superintendency of Banks authorized and supervises operation of banks, companies or personal activities, and their compliance with all laws and regulations. Central Bank supervises monetary policy through reserve requirements, credit ceilings on commercial bank lending and interest rate ceilings for loans and deposits. Foreign banks may establish branches in Ecuador with prior authorization of Superintendency of Banks.

3.02 BILLS AND NOTES:

(C. Com., arts. 410-489).

Bills of exchange must state: (1) The words “bill of exchange” or that it is to order; (2) specific amount; (3) drawee; (4) maturity; (5) place of payment; (6) payee; (7) date and place where drawn; (8) signature of drawer. If no maturity date is expressed the bill is considered a sight draft. A draft may be drawn to the order of the drawer or against the drawer or for account of a third person.

Endorsements must be unconditional and cannot be partial. However, they may be made for collection or in other forms indicating agency.

Endorsements may be in blank, in which case legal holder is regarded as endorsee; same applies when endorsement is to bearer. They may also be to a specific person.

A draft drawn at a certain period after sight must be presented for acceptance within six months after date unless a different time is determined by drawer or the time is shortened by an endorser. Drawee may ask that draft payable at his domicile be presented to him again for acceptance at another address in same city. Draft may be drawn for payment: (a) At sight; (b) a certain period after sight; (c) a certain period after date; (d) on a specific date. Maturity of a draft payable a specific time after sight is determined by date of presentation. Other kind of maturity or successive maturities render draft null and void. Interest may be promised in drafts payable at sight or term after sight. In others, interest clauses are deemed "not written."

Drafts must be presented for payment on due date or on one of the subsequent two working days. Bearer can refuse partial payment but in case of partial payment he must keep draft until fully paid. Bearer may enforce his rights even before maturity: (a) In case acceptance is refused; (b) in case of bankruptcy of drawee, suspension of payments or attachments of his assets. And after maturity for lack of payment. Failure to accept or pay must be proved by protest in due form. Protest for failure to accept must be made within three working days following presentation but always before maturity. Protest for failure to pay must be made on one of three working days after maturity. Sight drafts are only protested for lack of payment and protest should be made day of maturity or within following three working days. After protest for failure to accept it is unnecessary to present draft for payment or to protest for failure to pay. In case of failure to accept or pay notary having intervened in protest must notify same to other interested persons within four days. Drawer may relieve holder from making protest by inscribing on draft words "without protest" or equivalent words.

Promissory notes must state: (1) The words "promissory note" or that it is to order; (2) promise to pay a specific sum; (3) maturity; (4) place of payment; (5) payee; (6) date and place where issued; (7) signature of maker. If no maturity date is expressed the note is considered payable at sight. Most of the provisions regarding bills of exchange are applicable to promissory notes.

Checks.

(Codification in Law of Sept. 20, 1975 as am'd). Checks may be issued only against banks authorized to receive deposits. Drawer must have provision of funds or credit granted. Following requisites are necessary: (a) Word "Check" in language used; (b) unconditional order to pay certain sum of money; (c) name of drawee; (d) place of payment, but if not stated place written beside drawer's names applies and if several, the first; (e) place and date of issue; (f) signature of drawer. Check may be payable "to the order of specified person". It may be issued in favor of same drawer. Issuer warrants payment. Check is payable always at sight. Only checks issued to individuals up to $500 may be endorsed. Blank or bearer endorsement is prohibited. Checks issued and payable in Ecuador must be presented within 20 days; if issued abroad and payable in Ecuador term is 90 days and if vice versa term follows law of country of issue. Stop order may be given in writing by drawer to drawee giving reason therefor, at his own risk. If holder has lost check drawer must stop payment. There are provisions on crossed and certified checks. Latter are irrevocable. Check protested within term for presentation gives right to executive action, with immediate attachment and sale for payment. If check is not presented timely drawer remains liable, unless he had funds in drawee's hands and these are lost after presentation period, when he becomes discharged. Notice of dishonor must be given by holder to drawer within four days of protest.

3.03 COMMERCIAL REGISTER:

See category 9 Documents and Records, topic 9.04 Records.

3.04 CONTRACTS:

(C. C. arts. 1453-2213) governs civil contracts and applies as second source as well to commercial and labor contracts. Contracts must be executed in accordance with rules of good faith, they are binding with respect to terms stated therein and according to their nature, are regulated by law or commercial practice.

In general, a civil contract may be: unilateral or bilateral; gratuitous or for monetary consideration; commutative; aleatory; principal or accessory; real; formal or consensual.

Object of a contract must be definite or subject to definite determination. Future inheritances and future hereditary rights cannot be object of a contract.

Civil contracts involving more than certain amount must be in writing and cannot be proved by parol evidence.

Form of contract is determined by place where executed.

Indemnity for damages includes monetary damages and loss of expected profits.

See category 2 Business Organizations, topic 2.01 Agency.

Public Contracts.

(Const., art. 16, Codification of Feb. 13, 2001 and Decree 2822 of July 12, 2002 as am'd). Contracts executed with government, state agencies and state enterprises are subject to special rules.

3.05 FRAUDS, STATUTE OF:

See category 9 Documents and Records, topic 9.03 Public and Private Instruments.

3.06 INFORMATION TECHNOLOGY, INTERNET AND NEW MEDIA:

E-Commerce, Digital Signature and Electronic Messages.

(Law 2002-67 of May 11, 2002 regulated by Decree 3496 of Dec. 12, 2002 as am'd). Law regulates access and use of data messages, e-commerce and digital signatures, electronic contracts, certification process and enforceability of acts performed by electronic means. Electronic messages are enforceable as written documents. Digital signature has same legal effect and value as handwritten signature when used according to law.

Law establishes rules for determining time and place that data message is deemed issued and received, as well as rules regarding acknowledgments of receipt. It also regulates digital certificates and certification service providers. Consejo Nacional de Telecomunicaciones authorizes entities providing electronic certification services, and Superintendencia de Telecomunicaciones supervises certification service providers, and imposes sanctions on them for noncompliance with law. Certification service providers shall also comply with Organic Law on Defense of Consumers. Electronic certification issued by foreign entities, nonauthorized in country has same legal value and effect as local certifications when its validity is guaranteed by local certification entity. Electronic messages are also regulated by intellectual property laws and international conventions. Violation of law is sanctioned by administrative sanctions established in law and by fines and imprisonment contained in criminal code.

3.07 INTEREST:

Legal interest is calculated by formula based on interest rates of banking institutions. Parties may freely agree to interest rate, but if rate is higher than maximum fixed by law, judge may reduce it even without debtor request. Bank's operations have fixed rates according to type and duration of operation. If rate higher than legally permitted one is stipulated, creditor loses 20% of his credit in addition to other penalties. Interest on interest is prohibited. Usurious rates presumed when creditor gives receipt of interest payment without concretely indicating sum or value received. (C. C. 2108-2115; C. Com. 560).

3.08 MONOPOLIES, RESTRAINT OF TRADE AND COMPETITION:

(Const., art. 244).

State guarantees freedom of commerce and industry. Monopolies are prohibited. However, Government may establish monopolies by law because of special national needs or interests. These public monopolies are not transferable to private individuals.

Anti-dumping Regulations (Decision 283 of Commission of Cartagena Agreement of Mar. 21, 1991, Decree 3497 of Dec. 12, 2002). Decree 3497 contains regulations and administrative procedure in conformity with Agreement on Implementation of Article VI of General Agreement on Tariffs and Trade, Agreement on Subsidies and Countervailing Measures and the Agreement on Safeguards of the World Trade Organization. Resolution regulates unfair foreign trade practices and protection of local production from unfair practices of international trade by imposing countervailing duties on import of foreign goods. Dumping is determined by difference between normal value and export price. Subsidies are direct or indirect incentives, premiums or assistance of any kind granted by foreign governments to producers, manufacturers, or exporters of goods in order to make them more competitive in international market. Temporary safeguards on importation of products may be issued to protect local production of same or similar products.

Organic Law on Consumer's Defense.

(Law 2000-21 of July 4, 2000 regulated by Decree 1314 of Mar. 9, 2001 as am'd). Law regulations are considered of public order and social interest. It deals with rights and duties of consumers, education, promotion and reporting of needs, interests and problems of consumers. It also regulates adhesion contracts, sales on credit, utilities contracts, warranties, profiteering, hoarding and usury, advertisements, product liability and general representations and warranties, credit card payment, quality control and penalties for violation of law.

3.09 NEGOTIABLE INSTRUMENTS:

See topic 3.02 Bills and Notes.

3.10 SALES (REALTY AND PERSONALTY):

A sale of personal property generally is perfected and risk of loss passes when the vendor and vendee have agreed on the thing sold and on the price, but title passes on delivery. A sale of real property, easements, annuities or inheritances is not perfect until proper instrument of conveyance has been executed or delivery has taken place. Costs of instrument of sale and other accessories are for account of vendor in absence of special stipulations.

The vendor warrants the thing sold and the title thereto. Even if the title warranty be waived he is liable for the price unless the buyer knew the danger or bought at his risk. The vendor is not liable for defects which are visible or could easily have been ascertained by the buyer. Even though he stipulates that he will not be liable for hidden defects, he is liable for those which he knew and did not declare.

If the price is not paid, the vendor may ask that the sale be cancelled. A stipulation that nonpayment of the price rescinds the sale cannot be made for a longer period than four years. The right to repurchase cannot be reserved for longer than four years and cannot be assigned.

Rescission may be asked within four years from date of execution of contract by vendor if it is found that price received is less than one-half value of property, and by vendee if it is found that property is worth less than one-half price paid.

In commercial sales the vendor is liable for hidden defects for six months if the goods were delivered in Ecuador and for one year if they were dispatched abroad. If the buyer refuses without just cause to receive the goods purchased, the seller may demand the rescission of the sale with indemnity for damages or he may deposit the goods in court and sue the buyer for the price and interest. (C. C. 1732-1836; C. Com. 169-202).

Bulk sales and sales of whole concerns are subject to special rules and recordings.

Conditional sales under which seller of personal property may reserve title until payment of price is made. Only identifiable items may be subject to conditional sale. Three counterparts of the contract are required with the necessary details of parties, objects and conditions and place where object will be kept; whether bills, notes or other instruments of payment are issued and whether commercial pledge has been given also. Contract must be recorded in Mercantile Registry. Upon default property must be returned to seller who, if so agreed, may keep the installments already paid but not in excess of one-third of the full price, excess over which must be refunded. Buyer may repossess goods by paying arrears within 15 days after default. Seller has option to petition a court for sale of the property for payment. If buyer becomes bankrupt seller may repossess and trustees in bankruptcy substitute for the buyer. If an insured object is destroyed creditor is entitled to recover from the insurance proceeds. (C. Com. 202-A - 202-R).

International Sale of Goods.

United Nations Convention on Contracts for the International Sale of Goods, in force on Feb. 1, 1993. See category 24 Treaties and Conventions, topic 24.01 Treaties and Part V, Selected International Conventions.

3.11 STATUTE OF FRAUDS:

See category 9 Documents and Records, topic 9.03 Public and Private Instruments.

4 CITIZENSHIP

4.01 ALIENS:

See category 16 Immigration.

5 CIVIL ACTIONS AND PROCEDURE

5.01 ACTIONS:

Actions for Death.

See category 12 Estates and Trusts, topic 12.03 Death.

Limitation of.

See topic 5.04 Prescription.

5.02 JUDGMENTS:

Judgments may be executed by means of a summary executory action within five years after they are rendered. A judgment does not constitute a lien on the property of the debtor except with respect to property attached in the course of execution. A levy on real property must be recorded in the registry of properties.

Foreign judgments may be executed in Ecuador if: (1) They infringe no Ecuadorean law; (2) it is so provided by treaty; (3) in the absence of a treaty, it appears from the letters rogatory requesting the execution that (a) the judgment is a final unappealable judgment according to the laws of the country where rendered and (b) was rendered in a personal action. (C. C. P. 269-302, 413-418).

5.03 LIMITATION OF ACTIONS:

See topic 5.04 Prescription.

5.04 PRESCRIPTION:

(C. C. 2392-2424; C. Com. 723; 1002-1011).

Acquisition of property and rights by virtue of adverse possession and extinction of obligations by failure to require performance within statute of limitations is called prescription. Prescription may be waived but only after it has run.

Adverse Possession.

In order to create prescriptive title, possession must be uninterrupted. Personal property is acquired by ordinary prescription in three years and real property in five years, but as against persons living outside of country period is doubled. Ordinary prescription requires good faith and is subject to suspension in favor of minors and certain other incompetents. Any property may be acquired by extraordinary prescription in 15 years even without good faith and such prescription is not subject to suspension.

Statute of Limitations.

Prescriptive period in which right to enforce obligation is lost varies according to nature of obligation. More important are: (1) Ordinary actions not otherwise limited, ten years; (2) summary executory actions, five years; (3) actions to rescind contracts for duress, error, fraud or legal incapacity, four years; (4) actions for fees of lawyers, physicians, teachers and others exercising liberal arts, three years; (5) actions of merchants and artisans for goods sold, of employees and servants for salaries, and actions for amounts due to innkeepers, transportation agents and others whose services are only occasionally used, two years. These prescriptive periods are suspended in favor of minors and certain other incompetents, but in no case can period of prescription exceed 15 years. Prescription of actions is interrupted by express or tacit recognition of the debt on part of debtor and by judicial demand.

Actions in commercial matters follow the rules of ordinary civil actions when the Code of Commerce does not provide otherwise. In connection with bills of exchange the following periods of prescription apply: (a) Against acceptor, three years; (b) of bearer against endorsers and drawer, one year; (c) of endorsers against each other and drawer, six months. In certain maritime matters the following prescriptive periods apply: (a) Actions derived from maritime insurance, five years; (b) actions for supplies to vessels, for salaries in constructing and repairing vessels and for wages of crew, one year; (c) actions for collection of passage money and contributions to general average, six months.

5.05 SEQUESTRATION:

See category 7 Debtor and Creditor, topic 7.03 Attachment.

6 COURTS AND LEGISLATURE

6.01 COURTS:

Justice is administered by: (1) Supreme Court of Justice, which hears certain appeals, has original jurisdiction in certain cases such as those relating to contracts made by executive, accusations against high functionaries, etc., and exercises general supervision over courts; (2) superior courts which hear appeals from lower courts and have certain additional functions; (3) criminal judges in each province, having jurisdiction in criminal matters; (4) local judges in provinces and cantons, who have jurisdiction in civil matters. (Organic Judiciary Law, as codified by Decree 891 of Sept. 2, 1974 as am'd).

6.02 LEGISLATURE:

Congress meets on Jan. 5 for inauguration of ordinary and permanent meeting period and continues meeting until end of year, with two recess periods of one month each. Special sessions may be called. (Const., art. 132).

6.03 STATUTES:

Most of the legal provisions are codified. The principal codifications are: Civil Code, Code of Commerce, Organic Law of Judiciary, Code of Civil Procedure, Penal Code, Code of Criminal Procedure, Labor Code, Military Code, Municipal Law, Customs Law, Port Regulations.

7 DEBTOR AND CREDITOR

7.01 ASSIGNMENTS:

Title to personal property and rights may be transferred by public or private instruments. (See categories 3 Business Regulation and Commerce, topic Sales [Realty and Personalty]; Documents and Records, topic Public and Private Instruments; Property, topic Deeds.) The assignment of a credit is not effective with respect to the debtor or third persons until the debtor has been notified or has acknowledged the assignment. (C. C. 1841-1849; C. C. P. 195).

7.02 ASSIGNMENTS FOR BENEFIT OF CREDITORS:

Assignment of all his property for benefit of creditors may be made by non-merchant debtor who as result of inevitable accident is unable to meet his liabilities. Assignment procedure shall be administered by court. Creditors must accept it unless debtor has been guilty of culpable actions. Effect of assignment is to relieve debtor from attachments and to extinguish his debts as far as they can be paid from assigned property, but he continues liable for balance. Assignment does not transfer title to creditors but authorizes them to dispose of property or administer it. Merchants cannot assign for benefit of creditors; any request to do so causes them to be considered bankrupts. (C. C. 1630-1640; C. C. P. 516-518). See topic 7.04 Bankruptcy and 7.09 Insolvency.

7.03 ATTACHMENT:

Attachments may issue in summary actions on obligations clearly appearing from certain instruments having executory force such as confessions under oath before a judicial authority, judgments, first copies of public instruments, private documents acknowledged in court or before notary public, bills of exchange, wills, etc. Third persons may intervene if their rights would be directly impaired. If intervenor claims ownership of property attached proceedings are stayed until question is decided; if intervention is based on other grounds, proceedings continue, but proceeds of sale may be impounded if intervenor's rights are based on instrument having executory force.

Sequestration or retention of the property which is the subject of the litigation or guarantees the credit may be ordered if (1) the credit is proved by documentary evidence and (2) it is proved that the debtor's property is insufficient to cover the debt or is in danger of disappearing or being hidden or alienated. Likewise, in certain cases the debtor may be restrained from alienating his real property. (C. C. P. 413-418, 897-923).

7.04 BANKRUPTCY AND INSOLVENCY:

(C. C. P. 507-602; C. Com. 1012-1024; Codification 2006-012 of Nov. 29, 2006; Res. 99.1.1.3.0001 of Apr. 8, 1999 as am'd).

Reorganization process is mandatory prior to bankruptcy proceedings or those local companies under supervision and control of Superintendency of Companies, with assets over 10,515.60 U.S. dollars or with more than 100 permanent employees and with liabilities over 5,257.80 U.S. dollars. Reorganization agreement to prevent bankruptcy (concurso preventivo) may be requested by debtor or creditor by filing petition with Superintendency of Companies with proof of company's cessation of payments. Petition itself must comply with specific requirements of form and substance. Order opening reorganization process must appoint one or more receivers who are responsible for analyzing debtor's business activity for previous year and prepare report for creditor's meeting. Order opening reorganization process orders stay of execution against debtor on claims subject to concurso, and suspension of statute of limitations against person who filed petition for reorganization. Once creditors have qualified as such, meetings will be held with debtor to discuss reorganization agreement. Approval of reorganization agreement is binding on all creditors, even those who were absent and those who disapproved of it. Agreement can be interpreted, expanded or amended at any time, as stipulated by law. Process of reorganization should not last more than seven years. Early termination can be declared for noncompliance by debtor or creditor. Debtor may claim damages in case of creditor's noncompliance.

Bankruptcy (quiebra) is the name given to insolvency proceedings of merchants. A merchant is considered bankrupt when he makes assignment of all his assets for the benefit of his creditors or when he is insolvent, fails to comply with an order of payment, or to pay his obligations to three or more persons, or to designate property on which an attachment might be levied. There are three kinds of bankruptcy: (1) Fortuitous, when due to fortuitous circumstances; (2) culpable, when caused by imprudent or dissipated conduct; (3) fraudulent, when involving fraudulent acts of the debtor. On declaration of bankruptcy the property of the bankrupt is judicially seized and delivered to a receiver. As a result of the bankruptcy the bankrupt becomes incompetent to administer his property; except family property and one-half of any property acquired later shall be brought to the bankruptcy and the other half left to him for his and family expenses; he may be imprisoned in case of fraud, in any event he may not leave the locality without giving bond. The receiver sells the perishable property and may sell all the assets if the debtor agrees. Meetings of creditors determine whether the receiver should continue the business, resolve as to the classification of credits, and decide on agreements with the bankrupt; these agreements require the vote of two-thirds of the creditors present holding three-fourths of the credits represented at the meeting, or three-fourths of the creditors present holding two-thirds of the credits represented. If there is no agreement, the assets are liquidated and distributed by the receiver. A bankrupt who pays up his debts entirely, or to the extent agreed on, is rehabilitated, but culpable bankrupts can be rehabilitated only after suffering their punishment, and fraudulent bankrupts not until five years after the punishment.

Suspension of payments may be declared in favor of a merchant who, having assets sufficient to cover his liabilities, foresees the possibility of not being able to do so at their maturity. If assets are less than 90% of liabilities or if there were debts due before the petition, bankruptcy must be declared.

Insolvency proceedings (concurso de acreedores) relate to non-merchants. They are instituted when the debtor makes an assignment for the benefit of creditors or when he is deemed insolvent because he fails to pay a judgment or to designate sufficient assets on which an attachment may be levied. Same procedure as with bankruptcy applies.

See also topic 7.08 Fraudulent Sales and Conveyances.

7.05 EXECUTIONS:

When an order of execution has been issued and property attached, an appraisal is made of the property. The court then designates a day for receiving public bids, which call is advertised. The creditor may be a bidder. Written bids are filed and cannot be for less than two-thirds of the appraised value. If no bidders offer this amount, new bids are called for on the basis of a valuation of one-half the original appraisal, and likewise the creditor may demand a levy on additional property. After the sale there is no equity of redemption. (C. C. P. 413-488).

7.06 EXEMPTIONS:

The following property of the debtor is exempt from attachment: (1) Bed and clothing of debtor, his wife and children; (2) professional books up to certain amount in value; (3) machinery and instruments for teaching or practicing science or art up to certain amount in value; (4) soldiers' uniforms and equipment; (5) utensils of artisan or farm worker; (6) food and combustibles for family use for one month; (7) objects possessed as trustee; (8) rights whose use is personal to debtor, such as right of habitation; (9) property given to debtor with declaration that it is not subject to attachment, provided value was at time judicially appraised, but increments may be attached; (10) salaries except for alimony and child support; (11) homestead. (C. C. 1634; C. C. P. 441; L. C. art. 91).

7.07 FORECLOSURE:

See category 20 Mortgages, topics 20.01 Chattel Mortgages, 20.03 Mortgages.

7.08 FRAUDULENT SALES AND CONVEYANCES:

The following are void: Any agreement made by a creditor with the bankrupt or other person stipulating advantages in consideration of his vote, and any agreement made by a creditor after the cessation of payments stipulating advantages for himself with respect to the assets of the bankruptcy. Alienations or mortgages of the property of a decedent by his heirs within six months after the estate vests may be annulled unless made with the object of paying creditors of the estate. (C. C. P. 550; C. C. 1400).

7.09 INSOLVENCY:

See topic 7.04 Bankruptcy and 7.09 Insolvency.

7.10 LIENS:

Privileged credits in general are as follows in the order stated: (1) Judicial expenses; (2) funeral expenses; (3) expenses of last illness; (4) Government rights against its employees sentenced for embezzlement; (5) salaries, wages and pensions of laborers, which have preference even above mortgages; (6) child support; (7) social security debts; (8) rights on behalf of Government as indicated in National Constitution; (9) debts for maintenance of debtor and family for last three months. These credits do not affect mortgaged properties unless they cannot be covered from all the other properties of the debtor.

There are various liens on specific properties, such as: (a) Debts to innkeepers as to objects brought into the inn; (b) debts to carriers as to objects carried; (c) debts secured by pledge as to articles pledged (See topic 7.11 Pledges); (d) debts for premiums to the insurer on objects insured; (e) debts for construction and repair, while the object remains in possession of the person for whose account the debt was incurred; (f) sellers in possession, for price; (g) and others by special laws. After foregoing credits and mortgages have been satisfied, following have preference as to balance remaining: (1) Credits of children for their property administered by their parents, against parents' property; (2) credits of persons under guardianship against guardians. (C. C. 2367-2391; C. Com. 196, 247; C. C. P. 543).

7.11 PLEDGES:

Pledge contracts are not effective unless the pledged object is delivered to the creditor. In case of default the creditor may demand that the pledge be sold at public sale or, if no admissible bid is received, that it be appraised by experts and delivered to him at the appraised value; any stipulation to the contrary is void. Commercial pledges must be in duplicate writing to be effective against third parties and then they become negotiable by endorsement before maturity. Pledge of a credit requires notice to debtor but if of a document to the order it is endorsed in guarantee; registered shares need recording of transfer in guarantee in the company's books and bearer shares or documents require delivery only. (C. C. 2286-2308; C. Com. 569-575). “Special commercial pledge” can only be constituted by registered merchants on articles sold by them.

As to commercial pledge without delivery and agricultural and industrial pledges, see category 20 Mortgages, topic 20.01 Chattel Mortgages.

7.12 REDEMPTION:

See topic 7.05 Executions; category 20 Mortgages, topic 20.03 Mortgages.

7.13 USURY:

See category 3 Business Regulation and Commerce, topic 3.07 Interest.

8 DISPUTE RESOLUTION

—Scope —

(Codification 2006-014 of Nov. 29, 2006).

8.01 ARBITRATION:

Any dispute that is subject to settlement can be resolved by arbitration. Arbitration is administrated when it is according to Law and it is independent when it is according to parties' agreement. There are two types of arbitration de jure and in equity. Arbitration agreement must be in writing, whether in form of arbitral clause or in separate agreement, with regard to future disputes arising out of particular legal relationship or to submit to arbitration already existing dispute. Arbitration agreement can be evidenced by any kind of document or by other means of communication which constitute record of agreement. Number of arbitrators should be three, unless parties agree on another number. Parties are free to establish place of arbitration. Arbitration proceedings must be in Spanish language. Arbitrator has authority to issue provisional remedies. After answer to demand for arbitration is filed, arbitrators should propose conciliation; if parties do not get to agreement, arbitration continues until award is issued. Arbitral award is enforceable by local courts without exequatur. Law distinguishes between domestic and international arbitration based on: parties domicile, place of performance of duties and matter of dispute. International arbitration is only permitted when it does not affect or damage national or community interests and purpose of litigation refers to international trade operation.

Mediation and Conciliation.

Parties may agree to submit their disputes to extrajudicial dispute resolution by mediation or conciliation. Parties are free to appoint mediators or conciliators. Extrajudicial mediation and conciliation agreements homologated by judge are res judicata.

8.02 CONVENTIONS:

Convention on the Recognition and Enforcement of Foreign Arbitral Awards, New York, 1958; Inter-American Conventions on International Commercial Arbitration, Panama, 1975 and on Extraterritorial Validity of Foreign Judgments and Arbitral Awards, Montevideo, 1979.

8.03 MEDIATION:

Dispute resolution by mediation of controversies arising out of matters subject to settlement, of extrajudicial character and definitive is allowed. Parties are free to appoint mediators. Mediation agreements are homologated by judge and are res judicata.

9 DOCUMENTS AND RECORDS

9.01 ACKNOWLEDGMENTS:

Formal documents are executed before a notary public who retains original and issues certified copies. In addition, signatures on private documents may be acknowledged before notary public. Form of instruments is determined by law of place where they are executed, but where Ecuador laws require a public instrument, no private writings will be accepted. Instruments executed abroad require authentication by Ecuadorean diplomatic or consular officers or by apostille if country of execution is member of Hague Convention of 1961. (C. C. 16, 17; C. C. P. 1904 and Decree 1404 of Oct. 26, 1966 as am'd). See also topics 9.02 Notaries Public, 9.03 Public and Private Instruments.

9.02 NOTARIES PUBLIC:

Notaries are public officials, appointed by Superior Court. They must be Ecuadorean citizens by birth. They hold office for four years and are under supervision of courts of their district.

Instruments executed before a notary must be prepared with certain formalities. They must be in Spanish and state the date, the names of the parties, their age, domicile and whether married or single; also data as to the witnesses. The notary must declare that he knows the parties or that they were identified by two witnesses. Notarial instruments must have three witnesses. Employees and relatives of the notary to the fourth civil degree of consanguinity and second of affinity cannot be witnesses and certain other classes of persons are also excluded as witnesses. The notary retains the original document in a protocol and furnishes the parties with formal certified copies which have the effect of originals in court. (Decree 1404 of Oct. 26, 1966, as am'd, and Organic Judiciary Law, arts. 146-157; C. C. P. 164-190).

9.03 PUBLIC AND PRIVATE INSTRUMENTS:

Public instruments are documents executed with the legal formalities before a notary public (q.v.) or other competent public officer. Other documents are private instruments. A public instrument constitutes full proof of its date and fact of its execution but it constitutes proof of declarations it contains only with respect to parties to instrument. Law requires numerous contracts to appear in public instrument, e.g., articles of incorporation or partnership, deeds of real estate, mortgages, etc. Date of private writing is counted against third parties only as of date of death of one of signers or date when it was entered in public registry or presented in court or inventoried by competent official. Writing is required to prove any obligation of over certain amount. (C. C. 1716-1728; C. C. P. 164-206).

9.04 RECORDS:

There is a registry in each canton for the recording of documents relating to the conveyance and encumbrance of real property. Registrars do not transcribe the entire document but only the essential parts and they may refuse to record a document with serious defects. There are also commercial registries where certain data relating to merchants and corporations must be recorded, and civil registries for recording births, marriages and deaths. (C. C. 702-714; C. Com. 29-36; Civil Registry Law codified in Sup. Decree 278 of Apr. 2, 1976; and Registry Law as codified by Decree 1405 of Oct. 26, 1966).

9.05 SEALS:

Seals are not used in private matters. A document executed before a notary has most of the effects of a sealed instrument in the United States.

9.06 VITAL STATISTICS:

See topic 9.04 Records.

10 EMPLOYMENT

10.01 LABOR RELATIONS:

Provisions of Labor Code (Codification 2005-017 of Dec. 16, 2005 as am'd) govern relations between employers and employees.

Labor contracts may be: individual or collective; express or implied; oral or written. Contracts shall have a minimum duration of one year with exception of those involving domestic services, trainees, apprentices and others specified by law. Most labor contracts must be in writing. They could be in private or public document and must be registered at Labor Inspector's Office or at Labor Court of place of employment. If employer dismisses employee, he must pay severance equal to three months' salary to employees with up to three years of employment and for more than three years' employment amount equal to one monthly salary for each year of employment up to maximum of 25 monthly salaries. If employer or employee gives notice of termination of labor contract to other party employer must pay employee equivalent of 25% of last salary for each year of employment. If employee abandons his job without giving prior notice to employer, employee must pay employer amount equal to 15 days' salary. By Law 2001-55 of Nov. 27, 2001 as amended, all employers and employees must be covered by compulsory social security. Benefits provided by social security include following: sickness and maternity insurance; disability, death and old age; widowhood and orphan's; insurance against occupational accidents. Employers must distribute among their employees at least 15% of net profits obtained at end of each fiscal year.

Existence of employee associations or unions is guaranteed by Constitution and by Labor Code under art. 440 et seq.

11 ENVIRONMENT

11.01 ENVIRONMENTAL REGULATION:

(Codifications 2004-020 and 019 of July 22, 2004).

Constitution establishes legal framework for environmental legislation granting to each person right to enjoy healthy and balanced environment. It also considers environment and natural resources as national patrimony whose protection and conservation is public and social interest. Law contains such principles as prevention and control of environmental pollution, reparation of damages and environmental impact assessments. Environmental impact assessments are mandatory for any activity that may damage environment. Entry of hazardous waste and of radioactive waste into country is prohibited. Administrative or criminal penalties are imposed for violation of law. Environmental liability is regulated creating obligation to indemnify for damages caused and to restore environment to previous state. Environmental protection for areas such as mining, hydrocarbon, electric, forestry are regulated by specific legislation.

12 ESTATES AND TRUSTS

12.01 ADMINISTRATION:

See topic 12.06 Executors and Administrators.

12.02 CLAIMS:

See topic 12.06 Executors and Administrators.

12.03 DEATH:

Presumption of death of an absentee may be judicially declared after two years have elapsed since disappearance; thereupon three years after absence provisional possession of his property may be granted to his heirs. Definitive possession of property is granted after ten years or after six months when disappearance occurred in war, shipwreck, or any other similar danger. Definitive possession dissolves marriage of absentee. (C.C. 66-80).

Deaths are recorded in the Civil Registry of the jurisdiction where death occurred. Death certificates may be obtained by application to the Civil Registrar of the district. Nominal stamp taxes and fees are set by local regulations.

Actions for Death.

There is specific statute creating action for wrongful death in Civil Code under which anyone who causes damage to another is liable. Statute of limitations of tort action is four years from tort's date. (C. C. 2214-2237).

12.04 DECEDENTS' ESTATES:

See topics 12.05 Descent and Distribution, 12.06 Executors and Administrators, 12.09 Wills.

12.05 DESCENT AND DISTRIBUTION:

In the absence of testamentary dispositions a decedent's estate passes to the following, in the order named: (1) Descendants; (2) ascendants; (3) brothers and sisters; (4) spouse; (5) State. Descendants of deceased heirs succeed them by right of representation.

In accordance with Law 115 of Dec. 22, 1982, spouse and common-law wife have same hereditary rights.

Aliens have the same inheritance rights as an Ecuadorean. The Ecuadorean heirs of an alien have the same rights in his estate as they would have in the estate of an Ecuadorean and may demand that their claims be satisfied out of the alien's property in Ecuador.

Even though there be a will, a part of the estate goes to certain heirs by operation of law. (See topic 12.09 Wills, subhead Testamentary Disposition). Certain persons are excluded from testate or intestate succession, as for example, persons who were guilty of crime against the decedent or his spouse or legitimate ascendants or descendants.

Inheritances may be accepted expressly or impliedly or may be refused. If accepted the acceptance may be with benefit of inventory, in which case an inventory of the property is prepared and the heir is liable to creditors only up to the amount shown in such inventory, or it may be unconditional, in which case the heir is liable for all debts of the decedent in the proportion of his share of the estate. If there is no one appointed by the testator to make the partition the heirs make the partition themselves, minors and incompetents being represented by their guardians, with judicial approval. In case of controversy the judge appoints the partitioner. (C. C. 993-1036; 1245-1286; 1338-1401).

12.06 EXECUTORS AND ADMINISTRATORS:

If there is no executor appointed by the testator the heirs are charged with carrying out the testator's wishes. The law designates a number of classes of persons who cannot be executors, among them being persons whom the law considers physically, mentally or morally unfit. Executor must conclude his work within time designated by testator or within one year, but this period may be extended by court for another year.

When a person dies his property passes immediately to his heirs and may be held by them unless the testator has provided otherwise. An heir who accepts the inheritance unconditionally is liable for all the debts of the decedent according to his proportion of the inheritance; if he accepts with benefit of inventory he is liable only for the value of the property received by him. The executor must publish a notice to creditors, and must pay the debts if the testator charged him with this duty; but in any case he must see that a sufficient amount be set aside for debts in the division of the estate and if he is tardy in paying debts the creditors may bring suit against the heirs. Creditors may demand that the property of the deceased be kept separate from that of the heir. (C. C. 1293-1331; 1370-1401).

12.07 INTESTACY:

See topic 12.05 Descent and Distribution.

12.08 TRUSTS:

(C. C. arts. 748-777). Law expressly authorizes assignment or devise of property on condition that it shall later pass to another, provided it has not been constituted in fraud of third parties. Trust can be created by will or by contract. Secret trusts are prohibited as well as those in favor of two or more successive beneficiaries.

Codification 2006-01 of Jan. 24, 2006 regulates commercial trust.

12.09 WILLS:

(C. C. 1037-1244).

Wills may be made by all persons except those who: (1) Are under 18 years old; (2) have been adjudged incompetent on account of insanity; (3) are not in their sound senses; (4) cannot clearly express their will orally or in writing.

Wills are either: (1) Solemn; or (2) less solemn or privileged. Solemn wills are always in writing and are of two classes: (a) Open, nuncupative or public; or (b) closed or secret. The following cannot be witnesses to a solemn will: (a) Minors below 18 years; (b) persons of unsound mind; (c) blind, deaf or dumb persons; (d) persons convicted of certain crimes; (e) clerks of the officiating notary; (f) undomiciled aliens; (g) those who cannot understand the language of the testator.

Open wills are made either before notary or judge and three witnesses; or before five witnesses. They must state name of testator; his birth place; his nationality; his residence if he lives in Ecuador; his age; fact that he is of sound mind; names of persons he married; names of his children, dead or alive; names of witnesses; date; and name of notary or judge. Will must be read aloud in presence of testator and witnesses by notary or judge, if any, or by one of witnesses. Testator, witnesses and notary or judge sign document. If will was made before notary or judge no further probate is necessary; if it was made before witnesses only it must be probated in court. Blind persons can make only open wills, before notary or judge, and same must be read aloud twice by different persons.

Closed wills require a notary and five witnesses. A judge cannot act in place of a notary. The will having been written by the testator, or by another and signed by him, it is enclosed in an envelope which is sealed and handed by the testator to the notary in the presence of the witnesses with the statement that it contains his last will. On the envelope the notary writes a minute of the presentation stating that the testator is of sound mind; the name and domicile of the testator and each witness; and the date; and the same is signed by all present. The envelope containing a closed will cannot be opened until the signatures thereon have been proved in court.

Privileged wills are of two kinds: (a) military; (b) maritime. Military wills may be made by soldiers in time of war, in writing, before an officer, chaplain or surgeon and three witnesses. A maritime will may be made on Ecuadorean vessels before the captain or mate.

Testamentary Disposition.

In making will testator must necessarily observe following requirements: (a) He must provide for marital portion which law allows surviving spouse (see category 13 Family, topic 13.05 Husband and Wife); (b) one-half balance of estate must be distributed accordingly to rules of intestate succession among certain heirs designated by law as obligatory heirs, namely, descendants, ascendants, and other half may be freely disposed of by testator; (c) if there are descendants further fourth of estate must go to them, distributed as testator may desire, and he may freely dispose of only remaining fourth.

Foreign wills are valid in Ecuador if executed in accordance with the laws of the country where they were made. Ecuadoreans and aliens domiciled in Ecuador are allowed to make wills abroad before an Ecuadorean diplomatic officer or consul, accordingly to the rules covering Ecuadorean solemn wills; the witnesses must be either Ecuadoreans or aliens domiciled in the city where the will is made.

13 FAMILY

13.01 ADOPTION:

(C. C. 314-330; C. C. A. 151-189).

Adoption is institution by virtue of which a person called adopting party acquires rights and duties of a parent towards a minor called adopted party.

Any person over 30 and not older than 45 years may adopt minor under 18 years, provided he is at least 14 years older than such minor and obtains consent of parents and court. Widowers, single or divorced persons may adopt only minors of same sex of adopting party, unless adopting party is 40 years older than adopted party. Married people can adopt minors of any sex provided consent of both spouses is given.

Rights and obligations of adopted children are same as those of blood children. Adoptive child does not lose any of his rights towards his natural parents or relatives.

Adoption cannot be revoked.

13.02 ALIMONY:

See topic 13.04 Divorce.

13.03 COMMUNITY PROPERTY:

See topic 13.05 Husband and Wife.

13.04 DIVORCE:

(C. C. 105-130; C. C. A. 126-150).

Divorce dissolves marriage bond and may be obtained by mutual consent or granted for: (1) Adultery; (2) cruelty; (3) grave insults or hostile attitude showing habitual lack of harmony; (4) frequent threats against life of spouse; (5) attempt against life of spouse; (6) wife giving birth to child conceived before marriage if proved not spouse's child; (7) acts intended to corrupt spouse or children; (8) incurable and contagious disease; (9) habitual drunkenness or drug addiction; (10) sentence for imprisonment for felonies; (11) separation for one year, upon complaint of deserted party only, or with separation for three years at request of either party. Court must take into account educational background, social position and any other reasonable considerations.

No particular length of residence is specified, but bona fide domicile is required. Action is filed before judge of defendant domicile; if living out of country, before judge of defendant's last local domicile.

The action must be brought within one year from the time when the cause came to the knowledge of the offended party in cases (1), (5) and (7) and from the time when it accrued in most other cases. For divorce by mutual consent the parties submit a petition to the judge who after two months holds a hearing and attempts their reconciliation; if not successful he grants the divorce.

Parties must agree as to custody and support of children; this agreement may at any time be modified by judge for good cause shown.

Alimony in amount determined by the court, may be allowed to a wife or to husband. Upon judgment of divorce marriage community property is divided.

A judgment of divorce is not effective until recorded in the Civil Registry. A marriage contracted in Ecuador, when either spouse is Ecuadorean, may be annulled, or dissolved by divorce, only by Ecuadorean judges.

13.05 HUSBAND AND WIFE:

The spouses owe each other fidelity and protection and they have equal rights and duties.

Before contracting marriage or after by mutual consent parties may agree on marriage articles regarding property matters. In absence of such agreement parties are presumed to enter into marriage community comprising following property: (1) Salaries and emoluments earned by each spouse during marriage; (2) fruits and revenues of both separate and community property; (3) money and personalty brought by parties into marriage, such money and value of personalty to be restored by community; (4) property acquired by either spouse during marriage for valuable consideration. Either spouse may administer property of community, but in order to alienate or encumber community real property acquired during marriage, consent of other spouse is required.

In absence or inability of spouse administrator, other spouse is given by court administration of community and property of former.

Upon dissolution of the community each spouse or his or her estate is entitled to one-half of the property.

Upon the death of a spouse the surviving spouse is entitled to a marital portion amounting to one-fourth of the estate or equivalent to the obligatory share of child only if surviving spouse cannot sustain him- or herself. (See category 12 Estates and Trusts, topic 12.09 Wills.) If surviving spouse has property marital portion is diminished by value of such property. All amounts received by surviving spouse from estate of deceased, including share in community property, are credited to marital portion. (C. C. 131-232; 1204-1229; C. Com. 12-20).

13.06 INFANCY:

(C. C. 283-313).

Paternal authority (Patria Potestad) comprises rights and duties that legitimate parents have upon their children. Father or mother is legal administrator of his children's estate; but may lose this right in case of gross and habitual negligence in such administration.

Age of majority is 18 years, but a minor may previously be emancipated; this puts and end to paternal authority. Emancipation can be voluntary, legal, or judicial.

Voluntary emancipation is granted by parents and has to be done by public instrument acknowledged by a Notary Public and with judicial approval. Legal emancipation occurs when: (a) Parents are dead; (b) by marriage; (c) by judgment granting possession of parents' estate if they have disappeared; and (d) when infant reaches age of 18 years. Judicial emancipation occurs by judgment of courts in case of severe mistreatment that endangers mental and physical health of infants or when parents have been sentenced to four or more years in jail.

Emancipation, once granted, is irrevocable.

Code of Childhood and Adolescence (Código de la Niñez y Adolescencia), Law 2002-100 of Dec. 17, 2002 regulates special rights, guaranties and duties of children and adolescents, among them right to life, to know whom their parents are, to have family, to enjoy good health, to education; to protection in case of abuse, sexual exploitation, disappearance, illegal traffic of minors, minimum working age and working conditions, child support, adoption. Adoption by adopting parents living abroad is also regulated by Code. National Board of the Childhood and Adolescence is in charge of enforcing Code. Severe penalties are imposed in case of violation of provisions of law.

Parental authority can be suspended by Judge of Minors in case there is strong evidence that either parent suffers from mental incapacity, alcoholism or any kind of drug addiction, neglect or lack of interest in education of minor.

Other provisions of law contemplate prevention of minors' antisocial behavior and correction of it with adequate treatment.

13.07 MARRIAGE:

(C. C. 81-104).

Marriages must be performed before a civil functionary and two witnesses. A marriage by religious rite must be preceded by a civil ceremony. Marriages by proxy are allowed. A void marriage legally performed produces civil effects with respect to the spouse who acted in good faith and the children.

In order to marry, a person must have attained the age of 18 years, but persons under that age may marry with consent of parents or guardian. The following are grounds for annulment: relationship by consanguinity in direct line or to second degree in collateral line, or by affinity in first degree; insanity; impotence; existing marriage; marriage of male under 14 or female under 12 years old; marriage of surviving spouse and principal or accomplice of death of one's spouse; error as to person, duress, mental illness, kidnapping. Statute of limitation of action for annulment is two years as of date of marriage or when innocent party has knowledge of ground, except in case of previous marriage and relationship by consanguinity in direct line. Widow may not remarry within 300 days after her husband's death unless she files proof of nonpregnancy; guardian or his descendants and ward may not marry until accounts of guardianship are liquidated.

Ecuadorian diplomatic agents and consuls general may celebrate marriages between Ecuadorians outside Ecuador and between aliens domiciled in Ecuador.

13.08 MARRIED WOMEN:

See topics 13.05 Husband and Wife, Marriage; categories 12 Estates and Trusts, topics Executors and Administrators, Wills; Property, topic Dower.

14 FOREIGN TRADE AND COMMERCE

14.01 EXCHANGE CONTROL:

(Codification 2005-022 of Dec. 13, 2005 as am'd).

Central Bank authorizes private banks to deal in foreign exchange. In order to import and export special permit must be issued. Export proceeds must be surrendered to authorized private banks and financial companies.

14.02 FOREIGN EXCHANGE:

See topic 14.01 Exchange Control.

14.03 FOREIGN INVESTMENTS:

(Law 46 of Dec. 2, 1997 regulated by Decree 1525 of June 18, 1998 and Decree 3497 of Dec. 12, 2002).

The Common Regime for Treatment of Foreign Capital and of Trademarks, Patents, Licenses and Royalties (Decision 291 of Commission of Cartagena Agreement) is in force. No prior authorization is required for foreign investment to participate in national, mixed or foreign companies.

For foreign investment purposes, companies are classified as follows: (a) Foreign Company: one whose capital, in hands of national investors, amounts to less than 51% or, if that percentage is higher, is not properly reflected in opinion of Central Bank in technical, financial, administrative and commercial management; (b) National Company: one in which more than 80% of capital belongs to national investors, provided that in opinion of competent authority, that proportion is reflected in technical, financial, administrative and commercial management of company; (c) Mixed Company: one whose capital belongs to national investors in a proportion which may fluctuate between 51% and 80%.

Purpose of Law is to promote investment and is considered national priority.

Foreign investment is investment made by foreign individual or juridical person in freely convertible foreign currency, assets, investment of profits entitled to repatriation, technological contributions. Foreign investors have same rights and duties as national investors; they may invest in all economic activities without prior authorization, except in strategic areas. Foreign investment must be registered with Central Bank of Ecuador. Law guarantees free remittance abroad of profits and repatriation of capital, in free convertible currency; access to national financial system, free availability of foreign currency. Tax regime stability is granted for ten years to investment made in existing companies and for 20 years for new projects or expansion of production. Investment must be over $500,000. Any controversy arising between foreign investor and government may be subject to international arbitration.

License agreements on transfer of technology and use and exploitation of foreign patents and trademarks do not require prior authorization. All transfer of technology agreements must be registered with Ministry of International Trade, Industrialization and Fishing.

For tax in foreign loans see category 22 Taxation, topic Business Taxes, subhead Tax on Loans.

14.04 FOREIGN TRADE REGULATIONS:

(Law 12 of May 12, 1997 as am'd).

Law considers foreign trade national priority, especially promotion of export activity. There is no tax on exports, with exception of hydrocarbons. Most imports are subject to system of import duties, ad valorem surcharges and excise tax, unless expressly exempted therefrom. Law creates Council of Foreign Trade and Investments empowered to issue regulation on subject matter.

See topic 14.01 Exchange Control.

15 HEALTH

15.01 HEALTH REGULATIONS:

Organic Law of National Health System.

Law 2002-80 of Sept. 17, 2002 regulated by Decree 3611 of Jan. 14, 2003. Purpose of law is organization of National Health System to improve health and life level of whole population of country. It deals with definition, principles and objectives, integral healthcare plan, integration, operation, health council, human resources, manufacturer of generic medicines, science and technology in health. Public and private health organizations are part of National Health System. Preparation, importation, commercialization and sale of generic medicines is regulated by Codification 2005-19 of Nov. 17, 2005 as amended.

Organic Health Law.

Law 2006-67 of Dec. 14, 2006. Ministry of Public Health is in charge of regulating, planning and coordinating public and private activities related to health and enforcement of law. Law regulates among others, supply of drinking water; processing of waste water; toxic substances; solid waste; practice of health related professions; industrial establishments; preventive medicine; disease control and vaccination; pharmacies; medical equipment and pharmaceutical products; registration of cosmetics, food products, plaguicides, medicines and drugs; donations and transplants of organs; consumption of alcoholic beverages and use of tobacco, international sanitary protection; cemeteries, burial and exhumation; air, noise and water pollution and sanctions for infringement of Law. Accord 693 of Nov. 15, 2007 regulates sanitary permits, preparation, storage, importation, exportation and commercialization of homeopathic medication.

16 IMMIGRATION

16.01 ALIENS:

Aliens in general enjoy same civil rights as citizens. Entry of paupers, criminals, etc., is prohibited and government may expel aliens who take part in Ecuador politics or are guilty of crime or whose presence is considered menace to morals or public order. All aliens must register with Registry of Aliens within 30 days of their arrival. Aliens may enter country as immigrants and non-immigrants. Immigrants are those who enter country with intention to stay and are duly authorized to do so. Immigrant aliens must prove minimum income per month or provide certain other guaranties and must obtain identity card. Non-immigrant aliens may enter country and stay there for limited time and perform lucrative activities. (Const., art. 13; Codification 2004-023 of Oct. 13, 2004, Decree 1991 of June 30, 1986 as am'd). Law regulates admission and deportation, entrance, stay, registry, control and information of exit and re-entrance of alien to country and their rights and duties. (Codification 2005-006 of Mar. 8, 2005).

See also categories 2 Business Organizations, topic Corporations; Estates and Trusts, topic Descent and Distribution; Mineral, Water and Fishing Rights, topic Mines and Minerals.

17 INTELLECTUAL PROPERTY

17.01 COPYRIGHT:

(Decision 351 of Dec. 17, 1993 of Cartagena Commission; Codification 2006-013 of Nov. 29, 2006 and its regulations Decree 508 of Jan. 25, 1999 as am'd).

Law grants certain intellectual, moral and property rights to author, his successors or assignees, regarding literary and artistic works. Copyrights include all kinds of intellectual (including software), literary and artistic creations reproduced by any means. Law also protects translations, adaptations, musical arrangements and other transformation of private intellectual works; to protect these copyright works written authorization from original owner of work is necessary. Performers' rights are also protected. Literary and artistic works, performances and other productions are protected by law without requiring registration. Protection runs for life and 70 years in favor of successors.

Conventions.

Berne Convention for the Protection of Literary and Artistic Works, as reviewed and amended; International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations, Rome, 1961; Convention for the Protection of Producers of Phonograms, Geneva, 1971; WIPO Copyright Treaty, Geneva, 1996; WIPO Performances and Phonograms Treaty, Geneva, 1996.

17.02 PATENTS:

(Decisions 486 of Sept. 14, 2000 and 345 of Oct. 29, 1993, Codification 2006-013 of Nov. 29, 2006 and its regulations Decree 508 of Jan. 25, 1999 as am'd).

Any invention of products or proceedings in any technology field which are novel, represent inventive step and are susceptible of industrial application. Invention is novel when it is not within state of art. Among others discoveries, scientific theories and mathematical methods; literary and artistic works; are not considered inventions. Inventions contrary to public policy, morals and against life or health of people or animals and environment; cloning procedure; on plants and on animal species and races and biological procedures to obtain them, natural biological process, biological material existing in nature or resulting from isolation, including genome or germplasm of any natural being, plan, rules and methods for pursuit of intellectual activities, games or economic-commercial activities, computer programs or software, as such, and forms of representing information; and related to substances composing human body are not patentable.

Patents are granted for 20 years from filing date. Compulsory licenses may be granted in case of declared emergency or national security reasons. Utility models for new forms of objects or mechanism, provided they have practical use are registrable. Registration term is ten years from filing date. Industrial designs are registrable if new. Registration confers right of exclusive use for ten years. Provisions regarding patents are applicable to utility models. Applications are published and opposition can be filed. Law also protects trade secrets and considers them as any confidential information that is valuable and provides competitive or economic advantages to owner.

Layout-designs of integrated circuits are protected when considered original and indicated by law. Application must be filed within two years from its first commercial exploitation in any part of world, and when it has not been exploited application must be filed within 15 years from last day of year of invention. Rights may be licensed, and compulsory license may be granted; they are also assignable and inheritable. Registration is granted for ten years from filing date or from last day of year of first exploitation.

Vegetal species are protected when they are novel, homogeneous, distinguishable and stable and generic designations have been assigned to them. Registered certificate of holder is issued for 20 or 25 years, depending on type of vegetal variety. International Convention on Protection of Vegetal Species, Geneva, Dec. 2, 1961 as revised.

Conventions.

Patents Cooperation Treaty (PCT), Washington, June 29, 1970 as amended; Paris Convention for the Protection of Industrial Property, as reviewed and amended.

17.03 TRADEMARKS:

(Decisions 486 of Sept. 14, 2000 and 345 of Oct. 29, 1993, Codification 2006-013 of Nov. 29, 2006 and its regulations Decree 508 of Jan. 25, 1999 as am'd).

Those signs sufficiently distinctive can be registered as marks. Trademark is any sign used to distinguish products or services produced or commercialized by one person from same or similar products or services produced or commercialized by another person. Following signs, among others, can be registered as marks: words or combination of words, pictures, figures, symbols, graphic elements, logotypes, monograms, portraits, labels, emblems, sounds, smells, letters and numbers, shape, packing and wrapping of products. Slogans are words, sentences or captions used as supplement to trademark.

Following cannot be used as trademarks: Letters, words, arms and emblems used by the nation or municipalities or by foreign states or cities or by international organizations; name or picture of person without consent of such person, or descendant if person is dead; generic terms; local common names used to describe products; form and color of products; marks contrary to law, those against public policy, denomination of protected vegetal varieties, those identical or similar to registered trade slogans and trade names provided under circumstances public may be confused; those that are reproduction, imitation, translation or total or partial transcription of distinctive signs, locally or internationally, well known, without taking into consideration classification of goods or services concerned; or because of similarity to well-known trademarks causes confusion to public independent of classification of goods and services for which registration is applied for. Registration of generic or descriptive terms, usual or common expressions, and individual color may be registered as mark provided owner of mark can prove that mark permits consumers to identify expression with its specific good or service. Term of registration is ten years subject to renewals for periods of ten years indefinitely. Renewal application can be filed during six months after expiration ten-year period. Trademarks can be cancelled for nonuse for consecutive three years by owner or licensee in any member country of Andean Pact. Partial cancellation may be done when owner proves use of mark for some goods or services. Statute of limitation for action to declare invalid registration of well-known mark registered by third party is five years from date owner becomes aware of unauthorized use; there is no limitation when it has been used in bad faith. Owner of well-known marks can request cancellation or amendment of registered domain name or e-mail address affecting its exclusivity rights. Law regulates infringement actions and unfair competition.

Tradenames is any sign that identifies economic activity, enterprise or mercantile establishment. Tradenames are independent from company denomination, and both can coexist. Exclusive right is acquired by first used in commerce and terminates with activities of enterprise. Tradenames may be licensed.

Certification marks sign to be applied to products or services used by others whose quality or other specific characteristics have been certified by legal owner of mark, which shall be public or private entity.

Denomination of origin may be declared at government's initiative or at petition of interested party. Authorization to use them may be granted for ten years, renewable. (Law 83 of May 8, 1998).

Conventions.

Paris Convention for the Protection of Industrial Property, as reviewed and amended.

18 LEGAL PROFESSION

18.01 ATTORNEYS AND COUNSELORS:

(Decree 891 of Sept. 2, 1974 as am'd, Law 201-A of Feb. 20, 1974).

To practice law attorney holding law degree from Ecuadorian university must be registered with “Colegio de Abogados” (Lawyers' Association) and with “Corte Suprema” (Supreme Court). Attorney holding law degree from foreign university may practice law if authorized by international convention adopted by Ecuador and if complies with revalidation of degree according to law. License to practice law may be temporarily suspended or canceled if attorney is convicted of crime or felony.

19 MINERAL, WATER AND FISHING RIGHTS

19.01 MINES AND MINERALS:

Law 126 of May 28, 1991 as amended regulated by Decree 1415 of Apr. 6, 2001 as amended provides that mines are property of State, which conducts all mining activities, either directly or by granting mining rights with third parties. State may reserve any zone for its exploitation or exploration. There remain certain areas not regulated by this law but which come instead within special laws governing hydrocarbons, radioactive substances and mineral water. Environmental regulations for mining activities are established by Decree 625 of Sept. 2, 1997.

Mines in General.

Mining activity, including smelting, refining and commercialization, is public utility. Mining concessions are considered real property distinct from surface, may be alienated, rented, encumbered or transferred by inheritance, but ownership is not considered as transferred nor is mortgage effective for third persons until recorded in Mining Registry. Mining policy is executed by Corporación de Desarrollo e Investigación Geológico- Minero- Metalúrgica which may create mixed economy companies with national or foreign companies or individuals. Law establishes causes for expiration or cancellation of contracts. All mining activities and disputes are subject to

Ecuadorian law and jurisdiction. All individuals or juridical persons, domestic or foreign with legal capacity may obtain exploration or exploitation concessions. Prospecting is free. Exploration concessions are granted for two years which may be extended twice for periods of two years. Area allocated for exploration is up to 5,000 “héctareas mineras”, as stipulated by law. Exploration concessions guarantee owners right to exploitation concessions. Exploitation concessions are granted up to 20 years, renewable; area allocated is up to 3,000 “hectáreas mineras”.

Taxes.

Exploration and exploitation are subject to annual surface rights which are adjusted every year as stipulated by law. All mining activity is subject to income tax on taxable income which represents difference between gross income and authorized deductions from gross income. There is royalty of 3% on value of gross production of all minerals. Importation of capital goods and raw materials necessary for all mining activity pays duties at lowest rate.

Petroleum.

(Decree 2967 of Nov. 6, 1978, as am'd, codifies Hydrocarbons Law as am'd, Decree 1672 of July 11, 2006 as am'd). Hydrocarbon industry, including production, refining, transport and commercialization, is public utility. Expropriation of property may be conducted for development of industry. Primary goal is refining within Ecuador. Hydrocarbon policy is dictated by Ministries of National Defense and of Energy and Mines. In accordance with Decree 873 of Sept. 22, 2003, and Law 45 of Sept. 18, 1989 regulated by Decree 1420 of Apr. 10, 2001, Decree 2025 of Oct. 26, 2001, Empresa Estatal Petróleos del Ecuador (PETROECUADOR) or its subsidiaries may execute association participation and service contracts for exploration and exploitation of hydrocarbons with private developers under various stipulated arrangements by bid or individual evaluation or creating mixed economy companies with national or foreign companies duly established in country and having signed agreement renouncing all diplomatic recourse. Refining, industrialization, transport and commercialization shall be done by PETROECUADOR or national or foreign companies established in country authorized by government to do so at their own risk and expense. Professional services that need to be performed by PETROECUADOR may be performed by itself or by others through professional services agreements. Each contract of exploration or exploitation is limited to maximum of 200,000 hectares onshore and 400,000 offshore. Companies must also commit themselves to minimum annual investment per hectare onshore and offshore during first three years of exploitation period. Exploration may last four years renewable for two more years. If oil is found company can enter into 20-year exploitation agreement, renewable according to public interest. If commercial find is made PETROECUADOR will reimburse either in cash or in crude, at latest PETROECUADOR negotiated spot price investment and cost incurred during exploration phase. Both can be done simultaneously in areas partially explored. Contracting parties must post guaranty of 20% of projected investment. At termination of contract all equipment and installation must be turned over to PETROECUADOR. Contracting company must employ Ecuadorian nationals for at least 95% of its blue collar positions, 90% of its administrative employees and 75% of its technical personnel, during first five years; contracting company must also implement program of technical and administrative instructions, and after first five years of exploration period, all blue collar positions and administrative employees must be Ecuadorian nationals and at least 90% of its technical personnel.

Educational surcharge is levied on production. Minimum of 10% of net profits must be reinvested within five years in national petroleum industry or in government bonds and notes. Measures necessary for environmental protection are required.

Government authorizes exploitation of petroleum or natural gas in accordance with agreements provided by law. Contractors have option to buy whatever exportable surplus is left once local demand is satisfied, provided their purchases do not exceed 50% of output from their units. No export tax is levied on purchase of crude. State requires guaranty right of compensation for itself from production and marketing in cash or petroleum. Compensation in cash royalties is measured by monthly gross production and ranges from 12½% to 18%. Partial payment may be required at beginning of each year. All oil and gas pipe lines must be authorized by Government. Royalties, income tax, State participation, including 99% of extraordinary income from increase of crude oil price over price in force at date of execution of contract calculated according to formula, reasonable rate of return on capital and world prices control price set for petroleum, which is uniform for all products, both raw and refined. Contract may be cancelled under stipulated conditions. Such cancellation results in immediate reversion of area of contract to State and loss of installations and equipment and depository guaranty. Fines may also be imposed in certain cases. Foreign investments and foreign loans made in or to petroleum industry must be registered with Central Bank of Ecuador.

Assignment of contracts is regulated by Decree 1363 of Mar. 16, 2001 and Decree 1442 of June 1, 2006.

Decree 1215 of Feb. 2, 2001 contains environmental regulations for hydrocarbon operations.

Taxes.

Contracting companies pay income tax at rate of 44.4% and at rate of 25% on amounts of income reinvested in same activities when executed services contract and in case of association and participation contracts at minimum rate of 25%. (Codification 2004-026 of Oct. 21, 2004 as am'd).

20 MORTGAGES

20.01 CHATTEL MORTGAGES:

Law recognizes pledge of chattels, without delivery, with registration, and agricultural and industrial pledges. Former is called “Special Commerce Pledge” and may be granted only to registered merchant on goods sold by him on credit. It must be executed in duplicate writing with details of persons and goods involved and recorded in special registry, otherwise it is not binding on third parties. Creditor is entitled to have thing pledged shown at any time. Failure to comply with his request for 48 hours renders debt due and payable. Proceedings for sale of pledged object are summary. Sale is made by auctioneer designated by court, after expert appraisal. Failure to produce object pledged or deliver it for sale, its destruction, transfer or change of place, where it must be kept under contract, are punishable under Penal Code. Counterpart of document held by pledgee is negotiable by endorsement and annotation on margin of recording entry. Partial payments must be annotated on same. Debtor may advance payment before due date by tendering principal and interest to date of payment only. Installment with pledge may be made in printed forms and then creditor's counterpart may have detachable coupons exchangeable against corresponding payment without annotation on document. Separate bills or notes may be issued for installments. (C. Com. 202-A—202-R). Codification 2006-011 of Nov. 29, 2006 and its regulations, Decree 2524 of Apr. 4, 2002 as amended regulates issuance of mortgage certificates issued by financial institution.

Agricultural pledges may be constituted on (a) animals and their increase, (b) fruit pending or gathered, (c) products of forests and agricultural industries and (d) agricultural machinery and utensils. Industrial pledges may be constituted on industrial machinery, installations, tools, utensils and other elements of industrial labor, animals destined for the service of an industry and products industrially transformed. If the pledge relates to pending fruits or objects regarded as real property the consent of mortgage creditors must be obtained. The pledge contract must appear in writing and be recorded in a special registry. In case of default the property is sold by judicial sale. (C. Com. 576-601).

20.02 COLLATERAL SECURITY:

See category 7 Debtor and Creditor, topic 7.11 Pledges.

20.03 MORTGAGES:

Mortgages must be executed in the form of a public instrument (q.v.) or at a purchase under execution of an attachment. They may be made in a foreign country with respect to property in Ecuador. They are effective only from the date of their record in the registry. A mortgage can be given only on real property and on vessels. Mortgages are foreclosed by a summary executory suit. After foreclosure there is no right of redemption. (C. C. 2309-2336). Decision 487 of Dec. 7, 2000 of Andean Community on Maritime Guarantees (Naval Mortgage and Maritime Privileges) and Attachment of Vessels is applicable to all commercial vessels navigating within jurisdiction of member countries regardless of place of registration and without affecting any existing rights granted by international convention, or member's local law.

21 PROPERTY

21.01 ABSENTEES:

See category 12 Estates and Trusts, topic 12.03 Death.

21.02 ADVERSE POSSESSION:

See category 5 Civil Actions and Procedure, topic 5.04 Prescription.

21.03 CONVEYANCES:

See topic 21.05 Deeds; category 9 Documents and Records, topics 9.02 Notaries Public, 9.03 Public and Private Instruments.

21.04 CURTESY:

There is no estate by curtesy. As to rights of surviving husband, see categories 12 Estates and Trusts, topic Descent and Distribution; Family, topic Husband and Wife.

21.05 DEEDS:

(C. C. P. 160-190).

Conveyances of real estate must be by public instrument (q.v.) and contain a true statement of the consideration since the state tax on transfers of title is based on the real consideration. Deeds must likewise bear stamps depending on the amount involved and be recorded in the Registry of Properties. Both grantor and grantee must sign the deed and both must be present before the notary at the same time. If one is absent he must be represented by an attorney in fact. The original deed, if executed in Ecuador, remains in the files of the Ecuadorean notary who gives to either party a certified copy which has the effect of an original in the courts of law.

Wife has no dower right.

21.06 DOWER:

No dower right. As to rights of widow, see categories 12 Estates and Trusts, topic Descent and Distribution; Family, topic Husband and Wife.

22 TAXATION

—Scope —

There is Fiscal Code which refers to taxes in general, interpretation of tax laws, collection of taxes and certain procedural matters. (Fiscal Code, Codification 2005-009 of May 10, 2005).

22.01 EXCISE TAX:

(Codification 2004-026 of Oct. 21, 2004 as am'd and its Regulations, Decree 2209 of Dec. 28, 2001 as am'd).—Tax is levied on specified products at importer or producer level only. Tax rates vary. Products taxed include cigarettes, beer, soft drinks, alcohol and alcoholic beverages. Excise tax is included in taxable base of value added tax.

22.02 FREE ZONES:

(Codification 2005-004 of Mar. 8, 2005, regulated by Decree 2790 of June 27, 2002 as am'd). Free zones can be publicly or privately operated under supervision of “Consejo Nacional de Zonas Francas” (CONAZOFRA). All types of industries, trading and service companies are allowed to function there. Importation and exportation of raw materials, goods, equipment are duty free. Companies are exempted from all taxes for period of 20 years from installation date, renewable, up to CONAZOFRA. There are no restrictions for repatriation of capital and remittance of profits abroad.

22.03 INCOME TAX:

(Codification 2004-026 of Oct. 21, 2004 as am'd and its Regulations, Decree 2209 of Dec. 28, 2001 as am'd). Income earned from Ecuadorian sources by individuals, undistributed estates, and national or foreign companies and income earned abroad by locally domiciled Ecuadorian individuals and national companies are taxed under this Law.

Law considers income from Ecuadorian sources income earned by national or foreign individuals from any kind of property or activities or labor, income earned abroad by national and foreign individuals from individuals or national or foreign companies domiciled in Ecuador, or from Ecuadorian public entities, capital gains from transfer of personal or real property, royalties from patents, trademarks, copyright and transfer of technology, profits paid by local companies, interests, inheritances, legacies and donations of assets located in Ecuador, lottery, raffle, game or similar awards or gains.

See category 2 Business Organizations, topic 2.02 Corporations.

Deductions, among others, are: Insurance premiums, losses due to acts of God or force majeure, traveling expenses, depreciation and amortization according to law, wages and salaries paid, indemnification, social security contributions, bad debts, exchange differences, investment amortization; payments abroad according to law; payments to parent companies under 5% of net income.

Tax rate for undistributed estates is 5% and for individuals domiciled in Ecuador range from 5% to 25%. Heirs, legatees and donees are taxed at 5%. Nonresident foreign individuals are taxed at 25% rate on total income when services are not performed on regular basis.

Corporations organized in Ecuador, branches of foreign corporations domiciled in country and permanent establishments of non-domiciled foreign corporations are subject to tax at 25% rate. Profits and dividends credited or paid to residents and nonresidents when paid out of tax exempted profits or profits already subject to corporate rate are not taxed. Reinvested profits are taxed at 10% rate. Other income or gains remitted, paid or credited abroad is subject to withholding tax at 25% rate.

Salaries and taxable payments are subject to system of withholding at source as provided by Law.

Credits.

Withheld tax constitutes a credit against tax to be paid. If distributed dividends proceed from foreign incomes foreign tax may be credited in accordance with tax applied in country of origin to income from Ecuadorean sources subject to former's tax laws, but credit is limited to amount of tax to be applied.

When an individual receives salary compensation abroad which is considered taxable as from Ecuadorean sources, tax paid on same in foreign country is credited as per regulations.

22.04 PROPERTY TAXES:

Transfer and registry taxes are collected on conveyances of property, inscriptions of merchants and numerous other acts. (See category 9 Documents and Records, topic 9.04 Records.)

22.05 TAX INCENTIVES AND EXEMPTIONS:

Industrial Development Benefits.

Codification 2006-004 of May 4, 2006 and its regulations, Decree 427 of Jan. 11, 1985 as amended to promote industrial development grants incentives to new and existing companies dedicated to industrial activities as indicated by law.

To obtain benefits, following categories of applications must be made: (1) Exoneration; (2) inscription; (3) classification; (4) reclassification; (5) customs duties modification; (6) deductions for investment and reinvestment. Business will then be classified on basis of technical and economic data evaluation. Central Bank will control importation of machines, spare parts and raw materials. Benefits may be extended to importers of used machines and used spare parts.

Violation of law is subject to fines, and suspension or revocation of benefits. Verifications of compliance are made. Businesses are required to: (1) Comply with all laws and regulations; (2) maintain proper accounting; (3) provide income tax and other declarations; (4) cooperate with authorities; (5) employ Ecuadorean nationals, except if skills required cannot be obtained; (6) publish annual general balance publicly. Businesses must buy national products as first preference. Businesses may solicit protective measures against “dumping” practices; also, provisions will be made to avoid ruinous competitive practices domestically.

If company is engaged in various types of production, it will be classified according to its predominant activity, usually that which accounts for greater than 50% of total sales. Changes in sales, name of firm, purpose, merger, division or other modifications must be approved by Interministerial Committee (Comité Interministerial). Business may solicit reclassification of its category of benefits, if its operations change.

Law 90 of Aug. 2, 1990 and Decree 3497 of Dec. 12, 2002 regulate draw-back activity.

Other Incentives.

(Law 2005-20 of Nov. 9, 2005 regulated by Decree 1575 of June 23, 2006). New investments on new productive areas that increase employment and services; on new hydroelectric and non-conventional electricity generation; refining and industrialization of hydrocarbons and petrochemical products; manufacture of high technology electronic apparatus and optic fiber; development, implementation, installation and operation of regional centers for distribution of air traffic and interconnection freight of international flights; construction and operation of ports; manufacture of machinery and equipment for industry and agriculture not produced in country among others, enjoy duty free importation of raw materials, goods, equipment not produced locally. No income tax due; municipal tax exemptions up to 95% for ten and 12 years available, depending on location of project, according to law.

Tourism Law.

Law 2002-97 of Dec. 17, 2002 regulated by Decree 133 of Feb. 7, 2003 as amended, Decree 1186 of Dec. 16, 2003 as amended promotes development and regulates tourist sector. It grants rights and imposed duties on users and renderers of tourist services. It creates Consejo Consultivo de Turismo as advisor on tourist activities. Law grants some tax incentives to tourist activity according to invested capital. When leaving country tourist may apply for reimbursement of value added tax.

22.06 TREATIES AND AGREEMENTS:

Double Taxation.

Effective with Belgium, Bolivia, Brazil, Canada, Chile, Colombia, France, Germany, Italy, Mexico, Peru, Romania, Spain, Switzerland and Venezuela.

22.07 VALUE ADDED TAX:

(Codification 2004-026 of Oct. 21, 2004 as am'd and its Regulations, Decree 2209 of Dec. 28, 2001 as am'd). Tax is levied on transfer and importation of goods, in all stages of commercialization, and on rendering services at rate of 12%. Transfer and importation of some goods are exempted from this tax, such as medicines, books, seeds, chemical products used in agriculture, raising of animals; and among services exempted from this tax, are freight and passengers transportation by land, river and sea, health services, public utility services, educational services and financial and stock services.

23 TRANSPORTATION

23.01 SHIPPING:

Captains and officers of vessels of Ecuadorean registry must be Ecuadorean citizens except when no professional title is required. Only Ecuadorean citizens and alien residents in Ecuador can be owners of a national vessel. Vessels may be mortgaged. (Codification 40 of Aug. 20, 1960 as am'd, Decree 289 of Apr. 12, 1976; C. C. 2320, C. Com. 727). Many provisions of admiralty law are found in Code of Commerce. (arts. 724-1011).

Art. 609 of Civil Code extends national sovereignty up to distance of 200 marine miles, measured from low tide marks.

Law 147 of Mar. 23, 1992 as amended, regulated by Decree 3431 of June 12, 1992 as amended, establishes that cargo coming in or going out of Ecuador can be transported in local or foreign vessels based on principle of reciprocity and international conventions. Temporary restrictions may be imposed on foreign vessels if country of origin imposes any restrictions on Ecuadorian cargo vessels. Transportation of passengers, cargo and mail is reserved to local vessels. All maritime transport companies importing or exporting cargo must register their rates with Dirección General de la Marina Mercante y del Litoral.

Law 2003-18 of Oct. 27, 2003 as amended regulated by Decree 1886 of July 9, 2004 grants tax incentives to maritime transport companies, and companies in charge of constructing and repairing vessels.

24 TREATIES AND CONVENTIONS

24.01 TREATIES:

Ecuador is party to the following: Convention on Private International Law (Bustamante Code), Havana 1928; Andean Pact, Cartagena 1969; Latin American Integration Association, Montevideo 1980; Latin American Economic System, Panama 1975; United Nations Convention on Recognition and Enforcement of Foreign Arbitral Awards 1958; Interamerican Convention on Copyrights June 22, 1946; Universal Convention on Copyrights Dec. 31, 1956; Inter-American Convention on Conflict of Laws concerning Bills of Exchange, Promissory Notes and Invoices. Signed in Panama on Jan. 30, 1975; Inter-American Convention on Conflict of Laws concerning Checks. Signed in Panama on Jan. 30, 1975; Inter-American Convention on Letters Rogatory. Signed in Panama on Jan. 30, 1975; Inter-American Convention on Taking of Evidence Abroad. Signed in Panama on Jan. 30, 1975; Inter-American Convention on Legal Regime of Powers of Attorney to Be Used Abroad. Signed in Panama on Jan. 30, 1975; Inter-American Conventions: On Conflicts of Law concerning Checks, on General rules of private international law, on execution of preventive measures, on extraterritorial validity of foreign judgments and arbitral awards, additional protocol to Inter-American convention on letters rogatory and on domicile of natural persons in private international law. Signed at Montevideo on May 8, 1979. Multilateral Trade Negotiations, The Uruguay Round, Final Act, Marrakesh, Apr. 15, 1994 and Agreement Establishing the World Trade Organization, Marrakesh, Apr. 15, 1994; Convention on abolishing the requirement of legalization for foreign public documents, The Hague, 1961.

International Sale of Goods.

United Nations Convention on Contracts for the International Sale of Goods, in force on Feb. 1, 1993. See category 3 Business Regulation and Commerce, topic Sales (Realty and Personalty) and Part V, Selected International Conventions.

Double Taxation Treaties with: Bolivia, Brazil, Canada, Colombia, Chile, Germany, France, Italy, Mexico, Romania, Spain, Switzerland.

MERCOSUR, established in 1991, is regional trade market. Member countries are Argentina, Brazil, Paraguay, Uruguay and Venezuela. Member countries liberalize trade with one another while imposing common external tariff on goods imported from nonmember countries. MERCOSUR has extended its scope by entering into free trade agreements with Chile, Bolivia, Colombia, Ecuador and Peru.

EL SALVADOR LAW DIGEST

—Scope —

Revised for 2008 edition by

CURTIS, MALLET-PREVOST, COLT & MOSLE LLP, of New York.

(Abbreviations used are: C. C.—Civil Code; C. Fam.—Code of Family; C. Com.—Code of Commerce; C. C. P.—Code of Civil Procedure; L. C.—Labor Code; L. C. P.—Law on Commercial Procedure; L. F. P.—Law of Family Procedure; L. D.—Legislative Decree. Numbers in code references indicate articles.)

Note: This revision incorporates legislation through Nov. 30, 2007.

1 INTRODUCTION

1.01 CURRENCY:

(L. D. 746 of Apr. 22, 1991 as am'd; L. D. 201 of Nov. 11, 2000).

Monetary unit is colón, and is divided in 100 cents, 8.75 colones equal to one U.S. dollar, also legal currency. Obligations are paid in El Salvador in national currency or in U.S. dollars, but international obligations payable abroad or in El Salvador, foreign money securities issued by Government or Banco Central and some others may be payable in agreed currency.

See also category 14 Foreign Trade and Commerce, topic 14.01 Exchange Control.

1.02 GOVERNMENT AND LEGAL SYSTEM:

(Constitution promulgated on Dec. 15, 1983 as am'd). Government is republican, democratic and representative and is composed of three branches: Legislative, Executive, and Judicial power. Territory of Republic, aside from its present boundary, includes adjacent sea with distance of 200 marine miles measured from line of lowest tide, and also comprises air space above, subsoil, and continental shelf. Freedom of navigation and aero-navigation are not affected by provisions described above, if performed in accordance with principles of international law.

Following are Salvadorians by birth: those born in territory of country; those born in foreign country, but of Salvadorian father or mother and also other natives of Central America who being domiciled in El Salvador declare to authorities their desire to become citizens. Other provisions also state who can be citizens by naturalization. Juridical persons if constituted in accordance with laws of country and having legal domicile there, are also Salvadorians.

Legislative power is vested in a legislative assembly of deputies having a single chamber and elected for three year period.

Republic is divided into departments and these into municipalities; at head of each department there is a governor appointed by president. Municipalities are administered by municipal councils with limited local powers. Constitution sets forth in detail powers and duties of legislative assembly which, among others are: To make rules for its internal government, to enact, interpret, amend and repeal statutory laws, to create judicial districts and establish offices as indicated by Supreme Court, to levy taxes on all classes of property and income, and in event of war to declare compulsory loans if normal public revenues are insufficient, to establish and regulate national currency and to determine administration and circulation of foreign currency, etc.

President of Republic is elected for five years and cannot be re-elected until another term has elapsed.

Judicial power is vested in Supreme Court of Justice whose judges are designated by Legislative power, and one of whom is its president.

Constitution in subsequent articles provides for public wealth, economic regime, individual and social rights, etc.

1.03 HOLIDAYS:

(L. C. art. 190).

Jan. 1 (New Year's); Maundy Thursday*; Good Friday*; May 1 (Labor Day); Feasts of San Salvador* (first week of Aug.); Sept. 15 (Independence Day); Nov. 2 (All Souls'); Dec. 25

(Christmas).

* These are movable holidays.

1.04 OFFICE HOURS AND TIME ZONE:

El Salvador is in the U.S. Central Standard (-06:00 GMT) time zone. Office hours are generally from 9 a.m. to 5 p.m.

2 BUSINESS ORGANIZATIONS

2.01 AGENCY:

(C. C. 1875-1931).

An agency may be conferred in writing or orally, or tacitly, but in court it can be proved by witnesses only in accordance with general rules of evidence, and a private document will not be accepted where a public instrument is required. A general power of attorney covers only acts of administration; a special power is required for other acts, such as to sell, mortgage, compromise, etc. Principal must reimburse agent for expenses and for damages caused by agency and pay stipulated or usual compensation.

An agency is terminated by: (a) Termination of business or expiration of time for which given; (b) revocation by principal; (c) resignation of agent; (d) death, bankruptcy or insolvency, or declaration of incapacity, of principal or agent; (e) cessation of principal in capacity in which he conferred agency.

Commercial Code (1083-1097) also regulates this matter. Agent undertakes commercial transactions in name of his principal. Salary must be stipulated by mutual agreement, but in absence of it, commercial practice of place when it is executed must be taken into account. In case agent refuses to continue with contract, he must communicate such refusal to principal within eight days, but nevertheless, he must take necessary steps to protect merchandise remitted to him or kept under his control. Agent must keep merchandise in good condition and is responsible for any damage, unless some unforeseeable event or hidden defect in merchandise releases him from liability. Agent must enter into insurance contracts to protect merchandise under custody, but he is free of any responsibility if he has received orders from his principal to contrary. Agent must fulfill his duties according to instructions received and if such instructions are not clear enough he must proceed according to local practice in force in that particular market. Agent also has lien on goods sent to him for amount of his advances, expenses, credits, etc.

Other provisions of Commercial Code (1066-1082) regulate commission merchant; he acts on his own account as undisclosed agent of a principal before third parties.

Agents Representing Corporations.

(C. Com. 400-410, 1066-1097). Natural or juridical persons can be agents. In case of absence of agreement regarding salaries, agent is allowed to receive commission proportionate to amount of business involved according to practice in such place. If, due to principal's fault, business is not completely successful, nevertheless, agent has right to receive total amount of compensation as agreed upon. In case of unilateral termination of contract, either one is allowed to receive payment for damages or expenses incurred, set forth in detail by Commercial Code.

C. Com. 392-399B regulates contracts between agents, representatives and distributors of products or services of foreign companies in El Salvador; if appointment is for continuous term and is made pursuant to contract, whether or not agent, representative or distributor is legal representative of principal. Agent's compensation shall be based on percentage of value of each transaction facilitated by agent, which percentage shall be determined in accordance with local business customs. Moreover, agent is also entitled to collect total amount of his compensation if proposed business transaction is not carried out, whether in whole or in part, due to fault of principal; also agent shall be entitled to collect compensation for business transactions carried out in such area by principal or its representative. Three months prior written notice upon unilateral termination, modification or non-renewal of agency agreement is required. Principal may only terminate, modify or refuse to renew agency agreement when agent: (i) Breaches agency agreement; (ii) commits fraud; (iii) engages in incompetent or grossly negligent behavior; (iv) engages in activities which decrease principal's volume of sales; (v) discloses confidential information; and (vi) engages in activities which adversely affect introduction, sale or distribution of principal's products which were entrusted to agent. Agent may claim following damages: (i) Unrecoverable costs incurred by agent in exercising business activity on behalf of principal; (ii) value of assets, including equipment, facilities, furnishings and tools which have no alternate use; (iii) value of existing merchandise and accessories which cannot be sold after termination of agency agreement; (iv) amount of gross profits obtained by agent in exercise of agency during last three years or during course of agency, if such term is less than three years; and (v) value of credit extended by agent to purchasers of principal's products. Agent shall also be entitled to claim these damages in event principal unilaterally modifies terms of agency agreement in manner which adversely affects rights of agent. Upon judicial determination by local court that principal has unjustly terminated, modified or refused to renew agency agreement, principal shall be prohibited from importing products or trademarks or from offering services in El Salvador until it has satisfied judgment rendered against it. Principal is liable for unrecoverable expenses incurred by agent for benefit of agency and for value of physical assets which have no alternative use, including equipment, furnishings and tools. Disclosure of confidential information by agent as valid reason for termination, modification or refusal to renew agency agreement. Any dispute arising from agency agreement shall be resolved by competent court of agent's domicile. According to Free Trade Agreement between United States, Central America and Dominican Republic (CAFTA) Arts. 394 to 399B do not apply to any distribution contract with U.S. companies after date of entry into force of CAFTA, as long as contract so provides.

2.02 CORPORATIONS:

(C. Com. 191-295).

Corporations can be organized provided name is followed by words “Sociedad Anónima” or its abbreviation “S.A.”. Omission of this requisite means that shareholders and directors shall be jointly and severally liable without limitation. In order to incorporate, following requirements must be met: Capital of corporation cannot be less than 100,000 colones and must be entirely subscribed; 25% of value of each share must be paid-in in cash; value of each share must be totally paid-in when payment is made in goods rather than in money. In any case, one-fourth of total capital of corporation must be paid-in.

Document of Incorporation must contain following information: Name, age, profession, nationality and domicile of natural persons, and name, nationality and domicile of juridical persons that integrate company, type purpose, corporate name, duration or express declaration that it is constituted for indefinite time; amount of capital stock, or at least minimum capital stock required by law; shareholders' contribution either in cash or in goods and value attributable to latter; management of corporation stating names, powers and obligations of respective officers; distribution of profits and losses among shareholders; constitution of reserves; and, finally, requisites to dissolve and wind up its business and rights and duties of persons to do so. Aside from requisites above mentioned (which are common to all types of companies) corporations required, in addition to, to include in document of incorporation following data: Subscription of shares indicating amount of paid-in capital; conditions in which difference shall be paid in, number of, par value and type of shares in to which capital is divided; determination of rights, duties and limitations in case of preferred stock; indication of all other types of stock; powers to shareholders to subscribe or to increase capital of corporation; manner in which board of directors and auditors shall be elected, time and conditions in which they shall hold office and how to fill in vacancies; provisions to call for general meetings of shareholders and also how to call for extraordinary meetings.

Shares.

(C. Com. 126-172; 207-219). In general shares must have nominal value of ten colones or its multiples. Each share is indivisible, but several persons can own shares if represented by one of them. Co-owners are jointly liable to corporation. Shareholders must pay total amount of shares subscribed for, according to terms agreed upon; liability shall only extend to amount of shares owned. Corporations are not allowed to issue shares at less than par value. They are also forbidden to issue shares if no valuable consideration has been paid or will be paid in future. Shares must be registered until fully paid. Later on, they may be converted into bearer shares if so allowed by document of incorporation. Before delivery of shares, corporations can issue provisional certificates.

Other articles of Commercial Code contain regulations as to manner and time of share issuance, sales of stock and payments as well. Corporations are not allowed to acquire their own shares except at auction or by judicial decision.

Stock certificates must also contain certain information such as: Name, domicile and duration of corporation; all details regarding document of incorporation; name of shareholder (if registered shares); amount of capital stock and total amount of shares (number and series); indication as to whether or not shares have been fully paid and signature of administrators that pursuant to document of incorporation must sign them. If corporations issue registered shares they must also keep a record of shareholders, and transactions regarding same.

Document of incorporation may allow division of capital stock into different classes of shares; otherwise there is only one class of shares.

Each share gives right to one vote, although preferred stock can be issued with limited voting power. Such shares cannot vote in general shareholders' meetings, only in extraordinary ones. Preferred shares are entitled to dividends, which cannot be less than 6% of nominal value; document of incorporation can authorize payment of higher dividends. When corporation is liquidated these shares have preference to common ones. If no dividends are paid for more than three fiscal years to preferred shares, they shall be converted, automatically, into common shares, and, therefore, they will have full voting rights.

Corporations must pay dividends in cash.

Any agreement restricting voting rights of shareholders is void, except in case of shares that have not been totally paid.

Shareholders' meeting (C. Com. 220-253) when properly called is highest authority of company. Meetings are divided into ordinary and extraordinary. Ordinary meetings shall be convened at least once a year within five months after closing of fiscal year and must decide, among other matters included in agenda, following: To approve actions taken by board of directors; annual report and balance sheet and information of auditor regarding profits and losses; to designate and to remove directors and auditors; to determine their salaries if they have not been fixed in document of incorporation; and to distribute profits.

Extraordinary meetings may be called in order to discuss following matters: Modification of document of incorporation, new issuance of debentures or bonds, redemption of shares with funds of corporation and any other matters that in accordance with law and/or bylaws must be considered in extraordinary meetings.

A call for a meeting must be sent 15 days before date of meeting, unless document of incorporation indicates a longer period. If shares are registered, notice must be also be sent to such shareholders.

Shareholders representing at least 5% of capital can make request in writing, at any time, to board of directors to call for a general meeting of shareholders in order to decide business indicated in such petition; if board of directors refuse to do so, call must be made by Court (commercial judge) of domicile of corporation upon request of interested shareholders. General shareholders' meeting to be valid must be represented by a quorum of shares entitled to vote, and resolutions are valid when passed by a majority of votes present.

Management.

(C. Com. 254-281). Corporations must be administered by one or more directors who do not need to be shareholders. Directors are elected by general shareholders' meetings, unless document of incorporation provides otherwise, that is to say, directors can be elected by special meetings representing different categories of shares. Directors shall hold office for five years unless document of incorporation determines a shorter period of time. Directors can be re-elected; board of directors is necessary, even if there are only two directors in which case one shall be president with power to decide in case of a tie. Third persons cannot represent directors in their functions, since such duty is strictly a personal one.

Board of directors passes resolutions if majority of members are present and if taken by majority of votes. Document of incorporation can specify that in certain cases directors are required to give bond, to guarantee fulfillment of their obligations. Other articles of code determine rights and duties of managers; said office is also personal and cannot be exercised by agents.

Administrators of corporations, either directors or managers are not allowed: To use capital of corporation for their particular business; to do business in name of corporation if different from purposes specifically indicated in document of incorporation; to enter into commercial or industrial contracts similar to those of corporation, or to do business directly or indirectly with corporation, unless they are expressly authorized, in each case, by shareholders. Directors are jointly liable for administration of corporation. Shareholders representing at least 25% of capital stock can sue administrators if certain requisites of law are complied with.

Balance Sheets and Annual Reports.

(C. Com. 282-294). Corporations must present every year a balance containing detailed information of profits and losses, which must be concluded within three months after closing of fiscal year. Administrator or board of directors in its case, must deliver it to auditor who within 30 days after reception of same must give opinion about it.

Balance sheets and annual report must be discussed and approved in general stockholder's meeting and if approved, must be filed with Registry of Commerce.

Reserves.

(C. Com. 295). Corporations must set aside, every year, in order to form what is known as “reserve fund,” 7% of net profits; minimum legal limit of said fund must be one-fifth of total capital stock. Two-thirds of amount of fund must be invested in stock of other Salvadorian or Central American enterprises; remaining one-third can be invested according to purposes of corporation.

Limited Partnership Companies Issuing Shares.

(C. Com. 296-305). Some partners are jointly and severally liable for corporate obligations, but limited partners are only liable up to amounts of shares owned in such concern. This type of company must have one or more partners and several limited shareholders. Capital stock must be divided into shares, partners must subscribe for at least one share. Shares issued to shareholders must be registered and cannot be transferred unless unanimous consent of other shareholders and partners.

Partners must administer company, although other provisions also contemplate possibility of shareholders' meetings.

This type of company is regulated by rules of limited partnership companies regarding rights and duties of partners; as to shareholders, general principles of corporations are applicable.

See also topic 2.05 Partnerships.

Corporations with Variable Amount of Capital.

(C. Com. 306-314). Any type of company can adopt system of “variable capital” which means that same can be increased by new quotas or by admission of new shareholders or decreased by partial or total withdrawal of some shareholder's contribution. Shares must always be registered.

Merger and Consolidation of Corporations.

(C. Com. 315-325). This is possible when two or more corporations integrate a new one, or when one of them absorbs the other. New corporation acquires all rights and duties of old ones. Agreement to merge must be taken by shareholders of each corporation according to their own rules and must be registered in commercial register of domicile of each of corporations merged. After registration, agreement and last balance sheet of corporation must be published; 90 days after said publication, merger is final. Shareholders that do not agree with said merger are allowed to resign.

Liquidation of Corporations.

(C. Com. 326-342). Once corporation has been dissolved it must be liquidated; therefore, after corporate name there must be included following words: “in liquidation.” Liquidators (who are designated by shareholders) must be administrators and agents of corporation and are personally liable for their acts, if exceeding their duties. If document of incorporation does not contain rules as to how corporation must be liquidated it must be performed under directions given by all shareholders entitled to amend document of incorporation. Among other obligations, liquidators must do following; wind up its business, sell assets, prepare final balance sheet (which must be filed in commercial registry) and give to each shareholder his quota in remaining assets, if any. While corporation is in process of liquidation, shareholders can receive partial payments if circumstances so allow.

This chapter of Commercial Code also applies to other types of corporations, as well, as all types of partnerships.

Foreign Corporations.

(C. Com. 358-361 and Decree 825 of Feb. 26, 2000). Foreign corporation domiciled in country and branches of foreign companies must be registered with Registry of Commerce. They must file proof that they are duly authorized to operate in country of incorporation, that resolution to establish its domicile in country has been legally adopted, appoint local representative, scope of his authority and duties; register capital of no less than 100,000 colones with Registro de Inversión Extranjera; certified balance sheet issued by authorized public accountant including such capital; express submission of corporation or branch to laws and courts of country regarding acts to be executed there or have effect here. Domicile of branches of foreign companies is where main office is located. Foreign corporations are supervised by specialized agency of Ministry of Economy depending on their purpose.

Authorization for foreign banks to operate in country is regulated by arts. 26-31 of Banks Law. (Decree 697 of Sept. 2, 1999, as am'd).

2.03 FOREIGN CORPORATIONS:

See topic 2.02 Corporations.

2.04 LIMITED PARTNERSHIP:

See topic 2.05 Partnerships.

2.05 PARTNERSHIPS:

(C. Com. 44-125).

General Partnership.

(Sociedad Colectiva: C. Com. 73-92). In general partnership, partners can use as company name, name of one or more partners accompanied by “and company” or other similar words, e.g., “and brothers.” Partners are jointly liable for debts of company; any agreement exempting partners of such responsibility is null and void towards third parties; partners among themselves can stipulate that responsibility of one or more is limited to certain amount. Any person that allows his name to appear in any or all documents of company shall be considered a partner, also subject to unlimited responsibility. It is formed by public instrument recorded in Commercial Registry, and must state all personal data of partners, domicile, purpose, duration, etc. Company must be administered by one or more managers who can be partners or third persons. In general, unless contrary intention is shown, all decisions must be taken by majority of votes, e.g., removal of administrators. In general rules, governing corporations are also applicable to companies, such as responsibility of partners, managers, reserve fund, dissolution, liquidation, etc.

Limited Partnership.

(Sociedad en Comandita: C. Com. 93-100). In this company one or more partners are special partners liable only for amount of their contribution. In this case name of company must have following words “and company” or “S. en C.”; if requisite is omitted, it shall be treated as a general partnership. If special partner allows his name to appear in firm name or engages in management of same, he is jointly liable with general partners.

Limited Liability Company.

(Sociedad de Responsibilidad Limitada: C. Com. 101-125). Limited liability company, as its name indicates, is a company where all partners are only liable up to amount contributed to it. Its name must be followed by words “Limitada” or “Ltda.”; omission of this requisite means that all partners are personally and unlimitedly liable for obligations of company. Capital of company cannot be less than 100,000 colones; industrial contributions or other type of consideration rather than cash is not allowed. Any person alien to company that tolerates inclusion of his name in firm name is liable to third parties doing business with company. This type of company cannot have more than 25 partners; otherwise, it shall be null and void. It must have special book called “registry of partners,” which shall be kept by one of administrators and in which must be recorded names and contributions of all partners. Other provisions of Code regarding general partnership and/or corporations are also applicable to these companies such as administration, reserve fund, dissolution, liquidation, etc.

Individual Limited Liability Company.

(Empresa de Responsibilidad Limitada Individual: C. Com. 600-622). This type of company is authorized to operate if name of individual owner is followed by words “Empresa de Responsibilidad Limitada Individual,” or its abbreviation “E. de R. L.”. In order to form it, it is necessary to prepare an inventory regarding all assets that shall integrate its patrimony. Several articles of Code regulate manner to integrate such corporate capital, if assets consist of shares or other valuable goods. In general, public instrument, constitutive of company must contain name and personal data of owner, name of company, purposes, domicile, capital and all information regarding reserves, etc. Other provisions also regulate situations regarding dissolution and liquidation.

3 BUSINESS REGULATION AND COMMERCE

3.01 BILLS AND NOTES:

Bills of exchange (C. Com. 702-787) must contain following: Words “bill of exchange” written on document; place, day, month and year in which it is drawn, unconditional order to drawee to pay a sum of money; name of drawee; place and date of payment; name of payee; signature of drawer or of person that signs it upon drawer's request. Bill of Exchange can be drawn: at sight; at specified time after sight; at specified time after date; at certain date.

If date of payment is not indicated in text, bill must be considered payable at sight. Bill can be drawn to order of same drawer, in such case drawer is considered acceptor. Drawer can designate as place of payment domicile of third party wherever that place may be. Drawer can also designate his domicile or residence for payment of bill.

Acceptance.

Bill must be presented for acceptance either by a holder in due course or by a holder at place and address indicated in document. If for any reason such address or place is not indicated, presentment for acceptance must be made at residence of drawee. If bill indicates several places for acceptance, holder can present it at any of them. Bill payable at certain time after sight must be presented for acceptance within year after its date. Any of holders can reduce term if it is so allowed on bill. Acceptance must appear on document and words “I accept,” or words of other equivalent meaning must appear on bill, followed by signature of drawee. However, only drawee's signature is enough to operate as full acceptance. Acceptance must be unconditional, but it can be done for an amount less than sum indicated on bill. Any other change introduced by drawee/acceptor is equivalent to a refusal. If drawee after acceptance cancels same, before returning bill, such act is also a refusal. Acceptance of bill means that drawee must pay it when due. If drawer pays accepted bill drawer has action against drawee. Drawee does not have any action against drawer nor any other persons whose signatures appear on bill.

Aval guarantees in full or in part payment of bill. Such guarantee can be given by any person that has negotiated bill or by any other person stranger to it. Aval shall be written in document with expression “by Aval” or any other equivalent words, and must bear signature of guarantor. If Aval cannot be written on document, it can be stated in another paper, provided it is firmly attached to first one. Aval guarantees total amount of bill and must indicate person guaranteed. Guarantor is jointly liable with person whose signature has been guaranteed and his obligation is valid even though principal obligation might be void. Aval is void only when there are formal defects in document.

Payment must be made at place and address indicated in document. If for any reason document does not mention such address it can be presented for payment at commercial address or domicile of drawer or drawee. Presentment for payment must be made when due or next working day; when payable at sight it must be presented for payment within one year after issuance. Payment must be made upon presentment and delivery of document. Holder can refuse partial payment, but if it is so received he can withhold document until total amount is paid. Holder is not bound to receive payment before bill is due.

Protest can be made in case of failure to accept or failure to pay. Protest must be performed before a notary public with requirements indicated in law. However, when bill of exchange is presented either for acceptance or payment to a bank, statement of same refusing to accept or pay shall have same effects as protest before a notary public.

Promissory note (C. Com. 788-792) must contain following: Words “promissory note” written on document; unconditional promise to pay a determined amount of money; name of payee; date and place of payment; date and place where document is issued and signature of maker.

If promissory note does not mention when it is due, it shall be considered payable at sight and if place of payment is not mentioned it must be understood to be domicile of maker; promissory note when drawn at a specified time after sight must be presented for payment within a year of its date. In general, all articles and regulations applicable to bills of exchange also regulate promissory notes.

Checks (C. Com. 793-838) must contain following: Number and series; word “check” written on document; name and domicile of drawee bank; unconditional order to pay a determined amount of money indicating such amount in letters and numbers (any contrary clause in check shall be considered void and as if it were not written); name of payee or to his order, or indication that it is a bearer check; place and date of issue; signature of maker.

Instrument shall only be a check if drawn on a duly authorized bank; if document has been corrected, erased, or altered it is void.

Checks can be drawn: (1) to name of a person who can be maker or a third person, in both cases it shall be understood that it is “or to the order” of them; (2) in favor of a person with clause “not to the order,” “non-negotiable,” or any other equivalent, in such instance, check is not negotiable; (3) to bearer.

Checks are always payable at sight; any other indication to contrary is void. It must be presented for payment to drawee bank or to any of its agencies in country.

Checks must be presented for payment: Within 15 days after issuance if payable at same place, within a month if issued in national territory and payable at different place than place of issuance, within three months if issued abroad and payable in national territory, within three months if issued in national territory to be paid abroad, provided foreign laws do not conflict.

Commercial Code also provides for other types of checks such as: Check for payment in certain accounts, certified check, travelers check, check with guaranteed amount or limited check, circular check and cashier's check.

Maker has right to request bank to certify check; such certification cannot be partial or to a lesser amount. Certified check is not negotiable. When check has been certified, only person liable for payment is bank. If bank writes following words on face of check “accepted,” “good” or any other equivalent, or sole signature of any of its agents this can be deemed a certification.

Only banks and financial institutions can issue cashiers' checks, which must be in favor of a specified person.

3.02 COMMERCIAL REGISTRY:

(Legislative Decree 271 of Feb. 15, 1973 as am'd, regulated by Dec. 33 of May 7, 1973).

Registry is made up of a division and three departments: (a) Registry of Merchants and Commerce and Industry, licenses classified in corporate merchants, and mercantile concern; (b) Registry of Mercantile Documents divided in four sections: documents of incorporation, powers of attorney, appointments of agents and credentials, contracts of personal property sale by installments and others subject to recording; (c) Registry of Patents, Trademarks and Industry; copyrights and names and distinguishing commercial signs.

Both natural and juridical persons must be registered. No concern may operate without being registered. Documents involving mercantile acts and contracts are subject to registration and if not registered do not have any effect against third parties.

3.03 CONTRACTS:

Civil Code (Arts. 1308 to 2064) contains general principles. These apply supplementarily to commercial contracts and also to labor contracts.

A contract is an agreement by virtue of which one or more persons bind themselves toward one or more other persons, or reciprocally among themselves to give, to do, or not do something. Civil contracts involving more than 200 colones must be in writing and cannot be proved by witnesses unless there is a writing which gives credibility to parol evidence. Future inheritances and future hereditary rights cannot be object of a contract. Public contracts are regulated by L. D. 868 of Apr. 12, 2000 as amended and its regulations Decree 98 of Oct. 20, 2005.

3.04 FRAUDS, STATUTE OF:

See category 9 Documents and Records, topic 9.03 Public Instruments.

3.05 INTEREST:

Legal interest is 6% per annum but parties may stipulate any other rate. Compound interest is prohibited. (C. C. 1963-1967).

3.06 MONOPOLIES, RESTRAINT OF TRADE AND COMPETITION:

(Const. 110, L. D. 528 of Dec. 22, 2004, as am'd, regulated by Decree 126 of Dec. 5, 2006).

Art. 110 of Salvadorian Constitution of 1983 proscribes all types of monopolies in hands of private, natural or juridical persons.

Law is based on concept of free competition and market structure. It promotes and protects free competition, prohibits monopolistic practices and any other unfair practice that may limit economic freedom. Law is applied to individuals and public and private juridical persons engaged in economic activities. Following are practices which are considered restrictive practices, among others: price arrangement between competitors; market division; combined bids; productions arrangement; economic concentration leading to domination of part or whole market; abuse of dominant position in market. Law is enforced by Superintedencia de Competencia that can collect evidence, ex officio or at party's request, may order end of restrictive practice and also impose fines.

Central American Regulations on Unfair Trade Practices of Dec. 12, 1995 implemented principles established by Agreements of World Trade Organization protect Central American products from unfair practices of international trade imposing countervailing duties on import of goods out of area.

Central American governments may issue restrictive covenants to protect temporarily their local production from massive import of same or similar products that may cause pecuniary loss to local producers.

Restrictive covenants may be issued according to United States of America-Dominican Republic-Central America Free Trade Agreement to protect local production from import of same or similar products, from member countries that may cause pecuniary loss to local production. Accord 166 of Feb. 15, 2006 regulates proceedings for issuing such covenants.

Consumer Protection Law.

(L. D. 776 of Aug. 31, 2005 regulated by Decree 52 of May 12, 2006). Law deals with consumers' rights and obligations, suppliers' obligations, adhesion contracts, general representation and guaranties, products liability, lack of performance, parts, shipping and technical services, credit operations, special regulations for advertisement and promotion, monopoly, professional ethics, penalties for infringement of law and general regulations on subject. Defensoría del Consumidor, government agency in charge of enforcement of law.

3.07 SALES (REALTY AND PERSONALTY):

(C. C. 651-672, 1597-1686).

A sale is perfected when an agreement is reached as to thing sold and price, but title does not pass until delivery of personalty or transfer of realty by deed. (See also category 21 Property, topic 21.04 Deeds.) Even if payment be made for promise of a contract, either party may withdraw, with loss of sum paid by him who paid it or loss of double such sum by him who received it; however, if no time limit is specified, there may be no withdrawal after two months; and if payment was expressly made as part of purchase price, or as a token of agreement, sale is perfected. Taxes and costs of deed and of delivery are for account of seller.

If seller delays delivery, buyer may either insist on contract or cancel it, with damages in either case; but if buyer has failed to pay or in case of a sale on installments, if his financial position suffers, seller may demand payment or security. Right to repurchase cannot be reserved for over four years and cannot be assigned. Seller warrants against serious hidden defects. If real estate sold on basis of its area is found to have a different area from that declared, an adjustment of price is made; but if difference exceeds 10%, purchaser has option of rescinding contract.

Commercial sales (C. Com. 1013-1050) involve those executed within normal exploitation of commercial enterprise, and those involving commercial things. Following sales are not considered commercial: Those performed by farmers regarding animals and crops and artisans of objects manufactured by them. In absence of price, it shall be understood to be fixed, if it is one rated at stock exchange or market, national or foreign at a certain date, if indicated. If a bona fide purchaser buys goods or merchandise from a store and later on he finds out that owner of store was not authorized to sell them, nevertheless, sale is considered valid. If buyer is allowed to examine goods at time of purchase, he cannot have action against seller in case of defects. However, if purchaser received merchandise wrapped up or packed, and if he could not reasonably inspect such goods, he has action against seller if exercised within eight days after reception of goods. In case of hidden defects of merchandise buyer has 15 days after discovery of them to denounce such fact before a notary public. Seller guarantees for a determined period of time that goods were sold in good condition and, unless contrary agreement, buyer must denounce any defect regarding functioning of goods or machinery within 30 days after discovery. Statute of limitations, in this case, is six months after date of such report. In absence of any specific period, it shall be understood that guarantees are given for a three year period.

Provisions of Code regulate in detail sales “documents against acceptance,” “documents against payment” and sales “cost, insurance, freight” (CIF), “free on board” (FOB), and “cost and freight” (CF).

In case of sales of goods in installments, it is agreed that buyer acquires ownership of them when total amount or at least certain amount of price has been paid for. In this instance contract must be registered in Registry of Commerce, if value is above 1,000 colones. Other articles of code regulate necessary procedure to follow in case of nonpayment or nonfulfillment of conditions indicated in contract. In general, taxes and insurance, if any, must be paid by buyer, and all risks and damages to goods must be borne by him too.

4 CITIZENSHIP

4.01 ALIENS:

See category 16 Immigration, topic 16.01 Aliens.

4.02 IMMIGRATION:

See category 16 Immigration, topic 16.02 Immigration.

5 CIVIL ACTIONS AND PROCEDURE

5.01 ACTIONS:

Actions for Death.

See category 12 Estates and Trusts, topic 12.02 Death.

Limitation of.

See topic 5.04 Prescription, subhead Limitation of Actions.

5.02 JUDGMENTS:

(C. C. P. 441-453).

Judgments are executed in a summary proceeding. A judgment does not constitute a lien on the property of the debtor except with respect to property attached. A levy on real property must be recorded in the public registry.

Foreign judgments have the effect designated in the treaties with the respective country. If there is no treaty on the subject with the foreign country, the foreign judgment is effective in El Salvador if the following requisites exist: (1) That it was rendered in a personal action; (2) that it was not rendered by default; (3) that the obligation on which it is based is legal in El Salvador; (4) that it is duly authenticated. For the execution of a foreign judgment the approval of the Supreme Court is required after hearing the opposite party.

5.03 LIMITATION OF ACTIONS:

See topic 5.04 Prescription.

5.04 PRESCRIPTION:

(C. C. 1658, 1668, 2231-2263; C. Com. 995-998 among other provisions).

The acquisition of property or rights by virtue of possession and the loss of rights by failure to enforce them is called prescription. Prescription may be waived expressly or tacitly as far as it has run. The rules of prescription apply also to the State and to municipalities. Prescription is interrupted: (a) Temporarily when natural causes require a temporary relinquishment of possession; (b) permanently when another person takes possession and is not ousted; (c) when another claimant brings suit against the possessor, but in this case the interruption can be alleged only by such other claimant and only if the suit is properly prosecuted and not dismissed.

Ownership is acquired by ordinary or extraordinary prescription. By ordinary prescription real property is acquired in ten years and personal property in three years, but as against persons residing abroad and unrepresented in the Republic the periods are extended, every two days being counted as one. Property is acquired by extraordinary prescription in 30 years of open, uninterrupted possession, without need of showing any title.

Limitation of Actions.

Prescriptive period in which power to enforce rights is lost varies according to nature of action. More important are: (a) Ordinary actions not otherwise limited, 20 years; (b) summary actions, ten years; (c) actions between partners, two years; (d) title warranty actions, four years; (e) actions for fees of professional men, three years; (f) actions of employees for salaries and wages, two years; (g) actions of commercial clerks for cost of repairing or provisioning vessels, one year; (h) actions for rescission of personal property sales, six months in civil contracts.

In the acquisition of property by ordinary prescription and in the extinguishment of the actions designated under (a) and (b) above, the prescriptive period is suspended with respect to minors, demented persons, deaf and dumb persons, persons under guardianship, and claimants of an inheritance. However, after thirty years such suspension is no longer considered.

Commercial Code (995-998) also sets forth certain rules regarding subject, for example: (1) Actions for rectification in checking account balances, six months; (2) actions to declare void agreements taken in shareholders' meetings, checks, bills of exchange, actions for hidden defects in merchandise, actions concerning transportation contracts and actions regarding liability of administrators, auditors and interventors of companies, one year; (3) actions derived from contracts such as partnerships, sales, deposits, commissions, supply, edition, participation, security except those aforementioned and those contracts that do not have different statute of limitations than those statute of limitations stipulated in this code or in special laws, two years; (4) actions derived from credit contracts as of date of last acknowledgment by debtor, and other mercantile rights shall prescribe in five years. Parties are not allowed to modify terms of prescription by mutual agreement.

6 COURTS AND LEGISLATURE

6.01 COURTS:

The judicial power is exercised by: (1) A supreme court which has administrative functions regarding courts and lawyers and judicial functions in certain cases; (2) chambers of second instance which hear appeals from judges of first instance and have original jurisdiction in certain cases; (3) judges of first instance having original jurisdiction in most civil, family, commercial and criminal matters; (4) justices of peace. (Judiciary Law, Decree 123 of June 6, 1984 as am'd; Const. arts. 172-190).

6.02 LEGISLATURE:

Legislative Assembly meets on week day and time decided by its President in ordinary meetings and in extraordinary meetings whenever they are called by its President. (L. D. 756 of July 28, 2005).

6.03 STATUTES:

Most of legal provisions are codified. Principal codifications are Civil Code; Code of Civil Procedure; Penal Code; Code of Criminal Procedure; Code of Commerce. Laws are published in government paper entitled “Diario Oficial.”

7 DEBTOR AND CREDITOR

7.01 ASSIGNMENTS:

The assignment of a personal right is made by delivery of the instrument evidencing the same, with a written statement signed by the assignor and giving the date of the assignment and the name of the assignee. It does not bind the debtor nor third parties unless the debtor has been notified thereof or has accepted it. In the assignment of a credit document the assignor warrants the existence of the credit, but does not warrant the solvency of the debtor unless otherwise stipulated, and then only up to the amount of the price he received. Bills of exchange and documents to order or bearer are subject to the special rules of the Code of Commerce. (C. C. 1691-1702).

7.02 ASSIGNMENTS FOR BENEFIT OF CREDITORS:

An assignment for the benefit of creditors is the voluntary abandonment by the debtor of all his assets when in consequence of unavoidable accident he cannot pay his debts. The creditors must accept the assignment unless the debtor was guilty of fraud or has dissipated his property or has received reductions or extensions from the creditors. The assignment does not transfer title to the property but only the right to dispose thereof. The debtor may be left in charge of the administration. The debts are extinguished only up to the amount obtained from the property assigned. (C. C. 1484-1494. See also topic 7.04 Bankruptcy and 7.09 Insolvency).

7.03 ATTACHMENT:

Attachment may be obtained before or during a suit when: (1) The object sued for is in danger of being lost or deteriorated; (2) the debtor intends to dispose of his property; (3) the debtor is an alien not domiciled in the country; (4) a debt is owing by a third party for plaintiff's property acquired by such party. The plaintiff must give bond, and the defendant may raise the attachment by giving bond. The following authorize a summary action and an attachment without bond: (1) Public instruments, i.e., instruments executed before a notary; (2) authentic instruments, i.e., those issued by public officials, including tax notices; (3) acknowledged instruments, including private documents acknowledged before a judge or notary, and drafts and promissory notes if duly protested and their signatures are acknowledged; (4) judgments. Suits relating to real estate may be registered as a lien on the property. (C. C. P. 142-156, 586-632; C. C. 719-730).

7.04 BANKRUPTCY AND INSOLVENCY:

(C. C. P. 659-777; C. Com. 498-552).

Insolvency proceedings may be voluntary or necessary. The proceeding is voluntary when the debtor makes an assignment for the benefit of creditors. It is necessary when demanded by one or more creditors and it is shown that two or more executions have been issued against the debtor and there is not sufficient property to satisfy them. In declaring the insolvency the judge orders the attachment of the debtor's property, appoints a temporary depositary and may order the arrest of the debtor unless he gives bond. A meeting of creditors is called, unrepresented foreign creditors being notified through their consul. The meeting elects a depositary and a receiver who administers and liquidates the estate and distributes the proceeds, reports being made to the creditors.

At any time after the creditors' claims have been examined and approved an agreement between the insolvent and his creditors may be proposed. The agreement is considered at a creditors' meeting and requires for its approval the vote of two-thirds of creditors present representing at least three-fifths of all liabilities. In order to be reinstated a debtor must show that his debts have been paid in full, and culpable or fraudulent insolvents must have served their punishment.

Bankruptcy relates to merchants and must be declared by commercial judge in special proceeding. Bankruptcy may be declared under certain conditions, such as: Nonpayment of liquid and mature obligations; lack of assets on which to levy for execution; absconding for more than 15 days without leaving an agent in charge of legal obligations of enterprise; voluntarily closing enterprise for 15 days or more if there are pending obligations; transfer of assets to prejudice of creditors; fraudulent, prejudicial or fictitious activities to avoid compliance with obligations; petition by merchant himself; default in obligations resulting from composition with creditors; and, in general, similar situations.

Bankruptcy of a company also causes bankruptcy of members with unlimited liability but bankruptcy of members does not produce bankruptcy of company. De facto companies and companies in process of liquidation may also be adjudged bankrupt.

Petition may be filed by public attorney, bankrupt himself or any creditors and, in case of companies, by any member whenever stockholders' meeting or administrators refuse to file petition.

Bankruptcy can be fortuitous, culpable or fraudulent. Bankrupt is not allowed to administer his business and cannot be appointed officer of any commercial concern, but he may administer: Business strictly related to his person or to his civil and political status; earnings from personal work, obtained after declaration of bankruptcy, which may be reduced by court; and assets exempt from attachment under law.

Foreign declarations of bankruptcy produce effects in El Salvador whenever enforceable under provisions of Civil Procedure Code, but creditors domiciled in country will have preference over creditors domiciled abroad.

Law sets forth in detail provisions regarding effects of bankruptcy upon obligations and acts of bankrupt. All fraudulent acts, regardless of date of execution, are invalid but if for consideration, bad faith of third party is necessary. Acts executed after date to which judgment decree is retroactive are irrebuttably presumed fraudulent, if made without or for inadequate consideration, or when consisting of payment of obligations not yet due. Acts made after such effective date are presumed invalid unless otherwise established, if consisting of payments made in kind which were not object of promise, or consisting in creation of in rem rights to secure obligations prior to such effective date of bankruptcy, if there was no promise to give guaranty or if obligation resulted from receipt of money or assets delivery of which was not attested by a notary when required.

Any payment act or transfer by bankrupt is also presumed fraudulent even if there was consideration, if made after effective date of bankruptcy and third party knew of merchant's situation.

See also topic 7.08 Fraudulent Sales and Conveyances.

7.05 EXECUTIONS:

When an order of execution is issued, announcements are posted and published. An appraisal of the property is made unless the parties have agreed on a value. The date of sale is then posted and the sale is held under the auspices of the court. No bid is received for less than two-thirds the appraised value. If there are no bidders the plaintiff may ask that the property be adjudicated to him for two-thirds of the appraised value, or that the real estate be delivered to him so that he may apply its revenues to his credit. Otherwise the property remains on deposit or under administration and its revenues are delivered to the creditor until a bidder appears or the debt is paid. After the sale there is no right of redemption. (C. C. P. 633-645).

7.06 EXEMPTIONS:

The following property is exempt from attachment: (1) Pensions for support; 80% of other pensions; salaries of 100 colones or less but if in excess thereof only from 5% to 20% may be garnished; (2) bed and necessary clothing of the debtor and his wife and children; (3) professional instruments, furniture and books; (4) implements to teach a science or art; (5) soldiers' uniforms and equipment; (6) tools of artisans or farmers and ungathered field crops; (7) food and combustibles of the debtor's family for one month; (8) personal rights, such as habitation; (9) real property given or devised as not subject to attachment, up to value appearing in appraisement made at time of delivery and judicially approved; (10) savings of public employees in cooperative societies under government supervision: (11) homesteads, recorded as such; (12) life annuities to extent decided by court to be necessary for support of debtor and dependents. (C. C. 1488 as am'd; C. C. P. 619; Labor Code, art. 133).

7.07 FORECLOSURE:

See category 20 Mortgages, topic 20.03 Mortgages.

7.08 FRAUDULENT SALES AND CONVEYANCES:

Payments, alienations and other acts by a debtor in fraud of creditors may be annulled. See topic 7.04 Bankruptcy and Insolvency; category 3 Business Regulation and Commerce, topic Sales (Realty and Personalty).

7.09 INSOLVENCY:

See topic 7.04 Bankruptcy and 7.09 Insolvency.

7.10 LIENS:

There are three classes of privileged credits: (1) Those affecting all property of the debtor, namely, judicial costs in the general interest of the creditors, funeral expenses, and 80% of sums payable for support; (2) those affecting specific property, such as the liens of (a) innkeepers on debtor's effects brought to the inn, (b) carriers on articles carried, for cost of transportation and damages, and (c) pledgees on the article pledged; (3) mortgage credits. The law recognizes certain other liens, such as maritime liens and miners' liens. (C. C. 2212-2230).

7.11 PLEDGES:

A pledged object must necessarily be delivered to creditor. In case of non-payment of debt, creditor may demand sale of pledge at public sale and if there is no admissible bid, he may demand that pledge be adjudged to him for its appraised value. Parties may stipulate that creditor keep or dispose of pledge at designated value without need of sale. (C. C. 2134-2156).

Commercial Code (1525-1538) also contains provisions regarding subject. Credits or goods can be subject of this contract. It can be executed by debtor himself, or by a third party, even without approval of debtor. Usually object of pledge must be delivered to creditor or can be given to a third party in order to be kept by him.

7.12 REDEMPTION:

See topic 7.05 Executions; category 20 Mortgages, topic 20.03 Mortgages.

8 DISPUTE RESOLUTION

8.01 ALTERNATIVE DISPUTE RESOLUTION:

(D. 914 of July 23, 2002).

Conciliation.

Mediation and Conciliation.

Law regulates extrajudicial dispute resolution by mediation or conciliation of any controversy at any time. Parties may resolve any dispute with help of neutral and impartial third party preventing conflict from reaching court or arbitral proceedings. Intervention of third party in conciliation process is administered by institutions established for such purpose (centros de mediación). Decision shall be in writing and shall have legal effect of settlement. Conciliation proceedings are confidential.

Arbitration.

Any dispute arising out of specific legal relationship, when such dispute is under proper legal control of parties may be subject to arbitration, with exceptions indicated by law. Arbitrators may be empowered by parties to decide according to rules of law, in equity or technical rules. Arbitrators may be individuals in full enjoyment of their rights in instances where decision is in equity, where decision is according to rules of law they must be lawyers and where decisions must be according to technical principles, they must be experts in that area. Number of arbitrators should be three unless parties have agreed on different uneven number. Arbitration agreement must be in writing, whether in form of arbitral clause in contract or in separate agreement. Invalidity of contract does not extend to arbitration clause contained therein, if reasons why contract is held invalid do not apply to such arbitration agreement.

Parties are free to establish place and language of arbitration. Arbitrators have authority to grant provisional remedies. Award must be rendered within three months from installation of arbitral tribunal. Deposit of arbitrator's fees and estimated expenses may be in advance.

Law distinguishes between domestic and international arbitration based on: parties' domicile, place of performance of duties, place with which subject matter of dispute is most closely connected and parties' agreement. Domestic and international arbitration may be according to rules agreed to by parties or subject to rules of arbitration center. Disputes arising between members of business corporations related to interpretation of articles of incorporation or corporate affairs must be subject to arbitration.

Conventions.

Convention on Private International Law, La Havana, 1928, New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958; Inter-American Convention on International Commercial Arbitration, Panama, 1975.

9 DOCUMENTS AND RECORDS

9.01 ACKNOWLEDGMENTS:

Acknowledgments may be made before a notary, and must state the age, business and domicile of the person making the acknowledgment. Documents so acknowledged are regarded as authentic, and of date certain as to third persons from date of acknowledgment. Important documents are executed as public instruments before notaries, who retain the original in their records and issue certified copies. See topics 9.02 Notaries Public, 9.03 Public Instruments.

Documents executed abroad for use in El Salvador will be accepted if executed in accordance with the laws of the respective country and authenticated by a diplomatic or consular officer of El Salvador or by the Minister of Foreign Affairs of the foreign country and the Minister of Foreign Affairs of El Salvador or signature of notary public must be legalized by apostille if country of execution is member of Hague Convention of 1961. In cases where Salvadorean laws require public instrument as evidence, no private writing will be accepted. (C. C. 17, 18; C. C. P. 261; Notarial Law 218 of Dec. 6, 1962 as am'd).

9.02 NOTARIES PUBLIC:

(Notarial Law, D. 218 of Dec. 6, 1962 as am'd and Decree 1073 of Apr. 13, 1982 as am'd by Decree Law 772 of Apr. 25, 1991 on voluntary jurisdiction).

Notaries require authorization of Supreme Court and must be attorneys admitted to practice in El Salvador, Salvadorean, or Central Americans qualified to be notary public in their country of origin provided that country grants same treatment to Salvadoreans, and have at least two years of residence in El Salvador. In certain cases judges of first instance and justice of the peace act as notaries, and likewise Salvadorean diplomatic and consular agents sometimes have notarial functions.

Instruments executed before a notary must be prepared with certain formalities. They must be in Spanish. The notary must declare that he knows the parties or that they were identified. The notary retains the original document in a protocol and furnishes the parties with certified copies which have the effect of originals in court.

See topic 9.01 Acknowledgments.

9.03 PUBLIC INSTRUMENTS:

A public instrument is a document executed by or before a notary public or other competent official. It is full proof of the fact of its execution, and the declarations made therein are proof against the parties or their successors. The law requires numerous contracts to be executed as public instruments, e.g., mortgages, articles of incorporation, etc. Other documents are private documents. With respect to third persons, a private document is effective only from the death of one of its signers, or the date on which it was presented in court or was registered or inventoried by a public officer or acknowledged before a notary. (C. C. 1569-1585. See also topic 9.02 Notaries Public.)

9.04 RECORDS:

There is a public registry of real property, mortgages and judgments. Registrars may refuse to record a defective instrument or one as to which their books show an inconsistent entry, and from such decisions an appeal may be taken to the courts. There is also a registry of the civil status, for the recording of births, marriages, divorces, etc., and a mercantile registry for the recording of articles of incorporation and partnership, powers of attorney, etc. (C. C. 673-744; C. Fam. 187-201; C. Com. 456-487; L.D. 292 of Feb. 3, 1986 and its regulations Decree 24 of Apr. 29, 1986 as am'd; Law 271 of Feb. 15, 1973 as am'd, regulated by Decree 33 of May 7, 1973 as am'd).

9.05 SEALS:

Seals are not used in private matters. A document executed before a notary has most of the effects of a sealed instrument in the United States.

10 EMPLOYMENT

10.01 LABOR RELATIONS:

Labor is a social function and has protection of State. Art. 37 of Constitution guarantees minimum wage which must be sufficient to satisfy normal family needs of worker. Right to strike is recognized in Art. 48.

Social Security is compulsory. Employers, workers and State shall contribute to payment of insurance premiums.

Labor relations are regulated by provisions of Labor Code. Work week may not exceed 44 hours, shifts of 39 hours for night work. Every worker is entitled to day rest with pay for each working week and paid vacation after a year of continuous work. 90% of personnel of any concern must be Salvadorians except in special circumstances qualified by Minister of Labor. There are special regulations for minors and women's work.

Except for agricultural work, domestic service, labor agreements should appear in writing, but lack of formalities may not be prejudicial to laborer if he can prove terms of his contract.

Employees and laborers are protected against unjust termination of contract. Disability resulting from labor accident and certain other occupational risks are specifically covered. (Art. 316, etc.).

Social Security Law No. 1263 of Dec. 3, 1953 as amended created Salvadorean Social Security Institute. Basic regulations were issued in Dec. 37 of May 10, 1954 and Dec. 118 of Sept. 25, 1968.

11 ENVIRONMENT

11.01 ENVIRONMENT REGULATION:

(Const. Art. 117, Decree 233 of Mar. 2, 1998 regulated by Decree 17 of Mar. 21, 2000, as am'd and Decree 41 of May 31, 2000, Accord 17 of June 7, 2005).

Constitution declares protection, restoration, development and utilization of national resources to be of social interest. Law grants to all persons right to enjoy ecologically balanced environment and imposes duty on government to defend and preserve it. Among duties set forth for public authorities is prior analysis of conditions involving installation and development of any potential activity to determine environmental impact. Environmental impact statements are required for activities such as mining, chemical industry, energy production, infrastructure construction, real estate development and projects involving use of natural resources. Environmental protections apply to air, water, soil, and hazardous waste. Authorization must be obtained before generating or handling hazardous waste. As general rule, polluter has civil liability regardless of fault. Polluter's liability may be based on action or omission of agent when damages are proven. Other individuals and entities that participated in cause generating environmental damage are also subject to liability. Polluter must repair damage; if repair cannot be made, he must indemnify State and individuals affected. Besides civil liability polluter may be held criminally liable. Environmental authorities may impose fines, which vary according to damage caused, as established by law. Among main environmental authorities forming Natural System of Environment Management are: Ministry of Environment and Natural Resources, office in charge of environment matters in each Secretariat, autonomous institutions and municipalities.

12 ESTATES AND TRUSTS

12.01 ADMINISTRATION:

See topic 12.05 Executors and Administrators.

12.02 DEATH:

The presumption of death of an absentee may be judicially declared and the provisional possession of his property may be granted to his heirs, after four years have elapsed since his disappearance. Thereafter definitive possession of the property is granted when eighty years have elapsed since his birth, or 20 years since his disappearance, or 15 years since the declaration of the presumption of death. However, definitive possession is granted after four years when the disappearance occurred in war or shipwreck or similar danger. (C. C. 79-93).

Actions for Death.

There is no specific statute creating this action, but it may be supported by the general provisions on torts contained in Civil Code. (Arts. 2065-2085). In practice separate civil action for wrongful death is not exercised. Under Criminal Code, any damage resulting out of crime must be liquidated in the criminal action and under Criminal Procedure Code no civil action lies while the criminal action is pending.

Law 420 of Sept. 1, 1967 as amended establishes special rules and procedures for criminal and civil damage actions resulting from motor vehicle accidents.

12.03 DECEDENTS' ESTATES:

See topics 12.04 Descent and Distribution, 12.05 Executors and Administrators, 12.08 Wills.

12.04 DESCENT AND DISTRIBUTION:

(C. C. 952-995, 1146-1191, 1235).

In the absence of testamentary dispositions a decedent's estate passes to the following classes of persons in the order named, the persons in each of the respective classes sharing equally: (1) children, parents, surviving spouse, common law spouse; (2) grandparents and other ascendants, grandchildren, natural father who voluntarily acknowledged children; (3) brothers and sisters; (4) nieces and nephews; (5) aunts and uncles; (6) cousins; (7) University of El Salvador and hospitals.

Deceased children are represented by their descendants but in collateral line representation extends only to grandnephews and grandnieces.

Certain persons are excluded from testate and intestate succession, as for example, persons convicted of a crime against the life, honor or property of the decedent, his spouse or his ascendants or descendants, or who by force or violence induced the decedent to make a will or prevented him from making one.

The acceptance of an inheritance must be expressly declared. Acceptance may be unconditional or with benefit of inventory; in the former case the heir is liable for the debts of the decedent in proportion to his share in the estate; in the latter case he is liable only up to the amount actually inherited by him.

12.05 EXECUTORS AND ADMINISTRATORS:

The heirs or their legal representatives are the administrators of the estate and have the duty of carrying out the testator's directions. No executor may be appointed by will. The estate vests in the heirs immediately on the death of the testator and suits for or against the estate are carried on by them. If any of the heirs be incompetent and lacks a legal representative, the court appoints a guardian to represent him. If some of the heirs delay in accepting the inheritance, those first appearing act as administrators, but the court may require them to give bond. In case of disagreement among the heirs regarding the administration the court decides. For the partition of property the court appoints a partitioner who must be a lawyer, but the decedent may by will appoint a partitioner without this qualification (C. C. 1162-1168, 1192-1257. See also topic 12.04 Descent and Distribution.)

12.06 INTESTACY:

See topic 12.04 Descent and Distribution.

12.07 TRUSTS:

Commercial Code (1233-1262) allows three types of trusts: Inter vivos, mortis-causa (in which case a will is required) and those of mixed nature, that is to say, that trust starts when settlor is still alive, but continues running after his death. Only banks are authorized to act as trustees. Trustee must perform his duties according to trust contract and in absence of particular details, it is understood that trustee cannot be beneficiary of it, and presence of third party beneficiary is indispensable requisite. Beneficiary is allowed to sue trustee, if he has exceeded powers granted. In any case all goods and assets given in trust must return to settlor or vest definitively in beneficiary after maximum term of 25 years. However, trusts in favor of Government, municipalities or charitable institutions can be settled in perpetuity. Settlor can set up trust for his own benefit. Documents must be registered in Registry of Commerce and/or Registry of Real Estate, as case may be. Trust cannot be gratuitous; in case no compensation has been fixed to trustee, he is allowed to receive 5% of net income produced by goods object of trust.

Other rules of Code determines causes for substitution of trustee and for termination of trust, as well.

Convention on the Law Applicable to Trusts and on their Recognition. Signed at The Hague on July 1, 1985.

12.08 WILLS:

(C. C. 996-1145 and Notarial Law Art. 40).

Wills may be made by all except: (1) Persons below age of puberty; (2) demented persons; (3) persons temporarily not of sound mind by reason of intoxication or otherwise; (4) those who cannot clearly express their will orally or in writing. Wills are formal or privileged.

Formal wills are (1) open, also known as nuncupative or public, or (2) closed. The following cannot be witnesses to a formal will executed in El Salvador: (a) Minors below 18 years old; (b) persons temporarily or permanently not of sound mind; (c) blind persons, deaf persons, dumb persons; (d) persons convicted of crimes against property or forgery; (e) persons of notoriously vicious conduct; (f) fraudulent debtors; (g) heirs, their relatives within fourth degree of consanguinity and second of affinity, and legatees; (h) relatives within same degrees of notary before whom will is made; (i) aliens not domiciled in El Salvador; (j) persons who do not understand language of testator.

Open wills are made as public instruments before a notary or judge with the presence of three witnesses. The will must state name and domicile of testator, notary and each witness; place and date of execution; whether testator is of sound mind; age, place of birth, nationality and domicile of testator; names of persons whom the testator married and children, stating whether living or deceased. The will must be read aloud in the presence of the witnesses, and signed by the testator, witnesses and notary. There are special rules for deaf and blind testators.

Closed wills must be signed by the testator and presented by him in a closed envelope to a notary or judge in the presence of seven witnesses, with a statement that the envelope contains his will. A minute of such statement is written on the envelope by the notary, setting forth that the testator is of sound mind, the names of the testator and each witness, and the date, and is signed by the testator, witnesses and notary.

Privileged wills may be made by soldiers in time of war and by persons on board Salvadorean vessels. They are made before certain officers and require fewer formalities than formal wills.

Foreign wills may be made by Salvadoreans in accordance with the laws of the country where they are; or before a Salvadorean diplomatic or consular officer by Salvadoreans or by foreigners domiciled in El Salvador.

Testamentary Dispositions.

The testator must set aside an amount sufficient for the support of the persons to whom he owes support, namely, his spouse, descendants, ascendants and brothers or sisters, if their means of substance are inadequate, but such persons may be deprived of support in certain cases when they have proved themselves unworthy, as by committing a grave offense against the testator or his spouse, ascendants or descendants. If the amount assigned for support is insufficient, the judge may designate an amount or assign a lump sum not exceeding one-third of the net estate. No testamentary provision may be made in favor of the notary or other official before whom the will is executed, nor their wife, ascendants, descendants, brothers or sisters, brothers-in-law or sisters-in-law or servants, and the same rule applies with respect to witnesses of closed wills.

13 FAMILY

13.01 ADOPTION:

(C. Fam. arts. 165-185, L.F.P. 192, 193, 193a).

Adoption is irrevocable and extinguishes legal bonds between adopted party and natural family, must be authorized by Attorney General of El Salvador and by Salvadorian Institute for Protection of Minor and approved by judge. Adopting party must be of good reputation, under 45 years of age and at least 15 years older than adopted party. Consent is required from spouse of adopting party, from adopted party who is over 12 years old, from parents, if adopted party is under their “patria potestad” and from Attorney General when adopted party is under tutorship, abandoned or orphan. Adoption where parties are subject to different jurisdictions besides complying with same requirements as local parties, adopting party must have been married for at least five years, comply with all requirements for adoption in its own jurisdiction and prove existence of public institution dedicated to protection of minors or family in their domicile which will take care of interest of adopted party.

13.02 ALIMONY:

See topic 13.04 Divorce.

13.03 COMMUNITY PROPERTY:

See topic 13.05 Husband and Wife.

13.04 DIVORCE:

(C. Fam. 104-117; L. F. P. 91-137, 147-178).

Divorce dissolving the marriage bond may be granted for: (1) mutual consent; (2)

separation for one or more consecutive years; (3) any cause that makes living together impossible. In third case only innocent party may ask for divorce.

The court of first instance of the conjugal domicile is the court competent to take cognizance of divorce actions. (L. F. P. 4). No particular length of residence is required.

The court determines the amount payable for alimony and for support of children.

A divorce by mutual consent must be requested by the parties in person or by attorney expressly appointed for that purpose. With their petition parties must file agreement regarding division of their property and custody of their children.

Upon judgment of divorce there is a liquidation of community property. Children are awarded to either or both spouses.

13.05 HUSBAND AND WIFE:

(C. Fam. arts. 36-89, 118-126).

Husband and wife have equal rights and duties, should live together and owe each other fidelity and mutual assistance.

Before contracting marriage the parties may make an agreement regarding ownership and administration of their property. Such agreement must be recorded; it may be modified after the marriage but the modification must be recorded. Parties may agree on either of three systems: separation of assets, participation of profits or community property. If there is no premarital agreement, parties are subject to community property. Agreement ceases by agreement of parties or by judicial declaration of invalidity or dissolution.

Parties' consent is required for mortgage or sale of real estate used as family dwelling.

13.06 INFANCY:

(C. C. arts. 26, 41, 1316-1318, 1552-1554, C. Fam. arts. 202-246).

Age of majority is 18. Contracts by males under 14 females under 12 are void and, if over those ages, voidable, except by emancipated minors in some cases. Infants are subject to parental authority of father and mother or one of them. Parental authority includes custody, administration and legal representation. In absence of parents guardian is appointed. Parents and guardians have limited powers of disposition.

13.07 MARRIAGE:

(C. Fam. arts. 11-35, 90-117).

Marriage ceremony is performed by Attorney General, mayor or departmental governor or notary public, but foreigners with less than five years of residence may not marry before notary and advance publication is required. Marriages by proxy are allowed. No religious marriages may be performed unless there has been previous civil ceremony.

Marriages of following persons are prohibited: (1) Minors under 18 years old; (2) persons mentally incapacitated; (3) persons already married. Marriages between following persons are also prohibited: (1) Relatives by consanguinity or adoption in direct line; brothers and sisters; (2) surviving spouse and person implicated in death of deceased spouse. Minors below age of 18 require consent of parents, guardian, or Attorney General.

Marriages are considered invalid and may be annulled for following causes: (a) causes for absolute nullity of marriage are: (1) not contracted before proper authority, (2) lack of consent by any party, (3) parties are of same sex, (4) prohibited marriages above mentioned, except case of minors; (b) causes of relative nullity of marriages are: (1) error in person, (2) duress, (3) not contracted in presence of witnesses, (4) minority of either party. Marriages where consent was given under error or duress, but such marriages are validated if parties live together three months after error was known or duress ceased.

A marriage contracted abroad by a Salvadorean according to the laws of a foreign country or the Salvadorean laws is valid in El Salvador.

Law regulates common law marriage.

14 FOREIGN TRADE AND COMMERCE

14.01 EXCHANGE CONTROL:

(L. D. 746 of Apr. 22, 1991 as am'd; L. D. 201 of Nov. 11, 2000).

There is no control of foreign exchange. All obligations payable in money may be paid in U.S. dollars or in colones. All commercial transactions may be in U.S. dollars or colones. Export registration certificate from Banco Central is required for all exports exceeding certain amount. Import licenses are required for some items.

14.02 FOREIGN EXCHANGE:

See topic 14.01 Exchange Control; category 1 Introduction, topic 1.01 Currency.

14.03 FOREIGN INVESTMENT:

(Investment Law, L. Decree 732 of Oct. 14, 1999 as am'd).

Law promotes national and foreign investment.

Foreign investment is defined as foreign source contributions made by individuals or juridical persons.

Direct foreign investment may be effected in form of freely convertible foreign currency, assets, capitalization of profits, conversion of debentures in shares, investment of profits entitled to repatriation, equity contributions of intangibles or in intangible technological contributions, and any investment to development country. Foreign investors have same rights and duties as national investors; therefore they may invest in all economic activities with some limitations. Foreign investors have access to local financing. Foreign investment must be registered with National Office of Investment, dependency of Ministry of Economy. Registration is necessary for validity of foreign investor's rights. Registered foreign investors have no limitation to remit profits abroad; investors are entitled to repatriate their investment plus any capital gains.

Temporary or permanent residence permits may be granted to foreign investors with investment over equivalent of 4,000 minimum monthly salaries. Solution of conflicts and disputes arising from direct foreign investment may be subject to arbitration according to Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, Washington, 1965.

14.04 FOREIGN TRADE REGULATIONS:

See topic 14.01 Exchange Control.

15 HEALTH

15.01 HEALTH CODE:

Decree 955 of Apr. 28, 1988 as amended. Ministry of Public Health and Social Assistance is in charge of regulating, planning and coordinating public and private activities related to health. Law regulates among others, practice of health related professions, supply of drinking water; solid waste; food products; disease control and vaccination; preventive medicine; medical equipment; transplants of organs; medical and dental assistance; international sanitary protection; and sanctions for infringement of Law.

16 IMMIGRATION

16.01 ALIENS:

In general, aliens enjoy same civil rights as citizens, but small industry and commerce is limited to native born citizens of Central American countries. Aliens or corporations controlled by aliens whose countries deny to Salvadoreans right to own real property, cannot acquire rural realty in El Salvador except for industrial purposes. Aliens must register in central immigration office. All employers must limit number of foreign employees to no more than 10% with no more than 15% of sum of salaries. (Const. arts. 47, 96-100, 109, 115; Alien Law approved by Decree 299 of Feb. 20, 1986; Immigration Law 2772 of Dec. 19, 1958, as am'd; Regulations by Decree 33 of Mar. 9, 1959, and Decree 1020 of Mar. 10, 1982; Labor Code).

See also topic 16.02 Immigration.

16.02 IMMIGRATION:

(Constitution arts. 96-110; Law on Immigration 2772 of Dec. 19, 1958 as am'd regulated by Decree 33 of Mar. 9, 1959).

Law classifies foreigners entering country into: (a) tourists; (b) temporary residents and (c) permanent residents.

(a) Tourists must present a tourist card or passport visaed by a Salvadorian Consul and are allowed to stay 90 days. This period may be renewed once.

(b) Temporary residents may remain in country one year for following reasons: (i) to engage in some scientific, cultural or sport activity; (ii) to work as a technician or a skilled worker; (iii) to engage in any other temporary, lawful activity. Technicians must apply for advance authorization of Ministry of Interior submitting a copy of respective contract. Other residents may not work in remunerative activities except with special authorization.

(c) Permanent residents: passport and a visa is required. Permanent residency will not be granted if work applicant intends to do may cause displacement of or competition with Salvadorians. Permanent residents may engage themselves in remunerative or lucrative activities.

A special category of “Resident with an Income” not allowed to work is established by Dec. 476 of Nov. 8, 1973 as amended, regulated by D. 48 of May 28, 1974.

17 INTELLECTUAL PROPERTY

17.01 COPYRIGHT:

(L. D. 604 of July 15, 1993 as am'd regulated by Decree 35 of Sept. 28, 1994).

Law grants moral and pecuniary rights to author, his successors or assignees regarding scientific, literary and artistic works. Copyrights include all kinds of intellectual (including software), scientific, literary and artistic creations reproduced by any means. Law also protects translations, adaptations, arrangements and other transformation of intellectual works. Performers' rights are also protected. Works are protected by law without requiring registration.

“Moral rights” are unassignable and unlimited in time of enjoyment, including right to make work known publicly, use of name or pen name, assert paternity of work, oppose plagiarism or deformation, mutilation, change or abridgment of work or title. Any violation of moral rights gives action for damages.

Pecuniary rights are granted for enjoyment of pecuniary benefits from use of author's works, including all kinds of reproduction, performance, distribution, importation, exportation and broadcasting with some exceptions. These rights are assignable by inter vivos acts or transferred upon death. Protection is for life of author plus 70 years after death of author or last surviving co-author. If author appears to be corporation or collective entity protection lasts 70 years from Jan. 1 of year following year of first authorized publication or 70 years from Jan. 1 of year following creation, interpretation or execution, according to law.

El Salvador has ratified Berne Convention for protection of literary and artistic works of 1886, last revision Paris July 24, 1971; International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations, Rome, 1961; Convention for the Protection of Producers of Phonograms Against Unauthorized Duplication of Their Phonograms, Geneva, 1971; WIPO Copyright Treaty of Dec. 20, 1996; WIPO Performances and Phonograms Treaty, Geneva, 1996.

17.02 PATENTS:

(L. D. 604 of July 15, 1993 as am'd regulated by Decree 35 of Sept. 28, 1994).

Invention Patents.

Any invention of products or proceedings which are novel, represent inventive step and are susceptible of industrial application. Invention is novel when it is not within state of art. Any individual or juridical person who invents or discovers or improves something of industrial application may obtain patent. Discoveries, scientific theories and mathematical methods; economic or business plans, principles or methods; surgical, therapeutic or diagnostic treatment methods, inventions contrary to public policy and morals, are not patentable. Patents are granted for 20 years from filing date according to law. Patent gives exclusive right of exploitation but compulsory license may be granted in case of declared emergency or national security reasons. Patent rights are transferable.

Utility Models.

Any new model which may be applied to industrial object may be registered as ownership of author. Utility models are new forms of objects or mechanism, which, provided they have practical use, are registrable. Registration term is ten years from filing date. Provisions regarding patents are applicable to models.

Industrial Designs.

Any new design which may be applied to industrial object may be registered as ownership of author if no publicity thereof has been made in any form. Registration term is ten years from filing date.

Trade Secrets.

Law also protects trade secrets and considers them as any confidential information that is valuable and provides competitive or economic advantages to owner. Information considered trade secret is protected even if it is not expressed in tangible form.

Testing Data.

In order to obtain authorization to commercialize new pharmaceutical products and agrochemical products, testing data on safety and effectiveness of products must be supplied to corresponding authority. Such information is protected for five years for pharmaceutical products and ten years for agrochemical products from date of commercialization approval.

Treaties.

El Salvador has ratified Paris Convention on Industrial Property, Paris, Mar. 21, 1883, Stockholm Revision of July 14, 1967 as amended on Sept. 28, 1979. Patent Cooperation Treaty, Washington, June 19, 1970, as amended. Budapest Treaty on the International Recognition of the Deposit of Microorganisms for the Purposes of Patent Procedure, Budapest, Apr. 28, 1977, as amended.

17.03 TRADEMARKS:

(L. D. 868 of June 6, 2002 as am'd).

Trademarks and Slogans.

Any sign or combination of signs sufficiently distinctive and susceptible of identifying goods and services can be registered as marks. Mark is any sign used to distinguish products or services produced by one person from same or similar products or services produced by another person. Words or their combination, personal names, letters, monograms, numbers, pictures, labels, lines, sounds, smells, combination of colors, shapes and wrapping of goods, among others may be registered as marks. National or foreign geographic names may be registered as marks if no confusion is caused with reference to origin, characteristics or qualities of goods and services to be protected. Ownership of mark and exclusive right to use is granted by registration of mark according to law. No registration may be granted, among others, to flags, denominations, signs and emblems of any State or its agencies, or international organizations; to usual or necessary shapes of products or denomination and color thereof; common words or their equivalent in common languages or descriptive denominations; marks which may be confused with others registered or pending registration; geographical names if their use may suggest origin; marks contrary to law, those against public policy, denomination of protected vegetal varieties, those identical or similar to registered logos and commercial names provided under circumstances by which public may be confused; those that are reproductions, imitations, translations or total or partial transcriptions of distinctive signs, locally or internationally, well-known, or because of similarity to well-known trademarks causes confusion to public independent of classification of goods and services for which registration is applied. Registration of trademark grants ownership in mark and exclusive right to use it during ten years, renewable. Trademark registration may be cancelled for lack of use as requested by third party after fifth year from registration date, as regulated by law. Owner of trademark may grant license to use or exploit it. Infringement actions and unfair competition are regulated by law. Slogans are words, sentences or captions used as supplement to trademark. Any person or corporation may apply for registration of slogans employed or to be employed in relation with economic activities. Item registered must be sufficiently distinctive. Provisions regarding trademarks are applicable to slogans.

Certification Marks.

Private or public enterprises, governmental bodies or regional and international organizations may register certification marks. Registration is granted for ten years, subject to renewal, but if granted to government body registration is for indefinite period of time. It can be cancelled as requested by owner. It cannot be encumbered or subject to attachment. Provisions regarding trademarks are applicable to certification marks.

Trade Names and Logos.

Those signs used to identify individuals or juridical persons regarding their economic activity. Exclusive right to use of trade name and logo ends with closing of establishment or termination of industry covered by name. Registration is granted for indefinite period. Provisions regarding trademarks are applicable to trade names and logos.

Collective Marks and Origin Denominations.

Producers' or traders' associations may register collective marks. Origin denominations belong to State that may grant right to use them. Registration is granted for indefinite period. Provisions regarding trademarks are applicable to collective marks.

Conventions.

Paris Convention for the Protection of Industrial Property, Mar. 21, 1883, Stockholm Revision of July 14, 1967 as amended on Sept. 28, 1979; Nice Agreement Concerning the International Classification of Goods and Services for the Purposes of the Registration of Marks, 1957 as reviewed and amended; Agreement on Trade-Related Aspects of Intellectual Property Rights, Marrakech, Apr. 15, 1994.

18 LEGAL PROFESSION

18.01 ATTORNEYS AND COUNSELORS:

(Decree of June 12, 1984 as am'd).

Supreme Court of Justice grants attorney degree to applicant having law degree from local university, no criminal record and at least two years of legal practice.

Salvadorians or nationals of other Central American Countries holding law degree from foreign university must comply with evaluation proceedings of law degree before “Universidad de El Salvador”.

19 MINERAL, WATER AND FISHING RIGHTS

19.01 MINES AND MINERALS:

(L.D. 544 of Dec. 14, 1995 and Decree 68 of Aug. 7, 1996 as am'd).

State is owner of all mineral deposits within its territory and its continental shelf. State may grant rights of exploration, exploitation, processing and commercialization to individuals, private entities, whether local or foreign, with exception of certain government officials and their relatives. All mining activities and disputes are subject to Salvadorian law and jurisdiction. Mining titles constitute jus ad rem, distinct from surface. Prior permission is required to alienate, encumber or inherit. Exploration licenses are granted for maximum period of four years, which may be extended for two year periods up to eight years; maximum allocated area is 50 square kilometers. Exploitation concessions are granted for maximum period of 30 years, which may be extended. Rights to process and commercialize minerals are included in exploitation concession. Environmental impact assessment is mandatory. On termination of concessions area to which concession was granted must be immediately reverted to State and installations must be transferred to State without compensation. Exploration licenses and exploitation concessions are subject to all taxes. Royalty equal to 1% of value of exploited metal mineral must be payed to State and 1% to municipality where mine is located for exploitation of metal and nonmetal minerals.

Petroleum Law, Decree 626 of Mar. 17, 1981, regulates promotion, development and control of exploration and exploitation of hydrocarbons, as well as their transportation. Hydrocarbons are property of State. Executive Power is authority in charge of Law's application. Executive Commission of Rio Lempa (C.E.L.) has exclusivity for exploration and exploitation of mineral substances and may execute contracts with other parties aimed to achieve said activity. Types of contracts are: (a) Operation contracts, in which contracting party bears risk for mining operation being compensated with percentage of total production obtained; (b) contracts for rendering of services, in which contracting party agrees on behalf and at risk of C.E.L., to perform specific petroleum activities, furnishing all technology, capital, and machinery necessary to carry out contracted work for certain amount of cash, or its equivalent in petroleum or gas. Arts. 30, 31, 32, and 33 of Law establish obligations of natural or juridical persons that enter into any of above-mentioned agreements with C.E.L. Foreign corporations will be subject to regulations established in C. XIII, Tit. II of Commercial Code in order to enter into these license agreements with exception of “rendering services” in which case Ministry of Economy may authorize it.

Payments made to contractor for exploitation of petroleum and gas are taxed by so-called “Specific Direct Tax”, which must be paid in accordance with Arts. 62 and 65 of Law. C.E.L. shall be withholding agent for payment of said tax. Transportation service for hydrocarbons will be furnished by C.E.L. or through third contracting parties. Any controversy arising out of license agreements shall be resolved by arbitration. Registry for activities related to hydrocarbons will be kept by C.E.L., organization and functioning of which shall be governed by further regulations.

20 MORTGAGES

20.01 CHATTEL MORTGAGES:

There is no provision for chattel mortgages. See category 7 Debtor and Creditor, topic 7.11 Pledges.

20.02 COLLATERAL SECURITY:

See category 7 Debtor and Creditor, topic 7.11 Pledges.

20.03 MORTGAGES:

(C. C. 2157-2180).

Mortgages must be executed in the form of public instruments and are not valid unless recorded in the mortgage registry. Mortgages made abroad on property in El Salvador are valid if duly recorded. Only realty, some aircraft and ships can be mortgaged. The mortgage covers the increases and improvements of the property as well as sums due for rentals and insurance, but a mortgage of mines or quarries does not cover substances separated from the soil. A property already mortgaged may be mortgaged again notwithstanding any stipulation to the contrary.

When property encumbered by mortgage is sold at a public sale under execution, it is sold free of the encumbrance if the mortgage creditor was duly summoned; in such case the proceeds of the sale are devoted to the payment of liens in their order of preference. Mortgage foreclosures follow the general rules of summary actions and execution of judgments. After the sale there is no right or redemption.

21 PROPERTY

21.01 ABSENTEES:

See category 12 Estates and Trusts, topic 12.02 Death.

21.02 ADVERSE POSSESSION:

See category 5 Civil Actions and Procedure, topic 5.04 Prescription.

21.03 CONVEYANCES:

See topic 21.04 Deeds.

21.04 DEEDS:

(C. C. 1605, Notarial Law, D. 218 of Dec. 6, 1962 as am'd).

Conveyances of real estate, and of easements and inheritances, must appear in public instrument, and contain true statement of consideration, since tax on transfer of title is based on real consideration. Deeds must be recorded in registry of property. Both grantor and grantee must sign deed and must therefore be present before notary at same time in person or by attorney-in-fact. Original deed remains in files of notary, who gives to either party certified copy which has effect of original in courts of law. See category 9 Documents and Records, topics 9.02 Notaries Public, 9.03 Public Instruments.

21.05 DOWER:

No dower right. See categories 12 Estates and Trusts, topic Descent and Distribution; Family, topic Husband and Wife.

21.06 REAL PROPERTY:

Arts. 102 and 105 of Salvadorian Constitution guarantees every person free disposition of his property except owners of rural real property over 245 hectares. Expropriation is possible only by reasons of public or social interest, when authorized by law and subject to just compensation. (Art. 106, Const.).

Rural real property may not be acquired by foreigners in whose countries of origin Salvadorians do not have this right, except in case of land for industrial establishments.

Lands and buildings or improvements of any kind attached thereto are real property as well plants and trees and, in general, anything united to land in a fixed and permanent manner. Arts. 587, etc., of Civil Code list different ways to acquire real property; occupation, accession, adverse possession and conveyance. For a transfer to be binding on third parties it must be recorded in Registry of Real Property. (Arts. 673, etc., Civil Code).

Dec. 4 of Jan. 17, 1978 regulates parcelization for commercial purposes of agricultural or forest lands.

Decree 153 of Mar. 5, 1980 as am'd regulates agrarian reform.

Decree 31 of Feb. 21, 1961 as am'd regulates condominiums.

22 TAXATION

—Scope —

Leg. Decree 230 of Dec. 14, 2000 as amended (Fiscal Code) and its regulations, Decree 117 of Dec. 11, 2001 contains general principles, taxpayer's rights and duties, exemptions, proceeding applicable to all taxes, violations and sanctions, among others.

22.01 ALCOHOL, BEVERAGES AND TOBACCO TAXES:

Tax on Alcohol and Alcoholic Beverages.

(Decree 640 of Feb. 22, 1996 and its regulations of Mar. 11, 1996). Production and importation of alcohol and alcoholic beverages are taxed: at different rates depending on content of alcohol and ad valorem at 30% rate.

Tax on Soft Drinks.

(Decree 641 of Feb. 22, 1996 and its regulations of Mar. 11, 1996). Production, importation or distribution of soft drinks are taxed at 10% ad valorem rate.

Tax on Tobacco Products.

(Decree 539 of Dec. 22, 2004). Production and importation of tobacco products taxed at US 0.005 cent per cigarette, cigar or any other product and ad valorem at 39% rate.

22.02 BUSINESS TAXES:

License Tax.

(Law 271/1973 of Feb. 15, 1973 as am'd). Registration fee for business license is paid based on business assets.

22.03 EMPLOYMENT TAXES:

Social Security Benefits.

(Decree 1263 of July 27, 1972, as am'd). Contributions paid based on total salary for sickness, workers compensation and maternity, employer pays 7.5% and employee pays 3%. Self-employed persons and businessmen pay 10.5% of their income up to certain monthly amount.

Pension Fund.

(L. D. 664 of Dec. 2000). Payments for disability, retirement and death benefits for private employees. Employer's contribution is 6.75% and employee's contribution is 6.25% of total salary.

22.04 FREE ZONES:

Free Zones Law.

(L. Decree 405 of Sept. 3, 1998 as am'd). National or foreign individual or legal entity may establish and manage free zones, and operate in free zones by authorization of Ministry of Economy. Owners of free zones are exempted from income tax for 15 years from start of operation, from tax on business net capital for ten years, renewable and from sales tax. Companies operating in free zones engaged exclusively in export and companies in bonded areas exporting their entire production or engaged in international markets of goods are exempted from income and sales tax and from tax on business net capital for period of operation. Raw materials, equipment machinery, parts, components and everything necessary for establishment, management and operation in free zones may be imported duty free. Infringement of law can carry suspension or cancellation of authorization, or imposition of fine.

22.05 INCOME TAX:

(L. D. 134 of Dec. 18, 1991 as am'd and its regulations, Decree 101 of Dec. 21, 1992 as am'd).—Individuals and trusts domiciled in El Salvador, and estates of decedents whose last domicile was in El Salvador, until inheritance is accepted, are subject to taxation on incomes received from sources in or out of country.

Other individuals, estates and trusts and any corporation or juridical person whether national or foreign, domiciled or not, are subject to tax on income from Salvadorian sources only.

Among others, the following items are exempt: insurance proceeds; gifts and inheritances; rent from house occupied by owner; interest received by credit institutions domiciled abroad; interests from treasury bonds; workers compensation; severance up to certain amount; pensions.

Among items which are deductible are necessary expenses to produce income, salaries, social security payments, interests, depreciation, investment for welfare of workers, gifts to charitable institutions, insurance premiums, traveling expenses and rent paid for personal or real property use in production of taxable receipts.

Individuals may also deduct up to 5,000 colones, for each of following local expenses: hospital and medical, educational. Individuals with income from salary only up to 50,000 colones have single deduction of 12,000 colones.

Rates.

Individuals, estates and trusts domiciled in El Salvador are exempted on first 22,000 colones and their income is subject to tax rates of 10%, 20% or 30%. Tax cannot exceed 25% of net income. Individuals, estates and trusts not domiciled in El Salvador are taxed at rate of 25% on net income. Juridical persons domiciled or not their net income is taxed at rate of 25%.

Withholding Tax.

Payments to resident individuals are subject to withholding tax calculated according to special procedure. Payments to nonresident individuals and non-domiciled juridical persons, trust and estates are subject to withholding tax, at 20% rate with certain exceptions, such as cultural, artistic and sports activities which are subject to 5% rate on gross income. Lottery awards to same individuals are subject to 25% rate. Resident individuals are subject to 10% withholding tax on interest and fees paid for services.

Tax on Dividends and Capitalizations from Profits.

Under income tax law, dividends are generally exempt from withholding taxes, but stockholders must declare them in their own return, excepting stock dividends. However, when distributee is a corporation not domiciled in country or individual residing abroad 20% must be withheld.

Interest payments by financial institutions to juridical persons are subject to withholding tax at 10%.

Salaries and other permanent service compensations are subject to system of withholding at source as provided by Regulations.

Lottery, raffle, game or similar awards or gains in excess of 1,000 colones are subject to 2% withholding tax if recipient is domiciled in the country, and 25% if otherwise, and then on entire amount. These taxes do not apply to national lotteries or other exempt awards.

Any withholding tax on payments in kind must be made in cash in proportion to market value of assets.

Capital gains from sale, exchange or negotiation of personal or real property assets, realized by a taxpayer not habitually dedicated to that kind of activities are to be recognized according to a special formula, dividing the gain by the number of years of holding of the property and adding the quotient to the ordinary taxable income. This sum is subject to the corresponding ordinary tax. The over-all rate thus applied, i.e., the rate resulting from dividing the tax for said sum of taxable income, is divided by 2 and the resulting one-half is the rate to be applied to rest of gain not included as ordinary income. When there are several gains from assets held for different numbers of years a similar formula applies, adding up all the quotients of the several gains and subtracting the quotients of the losses and the result, if positive, is added to ordinary income. Tax rate on this is divided by 2 and the result is rate applicable to rest of gain not included as ordinary income.

If a sale has been subject to gift, tax, as presumed gift under the special law, the capital gain of the seller is not taxable.

22.06 PROPERTY TAXES:

Real estate transfer tax is exempted up to 250,000 colones, and 3% on excess of 250,000 of value of property transferred. (L. D. 552 of Dec. 22, 1986 as am'd).

22.07 TAX INCENTIVES AND EXEMPTIONS:

Export Incentives Law.

(L. Decree 460 of Mar. 15, 1990 as am'd regulated by Decree 68 of Nov. 27, 1990). Law grants special benefits to industries dedicated to export services and nontraditional products outside Central American region. Tax incentives consist mainly in reimbursement of import taxes and other indirect taxes paid by export activity equal to 6% of FOB value of exported goods, or services.

Tourism Law.

(L. D. 899 of Dec. 10, 2005). Investment on new projects or expansion of infrastructure in tourism area of at least $50,000 may enjoy tax incentives. Benefits include exemption of duties and taxes on importation of goods, equipment, accessories, machinery, motor vehicles, aircraft, freight vessels and construction materials for installations; transfer of real property, income tax for ten years, local taxes up to 50% for five-year period. Ministry of Finance is government agency in charge of granting tax benefits.

22.08 VALUE ADDED TAX:

(L. D. 296 of July 24, 1992 as am'd regulated by Decree 83 of Sept. 22, 1992 as am'd). Tax is levied on transfer, import, export and sales of most goods and rendering services at rate of 13%.

23 TRANSPORTATION

23.01 AIRCRAFTS:

(L. D. 582 of Oct. 18, 2001 as am'd).

Organic Law of Civil Aviation regulates operation and use of air space in connection with rendering and development of air transportation services; construction, rehabilitation, administration, operation and maintenance of aerodromes and heliports; classification of aircrafts; registry of civil aviation; aeronautical licenses; operation permits; air traffic; air transportation services; accidents; captain and crew members; sale, lease, and mortgage of aircraft; civil liability; resolution of conflicts and prescription; infringement and penalties, among others.

23.02 MOTOR VEHICLES:

(L. D. 477 of Oct. 19, 1995 as am'd and its regulations D. 35 of Feb. 14, 2002).

Law contains regulations governing motor vehicles, pollution and public ways. Minors between 15 and 18 years of age are permitted to operate motor vehicles in special circumstances. In case of traffic accidents, law provides for fines, suspension or cancellation of driving license, cancellation of license plates and impounding of motor vehicle depending upon type of violation; suspension and cancellation of driving license is applied when driving while intoxicated. Insurance is compulsory. There is National Registry of Motor Vehicles where ownership, transfer, encumbrance, attachment of vehicles authorized to use public ways is recorded. Registration is compulsory. There are special rules and procedures for criminal and civil damages actions resulting from motor vehicles accidents.

23.03 SHIPPING:

Vessels constructed in El Salvador or owned by Salvadoreans are entitled to Salvadorean registry; other vessels may also be so registered by authorization of the Executive. Coastwise trade is restricted to Salvadoreans. (Navigation Law 236 of Oct. 23, 1933 as am'd). Law divides maritime ports into categories according to ownership, regulates administration and operation of ports. It creates Autoridad Marítima Portuaria as regulatory entity and defines administrative system, vessels in ports; establishes Registro Marítimo Salvadoreño; violations and sanctions. Vessels owned by or leased to Salvadorean individuals or juridical persons must be registered at maritime registry. All vessels registered in El Salvador are considered of Salvadorean nationality. Vessels can belong to several owners under common or joint tenancy. Law divides vessels into categories, according to tonnage and regulates maritime mortgage and attachment, lease of vessels, charter party, cargo and passenger transportation and compulsory maritime insurance. In general, statute of limitations for actions arising under law is five years. (L. Decree 994 of Oct. 1, 2002 as am'd).

24 TREATIES AND CONVENTIONS

24.01 TREATIES:

El Salvador is a party, among others, to following:

Multilateral: Convention on private international law (Bustamante Code, Havana, 1928); General Treaty of Central America Economic Integration signed in Nicaragua, 1960 and its Protocol; Inter-American Convention of Laws Concerning Bills of Exchange, Promissory Notes and Invoices. Signed in Panama on Jan. 30, 1975; Inter-American Convention on International Commercial Arbitration. Signed in Panama on Jan. 30, 1975; Inter-American Convention on Letters Rogatory. Signed in Panama on Jan. 30, 1975; Addition Protocol. Signed in Montevideo on May 8, 1979; Inter-American Convention on the Taking of Evidence Abroad. Signed in Panama on Jan. 30, 1975; Inter-American Convention on the Legal Regime of Powers of Attorney to be used abroad. Signed in Panama on Jan. 30, 1975; Central American Agreement on Tariff and Customs Regime. Signed in Guatemala on Dec. 27, 1984, ratified by D. L. 293 of Jan. 4, 1985; Multilateral Trade Negotiations, the Uruguay Round, Final Act (Marrakech, Apr. 15, 1994) and Agreement Establishing the World Trade Organization (Marrakech, Apr. 15, 1994); Convention Abolishing the Requirement of Legalization for Foreign Public Documents. Done at The Hague on Oct. 5, 1961; Convention on the Recognition of Foreign Arbitral Awards, New York, 1958; United States of America-Dominican Republic-Central America Free Trade Agreement. Signed Aug. 5, 2004, Washington, D.C.; United Nations Convention on Contracts for the International Sale of Goods. Signed in New York on Apr. 11, 1980.

1
ENGLAND LAW DIGEST

—Scope —

Revised for 2010 edition by

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See category 6 Courts and Legislature, topics 6.02 Law Reports, 6.05 Statutes.

England is member of EU. See also European Union Law Digest.

Note: This revision incorporates legislation through September 2009.

1 INTRODUCTION

1.01 CURRENCY:

Bank of England has exclusive right to issue paper money in England and Wales. Notes issued by Bank are legal tender in England, Northern Ireland, Scotland and Wales. Part of notes issued is covered by gold coin and gold bullion. Remainder, known as “fiduciary note issue” must be covered by securities. Great Britain left gold standard in 1931. One pound and two pound coins are only currency of these denominations.

Unit of currency is pound sterling which is divided into 100 pence.

See also category 14 Foreign Trade and Commerce, topic 14.02 Exchange Control.

1.02 GOVERNMENT AND LEGAL SYSTEM:

Legislature.

The British Constitution is unwritten in the sense that there is no document or statute laying down the law of the constitution and therefore all the laws can be altered by the Sovereign legislative body, i.e., the Crown in Parliament, composed of the House of Commons, the House of Lords and the Crown. Membership of E.U. by Treaty has effect of limiting Parliament's legislative powers to those not in conflict with European Community Law.

Membership of Commons is by general election, held at least every five years. Membership of Lords is partly hereditary and partly by appointment to life peerages. Parliamentary sessions are annual, beginning normally in Nov. with Queen's Speech (containing outline of government's proposals for legislation in session). Pattern may be affected by general election.

In general legislative proposals (Bills) have to be passed by both Commons and Lords in order to become Acts of Parliament (Crown's assent being purely formal).

Bills are divided into two classes: (1) Public Bills, subdivided into (a) money bills and (b) bills other than money bills; and (2) Private Bills.

A public bill, other than a money bill, will become law without the consent of the Lords if it is passed in the Commons, and sent up to the Lords in two successive sessions. But one year must elapse between the date of the second reading in the Commons in the first session and the date when it is passed by them in the second session. By the Parliament Act, 1911, if a money bill is not passed unamended by the House of Lords within a month of its being sent up it becomes law on the Royal assent being signified.

Executive.

The executive consists of the Queen in Council, the work being carried on by the Cabinet, a body which has no official corporate existence. It is composed of Prime Minister and ministers at head of major Government departments, who hold their office during Queen's pleasure. Ministers are severally responsible to Parliament for their actions and Cabinet as whole is responsible to Parliament for central government administration.

Judiciary.

All judges are appointed by the Queen on recommendation of Lord Chancellor and derive authority from her. Once appointed they hold office during good behaviour and if appointed after 1993 Judicial Pensions and Retirement Act 1993 must retire at 70, otherwise at 75.

See also European Union Digest, category Courts and Legislature, topic Legislature.

1.03 HOLIDAYS:

New Year's Day, Good Friday, Easter Monday, May Day, (1st Mon. in May) Spring Holiday (last Mon. in May), late Summer Holiday (last Mon. in Aug.) Christmas Day and Boxing Day are Bank Holidays in England and Wales and no business of any kind is transacted, all banks and Stock Exchange being closed.

If Boxing Day, Christmas Day or New Year's Day fall on Sat. or Sun., then extra days are taken as holiday in lieu.

No bank transacts business after closing for day, i.e., 3:00 p.m. in City, 5:00 p.m. for main branches, 4:30 p.m. for other minor branches. Main branches also have extra opening hours on Sat. mornings for financial advice.

1.04 OFFICE HOURS AND TIME ZONE:

England is in the Greenwich Mean Time zone. Summer time + 1 hour (Mar. - Oct.). Office hours are generally from 9 a.m. to 5 p.m.

2 BUSINESS ORGANIZATIONS

2.01 AGENCY:

Common law rules apply. In general the principal is responsible for the acts of his duly authorised agent or of his agent acting with apparent authority. Agent acting for undisclosed principal is personally liable. Agent acting outside his authority is liable on action for breach of warranty of authority.

2.02 ASSOCIATIONS:

See topic 2.04 Partnerships.

2.03 CORPORATIONS:

Companies with limited liability are regulated by Companies Act 2006 (which was fully implemented on 1 Oct. 2009) and are divided into public and private companies.

Public company is defined by 2006 Act as company limited by shares or guarantee: (a) Whose certificate of incorporation states that it is public company, and (b) in relation to which requirements of this Act, or former Companies Acts, as to registration or re-registration as public company have been complied with on or after 22 Dec. 1980. It must have authorised minimum share capital of at least £50,000 (or "statutory equivalent" in Euros, currently set at 65,000 Euro). It must not do any business nor exercise any borrowing power before obtaining trading certificate from Registrar of Companies. Private Company is any company which is not public company. Private limited company may have only one member and no minimum capital requirement. Private companies must not issue shares to public. Public company usually invites public to subscribe by issue of prospectus. Name of public company must end with words “public limited company” or its abbreviation plc and word “limited” may not precede that phrase. Name of private company must end with “limited” or its abbreviation Ltd. Company may not be registered with name too like another on register. Use of some words prohibited or subject to approval from Secretary of State or other body.

Company name, registration number, place of registration and registered office address must be stated on all business letters, invoices, websites, order forms and electronic documents, etc. and displayed at each place of business.

In order to register company, application delivered to registrar of companies must state: company's proposed name, whether company's registered office is to be situated in England and Wales (or in Wales), in Scotland or in Northern Ireland; whether liability of members of company is to be limited, and if so whether it is to be limited by shares or by guarantee; and whether company is to be private or public company. It must also include statement of capital and initial shareholdings or statement of guarantee, statement of company's proposed officers, statement of intended address of company's registered office and copy of any proposed Articles of Association.

Companies must have constitution which includes its articles and certain important shareholder resolutions.

Objects of company are unrestricted if its articles are silent. Companies almost invariably file Articles of Association which are rules governing internal regulation of company, duties of directors, rights of voting etc. If Articles of Association of private company not filed or do not make provision for particular matter, default rules prescribed by Secretary of State will govern internal management.

Fees.

There is fixed registration fee of £15 if documents filed electronically (£30 for same-day service), £20 for normal filing (£50 for same-day service). If company wishes to change its name it must register new name for which there is fee of £10 (£50 for same-day service). On filing annual return and balance sheet there is fee of £15 if filed electronically (£30 otherwise). Fee for registration of mortgages is £13 per form.

Offering Shares to Public.

Company intending to offer shares to public in U.K. must comply with rules in Part VI of Financial Services and Markets Act 2000 in addition to United Kingdom Listing Authority Listing Rules. Prospectus must contain all such information as investors and their professional advisers would reasonably require to make informed assessment of financial position of issuer and rights attaching to securities. United Kingdom Listing Authority must approve prospectus before publication. Criminal penalties against directors and civil compensation liability against directors, experts and company for misleading information. Company may be removed from listing. Provision for mutual recognition of prospectuses from other EU Member States.

Reports.

Every company must file every year with registrar annual accounts, consisting of balance sheet and profit and loss account, together with directors' report (and directors' remuneration report if company is listed). Accounts must be prepared by directors for individual companies and consolidated accounts for group of companies (if applicable). Qualified independent auditors should report on annual accounts and directors' report unless company exempt.

Under Companies Act 2006, disclosure is required in company's accounts of numerous items, e.g., statement of company's shareholding in subsidiaries, statements in subsidiary's accounts of its holding company, average number of persons employed and aggregate costs, directors' remuneration (as required by statutory instrument). Under 2006 Act, independent valuation is required when shares in public companies are allotted for noncash consideration or for noncash assets acquired from subscribers during first two years of company's existence, etc.

All companies must file at Companies Registry every year on Annual Return containing specified information such as location of registered office, business of company, details of members and directors, etc. If company has share capital, return must give particulars of its share capital including extent to which it is paid up. Return must be in statutory form and filed within 28 days of return date, failing which, directors, company secretary and company commit criminal offence punishable by fine.

Where registrar has cause to believe that company is not carrying on business or in operation, it may be struck off register with its property becoming bona vacantia. Companies Act 2006 also regulates appointment, removal and resignation of auditors and augments auditors' powers to require information in respect of subsidiaries, etc. Any officer of company who knowingly or recklessly misleads or deceives auditors is guilty of offence.

Registration of Mortgages.

Every mortgage or charge falling within categories specified in Companies Act 2006, subject to certain exceptions, must be registered at Companies Registry. Categories are: (a) Charge on land or any interest in land, (b) charge created or evidenced by instrument which, if executed by individual, would require registration as bill of sale, (c) charge for purposes of securing any issue of debentures, (d) charge on uncalled share capital of company, (e) charge on calls made but not paid, (f) charge on book debts of company, (g) floating charge on company's property or undertaking, (h) charge on ship or aircraft, or any share in ship, (i) charge on goodwill or on any intellectual property.

Company creating such charge or acquiring property subject to such charge must file particulars of charge within 21 days beginning with day after day on which charge is created or acquisition of property is completed; otherwise, charge will be void against administrator, liquidator and creditor of company. Chargeholder may also register charge. Where charge becomes void, money secured by it immediately becomes payable.

If particulars are not filed, company and its officers commit offence and are liable to fine.

Every company must keep at its registered office copy of any charges over its property and register of charges. Copies and register are open to inspection by creditors or members of company without fee and to inspection of any other person on payment of such fee as may be prescribed.

Secretary of State may make rules requiring overseas companies to file particulars of charges over property in U.K. and to disclose other information.

Control of Companies.

Control of company is vested in directors who may be appointed in accordance with constitution, usually by shareholders. Directors may always be removed by majority resolution of shareholders, subject to certain procedures. Private companies must have at least one director and public companies must have at least two. Directors usually act via meetings of Board in larger companies, but with extensive delegation to Committees and individual directors may bind company to contracts. Companies Act 2006 contains statement of directors' duties which is based on, and interpreted in accordance with, common law duties. Liability of directors for breach of duty is determined in accordance with common law and equity. Directors of public companies must retire at 70 years. Enforcement of duties and litigation usually controlled by board as part of control of company, but exceptionally by shareholders.

Companies Act 2006 makes provision to protect minority shareholders and persons dealing with company. Provisions include protection against oppression of minority shareholders, maintenance of capital and restrictions on distribution of profits and assets.

Overseas Companies.

Secretary of State may make regulations requiring companies incorporated outside the U.K. to make disclosures. Those regulations must require overseas companies to disclose every person resident in U.K. authorised to accept service of documents on behalf of company, or make statement that there is no such person. They must also require particulars to be registered if company opens branch in U.K. 11th EC Company Law Directive (89/666/EC) specifies information which Member States must require branches to disclose. Foreign incorporated companies can also be served with proceedings at any place at which they do business in England. (CPR 6.5[6]).

Inspection.

Companies Act 1985 contains certain provisions for inspection of corporation's affairs by Department of Trade and Industry Inspectors on application of certain minimum number of members, company itself, or following court order. Secretary of State may appoint inspectors if it appears to him that company's affairs are being conducted with intent to defraud creditors, etc. Inspectors have wide powers of investigation and officers of company are under obligation to produce documents, attend before inspectors and otherwise assist. Act contains further extensive powers which allow Department of Trade and Industry itself to carry out investigation of ownership of company, share dealings, etc. Company can be requested to produce books and papers.

Taxation.

See category 21 Taxation, topic 21.05 Income Tax, subhead Corporation Tax.

Winding Up.

Company may be wound up either voluntarily or compulsorily, in both cases usual reason being insolvency. See category 7 Debtor and Creditor, topic 7.04 Bankruptcy and 7.09 Insolvency.

Administration.

Court may appoint administrator if company is unable to pay its debts on petition of company or creditor. Holder of floating charge over substantially all company's assets can also appoint administrator under Enterprise Act 2002. Such chargeholder also has veto over identity of administrator appointed on petition of company or other creditor. Administrator's purpose is to attempt to procure survival of company as going concern, or, if this is not reasonably practicable, to achieve better result for company's creditors. If neither purpose reasonably practicable, administrator should realize property for distribution to secured or preferential creditors. No winding up during currency of administration order.

The Company Directors Disqualification Act 1986 provides rules allowing court to disqualify “unfit” people from holding directorships or otherwise being concerned with company's affairs for periods of two–15 years.

The Criminal Justice Act 1993, Part V, amends and restates law on insider dealing. Insider trading is also regulated by Financial Services and Markets Act 2000, §§118–118C.

The Insolvency Acts of 1986, 1994 and 2000 govern law of corporate insolvency, disqualification of directors, wrongful and fraudulent trading, receivership, and winding up of companies. See category 7 Debtor and Creditor, topic 7.04 Bankruptcy and 7.09 Insolvency.

Financial Services and Markets Act 2000.

See category 3 Business Regulation and Commerce, topic 3.13 Securities and Investments. Also creates offence of market abuse.

Societas Europea.

European company registered in England usually formed by merger of existing English public company with another existing company formed in another Member State of EU. Governed by EC Regulation 2157/2001 which refers back to many of rules applicable to public limited companies in English law, and Directive 2001/86/EC on employee participation.

2.04 PARTNERSHIPS:

These are either ordinary partnerships (Partnership Act, 1890) or limited ones (Limited Liability Partnerships Act 2000). In partnership each partner impliedly confers upon his copartners apparent authority to incur debts on behalf of partnership to bind all partners.

A partnership exists between persons carrying on a business in common with a view to profit. Neither common ownership of property nor sharing of gross returns by itself creates a partnership but an unqualified agreement to share profit and loss is very strong evidence of partnership. 1890 Act has default provisions on sharing profits, participation in management, etc. but such matters usually provided for by partnership deed. Regulations made under 2000 Act have similar provisions, unless matters usually specifically provided for by agreement.

Ordinary partnership firm has no legal personality distinct from members composing it but partners can sue and are liable to be sued in their firm name. Receiving order in bankruptcy may be made against firm and it operates as if it were made against each of the persons who at its date are partners in firm.

Permitted number of partners is without restriction.

Limited liability partnership (LLP) has separate legal identity and liability of member partners for debts of LLP is limited. LLP formed by registration of incorporation document and other forms at Companies Registry. Fee £20 (£50 for same-day registration). Rules on restrictions on name, filing requirements, disclosure, filing of charges, audit and winding up of LLP similar to companies. At least two designated members necessary, their role similar to directors. LLP taxed and managed by rules similar to ordinary partnership rules.

Under Income and Corporation Taxes Act 1988 income tax assessment on individual partners is treated as part of that partners own individual taxation liability.

As to firm name, see category 17 Intellectual Property, topic 17.04 Trademarks and Tradenames, subhead Tradenames.

3 BUSINESS REGULATION AND COMMERCE

3.01 BILLS AND NOTES:

Bills of exchange (including cheques) and promissory notes are regulated by Bills of Exchange Act 1882, and Cheques Acts 1957 and 1992.

Bill is unconditional order in writing, addressed by one person to another, signed by person giving it, requiring payment of sum certain in money. Bill is not invalid because it (a) is not dated, (b) does not specify the value given or that any value has been given therefor or (c) does not specify place where drawn or where payable.

Inland and Foreign Bills.

Inland bill is one which is or on its face purports to be (a) both drawn and payable within British Isles or (b) drawn within British Isles on some person resident therein. Any other bill is foreign bill. There is no longer any stamp duty on bills. Foreign bill, appearing on face of it to be such, must be duly protested for nonacceptance and for nonpayment; and where foreign bill has been accepted as to part, it must be protested as to balance. Inland bill need not be protested for nonacceptance or for nonpayment.

Cheques.

Bill of exchange drawn on a banker and payable on demand. However: (a) cheques are not accepted and therefore holder cannot sue banker on whom cheque is drawn; (b) drawer is not discharged by holder's failure to present in due time unless, and to the extent that, he suffers damage through delay; (c) under Acts banker is protected in certain cases where wrong payment is made or endorsement is unauthorised or forged; (d) drawer is under duty of reasonable care towards banker in drawing cheques; (e) rules as to crossing only apply to cheques.

Days of Grace.

Three days of grace no longer added to time of payment where bill not payable on demand (matter now governed by Banking and Financial Dealings Act 1971). Where bill is not payable on demand, bill is due and payable on last day of time for payments as fixed by bill unless it is a nonbusiness day when it is then due on succeeding business day. Nonbusiness day is (a) Sat., Sun., Good Friday, Christmas Day; (b) Bank holiday under Act; (c) day proclaimed by Crown as a public fast or thanksgiving; and (d) any day declared by order under Act as a nonbusiness day.

Holder in Due Course.

A person who takes a bill complete and regular on its face before it was overdue, without notice of previous dishonour, in good faith and for value and without notice of defect in title of person who negotiated it, is a holder in due course and holds the bill free of defects of title of prior parties and may enforce payment against all parties liable on the bill. One who derives title through holder in due course and is not himself party to any fraud or illegality affecting bill has all rights of holder in due course as regards acceptor and all parties to bill prior to that holder, although he may have notice of prior defect. This does not apply to crossed cheques marked “not negotiable” to which holder cannot give better title than that of person from whom he took it. It also does not apply to crossed cheques marked “account payee” or “a/c payee”, either with or without word “only”, as such cheques are not transferable and are only valid as between parties thereto. Every party whose signature appears on bill is prima facie deemed to have become party thereto for value and every holder, except payee, is prima facie deemed to be holder in due course.

Presentment for acceptance is necessary where bill (1) is payable after sight, (2) expressly stipulates it shall be presented for acceptance or (3) is payable elsewhere than at residence or place of business of drawee. If on presentment for acceptance it is not accepted within customary time (stated to be 24 hours) the presentor must treat it as dishonoured by nonacceptance. These provisions do not apply to cheques or notes.

Presentment for payment must be made in case of bill not payable on demand on day it falls due and in case of bill payable on demand within reasonable time after issue or indorsement. Where bill is dishonoured by nonacceptance, presentment for payment is not necessary.

Notice of dishonour must be given, in case of dishonour by nonacceptance or nonpayment, to the drawer and each indorser. Any drawer or indorser to whom notice is not given is discharged unless notice is waived or otherwise dispensed with in accordance with 1882 Act. Dishonoured foreign bills must be noted and protested. There is no need to note and protest foreign note as distinguished from foreign bill.

Conflict of Laws.

Where a bill drawn in one country is negotiated, accepted or payable in another, the rights, duties and liabilities of the parties are determined as follows: (1) Subject to certain provisos, validity of bill as regards requisites of form is determined by law of place of issue and validity of supervening contract (e.g., acceptance, indorsement, etc.) is determined by law of place where such contract was made. (2) Interpretation of drawing, indorsement or acceptance is determined by law where contract was made, provided that where inland bill is indorsed in foreign country indorsement must, as regards payer, be interpreted according to law of U. K. (3) Duties of holder with respect to presentment for acceptance or payment and necessity for or sufficiency of protest or notice of dishonour, or otherwise, are determined by law of place where act is done or bill dishonoured. (4) Where bill is drawn in one country and is payable in another, due date thereof is determined according to law of place where it is payable.

3.02 BILLS OF SALE:

See also topic 3.12 Sales; category 19 Mortgages, topic 19.01 Chattel Mortgages.

3.03 COMMERCIAL REGISTER:

See categories 2 Business Organizations, topic Corporations; Intellectual Property, topic Trademarks and Tradenames, subhead Tradenames.

3.04 CONTRACTS:

Gratuitous promise even though made in writing is not enforceable unless it is made in deed under seal. Otherwise there must be agreement between parties intending to create legal relationship based upon offer and acceptance with consideration moving from promisee to promisor. Adequacy of consideration immaterial but there must be some benefit accruing to promisor, measurable in terms of money.

Privity.

Person not a party to contract cannot sue upon it even if it is for his benefit unless he is principal suing on contract made for him by agent or contract constitutes trust and person seeking to sue is beneficiary thereunder. There are further exceptions in statute. See Contracts (Rights of Third Parties) Act 1999.

No action may be brought in following cases, unless agreement or promise, or some note or memorandum thereof, be in writing and signed by party to be charged or someone by him lawfully authorised: (1) Whereby to charge a defendant on any special promise to answer for debt, default or miscarriage of another; (2) or on any contract for sale of lands or of any interest therein or concerning them or for any lease thereof for more than three years. (Statute of Frauds, 1677, §4; Law of Property [Miscellaneous Provisions] Act 1989).

Excuses for Nonperformance.

A contract which is not capable of performance when made is in general void. Doctrine of frustration operates to excuse further performance where (i) it appears from nature of contract and surrounding circumstances that parties have contracted on the basis that some fundamental thing or state of things will continue to exist or that some particular person will continue to be available or that some future event which forms the foundation of the contract will take place, and (ii) before breach performance becomes impossible or only possible in a very different way to that contemplated without default of either party or owing to a fundamental change of circumstances beyond control and original contemplation of parties. To excuse nonperformance impossibility must be in nature of a physical or legal one and not merely a relative impossibility, i.e., referable solely to the ability or circumstances of the promiser.

A statute may also render performance impossible, which is sufficient excuse.

Rescission.

Contract may be rescinded at instance of party induced to enter it by a misrepresentation of facts made by other party. Damages may be ordered by court in lieu of rescission and are also available in addition to rescission (or damages in lieu) where this representation is negligent or fraudulent. (Misrepresentation Act 1967).

Unfair Terms.

Liability for death or personal injury through negligence cannot be restricted by contract. Liability for other damage through negligence can only be restricted by contract if reasonable. Consumer protected against unreasonable exclusion of liability clauses in written standard terms of business; consumer also protected against unreasonable indemnity clauses. Unfair terms provisions do not apply to international supply contracts unless one party consumer resident in England and essential steps necessary for contract were taken in England. Certain other commercial contracts, such as charter parties, are excluded from these rules. (Unfair Contract Terms Act 1977).

EC Directive on unfair terms in consumer contracts (93/13/EEC) was implemented in United Kingdom by Unfair Terms in Consumer Contracts Regulations 1999: SI 1999 No. 2083. Effect is, first, unless term in consumer contract is “plain and intelligible”, it will be given interpretation which is most favourable to consumer. (Reg. 7[2]). Second, if term, not being core provision (see Reg. 6[2]), has effect of creating “significant imbalance” “contrary to the requirement of good faith” (Reg. 5[1]), although rest of contract may remain in force, that term is not binding on consumer.

Applicable Law.

At Common Law, interpretation and effect and rights and obligations of parties are governed (with certain exceptions) by law which parties agree or intend shall govern it or which they are presumed to have intended or, if parties did not express choice, and one could not be inferred by courts, by system of law with which transaction was most closely connected. This was known as the proper law of the contract. Law expressly stipulated will be proper law of contract provided selection is bona fide and there is no objection on grounds of public policy even where law has no real connection with contract. Where parties make no stipulation and none can be inferred courts decide by considering contract as a whole. Contracts entered into after 1 Apr. 1991 governed by Rome Convention implemented in U.K. law by Contracts (Applicable Laws) Act 1990. Questions of interpretation, essential and material validity, performance, consequences of breach and various ways of extinguishing obligation are governed by applicable law. Applicable law is law expressly or impliedly chosen by parties. In absence of choice, contract is presumed to be governed by law of place of characteristic performer. Applicable law subject to mandatory rules and public policy. From 17 Dec. 2009, Rome I Regulation (Reg. No. 593/2008) applies to contracts entered into after that date.

Government Contracts.

As result of Crown Proceedings Act 1947, proceedings by or against Crown in contract are, for most part, governed by same rules of procedure as proceedings between subjects.

See also topic 3.12 Sales; category 20 Property, topic 20.04 Deeds.

3.05 FINANCIAL SERVICES:

See topic 3.13 Securities and Investments, subhead The Financial Services and Markets Act 2000.

3.06 FRAUDS, STATUTE OF:

See topic 3.04 Contracts.

3.07 INFORMATION TECHNOLOGY, INTERNET AND NEW MEDIA:

Computer Programs.

Copyright.

Computer programs may be copyright protected as literary work, under Copyright, Designs and Patents Act 1988 as amended by EC Software Directive. Preparatory design material may also be protected. Ideas and principles underlying computer program are not protected. Computer program must be original in order for copyright to subsist. Author is person who writes computer program and is first owner of copyright. Where author makes computer program in course of his employment copyright vests automatically in employer. Copyright lasts for 70 years after author's death.

Owners have exclusive right to grant licenses to copy or adapt computer programs and to distribute or rent originals or copies of computer programs.

Right of lawful users to study, observe and test functioning of program cannot be excluded. Lawful users can reverse engineer computer programs where it is necessary to obtain information necessary to create interoperable independent computer program and this cannot be excluded. Lawful user can copy or adapt computer program for purposes of error correction. Right of lawful user to make back up copies of computer program cannot be excluded.

Screen displays of computer programs may be protected as separate works, such as artistic works or films, or by virtue of preparatory design material.

Patents.

The Patents Act 1977 and European Patent Convention 2000 provides that computer programs as such are not patentable inventions. In U.K., technical result of computer program may be patentable, but not if it represents method for performing mental act, mathematical method or method of doing business. Under European Patent Convention 2000, technical result of computer program may be patentable and technical result is established more easily than under Patents Act 1977. Tests of novelty and inventive step must also be satisfied. Protection lasts for 20 years from date of application.

Circuit Layouts.

Unregistered design right in 1988 Act protects semiconductor topography, viz designs of patterns, or arrangement of patterns, fixed or intended to be fixed, in or upon layer or layers of semiconductor product. Semiconductor topography may be reverse engineered in order to create another original topography. Circuit diagrams may also be protected as copyright artistic works.

Databases.

Copyright.

1988 Act protects original databases and compilations as literary works, following implementation of EC Database Directive. Compilations must be result of labour, skill and effort and databases must satisfy higher test of author's own intellectual creation. Databases must fall within specific definition, but may comprise wider range of materials than compilations.

Owners of compilations or databases have exclusive right to copy and adapt work and to distribute or rent original or copies of work. Protection for compilations and databases is only of selection and arrangement of contents and not contents themselves. Protection lasts for 70 years after author's death.

Right of lawful user of database to do anything which is necessary for purpose of access to and use of database contents cannot be excluded.

Sui Generis Right.

UK has established sui generis database right in accordance with EC Database Directive.

Databases must fall within specific definition and there must be substantial investment in obtaining, verifying or presenting database contents. Investment can include financial and intellectual resources, but investment in creation of contents is disregarded. Maker of database is person who takes initiative in obtaining, verifying or presenting database contents and risk of investment and is owner of database right. Employers invariably will own database right in databases created by employees. Protection lasts for 15 years from time database was completed or made available to public. Substantial new investment in existing database may trigger further 15 year term of protection.

Owners have right to prevent others from extracting or reutilizing all or substantial part of database contents. Extraction refers to permanent or temporary transfer of contents to another medium by any means or in any form. It is not limited to first removal of data. Extraction includes transfer of material from protected database following individual assessments of material resulting from consultation of database. Reutilization covers most forms of communication to public and is not limited to first publication of data. Substantial part can be evaluated quantitatively or qualitatively. For qualitative evaluation, type of investment reflected in contents that are extracted or reutilized will be highly relevant. Repeated and systematic extraction or reutilization of insubstantial parts of database contents may also infringe database right.

Lawful users of database may extract substantial part of database contents where it is for noncommercial teaching or research purposes and source is indicated. Other exceptions exist for purposes of public administration.

Remedies available are same as those for copyright databases.

Internet Service Providers.

Copyright.

ISP may infringe copyright by transmitting copyright material across network or by operating proxy server. ISP also may be liable for authorising acts of infringement carried out by their subscribers.

Following implementation of EC E-Commerce Directive, liability of ISPs is limited when acting as mere conduit for network transmission or when proxy caching or when hosting content of third parties, subject to certain conditions being fulfilled.

Defamation.

ISP will have defence in defamation proceedings where it was not author, editor or publisher of alleged defamatory statement; took reasonable care in relation to its publication; and did not know, or had no reason to believe, that what it did caused or contributed to publication: see §1, Defamation Act 1996. ISP that does more than merely operate transmission facilities is unlikely to be publisher. However, where ISP is notified that it hosts alleged defamatory statement and fails to remove statement expeditiously, it will no longer have requisite lack of knowledge to establish defence.

EC E-Commerce Directive declares ISPs exempt from civil liability where they host content originating from third parties. This is provided ISPs do not have actual or constructive knowledge of illegal activity or information or, upon obtaining such knowledge, act expeditiously to remove or to disable access to information. ISPs are not, however, placed under general obligation to monitor information which they transmit or host.

U.K. Government is considering whether to introduce legislation obliging ISPs to take action against subscribers who are repeat copyright infringers.

Obscenity.

ISPs have not been prosecuted for distributing or hosting pornography or other obscene material generated by third parties. Internet Watch Foundation (IWF) does, however, provide form of self-regulation for removal of offensive material found on Internet.

EC E-Commerce Directive declares ISPs exempt from criminal liability in respect of material hosted by them and originating from third parties. This is provided that they have no actual knowledge of illegal activity or information or, upon obtaining such knowledge, act expeditiously to remove or to disable access to information. This does not place on ISPs general obligation to monitor information which they transmit or store.

Domain Names.

Registration and use of Internet domain names may raise issues of passing off and trademark infringement. “Cyber-squatting” is likely to be restrained as actual or threatened passing off, or as instrument of fraud, or as trademark infringement. Trademark owners may also take action against abusive domain name registrations using either ICANN dispute resolution procedure (for Top Level Domains) or Nominet dispute resolution procedure (for.uk Top Level Domain), provided they can show that domain name has been registered and used in bad faith.

For domain name registrations that are not abusive in character, usual trademark law principles apply. Thus, domain name will infringe where it is identical to trademark and used in respect of identical goods or services; or where it is identical or similar to trademark and is used in respect of similar goods or services, such that it gives rise to likelihood of confusion. Where goods or services are dissimilar, it is unclear in what circumstances, other than where there is confusion, domain name holder will take advantage of distinctive character or repute of trademark.

Keywords.

Trademark proprietors have contested whether search-engine operators are entitled to sell keywords that correspond to their registered trademarks. Several references to European Court of Justice have been made on this issue.

3.08 INTEREST:

Interest is payable either: (1) When allowed by a particular statute as on a bill of exchange or solicitor's bill of costs; or (2) by express or implied agreement (as under Late Payment of Commercial Debts [Interest] Act 1998) between parties. In absence of statute or contract, no interest can be charged.

There is no law against usury and lender and borrower may make any agreement they wish as to rate of interest, except that consumer credit agreements are governed by Consumer Credit Act 1974 as amended by Consumer Credit Act 2006. Credit bargain can be reopened if it is extortionate under §§137 to 140, that is if it requires debtor (or his relative) to make grossly exorbitant payments or otherwise grossly contravenes ordinary principles of fair dealing. Agreements as to rate of interest between seller or supplier and consumer may also be subject to provisions of Unfair Terms in Consumer Contract Regulations 1999.

Court also has power to award interest in any debt or damages case. Period and rate of interest is at Court's discretion. Interest is also payable on judgments in High Court and in County Court.

3.09 LICENCES, BUSINESS AND PROFESSIONAL:

These are required for many activities including following: to conduct a betting office or gaming club or hold lottery, fly aircraft, be in possession of firearms, sell intoxicating liquors, hold market or fair or conduct street trading, drive motor vehicle on public road, conduct business as money lender or pawnbroker, fish, kill game or marry or use television receiver. Term is also used to describe certain contractual arrangements e.g., relating to copyright patents and occupation of land.

Licensing Act 2003 governs orders for extended hours.

See also category 14 Foreign Trade and Commerce, topic 14.05 Foreign Trade Regulations.

3.10 MONOPOLIES, RESTRAINT OF TRADE AND COMPETITION:

Subject to the following, it is governed by common law rules. Significant reforms to align U.K. law with E.C. competition law have been introduced by Competition Act 1998 and by various implementing Regulations in 2004. Most provisions of Fair Trading Act 1973 have now been repealed by Enterprise Act 2002.

Enterprise Act 2002 empowers Office of Fair Trading to control undesirable practices and individual traders who flout legal obligations. In addition, and under Enterprise Act 2002, Office of Fair Trading has power to make market investigation references to Competition Commission, which replace monopoly enquiries under Fair Trading Act 1973. Main regime for U.K. mergers is also provided now in Enterprise Act 2002; and Office of Fair Trading will refer mergers that substantially lessen competition to Competition Commission. Finally, Enterprise Act has introduced other important changes such as criminalisation of cartels and provision of new rules governing disclosure of certain types of information by public authorities. Prior to 2002 Enterprise Act, Competition Commission Appeal Tribunal (division of Competition Commission) also used to hear appeals from decisions of Director General of Fair Trading and sectoral regulators under Competition Act 1998. 2002 Enterprise Act has created Competition Appeal Tribunal, new independent body, which has taken on functions of Competition Commission Appeal Tribunal as well as new functions such as making damages and other monetary awards consequent upon competition law infringements.

Competition Act 1998 repeals previous legislation on control of anticompetitive practices. C. I mirrors Art. 81 EC and prohibits agreements between undertakings, decisions by associations of undertakings and concerted practices, which may affect trade within U.K. and which have anticompetitive object or effect. Exemption criteria and procedure are similar to those found in Art. 81(3) EC. To qualify for exemption, agreement needs to contribute to improving production or distribution or promoting technical or economic progress while allowing consumers fair share of resulting benefit. Moreover, it must not impose restrictions not indispensable to attainment of those objectives and it must not afford undertakings concerning possibility of eliminating competition in respect of substantial part of products in question. Office of Fair Trading can make recommendation that Secretary of State make block exemption order in relation to certain categories of agreements. Original regime of notification for individual exemption repealed by 2004 Statutory Instrument (Competition Act 1998 and Other Enactments [Amendment] Regulations 2004). Now, OFT cannot accept notifications for guidance or decision but can still offer informal advice or produce opinions on novel questions of competition law. Agreement satisfying exemption criteria will not be prohibited and no prior OFT decision to that effect is required. Block exemptions from c. I may also be adopted by responsible minister and U.K. competition law also uses EC Block Exemption Regulations as parallel exemptions from c. I prohibition. Repeal of regime exempting vertical agreements from c. I prohibition means that vertical agreements now gain exemption by parallel use of 1999 EC vertical agreements Block Exemption Regulation. (Reg. 2790/1999/EC). C. II of Act based on Art. 82 EC. Any abuse of dominant position by one or more undertakings, which may affect trade within U.K., is prohibited. Office of Fair Trading empowered under Act to investigate infringements of cc. I and II. If decision made that agreement is anticompetitive, OFT may order parties to modify or terminate agreement. If decision made that undertaking(s) abused dominant position, OFT may order undertaking(s) to modify or cease abusive conduct. Office may also impose penalties on undertakings concerned for infringements of cc. I and II prohibitions. U.K. is member of EC, and EC Competition law applies when trade between member states is restricted to appreciable extent.

The Restrictive Trade Practices Acts 1976 and 1977 repealed by Competition Act 1998.

See topic 3.12 Sales, subhead Resale Price Maintenance, and European Union Digest, category 3 Business Regulation and Commerce, topic 3.10 Monopolies, Restraint of Trade and Competition.

3.11 NEGOTIABLE INSTRUMENTS:

See topic 3.01 Bills and Notes.

3.12 SALES:

Sales are regulated by Sale of Goods Act 1979 as amended by Sale of Goods (Amendment) Act 1994, Sale and Supply of Goods Act 1994 and by reference to Misrepresentation Act 1967 and Unfair Contract Terms Act 1977 and other related statutes.

It is defined that a seller is an unpaid seller when: (a) The whole of the price has not been paid; or (b) a negotiable instrument has been received as conditional payment and has not been duly met.

Irrespective of the rights of an unpaid seller by action he has also the right, if the title in the goods has not passed, to withhold delivery. If the title in the goods has passed to the buyer the seller has: (a) A lien on the goods for the price while he is in possession of them; (b) in case of the insolvency of the buyer a right of stopping the goods in transit after he has parted with possession; (c) right of resale as limited by Sale of Goods Act.

Applicable Law.

See topic 3.04 Contracts, subhead Applicable Law. Note that Vienna Convention 1980 is not in force in U.K.

Consumer Protection Act 1987 enables regulations to be made imposing safety requirements as to composition, contents, design, packing, etc., of all goods and as to instructions or warnings to be marked on them or issued with them and give powers for enforcement of regulations.

Resale Price Maintenance.

Competition Act 1998, as amended makes such provisions void, except as regards few classes of goods which have been exempted from Act. See also European Union Digest, category Foreign Trade and Commerce, topic Internal Market, subhead Free Movement of Goods.

Bills of Sale.

An absolute bill of sale must be registered with the Registrar of the County Court of the district in which the grantor lives within seven days after the making or giving hereof. (Bill of Sale Act, 1878). For security bills of sale see category 19 Mortgages, topic 19.01 Chattel Mortgages.

Stoppage in Transitu.

The law on this subject is chiefly governed by the Sale of Goods Act. By that 1979 Act goods are deemed to be in course of transit from time when they are delivered to carrier by land or water or other bailee for purpose of transmission to buyer until buyer or his agent in that behalf takes delivery from such carrier or other bailee.

The unpaid seller may exercise his right of stoppage in transitu, either (1) by taking actual possession of the goods or (2) by giving notice of his claim to the carrier or other bailee in whose possession the goods are. Such notice may be given either to the person in actual possession of the goods or to a principal of an agent so in possession. The notice to be effectual must be given in sufficient time to enable the principal to communicate it to his servant or agent in time to prevent delivery. Where notice is given to a ship-owner it is his duty to transmit it with reasonable diligence to the master of the ship.

Where a document of title to the goods has been lawfully transferred to any person as buyer or owner of the goods, and that person transfers the document to a person who takes it in good faith, without notice and for valuable consideration, then, that transfer was by way of sale, the unpaid seller's right of lien or stoppage in transitu is defeated, and if the transfer was by way of pledge or other disposition for value, the unpaid seller's right of lien or stoppage in transitu can only be exercised subject to the rights of the transferee.

Credit sales are governed by Consumer Credit Acts 1974 and 2006. Act requires such agreement to be in writing and to contain certain information. Copy agreement to be sent to consumer within seven days. Opportunity, in some circumstances, for consumer to withdraw from agreement within five days of receiving copy agreement.

Act provides for transfer of title by hirer in certain cases in which a purchaser buys without notice of hire purchase agreement.

At present there are restrictions on the disposal and possession of certain goods under Hire-Purchase or Credit Sale Agreements and Hiring Agreements, particularly vehicles.

See also subhead Warranties, infra.

Consumer Protection from Unfair Trading Regulations 2008 (No 1277) provides criminal sanctions for any commercial practice which is misleading, contravenes requirements of professional diligence, is likely to materially distort economic behaviour of average consumer, or is aggressive.

Misrepresentation Act 1967 provides for rescission of any contract entered into as a result of a misrepresentation even when misrepresentation has become a term of contract and even when contract has been executed. When misrepresentation is innocent, court may award damages in lieu of rescission at its discretion; when it is negligent, court may award damages for negligence as well as rescission or again damages only, in lieu of rescission, at its discretion; when it is fraudulent remedies similar in effect are available at common law.

Warranties.

The Sale and Supply of Goods Act 1994 implies following terms in contracts for sale of goods: (1) Seller has right to sell goods and that goods are free from any charge or encumbrance not disclosed; (2) when sale is by description as defined in Act that goods correspond to that description; (3) where goods sold in ordinary course of business that goods supplied are of satisfactory quality except in relation to defects brought to buyer's attention before contract or where buyer examines goods all defects which that examination ought to reveal; (4) where goods sold in ordinary course of business that goods are fit for purpose for which they are required provided that buyer impliedly or expressly makes known to seller purpose for which goods are required except where circumstances show that buyer did not rely, or it would be unreasonable for him to rely, on sellers skill or judgment; (5) where sale is by sample that bulk corresponds with sample in description and quality and that buyer should have reasonable chance of comparing the two.

Above conditions cannot be excluded by parties to contract in case of “consumer sales” (as defined) or in any other case where such an exclusion would be unfair or unreasonable in accordance with guidelines laid down by Unfair Contract Terms Act 1977 except in case of international supply contracts, as defined by §26, where exclusions are permitted. Seller can never exclude warranty of good title. Neither can seller exclude terms of satisfactory quality, fitness for purpose and conformity to description where sale is consumer sale. Consumer sale is sale in ordinary course of business of goods of type ordinarily bought for private use to person who does not buy them in ordinary course of business. Implied warranties may be excluded in all other sales where it is fair and reasonable to do so within guidelines laid down by Act. Similar provisions apply to hire purchase contracts.

The Supply of Goods and Services Act 1982.

§1 defines term “contract for transfer of goods”. Contracts for sale of goods, hire-purchase agreements, transfers by deed and agreements for mortgage are excluded. Contracts not precluded from being contract for transfer of goods if service also provided or because consideration involves something other than money. §§2-5 make provisions for terms implied in such contracts relating to title etc., transfer by description, quality or fitness and transfer by sample similar to those made in relation to contracts for sale of goods by Sale of Goods Act 1979. (See subhead Warranties, supra.)

§§6-10 relate to contracts for hire of goods. §6 defines term “contract for hire of goods”. Contracts not precluded from being contract for hire of goods if service is also provided or consideration involves something other than money. §§7-10 make provision for terms to be implied in such contracts relating to title etc., hire by description, quality or fitness and hire by sample similar to those in relation to contract for sale of goods by Sale of Goods Act 1979. (See subhead Warranties, supra.)

Unfair Contract Terms Act 1977.

In contracts for supply of goods liability for death or injury resulting from negligence cannot be excluded. Liability for loss or damage cannot be restricted or excluded in guarantees of goods and can only otherwise be excluded if reasonable in circumstances of contract. Unfair Terms in Consumer Contracts Regulations 1999 provides that, with certain exceptions, any term which has not been individually negotiated in contracts concluded between consumer and seller or supplier must not be unfair.

Consumer Protection Act 1987 provides for strict liability of manufacturers and suppliers of defective products which cause damage to individuals subject to certain defences. Act also governs giving of price indications.

International Sale of Goods.

Uniform Laws on International Sales Act 1967, gives effect in U.K. to Uniform Law on International Sale of Goods and Uniform Law on Formation of Contracts for such sales. It will apply only where parties have agreed that this will be case. United Nations Convention on Contracts for International Sale of Goods (Vienna Convention). Note that Vienna Convention 1980 is not in force as not been ratified by U.K.

3.13 SECURITIES AND INVESTMENTS:

The Financial Services and Markets Act 2000.

This Act replaces Financial Services Act 1986 and is intended to provide up-to-date system of regulation, maintaining balance between consumer protection and promoting innovation. Act establishes Financial Services Authority (FSA) as single regulator, and transfers to it power to authorise and control providers of financial services.

FSA's statutory objectives are (i) maintaining market confidence in financial system; (ii) promoting public awareness; (iii) protection of consumers; and (iv) reduction of financial crime. To this end, it is given broad rule-making, investigatory, prosecutorial, and disciplinary powers. It can also issue codes of practice in relation to conduct of approved persons.

Regulated activities are defined in Schedule 2 of Act to include dealing in investments, giving investment advice, and insurance activities (including at Lloyd's of London).

Part VIII of Act imposes penalties for “market abuse”, concept defined very generally as failure to observe standards which regular user of market would reasonably expect and which behaviour (i) is based on information which is not generally available in market; or (ii) is likely to give false or misleading information; or (iii) would likely be regarded by regular user as behaviour that would, or would be likely to, distort market. Guidance on these issues is provided by Market Code of Conduct revised in 2005 to take account of Market Abuse Directive.

Appeal against decision of FSA lies to Financial Services and Markets Tribunal. Right of appeal against decision of Tribunal lies only on points of law.

3.14 STATUTE OF FRAUDS:

See topic 3.04 Contracts.

4 CITIZENSHIP

4.01 ALIENS:

See category 16 Immigration, topic 16.01 Aliens.

4.02 ASYLUM:

See category 16 Immigration, topic 16.02 Asylum.

4.03 BRITISH CITIZENSHIP:

On 1 Jan. 1983 British citizenship automatically acquired, except certain formerly stateless persons, by all persons who till then citizens of U.K. and colonies who have right of abode in U.K. Certain persons registered under transitional provisions of British Nationality Act 1948 become British citizens if ancestral connection with U.K. British Dependent Territories citizenship was acquired by citizens of U.K.'s remaining colonies and British Overseas Citizenship by former citizens of U.K. and Colonies but neither BDTC nor British citizen. Neither BDTCs nor BOCs had right of abode but full British citizenship since granted to Gibraltarians, Falkland Islanders and 50,000 selected Hong Kong persons (and their families). Government undertook (White Paper, 17th Mar. 99) to extend full British citizenship to BDT citizens if local government so requested.

After 1 Jan. 1983 following become British citizens: (a) Children born in U.K. at least one of whose parents is British citizen or is settled in U.K.; (b) foundlings; (c) persons born in U.K. one of whose parents subsequently becomes: (i) settled here or (ii) British citizen if that person has lived in U.K. for ten years from birth; (d) children adopted by order of court of U.K.; (e) children born overseas to British citizen if one of his parents: (i) British citizen otherwise than by descent or (ii) British citizen in crown or EU service etc.; and (f) persons registered by Secretary of State as British citizens. Secretary of State may register as British citizens children born abroad if one of parents British citizen by descent and certain requirements of residence in U.K. satisfied. Borders, Citizenship and Immigration Act 2009 (expected to come into force in 2010) will ease time limits for registration in such cases (registration before child is 18 years of age rather than within 12 months of birth). British dependent territory citizens, British overseas citizens, British subjects or British protected persons to be registered as British citizens if living in U.K. lawfully for five years and without restriction for 12 months preceding application or special circumstances. 2009 Act (expected to come into force in 2010) will facilitate registration of children born abroad to members of armed forces. But under 2009 Act, registration may be refused if child not of good character.

Persons may be naturalised as British citizens if resident in U.K. for five years (and not absent from U.K. for more than specified periods), of good character, having sufficient knowledge of English, Welsh or Scottish Gaelic, sufficient knowledge of U.K. and intending to remain in U.K. or enter crown service. Changes pending under 2009 Act introduce concept of "earned naturalisation" which speed up naturalisation of active citizens who contribute to community. This will be "points based" system with approved activities or characteristics earning points towards naturalisation. Process culminates in ceremony where intending citizen swears allegiance to Her Majesty and pledges loyalty to U.K. and to uphold its laws. Where fact leading to naturalisation is subsequently found to be incorrect, this does not automatically nullify naturalisation. Those married to British citizens required only to reside in U.K. for three years preceding application (with certain restrictions on periods spent out of U.K.). But spouse also required to have “sufficient knowledge” of English, Welsh or Scottish Gaelic and of U.K.

Special transitional provisions enabling those already in process of acquiring rights to citizenship under previous enactments to acquire British citizenship.

Renunciation and Resumption.

Persons may renounce British citizenship if have another nationality or citizenship or expect to acquire such. Persons who have renounced British citizenship entitled once only to resume British citizenship. Otherwise resumption of British citizenship at discretion of Secretary of State.

British Subject.

Only British subjects without citizenship on 1 Jan. 1983 remain British subjects.

Commonwealth Citizenship.

Persons who not British citizens, British dependent territories citizens, British overseas citizens or British subjects but who citizens of countries belonging to Commonwealth, e.g., South Africa, Canada, Australia, New Zealand, India, Sri Lanka, Ghana, Malaysia, Jamaica etc.

Property.

For all practical purposes property of every description may be taken, acquired, held and disposed of by alien in same manner in all respects as by British citizen except he may not own British ship or even share in one but may own shares in English company which owns such ship. European law prohibits such discrimination against EU nationals.

Corporation Owned or Controlled by Alien.

See category 2 Business Organizations, topic 2.03 Corporations, subhead Overseas Companies.

See also topic 4.05 Immigration; and European Union Digest, category 14 Foreign Trade and Commerce, topic Internal Market, subheads Free Movement of Workers and Freedom to Provide Services.

4.04 DOMICILE:

Nobody can have more than one domicile. It connotes “permanent home,” country where a person is when he is not travelling and is generally domicile of origin or domicile of choice. By virtue of Domicile and Matrimonial Proceedings Act 1973 it is possible for wife to acquire separate domicile to that of her husband. Infant (under 16) is deemed to have domicile of his father unless parents are living apart in which case infant has domicile of parent with whom he has his home. Illegal residents may acquire domicile in England. UK tax advantages previously extended to non-domiciliaries are now only available on payment of charge (£30,000pa).

4.05 IMMIGRATION:

See category 16 Immigration, topic 16.03 Immigration.

5 CIVIL ACTIONS AND PROCEDURE

—Scope —

Note: For succinct statement of civil procedure, see Neil Andrews in P B H Birks (ed), English Private Law (Oxford U Press, 2000) with 2002 supplement, at vol. 2, c. 19 containing full references to other sources; other, more detailed works, include Neil Andrews, English Civil Procedure (Oxford UP, 2003).

5.01 ACTIONS:

Generally any person may sue or be sued in English courts subject to rules of procedure framed by courts. Questions relating to evidence such as competence of witness and methods and sufficiency of proof are matters of procedure governed by rules of English courts. Thus, no action is maintainable in England on contract abroad and enforceable by foreign law if proof required by English law is wanting. With certain exceptions English courts cannot take judicial notice of foreign law, which is presumed to be the same. Onus is on one who asserts difference to prove it. May be proved by properly qualified witness or by reference to code.

Plaintiffs resident abroad or English company in financial difficulty may be ordered to pay court sum to ensure defendants legal costs will be met by plaintiffs if plaintiffs fail in action. Sum is refunded if plaintiffs succeed.

Limitation of.

See topic 5.07 Limitation of Actions.

5.02 CERTIORARI:

Order of certiorari is recognised means of procuring through medium of Queens Bench Division inspection of proceedings of courts of inferior jurisdiction in order that they may be reviewed and rectified.

Grounds of Issue.

When there is some defect or informality apparent on face of proceedings, where there is want of jurisdiction, where it is clear and manifest that adjudication has been obtained by fraud, or where there has been a denial of natural justice.

Procedure.

Leave must be obtained within prescribed time limits (normally three months although there is power to extend time limit inherent in jurisdiction of court) and application is made ex parte to judge, and must be accompanied by statement setting out name and description of applicant, relief sought, grounds, and by affidavits verifying facts relied on. If leave is granted application for certiorari is in criminal case to Divisional Court and in civil case, to judge in open court by way of originating motion. Affidavit must be filed subsequently. Grant of order is discretionary and Court has no power to amend proceedings but proceedings may be quashed and retrial ordered or direction to convict or acquit may be made. This order may be applied for by prosecution by way of appeal from acquittal in lower court.

5.03 CIVIL PROCEDURE RULES (1998):

Civil Procedure Rules govern civil system of first instance jurisdiction and change rules of procedure. Main features are summarised here.

Allocation of Actions.

Small claims arbitration concerns claims up to £5,000 (£1,000 if personal injury claim). “Fast-track” procedure for county court proceedings applies when sum in issue is less than £15,000 but in excess of small claims limits. There is “multitrack” for more valuable or complex civil actions.

No claim can be commenced in High Court unless sum in issue is for more than £15,000 or, in case of damages for personal injuries, for sum more than £50,000. Beyond this allocation of business to High Court and county court is assessed according to importance or difficulty of action. Unless parties agree, defamation actions must take place in High Court.

Other Procedural Changes.

Both on fast-track and multitrack court has new and extensive powers of case-management.

Most claims are begun by “claim form” (replacing “writ” or “summons”).

Court will serve claim form unless claimant elects otherwise.

“Pleadings” are replaced by “statements of case” by both parties, which can embrace claim form, particulars of claim (if separate from claim form), defence, possible reply to defence, as well as “further information” (formerly “further and better particulars”) and counterclaim or third party proceeding (known as “a Part 20 claim”). All these materials must be verified by statement of truth (affidavit). Dishonest statements by signatory can lead to contempt proceedings.

Disclosure of Documents.

Party is obliged to provide both list of documents (“disclosure”) and to allow inspection of these by other side. Such order will be normal on both fast-track and multitrack. “Standard disclosure” requires party to reveal: documents on which she will rely; or which adversely affect her own case; or adversely affect opponent's case; or support opponent's case; or any other documents which must be disclosed under special rule.

Court has power (sparingly exercised) to order pre-action disclosure in all types of action. Court also has power to order disclosure of documents (or other information) by nonparty in any type of case.

For important discussion of attorney-client privilege in England, see House of Lords' decision in Three Rivers case (2004) UKHL 48.

Witness Evidence.

Both witness statements and expert reports must be exchanged before trial. Court can appoint joint expert instead of party-appointed experts.

Appeals to Court of Appeal.

These require permission (formerly known as “leave”) in nearly all cases.

5.04 DEPOSITIONS AND DISCOVERY:

Civil Evidence Act 1995 (applicable to trials after Jan. 31, 1997) abolishes hearsay rule in civil proceedings. Such evidence, whether in documentary or oral form is now admissible. Normally, party adducing such evidence must first notify other party, but breach of this requirement does not render material inadmissible. (§2, 1995 Act). Police and Criminal Evidence Act 1984 governs admissability of hearsay evidence in criminal cases.

Obtaining Evidence Out of the Jurisdiction.

Any party desiring to cross-examine a deponent to an affidavit may serve upon the party filing it a notice in writing requiring the deponent to attend for cross-examination at the trial. Unless deponent attends accordingly, affidavit may not be used as evidence except on special leave of the court.

Evidence out of the jurisdiction may be obtained: (a) By appointment of a special examiner, or in the case of a country with which a convention has been made, by examination of witnesses before the British consular authority in that country; (b) by letters of request, available for all countries, but not employed in U.S., which prefers method (a); or (c) court may order that evidence may be given by witness in foreign jurisdiction by means of live television link-up with court.

The examination takes place in the presence of the parties, their counsel and their solicitors or agents, and the witnesses are subject to cross-examination and re-examination.

Depositions taken before an officer of the court, or before any other person appointed to take the examination, are taken down in writing by or in the presence of the examiner, not ordinarily by question and answer, but so as to represent as nearly as may be the statement of the witness, and when completed must be read over to the witness and signed by him in the presence of the parties, or such of them as may think fit to attend. If the witness refuses to sign the depositions, the examiner may do so.

When the examination of any witnesses is concluded, the original depositions, authenticated by the signature of the examiner, must be transmitted by him to the central office of the Supreme Court and there filed.

The person taking the examination under these rules may, and if need be must, make a special report to the court touching such examination and the conduct or absence of any witness or other person thereon, and the court or a judge may direct such proceedings and make such order as, on the report, they or he may think just.

Perpetuating Testimony.

Any person who would under the circumstances alleged by him to exist become entitled, on the happening of any future event, to any honour, title, dignity or office, or to any estate or interest in any property, real or personal, the right or claim to which cannot by him be brought to trial before the happening of such event, may commence an action to perpetuate any testimony which may be material for establishing such right or claim.

Witnesses may not be examined to perpetuate testimony unless an action has been commenced for the purpose.

Obtaining Evidence for Foreign Tribunals.

Under Evidence (Proceedings in Other Jurisdictions) Act 1975, application may be made to High Court for Order for evidence to be obtained in England. High Court must be satisfied that application is made in pursuance of request issued by court or tribunal (“requesting court”) exercising jurisdiction and that evidence to which application relates is to be obtained for purposes of civil proceedings which have been instituted or which are to be instituted before requesting court.

High Court may make such order for obtaining evidence as may appear appropriate for giving effect to request. Order may require specified person to take appropriate steps. In particular, Court may make provision for: (a) Examination of witnesses orally or in writing; (b) for production of documents; (c) for inspection, photographing, preservation, custody or detention of any property; (d) taking of samples of any property; (e) medical examination of any person including taking and testing of samples of blood. Order shall not require any particular steps to be taken unless steps can be required for obtaining evidence for purposes of civil proceedings in High Court. Order requiring person to give evidence not on oath may be made if this is asked for by requesting court. No order may be made requiring person to state what documents relevant to proceedings have been or are in his possession, custody or power or requiring any person to produce any documents other than particular documents specified in order as being documents appearing to High Court to be or likely to be in his possession, custody or power.

5.05 EVIDENCE:

See topic 5.04 Depositions and Discovery.

5.06 JUDGMENTS:

Any actionable wrong can be rectified by a judgment, decree or order of the court.

In cases of liquidated demands (e.g., bills, cheques, accounts for goods sold, etc.), summary judgment may be obtained where it is clear there is no prima facie defence. Judgment in default can be entered where defendant does not acknowledge claim form, does not file defence, or fails to heed court order.

Foreign judgments for fixed amounts can be enforced by action in the English courts and cannot normally be reopened provided the defendant was present in the jurisdiction of the foreign court when the proceedings were begun or submitted to it, e.g., by defending the foreign proceedings.

Judgment for multiple damages, judgment based on provision or rule of law specified or described in order and judgment or claim for contribution in respect of damages awarded by either of aforementioned judgments may not be registered and no U.K. Court may entertain proceedings at common law for recovery of any sum payable under such judgment.

Under the Administration of Justice Act, 1920, judgments obtained in many parts of the British Commonwealth can be registered in the High Court if the Court thinks it just and convenient and provided application is made within 12 months. Under the Foreign Judgments (Reciprocal Enforcement) Act, 1933 as extended, a judgment for a fixed amount obtained in Belgium, Burma, India and certain other countries can be registered in High Court as of right within six years. On registration foreign judgment may be enforced in same manner as judgments of High Court of England. Certain formalities regarding application for registration and notice to debtor must be observed and power is given to Court to cancel registration on certain grounds.

Maintenance Orders (Reciprocal Enforcement) Act 1972 makes provision for reciprocal enforcement of maintenance acts between U. K. and other countries to be designated by Order in Council.

There are reciprocal arrangements for enforcing judgments of EU member states. See European Union Digest, category Civil Actions and Procedure, topic Judgments.

5.07 LIMITATION OF ACTIONS:

Governed by Limitation Act 1980 which consolidates previous Acts. Actions must be commenced within following periods. This list contains more common types of proceedings only; there are many others for which special time limits are laid down.

Twelve years: On speciality, e.g. deed, to recover land or money charged on land, claim on deceased estate (but not interest on entitlement).

Six years: All actions in tort (including infringement of copyright), other than those for damages which consist of or include damages for personal injuries or death, or libel or slander, on simple contracts to recover arrears of rent or damages in respect thereof, to recover mortgage interest or damages in respect thereof, to recover loans, to recover award under seal, sums recoverable by statute, for contributions between joint tortfeasers, for interest on legacy, to enforce judgment and interest thereon.

Latent Damage Act 1986 alters Limitation Act 1980 in cases of actions for negligence in respect of latent damage not involving personal injury. Limitation period is now either six years from date cause of action accrued, or three years from date claimant first had enough knowledge to bring action.

Three years: All actions for tort of negligence, nuisance or breach of duty where such damages include damages for personal injury or death. Time runs when right of action accrued or claimant should have known of right of action. Provisions as to when plaintiff presumed to have known. Court has discretion to extend time if fair to do so in circumstances. Guidelines in Act.

One Year: Actions for libel, slander or malicious falsehood.

Maritime Actions.

Time limits for maritime collisions are laid down by Maritime Conventions Act 1911.

The Crown.

Subject to certain exceptions, the Acts bind the Crown.

Persons under Disability (i.e., an infant or of unsound mind).—Period of limitation does not begin to run until disability ends or person dies.

Fraud or Mistake.

Where action based on fraud of defendant, his agent or any person through whom he claims or his agent; or is concealed by any such person as aforesaid; or is for relief from consequences of mistake, time runs from when claimant discovered fraud or mistake or could with reasonable diligence have discovered it.

Pre-Trial Attachment.

Freezing injunction ("Mareva" injunction) can be granted ex parte ("without notice"), normally before trial, and even before commencement of main proceedings, to prevent dissipation or removal from jurisdiction by debtor or wrongdoer of his assets. Such injunction can be issued to support primary litigation occurring in (a) another jurisdiction party to Brussels or Lugano conventions relating to jurisdiction and judgments; or (b) in jurisdiction not subject to those conventions. (Civil Jurisdiction and Judgments Act 1982 [Interim Relief] Order 1997, operative Apr. 1, 1997). Exceptionally, injunctions can also relate to assets outside English jurisdiction and might even affect defendant's assets around world.

5.08 PRESCRIPTION:

See topic 5.07 Limitation of Actions.

5.09 PROCESS:

Service of Process.

In County Court matters service is usually made by appropriate court official because case is conducted through court. In County Court where service is to be effected otherwise than by court official copy of summons must be filed at Court instead of request. In any High Court or other proceedings there are few restrictions on who may serve any claim form or notice, although this is usually done by or on behalf of firm of solicitors. Proceedings may be served personally or by post. Specific rules govern service on companies or partnerships. Divorce proceedings may be served by Court, or petitioner's solicitors although personal service may not be effected by petitioner himself, on behalf of petitioner's solicitors.

5.10 REPLEVIN:

Governed by common law rules. This is process of restoration or recovery of detained goods on security given for submission to trial and judgement. County court has jurisdiction up to any amount, but in certain cases action may be removed to High Court.

5.11 SEQUESTRATION AND ENFORCEMENT:

Sequestration is available against one who has disobeyed an order of the court. It empowers the sequestrators to enter on the lands of defendant and receive the rents and profits and to take possession of his real or personal property until he complies with order. With court's leave they may sell personal property and pay proceeds into court. This is only available in High Court.

The Tribunals, Courts and Enforcement Act (not yet implemented), will modify general law of civil enforcement as follows: First, it will introduce new regime for “taking control of goods” which will replace system of “seizure of goods”. Secondly, it will create new methods of obtaining information concerning debtor's assets and indebtedness.

6 COURTS AND LEGISLATURE

6.01 COURTS:

Magistrates Courts.

Minor criminal matters, preliminary investigation of indictable offences, as well as some civil or quasi-civil matters (e.g., affiliation proceedings) are dealt with by Magistrates Court presided over by unpaid justices of peace or by paid stipendiary magistrates. Minor criminal offences are tried summarily, but in case of indictable offences prisoner will be committed to Crown Court to be tried on indictment.

Crown Court.

Established by Courts Act 1971. Crown Court able to sit anywhere in England and Wales. All trials on indictment take place before Crown Court which also exercises appellate jurisdiction from Magistrates Courts. Judges of Crown Court are High Court judges and Circuit judges and Recorders. They sit with justices of peace in case of appeals and committals for sentence.

Magistrates Courts fix place at which person is to be tried on indictment, and defendant or prosecutor, if dissatisfied with place fixed by Magistrates Court may apply to Crown Court for direction varying place of trial.

Circuit Bench.

Circuit judges appointed either from barristers or solicitors of at least ten years' standing, or from recorders who have held office for at least five years. Recorders are appointed from solicitors or barristers of ten years' standing.

Circuit judges are able to sit in Crown Court and county courts and also, if so requested by Lord Chancellor, available to assist High Court judges in trial of civil actions. Recorders able to sit as part-time judges of Crown Court.

Juries.

Lord Chancellor responsible for summoning of jurors for all courts except coroners' courts. Majority verdicts may be given in civil and criminal matters. There is no right to examine jury for prejudice or to have all black or all white jury, and judge no longer has power to order all male or all female jury.

County Courts.

England and Wales is for these purposes divided into districts by Lord Chancellor who may alter number and boundaries of districts. In each district county court sits at one or more places in it to decide civil matters. Actions in respect of personal injuries must be commenced in

County Court unless claim is worth £50,000 or more. Action worth less than £15,000 must be brought in County Court. Special provisions apply to claims of less than £1,000 for personal injury damage and less than £5,000 for other debt or damage claims.

Ecclesiastical courts have jurisdiction in certain Church matters.

Supreme Court of Judicature, which sits continuously in London, is divided into two parts: (1) The High Court of Justice, divided (for convenience of administration only) into Queen's Bench Division (including Admiralty and Commercial Court), Chancery Division (including Probate, Companies, Patents and Bankruptcy Courts), and Family Division; (2) Court of Appeal.

High Court of Justice exercises original jurisdiction and appellate jurisdiction from inferior courts in civil matters. Queen's Bench Division has a limited criminal jurisdiction which is rarely exercised.

Court of Appeal is composed of Lord Chancellor and any ex-Lord Chancellor, Lord Chief Justice, Master of the Rolls, President of Family Division, Vice-Chancellor and not more than 32 Lord Justices. It hears appeals from High Court or from order of county court judge on point of law, and appeals from court martial. Permission to appeal in civil case is required in nearly every type of case. Second appeals are unlikely to be permitted unless case is of considerable general importance or unusually difficult.

Central Criminal Court (the Old Bailey) sits every month in London to try any indictable offence committed in London and its environs or on the high seas.

Court of Appeal (Criminal Division) sits in London to hear appeals in criminal matters from Crown Courts, including Central Criminal Court.

Supreme Court (Sept. 2009) becomes final court of appeal. Qualifications for appointment (with minimum terms): Holder of high judicial office (two yrs.) or qualified practitioner (15 yrs). Practitioner defined as: Holding Senior Courts qualification (within §71 of Courts and Legal Services Act 1990 (c. 41); (in Scotland) advocate or solicitor entitled to appear in Court of Session and High Court of Justiciary; (in Northern Ireland) member of Bar or solicitor of Court of Judicature.

Judicial Committee of the Privy Council consists of the Lord Chancellor, the Lords of Appeal, if Privy Councillors, and other members of the Privy Council who have held high judicial office in the United Kingdom or the colonies. It is the court of final appeal from the Ecclesiastical Courts and from the Courts of certain of Colonies, Channel Islands and Isle of Man.

See also category 12 Estates and Trusts, topic Estates in Chancery, and European Union Digest, category 6 Courts and Legislature, topic 6.01 Courts.

6.02 LAW REPORTS:

Official reporting of English Law is conducted by Law Reports Series, and there are numerous other published reports. All High Court and higher final decisions are now electronically accessible to subscribers.

See, as to statutes, topic Statutes, and European Union Digest, category Courts and Legislature, topic Reports.

6.03 LEGISLATURE:

See category 1 Introduction, topic 1.02 Government and Legal System, and European Union Digest, category 6 Courts and Legislature, topic Legislature.

6.04 REPORTS:

See topic 6.02 Law Reports.

6.05 STATUTES:

Official Statutes are published by H. M. Stationery Office, High Holborn, London, W.C.2. A comprehensive volume of statutes is printed in Halsbury Statutes published by Butterworth & Co. (Publishers) Ltd. Halsbury House, 35 Chancery Lane, London WC2A 1EL. Acts of U.K. Parliament are also available on Internet at http://www.legislation.hmso.gov.uk/acts.htm. Site includes all Public Acts passed since 1988 and all Local Acts since 1991.

As to law reports, see topic 6.02 Law Reports.

7 DEBTOR AND CREDITOR

7.01 ASSIGNMENTS:

Statutory assignments of legal and equitable choses in action are governed by Law of Property Act 1925. Any absolute assignment by writing under hand of assignor (not purporting to be by way of charge only) of any debt or other legal thing in action (phrase judicially defined to include choses in action) of which express notice in writing has been given to debtor, trustee or other person from whom assignor would have been entitled to claim such debt or thing in action, is effectual in law (subject to equities having priority over right of assignee) to pass and transfer from date of such notice: (a) legal right to such debt or thing in action; (b) all legal and other remedies for same and (c) power to give good discharge for same without concurrence of assignor. Provided that if debtor, trustee or other person liable in respect of such debt or thing in action has notice (a) that assignment is disputed by assignor or any person claiming under him or (b) of any other opposing or conflicting claims to such debt, or thing in action, he may either call on persons making claim thereto to interplead concerning same or pay debt or other thing in action into court. (§136). Provided assignment satisfies conditions laid down by that section, assignee can sue debtor in his own name without joining assignor as party to proceedings. Assignments of this kind need not be for valuable consideration but must be of whole debt and not of part thereof. Notice in writing to debtor is essential, not only to comply with formalities of Law of Property Act 1925, but also to preserve assignee's priority as against subsequent assignees. Statutory assignee takes subject to any prior equities arising between assignor and debtor.

Assignments of life assurance are excluded from scope of Law of Property Act 1925 and must be assigned by deed in accordance with Policies of Assurance Act, 1867.

Equitable assignments both of legal and equitable things in action are recognized as valid. For such assignments to be valid, formalities of statute need not be complied with, but assignment must be complete so that assignee can demand payment from debtor. Equitable assignee cannot sue in his own name but must use assignor's name except if he is assignee under absolute equitable assignment of equitable chose in action. Notice in writing to debtor is essential, as priority of assignee's rights depends on date of such notice and he is entitled to be paid out of fund in order in which he gives notice to debtor or other person by whom fund is distributable.

7.02 ASSIGNMENTS FOR BENEFIT OF CREDITORS:

Any instrument whether, under seal or not, made by, for or in respect of affairs of debtor (a) for benefit of his creditors generally or (b) where debtor was insolvent at date of execution of instrument, for benefit of any three or more of his creditors, and made otherwise than in pursuance of law relating to bankruptcy, is deemed to be deed of arrangement within Deeds of

Arrangements Act 1914. Instruments that fall within scope of that enactment include: (a) assignments of property; (b) deeds of, or agreements for, composition; (c) deeds of inspectorship for purpose of carrying on or winding up business; (d) letters of licence authorising debtor or any other person to manage, carry on, realise or dispose of business with view to payment of his debts and (e) any agreement entered into for purpose of carrying on or winding up debtor's business or authorising debtor or any other person to manage, carry on, realise, or dispose of debtor's business, with view to payment of his debts. Instruments listed in (c)-(e) above will, however, only fall within scope of Deeds of Arrangements Act 1914, if debtor's creditors obtain control over his property or business.

A deed of arrangement is void unless it is registered with registrar appointed by Board of Trade (whose functions are in practice now exercised by Secretary of State for Trade and Industry) within seven clear days after its execution, if deed is executed in England, or if it is executed abroad, within seven clear days after time at which it would in ordinary course of post, arrive in England if posted within one week of its execution. Documents which must be sent to Registrar include true copy of deed of arrangement, affidavit detailing place of execution of deed and residence and occupation of debtor and affidavit detailing financial circumstances of debtor.

A deed for benefit of creditors generally is void unless before or within 21 days of registration it receives the assent in writing of a majority in number and value of creditors. Creditor may demonstrate his assent either by executing deed of arrangement or by having his written assent attested by witness. Trustee under deed must file statutory declaration that requisite majority of creditors have given their assent. That declaration must be filed with Registrar either at time of registration of deed or, if deed is assented to after its registration, within 28 days of its registration. Trustee must also give security unless majority in number and in value of creditors dispense with it.

A debtor is at liberty to make a private arrangement with his creditors upon any terms to which he can get them to agree, but no creditor is bound to join in such arrangement unless he thinks proper.

See topic Bankruptcy and Insolvency for additional arrangements available under Insolvency Act 1986.

7.03 ATTACHMENT:

Attachment of debts may be either by:

Third Party Debt Orders (on which see below); or by

Charging Orders (Charging Orders Act 1979 and Civil Procedure Rules 1998, Part 73) enable court to provide judgment creditor with security over some or all of judgment debtor's property in respect of judgment debt. Charging order may be granted over land, stocks and shares, funds held in court and beneficial interest in assets subject to trust. Such order will not be made against executor of judgment debtor or in respect of property of infant. Judgment creditor may apply for interim charging order, without giving notice to judgment debtor and by using form specified in CPR Practice Direction. Application notice must be verified by statement of truth. Copies of interim order must be served on judgment debtor and his creditors. It is possible to object to granting of interim charging order. In such case there will be further hearing at which court may discharge interim order or grant final charging order.

Such order effectively places judgment creditor in same position vis-à-vis his debtor as person to whom debtor has granted consensual security and judgment creditor also has same powers as such secured creditor. This includes possibility of applying to court for sale of charged property. Applicant must use procedure laid down in CPR Part 8 and provide information required by CPR Practice Direction.

Stop Orders (Charging Orders Act 1979 and Civil Procedure Rules 1998, Part 73) may be obtained against fund held in court and provides court with notice of creditor's claim and prevents fund being dealt with without creditor's knowledge. Applicant for such order must use procedure laid out in CPR Part 8, if not being made in course of existing proceedings, and copy of application notice must be served on every person who may be affected by order.

Stop Notices (Charging Orders Act 1979 and Civil Procedure Rules 1998, Part 73) are issued by court, upon application of person claiming to be beneficially interested in particular securities, other than ones held in court. Such notice requires person to whom it is addressed to desist from dealing with securities identified in notice, without first giving notice to applicant. To apply for such notice, applicant must file draft stop notice and written evidence, which identifies securities in question, describes applicant's interest in those securities and gives address for service. Notice must be served on person to whom it is addressed. Effect of obtaining stop notice is that applicant ought to receive 14 days' notice of any dealing with securities in question, upon which he may apply for injunction to prevent such dealing.

Attachment of Earnings Act 1971 gives court power to enforce maintenance orders and judgment debts against debtors by attaching their earnings.

7.04 BANKRUPTCY AND INSOLVENCY:

Corporate Insolvency.

Company Voluntary Arrangements (Insolvency Act 1986, Insolvency Act 2000 and Insolvency Rules 1986).—This is scheme whereby company may conclude effective arrangement with its creditors which will be subject to supervision of qualified insolvency practitioner (infra). Arrangement is usually proposed by company's directors, who are entitled to apply to court for initial moratorium on creditor action whilst arrangement is being implemented.

Administration Orders (Insolvency Act 1986 and Insolvency Rules 1986).—Court can make Administration Order to place management of company in hands of Administrator. Court will do so if satisfied that, inter alia, order would bring about continued survival of company or, failing that, more efficient realisation of company's assets than would otherwise have been achieved had company been put into liquidation. Application is by petition to court presented by either company, its creditors or directors or all or any of those parties acting together or separately. On his appointment statement of company's affairs in prescribed form and verified by affidavit must be submitted to Administrator. Administrator is required within specified period to send statement of his proposals to Registrar of Companies, all creditors and members of company. Administrator has all necessary management powers including authority to call meetings and to appoint and remove directors. Pursuant to reforms introduced by Enterprise Act 2002 holder of qualifying floating charge will as from 15 Sept. 2003 have power to appoint Administrator without need for court order.

Administrative Receiver (Insolvency Act 1986 and Insolvency Rules 1986).—Administrative receiver is receiver or manager of company's property appointed by creditor whose debt is secured over debtor company's entire undertaking by virtue of floating charge. In this way, administrative receiver should be distinguished from receiver appointed under Law of Property Act 1925. Administrative receiver will have powers conferred upon him by instrument under which he was appointed and in addition those powers conferred upon him by statute. On his appointment administrative receiver must send company and its creditors notice of his appointment. Within three months of his appointment administrative receiver must send report to Registrar of Companies and to company's creditors containing information about company's financial situation. Pursuant to reforms introduced by Enterprise Act 2002 power to appoint Administrative Receiver will as from 15 Sept. 2003 be severely curtailed. Effect of these changes is that, subject to number of exceptions, holder of floating charge over company's entire undertaking will lose ability to appoint Administrative Receiver. In future, however, such chargeholder will have power to appoint Administrator out of court (see catchline Administration Orders, supra).

Winding Up.

(Insolvency Act 1986 and Insolvency Rules 1986). Winding up of company may be either voluntary, following appointment of liquidator by company in general meeting and/or by meeting of creditors, or compulsory, following appointment of liquidator by court.

Bankruptcy; Individual Insolvency.

Individuals can also propose composition or scheme of arrangement with their creditors. (Insolvency Act 1986). There is now alternative fast-track voluntary arrangement procedure. (Enterprise Act 2002, §264 & sched. 22).

Bankruptcy Proceedings (Insolvency Act 1986 and Insolvency Rules 1986).—Court may make bankruptcy order against individual following presentation of petition by individual himself or by one or more of his creditors. Whoever presents petition, individual must be subject to jurisdiction of court by being either domiciled in England and Wales, ordinarily resident there for three years preceding presentation of bankruptcy petition or, at very least, present within jurisdiction upon that date.

In case of petition presented by creditor, there are several conditions that must be satisfied before such order will be made. First, amount of debt or debts owed to petitioning creditor must exceed “bankruptcy level”, which is currently set at £750. Secondly, debt or debts payable to petitioning creditor must be for liquidated sum to be paid immediately or at some future certain time and must be unsecured. Thirdly, court must be satisfied that individual debtor is either unable to pay his debts or has no reasonable prospect of being able to pay its debts. Petitioning creditor may demonstrate debtor's inability to pay his debts in one of two ways. First method is if creditor has served debtor with statutory demand to either pay or provide security for debt owing and three weeks have passed since demand was served without debtor taking steps to comply with it. Second method is if petitioning creditor seeks to execute judgment debt and execution is returned unsatisfied. Court may dismiss creditor's petition if it is satisfied that debtor has made offer to secure or compound debt upon which petition is based.

Right of debtor to petition for his own adjudication as bankrupt is preserved by Insolvency Act 1986, §272. Sole ground for such petition is that debtor is unable to pay his debts. To demonstrate this, petition must be accompanied by statement of debtor's affairs, which contains details of debtor's liabilities and assets. Upon hearing of petition court may either make bankruptcy order or may appoint insolvency practitioner to report to court on debtor's state of affairs and consider whether it might be appropriate to propose voluntary arrangement between debtor and its creditors. If court makes bankruptcy order it may appoint Official Receiver as receiver and manager of debtor's affairs pending appointment of trustee in bankruptcy, who will carry out actual administration of bankrupt's estate. If order is made following presentation of bankruptcy petition by creditor, debtor must submit statement of his affairs to Official Receiver within 21 days of making of bankruptcy order. Bankruptcy will continue until debtor is discharged. As of 1 Apr. 2004 this will occur automatically after period of one year from commencement of bankruptcy. (Enterprise Act 2002, §256). Court has power to extend duration of bankruptcy. Transitional provisions of Enterprise Act 2002 will apply to bankruptcies already commenced before that date and will apply with full force to bankruptcies commenced after that date.

Criminal Offences.

Insolvency Act 1986 revises offences contained in Bankruptcy Act 1914. As of 1 Apr. 2004 offences contained in Insolvency Act §§361 and 362 have been repealed. (Enterprise Act

2002, §263).

Insolvency Practitioners.

Insolvency Act 1986 introduces system of licensed insolvency practitioners, who have to be authorised by recognised professional body or by relevant authority appointed by Secretary of State.

See also topic 7.02 Assignments for Benefit of Creditors.

7.05 EXECUTIONS:

Judgment creditor may enforce his judgment by seeking to attach debts owed to judgment debtor or by seeking to levy execution upon judgment debtor's assets. Judgment creditor will seek Third Party Debt Order in order to attach debts owed to judgment debtor (see topic 7.13 Third Party Debt Orders) or one of Writs of Execution in order to execute judgment upon judgment debtor's assets. These include writs of Fieri Facias, of Possession, of Delivery and of Sequestration. Furthermore, if amount of judgment, including original debt and court costs, exceeds £750, judgment creditor may petition for judgment debtor's bankruptcy. Equally, judgment creditor may petition for winding up of corporate debtor, if it has served statutory demand on debtor requiring payment within 21 days and payment has not been received.

The commonest method of levying execution is by means of the writ of fieri facias in High Court (Civil Procedure Rules 1998, Schedule 1, RSC O.47), which is order of court directed to sheriff of county in which judgment debtor resides directing him to take possession of debtor's goods and chattels of sufficient value to cover judgment debt and costs, including costs of enforcement. On receipt of writ sheriff, through his officer, seizes debtor's goods and proceeds to sell them by public auction (unless Court orders otherwise), accounting to creditor for the proceeds. Equivalent form of enforcement in County Court is by Warrant of Execution, which is executed by Bailiff of court serving district in which warrant is to be executed. (Civil Procedure Rules 1998, Schedule 2, CCR O.26).

Writ of Elegit has now been abolished.

Appointment of Receiver.

Where property of judgment debtor cannot be reached by any other means, execution by way of appointment of receiver by court may be ordered. (Civil Procedure Rules 1998, Part 69).

Exemptions.

(1) Tools, books, vehicles, equipment necessary for debtor's personal use in his employment, business or vocation may not be seized. (2) Clothing, bedding, furniture, household equipment and provisions necessary for satisfying basic domestic needs of debtor and his family may not be seized. (3) Money in hands of third person, property of lunatic under control of Court of Protection, partner's share in partnership, property held in fiduciary capacity, goods of debtor deposited with another person as security for debt, and goods on hire may not be seized. *Note:* (a) Money, banknotes, bills of exchange, promissory notes, bonds, specialities or securities for money may be seized. (b) Costs of earlier attempts at enforcement are recoverable when taking current enforcement steps unless those costs are not reasonably incurred.

7.06 EXEMPTIONS:

See topic 7.05 Executions.

7.07 FRAUDULENT SALES AND CONVEYANCES:

Insolvency Act 1986 §423 contains provisions dealing with transactions defrauding creditors. (Law of Property Act, 1925, §172 has been repealed.)

A voluntary disposition of land, made with intent to defraud a subsequent purchaser, is voidable at the instance of such purchaser. (Law of Property Act, 1925, §173).

Voluntary settlements, although not fraudulent, are voidable under certain circumstances as provided by Insolvency Act 1986.

7.08 GARNISHEE PROCEEDINGS:

See topic 7.13 Third Party Debt Orders.

7.09 INSOLVENCY:

See topic 7.04 Bankruptcy and 7.09 Insolvency.

7.10 LIENS:

Lien is right that person has to retain possession of goods belonging to another until certain conditions, usually payment of sum of money, have been satisfied.

It is a personal right which exists only in respect of goods received rightfully, and it cannot be transferred. Right may be excluded by express agreement or through course of dealing between parties. It is right merely to retain possession and no charges in respect of warehousing may be made. Unless statute provides otherwise (as is case with innkeepers), lien confers no right of sale upon lien-holder without first commencing legal proceedings against debtor. Ordinary liens must be distinguished from equitable and maritime liens, which enable creditors to have certain specific property applied in satisfaction of their demands.

Lien is conferred by law in two classes of cases: (1) to persons who are under common law duty to render services, as in case of carriers, on goods carried for price of carriage, and of innkeepers, who have lien on baggage of their customers for amount outstanding on customer's account; (2) to persons rendering services, spending money, skill or labour, on the property of another person employing them for that purpose, as in case of all agents and artificers.

A lien may be either: (1) general, for general balance owing to creditor by his debtor, such as right of solicitor to retain his client's papers for general balance due to him; or (2) particular, right over goods until certain demands are satisfied, such as ordinary right of seller to retain particular goods until payment of their price.

An hotel keeper has a right, if his account remains unpaid, to sell by public auction any personal effects, goods, or livestock of the guest left or deposited with him or in his hotel. But no such sale may be made until he has had the goods for six weeks, nor until one month after he has advertised the intended sale in one London newspaper and one local newspaper circulating in the district in which the goods were left.

A bankers' lien is the right of a banker to retain securities belonging to his customer for money due on a general balance.

A trustee has an equitable lien for expenses lawfully incurred in connection with the trust property; limited liability company may create lien upon its own shares.

Lien may arise through right of subrogation, as where third party to contract of sale uses its money to pay purchase price at purchaser's request.

The right of lien is lost: (1) by discharge of the debt; (2) by tender of the debt; (3) by taking security for the debt under circumstances inconsistent with its continued existence; (4) by loss of possession.

It is suspended by taking a negotiable instrument as payment, but unless it is taken as absolute satisfaction the debt will revive on its dishonour, even though it is in the hands of assignees for value.

7.11 PLEDGES:

A pledge of personal chattels is the transfer by delivery of immediate possession thereof by way of security for an advance, whether past or present, the pledgor remaining the owner of the chattel but the pledgee acquiring a right to sell (but not to foreclose) if the advance be not repaid on the due date.

7.12 RECEIVERS:

See topic 7.05 Executions, subhead Appointment of Receiver; category 19 Mortgages, topic 19.03 Mortgages.

7.13 THIRD PARTY DEBT ORDERS:

Creditor who has obtained judgment of court for any sum of money may apply to that court for third party debt order, which directs third party, who owes sum of money to judgment debtor, to pay that money to judgment creditor. Judgment creditor can apply for such order without giving notice to judgment debtor. Application notice must be in specified form and must contain required information. (Civil Procedure Rules 1998, Part 72, Practice Direction, Para. 1.1). It must also be verified by statement of truth. Application for third party debt order will initially be dealt with by judge without hearing. At this stage, judge will make interim third party debt order and fix date, within following 28 days, for hearing, at which court will determine whether to make final third party debt order. Copies of interim order must be served on third party and judgment debtor. Upon service of interim order, third party is prohibited from making any payment to judgment debtor, which might reduce amount ultimately payable to judgment creditor. If liability of third party to judgment debtor is undisputed, court will usually make final third party order at hearing. If third party or judgment debtor has filed written evidence with court opposing making of final order, at hearing, court may either deal with issues in dispute itself or direct trial of any such issues. Payment made pursuant to final order discharges third party from his liability to judgment debtor. This process may be used to attach earnings or money held by judgment debtor's bankers.

8 DISPUTE RESOLUTION

8.01 ALTERNATIVE DISPUTE RESOLUTION:

Disputes can be resolved by means of negotiation, alternative dispute resolution methods (ADR), arbitration or litigation. Only arbitration and litigation have binding and enforceable effects on parties.

Mandatory Dispute Resolution.

Arbitration.

Many statutes provide for settlement of disputes or differences by means of arbitration. Arbitration Act 1996 codifies, and in some aspects radically amends, law of arbitration and applies to all English law arbitrations. Reference to arbitration may be compulsory but in other cases it is optional with one or both parties electing arbitration (see subhead Voluntary Dispute Resolution, catchline Arbitration, infra). Statutory and voluntary arbitration are governed by Arbitration Act 1996 unless excluded by arbitration agreement. Whether reference is made to arbitration by statute or it is result of party autonomy procedure of arbitration is same. Arbitration Act 1996 contains provisions that are mandatory and applicable to all arbitrations and other optional provisions. Parties retain considerable control over arbitration. Generally, M Mustill & S Boyd Commercial Arbitration (Companion Volume) (London, 2001).

Voluntary Dispute Resolution.

ADR.

All ADR methods are voluntary and decisions are normally nonbinding. Their common feature is that as opposed to negotiation they require involvement of independent third party. However, since Apr. 1999 reforms effected by Master of the Rolls, Lord Woolf (new Civil Procedure Rules) civil courts now encourage ADR. In particular, Technology and Construction Court and Admiralty and Commercial Court have been proactive in promoting ADR and issuing ADR Orders. ADR Orders stop short of ordering parties to mediate, but they do compel parties to take number of steps towards ADR. Litigants may request in writing that court stay case to allow ADR when filling in court allocation questionnaire. (Form N150, Part A). In accordance with overriding objective that cases be dealt with “justly” (CPR 1.1[1]), courts, of their own initiative, have discretion to stay proceedings for specified period to facilitate settlement by negotiation and ADR methods (CPR 26.4 and CPR 3.1[2][f]). Active case management requires courts to encourage parties to use ADR procedure if court considers that appropriate and to facilitate use of such procedures. (CPR 1.4[2][e]). Court must consider expense of trial, sums at stake, complexity and importance of issues and financial position of parties. (CPR 1.1[2][c]). Court may order costs against party who fails to accede to reasonable requests for ADR. Court of Appeal recently explored factors which should be taken into account in considering whether refusal to adopt ADR is “unreasonable”. (See Halsey v. Milton Keynes General NHS Trust [2004] EWCA Civ 576.) §3 of CPR PD 26 provides guidance where proceedings are stayed to facilitate ADR. There may be tension between court directed ADR and right of party to fair trial. (European Convention on Human Rights Art. 6).

The Queen's Bench Guide, Chancery Court Guide and Admiralty and Commercial Court Guide (2009) each express positive approach to ADR. Court of Appeal has ADR Scheme under which proceedings under appeal may enjoy services of mediators free of charge.

Parties often include ADR clause, for instance in contract governing parties' relationship, stipulating precise details of dispute settlement procedures before any dispute has arisen.

Many organisations offer ADR services: consult Civil Justice Council's ADR website. Some are general (e.g., Centre for Dispute Resolution [CEDR], ADR Group, Chartered Institute of Arbitrators [CIArb]) and others are specialised or focused on particular sectors of economy (e.g., Academy of Experts, City Disputes Panel, London Court of International Arbitration [LCIA], London Maritime Arbitrators Association [LMAA]) or for employment and labor disputes, Advisory, Conciliation and Arbitration Service (ACAS).

Dispute settlement procedures often operate simultaneously and can manifest as hybrid forms (e.g., med-arb), principal ADR methods include:

Mediation (or conciliation)—This is main ADR method. Current popularity is rooted in Lord Woolf's report “Access to Justice” (1996): for survey of English ADR see N Andrews, Modern Civil Process. (Tübingen, Germany) (2008). Parties meet before neutral mediator in private who assists them in reaching settlement through structured negotiation. Mediator has no authority to make binding decision but facilitates talks which are typically held on confidential and without prejudice basis. Settlement may later be recorded in contract or consent order binding on parties. Mediation services are available for great range of disputes including commercial and civil disputes, family, employment, neighbourhood and victim/offender disputes.

Mini-trial (or executive tribunal)—This is panel, consisting of neutral mediator and one senior executive from each party, which hear presentations of both parties and in complex cases evidence of witnesses. No formal court rules apply. Neutral member will ordinarily express nonbinding opinion which may assist negotiated settlement.

Early Neutral Evaluation—Written or oral presentations are made to senior legal figure (such as retired judge) who appraises merits of case. Parties can contract beforehand on whether appraisal is open or on without prejudice basis and whether it will be adapted into binding decision afterwards. Although primarily used as method of ADR in U.S., early neutral evaluation has been extended to other jurisdictions, including U.K. Commercial Court Guide provides for early neutral evaluation by Commercial Judge if parties agree. (§G-2). Similar hybrid process is Financial Dispute Resolution appointment with district judge.

Adjudication—Written or oral presentations made to adjudicator or ombudsman who acts as valuer or impartial expert. Decisions are binding without right of appeal unless parties contract otherwise (e.g., Housing Ombudsman Scheme under auspices of Housing Act 1996).

Dispute Review Board/Dispute Advisor—This is formalised mediation with panel of experts or single advisor to advise or adjudicate between parties at outset of complex contracts. Decisions are nonbinding.

Arbitration.

Parties may volunteer to go to arbitration. Many commercial contracts contain arbitration clause whereby parties agree to use arbitration if dispute arises. Under statute parties may have option to use arbitration before proceeding with litigation. For instance cases which are referred to any judge of Commercial Court or Official Referee such as most shipping and construction cases can be heard by way of arbitration under Arbitration Act 1996.

Arbitration Tribunal may consist of one, or sometimes several, arbitrators nominated in arbitration agreement or otherwise appointed by court or parties' chosen appointing authority. Disputes are normally heard orally and in private with usual court rules applying unless parties elect for award solely on documents. Arbitration Tribunal decides all questions of law and fact. Award is binding and enforceable with limited rights of appeal.

9 DOCUMENTS AND RECORDS

9.01 ACKNOWLEDGMENTS:

For form see topic 9.02 Affidavits and Statutory Declarations, subhead Form, Jurat.

9.02 AFFIDAVITS AND STATUTORY DECLARATIONS:

Affidavits.—Affidavit is written statement of facts sworn by deponent before person authorised to administer oath. In U.S. affidavit for use in England should be sworn before notary or British consul. They are usually used in judicial proceedings.

An affirmation instead of an oath may be made where it is not reasonably practicable without inconvenience or delay to administer an oath in manner appropriate to person's religious belief. (Oaths Act, 1978).

For use in the High Court affidavits are required to be written, typewritten or printed in black ink, on metric size A4 paper, bookwise, with margin on left side.

Form.

An affidavit is commenced with the title of the action, e.g.:

Forms

In the High Court of Justice 20. . (Initial of plaintiff). No. (in Court index).

Queen's Bench Division (or Chancery Division)

(In Chancery, add “In the Matter of the Estate of. . . ., deceased,” or as the case may be)

Between James Brown Plaintiff

—and—

John Smith Defendant

Full christian and surnames and true place of abode of deponent, and his description, must then be stated. For U.S. a proper form is as follows:

I, (full names), of No. . . . . Street. . . Town. . . ., County in the State of. . . . United States of America (description). . . . make oath and say

Then set out the facts deposed to in the first person in paragraphs numbered consecutively and, as nearly as may be, confined to a distinct portion of the subject in chronological order. An affidavit must be confined to facts within deponent's own knowledge, except in interlocutory proceedings, and certain other defined exceptions where statements as to his belief, with sources and grounds thereof, may be admitted.

Every quotation must be placed between inverted commas, and dates, sums and numbers expressed in figures not words. Alterations or interlineations should be avoided, but if made must be authenticated by initials of officer before whom affidavit is sworn; and, in case of erasure, words and figures appearing at time of swearing affidavit to be written on erasure must be rewritten and signed or initialled in margin by such officer.

Jurat.

An affidavit is formally concluded by the jurat, a memorandum of the place, time and person before whom it is sworn.

Full address sufficient for identification must be given and jurat should follow immediately after end of text. It must not be written on page upon which no part of statements in affidavit appears.

The deponent must sign his usual signature or make his mark at the right of the jurat, not beneath it, and the signature and full official character and description of the person before whom the affidavit is sworn, his official seal of office attached, must follow immediately after the jurat, in the form as follows:

Forms

Sworn by the deponent. . . . (Name). . . . at. . . .

in the County of. . . . State of. . . . United States of America on the. . . . day of. . . . 20. ., Before

me,. . . . .

(Signature of Officer)

(Seal). . . . (Title of Officer) } (Signature of Deponent)

Sworn at. . . . . . . this. . . . . day of. . . . .

Before me,

(Signature of Deponent)

(Signature of Solicitor/Commissioner for

Oaths) Solicitor/Commissioner for Oaths

If the deponent is blind, or illiterate, the jurat

is as follows:

Sworn by the deponent. . . . (name) at (place

and date as above). . . . . . I having first truly

distinctly and audibly read over the contents of

the above affidavit to the said deponent who

seemed to perfectly understand the same and

made his mark thereto in my presence.

Before me, (etc., as above). }

The mark of X

(Deponent's name)

On front page of affidavit and on backsheet one must state: (i) Party on whose behalf it is filed, (ii) initials and surname of deponent, (iii) number of affidavit in relation to deponent and (iv) date when sworn e.g. Defendant: J Smith: 1st: 6.6.1986.

For use in county courts affidavits are, for most purposes, prepared on specially printed forms provided free by each court. They must, however, be sworn in same manner as those for use in High Court.

If deponent is atheist affidavit may be affirmed rather than sworn and jurat is altered by replacing word “sworn” by “affirmed”.

Exhibits.

Any document may be referred to in the body of an affidavit, as an exhibit, thus: “the said letter is now produced and shown to me and marked ‘A.B.’” (the deponent's initials are generally used).

Where there is more than one exhibit best course is to use as exhibit marks deponent's initials followed by consecutive numbers, as thus “A.B.1.” “A.B.2.” etc. By this means exhibits to affidavits of several witnesses are readily identified.

Every exhibit referred to in an affidavit must be marked with the short title of the cause or matter, as hereinbefore set out for an affidavit, and bear a certificate signed by the officer before whom the affidavit is sworn, as follows:

Form

A. B. v. C. D. (title of action)

This is the Exhibit marked “A.B.” (or “A.B.1.”) referred to in the Affidavit

of X.Y. sworn in this action (if Chancery, “Matter” not “Action”) this. . . . day of. . . ., 20. ..”

Before me,

(Name and Title of Officer.)

Statutory Declarations.

Solemn verification of facts, usually used in cases other than judicial proceedings, e.g. conveyancing, tax, company matters.

Form.

They must start with:

“I A.B. of (Address) do solemnly and sincerely declare as follows. . . . . .”

Last paragraph should read:

“AND I make this solemn declaration believing the same to be true and by virtue of the provisions of the Statutory Declarations Act 1835.”

Remaining requirements are as for Affidavits.

Jurat.

Declared before me at (address) on   Signature of Declarant

(date)

signature and qualification of person taking declaration

9.03 COMMISSIONS TO TAKE TESTIMONY:

See category 5 Civil Actions and Procedure, topic 5.04 Depositions and Discovery.

9.04 NOTARIES PUBLIC:

Applications for appointment as notary public for this country must be made at the

Court of Faculties: The Sanctuary, Westminster. Notarial Faculties for London are granted after: (1) service by the applicant with a London notary for five years; (2) admission to the freedom of the Scriveners' Company.

Faculties for any other place in England or Wales are granted: (1) After service with a notary for five years; (2) to solicitors, where the applicant can show, by memorial to the Master of the Faculties, the need for the appointment.

The cost of a faculty for this country (including the stamp duty) is about £20.

9.05 RECORDS:

As to various instruments which must be registered or recorded, see categories 2 Business Organizations, topic Corporations; Business Regulation and Commerce, topic Sales; Debtor and Creditor, topic Assignments for Benefit of Creditors; Mortgages, topic Chattel Mortgages.

Land Registration.

Title to property may be registered at H.M. Land Registry and is open to public inspection.

See category 20 Property, topic 20.07 Real Property, subhead Land Registration.

Births, deaths and marriages are registered in the first instance with the local registrar, who forwards the necessary particulars to the Registrar-General of Births, Deaths and Marriages, St. Catherine's House, London W. C. 2. Copy of certificates may be obtained from General Register Offices, Smedley Hydro, Southport, Merseyside PR8 2HH. Alternatively, expedition fee of £27.50 is payable guaranteeing return of certificate within 48 hours. Copies may be obtained personally from Saint Catherine's House, 10 Kingsway, London W.C.2.

Probate.

Copy of probate with will can be inspected at Somerset House, Strand London, WC2.

Companies.

Records of company accounts, annual returns, shareholdings, special resolutions are kept in Companies House, Maindy Way, Cardiff, Wales.

9.06 SEALS:

See category 20 Property, topic 20.04 Deeds.

10 EMPLOYMENT

10.01 LABOUR RELATIONS:

Individual rights principally governed by Employment Rights Act 1996. Trade unions and collective labour relations governed mainly by Trade Union and Labour Relations (Consolidation) Act TULR(C)A 1992. Both main Acts further amended by Employment Relations Act 1999, Employment Act 2002, Employment Relations Act 2004 and Employment Act 2008.

Code of Practice.

Secretary of State, ACAS, EHRC and HSE are empowered by statute to issue codes of practice containing practical guidance on conduct. No liability under Acts for breach of code but admissible in proceedings.

Employees' Rights.

Employment Rights Act 1996 protects employees employed for continuous period of one year against unfair dismissal. Employee gains rights to redundancy payment after continuous employment of two years. Act also gives certain other rights, including protection against dismissal for pregnancy, without any qualifying period of employment. Disputes referred to Employment Tribunal which can award compensation, reinstatement or reengagement where appropriate.

Trade Disputes.

TULR(C)A 1992 provides unions and individuals with limited immunity from actions in tort in respect of certain acts done in contemplation or furtherance of trade dispute as defined by Act, and grants limited rights of peaceful picketing in connection with trade disputes.

Trade Union Recognition.

Employment Relations Act 1999 requires employers to recognise trade unions for purposes of collective bargaining under specified, carefully defined circumstances.

List of Union and Employers Associations.

Certification officer (appointed by Secretary of State) keeps list of these bodies.

Accounts.

Unions and Employers' Associations under duty to keep audited accounts and make annual returns to certification officer, and to make their annual returns and rules available for inspection by any person.

Employers' Liability (Compulsory Insurance) Act 1969 requires employers to insure against their liability for personal injury to their employees. Certain employers are exempted from this duty.

Sex Discrimination Act 1975 and Equal Pay Act 1970 prevent discrimination on grounds of sex, sex change or being married in employment field except where sex is genuine occupational qualification or, in case of equal pay, where there is genuine material factor defence. Equality Act 2006 imposes duty on public bodies to promote equality of opportunity in relation to sex. Other secondary legislation prohibits discrimination on grounds of religion or belief, sexual orientation and age.

Race Relations Act 1976 prohibits discrimination on grounds of race and ethnic origin. Race Relations (Amendment) Act 2000 imposes monitoring duties on public sector employers.

Disability Discrimination Act 1995 prohibits discrimination on grounds of disability. It has been substantially amended number of times including by Disability Discrimination Act 2005 which also imposes duty on public bodies to promote equality of opportunity for disabled people.

Wages Act 1986, now included in Employment Rights Act 1996, regulates payment of wages.

National Minimum Wage Act 1998 makes provision for statutory minimum wage.

Public Interest Disclosure Act 1998 provides protection against unfair dismissal of “whistle blowers” making “qualified disclosure” within meaning of Act.

See also European Union Digest, category Employment, topic Labor Law.

11 ENVIRONMENT

11.01 ENVIRONMENTAL REGULATION:

Until relatively recently common laws of nuisance and negligence were major forms of protecting environment from pollution. This meant that actions were brought either by individuals or by Attorney General and therefore generally dealt with private property. Law grew due to litigation but was piecemeal. It is now supplemented by various statutes, main one being Environmental Protection Act 1990 which seeks to integrate pollution control. Her Majesty's Inspectorate of Pollution is main agency for enforcement of antipollution legislation. Of increasing importance in this area are numerous Directives issued by European Community, which require implementation in domestic legislation.

Atmospheric Pollution.

Environmental Protection Act 1990 makes it statutory nuisance to release trade dust into atmosphere which is prejudicial to health. The Clean Air Act 1993 provides for regulations on new chimneys such as height and filters. The Control of Pollution Act 1974 allows regulations to be made regarding content and composition of fuel used in motor vehicles.

Pollution on Land.

This is partly controlled by statutes such as Environmental Protection Act 1990 and Town and Country Planning Act 1990.

Noise Pollution.

Various acts cover noise emitted from airports and motor vehicles.

Inland Water Pollution.

This is covered by Water Resources Act 1991. Trade effluents which are taken by inland waterways to the sea are covered by Water Industry Act 1991.

Pollution of Sea.

This is partly covered by Water Resources Act 1991 and Food and Environment Protection Act 1985. These mainly incorporate international rules and conventions.

General Supervision.

Refuse Collection.

Each local council is responsible for this in their area. There is right to have household rubbish collected.

Litter.

Crown Bodies have responsibility to keep their land free from litter, as do councils. Councils can ensure that landowners have same responsibility.

Dogs.

It is responsibility of local councils to clear dog mess, byelaws can be passed providing for dogs to be kept on a lead and poop scoops to be used.

Recycling.

Department of the Environment, Food and Rural Affairs has overall responsibility for recycling, but local councils should provide recycling points in their area.

Nuisance.

Again it is responsibility of each local council to deal with complaints such as noise, smells, fumes and dust.

12 ESTATES AND TRUSTS

12.01 ADMINISTRATION:

See topic 12.07 Executors and Administrators.

12.02 CLAIMS:

See topic 12.07 Executors and Administrators.

12.03 DEATH:

Presumption of Death.

Application by a personal representative must be made to the court where it is not certain that death has occurred. The law presumes a man to be dead if he has not reasonably been heard of for seven years and all appropriate enquiries have been made, but each case is considered as question of fact, and period can be less than seven years. There is no legal presumption as to time of death. Since 1925, if two or more persons apparently die simultaneously, legal presumption is that younger died later than older. (§184, Law of Property Act 1925). Presumption does not apply between husband and wife (or between civil partners) where elder dies wholly or partially intestate. However, §46(2A) Administration of Estates Act 1925 provides that if intestate's spouse or civil partner does not survive for 28 days then he/she is not deemed to have survived his/her spouse or civil partner. See also category 13 Family, topic 13.09 Marriage, subhead Dissolution.

Registration.

All deaths must be registered locally. See category 9 Documents and Records, topic 9.05 Records, subhead Births, Deaths and Marriages.

Actions for Causing Death.

By Fatal Accidents Act 1976, personal representatives may on behalf of dependants of decedent sue within three years if death was caused by some wrongful act, neglect or default. Measure of damages is loss of support suffered. By Law Reform Act 1934 all causes of action subsisting against or vested in decedent shall survive against, or, as case may be, for benefit of his estate. No contract can exclude action for causing death. (Unfair Contract Terms Act 1977).

12.04 DECEDENTS' ESTATES:

See topics 12.05 Descent and Distribution, Executors and Administrators, Wills; category 9 Documents and Records, topic 9.05 Records.

12.05 DESCENT AND DISTRIBUTION:

Following are rules generally applied on intestacy once letters of administration have been granted. (Testate succession governed by properly executed will of testator.)

Surviving spouse or civil partner takes whole of estate absolutely if deceased leaves no issue and no parent or brother or sister of whole blood or issue of such brother or sister. If deceased leaves issue, surviving spouse or civil partner takes all personal chattels (very wide term), £125,000 free of tax with interest at 6% and life interest in half residue, issue taking balance and other half residue after death of surviving spouse. If no issue, but parent or brother or sister of whole blood or issue of such brother or sister, surviving spouse takes all personal chattels, £200,000 free of tax with interest at 6% and half residue absolutely; if parent or parents survive, half residue passes to such parent or parents absolutely but if no parent survives half-residue passes to brothers and sisters of whole blood.

Where the matrimonial home forms part of the deceased's residuary estate, surviving spouse can generally require the interest in the house to be appropriated towards any absolute interest of his or hers.

When there is no surviving spouse the surviving issue take the whole estate in equal shares upon statutory trusts. If there is no issue but parent(s), he or she takes and if both parents survive, they take in equal shares. If there is neither issue nor parent(s), relatives take as follows: (1) brothers and sisters of the whole blood and their issue; (2) brothers and sisters of the half blood and their issue; (3) grandparent(s) in equal shares; (4) uncles and aunts being brothers and sisters of the whole blood of a parent and their issue; (5) uncles and aunts being brothers and sisters of the half blood of a parent and their issue; (6) the Crown, Duchy of Lancaster or Duke of Cornwall.

Illegitimate Children.

Under Family Law Reform Act, 1987, illegitimate child (or issue) and both his parents shall have same rights to succeed (on intestacy on or after Jan. 1, 1970) as if child were legitimate. Rebuttable presumption is to be made that illegitimate child's father has predeceased him. Existing rights of legitimated or adopted children are preserved where that would be advantageous.

As to allowance for maintenance of dependants not properly provided for by will, see topic 12.11 Wills.

12.06 ESTATES IN CHANCERY:

Information respecting any fund is obtainable only on request giving correct title of suit or matter to which fund is placed, signed by applicant. Information is not given to applicant, other than solicitor, unless he satisfies paymaster of court that request may properly be complied with. Mere coincidence of surname of original owner of property with surname of party to suit is not sufficient evidence of genuine ground of claim. When request for information is made through solicitor, he must state name and address of person whom he represents and that he is of opinion that such person is beneficially interested in fund. Therefore persons instructing solicitors to put forward claims should send full particulars of grounds on which their claims are based. Funds in court can be dealt with only by order of court.

12.07 EXECUTORS AND ADMINISTRATORS:

Upon death of a person whole of his property, both real and personal, devolves upon his personal representatives, who in cases where he has left a will are his executors, and in cases where he has died intestate, his administrators and to whom probate of will or letters of administration, as case may be, is granted by Principal Registry of Family Division or District Probate Registry of probate court. If no executor appointed, estate vests in President of Family Division until letters of administration are taken out. Such grant is made at any time after seven days from death have elapsed in case of executors and 14 days after death in case of administrators. Executor is not required to furnish any security. In case of administrator guarantee by sureties may be required in certain cases.

The powers of an executor appointed under a will valid by English law or by the law of the domicile are accepted here as being the same as those of an English executor similarly appointed. No evidence of the extent or duration of his powers is required.

Inheritance tax (see category 21 Taxation, topic Taxes) may be payable before probate can be granted or letters of administration issued.

An executor or administrator who has advertised for claims against the deceased's estate, and given public notice of his intention to divide up the estate after a specified date (being not less than two months away), is not liable after he has divided up estate amongst beneficiaries in respect of claims of which he has not received notice (except for claims under Inheritance [Provision for Family and Dependants] Act 1975 and claims by beneficiaries of will rectified by Court under §20 Administration of Justice Act 1982, where estate has been distributed within six months of grant of representation).

Except for very small estates, if person (whatever his nationality or domicile at time of his or her death) dies leaving property (even if only debt) in this country grant of either probate of will or administration of estate must be obtained here before his or her executor or administrator respectively may deal with such property.

As to allowance for maintenance of dependents not properly provided for by will, see topic 12.11 Wills.

12.08 FIDUCIARIES:

See topics 12.07 Executors and Administrators, 12.10 Trusts.

12.09 INTESTACY:

See topic 12.05 Descent and Distribution.

12.10 TRUSTS:

Trust of land may be created, whereby trustees are joint tenants of legal estate, and beneficial interests are held either as joint tenants or as tenants in common. Express trust of land or any interest therein must be evidenced in writing. (Law of Property Act, 1925, §53). However, implied, resulting or constructive trusts do not require any particular formality.

A trust is irrevocable unless the settlor reserves a right of revocation, but it may be set aside in certain circumstances. See category 7 Debtor and Creditor, topic 7.07 Fraudulent Sales and Conveyances.

Duties of Trustee.

These are numerous and include: (1) To follow settlor's directions and to secure trust property by reducing it to possession; (2) to invest trust funds (see subhead Trustee Investment, infra); (3) to keep accounts and to produce them to any beneficiary when required and to give him all reasonable information as to trust estate; (4) to exercise such care and skill as is reasonable in circumstances in administration of trust. (Trustee Act 2000). He has, however, no general duty to give reasons for exercise of his trustee's discretions.

Powers of Trustee.

These include powers expressly given by trust instruments and (subject to any contrary intention expressed by trust instrument) powers given to trustees by Trustee Act 1925, including: (1) Trustee has power to sell or concur in selling all or any part of property. (2) They may raise money by sale, conversion, calling in or mortgage of all or any part of trust property. (3) Effective receipt requires to be given by two trustees or trust corporation. (4) Trustees are empowered to insure trust property against loss or damage due to any event save in certain cases of property being held on bare trust. They also may compromise actions, pay trust money into court and so obtain discharge in cases of difficulty, maintain infants, and make advances of capital in certain circumstances.

Liability of Trustee.

A trustee is liable only for a breach of trust committed by himself. There is, as rule, right of contribution between trustees who are liable for breach of trust but this does not apply if they have all been guilty of fraud. One trustee must, however, indemnify the others (a) where he has received trust money and benefitted personally from breach, (b) where he acted as solicitor to trust and breach of trust was committed on his advice and (c) where he is beneficiary.

Some protection is afforded to a trustee who has been guilty of a breach of trust by Trustee Act, 1925, §61, under which the court may relieve him if he has acted honestly and reasonably and ought fairly be excused, and he is also protected where a beneficiary who is sui juris and fully informed of facts concurs in breach, confirms breach or releases trustee.

Variation of Trusts.

By Variation of Trusts Act, 1958, High Court has discretionary power to vary trusts for benefit of children or other persons whose interests may be uncertain.

Trustee Investment.

Trustee has same powers of investment as absolute owner and power to acquire land for any purpose. (Trustee Act 2000).

12.11 WILLS:

Any adult, male or female, of sound mind, may make a will. Minor cannot make will, unless married or soldier in actual military service or mariner or seaman at sea. Person of unsound mind cannot make valid will, except during lucid interval. Alien has same testamentary capacity as British subject. It would appear that felon may dispose of his property by will.

Will must be in writing and signed by testator or by some other person in his presence and by his direction, and it must appear that testator intended by his signature to give effect to will (§9 Wills Act 1837 am'd by Administration of Justice Act 1983), and such signature shall be made or acknowledged by testator in presence of two or more witnesses present at same time, and such witnesses shall attest and sign will or acknowledge their earlier signature in presence of testator but not necessarily in presence of each other. Will should not be witnessed by beneficiary or spouse of beneficiary named in will. Wills Act 1968 ensures that will is still valid if containing disposition to one of witnesses provided that there are two further witnesses neither of whom benefits under will. Upon death of testator, where there is no opposition, probate of will may be granted to executors by probate court at expiration of seven days after death of deceased.

Probate of Foreigner's Will.

Wills Act 1963 provides generally that a will will be held to be validly executed as regards form if it satisfies requirements of internal law of any of the following: (a) Territory where it was executed; (b) territory where testator was domiciled, either at time of execution or at death; (c) territory where testator had habitual residence either at time of execution or at death; (d) in state of which, either at time of execution or at death, he was national; (e) so far as it disposes of immoveable property, territory where property situated. In practice, upon production of sealed and certified copy of probate granted by proper court of foreign country where testator was domiciled at his death, court will follow such grant in granting probate here upon application here by executor.

Will disposing of land situate in England must comply with English form.

Allowance for Maintenance of Dependents.

Under Inheritance (Provision for Family and Dependents) Act 1975 certain persons may make application to court for payment out of deceased's estate. Court may make order for reasonable financial provision for spouse or civil partner, whether or not that provision is needed for his or her maintenance or reasonable financial provision for his or her maintenance in case of other applicants, for applicant if court considers reasonable financial provision has not been made.

Persons for whom provision may be made are: (a) Spouse or civil partner, (b) former spouse who has not remarried, (c) child, (d) person (not child of deceased) who, in case of marriage to which deceased at any time party, was treated by deceased as child of family in relation to that marriage, (e) any person immediately before death of deceased being maintained partly or wholly by deceased, (f) any person living in deceased's household as his husband or wife for two years before death. Illegitimate children treated as legitimate children. (Family Law Reform Act 1969).

Application for provision must, except with permission of court, be made within six months from date on which representation in deceased's estate first taken out. In construing application, court must have regard to: (a) Present or likely future financial resources and needs of applicant, (b) present or future likely financial resources and needs of any other applicant, (c) present or future likely financial resources and needs of any beneficiary of estate, (d) obligations and responsibilities of deceased to any applicant or beneficiary of estate, (e) size and nature of estate, (f) any physical or mental disabilities of any applicant or beneficiary, and (g) any other matter including conduct of applicant or any other persons as court considers relevant.

Where surviving spouse or former spouse who has not remarried applies, court must also have regard to: (a) Applicant's age and duration of marriage, (b) applicant's contribution to welfare of family and (c) provision applicant might reasonably expect on divorce.

13 FAMILY

13.01 ADOPTION:

Adoption in England and Wales is regulated by Adoption and Children Act, 2002. Applicants must be at least 21 or, in case of adoption by couple one of whom is parent of child to be adopted, that parent must be at least 18 and his or her spouse or partner at least 21 years of age. (§§50, 51). In reaching any decision relating to adoption of child, paramount consideration of court or adoption agency must be child's welfare, throughout his life. (§1[2]). Court or adoption agency must bear in mind that delay is likely to prejudice child's welfare (§1[3]) and must have regard to following matters (among others): child's ascertainable wishes and feelings (considered in light of his or her age and understanding; child's particular needs; likely effect on child (throughout his or her life) of having ceased to be member of original family and become adopted person; child's age, sex, background and any characteristics court or agency considers relevant; any harm child has suffered or is at risk of suffering; relationship child has with relatives or other relevant persons, including likelihood of continuation of relationship and its value to child; ability and willingness of relative or other relevant person to provide secure environment and to meet child's needs; wishes and feelings of child's relatives or other relevant person. (§1[4]).

Intercountry Adoption.

Children and Adoption Act 2006 creates statutory framework for suspension of intercountry adoption from specified countries where there are concerns about adoption practices.

Adoption Services.

Local authorities are required to establish adoption and adoption support services to provide facilities including: temporary board and lodging where needed; arrangements for assessing children and prospective adopters and placing children for adoption; counselling and financial assistance. Voluntary organisations that wish to act as adoption agencies must be registered under Care Standards Act 2000. (Adoption and Children Act 2002, c. 2). 2002 Act provides for establishment of Adoption and Children Act Register to facilitate cooperation between local authorities and adoption agencies in different regions. (§§125-131).

Application May be made jointly by couple including unmarried couple, whether opposite-sex or same-sex, living as partners in enduring family relationship (§144[4]) or by one person (§§49, 50). No order can be made on application of one person who is spouse or civil partner unless court is satisfied that other spouse or civil partner cannot be found, or that parties have separated and separation is likely to be permanent, or that other party is incapable by reason of ill-health of making application for adoption order. (§51[3]). No order can be made on sole application of mother or father of child unless court is satisfied that other natural parent is dead or cannot be found, or that there is no other parent by virtue of Human Fertilisation and Embryology Act 1990, §28, or there is some other reason justifying adoption by applicant alone. (§51[4]).

Conditions Precedent.

Applicant, or at least one of joint applicants, must be domiciled in British Islands (§49[2]); or applicant or both applicants in case of joint application, must be habitually resident in British Islands for not less than one year at time of application (§49[3]). Child must be under 18 years of age at time of application and under 19 at time of adoption order. (§49[4], [5]). No adoption order may be made in relation to child who has been married or civil partner. (§47[8][8A]).

Where child was placed for adoption by adoption agency or in pursuance of High Court order, or applicant is parent of child, child must have had his home with applicant (or one or both applicants in case of joint application) at all times during the ten weeks preceding application. If applicant or one of applicants is partner of parent of child, child must have had his or her home with applicant(s) at all times during preceding six months. If applicants are local authority foster parents, child must have had his or her home with applicants at all times during preceding year. In all other cases, child must have had his or her home with applicant(s) for not less than three years (continuous or not) during preceding five years. (§42). Court must be satisfied that sufficient opportunities have been afforded to appropriate authority to see child and applicant(s) in home environment. (§§42[7], 43).

Each parent (or mother alone, if she alone has parental responsibility (§52[6])) or guardian must consent unconditionally to making of adoption order, unless court dispenses with consent on ground that welfare of child so requires (§52). Consent by mother is ineffective if given less than six weeks after child's birth. (§52[3]). Consent to placement for adoption may include advance consent to making of adoption order. (§20).

Before making adoption order, court must consider whether arrangements should allow any person contact with child. (§46[6]). Subject to certain exceptions regarding prospective adopters who are natural relatives of child, only adoption agency or person acting in pursuance of High Court order may arrange placement or adoption, etc, (§§92, 93). Restrictions apply as to preparation of reports concerning suitability for adoption, etc. (§94), and advertising concerning adoption (§§123, 124). Subject to strictly controlled exceptions, no payment or reward may be made for or in consideration of adoption of child, giving of consent to adoption, removing child from U.K. or handing over child with view to adoption, etc. (§§95, 96). Payments have been authorized by court in surrogacy cases, but commercial surrogacy is illegal and surrogacy contracts are unenforceable. (Surrogacy Arrangements Act 1985, §§1A, 2-4).

Order under Children Act 1989 (e.g., residence order or special guardianship order, §§8, 10, 14A-14G) may be made instead of adoption order in appropriate circumstances. (§1[6]).

Effect of Adoption.

Adoption order gives parental responsibility for child to adopters and operates to extinguish: (a) parental responsibility which any person has for child immediately before making of order; (b) any order under Children Act 1989; and (c) as regards any period after making of adoption order, any previously enforceable maintenance obligation (unless duty arises under trust or by way of express agreement that duty is not to be extinguished by making of adoption order). (§46[2]-[4]).

Adopted person is treated in law as if born as child of adopters or adopter. (§67[1]). He or she is legitimate child of adopter(s) and if adopted by couple or partner of natural parent is treated as child of relationship and of no other person. (§67[2], [3]).

Where disposition of property (whether inter vivos or by will) depends on date of birth of child or children of adoptive parents, that disposition is construed as if adopted child had been born on date of adoption (but this does not affect any reference to age of child and does not apply in cases where child is adopted by natural parent as sole adoptive parent). (§§69, 70).

Registration.

Registrar-General maintains Adopted Children Register, index of which is open to public search. (§§77, 78, Sch. 1). On reaching age of 18 adopted persons may obtain copy of their original birth certificate. (§§79[5], [6], Sch. 2). Since 1989 Registrar-General has maintained Adoption Contact Register. Birth relatives and adopted persons may register their wish to establish contact. (§§80, 81).

13.02 CHILDREN:

See topic 13.07 Infants.

13.03 CIVIL PARTNERSHIP:

See topic 13.12 Same-sex couples.

13.04 DIVORCE:

Divorce in England and Wales is regulated by Matrimonial Causes Act 1973. No petition may be presented before one year from date of marriage. (§3).

Grounds for Divorce.

By §1(1), sole ground for divorce is irretrievable breakdown of marriage. By §1(2), irretrievable breakdown can be established only by proof of one or more of following five facts: (a) that respondent has committed adultery and petitioner finds it intolerable to live with him or her; (b) that respondent has behaved in such a way that petitioner cannot reasonably be expected to live with him or her; (c) that respondent has deserted petitioner for continuous period of not less than two years immediately preceding presentation of petition; (d) that parties have lived apart for continuous period of at least two years immediately preceding presentation of petition and respondent consents to decree; (e) that parties have lived apart for continuous period of at least five years immediately preceding presentation of petition.

By §1(3), court is under duty "to enquire, so far as it reasonably can, into the facts alleged" by both parties. If at least one of five facts is established, court must pronounce decree unless either it is satisfied that marriage has not broken down irretrievably (§1[4]) or, where sole fact established is five years' separation, it is of opinion that decree should be refused because it would result in grave financial or other hardship to respondent and in all circumstances it would be wrong to dissolve marriage (§5).

Provisions Aimed at Encouraging Reconciliation.

Petitioner's solicitor must certify whether possibility of reconciliation has been discussed and court is given power to adjourn proceedings for such period it thinks fit if at any stage it appears to court that there is reasonable possibility of reconciliation. (§6). §2 permits resumption of cohabitation for period or periods not exceeding six months in total without prejudicing right to petition.

Procedure relating to matrimonial causes is set out in Family Proceedings Rules 1991. Cause is pleaded by petition and must contain information prescribed by rules. If opposed, respondent files answer and if no compromise can be achieved, case proceeds as defended suit. If undefended, divorce petitions proceed under “special procedure” by which prescribed affidavit is filed. If satisfied that grounds are made out and service has been effected, district judge issues certificate to that effect. Brief formal decree nisi hearing follows.

Vast majority of petitions are undefended and therefore proceed by way of “special procedure.” Inevitably, district judge is unable properly to fulfil his duty of enquiry into facts.

Additional Provisions.

Decree is granted in two stages; decree nisi, followed after six weeks and on application by petitioner by decree absolute. (§1[5]). If petitioner has not applied for decree to be made absolute at end of period of three months from earliest date on which he or she could have so applied, respondent may make application. (§9[2]). Decree nisi may be rescinded by court where Queen's Proctor (§8) or other person (§9[1]) has intervened and shown cause why it should not be made absolute. By §10, where only fact established is two years' separation with consent to divorce, court may rescind decree nisi if petitioner has misled respondent about any matter that he or she took into account in deciding to give consent. Further, in cases of either two years' separation with consent or five years' separation (in either case with no finding as to any other fact), court may, on application by respondent to consider his or her financial position, refuse to make decree absolute unless it is satisfied either that petitioner should not be required to make financial provision for respondent, or that provision has been made which is reasonable and fair or best that can be made in circumstances. Notwithstanding that such provision has not been made, court may nevertheless make decree absolute if it is desirable that decree should be made absolute without delay and satisfactory undertaking has been given by petitioner. Rules made under §7 allow agreements or arrangements to be referred to court for its opinion and directions.

Until decree nisi is made absolute parties are unable to marry again but thereafter there is no restriction on remarriage.

Judicial Separation.

By §17 grounds for judicial separation are those contained in §1(2) as facts for purposes of divorce. Court is not concerned to establish in proceedings for judicial separation that marriage has broken down irretrievably. Grant of decree of judicial separation releases parties from obligation to cohabit. (§18[1]). If while decree of judicial separation is in force either party to marriage dies intestate, his or her property devolves as if other party to marriage had then been dead. (§18[2]).

Jurisdiction.

Spouse may file petition in courts of England and Wales if any of conditions set out in European Community Regulation No. 2201/2003 (known as “Brussels II Bis”). Various conditions are based on concepts of habitual residence or domicile in England and Wales. Residual domestic rules apply where Brussels II Bis does not: Domicile and Matrimonial Proceedings Act 1973, §5.

Recognition of Foreign Divorce Decrees.

Decrees granted in other countries are recognized in accordance with conditions set out in Family Law Act 1986 §§45-49, save where European Community Regulation No. 2201/2003 (known as “Brussels II Bis”) applies (decrees granted by another Member State of European Union). Different criteria apply under 1986 Act to divorces obtained by means of proceedings and those obtained other than by proceedings. Act also provides for mutual recognition of divorces and judicial separations granted in any part of British Isles.

Ancillary Relief on Divorce or Nullity of Marriage.

Financial provision on or after divorce or nullity is governed by Matrimonial Causes Act 1973, Part II. Court is given broad discretionary jurisdiction to reallocate property by means of maintenance pending suit, orders for periodical payments and secured periodical payment orders, lump sum orders, settlements, variation of existing settlements, property transfer orders, pension sharing and sale of property orders. (§§21-24D). Periodical payment and lump sum orders may also be made by way of pensions attachment. (§§25B-25D). All property of either spouse, whenever and however acquired, is subject to jurisdiction. In exercising discretion, court is instructed to take into account all circumstances of case, first consideration being welfare while minor of any child of family who has not attained age of 18, plus list of further specific factors, including parties' financial resources, obligations and needs, standard of living enjoyed during marriage, their ages and duration of marriage, any physical or mental disability, conduct of parties at any time if it is such that it would be inequitable to disregard it, and any benefit which would be lost by reason of dissolution or annulment. (§25). Pre-nuptial agreements are void and so not binding, but may be taken into account in exercise of court's discretion. Recent decisions have given pre-nuptial agreements increasing weight in certain circumstances: Crossley v. Crossley (2007) EWCA Civ 1491; Radmacher v. Granatino (2009) EWCA Civ 649; but legislation required to make such agreements prima facie binding: MacLeod v. MacLeod (2008) UKPC 64.

Court is under duty to consider whether it would be appropriate to make “clean break” order. (§25A). Duty of full and frank disclosure is imposed on all parties in relation to all ancillary relief proceedings and order may be set aside if there has been material nondisclosure. Private agreements are encouraged and may be embodied in consent orders. (§33A). Orders for continuing financial provision terminate on remarriage, or formation of civil partnership, by party in whose favour order is made. (§28).

House of Lords in White v. White (2001) 1 AC 596 set out “yardstick of equality of division” to guide courts in ancillary relief proceedings. Further elaboration of three principles underpinning exercise of courts' discretion—need, compensation, and equal sharing—provided by House of Lords in Miller v. Miller; McFarlane v. McFarlane (2006) UKHL 24 and Court of Appeal in Charman v. Charman (2007) EWCA Civ. 503.

Divorce Reform.

The Family Law Act 1996 received royal assent on 4 July 1996. Part II of 1996 Act was to replace divorce law as described above with “no fault” system based on “a process over time”. Decrees of divorce and judicial separation were to be replaced by divorce orders and separation orders respectively. (§2). Irretrievable breakdown was to remain sole ground for divorce. Following unsatisfactory pilot schemes, in 2000 government announced that Part II of Family Law Act 1996 will not be implemented.

Annulment of Marriage.

See topic 13.09 Marriage.

Dissolution of Marriage and Presumption of Death.

See topic 13.09 Marriage.

13.05 DOMESTIC VIOLENCE AND OCCUPATION RIGHTS:

Occupation of Matrimonial or Civil Partnership Home.

Family Law Act 1996, Part IV, re-enacts with amendments law relating to rights of spouse or civil partner to occupy dwelling house which has been used, or is intended to be used, as matrimonial or civil partnership home. Act protects against eviction spouse or civil partner who is not entitled by virtue of beneficial estate or interest to occupy house and provides for statutory “home rights” to be registrable as charge on land (see further subhead Domestic Violence, infra). It further gives court jurisdiction to transfer certain tenancies on divorce, dissolution of civil partnership, breakdown of unmarried cohabitation, etc.

Domestic Violence.

High Court and county court possess inherent jurisdiction to issue injunctions in all cases where it is just and convenient to do so. (Supreme Court Act 1981, §37; County Courts Act 1984, §§38, 39). Although wording suggests very broad discretion, it is clear that such injunction will only be granted in support of existing legal or equitable right.

Part IV of The Family Law Act 1996, which came into force in 1998, replaces old law on domestic violence with new and unified scheme. Because of political wrangling original proposals were heavily amended and resultant law is cumbersome and unduly complicated. All courts have jurisdiction to grant new “non-molestation” and “occupation” orders. Domestic Violence, Crime and Victims Act 2004 introduces reform to civil and criminal law in this area by criminalising breach of non-molestation orders under Family Law Act 1996; by extending availability of restraining orders under Protection from Harassment Act 1997. New provision is made for establishment of Commissioner for Victims and Witnesses, whose function is to promote interests of victims and witnesses; to take steps to encourage good practice in treatment of victims and witnesses; and to review operation of code of practice. Further amended by Forced Marriages (Civil Protection) Act 2007 to give courts wide statutory powers to protect victims of forced marriage.

Non-molestation orders. Based on concept of “associated person”, broadly defined in §62 to include: (a) spouses or former spouses; (aa) civil partners or former civil partners; (b) cohabitants or former cohabitants; (c) persons living in same household otherwise than merely by reason of one of them being other's employee, tenant, lodger or boarder; (d) relatives; (e) engaged or formerly engaged couples; (eza) parties who have entered into civil partnership agreement; (ea) parties who have or have had intimate personal relationship with each other which is or was of significant duration; (f) in relation to child, both parties being parents or having had parental responsibility for child; or (g) parties to same family proceedings other than proceedings under Part IV of Act.

Forced Marriage Protection Orders.

May be made to protect someone from being forced into marriage, from attempts to be so forced, or to protect someone who has already been forced into marriage. (§63A[1]). "Forced marriage" occurs where one person forces another to enter into marriage (with that person or third party) without other's "free and full consent". (§63A[4]). High Court and county court empowered to make various orders in relation to very wide range of conduct and against very wide range of persons. (§63B). Breach of orders is enforceable and punishable as contempt of court. (§63H-L).

Occupation Orders.

Extent of protection offered and factors relevant to exercise of court's discretion depend on category of applicant. Initial distinction must be drawn between “entitled” and “non-entitled” applicants and respondents. Person is “person entitled” if he or she has right to occupy dwelling house by virtue of beneficial estate or interest or contract or enactment, or if he or she has “home rights” (see subhead Occupation of Matrimonial or Civil Partnership Home, supra) in relation to dwelling.

Entitled applicant may apply for occupation order against any associated person where dwelling-house was, or was intended to be, at any time home of both parties. Court has wide powers to regulate occupation, exclude respondent from vicinity and/or terminate home rights. Order may be made for specified period, until occurrence of specified event or until further order. (§33). If applicant is non-entitled, protection afforded will depend upon which of following categories applies: (a) Former spouse or former civil partner with no existing right to occupy: Where applicant is non-entitled former spouse or former civil partner, he or she may apply under §35 for occupation order against his/her entitled former spouse or entitled former civil partner in relation to dwelling that at any time was, or was intended to be, their matrimonial or civil partnership home. Order must be limited to have effect for specified period not exceeding six months, but may be extended on one or more occasions for further specified period not exceeding six months. (b) Cohabitant with no existing right to occupy: Where applicant is non-entitled cohabitant or former cohabitant, he or she may apply under §36 for occupation order against his/her entitled cohabitant or former cohabitant in relation to dwelling-house in which both parties cohabit or at any time cohabited or intended to cohabit. Order must be for specified period not exceeding six months, but may be extended on one occasion for further period not exceeding six months. (c) Neither spouse or civil partner, or neither former spouse or former civil partner, entitled to occupy: Where neither spouse or civil partner, or neither former spouse or former civil partner, is entitled person (i.e., they are mere licencees or squatters), either may apply under §37 for occupation order in relation to dwelling occupied by both which is or was matrimonial home. Order must be limited to have effect for specified period not exceeding six months, but may be extended on one or more occasions for further specified period not exceeding six months. (d) Neither cohabitant or former cohabitant entitled to occupy: Where both cohabitants, or former cohabitants, occupy dwelling which is home in which they cohabit or cohabited, but neither is entitled to remain in occupation, then either may apply under §38. Order must be for specified period not exceeding six months, but may be extended on one occasion for further period not exceeding six months.

13.06 HUSBAND AND WIFE:

Property Regime.

Common law doctrine of legal unity of husband and wife has been much eroded, both by statute and by judicial decision. Number of statutory reforms leading up to Married Women's Property Act 1882 replaced regime of unity of property with regime of separation of property; Law Reform (Married Women and Tortfeasors) Act 1935 placed married women on footing similar to single women for purposes of entry into contracts, torts, judgments and bankruptcy, and released husband from liability for his wife's torts and for her debts (see also Matrimonial Property and Proceedings Act 1970, §41). By Law Reform (Husband and Wife) Act 1962, parties to marriage have right of action in tort against each other, subject to court's discretion in certain circumstances.

There is no regime of community property in England. Instead, each spouse owns his or her separate property, and courts apply, in disputes between husband and wife general principles of property law addressed by House of Lords in Stack v. Dowden (2007) UKHL 17. Under Married Women's Property Act 1964 §1, money and property derived from any housekeeping allowance shall in absence of agreement to contrary be treated as belonging to husband and wife in equal shares.

13.07 INFANTS:

Age of majority is 18 for both sexes. (Family Law Reform Act 1969, §1).

Disabilities.

Contracts entered into by minors are generally not binding on minor, although they bind other party. Once minor has performed contract, however, he or she cannot recover money paid or property transferred. Moreover contract entered into by minor becomes binding if it is ratified by him or her after reaching full age.

Exceptions to general principle exist, and certain contracts will be valid and others voidable at instance of minor. Contracts that bind minors include contracts for necessaries, unless contract contains harsh and onerous terms. Necessaries include goods and services such as food, clothing, medicine, education and legal or medical advice. Minor is similarly bound by service contract or contract under which he or she makes living (e.g., as entertainer or athlete) unless it contains harsh or onerous terms.

Contracts voidable at instance of minor include contracts concerning land, to buy shares in companies, partnership contracts (to some extent) and marriage settlements. Voidable contract may be repudiated by minor either during his or her minority or within reasonable time of attaining majority.

On application by other party to contract, court has discretion to order minor to transfer to that other party any property acquired under unenforceable contract, or any property representing it. (Minors' Contracts Act 1987, §3). Contracts obviously prejudicial to minor are wholly void. Parents are not liable on their child's contract unless child acts as their agent, nor can minor's contract be validated by consent or authorisation of parent or guardian.

Property.

Minor cannot hold legal estate in land (Law of Property Act 1925, §1[6]), but can own beneficial interest under trust of land or settlement.

Illegitimacy.

Aim of Family Law Reform Act 1987 was to remove any remaining discrimination against illegitimate children. General principle enshrined in §1 is that enactments and instruments are to be construed without regard to whether father and mother of any person have or had been married to each other at any time. Affiliation proceedings were abolished by 1987 Act, and child support (see subhead Child Support, infra) is now assessed without regard to whether mother and father are or ever were married to each other.

Children Act 1989, §4 was amended by Adoption and Children Act 2002 to give automatic parental responsibility to unmarried father where birth of child is registered in names of both mother and father. In other cases, however, parental responsibility is not automatically acquired by unmarried father (Children Act 1989, §2[2]), although he may acquire it by virtue of parental responsibility agreement or by court order (Children Act 1989, §4). It remains case, furthermore, that citizenship in case of illegitimate child is acquired solely through mother (British Nationality Act 1981, §50[9]), that consent of unmarried father without parental responsibility is not required to give child up for adoption (see topic 13.01 Adoption), and that certain actions in respect of children, which depend on concept of “child of the family”, are available only where applicant is spouse or civil partner of respondent (whether child is illegitimate or stepchild) and therefore cannot be brought by unmarried mother of illegitimate child (see subhead Child Support, infra and topic 13.06 Husband and Wife, subhead Domestic Violence).

See also category 12 Estates and Trusts, topic 12.05 Descent and Distribution.

Actions.

As general rule children may bring or defend civil proceedings only if they are represented by “next friend” or guardian ad litem. Recent legislation, however, gives greater recognition to children's rights generally and includes in particular grant of locus standi to children themselves in certain actions, usually with leave of court and providing they are of sufficient understanding to make proposed application (see, for instance, Children Act 1989, §10[8], Family Law Act 1996, §43). Even where child is not represented or party to proceedings, courts are increasingly instructed to ascertain and take into account wishes and feelings of child concerned, considered in light of his or her age and understanding (e.g., Children Act 1989, §1[3][a]).

Adoption.

See topic 13.01 Adoption.

Parental Disputes.

Much of English child law was codified and/or amended in Children Act 1989. Old concepts of custody, care and control were abandoned in favour of central concept underlying child law of “parental responsibility”, defined as “all the rights, duties, powers, responsibilities and authority which by law a parent of a child has in relation to the child and his property”. (§3[1]). Parental responsibility automatically vests in each parent if they were married to each other at time of, or after, child's birth, or in case of illegitimate child, if child's birth is registered in names of both mother and father. (§§2, 4). In other cases of illegitimate children, mother alone has automatic parental responsibility. (§2); and unmarried father may acquire parental responsibility by agreement with mother, by joint registration of birth or by court order. (§4). Step-parent may acquire parental responsibility by agreement with each parent who has parental responsibility for child, or by court order. (§4A). Parental responsibility cannot be surrendered (except by adoption), but can be delegated. (§2[9]). Unmarried father or step-parent may cease to have parental responsibility if court so orders. (§§4[2A], 4A[3]).

Legal Proceedings Concerning Children.

Three main principles underlie law: (a) welfare principle: by §1(1) of Children Act, court is instructed that in any issue concerning upbringing of child or administration of his or her property, child's welfare shall be paramount consideration; (b) nonintervention principle: court must not make any order under Act unless it considers that doing so would be better for child than making no order at all (§1[5]); (c) presumption that delay is prejudicial (§1[2]).

§8 Orders.

Main types of order include following: (a) Residence order: settling arrangements to be made as to person with whom child is to live; (b) contact order: requiring person with whom child lives, or is to live, to allow child to visit or stay with person named in order, or for them otherwise to have contact; (c) prohibited steps order: order that no step which could be taken by parent in meeting his or her parental responsibility for child, and which is of kind specified in order, shall be taken by any person without consent of court; (d) specific issue order: giving directions for determination of specific question.

Specified persons may apply for §8 order as of right, others (including child himself or herself) with leave of court, and court may make order of its own initiative. (Children Act 1989, §10).

Enforcement of Contact Orders.

Children and Adoption Act 2006 strengthens powers of courts to promote and enforce contact orders.

Special Guardianship.

Children Act 1989 is amended by Adoption and Children Act 2002 to introduce new concept of “special guardianship”. Special guardian must be age 18 or over and must not be parent of child in question. Application may be brought as of right or with leave of court, and court may make special guardianship order of its own initiative. (§14A). Applicant must give written notice to local authority of intention to apply and local authority must prepare report on suitability of applicant to be special guardian, etc. (§14B[8]). Effect of special guardianship order is to give parental responsibility for child to special guardian and, subject to any other Children Act 1989 order in force with respect to child, is entitled to exercise parental responsibility to exclusion of any other person with parental responsibility for child (apart from another special guardian). (§14C). Exceptions apply to any enactment or rule of law that requires consent of more than one person with parental responsibility; and to rights of parent of child with respect to adoption. (§14C[2]). Before making special guardianship order, court must consider whether contact order should also be made and whether any §8 order should be varied or discharged. On making order, court may also give leave for child to be known by new surname. (§14B). Special guardianship orders may be varied or discharged by court order. (§14D). Each local authority must arrange for provision of special guardianship support services, including counseling, advice and information. (§14F).

State Intervention and Children.

Children Act 2004 establishes Children's Commissioner for England. Commissioner's role is to promote awareness of views and interests of children (§2); he may hold enquiries on direction of Secretary of State or on his own initiative. 2004 Act aims to improve integrated planning, commissioning, and delivery of children's services and to provide for clear accountability through local Directors of Children's Services. Act imposes duty on local authorities to make arrangements through which key agencies cooperate to improve well-being of children and young people and widen services' powers to pool budgets in support of this aim. Provision is made for establishment of information databases to facilitate contact between professionals who are supporting individual children or who have concerns about their development, well-being or welfare with aim of securing early, coherent intervention. Each local authority must establish Local Safeguarding Children Board. Aim is to ensure that each local area has effectively managed coherent approach to safeguarding children based on contributions from all key agencies.

Voluntary Placement of Children in Local Authority Accommodation.

Child may be placed in local authority accommodation voluntarily; in which event parental responsibility is not acquired by local authority. Person with parental responsibility may at any time remove child from such accommodation. (Children Act 1989, §20).

Care Proceedings.

Child may be taken into compulsory care if court is satisfied: (a) that child is suffering, or is likely to suffer, significant harm; and (b) that harm or likelihood of harm is attributable to (i) care given or likely to be given to child if order were not made, not being what it would be reasonable to expect parent to give; or (ii) child's being beyond parental control. (Children Act 1989, §31).

Emergency Protection Orders.

To remove, or prevent removal of, child from accommodation where there is likelihood of significant harm. Orders may be for up to eight days in duration, with extension for possible further seven days. Challenge is possible after 72 hours. (Children Act 1989, §44). Exclusion requirement may be included in emergency protection order in certain circumstances. (Children

Act 1989, §44A).

Other Possible Orders Under Children Act 1989.

(a) Child assessment order: directs production of child so assessment can be made and decision taken as to whether to proceed for emergency protection order or care order (§43); (b) education supervision order: places child under supervision of local education authority (§36); (c) family assistance order: requires officer of Children and Family Court Advisory and Support Service or local authority to "advise, assist and befriend" particular family (§16); (d) recovery order: to discover whereabouts and secure production of child who is missing or away from home (§50); (e) supervision order: places child under supervision of local authority or probation officer, possibly subject to certain conditions (§35).

Child Support.

The Child Support Act 1991 introduced fundamental changes to obtaining of financial support for children. Two key characteristics of new law were: (1) Assessment, collection and enforcement of maintenance was carried out not by courts, but by Child Support Agency, administrative body responsible to Department for Work and Pensions; and (2) Act laid down formula to be applied to calculate amount of maintenance needed by child and to be met by nonresident parent. Key aspects of 1991 Act amended by Child Maintenance and Other Payments Act 2008, inter alia replacing Child Support Agency with non-departmental public body, Child Maintenance and Enforcement Commission (``CMEC'').

Relevant parties for purposes of child support (§3) are: (1) "qualifying child": child must be single, never having been spouse or civil partner, under age of 16 or under age of 19 and in full-time non-advanced education, and one or both of his or her parents must be, in relation to child, "nonresident parent"; (2) "nonresident parent": "parent" for purposes of 1991 Act includes birth parents, adoptive parents and parents by virtue of Human Fertilisation and Embryology Act 1990. Stepparents are not included. Parent is "nonresident parent" if he or she does not live in same household with child and child has his or her home with person who is, in relation to him, person with care; in cases of dispute as to parentage, child support officer must not make maintenance calculation and matter must be referred to court for declaration that alleged parent is or is not child's parent unless case falls within statutory presumptions (§§26, 27); (3) "person with care": person with whom child has his or her home, who usually provides day to day care (exclusively or in conjunction with any other person) and who does not fall within proscribed category. More than one person can be "a person with care" in relation to child.

Subject to certain exceptions, child support officer has jurisdiction only if each of relevant parties is habitually resident in U.K. (§44[1]).

Applications.

Original Act distinguished parents with care in receipt of certain types of state benefit from other applicants. For former, effectively compelled to apply to Agency and was under duty to cooperate with Agency on pain of reduction in benefits. Child support received from nonresident parent would, after small disregard, reduce pound for pound benefits payable to parent with care. All other applicants were free to decide whether to apply to Agency.

This distinction now abolished by 2008 Act. All persons with care now free to decide whether to apply to CMEC, though application is (as before) precluded in certain cases (where there is in force written maintenance agreement made before 5 Apr. 1993 or maintenance order made before 6 Apr. 2002, or made after that date but has been in force for less than one year from date on which made). From Apr. 2010, parents with care claiming relevant benefits will retain benefits in full, regardless of amount of maintenance recovered from nonresident parent. All parents now encouraged to reach private agreement regarding maintenance, but such agreements not legally enforceable by CMEC or courts (save where enshrined in consent order, though such order only excludes jurisdiction of CMEC for one year).

Duty to supply information is imposed on nonresident parents, employers, tax authorities and local authorities administering housing benefit, to enable CMEC discover nonresident parent's means and liabilities. (Child Support Act 1991, §14, Sch.2, Child Support [Information, Evidence and Disclosure] Regulations, 1992). Inspectors with wide powers of entry and enquiry appointed under §15 of 1991 Act. It is criminal offence to fail to comply, or intentionally to delay or obstruct, inspector in exercise of his duties. (§15[9]).

Calculation itself is made under formula contained in Schedule 1 of Act. Old, complex formula was replaced (by Child Support, Pensions and Social Security Act 2000) with new calculation based on simple fraction of nonresident parent's income, depending on number of qualifying children and whether care is shared. Formula further amended by 2008 Act, principally to base assessment on previous year's gross weekly earned income, rather than current net earned income.

Default and interim maintenance decisions may be made where CMEC does not have sufficient information to make full calculation or variation decision. (§12).

Variations.

Criticisms of original child support scheme resulted in various amendments, incorporated into 1991 Act by Child Support Act 1995 and Child Support, Pensions and Social Security Act 2000, so amount of child support payable may be varied in minority of cases. (§§28A-J, Schedules 4A, 4B).

Collection and Enforcement.

CMEC has wide powers of collection and enforcement, enlarged by 2008 Act (§§29-43A). House of Lords has held that parent with care has no right to enforce child support by application to court: R (Kehoe) v. Secretary of State for Work and Pensions (2005) UKHL 48, Kehoe v. UK (2009) 48 EHRR 2.

Residual Role of Courts.

Court has no power to make periodical payments orders in favour of children where CMEC has jurisdiction but retains residual role in cases falling outside that jurisdiction (e.g., stepchildren, cases where habitual residence requirement is not satisfied or child is not qualifying child) and in certain cases where application to court may be made in addition to CMEC (e.g., “top up” orders, where parental income is above certain level; orders solely to meet costs incurred with education or training; orders for lump sum or property adjustment; and orders made by consent).

13.08 MAINTENANCE DURING MARRIAGE OR CIVIL PARTNERSHIP:

Duty to maintain is imposed by statute on both husband and wife, and on civil partners. In case of spouses, duty is enforceable by way of action under Domestic Proceedings and Magistrates' Courts Act 1978 or Matrimonial Causes Act 1973; in case of civil partners, duty is enforceable under Sch. 5 of Civil Partnership Act 2004. Court is given broad discretionary jurisdiction to determine what order, if any, to make, taking into account list of specific factors and all circumstances of case. Additionally, duty to maintain may be enforced by state against person whose spouse or civil partner is in receipt of certain state benefits: Social Security Administration Act 1992, §§105-108.

13.09 MARRIAGE:

Age of consent to marry is 16 for both sexes. Consent of parents or guardians is required for marriages where either party is under 18.

Marriage must be celebrated pursuant to formal requirements attaching to completion of one of following preliminaries: (1) By special licence; (2) by common licence; (3) by publication of banns; (4) by certificate of Superintendent Registrar, either (a) with or (b) without licence.

Medical examinations and blood tests are not required.

If either party has previously had marriage or civil partnership, certified copy of decree absolute/final dissolution order must be produced at ceremony.

Prohibited Marriages and Annulment.

Matrimonial Causes Act 1973 distinguishes between void and voidable marriages. Marriage which is void is complete nullity, and no decree of annulment is required before entry into further marriage, although certain legal consequences may flow from grant of decree, such as grant of ancillary relief. Marriage which is voidable is valid unless and until decree of nullity is obtained from court of competent jurisdiction. In case of voidable marriage, only parties to marriage may petition, and only while both are still alive; in case of void marriage, not only parties themselves, but any person with "sufficient interest" (any pecuniary interest) may petition, and this even after death of one or both parties to void marriage.

Void Marriages.

As regards marriages celebrated after 31 July 1971, grounds on which marriage is void ab initio are set out in Matrimonial Causes Act 1973, §11, namely: (a) that marriage is not valid marriage under Marriage Acts 1949-1986 because (i) parties are within prohibited degrees of relationship, (ii) either party is under age of 16, or (iii) certain formal requirements have not been complied with; (b) that either party was already lawfully married or civil partner; (c) that parties are not respectively male and female; (d) in case of polygamous marriage entered into outside England and Wales, that either party was at time of marriage domiciled in England and Wales.

Grounds on which marriage celebrated before 1 Aug. 1971 is void are set out in Schedule 1 to Matrimonial Causes Act 1973.

Prohibited Degrees of Relationship.

Marriages are void between a person and each of following relations (Marriage Act 1949, Sch. 1):

Child

Sibling's child

Adoptive child

*Child of former spouse

Former adoptive child

*Child of former civil partner

Parent

*Former spouse of parent

Adoptive parent

*Former spouse of grandparent

Former adoptive parent

*Former civil partner of parent

Grandparent

*Former civil partner of grandparent

Grandchild

*Grandchild of former spouse

Parent's sibling

*Grandchild of former civil partner

Sibling

However, marriages between persons related by affinity and marked with symbol* are permitted provided that both parties have attained age of 21 at time of marriage and younger has not at any time before attaining age of 18 been child of family in relation to elder. Marriages between parents- and children-in-law are now permitted, following decision of European Court of Human Rights in B and L v. United Kingdom (2006) 42 EHRR 11.

Voidable Marriages.

As regards marriages celebrated after 31 July 1971, grounds on which marriage is voidable are set out in Matrimonial Causes Act 1973, §12, namely: (a) non-consummation owing to incapacity of either party; (b) non-consummation due to wilful refusal of respondent; (c) lack of consent by either party in consequence of duress, mistake, unsoundness of mind, or otherwise; (d) that either party was at time of marriage suffering from mental disorder so as to be unfit for marriage; (e) that respondent was suffering at time of marriage from venereal disease in communicable form; (f) that respondent was pregnant per alium at time of marriage; (g) that after time of marriage interim gender recognition certificate was granted to either party; (h) that respondent had become acquired gender under Gender Recognition Act 2004.

Certain bars to relief are contained in §13: in cases (c) to (f) and (h) petition must be brought within three years of marriage; in case (g) petition must be brought within six months of issue of interim gender recognition certificate; and in cases of (e), (f) and (h) petitioner must at time of marriage have been ignorant of facts alleged. In all cases decree will not be granted if respondent satisfies court that petitioner, with knowledge that it was open to him or her to have marriage avoided, so conducted him- or herself as to lead respondent reasonably to believe that he or she would not seek to do so, and that it would be unjust to respondent to grant decree. Collusion is no longer bar.

Children of Void and Voidable Marriages.

Decree of nullity in respect of voidable marriage is no longer retrospective (§16), so children remain legitimate. By Legitimacy Act 1976, §1, child of void marriage will be treated as legitimate child of his parents if at time of insemination resulting in birth (or at time of celebration of marriage, if later) either or both of parties reasonably believed that marriage was valid.

13.10 MARRIED WOMEN:

See topics 13.06 Husband and Wife, 13.09 Marriage.

13.11 PRESUMPTION OF DEATH AND DISSOLUTION OF MARRIAGE OR CIVIL PARTNERSHIP:

Married person who alleges that reasonable grounds exist for supposing other party to marriage is dead may petition court under §19 of Matrimonial Causes Act 1973 for decree of presumption of death and dissolution of marriage. In case of civil partners, presumption of death order may be obtained under §55 of Civil Partnership Act 2004.

13.12 SAME-SEX COUPLES:

Civil Partnership Act 2004 enables same-sex couples to obtain legal recognition of their relationship by registering civil partnership. Under Civil Partnership Act 2004 §3, in order to register civil partners must be: of same sex; not already in civil partnership or married; not within prohibited degrees of relationship; both age 16 or over (if either of them is under 18, consent of appropriate person or persons, as set out in Part 1 of Sch. 2, must be obtained).

Registration of civil partnership confers on civil partners rights that are virtually identical to those of married couples. C. 2 of Civil Partnership Act 2004 governs dissolution, nullity, presumption of death and separation orders. C. 3 makes provision for financial relief for civil partners and children of family on dissolution, nullity or separation order. It includes provisions to allow civil partners to benefit from succession rights identical to those of married couples. C. 5 amends existing child and adoption legislation to reflect relationship of civil partnership. C. 6 extends to civil partners same rights as married couples as regards tenancies, occupation rights, remedies for domestic violence, actions in tort and rules of evidence (see topic 13.05 Domestic Violence and Occupation Rights).

Part 6 of Civil Partnership Act includes provision for recognition of same-sex relationship registrations effected in other jurisdictions. Parties who have same-sex marriage from another jurisdiction not recognised as spouses but as civil partners: Wilkinson v. Kitzinger (2006) EWHC 2022.

13.13 TRANSSEXUALS:

Following Goodwin v. UK (2002) 35 EHRR 18, Gender Recognition Act 2004 confers on post-operative transsexuals right to legal recognition of their acquired gender on issue of full gender recognition certificate by Gender Recognition Panel. Rights include right to new birth certificate and right to marry, although nondisclosure of acquisition of gender recognition certificate renders subsequent marriage voidable at instance of other spouse (see topic 13.09 Marriage). Existing status as parent is not affected. Provisions are included to regulate social security and pension entitlement, succession rights, and gender-specific criminal offences. Specific regulation is included to empower sports regulators to prohibit or restrict participation by transsexuals in gender-affected sports where such prohibition or restriction is necessary to ensure fair competition or safety.

13.14 UNMARRIED COHABITANTS:

Law Commission published in 2007 report on financial relief on breakdown of relationships between couples, opposite-sex or same-sex, not spouses or civil partners of each other. Under present law, cohabitants must rely on ordinary principles of trusts, proprietary estoppel, etc., in seeking share of assets on breakdown of relationship. Report recommends introduction of new statutory remedies in certain cases. Government wishes to gather further information before deciding whether to adopt recommendations. Two private members' Bills introducing remedies for cohabitants failed in 2009.

14 FOREIGN TRADE AND COMMERCE

14.01 CUSTOMS:

Customs duties are levied on many imports. Different rates apply to the various categories of goods and in many cases vary according to the country of origin. Commissioners for Revenue and Customs responsible for collection and management of duties of customs and excise. They perform their functions subject to direction and control of H. M. Treasury and enforce V.A.T. system. (See category 21 Taxation, topic Taxes.) They may also stop importation of certain prohibited articles. (Commissioners for Revenue and Customs Act 2005).

U.K. is member of EU and enjoys special relationship with other member states for these purposes. U.K. applies customs rules of EU, and its application of excise duties is subject to various EU Directives.

See also category 21 Taxation, topic Taxes, and European Union Digest, category 14 Foreign Trade and Commerce, topic Customs Duties.

14.02 EXCHANGE CONTROL:

There are no restrictions on transfer of funds into or out of U.K.

14.03 FOREIGN EXCHANGE:

See topic 14.02 Exchange Control.

14.04 FOREIGN INVESTMENT:

There are no exchange controls and capital may be moved in and out of U.K.

14.05 FOREIGN TRADE REGULATIONS:

Many complicated provisions apply. Law consolidated in Alcoholic Liquor Duties Act 1979 (as am'd by Police and Criminal Evidence Act 1984 and by Value Added Tax Act 1983), Customs and Excise Duties (General Reliefs) Act 1979 (as am'd by Police and Criminal Evidence Act 1984 and by Value Added Tax Act 1983), Customs and Excise Management Act 1979 (as am'd by Police and Criminal Evidence Act 1984, by Car Tax Act 1983 and by Value Added Tax Act 1983), Excise Duties (Surcharge or Rebates) Act 1979, Hydrocarbon Oil Duties Act 1979 (as am'd by Police and Criminal Evidence Act 1984 and by Value Added Tax Act 1983), and Tobacco Products Duty Act 1979 (as am'd by Value Added Tax Act 1983 and by Police and Criminal Evidence Act 1984).

Generally speaking, goods imported subject to customs duty or value added tax at various rates. Importation of forged coins, indecent matter, goods bearing false trademarks or falsely described and certain drugs prohibited. Importation of agricultural products, food, animals, explosives and certain drugs subject to controls. Export of certain antiques prohibited and export of certain metal wastes subject to EU quotas.

U.K. is member of European Union, hence certain preferences for member states. No exchange control restrictions.

See also topic 14.02 Exchange Control, and European Union Digest, category 14 Foreign Trade and Commerce, topics 14.05 Foreign Trade Regulations; Internal Market, subheads Free Movement of Goods, Free Movement of Workers and Freedom to Provide Services.

15 HEALTH

15.01 LAWFULNESS OF TREATMENT:

General Principles.

Competent adults can only be treated with their consent, which is valid provided that they have been informed in broad terms of nature of procedure which is intended. (Chatterton v. Gerson [1981] 1 All ER 643). Competence is tested in relation to patient's ability to understand information relevant to decision, to retain that information, to use or weigh that information as part of process of making decision, and to communicate his decision (Mental Capacity Act [MCA] 2005, §3[1]). Competent patients are free to decline treatment for reasons which are rational, irrational or for no reason at all. (Sidaway v. Board of Governors of the Bethlem Hospital [1985] 1 All ER 643). To provide for future loss of capacity, competent adults can confer power to make decisions relating to personal welfare, including medical treatment and care, on donee of “lasting power of attorney” (LPA), which remains valid beyond patient's subsequent loss of capacity. (§9 MCA). LPAs are court reviewable. (§§22, 23 MCA).

Children (below age of 18) can be treated with consent of their parents, or with their own consent provided they are over 16 or sufficiently mature to be able to consent. (§8 Family Law Reform Act 1969 and Gillick v. West Norfolk and Wisbech Health Authority [1986] AC 112). Unlike adults, competent children have no absolute right to refuse treatment; their parents remain able to consent on their behalf and in absence of parental consent, courts can order treatment to go ahead in their best interests. (Re W [1992] 4 All ER 627). Competent children (under the age of 18) cannot create LPA.

Incompetent Patients.

MCA 2005 put treatment of incompetent patients in England and Wales on statutory footing. Under §5(1) MCA, incompetent patients can be given treatment which is in their “best interests” (defined in §4 MCA). Decisions involving restraint of incompetent patient are subject to further procedural safeguards and substantive qualifications (§6 MCA). §§15 to 21 MCA set out powers of court in relation to treatment of incompetent patients and make provision for court-appointed deputees. In Scotland, treatment of incompetent adult patients is governed by Adults with Incapacity (Scotland) Act 2000.

No Authority to Order Treatment Not Backed by Doctors in Charge.

Doctors and Health Authorities cannot be forced to provide treatment which they do not consider is in patient's best interest. (Re C [1998] 1 FLR 384).

Special Issues.

End-of-Life Decisions.

Competent patients have absolute right to refuse life-saving treatment even if withholding or withdrawal of such treatment will result in their death. (Re B [2002] 2 All ER 449). Such treatments also may not be provided to adult incompetent patients who, while still competent, have made advance decision to refuse certain life-saving treatments which meet terms of §24 MCA, or have executed LPA in which they have expressly empowered donee to refuse such treatments on their behalf, and donee refuses treatment. Treatments can, however, be provided while court decision on validity and scope of either is pending. (§6[7] MCA). Incompetent patients (whether adults or children) will be provided with life-saving treatment as long as such treatment is in their best interests. (§4 MCA). In case of insensate patients, for instance those in Permanent Vegetative State (PVS), treatment (including nourishment) will be withdrawn once it is clear that there is no hope of patient regaining at least some degree of sensate experience. (Airedale NHS Trust v. Bland [1993] AC 789). Much weight is placed in this context on act-omission distinction, which allows and indeed mandates withholding or withdrawal of treatment which is no longer in patient's best interests, while active euthanasia and assisted suicide remain unlawful. (Suicide Act 1961, §2).

Surgical separation of conjoined twins has been declared lawful in case where weaker twin lacked functional heart and separation meant her certain death but normal life for stronger twin, who would otherwise have suffered heart failure within a couple of months due to double strain of pumping blood through her own and her twin's body. (Re A [2000] 4 All ER 961).

Abortion.

Abortions can be provided under Abortion Act 1967, which allows for abortions to be performed during first 24 weeks of pregnancy on “social grounds” and—without time limit—in order to prevent grave permanent injury to physical or mental health or loss of life of pregnant woman, and on grounds of fetal abnormality. Procedurally, in any but emergency situation abortion has to be performed by registered medical practitioner after two such practitioners have, in good faith, formed opinion that one or more of grounds for lawful abortion are present. Conscientious objection to participation in such treatment is possible.

Abortion Act 1967 applies only in England and Wales, and in Scotland. In Northern Ireland, abortions can only be performed to save life or avert grave physical or mental injury to pregnant woman. (R v. Bourne [1938] 3 All ER 615).

Mental Illness.

Compulsory treatment for mental illness is governed by Mental Health Act 1983 as amended by Mental Health Act 2007. Persons suffering from mental illness can also seek treatment voluntarily. Mentally ill patients in many cases retain their capacity to consent to treatment, especially if treatment in question relates to their physical condition rather than their mental health.

15.02 MEDICAL NEGLIGENCE CLAIMS:

General Principles.

Doctors and—vicariously—Health Authorities who employ them are liable for harm which results from negligent treatment. Health Authorities can also be directly liable for negligently failing to set up organisational structures so as to ensure proper treatment and care. (Blyth v. Bloomsbury HA [1993] 4 Med LR 151).

Basis of Claim.

Doctor is not guilty of negligence if he has acted “in accordance with a practice accepted as proper by a responsible body of medical men skilled in that particular art”. (Bolam v. Friern HMC [1957] 2 All ER 118). Courts are prepared to review whether opinion of qualified practitioner is “responsible”; where expert opinion is not capable of withstanding logical analysis judge is entitled to reject it. (Bolitho v. City and Hackney HA [1997] 4 All ER 771).

Under this test, malpractice claims based on failure to inform patient of risks pertaining to treatment which in event materialise despite proper care can only succeed if court finds that doctor's choice not to warn patient has no support from his peers. “Bolam test” applies in regard to how much information concerning treatment doctor needs to volunteer (Sidaway v. Board of Governors of the Bethlem Hospital [1985] 1 All ER 643), and only inquisitive patient will be entitled to full and comprehensive information about possible risks and side effects of proposed treatment (Chester v. Afshar [2004] 3 WLR 927 [HL]). Doctrine of “informed consent”, accepted in other common law jurisdictions, has no place in English medical law. (Chatterton v. Gerson [1981] 1 All ER 257).

Liability can arise both towards patient as “primary victim” and towards certain other “secondary” victims who are immediately and foreseeably affected by treatment given to patient (including hospital staff), or so close to patient that doctor's duty of care extends to them. (Farrell v. Avon NHA [2001] Lloyd's Rep. Med. 458).

Causation and Recoverable Damages.

General principles apply. Causal link between negligence and injury, and between injury and damage needs to be shown. Remoteness of damage precludes recovery. Psychological harm is recoverable. (Walters v. North Glamorgan NHS Trust [2003] Lloyd's Rep. Med. 49). In “negligent failure to warn” cases causation between failure to warn and subsequent harm is made out not only if patient would not have undergone procedure at all if duly warned, but also if patient would have undergone procedure on different occasion, on which (on balance of probabilities) patient would not have suffered harm (Chester v. Afshar above). Loss of less than 50% chance of recovery is not recoverable. (Gregg v. Scott [2005] UKHL 2). Patients may alternatively opt for compensation under NHS Redress Act 2006.

NHS Indemnity.

Unlike general practitioners who have to rely on professional insurance to cover against risks of malpractice, hospital doctors benefit from NHS indemnity scheme according to which NHS will bear damages of successful malpractice claims brought against its employees. (Department of Health, NHS Indemnity—Arrangements for Clinical Negligence Claims in the NHS [1996] Cat No. 96 HR 0024).

Wrongful Life and Wrongful Birth.

Failed sterilisations have given rise to cases where patients sought to claim damages for birth of healthy child. Such claims are accepted by courts provided that sterilisation was performed negligently or that there was negligent failure to warn patient of residual risk of pregnancy. Refusal by mother to have abortion following discovery of unwanted pregnancy does not break chain of causation. However, costs of raising unwanted but healthy child are not recoverable. Claim is limited to pain, suffering and inconvenience of pregnancy experienced by mother. (McFarlane v. Tayside Health Board [2000] 2 AC 59). Furthermore, in recognition of fact that parent of child born following negligently performed sterilisation is, after all, victim of legal wrong, “conventional award” in region of £15,000 will be made to parent to mark injury and loss of freedom to limit size of one's family. (Rees v. Darlington Memorial Hospital NHS Trust [2003] 3 W.L.R. 1091).

No exception from these rules will be made in case where healthy child is born to severely disabled parent, even where disabled parent incurs extra expenses in raising child compared to parent without disability. In Rees v. Darlington Memorial Hospital NHS Trust [2003] 3 W.L.R. 1091, House of Lords overturned earlier Court of Appeal's decision which had allowed such claim.

In case where child which was born after failed sterilisation was disabled, Court of Appeal allowed parents to recover “extra expenses associated with child's disability”, though not basic costs of raising child. Court also awarded general damages for extra personal care and burdens associated with upbringing of disabled child (Parkinson v. St. James & Seacroft University Hospital NHS Trust [2002] QB 266). House of Lords' decision in Rees v. Darlington Memorial Hospital NHS Trust (above) has recently cast doubt on this ruling. Two of their Lordships suggested obiter that even where disabled child is born in case of wrongful conception, conventional award should be end of matter.

Child itself has no claim, since it could never have been born otherwise than disabled (McKay v. Essex AHA [1982] 2 WLR 890 - “wrongful life”).

Negligent Injury to Child Before or During Birth.

Principles set out above apply to cases where disability arises from undetected natural cause, with negligence pertaining to either occurrence of pregnancy as such—“wrongful conception”—, or to failure to diagnose risk or existence of natural disability or malformation in course of pregnancy. Different principles apply where child is born disabled because of negligent medical treatment prior to or during delivery. In these cases child itself can claim damages for negligent injury that caused disabilities under Congenital Disabilities (Civil Liability) Act 1976, §1 para. 2(b). Child's claim is founded on injury to person and consequential loss. Damages awards are substantial.

15.03 MEDICALLY ASSISTED REPRODUCTION:

Medically assisted reproduction is regulated by Human Fertilisation and Embryology Acts 1990 and 2008. Human Fertilisation and Embryology Authority is charged with licensing fertility clinics and treatments. Licensed clinics provide for treatment services involving storage of gametes and/or use of donated sperm or eggs and/or in vitro fertilization. Legislation also regulates licensing of embryo research.

15.04 THE SYSTEM OF PUBLIC HEALTHCARE IN BRITAIN:

Healthcare in Britain is provided largely free of charge to all persons resident in England and Wales through National Health Service, “NHS”. (National Health Service Act 2006, §1 para. 3). Overseas visitors can be charged (NHS [Charges to Overseas Visitors] Regulations 1989, SI 1989 No. 306), and it is not unlawful for NHS Trust to refuse to continue to treat visitors without payment in advance (R. v. Hammersmith NHS Trust, ex parte Reffell [2000] 55 BMLR 130).

No Right to Treatment.

There is no right to receive particular kind of treatment. Review applications brought by patients who are being denied treatment tend to be unsuccessful, as courts are reluctant to interfere with health authorities' choices about resource allocation. (R. v Cambridge HA, ex parte B [1995] 23 BMLR 1). NHS is notorious for being chronically understaffed and under-resourced, with waiting lists for all but most urgent surgical interventions and some potentially life-saving treatments unavailable due to financial constraints. At same time, reasonable standard of care is ensured in most cases.

Private Treatment.

Alongside this system of free public healthcare private treatment is available and often provided in same hospitals which offer NHS care. (§65, 77 NHSA 1977; §267 NHSA 2006). Additional private health insurance is exception rather than norm.

16 IMMIGRATION

16.01 ALIENS:

Nationality covered by British Nationality Act 1981. Alien is person who is neither Commonwealth citizen nor British Protected Person nor citizen of Republic of Ireland.

Alien not eligible to vote in any election except EU nationals who may vote in “municipal” but not “national” elections. (European Communities [Amendment] Act 1993; Treaty on European Union [Maastricht Treaty], art. 8b). Alien may sue or be sued (except in wartime) and is triable in criminal matters. See category 5 Civil Actions and Procedure, topic 5.01 Actions.

Visitors.

Those without right of abode (see topic 16.03 Immigration) must obtain leave to land here. Aliens (but not EU nationals) may be required to register with police (and pay fee). Visitor granted leave up to six months but period not able to be extended. Nationals of many countries must be granted entry clearance by local British consular representatives before travelling to U.K. Appeals against refusal of entry clearance may not be exercised from within U.K. Right of appeal against refusal of entry clearance limited but is available to those seeking to visit relative in U.K. Often appeals against refusal of leave to enter must be made from outside U.K. There are special rules for particular groups (business travellers, those seeking medical treatment, etc.). ``Points based'' system is in process of being adopted in order to manage migration on economic grounds to U.K. new system divided into five ``tiers'' (Tier One [Highly Skilled Workers], Tier Two [Skilled Workers (with job offers)], Tier Three [Unskilled Workers], Tier Four [Students], Tier Five [Temporary Workers]) with special rules concerning accumulation of points for each tier.

See topic 16.03 Immigration.

16.02 ASYLUM:

Those in fear of persecution in home country on racial, religious, national origin or like grounds may apply for political asylum in U.K. Women in fear of violence because of accusation of adultery have right to asylum. But applicable rules applied strictly. Rights of appeal limited and asylum seekers ineligible for many welfare benefits unless asylum claimed on entry to U.K. Asylum seekers must claim asylum in first country reached which would give proper consideration to claim under Geneva Convention 1951. U.K. generally returns asylum seekers to such safe third country. Immigration and Asylum Act 1999 tightens administration of rules further (asylum seekers may be held in detention while claim determined) and extends limited welfare benefits, predominantly in kind but with small cash component, to asylum seekers. “Accommodation Centres” have been established in which growing numbers of asylum seekers will be held while claims determined have been established.

16.03 IMMIGRATION:

Regulated by Immigration Act 1971 (as am'd by British Nationality Act 1981) and Statement of Changes in Immigration Rules. (HC 645 [2005]).

Right of abode under 1971 Act is given to British citizens as defined by 1981 Act and those defined Commonwealth citizens who retain their present right of abode for their lifetimes. Nationality, Immigration and Asylum Act 2002 requires such persons to obtain certificate of entitlement to right of abode.

British citizenship acquired (i) by birth in U.K. to parents at least one of whom is citizen or settled in U.K., (ii) by birth outside U.K. to parents at least one of whom is citizen by birth in U.K. Offspring born abroad of citizens by descent may be registered as such by Secretary of State. There are other exceptional cases. See category 4 Citizenship, topic 4.03 British Citizenship.

Those who are not citizens must obtain leave to enter U.K. from Immigration Officer. Secretary of State may make regulations concerning landing and embarking and conditions to be imposed upon them. Spouses of citizens (and others settled in U.K.) generally qualify for entry. Where both parents settled in U.K. unmarried children under 18 may be granted leave to join them.

Only appeal from decision of immigration officer is to new Asylum and Immigration Tribunal with limited right of appeal from AIT to High Court to be exercised only once and subject to tight time limits (five days if appellant in U.K.). Immigration, Asylum and Nationality Act 2006 restricts appeal rights of persons refused clearance to enter the U.K. by U.K. consulates abroad to those seeking entry as dependants or family visitors. There is special right of appeal on ground of breach of human rights. Where claim "clearly unfounded" asylum seeker may be removed from

U.K. before appeal heard.

EU nationals may enter and work in U.K. without restriction. There is similar free movement of persons within European Economic Area (EEA), viz, EU plus Norway and Liechtenstein (but not Switzerland). Also see Statement of Changes (as above).

See also topic 16.01 Aliens, and European Union Digest, category 14 Foreign Trade and Commerce, topic Internal Market, subheads Free Movement of Workers and Freedom to Provide Services.

17 INTELLECTUAL PROPERTY

17.01 COPYRIGHT AND DESIGNS:

U.K. Law relating to copyright is contained in Copyright, Designs and Patents Act 1988, as amended to give effect to Directives of European Union. Works created before this Act continue in some respects to be governed by earlier law.

Nature of Copyright.

Copyright is property and consists of the exclusive right to do or authorise others to do the acts in relation to copyright works which are set out in 1988 Act. Any other person who does such acts without licence infringes copyright. No registration of copyright is necessary.

Copyright is given in following works: (i) Original literary, dramatic and musical works, for author's life and 70 years thereafter (for joint authorship, copyright runs from death of survivor; special rules apply for works published anonymously or under pseudonym); computer programs are literary works, and databases may be (they in any case receive separate, more limited protection); (ii) original artistic works (which include paintings, sculptures, drawings, engravings and photographs, architectural works and works of artistic craftsmanship), also for author's life, plus 70 years; (iii) films, for director's and other contributors' lives, plus 70 years; (iv) sound recordings, for 50 years from year of first publication, provided that this is within 50 years of making; (v) sound and television broadcasts (including cablecasts), for 50 years from first transmission; (vi) typographical format of published edition, for 25 years from publication.

There are also “quasi-copyrights” in: (i) Performances of works, etc.; (ii) databases; and (iii) first publishing of out-of-copyright works.

Initially, and subject to any contrary contract, copyright in literary, dramatic, musical and artistic works belongs to author, unless made in course of employment, when it belongs to employer. Copyright in recent films belongs jointly to director and producer. Copyright in sound recordings belongs to producer, in broadcasts and cablecasts to organisation, and in typographical format to publisher.

Economic Rights.

Scope of each kind of copyright varies to some extent. For literary, dramatic, musical and artistic works it includes following acts: (i) Copying, i.e., reproducing in material form; this includes electronic storage, which may even be transient or incidental; (ii) issuing copies to public, somewhere in EC; (iii) renting; (iv) performing, broadcasting, cable-casting and making available on Internet, etc., (v) adapting (translating, dramatising, arranging, transcribing, converting into or out of computer code). Special scheme covers public lending of books. Under EU Directive artists' resale right (droit de suite) is to be introduced in future.

Where person concerned knows or has reason to believe that he is dealing with illicit copies, various acts of commercial exploitation, including importing, constitute secondary infringement.

Infringement occurs when substantial part of work is taken without authority. Owner of right, or exclusive licensee may sue on infringement and provision is made for granting of injunctions and for recovery of damages and accounts of profit. Unless contrary is shown, copyright is assumed to exist and author named assumed to be true author. Owner of copyright in literary, dramatic, or musical work may give notice of work to Customs authorities and prohibit import of any copies for period up to five years. In some cases, infringement of copyright is also criminal offence. Use of copyright works for purposes of private study, non-commercial research, criticism, or reporting of current events, may be permitted when this constitutes ``fair dealing''. Use in judicial proceedings is also allowed, as is use in schools or giving of recitation in public by one person of literary or dramatic work. Certain libraries are excluded from liability for breach of copyright for doing certain acts. It is permitted to use any work which is incidentally included in any artistic work, sound recording, film broadcast, or cable programme. There are numerous other exceptions. All of them operate within defined limits.

Moral Rights.

In addition to economic rights, some authors and other persons acquire following “moral rights” in respect of works. These rights cannot be assigned to others, although they descend to inheritors on death. They may be waived at any time.

Right of Paternity.

Author of copyright literary, dramatic, musical, or artistic work, including director of copyright film, has right to be identified as author or director of work. This does not apply when musical work is performed in public. Owner of right must “assert” his right before there can be any infringement of it.

Right of Integrity.

Authors of works and film directors may object to certain types of “treatment” of work, e.g. addition to, deletion from, alteration or adaptation to work if it is derogatory, i.e. distorts or mutilates work or is prejudicial to honour or reputation of author. It does not prevent destruction of work.

There are number of exceptions where rights of paternity or integrity are not granted.

False Attribution of Work.

Person can complain against untrue assertion that he is author of work.

Right to Privacy.

In relation to photographs and films commissioned for domestic or private use, commissioners may prevent work from being issued, exhibited, shown or broadcast to public. (More general right to personal privacy now arises through application of principles of European Convention on Human Rights, Art. 8.)

All these rights endure for whole copyright period, save for right against false attribution, which lasts for 20 years after death of person named.

Performance Rights.

Performer of dramatic or musical work or variety act or recitation of literary work has rights for 50 years which are infringed (if certain qualifying circumstances apply) by making recording, copying, renting, transmitting live, exploiting recording by showing or playing it in public or dealing, possessing or importing illicit recording unless it is done with performer's consent.

Recording Rights.

Performers can confer exclusive right on someone to record performances. Live broadcast does not infringe recording rights, nor does any recording made with consent of performer (despite fact that owner of recording right has not consented). Broadcast of recording of performance is infringement of rights of owner of recording rights.

Database Right.

Investor in substantial database has 15 year right to prevent extraction or reutilisation of substantial parts of content. Additions, etc. may start time running afresh. European Court of Justice has restricted scope of right to databases compiled from information existing separately; and to copying by person taking much of whole database. Right is separate from copyright arising from compiling content of database.

Copyright Tribunal.

This body has jurisdiction over licensing schemes and licences granted by licensing bodies. Schemes would include system operated by Performing Rights Society whereby licenses are granted to users of copyright music in broadcasts and public places. In general Tribunal assesses whether terms are reasonable in circumstances. Various further criteria are specified.

There is right of appeal from Tribunal on point of law to High Court.

Extent of Operation of 1988 Act.

Act applies to England, Wales, Scotland and Northern Ireland. Work qualifies for protection by reference to (a) author or (b) country where work was first published or in case of broadcast or cable programme, where broadcast was made or cable programme sent. “Authors” qualify for protection if they are British citizens, nationals, citizens of British dependent territories or domiciled or resident in U.K. at time when work was made or domiciled or resident in any other state which is party to Berne Convention or Universal Copyright Convention.

If there is no qualified author, protection will be given to works “first published” in U.K. or any Convention country. Similar arrangements apply to performers and recording companies by virtue of membership of Rome Convention (1961).

Act may be extended to British colonies and dependencies, if so ordered, and in that case may be limited by local laws.

Assignment.

Copyright is transmissible by assignment, testamentary disposition or by operation of law as personal moveable property. An assignment may be of the whole copyright or part of it and can be subject to limitation. It must be in writing signed by or on behalf of the assignor. Where an unpublished work is disposed of by will, it is inferred that the copyright passes with the work, unless the contrary is expressed in the will.

Registered Designs and Unregistered Design Rights.

Where design for article is work of art, e.g. painting for vase, it is protected by copyright; so too with work of artistic craftsmanship. Copyright in 3D industrial reproductions of these works lasts for 25 years from authorised exploitation. If design is inventive, product may be patentable and therefore protected for 20 years in every form which embodies invention.

Under Registered Designs Act 1949, as amended, and (as from 2003) under Community Designs Regulation (EU), new design may be registered affording up to 25 years protection if it also has “individual character”. Design means “the appearance of the whole or a part of a product resulting from the features of, in particular, the lines, contours, colours, shape, texture or materials of the product or its ornamentation".

Neither copyright nor design registration protects purely functional, non-artistic shapes embodied in product. U.K. Unregistered Design Right ("UDR")—introduced by Copyright Designs and Patents Act 1988—subsists in original (not commonplace) design of "any aspect of the shape or configuration (internal or external) of the whole or part of an article". As there is no reference to eye appeal, right applies to functional as well as aesthetic designs. Design right does not subsist in method or principle of construction (which may be patentable), features of shape or configuration of article which enable article to be connected to or placed in, around or against another article so that either article may perform its function ("must fit") or are dependent upon appearance of another article of which article is intended by designer to form integral part ("must match"), or in surface decoration.

With U.K. UDR, designer is first owner of design rights unless design is created by employee in course of his employment or is commissioned, in which case right belongs respectively to employer or commissioner (as to commissions, contrast presumptive rule for copyright).

UDRs expire 15 years from year in which design was first recorded in design document or article was first made from design, whichever is first. However, if article is exploited commercially in first five years of that period, duration is ten years from first commercial exploitation.

Owner has exclusive right to reproduce design for commercial purposes. Owner's rights are infringed if someone copies designs or article, or knowingly deals with articles which infringe right.

Licences of right are to be available to anyone to manufacture protected article during final five years of term.

Unregistered Design Right and copyright may not subsist concurrently, whereas these design rights can subsist concurrently with registered design.

Design rights only apply to designs recorded or articles made after 1989. Non-British designs attract design right only if designer is from EU country or from one of few countries which grant reciprocal rights in British designs. Community Designs Regulation provides for three-year UDR in designs which can be registered under EU system. Right is effective only against copying of products. This is quite different from British UDR.

See also European Union Digest, category Intellectual Property, topic Copyright.

17.02 INDUSTRIAL PROPERTY RIGHTS:

See topics 17.01 Copyright and Designs, 17.04 Trademarks and Tradenames, 17.03 Patents for Conventions.

17.03 PATENTS FOR CONVENTIONS:

Law of patents was considerably changed by Patents Act 1977. It established new system of domestic law, gave effect to granting system of European Patent Office and made provision for Community Patents (these last still not available).

Scope of System.

Patentability is elaborately defined. Invention is not patentable unless it is new, involves inventive step and is capable of industrial application. Some inventions are never patentable as such, particularly scientific theories, aesthetic creations, business methods, computer programs, methods of medical treatment (in strict sense) and biological processes except for those involving microbiology.

Application for patent may be made by any person, whether British citizen or not. Patents are granted primarily to inventor or joint inventors but in case of inventions made in course of employment, employer is entitled. They may also be granted to successors in title of person initially entitled.

Mode of Application.

Patent for U.K. may be obtained by applying either to European Patent Office (EPO), Munich, or British Patent Office. First steps in process may be taken through international application for patents in various countries under Patent Co-operation Treaty. Whichever route is followed, initial application will first be examined formally for inadequacies, search will be made of prior patent specifications and technical literature for material bearing on alleged invention, and then, on request, application will be examined against search report in order to consider novelty and inventiveness of invention (judged at “priority date” which is application date unless earlier date can be claimed from prior application abroad or from earlier, less complete, British application); adequacy of description of it; and fairness and clarity of claimed scope of protection.

Objections and Grant.

Before patent is granted third parties may not oppose it, save where they claim that they are entitled to rights in invention. However any person may lodge written observations as to whether invention is patentable at all. If Patent Office decides that application complies with Act and Rules patent is granted upon payment of fee. It takes effect from date of publication in Official Journal and runs for up to 20 years from date of filing of application. Renewal fees must be paid at end of fourth year from filing and every year thereafter or else patent ceases. Extensions by supplementary Protection Certificate possible in fields of pharmaceutical and agro-chemical inventions.

Revocation.

Third party may apply to court or comptroller of U.K. Patent Office to revoke patent on any of following grounds, but no other: (A) Invention was not patentable. (B) Patent was not granted to person entitled to make application. (C) Specification of patent does not disclose invention clearly and completely enough for skilled person to perform it. (D) Matter disclosed in specification of patent extends beyond that disclosed in application for patent as filed. (E) Protection conferred by patent has been extended by amendment which should not have been allowed. For EPO grant there is also limited period for opposition on these grounds before that Office. Ground (B) can only be invoked by person who has obtained prior finding of court or comptroller that he was person truly entitled to patent invention. Further, except in cases of fraud, ground (B) cannot be invoked unless proceedings which produced that finding were commenced within two years of grant of patent.

Infringement.

Right to sue for infringement does not arise until patent is granted and can then relate back only to acts occurring since early publication of application. Broadly, infringement may be defined as commercial use of or dealing with patented invention without consent of proprietor of patent. Invention is any product or process within “claims” of patent specification. Interpretation of these pithy encapsulations is thus of first importance. Indirect infringement may occur by knowingly supplying essential means for making product or carrying out process. Defendant to infringement action may attack validity of patent on grounds available upon application to revoke (see subhead Revocation, supra). Usual relief granted to successful plaintiff is injunction coupled with damages or account of profits. Damages or account will not be ordered against defendant honestly and reasonably ignorant of patent. Failure to register transaction passing property in patent, license or sub-license within six months or if six months was too short as soon as practicable, also bars right of transferee to damages or account. Although secret prior user is no longer ground for revocation, bona fide prior use may be continued without constituting infringement.

Registration of Patent Rights.

Grants, assignments, mortgages, vesting assents and court orders in relation to patent applications, patents, licenses and sub-licenses are all registrable. Priority of claims in respect of such property depends upon order of registration unless earlier unregistered transaction was known to person claiming under later registered transaction.

Licences.

Right to use or deal with patented invention can be negotiated with proprietor in ordinary way. There is also system of compulsory and semi-compulsory licencing. Under latter, proprietor who is perfectly willing to grant licences on reasonable terms can at any time apply to have entry in register to effect that licences under patent are available as of right. If applicant for licence of right cannot agree on terms with proprietor they will be settled by comptroller. Any person may at any time after three years from grant of patent apply to comptroller for compulsory licence upon such terms as are reasonable. Possible grounds for application are that: (A) Invention can be worked commercially in U.K. but is not being worked at all or to fullest practical extent in EU; (B) U.K. demand for patented product is not being met on reasonable terms or is being met to substantial extent by imports from outside EU; (C) commercial working of patent in U.K. is being prevented or hindered by imports of patented products or products produced by patented process; (D) injury to commerce and trade of U.K. by reason of refusal of licenses on reasonable terms; (E) injury to commerce and trade of U.K. by reason of imposition of conditions by proprietor. Finally Crown has certain rights to use patented inventions compulsorily upon such terms as may be agreed or as may be ordered by court. Patent licences will be subject to EU and British rules of competition.

Patent Agents.

Applications to and proceedings before Patent Office are generally made and conducted by patent agents who may also appear as advocates in patent—related litigation. They are highly skilled in relevant law and practice. They are governed by Chartered Institute of Patent Agents, London WC1. They also qualify to practice in EPO as European Patent Attorneys.

See also European Union Digest, category Intellectual Property, topic Patents.

17.04 TRADEMARKS AND TRADENAMES:

Trademarks, tradenames and get-ups can be protected by registration or in consequence of their use in trade.

Protection by Registration.

Trade Marks Act 1994 amends domestic law and implements European Union and international obligations.

Under Act right to exclusive use of trademark is obtained by registration. Such registration is for ten years, but may be renewed for periods of ten years.

In addition to system for registration, trade marks and names with trading reputation may be protected by common law action against passing off.

What Can Be Registered.

Registration may now be obtained for sign capable of being represented graphically which is capable of distinguishing goods or services of one undertaking from those of another. It may consist of words, including personal names, designs, letters, numerals or shape of goods or their packaging. Registration will be refused on following absolute grounds: if sign is devoid of any distinctive character or which consists exclusively of sign which may serve to designate kind, quality, quantity, intended purposes, value, geographical origin, time of production of goods or of rendering of services or signs or indications which have become customary in current language or in bona fide and established practices of trade. Registration will be allowed if there is sufficient use of sign as trademark to overcome its inherent deficiencies. Trademark cannot consist solely of shape which results from nature of goods themselves, which is necessary to obtain technical result or which gives substantial value to goods. Trademark shall not be registered if it is contrary to public policy or to accepted principles of morality or is of such nature as to deceive public. Registration will also be refused on ``relative'' grounds, i.e. that there exists earlier mark (registered or unregistered) which conflicts with mark being sought.

Registration under U.K. system is responsibility of Registrar (Comptroller-General of Patent, Designs and Trade Marks). Third parties may oppose application before grant on same absolute and relative grounds. Alternatively, Community Trade Mark may be registered for whole European Community at Office for Harmonisation in the Internal Market (OHIM, Alicante, Spain).

Applications for registration should contain request for registration, name and address of applicant, statement of goods or services to which trademark is to apply and representation of trademark, together with appropriate fee and statement that trademark is being used by applicant or with his consent in relation to those goods or services in which he intends that it should be used.

Infringement of registered trademark occurs if sign is used in course of trade which is identical to or confusingly similar to trademark and used in relation to goods or services similar to those for which trademark is registered; also when identical or similar sign is used in relation to dissimilar goods or services where trademark has reputation in U.K. and its use is detrimental to distinctive character of trademark or other unfair advantage is taken.

Remedies for infringement are damages or account of profits, and injunction to prevent further infringement and order for delivery up if sought.

Protection by Reputation from Trade Use.

Common Law tort of passing off arises where: (A) Trader acquires reputation with public by trading with mark, name or distinctive get up; (B) another trader uses same or similar sign in trade so as to be likely to confuse public; and (C) first trader suffers or is likely to suffer damage in consequence. Passing-off action remains valuable particularly where there is no relevant trademark on register.

Tradenames (Business Names Act 1985).—Firms, individuals and corporations carrying on trade in name other than true name not required to register tradename. Tradenames indicating connection with government and words specified in regulations not to be used without approval of Secretary of State. If tradename consists of surnames and/or corporate names of all partners (with or without permitted additions), no special legal requirements. Permitted additions to names are addition of forename or its initial, “s” at end of surname, or addition merely indicating business carried on in succession to former owner of business. If tradename not of type already described, all business letters, written orders for goods or services, invoices and receipts and written demands must state names of proprietors of business and for each proprietor address within Great Britain at which service of any document relating to business will be effective. All premises where business carried on and to which customers have access must display in prominent position so as to be easily read notice containing such names and addresses. If more than 20 partners, and no partners' names on document, sufficient compliance for firm to keep at place of business list of names and addresses of all partners. Trade documents must then state that such list open to inspection at that place.

Registered Designs.

See topic 17.01 Copyright and Designs, subhead Registered Designs and Design Rights.

18 LEGAL PROFESSION

—Scope —

At time of writing (first half of 2007), there are important proposals before Parliament concerning re-organisation of legal practices: see “Legal Services Bill” at: http://www.publications.parliament.uk/pa/pabills/200607/legal_services.htm.

18.01 ATTORNEYS AND COUNSELORS:

These terms are not used in U.K.—legal profession consists of barristers and solicitors. One cannot be both a barrister and a solicitor at same time. Barrister's main function is to act as advocate in court, but he may also give advice and opinions to his instructing solicitors. Solicitor gives legal advice to his clients and conducts legal proceedings. Solicitors have full rights of audience in lower courts and limited rights in higher courts.

Admission.

To be admitted as solicitor, one must: (1) Enrol with Law Society whilst still student; (2) successfully complete necessary examinations (including Legal Practice Course); and (3) serve two years' Articles of Clerkship, usually within law firm. To practice as solicitor, one must: (1) Have been admitted as solicitor; (2) hold current Practising Certificate; and (3) be listed on Roll of Solicitors.

To be admitted as barrister, one must: (1) Be admitted to one of four Inns of Court (Inner Temple, Middle Temple, Gray's Inn and Lincoln's Inn); (2) successfully complete necessary examinations (including Bar Examination); and (3) normally serve one year's pupillage. There are various bars to admission, including being adjudged bankrupt, being convicted of certain criminal offences, and being solicitor. Before, during or after pupillage, pupil will be “called to the Bar”.

Continuing Legal Education.

There is mandatory system of continuing legal education for solicitors.

Discipline.

The Solicitors' Disciplinary Tribunal has power to strike name of solicitor off Roll or require him to answer allegations contained in affidavit, where there are certain grounds which are specified by statute present or solicitor has been found guilty of conduct unbefitting to solicitor (such as conviction for certain criminal offences). For barristers, each of four Inns of Court has disciplinary jurisdiction over its members. Complaints are investigated by Professional Conduct Committee of General Bar Council, who may refer matter to disciplinary tribunal. If charge is proved, tribunal can make order for disbarment, suspension, repayment of fees, or order that Treasurer of barrister's Inn reprimand him. It is the Inn which carries any sentence into effect.

Professional Bodies.

Professional body for solicitors is Law Society, 113 Chancery Lane, London, WC2A 1PL, England (Tel: 0171 242 1222), which exists both to further interests of solicitors and to discharge statutory functions in relation to their admission, conduct and discipline. General Council of the Bar, 3 Bedford Row, London, WC1R, England (Tel: 0171 242 0082) is equivalent organisation which exists to further interests of barristers.

Privileges and Immunities.

Both barristers and solicitors are ineligible for jury service, and enjoy absolute privilege that no defamation action will lie against them for statements made in course of judicial proceedings.

Contingency Fees.

Civil litigation in nearly all contexts can be conducted on “conditional basis”: solicitor or barrister being paid, or paid more, only if litigation is “success”. Success fee is not, however, linked to damages recovered or averted but is instead additional and agreed percentage of lawyer's normal fee for case. Costs system under review by Sir Rupert Jackson: final report expected Dec. 2009.

Licenses.

Solicitor may not practice without practising certificate, issued annually by Law Society on payment of fee.

Lien.

Solicitor has two liens: (1) Right to retain property in his possession until his costs have been paid; and (2) right to ask court for order that property which is recovered as result of solicitor's efforts, be held as security for costs he has incurred in obtaining such recovery. In theory, there is no reason why barrister should not exercise lien over documents in his possession, until his fee has been paid.

18.02 BARRISTERS AND SOLICITORS:

See topic 18.01 Attorneys and Counselors.

19 MORTGAGES

19.01 CHATTEL MORTGAGES:

All mortgages of chattels, except those executed by limited companies, which require registration under the Companies Act (see category 2 Business Organizations, topic 2.03 Corporations) and mortgages of aircraft (which are governed by Mortgaging of Aircraft Order 1972), and mortgages of ships come under Bills of Sale Acts, 1878 to 1891. Chattel mortgage must be for sum of not less than £30, be duly attested and registered within seven clear days, or if executed out of England within seven clear days after time at which it would in ordinary course of post arrive in England if posted immediately after execution, and be according to form specified in Bills of Sale Acts; otherwise such chattel mortgages are void, even against grantor. Copies have to be filed and are open to public inspection. Registration must be renewed every five years.

19.02 COLLATERAL SECURITY:

See category 7 Debtor and Creditor, topic 7.11 Pledges.

19.03 MORTGAGES:

The Law of Property Act 1925 provides that mortgage of estate in fee simple can be effected in law by demise for term of years subject to proviso for cessation on redemption, or charge by deed expressed to be by way of legal mortgage. Mortgage of term of years absolute may be effected only by subdemise or charge by deed expressed to be by way of legal mortgage. (§§85-87). Mortgage by demise or subdemise has now become obsolete in respect of registered land. (Land Registration Act 2002 §23). In case of registered land proprietor may by deed charge land; such charge, if it is to be legal, must be registered against title affected. (§§27, 59 Land Registration Act 2002). In case of unregistered land, first legal mortgage secured by deposit of title deeds executed on or after 1st Apr. 1998 "triggers" compulsory registration of title. (§4 Land Registration Act 2002).

Where a mortgage is made by deed expressed to be by way of legal mortgage, and, where necessary, that deed has been registered as registered charge, mortgagee has same protection, powers and remedies as if: (1) In case of mortgage of fee simple he had mortgage term of three thousand years, or (2) in case of mortgage of term of years absolute he had sub-term less by one day than term vested in mortgagor.

The mortgagee has the following powers: (1) To sell the mortgaged estate provided that the mortgage money has become due and either (a) notice has been served requiring payment and there has been default in whole or part thereof for three months, or (b) interest under the mortgage is two months in arrear or (c) there has been a breach of some other covenant in the mortgage; (2) to insure the mortgaged property against loss or damage by fire; (3) to appoint a receiver, which power is exercisable in the same circumstances as the power of sale; (4) when in possession, to cut and sell timber or to contract for any such cutting and sale; (5) when in possession, to make leases or accept surrenders of the leases for certain limited purposes and periods.

Priority.

Mortgages of registered land take effect in order of entry on Register (subject to any contrary entries). Priority of mortgages of unregistered land made after 1925 (not being mortgages protected by deposit of documents relating to legal estate) is governed by date of registration of mortgage as land charge. (Law of Property Act 1925, §97). Registration as land charge is deemed to be actual notice to subsequent mortgagee or purchaser of land, except that in case of prior mortgagee who is seeking to make further advances to rank in priority to subsequent mortgages where prior mortgage was made expressly for securing current account or further account, registration is not deemed to be actual notice to him of subsequent mortgage if mortgage was not registered when his original mortgage was created or when last search was made by him or on his behalf whichever event last happened. Prior mortgagee may make further advances to rank in priority to subsequent mortgagees, legal or equitable, only if: (1) such arrangement has been made with subsequent mortgagees; (2) he made his further advance with no notice of intervening mortgages; or (3) his original mortgage imposes obligation on him to make such further advances.

See category 20 Property, topic Real Property for distinction between registered and unregistered land.

Discharge or Satisfaction.

In case of mortgages other than registered charge, receipt indorsed on or written at foot of or annexed to mortgage in respect of all moneys thereby secured operates in case of mortgage by demise or sub-demise to determine term or merge it in reversion and, in any other case, as reconveyance of mortgage to person who immediately before execution of receipt was entitled to equity of redemption, and in either case as discharge of mortgage.

The receipt must state the name of the payer and be executed by the chargee by way of legal mortgage or person in whom the property is vested and who is entitled to give a receipt. If the payer is not the person entitled to the immediate equity of redemption, the receipt operates as if the benefit of the mortgage had by deed been transferred to him unless (1) it is otherwise expressly provided or (2) the mortgage is paid out of capital money or other money in the hands of a trustee and properly applicable for the discharge of the mortgage and it is not expressly provided that the receipt is to operate as a transfer.

By §116 of Law of Property Act 1925, mortgage term becomes satisfied term and ceases when money secured has been discharged but without prejudice to right of person having only limited interest in equity of redemption to require mortgage to be kept alive by transfer or otherwise. See also topic 19.01 Chattel Mortgages.

Usual evidence of discharge of registered charge is discharge in Form DS1 (where discharge relates to whole of land in title) and Form DS3 (where discharge relates to only part), duly executed by proprietor of charge. (Rule 114, Land Registration Rules 2003).

20 PROPERTY

20.01 ABSENTEES:

In absence abroad person may generally delegate authority to any person of full capacity. Usual to give power of attorney. Under Powers of Attorney Act 1971 it is no longer necessary to file powers of attorney at Central Office of High Court. Special rules relating to trustees abroad contained in Trustee Act 1925. Power may be given to sue or accept service of proceedings but strictly construed.

Power is revoked upon donor becoming mentally incapable. Under Enduring Powers of Attorney Act 1985 person may delegate authority to attorney which will endure after donor has become mentally incapable. Attorney shall, as soon as practicable, make application to court for registration of instrument creating power. Power may be limited or unlimited as donor wishes.

20.02 CONVEYANCES:

See topic 20.04 Deeds.

20.03 CURTESY:

Abolished by Administration of Estates Act, 1925 in the case of a wife dying after Dec. 31, 1925.

20.04 DEEDS:

Note: §1 Law of Property (Miscellaneous Provisions) Act 1989 requires presence of attesting witness to signature of person executing deed and that deed makes it clear on face of itself that it is intended to be deed. It is no longer necessary for deeds executed by individuals to be sealed, but mere fact that instrument is executed under seal is no longer sufficient to indicate its status as deed (§1[2A] of Law of Property [Miscellaneous Provisions] Act 1989, as inserted by Regulatory Reform [Execution of Deeds and Documents] Order 2005 [SI 2005/1906]).

A corporation or company executes a deed in the manner provided by its articles of association, but a deed executed by a corporation aggregate in favour of a purchaser is sufficiently executed if its seal is affixed thereto in presence of and attested by two members of board of directors (as alternative to one board member and clerk, secretary or other permanent officer or deputy [Law of Property Act 1925, §74(1), as am'd by SI 2005/1906]).

A person authorised by a power of attorney or any other power to convey an interest in property on behalf of a corporation sole or aggregate, may execute the conveyance by signing the name of the corporation in the presence of a witness.

Deed may require registration. But see category 9 Documents and Records, topic 9.05

Records.

Stamp Duty Land Tax on Purchase Deeds.

Stocks and shares ½%. Stamp Duty Land Tax on freehold and existing leasehold property up to £60,000 nil, above £60,000, up to and including £250,000 1%, above £250,000 up to and including £500,000 3%, above £500,000 4%. To obtain reduced rates as above appropriate certificate of value must be inserted.

20.05 PERPETUITIES:

Property may not be settled for a period longer than that of a life or lives in being plus 21 years, unless settlor or testator specifies a period of years not exceeding 80 years as perpetuity period.

By the Law of Property Act, 1925, §163, where in any instrument coming into operation after 1925 the date of absolute vesting of capital or income or the ascertainment of a beneficiary or class of beneficiaries depends on the attainment by the beneficiary or members of the class of an age exceeding 21 years, and there is a gift over in the event of a total or partial failure of the original gift, the age of 21 years is substituted for the age specified if, but for this section, the gift would be void for remoteness.

Under Perpetuities and Accumulations Act 1964 instead of substituting age of 21 years there is substituted in instruments taking effect after July 16, 1964 the age nearest the specified age, consistent with gift being valid.

Accumulations.

By §164 of Law of Property Act 1925, as am'd by Perpetuities and Accumulations Act 1964, property may not be settled by instrument or otherwise in such manner that income thereof shall be wholly or partially accumulated for any longer period than: (a) Life of grantor or settlor; (b) 21 years from death of grantor, settlor or testator; (c) duration of minority or respective minorities of any person or persons living or en ventre sa mère at death of grantor, settlor, or testator; (d) duration of minority or respective minorities only of any person or persons who under limitations of instrument directing the accumulations would, for time being if of full age, be entitled to the income directed to be accumulated; (e) 21 years from date of settlement on; or (f) minority or minorities of any persons in being. Section does not apply to any provision: (1) for payment of debts of grantor, settlor, testator or other person; (2) for raising portions for any child or remoter issue of testator, grantor, settlor or person taking an interest under any settlement directing the accumulation or to whom any interest is thereby limited; or (3) respecting accumulation of produce of timber or wood.

20.06 POWERS OF ATTORNEY:

Any competent person may grant power of attorney to another person to enable attorney to act as agent of donor with, inter alia, power to execute deeds on donor's behalf. In general power continues until revoked by donor although in some circumstances consent of attorney is required. (Powers of Attorney Act 1971).

Under Enduring Powers of Attorney Act 1985 “enduring” power of attorney may be granted. This will be granted in special form which will include explaining note that power endures despite subsequent mental incapacity of donor, subject to registration in Court of Protection.

Where land is held by trustees, trustee must grant trustee powers or enduring power.

See also topic 20.01 Absentees.

20.07 REAL PROPERTY:

In general, by the Law of Property Act, 1925, §1, the only estates in land capable of subsisting or of being conveyed or created at law are (a) an estate in fee simple absolute in possession and (b) a term of years absolute; and the interests in land which may be so dealt with at law are: (a) easement, right or privilege in or over land for interest equivalent to fee simple absolute in possession, or term of years absolute; (b) rentcharge in possession on land, either perpetual or for term of years absolute; (c) charge by way of legal mortgage; (d) certain charges on land not created by instrument; (e) rights of entry over or in respect of legal term of years absolute or annexed for any purpose to legal rentcharge.

Land held by two or more persons must be held by them as joint tenants in law but in equity they can be joint tenants (survivorship applies) or tenants in common (no survivorship). Land cannot, generally, be held at law by more than four persons.

Land Registration.

There are two systems of conveyancing:

(I) Unregistered.

Where evidence of title lies in title deeds. Certain interests can be protected by registration as land charges under Land Charges Act 1972.

(II) Registered.

Where title to property is registered at H.M. Land Registry. Register becomes conclusive evidence of title. All of England and Wales is now designated as area of compulsory registration of title but title is not registrable until freehold property or existing leasehold term with more than seven years unexpired is: transferred/assigned on sale, by way of gift, or pursuant to court order; is subject of assent or vesting assent; is mortgaged by way of first legal mortgage accompanied by deposit of title deeds; or is let on lease for term/sub-term exceeding seven years (in which case requirement of registration of title applies to term/sub-term).

Note: In force as of 13 Oct. 2003 Land Registration Act 2003 greatly intensifies transition of land title from unregistered to registered.

See also category 4 Citizenship, topic 4.01 Aliens, subhead Property.

21 TAXATION

21.01 ADMINISTRATION:

All taxation is imposed by Parliament and is collected either by deduction at source of taxable payment or from taxpayer by recently combined Revenue and Customs Department direct or by officials at ports and airports.

There is no taxation with respect to the ownership of property except as hereinafter stated.

Much of income tax legislation has now been rewritten in modern style language but with no (or very little) change of meaning. This process has now reached corporation tax and will end thereafter.

21.02 BUSINESS TAXES:

Stock Dividend Options.

Where a corporation gives a shareholder an alternative, however expressed, enabling him to receive additional shares instead of a cash dividend, any shares which it so issues are treated as distribution for income tax purposes as if alternative cash dividend paid.

21.03 CUSTOMS DUTY AND TAX:

Customs Duties.

See category 14 Foreign Trade and Commerce, topic 14.01 Customs.

21.04 EMPLOYMENT TAXES:

National Insurance.

In addition to income tax, employers pay National Insurance Contributions.

Employer's contributions have been greatly simplified. For 2009-2010, there is no liability until individual receives £110 per week (£5,500 p.a.). Once this threshold is passed, employer pays between 9.1% and 12.8% depending on level of earnings and whether scheme is salary related scheme or money purchase scheme. NICs now apply to many benefits in kind.

Individual employees earning below £110 per week or £5,500 per year continue to have no liability. Those earning above this level have liability calculated at flat 11% rate for contracted-in employees (9.4% for contracted out salary related schemes) on amounts between £110 and upper earnings limit (£844 per week or £43,888 per year). Rate on earnings above £844 per week is 1%.

Self-employed are also subject to NICs; they pay at lower rates but get fewer benefits.

21.05 INCOME TAX:

U.K. operates schedular rather than global concept of income. Income is taxable if it arises from land or from employment or office or if it consists of distribution from U.K. resident company (e.g. dividend). In addition it is imposed on annual income or profits accruing to any person residing in U.K. from any property, trade, profession or vocation whether in U.K. or elsewhere. It is also imposed on income or profits of persons residing outside U.K. from any property, trade, profession or vocation within U.K. (Income Tax [Earnings and Pensions] Act 2003, Income Tax [Trading and Other Income] Act 2005 and Income Tax Act 2007). This wide formulation covers income from land outside U.K. and distributions from nonresident companies.

Since 1990 income (and capital gains) of husband and wife have been separately taxed. Each spouse has separate basic or lower rate band and there is no aggregation of income. Personal allowances are given to each spouse. Married couple's allowance was abolished as from 6 Apr. 2000 unless taxpayer was born before 6 Apr. 1935.

For tax purposes, fiscal year is from Apr. 6 in one year to Apr. 5 in following year. For companies year runs from 1 Apr. to 31 Mar.

Income above personal allowance for fiscal year 2009-2010 is charged as follows:

Rate	**Income.**
Rate is 20%	£37,400

and 40%	over that figure.

Dividends have their own special rules and are taxed at 10% or 32.5% (see subhead Corporation Tax, infra). In addition, there is special 10% rate which applies instead of 20% rate to non-dividend savings income up to £2,440 in certain narrow circumstances.

(1) Personal allowance for single person £6,475. Personal allowance for single person (over 65, under 75) £9,490 or over 75, £9,640; extra above £9,490 is subject to tapering if total income exceeds £22,900.

(2) Married couple's allowance: taxpayer born before 6 Apr. 1935 elder spouse 75 or over, £6,965. Married couple's allowances take effect only at 10%; these too are subject to some tapering subject to minimum figure of £2,670.

(3) Blind persons allowance £1,890.

(4) Radical systems of refundable tax credits apply to support families; these integrate welfare elements and tax relief, and include credits for child care. There are two main tax credits. On annual basis and using maximum figures for 2009-2010, child tax credit is worth £2,235 per child with family getting £545 (enhanced for first year of child's life). Working tax credit is worth maximum of £1,890 and further £1,860 for certain couples and lone parents. There is also element for child care. Credits are reduced as income rises but benefits can still be of value to families with income of £50,000.

British subjects residing abroad are entitled to the same allowances as though residing in the United Kingdom since 1988. Same allowances are made to residents of Channel Islands and Isle of Man, nationals of state within European Economic Area, persons in service of territory under Crown protection and to certain persons resident abroad for health and those who are or have been in service of Crown or widows of same or are employed by missionary society. Certain commonwealth citizens lost their entitlement as from start of 2009-2010 if this was only basis on whether they could claim.

Allowances are made as against ascertained tax for premium payable on certain insurance policies. Allowance on premiums for life assurance policies has been abolished for policies taken out after 13th Mar. 1984. Maximum allowance allowable for premiums on retirement annuity policies is set out in table below. Mortgage interest relief was abolished as from 6 Apr. 2000.

Legislation makes provisions for personal pensions. This was revolutionised as from 6 Apr. 2006. Maximum amount of relevant earnings that can be contributed, free of income tax, in 2009-2010 is total amount of such earnings subject to cap of £245,000. Individuals without relevant earnings can contribute £3,600. This liberality is offset by other rules to prevent excessive savings being built up, so for 2009-2010 lifetime allowance is set at £1.75m. In 2010-2011 figure will be at £1.8m. Special transitional rules protect individuals whose pension savings built up in previous years already exceed lifetime allowance; certain elections had to be made by 5 Apr. 2009.

Self assessment was brought in for tax year 1996-7 but not for all individual taxpayers. In case of employees regulations provide for collection of tax by weekly deductions from their salaries. 20% tax on interest arising on public loans, etc., is deducted at source.

Nonresidents can often obtain repayment of whole U.K. tax deducted from income.

Income Tax Rates as from 2010-2011. New upper rate of 50% will apply to taxable income over £150,000. Benefit of persons relief will be withdrawn for income over £100,000; rate of withdrawal is equivalent to tax rate of 60%. Taxpayers with incomes over £150,000 tempted to reduce their taxable income by increasing their payments to pension schemes will find their way impede.—in many circumstances relief will be available but at 20% not 50%.

Visitors.

Briefly visitors from abroad are liable to tax:

(1) *On income arising in this country,* but income from certain Government securities is exempt.

(2) *When They Are Resident in United Kingdom on Income Arising Abroad.*—For many years, basis of liability was amount received in or remitted to United Kingdom if persons resident here but domiciled (or in some cases ordinarily resident) abroad. This remittance basis was much changed by FA 2008 (see below).

The terms “resident” and “ordinarily resident” and “domiciled” have technical meanings and each case is dealt with on its own facts. For example, visitor is regarded as “resident” if he makes regular visits for substantial periods (e.g., average three months year for five consecutive years); or if he spends 183 days in U.K in tax year. Older version of this rule referred to months rather than days. 2008 legislation includes further rules on whether days are spent in U.K. It is emphasized that provisions affecting visitors are intricate and above is only intended as guide. In Apr. 2009, HMRC issued new guidance on these questions. In some respects, new guidance is less favourable to taxpayer; there will be less emphasis on counting and more on looking at overall manner of living.

Remittance basis. Scope of remittance basis is reduced by FA 2008. In ordinary case, individual may continue to use remittance basis but as from 6 Apr. 2008, person may not also claim benefit of any personal allowances (as defined). Moreover, person may be subject to £30,000 Remittance Basis Charge (RBC). Person who does not elect to use remittance basis is taxed on arising basis and may use these allowances and is not subject to RBC.

£30,000 RBC only applies to long term residents. It arises if individual is 18 or over at some point in tax year, and has been resident in U.K. in at least seven of last nine tax years. Person is required to nominate particular income or gains to which RBS is to be attributed; such income or gains are not taxed again when actually remitted to U.K.

One should also note a de minimis rule; where individual has unremitted foreign income or gains for year but these are less than £2,000. Such individual may still use personal allowances—and is not subject to RBC.

FA 2008 widens scope of what is remittance. Many familiar techniques for exploiting basis have been stopped.

Corporation Tax.

Income and Corporation Taxes Act 1988, provides for all companies resident in U.K. to be chargeable to corporation tax on all income and on all capital gains. Although starting point is that income means income as defined for income tax and chargeable gains, as for CGT divergencies have developed over years. As from 1 Jan. 2007, it has been possible for company to enter into Real Estate Investment Trust regime.

In 2009-2010 companies with profits over £1,500,000 pay tax at 28%. Companies with profits below £300,000 pay tax at 21%. Companies with profits between £300,000 and

£1,500,000 pay tax at marginal rate exceeding 28% so that total burden of tax rises from 21% on all profits at £300,000 to 28% on all profits at £1,500,000. It was intended that rate for companies with profits below £300,000 would rise to 22% in attempt to reduce differential between incorporated and unincorporated but this has been postponed because of recession. Other rates apply to ring-fence profit from North Sea exploration.

Corporation tax was greatly simplified as from 1 Apr. 1999 when Advance Corporation Tax was abolished. Certain cases recently decided by European Court of Justice relate to ACT era. Most big companies must now make four quarterly payments of corporation tax on account beginning just after sixth month of their year. Self assessment began for corporation tax on 1st July 1999.

Dividends from U.K. resident companies are taxed under special rules. Such dividends come with credit of 1/9th of dividend and so equal 10% of sum of dividend and credit. In response to decision of European Court of Justice, legislation now extends 1/9th credit system to certain U.K. individuals' dividends from non-U.K. resident companies (see further “Foreign Dividends” below); for most U.K. taxpayers there will be no further tax to pay as dividends are charged at special 10% rate unless their income exceeds £37,400 in which case 32.5% rate applies. There is no general right to repayment of 10% credit whether taxpayer is exempt person such as pension fund or low income taxpayer. Nonresident taxpayer will find that 15% withholding tax permitted under many treaties is greater than 10% credit and so no repayment can arise. Right to repayment can arise if treaty gives U.K. only 5% withholding tax. European Court of Justice has addressed other issues of repayments. As from 2010-2011, total rate of tax of dividend will be 42.5% instead of 32.5% if taxpayers income exceeds 150,000.

“Close company,” that is in main company controlled by not more than five persons, is subject to different tax rules. Likewise, close investment holding company, defined by long statutory test, is also subject to different tax rules, e.g. cannot use 21% rate.

Capital Gains.

Taxation of Chargeable Gains Act 1992 imposes tax on total amount of chargeable gains accruing to individual or corporation chargeable in period of charge (e.g. 6 Apr. 2008 to 5 Apr. 2009 for individuals and trusts but 1 Apr. 2008 to 31 Mar. 2009 for companies) after deducting allowable losses. Base value of assets held on Mar. 31, 1982 was rebased to that date so that only gains or losses since that date will be brought into account. For companies subject to corporation tax, same rate of tax (28% or 21%) is charged on all profits whether consisting of income or capital gain. In calculating their gains, companies may claim indexation relief which increases allowable costs in line with inflation. For individuals, trusts, and others subject to capital gains tax, as opposed to corporation, position is rather different. There is no indexation relief and taper relief which was introduced in 1998 was repealed in 2008. For disposals on or after 6 Apr. 2008, there is single rate of CGT—18%. One particular group of taxpayers lost out under this simplification—those with business assets where effect of relief was to give them 10% rate on lifetime gains on qualifying assets up to £1m. Tax arises on “disposal” of “assets” which are widely defined to include options, debts, incorporeal property, and currency other than sterling. For individuals there is no tax on cumulative gains of less than £10,100 (£5,050 for trusts). There are arrangements for double taxation relief and disposals involving foreign element. (§§10-19). Capital losses in current year may be set against gains in that year or future year. Government nonmarketable securities and savings certificates are exempt. Liability turns on residence so non-residents are not in general liable to tax even if asset is in U.K. Those who are resident but not ordinarily resident or not domiciled may use remittance basis. FA 2008 reforms mentioned above for income tax apply here also. Person unable to use personal allowances for income tax may not use £10,100 exemption for CGT.

Fundamental distinction between income and capital gains has been swept away for corporation tax for gains and losses in respect of foreign exchange transactions, derivatives, loan relationships and intangible property. Moreover, most gains and losses in respect of these sources are now charged to tax on accounting basis.

Foreign Dividends.

Dividends arising to U.K. residents from non-U.K. sources are subject to U.K. tax. The U.K. tax system may give credits for taxes paid in source country. This may arise under double tax treaty or under special rule of unilateral relief. Where taxpayer has 10% interest in foreign company, relief is given not only for tax on dividend but also for tax on profits underlying dividend.

As mentioned above, legislation taking effect in 2008 and 2009 is designed to extend 1/9th credit system to foreign dividends for individuals. Foreign dividends accruing to companies subject to U.K. corporation tax for accounting periods beginning on or after 1 Jan. 2010, are to enjoy exemption from corporation tax if income within wide-ranging new rule. This exemption may be waived in which case credit system may still apply.

21.06 INHERITANCE TAX:

Inheritance.

On death tax is charged on property passing on death and on cumulative basis takes account of gifts within seven years of death. There is no charge on lifetime gifts between individuals. However if donor dies within seven years of making gift, gift will be taxable with cumulation of chargeable transfers in previous seven years. Gift of property passing on death will be taxed on its value at date of death; earlier gifts where donor dies within seven years generally use value at date of gift. In either case, rate (is) 40%. There is charge for lifetime gifts involving companies.

Trusts are subject to several regimes; legislation passed in 2006 has redrawn boundaries. (a) Discretionary Trusts; lifetime transfers into such trusts are taxable; they are also subject to periodic charges on ten yearly basis; there is also exit charge for property leaving trust between ten yearly anniversaries. (b) Trusts with interest in possession; trust property is treated as belonging to person with interest in possession. There is no charge on lifetime gifts to such trusts; charge will arise if donor dies within seven years. (c) Accumulation and Maintenance Trusts; particularly advantageous version of (a) applies here to A and M trusts and some others.

2006 reforms greatly reduce scope of (b); types of trust previously within (b) will now come within (a). They also reduce scope of trusts within (c). 2006 rules apply to new trusts created—and to additions to existing trusts made—on or after 22 Mar. 2006. However they may also apply to existing trusts when event relevant to IHT happens on or after that date. Interest in possession in existence immediately before 22 Mar. 2006 will continue to be treated under rules in (b).

Trusts were used for much estate planning and avoidance. In response rules were changed as from 22 Mar. 2006; broad effect of change is to make rules just outlined for discretionary trusts—charge to tax when trusts is set up, periodic charge every ten years and exit charge—apply to many interests in possession trusts as well. Therefore, there is urgent need to review all existing wills and settlements if IHT charge is possible.

Three exceptions where old rules will continue to apply even for trusts created on or after 22 Mar. 2006 are: (a) Trusts created on death by parent for minor child who will be entitled to assets at 25; (b) trusts created on death for benefit of single life tenant; and (c) trusts set up on death or in settlor's lifetime for disabled person.

Existing accumulation and maintenance trusts will continue to benefit from existing treatment if relevant minors become entitled to capital at 25. If this requires change, taxpayers were given until Oct. 2008 to do it. When person takes capital at 25, there will be periodic charge for years from 18th birthday to 25th.

As indicated above, existing interest in possession trust will continue to benefit from existing treatment if person becomes absolutely entitled in due course; if trust continues beyond relevant event it is treated as new trust from that date and new rules apply. Area is now very complex one and professional advice is essential.

Tax is borne primarily by donor. Nil rate threshold for fiscal year 2009-2010 is £325,000. Existing legislation provides that it will be £350,000 for 2010-11.

Inter vivos gifts made more than three years before death attract lower rate than on death; those made more than seven years before death attract no tax at all.

Gifts between spouses or civil partners inter vivos and on death are exempt. Other main exemptions are inter vivos gifts up to £3,000 in any tax year and gifts of £250 per donee. Where one spouse dies and proportion of that person's nil rate band has not been fully used up, it is now available on death of surviving spouse—in addition of course to surviving spouse's own nil rate band. This was enacted by FA 2008.

Gifts to charities and political parties are exempt.

21.07 LOCAL GOVERNMENT TAXES:

Council Tax began in 1993. (Local Government Finance Act 1992). Level is fixed locally by each billing authority depending on its financing needs, and is subject to Secretary of State for Environment's power to cap level chosen by authority. Whilst amount due it linked to saleable value of property on 1 Apr. 1991 (properties are allocated to one of eight bands), discounts are available for single occupants and for certain adults such as students, care workers etc.

Council tax does not apply to business property. Since 1990 local business taxes have been replaced by national nondomestic rate at poundage determined by central government. Sums collected by central government are allocated to local authorities on per capita basis.

21.08 MOTOR VEHICLE TAXES:

Motor Tax.

See category 22 Transportation, topic 22.02 Motor Vehicles.

21.09 STAMP TAX:

Stamp Duty.

There are now three stamp duties; they are listed in order of being introduced: (1) Stamp duties (SD). These duties have long history but since 1 Dec. 2003 have applied only to certain transactions in shares and other marketable securities and partnerships. Failure to stamp within prescribed time entails heavy penalties, but generally speaking, does not invalidate document. However document which has not been properly stamped is not admissible in evidence (other than in criminal proceedings). Moreover, company registrars are not allowed to amend share registers to reflect change of owner unless document has been duly stamped. It was found that 68% of share transfers attracted minimum stamp duty charge of £5 and therefore FA 2008 exempts instruments from stamp duty where duty would be not more than £5; (2) Stamp Duty Reserve Tax (SDRT) came into force on 1 July 1996 and is chargeable on agreements to transfer chargeable securities; rate is 0.5% with higher rate of 1.5% on depositary receipts and clearance services. Among many exceptions are certain transfers in connection with public issues or by bearer instruments. This charge was introduced when changes in title began to be made electronically and so ceased to be subject to normal stamp duty on transfers. SDRT has its own compliance and enforcement regime and, unlike SD themselves, Revenue may sue accountable party for tax. If transfer of shares carried out non-electronically, stamp duty applies and not SDRT; (3) Stamp Duty Land Tax (SDLT) came into force on 1 Dec. 2003 and replaces stamp duty on land. It is major departure from normal stamp duties being much concerned to counter avoidance which had become rife and has been described as compulsory self assessed transaction tax—on land in U.K. There is no need for instrument and no need for person to be either resident or present in U.K. It is charged on acquisition of chargeable interest and extends to grants of easements, variations of leases and releases of covenants. Rates are set out below. Unlike SD themselves, payment of tax must accompany return and there are penalties for late payments and rules as to accountability and liability.

Rates of SDLT on transfers of property other than shares, now principally land. If value of property exceeds £125,000 rate is 1% but if value passes £250,000 rate is increased to 3% with even higher 4% applying if value exceeds £500,000. Each rate applies to whole price so sale of house for £600,000 attracts stamp duty of £24,000.

For SDLT 1% bracket starts at £150,000 for nonresidential property and for residential property in certain disadvantaged areas. Leases also attract SDLT; charge is on net present value or NPV, which is total discounted annual rental payments.

Transfers of shares attract duty of 0.5% whatever value transferred, unless 1.5% SDRT rate applies.

21.10 TREATIES AND AGREEMENTS:

Double Taxation.

In certain circumstances unilateral relief is given from income tax and profits tax in respect of tax payable under the law of any territory outside the United Kingdom by allowing the last mentioned tax as a credit against income tax or the profits tax.

U.K. Party to many double taxation agreements with other countries. International agreement comes into force in U.K. by Statutory Instrument after considerable delay. Hence agreements usually come into force retrospectively.

Following are agreements between U.K. and U.S.A.: Convention of 24 July 2001 SI 2002/2848 as amended by Exchange of Notes 24 July 2001 and Protocol of 19 July 2002.

Following are agreements between U.K. and Canada: Convention of 8 Sept. 1978 (Statutory Instrument No. 709 of 1980), Amending Protocol of 15 Apr. 1980 (No. 1528 of 1980), Dividend and Interest Regulations of 4 June 1980 (No. 780 of 1980), Amending Dividend and Interest Regulations of 27 Nov. 1987 and Amending Dividend Regulations 1996 No. 1782 of 1996. 1985 Protocol of 16 Oct. 1985 (SI 1985/1996) was superseded by Protocol of May 2003 SI 2003/2619.

21.11 VALUE ADDED TAX:

Value Added Tax (V.A.T.).

Introduced by Finance Act, 1972, V.A.T. is payable on supply of all goods or services, unless specifically exempted, in U.K. by registered person in course of his business, and on import of goods into U.K. by any person. As from 1 Apr. 2009, any person whose turnover exceeds £68,000 per annum unless turnover for next year will not exceed £66,000 (no provision for quarter turnovers any more) must register under Act. Special provisions are made for companies with turnover of less than £300,000 per annum.

Registered person can reclaim tax (input tax) on goods or services supplied to him except where his business makes exempt supplies.

Where supply is zero rated, no tax shall be chargeable on supply but it shall be treated in all other respects as taxable supply and therefore any input tax may be reclaimed.

V.A.T. is chargeable at basic rate of 17½% with effect from 1 Apr. 1991 except for reduced rate of 5% for supplies of fuel and power for domestic, residential or nonbusiness charity use and for certain conversions and renovations of houses and residential homes.

Legislation is now found in VAT Act 1994 (as am'd).

22 TRANSPORTATION

22.01 AIR:

Carriage of Passengers, Luggage and Goods.

Principal legislation is Carriage by Air Act 1961 and Carriage by Air (Supplementary Provisions) Act 1962. Carriage to states which, like U.K., have implemented Montreal Convention 1999, is governed by The Carriage by Air Acts (Implementation of the Montreal Convention 1999) Order 2002. Carriage to states which still apply Warsaw Convention 1936 or amended Warsaw Convention 1956 is governed by similar Orders.

Safety.

Principal legislation is found in Civil Aviation Act 1982.

22.02 MOTOR VEHICLES:

Vehicle licence is required to be taken out by person keeping vehicle. Number plates must be displayed front and rear and must be of requisite size. Receipt for motor tax (see subhead Motor Tax, infra) must be exhibited on front windscreen.

Operator's licence is required under Goods Vehicles (Licensing of Operators) Act 1995 from Traffic Commissioner for use on road of goods vehicle for carriage of goods: (a) For hire or reward or (b) for or in connection with any trade or business carried on by applicant. No badge necessary, except on public service vehicles and must be fixed and exhibited on vehicle as prescribed by regulation from time to time but licence must be produced to police on demand. Licence may be suspended in case of violations regarding motor vehicles. Concerning drivers' licences, see Road Safety Act 2006.

Transfers.

Registration document is provided by Driver Vehicle Licensing Centre for each new or transferred vehicle and DVLC must be notified in proper form of each transfer by transferor and transferee.

Operation Prohibited.

Person under 16 years of age may not operate any motor vehicle. Person over 16 may operate moped, over 17 motor car or motorcycle. Person under 21 may not drive heavy or light locomotive (vehicles weighing over 7¼ tons) or motor tractor, except agricultural tractor used on farm. Person under influence of liquor or drug may not operate.

Visitor from U.S. may drive in Britain provided that he is in possession of licence valid in U.S. and has not been in Britain for more than 12 months.

Parking.

No vehicles at any time may park on part of street which is marked with double yellow line. When there is single yellow line this restriction applies during normal business hours although reference should be made to notices in street stating times of restrictions. In certain areas vehicles may only park at meters during normal business hours. Local authorities have power to remove from roads cars which have broken down and appear to be abandoned and cars towed away may be sold if not claimed after six weeks. Certain local authority may clamp cars which are illegally parked.

New Offences were created for dangerous driving, and penalties provided for all kinds of offences by Road Safety Act 2006.

Tests.

Road Traffic Act 1988. Vehicles may be stopped on road and tested as to condition of certain parts. Annual testing of vehicles registered for three years or more is compulsory before vehicle licence issued (MOT [Ministry of Transport]). Certain vehicles, e.g., of visiting forces, exempted.

Accidents.

In case of accident causing damage or injury to any person, vehicle or animal (except cats, rabbits, fowls, geese, etc.) driver must stop, give any particulars required and report accident to police station or to constable as soon as reasonably practicable and in any case within 24 hours and produce insurance certificate to police either when reporting accident or within seven days at police station selected.

Insurance.

Anyone using, or permitting another to use, motor vehicle on road must be insured against liability for personal injury to third persons and passengers and damage to property or goods and must be in possession of certificate of insurance in statutory form. (Road Traffic Act, 1988). American visitors, if their policies cover accidents in England, can obtain certificate of foreign insurance from Royal Automobile Club or Automobile Association.

The Third Parties (Rights against Insurers) Act, 1930, gives third party right of action direct against insurer if insured is bankrupt or in liquidation.

Road Traffic Act 1988 obliges insurers to satisfy any judgment not satisfied by insured provided that insurer receives notice of commencement of proceedings from third party prior to or within seven days of their commencement.

Motor Insurance Bureau agreed in 1999 with Minister of Transport to satisfy any judgment obtained against driver of motor vehicle which is not satisfied within specified notice period for any reason (e.g., no policy, risk not covered, policy voidable), provided: (a) Notice of proceedings given to Motor Insurance Bureau before or within 14 days after their commencement, (b) liability is one required to be covered by statute. Motor Insurance Bureau has also agreed in 2003 to compensate hit and run victims in certain cases.

Motor Tax.

Annual tax for motor cars is variable according to size of vehicle's engine: http://www.dvla.gov.uk/vehicles/taxation.htm (search Car Emissions database). See also http://www.direct.gov.uk/en/Motoring/OwningAVehicle/HowToTaxYourVehicle/DG_10021514. Tax may be paid annually or in six monthly periods. Receipt containing material particulars is given and this must always be fitted into circular disc attached to front of car so that it is open to police inspection. It is offence to drive car in respect to which tax has not been paid. Motorcycles are taxed according to cylinder capacity of engine.

Visitors should produce their International Insurance Certificate ("Green Card") and vehicle registration certificate at port of entry and will obtain exemption for period of 12 months.

22.03 SHIPPING:

Courts.

Admiralty division of High Court and, for smaller matters, County Court in its Admiralty jurisdiction deal with shipping litigation.

Ships.

Ownership, mortgages, registration, construction, safety equipment etc. are covered by Merchant Shipping Act 1988, Aviation & Maritime Security Act 1990, Carriage of Goods by Sea Act 1992, Merchant Shipping Act 1995, Merchant Shipping and Maritime Security Act 1997. Many enactments relating to Merchant Shipping (along with certain other enactments) have been consolidated in Merchant Shipping Act 1995 and Shipping & Trading Interests (Protection) Act 1995. Under Interpretation Act 1978, §17(2)(b) regulations made under repealed legislation are continued in force unless otherwise selected. By virtue of Merchant Shipping Act 1995, §314, Sch. 14, para. 2 any references in any other Act (not amended by 1995 Act, Sch. 13), or in any instrument made under any other Act to registration of ship or fishing vehicle under certain earlier enactments is construed, unless context requires otherwise as, or as including, reference to registration under 1995 Act Part II (§§8-23).

Crew.

Merchant Shipping Acts provide for manning of ships, certification, authority, liability and welfare of masters, officers, and crew. The Merchant Shipping Act 1988 makes further provision for giving of financial assistance in connection with training of seamen and crew relief costs, and for establishment of Merchant Navy Reserve (see subhead Ships, supra for effect of consolidation).

Safety.

Dangerous Vessels Act 1985 enables harbour masters to prohibit vessels from entering jurisdiction of harbour authority, or to require their removal therefrom in certain circumstances. Merchant Shipping Act 1995 deals with safety of equipment and crew. Provision has been made for suppression of unlawful acts against Safety of Ships by Aviation & Maritime Security Act 1990.

Carriage of Goods by Sea.

Covered by charterparty, bill of lading and various common law rules. Carriage of Goods by Sea Act 1971 overrides contrary common law rules. This Act gives effect to "Hague Visby rules" in International Convention for the Unification of Certain Rules of Law relating to Bills of Lading (see subhead Ships, supra for effect of consolidation).

Carriage of Passengers.

Main Act is Merchant Shipping Act 1995.

Pilotage and Towage.

Pilotage regulated by Pilotage Act 1987. Towage is matter of contract between parties (see subhead Ships, supra for effect of consolidation).

Collisions.

Collision Regulations 1996/75 made under Merchant Shipping Acts provide rules for all British vessels upon high seas subject to any local rules. Under Merchant Shipping (Distress Signals and Prevention of Collisions) Regulations 1996 and Merchant Shipping Act 1995, person whose negligence causes ship to collide liable. Owner vicariously liable. Master liable for own negligence or breach of contract. Owners of injured ship, owners of cargo or other property and persons suffering personal injuries or death have right to damages. Damages, subject to certain limitations, generally follow principle of full compensation (see subhead Ships, supra for effect of consolidation).

Liens.

Maritime liens recognised by English Law are for bottomry and respondentia bonds, salvage of property, seamen's wages and damage. Statutory lien attaches when property is arrested in action in rem in English court. Wharfinger, harbour and dock authorities, and repairer have various liens (see subhead Ships, supra for effect of consolidation).

Lighthouses.

Corporation of the Trinity House controls lighthouses, buoys and beacons for England and Wales and Commissioners for Irish Lights control same in Northern Ireland (see subhead Ships, supra for effect of consolidation).

Pollution.

Oil pollution covered by Prevention of Oil Pollution Act 1971, giving effect to International Convention for Prevention of Pollution of Sea by Oil 1954. Offence to discharge oil into sea. Emission of dark smoke by ship in territorial waters offence under Clean Air Act 1993.

Hovercraft governed by Hovercraft Act 1968.

Limitation and Exclusion of Liability.

Law regarding rights of shipowners and others to limit or exclude liability largely contained in Merchant Shipping Acts. See Merchant Shipping Act 1995.

Registration.

Merchant Shipping Act 1995 part II—establishes central register of ships in U.K. under control of Registrar General of Shipping and Seamen.

23 TREATIES AND CONVENTIONS

23.01 TREATIES:

Treaty describes international agreements concluded between States and/or other subjects of international law governed by international law, whether embodied in single instruments or in two or more related instruments and whatever their particular designation. Most treaties are in writing, but there can also exist informal agreements, generally concluded at executive level.

International law aspects of treaties are governed by Vienna Convention on the Law of

Treaties, in force since 27 Jan. 1980 (Cmnd. 7964). U.K. deposited its ratification to that convention on 25 June 1971. Convention informs U.K. practice in relation to authority of HMG agents to bind U.K., practice of reservations, and provisions on amendment and modification of, or withdrawal from, treaties.

In U.K., constitutional authority to enter into treaties is vested in Crown as part of royal prerogative of foreign affairs. In cases of treaties affecting rights or duties of individuals within U.K. jurisdiction, treaties require incorporation into U.K. law by legislative act. Treaties subject to ratification are laid before Parliament for information under so-called “Ponsonby Rule”.

Legislation implementing treaties is generally interpreted in purposive way and in conformity or harmony with international legal understanding of their terms, if there exists room for interpretation in relation to wording at issue. Special rules and considerations apply in case of treaties establishing European Communities and European Union, inasmuch as supranational powers have been transferred to some European institutions in respect of some areas of regulation. U.K. is member of EU. Human Rights Act 1998 gives effect to rights and freedoms guaranteed under European Convention on Human Rights.

In general, failure to apply treaty internally or to interpret it internally in accordance with international understanding of its terms will not render invalid such act in domestic law. However, U.K.'s international responsibility may be invoked for having engaged in conduct not in conformity with its international obligations.

U.K. has many commercial treaties, agreements and exchange of notes, too numerous to list, some of which have been in force for several hundred years. Annual list of treaties called Index to Treaty Series is published by H.M. Stationery Office.

U.K. is party to: (1) Convention on Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters, (2) Convention on Taking of Evidence Abroad in Civil or Commercial Matters, (3) United Nations Convention on Recognition and Enforcement of Foreign Arbitral Awards, (4) Convention Abolishing the Requirement of Legalisation for Foreign Public Documents. Draft treaty between USA and U.K. for reciprocal enforcement of judgments has been initialled but is thought unlikely to be ratified and brought into force in its present form.

See category 21 Taxation, topic 21.10 Treaties and Agreements, subhead Double Taxation.

See also Selected International Conventions section.

1
ESTONIA LAW DIGEST

—Scope —

Revised for 2010 edition by

THE LAW OFFICE OF TARK & CO of Tallinn.

(GPCCL indicates General Principles of the Civil Code Law.)

Estonia is member of EU. See also European Union Law Digest.

Note: This revision incorporates legislation through Nov. 1, 2009.

1 INTRODUCTION

1.01 CURRENCY:

National currency is Estonian kroon (EEK—hereafter Estonian kroon) equal to 100¢. Estonia has modified currency board system. Estonian kroon was tied with Deutsche mark at rate of 8:1. Estonian kroon is tied with EURO. Rate is 1 EURO = 15.6466 EEK. Estonia is member of Exchange Rate Mechanism II. Entry to ERM II left exchange rate of EEK unchanged. Also in coming years Estonia will run currency board arrangement with fixed exchange rate, 1 EURO corresponding 15.6466 Estonian kroon.

1.02 GOVERNMENT AND LEGAL SYSTEM:

Estonian Constitution was accepted by referendum held on June 28, 1992. Constitution consists of preface and 15 chapters: General Provisions; Fundamental Rights, Liberties and Duties; People; Riigikogu (parliament); President; Government; Legislation; Finance and State Budget; Foreign Relations and Foreign Treaties; National Defence; State Audit Office; Legal Chancellor; Courts; Local Government; Amendments to Constitution.

Work of Parliament, President, Government and courts is organised on basis of separate and balanced powers.

Legislative power is exercised by Riigikogu. Riigikogu is unicameral parliament consisting of 101 members. Members are elected in free, general and direct elections, using proportional representation, for four year terms. Every Estonian citizen who has attained 18 years of age has right to vote. Ordinary sessions take place starting from 2d Mon. of Jan. until 3d Thurs. of June and from 2d Mon. of Sept. until 3d Thurs. of Dec.

In addition to legislative function, Riigikogu has number of other powers under Constitution: (1) determine all questions involving referenda; (2) elect President; (3) ratify and denounce treaties; (4) authorise candidate for Prime Minister to form government; (5) decide on vote of no-confidence in government or any minister; and (6) nominate appointment of some high state officials.

Executive power rests with government of Republic. Powers of government include implementing domestic and foreign policy, submitting draft laws to Riigikogu, preparing draft state budget and issuing regulations. Government consists of Prime Minister and other ministers.

Head of state of Republic of Estonia is President. President may be elected only from Estonian citizens at least 40 years of age; and shall be elected by Riigikogu. Term of office of President is five years, renewable on one occasion only. Beyond formal powers, President has powers where he is afforded measure of political discretion: President has power to proclaim law adopted by Riigikogu unconstitutional or apply to National Court to have law declared unconstitutional.

Judicial power is exercised exclusively by courts. Judges are appointed for life so as to guarantee their independence. Chairman of National Court is appointed by Riigikogu on proposal of President; members of National Court are appointed by Riigikogu on proposal of Chairman of National Court. Other judges are appointed by President on proposal of National Court.

Estonian court system has three levels. Courts of first instance are county courts and administrative courts. District courts act as courts of appeal and review decisions of courts of first instance. National Court is supreme court of Republic, reviewing appellate decisions from district courts and additionally acting as court for constitutional review.

1.03 HOLIDAYS:

Based on Law on Holidays and Anniversaries (adopted Jan. 27, 1998) following are legal holidays in Republic of Estonia. National holiday is: Feb. 24—Independence Day, anniversary of Republic of Estonia. Public holidays are: Jan. 1 (New Year's Day), Good Friday, Easter Sunday, May 1 (May Day Holiday), Whitsunday, June 23 (Victory Day), June 24 (Midsummer Day), Aug. 20 (Liberty Day), Dec. 24, 25 and 26 (Christmas).

1.04 OFFICE HOURS AND TIME ZONE:

Republic of Estonia is in Eastern European (GMT +02:00) time zone. Office hours are generally from 9 a.m. to 5 p.m.

2 BUSINESS ORGANIZATIONS

2.01 ASSOCIATIONS:

Associations exist in form of profit organisations or nonprofit organisations.

Nonprofit organisations are governed by Non-profit Associations Act (adopted on June 6, 1996, latest amendments entered into force on July 1, 2009). Two or more natural persons or legal entities may establish nonprofit organisation to carry out certain activities or achieve certain goals, main purpose of which cannot be making of profit. Profit may not be distributed to members of nonprofit organisation, and may be used only to achieve objectives specified in articles of association. Nonprofit organisation acquires status of legal entity upon registration with Register of Nonprofit Organisations and Foundations.

Profit organisations are considered type of business association. Profit organizations are governed by Commercial Associations Act (adopted on Dec. 19, 2001, latest amendments entered into force on July 1, 2009). Profit organisation is association consisting of at least five members or if members are profit organisations membership of at least three is required. Aim of profit organisation is to support activities or households of its members through offering services. Profit organisation acquires status of legal entity upon registration with Commercial Register.

2.02 COSTS OF INCORPORATION:

Costs of establishing company are stamp duty: (1) for registration of limited liability company, stock corporation, commercial association or branch of foreign company—2,200 Estonian kroons, in case of expedited procedure—2,900 Estonian kroons; (2) for registration of sole trader, partnership or limited partnership—200 Estonian kroons.

Cost of establishing company also includes out-of-pocket costs.

2.03 LIMITED LIABILITY COMPANY:

Share.

Limited liability company is enterprise whose share capital has been divided into shares with nominal value of 100 Estonian kroons or its full multiple. Each shareholder may have only one share. When shareholder acquires additional share, nominal value of initial share increases respectively. No certificate is issued for share.

Share can be freely transferred to another shareholder. In case shareholder wants to transfer share to third persons, other shareholders have preemption right within one month. Articles of Association may prescribe that resolution of shareholders is required to transfer share to third party or to transfer part of share, whereas at least 2/3 of votes must be in favour of such resolution.

In case share purchase agreement has been concluded, seller must notify board of directors, who in turn must notify other shareholders. Share transfer agreement has to be notarised. Notary is required to send notarially authenticated copy of share transfer agreement after notarization of agreement to Commercial Register.

If shares have been registered with Estonian Central Register of Securities and share register is kept by Estonian Central Register of Securities, share transfer agreement and agreement for encumbrance of share do not have to be notarised, but can be concluded in simple written form.

Otherwise, share encumbrance agreement needs to be notarised if preceding two conditions are not met.

Number of votes provided by share is proportional to nominal value of share.

Share Capital.

Since Sept. 1, 1999, minimum amount of share capital is 40,000 Estonian kroons.

Both monetary and nonmonetary contributions can be made into share capital. Nonmonetary contribution must be thing assessable in monetary terms or enforceable property right. Assessment of value of nonmonetary contribution has to be confirmed by auditor if value of nonmonetary contribution exceeds 40,000 Estonian kroons or if nonmonetary contributions form more than half of total share capital.

Issue price of share has to be at least nominal value of share.

Management.

Administrative bodies of limited liability company are meeting of shareholders, board of directors, and, on certain conditions, council (supervisory board).

Meeting of shareholders is authorised to pass resolutions if more than half of votes determined by shares are present. It is also allowed to pass resolutions without convening meeting. Conditions for passing resolutions are same as for stock corporation (see topic 2.05 Stock Corporation). Resolution of general meeting will be adopted when more than half of votes represented at general meeting are in favour of proposal. Two-thirds majority of votes is required to adopt amendments to articles of association, to increase or reduce share capital and to terminate activity of limited liability company.

When shareholders decide to reduce nominal value of shares or cancel some shares disproportionate to others, resolution is deemed adopted if, in addition to 2/3 majority vote requirement, all shareholders whose disproportionate shares are cancelled or nominal value reduced vote in favour of decision.

Articles of Association may stipulate higher quorum requirement, and requirements for higher majority of votes for passing resolutions.

Council.

Limited liability company may have council. Council is obligatory only if share capital exceeds 400,000 Estonian kroons and board of directors has less than three members. Council of limited liability company has same requirements as council of stock corporation (see topic 2.05 Stock Corporation). Council plans activity of limited liability company, organises its administration and supervises activity of board.

Consent of Council is required for conclusion of transactions which are beyond scope of everyday economic activities of company. Articles of Association may further specify these issues.

Council has at least three members. Member of council cannot be member of board of directors or procurator. Members of council are elected and dismissed by general meeting. There is no requirement as to residence of members of council. Member of council is prohibited from competing with company, obligated to keep business secrets and is liable for damage caused to company or creditors through wilful infringement of law or articles of association or by neglect of duty.

Board of directors of limited liability company has in general same requirements as board of stock corporation (see topic 2.05 Stock Corporation). Board of directors is administrative body of limited liability company that represents and administers its day-to-day economic activities. If limited liability company has council, then board of directors has to act according to instructions of council. Transactions that exceed limits of day-to-day economic activities may be made by board of directors only if approved by council.

Board of directors must have at least one member. Member of board cannot be member of council. At least half of members of board of directors must have their residence in Estonia, in another Member State of European Economic Area or in Switzerland. Members of board are elected and dismissed by council. If limited liability company has no council, board is elected by meeting of shareholders. Each member of board has right to represent limited liability company individually, unless otherwise provided by articles of association.

Member of board is prohibited from competing with company, obligated to keep business secrets and is liable for damages incurred by limited liability company or its creditors due to member's violation of his or her obligations. Member of board is released from liability if he or she proves that he or she has performed his or her obligations with due diligence.

Auditor.

Limited liability company must have auditor if its share capital is more than 400,000 Estonian kroons.

2.04 PARTNERSHIPS:

There are two types of partnerships: general partnership and limited partnership.

General partnership is commercial undertaking in which two or more persons operate under common business name and are jointly and separately liable for obligations of undertaking with all their assets.

Limited partnership is commercial undertaking in which two or more persons operate under common business name, and at least one person (general partner) is liable for obligations of undertaking with all assets, and at least one person (limited partner) is liable for obligations of undertaking to extent of its contribution in partnership.

2.05 STOCK CORPORATION:

Share.

Stock corporation is enterprise whose share capital has been divided into shares with nominal value of 10 Estonian kroons or its full multiple. Shares must be registered. Shares must be entered in Estonian Central Register of Securities. Registered shares may be freely transferred. In case of stock corporation, upon transfer of shares to third persons, articles of association of company may stipulate that other shareholders have right of preemption for period of two months. In case share purchase agreement has been concluded, seller must notify board of directors, that in turn must notify other shareholders.

Each share, except preference share, gives right to vote. Shares with equal nominal value give equal number of votes, shares with different nominal value give number of votes corresponding to difference of nominal value. Corporation may issue nonvoting preference shares giving priority to shareholders regarding distribution of dividends and payments upon liquidation of company. Sum of nominal values of preference shares cannot be higher than one third of share capital.

Share Capital.

Since Sept. 1, 1999 minimum amount of share capital is 400,000 Estonian kroons.

Both monetary and nonmonetary contributions can be made into share capital. Nonmonetary contribution must be thing assessable in monetary terms or enforceable property right. Assessment of value of nonmonetary contribution has to be confirmed by auditor. Issue price of share has to be at least nominal value of share.

Management of stock company has three levels: general meeting of shareholders, council (supervisory board), and board of directors.

Takeover of Shares for Monetary Compensation.

Majority shareholder, whose shares represent at least 9/10 of share capital of company, may take over shares belonging to remaining minority shareholders in return for fair monetary compensation; amount of compensation shall be determined by majority shareholder on basis of value of shares to be taken over that these shares had ten days prior to date of which notice calling general meeting was sent out. Audited takeover report has to be submitted to general meeting by majority shareholder explaining and justifying condition of taking over shares and bases for determining amount of compensation. At least 95/100 of votes represented by shares have to be in favour for resolution on takeover of shares to be adopted.

Meeting of Shareholders.

General meeting may pass resolutions if more than half of votes represented by shares are present. Resolution of general meeting shall be adopted when more than half of votes represented at general meeting support proposal. Two-thirds majority of votes required to adopt amendments to articles of association, to increase or reduce share capital and to terminate activity of stock corporation.

If company has several types of shares, then, in addition to 2/3 general majority requirement to amend articles, increase or reduce share capital, at least 2/3 of votes representing each respective type of share must support decision.

Articles of association may stipulate higher quorum requirement and higher voting requirements for passing resolutions.

Council plans activity of stock corporation, organises its administration and supervises activity of board. Council is authorised to decide important issues of economic activity of stock corporation. Articles of association may further specify these issues.

Council has at least three members. Member of council cannot be member of management board or procurator. Members of council are elected and dismissed by general meeting. However, it may be stipulated in Articles of Association that up to half of council members are elected or appointed in some other manner. There is no requirement as to residence of members of council. Member of council is prohibited from competing with company, obligated to keep business secrets and is liable for damages incurred by company or creditors due to member's wilful violation of law or articles of association or neglect of duties.

Board of directors is administrative body of stock corporation that represents and administers it's day-to-day economic activities. In its activity, board has to follow requirements of council. Transactions that exceed limits of day-to-day economic activities may be made by board of directors only if approved by council.

Board of directors must have at least one member. Member of board cannot be member of council. At least half of members of board of directors must have their residence in Estonia, in another Member State of European Economic Area or in Switzerland. Members of board are elected and dismissed by council. Each member of board has right to represent stock corporation individually unless otherwise provided by articles of association.

Member of board is prohibited from competing with company, obligated to keep business secrets and is liable for damages incurred by stock corporation or its creditors due to member's violation of his or her obligations. Member of board is released from liability if he or she proves that he or she has performed his or her obligations with due diligence.

Auditor.

Stock corporation must have auditor(s) elected by general meeting that also determines number of auditors.

3 BUSINESS REGULATION AND COMMERCE

3.01 BANKS AND BANKING:

Estonian banks (credit institutions) are generally commercial banks.

Pursuant to Credit Institutions Act (CIA) of 1999 replacing CIA of 1995, commercial credit institution (commercial bank) may operate only as public limited liability company (aktsiaselts) or association (ühistu). Therefore, based on CIA, Commercial Code, Savings and Loan Associations Act, Commercial Associations Act and other laws apply to extent they do not contradict CIA or any other special laws. Bank of Estonia is central bank authorised to regulate activity of commercial banks in Estonia. Bank of Estonia is member of ESCB.

Foreign banks may operate in Estonia through their subsidiaries or via branch offices or, in case of EU foreign banks, offering cross-border services. Subsidiaries as well as branch offices have to be registered with Commercial Register. Foreign bank is entirely liable for liabilities stemming from operation of its branch office. EU foreign bank may enter market via single passport.

Main authority performing supervisory functions over banks is Financial Supervision Authority. Financial Supervision Authority has power to inspect all Estonian banks, all subsidiaries and offices of Estonian banks abroad and all subsidiaries and offices of foreign banks in Estonia.

Minimum mandatory amount of net own funds for commercial banks is equivalent to [Euro]5 million. Commercial bank has to observe certain capital requirements and prudential ratios like capital adequacy, limitations on concentration of exposures and limitations on participation in companies. Procedure for application and calculation of prudential ratios is established by Bank of Estonia. Executives of commercial banks are required to constantly monitor commercial bank's compliance with prudential ratios and are required to promptly notify Financial Supervision Authority of any violations of prudential ratios. Capital requirements and mandatory prudential ratios have recently been harmonized with directive 2006/48/EC introducing updated supervisory framework in EU which reflects Basel II rules on capital standards agreed at G-10 level. Objective of capital requirements recently introduced is to have in place comprehensive and risk-sensitive framework and to foster enhanced risk management amongst commercial banks.

Estonian commercial bank is not permitted to accumulate any exposure exceeding 25% of its own funds to single individual or to group of affiliates. Any accumulated exposure exceeding 10% is deemed to be large. Executives are obligated to inform supervisory board of each person or group of affiliates in respect of whom large exposure arises. Necessary ratio of liquid assets to current liabilities must be sufficient to meet legitimate claims of creditors (ratio is unspecified) and certain minimum sum (determined by Bank of Estonia) must be kept with Bank of Estonia by way of reserve.

Credit institution is responsible for following minimum requirements established by Bank of Estonia in granting, monitoring and assessing loans and writing off overdue loans.

Guarantee Fund Act of 2002 establishes Guarantee Fund that is legal successor of Deposit Guarantee Fund which operated on basis of Deposit Guarantee Fund Act until entry into force of Guarantee Fund Act on July 1, 2002. Guarantee Fund will guarantee, under conditions and to extent provided by Guarantee Fund Act, protection of funds deposited by clients of credit institutions, clients of investment institutions and unit-holders of mandatory pension funds. Deposits of clients of Estonian commercial banks and Estonian branches of foreign commercial banks, together with interest thereon as at date on which deposits become unavailable, are guaranteed and compensated for to extent of 90% but not more than in amount of EUR 50,000 (approx. USD 75,000) per client in any one credit institution. This limit is applied since Oct. 9, 2008. Protection of Guarantee Fund does not extend to deposits in branches of foreign credit institutions which, under guarantee scheme of home country of credit institution, are guaranteed to same or higher level. Protection of Guarantee Fund is applicable to deposits in branches of European Economic credit institutions only to extent that such deposits are not guaranteed under guarantee scheme of home member state of credit institution. Deposits in foreign branch of Estonian credit institution which is not located in European Economic Area member state are not guaranteed by Guarantee Fund if such deposits are guaranteed under guarantee scheme of host country of branch to same or higher level than prescribed by Guarantee Fund Act.

New Money Laundering and Terrorist Financing Prevention Act took effect in Jan. 2008, harmonizing respective rules with 3d EU Money Laundering and Terrorist Financing Prevention Directive (Directive 2005/60/EC) and its implementing directive (Directive 2006/70/EC). Law sets out provisions for prevention of money laundering, imposing, inter alia, obligation to identify clients, to conduct ongoing monitoring of business relationships, to keep appropriate records, to establish internal procedures, to train staff, and to report any indications of money laundering to competent authorities. New law provides more specific and detailed provisions relating to identification of clients and of any beneficial owners and verification of their identity. Customer due diligence procedure must be performed when establishing business relationship; when carrying out transaction in amount of EEK 200,000 or more; when there is suspicion of money laundering or terrorist financing, regardless of any derogation, exemption of threshold; or when there are doubts about veracity or adequacy of previously obtained client identification data. Law provides possibility for simplified client due diligence and prescribes circumstances in which enhanced client due diligence must be performed.

Anonymous bank accounts are prohibited.

International Sanctions Act of 2002 regulates internal application of international sanctions where imposition of international sanctions has been decided by UN, Council of European Union, other international organisations or Estonian Government at its own initiative.

For internal application of international sanctions, Estonian Government has inter alia, right to prohibit payment and any other use of funds and securities.

3.02 COMMERCIAL CODE:

Estonian Commercial Code was adopted by Estonian Parliament on Feb. 15, 1995 and came into force on Sept. 1, 1995. Law has been amended several times, latest amendment from Nov. 15, 2009. German and Swiss codes as well as EU company law directives greatly influenced drafting of Estonian Commercial Code.

Commercial Code provides for five types of business organisations: partnership, limited partnership, limited liability company, stock corporation (public limited company) and commercial association. Latter is very rarely used and then mainly in specific fields of economic activity (e.g. agriculture). Code also contains special provisions for sole proprietor.

In addition, foreign company may establish branch in Estonia to permanently offer goods or services in name of foreign company. Branch is not legal entity, and therefore such foreign company shall be liable for obligations arising from activities of branch. Foreign company must appoint director(s) to manage day-to-day business of branch.

Besides specific provisions about each business organisation, Commercial Code contains general provisions, provisions about Commercial Register, mergers and divisions of companies as well as provisions about transformation and dissolution of companies.

3.03 COMMERCIAL REGISTER:

According to Commercial Code registration departments of county courts (hereinafter registrar) shall maintain commercial register of enterprises of sole proprietors located in and of companies whose seat is in territorial jurisdiction of registrar. Registrar in whose territorial jurisdiction seat of company is located or enterprise of sole proprietor is located shall make entries in commercial register.

Commercial Code provides that commercial register is maintained in Estonian language. Documents not in Estonian language are submitted to registrar with notarised Estonian language translation.

Entry in commercial register is made on application of trader, on basis of court order or on another basis provided by law; signatures on application to registrar must be notarised. Person entitled to sign application submitted to registrar may authorise another person to sign; signature on such proxy must be authenticated by notary. Entries in commercial register are public. Everyone has right to examine card register and business files, and to obtain copies of registry cards and of documents in business files.

Upon submission of application for entry in commercial register, registrar inscribes on application date of receipt, list of documents appended to application and number of pages in each document. Inscription is signed by person who receives application.

Registrar shall not make entry in register if application or documents appended thereto do not comply with law or are submitted prior to term permitted or after term prescribed by law.

After review of application, competent person (registrar) issues entry order approving or denying application in whole or in part. Person competent to issue entry order must review application within five working days after its receipt. Due to circumstances requiring special inspection, court may extend deadline by up to three months.

Information entered in commercial register is regulated by provisions of Commercial

Code regulating activity of sole proprietor and all different commercial undertakings.

Entry in commercial register enters into force upon signature of person who executes entry order and by person who is competent to issue entry order. After order has been issued, registrar enters text of entry to registry card opened for each trader entered in register. Entry shall be held as correct with regard to third person, except if third person knew or should have known that entry is not correct.

3.04 CONSUMER PROTECTION:

Consumer Protection Act was adopted on Feb. 11, 2004 and entered into force on Apr. 15, 2004. Act determines rights of consumers with respect to seller regarding purchase or use of services or goods, as well as obligations and liabilities of seller, producer and intermediary in safeguarding those rights. Act also stipulates criteria for goods and services, such as: safety to consumer's health, life, property and environment; conformance to expected consumer standards; and labelling with Estonian language data and instruction for use, etc. Main rights of consumers provided in Consumer Protection Act are inter alia right to demand goods or services which satisfy at least unconditional requirements, right to obtain necessary and authentic information concerning goods and services supplied and right to claim for compensation for material and moral damage caused by vendor. Obligations of seller must correspond to good customs and must amount to at least following: guarantee that goods or services conform to criteria established by Act for such goods and services; give necessary and truthful information regarding goods or services; fulfil mandatory regulations and standards; adhere to price criteria; guarantee that goods or services conform to sample or adhere to contract; adhere to guarantees of producer, etc. Limitations on distribution of certain goods or favouring of distribution of certain goods, etc. are regulated as unfair competition. (See topic 3.08 Monopolies, Restraint of Trade and Competition.) Law of Obligations Act also contains consumer protection provisions by setting forth criteria to standard terms, contracts negotiated away from business premises and distance contracts for delivery of goods or provision of services. According to Law of Obligations Act that protects consumer as weaker party to contract standard term shall be void if, taking into account nature, contents and manner of entry into contract term causes unfair harm to other party or if standard term is contrary to good morals. Contract terms shall also be void if they are contrary to good morals or imperative terms provided by law. Law of Obligations Act regulates liability of producers that shall be liable for causing death of person and for causing bodily injury to or damage to health of person if this is caused by defective product.

Estonian Consumer Protection Board is national authority whose main task is to protect rights of consumers and to represent their interests, to develop and implement consumer policy in accordance with provisions of UN Guidelines, of Consumer Protection Act and of European Union consumer policy.

Liability of legal persons for infringements of Act range from fines of up to 50,000 Estonian kroons.

3.05 CONTRACTS:

Pursuant to Act adopted by Riigikogu on 5 June 2002, Law of Obligations Act entered into force on 1 July 2002. When compared to previously effective legislation, Law of Obligations Act contains several new principles and it will affect all parties in proprietary relations.

General Part of Civil Code Act and Private International Law Act entered into force concurrently with enactment of Law of Obligations Act.

Definite recognition of freedom of contract principle is significant change for undertakings, which should yield more flexible possibilities to enter into contracts. According to this principle, parties to proprietary relationship or to contract may derogate from provisions of

Law of Obligations Act upon agreement between parties, unless Act expressly provides or nature of provision indicates that derogation from Act is not permitted, or unless derogation is contrary to public order or good morals or violates fundamental rights of person. Freedom of contract principle as general rule allows parties freely choose form of contract. However, there are certain exceptions prescribed by law. For example, marital property contracts and transactions for acquisition of immovables have to be notarized.

In addition to types of contracts set out in Law of Obligations Act, provisions of Act apply also to contracts that are not regulated by law but are not in conflict with content and spirit of law, as well as to obligations that do not arise from contract.

Requirement Concerning Due Diligence Exercisable by Undertakings, and Adherence to Principle of Reasonableness.

Regulation of liability for breach of contract is different as of 1 July 2002. While, according to former regulation, person failing to perform obligation or performing obligation in inadequate manner generally incurred proprietary liability only in case of existence of that person's fault, Law of Obligations Act stipulates that violation of obligation is, as rule, excused only if violation was caused by force majeure.

Concept of force majeure has become wider and it comprises circumstances that are beyond reasonable control of obligor and that obligor could not reasonably have been expected to take into account when entering into contract, or that obligor reasonably could not have avoided or overcome.

Because of freedom of contract principle, parties may still agree upon application of liability that only arises from wrongful behaviour.

Owing to foregoing, adherence to principle of reasonableness is remarkable new regulation contained in Law of Obligations Act. In assessing what is reasonable, nature of obligation, purpose of transaction, usages and practices in fields of activity or professions involved and other circumstances must be taken into account. In case of dispute, court may be brought to investigate and assess reasonableness of provision in contract. Therefore it is recommended to be careful when signing contracts and to use legal assistance upon entry into contracts of great consequence.

Additional Guarantees to Consumers.

Attention should also be paid to issues concerning consumer protection contained in Law of Obligations Act, in which case principle of parties' freedom of contract is not applicable. In consumer protection transactions, unlawful derogations from Law of Obligations Act should guarantee additional protection to consumer—economically weaker and less experienced party.

Regulation of several types of contracts contained in Law of Obligations Act involves special provisions that are more advantageous to consumer. Agreement that derogates from provisions of Law of Obligations Act to detriment of consumer is void and in such case provisions of law are applied instead of provisions of agreement.

For purposes of Law of Obligations Act, consumer is natural person who performs transaction not related to independent economic or professional activity. Therefore, commercial undertaking is not consumer for purposes of Act.

Fate of Contracts That Have Been Signed Before Entry into Force of Law of Obligations Act.

Contracts signed before entry into force of Law of Obligations Act need not be amended, since provisions of legislation effective prior to enactment of Law of Obligations Act apply to obligations that have arisen before 1 July 2002.

However, long-term contracts are exception to foregoing general regulation—as from 1 July 2002 provisions of new General Part of Civil Code Act and Law of Obligations Act apply to long-term contracts signed before 1 July 2002.

Pursuant to Law of Obligations Act, long-term contracts are contracts for performance of continuing obligation or recurring obligations, such as lease and commercial lease contracts, account contracts made with banks, and other contracts that regulate long-term contractual relations.

Pursuant to general regulation, provisions of then effective legislation are applied to circumstances and acts that arose or were performed before 1 July 2002.

If after 1 July 2002 provision of long-term contract is in conflict with provision of Act that must not be derogated from pursuant to agreement between parties, provisions of law apply in lieu of conflicting contractual provision.

Impact of New Acts on Legislation.

Approximately 100 Acts were amended or repealed concurrently with enactment of Law of Obligations Act, General Part of Civil Code Act and Private International Law Act.

3.06 FRAUDS, STATUTE OF:

Republic of Estonia has no Statute of Frauds, but see topic 3.05 Contracts.

3.07 LICENSES, BUSINESS AND PROFESSIONAL:

License or registration in Register of Economic Activities is required for certain kinds of entrepreneurial activity. Activity may not be commenced prior to submission of license or obtaining of registration (as applicable). License is issued by administrative act or specific period of time and entitles its holder to engage in economic activities for which, under applicable laws, consent of administrative authority is required. Registration is obtained for specified or unspecified term of activity for which registration (storing of specific data in state database) is required.

Activities that require license or registration in Register of Economic Activities include insurance operations; establishment of credit institution; management of investment or pension fund; activities in securities market; stock brokerage; security services; production and sale of tobacco and alcohol products; manufacture and sale of weapons and explosives; transport services; entrepreneurship in field of tourism; medicine; veterinary medicine; and others.

3.08 MONOPOLIES, RESTRAINT OF TRADE AND COMPETITION:

Competition Act (adopted June 5, 2001, effective Oct. 10, 2001), applies to all physical or legal persons, including state and local government institutions, engaged in economic activity. Act applies to both natural and state monopolies. Undertaking is in dominant position if its position enables it to operate in market to appreciable extent independently of competitors, suppliers, and buyers. Dominant position is presumed if undertaking accounts for at least 40% of turnover in relevant market.

Competition Authority (established on Oct. 21, 1993) is governmental agency under direct supervision of Ministry of Economic Affairs and Communications. It is headed by Director General who is appointed by Minister of Economic Affairs and Communications. Since Jan. 1 2008, previous Estonian Competition Board and Estonian Communications Board and Energy Market Inspectorate have been merged into Estonian Competition Authority, dealing with supervisory activities in areas of competition supervision, fuel and energy, electronic, and postal communications. Although Competition Board is entitled to issue suggestions, it lacks competence to supervise credit institutions and securities intermediaries, except in case of mergers.

Competition Authority exercises state supervision over implementation of Competition Act, except implementation of provisions of state aid Competition Authority analyses competitive situation, proposes measures to promote competition, makes recommendations to improve competitive situation, makes proposals for legislation to be passed or amended, and develops cooperation with competition supervisory authorities of other states and associations of states. As of 1 May 2004 European Commission also exercises supervision over competition issues in Estonia provided that activities have community dimension. Act foresees possibility of discussion between Authority and market participant in oral hearing of case initiated on suspicion of violation. Such procedure is intended to attempt to achieve termination of possible violation before adopting decision. Such discussion procedure is not obligatory but may become so upon direct request from market participant.

Competition Authority is prohibited from disclosing business secrets of market participant to third persons or to public without consent of market participant.

Act prohibits various types of restrictive agreements and practises. This provision of Estonian law is analogous to Art. 81 of Treaty of Amsterdam of European Union. Agreements, which restrict competition, which have not been granted block exemption and do not qualify for individual exemption, are null and void.

Act also prohibits abuse of dominant position. Estonian provision corresponds generally to Art. 82 of Treaty of Amsterdam of European Union. Estonian provision lengthens list of activities constituting infringements in addition to those provided by Art. 81. For instance, forcing to merge with undertaking or another undertaking or forcing to conclude contract or adhere to concerted practises; unreasonable refusal to sell goods to another undertaking; and unequal treatment of undertakings participant at sale offers. Both Estonian and EU lists of infringements relating to anticompetitive agreements and to abuse of dominant position are non-exhaustive. On Sept. 1, 2002 new Penal Code entered into force, providing under specific circumstances criminal liability for competition offences. Code also provided for legal persons criminal liability with penalty payment of up to 250 million kroons (1 [Euro] = 15.64 EEK). For physical persons, maximum sanction is imprisonment for up to three years.

Since 25 Oct. 2002 Estonian Competition Authority has right to conduct pre-trial investigation of competition offences. Investigation has to be done in conformity to criminal procedure rules. This means that Competition Authority has same investigative rights as other pre-trial investigation authorities, except right to conduct surveillance activities. Competition Authority has right to conduct interrogations, search undertakings' premises or person's house, seize documentary and physical evidence, etc. If surveillance becomes necessary in certain criminal matter, Competition Authority can turn to Police Board which organizes covert investigation. In end of pre-trial investigation, preliminary investigator compiles summary of charges and sends it to prosecutor who takes case to court.

For example, for abuse of dominant position in market there is criminal punishment foreseen by Penal Code but only in case that it is repeating offence and undertaking has been punished with misdemeanor punishment previously for abuse of dominant position. Under Penal Code, person who establishes unfair trading conditions, or who limits production, services, market, technical development or investments to prejudice of consumers, or engages in activities involving abuse of dominant position in market may be punished by pecuniary punishment or up to three years' imprisonment. Company can be punished by pecuniary punishment of up to 250,000,000 EEK.

In case of same infringement but provided that criminal procedure has been terminated or infringement was committed out of negligence, Competition Authorityconducts misdemeanour procedure and person may be punished by pecuniary punishment or detention. Company can be punished by pecuniary punishment of up to 500,000 EEK.

Some, not all, agreements, practices or decisions are considered to be of minor importance (*de minimis*), and thus Competition Act not applicable, if combined market share of total turnover of undertakings which enter into agreement, engage in concerted practices or adopt relevant decision does not exceed 15% in case of vertical agreement, practice or decision; 10% in case of horizontal agreement, practice or decision; 10% in case of agreement, practice or decision which includes concurrently characteristics of both vertical and horizontal agreements, practices or decisions. Regulation on agreements of minor importance is almost analogous to relevant EU regulation.

Concentration is subject to control if, during previous financial year, aggregate turnover of parties to concentration exceeded 100 million kroons in Estonia and aggregate turnover of each of at least two parties to concentration exceeded 30 million kroons in Estonia. It should be noted, that place of generation of turnover is determined by location of purchaser at time of transaction. This is mainly place where turnover was generated for seller and where seller was in competition with other sellers.

3.09 SALES:

General principles of civil and contract law apply also to sale contracts (see topic 3.05 Contracts), but purchase and sale contract is also regulated in more detail by Law of Obligations Act.

By contract of sale of thing, seller undertakes to deliver existing thing, thing to be manufactured or produced or thing to be acquired in future by seller to purchaser and to allow transfer of ownership to purchaser, and purchaser undertakes to pay purchase price for thing to seller and to take delivery of thing. Entering into sale and purchase agreement does not itself give rise to transfer of title of property. In case of movable property, transfer of title in general requires transfer of possession of movable property. In case of immovable property, transfer of title is created only by recordation in land register. In order to transfer title of immovable property, in addition to purchase and sale contract under obligations law, notarised real right agreement must also be concluded, whereby transfer of immovable property is agreed upon.

Conformity of Thing.

Things delivered to purchaser shall conform to contract, in particular in respect of quantity, quality, type, description and packaging. Documents relating to thing shall also conform to contract. Thing does not conform to contract if: (1) thing does not have agreed characteristics; (2) failing agreement concerning characteristics of thing, thing is not fit for particular purpose for which purchaser needs it and of which seller was or ought to have been aware at time of entry into contract if purchaser could reasonably expect to rely on professional skills or expertise of seller, and in other cases for purposes for which such things would ordinarily be used; (3) use of thing is hindered by provisions of legislation of which seller was aware or ought to have been aware at time of entry into contract; (4) third parties have claims or other rights which they may submit with respect to thing; (5) movable is not packaged in manner usual for such things or, where there is no such manner, in manner adequate to preserve and protect thing; (6) in event of consumer sale, thing does not possess quality usual for that type of thing which purchaser may have reasonably expected based on nature of thing and considering statements made publicly with respect to particular characteristics of thing by seller, producer or previous seller of thing or by another retailer, in particular in advertising of thing or on labels.

Upon sale of right to possess thing, seller shall deliver thing to purchaser without any lack of conformity, including being free from any right or claim of third party.

Liability of Seller in Event of Lack of Conformity of Thing.

Seller is liable for any lack of conformity of thing which exists at time when risk of accidental loss of or damage to thing passes to purchaser even if lack of conformity becomes apparent after that time. In event of consumer sale, seller is liable for any lack of conformity of thing which exists at time when thing is delivered to purchaser even if passing of risk of accidental loss of or damage to thing is agreed for earlier date. Seller is not liable for any lack of conformity of thing if purchaser was or ought to have been aware of lack of conformity of thing upon entry into contract.

Seller of immovable shall not be held liable for fact that thing is subject to public taxes or nonmonetary obligations.

Obligation to Examine Things.

If purchaser has entered into contract of sale in course of purchaser's professional or economic activities, purchaser shall promptly examine purchased thing or have purchased thing examined.

Notification of Lack of Conformity of Things.

Purchaser shall notify seller of any lack of conformity of thing after he or she becomes or should become aware of lack of conformity. In event of consumer sale, consumer shall notify seller of any lack of conformity of thing within two months after becoming aware of lack of conformity. Purchaser who enters into contract of sale in course of professional or economic activity thereof shall provide detailed description of lack of conformity when giving notification thereof. Purchaser shall not rely on lack of conformity of thing if purchaser does not notify seller thereof on time or, in case of contract entered into by purchaser in course of professional or economic activity thereof, if purchaser does not provide sufficiently detailed description of lack of conformity. If purchaser has reasonable excuse for failure to give notice, purchaser may, relying on lack of conformity, reduce purchase price or claim compensation for damages from seller.

Requirement to Perform Contract as Legal Remedy.

If thing does not conform to contract, purchaser may demand repair of thing or delivery of substitute thing from seller if this is possible and does not cause seller unreasonable costs or unreasonable inconvenience considering, inter alia, value of thing, significance of lack of conformity and opportunity for purchaser to acquire thing which conforms to contract from elsewhere without inconvenience. Seller may, instead of repairing thing, deliver substitute thing which conforms to contract.

Restrictions on Reduction of Purchase Price.

Purchaser shall not reduce purchase price: (1) if seller repairs thing or delivers substitute thing which conforms to contract; (2) if purchaser unreasonably refuses to accept proposal of seller concerning repair of thing or delivery of substitute thing; (3) upon purchase of used thing which is sold by public auction.

Specifications for Compensation for Damage.

Purchaser may also claim compensation from seller for such damage as is caused due to use of thing for purposes other than those intended if damage arises from seller providing insufficient information to purchaser, and compensation for damage which is caused to thing due to lack of conformity thereof.

3.10 SECURITIES:

Public offer and listing of securities, activities of investment firms, provision of investment services, operations of securities markets and securities settlement systems as well as exercising of supervision over securities market and participants therein is regulated by Securities Market Act of 2001. Securities Market Act also contains takeover rules, rules prohibiting conduct of transactions and manipulation of market on basis of inside information. In Nov. 19, 2007, amendments to Securities Market Act, implementing Directive 2004/39/EC of European Parliament and of Council on Markets in Financial Instruments and implementing Commission Directive 2006/73/EC, took effect.

Securities in Estonia are shares, bonds, convertible bonds or other tradable debt obligations, subscription rights or other tradable rights granting right to acquire securities, investment fund units, money market instruments, derivative instruments or contracts and tradable depositary receipts. Securities market participants are issuers, offerors, investors, clients, and professional securities market participants. Besides credit institutions, fund management companies, operator of regulated market and operator of securities settlement system, professional securities market participants are investment firms, which are public limited companies whose permanent activity is to provide investment services to third parties. In order to operate as investment firm, relevant activity licence is required.

From Jan. 1, 2002 Financial Supervision Authority conducts financial supervision in name of state over activities of professional securities market participants, credit institutions, insurance companies, investment funds and pension funds replacing former supervisory institutions: Securities Inspectorate, Insurance Supervision Authority and Banking Supervision of Bank of Estonia. Financial Supervision Authority Act determines its functions, authorities and its legal status.

Several securities like shares of public limited companies registered in Estonia, shares and units of investment funds registered in Estonia which are traded on regulated market as well as units of Estonian pension funds, several types of debt obligations and subscription rights have to be registered in Estonian Central Register of Securities regulated by Estonian Central Registry for Securities Act that entered into force on Jan. 1, 2001. Registration obligation also applies to operations and transactions performed with such registered rights.

NASDAQ OMX Tallinn (Internet address: http://www.nasdaqomxbaltic.com) is only regulated secondary market in Estonia, which enables investors, via exchange's members and its electronic trading system, to engage in security transactions and gives listed companies access to host of capital resources. Tallinn Stock Exchange belongs to NASDAQ OMX Group and uses SAXESS trading system along with exchanges in Helsinki, Stockholm, Copenhagen, Reykjavik, Oslo, Riga and Vilnius. Stock exchanges in Tallinn, Riga and Vilnius form Baltic Market, that comprises of common trading system, harmonized rules and market practices, easy cross-membership, delivery-versus-payment and free-of-payment links between Baltic central securities depositories, common securities list and index and harmonized local indices. Baltic exchanges are owned by NASDAQ OMX Nordic. (http://www.nasdaqomxnordic.com).

Listing Requirements.

All listings must be approved by five to nine-person listing committee elected by Exchange's supervisory board. All listed securities must be dematerialised, freely negotiable and registered with Estonian Central Register for Securities or similar register acceptable to Exchange. Applications for listing must cover all shares of same class.

Main List.

Market capitalisation of shares must be at least [Euro]4 million. At least 25% of shares must be distributed publicly, unless, taking into account number of shares and their public distribution, market would operate properly with such lower percentage of shares distributed publicly. Company must provide last three audited annual reports.

Secondary List.

Requirements set for securities subject to admission to trading on Secondary List are not as high as for listing securities on Main List or Bond List. Market capitalisation of shares or, if that cannot be assessed, issuer's equity capital must be at least [Euro]1 million. Total of nominal values of debt securities submitted for admission to trading on Secondary List must be at least [Euro]200,000. Sufficient number of securities to be determined by listing committee must be distributed to public in order to ensure there is sufficiently active secondary market. Company must provide two years' audited annual reports if it has carried out its main activity for more than two years.

Bond List.

Sum of nominal values of listed bonds must be at least [Euro]1 million. Company must provide two years' audited annual reports.

Fund List.

Units of shares of investment funds complying with requirements provided by law may be listed at Funds List.

Multilateral Trading Facility Free Market.

Multilateral trading facility called First North is operated by NASDAQ OMX Tallinn. Requirements for admitting securities to trading on First North are lower than in case of regulated markets. Securities submitted for admission to trading on First North must be dematerialised, freely negotiable, and registered with Estonian Central Register for Securities or similar register acceptable to Exchange. Applications for listing must cover all shares of same class. Issuer must conclude agreement with certified adviser of NASDAQ OMX Tallinn who will assist issuer in application proceedings and use its best efforts to make sure issuer properly adheres to rules and requirements of First North.

4 CITIZENSHIP

4.01 CITIZENSHIP:

Main principles of acquiring and maintaining of Estonian citizenship are set forth in Estonian constitution and elaborately regulated in detail in Citizenship Act whereby issues of acquiring, receiving, restoring and revoking of citizenship and legal requirements thereto are dealt with. Estonian citizenship can be acquired at birth, received by means of naturalisation, restored to person who has lost citizenship while minor, and revoked by means of either freeing one from citizenship, taking citizenship away from one or by accepting citizenship of another state. Main requirements in applying for Estonian citizenship are: be at least 15 years of age, applicant has stayed in Estonia permanently on basis of permanent residence permit for at least eight years, of which five last years permanently prior to date on which he or she submits application for Estonian citizenship and for six months from day following date of registration of application, has registered residence in Estonia, has knowledge of Estonian language, has knowledge of constitution of Republic of Estonia and Citizenship Act, has permanent legal income which ensures his or her own subsistence and that of his or her dependants, has loyalty to Estonian state and takes oath.

Legal status of aliens in Estonia is regulated by Aliens Act. Act regulates entry of aliens into Estonia and bases for legal liability of aliens. Bases for stay in Estonia for citizens of EU, EEA state or Switzerland and their family members are regulated by Citizen of European Union Act.

Law sets forth immigration quota which cannot annually exceed 0.1% of permanent Estonian population. Law also stipulates issuing of visas, residence and work permits for aliens.

Corporations Owned or Controlled by Aliens.

Generally there are no legal restrictions for aliens operating business activities, except for certain minor regulations. However, at least half of members of management board of limited liability company must reside in Estonia, any other EEA member state or Switzerland.

According to Aliens Act aliens staying in Estonia are guaranteed rights and freedoms equal to those of Estonian citizens unless constitution, Aliens Act, other acts or international agreements of Estonia provide otherwise.

5 CIVIL ACTIONS AND PROCEDURE

5.01 ACTIONS:

Every person, including noncitizens and non-registered legal entities, has right to apply to county court under procedure provided by law for protection of right or freedom violated or under dispute. Dispute related to civil law may be referred to arbitration court upon agreement of parties, unless law provides otherwise.

Civil courts resolve disputes arising out of civil law (incl. property law, law on obligations, family law, inheritance law, commercial law) and employment law relations. Actions can be brought for recognition of rights, elimination of violations and prevention of further violations, compensation for damage, compulsory performance of obligations as well as other possible measures for protection of civil rights.

Regulations of civil actions are stipulated in Code of Civil Procedure (“CCP”).

Civil case is commenced by filing application with court. Venue of action is determined by defendant's residence if natural person or defendant's location if legal person. Plaintiff has right to bring action pursuant to location of defendant's real estate or defendant's last known residence if not known. Action against defendant whose residence is not in Estonia may be brought pursuant to location of defendant's property or defendant's last known residence in Estonia. Action arising from economic activity of defendant may be brought according to defendant's place of activity. Action for compensation of damages may be brought according to place where activity or event causing damages occurred. Action arising from contract may be brought pursuant to place of performance of obligation.

Upon written agreement of parties, jurisdiction may be changed, if dispute is related to economic activities of parties. Parties may not change exceptional jurisdiction set forth in CCP by agreement. For example, action related to immovable property must be brought pursuant to location of immovable, action for annulment of resolution adopted by organs of legal entity must be brought pursuant to location of legal entity.

5.02 COSTS:

Proceeding costs comprise of court expenses and extrajudicial expenses. Court expenses include state duty, costs for hearing of case and bail. Amount of state duty is determined by state duty law and is fixed on basis of action price. Hearing expenses consist of: Costs related to witnesses, experts, interpreters and translators, costs related to obtaining documentary evidence and physical evidence, costs related to inspection, including necessary travel expenses incurred by court, costs on delivery, forwarding and issuing of procedural documents, costs relating to publication of summonses and notices in publication *Ametlikud Teadaanded* (http:// www.ametlikudteadaanded.ee) or newspaper, costs related to determination of value of civil matter. Costs for hearing of case are prepaid by party filing such application whereupon costs incur.

Extrajudicial expenses are e.g. costs related to representatives and advisers of participants in proceeding, travel costs of participants in proceeding, non-received wages or salaries or other non-received permanent income of participants, costs of pre-trial proceedings provided by law unless action was filed later than six months after end of pre-trial proceedings, bailiff's fee for securing of action and expenses related to execution of ruling on securing of action, costs related to processing of application for procedural assistance in bearing procedural expenses. Amount of legal fees is determined by agreement between participant and its counsel.

State duty on plea of appeal filed against judgment of court of first instance is paid in same amount as would be payable upon bringing of action to court of first instance. Bail is to be paid upon filing cassation plea, plea for restoring proceedings and plea for reinstatement of procedural deadline.

Proceeding costs shall be borne by party losing dispute. Losing party shall cover costs of other party, including extrajudicial costs. Upon partial satisfaction of claim, proceeding costs shall be borne by parties in equal amounts, but court may also adjudge proceeding costs from losing party in proportion with amount of satisfied claim. Government of Republic shall, by regulation, set limits of costs of representative and counsels to be adjudged from losing party. Also courts have right to limit costs of representatives and counsels to reasonable amount.

5.03 DEPOSITIONS AND DISCOVERY:

Estonia is party to Hague Convention on Taking of Evidence Abroad in Civil or Commercial Matters. Also, Council Regulation (EC) No. 1206/2001 of 28 May 2001 on cooperation between courts of Member States in taking of evidence in civil or commercial matters is applicable in Estonia.

5.04 JUDGMENTS (Enforceability of Judgments of Foreign Court):

Judgment of foreign court and arbitration court is recognized in accordance with international treaties of Estonia. As Estonia is member of EU, EU conventions and regulations on judicial cooperation in civil matters (incl. Council Regulation [EC] No. 44/2001 of 22 Dec. 2000 on jurisdiction and recognition and enforcement of judgments in civil and commercial matters) are applicable in Estonia. Estonia is also party to New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards. (10 June 1958).

Application for enforcement of judgments of foreign court and arbitration court are filed in writing and following are attached thereto: (1) Copy of court decision authenticated pursuant to requirements of law of country of location of court which made decision; (2) document which confirms that action, summons or other document initiating proceedings has been served in time on at least one occasion pursuant to laws of such country on defendant or based on decision, on another debtor who did not participate in proceeding; (3) document which certifies that decision was made and has been communicated to defendant or based on decision, another debtor; (4) document concerning execution of decision if execution has already been attempted; (5) document concerning execution of decision if decision has been executed; (6) notarized translations into Estonian of documents specified above.

Judgment of foreign court and arbitration court is executed under procedure provided by code of enforcement procedure unless EU law or Estonian international treaty provides otherwise.

5.05 LIMITATION OF ACTIONS:

According to General Principles of the Civil Code Act (hereinafter “GPCCA”), which entered into force on July 1, 2002, period of limitation of claim stemming from transaction is three years, if obligated party of transaction infringed its obligations willfully period of limitation of claim is ten years.

GPCCA foresees that conditions of limitation of claim can be relieved by transaction, especially period of limitation can be shortened. Period of limitation which is shorter than ten years can also be renewed by agreement of parties, but not for more than ten years.

According to GPCCA period of limitation of claim stemming from law is ten years. Period of limitation of claim stemming from illegal causing of damage and also from unjust enrichment is three years, from time justified person respectively learned or should have learned about damage or about having claim stemming from unjust enrichment. Both of claims expire instead of before mentioned after passing of ten years of deed or event which caused damage, or after passing of ten years of unjust enrichment.

6 COURTS AND LEGISLATURE

6.01 COURTS:

Constitution provides that judicial power in Estonia is to be exercised exclusively by courts. Estonian court system has three levels. Courts of first instance are county courts (maakohtud) and administrative courts (halduskohtud). District courts (ringkonna kohtud) act as courts of appeal and review decisions of courts of first instance. National Court (Riigikohus), located in Tartu, is supreme court of Republic, reviewing appellate decisions from district courts and, additionally, acting as court for constitutional review.

Judges are appointed for life. Chairman of National Court is appointed by parliament on proposal of President; members of National Court are appointed by parliament on proposal of Chairman of National Court. Other judges are appointed by President on proposal of National Court.

6.02 LAW REPORTS, CODES:

All law is codified. No case law or law by precedent exists. However, in practice decisions of highest court (National Court) are considered as guidelines for lower courts. Official texts of laws and regulations are published in official state gazette called Riigi Teataja.

6.03 LEGISLATURE:

See category 1 Introduction, topic 1.02 Government and Legal System.

7 DEBTOR AND CREDITOR

7.01 ASSIGNMENTS:

As general rule, creditor may assign claim to third party, if such assignment is not against statute or contract, or if claim to be assigned is not inseparably connected to person of creditor. Debtor has right to perform its obligation to initial creditor and such performance is legal, if debtor was not notified about assignment. Debtor may assign debt obligation to third party if creditor approves such transfer. In case claim or debt arises from written contract, agreement on assignment or transfer should be in written form. Debtor retains all objections that it had before transfer or assignment.

7.02 ATTACHMENT:

Prior to initiation of civil action, upon filing of court claim or during court proceedings, plaintiff may request court to secure claim. Plaintiff must prove to satisfaction of court that if measures are not taken to secure claim, execution of judgment will be difficult or impossible. At its discretion, court may, among other measures, attach defendant's property or bank accounts, prohibit all or certain transactions with defendant's property or prohibit defendant from making transactions.

7.03 BANKRUPTCY:

Bankruptcy law is relatively well regulated by statute and court practice, especially when compared to certain other areas of private law. New Bankruptcy Act passed by Riigikogu entered into force on Jan. 1, 2004 and significantly amended principles of bankruptcy proceeding. New Act is in conformity with EU legislation. Bankruptcy Act applies to debtors who are natural persons residing in Estonia and to debtors who are legal persons located in Estonia. General civil law courts have subject matter jurisdiction over bankruptcy matters. Court of district where debtor has place of residence has personal jurisdiction over bankruptcy matter.

As defined by law, bankruptcy is insolvency of debtor declared by judgment. Debtor is insolvent if debtor is unable to satisfy claims of creditors due to debtor's financial situation and this inability is not temporary. State or local government cannot be bankrupt.

Bankruptcy procedure is divided into five parts: filing bankruptcy petition, declaration of bankruptcy, formation and administration of bankruptcy estate, sale of bankruptcy estate or restructuring estate and satisfaction of claims.

Bankruptcy petition may be filed by debtor (in certain cases it is statutory duty of debtor) or creditor. In case of creditor, petition should show prima facie elements supported by relevant evidence that debtor may be declared bankrupt. Court will dismiss petition or not commence bankruptcy proceeding, if aforementioned prima facie elements are not proven, petition is based on claim which is not clear, claim is entirely secured by pledge, sum of debt does not exceed 200,000 kroons in case of public limited company or 40,000 kroons in case of private limited company, or 10,000 Estonian kroons in case of natural person, debtor has paid debt on which petition is based before commencement of bankruptcy proceeding, etc. Usually court will appoint interim trustee to determine financial condition of debtor.

Court declares bankruptcy of debtor on basis of petition of creditor if debtor is permanently insolvent, petition is based on clear claim and all other prima facie elements of bankruptcy exist. If debtor files bankruptcy petition, court declares bankruptcy of debtor if no good reason exists not to declare bankruptcy.

Pursuant to court judgment on bankruptcy, bankruptcy estate is formed from debtor's property. With certain exceptions where debtor is natural person, debtor will lose and trustee will receive right to manage bankruptcy estate; certain other rights of debtor will be restricted. Creditors of bankrupt must notify trustee of bankruptcy of their claims within two months after date of publication of bankruptcy notice in official publication Ametlikud Teadaanded. Claim and its priority should be deemed to be accepted if at meeting for defence of claims neither trustee nor any creditor objects thereto. Creditor, whose claim has been disputed, may appeal such act in court. Under specific rules, claims against bankrupt may be offset or assigned.

Bankruptcy estate is property which debtor has at time of declaration of bankruptcy and property return of which is being demanded or recovered or which debtor acquires during bankruptcy proceeding in any other manner. Administration of bankruptcy estate consists of management of legal person or organisation of business of sole proprietor and preservation of bankruptcy estate. Trustee may as legal representative of debtor enter into transactions to organise business of debtor. Other important bodies in bankruptcy proceeding are court, general meeting of creditors, and bankruptcy committee.

At first general meeting of creditors, trustee should present for creditors' approval restructuring plan or proposal to wind-up legal person. Trustee should sell bankruptcy estate by public auction. General meeting of creditors may issue precepts to trustee for sale of property in more profitable manner. Debtor may propose compromise. Compromise is agreement between debtor and creditors concerning payment of debts involving reduction of debts or extension of term for payment thereof.

Claims are satisfied on basis of distribution ratios. Distribution ratio indicates amount of money creditor has right to receive from sale of bankruptcy estate, on basis of defended claim, subject to priority of other claims. Before payment of money on basis of distribution ratios, claims arising from exclusion of property and recovery of property should be satisfied and support should be paid to debtor and his dependants and thereafter payments connected with bankruptcy proceeding should be made.

Claims shall be satisfied as follows: expenses relating to bankruptcy proceedings, claims secured by pledge, recognised claims submitted on time, other recognised claims not submitted on time.

Claims are satisfied in full in order of their priority.

Penal Code foresees penalty for causing insolvency and concealment of assets in bankruptcy or enforcement proceedings.

7.04 EXECUTIONS:

Execution in civil matters is granted on basis of court judgments, foreign court judgments according to international treaties, arbitral decisions, court-approved settlements, decisions by commissions in labour and rent disputes, and decisions by other tribunals and commissions established by law.

Execution proceedings in civil matters are commenced by application of court or claimant. Court may grant writ of execution from date such judgment or any other decision has become final by law. Claimant is person for whom court has issued writ of execution. Executions are carried out by bailiffs, who are independent persons holding office in public law. Bailiff is obliged to exploit all means permitted by law to carry out judgment rendered by court. All expenses of execution are payable by debtor. However, bailiff may demand prepayment of execution expenses, which upon execution are remitted to claimant.

7.05 LIENS:

Estonian law recognises for example following types of liens:

Liquidated Damages.

Parties may agree that one party is relieved from its obligation of proving amount of damages—if it can prove that other party has breached agreement, liquidated damages in prefixed sum are payable.

Earnest Money.

This is sum of money given by one party to contract to other party to certify that contract has been entered into and to secure performance thereof. Upon performance of contract secured with earnest money, it is presumed that earnest money will be used towards performance of obligation or, if performance is impossible, that earnest money will be refunded.

If nonperformance of contract secured with earnest money is fault of party which gave earnest money, other party shall retain earnest money. If party which receives earnest money requires compensation for damage incurred by party due to nonperformance of contract, earnest money shall be used towards such compensation. If contract secured with earnest money is not performed for reason other than fault of party which gave earnest money, party may require earnest money to be refunded.

Guarantee.

Person engaged in economic or professional activity (guarantor) may, by contract, assume obligation (guarantee) before obligee, according to which person undertakes to perform obligations arising from guarantee on demand of obligee. Obligation of guarantor before obligee which arises from guarantee shall not be affected by obligation of obligor secured by guarantee nor validity of obligation even if guarantee contains reference to obligation. Guarantor may only set up such defences against obligee which arise from guarantee.

7.06 PLEDGES:

Estonian law recognises for example following types of pledges in addition to real estate mortgages:

Possessory pledge is created by debtor transferring movable object into possession of creditor. In case value of pledged object exceeds 500 EEK, pledge has to be in written form. Pledgee has to maintain pledged property. Pledgee may not use pledged property unless otherwise agreed. In case claim is transferred to another person by pledgee, pledge will transfer as well and new claimant may request transfer of possession of property. Possessory pledge may not transfer without claim.

Registered pledge can be created for properties that are registered in registers provided for by law. In this case pledge is registered, whereas property remains in possession of owner, who can continue using it. There can be several registered pledges on one property. Claims of pledgees are satisfied in registration order of pledges. Registered pledges can be asserted over vehicles, intellectual property, shares etc.

Pledge of rights may be established over proprietary rights which are transferable.

Commercial pledge is special type of registered pledge, which covers all movable assets (except for cash, shares and objects that can be pledged under other types of registered pledges) of company. This pledge is entered into commercial pledge register which is kept together with Commercial Register by local court. Pledgor can freely use and dispose of its assets within frames of its day to day economic activities. All movable assets sold within frames of day to day economic activities will no longer be pledged under commercial pledge agreement. All movable assets bought by pledgor will become pledged under commercial pledge agreement.

8 DISPUTE RESOLUTION

8.01 ARBITRATION AND AWARD:

Disputes arising from contractual and other civil matters may be submitted to arbitration where provided by Estonian law, bilateral or multilateral international treaties or parties' agreement. Arbitral agreement shall be invalid if its object is dispute concerning validity or cancellation of residential lease contract, and vacating dwelling located in Estonia or dispute concerning termination of employment contract.

Arbitral agreement must be concluded in format which can be reproduced in writing. Arbitral agreement may also be contained in written confirmation.

When agreement between parties refers to laws of concrete state, it is presumed that agreement excludes private international law clauses, unless parties have agreed otherwise. If parties have not agreed on applicable law, Estonian law applies. Arbitration court may resolve dispute basing its award on principles of justice if parties have so agreed. Arbitration court considers commercial practices when resolving dispute. Arbitration claims may be secured on application to arbitration court. Decisions securing claim are enforced analogously to final award.

Arbitration awards may be appealed within one month from receiving award if: (i) person concluding agreement to arbitrate was incapacitated during its conclusion; (ii) agreement to arbitrate is invalid according to law of state on basis of which parties have agreed to value validity of agreement or according to Estonian law; (iii) party appealing was not duly notified of appointment of arbiter or arbitration proceedings or not afforded due process; (iv) award pertains to dispute which parties have agreed not to arbitrate.

Decision of arbitral tribunal is recognised in Estonia, and enforcement proceedings based on decision of arbitral tribunal are carried out only if court has recognised decision and declared decision to be subject to enforcement. Decision made in proceeding of arbitral tribunal operating in Estonia on permanent basis is subject to recognition and enforcement without separate recognition and declaration of enforceability by court. Estonia is also party to New York Convention on Recognition and Enforcement of Foreign Arbitral Awards (June 10, 1958 in force in respect of Estonia from Nov. 28, 1993).

9 EMPLOYMENT

9.01 LABOR RELATIONS:

Employment laws in Estonia apply to all employees and employers whose employment relations are based on employment contract. Applicable law is Employment Contract Act (ECA). Employment contract is agreement between employer and employee which requires that employee performs certain work for employer under employer's supervision and control; and employer pays remuneration for work done and ensures that working conditions are as parties agreed in employment contract, collective agreement, administrative act or law. It is presumed that employment contracts are made for unspecified period. Fixed-term employment contract may be made up to five years if it is justified by good reasons arising from temporary fixed-term characteristics of work, especially temporary increase in work volume or performance of seasonal work. In addition, for period of replacement of employee who is temporarily absent, fixed-term employment contract may be made for period of replacement. Employment contracts must be in writing and must specify data of parties, date of entry into contract and commencement of work, description of duties, official title, wages, manner of calculation of wages, procedure for payment of wages and pay day, taxes and payments payable and withheld by employer, other benefits if agreed upon, working time, place of performance of work, duration of holidays, reference to or terms of advance notification of cancellation of employment contract, rules of work organization approved by employer, reference to collective agreement if collective agreement is applicable to employee. Oral employment contract may be entered into only when term of employment does not exceed two weeks.

Employer shall not enter into employment contract with minor under 15 years of age or minor subject to obligation to attend school, or allow such minor to work. As exception, it is allowed for employer to enter into employment contract with minor of 13-14 years of age or minor of 15-16 years of age subject to obligation to attend school and allow them to work if duties are simple and do not require any major physical or mental effort (light work). Minors of 7-12 years of age are allowed to do light work in field of culture, art, sports or advertising. Minor may enter into employment contract with consent of legal representative. To enter into employment contract with minor of 7-14 years of age employer shall apply to labor inspector of place of business for consent.

Length of annual leave is usually 28 calendar days. Periods of leave in excess of 28 days are usually made available to minors, disabled people, state, government and local government officials and school teachers. Pregnancy and maternity leave of 140 calendar days shall be granted to woman on basis of certificate for maternity leave. Woman has right to commence pregnancy and maternity leave at least 70 calendar days before estimated date of delivery as determined by doctor. Either mother or father is entitled to child care leave until child is three years old.

Rights and duties of employer and employee are contained in ECA, in rules of work organization approved by employer, in collective agreements and in individual employment contract. If employee disregards employer's reasonable instructions or breaches its duties, employer may give employee warning. If employee breaches its duties again despite of previous warning, employer may terminate employment contract. Prior warning is not prerequisite for termination if, pursuant to principle of good faith, employee cannot expect it from employer due to particular severity of breach of duties or for another reason. Material damage caused by employee to employer by employee must be compensated for by employee. At same time employer is obligated to compensate employee for any injury or damage arising from course of employment.

In field of collective employment relations, principal focus of attention is on collective bargaining of collective agreement and settling of collective employment disputes, including strikes.

Employees working in different trades have separate trade unions. All trade unions belong to Association of Trade Unions. Each trade union has statutes registered in order required by law. Employers belong to Association of Employers.

10 ESTATES AND TRUSTS

10.01 DEATH:

At request of interested person, court may declare person dead if during five years there is no information that person is alive. If person is missing due to situation dangerous to life or gives reason to presume that person perished in accident, court may declare person dead after person has been missing for six months. Declaration of death of person has same legal consequences as person's actual death unless otherwise provided by law.

10.02 DECEDENTS' ESTATES:

Estate of decedent consists of real and movable property of decedent, rights and obligations at time of death. It does not include rights and obligations of decedent which pursuant to law or by their nature are inseparably bound to person of decedent.

10.03 DESCENT AND DISTRIBUTION:

Succession is intestate if decedent has not left valid will or testamentary contract. Successors are relatives of decedent and surviving spouse.

Relatives succeed in three orders: first order intestate successors are descendants of decedent, second order intestate successors are parents of decedent and their descendants, third order intestate successors are grandparents of decedent and their descendants. Second order successors succeed if there are no first order successors, and third order successors succeed if there are no first or second order successors. Children succeeding through deceased parent succeed in equal shares to share of estate to which their deceased parent would have had right.

Together with relatives of decedent, surviving spouse succeeds in intestacy (a) with first order successors, equally with share of child of decedent but not to less than ¼ of estate; (b) with second order successors, to one half of estate; (c) if there are no relatives from first or second orders, surviving spouse succeeds to entire estate. If there are no relatives from first or second order nor grandparents, decedent's spouse succeeds to entire estate.

In addition to his or her share of estate, surviving spouse may request establishment of personal right of use on immovable which was matrimonial home of spouses provided that standard of life of surviving spouse would deteriorate due to succession.

Surviving spouse does not have right of succession or right to preferential share if decedent has filed claim with court for divorce or agreed to divorce in writing or if decedent was entitled, at time of his or her death, to claim annulment of marriage and has filed corresponding claim with court.

Upon opening of succession, estate transfers to successor. Successor may renounce succession.

10.04 WILLS:

Will is unilateral transaction whereby testator makes disposition of estate in event of death. Will may be notarial or domestic. Notarial will may be notarised will or will deposited with notary. Domestic will may be will signed in presence of witnesses or holographic will.

If decedent has by will or testamentary contract disinherited ascendant, descendant or spouse incapacitated for work and entitled to succeed in intestacy, or has reduced their shares of estate as compared to their shares according to intestate succession, relatives and spouse have right to succeed to compulsory portion, which is one-half of share of estate which successor would have received in case of intestate succession if all intestate successors would have accepted succession.

If in will testator gives particular proprietary benefit to successor, it shall be deemed to be legacy and recipient of benefit shall be deemed to be legatee.

Testator may nominate one or several alternative successors in place of successor if person nominated as successor dies before opening of succession, renounces succession, or is unworthy to succeed.

Testator may provide in will that upon occurrence of particular date or fulfilment of suspending condition, entire estate or share thereof transfers from successor to subsequent successor.

11 FAMILY

11.01 ADOPTION:

Child may be adopted only in best interests of child. Adult cannot be adopted. Adoptive parent may be person who is at least 25 years old, capable of raising, caring for and maintaining child. Between adoptive parent and adopted child are identical rights and duties created as between parent and child.

Court decides adoption on basis of application of person wishing to adopt. In deciding adoption, court shall include supervisory guardian in proceeding for purpose of hearing guardianship authority's opinion.

11.02 DIVORCE:

Divorce is granted by court or by vital statistics office. Vital statistics office grants divorce upon agreement of spouses on basis of joint written petition which spouses submit to vital statistics office personally. Vital statistics office shall not grant divorce if together with divorce spouse desires to resolve dispute concerning child or concerning division of joint property or desires support to be ordered. In those cases, divorce is granted by court. Divorce shall be granted if court ascertains that continuation of marriage is impossible.

11.03 INFANTS:

Person who has attained 18 years of age is adult and has active legal capacity. Minor under 18 years of age has restricted active legal capacity. Minor has right to enter into transactions with consent of legal representative. Transactions in name of minor shall be entered into by legal representative.

Parents have equal rights and duties with respect to their children. Parents have right and duty to raise child and to care for child. Parent is legal representative of child.

11.04 MARRIAGE:

Marriage is contracted between man and woman. Both spouses have to be at least 18 years of age. Minor between 15 and 18 years of age may marry with written consent of parents or guardian. Marriage shall not be contracted: (1) between persons of whom at least one is already married; (2) between direct ascendants and descendants, brothers and sisters, half-brothers and half-sisters, adoptive parents and adopted children, or between children adopted by same person; (3) between persons of whom at least one is declared to be without active legal capacity, without written consent of guardian.

12 FOREIGN TRADE AND COMMERCE

12.01 CUSTOMS DUTIES:

Estonian Parliament (Riigikogu) passed Customs Act on Apr. 13, 2004. Act entered into force on May 1, 2004, i.e. at same time with Community Customs Code. Act contains national provisions not regulated by EC law that fall within competence of Member State. Customs territory shall be deemed territory of EU. Customs Act and other acts related to it enable exemption of import and export taxes. Act provides for customs duties and other taxes collected in conjunction with import and export including VAT, excises, etc. Act lays down conditions of collection of custom duties during temporary storage and/or processing of goods in Estonia or postponing taxes until importing goods for free circulation.

12.02 EXCHANGE CONTROL:

There are no foreign currency exchange controls applicable to repatriation of profits from Estonia, or otherwise.

12.03 FOREIGN EXCHANGE:

Financing and credit institutions duly registered and licensed by Financial Supervision Authority (formerly Bank of Estonia) have legal right to buy and sell foreign currency (money exchange), however, providers of currency exchange services are required to register themselves in Register of Economic Activities. Only legal tender in Estonia is kroon. As general rule, natural and legal persons in Estonia are not prohibited from using any other currencies in their monetary transactions. It is legal to open and keep bank accounts for deposit of foreign currency.

12.04 FOREIGN INVESTMENT:

Republic of Estonia grants to foreign investors national treatment.

Generally, foreigners may acquire, own and sell land. Foreign persons (either person who does not have Estonian citizenship or citizenship of EU Member State or legal person not registered in Estonia or EU Member State) must get permission from appropriate state or municipal body to acquire certain real property. Acquisition of real property in areas near border and in certain other areas is either prohibited or allowed only when authorised state or municipal body grants permission to foreign person.

Nationalisation, expropriation, etc. of foreign investment is illegal. Nationalisation, expropriation, etc. of property must be conducted in order as provided by Estonian statute for all residents of Estonia. Losses sustained by foreign investor due to nationalisation or expropriation of its property must be fully compensated in foreign currency initial investment was made in or in other currency acceptable to investor. In case of dispute arising in connection with compensation, foreign investor has right to commence action with Estonian courts, if treaty does not provide otherwise. Republic of Estonia has concluded and ratified number of treaties on protection of foreign investments, for example with U.S., U.K., Czech Republic, Ukraine, Austria, etc.; free trade agreements, for example with Swiss Confederation, etc.

12.05 FOREIGN TRADE REGULATION:

Licence must be obtained to carry out activities in certain areas notwithstanding origin of operator (e.g. mining, retail sales of pharmaceuticals, production of alcohol and tobacco, etc.). Estonia as member of WTO has adopted WTO treaties' framework and codified certain trade regulations into Estonian law. Additional trade regulations (especially provisions on subsidies and dumping) have been adopted directly or codified into Estonian law upon Estonia's accession with EU.

13 IMMIGRATION

13.01 CITIZENSHIP:

See category 4 Citizenship.

14 INTELLECTUAL PROPERTY

14.01 COPYRIGHT:

This topic is governed by Copyright Act (``Act'') (adopted Nov. 11, 1992, enforced Dec. 12, 1992). In accordance with Act, literary, art and scientific works are protected by Estonian law. Work is defined as original outcome of person's creativity in fields of literature, art or science expressed in objective form and perceived and reproduced either directly or by means of technical device. Act acknowledges joint and collective works. Act identifies works that may be copyrighted as following: works of literature, articles, political, educational, etc. works; scientific and works of popular science, three-dimensional works (monographies, plans, schemes, models, tests, etc.); computer programmes (protected as written works); speeches, synopses, and other oral works; scenarios and librettos; drama and musical works; choreography and pantomime works; audiovisual works; radio-works; works of art, graphics, print, drawing and illustrations; sculptures; architectural graphics; design and fashion works; photography works and works analogous to photography as well as slides and slide-films; cartography works, draft laws, opinions and reviews; derivative works and adaptations; compilations of works and compilations of information (including databases), etc. Act provides for protection of intermediate stages of work and protects original title of work on equal basis of protection of works themselves. Author of derivative work acquires distinct copyright.

Act also lists results of intellectual activity not protected by copyright: ideas, definitions, theories, processes, systems, methods, conceptions, principles, inventions, discoveries etc.

described, explained or in other way expressed in work; works of folklore; legal acts and administrative documents and their official transcripts; court decisions and their transcripts; state official symbols and monetary signs; daily news; single statements and data; ideas and principles underlying any element of computer program, including user interface.

Act states that exclusive rights to work (copyright) commence and are valid from time of creation of work (from moment of fixing work in objective and perceivable form). Copyright exists during lifetime of author and during 70 years following his/her death. Authorship and right to honour and dignity of author are protected without time limitation. No registration of work, depositing or any other formalities are necessary for commencement and enforcement of copyright. Copyright is applicable to both published and unpublished works. Copyright consists of personal nonproprietary rights and property rights to work. Personal nonproprietary rights are inseparable from author and are non-transferable during lifetime of author. Basic personal nonproprietary rights are following: authorship, right to title of work, right to inviolability of work, right to additions to work, right to protection of honour and dignity of author, right to publication, right to amendment, right to withdrawal of work or removal of name from work. Principal proprietary rights of author are: right of reproduction of work or its part, right of distribution, right to translation, right to adaptations, right to issue compilations of works and systematisation of work, right to display or present work; right of communication of work, right of making work available to public (for example, via Internet). Unless author has stipulated otherwise during his lifetime, Act provides that following nonproprietary rights may be transferred to heirs of author: right to additions of work, right to honour and dignity of author, right to publication of work. Other persons may receive only proprietary rights of work. Besides transfer of rights, use of copyright may be granted on basis of written license. Non-exclusive or exclusive licences as well as sublicensing are permissible.

Reproduction without consent from author and without payment for use of copyright is permissible for personal use (scientific research, educational work) only to physical persons. Reproduction for citation or educational purposes without consent of author and without payment for use of copyright is permissible if correct source is cited. Use of works without consent of author but with payment for use of copyright applies to reproduction of audiovisual works via payment deduced from means of reproduction (including empty tapes) by producers and importers. This clause does not apply in case of professional and exported means of reproduction as well as in case of means used for making reproductions to persons with hearing and seeing disabilities.

Act also provides for protection of performer of work, producer of phonogram and rights of radio and television organisations (neighbouring rights). Such rights are protected during 50 years following first performance, fixation, publication or distribution of such work by air, whereas term commences on Jan. 1 of year following year when such events take place. Proprietary rights to such work are inheritable, as well as one particular nonproprietary right: right to honour and dignity of performer. Authorship, name of performer and honour and dignity of performer are protected without time limitation.

Organisation supervising rights of members (collective rights) is Organisation of Estonian Authors (Eesti Autorite Ühing or in short EAÜ). If provision of copyright legislation is in conflict with international agreement of Republic of Estonia, provisions of international agreement apply. Act also applies to works that must be protected in accordance with international agreement of Republic of Estonia.

Estonia has also ratified World Intellectual Property Organisation (WIPO) Convention on Aug. 25, 1993 (enforced on Sept. 17, 1993), Paris Convention on Industrial Property Rights on Mar. 23, 1994 (enforced on Apr. 25, 1994) and acceded to Bern Convention on May 18, 1994 (enforced June 20, 1994).

14.02 INDUSTRIAL PROPERTY RIGHTS:

Industrial property rights include besides patents and trademarks also industrial designs, utility models, layout designs of integrated circuits and geographical indications. General questions of intellectual property protection (registers, Board of Appeal, extra-judicial contestation of decisions of registers) are regulated in Principles of Legal Regulation of Industrial Property Act (adopted 28 Jan. 2003; enforced 1 May 2004). Industrial Design Protection Act (adopted Nov. 18, 1997, enforced Dec. 18, 1997) establishes protection of industrial designs. In accordance with Act, both two-dimensional and three-dimensional external designs of product are protected in Estonia. External design is defined as external look of product that consists of compilation of following characters protected either in separate or in different combinations: form, configuration, ornament, colour design, facture and material. Products are defined by Act as separate products or their spare parts and compilation particles regarded as external features (does not include servicing and repairs). Industrial designs may have different versions that retain similar outlook.

Protection is granted if industrial design is new, differentiated and products may be produced either industrially or manually after such design. Act also states that protection is not granted to industrial designs which: only derive from technical purpose of product; are in conflict with good customs; are unstable; are microchip topography designs; are spare parts or compilation particles, which if placed into product are not regarded as external features of regular use. Act provides for special cases of protected industrial designs. If industrial design contains official symbols, flags, coats of arms and like of Republic of Estonia or its territorial unit, historical name of enterprise or element of symbol, protection is granted upon written consent of relevant competent body or official.

Act distinguishes author of industrial design and owner of design. Author of design or person to whom such right has been transferred may apply for registration of design. Upon registration of industrial design applicant is marked as owner of design into Register of Industrial Designs, i.e. exclusive rights to industrial design may be obtained by any physical or legal person upon registration. Full rights to industrial design, including exclusive rights against third persons are valid from date when application for registration of design has been submitted to (received by) Patent Office (located at 7 Toompuiestee Street, Tallinn, 15041) (see topic 14.04 Trademarks and Tradenames). Such date is announced to applicant in writing. Exclusive rights are evidenced by certificate issued by Patent Office after industrial design has been registered with Register of Industrial Designs.

Act also regulates process of submitting application for registration as well as stipulates that foreign applicants that wish to register their industrial design in Estonia may act either on their own or submit their application through authorised intermediaries—Patent Agents. Act also provides for acknowledgment of priority of application based on previously submitted applications in country which is member state of Paris Convention. Term of priority is six months.

Registered industrial designs and relevant information regarding them is contained in Register of Industrial Designs managed by Patent Office.

Within two months from date of decision of Patent Office any person, including applicant is entitled to submit objections regarding decision to Industrial Property Board of Appeal of Ministry of Economy and Communication. Board of Appeal also reviews appeals against decision not to register design. Under law, submission of objections to Board of Appeal is mandatory before initiating any judicial dispute resolution proceedings.

Registration of industrial design is valid initially for five years from date of submission and may be renewed for four five-year terms (25 years altogether).

Act states that industrial designs and rights to submit application for registration as well as rights to use design may be transferred to third persons. Transfer of right to apply for registration has to be in writing and transfer of rights to use (usufruct) may take place via licensing agreement. Term of license may not be longer than term of protection of industrial design. Licensing agreement must be registered, otherwise it lacks validity in respect to third persons.

Act provides for priority of international agreements over provisions of Act.

Same inventions, which can be protected by patents, can be protected as utility models, except biotechnological inventions; inventions that are contrary to public order and morality; methods of treatment and diagnostic methods practiced on animals and humans. As of 1 July 2000, methods and substances can also be protected as utility models in addition to devices.

When compared with patent requirements, utility model has lower inventive step requirements. Protection of inventions as utility models has been stipulated in Utility Models Act (adopted 16 Mar. 1994; enforced 23 May 1994). Same principles apply to preparation and filing of utility model application as do to preparation and filing of patent application with only difference being that utility model application may comprise only one invention. It means, utility model application cannot be filed for registration of group of inventions so linked as to form single general inventive concept.

In course of processing utility model application, only compliance of application with formal requirements is examined by Patent Office. Applicant is responsible for novelty and industrial applicability, which means that even though process of registration of utility model is cheaper and faster than patent procedures, there is greater risk of revocation of protection in case anyone should contest registration. Utility model is registered in State Register of Utility Models and utility model certificate will be issued.

Legal protection of utility model is four years as of filing date, but term of protection can be extended to maximum of ten years.

Geographical Indication Protection Act (adopted 15 Dec. 1999; enforced 10 Jan. 2000) establishes protection of geographical indications, which show that product or service originates from particular geographical area and essential quality-related connection exists between product or service and place where it is produced or rendered. Geographical indication may be in figurative or word form. Registered geographical indication does not give exclusive right to person who applied for it nor does he become owner of geographical indication. Registration of geographical indication gives applicant right to use indication on one's production and to prevent persons not possessing this right from using geographical indication. Protection of geographical indication is valid for unspecified term.

This topic is also governed by Paris Convention on Industrial Property Rights which Estonia has acceded to twice—on Nov. 29, 1923 and on Mar. 23, 1994. (Ratification act took force on Apr. 25, 1994.)

14.03 PATENTS:

This topic is governed by Patent Act (``Act'') (adopted Mar. 16, 1994, enforced May 23, 1994). In accordance with Act, invention is registered and protected by way of patent if it is new, has qualities as invention and has industrial application (patentability criteria). Following may be objects of patentable invention: equipment, method, substance or body of microorganism or combination of previous, as well as their use for new unprecedented purposes. Invention has to be whole, i.e. application may not contain more than one invention or several combinations of objects of invention bound by common inventive thought. Medical products and plant protection products, which contain active ingredients protected by patent, may be provided with additional legal protection.

Act also lists objects that cannot qualify as objects for invention: discovery, scientific theory and mathematical method; economic and thought-structured plan, rule, regulation and method; projects and schemes of buildings, facilities and land-areas; symbol, computer algorithm and programme; design approach; simple description of information; sort of plant and animal breed, layout-designs of integrated circuits. Act also provides for inventions that may not be protected by patent: inventions contradicting public order and morals, treatment and diagnostic methods that are used for treatment or diagnostics of human beings or animals. Act also provides list of biotechnological inventions that may not be protected by patent: methods of cloning human beings; methods of altering genetic identity of human embryo; methods of using human embryos for commercial purposes; methods of modifying genetic identity of animals, where this may cause them suffering without any substantial use from medical point of view for humans or animals, as well as animals obtained by such methods; essentially biological processes for obtaining plants and animals; inventions that can only be used in relation to single plant or animal variety. Inventions are classified according to patent qualifications adopted on basis of International Patent Qualification Agreement (Strasbourg).

Act states that exclusive rights to patent may be obtained by author of invention (physical person) and his heirs. In case of contractual or labour relationships, third person determined by contract may obtain ownership rights to invention. Patent is awarded temporary protection against third persons from date when application of registration of patent has been received by Patent Office (for address see topic 14.04 Trademarks and Tradenames). Such date is announced to applicant after Patent Office has reviewed and established that documents submitted correspond to requirements posed by Act.

Foreign applicants wishing to register patents in Estonia can submit applications and pay any respective state duties themselves or through authorised intermediaries—Patent Agents (registered with Patent Office), but other acts of patent protection in Patent Office or committee of appeal of industrial property have to be carried out by Patent Agent authorised for that purpose by applicant. Act also provides for acknowledgment of priority of application based on previously submitted applications in country that is member state of Paris Convention or WTO or non-member state of Convention or WTO if that country grants Estonian patent applications or utility model application same treatment.

Registration process of patent consists of two stages—preliminary and examination stage. During preliminary stage, Patent Office determines that all necessary documents have been submitted with application and that state duties have been paid, that priority requirements have been complied with (if applicable) and other formal requirements have been fulfilled. Examination stage shall not commence unless preliminary stage has been completed. Examination consists of assessment as to whether invention corresponds to patentability criteria. Proceeding from subparagraph 5 of Art. 15 of Washington Convention (June 19, 1970) applicant may request international search to be made.

Full protection is awarded upon registration into State Register of Patents. Exclusive rights are evidenced by patent certificate issued by Patent Office after patent has been registered with State Register of Patents.

Registered patents and relevant information regarding them is contained in State Register of Patents managed by Patent Office.

Registration of patent is valid for 20 years from date of application and state duty has to be paid annually to keep patent valid.

Act states that patents and rights to use them may be transferred to third persons. In order to transfer use of rights (usufruct) of patent, licensing agreement needs to be signed and respective note be made into State Register of Patents. In case patent owner has not used invention in Estonia during four years following filing of patent application or does not use invention within scope corresponding to needs of Estonian market or patent is obstructing use of another technically progressive invention or national defense, environmental protection, public health and other significant national interests require use of invention; or patent hinders granting plant variety rights or use of plant variety which is granted legal protection; and patent owner refuses to grant licence to third persons for use of patent, third person may file court claim to obtain compulsory license. In that case, cross-licensing (obtaining of compulsory license over another's invention in exchange for compulsory licensing of one's own invention) is permissible.

Act provides for priority of international agreements over provisions of Act. If any international agreement of which Estonia is party contains provisions which differ from provisions of Act, provisions of international agreement take precedence.

On Feb. 27, 2002 Ratification Act of Convention on the Grant of European Patents was passed by Parliament and it entered into force on Apr. 14, 2002. On Jan. 29, 2003 Parliament ratified Patent Law Treaty.

14.04 TRADEMARKS AND TRADENAMES:

In accordance with Trademark Act (``Act'') (adopted 22 May 2002, enforced 1 May 2004), both goods and services marks (trademarks) are registered and protected in Estonia. Trademark is defined as sign used to distinguish goods or services of person from other similar types of goods or services of other persons.

According to Act, protected trademarks must be capable of being represented graphically. Legal protection is granted to: (a) Trademarks that are well known in Estonia within meaning of Art. 6bis of Paris Convention for the Protection of Industrial Property; (b) trademarks which are registered in Estonian trademark register or in International Register of the Bureau (if registration includes Estonia).

Act provides for list of absolute and relative grounds for refusal. Grounds are generally in line with international practice.

Full rights to trademark, including exclusive rights against third persons are valid from date when application for registration of trademark has been received by Patent Office. Such date is announced to applicant after Patent Office has reviewed and established that data and documents submitted correspond to requirements posed by Act.

Exclusive rights are evidenced by registration certificate issued by Patent Office after trademark has been registered in State Register of Trade and Service Marks.

Act also regulates process of submitting registration applications. In case of foreign applicants (natural or legal persons), there is requirement that for procedures in Patent Office (except submitting of registration application) and Industrial Property Board of Appeal of Ministry of Economy and Communication, applicant has to appoint authorised representative—patent agent. Act also provides for acknowledgment of priority of application based on previously submitted applications in country which is Member State of Paris Convention (convention priority) and exhibition priority.

During examination of trademark by Patent Office, conformity with both absolute and relative registration criteria is examined.

Registered trademarks and relevant information regarding such trademarks is contained in State Register of Trade and Service Marks managed by Patent Office.

Within two months of date of making decision to register trade mark, any interested person is entitled to submit objections against registration of trademark to Board of Appeal. Board of Appeal also reviews appeals to decision of Patent Office not to register trademark. Owners of trademarks may also protect their rights in court. All disputes related to intellectual property are tried at county court level. However, submission of objections to Board of Appeal is mandatory before initiating any judicial dispute resolution proceedings.

Registration of trademark is valid for ten years from date of registration in State Register of Trade and Service Marks and may be renewed without limitation each time for ten year period.

Act states that trademarks and their use rights may be transferred to third persons. In order to transfer using rights of trademark, licensing agreement needs to be signed. Licensing agreement can be entered in State Register of Trade and Service Marks. Act also provides for possibility to pledge of trademarks. Pledge agreement must be in notarised form.

Act provides for priority of international agreements over provisions of Act. If any international agreement of which Estonia is party contains provisions which differ from provisions of Act, provisions in international agreement take precedence.

As from May 1, 2004, EU community trademarks are also valid in Estonia. Owner of trademark that has been registered in Estonia before May 1, 2004 may request court to prohibit use of conflicting (identical, similar, associating, etc.) community trademark in Estonia. Same applies to owners of Estonian trademarks which have been applied for before May 1, 2004 but have been registered after May 1, 2004.

15 LEGAL PROFESSION

15.01 ATTORNEYS AND COUNSELORS:

Attorneys are persons with university degree in law who represent other people in civil cases and act as defence counsel in criminal cases, give legal advice and draft complicated legal documents. Attorneys belong to Estonian Bar Association (EBA) which is independent union of attorneys for provision of legal assistance and protection of rights of attorneys. Attorney must be independent and cannot be engaged on basis of labour contract. Information received by attorney from client is confidential.

All members of EBA are advocates, but more specifically there are sworn advocates, sworn advocate's senior clerks and sworn advocates' clerks. Persons who have passed examination of sworn advocate's clerk may be admitted to EBA as sworn advocates' clerks. Professional title of sworn advocate's senior clerk may be granted to member of EBA on basis of written application if he or she has worked as sworn advocate's clerk for at least one year and has passed examination of sworn advocate's senior clerk. Persons who immediately prior to admission to EBA have worked for at least two consecutive years in position which requires completion of studies of higher education in law and who have passed examination of sworn advocate's senior clerks and senior clerks shall practice under supervision of sworn advocates.

Member of EBA may become sworn advocate on basis of written application if he or she has passed sworn advocate's examination and has practiced as sworn advocate's clerk for at least two years, or as sworn advocate's senior clerk for at least one year. Sworn advocate shall be at least 24 years old.

Counselors are all persons who have graduated from Faculty of Law but who have not entered EBA. They have right to give legal advice and establish law offices but they do not share rights and obligations of attorneys; for example they cannot act as arbitrators and they cannot represent clients in supreme court. They also do not adhere to Code of Conduct promulgated by

EBA.

16 MINERAL, WATER AND FISHING RIGHTS

16.01 FISHING RIGHTS:

Fishing Acts purpose is to grant sustainable use of stocks of fish and aquatic plants guided by principles of responsible fishery. During fishing and collection of aquatic plants, reproduction capacity of their stocks and productivity of bodies of water must be preserved and undesirable changes to ecosystem of bodies of water must be avoided. Law provides who has right to fish and where and under what conditions and restrictions fishing is permitted. Fishing rights are either free of charge or subject to fee. Environmental Charges Act establishes fishing charge which must be paid for certain rights to fish and collect aquatic plants. Fishing is regulated by Fishing Rules and, taking international agreements and Estonian law into consideration, by establishing quota allocations, permitted types and permitted amount of fishing gear, and permitted number of fishing days and fishing vessels. Bases for restrictions on fishing are scientific research and statistical data concerning fishing. Fishing vessels are registered in state register for fishing vessels. Estonian fishing vessels must be supplied with satellite monitoring system. Organisation of Fishery Market Act sets forth distribution standards for fishery products, measures for organisation of market on fishery, rules for application and institutions that apply rules and issues of state supervision. By order of Government, special regulations have been imposed on fishing, issuing of fishing permits, populating water environments with fish; composition of board, numbers of fishing vessels and applying these to vessels, in submitting data related to fishing activities, etc.

16.02 MINING AND MINERALS:

Mining activity as well as legal status of minerals in Estonia is regulated by several acts enacted by Riigikogu and regulations issued by Government and Minister of Environment.

Law on Property Act sets forth principles of ownership of minerals. Mining Act provides safety and sustainability requirements for mining activities as well as qualification and registration requirements for undertakings engaged in mining. Earth's Crust Act sets forth rules on exploring and exploitation of earth's crust. Issues of mining activity and minerals related to Estonian exclusive economic zone are also regulated by Exclusive Economic Zone Act. Specific regulations provide rules for conducting surveys on minerals, specifying requirements for application and issuing of mining licenses, etc.

16.03 WATER RIGHTS:

Main principles relating to usage of water and its protection are regulated in Water Act addressing issues of maintaining ecological balance in Estonian waters, purity of groundwater and border and in-land waters, regulating relations between users of water and land owners. As for protection of waters, provisions of Water Act apply also to Estonian exclusive economic zone. Certain ownership issues relating to water are regulated in Law of Property Act. Environmental Charges Act provides bases for determination of water extraction charge (right to extract water from water body or aquifer) as natural resource charge, which must be paid for. In addition, there are rates of pollution charge which must be paid in case of pollution of water body or ground water, as well as procedure for calculation and payment of charges. Environmental Liability Act regulates prevention of and remedying of water damage.

17 MORTGAGES

17.01 CHATTEL MORTGAGES:

See category 7 Debtor and Creditor, topics 7.05 Liens, 7.06 Pledges.

17.02 MORTGAGES OF REAL ESTATE:

Mortgage of real estate (hüpoteek) is created by notarised agreement between landowner and another person. Real estate mortgage is unrelated to existence of debt, it can be created and it can exist without any indebtedness from landowner to mortgagee. Mortgage is registered in Land Register kept by local court. Mortgage can also be registered in name of landowner himself. There can be several mortgages on one real estate in which case they are registered either on same or different ranking numbers. Ranking numbers are significant in case of distribution of proceeds from sale of real estate on account of mortgages.

Mortgage secures claims of mortgagee up until amount registered. For example, mortgage of first order for sum of 1,000,000 EEK means that claim of holder of mortgage is secured and he will receive proceeds of sale of real estate in amount up to 1,000,000 EEK. If his claim is larger, it will not prevail over claims of other creditors for proceeds of sale exceeding 1,000,000 EEK.

18 PROPERTY

18.01 REAL PROPERTY:

Term “Real Property” or real estate means land and its undetachable parts under Estonian law. Buildings are usually undetachable from land and in same ownership with land. Only special legal concept of building title allows ownership of land and buildings to be separated. Owner of building title can own buildings on land of another person. Building title is always created for certain time period and after expiration, buildings go to ownership of land owner who normally has to indemnify owner of building.

Real estate, including land, is freely alienable in Estonia. Title is registered in Land Register, register kept by courts. All contracts concerning real estate have to be notarised.

There are few limitations on foreigners' ability to acquire land. Citizen of EEA member state may acquire real estate that includes more than ten hectares of agricultural land or forest if that person has been engaged in agricultural or forestry activity in Estonia as sole proprietor for at least last three financial years or with permission of county governor of location of plot of land. Foreigners of non-EEA member states may acquire of agricultural or forest land only with permission of county governor and they may not acquire land in certain border areas.

19 TAXATION

19.01 ADMINISTRATION:

Estonian taxation system contains two types of taxes: state taxes and local taxes.

State taxes are: income tax, VAT, land tax, social tax, customs tax, heavy carriers tax, gambling tax and excise taxes. All state taxes are administered by Estonian Tax and Customs Board. In addition compulsory unemployment insurance and funded pension payments are declared and paid through tax and customs board.

Local taxes are administered by local municipalities (city or county governments). Such taxes must not prevent free movement of people, goods and services. Each local municipality has right to enact one or all of following taxes: sales tax, boat tax, advertisement tax, tax for closing roads and streets, motor vehicle tax, animal keeping tax, entertainment tax, parking charge.

19.02 ALCOHOL, BEVERAGES AND TOBACCO TAXES:

Pursuant to Alcohol, Tobacco, Fuel and Electricity Excise Duty Act, excise duties are imposed on alcohol, tobacco products and fuel and electrical energy.

Alcohol imported or produced in Estonia is taxed with alcohol excise. Alcohol produced in Estonia and exported is free of excise. Out of total alcohol excise 3.5% is distributed from state budget to Estonian Culture Capital (0.5% of which goes to sports capital in composition of Estonian Culture Capital). There are many different amounts of excise for different types of alcoholic beverages. Excise is determined by litre or pure alcohol content per litre.

Excise on imported alcohol is paid to Estonian Tax and Customs Board, which transfers it to state budget.

Tobacco imported or produced in Estonia is taxed with tobacco excise. Tobacco produced in Estonia and exported is free of excise. Tobacco excise is administered similar to alcohol excise, except that in case of tobacco, tax stamps are sold in return of tax payments and such stamps have to be on each tobacco product sold. Out of total collected tobacco excise 3.5% is distributed from state budget to Estonian Cultural Capital (0.5% of which goes to sports capital in composition of Estonian Cultural Capital). There are many different types of excise for different tobacco products. Excise is determined per package, per piece or per weight unit.

Excise on imported tobacco is paid to Estonian Tax and Customs Board, which transfers it to state budget.

19.03 BUSINESS TAXES:

No separate business taxes exist in Estonia.

19.04 CONSUMPTION TAXES:

No separate consumption taxes exist in Estonia. VAT and local municipalities sales taxes are dealt with separately below.

19.05 CUSTOMS DUTY AND TAX:

Most important customs tax is VAT collected at importation of goods. Other customs duties are governed by Customs Act and European Community Law. Tariffs may be imposed for fulfilling Estonia's obligations arising from international agreements, to preserve stable development of Estonia economy and for insuring equal possibilities for Estonian producers when compared to foreign producers. Estonia is member of WTO and customs tariffs are imposed subject to WTO agreements.

19.06 EMPLOYMENT TAX:

No separate employment tax exists in Estonia. Employment related taxes are income tax (applied as withholding tax on salaries and fringe benefits) and social tax (paid by employer on salaries and fringe benefits) dealt with below.

There is also obligation to pay unemployment insurance premium. Unemployment insurance is type of compulsory insurance purpose of which is to pay benefits to employees and public servants upon unemployment, collective termination of employment contracts and service relationships, and insolvency of employers. Rate of unemployment insurance premium payable by insured persons is 0.5 to 2% on amounts paid to individuals on basis of contracts for services, authorisation agreements or contracts under law of obligations entered into for provision of other services, unless recipient of remuneration is entered in commercial register or registered with local Estonian Tax and Customs Board of his or her residence as sole proprietor.

Rate of unemployment insurance premium for payable by employers is 0.25 to 1%. Rates of unemployment insurance premium are established by Government of the Republic. In

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addition compulsory unemployment insurance and funded pension payments are declared and paid through Tax and Customs Board. In addition to above, employers are obliged to withhold funded pension payments from salary and pay them to pension fund managers.

Social Tax.

Rate of social tax is 33% from payment. This tax is payable by employer or any other person making payments (or making available fringe benefits) to individuals in addition to actual payment. For example, if individual receives salary of 10,000 EEK, 21% income tax will be withheld and 33% social tax paid on top of payment.

Individual entrepreneurs who have registered themselves with tax department can pay their own social taxes, whereas payers to such entrepreneurs are relieved from this obligation.

Social tax will go directly to two state funds, opposed to income tax and VAT which go to state revenue. Such funds are health care fund and pension fund.

19.07 EXCISE TAXES:

In addition to tobacco and alcohol excises, dealt with above, there are package excise tax, fuel excise tax and electric energy excise tax in Estonia. Fuel excise is dealt with below and therefore only package excise and electric energy excise remain for this subsection.

Package excise is levied upon packages filled in Estonia or imported to Estonia. Exported packages are tax free. Packages, to which deposit system applies and of which, as from 1 Jan. 2009, at least 75% and as from 1 Jan. 2012 at least 85% are reused are tax free. Other reuse rates apply to metal packages and to packages to which deposit system does not apply. There are different excise rates for different types of packages (e.g., paper and carton – 20 EEK [approx. 1.28 EUR]/kg). Excises are determined based on mass of package and applicable excise rate.

Electric energy excise is levied on electric energy at rate of 3.2 EUR/MWh.

19.08 FOREIGN INVESTMENT TAXES:

No separate investment taxes exist in Estonia. On contrary, Estonia has abolished corporate income tax on retained earnings since 1 Jan. 2000 in order to attract foreign and local investment.

19.09 GAMBLING AND ENTERTAINMENT TAXES:

Gambling tax is payable by certified casinos and other certified arrangers of gambling and games. Tax rates are very specific for different kinds of games.

19.10 GASOLINE AND SPECIAL FUELS TAXES:

Only fuel tax levied in Estonia is fuel excise. Engine fuels and motor and heating oils produced or exported into Estonia are subject to this tax. Exported fuels are tax free. Agricultural producers and diplomats are, under certain circumstances, entitled to refunds. For different fuels exist different excises, determined by litre or kilogram.

19.11 GIFT TAX:

No separate gift tax exists in Estonia. Please see topic Income Tax for taxation of gifts by resident legal persons.

19.12 INCOME TAX:

Estonia has personal income tax. New system of corporate income tax, shifting moment of taxation to distribution of accrued profits was imposed and came into force on Jan. 1, 2000. More detailed overview of application of income tax act on legal entities is provided in this section after short analysis of taxation of individual's income.

Rate of income tax is 21% for individuals. Same tax rate applies to capital gains that are taxed under income tax law.

Income tax is imposed on all types of income of any resident of Estonia. Residents are individuals who permanently live in Estonia and individuals who stay in Estonia more than 183 days per year. Income tax is also imposed on certain categories of income earned from sources within Estonia by any nonresident individual or legal entity.

Withholding is used for various payments, including salaries, leases, certain payments to nonresidents etc.

Estonia has income tax treaties in force with various countries: Finland, Netherlands, Norway, Sweden, Latvia, Lithuania, Denmark, U.K., Canada, Poland, Iceland, Czech Republic, Ukraine, Germany, Belorussia, France, Italy, Croatia, Switzerland, Hungary, Portugal, Spain, Kazakhstan, Ireland, Moldova, USA, Armenia, Turkey, Romania, Slovakia, Malta, Belgium, Austria, China, Luxembourg, Slovenia, Singapore, Georgia, Greece Azerbaijan, Bulgaria and Macedonia (latter in force as from 1 Jan. 2010) as of Dec. 1, 2009.

Estonian Parliament adopted on Dec. 15, 1999 new Income Tax Act which came into force on Jan. 1, 2000. Most important change is that income of Estonian companies is no longer taxed on condition that it is re-invested and not distributed. All legal entities registered in Estonia, regardless of type or ownership basis (local or foreign shareholders), qualify as Estonian resident companies for corporate income tax purposes. In addition, registered branches and registered permanent establishments of foreign companies qualify for similar tax treatment.

According to current corporate income tax system, profit distributions in form of dividends and concealed profit distributions are subject to tax at 21/79 of net amount (i.e. 21% of gross amount of distribution). Proceeds payable upon: (i) Share capital reduction, (ii) liquidation, (iii) shares buyback are subject to same tax treatment as profit distributions as from Jan. 1, 2009.

For purposes of more stringent tax rules, legislature improved following: definition of associated persons and transfer pricing regulation, included definition of low tax territories, included rules concerning taxation of income earned by legal entities situated in such low tax territories (so called CFC rules), improved rules concerning allowed deductions of business costs for individuals and foreign legal entities, rules for payment of taxes upon fringe benefits, gifts, donations and reception costs, dividends and other profit sharing arrangements, costs not related to business of Estonian companies and other payments not related to business of Estonian companies and rules concerning taxation of permanent establishments of foreign legal entities.

Definition of associated persons is important for purposes of transfer pricing regulations.

Law provides that persons are associated to each other, for example in following cases: one person owns more than 10% of shares, votes or rights to profits in another person; persons belong to one corporate group; individuals are directly related to each other; person owns together with other persons related to him more than 50% of shares, votes or rights to profits in another person; persons are under common control by one person; persons own collectively more than 25% of shares, votes or rights to profits in another person; members of board (or body replacing board) are same; individual is relative to members of board or other directing or controlling bodies of legal entity.

For avoidance of transfer pricing abuses law authorises tax administrator to revaluate values of transactions concluded between associated persons. In particular, if value of transaction conducted between resident legal person and its associated person differs from value of similar transactions conducted between non-associated persons, tax administrator may, upon determining income tax, use values of transactions applied by non-associated independent persons under similar conditions. In such case income tax is charged either on income which taxpayer would have derived or expense which taxpayer would not have incurred if value of transaction conducted with associated person had been such as applied by non-associated independent person under similar conditions.

Low tax rate territories are foreign countries, or parts thereof, where no tax or tax lower than 2/3 of Estonian tax applicable to business income of Estonian individuals has been established for taxing income earned or distributed by legal entities.

Persons situated in low tax rate territories, but receiving more than 50% of their annual income from production of goods in such territories or chartering ships registered in such territories, or from trade, provision of transport, communication, accommodation or tourism services in such territories, or insurance services by licensed insurer, are not considered to be situated in such territories.

Government of Estonia is entitled to adopt and amend list of countries and territories automatically excluded from low tax rate territories. Government has adopted list of 42 countries at this point.

Services provided to Estonian residents by legal entities situated in low tax countries are taxable at rate of 21%. This rule applies regardless of where services are provided i.e. services provided outside Estonia are also taxable by Estonia. Also acquisition of shares in companies located at low tax rate territory and certain transactions are handled as expenses not related to business and taxed at rate of 21/79.

Income Earned by Legal Entities Situated in Low Tax Rate Territories.

Income earned by such legal entities is taxed by Estonia provided that legal entity is controlled by Estonian residents and regardless of whether entity has distributed its income or not.

Such legal entities are considered to be under control of Estonian residents if latter own individually or jointly, directly or through associated person at least 50% of shares, votes or rights to profit in such low tax territory legal entities.

Income of such foreign legal entities is considered taxable income of Estonian resident, if in addition to control by Estonian residents, particular resident owns at least 10% of shares, votes or rights to profits in such person.

Allowed Deductions of Business Costs.

As corporate income tax for Estonian companies is charged only upon distribution, allowance of deductions for business costs has direct influence only upon individuals and foreign legal entities.

Among other things, following costs cannot be deducted from taxable income: income tax; legal fines and interests on late payment of taxes; value of property subject to special seizure; increased rate (as opposed to normal rate) pollution fees and pollution damages; costs made at account of nontaxable support; gifts and donations, unless income tax has been paid by payer of such sums; losses due to transfer of property to associated persons; losses due to sale of property that was purchased from associated persons.

Taxes Upon Fringe Benefits.

Employers pay income taxes at rate of 21/79 upon fringe benefits provided to employees. Fringe benefits include among other things: payments for housing costs; payments for car usage costs above allowed levels; insurance costs, if such are not required by law; provision of loan below interest rate fixed by Ministry of Finance (currently annual rate of 3%); sale or exchange of assets or services below market prices; purchase of assets or services above market prices; waiver of debt, unless collection costs would exceed sum of debt. Fringe benefits are also subject to social tax payable by employer with rate of 33%. If fringe benefit is product or service taxable with VAT, employer shall also pay VAT at applicable rates (20%, 9% or 0%).

Taxes Upon Gifts, Donations and Reception Costs.

Estonian companies pay income taxes at rate of 21/79 upon all gifts and donations.

Certain exceptions apply and taxes are not payable upon donations to NPO's (nonprofit organizations) entered into special list.

Estonian companies pay income taxes at rate of 21/79 upon reception costs of guests or business partners of legal entity.

Gifts and, donations to specific categories of persons (culture, education, sports and similar organizations, etc.) in amount of up to 3% of total amount of payments subject to individually registered social tax made by company during same calendar month are exempted from taxation as well as up to 10% of profit gained by taxpayer at end of calendar year.

Taxes Upon Dividends and Other Profit Sharing Arrangements.

Estonian companies pay income taxes at rate of 21/79 upon all dividends or other profit distributions made. Estonian company receiving dividends does not have to pay corporate income tax upon redistributing part of dividends on which tax has been paid either in Estonia or abroad, if it owned at least 10% of shares of distributing company at time of receipt of dividends. Redistributing part of dividends received from resident taxpayer of EU member state or Switzerland if at least 10% of shares thereof belonged to distributing company, is also tax exempt. If shareholding in distributing foreign company is less than 10%, income tax paid abroad can be deducted from income tax payable upon distribution of profits in Estonia. Further exemptions apply to taxation of Estonian companies upon distribution of profits earned through foreign permanent establishments.

In addition, same amount of tax is payable upon concealed distribution of profits and transfer pricing adjustments.

Estonian Tax and Customs Board is entitled to revaluate transactions between Estonian resident legal persons and associated persons on basis of similar transactions between unrelated parties. In such cases, either income that taxpayer would have received or cost that taxpayer would not have carried if correct values would have been used is taxed at rate of 21/79.

Taxes Upon Payment of Interest and Royalties.

In case of payment of interests from one Estonian company to another, there are no income tax consequences unless transfer pricing implications arise. In case of payment of interests to resident individuals, such are taxed at rate of 21% and whole sum is withheld (interests paid by credit institutions are exempt). In case of payment of interest to nonresidents (regardless of whether individuals of legal entities), only part of interest that exceeds market interest is taxable at rate of 21% and whole sum is withheld.

Income tax is not charged on license fee paid by resident company or through or on account of permanent establishment of resident company of Switzerland or member state of European Union registered in Estonia to EU or Swiss resident company or permanent establishment registered in one of mentioned states, provided that payer and recipient have been associated for more than two years (either one holds at least 25% of shareholding in another company or third EU company holds at least 25% in both companies). Tax exemptions is not applied to part of license fee which exceeds value of similar transactions conducted between non-associated persons.

Taxes Upon Costs Not Related to Business of Estonian Company and Other Payments Not Related to Business of Estonian Companies.

Estonian companies pay income taxes at rate of 21/79 from all costs not related to their business and other payments not related to their business.

For example following costs are unrelated to taxpayer's business: annual membership fees and accession fees of NPO's, participation in which is unrelated to taxpayers business; payments with regard to which taxpayer does not have proper invoice; costs for purchasing services not necessary for taxpayer's business.

For example following other payments are unrelated to taxpayer's business: acquisition of property not necessary for taxpayer's business; acquisition of securities or shares issued by legal entities situated in low tax territories; payment of late payment fees or liquidated damages to legal entities situated in low tax territories without judgment by courts or arbitration; lending or making prepayments or otherwise acquiring claims against legal entities situated in low tax territories.

Taxation of Permanent Establishments of Foreign Legal Entities.

Nonresident legal entity which has registered (with Estonian Tax and Customs Board) permanent establishment in Estonia, pays income taxes on account of such permanent establishment based on same principles as Estonian resident companies (subject to certain limited exceptions). Profits earned by permanent establishment are taxed at moment of distribution.

For example, transfer of assets brought to Estonia for such permanent establishment are taxed at 21/79 rate upon their transfer away from Estonia, unless there is market value payment for these assets. All payments to headquarters or other units of same legal entity are taxed similarly unless there is market value return payment. All payments to third persons without receiving any payment in return are taxed similarly.

Taxation of Capital Gains.

Resident individuals do not realize capital gains from non-monetary down payments to share capital of legal entities.

Nonresidents do not pay income tax on their capital gains realized from sale of Estonian shares, unless company whose shares are sold is so-called ``Real Estate Company''. Company qualifies as real estate company if at time of transfer or during period within two years before transfer, more than 50% of company's assets were directly or indirectly made up of immovables or structures as movables located in Estonia and in which non-resident had holding of at least 10%. Qualifying capital gains are subject to 21% income tax.

19.13 INHERITANCE TAX:

No separate inheritance tax exists in Estonia.

19.14 LAND TAX:

Owners of land and, in some instances, users of land have to pay land tax. Rate of land tax varies from county to county and is fixed by local municipality which generally is also recipient of land tax. However, rate has to be between 0.1-2.5% from taxation price of land, with certain limited exceptions. Taxation price of land is based on regular evaluations of land carried out regularly under special land evaluations law.

19.15 LOCAL MUNICIPALITY TAXES:

Local Self-Government Taxes.

Each local municipality has right to enact one or all of following taxes: sales tax, boat tax, advertisement tax, tax for closing roads and streets, motor vehicle tax, animal keeping tax, entertainment tax and parking charge. Most commonly advertisement tax, road and street closure tax and parking charge are applied. Tallinn, capital of Estonia, is currently contemplating to introduce 1% sales tax.

19.16 PROPERTY TAXES:

No separate property taxes exist in Estonia. Land tax is closest to property tax. See topic 19.14 Land Tax.

19.17 SALES TAX:

As discussed under topic Local Government Taxes above, local municipalities may levy sales taxes in Estonia. Amount of tax may not exceed 1%. Only few minor self-governments have introduced this tax.

19.18 STAMP TAX:

In Estonia there is stamp duty payable on different governmental acts, applications for registration, licenses, court claims etc. This is not officially part of tax system, but revenues will go to state budget.

19.19 TAX INCENTIVES:

There are various tax incentives under different taxes in Estonia. Below a few are listed:

Income tax: tax deferral and reduction for sums deposited to qualified pension funds and under qualified pension insurance agreements; release from taxation of income from sale of nonmanufactured agricultural goods sold by individual taxpayers up to 45,000 EEK per year; individual taxpayer's right to deduct certain housing loan interests; individual taxpayer's right to deduct certain educational costs; individual taxpayer's and company's right to deduct donations to qualified nonprofit organizations.

VAT.

No VAT is charged on certain educational services, medical services, cultural services etc. VAT of 9% is charged on books, certain medicines and other socially significant goods and services.

19.20 TREATIES AND AGREEMENTS:

Double taxation treaties of Estonia are listed under topic Income Tax, all such treaties are based on OECD model tax treaty. Primarily they stipulate reduced rates of withholding and tax rates for dividends, royalties, interests etc.

19.21 VALUE ADDED TAX:

Estonian Value Added Tax Act enforced upon accession into EU is based on EU Directive 2006/112/EC on common system of VAT. Also other EU directives on VAT have been incorporated to Estonian laws.

Value added tax is imposed on sales of goods and supply of services. Rate of VAT is 20%, but also 9% and 0% is used for certain supplies. In case of intracommunity supply reverse charge is applied. VAT is payable by seller of goods or provider of service who has to show amount of VAT on its invoice. VAT is payable only by such persons who have or are under law obliged to register themselves as VAT obligatory persons. Person has to register himself once taxable turnover exceeds 250,000 EEK for such taxation year. VAT obligatory person can deduct VAT paid in relation to purchasing goods and services for VAT taxable purposes from VAT payable by it as result of sale of goods and services. Export of goods and services is tax free.

19.22 WEALTH TAX:

No separate wealth tax exists in Estonia.

20 TRANSPORTATION

20.01 MOTOR VEHICLES:

All motor vehicles in Estonia have to be registered with State Motor Vehicle Registry. State Motor Vehicle Registry keeps records of registered vehicles and also gives driver's licences.

All motor vehicles in Estonia must have mandatory traffic insurance. This is governed by Traffic Insurance Law (adopted Apr. 10, 2001).

21 TREATIES AND CONVENTIONS

21.01 TREATIES:

Human Rights.

International Convention on the Elimination of All Forms of Racial Discrimination; Convention on the Elimination of All Forms of Discrimination against Women; Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; Optional Protocol to Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; International Convention against Apartheid in Sports; International Convention on the Suppression and Punishment of the Crime of Apartheid; Convention on the Rights of the Child; Amendment to Article 43(2) of Convention on Rights of Child; Convention on the Prevention and Punishment of the Crime of Genocide; International Covenant on Economic, Social and Cultural Rights; International Covenant on Civil and Political Rights; Optional Protocol to the International Covenant on Civil and Political Rights; Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity; Protocol No. 4 to the Convention for the Protection of Human Rights and Fundamental Freedoms Securing Certain Rights and Freedoms Other than those Included in the Convention and in the First Protocol Thereto; Convention for the Protection of Human Rights and Fundamental Freedoms (ETS 005); Protocol No. 6 to the Convention for the Protection of Human Rights and Fundamental Freedoms concerning the Abolition of the Death Penalty; Protocol No. 7 to the Convention for the Protection of Human Rights and Fundamental Freedoms ETS 117; Protocol No. 9 to the Convention for the Protection of Human Rights and Fundamental Freedoms; Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms; Geneva Convention for the Amelioration of the

Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea of Aug. 12, 1949. (II); Geneva Convention relative to the Treatment of Prisoners of War of Aug. 12, 1949; Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field of Aug. 12, 1949. (I); Convention (IV) relative to the Protection of Civilian Persons in Time of War, Geneva 12 Aug. 1949; Protocol Additional to the Geneva Conventions of 12 Aug. 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I); Protocol Additional to the Geneva Conventions of 12 Aug. 1949, and relating to the Protection of Victims of Non-international Armed Conflicts (Protocol II); Protocol additional to Geneva Conventions of 12 Aug. 1949, and relating to Adoption of Additional Distinctive Emblem (Protocol III); Framework Convention for the Protection of National Minorities; European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment; Protocol No. 13 to the Convention to the Protection of Human Rights and Fundamental Freedoms, concerning the abolition of the death penalty in all circumstances; Convention Relating to the Status of Refugees (Geneva 28.07.1951); Protocol Relating to the Status of Refugees; Optional Protocol to the Convention on the Rights of Child on the Sale of children, child prostitution and child pornography, Second Optional Protocol to the International Covenant on Civil and Political Rights, aiming at the abolition of the death penalty, and Protocol No. 11 to the Convention for the Protection of Human Rights and Fundamental Freedoms restructuring the control machinery established thereby.

Consular and Diplomatic Relations.

Convention on the Privileges and Immunities of the United Nations; Vienna Convention on Diplomatic Relations; Vienna Convention on Consular Relations; Convention on Special Missions; Agreement on the Privileges and Immunities of the IAEA; General Agreement on Privileges and Immunities of the Council of Europe; Convention on the Privileges and Immunities of the Specialized Agencies; Sixth Protocol to the General Agreement on Privileges and Immunities of the Council of Europe; the Third Protocol to the General Agreement on Privileges and Immunities of the Council of Europe; Agreement on the Privileges and Immunities of the International Criminal Court; Agreement Implementing the Protocol on the Privileges and Immunities of the European Communities in the Republic of Estonia; Convention determining the State responsible for examining applications for asylum lodged in one of the Member States of the European Communities - Dublin Convention; Protocol on Privileges and Immunities of International Seabed Authority (ISBA), Agreement on Privileges and Immunities of International Tribunal for Law of Sea (ITLOS).

International Cooperation in Legal Matters.

Protocol on Arbitration Clauses; Convention Relating to Civil Procedure; General Act of Arbitrations (Pacific Settlement of International Disputes); European Convention on Extradition; European Convention on Mutual Assistance in Criminal Matters; European Charter of Local Self-Government; Convention on the Transfer of Sentenced Persons; Additional Protocol to Convention on Transfer of Sentenced Persons; European Convention on Information on Foreign Law; Additional Protocol to European Convention on Information on Foreign Law (CETS 097); Convention on the Taking Evidence Abroad in Civil or Commercial Matters; Convention on International Access to Justice; European Convention on the Transfer of Proceedings in Criminal Matters; Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil and Commercial Matters; European Agreement on the Transmission of Applications for Legal Aid; Statute of the Hague Conference on Private Law; Amendments to Statute of Hague Conference on Private International Law; Convention on the Conflicts of Laws Relating to the Form of Testamentary Dispositions; Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime ETS 141; Convention for the Protection of Individuals with Regard to Automatic Processing of Personal Data ETS 108; European Convention on the Service Abroad of Documents relating to Administrative Matters (ETS 94); European Convention on the International Validity of Criminal Judgments (ETS 70); Criminal Law Convention on Corruption (ETS 173); European Convention on Recognition and Enforcement of Decisions concerning

Custody of Children and Restoration of Custody of Children (ETS 105); Convention on the Establishment of a Scheme of Registration of Wills (ETS 077); Convention on the Civil Aspects of International Child Abduction; Convention abolishing the Requirement of Legalisation for Foreign Public Documents; Convention on the Law Applicable to Maintenance Obligations; Convention on the Recognition of Divorces and Legal Separations; Convention on jurisdiction, applicable law, recognition, enforcement and co-operation in respect of parental responsibility and measures for the protection of children. Civil Law Convention on Corruption (ETS 174), Convention on the Recognition and Enforcement of Decisions Relating to Maintenance Obligations, European Convention on the Supervision of Conditionally Sentenced or Conditionally Released Offenders (ETS 051), Second Additional Protocol to the European Convention on Mutual Assistance in Criminal Matters (ETS 182), Convention established by the Council in accordance with Article 34 of the Treaty on European Union, on Mutual Assistance in Criminal Matters between Member States of the European Union; Convention based on Article K.3 of the Treaty on European Union, on Establishment of a European Police Office (Europol Convention); Protocol drawn up on the basis of Article K.3 of the Treaty on European Union, on the interpretation, by way of preliminary rulings, by the Court of Justice of the European Communities of the Convention on the establishment of a European Police Office; Protocol drawn up, on the basis of Article K.3 of the Treaty on European Union and Article 41(3) of the Europol Convention, on the privileges and immunities of Europol, the members of its organs, the deputy directors and employees of Europol; Convention drawn up on the basis of Article K.3 (2) (c) of the Treaty on European Union on the fight against corruption involving officials of the European Communities or officials of Member States of the European Union; Protocol drawn up on basis of Article 43(1) of Convention on establishment of European Police Office (Europol Convention) amending Article 2 and Annex to that Convention; Protocol amending Convention on establishment of European Police Office (Europol Convention) and Protocol on privileges and immunities of Europol, members of its organs, deputy directors and employees of Europol; Protocol drawn up on basis of Article 43(1) of Convention on establishment of European Police Office (Europol Convention), amending that Convention; Convention on Combating Bribery of Foreign Public Officials in International Business Transactions. Additional Protocol to European Agreement on Transmission of Applications for Legal Aid; Agreement between United Nations and Government of Republic of Estonia on Enforcement of Sentences of International Criminal Tribunal for Former Yugoslavia; Council of Europe Convention on Prevention of Terrorism.

Agreements on legal assistance and legal cooperation with following countries: Russia, Ukraine, Poland, Latvia, and Lithuania.

Arbitration.

New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards; Convention on the Execution of Foreign Arbitral Awards.

International Transportation and Trade.

International Convention on Contracts for the International Carriage of Goods by Road—CMR; UN Convention on Contracts for the International Sale of Goods; Custom Convention on the International Transport of Goods under Cover of TIR carnets (TIR Convention); International Convention on the Harmonisation of Frontier Controls of Goods; European Agreement concerning the International Carriage of Dangerous Goods by Road (ADR); Agreement concerning the Adoption of Uniform Technical Prescriptions for Wheeled Vehicles, Equipment and Parts which can be fitted and/or be used on Wheeled Vehicles and the Conditions for Reciprocal Recognition of Approvals granted on the Basis of these Prescriptions; Convention on Road Traffic; Convention on Road Signs and Signals; European Agreement concerning the Work of Crews of Vehicles Engaged in International Road Transport (AETR); Agreement on the International Carriage of Perishable Foodstuffs and on the Special Equipment to be used for such Carriage (ATP); Agreement Concerning the Adoption of Uniform Conditions for Periodical Technical Inspections of Wheeled Vehicles and the Reciprocal Recognition of Such Inspections;

Convention and Statute on Freedom of Transit; Convention on the International Regime of Railways, Convention and Statute on the International Regime of Maritime Ports, International Transportation and Trade, Convention for the Unification of Certain Rules Relating to International Carriage by Air, Convention for the Unification of Certain Rules for International Carriage by Air, International Convention on Maritime Liens and Mortgages, Protocol to the Convention on the Contract for the International Carriage of Goods by Road. (CMR); Agreement on Trade in Civil Aircraft; Convention, Supplementary to the Warsaw Convention, for the Unification of Certain Rules Relating to International Carriage by Air Performed by a Person Other than the Contracting Carrier; Convention on the International Recognition of Rights in Aircraft; International Air Services Transit Agreement; Arrangements Concerning the Development, the Acceptance and the Implementation of Joint Aviation Requirements; Convention on International Civil Aviation; Convention for the Suppression of Unlawful Seizure of Aircraft; Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation; Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation; Supplementary to the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation; Convention on Offences and Certain Other Acts Committed on Board Aircraft; Multilateral Agreement on Commercial Rights of Non-Scheduled Air Services in Europe; Convention concerning International Carriage by Rail; Convention on the International Regulations for Preventing Collisions at Sea (COLREG 1972); International Convention on Load Lines; Protocol of 1988 relating to International Convention on Load Lines, 1966; International Convention on Tonnage Measurement of Ships, 1969. (TONNAGE); Protocol of 1978 relating to the International Convention for the Prevention of Pollution from Ships, 1973 (MARPOL 1973/78); International Convention for Safe Containers; International Convention on Maritime Search and Rescue; Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation; Convention on the Facilitation of International Maritime Traffic; International Convention on Salvage; International Convention for Unification of Certain Rules of Law relating to Maritime Lines and Mortages; International Convention for Safety of Life at Sea (SOLAS).

Protection of Intellectual Property.

Convention Establishing the World International Property Organisation; Paris Convention for the Protection of Industrial Property Rights; Berne Convention for the Protection of Literary and Artistic Works; Patent Cooperation Treaty; Nice Agreement Concerning the International Classification of Goods and Services for the Purposes of the Registration of Marks; Locarno Agreement Establishing an International Classification for Industrial Designs; Strasbourg Agreement Concerning the International Patent Classification; Budapest Treaty on the International Recognition of the Deposit of Microorganisms for the Purposes of Patent Procedure; Protocol Relating to the Madrid Agreement Concerning the International Registration of Marks; International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organisations; Convention for the Protection of Producers of Phonograms against Unauthorized Duplication of their Phonograms; European Patent Convention; Act Revising the Convention on the Grant of European Patents; Trademark Law Treaty; Geneva Act of the Hague Agreement Concerning the International Registration of Industrial Designs; and Patent Law Treaty; Convention Relating to International Exhibitions; Protocol to Amend Convention Signed at Paris on 22 Nov. 1928 Relating to International Exhibitions

Taxation.

Treaties for avoidance of double taxation are currently in force with following countries: Norway, Denmark, Latvia, Lithuania, Sweden, Finland, Poland, Iceland, Czech Republic, Canada, Ukraine, Netherlands, Germany, China, Belorussia, Ireland, U.K., Italy, Moldova, USA, France, Belgium, Kazakhstan, Austria, Armenia, Malta, Switzerland, Spain, Hungary, Portugal, Croatia, Turkey, Romania, Slovenia, Luxembourg, Slovakia, Singapore, Georgia, Greece, Azerbaijan, Bulgaria, and Macedonia.

Investment protection treaties are currently in force with following countries: USA, Netherlands, Norway, Denmark, France, China, Poland, Switzerland, Sweden, Germany, Finland, Israel, U.K., Austria, Czech Republic, Ukraine, Lithuania, Greece, Latvia, Spain, Turkey, Italy and Belgo-Luxembourg Economic Union.

Agreements among Baltic States.

Following agreements inter alia, are in force with Latvia and Lithuania: Agreement on Cooperation Regarding the State's Frontier Guards, Agreement on Cooperation in the Field of Environmental Protection, Agreement on Mutual Travelling Procedure for Aliens Residing in the territories of Estonia, Latvia and Lithuania, Agreement between Government of Republic of Estonia, Government of Republic of Latvia and Government of Republic of Lithuania on readmission of persons residing illegally, Agreement on Consular Assistance and Co-operation between Government of Republic of Estonia, Government of Republic of Latvia and Government of Republic of Lithuania

1
EUROPEAN UNION LAW DIGEST

—Scope —

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(Abbreviations used are: Art. [Article]; Dec. [Decision]; Dir. [Directive]; Reg. [Regulation]; MS [Member State(s)]; EAEC [European Atomic Energy Community]; ECSC [European Coal and Steel Community]; EEC [European Economic Community]; EU [European Union]; EC [European Community];). Treaty citations are to: European Union, consolidated versions of Treaty on European Union [TEU] and of Treaty establishing European Community (2002) (2002/C325/01), and Reform Treaty of Lisbon (Dec. 2007) (LRT). For simplicity's sake term “EU” is used as umbrella term.

Note: This revision incorporates legislation through Sept. 1, 2008.

1 INTRODUCTION

1.01 CURRENCY:

EU lacks single currency. Common currency—EURO—was product of Maastricht Treaty or (“TEU”); on Jan. 1, 1999, EURO was introduced and banking and finance industry started executing transactions in EURO within original 13 Member States that adopted EURO (UK, Denmark, and Sweden did not adopt and still have not adopted EURO). Circulation of EURO banknotes and coins started on Jan. 1, 2002 within original 13. In 2004, EU admitted 10 countries, and in 2007 additional two: Romania and Bulgaria—each of which is obligated to adopt EURO, provided criteria set forth in Art. 121 of “TEU” is met. Republic of Slovenia adopted EURO 1 Jan. 2007; Malta and Cyprus introduced EURO in Jan. 2008. EURO constitutes official currency in 16 Member States. Excepting Slovakia expected to adopt EURO in Jan. 2009, remaining 2004 and 2007 accession MS have adjusted timetables for delayed introduction of EURO. Hungary, for example, withdrew from ERM II and is not expected to qualify for EURO adoption until 2013, due to non-complying budget deficits. For more detailed information, see topic Government and Legal System, subhead Economic and Monetary Union.

1.02 GOVERNMENT AND LEGAL SYSTEM:

Introduction.

European Union, under principles of public international law, is *sui generis* entity that is product of series of treaties under which Member States have conferred circumscribed competences upon Community Institutions. EU itself is framework housing two communities that exercise real power: European Community and less relevant European Atomic Energy Community. Nuclear core of EU is European Community that has supranational authority in all areas where Member States have ceded authority. It is First Pillar consisting of Community institutions and Community's *acquis commaunataire*. EC Regulations are directly applicable and prime Member State law; EC directives have direct effect and must be implemented to achieve their intended objectives. In landmark decisions, ECJ has expanded supranational authority of EC, and adoption of majority and qualified voting in many areas has further increased authority of EC enhancing its ability to create single market and common set of regulatory norms. EU consists of 27 Member States and recognizes 23 official languages. Member States still are regarded as "Masters of the Treaties"; however, MS have transferred considerable sovereignty to Community Institutions.

Select History. EU was established by Treaty on European Union in 1992 (Maastricht Treaty); term "EU" is nomenclature as EU lacks legal personality; appropriate term remaining "EC". EU is product of series of treaties developed over 50 years. Three European Communities established by Treaty led to formation of EU: ECSC set up by Paris Treaty (1952, expired on 23 July 2002); EEC and EAEC (known as Euratom) set up by Rome Treaties (1958). Maastricht Treaty changed name EEC to EC, thereby embodying in EU previously existing communities. Full list of treaties is found at http://eur-lex.europa.eu/en/treaties/index.htm. EU structure rests on three pillars (notional term no where found in Treaties): First Pillar or Community Pillar, most elaborated and historically substantial, deals with EC and EAEC objectives and tasks—primarily, creation of common union, single market, competition, agriculture and fishery, EU citizenship, and economic and monetary union, to name only several significant areas; Second Pillar is Common Foreign and Security Policy; and Third Pillar is Cooperation on Justice and Home Affairs (later renamed by 2001 Nice Treaty "Police and Judicial Cooperation in Criminal Matters"). Origin of three pillars is 1992 Maastricht Treaty where decision taken to expand Community competences. Note that only First Pillar is directly under control of Community; Second and Third Pillars are inter-governmental arrangements.

In 2004, biggest enlargement took place with ten new countries joining: Czech Republic, Cyprus, Estonia, Hungary, Latvia, Lithuania, Malta, Poland, Slovakia, and Slovenia. On 1 Jan. 2007, Romania and Republic of Bulgaria joined EU, enlarging number of Member States to 27. Candidate countries include: Croatia, Republic of Turkey (associate member since 1963), Republic of Macedonia, Albania, Bosnia and Herzegovina, Serbia, and Montenegro. Turkey has been in accession negotiations with EU since 2005, and on 12 June 2006, examination and assessment of acquis communautaire respecting Turkey began.

Sequence of Treaties. Major, but not all, treaties are: Treaty of Rome (1958); Single European Act (1987); Maastricht Treaty (1993); Amsterdam Treaty (1999); and Nice Treaty (2001). Three European Communities have same original Member States: Belgium, France, Federal Republic of Germany, Italy, Luxembourg and Netherlands. In 1973 Denmark, Ireland and United Kingdom became Member States of European Communities, followed in 1981 by Greece, in 1986 by Portugal and Spain, and in 1995 by Austria, Finland and Sweden. Treaty on European Coal and Steel Community, covering production and distribution of coal and steel, expired on 23 July 2002; Treaty of Rome created EEC and EAEC communities; European "Single Act" entered into force in July 1987, strengthening institutions and powers of EC. TEU marked new stage in European integration. Objective was to promote Economic and Monetary Union, implement Common Foreign and Security Policy, introduce Citizenship of EU, develop Cooperation on

Justice and Home Affairs and maintain in full “acquis communautaire” (existing community law as interpreted by ECJ). TEU entered into force on Nov. 1, 1993, last instrument of ratification having been deposited on Oct. 13, 1993; 1999 Amsterdam Treaty stressed rights of EU Citizenship, added new Title “Employment” and introduced Common Foreign and Security Policy; and 2003 Nice Treaty addressed important issues of voting rights attempting to streamline and clarify process. More specifically, all then 15 Member States ratified Amsterdam Treaty (signed in Oct. 1997) and it entered into force on May 1, 1999. Amsterdam Treaty simplified “co-decision” procedure (legislative sharing system between Council and Parliament), giving Parliament enhanced role in legislation process. Parliament conferred greater role in appointment of Commissioners. Amsterdam Treaty also increased EC competences in matters of Justice and Home Affairs and Social Protocol. Nice Treaty (signed in Feb. 2001) came into force on 1 Feb. 2003. Treaty paved way for enlargement of EU to 25 Member States between 2004 and 2009. Composition of various institutions amended for this purpose. Numerous legislative powers reduced from need for unanimity among Member States, to qualified majority voting (qmv). Form of qmv also amended. Role of Commission and Commission President in particular strengthened. Charter of Fundamental Rights of EU drawn up, addressed to institutions and Member States. European Parliament presses for incorporation in Treaty. QVM is required when issues are debated under Art. 205(2) of TEU.

EEA. Treaty on European Economic Area (EEA) was signed between European Communities, its Member States on one hand and Member States of EFTA, on other hand, in May 1992. EEA-Treaty as well as competition rules apply throughout EEA. Current EFTA Member States, parties to EEA Treaty, are Iceland, Norway and Liechtenstein. Switzerland is EFTA member though not EEA member.

Constitution.

EU lacks constitution as formally conceived; attempt to adopt Constitution (Text agreed in 2004) failed due to rejections by France and Denmark in 2005. TEU has constitutional characteristics, and ECJ in cases has referred to term “constitutional charter”.

LRT. In Dec. 2007, Heads of MS signed in Lisbon Reform Treaty (LRT) that amends existing EU Treaties. LRT is most important development in EU in 2007-2008 since, if adopted as expected, it will virtually serve as constitution of EU. LRT cannot be read in isolation as it simply consists of amendments to existing treaties; however, consolidated versions of Treaties exist, *e.g.* Institute of International and European Affairs prepared consolidated and readable version entitled ``Consolidated Version of the Treaties amended by the Treaty of Lisbon'' released in 2008 available at http://www.iiea.com/publicationxtest.php?publication_id=33. New Treaty contains two sets of amendments; first set amends TEU and second set amends Treaty establishing European Community, conferring new name: ``Treaty on the Functioning of the European Union''. Hence, LRT proposes Treaty consisting of two parts: Treaty on European Union and Treaty on the Functioning of the European Union (replacing European Community).

Status of proposed Treaty is 24 MS have approved or ratified, through indirect procedure such as Parliamentary approval; Ireland, only MS to hold referendum and submit proposal to popular vote has rejected LRT; latter remains under consideration in Republic of Sweden and Czech Republic. It is anticipated that all 26 MS will approve, and that LRT will be re-submitted to Republic of Ireland for second vote. Without unanimous approval, LRT cannot become effective. But, it is unlikely that original deadline for implementation 1 Jan. 2009 will be met.

LRT runs with protocols, annexes, and references to Charter of Fundamental Rights, more than 300 pages. Art. 1 of LRT (TEU) states, “The Union shall replace and succeed the European Community”. Art. 47 states explicitly, “The Union shall have legal personality”. Art. 50 provides for opt-out provision permitting MS to withdraw from EU. Art. 5 (1) reasserts principle of conferral, that is, competences not transferred to Union, remain with MS, and Art. 5 (1) also reinforces main principles of Union action: subsidiarity and proportionality. Proposed Treaty on

“Functioning of the European Union” sets out, among many things, division of competences between Union and MS Art. 2 sets forth general principles of division of power; Art. 3 sets forth exclusive competences of EU; Art. 4 identifies areas where EU and MS share competences, and Art. 6 provides when EU may support or supplement actions of MS. Three Pillar system created by Maastricht is eliminated, and addresses ECJ competence in area.

LRT brings to convergence Community and non-Community integration paths to achieve consolidated Union under auspices of Treaty, rather than European Constitution. TEU, as amended by LRT, contains Title V entitled “General Provisions on the Union's External Action and Specific Provisions on the Common Foreign and Security Policy”, consisting of two chapters and containing Arts. 21 through 46. Scope of Union's interest and authority under Title V is extremely broad as set forth in Arts. 21(1) and 21(2). Conduct of CFSP does not differ dramatically from conduct provided by existing Treaties. European Council is responsible for strategic development of Union's policy under Art. 22. Unless Treaty provides otherwise, as it does in Art. 31(2) permitting qualified majority voting, CFSP is implemented by European Council and Council acting unanimously, as specified under Art. 24(1).

LRT does not expand jurisdictional authority of ECJ. Rather, Art. 24(1) specifies, “The Court of Justice of the European Union shall not have jurisdiction with respect to these provisions, with the exception of its jurisdiction to monitor compliance with Article 40 of this Treaty and to review the legality of certain decisions as provided for by the second paragraph of Article 275 of the Treaty on the Functioning of the European Union”. Art. 40 provides that action under Title V cannot violate separation of competences set forth in Arts. 3-6 of TFEU. Art. 275 of TFEU reiterates duty of ECJ to monitor compliance with Art. 40 of TEU, and authorises review of legality of decisions “providing for restrictive measures against natural or legal persons adopted by the Council on the basis of Chapter 2 of Title V of the Treaty on European Union”. Taken together, language of LRT reflects existing practices of ECJ and does not appear to alter its role significantly in field of CFSP.

LRT incorporates Charter of Fundamental Rights that is binding on Union institutions and MS when implementing EU law. LRT also creates significant new position: High Representative of Union for Foreign Affairs and Security Policy having role in all external matters as authorized by Council.

If adopted, LRT re-numbers existing Treaty articles.

Acquis Communautaire.

Term used to embody EU law accumulated over more than 50 years. For 2004 enlargement purposes, “acquis” was divided into 31 Chapters; for enlargement regarding Turkey and Croatia, “acquis” is divided into 35 Chapters. “Acquis”, impossible to summarise, sets framework of new legal order called EU.

Institutions in General.

EU institutions are:

- European Parliament

- European Council

- Council

- European Commission

- Court of Justice of the European Union

- European Central Bank

- Court of Auditors

Council (not to be confused with “European Council” or “Council of Europe”) consists of one representative of government of each Member State at ministerial level authorized to commit government; presidency rotates every six months (France currently holds presidency); votes are taken unanimously by majority or by qualified majority depending on subject matter dealt with and Treaty article serving as legal basis; Council has its Secretariat in Brussels, but meets also in Luxembourg. Council is supported by COREPER, consisting of one MS representative and working permanently in Brussels preparing agenda of Council. There are nine different Council configurations. Council of Europe precedes existence of ECSC; it also has broad membership (40 states including Russia); its most notable achievement is European Convention on Human Rights, with its own court in Strasbourg.

Commission, based in Brussels, consists of 27 members appointed for five years by agreement among Member States, one member per Member State. Members of Commission are independent from Member States during tenure; Commission can be censured, that is, dismissed, by special vote of European Parliament; Commission has administrative staff of about 25,000 divided into departments called Directorates-General. Current Commission term of office expires 31 Oct. 2009; Jose Manuel Barroso is current President of Commission. Commission initiates new policies and legislative proposals. In narrowly qualified circumstances, Commission has original legislative power. (Cases 188-190/80 [1982] ECR 2545).

European Parliament consists of directly elected representatives every five years from each Member State (currently 785 members); General Secretariat is based in Luxembourg, plenary sessions are held in Strasbourg and extraordinary sessions and Committee meetings in Brussels. Next Parliamentary term is 2009-2014. In co-decision, procedure used for most EU law-making, Parliament shares power with Council. Co-decision and “qmv” voting are by-products of Community enlargement.

Court of Justice, based in Luxembourg, consists of one judge per Member State appointed for six years by agreement among Member States; eight Advocates-General, appointed on same terms, share responsibility to issue individual non-binding opinions on case submitted to Court. By Council Decision of Oct. 24, 1988, Court of First Instance was established which has been attached to Court of Justice of EC. Also consists of at least one judge per Member State.

Court of Auditors based in Luxembourg and established in 1975 assures that EU funds derived from taxpayers are spent legally, correctly and as intended. See http://eca.europa.eu/portal/page/portal/aboutus

European Council consists of Heads of State and Government of Member States and President of Commission. It holds two summits per year. It is entrusted with task of providing EU with necessary impetus for its development and must define general political guidelines thereof. If LRT is adopted, European Council will have President. With significant qualifications, certain competencies of EU are outside EC legal order and thus expressly excluded from jurisdiction of Court of Justice. Police and Judicial Cooperation in Criminal Matters are reserved for cooperation among Member States, but Council issues framework decisions. In 2005, ECJ extended its jurisdiction to criminal law. Common Foreign and Security Policy are matters left to Member States and EU. They remain subject to intergovernmental relations of Member States. Amsterdam Treaty brings matters of Justice and Home Affairs relating to free movement of persons within EC legal order.

European Central Bank (Art. 8 TEU) is central bank of EU whose main, but not sole, purpose is price stability; it is key institution of European System of Central Banks.

In Dec. 2000 at Nice, European Council approved declaration on future of Union. Nice Declaration sought: better division and definition of competence in EU, simplification of Union's instruments, increase of democratic legitimacy, transparency and efficiency in EU. It set out three steps for this reform: launch of debate on future of European Union, Convention on institutional reform, implementation of which was agreed by Laeken European Council in Dec. 2001, and finally convening of IGC in 2004. European Constitution was primary objective toward further unification of EU, but failed in 2005.

On 19 Oct. 2007, Heads of States and Governments approved draft 2007 Reform Treaty in Lisbon. See http://europa.eu/reform_treaty/index_en.htm. (See category Government and Institutions, topic Constitution, subhead LRT.)

Legislative Power.

See category 5 Courts and Legislature, topic 5.02 Legislature.

Executive Power.

European Commission is EU's executive arm; Art. 211-19 of TEU sets forth tasks, operation, composition, and other terms regulating Commission. Commission is “Guardian” of TEU. Legislation of European Communities is executed by Member States under supervision of Commission. (Arts. 10 [ex. Art. 5] and 211 [ex. Art. 155] EC Treaty). In some cases, Commission itself executes Treaty provisions or Community legislation, e.g. competition law (powers to order termination of infringements and to impose fines—see however “Competition Rules”), anti-dumping and anti-subsidy law (regulatory powers). Council exceptionally has power to execute Community legislation (Art. 202 TEU). Commission has “right of initiative” meaning it drafts proposals for new legislation presented to Parliament and Council. As executive body, Commission manages and implements EU budget. Commission has virtually exclusive rights to initiate legislation.

Judicial Power.

See category 5 Courts and Legislature, topic 5.01 Courts.

Supremacy of Community Law.

Community law rests upon Treaties, in essence, international law. However, ECJ has clarified that Community Law takes precedence over inconsistent MS law. In case of conflict with Member State law, Community law prevails (Van Gend & Loos [C-26/62]; Costa v. ENEL [C-6/64]); provisions “directly applicable” (regulations are directly applicable) can be invoked by interested parties in national courts. Provision of Community law has “direct effect” when it is clear, unconditional, and sufficiently precise to confer rights on individuals.

Supremacy of Community law implies that Member States are obliged to make good loss and damage caused to individuals by breaches of Community law for which they can be held responsible (Frankovich v. Italy [C-6&9/90]). Actions taken by individuals for damages must be brought before national courts, subject to national procedural rules. However, procedural rules that are discriminatory or render virtually impossible or excessively difficult such action must be set aside by national courts. As to substance, it results from case law of Court of Justice that individuals may claim compensation for consequences of loss and damage caused, provided: (i) EC provision concerned entails granting of rights to individuals, (ii) it is possible to identify those rights on basis of said provisions, and (iii) there is causal link between breach of State's obligation and loss and damage suffered by injured parties. Further, liability of State cannot be conditioned upon existence of fault by State and compensation may be claimed for period prior to judgment confirming infringement when breach is sufficiently clear. It is, in principle, for national courts to verify whether those conditions are fulfilled or not.

Economic and Monetary Union.

First pillar of EU involves Economic and Monetary Union (“EMU”). Pursuant to Art. 121 (ex. Art. 109J) EU Treaty, EMU must be achieved following three stage timetable.

First stage took place under existing Rome Treaties. It aimed at completion of internal market (see category 11 Foreign Trade and Commerce, topic 11.03 Internal Market) and creation of single financial area in framework of European Monetary System (“EMS”). EMS provided that each national currency had ECU-related central rate around which fluctuation margins were established. When certain thresholds were reached, central banks intervened to correct situation. Second stage began in Jan. 1994 with establishment of Economic and Monetary Institute (“EMI”) to strengthen coordination of monetary policies, prepare for institution of single currency, monitor EMS and facilitate use of ECU.

MS must meet four convergence criteria to prepare accession to third stage of EMU (convergence criteria are set in Art. 121[1]):

- Price stability (rate of inflation of no more than 1.5% above average of three best performing countries);

- Government deficit not exceeding 3% of GDP and public debt not exceeding 60% of GDP;

- Stable exchange rates within EMS; and

- Long term interest rates no more than 2% above three best performing countries over previous 12 months.

Third stage of EMU began on 1 Jan. 1999. European Central Bank (“ESCB”) consisting of European Central Bank (“ECB”) and national central banks was inaugurated on 30 June 1998. On 1 Jan. 1999 it took over responsibility for implementing European monetary policy as defined by European System of Central Banks (ESCB). As to practicalities, ECB's decision-making bodies (Governing Council and Executive Board) run European System of Central Banks, whose tasks are to manage volume of money in circulation, conduct foreign-exchange operations, hold and manage Member States' official foreign-exchange reserves, and promote smooth operation of payment systems. ECB took over from EMI - European Central Bank (ECB).

On 1 Jan. 2002, EURO notes and coins were introduced in Member States. National notes ceased to be legal tender after 28 Feb. 2002. Currently, 16 MS have adopted EURO. (See category Introduction, topic Currency, infra.) Each new Member State must adopt EURO subject to Maastricht criteria and two years in ERM II.

ECB defines and implements monetary policy of Community, conducts foreign exchange operations, holds and manages official foreign reserves of Member States and promotes smooth operation of payment systems. ECB has exclusive right to authorise issue of banknotes within Community. ECB and national central banks may issue EURO notes.

Common Foreign and Security Policy (CFSP) constitutes second pillar on which EU is based. Title V. Arts. 11 to 28 TEU provides for framework within which systematic cooperation between Member States will take place where they have essential interest in common.

Council adopts joint actions (Art. 14) where “operational action by the Union” is required; Council also adopts common positions (Art. 15) defining Union's approach respecting geographical or thematic issue. MS are required to act accordingly as specified in Treaty. Council will, by qualified majority voting, adopt joint actions, common positions, and decisions implementing joint actions or common positions, or any other decision on basis of common strategy, but common strategy; if MS opposes, then Council by “qmv” may refer to European Council for decision taken by unanimity. (Art. 23[2]). Council takes other decisions by unanimity. Art. 17 states, CFSP includes all questions security of Union, including development of common defense policy and common defence (inclusive of field of armaments). Latter requires substantial agreement and consultation with MS.

EU is represented by Presidency of Council, assisted by Secretary-General of Council who exercises function of High Representatives for CFSP. Principles and general guidelines for CFSP, including matters with defence implications, are defined by European Council that brings together Heads of State or Government of Member States and President of Commission. In cases of imperative need, unilateral measures may still be taken as matter of urgency by Member States but only in accordance with objectives of common action and upon immediate notification to Council. EC Commission will be fully associated and European Parliament must be kept regularly informed of decisions adopted in this field and must be consulted on main aspects and basic choices of CFSP. Treaty also provides EU with common security and defence policy (“ESDP”) that covers all matters relating to its security, including gradual formulation of common defence policy.

Police and Judicial Cooperation in Criminal Matters.

Third pillar of EU (Arts. 29 to 42 of EU Treaty) was renamed in Nice Treaty. Originally called Justice and Home Affairs following Maastricht.

Amsterdam Treaty has substantially modified third pillar and brought significant parts of it into framework of EC Treaty under new Title on free movement of persons, asylum and immigration. This concerns all aspects of asylum, immigration, external border controls, judicial cooperation in civil matters as well as necessary closer administrative cooperation in areas covered by this Title. Actions against fraud affecting financial interests of EC and measures to strengthen customs cooperation have also been transferred from third pillar to EC Treaty (respectively to new Arts. 280 and 135 EC Treaty) insofar as they do not affect application of criminal law (which remains in third pillar). Hence change of name at Nice. Subjects remaining in third pillar are police and judicial cooperation in criminal matters. Schengen acquis is integrated into EU Treaty framework by special Protocol. In areas covered by new Title VI of EU Treaty, Member States inform and consult one another within Council of Ministers with view to coordinate their actions. Where required by Treaty (Art. 34i) Council acts unanimously, upon MS or Commission proposal, to adopt common positions, framework decisions, decisions, and establish conventions. Amsterdam Treaty brought all measures under this Title under Court of Justice. (Arts. 35, 40)

1.03 OFFICE HOURS AND TIME ZONE:

European Union depends upon country. Ireland and United Kingdom are GMT [GMT+1 Summer]; Brussels is GMT +1[GMT +2 Summer]; Finland is GMT +2 [GMT+3 Summer]. Office hours are generally from 9 a.m. to 5 p.m.

2 BUSINESS ORGANIZATIONS

2.01 CORPORATIONS:

Commissioner Bolkstein appointed “High Level Group of Company Law Experts” to prepare Report providing “modern regulatory framework for company law in Europe”. Chaired by Jap Winter, Group submitted its Report to Commission in 2002. That report outlined main strategy for development of EU company law over short, medium, and long term. Without reproducing detail of Report, key policy objectives included: (1) Strengthening shareholder and Third party protections to promote confidence in business relationships; (2) distinguishing between large listed companies and small and medium sized enterprises, giving latter more flexibility and less regulatory burden; (3) fostering competition in single market where company action exceeds national borders; (4) corporate governance codes (MS have adopted over years more than 40 individual codes - need to consolidate and simplify); (5) enhanced transparency and disclosure, including executive compensation, and particularly for groups of companies referred to as “pyramids” in Report; (6) heightened scrutiny and enforcement of Board of Director liability; (7) review of capital maintenance requirements; and (8) creation of new company forms to meet challenges of global competition and efficiency. (See Com [2003] 284 Final.) Numerous recommendations of Report adopted and enacted.

In conjunction, Company Law Slim Working Group is established to deregulate and simplify company law, particularly Company Law Directives. “Slim Working Group” has produced reports recommending simplification of several existing company law Directives. Progress is illustrated by amendment of Second Company Law Directive: e.g. Directive 2006/68/EC, and Commission has adopted proposal to amend First and Eleventh Company Law Directives to reduce costs on businesses. (See COM [2008] 194 Final, 2008/00803 [COD].)

EU company law, while still mainly matter of Member State law, is in nascent, but significant, stage of development at Community level as evidenced by European Economic Interest Grouping, Statute of European Company, and likely adoption of European Private Company. Subject to foregoing qualification, company law remains primarily matter of national legislation. EU Directives are intended to harmonize and coordinate certain aspects of company law. Corporations formed in accordance with law of Member State and having registered or central administration or principal place of business within EC enjoy right of free establishment in all Member States on same conditions as citizens of Member States. (Art. 48 EC Treaty). With significant exceptions, corporations are mainly governed by law of each Member State.

European Company (Societas Europaea).

European Company Statute (Regulation and accompanying worker Directive), adopted in 2001, effective 8 Oct. 2004. SE can operate on European-wide basis and be governed by Community law directly applicable in all Member States. European Company Statute is established by two pieces of legislation, namely Regulation No. 2157/2001 establishing SE and Directive 2001/86/EC on worker involvement. Four modes of creation: (1) Merger of national companies in different Member States, (2) joint venture between companies in different Member States, (3) creation of SE subsidiary by national company, and (4) conversion of existing company into SE.

If SE's shares are quoted, it must be treated in same way as public companies established under national law. Minimum capital requirement has been set at [Euro]120,000 so as to enable medium-sized companies from different Member States to create SE. Each SE must be registered in Member State where it has its administrative head office, on same register as companies established under national law. However, MS have implemented SE Regulation in different ways, therefore, each has adopted slightly different mechanism for approval and registration. Registration of each SE will be published in EC's Official Journal.

Under accompanying Directive on employee involvement, creation of European Company requires involvement of employees with body representing all employees of companies concerned. If it proves impossible to negotiate mutually-satisfactory arrangement then set of standard principles applies, exact nature of which depends on format for worker participation in companies concerned before European Company was set up.

Note: SE Statute does not contain any tax arrangements. SE will therefore, for tax purposes, be treated as any other multinational company according to national fiscal legislation applicable at company level or branch level. Employment contracts and pensions are not covered by Regulation either. They would be subject to national law in Member States where headquarters and branches operate. There are numerous “SE”s in European Union, including smaller Member States. SE constitutes important option for companies selecting appropriate business organisation form.

European Private Company

Commission has presented proposal for statute on European Private Company (SPE). SPE is new legal form, like SE. It is company limited liability and legal personality established and run on same rules in all MS, like SE. This is proposal designed for small and medium sized enterprises to give them parallel benefits provided to larger companies under SE statute. It provides flexibility, simplicity, and cost effective measures for smaller enterprises that make up majority of companies in EU, as elsewhere. Limitation is that it does not deal with tax issues.

Protection of Members.

EC has harmonised safeguards required of corporations for protection of members and others and to establish system of public disclosure. See: First Directive 68/151/EEC of 9 Mar. 1968. *Note:* Company Law Slim Working Group has recommended simplification of first and second Company Law Directives. Directive 2007/36/EC of 11 July 2007 on exercise of certain rights of shareholders of listed companies provides for following protections regarding general meeting of shareholders: (1) Right to vote, (2) right to know items on agenda, (3) right to appoint proxy, (4) right to place decision on agenda (MS shall decide conditions). Directive designed to improve shareholder participation, knowledge and control in cross-border shareholding situations.

Capital.

Formation, maintenance and alteration of corporation capital are dealt with in Second Directive 77/91/EEC of 13 Dec. 1976, as amended by Directive 2006/68/EC. Directives apply to public limited liability companies. It imposes number of requirements intended to protect creditors and others, such as minority shareholders.

Mergers of Limited Liability Corporations Taking Place within Single Member State.

See Third Directive 78/855/EEC of 9 Oct. 1978. Commission has issued Proposal for Directive of European Parliament and of Council concerning mergers of public limited liability companies that, if adopted, would repeal Third Directive. (See COM [2008] 26 Final, 2008/0009 [COD].)

Standardization of financial statements; standard format for balance sheet, profit and loss statement, and minimum information for company's annual report. See Fourth Directive 78/660/EEC.

Division of limited liability corporations mainly protects rights of creditors against transfer of assets into another corporate entity. See Sixth Directive 82/891/EEC of 17 Dec. 1982.

Consolidated Accounts.

See Seventh Directive 83/253/EEC.

Approval of Persons Responsible for Carrying Out Statutory Audits of Accounting Documents.

See Eighth Directive 2006/43/EC of European Parliament and of Council of 17 May 2006. Directive concerns statutory audits and often is referred to as "Sarbanes-Oxley" light.

Information Which Should be Provided by Foreign Branches.

See Eleventh Directive 89/666/EEC of 21 Dec. 1989.

Single-member Private Limited Liability Companies.

See Twelfth Directive 89/667/EEC of 21 Dec. 1989.

Merger Directive 2005/19/EC, amending Directive 90/434/EEC, expands list of entities entitled to benefits of common system of taxation to restructuring operations, provides capital gains exemption when receiving company holds shares in transferring company and thresholds in line with Parent Subsidiary Directive, and provides relief on conversion of branches into subsidiaries; its rules apply to European Company (SE).

European Economic Interest Grouping (EEIG) are dealt with in Reg. No. 2137/85 of 25 July 1985. EEIG can be formed by companies, firms, and other legal entities governed by public or private law which have been formed in accordance with law of Member State and which have their registered office in Community. It can also be formed by individuals carrying on industrial, commercial, craft or agricultural activity or providing professional or other services in Community. EEIG must have at least two members from different Member States. Purpose of grouping is to facilitate or develop economic activities of its members by pooling of resources, activities or skills. It is not intended that grouping should make profits for itself. EEIG cannot employ more than 500 persons; it may not invite investment by public. EEIG is treated as partnership for tax purposes; EEIG itself is not taxable on losses or profits. For VAT, property and capital duty, EEIG is treated like any other entity.

Cross-border Mergers of Companies with Share Capital.

EU Parliament and Council of EU adopted Directive 2005/56/EC of 26 Oct. 2005 on cross-border mergers of limited liability companies. Member States must transpose by 15 Dec. 2007. Directive determines applicable law, addresses co-decision of employees, simplifies take-overs, and prohibits nullification after merger comes into effect. (See Sevic Systems AG, C 411/03 regarding cross-border transfer of registered offices.) Note that Directive 2007/63/EC amends Council Directives 78/855/ECC and 82/891/EEC dispensing with requirement of independent expert's report on occasion of merger or division of public limited liability company.

European Cooperative Society.

Statute for European cooperative society has been in preparation since 1991, and was finally laid down on 22 July by Council Regulation (EC) No. 1435/2003. This instrument is based on that adopted for European companies in 2001 (see above), with necessary changes due to specific characteristics of cooperative societies. It is intended to make it possible to set up new legal bodies to organize certain economic transactions in at least two Member States. In 2003, Council also adopted Directive 2003/72/EC supplementing this statute with regard to worker involvement.

Disclosure Requirements.

In July 2003, European Parliament and Council adopted Directive 2003/58/EC amending Directive 68/151/EEC as regards disclosure requirements for certain types of companies in order to speed up public access to information on those companies and to simplify formalities required of them. Amendments concern use of electronic formats and linguistic diversification on voluntary basis. Parliament and Council adopted Directive 2004/109/EC of 15 Dec. 2004 on harmonization of transparency requirements in relation to information about issuers whose securities are traded on regulated market and amending Directive 2001/34/EC.

Takeover Bids.

European Parliament and Council adopted Directive 2004/25/EC of 21 Apr. 2004 on takeover bids. Directive sets out to establish minimum guidelines for conduct of takeover bids involving securities of companies governed by laws of Member States, where all or some of those securities are admitted to trading on regulated mark. Art. 12 permits Member States to opt out of substantive rules of Arts. 9 and 11.

Accountancy and Accounting Standards.

Directive 2003/38/EC, adopted by Council on 13 May 2003 amended Directive 78/660/EEC; latter subsequently was amended by Directive 2006/46/EC on annual accounts of certain types of companies so as to exempt small and medium-sized enterprises from various obligations in this area. Should also be mentioned adoption, on 18 June 2003, of Directive 2003/51/EC, in which European Parliament and Council provide Member States with possibility of gradually bringing national accounting requirements closer in line with International Accounting Standards (“IAS”) ratified in Regulation No. 1606/2002. Directive 2006/46/EC also amends Directives 83/349/EEC, 86/635/EEC and 91/674/EEC on, respectively, consolidated accounts in general, annual and consolidated accounts of banks and other financial institutions and those of insurance undertakings.

Non-Compliance with Company Law and Anti-Money Laundering Directives: Numerous MS have failed to adopt Directives; 207 instances of non-compliance exist as of 1 Sept. 2008 (varying stages of notification/examination, etc.). In particular, 11 MS have failed to implement Directive 2005/56/EC on cross-border mergers of limited liability companies.

3 BUSINESS REGULATION AND COMMERCE

3.01 COMPETITION RULES:

Prohibition of Restrictive Practices.

Art. 81(1) EC Treaty prohibits all agreements between undertaking, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect prevention, restriction or distortion of competition within common market. All undertakings previously falling within ECSC regime now fall under EC Treaty. Art. 81(1) requires three elements to constitute practice: (1) Functional—undertaking, (2) intellectual—agreement or concerted practice, and (3) economic—agreements affect trade between Member States. Hardcore restrictions, e.g., Art. 4 Regulation 2790/99, may result in claims of compensation as delineated in Courage (C-453/99) doctrine. ECJ found that insurance agreements colluding to affect policy prices in single MS had capacity affect trade among MS provided is possible to “foresee with a sufficient degree of probability, on basis of a set of objective factors of law or fact, that they *may* have an influence, direct or indirect, actual or potential on pattern of trade between members states … as to cause concern that they might hinder the attainment of a single market". (Cases C-295-C-298/04 [2007]). Court reinforced rule that anyone harmed by Art. 81 violation has right of damage recovery, though MS establishes procedures, limitations period, and extent of recoverable damages, provided domestic law does not violate Community principles of equivalence and effectiveness.

Also see: Commission Notice on agreements of minor importance which do not appreciably restrict competition under Art. 81(1) of Treaty establishing European Community (de minimis) (OJ, No. C 368, 22.12.2001): "de minimis" thresholds are raised to 10% market share for agreements between competitors and to 15% for agreements between non-competitors (agreements between small and medium sized enterprises are in general "de minimis"). Where companies assume in good faith that agreement is covered by Notice, Commission will not impose fines. Although not binding on them, Notice also intends to give guidance to courts and authorities of Members States in their application of Art. 81.

Art. 81(3) (ex. Art. 85[3]) EC Treaty allows for exemption of restrictive practices from prohibition stated in Art. 81(1). On delegation of Council, Commission has granted block exemptions for both horizontal and vertical restrictions. Save for technology licensing agreements (Commission Reg. No. 772/2004 of 27 Apr. 2004), which covers patent and know-how licensing agreements, and motor vehicle distribution and servicing agreements (Commission Reg. No. 1400/2002 of 31 July 2002 on application of Art. 81[3] of Treaty to categories of vertical agreements and concerted practices in motor vehicle sector, OJ, No. L 203, 1 Aug. 2002, entered into force on 1 Oct. 2002 and shall expire on 31 May 2010), vertical agreements may be exempted under Commission Reg. No. 2790/1999 which has replaced previous block exemptions on exclusive distribution, exclusive purchasing and franchising since 1 June 2000. As criterion for exemption, it uses 30% market share threshold of supplier (purchaser, in case of exclusive supply obligations). Commission Reg. No. 2790/1999 is seen as example of general trend towards modernising EC competition law. On 1 Jan. 2001 new block exemption regime for Horizontal Agreements entered into force. New rules consist of block exemption relating to Research & Development (Reg. No. 2659/2000), one relating to Specialisation Agreements (Reg. No. 2658/2000) and guidelines allowing parties to assess for themselves whether agreement will qualify for exemption. Other block exemption agreements exist in relation to specific sectors, e.g. insurance, air transport and maritime transport. Generally, conditions for exemption, stated in Art. 81(3), are: (1) Restrictive practice contributes to improve production or distribution of goods or to promoting technical or economic progress; (2) it allows consumers fair share of resulting benefit; (3) it is indispensable to attainment of said objectives; (4) it does not eliminate all possibility of competition. In air transport sector, Council Regulation (EC) No. 411/2004 gives Commission authority to investigate and enforce infringements of Arts. 81 and 82 in air transport between Community and Third Countries, and gives Commission authority to grant block exemptions in air transport sector. Commission has proposed draft general block exemption regulation in State Aid area. See http://ec.europa.eu/comm/competition/state_aid/reform/reform.cfm.

Maritime Transport Law and Policy.

EC adopted Regulation 4055/86 applying principle of freedom of services to sea transport and therefore bringing maritime law and policy within ambit of competition regulation. Legislative activity generally followed maritime accidents and pollution damage, e.g. Erika I and Erika II packages of legislation (Regulation 1406/2002; Directive 2002/59). Commission's Green Paper on maritime policy was issued in June 2006 (COM [2006] 275). Importantly, Council Regulation (EC) No. 1419/2006 repeals Regulation (EEC) No. 4056/86 giving liner shipping conferences block exemption treatment. Liner shipping conferences shall be treated in line with recommendations of OECD Secretariat of 2002.

Prohibition of Abuse of Dominant Position.

Art. 82 EC Treaty prohibits any abuse by one or more undertakings of dominant position within common market or in substantial part of it (Commission Notice on definition of relevant market for purposes of Community Competition Law, OJ, No. C 372, 9 Dec. 1997), insofar as it may affect trade between Member States.

No exemptions of Art. 82 (ex. Art. 86) EC Treaty can be given.

Monopolies or oligopolies are not prohibited as such under Art. 82 (ex. Art. 86) EC Treaty. Only abuse of dominant position is prohibited, e.g. directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions; limiting production, market or technical development to prejudice of consumers; applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at competitive disadvantage; making conclusion of contracts subject to acceptance by other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with subject of such contracts ("tying"). Enforcement and investigation are parallel to Art. 81 (ex. Art. 85) EC Treaty.

In 2008, ECJ ruled under Art. 82 that pharmaceutical company having dominant position in MS cannot refuse to meet wholesale orders from companies in that national market intended for parallel import to other MS for purpose of selling at higher price in import market. In reply to argument that parallel exports constitutes threat to ability of company to undertake necessary R&D to develop new products, ECJ said national court must decide whether orders from exporters are out of ordinary, as orders of ordinary magnitude fail to support restriction of supply. (Cases C-468/06 to C-478/06 [2008]).

Practical Application.

Restrictive practices involving pricing (horizontal or vertical price fixing, discriminatory pricing) are per se contrary to Art. 81(1) EC Treaty. Discriminatory or predatory pricing by undertaking with dominant position on relevant market violates Art. 82 (ex. Art. 86) EC Treaty. Restrictive practices involving distribution may fall under Art. 81(1) (ex. Art. 85[1]), but Commission is willing to grant exemptions under Art. 81(3) (e.g. block exemption of Reg. No. 2790/1999 in case of vertical restraints provided supplier does not have market share in excess of 30% on relevant market and agreement does not contain any "hardcore restrictions" such as resale price fixing or absolute territorial protection [including restriction on parallel imports]). Treatment of agreements falling outside scope of Reg. No. 2790/1999 is clarified in Commission Guidelines on Vertical Restraints. Restrictive practice involving cooperative joint ventures or cooperation between undertaking may also fall under Art. 81(1) but here again Commission is willing to grant individual exemptions under Art. 81(3) (ex. Art. 85[3]) if conditions of this provision are met (See Commission Notice on Co-operative Joint Ventures, basis of Commission assessment in view of application of Art. 81(3) (ex. Art. 85[3]) to joint ventures. See, however, subhead Merger Control, infra for treatment of full function joint ventures.) Restrictive practices contained in technology licensing agreements are prohibited under Art. 81(1) Following Commission Reg. No. 772/2004, entered in force on 1 May 2004, however, approves technology transfer agreements between competitors with combined share of relevant market not exceeding 20% or between non-competitors with individual share of relevant market not exceeding 30% that do not contain any severely anti-competitive restraints, generally lead to improvement in production or in distribution and allow consumers fair share of resulting benefit. Guidelines (OJ, No. C 101, 27 Apr. 2004) provide guidance on application of TTBER as well as on application of Art. 81 to technology transfer that fall outside scope of TTBER. TTBER and guidelines are without prejudice to possible parallel application of Art. 82 to licensing agreements. In 2006, Council agreed unanimously to end block exemption for liner shipping conferences; repeal enters into effect Oct. 2008; to facilitate transition to competitive regime, Commission, with agreement of Parliament, will issue guidelines on application of competition rules to maritime services.

Unlike U.S. counterpart, Commission arguably has taken remedy first, analysis second, approach to competition matters. Art. 82 can be used to dictate business practices, as exemplified in pharmaceutical case Syfait (C-53/03) case where GlaxoSmithKilne was ordered to deliver excessive quantities of drugs to Greece to enable wholesale dealers to profit from parallel trade, and in Microsoft case (COMP/C-3/37.792) where for first time in history, competition authority required dominant undertaking to disclose its intellectual property for indefinite duration to unidentified number of competitors to allow latter to improve their products.

Enforcement of EC Competition Law.

Since 1 May 2004, decentralised application of Art. 81 and Art. 82 EC by Member States has come into force with Commission's activities refocused on most serious infringements of competition law (cartels or practices having effects on competition in more than three Member States). See: Council Regulation (EC) No. 1/2003 of 16 Dec. 2002. System of notification and exemption are therefore abandoned in favour of direct application of Art. 81(3) (ex. Art. 85[3]) by both National Authorities and National Jurisdictions. To ensure overall coherence, certain supervisory measures for Commission are proposed (see: Commission Regulation [EC] No. 773/2004 of 7 Apr. 2004, OJ, No. L 123, 27 Apr. 2004; Commission Notice on cooperation within Network of Competition Authorities, OJ, No. C 101, 27 Apr. 2004; Commission Notice on co-operation between Commission and courts of EU Member States, OJ, No. C 101, 27 Apr. 2004; Commission Notice on handling of complaints by Commission, OJ, No. C 101, 27 Apr. 2004; Commission Notice on informal guidance relating to novel questions concerning Arts. 81 and 82 of EC Treaty that arise in individual cases [guidance letters] OJ, No. C 101, 27 Apr. 2004; Commission Notice—Guidelines on effect on trade concept, OJ, No. C 101, 27 Apr. 2004; Commission Notice—Guidelines on application of Art. 81[3] of Treaty, OJ, No. C 101, 27 Apr. 2004).

As to investigation, Commission can require information by decision and proceed to in-house searches. Cooperation with investigation is compulsory. If necessary, Commission may obtain it through imposition of fines. (See Guidelines OJ, No. 98, C 9/03.) Provided certain conditions are met, immunity may be granted from imposition or reduction of fines to undertaking informing Commission of illegal cartel in which they have participated. (See Commission Notice on non-imposition or reduction of fines in cartel cases; OJ, No. C 45, 18.02.2002.) Since 1 May 2004, National Authorities are also competent to apply not only Art. 81(1) and Art. 82 but also for verifying whether conditions of Art. 81(3) are met or not.

Court of First Instance hears all annulment actions brought by interested parties against Commission decisions. Judgments of Court of First Instance are subject to appeal before Court of Justice.

Interim-measures may be ordered as to payment of fines or compliance with investigative decision or termination order of Commission. Court recognizes legal privilege for communications between independent lawyer entitled to practice in at least one Member State and his client to extent communications relate to client's defence in competition case.

Member State courts also enforce EC competition law by prohibiting practices caught by Art. 81(1) (ex. Art. 85[1]) or Art. 82 (ex. Art. 86), by declaring restrictive practices void under Art. 81(2), and since 1 May 2004 by applying Art. 81(3). If need be, they request preliminary ruling from Court of Justice, under Art. 234. Carre, Gunster, and Schinkel provide exhaustive study of EU Anti-Trust Policy from 1957-2004 available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1162145.

Merger Control.

In Dec. 1989, Council of Ministers adopted Regulation No. 4064/89 requiring enterprises other than coal and steel companies to notify concentrations with Community dimension to EC Commission with view of determining whether such concentrations create or strengthen dominant position as result of which effective competition would be significantly impeded in Common Market. Regulation entered into force on 21 Sept. 1990. (OJ, No. L 257). Concentrations with Community dimension are reviewed by Commission. Concentration has community dimension where certain financial thresholds, relating to worldwide and European turnover of companies involved, are met (Commission Notice on calculation of turnover, OJ, No. C 66, 2 Mar. 1998). Commission has maximum of one month (extended to six weeks in case undertakings are offered within this phase to ease competition concerns) to decide if concentration raises serious doubts as to its compatibility with common market. If serious doubts are raised, Commission opens proceedings and has to decide as to compatibility or not of concentration within additional period of four months (second phase) (But see: Commission Notice on simplified procedure for treatment of certain concentrations under Council Regulation No. 4064/89, OJ, No. C 217, 29 July 2000). Commission frequently attaches conditions to its approval (Commission Notice on remedies acceptable under Council Regulation No. 4064/89, OJ, No. C 68, 2 Mar. 2001). Regulation No. 4064/89 was amended by Regulation No. 1310/97 which entered into force in Mar. 1998. Jurisdictional thresholds have changed and all full-function joint ventures are now regarded as concentrations within meaning of Regulation. Commission Green Paper of 11 Dec. 2001 launched discussion reporting proposals for modernisation of Reg. No. 4064/89 and resulted in new Council Regulation No. 139/2004 of 20 Jan. 2004 (OJ, No. L 24, 29 Jan. 2004) and Commission Regulation (EC) No. 802/2004 implementing Regulation 139/2004. On 10 July 2007, Commission adopted new Consolidated Jurisdictional Notice under Council Regulation (EC) No. 139/2004.

Since 1 May 2004, Council Regulation No. 139/2004 is applicable (however, merger agreements reached or bids announced before this date will continue to be assessed under old regulation). In order to resolve problem of multiple filings, Council has agreed that companies will be able to ask to benefit from one-stop shop if they have to notify in three or more Member States. Where none of competent Member States object to referral within 15 working days of receiving submission, merger benefits from “one-stop shop”, and will be examined by Commission. Turnover thresholds remain same in new Regulation. Review timetable has also been changed: (i) 1st phase: 25 working days starting day which follows receipt of notification (likely to be extended to 35 working days); (ii) 2d phase: 90 working days from day that follows decision to carry out in-depth inquiry (plus 20 working days if requested by notifying parties or by Commission with agreement of notifying parties plus 15 working days if companies offered remedies after 54th working day that followed initiation of in-depth inquiry). Besides, substantive test for assessing mergers has been reworded. Following new text, concentration which would significantly impede effective competition, in common market or in substantial part of it, in particular by creation or strengthening of dominant position shall be declared incompatible with common market. New test focuses unambiguously on impact of mergers on competition and, by doing so, clarifies that Commission has power to investigate all types of harmful scenarios in merger, from dominance by single firm to effects stemming from situation of oligopoly.

State Aid.

Arts. 87-89 (ex. Arts. 92-94) EC Treaty restrict power of Member States to grant states to grant state aid which distorts or threatens to distort competition by favouring certain undertakings or production of certain goods. State aid includes any aid granted by State or through State resources such as investments, grants, writing-off of debts, provision of capital or deferment of payment taxes. Existing aids, i.e. aids in existence at time of entry into force of EC Treaty, are kept under constant review by Commission. Planned new aid or modification of existing aid must be notified by Member State to Commission. Member State may not put proposed measures into effect until procedure has resulted in final decision. Procedure follows two-stage approach. During first stage, Commission examines whether there are serious doubts as to compatibility of aid. If not, it will close procedure and authorise aid. In case of serious doubts, it must open second phase of procedure and give notice to parties concerned to submit their comments. If Commission decides that aid is incompatible, Member State concerned must abolish or alter such aid within specific period of time. Commission now requires that States recover unduly paid state aid in violation of suspension obligation or notification obligation (so-called “illegal state aid”) from undertaking concerned. If State does not comply with its decision, Commission may directly bring action for infringement before Court of Justice. Individuals have rights of action before national courts, and courts are competent to take measures in respect of State aids which were not notified to Commission or to prevent implementation before authorisation by Commission. Several exemption regulations (e.g. Commission Regulation Nos. 68/2001 of 12 Jan. 2001 on application of Arts. 87 and 88 of EC Treaty to training aid, OJ, No. L 10, 13 Jan. 2001; Commission Regulation No. 69/2001 of 12 Jan. 2001 on application of Arts. 87 and 88 of EC Treaty to de minimis aid, OJ, No. L 10, 13 Jan. 2001, Commission Regulation No. 70/2001 of 12 Jan. 2001 on application of Arts. 87 and 88 of EC Treaty to State aid to small and medium-sized enterprises, OJ, No. L 10, 13 Jan. 2001; Commission Regulation No. 2204/2002 of 12 Dec. 2002 on application of Arts. 87 and 88 of EC Treaty to State aid for employment, OJ, No. L 337, 13 Dec. 2002) and provisions for specific sectors exist, such as aid for agriculture, transport, motor vehicle industry, shipbuilding or public service broadcasting. State Aid is undergoing thorough reform as indicated in "Vademecum Community Rules on State Aid" found at http://ec.europa.eu/comm/competition/state_aid/studies_reports/vademecum_on_rules_2007_en.pdf. In 2008, Commission approved Commission Regulation (EC) No. 800/2008 of 6 Aug. 2008 declaring certain categories of aid compatible with common market in application of Arts. 87 and 88 of Treaty (General block exemption Regulation). Regulation is aimed at providing aid to small and medium enterprises, research institutes and educational institutions (see Art. 1 for full list of categories of Aid); concept is to provide incentives for development, growth and competitiveness in targeted areas.

3.02 CONSUMER POLICY:

Treaty provides protection of consumers in Title XIV (entitled Consumer Protection) at Art. 153. Numerous Directives, and to limited extent Regulations, issued to protect consumers. E,g., Community secondary legislation, mainly, covers: First Commission Directive 80/1335/EEC of 22 Dec. 1980 on approximation of laws of Member States relating to methods of analysis necessary for checking composition of cosmetic products; Second Commission Directive 82/434/EEC of 14 May 1982 on approximation of laws of Member States relating to methods of analysis necessary for checking composition of cosmetic products; Third Commission Directive 83/514/EEC of 27 Sept. 1983 on approximation of laws of Member States relating to methods of analysis necessary for checking composition of cosmetic products; Fourth Commission Directive 85/490/EEC of 11 Oct. 1985 on approximation of laws of Member States relating to methods of analysis necessary for checking composition of cosmetic products; Fifth Commission Directive 93/73/EEC of 9 Sept. 1993 on methods of analysis necessary for checking composition of cosmetic products; Sixth Commission Directive 95/32/EC of 7 July 1995 relating to methods of analysis necessary for checking composition of cosmetic products; Seventh Commission Directive 96/45/EC of 2 July 1996 relating to methods of analysis necessary for checking composition of cosmetic products; Council Directive 88/378/EEC of 3 May 1988 on approximation of laws of Member States concerning safety of toys; Directive 2000/13/EC of European Parliament and of Council of 20 Mar. 2000 on approximation of laws of Member States relating to labelling, presentation and advertising of foodstuffs for sale to ultimate consumer; Council Directive 84/450/EEC of 10 Sept. 1984 on approximation of laws, regulations and administrative provisions of Member States concerning misleading advertising; Council Directive 85/577/EEC of 20 Dec. 1985 to protect consumer in respect of contracts negotiated away from business premises; Directive 2001/95/EC of European Parliament and Council of 3 Dec. 2001 on general product safety; Directive 93/13/EEC on unfair terms in consumer contracts; Directive 94/47/EC of European Parliament and Council of 26 Oct. 1994 on protection of purchasers in respect of certain aspects of contracts relating to purchase of right to use immovable properties on timeshare basis; Directive 98/27/EC of European Parliament and Council of 19 May 1998 on injunctions for protection of consumer interests; European Parliament and Council Directive 97/7/EC of 20 May 1997 on protection of consumers in respect of distance contracts; European Parliament and Council Directive 97/5/EC of 27 Jan. 1997 on cross-border credit transfers; Regulation 2560/2001 on cross-border payments in EURO; and Directive 2005/29/EC on unfair commercial practices (effective 12 Dec. 2007) (definition of product is broad, beyond goods).

Injunctions.

Directive 98/27/EC concerning injunctions to protect consumer interests; see Commission Communication on Art. 4(3) of Directive concerning entities entitled to bring actions under Art. 2 (2006/C 39/02).

Consumer Representation.

In Oct. 2003, Commission adopted decision setting up European Consumer Consultative Group to replace Consumer Committee, composed of members representing consumer organisations at national and European levels, with three-year term of office. Commission appointed members of Group on 30 Oct. 2003.

Contract Law.

In Feb. 2003, Commission adopted action plan for more coherent contract law reflecting conclusions of consultation process launched in July 2001, aimed at enhancing consistency of acquis communautaire in field of contract law, through creation of common frame of reference for EU contract law developing common rules, terminology and principles, while also seeking to promote use of Europe-wide standard contract terms and gauge desirability of optional instrument in field of contract law, which parties could adopt where applicable. European Parliament and Council both welcomed establishment of this common reference framework. Principles of European Contract Law, produced by Lando Commission, originally conceived as blueprint for common contract law of EU, will be developed into restatement of contract law, form of “soft” law, to encourage uniformity among Member States.

Consumer Protection.

Plethora of Consumer Protection Directives exist and recent directives address problems arising in context of distance or electronic transactions. for example: Distance Selling Directive 97/7 adopted on 20 May 1997 which covers protection of consumers in respect of distance contracts (mod. by Dir. 2002/65 concerning distance marketing of consumer financial services); and e-Money Directive 2000/46 adopted on 18 Sept. 2000 aim of which is to lay down conditions under which institutions (banks and other financial institutions) can issue e-Money. Example of extent to which ECJ willing to provide consumer protection is found in Heininger v. Bayerische—Hypo und Vereinsbank, (C-481-99) (ECJ awarding consumers [debtors under mortgage credit, full amount of principal and interest paid, plus incidental damages for bank's failure to notify of seven-day cooling off period under door-step selling Directive when Opinion of AG made it clear from facts transaction was not distance transaction, but credit agreement executed at bank's office]).

Consumer Credit.

As result of Directive 87/102/EEC, consumer may seek redress against grantor of credit when following conditions are fulfilled: consumer has entered into credit agreement with person other than supplier of goods or services purchased; grantor of credit and supplier of goods or services have pre-existing agreement under which credit is made available exclusively by former; consumer obtains his or her credit pursuant to that pre-existing agreement; goods or services covered by credit agreement are not supplied or are not in conformity with contract; consumer has sought redress against supplier but has failed to obtain satisfaction. Second revised proposal for Directive on Consumer Credit was published 7 Oct. 2005.

Note: Directive does not cover: credit agreements for purpose of acquiring or retaining property rights in land or building; credit agreements for purpose of renovating or improving building; hiring agreements which do not provide for title passing to hirer; credit free of interest or any other charge; interest-free credit agreements where consumer repays credit in single payment; credit in form of advances on current account granted by credit institution or financial institution, with exception of credit card accounts; credit agreements involving amounts less than [Euro]200 or more than [Euro]20,000; credit agreements whereby consumer undertakes to repay credit either within three months or by maximum of four payments within 12-month period. Member States may also exclude from scope of Directive certain types of credit which are granted at rates of charge below those prevailing in market and which are not offered to public generally.

Commission has introduced two proposals to amend: Directive 87/102/EEC and Directive 93/13/EEC to enhance consumer protection in relation to cross-border transactions so as to achieve internal market in consumer credit sector.

Proposal is underpinned by eight guidelines: (1) Harmonisation of consumer-related rules in different Member States, which will not be allowed to add anything to new rules; (2) extension of scope to cover all consumer credit. Only home loans are not covered; (3) consumer's right of withdrawal within 14 days of signing credit agreement, with no need to give reason or pay additional costs; (4) easier comparison between available forms of credit through introduction of three rates expressing, respectively, capital cost (“borrowing rate”), sum levied by creditor (“total lending rate” or TLR) and total cost to consumer including, for example, insurance; (5) lender is obliged to advise consumer on products offered and to satisfy himself about client's solvency before granting credit. Consumer also benefits from fuller information on costs, clauses and conditions of product; (6) personal guarantor is entitled to same information as borrower. In event of consumers failing to fulfil their contractual obligations, there are ground rules for repossession of goods and debt recovery; (7) registration of lenders and credit intermediaries, with ground rules laid down for activities of intermediaries; (8) where suppliers of goods and services act as credit intermediaries for lenders, latter will be held jointly liable if obligations towards consumers are not met.

3.03 INFORMATION TECHNOLOGY, INTERNET AND NEW MEDIA:

This section considers how business is regulated in electronic age in Europe, in particular, with regard to telecommunications and electronic commerce. However, it is important to appreciate that this is area where both regulatory framework and legislation is continually developing.

Telecommunications.

Liberalisation of Telecommunication Services.

European Commission's strategy toward telecommunication sector (set out in 1987 Green Paper [COM (87) 290 final 30.6.87]), involved three main actions: (i) Process of liberalisation of services and equipment; (ii) establishment of harmonised and open access conditions to telecommunications network; and (iii) application of European Union's competition rules to telecommunications sector. Together these actions sought construction of European-level regulatory framework necessary to create more competitive environment for telecommunications services and equipment.

Subsequent to 1987 Green Paper, legislation has been passed in order to facilitate implementation of European Union's telecommunications strategy, for example, number of directives have been adopted to regulate implementation of full competition in telecommunications, mobile and personal communications.

Specific areas have been defined (such as Radio Spectrum Decision, audiovisual sector) and are currently being developed by European Commission, such as convergence of Telecoms Broadcasting and IT Sector.

E-Commerce.

Removing Barriers to E-Commerce.

Electronic Commerce Directive 2000/31 was adopted on 4 May 2000. This Directive establishes common principles on several e-commerce issues, such as defining place of establishment and criteria for conclusion of online contracts, transparency requirements for commercial communications, liability for illegal transmissions that violate rules on copyright, protection of minors or involve criminal activity and exemptions from such liability for passive intermediaries acting as “mere conduits”. Directive also attempts to ensure high levels of protection for consumers by giving users right to opt out of unsolicited email messages, or spam, by signing up with opt-out registers in their home country. Finally, Directive exempts service providers from liability for transmission from network or discontinue access to it. Member States were required to implement Electronic Commerce Directive by 17 Jan. 2002. *Note:* Following Art. 11, Member States shall ensure, except when otherwise agreed by parties who are not consumers, that in cases where recipient of service places his order through technological means, following principles apply: service provider has to acknowledge receipt of recipient's order without undue delay and by electronic means; order and acknowledgment of receipt are deemed to be received when parties to whom they are addressed are able to access them.

Member States shall ensure that, except when otherwise agreed by parties who are not consumers, service provider makes available to recipient of service appropriate, effective and accessible technical means allowing him to identify and correct input errors, prior to placing of order.

(Paragraph 1, first indent, and paragraph 2 shall not apply to contracts concluded exclusively by exchange of electronic mail or by equivalent individual communications).

Electronic Signatures Directive 1999/93 was passed on 30 Nov. 1999. This Directive defines requirements for electronic signature certificates in order to ensure that minimum security levels are met through internal European Union market. Directive also provides legal recognition of electronic signatures, free circulation of products and services related to electronic signatures, minimum liability rules for service providers and recognition of electronic signatures irrespective of particular technologies used. Member States were required to implement Directive by 19 July, 2001.

Domain Names.

Commission Regulation (EC) No. 874/2004 specifies public policy rules concerning.eu Top Level Domain and registration.

Copyright, Privacy and Data Protection.

European Union Data Protection Directive 95/46 was adopted in Oct. 1995 and took effect on 25 Oct. 1998. Two objectives of Directive are protection of fundamental rights and freedoms of natural persons, and in particular right to privacy with respect to processing of personal data, and requirement that Member States do not restrict or prohibit free flow of personal data between Member States for reasons not permitted by Directive.

There is also Directive 2002/58/EC of European Parliament and of Council of 12 July 2002 concerning processing of personal data and protection of privacy in electronic communications sector (Directive on privacy and electronic communications). Provisions of this Directive particularise and complement Directive 95/46. Moreover, they provide for protection of legitimate interests of subscribers who are legal persons. This Directive shall not apply to activities which fall outside scope of Treaty establishing European Community, such as those covered by Titles V and VI of Treaty on European Union, and in any case to activities concerning public security, defence, State security (including economic well-being of State when activities relate to State security matters) and activities of State in areas of criminal law.

European Commission recognised need to ensure appropriate level of copyright protection across Europe by way of harmonisation of national provisions. European Commission put forward directive 2001/29 harmonising certain aspects of copyright and related rights in information society. Copyright Directive focus on: (i) Reproduction right; (ii) right of communication to public; and (iii) distribution right and protecting of technical measures and rights. Copyright Directive was formally adopted on 22 May 2001 and Member States were required to implement Directive by 22 Dec. 2002. *Note:* In resolution of 13 Mar. 2003, European Parliament called on Commission to examine compatibility with Community law of measures taken by U.S. authorities to gain access to data in computerised reservation systems of airlines operating transatlantic flights. It repeated its reservations regarding such measures in resolution of Oct. 2003, in which it also put forward new recommendations for Commission.

E-business.

In context of action line "A dynamic environment for e-business", E-business showcases report was published in Sept. 2003, and two projects concerning e-business interoperability (Athena and Interop) were launched. Lastly, conference on 'E-challenges' relating to applications, in particular information society e-business technologies, was held in Bologna.

Impact on Business.

In communication of 27 Mar. 2003, drawing conclusions from "Go Digital" initiative, Commission stressed shift from promoting e-commerce to more holistic view of e-business, involving restructuring of business processes to make best use of digital technologies. It encouraged Member States and regions to review their e-business strategies in support of small and medium-sized enterprises ("SMEs"), setting new and more innovative targets in context of changing e-business activities. On 13 May 2003, this communication was welcomed by Council, which called on Commission and current and future Member States to set up European e-business support network for SMEs in field of online economic activity under eEurope 2005 action plan.

4 CIVIL ACTIONS AND PROCEDURE

4.01 JUDGMENTS:

Council Reg. No. 44/2001 of 22 Dec. 2001 on jurisdiction and recognition and enforcement of judgment in civil and commercial matters replaces for all Member States, except Denmark, Brussels Convention of 27 Sept. 1968. Regulation establishes common standards and includes provisions relating to contracts concluded by consumers applicable to on-line transactions. Matters relating to family law are dealt with under EC Reg. No. 1347/2000 of 29 May 2000 (mod. by Reg. No. 1185/2002 of 1 July 2002) and for bankruptcy and insolvency proceedings Reg. No. 1346/2000 of 29 May 2000 applies, amended by Council Regulation (EC) No. 788/2008 of 24 July 2008 amending lists of insolvency proceedings and winding-up proceedings in Annexes A and B to Regulation 1346/2000. New Regulation corrects errors contained in first Insolvency Directive and provides for identification of procedures in post 2000 accession States. Council Regulation (EC) 2201/2003 governs jurisdiction and recognition and enforcement of judgments in matrimonial matters and in matters of parental responsibility repealing Reg. No. 1347/2000. Regulation does not apply to civil proceedings related to maintenance that are governed by Reg. No. 44/2001. Regulation (EC) No. 85/2004 created European Enforcement Order of uncontested claims. With regard to service of judicial and extrajudicial documents in civil or commercial matters, Reg. No. 1348/2000 of 29 May 2000 applies. Further harmonisation of law relating to procedural aspects of civil litigation has also been achieved through Reg. No. 1206/2001 on cooperation between Member States courts in taking of evidence. Decision 2001/470/EC of 28 May 2001 established European Judicial Network in civil and commercial matters. European Council of Tampere (Oct. 1999) referred to need for adoption of extra-judicial procedures for resolution of disputes. Commission published

Green Paper on this on 19 Apr. 2002. It also proposed Directive to improve access to justice in cross-border disputes by establishing common rules relating to legal aid and other financial aspects of civil proceedings (COM [2002] 13 final), adopted by Council on 27 Jan. 2003 (Council Directive 2002/8/EC).

Choice of Law.

Virtually all Member States are bound by Rome Convention of 1980 with regard to law applicable to contractual obligations. On 15 Dec. 2005, Commission adopted proposal for Regulation of European Parliament and Council on law applicable to contractual obligations. (Rome I Regulation). Rome I likely to be adopted shortly (see COM [2005] 650). Rome I introduces significant changes particularly regarding default rules governing choice of law. Regulation 864/2007 (Rome II Regulation) on law applicable to non-contractual obligations, including intellectual property rights, adopted and enters into force 11 Jan. 2009.

4.02 PRODUCT LIABILITY:

Law of Member States governs product liability. In 1985 EC Directive 85/374/EEC (as last amended by Directive 1999/34/EC of 10 May 1999) on product liability was adopted, creating supplementary possibility for consumers to obtain damages from manufacturer or importer in EC. Directive does not, however, revoke more favorable national law. Commission issued Green Paper on liability for defective products on 28 July 1999, aiming at practical assessment of application of Directive and its efficiency and also serving to gauge reaction to possible revision of legislation. (COM [1999] 396). On 31 Jan. 2001, Commission issued its report on responses received in response to Green Paper. (COM [2000] 83).

5 COURTS AND LEGISLATURE

5.01 COURTS:

Judicial power in EC is exercised by Court of Justice and Court of First Instance. Main function of ECJ and Court of First Instance is to ensure that EC law is observed. (Art. 220 TEU). Court has jurisdiction to pronounce on actions for annulment or for failure to act brought by Council or Commission against each other, or by Member State against Council or Commission. Acts adopted jointly by European Parliament and Council are also subject to review. Only ECJ may annul EC Acts (Foto Frost C-314/85). Private persons and corporations can bring these actions, when act or failure to act is of individual scope. They also can bring action for damages against EC. Following Nice Treaty, Court of First Instance becomes common law judge for all direct actions including proceedings against decision (Art. 230 EC), action for failure to act (Art. 232 EC) and action for damages (Art. 235 EC) unless Court of Justice has reserved jurisdiction. Court of Justice retains responsibility for other proceedings (including action for failure to perform obligations under Art. 226 EC). Decision of Court of First Instance is subject to right of appeal to Court of Justice on points of law only. In European Constitution for Europe (June 2004), some modifications relate to judiciary organisation of Union. Among others, Court of First Instance will be renamed “General Court” and specialised courts will be attached to it to hear and determine at first instance certain classes of action or proceeding brought in specific areas. As to interim relief granted by national court of Member State see ABNA (C-453/03).

Member State courts enforce Community law on behalf of interested parties. In case of doubt about interpretation or challenge of validity of acts made by community institutions, request for preliminary ruling may be lodged with Court of Justice. (Arts. 234 EC Treaty and 150 EAEC Treaty). Member State courts of last resort are bound to refer to Court of Justice interpretation or validity questions arising before them. Preliminary rulings of Court of Justice are binding for Member State courts applying them to facts of case.

EC and EAEC Protocols on Court of Justice, annexed to Treaties, and Rules of

Procedure, decided by Court of Justice and Court of First Instance and approved by Council, govern direct actions (e.g. time-limits, language used, interventions, incidents) and preliminary rulings. President of Court of Justice and of Court of First Instance may award interim-relief on special request.

5.02 LEGISLATURE:

In EC, Council has power to adopt legislative measures on proposal from Commission, depending on subject matter dealt with, after advice or with co-decision of European Parliament Amsterdam Treaty has simplified legislative procedures and has increased substantially matters to be decided according to co-decision procedure. Under consulting procedure, Commission transmits its proposal to Council, which consults European Parliament and/or Economic and Social Committee. Council can amend proposal only by unanimity. (Art. 250 [ex. Art. 189A] EC Treaty). Co-decision is procedure now used for most EU law-making, in following fields: free movement of workers, right of establishment, services, internal market, education (incentive measures), health (incentive measures), consumer policy, trans-European networks (guidelines), environment (general action programme), culture (incentive measures) and research (framework programme). In co-decision procedure, Parliament does not merely give its opinion: it shares legislative power equally with Council. If Council and Parliament cannot agree on piece of proposed legislation, it is put before conciliation committee, composed of equal numbers of Council and Parliament representatives. Once this committee has reached agreement, text is sent once again to Parliament and Council so that they can finally adopt it as law.

Reorganisation of legislative procedures applicable in European Union Law as result of adoption of European Constitution, co-decision procedure becomes ordinary legislative procedure designed to adopt European laws or framework laws (Art. III-396). Its scope is near generalised. Qualified majority is applicable for this legislative procedure. Its definition has been reviewed: Council will decide on basis of double majority of Member States (55%) and of people (65% of population). Moreover, blocking minority needs to comprise at least four Member States and number of Council members representing at least three-quarters of blocking minority, whether at level of Member States or at level of population, that can demand vote to be postponed and discussions to be continued for reasonable time in order to reach broader basis of consensus within Council. Co-operation procedure is suppressed by European Constitution.

5.03 REPORTS:

European Court Reports (ECR) list in chronological order all judgments of Court of Justice and Court of First Instance and opinions of Advocates-General, published by Office for Official Publications of European Communities (Luxembourg), under responsibility of Court itself. Electronic version of Case-Law of Court of Justice is also available free of charge on Internet for information purpose. (http://curia.eu.int; http://eur-lex.europa.eu/).

There also exist unofficial (and most often incomplete) reports, in Common Market Law Reports (London).

5.04 STATUTES:

Community powers are those which are conferred on EU in specific areas by Member States. EU is thus able to act only within framework of Treaties. In main, EU has exclusive powers, shared powers, and MS have reserved powers. LRT defines spheres of competence, though language is subject to interpretation. LRT also contains Protocols on Subsidiarity and Proportionality principles, and Protocol on exercise of shared competence. According to "subsidiarity principle", Union does not take action (except in areas which fall within its exclusive competence) unless it is more effective than action taken at national, regional or local level. It is closely bound up with principles of proportionality and necessity, which require that any action by Union should not go beyond what is necessary to achieve objectives of Treaty. According to "proportionality principle", content and form of Community action cannot exceed that which is necessary to achieve Treaty objectives.

Legislative power is exercised through specific instruments. (Art. 249 EC Treaty). Regulations operate as statutes and directly applicable to Member States; directives are binding as to goals to be reached, but leave to Member States freedom as to choice of means; decisions contain implementation rules directly binding on those to whom they are addressed.

Regulations and directives and sometimes decisions are published in Official Journal ("L" series, standing for "Legislation").

Court of Justice held that directives, although not directly applicable as are regulations (Art. 249 EC Treaty), may produce direct effect, so that private persons or corporations are allowed to invoke directive against Member State which failed to implement it (so-called "vertical direct effect"). Inconsistent national law then has status of being unenforceable; Member State has obligation to bring its laws into accord with Community law. (See also supremacy of community law.)

6 EMPLOYMENT

6.01 LABOR LAW:

Title VIII of TEU is entitled "Employment" and seeks to achieve full employment in EU while providing for social protections. Art. 125 provides "Member States and the Community shall, in accordance with this title, work towards developing a coordinated strategy for employment and particularly for promoting a skilled, trained and adaptable workforce and labour markets responsive to economic change with a view to achieving the objectives defined in Article 2 of the Treaty on European Union and in Article 2 of this Treaty. Topic also is subject of Title "Social Policy, Education, Vocational Training and Youth". Labor law primarily remains province of national legislation of Member States subject to exceptions. Amended Art. 141 EC Treaty states that men and women should receive equal pay for equal work, but allows Member States to take positive discrimination measures. See comprehensive statement of EU labour law at http://ec.europa.eu/employment_social/social_model/index_en.html.

Besides, EC directives harmonising aspects of labour law led to uniformity of national laws as to equality between men and women for general employment conditions, mass dismissals and employees' rights in case of bankruptcy of employer, transfer or merger of business, safety at work and setting up of European Works Council in multinational companies.

Working Time.

On 4 Nov. 2003, European Parliament and Council adopted Directive 2003/88/EC codifying Directive 93/104/EC concerning certain aspects of organisation of working time.

Collective Redundancies means dismissal of workers not related to individual workers concerned, effected by Directive 98/59/EC, consolidating earlier Directives 92/56/EEC and 75/129/EEC.

Transfer of Undertakings.

EU gives employees certain rights in circumstances of corporate change, e.g. Council Directive 2001/23/EC. Pertinent example is right of worker involvement in creation of European Company (SE).

Employee Financial Participation.

During 2003, European Parliament and European Economic and Social Committee endorsed guidelines formulated by Commission in 2002 for development and promotion of employee financial participation and spelt out essential principles to enable such model to work.

Corporate Social Responsibility (“CSR”).

On 6 Feb. 2003 and 13 May 2003 respectively, Council and European Parliament welcomed 2002 guidelines on European strategy for CSR.

European Works Councils.

Council Directive 2006/109/EC adapts Directive 94/45/EC on European works councils, by reason of accession of Bulgaria and Romania. Council Directive 97/74/EC extends Directive 94/45/EC to U.K. and Ireland.

Posted Workers.

Directive 96/71/EC of European Parliament and of Council of 16 Dec. 1996 concerning posting of workers in framework of provision of services. Regarding social security, relevant provisions found in Regulation (EEC) No. 1408/91. On 3 Apr. 2008, Commission adopted Recommendation on enhanced administrative in context of posting of workers in area of freedom of services. Worker is deemed “posted” when employed in one EU MS, employer sends worker for temporary period to another EU MS.

Charter of fundamental rights of European Union contains provisions in c. IV (Solidarity) providing worker rights as they result from constitutional traditions common to Member States.

7 ENERGY

7.01 LIBERALISATION:

List of Regulations and Major Directives:

- Regulation (EC) No. 106/208 (energy efficiency labeling programme for office equipment)

- Directive 2006/3/EC (energy end use efficiency and energy services)

- Directive 2002/91/EC (energy performance of buildings)

- Directive 2005/32/EC (establishing framework for eco-design requirements for energy using products)

- Directive 2033/66/EC (labeling requirements for household appliances)

- Directive 2004/8/EC (promotion of co-generation based on useful heat demand in internal energy market)

EU, as major consumer of energy (gas and electricity) is in process of liberalising its energy markets; in addition is committed to increase energy efficiency and development of sustainable and renewable energy resources, for example bio-fuels. While numerous Directives in energy area exist, two major are: Directive 2003/55/EC of 26 June 2003 concerning common rules for internal market in natural gas and repealing Directive 98/30/EC, and Directive 2003/54/EC of 26 June 2003 concerning common rules for internal market in electricity and repealing Directive 96/92/EC. Also significant from policy viewpoint is security of energy supply addressed in Directive 2004/67/EC of 26 Apr. 2004 concerning measures to safeguard security of natural gas supply. For European Energy Policy, see http://europa.eu/scadplus/leg/en/s14001.htm

2003 gas and electricity Directives seek to achieve opening of energy markets with aim that businesses and consumers shall be able to purchase gas and electricity in freely competitive marketplace. Large companies now controlling entire process must “unbundle” distribution and transmission/transportation sides of their business; they also must set tariffs to all users on nondiscriminatory basis and give third party access to system; and they must meet EU minimum standards of public service. Directives have not been fully implemented in all Member States.

Select other legislation (not exhaustive list): Directive 2001/77/EC of 27 Sept. 2001 on promotion of electricity produced from renewable energy sources in internal electricity market; Regulation (EC) No. 1228/2003 of 26 June 2003 on conditions for access to network for cross-border exchanges in electricity; Directive 2003/87/EC of 13 Oct. 2003 establishing scheme for greenhouse gas emission allowance trading within Community and amending Council Directive 96/61/EC; Directive 2003/96/EC of 27 Oct. 2003 restructuring Community framework for taxation of energy products and electricity; Directive 2004/8/EC of 11 Feb. 2004 concerning promotion of co-generation on basis of demand of heat utilization in single market for energy and amending Directive 92/42/EC; and Directive 2006/32/EC of 5 Apr. 2006 on energy end-use efficiency and energy services and repealing Directive 93/76/EEC. Also see Council Directive 2003/96/EC restructuring framework for taxation of energy products and electricity.

On 10 Jan. 2007, Commission presented its (latest) view on EC energy markets. One of many policy issues addressed by Commission was question how to best regulate electricity and gas markets, in light of “internal market” objectives of Electricity and Gas Directives. See http://www.ec.europa.eu/energy/electricity/package_2007/index_en.htm. Also see http://ec.europa.eu/energy/energy_policy/index_en.htm. Commission also is considering creation of single European Energy Regulator. For current news, see http://ec.europa.eu/energy/demand/index_en.htm.

8 ENVIRONMENT

8.01 ENVIRONMENTAL REGULATION:

Legislation.

In 1987, Single European Act gave Treaty basis to Community environmental policy to preserve, protect and improve quality of environment. Arts. 174-176 (ex. Arts. 130R, 130S and 130T) EC Treaty, concisely define principles and objectives of Community environmental policy as developed through Action Programs adopted by Member States since 1972. Amsterdam Treaty introduced promotion of sustainable development into Preamble and Art. 2 (ex. Art. B) EU Treaty. To that end, environmental protection requirements must be integrated into every definition and implementation of Community policies and all activities. (Art. 6 [ex. Art. 3C] EC Treaty). *Note:* At present, sixth Environmental Action Programme which focuses on climate change, sustainable use of natural resources, health risks caused by environmental damages and preservation of bio-diversity, is being implemented. These articles also give indication of respective competences of Community and of Member States and contain provision on relations with third countries and international organisations. Legislative procedure is spelt out and possibility of introducing safeguard clauses is foreseen. New Art. 175 (ex. Art. 130S) EC Treaty enables Council to adopt environmental measures following simplified co-decision procedure. On the other hand, Art. 95 (ex. Art. 100A) offers alternative procedure for adopting environmental measures which have impact on establishment and functioning of internal market. Safeguard measures based on protection of environment may be adopted by Member States under Art. 95(4) (ex. Art. 100A[4]). On basis of those provisions, EC has enacted more than 200 legislative measures, most of them being directives harmonising national laws and introducing minimum environmental standards. Member States can enact higher standards, provided these are not protectionist devices. Besides horizontal measures protecting environment in general, as for example Directive on assessment of effects of certain public and private projects on environment, EC has adopted vertical measures applicable to specific types of pollution. In particular, there exists EC legislation on waste management, water protection, prevention of noise pollution, nuclear safety, monitoring of atmospheric pollution, protection of ozone layer, chemicals, industrial risk and biotechnology, efficient use of space, conservation of wild fauna and flora and international cooperation. In Mar. 2000, Commission launched European Climate Change Programme (ECCP) to prepare additional policies and measures, as well as emissions trading scheme, to ensure that EU achieves 8% cut in emissions by 2008-2012 which it committed to under Kyoto Protocol.

Kyoto Protocol.

In Mar. 2004, Decision of European Parliament and Council entered into force which makes all remaining requirements under 1997 Kyoto Protocol legally binding in all Member States. Targets of EU and its individual Member States related to emissions of greenhouse gases became binding in 2002. New Decision relates in particular to way in which emissions have to be monitored and reported in accordance with Protocol. Kyoto Protocol to U.N. Framework Convention on Climate Change (“UNFCCC”) is only international framework to combat global warming.

Climate Change.

European Commission has also adopted in July 2003 new initiative to combat climate change globally. Proposal for new Directive allows European companies to carry out emissions-curbing projects around world and convert credits earned into emissions allowances under European Union emissions trading scheme. It is based on so-called market-based flexible mechanisms “Joint Implementation” and “Clean Development Mechanism” envisaged by Kyoto Protocol. Aim is to reach global emissions reduction targets in cost-effective way while transferring advanced technology to other industrialised and developing countries.

Chemicals.

European Commission launched in Oct. 2003, proposal for new EU regulatory framework for chemicals. Under proposed new system called REACH (Registration, Evaluation and Authorisation of Chemicals), enterprises that manufacture or import more than one tonne of chemical substance per year would be required to register it in central database. Aim is to improve protection of human health and environment while maintaining competitiveness and enhancing innovative capability of EU chemicals industry. REACH would, furthermore, give greater responsibility to industry to manage risks from chemicals and to provide safety information on substances.

Environmental Liability.

Principle according to which polluter should pay when environmental damage occurs (“polluter pays” principle) is set out in Treaty establishing European Community. Aim of White Paper on environmental liability, published in Feb. 2000, was to examine how to implement “polluter pays” principle in order to carry out EU's environmental policy. It concluded that drawing up directive was best way to set up Community regime for environmental liability and adopted Directive 2004/35/EC. Under this Directive, environmental damage is defined as damage caused to aquatic environment covered by Community legislation on water management, species and habitats protected under Community legislation on nature conservation, areas protected under national or regional legislation on nature conservation, and health risks resulting from soil contamination. Where there is imminent threat of environmental damage, competent authority designated by each Member State will require operator (potential polluter) to take necessary preventive measures, or will take such measures itself and recover costs incurred at later date. Where environmental damage has occurred, competent authority will require operator concerned to take necessary restorative measures or will take such measures itself and recover costs incurred at later date. Where several instances of environmental damage have occurred, competent authority may determine order of priority according to which they must be remedied. Where operator has insufficient financial means to take all or part of necessary restorative measures, or where it is not possible to identify operator, Member States will ensure that measures are taken anyway. If necessary, they may set up alternative financing mechanisms (such as financial guarantees, securities, collective funds).

Environment and Health Action Plan 2004-2010.

European Commission launched in June 2004 action plan to reduce diseases caused by polluted environment. Plan would develop EU system integrating information on state of environment, ecosystem and human health. It has three main themes: (1) Improving information chain to understand links between sources of pollution and health effects; (2) filling knowledge gap by strengthening research and addressing emerging issues on environment and health; and (3) reviewing policies and improving communication.

Forests.

On 17 Nov. 2003, European Parliament and Council adopted Regulation No. 2152/2003 which defines five-year (2003-08) comprehensive, harmonised approach for activities relating to monitoring and protecting forests from atmospheric pollution and fires, biodiversity, climate change, carbon sequestration and soils. Regulation establishes system for evaluating and assessing action taken.

Fuel.

With view to supplementing specifications for air quality standards provided for in Directive 98/70/EC, on 3 Mar. 2003 European Parliament and Council adopted Directive 2003/17/EC, which places obligation on Member States to reduce sulphur content of petrol and diesel fuels by 2005 and to ensure full conversion to zero-sulphur fuels by 2009.

Gas Emission.

On 13 Oct. 2003, European Parliament and Council adopted Directive 2003/87/EC establishing Community scheme for greenhouse gas emission allowance trading to be phased in by 2012. Pursuing twin objectives of cost-effective global reduction of emissions of greenhouse gases and of smooth operation of internal market without distortion of competition, new directive provides for allocation and trading of authorised emission allowances, and penalties in event of non-compliance, with view to making information reported by Member States generally more prompt, consistent, accurate, full and more transparent and comparable.

Motor Vehicles.

In Aug. 2003, Commission Directive 2003/76/EC was adopted amending Council Directive 70/220/EEC relating to measures to be taken against air pollution by emissions from motor vehicles (OJ, No. L 206, 15 Aug. 2003), to be implemented by Member States by 3d Sept. 2004.

Organisms Genetically Modified.

On 15 July 2003, in order in incorporate provisions of Cartagena Protocol into Community legislation, European Parliament and Council adopted Regulation (EC) No. 1946/2003. This introduced common system of notification and information regarding exports on GMOs to third countries, imposing on Community exporters requirements that go beyond those imposed by protocol. On 22 Sept. 2003, they subsequently adopted Regulation No. 1830/2003 concerning traceability and labelling of GMOs and traceability of food and feed products produced from GMOs. Regulation is designed, in particular, to monitor effects on environment and, where appropriate, on health and to implement appropriate risk management measures. Resolution adopted by European Parliament on 18 Dec. 2003 called for definition of framework for coexistence between genetically modified crops and conventional or organic crops.

Ozone Layer.

In order to bring European legislation into line with requirements of Montreal Protocol and to contribute to speeding up process of regeneration of ozone layer, on 22 Sept. 2003 European Parliament and Council adopted Regulation No. 1804/2003. Directive obliges Member States to inform and alert population when ozone concentrations in air are above certain thresholds. It also defines long-term objectives to protect human health and vegetation from ozone to be attained across EU as far as possible by 2010.

Prevention and Limitation of Risks.

Following industrial accidents in Baia Mare and Enschede in 2000 and then in Toulouse in 2001 and in light of studies on carcinogenic substances and substances posing hazards for aquatic environment, on 16 Dec. 2003 European Parliament and Council adopted Directive 2003/105/EC amending ‘Seveso II’ Directive. New directive now includes chemical and thermal processing operations in mining as well as operational management facilities for tailings containing dangerous substances and also applies to carcinogenic substances. Number of provisions have been tightened up on points such as information for public, training for emergencies and involvement of subcontracted personnel. Directive obliges industrial operators to produce risk maps showing areas that might be affected by major accident. Last but not least, Member States are required to provide Commission with minimum data on all ‘Seveso sites’ within their territory.

Strategic Environmental Assessment (SEA).

From 21 July 2004, European citizens are able to have more influence on decisions which will affect their environment. By Directive on Strategic Environmental Assessment, environmental effects of wide range of public plans and programmes must be assessed under better and more open planning procedures.

World Water Day.

European Union agreed in Mar. 2004 World Water Day to set up special Water Facility to promote access to clean water and sanitation for people of Africa, Caribbean and Pacific. Facility originally proposed by President Prodi in 2003, could in first phase be worth up to [Euro]500 million and is designed to have important catalytic effect in generating additional funds for water and sanitation.

General Supervision.

Commission ensures full application of EC legislation, generally directives, by Member States. Directives must be transposed into national laws which will be enforced by national bodies subject to supervision by national courts. Since Nov. 1993, European Environment Agency, which is located in Copenhagen, cooperates with Commission. Its function is to ensure supply of objective, reliable and comparable information at EC level on state of environment by processing information on environmental data which has been collected through national networks.

Amsterdam Treaty confirms need for integration of environmental protection requirements into definition and implementation of all Community policies.

9 EU CITIZENSHIP

9.01 REQUIREMENTS AND RIGHTS OF CITIZENSHIP:

Citizenship of Union is set forth in Arts. 17 through 22 of TEU. EU citizenship is dependent on holding nationality of one of Member States. In other words, anyone who is national of Member State is considered to be citizen of Union. Introduction of notion of Union citizenship does not replace national citizenship: it is in addition to it. EU citizenship confers four special rights: freedom to move and take up residence anywhere in Union; right to vote and stand in local government and European Parliament elections in country of residence; diplomatic and consular protection from authorities of any Member State where country of which person is national is not represented in non-Union country; and right of petition and appeal to European Ombudsman. Directive 2004/58/EC of European Parliament and of Council of 29 Apr. 2004 on right of citizens of Union and their family members to move and reside freely within territory of Member States amending Regulation (EEC) No. 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC (Text with EEA relevance). ECJ has rendered judgments in area: e.g., C-540/03 interpreting Directive 2003/86/EC on right of family reunification; while not finding Directive provisions invalid as contrary to fundamental rights, ECJ stated that MS must interpret provisions to give effect to Directive consistent with decisions of ECHR, Charter on fundamental rights and other related international conventions.

10 FINANCIAL SERVICES

10.01 BANKING:

Since 1 Jan. 1993, second banking coordination Directive entered into force. This Directive established principle of single licence allowing banks and other credit institutions to set up branches and offer services throughout Community; it contains list of banking services that can be provided in all Member States on basis of such licence. In addition to requirements already laid down in first Directive of 1977, this Directive requires banks to have minimum level of capital, and it lays down prudential rules covering, for example, qualifying holdings, sound administrative and accounting procedure, and adequate internal control. Also adopted are rules on preparation and publication of annual and consolidated accounts; rules designed to harmonise concept of “own funds”; definition of solvency ratio; rules on monitoring of market risks incurred by credit institutions; rules aimed at preventing use of banking system for purpose of money laundering; rules on supervision of credit institutions on consolidated basis; rules on limitation of large exposures incurred by credit institutions; rules on deposit-guarantee schemes. All but three of these measures have been in force since 1 Jan. 1993: Directive on large exposures came into force on 1 Jan. 1994, Directive on deposit-guarantee schemes came into force on 1 July 1995, and Directive on supervision of market risks came into force on 1 Jan. 1996. Directive 2000/12/EC consolidates most of Directives concerning taking up and pursuit of business of credit institutions by combining them in single text. Parliament and Council adopted Directive 2006/48/EC related to taking up and pursuit of business of credit institutions (taking account of Basel II framework); that Directive substantially recasts consolidated banking Directive 2000/12/EC. Directive 2006/49/EC on capital adequacy of investment firms and credit institutions recasts several Directives. For transposition of FSAP Directives as of 18/09/06 see http://ec.europa.eu/internal_market/finances/docs/actionplan/index/transposition_en.pdf. Also see White Paper on Investment Funds COM (2006) 686.

Payment Systems.

Single EURO Payments Area (SEPA) is major initiative to create single market for payments in EU. Creation of SEPA will result in all payments denominated in EURO are considered domestic. Directive 2007/64/EC on payment services in internal market amending Directives 97/7/EC, 2005/60/EC and 2006/48/EC and repealing 97/5/EC (Payment Services Directive) is legal framework for SEPA and establishes foundation for SEPA. SEPA is bank driven initiative with full support of Commission. European Payments Council is private organization developing and implementing technical changes to payment system to achieve goals of single payment area. CREDEURO and ICP conventions, as well as development of other clearing and settlement systems, figure prominently in harmonized cash and card services scheme. Existing payment law consists of Directive 98/26/EC on settlement finality; and, though not law, Commission Recommendation 97/489/EC on electronic payment instruments. See also Directive 2002/47/EC on financial collateral arrangements and Directive 2000/46/EC on electronic money institutions. E-Money Directive 2000/46/EC evaluated in 2006 with view toward revision and integration of E-Money institutions into proposed Payment Services Directive. 2006 Final Report entitled "Evaluation of the E-Money Directive" provides comprehensive analysis of success and failure of E-Money Directive; it is invaluable source of information found at http://ec.europa.eu/internal_market/bank/docs/e-money/evaluation_en.pdf.

Equity Market Regulation.

Prospectus Directive 2003/71/EC harmonises requirements for publishing prospectuses when issues are intended for cross-border distribution respecting shares admitted to trading on "regulated market"; it also introduced passport system for prospectuses approved in home state of issuer, that is, once given home approval, prospectus was valid throughout EU, provided notification given to host state authority. In 2008, DG Internal Market and Services issued Final Report on effects of implementation Directive; it is comprehensive and provides provocative conclusions at http://ec.europa.eu/internal_market/securities/docs/prospectus/cses_report_en.pdf. Commission Regulation (EC) No. 211/2007 of 27 Feb. 2007 amends Regulation (EC) No. 809/2004 implementing Directive 2003/71/EC of European Parliament and of Council as regards financial information in prospectuses where issuer has complex financial history or has made significant financial commitment. See also Commission Regulation (EC) No. 1569/2007 of 21 Dec. 2007 establishing mechanism for determination of equivalence of accounting standards applied by third country issuers of securities pursuant to Directives 2003/71/EC and 2004/109/EC of European Parliament and of Council. Directive 2004/39/EC on markets in financial instruments (MiFID) repeals 1993 Investment Services Directive (ISD); Member States are required to transpose by 31 Jan. 2007, with Directive entering into full effect 1 Nov. 2007. Directive designed to foster competitive, transparent, fair, and integrated European financial market. While providing investor protection, it permits trading off "regulated markets" and multiplication of non-regulated markets has affected efficacy of Prospectus Directive.

Payment Regulations.

Regulation (EC) 2560/2001 on cross-border payments in EURO, and Regulation (EC) 1781/2006 on information on payer accompanying transfer of funds.

Money Laundering.

EU became active in promulgating Directives to protect financial system against abuse of money laundering in 1990s commencing with Directive 91/308/EEC, amended by Directive 2001/97/EC; subsequently Parliament and Council issued Directive 2005/60/EC repealing Directive 91/308/EC. Third money laundering Directive is entitled "the prevention of the use of the financial system for the purpose of money laundering and terrorist financing". Directive expands predicate crimes, scope to cover not only credit and financial institutions by also, for example, auditors, real estate agents, attorneys; imposes on banks substantial due diligence requirements for customer identification (beneficial ownership); enhances reporting and record keeping requirements; and requires Member States to develop appropriate enforcement procedures and penalties for violation. Commission Directive 2006/70/EC sets out rules specifically for political exposed persons. Regulation (EC) No. 1889/2005 establishes controls on cash entering and leaving community by requiring natural persons to declare carrying cash with value of [Euro]10,000 or more. Multi-lingual leaflet explaining regulation is available at http://ec.europa.eu/taxation_customs/customs_controls/cash_controls/index_en.htm.

10.02 INSURANCE:

Complete list of Directives, Recommendations and Decisions on Life, Non-Life, Accounting, E-Commerce, Insurance Groups, Financial Conglomerates, Insurance Mediation, Motor Insurance, Reinsurance, Solvency, Winding-up, and European Insurance and Occupational Pensions Committee is found at http://ec.europa.eu/internal_market/insurance/legis-inforce_en.htm.

Life Assurance Sector.

First coordinating Directive on direct life assurance (Directive 79/267/EEC repealed by Directive 2002/83/EC) aimed to lay down rules necessary to facilitate effective exercise of right of establishment in respect of such insurance activities. Second coordinating Directive on life assurance (Directive 90/619/EEC, also repealed by Directive 2002/83/EC) was adopted to facilitate effective exercise of right to supply life assurance services. It laid down two sets of arrangements in respect of freedom to provide services: first provides for application of rules of, and supervision by, Member State of origin of insurance undertaking or home country control, and covers those policy-holders not requiring specific protection arising from application of rules of their Member State of residence; second, which covers other policy-holders requiring such specific protection, is based on application of rules of, and supervision by, Member State in which service is supplied in order to guarantee that such protection is provided (risk country control). In 1992 Directive 92/96/EEC was adopted, third coordinating directive on direct life assurance. Its aim was to complete internal market in this form of insurance activity on basis of principles of single administrative licence and supervision of insurance undertaking's activities by authorities in Member State in which that undertaking has its head office. In 2002 Directive 2002/83/EC was finally adopted consolidating all directives in one coherent text.

Insurance Other Than Life Assurance Sector.

Appropriate legal framework for exercising freedom of establishment in Community in respect of direct non-life insurance was established by Directive 73/239/EEC. Arrangements necessary to guarantee effective exercise of freedom to provide non-life insurance services are laid down in Directive 88/357/EEC. This Directive covers all non-life insurance, including compulsory insurance. Finally, third coordinating Directive on direct non-life insurance was adopted by Council, that covers coordination of national rules governing investment, spread and localization of assets used to cover technical provisions, law applicable to insurance supervision, terms of insurance and physical inspection of policies and contract documents, access to and pursuit of insurance activities, and supervision according to principle of home country control.

Note: Community has also legislated in specific areas such as motor vehicle insurance (Five Motor Insurance Directives), annual accounts and consolidated accounts of insurance undertakings as well as solvency margin requirements, legal protection insurance and credit and suretyship insurance.

In 2007, Commission proposed new Directive on taking up and pursuit of business of insurance and reinsurance (called “Solvency II”) aimed to fundamentally change insurance regulation in EU especially for capital requirements and supervision. EC Insurance Interim report, published 24 Jan. 2007, contains detailed analysis of certain aspects of insurance industry but does not contain definite conclusions. Select areas of concern: market fragmentation and questionable profitability, especially in Eastern Europe; excessive policy duration and automatic renewal, contingent fees, and block exemption under Regulation (EC) No. 358/2003.

11 FOREIGN TRADE AND COMMERCE

11.01 CUSTOMS DUTIES:

At EU level, European Commission proposes to enhance security and to simplify administration at EU's external borders. European Commission has published in July 2003 Communication (Communication on role of customs in integrated management of external borders) and proposal for Regulation (Proposal for Regulation of European Parliament and of Council amending Council Regulation (EEC) No. 2913/92 establishing Community Customs Code) to modify Community Customs Code aimed at enhancing role of customs in security management at EU's external borders. Commission also tabled another Communication (Communication relating to simple and paperless environment for Customs and Trade) comprising action plan for comprehensive overhaul of customs procedures. Main aim is to radically simplify these procedures and to fully exploit opportunities offered by information technologies. Commission Regulation (EC) No. 402/2006 amends Regulation (EEC) No. 2454/93 laying down provisions for implementation of Council Regulation (EEC) No. 2913/92 establishing Community Customs Code; Commission Regulation (EC) No. 215/2006 amends Regulation (EEC) No. 2454/93. Commission's strategy for Customs Union was set out in Communication COM (2001) 51; in addition, Council and Parliament have published proposal for paperless environment for customs and trade COM (2005) 609. See for overview of EU Taxation and Customs Union http://ec.europa.eu/taxation_customs/index_en.htm.

European Commission has established new rules on waiving of post-clearance recovery, remission and repayment of duties. These rules apply from 1 Aug. 2003. Regulation EC No. 1335/2003 has raised threshold value ([Euro]500,000) up to which Member States are authorised to make decisions with regard to non-recovery and repayment or remission of customs duties.

Intra-EU Trade.

Among Member States, import and export duties or charges having equivalent effect are prohibited under Arts. 23-31 EC Treaty. Rule applies whether goods originate in Member State or in third country but are in free circulation in at least one Member State (that levied customs duties applicable on import into EU from third countries). Thus, with completion of single market in 1993, there is complete free trade within EU.

Trade with Third Countries.

Council Regulation (EC) No. 732/2008 of 22 July 2008 applies scheme of generalized tariff preferences for period 1 Jan. 2008 to 31 Dec. 2011. For full report of legislation, reports and texts regarding GSP, see http://ec.europa.eu/trade/issues/global/gsp/legis/index_en.htm. Goods imported into EU from third countries are subject to Common Customs Tariff (known as CCT), enforced by Member States on behalf of Community. Duties are levied according to CCT schedules based on Harmonised System nomenclature; rates of duty differ depending on nature of goods and their origin. In case of litigation, Member State courts pronounce on classification of goods into CCT schedules. CCT schedules are part of EC law. Court of Justice can give interpretation through preliminary rulings procedure. Taxable base is actual price of transaction determined at arm's length. If there is none, substitutes are: (1) Normal transaction value of identical or similar goods sold to be imported into EU; (2) deductive value obtained by some deductions from price at which identical or similar imported goods are sold in EU between nonrelated parties; (3) computed value obtained by sum of manufacturing cost, profit usually inherent in sale price of identical or similar goods exported from third country and finally, transportation and insurance cost from third country to outside border of EU.

European Union maintains some limited quantitative restrictions with third countries in sectors of textiles and steel.

Special regimes of customs duties cover imports from third countries. For example, Lomé Convention covers trade with African, Caribbean and Pacific States (ACP states). EU has adopted new strategy for trade relations with ACP countries, aiming to broaden EU's bilateral trade cooperation with ACP countries by tackling non-tariff barriers to trade, strengthening regional trade integration and aid and trade measures.

Note: in area of trade between EU and Caribbean, European Union opened negotiations for Economic Partnership Agreement ("EPA") between EU and 16 Caribbean countries on 16 Apr. 2004. Meeting in Kingston, Jamaica, EU Commissioners for Trade and Development and their Caribbean colleagues officially launched these negotiations aimed at promoting trade and development by concluding region-to-region agreement. By opening up trade between both regions and setting up clear rules for trade, EPA contributed to economic integration of Caribbean.

Moreover, EU and seven Southern African countries have recently decided to join forces and promote trade and development by launching negotiations for region-to-region Economic and Partnership Agreement (EPA). By opening up trade between both regions and setting up clear rules for trade, EPA will contribute to economic integration of region. Tearing down barriers to trade among themselves is necessary complement to almost full access to EU market already enjoyed by these countries.

Should also be mentioned agreements covering Mediterranean islands and Middle East as well as Generalised System of Preferences ("GSP") covering trade with developing countries.

EU and U.S. have several specific trade agreements, one is notably REACH whereby EU manufacturers and importers of chemicals must pre-register chemical substances by 1 Dec. 2008.

Another example is relating to collaboration between representatives of U.S. Customs and Border Protection and of European Commission, assisted by representatives of Member States. In July 2003, both sides decided to continue close co-operation with aim of concluding in near future agreement, covering whole of Community, to intensify and broaden co-operation under existing EC-US Customs Co-operation Agreement. Main aim of intensified co-operation between EU and USA in this area consist in improving security of sea-container traffic and at later stage other shipments from all destinations that are imported into, transhipped through, or transiting through European Community and United States of America.

11.02 FOREIGN TRADE REGULATIONS:

Art. 133 (ex. Art. 113) EC Treaty empowers Community to regulate trade with third countries. EU set forth its global trade strategy in 2006 focusing on development of increased competition in EU and externally and recognizing China as major future challenge, see http://ec.europa.eu/trade/issues/sectoral/competitiveness/pr041006_en.htm.

Protection from Dumped or Subsidised Imports.

Using this power, Council enacted EC Reg. No. 384/96 and EC Reg. No. 3284/94 repealed and replaced by Council Regulation No. 2026/97 of 6 Oct. 1997 on protection against subsidised imports from countries not members of European Community. (OJ, No. L 288, 21 Oct. 1997). These duties aim at avoiding injury to EU industry caused by import from third countries at dumped or subsidised prices—generally below those in home market of exporting country. Complaints by any natural or legal person (or any association not having legal personality acting on behalf of EC industry) shall be submitted to Commission or to Member State (that shall forward it to Commission). Complaint shall include sufficient evidence of existence of countervailing subsidies (including, if possible, of their amount), injury and causal link between allegedly subsidised imports and alleged injury. Commission leads investigation as to existence of dumping practice or state subsidies and injury to EU industry resulting there from. Investigation usually initiated following formal complaint and must cover particular reference period which is usually 12 months preceding investigation (normally this period shall be most recent accounting year of beneficiary, but may be any other period of at least six months prior to initiation of investigation for which reliable financial and other relevant data are available). Evidence obtained through combination of written questionnaires to all market participants and written submissions or oral hearings involving main parties. Following investigation, Commission may take no action or impose provisional duties and/or accept price undertakings. Council must approve provisional duties and can, if requested by Commission before their expiry, convert provisional duties into definitive duties, which can last initially up to five years. Following this initial period (and any subsequent one), Commission may review duties and if it considers that their removal would lead once again to injury to EU industry, it may recommend to Council that duties be re-imposed again for up to five years.

In addition, quantitative restrictions (referred to as "safeguard measures") can be put to imports from third countries, causing injury to EU industry. For agricultural imports from third countries, special system of upward price adjustment must prevent disturbance of common agricultural policy within EU. EU agricultural exports may be subsidised.

Obstacles to Trade.

Reg. No. 3286/94 (as last am'd by Regulation No. 356/95 of 20 Feb. 1995) enables Community institutions to react to obstacles to trade adopted or maintained by third countries which cause injury or otherwise adverse trade effects. *Note:* EU has adopted Council Regulation (EC) No. 963/2002 of 3 June 2002 laying down transitional provisions concerning anti-dumping and anti-subsidy measures adopted pursuant to Commission decisions taken under expired ECSC Treaty, as well as pending anti-dumping and anti-subsidy investigations, complaints and applications pursuant to those decisions.

Counterfeiting and Piracy.

On 20 Jan. 2003, Commission proposed draft regulation about customs intervention where there is suspicion of counterfeiting or piracy. Proposal sets out condition under which customs authorities might intervene where goods are suspected by holder of intellectual rights or by customs authorities to contravene intellectual property rights and steps to be taken by appropriate authorities where goods have contravened these rights. Proposal resulted in Council Regulation (EC) No. 1383/2003 of 22 July 2003 concerning customs actions against goods suspected of infringing certain intellectual property rights and measures to be taken against goods found to have infringed such rights (OJ, No. L 196, 2 Aug. 2003) which replaces prior Regulation No. 3295/94. In 2005, Commission issued Communication to Council, European Parliament and European Economic and Social Committee on Customs response to latest trends in counterfeiting and piracy (COM [2005] 479 Final).

WTO.

EU is part of World Trade Organisation ("WTO"), successor to GATT, which deals with global rules of trade between nations by acting as forum for trade negotiation and settling trade disputes. Doha Development Agenda ("DDA") agreed to at fourth World Trade Organisation (WTO) Ministerial in Nov. 2001 laid out programme for trade liberalisation that included series of objectives for which progress will depend on achieving sound solutions to underlying regulatory issues. Regulatory issues were integrated in stocktaking and decisions expected at fifth WTO Ministerial, which was held in Sept. 2003 in Cancun, Mexico. Aim was to take stock and reach political decisions needed to pursue further negotiations under Doha Development Agenda, particularly in areas of agriculture; access to markets for non-agricultural products; trade in services; development, and 'Singapore issues': trade and investment, trade and competition policy, transparency of government procurement and trade simplification. Conference failed to reach agreement or common position on any issue, delaying negotiations and leaving it up to permanent representatives of WTO members in Geneva to continue discussion. The DDA remains unfinished.

WTO's dispute settlement system has potential to provide security and predictability in resolving international trade disputes, as panels and appellate body interpret WTO and its texts. EU, like other major countries: US, Canada, and Japan, have been involved in numerous cases before DSB. WTO website contains comprehensive list and texts of disputes, see http://www.wto.org/ for up-to-date account of cases in which EU was party.

Other Trade Arrangements.

In addition to WTO, EU has trade arrangements with individual countries and economic trading blocs, both within Europe (e.g., EFTA) and world-wide (e.g., ACP states through Lomé Convention, Mediterranean countries through Euro-Med and numerous Asian and South American agreements). For example, Cotonou Agreement entered into force on 1 Apr. 2003 sets out comprehensive, integrated vision of development strategies based on three interlocking strands: political dialogue, economic and trade cooperation and development aid. It lays foundation for new partnership between Union and ACP States, based on fundamental concept that ACP States should take charge of their own development strategies. Partnership is aimed to alleviate poverty and integrate ACP economies into global economy.

Another important agreement is with USA, through New Trans-Atlantic Agenda and accompanying EU-US Joint Action Plan signed in 1995, which commits both parties to political and economic co-operation and creation of New Trans-Atlantic Marketplace with reduced barriers to flow of goods, services and investment between EU and US.

European Commission and U.S. Administration agreed on 28 Apr. 2003 on details for renewed commitment to Trans-Atlantic Business Dialogue (TABD) as key forum for government and industry discussions on trans-atlantic commercial matters. On 30 Apr. 2007, EU-US agreed on framework for advancing Trans-Atlantic economic integration. See http://www.tabd.com/.

11.03 INTERNAL MARKET:

EC Treaty, by establishing common market and progressively approximating economic policies of Member States, seeks to unite national markets into single market having characteristics of domestic market. (Case 270/80, Court Report 1982, 348, 16). No attempt is made here to reproduce all cases that develop meaning and application of these essential Treaty rights.

Free Movement of Goods.

For abolition of customs duties among Member States, see topic 11.01 Customs Duties. Quantitative restrictions to imports, exports and transit, as well as measures having equivalent effect, are prohibited (Arts. 28-29 [ex. Art. 30-34] EC Treaty), unless they can be justified on one of grounds stated in Art. 30 (ex. Art. 36) EC Treaty, or on one of “mandatory requirements” defined by Court of Justice (Case 120/78, Court reports 1979, 649). For Court of Justice, all trading rules enacted by Member States which are capable of hindering, directly or indirectly, actually or potentially, intra-EU trade are to be considered as measures having effect equivalent to quantitative restrictions. (Case 8/74, Court Reports 1974, 852). Nevertheless, application to products of other Member States of national provisions restricting or prohibiting selling arrangements does not constitute measure having equivalent effect to quantitative restrictions as long as they are not discriminatory towards imported goods (Joint Cases C-267 and C-298/91, Court Reports 1993, 6097).

Free Movement of Workers.

Member States must refrain from limiting access of citizens of other Member States to national labour market. Freedom to cross Member State borders with view of taking up employment, or just seeking employment, is guaranteed. Nonetheless, Member States can remove from national territory migrant worker, citizen of other Member State, for reasons of public policy relating to individual behavior of worker. (Arts. 39-42 [ex. Arts. 48-51] EC Treaty). During period of employment and thereafter, no discrimination on grounds of citizenship is allowed. Initially, only three Member States opened their labour markets to workers from 2004 enlargement countries; others exercise option to defer.

See also Visa, Asylum, Immigration.

Freedom of Establishment.

Citizen or corporation of one Member State may establish independent business in other Member State on same conditions as nationals of latter Member State can. (Arts. 43-48 [ex. Arts. 52-58]). For companies, key cases are Daily Mail (C-81/87), Centros (C-212/97), Inspire Art (C-167-01), Überseering (C-208-00), and Sevic Systems AG (C 411/03).

When national regulation is not in accordance with principle of freedom of establishment, European Commission may request national authorities to take measures necessary to respect this principle and/or commence infringement procedures.

National regulations which are discriminatory towards citizens or corporations from other Member States are prohibited unless justified by reasons of public policy, public security or public health. Non-discriminatory legislations which hinder freedom of establishment are also prohibited unless justified by “mandatory requirements” (case 19/92, Court reports 1993, 1689). See, e.g. C-284/06 (2008) for ECJ decision concerning effect of Art. 43 on distribution of profits by German subsidiary to Netherlands Parent.

Freedom to Provide Services.

Citizen or corporation of one Member State may provide services in another without being established, on condition to respect rules governing providing of services on basis excluding discrimination between citizens and citizens of other Member States, or between established and non-established business. (Arts. 49-55 [ex. Arts. 59-66] EC Treaty). Non-discriminatory legislations restricting freedom to provide services are also prohibited unless justified by “mandatory requirements” (case 33/74, Court reports 1974, 1299). In relation to service providers, new strategy aims to ensure that they can operate as easily throughout EU as they can in any single Member State. This strategy was set out in two-step approach, first one for 2001 and second one for 2002. Aim of strategy was to eliminate by end of 2002 all barriers that can currently prevent business model successfully pioneered in one Member State from being introduced elsewhere in Union and proposes harmonised rules for service provision where strictly necessary. Finally, strategy aimed also to propose mechanism to ensure that in other areas EU Member States will be required to recognise each other's rules and practices, rather than impose their own, whilst ensuring high level of protection of public interest objectives. Moreover, general directive on services within internal market has been proposed by Commission in 2003. Treaty (Art. 50) defines services negatively by stating that service is residual category, that is, not good, person or capital, and is provided for remuneration. Art. 50 provides examples but list is not exhaustive. Proposed Services Directive is intended to remove barriers for cross-border provision of services; numerous services are excluded from scope of Directive; Member States can impose regulations justifiable in public interest provided proportionate. Directive 2006/123/EC of 12 Dec. 2006 on services in internal market intended to remove barriers to cross-border movement of services; it affects both freedom of establishment (TEU 43) and free movement of services (TEU 49). Four main components: (1) Simplification of administrative procedures, (2) support for freedom of establishment and free movement of services, (3) mutual assistance among regulatory bodies, and (4) limited harmonization. Key case in area is “Laval un Partneri Ltd” (C-

341/05) where Swedish Trade Union blockaded workers posted from Latvia to provide construction services, based on fact that pay to Latvian workers did not correspond to Swedish trade union standards. ECJ rejected position of Sweden holding that Art. 49 precludes trade union, acting under Directive 96/71, from blockading sites to force provider of services from another MS to enter into negotiations to set pay for posted workers and sign collective bargaining agreement under terms dictated by MS where posted workers will provide services.

Free Movement of Capital.

On 1 Jan. 1994, Arts. 56 to 60 (ex. Arts. 73B to 73G) EC Treaty entered into force, providing for complete liberalization of capital movements and payments between Member States and between Member States and third countries. Some restrictions may still apply. (Arts. 57 and 58 [ex. Arts. 73C to 73D]). With exceptions, it extends to third countries as EU is open to world capital markets. Free movement of capital applies to all markets: equity and finance, direct investment, purchase of real property and securities and financial derivatives. Certain transactions implicate both free movement of services and of capital.

European Commission has established its Internal Market Strategy 2003-2006, ten-point plan to make Internal Market work better. Strategy aims to respond to challenges of enlargement and aging population and to keep Europe on course to become world's most competitive economy by 2010. Particular priorities include improving implementation and enforcement of Internal Market law, making free movement of services into practical reality, removing remaining obstacles to trade in goods and building genuinely European public procurement markets. Strategy calls on them to implement Internal Market laws promptly and correctly, inform their citizens and businesses of their rights, solve problems when they arise and refrain from adopting national laws which conflict with Internal Market principles. Strategy proposes strengthening enforcement through closer co-operation between Commission and Member States, so that quick and effective solutions can be obtained without systematic recourse to infringement procedures. Internal Market Strategy is undergoing active reconsideration and refinement (Commission Staff Working Document, Public Consultation on a Future Single Market Policy [Brussels 20.09.06]). On May 10, 2006, Commission adopted Communication entitled “A citizen's Agenda—delivering results for Europe” that sets out various policy initiatives.

Trans European Networks (TEN) also contribute to integration of single market. TEN focuses on three areas: Energy, Transportation and Telecommunications.

12 HEALTH

12.01 INTRODUCTION:

Previously underlying other concepts, concept of protection of public health was set as freestanding goal in EC Treaty in 1993. Art. 3 of EC Treaty, clearly states that Community will be contributing to attainment of high level of health protection. This objective is further developed in Title XIII (“Public Health”) of EC Treaty, which sets out that “a high level of human health protection” will be ensured in all Community policies and activities. Community complements Member States' action in field of public health.

Commission's Health and Consumer Protection Directorate-General participates in achievement of Community's objectives in field of public health. In 2000, Commission adopted Communication on the Health Strategy of the European Community, which establishes new framework for future public health action.

12.02 CONSUMER HEALTH PROTECTION:

Proposal for European Parliament and Council decision establishing programme of Community action in field of health and consumer protection (2007-2013). It will replace existing programmes in field of public health and consumer policy. New programme consolidates three strands of action of current public health programme (“surveillance of health threats”, “determinants” and “information”) and also creates three new strands: “delivering response to health threats”, “preventing diseases and injuries” and “achieving synergies between national health systems”. Health inequalities, aging and children's health will be themes underpinning all activities carried out under different strands. Programme is open to participation of EFTA/EEA countries and certain non-Community countries, in particular countries which border Community, countries which are applying for, candidates for, or acceding to membership of Union, and western Balkan countries included in process of stabilisation and association process. Once it has been adopted, decision will repeal Decisions 1786/2002/EC and 20/2004/EC. In 2006, European Parliament and Council adopted Regulation (EC) No. 2006/2004 on consumer protection cooperation. Important potential development is Commission Proposal to adopt Directive on patients’ right to cross-border healthcare; proposal adopted 2 July 2008, extremely controversial. Directive would set forth rules for receiving cross-border healthcare and establish mechanisms for reimbursement of costs.

12.03 FOOD SAFETY:

Commission recently put even greater emphasis on food safety. Objective is to rebuild public's confidence in food, which was undermined during food crisis of 2000 (including BSE and Foot and Mouth disease episodes). In order to achieve this reinforced goal, Commission produced White Paper on Food Safety in Jan. 2000, which aims at modernising rules to which food industry is subject at every stage “from the farm to the table”. Further to this White Paper, number of measures has already been taken to achieve best possible food safety levels within EU: in particular, EC Reg. 178/2002 of 28 Jan. 2002, laying down general principles and requirements of food law, establishing European Food Authority (EFSA) and laying down procedures in matters of food safety. This Regulation foresees that general principles of food law and some of key new measures to secure food safety immediately enter into force after 20 days. Other Regulations of note are: Regulation (EC) No. 852/2004 on hygiene of foodstuffs (requiring HACCP and registration]; Regulation (EC) No. 853/2004 regarding specific rules for foods of animal origin intended for human consumption. Raft of other Regulations apply: may be found at http://www.food.gov.uk/foodindustry/regulation/europeleg/eufoodhygieneleg/.Other specific provisions will apply as of 2005, or, in case of other provisions, since EFSA has become operational in May 2003. Among measures taking effect is start of operation of new and reinforced rapid alert system for feed and food risks. System foresees obligatory notification of any direct or indirect risk to human health, animal health or environment within network consisting of national competent authorities, EFSA and European Commission. Commission will have new powers to take emergency measures in case of threat of serious risk. As announced in White Paper, Commission also issued Proposal amending Directive 2000/13/EC in Sept. 2001, making label indication of all ingredients obligatory for foodstuffs. Proposal also established list of ingredients liable to cause allergies or intolerances; alcoholic beverages will also have obligation to mention allergens on their labels. New Directive was finally adopted on 10 Nov. 2003. In meantime, Directive modifying Dir. 2000/13/EC on ingredients called “meat” was adopted on 26 Nov. 2001. On 1 July, 2007, EU adopted Regulation 1924/2006 on nutrition and health claims used by producers to advertise their products; Regulation seeks to harmonize such claims and protect consumers.

Several pieces of legislation were adopted in 2003 and 2004 concerning GMO among which Regulation (EC) No. 1829/2003 of 22 Sept. 2003 on genetically modified food and feed and Regulation (EC) No. 1830/2003 of same day concerning traceability and labelling of genetically modified organisms and traceability of food and feed products produced from genetically modified organisms. Two regulations of Commission, Commission Regulation (EC) No. 65/2004 of 14 Jan. 2004 and Commission Regulation (EC) No. 641/2004 of 6 Apr. 2004 contain rules of implementation of Regulations (EC) No. 1829 and Regulation (EC) No. 1830.

Further relevant developments include adoption on 8 Aug. 2001 of Commission

Communication on foods and food ingredients authorised for treatment with ionising radiation in Community. Directive 2002/46/EC concerning food complements was also adopted on 10 June 2002.

12.04 HEALTH CARE COORDINATION:

Historically, Member States had almost exclusive competence to organize health and social security systems. Regulation No. 1408/71/EEC and Regulation No. 574/72/EEC governed cross-border health care coordination. EU Treaty (Art. 152[1]) and ECJ decisions (Case Kohll C-158-96) have begun re-evaluation of current system and called into question certain provisions of previously mentioned Regulations. ECJ has applied free movement of goods and services jurisprudence to health care thereby indicating that health care systems are not beyond reach of Community. See Commission Proposal for Directive on Cross-Border Health Care. See category Health, topic Consumer Health Protection, infra.

12.05 PUBLIC HEALTH:

Commission's 2000 Communication on Health Strategy focuses on necessity to improve health information, on need to be able to respond rapidly to health threats and reiterates its intention to tackle determining factors for health.

Furthermore, European Community is involved in wide range of prevention, information and action programs, dealing with various health issues, ranging from cancer and AIDS to drugs, alcohol, tobacco, pollution diseases, nutrition, blood donations, safety at work, etc. Commission has also issued Communication on Life Sciences and Biotechnology. (COM [2002] 27 final).

Decision 1786/2002/EC of European Parliament and of Council of 23 Sept. 2002 adopting programme of Community action in field of public health (2003-2008). This action programme is comprehensive programme which replaces eight existing actions in field of health. These programmes concerned health promotion, cancer, AIDS and certain communicable diseases, drug addition, health surveillance and pollution-related diseases, injury prevention and rare diseases. Programme is open to participation of EFTA/EEA countries, in accordance with conditions laid down in EEA Agreement; associated countries of Central and Eastern Europe, in accordance with conditions laid down in Europe Agreements, in their Protocols and in decisions of respective Association Councils; Cyprus, funded by additional appropriations in accordance with procedures to be agreed with that country; Malta and Turkey, funded by additional appropriations in accordance with provisions of Treaty. Cooperation with third countries and with international organisations working in sphere of public health, such as World Health Organisation (WHO), will also be encouraged. Since 1 Jan. 2005, new agency has been assisting Commission in implementation of Community's public health action programme. For 2005 agency has been entrusted with programme activities relating to health determinants. In 2006, it will cover two other fields of activity, namely health information and reactions to health threats. Agency is based in Luxembourg.

13 INTELLECTUAL PROPERTY

—Scope —

Note: To access latest information about EU Intellectual Property developments, see http://ec.europa.eu/internal_market/copyright/index_en.htm.

13.01 COPYRIGHTS:

Law of Member States governs copyright. Nevertheless, Council Directive 92/100 harmonises rental rights and lending rights on copyright work, as well as rights related to copyright. Council Directive 2001/84/EC on resale right for benefit of author of original work of art redresses balance between economic situation of authors of graphic and plastic works of art and that of other creators who benefit from successive exploitations of their works with European Union. Council Directive 2001/29 on copyright in information society establishes pan-European rules on copyright and related rights as regards e-commerce and digital age. Further, Council Directive 93/98 harmonises terms of protection of copyright and certain related rights. Copyright protection also extended to computer programmes (Council Directive 91/250) and semi-conductor products (Council Directive 87/54). Sui generis right, akin to copyright, afforded to databases. (Council Directive 96/9). Unlike other IPR types, copyright includes moral rights, that is, author can object to distortion or alteration of work thereby raising questions about legality to caricature copyrighted work.

Obstacles to free movement of copyrighted goods within EC have been tempered through doctrine of "Community-wide or EEA-wide exhaustion", adopted by Court of Justice: once copyright owner or licensee puts goods on market in Member State, he is estopped from relying on copyright to prevent imports of same goods in other Member States (Case Nos. C-355/96; C-173/98; T-198/98; C-414/99; C-415/99; C-416/99). Whether doctrine applies to copyrighted goods imported from third countries is matter for national law to decide.

European Commission issued in Jan. 2003 proposal for directive of European Parliament and of Council on measures and procedures to ensure enforcement of intellectual property rights. Proposal aims to harmonise national laws on means of enforcing intellectual property rights and to establish general framework for exchange of information between responsible national authorities. It resulted in Directive 2004/48 (OJ, No. L 157, 30 Apr. 2004) that must be implemented by Member States by 29 Apr. 2006. Directive complements adoption by EU Council of Ministers of regulation to combat counterfeiting and piracy (Council Regulation No. 1383/2003 of 22 July 2003 concerning customs action against goods suspected of infringing certain intellectual property rights and measures to be taken against goods found to have infringed such rights, OJ, No. L 196, 2 Aug. 2003) that repealed Regulation No. 3295/94 and sets out conditions under which customs authorities may intervene where goods are suspected of infringing intellectual property rights. Regulation extends its scope to new intellectual property rights and makes rules more accessible for right holders.

Directive 2006/116/EC of 12 Dec. 2006 governs term of protection copyright and certain related rights (follows Berne Convention: life of author plus 70 years; 50 years for performer); Directive 2006/115/EC of 12 Dec. 2006 governs rental and lending right and certain rights related to copyright. Also see Commission Proposal to amend Directive 2006/116/EC to improve position of performers who are outliving 50-year term and to address concerns of phonogram producers losing revenue respecting DVD business available at http://eur-lex.europa.eu/LexUriServ.do?uri=COM:2008:0464:FIN:EN:PDF. In addition, Commission in 2005 issued Recommendation on management of online right in musical works, entitled "on collective cross-border management of copyright and related rights for legitimate online music services". Call for comments issued on 17 Jan. 2007 yielded 89 replies summarized in Commission Report.

Furthermore, doctrine of "Community-wide or EEA-wide exhaustion" only applies to copyright goods. Nonmaterial aspects of copyright still can be assigned by contract for one or some Member States only, e.g. right to exhibit motion pictures by cable television.

13.02 DESIGNS:

Law of Member States governs design. Directive 98/71/EC on legal protection of designs harmonises national laws. Design can be protected if it is new and has individual character. Directive does not deal with motor vehicle spare parts. Commission will seek to obtain voluntary agreement by industry on this matter. Council Reg. No. 6/2002 on Community Designs sets up simple and inexpensive procedure for registering designs with European Union's Office for Harmonisation in the Internal Market (OHIM), based in Alicante, Spain. Unregistered designs will also be protected. Companies will still be able to choose to register designs under national law, as national design protection (as harmonised by design protection Directive 98/71/EC) will continue to exist in parallel with Community design protection.

European Commission adopted Regulation (Commission Regulation [EC] No. 2246/2002) setting fees payable to Office for Harmonisation in Internal Market (OHIM) in Alicante for registering Community designs. This can be considered as final stage in setting up Community Design system and allowed OHIM to register first Community Designs from 1 Apr. 2003. Registration fee for first design is [Euro]230, with lower fees for any further design registered at same time. Regulation establishes that holders of registered designs will have exclusive rights to use design concerned and to prevent any third party from using it anywhere within European Union for up to 25 years.

13.03 PATENTS:

Law of Member States governs patents. In 1973, European Patent Convention was signed by number of European countries (outside EC framework), entered into force in 1977; European Patent Office, based in Munich, administers unified procedure for grant of bundle of patents in countries concerned. When patent is granted, it is granted as bundle for protection in individual states; it is not “Community-Wide” patent. Adoption of Community Patent was identified as top priority by Mar. 2000 Lisbon European Council because of its potential to boost innovation and competitiveness. Proposal for Community patent currently still in discussions, and, if adopted as Regulation, would apply to all patents designating Community granted by European Patent Office under provisions of Munich Convention and to applications for European patent in which Community is designated. Community Patent would give inventors option of obtaining single patent legally valid throughout European Union at fraction of existing cost.

From viewpoint of EC law, patents are subject to doctrine of “Community-wide exhaustion” (see topic Copyright). In addition in 2006, Council and Parliament adopted Regulation No. (EC) 816/2006 on compulsory licensing of patents relating to manufacture of pharmaceutical products for export to countries with public health problems. Regulation demonstrates EU commitment to fulfill its obligations under WTO Trips agreement. In provides affordable medicine to poor countries.

13.04 TRADEMARKS:

Law of Member States governs trademarks. Since different trademark laws of Member States contain disparities which impede free movement of goods and freedom to provide services within EU, Council has in its Directive 89/104/EEC (OJ, No. L 40) provided for approximation of trademark laws. Harmonisation will be limited to those national provisions of law which most directly affect functioning of internal market. Directive had to be implemented by Member States by 31 Dec., 1992. For Belgium, Netherlands and Luxembourg uniform Benelux trademark law entered into force. Benelux Court can interpret this law through preliminary rulings procedure copied on Art. 234 (ex. Art. 177) EC Treaty.

Commission has undertaken great efforts to create Community trademark. Council Regulation No. 40/94 (1994 OJ, No. L 11/1) on Community trademark is based on Art. 308 (ex. Art. 235) EC Treaty. It entered into force in Mar. 1994. It was amended for implementation of agreements concluded in framework of Uruguay Round. (OJ, No. L 49). From Jan. 1996, Community trademark can be obtained by registration at OHIM. Applicable procedural provisions are laid down in Commission Regulations No. 2868/95 and No. 2869/95 (OJ, No. L 303), and Regulation No. 216/96 (OJ, No. L 28).

In Jan. 2003, European Commission presented proposal for Regulation (Proposal for Council Regulation amending Regulation [EC] No. 40/94, COM [2002] 767 final of 27.12.2002) modifying existing procedures for granting of Community Trade Marks (CTMs) by Office for

Harmonisation in Internal Market (OHIM) in Alicante. Proposal would abolish system of searches intended to help applicants for CTMs to monitor effectively possible existence of prior conflicting rights; would amend regime for professional representation before OHIM to bring it fully into line with principles of freedom of establishment and freedom to provide services; and it would expand system to include instruments allowing Boards of Appeal to improve further way they function. Proposal resulted in Council Regulation (EC) No. 422/2004 of 19 Feb. 2004 (OJ, No. L 70, 9 Mar. 2004).

From viewpoint of present EC law, trademarks are subject to doctrine of "Community-wide exhaustion" (see topic Copyright). This was confirmed by ECJ Judgment of 20 Nov. 2001 in joined Cases C-414/99 to C-416/99, Zino Davidoff SA v. A & G Imports Ltd, Levi Strauss & Co, Levi Strauss (UK) Ltd v. Tesco Stores Ltd, Tesco plc and Levi Strauss & Co, Levi Strauss (UK) Ltd v. Costco Wholesale UK Ltd.

With respect to recent cases on trademarks, it should be noticed decision of European Court of Justice in Case C-104/01, Libertel Groep BV v Benelux-Merkenbureau on interpretation of Art. 3 of First Council Directive 89/104/EEC of 21 Dec. 1988 to approximate laws of Member States relating to trademarks. Questions referred to Court for preliminary ruling by Hoge Raad der Nederlanden were raised in proceeding between Libertel Groep BV and Benelux-Merkenbureau (Benelux Trade Mark Office) relating to refusal by Office to register colour orange as trademark for telecommunications goods and services as requested by Libertel. European Court of Justice considered that colour per se may have distinctive character within meaning of Art. 3 of First Trademark Directive. In 2007, ECJ rendered two decisions on Trademarks worthy of note: Opel v. Autec (Case C-48/05 2007) (finding that Autec's use of Opel's trademark on toy car constituted infringement of Opel trademark) and Celine SARL v. Celine SA, (Case C-17/06 2007) (finding Celine SA had long established trademark, since 1928, in mark Celine SA associated with apparel industry, but noting that, if Celine SARL proved non-confusion in relation to goods and services under Art. 5[1], then national court may find absence of infringement).

Key developments in Intellectual Property in EU took place within judicial developments. See, for select cases, http://www.legalday.com/commentaries/law_now/IPLaw_Trademarks_Copyright_Patent.html.

14 TAXATION

14.01 INTRODUCTION:

In 2006, Commission issued its report entitled "Structures of the Taxation System in the European Union: 1995-2004" (TAXUD E4/2006/DOC/3201) consisting of 417 pages. Publication deals with analysis of main trends in tax policy in 25 Member States plus Norway. Major findings were: (1) Total tax burden to GDP ratio from 1995 to 2004 fell modestly from 39.7% to 39.3%; (2) labour taxes remain largest source of revenue, accounting for about one-half of all tax receipts, followed by taxes on capital of 22% of tax receipts and consumption taxes yielding about 28%; (3) there is neither convergence of Member States tax structures nor Member State tax levels, for example lowest tax to GDP ratio are found in Baltic states, Ireland and Slovakia while highest ratio are found in Belgium, Sweden, and France; and (4) corporate tax rates appear to be falling and converging. Environmental taxes are subject of debate. Accession of Romania and Bulgaria has resulted in Council Regulation (EC) 1791/2006 and Directive 2006/98/EC, adapting regulations, directives and decisions due to accession.

14.02 CORPORATE TAX:

With aim of favoring mergers and operations between EU and cross-border companies, two main directives (parent-subsidiary and mergers) providing for tax-neutrality and widening scope of application (all companies are concerned) have been modified. Commission would prefer Common Consolidated Corporate Tax Base for corporations doing cross-border business.

Progress has been made, but there is no legislation in effect: e.g., July 2004 non-paper on common tax base; 2006 working paper on CCCTB; and 2007 Commission communication on next steps towards proposal on CCCTB; documents may be found at http://ec.europa.eu/taxation_customs/taxation/company_tax/common_tax_base/index_en.htm.

EU Directive 2003/123/EC broadens scope and improves operation of Parent-Subsidiary Council Directive 90/435/EEC on common system of taxation applicable in case of parent companies and subsidiaries of different Member States. Purpose is to eliminate tax obstacles in area of profit distributions between groups of companies in EU by abolishing withholding taxes on payments of dividends between associated companies of different Member States and preventing double taxation of parent companies on profits of their subsidiaries. It updates list of companies to include certain co-operatives, mutual companies, certain non-capital based companies, savings banks, funds, associations with commercial activity, European Company (which can be created since 2004) and European Co-operative Society (which may be created from 2006). Companies and co-operatives operating in more than one Member State will have option of establishing themselves as single entities under Community law. This Directive also relaxes conditions for exempting dividends from withholding tax (reduction of participation threshold). Currently, parent company must hold at least 25% of shares in subsidiary company for application of exemption, while minimum shareholding will be reduced gradually to 10% (20% from Jan. 1, 2005; 15% from Jan. 1, 2007 and 10% from Jan. 1, 2009).

EU Directive 2005/19/CE of Feb. 17, 2005 modified EU Directive 90/434/CEE about mergers, division of companies, transfers of assets and exchange of shares. Amendment broadens existing EU Directive's scope to cover larger range of companies (entities that are subject to corporate tax in their Member State of residence) including European Company (EC) and European Co-operative Society (ECS). It provides for new tax-neutral regime for transfer of registered office of EC or of ECS between Member States, it applies in case of conversion of branches into subsidiaries and covers also “partial division” or “split-off” whereby existing Company transfers one or more of its branches of activities to newly created sister company. Transfer of registered office of EC or ECS from one Member State to another would not result in taxation of capital gains. Intention is that facility to make such transfer, which is specifically provided for in Statutes governing those entities, would not be hampered by discriminatory tax rules or by unjustified restrictions or distortions. EU Directive 2005/19/EC provides for capital gains exemption when receiving company holds shares in transferring company. Holding threshold required to enjoy this exemption is now set consistently with that of Parent-Subsidiary Directive. This threshold will be lowered in stages from 25% now to 20% in 2006, 15% in 2007 and 10% in 2009. EC transferring its registered office will enjoy tax deferral on capital gains where its assets remain connected with permanent establishment situated in Member State from which it is moving. Shareholders of EC should not be liable to tax on this occasion.

Corporate income tax rates vary considerably in EU from 12.5% (Ireland) to 33.3% (France); noteworthy is that in Estonia profits realized by company that are not distributed are not subject to any tax resulting in effective tax rate of 0%. However, EU has required Estonia to amend its tax regime by 2008.

14.03 EXCISE DUTIES:

Community law relating to excise duties can be divided into three main groups: structure of tax to be applied to particular group of products, rates of tax to be applied and movement and storage of goods subject to excise duties. Council Directive 95/59/EC deals with structure of tax on tobacco, Council Directive 92/81/EEC with structures of excise duties on mineral oils and Council Directive 92/83/EEC with those on alcohol and alcoholic beverages. Rates are laid down in Council Directive 92/79/EEC for cigarettes, in Council Directive 92/80/EEC for manufactured tobacco other than cigarettes, in Council Directive 92/82/EEC for mineral oils and in Council Directive 92/84/EEC for alcohol and alcoholic beverages. Most recent amendment of Council Directive 92/79/EEC, 92/80/EEC and 95/59/EC is Council Directive 2002/10/EC for manufactured tobacco which purpose is to reduce existing differences between Member States as regards taxation of tobacco products. Council Directive 92/12/EEC deals with holding, movement and monitoring of products subject to excise duties and has been amended regularly over past 13 years.

14.04 INTERNAL TAXATION:

No-Discrimination in Internal Taxation.

There is no harmonisation of tax systems across EU. EU merely aims to ensure that all Member States tax systems are compatible with each other and EU Treaties. However no Member State shall impose, directly or indirectly, on products of other Member States any internal taxation (as opposed to customs duties) of any kind in excess of that imposed directly or indirectly on similar domestic products, i.e. products competing on same relevant market such as e.g. different brands of wine. No Member State shall impose either on products of other Member States any internal taxation of such nature as to afford indirect protection to other products, i.e. products relating to each other as substitutes, e.g. beer producing Member State without wine industry levies consumption tax on wines only. Discrimination is prohibited as to taxable base, rates, facilities of payment of tax. See generally Art. 90 (ex. Art. 95) EC Treaty. Tax exemptions will also be examined by Commission to ensure they contain no hidden state aid elements. Community activity in field of taxation regulatory framework has increased these last years. Among others, EC has presented Communication (COM [2001] 260 final), containing comprehensive strategy for EU future taxation policy. Commission intends to focus more on tax problems facing individuals and businesses operating within Internal Market. In addition, enhanced cooperation and non-binding measures, such as recommendations, could be used instead of legislation, where appropriate. ECOFIN Council adopted on 3 June 2003, directive on taxation of savings income that provides for automatic exchange of information enabling savings income (in form of interest payments from one member state to another) of EU resident individuals to be made subject to effective taxation. Although all Member States are ultimately expected to exchange information, three Member States (Austria, Belgium and Luxembourg) are allowed by directive to levy withholding tax as alternative to exchanging information for transitional period, at rate of 15% from 2005, 20% from 2008 and 35% from 2011, whereof one fourth will be retained by withholding state and three fourths transferred to Member State of residence of beneficiary of interest payment. 1 July 2005 implementation date has been subject to critical conditions being met: EU Member States have reached agreement with several non-EU countries (Switzerland, Liechtenstein, San Marino, Monaco and Andorra) and dependent or associated territories of United Kingdom (Anguilla, Montserrat, Cayman Islands, Guernsey, Jersey, British Virgin Islands, Turks and Caicos, Isle of Man) and Netherlands (Aruba, Curacao) on adoption by latter of measures comparable with these in directive. Applicable Directive is 2003/48/EC of 3 June 2003 on taxation of savings income in form of interest payments.

14.05 VALUE ADDED TAX:

VAT Harmonisation.

Pursuant to Arts. 93 and 94 (ex. Arts. 99 and 100) EC Treaty, Council Directive 77/388, as last modified by Directive 2000/65/EC of 17 Oct. 2000, 2001/41/EC of 19 Jan. 2001, Regulation (EC) No. 1777/2005 laying down implementing measures for Directive 77/388/EC on common system of value added tax, Directive 2005/92/EC of 12 Dec. 2005, and Directive 2006/69/EC of 24 July 2006, harmonised value added taxes (VAT) throughout Community, as to operation of VAT and basis of assessment. EC obtains 1% of VAT levied in Member States as own budgetary resources. (See Decision 94/728.) *Note:* There is high level activity to reform VAT system as evidenced by numerous proposals and communications found at http://ec.europa.eu/taxation_customs/taxation/vat/key_documents/legislation_proposed/index_en.htm. Council adopted Directive 2008/8/EC of 12 Feb. 2008 amending Directive 2006/112/EC as regards supply of services. Council also adopted Directive 2008/9/EC of 12 Feb. 2008 laying down detailed rules for refund of value added tax, provided for in Directive 2006/112/EC, to taxable persons not established in Member State of refund but established in another Member State. In addition, Council adopted Regulation (EC) No. 143/2008 of 12 Feb. 2008 amending Regulation (EC) No. 1798/2003 as regards introduction of administration cooperation and exchange of information concerning rules relating to place of supply of services, special schemes and refund procedure for value added tax.

In 1995, new transitory regime for VAT provided by Directive 94/76 entered into force in context of enlargement of EU to Austria, Finland and Sweden. Cross border formalities are abolished for operations between taxable persons, while purchase by individuals are only subject to VAT of originating country. Directive 1999/49/EC provides for standard rate of VAT of minimum 15%. Single standard rate was to be decided on and applied after 31 Dec. 2000. As no agreement on this single standard rate was reached, minimum standard rate of 15% was prolonged until 31 Dec. 2005. Furthermore, Council Directive 2002/38/EC of 7 May 2002, as amended by Directive 2006/58/EC of 27 June 2006, regulates value added tax arrangements applicable to radio and television broadcasting services and certain electronically supplied services. New rules create level playing field for taxation of digital e-commerce in accordance with principles on taxation of e-commerce agreed at 1998 OECD Ministerial Conference. Rules ensure that when these services are supplied for consumption within European Union, they are subject to EU VAT, and that when they are supplied for consumption outside EU, they are exempt from VAT. Rules also contain number of facilitation and simplification measures aimed at easing compliance burden for business. Member State must implement new measures by 1 July 2003. At same time Council adopted Council Reg. 792/2002 temporarily amending Reg. 218/92 on administrative cooperation in field of indirect taxation to introduce additional measures necessary for registering of foreign e-commerce traders for VAT purposes and for distributing VAT receipts to Member State where services were actually used: suppliers established outside EU rendering digital e-commerce services to non-VAT registered customers in EU must register for VAT purposes in one Member State and apply VAT rate of Member State where customer actually uses services. Directive 96/95 and Directive 1999/85/EC also provide for possibility for Member States to apply, for certain goods and services, one or two reduced rates that may not be less than 5%. As from 1 July 1999, tax and duty free sales are prohibited for intra-Community travellers.

Other measures related to taxation include proposal to strengthen cooperation among Member States related to VAT and to amend Directive 77/799/EC on mutual assistance in field of direct and indirect taxation (COM [2001] 249 final), Communication on Strategy for Company Taxation (COM [2001] 582 final) as well as package of measures to tackle harmful competition in European Union to ensure effective minimum level of taxation of savings income (COM [2001] 400 final), and proposal for common system of taxation for interest and royalty payments between associated companies of different Member States.

From July 1, 2006, if Commission's six-proposals for VAT simplification such as “one-stop shopping” for cross-border VAT compliance is accepted, that would result in simplification of EU-wide VAT compliance obligations for U.S. corporations that trade in Europe. Business would account for VAT supplies made in EU Member States where it is not established, through its VAT registration in Member State where it is established; this means reduction or elimination of need for multiple EU VAT registrations. Foreign VAT declarations would be made through single electronic portal. Increased use of “reverse charge rule” which means that customer is responsible for all VAT obligations connected with service, not supplier. Extension of VAT self-assessment rules to more B2B services. Commission also proposes “one-stop-shop” VAT recovery procedure for EU refunds with easier and quicker obtaining of refunds for expenditures incurred in other Member States, reduction of statutory repayment times and unified rate of interest on late refunds. (COM [2004] 0728).

Commission also adopted draft regulation for mutual administrative assistance and exchange of information between Member States, coordinated by Commission and European Anti-Fraud Office (OLAF) to protect EU financial interest against any kind of fraud. It widens scope of cooperation to all forms of irregularities harmful to EU budget (large scale transnational VAT fraud, money laundering of profits stemming from fraud on structural funds and other subsidies from EU budget).

15 TRANSPORTATION

15.01 POLICY AND MODE OF TRANSPORT:

Transport is one of Community's earliest common policies. It mainly covers: road transport (Regulation No. 3916/90 on measures to be taken in event of crisis in market in carriage of goods by road); road transport operator must hold community license to operate cross-border (Regulation [EEC] No. 881/92); carriage of passengers by road (Regulation No. 12/98 providing that any carrier who operates road passenger transport services for hire or reward, and who holds Community licence is permitted, under conditions laid down in Regulation and without discrimination on grounds of carrier's nationality or place of establishment, temporarily to operate national road passenger services for hire or reward in another Member State [host Member State], without being required to have registered office or other establishment in that State; carriage of passengers by coach and bus governed by Regulation 684/92 as amended by Regulation 11/98; Directive 96/26/EC on admission to occupation of road haulage operator and road passenger operator and mutual recognition of diplomas, certificates and other evidence of formal qualifications intended to facilitate for these operators right to freedom of establishment in national and international transport operations); road safety; rail transport (Directive 2004/49/EC on safety on Community's railways and amending Council Directive 95/18/EC on licensing of railway undertakings and Directive 2001/14/EC on allocation of railway infrastructure capacity and levying of charges for use of railway infrastructure and safety certification, sets out essential elements of safety systems for infrastructure managers and railway undertakings; Directive 2001/14/EC on allocation of railway infrastructure capacity and levying of charges for use of railway infrastructure and safety certification applying to railway infrastructure used for domestic or international rail services); maritime transport (Regulation No. 3577/92/EEC applying principle of freedom to provide services to maritime transport within Member States [maritime cabotage]; Directive 1999/63/EC is intended to put into effect European Agreement concluded on 30 Sept. 1998 between trade-union and employer's organisations of maritime transport sector (ECSA and FST) concerning working time of seafarers; Directive 2001/25/EC that determines minimum standards of training, certification and watchkeeping for seafarers serving on board Community vessels); inland waterways (Regulation No. 3921/91 laying down conditions under which nonresident carriers may transport goods or passengers by inland waterway within Member State); air transport (Directive 91/670/EEC applying to procedures for mutual acceptance of licences issued by Member States to flight crews in civil aviation; Regulation No. 3976/87 that empowers Commission to adopt regulations exempting certain categories of agreement in air transport; Directive 96/67/EC on access to groundhandling market at Community airports); infrastructure charging (Directive 1999/62/EC covers vehicle taxes, tolls and user charges imposed on vehicles intended for carriage of goods by road and having maximum permissible gross laden weight of not less than 12 tonne). Commission adopted Regulation (EC) No. 820/2008 of 8 Aug. 2008 laying down measures for implementation of common basic standards on aviation security text with EEA relevance. Regulation standardizes procedures of security at airports subject to regulation, including examination of passengers, luggage, and cargo.

Note: Commission submitted in 2001 White Paper on “European transport policy for 2010: time to decide” in which Commission has proposed 60 or so measures to develop transport system capable of shifting balance between modes of transport, revitalising railways, promoting transport by sea and inland waterway and controlling growth in air transport. “Mid-term review of the White Paper on European Transport Policy” issued in Brussels 1 Dec. 2005.

For directory of legislation in force on transport see http://europa.eu/eur-lex/en/lif/ind/en_analytical_index_07.html.

16 TREATIES AND CONVENTIONS

16.01 TREATIES:

Commission negotiates on behalf of EU to conclude international trade and other agreements with third party states. Several provisions of EC Treaty provide for power to conclude agreements with third countries. See Art. 133 (ex. Art. 113) (for trade agreements necessary to common commercial policy). Examples are free trade agreements with EFTA (European Free Trade Association) countries and association agreement with ACP countries. More generally, Court of Justice accepts that EC has treaty-making power in every field of internal competence without prior adoption of internal legislation, when conclusion of international agreement is necessary to achieve EC Treaty objectives that cannot be attained by adoption of autonomous rules. (Opinion 1/76). Power is then to be exercised pursuant to Art. 300 (ex. Art. 228) EC. When not the case, Court considers that external competence becomes exclusive only insofar as common rules were effectively established at internal Community level. Therefore, with regard to General Agreement on Trade in Service ("GATS") and Agreement on Trade-Related Aspects of Intellectual Property Rights ("TRIPS") negotiated by Commission within framework of GATT, and with regard to Third Revised Decision of OECD on national treatment, Court concluded that, since harmonisation achieved at EC level was only partial, EC and Member States have joint competence. (Opinions 1/94 et 2/92). Amsterdam Treaty modified Art. 133 to extent that Council could unanimously decide to extend exclusive competence of Community to international negotiations and agreements on services and intellectual property. Nice Treaty extends Art. 133 further—Council can act by qualified majority voting in areas of intellectual property and services unless internal rules under Treaty specifically require unanimity. Eventually, Art. I-12 of European Constitution clearly accords Union exclusive competence for common commercial policy. Common commercial policy is extended to negotiation and conclusion of agreements in areas of foreign direct investment, all services and commercial aspects of intellectual property. However, agreements in field of transport remain outside scope of common commercial policy. Note: however, qualified majority voting is not extended to all aspects of common commercial policy. In fact, European Constitution retains principle of parallelism between internal and external rules established at Nice (according to this principle, decisions relating to negotiation and conclusion of agreements in areas of trade in services, which involve movement of persons and commercial aspects of intellectual property, are subject to unanimity when these agreements contain provisions for which unanimity is required for adoption of internal rules). European Constitution also provides for unanimity for agreements in field of trade in cultural and audiovisual services, where there is risk that they could prejudice Union's cultural and linguistic diversity. In other areas, European Community's external responsibilities are not "exclusive"; it conducts to conclusion of "mixed agreements" which are signed and have to be ratified by both Community and Member States.

Conversely, in respect of human rights, Court observed that EC has no internal competence and thus cannot adhere to European Convention of Human Rights. (Opinion 2/94). However, every state that is member of Council of Europe must accede to ECHR; therefore every person within contracting state is protected by ECHR. Member States are all bound by ECHR. Art. 6(2) of EU Treaty confirms importance of ECHR and ECJ increasingly refers to applicable case law of ECHR to decide cases.

17 UNITED STATES COOPERATION

17.01 SPECIFIC AREAS OF COOPERATION.

Negotiations continued on scientific and technological cooperation agreements with U.S. and United Mexican States. On 3 June 2003, Council adopted statement on mandatory registration of EU auditors with U.S. Public Company Accounting Oversight Board ("PCAOB"). Commission adopted report on 13 Aug. 2003 on application of competition rules in agreement with U.S. On 15 Sept. 2003, it also proposed measures to provide protection from effects of U.S. 1916 Antidumping Act. On 23 Sept. 2003, protocol of agreement on number of bilateral investment treaties was concluded between U.S., eight countries acceding to EU and Commission. On 9 Oct. 2003, European Parliament adopted resolution on transfer of personal data by airlines in case of transatlantic flights. On 13 Oct. 2003, negotiations started on agreement on mutual recognition of organic production rules and related inspection systems. On 18 Nov. 2003, customs cooperation agreement was initialled with United States on transport security, particularly for containers. In 2006, EU and U.S. renewed agreement on higher education and vocational training; EU and U.S. also have developed methods of cooperation to combat terrorism; EU and U.S. also cooperate in area of Occupational Safety and Health. Informal discussions between EU and U.S. continued in area of Financial Markets Regulatory Dialogue (FMRD); work continues on accounting standards, mergers between EU and U.S. securities markets, and U.S. reinsurance collateral for EU firms.

1

FINLAND LAW DIGEST

—Scope —

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See category 6 Courts and Legislature, topics 6.02 Law Reports, 6.05 Statutes.

Finland is member of EU. See also European Union Law Digest.

1 INTRODUCTION

1.01 CURRENCY:

Legal currency in Finland, as in all countries in European Economic and Monetary Union, is [Euro], divided into 100¢.

Bank of Finland (Suomen Pankki) is central bank of Finland, and functions within European Central Bank system. Main goal of Bank of Finland is to stabilize currency and financial system.

1.02 EUROPEAN UNION:

Finland is member of EU as of 1995.

1.03 GOVERNMENT AND LEGAL SYSTEM:

According to Constitution of June 11, 1999, Finland is republic with parliamentary form of government. Legislative power rests with Parliament. Parliament convenes for its regular session annually in two ordinary sessions; one running from Feb. to June and other from Sept. to Dec. Highest executive power rests with President of Republic and Government. Judicial power rests with independent courts. President of Republic is elected for six years and Parliament for four years.

1.04 HOLIDAYS:

Public holidays are New Year's Day; Epiphany; Good Friday; Easter Day and second day of Easter; May Day; Ascension Day; Whitsuntide (or Pentecost); Midsummer; All Saints' Day; Finnish Independence Day; Christmas Day and Boxing Day.

1.05 OFFICE HOURS AND TIME ZONE:

Finland is in the +02:00GMT time zone. Office hours are generally from 8:00 a.m. to 4:15 p.m.

2 BUSINESS ORGANIZATIONS

2.01 AGENCY:

There is no monopoly of attorney representation in legal proceedings in Finland. Parties have right to use attorney. Attorney or agent must be authorized by his principal. Written authorization is required. This does not apply to advocates. See category 20 Legal Profession, topic 20.01 Attorneys and Counselors. Authorization is given in form of power of attorney.

Procuration is regulated in Procuration Act (130/1979). Procuration (prokura) is oral or written authorization given by company registered in commercial register to specified person and is expressly stated to be procuration. Holder of procuration has authority to act for his principal in all matters appertaining to conduct of principal's business and sign his principal's name. Unless expressly authorized, holder of procuration cannot sell, mortgage or pledge his principal's real property. In signing in his principal's name, holder of procuration must indicate procuration, by adding letters “p.p.” or words “per procuram”. Entry of procuration in commercial register is not mandatory, but if it is registered, entry of alteration or revocation of such procuration is mandatory. It is inherent in procuration that mentioning it as such notifies third person of content of authorization.

2.02 ASSOCIATIONS:

Main purpose of co-operative associations is to assist members in carrying out business, or otherwise improve their living condition. Liability of members depends on whether association agreement contains liability for additional payment.

In general, the business of a co-operative may be in any field of economic endeavor other than insurance business. Co-operative association may be either production co-operative or consumer co-operative.

The co-operative is constituted by written agreement. Minimum number of members is three persons. Notice of Co-operative must be filed with commercial register. Name of co-operative must contain word co-operative association (“osuuskunta” or “andelslag”) or word “osuus” or “andel” or abbreviation “osk”.

Affairs of co-operative are determined by its members, or their representatives, at annual meeting, at which board of directors of co-operative is also elected. Board of directors also represents co-operative association against third persons. If number of members decreases below three, board of directors must proceed to have co-operative dissolved.

In meetings of members, each member has one vote. However, in articles of association, it is permitted to stipulate for unequal number of votes. In changing articles of association, insofar as it is permitted, majority of qualified voters is required.

See also topics 2.04 Joint Stock Companies, 2.05 Partnerships, 3.02 Commercial

Register, 4.01 Aliens.

2.03 CORPORATIONS:

See topics 2.02 Associations, 2.04 Joint Stock Companies.

2.04 JOINT STOCK COMPANIES:

Introductory Provisions.

Joint stock companies are strictly regulated in Finnish Companies Act (624/2006). New Companies Act entered into force Sept. 1, 2006 and significantly amended previous Companies Act (734/1978).

Finnish joint stock company is corporation carrying out activities with capital contributed by shareholders and divided into shares without personal liability of shareholders for obligations of company.

Share capital of private limited liability company must not be less than [Euro]2,500. Minimum share capital of public limited liability company is [Euro]80,000. Shares do not generally have nominal value. Shares can, however, be given nominal value in articles of association.

Formation.

Limited liability company is formed by one or several shareholders. Founding shareholders must draw up, date, and sign memorandum of association including information on shareholders, quantity of subscribed shares by each shareholder, subscription price of shares, term of payment of subscription price, board members, and where appropriate, information on managing director, members of supervisory board, and auditors. Articles of association must be included or attached into memorandum of association. Company must apply to National Board of Patent and Registration for registration no later than three months after signing of memorandum of association. At date of registration, share capital must be fully paid up. If property other than cash (contribution in kind) is given as payment of shares, there must be provision concerning contribution in kind in memorandum of association. Also, circumstances affecting valuation of such property and valuation principles must be stated in memorandum of association.

Prior to registration, company can neither acquire rights nor enter into obligations, nor can it sue, complain or defend itself in court or before any other authority. Persons acting in company's name before it is registered are personally liable for such action. At registration, liability passes to company provided that obligation results from deed of formation or has arisen subsequent to formation of company.

Articles of association must always contain following information: (a) Name of company, (b) domicile of company, and (c) field of operation of company. Articles of association are supplemented by provisions of Companies Act if articles of association do not contain provisions deviating from Companies Act. For example, if number of board members is not specifically stipulated in articles of association, provision of Companies Act is applied to company.

Articles of association may provide that shareholders, company, or third parties have right of redemption if share has been transferred to new owner. Articles of association may also stipulate that acquisition of shares by transfer requires consent of company.

Shares.

Share certificates must be signed by board of directors or person authorized by board of directors. Signatures may be printed. Share certificate must state name and registration number of company, serial number and quantity of shares, share class, if any, serial number of share certificate and name of shareholder. If articles of association contain provisions of redemption clause, consent clause, or liability to make specific payments to company, mention of these must be included in share certificates. Share certificates may not be issued before shares are fully paid up and company or increase of share capital has been registered in trade register.

Share certificate represents title to shares. Bona fide holder of share certificate, who can prove his title by unbroken chain of transfers or endorsements in writing from duly registered shareholder to specific person or in blank, is protected as legitimate shareholder and is entitled to be registered as shareholder.

Board of directors must maintain share and shareholder registers in which all shares and shareholders must be registered. These registers, which are public, are basis for confirming shareholders and their votes at general meeting of shareholders.

Book-Entry Securities System.

Finnish listed companies, whose shares are quoted on Helsinki Stock Exchange, are required to transfer their shares to book-entry securities system. This requirement does not apply to foreign companies quoted on Helsinki Stock Exchange. Transfer of shares of other companies to book-entry securities system is voluntary and requires approval of Finnish Central Securities Depository.

Instruments other than equity-ranked instruments may be transferred to book-entry system at request of registrar representing issuer.

Increase of Share Capital.

Share capital may be increased by way of share issue or issuing option rights or other special rights entitling to shares and by crediting subscription price of shares, option rights, or other special rights entitling to shares in full or in part to share capital, or by transferring assets from reserves of unrestricted equity into share capital (increase from reserves), or by crediting other assets invested into company on condition that they be credited to share capital into share capital (share capital investment).

Resolution on share issue or issuing option rights or other special rights entitling to share or to increase share capital by way of increase from reserves must be adopted at general meeting of shareholders. General meeting may also authorize board of directors to resolve on share issue or issuing option rights or other special rights entitling to share or to increase share capital by way of increase from reserves. Resolution on share capital investment must be made by board of directors. Companies Act (624/2006) contains detailed provisions concerning contents of such resolutions.

Decrease of Share Capital.

Shareholders' meeting may resolve on decreasing share capital. Purpose of decreasing share capital may be covering at once loss which cannot be covered from unrestricted equity, distribution of share capital, or transfer of assets to reserves of unrestricted equity.

Management of company is carried out by board of directors and managing director. Board of directors consists of at least one and at most five members, if not stipulated otherwise in articles of association. If board consists of less than three ordinary members, one deputy member must be appointed. Board of directors is elected by general meeting of shareholders. Articles of association may stipulate that one or more directors, being less than half of total number of directors, are elected through other procedures.

Board of directors may appoint managing director. Managing director is not required to be member of board. At least one of members of board and managing director must be residents of European Economic Area unless exemption is granted by register authorities. Person who is incompetent, minor or bankrupt cannot act as member of board or as managing director.

Board of directors represents and signs for company. Board of directors represents company in dealing with third parties, as well as before court and other authorities. Board of directors may authorize director, managing director or any other person to represent and sign for company if such delegation of authority is permitted by articles of association. Managing director may always represent and sign for company with regard to measures which are within director's duties.

General Meeting of Shareholders.

Shareholders' right to make decisions concerning company's affairs is exercised at general meetings of shareholders. Board of directors may allow shareholders to participate in general meeting of shareholders through technical devise. Shareholder may exercise his rights at general meetings of shareholders personally or by granting proxy to third person. Unless otherwise prescribed in articles of association, shareholder has one vote per share.

Resolution of general meeting of shareholders must be adopted by simple majority. In case of equality of votes (tie), chairman has casting vote, with exception that election of directors and auditors must be decided through drawing of lots. For certain significant resolutions, such as amendment of articles of association, qualified majority is required. Annual general meeting of shareholders must be held within six months from end of each fiscal year. At annual general meeting resolutions shall be passed in respect of: (a) Adoption of income statement and balance sheet, (b) approbation of company's profit or loss according to balance sheet, (c) directors' and managing director's discharge from liability, (d) election of directors and auditors, and (e) other matters which in accordance with Companies Act or articles of association must be dealt with at annual general meeting.

Extraordinary meetings of shareholders shall be held whenever board of directors deems appropriate or at request of auditor or shareholders owning at least one-tenth of all shares for specified purpose.

Merger and Division.

Companies can, under Companies Act, both merge and demerge. Demergers can be carried out by transferring all or part of assets and liabilities of company under demerger into one or more recipient companies. Companies Act (624/2006) contains detailed provisions concerning mergers and demergers.

Auditing.

Auditor may be individual or accounting firm. Shareholders must elect one or more auditors at general meeting. Deputy auditor is mandatory if only one auditor is elected, except if accounting firm is elected as auditor. In public limited liability companies at least one auditor must be approved by Central Chamber of Commerce.

Auditor must render its report to general meeting of shareholders for every fiscal year. Auditor's report must include statement on adoption of balance sheet and income statement, inter alia.

Financial Instruments.

All shares generally carry equal rights in company. It may, however, be provided in articles of association of company that company has or may have shares that differ from each other as regards rights or obligations they carry. Differences between shares must be indicated in articles of association.

Shares generally carry equal voting rights at shareholders' meetings. However, it may be provided in articles of association of company that different shares carry different voting rights, or that certain shares carry no voting rights, or certain shares carry no voting rights in given matters dealt with by general meeting.

Subordinated loan can be repaid only under certain preconditions. During company's activities, capital can be repaid only to extent that amount of unrestricted equity added with all subordinated loans exceed amount of cumulated losses according to latest financial statement. Further, loan ranks only above share capital of company in liquidation or bankruptcy. No security can be issued for preferred capital loan by company or its subsidiary.

Companies may issue options entitling holders thereof to subscription for its shares.

Company may acquire its own shares. Public limited liability company cannot acquire more than 10% of its shares or votes. In addition, public limited company may acquire or sell its shares through stock market only one week after having issued official announcement thereof.

Dividends.

Resolution to distribute dividends must be adopted at general meeting of shareholders. Distribution of profit may not exceed amount of unrestricted equity deducted by amount that may not be distributed in accordance with articles of association. Funds may not be distributed if company is insolvent or distribution results in insolvency.

General meeting of shareholders may not distribute dividends exceeding amount proposed or approved by board of directors. Shareholders representing no less than 10% of share capital may, in certain circumstances, call for distribution of higher dividend in accordance with stipulations in Companies Act (624/2006); however, not exceeding 8% of company's own capital.

Liquidation.

General meeting of shareholders may resolve that company shall be placed under liquidation.

Trade register must place company under liquidation if company does not have competent registered board of directors, company does not have registered representative with domicile in Finland, company has not registered its annual accounts within year from end of financial year despite notification by register authority, or company is declared bankrupt and bankruptcy has become void because of lack of funds.

General meeting of shareholders which resolves, or trade register which orders, that company must be placed under liquidation shall at same time appoint one or more liquidators. Liquidators replace board of directors and managing director and are responsible for carrying out of liquidation.

Auditor's appointment does not terminate when company is placed under liquidation.

Companies Act (624/2006) gives detailed provisions for administration of company under liquidation.

Trade name of company must contain word “osakeyhtiö” or “aktiebolag” or their abbreviation (“Oy” or “Ab”) or for public limited liability companies “julkinen osakeyhtiöj” or “Oyj” or “publikt aktiebolag” or “bp”. Trade name of company shall be clearly distinguishable from existing trade names previously entered in Trade Register. If name of company is registered in two or several languages, each version must be mentioned in articles of association. Further, company's business ID must be printed on all official papers.

Names of divisions or other business units may be registered as supplementary trade names in addition to name of company.

Miscellaneous.

Companies Act (624/2006) also contains detailed provisions regarding compulsory transfer of minority shares, damages, penalties and registration.

See also category 4 Citizenship, topic 4.01 Aliens.

2.05 PARTNERSHIPS:

Finnish partnerships or so-called open companies (general partnership) and commandite companies (limited partnership) are regulated in Partnerships Act (389/1988).

General partnership has to have minimum of two partners who carry out trade together on basis of written partnership agreement and who are personally liable for obligations of partnership. Partner cannot assign one's partnership interest without consent of all other partners. Consent of all partners is also required for accepting new partner into partnership.

Limited partnership must have minimum of two partners, general partner and limited (silent) partner. General partner is personally liable for obligations of partnership, but silent partner's obligations are limited to amount of his investment in partnership.

Trade name of partnership must clearly differ from any other trade names already recorded in Trade Register.

See topics 3.02 Commercial Register, 17.01 Aliens, subhead Corporations Owned or Controlled by Aliens.

2.06 SOCIETAS EUROPAEA:

Formation of Societas Europaea (SE) has been possible since Oct. 8, 2004. Formation is based on EU regulation (2157/2001) and National Societas Europaea Act (742/2004). Also rules of Companies Act (624/2006) regarding public limited companies are applicable to SE. Companies forming SE are required to be public limited companies.

See also topic 2.04 Joint Stock Companies.

3 BUSINESS REGULATION AND COMMERCE

3.01 BILLS AND NOTES:

Bills of Exchange.

Bill of exchange is negotiable instrument, form of which is strictly prescribed by law and in which consideration is conclusively presumed. Special feature of obligation under bill of exchange is its severity toward debtor and possibility of securing judgment and execution thereon in shorter time and in simplified manner. In bill of exchange each indorser in general is liable to subsequent indorsers.

Parties to bill of exchange, in accordance with general rule, are drawer, drawee (who after acceptance of bill is known as acceptor), and payee. Bill of exchange may be made payable to or by drawer himself.

Bill of exchange must bear words “bill of exchange” (“vekseli” or “växel”), place and time of issue, amount of money payable, name of payee and drawee, address of drawee, time when and where bill is payable, and signature of drawer. Name of acceptor is written on face of instrument and indorsements on back. Transfer may be either by full indorsement or by blank indorsement.

If obligation to pay based on bill of exchange is not fulfilled, claim must be made to official at latest on second day, result of which is that person who filed claim of protest preserves his rights under bill of exchange against all parties liable on instrument. Once these rights under bill of exchange are lost, bill of exchange is considered as ordinary promissory note which does not have advantages as to proof and collection inherent in bill of exchange. However, in order to preserve rights under bill of exchange, action on same must be commenced within specified time, for instance against acceptor within three years from due date. Actions against indorser and drawer must be commenced within one year from conditions specified in act on bills of exchange.

Procedure to be followed by holder of bill of exchange in order to preserve his rights where it is payable outside of Finland, is governed by law of that place or accepted custom and usage. (Bill of Exchange Act 242/1932).

Checks.

Check must contain on its face word “check” (“shekki” or “check”), place and time of drawing, order to pay specified sum of money, place of payment, name of bank who shall pay check, and signature of drawer.

Check is payable at sight, even though it contains different time of payment or if time of payment is not mentioned. Check may be made payable to designated person or to bearer.

Check may be transferred in same way as bill of exchange. In order to preserve retroactive cause of action, check must be presented for payment at latest on 20th day after date of issue, other than checks issued outside Europe which must be presented for payment on 70th day after date of issue. Checks payable abroad are governed by law of place of payment. There are separate provisions on this point concerning checks issued abroad.

In order to preserve retroactive cause of action where check presented for payment is not paid, claim for nonpayment or equivalent proof is necessary. (Check Act 244/1932).

3.02 COMMERCIAL REGISTER:

(Trade Register Act 129/1979).

Those desiring to conduct trade, manufacturing, handicraft, or other business are obliged to file notification with commercial register prior to starting business activities (basic notification) within prescribed time period.

Commercial register is kept by National Board of Patents and Registration of Finland. Entries to commercial register and documents filed are open to public and entries are generally published in Official Gazette.

Basic notification to commercial register must contain, inter alia, company name and type, company's domicile and address, line of business, and who represent(s) company. For information on trade register, forms and instructions for registration, please see http://www.prh.fi/en/kaupparekisteri.html.

Changes in registered particulars must be filed to trade registry immediately using amendment notification form. Dissolution of company and termination of business also have to be reported. Annual accounts of company must be submitted to register.

Failure to register may lead to fines, liability for damages, lapsing of incorporation of company, etc.

If no notification has been made to commercial register within ten years, company may, after procedure prescribed by Act, be removed from register.

3.03 CONTRACTS:

In accordance with Contracts Act (228/1929) (result of co-Nordic legislation), contracts ensue from acceptance of offer. This is not applicable to contracts fixed in form by law and certain other contracts such as pledge of personal property that require conveyance of object. In case of oral offer, acceptor must accept immediately unless grace period is granted. Other offers must be accepted within stated or reasonable time. Promisor and acceptor are respectively bound by offer and acceptance which cannot be withdrawn or revoked unilaterally after having come to other party's attention.

Contracts are valid regardless of form except in certain specified contracts such as sale of real property, etc. Force majeure is generally accepted excuse for nonperformance. Invalidity of contract can be alleged in circumstances enumerated in Act including duress, fraudulent persuasion, exercise of undue influence and incapacity or mental disorder of contracting party. Third party acting in good faith is protected in most instances. Contracts Act contains rules on general adjustment of exorbitant stipulations. In accordance with these, conditions which are exorbitant may be adjusted or ignored. Other conditions may be modified or entire contract may be set aside if unreasonable condition is of such importance that it cannot reasonably be argued that contract should be valid.

Applicable Law.

There are no statutory rules concerning conflict of laws in contracts except as regards bills of exchange and checks.

Government Contracts.

State and municipal authorities and some legal persons governed by public law must observe Act on Public Contracts (348/2007). Entities operating in water, energy, transport, and postal services sectors must apply Utilities Act (349/2007) in procurement procedures.

See also topic 3.10 Sales.

3.04 INFORMATION TECHNOLOGY, INTERNET AND NEW MEDIA:

Computer Programs.—Computer programs are copyright protected as literary works under Copyright Act (404/1961) implementing EU Directive on protection of computer programs (91/250/EEC). Prerequisite for copyright protection is that program is considered to be creative and original work of author. No qualitative criteria may be applied. Ideas and principles of computer programs are not subject to protection under Copyright Act.

Copyright holder of program has exclusive right to grant license to copy, modify, translate or arrange computer programs, and to distribute or hire out originals of computer programs or copies. Right of user to copy software for backup purposes or to watch, examine or test programs to find out ideas or principles of program cannot be excluded by contract provisions. Users may also reverse engineer computer programs with certain limitations to acquire information required to achieve interoperability with another program. All commercial rights to computer program produced by employee while conducting tasks under employment will belong to employer.

Domain Names.

Act on Domain Names (228/2003), entered into force on Sept. 1, 2003, sets out requirements for registering domain names under Finnish country code top level domain root ".fi". As from Mar. 27, 2006, Act has also made it possible to register domain names under Åland Province code top level domain root ".ax". In accordance with Act, domain names can be chosen rather freely, however, certain types of registrations, e.g., another person's registered trade name or trademark, are not allowed. Applicant is responsible for ensuring legality of domain name, and FICORA (Finnish Communication Regulatory Authority) can close down or revoke illegal domain names.

Registered Finnish legal persons, Finnish persons practicing profession, Finnish public entities, diplomatic mission of foreign state registered in Finland and as from Mar. 27, 2006 persons who are at least 15 years old, are registered citizens of Finnish municipality and have Finnish social security code may apply for domain names. Domain names are in force for period of three years and thereafter can be renewed for successive three year periods. Domain names granted before Act on Domain Names entered into force will be effective until Aug. 31, 2006.

Database Protection.

Databases are protected under regulations of Copyright Act (404/1961) implementing Directive on protection of databases (1996/9/EC). Database can be subject to normal copyright protection if it is considered as either independent work or compilation. In both instances, prerequisite is that database is organized in manner displaying creativity and originality. If database consists of individual items of information not subject to copyright protection separately, it is considered as independent work. If it is collection of independently protected works that is organized in manner displaying creativity and originality, it is protected as compilation. In both instances, database enjoys similar protection to other copyrighted works.

If database is neither independent work nor compilation, it may be protected as database under specific provisions of Copyright Act. Originator of list, table, program or other such work that includes collection of large amount of data, or database which includes content that has been collected, backed up or presented with considerable amount of effort, has exclusive right to copy, distribute or publicly reproduce database as whole or essential parts of database. Protection continues for 15 years after database was completed or 15 years after database was made publicly available if it was published within 15 years of its completion.

Electronic Commerce.

Directive on electronic commerce (2000/31/EC) has been implemented in Finland primarily into Act on Provision of Information Society Services (458/2002). Act contains regulations concerning, inter alia, freedom of provision of information society services, information requirements, commercial communications, electronic contracts, and liability of intermediary service providers.

Providers of information society services are required to give to recipients of services and authorities, inter alia, service provider's name, contact details and information on public register in which service provider is registered, and certain additional information in case of regulated professions, in easy, direct, and permanent accessible manner. Further, service providers are required to provide information on technical steps necessary to conclude electronic contract, whether contract will be filed and accessible, means available to identify and correct input errors, languages offered for conclusion of contract, and any codes of conduct applied by service provider, prior to recipient's placement of order.

When legislation requires that contract be in written form, electronic contract that cannot be unilaterally altered and remains accessible by parties will also fulfill this requirement. If contract requires signature, electronic signature fulfilling legal requirements therefore will fulfill this requirement.

In accordance with provisions on liability of intermediary service provider, under certain conditions ISPs are free from liability for caching and hosting illegal content. ISPs are also free from liability where material hosted or transmitted by ISP is used in unauthorized manner. However, role of ISP in these situations must be merely technical in nature, and ISP must also remove illegal contents without delay, if so ordered by court.

However, when contents constitute infringement of copyright, so-called ``notice and take-down'' procedure will apply. Under this, ISPs must remove from their server content that copyright holder claims infringes on their copyright. On other hand, if content provider responds to copyright holder's claim within 14 days and provided that response fulfills requirements set out in Act, ISPs are required to cancel take-down proceedings. If copyright holder still wishes contents to be taken down, it must commence legal action and dispute will be ultimately solved in court.

To some extent, e-commerce is also regulated by provisions in Consumer Protection Act (38/1978), which implements Distance Selling Directive (97/7/EC), concerning distance selling. Act applies now to all types of distance sales, including e-commerce activities that involve consumer contracts for delivery of consumer goods or services. Scope of application does not include, for example, purchases of real estates or time-share apartments or contracts concerning securities or financial services.

In accordance with distance selling provisions of Consumer Protection Act, consumers are entitled to cancel orders within 14 days after being properly informed of their right to cancel order. In case of delivery of goods, this period does not start until goods are delivered. If confirmation notice is not in accordance with regulations, consumers may cancel order within three months or if no notice is given, within one year.

Entrepreneurs are obliged to provide information to consumers prior to entering into any agreement. This information must include entrepreneur's name, address and place of business, essential features of goods and services, price of goods and services, costs of shipping and delivery and payment instructions. In addition, consumer must receive notice of contract's effective date, minimum duration of contract if it includes recurring performances, and statutory right to cancel order for or return goods.

Directive on distance marketing of consumer financial services (2002/65/EC) has been implemented into Consumer Protection Act. Provisions set providers of financial services obligation to provide consumers with certain information prior to entering into any agreement. Consumers, as general rule, have right to cancel agreements on financial services entered into as result of distance marketing within 14 days from date when consumer has received statutory information to be given and contract terms and conditions.

Electronic Signatures.

Act on Electronic Signatures (14/2003) implements Directive on electronic signatures (1999/93/EC). In accordance with Act on Electronic Signatures, advanced electronic signatures based on qualified certificate and created by secure_signature-creation device will also satisfy legal requirements of Finnish legislation regarding handwritten signatures. Legal effects of electronic signatures not qualifying as advanced electronic signatures are determined on case-by-case basis in process of evaluation of evidence. Such non-qualifying electronic signatures, however, may not be denied legal effect and admission as evidence in court proceedings solely on grounds that it is either in electronic form, not based on qualified certificate, or not created by secure_signature-creation device.

Telecommunications.

Finnish telecommunications legislation was reformed in early 21st century by implementing EU communications directives. Legislation in this field comprises, at present, principally Communications Market Act (393/2003), Act on Protection of Privacy in Electronic Communications (516/2004), and numerous government decrees and resolutions.

License is required to provide network service that uses radio frequencies in digital terrestrial mass communications network or in mobile network practicing public telecommunications. With respect to operating other public telecommunications, written notification of intention must be submitted to FICORA (http://www.ficora.fi/) before operations begin, unless operations are temporary in nature, aimed at small audience, or otherwise of minor significance. Pricing must be cost-oriented and non-discriminatory.

As regards direct marketing to natural persons, direct marketing by means of automated calling systems, email, or other similar mechanisms may only be directed at natural persons who have given their prior consent. Act on Protection of Privacy in Electronic Communications applies also to workplaces, premise being that all messages as well as identification and location data are confidential. However, see category Employment, topic Labor Relations on specific provisions as to retrieving and opening email messages belonging to employer.

3.05 INTEREST:

(Interest Act 633/1982).

Interest Act is applied on money debts with some exceptions. There is no liability to pay interest on debts before due date unless otherwise agreed. If definite date of payment is agreed in advance and payment is not made in due time, debtor is liable to pay interest from due date. If no due date is agreed, interest is payable after 30 days have elapsed from day when creditor claimed payment. If debt is consumer debt as defined in Act, creditor shall also inform debtor about interest rate and date from which liability to pay interest begins in claim.

Interest rate on late payments is reference interest rate plus 7% per annum unless otherwise agreed. Reference interest rate is interest rate applied by European Central Bank to its latest main refinancing operations. Reference interest rate is rounded up to nearest one-half percentage unit. With regard to consumer debts, interest rate on late payments, as set out in Act, may not be exceeded.

With regard to compensation for damages, interest is payable 30 days after day on which claim and statement of facts were presented, taking into consideration also possibilities of payer to state facts. Notwithstanding foregoing, interest must be paid latest at date of filing of lawsuit. With regard to damages caused by willful crime, interest shall accrue from date on which damage was incurred.

Penal code prohibits usury.

3.06 LICENSES, BUSINESS AND PROFESSIONAL:

See topics 4.01 Aliens, 15.03 Foreign Exchange Regulations.

Commercial Representatives.

Act on Commercial Representatives and Salesmen (417/1992). As stated in Act, commercial representative promotes, as agent, for its principal's account, sales of its goods by obtaining purchase offers for its principal or by concluding sales agreements in its principal's name. Commercial representative is either agent with permanent place of business or salesman.

General.

Except where otherwise expressly provided, Act is applied only if nothing contrary follows from contract or from custom of trade.

Agency agreement and amendments thereto must be made in writing if one of parties so requests.

If application of any provision in agency agreement would obviously be repugnant to sound business practice or otherwise unreasonable, such provision may be modified or set aside.

Commission.

Agent has right to commission while agency agreement is in force for all sales agreements which he has concluded or which otherwise can be attributed to his contribution.

For sales attributable to agent, agent is entitled to commission even if sales were made after termination of agency agreement, provided buyer's offer reached principal or agent prior to termination of agency agreement. Agent right to commission for post-agency sales further exists when such sales arose primarily from agent's activities while agency still was in force and when sales were made within reasonable time after termination of agency agreement.

If parties have not agreed upon any commission rate, commission shall be calculated in accordance with common payments for similar or equivalent services at agent's place of business.

In addition to commission, after termination of agency, agent is entitled to compensation that, at most, equal to agent's average annual provision over previous five years for new customers agent obtained for principal or for any significant expansion of business agent achieved with principal's old customers if these factors result in significant benefit for principal in connection with or after termination of agency, provided that such compensation is reasonable in light of all relevant factors of each particular case. Contractual provision that restricts agent's right to such post-agency compensation beyond that stated in Act is null and void.

Termination.

Agency agreement concluded for fixed period of time expires when period agreed upon has elapsed. Agency agreement concluded for indefinite period of time can be terminated after one month's notice provided that agreement has been in force for less than a year. For each subsequent year, notice period to terminate increases by one month up to maximum of six months. Parties may not agree on notice periods shorter than those stated above, provided that parties may agree on three-month notice period for agent even if agency has been in force for more than three years.

Either party may also rescind agency at any time in event of any actions or omissions by other party that result in it being unreasonable for that party to continue agency relationship. Agency agreement may be prematurely terminated without existence of valid grounds if terminating party compensates other party for all resulting damages.

3.07 MONEY LAUNDERING:

According to Finnish Penal Code (39/1889 as am'd) person who knowingly receives, uses, converts or transfers property acquired through offence or tries to conceal true nature or origin of such property, must be sentenced for money laundering to fine or maximum of two years in prison, or in case of aggravated form of crime, for maximum of six years in prison. Also attempt is punishable. Law also includes rules for negligent form of this crime.

Act on Preventing and Clearing Money Laundering and Terrorist Financing (503/2008, as am'd) imposes obligation for variety of parties, e.g. credit and financial institutions, real estate agents, investment firms, providers of legal assistance in legal matters (except trial proceedings) to identify and know their customers and their businesses and to detect suspicious transactions and report them to Money Laundering Clearing House (Central Criminal Police, Money Laundering Clearing House, Jokiniemenkuja 4, POB 285, 01301 Vantaa, Tel. +358 (09) 8388 6822, Fax, +358 (09) 8388 6811, e-mail: Krp-rahanpesu@krp.poliisi.fi). Failure to report or act according to due diligence rules and obligations of law may constitute punishable offence.

3.08 MONOPOLIES, RESTRAINT OF TRADE AND COMPETITION:

Finland is member state of EU, wherefore Finnish competition legislation closely follows EC Competition rules.

In accordance with Act on Competition Restrictions (480/1992 reformed in 2004; currently, Working Group investigates need to revise Act) agreements or concerted practices between undertakings or decisions by associations of undertakings that prevent, restrict or distort competition are prohibited. Hence, cartels and vertical restrictions, including, inter alia, fixing of purchase or sale prices, limiting production and sharing markets, are prohibited.

However, there are exceptions to this general prohibition. Agreement or concerted practice of undertakings or decision of association of undertakings is allowed if it promotes production or distribution of goods or technical or economical progress, while allowing consumers or customers fair share of benefit, provided that it does not impose on undertakings concerned restrictions which are not indispensable to attainment of these objectives, and provided that it does not afford such undertakings possibility to eliminate competition in respect of substantial part of products in question. Undertakings concerned must conduct self-assessment whether agreement, concerted practice or decision of association of undertakings prohibited in principle may be allowed based on abovementioned exception.

Act also prohibits abuse of dominant position.

Upon request undertakings or associations of undertakings are obliged to give Finnish Competition Authority all information and documentation needed to investigate competition restrictions. If undertaking is found to be in breach of prohibition of Act, fines up to 10% of undertaking's turnover can be imposed. Finnish Competition Act also provides for leniency, i.e. immunity from fines for party first revealing prohibited restriction of competition of which it is party.

Business acquisitions, mergers and full-function joint ventures must be notified to Finnish Competition Authority if combined worldwide turnover of undertakings concerned exceeds [Euro]350 million and at least two of parties to acquisition each have turnover exceeding [Euro]20 million in Finland. Rules also apply to foreign-to-foreign mergers and acquisitions. In case concentration leads to dominant position, which might impede competition in relevant Finnish market, Market Court has right to prohibit, declare void or set conditions for concentration.

For further information, please see website of Finnish Competition Authority: http://www.kilpailuvirasto.fi.

See also topic 26.01 Treaties.

3.09 NEGOTIABLE INSTRUMENTS:

See topic 3.01 Bills and Notes.

3.10 SALES:

General.

Sale is either sale of real or movable property. Applicable law must be chosen depending on type of property sold.

Sales of real property are governed by Code of Real Estate (540/1995). Sales of real property require prescribed form. Contract has to be made in writing and confirmed by notary public. When sale has been completed transfer of ownership must be registered at local court. By registration, ownership of buyer is made public and secured against claims of other buyers or creditors of seller. Title passes, however, when sale is made and contract is signed.

Sales of Goods.

In accordance with Sale of Goods Act (355/1987). Act applies to sale and barter of movable property unless otherwise agreed or usage or trading practice prevails. Act is applied only if nothing to contrary follows from Consumer Protection Act. Sales of movable property are not restricted to any set form. Sale may be made either in writing or orally. Title to movable property passes to buyer at moment sale is completed except in cases of brokerage sale.

Goods must be placed at buyer's disposal at seller's place of business or residence. If goods are to be transported delivery takes place when handed over to buyer or to carrier. Fixed goods must be delivered within reasonable time from conclusion of contract. Either party may withhold performance until performance by other party is tendered. Risk for goods passes on in act of delivery. Goods must be fit for purpose for which similar goods are ordinarily used. Goods must be corresponding to information given by seller. If goods are sold subject to “as is” clause, delivery is deemed defective if goods are in considerably worse condition than buyer had reason to expect considering price and other circumstances. If no price is fixed buyer must pay what is reasonable considering nature and quality of goods, market price and other circumstances.

Delay in delivery may entitle buyer to require performance or declare contract void as well as claim damages. Right to declare contract void on account of delay arises only if breach of contract is of essential importance to buyer and seller must have realized this.

Seller is not obliged to perform delayed delivery if there are insurmountable obstacles to delivery or delivery would cause unreasonable sacrifice. Buyer must claim fulfillment of delayed delivery within reasonable time. Unless buyer, when asked if willing to accept delayed delivery, answers without unreasonable delay, right of declaring contract void is forfeited. If delivery already made is found to have been delayed, buyer's right to declare contract void or claim damages is forfeited unless intention to do so is declared within reasonable time after buyer received information of delivery.

If defective goods are delivered and this is not dependent on buyer or circumstances on his part, buyer may claim remedy of defect, re-delivery, or price reduction, or declare contract void. In addition, buyer may claim damages. Buyer is liable to examine goods as soon as possible after delivery. If goods are transported from place of delivery, buyer may examine goods after arrival. Buyer must give notice of defect within reasonable time after buyer has noticed or should have noticed defect. Notwithstanding buyer's above-mentioned obligation to examine goods and complain, buyer may refer to defect if seller is guilty of gross negligence or dishonourable and unworthy conduct.

Buyer may claim rectification without costs if this does not cause seller unreasonable costs or inconvenience. Buyer has right to claim re-delivery on account of defect if breach of contract is of essential importance for buyer and seller knew or should have known this. If seller does not remedy defect, buyer is entitled to compensation for having goods rectified. Although buyer does not claim rectification or re-delivery seller is entitled to take respective measures if this does not cause buyer unreasonable inconvenience and buyer is reimbursed for his costs.

If remedy of defect and re-delivery are out of question or not effected within reasonable time after buyer's notice of defect, buyer is entitled to require reduction of price. Right to declare contract void arises only if breach of contract is of substantial importance to buyer and seller knew or should have known this. Right to cancel is contingent upon notice within reasonable time after buyer became or should have become aware of defect.

If buyer fails to pay in time, seller may claim performance or declare contract void as well as claim damages. He is also entitled to interest and, under certain circumstances, to keep goods.

Seller may declare contract void for late payment if buyer's delay is substantial. If goods are in buyer's possession seller may declare contract void only if seller reserved such right or buyer rejects goods.

If party's conduct or financial circumstances after conclusion of contract indicate that there are strong reasons to presume that party will fail to perform substantial part of its obligations, other party may suspend its performance, if opposite party does not give adequate assurance of its performance.

If party has gone bankrupt before fulfilling its obligations other party must require bankrupt estate (receiver or trustee in bankruptcy) to state whether estate wants to be bound by contract. If estate notifies within reasonable time that it wants to be bound and gives adequate assurance, contract must not be declared void. If goods are delivered to buyer or his estate after bankruptcy, seller can claim goods be returned unless payment is made immediately.

Compensation for breach of contract includes compensation for costs, price-difference, lost profit and other direct or indirect loss. In principle, responsibility for direct loss is more severe whereas liability for indirect loss normally requires negligence. Indirect loss is loss caused by reduction or interruption of production or turnover, loss caused by fact that goods cannot be used as intended, lost profit because of non-fulfillment of contract with third party, loss caused by damage to other property or other similar loss that is difficult to foresee.

Party suffering damage must try to minimize its loss. If buyer does not collect goods in time seller shall take care of goods on buyer's account. Same rule applies to buyer if he wishes to reject goods he already has received. In both cases seller and buyer have right to compensation for costs. If it is not possible to take care of goods or to continue taking care of them, goods may be sold. Surplus must be paid to other party.

Consumer Protection.

Consumer Protection Act (38/1978, changes expected in near future) concerns supply, sale and marketing of commodities to consumers for private use. Act prohibits marketing practices which are incompatible with good marketing standards or otherwise unfair to consumers, for example untrue or misleading information. Consumer Ombudsman and Market Court supervise that Act is observed. Latter may also impose fine. General court of first instance may impose fine for consumer protection violation. Consumer cannot be deprived of rights provided by Act by contract. Seller's liability for damages is judged in accordance with normal liability principles and implies seller's negligence.

Product Liability.

In accordance with Product Liability Act (694/1990), entrepreneur (importer, manufacturer and in some cases seller of products) is obliged to compensate any and all damages caused by product which they have imported, manufactured or sold irrespective of negligence. Act is in conformity with EC-regulations except that there is no self risk in Finland for damages caused to objects.

Warranties.

See category 8 Debtor and Creditor, topic 8.08 Guaranty.

International Sale of Goods.

United Nations Convention on Contracts for International Sale of Goods, entered into force 1 Jan. 1989. Reservations: Finland is not bound by Part II of Convention (Formation of Contract) and Convention does not apply to contracts of sale where parties have their places of business in Denmark, Finland, Sweden, Iceland, or Norway. If parties are from Nordic countries, national laws are applicable. In these cases, applicable act is chosen based on rules of international private law. See topic 26.01 Treaties.

4 CITIZENSHIP

4.01 ALIENS:

See topic 17.01 Aliens.

4.02 CITIZENSHIP:

In accordance with Nationality Act (359/2003), person acquires automatically Finnish citizenship on basis of birth, marriage of parents (legitimation), adoption, or place of birth. In addition, Finnish citizenship can be acquired by application or by declaration to authorities. Foreign nationals may be granted Finnish citizenship upon application provided they have resided in Finland for sufficient length of time, can speak Finnish or Swedish and meet integrity requirement. Essential requirement for citizenship is that applicant's identity has been reliably established. Finnish legislation accepts multiple nationality (dual nationality). Declaration procedure is limited to certain groups of people such as former Finnish citizens and young people (aged 18-22) who have resided in Finland for long time.

Upon application, Finnish citizen may be released from Finnish citizenship if person is citizen of or is about to gain citizenship of foreign state.

Military/National Service.

Finland's national defence is based on system of military service. Military service is not restricted to conscription: period during which Finnish men are eligible for military service starts at beginning of year in which they turn 17 and continues until end of year when they turn 60. Conscription lasts 180, 270 or 362 days. Reservists can be commanded to undergo refresher courses in total from 40 to 100 days. Conscientious objector is person who for religious or ethical reasons refuses to serve in Finnish Defence Forces. Personal conviction against use of weapons no longer needs to be proven. Service preformed must consist of work that benefits public interest—generally it is carried out in government or municipalities.

4.03 EQUALITY:

Act on equality between Women and Men (609/1986) aims to prevent gender based discrimination, promote equality between women and men and improve position of women in working life. Issues related to religion and personal life are not within scope of Act. Act contains general prohibition against gender discrimination in working life and this prohibition is sanctioned by compensation payable to employee by employer in breach of this prohibition. Equality Ombudsman acts as special supervising authority in gender discrimination issues.

Non-Discrimination Act (21/2004) has been in force since Feb. 2004. Act prohibits discrimination based on age, ethnic or national origin, nationality, language, religion, belief, opinion, health, disability, sexual orientation or other personal characteristics. Act defines direct and indirect discrimination and infringements of Act are sanctioned. Prohibition on discrimination based on ethnic origin, other than in employment and service relationships governed by public law, are supervised by Ombudsman for Minorities and Discrimination Board.

4.04 IMMIGRATION:

See topic 17.02 Immigration.

5 CIVIL ACTIONS AND PROCEDURE

5.01 ACTIONS:

New Act regarding class actions (444/2007) enters into force on Oct. 1, 2007. Act is applied to civil actions concerning disputes between consumers and businesses. Consumer Ombudsman acts as plaintiff. Class action requires that multiple people have claims against same defendant and that claims are based on same or similar facts.

Limitation of.

See topic 5.04 Limitation of Actions.

5.02 DEPOSITIONS AND DISCOVERY:

Finnish court of first instance must give its official assistance to foreign judicial officers, if they are requested to take oaths, conduct examinations or inspect documents or objects. Finnish court may also permit testimony to be taken in civil or criminal matter before foreign official. Pretrial discovery of documents is not allowed for purpose of obtaining evidence either in civil or criminal matters. Discovery of documents is, however, possible in preliminary hearing of case where party must on request of opposing party state whether he has in his possession written evidence or object referred to opposing party that might be relevant in case. Person having possession over document is required to bring it to court when document has significance in case.

5.03 JUDGMENTS:

Judgment of foreign court may be enforced in Finland in accordance with treaty entered into with such foreign country or upon principle of reciprocity. This is possible either through diplomatic channels or based on petition presented to authority in charge of enforcement. EU Council Regulation on jurisdiction, recognition and enforcement of judgments in civil and commercial matters (44/2001) came into force Mar. 1, 2002. Regulation supersedes Brussels Convention and contains provisions on jurisdiction in civil and commercial matters as well as on recognition and enforcement in courts of one member state of judgments awarded in other member states. Nordic countries also have entered into agreement on recognition and enforcement of judgments given in another member country. See also category 26 Treaties and Conventions, topic 26.01 Treaties.

5.04 LIMITATION OF ACTIONS:

New Act regarding statute barring of debts (728/2003) came in force Jan. 2004. Based on Act, general limitation period is three years but there are also specific provisions elsewhere in legislation that supersede Act.

Rule based on Act is that limitation period will begin to run when debt falls due on agreed date of expiry or when creditor otherwise can claim payment of debt or as main rule, when injured party became aware of damage caused. Creditor may interrupt statute barring by means of freeform reminder or by bringing action against debtor.

Judgments and other awards are time-barred if not enforced within five years of rendering of judgment. Enforcement rules do not allow execution against natural persons after 15 years. Term is 20 years if creditor is natural person or if claim is based on criminal offence for which debtor has been sentenced to prison or community service.

Criminal charges must be brought within two, five, ten or 20 years from commission of illegal act, depending on prescribed punishment for crime in question. Claims for compensation based on criminal acts must usually be made within ten years, except for cases in which criminal charges may be brought within longer period of time.

5.05 PRESCRIPTION:

See topic 5.04 Limitation of Actions.

5.06 SEQUESTRATION:

See topic 8.03 Attachment.

6 COURTS AND LEGISLATURE

6.01 COURTS:

Courts of general jurisdiction in first instance are District Courts. Judgments of District Court are subject to appeal to Court of Appeal, and highest court is Supreme Court. Decisions of Court of Appeal usually remain final, as appeal to Supreme Court is, in Finland, subject to leave.

In administrative field there are Administrative Courts, and highest tribunal is Supreme Administrative Court.

Special courts are Labour Court, Insurance Court, High Court of Impeachment and Market Court. There is no special constitutional court in Finland, but Constitutional Committee of Parliament has been entrusted with advance supervision of compatibility of new legislation with Constitution. In addition, courts and other authorities are under obligation to interpret legislation in such a way as to adhere to Constitution and to respect human rights.

6.02 LAW REPORTS:

Judgments of Supreme Court and Supreme Administrative Court as well as consolidated statutes and some translations of statutes are published on Internet: www.finlex.fi. Completed records of judgments of lower courts are not published.

6.03 LEGISLATURE:

New Finnish Constitution came into force in Mar. 2000.

Legislative power in Finland is administered by Parliament, in conjunction with President of Republic. Initiative to new Act of Parliament is normally taken by Council of State, but may also be taken by President or by individual members of Parliament. Acts adopted by Parliament have to be presented to President of Republic for ratification. However, if President declines to ratify Act, Act will immediately be re-tabled for consideration. If Parliament readopts Act, it will enter into force without ratification.

President of Republic, Council of State and Ministry can issue decrees in less important matters without assistance of Parliament.

6.04 REPORTS:

See topic 6.02 Law Reports.

6.05 STATUTES:

Laws of Finland are based to large extent upon codification of laws of Sweden from 1734, which have, however, been greatly changed and amplified by newer legislation since Finland was separated from Sweden in 1809.

7 CRIMINAL LAW

7.01 EXTRADITION:

Extradition varies between countries owing to different regional arrangements. Regional arrangements have been concluded between Nordic countries (uniform legislation), Member States of EU (Council Framework Decision of 13 June 2002) and between Member States of Council of Europe (European Convention on Extradition, Treaty Series 32/1971, and its Second Additional Protocol, Treaty Series 15/1985). Finland has Bilateral Agreement on Extradition with Australia, Canada, France, Great Britain and Northern Ireland, Kenya, Netherlands, New Zealand, Uganda, and U.S.A.

Extradition Act (456/1970) provides for extradition to and from Finland. In absence of international obligation, Finland may extradite person on basis of its internal legislation. In that case, extradition is discretionary. Central Authority foreseen in various international agreements is Ministry of Justice. In Nordic Extradition, corresponding role falls on Ministry of Interior. Also National Bureau of Investigation, Supreme Court, District Courts and prosecutors take part in extradition procedures.

Extradition requires existence of minimum requirements of gravity of alleged offence, length of sentence passed, and dual criminality. Maximum penalty in both countries has to be of certain duration, usually at least one year. When request concerns extradition for execution of sentence, remaining sentence has to be of certain length, usually at least four months. Grounds for refusal are related to extradition of own nationals, political offences and personal circumstances. Finland extradites its own nationals only to Member States of EU and to other Nordic Countries.

In case authorities of requesting state want to prosecute extradited person for other offences than those on basis of which person was extradited, consent of requested state is to be acquired. Within EU, this rule of speciality has been dispensed with to large extent.

8 DEBTOR AND CREDITOR

8.01 ASSIGNMENTS:

Creditor may assign and transfer its claim to another. Unless negotiable instrument is in question, instrument of indebtedness may not be assigned and transferred to detriment of debtor. Debtor may avail itself of all defenses against assignee and transferee which were available to it against original creditor. If negotiable instrument is transferred, debtor does not have this advantage.

Transfer of nonnegotiable instrument presupposes agreement between transferor and transferee. Transfer of nonnegotiable instrument has to be notified to debtor. There is no prescribed form for this agreement. On other hand, transfer must be indorsed on instrument when

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it is negotiable instrument. This indorsement can be confined to mere blank indorsement if, in accordance with law it has been specially provided (for instance as to bills of exchange). Bearer instrument may be negotiated by transfer of possession to transferee.

8.02 ASSIGNMENTS FOR BENEFIT OF CREDITORS:

See topic 8.04 Bankruptcy.

8.03 ATTACHMENT:

Attachment is measure, based upon determination by proper court of first instance upon petition, by which specified real or movable property is distrained in order to secure debt or other right.

Grounds for granting petition are that there is danger that debtor may conceal or destroy property. Debt must be due or about to become due. Existence of debt must be established by credible facts. Decision of court of first instance is filed to enforcement authorities that executes measure and specifies property to be distrained. Execution officer, when executing measure, may render injunction against dispersion of property instead of attachment.

After attachment or injunction against dispersion of property has been granted, petitioner must, within specified time, commence action for debt. If this is neglected, attachment or writ to prevent waste is void. Plaintiff must furnish attachment bond required by official. (Code of Judicial Procedure).

8.04 BANKRUPTCY:

Finnish bankruptcy regulation has been revised recently. Overall revision of Bankruptcy Act has been underway for decades. Finally, in Dec. 2003, Finnish Parliament passed Government bill on new Bankruptcy Act. New Bankruptcy Act (120/2004) (“Konkurssilaki”) came into force on Sept. 1, 2004 superseding old Bankruptcy Act of 1868 (“Konkurssisääntö”).

Bankruptcy petition may be submitted either by creditor or debtor to court of first instance based on specific grounds set forth in Bankruptcy Act. Creditor may submit petition to initiate bankruptcy proceedings if creditor's claim is based on res judicata judgment. In addition, if creditor's claim is based on written undertaking signed by debtor, and debtor has not disputed claim on grounds, which are indisputably true, respective creditor may file bankruptcy petition. Moreover, claim whose validity cannot fairly be questioned may also constitute grounds for bankruptcy petition. Notwithstanding foregoing, creditor's petition will not succeed if creditor's claim is insignificant and if contemplated bankruptcy proceedings would be apparently impractical taking into consideration costs and benefits thereof.

In order for bankruptcy petition to be successful, there must be general grounds for bankruptcy at hand. That is, debtor is required to be insolvent. Debtor is considered to be insolvent if it is other than temporarily unable to pay its debts when they fall due. Bankruptcy Act lists following situations in which insolvency is presumed, unless proven otherwise: (i) Debtor has ceased payments; (ii) in context of execution measures that have taken place during six months preceding submitting of bankruptcy petition, it has become apparent that debtor's assets do not cover outstanding debts in full; or (iii) after having received creditor's request for payment, debtor has not repaid respective valid and due debt within period of one week. However, mere notification from debtor confirming insolvency is sufficient in this respect, unless there are specific reasons to believe that such notice is inaccurate.

If court decides to open bankruptcy proceedings, court appoints administrator, or if deemed necessary, more than one administrator, to take bankruptcy estate into his custody and to administer it. Appointment of administrators is generally governed by wishes of creditors representing majority of claims in value.

New Bankruptcy Act has introduced concept of “public receivership”. If debtor's assets do not cover costs of bankruptcy proceedings, such public receivership may take place. Court may decide upon placing debtor under public receivership based on Bankruptcy Ombudsman's proposition. As consequence, possible misconducts and defaults can be detected also as regards truly indigent companies. This new provision might also prevent misconduct within administration of going concern. When court has decided to open public receivership, administrator no longer represents estate. Moreover, creditors forfeit power of decision regarding bankruptcy estate's matters. Bankruptcy Ombudsman appoints public receiver, who shall seize assets of bankrupt's estate.

Once bankruptcy proceedings have commenced, debtor forfeits control of all assets belonging to estate and any precautionary measures, such as attachments or injunctions, become null. Creditors' meeting has final power of decision as regards affairs of bankruptcy estate, although administrator is usually vested with authority to sell assets of estate and to take other measures needed for lawful and effective administration thereof. Creditors' meeting can be held at distance with help of modern technology (e.g., by telephone or video conference).

Within two months from commencement of bankruptcy proceedings, administrator submits estate inventory to debtor, principal creditors and other creditors who have requested it. Directors of debtor or other authorized representatives must sign inventory as confirmation of its accuracy or if court so orders, attest under oath to its accuracy. Estate inventory must include all assets of debtor and all debts that arose before commencement of bankruptcy proceedings. After estate inventory has been drawn up, creditors will decide at creditors' meeting on process for sale or realization of assets. Creditors have final decision with respect to realization process and administrator(s) must act accordingly, taking also into consideration mandatory provisions of law.

Administrator will establish lodgement date by which all creditors must submit their claims. Each creditor must generally lodge his claim in writing or by electronic transmission and state which priority he claims thereto. Creditor is required to notify administrator of agreements, undertakings or other written evidence, which claim is based on. Also claims in foreign language must be accepted and claims must be translated into Finnish or Swedish by administrator. If amount of creditor's receivable, as well as basis thereof are clear, administrator may take such receivable into account without lodgement. In such case, administrator must inform creditor of amount of receivable that will be stated in proposal for distribution list. If creditor files proof of claim after deadline set by administrator, claim will not be finally disallowed. Creditor shall, however, be charged for this so-called retroactive lodgement with fee amounting to 1% of lodged claim. Fee is never less than [Euro]600 or more than [Euro]6,000. Notwithstanding foregoing, retroactive lodgement is disallowed after confirmation of proposal for distribution list.

Within two months from lodgement date, administrator must draw up proposal for distribution list. Proposal for distribution list, or notice thereof, must be submitted to debtor and to those creditors who have requested it as well as to creditors whose claims administrator has contested. Generally, disbursement to creditors must be paid out in accordance with certified distribution list.

Once bankruptcy estate has been scrutinized and assets liquidated, administrator must draw up final settlement for accounts to be approved by final creditor's meeting. Administrator must pay out final disbursements to creditors once final settlement for accounts has been approved unless there is reason, because of appeal, to postpone disbursement until order is res judicata. Unless no objections are raised, bankruptcy ends.

Directors of debtor that traded wrongfully may be placed under injunction restricting further business transactions. Preconditions for injunction are that director's acts or operations show gross negligence against creditors, or if director otherwise grossly failed to fulfill obligations regarding conducting of business. Directors can also become criminally responsible for their actions or omissions.

8.05 EXECUTIONS:

Enforcement procedure is comprehensively regulated in Enforcement Act (705/2007) which was recently revised in order to ensure effective but also transparent execution procedure of court decisions. Procedure is driven and supervised by enforcement officials whereas creditor may also have right to self-enforcement in certain circumstances. Taxes and certain other public charges can be enforced without judgment or corresponding order.

General requirement for official execution is non-appealable judgment confirming debtor's obligation to pay debt or fulfill other obligation. Moveable property must be foreclosed and sold prior to real property. Property foreclosed under appealable judgment may not be sold nor may any proceeds accrued be distributed without sufficient collateral lodged by creditor. Judgment given by court of appeal as second instance may be enforced as non-appealable judgment but disbursement of proceeds is subject to collateral until High Court of Justice has decided not to grant leave to appeal. Generally, property must be sold by public auction with highest bid unless such bid is significantly under market value of respective property. Priority over proceeds accrued from foreclosed and sold property subject to pledge, mortgage or other collateral must be granted to such privileged creditors.

Two new innovations were introduced in revised Enforcement Act: (i) Possibility to enter debt into passive register to wait e.g. tax refunds; and (ii) concept of limited enforcement where enforcement measures are limited to garnishment of wages, salaries or other corresponding incomes which may be ascertained from public registers. Further, private debts may be collected from individuals only for period of 15 years from final judgment date. Time limit may be extended to 20 years in certain circumstances. Latter reform has partially retroactive effect, i.e., if final judgment was issued before Mar. 1, 1993, such judgment is enforceable until Mar. 1, 2008 or 2013 depending on applicable time limit whereas time limit for later judgments run from actual judgment dates.

8.06 EXEMPTIONS:

Generally, ordinary household effects, utensils and necessary working tools may not be foreclosed. Further, only one-third of wages, salaries, pensions, unemployment benefits and maternity benefits may be garnished provided that protective portion needed for livelihood and established yearly by Ministry of Justice is not prejudiced. Protected portion for single debtor is [Euro]19.50 per day and [Euro]7.00 per day for each dependent.

8.07 GARNISHMENT:

See topics 8.03 Attachment, 8.05 Executions, 8.06 Exemptions.

8.08 GUARANTY:

Guaranty is contract, by which guarantor becomes obligated to creditor for liability of third person, debtor. There are no provisions as to form of guaranty. Accordingly, guaranty can be concluded orally or in writing. Provisions of Act on Guaranties and Third-Party Pledges (361/1999) are mandatory where debtor is consumer.

Guaranty may be personal in which case guarantor guarantees debtor. Generally, however, with guaranty is meant property guaranty by which guarantor undertakes in specified event to pay certain amount of money. In Finland difference is made between personal debt guaranties and secondary guaranties. In former case, guarantor is jointly bound with debtor and in latter case guarantor undertakes to pay any deficiency remaining after eventual enforcement or bankruptcy of debtor. Guaranty is secondary guaranty provided that parties have not agreed on personal debt guaranty.

If there are several guarantors for same debt, guaranty may be joint and several when each guarantor is liable for himself and for others, so that debt may be collected from any one of them; or guaranty may be per capita in which case each guarantor is liable only for own share (pro rata parte). Undertaking is joint and several if guarantors have not divided liability among themselves by express provision.

Guarantor, who has paid debt, is subrogated to rights of creditor as against debtor and other guarantors.

8.09 LIENS:

Landlord has right to retain goods which tenant has upon leased land or in building until payment of rent. Similar right of retention belongs to house owner and keeper of inn to goods of tenant found in house or inn, and artisan to chattels on which repairs has been made. Attorney-at-law may retain papers of client until expenses and fees have been paid.

8.10 PLEDGES:

Right of pledge is such right to chattel as entitles creditor to use sale price of chattel pledged in order to obtain certain sum of money. Changes in title to pledged chattels have in general no effect on rights of pledgee. Right of pledge survives even though debt secured by pledged chattel is outlawed. Both real and personal property may be pledged. To preserve right of pledge to real property against new owners of realty, mortgage is necessary. Pledging of chattel requires delivery of chattel to creditor, except in cases in which enterprise mortgage is permissible (see category 22 Mortgages, topic 22.01 Chattel Mortgages). Use of pledged chattel for payment of debt is accomplished by converting chattel to cash. Sale of chattel by auction is usually stipulated in agreement made at time of pledging. Real property is sold at judicial sale.

Enterprise Mortgage Act (634/1984) came into force on Jan. 1, 1986. Personal property of all enterprises and other business of which notification is filed in commercial register may be mortgaged for payment of debt. Mortgage comprises chattels, intangible rights, rights to use specified chattel and claims belonging to enterprise.

Enterprise mortgage gives preference in event property is sold at judicial sale or in case of debtor's bankruptcy. Enterprise mortgage is secured by application to Patent and Register Office in Helsinki. Application is made on form specified by registration authorities and it must include note and debtor's consent to mortgage. Enterprise mortgage is valid until it is discharged.

8.11 RESTRUCTURING:

Provisions relating to restructuring of enterprises are included in Restructuring of Enterprises Act (47/1993) which was amended in 1 June 2007 (247/2007). Aim of Restructuring of Enterprises Act is to rehabilitate viable business activities of debtor in difficulties and to reschedule debts. Process of enforced debt restructuring or rescheduling closely resembles American Chapter 11 of Bankruptcy Act. There are, however, some major differences, e.g. Finnish law provides that one or more administrators always are appointed. Application for restructuring, which is made to court of first instance, can be filed either by: (i) Debtor; (ii) creditor or group of creditors (excluding any creditors whose claims are contestable or otherwise unclear); or (iii) party for whom debtor's insolvency would likely cause financial loss, for reasons other than partnership with debtor (“probable creditor”).

If debtor is insolvent, restructuring procedure may be commenced subsequent to lawful petition thereof. Conditions for initiation of restructuring proceedings are following: (i) Debtor together with at least two creditors, whose aggregate claims represent at least 20% of known debts, file application, (ii) debtor is facing threat of insolvency, or (iii) debtor is insolvent. If debtor is not yet insolvent but is under threat of becoming insolvent, restructuring procedure may be commenced based on petition by creditor(s) or probable creditor(s), provided that restructuring is necessary in order to protect substantial financial benefits of petitioner or to avoid endangering such benefits.

Administrator is appointed by court of first instance upon proposal made by creditors representing majority of claims in value. In order to fulfill purpose of process and to attend to creditors' interest, administrator's most important duties are to: (i) Prepare report on debtor and its finances; (ii) supervise activities of debtor during proceedings; and (iii) draft proposal for restructuring program.

Committee of Creditors may be appointed by court as joint representation for creditors if court finds it necessary. Committee's assignment is to assist administrator as advisory organ.

After proceedings have been initiated, several legal consequences follow: (i) Debtor is neither allowed to pay nor give security for debts that have arisen before filing of application except under certain circumstances; (ii) no collection measures may be taken regarding debts that arose prior to commencement of proceedings and initiated measures cannot be completed; (iii) property may not be foreclosed nor any other enforcement measures carried out; (iv) although debtor retains authority to dispose of his property and carry out direct operations, debtor may not, without consent of administrator, e.g.: (a) Draw new credit; (b) assign fixed, current or liquid assets of company; (c) terminate agreements; or (d) surrender property into bankruptcy.

Restructuring program must, apart from report on assets and liabilities of debtor, include proposals for restructuring financing and operations such that debtor may be rendered healthy once again. Furthermore, proposal for restructuring debts shall be included therein. Debts can either be arranged by: (i) Changing time schedule for repayment; (ii) directing payments at capital in first hand and at credit expenses in second; (iii) reducing credit costs; or (iv) reducing amount of remaining debt.

If application for surrendering company's assets into bankruptcy has been made, but court has not yet declared company bankrupt before application for restructuring is filed, latter shall be decided upon first. Same applies to bankruptcy application that is filed during consideration of restructuring application in court.

Act on Adjustment of Debts of Private Individuals (57/1993) follows, wherever applicable, same principles as Restructuring of Enterprises Act.

Regulation No. 1346/2000 on insolvency proceedings of European Council came into force on May 31, 2002, and is directly applicable in member states. This Regulation facilitates cross-border insolvency proceedings in EU area and clarifies legal positions thereof. Regulation enables, with some exceptions, to apply one insolvency proceeding of one member state to all of debtor's assets in EU area. Regulation replaces all previous treaties inside EU on reciprocal recognition of bankruptcy judgments and facilitates execution of those judgments in cross-border cases.

9 DISPUTE RESOLUTION

9.01 ALTERNATIVE DISPUTE RESOLUTION:

Mandatory Dispute Resolution.

In Finnish legislation mandatory dispute resolution exists in form of rectifying procedure. Rectification committees are established especially in field of social security. Claim for rectification can be submitted to Accident Appeal Board, Labour Council, Unemployment Appeal

Board, Council for Equality, among others.

Voluntary dispute resolution can be divided into two subcategories: Arbitration and committee procedure through which recommended decisions are given. Parties may choose whether to enter into legal proceedings in court or in committee. Committees that have power to give recommended decisions are Consumer Complaint Board, Traffic Accident Board, Employee Inventions Board, Finnish Insurance Complaints Board, Patient Injuries Board, and Board of Business Practice, among others.

9.02 ARBITRATION AND AWARD:

Finnish Arbitration Act (967/1992) was drafted along lines of original Arbitration Act of 1928 with several influences taken from UNCITRAL Model Law on International Commercial Arbitration. Provisions regarding arbitration in foreign countries correspond with New York Convention.

Arbitration may be used only in private law disputes, which can be agreed on. Act is relatively detailed, but leaves number of issues for parties to agree on. Arbitration agreement must be made in writing. It is possible to start arbitration on basis of several similar arbitration agreements at same time provided that they relate to same subject matter. Finnish arbitration is based on doctrine of “independence” of arbitration agreement. Parties are free to agree on number of arbitrators, and failing such agreement, arbitration panel consists of three arbitrators as stipulated in Act.

Control of legality of award, due process and fundamental legal rules including ordre public is subject to post control by courts in connection with enforcement of award.

9.03 MEDIATION:

Judicial Mediation in Civil Disputes.

Act on Conciliation of Civil Cases in Ordinary Courts (663/2005) entered into force on Jan. 1, 2006. New Act provides possibility for District Court and Court of Appeal to decide upon initiating mediation in civil disputes.

Mediation requires that both parties consent to procedure, that dispute is suited to mediation and that mediation is appropriate considering claims of parties. Judge of court acts as mediator. Mediation is usually public.

If attempt at conciliation is successful, conditions of conciliation can be set down in agreement. At request of parties, court may confirm conciliation agreement which then constitutes enforceable judgment and is subject to appeal.

Mediation procedure is terminated without conciliation if party so wishes or if judge finds that no real prospects for conciliation exists. After termination of mediation procedure, parties may initiate or continue court litigation proceedings. Circumstances put forward by party during mediation may not be invoked before court.

Judicial Mediation in Criminal Matters.

Act on Conciliation in Criminal and Certain Civil Cases (1015/2005) entered into force on Jan. 1, 2006. In criminal matters, mediation is process in which victim and offender may meet confidentially in presence of impartial mediator in order to discuss mental and material harm caused by crime and to reach agreement on restitution of that harm. Mediation requires free consent of parties and it may deal only with crimes considered eligible for conciliation. In cases of serious crimes, possibility of mediation is often excluded.

Mediation is carried out by voluntary lay mediator who is trained for task. Successful mediation may result in decision not to prosecute, waiving of sentence or more lenient punishment.

Mediation of Finnish Bar Association.

Rules for mediation of Finnish Bar Association have been in force since Jan. 1999. Mediation, in accordance with these regulations, is voluntary and based on agreement between parties. Mediation complies with procedure agreed by parties. Mediator is advocate appointed to settle dispute between parties. Finnish Bar Association arranges education in mediation for lawyers.

Unless otherwise agreed, mediator is entitled to hold confidential discussions with either party separately and to receive material from either party provided that this is not disclosed to other party. Mediation ends either with written settlement agreement between parties, by mediator notifying parties that there is no reason to continue mediation, or by one of parties notifying mediator in writing that he or she no longer wishes to continue mediation.

10 DOCUMENTS AND RECORDS

10.01 ACKNOWLEDGMENTS:

Foreign documents to be used in Finland must be certified by relevant country's notary public, legalised by relevant country's Ministry of Foreign Affairs and legalised by particular embassy/consulate of Finland. If relevant country is member of Hague Convention, documents must only be certified by country's notary public and provided with apostille.

10.02 AFFIDAVITS:

Use of affidavit is confined to certain cases where oath is administered by court only.

10.03 NOTARIES PUBLIC:

Duties are exercised in cities by magistrates and by bailiffs in rural districts in accordance with Act on Notaries Public (287/1960).

10.04 RECORDS:

Real property is entered into computer based register. Information in database is valid as evidence and presumed to be correct. All juridical acts pertaining to real property must be recorded in database.

In addition to above-mentioned real property register, there are following public registers: association register, patent register, ship register, motor vehicle register, register of matrimonial or prenuptial agreements, etc.

See category 3 Business Regulation and Commerce, topic 3.02 Commercial Register.

Births, deaths and marriages are registered with local parish priest, who for nominal fee will issue certificates as to birth, death and marital status of any member of this parish. Registration regarding persons not belonging to church is kept by County Registrars. All population information is delivered to Population Register Centre that maintains complete population information system. These certificates are accepted as legal evidence by Finnish courts.

10.05 SEALS:

Although many courts and departments use their own seals on official documents they have really no effect on legality of documents as Finnish law contains no provisions concerning seals.

11 EMPLOYMENT

11.01 LABOR RELATIONS:

Employment contracts concluded individually between employers and employees are regulated by Employment Contract Act (55/2001). Provisions of this Act are applicable unless agreed otherwise, but this Act also contains number of mandatory provisions. Act guarantees freedom of association by stating that stipulation under which either party consents to refrain from membership of association is void. In addition, Act regulates mandatorily grounds for terminating employment contracts. Employment may be terminated on either individual or financial and production-related grounds. As to collective agreements, there is Collective Agreements Act (436/1946). Disputes concerning collective agreements are settled by Labor Court (Act on the Labor Court 646/1974).

Working time is determined in Working Hours Act (605/1996) to be eight hours daily and 40 hours weekly at maximum, or upon average - 40 hours per week in 52 week period. There are number of statutes containing provisions regarding working time under special circumstances and in certain occupations. Annual overtime up to 250 hours is allowed with increased wages for overtime and Sunday work. There are special provisions concerning young employees. In accordance with Annual Holidays Act (162/2005), every employee is entitled to two days' (after one year's employment 2½ days') paid annual vacation for each month during which employee has worked for more than 14 days.

Employee participation is regulated in Act on Co-operation Within Undertakings (334/2007). Act applies to companies regularly employing at least 20 employees. In case employment is terminated on financial and production-related grounds, employer must follow procedure defined in this Act prior to deciding on termination of employment. Most important item of legislation in field of employee protection is Occupational Safety and Health Act (738/2002). Occupational safety authorities ensure that provisions of this Act are observed. Labor Council grants exceptions from provisions concerning employee protection. Protection of employee's private life and rules concerning processing and collecting of private data in employment relationship are governed by Act on Protection of Privacy in Working Life (759/2004). Act includes provisions on drug testing and camera surveillance. Act provides employers, when necessary, with opportunity to access their employees' e-mail messages, subject to specific statutory procedures, while at same time safeguarding confidentiality of employees' private e-mail messages.

See also Act on Equality between Women and Men (609/1986), as well as Non-Discrimination Act (21/2004), category Citizenship, topic Equality.

Compulsory pension insurance for employees is governed by Employee's Pension Act (395/2006), which determines, e.g., premiums to be paid by employers. Employees also pay small amounts of social security, accident insurance, and unemployment insurance contributions.

12 ENVIRONMENT

12.01 ENVIRONMENTAL REGULATION:

Finnish environmental legislation was sector-based until year 2000, when comprehensive code of environmental protection, Environmental Protection Act (86/2000), came into force. Finnish legislation concerning pollution control is now regulated in one comprehensive act.

Soil contaminant levels are regulated by Governmental Statute of evaluating polluted land and remediation needs (214/2007, as am'd) includes list of threshold and standard value for most common harmful substance concentrations.

Environmental regulation is based on administrative decisions and permits granted by authorities. Particular authority makes its decision case-by-case basis, based on general provisions and administrative guidelines. Because of Finland's membership in EU, all environmental EU directives must be implemented in Finland.

For construction of establishments, environmental permit is required in accordance with Environmental Protection Act. For water management or construction, permit is required according to Water Act (264/1961). Chemical issues are regulated in Chemicals Act (744/1989). Chemicals Act has been amended to meet requirements of European Chemicals Regulation (REACH). Furthermore, penal provisions relating hereto have been implemented into national legislation.

For construction of establishments causing notable harm to environment, assessment on impacts of environment is required. (Act on Environment Impact Assessment Procedure 468/1994). This assessment has to be annexed to environmental permit application mentioned above.

Air.

Environmental Protection Act is main rule concerning protection of air. Most essential means of air pollution control are general regulations issued by Council of State. Regulations set limitations for concentration of substance in emission. General regulations are directly binding on plant operators, importers of fuel, etc.

Waste.

Environmental Protection Act and Waste Act (1072/1993) are main rules concerning waste issues. Principles of Acts apply to preventing harm to environment from waste and to recycling of waste. Waste Act regulates waste collection, transport and treatment of waste.

Water.

Rules on water pollution control are included in Environmental Protection Act. Rules on water management are included in Water Act. New Water Act is under preparation and Government Bill will most likely be provided in winter 2008. EU Water Framework Directive has been implemented by Act on Organization of Water Management (1299/2004).

Compensation for Environmental Damage.

Act on Compensation for Environmental Damage (737/1994) is based on strict liability, reduced requirement for evidence on causality and joint responsibility.

13 ESTATES AND TRUSTS

13.01 CLAIMS:

See topic 13.03 Descent and Distribution.

13.02 DEATH:

If person dies and death appears unnatural, post-mortem examination must be held and if result of this examination still is unsatisfactory inquest must be held to ascertain cause of death.

If person, at time of disappearing, has been in accident causing imminent danger to life or in similar situation and there is no reason to believe that person has survived, petition to have person declared legally dead may be presented immediately after person has disappeared. Under other than aforementioned circumstances petition may be presented after five years have passed from date when person was last known to have been alive. However, if person, at time of disappearance was under circumstances involving danger to life or if considering circumstances related to disappearance, as well as other factors, it is highly probable that person is dead, waiting time is one year.

Petition must be filed with court which would be proper forum if person were alive. If such forum cannot be established petition may be presented to applicant's own forum.

Court summons absentee and any person who might know about former to give notice to court before certain day, fixed at least three months after summons has been published in official gazette. If court at fixed day has no information that absentee may be alive, court will declare that person is considered dead. Day of death will be fixed on day disappeared person most likely died. If that day cannot be determined, day of death will be fixed on day when five years have passed from date when person was last known to be alive.

See category 10 Documents and Records, topic 10.04 Records.

Actions for Death.

In case of death caused by criminal act, widow or child of deceased is entitled to plead in court for damages or necessary allowance, and other relatives for damages. There is no maximum or minimum rate of allowance prescribed by law but this depends on criminal's solvency and deceased's own share of guilt, inter alia.

Action must generally be taken within ten years, but if crime falls under statute of limitations later, action can take place as long as crime can be prosecuted or as long as criminal matter is pending in court.

Special stipulations concerning damages caused by motor vehicles, aeroplanes, trains, etc., in which cases liability for payment of damages might arise even if no criminal or negligent act has been committed.

Above-mentioned is also applicable to foreigners.

13.03 DESCENT AND DISTRIBUTION:

Finnish Code of Inheritance (CoI/40/1965) was partially prepared in cooperation with Swedish authorities. As result it is closely related to corresponding Swedish Code. Amendment to CoI (Act 1228/2001), which entered into force on Mar. 1, 2002, clarifies rules governing inheritances. General rule is that law of country in which deceased was domiciled at time of death will apply. However, if deceased was domiciled in another country, general rule will apply only if deceased was citizen of that country or if lived in that country for at least five years prior to one's death. If law of country of deceased's last domicile does not apply based on above, law of country of which deceased was citizen will apply, unless deceased had closer ties to country of last domicile. Testator can also, to some extent, determine applicable law through last will and testament. Amendment of CoI also includes stipulations on estate administration and distribution of estate regarding property located outside Finland.

Range of relatives entitled to succeed to property of intestate has been restricted so that cousins and more distant relatives do not have right of inheritance from intestate. If no one takes by virtue of succession, estate belongs to State.

Spouse will inherit whole estate if deceased leaves no issue. Upon death of surviving spouse, whole estate with few exceptions will be divided equally between heirs-at-law of each of spouse, but not to those heirs of predeceased who are more remote than nephews or nieces.

As regards right of succession of children, two exceptions should be noted: (a) If deceased during one's life has made one's child advancement, this shall be deducted from child's share of estate unless donor's intention was to contrary; (b) if deceased has left infant child dependent on additional means for its upbringing and education, addition to share of estate may be granted in lump sum from undivided estate.

Illegitimate child has right of succession after one's mother and her relatives, as well as after one's own descendants. If paternity of illegitimate child has been confirmed in accordance with Paternity Act (700/1975), child will also take after one's father and paternal relatives. Adopted child takes after adoptive parents as biological child.

Condition of right to claim share upon intestacy is that heir has not forfeited his right of succession.

Right of succession may become barred by time, i.e., if heir does not within ten years take any measures with view to receiving one's share of estate. Anyone who by wilful criminal act has caused death of another is precluded from deriving any benefit either from intestacy or under will of deceased.

Administration of estate may be handled by representatives themselves, or they may leave this to administrator appointed by court upon application by one of representatives. If appointed by will, executor will take possession of estate to exclusion of blood heirs, but not of surviving spouse.

Apportionment or distribution may be in form agreed by personal representatives. If representatives cannot agree on apportionment, they may apply to court for appointment of special distributor or apportioner. Distribution must always be effected by apportioner when one of representatives makes such a demand, or one of representatives is a minor or a ward of court, or if share of one of representatives has been seized. Administrator or executor may on request of representatives and without special appointment act as apportioner.

13.04 EXECUTORS AND ADMINISTRATION:

See topic 13.03 Descent and Distribution.

13.05 TRUSTS:

Finnish law does not recognize trusts as used in U.S.A.

13.06 WILLS:

Right to dispose by will belongs to: (1) person who has attained age of 18 years; (2) person who is or has been married even though he or she is younger than 18 years; (3) person who has attained age of 15 years regarding such property that has accumulated through his or her own earnings.

Will must be made in writing with two witnesses simultaneously present. Witnesses must sign will after testator has signed it or acknowledged his or her signature. Witnesses must know that they have witnessed will, but they need not know its contents. If will in case of emergency cannot be executed in such form, “will of emergency” may be made orally in presence of two witnesses, or even without witnesses, by testator's own hand. Will of emergency becomes invalid, if testator does not, within three months after state of emergency ceases, make will in manner above. All these regulations also apply to alterations and codicils.

If person leaving descendants (children, adopted children or their descendants) gives away by will so much of his or her estate that descendant's share will be less than one-half of what it would be if deceased had died intestate, descendants can bring action to invalidate will in this respect.

Legatees or executor of will must take care that will acquires legal force. This is done by serving will on legal heirs.

14 FAMILY

14.01 DIVORCE:

Grounds for Separation and Divorce.

Court can terminate cohabitation on demand of both spouses or either spouse and rule that other spouse must leave common home. Such decision is not in force more than two years.

Spouses have right to divorce after consideration period of not less than six months and not more than one year.

Divorce is possible without consideration period provided that spouses have lived separately for preceding two years.

Marriage is dissolved by court, which at same time addresses questions regarding care and education of children, duty to support and, if parties so request, decrees these issues. (Marriage Act 234/1929).

Proceedings for divorce can be taken in Finland if at least one of spouses has his or her domicile in Finland, or if party applying for divorce was previously domiciled in Finland and provided that proceedings cannot be taken in foreign country or such foreign proceedings would cause unreasonable difficulties for applicant and it is held appropriate with regard to circumstances.

Proceedings for terminating cohabitation can be taken in Finland if spouses have residence in Finland, which was intended to be home for both parties. Finnish law is applied in divorce proceedings taken in Finland.

14.02 HUSBAND AND WIFE:

Both spouses, after marriage, secure their own surnames or either of spouses may secure surname of other spouse. Spouses have equal legal rights. Each spouse has right to make contracts with third persons on his or her own behalf and are to sue and defend in courts. Spouses may make contracts between each other; as of 1992 they may give gifts to each other. In case donor becomes over-indebted in future, notice regarding gift can be made to local register office. Time for making claim for recovery in bankruptcy will, in such case, be calculated from date such notice was made.

Marriages contracted prior to Jan. 1, 1930, were governed by principle of joint ownership. Property of spouses in general belonged to them both. However, by law and by marriage settlement agreement certain property or certain types of property might belong personally to one or other of spouses (Marriage Act Apr. 5, 1889). In marriages contracted after

Jan. 1, 1930, principle of separate property governs. Property which belonged to one spouse upon entering marriage continues to belong to that spouse, and same is true as to property obtained during marriage. Spouses, upon certain conditions, are entitled to control their own property. Rule is that each spouse is solely liable for debts contracted by such spouse.

Spouses have dower right in property of each other should no direct heirs of deceased spouse exist. Surviving spouse on distribution of estate receives one-half of surplus. No dower right exists with respect to property governed by provision made in marriage settlement agreement, deed of gift or last will and testament. Spouse may lose dower right by criminal act or by conduct injurious to other spouse. Dower right may be excluded upon demand of one spouse when other has become bankrupt.

Conveyance of Property.

Spouse may not without written consent from other spouse convey or let real property, which is used entirely or mainly as home of spouses.

Neither may spouse without written consent from other spouse convey common home of spouses or chattels intended for mutual use of spouses or work equipment used by other spouse or chattels intended for personal use of other spouse or children.

If such property as defined above is sold without consent buyer must return property without compensation under certain conditions. If common home is rented equal rules apply on conveyance of rental right.

If consent is denied by other spouse without acceptable reason court may rule otherwise.

Persons intending to enter matrimony and persons married under Marriage Act (234/1929), may by agreement change property arrangement which would otherwise exist between them in accordance with provisions of law. Under earlier law, such agreement could relate to share of spouses or so-called dower right, to their joint estate, and partly concerning control of property. Under present law, it may be provided in such agreement that no dower right shall exist with respect to certain property. Such agreement must be in writing and filed with court for safekeeping.

Under main rule, each spouse is solely liable for debts such spouse has contracted during marriage or prior thereto. Exceptions are such debts as have been contracted jointly, or debts contracted by either spouse for support of family.

14.03 INFANCY:

In accordance with Finnish law, age of majority is 18. Agreements entered into by minors are invalid until age of majority is reached. There are some exceptions as regards marriage contract, means earned with own work and contract of employment. Parents or, in their absence, appointed person, act as guardian. Minors below age of 15 cannot be punished for criminal offences and have only subsidiary responsibility for damages. Up to age of 18 there is reduced penalty. Minors below age of 15 can give evidence at court only with consent of latter. See also topic 14.04 Marriage.

14.04 MARRIAGE:

Persons must have reached age of 18 to be married, unless Ministry of Justice for special reasons allows exception to age limit.

Marriage is solemnized by church or civil wedding. Prior to marriage, local register office must determine that no impediments to such marriage exist.

Freedom of marriage is restricted by impediments such as consanguinity or affinity, relationship of adoption, and former subsisting marriage.

14.05 REGISTRATION OF PARTNERSHIP:

Persons of same sex over age of 18 may register their partnership as of Mar. 1, 2002. Authorities that perform civil weddings or persons to whom register office have granted right may register same sex partnerships.

Registration grants couple same rights as marriage, if not otherwise stated. (Act on Registered Partnership 950/2001). Registration of partnership does not grant couple right to adopt children.

15 FOREIGN TRADE AND COMMERCE

15.01 CUSTOMS DUTIES:

Finland is member of EU and custom regulations of EU therefore apply in Finland. Finland is member of Customs Co-operation Council and customs tariffs are based on Brussels nomenclature.

See also topic 26.01 Treaties.

15.02 EXCHANGE CONTROL:

See topic 15.03 Foreign Exchange Regulations.

15.03 FOREIGN EXCHANGE REGULATIONS:

Summary of Prevailing Exchange Control Regulations.

Since Jan. 1, 2002, Finland is part of [Euro] area. Bank of Finland operates in accordance with guidelines and under supervision of European Central Bank. There are no exchange control regulations in Finland. In general, there are no restrictions concerning foreign exchange transactions.

Import of Goods.

Finland is member of EU and import regulations of EU therefore apply in Finland.

Export of Goods.

Export regulations of EU apply in Finland. In addition, there are restrictions concerning export of military material and products that could be used for military purposes.

15.04 FOREIGN INVESTMENTS:

See topic 4.01 Aliens.

15.05 FOREIGN TRADE REGULATIONS:

See topic 15.03 Foreign Exchange Regulations.

16 HEALTH

16.01 PHARMACEUTICAL REGULATIONS:

National Agency for Medicines (NAM) is main regulatory authority for medicinal products. NAM's functions include supervision of pharmaceuticals and monitoring manufacture, importation, distribution and sale of pharmaceutical products. It is governed by Ministry of Social Affairs and Health. Pharmaceuticals cannot be sold to public or otherwise put in circulation without marketing authorisation from NAM or EU institution and NAM grants wholesale licenses needed for importation of medicinal products. Pharma Industry Finland (PIF), voluntary organization, monitors pharmaceutical establishments and especially sales promotion of medicinal products with view to improving public confidence in industry.

Only pharmaceuticals defined in Medicines Act (395/1987 as am'd) can be advertised or marketed as medicines. If pharmaceutical is advertised in breach of regulations, NAM can prohibit continuation or repetition of that advertising and may order correction to be issued. These actions can be backed up by conditional fine. Marketing authorization is valid for five years. It can be renewed by application for subsequent period of five years in case that NAM, based on medicines safety reasons, so requires. Otherwise, and always after second fixed-term period, authorization is valid until further notice. Pharmaceutical products sold outside pharmacies have been widened to include nicotine compensation self-care products in addition to certain herbal medicinal, homeopathic and anthroposophic products through change in Medicines Act in 2006.

Detailed regulations on manufacture, import and wholesale of medicines as well as regulations on pharmaceutical marketing and clinical trials are set out in Medicines Decree (693/1987 as am'd) and in various administrative regulations of NAM. Medicinal products can only be manufactured on industrial scale in pharmaceutical plants with approved production facilities and prior permission (manufacturing license) from NAM. Licenses may have conditions attached to them. Licenses are granted for indefinite period. NAM has issued regulations in relation to packaging and labeling of medicinal products. Labels and leaflets must be at least in Finnish and in Swedish. EU Product Liability Directive was implemented in Finland by Product Liability Act (694/1990 as am'd) and has been amended to apply also to pharmaceuticals in 1993. Act establishes system of compensation for damage caused by defective products, covering personal injury and damage to property (which, at time of damage, was primarily in private use). Pharmaceutical industry has also established together with insurance companies Medicines-Related Injuries Insurance which is voluntary scheme regarding medicines distributed for consumption in Finland. Most personal injuries caused by use of medicine are covered by this system.

Medicines Act includes provisions on generic substitution. Pharmaceutical product sold in pharmacies must be substituted with least expensive product containing same amount of same active ingredient in accordance with NAM regulations, unless doctor or patient forbids substitution. Doctor may forbid substitution only on medical or treatment-related grounds. Government has proposed that Finland should implement reference price model in reimbursement of pharmaceuticals in 2009. This change would supplement generic substitution and may also affect patent protection of number of medicinal products if line drawn in 2008 proposal is followed.

17 IMMIGRATION

17.01 ALIENS:

Nationalisation, acquisition and loss of Finnish citizenship are determined in Nationality Act (359/2003). Foreigners may apply for Finnish citizenship if they are of legal age (i.e. have reached age of 18), have lived in Finland for significant length of time, six years without interruption as rule, before making application, have lived respectable life, have secure income and have adequate skills in Finnish or Swedish. Act also contains rules regarding dual citizenship.

Only Finnish citizens may vote in general and presidential elections in Finland. Permanently residing foreigners may vote in municipal elections. EU and Nordic countries' citizens may vote in municipal elections and EU elections provided, e.g., that they have had their home municipality in Finland for 51 days prior to election. Certain public offices require that office holder is Finnish citizen. Some property rights and business occupations are also supervised and restricted from foreigners. It can be stated that foreigners residing in Finland are divided in two categories, i.e. EU/EEA and non-EU/EEA nationals of which EU/EEA nationals often enjoy similar rights to Finnish citizens.

Corporations Owned or Controlled by Aliens.

Act on Monitoring of Foreigners' Acquisitions of Shares in Finnish Companies (1612/1992), when national interests require, restricts aliens' and foreign corporations' gaining of power in important companies. National interests are defined as: (a) securing of national defence; (b) prevention of serious economic, public or environmental difficulties; and (c) public order as well as safety and health of citizens. Subject to supervision and restrictions are only companies of substantial size. If company is reckoned to be important company and exceeds limits of size, as set out by law, permission for acquisition from Ministry of Commerce and Industry is required.

As to right of inheritance, see topic 13.03 Descent and Distribution.

See also categories topic 2.04 Joint Stock Companies, 3.02 Commercial Register, 13.02 Death, subhead Actions for Death.

17.02 IMMIGRATION:

Entry into, residing, and working in Finland as well as asylum issues are regulated in Aliens Act (301/2004) and Schengen agreement and convention. Schengen countries have agreed on what countries are free of visa requirements and what countries are under visa obligations. Visas are valid for temporary residence not exceeding three months. Of EU member states, Great Britain and Ireland are not members of Schengen Convention and Cyprus, Romania, and Bulgaria do not yet apply Convention in full which means that frontier supervision exists between borders of these states and Finland.

Non-EU/EEA-citizens need residence and/or work permit in order to reside and work in Finland. Freedom of movement enables EU/EEA and Swiss citizens to move freely within EU/EEA territory and Switzerland if purpose is to work, look for work, set up enterprise, for self-employment, or studies. Even other grounds will be accepted if person concerned can finance his stay. Citizens of EU/EEA and Switzerland may freely enter, reside, and work in Finland without visa and residence permit for three months. For longer periods, right of residence must be registered at local police in Finland. Citizens of Nordic countries (Sweden, Norway, Denmark, and Iceland) may freely enter Finland and reside there without residence permit and work as main rule without work permit. If they move to Finland to stay longer than six months, they must register at local register office in accordance with inter-Nordic agreement on population registration. There are no special residences or work permits for temporary entry on basis of belonging to certain occupational group (e.g. industrial personnel).

18 INSURANCE

18.01 INSURANCE COMPANIES:

Supervision.

Insurance Supervision Authority (Mikonkatu 8, POB 449, 00101 Helsinki, Finland, Tel. +358 9 415 5950, Fax +358 9 415 59660, www.vakuutusvalvonta.fi) started in 1999 under supervision of Ministry of Social Affairs and Health. Insurance Supervision Authority's task is to supervise and inspect insurance and pension institutions and other agencies operating in insurance sector.

Consumer Protection.

Finnish insurance sector has contractual consumer organization which is joint body of consumer authorities, organisations and insurers. Finnish Insurance Ombudsman Bureau (Malminkatu 34, 00100 Helsinki, Tel. +358 9 6850120, Fax +358 9 68501220) gives guidance and advice to customers and settles disputes between insurers and policyholders. There is also supervisory board and Finnish Insurance Complaints Board in same organization.

Establishing Insurance Company.

Ministry of Social Affairs and Health grants license for Finnish insurer to establish insurance company in Finland if applicant fulfils certain conditions, e.g. insurer must obey sound and cautious business principles, members of upper management must be professional, and insurance company must have basic capital assets required by law.

Due to third insurance directive of EU (92/49/EEC), insurers can offer services and establish branches in Member States of European Economic Area (EEA) on basis of single license issued by their home Member State. At moment, (7/2007) there are 20 foreign insurance branches in Finland. Foreign insurers have to observe Finnish mandatory provisions, e.g. Insurance Contracts Act (543/1994) in consumer relations. Insurer's home state is responsible for economic supervision of insurers that offer their services to other Member States of EEA but Finnish authorities supervise marketing, insurance terms and conditions in Finland.

Insurers whose home state is outside of EEA must apply for license from Finnish Ministry of Social Affairs and Health if they wish to offer insurance services in Finland. Finnish Insurance Supervision Authority is responsible for supervision and inspection of these insurers in Finland.

Insurance Legislation.

Finnish insurance legislation has undergone many changes since Finland joined EEA and EU. Harmonisation of insurance sector has caused changes to among others Insurance Companies Act (1062/1979) and Foreign Insurance Companies Act (398/1995). Insurance Contracts Act (543/1994) (http://www.vakes.fi/asp/system/empty.asp?P=954&VID=default&SID=647696500222107&S=2&A=closeall&C=25345) is mandatory. It is applied to insurance of person and nonlife insurance.

In accordance with Insurance Companies Act insurance companies are authorized to provide financial services other than insurance products. This amendment entered into force on May 15, 2001.

Statutory Pension System.

Finland has statutory earnings-related pension scheme. Retirement age is flexible (between 62 and 68 years) and rewards those who continue work between 63 and 68 with accelerated accrual of pension rights at rate of 4.5% per year (rate is 1.5% until age of 53 and is 1.9% in following ten years). Pensions are calculated on basis of earnings during entire work history and pension accrues from age 18. Pension can exceed 60% of wage. (For additional information on topic, please see site of Central Pension Security Institute: http://www.etk.fi/default.asp?lang=2.)

Insurance Economy.

In 2007, premiums written by nonlife insurers decreased slightly, premium level still being at [Euro]3.3 billion and statutory pension premiums increased by 4.2% to [Euro]9.1 billion, following growth in recent years. Life and personal pension insurance premium income shows decrease of 8.5%, premium income now being [Euro]2.8 billion.

19 INTELLECTUAL PROPERTY

19.01 COPYRIGHT:

Finland is signatory to Berne Convention, Rome Convention, WIPO Treaties, and TRIPS. Works of Finnish origin are protected by Copyright Act (404/1961 as am'd), pursuant to which author of copyright protected work has within certain limits exclusive right to exploit one's creation commercially. In addition, copyright confers protection to author in form of so-called moral rights also attached to copyright protected work. Protection is granted upon mere creation of “literary or artistic work” as specified in Act. No registration or other such formal procedure is required or even possible.

Literary or artistic work refers, inter alia, to fictional or descriptive, either written or oral presentations, musical, dramatic or cinematographic works, works of fine art, architecture, artistic handicraft, industrial art, computer code or works expressed in some other manner. Translations, adaptations and compilations of original works may also merit copyright protection. Copyright Act further makes specific provisions for rights of performing artists, record and film producers, radio and television organizations and photographers, so-called neighboring rights.

Author may assign commercial rights (i.e. other than moral rights) to his or her work to another party either in whole or in part. However, if not agreed to contrary, assignee of such rights may not alter works nor is it allowed to reassign received rights further to third party. Copyright of computer program, database and any related work created while performing duties under employment contract is automatically transferred to employer of author.

Author's rights after his or her death pass to estate and further to distributees of estate by virtue of law.

Protection granted under copyright remains in force for lifetime of author and thereafter for period of 70 years from end of year in which author passed away.

Effective technological measures safeguarding works protected under Copyright Act may not be circumvented, should measures be established or authorized by author of work to protect work when making it available to public.

See also topic 3.04 Information Technology, Internet and New Media.

19.02 PATENTS:

Under Patents Act (550/1967), patent can be granted, upon application, for invention which is new compared to what is known prior to date when application for new patent is filed, involves inventive step and is capable of industrial application. Written applications are to be filed with National Board of Patents and Registration of Finland (Arkadiankatu 6 A, PO Box 1140, FI-00101, Helsinki, Tel. +358 (0)9 6939 500, Fax: +358 (0)9 6939 5328, http://www.prh.fi), which processes each application as to its inventiveness and novelty before registration is granted.

Application must contain description of invention, with drawings if necessary, detailed claim(s) for scope of protection and summary of description and claim, all either in Finnish or Swedish. Applicant must also pay application fee. Foreign inventors, who are not domiciled in Finland, must appoint patent representative residing in EEA.

When application complies with requirements of patentability and procedural provisions, application must be accepted upon payment of printing fee by applicant. Thereafter, public notice must be made on acceptance of application. Patent is granted on date of public notice. Objections against granted patent can be made by filing written notice to that effect to patent authority within nine months from date of grant of patent.

Patent may be maintained in force, through due payment of annual patent fees, for period of 20 years from date of filing of application. For pharmaceutical patents Supplementary Protection Certificate is available for additional protection up to five years.

Finland is party to European Patent Convention, Patent Co-operation Treaty, TRIPS and Patent Law Treaty.

Utility Model.—New inventions can be protected also with utility model “petty patent”. Utility model is granted by National Board of Patents and Registration of Finland. Right is in force for limited period of time, generally ten years from date of filing of application. (Act on Utility Model Rights 800/1991 as am'd).

Plant Breeders' Right.—Breeder of plant variety or anyone to whom breeder's variety rights have been assigned (variety holder) may register exclusive right to professional exploitation of variety as provided in Act on Plant Variety Rights (789/1992 as am'd). Registration authority is Plant Variety Board which maintains plant variety register. Right may be maintained in force, through due payment of annual patent fees, for period of 25 years from date of acceptance of application. For some species protection time can be 30 years.

Mask Works. Also integrated circuits may be registered. Registration authority is National Board of Patents and Registration of Finland. Right is in force for period of ten years from year in which exclusive right began. (Act on Exclusive Right in Layout-Design, [Topography] of Integrated Circuit 32/1991 as am'd).

Industrial Design Rights.—Designs may be protected in accordance with Registered Designs Act (221/1971 as am'd) and also as Community design. Registration authority is National Board of Patents and Registration of Finland. Maximum term of protection is 25 years.

19.03 TRADEMARKS:

Trademark right under Trademarks Act (7/1964 as am'd) can be obtained based on any symbol capable of being represented graphically either through registration of mark with National Board of Patents and Registration of Finland or simply by establishment of mark through actual use in Finland. Trademarks Act further provides provisions on trademark protection under Madrid Protocol procedure or through registration as Community trademark.

Protection through registration involves payment of application fee and is subject to ex officio review of absolute and relative grounds for refusal by Trademark Register of National Board of Patents and Registration. Prerequisite for registration is that mark possesses sufficient distinctiveness and does not fall foul of other criteria for registration.

Protection under trademark confers exclusive right to use trademark starting from filing date of application. Registration procedure takes average about one year. Protection against use of trademark by others is, however, limited to situations where confusion is likely to arise as to origin of goods or services offered under trademarks concerned. Standard of confusion is determined on basis of whether marks themselves are likely to be confused with each other and whether they are used for same or similar type of goods or services. Therefore, even identical marks that do not involve similar goods or services are not considered confusing within meaning of trademark law. Exception to this general rule exists for trademarks considered to have particularly widespread reputation and well-known position.

Trademark registration is valid for period of ten years from date of registration and may be renewed for consecutive ten-year periods for unlimited number of times. On other hand, if trademark has been unused for period of five years, registration may be cancelled upon claim to that effect in District Court of Helsinki by third party experiencing harm from registration. Rights to established trademark may also be lost if mark has since its registration or establishment lost its distinctiveness or become misleading or violates law or public order.

Trade Names.—See topics 2.04 Joint Stock Companies, subhead Trade Name of Company, 2.05 Partnerships, 3.04 Information Technology, Internet and New Media, subhead Domain Names.

20 LEGAL PROFESSION

20.01 ATTORNEYS AND COUNSELORS:

Party to proceedings before court usually uses services of counsel, even though this is strictly speaking not required by Finnish law. Only advocate or otherwise honest, suitable and competent person with full legal capacity is qualified to function as attorney or trial counsel.

Finnish Bar Association: Address: Simonkatu 12 B, 00100 HELSINKI, telephone +358-9-686 6120, fax +358-9-6866 1299.

Qualifications of Advocate.

Only members of Finnish Bar Association are entitled to use professional title “advocate”. Advocate must be citizen of Finland or another EEA (European Economic Area) Member State who has reached age of 25 and completed Master of Laws (LL.M.) degree in Finland or has completed Master of Laws degree elsewhere and received decision from National Board of Education according to Act on enforcement of professional competence (1093/2007) or Act on competence by abroad completed university studies (531/1986) on qualifications for assignment that requires Master of Laws degree. He must be known to be person of integrity and have minimum of four years experience in legal profession or other judicial duties. He also has to pass special examination in advocacy law given by Finnish Bar Association. Advocate must be independent and autonomous in relation to government and all other quarters with exception of his client.

Advocate from another member state of EU, who regularly practices profession of advocate in Finland under professional title of his home member state, may enter EU register of advocates.

EU advocate may be admitted as member of Finnish Bar Association three years after he has been entered in EU register. EU advocate must be able to prove that he has practiced profession of advocate regularly in Finland for at least three years.

Person qualified for profession of advocate in another EEA state may also be accepted as member if he passes examination given by Faculty of Law of University of Helsinki and conferring qualification for duties requiring master of laws degree on Finland. Passing of special examination in advocacy law is also required.

Advocates' Duties and Their Supervision.

Advocate is to fulfill his duties in accordance with law and code of professional ethics honestly and conscientiously in all activities. Outlines of these universal rules are included in 1958 Advocates Act (496/1958) and in rules of Finnish Bar Association. It is obligation of Board of Bar Association to supervise and ensure that advocates fulfill their duties in accordance with professional ethics. Supervision and responsibility are enforced through disciplinary actions.

21 MINERAL, WATER AND FISHING RIGHTS

21.01 MINES AND MINERALS:

(Mining Act 503/1965).

Natural mineral resources are conceded to claimers, i.e., to finders of mineral resources. Legislation is thus built on claiming-system and not on concession-system as in several other countries.

Prospector must announce one's claim to local bailiff and after this, file it within one year with Ministry of Trade and Industry. Concession will be granted if formal conditions are fulfilled.

Individual or corporation domiciled within European Economic Area may search, claim and use mineral findings. Individual or corporation domiciled outside of European Economic Area can be granted concession by Ministry of Trade and Industry.

Note: New Mining Act is under preparation.

22 MORTGAGES

22.01 CHATTEL MORTGAGES:

See topic 8.10 Pledges.

22.02 MORTGAGES:

Real estate liens are used as securities for debt. Real estate lien may be raised over real estate, share or parcel of real estate, lease, and another usufruct on real estate, as provided in Finnish Code of Real Estate (540/1995). Real estate lien is raised by creating mortgage over real estate or other property and handing mortgage instrument over to creditor. Contents of lien commitment are regulated by Finnish Commercial Code (3/1734).

Only titleholder who has last applied for registration of his/her title can apply for mortgage over real estate. Written mortgage application is addressed to local district court. Application indicates property to be mortgaged and amount of mortgage. Legal effects of mortgage begin on day when application has become pending. When mortgage has been created, applicant is issued mortgage instrument as certificate of mortgage.

23 PROPERTY

23.01 ABSENTEES:

Interest of absentee in matters concerning one's property and with regard to rights as an heir, legatee or beneficiary is attended to by trustee appointed by court. This applies also to cases in which heirs to deceased are unknown or uncertain. See also topic 13.02 Death.

23.02 CONVEYANCES:

See topics 23.04 Deeds and 3.10 Sales.

23.03 CURTESY:

Does not exist in Finland.

23.04 DEEDS:

Generally, juridical acts may be performed either orally or in writing. Written form is necessary for legal effect in transfers of real property, ante-nuptial agreements, partnership or joint stock company agreements, etc. See topic 14.02 Husband and Wife, subhead Conveyance of Property; also topic 3.10 Sales.

23.05 DOWER:

See topic 14.02 Husband and Wife.

23.06 POWERS OF ATTORNEY:

Form of general power of attorney is open power of attorney. It is not necessary to specify purpose for which power of attorney is issued, and therefore, it is sufficient to use wording: “open power of attorney.” In court proceedings, attorneys who are members of Bar Association of Finland require power of attorney only if court so orders.

23.07 REAL PROPERTY:

Law of Finland draws sharp distinction between real property and personal property. This distinction is important, for instance, in inheritance, matrimonial and tax law matters, in questions concerning property under mortgage, form of sale, etc. Real property comprises pieces of real estate, lots, shares of real estates, common lands and waters. Components and appurtenances of real property, such as growing timber and chattels which are attached to buildings are included in definition of real property.

24 TAXATION

24.01 ADMINISTRATION:

Direct taxation is carried out by regional tax offices. Appeals against their decisions and proceedings can be made to higher authorities and finally to Supreme Administrative Court. Indirect taxation, e.g. excise duties, on other hand, is carried out by several authorities.

State income tax, municipal tax, church tax, pension premiums, insurance premiums, unemployment insurance premiums and health insurance premiums are collected during tax year through prepayment system. Employer is obliged to withhold these taxes from all wages paid to employees. In connection with these withholdings, employer must pay to state employer's social security premium.

24.02 CORPORATE TAXES:

See topic 24.05 Income Tax.

24.03 EXCISE DUTIES:

Main excise duties are those on liquid fuels, alcohol and alcoholic beverages and manufactured tobacco. In addition, excise duties are payable on soft drinks, gas, electricity, etc.

24.04 GIFT TAX:

Gift tax is payable to state on progressive rate. Rate is dependent upon consanguinity between parties concerned.

24.05 INCOME TAX:

National income tax is most important of direct taxes.

Taxation of individuals is governed by Income Tax Act (1535/1992 as am'd). Taxable earned income of individuals is determined in accordance with person's net income. However, individuals are entitled to some special deductions. Married persons are taxed separately. Gains on sale of real estate and personal movables are taxed as capital income according to fixed rate of 28%. Gains on selling ones' own dwelling are tax exempt under certain conditions. Total amount of marginal taxation for individuals in Finland may amount to maximum burden of approximately 60% of income earned during year depending on municipality.

Corporate income taxation is governed by Act on Taxation of Business Income (360/1968 as am'd). This law contains broad notion of income and all costs relating to procurement of income are deductible. In principle, all realised capital gains are taxable in net corporate result at fixed rate of 26%. However, capital gains gained by company from sales of shares are under certain condition exempt from tax. Losses are deductible to extent that corresponding gain would be taxable. Certain provisions of Income Tax Act are also applicable to corporations.

In accordance with Act on Taxation of Shareholders of Controlled Foreign Companies (1217/1994), under certain circumstances income incurred by CFCs, resident in tax haven countries, can be taxed in Finland as income of their Finnish shareholders.

Tax consequences on individuals depend on type of company paying dividend. Dividends paid out to another company are mostly exempt.

Local income tax is proportional tax collected from every individual. Tax rate varies from 16% to 21%.

Church tax is imposed on basis of taxable income in local taxation. Tax rate is 1-2.25% payable by individual members of church.

24.06 PROPERTY TAXES:

Real estate tax is levied upon owning of real estate, with particular exceptions mentioned by law. Real estate is defined as any independent registration unit land owning. Law also applies on buildings situated on real estate. Tax percentage is decided and paid to municipality in which real estate is situated. Percentages vary between 0.50% and 3.0% of tax value of real estate. Limits of percentages are lower for housing (0.50%).

24.07 VALUE ADDED TAX:

Standard rate of VAT is 22%. Reduced tax rate of 8% is applied to, e.g., books, medicines, passenger transport services, accommodation services and services enabling sporting activities. Reduced tax rate of 17% is applied to food products.

24.08 WEALTH TAX:

Wealth Tax Act has been abolished on Jan. 1, 2006 and, therefore, there is no net wealth tax assessed on assets from beginning of 2006.

25 TRANSPORTATION

25.01 MOTOR VEHICLES:

Motor vehicle, before its use, must be approved at proper inspection, registered within specified time and provided with identifying license plate.

All drivers must have drivers' license. Licensees must be 18 years old, complete training and pass theoretical and practical tests.

Owners of registered motor vehicles must have statutory Third Party Motor Insurance with insurance company licensed to carry out such insurance business in Finland. Compensation is paid out from such insurance for damages or injuries arising from use of motor vehicle in traffic regardless of whether or not any personal liability is involved.

(Decree on Vehicle Registration 1598/1995 and Traffic Insurance Act 279/1959).

25.02 SHIPPING:

Finnish Maritime Code (674/1994) is result of co-Nordic legislation and is mix of Hague-Visby and Hamburg rules.

Vessels are considered Finnish and entitled to use Finnish flag if Finnish national or Finnish registered corporation owns more than 6/10 of vessel.

All Finnish merchant vessels of at least 15 meters length must be entered into Register of Ships.

Master is legally competent to bind ship owner in matters concerning maintenance and operation of vessel.

Owners can limit their liability pursuant to general provisions on limitation in c. 9 of Maritime Code, which are based on Convention on Limitation of Liability of Maritime Claims 1976. Code also contains detailed provisions on carrier's liability in connection to carriage of goods and carriage of passengers. Period of liability for damage to or loss of goods is period during which goods are in custody of carrier.

Certain claims are secured by lien on ship and cargo by law. Those claims (e.g. wages, salvage awards, average contribution etc.) are enumerated in Code.

26 TREATIES AND CONVENTIONS

26.01 TREATIES:

Finland has entered into several bilateral and multinational treaties and conventions.

Finland has acceded inter alia to following treaties concerning legal assistance: Convention on Civil Procedure (Mar. 1, 1954, Hague), Convention on Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters (Nov. 15, 1965, Hague), Convention on Settlement of Investment Disputes between States and Nationals of other States (Mar. 18, 1965, Washington), Convention on Taking of Evidence Abroad in Civil or Commercial Matters (Mar. 18, 1970, Hague), Council Regulation (EC) No. 1206/2001 of 28 May 2001 on cooperation between courts of Member States in taking of evidence in civil or commercial matters, Agreement between Finland, Denmark, Iceland, Norway and Sweden on Mutual Legal Assistance in Service and Taking of Evidence (Apr. 26, 1974, Copenhagen), Council Regulation (EC) No. 1348/2000 of 29 May 2000 on service in Member States of judicial and extrajudicial documents in civil or commercial matters.

Finland is party inter alia to following treaties concerning recognition and enforcement of foreign decisions: Convention on Recovery Abroad of Maintenance (June 20, 1956, New York), Nordic Convention on Recovery of Maintenance (Mar. 23, 1962, Oslo), Convention concerning Recognition and Enforcement of Decisions relating to Maintenance Obligations towards Children (Oct. 2, 1973, Hague), Convention on Recognition and Enforcement of Decisions relating to Maintenance Obligations (Oct. 2, 1973, Hague), Convention on Recognition of Divorces and Legal Separations (1 June 1970, Hague), Nordic Convention on Recognition and Enforcement of

Civil Judgments (Oct. 11, 1977, Copenhagen), Convention on Recognition and Enforcement of Decisions concerning custody of Children and on Restoration of Custody of Children (Luxembourg May 20, 1980), Convention on jurisdiction and enforcement of judgments in civil and commercial matters (Sept. 16, 1988, Lugano), Council Regulation (EC) No. 44/2001 of Dec. 22, 2000 on jurisdiction and recognition and enforcement of judgments in civil and commercial matters, Council Regulation (EC) No. 2201/2003 of 27 Nov. 2003 concerning jurisdiction and recognition and enforcement of judgments in matrimonial matters and matters of parental responsibility, Regulation (EC) No. 805/2004 of European Parliament and of Council of 21 Apr. 2004 creating European Enforcement Order for uncontested claims.

Finland is also party to Convention on Recognition and Enforcement of Foreign Arbitral Awards (June 10, 1958, New York).

Finland has ratified agreement on European Economic Area. Agreement has come into force Jan. 1, 1994.

Since Jan. 1, 1995 Finland has been member of EU and therefore EU law applies in Finland.

Tax Conventions.

Tax conventions for avoidance of double taxation exist between Finland and following countries: Argentina, Armenia, Australia, Austria, Azerbaijan, Barbados, Belgium, Bosnia-Herzegovina, Brazil, Bulgaria, Canada, China, Croatia, Czech Republic, Denmark, Egypt, Estonia, France, Germany, Great Britain, Greece, Hungary, Iceland, India, Indonesia, Ireland, Israel, Italy, Japan, Republic of Korea, Kyrgyzstan, Latvia, Lithuania, Luxembourg, Macedonia, Malaysia, Malta, Mexico, Montenegro, Morocco, The Netherlands, New Zealand, Norway, Pakistan, Philippines, Poland, Portugal, Romania, Russia, Serbia, Singapore, Slovak Republic, Slovenia, South Africa, Spain, Sri Lanka, Sweden, Switzerland, Tanzania, Thailand, Turkey, Ukraine, United Arab Emirates, USA, Uzbekistan, Vietnam, Republic of Zambia.

There are also agreements on death duties and gift taxes with several countries.

In 1955, Finland's application for membership in United Nations was accepted. Finland joined in 1950 General Agreement on Tariffs and Trade (GATT) and in 1961 became associated member of European Free Trade Association (EFTA). In 1969 Finland joined the OECD.

International Sale of Goods.

United Nations Convention on Contracts for the International Sale of Goods, entered into force Jan. 1, 1989. See topic 3.10 Sales.

1
FRANCE LAW DIGEST

—Scope —

Revised for 2006 edition by

COUDERT BROTHERS, New York City, and COUDERT FRÈRES, Paris.

(C. C. indicates Civil Code; C. civ.—Code civil; Com. C.—Commercial Code; C. C. P.—Code of Civil Procedure; C. G. I.—General Code of Taxes; C. O. J.—Judicial Code (“Code de l'organisation Judiciaire”); C. P. I.—Code of Intellectual Property; C. T.—Labor Code; N.C.P.C.—New Code of Civil Procedure; NRE—New Economic

Regulations.)

France is a member of EU. See also European Union Law Digest.

Note: This Digest not updated for 2007 and 2008 editions.

1 INTRODUCTION

1.01 CURRENCY:

In France fundamental unit of currency is EURO, which is divided into 100 centimes.

Decree (arrêté) dated Jan. 10, 2003, implementing European Directive 2000/46, introduced concept of electronic money under French law, which is monetary value issued by specific institutions, accepted as means of payment and stored on electronic device.

1.02 GOVERNMENT AND LEGAL SYSTEM:

The "Fifth Republic."

Present constitution of France was approved by referendum held on Sept. 28, 1958, and promulgated on Oct. 4, 1958. Institutions created form what is called "Fifth Republic." Constitution was amended by constitutional law of June 4, 1960 in order that Member States of Community could, by agreement, become fully independent, while still remaining in Community. Subsequent to this law all former Autonomous Republics became independent but remained connected with France through Cooperation Agreements.

Territory.

French Republic now comprises: (a) Metropolitan France including Corsica (b) Overseas Departments (Guyane, Guadeloupe, Martinique, Réunion, St. Pierre et Miquelon) (c) Overseas Territories (French Polynesia [French, Southern and Antarctic Territories], Wallis and Futuna). Mayotte Island enjoys special status of territorial collectivity ("collectivité territoriale"). Organic Laws No. 99-909 and No. 99-910 of Mar. 19, 1999 transformed status of New Caledonia Island from overseas territory to overseas territorial collectivity. Law No. 2000-1207 of Dec. 13, 2000 provides for possibility for Guadeloupe, Guyana, Martinique and Réunion to have, in future, their own institution.

European Union.

New Arts. 88.1 to 88.4 were added to Constitution by Constitutional Law No. 92-55 of June 25, 1992, defining relationships between European Union and France. Constitutional Law No. 99-49 of Jan. 25, 1999 modified Arts. 88.2 and 88.4 to allow implementation of Amsterdam Treaty.

Cooperation agreements varying in scope and content have been concluded with following countries: Burundi, Cameroun, Central African Republic, Congo, Zaire, Ivory Coast, Benin, Gabon, Guinea, Burkina-Faso, Mali, Mauritania, Niger, Ruanda, Senegal, Chad, Togo, Malagasy Republic, Tunisia, Morocco, Turkey, Lebanon, Pakistan, Armenia, Argentina, Latvia, Brazil, Venezuela, Colombia, China, Qatar, Chile, Dominican Republic, Bolivia, Mexico, Paraguay, Vietnam, Egypt, South Africa, Uruguay, Botswana, Hungary, Iraq, Malaysia, Thailand. Other cooperation agreements have been entered into with newly independent countries such as Ukraine, Uzbekistan, Slovenia, Georgia, Macedonia, Turkmenistan, Kazakhstan and Russian Federation.

Political Rights.

National sovereignty belongs to French people and is exercised by votes of representatives of people and by referendum. (Art. 3). All French citizens of both sexes who have reached 18 years of age enjoy civil and political rights and qualify for electoral franchise, under conditions determined by law. Subject to reciprocity, citizens of European Union residing in France qualify for electoral franchise and eligibility in local (town) elections under conditions provided by EU Treaty. Such citizens cannot be elected as mayor or deputy mayor and cannot participate in election of senators. (Constitutional Law of 25 June 1992).

President of Republic is elected by universal direct suffrage. Constitutional Law No. 2000-964 of Oct. 2, 2000 modifies duration of office of President of Republic as of next elections (i.e. 2002), he/she will be elected for five years. In case of vacancy of presidency or disability of President, his functions are temporarily exercised by President of Senate with exception of powers under Arts. 11 and 12 of Constitution. President of Republic appoints Prime Minister and, upon proposition of Prime Minister, other members of government. (Art. 8). He presides over Council of Ministers (Art. 9), Superior Council of Judiciary (Art. 65) and Superior Councils and Committees of National Defense (Art. 15). He is chief of Armed Forces. (Art. 15). He can exercise right of pardon. (Art. 17). He negotiates and ratifies international treaties, some classes of which require prior legislative approval. (Arts. 52 and 53). He promulgates laws adopted by Parliament (Art. 10) and signs ordinances and decrees adopted by Council of Ministers (Art. 13).

After having taken advice of Prime Minister and of Presidents of both Houses of Parliament, President of Republic may dissolve National Assembly. General elections must take place not less than 20 nor more than 40 days after dissolution. Second dissolution cannot take place within one year from general election. (Art. 12).

Upon proposition of government or of both Houses of Parliament, President may submit to approval by referendum laws concerning organization of public authorities, modification of Nation's economic and social policy along with public services concerned, approval of agreements with Member States of Community or ratification of treaties. (Art. 11). Laws authorizing ratification of treaties relating to enlargement of EU must be submitted to approval by referendum. (Art. 88-5).

In case of serious and immediate threats to institutions of Republic, to independence of nation, to integrity of its territory or to fulfillment of its international commitments, President of the Republic may assume emergency powers. (Art. 16).

The government consists of Prime Minister and Ministers. Members of government cannot be, at same time, members of Parliament or national representatives of business or professional organizations. They cannot hold other public office and cannot engage in business or professional activities. (Art. 23). Newly appointed ministers must provide statement of their patrimonial situation. (Law of 8 Feb. 1995). Members of government have access to both Chambers of Parliament and must be heard when they request it. (Art. 31).

Prime Minister directs activity of government. He is responsible for National Defense, ensures execution of laws and appoints all civil and military officials. (Art. 21).

National Assembly may pass motion of censure on government. Such motion can be moved only if endorsed by at least one-tenth of membership of Assembly and can be adopted only by vote of majority of membership. If motion is rejected, its signatories cannot renew it in course of same session, except for case referred to in following paragraph. (Art. 49).

Prime Minister, after consultation with Council of Ministers, can request vote of confidence from National Assembly on program of government or on statement of general policy or on passing of law. In latter case, law is deemed to have been adopted if motion of censure is not moved within 24 hours and adopted, as indicated in foregoing paragraph. (Art. 49).

Parliament is composed of two Houses: National Assembly and Senate. (Art. 24). Pursuant to reform dated Aug. 4, 1995, parliament meets for nine-month session, beginning on first working day of Oct. and ending on last working day of June. There are maximum of 120 working days, although supplementary days may be added. It is called “session unique”. Organic Law No. 2000-294 of Apr. 5, 2000 establishes incompatibilities between some electoral mandates (deputy or senator cannot be, at same time, representative at European Parliament) and limits possibility to fulfil several electoral mandates simultaneously.

National Assembly is elected on territorial basis, by universal and direct suffrage. (Art. 24). If no candidate in constituency has absolute majority in first round, second round is held one week later and candidate with greatest number of votes is elected. All elected representatives (“députés”) must provide “Commission for financial transparence of political life” with affidavit regarding their financial situation and patrimony. (Organic Law of 19 Jan. 1995). Decree dated Mar. 4, 1996, pursuant to law of Mar. 11, 1988, sets at FRF 526,500,000 total amount of public financial support granted to various parties regarding elections to National Assembly.

Furthermore, Law dated Apr. 10, 1996 prohibits candidate to be member of association contributing to financing of his campaign. (This rule also applies to elections of “Conseillers Généraux” and “Conseillers Municipaux”.)

Senate consists of senators, elected by indirect suffrage, for term of nine years, one-third of its membership being renewed every three years. Law No. 2000-641 of July 10, 2000 modifies mode of elections of senators. Senate has no veto power since Assembly can always overrule it on second hearing.

Parliament meets every year in one ordinary session which begins first working day of Oct. and finishes last working day of June, and its duration cannot exceed 120 days. (Art. 28).

Extraordinary sessions may be summoned at request of Prime Minister or of majority of members of National Assembly. In latter case, duration of session cannot exceed 12 days. (Art. 29).

Parliament exercises legislative power defined extensively in Art. 34 of Constitution. All other matters belong to Executive Branch and are determined by governmental decrees. (Art. 37). Law and governmental decrees may contain temporary provisions of experimental nature. (Art. 37.1 created by Law of Mar. 29, 2003).

The Judiciary.

Constitution provides for Superior Council of Judiciary (Art. 64) and establishes principle that judges shall not be removable. This autonomy has been reinforced under new Art. 65 of Constitution. (Constitutional Law No. 93-952 of July 27, 1993). Organization and operation of courts is left to ordinary legislation. Justice is administered by two separate and independent systems of courts: judicial and administrative. Highest judicial court is Cour de Cassation; supreme administrative court is Council of State (Conseil d'Etat). Conflicts in jurisdiction between administrative and judiciary courts are arbitrated by High Court called Court of Conflicts (Tribunal des Conflits). High Court of Justice has jurisdiction over cases of high treason involving President of the Republic. Its powers expire on first Tues. of fifth year following its election. Court of Justice has jurisdiction over matters involving Government ministers. (Constitutional Law, July 27, 1993). Constitutional Law of July 27, 1993, modified criminal liability of ministers. From now on, they fall within jurisdiction of Court of Justice of Republic (Cour de Justice de la République) as regards crimes and offenses committed during their term of office. Anyone suffering from such misconduct can file claim. Commission renders decision over admissibility of claim. (Art. 68-2). Then, Court of Justice of Republic rules. Appeal is possible. See also category 6 Courts and Legislature, topic 6.01 Courts. Constitutional Law No. 99-568 of July 8, 1999 allows recognition of

International Criminal Court jurisdiction pursuant to Treaty signed on July 18, 1998. (Art. 53-2 of Constitution).

Local Administration.

French Constitution recognizes existence of local administrative bodies, which are Communes (municipalities), Departments, Regions, Overseas Territories and Territories with specific statutes. (Art. 72, as modified by Constitutional Law of Mar. 29, 2003). Mar. 28, 2003 Constitutional Law No. 2003-276 on decentralized organization of French Republic sets principle that “the organization of the French Republic is decentralized”. (Art. 1, as modified by Law of Mar. 29, 2003).

Law No. 2000-295 of Apr. 5, 2000 limits possibility for representative of local administrative body to fulfil several electoral mandates simultaneously. Moreover, it establishes incompatibilities between some other electoral mandates.

Constitutionality of Laws.

Courts have no power to determine constitutional validity of laws. Constitutional Council is established (Art. 56) consisting of nine members, of which three are appointed by President of Republic, three by President of National Assembly and three by President of Senate. Members of Constitutional Council are appointed for term of nine years, one-third of membership being renewed every three years. President of Republic, Prime Minister and Presidents of both Houses of Parliament may submit any law to Constitutional Council before promulgation for advice on its conformity with Constitution. Such submission may also be made by resolution signed by 60 Deputies or 60 Senators. For certain laws deemed of fundamental importance by Constitution (“lois organiques”), submission to Constitutional Council is mandatory. (Art. 61). Laws declared unconstitutional by Council cannot be promulgated nor applied. (Art. 62). Constitutional Council supervises legal regularity of elections of President of Republic and of members of Parliament as well as proper conduct of referendums. (Arts. 58, 59, 60).

1.03 HOLIDAYS:

Suns. and following days are legal holidays: Jan. 1, Easter Monday, May 1, May 8, Ascension Thursday, Pentecost Monday, July 14, Aug. 15, Nov. 1, Nov. 11, and Christmas.

1.04 OFFICE HOURS AND TIME ZONE:

France is in Central European (GMT +01:00) time zone. Office hours are generally from 9 a.m. to 5 p.m.

Legal duration of work week is 35 hours. (See category 10 Employment, topic Labour Relations for more detail.)

Law of Mar. 31, 2005 aims to relax law on 35-hour work week.

2 BUSINESS ORGANIZATIONS

2.01 AGENCY:

Appointment of agent may be done orally, in writing by notarial act, private agreement, letter (C. C. 1985), but some require notarial act, e.g., inter vivos gift, gifts between spouses, revocation of gift or will, recognition of illegitimate children, nuptial agreements, bill of sale of real property or creation or release of mortgage unless principal is company. (Art. 1844-2 C. C.). General agency authorizes transaction of all of principal's business, but not disposition of principal's property without express authorization. (C. C. 1988).

Agency appointment other than in French must be accompanied by official translation before being used in any legal proceeding. Regardless of its language, appointment must be executed with words “bon pour pouvoir” (valid for power of authority), hand written by principal immediately above signature. It is advisable to have foreign agency appointments notarized and legalized.

Agent must exercise his agency according to instructions given to him by principal. However, case law has developed doctrine of apparent authority, binding principal to any contractual obligation when third party has relied in good faith on agent's apparent authority. Agent does not usually cause principal's liability with respect to torts unless circumstances establish principal's specific power to control or command agent. Employer is liable for all injuries caused to third parties by employee even when acting outside scope of employment limitation. (C. C. 1384, see category 5 Civil Actions and Procedure, topic 5.11 Torts).

Agency is terminated: (1) Upon revocation by principal, which may be at will; principal must then indemnify agent if agent has interest in continuation of agency (C. C. 2004); (2) upon renunciation by agent, provided principal is indemnified for any loss sustained (C. C. 2007); (3) upon death of either party; heirs of principal are bound by acts of agent when latter was not aware of principal's death when carrying out agency (C. C. 2003, 2008).

Commercial Agents.

Pursuant to Art. L.134-1 of Commercial Code, commercial agents (“agents commerciaux”) are professionals in charge of negotiating and/or concluding commercial agreements on behalf of principals and must be registered with commercial courts. All commercial agents (individuals and legal entities) must register with Commercial Court every five years. (See category 9 Documents and Records, topic 9.05 Records.) Foreign commercial agents must hold valid trader's card in order to register. (See category 16 Immigration, topic 16.01 Aliens.) Commercial agency relationship should be evidenced by written instrument executed in as many originals as number of parties; each party to receive written evidence of commercial agency relationship upon request (Art. L.134-2 of Commercial Code); commercial agent must regularly inform principal of acts carried out on his behalf. Agent is liable to principal for all wrongdoings committed in course of execution of terms of agency contract (C. C. 1992) and wrongdoings of his sub-agents (C. C. 1994).

Generally courts make no distinction between commercial agents and other agents with regard to award of damages for improper revocation of agency.

Pursuant to Art. L.134-14 of Commercial Code, agency contract may contain noncompetition clause barring agent from representing competitors after termination of contract, provided noncompetition clause is limited in time (maximum two years after termination of contract) and in geography (only geographical sector in which agent used to be active), and is expressly set forth in contract. Commercial agency may be revoked by each party in case of material breach by other party, “force majeure”, termination of agency due to agent or assignment of agency by agent. Otherwise, revocation gives agent right to indemnity for prejudice sustained. (Art. L.134-12 of Commercial Code).

Principals have certain obligations vis-à-vis agents such as communicating all relevant information to agents and transmitting quarterly commission statement to agents.

2.02 ASSOCIATIONS:

Associations are nonprofit organizations governed by law of July 1, 1901 as modified.

Right to form association is constitutional. Associations are freely organized, without need for any specific legal formalities pursuant to their by-laws and internal rules, and may be formed for any purpose provided such purpose is legal.

Creation of association is not subject to prior control from Public authorities (except for very limited category of associations). Thus, associations are generally not required to acquire legal capacity. Associations with no legal capacity cannot conclude agreements, be subject to civil liability or initiate, or participate in, legal actions before any jurisdiction in their own name (only members may individually sue in their own names or enter into agreements).

To enjoy legal capacity, associations must register with “Préfecture” and wait for publication of their registration in “Journal Officiel”. Associations with legal capacity enjoy same right as any other legal entity (e.g., choose and protect their own name, initiate and defend against any legal action including moral prejudice, have its own assets, conclude agreements on its own name). Such associations may freely receive contributions (in cash or in kind) and gifts (including inheritance) from its members as well as subsidies from state-owned public entities, except for few categories of associations which must obtain prior approval from public authorities (i.e., public interest associations, cultural associations and charitable and scientific or medical associations). As alternative source of funding, Art. L.213-8 of Monetary and Finance Code authorizes associations that have been in business for at least two years to issue bonds. Such associations must be registered with Registry of Commerce and include in by-laws provisions regarding management and supervision by corporate entity. Provisions of French Commercial Code regarding board of directors, directorate and management of companies as well as accounting obligations and liability with regard to management are applicable to such associations.

In connection with any such bond issuance, associations must report certain information regarding issuance. Bonds may be offered for public subscription, subject to authorization and supervision by AMF (“Autorité des Marchés Financiers”). Notes issued by associations are subject to special regime (see in particular prohibition under Art. L.213-14 of Monetary and Finance Code).

Tax regime applicable to associations vary depending upon purely nonprofit associations and other associations. Assessment of nonprofit nature based upon several criteria set forth in French General Tax Code. Nonprofit associations are, in principle, not liable for commercial taxes (such as corporate income tax, professional business tax), although in some instances reduced income tax may apply to such associations.

Gifts and legacies to public interest organizations having charitable purposes or whose resources are used exclusively for scientific, cultural or artistic purposes are exempt from gift and inheritance taxes. (C. G. I. 795; see category 12 Estates and Trusts, topic 12.09 Trusts, subhead Foundations). Arts. 200 and 238 bis of C.G.I. authorize individuals and business enterprises to deduct gifts to associations from their taxable income or profits.

Art. 238 bis al. 4 of C.G.I. also set forth that business enterprises may deduct up to 5% of turnover from taxable profit, gifts made to organisations, management of which is disinterested and whose purpose is exclusively to help small to medium-sized companies to be created, to take part in retaking of company experiencing financial difficulties.

Beneficiary organizations are strictly defined by law and gifts are not subject to tax under certain conditions.

Provision of Arts. L.611-1 et seq. of Commercial Code on prevention of bankruptcy and financial difficulties to associations conducting business activity.

2.03 COMPANIES:

See topics 2.04 Corporations and 2.07 Partnerships.

2.04 CORPORATIONS:

Corporations in General.

French equivalents of corporation are either “société anonyme” (“S.A.”), “société par actions simplifiée” (“S.A.S.”), “société en commandite par actions” (“S.C.A.”) or “société à responsabilité limitée” (“S.A.R.L.”). Liability of shareholders of these companies is limited to amount of their investment. Since codification of former Company Law of July 24, 1966, S.A., S.A.S., S.C.A. and S.A.R.L. are governed by provisions of Commercial Code. (Book II). Commercial Code also governs following commercial entities: “Société en nom collectif” (see topic 2.07 Partnerships, subhead General Partnership [“société en nom collectif”]), and “société en commandite simple” (see topic 2.07 Partnerships, subhead Special Partnership [“société en commandite simple”]).

On May 15, 2001, French Parliament passed Law No. 2001-420 relating to New Economic Regulations (a.k.a. “NRE Law”). This Law was completed by Decree No. 2002-803 of May 3, 2002. These regulations are meant to introduce more transparency in governance of French corporations and to make S.A.S. most commonly used corporate vehicle for companies not seeking investment from public.

Corporations in Form of Sociétés Anonymes.

S.A. is stock company whose capital is divided into shares.

Purposes.

Any lawful and specific purpose, except activities expressly reserved by law to other corporate entities.

Term of Corporate Existence.

Any duration up to 99 years. (Art. L.210-2 of Commercial Code).

Corporate name freely chosen. Corporate name must be preceded or followed by words “société anonyme” or initials “S.A.” in all documents issued by company addressed to third parties. All corporate documents must also indicate incorporation number of company (SIREN number), registered office and corporate and commercial registry where S.A. has been incorporated (see catchline Filing of Articles and Other Formalities, infra, for further details).

Incorporators.

S.A. must be formed by minimum of seven shareholders, either individual or corporate entities, which minimum must be maintained during life of corporation. If during life of S.A., number of shareholders falls below seven for more than one-year period, Commercial Court may, upon request of any interested party, order dissolution of S.A. However, Court may, at its discretion, grant S.A. maximum period of six months to increase number of shareholders to that required by law.

Capital.

Minimum capital is [Euro]225,000 for S.A. seeking investment from public and [Euro]37,000 for other S.A.s. S.A. will be considered to seek investment from public if it is listed on stock exchange or if its shares are placed with banks, investment houses or stockbrokers or if it makes use of publicity for sale of shares or if it uses solicitation for securities. (Art. L.411-1 of Financial and Monetary Code). However, Art. L.411-2 of Financial and Monetary Code provides that issuance or transfer of securities to so-called “qualified investors” (“investisseurs qualifiés”) or to so-called “limited circle of investors” (“cercle restreint d'investisseurs”) is exempt from rules applicable to public offering. Such operations of qualified private placements ("placements privés") are precisely defined by Art. L.411-2, Decree No. 98-880 of Oct. 1, 1998 and AMF General Regulation ("Règlement Général de l'Autorité des Marchés Financiers"—AMF). Investment by nonresident in S.A. may be subject to regulations of Ministry of Finance. See category 14 Foreign Trade and Commerce, topic 14.02 Exchange Control.

Articles of Incorporation and By-laws.

Articles and by-laws ("statuts") state corporate name, purpose and term of existence, registered office, amount of capital, par value of shares (optional pursuant to Art. L.228-8 paragraph 1 of Commercial Code), and type of shares issued, and if applicable, share transfer restrictions. Where contributions in kind are made, judicially appointed auditor ("commissaire aux apports") reports on value of property, and articles of association and by-laws indicate name of contributor, description of contribution and number of shares granted to contributors. For S.A. not seeking public investment no shareholders' meeting is held prior to formation and therefore articles of incorporation and by-laws name first board of directors and legally required statutory auditors ("commissaires aux comptes").

Filing of Draft Articles.

S.A. seeking investment from public must file draft articles of incorporation signed by persons acting as founders with Clerk of Commercial Court where registered office is located. Only after such filing can capital be subscribed. (Art. L.225-2 al. 3 of Commercial Code). This requirement does not exist for S.A. not seeking investment from public.

Registered Office.

S.A. must have office address evidenced by: (i) Commercial lease or agreement to use premises as registered office, or (ii) by temporary agreement with resident company (agreement known as "contrat de domiciliation"), or (iii) by agreement with parent company in order to have same registered office (agreement known as "contrat de mise à disposition").

Incorporation.

S.A. not seeking investment from public is formed by: (1) Drafting articles of incorporation and by-laws; (2) subscription in full of stated capital (Art. L.225-3 of Commercial Code); (3) payments of at least one-half of such capital; (4) deposit of funds as required by regulations; (5) certificate drawn up by depositary of funds (bank) recording subscriptions and payments; (6) signature of articles of incorporation and by-laws by shareholders themselves or by proxy.

As between founders of company, S.A. is formed from date of signature of articles of incorporation and by-laws. However, S.A. does not become legal entity until it has been duly registered with Corporate and Commercial Registry, after having fulfilled procedural requirements set forth in regulations. Until such inscription, responsibility for actions taken on behalf of S.A. rests with those who act in its name who are personally liable until S.A. ratifies their acts. (Art. L.210-6 of Commercial Code).

S.A. seeking investment from public must follow more complicated procedure. Articles of incorporation must have been duly filed and certain legal information published. Subscription to shares issued for cash is made by signing subscription bulletin. All subscription bulletins, together with at least 50% of nominal value of each share subscribed for cash, must be deposited with notaire or in specially designated bank account. Subscriptions and payments are recorded in certificate drawn up by depositary (bank) upon presentation of subscription bulletins. Immediately thereafter founder may convoke all subscribers for organization meeting. This meeting is held subject to formal requirements and delays established by regulations. (Art. L.225-7 of Commercial Code).

Organization meeting is required only for S.A. seeking investment from public, and consists of general meeting of shareholders that precedes formation of company. Each stockholder has as many votes as shares of stock he holds or represents by proxy. Organization meeting ascertains conformity of subscription and payment recorded in certificate of depositary (bank), approves articles of incorporation and by-laws, names first board of directors and statutory auditors ("commissaires aux comptes"), if applicable, approves report of judicially appointed auditors ("commissaires aux apports") as to value of contributions in kind, and, upon acceptance of their functions by board of directors and statutory auditors, declares S.A. duly organized.

Filing of Articles and Other Formalities.

After organization of S.A., "by-laws" must be registered with tax authorities at no cost, then registration form must be filed with Centre de Formalité des Entreprises which coordinates among tax authorities, social security authorities and Commercial Court. It is required to file with Clerk of Commercial Court said by-laws and other documents. Documents so filed are open to public inspection. Also, notice of formation must be published in legal gazette and must include summary of essential features of articles. S.A. must be listed with corporate and commercial registry.

Paid in Capital Requirements.

Regulations require all subscriptions for contributions in kind and at least 50% of contribution in cash be paid up at time of incorporation. Balance must be paid up within period of five years from incorporation.

Amendment of Articles.

Only extraordinary general shareholders' meeting ("assemblée générale extraordinaire") has power to amend by-laws, including changing corporate purpose, duration, corporate name and registered office, or implementing merger, increase or decrease of capital and early dissolution. Amendment of articles must be approved by two-thirds majority (except for decisions increasing shareholders' obligation to be approved unanimously). Change of registered office to new address within same or adjacent department may be effected by board of directors but decision must be ratified by general shareholders' meeting ("assemblée générale").

Increase or Decrease of Capital.

Except in cases of stock dividend payments and capitalization of reserves, extraordinary shareholders' meeting is competent to decide upon increase or decrease in capital. S.A.'s capital is increased either by issuance of new shares, or by increase in value of existing shares. Increase in value of existing shares must be by unanimous vote, except for increase in value of existing shares by capitalization of reserves. Shareholders have preferential right to subscribe to new shares issued for cash. Each shareholder may waive his preferential right. Shareholders' meeting which decides on increase in capital may eliminate preferential right of subscription in favor of one or more persons. (Art. L.225-135 of Commercial Code). Where S.A. grants stock options to its employees, preferential right as to stock covered by said options is relinquished by existing shareholders in favor of such employees. (Art. L.225-178 of Commercial Code). Any shareholders meeting deciding on increase in capital in cash must also vote on resolution covering increase in capital reserved for employees (shareholders are free to reject said resolution). In case of capital reduction, statutory auditors ("commissaires aux comptes") are to draft report which must be at shareholders' disposal at least 15 days prior to extraordinary shareholders' meeting. (Art. 179 of Decree of Mar. 23, 1967). Reduction of capital to amount less than legal minimum can only be approved subject to increase in capital bringing amount of capital up to legal minimum unless S.A. is changed subsequently into another corporate entity. S.A. have right under certain conditions in connection with profit-sharing plans and with stock option plans, to buy their own shares. Moreover, shares held collectively by company's employees represent less than 3% of share capital, Board of Directors must convene, every three years, extraordinary shareholders' meeting for purpose of proposing increase in capital reserved for employees who are contributors to company savings plan. This consultation of shareholders' meeting must be renewed for as long as employees' stake in share capital remains below 3%. See also category 10 Employment, topic 10.01 Labor Relations.

By-laws.

See catchline Articles of Incorporation and By-laws, supra.

Stock.

Shares may have minimum par value fixed by by-laws. (Art. L.228-8). Basically, shares may be issued in either bearer or nominative form. In S.A. not admitted to trading on regulated market, all shares must be in nominative form. Only S.A. which stock is listed on French regulated market and mutual fund (SICAV) can still issue “bearer” shares.

Distinction between ”bearer” and nominative shares is now mostly artificial: pursuant to Law No. 81-1160 of Dec. 30, 1981, French company shares have been dematerialized, i.e. they are no longer represented by certificates. Shares are registrated in account in name of shareholders maintained: (i) By issuing S.A. for nominative share, or (ii) by financial institution approved by AMF for bearer share.

Ordinance No. 2004-604 dated June 24, 2004 provides possibility to issue preference shares, with or without voting rights, with particular rights of any type, temporarily or permanently. Such preferential rights may be determined, subject to general principles of French corporate law, in by-laws.

Except in few cases, S.A. may not hold its own shares as treasury stock.

Transfer of Stock.

Commercial Code allows by-laws to restrict transfer of shares except for S.A. whose shares are listed on stock exchange; such restriction cannot prohibit transfers between shareholders by way of inheritance, liquidation of marital property or transfers to spouse or direct relatives except if S.A. reserves shares for its employees, in which case articles of incorporation may provide that these shares may neither be inherited by, nor transferred to non-employees. (Art. L.228-23 of Commercial Code). Restriction to transfer is not absolute, and if board of directors or management committee refuses permission for transfer, it must arrange for purchase of shares by shareholder or third party or, with consent of seller, by S.A. itself by way of capital decrease. (Art. L.228-24 of Commercial Code).

Art. L.228-23 paragraph 4 provides for annulment of transfers which violate articles of incorporation and by-laws.

Transfers of nominative shares are entered in stock accounts upon presentation of transfer form, (“Ordre de Mouvement”) signed by transferor.

No shares may be transferred by shareholder until S.A. is registered with corporate and commercial registry. In case of increase in capital, shares are negotiable as of date of realization of said increase in capital (i.e., in case of cash increase, date of certificate of deposit of funds; or, in case of increase in capital by incorporation of receivables and reserves, date of extraordinary general shareholders' meeting).

Bonds and Debentures.

S.A. having been in existence for at least two years may issue bonds and debentures provided shareholders have approved annual balance sheets for last two years and provided that capital has been fully paid up. S.A. issuing bonds and debentures when it did not have at least two balance sheet statements approved by shareholders must subject its assets and debts to verification of statutory auditor further to conditions set forth by Art. L.228-39 al. 1 of Commercial Code prior to issuance of bonds. Latter restriction is not applicable if bonds are issued in favor of salaried employees under profit-sharing plan. (Art. L.228-39 of Commercial Code).

Bonds and debentures are issued by Board of Directors' decisions, except when by-laws reserve such power to general shareholders' meeting. (Art. L.228-40 of Commercial Code). Convertible debentures and debentures with rights of subscription (Arts. L.228-91 and et seq. of Commercial Code) can be issued by extraordinary shareholders' decision, who may also delegate to Board power to issue these securities or to determine their terms (Arts. L.225-129-1 and L.225-612-962 of Commercial Code).

Certificates of Investment.

Since ordinance of June 24, 2004, distinction is made between two categories of shares, namely ordinary shares and new preference shares which replace certificates of investment which represent financial rights. Former certificates of investment are maintained on transitional basis only for issuances made or authorized prior to ordinance.

Independent Warrants.

Prior to June 24, 2004 ordinance, Art. L.228-95 of Commercial Code permitted issuance of independent warrants (i.e., not tied to other securities) which were giving right to subscribe to capital increase of issuing company. Since 2004 said warrants are governed by general rules applicable to equity-linked securities (Art. L.228-11 of Commercial Code). Such warrants can be issued by extraordinary shareholders' decision, who may also delegate to Board powers to issue them or to determine their terms.

Reporting Requirements.

Art. L.233-6 of Commercial Code provides that when during any fiscal year, company has acquired interest in another French company and holds more than one-twentieth, one-tenth, one-fifth, one-third, one-half or two-thirds of capital of such company or has taken control of latter, report presented to annual shareholders' meeting and, if applicable, report of statutory auditors (“commissaires aux comptes”), shall make mention thereof.

Any individual or corporate entity holding alone or with others more than above threshold in French company listed on regulated market must inform said company and French stock exchange Authority (“Autorité des Marchés Financiers”) of number of shares held within five trading days after relevant threshold is reached (upwards or downwards) and must inform, within 15 days after relevant threshold is reached, said company of its objectives and intention for next 12 months. (Art. L.233-7 and following of Commercial Code). Company's by-laws may provide for additional obligation to furnish information relating to holding of less than one-twentieth of capital, but not less that 0.5% of capital. Failure to proceed with relevant notification result in shares exceeding relevant fraction to be deprived of related voting right until notification is regularized and two years thereafter. (Art. L.233-14 of Commercial Code).

In addition, corporations directly or indirectly controlled by another corporation must report to such corporation, as well as to each controlling corporation, amount of shares (and variations in this amount) said controlled corporations directly or indirectly hold in each of controlling corporations' stock. Such notification must be made within month of date when shareholdings have changed as result of acquisition or transfer of shares. (Art. L.233-12 of Commercial Code).

Stockholders' Rights and Liabilities.

Liability of each stockholder is strictly limited to amount of his investment determined by his subscription. Rights of shareholders include right to vote, to receive dividends and to share in distribution of assets in case of liquidation.

Commercial Code requires all S.A.s to furnish to shareholders, upon request at any time, pertinent financial information relating to past three fiscal years, including income statement, balance sheet and report of statutory auditors as well as global amount of remuneration of ten (limited to five when personnel does not exceed 200) most highly paid employees or agents of S.A. (Art. L.225-115 of Commercial Code), as well as minutes and attendance records of prior shareholders' meetings held in past three fiscal years. Management report must be submitted annually to shareholders with certain information relating to company. (Art. 148 of Decree of Mar. 23, 1967). For listed companies or companies controlled by listed company, said report must list all remuneration and payments in-kind made to S.A.'s officers and to officers working for companies controlled by such S.A. For all S.A.'s, management report shall also inform shareholders of any concurrent office held by S.A.'s representatives officers. Moreover, shareholders must be provided, at Annual Ordinary Shareholders' Meeting, with special report describing stock-option plans which have been adopted during course of year by company or any and all companies controlled by company. This report shall also mention stock-option plans granted to representatives officers of company by company itself or any companies of its group.

Shareholders have right to submit written questions which must be answered by Board of Directors (or management board). Before issuance of any shares on stock exchange can be effected, S.A. must submit documentation which will be available for public inspection. When corporation controls directly or indirectly one or more companies which in turn hold shares in corporation, votes cast by controlled companies at corporation's shareholders' meeting may not represent more than 10% of all votes cast by present or represented shareholders.

Ordinary Shareholders' Meeting (“Assemblée Générale Ordinaire”).

Regular meeting must be held annually within six months of end of fiscal year (Art. L.225-100 of Commercial Code) for purpose of approving balance sheet and income statement, voting allocation of profits. Ordinary shareholders' meeting (“A.G.O.”) is competent to elect or to dismiss (at any time) directors and to appoint (for six financial years) statutory auditor (“Commissaire aux Comptes”). Quorum for ordinary shareholders' meeting “A.G.O.” is one-fourth of registered shareholders on first call with no specified minimum on second call. (Art. L.225-98 of Commercial Code). Decisions are taken by majority of votes of shareholders present or represented. Shareholder may be represented at meeting by another shareholder or by spouse but not by third persons. Shareholders may vote by proxy or by mail. (Art. L.225-107 of Commercial Code).

Votes by proxy must comply with certain requirements as to form. Votes by mail must be received by company at least three days before meeting, unless shorter period of time allowed by by-laws.

If vote called on question raised during shareholders' meeting, shares of shareholders who voted by mail are not taken into account for calculation of quorum or vote on such question, unless intent or effect of question is to amend or to render inoperative, in whole or in part, resolution set forth on agenda for meeting, in which case shares of shareholders who voted by mail taken into account for calculation of quorum and treated as having voted against relevant question.

Extraordinary Shareholders' Meeting (“Assemblée Générale Extraordinaire”).

Is only corporate body competent to amend by-laws. See catchlines Amendment of Articles, Increase or Decrease of Capital, supra; and Dissolution, infra. Quorum for extraordinary shareholders' meeting is one-third of registered shareholders on first call and one-fourth on second call. (Art. L.225-96 of Commercial Code). Decisions are taken by two-thirds of votes of shareholders present or represented. Shareholders may vote by proxy or by mail.

By-laws may not provide for quorum and/or majority disposition which are not in conformity with law.

Alien Stockholders.

See category 14 Foreign Trade and Commerce, topic 14.02 Exchange Control.

Voting Trusts.

Proxy votes by other shareholders are permitted, voting trusts and other agreements in respect to voting are under specific conditions, valid but unenforceable towards company and third parties.

Management.

Commercial Code provides that S.A.s may be managed, as provided for in by-laws, either by traditional Board of Directors ("conseil d'administration") or by management board ("directoire") functioning under supervision of supervisory board ("conseil de surveillance"). Adoption of latter must be made either in by-laws or by vote of extraordinary shareholders' meeting. Otherwise, former is deemed to be management regime.

Management by Board of Directors.

NRE law (see subhead Corporations in General, supra) has introduced several modifications to regime governing S.A.s managed by Board of Directors. Number of directors, specified in articles of incorporation, may be anywhere from minimum of three to maximum of 18, subject to certain exceptions (see L.225-17 of Commercial Code). Maximum term of office is six years for directors elected at general shareholders' meeting and three years for directors named in by-laws. Shorter term of office may be provided for in by-laws.

Unless by-laws provide otherwise, not more than one-third of directors serving on board may be over 70.

Directors are eligible for re-election. Director who dies or resigns during his term of office may be replaced by decision of board of directors provided that number of remaining directors is no less than three, and such action is presented to next general shareholders' meeting for ratification. Directors may be removed from office at any time, without indemnity, by vote of shareholders at ordinary general shareholders' meeting. However, case law specifies that if circumstances of such removal are abusive or if procedural due process ("Droits de la défense") is not respected, it may give rise to action for damages. If corporate entity is elected as director, as is permitted by law, it must designate physical person as its permanent representative on board of directors, and such person is, together with corporate entity, subject to civil and criminal sanctions for breach of director's duties. Individual cannot serve at same time and on same board both as director and permanent representative. Employee can be appointed to board without losing benefit of his employment contract only if he has effective employment separated from his functions as director.

Director must own number of shares stipulated in S.A.'s by-laws. No individual may serve simultaneously on more than five boards of directors and supervisory board of French S.A.s. (Art. L.225-21 al. 1 of Commercial Code). However, person may be director of unlimited number of S.A.s that are controlled by company in which he is already director. (Art. L.222-21 al. 2 of Commercial Code). Commercial Code also provides that no more than one-third of board's members may have employment contracts with S.A. At least half of board must be physically present for meetings to be valid and decisions are taken by majority of those present or represented. By-laws can provide for higher majority if unanimously accepted, but quorum cannot be changed. Any action undertaken with unlawful quorum is null and void.

Board of Directors is vested with power to define strategic guidance of company and to supervise general management which is granted to General Manager (“Directeur Général”). Powers of Board of Directors include following: (1) Calling meetings of shareholders and establishing agenda; (2) drawing up annual accounts (balance sheet); (3) authorizing contracts subject to provisions of Art. L.225-38 of Commercial Code (i.e., entered into between S.A. and its General Manager, or its Deputy General Manager, or any shareholder holding at least 10% of voting rights, or entered into between S.A. and any controlling shareholder which is legal person holding at least 10% of voting rights of such S.A.); (4) authorizing any financial guarantees or endorsements of obligations of other persons or companies; and (5) electing Chairman of Board (“Président du Conseil d' Administration”), General Manager and upon proposition by General Manager (“Directeur Général”), Deputy General Managers (“Directeurs Généraux Délégués”).

Directors may receive fee for attendance at board meeting (“jetons de présence”) but cannot receive other remuneration in their capacity as directors except for specific task, on temporary basis. They may not, as a rule, enter into contracts with S.A. without prior board approval, and, subsequent report must be made to shareholders' meeting, which is to ratify agreement.

Management of S.A. is now granted to General Manager and Deputy General Managers.

General Manager is appointed by Board of Directors of which he is representative but not necessarily member. Art. L.225-56 of Commercial Code provides that General Manager is given broadest powers to act under all circumstances in name of company. General Manager bears responsibility for general management of S.A. which he represents in its dealings with third parties. He exercises these powers within scope of corporate purpose stated in by-laws and subject to powers given by law to Board of Directors and shareholders. Third parties may rely upon these statutory powers and are not bound by additional limitations on powers of General Manager which may be provided for in by-laws or by board decision. In case of incapacity, General Manager may provisionally delegate his functions to one of Deputy General Managers. No person may be General Manager of more than one stock company (“S.A.”). However, Art. L.225-54-1 of Commercial Code provides that person may be General Manager of one additional S.A. controlled by company in which he is already General Manager and/or one additional S.A. if both companies are not listed on regulated market.

General Manager may ask Board of Directors to appoint Deputy General Managers (“Directeurs Généraux Délégués”) to assist him in his duties. It should be noted that Deputy General Managers are not necessarily members of Board. By-laws shall fix number of Deputy General Managers up to maximum of five. Powers of Deputy General Managers are defined by Board of Directors. In dealing with third parties, Deputy General Managers are deemed to have powers similar to those of General Manager.

Board of Directors shall fix remuneration of General Manager and Deputy General Managers. Commercial Code does not provide for maximum and minimum term of office of General Managers and Deputy General Managers which shall therefore be defined by Board of Directors, unless by-laws provide otherwise. Unless by-laws provide otherwise, General Managers and Deputy General Managers cannot be more than 65 years old. They may be removed from office at any time, without indemnity, by vote of Board. However, if circumstances of such removal are abusive or if procedural due process is not respected, it may give rise to action for damages.

Powers of Chairman of Board of Directors have been considerably reduced by NRE law, which only grants him power to represent Board of Directors and to report Board's actions to shareholders. He has also responsibility to ensure proper functioning of S.A.'s bodies. As such, Chairman of Board of Directors must describe, in report attached to annual management report, conditions for preparing and organizing work of Board, and secondly, internal control procedures implemented by company. Report may also indicate any limitations which Board applied to powers of General Manager. As member of Board of Directors, Chairman is subject to same limitation regarding number of offices he can hold concurrently as director. Law allows, however, Chairman of Board of Directors to also serve as General Manager of same S.A. In such case, he will be subject to rules applying to General Manager especially regarding plurality of offices.

Foreign Managers.

Before non-EU EEA or OECD citizen can act as Chairman, General Manager or Deputy General Manager, he must obtain prior authorization ("carte de commercant étranger") competent Préfecture de Police or departmental préfecture. No registration with corporate or commercial registry is possible without such authorization.

Management by Management Board and Supervisory Board.

Provisions of Commercial Code authorizes management of S.A. by management board ("directoire") functioning under control of supervisory board ("conseil de surveillance"). Supervisory board has many similarities to board of directors of traditional S.A. Supervisory board is composed of minimum of three and maximum of 18 members. Unless by-laws provide otherwise, no more than one-third of members of supervisory board may be over 70.

Maximum term of office for members of supervisory board is six years for members elected at general shareholders' meeting and three years for members named in by-laws. Shorter term of office may be provided in by-laws. No person may be member of more than five supervisory boards subject to same exception as for members of board of directors. Members of supervisory board may be removed from office by vote of shareholders at ordinary shareholders' meeting at any time.

Corporate entity may be elected member of supervisory board but it must designate person as its permanent representative on supervisory board, and such person is, together with corporate entity, subject to civil and criminal sanctions for breach of duties as member of supervisory board. Person may not serve at same time and on same supervisory board both as member and permanent representative. Member must own number of shares stipulated in S.A.'s by-laws. Member of supervisory board may not be member of management board ("directoire"). Supervisory board elects president and vice-president whose duty is to call meetings of supervisory board and to direct meeting. At least half of members of supervisory board must be present for meetings to be valid, and decisions are taken by majority of those present or represented. (Art. L.225-82 of Commercial Code). Quorum requirements cannot be modified, but by-laws can provide for higher majority.

Supervisory board, like board of directors in traditional S.A., represents interest of shareholders. Its function, rather, is to supervise actions of management board, which must deliver to it a report at least every three months as well as a financial report (balance sheet and income statement) annually. (Art. L.225-68 of Commercial Code). In addition, supervisory board: (1) May require additional reports from management board at any time; (2) delivers report at annual shareholders' meeting regarding management of S.A.; (3) authorizes contracts between S.A. and one of members of management board or supervisory board (or between S.A. and another company in which member of either body has interest); (4) authorizes any financial guarantee or endorsements by S.A. of obligations of other persons or companies; (5) authorizes transfer of real property or total or partial transfer of participations; (6) has power to call meeting of shareholders. President of supervisory board must describe, in report attached to management report provided to general shareholders' meeting, conditions for preparing and organizing work of board, and secondly, internal control procedures implemented by company.

Pursuant to Law No. 85-1321 of Dec. 14, 1985, supervisory board may grant remuneration to their President and Vice President.

Management board (“directoire”) is composed of two to five members (seven for companies listed on regulated market), except for S.A. with registered capital of less than [Euro]150,000 in which case “directoire” may consist of single member called single manager (“directeur général unique”).

Corporate entity may not be member of management board. Management board, as well as its chairman, or “Président du Directoire,” is elected by supervisory board. By-laws should provide for term for these offices lasting from two to six years. If not expressly provided by term, is fixed at four years. Members need not be shareholders and no person may be member of more than one management board subject to same exceptions as for general managers of traditional S.A.s. Members of management board may be removed from office by vote at general shareholders' meeting, but such removal, without just cause, may give rise to action for damages. Members of management board may also be removed from office by supervisory board, if expressly provided by by-laws.

Management board is given broadest powers of management consistent with corporate purpose as stated in by-laws except for certain specified powers reserved by law to supervisory board and shareholders. By-laws determine manner in which management board shall meet and make decisions. Chairman of management board or single manager represents S.A. in its dealings with third parties. By-laws or supervisory board decision may require that certain decisions of management board be submitted to supervisory board for approval, but third parties are not bound by such restrictions.

Dividends can be declared only by general shareholders' meeting from profits or reserves at its disposition. Payment must be made available by S.A. for payment to stockholders within nine months of closing of fiscal year, although stockholders may choose to be paid after this period.

However, interim dividends may be distributed before close of fiscal year, if audited partial balance sheet drawn up during fiscal year indicates that S.A. has during this period earned profits (after allowances for depreciation, prior losses, and legal and statutory reserves), sufficient to cover such interim dividends. Board of directors or management board may decide whether to distribute such interim dividends, and fixes amount and date of distribution. (Art. L.232-12 al. 2 of Commercial Code). Shareholders' meeting approving accounts of fiscal year may give shareholders choice of receiving their dividends in cash or in shares issued by S.A. if expressly provided by by-laws.

Accounts.

Supervision of corporate accounts must be entrusted to statutory auditors (“commissaires aux comptes”) first appointed at time of incorporation in by-laws of any S.A. not seeking public investment and by first organization meeting of shareholders in S.A.s seeking public investment. Term of office is six financial years. Subsequent to incorporation, special auditors are named by general shareholders' meetings.

Commercial Code requires that statutory auditors be named from list established by competent regional registration commission government. Prerequisites for appearing on such list are established by regulations intended to strengthen professional and technical qualifications. Mission of statutory auditors has been expanded so as to include duty to certify regularity and good faith of financial reports as well as their accuracy, and also to ensure equality among shareholders. (Art. L.225-235 of Commercial Code). Such statutory auditors have to certify that annual accounts exactly reflect financial situation of S.A. Statutory auditors have right of inspection of all accounts and business papers of S.A.s, including inspection of accounts of parent and subsidiary. They inform board of directors (or management board) of results of their investigations and deliver report to annual shareholders' meeting. Statutory auditor must now also submit to said annual general shareholders' meeting additional report with its comments on report by Chairman (or president of supervisory board) on internal procedures for preparation and processing of accounting and financial information. They have right to call shareholders' meeting.

Corporation must file following documents with Commercial Court: two copies of annual accounts, board of directors report, together with report by Chairman (or president of supervisory board) special auditor's report, together with statutory auditor's report on report by Chairman and proposal for allocation of financial results. (Art. L.232-23 of Commercial Code).

Dissolution occurs upon expiration of time stated in by-laws, decision of special meeting of shareholders, or by court order in cases provided for by law. In particular, in event S.A. net assets fall below one-half of registered capital, shareholders' meeting must be called within four months following approval of accounts showing such loss for purpose of deciding whether to dissolve S.A. Within two years after end of fiscal year during which such loss of capital occurred, S.A. must reduce its capital by at least amount of loss or restore its net assets to at least one-half of registered capital. Liquidator, appointed by general meeting of shareholders, or by court decree, attends to liquidation of S.A. Dissolution and name of liquidator must be registered with corporate and commercial registry. When liquidation is accomplished, entry of S.A. on corporate and commercial registry is cancelled.

Corporations in Form of Sociétés à Responsabilité Limitée.

Commercial Code is also applicable to limited liability companies (“sociétés à responsabilité limitée” or “S.A.R.L.”), which companies resemble in large measure small, closely held American corporations. Liability of members (“associés”) of S.A.R.L. is limited to amount of their contribution in capital. Since 1985 new forms of S.A.R.L. were instituted: “Entreprises unipersonnelles à responsabilité limitée” or “E.U.R.L.”, one-person limited liability corporations, and “exploitations agricoles à responsabilité limitée” or “E.A.R.L.”, limited liability agricultural enterprises.

As result, Art. 1832 of Civil Code now provides that corporation is instituted through contract between two or more persons, or may be created by single person's voluntary act. When corporation formed by single person, such person called single member (“associé unique”).

Formation.

One or more persons may create “S.A.R.L.” for maximum duration of 99 years. (Art. L.210-2 of Commercial Code). Membership may not exceed 100 in S.A.R.L. Companies may be members; however, single member of E.U.R.L. may not be another E.U.R.L. Individual may be single member of several E.U.R.L.'s. (Art. L.223-5 of Commercial Code). If above two prohibitions violated, any interested party may request dissolution of corporation in accordance with paragraph two of Art. L.223-5 of Commercial Code. Minimum capital of S.A.R.L. was [Euro]7,500 but pursuant to Law No. 2003-721 of Aug. 1, 2003, amount of capital is now freely fixed in by-laws. All contributions in-kind must be fully subscribed and paid up.

Investment by nonresident in S.A.R.L. may be subject to regulations of Ministry of Finance. See category 14 Foreign Trade and Commerce, topic 14.02 Exchange Control.

S.A.R.L. is formed by all members or by single member signing by-laws which must indicate duration, name, purposes and amount of stated capital of S.A.R.L., as well as division of participations among members, if applicable. By-laws need not be notarized. By-laws must indicate value of any contributions in-kind in standard S.A.R.L. Evaluation of contributions in kind must be fixed by special auditor (“commissaire aux apports”) who is appointed either by unanimous decision of future members of S.A.R.L. or by judicial appointment upon request of one of future members. Commercial Code provides that such auditor may be appointed by single member in E.U.R.L. If no contribution in kind exceeds [Euro]7,500 or if total value of such contributions does not exceed half of capital, such appointment is not required in E.U.R.L. and S.A.R.L. (Art. L.223-9 al. 2 of Commercial Code).

S.A.R.L. is formed from date of signature of by-laws. However, S.A.R.L. does not become legal entity until it has been duly filed with corporate and commercial registry, after having fulfilled procedural requirements established by regulation. Registration number must appear on all S.A.R.L. stationery together with indication of S.A.R.L. capital and registered office. Until inscription in corporate and commercial registry, actions taken on behalf of S.A.R.L. are responsibility of those who act in its name and their personal liability is extinguished upon notification by company. (Art. L.210-6 of Commercial Code).

There must be notice of formation of S.A.R.L. in legal gazette, stating: (1) Existence of limited responsibility; (2) name of S.A.R.L. and designation of registered office; (3) purpose of S.A.R.L.; (4) person or persons authorized to manage and sign for S.A.R.L.; (5) amount of capital; and (6) date of formation and term of existence of S.A.R.L.

Registered Office.

See subhead Corporations in Form of Sociétés Anonymes, catchline Registered Office, supra.

Management.

S.A.R.L. is managed by one or more managing directors ("gérants") named by member(s) but who need not be members themselves. As opposed to prior law, S.A.R.L. may not be managing director. Managing director may be removed from office by vote by members. However, if such removal is unjustified it may give rise to action for damages. (Art. L.223-25 of Commercial Code).

Unless limited by by-laws, managing director may take any action consistent with S.A.R.L.'s purpose, and such action vis-à-vis third parties is binding on S.A.R.L.

Third parties are not bound by special limitations on powers of managing directors which may be provided for in by-laws. Where there is more than one managing director, third parties may in principle rely upon acts of any one of them.

Any agreement between S.A.R.L. and one of its members or managing director must be object of special report by managing director or statutory auditor, if any, which report must be approved by members. If there is no statutory auditor, agreements between S.A.R.L. and nonmember managing director are subject to prior approval by member(s). If approval is refused, any harmful consequences of agreement are liability of contracting managing director or member. Such supervision procedure excluded when agreements between S.A.R.L. and managing director or member concern common operations and are concluded in normal terms.

Non-EU, EEA or OECD citizen, acting as managing director must obtain prior authorization ("carte de commerçant étranger") from competent Préfecture de Police or departmental prefecture. No registration with corporate and commercial registry is possible without such authorization.

Dividends.

See subhead Corporations in Form of Sociétés Anonymes, supra.

Accounts.

Members may name statutory auditors ("commissaires aux comptes") to supervise accounting and financial reports of S.A.R.L. Art. L.223-35 al. 2 of Commercial Code requires company to appoint statutory auditor and deputy statutory auditor for six financial year term when any two of following three criteria have been met during preceding fiscal year: (i) Total assets on balance sheet exceed [Euro]1,550,000; (ii) turnover (excluding V.A.T.) exceeds [Euro]3,100,000 and; (iii) average number of salaried workers exceeds 50. For fuller description of functions of statutory auditors, see subhead Corporations in Form of Sociétés Anonymes, supra.

S.A.R.L.s must file following documents with Commercial Court within month following approval of accounts: Annual Accounts, Management Report, Statutory Auditor's Report if any, and proposal for allocation of profits.

Participations may not be offered for public subscription. They are not represented by certificates and transfers can only be made by transfer document served upon S.A.R.L. Participations may be transferred only with consent of majority of members representing half of capital. (Art. L.223-14 of Commercial Code). If consent denied, S.A.R.L. must within three months from such refusal acquire or cause to be acquired participations so offered at price fixed under usual provisions of Civil Code. S.A.R.L. may also, with consent of member proposing transfer, within same three months period repurchase and cancel participations involved to reduce its capital by their face value. If neither solution is reached after three months, member proposing transfer may proceed as originally proposed, provided such member had held his participation for at least two years; otherwise participation cannot be transferred.

Transfers between members are not restricted by law, but articles' by-laws may provide restrictions of equal, but not greater, severity than those provided by law for third party transfers.

In case of contributions and acquisitions with marital goods, spouse of person who has decided to make acquisition must be informed in advance in order to allow spouse to assert right to one half of shares. Furthermore, this must be notified in act, failure to do so making it null and void.

Transfers by way of inheritance or liquidation of community property, or to spouse or direct relation are not restricted by law but some restrictions may be in by-laws.

Registration Tax.

Such transfers are subject to registration tax of 4.80%.

Members' Rights and Duties.

Annual meeting of members must be held within six months of close of fiscal year of S.A.R.L. Prior to such meetings management must make available to members pertinent financial information, including latest income statement and balance sheet. (Arts. L.223-26 and L.223-31 of Commercial Code). In E.U.R.L. management submits such documentation to sole member who must approve them within six months. Members may also obtain similar information for prior three fiscal years. Members have right to submit written questions which must be answered by managing director at meeting.

Ordinary members' meeting approves accounts for fiscal year; vests increased authority in managing directors if necessary; and generally decides upon all questions not requiring extraordinary collective decision ("décision collective extraordinaire") by absolute majority on first call and by majority of votes cast on second call. Extraordinary collective decisions can be made only with consent of majority of members representing at least three-fourths of capital and include amendments to by-laws, increase or reduction of capital, and dissolution of S.A.R.L. Change of nationality or transformation of S.A.R.L. to partnership or other forms of corporation or decisions increasing members' obligations normally requires unanimous approval. In E.U.R.L., single member has same powers as members meeting in other S.A.R.L.s. S.A.R.L. can be transformed into S.A. by simple majority if net assets exceed [Euro]750,000.

If S.A.R.L. becomes S.A., one or more special auditors ("Commissaires à la transformation") must be appointed by President of Commercial Court to verify current value of assets.

Dissolution.

In case company's net assets fall below one half of registered capital, managing director or statutory auditor must, within four months after approval of accounts showing such loss, consult members about possibility of dissolution. If members decide not to dissolve S.A.R.L., capital must, within two years, be reduced by amount of loss or S.A.R.L.'s net assets must be restored to at least one-half of registered capital. (Art. L.223-42 of Commercial Code). In any case, decision must be published according to rules established by decree. Cause for dissolution also arises when S.A.R.L. retains more than 100 members. Other causes of dissolution are those common to all forms of commercial companies. See subhead Corporations in Form of Sociétés Anonymes, supra.

From moment of its dissolution, S.A.R.L. is in liquidation being realization of assets and payment of creditors in order to proceed with distribution between members of remaining assets.

However, dissolution of E.U.R.L. does not give way to liquidation, but instead transfer of universality of E.U.R.L. property to sole member with right of opposition given to creditors, only in case sole member is another company.

Corporations in Form of Société par Actions Simplifiée-S.A.S.

Law No. 94-1 of Jan. 3, 1994 instituted simplified company form called Simplified Shares Company ("Société par Actions Simplifiée" or "S.A.S."). Originally S.A.S. was meant as vehicle for joint ventures between other companies and introduced to answer concerns of businesses who complained about rigidity of existing French corporate structures. Accordingly, Law No. 94-1 of Jan. 3, 1994 provided that only corporations with minimum paid-up capital of FRF 1.5 million (or equivalent in foreign currency) could be shareholders of S.A.S. As it appeared that flexibility of S.A.S. was very attractive for small and medium businesses, legislature allowed any individual or corporation to be shareholder of S.A.S. without any restriction concerning share capital of such shareholder. In addition, recent legislation allowed S.A.S. to be established by one shareholder ("S.A.S. unipersonnelle") which may be either corporation or individual. Accordingly, S.A.S. can be established by one shareholder and then be owned by two or several shareholders pursuant to share transfer (and conversely) without any other formalities than such share transfer.

Minimum capital of S.A.S. is [Euro]37,000: 50% of cash subscription must be paid up at time of incorporation and balance paid within five years. S.A.S. may not solicit funds from public.

Management structure is freely set-up in by-laws. Only minimum requirement concerns office of President. President represents S.A.S. with respect to third parties and limitation of President's powers are not binding on third parties.

President may be corporation or individual and may be appointed for determined or undetermined duration. Presidents of S.A.S. are not limited in terms of number of offices they can assume concurrently in multiple S.A.S. By-laws may also provide condition in which General Manager or Deputy General Manager may exercise same powers as President.

By-laws may also provide for collective management.

When President (or member of collective supervisory body set by by-laws) is corporation, directors of that corporation are subject to same conditions and liabilities as if they were themselves President (or member of collective supervisory body).

By-laws may freely set rules governing shareholders' decision. Resolutions may be adopted by holding actual meeting, by correspondence, by videoconference, by fax or by circulating written consent for signature.

However, following decisions can only be made by extraordinary shareholders' meeting: increases and decreases in capital; decision to merge, split-up or contribute S.A.S. to capital of another company; nomination of statutory auditors; decisions regarding review of annual accounts and distribution of dividends; dissolution and transformation to other forms of corporation.

Unanimity is also required to modify certain provisions of by-laws such as those regarding: nontransferability of shares (which may be provided with ten year maximum duration); shareholders' agreements concerning share transfers; expulsion of shareholder (which, as opposed to S.A., is possible); and suspension of shareholder's voting rights when control of that shareholder has changed; and decisions increasing shareholders' obligation.

Foreign Corporations.

Such corporations desiring to do business in France through branch must comply with exchange control regulation (see category 14 Foreign Trade and Commerce, topic 14.02 Exchange Control). Foreign corporation must file with corporate and commercial registry two certified copies of its articles of incorporation and by-laws, as well as various supporting documents, all accompanied by French translations. Branch must have office address, evidenced by: (i) Commercial lease or agreement to use premises as registered office; (ii) by temporary agreement with resident company; or (iii) by agreement with parent company.

Foreign corporation must also be registered with corporate and commercial registry, filing special forms specifying, among other things, representative entitled to sign for and administer French office of corporation. If said representative, or director, is non-EU, EEA or OECD citizen, he must obtain prior authorization from competent Préfecture de Police or departmental préfecture. If said representative is of French nationality, no authorization is required.

Foreign corporation complying with these legal formalities has same legal status as French corporation provided, however, branch is not per se legal entity and that any action carried out is legally considered as carried out by foreign corporation. Foreign corporations doing business in France are subject to same taxation as French corporations for profits made in France, but with special provisions with regard to dividends.

Foreign corporation having branch in France must file its annual accounts with clerk of Commercial Court.

Corporate Taxes.

See category 22 Taxation, topic Taxes.

2.05 FOREIGN CORPORATIONS:

See topic 2.04 Corporations.

2.06 LIMITED COMPANIES:

See topic 2.04 Corporations.

2.07 PARTNERSHIPS:

Partnerships may be either general partnerships (“sociétés en nom collectif”), special partnerships (“sociétés en commandite simple”), or special partnerships by shares (“sociétés en commandite par actions”). There is also form of association similar to joint venture (“société en participation”). Under law, all forms of partnerships except “société en participation” are considered to be commercial and therefore subject to commercial, not civil, jurisdictions and bankruptcy proceedings. See category 3 Business Regulation and Commerce, topic 3.02 Commercial Law. Formation of partnerships is subject to regulations regarding registration with corporate and commercial registry as provided by Decree No. 67-236 of Mar. 23, 1967.

Investment or participation by nonresident in partnership subject to regulations of Ministry of Finance. See category 14 Foreign Trade and Commerce, topic 14.02 Exchange Control.

General partnership (“société en nom collectif”) may be given name which is invented or which includes name of one or more persons associated with partnership. Name must be preceded or followed by words “société en nom collectif” or “SNC”. (Art. L.221-2 of Commercial Code). Partners' liability is unlimited. Each partner represents firm, unless articles provide to contrary. Non-EU citizen who becomes partner, or manager (“gérant”), must obtain special “foreign merchant card” (“carte de commerçant étranger”) from Préfecture de Police or departmental préfecture. Partnership assets constitute primary fund for satisfaction of partnership creditors. Partnership creditors may also bring suit against individual partner, but must first establish their status as partnership creditors either by judgment against partnership or by recognition of claim by partnership and proof of inadequacy of partnership assets.

Unanimous agreement of partners is always necessary for certain decisions for transfer of partnership interest and that annual meeting must be held to approve accounts for that fiscal year.

Art. L.221-9 al. 2 of Commercial Code, requires partnership to appoint Statutory Auditor and Replacement Statutory Auditor for six year term when any two of following three criteria have been met during two preceding fiscal years: (i) Total assets on balance sheet exceed [Euro]1,550,000; (ii) turnover (excluding V.A.T.) exceeds [Euro]3,100,000; and (iii) average number of salaried workers exceeds 50.

Special partnership (“société en commandite simple”) may be given name which includes name of one or more persons associated with partnership, either general partners (commandités) or special partners (commanditaires). General partners are basically subject to same regulations as general partnership's partners (see subhead General Partnership [“societé en nom collectif”], supra). Special partners are liable for partnership debts only up to amount that they have contributed. They cannot participate in management, but may act in advisory capacity.

Unless otherwise provided in articles and by-laws, unanimous consent of partners is necessary for transfer of special partner's interest. Annual meeting is necessary to approve accounts for that fiscal year. (Concerning auditors, see last paragraph of subhead General Partnership [“société en nom collectif”], supra.)

Special partnership by shares (“société en commandite par actions”) lies between special partnership and corporation (“société anonyme”). Minimum capital is [Euro]225,000 for companies seeking investment from public and [Euro]37,000 for others. (Art. L.224-2 of Commercial Code). Rules for constitution of société en commandite par actions are similar to those for société anonyme. See topic 2.04 Corporations. Special partner's liability is limited to amount of their contribution. Business is carried on by general partner or partners, known as managers (“gérants”), whose management is supervised by Supervisory Board (“conseil de surveillance”) composed of not less than three shareholders appointed by general meeting of shareholders. (Art. L.226-4 of Commercial Code). Members of Board incur no personal liability for their manner of supervision, but are liable for own faults in carrying out duties. They submit annual report to shareholders. Profits distributed in form of dividends.

Articles of incorporation and by-laws set age limit for managing directors which shall not exceed 65 unless articles of incorporation and by-laws expressly provide otherwise. (Art. L.226-3 of Commercial Code). Also, unless articles or by-laws provide otherwise, no more than one-third of active members of committee of inspection may be older than 70. (Art. L.226-5 of Commercial Code).

Law requires that statutory auditors ("commissaires aux comptes") be appointed to control financial reports and accounts of partnership. For description of functions and qualifications of statutory auditors, see topic 2.04 Corporations.

Special partnership by shares may be transformed into corporation or limited liability company by decision of shareholders at extraordinary meeting with approval of majority of general partners (no unanimous consent required).

Société en Participation.

It is nonregistered company by decision of its shareholders and société en participation, which can be either civil or commercial depending on nature of business, is similar to joint venture. It is formed by written or even oral contract, which need not be notarized for commercial purposes. Unless otherwise provided in by-laws, applicable rules are those governing companies as entity, though "société en participation" is not legal entity. Each partner contracts in his own name and is personally liable to third party, unless société is sold to third party, in which case partner is jointly and severally liable. If "société" is of undetermined duration, each partner can, in principle, terminate its existence at any time.

3 BUSINESS REGULATION AND COMMERCE

3.01 BILLS AND NOTES:

France is signatory to Geneva Agreements of June 7, 1930 on promissory notes and bills of exchange. Legislation has been enacted for internal application of provisions of said Agreements. (Com. C. L.511-1—L.512-8).

A bill of exchange ("lettre de change" or "traite") which fulfills all requirements brings parties within trading law ("acte de commerce"), regardless of whether they are traders or nontraders (see topic 3.02 Commercial Law), and whether or not bill was given in respect of a purely civil transaction. Consequently, suits in respect thereof are brought before commercial courts.

Formal requirements (Com. C. L.511-1) are similar to those of Anglo-American law, except that words "bill of exchange" must appear in language of document. Consideration for which bill of exchange was issued need not be indicated on bill. Omission of words "bill of exchange" or of names of drawer, drawee and payee, of date of issuance, of order to pay, of sum to pay, or of signature of drawer, may result in nullity of bill of exchange. "Provision" must be made by drawer. This is considered to have been done if drawee at time of maturity is indebted to drawer in sum at least equal to amount of bill. Acceptance presupposes "provision" (i.e. adequate funds to honor bill) and is proof of such in respect to indorsers. In case of dispute, drawer has burden of proving that drawee had, at maturity of bill, adequate "provision". (Com. C. L.511-7). Drawee cannot refuse to accept bill created for payment for merchandise sold. (Com. C. L.511-15).

Bills may be drawn at sight. In that case they must be presented for payment within one year. (Com. C. L.511-23). Drawer may shorten or lengthen this period. There are no days of grace. (Com. C. L.511-81). Bills falling due on Sun. or holiday are payable on succeeding business day.

Bill may be endorsed before or after maturity. (Com. C. L.511-14). Mere signature of indorser is sufficient to constitute indorsement. Antedating indorsement is forgery. All those whose signatures appear on bill of exchange are jointly and severally liable to bearer. (Com. C. L.511-44). Persons sued on bill of exchange may not set up against holder in good faith defenses based entirely on their relationship with drawer or with previous holders. Holder in bad faith is one who assented to bill being indorsed to his benefit, knowing that drawee would not be able to set up against drawer or previous holder defense based on its relationship with latter. (Com. C. L.511-12). Negligence may give rise to damages which cannot in any case exceed amount stated in bill. (Com. C. L.511-42). Defenses cannot be opposed to discounting bank, unless it is proved that at time draft was discounted, bank knew that (i) “provision” would not be present at term, or (ii) that situation of preceding holder was irremediably compromised. Bank is deemed to have cognizance, at time of discount, that it was preventing accepting drawee from arguing of lack of provision.

If holder does not protest by notarized deed, drawer's failure to pay within two days of maturity, he loses his right against endorser (Com. C. L.511-39); if there was provision at time of maturity, he also loses his right against drawer (Com. C. L.511-49).

In order to be paid, holder may draw new bill of exchange (“retraite”) on one of his guarantors and payable on sight for amount of principal, expenses and cost of exchange. Amount of expenses includes protest fees, brokerage, interest and stamp duties. (Com. C. L.511-62—L.511-64).

If bill of exchange is modified by any party during course of its circulation, drawer and all indorsers prior to change are held to original obligation, while all subsequent indorsers are bound by terms of new obligation. (Com. C. L.511-77). Forgery of signature of drawer does not bind him in any way, but indorsers are bound under forged instrument. (Com. C. L.511-5).

Law No. 81-1 of Jan. 2, 1981 (codified under Arts. L.313.23 et seq. of Monetary and Financial Code) and implementing Decree No. 81-862 of Sept. 9, 1981 create another form of commercial paper (called “Bordereau Dailly”), aimed at simplifying transfer (or pledge) of claims in favor of credit institutions only, and applies to claims arising solely out of business activity (“créances professionnelles”) as opposed to financial claims. Transfer (or pledge) of claim is made effective by simple remittance of “bordereau” bearing reference “acte de cession (ou de nantissement) de créances professionnelles”, which is statement evidencing transfer (or pledge) of one or several claims. In order to be valid, bordereau must bear some specific references as set forth by law, and credit institution must date it. Latter can prevent debtor from paying transferor by sending him notice bearing specific references as provided for in Decree No. 81-862 of Sept. 9, 1981. Such bordereau can then be endorsed by other credit institutions only, and circulate like bill of lading. All rights attached to transferred claims are automatically transferred, in particular all guarantees and securities, including mortgages.

Promissory notes (“billets à ordre”) are subject to rules relating to bills of exchange in so far as these concern maturity, indorsement, joint and several liability, payment, protest, rights and duties of holder. Promissory note must be dated and must set forth name of payee, place of issuance, as well as time and place of payment; it must also contain undertaking by drawer to pay determined amount. It must contain words “Promissory Note.” (Com. C. L.512-1). Omission of one of above references, except place of issuance and time and place of payment, may result in nullity as would omission of debtor's signature.

In all debtor-creditor relationships, payment through promissory notes allowed to debtor only if specifically envisaged by parties and mentioned in invoice. If promissory note is not received by creditor within 30 days of sending of invoice, creditor may issue bill of exchange which debtor must accept pursuant to conditions provided by law. (Com. C. L.512-8).

In respect of bills of exchange and promissory notes all actions against acceptor are barred by limitation after three years from maturity. Actions of bearer against drawer or indorsers are barred after one year from protest. Actions of indorsers against other indorsers or drawer are barred after six months from repayment of bill or note by indorser or from date of action against indorser. (Com. C. L.511-78).

In case of judicial proceedings, the period of limitation is calculated from last formality accomplished. (Com. C. L.511-78). Defendant setting up statute of limitations under this section may be required to affirm under oath that nothing further is due, and if action is against heirs or representatives they may be required in similar manner to affirm under oath that to best of their belief nothing is due.

Checks must be payable at sight. Place and date of drawing must be stated. Check can be drawn only on bank, investment service provider, or other authorized institution, and it must contain word “check”. It may be drawn in favor of specified person or to his order, or to bearer. (Monetary and Financial Code L.131-1 to 15).

“Provision” must exist at time of issue of check, i.e. drawer must have claim free from all liability and payable on demand against drawee.

If drawee pays check he is then subrogated to rights of beneficiary. Stop-payment orders are possible only if check is lost or stolen, fraudulently used or if payee is bankrupt. (Art. L.131.35 of Monetary and Financial Code).

Anyone who wilfully withdraws provision after he has drawn check, or who instructs bank not to pay, can be prosecuted under Art. L.163-2 of Monetary and Financial Code with respect to security of checks and payment cards. Pursuant to Art. L.131-78 of Monetary and Financial Code, person drawing non-provisioned check may not draw another check for five years, unless he pays amount of check as well as penalty in proportion to amount of non-provisioned check. No penalty is assessed, however, if amount for which check was drawn is paid within two months of bank's paying order (“regularization”) and if this was only regularization during previous 12 months. Penalty doubles upon fourth regularization in any 12 month period. Pursuant to Art. L.131-84 of Monetary and Financial Code, drawee must record every “payment incident” relating to nonpayment of check and, within few days, has to notify such failure to Banque de France. Latter centralizes information on clients prohibited from drawing checks.

Rules governing liability of endorsers and drawers are same as those which govern bills of exchange. Check must be presented for payment within eight days if issued and payable in France, and within 20 days or 70 days if issued outside of France but payable in France, depending on whether issued in Europe or outside Europe. Computation starts from date of issuance. (Art. L.131-32 of Monetary and Financial Code). Protest must be made before time for presentation expires.

Actions brought against drawer or endorser are barred after six months and against drawee after one year from expiration of presentation period. (Art. L.131-59 of Monetary and Financial Code).

Checks delivered by banks to customers are normally “barred” (imprinted with parallel lines, usually oblique) and are not endorsable, except to bank or other authorized institution. They may be presented to drawee for payment only through bank. Unbarred checks are available if requested but are subject to small stamp duty.

Code Monetaire et Financier.

Pursuant to Ordonnance No. 2000-1223 of Dec. 14, 2000, financial and banking provisions of several different laws (e.g., Law No. 84-46 of Jan. 24, 1984 and Law No. 96-597 of July 2, 1996) have been codified in order to create new financial code, namely Code Monétaire et Financier.

3.02 COMMERCIAL LAW:

Ordinance No. 2000-912 of 18 Sept. 2000 has reformed French Commercial Code. It has integrated Law No. 66-537 of 24 July 1966 on Commercial Companies, Ordinance No. 67-821 of 23 Sept. 1967 on Economic Interest Groupings, Law No. 89-377 of 13 June 1989 on European Economic Interest Groupings as well as Ordinance No. 86-1243 of 1 Dec. 1986 on Competition into French Commercial Code.

French Law distinguishes between traders (commercants) and nontraders. Traders are persons who are engaged in trading transactions as their regular occupation. They must register with Register of Commerce. (Decree of Mar. 23, 1967, Art. 1, May 30, 1984, Art. 7 modified by Decree of July 2, 1998). Foreign traders must obtain foreign trader I.D. card (Decree-Law of Nov. 12, 1938), subject to specific conditions (Decree No. 98-58 of Jan. 28, 1998 modified by Decree No. 2004-1260 of Nov. 25, 2004 and circular of June 8, 1998). Traders are subject to special commercial tribunals, and they may be declared bankrupt (Trade Courts). They must keep daily or monthly business records which may be received in evidence in commercial litigation. They must also have prepared annual balance sheets and profit and loss statements. All such books, documents and business correspondence must be kept for ten years.

Included as trading transactions are all purchases of goods for purposes of resale or hire, contracts of carriage, contracts for supply of goods, or relating to agencies, business offices, auction galleries, contracts of exchange, banking and brokerage, transactions involving public banks, obligations between merchants, traders, and bankers, bills of exchange (regardless of persons contracting), and contracts in respect of ships, marine insurance and wages and hire of crew. (Com. C. L.110-1—L.110-2). Transactions between traders are brought before commercial courts; parties to commercial contract may provide for arbitration. (Code de l'Organisation Judiciaire Art. L.411-4). All forms of evidence may be used in actions against trader. (Com. C. L.110-3).

See topics 3.01 Bills and Notes, Contracts; categories 4 Citizenship, topic Aliens; Civil Actions and Procedure, topic Actions; Courts and Legislature, topic Courts.

3.03 COMMERCIAL REGISTER:

See category 9 Documents and Records, topic 9.05 Records.

3.04 CONDITIONAL SALES:

See topic 3.13 Sales.

3.05 CONSUMER PROTECTION:

In French law, consumption is recognized as legal act which permits consumer to obtain good or service in view of satisfying personal or familial need. Law protects consumer in use of disposable and durable goods, such as food and housing, as well as in receipt of services, both material (repair, insurance, credit) and intellectual (medical, legal), which are destined to satisfy personal or familial need. Utilization of public services, such as postal, telephone, and hospital services, is also characterized as act of consumption for purpose of French law.

Consumer, in legal sense, is individual who accomplishes act of consumption referred to in above definition. Nonetheless, French law of consumer protection is concerned with particular category of acts rather than particular class of persons.

Private and Public Enforcement.

Enforcement of consumer rights is assured by representative organizations of both private and public law. Among private organizations, Associations of Consumers are most important.

Public bodies mainly in charge of consumer protection are Secretary of State for Consumer Affairs, French Directorate General for Competition (“DGCCRF”) under control of Ministry of Economy and Finance and local committees in charge of consumer affairs. Other governmental units which participate in protection of consumer affairs are: Service of Instruments of Measure (Ministry of Industry); Customs Bureau (Ministry of Finance); Veterinary Service of Dietary Hygiene (Ministry of Agriculture); and Inspection Service of Pharmacy and Health (Ministry of Health). In addition, law of Dec. 22, 1966 (last modified by Decree of May 4, 1990), created National Institute of Consumer Affairs, public institution which has subsequently developed expertise in several areas: Analysis and documentation of information provided by press and of legal, economic and new technological developments. Institute, managed by consumers, both informs and counsels consumers on recent developments in consumer affairs inter alia by issuing weekly leaflet (INC Hebdo) and magazine (60 millions de consommateurs). Decree of July 12, 1983 (modified by decree of Mar. 2, 1987) creates National Council for Consumer Affairs, which allows for negotiation between consumers and professionals and issues opinions on bills with respect to consumer affairs.

Principal Sources of Law.

The Consumer Code (“Code de la consommation”) created by Law No. 93-949 of July 26, 1993 has codified numerous laws relating to consumer protection, principal of which are listed below. Decrees, have been codified in regulatory chapters of Code de la Consommation by Decree No. 97-298 dated Mar. 27, 1997. Arrêtés are not codified.

Defective Products.

Civil Code, which in Arts. 1641 to 1649 holds seller responsible for all hidden defects in merchandise sold. (Art. L.211-1 of Consumer Code). (See topic 3.13 Sales, subhead Warranties.) Law No. 98-389 of May 19, 1998 concerning liability for defective products, which implements EC Directive of July 25, 1985 holds manufacturer liable for damage caused by defect in his product, regardless of whether he has direct relationship with victim. (Art. 1386-1 of Civil Code). Nevertheless, victim is required to prove damage, product's defect and causal relationship between defect and damage. (Art. 1386-9). However, 1998 Law provides discharge of liability in particular if producer proves that state of scientific and technical knowledge at time when he put product into circulation was not such as to enable existence of defect to be discovered. (Art. 1386-11, §4).

EC Directive 1999/44 was transposed in French law by Ordinance 2005-136 of Feb. 17, 2005. It allows consumers to benefit from legal warranty that products purchased by consumer conform to sole contract.

Fraud.

Law of Aug. 1, 1905 provides criminal treatment for fraud or falsity in sale of goods or services no matter how perpetrated and whether in respect to nature, origin, essential qualities or composition, or by delivery of quantity or kind of goods or services other than that specified in contract, or concerning use, inherent risks, controls effectuated or safety instructions. (Arts. L.213-1 to L.216-1 of Consumer Code). Numerous decrees and arrêtés have been promulgated with respect to individual products. Decree of Dec. 7, 1984 provides specific rules regarding labelling and presentation of foodstuffs. (Arts. R. 112-1 to 112-33).

Product Safety.

Law of July 21, 1983 establishes general obligation of safety. Products and services which fail to meet it are prohibited or regulated. (Arts. L.221-1 to L.225-1 of Consumer Code). General Product Safety Directive (GPSD—2001/95/CE) adopted in 2001 and entered into force on Jan. 5, 2004 concerns safety controls of all consumer products (except food). In June 2004, GPSD is still not implemented in France. Law No. 2004-23 of Mar. 18, 2004 obliges French government to implement GPSD by ordinance at latest in eight months.

Law No. 78-23 of Jan. 10, 1978, modified by Law No. 94-442 of June 3, 1994, protects consumers with respect to health and safety of goods and services and contains further measures, against fraudulent sales practices. (Arts. L.115-27 to L.115-33, L.561-1 and L.561-2, L.132-1 to L.132-5 of Consumer Code). Law No. 98-535 of July 1, 1998 reinforces control over safety of goods and especially of food: special body ("Agence Française de Sécurité Sanitaire") is in charge of sanitary safety of food, as from production of raw material to distribution to consumers.

Prices.

Arrêtés of Dec. 3, 1987 and Sept. 2, 1977 as well as provisions of former Ordinance dated Dec. 1, 1986 (now codified in Commercial Code under Arts. L.410-2 et seq.), make it compulsory for professionals to clearly and correctly announce price of their products and services. Since Jan. 1, 2002, prices are in EURO with possibility of posting in French Francs.

Misleading and Comparative Advertising.

Arts. L.121-1 to L.121-7 of Consumer Code forbid all false and misleading advertising practices, whether so considered because they are patently false or merely tend to mislead.

EC Directive of Oct. 6, 1997 concerning comparative advertising has been transposed in French Law by Ordinance 2001-741 of Aug. 23, 2001. This Law defines comparative advertising that puts in comparison goods and services in identifying, explicitly or implicitly, competitor or goods or services offered by competitor (Art. L.121-8 of Consumption Code); and provides that company for which comparative advertising is made has to prove within brief term exactness of information used in advertising (Art. L.121-12 of Consumption Code).

Abusive Clauses.

Law No. 95-96 of Feb. 1, 1995 which implements EC Directive of Apr. 5, 1993 prohibits abusive clauses in consumer sales contracts. (Art. L.132-1 of Consumer Code). Attached to Law is non-limitative list of 17 clauses which may be deemed abusive (relating to effective knowledge by consumers of contractual provisions, possibility to cancel sale, determination of price, warranty limitations, indemnification and termination clauses, unilateral changes by seller). In addition to this list special commission has established list of abusive clauses which are prohibited. Such clauses are null and void, and may result in nullity of entire contract as well as in criminal penalties.

Credits to Consumer.

Law No. 78-22 of Jan. 10, 1978 on credit sales transactions provides that advertisement of credit sales must indicate name of lender, purpose and duration of loan, total cost, effective interest rate and other transaction charges, and contains other rules governing consumer credit sales. (Arts. L.311-1 to L.313-15 of Consumer Code).

Law No. 2003-706 of Aug. 1, 2003 on financial safety modifies some provisions concerning borrower's information and protection in consumer credit contracts (requirements for any “honest and informative” advertisement). In compliance with EC Directive of Feb. 16, 1998 on approximation of legislations of Member States concerning consumer credit (implemented in French law by Decrees No. 2002-927 and 2002-928 of June 10, 2002), any advertisement or any credit offer shall include statement of annual (and not monthly) percentage rate of charge. Consumer protection is reinforced during formation and execution of consumer credit contract. Creditor shall provide to borrower, monthly and in reasonable time before date of payment, updated report on total amount of exigible sums, part of transferable property and redemption date (New Art. L.331-9-1 of Consumer Code).

Decree Mar. 27, 1997 governs labelling of food products. (Arts. L.112-1 et seq. of Consumer Code have to be respected as well as Art. L.213-1 of Consumption Code). Directives of May 19, 2000 and Apr. 25, 2000 have been transposed by Arrêté of June 30, 2001 on declaration, classification, packaging and labelling of substances.

Sales Regulations.

Prior municipal authorization is required for sale of unused goods in liquidations, forced sales and “sales”. (Law No. 96-603 of July 5, 1996). Sale of goods involving rebates is regulated by Arrêté 77-65/P of Sept. 2, 1977. “Snowball” sales tactics, whereby consumer obtains goods or services free or at reduced prices in exchange for procuring sales to or subscriptions by third parties, are forbidden by Law of Nov. 5, 1953. (Arts. L.122-6 and L.122-7 of Consumer Code). Art. L.121-35 prohibits sales, offers to sell goods, and rendering of services which give right to premium or bonus; unless premium or bonus consists in giving more of same good. MURCEF Law of Dec. 11, 2001 states that it is Monetary and Financial Code that applies to sales with bonus. This rule does not apply to inexpensive goods or to rendering of minor services or to gifts. Art. L.121-36 prohibits sales accompanied by lottery. Law of July 13, 1992 implementing Directive 90/314 on package travel, package holidays and package tours, governs organisation and sale of tours and travels.

Excessive Debts.

Settlement procedure for excessive debt situations has been established by Law No. 89-1010 of Dec. 31, 1989 modified by Law No. 95-125 of Feb. 8, 1995. (Arts. L.331-1 to L.333-8 of Consumer Code). Procedure is set up for individuals acting in good faith unable to meet their nonprofessional payable debts. Commission tries to reconcile debtors with creditors and to draw up contractual reorganisation plan. Law No. 98-657 dated July 29, 1998 and Decree No. 99-65 dated Feb. 1, 1999 amending articles of Consumer Code cited above, set up special procedure for poorest individuals, according to which payment of certain debts may be suspended for fixed period of time. Settlement procedure for excessive debt situations has been recently amended by Law No. 2003-710 of Aug. 1, 2003 and Decree No. 2004-180 of Feb. 25, 2004. New provisions concern composition and competences of Commission (Art. L.331-1 of Consumer Code), instruction of file (six months maximum deadline) and duration of plan of settlement (Art. L.331-6 of Consumer Code). Individual settlement procedure (“procedure de retablissement personnel”) has been particularly amended. (Arts. L.332-5 to L.332-12 of Consumer Code).

See also topics 3.09 Interest, 3.13 Sales.

3.06 CONTRACTS:

From Jan. 1, 2002 EURO will be only valid currency unit. Therefore, contracts shall be denominated in EURO.

French law of contracts varies, to some extent, according to whether contract is deemed to be commercial or civil. Contract is deemed commercial when entered into by trader for purposes of commerce. Contracts between trader and non-trader may be deemed commercial as to trader, and civil as to non-trader.

Civil contracts may be concluded either orally or in writing. Oral contracts are valid without any special formality. Contracts of value equal to or exceeding [Euro]800 (Decree No. 80-533 of 15 July 1980) must be in writing and their validity may not be proven by witnesses. Parol evidence is not allowed to alter or challenge contents of any written contract (C. C. 1341) except where there is element of written proof ("commencement de preuve par écrit") in support of alteration or challenge. However, element of written proof must come from party against which alteration or challenge is alleged. (C. C. 1347).

Written contracts may be made either privately, as simple contracts, or by formal instrument before notary ("acte authentique"). (C. C. 1317-1321). For certain types of agreements such as gifts, prenuptial agreements and mortgages, notarial deeds are mandatory.

Private contracts must be made in as many originals as there are parties to agreement with differing interests and number of originals must be expressly indicated in document. No witnesses are required for validity of such contracts.

Commercial Contracts.

Parol evidence is permissible to establish existence or contents of most commercial contracts, regardless of amount of money involved. Nevertheless, contract made by trader for trader's personal purpose must be proven in accordance with civil rules. Contracts between corporations, contracts on maritime rights, and contracts for sale of fonds de commerce (entire going business concern, including goodwill), as well as credit paper (bills of exchange, promissory notes) can only be proven by written evidence.

Exchange of correspondence may establish written contract.

Extensive body of law pertaining to "leasing" contracts and to real estate companies for commerce and industry has been developed, principal applicable text being Ordinance No. 67-837 of Sept. 28, 1967.

Commercial contracts are not required to be registered, but may be registered voluntarily. In contract concluded between trader and consumer, any clause that aims at or whose consequence is to unbalance parties' obligations in favor of trader is disregarded. (List of sample clauses which might be regarded as aiming at or resulting in imbalance between parties obligations is attached to French Consumer Code—some may be fixed by decree.) This concerns every type of contract, whether freely negotiated or not. Such contract may survive if its structure is not altered, should invalid clause be essential one for trader. These provisions (set forth by Art. L.132-1 of Consumer Code), are part of public policy and are applicable whenever consumer lives in member state of EU, or whenever contract has been proposed, concluded or performed within EU. (L.135-1 of Consumer Code).

Formation of Contracts.

Four elements are essential to validity of contract: Consent of parties (which may result from letter of intent); legal capacity to contract of both parties; specific object not contrary to public policy; and "cause," analogous to consideration. Valid contracts have force of law between contracting parties. (C. C. 1134). Contracts must be performed in "good faith". Contract may not be reformed or modified by courts for reasons of equity or otherwise. (Cass. Com. Dec. 18, 1979). Laws considered as relating to public policy and morals ("ordre public") may not be derogated from by contract. (C. C. Art. 6).

Secret contracts concluded in addition to a publicly made contract in order to annul or modify this public contract are not necessarily void. (C. C. 1321). Such secret contracts, however, concluded in order to conceal from tax authorities part of principal in sale of real estate, of "fonds de commerce" (entire going business concern including goodwill), or of lease are void. Unilateral promise to lease or sell real estate or fonds de commerce is invalid unless evidenced by notarial instrument or private contract placed on record within ten days of promissee's acceptance. (C. G. I. Art. 1840).

Many types of contracts are subject to compulsory registration with fiscal authorities within one month from day of signature, notably: Contracts concerning conveyances of movable or immovable property; leases; prenuptial agreements; and contracts concerning formation, modification and winding up of partnerships and corporations. Registration of contracts requires payment of registration taxes, rate of which varies in accordance with value and specific nature of contract. An oral offer must be accepted at once. Written offer may be accepted during time specified, if any, or within reasonable time according to circumstances. Current case law permits revocation of offer until moment when offeree dispatches acceptance. Offer must be accepted unequivocally; any modification of offer by acceptance is deemed to constitute refusal. Silence is only deemed acceptance (i) if parties were involved in former business relations, (ii) for contracts entered into by parties belonging to same professional sector or (iii) if offer has been made for personal interest of offeree.

Contract is formed at moment of acceptance. Disputes over construction of contract are generally governed by law and in courts of place of acceptance, absent contrary stipulation by parties.

Nonperformance.

Disputes as to performance of contract are governed by law parties have chosen, unless this law would violate French public policy. (See subhead Applicable Law, infra.)

For nonperformance or defective performance aggrieved party may seek rescission and/or damages plus interest, but only after making formal request for good performance (mise en demeure). (C. C. 1138, 1139, 1146, 1184). Specific performance is not generally available. Contract may stipulate liquidated damages in event of nonperformance or defective performance (clause pénale, C. C. 1152) and courts customarily enforce such clauses without more. Court can, even ex officio, reduce or increase stated amount of liquidated damages if manifestly unfair. Court can also reduce such stated amount in proportion to benefit conferred by any partial performance of contract. Any contrary stipulation is ineffective. (C. C. 1231).

Nonperformance or defective performance may be excused by “force majeure”; this concept covers all events which are exterior to party in breach, and which are unforeseeable and irresistible; such events include acts of State, acts of God, and some acts by third party. (C. C. 1148). War or strike may constitute force majeure in some circumstances, but insolvency or change of economic position will not.

France has ratified United Nations Convention on Contracts for the International Sale of Goods (entry into force in France 1 Jan. 1988) applicable to transactions between parties established in different countries, which modifies French rules concerning liability arising from such contracts.

Applicable Law.

1980 Convention on the Law Applicable to Contractual Obligations referred to as Rome Convention, came into force on Apr. 1, 1991 and applies, as French conflict of laws rules, to contracts made after that date.

General choice of law rules to be found in Art. 3 and 4 of Convention provide that parties are free to choose law governing their contract. In absence of choice, contract is to be governed by law of country which is most closely connected to Convention, then provides for presumptions to determine country which is most closely connected with contract.

Convention also provides for specific rules to be applied to certain consumer contracts or individual employment contracts. Laws of police and public policy can be applicable to certain contracts.

Government Contracts.

Public Contracts Code provides that above threshold of [Euro]90,000, Government as rule enters into contracts for economic purpose only on basis of acceptance of bids, with specifically negotiated contracts being exception. Conditions and specifications of bids are set forth in general publication to all bidders and thereafter constitute part of contract. Contractor may receive funds on account of work done or advances on future work.

Contractor may furnish bond, which can be replaced by personal guaranty or bank guaranty, or Government may be entitled to withhold part of funds on account in order to insure good performances.

New Code introduces time limit for payments made by Government: 60 days for payments until 31 Dec. 2002 and 50 days for payments between 1 Jan. 2003 and 31 Dec. 2003.

French Language.

Under Law No. 94-665 of 4 Aug. 1994 known under name of “Loi Toubon” all contracts to which public entity or private entity performing mission of public service is party, whatever purpose and form of such contracts, must be drafted in French. Foregoing rule does not apply to contracts entered into by public entity operating industrial and commercial activities when such contract is to be fully performed outside of France. When such contracts are entered into with one or several foreign parties, French version may be accompanied by one or several versions in another language which may be equally binding. (Art. 5).

3.07 FRAUDS, STATUTE OF:

In civil contracts oral testimony is not sufficient to prove claim amounting to [Euro]800 or more. (C. C. 1341). This rule does not apply to commercial transactions, where such testimony is theoretically admissible, regardless of amount involved. (Com. C. L.110-3).

In civil transactions, when one party alone agrees to pay sum of money or deliver specific thing, this should be stated in document signed by obligor who should write in full sum or quantity while also writing numerals. (C. C. 1326).

Written testimony may now also result from electronic medium. Indeed Civil Code was modified by Law No. 2000-230 dated Mar. 13, 2000 (Arts. 1315 and 1316). Art. 1316-4 of Civil Code implemented by Decree No. 2001-272 of Mar. 30, 2001 creates secured mechanism of electronic signature.

3.08 INFORMATION TECHNOLOGY, INTERNET AND NEW MEDIA:

Telecom.

Competition on Telecommunications Market.

Telecommunications in France are governed by Telecom Act of July 26, 1996. Pursuant to Decree No. 2000-881 of Sept. 12, 2000 relating to access to local loop and issuance of (EC) Regulation No. 2887/2000 by European Parliament and Council on Dec. 18, 2000 regarding unbundled access to local loop, local French telecommunications market is officially open to competition since Jan. 1, 2001.

Regulator.

Telecom sector is under supervision of Ministry in charge of telecommunications and French Telecommunications Regulator (A.R.T.). Previous licensing regime has been replaced by declaration regime by virtue of Law of July 9, 2004 adopting European "Telecom Package".

Application of European Framework.

The Telecommunications Act of July 1996 and Order No. 2001-670 of July 25, 2001 adopted EU directives in this area.

Modifications made to Post and Telecommunications Code are significant. They concern, scope and methods of implementation of dispute settlement procedures (requests for settlement of disputes involving technical and financial conditions of provision of list of subscribers) sanctioning by Telecommunications Regulatory Authority (Autorité de régulation des télécommunications). Modified procedures to be followed relating to significant market power operators, to conformity evaluations, to universal directories and to terminal equipment.

Law of July 9, 2004 adopted European "Telecom Package" relating to electronic communications (Framework Directive; Access and Interconnection Directive; Authorization Directive).

Power of Intervention of Local Governments.

Law of July 17, 2001 permits local authorities to establish telecommunication networks and provide related services when private sector has failed to meet demand.

Internet and IT.

E-Signature.

Legislation and regulations in 2000 and 2001 adapts law of evidence to include information technologies and electronic signatures, sets forth technical requirements for recognition of e-signatures, establishes presumption of reliability of electronic signatures and specifies rules of evaluation and certification of security devices regarding creation of e-signatures (dispositifs sécurisés de creation de signature électronique).

Encryption.

Law of June 21, 2004 allows free use of means for encryption; supply, import and export of encryption means which are used only for controlling authenticity and integrity of electronic messages are not regulated per se; other means are subject to government control. Providers of encryption services must register with authorities.

Liability of Intermediaries on Internet.

French Courts and Parliament have adopted special policies regarding liability of intermediaries on Internet. Law of June 21, 2004 absolves Internet service and hosting providers from liability except when they are source of challenged transmission, selected recipient, modified its content or, in case of hosting providers when provider has knowledge of illegal nature of content of transmission and does not stop it. Decision of Constitutional Counsel in June 2004 further restricts providers liability for failing to remove illicit information except when its illegality is manifest or its removal is ordered by judge.

Intellectual Property Issues.

French law is particularly challenged by "Cyber-squatting".

Some companies were thus ordered, in addition to payment of damages, to transfer domain name in dispute. In these cases, it was held that infringement was characterized by registration of domain name reproducing registered trademark and that misappropriation of this domain name constituted risk of confusion for Internet users.

Likewise, when obvious likeness between prior trademark and domain name is likely to lead to confusion in minds of public, trademark law must prevail. Therefore, infringer may be forbidden from using domain name in dispute and may have to transfer it, free of charge, to legitimate holder of trademark.

E-Commerce.

Due to its experience with Minitel (in-home terminal of French telecommunications system) during last two decades, France is well-positioned to handle development of e-commerce.

French government, keeping pace with growth of Internet, has sought to stimulate development of this new sales vehicle since 1999 by adapting legislative framework to upcoming Information Society as previously mentioned.

France is bound by recent Council Regulation (EC) No. 792/2002 of 7 May 2002 on administrative cooperation in field of indirect taxation (VAT) as regards additional measures regarding electronic commerce.

Protection of Personal Data.

Provisions of Law of 6 Jan. 1978 relative to computers, files and liberties, are applicable to all companies compiling computerised files of their clients, private individuals. Prior authorization of CNIL is required in some cases and transfer of computerized personal information outside EU is restricted. Declaration to CNIL (National Commission for Information Technology and Civil Liberties) is also required for collection of computerized data. Law of Aug. 6, 2004 modifies 1978 law to increase investigative and sanction authority of CNIL and to permit designation of correspondent for protection of personal data within enterprise or association. Such designation provides exemption from declaration requirements.

Consumer Protection.

Application of both Consumer Code and European Directive No. 97/66/EC dated May 20, 1997 concerning protection of consumers with respect to long distance sales, includes protection of on-line consumers. Furthermore, State Council (Conseil d'Etat) has expressly recognized scope of application of these two texts for all contracts entered into on Internet network or using on-line services.

Requirements Regarding Use of French Language.

On Aug. 4, 1994, French Parliament adopted law relating to use of French language. Pursuant to Art. 2 of this law, “the use of the French language shall be mandatory for the designation, offer, presentation, instructions for use, and description of the scope and conditions of warranty of goods, products or services, as well as for bills and receipts”. Proposed legislation would specifically require that computer generated electronic messages and web sites be in French unless exclusively sent to or used by foreign persons.

In addition, there are plans to legislate on topics as varied as consumer protection, establishment of regulatory body, protection of content and royalties and setting up of technical procedures to protect against unlawful copyright infringement.

3.09 INTEREST:

Art. 1153-1 of French Civil Code provides that monetary judgments bear interest at legal rate which, unless otherwise provided by law, starts to run as of date of judgment or such other date as judge may determine. Legal rate of interest is fixed in France by decree each calendar year. For instance, rates fixed for last four years are as follows: 2.74% (2000), 4.26% (2001), 4.26% (2002) and 3.29% (2003).

For all matters, legal interest rate is fixed for each civil year by Decree. For each year it is calculated as average of previous 12 monthly averages of rates of return on 13-week fixed rate Treasury bonds.

Contractual interest rate must be in writing. It can exceed legal rate, as long as rate stipulated is not prohibited by law.

Usury is defined as actual global interest rate, as defined by law. (Art. L.313-1 of Consumers' Code) exceeding ordinary rate applied by banks during preceding quarter for similar operations carrying similar risks by more than 33.33%. Usury thresholds are published quarterly in French Official Journal. Usury is also criminal offence. (Art. L.313-3 et seq., Consumers' Code).

Law No. 2003-721 of Aug. 1, 2003 provides that usury prohibitions do not apply to loan granted to commercial, industrial, artisanal, or agricultural legal entities. As consequence, usury prohibitions neither apply to bonds and notes issued by such legal entities.

3.10 LICENSES, BUSINESS AND PROFESSIONAL:

See category 17 Intellectual Property, topic 17.03 Industrial Property Rights.

3.11 MONOPOLIES, RESTRAINT OF TRADE AND COMPETITION:

Monopolies and restrictive trade practices are presently governed by two sets of legal rules in France: (a) competition rules of EU (see EU Law Digest); (b) Arts. L.410-1 to L.470-8 of French Commercial Code.

French Competition Law.

French Commercial Code first prohibits “traditional” anti-competitive practices, i.e. unlawful agreements and abuses of dominant position which affect competition on markets; French law also acknowledges two additional kinds of abuses not expressly recognized as such in EC competition law: abusive exploitation of state economic dependence and abusively low sale prices to consumers. Second, French law prohibits specific conduct even if competition is not affected on market referred to as restrictive trade practices discussed below.

Anti-competitive Practices.

Basic distinction of EC competition law is reproduced in French law.

Anti-competitive Agreements.

Written or implicit agreements, concerted practices or conspiracies which have as object or effect restriction or distortion of free competition in relevant market are prohibited. In this context, Art. L.420-1 of French Commercial Code refers to following as being prohibited practices: limiting access to market or limiting free exercise of competition by other competitors; hindering free price fixing through artificially encouraging price increase or reduction; limiting or controlling production, outputs, investments or technical progress and market or sources of supply sharing. However, these are only examples. Similarly, anti-competitive agreements are prohibited whatever their form as soon as anti-competitive object or effect in relevant market is detected. Anti-competitive agreements are not prohibited where their impact on competition is not appreciable (“de minimis” agreements). Pursuant to Commercial Code Art. L.464-6-1 and L.464-6-2 as created by Ordinance 2004-274 of 25 Mar. 2004, Competition Council has option whether or not to examine cases which are of less significance from competition policy standpoint, described as cases where total market share of parties to agreement does not exceed 10% (for agreements between competitors) or 15% (for agreements between non-competitors). However, hardcore restrictions, such as minimum price fixing, market sharing, or limiting production outputs, cannot benefit from such provisions.

Abuse of Dominant Position.

Like in EC law, it is forbidden for enterprise or group of enterprises which hold dominant position on relevant market to abusively exploit such position in way that has as its object or its effect restriction or distortion of competition on this market. (Commercial Code, Art. L.420-2, 1). According to Commercial Code provisions, such behavior may be constituted, inter alia, by refusals to sell, tied sales, discriminatory conditions of sale or termination of established commercial relations solely because partner refuses to submit to unjustified commercial conditions provided that it affects competition on market. Again, these are only examples.

Relevant product market on which dominant position must be demonstrated comprises all those products or services which are regarded as substitutable by consumer, because, in particular, of products' characteristics, their prices and their intended use. Product market also has to be geographically delimited, which requires determination of place where conditions of competition are homogeneous and which can be distinguished from neighboring areas.

Dominant position is usually defined as holding by firm of market power which allows it to behave without taking into account behavior of its competitors, its clients or its suppliers. First clue of such market power consists in market share of firm; higher market shares, stronger position held in market. Such criteria must then be supported by case-by-case elements (competitors' market shares, barriers to entry on market, price elasticity etc.).

Abuse of dominant position is meant to describe any kind of conduct, which affects consumers, competitors and/or market structure itself, which is possible merely because of such dominant position or which is harmful because of lessened competition which remains on this market due to dominant position held by firm concerned.

Abusive Exploitation of State of Economic Dependence.

First additional kind of abuses acknowledged by French law but not expressly recognized by EC Law.

Abusive exploitation of state of economic dependence is French law expressly prohibiting abusive exploitation by enterprise or group of enterprises of state of economic dependence within which it holds some clients or suppliers, when it may affect competition in relevant market. (Commercial Code, Art. L.420-2, 2). Such abusive exploitation usually consists in refusal to sell, tying arrangements and discriminatory commercial conditions.

State of economic dependence shall be mainly assessed with respect to part of supplier/distributor's turnover realized with distributor/supplier, role of distributor in marketing of supplier's products, existence of alternative distribution/supplying solutions for supplier/distributor.

Distributors may be in state of economic dependence towards suppliers as well; such dependence shall then be assessed with respect to same criteria.

Abusive Consumer Prices.

Abusively low sale prices to consumers is second additional kind of abuses acknowledged by French law. Prices (or even sale price offers) to consumers which are excessively low in relation to production, processing and marketing expenses are prohibited where these offers or prices have as their object or effect elimination of competitor from market or prevention of access to market by enterprise or one of its products. (Commercial Code, Art. L.420-5). This prohibition does not expressly require firm concerned to hold dominant position.

Exemption System: Three Kinds of Exemptions.

French law acknowledges three kinds of exemptions to prohibited anti-competitive practices. (1) Arts. L.420-1, L.420-2, and L.420-5 thereof do not apply when prohibited agreements or practices results from implementation of legal or regulatory provisions (Art. L.420-4, I, 1° of Commercial Code); (2) Minister of Economy may grant “block exemptions” by decree, upon recommendation of Competition Council (Art. L.420-4, II of Commercial Code); and (3) Arts. L.420-1 and L.420-2 do not apply if Competition Council grants “case-by-case” exemptions (Art. L.420-4, I, 2° of Commercial Code) when their author can demonstrate that effect of concerned behaviors is to promote economic progress, as long as consumers receive fair share of resulting benefit, and provided that these practices are indispensable to reach such economic progress and that they do not allow their author to eliminate competition on substantial part of products or services concerned.

Enforcement—Sanctions.

First, anti-competitive practices may be referred to French competition authority, Competition Council. Competition Council is independent administrative agency, composed of 17 members appointed by Government upon recommendation of Minister of Economy for six-year terms. It has jurisdiction over any question arising with respect to anti-competitive practices, as set forth by Commercial Code. (Arts. L.420-1, L.420-2 and L.420-5).

It may as consequence: order cessation of anti-competitive practice; order interim injunctions (conservatory measures); impose sanctions on wrongdoer, so that free and efficient competition may be restored in relevant market. Anti-competitive practices are sanctioned by fine, of which amount may go as high as [Euro]3 million if offender is individual as opposed to company; if it is indeed company, up to 10% of its highest annual worldwide turnover since beginning of anti-competitive practice (or that of group it belongs to). (Art. L.464-2, I of Commercial Code). Moreover, Competition Council may order decision to be published in selected newspapers, advertised in specific locations, or to be added to company's annual report. Since Nov. 2004, Competition Council is also allowed to accept undertakings to restore competition made by wrongdoer and put end to proceedings.

Leniency program has been recently established as regards proceedings before Competition Council. Competition Council may totally or partially exonerate from fine which wrongdoer does not express any kind of contestation or disagreement with respect to infringement at stake and agrees to change its behavior in future (Art. L.464-2, II of Commercial Code) or which agrees to cooperate with Competition Council in order to prove that Art. L.420-1 of Commercial Code has been infringed (Art. L.464-2III of Commercial Code).

Competition Council also performs advisory mission and may be requested to provide its opinion on any proposed legislation relating to competition law, on any question regarding competition matters, or on any potential merger.

Second, all French courts (civil, criminal, administrative, commercial; from first instance up to Supreme Court) are competent to apply rules (both French and EC) relating to anti-competitive practices. Courts alone may award damages and declare anti-competitive agreements or part of given agreement null and void.

Criminal Sanctions.

When necessary, Competition Council may submit case to criminal courts. (Commercial Code, Art. L.462-6). Individuals that personally took active part in organization or realization of anti-competitive practice may as consequence be sentenced to prison, for up to four years, and receive fine up to [Euro]75,000. (Commercial Code, Art. L.420-6). Such sentence is not theoretical. (e.g. Rouen Court of Appeal, Feb. 25, 2002).

Restrictive Trade Practices.

Certain practices are considered per se offenses under French Commercial Code even if they do not qualify as anti-competitive agreement, abuse of dominant position or exploitation of situation of economic dependence for they do not affect competition on market. They are designated as restrictive trade practices and may give rise to criminal sanctions. They are as follows.

Failure to Deliver Invoices for Transactions between Professionals.

French law requires that invoice must be delivered for each transaction between professionals. (Arts. L.441-3 to L.441-5 of Commercial Code). Three exceptions to obligation of delivery of invoices: (1) Differed invoice (différé de facturation): when element is unknown at delivery date, intermediate invoice must be raised in two specimens and indicate required information, except for this element; (2) summary invoices (factures récapitulatives): this exception aims to reduce costs of invoicing especially for frequent deliveries of low amounts and for short periods; in this case, and with prior agreement of purchaser, only delivery order is required for such transactions; and (3) “invoices-statements” (factures-relevés): they recapitulate sums due for specific period and are legal if they include required information.

Invoice must contain specific information such as names of parties and their addresses, date of sale or service provision, quantity, description and unit price (excluding VAT) of products sold or services provided, any applicable price reduction on date of sale or provision of services and directly linked to this sale or service provision (excluding discounts not specified on invoice), date of payment, applicable discount conditions in event of payment on date prior to that resulting from application of general conditions of sale and rate of penalties due from day after payment date entered on invoice.

Failure to Communicate Price List and Conditions of Sale.

Art. L.441-6 of French Commercial Code requires professionals to communicate to any potential customer who asks, their price list and their General Terms and Conditions. These conditions of sale include conditions of payment and, if applicable, discounts and rebates. This transparency aims in particular to protect purchasers from tariff discrimination insofar as they know if they get different treatment than their competitors.

Resale at Loss or Advertising for Resale at Loss.

Art. L.442-2 of Commercial Code prohibits resale at loss, which is defined as reselling (but not selling) product in unaltered state at price lower than its actual purchase price (unit price appearing on invoice, plus turnover taxes, specific taxes relating to this resale and transport cost). Contrary to predatory pricing abuses, for resale at loss market share held by firm which engaged in such practice is irrelevant.

However, Art. L.442-4 of Commercial Code recognizes certain exceptions to prohibition principle: resale at loss is allowed for voluntary or forced sales caused by cessation or change of commercial activity, sale of marked seasonal nature products, sale of obsolete products which no longer respond to general demand, sale of identical products whose restocking has occurred at lower price, specific products whose resale price is aligned with price legally applied to same products by another trader in same area of activity and sale of perishable products threatened by rapid deterioration.

Minimum Price Fixing.

Art. L.442-5 of Commercial Code prohibits imposing, directly or indirectly, minimum resale price on product or service, or minimum trading margin. It is to be recalled that maximum price fixing or recommended prices are not prohibited by French law except if, in practice, they turn out to be minimum price fixing.

Refusal to Supply to Consumers or Tying Arrangements to Consumers.

Arts. L.442-1 of Commercial Code and L.122-1 of Consumer Code prohibit refusing to sell product or to provide service to consumer without valid reason, or to make sale of product conditional upon purchase of imposed quantity or concomitant purchase of another product or also to make provision of service conditional upon provision of another service or purchase of product is prohibited.

Restrictive Trade Practices of Art. L.442-6 of Commercial Code.

Art. L.442-6 of Commercial Code prohibits several restrictive trade practices: (1) Discriminatory practices, which consist in applying to economic partner, or obtaining from him, discriminatory prices, terms of payment or conditions of sale or purchase which are not justified by any real consideration, thus creating, for that business partner, competitive disadvantage or advantage; (2) obtaining any advantage unrelated to commercial service effectively rendered or which is manifestly disproportionate (for instance participation in financing of promotional activities); (3) abuse of business partner's dependence, which means using of his own purchasing power or selling capacity by subjecting business partner to unjustified trading conditions; (4) abuse relating to “les primes de référencement”, which consists in obtaining advantage as precondition for placing of orders without providing written undertaking on given volume of purchases and, if appropriate, service requested by supplier which is subject of written agreement; (5) threat of sudden total or partial severance of business relationships in order to obtain prices, terms of payment, selling arrangements or commercial cooperation conditions which are manifestly different from general conditions of sale; (6) suddenly breaking off established business relationship, even partially, without prior written notice taking into account duration of business relationship and consistent with minimum notice period in line with standard commercial practices or determined by multi-sector agreements; and (7) prohibition of subjecting business partner to terms of payment which are manifestly unfair in consideration of good commercial practices.

Enforcement—Sanctions.

Civil courts, and at time, criminal courts, are competent to apply rules relating to restrictive trade practices.

Jurisdiction and sanctions applied depends on offense: (1) Failure to deliver invoice for transactions between professionals (or irregular invoice) is punished by fine of [Euro]75,000. Fine may be increased up to 50% of amount of invoice or amount which should have been invoiced. Legal persons may be declared criminally liable (in conditions specified by Art. 121-2 of Criminal Code) and incur following penalties: payment of fine (up to [Euro]375,000) and exclusion from public procurement tenders for maximum period of five years (Art. 131-39, 5° of same code); (2) any breach of obligation to communicate price list and conditions of sale is punished by fine of [Euro]15,000. Legal persons may be declared criminally liable and punished by [Euro]75,000 fine (Art. 121-2 of Criminal Code); (3) resale at loss is punished by fine of [Euro]75,000. This fine may be increased to half publicity expenses where advertisement, whatever medium of this, indicates price lower than actual purchase price. Legal persons may be declared criminally liable and receive following penalties: payment of fine (up to [Euro]375,000) (Art. 131-38 of Criminal Code) and exclusion from public markets biddings for maximum period of five years (Art. 131-39, 5° of same code); (4) minimum price fixing is punished by fine of [Euro]15,000; other penalties are also incurred: publication of judgment in selected newspapers, eventually added to enterprise annual report and nullity of unlawful clauses. (Art. L.442-5 of Commercial Code does not provide for criminal liability of legal persons; and (5) refusal to supply consumers is punished by [Euro]1,500 criminal fine.

In addition, restrictive practices of Art. L.442-6 can be punished in three different ways, which can be cumulative: (1) They may engage tortious liability of concerned firm, victim may obtain damages; (2) they may be fined with civil penalty of up to [Euro]2 million; and (3) some specific restrictive trade clauses are sanctioned by being declared null and void; this may also extend to contract which contains them. (Art. L.442-6, II of Commercial Code). These include benefiting retroactively from discounts, commissions or commercial cooperation agreements, obtaining payment to guarantee inclusion in catalogue or product range before any order is placed and prohibiting other contracting party from transferring debts it holds against him to third party.

Action is brought before civil or commercial court by any person who can prove interest, by Public Prosecutor, by Minister for Economy, or by Chairman of Council for Competition. Urgent applications judge “Juge des référés” may also order cessation of discriminatory or unfair practices or any other interlocutory measure.

EC Competition Law.

See EU Law Digest.

EC Treaty (Arts. 81 and 82), secondary law (Council, Commission), case law (European Court of Justice, Court of First Instance). Art. 81 applies only to agreements, decisions by associations of undertakings and concerted practices, which “affect trade between Member States”. Art. 82 applies to abuses of dominant position held in “substantial part of the common market” which “affect trade between Member States.” If these criteria are not met, national competition rules apply.

Relation between National and EC Laws.

European and national legislation are of cumulative application, in sense that national and European provisions may be invoked at same time, if not successively. However, National laws are not permitted to prohibit agreements or practices either not caught by Art. 81(1) or exempted under Art. 81(3) or block exemption. By contrast, Member States can adopt and apply to their territory stricter national law as regards abuse of dominant position (Art. 3, paragraph 2 of Regulation No. 1/2003). Further, behavior that is authorized by national law could be deemed unlawful as regards European law.

Merger Control.

National Level.

French merger control applies whenever EU merger control does not apply, namely whenever concentration exceeds national thresholds but remain inferior to EU thresholds.

French merger control regime is set out in French Commercial Code (Arts. L.430-1 to L.430-10) and in Decree No. 2002-689 of 30 Apr. 2002. French law defines “concentration” in line with EC Regulation 139/2004. Notification of concentration is mandatory if combined world-wide pretax annual turnover of enterprises' income exceeds [Euro]150 million, provided that at least two of enterprises have achieved annual pretax turnover of [Euro]50 million in France. Thresholds of sales turnover achieved in France have been raised by Art. 25 of Ordinance No. 2004-274 of 25 Mar. 2004 (published in French Official Journal [Gazette] of Mar. 27, 2004) from [Euro]15 million to [Euro]50 million. This modification significantly stretches scope of merger control rules set out in French Commercial Code. This increase is expected to result in corresponding decrease in number of notifications. Reasons are surge of notifications, excessive cost for companies of average size and France's desire to align itself with thresholds retained by other Member States. Turnover is calculated on basis of rules laid down in Art. 5 of ECMR. (Art. 2 of Decree).

According to Art. L.430-3 of French Commercial Code, notification shall be made as soon as there is irrevocable commitment by parties. Notification brings about suspension of notified operation. Nevertheless, exemption to this suspension may be granted in exceptional cases.

French test is close to EC one, as French authorities study if notified operation jeopardizes competition, particularly by creating or strengthening dominant position or by creating or strengthening buying power that places suppliers in state of economic dependence.

Merger control timetable is divided into two stages. First stage normally lasts five weeks. Nonetheless, if parties propose remedies more than two weeks after notification, first stage is extended for three additional weeks. Under Art. L.430-5, III of French Commercial Code, Minister of Economy may at end of this period: (1) Inform notifying parties that operation notified to him does not enter field of application of Arts. L.430-1 and L.430-2; or, (2) authorize operation; or, (3) refer matter to Competition Council for its opinion if operation is likely to jeopardize competition and commitments made (if any) are insufficient to remedy situation. If Minister does not reach any of these three decisions within five to eight weeks, operation is deemed to be cleared. As result, Minister may not prohibit operation during first stage of procedure. Indeed, he must refer any transaction he intends to prohibit to Competition Council.

Second stage begins with referral of matter by Minister to Competition Council. This stage may last from 16 to 19 weeks. Competition Council renders its opinion within three months from referral. Under Art. L.430-6 of French Commercial Code, if competitive assessment of operation has revealed that concentration is likely to adversely affect competition, Competition Council will assess if contribution to economic progress is sufficient to offset damage to competition. Council takes also into account “the competitiveness of the undertakings in question with regard to international competition”. Reporting investigator (rapporteur), in charge of investigating case, issues report. Parties have three weeks to make their comments on it. Competition Council has discretionary power to hear third parties, either during formal hearing or in absence of notifying parties. {rpata} Following Competition Council opinion, Minister, who is not bound by Council's opinion, has further four weeks to decide either to prohibit concentration operation and enjoin parties to take measures to restore sufficient competition; or to approve operation either unconditionally or subject to certain requirements to remedy potential restrictions on competition. (Art. L.430-7, III of French Commercial Code). Minister must transmit his draft decision to parties to allow them to make their comments.

Minister's decision may be appealed before Council of State (Conseil d'Etat) within two months (or three months in case of applicants based in French overseas departments and territories, and four months for applicants based elsewhere abroad).

Furthermore, under Art. L.430-8, I and II of French Commercial Code, if parties do not notify relevant transaction or if they implement transaction before clearance has been obtained, Minister may impose fine. Maximum amount of fine is, for legal entities, 5% of pre-tax turnover in France during most recent fiscal year for parties concerned and if necessary that of acquired party; or, for individuals, [Euro]1.5 million. Same fines may also be applied in event of omission or inexact declaration in notification (Art. L.430-8, III) or if parties do not comply with undertakings contained in Minister's decision (Art. L.430-8, IV). In such cases, Minister may withdraw decision that authorized operation and order parties to submit new notification or comply with undertakings contained in his decision.

DGCCRF, French Directorate General for Competition, Consumer Affairs and

Repression of Fraud, published draft guidelines relating to analysis of concentrations in Dec. 13, 2002 which has not been yet adopted. This project stresses: importance of pre-notification of agreements, referral procedure for operations of Community dimension to national authorities by Commission, application of control of concentrations in audio-visual communication sector, justification of absence of time to notify operation, typology of barriers to entering market and, finally, remedies.

EC Level.

See EU Law Digest.

Regulation No. 139/2004 of 20 Jan. 2004 on control of concentrations between undertakings (hereinafter: "the Merger Regulation") entered into force on 1 May 2004. It replaces Regulation No. 4064/89 of Dec. 21, 1989 and applies to all concentrations with Community dimension.

Community dimension criterion is met either when two thresholds established by Art. 1(2) of Regulation are attained: (a) Aggregate worldwide turnover for two of parties concerned of over [Euro]5 billion; and (b) aggregate EC turnover of each of at least two of parties concerned of over [Euro]250 million; or when four thresholds of paragraph three are reached. These four thresholds are: (a) Aggregate worldwide turnover for parties concerned of over [Euro]2.5 billion; and (b) in each of at least three Member States, combined aggregate turnover of all undertakings of over [Euro]100 million; and (c) in each of at least three Member States included for purpose of point (b), aggregate turnover of each of at least two of undertakings concerned of over [Euro]25 million; and (d) aggregate EC turnover of each of at least two of undertakings concerned of over [Euro]100 million. There is no Community dimension if each group achieves more than two-thirds of its aggregate EC turnover within one and same country.

3.12 PRICES:

Prices in France have been subject to many successive regulations. Starting with Ordinance No. 45-1483 of June 30, 1945 on price control and Ordinance No. 86-1243 of Dec. 1, 1986 relating pricing freedom and competition (codified in 2000 in Commercial Code under Arts. L.410-1 et seq.).

Pursuant to Commercial Code, prices of goods, products and services are freely determined by market forces and free competition. These rules apply to all production, distribution and service activities, including those which are carried out by public persons, in particular in context of public service delegation agreements.

Art. R.113-1 of Consumer Code specifies that sale of goods or products, or provision of service at fixed prices in violation of decrees adopted in application of Art. 410-2 of Commercial Code is punishable by fine of "fifth category" laid down for petty offences (maximum of [Euro]1,500, this amount may be increased to [Euro]3,000 in case of persistent offender).

However, Minister of Economy retains right to intervene in fields or zones which are characterized by structural absence of competition due to monopoly or various regulations (e.g. chemicals, books). In this specific case, Council of State decree may regulate prices after Competition Council has been consulted.

Moreover, control can be reestablished in case of exceptional increase or decrease in price. But any temporary measures of control taken by Administration must be motivated by crisis situation, exceptional circumstances, public disaster or clearly abnormal situation in market in given sector. Decree, which will fix temporary measures, must be adopted following consultation of National Consumer Council and specify its period of validity (it must not exceed six months).

Finally, Arts. L.162-38 of Social Security Code and L.5123-1 of Public Health Code make exception to rule of pricing freedom by authorizing Minister for Economy or Minister for Public Health to fix prices and profit margins of products and services which are reimbursed by social security.

3.13 SALES:

Sale is agreement whereby one person binds himself to deliver thing, and another to pay for it. (Art. 1582 of Civil Code, hereinafter C. C.).

Where amount of sale exceeds [Euro]800, contracts of sale must be made by notarial deed or legal private instrument, and no proof by witness is allowed against or beyond contents of this instrument. (C. C. 1341).

Nevertheless, with regard to traders, all contracts of sale may be proved by all means unless otherwise provided by Law. Commercial contracts can therefore be proved by note or order of broker duly signed by parties or by accepted invoice, by correspondence, by books of parties, or in proper commercial cases, by oral testimony. (Com. Code, Art. L.110-3).

Sale is complete between parties, and, subject to contractual provisions reserving title in seller until purchase price is paid in full, ownership passes to buyer as soon as there is agreement as to object and price, even though no delivery has taken place, nor price paid. (C. C. 1583). Sales price must be determinable and must be specifically set forth or clearly determinable in contract, otherwise contract is void. Where goods are sold by weight, number, or measure, risk of loss does not pass to buyer until goods have been weighed, counted or measured, unless sale is in bulk. As regards wine, oil and other things customary to taste before buying them, C. C. states that there is no sale until buyer has tasted and accepted them. (C. C. 1585-1587). In distribution contracts, reference to seller's standard prices may be deemed sufficient, under certain circumstances, to render price clearly determinable.

Principal obligations of seller are to deliver goods and to give certain warranties. (C. C. 1602-1648). Expenses incurred in delivery of goods are borne by seller unless contract provides otherwise. (C. C. 1593). If commitment to sell has been granted with deposit (“arrhes”), each party may still withdraw, buyer by forfeiting money and seller by returning twice amount. (C. C. 1590). Buyer bears risk of loss from time sold thing should have been delivered, unless seller has been given notice to deliver. (C. C. 1138). Interests runs from time of payment if it has been agreed so at time of sale, or if buyer is under notice to pay, or if sold thing produces fruits or other incomes. (C. C. 1652).

Commitments to sell real estate, real rights, or business goodwill is void if not contained in notarial deed or private act registered at tax registry office within ten days after acceptance by buyer. (C.G.I., Art. 1840-A).

As regards real estate sales, seller is entitled to rescind sale if he suffers loss greater than seven-twelfths of price of immovable. Buyer can either return immovable while taking back price paid, or keep it while paying balance of fair price, after deducting one-tenth of total price. Buyer has no right to rescind for loss. Action must be brought within two years of day of sale. Value to be considered is value at time of sale. (C. C. 1674-1685).

Buyer has remedy for rescission if object of sale has not been delivered in condition in which it was at time of sale, provided he has in first time unsuccessfully requested seller to remedy deficiencies. (C. C. 1614).

In matter of movables, possession is equivalent to title. (C. C. 2279).

Suit may be brought for recovery of lost or stolen property within three years from date of loss or of theft. Person in actual possession of stolen or lost property bought at fair or market, or at public sale, or from merchant selling similar articles, cannot be forced to return article to original owner, unless latter repays possessor for price he paid for it. (C. C. 2279, 2280).

See also topic 3.05 Consumer Protection; category 9 Documents and Records, topic 9.04 Notaries Public.

Warranties.

Unless parties have agreed differently, seller warrants buyer against dispossession and latent defects, entitling buyer to either return defective goods, rescind contract, and collect damages in circumstances below, or retain goods but reduce purchase price by amount set by appraiser. Action by buyer should be brought as quickly as possible after discovery of defect but time limit for bringing same depends on nature of defect and practice of trade as determined by court. However, in case of contract for construction of building, action for hidden defects must be brought within ten years of delivery of completed structure, that for apparent defects, within one month of delivery of completed structure. (C. C. 1625, 1641-1646).

Warranty against hidden defects includes those rendering thing unfit for use intended, or reducing its value for that purpose to such extent that buyer would not have taken it or would have paid less for it if he had known of defects. Liability for hidden defects arises even if seller was unaware of them, unless he stipulated to contrary. If seller was aware of defects in things sold, he is liable for return of price and for damages directly caused by defects and foreseeable at time of contract's conclusion (legal rights are forfeited unless suit is brought within ten years). If he was ignorant of defect, he is only liable for return of price and repayment of expenses occasioned by sale. Case law presumes that professional seller (including producer of good) knows of hidden defect, even if buyer is also professional. Presumption is deemed irrebuttable. If contract contains liquidated damage clause, court is held to that award provided faulty performance was not intentional. (C. C. 1150). However, court may lower or increase damages if such clause is manifestly excessive or inadequate. (C. C. 1152). See also topic 3.06 Contracts.

Applicable Law.

Disputes over sales of real property are governed by law of situs. For personal property, governing law is usually that of place of delivery, absent contrary stipulation, but courts will apply other governing law if it seems more in accordance with will of parties (l'autonomie de la volonté) gathered from conditions and circumstances of sale.

Conditional sales agreements (“clauses de réserve de propriéte”), reserving title and right to repossession in seller, are now valid against third parties in judicial settlements and bankruptcies by virtue of Law No. 80-335 of May 12, 1980, as amended by Law No. 96-588 of July 1, 1996. (See Com. C. L.621-22.) Right must be exercised within four months of publication of judgment (see category 7 Debtor and Creditor, topic Judicial Recovery and Liquidation). Another security device, limited to certain types of goods, is purchase price chattel mortgage, as for new automobiles. See category 20 Mortgages, topic 20.01 Chattel Mortgages.

See also category 9 Documents and Records, topic 9.04 Notaries Public.

International Sale of Goods.

United Nations Convention on Contracts for the International Sale of Goods of Apr. 11, 1980, in force on Jan. 1, 1988. See category 24 Treaties and Conventions, topic 24.01 Treaties and Part V, Selected International Conventions.

3.14 STATUTE OF FRAUDS:

See topic 3.07 Frauds, Statute of.

3.15 TESTIMONY, STATUTE OF:

See topic 3.07 Frauds, Statute of.

3.16 UNFAIR COMPETITION:

Unfair competition (“concurrence déloyale”) is tort, developed by case law from basic fault concept of C. C. 1382, that any person whose fault in act or omission causes damage to another is obligated to indemnify damage. Although it is impossible to give exhaustive list of all possible acts of unfair competition, torts of this special type include: Disparagement of competitors; creation of confusion by using tradenames, symbols, wrappings or containers imitating those of competitors; copying of advertisements or catalogues of another in manner calculated to deceive public; manipulative use of famous trademarks or products to attract clients and sell competing items to them; bribing or inducing employees of another to leave their employer or to reveal trade secrets. Fraud need not be shown, negligence or fault is sufficient.

Objective and scientifically based criticism of competing product for purpose of informing public and not of denigrating product is not deemed unfair competition.

Advertising by comparison of resale prices for identical products and advertising by comparison of products are allowed under specific conditions. (Arts. L.121-8 to L.121-14 of Consumer Code).

See also topic 3.11 Monopolies, Restraint of Trade and Competition.

4 CITIZENSHIP

4.01 ALIENS:

See category 16 Immigration, topic 16.01 Aliens.

4.02 IMMIGRATION:

See category 16 Immigration, topic 16.02 Immigration.

5 CIVIL ACTIONS AND PROCEDURE

5.01 ACTIONS:

Civil actions are brought before local Tribunal d'Instance or Tribunal de Grande Instance depending on amount at stake and subject matter. (See category 6 Courts and Legislature, topic 6.01 Courts.) Civil actions include all actions relating to contracts, torts and other obligations, property, succession, and domestic relations. Commercial actions must be brought before local Tribunal de Commerce. These actions include: disputes concerning contracts between merchants or involving banks; all internal disputes in corporations, companies or partnerships of commercial nature; all disputes relating to maritime acts, commercial acts or contracts (see category 3 Business Regulation and Commerce, topic 3.06 Contracts) among any persons whatsoever; all matters of insolvency or bankruptcy involving commercial entities; operations of agents in connection with purchase or sale of real estate, and more generally all disputes relating to commercial contracts or to breach of legal duty e.g.: for unfair competition practices. (C. O. J. L.411-4 to L.411-7). All actions are initiated by service of summons (assignation), both before civil and commercial courts. In case of urgency and when claim appears well-founded or when it cannot be seriously disputed Presiding Judge of Court which has jurisdiction can order conservatory measures in summary proceeding. Although concept of equity, as such, does not exist, certain types of equitable relief are available, e.g., injunctions in tort action for unfair competition.

Special courts have exclusive jurisdiction over criminal matters, administrative affairs, labor relations, agricultural matters and social security affairs. Civil procedure does not apply to criminal and administrative matters, which have their own special rules.

Parties may agree to submit their dispute to arbitration instead of proceeding before Courts. (See category 8 Dispute Resolution, topic 8.02 Arbitration and Award.)

Foreign law may be proved in any judicial proceeding by attestation by legal officer or lawyer of country involved (Certificat de coutume). These attestations, duly certified, are then submitted to court under same conditions as any other evidence.

Limitation of.

See topic 5.07 Limitation of Actions.

5.02 APPEAL AND ERROR:

See category 6 Courts and Legislature, topic 6.01 Courts.

5.03 DAMAGES:

See topic 5.11 Torts; categories Estates and Trust, topic Death; Intellectual Property, topic Industrial Property Rights.

5.04 DEPOSITIONS AND DISCOVERY:

General rules of civil procedure require each party to disclose documents and written statements on which they rely in support of their claim.

Party may also request judge to order other party or any third party to disclose any documents relating to dispute. When such requested party does not comply with judge's order, judge is entitled to draw all legal consequences from refusal to disclose. (Arts. 9, 11 of new Code of Civil Procedure).

Rules relating to internal rogatory commission are to be found in Arts. 730-732 of N.C.P.C. By contrast, those relating to international rogatory commission are contained in Arts. 733-748 of N.C.P.C. whereby French judge may request diplomatic authority to obtain evidence or to perform some other judicial act in another State within limits determined by other State. France has thus signed Hague Convention on the Taking of Evidence Abroad in Civil and Commercial Matters dated Mar. 18, 1970 (French Decree dated Apr. 9, 1975 and Jan. 24, 1989) which improves methods for obtaining of evidence between Contracting States (notably U.S.).

Pursuant to Hague Convention, courts may request taking of evidence by competent authority of another Contracting State, either by means of Letter of Request (“commission rogatoire”) or by intervention of diplomatic officer or consular agent of France. This agent is granted power to take his own nationals' or even other nationals' evidence subject to certain conditions. Request is made via French “Ministère de la Justice (Service civil de l'entraide judiciare internationale)”, 13 Place Vendôme, 750001 Paris, in accordance with French provisions. (Arts. 733-748 of N.C.P.C.). Evidence should be taken exclusively within premises of Embassies or Consultates, on premises which are accessible to public. Person whose evidence is sought may have assistance of lawyer etc.

Letters rogatory issued by courts of countries non-signatory to Convention are transmitted through ordinary diplomatic channels and must be translated into French. Documents will be transmitted by French Ministry of Foreign Affairs to Minister of Justice, which will in turn transmit them to State's Attorney (“Procureur de la République”) of Tribunal to which they are addressed. Judge is designated to carry out requests.

Law No. 80-538 of July 16, 1980 shields French corporations from disclosing any document that would threaten sovereignty, security and essential economic interests of France (Art. 1) to foreign anti-trust and other foreign public authorities and prevents taking of depositions in France other than depositions specifically authorized by Hague Evidence Treaty of 1970 (depositions before Consular Office at U.S. Embassy after specific authorization of French Ministry of Justice, or Letters Rogatory). This law was also enacted to force foreign litigants and judges to comply with procedures provided by Hague Convention. Under these provisions, persons subject to discovery measures are authorized to refuse to disclose requested information by pleading lawful excuse provided by French statute. Sanctions are two to six months in jail and/or [Euro]1,524 to [Euro]3,028 fines.

Depositions obtained abroad according to local procedure may be used in France provided manner in which they are obtained does not violate French public policy. They are given same value as domestic testimony, but appraisal of all testimony is strictly matter of court discretion. (J. O. Apr. 17, 1975).

5.05 EVIDENCE:

See topic 5.04 Depositions and Discovery.

5.06 JUDGMENTS:

Bilateral treaties for enforcement of foreign judgments exist with Algeria, Austria, Belgium, Benin, Bulgaria, Burkina Faso, Cameroon, Chad, Congo, Egypt, Great Britain, Hungary, Ivory Coast, Madagascar, Mauritania, Morocco, Quebec, Rumania, Senegal, Spain, Switzerland and Togo. Less formal bilateral arrangements (some applicable only to specified subject matter) exist with Brazil, China, Czechoslovakia, Djibouti, Germany, Tunisia and U.S. France is party to Brussels Convention on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters of Sept. 27, 1968 (ratified by Decree No. 73-63 of Jan. 13, 1973), to subsequent Protocol of 1971 providing for interpretation of Convention by European Court of Justice (entered into force for France by Decree No. 76-298 of Mar. 31, 1976) which has been replaced by EC Regulation No. 44/2001 dated Dec. 22, 2000 and to 1973 Hague Convention on Recognition and Enforcement of Judgments relating to Maintenance Obligations (entered into force for France on Oct. 1, 1977 by Decree No. 77120 of Sept. 22, 1977). France has also signed and ratified Lugano Convention on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters of Sept. 16, 1988. In absence of treaty, foreign judgments are normally enforceable by order ("exequatur") delivered by Tribunal de Grande Instance after proceedings. Foreign judgments concerning personal status or creating rights ("jugements constitutifs") are recognized without exequatur. Exequatur must however be officially granted for judgments for which enforcement with respect to property or where coercive action against persons is required. Under French law, recognition and enforcement in France of foreign judgments are subject to specific requirements which are as follows: (1) foreign court must have had jurisdiction to settle matter according to French rules on Private International Law; (2) foreign judgment must not be contrary to French international public policy and to rules of natural justice (see decision of Supreme Court dated Oct. 4, 1967, Dalloz 1968, p. 95); (3) law applied by foreign court must have been law applicable according to French conflict of laws rules except if law applied by foreign judge has same effect as law which would have been applied by French judge; (4) foreign proceedings must have been in due process and (5) foreign judgment must not have been obtained by fraud ("fraude à la loi"). In addition, foreign judgment must be final and conclusive in country in which it was delivered. In no case will facts be reexamined. Plaintiff has burden of proof as to these requirements by use of documents and expert testimony, normally in form of certificate of law.

If enforcement (exequatur) is granted, foreign judgment becomes in legal effect a French judgment.

France is also party to bilateral and multilateral treaties on recognition and enforcement of foreign arbitral awards including New York Convention of June 10, 1958 (ratified by France on June 26, 1959) and Geneva Convention of Sept. 26, 1927 (ratified by France on May 12, 1931). France is also party to European Convention of Geneva of Apr. 21, 1961 (ratified by France on Dec. 16, 1966) and Washington Convention on Settlement of Investment Disputes between States and Nationals of other States of Oct. 14, 1966 (ratified by France on Aug. 21, 1967).

Fines for Delay in Civil Cases.

To ensure execution of court decisions, Law of July 9, 1991 gives courts power to levy fines for delay in execution of judgments and orders. Fines may be definitive or provisional; judges may reduce or revoke provisional fines, even when nonexecution of court order has been proved.

5.07 LIMITATION OF ACTIONS:

Rules in relation to limitation of actions are to be found in Arts. 2219-2281 of Civil Code.

Periods of Limitation.

General period of limitation is to be found in Art. 2262 of Civil Code whereby all actions, both in rem and in personam, are barred at end of period of 30 years, without any necessity for party who alleges this limitation period to show title, and without opponent being able to rely upon any defense based on bad faith.

Periods of limitation in relation to other matters are set out under following articles. For instance, with respect to tort liability, period of limitation of actions is of ten years as of knowledge of damage or its aggravation (see Art. 2270-1 of C. C.).

In addition, French law provides for special limitations of actions in Arts. 2271-2281 of C. C., varying from six months to five years. For instance, limitation of two years applies to actions brought by doctors, surgeons, dentists and chemists for professional services and medicines supplied by them and to actions brought by traders against non-traders for payment of goods sold by them. Period of five years applies to salaries, arrears of perpetual rent charges or annuities, alimony, rent of town houses or of agricultural property, interest on money lent, and in general in respect of every sum payable yearly or at shorter intervals. For defendant-debtor to interpose successfully defense of limitation for periods of six months to five years, he must, if required by plaintiff-creditor, affirm under oath that debt has in fact been paid. If debtor is dead his widow or heirs may be required to make declaration under oath that they are unaware that debt is due. Taking of such oath cannot be required as regards annuities, alimony, maintenance, interest, rent or salary.

Even if the creditor has continued to furnish supplies, services and work, etc., during the period, the statute will continue to run unless he has rendered an account stated or a schedule of obligation or had a summons issued. (C. C. 2274).

Actions between traders (“commerçants”) relating to their business affairs must be brought within ten years after cause of action arises, unless shorter period is specially prescribed by law. See also category 3 Business Regulation and Commerce, topic 3.13 Sales. (Com. C. Art. L.110-4). Limitation of three years after maturity applies to bills of exchange, promissory notes and to actions against bank for payment of check.

A limitation of five years after guardianship ceases applies to claims of ward against his guardian. (C. C. 475).

Actions on ordinary insurance policies must be brought within two years from date of damage; actions on marine insurance policies must be brought within two years from date of contract. (Insurance Code, Art. L.114-1 and L.172-31). Period of one year applies for actions in case of loss of goods or luggage and period of two years for action in case of collisions. (Laws of June 18, 1966, July 7, 1967). See category 3 Business Regulation and Commerce, topic Bills and Notes for limitations relating to same when given by traders. In addition, limitation of ten years for structural defects or of two years for minor repairs, applies to architects and contractors (see Arts. 1792, 2270 of C. C.).

A court cannot on its own motion set up a plea of limitation (C. C. 2223), but it may be set up by the creditors of an interested party (C. C. 2225).

Causes Which Interrupt or Suspend Period of Limitation.

As general rule, these periods of limitation may be interrupted or suspended by variety of causes provided for in French law.

Period of limitation may be interrupted by writ (including by summary proceeding as "référé-provision"), by order to pay or by attachment (see Art. 2244 of C. C.). In addition, period of limitation may be interrupted by acknowledgment of debt by debtor. (Art. 2248 of C. C.).

Limitation period runs against all persons, unless they come within exception provided for in law (see Art. 2251 of C. C.). For instance, limitation does not run between spouses (see Art. 2253 of C. C.) nor does it not run against minors who are not emancipated nor against adults who are under guardianship except for what is stated in Art. 2278 (see Art. 2252 of C. C. and also exception provided for in Arts. 2257, 2258).

It runs against estate having neither claimant nor heir even though no administrator has been appointed. (C. C. 2258).

5.08 PRESCRIPTION:

See topic 5.07 Limitation of Actions.

5.09 REPLEVIN:

See category 21 Property, topic 21.09 Real Property.

5.10 SEQUESTRATION:

Sequestration by agreement ("séquestre conventionnel") is deposit by one or more parties of goods (whether real or personal property) whose ownership is challenged into hands of third party, who is obligated to return it at end of dispute to person deemed entitled to it. (C. C. 1956). Delivery of object by person holding it in deposit can only be made by consent of all parties involved, except that holder must return it to person from whom obtained if legally sufficient reason (as grave illness) compels him no longer to retain it.

In general, sequestration may be ordered by courts ("judicial sequestration") when: (1) Title or possession of real or personal property is disputed among several persons; (2) some goods (except buildings) are seized; (3) debtor voluntarily delivers property to sequestration to satisfy obligations arising from outstanding debt. (C.C. 1961). In fact, however, courts have not hesitated to order sequestration of property whenever such measure appeared necessary or useful for preservation of parties' rights.

Person who is custodian of the property has normal powers of administration, but not of disposition. Custodian has lien for payment of expenses incurred for preservation of sequestered object. (Cass. Civ. June 29, 1875). For liability of custodian, see decision of Cass. Comm. of Dec. 19, 1977.

5.11 TORTS:

Liability in tort (responsabilité civile) is based on Civil Code (Arts. 1382-1386) and has been further developed by case law. Basic principle is that any person by whose fault ("faute") or negligence damage is caused to another is obligated to repair damage. (C. C. 1382). Plaintiff must prove his injury, defendant's acts or omissions constituting fault, and that damage sustained results directly from defendant's negligence ("lien de causalité"). Fault in this context includes both intentional wrongs and negligence. (C. C. 1383). Misuse of legal right is deemed to be covered by Art. 1382. Such misuse includes use of legal right with malevolence or other improper purpose. Person liable for damages must fully compensate injured party no matter what degree of fault. Party at fault may, partly or totally, be exonerated from liability if he proves that damage results from force majeure, fault of victim or act of third party.

Virtual absolute liability is, however, created under Arts. 1384 and 1385 when damage is caused by act of a person under supervision of defendant (employer-employee, master-servant, parent-child, teacher-student relations) or by a thing under control ("garde") of defendant (e.g. automobile), or by animal which is or should be under control of defendant. Liability in these cases can be avoided under limited circumstances. Special provision makes owner of real property liable to any person for injuries caused through defect in construction or maintenance of property. (C. C. 1386).

Economic torts and product liability have been widely developed by application of the principle of Art. 1382. See category 3 Business Regulation and Commerce, topic 3.16 Unfair Competition. With respect to product liability, EEC Directive dated July 25, 1985 relating to Approximation of the Laws, Regulations and Administrative Provisions of the Member-States Concerning Liability for Defective Products deals with this matter. Words "Product Liability" refers to liability imposed on manufacturer, distributor or seller of defective product for injuries or damages to property caused by product. As general rule, Directive imposes system based upon non-fault liability which means that, in order to recover damages, person who suffered damage merely has to prove the existence of product defect, damage and causal connection between damage and defect. French law has eventually adopted this EEC directive. Indeed, May 19, 1998 Act or "Product Liability" Act inserts 18 new articles in French Civil Code (1386-1 to 1386-18) to regulate this liability.

In addition to general rules of liability, special systems of liability exist. For instance, operators of aircraft bear strict liability pursuant to Art. L.322.3 of Decree of Mar. 30, 1967 and by Warsaw Convention. Damages for passengers are limited to higher of [Euro]114,337 or any figure set through revision of Warsaw Convention. (Law no. 76-529 of June 18, 1976).

France has ratified United Nations Convention on Contracts for the International Sale of Goods (J.O. Dec. 27, 1987) applicable to transactions between parties established in different countries, which modifies French rules concerning liability arising out of such contracts.

With respect to motor vehicle liability, Law No. 85-677 dated July 5, 1985 provides not only for special rules of liability but also for specific system of compensation in favor of victims (see Insurance Code). The Guarantee Fund ("Fonds de Garantie") provides compensation to victims (or their heirs or successors in interest) for personal injuries suffered in accidents including where vehicle involved is unidentified or uninsured or when insurer of vehicle is insolvent. (Art. L.420-1 of Insurance Code).

6 COURTS AND LEGISLATURE

6.01 COURTS:

French court system is basically divided into two separate orders: judicial courts and administrative courts. Conflicts between the two orders as to their jurisdiction are settled by special court called “Tribunal des Conflits” which is composed of judges of both orders.

Judicial Courts.

French judicial system consists of civil and criminal courts. French Supreme Court is called “Cour de Cassation” and reviews exclusively points of law of final decisions from civil and criminal courts.

Civil courts consist of two levels: courts of first instance and courts of appeal, which may examine or reexamine both questions of facts and law. Rules relating to French civil jurisdiction and proceedings are to be found in Code of Judicial Organisation (“Code d'organisation judiciaire—C. org. jud.”) and in New Code of Civil Procedure (“Nouveau Code de Procédure Civile—N.C.P.C.”). First Level includes one court with general jurisdiction (“Tribunal de Grande Instance”) and several specialised courts with exclusive jurisdiction over particular subject matters. Specialised courts are subject to special procedural rules, e.g. assistance of lawyer is not compulsory and proceedings are oral. Courts of first level are: (1) “Tribunal de Grande Instance” which is composed of three judges and has jurisdiction over all matters except those coming within exclusive jurisdiction of specialised courts by reason of amount involved or of subject matter of case (Art. R.311-1 C. org. jud.). However, this tribunal does also have exclusive jurisdiction over certain subject matters without consideration of amount involved, in particular commercial lease and real estate. (2) “Tribunal d'Instance” which is composed of single judge and has jurisdiction over small civil claims of no more than [Euro]7,600 (Art. R.321-1 C. org. jud.). (3) “Tribunal de commerce” which is composed of lay judges elected by tradesmen and has jurisdiction over commercial matters including insolvency procedure (Art. L.411-1 C. org. jud.). (4) “Conseil de Prud'hommes” which is composed of lay judges elected by college of wage-earning workers and college of employers and has jurisdiction over labour matters (Art. L.511-1 of Labour Code). (5) Two other specialised courts exist which have jurisdiction over claims relating to social security and agricultural leases. Second Level is: “Cour d'Appel”. There are 35 Courts of Appeal (Code de l'organisation judiciaire R.212-1) with territorial jurisdiction over one or several departments. Each “Court of Appeal” is organised in chambers which are composed of at least three magistrates and has jurisdiction over appeals on decisions rendered by any first level civil courts, when amount involved exceeds [Euro]3,800. “Court of Appeal” may modify or reverse decisions of lower courts both on points of facts and on points of law. Judgments issued by “Court of Appeal” are final decisions and matter is not returned to lower courts.

Criminal Courts.

French law distinguishes investigating authorities from those of trial; it also distinguishes jurisdiction over petty offences, misdemeanours and crimes. However, whatever criminal offence is, there are two levels of jurisdiction. First Level courts are: (a) Investing authority: “Juge d'instruction” who investigates crimes and high misdemeanours to determine whether there are enough charges to send author accused of offence, “mis en examen”, to trial. Investigating judge is judge of “Tribunal de Grande Instance”. Investigating judge used to decide over detention under remand but Law No. 2000-516 of June 15, 2000 (Art. 137-1 of Criminal Procedure Code) modified competence regarding detention awaiting trial and provided for special judges to be appointed. (b) Trial authorities: (1) “Tribunal de Police”, which is “Tribunal d'Instance” with jurisdiction over petty offences. (2) “Tribunal Correctionnel” which is “Tribunal de Grande Instance” with jurisdiction over misdemeanours. (3) “Cour d'Assises” which is composed of three judges, President being judge of Court of Appeal, and jury of nine people and has jurisdiction over crimes. These “Cour d'Assises” only stand periodically. There was no appeal against their decisions but Law 2000-516 of June 15, 2002 modified system by providing for circular Appeal to another “Cour d'Assises”. Second Level courts are: (a) Investing authority: “Chambre d'Instruction” which is special chamber of “Cour d'Appel” composed of three judges and has jurisdiction over acts and decisions of investigating judge. (b) Trial courts: (1) “Chambre des Appels Correctionnels” which is specialised chamber of “Court of Appeal” and has jurisdiction over appeals on decisions rendered by “Tribunal correctionnel” and by “Tribunal de Police” when petty offences of 5th type. (Code de Procédure Pénale 546). (2) “Cour d'Assises” as second level court will be designated by criminal chamber of “Cour de Cassation” and will be composed of three judges and jury of 12 people. It has jurisdiction to review both points of law and points of facts of decisions rendered by previous “Cour d'Assises”. Finally there are also special criminal courts with exclusive jurisdiction over criminal offences perpetrated by minors who were under 18 years old when they committed offence or by members of army.

“Cour de Cassation” is French Supreme Court and reexamines only questions of law.

It is located in Paris. It is composed of three civil chambers, one commercial chamber, one labor chamber and one criminal chamber. “Cour de Cassation” reviews exclusively points of law from final decisions only, whether they be from first or second level, civil or criminal courts. If “Cour de Cassation” quashes judgment, it refers case back to another lower court of same level and jurisdiction as court which issued judgment under review. If new court does not comply with decision of “Cour de Cassation,” party may again file petition for review on same point of law and case is then heard by court composed of magistrates of all chambers of “Cour de Cassation” (“assemblée plenière”). If “assemblée plenière” quashes judgment case is referred to third lower court of same level and jurisdiction which must comply with decision of Assemblée plenière unless assemblée renders final decision.

Law No. 91-491 of May 15, 1991 instituted new proceeding whereby judicial courts can seek interpretation and advice of “Cour de Cassation” in connection with any new issue of law which appears to be problematic in numerous disputes brought before such courts. Equivalent procedure already exists before “Conseil d'Etat”, in matters of administrative law, pursuant to Law No. 87-1127 of Dec. 31, 1987. It should be noted, however, that referral to “Cour de Cassation” so instituted by 1991 Law is not available in criminal matters. Lower court must suspend all proceedings until “Cour de Cassation” renders its opinion on submitted issue. Its opinion must be rendered three months from date of referral. Measures required by emergency and measures of merely preventive nature may still be ordered by lower court. However, pursuant to Decree No. 92-228 of Mar. 12, 1992, lower court using this new proceeding to refer legal issue to “Cour de Cassation” must advise parties in dispute of their right to submit written pleadings with respect to such issue, if they have not yet done so. Opinion of “Cour de Cassation” has no binding authority on lower court who referred matter to it. It is, however, communicated to parties in dispute.

Decree of Feb. 26, 1999 in force since Mar. 1, 1999 has instituted new procedural rules in order to give additional procedural rights to parties and to lighten “Cour de Cassation” cases load.

Administrative courts have jurisdiction over public law disputes involving public bodies or state and private individuals. For instance, administrative courts hear cases involving government contracts and torts of government departments, some tax cases and appeals against administrative decisions. Administrative courts are divided into three levels. (Code de justice administrative R.221-3). Lowest level consists of 36 administrative tribunals or “Tribunaux Administratifs”, which have general jurisdiction over public law disputes except those coming within exclusive jurisdiction of special courts. Second level (Code de justice administrative R.221-7), each created by Law of Dec. 31, 1987, consists of seven Administrative Courts of Appeal or “Cour Administrative d'Appel”, with territorial jurisdiction over several “Tribunaux Administratifs” each. This level has been in effect since Jan. 1989, and has jurisdiction only over appeals on decisions of “Tribunal Administratif”. Highest level is “Conseil d'Etat”, located in Paris, which has jurisdiction over some appeals against decisions of administrative tribunals, and over appeals against decisions of Cour Administrative d'Appel.

“Conseil d'Etat” has also full and final jurisdiction “compétence directe en premier et dernier ressort” over specific subject matter excluded from general jurisdiction of Tribunal Administratif. For instance it has jurisdiction over complaint against ministerial decisions or over claims relative to status of public servants.

6.02 LAW REPORTS AND LEGAL MATERIALS:

Current constitution, that of Fifth Republic, is of Oct. 4, 1958.

Laws of France is codified system, principally based on five original or Napoleonic codes: Civil Code "Code Civil", Civil Code of Procedure "Code de Procédure Civile", Commercial Code "Code de Commerce", Criminal Code "Code Pénal" and Criminal Code of Procedure "Code de Procédure Pénale". "Code Civil" contains basic legal framework of society, including civil status, contracts and torts, family law, property and inheritance. "Nouveau Code de Procédure Civile" (revised 1975 and 1992) and old company law, "Code de Procédure Civile" (1806 ed., as subsequently modified) govern organization, jurisdiction and procedure of civil courts. "Code de Commerce" regulates commercial transactions, bills and notes, maritime law, bankruptcy, commercial procedure, and jurisdiction of commercial courts. "Code Pénal" (revised 1992 "Nouveau Code Pénal") and "Code de Procédure Pénale" (revised 1992 and 1993) contain respectively criminal law and criminal procedure.

Important new codifications are "Code Général des Impôts", or general tax code, "Code du Travail" or labor code, "Code de la Propriété Intellectuelle" (1992) or intellectual property Code ("C.P.I."), and "Code de la Consommation" or consumers code. These codes are those published by Dalloz and Litec; they are issued annually, and contain all significant supplementary laws and annotations to leading cases.

Statutes and decrees are published in "Journal Officiel de la République Française" (cited as J. O.), which appears daily (Web site available: www.legifrance.gouv.fr.). There are yearly cumulative indexes. There is also unofficial but widely used "Bulletin Legislatif Dalloz".

There are two official law reports, one for decisions of Supreme Court: "Bulletins des Arrêts de la Cour de Cassation" and one for decisions of highest authority regarding administrative issues: "Recueil des Arrêts du Conseil d'Etat". There are four general and unofficial compilations of judicial and administrative decisions. Recueil Sirey (cited: S), begun in 1801, consists of monthly issues containing annotated decisions of Cour de Cassation, decisions (often annotated) of appellate and significant trial courts, administrative decisions, and legislation. This casebook was merged with "Recueil Dalloz" on Jan. 1, 1965. "Recueil Dalloz" (cited: D), begun in 1808, consists today of weekly publications containing articles, annotated reports of courts of all levels, summaries of additional decisions, and legislation. "La Gazette du Palais" (cited: Gaz. Pal. or G. P.), began publication in 1881 and consists today of biweekly issues of briefly annotated case law and legislation together with doctrinal articles. "La Semaine Juridique" (cited: J. C. P.) is weekly publication for practitioner begun in 1927 and containing doctrinal articles, annotated case reports and legislative texts. "Recueil Dalloz-Sirey" is now available on CD-Rom (since 1998). Court decisions, legislation, articles can be easily found by entering key word, author or date. Other CD-Roms such as "Doctrinal", "Lamy" or "Lexilaser" contain similar up-to-date information. On-line information is also available through Lexis.

Significant legal dictionaries are Dalloz, Dictionnaire de Droit and Vocabulaire Juridique under supervision of Prof. Cornu. Most significant encyclopedias are Répertoire Dalloz, loose leaf service of Juris-Classeur, Lamy and Dictionnaire Permanent for, inter alia, corporate, civil, commercial, labor, administrative and tax matters. Doctrinal presentations by leading commentators are regarded as very significant authority, on a plane with court decisions. Some of most significant treatises in basic areas are: Planiol, Traité Pratique de Droit Civil (current ed. Ripert & Boulanger); Colin and Capitant, Cours Elémentaire de Droit Civil Français (current ed. Julliot de la Morandière); Marty and Raynaud, Droit Civil; Mazeaud, Leçons de Droit Civil; Hamel and Lagarde, Traité de Droit Commercial; Ripert, Traité Elémentaire de Droit Commercial; Hemard, Sociétés Commerciales; Bouzat, Traité de Droit Pénal; Hémard, Les Contrats Commerciaux; Batiffol and Lagarde, Droit International Privé; Laubadère, Traité Elémentaire de

Droit Administratif; tax practitioners rely on Lefèbvre, Feuillets de Documentation Pratique (Impôts Directs, Impôts Indirects, and Enregistrement) while most commonly used corporate forms are found in Joly, Dictionnaire du Droit des Sociétés Anonymes and Dictionnaire du Droit des Sociétés à Responsabilité Limitée.

6.03 LEGISLATURE:

See category 1 Introduction, topic 1.02 Government and Legal System.

6.04 STATUTES:

A law is voted by Parliament, promulgated by President within 15 days, unless he decides to refer it to Constitutional Court or to Parliament for further reading, and published in "Journal Officiel de la République Française", collection of Laws and Decrees. Publication in "Journal Officiel" of decree of promulgation and of text of law is formal requisite of legality. Law, inserted in "Journal Officiel", is deemed known by all and becomes effective in Paris following day and elsewhere shortly thereafter unless otherwise stipulated.

Also published in "Journal Officiel" with force of law are: Decrees from President, or from Prime Minister, and made for execution or application of laws (Const. of Oct. 4, 1958, Art. 34); regulatory decrees of President or Prime Minister made in all non-legislative matters (Const., Art. 37); ministerial or interministerial regulatory orders signed by one or more ministers which determine details of application of laws; ordinances from Government having force of law (Const., Art. 38).

Orders issued by Republic Commissioners in their departments or by Communes are not published in Journal Officiel, but are contained in special publications.

See also topic 6.02 Law Reports and Legal Materials; category 1 Introduction, topic 1.02 Government and Legal System.

7 DEBTOR AND CREDITOR

7.01 ASSIGNMENTS:

Basic rules for assignments are set out in Code Civil. These are executed by delivering instrument of assignment to assignee (C. C. 1689) but assignment is not effective against third parties (including obligor) until assignee gives formal notice to obligor by sheriff ("huissier") or obligor formally agrees on assignment in instrument drawn up by notary (C. C. 1690). Payment by obligor to assignor before receipt of such notice is valid discharge. (C. C. 1691). No seals are required in France. Depending on type of assignment, special rules may apply which may or may not figure in Civil Code. For example:

Obligor can get release from litigated claim that has been assigned by paying assignee actual amount paid for assignment. (C. C. 1699). This does not apply, however, to assignment to co-heir or joint owner or to creditor in satisfaction of debt. (C. C. 1701).

Under Code du Travail R.145-2 (as modified by Decree No. 2002-1530 of Dec. 24, 2002) only portion of salaries can be assigned.

For assignments involving bills and notes, see category 3 Business Regulation and Commerce, topic 3.01 Bills and Notes.

Arts. L.313-23 to L.313-35 of Code Monétaire et Financier have facilitated assignment of accounts receivable in relation with professional activity to obtain credit from financial institutions.

7.02 ATTACHMENT:

Law No. 91-650 of July 9, 1991, completed by Decree No. 92-755 of July 31, 1992, created general remedy of prejudgment attachment by permission of judge where creditor shows urgency and well-founded claim. (Arts. 67 et seq. of Law of 1991). Particular form of prejudgment attachment is available in specific situation. Creditor may have property to which he claims rights, attached and delivered to third party or indeed retained under judicial supervision by debtor himself, until court has passed on rights of all parties concerned. (“Saisie-revendication”, Arts. 155 et seq. of Decree of July 31, 1992). This action is available even when property is originally in possession of third person.

See topic 7.04 Executions.

7.03 BANKRUPTCY AND JUDICIAL SETTLEMENT:

See topic Judicial Recovery and Liquidation.

7.04 EXECUTIONS:

New regime of execution by attachment of debtor's personal property came into effect on Jan. 1, 1993. (Law No. 91-650 of July 9, 1991 [J.O. July 14, 1991] and Decree No. 92-755 of July 31, 1992 am'd in 1996, 1997, 1998, 2002 and 2003 [Decree No. 2003-1246 of Dec. 18, 2003]). To attach or seize property, unsecured creditors must obtain enforceable title (“titre exécutoire”); however, where merely conservatory measures are sought, no such title is required.

Special judge (“juge de l'exécution”) is authorized to deal with disputes relating to execution matters and authorizes conservatory measures. Execution measures relating to monetary claims are called “saisies-attribution” and effect immediate transfer of attached debt to creditor. Special procedures exist for attachment of funds held by banks (“saisie-attribution bancaire”) and of payments due from employer (“saisie-attribution des rémunérations”).

Execution measures on chattels are called “saisies-vente” and give creditors right to attach and sell any of debtor's tangible movable property. (Other special execution procedures exist with respect to vehicles, intangible movable property and real property.)

Conservatory measures (“mesures conservatoires”) may be granted ex parte by judge for execution matter when claimant demonstrates both that his claim is prima facie founded and that circumstances threaten recovery of said claim. Conservatory measures can take form of either attachment (“saisie-conservatoire”), which affects debtor's ability to dispose of its personal property, or real estate interest (“sûreté judiciaire”). Conservatory attachment on money debt gives creditor preferential right of secured creditor. “Sûreté judiciaire” gives creditor “droit de suite”, i.e., right with respect to secured property that cannot be defeated even by change in ownership.

Sale of real property subject to attachment must be made by auction. Some types of property, for example homesteads, are immune from execution. Attachment of ships and airplanes is subject to special procedures.

Treaties, such as Brussels Convention of Sept. 27, 1968 (applicable to EU members) and Treaty for Unification of Certain Rules Applicable to Conservatory Attachment of Sea Ships of May 10, 1952, contain special rules on execution procedures in France.

See also topics 7.02 Attachment, 7.05 Exemptions, 7.07 Garnishment.

7.05 EXEMPTIONS:

General principle to be found in Art. 2092 of French Civil Code provides that personal property or real estate of debtor is subject to execution by its creditors to enforce collection of debt.

However, following items are exempted from seizure (see Law dated July 9, 1991 and Decree No. 92-755 dated July 31, 1992): (1) Property which law declares exempted from seizure; (2) provisions, sums and pensions of alimentary nature (except those which have been already paid; (3) disposable portion of property declared to be exempted from seizure by testor or grantor except for proportion which may be authorized by court in favor of creditors after date of gift or of opening of legacy; (4) personal property necessary to life and work of debtor and his family except for payment of its purchase price within limits determined by Decree adopted by “Conseil d'Etat”; however personal property remains seizable if not located at domicile or place of work of debtor; (5) necessary items for handicapped individuals or necessary for health of sick persons.

Only part of salaries of workmen and servants can be seized whatever total salary. Same applies to employees and civil clerks.

In addition, Law No. 2003-710 of Aug. 1, 2003 introduced judicial recovery procedures for insolvent individuals. When such procedures are launched, execution measures are immediately suspended by effect of Law.

7.06 FRAUDULENT SALES AND CONVEYANCES:

Creditor may act to exercise rights on behalf of and institute legal action against his debtor in order ultimately to protect his own credit interest in event debtor, by negligence or through outright refusal, does not act himself. However, creditor cannot exercise certain rights of predominantly personal nature, such as debtor's rights to alimony payments. Subject to that limitation creditor can exercise right belonging to his debtor and faces every defense his debtors could have faced. (Action oblique, C. C. 1166). Creditor may also attack contracts or instruments of transfer made by his debtor in fraud of his own rights. (Action Paulienne, C. C. 1167). There are special procedures to challenge fraudulent transfers between spouses, or by decedent to devisees or legatees, or by insolvent. (Art. L.621-107, Commercial Code).

7.07 GARNISHMENT:

Law No. 91-650 of July 9, 1991 (ratified by Decree No. 92-755 of July 31, 1992 as am'd) has modified existing garnishment law.

Garnisher must have enforceable decision or title “titre exécutoire” acknowledging that debt is due (Art. 42 of Law) and must serve process to garnishee indicating identity of debtor, sums owed, nature of debt and unavailability of such sums (Art. 56). Within eight-day period, garnishment process is notified to debtor and indicates relevant court where debtor may challenge garnishment within one month. (Art. 58 of Decree). If no protest is made within one month, garnisher will have right to receive immediate payment from garnishee. (Art. 61 of Decree). If garnishment is challenged by debtor, competent judge (“juge de l'exécution”) of place where debtor is domiciled settles matter. (Art. 65 of Decree).

Law of July 11, 1972 allows Treasury to use simplified administrative procedure to recover sums owed to State (such as taxes and fines) by individuals or corporations, directly from depository banks or employers.

In principle, family allowances are not assignable and not attachable, except in cases of undue payment provoked by fraud or false declaration and of payments related to family alimony, child maintenance and education and unpaid rents or nonrepayment of debt contracted for acquisition of property. Specific rules apply to garnishment of remuneration owed by employer to employee. Share of remuneration which may be attached is determined. (Arts. L.145-2 and R.145-2 of French Labor Code).

7.08 HOMESTEADS:

Law of July 12, 1909 created institution of homestead (“bien de famille”), constituted by house or divisible portion thereof or house and adjoining land, or house with shops or workshops (along with materials and tools), and provided that house is occupied by family as its principal residence, and adjacent land or workshops are exploited by family. Value of entire homestead at time of creation may not exceed FRF 50,000 (approx. [Euro]7,622) (Law of Mar. 12, 1953), may not be mortgaged, and must be insured against fire. Foreigners may benefit from homestead law only if they are domiciled in France. Homestead cannot be attached or seized for debt, even in event of owner's bankruptcy. Deed to homestead must be in form of notarial act, with fulfillment of legal notice requirements to permit third parties to challenge title or proper valuation of homestead, followed by registration with local civil court of general jurisdiction which verifies value. (Decree of Mar. 26, 1910). Authors consider that French institution of homesteads has passed into disuse.

7.09 INSOLVENCY:

See topic 7.10 Judicial Reorganization and Liquidation.

7.10 JUDICIAL REORGANIZATION AND LIQUIDATION:

Judicial reorganization and liquidation of enterprises (“redressement et liquidation judiciaires des entreprises”) are governed by Law No. 85–98 of Jan. 25, 1985, as modified by Law No. 94-475 of June 10, 1994 and Law No. 2005-845 of July 26, 2005 (applicable Jan. 1, 2006) and Decrees Nos. 85–1387, 85–1388 of Dec. 27, 1985 and Decree 94-910 of Oct. 21, 1994. Law of Jan. 25, 1985, as amended, has been codified under Arts. L.620-1 et seq. of French Commercial Code. They provide single procedure for both restructuring and possible eventual liquidation of insolvent enterprises, including all non-state-owned corporate entities and sole proprietorships. Subsidiaries of foreign entities carrying on business in France are subject to procedure on same basis as French entities. Law No. 88-15 of Jan. 5, 1988, Decree No. 88-430 of Apr. 21, 1988 and Law No. 94-475 of 10 June, 1994 further amend 1985 Law. Decree No. 89-339 of May 29, 1989 (effective June 1, 1989), Decree No. 94-910 of Oct. 21, 1994 (effective Oct. 22, 1994) and Decree No. 98-1232 of Dec. 29, 1998 further modify Decree No. 85-1388 of Dec. 27, 1985. Decree of 1985 has also been completed by Decree No. 99-656 of 29 Sept. 1999. Law No. 88-1202 of Dec. 30, 1988 extends application of above procedure for judicial reorganization and liquidation to farmers, subject to minor modifications such as provision for mandatory conciliation procedure.

Several procedures are available for companies in financial difficulty prior to commencement of formal reorganization/liquidation proceedings. “Preliminary alert” procedure can be initiated by company's statutory auditor or by President of Commercial Court. Company can request court appointment of ad hoc representative for purpose of assistance in negotiating with its creditors without court supervision (Art. 611-3 of Commercial Code) and can also formally request opening of conciliation proceeding not exceeding four months (which may be extended by one month) during which court-appointed conciliator negotiates with creditors on behalf of debtor and agreed debt restructuring plan can be approved by court (Art. 611-4 et seq. of Commercial Code). During conciliation procedure debtor is not protected from creditors unless specific court order granted. Law of 26 July 2005, effective beginning 2006, introduces “safeguard procedure” (“procedure de sauvegarde”), modeled in large part on c. 11 procedure under U.S. bankruptcy law. Under new procedure business facing insurmountable difficulties which may lead to insolvency can apply to Commercial Court for temporary protection from its creditors. During observation period enterprise, under its current management and subject to review by court appointed representatives, can negotiate with two committees, one constituted by its financial creditors and other by its principal suppliers. At end of process two committees must vote to approve restructuring plan which then must be approved by court.

Formal reorganization procedure starts with either voluntary declaration or determination by court on demand of creditor or public prosecutor of date of cessation of payments. Jurisdiction over proceeding lies with court of enterprise's registered office at time petition filed unless registered office transferred within preceding six months, in which case court of former location has jurisdiction. (Art. 1 of Decree No. 85-1388, as am'd by Art. 12 of Decree No. 89-339 and Decree No. 94-910 of Oct. 21, 1994). Creditor-requested liquidation of agricultural holding is preceded by mandatory conciliation procedure. (Art. 7 of Decree No. 85-1388, as am'd by Art. 15 of Decree No. 94-970). Procedure may also start in event of debtor's nonperformance of financial commitments undertaken pursuant to amicable settlement with creditors. (Art. L.621-3 of Commercial Code).

Recovery procedure, which may either be “simplified” or “standard” depending upon size of enterprise, authorizes court to order “observation period”, which lasts six months renewable once and which can be exceptionally prolonged for additional period of eight months at request of public prosecutor (total of 20 months). (Art. L.621-6 of Commercial Code and Decree No. 85-1388 of Dec. 27, 1985, Art. 20, am'd by Law No. 94-910 of Oct. 21, 1994), or prolonged up to maximum of two years if management lease (“location-gérance”) agreement with third party is involved. However, observation period may be avoided in cases when enterprise is to be directly liquidated, i.e. when enterprise has stopped any activity or its recovery is considered as impossible. (Art. L.620-1 of Commercial Code). During this period, activities of enterprise may continue and debtor normally remains in charge. Debtor may be assisted by court-appointed “administrator” which may take over management of debtor (former receiver or “syndic” no longer exists). “Judicial commissioner” appointed by court supervises procedure.

Claims must be declared by creditors within two months (or four months for foreign creditors) after publication of court decision opening procedure. (Art. 66 of Decree No. 85-1388, as am'd by Art. 6 of Decree No. 88-430). Creditors are kept informed of main steps of procedure. Liquidation proceedings are effective from date of court decision opening procedure, not date of its publication. (Art. 14 of Decree No. 85-1388 of Dec. 27, 1985 am'd by Decree No. 94-910 of Oct. 21, 1994). Commercial Code no longer provides for general body (“masse”) or meeting of creditors, but all creditors (secured and unsecured, privileged or not) are now represented by one or more representatives appointed by court. (Art. L.621-39 of Commercial Code). Judicial commissioner may also appoint controllers upon creditors' request.

Following actions performed after date of cessation of payments are null and void: transferring assets for no consideration, entering into grossly unbalanced agreements, paying debts before their due dates, paying debts other than through normal payment procedures, or granting any security interest over company's assets for existing debts, etc. (Arts. L.621-107 and L.621-108 of Commercial Code).

Payment of all claims incurred prior to court decision opening procedure is forbidden during observation period. (Art. L.621-24 of Commercial Code). Litigation concerning such claims, including privileged claims, is postponed until creditor has declared his claim. Procedures are then resumed but only aim at establishing and valuing claims. (Art. L.621-41 of Commercial Code). Other legal actions are maintained during “observation period”, including actions brought before “prud'homme” Court. Claims not due at date of opening decision are not accelerated on account of decision; all provisions to contrary are deemed null and void. (Art. L.621-49 of Commercial Code).

Administrator may require performance of existing contracts which are not terminated nor rescinded by insolvency, notwithstanding any legal or contractual provision to contrary. (Art. L.621-28 of Commercial Code).

At end of observation period, court either orders continuation of enterprise and/or partial or total transfer of its assets or else liquidation of enterprise. Claims not yet due become payable only if either transfer of all assets or liquidation takes place. Order of liquidation or total transfer of assets is grounds for dissolution of enterprise. (C. C. 1844-7, as am'd by Art. 3 of Law No. 88-15). Effect of orders may be suspended pending appeal. (Art. 155 of Decree No. 85-1388).

Claims incurred after decision opening procedure are paid as they mature and upon liquidation or transfer of all assets in preference before all other claims, including certain privileged or secured claims, but excepting certain privileged labor claims. (Art. L.621-32 of Commercial Code). Substitution of security presenting “equivalent advantages” may be ordered by court if necessary in absence of agreement by creditors. (Art. L.621-80 of Commercial Code).

Law no longer presumes mismanagement of debtor, but if there is proof of mismanagement contributing to insufficiency of debtor's assets, managers (including de facto managers) may be held liable for debts. (Art. L.624-3 of Commercial Code).

In addition, if manager has abused corporate assets for personal ends or committed fraudulent act, court may impose personal bankruptcy, or prohibit him from managing, operating, controlling, directly or indirectly any commercial, artisanal or agricultural business entity. These prohibitions are imposed for at least five years. (Art. L.625-1 of Commercial Code). Court may require sanctions to be published. (Art. 15 of Decree No. 88-430). Court may order such prohibitions against manager unable to pay debts for which he was made liable. (Art. L.625-6 of Commercial Code).

In case of fraudulent bankruptcy (“banqueroute”), court may order penal sanctions. (Art. L.626-1 of Commercial Code).

See also category 3 Business Regulation and Commerce, topic 3.13 Sales.

7.11 LIENS:

Liens may be created expressly by contract as in the case of pledges (C. C. 2073; see topic 7.12 Pledges) and antichreses (C. C. 2085; see category 20 Mortgages, topic 20.03 Mortgages). They may also arise by operation of law, for example in following cases: (1) In cash sales seller has lien until price is paid (C. C. 1612) or, in sales on credit, if buyer becomes bankrupt or unable to pay (C. C. 1613); (2) in sales where seller has right of repurchase, buyer may retain property until not only purchase price is refunded but also value of repairs or improvements. (C. C. 1673); (3) in deposits (C. C. 1948); (4) where property is condemned by state for public purpose (C. C. 545); (5) in transporting merchandise by ship, carrier has lien for freight charges (Art. 2, Law No. 66-420 of June 18, 1966); (6) hotel keepers and carriers have liens for their charges (C. C. 2102); (7) workman has mechanic's lien (C. C. 571); (8) co-heir has lien for improvements made on any real estate he must return to decedent's estate (C. C. 867); (9) person who buys stolen goods at market or fair value has lien thereon until he has received price he paid from original owner (C. C. 2280); (10) tenant evicted by third person who buys premises can retain premises until he is indemnified by his prior landlord (C. C. 1749).

There are other liens which have been established by case law such as in case of persons performing meritorious services officiously, agents, architects and orchestra conductors.

7.12 PLEDGES:

A pledge (gage) is civil or commercial, depending on the debt guaranteed.

Civil pledge is enforceable against third parties only if established by registered instrument. Except for pledges over listed financial instruments account, in event of default in payment creditor who holds pledge cannot dispose of it. He must obtain court order allowing him to sell property pledged or order giving him right to take property in payment of debt. Should value of pledge exceed amount of debt, amount payable to creditor is determined by expert appointed by court. (C. C. 2073 et seq.).

The commercial pledge can be established without special formalities and can be proved by any legal means, such as the correspondence exchanged, or books of parties. Creditor can foreclose pledge by selling it at public auction eight days after demand has been served on debtor by sheriff ("huissier") if debtor has not paid within time specified. (Art. L.521-1 et seq.).

With respect to both kinds of pledge, the property must actually be in the possession of the creditor, or deposited with a third party. Certain pledges can be established without actually divesting owner of possession, as in case of pledges on "fonds de commerce" (entire going business concern, including goodwill) and liens on automobiles.

If merchandise is in warehouse pledge is made by endorsement of warehouse certificate to creditor and by transcription of this endorsement on books of warehouse ("warrant").

If a debt due by a third party is given in pledge, an instrument duly registered on paper with fiscal stamps affixed must be served on debtor by means of sheriff ("huissier"). (C. C. 2075). Pledge of "professional" debt can be granted to credit institution in simplified form ("bordereau") as provided by Arts. L.313-23 to L.313.35 of Code Monétaire Financier. See category 3 Business Regulation and Commerce, topic 3.01 Bills and Notes.

Account composed of registered securities may be pledged, but this fact must be noted in books of corporation issuing securities or, as case may be, must be specified in registers of financial intermediary holding pledged account. (Art. L.431-4 of Monetary and Financial Code). In addition, if corporation is of noncommercial type (société civile), any pledge of its shares is subject to specific registration with registrar (greffe) of Commercial Court, failing which pledgee loses his ranking with respect to competing pledgees (C.C. 1866).

See also category 20 Mortgages, topic 20.01 Chattel Mortgages.

8 DISPUTE RESOLUTION

8.01 ALTERNATIVE DISPUTE RESOLUTION:

In France most disputes in civil and commercial matters are resolved by courts as expense of judicial proceedings in civil matters remains relatively low and so-called alternative dispute process (contractually agreed measures such as conciliation, mediation and minitrials) has not achieved popularity noted in some common law jurisdictions (notably U.S.).

Within framework of judicial proceedings variety of dispute resolution techniques may be resorted to, some having mandatory character.

Mandatory Dispute Resolution Measures.

Mandatory Conciliation/Mediation.

Art. 8 of Law No. 2002-1138 of Sept. 9, 2002, modified Art. 21 of Law No. 95-125 of Feb. 8, 1995. It holds that if judge has not reap parties consent to conciliate, he can enjoin them to meet "third person". This provision is applicable to all conciliation procedures which are condition to contentious treatment of dispute, except for mandatory conciliation in case of divorce. This article creates injunction in favor of judge, regardless of parties consent.

In following instances, attempt at conciliation is required by law either prior to issuing formal proceedings or prior to case being submitted for judgment.

(i) Employment Matters.

Before individual proceedings on employment matters is declared admissible by Labor Court ("Conseil des Prud'hommes")—who has exclusive jurisdiction on individual employment matters, collective employment matters are under jurisdiction of Civil Trial Court of General Jurisdiction ("Tribunaux de grande instance")—mandatory attempt at conciliation before Conciliation Bureau is required. (Arts. R 516-10 and R 516-11 of Labor Code 516-16). In case of seizure of sums corresponding to salaries, prior attempt at conciliation is mandatory and takes place before tribunal of first instance. (Art. R 516-21 of Labor Code). Conciliation takes place before Conciliation Bureau. (Art. R 516-13 of Labor Code). When conciliation succeeds, report mentioning agreement between parties is drawn up. (Art. 516-14 of Labor Code). However, in order to be valid, settlement ("transaction") implies reciprocal concessions of parties and to that end, Conciliation Bureau must make sure that parties were conscious about their rights. If this is not case, settlement is null and void and judge can be seized. (Cour de Cass. Ch. Soc., No. 87-42419, Mar. 28, 2000).

Although collective labor disputes are not subject to mandatory conciliation—collective bargaining agreements can, nonetheless, provide for conciliation mechanisms (Art. L.523-1 Labor Code), option of submitting them to conciliation is preserved (Arts. R 523-1 and R 523-2 Labor Code). Once conciliation has been chosen, parties are obliged to attend to conciliation hearings and to facilitate process in good faith. These disputes may also be submitted to mediation after failure of conciliation. (Art. L.524-1 Labor Code).

(ii) Divorce.

Attempt at conciliation is compulsory before judicial proceedings are commenced unless divorce is mutually agreed upon by parties. (C. civ., Arts. 252-253). Rational of this compulsory conciliation is assistance to parties by judge (C. civ., Art. 252, al. 2), who has to ask them to present settlement project concerning effects of divorce. (Art. 252-3). Presence of parties' lawyers to conciliation is also compulsory. (Art. 252-1, al. 2, c). During conciliation audience, judge can make interim orders (C. civ., Art. 254-257) in order to assure maintenance of daily existence of spouses and their children until divorce sentence becomes res judicata. (C. civ., Art. 254). Among measures judge can take, Art. 255 contemplates fixing terms of split residency, allowing use or enjoyment of couple's residence and assets, etc. Law No. 2004-439 of May 26, 2004 introduced new kind of interim measure: judge can designate mediator.

(iii) "Tribunal Paritaire des Baux Ruraux" (Commission for Agricultural Leases).

(N.C.P.C. Arts. 882, 887, 888).

Parties are always summoned to conciliation hearing. In event of non-conciliation, minutes must specify terms of settlement offer made and rejected.

(iv) Taxation Law.

In event that taxpayer disputes tax adjustment; he must first submit his claim to tax administration (Arts. R 196-1 et seq. Tax Procedures Code [LPF]), later having six months—renewable once for three months—to decide. His silence is equivalent to negative response. Taxpayer, as well as tax administration, can submit dispute to departmental conciliation commission. (Art. 59 LPF; Arts. 667 and 1651 of General Tax Code). Tax administration is bound by taxpayer request of conciliation, even if he believes commission is incompetent. (Cour de Cass. Ch. Com., No. 90-22158, Feb. 9, 1993; No. 95-17599, Nov. 18, 1997). Tax administration refusal is substantial irregularity invalidating tax recovery proceedings. (Cour de Cass., Ch. Com. No. 94-18235, Mar. 12, 1996). Therefore, tax administration must recall taxpayer of possibility of seizing conciliation commission. (Art. 57 LFP; Cour de Cass. Ch. Com., Dec. 7, 1993).

(v) Agricultural Undertakings in Financial Difficulty.

Art. L.351-2 of Rural Code, provides for compulsory attempt at conciliation with creditors before receivership or bankruptcy proceedings can be commenced.

Voluntary Dispute Resolution.

Conciliation/Mediation.

Terms of conciliation and mediation are often used interchangeably but legislation draws distinctions between two: Conciliation takes place outside of judicial process, except in cases where law permits delegation of judge's powers of conciliation to third party (preliminary conciliation [“conciliation préalable”]) where it is mandatory for initiation of process. (Arts. 830-835n, 840-841, 847, N.C.P.C.). Conciliation must respect adversarial principle and therefore judge cannot converse exclusively with one party. Mediation procedure is more flexible: Mediator can receive only one party, with or without its legal counsel.

Conciliation and mediation have, however, some common principles: Option to submit any agreement reached to judge to render it enforceable as judgment (Art. 129 N.C.P.C. for conciliation, Art. 131-6 for mediation); statements made by parties in course of conciliation or mediation cannot be used before judge (Art. 131-14 N.C.P.C.).

In context of voluntary dispute resolution, distinction may be drawn between judicial or conciliation and extrajudicial conciliation.

(i) Judicial Conciliation and Mediation.

General principle is embodied in Art. 21 of Code of Civil Procedure: judge is empowered to try to conciliate parties. Paris T.G.I. has extended this power to arbitrator (réf. Dec. 19, 1996). Conciliation power is inherent to judge's mission (Paris Appeals Court, 17 Dec. 1987), regardless of its competence (Cour de Cass. Civ. 1, Feb. 27, 1985).

Parties of dispute can conciliate all along proceedings. (Art. 127 of Code of Civil Procedure).

Mediation is designation by judge—even by judge dealing with emergency summary proceedings (“juge des référés”) Art. 131-1 N.C.P.C.—of third party further to agreement of parties to help them to find solution to dispute for period of three months, renewable once (Art. 131-3 N.C.P.C.). Appointment becomes effective only upon payment provision for respect of mediator's fees. Judge does not lose its competence and can intervene at any time and take necessary measures. (Art. 131-2 of Code of Civil Procedure). Judge still seized during mediation and he can put end to it on its own initiative. (Arts. 131-2 and 131-10 N.C.P.C.). Mediation is divided in two phases: Negotiation and judge's recording of settlement of dispute or failure of mediation. Parties can retract until judge's control of settlement, mainly existence of reciprocal concessions. (Cour de Cass., Ch. Soc., No. 87-42419, Mar. 28, 2000). Once settlement is recorded and approved, parties cannot retract.

Although conciliation and/or mediation are not provided for any criminal legislation, there exists spontaneous recourse to mediation in criminal proceedings, in particular for minor acts of delinquency.

(ii) Extrajudicial Conciliation.

Conciliation may take place in relation to private law disputes but also in context of public law matters.

(a) Private Law.

Parties can conciliate all along proceedings. (Art. 127 N.C.P.C.). They are free to appoint any third party to act as conciliator but there exists body of “auxiliaries of justice”. (See Decree No. 2000-344 of Apr. 19, 2000, modifying Decree No. 78-381 of Mar. 20, 1978.) They act as volunteers and are mainly retired magistrates and lawyers. Their mission is to facilitate independently of any judicial proceeding amicable resolution of disputes bearing upon rights of which parties are free to dispose of. They have no power to determine dispute.

Parties to contract can choose mediation clause forcing them to mediate before submitting claim related to contract judge. During some time, violation of that contractual clause was regulated solely by law of contracts and by principle inadimplenti contractus (Art. 1184 of Civil Code), provoking rescission of contract, which didn't respond to interests of party to whom mediation or conciliation was refused. After some hesitation (Cour de Cass. Ch. Civ. 1, Jan. 23, 2001), jurisprudence finally accepted that party instituting proceeding before judge without satisfying its contractual obligation of previous mediation or conciliation should see its claim rejected because inadmissible (Cour de Cass. Joint Chambers, Feb. 14, 2003), as long as parties are clearly willing to make admissibility of claim dependent on exhaustion of mediation or conciliation (Cour de Cass. Ch. Civ. 1, Mar. 6, 2001).

Conciliation is also provided for in relation to specific issues: commercial undertakings in financial difficulty (Law No. 84-148 of Mar. 1, 1984, am'd by Law No. 94-475 of June 10, 1994 modified by Law No. 96-62 of Jan. 29, 1996, and Law No. 2000-1208 of Dec. 13, 2000), local conciliation commission for leases (Law No. 89-1010 of Dec. 31, 1989 as am'd by Law No. 92-1336 of Dec. 16, 1992, abrogated by Ordinance 2000-912 of Sept. 18, 2000 Art. 611-6 Commercial Code); Commission for personal over-indebtedness (Law No. 89-1010 of Dec. 31, 1989 and Law No. 91-650 of July 9, 1991 modified by Law No. 91-1323 of Dec. 31, 1989, Law No. 92-644 of July 13, 1992, Law No. 94-126 of Feb. 13, 1994, Law No. 98-657 of July 31, 1998, Law No. 99-957 of Nov. 23, 1999 and Law No. 2004-130 of Feb. 12, 2004).

Agreement reached after conciliation or mediation has to be certified in report or statement (process-verbal) signed by parties and judge, is not subject of appeal, since it is not judicial decision. It is contract and judge does not approve or ratify agreement reached by parties. Nature of conciliation or mediation record or statement is relevant to establish admissibility or not of exequatur of foreign mediation or conciliation. According to Art. 509 of Code of Civil Procedure, public foreign acts different from judicial decisions, can be executed in France by means of exequatur if its author exercised some decision-making power, mere authentication or notary's approval of private act is not covered by Art. 509. (Paris Court of Appeals, 1st Civ. Ch., 2 Apr. 1998).

(b) Public Law.

Conciliation and mediation are two techniques of wide application in public law. Function of “Mediateur de la République” (ombudsman) was created by Law No. 73-6 of Jan. 3, 1973, modified by Laws No. 89-18 of Jan. 13, 1989, 92-1336 of Dec. 16, 1992 and 2000-321 of Apr. 12, 2000. Republic's Ombudsman (“médiateur de la République”) is impartial authority—even if appointed by Prime Minister—who seeks settlement of disputes between citizens and public authorities. He is not judge or arbitrator, nor superior official authority and cannot reform decisions of public officials. According to Art. 1 of 1973 Law, ombudsman receives complaints of natural or legal persons against State's administration, local authorities, public entities and every organism entrusted with public service mission.

Jurisdiction is invoked informally by natural or legal persons, via members of Parliament, or upon latter's initiative. In order to be admissible, plaintiff must prove public power's deficiency and exhaustion of remedies before Administration. (Arts. 6-7 of 1973-6 Law). Ombudsman is incompetent for disputes between State and its agents. (Art. 8 of 1973-6 Law). He must also reject complaint if judicial proceeding is pending and if complaint is direct against judicial decision. (Art. 8 of 1973-6 Law; Conseil d'Etat, May 31, 1978). If claim seems acceptable, ombudsman proposes recommendations to public organism in question in order to improve its services. (Art. 9 of Law 1973-6). In case of silence, ombudsman can substitute competent administrative authority to impose sanction. (Art. 10 of Law 1973-6). He must determine whether his administration concerned by complaint has acted in conformity with its duties as public service and offer solutions to dispute. He enjoys wide investigative powers.

Other specific conciliation mechanisms exist in relation to specific industries and functions: cinema, book, publishing, environmental issues, taxes.

Amiable Composition.

Parties may, after dispute has arisen, confer upon judge power to rule as amiable compositeur (ex aequo et bono), which allows judge to depart from strict legal principles and to adjudicate dispute in accordance with notions of fairness and equity. Parties' freedom may, however, only be exercised in relation to rights of which they have free disposition. (Arts. 12 and 58 N.C.P.C.; Art. 2060 of Civil Code). Parties may also confer powers of amiable composition to arbitrator. (Arts. 1474b and 1497 N.C.P.C.).

Settlement.

Arts. 2044-2058 of Civil Code set out legal framework for settlements. Art. 2044 recognizes parties' freedom to enter into settlement agreements for purpose of bringing dispute to end or to avoid future litigation, subject to their having necessary capacity in relation to subject-matter of proposed settlement. (Art. 2045 of Civil Code).

Settlement agreement must be made in writing, although absence of writing will not invalidate agreement, provided that its existence is proven so, in accordance with Arts. 1341 et seq. of Civil Code. There is no settlement unless parties make mutual concessions to each other. Reciprocal concessions between parties are of essence of contract. (Cour de Cass. Ch. Soc., Mar. 30, 1994 and June 20, 1995). Traditionally, this element has been established by analyzing reciprocal claims abandoned by parties to dispute (Cour de Cass., Ch. Soc., Oct. 11, 1990 and Mar. 27, 1996) however, recent decision requires reciprocal abandon of subjective rights (Aix-en-Provence Court of Appeals, 10th Civil Chamber, Apr. 14, 2004), which oblige judge to submit contract to legal solution he would have achieved if parties had not prevented him from deciding. If reciprocal concessions do not exist, contract is declared null and void (Cour de Cass. Ch. Civ., July 9, 2003), although some judges have re-qualified contract (Aix-en-Provence Court of Appeals, 10th Civil Chamber, Apr. 14, 2004). For circumstances when agreement is null and void, see Arts. 2053-2054.

Issues covered by settlement agreement is res judicata between parties (Art. 2052 of Civil Code) that can only be appealed on grounds of nullity of contract itself (error, violence or fraud, lesion is excluded by Art. 2025 of Civil Code; Cour de Cass. Ch. Civ. 1, May 30, 2000 and July 9, 2003; Cour de Cass. Ch. Soc., Dec. 17, 1986 and June 14, 2000; See also Code of Commerce Art. L.621-107). For circumstances when agreement is null and void, see Arts. 2055 through 2057 of Civil Code.

8.02 ARBITRATION AND AWARD:

According to Art. 1422 N.C.P.C., arbitration clause is convention by which parties to contract may decide that disputes arising out of their contract will be submitted to arbitration. Freedom to enter into arbitration agreement is embodied in Art. 2059 of Civil Code. Contractually agreed arbitration on commercial disputes is frequently resorted to, particularly in international matters. Parties to international contracts can agree to refer their disputes to arbitration, either at time when contract is entered into (Art. 1443 N.C.P.C.) or when disputes arise (Art. 1447 N.C.P.C.).

It is important to distinguish internal and international arbitration because specific rules apply in relation to international arbitration (Arts. 1495-1507 N.C.P.C.), even if latter have influence in interpretation and application of rules concerning internal arbitration and distinction becomes blurred.

National Arbitration.

(i) Scope of Arbitration Clause.

Some matters cannot be submitted to arbitration, according to Art. 2060 of Civil Code (questions of status and capacity of individuals, divorce or separation, dispute involving local authorities or public bodies and generally matters related to public order). However, arbitration clause is considered null and void only when rule of public policy is effectively violated and not when matter is merely one of public policy. (Paris Court of Appeal, June 15, 1957). Freedom to enter into arbitration agreement is embodied in Art. 2059 of Civil Code.

Art. 126 of Law on the New Economic Regulations of May 15, 2001 extended domain of arbitration provided by Art. 2061 of Civil Code: before that law, clause was prohibited for every noncommercial relationship but now arbitration clause is valid in every contract related to professional relationships. Modification stresses functional character of matter (professional activity, Paris Trib. Com. Ch. 17, Feb. 17, 2004) and not personal quality of parties (professionals). Five prohibitions to resort to arbitration were maintained as exceptions to principle of arbitrability of disputes: disputes falling in scope of competence of labor judge (“conseil des purd'hommes”), disputes about contracts concluded between professionals and nonprofessionals or consumers, about contracts concerning financial instruments concluded by unaware trader or operator, about agricultural leases and co-ownership regulations. When validity conditions of arbitration clause are not met, clause is non-invocable.

Even if, in principle, arbitration clause is contract (Art. 1442 N.C.P.C.) and therefore only have effect inter partes, based on Art. 1692 of Civil Code, automatic transmission of arbitration clause to non-signatory parties has been recognized in case of assignment of rights or contracts (Paris Court of Appeals, Nov. 20, 1988 and May 6, 1992; Cour de Cass. Ch. Civ. 1, Jan. 5, 1999; Cour de Cass. Ch. Civ. 2, Dec. 20, 2001; Aix-en-Provence Court of Appeals, Jan. 9, 1997), in case of subrogation (Cour de Cass. Ch. Civ. 2, May 13, 1966; Cour de Cass. Com., Mar. 3, 1992; Paris Court of Appeals, Nov. 13, 1992) or economic dependence of several contracts (Cour de Cass. Com., Mar. 5, 1991; Paris Court of Appeals, Jan. 11, 1990).

(ii) Arbitration with State Entities.

In principle, disputes with State are heard by special administrative courts, and public administrations may not consent to arbitration. (Conseil d'Etat advisory decision of Mar. 6, 1986). However, Art. 11 and 14 of Edict of June 17, 2004 and Art. L.1414-12 of “Code général des collectivités territoriales”, allowed State and its agencies to conclude arbitration clause in partnership contracts (“contrat de partenariat”) with private parties (Conseil d'Etat, Oct. 29, 2004; Constitutional Council, Dec. 2, 2004). Some state owned enterprises such as French Mail (la Poste) (Law No. 60-568 of July 2, 1990) and other industrial and commercial public enterprises (Decree No. 2002-56 of Jan. 8, 2002) can also resort to arbitration.

(iii) Constitution of Arbitral Tribunal.

French Law sets no requirements as regards constitution of arbitral tribunals (qualification of arbitrators, number of arbitrators, etc.). (Art. 1442 et seq. N.C.P.C.).

If nomination of arbitrators rises conflicts between parties, president of “tribunal de grande instance” will make designation, unless he notices manifest nullity of arbitration clause. (Art. 1444 N.C.P.C.).

Nomination decisions of arbitrators are not open to appeal (Art. 1457 N.C.P.C.; Paris, Ch. Com. 14. B, Apr. 9, 2004; Besançon Court of Appeals, Ch. Com. 2, Apr. 24, 1996). (In case of arbitrator's fraud see Cour de Cass. Civ. Ch. 2, Feb. 12, 2004).

There is no agency contract between arbitrator and party that designated him. (Cour de Cass. Ch. Civ. 2, July 3, 1996).

(iv) Autonomy of Arbitration Clause.

Validity of arbitration clause is independent of validity of contract in which clause is contained. (Cour de Cass. Civ. Ch. 2, Apr. 4, 2002; Cour de Cass. Ch. Com., Apr. 9, 2002).

To be valid, arbitration clause must be written and must designate arbitrators or modalities of appointment of arbitrators. (Art. 1443 N.C.P.C.).

(v) Arbitrators Competence.

Art. 1460 N.C.P.C. provides some general principles which must be respected by arbitral tribunal. Its powers concerning evidence are ruled by Art. 1467 N.C.P.C. Arbitrators can only pronounce about submissions made by parties. (Arts. 4, 5, 1460 and 1484-3 N.C.P.C.; Cour de Cass. Civ. Ch. 2, July 3, 1996). Once award is made, arbitral tribunal is taken off case. (Art. 1475 N.C.P.C.).

(vi) Appeals.

Final nature of arbitral awards is fully accepted by French courts which rarely upset or revise award. Award is not open to cassation and parties can expressly waive their right to appeal or if tribunal decided as amiable compositor. (Arts. 1481-1482, 1483 N.C.P.C.). However, award is always open to appeal if award was given without arbitration clause or on base of null and void arbitration clause; if arbitral tribunal was irregularly constituted; if arbitrators acted ultra vires; in all cases foreseen by Art. 1480 N.C.P.C. and if award violates public policy. (Art. 1484 N.C.P.C.).

International Arbitration.

In contrast to national arbitration, commercial quality of parties has no influence; even though French international public policy preserves control of French judges of their competence and arbitrability of dispute. (Cour de Cass. Civ. Ch. 1, Mar. 30, 2004).

(i) Applicable Law.

In international arbitration, parties are free to choose law governing issues and substantive law applicable to dispute. When parties have not designated governing law, applicable to procedure or substantive issues, arbitrators are free to apply whatever legal rules they deem appropriate. (Arts. 1494 and 1496 N.C.P.C.). Parties and arbitrators may refer to single national legal system or to set of non-national legal rules. (Vienna States Convention, “general principles of international law”).

When arbitrators declare removal of case from arbitral tribunal and point of law not treated in award is disputed by parties during execution of award, applicable law will be law of enforcement procedure. (Cour de Cass. Ch. Civ. 1, No. 01-1069, June 30, 2004).

(ii) Autonomy of Arbitration Clause.

According to substantive rule of international arbitration recognized by French case law, arbitration clause is legally independent from principal contract which contains it. Existence and effectiveness of clause is appreciated by reference to parties' common intention, regardless of any national law. (Cour de Cass. Ch. Civ. 1, No. 01-14311, Mar. 20, 2004). Paris Tribunal de Grande Instance is competent to decide on recognition or enforcement of arbitral award rendered abroad. (Cour de Cass. Ch. Civ. 1, Nov. 3, 2004).

(iii) Scope of Arbitration Clause.

Effect of arbitration clause extends to non-signatory parties if their situation or activity allows presumption that they had knowledge of existence and extent of arbitration clause. (Paris C., 1st Ch. D, Oct. 4, 2000).

It is also admitted that when several contracts are successively concluded in short period of time, and only one contract has arbitration clause, this one extends to both contracts, as long as they are complementary or related contracts. (Paris C., 1st Ch. C, Nov. 23, 1999).

(iv) Competence of French Judges.

As long as there is not manifest nullity of arbitration clause, judges must apply it and deny their competence. (Art. 1458 N.C.P.C.; Cour de Cass. Ch. Civ. 1, No. 01-11951, Mar. 30, 2004).

When arbitration clause is manifestly inapplicable to dispute (when one party did not accept or know about existence of arbitration clause in case of assignment of all contractual rights), competence-competence of arbitrator is not applicable. (Cour de Cass. Ch. Civ. 1, Mar. 16, 2004; Cour de Cass. Ch. Civ. 1, No. 01-17800, Mar. 30, 2004). Arbitration clause is considered manifestly inapplicable when disputed act was realized when clause did not exist. (Cour de Cass. Ch. Civ. 1, No. 01-15975, Apr. 27, 2004). Violation of French international public policy must, on contrary, be argued before judge when annulment of award is claimed. (Cour de Cass. Ch. Civ. 1, No. 02-12259, Mar. 30, 2004). When arbitrators declare removal of case from arbitral tribunal and point of law not treated in award is disputed by parties during execution of award, applicable law will be law on enforcement procedure. (Cour de Cass. Ch. Civ. 1, No. 01-1069, June 30, 2004).

Right of access to competent judge embodied in Art. 6 of European Convention of Human Rights is international public policy principle concerning international arbitration. Therefore, in case of denial of justice, French judges (Paris “Tribunal de grande instance”) are competent to assist parties of international dispute to setting-up and running of arbitral tribunal if there is link, even weak, with France (for instance designation of Paris' ICC President as appointment authority for arbitrators of tribunal). (Cour de Cass. Ch. Civ. 1, Feb. 1, 2005).

(v) Suspension of Arbitral Proceedings.

According to Art. L.621-41 of Code of Commerce, in case of insolvency of one of parties to arbitration, arbitral proceeding must be suspended during insolvency proceeding in France. This suspension is considered to be principle of French public policy which aims to protect creditors' equality. (Cour de Cass. Ch. Civ. 1, No. 02-12259, Mar. 30, 2004).

(vi) Annulment and Rejection of Arbitral Awards.

Under Art. 1504 N.C.P.C., international arbitral awards may be set aside on five limited grounds listed in Art. 1502 N.C.P.C.: (a) If arbitrator decided in absence of arbitration agreement or on basis of void or expired agreement; (b) if arbitral tribunal was irregularly composed or sole arbitrator irregularly appointed; (c) if arbitrator decided in manner incompatible with mission conferred upon him; (d) if due process (principle of adversarial process) was not respected; and (e) if recognition or enforcement would be contrary to international public policy. Right to apply for annulment of arbitral award subsists despite contrary provision of arbitration clause. Revision of international award rendered in France may be brought on ground of fraud only and provided arbitral tribunal has not become functus officio. (Cour de Cass. Civ. Ch. 1, May 25, 1992).

Arbitral awards rendered abroad are recognized and enforced in France subject only to judicial recourse on limited grounds set out in Art. 1502 N.C.P.C.

Accordingly, only violation of principle of adversarial system or international public policy, can be argued to nullified arbitral award. Content of motivation of arbitrators cannot be controlled by French judge. (Cour de Cass. Ch. Civ. 1, Nov. 3, 2004).

Paris Tribunal de Grande Instance is competent to decide on recognition or enforcement of arbitral award rendered abroad. (Cour de Cass. Ch. Civ. 1, Nov. 3, 2004).

9 DOCUMENTS AND RECORDS

9.01 ACKNOWLEDGMENTS:

Documents which are acknowledged before notary public in U.S.A. and which are intended for use in France should have signature of notary public certified by county clerk and that of county clerk certified by French consular or diplomatic officer in place in which documents were executed. (Decree of Oct. 23, 1946 Art. 3). If documents are to be produced outside of French diplomatic and consular posts signature of consul must be legalized by French Ministry of Foreign Affairs. (Decree of Oct. 23, 1946 Art. 4 modified by Decree 65-283 of Apr. 12, 1965).

France is signatory to Convention of Oct. 5, 1961 (J.O. Jan. 28, 1965) and to European Convention of June 7, 1968 (J.O. Nov. 2, 1970) eliminating legalization requirement of consular or diplomatic certification between France and other signatory countries. However, documents acknowledged before notary in France and which are intended for use in foreign countries should be sealed as well as signed by notary. (Circulaire 78-19 of Nov. 30, 1978).

9.02 AFFIDAVITS:

There is no general instrument upon oath analogous to affidavit. However, written declaration on facts witnessed by person, which is not notarized, may be used in legal proceedings. (See N.C.P.C., Arts. 200, 202.) Proof of specific facts, as family relationships, may be made by declaration (“acte de notoriété”) before notary or judge of “Tribunal d'instance”. (See C. C. 311-3 and 71.)

See also topic 9.04 Notaries Public.

9.03 COMMISSIONS TO TAKE TESTIMONY:

See category 5 Civil Actions and Procedure, topic 5.04 Depositions and Discovery.

9.04 NOTARIES PUBLIC:

Position of notary (Notaire) is of high importance. He is “Officier Ministériel” appointed by Minister of Justice, must have passed qualifying examinations and had required minimum professional experience. Notaries have exclusivity with respect to preparation of deeds of sale, mortgages, and other instruments affecting real property interests, as well as deeds of gift and marriage contracts. Such instruments prepared by notary are called notarial acts. Number of notaries is strictly limited. Decree No. 67-868 of Oct. 2, 1967 defined manner notaries may join together to form professional associations (sociétés civiles professionnelles) created by Law No. 66-879 of Nov. 29, 1966 and modified by Law No. 72-1151 of Dec. 23, 1972 and by Decree No. 75-979 of Oct. 24, 1975. Notary may exercise his functions throughout national territory (Decree No. 86-728 of Apr. 29, 1986), but his geographic competence is limited regarding certain real estate transactions (Decree No. 71-942, Nov. 26, 1971, Art. 10).

Notary's function is to verify and keep on file or to make record of certain instruments which by law must be in authentic form or which parties desire in such form. (Ordinance No. 45-2590 of Nov. 2, 1945). Notary is not allowed unless authorized by President of Tribunal de Grande Instance to reveal such instruments to persons other than parties thereto, their heirs and assigns. For deeds of sale, notary must verify that seller owns real property. (Trib. Civ. Seine Jan. 15, 1889). In addition, he must verify status of liens and mortgages registered on property before sale and at moment of publication of sale. (Cour de Cass. Jan. 4, 1966). Notary also drafts wills according to instructions of testator. He may also certify existence of basic facts upon declaration of witnesses before him (certificat de notoriété), e.g. family relationships. These certificates are then accepted as prima facie evidence in legal proceedings, as in settlement of descendants' estates.

If notary drafts instrument, he retains original permanently on file. Certified copies are provided to all parties having separate interest. Notarial instrument is absolute proof of any agreement between parties and their heirs and legal representatives. (C. C. 1319). Notary will issue certified copies for use in legal proceedings. In such case, he is personally liable both for accuracy of copies and legal validity of original act, if he prepared it. As such, prior to drafting instrument, notary must verify facts and conditions to ensure validity and utility of such instrument. (Cour de Cass. Civ. ler, Jan. 6, 1994).

Notary will also provide certified copies of private acts or contracts presented to him, retaining one such copy in his files. In such case, he is personally liable only for accuracy of copy and not legal validity of original instrument. Notary may be liable for damages arising from unsound advice given by him based on matters and knowledge within his competence. (J.C.P. 1975 II, 18164; Cour de Cass. Civ. ler Oct. 2, 1979, Nov. 14, 1979, Feb. 12, 1980). Notary must give advice regarding legal and tax consequences of instruments whether drafted by parties or by him. (Cour de Cass. Civ. ler, June 25, 1991).

Notary's fees for instruments which only notaries are authorized to prepare are determined based on rates fixed by decree. (Decree No. 78-261 of Mar. 8, 1978 and Decree No. 86-358 of Mar. 11, 1986). Fees charged by notary for instruments which non-notaries may prepare are not subject to fixed rates.

9.05 RECORDS:

There are a number of public registers created by special laws either to make certain basic information relating to a person or to an enterprise a matter of public record, or to confer a priority or presumption of title in some property interests in favor of party making the registration.

Principal registers are:

(1) Civil Status Register.

This register is kept in every commune and arrondissement. All vital statistics (birth, marriage, divorce and death certificates) relating to citizen are entered on register of place where born, regardless of subsequent domicile.

(2) Clerk Office (Greffe) of Commercial Court (“Tribunal de commerce”).

Here must be deposited copies of articles of incorporation or economic interest group and related documents of every stock corporation formed in France, every foreign corporation having office in France, every limited liability company, commercial partnership, and special partnership by shares as well as registration records of commercial agents. Any substantial modification of articles of incorporation or association must be filed in same office.

General mortgage of a going business (nantissement de fonds de commerce) and chattel mortgage on industrial and professional equipment must also be registered here within 15 days after creation or mortgage is null and void.

(3) Registry of Trade and Companies (“Registre du Commerce et des Sociétés”).

Art. L.123-1 of Commercial Code and other various later Decrees including Decree of May 30, 1984, as modified by subsequent Decrees and Order of Feb. 9, 1988 as modified by subsequent Orders set forth regulations and various technical details concerning Registry of Trade and Companies. This public Register exists in each department in France and is held by clerk of Commercial Court. All persons or companies, domestic or foreign, which are engaged in commercial activity in France, either directly, or through intermediary of branch or agent, or in any other manner, must be registered, companies carrying on noncommercial activity must also apply. Traders must be registered for registration within two weeks after commencement of activity. Companies must apply for registration as soon as possible after completion of incorporation formalities including publication formalities. They acquire legal personality as of registration.

If trader or company has several offices in France, then it must apply for registration of each additional office within 15 days. If it has offices within territory of several Commercial Courts, it must apply for "secondary" registration for each one. If office is transferred to territory of another Commercial Court, new registration must be sought within one month of transfer. Termination of activity must also be declared within one month.

Application must be made by trader ("commerçant") himself or legal representative of company.

All individuals applying for registration must present, among other elements, following information: Name and personal domicile; date and place of birth; nationality; date and place of marriage, matrimonial regime, and clauses of marriage contract and its amendments, if any (Civil Code 1394, paragraph 4, Decree No. 95-374 of Apr. 10, 1995) which might affect free disposition of goods of spouses; evidence of information given to spouse when joint estate on consequences of obligations entered into in context of business on joint estate; declaration of inability to attachment of their rights on their main residence; activities engaged in; operating name; persons empowered to act in his name; address and registration number of domestic and foreign offices; date of commencement of operations. (Art. 8 of Decree of May 30, 1984).

All companies must supply certain information including: Articles of incorporation ("statuts"); acts naming persons to positions of management, direction and control of company. Registrar verifies validity of incorporation. (Art. L.210-7 of Commercial Code). However, declaration of procedures complied with is required in case of merger. Companies must file reports of auditors charged with valuating contributions in kind ("commissaires aux apports") and must file declaration of capital subscription with list of subscribers, number of shares subscribed to and sums paid in by each subscriber. (Art. L.210-7 of Commercial Code). If S.A. seeks public investment, minutes of organization meeting and reports of auditors charged with valuating contributions in kind ("commissaires aux apports") and granting special advantages must be presented. In addition, all companies must indicate in particular: Purpose and form; particular legal status; capital; activity; date of fiscal year end; address of head office of company with indication of principal office, and, if applicable, address of other foreign or domestic offices; term of existence; references of members who are held jointly and severally liable for indefinite term of corporate debts; references of members and third persons having power to engage company; and documents which permit trader, if foreign, to live and work in France (carte de commerçant étranger). (Art. 15 of Decree of May 30, 1984, and Decree No. 98-58 of Jan. 28, 1998).

Upon registration, registration number, which must appear on all commercial documents as well as on stationery, is assigned to person or entity. (Art. 72 of Decree No. 84-406 of May 30, 1984).

Modifications must be made within one month with Registry of Trade and Companies if situation of person or company changes (Art. 22 of Decree of May 30, 1984), in order to be opposable to third parties.

In addition, certain documents relating to judicial settlement, liquidation, orders forbidding exercise of commercial activities, and withdrawal of trader's card are recorded directly by clerk of Commercial Court at Register of Commerce.

Registration with Register of Commerce raises presumption that inscribed is trader. Individuals may not avail themselves of their status as traders unless they are registered with Register of Commerce, but they may not invoke their failure to register to avoid responsibilities and obligations that this status entails. Persons who must be registered with Register of Commerce may not when dealing with third parties make use of facts whose publication is mandatory but has been neglected, while third parties may avail themselves of such facts if they so wish. Presumption as to commercial status cannot be asserted against third parties or Administration if they prove contrary. (Arts. L.123-7, L.123-8, L.123-9 of Commercial Code).

Traders and directors of commercial operations are liable to certain penal sanctions if they refuse, after judicial decree, to register themselves with Register of Commerce or if, in bad faith, they give inaccurate or incomplete information concerning their field and method of operation. (Arts. L.123-4 and L.123-5 of Commercial Code). Order of Sept. 24, 1984 relative to registration of public companies has been replaced by Order of Feb. 9, 1988, simplifying rules and procedures of registration which was modified by subsequent decrees. (See also Law No. 94-126 of Feb. 11, 1994 simplified.)

(4) Register of Trade.

All craftsmen must be registered with local guild chambers. (Law No. 96-603 of July 5, 1996 subsequently modified).

Such registration does not exempt craftsman from registering with Registrar of Commerce, when craftsman is also commerçant. Procedure is detailed in Decree No. 98-246 of Apr. 2, 1998.

(5) Register of Associations and Foundations.

This register is held in Préfecture of Police of Paris and in Préfectures of every department. It is registry of nonprofit associations and foundations and contains extracts from their articles of association. Association becomes legal entity only upon registration. Declaration to registry includes name and purpose of association, offices, names, occupations, domiciles and citizenship of managers of association. Changes in management of association must also be declared. (Actually, there is no “register” per se. Law of 1901 merely provides that anybody has access to declaration and articles of association at préfecture.) (Law of July 1, 1901 and Decree of Aug. 16, 1901, as am'd).

(6) Register of Real Estate Mortgages (“Bureau de la Conservation des Hypothèques”).

There are about 350 “bureaux des hypothèques” throughout France, where register is held. This register records all events affecting title to real property in district covered by register, e.g., deeds of sale, mortgages, transfers by testate or intestate succession, tenancies in common, long term leases and contractual servitudes. Bureau also keeps separate dossier for each tract in every local district (“fichier immobilier”). Fichier immobilier itself is divided in two subdossiers, personal information card (“fiche personnelle”) and real property information card (“fiche réelle”), which allow doing research either from names of owners or from description of real property. (Decree No. 55-22 of Jan. 4, 1955 and Decree No. 55-1350 of Oct. 14, 1955 as subsequently amended).

Priority of deeds, mortgages or other instruments is determined by date of registration and not date of transaction. Mortgages must be renewed every ten years, if installment or last installment is not determined or if it is prior to or simultaneous with registration, and two years if principal of debt must be paid on one or more determined dates, to preserve priority. Failure to register mortgage means that right to possession is lost to bona fide purchasers, but personal liability of mortgagor remains. However, seller has two months to register his lien for unpaid purchase price and only thereafter does it become subordinate to mortgages previously registered. Failure to register deed of sale means that title may be lost to bona fide purchaser. First among several claimants to register acquires good title regardless of date of contract of sale.

(7) Register of Automobile Mortgages (“Gages”).

This is located at Préfecture in each department. Recordation must be made within three months of initial registration of new vehicle or it is null and void.

(8) Tax Register (**“Recette des impôts”).**—This local register records actual date of all legal transactions on application by interested party.

(9) National Institute of Industrial Property.

This register, located in Paris, includes all patents, trademarks, tradenames, trade symbols and models or designs, etc. In general, registration creates presumption of title which may be rebutted by proof of prior art or usage by another. See category 17 Intellectual Property, topic 17.03 Industrial Property Rights. (Law No. 91-7 of Jan. 4, 1991 am'd by decree No. 95-385 of Apr. 10, 1995).

(10) Public Register of Cinematography.

This register, also located in Paris, lists under film title, record of all production and employment contracts, credit agreements and mortgages, and sale or distribution agreements concerning film. Similarly, all court decisions regarding film must be registered. Failure to register results in loss of priority, but does not invalidate contract or mortgage. (3rd title of Cinematography Industry Code).

(11) Public Register of Computer Files.

Before being put into operation, each nominative computer file must be declared to (and in certain cases authorized by) National Commission on Data Processing and Freedom (created by Law No. 78-17 of Jan. 6, 1978 as subsequently modified by Law No. 2004-801 of Aug. 6, 2004). Failure to do so can subject offender to penalties.

(12) Forward Agents Register.

Decree of Mar. 5, 1990 as subsequently amended creates Forwarding Agents Register (“Registre des Commissionnaires de Transport”); registration certificate (“Certificat d'inscription”) with Register entitles forwarding agent to exercise his activity throughout French territory. Certificate is personal and granted for unlimited period of time and is not assignable. Each region of France has own Forwarding Agents Register. Change in forwarding agent's status must be filed with Register. Registration is subject to conditions relating to professional aptitude, respectability and financial capacity. Forwarding agent may be removed from Register in following cases: (1) Failure to continue to meet conditions for registration; (2) abandonment of this activity for one year or longer; (3) serious or repeated violations of transport, labour and safety regulations; (4) delays in payments owed to carriers.

See also categories 2 Business Organizations, topics Agency, Associations, Corporations, Limited Companies, Partnerships; Estates and Trusts, topic Trusts; Intellectual Property, topic Industrial Property Rights; Mortgages, topics Chattel Mortgages, Mortgages; Property, topics Deeds, Real Property.

9.06 SEALS:

The seal does not exist in France.

10 EMPLOYMENT

10.01 LABOR RELATIONS:

Hiring.

Prior to employment, declaration of employment must be made by employers to Social Security bodies. All prospective employees must undergo medical examinations, with supplementary examinations required annually for adults. Minors and workers conducting particularly dangerous work must submit to special medical supervision. Employee's name and basic information about him must be made available to local labor inspector. Salary records must also be kept and detailed pay slips given to all employees. (C.T.R. 143-2). Foreign employees (and also, during transitional period, Nationals of new EU countries) must obtain permit for work and residence before starting employment. (C.T.R. 341-1). Nationals of EU countries are not subject to above requirements. Clandestine work is prohibited and punished with criminal sanctions as of first violation. (C. T. Art. L. 362-3 as modified per Law of Mar. 11, 1997). Two cumulative sanctions are provided for—three-year prison sentence and [Euro]45,000 fine for natural persons or [Euro]225,000 fine for legal entities.

According to EC Directive of Oct. 14, 1991, employment contracts for indefinite period of time concluded as of July 1, 1993 must be in written form and contain certain mandatory information. Moreover, written employment agreements must be in French language, and translation may be supplied to employee, if so requested. (C. T. Art. L. 121-1).

Pursuant to C. T. Art. L. 321-1-2, when employer contemplates modifying employment contract for economic reasons, employee must be notified by registered mail with acknowledgment of receipt thereof, and has one month upon receipt of such notification to make known his refusal. Should employee fail to respond during this period, he is deemed to have accepted proposed modification. In event ten or more employees refuse proposed modifications and that their dismissal is being contemplated, said dismissals are subject to rules applicable to collective economic dismissals (new Art. L.321-1-3 created by new Law on Social Cohesion “Loi de Programmation pour la Cohésion Sociale” of Jan. 18, 2005).

Termination of Employment.

Termination by employer of employment contracts concluded for indefinite period of time are subject to special procedures, details of which vary according to reasons for dismissal, size of firm, number of employees dismissed if dismissal is based on economic reasons.

If dismissal of employee is based on reasons other than economic reasons, employer must call employee to pre-dismissal meeting by registered letter return receipt requested, informing him of purpose of meeting. In addition, employer must take in employee's explanations during pre-dismissal meeting (employee has right to assistance from another employee of firm during this meeting and/or to special outside counsel in firms where there are no Personnel Representatives); and two full days (Ordinance of June 24, 2004) after date of such dismissal meeting employee is notified by registered mail with acknowledgment of receipt with mention of reasons for dismissal if made for fault committed by employee.

If dismissal is based on economic reasons, employer must: (1) Meet and discuss terms of economic layoff with Labor Management Committee (“Comité d'Entreprise”) or Personnel Representatives (“Délégués du Personnel”), depending on size of firm; (2) call employee to meeting as mentioned above. It is not necessary to hold pre-dismissal meeting for dismissal of at least ten persons for economic reasons, provided there are Personnel Representatives; (3) inform local labor authorities of dismissal in case of dismissal of ten or more employees (contents of information given to local labor authorities and control of this authority on application of procedure are broader if dismissal concerns collective layoff of more than ten employees within same 30-day period); (4) notify employee of dismissal by registered mail with acknowledgment of receipt mentioning reasons for dismissal. (Date at which dismissal can be notified is subject to delays which depend in particular upon professional category of person dismissed, and number of employees dismissed.)

Economic collective layoffs are accompanied by social measures proposed by employer in favor of employees who are likely to be dismissed.

Law on Social Cohesion maintains disposal of training courses for companies over 1,000 employees (“congé de reclassement”) and put in place new disposal for companies with less than 1,000 employees (“convention de reclassement personnalisé”), replacing former training courses called “Pré-Pare”.

According to this last disposal, each employee whose dismissal is contemplated must be proposed such disposal. During eight months, employee benefits from specific indemnity from Unemployment Funds. Employee contract is breached through common agreement. Employee cannot pretend to indemnity of time notice, but employer will pay two months salary to Unemployment Funds; should time notice have been longer than two months, employer will pay difference to employee. Other disposals of this nature were put in place for bigger companies (congés de reclassement).

Companies employing at least 50 employees which plan to dismiss more than nine employees within same 30 day period are required to propose social measures (internal resettlement, external resettlement, training, reduction of working time) for employees and must issue Plan of Safeguard of Employment (plan de sauvegarde de l'emploi).

When layoff is likely to affect equilibrium of labour pool, measures are contemplated in order to create companies, training programs and develop employment in labour pool (ré-industrialisation du bassin de l'emploi).

Violations of dismissal procedures may be sanctioned by fines and damages to employees. Improper termination of employee's contract gives employee right to damages. Procedures for economic dismissal may be nullified by court if firm fails to comply with requirements of Plan of Safeguard of Employment. From Aug. 1, 1992, dismissal of employees over age 50 requires giving right to unemployment insurance payment of additional contribution by employer (from one to 12 months salary). According to Law of Social Modernisation, if Plan of Safeguard of Employment is nullified by court, dismissals resulting from Plan of Safeguard of Employment become null and void. Therefore, employee could be reinstated or obtain indemnity of at least 12 months salary. According to Law on Social Cohesion, if reinstatement is not possible because of closure of company or because no employment is available in company, employee can only obtain indemnity.

For termination of contracts of indefinite duration, except in case of dismissal for serious offence, all employees having worked more than six months must receive time notice which varies from one month (for employment duration of six months to two years) to two months (employment duration of over two years). (C. T. Art. L. 122-6). Time notice for executives is usually three months. C. T. Art. L. 122-5 (regarding resignations) and C. T. Art. L. 122-6 (regarding dismissals) extend benefit of time notice provisions to some employees who have worked less than six months with same employer.

Law of May 4, 2004 on professional training created new disposal, individual right to professional training (“droit individuel à la formation”, hereafter “DIF”). Employee employed under indefinite term contract and with one year of seniority is entitled to 20 hours of professional training per year (collective bargaining agreement can provide for more). Each year, employer must inform employee of capitalized hours of professional training. In case of dismissal, employer must inform employee of his right to benefit from hours of DIF which have not been used in dismissal notice. Employee could ask for benefit of it during notice period.

Personnel representatives benefit from special protection and prior authorisation of competent labor authority must be requested to dismiss all types of personnel representatives.

Employment contracts may be terminated any time during trial period, in principle without formal procedure; short notice period may be required by labor agreement or collective bargaining agreement.

Employer must, when any labor contract is terminated, provide employee with work certificate whatever reasons for termination of contract are and certain number of mandatory statements. Voucher showing all sums paid to employee upon termination of labor contract (reçu pour solde de tout compte) and drawn up at time employment contract is ended is worth simple receipt of all sums mentioned.

Law of July 25, 1985 as modified by Law of Dec. 1993 creates new management system of personnel, so-called “groupement d'employeurs”, which is association composed of individuals or companies (employing up to 300 employees). However, since Feb. 1, 2000, companies and organizations with more than 300 employees included in scope of legislation on labor-management committees, may join employers' associations provided that they have entered into collective bargaining agreement defining guarantees granted to association's employees. New system permits exchange of employees among members when labor needed is insufficient to hire full-time employee. (C. T. Art. L. 127, paragraphs 1 to 7).

Employment Contract Duration.

Contracts may be concluded with temporary work agencies under conditions defined by law including requirements with respect to when employer may hire temporary employee (reasons for recourse to temporary work), duration of work assignment and renewal terms thereof. (C. T. Art. L. 124-2, 124-2-1, 124-2-2, 124-2-3, 124-2-4).

Employment can be made for definite period of time; such employment is subject to specific rules provided by Laws of July 12, 1990 and of Jan. 17, 2002 (Law of Social Modernisation). Cases where this type of contract can be used are in principle limited to performance of punctual and specific tasks, and must not have purpose or effect of occupying position in company on permanent and lasting basis. (C. T. Art. L. 122-1). Those contracts must be in writing. In cases where this type of contract can be used, term must be specified in contract; it can be renewed once; total duration of contract (renewal included) cannot exceed, depending on particular case, nine, 18, and 24 months. In some other cases, such as replacement of employee on sick leave, term of contract need not be specified. Employment contract of fixed duration cannot be terminated except for serious offense (“faute grave”) or force majeure. Subject to specific cases and specific rules, if terms of contract continue to be honored after expiration, it becomes contract of indefinite duration. (C. T. Art. L. 122-3-10). Under certain conditions, fixed term agreements can also be used to hire individuals unemployed for certain period of time or to offer training positions. Such fixed term contracts are governed by specific provisions and may give rise to reduction of employer's social contributions. (Law of Dec. 20, 1992). Law of Social Modernisation aims at limiting use of fixed-term employment contracts and temporary employment contracts.

Any employer deciding to take action against employee because of fault committed by employee must inform employee in writing stating reasons for action. For any action other than of minor importance, employer must call employee to preliminary meeting during which employee can be assisted by another employee.

Nondiscrimination.

Principle of nondiscrimination for normal and legitimate use by employee of constitutional right to strike is specifically recognized. (C. T. Art. L. 521-1). Except for serious fault committed by employee, dismissal or any sanction or measure taken by employer against employee because of participation in strike is automatically void. Employee may ask not only for damages but also for reappointment to job. (C. T. Art. L. 122-45, paragraph 2 and 521-1, paragraph 3).

Working Time.

Working week is subject to following limits except for exemption: ten hours/day, 48 hours per week/44 per week over period of 12 consecutive weeks.

Overtime is computed from 35 hours. Since Decree of Dec. 21, 2004, overtime is statutorily limited to 220 hours per year (extended industry-wide agreements can provide for higher limits). This limit is reduced to 130 hours in event that modulation agreement is applied. Prior authorisation of labour inspector must be requested for overtime exceeding statutory or conventional overtime limits.

Overtime hours are compensated by hourly rate increase of 10%, 25% or 50% (or by equivalent compensatory time off if fixed by extended collective bargaining agreement). Applicable rates and nature of compensation (increased remuneration or compensatory time off) vary in accordance with existence of collective bargaining agreement on reduction of working time, number of overtime hours, size of company, period during which overtime is performed.

In addition to increased remuneration (or compensatory time off), overtime entitles employees to mandatory resting time (“repos compensateur obligatoire”).

Specific working time rules apply for executives. Three categories of executives must be distinguished: Top management executives (“cadres dirigeants”): above mentioned rules do not apply to this category; integrated executives (“cadres intégrés”): law of Jan. 17, 2003 has changed definition of this category. Working time rules apply to this group of employees; other executives: for this category of executives, working time duration may be computed on a year basis. In addition, it is possible to provide for lump sum remuneration which includes in advance certain number of overtime hours.

Since Law of June 30, 2004, in order to compensate contribution of employers in solidarity with elderly and handicapped (0.3% of total wages), employees must work one day more per year which is not paid. Companies may execute company bargaining agreement to choose day (public holiday, except from May 1, or any rest day). If not, Whit Monday has to be worked.

Law on Social Cohesion recalls that travel time to workplace is not effective working time. If travel time to workplace exceeds usual time (i.e. from residence to workplace), employer must either pay lump sum, or grant rest time.

Vacations.

Annual paid vacation is required by law at rate of two and a half days per month of work or total of 30 working days for year (C. T. Art. L. 223-2) unless more favorable provision is set out in collective bargaining agreement, employment contract, or custom.

Employees can, under special conditions in each case, take leaves of absence for certain family events, maternity, (including necessary medical exams before and after birth [Law of Jan. 27, 1993]), adoption, training or education of young children, creation of business or in case of sabbatical leave, and for paternity (Law of Dec. 21, 2001).

In event of transfer of undertaking new employer must take over all existing employment agreements. (C. T. Art. L. 122-12).

Wages are negotiated with employees or labor unions subject to minimum wage agreed upon in collective labor agreement (convention collective) for each employment category. Guaranteed minimum hourly rate (S.M.I.C.), is currently [Euro]8.03 throughout France as of July 1, 2005 (raised on July 1st of every year).

Since Law of Aug. 6, 2005 modifying Law on “Informatique et libertés” (“Information Technology and Individual Freedom”), payrolls are not to be declared by employer any longer. Salaries exceeding [Euro]1,500 net per month must be paid by check or by bank transfer. (C. T. Art. L. 143-1).

Minors under 16 cannot be employed by business concerns. Minors under 18 are forbidden from working at certain dangerous jobs and night work unless exemption is granted by labor inspector. They are entitled to more liberal paid vacations. Their wages may be lower than adults' wages: (20% less from age 16 to 17; 10% less from 17 to 18) except if paid by piece or by output, or if they have six months' experience. Minors benefit from special labour contracts during their apprenticeship which bind employer to “pay wages required by the law and provide for practical training (“formation professionnelle”)” within firm and outside in special training centers.

Internal statute (“règlement intérieur”) must be drawn up in firms employing 20 persons or more. Statute provides rules regarding hygiene and safety, disciplinary sanctions as well as sexual and moral harassment. (C. T. Art. L. 122-33 and L. 122-34).

Payroll Tax and Social Benefits.

Employer contributions for payroll taxes and social benefits amount to cost over base salary of approximately 44%. Most important mandatory contributions are following:

Complementary Retirement Pensions.

With respect to “non cadres”, i.e. all employees except managerial and professional employees: Rate of complementary retirement pension contributions on portion of monthly salary between [Euro]1 and [Euro]2,516 inclusive is 7.5% (4.5% paid by employer and 3% paid by employee). For portion of monthly salary between [Euro]2,516 and [Euro]7,548, rate is 20% (12% paid by employer and 8% paid by employee). With respect to “cadres” i.e. Managerial and professional employees only: Rate of complementary retirement position contributions on portion of monthly salary between [Euro]1 and [Euro]2,516 inclusive is 7.5% (4.5% paid by employer and 3% paid by employee). For portion of monthly salary between [Euro]2,516 and [Euro]10,064, rate is 20% (12% paid by employer and 8% paid by employee). For portion of monthly salary between [Euro]10,064 and [Euro]20,128, rate is usually 20% (contributions are freely shared between employer and employees. For instance: 12.5% paid by employer and 7.5% by employee). Rate of death contribution on portion of monthly salary between [Euro]1 and [Euro]2,516 is 1.5% only paid by employer. Contribution to A.G.F.F. (i.e. Association pour la Gestion du Fond de Financement de l'AGIRC et de l'ARCCO). For portion of monthly salary between [Euro]1 and [Euro]2,516 rate is 2% (1.20% paid by employer and 0.80% paid by employee). For portion between [Euro]2,516 and [Euro]7,548 for “non cadres” and between [Euro]2,516 and [Euro]10,064 for “cadres” rate is 2.2% (1.30% paid by employer and 0.90% by employee).

Social Security Contributions.

Based upon portion of employees' monthly salary up to [Euro]2,516 (Monthly Social Security Ceiling—reviewed every year), contributions for retirement pensions is 14.75% (8.20% paid by employer, 6.55% paid by employee).

Based on total salary, contributions are as follows: (a) For sickness and death, 13.55%

(employer pays 12.8% and employee pays 0.75%); (b) for widows insurance, 0.10% paid by employee; (c) for family allowance: 5.40% (all paid by employer); (d) for retirement pension, 1.70% (1.60% paid by employer, 0.1% paid by employee).

Employer Social Security Contributions may be reduced for certain types of employment agreements.

Unemployment Insurance.

Rate in force from Jan. 1, 2003. On basis of gross salary up to [Euro]2,516 per month (Social Security Ceiling): 6.4% (4% paid by employer, 2.4% paid by employee) and on basis of portion of gross monthly salary between [Euro]2,516 and [Euro]10,064: 6.4% (4% paid by employer, 2.4% paid by employee), plus special employer contribution of 0.35% on portion of monthly salary up to [Euro]10,064; executives' contribution to unemployment fund (APEC) amounts to [Euro]18.12 between [Euro]2,516 and [Euro]10,064 ([Euro]10.87 paid by employer, and [Euro]7.25 paid by employee).

General Social Tax (“Contribution sociale généralisée”).

All compensation subject to Social Security taxes, as well as other types of income, is subject to 7.6% social tax paid entirely by employee. As of Feb. 2, 1996, new social tax (“Contribution au remboursement de la dette sociale—C.R.D.S.”) to be paid on all compensation and amounting to 0.5%.

Taxes Based on Salaries.

Payroll tax 4.25% on portion of annual salary below or equal to [Euro]6,904, 8.50% on portion above [Euro]6,904 and below or equal to [Euro]13,797, 13.60% on that portion exceeding [Euro]13,563. This payroll tax is only imposed upon employers who are not subject to value added tax (TVA). Apprenticeship tax (on most commercial and industrial companies): 0.5% on total salary of previous year. Tax for permanent education of personnel: 1.6% of total salaries of current year (paid by employers of more than nine persons) and 0.55% as of Jan. 1, 2005 (paid by employers of less than ten persons). Construction tax: 0.45% of total salary (paid by employer of more than nine persons). Rent subsidy tax: 0.10% on portion of salary limited to [Euro]2,516 (paid by all employers) plus 0.40% on total salary paid by employers of more than nine persons. Solidarity tax: applicable to companies (with some exceptions) turnover of which is at least [Euro]760,000 (taxes excluded) per year, 0.13% of turnover (taxes excluded) (paid by employer). Transport tax (applicable in major cities): rates vary with city (2.60% in Paris area) (paid by employer) plus reimbursement to employee of 50% of cost of public transport. (Law of Jan. 23, 1990).

Employees over 60 are exempted from payment of certain employment and pension contributions.

Number of above-mentioned contributions are assessed on basis of Social Security Ceiling or multiple of such; Social Security Ceiling is set at [Euro]2,516 for 2005.

Normal retirement age is 65 as from Aug. 23, 2003, with respect to settlement at full rate of Social Security Retirement Pension. In principle, right to receive retirement pension is subordinate to definitive ceasing of previous professional activity.

Profit-Sharing Plans (“Participation des salariés aux résultats de l'entreprise”).—

(a) Profit Sharing Plans (“Accords”).—Ordinance of Oct. 21, 1986 as codified by Law of July 25, 1994 under Art. L.442-1 and following Arts., provides for different formulas to favor participation of employees in results or capital of their employing company which are accompanied by tax advantages and social exonerations for employees and company if

conditions provided by said regulations are met. These provisions were thoroughly reformed by law of Feb. 19, 2001. In particular, scope of mandatory participation was modified. (Arts. L.442-1 and L.442-4 of Labor Code). Consequently, participation regime is mandatory not only for companies usually employing at least 50 people but also for companies belonging to economic and social unit (unité économique et sociale), recognized by collective agreement or court decision, in which at least 50 people are employed.

(b) Company Savings Plans.

Ordinance dated Oct. 21, 1986 as codified under Art. L.443-1 and subsequent Arts. and implementing decree of July 17, 1987 as codified by Decree of Apr. 11, 1995 under Art. R.441-1 and following Arts. and law on employee savings dated Feb. 19, 2001 provide for voluntary company savings plans enjoying tax and social advantages. They consist of purchase of stocks and debentures by means of employees' and company's voluntary payments. Stocks and debentures so purchased are to be held by employees for minimum five-year period.

Since new law on employee savings plans, scope of beneficiaries under these plans – until then reserved to employees and former employees having left company for retirement or early retirement – has been broadened in companies where usual workforce consists of at least one employee and at most 100 employees, to include company managers. In addition, question of setting up company savings plan should be raised during negotiation of voluntary or mandatory profit-sharing plans.

(c) New Measures Stemming from Feb. 19, 2001 Law on Employee Savings.

In order to encourage development of employee savings in small- and medium-sized companies, law authorizes creation of inter-company joint savings schemes (PEI) which are governed by Art. L.443-1-1 of Labor Code.

Furthermore, it is also possible to institute within company voluntary employee joint savings plan (plan partenarial d'épargne salariale volontaire:PPESV) under Art. L.443-1-2 of Labor Code. This measure is intended to secure savings to carry out medium-term projects and is also accompanied by social and fiscal exonerations. It obligatorily complements PEE (company savings scheme) or PEI.

(d) Stock Options.

This purely optional mechanism, instituted by law 70-1322 of Dec. 31, 1970, implementing decree 71-748 of June 7, 1971 and by new law on economic regulations adopted on May 2, 2001, consists – for corporation (Société Anonyme - S.A.) or special partnership by shares (Société en Commandite par Actions), whether listed or not – of offering all or part of its personnel option of subscribing or purchasing its shares or investment certificates at certain price which is fixed at date on which option is granted. Upon decision of Extraordinary General Shareholders' Meeting (Assemblée Générale Extraordinaire), Board of Directors (Conseil d'Administration) or Management Committee (Directoire), depending on case, has maximum period of 38 months in which to grant options. Options may be exercised by their holders during period of time which is set by General Shareholders' Meeting and during which option price, in principle, does not vary. Thus, in event of increase in share value, capital gains may be made with respect to option price. Options may be offered to employees as well as to certain executives, even those who are not under employment contract. They may concern employees and/or executives of company itself, but also those of companies within its group (even if their registered offices are abroad). Issuing company may deduct from its taxable results any costs incurred by it on account of exercise of options and any capital losses which may be suffered at such time. Moreover, until Dec. 31, 2001, incentive granted to employee will be exempt from tax on salary. Tax regime for option holder has been modified by new law on The New Economic Regulations, aim thereof being to increase taxation of capital gains on acquisition in excess of [Euro]152,500 and to provide tax incentive to keep shares beyond holding period which is, however, reduced to four years.

Labor-Management Relations.

Personnel delegates ("délégués du personnel") are required by C. T. Art. L.421-1, in every company with usually more than ten employees. They are elected by all employees divided in classes according to their functions, e.g., manual workers, technicians, engineers, office employees, etc., with classes determined by most important labor unions among employees. (L.423-2). Since Law 93-13.13 of Dec. 20, 1993 these representatives serve for two years and are eligible for reelection. Their duties consist in communicating to management all grievances, both individual and group, relating to salaries, work safety, hygiene, social benefits, etc. (L.422-1). However, any employee has right to communicate his own grievances to management. Personnel delegates must be met by management at least once a month.

Worker's Committee ("Comité d'Entreprise").

Worker's Committee exists by law in every enterprise employing 50 employees or more. (L.431-1). This includes foreign-owned companies having their business in France even if their head office is located abroad. (Conseil d'Etat June 29, 1973). In companies having one or several centers of activities employing 50 or more persons, Worker's Committees called "comité d'établissements" for each such centers are created. (Art. L.435-1). These "comités d'établissements" are represented by some of their members at central committee ("comité central") of firm which holds meeting at least once every six months at head office of firm. "comité d'entreprise" or "comité d'établissements" holds meeting which is called by general manager or his representatives. Since Law No. 93-13.13 of Dec. 20, 1993, periodicity of meetings depends on size: less than 150 employees, meetings are held every two months except if members of Worker's Committee serve also as personnel delegates. In companies with more than 150 employees, Worker's Committee convenes at least once a month. Committee members are elected by all employees divided in classes according to their functions, with classes determined by major labor unions among employees. (L.433-2). General manager or plant manager is member ex-officio and chairman of labor-management committee. Elections are conducted by management in collaboration with principal labor unions, with members elected for two year term and eligible for relection. (L.433-12). Committee is not intended to be organ for transmitting grievances but rather one for labor-management cooperation. List of duties is set forth by C. T. Art. L. 432-1 et seq. as modified by Law of Oct. 28, 1982. Committee must be informed and consulted on all questions related to organization, management and general affairs of company, introducing in firm of new technologies. Quarterly or half-yearly, depending on size of staff, employer informs Committee in particular on evolution of sales, financial situation of firm, methods of production, employment situation.

Worker's Committee has extended powers since Law NRE of May 15, 2001 and Law of Social Modernisation of Jan. 17, 2002. Worker's Committee has to be informed when company is part of operation of concentration. Since Law on Social Cohesion of Jan. 19, 2005, Worker's Committee no longer has to be informed in writing and in advance when public announcement is issued by company concerning restructuring or downsizing and would affect conditions of employment.

At least once a year management must give committee a general report on activity of business stating profits, turnover, investments, productivity, structure and amount of wages and plans for following year (L.432-4), and committee can make recommendations based thereon. In every commercial company, committee is entitled to same documents as shareholders and has right to representation at all meetings of board of directors by two members with right to speak but no vote. (L.432-4). In addition, every enterprise employing more than 300 employees must submit to committee report giving general figures of enterprise to permit evaluation of performance of enterprise in social and labor-management field ("Bilan social"). (C. T. Art. L. 438-1.2.9).

In case of bankruptcy, Worker's Committee (or personnel delegates or employees) may now be invited by court to elect employee representative to participate in bankruptcy procedure and control all credits owed to employees for employment contract. (Bankruptcy Law of Jan. 25, 1985 as modified).

When there is group of companies constituted by ruling company, its subsidiaries and companies controlled by ruling company, group committee must be created. This rule concerns only companies with head office in France. Purpose of creation of group committee is to collect financial and labor information concerning each company of group for transmission to all companies of group. This committee must meet at least once a year. (Law of Oct. 28, 1982).

European Directive of Sept. 22, 1994 codified by Law of Nov. 12, 1996 (C. T. Arts. L. 439-6 to L. 439-24) created European Labor Management Committee for companies employing at least 1,000 employees in countries of European Union and employing at least 150 employees in two or more member States.

In firms employing 50 persons or more safety and hygiene committee must be created, purpose of which is to contribute to protection of health and security of employees, improvement of their working conditions. (Law of Dec. 23, 1982). Law of Aug. 4, 1982 complemented by Law of Jan. 3, 1986 gives direct and collective right to all employees to express themselves on work conditions. Practical means of exercise of this right defined by agreement between employer and either labor unions or labor representatives.

Labor Unions.

Labor union unit may be created in any firm whatever number of employees. Nomination of union representatives benefiting from statutory rights is limited to firms of 50 employees or more. (Law of Oct. 28, 1982).

In companies where one or more labor-union representatives (“délégués syndicaux”) exist, employer must meet annually with labor representatives to negotiate questions relating to wages and working hours.

Accidents at Work.

Employer must notify Local Sickness Insurance Fund (caisse primaire d'assurance maladie) within 48 hours of learning of employee accident at work or on way to or from work except for minor accidents which may be filed on special register replacing infirmary register. (Law of Jan. 3, 1985 at Art. 71 effective Jan. 1, 1986; Decree of Oct. 22, 1985). Upon declaration of employer, Social Security pays indemnity to victim which includes compensation during temporary incapacity, reimbursement for medical and surgical costs, drugs and accessories including artificial limbs, transportation expenses, costs of treatment and retraining, a pension in case of permanent incapacity, and, in case of death, a pension to beneficiary. Costs are borne partly by employer with annual rate of contribution calculated for each risk category according to number of employees, size and activity of firm, and total wages of personnel, in liaison with Technical Committees (Comités Techniques) connected with Regional Social Security Offices. Rate is reviewed annually.

Severance Indemnities.

In case of labor contracts of undefined duration, each employee who has been employed by same employer for more than two years must, upon dismissal, receive legal minimum separation indemnity. However, employees who have been dismissed for serious offense (“fautes graves”) are not entitled to this benefit. (C. T. Art. L. 122-9). Severance payment cannot be less than sum equal to either 20 hours of pay (for employees paid by hour) or 1/10 of month's salary (for employees paid monthly) multiplied by number of years of employment plus 1/15th of month's salary multiplied by number of years of employment beyond ten years of seniority. Since Law of Social Modernisation, those amounts are multiplied by two in case of economic dismissal. Salary base is average of three or 12 months prior to discharge. Law of Jan. 7, 1981 provides for special severance indemnities in case of dismissal following accident at work, other than accident occurred on home return, or industrial disease.

Collective Bargaining Agreements and Labor Union Agreements.

Collective bargaining agreements are negotiated in practically all fields of activity; number of them are automatically applicable to firms having activity falling into field of application of particular collective bargaining agreement; these agreements contain provisions regarding status of employee during execution of employment agreement or upon termination of same, which are equal to or more favorable than those provided by law and which prevail over labor code conditions when more favorable; certain firms are subject to application of labor union agreements negotiated outside firm which may concern, for example, procedure to apply in case of collective economic layoff. So far and with only certain exceptions, each level of collective bargaining agreements could only derogate to superior level if collective bargaining agreements provisions were more favorable to employee. As from Law of May 4, 2004, under certain conditions, Law allows trade unions to execute agreements which may be more or less favorable to employee.

Unemployment Allowances.

Measure laid out below results from Jan. 1, 2001 UNEDIC convention and regulations attached thereto which follow from Jan. 1, 1997 convention. It will be implemented in stages until Dec. 31, 2003, with transitional period between Jan. 1, 2001 and June 30, 2001. Agreement dated Dec. 20, 2002 set new measures for 2003, 2004 and 2005 as to contribution increase and decrease of indemnification period.

Henceforth, all employees who lose their jobs and who are registered as job-seekers as of July 1, 2001, will be covered by this new measure, of which main innovation is that it sets up return-to-work assistance plan (plan d'aide au retours à l'emploi: PARE) and abolishes decreasing allowances. As regards employees who had lost their jobs and received compensation at Dec. 31, 2000, and those whose contracts are terminated and who are registered as unemployed between Jan. 1, 2001 and June 30, 2001, they will remain covered by provisions of Jan. 1, 1997 convention.

Unemployment benefit regime provides for employees who have lost their jobs to be paid replacement revenue consisting of insurance allowance, which, as of July 1, 2001, will be called “return-to-work assistance allowance” (“allocation d'aide au retour à l'emploi”), amount and term of payment of which vary according to length of time person concerned has been affiliated and also according to age of said person.

In order to receive unemployment benefit, former employees must satisfy several conditions, and, in particular, have committed to PARE, which supports former employee in his or her efforts to find job. Signed by unemployed person and ASSEDIC (unemployment organization), PARE is document which states rights and obligations of former employee as well as undertakings of ANPE (national employment agency) and UNEDIC. It specifies assistance provided to unemployed person in order to help him or her find job within framework of personalized action plan (Projet d'Action Personnalisée).

In case of dismissal not justified by serious and valid reasons, employer must by court injunction reimburse all or part of unemployment allowances to institutions making payments (ASSEDIC).

Special allowances are granted to employees suffering from partial employment due to reduction of their working hours by their employers. Allowances are also given to following: unemployed workers following training and persons retired early in certain circumstances; and persons who are excluded from unemployment regime due to insufficient contributions or following expiry of their rights.

(Terms of unemployment regime have been modified by agreement dated July 18, 1992.)

See also category 1 Introduction, topic 1.03 Holidays.

11 ENVIRONMENT

11.01 ENVIRONMENTAL REGULATION:

In French law protection of environment is dealt with in two ways through application of: (1) General rules of law to particular nuisance, (2) specific legislation in designated areas such as town planning, public health, waste, air and water pollution.

Most important in field of environmental protection is Environment Code appended to Ordonnance No. 2000-914 of Sept. 18, 2000. It codifies regulations applicable to various aspects of environmental issues which, until their unification in Environment Code, were spread among number of various laws. Constitutional law of Mar. 1, 2005 establishes charter of environment which acknowledges that human right to environment is constitutional right, and establishes general principles of environmental law as to liability and prevention of risk which will have priority over law.

Environmental Code now divides French environmental law into six principal chapters: (I) General Provisions, including sub-chapters (1) general principles, such as precaution and polluter pays principles (Arts. L.110-1 to L.110-2), (2) citizen information and participation (Arts. L.121-1 to L.126-1), (3) institutions (Arts. L.131-1 to L.132-2), (4) environmental protection organisations (Arts. L.141-1 to L.142-3), and (5) fiscal provisions (Arts. L.151-1 to L.151-2); (II) the Physical Realm, including sub-chapters (1) water and aquatic realms (Arts. L.210-1 to L.218-81 formerly Law No. 92-3 of Jan. 3, 1992) and (2) air and atmosphere (Arts. L.220-1 to L.229-4); (III) Natural Spaces, including sub-chapters (1) inventory and land improvement of natural heritage (Arts. L.310-1 to L.310-3), (2) coastlines (Arts. L.321-1 to L.322-14), (3) parks and reserves (Arts. L.331-1 to L.333-4), (4) sites (Arts. L.341-1 to L.342-1), (5) landscapes (Art. L.350-1) and (6) access to nature (Arts. L.361-1 to L.364-1); (IV) Floral and Fauna, including sub-chapters (1) protection of floral and fauna (Arts. L.411-1 to L.415-5), (2) hunting (Arts. L.420-1 to L.429-40), (3) fresh water fishing and management of fishing resources (Arts. L.430-1 to L.438-2); (V) Pollution, Risk and Nuisance Prevention, including sub-chapters (1) classified installations (Arts. L.511-1 to L.517-2, formerly Law No. 76-663 of July 19, 1976), (2) manufacturing, importation, and marketing of chemical substances (Arts. L.521-1 to L.522-18), (3) genetically modified organisms (Arts. L.531-1 to L.537-1), (4) waste (Arts. L.541-1 to L.542-14, formerly Law No. 75-633 of July 15, 1975), (5) special provisions regarding certain (structures) and installations (Arts. L.551-1 to L.553-4), (6) prevention of natural risks (Arts. L.561-1 to L.565-2), (7) prevention of acoustic and visual nuisances (Arts. L.571-1 to L.572-1), (8) protection of living environment (Arts. L.581-1 to L.581-45); and (VI) Provisions Applicable to New-Caledonia (Arts. L.611-1 to L.614-1), French Polynesia (Arts. L.621-1 to L.624-1), Wallis-and-Futuna (Arts. L.631-1 to L.635-1), Austral and Antarctic French Territories (Arts. L.640-1 to L.640-3) and Mayotte (Arts. L.651-1 to L.656-1). Decree No. 2003-768 of Aug. 1, 2003 inserts in Environmental Code regulatory part. It is codification of Arts. R. 211-1 to R. 264-18 from Rural Code. Other legislation exists (e.g., in field of chemical products mandatory remedial measures in buildings containing asbestos Decree of Dec. 24, 1996 imposes global ban on asbestos), or may be enacted by either national or local authorities. More general rules contained in Civil Code, Code of Expropriation for Public Purposes, Forestry Act, Rural Law, Code of Town Planning, Penal Code, and Code of Public

Health, may be applicable in particular cases.

Law of Jan. 3, 2003, relating to gas and electricity markets, introduced new underground stocking plan for dangerous materials, codified under Title V bis of mining code.

Thus, legal entities can be found guilty of environmental offenses and fined. Nevertheless, this does not prevent managers of such entities from being held personally liable if they are at fault.

Finally, Art. L.225-102-1 of French Commercial Code (Law No. 2001-420 of May 15, 2001) introduced requirement that listed companies now include environmental information in their annual reports for fiscal year beginning on or after Jan. 1, 2002. Decree No. 2002-221 of Feb. 20, 2002 and Order of Apr. 30, 2002 specify extent of such environmental information.

Publication of corporate information is not only to explain its environmental and social policy, but equally impact of its activities and obtained results. Art. 23 of law dated 30 July 2003 inserts in Commercial Code new Art. L.225-102-2, which provides that companies which run at least one “Seveso” installation must mention, in their annual reports, additional information regarding: (1) Risks prevention policy in area of technological accidents which is led by company, (2) means that company intends to use in organization of victims' compensation in case of technological accidents that company is responsible for.

Law No. 2003/699 dated 30 July 2003 regarding prevention of technological and natural risks and repair of damage sets three primary goals: (1) Reducing risks upstream from urbanized zones, (2) promoting prevention habits among concerned citizens, and (3) protecting property and people in developed areas. Law aims at preventing flooding and industrial accidents, and developing consciousness of existing risks in population. It creates obligation for all towns to put warning signs of historical floods.

Classified Installations.

Aim of Arts. L.511-1 to L.517-2 of Environment Code (Law No. 76-663 of 19 July 1976) and implementing Decree No. 77-1133 of 21 Sept. 1977, Decrees of Feb. 12 and 23, 1998 and Decree No. 2000-258 of Mar. 20, 2000, both texts modified on several occasions, is to protect environment, public health, public security and salubrity as well as nature, agriculture, sites and monuments against all forms of dangers or adverse effects which are likely to arise from operation of factories, and generally all publicly or privately owned or operated installations. This law provides extensive and detailed list known as “nomenclature of classified installations” of industrial activities which may not be operated without prior approval by, or prior declaration to, competent administrative authority depending on gravity of nuisance inherent to their operation. First category installations may be opened only with specific authorization of local representative of French state (“Préfet”). After procedure which includes various consultations and public inquiry, authorization (or refusal) is granted in form of “arrêté” which sets forth technical and environmental standards with which establishment must comply. Default of reply within time limits does not amount to acceptance and investments must be postponed until administration has issued decision. Second category installations may normally be opened only by prior written declaration to “Préfet” and are only subject to general “arrêtés” issued on industry-by-industry basis in department concerned. Both types of establishment normally are exempt if duly created prior to publication of Law No. 76-663 or of any decree adding applicable industry to “nomenclature of classified establishments”, and if in compliance with certain registration requirements. Arrêté of Feb. 2, 1998 called “Integrated Arrêté”, replaces over 40 separate regulations on water utilization and emission of any nature applicable to first category installations (modified by Arrêté of Feb. 14, 2000).

Classified establishments are subject to TGAP (tax on polluting activities).

Failure to comply with standards set forth in authorization of “Préfet” or in general “arrêtés” is punishable by fines and, in certain cases, imprisonment of responsible individuals (Cass. Crim. Mar. 23, 1999) or closing down facility. All establishments are subject to inspection by administrative authority. When operator of classified installation changes, new operator must notify “Préfet” of such change within one-month period following actual take over of installation.

When operator of classified installation decides to close it down, it must so notify “Préfet” and is bound to take all necessary measures to prevent any subsequent danger or adverse effect to environmental interests and clean-up site.

Law No. 2003-699 of July 30, 2003 relating to prevention of technological and natural risks and to repair of damage, extends scope of Law No. 76-663 of 19 July 1976, which regulates prevention of major accidents involving classified installations. In light of recent industrial accident at AZF plant in Toulouse in Sept. 2001, several Arts. of Environment Code have been amended. These amendments include creation of local information committees about technological risks (Art. L.125-2) and creation of plans to prevent technological risks (Art. L.515-15).

This law provides better information to people living around classified installation and introduces better evaluation of technological risks due to presence of classified installation.

Air Pollution.

(Art. L.227-1 of Environment Code). Law of Aug. 2, 1961 and European Directives of Dec. 16, 1997 and of Oct. 13 and Dec. 28, 1998, provide that buildings, industrial and commercial establishments, and vehicles including aircraft or other personal property must be constructed, exploited or used so as to avoid pollution and odors endangering health and public safety. Particular implementing decrees, e.g., Decree No. 74-415 of May 13, 1974, determine cases and conditions in which regulation of building construction, vehicular equipment, use of inflammables and motor fuel, heating equipment and apparatus installed in industrial, commercial and professional establishments, and emission of smoke, dust, gas, etc. into atmosphere, is carried out with various administrative measures related thereto. Special protection zones where polluting elements may not exceed standards fixed by ministerial “arrêtés” may be created. (Art. L.227-1 of Environment Code). Law No. 96-1236 of Dec. 30, 1996 regarding air and rational use of energy provides for air quality surveillance, information right, guidelines for preventing and reducing atmospheric pollution, emergency measures and some technical measures; some financial and fiscal provisions favour certain vehicles using electricity, TNG or LPG. Law of Dec. 30, 1996 limits scope of law of Aug. 2, 1961 to nuclear facilities and radioactive pollutions. Various implementing decrees should still be enacted. Four of them have already been published. Implementing Decree of Apr. 29, 1997, National Air Council (“Conseil National de l'Air”) was created with consultation powers. Decree No. 98-360 of May 6, 1998 related to air surveillance, and further modified by Decree of Feb. 15, 2002, implementing European Directives 1999/30/EC and 2000/69/EC; Decree Nos. 98-361 and 98-362 of May 6 and 13, 1998 related to agreement of conveyance entities and to method of elaboration of plans for air quality. Arrêté of Apr. 11, 1997: special protection for Ile-de-France (vehicles are permitted to circulate every other day). Other implementing decrees should still be enacted. Various incentive taxes are provided for establishments which comply with dispositions of law. (See e.g., Decree No. 75-975 of Oct. 23, 1975.) Decree No. 93-299 of Mar. 4, 1993, exempting from professional tax for limited period units of sulfurization of diesel and heavy fuel. Law 80-513 of July 7, 1980 created Agency For Air Quality “l'Agence pour la qualite de l'air”. Said Agency allows grants and loans within framework of its activity. Enterprises which erect buildings are, in certain cases, allowed exceptional depreciation if such premises comply with environmental regulations. (C. G. I. Art. 39 quinquies D, DA, E, F).

Decree of Apr. 4, 2002 relating to protecting people from ionizing radiation creates new c. V: “Ionizing Radiation”, in Public Health Code.

Law of Feb. 19, 2001 confers status of national priority to fight against global warming and related risks.

Decree of Mar. 8, 2002 created “National Observatory on the Effects of Global Warming” (Observatoire National sur les effets du réchauffement climatique).

Water Pollution.

(Arts. L.211-1 to L.217-1 of Environment Code). Law of Dec. 16, 1964 as amended by Law No. 92-3 of Jan. 3, 1992 and related decrees (see e.g., Decrees 73-218 and 73-219 of Feb. 23, 1973; Decree 75-177 of Mar. 12, 1975); Decree No. 93-1038 of Aug. 27, 1993 relating to prevention of water pollution by agricultural nitrates, subject to administrative control pumping and discharge of water by industrial sites subject to 1976 Law on Classified Installations, regardless of nature of water (ground and underground, continental and seawater) within limits of territorial waters. (Directive 98/83 of Nov. 3, 1998). Courts are extremely strict, taking into account weather conditions to assess effective pollution level, even if pollution thresholds set up by law are not exceeded.

Table called “nomenclature”, was enacted by Decree No. 93-742 of Mar. 29, 1993 which lists thresholds beyond which pumping or discharge of water will be subject to declaration or authorization. Operating permit, which includes permit to discharge used water or to take underground and groundwater will be granted by “Préfet” after consultations.

Law provides for various fines and imprisonment penalties for damaging fish life, health or waterlife and for operating or carrying out work without authorization or with withdrawn or suspended authorization. Environmental associations of at least five years of age are acknowledged right to claim damages in criminal proceedings for both direct and indirect damages to environment.

Law of 1964 created national and local agencies dealing with water pollution problems, namely, on national level, National Committee for water and, on local level, basin committee and financing agency for each water basin. Local water basin committees are consulted on all local issues relating to water pollution. Local financing agencies facilitate implementation of initiatives of general interest with respect to basin (for example providing funds for work project). Similar procedure is organized by Law of 1992 at smaller units' level; local water commission is responsible for drafting, reviewing and controlling implementation of programs.

Law No. 2004/338 of Apr. 21, 2004 implementing Directive No. 2000/60 of European Parliament and of Council aims at maintaining and improving aquatic environment in France.

Waste.

(Arts. L.541-1 to L.541-50 of Environment Code). Law of July 15, 1975 modified by Law No. 92-646 of July 13, 1992, Law No. 53-3 of Jan. 4, 1993 and Law No. 95-101 of Feb. 2, 1995, provides that any person producing domestic or industrial waste is responsible for its elimination, including final treatment. Elimination must be carried out in such manner as to avoid harmful effects on environment. Specific national and local regulations apply to use and treatment of special types of waste (e.g., PCBs, PCTs, used oils, used solvents, cyanide and chromium compounds, laboratory and hospital waste and nuclear waste). These regulations usually require procedures such as maintenance of waste disposal records (“système de bordereaux”), and disposal of waste only through licensed companies. Decree No. 2002-540 of Apr. 18, 2002 creates new classification of waste, distinguishing between normal waste (déchets banals) and dangerous waste (déchets dangereux), second of which has special industrial waste status. Decree No. 92-377 of Apr. 1, 1992 organizes disposal of consumer goods packagings. As of Jan. 1, 1993, producers of such packagings have to contribute to final disposal thereof, either by organizing disposal and elimination of above wastes through returnable packagings or special locations where packagings may be disposed of, or by entering into contract with specially licensed waste disposer. Decree No. 96-638 of July 20, 1998 defines limits regarding volume and weight of packaging as well as use of toxic products in such packaging. Under Decree No. 94-609 of 13 July 1994, only authorized means of eliminating industrial packaging waste is reuse, recycling or other methods aimed at obtaining reusable materials, including incineration which leads to energy recovery. Simple incineration is no longer allowed. Specific regulations regarding disposal of waste are also often contained in "arrêtés" adding industries to "nomenclature of classified establishment". Law of July 13, 1992 and Law of Feb. 2, 1995, provide respectively for new tax levied on all operators of installations for elimination of domestic waste of special industrial waste (definition in decree), under certain circumstances; similar special industrial waste is subject to Decree of Nov. 18, 1996 relating to its elimination. This tax may be passed on to waste producers.

Nuclear wastes are subject to Law of July 15, 1975. Law No. 91-1381 of Dec. 30, 1991 (L.542-1 to L.542-14 of Environment Code) provides that disposal of imported nuclear wastes shall be forbidden.

Law No. 96-1139 of Dec. 26, 1996 organizes elimination of carcasses of animals which are unfit for consumption, whereas Decree of Nov. 6, 1997 organizes elimination of infectious medical waste and anatomic parts.

See also Directive 98-101 of Dec. 22, 1998 of European Parliament and Council organizing collection and elimination of batteries and Directive 2002/96/EC on waste electrical and electronic equipment (WEEE).

Genetically Modified Organisms (GMO).

Arts. L.531-1 to L.537-1 of Environment Code codifies Law No. 92-654 of July 13, 1992 which controls use and release of GMO.

Pursuant to Art. L.531-1 of Code, GMO signifies any organism in which genetic material has been altered in way that does not occur naturally by mating and/or natural recombination.

Contained use of GMO: GMO are classified according to risk that they may pose to public health and to environment. Any use of GMO for teaching, research or industrial production purposes must be contained (i.e. by means of physical, chemical or biological barriers). Any use of GMO for teaching, development or research in public or private institution shall be authorized (information contained in application is specified by Decree No. 93-773 of Mar. 27, 1993). This authorization defines, among others, conditions of contained use. Tax was established for instruction of each application. ("Ordonnance" No. 2000-916 of Sept. 19, 2000).

Deliberate release of GMO: "Deliberate release" means any intentional introduction of GMO or combination of GMO into environment for research, development or any purpose other than placing on market. (Art. L.533-2 of Code). Authorization of Ministry of Agriculture is necessary prior to release of GMO. (L.533-3 of Code; Decree No. 94-359 of May 5, 1994).

Placing of GMO on market: "Placing on the market" means making available to third parties, for free or not, products made in whole or in part of GMO. Prior authorization is necessary. (Arts. L.533-4 and L.533-5 of Code). Such authorization is granted for ten years. (Decree No. 94-359 of May 5, 1994).

Labels: At EU level, see Regulation No. 1139/98 of May 26, 1998 providing that indication on labeling of foods produced, in whole or in part, from genetically modified soya beans or maize shall be compulsory. As amended by European Commission Regulation No. 2000/49 of Jan. 10, 2000 establishing "de minimis" threshold for adventitious presence in food ingredients of material derived from genetically modified soya and maize.

See also Regulation EC No. 1830/2003 of European Parliament and of Council of 22 Sept. 2003 concerning traceability and labelling of genetically modified organisms and traceability of food and feed products produced from genetically modified organisms.

Noise.

Law No. 92-1444 of 31 Dec. 1992 provides protection against “noise pollution” which may be harmful to health or environment. Decree No. 95-79 of 23 Jan. 1995 sets forth standards to be met with respect to noise emissions. This Decree provides that manufacture, import, sale, transfer or use of any item which emits noise exceeding certain limits is prohibited. Manufacturers or sellers must ensure that items comply with regulatory limits through homologation, certification or declaration, depending on extent of risk. Two decrees dated Apr. 18, 1995 facilitate process for establishing existence of domestic noise, insofar as it abolishes notion of fault and suppresses acoustic control. Law No. 99-1173 of Dec. 30, 1999 and Decree No. 2000-903 of Sept. 18, 2000 establish fund to compensate harm caused to municipalities next to Paris airports as result of airport noise pollution. European Directive No. 2000/42 dated June 25, 2002 relating to growth and management of ambient noise in environment, requires Member States to communicate different noise limits in effect in their territory to Commission and provides for creation of noise maps.

Labels.

Labelling obligations may be imposed by law or regulation, e.g. under Decree No. 98-257 of Mar. 31, 1998, and certain domestic appliances must have labels setting out information concerning energy consumption and noise production of product. Specific labeling requirements concern GMO.

Authority.

All national governmental authority relating to environmental policy is exercised by Ministry of Environment.

Law of 2 Feb. 1995 sets up National and Local Commissions of Public Debate which may be seized by ministers, 20 representatives (“députés”) or senators, by regional council or departmental council to debate of any major operation of development of national interest.

Decree of Jan. 13, 2003 created advisory body: National Council for Sustainable Development (le Conseil National du Développement Durable).

In field of environment, important legislation (“Directives”) has been developed on EEC level, including Seveso Directive of June 24, 1982 governing prevention of industrial accidents which shall be replaced by Seveso Directive II of Dec. 9, 1996 on Feb. 3, 1999 (implemented by Decrees No. 99-1220 of Dec. 28, 1999 and No. 2000-258 of Mar. 20, 2000 and Arrêté of May 10, 2000); and Directive of June 28, 1984 regulating industrial air pollution, amended by Directive of Nov. 24, 1988 concerning manufacture of aerosols.

France is also signatory to Basel Convention on “Cross-Border Control of Hazardous Wastes and their Disposal” of May 22, 1989 and to various other international agreements.

12 ESTATES AND TRUSTS

12.01 ADMINISTRATION:

See topic 12.05 Executors and Administrators.

12.02 DEATH:

Certificate of death is established by registrar ("officier de l'état civil") of place of death upon proof of death. However, special legislation permits court declaration of death without specific proof in case of disappearance during war or under circumstances suggesting that life was in danger. (C. C. 78-90).

Presumption of Absence.

When person disappears from his last domicile and there is no evidence of his further existence, interested parties or department of Public Prosecutor ("Ministère Public") may apply to court or judge having jurisdiction over guardianships of his last domicile for judgment of presumption of absence. (C. C. 112). Court may designate parents, relatives or any other person to represent absentee and administer his property. (C. C. 113). Ten years after judgment of presumption of absence, court may, upon request of any interested party or department of Public Prosecutor, declare absence conclusive. Judgment produces same effect as death. If above procedure has not been followed, court may declare absence if absentee has disappeared from his domicile without any news for 20 years. (C. C. 122). If absentee reappears, he recovers his rights and judgment is vacated. However, there are no effects on dissolution of marriage in case of cancellation of judgment declaring absence. (C.C. 132).

Actions for Death.

There are no special statutory provisions for actions for wrongful death. Such actions may be brought by persons toward whom deceased had obligation of support on legal theory of direct harm to plaintiff by reason of death. Damages may include pecuniary loss to plaintiff as well as "moral" harm representing grief.

French courts now show distinct tendency to receive actions brought by persons not related to deceased by blood or marriage, such as fiancé or long-time partners favorably. (Cassation Chambre mixte, Feb. 27, 1970; Cassation Crim. May 29, 2001).

In addition to civil action for damages, it is possible to request damages by joining as civil party in criminal prosecution for voluntary or involuntary homicide.

Presumption as to Survivorship.

Where several persons respectively entitled to inheritance perish in same event proof of order of death may be established by any means when it is impossible to determine who died first inheritance will be determined for each without considering that other survived. (C. C. Art. 725-1).

12.03 DECEDENTS' ESTATES:

See topics 12.04 Descent and Distribution, 12.05 Executors and Administrators, 12.07 Forced Heirship, 12.10 Wills.

12.04 DESCENT AND DISTRIBUTION:

Rules of succession to real property and personal property are same. There is no doctrine of primogeniture. Certain persons (e.g., person sentenced for murder or attempted murder of deceased) are excluded from succession. (C.C. 727).

Order of intestate inheritance is as follows as modified by Law No. 2001-1135 of Dec. 3, 2001 and entered into force on July 1, 2002:

(1) Law devolves estate to descendants and spouse. (C. C. Art. 731). Law does not distinguish between legitimate and illegitimate children. (C. C. Art. 733).

(2) Surviving spouse has right of usufruct: If decedent left children or descendants, surviving spouse has choice to receive either usufruct on totality of decedent's property or

ownership of one-fourth of decedent's property when all children were couple's children, and ownership of one-fourth of decedent's property when one or more of children are not couple's children. (C. C. Art. 757). Moreover surviving spouse has right to remain in house occupied by couple prior to death of decedent, for at least a year. (Art. 763, et seq.). When there are no children and decedent leaves parents, surviving spouse receives half of decedent's property and each parent receives one-fourth. (C. C. Art. 757-1). When there is only one parent left, surviving spouse receives three-quarters of goods and surviving parent one-fourth. (C. C. Art. 757-1). In principle, if no children and no direct ascendant, surviving spouse receives totality of goods (C. C. Art. 757-2) but for goods that had been transmitted gratuitously by ascendant of decedent. In that case, half of these “family” goods go to “privileged” collaterals. (C. C. Art. 757-3). Indirect ascendants have no rights to decedent's property but can ask surviving spouse for support alimony. (C. C. Art. 758). With regard to rights of surviving spouse, they will be determined on basis of all goods existing at time of death of decedent to which must be fictitiously added those decedent would have had at his disposal either by way of gift inter vivos or through will without exemption of return. (C. C. Art. 758-5). See category 21 Property, topic 21.09 Real Property, subhead Usufruct.

If there are no descendants or ascendants and no collaterals capable of taking and no surviving spouse, the estate escheats to the state. (C. C. 768).

Relationship is determined by degrees. In direct line each generation is degree, in collateral line number of generations is counted up to common ancestor and from such common ancestor to person whose relationship is to be determined, but not counting common ancestor. Thus grandson is related to his grandfather in second degree; two brothers are related in second degree; first cousins in fourth degree. (C. C. 741-745). Representation takes place ad infinitum in direct descending line. Representation does not take place with regard to ascendant. In collateral line representation is allowed only as regards descendants of brothers and sisters of deceased. Where representation is allowed division takes place per stirpes. (C. C. 751-755).

Children and their descendants in right of representation inherit without distinction, even if they are issue of different marriages.

The state is an irregular heir and must get courts to put it in possession (envoi en possession) whereas other heirs and surviving spouse succeed directly without need of intervention of court. (C. C. 770).

French law governs all real property situated in France regardless of nationality or of place of death of decedent.

As to personal property of such inheritance, French courts usually consider that inheritance status is determined by law of last residence.

Both principles are subject to special exceptions through international treaties and agreements.

On the other hand, aliens inherit property in same way and upon same basis as French citizens. However, in case of estate partly in France and partly abroad, French citizens will be entitled to receive in France share of estate equal to value of estate located abroad to which they do not have access, due to local laws and regulations.

See also topics 12.07 Forced Heirship, 12.10 Wills.

Death Duties.

See category 22 Taxation, topic Taxes.

12.05 EXECUTORS AND ADMINISTRATORS:

There is no procedure exactly corresponding to probate or grant of administration. Estate vests directly in heirs (héritier—French word—includes next of kin), who continue "personality" of deceased. No one is bound to accept succession, and acceptance may be unconditional or subject to inventory. (C. C. 774, 775). Heirs must accept or refuse succession within 30 years of date of death. (C. C. 789). Within such 30-year period heir may accept succession notwithstanding his previous refusal, unless already accepted by other heirs. (C. C. 790). Refusal to accept succession must be made explicitly in writing and registered with clerk of court of domicile at time of death. (C. C. 784). Heirs may accept with "benefit of inventory", in which case special proceedings is followed with result that heirs are not charged with debts of estate greater than their distributive share. Unless they accept "with benefit of inventory" heirs are deemed to have accepted succession unconditionally, in which case they bear estate liabilities indefinitely and estate creditors may move against their own assets. (C. C. 802).

Administration is in hands of heirs, but if none are known to exist provisional administrator and ultimately curator is appointed by court or judge having jurisdiction over guardianships of district in which estate procedure was opened. Specific legatees are not responsible for debts. No legal requirement as to advertising for creditors. In general, rules governing ordinary collections apply.

Testator may appoint executor. (C. C. 1025). Purpose of appointing executor is to bring about prompt payment of legacies. Testator may specifically grant seizin ("saisine") to executor over all or part of movables and personal property. Seisin thus granted executor may not exceed period of one year and one day after death. (C. C. 1026). Executor has no power over immovables, or real property, as devisee can protect his own interests by having his rights registered. However, case law validates specific authorization by testator to executor to sell real assets, receive and distribute price thereof, if there are no surviving reserved heirs. Minor and, according to case law, incompetent adult cannot act as executor but nonresident alien may.

If testator does not specifically grant seizin ("saisine") to executor, he becomes essentially agent, without significant functions, of heir or universal legatee. With seizin, he may take possession of movables, place property under seal to protect interests of minors and absent persons, and make a notarized inventory. (C. C., Art. 1031). He is obligated to pay all legacies from movables and may accordingly sell movables at auction. He may act on his own authority against heir or universal legatee if they refuse to comply with terms of will and accordingly may be represented in legal proceedings. Executor's powers and functions are personal and do not pass to his heirs on his death. (C. C. 1032).

Whenever there are heirs with right to a reserve (see topic 12.07 Forced Heirship), certain proceedings are necessary to vest universal legatee with property.

See also topics 12.04 Descent and Distribution, 12.10 Wills.

12.06 FIDUCIARIES:

See topics 12.05 Executors and Administrators, 12.09 Trusts.

12.07 FORCED HEIRSHIP:

Certain portions of person's property cannot be given away by him, either by transfer inter vivos or by will. This reserve portion (réserve) amounts to one-half of his property if he leaves one child; if he leaves two children he can only give away third; if he leaves three or more, only one-fourth of his property; without any distinction being made between legitimate and illegitimate children duly acknowledged except case of C. C. 913. (C. C. 913). Under head of "children" are included more remote descendants, who, however, take per stirpes. (C. C. 913-1). All discrimination between legitimate and illegitimate was eradicated by Law No. 2001-1135, 3

Dec. 2001.

If person has no children, and leaves one or more ascendants in both paternal and maternal lines, he can dispose only of half of his property by gift or will. If he leaves ascendants in only one line, he may dispose of only three-fourths. (C. C. 914). But this share reserved to ascendant or ascendants may be cut down to usufruct in case decedent gives title ("nue-propriété") to said share to his surviving spouse. (C. C. 1094).

If there are no ascendants or descendants, there is no reserve. (C. C. 916).

Husband or wife may, either by marriage contract or during marriage, in case he or she leaves no children or descendants, and no surviving spouse convey by will or deed to other spouse fee in all property which he or she could convey to stranger and in addition remainder interest of that portion reserved to ascendants for life. (C. C. 1094).

In case where spouse leaves children or descendants, whether born of marriage or not, and whether legitimate or illegitimate, spouse may give to other spouse either that amount of property which he could give to stranger, or quarter of his property and usufruct in remaining three-quarters, or usufruct in all his property. (C. C. 1094.1).

Dispositions of property made in contravention of these rules are valid, but reducible down to legal amount. (C. C. 920-930). In order to determine disposable part, all property conveyed inter vivos is fictitiously included in estate and given value as of time of decedent's death (C. C. 922) except for goods transferred in "donation-partage", which are valued as of date of gift on conditions stated in C. C. 1078. Only heirs benefiting from forced heirship may demand reduction of conveyances inter vivos (C. C. 921) and then only after all legacies are exhausted (C. C. 923, 925). Legacies are reduced pro rata (C. C. 926) except where testator expressly requests priority of legacies (C. C. 927).

Disposable part may be given in whole or part to any heir or heirs, by will or gift, in which case it is not required to be brought back into estate at donor's death, if, in case of gifts, it is stipulated in deed or later, that this is in addition to that heir's part. (C. C. 919). If such stipulation was not expressly made by decedent, value as of time of donor's death of all gifts made inter vivos to any of decedent's heirs is added to estate and used in computing reserve and disposable portion thereof.

As real property situated in France is governed by the lex rei sitae a disposition of the same by a nonresident alien must take into account the provisions above set forth relating to the réserve.

12.08 INTESTACY:

See topic 12.04 Descent and Distribution.

12.09 TRUSTS:

Concept of "trust" does not exist under French law. Dispositions of property whereby the donee or the heir or legatee under the will is required to keep property intact and transfer it to a third person are void both as to the beneficiary and the trustee. (C. C. 896). Parents may provide that the whole or a part of their property not belonging to "réserve" (see topic 12.07 Forced Heirship) shall vest in child for life, with remainder over to child or children of such child. But no further entailing is permitted. Person having no children may create life estate in disposable part of his property in favor of his brothers and sisters with remainder to children of life tenant. Remainder must in all cases be to children indiscriminately; it may not be to certain of them. Guardian may be appointed to carry out trust. (C. C. 1048-1074).

Note, however, that a legacy “de residuo” is valid. This type of legacy passes to second legatee upon death of first legatee. However, first legatee is not obliged to keep principal of legacy intact.

Foreign trusts are generally recognized by French courts unless incompatible with French public international order. Trustee in such case is permitted to exercise certain property rights under French law. His powers and duties are governed by terms of trust and by rules of equity. (J.C.P. 1975 II, 18168). Foreign trusts involving French real estate are deemed valid only as to disposable portion (see topic 12.07 Forced Heirship). With respect to succession, French case law normally treats trust as transparent entity for tax purposes, as trustee is not deemed owner of corpus.

Foundations.

In essence, foundations consist of res administered for cultural, social, scientific or charitable purpose by board of directors in legal form analogous to an association. (See category 2 Business Organizations, topic 2.02 Associations.) Model by-laws for foundations have been prepared by administrative court, Conseil d'Etat, and regularly updated by such court. Request must be made through Prefecture for letter of approval issued by Conseil d'Etat. This letter of authorization establishes foundation as legal entity capable of receiving gifts or legacies. Gifts and legacies to scientific, cultural or artistic foundations are exempt from gift or estate taxes, provided Ministry of Finance certifies foundation as truly disinterested. (C. G. I. 795). There is special register for associations and foundations. (See category 9 Documents and Records, topic 9.05 Records.)

Testator cannot create foundation by will, but he can give universal legacy to named person, upon condition that latter establish foundation. Such instructions, however, are merely precatory and named person is free to disregard wishes of testator, remaining nonetheless universal legatee.

New type of foundation, “fondation d'entreprise,” was created by Law No. 90-559 of July 4, 1990 in order to encourage activities of foundations. This law allows such foundations to be created for limited periods and simplifies necessary administrative authorizations and related tax regulations provide certain fiscal advantages for this type of foundation.

12.10 WILLS:

Mutual wills or wills executed in one instrument by two or more persons in favor of third are invalid. (C. C. 968). Will may be: (1) Holographic; (2) notarial; (3) mystic. (C. C. 969).

Only essentials as to form of holographic will are that it must be entirely handwritten, dated (date must be clearly indicated) and signed by testator. (C. C. 970). Case law has admitted that, if will is not dated, proof of date can be settled by internal elements or external elements, if latter find their principles and roots in some internal elements they confirm.

Notarial will is one executed in presence of two notaries or of one notary and two witnesses. Testator dictates his will to notary who writes it down word for word in continuous and simultaneous presence either of two witnesses or of second notary. Once dictation is completed, will is re-read and signed by testator who confirms that it expresses his desires and countersigned by notary, witnesses and, if such be case, second notary. (C. C. 971-974).

Mystic will is drawn up by testator or third person and document is then signed by him and sealed. Document so sealed is handed to notary in presence of at least two witnesses in whose presence notary encloses sealed document in another covering which is also sealed. Testator must make declaration to effect that paper contains his will and that it is written by himself or by third person and signed by him. Protocol of such declaration is drawn up by notary on outer covering, and this protocol is signed by notary, testator and witnesses. These acts must be uninterrupted by any other business. (C. C. 976).

Witnesses must be French citizens and of age. No legatee and no relative (up to and including fourth degree) of legatee, and no clerk of notary can be witness to notarial will. Husband and wife cannot both be witnesses to same will. (C. C. 975, 980). Special rules govern wills made by persons in armed services. (C. C. 981-984).

French citizens while abroad may make holographic wills or wills in accordance with form prescribed by law of place where will is made. (C. C. 999). Wills made by alien in France may be made in accordance with French law or with national law of alien. While real property situated in France is subject to French law (C. C. 3), alien residing abroad may dispose of same by will made in accordance with form prescribed by law of place where drawn. Will must be registered in France at place where property is situated and, as is generally required for wills drawn up outside of France for their execution as to both real and personal property situated in France, at place where decedent had last or last known residence in France. (C. C. 1000). Wills which do not respect above mentioned rules are invalid. (C. C. 1001).

Minor who has attained age of 16 can dispose, by will, of his property to extent of one-half amount that he would be permitted by law to dispose of were he major. (C. C. 904).

Legacies.

There are residuary or universal legacies (“legs universels”), general legacies (“legs à titre universel”) and specific legacies (“legs particuliers”). (C. C. 1003, 1010, 1014). Residuary or universal legatee has to get delivery of property from heirs who are entitled to reserve (C. C. 1004; see topic 12.07 Forced Heirship), but if there are none he is seized as matter of right (C. C. 1006). Nevertheless, he must obtain possession by order of President of Court if will is holographic or mystic. General legatee must get delivery of his legacy from heirs entitled to reserve or, if none, from universal or residuary legatee. (C. C. 1011). Both universal or residuary legatee and general legatee are liable for payment of debts and charges of succession and of specific legacies according to proportion of their legacies to entire succession. (C. C. 1009, 1012).

General legacy gives to the legatee a right to goods bequeathed as of date of death. Legatee may enforce his rights against heirs, except for amount of legal reserve, and costs are borne by estate. But specific legatee cannot take possession or claim income or interest until he has brought his action for delivery (C. C. 1014) except in case of annuity or pension for nourishment or where testator has provided to contrary (C. C. 1015).

Wills can be revoked in whole or in part only by subsequent will or by specific act of revocation executed before notary. Case law does not permit proof of contents of lost or destroyed will. Subsequent will which does not contain express revocation clause cancels in prior will only such provisions as are incompatible with those contained in subsequent will. (C. C. 1036).

Estate tax treaty between France and U.S. entered into effect Oct. 17, 1949. New estate and gift tax treaty between France and U.S. entered into effect on Oct. 1, 1980. France ratified, on Dec. 24, 1967, Hague Convention on Conflicts of Law relating to Form of Testamentary Dispositions to which U.S. is not signatory.

Recently, Art. 1 of Decree dated June 13, 1966 has been replaced by Art. 1 of Decree No. 94-119, dated Dec. 20, 1994 which states that acceptation of legacies by public companies, religious associations and all others covered by Art. 6 of law of 1901 must be authorized by “Préfet” having jurisdiction where association is located.

See also topic 12.07 Forced Heirship; category 9 Documents and Records, topic 9.04 Notaries Public.

13 FAMILY

13.01 ADOPTION:

Relevant laws are Law of July 5, 1996, Law No. 2001-111 of Feb. 6, 2001, Law No. 2002-304 of Mar. 4, 2002 and Law of July 4, 2005. Basic distinction exists between full adoption ("adoption plénière") (C. C. Arts. 343-359) which destroys all bonds with child's first family and simple adoption ("adoption simple") (C. C. Arts. 360-370-2) which does not destroy bonds (and allows child to inherit from his first family). Adoption procedure requires prior approval ("agréement") from relevant administration ("Aide sociale à l'enfance"). Financial aid is provided to adopting family. Rules of attribution of child's name are governed by Arts. 311-21 (choice of parents to grant child either father's name or mother's name, or both) and 357 of C. C. as modified by Law of Mar. 4, 2002. Moreover, Circular of Feb. 16, 1999 on international adoption has determined conditions and consequences of adoption. French Adoption Agency ("Agence française de l'adoption") was created in 2005 to inform, advise and act as intermediary for adoption of foreign born children.

13.02 ALIMONY:

See topic 13.04 Divorce.

13.03 COMMUNITY PROPERTY:

See topic 13.06 Husband and Wife.

13.04 DIVORCE:

In France, issue of divorce is governed until end of 2004 by Law No. 75-617 of July 11, 1975 as amended by Laws No. 85-1372 of Dec. 23, 1985, No. 87-570 of July 22, 1987, No. 93-22 of Jan. 8, 1993 and Law No. 2000-596 of June 30, 2000. New law (No. 2004-439 of May 26, 2004) applies as of 2005. Following will treat primarily regime applicable under new law. French law provides for divorce in four instances: (1) Divorce by mutual consent of both parties on mutual petition and submission of proposed settlement agreement to "juge aux affaires familiales" (judge in charge of family matters whose office is attached to Tribunal de Grande Instance). Judge may disapprove proposed settlement agreement and divorce if he finds that either party did not enter into agreement freely (C. C. 232) or that agreement/divorce does not sufficiently protect children or one of parties. Otherwise he approves agreement and grants divorce. Under new law only one hearing is required. Costs are borne equally supported by both parties (C. C. 230-232); (2) in event of acceptance of principle of rupture of marriage; permits simplified procedure without parties having to agree to divorce by mutual consent; (3) in event of separation for two years; (4) divorce still granted upon grounds of acts constituting serious or repeated violations of marital duties rendering marital state intolerable, including for instance adultery, violence, gross insults, or cruelty. Conviction for infamous crime punishable pursuant to provisions of Art. 131-1 of Penal Code is fault ground for divorce. Reprehensible conduct of party petitioning for divorce may be taken into account by court. Even in absence of counterclaim, divorce may be granted on grounds of common wrong-doing. (C. C. 242-246). At any point in procedure couple may request judge to acknowledge their agreement to proceed on basis of mutual consent. Fact that divorce is for fault does not change financial consequences of divorce.

Conflict of Laws.

Divorce and separation are governed by French law when both parties are French citizens, or when both parties are domiciled in France, or when there is no assumption of jurisdiction under foreign law and French courts are competent. (C. C. 310). Husband and wife may have separate domicile. (C. C. 108).

Proceedings.

"Juge aux affaires familiales" (family-law judge) renders divorce judgment and determines parental authority, alimony questions, what possible third party will be entrusted with care of children as well as visitation rights (C. C. 247 and 256) and child support obligations of parent who was not awarded parental authority, or with whom children do not reside habitually. (C. C. 288 and C. C. 293). Proceedings are not public. In case of mutual consent or of facts admitted by both parties indicating marital state intolerable, divorce judgment is rendered by judge. In case of facts indicating marital state no longer tolerable, reconciliation meeting must be held in front of judge. If it fails, case is brought before Tribunal. Judge may order any temporary measure he deems necessary before final judgment. (C. C. 247 to 258). Facts can be proven by any means except by evidence obtained through fraud or coercion. Statements made at request of one spouse and obtained by unlawful entry or invasion of privacy are inadmissible. (C. C. 259 to 259-3).

Name.

Following divorce each party loses right to use name of other unless judge determines that there is particular interest for one party or children to retain use of other party's name. Woman can keep her husband's name with his consent or court's approval. (C. C. 264).

Alimony.

In any instance of divorce, one of parties may be awarded monthly or capital sum to compensate for change created by divorce in living conditions taking into account length of marriage, age and health of spouses, their education and professional situation, effect of career choices made by one of spouses for education of children or to favor career of other spouse to their own detriment, estimated or foreseeable wealth of spouses after divorce, their respective situations with regard to pensions. (C. C. 270 to 280-1). In divorce granted on grounds of unilateral fault or desertion, party at fault may have to indemnify other party for any material damage or mental suffering caused by divorce. (C. C. 265-269). Nature and amount of compensation are determined by judge. Principle established that alimony is now awarded as capital sum and only exceptionally as periodic payment. Periodic payment may be adjusted in case of significant change in resources or needs of one of parties. Obligation to pay alimony is binding on heirs of spouse required to pay if they accept inheritance.

Children.

As regards parental authority, Law of Mar. 4, 2002, has established right and duty, for both parents and until child's majority or emancipation, to protect latter as regards security, health and morality, to allow child's development. (C. C. 371-1).

In case of separation, rules relating to attribution of parental authority remain unchanged. Each parent must retain personal relations with child and respect ties that latter has with other parent. (C. C. 373-2). If required by child's interest, judge shall grant parental authority to one of parents. However, other parent retains right and duty to educate child and to provide for child's needs. Other parent must furthermore be informed of important choices relating to child's life. (C. C. 373-2-1).

If required by circumstances, parents may, on their own or jointly, request judge to vest parental authority in third party, or if one cannot be found, to educational institution. (C. C. 377).

Law of Jan. 8, 1993, which came into force on Feb. 1, 1994, has recognized right for children to be heard by judge in any proceedings which concern them (until 1994, only children over 12 were granted this right). (C. C. 388-1).

In some cases, minor children have even been allowed to become parties in their parent's divorce based on Art. 12 of Convention on rights of the Child ratified by France. (Law No. 90-458 of July 2, 1990 and Decree No. 90-917 of Oct. 8, 1990).

Separation may be granted by court on same grounds for which divorce may be granted. After judgment of separation has been entered for two years, in absence of no reconciliation either party is entitled to apply to court, and have entered judgment of divorce thereon. (C. C. 296-309).

Judgment of separation carries with it separation of property. In case of reconciliation, separation of property continues but is not effective against third parties unless special deed is signed before notary and duly published. (C. C. 305).

13.05 GUARDIAN AND WARD:

Guardianship (C. C. Arts. 389-475) includes four essential legal institutions:

(1) Conseil de Famille.

(C. C. Arts. 407-416). This family council plays major role in guidance of minor as well as in management of his property. Family council authorization is required for all important transactions. Council is composed of four to six members designated by juge des tutelles (judge of guardianship) who presides over council. (C. C. Arts. 407 and 415). Council is created either ex officio by judge or when requested by any person concerned such as relatives, creditors or government. It meets at request of judge, relatives, creditors, government attorney, or ex officio. (C. C. Art. 405).

(2) Guardian.

(C. C. Arts. 397, 398 and 401 to 406). Guardian is designated as follows: (a) Either by testament or declaration before notary of father or mother last deceased (“tutelle testamentaire”); (b) by law in favor of closest ascendant (“tutelle légale”); or (c) by family council at request of juge des tutelles (“tutelle dative”). Guardian is supervised by family council and deputy guardian (“subrogé tuteur”).

(3) Deputy Guardian (Subrogé Tuteur).

(C. C. Arts. 420-426). His main duty is to supervise management of minor's property. Law of Dec. 14, 1964 which modified Civil Code has attributed greater importance to this guardian. He represents minor when minor's interests are in conflict with those of guardian.

(4) Juge des Tutelles.

(C. C. Arts. 393-396). This judge of guardianship has general supervisory capacity and in exceptional cases may be substituted in place of family council.

Law of June 6, 1984 (Code de la Famille et de l'Aide Sociale) created special guardianship to assist and represent orphaned or abandoned children (“pupilles de l'Etat”), but with only two legal institutions (“conseil de famille” and guardian) represented by state officials.

13.06 HUSBAND AND WIFE:

Regulation of marital relations, provided for in C. C. Arts. 214 to 226 and 1387 to 1581, was revised by law of July 13, 1965 (J. O., July 14, 1965), which entered into effect Feb. 1, 1966, modified by Law of Dec. 23, 1985 (J.O. Dec. 26, 1985) effective July 1, 1986 which substantially amends or replaces above cited provisions of Civil Code. New law enlarges, under all marital regimes, rights of married woman. Married woman may now have her own bank account, and may establish a business without prior consent of her husband as well as retain any income therefrom after fulfillment of matrimonial obligations, and may choose to exercise her profession under maiden name with option of adding husband's name. Wife may act alone in ordinary transactions without being considered agent of husband, and either spouse may enter into contracts binding other spouse for upkeep of family or education of children. New provisions (C. C. Arts. 214 to 226), generally providing for rights and obligations of spouses, apply to marriages contracted under old law as well as to marriages taking place after Feb. 1, 1966.

Matrimonial Regimes.

Marital property regime is fixed either by law, if spouses are married without contract, or by contract. Contract must be drawn up by notary before marriage. Special rules for business owners apply: Business owners must publish marriage contract and subsequent modifications at “Registre du Commerce et des Sociétés”. (C. C. 1397 al 6). Minor has capacity to bind himself in marriage contract, provided that parent or guardian consenting to marriage assents to contract. (C. C. Arts. 1387-1399).

Marriages which occurred before Feb. 1, 1966 without contract are governed by community property regime of former law, but administration of property (including right of each spouse to arrange and enjoy income from his separate property) is governed by provisions of new law. Spouses could until Dec. 31, 1967, by declaration before notary, elect to be governed by substantive provisions of new community property law.

Marriages which took place prior to Feb. 1, 1966 pursuant to contract continue to be governed by terms of contract and, with certain exceptions, property is still administered under provisions of prior law. However, spouses could, until Dec. 31, 1967, by declaration before notary, elect to be governed under provisions of new law relating to their particular contractual regime.

Dotal system was abrogated by law of July 13, 1965. Persons married under this system continue to be governed by terms of their marriage contracts, but they were able to decide to change over to community or separate property regime before Feb. 1, 1968.

Spouses married either before or after enactment of new law may, upon showing of good cause and fulfillment of certain formalities, modify their marital regime, either in whole or in part, by notarized act approved by civil court. (C. C. Art. 1397). Both legal and contractual regimes may be modified, but, modification is only possible after two years under one regime have elapsed except if new contract entered into for purposes of divorce settlement.

Community Property.

Subject of community property regime is quite complex, and only brief summary can be given here. For rules, see C. C. Arts. 1400 to 1527 as modified.

If no marriage contract is made, system of community property prevails. Under old law, community assets consisted of: Personal property possessed by spouses at time of marriage or acquired during marriage, either by inheritance or by inter vivos gift, unless donor expressed contrary intention; income received during marriage from property of any nature owned at time of marriage or acquired thereafter; and all real property purchased during marriage. Immovables (real property) were presumed to have been purchased until contrary was shown. Immovables belonging to either spouse at time of marriage or afterwards inherited or received as a gift did not become community property.

As of Feb. 1, 1966 this legal regime was modified and now assets acquired by one spouse prior to marriage, or during marriage through succession, bequest, or gift where donor does not specifically intend that gift enter community, are not community assets. In general,

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however, any movable or immovable property is presumed to be acquired by community unless it is demonstrated that it belongs to one of spouses. Income derived from private property of one spouse is included in community property if it has not been spent. (C. C. Arts. 1401 to 1405).

Pursuant to Law of Dec. 23, 1985 community is liable only for following debts: necessary expenses for family and for children's education and extra contractual commitments. (C. C. Arts. 1409 to 1418). If one spouse refuses to contribute to common expenses, other spouse may request court to seize part of his salary or income.

Community can be dissolved by death, declaration of absence, divorce, separation, separation of estates and by change of matrimonial regime. (C. C. Art. 1441). Special rules govern accounting.

Community system may be modified by contract. Since Law of July 13, 1965 as modified by Law of Dec. 23, 1985 it has been possible to adopt by contract previous legal regime. It has also been possible to exclude personalty, either wholly or in part; to provide for separate responsibility for debt; to give survivor right to withdraw certain sum or specific thing from assets before any division takes place; to give parties unequal shares; or finally, to provide for community in all property or subject to whatever conditions parties will. (C. C. Arts. 1497 to 1501; 1503; 1511 to 1527).

Separate Property.

Parties may agree that each spouse shall retain separate ownership of separate property, and, in such case, each spouse retains entire management of his property and full enjoyment of income therefrom. (C. C. Arts. 1536-1541).

Alienation of Property.

New law provides that both husband and wife have power individually to manage community assets. Spouse cannot, without prior consent of other, give away any asset of community, nor can he sell, mortgage or transfer rights in real property or in business belonging to community. Further, spouse may not alienate property rights whose transfer must be published according to law. Finally, granting of commercial or agricultural leases is forbidden. (C. C. 1425). Spouse can dispose by will only of his share in community. (C. C. Arts. 1421–1424).

Capital is inalienable except under special circumstances. Wife's property not made part of her dowry constitutes her paraphernalia, over which she has right of management and enjoyment. (C. C. Arts. 1540-1581). Upon dissolution of marriage, dowry is part of wife's estate.

Each spouse liable for acts executed by other without fraud. (C. C. 1421). In case of bankruptcy, spouse of debtor establishes inventory of personal property according to matrimonial regime adopted. Liquidator may join all property acquired during marriage to assets of creditors. Spouse of debtor or creditors may not challenge advantages given by one spouse or other in marriage contract or during marriage. (Law of Jan. 1, 1985, Arts. 111 to 114). Married woman may, in most cases, charge, mortgage or sell realty, but not stipulated dowry, if married under dotal system.

13.07 INFANTS:

Age of majority is 18 for both sexes. (C. C. Arts. 388 and 488 as modified by Law of July 5, 1974). Infant may be emancipated at 16 by declaration of mother or father and hearing of other parent if possible received by judge of Guardianship Court. (C. C. Art. 477 as modified by Law of June 5, 1974 and Law of Jan. 8, 1993). Infant is automatically emancipated by marriage (C. C. 476) or after completion of service in armed forces. Emancipated minor must still obtain authorizations and consents to marry (see topic 13.08 Marriage) or to be adopted. (C. C. 481). Emancipated minor may not engage in commerce as major. (C. C. Art. 487).

Law of Dec. 23, 1985 (J.O. Dec. 26, 1985) effective July 1, 1986, modifies rules concerning administration of assets of minor children. (C. C. 383, 389, 389-1, 389-2). Legal administration now attributed either to parent(s) exercising parental authority (jointly to father and mother or one parent only in certain circumstances), or to judge of guardianship ("juge des tutelles") if one parent dead and surviving parent barred from parental authority.

Pursuant to Law of Mar. 4, 2002, children may now add in second position name of their other parent, provided, in case of plurality of names, that this addition results in unique last name. Children are entitled to achieve such change insofar as they have reached age of majority and as they have not had any child yet themselves. (C. C. 311-22).

Pursuant to Law of Dec. 9, 2004 government promulgated rules in 2005 aimed at eliminating distinctions in matters of descendancy based on whether children are born to married or unmarried parents.

France has ratified International Convention on voluntary recognition of children born to unmarried parents. (Law of Jan. 1, 1985).

France has ratified Convention on the Rights of the Child. (Law No. 90-548 of July 2, 1990 and Decree No. 90-917 of Oct. 8, 1990). Law No. 93-22 of 8 Jan. 1993 and Law No. 2002-304 of Mar. 4, 2002 have considerably modified procedure concerning recognition of child (Arts. 335 to 339 of Civil Code) and their civil status, in particular when they are born abroad and they acquire or regain French nationality (Arts. 388-1 and 388-2 of Civil Code). France has adopted several laws concerning child protection. Law 99-478 of June, 9, 1999 has set up measures against labour of children. Law 2000-196 of Mar. 6, 2000 has created independent authority, "Defender of children" ("défenseur des enfants"), nominated by Decree for six years. He has to discover and prevent child ill-treatment. Law 2000-197 of Mar. 6, 2000 has provided for medical examination for children under six years in nursery schools to prevent and discover ill-treatment.

It has also modified regime with regard to legitimate and illegitimate descent, as well as adoption. (c. II of Law). In particular, it has established principle of joint parental authority by recognizing right for child to be raised by both parents. For this purpose, it has appointed judge in charge of matrimonial matters (Juge aux affaires matrimoniales "JAM") having special jurisdiction to deal with these types of disputes.

New Law No. 94-629 dated July 25, 1994, regarding "family policy" provides certain number of provisions allowing government financial allocation in case of adoption.

See also topic 13.04 Divorce, subhead Children.

13.08 MARRIAGE:

Marriage takes place before civil official at domicile of one of parties in presence of at least two but not more than four witnesses. Domicile may be acquired for this purpose by prior 30 days residence in arrondissement or district. Publication by notice ("bans") posted at door of city hall of arrondissement for ten days preceding marriage. Medical certificate required. (C. C. 63, 165). These may be dispensed with in very rare cases by local district attorney. (C. C. 169). Marriage abroad between French citizens or between French citizen and foreigner is valid if in accordance with law of place where celebrated, or if celebrated by certain specified consular agents. Publication required in both cases. (C. C. 170).

American citizen to marry in France French citizen or another foreigner must produce in addition to medical certificate various documents establishing identity, date and place of birth, and nationality. Alien to marry in France must also produce identity card delivered by French authorities, valid for three years, or obtain special authorization. Before bans can be posted at city hall, medical certificate must in all cases be provided and authorities may require other documents depending on circumstances.

Man must have completed his 18th year, and woman her 15th year. (C. C. 144). Under these ages, authorization from Procureur de la République (Attorney General) is necessary and may only be given for serious motive. (C. C. 145). Minor must also have consent of one parent or if both parents are dead or incompetent, of grandparents or, if none, of family council. (C. C. 148-155). No consent necessary for remarriages.

Prohibited Marriages.

Marriage is prohibited in direct line between all legitimate or illegitimate ascendants, and descendants and connections by marriage in same line (C. C. 161); in collateral line between legitimate or illegitimate brother and sister (C. C. 162); and, between uncle and niece or aunt and nephew (C. C. 163). But President of République may allow marriages between brother-in-law and sister-in-law, uncle and niece or aunt and nephew but only for serious motive. (C. C. 164).

“Solidarity civil covenant” (“Pacte civil de solidarité” PACS).

Law of Nov. 15, 1999 completed by Decrees Nos. 99-1089, 1090, 1091 of Dec. 21, 1999 has completed civil code. It has added title on “solidarity civil covenant” (“Pacte civil de solidarité” PACS) which covers Arts. 515-1 to 515-7 of Civil Code. It is agreement which organises common life, especially concerning expenses and housing, between any pair of adult people living together (heterosexual or same-sex couples). Joint declaration must be done at office of clerk of civil trial court of general jurisdiction (tribunal de grande instance). Conditions of “mutual and material help” must be provided in this agreement. Joint ownership of household furniture can be provided in this covenant, if not law establishes presumption of joint ownership by half. Law has granted several advantages concerning common taxation, inheritance, etc. Thus, law has introduced modifications in tax code, in national health service code (“code de la sécurité sociale”), in labour code, and in law on lease agreement.

See also category 9 Documents and Records, topic 9.04 Notaries Public.

13.09 MARRIED WOMEN:

See topics 13.06 Husband and Wife, Marriage; categories 4 Citizenship, topic Aliens; Estates and Trusts, topic Executors and Administrators; Property, topic Dower.

14 FOREIGN TRADE AND COMMERCE

14.01 CUSTOMS DUTIES:

Customs regulations are contained in Code des Douanes.

Responsibilities and Powers of Customs Authorities.

Responsibilities are multifold, encompassing collection of customs duties and other taxes, enforcement of foreign exchange regulations, sanitary inspections (“police sanitaire”), inspections of imported regulated products, inspections of works of art for exportation, and customs control of persons.

Power of customs authorities extends to entire territory of France and may even extend to parts of foreign territories. (Art. 1 of Code des Douanes). Customs agents have power to conduct extensive investigations. They may demand and seize any documents of special interest to customs services and may inspect domestic premises (Law of Dec. 30, 1986, No. 86-1317, Law of Dec. 29, 1989, No. 89-935; Law of Apr. 12, 1996, No. 96-314; Law of June 15, 2000, No. 2000-516, codified under Art. 64 of Codes des Douanes) and professional premises (Law of Apr.

12, 1996, No. 96-314, adding Art. 63 ter in Code des Douanes) and search, under specific conditions, houses. Decree of Sept. 27, 1996 authorizes customs agents to take samples during investigations.

Procedures for Clearance of Goods.

All imported merchandise, regardless of how it is transported, must be submitted to customs for clearance and declared in detail at nearest customs office. There are now simplified procedures, provided for by contract between customs authorities and enterprises, for clearing goods on business premises. Decree of May 25, 1999 specifies procedures for clearing certain categories of arms and military munitions.

Customs Duties.

Today, almost all French customs duties are established by GATT or by bilateral agreements. Merchandise imported from non-EU countries is subject to common foreign tariff ("tarif extérieur commun") levied by all EU countries. (French customs authorities publish each year up-dated Customs Tariff.) Since July 1, 1968, EU has prohibited customs duties among member states except on certain agricultural products. In addition, customs duties on exports no longer exist. The European Council Regulation No. 2913-92 of Oct. 12, 1992, and European Commission Regulation No. 2454/93 of July 2, 1993, have unified and codified existing custom rules.

Other tariffs and taxes, e.g., VAT on imported goods, stamp duties, and taxes on tropical goods and oil products, are paid to customs authorities at French border.

Exemptions of Customs Duties.

Exemptions from customs duties may apply to merchandise that merely passes through France, that stays in France only temporarily, that is imported in order to be reexported later after modification in France, or that is reimported after having been exported. Applicants must declare merchandise for which exemption is sought; this declaration must be accompanied by guarantee made by solvent third party.

Prohibitions.

Importation of narcotics and certain pharmaceutical products is prohibited. Subject to EEC rules, customs agencies enforce quotas on certain imports and restrict "dumping" of imports at artificially low prices.

Disputes and Sanctions.

Customs litigation, except for questions involving liability of customs agencies, is handled by civil and criminal courts. Procedural rules are stricter in customs cases than in most other cases.

Anyone who participates in or benefits from customs fraud is liable to criminal sanctions, which range from fines (which may be substantial) to confiscation of merchandise or imprisonment. Administrative sanctions, such as revocation of temporary exemptions, may also apply.

Finally, customs authorities have power to settle disputes relating to customs violations by ordering accused to pay flat sum. Such settlement precludes further legal action.

See also topic 14.02 Exchange Control; category 22 Taxation, topic Taxes.

14.02 EXCHANGE CONTROL:

French Exchange Control Regulations are set forth in Decree No. 89-938 of Dec. 29, 1989 (as modified by Decrees No. 92-134 of Feb. 11, 1992, No. 94-658 of July 27, 1994 and No. 96-117 of Feb. 14, 1996) and, as regards direct investments, Order of Feb. 14, 1996, have been replaced by Decree No. 2003-196 dated Mar. 7, 2003 and regulation ("Arrêté") taken on same date. These new regulations have been codified in Monetary and Financial Code in Arts. L.151-1 to L.151-4.

Direct Investments.

Decree 2003-196 defines direct investments as: (1) creation of new company by foreign company or by nonresident individual; (2) acquisition of all or part of branch of activity of French company by foreign company or nonresident individual; (3) any operation done in capital of French company by foreign company or by nonresident individual if after operation, aggregate sum of capital and voting rights held by foreign companies or nonresident individuals exceeds 33.3% of capital, or of voting rights of French company; and (4) any operation done by French company capital and voting rights of which are held by more than 33.33% by one or more foreign companies or one or more nonresident individuals.

Direct Foreign Investments in France.

Direct investments (as defined above) made in France by nonresidents, by companies directly or indirectly under foreign control, or by French establishments of foreign companies are deemed to be direct foreign investment in France by Decree of Mar. 7, 2003. Order further states that French nonlisted company is deemed to be under foreign control when nonresidents, or French companies controlled by nonresidents, hold more than 33.33% of its share capital or voting rights. (Order of Feb. 14, 1996). It is however specified that French Ministry of Economy may use other thresholds and other criteria (such as financing, commercial agreements, call agreements) to determine whether there exists de facto control even if above thresholds were not reached.

Direct foreign investments in France are exempted from prior authorization and/or prior declaration. Investor will only have to file declaration at time of its investment, provided they do not concern certain "sensitive" sectors (such as activities relating to public authority, public health and safety, production and sale of weapons and war material) (Art. 7.1°, (a)2(b) of Decree Mar. 7, 2003) remain subject to prior authorization by Ministry of Economy. Such authorization is deemed granted when Ministry has not objected to proposed investment two months after receiving above request.

However, following direct investments in France are exempted from prior declaration and authorization: (1) creation of branch or new enterprise held directly or indirectly by foreign companies or nonresident individuals; (2) expansion of activity of existing enterprises held directly or indirectly by foreign companies or nonresident individuals; (3) increase in percentage ownership in French company under foreign control when such increase is made by investor already holding more than 50% of share capital or voting rights; (4) subscription to capital increase of French company under foreign control by investor, provided such investor will not increase its percentage ownership at that time; (5) direct investment transactions between companies which are part of same group; (6) loans, advances, guarantees, consolidation or writing-off of debts, subsidies or contributions to branches, granted to French enterprise held directly or indirectly by foreign companies or nonresident individuals; (7) taking share ownership in French enterprises having real estate activity other than construction of buildings for sale or lease; (8) direct investments not exceeding [Euro]1,500,000 in hotel enterprises, craft industry enterprises, retail business enterprises, retail enterprises, miscellaneous merchant services and quarry or gravel businesses; (9) acquisition of agricultural land.

Implementation and liquidation of foreign investments in France as well as creation of branch or new enterprise with investment exceeding [Euro]1,500,000 and acquisition of land used for purposes of wine production require filing of report.

Filing for Data Purposes.

Some investments are now required to file information at central bank for data purposes. They are considered direct foreign investments in France or French direct investments abroad. These are operations for which resident or nonresident acquires at least 10% of capital or voting rights of resident or nonresident company respectively.

Current Operations and Operations on Securities.

Transfer of money between France and abroad is free subject to rules and regulations that government may decide. Former Banking Law No. 84-46 of Jan. 24, 1984 as modified by Law No. 92-1336 dated Dec. 12, 1992 has become almost entirely null and void by enactment in 2000 of Monetary and Financial Code. Natural persons transferring funds, currencies, swaps or others abroad must declare same if amount exceeds [Euro]7,600. In any event, intermediary credit or financial institutions must keep records of any such transfer or any transfer made by associations and non-commercial companies. Such records shall be made available to tax and customs administrations if required.

Bank of France may set terms and conditions of declaration by which resident reports its direct operations abroad or in France with nonresidents, either directly or through intermediary credit or financial institution.

It shall also be pointed out that government may by decree submit to declaration, authorization or control any monetary operation (see Art. 15-1-2 of Monetary and Financial Code).

14.03 FOREIGN EXCHANGE:

See topic 14.02 Exchange Control.

14.04 FOREIGN INVESTMENT:

All investments by nonresidents in France are subject to currency exchange and other regulation. In connection with creation of EURO, Arrêté dated Dec. 30, 1998 rules consumer information on this matter. See generally topic Exchange Control. In addition, certain economic sectors are state-owned, such as electricity, or partially state-owned as communication, and others are withdrawn altogether from foreign investment, or require specific authorization, such as marine, air and land transportation, petroleum extraction, banking and insurance.

Treaty of Establishment of Nov. 25, 1959 between France and U.S. governs rights of American nationals and enterprises to enter and invest in France. After covering rights of entry and sojourn, free access to courts and tribunals and other personal rights, treaty guarantees to American nationals and enterprises treatment as French nationals with respect to engaging in commercial, industrial, financial and other remunerative activities. (Art. V). Accordingly, American nationals and enterprises may establish branches, organize companies, acquire majority interests in existing companies, and control and manage enterprises engaged in communications, air or water transport, banking, exploitation of natural resources, and production of electricity. (Art. V[2]).

American nationals or enterprises may acquire any interest in real or personal property of any kind (except ships), including patents, trademarks, and other industrial property, and are entirely free to dispose of such property interests. (Arts. VII, VIII). Expropriation of such property may only be for public purpose and upon payment of just compensation. (Art. IV[3]).

Taxation of American nationals or enterprises, with or without permanent establishment in France, shall not be more burdensome than that of nationals or enterprises of France. (Art. IX[1]). French enterprises owned or controlled in whole or in part by American nationals or enterprises shall not be subject to any form of taxation or obligation relating thereto which is more burdensome than that upon like French owned or controlled enterprises. (Art. IX[3]). Fees relating to police or other formalities shall be no heavier than those imposed on aliens of any other nation. (Art. IX[7]).

Free flow of investment capital is set as goal of treaty, and therefore treaty states principle that exchange control restrictions are to be at minimum level necessary to protect currency reserves, with repatriation of investment earnings or proceeds on liquidation to be in general unhindered. (Art. X). Finally, express reservations permit limitation of above rights by measures designed to check monopolies or restraints of competition (Art. XI) or by measures for regulation of fissionable materials, arms and munitions or measures necessary to protect essential security interests (Art. XII).

See also category 22 Taxation, topic Taxes.

14.05 FOREIGN TRADE REGULATIONS:

Imports.

According to their nature and country of origin, imports are either free or subject to quota restrictions. Latter must be covered by import licenses. Procedure for obtaining such licenses is laid down in Arrêté and Avis of Jan. 30, 1967 (Journal Officiel, Jan. 31, 1967, p. 1127) and subsequent amendments published in Journal Officiel.

Exports.

As a general rule, exports are free, subject to prohibitions published from time to time in Journal Officiel. Merchandise covered by prohibitions requires export licenses, but exporters can obtain long-term commitments from Government to issue such licenses. For procedure, see J. O. Jan. 31, 1967, p. 1129, and subsequent Avis published in Journal Officiel.

Export Control.

Certain goods and technologies expressly mentioned on document called “List” are subject to strict control with respect to final destination or country of origin. Applicable regulation and “List” are codified in “Avis” from Ministry of Economy, Finance and Budget. (J.O. Nov. 29, 1990, as modified by J.O. Dec. 21, 1990). Law No. 92-1477 as modified on Aug. 8, 1994 (Law No. 94-679, Art. 60, J.O. Aug. 10, 1994), further restricts movement of certain goods such as weapons and art works.

Intermédiaire Agréé.

Decree 68-1021 of Nov. 24, 1968 and circulars of Nov. 25 and Nov. 27, 1968, as implemented by subsequent decrees and circulars, have imposed requirement on importers and exporters to effect all exchange transactions, movements of capital and payments relating to their export-import transactions through “intermédiaire agréé” (banks, Treasury Public, Bank of France, financial departments of Post Offices, “Caisse des Dépôts et Consignations”). Such authorized agents are listed in Arrêté of Aug. 26, 1969, and subsequent arrêtés published from time to time in Journal Officiel.

See topic 14.02 Exchange Control.

15 HEALTH

—Scope —

New Public Health Code, implemented by Ordinance No. 2000-548 of June 15, 2000 has been modified by Law No. 2002-303 of Mar. 4, 2002 relating to rights of patients and quality of health system and by Law No. 2002-1577 of Dec. 30, 2002.

15.01 ALCOHOL:

Advertising for alcoholic drinks is limited. State is responsible for prevention and treatment of alcoholism. Any importer or manufacturer of alcoholic beverages (class 3 to 5) must file declaration to tax authorities before selling or freely distributing such beverages. Opening of “débit de boissons” (public place in which alcoholic drinks are bought and consumed) is submitted for prior notification or authorization. (Arts. L.3332-1 to L.3332-17).

15.02 BIOMEDICAL RESEARCH:

No biomedical research may be carried out on human beings if foreseeable risk run by persons agreeing to participate in this research is disproportionate to anticipated benefit for such persons or interest of research concerned. (See Art. L.1121-2.) Person concerned must, however, give free and informed consent (“libre et éclairé). Voluntary individuals participating in subjects in biomedical research must not be paid except for when there is no direct benefit for individual. In each region, Health Minister gives approval to one, or more, advisory boards as required aimed at protecting persons involved in biomedical research.

French Parliament is currently reviewing draft bill which is to implement Directive 2001/20/CE under French law. Implementation of Directive should result in substantial amendments to current legislation concerning, in particular, administrative authorizations to be obtained and possibility to indemnify trial subjects.

15.03 COSMETICS AND MEDICINES:

Law No. 75-604 of July 10, 1975 replaced by Law July 1, 1998 codified in PHC (Art. L.5131-1 to L.5131-9); opening and operation of all premises relating to manufacturing, packaging or importation of cosmetics requires declaration to be made to French Health Products' Safety Agency (Agence Française de Sécurité Sanitaire des Produits de Santé). Authorization from French Health Products' Safety Agency is required prior to opening pharmaceutical establishment relating to manufacturing, packaging or importation of pharmaceutical products; medicine and pharmaceutical products must obtain market-release authorization delivered by French Health Products' Safety Agency (Agence Française de Sécurité Sanitaire des Produits de Santé) or by European Community. Authorized medicines are subject to annual tax. (See L.5121-17.)

15.04 DONATION AND USE OF PARTS AND PRODUCTS OF HUMAN BODY:

Law No. 94-654 of July 29, 1994 as well as by c. II, Title 1, Volume 1 of Civil Code governs or regulates transfer and use of parts and products of human body. Among these products, biological products with therapeutic purpose include organs, tissues and cells that have been modified for therapeutic purposes. In order to ensure health safety compliance, their use is subject to specific measures aimed at identifying known risks and effects as well as any emerging hypothetical risks.

Cellular therapy concerns biological products with therapeutical purposes coming from preparation of living human or animal cells. Consent must be provided in order for sample to be taken. (L.1211-1).

Blood transfusion is governed by “the French blood institution” (l'Etablissement français du sang), public institution under authority of French Health Minister. Blood transfusion shall be carried out according to patient's interest and ethical principles of voluntary, anonymous donation and nonprofit making purpose (L.1221-1); blood, its components and their by-products may not be distributed or used without preliminary biological analysis and detection tests for transmissible diseases. (L.1221-4).

Removal of organs, tissues or cells or collection of products from human body from living or dead donor, is regulated by 1976 “Caillavet” law later supplemented by Law No. 94-654 of July 29, 1994 and can only be carried out in order to directly satisfy receiver's therapeutic need. Samples may only be taken in health care institutions, duly authorized to this effect by administrative authority.

Transformation, preservation, distribution or transfer, for therapeutic purposes of tissues and cells which are not intended for gene or cell therapy is undertaken by public health institutions and nonprofit-making organizations duly authorized to this effect by French Agency for the Safety of Health Products (Agence Française de Sécurité Sanitaire des Produits de Santé). (L.1263-1).

15.05 DRUG ADDICTION:

Law No. 70-1320 of Dec. 31, 1970 prohibits manufacturing, importation, advertisement, sale or distribution of drugs.

Unlawful use of substance or plant classified as drug is punishable by one year imprisonment and fine of [Euro]3,750. (L.3421-1). In courts of first instance prosecutor can order anyone having unlawfully used drugs to follow detoxification treatment or to be placed under medical surveillance pursuant to conditions stipulated in Arts. L.3413-1 and L.3413-3.

According to conditions defined in Art. 16 of Law No. 84-610 of July 16, 1984, Ministry in charge of sports, in collaboration with sports federations, shall ensure protection of sportsmen's and sportswomen's health and fight against illegal drug use.

15.06 FIGHT AGAINST INFECTIOUS DISEASES:

Vaccinations for diphtheria, tetanus, polio and tuberculosis are compulsory except in cases of recognised medical conditions for certain age groups. Arts. 21 and 22 of World Health Organisation's Constitution regulates sanitary control at borders. (L.3115-1). Compensation will be paid by specific compensation fund to victims suffering as result of contamination of human immune-deficiency virus caused by transfusion of blood products or by injection of blood by-products carried out on French soil. (L.3122-1).

15.07 FRENCH AGENCY FOR FOOD SAFETY (AGENCE FRANÇAISE DE SÉCURITÉ SANITAIRE DES ALIMENTS):

French Agency for Food Safety (Agence Française de Sécurité Sanitaire des Aliments or AFSAA) was set up by Law No. 98-535 of July 1, 1998. It is public body under authority of ministers in charge of Agriculture, Consumer Affairs and Health.

AFSAA's duty is to contribute to protection of human health especially in terms of health and safety in food stuff and it does this by taking measures ranging from production of raw materials to distribution to final consumer. AFSAA evaluates health and nutritional risks posed by foodstuffs intended for human or animal consumption. This includes evaluating risks likely to come from water intended for human consumption, process and conditions of production, transformation, preservation, transportation, storage and distribution of human foodstuffs, as well as animal diseases and infections, phytosanitary products, veterinary medicines, especially, as well as extemporaneous preparations and medicinal foodstuffs, anti-parasitical products for agricultural use and similar products, fertilizers and aids to growth as well as packaging and materials destined to come into contact with aforementioned products.

AFSAA also takes part in national defense mission concerning field of foodstuffs. (See Art. L.1323-1.)

15.08 MATERNAL AND CHILD PROTECTION:

Pursuant to Law No. 89-899 of Dec. 18, 1989, State, territorial authorities and social security organisations participate in protection and promotion of maternal and infantile/child health which includes, in particular, prenuptial examination (Art. 63 of Civil Code), preventative examinations during and after pregnancy, prenatal diagnosis and medical assistance for procreation.

Art. 511-15 of Criminal Code provides that obtaining human embryos in return for payment, in whatever form, is punishable by seven years imprisonment and fine of [Euro]100,000.

Legislation on abortion has been modified by Law of July 4, 2001. (Arts. L.2213-1 to L.2213-3). This deals with: abortion in case of serious risk to mother's health or certainty that unborn child will suffer from very serious incurable condition. These reasons must be certified and confirmed by two doctors, one of whom must be working in hospital. Abortion can take place within period of 12 weeks after conception if justified by distress of woman carrying child and can only take place in approved medical centers. Failure to comply with these conditions can result in sanctions varying from two to five years' imprisonment and fine of [Euro]30,000 to [Euro]75,000.

15.09 MONITORING AND ISSUING WARNINGS REGARDING PUBLIC HEALTH SAFETY:

Law No. 98-535 of July 1, 1998 created national committee for health safety in charge of analyzing events which are likely to affect population's health and comparing available information. This committee is also in charge of supervising coordination of scientific policy of Institute for monitoring of health safety (“Institut de veille sanitaire”) and French agencies in charge of health products and food safety. (See Art. L.1413-1.)

15.10 PHYSICIAN'S LIABILITY:

If during disciplinary action, issue of physician's liability concerning his failure to comply with professional ethics is raised, then disciplinary sanctions can be imposed by French medical association (Conseil de l'Ordre des médecins).

In case of intentional breaches of duty, non-assistance to endangered persons, infringements by carelessness or negligence such as manslaughter or injuries by negligence, physician's criminal liability can be raised. (Arts. 221-6, 222-19 and 222-20 of Criminal Code).

Aim of civil liability is to compensate person for having suffered harm. Indeed harm may be as result of professional misconduct or criminal liability. Principle of “duality of jurisdiction” would be appliable in present case. This means that judicial courts (“tribunaux judiciaires”) have competence to rule on issue of private sector hospitals or physician's liability whereas administrative courts have power to rule on issue of public sector hospitals or physician's liability. Finally, physician has duty to comply with safety requirements and duty to inform patient.

As general rule, physicians and health care centers are held only liable in cases of negligence (“faute”)—(L.1142-1). However, Law of Mar. 4, 2002 provides for compensation for dangers associated with therapeutic treatment: in absence of civil liability, certain events or circumstances entitle patients to compensation for having suffered harm, on basis of strict liability. Newly created state agency: “National compensatory board for victims of medical accidents” (“Office national d'indemnisation des accidents médicaux ‘ONIAM’ ”) pays compensation in specific cases. Law of Dec. 30, 2002 adds three new cases where compensation costs are paid by ONIAM, in particular, heavy costs resulting from nosocomial infections.

15.11 PREDICTIVE MEDICINE, GENETIC IDENTIFICATION AND GENETIC RESEARCH:

Pursuant to Law No. 96-452 of May 28, 1996, examination of person's genetic characteristics or their identification by genetic fingerprints, when not undertaken in context of legal proceedings may only be carried out for medical purposes or for scientific research and only after person has given their consent. (L.1131-1).

15.12 RIGHTS OF PATIENTS AND USERS OF HEALTH SERVICE:

It is patient's fundamental right and freedom to choose his medical practitioner and health care institution and this is enshrined in health care legislation. This includes getting access to his/her “medical file” (“les informations médicales le concernant”), enjoying right to privacy and patient confidentiality (“le respect de la vie privée et du secret médical”), and freedom from any discrimination based on gender. (Arts. L.1110-1 to L.1111-9).

15.13 TOBACCO SMOKING (Control):

Public health code prohibits smoking of tobacco in public transport and public places: cinema, theatre, offices for special rooms designated for smokers, lifts, medical establishment, schools, etc. Further, advertisements for tobacco products through media and via leaflets is also prohibited. In addition packages must contain warnings that tobacco smoking is dangerous to health. (Arts. L.3511-1 to L.3511-9).

16 IMMIGRATION

16.01 ALIENS:

Aliens remaining in France more than three months must obtain residence permit (“carte de séjour”). (Ordonnance No. 45-3853 of Nov. 2, 1945 as modified by Law No. 93-1027 of Aug. 24, 1993 and by Law No. 97-396 of Apr. 24, 1997 and Law No. 98-349 of May 11, 1998 and Law No. 2003-1119 of Nov. 26, 2003).

Prior to their arrival, aliens who wish to be employed in France must obtain long term visa (“visa de long séjour”) from French consular officials of area in which they reside. Prospective employer must submit application for long term visa to local office of National Agency for Employment (“Agence Nationale pour l'Emploi”), which submits it to Labor Ministry for approval; file is then sent to Immigration Office (“Office des Migrations Internationales”) and thereafter forwarded to French Consulate of place of residence of applicant prior to issuance of their visa. Upon arrival in France, aliens undergo medical examination at International Immigration Office (“OMI”) before issuance of their residence permit from local Police Authorities depending on their residence in France. Ministry of Interior may also review application before issuance of visa.

Aliens must obtain identity trader's card (“carte d'identité de commerçant”) if they plan to set up business in France or to work as: (a) President or general manager of French corporation; (b) manager (“gérant”) of any other French company; (c) manager (“gérant”) of French commercial partnership; or (d) manager of French branch of any foreign business concern. Local police authorities issue identity trader's card, as well as temporary resident permit, only after applicant obtains permanent visa (“visa d'établissement”). French Consulate delivers visa after approval of application by: (1) Consulate, (2) Foreign Affairs Ministry, (3) Police Department, and (4) Chamber of Commerce for alien's place of business. (Circular of Oct. 26, 1985 and Circular of Dec. 23, 1992 modified by Decree No. 98-58 of Jan. 28, 1998 and “Arrêté” of Mar. 26, 1998).

Order No. 2004-279 of Mar. 25, 2004 simplifies that conditions of exercise of some business activities, has cancelled obligation to obtain such identity trader's card (“carte d'identité de commerçant") and has replaced it by prior authorization to set up business activity delivered by local Police Authorities. Furthermore, rules of this Order which exempt nationals of European Union countries, nationals of European Economic Space countries and nationals of Switzerland from requirement of prior authorization haven't been extended to nationals of OCED ("Organisation for Economic Co-operation and Development") countries i.e. United States of America, Australia, Canada, Japan, Korea, Mexico, New Zealand, Turkey.

More generally, Law of July 17, 1984 protects aliens rightfully residing in France by establishing new residence permit ("carte de résident") that is valid for ten years and automatically renewable has been amended by Law No. 2003-1119 which extend obligation of five years of residence in France prior to obtention of such residence permit. It allows holder to exercise professional activity of his choice.

To reside and work in France, EU, EEE and Switzerland nationals have no more obligation to obtain residence permit. If they wish so, residence permit valid for ten years is generally issued. However, nationals of European Countries being submitted to period of transitories measures are still subject to obligation of applying for residence permit if they wish to exercise economic activity.

An alien enjoys in France same civil rights as are conceded to French citizens by his own nation under treaties with France. There are no restrictions on right of aliens to own real property, but such property is governed by French law. (C. C. 3). Alien may dispose of his property by acts inter vivos or by will on same basis as French national. However, investments in France by nonresidents are regulated by Ministry of Finance. (See category 14 Foreign Trade and Commerce, topic 14.02 Exchange Control.)

Judicial jurisdiction is asserted over nonresident alien with regard to any obligation entered into in France, or anywhere else, to which French national is party. (C. C. 14, 15). French party may waive jurisdiction of French courts. Courts allow suit by aliens in most cases.

Under the Franco-American Establishment Treaty of 1959 U.S. citizens enjoy national treatment in France in the fields of: press freedom (Art. II); legal aid (Art. III); patent rights, trade marks, registered trade names and labels of guaranty (Art. VIII) and commercial activity (Art. V). In other fields Treaty provides that obligations imposed on U.S. nationals in France shall be no heavier than those imposed on aliens of other nationalities, and in field of taxation, U.S. nationals are not to be taxed more stringently than French nationals under similar circumstances (Art. IX). Treaty also grants American nationals free access to courts.

Marriage.

Upon marriage to French man, foreign woman no longer acquires French nationality automatically (Art. 37 French Nationality Code), but foreign spouse of any French national may acquire French nationality by filing declaration two years after date of marriage (Art. 37-1 as modified by Law No. 2003-1119 of Nov. 26, 2003), which, during year after filing has been officially received, French government may oppose (Art. 39). Making such declaration may cause loss of U.S. citizenship by Americans. (8 U.S.C. §1481[a][1]).

French citizen marrying alien may make written declaration to give up French nationality so long as he has acquired citizenship of spouse and both normally reside abroad, except French men aged less than 35 may exercise this right only after fulfilling military obligations. (Art. 94).

Corporations Owned or Controlled by Aliens.

There is no general disqualification from alien ownership or control of business entities in France. However, investment regulations must be observed and corporation with substantial alien ownership or control may be disqualified or subject to special authorizations with respect to their right to participate in certain activities or economic sectors (e.g., communications, transportation, banking, mining and mineral exploitation, electricity).

See also topic 16.02 Immigration; categories 2 Business Organizations, topics Associations, Corporations, Limited Companies; Debtor and Creditor, topic Judicial Recovery and Liquidation; Estates and Trusts, topic Descent and Distribution; Foreign Trade and Commerce, topics Exchange Control, Foreign Investment, Foreign Trade Regulations; Intellectual Property, topics Copyright, Industrial Property Rights; Taxation, topic Taxes; Transportation, topic Shipping.

16.02 IMMIGRATION:

Visas.

Pursuant to Ordonnance No. 45-2658 of Nov. 2, 1945 as modified by Law No. 98-349 of May 11, 1998 and Law No. 2003-1119 of Nov. 26, 2003, persons entering France except EU, EEE and Switzerland nationals must obtain either tourist visa (for stay of three months or less) or long-term visa ("visa de long séjour") for stay exceeding three months, from local French Consulate of area in which they reside. To do so, evidence of sufficient means to remain in France must be shown. (See topic 16.01 Aliens.) Such persons may also be required, subject to international agreements, to furnish guarantees of repatriation, and entry into France may be refused to aliens for reasons of public order ("Ordre Public"). (Law No. 80-9 of Jan. 10, 1980).

Pursuant to Decree No. 70-29 of Jan. 5, 1970, completed by Decree No. 77-957 of Aug. 19, 1977, nationals of European Union countries are entitled to residence permits, indefinitely renewable as of right, under conditions set forth therein if they wish to apply for.

Citizenship.

Aliens who have been residents of France for five years, and have duly held residence permit during that time, may apply for French nationality. (French Nationality Code, Art. 62). This duration is reduced to two years where applicant holds French university degree or has rendered "important" services to France. (Art. 63). Alien may be exempt from any length of stay altogether if, for example, he has rendered "exceptional" services to France, served in combat unit of French Army, is spouse or child of person acquiring French nationality or belongs to cultural and linguistic French Entry. (Art. 64).

Application for French citizenship should be submitted to Préfet of Department where applicant has established his residence, who, upon due enquiry, transmits application to Ministry of Social Affairs. Minister's decision is published in Journal Officiel in form of decree.

17 INTELLECTUAL PROPERTY

17.01 COPYRIGHT:

Law No. 92-597 of July 1, 1992 has gathered several existing laws related to "Code de la propriété intellectuelle" ("C.P.I.").

Law No. 92-1336 of Dec. 16, 1992 added Art. L.335-8 to C.P.I. which provides criminal liability for legal entities and defines applicable penalties. Law No. 2004-204 of Mar. 9, 2004 regarding adaptation of justice to modern criminality has recently increased penalties for copyright, trademark, design and model and patent infringements to three-year imprisonment and payment of fine up to [Euro]300,000.

Law of July 3, 1985, effective as of Jan. 1, 1986 applying to rights of authors, performing artists, record and video producers, and audiovisual broadcasting companies, provides extensive revision of law of Mar. 11, 1957 on literary and artistic property. New law also provides for creation of payment for private copy, for video and audio works, establishment of royalty collection and distribution companies, protection of software programs, and for special protections and sanctions. Term of copyright and related rights was extended by Law No. 97-283 of Mar. 27, 1997, which implemented provisions of EC Directive on term of copyright protection of Oct. 29, 1993, and of EC Satellite and cable Directive of Sept. 27, 1993. Law No. 98-536 of July 1, 1998 implements provisions of EC Directive on term of data base protection of Mar. 11, 1996.

EC Directive No. 2004/29 on harmonization of certain aspects of copyright and related rights in information society has been adopted on May 22, 2001.

This Directive was designed to extend copyright protection to Internet and digital television and ensures protection of right to copy for software, musical files in digital format and for all other forms of works on Internet or which can circulate on web. Copyright owners will now be able to protect their material by technological means.

Member States had until Dec. 22, 2002 to implement Directive's principles into their own national copyright laws. France has still not implemented Directive, which has limited impact, since it has already adjusted its internal laws to technological progress.

Rights of Author (“droit d'auteur”).—Only author has right to divulge and exploit his work. This right remains in force during his lifetime and accrues to benefit of his heirs for 70 years after his death (Art. L.123-1 C.P.I.) or death of last living author for collaboration works. (Art. L.123-2 C.P.I.). Collective, anonymous works and works published under alias are protected for 70 years after disclosure of work (Art. L.122-5 C.P.I.). (Art. L.123-3 C.P.I.). After disclosure of work (Art. L.122-5 C.P.I.), author cannot forbid private and free presentations or copies and must accept, in certain circumstances, citation of his work and press reviews, provided his name is indicated.

Author or artist also enjoys perpetual and nonassignable moral right (“droit moral”) giving him and his heirs recourse against others, including his assignee, for any distortion, modification or reproduction of his work which tends to discredit his name, his reputation or original spirit of work. Contract assigning rights in all future works of author is void.

Author may assign or license jointly or separately right to reproduce and right to perform (“droit de représentation”) his work. (Art. L.122-7 C.P.I.). New law gives general definition of performance so as to encompass communication by any means. (Art. L.122-2 C.P.I.). This includes television broadcasting and transmission via satellite and also under recent case law, diffusion via Internet.

Law also contains specific provisions governing representation, publishing and audiovisual production contracts. Absent contrary proof, following individuals are presumed co-authors of audiovisual work: Screenwriter, adaptor, scriptwriter, composer of original musical score, director and author of original work. (Art. L.113-7 C.P.I. as modified). However, producer deemed assignee of right to exploit audiovisual work unless production contract provides otherwise. (Art. L.132-24 C.P.I.). Moral and pecuniary rights of authors of audiovisual work vest as soon as work is in its final version (Art. L.121-5 C.P.I.), which must be established by mutual consent between film maker (or co-authors) and producer. Final version may not be modified without authorization of director (or co-authors) and producer. Transfer of work from audiovisual to other medium for purpose of further exploitation requires prior consent of director. Adaption of written work to audiovisual medium requires specific written contract separate from contract governing publication. Provisions of EC Directives No. 93/83 and 93/98 on satellite broadcasting and cable retransmission and on term of protection of copyright have been implemented into French law by Law No. 97/283 of Mar. 27, 1997, as well as provisions of EC Directive on term of data base protection implemented into French law by Law No. 98-536 of July 1, 1998.

Related Rights.

(Tit. II of Law of July 3, 1985). Related rights (“droits voisins”) are newly created rights which protect artist, performing artists, record and video producers, and audiovisual communications companies and do not limit in any way whatsoever existing copyright. “Performing artist” is one who represents, sings, recites, plays or executes in any other manner literary or artistic work, show, circus or puppet act. (Art. L.212-1 C.P.I.). Such artist has identical nonassignable right (“droit moral”) in performance, which is perpetual and may be transmitted to heirs. Only artist may authorize in writing attachment, reproduction and public communication of his performance. (Art. L.212-3 C.P.I.).

Record and video producers have right to forbid any reproduction of their records or videos, including any public sale, exchange or rental, as well as any public communication thereof. (Arts. L.213-1 and 215-1 C.P.I.). Audiovisual communication companies have similar rights with regard to their broadcasts.

Related rights lapse 50 years after first of Jan. of civil year following one of first performance, fixation or publication, as case may be. (Art. L.211-4 C.P.I.).

Audiovisual works may not be divided so as to assign video rights separately from soundtrack. (Art. L.215-1 C.P.I.). Prior to commercial release audiovisual communication companies also have right to forbid reproduction, public disposal, televised broadcasting and paid public communication of their programs. (Art. L.216-1 C.P.I.).

Resale Rights.

EC Directive on resale rights (“droit de vente”) has been adopted on Sept. 27, 2001. (Art. L.122-8 C.P.I.). It provides that authors of paintings, collages, drawings and engravings shall be paid right on any resale of their original works in galleries or by auction, amounting to 4% or 5% of resale price with maximum of [Euro]50,000. EU Member States have until Jan. 1, 2006 to implement Directive's principles into their own national copyright laws.

Remuneration for Private Copies of Records and Videos.

Manufacturers or importers of recording information and tapes must pay royalties for private copies to collecting companies which distribute said royalties among authors, artists and producers responsible for work. Distribution occurs only if record or video is originally made in France, except as otherwise provided by treaties. (Arts. L.311-1 to 311-8).

Royalties Collecting and Distribution Companies.

(Arts. L.321-1 to 321-12). These civil companies are composed of associates who must be authors, artists, producers or their entitled parties. They have certain obligations with regard to by-laws, financing, accounting, and certain of their acts are under control of Ministry of Culture. Associations which formerly collected and distributed royalties transferred all or part of their property to these newly created companies.

Software Programs.

Law No. 94-361 of May 10, 1994 faithfully implemented provisions of EC Directive on software protection. Software programs are now protected for same length as rights of authors, i.e. 70 years after death of author. (Art. L.123-1 of Intellectual Property Code). Software programs created by employee under labor agreement belong to employer. EC Directive, currently under discussion before EU Parliament, proposes to change status of software from copyrighted work to patented invention under certain conditions. However, this project meets with strong opposition and Commission might withdraw directive.

Data Base.

Law No. 98-536 of July 1, 1998 implemented provisions of EC Directive on data base protection.

Protection and Sanctions.

Cinematographic works and videos must be registered, and contracts must be published in special register.

Videos designed for private use are controlled by “Centre National de la Cinématographie”, administrative agency, and persons involved must keep documents for proof of origin and destination of videos. (Art. 52 of Law of July 3, 1985 [not codified in C.P.I.]).

If representatives of deceased author manifestly abuse use or even nonuse of right of divulgation and exploitation of works they have been granted at death of author, civil courts are empowered to order all necessary measures. (Art. L.121-3 C.P.I.). Courts may also forbid creation or continuation of activities of collecting company.

Copyright infringement is criminal offense which may be punished by imprisonment and fine (Art. L.335-2 C.P.I.) and authorized attachment of illegal records, videos and software as well as all equipment fixed for this purpose (Art. L.332-4 and L.335-1 C.P.I.). In addition, copyright infringement may be sanctioned by closure of establishment, attachment of profits, and bill-posting or publication of conviction order. Author can request prosecution by public prosecutor in order to obtain civil damages. Suit may also be brought before civil courts only without criminal charges.

France and U.S. have subscribed to Berne Convention for the Protection of Literary and Artistic Works (U.S. adhesion effective Mar. 1, 1989). France and U.S. also signatories to Universal Copyright Convention, which provides reciprocal protections if certain formalities respected. Law of July 8, 1964 has introduced principle of reciprocity. If foreign country does not adequately and sufficiently protect works published elsewhere, works published in said foreign country will not benefit in France from protection afforded by French law.

Intellectual and artistic property rights may be freely licensed or assigned without being submitted to any government agency for approval. In certain cases licenses and assignments must be declared to Ministry of Industry. (Decree of May 26, 1970). See also category 14 Foreign Trade and Commerce, topic 14.02 Exchange Control.

17.02 DESIGNS AND MODELS:

See topic 17.03 Industrial Property Rights.

17.03 INDUSTRIAL PROPERTY RIGHTS:

General Note.

Both France and U.S. are members of Convention of International Union for protection of industrial property of Mar. 20, 1883 (short: Paris Convention) applying to patents, trademarks and designs and models. Both countries have ratified Lisbon revision of Oct. 31, 1958, effective since Jan. 4, 1962, and Stockholm revision of July 14, 1967, which came into force in France on Aug. 12, 1975. France has also ratified Washington Treaty of June 19, 1970 on International Patent Cooperation (see Law 77-682 of June 30, 1977) which came into force for France on Feb. 25, 1978, Munich Convention of Oct. 5, 1973 on European Patents (see Law 77-683 of June 30, 1977) which has been in force since Oct. 7, 1977, and Luxembourg Convention of Dec. 15, 1975 on EEC patents (see Law 77-684 of June 30, 1977) which is not yet in force. Decree 78-1011 of Oct. 10, 1978 (J.O. of Oct. 15, 1978), issued to implement Law 77-683, establishes fees for filing of European patents. Treaty of Budapest of Apr. 8, 1977 on international recognition of patent registration of microorganisms came into force in France in Nov. 1980. (Decree no. 80-954 of Nov. 25, 1980). Law of Nov. 26, 1990 adapts existing industrial property legislation in order to streamline registration procedures and to encourage French industry to seek protection of such rights.

Law No. 92-597 of July 1, 1992 has gathered several existing laws into new code, “code de la propriété intellectuelle.” This new code groups existing provisions governing both copyrights and related rights and industrial property rights. Other than codifying different laws promulgated on different dates new code does not provide any modifications to state of law.

Law No. 94-102 of Feb. 5, 1994 has strengthened infringement of patent's repression.

Decree No. 95-385 of Apr. 10, 1995 (J.O. of Apr. 13, 1995) has collected all intellectual property decrees into C.P.I. Other than codifying different decrees promulgated on different dates, new decree does not provide any modification to present state of Law.

The TRIPS Agreement of Apr. 15, 1994 was ratified and Law No. 96-1106 of Dec. 18, 1996, modified C.P.I. accordingly.

Patents.

(C.P.I., Art. L.611-1 to L.615-22).

Patents under C.P.I. contain claims defining scope of patent, as in U.S. There is a patent office opinion based on novelty and priority. Applicant may contest opinion and revise his claim. Official opinion is published with patent, which also contains reference to international classification established by European Cultural Convention of Dec. 19, 1954.

Any natural person or legal entity, whether or not citizen or resident of France, who has invention of new industrial product or new process, or new application of known process for obtaining an industrial result or product, may, individually or jointly with others, apply for French patent by filing application in French with “Institut National de la Propriété Industrielle,” submitting at same time duplicate copies of full description of invention and of drawings illustrative thereof. Application must contain claims which define scope of protection applied for (unlike previous law which required no formulation of claims). Initial claims contained in application may be modified until final opinion is published by Institute of Industrial Property. Protection granted is limited to what may validly be claimed by description and drawings. Court of Appeal of Paris has immediate and exclusive jurisdiction to hear any complaints formed as a result of a rejected application.

Following are unpatentable: Purely scientific or theoretical principles without industrial application, creations which are exclusively decorative, financial schemes, rules for games and, in particular, programs or instructions for operation of computers.

Medicines can henceforth be protected by patent, but not by certificate of utility. New therapeutical use of medical product is not patentable.

Two protective rights are available under C.P.I.: (a) Patent (“brevet”); (b) Certificate of Utility (“Certificat d'Utilité”). Patent covers all inventions including medicinal products. Certificate of Utility, protected right introduced by C.P.I., is intended for protection of inventions of minor importance and concerns any type of invention, including chemical products or manufacturing processes. It must comply with same rules as those required for patents. However, it does not have to undergo an examination for novelty and may not be issued for protection of medicinal products. Certificate of Utility is not covered by Paris Convention (and it is uncertain whether such protective right may serve as basis of priority).

Life of a patent is 20 years from date of application; life of Certificate of Utility is six years from date of application.

Patent and “Certificat d'Utilité” are subject to payment of annual fees, amount of which is specified in Arrêté of Dec. 28, 1992. Nonpayment of any one annual fee within six months of its due date results in irrevocable extinction of patent. It should be noted that Certificate of Addition (“Certificat d'addition”) used to be granted to holder of principal Certificate of Utility or of principal patent for inventions relating to at least one claim of principal patent. Such titles are no longer issued. (Law of Nov. 26, 1990). However, those Certificates of Addition which were already delivered at date 1990 law entered into force, remain valid as long as does principal Certificate of Utility or patent to which it is accessory.

Inventions of employee made pursuant to employment contract including inventive activity or pursuant to researches and studies of which employee is in charge belong to employer who may directly apply for patent in his own name without any assignment from employee. His rights to compensation are governed by contract and by various industry-wide collective labor conventions. These conventions usually cover not only laborers but also engineers and administrators (“cadres”). Under French case law, rights of employees provided for in these conventions may not be validly abridged or waived by individual contract.

Any other inventions belong to employee, unless made in area of his firm activities or on basis of knowledge or use of means and technics specific to firm or data provided by firm. In this case, employer is entitled to obtain part or whole of ownership or use of rights attached to patent obtained by employee. Employee has to obtain fair compensation fixed by agreement between him and his employer or by specific body in case of failure to reach such agreement.

Foreigners who are domiciled or established in countries not signatories of Paris Convention are protected by French Law, provided French domiciliaries enjoy reciprocal protection in said countries.

Under Paris Convention and Washington Treaty, international priority may be claimed by applicant who files his patent in France within 12 months of his first filing in another member country.

Notification of License Agreements and Assignments.

Under Arts. R 624-1 to R 624-7 of C.P.I., licenses and assignments of industrial property rights are subject to administrative formalities. All agreements involving assignments or licenses to or by French resident of any industrial property rights, including technical, scientific, and engineering assistance and other forms of knowhow, must be submitted to INPI (Industrial Property National Institute) within a month of their execution. Ministry furnishes registration number which must be utilized by licensed banks (intermédiaires agrées) in clearing fees for transmission abroad. Decree no longer provides for Ministry to issue “opinion” on agreement, but it is expected that Ministry will transmit information concerning agreements to fiscal authorities and Bank of France. Arrêté of May 26, 1970 sets forth procedure to be followed in making notification to Ministry. License agreements presently in force need not be submitted to Ministry unless modified.

Prior authorization of exchange control authorities no longer required for transfer of royalties or other payments by French entities to non-French entities under agreements assigning or licensing patents, trademarks, know-how and other industrial property rights. (Law No. 66-1008 of Dec. 28, 1966). See category 14 Foreign Trade and Commerce, topic 14.02 Exchange Control.

Notice of patent licenses may have to be given to EU Commission, unless license agreement falls within group exemption under EU Commission Regulation No. 2349/84 of July 23, 1984 which applies to agreements in force on 31 Mar. 1996, or under EU Commission Regulation No. 240/96 of 31 Jan. 1996, which applies to agreements effective as of 1st Apr.

1996.

Recording.

Assignments and licenses to be enforceable against third parties must be recorded on Special Register at Institut National de la Propriété Industrielle.

Compulsory Licenses.

C.P.I. defines two general types of compulsory licenses: “License obligatoire” (mandatory licenses) and “license d'office” (license granted ex-officio to Government).

Licenses Obligatoires.

Any natural or legal person may, three years after issuance of patent or four years after filing of application therefor and after having unsuccessfully demanded a license from patentee, obtain from Tribunal de Grande Instance, a “license obligatoire,” if at time of such request patentee, without valid excuse, has for more than three consecutive years either totally abandoned exploitation of his patent or failed to exploit it sufficiently enough to satisfy French market needs. “License obligatoire” is nonexclusive and nonassignable without court approval; court determines scope, duration and reasonable royalties. Applicant for “license obligatoire” must prove he is able to exploit patent in serious and effective manner.

Holder of patent relating to improvement over invention already patented by a third party (“brevet de perfectionnement”) cannot exploit his patent without authorization from owner of earlier patent; similarly, owner of earlier patent cannot exploit patent of improvement without authorization from owner of patent of improvement. Failing such authorization, holder of patent of improvement may after the three or four year period referred to in paragraph immediately above obtain license to exploit patent which forms basis of improvement and, in turn, holder of earlier patent may obtain license to exploit patent of improvement.

License d'Office.

(a) Public Health: In case of medical patents, Minister of Public Health may ask Minister in charge of Industrial Property to declare such patents open to compulsory government licensing if medicines are made available to public in insufficient quantity or quality, or at unreasonable prices; (b) National Economy: Minister in charge of Industrial Property may require holders of patents other than medicines to exploit their patents so as to satisfy needs of national economy. If after one year such a request has not been complied with and if absence of exploitation or insufficiency of quality or quantity is seriously prejudicial to national economic expansion or public interest, patent may be subjected to compulsory government licensing and any qualified person, as of date of issuance of decree declaring patent open to compulsory government licensing, may apply to Minister in charge of Industrial Property for granting of “license d'office”; (c) National Defense: State may, for purposes of national defense, obtain “license d'office” at any time for itself or for third party.

Licenses for exploitation obtained for patents affecting public health, national defense or national economy are nonexclusive and may not be assigned or transferred. They are granted by decision of Minister in charge of Industrial Property which decision sets terms and conditions and duration of licenses; royalties, however, absent agreement of parties, are fixed by Tribunal de Grande Instance.

Infringement.

In case of infringement, an order from Tribunal de Grande Instance may be obtained authorizing real or symbolic seizure (“saisie contrefaçon”) of infringing articles by a “huissier” (process server). Main purpose of this procedure is to discover and determine existence and extent of suspected infringement. Patent infringement is generally civil offense, but all prejudice knowingly caused is penal offense punishable by fine and/or imprisonment. However, criminal court has jurisdiction only after civil court has acknowledged infringement. Both civil and criminal action must be brought within three years of occurrence of alleged wrong. Additional remedy may be confiscation of all infringement products or, in case of process patent, even of special tools or machines which are designed to produce infringing article.

Know-How.

Although not defined by legislative text, know-how is recognized by case law as form of property which may be transferred and protected by agreement and in exchange of which, “owner” may be paid royalties. Notice of transfers of know-how may have to be given to EU Commission, unless transfer falls within group exemption under EU Commission Regulation No. 556/89 of Nov. 30, 1988 which applies to agreements in force on 31 Mar. 1996, or under EU Commission Regulation No. 240/96 of 31 Jan. 1996, which applies to agreements effective as of 1st Apr. 1996.

Designs and Models.

(C.P.I., Arts. L.511-1 to L.521-7).

Any object which is not patentable, may be protected as model or design if it has unique shape or form or surface design (including color scheme) which distinguishes it from other similar products and which appeals to the esthetic sense. Such esthetic shape or surface design must be original. Exclusive proprietary right to such creation is acquired by its author through mere act of creating it; registration as design and model is mere prima facie evidence of ownership. (Author may also acquire rights in object based on C. P. I. provisions relating to authors' and artists' rights. See topic 17.01 Copyright.)

Procedures for registration of designs and models is as follows: Applicant must deposit with “Institut National de la Propriété Industrielle” (if domiciled in Paris or outside France) or otherwise with Clerk of Commercial Court of applicant's domicile, reproduction of design or model, which will be accepted if it is properly described and if its publication would not be contrary to public policy. Protection is valid for five years renewable for five-year period up to maximum of 25-year protection.

Infringement suit in the case of models and designs is similar to that in the case of patents or of trademarks, and, similarly, it can be initiated by preliminary seizure proceeding (“saisie-contrefaçon”). Infringement proceedings, however, are available only to owner of registered design and model, and suit may be started only after publication of such registration. Bad faith is always presumed when there is infringement (cf. Trib. Corr. of Belfort, Apr. 25, 1980. G.P. 12-13 Sept., 1980 P. 8). Damages for infringing acts committed by defendant after registration of design and model but before its publication will be awarded only if knowledge and bad faith on part of defendant are proved.

Owner of unregistered design or model may proceed against infringers either under the special C. P. I. provisions protecting authors' and artists' rights (see topic 17.01 Copyright), or he may sue them for unfair competition under general tort provisions of Civil Code.

In order to be enforceable against third parties, contracts affecting rights to design or model must be registered with National Register of Designs and Models.

Under Paris Convention, international priority may be claimed by applicant who files his French design and model registration within six months of his first filing in another member country.

Decree No. 92-792 and Arrêté of Aug. 13, 1992 provide detailed rules for registration of designs and models.

Semi-Conductor Chips.

(C.P.I., Art. L.622-1 to L.622-7). Legislation is similar to U.S. Chip Law. Law provides protection for “final or intermediary topographies” of semiconductors if they (1) “demonstrate an intellectual effort of the inventor” and (2) are not commonly used in semiconductor field. Protection is acquired by registration with National Institute of Industrial Property (Institut national de la propriété industrielle) for period of ten years. Protection may be lost if chip is not commercially used. Reproduction of registered chip is prohibited except for purposes of evaluation, analysis or education. Marketing or importing of unlawfully reproduced chips is also prohibited. Reverse engineering is permitted if it leads to development of another chip design which can be protected under Law. Law refers to relevant provisions of patent law concerning transfer and acquisition of rights conferred by registration, sanctions and dispute resolution.

Foreigners are protected if either (1) they are domiciled or resident or established in EU; or (2) they market, pursuant to exclusive license for entire EU, chip not previously protected by Law; or (3) they are domiciliaries or established in countries in which French domiciliaries enjoy reciprocal protection.

Trademarks.

(C.P.I., Art. L.711-1 to L.716-16).

Trademarks may be registered to cover goods as well as services. Registrable as trademarks are any names, including proper names, fictitious names, geographical names, or any arbitrary or imaginary words, signs or symbols, characteristic forms or shapes of products or their containers or presentation, labels, wrappers, emblems, stamps, seals, combinations or dispositions of colors, designs, reliefs, letters, numerals, and, in general, any and all material signs serving to identify and distinguish products or services from similar products or services. (Registration of proper name will not prevent natural person from using in good faith his own name in his business activities, but court may prohibit or regulate manner of using such unregistered proper name so as to avoid confusion of public with identical or similar name registered as trademark.)

Not registrable are trademarks: (1) Containing elements contrary to public order or morals, (2) containing elements prohibited by Art. 6 ter of Paris Convention (national and international emblems), (3) consisting exclusively of necessary or generic designation of product or service or containing deceptive or misleading indications, or (4) consisting exclusively of indications or descriptions of essential quality or composition of product or service. It seems, however, that generic or usual designation may become registrable when it has been in use and has through this use come to acquire distinctive character for long period of time. (cf. Cass. com. May 7, 1980. Société Verrerie de Biot. G.P. Oct. 12-14, 1980).

Registration may be refused for lack of originality or based on opposition proceeding. Registration may be challenged by existing trademark holder or its licensee within six months of request for registration. Rights in trademark acquired by registration may only be challenged within three years of registration request unless bad faith of registrant is shown. Registration requests filed before effective date of new law will be processed and examined according to law being replaced. Court of Appeals of Paris has exclusive jurisdiction to hear any complaints resulting from rejected application. (C.P.I. contains provisions necessary for implementation of law and for implementation of opposition proceeding. New proceeding allows individuals with anterior rights to oppose registration of trademark.)

Applications for registration may be filed by any natural person or legal entity either directly with National Institute of Industrial Property (Institut National de la Propriété Industrielle) or through clerk of commercial court of applicant's domicile or permanent business establishment. Trademark registration is subject to payment of fees set forth in Arrêté of Dec. 28, 1992. Foreigners with no domicile or permanent business establishment in France may register trademarks and enjoy full protection of law even without first filing in home country, provided that applicant is domiciliary or established in member country to Paris Convention or of country granting reciprocal privileges to French domiciliaries. Such foreigners must file trademark application directly with National Institute of Industrial Property and elect domicile in France for that purpose.

Benefit of priority date of foreign registration, if any, may be obtained under Paris Convention if French application is filed within six months of foreign application, but such priority must be claimed in writing at time of filing French application, or, upon payment of late fee, within six months thereof.

All applications are classified, entered on National Trademark Register, and published in Bulletin Officiel by National Institute of Industrial Property. France uses International Trademark Classification comprising 34 classes of goods and eight classes of services.

Duration of registration is ten years from date of filing application; it may be renewed for indefinite number of additional ten year periods. Formalities of renewal are same as of registration. Renewal registration should be effected before expiration of preceding term (in which case new period starts with date of renewal application), but it may also be undertaken any time within six months of expiration of preceding term upon payment of late fee (in which case new period starts with date of expiration of preceding term).

Property right in trademark is created only by registration; mere use of unregistered trademark does not provide basis for legal protection. As between two registrants in good faith, one with earlier filing date, or earlier Convention priority date, has precedence and may apply to court for radiation or assignment of later registrations. Exception is made for “well-known trademarks” covered by Art. 6 bis of Paris Convention, whose owners, even without registration in France, may demand cancellation of confusingly similar registered trademarks. If such conflicting trademark has been registered in good faith, action for cancellation under this provision is limited to five years from its registration date.

French trademark registration may be obtained without showing previous use of trademark by applicant or existence of established business. However, all rights in trademark are forfeited if trademark is not publicly and unequivocally exploited, without valid excuse, for five years preceding challenge in court. Exploitation in only one class of trademark registered in several classes of goods and/or services, may be sufficient to save that trademark from forfeiture with respect to other, unexploited classes, but only if such partial forfeiture would create confusion of public detrimental to remaining exploited portion of registered trademark. Issue of forfeiture can be raised either as defense in infringement suit or in separate court action by any interested party. Burden of proving sufficient exploitation or valid excuse is upon owner of trademark. Under new law, statute of limitation for infringement action is three years. Infringement action may be brought by trademark holder, or by its licensee if trademark holder takes no action after receiving notice from licensee. Absolute bar to infringement action exists after five years from registration, except where registration was procured in bad faith.

Manufacturers' syndicates, trade associations, regional organizations, etc., may register “collective trademarks” to be used by their members to indicate origin, quality, or composition of their goods or services. Use of “collective marks” is strictly regulated and penalties are provided for misuse or abuse. Law permits applicant for registration of trademark to commence infringement action against third party, after notice to such third party of application, for acts of infringement occurring after such notification. Applicant may obtain seizure (“saisie contrefaçon”) subject to verification of application and notification, and court will suspend judgment pending actual registration and publication.

Trademark infringement covers unlawful copying (contrefaçon), affixing or using (apposition frauduleuse), imitating (imitation frauduleuse) of someone else's registered trademark in connection with same or similar goods or services so as to create confusion in minds of customers or clients, or knowingly holding, handling, selling, or offering for sale, goods or services under infringing mark. Action for trademark infringement is similar to patent infringement (see subhead Patents, supra). Suit may be commenced by real or descriptive seizure of articles bearing infringing mark, as well as of books and records showing extent of infringement; it may be prosecuted either in criminal or civil action, and criminal penalties are provided for in addition to civil damages (they may include confiscation of all articles bearing infringing trademark).

Trademark assignments, licenses and pledges can be made independently of any transfer of going business (good will); they must be evidenced by writing, and, in order to be enforceable against third parties, they must be recorded on National Trademark Register at National Institute of Industrial Property. Agreements involving foreigners are subject to conditions set forth above under subhead Patents. Licenses, but not assignments or pledges, may be granted for limited territory within France. Collective trademarks may not be assigned or pledged.

Under terms of special Franco-Italian treaty of Oct. 21, 1959, in effect since Jan. 31, 1961, any applicant for French trademark may have his registration extended to Italy with same effect as if he had filed it directly in Italy.

France is signatory to Madrid Convention (Nice Revision of June 15, 1957), but foreigners may take advantage of international trademark registration provided thereunder only if they have citizenship, domicile, or permanent business establishment in one of member countries (U.S. and U.K. are not members).

EU Trademarks.

European Council regulation No. 40/94 of Dec. 20, 1993 established system of community trademark. EU trademark as unit characteristic, produces same consequences in whole European Community and can be registered, assigned, forfeited or cancelled only for whole Community. Head office of Community agency is in Alicante (Spain). Applications for registration may be filed by any natural person or legal entity, who is national of, domiciled or established in member State of EU or signatory to Paris Convention or to World Trade Organization. It grants its owner exclusive right throughout whole EU.

Plant Variety Rights.

Arts. L.623-1 to L.623-35 of C.P.I. organize protection of plant variety rights. Plant varieties are protected (Art. L.623-1) when they are uniform, distinct, stable and new. Each plant variety may benefit from “Certificate of Plant Variety” (“Certificat d'Obtention Végétale”) which gives its owner exclusive right to produce, sell or offer to sell all or part of plant in France. (Art. L.623-4). Such certificate is granted for period of 20 years or 25 years if plant variety production requires long period. (Art. L.623-13). Any infringement to rights resulting from certificate is criminal offense punished by penalty.

European Council Regulation of July 27, 1994 (No. 2100/94) established system of community plant variety rights as sole and exclusive form of community industrial property rights for plant varieties. Such protection will be without prejudice to rights of Member States to grant national property rights for plant varieties. However, varieties which are subject matter of community plant variety rights cannot be subject matter of any other form of national plant variety rights or patents.

See also topic 17.01 Copyright and category 3 Business Regulation and Commerce, topic 3.16 Unfair Competition.

17.04 MODELS AND DESIGNS:

See topic 17.03 Industrial Property Rights.

17.05 PATENTS:

See topic 17.03 Industrial Property Rights.

17.06 TRADEMARKS AND TRADENAMES:

See topic 17.03 Industrial Property Rights.

18 LEGAL PROFESSION

18.01 ATTORNEYS AND COUNSELORS:

Effective Jan. 1st, 1992, and pursuant to Law No. 90-1259 of Dec. 31, 1990, legal profession was reorganized and prior distinction between “avocats” (litigators) and “conseils juridiques” (counselors) no longer exists. New profession consists only of “avocats” who may give legal advice and appear in court. Attorneys admitted to practice in foreign countries may become “avocats” under certain conditions.

Admission.

Applicants must hold “Maîtrise en droit” i.e. law degree obtained after four years of study in law school. Decree of Dec. 26, 1991 lists other degrees, which are considered as equivalent to “Maîtrise en droit” for purpose of admission. List includes foreign degrees necessary in order to practice regulated legal profession in foreign country. In addition, European Directive 89/48/CEE of Dec. 21, 1988 regarding mutual recognition of diplomas must be taken into account.

Applicants must then pass examination for admission to “Centre Régional de Formation Professionnelle” (CRFP) where they follow one year training course, including classes and internships in law firms and/or legal departments of companies and courts. At end of this one year period, applicants are required to pass examination and receive “Certificat d'Aptitude à la Profession d'Avocat” (CAPA) entitling them to admission to bar.

Admission of Foreign Attorneys.

Attorneys from non-EU countries may be admitted upon passing special exam. Attorneys from EU countries may be admitted on basis of “de facto” reciprocity. These attorneys are required to pass professional exam.

Registration of Attorneys.

Attorneys admitted to practice are registered with Bar (“Barreau”) in locality of their professional practice.

French avocats are only allowed to appear alone before courts of civil jurisdiction (Tribunal de Grande Instance) of Bar to which they are admitted. In order to appear before such courts in other jurisdictions, they must engage “correspondant”, who is registered with bar of that jurisdiction. French avocats may appear before any commercial court. Foreign lawyers from non-EU countries may not appear in French courts, even accompanied by French avocat.

Status of Attorneys.

Traditionally, “avocats” have practiced law as independent professionals. Under this status, “avocats” are allowed to have their own clients, even if they are associates in law firms. Above mentioned Law of Dec. 31, 1990, now allows “avocats” to be salaried employees. Salaried “avocats” are subject to different social security regime than independent “avocats” and may not have their own clients. Whether working as independent advisors or as salaried employees, all “avocats” are subject to same ethical rules.

Code of Ethics.

Attorney-client privilege: correspondence and exchanges of any kind between “avocat” and his client are absolutely confidential.

Correspondence and contacts between “avocats” are confidential and in principle may not be used in court. However, agreement resulting from this correspondence is considered as “official” and can be used in Court. Law No. 97-308 adopted by French Parliament on Apr. 7th, 1997 extends scope of “Avocat's professional secret” to “Counsel Activities”.

French procedure is adversarial and “avocat” for each party must communicate to “avocat” for other party written pleadings and supporting evidence. Any correspondence addressed to court must be communicated to “avocat” of other party.

“Avocats” are subject to obligations regarding legal assistance to indigents.

Specialization.

CRFP may grant to “avocat” certificate of specialization. Criteria used to grant such certificate are degrees and practice experience in area of specialization. Specialization of “avocat” may be mentioned by words “Conseil en ” or “Spécialiste en ”, or “Titulaire du certificat ” followed by name of specialization. C.N.B. has proposed list of 14 areas of specialization.

Professional Associations include: The Conseil National des Barreaux (CNB) which represents profession before administration and monitors harmonization of rules of profession. CNB also determines categories of persons who may benefit from European Directive 89/48/CEE of Dec. 21, 1988 regarding mutual recognition of diplomas. Its members are elected from each “Barreau” (local Bar Association).

Address and phone: 23 rue de la Paix, 75002 PARIS, tel. 01.53.30.85.60, fax. 01.53.30.85.61.

Local Bar Association: there is one Barreau for each Appellate Court jurisdiction (“Cour d'Appel”). Each “Barreau” has Conseil de l'Ordre, which is headed by “Bâtonnier”.

Addresses and phone numbers may be obtained from local “Cour d'Appel”.

19 MINERAL, WATER AND FISHING RIGHTS

19.01 MINES AND MINERALS:

Mining Code, which governs exploration and exploitation of mines and minerals, including liquid and gaseous hydrocarbons, was substantially modified by Law No. 94-588 of July 15, 1994 and its implementating Decrees No. 98-9870 of Oct. 26, 1998 and No. 95-427 of Apr. 19, 1995, relating to procedure for granting mining titles, No. 95-696 of May 9, 1995, relating to authorization procedure for commencing mining works, and application of mine policing (control of mining work consequences on water and environment). Ministerial order (arrêté) dated July 28, 1995 was signed by Minister of Industry to supplement Decree No. 95-427 of Apr. 19, 1995, and to set out locations for filing mining title applications. Law No. 98/297 of Apr. 28, 1998 partly extends Mining Code provisions to overseas departments, enacts certain special rules in such jurisdictions, and provides for optional creation of Department of Mines in each overseas department. Law No. 99-245 of Mar. 30, 1999, Law No. 2000-1207 of Dec. 13, 2000, Ordinance No. 2000-914 dated Sept. 18, 2000, Law No. 2003-8 dated Jan. 3, 2003 and Law No. 2004-105 dated Feb. 2004 also complete and amend Mining Code.

Although theoretically surface landlord is legal owner of sub-surface as well (C.C. Art. 552), any research work must be declared to “Prefet” (Art. 7, Mining Code), and any activity involving exploration or exploitation is subject to prior approval. Administrative court decree (décret pris en Conseil d'Etat).

One of goals of new Law of July 15, 1994 is simplification of various existing mining rights. As result, new code only contains two mining titles: exploration permit, which grants right of exploration, and concession, which grants right of exploitation of minerals (former “Exploitation Permit” no longer exists).

Right to explore for minerals may be obtained as follows: (a) By surface owner or by person with owner's consent after declaration to local Prefet; (b) by authorization from Minister in charge of mines (for renewable two year period) (if owner of surface has not consented); or (c) by virtue of exploration permit granted by decree (Art. 7, Mining Code). Only exploration permit grants exclusive right of exploration for certain substances within defined perimeter. There are two types of exclusive exploration permit (c above): H permit for liquid and gaseous hydrocarbons, and M permit for other mineral substances. Both H and M permits are granted for maximum period of five years, and are renewable twice for same length of time. Holder of exclusive exploration permit is entitled to conversion thereof into concession, if results are favorable.

Concession grants its holder exclusive right to exploit minerals for maximum period of 50 years, and is renewable twice for periods up to 25 years (Art. 29, Mining Code). Concession constitutes real property right (Art. 36, Mining Code), entirely separate from surface ownership, and cannot be mortgaged. In overseas departments, exploitation authorization is provided for small-scale exploitations, and exploitation permit for industrial production. (Mining Code, Art. 68, as modified by Law No. 98-297 of Apr. 28, 1998).

Transfer of exclusive research permit, and transfer or lease of concession requires prior administrative approval. Any transfer or lease agreement not in compliance with Mining Code formalities and requirements is null and void. (Arts. 119-5 et seq., Mining Code).

Procedures for application for exploration permits and concessions are set forth in Decree No. 95-427 of Apr. 19, 1995 as modified by Decree 2001-50 dated Jan. 19, 2001, and Arrêté of July 28, 1995. Main change in new law is that no public inquiry is required before exploration permit is granted: upon filing application for permit, notice (“avis”) is published in Official Journal (“Journal Officiel”), which is followed by 90-day period for submission and evaluation of competing applications. After application period, Administration of Mines chooses best (financially and technically) proposal, and transmits it to “Conseil Général des Mines”, for avis, before transmittal to Minister in charge of Mines, who will grant permit by ministerial decree (“arrêté”). Concessions, however, are still subject to public inquiry during 30 days after publication of notice in Journal Officiel. Upon evaluation of application, it is transmitted to Minister of Mines and then to Conseil d'Etat which then grants concession by decree.

Decree No. 95-696 of May 9, 1995 as amended by Decree 2001-209 dated Mar. 6, 2001 sets forth authorization procedure for commencement of mining works and environmental regulations applicable to such works. Provisions of Law on water resources, dated Jan. 3, 1992, are integrated in provisions of this Decree.

Authorized administrative agents may inspect research and concession site at any time, and may require communication to them of any document required. (Art. 77, Mining Code).

Open cast mining and quarries regime was modified by Law No. 94-588 of July 15, 1994, to take into consideration Law No. 93-3 of Jan. 4, 1993 which subjects quarries to legislation concerning protected sites and their regulated access. Arrêtés of Jan. 10, Jan. 23, and Dec. 31, 1998, provide procedures and formula for determining financial guarantee relating to site rehabilitation required of title holders in connection with use of certain classified installations during exploitation of quarries. Decree of Feb. 12, 1999 requires operator to report any incident or accident which could endanger public safety and increases prefect's broad powers for policing quarries exploration and exploitation in his district (departement). Right to exploit quarries is subject to exclusive quarries permit. (Arts. 109-119, Mining Code).

Mining Code (Art. 75-1) holds to make prospector, operator and title holder liable for damages resulting from mining activities. Such liability is not limited to mining title area or term. In case of disappearance or incapacity of such parties, State guarantees reparation of damages and is subrogated to rights of victim. Law No. 99-245 created Agency for the Prevention and Policing of Mining Risks (Agence de prévention et de surveillance des risques miniers). Upon completion of mining works, title holder is required to deliver to such public authority report on consequences of its mining works on water and gas seepage and on environment generally as well as measures that it proposes to put into place to preserve environment, historical and archaeological sights and public safety. After consultation with local authorities, Agency prescribes rehabilitation works and deadline for title holder to complete same.

Law No. 99-245 also grants State broad authority to take all necessary measures in case of accident during exploitation and requires seller of land on which mining exploitation activities were conducted to describe in writing to purchaser existence of such activities, and, to best of its knowledge, existence of any significant dangers or consequences resulting from such exploitation. Absent such notification, purchaser can petition for rescission of sale, restitution of part of purchase price, or in certain cases rehabilitation of site at seller's expense.

Mining Code also contains special provisions regarding radioactive elements, duties and fees levied on mining titles, and sanctions for noncompliance.

19.02 WATER AND FISHING RIGHTS:

French maritime seas delimited by Law No. 71-1060 of Dec. 24, 1971 and its economic zone defined in Law No. 76-655 of July 16, 1976 as modified by Law 2003-346 dated Apr. 15, 2003. This economic zone is situated within fishing zone of European Union further to declaration of July 27, 1976. Maritime fishing defined in Decree of Jan. 9, 1852 (modified by Law No. 85-542 of May 22, 1985, Law No. 86-2 of Jan. 3, 1986, Law No. 91-627 of July 3, 1991 and Law No. 97-1051 of Nov. 18, 1997 modified by Decree No. 98-851 dated Sept. 16, 1998), is free in principle, but commercial fishing is subject to satisfaction of certain conditions (Decree No. 67-690 of Aug. 7, 1967, Law No. 91-627 of July 3, 1991), and subject to regulations relating to over-fishing, protected species, authorized nets and related equipment (Decrees No. 90-94, and No. 90-95 of Jan. 25, 1990). French authorities may seize prohibited equipment at place of manufacture, on vessel at sea or on dock, as well as produce from fishing with such equipment. (Decree No. 83-532 of July 5, 1983). Maritime aquaculture is subject to exploitation authorization (Arrêté of Oct. 19, 1983). All commercial maritime fishermen, operators of maritime aquaculture facility, initial purchasers of fish and fishery product manufacturers are members of Interprofessional Organization of Maritime Fishing and Nurseries, under authority of Ministry charged with maritime fishing, and whose duties are management of resources, and protection of general interest of their activities. Recreational maritime fishing for most species is not subject to licence, is subject to minimum capture size and prohibition against sale. Prefects and state representatives of Normandy, Brittany, Loire, Aquitane, Provence, Alpes, Côte d'Azur and Corsica as well as in overseas departments and territories have authority to issue regulations regarding size and capture number for protection of species. (Decree No. 84-846 of Sept. 12, 1984, and Decree of July 11, 1990 as modified). Sale of produce from recreational maritime fishing for most species not subject to licence, and sale of produce from such activity is prohibited. Prohibition against foreigners fishing in French maritime waters removed. (Law No. 85-54 of Mar. 22, 1985).

Rules relating to commercial and recreational freshwater fishing are contained in Rural Code, which grants authority to local administration and accredited fishing organizations for management, protection and granting of required licences. Quotas are fixed each year by ministerial order for salmon and trout fishing. Finally, Ordinance No. 98-523 dated June 24, 1998 governs regime applicable to commercial fishing in Antarctic and Southern lands.

Provisions regarding protection, management and conservation of water and waterways are contained in Rural Code, Public Health Code, Code on the Public Fluvial Domain and Interior Navigation, Maritime Ports Code and various laws, decrees and arrêtés.

See also topic Environmental Law.

20 MORTGAGES

20.01 CHATTEL MORTGAGES:

Chattel mortgages exist in limited cases provided by law. Most important is general mortgage (nantissement) on entire business as going concern (fonds de commerce), which includes firm equipment, tradename, patents and trademarks, good will, lease rights, but not inventory of merchandise or accounts receivable and accounting books. Possibility of chattel mortgage has been extended to fonds artisanal. (Law No. 96-603 of July 5, 1996). This general mortgage must be filed within 15 days of creation with clerk of Commercial Court. Mortgage is null and void if not registered. (Art. L.142-4 of Commercial Code). Registrations are deleted either with consent of parties or by virtue of judgment. (Art. L.143-2 of Commercial Code). Without judgment, registrar can proceed with deletion if creditor has consented to that deletion either in affidavit registered with Notary or in duly registered private instrument. (Law No. 2003-721 of Aug. 1, 2003).

By Law of Jan. 18, 1951, chattel mortgage may be placed on all types of industrial and professional equipment (See also Decree of Sept. 30, 1953). Recordation requirements are essentially same as for general mortgage. Chattel mortgages also exist for automobiles, ships and airplanes, motion pictures, each under special procedure, e.g., for automobiles, registry at Préfecture within three months of registry of new car. As rule, failure to register within various periods prescribed renders mortgage null and void. Except for automobiles, no consumer goods may be subject to chattel mortgages. Chattel mortgages may also be undertaken on stocks and shares.

In any event, mortgagees are not deprived of their goods while chattel mortgages goes on. Mortgagees must obtain judgment ordering sale of mortgaged goods.

20.02 COLLATERAL SECURITY:

See category 7 Debtor and Creditor, topic 7.12 Pledges.

20.03 MORTGAGES:

Mortgages (“hypothèques”) are of three classes: (1) Legal (C. C. 2121); (2) judicial, arising from judgment against debtor (C. C. 2123); and (3) contractual, which can be created only by instrument formally executed before notary (C. C. 2127). Contract executed abroad cannot create mortgage on property located in France, unless provided by international agreements. (C. C. 2128).

Ranking of mortgages depends on date of registration with Land Registry. (C.C. 2134). For mortgage debts to be paid within fixed period, registration of mortgage will be effective for period not exceeding two years beyond this fixed period for repayment, or total of 35 years, whichever is shorter. Registration must be renewed prior to its expiration date to retain priority of mortgage. (C. C. 2154). Personal obligation of mortgagor remains if mortgage is not duly registered, but mortgagee loses all protection against bona fide purchasers. (C. C. 2134). Mortgage can only be cancelled by formal release, either by notarial act or by judgment. (C. C. 2157).

If mortgagor defaults in payment while still owning property, mortgagee may cause property to be attached and sold at auction to satisfy mortgage debt. (See category 7 Debtor and Creditor, topic 7.02 Attachment). If proceeds of sale are not sufficient to pay debt, creditor may proceed against debtor personally for rest.

Purchaser from mortgagor has right to “purge” (release) property of mortgage by payment at time of purchase to mortgagee either of full debt if it is inferior to purchase price, or of purchase price if it is inferior to debt. (C. C. 2184). In latter case, property is free of mortgage but mortgagee may proceed against principal debtor personally for unpaid balance. If mortgagee finds purchase price too low, he may compel sale at auction, provided he agrees to commence bidding at price 10% above purchase price. (C. C. 2185). If there is no purgation at time of sale, and if principal debtor later defaults, owner may still offer to “purge” by paying mortgagee amount of debt up to purchase price of property, then assuming pro tanto mortgagee's rights against debtor on latter's personal obligation. If owner declines to purge, mortgagee may cause property to be attached and sold at auction, retaining his rights against principal debtor for unpaid balance. (C. C. 2169).

Privileges.

Certain liens have by virtue of their nature priority over all other securities including mortgages (C. C. 2095), most important being that of Treasury (Trésor public) (C. C. 2098), that of Social Security (C. C. 2101), that of seller of real estate for unpaid purchase price, or that of architect or contractor for expense of construction or repairs (C. C. 2103). Privileges on immovables produce effect as between competing creditors only when registered with Land Registry. (C. C. 2106; see category 9 Documents and Records, topic 9.05 Records). Ranking depends on nature of privileges. Privileged creditors of some ranking are paid in proportion to their debt. (C. C. 2096, 2097). However, seller has two months in which to register, without loss of priority in that time. (C. C. 2108).

Antichresis is device in French law whereby creditor acquires right to collect revenue of real estate and apply it against interest and principal of debt. (C. C. 2085). Unless otherwise agreed, creditor must pay taxes and maintain property in good repair. (C. C. 2086). This does not prejudice other existing mortgages or preferences. (C. C. 2091).

See also category 9 Documents and Records, topic 9.04 Notaries Public.

21 PROPERTY

21.01 ABSENTEES:

When person has disappeared from his last domicile and there is no evidence of further existence of that person, interested parties and public authorities (“Ministère Public”) may apply to court (“Juge des Tutelles”) of his last domicile for “judgment of absence”. (C. C. 112). Court may designate relatives or any other person to represent absentee and administer his property. Powers of representation, and in particular power to administer absentee's property, are subject to restrictions similar to those applying to guardians of minors. (C. C. 113). (See category 13

Family, topic 13.05 Guardian and Ward.) Court may fix amount of representative's remuneration and may replace representative. If absentee reappears, he regains property in condition at time of reappearance. (C. C. 118-119).

After ten years following “presumption of absence” judgment, court at request of interested parties or public authorities (“Ministère Public”) may declare absence conclusive. (C. C. 122). Specified public notice requirements must be met. Judgment is rendered one year after public notices (C. C. 125) and has same effects as those resulting from absentee's death (C. C. 128). If absentee reappears, he regains property, including property which he should have received during his absence, in conditions at time of reappearance. (C. C. 130). Marriage remains dissolved even though absence judgment has been annulled. (C. C. 132).

If person in question has not reappeared for 20 years, and no “presumption of absence” judgment has been taken, interested parties or public authorities may apply for judgment of absence. (C. C. 122).

Estate to which there is no claim becomes property of State. (C. C. 768).

See also category 12 Estates and Trusts, topic 12.02 Death.

21.02 CURTESY:

This common law institution does not exist in France. See category 13 Family, topic 13.06 Husband and Wife.

21.03 DEEDS:

All instruments for transfer of real property interest must be by notarial act or contract. Notary keeps original deed in his files. Extracts from deed are entered upon Register of Real Estate Mortgages. (Decree of Jan. 4, 1955 modified by Decree 98-515 of June 23, 1998). Failure to register leaves instrument valid as between parties, but enables bona fide third party purchaser to obtain good title to property. Under registration statute, first person to register among several claiming under deeds from last registered owner acquires good title.

Notary must verify that seller is owner of real property. (Cour de Cass., 1ére civ., Feb. 12, 2002, pourvoi 99-11106, Juris Data No. 2002-012954). Also he must verify status of liens and mortgages registered on property before sale and at moment of publication of sale. (Cour de Cass., 1ére civ., Jan. 6, 1994, pourvoi 91-22181).

See topic 21.09 Real Property; category 9 Documents and Records, topics 9.04 Notaries Public, 9.05 Records.

See also category 13 Family, topic 13.06 Husband and Wife, subhead Alienation of Property.

21.04 DOWER:

This common law institution does not exist in France. Under community property regime, wife automatically enjoys half interest in assets purchased by spouses during marriage with their own income or savings, and in gifts to spouses, unless donor expresses contrary intention. See category 13 Family, topic 13.06 Husband and Wife.

21.05 ESCHEAT:

See category 12 Estates and Trusts, topic 12.04 Descent and Distribution.

21.06 GIFTS:

Deed of gift of real property must be by notarial act (C. C. 931) and expressly accepted by donee before donor becomes bound (C. C. 932). Gift of personal property is valid where there is actual delivery. Actual delivery may occur by simple transfer of funds from one bank account to another. Acceptance by minors and incapacitated persons must be by their legally appointed guardians. (C. C. 935). Gift can never include future property (C. C. 943), but it is possible to transfer remainder interest as gift, usufruct being kept by donor.

Gifts are as a rule irrevocable with revocation possible only in following cases: Express stipulation by donor that gift be returned if donee predeceases donor with or without surviving descendants (C. C. 951); nonperformance of express conditions of gift (C. C. 953); proof of base ingratitude, as refusal to provide basic necessities to donor in need (C. C. 953); subsequent birth of children (C. C. 953); gifts between spouses made during marriage (C. C. 1096). Further, extent to which donor may make valid gift is limited by legal reserve requirements as is any disposition of property by will (see category 12 Estates and Trusts, topic 12.07 Forced Heirship) and donee is liable for same tax as on property passing by succession (see category 22 Taxation, topic Taxes). In case of divorce rendered on grounds of exclusive fault of one of spouses, party at fault automatically loses benefit of gifts received from other spouse. (C. C. 267).

All donees may ask judge to revise conditions and charges of deeds or gifts received, if after change of circumstances, performance and compliance are rendered difficult or seriously damaging for donees. (Law of July 4, 1984 as codified in C. C. 900-2 to 900-8).

See also categories 9 Documents and Records, topic Notaries Public; Estates and Trusts, topic Forced Heirship.

21.07 LANDLORD AND TENANT:

Commercial Leases.

Leases of premises utilized for business, industry or trade, are generally described as commercial leases and governed by Arts. L.145-1 to L.145-60 of Commercial Code which transpose Decree 53-960 of Sept. 30, 1953, which has been substantially amended by number of subsequent laws and decrees. Under present law (Arts. 3-1, L.145-4 C. Comm.), duration of commercial lease must be at least nine years with right of termination by tenant at end of each three-year period; however, on first entry into premises, parties can agree to term of two years or less (“bail précaire”) but tenant then has no right of renewal and rent increases are free (Art. L.145-5 C. Comm.). If tenant remains after two years or if lease renewed, it automatically becomes nine-year lease by operation of law.

Principal significance of commercial lease is tenant's right either to renew lease upon expiration or, if landlord refuses renewal, to receive substantial indemnity for loss of leasehold right. This right arises if tenant has operated business, industry or trade for more than three consecutive years in premises. Leasehold right, with right to renewal or compensation in lieu thereof, is referred to as “droit au bail” or “propriété commerciale.” Right can be defeated by landlord only for legitimate cause such as serious breach by lessee. Ceiling applies to rent on renewal. (Decree of July 3, 1972 and Law of Dec. 26, 1975).

Every three years, either party may request change in rent. Change may not exceed variation of official index of construction costs unless leasehold value has increased by over 10% due to change of commercial nature of locale. Law No. 2001/1168 dated Dec. 11, 2001 amending rules governing commercial leases, provides that renewed rent shall correspond to leasehold value. However, implementation of such Law reveals that in practice renewed rent will never fall under amount of rent initially agreed between parties unless leasehold value decreased over 10% as described hereabove. If parties are unable to agree on new rent, it will be determined by court action.

Subleases of commercial premises are forbidden without consent of landlord unless lease provides to contrary. If rent in sublease is higher than in principal lease, landlord has right to corresponding increase in rent. Subtenant has right of renewal against sublessor to extent of latter's right against landlord. On expiration of principal lease, authorized subtenant generally has right of renewal against landlord. (Arts. L.145-31 and L.145-32 C. Comm.).

Commercial lessee may assign leasehold right to successor in business, without consent of landlord. Otherwise, consent is necessary unless assignment permitted by lease.

Under Law No. 71-585 of July 16, 1971 modifying Art. L.145-47 C. Comm., tenant may engage in additional activities related to principal business, provided landlord is informed thereof. Tenant may also request permission from landlord to engage in new and unrelated activities; landlord can refuse only for serious cause but can be authorized by court to increase rent.

Residential and Professional Leases.

Leases are governed by four different laws, Law of Sept. 1, 1948, Law of June 22, 1982 nearly entirely deleted, Law of Dec. 23, 1986, Law of July 6, 1989 and Law of July 21, 1994 modifying certain aspects of Law of July 6, 1989, which apply according to date of signature and renewal of lease and according to type of lease in question.

New Law of July 6, 1989 No. 89-462 replaces certain provisions of Law of Dec. 23, 1986 No. 86-1290, granting stronger protections for tenants and reinstating certain aspects of law of June 22, 1982. Most significant changes are as follows: Landlord may now refuse to renew lease only if he intends to sell property (in which case he has to comply with Art. 15 of Law which requires him to give priority to tenant for buying of premises), occupy premises, or has just cause (i.e. tenant has failed to fulfill his obligations); initial rents for old premises which have not been improved in previous six months are set by reference to standard rents for comparable premises; and on renewal, rent increase may exceed standard rent increase only if rent is obviously subnormal. Art. 1 of Law of July 6, 1989 has been modified by Law of Jan. 17, 2002 (No. 2002-75) to protect tenants from any discrimination (for example: race, sex, health....).

Law of Dec. 23, 1986, known as Loi Méhaignerie, applies to all leases signed after Dec. 23, 1986 and is destined to replace other two entirely. Art. 3 of Law of July 6, 1989 provides that lease must be in writing. Lease must be concluded for minimum of three years if tenant is person and six if tenant is professional; however, if lessor can justify at time of conclusion of lease forthcoming professional or family occurrence necessitating that he take back premises, lease may be for less than three years, within one year minimum. Lessor may terminate lease to take back premises or sell them or if tenant has failed to fulfil his obligations. Tenant may terminate lease at any time with three months notice. Contrary to previous law, tenant has no right to renewal of lease; lessor must, six months before end of lease, notify tenant of either termination (provided it is justified by one of reasons mentioned above) or terms of renewal; failing acceptance by tenant of lessor's terms within three months, lease is terminated; in case of acceptance, lease is renewed for three years; if lessor fails to notify tenant either way six months before end of lease, lease is automatically renewed for three years. Rent can be fixed freely by parties at conclusion and at each renewal of lease; increases in rent during term of lease can only occur yearly and must not exceed increase of cost of construction index. Subleasing must be authorized in writing by lessor, as under previous law.

Law of Sept. 1, 1948, which, until Law of Dec. 23, 1986, still applied in most cities to leases in buildings constructed before Sept. 1, 1948, is destined to disappear progressively under new law. Only premises which do not satisfy certain requirements of comfort and fitness for habitation remain fully governed by Law of Sept. 1, 1948, where lease may be oral or written; tenant has right to remain in premises upon expiration of term of lease and rent ceiling is imposed. However, to incite lessors to improve premises, law provides that rent may be set freely if premises are in conformity with given requirements of comfort and fitness for habitation and are rented for six years at least. At end of such term, Law of Dec. 23, 1986 shall apply. Vacant premises having remained subject to Law of Sept. 1, 1948 must now be governed by Law of Dec. 26, 1986 when rented out for residential use and by French Civil Code if for professional use. Lessors of premises currently rented under Law of Sept. 1, 1948 can offer tenant new lease governed by Law of Dec. 23, 1986 or by French Civil Code if premises for professional use; tenant or occupant has two months to accept or refuse; in case of refusal, either party can seize commission or tenant can refer matter to court; failing referral to court within six months of lessor's proposal, tenant is deemed to have refused offer and must evacuate premises within six months. If agreement is reached, new lease must be concluded for eight years and at its term shall be entirely subject to Law of Dec. 23, 1986.

Law No. 2000-1208 of Dec. 13, 2000 and Decree No. 2002-120 of 30 Jan. 2002 reinforce tenant rights: lessor has obligation of delivering decent premises free of risks for safety or health. If he fails in his obligation, tenant can go to court and judge will determine necessary improvements to be made on premises and impose time period to lessor to conform.

Agricultural Leases.

These are governed by special legislation, codified in Agricultural Code under Decree of Apr. 16, 1955.

21.08 PERPETUITIES:

See category 12 Estates and Trusts, topic 12.09 Trusts.

21.09 REAL PROPERTY:

A basic distinction in French law is made between immovables, roughly equivalent to real property, and movables, roughly equivalent to personal property. Real property consists of: (1) Property immovable by nature, such as land and buildings or structures thereon; (2) immovables which include fixtures, animals required for cultivation, and machines or installations indispensable for factories or commercial premises; (3) types of interests traditionally classified as immovables, such as usufruct, servitude, mortgage, and certain privileges (liens).

Real property may be acquired by accession, succession, prescription, or contract:

Accession is increase of existing land by act of nature, e.g., alluvial lands. (C. C. 551)

Succession involves passage of title by direct descent to heirs, or by universal legacy or specific devise. Change of title by intestate as well as testate succession must be registered upon Register of Real Estate Mortgages (Bureau de la Conservation des Hypothèques—see category 9 Documents and Records, topic 9.05 Records).

Prescription is acquisition of title by adverse possession, which must be continuous, public, unequivocal, and peaceful. (C. C. 2229). Normal statute of limitations is 30 years (C. C. 2262), but it is reduced to term of 10 to 20 years, depending on location of property, provided adverse possessor acts in good faith and under color of title (C. C. 2265). Successive periods of adverse possession may be cumulated. (C. C. 2235). Period of prescription is interrupted by failure to exercise possessory acts for more than one year (C. C. 2243), by challenge of possession made by true owner (C. C. 2249), or by recognition by adverse possessor of title of true owner (C. C. 2248). True owner may protect his title by action before local civil tribunal (action pétitoire); adverse possessor may protect his possession against third parties by possessory action before same tribunal (see subhead Possessory Actions, infra).

Acquisition by Contract.

Every creation or transfer of real property interest by contract must be by notarial act registered upon Register of Real Estate Mortgages. (See category 9 Documents and Records, topic 9.05 Records.) This includes deeds of sale, deeds of gift, contracts creating rights of usufruct or servitudes, long term leases, attachment liens, contracts creating or dissolving tenancy in common and condominium. (Law of Mar. 23, 1855, supplemented by Decree Law of Oct. 30, 1935 and Decree of Jan. 4, 1955). Failure to register enables acquisition of property by bona fide purchaser or loss of priority to subsequent transferee who first registers.

Usufruct.

Analogous to a life estate (C. C. 578), usufruct gives right to one person to use and enjoy property while another remains vested with bare title. Usufruct may be created by operation of law, e.g., rights of surviving spouse (see category 12 Estates and Trusts, topic 12.04 Descent and Distribution), or rights of parents over property of infants; or from contract of gift or sale. (C. C. 579). Though most often given for life, usufruct may also be for fixed term. (C. C. 617). Usufructuary enjoys personal use of property, receiving all income and exercising full administration, but may not alienate or mortgage property. (C. C. 582-599). Inventory is made at outset of usufruct. Usufructuary must not waste and may usually be compelled to post bond for this purpose. (C. C. 600, 601).

Servitudes.

Servitudes may be created by operation of law, sometimes in public interest (passage of electric power lines), sometimes for private interest (right of way to wholly enclosed tract); by contract; or by prescription during period of 30 years under same conditions as adverse possession of other interests. Servitudes created by contract must be by notarial act, registered upon Register of Real Estate Mortgages. (C. C. 637-710).

Tenancy in Common.

Tenancy in common (indivision) exists when several persons jointly are owners of specific tract, usually derived simultaneously by succession or gift. Any juridical act concerning whole property requires unanimous consent. Joint tenant can use tenancy in common (C. C. 815–9) (against consideration when for his private use) when he does so for normal purposes. Gains and losses of tenancy in common are shared in proportion to share held of tenancy in common. Law 76-1286 of Dec. 31, 1976 institutes new rules applicable to joint tenancies existing as of July 1, 1977. However, joint tenancy agreements entered into prior to July 1, 1977 continue to be governed by old rules unless parties agree to apply new rules. Under old rules, each co-tenant may freely dispose of individual interest without consent of others. Under new rules, each co-tenant may dispose of his individual interest provided terms of sale and identity of buyer are notified to other co-tenants who may generally exercise preemptive right (transfer to usufructuary who is not joint owner is still subject to preemptive rights). (C. C. 815-14). Except in few cases provided by law or by contract, any co-tenant at any time may compel partition. (C. C. 815). If property is by nature indivisible, any co-tenant may demand its sale at auction, or demand to have his interests purchased by others. Co-tenants may by contract exclude partition for period of five years, which term may be renewed. (C. C. 1873-3). Concept of joint tenancy is not recognized by French law.

Condominium companies, called “sociétés constituées en vue de l'attribution d'immeubles aux associés par fractions divises,” were created by Law of June 28, 1938 and are currently governed by Title II, Law of July 16, 1971 as modified by Law No. 71-1054 of Dec. 24, 1971, with additional modification of Tit. 2 by Law No. 72-649 of July 11, 1972 and Decree No. 78-704 of July 3, 1978. Ownership of condominium shares gives right to use, and upon dissolution, to ownership of a predetermined part of company's real estate holding.

Company objectives may be construction, purchase, management or maintenance of real estate; companies may be run according to civil or commercial regulations.

Possessory Actions.

There are three types of possessory actions analogous to replevin designed to enable an aggrieved party to recover possession or to defend quiet possession of interest in real property. Plaintiff must prove quiet possession within at least a year preceding the action; however, it is possible to take action against author of violent dispossession, even when plaintiff has not possessed property for full year. (New Civil Procedure Code Arts. 1264-1267 following Decree No. 81-500 of May 12, 1981, effective as of Jan. 1, 1982). These possessory actions are intended to protect possession when: (a) Complainant's quiet possession is being disturbed in fact or in law; (b) complainant fears disturbance in his quiet possession through construction in course of adjacent building; (c) complainant has been dispossessed in fact. If there exists contract between disputing parties relating to that possession, court will not allow use of possessory actions but allow only litigation based on that contract.

Action must be brought before local court of general jurisdiction within one year from time of disturbance; decision of court will only be given as to possession and not to title. (New Civil Procedure Code Arts. 1264-1267 following Decree No. 81-500 of May 12, 1981 effective as of Jan. 1, 1982). Judgment normally orders any action necessary to return real property in condition it was in before disturbance to possession began.

See also category 9 Documents and Records, topic 9.04 Notaries Public.

22 TAXATION

22.01 ADMINISTRATION:

At national level, tax authorities are part of Finance Ministry and include Direction Générale des Impôts (DGI), Direction Générale de la Comptabilité Publique, Direction Générale des Douanes et Droits Indirects. Within DGI Direction de la Législation Fiscale is in charge of drafting draft bills and tax instructions, each of the three Directions are represented at level of Regions, Departments and Municipalities (or sectors thereof). Local divisions of DGI and Direction de la Comptabilité Publique—tax centers and tax collection centers—are in charge, for former, of assessing and controlling direct and indirect taxes and, for latter, of collecting indirect taxes. Special division, Direction des Grandes Entreprises, is in charge at national level of assessing, collecting and controlling taxes owed by companies having turnover or total assets exceeding [Euro]400 million since decree dated Mar. 18, 2004. Local divisions of Direction Générale des Douanes et Droits Indirects—collection offices and brigades—are in charge, for former, of assessing and collecting customs duties and indirect contributions and, for latter, of controlling same. Finally, local divisions of Direction de la Comptabilité Publique—“perceptions”—are in charge of collection of direct taxes. As from Jan. 1, 2005, direct taxes will be collected by DGI.

22.02 ALCOHOL, BEVERAGES AND TOBACCO TAXES:

According to Article/Provision 401 of CGI, alcoholic beverages are subject to consumption tax, amount of which varies depending on percentage of alcohol contained therein. Consumption tax is also imposed on non-alcoholic beverages. Contribution (“cotisation CNAM”) is also applicable to beverages having certain alcoholic content; tobacco products are also subject to consumption tax which may be as high as 64% for cigarettes. See also topic 22.08 Excise Taxes.

22.03 BUSINESS TAXES:

Business License Tax (“Taxe Professionnelle”).

Are liable to business license tax: individuals and companies engaged in independent professional activities on Jan. 1 of any given year. Since Jan. 1, 2003, basis for “Taxe Professionnelle” is sole rental value of taxable fixed assets used by taxable person. For professionals and certain middlemen employing less than five salaried workers, basis for “Taxe Professionnelle” is rental value of tangible fixed assets plus 6% of gross collections for 2005 (10% in 2002, 9% for 2003 and 8% for 2004 onward). Total taxable base is then reduced by 16%. Rates vary from each region, department, municipality to another.

Business license tax can be limited to 3.5%, 3.8% or 4% of value-added depending upon turnover of taxpayer: tax may not exceed 3.5% if turnover is below [Euro]21.350 million, 3.8% if turnover is between [Euro]21.350 million and [Euro]76.225 million and 4% if turnover is above [Euro]76.225 million. Maximum amount of abatement based on this limitation is capped at [Euro]76.225 million. Value-added corresponds to difference between production of goods and services and cost of goods and services acquired from third parties, for given fiscal year. Minimum business license tax of 1.5% is due by companies with turnover above [Euro]7.6 million. Business license tax is deductible for corporate income tax purposes. Special exemptions may apply with respect to newly formed companies located in certain areas. Eligible new companies existing on Jan. 1, 2004 or created between this date and Dec. 31, 2013 which carry out research and development projects may benefit from five-year exemption under certain conditions. Newly-created companies benefit from two-year tax exemption. Assets subject to business license tax are exempt from “taxe d'habitation” (see topics 22.03 Business Taxes, subhead Business License Tax; 22.15 Property Taxes, subheads Real Estate Tax on Improved Land, Real Estate Tax on Unimproved Land, Dwelling Tax).

Registration Duty (Droits d'Enregistrement).

This tax is paid on transactions evidenced by written documents and, in some cases, on transfers even when not so evidenced. For instance, documents evidencing sales of going concern, transfers of clientele, or agreements having effect of enabling one contracting party to conduct activity previously conducted by other contracting party must be registered within one month of their date and give rise to proportional duty of 5% as from Jan. 1, 2006 for portion of purchase price (or real value) in excess of [Euro]23,000. Sales of shares in unlisted sociétés anonymes, sociétés par actions simplifiées and sociétés en commandite par actions give rise to 1.10% as from Jan. 1, 2006 duty capped at [Euro]4,000 as from Jan. 1, 2006 per transaction, to extent assets of such companies do not mainly comprise real estate property or rights, while sales of shares in SARL, partnerships and in all companies which assets mainly comprise real estate property or rights give rise to proportional duty of 5% as from Jan. 1, 2006 of purchase price, which should correspond to fair market value of transferred shares. As from Jan. 1, 2004, basis of 4.80% duty may under certain conditions be reduced by abatement capped at [Euro]23,000. Documents presented for registration and which are either not mandatorily subject to registration formalities or do not fall under any specific provision are subject to fixed duty of [Euro]75. Contributions in cash at time of incorporation of new company are exempted from registration duty. Registration duty is deductible for corporate income tax purposes and is generally due by purchaser. Payment of tax is accompanied by presentation of deeds to registration formality. Assessment basis normally consists of market value of property at date of deed or of transfer.

22.04 CONSUMPTION TAXES:

See topics 22.02 Alcohol, Beverages and Tobacco Taxes and 22.21 Value Added Tax.

22.05 CUSTOMS DUTY AND TAX:

All customs duties on intra-European Union exchanges have been abolished. Customs duties however apply to imports of goods from countries which are not members of European Union. Rates of such duties vary depending on nature and value of goods imported. In addition, antidumping duties may be imposed at level of European Union with respect to goods imported from specific countries.

22.06 EMPLOYMENT TAXES:

See category 10 Employment, topic 10.01 Labor Relations, subhead Payroll Tax and Social Benefits.

22.07 ESTATE TAX:

See topic 22.12 Inheritance Tax.

22.08 EXCISE TAXES:

Excise taxes apply to intra-community transactions bearing on specific products such as mineral oil, alcohol, alcoholic beverages and tobacco. Said taxes become due when these products are put on market at rates varying depending on nature of products.

22.09 GASOLINE AND SPECIAL FUELS TAXES:

Special consumption tax applies to gasoline and products derived therefrom. Rate of this tax varies depending on nature of product. Said products are also subject to VAT.

22.10 GIFT TAX:

Gift tax (“droits de donation”) is, generally speaking, levied at same rate and under same conditions as inheritance tax (see topic 22.12 Inheritance Tax) except for specific abatements and reductions. Specific abatement of [Euro]30,000 applies to gifts made to grandchildren (may apply once every ten years) in full ownership or in usufruct. Gift tax due on assets received is reduced by half if donor is less than 65 years of age, and by 30% when donor is over 65 but under 75 years of age. Gifts in cash granted between June 1, 2004 and May 31, 2005 to children and grandchildren over 18 years old may be exempt within maximum amount of [Euro]20,000.

Since Jan. 1, 2005, partners of PACS benefit from specific rate (40% for fraction up to [Euro]15,000 and 50% for excess) and are eligible to relief of [Euro]57,000.

22.11 INCOME TAX:

Taxation of Individuals.

Resident individual of France is taxed on his world-wide income while nonresident individual of France is taxed on his individual French source income (or, if he is not resident of country having signed tax treaty with France and disposes of residence in France, on three times rental value if higher than his French source income) subject to tax treaty provisions. For example, salaries received by U.S. employees for work accomplished in France are exempt from French tax: (i) if employees spend less than 183 days there during a year, (ii) if salary is paid by employer not resident of France, and (iii) if employee's salary is not deducted from French taxable income of French branch of American employer. Foreigner who maintains his habitual residence in France or transfers his center of interest to France or either is salaried or independently employed in France is considered domiciled in France in accordance with French tax law.

Individual income tax is assessed per household, i.e., on total income earned by taxpayer, taxpayer's spouse and dependent children (children under 18 years or children under 21 [optional] or children under 25 if pursuing education [optional] aggregate their income with that of their parents). Depending on his family status, taxpayer is assigned certain number of “parts” (single, one part; married, two parts; each child, one-half part unless child is crippled or dependent of solitary parent or starting with third child and thereafter in which case child is one part). With number of “parts” and amount of total net income, it is possible to determine amount of tax. Total net income is total of net results of each of taxpayer's income categories (real property, commercial and industrial business, agricultural business, noncommercial activities, employment/pensions, activities performed by certain managers controlling certain companies, movable capital, certain capital gains). Net result of each category is equal to gross income minus expenses incurred in earning income. For instance, for employment income, expenses comprise (i) employee social security charges, (ii) professional expenses (basic deduction of 10% on income after deduction up to maximum [Euro]12,862 for 2004 income or real value), and (iii) additional abatement of 20% on net income after (i) and (ii) up to maximum of [Euro]23,580 for 2004 income (not applicable to portion of employment income superior to [Euro]117,900 income for 2004). In addition, losses pertaining to real estate may be offset against overall income if not exceeding [Euro]10,700 (losses in excess of [Euro]10,700 and losses pertaining to loan interest may be deducted from real estate income of following ten years).

Rates vary from 0% to maximum of 48.09% for 2005 on 2004 net taxable income. Following income tax, after reduction, is due from taxpayers with net taxable income of [Euro]40,000: (a) if unmarried, [Euro]5,877, (b) if married with no children, [Euro]10,048, and (c) if married with one child, [Euro]4,520. For nonresident taxpayers, income tax may not be lower than 25% of net taxable income.

Within certain limits, income base reductions or tax credits are allowed for certain maintenance expenses in main residence, for certain childcare expenses, for certain life insurance premiums, for certain gifts, for alimony paid to parents and for certain investment in new rental housing.

Special Rules Applicable to Dividend Income.

For dividends received up to Dec. 31, 2004, individual shareholder takes into income amount of dividend received from French company grossed by 50% tax credit (“avoir fiscal”). He therefore has tax credit of 50% of dividend. E.g., for dividend of [Euro]100 received by shareholder, his taxable income therefrom will be [Euro]150 and he will have tax credit of [Euro]50. Subject to treaty provisions, individual nonresident shareholders are entitled to repayment of tax credit. For dividends received as of Jan. 1, 2005, taxable in 2006, 50% tax credit is abolished and replaced by 50% allowance. Individual shareholder will therefore be taxable only on 50% of dividend income received.

Special Rules Applicable to Capital Gains.—Individuals are taxed on certain capital gains by inclusion of such gains, determined according to nature of asset and length of time held, in overall income. Capital gains taxable to individuals include following:

(1) Real property or rights in real property: determination is made based on nature of property and time held. Capital gains from sale of buildings and land (other than farmland or property on which purchaser intends to effect construction) are included in overall income if occurring within two years after purchase and thus subject to ordinary income tax rates. For sales made after two years of purchase, capital gain, if any, is equal, for persons whose activity is not trading in real estate, to difference between (i) sales price and (ii) purchase price increased by related expenses. Gross fiscal capital gain so determined is reduced by 10% for each year of ownership beginning with fifth year. Therefore, sales of properties held for more than 15 years are exempt from capital gains tax. Since Jan. 1, 2004, real estate capital gains are taxable at proportional global rate of 27%. Specific exemptions apply: capital gains realized by resident or nonresident individual who was French tax resident for at least two years, upon sale of his main residence (if said individual is resident in European Union or in country having signed Tax Treaty with France which contains nondiscrimination clause). If exemptions do not apply, nonresident individuals are taxed at 16% for those residents in EU and 33.33% for others.

Profits from construction are generally taxed at capital gains rates for resident individuals while nonresident individuals are taxed at flat rate of 331/3% (16% for EU residents), save for case of nonresident who actually oversees or manages construction of building in France to whom 50% rate applies.

(2) Gains realized upon sale of shares, by French resident individuals, are generally taxed at 16% (plus social contributions of 11% resulting in global 27% rate). If total proceeds of sales of shares do not exceed [Euro]15,000 in 2005, capital gain is exempt. As regards nonresident individuals or companies owning at least 25% interest in French company, they may be subject to capital gains tax in France at rate of 16% unless otherwise provided in relevant Tax Treaty.

(3) Taxation of gains from stock options: No taxation occurs at date of grant. Similarly, no taxation occurs at date of exercise of options unless exercise price of option is less than 95% of fair market value of shares at date of grant. In such case, portion of discount in excess of 5% is treated as salary and is subject to employer and employee social security charges and to ordinary income tax upon exercise of option. Except where discount in excess of 5% is granted, taxation only occurs at date of sale of option shares.

Two specific gains have to be distinguished: (i) acquisition gain, i.e., difference between fair market value of shares at date of exercise and exercise price (minus discount in excess of 5% that has been taxed upon exercise, if any) and (ii) sale gain, i.e., difference between sale price of shares and fair market value of shares at date of exercise.

Sale gain is treated as ordinary capital gain taxable at total rate of 27%.

As for acquisition gain, taxation varies depending upon whether options were granted before or after 27 Apr. 2000: (a) for options granted before 27 Apr. 2000, acquisition gain is taxable at total rate of 41%, provided that period of at least five years elapses between date of grant of option and date of sale of corresponding shares. Otherwise, acquisition gain is treated as ordinary salary subject to employer and employee social security charges and to income tax at progressive rate (up to 48.09% in 2005 on 2004 income); (b) for options granted as of 27 Apr. 2000, acquisition gain is subject to following tax treatment: taxation occurs at total rate of 41% for acquisition gain up to [Euro]152,500 and at total rate of 51% for portion beyond, if at least four years elapse between date of grant of option and date of sale of shares. Above rates are reduced respectively to 27% and 41%, if shares are effectively held for at least two years from either expiration of aforementioned four-year period or date of exercise of option, whichever is later. When shares are sold less than four years after date of grant of option, acquisition gain is treated as ordinary salary subject to employer and employee social security charges and to income tax at progressive rate (up to 48.09% in 2005 on 2004 income).

Benefit of preferred tax and social security treatment applicable to acquisition gain is also conditional upon shares acquired upon exercise of option being registered as opposed to bearer shares and certain filing requirements being met by both employer and optionee.

(4) Precious metal (gold, silver and platinum) is taxed at rate of 7.5% (plus 0.5% social tax if seller is tax-domiciliary of France) calculated on sale price.

(5) Antiques (objects, collectors' items and jewelry) are taxed at rate of 4.5% of sale price (plus social tax of 0.5% if seller is tax-domiciliary of France).

Taxation of Companies.

Corporations (“Sociétés Anonymes” or “Sociétés par Actions Simplifiées”), Limited Liability Companies (“Sociétés à Responsabilité Limitée”), and “Sociétés en Commandite par Actions” are subject to corporate income tax. Partnerships as well as joint ventures (“Sociétés en Participation”) are taxed as pass-through entities (i.e., taxation in hands of shareholders) unless they elect to be subject to corporate income tax. Other entities (“Sociétés en Commandite Simple”, “Entreprises Unipersonnelles à Responsabilité Limitée” EARL “Société Immobilière” and

S.A.R.L. de Famille) may be subject to either corporate tax or individual income tax depending upon their shareholders, their activity, etc. Companies created in specific areas benefit from favorable tax treatments.

Corporate income tax is applied at rate of 331/3%. 15% in 2005 and abolished in 2006. Further surtax of corporate income tax is applied for financial years ending as of Jan. 1, 2002, amounting to total rate of 33.83%. Additional 3.3% surtax assessed on corporate income tax reduced by [Euro]763,000 abatement, applies to corporations which realize annual turnover in excess of [Euro]7,630,000 (before VAT) and whose capital is not held 75% by individuals or by corporations themselves held 75% by individuals. Total corporate income tax rate is thus 33.83% on profits up to [Euro]2,289 million and 34.93% on profits in excess of [Euro]2,289 million. Specific rate of 15% (plus 1.5% and 3.3% surtaxes, thus adding to 15.23% on gains up to [Euro]2,289 million and 15.73% thereafter) apply to income qualifying as long-term capital gains, i.e., gains realized upon sale of participation held for over two years and proceeds of license of patents. Such capital gains will be subject to specific limited tax rate when taxed in 2006 and will be exonerated as from Jan. 1, 2007 (with exception of 5% taxable portion of gain). Proceeds of license of patents are taxed as long term capital gain (15% plus surtaxes) but will not benefit from 8% reduced rate (2006) and exemption (2007).

Intercompany Dividends.

Until Dec. 31, 2004 resident companies receiving dividends from French subsidiaries were entitled to tax credit (avoir fiscal) equal to 10% of dividend for tax credits used in 2004 unless company receiving dividend qualifies for participation exemption regime in which case tax credit is equal to 50% of dividend. Avoir fiscal is only available to dividends distributed according to decision of annual shareholders meeting approving accounts. Under participation exemption regime, dividends received by French parent company from French and nonresident companies in which parent company holds participation of at least 5% of capital are exempt from corporate tax (except for portion of gross dividends received [i.e., including tax credits] equal to maximum of 5%). Upon redistribution of dividends by parent company for period up to Dec. 31, 2004, precompte tax (see catchline “Précompte”, infra) becomes due but is offset by avoir fiscal which was attached to exempt dividends received by parent company. Nonresident companies may also benefit from tax credit if expressly provided by relevant tax treaty. As of Jan. 1, 2005, avoir fiscal tax credit is abolished.

“Précompte” is special tax of 50%, applicable until Dec. 31, 2004 on amounts distributed by company to residents or to nonresidents when company distributes income which was not previously taxed at full standard rate of corporate tax or which was earned more than five years before year of distribution. When distribution gives rise to “précompte” and recipient is entitled to 10% tax credit (“avoir fiscal”), recipient receives additional tax credit equal to 80% of “précompte” effectively paid. Shareholders residents of countries which have tax treaties with France are granted either avoir fiscal tax credit or receive repayment of sum equal to “précompte” paid by French distributing company. This sum is treated as dividend and as such is subject to withholding tax. As from Jan. 1, 2005, “précompte” will be abolished as consequence of abolition of avoir fiscal. However, 25% exceptional tax will be levied on amounts distributed in 2005 out of profits that have not been taxed at standard corporate tax rate or were generated more than five years ago. 25% tax will, subject to certain conditions, be refundable over period of three years.

Special Tax Regime Applicable to Restructuring Transactions.

In order to encourage corporation restructuring, certain transactions such as mergers, spin-off, contribution of assets or share purchase exchanges may under certain condition benefit from special tax treatment: exemption of capital gains tax, application of fixed [Euro]230 transfer duty (vs. proportional duty of up to 4.80% on certain assets), income tax exemption of shares and gains recognized by shareholders upon merger or spin-off, transfer of carried forward losses.

Consolidated Return Groups “intégration fiscale”.

Group may elect to file consolidated return if it meets following conditions: (i) Parent company must not be 95% controlled by another corporation subject to French income tax (parent company may however be held indirectly by entity liable to corporate income tax through one or more legal entities which are not subject to corporate income tax such as foreign company or partnership); (ii) parent company must directly or indirectly hold at least 95% of stock and dividends rights of electing subsidiaries; and (iii) all companies must have tax years of duration of 12 months and open and close their tax years on same dates. If these conditions are met, consolidated taxable income of group is determined by combining taxable income and losses of members of group. This total is subject to adjustments designed to avoid double taxation or double deduction and to neutralize certain operations within group. Group's net taxable income is then subject to corporate income tax levied at level of parent company.

Withholding Taxes.

Dividends paid by French companies to French residents and French companies are not subject to withholding tax. Dividends paid to nonresidents are subject to withholding tax of 25% unless this rate is reduced by relevant tax treaty, which is often subject to prior advance clearance. With respect to dividends paid to American residents by French company, withholding tax is imposed, under tax treaty, at reduced rate of 15%. Treaty further reduces this withholding to 5% when dividends are paid by French company to American company (entitled to Treaty benefits) holding at least 10% of capital of company. This 25% withholding tax rate is not levied, subject to certain conditions, if beneficiary of dividends is EU corporation.

Foreign corporations are subject to corporate income tax under same conditions and at same rates as French companies, i.e., 33.83% or 34.93% tax on income realized through permanent establishment in France or if they engage in complete commercial cycle in France (e.g., buying and selling merchandise in France) or have agent in France with authority to bind company. Most tax treaties (including U.S. treaty) limit liability of foreign corporations to such tax to those having permanent establishment or dependent agent in France.

In addition, under Art. 115 quinquies of C.G.I., business profits derived from French sources by foreign companies through permanent establishment in France are deemed distributed annually to shareholders not having their domicile or head office in France. 25% withholding tax is thus imposed on after corporate tax profits of French branch. Such withholding may be reduced or eliminated by international tax treaties and is subject to later adjustment or refund if (i) amount subject to withholding tax exceeds total income distributed by foreign company or (ii) foreign company can demonstrate that amounts were distributed to French residents. For American companies having permanent establishment in France, such branch profit tax is, pursuant to Franco-American Tax Treaty, imposed at rate of 5% of after corporate tax profits of permanent establishment.

Deductibility of interest payments made by French company to shareholders is permitted for tax purposes if company's capital is entirely paid up. Deductible interest paid to shareholder(s) is limited to average rate granted by financial institutions on loans of duration at least equal to two years and with variable interest rate (4.58% in 2004). Also, if borrowing company is subject to corporate tax, interest deduction will not be allowed where amounts loaned by managing or controlling shareholders exceed 150% of capital of borrowing company, except if loan is from French or European parent company to subsidiary or from foreign parent company located in country bound to France by tax treaty containing equal-treatment-clause.

Withholding on Interest Payments.

Interest payments to foreign residents are generally exempt. Some exceptions apply (e.g., certain shareholders' loans) in which case, interest payments are subject to withholding tax at rates of 10% to 60% depending upon nature and term of debt as well as applicable tax treaty (if any).

Withholding Tax on Other Income.

Other income received by non-French residents may be subject to withholding tax. Royalties and remuneration of services are subject to withholding tax at rates of 15% to 331/3% depending upon nature of services and income unless rate is reduced by applicable treaties.

International Tax Evasion.

Following provisions are intended to defeat international tax evasion: (1) C.G.I. Art. 57 reintegrates into income taxable in France profits indirectly transferred to an enterprise located outside France by French company controlling it or controlled by it or without any control situation if foreign enterprise is located in tax haven country; (2) sums received by foreign company for services rendered by one or more individuals or companies may be taxable to latter if: (a) latter controls foreign company, (b) latter cannot show foreign company has industrial or commercial activity other than rendering of taxable service, or (c) if foreign company is established in tax haven (C.G.I. Art. 155A); (3) payments made by French domiciliaries to foreign domiciliaries having favored tax situation are deductible by French domiciliaries only if it can be proved payments relate to effective transaction and constitute normal prices (C.G.I. Art. 238A); (4) French corporation owning directly or indirectly 10% or more of tax haven company or branch is subject to 33.83% or 34.93% corporate tax on its pro rata share of such company's profits unless proof is provided that operation of subsidiary in tax haven country does not have effect of localizing income in tax favored country. (C.G.I. Art. 209B). However, based on French Supreme Court's case Law, Art. 209 should not be applicable in presence of tax treaty unless such tax treaty explicitly authorizes France to enforce such domestic tax provision.

22.12 INHERITANCE TAX:

Tax is not imposed on estate of deceased but on each beneficiary in respect of their respective shares. Tax is due on all movable or immovable property situated in and outside France when either deceased was, or beneficiary is, domiciled in France. Tax is due on French assets only when both deceased was and beneficiary is domiciled outside of France.

Rates of inheritance tax (“droits de succession”) range from 5% to maximum of 60% of net estate depending on value of estate and relationship between decedent and heirs or legatees.

When beneficiary is spouse or child, rates of inheritance tax range from 5% to 40%. When beneficiary is collateral, rates range from 35% to 45%. When beneficiary is other related parent, rate of tax is 55%. For nonrelated beneficiaries, rate of tax is 60%.

Abatement of [Euro]76,000 applies to share of estate which is bequeathed to or inherited by surviving spouse. For direct descendants (living or represented) or for ascendants, abatement is equal to [Euro]50,000. Above abatements also apply for gift tax but may only apply once every ten years. Gifts made to heirs or legatees prior to death are added back to their shares for purposes of calculating inheritance tax if made less than ten years before death and effectively declared to tax authorities or whatever their date if undeclared.

Abatement of [Euro]50,000 is granted for property passing to heir, legatee or donee whose ability to earn his livelihood is diminished as result of permanent physical handicap.

22.13 LOCAL GOVERNMENT TAXES:

There are large number of local taxes in France levied for benefit of administrative regions, departments and/or municipalities. Most important of local taxes are business license tax, real estate taxes on improved and unimproved land and dwelling tax (see topics 22.03 Business Taxes, subhead Business License Tax and 22.15 Property Taxes).

22.14 MOTOR VEHICLE TAXES:

Tax on Company Vehicles (“taxe sur les voitures de sociétés”).—This tax is due by all legal companies and calculated on basis of number and horsepower (per “cv”) of vehicles they own at opening of each civil quarter. Amount of tax is [Euro]1,130 for period from Oct. 1, 2004 to Sept. 30, 2005 per quarter and per vehicle owned which does not exceed 7 cv and [Euro]2,240 for period from Oct. 1, 2004 to Sept. 30, 2005 per quarter and per vehicle owned which horse power is at least equal to 8 cv. For CIT (Corporate Income Tax) purposes, this tax is not deductible.

Tax on Motor Vehicles (“vignette”).—This tax applies to all motor vehicles which are less than 25 years old. General exemption applies to vehicles owned by certain individuals if vehicles do not exceed certain weight. Amount of tax varies depending on horsepower, age of vehicle, and department in which vehicle is registered.

22.15 PROPERTY TAXES:

Real Estate Tax on Improved Land (“taxe foncière sur les propriétés bâties”).—Assessed annually on 50% assigned rental value of all developed land located in France which has been significantly improved. Improvements may involve permanent constructions, workshops, assembly plant, hangars or any industrial improvements, roads and infrastructure other than public property. Tax is due by owner of property as of Jan. 1 of year of taxation. Tax is levied for benefit of Regions, Departments and Municipalities. Rates vary from one municipality to another. Specific exemptions may apply to new constructions, newly created companies or companies created in specific areas.

Real Estate Tax on Unimproved Land (“taxe foncière sur les propriétés non bâties”).—Assessed annually on 80% of assigned rental value of unimproved land for benefit of Regions, Departments and Municipalities. Rates vary from one municipality to another. Tax is due by owner of land as of Jan. 1 of year of taxation.

Dwelling Tax (“taxe d'habitation”).—Charged annually against every individual or company having at its disposal on Jan. 1 of each year dwelling and is based on assumed unfurnished rental value of property. Rate varies from one municipality to another.

3% Tax Due by Corporate Entities Owning Real Estate in France.

This tax is due on market value of French situs real estate owned by legal entities. However, provided certain reporting requirements are met, tax is not due by companies resident in France or in countries having signed with France tax treaty which contains either nondiscrimination or administrative assistance clause.

22.16 SALES TAX:

See topic 22.21 Value Added Tax.

22.17 STAMP TAX:

Stamp Tax (“droits de timbre”).—Deeds made before notary or other public official, agreements deposited in files of notary or attached to deed, agreements mandatorily or voluntarily subject to Registration Duty, subscription blanks, and certain other limited categories of documents are subject to stamp duty. Amount of duty is generally on per page basis, varying with size of page. (C.G.I., Arts. 905 and 907). Minimum duty is [Euro]6 for both sides of 21 x 29.7 cm page but documents containing several pages written on one side only with other side indelibly cancelled need only pay half duty.

22.18 TAX INCENTIVES:

Numerous tax incentives are available in France, amongst which are following:

Newly Created Companies: May, subject to certain conditions and to location, benefit from full corporate tax exemption during first two years (extended to four years for certain companies created as of Jan. 1, 2004). This exemption is reduced to 75%, 50% and 25% for each of three following 12-month periods. For companies created as of Jan. 1, 2000 maximum exempted profits are capped at [Euro]225,000 for any 36-month-period.

Tax Credit for Research and Development: Companies incurring expenses for research and development may benefit from corporate tax credits corresponding to: (i) 5% of research and development expenses of year and (ii) 45% of difference between research and development expenditure of year and average of research and development expenditure during preceding two years as adjusted by coefficient based on consumer index, up to maximum of [Euro]8 million ([Euro]2 million for establishment located in Member State of EU or EEA).

Headquarters and Distribution Centers: Subject to prior approval from Finance Ministry, headquarters or distribution centers of foreign or French groups may be subject to corporate tax on basis equal to certain percentage of their expenses. Following decision by EU Commission in 2003 holding such regime prohibited state aid, French tax authorities amended special headquarter and distribution center tax regime on specific aspects to comply with EU legislation.

Foreign Expatriates.

Foreign tax resident employees and executives sent to France may be subject to certain conditions: (i) Benefit from five year French income tax exemption of additional remuneration period in relation to their transfer to France and (ii) deduct payments made to foreign social security and foreign pension on employer benefits regime.

22.19 TAX ON SALARIES:

French resident employers who are not subject to VAT or have not been subject to VAT on at least 90% of their turnover for preceding year are subject to tax on salaries on basis of total gross remuneration paid, including advantages in kind. Normal tax rate is 4.25% up to [Euro]6,904. This rate is increased to 8.5% for individual annual remunerations comprised between [Euro]6,904 and [Euro]13,793 and to 13.6% for individual annual remunerations in excess of [Euro]13,793.

French resident employers are also subject to other minor taxes that are computed on basis of remuneration paid: apprenticeship tax, participation to continuing education and social construction tax.

22.20 TREATIES AND AGREEMENTS:

See category 24 Treaties and Conventions, topic 24.01 Treaties.

22.21 VALUE ADDED TAX:

Value Added Tax (“Taxe sur la Valeur Ajoutée”).

Value added tax is noncumulative tax levied at every taxable stage of production, distribution, delivery of goods or services. Burden of tax is generally borne by final consumer.

Normal VAT rate is 19.6% and low rate is 5.5%.

Deliveries of goods are subject to VAT if goods are located in France. By way of exception, supply and acquisition of goods between EU member states are subject to special regime under which supply of good is generally exempt in country of departure and taxable in country of destination. Exports to non-EU states from France are exempt from VAT. Real estate transactions and related services are, subject to certain conditions, liable to VAT if real property is located in France. Rentals are subject to VAT in France if property is furnished or exploited in France. Specific types of services including engineering, accounting, insurance, telecommunication and advertising services, as well as licensing of patents, trademarks, copyrights and other similar rights are subject to VAT when: (a) Parties providing and benefitting from such services are residents of France; (b) party providing services is resident of France and beneficiary is resident of EU member state but is not liable to VAT in that country; or (c) party providing services is established outside of France and beneficiary is resident of France and subject to VAT in France. Services rendered by qualified member of legal profession are subject to VAT at standard rate of 19.6%.

22.22 WEALTH TAX:

All individuals who are tax-residents of France are subject to wealth tax if their worldwide taxable assets, as of Jan. 1, 2005 are valued in excess of [Euro]732,000. Wealth tax is also imposed on all individuals who, although not otherwise subject to taxation in France, have taxable assets located in France valued in excess of [Euro]732,000 unless tax treaty otherwise applies. Professional assets (including, subject to certain conditions, shares in company in which taxpayer is officer), work of art, collectors' items, industrial or literary, or artistic property rights are not subject to wealth tax. Investments in French securities by non-French residents are also exempt. Shares subject to collective minimum six-year holding commitment pursuant to shareholders agreement may under certain conditions be exempt for up to 50% of their value. Liabilities and other charges are deductible from gross value of taxable assets. Amount of tax is determined by applying scale to assessment basis on Jan. 1, 2005. Net taxable assets exceeding [Euro]732,000 but less than [Euro]1,180,000 are subject to 0.55% tax; net taxable assets portion between [Euro]1,180,000 and [Euro]2,339,000 is subject to 0.75% tax; net taxable assets portion between [Euro]2,339,000 and [Euro]3,661,000 is subject to 1% tax; net taxable assets portion between [Euro]3,661,000 and [Euro]7,017,000 is subject to 1.3% tax; net taxable assets portion between [Euro]7,017,000 and [Euro]15,255,000 is subject to 1.65% tax and portion of net taxable assets exceeding [Euro]15,255,000 is subject to 1.80% tax. If amount of wealth tax and income tax exceeds 85% of net taxable income of individuals who are tax-residents of France, wealth tax is capped. This decrease is however limited for taxpayers whose wealth exceeds [Euro]2,339,000 in 2005. Wealth tax is not due by legal entities.

23 TRANSPORTATION

23.01 AUTOMOBILES:

See topic 23.02 Motor Vehicles.

23.02 MOTOR VEHICLES:

Bona fide foreign tourists whose habitual residence is outside Customs territory of European Community or DOM (Dèpartement d'Outre-Mer) and who buy automobiles in France in view of their export are entitled to form of registration of their vehicle called “TT” (“transit temporaire”) if following conditions are met: (i) their habitual place of residence is outside Customs territory of European Community or DOM (Dèpartement d'Outre-Mer); (ii) their stay in European Community is temporary; and (iii) import duties and value added tax are not paid on such vehicle, and they engage in no lucrative activity duty during their temporary stay in European Community.

This registration is valid for six months and, in certain cases, may be extended. Letters in licence plate range from “TAA” to “TZZ”. (Decree of Nov. 5, 1984, as modified by Decrees of Nov. 27, 1988 and of Jan. 11, 1999). At expiration of “TT” registration period, vehicle must either be physically removed from France or regular French registration must be obtained. In case of French manufactured vehicles, payment of value added tax based on current fair value is required. In case of foreign manufactured vehicles, payment of these taxes as well as of import duties is also required.

Members of diplomatic corps and assimilated individuals or entities, are entitled to special registration valid as long as owner retains status originally entitling him to it.

At expiration of such registration or loss of status, same conditions apply as in case of "TT" registration (see above).

Tourist arriving in France no longer needs to present at frontier customs, documents such as "tryptique" or "carnet de passage." However, motor vehicle insurance is now compulsory in France and tourists must either present international motor insurance card valid in France or subscribe to insurance policy issued at frontier and valid for 30 or 90 days (renewable once for same period).

Before regular French registration, vehicles of foreign manufacture must conform with French safety regulations. Vehicles (except motorcycles) with regular French registration are subject to an annual tax ("vignette") based on horsepower and age. Vignette is now collected by départements. (Arts. 24 and 26 of Budget Law for 1984 of Dec. 29, 1983). However, pursuant to Art. 6 of Budget Law for 2001 of Dec. 30, 2000, vehicles owned by private individuals are no longer subject to said annual tax.

See category 5 Civil Actions and Procedure, topic 5.11 Torts.

23.03 SHIPPING:

French maritime law is mainly found in Commercial Code which contains rules relating to legal status of ships, charter parties, bill of lading, salvage and general average, shipowners and maritime sales. It should be noted that, in most cases, French law refers to treaties concluded by France for purposes of unifying international maritime law.

General rule for conflict of laws is that each State may exercise its jurisdiction over ships flying its flag. To be granted right to fly French flag, which is main basis for intervention and protection under French law, it is necessary to comply with conditions under which France will grant its nationality to ship, as contained in Law No. 67-5 of Jan. 3, 1967 (entered into force on Feb. 5, 1968 and modified by Law No. 96-151 of Feb. 26, 1996) and Law No. 2001-43 of Jan. 16, 2001, new Art. 219 and 219 bis of Customs Code. Ship qualifies for French status (francisation) if it is owned: (1) at least 50% either by nationals of Member State of European Community or, as regards merchant vessels or yachts, by nationals of Member State of the European Economic Area (EEA) who, if residing fewer than six months a year in France, must elect domicile in France for all administrative and legal matters relating to ownership and state of ship, or, (2) at least 50% by companies having their head office in France or in another Member State of European Community or, as regards merchant vessels or yachts, in Member State of EEA provided, in either case, that ship remains under control of permanent establishment located in France. (Art. 219-IB of Customs Code). However, head office of company may also be located in non-European Community or non-EEA country if treaty so provides. Another condition required by French law is delivery of registration certificate as to French nationality of ship (acte de francisation) which must be kept on board. This certificate is also considered as evidence of shipowner's identity.

Ownership may be acquired by shipbuilding contract, sales contract, etc. Although designated as personal property, ships are subject to specific rules which are similar to rules relating to real property. In this respect, any transaction in relation to title of ownership must be in writing. In addition, ships may be mortgaged. Each mortgage must be in writing and registered with public register. It is valid for period of ten years. Mortgage duly effected on ship bought or built abroad may be recognized in France if mortgage is registered in France. Each coowner is

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entitled to mortgage his own share. Under French law, following may be mortgaged: ship and its accessories or, if ship is lost, payment of indemnities relating to insurance, salvage, contribution to general average and loss and/or damage of ship. However, mortgages do not extend to freight. Mortgages rank immediately after maritime liens.

In accordance with International Convention for the Unification of Certain Rules relating to Maritime Liens and Mortgages to which French Law of Jan. 3, 1967 refers to following may give rise to maritime liens on ship, on freight and on accessories of ship: (1) legal costs incurred in order to procure its sale and distribution of proceeds of sale, (2) tonnage dues, other public taxes etc., (3) claims arising out of employment contracts of boatswain, crew and others, (4) remuneration for assistance and salvage and contribution of vessel in general average, (5) indemnities for collisions or other navigation accidents, (6) claims resulting from contracts entered into or acts done by boatswain. Maritime liens are valid for period of one year except liens which are connected with ship's preservation or continuation of voyage which are extinguished at end of period of six months.

Rules relating to arrest of ships are found in Law of Jan. 3, 1967 (Arts. 70-72) and Decree No. 67-967 of Oct. 27, 1967 (Arts. 26-58) whereby ships may be arrested in France by creditors either for sale at public auction (“saisie-exécution”) or as conservatory measure in order to prevent ship from leaving port (“saisie-conservatoire”). With respect to latter, ships may be arrested on basis that claim appears to be valid in principle. (Art. 29 of Decree of Oct. 27, 1967 modified by Decree of Feb. 24, 1971). It should be noted however that France is signatory to International Convention for the Unification of Certain Rules relating to the Arrest of Sea-Going Ships of May 10, 1952. It follows that international rules must prevail over provisions of law of 1967 and must be applied to arrest in France of any ship flying flag of Member State. As general rule, Convention states that ship may be arrested in respect of any maritime claim listed in Art. 1 but in respect of no other claim. Any ship arrested may be released provided that sufficient bail or other security is furnished by person in possession of ship. Concerning ship flying non-Member State flag claimant may request arrest of ship on basis of 1952 Convention or on basis of rules provided by Law of 1967.

Rules relating to charter party and bill of lading are contained in Law No. 66-420 of June 18, 1966, modified by Law No. 86-1292 of Dec. 23, 1986. Former are complementary whereas latter, referring to rules provided in International Convention for the Unification of Certain Rules of law relating to Bills of Lading (1924 Brussels Convention as modified by Protocol of Feb. 23, 1968 [Visby Rules] and Second Amending Protocol of Dec. 29, 1979), are mandatory. France has not ratified U.N. Convention on the Transport of Goods by Sea of Mar. 31, 1978 (Hamburg Convention), however, French courts may apply its provisions: (1) when transport documents are issued in signatory state; (2) when port of loading and unloading is located in signatory state; (3) when Convention is chosen by parties as applicable law. Under French law, bill of lading (B/L) has various functions: (1) it is evidence of contract of carriage concluded between shipper and carrier (B/L must be at least in duplicate and signed by carrier); (2) it is prima facie evidence of receipt by carrier of goods; (3) it is equivalent to goods therein described. It follows that transfer of B/L means transfer of goods.

24 TREATIES AND CONVENTIONS

24.01 TREATIES:

Among other treaties, France is party to Treaty of Rome (constituting European Economic Community); Treaty of Paris (constituting European Coal and Steel Community); European Atomic Energy Treaty (Euratom); treaty constituting International Monetary Fund (IMF); treaty constituting European Bank for Recovery and Development (EBRD); General Agreement on Tariffs and Trade (GATT) which became World Trade Organisation (WTO) in 1995; North Atlantic Treaty Organisation (NATO); Maastricht Treaty on European Union (signed Feb. 7, 1992, in force on Nov. 1, 1993, amending Treaty of Paris, Treaty of Rome and EURATOM); Amsterdam Treaty (signed on Oct. 2, 1997, in force since May 1, 1999, amending Maastricht and three previous European Treaties). Cooperation Agreements exist with most former French Colonies, see category 1 Introduction, topic 1.02 Government and Legal System.

For Treaty of Establishment with U.S., see category 14 Foreign Trade and Commerce, topic 14.04 Foreign Investment.

France is party to many other treaties including:

In Relation to International Disputes.

Arbitration Conventions.

Geneva Protocol on Arbitration Clauses (signed on Sept. 24, 1923, entered into force for France on July 19, 1928); Convention for the Execution of Foreign Arbitral Awards (signed on Sept. 26, 1927, entered into force for France on Aug. 13, 1931); Convention on the Recognition and Enforcement of Foreign Arbitral Awards (signed on Nov. 25, 1958, entered into force for France on Sept. 24, 1959); European Convention on International Commercial Arbitration (signed on Apr. 21, 1961, entered into force for France on Mar. 17, 1968); Agreement relating to Application of the European Convention on International Commercial Arbitration (signed on Dec. 17, 1962, entered into force for France on Mar. 16, 1967); Convention on the Settlement of Investment Disputes between States and the Nationals of Other States (signed on Dec. 22, 1965 and entered into force in France on Sept. 20, 1967). Bilateral treaties on arbitration have been concluded by France with Algeria, Belgium, and Spain.

Litigation Conventions.

Convention Abolishing the Requirement of Legalization for Foreign Public Documents (signed on Oct. 9, 1961 and entered into force for France on Jan. 24, 1965); Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters (signed on Jan. 12, 1967 and entered into force for France on Sept. 1, 1972) (with subsequent interpretative declarations for Arts. 8, 15 and 16); European Convention on Information on Foreign Law (signed on June 7, 1968, entered into force for France, July 11, 1972); Additional Protocol to the European Convention on Information on Foreign Law (signed on Mar. 15, 1978 entered into force for France on Dec. 31, 1983); Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters (signed on Sept. 27, 1968, entered into force for France on Feb. 1, 1973, replaced as of Mar. 1, 2001 by Council Regulation No. 44/2001 of Dec. 22, 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters except in relation to Denmark); Convention on the Taking of Evidence Abroad in Civil and Commercial Matters (signed Aug. 24, 1972, entered into force for France on Oct. 6, 1974 with reservations and interpretative declarations for Arts. 4, 16, 17 and 23); European Agreement on the Transmission of Applications for Legal Aid (signed on Jan. 27, 1977, entered into force on Jan. 22, 1980); Convention on International Access to Justice (signed on Oct. 25, 1980, entered into force for France on May 1, 1988 with reservations for Arts. 1, 7, 33).

In Relation to International Trade.

Convention on the Law Applicable to International Sale of Goods (signed on July 25, 1955, entered into force for France on Sept. 1, 1964); Convention on the Law Applicable to Products Liability (signed on Dec. 18, 1973, enforceable since Oct. 1, 1977); Convention on the Law Applicable to Agency (signed on Mar. 14, 1978 entered into force for France on May 1, 1992); Convention on the Law Applicable to Contractual Obligations (signed on June 19, 1980 and entered into force for France on Apr. 1, 1991); United Nations Convention on Contracts for International Sale of Goods (signed on Aug. 27, 1981 and entered into force for France on Jan. 1, 1988); UNIDROIT Convention on International Factoring (signed on Nov. 7, 1989 and entered into force on May 1, 1995); UNIDROIT Convention on International Financial Leasing (signed on Nov. 7, 1989 and entered into force for France on May 1, 1995).

In Relation to Investment Treaties.

France is party to Convention Establishing the Multilateral Investment Guarantee Agency—MIGA (signed on July 22, 1986 and entered into force for France on Dec. 28, 1989), and The Energy Charter Treaty (signed on Dec. 17, 1994 and entered into force for France on Dec. 27, 1999).

Following bilateral investment treaties have been signed by France with following countries on dates indicated and are in force: Albania (June 13, 1995); Algeria (Feb. 13, 1993); Argentina (July 3, 1997); Armenia (Nov. 4, 1995); Azerbaijan (Sept. 1, 1999); Bangladesh (Sept. 10, 1985); Benin (May 5, 2003); Bolivia (July 2, 2001); Bulgaria (Apr. 5, 1989); Cambodia (July 13, 2000); China (May 30, 1984); Chile (signed July 14, 1992); Congo (Oct. 5, 1972); Costa Rica (Mar. 8, 1984); Croatia (signed on June 3, 1996); Cuba (Apr. 25, 1997); Czech Republic (Sept. 13, 1990); Democratic Republic of Congo (Oct. 5, 1972); Dominican Republic (Jan. 14, 1999); Ecuador (Sept. 7, 1994); Egypt (Dec. 22, 1974, modified Mar. 20, 1986); El Salvador (Sept. 20, 1978); Estonia (May 14, 1992); Ethiopia (June 25, 2003); Equatorial Guinea (Mar. 3, 1982); Georgia (Feb. 3, 1997); Guatemala (May 27, 1998); Haiti (May 23, 1984); Honduras (Apr. 28, 1998); Hong Kong (Nov. 30, 1995); Hungary (Nov. 6, 1986); India (Sept. 2, 1997); Indonesia (June 14, 1973); Iran (May 12, 2003); Israel (June 9, 1983); Jamaica (Jan 25, 1993); Jordan (Feb. 23, 1978); Kazakhstan (Feb. 3, 1998); Korea (Dec. 28, 1977); Kuwait (Sept. 27, 1989); Kyrgyzstan (June 2, 1994); Laos (Dec. 12, 1989); Latvia (May 15, 1992); Lebanon (Nov. 28, 1996); Liberia (signed Mar. 23, 1979); Lithuania (Apr. 23, 1992); Macedonia (Jan. 28, 1998); Malaysia (Mar. 24, 1975); Malta (Aug. 11, 1976); Mauritius (Mar. 22, 1973); Mexico (Nov. 12, 1998); Moldova (Sept. 8, 1997); Mongolia (Nov. 8, 1991); Morocco (Jan. 13, 1996); Nepal (May 2, 1983); Nicaragua (Feb. 13, 1998); Nigeria (Feb. 17, 1990); Oman (Oct. 17, 1994); Pakistan (June 1, 1983); Panama (Nov. 5, 1982); Paraguay (Nov. 30, 1978); Peru (Oct. 6, 1993); Philippines (Sept. 13, 1994); Poland (Feb. 14, 1989); Qatar (July 8, 1996); Romania (Mar. 21, 1995); Russia (Feb. 6, 1992 and July 4, 1989); Saudi Arabia (June 26, 2002); Singapore (Sept. 8, 1975); Slovakia (Sept. 13, 1990); Slovenia (Feb. 11, 1998); South Africa (Oct. 11, 1995); Sri Lanka (Mar. 10, 1980); Sudan (July 31, 1978); Syria (Nov. 28, 1977); Tajikistan (Dec. 4, 2002); Trinidad and Tobago (Oct. 28, 1993); Tunisia (Oct. 20, 1997); Turkmenistan (Apr. 28, 1994); UAE (Sept. 9, 1991); Ukraine (May 3, 1994); Uruguay (Oct. 14, 1993); Uzbekistan (Oct. 27, 1993); Venezuela (July 2, 2001); Vietnam (May 26, 1992); Yemen (May 22, 1986 and Mar. 27, 1984); Yugoslavia (Mar. 28, 1974).

In Relation to Tax Treaties.

Double tax treaties in respect of income and/or capital with following countries or territories are in force: Albania, Algeria, Argentina, Armenia, Australia, Austria, Azerbaijan, Bahrain, Belgium, Bolivia, Bangladesh, Botswana, Benin, Brazil, Bulgaria, Burkina Faso, Cameroon, Canada, Central African Republic, China (People's Republic), Congo, Comoro Islands, Czech Republic, Croatia, Cyprus, Denmark, Democratic Republic of Congo, Ecuador, Egypt, Estonia, Finland, French Polynesia, Gabon, Georgia, Germany, Ghana, Greece, Guinea, Hungary, Iceland, India, Indonesia, Iran, Ireland, Israel, Italy, Ivory Coast, Jamaica, Japan, Jordan, Kazakhstan, Kuwait, Latvia, Lebanon, Lithuania, Luxembourg, Macedonia, Madagascar, Malaysia, Malawi, Mali, Malta, Mauritania, Mauritius, Mexico, Monaco, Mongolia, Morocco, Namibia, Netherlands, New Zealand, Niger, Nigeria, Norway, Oman, Pakistan, Philippines, Poland, Portugal, Qatar, Quebec, Romania, Russia, Saint-Pierre & Miquelon, Saudi Arabia, Senegal, Singapore, Slovak Republic, South Africa, South Korea, Spain, Sri Lanka, Sweden, Switzerland, Thailand, Trinidad and Tobago, Togo, Tunisia, Turkey, Turkmenistan, UEA, Ukraine, UK, U.S., Uzbekistan, Venezuela, Vietnam, Yugoslavia, Zambia and Zimbabwe.

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GERMANY: LAW DIGEST OF THE FEDERAL REPUBLIC OF GERMANY

—Scope —

Revised for 2009 edition by

WALDECK Rechtsanwälte of Frankfurt/Main

(Abbreviations used are: BGB, Bürgerliches Gesetzbuch, Civil Code of FRG; BGBl., Bundesgesetzblatt, Federal Statutes Gazette; Federal Republic: Federal Republic of Germany; GewO, Gewerbeordnung, Industrial Code; GDR, German Democratic Republic; HGB, Handelsgesetzbuch, Commercial Code; RGBl., Reichsgesetzblatt, former Official Gazette; WG, Wechselgesetz, Act of Bills and Notes; WpHG, Wertpapierhandelsgesetz, Securities Trading Act; ZPO, Zivilprozessordnung, Code of Civil Procedure.)

Germany is member of EU. See also European Union Law Digest.

Note: Except where noted otherwise, this revision is as of Mar. 31, 2009.

1 INTRODUCTION

1.01 CURRENCY:

Current German currency is as in many other member states of European Union Euro. Deutsche Mark is no longer in existence. In period between Jan. 1, 1999 and Dec. 31, 2001. Deutsche Mark was “denomination” of EURO and existed only as deposit money. Deutsche Mark coins and bank-notes are changed by Landeszentralbanken (State Central Banks) for extended period (1 EURO = DM 1.95583).

With effect of Jan. 1, 1999 competence in matters of monetary policy in particular responsibility for monetary stability, money circulation and supply of credit moved from Federal Reserve Bank (Deutsche Bundesbank) to European Central Bank in Frankfurt am Main.

Deutsche Mark was introduced in former GDR as of July 1, 1990 (cf. topic Government and Legal System, subhead Preliminary Note, catchline Reunification of Germany). Bank deposits and current liabilities and claims were exchanged from Mark/GDR to DM at specific rates (3:1, 2:1 and 1:1, depending on amount involved and on whether natural persons or trading companies, GDR citizens or others were involved). Mortgages entered into land register in currency of German Reich (Reichsmark, Goldmark) and never adapted in former GDR are to be recalculated into DM at rate of 2:1.

Foreign Exchange.

Foreign trade and payments are regulated by law of Apr. 28, 1961, BGBl. I, p. 481 as am'd (Aussenwirtschaftsgesetz-AWG) and regulation in version of Dec. 18, 1986, BGB1. I, p. 2671 as am'd (Aussenwirtschaftsverordnung-AWV) which liberalize foreign exchange as matter of principle subject only to special restrictions as specified. Persons entering Federal Republic of Germany may import any foreign or German currency in unrestricted amounts. In same way, they may export any currency when leaving territory. Credit Cards and Traveler's Checks may be used.

See also category 14 Foreign Trade and Commerce, topic 14.06 Foreign Trade and Foreign Investments.

1.02 GOVERNMENT AND LEGAL SYSTEM:

Preliminary Note.

Origin.

Federal Republic as state is identical with but not legal successor of state founded in 1867 in form of “Norddeutscher Bund” (Federation of the until then independent northern German states), which by accession of southern German states in 1871 became “Deutsches Reich”. With unconditional surrender after World War II on May 8, 1945 and collapse of then German state due to cessation of all public authority and institutions state became incapable of acting, however, German state was not dissolved.

Division of Germany.

With unconditional surrender after World War II responsibility for Government was assumed by four occupying powers, U.S., Great Britain, France and Soviet Union. Each power occupied specific zone of Germany; Berlin, although situated in Soviet Zone, was occupied by all four powers and was to be governed by inter-allied Authority. At Potsdam Conference it was agreed that, although program of decentralization should be carried out, Germany must be treated as single economic unit. Allies' plans for common policy in Germany proved abortive because of their own divergent interests. Increasing deadlock characterized meetings of Allied Control Council. In Mar. 1948, Soviet Union left Allied Control Council, thus initiating division of Germany into Western state, Federal Republic of Germany (Bundesrepublik Deutschland) and into Eastern state, German Democratic Republic (Deutsche Demokratische Republik).

In Western zones much administrative responsibility was handed over to Germans during 1946/1947, and State (Länder) Governments were set up, and state parliaments (Landtage) elected. In 1948 German Economic Council adopted plan providing for Federal German Government for three western zones and summoning of constituent assembly, without cooperation of Soviet Union and consequently without integration of zone occupied by Soviet Union. Parliamentary Council, elected by Landtage of Länder of three Western zones met at Bonn on Sept. 1st, 1948 to draft constitution. New German constitution called “Basic Law” (Grundgesetz) was passed by Parliamentary Council on May 8, 1949, four days later approved by Western Allied military governors, proclaimed on May 23, 1949 and put into effect next day.

GDR formed in 1949 in zone occupied by Soviet Union as response to creation of Federal Republic.

Reunification of Germany.

Through so-called Peaceful Revolution, which was promoted primarily by grass-roots movements in GDR and in eastern part of Berlin, political, social and legal structures in this area underwent complete change as of fall of 1989. This transformation culminated in transacted reunification of both parts of Germany. Reunification was initiated by “State Treaty on the Creation of a Monetary, Economic and Social Union” (Staatsvertrag über die Schaffung einer Währungs-, Wirtschafts- und Sozialunion), which became effective already on July 1, 1990. Objectives of contract were, among others, to prepare national unity and to install social market economy also in GDR. With this contract, Deutsche Mark became only legal currency of GDR. Contract further provided that significant parts of Federal German economic law (esp. commercial and corporate law, bank law, and laws governing insurance and competition) as well as labor and social legislation be adopted by GDR. Since GDR and East Berlin joined Federal Republic in accordance with Art. 23 of German constitution (Grundgesetz) as effective until Aug. 31, 1990, both parts once again form political, economic and legal unit. Resolution to join FRG was passed by GDR parliament (Volkskammer) on Aug. 23, 1990. It became effective on Oct. 3, 1990. On this day reunification of Germany was accomplished. Act of GDR joining FRG in accordance with former Art. 23 of Federal Constitution did not, in fact, require any special legal act on part of Federal Republic, since resolution to join became effective simply as result of its declaration.

Nevertheless, governments of both German states agreed to stipulate terms of union in second comprehensive State treaty, so-called “Unification Treaty” (Einigungsvertrag).

Furthermore, external aspects of reunification were to be settled in cooperation with the four occupying powers. Occupied status of Germany still prevailed. In particular, question of alliance had to be settled, with pressure exerted primarily by USA to ensure that unified Germany belongs to NATO (and only to NATO) posing certain problem. However, this point of view also met with general approval in both parts of Germany. These issues were negotiated with the four occupying powers in so-called 2-plus-4 talks. Break-through came on July 16, 1990, when Soviet leadership finally declared its willingness to refrain from insisting—even temporarily—that new Germany also be member of Warsaw Pact and to withdraw Soviet troops from Germany within four-year transition period.

2-plus-4 talks were concluded on Sept. 12, 1990 in Moscow, when the four occupying powers and two German states came to agreement of sovereignty, granting reunified Germany full national sovereignty. Agreement became effective Mar. 15, 1991. By that date unrestricted sovereignty of reunified Germany has been definitively reestablished.

Second State treaty—Unification Treaty—comprises two appendices with approximately 250 pages of legislation governing application of Federal German law to area of now former GDR, as well as perpetuation of GDR law with, in some respects, highly complex transitional stipulations. Basically, however, simple process whereby GDR joins Federal Republic in accordance with Art. 23 of German constitution as effective until Aug. 31, 1990 and accompanying dissolution of GDR automatically imply that Federal German law is now effective in all of Germany.

To extent currently effective, following sections will indicate principal points of Unification Treaty with special regard to transitional stipulations for area of former GDR. Owing to multitude of such regulations, subject cannot be dealt with in its entirety.

Unification Treaty also contains provisions for reprivatisation and restitution of confiscated property in realm of former GDR.

Structure and authority of Germany's government is derived from German constitution called “Basic Law” (Grundgesetz) of May 23, 1949 (see subhead Preliminary Note, supra). Word “constitution” was avoided in 1949 in order to be left for future new constitution of united Germany. When unification took place, Basic Law was only amended and no new constitution was set into force.

Federal Republic consists of 16 Länder. These are Bayern (Bavaria), Baden-Württemberg, Berlin, Brandenburg, Bremen, Hamburg, Hessen (Hess), Niedersachsen (Lower Saxony), Nordrhein-Westfalen (Nordrhine-Westfalia), Mecklenburg-Vorpommern, Rheinland-Pfalz (Rhineland-Palatinate), Saarland, Sachsen (Saxony), Sachsen-Anhalt (Saxony-Anhalt), Schleswig-Holstein and Thüringen (Thuringia). Five Länder formerly forming GDR (Brandenburg, Mecklenburg-Vorpommern, Saxony, Saxony-Anhalt and Thuringia) are often mentioned as “Neue Bundesländer”. Berlin, with its western and eastern parts, now forms state of Berlin. Each of Länder has constitution of its own. Länder governments are headed by prime ministers except for city states Berlin, Hamburg and Bremen, which are headed by mayor.

Certain functions are specifically province of Länder notably education and law enforcement; yet even here attempt is made to maintain degree of uniformity among Länder through joint consultative bodies. Governments of Länder are generally parallel in structure to that of federal state but need not be. In 13 of Länder, head of government has his own cabinet and ministers; each has its own parliamentary body. In city states of Hamburg, Bremen, and Berlin, mayor is head of government with senators as members of government. Municipal senates serve also as provincial parliaments, and municipal offices assume nature of provincial ministries.

Administrative subdivisions of Länder are known as Regierungsbezirke (departments), not existing in Länder which are small in size and population. In addition, Länder are divided into Kreise (counties). Kreise themselves are further subdivided into Gemeinden, roughly “boroughs” or “municipalities” which through long German tradition have considerable local autonomy and responsibility in administration of schools, housing and zoning, social welfare, public services and utilities, and cultural activities.

Unification Treaty establishes that Berlin is capital city of reunified Germany. In fall 1999 federal parliament and government moved from Bonn to Berlin. Few government agencies, however, remain in Bonn permanently.

Fundamental Rights of People.

German constitution (Grundgesetz) exhibits features similar to Constitution of U.S.: its formal declaration of principles of human rights and of bases for government of man.

Basic Principles.

Federal Republic of Germany is democratic and social federation. All governmental authority is derived from people, such authority exercised by people in voting as well as by representatives of people through legislative, executive, and judicial power. Legislature is bound by constitution; executive and judicial power is bound by law. All German citizens of both sexes who have reached 18 years of age enjoy civil and political rights and qualify for voting.

Federal legislative power is exercised by two chambers, Bundestag and Bundesrat:

Bundestag is German parliament and is cornerstone of German political system. It consists of 598 members (subject to slight variation caused by system of election) which are elected in general, direct, popular elections held every four years.

Bundesrat (Federal Council) consists of delegates of Länder. In Bundesrat, Länder themselves exercise authority to protect their rights and prerogatives. Its members are appointed by governments of Länder, each Land sending certain number of members, depending on size of population. Delegations are bound by instructions of their governments.

All legislation originates in Bundestag, and Bundesrat's consent is necessary only on certain matters directly affecting interests of Länder, especially in area of finance and administration, and for legislation in which questions affecting constitution are involved. Bundesrat may exercise restraint on Bundestag by rejecting certain routine legislation passed by lower chamber, but unless bills fall within certain categories, its vote may be overridden by simple majority in Bundestag. Should President of Federal Republic be absent for long periods or withdraw from office, speaker of Bundesrat deputizes for him. Legislative competence is partly with federation, partly with Länder. Powers of federal legislature are kept in careful balance with those of Länder. Certain matters such as foreign affairs, defense, citizenship, currency and minting, customs and international trade, mail and telecommunications are in exclusive competence of federal legislative bodies. (Grundgesetz. Art. 73). Some other fields are subject to concurrent legislation; i.e. Länder are entitled to legislation if and to extent federal state does not exercise its right of legislation. In principle, Bundestag initiates or approves legislation in matters in which uniformity is essential, but Länder otherwise are free to act in areas in which legislative authority is not expressly resolved to federal bodies.

Executive Power.

President of Federal Republic of Germany is formal chief of state. Intended to be elder person of stature, he is chosen for term of five years by assembly specially convened which consists of members of Bundestag and equal number of members elected by popular representative bodies of Länder according to principles of proportional representation. Apart from representing Germany among other nations, President signs all federal legislation and treaties. Among President's important functions are those of appointing federal judges and certain other officials and right of pardon and reprieve. In case of absence he will be substituted for by speaker of Bundesrat.

Chancellor is head of federal government. He is elected by majority vote of Bundestag and then appointed by President. Chancellor is vested with considerable independent powers and initiates government policy. His cabinet and its ministries also enjoy extensive autonomy and powers of initiative. Chancellor can be deposed by absolute majority of Bundestag through election of his successor. Government may not be dismissed by President. President may not even in crisis call upon political leader at his discretion to form new government.

Judicial Power.

German constitution (Grundgesetz) emphasizes strongly independent position of courts, especially in right of Federal Constitutional Court (Bundesverfassungsgericht) to declare law unconstitutional and void.

Independent position of judiciary is secured by grant of independence to individual judges who are bound solely by constitution and law and are not subject to any order or other oppression or removal from office. Judges for state courts and for federal courts are elected by special committees.

German constitution (Grundgesetz) provides for, besides Constitutional Court, five federal supreme courts in fields of civil and criminal law ("Bundesgerichtshof"), administrative, tax, labor and social security law. Courts of lower instances in these fields are state courts; thus, no parallelism of state courts and federal courts exists. Organization and operation of courts is regulated by ordinary laws. See category 6 Courts and Legislature, topic 6.01 Courts.

Law.

German law is based on two ancient systems: German law, derived from Germanic tribal conventions of antiquity, and Roman law. Laws are codified.

International Law.

Common rules of international law are considered to be part of law governing in Federal Republic of Germany; moreover, in cases of conflict they have supremacy over national law, and create direct rights and duties for residents of Germany. (Art. 25 of Basic Law).

Law Enforcement.

Law enforcement is reserved to Länder; except Federal Police (former Federal Border Police) no nationwide police force exists. Each Land maintains its own force which is charged with all phases of enforcement throughout each Land except where their function is assumed by municipal police force. However, federal offices may investigate certain actions, notably those incident to internal and external security of Federal Republic, and criminal actions that transcend confines of Länder. In state of national emergency Länder forces may be put under command of federal authority.

Sovereign Immunity.

Defense of sovereign immunity is not available to German government in German courts if plaintiff can comply with one of statutory provisions admitting his claim. Access to courts is guaranteed by Art. 19 of German constitution (Grundgesetz - Basic Law) to everyone whose rights have been violated by authoritative power. Moreover, BGB, §839 explicitly creates civil liability of officer for compensation for damages caused by violation of his official duties owed to third parties. By virtue of Art. 34 of Federal Constitution, public entity for which officer was acting, mainly Federal Republic or Land, in principle assumes such liability. However, German government being sued in foreign court is likely to raise, in compliance with rules of international law, defense of sovereign immunity. See also category 6 Courts and Legislature, topic 6.01 Courts, subhead Jurisdiction over Foreign States.

1.03 HOLIDAYS:

Legal holidays are New Year's Day, Good Friday, Easter Monday, Labor Day (May 1), Ascension Day, Whit-Monday, Reunification Day (Oct. 3), Repentance Day (on 2d last Wed. in Nov., but only in Saxony), Christmas Day and Dec. 26. In addition, Reformation Day (Oct. 31) is holiday in Protestant districts and Epiphany (Jan. 6), Corpus Christi, All Saints' Day (Nov. 1) in Roman Catholic districts.

Time periods expire on next working day, if last day of period would fall on holiday, Sun. or Sat. (BGB §193).

1.04 OFFICE HOURS AND TIME ZONE:

Germany is in the Central European time zone (CET). During summertime (end of Mar. to end of Oct.) clock is put forward one hour (local time is GMT +2). Office hours are generally from 9 a.m. to 5 p.m. Offices sometimes close during lunch time.

2 BUSINESS ORGANIZATIONS

2.01 AGENCY:

See category 18 Property, topic 18.06 Powers of Attorney.

2.02 ASSOCIATIONS:

Association (Verein) as rule is nonprofit organization. With special public permission association may pursue operation of commercial business. Civil status is ruled by BGB, §21 et seq., public law of associations is ruled by law of Aug. 5, 1964 (BGBl. I, 593) as am'd. Right of association is freely recognized without any special formality. Only association registered with associations-register constitutes legal entity. Association is legally represented by directorate (Vorstand) who may act for association. Commitments by directorate vis-à-vis third parties are binding on association, even if these commitments exceed association's purpose (no ultra vires concept), unless third party has knowledge that directorate contravened internal restrictions of authority. See also topics 2.03 Corporations, 2.06 Partnerships.

2.03 CORPORATIONS:

German law recognizes two main types of corporations which may be formed for all lawful (not necessarily business) purposes: (1) “Aktiengesellschaft” (corporation limited by shares), which corresponds to American stock corporation; and (2) “Gesellschaft mit beschränkter Haftung” (company with limited liability), which has no equivalent in American law. Less popular is “Kommanditgesellschaft auf Aktien” (KGaA, stock corporation with elements of limited partnership). GmbH & Co. KG, basically limited partnership whose sole general partner is GmbH, was for time of great practical importance because it combined limited liability with tax advantages of partnership. Less attractive now due to amended law diminishing impact of double taxation at corporate and shareholders' level.

Basic difference between Anglo-American and German law is that in Germany concept of “ultra vires” acts is unknown. German corporation is not confined to objects which articles of incorporation enumerate. Its legal capacity to act is unlimited.

"Aktiengesellschaft (AG)."

Corporation Law (Aktiengesetz-AktG) of Sept. 6, 1965 (BGBl. I, p. 1089) last am'd by Law of Dec. 8, 2008 (BGBl. I, p. 2369).

Corporation may be formed by one or more (natural or corporate) persons, all of whom may be foreigners or nonresidents (AktG, §2), as separate legal entity with liability limited to corporation's capital (§1). Articles of incorporation which require notarial form and court record. They must contain corporate name (name must be distinctive and must contain reference to legal form such as "Aktiengesellschaft" or "AG") (AktG, §4), domicile, objects, amount of share capital, whether in cash or kind, par value and classes (if any) of shares, and form of corporation's public announcements (AktG, §23). Minimum capital is [Euro]50,000. (AktG, §7). Shares must have par value of [Euro]1 as minimum. (§8). Par value of shares with exceeding value must be divisible by [Euro]1. (AktG, §8). Shares without par value ("Stückaktien") are admissible. (AktG, §8). Such "Stückaktien" represent portion in share capital of corporation, such share must not be less than [Euro]1. Share may not be split. (AktG, §8). There may be common or preferred stock. (AktG, §11). Cumulative voting rights are prohibited. (AktG, §12). However, where corporations previously had cumulative voting rights, up to June 1, 2003 shareholders had possibility to resolve by shareholders meeting's vote to maintain this right. If no action was taken existing cumulative voting rights lapsed on June 1, 2003. Shareholders losing privilege of cumulative voting right must be compensated. Articles of incorporation determine whether shares must be issued to bearer (Inhaberaktien) or to registered holder (Namensaktien), but shares must be "Namensaktien" if issued prior to full payment of minimum face value, and in that case part payment made must be indicated on share certificate. Articles of incorporation may provide for conversion of bearer share into shareholder's certificate and vice-versa. (AktG, §§10, 24). Entitlement to share certificate can be excluded or restricted in Articles of Association. (AktG, §10).

Registered domicile must not necessarily be identical with location of management or headquarters or plant of corporation.

Certain regulations apply for listed corporations only. Corporation is listed, if its shares are admitted to market, which is regulated and controlled by officially recognized body, which takes place regularly and which is accessible to public directly or indirectly. (AktG, §3).

Stock capital is raised in cash and/or kind but, if latter, articles of incorporation must specify object of transfer, person from whom it is acquired, par value of shares issued; in case of shares without par value number of shares issued and possible compensation granted for contribution in kind. (AktG, §27). In case of stock capital raised in cash 25% of par value plus entire surcharge in case of issue above par has to be paid in as minimum and assets have to be transferred in full prior to registration. (AktG, §§36, 36a). Above regulations apply also in case corporation is formed by one shareholder as sole shareholder.

Corporation comes into existence by registration in Commercial Register of its domicile (see category 3 Business Regulation and Commerce, topic 3.05 Commercial Register) on application of all incorporators, managers and supervisors. (AktG, §36). Court must register corporation, provided it finds, upon proper examination that articles of incorporation comply with minimum requirements and after managers and supervisors confirm to court that they have checked incorporation proceedings and rendered incorporation report and all shares have been subscribed and necessary contributions in cash or kind have been made. ("Gründungsbericht"—AktG, §32). In cases, where shares have been issued against contribution of assets auditors appointed by court upon nomination by local Chamber of Industry and Commerce have to give same confirmation as required from corporation's managers and supervisors upon audit of die incorporation proceedings. (Gründungsprüfung—AktG, §33). Audit by auditors appointed by court or recording notary is required in case managers or members of supervisory board are shareholders incorporating company or if advantage, compensation or consideration as regards to incorporation is granted to managers or members of supervisory board. (AktG, §33). Registration must also be accompanied by articles of incorporation, all contracts, documentation of appointment of managers, supervisors and facsimile signatures of managers. (AktG, §37).

Board of Management (Vorstand) must consist of at least one manager (or two if corporation's stated capital is more than [Euro]3,000,000, unless articles of incorporation provide explicitly for one manager only); it may consist of several managers. (AktG, §76). Managers conduct business of corporation jointly unless otherwise stipulated by articles of incorporation; articles may, however, not provide that quorum can be constituted by minority of managers. They are representatives of corporation. (AktG, §§77, 78). Their power to act on behalf of corporation may be restricted internally but not with effect towards third persons. Acts of management exceeding such internal restrictions are nevertheless valid. Managers are, however, responsible to corporation for any such excess and, moreover, they occupy fiduciary relationship to corporation and are obliged to exercise same care as ordinarily prudent and diligent manager in like position would. (AktG, §93). Business judgement rule applies: manager making business decision does not breach his obligation, if on basis of information available he reasonably can assume to act to benefit of corporation. (AktG, §93). Each individual manager may be held liable by corporation, or, under additional requirements, by shareholder. (AktG, §117). By resolution of shareholder's meeting, corporation must pursue claim for indemnification against managers (or members of Supervisory Board). (AktG, §147). Court can on basis of application of minority shareholders under certain requirements entitle minority shareholders to sue managers (or members of Supervisory Board) in their own name. (AktG, §148).

Members of board of management are appointed by supervisory board for single period not exceeding five years at a time; appointment may be renewed, but not earlier than one year before expiration. (AktG, §84). In cases of emergency, court may temporarily appoint managers. (AktG, §85). Board of Management has to report to Supervisory Board particularly on purposed business policy and other fundamental questions of business planning, especially financial, investment and staff plans, profitability, course of business and transactions having impact on profitability. (AktG, §90).

Supervisory Board (Aufsichtsrat) consists of at least three members. Articles of incorporation may provide for additional board members but not more than nine for corporations with stated capital of up to [Euro]1,500,000, and not more than 15 for corporations with stated capital of up to [Euro]10,000,000 and not more than 21 for corporations with higher stated capital. Number of supervisors must be divisible by three. If corporation is subject to co-determination laws, number of members of supervisory board is substantially different (see subhead Co-determination). (AktG, §95). Shareholders' meeting (Hauptversammlung) elects all members of supervisory board unless employees are, by co-determination law, granted right to elect certain number of supervisors. (AktG, §101). Member of supervisory board may not be person who is already member of supervisory board of ten (under certain conditions 15) other corporations which are required by law to have supervisory board. Chairing supervisory board counts double. No person who is member of board of management of “dependent” corporation (abhängiges Unternehmen) may be supervisor of dominant corporation. Person who is member of board of management of corporation may not be supervisor in second corporation whose board of management includes manager who is supervisor of corporation in which proposed member is manager. Articles of incorporation may require personal qualifications for persons to be supervisors, but only for supervisors to be elected by shareholders. (AktG, §100). Articles of incorporation may grant preferred right to appoint supervisor to certain stockholder or to holders of certain class of shares, number of supervisors thus to be appointed not exceeding one-third of total number of supervisors to be elected by shareholders. (AktG, §101). Term of office of supervisors may not exceed date of shareholders' meeting discharging supervisors for fourth business year. Substitute for supervisor may be elected or appointed for same term to take office in case of removal or resignation of supervisor before expiration of term. (AktG, §§101, 102). Supervisor may not simultaneously be member of board of managers or permanent substitute for such member, and may not be representative (Prokurist, Handlungsbevollmächtigter) of corporation; but supervisor may represent manager or other agent of corporation for specified period not exceeding one year. (AktG, §105). Supervisory Board must meet twice in half calendar year. However, Supervisory Board of company not listed may resolve to meet only once in half calendar year. (AktG, §110). Supervisors must elect chairman and at least one vice-chairman, whose names are recorded in Commercial Register; minutes of meetings are signed by chairman and must include date of meeting, quorum, agenda. (AktG, §107). Supervisors in general act as board by resolution at properly called meeting. In absence of special statute or provision by articles of incorporation, majority of authorized number of supervisors constitutes quorum, minimum being three supervisors being present at meeting. Any action required or permitted to be taken by supervisory board may be taken without meeting by resolution in writing, by telex, fax, phone or by comparable means, if no supervisor dissents from such kind of proceeding. (AktG, §108). Supervisory board may appoint committees of its own members to act for board, but essential functions of board need to be exercised by entire board. (AktG, §107).

Designated function of board in general is to supervise and control conduct of business of board of management. Supervisors are not authorized to conduct business, neither individually nor as board. Supervisory board and board of management are distinctly separate bodies. Supervisory board in particular has authority to inspect books and papers of corporation in person or by experts. If it is necessary for benefit of corporation, supervisory board may call for shareholders' meeting. Moreover, articles of incorporation or supervisory board itself must provide that certain kinds of corporate business may be conducted only upon approval by supervisory board. If supervisory board refuses approval, board of management may ask shareholders' general meeting to decide upon approval by three-quarter vote of shareholders. (AktG, §111).

Supervisors and managers may be foreigners without German domicile or residence and need not be shareholders.

Corporate's business communication, including stationery and e-mail, must contain indication of legal form of corporation, its place of business, registration number of Commercial Register, names of all managers and of chairmen of board of management and of supervisory board. (AktG, §80).

Annual balance sheet, profit and loss statement, annex and report of management are, as rule, not approved by general meeting of shareholders but submitted to supervisory board after audition. (AktG, §170). Supervisory board accordingly reports to general meeting. (AktG, §171). If managers and supervisors agree, balance sheet is final unless they wish to put it before general meeting for approval. (AktG, §§172, 173). In this case, or if supervisors and managers dissent, balance sheet is submitted for approval to general meeting. In absence of special provision in articles of incorporation shareholders decide by simple majority of votes represented. (AktG, §§133, 173, 175).

Ordinary shareholders' general meeting (Ordentliche Hauptversammlung) which takes place once a year within first eight months of business year (AktG, §120) as rule resolves appointment of supervisors, distribution of profits, if any (dividends to be paid, profits carried forward, reserves, etc.), discharge of managers and supervisors (AktG, §§119, 120) and appointment of auditors. General meeting of shareholders, moreover, resolves, inter alia, on change in articles of incorporation, means of raising capital and reduction thereof and dissolution of company.

General meeting of shareholders is called by managers' resolution by majority vote (AktG, §121) with at least one month advance notice (AktG, §123) but, if circumstances warrant, must be called at request of shareholders' minority representing stock capital of 5% or less, if articles of incorporation permit (AktG, §122). In absence of special provision in articles of incorporation, publication of calling not required and registered letter sufficient, if all shareholders are known. (AktG, §121). Articles of incorporation may condition right to participate in meeting upon shareholder's registration of his participation not later than on seventh day before meeting or shorter period stated in articles of incorporation. (AktG, §123). In case of shares issued to bearer, articles of incorporation can provide that shareholder has to evidence his shareholding as precondition to the entitlement to participate in the meeting or to exercise voting rights. For listed corporation confirmation of shareholding by custodian bank is sufficient evidence. If all shareholders are present in meeting and consent resolution can be made without observance of statutory requirements for calling. (AktG, §121). All resolutions passed at general meetings must be laid down in notarial protocol and submitted to Commercial Register. (AktG, §130). However, unless shares are admitted to stock exchange trade and no resolutions are passed requiring three-quarter majority, simple minutes signed by chairman of supervisory board is sufficient recording. (AktG, §130). In absence of special statute or provision in articles of incorporation, voting is by majority. (AktG, §133). Each share carries one vote. Articles of incorporation may provide issuance of preferred stocks without voting right. (AktG, §§12, 139-140). Unless corporation is listed, articles of incorporation may fix maximum number of votes in case shareholder owns several shares. Articles of incorporation may also suspend votes of “dependent” corporations and subsidiaries on shares owned by corporation. (AktG, §§133, 134).

Articles of incorporation can be amended only by three-quarter vote of shareholders present at ordinary or extraordinary general meeting. Articles of incorporation may prescribe another majority which, if corporation's purposes are to be changed, only may be higher. (AktG, §179).

Any increase of nominal capital against issue of new shares requires majority vote of at least three-fourths of stock capital represented at meeting. Articles of Association may prescribe another majority, but in case of issuance of preferred nonvoting shares only greater one. (AktG, §182).

New shares are subscribed by written declaration (Zeichnungsschein) in duplicate and must recite date of resolution to increase capital, nominal value and kind of shares, date at which optional shares become invalid unless capital has in fact been raised prior to stated deadline, etc.; failure to include all necessary statements invalidates new shares. (AktG, §185). Articles of incorporation may authorize board of management to increase capital with consent of supervisory board within five years after incorporation, or after amendment of articles of incorporation giving authority to such increase (“genehmigtes Kapital”); authorised capital (“genehmigtes Kapital”) may not exceed half of issued share capital. (AktG, §202). Generally, shareholders have preemptive right to acquire new shares in proportion to previous holdings. (AktG, §186). Capital can also be increased out of corporation's own funds or legal reserves if latter exceed one-tenth of corporation's capital (AktG, §208), on basis of last balance sheet. Capital can be increased to satisfy stock-options issued; however only up to one-tenth of corporations' capital for stock-options issued to employees and members of board of management of corporation or subsidiaries. Resolution of shareholders' meeting must determine division of preemptive rights between employees and members of board of management, manner and time in which person entitled can acquire and then exercise stock-options (no less than two years after acquisition). (AktG, §§192, 193). Resolution to increase capital must be entered in Commercial Register. Within 18 months of passage of resolution, corporation may acquire its own shares if resolution determines lowest and highest price for shares and proportion of corporation's capital which shares can amount to and which is not greater than one-tenth of total capital. It is forbidden to acquire its own shares for trading. (AktG, §71 Nr.8).

Corporation may also issue bonds, profit-sharing or convertible. Issue requires three-fourths majority of stock capital represented at shareholders' meeting unless articles of incorporation provide otherwise. (AktG, §221).

Numerous reporting obligations exist. Some of them are: Commercial register is to be notified immediately, if all shares are held by one shareholder. (AktG, §42). Enterprise holding more than 25% of shares of domestic corporation or which holds majority of shares or voting rights in such corporation must report this to corporation. (AktG, §20). Same applies if such shareholding no longer exists. Corporation must publish such reported shareholdings and reported fact that such shareholding no longer exists. If corporation holds more than 25% and 50% of shares of another corporate entity, it must report this to corporate entity. (AktG, §21). In case of corporations listed with domestic stock exchange, shareholders whose shareholding reaches, exceeds or falls below 3%, 5%, 10%, 15%, 20%, 25%, 30%, 50% or 75% of voting rights must be reported to corporation and Federal Authority for Financial Services Supervision—Bundesanstalt für Finanzdienstleistungsaufsicht—BAFin. (WpHG, §21). Also, shareholder who holds 3% of voting right at time shares are listed for first time must report this to corporation. (WpHG, §21). Reports have to be published by corporation. (WpHG, §26). Foreign corporation whose shares are listed with German stock exchange are subject to reporting obligations. (WpHG §21). Shares with reporting obligations not fulfilled are barred from voting. (WpHG, §28)

Additional notification and reporting requirements exist, if it is considered to acquire shareholding in banking, insurance, or security trading corporation exceeding 10% of share capital or to increase shareholding in such corporation to more than 20%, 30%, or 50%.

Corporation is dissolved by resolution of at least three-quarters of stock capital represented at shareholders' meeting, by bankruptcy and on expiration of period provided for in articles of incorporation. (AktG, §262). Combination of all shares in one hand does not dissolve corporation. On dissolution it is liquidated by liquidators except if bankruptcy proceedings are opened and receiver is appointed. (AktG, §§264, 265). Assets may be distributed not earlier than one year after third public announcement to creditors requesting them to notify liquidators of their claims. (AktG, §272). Dissolution and corporation's final liquidation are registered by commercial register. (§263).

Corporations may be merged or consolidated with other corporations, general or limited partnerships, registered cooperatives or mutual insurance associations. Merger or consolidation is governed by Transformation Act (Umwandlungsgesetz) of Oct. 28, 1994 (BGB1. I, p. 3210), which has come into force with effect of Jan. 1, 1995, last am'd by Law of Aug. 14, 2006 (BGBl. I, p. 1911).

Corporation Law is supplemented by German Corporate Governance Codex (“Kodex”). Kodex sets out national and international standards for control and supervision of corporations. Kodex is not legally binding but board of management and supervisory board have to publish which recommendations are followed and which are not. (AktG, §162).

See also category 3 Business Regulation and Commerce, topic 3.17 Securities.

“Gesellschaft mit beschränkter Haftung (GmbH).”

This is another, most common form of corporation. (Law of Apr. 20, 1892, last am'd by Law of Dec. 17, 2008 [BGBl. I, p. 2586 - GmbHG]). Due to its simpler organization, corporation with limited liability is more convenient than Aktiengesellschaft in cases where capital is small or number of shareholders is limited. As all shares of Gesellschaft mit beschränkter Haftung may be combined in one hand, it is often appropriate form for subsidiary companies.

The main differences between Aktiengesellschaft and Gesellschaft mit beschränkter Haftung are that in case of the latter: shares are transferable only by notarial (or court) protocol (§ 15) in order to prohibit stock exchange transactions. As rule, no share certificates are issued; if issued, their transfer is not sufficient to transfer shares. Articles of incorporation may (and as rule do) provide for special restrictions on transfer of shares, e.g., consent of shareholders' meeting or of managers. (§ 15). Shareholders may interfere with day to day business of corporation and instruct management (directors – Geschäftsführer) to that extent.

Gesellschaft mit beschränkter Haftung may be incorporated by only one incorporator (natural or corporate person, German or alien) as sole shareholder. Articles of incorporation (as well as subsequent amendments, § 53) must be in notarial form (§ 2). Shareholders may hold business interests (shares) which may be of different denominations. Minimum par value of business interest: may be [Euro]1 only. Sum of par value of shares must equal nominal amount of corporation's stated capital which must be at least [Euro]25,000. Business interests may be issued against cash or assets. (§ 5). Upon incorporation, at least 25% of each business interest must be paid in, either in cash or in kind. However, total contribution to be made upon incorporation must amount to at least [Euro]12,500. Noncash capital contributions must be made in full. Shareholder can subscribe for more than one share. (§§ 5, 7).

Shareholding in Gesellschaft mit beschränkter Haftung is evidenced by list of shareholders to be filed by management and in certain cases instead of management by notary public involved with commercial register. In relation to corporation only such person or entity is deemed as shareholder, which is listed in list of shareholders filed with commercial register. In addition, under certain circumstances acquisition of shares in good faith is possible, if vendor is listed in list of shareholders. Therefore, regular inspection of list of shareholders is recommended.

There must be at least one manager (§6), natural person, German or alien, who is appointed by shareholders (§46). Supervisory board is optional, not obligatory (§52); but see also subhead Co-determination. Shareholders may vote orally, in writing or at meetings. No notarial protocol is required unless articles of incorporation are amended.

The corporate name must contain the words “Gesellschaft mit beschränkter Haftung” (company with limited liability) or abbreviation. (§4).

The corporation comes into existence by registration in the commercial register on application of managers. (§11). Court registers corporation on managers' assurance that 25% of capital in cash and/or all assets (if any), at least [Euro]12,500, are at their free disposal. (§8).

The liability of shareholders is as rule limited to unpaid part of their shares. They are, however, ratably liable if another shareholder fails to pay up his share in full. (§24). Articles of incorporation may provide for additional liability of shareholders in certain cases. (§26). Under certain circumstances loans to GmbH from shareholder are treated as capital of company to effect that reimbursement cannot be requested, unless shareholder's share is less than 10% and he is not manager. (§32a).

Unless articles of incorporation specifically provide differently, many provisions of Corporation Law (Aktiengesetz) of Sept. 6, 1965 are now applicable to optional or mandatory supervisory board of GmbH, as for instance to their number, personal requirements, remuneration, etc. (see subhead Aktiengesellschaft [AG], supra) to GmbHs being part of holding group.

Since Nov. 2008, new type of corporation, in which liability is limited to its assets, exists in form of Unternehmergesellschaft (entrepreneur company). Unternehmergesellschaft may be incorporated with stated share capital of [Euro]1 only. Firm name must contain indication “Unternehmergesellschaft (haftungsbeschränkt)” or “UG (haftungsbeschränkt)”. Such corporation has to allocate one quarter of its profits as statutory retained earnings, which may be used only to increase share capital or to compensate annual losses. If share capital is increased to amount of [Euro]25,000 as minimum, corporation becomes normal Gesellschaft mit beschränkter Haftung. However, it may retain term “Unternehmergesellschaft (haftungsbeschränkt)” or “UG (haftungsbeschränkt)” as part of its firm name. (§ 5a GmbHG).

Accounting.

Corporate (AG; GmbH; KGaA) accounting is ruled by Commercial Code (HGB) of May 10, 1897, §§238-335, repeatedly amended. Distinction is made between “small”, “intermediate”, and “large” corporations. “Large” are corporations admitted to quotation on stock exchange or corporations meeting at least two of following requirements: Balance sheet total over [Euro]16,060,000; turnover over [Euro]32,120,000; labor force over 250. “Intermediate” are corporations meeting at least two of following requirements: Balance sheet total over [Euro]4,015,000; turnover over [Euro]8,030,000; labor force over 50. (HGB, §267). “Small” are corporations not exceeding threshold qualifying corporation as “intermediate”.

Management has to draft annual accounts (balance sheet, profit and loss statement, annex) and report within first three months of new business year. In case of “small” corporations period may extend to six months. (HGB, §264). “Small” and “intermediate” corporations' accounting procedures are simplified in many ways in comparison with “large” corporations' accounting. Accounts and report must be audited by auditors appointed by shareholders' meeting, except in case of “small” corporations. (HGB, §§316-324). Accounts and report of managers and supervisors (if any) are to be filed within 12 months—in case of listed corporation; within four months—after end of fiscal year with operator of electronic Federal Gazette and published in electronic Federal Gazette. (HGB, §§325-329). “Small” corporations only have to file balance sheet and respective part of annex.

Annex must explain balance sheet and profit and loss statement and contain, in addition to information on managers' and supervisors' remuneration (including profit-sharing, commissions, and any other benefits) information about contingent liabilities not shown in balance sheet, relations to affiliated and associated enterprises, etc. (HGB, §§284-288).

Report must describe major events, if any, of current year up to meeting, corporation's foreseeable future development, and corporation's technical developments and research and development activities. (HGB, §289).

Consolidated annual accounts (balance sheet, profit and loss statement, annex, report) are mandatory for corporation holding group of companies meeting at least two of following requirements: Aggregate balance sheets worldwide total over [Euro]19,272,000 (unconsolidated) or [Euro]16,060,000 (consolidated); aggregate worldwide turnover over [Euro]38,544,000 (unconsolidated) or [Euro]32,120,000 (consolidated); worldwide labor force 250 or more. (§293). If shares of holding company or one of its consolidated subsidiaries or other instruments issued by holding company or one of its consolidated subsidiaries are listed above exemption from obligation to issue consolidated report does not apply. For credit institutions and insurance companies there are special parameters. (HGB, §§290-315). Consolidated annual accounts must be audited by sworn accountants, filed with operator of electronic Federal Gazette and published in Federal Gazette. (HGB, §§316-329).

Co-determination.

German business enterprises, under certain conditions, are co-determined by representatives of labor force and unions by virtue of four different statutory frameworks.

Co-determination in Enterprises of Mining and Steel Industry is regulated by Law of May 21, 1951 (BGBl. I, p. 347, Montanmitbestimmungsgesetz), as am'd, and by Law of Aug. 7, 1956 (BGBl. I, p. 707 Mitbestimmungsergänzungsgesetz), as am'd.

Enterprises of mining and steel industry carried on in legal form of Aktiengesellschaft (AG) or Gesellschaft mit beschränkter Haftung (GmbH) or bergrechtliche Gewerkschaft (see subhead Special Corporations, infra) and either employing more than 1,000 employees or being so-called “Einheitsgesellschaften” (companies divested under Law No. 27 of Allied High Commission of May 16, 1950) must have supervisory board, depending upon amount of stated capital, of 11 (5 + 5 + 1) or 15 (7 + 7 + 1) or 21 (10 + 10 + 1) members; half of members to be elected by shareholders, and other half to be elected by employees, and “neutral man” upon nomination by all other members of supervisory board to be elected by shareholders. Director of personnel (Arbeitsdirektor) is appointed as member of board of management by majority of supervisory board including majority of workmen's members. Likewise, Arbeitsdirektor cannot be removed from board of management against majority of workmen's members of supervisory board.

Co-determination Law of May 4, 1976 (BGBl. I, p. 1153, Mitbestimmungsgesetz) as am'd provides for equal workmen's representation in supervisory boards of all business associations (except those which are subject to co-determination for mining and steel industry) carried on in legal form of AG, Kommanditgesellschaft auf Aktien (KGaA), GmbH, incorporated bergrechtliche Gewerkschaft or Erwerbs- und Wirtschaftsgenossenschaft (for-profit co-operative association), and having regularly more than 2,000 employees. Exempt are associations directly serving political, religious, charitable, educational or scientific purposes or arts, and media associations as press, editors, broadcasters. Number of employees of affiliate association in one of legal forms subject to co-determination, is to be added to number of employees of parent association for purposes of co-determination, if parent company “dominates” affiliate (Aktiengesetz, §§15-18). Thus, holding company may very well be subject to co-determination although having itself only few employees. Moreover, company in legal form being subject to co-determination, which is general partner in limited partnership (KG) has to add number of employees of partnership to number of its own employees if majority of limited partners also constitutes majority (by capital or by voting power) in company which is general partner.

Foreign companies, i.e. companies incorporated or established under foreign law and doing business in Germany, are not subject to co-determination; however, subsidiaries incorporated under German law in one of legal forms shown above, although shares may be held partially or entirely by foreigners, have to comply with co-determination law.

Substance of co-determination is that all companies being subject to it must have supervisory board, half of whose members are to be elected by shareholders and other half by employees. Representatives of labor force on board consist partially of employees of company and partially of representatives of labor unions. Supervisory board has 12 members (six shareholders' representatives, four employees, two union representatives) in companies with not more than 10,000 employees, 16 members (8 + 6 + 2) in companies with not more than 20,000 employees, and 20 members (10 + 7 + 3) in companies with more than 20,000 employees. Labor force members of board are to be elected directly by employees if not more than 8,000 employees are entitled to vote; otherwise employees elect electors who then elect members of board. One member of each different group of employees, blue-collar workers, white-collar employees and management employees (Arbeiter, Angestellte, leitende Angestellte) must be elected to board; groups must be represented proportionally.

Supervisory board shall, by two-thirds majority, elect one of its members as chairman and one as vice-chairman. If required majority is not reached, shareholders' representatives elect chairman and labor force representatives elect vice-chairman.

Supervisory board, by two-thirds majority, appoints members of board of management. If required majority is not reached, supervisory board votes by one-half majority requirement on proposal made by committee of supervisory board, previously having been set up exclusively for purposes of this voting procedure. If majority requirement is not met, third election procedure shall take place in which chairman has two votes.

Enterprises, not being co-determined under foregoing, are subject to co-determination according to Law on Third Part Participation of Employees in Supervisory Board (Drittelbeteiligungsgesetz) of May 18, 2004 (BGBl. I, p. 974 as am'd). According to this law every AG, or KGaA, GmbH, Erwerbs-oder Wirtschaftsgenossenschaft (for-profit co-operative association) or insurance association (Versicherungsverein auf Gegenseitigkeit) having 500 or more employees, and, irrespective of number of employees, AGs, which have been registered before Aug. 10, 1994 or whose shares are not held by one family only, must have Supervisory Board. One-third of its members are to be elected by employees. Right to appoint managers of GmbH is reserved for shareholders. According to Law on Co-Determination of Employees in Cross Border Merger (Gesetz über die Mitbestimmung der Arbeitnehmer bei einer grenzüberschreitenden Verschmelzung) of Dec. 21, 2006 (BGBl. I 3332), complex co-determination regulations apply in case of cross border merger.

Every enterprise, without regard to its legal form, no matter if single proprietorship or association and no matter whether or not it is co-determined under rules shown supra, is subject to entire Works Council Act of 2001 (Betriebsverfassungsgesetz), if it has five or more employees. Employees may elect works council (Betriebsrat) whose main function is, unlike previously described co-determination which provides for participation of labor force in decision-making upon conduct of business, to care for working condition of employees. Thus, works council has certain specified rights to be informed, to be heard and to participate in decision-making of management concerning personnel matters; for example, termination of employment contract may be invalid without works council being heard before. See category 10 Employment, topic 10.01 Labor Relations.

Special Corporations.

There are several kinds of co-operative associations (Genossenschaften) regulated by special laws. They have no capital stock, but are simply combinations of persons. They have rights of corporation if formed in compliance with law and are numerous and used for various lawful trade purposes, especially for smaller and medium sized handicraft and agricultural purposes. Minimum number of members is seven and their liability, whether limited or unlimited, depends upon form of association.

Similar to American membership corporation are the “Vereine,” associations which obtain legal capacity through entry into register. See also topic 2.02 Associations.

Investment Funds.

Most important statutory provisions are: (i) Law on Investments (Investmentgesetz) of Dec. 15, 2003 (BGBl. I, p. 2676, as repeatedly am'd) concerning investment in securities, money market securities, derivatives, bank deposits, real property and investment shares; and (ii) Law of Sept. 9, 1998 (Gesetz über Unternehmensbeteiligungsgesellschaften, BGBl. I, p. 2765) as am'd concerning establishment of companies for purpose of investing in business interests of domestic companies and one-man enterprises (silent partner interest; see also topic 2.06 Partnerships, subhead Silent Partnership) not admitted to official or semiofficial listing (see category 3 Business Regulation and Commerce, topic 3.17 Securities).

Change of Corporate Form.

Corporation may change its corporate form into another form of corporation as well as into general or limited partnership, noncommercial partnership or registered cooperative. Transformation also is possible by assigning corporation's property to one shareholder. Shareholder's resolution to this effect requires a majority of three-quarters or 90% or even consent of all shareholders respectively. Recording in Commercial Register is legal prerequisite for validity of transaction. For details see Transformation Act (Umwandlungsgesetz) of Oct. 28, 1994 (BGB1. I, p. 3210), as repeatedly amended. Tax benefits are granted in cases of merger or transformation by Transformation Tax Law of Sept. 6, 1976 (BGBl. I, p. 2641) as repeatedly amended.

Special restrictions apply to certain kinds of corporations. Insurance companies (with certain exceptions, e.g., reinsurers) are controlled by Federal Authority for Financial Services

Supervision (Bundesanstalt für Finanzdienstleistungsaufsicht) with its seat in Bonn and Frankfurt am Main. Same authority exercises similar control over banking corporations and enterprises providing financial services.

Foreign Corporations.

Foreign corporations may do business in Federal Republic of Germany with or without maintaining a branch. If business of respective German enterprise needs special permit (e.g., Banks) such is also required for branches of foreign corporations. Branch must be registered with commercial register of court in district where branch is located. Various formalities are to be fulfilled, e.g., to application must be attached officially certified copy of articles of incorporation. See category 18 Property, topic 18.07 Real Property. Corporations from other EU member states are to some extent privileged due to EU Law. Corporations established under laws of EU member state can act in this form in Germany even if main business operation of corporation is not conducted in that other EU member state but in Germany only (European Court of Justice, judgment of Sept. 30, 2003—Rs. C-167/01—Inspire Art).

See also category 14 Foreign Trade and Commerce, topic 14.06 Foreign Trade and Foreign Investments.

Income Tax on Corporations.

See category 19 Taxation, topic Taxes.

Publication.

All the publications provided for in the above laws must be published at least in “elektronischer Bundesanzeiger” (electronic Federal Gazette), which is kept as online publication.

Former GDR.

Corporate forms listed above also existed in former GDR up until its final day, even if they served no practical purpose, since all economic activities were channeled through publicly owned enterprises called “Volkseigene Betriebe” (VEB). By law of June 17, 1990, (“Treuhandgesetz”—trust law), “Treuhandanstalt” (National Trust Agency), renamed Bundesanstalt für vereinigungsbedingte Sonderaufgaben—BVS—as of Jan. 1, 1995, became sole shareholder of all these enterprises, which were simultaneously, by same law, transformed into “Aktiengesellschaften” or “Gesellschaften mit beschränkter Haftung” GmbH.

See also category 3 Business Regulation and Commerce, topic 3.13 Monopolies, Restraint of Trade and Competition.

2.04 FOREIGN CORPORATIONS:

See topic 2.03 Corporations; category 18 Property, topic 18.07 Real Property.

2.05 INSIDER DEALING:

See category 3 Business Regulation and Commerce, topic 3.17 Securities.

2.06 PARTNERSHIPS:

The commercial partnerships of German law do not correspond exactly with what is meant by “partnership” in American law. While German law comprises under this term commercial enterprises only, or enterprises which are conducted in the way of commercial enterprises, American term comprises some features which pertain in German law to associations (Gesellschaften) of civil law under Civil Code, but last named associations differ in nearly all essential points from what is called partnership in American law.

Partnership of German law (Offene Handelsgesellschaft) provided for in Commercial Code (HGB) of May 10, 1897, as am'd, §§105-160, is reserved to commercial enterprises. It is not legal entity but has some features in common with legal person. It is entitled to carry on business and acquire rights in name of partnership; it may sue and be sued under firm name. Name of firm is registered in commercial register, kept by municipal court (Amtsgericht) and all entries demanded by law concerning partnership are registered under such name of firm. Partnership may even sell business with name of partnership to single person, and such person will then be permitted to use partnership's firm name provided that succession is indicated, for business conducted by him alone. Firm name must contain term “offene Handelsgesellschaft” or generally known abbreviation of this term. Partnership may have distinct partnership property.

Every partner is obliged and entitled to participate in the management of the business unless other provisions are made in the partnership agreement. Thereby some partners may be entirely excluded from the management, or several partners may attend to it collectively only. Profits and losses may be divided according to the agreement.

Different from the management is the representation to third parties. Here the same rules as to management apply and each partner may bind the firm and the other partners. Restrictions of a partner are only allowed to a certain extent and, in order to become operative as against third persons, must be recorded in the commercial register. In dealing with a partnership, it is advisable to ascertain whether the partner purporting to act for the firm is placed under any restriction which fact is ascertainable from an inspection of the commercial register.

The partners are liable for all debts and liabilities of firm, jointly and severally, and directly also. Any new partner, in joining partnership (which does not require dissolution of old partnership and forming of new one), becomes liable for all debts of partnership. Any creditor may, instead of firm, sue any single partner, if he so desires, or firm and all or any of partners. On other hand, firm keeps its property, which is property common to partners, separate from private property of each partner. Private creditor of single partner may not levy against any of assets of firm, but is confined to his right to have partnership dissolved at end of financial year with six months notice and levy against capital portion of his debtor due to him upon liquidation of firm.

Partnership is dissolved by expiry of term for which partnership was established, resolution of partners, opening of insolvency proceedings against partnership or by judicial decision. Creditors in insolvency proceedings against partnership may follow it up by insolvency proceedings against each partner.

Death of partner (unless partner agreement provides for continuing partnership with heirs of deceased), opening of insolvency proceedings against partner, termination by partner, termination of creditors of partner or other reasons stipulated in partnership agreement do not dissolve partnership, but affected partners are excluded from partnership. Moreover, under certain circumstances partners may resolve to exclude partner from partnership. In case of dissolution, after dissolution liquidation takes place. Partners themselves are liquidators by operation of law unless court, upon application for good reasons, appoints another liquidator.

Limited partnership (Kommanditgesellschaft) is composed of at least one partner (general partner) whose liability is unlimited, and one or more other partners (limited partners) whose liability is limited to amounts they have agreed to bring into business as their share of capital as registered in commercial register. Limited partner, who has not fully paid in amount he has agreed to put up or to whom such contribution is repaid, is liable to creditors of partnership up to that amount. Limited partner is not entitled to participate in management and cannot represent company in dealings with third person unless he receives special power of attorney for such purpose. Firm name must contain term “Kommanditgesellschaft” or generally known abbreviation of this term. Name of limited partner may not figure in name of firm. (HGB, §§161-177a).

Partner whose liability is unlimited may be "Gesellschaft mit beschränkter Haftung," see topic 2.03 Corporations, and its shares may be held by limited partners. Limited partner may also be foreign corporation from other EU member state.

In event of death of limited partner limited partnership is continued with heirs of deceased, unless otherwise regulated in partnership agreement.

Silent partnership (stille Gesellschaft) is a partnership only between parties, partly subject to provisions of Civil Code as to civil associations, and does not operate as a partnership against third persons; it has no firm name, and no entry is made in commercial register. For debts and liabilities of business only owner, not silent partner, is liable to any creditor. (HGB, §§230-237).

Civil partnership (Gesellschaft des bürgerlichen Rechts) is general form of partnership of which purpose may be any business not considered as commercial matter by HGB. It is ruled by BGB, §705 et seq.

Partnership of Professionals (Partnerschaftsgesellschaften Angehöriger Freier Berufe).—Form of partnership for professional persons—lawyers, auditors, tax consultants, physicians, etc.—regulated by law of July 25, 1994 (as am'd). Character similar to commercial partnership (Offene Handelsgesellschaft—see above). Rules for Commercial Partnership apply to large extent, in particular as far as participation in management, representation to third parties and joint and several liability for debts and liabilities of firm is concerned. Yet, professional liability is restricted to acting partners and assets of partnership, if only individual partners were dealing with matter. Firm name of partnership must contain words "und Partner" or "Partnerschaft" plus reference to partners' professions; firm name of other corporations may not contain these words.

European Partnership according to Law of Apr. 14, 1988 (BGBl. I, 1988, p. 514) may be established by contractors or unemployed persons. Provisions are quite similar to German partnership law. Partners of at least two EU member states are necessary.

3 BUSINESS REGULATION AND COMMERCE

3.01 ANTI-TRUST LAWS:

See topic 3.13 Monopolies, Restraint of Trade and Competition.

3.02 BILLS AND NOTES:

German law distinguishes sharply between bills of exchange (Wechsel) and checks (Scheck). This distinction is so pronounced that such matters are covered by two different codes, one dealing with bills of exchange (Wechselgesetz of June 21, 1933, RGBl. I, p. 399 as repeatedly am'd), other dealing with checks (Scheckgesetz of Aug. 14, 1933, RGBl. I, p. 597 as repeatedly am'd). Main difference is that bill of exchange is based upon personal credit of parties to bill while check drawn on bank or banker is means of payment only.

Germany is party to Treaty of Geneva of June 30, 1930, concerning Uniform Law of Bills and Notes. (BGB1. II, 1953, 148; BGB1. II, 1960, 2315).

The law of bills of exchange deals with two types of such instruments, one is the "drawn bill of exchange" (gezogener Wechsel), corresponding with American bill of exchange. The other is "own bill of exchange" (eigener Wechsel), corresponding with American promissory note.

The "drawn bill of exchange" must contain: (1) express designation as a bill of exchange in any language in which bill is drawn, (2) unconditional order to pay a definite amount of money, (3) name of drawee, (4) time of payment, (5) designation of a place where payment shall be made, (6) name of payee, (7) day and place of making, (8) signature of maker. If one of above mentioned requisites is absent, document is not considered bill of exchange. There are, however, certain exceptions to this rule; most important being that bill of exchange where time of maturity is absent is considered payable on sight.

The bill may be drawn on the maker or his order; it may be drawn on the account of a third party. If the amount is expressed in figures and words, the words prevail in case of discrepancy. Invalidity of one signature (e.g., minority, forgery, etc.) has no effect upon validity of genuine signatures on instrument. Bill of exchange must not be drawn to bearer. Bills may fall due at sight, at certain time after sight, at certain time after day of issuance, or on certain date.

The drawer of a bill is liable for its acceptance and payment; his liability for acceptance can, however, be eliminated. Unless it is eliminated he has to pay to holder in case of nonacceptance sum stated in bill with discount owing to payment before maturity. If bill has been issued or endorsed without being filled in completely and later on has been filled in contrary to agreement made with drawer or endorser, nonobservation of such agreement may not be asserted against third holder unless he acquired bill in bad faith or with gross negligence.

There are no days of grace, but any bill may be presented for payment within two business days following the day on which the bill is payable, and unless protest is waived, must be protested for purpose of having recourse against drawer and endorsers. Holder of protested bill is entitled to amount of bill plus cost of protest and other expenses, interest at 6%, in case of bill issued and payable in Federal Republic interest at 2% points above base interest rate according to BGB, §247, however, 6% as minimum from date of maturity, and commission of not over 1/3% unless other rate of commission is agreed. Endorser who cashes bill is entitled to be reimbursed for what he paid to previous holder plus his own expenses, plus interest as stated above from date of payment and not over 1/3% commission. Holder and endorser are entitled to issue new bills for amounts due to them. This right of recourse is barred after one year for holders and after six months for endorsers. Period of limitation for suit against acceptor is three years, beginning with stated time of payment.

The capacity of an alien to incur liabilities under a bill is determined by the law of his nationality unless such law declares another law to be applicable. A liability incurred by an alien is, however, binding if incurred in a country according to the law of which the liability would be valid. As to the form of obligations the lex loci is applicable; but obligations of German nationals need only comply with the requirements of German law. The substantive law applicable to the obligations of acceptors is the law of the place of performance. Other obligations under a bill are ruled by the law of the place where the signatures were affixed. The law of the place of performance also rules as to whether a bill may be accepted only in part and whether the holder must accept a partial payment, and for the measures which must be taken in case of loss or theft of a bill. The law of the place where the bill was issued determines the time within which recourse must be taken, whereas form and limitation of action for protestation are ruled by the law of the country in which the protest is taken.

The “own bill of exchange” (similar in function to promissory note) has to contain: (1) Designation as “bill of exchange” as above, (2) unconditional promise to pay certain amount of money, (3) time of payment, (4) place of payment, (5) name of payee, (6) date and place of making, (7) signature of maker (promisor). Lack of date of maturity renders note due on sight. Other rules about drawn bills of exchange are applicable by analogy.

Check should be drawn on a bank or bankers or certain public corporations, but is considered valid if drawn on some other party. It must be unconditional and payable at sight. It must contain order to drawee to pay certain amount of money. It must state place and date of drawing and must be signed by drawer and contain either word “Scheck,” or, if drawn in foreign language, corresponding designation in that language. Validity of check drawn abroad is governed by similar principles as validity of bill. It is sufficient if requirements of place of payment as to form are observed. Certified checks are permissible under certain conditions, although, on principle, check is not subject to acceptance.

Domestic checks are ordinarily made payable to bearer, and banks generally require all checks to be drawn in this manner. The drawer or holder of a check may write across its face the words, “Nur zur Verrechnung.” This affords some measure of protection as a check crossed in this manner can only be credited to the bank account of the holder and not paid out in cash (similar to: “For deposit only”). Law also provided for generally and specially crossed checks.

Checks drawn in Germany and payable there should be presented within eight days after they are drawn as otherwise any right of holder by way of recourse against drawer and indorsers is lost. After expiration of eight days drawer may revoke it. If there has been no revocation, right of drawee to pay after expiration of eight days is not affected. If drawn in country different from place of payment, time for presentation varies between 20 and 70 days, latter time being applicable for checks drawn in U.S. and payable in Germany.

Checks payable in a foreign country may be drawn on persons on whom checks may be drawn according to laws of such country.

Endorser is liable to holder for payment of check also in cases of bearer checks. Payer has similar rights of recourse against previous endorsers as in case of bills of exchange, such rights being barred after six months. Instead of formal protest drawee bank or clearing office may certify nonpayment on check presented to it. Check may be presented for payment even before date of issuance noted thereon.

Tax.

Bill of exchange or checks are not subject to any tax or stamp duty.

See also topic 3.14 Negotiable Instruments.

3.03 CARTEL LAW:

See topic 3.13 Monopolies, Restraint of Trade and Competition.

3.04 COMMERCIAL LAW:

Commercial Code (HGB) of May 10, 1897, as repeatedly amended, governs legal relationships of merchants. “Merchant” is term defined by law (HGB §1 subparagraph 1): “Merchant” is person engaged in trade (Handelsgewerbe) as defined by law. Trade is any and all commercial enterprise, unless according to its nature or size it does not require to be operated in manner of commercial business. In addition, business is deemed as trade, if firm name of commercial enterprise is registered with commercial register. (HGB §5). Moreover, partnerships and corporations are considered merchants. (HGB §6). Commercial Code contains, e.g., rules concerning principal and agent, general and limited partnerships, contracts concluded by merchants, and accounting rules for all kinds of merchants, including companies. See also category 2 Business Organizations, topic 2.03 Corporations, subhead Accounting.

3.05 COMMERCIAL REGISTER:

Commercial Register is maintained at municipal court (Amtsgericht called Registergericht for that purpose) and records registration of commercial enterprises and merchants. Registration constitutes declaratory notice to public and, in certain cases, it has constitutive character being legal prerequisite, i.e., corporation has no legal existence without such entry. All forms of mercantile and industrial enterprises such as merchants (as defined above), general and limited partnerships, stock corporations and companies with limited liability have to be registered in Commercial Register. Also legal representatives of firm, in particular members of management have to be listed in Commercial Register. Any amendment has to be filed for registration by legal representative(s) of enterprise. Filings have to be made electronically by means of electronic signature. In practice, filings are made by notaries public. Commercial Register is open to public and any person may ask for official certificate of entries and for certified copies of any document filed with Register. Excerpts from content of Commercial Register and other information to be filed with Commercial Register are available on Internet under www.handelsregister.de and www.unternehmensregister.de.

See also category 16 Intellectual Property, topic Patents for Patent Register maintained by German Patent and Trademark Office for patents, designs and 16.03 trademarks.

3.06 CONTRACTS:

While several principal aspects of German contract law are in accordance with principles prevailing in U.S. (e.g., offer and acceptance, mutual consent, etc.), there are several fields where German contract law differs widely from American. Main provisions are set forth in Civil Code (BGB). Chapter of German Civil Code (BGB) concerning law of obligations, in particular contract, statute of limitation, sale of goods and contracts on work performances has been substantially amended by Law to Modernize the Law of Obligations (Gesetz zur Modernisierung des Schuldrechts) of Nov. 26, 2001. (BGBl. I, p. 3138). For contracts entered into before Jan. 1, 2002 rules applicable before Law to Modernize the Law of Obligations became effective apply.

Special provisions are to be found in Commercial Code (concerning merchants), and in Laws on Bills of Exchange and on Checks, in various corporation laws and in other special laws. Certain categories of contracts (e.g., sale, gift, lease, etc.) are dealt with in these Codes in detail. Standard terms and conditions are subject to specific regulations (BGB, §§305 to 310), limiting admissible content of standardized contracts. (See subhead Consumer Protection, infra.)

An offer made during a personal negotiation between parties must be accepted at once; same applies to an offer made by telephone. An offer made to an absent person (by mail, by telegraph, facsimile, email or other electronic means) can be validly accepted only so long as offeror may expect to obtain answer under ordinary circumstances. However, American theory that offer is accepted at time of mailing or cabling, by using same media (post, telegraph) as offeror, is unknown; rather acceptance only becomes effective upon receipt by offeror. If offeror dies before receiving duly forwarded acceptance, contract is nevertheless valid. If offeror fixes time for acceptance, acceptance must be in his hands before such time elapses.

Oral contracts are generally valid and may be proved by any means of evidence, unless the law provides otherwise. Certain contracts must be in writing, especially: The establishment of a foundation inter vivos; assuming a mortgage upon a purchased property; a lease for more than one year (BGB, §550); promise of an annuity; guaranty and suretyship, but if the assumption thereof is a commercial transaction on part of guarantor, no writing is needed (HGB, §350); abstract obligation, which means promise to pay without reference to other contractual duties; acknowledgment of debt; assignment of mortgage, and others. Notarial or judicial document is required for: Assignment of one's entire property or fraction thereof (BGB, §311b subpara. 2); transfer of real estate and encumbrance thereof (BGB, §311b subpara. 1); and other special cases; including especially promise of gift. See also category 2 Business Organizations, topic 2.03 Corporations.

Consideration is not a requisite for the validity of a contract; hence gift contracts are valid. Also other contracts are valid without consideration, except when nature of contract requires it, e.g., sale or lease.

Contracts for benefit of third parties are valid, and generally third party acquires a direct right of enforcement of contract against obligor.

Principal claim of obligee is performance (specific performance in American terminology). In contrast to American law, claim for damages is only subsidiary claim. If obligor infringes obligations under contract obligee has claim for damages, if obligor is responsible for infringement. See also subhead Nonperformance, Bad Performance, Delay, infra.

Consumer Protection.

Consumer protection rules, formerly contained in separate laws, as of Jan. 1, 2002 have been integrated into German Civil Code (BGB). Standardized contracts, are subject to §305 to §310 of Civil Code (BGB), which intends to protect consumers against unfair clauses in standard contracts or standard conditions of business. However, with certain restrictions these rules apply also for contracts between merchants. Sales contracts with consumers are subject to specific rules (BGB, §§474, 475), excluding possibility of contractual regulations—not only in standard contracts or conditions of business—which deviate from respective provisions of Civil Code.

Loans granted to consumers (consumer credits-Konsumentenkredite) including instalment purchases are as of Jan. 1, 2002 subject to BGB, §§491-507. These regulations formerly where contained in Consumer Credit Act. Door-to-door contracts and similar contracts, formerly being subject of Law Concerning the Withdrawal from Door-to-Door Contracts (Haustürwiderrufsgesetz), are now regulated by BGB, §§312-312f. These rules contain also provisions concerning distance sales contracts (BGB, §§312b-312d) and electronic commerce (BGB, §312e).

Product liability is regulated by Law Concerning Producers' Liability (Produkthaftungsgesetz) of Dec. 15, 1989 (BGB1. I, p. 2198) as amended.

Nonperformance, Bad Performance, Delay.

Basic principle is that obligor infringing its obligations is liable for damages, provided obligor acted with fault (slight or gross negligence or intent). (BGB, §§280, 276). That excludes liability, if performance becomes impossible by reason beyond power of obligor, such as Acts of God. However, parties can agree that obligor shall be liable regardless of fault, for instance if obligor undertakes to guarantee certain performance or result. German law differs from American principles.

Obligor is in delay with performance either after having received reminder or after expiry of fixed delivery date. (BGB, §286). As stated above, in addition, it is necessary that obligor is responsible for delay. If obligor does not perform within adequate period set by obligee after obligor is in delay, obligee can withdraw from contract. (BGB, §323). In addition obligee may claim damages (BGB, §§280, 281) or reimbursement of expenses spent in vain (BGB, §284), provided preconditions for damages as stated above are fulfilled. If obligor is in delay with payment obligee has claim for interest. Statutory rate of interest is 5%-points above basic interest rate referred to in BGB, §247 and in case of business, in which no consumers are involved, 8%-points above this basic interest rate. (BGB, §288).

If performance is impossible, either for anybody or for obligor only, contract is effective (BGB, §311a), however, claim for performance is excluded (BGB, §275). In such case obligor might be liable for damages. (BGB, §§280, 283-285). Obligee is exempted from obligation to perform consideration. (BGB, §326).

If obligor does not perform or if he does not perform according to his obligations, obligee has claim for damages under additional condition that period set by obligee to perform or to repeat or improve performance has expired in vain. (BGB, §281). In case of sales contract obligee, who receives faulty performance (warranty), in addition to claim for damages (BGB, §§437, 440, 280, 281, 283, 311a) or for reimbursement of expenses in vain (BGB, §§437, 284) has according to his choice claim for delivery of faultless item or for repair of faulty good (BGB, §§437, 439). If obligor does not perform accordingly within adequate period set by obligee, obligee can withdraw from contract (BGB, §§437, 440, 323, 326) or reduce purchase price (BGB, §§437, 441). Withdrawal from contract does not exclude claim of obligee for damages (BGB, §325) or for reimbursement of expenses spent in vain (BGB, §325).

Same warranty rules apply in principle to contracts for work performances (Werkvertrag-BGB, §§633-639). In addition obligee has claim to remedy defects himself and to have costs incurred reimbursed by obligor. (BGB, §637).

In case of unforeseeable essential change of base of contract (Störung der Geschäftsgrundlage) or nonexistence of essential base of contract (Fehlen der Geschäftsgrundlage) contract may be reformed in order to comply with changed situation. If that is not possible or not reasonable for disadvantaged party disadvantaged party may withdraw from contract. (BGB, §313).

Applicable Law.

Form of contract is ruled by law which governs legal situation to which contract refers. Form of law of place where contract is concluded is, however, sufficient. This is not true for contracts by which there is any actual disposal of things, transfer of property or creation of title. Principles of conflict of law are laid down in Introductory Law to German Civil Code (EGBGB), Art. 27 et seq. Parties' autonomy is recognized. If there is no express or implied choice, law to which contract has its closest connection is applicable. Art. 28 EGBGB establishes appropriate legal presumption based on criteria such as place of performance, etc.

Uniform Law on the International Sale of Goods and Uniform Law on Formation of Contracts for International Sale of Goods of July 17, 1973 (BGBl. I, pp. 856 and 868) as of Jan. 1, 1991 have been replaced by United Nations Convention on Contracts for International Sale of Goods (see topic 3.16 Sales).

BGB also applies in former GDR. However, for legal proceedings concluded before Oct, 3, 1990, former GDR law remains effective, especially its legislation on application of laws, provisions of which closely resemble those of EGBGB.

3.07 DISTRIBUTORSHIPS, DEALERSHIPS AND FRANCHISES:

Distributorships and dealerships, which are practically same under German law, have been “developed by case law on basis of individual contracts” and are subject to general provisions of sales (BGB §433 et seq. and HGB §373 et seq.), commercial agency (HGB §84 et seq.), service contracts (BGB §611 et seq.) and management of business (BGB §675). Distributor or dealer (“Vertragshändler or Eigenhändler”) is someone who consistently distributes merchandise from certain manufacturer or supplier in its own name and on its own account.

Franchisee is special kind of dealer who, against franchise fee, has been authorised by franchisor to distribute certain merchandise or services using name, trademark, as well as commercial and technical know-how, and complying with organizational and advertising methods developed by franchisor. Franchisor shall grant technical and sales assistance and is entitled to exercise control of franchisee's business operations. (BAG BB 1979, p. 325).

If specific period is not agreed, reasonable notice is required to terminate distributor or franchise agreement. Rules relating to termination of commercial agency (§§89 et seq. HGB) may apply if position of distributor or dealer is sufficiently analogous to that of commercial agent.

3.08 FRAUDS, STATUTE OF:

Germany has no statute of frauds; but see topic 3.06 Contracts, supra.

In certain cases the law demands a notary's deed or court deed (authentic act). Principal cases are: Assignment of assignor's property in its entirety or in proportional share; contracts concerning interest in real property; waiver of certain inheritance rights; and marriage settlements (see category 13 Family, topic 13.03 Husband and Wife).

3.09 HEALTH:

Drugs are regulated by German drug law (Arzneimittelgesetz—AMG) of 1976, last am'd by Law of Nov. 23, 2007 (BGBl. I, 2631). Drugs marketed in Germany have to be licensed. There are three ways to license drugs. Most common is national license by Federal Institute for Drugs and Medical Devices (BfArM) according to §§21 et seq. AMG. Such licenses are limited to five years. (§ 31 AMG) Renewals are granted upon application. BfArM must be notified of variations to already licensed medicinal products. Major variations can only be implemented after authorization by BfArM. Drugs manufactured by certain biotechnical procedures must be licensed for all EU countries by centralized EU license procedure according to EU-Oder Nr. 2309/93 of EU Counsil of July 2, 1993 by London (UK) based European Agency for the Evaluation of Medicines (EMEA). Certain innovative drugs or drugs containing new substances can be licensed by this centralized EU license procedure. Central EU license is considered as license according to §21 AMG. (AMG, §37). Finally there is possibility of decentralized licensing procedure: drugs licensed in one EU member state can be licensed in other EU member states by competent national licensing authorities by means of mutual recognition procedure according to Directive 93/39/EU of European Council of June 14, 1993.

In principle, drugs have to be distributed by pharmacies, however, with special licence pharmacies may ship drugs. Pharmacies within European Union and in European Economic Area (EEA) may send drugs into Germany, if these drugs are admitted for German market and if laws of their home country regulate mailing of drugs similarly to German law. Price of drugs being subject to prescription charged to end-users are regulated by Regulation on Drug Prices (Arzneimittelpreisverordnung—AMPreisVO). Advertisement for drugs is regulated by German law concerning advertisement of drugs (Heilmittelwerbegesetz—HWG), as amended.

Food Products.

Lawbook on Food and Fodder (Lebensmittel- und Futtermittelgesetzbuch) of Sept. 1, 2005 (BGBl. I, p. 2618) as amended regulates general conditions concerning food products. Also, there are many statutes and regulations concerning different kinds of food products, such as for example Law on Hygiene of the Flesh of Poultry (GFIHG) of July 17, 1996, as amended; Law on Milk and Margarine of July 25, 1990, as amended; Regulation on Mineral and Table Water of Aug. 1, 1984, as amended; Regulation on Beer of July 2, 1990, as amended. Law on Food Products and Articles of Daily Use (Lebensmittelund Bedarfsgegenständegesetz—LMBG) of Sept. 9, 1997 (as am'd) remains in force for interim period as regards to tobacco products.

Smoking Regulation.

Most of Länder (states) have introduced regulation concerning smoking in public, prohibiting smoking for instance in restaurants, bars, trains, planes, public buildings, etc. According to Regulation on Place of Employment in version of Feb. 14, 2001 (BGBl. I, p. 253) as amended, each employee has right to be protected against risk of smoking. Regulation concerning Tobacco Products of Nov. 20, 2002 (BGBl. I, p. 4434) transforms EU directive 2001/37/EC (L 194/26) to German Law and regulates maximum tar, nicotine and carbon monoxide yields for cigarettes, labeling and some general warnings which have to be printed on each unit packet of tobacco products. Commercials and radio advertising for tobacco products is forbidden by Law on Food Products and Articles of Daily Use (LMBG) of Sept. 9, 1997 (as am'd).

3.10 INFORMATION TECHNOLOGY, INTERNET AND NEW MEDIA:

Computer programs are copyright protected as literary works. (§69a et seq. German Copyright Act, which are implementing EU directive on protection of computer programs of May 17, 1991—91/250/EEC). Prerequisite is that they are intellectual creation of owner. No other criteria, in particular as to quality, may be applied. Protection includes draft material. Ideas and principles being basis of elements of computer programs or interfaces are not protected.

Originators have exclusive right to grant license to copy, modify, translate or arrange computer programs and to distribute or hire out originals of computer programs or copies. Right of user to copy software for backup purpose cannot be excluded. User is entitled to watch, examine or test programs to find out idea or bases of computer program. With certain limitations user may reverse engineer computer program to acquire information required to achieve interoperability with another independently created computer program. Commercial rights in computer program produced by employee in conducting duties under his employment or according to instructions of employer vests exclusively in employer.

E-Commerce.

Providing e-commerce services as rule does not require public license or approval.

E-commerce is regulated to some extent by §§312b-312f of German Civil Code (BGB), replacing as of Jan. 1, 2002 Law on Distant Sales. Provisions apply for contracts on delivery of goods or provision of services entered into with consumers exclusively by means of so-called “telecommunication media”, such as letters, catalogues, telephone, fax, e-mail, radio, teleservices or media services (as defined in German Law on Teleservices [Telemediengesetz] of Feb. 26, 2007 [BGBl. I, p. 179]) as amended. Provisions require entrepreneur to inform consumers on business purpose and identity of his enterprise and before entering into contract inter alia on his identity and address, essential features of goods or services, at what time contract comes into existence, minimum period of contracts on permanent or recurring performances, price of goods or services, ancillary costs, payment instructions and delivery of goods or fulfillment of performance. In addition, entrepreneur must inform consumers of their statutory right to cancel order for goods or to return goods and, if any, of any costs consumer has to bear by using telecommunication media in addition to normal telecommunication fees. Consumer is entitled to cancel order within period of two weeks (BGB, §355) after being properly informed of his right to cancel order. Where customer has been informed on his cancellation right only after concluding contract, cancellation period extends to one month. In case of delivery of goods this cancellation period does not start before day goods are delivered. Right to cancel contract is precluded for customized products, audio or video recordings and software, if seal attached to respective data carrier has been removed by consumer, in case of delivery of newspapers and magazines, provision of betting or lottery services or in case of auction sales.

In addition, E-Commerce services are subject to Law on Telemedia (Telemediengesetz) of Feb. 26, 2007 (BGBl. I, p. 179) which includes also special regulations on data protection formerly contained in specific law (Teleservices Data Protection Act—Teledienstdatenschutzgesetz) which no longer is effective. See subhead Teleservices. EU directive on electronic commerce of June 8, 2000 (2000/31/EC) is implemented by means of Law on Electronic Commerce (Elektronischer Geschäftsverkehr-Gesetz) of Dec. 14, 2001 (BGBl. I, p. 3721) is now reflected by Law On Telemedia.

Database Protection.

Databases are subject to protection according to regulations of German Copyright Act. (§§4, 87a et seq., implementing EU directive on protection of databases of Mar. 27, 1996—96/9/EC). Protection differs for databases being treated as copyrighted works on one hand and other databases which are subject to protection sui generis.

Collection of works, data and other elements which according to selection and arrangement of its elements is personal intellectual creation (so called “Collections” – “Sammelwerke”) is subject to copyright protection. Database work (“Datenbankwerke”) is Collection (Sammelwerke) whose elements are systematically and methodically arranged and may be accessed individually by means of electronic facilities or by other means. Such “Datenbankwerke”, i.e. which according to selection and arrangement are personal intellectual creation, are subject to general rules for German copyright. Protection is granted for 70 years after death of originator.

Other databases, which are collection of works, data and independent elements, and which are systematically and methodically arranged and may be accessed by means of electronic facilities or by other means, are subject to protection sui generis (§§87a et seq. German Copyright Act), if acquisition, review or display of these elements required essential investment. Producer of such database has exclusive right to copy, distribute or publicly reproduce database as whole or essential parts of database. Repeated or systematic copying, distribution or public reproduction of nonessential parts are deemed as usage of essential part of database. Law provides for some restrictions in contracts with users of database works: in particular right of user to copy, distribute or publish immaterial parts of database may not be excluded, if that neither is in contradiction to normal use of database nor unreasonably interferes with reasonable interests of owner of database. Protection sui generis continues for 15 years after first publication of database, however 15 years after its production, if database has not been published within period.

Digital signature to identify originator of electronic message and to ensure that its contents is not manipulated is regulated by Law on Digital Signatures (Signaturgesetz) of May 16, 2001. (BGBl. 2001 I, p. 876) as amended. Digital signatures are issued by certification authorities. Regulations in detail are complicated. Rules contained in Law of Digital Signature (Signaturgesetz) are limited to formalities of issuing and administrating digital signatures. By Law of July 13, 2001 (BGBl. 2001, p. 1542) rules were introduced to German Civil Law regulating in particular for what purpose and to what extent digital signatures can be used. §126a BGB provides that legal requirement of writing can be replaced by so-called qualified electronic signature as defined in Law on Digital Signatures (Signaturgesetz). Transmission by “telecommunication means” fulfills requirement of written form stipulated in contract. Moreover, parties can agree in contract that declaration can be made in electronic form. Digital signature has not become common in Germany.

Telecommunication facilities (telecommunication lines, access to networks, connections and other telecommunication facilities) are regulated by German Telecommunication Law (Telekommunikationsgesetz) of July 25, 1996 (BGBl. 1996 I, 1120) as amended. Law provides for need of license for provision of certain telecommunication performances, such as transmission circuits, telecommunication lines, telephone services and like. Law's objective is to enable and strengthen competition in telecommunication market which historically was dominated by monopoly of German mail (Deutsche Bundespost). Matter is too broad to be explained here in detail.

Teleservices including Internet services are regulated by Law on Telemedia (Telemediengesetz) of Feb. 26, 2007 (BGBl. 2007 I, 179). Telemediagesetz regulates electronic information and communication services for purpose of individual usage. Regulations concerning information and content provided for public and which therefore are deemed as broadcasting are contained in Broadcasting State Treaty entered into by German Länder. Tele-services do not require admission or license. Telemediengesetz provides that only supplier of own contents is responsible according to general rules. Suppliers storing third party content are not responsible for such content if they have no knowledge of unlawful information or activities or facts or circumstances making unlawfulness of information or activity evident and if they immediately have taken action to remove unlawful information or to inhibit access to unlawful information or activities. (Telemediengesetz, §9). Suppliers transmitting third party information or providing access to usage of third party information are not responsible for such content, if they did not cause such transmission and have not selected addressee of transmitted information and did not select or modify transmitted information. (Telemediengesetz, §8). Liability for content accessible via link placed on one's website can be excluded to certain extent by disclaimer by which owner of website distances himself from such linked content. Provision of tele-and media-services is subject to strict data protection provisions. Personal data of user, in particular on usage of services and data used for accounting purposes may be stored only under restricted conditions and for limited periods. (Telemediengesetz, §§11 et seq.).

Data Protection.

All processing of personal data for commercial or administrative purposes falls into scope of Federal Data Protection Act (Bundesdatenschutzgesetz, BDSG) which came into effect in revised version on 23 May 2001, BGBl. I, p. 904, as amended. At long last, Germany has implemented EC Data Protection Directive.

Most German business entities must appoint either in-house or external Data Protection Official (Beauftragter für den Datenschutz), whose function has always been specific feature of German Data Protection Law. He supervises data processing and is responsible for organisation and performance of prior checking. (cf. Art. 20 EC Directive). These preventive reviews are required if processing of personal data contains specific risk for data subject.

Businesses have to register with supervisory authorities if personal data is processed for third parties' marketing or market research purposes. Moreover, they have to register automate processing of data before process is in operation, unless Data Protection Official has been appointed or data are processed for own purpose, and not more than nine persons are employed with processing of data and either persons concerned have agreed to processing of their data or data are processed for purpose of contractual relations or relations of confidence similar to contractual relations.

Restrictions to processing apply especially to marketing data, employment data, sensitive data and Internet data. Most important are: Marketing data may only be used if data subject is informed about source of such data and of his/her right to object to further marketing. Telephone and email marketing requires prior consent; processing employees' data, if not only for basic administrative purposes, has to be agreed on with employees' council, if one exists; so-called “sensitive data” may only be processed in special, narrowly defined circumstances. Such data are those relating to person's health, religion, sex life, political beliefs, or trade union membership; special provisions exist for Internet and telecommunications with Telemediengesetz (§§11 et seq.) of Feb. 26, 2007 and Telecommunication Law of 22 June 2004 (BGBI. I, page 1190) as amended (§§91 et seq.). Personal data is very much protected on Internet. Profiling may only be conducted pseudonymously; Internet data may generally not be used for marketing in offline world.

Important part of BDSG is one dealing with transfer of data to non-EU countries which do not have level of data protection “adequate” under European standards of data protection. Barriers for data export, especially affecting U.S., have become notably higher. As political compromise “Safe Harbor” solution—acceptance of certain data protection rules by U.S. based recipient of personal data, supervised by FTC—has originally been developed, but only few U.S. companies have adopted this solution. To large extent, data export has to rely on officially approved model agreements. Alternatively, data exporter from Germany can apply for approval by national supervisory authority. It is to be expected that agreements will be accepted by authorities more readily, if they contain major elements of official model agreements.

3.11 INTEREST:

If interest is to be paid on any money debts by law or by agreement, 4% interest may be demanded, unless another rate has been provided for by agreement. (BGB, §246). Merchants may demand, in case of transactions of commercial character on side of both parties, interest rate of 5% from due date. (HGB, §§352, 353). In case of default money debt bears interest of 5% points above base interest rate referred to in BGB, §247, and if no consumers take part in transaction of 8% points above base interest rate (BGB, §288). If creditor can demand exceeding interest for other reason such exceeding interest is due. Claim for additional damage is not excluded. In case of claim for money under certain circumstances debtor is in default by operation of law 30 days after due date and receipt of invoice or similar request for payment. (BGB, §286 III). Certain particularities apply for loan agreements entered into before 1987. In case of agreements concluded on or after Jan. 1, 1987, borrower may, after ten years from whichever is later of complete draw down of principal or signing of new agreement on date of repayment or interest rate, prematurely terminate agreement by giving six months notice, irrespective of interest rate provided for in agreement; floating rate loans may be terminated at any time upon three months notice. (BGB, §489).

Interest rate on right of recourse if a bill of exchange or a check is dishonoured, is 2% higher than base interest rate referred to in BGB, §247; at least, however, 6%. (WG Art. 48; Law on Checks Art. 45).

3.12 LICENSES, BUSINESS AND PROFESSIONAL:

Before any new enterprise can be started (without distinction as to foreigners or nationals owning business) certain formalities need to be observed which, primarily, are matter of registration only. Thus, reports and registration may have to be made with agency for business and trade (Gewerbeaufsichtsamt), local tax office (Finanzamt), commercial register (Handelsregister), local social security office (Versicherungsanstalt), local chamber of commerce (Industrie-und Handelskammer). New enterprise may be subject to reporting duty with central bank of state (Landeszentralbank) concerned in case of acquisition by nonresident if investment exceeds certain amount of money.

Special permits are required for certain business activities, e.g., in fields of banking, insurance, financial services (brokers, investment consulting) and so forth. To obtain such permit necessary qualifications or financial ability to conduct such business generally must be proven. EU subjects are granted specific relief. If business concerns handcrafts there are requirements as to owner being licensed in that handcraft or employing someone so licensed.

Nonresidents generally are subject to same or similar licensing requirements. Individual's foreign license may be recognized by virtue of bilateral treaties. Residents of EU countries have, in principle, same status as Germans.

Imports and exports are usually free of licensing requirements, except for certain obligations under international agreements (as, e.g., agricultural products subject to EU rules) and except specific licensing requirements concerning trade in certain products listed in Import and Export List (for example armaments and other strategic or technical products). Especially under EU rules, quota arrangements have to be observed.

See also topic 3.13 Monopolies, Restraint of Trade and Competition; categories 2 Business Organizations, topic Corporations; Citizenship, topics Aliens, Immigration; Foreign Trade and Commerce, topic Foreign Trade and Foreign Investments; Intellectual Property, topic Computer, Information and Communication Technology, subhead Telecommunication.

3.13 MONOPOLIES, RESTRAINT OF TRADE AND COMPETITION:

Law against Restraint of Competition (Gesetz gegen Wettbewerbsbeschränkungen - “GWB”) of July 27, 1957, published in new version of July 15, 2005 (BGB1. I, p. 2114) as amended. Objective of comprehensive revision of law was to adjust German Law to amended

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European antitrust law based on Arts. 81 and 82 of EEC-Treaty. Principle object, i.e., protection of free competition from any restrictions, remains unchanged. However, in future, enterprises cannot rely on explicitly regulated exceptions from prohibitions of cartel arrangements as much as before, but will have to judge independently whether their market behavior is legal. Amended GWB extends German cartel authority's power to investigate and penalize abusive conduct. Moreover, legal protection of private persons against restraint of competition is improved. Law against Restraint of Competition (GWB) applies to all restraints of competition which have effects within territory of Federal Republic of Germany, even if they are caused outside this territory.

Cartel arrangements are generally prohibited. (GWB §1). §1 GWB covers broad range of agreements, resolutions of—private or public—enterprises or of associations of enterprises and concerted practices having objective or effect to prevent, restrict or distort competition. Such agreements and practices include agreements directly or indirectly fixing prices or other terms or conditions, agreements providing for control of production or distribution, exchange of market data or allocation of territories.

Certain exemptions from general prohibition of cartel arrangements are allowed by law, however number of exemptions was substantially reduced. Similar to concept of Art. 81 EEC-Treaty law exempts agreements, resolutions of association and concerted practices from prohibition of §1 GWB which add to improvement of production or distribution of goods or to furtherance of technical or commercial progress provided consumers participate reasonably in benefits of such agreement, resolutions or practices. Yet, no restriction may be imposed on participating enterprises, which are not imperative to achieve above objectives or which allow to exclude competition for essential part of goods concerned. European block exemption regulations apply mutatis mutandis. Moreover, under certain circumstances certain cartel agreements between small and medium-sized enterprises (Mittelstandskartelle) are exempted from prohibition of §1 GWB.

Fixing of resale prices is not allowed with exception of newspapers and magazines (GWB, §30) and books and similar printed products (Law on Fixing of Resale Prices of Books - Buchpreisbindungsgesetz - of Sept. 2, 2002, BGBl. I S. 3448, as am'd). However, resale prices of brand-name goods may be recommended under certain circumstances. Recommendation of resale price need not be filed with Cartel Office but may be inadmissible in cases of abuse. Restrictions on acquirer or licensee of patents, registered designs, brands or copyrights which are not within scope of protected privilege may be deemed as offence. Same applies for licensing of know-how as long as know-how does not add to technology and is not identified business secret.

Enterprises dominating market (monopolies and oligopolies) are subject to strict nondiscrimination obligations and submitted to control of Cartel Authorities to determine whether or not they misuse their market position. Enterprise is market dominating within meaning of law if as offerer or buyer of particular kind of goods or services it does not have competitors or is not subject to any substantial competition or has superior market position in relation to its competitors (for instance with regard to market share, financial strength, access to supply and sales markets etc.). It is presumed that enterprise is market dominating if it has market share of at least one-third. Several enterprises are collectively deemed to be market dominating if three or fewer of them have joint market share of at least 50% or five or fewer have total market share of two-thirds, unless enterprises prove that due to their competitive situation essential competition between them is to be expected or that in relation to other competitors they have no dominating position in market.

Market dominating enterprises and enterprises entitled to fix resale prices may not, directly or indirectly, unfairly hinder other enterprises in business activities which are usually open to similar enterprises, nor, in absence of facts justifying such differentiation, treat similar enterprises differently, directly or indirectly. Same applies to—even non- market dominating—enterprises insofar as small or middle-sized enterprises depend upon them as suppliers or sellers of particular types of goods or services to such extent that sufficient and reasonable possibilities to switch to other enterprises do not exist. Market dominating enterprises may not take advantage of their market position to cause other enterprises to concede preferential conditions without justifying factual reasons.

Disregard of provisions of cartel law (GWB) may be considered to be offence and be punished with fine up to 10% of previous year's turnover, with certain caps for certain offences. In addition, Cartel Authority may order forfeit of excess profits to Authority.

Also of great importance are antitrust provisions in Treaty of Rome, founding European Economic Community, of Mar. 25, of 1957 (Arts. 81, 82 EEC-Treaty), and in so-called Montan-Union-Treaty, i.e. Treaty concerning Foundation of the European Community regarding Coal and Steel, of Apr. 18, 1951 (Arts. 65-67 ECCS-Treaty) which provisions partially supplement national antitrust provisions of EU-Members. On Sept. 21, 1990 Merger Control Rules of EU became effective, now partially shifting authority for pre-merger control to EU commission. See category 3 Business Regulation and Commerce, topic Monopolies, Restraint of Trade and Competition in European Union Law Digest (in this volume).

Merger Control.

Mergers of enterprises are subject to merger control of Cartel Authority if consolidated worldwide sales proceeds of participating enterprises in business year preceding merger exceeded [Euro]500,000,000 and at least one of participating enterprises had domestic sales proceeds of more than [Euro]25,000,000. Transaction is exempted from merger control if enterprise, which is not part of group of companies and which had worldwide sales proceeds of less than [Euro]10,000,000, merges with another enterprise or if market is affected in which goods or services have been offered for period of at least five years and in which in last calendar year sales were less than [Euro]15,000,000. Transactions subject to merger control of EU commission are not subject to control through German authorities. Mergers qualifying according to above rules for German merger control must be reported to German Cartel Authority. Such mergers may not be completed and executed before being released by Cartel Authority or before expiry of certain periods (one month and four months respectively) in case Cartel Authority does not take action. If merger is expected to create or to reinforce market dominating position Cartel Authority has to prohibit such merger unless participating enterprises prove that merger also has effect to improve competitive conditions and that such improvement outweighs disadvantages of market domination.

Unfair Competition.

German Unfair Competition Act (Gesetz gegen den unlauteren Wettbewerb, “UWG”) of 1909, has been extensively amended by new law of July 3, 2004 (BGBl. I, 1414) as amended. UWG's objective is protection of competitors, consumers or other market participants. (§1).

UWG provides blanket clause in § 3 subparagraph 1 prohibiting unfair acts of competition that might essentially impair competition to disadvantage of competitors, consumers and other market participants. § 3 subparagraph 2 describes business activities which, in relation to consumers, are considered as unfair since they interfere with ability of consumer to make free decisions. § 3 subparagraph 3 refers to annex to law with list of business activities which in relation to consumers are inadmissible by any means. Examples for business activities being unfair in relation to competitors, consumers, and other market participants are listed in § 4. This catalogue is not exhaustive, however. Competitive actions are unfair, for example, if they exert pressure on others thus affecting their freedom of decision, if they exploit commercial inexperience, if they discredit competitor or his goods or if they exploit good name of competitor for own business purposes. (§ 4).

According to §5, misleading advertising is also illegal. It is deemed misleading, for example, to advertise price reduction if previously higher price was only valid for inadequately short period of time. It is also deemed misleading to advertise goods that are not in stock in adequate quantity. As general rule, supply of advertised goods should suffice for at least two days. Comparative advertising is only permissible within certain limits specified in §6. For instance, comparison must relate to goods or services serving same demand, and comparison may not discredit competitor nor his goods. Advertising by telephone, fax or email is, in principle, not permissible without addressee's prior consent. (§7).

Anybody violating UWG can be held liable for claims in respect of omission, elimination or damages. (§§8, 9). Profits gained by means of unfair competition may have to be reimbursed to federal government. (§10). Regular procedure for stopping unfair competition is by means of warning notice (Abmahnung) and interim injunction (einstweilige Verfügung).

Discounts and free gifts for customers are admissible; however, they still have to comply with general regulations of UWG.

3.14 NEGOTIABLE INSTRUMENTS:

Bills of exchange, promissory notes and checks are negotiable instruments by operation of law (see topic 3.02 Bills and Notes). Certain other instruments may be made negotiable by statement to that effect. Through their endorsement or possession they confer upon holder in due course rights evidenced by and incorporated in such instruments.

Bill of Lading (Konnossement).—Bill of lading is document whereby carrier certifies that he has received specified quantity of merchandise which he promises to deliver to lawful holder of document. Instrument may be sold, deposited, mortgaged, pledged, etc., in same way as merchandise itself, and may be negotiated by endorsement.

Warehouse Receipt (Lagerschein).—Warehouse receipt is closely related to bill of lading. It states that warehouseman has received merchandise specified in it. Warehouse receipt is usually made out to one party only and is not negotiable, but it may be made negotiable by endorsement if issued by certain specially licensed and governmentally supervised warehouses.

Merchant's Trade Acceptance (Kaufmännische Anweisung).—Merchant's trade acceptance is document similar to bill of exchange or check. It is unconditional order to merchant to take certain action. It is used mainly to transfer goods. If it is made out to transfer money, regulations on bills of exchange and checks are applicable. Merchant's trade acceptance may be made negotiable by endorsement by statement. Merchant who is instructed to perform action may accept it in same way as drawee accepts bill of exchange.

Merchant's Unconditional Promise (Kaufmännischer Verpflichtungsschein).—Merchant's unconditional promise is similar to promissory note. Merchant promises thereby that he will effect certain action for benefit of lawful holder of instrument. This promise must be unconditional and without reference to obligation on which it is based. It may be made negotiable by statement to this effect.

Marine Insurance Policy (Transportversicherungspolice).—This is only insurance policy which may be made negotiable under German law.

Private Debenture Payable to Bearer (Inhaberschuldverschreibung).—Private debenture payable to bearer is instrument in which maker promises to perform certain act on demand of bearer of instrument. It is regulated by Civil Code. Unlike promissory note, this promise need not be abstract. Defenses against bearer of instrument are limited. Title to document is transferred by delivery. Actions on instrument are barred only after 30 years from date of issue or maturity. Anyone may issue private debenture payable to bearer. Government license is no longer required.

Mortgage Payable to Bearer (Inhaberhypothek, Inhabergrundschuld).—Mortgage on real estate may be given in such manner as to entitle any holder of mortgage deed to demand payment from mortgagor. This instrument is rarely used. It is similar to private debenture payable to bearer. It is transferred by conveyance of title and delivery.

Bearer Shares (Inhaberaktien).—Share certificates payable to bearer, used by stock corporations, are also negotiable.

3.15 POWERS OF ATTORNEY:

In general, representation by agent is permitted. Only in exceptional cases, mostly concerning family law, agency is not permitted. (BGB, §164 et seq.).

In German law, decisive point whether principal or agent shall be bound by agency is intention of agent expressed to third party. If agent has not disclosed agency or principal, normally relationship of principal and agent is matter only between such parties, and does not operate as to third person, and neither undisclosed principal nor third person with whom agent dealt acquires any rights against or assumes any obligation to other.

To prove powers of agent, written power of attorney may be issued to him. Relative to third parties, such power of representation may be established either by exhibiting such power of attorney or by declaration to that effect by principal directed to third party. Revocation of power takes place in same way as power has been conferred, i.e., by written revocation or oral declaration to third party. Authority to revoke such power depends upon legal relationship underlying granting of power. Power may be made irrevocable by contract. Death of principal does not necessarily terminate agency. Whether or not power is terminated depends on underlying contract.

Commercial law recognizes various classes of powers of attorney, most extensive of which is procura (§48 et seq. of Commercial Code—Handelsgesetzbuch—HGB) which is not known in American law. Procura confers upon agent, called “Prokurist,” all powers connected with conduct of business, except sale of business itself and disposal of real estate. It cannot be restricted by principal except so as to bind “Prokurist” to act collectively only with another “Prokurist” or principal or director of corporation or with restriction to one of several branch offices, and it virtually confers powers upon “Prokurist” tantamount to powers of principal himself. It must be recorded in commercial register, and may be revoked at any time by principal; also revocation has to be registered in commercial register in order to bind third persons.

Commercial agent (Handelsvertreter) is defined as independent contractor—not employee—whose business consists of finding customers and negotiating contracts for his principals. Commercial agent as such is not entitled to represent principal.

Powers of attorney which are requested in connection with applications for entries in the land register or commercial register must be notarized.

3.16 SALES:

Provisions regarding sales (BGB, §433 et seq.) relate to sale of goods and of real property. They are correspondingly applied to choses in action. Bargain and sale, in German law, is not real contract, but strict obligatory contract, executory on part of each party, and is to be distinguished from conveyance or transfer of title which does not pass through agreement itself. By agreement which, unless it relates to real property, does not require any form, seller is obligated to transfer thing sold to purchaser and to confer ownership upon him. In case of real property, transfer of title is effected by agreement of both parties before recording notary or judge to effect that title shall pass to purchaser (Auflassung) and respective record in land register

(Grundbuch). Purchaser, by agreement, is obligated to pay purchase-money agreed upon and to accept realty sold. In case of movables, title passes to purchaser only when actual corporeal transfer of goods sold has been effected, but corporeal transfer may be avoided by contract whereby seller retains possession with understanding that he is bound to surrender to purchaser on notice or at specified time. Moment of transfer is determining factor for settling question as to when fruits (income and profits) belong to purchaser and liabilities are to be assumed by him, as well as risk of deterioration or loss. If at purchaser's request seller transmits things sold to place other than place of performance, risk passes to purchaser as soon as seller has delivered thing to forwarder, freighter or other person or institution designated to handle shipment. Agreement is, relative to performance, governed by general rules applying to contracts, and there may be, in case of nonperformance, action for performance or damages respectively.

Warranties.

If delivered good has not quality agreed in contract or if contract should not contain such agreement, if it is not fit for usage assumed in contract, or if contract does not indicate such usage, if it is not fit for normal usage purchaser can normally expect, delivered good is considered as having material defect. (Sachmangel - BGB, §434). If third party can claim rights in delivered good, not taken over by purchaser under sales agreement, good is considered to have legal defect. (Rechtsmangel - BGB, §435). In both cases legal remedies of purchaser are same. Purchaser has according to his choice claim for delivery of new item free of defects or for repair of defective good or remedy of legal defect. If seller does not perform accordingly within adequate period set by purchaser, purchaser can withdraw from contract (BGB, §§437, 440, 323, 326) or reduce purchase price (BGB, §§437, 441). In addition, purchaser can claim damages (BGB, §§437, 440, 280, 281, 283, 311a) or reimbursement of expenses incurred in vain (BGB, §§437, 284). Claims fall under statute of limitation of five years in case of building or material used according to its normal usage for building, and in other cases of two years after delivery. (BGB, §438). In few exceptional cases claims as regards to legal defects fall under statute of limitation after 30 years. If sale is made to merchant, special supplementary rules of Commercial Code (HGB, §373 et seq.), e.g. duty to inspect goods and to notify defects without undue delay, apply.

Product liability is subject to different legal frameworks.

Arts. 823 et seq. of Civil Code provide for tort claims in case of negligence. Frequently shift of burden of proof applies. Limitation of claims occurs within regular period of limitation according to general principles. (See category 5 Civil Actions and Procedure, topic 5.06 Limitation of Actions.)

In addition, Product Liability Act of Dec. 1989 (BGB1. I, 1989, p. 2198 as am'd) provides for strict liability of producers of certain goods and electricity. Liability covers damages up to ceiling amount of [Euro]85 million in case of personal injury. In case of property damage only damages exceeding [Euro]500 are covered. Producer is liable if product is less safe than consumer could have reasonably expected. Limitation of claims takes effect three years after date upon which damage, defect and producer have been identified if claim is also brought to court within ten years after particular type of product has been first marketed.

Conditional Sales.

This legal institution is known under German law. (Partially ruled by BGB, §449).

If before transfer of title is completed, seller made reservation that title shall pass to purchaser only upon complete settlement of purchase price or occurrence of any other condition, seller retains title to goods sold and supplied to buyer. Transfer of title to buyer is effected only on full payment of purchase price and/or performance of any other conditions for transfer of property agreed upon or determined by seller. Up to that time buyer has real equitable right to acquire such property, and seller's retained title is restricted due to its purpose as security. Seller making such reservation may be in breach of contract, if parties agreed on unconditional transfer of title.

Should buyer be in default, seller is entitled to withdraw goods supplied under conditional sale and to satisfy himself out of secured claim; for a possible deficiency, buyer remains obligated. Registration in a public register is not necessary.

Notices Required.

If the party who is not in default, insists upon performance, he must notify the other party accordingly, allowing him adequate time to comply with the terms of the contract. (BGB, §§281, 323). See topic 3.06 Contracts. Written notice is not required, yet advisable. If time of performance is specified or if performance must take place within certain period of time, or time is otherwise of essence (Fixgeschäft), no such additional period of time is necessary in order to apply consequences of nonperformance. (HGB, §376). No giving of additional time is required if seller clearly indicates that he is not willing to perform.

Notice of rescission must be express, but no special form is required.

Sale with Payment by Instalments.

Unless sale is intended for trade, business or independent professional activity of buyer, buyer who pays purchase price by instalments is protected by BGB, §505 replacing former Consumer Credit Act (Verbraucherkreditgesetz).

International Sale of Goods.

On Jan. 1, 1991 United Nations Convention on Contracts for the International Sale of Goods (BGBl. II, 1989, pgs. 586, 588) came into operation. States signatory to this Convention are e.g.: France, Italy, Austria, Scandinavian States, USA and Peoples' Republic of China. Convention replaces relevant statutory provisions of domestic laws and Convention Relating to Uniform Law on the International Sale of Goods/Convention Relating to Uniform Law on Formation of Contracts for the International Sale of Goods.

Applicable Law.

See category 5 Civil Actions and Procedure, topic 5.04 Foreign Law.

Stoppage in Transitu.

There are provisions for stoppage in transitu in certain cases, whether the goods are being carried on land or on board ship. To exercise the right the duplicate bill of lading (Frachtbrief) must be produced if it has been receipted by the carrier.

Bankruptcy of Buyer.

Goods which have reached a bankrupt buyer only after the opening of the bankruptcy proceedings may be claimed by the seller if not fully paid for. The provisions appear in different laws, especially BGB and HGB and Insolvency Code (Insolvenzordnung) of Oct. 5, 1994 (BGBl. I, p. 2866 as am'd).

Restriction of Sales or Other Conveyances.

Works of art and other cultural goods whose removal from Germany would result in an essential loss of German cultural goods will be entered in a list of such goods. A license is required to transfer such objects abroad, whether by sale or otherwise. This license is to be applied for to, and is granted or denied by, the Federal Minister of the Interior. (Law of Aug. 6, 1955, BGBl. I, p. 501).

3.17 SECURITIES:

Admission to Stock Exchange.

Düsseldorf, Frankfurt am Main, Hamburg, Hanover, Munich, Stuttgart and Berlin have their own stock exchanges, with largest ones at Frankfurt and Düsseldorf. Stock exchange in Bremen ceased to exist 2007. Trade in stock and derivatives play increasingly important role. However, still sales of fixed interest securities are important activity, most significant being mortgage bank bonds and government bonds.

Securities may either be admitted to trading on stock exchange in Official Market (Amtlicher Markt) as top segment of market or admitted to stock exchange trading in Regulated Market (Geregelter Markt). Securities may be also included (einbezogen) in Regulated Market, where certain conditions are met (for example where securities are already admitted to trading on another German stock exchange in Official Market or Regulated Market) and upon application of trading participant. Official Market enables companies of intermediate size to more easily enter capital market, while providing necessary investor protection. Admission to Official Market or admission to Regulated Market comes only after approval by competent stock exchange authority, Admissions Office (Zulassungsstelle). With respect to securities which are neither in Official Market nor admitted to or included in Regulated Market, stock exchange may admit establishment of Regulated Unofficial Market (Open Market—Freiverkehr) if orderly conduct of trading and settlement appears to be ensured through trading guidelines. Frankfurt Stock Exchange created two new segments which took effect on 1 Jan. 2003—General Standard and Prime Standard. General Standard segment applies statutory minimum requirements set out for Official Market or Regulated Market. In addition, Prime Standard segment applies uniform post-admission duties. In Oct. 2005 Frankfurt Stock Exchange launched Entry Standard as part of Regulated Unofficial Market as easy access to capital market for small companies with low disclosure and reporting requirements. It is intended as first stage of company's listing from which it can subsequently advance to listing in Official or Regulated Market.

In addition to floor trading in Nov. 1997 new electronic trading system “XETRA” was launched. Unlike its predecessor system (IBIS) XETRA allows for electronic trade in large number of instruments during and after normal (floor) trading hours.

Prospectus is required for securities or unsecuritized shares and interests offered publicly according to Securities Prospectus Act (Wertpapierprospektgesetz) of June 22, 2005 (BGB1. I, p. 1698) as amended, providing language for several exceptions, Securities Sales Prospectus Act (Wertpapier-Verkaufsprosektgesetz) in version of Sept. 9, 1998 (BGB1. I, p. 2701) as am'd and Investment Sales Prospectus Regulation (Vermögensanlagen-Verkaufsprosektverordnung) of Dec. 16, 2004 (BGBl. I, p. 3464). Securities Prospectus Act (Wertpapierprospektgesetz) of June 22, 2005 applies for prospectuses for securities offered publicly or which shall be admitted to trade in organized market, while Securities Sales Prospectus Act (Wertpapier-Verkaufsprospektgesetz) of Sept. 9, 1998 applies to shares in profits of enterprises, for interests in assets held by issuer as trustee in his own name but on account of third parties or for interest in closed-end fund not being securitized. The Investment Sales Prospectus Regulation Act (Vermögensanlagen-Verkaufsprospektverordnung) of Dec. 16, 2004 supplements Securities Sales Prospectus Act (Wertpapier-Verkaufsprospektgesetz). In case of securities listed for Official Market, in addition, provisions of Exchange Act (Börsengesetz) of June 21, 2002 (BGBl. I, p. 2010) as amended, apply to contents of prospectus which must include: history of company and its objects; description of business, its present and anticipated course; latest financial statements with explanation of all major items appearing on balance sheet; appropriation of profits and payment of dividends for past three years.

Prospectus must be prepared in cooperation with sponsoring bank represented on stock exchange. Sponsoring bank and issuer file application for listing, enclosing prospectus, copies of annual reports of company for past three years and certain other documents including proof of validity of issue of securities to be admitted. After approval by Admissions Office, prospectus is published by issuer and “initial listing” (Einführung), official quoting of securities takes place.

If information in prospectus is incorrect, misleading or incomplete those who issued prospectus, as well as those who initiated its issue are jointly and severally liable to any holder of respective securities for damages incurred by acquisition of respective securities. Liability exists vis-á-vis any and all, even former, holders of respective securities. Claim comes under statute of limitations one year starting with investor becoming aware of incorrectness or incompleteness of prospectus, irrespective of such awareness within three years following publication of prospectus.

Trading in securities is done by banks that buy and sell on exchanges for their customers through official brokers (Kursmakler) or by means of electronic trading system “XETRA”.

Securities transactions executed at stock exchange or over-the-counter are subject to Securities Trading Act (Wertpapierhandelsgesetz) of July 26, 1994 republished Sept. 9, 1998 (BGB1. I, p. 2708) as amended. This law provides for securities trading supervision by Federal Authority for Financial Services Supervision (Bundesanstalt für Finanzdienstleistungsaufsicht) with its seat in Bonn and Frankfurt am Main. Function of this authority is to supervise trade in securities, options, futures, derivatives and similar financial instruments. Banks and enterprises providing financial services are subject to comprehensive reporting obligations to enable Authority to fulfil its function. (See subhead Insider Dealing, infra.)

Forward Transactions.

Enterprises when conduct financial futures transactions commercially or on scale which requires commercially organized business undertaking or which purchase, sell, arrange or provide information on such transactions are required to inform consumer in writing before conclusion of contract about financial futures transactions and risks involved. Such written information shall be signed by consumer and shall be repeated before each subsequent period of two years has elapsed respectively. If enterprise has violated duty to provide information it shall be liable to compensate consumer for damage resulting from such violation. Consumer's claim for compensation shall become time-barred after three years of date on which claim arises.

Insider Dealing.

Statutory insider regulations are provided by Securities Trading Act (Wertpapierhandelsgesetz), republished Sept. 9, 1998 (BGBI. I, p. 2708) as am'd. Insider regulations apply to financial instruments such as securities, options, futures and derivatives provided that they are listed on stock exchange trading in Official Market, admitted to stock exchange trading to Regulated Market or traded in Regulated Unofficial Market.

According to these rules it is prohibited for insiders to acquire or sell instruments on own account or on account of third party or for third party utilizing knowledge of insider facts or to inform third parties unauthorized on insider facts or to make such information accessible to third parties. Moreover, insiders are not intended to recommend on basis of knowledge of insider facts third parties to acquire or sell insider instruments. Third parties having knowledge of insider facts (secondary insiders) are prohibited from acquiring or selling insider instruments on own account or on account of third parties or for party utilizing knowledge of insider facts.

Insider facts are all those facts not known to public related to one or more issuers of insider instruments or related to insider instruments, which if becoming known to public are likely to significantly affect market price for insider instruments. Insider instruments are securities, options, futures, derivatives and similar negotiable rights admitted to trade at German stock exchange or stock exchange in EU member state or being traded at free market.

Insiders are individuals who have knowledge of insider facts as member of management board or supervisory body or as general partner of issuer or enterprise associated with issuer, or due to their share in capital of issuer or enterprise associated with issuer or according to their determination by virtue of their profession, employment or office. Secondary insider is any person having information of insider facts.

Compliance with insider legislation is supervised by Federal Authority for Financial Services Supervision (Bundesanstalt für Finanzdienstleistungsaufsicht). Insider dealing offences are subject to criminal penalties.

Essential part of law to prevent insider dealing is strict obligation (§15) of companies listed at domestic stock exchange to immediately publish facts likely to influence stock exchange price of listed instruments (so-called ad hoc information). Same applies to issuer of bonds with regard to facts impairing ability of issuer to comply with its obligations. Before publishing facts issuer must notify Board of Stock Exchange with which instruments are listed and Federal Authority for Financial Services Supervision. Ad hoc information must be published either in supra-regional newspapers appointed by exchanges or—which is most common way of publication—via electronic news service received by substantial number of banks, stock exchange traders and insurances.

Insider Register.

Issuers of securities must maintain register of such persons acting on their behalf having normally access to insider information. (Wertpapierhandelsgesetz, §15b). This register must be regularly updated and be supplied to supervising authority (Bundesanstalt für Finanzdienstleistungsaufsicht—BAFin) at authority's request. Persons listed must be instructed by issuer on their duties in regard to insider information.

Director Dealings.

Persons having leading management function with issuers of securities must report to supervising authority (BAFin) within five working days any own transactions in securities of issuer. Same duty applies amongst others to members of supervisory board and close relatives of persons having leading management function. (Wertpapierhandelsgesetz, §15a).

Investment Services.

Legal relationships between investors in securities market and investment services enterprises are governed by law of consultancy contracts as partly regulated in Securities Trading Act (Wertpapierhandelsgesetz). Usually, such contract is already implied when investment services enterprises offers advice to investor, i.e., irrespective of whether consideration is given or not. Basically, investment services enterprises is under duty to give true and complete advice as to both investor's individual circumstances and to character of potential investment itself. Normally, it is sufficient for investment services enterprises to advise orally, but in case of some forward transactions which are deemed to carry significant risk written advice must be given. In case of negligent breach of this duty, normally it is presumed as matter of fact that investor would have acted according to hypothetical advice investment services enterprises should have given. As consequence investment services enterprises may become liable for damages to investor.

Apart from investment services enterprises liability under law of consultancy contract, also third parties such as directors of corporate investment services enterprises may become liable in tort for willfully inflicting damages upon investor contrary to public policy.

Netting in Case of Insolvency.

§104 German Insolvency Act of Oct. 5, 1994 (BGBl. I, 2866) as amended provides statutory regulations governing netting by close-out of pending financial forward transactions in event of one party to transaction becoming insolvent. It excludes insolvency administrator's optional choice under general insolvency law, i.e. his option either to unilaterally require performance of pending contract or to have performance replaced by ordinary department in insolvency. Rather, where more than one financial forward transaction is pending between insolvent and counterparty, new statute provides that all outstanding contracts are liquidated and replaced by single liquidation claim. Single liquidation claim results from netting of positive and negative market values of various contracts if these contracts are combined in master agreement providing that contracts can only be terminated as whole. Thus so-called cherry-picking is rendered impossible for insolvency administrator.

3.18 STATUTE OF FRAUDS:

See topic 3.08 Frauds, Statute of.

4 CITIZENSHIP

4.01 ALIENS:

See category 15 Immigration, topic 15.01 Aliens.

4.02 IMMIGRATION:

See category 15 Immigration, topic 15.02 Immigration.

5 CIVIL ACTIONS AND PROCEDURE

5.01 ABSENTEES:

In absence abroad person may generally delegate authority to any person of full capacity. It is usual to give power of attorney; see category 3 Business Regulation and Commerce, topic 3.15 Powers of Attorney. Power may be given to sue or accept service of proceedings, but strictly construed. Foreigner conducting business in Germany must appoint resident representative responsible to authorities; see category 15 Immigration, topic 15.01 Aliens, subhead Status.

If absentee's whereabouts unknown and his property interests are at stake, upon request of interested party “curator absentis” may be appointed, who acts for absentee at his risk and at his charge—also in actions—until absentee reappears or appoints attorney. (BGB, §§1911, 1921). For purposes of commencing suit against absentee whose whereabouts are unknown, no “curator absentis” is necessary because Code of Civil Procedure provides for service by publication—constructive notice. See also category 12 Estates and Trusts, topic 12.02 Death.

5.02 ACTIONS:

Generally any person or legal entity may sue or be sued in German courts subject to rules of procedure. As to claims against German government see category 1 Introduction, topic 1.02 Government and Legal System, subhead Sovereign Immunity; as to claims against foreign states see category 6 Courts and Legislature, topic Courts, subhead Jurisdiction over Foreign States.

Rules governing procedure in civil actions are set forth in Code of Civil Procedure (Zivilprozessordnung—ZPO). There is only one form of civil action. Actions are either commenced by filing statement of claim with court or by collection proceedings (Mahnverfahren) for liquidated sum of money. Unique feature of this judicial payment order (Mahnbescheid) is that it is being issued and served on defendant by court without any examination of merits of claim. Judicial payment has in practice become very important since it is fairly simple, cheap and quick collection proceeding which is often used before normal court proceedings to interrupt running of limitation periods. For contesting payment order defendant has to lodge objection within two weeks otherwise plaintiff can apply for writ of execution that will almost automatically be issued by court. If defendant objects, plaintiff has to file statement of claim with court and regular court proceedings commence. Service of process on defendants is accomplished ex officio by court. Except before municipal courts (Amtsgericht) parties must be represented by attorney-at-law. (See topic Courts and Legislature, subhead Courts).

There are no special modes of proof of foreign claims. See category 21 Treaties and Conventions, topic 21.01 Treaties and Conventions. For proof of foreign law, see topic 5.04 Foreign Law.

Limitation of Actions.

See topic 5.06 Limitation of Actions.

Appropriate Forum.

On jurisdiction as to subject matter, see category 6 Courts and Legislature, topic 6.01 Courts. Appropriate venue generally is place of residence of defendant. Appropriate venue also may be: place of performance of contract; place of tort; situs of real property; situs of assets; place of company's branch if litigation involves such branch's business. Venue can also be agreed on by parties prior to commencing civil action.

Security for Costs.

Aliens, resident or nonresident, commencing civil action before German court must, upon demand by defendant, post security for costs which defendant may incur in such action, unless reciprocity exists with country of which plaintiff is citizen. Reciprocity is considered to exist with signatories of Hague Convention on Civil Procedure as well as with some other countries (as e.g., Chile, Ecuador, Greece, Iran, Lebanon, Libya, New Zealand, Turkey, U.K.). As to nationals of U.S., German-American Treaty of Friendship, Commerce and Navigation of Oct. 29, 1954 (implemented by Law of May 7, 1956) provides for exemption from obligation for posting security if U.S. plaintiff (individual or company) has his permanent residence or subsidiary (branch) or real property sufficient to meet costs, in district of court before which suit is pending in Germany or if otherwise reciprocity exists with plaintiff's home state in U.S. (No reciprocity with: Hawaii, Mississippi, New Mexico, Vermont, Canal Zone. Reciprocity only if U.S. plaintiff has been granted legal aid: Louisiana, North Carolina, Oklahoma, Tennessee, Texas, Wisconsin. Reciprocity with Alaska and Michigan, if plaintiff has his permanent residence or branch in Germany in district of court hearing case. With respect to other states reciprocity exists if plaintiff has permanent residence or branch in Germany.)

Costs.

Court costs and attorney's fees are, with respect to domestic litigation, fixed by statute and rates are in proportion to litigated sum. Needy persons may apply to court for legal aid. (ZPO, §114 et seq.). Losing party has to bear all costs, including lawyers' fees and necessary expenses of winning party. Fees for witnesses (and expert witnesses) are part of court costs which must be advanced by parties. According to jurisdiction contingency, fees are admissible under certain restrictive conditions.

5.03 DEPOSITIONS AND DISCOVERY:

Germany is party to Hague Convention on Taking of Evidence Abroad in Civil or Commercial Matters of Mar. 18, 1970. (BGB1. II, 1977, 1452, 1472).

Normal procedure for obtaining evidence under Convention is to send necessary information, including exact questions if desired, to proper German Authority (one Central

Authority has been designated for each Land) which then transmits this information to proper local German court.

See Part V of this volume for Convention and proper forms.

If testimony of German citizen is needed for use in foreign court, depositions of voluntary witness may be taken by commission before foreign diplomatic or consular officials.

Letters rogatory are executed by German courts. They must be submitted through appropriate foreign channel and through German Minister for Foreign Affairs and Minister of Justice to appropriate German court authorities. They cannot be sent directly. Owing to indirect method of transmission considerable delay may occur and it is advisable to employ counsel in Germany to expedite transmission through various ministries. Counsel may appear at examination of witnesses. German courts act by virtue of their own judicial authority and it is preferable to send open commission. If court which is to execute letters is not known, it need not be specified. It is advisable, even if court is designated, to add words “or other appropriate authority” in order to avoid delays.

Depositions in a Foreign Country.

Can be had upon request of the German Court before which the action is pending, by means of Questionnaires or Letters Rogatory, either to the German Consul or to a competent authority of the country concerned, or, if applicable, under Hague Convention referred to above.

If circumstances warrant, taking of depositions can also be entrusted to the parties. In that event, the respective party is obligated to produce a public instrument covering the deposition. (ZPO, §§363, 364).

5.04 FOREIGN LAW:

Proof of Foreign Law: Applicable foreign law is ascertained by courts ex officio. Parties are to assist court in its inquiries. Application of foreign law being considered a matter of fact, it cannot be appealed to Federal Supreme Court. See category 6 Courts and Legislature, topic 6.01 Courts.

5.05 JUDGMENTS:

Judgments of foreign courts are enforceable in Germany, if courts of respective foreign country also enforce judgments of German courts (Reciprocity). Not enforceable are foreign judgments in cases in which, under German law, court rendering judgment would not have jurisdiction, or defendant was a German citizen and was not served within jurisdiction or through German authorities, or where enforcement would be contrary to public policy (ordre public), and in certain other cases.

Reciprocity can be assumed between German and U.S. Federal Courts. As to U.S. state courts reciprocity differs. Reciprocity can be assumed for US-states which enacted Uniform Foreign Money-Judgments Recognition Act of 1962; they are Alaska, Colorado, California, Massachusetts, Michigan, Minnesota, Missouri, New York, Ohio, Oklahoma, Oregon, Texas and Washington.

European Community Convention on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters of Sept. 27, 1968 (BGBl. II, 1972, p. 775) respectively Council Regulation (EC) No. 44/2001 of Dec. 22, 2000 on jurisdiction and recognition and enforcement of judgments in civil and commercial matters (Official Journal L 012, 16/01/2001 P. 0001-0023) provides for special rules applying to enforcement of judgments of courts of member states.

Foreign Arbitration Awards.

Their enforcement or vacatur is regulated by Code of Civil Procedure (ZPO, §1061) and U.N. Convention on Recognition and Enforcement of Foreign Arbitral Awards of June 10, 1958. (BGB1. II, 1961, 121).

Awards are generally recognized and enforced in Germany unless they are not binding under law in country where rendered or are contrary to public policy of Germany, or if party against whom awards were made was not sufficiently notified or for some other reason was unable to defend case.

5.06 LIMITATION OF ACTIONS:

German statute of limitations prevents claimant from enforcing a right but does not extinguish obligation itself. Thus, a party performing his obligation after period of limitation has expired cannot claim restitution thereof. Claimant who is prevented from directly enforcing his claim by statute of limitation, may nevertheless obtain satisfaction of his claim from security. (BGB, §216).

Regular period of limitations of action in civil law is 3 years. (BGB, §195). Limitation period for tort claims for damages is subject to general rule, i.e. also is three years. Even though period of limitation for particular action may have been less, 30 year period governs after judgment has been rendered or for claims for return of items based on property or other rights in rem. (BGB, §195).

Period of limitation is beginning at end of that year in which claims came into existence and claimant had knowledge of circumstances establishing claims and identity of obliged person or claimant could have had such knowledge if he had employed due diligence. Regardless of such knowledge, claims for damages resulting from bodily injury or infringement of one's freedom fall under statute of limitation at latest of 30 years. Other claims fall under statute of limitation ten years after coming into existence and by any means 30 years after act, infringement or event, which caused damage, has happened. (BGB, §199). Three year period in respect of tort claims for damages runs from learning of damages and identity of tortfeasor regardless of such knowledge. (BGB, §852).

Various other laws, particularly as regards taxes and duties, provide for specific periods of limitation, the period regarding taxes and duties not exceeding ten years.

The German law distinguishes between suspension (Hemmung) and interruption (Unterbrechung) of the period. In the former case, the period continues to run after the fact causing the suspension has ceased to operate; in the latter case, the whole period starts running again after the time of the interruption has ended. Cases of suspension are extensions of time for performance, suspension of the administration of justice (justitium) and acts of God or other causes of force majeure, institution of suit or taking of measures tantamount to it at law. Interruption is rare exception. Cases of interruption are any admission of debt in any manner whatsoever, and acts of execution upon judgment rendered. Simple demand does not cause suspension or interruption.

Due to war and post-war time, various laws, regulations and ordinances have been issued to extend limitation by suspension.

Different from limitation of action is case where law or private agreement provides for certain period of time within which such action may only take place (Präklusivfrist). While limitation must be pleaded to have court take it into consideration and leaves natural obligation even after judgment, limited period of time (Präklusivfrist) for action must be given recognition by court ex officio.

Law applicable as of Jan. 1, 2002 provides for transitional provisions. Shorter periods of limitation, in particular three year regular period of limitation began as of Jan. 2002, however, claims which between period of Jan. 2002 and Dec. 2004 under old law would have fallen under statute of limitation do so.

5.07 PRESCRIPTION:

See topic 5.06 Limitation of Actions.

5.08 SEQUESTRATION:

Execution on real property of defendant can be effected by way of sequestration (forced administration, Zwangsverwaltung). On motion of creditor who has an enforceable claim, real estate of debtor is attached by decree of court of execution and placed in hands of administrator in trust, who has to manage real estate and receives rents and profits out of which creditor's claims are paid.

Sequestration must be entered into land register (Grundbuch).

6 COURTS AND LEGISLATURE

6.01 COURTS:

System.

As distinguished from U.S., with its parallelism of state and federal courts, Germany has single court system. It is divided into several orders, scope of jurisdiction depending upon subject matter to be decided upon: General matters (civil and criminal), labor relations, administration, taxes, social security, constitution.

Courts for General Matters (regular courts) have jurisdiction over civil matters which are not assigned to special courts (e.g. labor matters), and over criminal matters.

Lowest regular court is Amtsgericht (Municipal or Lower Court). Its civil jurisdiction extends to litigation where amount in controversy does not exceed [Euro]5,000 and to noncontentious jurisdiction including probate and guardianship activities, bankruptcy and settlement procedures, execution of judgments and other decrees, maintenance of registers such as registers for land, commercial associations, noncommercial associations, marital property status. In Amtsgericht all civil cases, contentious and noncontentious, are heard before single judge. Venue of Amtsgericht usually covers city or county. See also category 5 Civil Actions and Procedure, topic 5.02 Actions, subhead Appropriate Forum.

Courts of next resort are Landgerichte (District Courts). Venue of Landgericht usually covers several Amtsgericht districts. Appeals from judgment or decree of Amtsgericht may be taken, for reasons of fact or of law, to Landgericht. Landgericht, as court of first instance, has jurisdiction over all civil litigation where amount in controversy exceeds [Euro]5,000. Chambers are composed of three professional judges, but cases may be assigned to single judge unless general importance or factual or legal difficulty requires mandatory hearing by all three judges. Litigation on commercial matters involving registered merchants (including corporations and commercial associations) on both sides may be assigned to “commercial chamber” (Kammer für Handelssachen) bench being composed of presiding professional judge and two merchants as associate lay-judges.

While before Amtsgericht parties to litigation may argue their case personally, before Landgericht (and before courts of higher instances) party needs to be represented by attorney.

Appeals, for reasons of fact or of law, from judgment or decree of Landgericht may be taken to Oberlandesgericht (Court of Appeals), except from Landgericht's decision rendered as appellate decision.

Highest civil (and criminal) court is Bundesgerichtshof (Federal Supreme Court) located at Karlsruhe. It decides on appeals for reasons of law, not of facts, taken from decisions of Oberlandesgericht.

Attorneys-at-law are admitted before all German Country Courts (Landgerichte). Attorneys admitted before Court of Appeal can plead before any other Court of Appeal. Admittance before Federal Supreme Court (Bundesgerichtshof) is restricted to Federal Supreme Court.

Labor Courts (Arbeitsgerichte) are vested with jurisdiction over disputes between employers and employees arising out of labor relations, over questions of collective bargaining and also over questions of co-determination (see category 2 Business Organizations, topic 2.03 Corporations) insofar as labor relations are at stake.

Structure is that of three instances, District Labor Court being lowest one. Bench in all instances includes two lay-judges, one being nominated by employers' union, other by labor union.

Administrative Courts (Verwaltungsgerichte) are vested with jurisdiction over matters of administrative law, such as zoning, immigration, state licenses including licenses under foreign trade regulations. Governmental (federal, state, municipalities) acts. e.g., denial of license applied for, generally become final unless suit is brought before Verwaltungsgericht by addressee of such decree, within certain period of time after rendition of such decree. Administrative court system consists of three instances.

Tax Courts (Finanzgerichte), consisting of two instances, have jurisdiction over tax matters including customs duties and other taxes on international and foreign trade.

Social Courts (Sozialgerichte), consisting of three instances, have jurisdiction in matters governed by social legislation, such as social security and public mandatory health insurance.

Federal Constitutional Court (Bundesverfassungsgericht) and State Constitutional Courts have competence to control constitutionality of legislative, governmental (administrative) and judicial acts with binding force erga omnes.

Jurisdiction over Foreign States.

Situation concerning jurisdiction of German courts over foreign states is governed by decision of Federal Constitutional Court of Apr. 30, 1963, holding with force of law that rule of international law granting foreign States general immunity from jurisdiction of domestic courts can no longer be established, thus abandoning rule of absolute immunity and adhering to rule distinguishing between acts jure imperii (sovereign acts) and acts jure gestionis (acts in legal transactions of private law). Distinction between sovereign and non-sovereign state activities is not to be based on motive or purpose of activity of state or on connection of activity with sovereign function of state. Nor is it considered to be relevant whether state activity is commercial as there is no intrinsic difference between commercial activity of state and other non-sovereign activity of state. Distinction is based on nature of act of state or of resulting legal relation. Relevant is whether foreign state acted in exercise of its sovereign power, thus within sphere of public law, or acted like private person, thus within sphere of private law. Qualification of state activity is, in principle, made pursuant to lex fori, albeit, subject to rules of international law. In international law generally recognized sphere of sovereign (public) activity includes activity of foreign and military power, legislation, exercise of police power, and administration of justice. In exceptional cases, international law may render it necessary to qualify activity of foreign state as jure imperii because it falls within intrinsic sphere of public power although domestic law qualifies it as activity of private law.

Federal Republic of Germany is signatory to European Convention on State Immunity of May 16, 1972.

Enforcement of Judgment against Foreign State.

Federal Constitutional Court with decision of Dec. 13, 1977 held with force of law that there is no generally accepted rule in international law which would a priori prevent forum state from execution of judgment against foreign state; execution of judgment on non-sovereign activity of foreign state may be made against assets of foreign state located in forum state unless these assets serve official sovereign function of that foreign state. Waiver of immunity as to assets is recognized and given effect.

See also category 1 Introduction, topic 1.02 Government and Legal System, subhead Sovereign Immunity.

6.02 LAW REPORTS, CODES:

Germany is a country of codified law, which means that only the provisions set forth in the different codes are considered the law; no decisional or judiciary law, i.e., law by precedent, exists, and doctrine of *stare decisis* is unknown. Decision of higher court is only law of particular case, and, if matter is remanded, lower court is bound thereby. In all other respects, lower courts are independent and not bound by any precedents. However, decisions of higher courts are frequently cited and quoted and also followed by lower courts, not as “the law”, but because of their reasoning and persuasive force. Authority is also accorded opinions of scholars, set forth in textbooks, commentaries and monographs or pamphlets. In some cases, decisions of Federal Constitutional Court have legal force according to §31 Federal Constitutional Court Law (Bundesverfassungsgerichtsgesetz) of Mar. 1951. (BGBl. I, p. 243).

Official publication of a (written) law appears in Bundesgesetzblatt (BGBl.) formerly Reichsgesetzblatt (RGBl.), or, as far as Länder (States) are concerned, in their “Landesgesetzblatt.” Generally in use, however, by courts as well as by attorneys, are annotated editions of codes.

There are official collections of decisions of several Federal Courts (see topic 6.01 Courts); also legal periodicals contain many decisions.

6.03 LEGISLATURE:

See category 1 Introduction, topic 1.02 Government and Legal System.

6.04 REPORTS:

See topic 6.02 Law Reports, Codes.

6.05 STATUTES:

See topic 6.02 Law Reports, Codes.

7 DEBTOR AND CREDITOR

7.01 ASSIGNMENTS:

The assignment of personal property is effected by agreement about the transfer of title and by the transfer of possession to the assignee.

Assignment of debts is, except where claims are transferred by virtue of law or by judicial act, effected by agreement between assignor and assignee. Notice to debtor is not required, but is advisable to prevent bona fide debtor from discharging his debt by payment to assignor. (See BGB, §398 et seq.).

7.02 ATTACHMENT:

Where it is shown to satisfaction of court that without attachment execution of future judgment on money claim might be frustrated or rendered difficult, attachment will be granted prior to judgment. Such is presumed where judgment would have to be executed in foreign country. (ZPO, §916 et seq.). This attachment is called “Arrest.”

7.03 BANKRUPTCY:

Law on bankruptcy and composition (“Insolvency Code” - “Insolvenzordnung”) of Oct. 5, 1994 (BGBl. I, p. 2866) as amended and law on rescission of fraudulent transfers (“Anfechtungsgesetz”) of Oct. 5, 1994 (BGBl. I, p. 2911), which became effective as of Jan. 1, 1999, replace Bankruptcy Act (“Konkursordnung”) of 1877, Law on Composition Proceedings (“Vergleichsordnung”) of 1935 and also GDR bankruptcy law (“Gesamtvollstreckungsordnung”). Objective of new law is to harmonise bankruptcy proceedings and composition proceedings, to increase bankrupt's assets so that more bankruptcy proceedings can be conducted, to simplify insolvency plan and to enable private persons to be discharged from their debt after number of years.

Bankruptcy proceedings in Germany also include property of bankrupt in foreign countries. However, foreign law determines whether or not bankruptcy proceedings in Germany are recognized in foreign country. Though Germany recognizes bankruptcy proceedings in foreign countries, recognition does not prevent creditors from executing on assets located in Germany on other grounds. However, foreign law decides whether restitution may be claimed. If bankrupt has no residence in Germany but operates business through branch establishment, bankruptcy proceedings only concern assets located in Germany.

Opening insolvency proceedings requires application of bankrupt or of creditor. (§13). Insolvency proceedings can be opened, if debtor has suspended payment, i.e. is not in position to fulfill its due payment obligations (§17) or in event of imminent suspension of payments, i.e. if it is likely that debtor is unable to settle its due obligations.

In case of legal entities, moreover, application to open insolvency proceedings must be filed if its liabilities exceed entity's assets (status of overindebtedness - § 19).

On basis of application to open insolvency proceedings court shall take necessary measures to safeguard bankrupt's assets. (§21). If provisional trustee (receiver) is appointed and prohibition to dispose of his assets is imposed on bankrupt, bankrupt loses preliminarily its ability to dispose of its assets. (§22). If sufficient assets to cover costs of proceedings are available court opens insolvency proceedings (§§26 et seq., §207), appoints receiver (Insolvenzverwalter - §56) and calls in meeting of creditors (§74). Moreover, committee of creditors may be appointed. Bankrupt finally loses its competence to dispose of its assets. (§80). Any disposition made by bankrupt is null and void. (§81). During insolvency proceedings executions by individual creditors are admissible neither with regard to bankrupt's assets nor with regard to other assets of bankrupt debtor. (§89). Creditor's meeting resolves in first meeting, if committee of creditors shall continue. Moreover, receiver can be voted out. (§57).

Receiver decides on fulfillment of contracts not or not fully performed. (§103). Law contains special regulations for some specific contractual relations, for instance rent, long lasting obligations and reservation of title. (§§104 et seq.). To extent that employment is concerned possibly works council needs to be involved. (§120).

Creditors must give notice of their claims to receiver (§174), who enters claims into list. Claims which are not questioned are deemed as determined (§178), i.e. as accepted in full amount. Claims notified after expiry of stated period are taken into regard. If check of claims notified lately incur additional costs these must be borne by respective creditor. (§177). Creditors which have either right in rem or personal right (for instance title) in bankrupt's assets may withdraw such assets. They are not deemed as insolvency creditors. (§47). Creditors who have lien have right of realization to settle their claim. (§§50, 51). Distribution of bankrupt's assets is regulated by §§187 et seq. However, on basis of insolvency plan distribution of bankrupt's assets can be made other than provided by law. (§§217ff). Insolvency plan can be presented only by bankrupt or receiver. (§218). It shall contain provisions to secure rights of creditors and demonstrate effect on these rights. Objective of new provisions on insolvency plan is to structure insolvency proceedings to be more flexible and effective. Model was reorganization proceedings known under U.S. law.

Loans of shareholders holding interest of more than 10% are subordinated by law (§ 39 [1] No. 5) and may with certain exemptions be settled only after claims of other creditors.

Transactions entered into before opening of insolvency which are prejudicial to creditors may be attacked as void by receiver. (§§129 et seq.). In particular, receiver can attack as void transaction which granted insolvency creditor security or performance in last three months before opening of insolvency proceeding, if creditor knew of insolvency of debtor. (§130). If creditor had no claim for security or performance or no claim for specific means of security or performance or no such claim at respective time receiver may attack as void such transactions which had been effected in last month before application to open bankruptcy proceeding or in second and third months before such application, if debtor was already illiquid or if creditor knew that such transaction was prejudicial to other creditors. (§131). Moreover, transactions to repay loans of shareholders holding interest of more than 10% or to grant security as regards to such shareholder's loans can be attacked as void by receiver. (§ 135).

Insolvency Code provides for possibility to discharge private person from its remaining debt after seven years. (§§286 et seq.). Precondition is application of debtor together with declaration that for period of six years he assigns in favor of trustee all attachable claims under employment or other earnings. Court resolves on application. Insolvency of consumer (§§304—314) provides for three phases: in first step debtor has to try to find out-of-court settlement with its creditors to settle his obligations. If such out-of-court settlement is not possible within six months before opening of bankruptcy proceedings bankrupt can present, together with application to open bankruptcy proceeding, plan to settle his debt and request to be exempted from remaining debt. If also on basis of this plan agreement with creditors is not possible simplified proceeding is conducted with effect to discharge debtor from his remaining debt.

7.04 EXECUTIONS:

Execution is granted in respect to judgments, arbitration awards, as well as for settlements made and recorded in court; also in respect to special payment orders of court (Vollstreckungsbescheide) and in respect to so-called executory documents drawn at will of both parties by notary public or in German court.

In order to execute a judgment or other enforceable instrument the plaintiff in general must obtain an official copy with certification of enforceability (vollstreckbare Ausfertigung).

Movable property of debtor is seized by bailiff (Gerichtsvollzieher), his outstanding debts and other valuable rights are attached by decree of court. See topic 7.06 Garnishment.

Execution on immovable property is effected either by registration of a judicial mortgage (Zwangshypothek) on application of the plaintiff in real estate register, or by sequestration (Zwangsverwaltung) or by public sale (Zwangsversteigerung, see Law of Mar. 24, 1897, RGBl., p. 97, as am'd) of real property by decree of court. Also these measures are to be entered into estate register. (ZPO, §§704-945). See also category 5 Civil Actions and Procedure, topic 5.08 Sequestration.

Judgments and awards against Federal Republic, State thereof, or government agency, are executionable. Execution of money awards requires special notice to public officials, execution is not to commence prior to end of period of four weeks after proper notice. Certain assets of public interest and importance are exempt from attachment. (ZPO, §882 a). As to recognition and enforcement of foreign judgments, see category 5 Civil Actions and Procedure, topic 5.05 Judgments.

7.05 FRAUDULENT SALES AND CONVEYANCES:

Pursuant to a law of Oct. 05, 1994 (BGBl. I, p. 2911), as am'd (Anfechtungsgesetz), aside from bankruptcy proceedings, transactions can be attacked by creditor as void as against him, if entered into by debtor with intention of prejudicing his creditors in last ten years before attack provided that other party was aware of such intention; also contracts for value entered into with spouse or other relations if prejudicing creditors, unless contract was entered into more than two years before attack or other party was not aware of such intention. Moreover, dispositions entered into by debtor without valuable consideration during last four years before contest can be attacked by creditor as void. In addition, transactions to repay loans of shareholders holding interest of more than 10% or to grant security as regards to such shareholder's loans can be attacked as void by creditors. (§ 6). See also topic 7.03 Bankruptcy; category 3 Business Regulation and Commerce, topic 3.16 Sales.

7.06 GARNISHMENT:

Attachment of outstanding debts and of assets of debtor is done by decree of court pursuant to which debt is assigned to judgment creditor up to amount of his claim. This decree (Pfändungs-und Überweisungsbeschluss), together with garnishee order stating that debtor is forbidden to pay to his creditor, must be served on debtor and his creditor. (ZPO, §§828-863).

7.07 LIENS:

Lien is right in one person to retain in his possession goods belonging to another until certain demands of his against owner (or contracting party) have been satisfied. It is personal right and exists only in respect of goods received rightfully. Right may be excluded by express agreement or course of dealing between parties. It is right primarily to retain possession. However, after at least one month's notice to debtor, goods may be sold. See also topic 7.08 Pledges.

Commission merchants, forwarders, warehousemen, carriers, building-contractors and landlords are protected for their charges by statutory liens on possessed articles. (HGB, §§383-451; BGB, §§562-562d, 647).

7.08 PLEDGES:

Movable objects and assignable claims may be the subject of pledge (Pfand), the creditor obtaining possession of the object or an assignment of the claim. (BGB, §1204 et seq.).

In order to allow for pledging of movables without transfer of possession, there has been introduced in practice transfer of title for security (Sicherungsübereignung). See category 17 Mortgages, topic 17.01 Chattel Mortgages.

8 DISPUTE RESOLUTION

8.01 ARBITRATION AND AWARD:

Parties may agree to submit dispute to arbitration except such matters of which parties have no right to dispose. Contracts to arbitrate future disputes must refer to specific legal relations. Arbitration agreements must be made in writing, and they may not contain any clause which does not refer to arbitration agreement, unless agreement is included in contract among merchants concerning matter of their business. Third party notice (called “Streitverkündigung”) and bringing of counter-claims is difficult and need specific provisions in arbitration agreement. Awards may be enforced after they have been declared executory by court; Germany is party to U.N. Convention on Recognition and Enforcement of Foreign Arbitral Awards of June 10, 1958. (BGBl. II, 1961, 121). The German Institution of Arbitration (Deutsche Institution für Schiedgerichtsbrakeit e.V.) in Köln offers administrated arbitration procedure for parties who have agreed to settle their disputes according to DIS Arbitration Rules. Often, also arbitration procedure according to arbitration rules of International Chamber of Commerce in Paris is agreed to. See also category 5 Civil Actions and Procedure, topic 5.05 Judgments.

9 DOCUMENTS AND RECORDS

9.01 ACKNOWLEDGMENTS:

Ordinarily form of acknowledgment utilized in country where acknowledgment is taken may be employed. In all cases it is advisable to have acknowledgments to be used in Germany certified by German consular or diplomatic officer. Acknowledgments to be used in U.S.A. may be taken before American consular officials in Germany. If acknowledgment is taken before German notary or other public official, his signature may directly be certified by American official in Germany without intervening certification by his respective superior authority and of diplomatic official (Minister, Chancellor). See law of Aug. 28, 1969 (BGBl. I, p. 1513) concerning notarial documents.

Germany is party to Hague Convention of Oct. 5, 1961 providing that foreign public documents (of courts, administrative agencies, notarial and official certification on private documents, etc.) are exempt from requirement of legalization by diplomatic and consular representatives of country in which document is submitted, provided documents carry simple uniform acknowledgment (“Apostille”) serving as proof of signature or seal. Agreement remains in force for five years with successive five year automatic renewals and became law in Germany on June 22, 1965.

See also topic 9.03 Notaries Public.

9.02 AFFIDAVITS:

Affidavit is written statement of facts sworn by deponent before person authorized to administer oath. Such affidavit is unknown in Germany. However, written statement “in lieu of an oath” (eidesstattliche Versicherung) may be executed, and person executing false statement “in lieu of an oath” is subject to criminal charges. Abroad, written statement of facts in lieu of oath for use in Germany should be sworn before notary or German consul. When sworn before notary certificate as to his authority must also be attached.

Formal affidavit, in German or foreign language, to be executed in Germany for use abroad may be sworn before notary or respective consul in Germany, depending upon requirements under respective foreign law. When sworn before German notary certificate as to notary's capacity (legalization) can be attached to affidavit; see topic 9.01 Acknowledgments; category 5 Civil Actions and Procedure, topic 5.03 Depositions and Discovery.

9.03 NOTARIES PUBLIC:

They must be German citizens and with few exceptions have same professional qualifications as judges and must be in full possession of civil rights. In some parts of Federal Republic notaries are, for time being, lawyers functioning also as attorneys and notaries at same time; in other parts of FRG notaries are prohibited from acting as attorney-at-law.

Federal Notary Regulation (Bundesnotarordnung) of Feb. 24, 1961 (BGBl. I, p. 98) as am'd, regulates status of notaries public. Their activities consist chiefly in drawing up certain formal papers and declarations, contracts of sale of real property, mortgage instruments, wills, establishing of corporations, transfer of shares of companies with limited liability, protests of bills of exchange and checks, certification of signatures and copies. They are also competent for administration of oaths if oath is necessary to execute right in foreign countries. They also may take statements in lieu of oath. Notary may also issue certificates for use in foreign countries concerning existence or seat of legal entity or partnership, changes in firm name, merger or other circumstances which are registered in trade register. See topic 9.02 Affidavits.

The fees of notaries are regulated by law and are on a graduated scale according to the amount involved in the transaction.

9.04 RECORDS:

Land titles and all encumbrances on land, as mortgages, etc., are recorded in registers kept according and relating to parcels of land, all transactions affecting a parcel being entered in appropriate columns by the registry officials. These records (Grundbuch) are public in a restricted sense; anybody who has a well founded interest (mortgagees, heirs, prospective creditors, etc.) may inspect the records, relating to the particular parcel of land. Their legal meaning is far-reaching because of the legal system of public credence accorded to them and embodied in Civil Code and anything similar to what is known in American law as search of title is obviated thereby.

Other registers are the commercial register, maritime register for ships, register for airplanes, association register, and marriage property register, for their respective purposes. All these registers are managed by competent municipal court (Amtsgericht).

The “public credence” aforementioned means that any entry in the records is notice to the world. Nobody can be excused for ignoring the contents of the entry. On the other hand, every person acting in reliance upon such entries in good faith will get the full protection of the law.

There are no public officials charged with the general official registration of contracts or other instruments. Public credence to the texts of contracts and other private declarations is secured by judicial or notarial authentication.

9.05 SEALS:

Only public authorities, including notaries public, and public corporations carry a seal and are supposed to affix it to their signatures. The use of a seal by a private person or corporation has no meaning in a legal sense. The signature of corporations or other commercial companies is binding when made by authorized person, such authority to be regularly evidenced by entry in commercial register.

10 EMPLOYMENT

10.01 LABOR RELATIONS:

Labor relations are ruled by labor law, i.e., not only acts and prescriptive law but also collective labor agreements between management and labor. Fundamental labor regulations are to be found in Civil and Commercial Code. Important legislation for protection of labor are

Termination of Employment Act (Kündigungsschutzgesetz) of Aug. 25, 1969 as amended by law of Mar. 26, 2008 (BGBl. I, p. 444) protecting employees against arbitrary dismissal, and especially, Maternity Protection Act (Mutterschutzgesetz) of Jan. 24, 1952 in version of June 20, 2002 (BGBl. I, p. 2318) as amended, protecting pregnant employees and nursing mothers, inter alia against dismissal, Law on Protection of Young Workers (Jugendarbeitsschutzgesetz) of Apr. 12, 1976 as last amended by law of Oct. 31, 2008 (BGBl. I, p. 2149) protecting young workers, Code of Social Law Book IX of June 19, 2001 (BGBl. I, p. 1046) in version of Apr. 27, 2005 (BGBl. I, p. 1138), as amended, protecting invalid persons, Law on Hours of Employment (Arbeitszeitgesetz) of June 6, 1994 in version of Dec. 24, 2003 (BGBl. I, p. 3002 as am'd), Act on part-time work and contracts of employment for fixed time (Teilzeit-und Befristungsgesetz) of Dec. 21, 2000 as amended. There are exact statutory notice periods, and discharging without notice is not possible except for cause. Extensive rights of co-determination have been affirmed in favor of employees' council by Works Council Act (Betriebsverfassungsgesetz) of Jan. 15, 1972 (BGBl. I, p. 13) in version of Sept. 2001 (BGBl. I, p. 2518) as last amended by law of Aug. 12, 2008 (BGBl. I, p. 1666). See category 2 Business Organizations, topic 2.03 Corporations, subhead Co-determination.

Contracts between Employers' Associations and Trade Unions (Tarifverträge) are binding, in principle, upon the members of the contracting parties only; yet, the State Governments may declare them as generally binding and thereby they also become the source of law for labor relations between unorganized employers and employees.

Unfair labor practices are reviewed by Labor Courts which may also adjudge damages therefore. Courts may also review content of standard employment contracts and declare them as null and void. Courts have authority to prevent strikes in advance—in particular by way of preliminary injunctions—but rarely make use of this authority.

See also category 6 Courts and Legislature, topic 6.01 Courts.

11 ENVIRONMENT

11.01 ENVIRONMENTAL REGULATION:

Environmental protection is one of main principles of German policy. Hence, there have been number of legislative activities during last decades. In 1994 “preservation of the natural basis of existence” was even constitutionally protected by amendment of German constitution. (Art. 20 a Grundgesetz as am'd on Oct. 27, 1994, BGB1. I, 1994, 3146).

Federal system divides legislative and executive powers in environmental issues between federal and state authorities. Most basic regulations to preserve soil, water, air, and individual or public health were enacted by federal powers. In some fields, e.g. water resources management, protection of nature, and care of landscape, Länder may enact legislation deviating from federal acts. (Grundgesetz, Art. 72 subpara. 3). Nowadays, German environmental regulations become more and more influenced by European legislation. Besides, there exist additional local by-laws, especially on field of planning law.

Execution of environmental acts, even of federal origin, is mainly incumbent on state authorities. This may sometimes result in varying administrative practices in different states. Uniform administrative rules prevent a too wide-spread variety in execution of federal acts.

Administrative acts of environmental authorities are generally submitted to the control of the administrative courts.

Protection of Clean Air.

Federal Pollution Control Act (Bundesimmissionsschutzgesetz—BImSchG), first enacted on Mar. 15, 1974 (BGB1. I, 1974, 721), republished Sept. 26, 2002 (BGBl. I, p. 3830) as amended, is heart piece of German environmental legislation “to protect against and to prevent harmful environmental impacts” (§1 BlmSchG). This act differs between two types of installations. Those installations listed in “Ordinance Concerning Installations Requiring A Permit” (Verordnung über genehmigungsbedürftige Anlagen / 4. BlmschV of July 24, 1985, BGB1. 1, 1586), amended subsequently require permit procedure because of probability that they generate hazardous emissions (e.g. steel mills, chemical plants). Other installations require no special permit but they are nevertheless subject to operating requirements given by Federal Pollution Control Act.

Starting Jan. 1, 2005 operators of particular installations (e.g. combustion installations, mineral oil refineries) must be in possession of emission permit as well as emission allowances according to German Greenhouse Gas Emission Trading Act (Treibhausgas-Emissionshandelsgesetz—TEHG) of July 8, 2004 (BGBl. I, 1528) amended Aug. 7, 2007 (BGBl. I, 1788). Emission allowances are tradeable items in framework of European greenhouse gas emission trading scheme.

Federal Pollution Control Act is meanwhile complemented by 32 federal ordinances. Administrative guidelines set minimum standards. One of them is “Technical Instructions Air” (TA Luft) of Feb. 27, 1986. (GMB1. 1986, 95). This guideline contains, inter alia, detailed requirements for prevention and minimization of emissions and regulations about quantities of emissions allowable. In 2002 antiquated guideline was amended. With amendment several European directives were implemented into German law.

Further, there exist numerous federal and state acts, ordinances and guidelines to regulate environmental dangers in particular scopes (e.g. safety of nuclear installations, protection against air traffic noise).

Water Resources Management.

Any usage of water requires authorisation by competent water authority. Legal foundation therefor is Federal Water Management Act (Wasserhaushaltsgesetz) of Aug. 19, 2002 (BGB1. I, p. 3245, am'd subsequently) as framework law. Amendment by law of June 25, 2005 (BGBl. I, p. 1746) implemented EU directive 2000/60/EC. It is completed by state water acts. These acts codify conditions and obligations for permits and licenses to use water.

Waste Water Act (Abwasserabgabengesetz) of Sept. 13, 1976 (BGB1. I, 1976, 2721, am'd subsequently) intends to minimize water pollution by levying charges from generators of waste water.

Waste Management.

Recycled Use and Waste Disposal Act (Kreislaufwirtschafts- und Abfallgesetz) of Sept. 27, 1994 (BGB1. I, 1994, 2705 as am'd) is codified approach to give waste avoidance and recycling priority over dumping of waste. This act is supplemented by several ordinances concerning particular types of waste, e.g. Ordinance of Old Oil (Altölverordnung) of Oct. 27, 1987 (BGB1. I, 1987, 2335 as am'd), or special treatments, e.g. Ordinance on the Cross Border Transportation of Waste (Verordnung über die grenzüberschreitende Verbringung von Abfällen) of Nov. 18, 1988 (BGB1. I, 1988, 2126 as am'd).

Packaging Ordinance (Verpackungsverordnung) of June 12, 1991 (BGB1. I, 1991, 1234 as am'd) is regarded as important step to avoid waste, as it requires manufacturer and distributor of products to take used packagings back and to provide for their reuse or recycling.

Ground Contamination.

Federal Soil Protection Act (Bodenschutzgesetz) of Mar. 17, 1998 (BGB1. I, p. 502) as amended, deals with avoidance of ground contamination as well as decontamination or other safety measures in case of ground contamination. In addition, state laws apply. Details are now set out by Federal Soil Protection and Contamination Ordinance. (Bodenschutz- und Altlastenverordnung of July 12, 1999—BGB1. I, p. 1554).

12 ESTATES AND TRUSTS

12.01 ADMINISTRATION:

See Executors and Administrators.

12.02 DEATH:

Missing persons, whose death is not established, under certain circumstances may be declared dead. (Law of July 4, 1939, RGBl. I, p. 1186 as am'd by law of Jan. 15, 1951, BGBl. I, p. 63 and law of July 26, 1957, BGBl. I, p. 861).

Damages for Wrongful Death.

BGB, §844 provides that person who wrongfully caused death of another is obligated for primary obligations of deceased. If at time of injury deceased was or might have been under a legal obligation for maintenance of another, he who had caused death can be held to same obligation as deceased would have had during his probable lifetime. If deceased was bound by law to perform service for third party in his household or business, he who caused death is obligated to compensate third party by payment of annuity. (BGB, §845). Law does not make exceptions with regard to foreigners.

12.03 DESCENT AND DISTRIBUTION:

The rules governing descent and distribution apply both to movable and immovable property. The law groups the lines of descent according to orders. The first order includes the descendants of the deceased, the second order the parents of the deceased and their descendants, the third order the grandparents of the deceased and their descendants, the fourth order the great-grandparents of the deceased and their descendants, the fifth and further orders include more remote ancestors of deceased and their descendants. In first three orders distribution is per stirpes; in fourth and further orders, per capita. Presence of relatives in previous order excludes rights of relatives in more distant orders. Children inherit in equal parts. In second order, in case both parents survive, they inherit alone in equal parts. In case either is deceased and has left descendants, these descendants receive share of deceased. In case no descendants survive, surviving parent inherits whole. In third order, in case all four grandparents survive, they inherit alone in equal parts. Upon death of grandparent on either side, same rule is followed as in second order. If both grandparents on one side are deceased and leave no descendants, other grandparents or their descendants inherit in whole.

In the fourth order or following order the surviving great-grandparents, or more remote ancestors, inherit per capita. In case no great-grandparents or ancestors survive, the descendant of them who is nearest in relationship to the intestate inherits alone, or if there are several equally near, they inherit per capita.

Surviving spouse receives, along with the first order of relatives, mentioned above (i.e. the issue), one fourth of the estate; along with relatives of the second order (the parents and their issue) and with the grandparents, one-half of the estate, whereby the shares of the relatives aforementioned are reduced accordingly. If no relatives of the first or the second order nor grandparents are left, but a spouse survives, the latter inherits the entire estate to the exclusion of more remote relatives.

If surviving spouse inherits along with relatives of second order or with grandparents, he or she inherits also, in advance, objects belonging to matrimonial household and wedding gifts. Rights of intestate inheritance are excluded if decedent had applied for divorce or if he had agreed to application for divorce brought by surviving spouse, or, before application was made, if he was entitled to apply for divorce. Surviving spouse may, however, have claim for alimony against estate. (BGB, §1933; see also category 13 Family, topic 13.02 Divorce).

In case of spouses married under legal marital régime of “community of increases” share of surviving spouse is increased by one fourth of estate as lump sum compensation for spouse's share in assumed increase of property achieved by deceased spouse. As consequence share of mutual children is reduced accordingly. For details see category 13 Family, topic 13.03 Husband and Wife.

If spouses are married under régime of separate property, surviving spouse and one or two children of decedent inherit equal parts. (BGB, §1931).

Illegitimate children born after July 1, 1949 are heirs as legitimate children. Illegitimate children born before July 1, 1949 have inheritance compensation claim against heirs only, but do not become heirs. (BGB, §1934a et seq.).

In cases of inheritance in former GDR before Oct. 3, 1990, order of succession is governed by former GDR law, which closely resembles FRG inheritance legislation. Spouses always inherited same proportion as children, however, no less than one-quarter of inheritance. If deceased person had no offspring, surviving spouse was sole heir. Illegitimate children born since Oct. 3, 1990 come into inheritance as described above (BGB, §1934a ff.); if they were born before Oct. 3, 1990, inheritance law treats them as equals to legitimate children of deceased.

Certificate of Inheritance.

Provision is made for the issuance, by the probate court, of a certificate of inheritance, which proves the right of succession. (BGB, §§2353-2370).

Legitimate Portions.

See topic 12.07 Wills.

12.04 EXECUTORS AND ADMINISTRATORS:

There is no requirement under German law that testator appoints executor for his estate.

If no executor is appointed or in case of intestacy, testamentary or intestate heir or heirs are vested with possession and management of estate and also authorized to dispose of it.

An executor may be named in a will or his appointment left to the court, but he is not an executor in the American sense of the term and is not vested with property. If the executor accepts the office he takes possession of the estate and deprives the heir of the right of administration and of disposing of the estate. Functions of executor may extend to entire administration of estate or be confined to performance of certain acts. Where executor has been appointed suits must be brought by or against him, and in certain cases right of action also exists against heir. (BGB, §2197 et seq.).

Where suit is brought by person asserting right of compulsory shares (see topic 12.07 Wills) it must be brought against heirs to establish right thereto, and against executor for purpose of enforcing its execution in estate under his administration.

Administrators in the sense of that term in American law are not known in German law, all the powers and authorities of an American administrator being vested in the heir or heirs respectively. The appointment of a German estate manager (Nachlassverwalter), whose rights and duties pertain both to real and personal property, and who may be appointed either on motion of an heir or of a creditor, is a legal means for settling the liabilities of an estate. In the case of such an appointment upon motion of the heir it restricts liability for debts of the deceased to the estate and excludes personal liability of the heir. A motion for the appointment of an administrator made by a creditor must be filed within two years after the heir has accepted the estate, and be based on an allegation that the payment of the lawful debts of the deceased is endangered in the absence of such an appointment. When an administrator is appointed he takes possession of the estate and assumes all rights of management and disposition, and claims must then be enforced by a suit against the administrator. (BGB, §1975).

Claims cannot be enforced against estates until three months after the heir has accepted the inheritance, or in case he has during the first year thereafter applied for the issue of a public citation to creditors, until after the termination of the proceedings commenced by such public citation. The creditors may be required by public citation to present their claims within a specified period, and any creditor who, without belonging to one of the excepted privileged classes (such as, for example, certain secured creditors), does not present his claim within such period, is excluded from the division of the estate, with the result that the heirs, in so far as they have not forfeited their privilege of limited liability, may meet an action on the part of such creditor with the defense that the estate is exhausted. If anything is left of the estate the heir must surrender it to the creditor for his satisfaction by way of execution. Unsecured creditors who do not present their claims within five years from the death of the deceased are in general subject to the same defense.

12.05 INTESTACY:

See topic 12.03 Descent and Distribution.

12.06 TRUSTS:

Trusts within the meaning of law of equity for purposes of reaching equitable aims are not known in German law, since there is no distinct system of equity jurisprudence, and all such aims are reached by provisions of the civil law, mainly through certain legal institutions such as guardians, administrators, receivers and executors. In the law of succession and descent and distribution there is no division of title, as between the trustee and the holder of the equitable right, since the right of title is not subject to a division at all.

12.07 WILLS:

Wills and contracts of inheritance are governed by Civil Code.

A last will and testament may be made only by the testator personally and never through an agent. A minor may make a valid will if he is 16 years old or more. An adult, declared incompetent, cannot make a valid will.

Last will and testament can be executed in two manners:

(a) Holograph will: A will, written in longhand by testator and signed by him; no witnesses are needed for validity of such will. Law advises testators to add exact date (day, month and year) and place where will was executed, but omission of these items does not render will invalid. Minors and persons who cannot read, are excluded from right of making a holograph will.

(b) Will before a notary.

Testator may explain his will to notary who thereupon drafts will; testator may also submit to notary written will, in which case writing may have been done by third person, or will may be typewritten. Notary must read will and ascertain that will is valid, except where will has been submitted in sealed envelope. These proceedings must be taken to minutes, which must be signed by testator and notary. Documents must be deposited with district court. Minors or persons unable to read can only make will before notary.

Contract of inheritance may be executed before a notary. Such a contract is binding upon parties and may be altered or modified only upon mutual consent.

Emergency Wills.

If it is to be feared that a person will die before notary can be called he may execute will before a mayor in presence of two witnesses.

In case of emergency (war, high seas, etc.) will may be declared orally before three witnesses.

The “emergency wills” set forth in the foregoing two paragraphs become invalid, if the testator is still alive after three months from the execution of such will.

Mutual wills may be executed only by spouses.

Revocation of a will may be effected by express declaration of revocation in form of a will, by destroying will, by erasing same or of parts of it, in which latter case only these parts are deemed revoked, or by execution of new will. If, however, such new will does not contain express revocation of former will, former will remains valid as to provisions which are not inconsistent with new will.

Legitimate Portions (Compulsory Shares).

The spouse and the children (or in their place their issue) of the deceased, and where there are none, parents have statutory claim in estate amounting to one-half of their intestate shares (see topic 12.03 Descent and Distribution). If they are not accordingly provided for in will, they have right of action against heir for payment in cash of proportionate amount of estate. In exceptional cases testator may deprive them of their legal portions, but ground of deprivation must be named in will. Right of deprivation is available against any of testator's descendants who are guilty of certain crimes or actions against testator, against parent or spouse who is guilty of certain serious offenses.

Foreign Wills.

Form of wills is ruled by Convention on Conflicts of Laws relating to Form of Testamentary Disposition of Oct. 5, 1961 (BGBl. II, 1965, 1144) and Art. 26 of Introductory Law of Civil Code. Testamentary disposition is valid if its form complies with internal law of place where testator made it, or of nationality of testator, or of place of domicile of testator, or of place in which testator had his habitual residence, and, for immovables, of place where they are situated.

13 FAMILY

13.01 ALIMONY:

Relatives in direct line are, by statute, obliged to provide maintenance to each other if one is needy and other is able to provide such maintenance without endangering his own adequate subsistence. Welfare paid to needy person by governmental welfare department may be recovered from person obliged to provide maintenance.

Spouses have mutual obligation to support each other; as to alimony after divorce, see topic 13.02 Divorce.

Germany is party to New York Convention on Recovery Abroad of Maintenance of June 20, 1956. (BGB1. II, 1959, 149).

See also topic 13.04 Infants.

13.02 DIVORCE:

Divorce is regulated by BGB. New regulations became effective July 1, 1977. However, previous law concerning alimony between divorced partners remains valid in cases of divorce prior to July 1, 1977.

Divorce may be granted by court (and only by court). Sole ground is disruption of conjugal relationship if it is not expected that spouses would restore matrimonial relationship. Law irrefutably presumes that conjugal relations are disrupted if spouses have been separated for three years. If both spouses agree to divorce, irrefutable presumption is valid after one year of separation. In case of separation of less than one year divorce may be granted only if continuation of marriage would be undemandable hardship for applicant because of reasons arising from person of other spouse. Factors such as adultery, serious violation of marital duties, immoral conduct, mental derangement, contagious and repulsive diseases, are likely to be considered by court as causing undemandable hardship. Unless spouses have been separated for more than five years, divorce may be denied, although conjugal relations are disrupted, if court finds that overwhelming interests of minor children from marriage or very specific exceptional situation of respondent who opposes application for divorce, necessitate maintenance of marriage. (BGB, §§1565-1568).

Divorced spouse may resume his/her maiden name. (BGB, §1355; see also topic 13.05 Marriage).

If, after divorce, spouse cannot support himself, he may claim alimony from other, if his inability to support himself rests upon one of following grounds: Self-support cannot be expected because of education of and care for child born of divorced marriage, or because of advanced age or sickness; spouse does after divorce not immediately find adequate job; spouse, in expectancy of marriage, had ceased or not begun education or continued education and, immediately after divorce, starts education which, after completion, will enable him to be self-supporting; dominating reasons in equity demand alimony. Alimony is not to be granted if grant would be heavily unreasonable or if spouse can support himself by own income or own funds. (BGB, §§ 1569-1580). While, normally, amount of alimony is determined by matrimonial living conditions, under certain circumstances, it can be reduced to reasonable demand. (BGB, § 1578b). Upon death of spouse his estate is liable for alimony to surviving spouse. (BGB, §1586 b). If retirement benefits have accumulated to either spouse during marriage, such benefits will be allocated to both spouses equally. (BGB, §§1587-1587 p). Accumulated retirement benefits earned in former GDR have been taken over into FRG social security system by transformation law of July 25, 1991. (BGB1. I, p. 1606).

For support of spouse divorced before Oct. 3, 1990, old GDR law applies, whereby spouse is less favorably endowed (temporary limitation of extent of support). In divorce cases occurring after Oct. 3, Federal German law also applies to former GDR. Since Oct. 3, 1990, support claims of children are, in all cases, governed by Federal German law.

Annulment of Marriage.

Governed by BGB, §§1313 et seq. Each party may apply to court for declaration of nullity of marriage. Nullity may be based upon lack of form, lack of legal capacity, in cases of bigamy, in cases where marriage is null and void because of consanguinity.

Moreover, a party may sue at the court for dissolution of marriage in certain cases, especially in case of error in ceremony, in case of willful deceit, which does, however, not include misstatement about financial circumstances, and in case of threat, unless such marriage is later ratified by couple. Right to apply for dissolution of marriage expires within one year from knowledge or end of threat, unless in cases of mental disorder, bigamy, marriage with close relative, lack of form, lack of legal capacity or lack of capacity to marry. Financial consequences are same as in case of divorce. Child born from void marriage is legitimate to extent to which it would have been legitimate if marriage had been valid.

Aliens.

German courts assume personal jurisdiction if one of spouses is German, or if wife at time of marriage was German or, in case both spouses are aliens, if at least one of them is residing in Germany and German divorce decree will be recognized by laws governing husband.

Applicable law depends on nationality of spouses. If both spouses are aliens of same nationality, law of nationality applies. In case of aliens of different nationalities, law of last common domicile is applicable. If spouse seeking divorce is, or, at time of marriage was, German national, divorce can also be granted under German law.

Foreign divorce decree may be recognized in Germany if rendered under that law which is applicable under rules of German international private law; decree will not be recognized if considered rendered under violation of German public policy or if foreign court under German rules is considered not having jurisdiction.

13.03 HUSBAND AND WIFE:

Conflict of Laws.

Common national law of spouses applies to personal relations. If spouses neither have nor have had common nationality, national laws of common domicile or, if there is no common domicile, national law of state to which closest common links exist, apply.

Marital Régimes.

There are three marital régimes.

“Statutory marital régime of community of increase” (BGB, §§1363-1390) determines spouses' property rights if they do not stipulate otherwise. It provides separation of husband's and wife's property, including separate management thereof. Only one common item survived: “The community of increases” (Zugewinngemeinschaft), subjecting surplus (if any), that is difference between amount of property of each spouse at time of marriage and at time of dissolution of régime (by divorce, by death, but also by contractual termination of statutory régime) to common interest and to specific treatment, which is different in case of dissolution of marriage by death and otherwise.

In the event of death, the adjustment of the interests is achieved by the increase of the intestate share of the surviving spouse by one-fourth of estate, without regard to fact that no increase at all may have actually taken place. Alternatively, surviving spouse may claim share which would accrue to him in case marriage is dissolved otherwise than by death. Such share surviving spouse may claim also if, in case of testate succession, surviving spouse receives no bequest, he has right to claim share which would accrue to him in case marriage is dissolved otherwise than by death.

In case marriage is dissolved otherwise than by death, following provisions govern: Increases of respective properties are compared; if increase of one spouse's property exceeds increase of property of other spouse, later is entitled to claim one-half of such balance.

In spite of the separate management of the respective properties of the spouses, there are certain restrictions with respect to the right of disposal thereof. No spouse may alienate his or her property as a whole without the consent of the other spouse. Such consent may be supplemented by the court upon motion for good cause shown. Lack of consent renders such a transaction ineffective. Objects belonging to the common household cannot be disposed of by one spouse without the consent of the other spouse.

Spouse may adopt by notarial contract—before or after marriage—another system of marital régime, but only one régime provided for in Code; reference to foreign system is not permitted and not valid. Reference may, however, be made to foreign system of country of which one spouse is national or where one of spouses has his residence when marriage takes place or when contract is concluded, if it is concluded after marriage.

One system is (full) separation of property. A contract, which provides that rules regarding community of increase shall not apply, has same effect.

“Common Property”.

(BGB, §§1415-1421). System of common property (Gütergemeinschaft) is optional régime and has consequence that in case of dissolution thereof (by mutual consent, by death or divorce) each spouse, or his or her heirs, become owners of one-half of such common property. Notarial contract is required. It must also contain provisions as to which spouse shall manage common property. If no such provision is set forth, both spouses must manage property together. Certain objects, so-called “reserved property” (Vorbehaltsgut), are excluded from community. Apart from “legal reserved property” (gifts or bequests made to one of spouses), spouses may also include in their contract other assets which shall be considered “reserved property.” “Reserved property” is managed and disposed of independently by its owner. No spouse has right to dispose of assets belonging to common property without consent of other spouse; no spouse has right of demanding division of common property.

“Separate Property”.

(BGB, §1414). System of separate property is optional régime and provides complete separation of husband's and wife's property.

As statutory régime of matrimonial property, GDR acknowledged state of common property, whereby all wealth accumulated on regular basis during marriage belongs jointly to both spouses. Property brought into marriage remains in possession of spouse in question; same applies for objects which he or she inherits or receives as gifts during marriage, as well as for smaller personal belongings. As of Oct. 3, 1990, this system of marital property is automatically transformed into Federal German marital régime of community of increase (cf. above), unless one of spouses had declared before Amtsgericht by Oct. 1992 that former GDR legal system of marital property is to remain effective for his/her marriage. This does not apply if spouses have previously made contract in favor of another marital régime.

Personal Relations.

They are ruled by principle of equality of rights. There is no disability of married woman. Spouses are mutually obliged to support. Spouse doing household work normally fulfills this obligation. There are no restrictions on contracts made by married woman or between spouses. When living in legal marital régime of community of increases, disposal of entire assets of one spouse or things belonging to household is only valid with consent of other spouse. Spouses may, upon marriage, declare to registrar whether to use husband's or wife's name as family name. In absence of such declaration each spouse keeps family name he had before marriage. Spouse losing original name may add it to family name after declaration to registrar.

German nationality of spouse remains unchanged by marriage to foreigner, but is lost when acquiring foreign nationality upon application. Foreigner married to German may obtain German nationality, if he is losing or abandoning his own nationality and if he shows that he will adopt German way of life.

See also topic 13.02 Divorce; category 12 Estates and Trusts, topic 12.02 Death.

13.04 INFANTS:

Minority lasts until person reaches age 18.

Contracts.

Infants under seven years and incompetent persons cannot make any legal binding declaration and must be represented by legal representative. For any declaration of minor, between seven and 18 years, consent of his legal representative (parents, guardian) is necessary, unless minor acquires only advantage thereby. Minor can only enter into contract if his legal representative consents thereto. In certain cases even additional consent of guardianship court is required.

If, however, a minor enters into contract whereby he fulfills his obligations out of means given to him by his parents or by third person, for purpose of contract or free disposition of minor, no consent is needed.

If the legal representative, upon consent of the guardianship court, authorizes a minor to start a business of his own, the minor becomes unconditionally (i.e., without any consent) “sui juris” with respect to the ordinary transactions of such business. If minor, upon consent of his legal representative, takes an employment, he becomes “sui juris” with respect to transactions connected with this employment.

Support of Minor.

Child support unto age of 18 or until child's education (including university) has reasonably come to end, is mandatory for parents regardless of neediness or parents' financial situation. However, free education system (no tuition) practically limits parents' obligation to payments for livelihood which, in case of needy parents, may be substituted by variety of government scholarships and loans to qualifying pupils or students.

Germany is party to Hague Conventions on Law Applicable to Support Obligations toward Children of Oct. 24, 1956 (BGB1. II, 1961, 1012; BGB1. II, 1972, 589), on Competence of Authorities and Law Applicable in Field of Protection of Minors of Oct. 5, 1961 (BGB1. II, 1971, 217) on Recognition and Enforcement of Judgments on Support Obligations of Oct. 2, 1973 (BGB1. II, 1986, 825), on Civil Right Aspects of International Kidnapping of Minors of Oct. 25, 1980 and on Recognition and Enforcement of Custody Decisions for Minors and Restitution of Custody of May 5, 1980 (BGBl. II, 1990, p. 206).

13.05 MARRIAGE:

Marriage is regulated by BGB, §§1310 et seq.

A valid marriage ceremony can take place only before sworn registrar. Witnesses are not mandatory. Parties are at liberty to have a religious ceremony also but latter is of no legal effect.

Required marriage age is 18 years. However, marriage age may be reduced by court to 16 years on application, if future spouse is not minor. A minor needs consent of his legal representative or competent guardian. See also topic 13.04 Infants.

Prohibited Marriages.

Important prohibitions are: There can be no marriage between relatives in a direct line; between full or half brothers and sisters; between relatives by marriage in direct line. No marriage can be entered into until former marriage has been declared void or dissolved by court. (§§1306 et seq.).

Foreign.

Marriage is considered valid under rules of German private international law if each of spouses has entered into marriage validly under laws of country of which he or she is citizen. Marriages to be concluded in Germany before German official have to be in compliance with form as provided for by German laws. Marriages concluded in foreign country by Germans, aliens, or aliens to Germans are, as to form, considered valid if form was in compliance with rules in force in that foreign country. Alien desiring to enter into marriage in Germany must procure special certificate issued by appropriate authority of his home country (Ehefähigkeitszeugnis). This requirement may be waived only for good cause.

Marriage within Germany between parties neither of whom is German citizen, may be concluded before person duly empowered by government of country of which either party is national, according to form prescribed by law of that country. Certified copy of entry of that marriage is to be filed with German registrar.

Germany is signatory to Hague Convention on Conclusion of Marriage of June 12, 1902 (RGBl. 1904, 221) and to Paris Convention on Conclusion and Recognition of Validity of Marriages of Sept. 10, 1964 (BGBl. II, 1969, 445).

Live-Partnership.

Law for Ending the Discrimination against Homosexual Coexistence: live-partnership (Gesetz zur Beendigung der Diskriminierung gleichgeschlechtlicher Gemeinschaften: Lebenspartnerschaften) of Feb. 16, 2001, BGBl. I, p. 266 as amended gives homosexual pairs legal frame for living together. They must mutually agree in presence of appropriate authority to have partnership for life. This agreement has consequences concerning surname, obligation to pay alimony, right of inheritance and some property rights. One partner is considered as member of family of other partner by law. Partnership can be annulled by court decision.

13.06 SUPPORT:

See topics 13.01 Alimony, 13.02 Divorce, 13.04 Infants.

14 FOREIGN TRADE AND COMMERCE

14.01 CUSTOMS:

Germany is integrated member of European Union (EU) where customs duties have been abolished before Jan. 1, 1993. (Uniform European Charta of Feb. 2, 1986). Provisions and orders of Council or Commission of EC (mostly concerning control over food supplies and other commodities, general flow of merchandise or uniform prices) of common concern to all members, become legally binding upon member countries and part of their national law immediately upon publication thereof in Official Gazette of European Union (German Edition: Amtsblatt der Europäischen Union).

Principal special statutes are Customs Law of May 18, 1970 (BGBl. I, p. 529) as amended. General Customs Regulations of Dec. 21, 1992 (BGBl. I, p. 2125) and Customs Tariff Law of Sept. 24, 1986 (BGBl. II, p. 896) as amended. Entry of Federal Republic of Germany into EC has exposed these laws to permanent amendments.

Local or regional customs authorities decide upon classification of imported goods in general customs tariff rate and also determine their value for customs purposes. Decisions of customs authorities are appealable to tax courts.

Foreign nationals or foreign residents are subject to same extent and in same manner to German customs as are German nationals or residents.

Federal Republic of Germany has joined General Agreement on Tariffs and Trade (GATT).

14.02 EXCHANGE CONTROL:

See category 1 Introduction, topic 1.01 Currency.

14.03 FOREIGN CORPORATIONS:

See category 2 Business Organizations, topic 2.03 Corporations.

14.04 FOREIGN EXCHANGE:

See category 1 Introduction, topic 1.01 Currency.

14.05 FOREIGN INVESTMENT:

See topic 14.06 Foreign Trade and Foreign Investments.

14.06 FOREIGN TRADE AND FOREIGN INVESTMENTS:

Foreign Trade Law of Apr. 28, 1961, BGBl. I, p. 481 (Aussenwirtschaftsgesetz—AWG) and regulation of Dec. 18, 1986, BGBl. I, p. 2671, as amended (Aussenwirtschaftsverordnung—AWV) liberalize foreign trade and investment as matter of principle, in particular merchandizing and capital transactions. See category 1 Introduction, topic 1.01 Currency.

Government may impose restrictions on business; those restrictions, however, being only permissible for certain purposes, e.g., for meeting obligations under international treaties and for protecting German economy.

Export of goods is free of license; some exceptions, however, exist. Goods permitted to be imported are listed in regulation, which enumerates goods that may be imported from countries without license. But regulations of European Community's institutions take precedence over German regulations also with respect to extent of liberalization. Thus, most of foreign trade is liberalized. Also money and security transactions between residents and nonresidents are liberalized. See category 1 Introduction, topic 1.01 Currency. Within Common Market countries any discrimination against citizens or corporations of other member states is prohibited. Even in case of liberalized trade, most transactions must be reported to governmental authorities.

Presently, amendment of AWG is under parliamentary discussion according to which acquisition of domestic enterprises or interest in such enterprises by acquirer from outside European Union jeopardizing public order or security may be prohibited with consent of Federal Government by Federal Ministry of Economics.

Foreign Investment Shares.

Law concerning Investment Funds (Investmentgesetz-InvG) of Dec. 15, 2003 (BGBl. I, p. 2676), as amended, in addition to few specific provisions applicable to investment companies domiciled in member states of European Union (InvG, §§130-134) provides minimum regulations for activity of investment companies registered in states outside European Union selling investment shares in Germany (InvG, §§135-140). Provisions apply to distribution by public offering, by public advertising or by similar manner; mere quotation on stock exchange does not constitute distribution activity in terms of law concerning distribution of investment shares (InvG, §135).

Distribution of foreign investment shares is permissible, if foreign investment company is subject to effective public supervision for purpose of investor protection and supervising authority of respective state is ready to cooperate sufficiently with German authorities. Moreover, foreign investment company must designate as representative a domestic credit institution, fund assets must be held by custodian bank, domestic credit institution must be designated as transmittal agent for payments made by or destined for shareholders, and terms of contract must meet certain conditions. As any other (domestic) investment company foreign investment company must provide person who acquires shares with terms of contract, sales prospectus and copy of application to conclude contract. Other than domestic investment companies or investment companies domiciled in European Union investment companies from other countries may not issue short form version of sales prospectus, but must use full sales prospectus containing detailed information on investment company, company's representative and detailed information to judge shares and investment. Moreover, prospectus must contain instruction on right of investor to revoke its declaration to acquire shares and reference that foreign investment company is not subject to supervision of Federal Authority for Financial Services Supervision (Bundesanstalt für Finanzdienstleistungsaufsicht—BAFin). Prospectus as any other publication must be in German language.

Foreign investment company shall publish in electronic edition of Federal Gazette current offering and redemption price, financial report for each business year within four months of end of business year, and half term report within two months after end of business year's half term. Notice of intent to distribute foreign investment shares within German territory must be given to Federal Authority for Financial Services Supervision (Bundesanstalt für Finanzdienstleistungsaufsicht - BAFin) with its seat in Bonn and Frankfurt am Main. Notice must be accompanied by certain documents. Investment companies from member states of European Union may start marketing investment shares right after notification of BAFin, unless it does not provide missing information and documents requested by BAFin within six months after initial notification. In such event marketing of shares is deemed as forbidden due to missing proper notification. Investment companies from other states may launch marketing if three months since filing notification have passed and BAFin did not prohibit in this period to begin with marketing.

Persons who offer investment shares as agents are deemed as financial services institutions requiring license according to German Banking Supervisory Act. Additional license according to German Industrial Code (Gewerbeordnung) is not required. Soliciting of investors by telephone is prohibited. See also category 3 Business Regulation and Commerce, topic 3.17 Securities.

14.07 FOREIGN TRADE REGULATIONS:

See topic 14.06 Foreign Trade and Foreign Investments.

15 IMMIGRATION

15.01 ALIENS:

Generally, aliens entering Germany must hold valid passport and visa, either tourist or long term visa. Nationals of many countries including U.S. are exempted from tourist visa requirement. Nationals of EU countries may enter Germany with identification card only. As matter of right they are, under certain conditions set forth in EU doc. 70-29 of Jan. 5, 1970, entitled to residence permit which is prerequisite for alien remaining in Germany for three months or more. Travel, residence and even practice of profession have been substantially liberalized among EU countries.

See also topic 15.02 Immigration and European Union Law Digest.

Status.

Aliens have substantially similar rights and duties as German nationals. Basic civil rights guaranteed by German constitution (Basic Law—Grundgesetz) protect aliens in like manner as German nationals. However, this does not apply to items such as right to vote or privilege of unrestricted choice of occupation. Persons violating German laws may be deprived of privilege to remain in country through nonrenewal of residence permit or revocation of such permit and, unless privileged to political asylum, such person may then be deported.

Germany's attitude towards foreign investment and trade is considered very liberal. But like any German investor, foreigner must observe commercial laws and regulations concerning foreign trade, cartel law, and business in general.

Germany has numerous controls designed to safeguard health and to restrict activities of unqualified persons (i.e., food, pharmaceutical and medical products, transport, banks, insurance companies, handcrafts, restaurants and hotels) also applying to aliens but not revoking basic principle that any foreign enterprise may establish itself in Germany either as branch or through subsidiary company. There is no discrimination against foreign investment. Foreigner may conduct his business without German participation in either ownership or management (but see category 2 Business Organizations, topic 2.03 Corporations, subhead Co-determination), he may take over or invest in existing business; or he may participate in joint venture. There are no special rules to be followed by foreign enterprise, nor are there any restrictions on foreign ownership of land or buildings or any other property. Foreigner need not become resident in Germany to conduct his business, although when not in country he must appoint resident representative responsible to authorities. Certain investment incentives are available to foreigners in same manner as to domestic investors.

Constitution contains safeguards against expropriation without differentiation between nationals and non-nationals. Although not prohibited entirely, expropriation may take place only upon explicit act incorporating adequate compensation due upon expropriation and only for reasons of public interest.

For all practical purposes property of every description may be taken, acquired, held and disposed of by alien in essentially same manner as German subject. See also category 18 Property, topic 18.07 Real Property.

Nonresident aliens are subject to tax on their income from German sources. Resident individuals, i.e. persons having customary place of abode in Germany, are subject to tax on their worldwide income. Tax credits and exemptions are available. Numerous Double Taxation Treaties provide for additional relief. German tax law does not require special tax clearance for individual leaving country. Tax authorities may, however, make claims on property of taxpayer in Germany to satisfy any outstanding tax debt.

Upon marriage to German spouse alien does not automatically acquire German citizenship or even right to remain in Germany without compliance with immigration requirements; however, immigration or residency requirements in such case are even more liberalized and application for residence permit or naturalization may not be denied unless there are specific reasons. See topic 15.02 Immigration.

15.02 IMMIGRATION:

Visitors.

Visitors for business or for pleasure may freely land in Germany, with valid passport. In case of nationals of EU-countries identification card is sufficient. For some countries there still is visa requirement. Alien allowed to enter must register with Aliens Authority (Ausländerbehörde) if he intends to remain in Germany for three months or longer.

Gainful Occupation.

Foreigner taking job, except temporary work for foreign employer, or otherwise gainfully employed must have: (1) Proof of identity (passport, identification card); (2) residence permit (Aufenthaltserlaubnis), to be obtained from Aliens Authority (through German Consulate). This permit is usually valid for one year but may be renewed annually. As rule after five years of residence, permanent permit may be granted. These permits are, for good cause at any time, revocable; (3) work permit (Arbeitserlaubnis). Nationals from EU countries are exempted from requirement of work permits. Upon application of prospective employer to labor exchange, preliminary work permit may be issued to enable prospective employee to obtain entry visa. Final work permit will be issued after residence permit has been issued. Work permit may be issued for specific jobs only; it generally is subject to time limitations of one or two years, but it is renewable. Especially for exceptionally qualified employees conditions eased for both residence permit and work permit.

Only employees need work permit; directors, managers, legal representatives of foreign companies as well as assembly and repair technicians following import of equipment for short term work, but no trainees or apprentices, are excluded from work permit requirement.

So are self-employed persons, however, these have to report to local supervisory agency for business and trade (Gewerbeaufsichtsamt) before starting proposed business in Germany and, may be granted certificate of registration (Gewerbeanmeldeschein), if they invest at least one million [Euro] in Germany and employ at least ten German employees. Except for these reasons objections to enterprise (personal, commercial, environmental or other reasons) do not apply.

Immigration requirements do not, or under substantial modification, apply to consular persons, members of international organizations, crewmen and persons in transit.

Naturalization.

Certificate of naturalization may be granted to alien of good standing who is likely to integrate into German people and who has residence in this country and who is able to support himself and his dependents.

16 INTELLECTUAL PROPERTY

16.01 COPYRIGHT:

Governed by German Copyright Law (Gesetz über Urheberrecht und verwandte Schutzrechte) of Sept. 9, 1965 (BGBl. I, p. 1273, as am'd).

Period of copyright for literary, musical and other original and creative works, i.e., architectural, photographic, motion pictures, computer programs, etc. ends with expiration of 70th year after author's death. Work is published (“erschienen”) if it is accessible to public with consent of copyright owner. Varied terms of copyright protection are applied to co-authorship, anonymous works, editions of works in public domain, etc. Photographic works and films are protected for 50 years after publication; same period (after first performance, manufacture, etc.) also protects performing artist, producers of phonograms, film producer, broadcasting station for performance or material in film or broadcast. Models and designs are protected for period not exceeding 20 years for designs and ten for models according to Registered Design Act respectively Law on

Utility Models. See topic 16.02 Patents, subhead Design Patent.

Computer programs are subject to copyright protection. (§69a et seq.). Law provides for certain restrictions concerning contents of license agreements, for instance with regard to reverse engineering or right to copy or examine programs. Commercial rights (right to exploit) in computer programs created by employees within scope of their duties vest in employer. Moreover, databases which due to selection and arrangement of their elements constitute personal intellectual creation are protected as copyrighted work. Other databases are subject to protection sui generis (§87a et seq.), if collection, revision and compilation of its elements required substantial investment. Law provides for certain restrictions in contracts for usage of databases. (See category 3 Business Regulation and Commerce, topic E-Commerce, subheads Computer Programs and Database Protection.)

Law contains many important features such as compulsory license provision to manufacturers of recording devices and sound or picture recording medium, personality rights of authors and others. Even though copyright for title of book or magazine is in effect, publishing in certain publications is common. Authors have statutory right to reasonable compensation. If compensation author receives is unreasonable at time license agreement was concluded, author may demand amendment of compensation. (§32). Additionally, author can also ask for amendment of compensation if agreed compensation becomes disproportionate due to success of work. (§32a). These rules are mandatory if subject matter of agreement concerns utilizations within Germany. (§32b).

EC multimedia directive (directive 2001/29/EC of June 22, 2001—OJ L 167 p. 10) has been implemented. Thus, exclusive right of author to make work available to public (öffentliche Zugänglichmachung - §19a) in particular by means of Internet and prohibition of circumvention of technological measures designed for protection of rights in work (§95a) have been implemented.

No copyright registration is necessary except in case of models and designs. (See also topic 16.02 Patents.) Among remedies available to owner of copyright for infringement are restraining order, request for accounting or destruction of infringing article and damages where infringement is willful or negligent. Copyright as such cannot be transferred or assigned, with exemption that copyright is heritable and can be assigned to fulfill testamentary disposition. Exclusive or non-exclusive (simple) rights to use and/or exploit copyrighted works may be granted (with similar legal and commercial effects as transfer of copyright under other jurisdictions). Such usage right may be granted also for means of usage not known at time of grant of usage right.

Law protects works of German, EU or EEA citizens regardless of whether and where published, and foreign works first published in Germany, provided 30 days have not elapsed since publication of such work elsewhere; otherwise protection of foreign works is governed almost exclusively by two international Conventions:

Germany is member of Berne Convention of Sept. 9, 1886, granting extensive minimum protection to musical and literary works of member countries. With exception of U.S. and Soviet Union, most important countries in world adhere to Berne Convention.

In 1955, U.S., Germany, and some other countries ratified Universal Copyright Convention of Sept. 6, 1952 (Welturheberrechtsabkommen). Protection under Convention, while not as sweeping as under Berne Convention, is extensive and almost uniform.

Germany is also a party to other international conventions (see category 21 Treaties and Conventions, topic 21.01 Treaties and Conventions) and to bilateral agreements with many countries, but those agreements are important only in case of very few countries that are not parties to Berne Convention or Universal Copyright Convention.

Interesting features of law are extension of liability for royalty payments to manufacturers, distributors and importers of recording devices and picture or sound recording media, even if use is entirely private, and thorough coverage of rights and obligations of performing right societies in territory and other persons or agencies administering similar rights concerning, among others, distribution of profits among members, establishment of balance sheets, arbitration, etc., under jurisdiction of German Patent and Trademark Office.

16.02 PATENTS:

Governed by Patent Law of May 5, 1936, in new version of Dec. 16, 1980 (BGBl. I, 1981, 1 as am'd). By virtue of this law Convention of Nov. 27, 1963 on Unification of Certain Points of Substantive Law on Patents for Invention, Patent Cooperation Treaty of June 19, 1970 and Convention on The Grant of European Patents (European Patent Convention) of Oct. 5, 1973 are also applicable in Germany. Therefore, there exists possibility of making use of European patent in Germany. Patents are granted by German Patent and Trademark Office for new inventions which are susceptible of industrial use. Now, inventions of products obtained by chemical processes are patentable as well as inventions of food, luxuries and drugs. If inventor has already publicly described or used invention, patent protection may be in danger, unless inventor has registered invention in member state of PCT or EPC. If inventor is not identical with applicant he must be named in application, in publication, in patent qualification and in register, except upon inventor's request. §36 of German Patent Law contains detailed standards and requirements that must be met when filing applications for registration of patents.

Examination Department (Prüfungsstelle) has to examine application to determine if it obviously does not comply with prescribed requirements. If it states such deficiencies, Examination Department shall request applicant to eliminate them within a specified time.

Patent and Trademark Office now only upon request examines application to determine whether it conforms to prescribed requirements and whether subject is patentable. Such request can be made by patent applicant as well as by any other party within period of seven years from filing patent application. If not, patent application is considered to be withdrawn. Patent and Trademark Office only states if invention is obviously patentable.

Request can be limited so that Patent and Trademark Office shall only determine which printed material is relevant with regard to patentability of invention applied for.

18 months from date of filing application, Patent and Trademark Office grants upon request to anyone inspection of application as well as models and samples belonging to files; if priority date is claimed, this 18 month period will commence at such priority date. Patent and Trademark Office publishes periodically in Patent Journal announcements of possibility of inspecting files of not yet published patent applications. From this announcement on, applicant may demand adequate damages from person who has used subject of application although he knew or should have known that invention used by him was subject of this application; applicant, however, has not yet claims which will be given to him by publication of application.

If application conforms to prescribed requirements and if Patent and Trademark Office considers that grant of patent is not precluded, it shall order application to be published. From date of publication, applicant enjoys legal effects of patent, either until grant of patent applied for, or until refusal of application.

Effect of patent is, that patentee alone is entitled to produce subject matter of invention industrially, to bring it on market, to offer it or to use it. If patent protects a process, its effect is extended to products directly obtained by that process.

If these exclusive rights are violated, patentee (or applicant of published application) may require that violation cease and in case of intentional or negligent violation, may claim for damages. If infringer is charged only with slight negligence, damage may be reduced between damage of injured party and advantage of infringer.

Federal Patent Court (Bundespatentgericht) decides appeals from decisions of Examination Department and Patent Divisions of Patent and Trademark Office and proceedings for declaration of nullity or revocation of patents and for grant of compulsory licenses. Appeal on point of law from decisions of Board of Appeal of Patent Court, whereby appeal from decisions of Examination Department and Patent Divisions has been decided, lies to Federal Supreme Court (Bundesgerichtshof), if Board of Appeal has given leave in its decision to appeal on point of law. Further appeal from decisions of Nullity Boards of Patent Court lies to Federal Supreme Court.

The patent protection lasts for 20 years from the date of the application. For medicine, patent protection can be extended by so-called supplementary protection certificate. New patents are published by Patent and Trademark Office and entered into patent register. Patent may be revoked two years after compulsory license (see infra) has been granted, if invention is exclusively or mainly manufactured outside of Germany.

Person's without domicile or business establishment in Germany must appoint an attorney or a patent attorney as their representative if they wish to deal with Patent and Trademark Office or exercise rights under patent.

Patent Bar.

To be admitted to examination for admission to German Patent Bar held at Patent and Trademark Office, applicants must hold degree in natural sciences or technology and show proof of minimum of three years special legal education and six months practical experience in patent attorney's office according to Patent Attorneys' Code (Patentanwaltsordnung) of Sept. 7, 1966 (as am'd). Code also sets strict standards of professional ethics, defines rights and obligations of patent attorneys (Patentanwälte) and creates Patent Bar Association with executive committee of seven. Also transitory provisions for compliance with certain aspects by patent attorneys previously admitted to practice.

Inventions of employees are regulated by law of July 25, 1957. (BGBl., p. 756 as am'd). Law distinguishes between “free inventions” of employee and “inventions in service” or “bound inventions.” Latter are inventions of employee based upon activities of latter in trade or service of employer or upon experience gained by employee in such trade or service. All other inventions of employee are “free inventions.”

Bound inventions must be reported to employer in detail, and employer has right to lay claim to same by written notice to employee within four months. If employer claims unlimited usage right, he acquires by law any and all rights in (bound) invention. If employer claims limited usage right, he acquires non-exclusive usage right only. If employer either claims limited usage right or does not exercise his claim for (unlimited) usage right at all or within four month period, invention becomes free invention, i.e. employee has complete and unrestricted usage rights in invention. If employer claims unlimited usage rights, he has to register invention in patent register as patent or, if more appropriate, as utility model, unless employee agrees not to register invention or if employer for reason of protection of company secrets has justified interest not to register invention. Employer has to pay to employee reasonable compensation. If parties cannot agree thereon, they must first resort to arbitration board, appointed by President of Patent and Trademark Office, and this board must try to reach settlement; if no settlement is accepted parties may resort to courts.

Free inventions must also be reported to the employer who may, within three months, inform the employee that the invention is not a free invention in his opinion. In case no agreement comes about, the parties may resort to the arbitration board and, finally, to the courts. Before the employee may use a free invention otherwise, he must offer it to the employer who may accept it within three months. If the employer accepts the offer, but the parties cannot agree on the compensation, they may resort to the courts.

These legal provisions cannot be impaired by contract to the employee's disadvantage.

Licenses.

Patentee may grant licenses, and an exclusive license may be entered in patent register on application. Patent and Trademark Office may give compulsory license and fix terms and royalty after publication or grant of patent, if public interest so requires and patentee refuses to grant license on reasonable terms.

In case the registered patentee declares irrevocably his general willingness to grant a license to every interested party against a reasonable royalty, his patent fees are reduced to one half.

Models.

In addition, inventions which concern tools or other practical implements may be protected by a kind of “little patent” called Gebrauchsmuster (design, utility, petty) according to provisions of Law on Utility Models of Aug. 28, 1986 (BGBl. I, p. 1455), as repeatedly amended. They are registered by Patent and Trademark Office on application and are protected by such registration. They are designated as D. B. G. M. (Deutsches Bundes-Gebrauchsmuster). Protection is granted to new models and devices designed for use or work to extent that new means have been designed to accomplish object such as in arrangement of parts or in design of model, and also to extent that known designs are applied to new work or objects. Not protected by this law are procedures and business methods. (§3). Accordingly models complying with requirements of patent law as to novelty and usefulness may be patented, but in cases where they do not come within patent law, protection may still be secured by registration as Gebrauchsmuster. With application for registration, there must be filed in Patent and Trademark Office full description of model, with all necessary drawings. Inspection of register and of files of registered designs including files of cancellation procedures is open to anyone; and besides this, Federal Patent and Trademark Office upon request grants inspection of files to anyone if and insofar as justifiable interest is substantiated. Period of protection is three years, subject to renewal for each two years up to period not exceeding ten years. Foreigners must be represented in same manner as under Patent Law.

§4 of Law on Utility Models and the Regulation on the Registration of Utility Models (Gebrauchsmusteranmeldeverordnung) of Nov. 12, 1986 (BGBl. I, p. 1739 as am'd) contain detailed standards and requirements that must be met when filing applications for registration of models (Gebrauchsmuster).

Design Patent.

Registered Design Act (Geschmacksmustergesetz) of Mar. 12, 2004 (BGBl., p. 390) as amended protects industrial property like patent law; matter of protection, however, being aesthetic design, it is part of copyright law. Effect of design patent is, that copy or imitation of model or design for professional use is reserved to patentee. Registration provided, protection is granted for five years as of application to register design patent. It may be extended by payment of fee for maintaining design patent by each five years up to maximum of 25 years. (§§27, 28).

Conventions.

Germany is one of parties to International Convention of Paris, 1883, version of June 15, 1970 (BGB1. II, 1970, 293, 391), and of Berne Convention of July 30, 1920. There are various other treaties dealing with patents, made between Germany and various foreign countries separately. See also category 21 Treaties and Conventions, topic 21.01 Treaties and

Conventions.

Former GDR.

Patents and copyrights pending or registered in former GDR enjoy same protections as patents and copyrights pending or registered at German Patent and Trademark Office. German Patent and Trademark Office processes all applications. Objections to applications and registrations may be made as in case of all other patents and copyrights. According to Act on Extension of Industrial Property Rights ("Erstreckungsgesetz" of Apr. 23, 1992 BGB1 I, p. 938) protection of patents, models, design patents and trademarks effective either in territory of former FRG or territory of former GDR is extended to respective other territory.

16.03 TRADEMARKS:

Trademark Law of May 5, 1936 in version of Jan. 2, 1968 is replaced by new law (Markengesetz) of Oct. 25, 1994 (BGB1. I, p. 3082, as am'd) with effect of Jan. 1, 1995.

Any person who intends to use a trademark in his business in order to distinguish his goods or services from those of others may apply for mark to be registered in register of trademarks which is kept with Federal Patent and Trademark Office. "Any person" means merchants, commercial partnerships and corporations of any kind. Trademark may consist of words, or pictures and designs, or both. Moreover as of Jan. 1, 1995 letters, numbers, acoustic marks, under certain circumstances colors, three-dimensional forms including shape of goods or its packing can be protected. Marks can be assigned and licensed. Trademarks or service marks no longer are distinguished. According to jurisdiction there are certain limitations as to what marks may be employed. Marks which are in general use in certain trade or industry, such for example as figure of Chinese in tea trade, may not be registered. Same rule applies to words which contain statements exclusively relating to manner, time or place of manufacture of goods in question, or quality, purpose, price and quantity relations of goods, coats-of-arms of foreign states and inland cities, indecent, scandalous or deceiving marks, marks which encroach on personal business name of another.

Objections against registration of new trademark can be filed by one who has previously made use of mark for identical or similar merchandise.

Right to exclusive use of trademark expires ten years from date of registration, but it may be renewed for successive periods of ten years without limitation of time upon payment of new general fee. Trademark must have been used within five years after registration otherwise anyone may claim for deregistration.

Appeals against decisions of Examining Division of Patent and Trademark Office can be taken to Patent Court. Last resort is Federal Supreme Court (Bundesgerichtshof).

Enterprise having no business establishment in Germany may demand trademark protection in Germany. It must appoint lawyer or patent attorney as its representative. His powers pertain to maintaining all rights of owner of trademark under law. It must furthermore prove that trademark is protected in country where business is located.

Germany is member of Paris Convention as modified in Washington and The Hague, and of Madrid Conventions as likewise modified, and Trademark Convention of Vienna of June 1973. With few countries, not including U.S., it has special treaties on subject. There is, however, reciprocity with U.S.

17 MORTGAGES

17.01 CHATTEL MORTGAGES:

There is no exact equivalent for a chattel mortgage in Germany, but there may be a conditional sale. See category 3 Business Regulation and Commerce, topic 3.16 Sales.

In Germany, transfer of title for security has become customary law. To some extent, chattel mortgage resembles transfer for security. Transfer of movables is made by informal agreement between creditor and debtor on transfer of title whereby concrete property conveyance conditions are agreed upon. Security agreement, not identical with legal transaction, serves as basis. To be effective, registration of transfer for security in public register is not necessary. Security transactions as provided for in Uniform Commercial Code are unknown in German law. Debtor retains possession and possible use whereas title passes to creditor. Transfer for security grants secret lien and is externally not recognizable. Debtor continues to be considered financially sound. This fact implies certain danger for all creditors. However, debtor must separate transferred items from his property, e.g., by separate storing, by marking or registration in special books or lists. Specified items or impersonal entity (warehouse), even reversionary right may be transferred. Agreement may be reached by resolutory condition, i.e., conditioned by full performance of secured claim. In this case, title to secured goods is automatically reconveyed to debtor upon fulfillment of condition.

In case of bankruptcy of debtor, creditor has right of sequestration (§50 InsO) or right of separation (§47 InsO). In case of nonpayment, rights of creditor resemble those of governing pledgee. Provisions are set forth in security agreement. Unsecured creditors may refer to law prohibiting fraudulent transfers that transfer for security is void.

Cession for security means that debtor transfers to creditor for security purposes claim or other title which debtor has against third party. Institution equals transfer for security. Also in this case, entry in register for effectiveness of cession is not necessary. Tax authorities regard only debtor as liable for taxes as creditor has but nominal right of ownership, real title having remained with debtor.

17.02 MORTGAGES:

Real estate may be subject to a mortgage securing a debt (Hypothek) and where no such debt is expressly mentioned, on behalf of a certain amount of money to be paid out of land only (Grundschuld), or from annuity (Rentenschuld). Entries are made under recording acts. See category 9 Documents and Records, topic 9.04 Records. (BGB, §1113 et seq.). According to Civil Code mortgages must be registered in terms of EURO, currency of EU-member states (that after Jan. 1, 2002, have not adopted EURO), Swiss currency or US-Dollar.

In former GDR, there was only possibility of debts; moreover, in case of personal ownership (not ownership by enterprise or people), such debts could only be related to claims based on real estate property and directed against owner thereof. To back credits for building, credit institutions could file construction mortgages (“Aufbauhypotheken”) which had priority over all other mortgages. First State Treaty between FRG and GDR ended this system.

Since then, mortgage rights as defined by FRG law can be cited to back all claims, not just claims related to property in question. Construction mortgages no longer exist (although those already in existence continue).

18 PROPERTY

18.01 CURTESY:

Curtesy does not exist in Germany.

18.02 DEEDS:

Deeds, in common law sense, are unknown in Germany. Transfer of real property is effected by declaration of both parties before recording notary or judge (Auflassung) and by entry of transfer of title in real estate register (Grundbuch). See also topic 18.07 Real Property, subhead Transfer of Property. Alteration of Grundbuch, which was likewise prerequisite for transfer of real property, occurred solely on basis of document of contract of purchase. See also category 13 Family, topic Husband and Wife, subhead Marital Regimes, catchline Common Property; also category 9 Documents and Records, topic Records; also category 3 Business Regulation and Commerce, topic 3.16 Sales.

18.03 DOWER:

Dower does not exist in Germany.

18.04 LEASE:

German Civil Code contains detailed provisions on leases, emphasis being on safeguards for residential tenants most of which are mandatory. In commercial leases, statutory provisions often do not sufficiently balance interests of landlord and tenant. These are not mandatory and parties can agree to deviate from them, but if standard form contracts are used, these will be governed by strict terms control under Civil Code.

Legal status of German leases differs from their equivalent in Anglo-Saxon law. In Germany, leases are not interests in land. They are classified under law of contracts and not under law of real property. They merely constitute contractual relationship between landlord and tenant. Consequently leases cannot be registered in land register.

Leases do not require specific form, they can be concluded in writing or orally. Unless lease for residential space with term of for more than one year is not in writing, it is considered to be entered into for indefinite period of time with right of termination after one year at earliest. Leases may be entered into for either fixed term or unlimited period of time. Maximum period is 30 years; after that either party is entitled by law to terminate lease by giving six month's notice to end of calendar quarter. German Civil Code provides that landlord is responsible for maintenance of building. However, in practice, parties usually agree to disclaim statutory provisions and share responsibility. According to jurisdiction, provisions on obligation to renovate in standard contracts are subject to restrictions.

Property leasing is special kind of long-term financing of investment in real property. Apart from tax advantages, salient characteristic is use of off-balance-sheet financing. Companies listed on stock market in particular, use leasing financing to complement their financing range. Cross-border transactions, especially in connection with ground and soil rights, still involve considerable problems. These stem in particular from divergent legal and tax principles for treatment and assessment of land and buildings in respective countries. For treatment under civil and tax law, law of country in which property is located applies exclusively. In case of lease loan agreement, all lessor's expenditure is fully amortized during basic lease period via lease instalments and additional loan of lessee, whose repayment entitlement at end of lease agreement term is set-off with purchase price of property on exercise of option. Recent years have seen growing significance of financing public sector investments through leasing. Lessees in this case are public corporations—either at federal government, state or municipal level. Purpose of municipal leasing is to finance large scale infrastructure projects (waste disposal and waste-water treatment plants, hospitals, town halls and administrative buildings, car parks and power plants).

By fully exploiting tax advantages for investors, public sector is able to obtain finance on better terms than would be available if it obtained financing directly. However, desired tax effect for lessor applies only if leasing property in question can be used by third parties. Otherwise it is not imputed to lessor as his business property for tax purposes, and thus cannot be depreciated by him.

Asset-backed and Mortgage-backed Securities.

Asset-backed securities (ABS) caught on in Germany as further alternative financing instrument. ABS transactions are geared towards sale of credit portfolios with balance-sheet-relieving effect and low-cost refinancing through capital markets via issuance of securities. In ABS-transaction, assets (non-securitised assets or property) of one or several companies (originator) are sold to company specially created for this purpose (special purpose vehicle or SPV). SPV finances itself through issue of special bonds (ABS), which are backed exclusively by assets acquired and any additional collateral (credit enhancements). These bonds are serviced by payment flows from assets sold to SPV, in order to protect purchasers of asset-backed securities from risk of possible insolvency of SPV, to which regular revenue and other assets are passed on.

Unlike international accounting principles, according to US GAAP and IAS, there are no express accounting provisions for ABS transactions under German commercial law. In order to achieve off-balance-sheet treatment for company selling assets, sale must meet criteria of what is generally accepted to be true asset sale. With reference to decisions of Federal High Court of Justice [Bundesgerichtshof] and Federal Fiscal Court [Bundesfinanzhof] dealing with question of distinction between what is genuine factoring and what is not, following criteria must be met: Final purchase price, reasonable amount of purchase price and assumption of debtor's credit risk by asset purchaser. Result is that SPV becomes both legal and economic owner [wirtschaftlicher Eigentümer] of assets. If these criteria are not met, sale qualifies merely as loan collateralised by assigned assets.

Mortgage-backed securities (MBS) have emerged as special form of asset-backed securitisation. These securities consist of marketable debentures of mortgage assets. In Germany, sound mortgage bank and Pfandbrief (mortgage) system is somewhat of obstacle to extensive use of MBS. Mortgage banks raise funds for granting real property loans through issuance of debentures (mortgage, Pfandbrief), which are secured by charges on real property which mortgage banks require as security for loans granted. This method of financing is similar in structure to issue of ABS. At economic level, mortgage-backed assets are transformed into securities that can be sold. Given mortgage backing of assets and high-value portfolios usually achieved, this form of refinancing is extremely cheap. Pfandbrief is legally defined in Mortgage Bank Act and is subject to certain legal limitations. Under §11 of Mortgage Bank Act, lending limit for issue of mortgage Pfandbrief is 60% of real property value. Mortgage Bank Act cannot be applied to MBS.

MBS structures have been seen in Germany for some years. These are used to cover peaks that cannot be covered by issue of Pfandbrief. This type of financing is also attractive for building financing institutions (such as German building societies) that are not themselves allowed to issue Pfandbrief.

18.05 PERPETUITIES:

As to conveyances of properties to trustees upon trust perpetuities are forbidden by law under the rule, that reversionary heirs, etc., must become invested with their share within 30 years from the testator's death, with certain exceptions. (See BGB, §§2109, 2162, 2163, 2210).

18.06 POWERS OF ATTORNEY:

As regards to real property matters representation by agent is permitted. Powers of attorney concerning matters requiring application for entry in land register, incorporation of corporation or increase of share capital must be notarized. See also category Business Regulations and Commerce, topic Powers of Attorney.

18.07 REAL PROPERTY:

Transfer of Property.

Generally purchase of property by foreigners in Germany does not require any special permit by German authorities.

Under German law, prerequisite for acquisition of title to property is execution of purchase agreement and in addition, agreement on transfer of title [Auflassung] before notary public, and subsequent registration of buyer in land register (Grundbuch).

Purchase agreement is contract of obligation to transfer and does not itself transfer or encumber property. Under purchase agreement seller warrants transfer of title and absence of encumbrances unless they are to be assumed by buyer. Agreement on transfer of title [Auflassung] is separate contract, although it is usually attached to purchase agreement and executed as single instrument. Both purchase agreement and agreement on transfer of title, require notarial form to be observed. During absence abroad, person may generally delegate authority to any person of full capacity. Entire agreement, including all side documents and any additional agreements connected with property purchase, must be executed before German or non-German comparable notary. Otherwise contract is void.

Acquirer only becomes owner upon registration in land register. Land register shows legal status of every plot of land. It describes area and location of plots and lists current and previous owners, as well as any third party rights as to land, e.g. encumbrances, mortgages and land charges. Land register is kept by district courts for each area. Buyer or creditor of encumbrance is entitled to rely in good faith on accuracy of details shown in land register. Due to land register being definitive in this manner, purchase agreement generally provides that purchaser will not be registered as new owner in land register before having paid purchase price to seller, or into notary trust account. If payment of purchase price is effected via notary trust account, funds are released and notary applies to register transfer at land register as soon as he is informed that contractual sale conditions have been fulfilled. However, buyer is entitled to enter priority notice at land register after signing purchase agreement which prevents seller from mortgaging or selling land to another person.

Purchase of real property is mainly governed by German Civil Code [Bürgerliches Gesetzbuch]. Seller is obliged by statute to transfer real property to purchaser free of encumbrances and defects in quality. Statutory warranty period concerning warranty claims is mostly only two years. Since terms of purchase agreement are freely negotiable, seller's liability for defects in size, quality and condition of property, is very often expressly excluded in purchase contracts. However, this does not apply to buildings under construction, where seller usually gives warranties equivalent to those of contractor. As to problem of soil and groundwater contamination, variety of different clauses sharing risks between seller and purchaser are seen in practice.

Notarial costs and court fees for agreement and its implementation, are usually contractually borne by purchaser. Notary's fee for execution of notarial purchase contract and court fee for registration of purchase in land register, are calculated by reference to statutory scale. Notary and registration fees will amount to approximately 1.5 - 2% of purchase price. These fees are not negotiable.

Most common form of real property interests is “absolute ownership” [Eigentum] as right to possess and dispose of land in most absolute way, terminating only upon alienation or succession. In addition, “condominium ownership” [Wohnungseigentum] and “hereditary building rights” [Erbbaurecht] are also used in Germany. Under “condominium ownership” it is possible to be absolute owner of self-contained unit within building, each owner being co-owner of common parts and structure of building. Hereditary building right is encumbrance upon land consisting of transferable and heritable right. It enables holder of right to build over (or under) property still belonging to absolute owner. Holder of right is entitled to mortgage, transfer or devolve hereditary building right by way of succession.

Establishing mortgages or charges on land similar to acquisition of land requires notarial deed including application to register such mortgage or charge in land register (Grundbuch) and registration of mortgage or charge in land register. Same applies for transfer of mortgages and charges on land.

19 TAXATION

19.01 INTRODUCTION:

There are taxes of Federal Republic, taxes levied by states (Länder) and those levied by communities. Foreigners are subject to unlimited tax liability only if they are either domiciled in Germany or have their habitual place of abode there, which is considered to be case if they stay longer than six months within territory. Otherwise foreigners are subject only to limited tax liability on certain income from German sources (e.g. profits arising out of permanent establishments located in Germany) and on certain property located in Germany, rate of which amounts at least to 25% of income for individuals. Persons subject to such limited tax liability are not entitled to deduct expenditures specially allowed for unlimited taxpayers (personal allowances or deductions for exceptional burdens). There are some exclusions for EU citizens in this regard.

19.02 ESTATE TAX:

See topic Inheritance and 19.03 Gift Tax.

19.03 GIFT TAX:

See topic Inheritance and 19.03 Gift Tax.

19.04 INCOME TAX:

Income Tax on Individuals (Einkommensteuer).

Based upon Income Tax Code. Income of individuals and partnerships of individuals from agriculture and forestry, business, profession, employment, investment, rentals, annuities and certain other sources defined in Code is taxable. Any other income is tax free, e.g., lottery prizes, alimony, etc., and in particular capital gains, if not connected with business or essential shareholding (whereas share of 1% or more in corporation is deemed as essential shareholding). Additionally income tax is levied on profits arising out of resale of real property before ten years (with exception of real property uses for own residential purpose), of securities, shares and other assets before 12 months have elapsed since acquisition thereof.

Expenses connected with earning of taxable income (business expenses) are tax deductible. Additionally there are some allowances under which certain taxes (but not income tax), insurance premiums, contributions etc. lower tax rate up to certain maximum amount. Losses may be carried back for one year with amount up to [Euro]511,500 (in case of spouses up to [Euro]1,023,000). Remaining losses may deduct income of future years up to amount of [Euro]1,000,000 (spouses: [Euro]2,000,000) without restrictions, exceeding income can be set up against losses up to 60% (leaving at least 40% of income above [Euro]1,000,000 always taxable). Losses which thus cannot be utilized can be carried forward infinitely.

Spouses may file joint returns; to effect that income tax base is split. Income tax rate is assessed on progressive scale up to marginal rate of 45% for 2004 and 42% for 2005 onwards.

This marginal rate is reached at taxable income level of approximately [Euro]52,000 for singles and [Euro]104,000 for spouses who file joint returns. For income except for income from agriculture and forestry, business and profession, income tax rate increases by 3% in case of high income ([Euro]250,000 for singles and [Euro]500,000 for spouses). Certain income, e.g., dividends, sale of essential shareholdings in corporations, etc. is taxed on reduced (50%) tax base (Halbeinkünfteverfahren). Deduction of expenses is limited accordingly. Extraordinary income, e.g., from sale of unincorporated business is taxed under certain conditions at preferred rates. Foreign tax credits are allowed under certain conditions (baskets). Usually, taxable period is calendar year. Business enterprises keeping books may choose deviating tax year. Change from calendar year to deviating tax year requires consent of Tax Authority.

Certain items of income are taxed by deduction at source (withholding tax). Most important items are investment income such as dividends and interest, salaries and wages. Withholding tax is credited against tax finally to be assessed if relevant tax payer is subject to unlimited tax liability. Deduction at source is also applied to other items of income, e.g., royalties payable to foreign creditors. In case of persons subject only to limited tax liability, deduction at source is applied to further items of income such as income derived from activity as artist or performer, writer, journalist or photographic reporter, including activity of these kinds exercised on behalf of radio or television service, income derived from utilization of activities as defined just above and income arising from payments for use of or right to use copyrights and industrial patents as well as know-how. In these cases, tax liability is deemed to have been discharged by withholding tax.

Corporation Tax (Körperschaftsteuer).

Tax corporations are subject to, based on Corporate Tax Code with referrals to Income Tax Code. Former corporation tax system with full tax credit at shareholder level is abolished by tax reform with effect as of Jan. 2001. Flat tax rate of 25% for profit distributed and for retained profit. Tax rate for foreign corporations doing business in Germany through branch is 25%, determination of profits being limited to operation of permanent establishments. Individuals as shareholders will be taxed with 50% of amount of dividends (Halbeinkünfteverfahren), corporations as shareholders receive dividends tax-free. For both, withholding tax (20%) on full dividend. Reduction of withholding tax by Double Tax Treaties and/or EC-Parent Directive. Withholding tax is rechargeable partly or in full amount if specific requirements are met. For treatment of business expenses and carry back/forward of losses see subhead Income Tax on Individuals (Einkommensteuer), supra.

Thin capitalization rules for foreign as well as domestic shareholders with safe haven for debt-equity-ratio: 1.5:1. In case of holding companies with i.a. at least two operating incorporated subsidiaries equity of holding shall not be reduced by book value of subsidiaries when calculating its safe haven. No safe haven for debts bearing profit related interest. There is threshold of [Euro]250,000 for interest payments. Details of thin capitalization rules that were amended with effect from Jan. 1, 2004 are still under heavy discussions.

Tax-free sale of shareholdings for corporations as shareholders regardless of number of shares; however, 5% of capital gain are treated as nondeductible expenses, leading to tax burden of 2% of capital gain (as a total of Corporation Tax and Trade Tax). Tax exemption will not be granted for shares written off in previous years, earmarked shares (einbringungsgeborene Anteile) and short-term investments of banks or financial enterprises.

Trade Tax (Gerwerbesteuer).

Additional tax based on income for taxpayers with business activities only. Computation of taxable income usually same as of income and corporation tax with certain special additions and deductions. Trade tax constitutes deductible item for purpose of determining income and corporation tax. Tax is levied by municipalities. Tax rate depends on multiplier determined by respective municipality (ranging in vicinity between 300% and 500%). Calculation of effective tax rate is rather complicated. In practice, tax burden amounting from 15% to 20% of taxable income can be assumed.

19.05 INHERITANCE TAX:

See topic Inheritance and 19.03 Gift Tax.

19.06 INHERITANCE AND GIFT TAX:

Inheritance tax is tax on individual inheritance, not on estate; it is imposed upon heir; gift tax (gifts inter vivos) is imposed jointly upon donor and donee. Estate is jointly liable for these taxes. If decedent or donor are nonresidents, only share devolving upon German beneficiaries is taxable. If neither testator or donor, nor beneficiary, are German residents, only real estate or certain business property located in Germany is taxable. Mortgages, which must be registered in land register (Grundbuch), are considered real property in this regard.

Applicable tax rate depends upon size of share received and degree of kinship of beneficiary to decedent or donor and varies from 7 to 30% for class I (e.g., spouse or child), from 12 to 40% for class II (e.g., brothers/sisters and parents) and from 17 to 50% for class III (unrelated beneficiaries). Lowest/highest tax rates are applicable to persons receiving less than [Euro]52,000/more than [Euro]25,565,000. Tax free lump sum varying from [Euro]307,000 for spouses, [Euro]205,000 for children to [Euro]5,200 for unrelated beneficiaries.

Incidence of double taxation with estates of U.S. citizens in Germany is largely avoided following U.S.-German Convention for the Avoidance of Double Taxation with Respect to Taxes on Estates, Inheritance, and Gifts of Dec. 3, 1980/Dec. 14, 1998 as published on Dec. 21, 2000 (in force in Germany since Jan. 1, 1979/Dec. 15, 2000).

19.07 MOTOR VEHICLE TAXES:

See category 20 Transportation, topic 20.02 Motor Vehicles, subhead Vehicle Registration.

19.08 PROPERTY TAXES:

Tax for transfer of real property is imposed at rate in principle of 3.5% of tax base, e.g., consideration or value specially determined for tax purposes if no consideration is applicable. However, Federal States can determine different amount of property tax in their own discretion.Seller and Buyer are jointly liable for real estate transfer tax. Independent from transfer, municipalities impose annually land tax (Grundsteuer) on real property. Rate depends on respective applicable multiplier. Transfer of 95% or more of share capital of company owning real property in Germany is treated as transfer of real property being charged with property (transfer) tax.

19.09 SALES TAX:

See topic 19.13 Value Added Tax.

19.10 SOLIDARITY SURCHARGE (SOLIDARITÄTSZUSCHLAG):

In order to cover financial burden connected with reconstruction of former GDR, solidarity surcharge has been levied since fiscal year 1995. Every resident or nonresident individual or corporate taxpayer is subject to this surcharge in amount of 5.5% of income or corporation tax burden. Solidarity surcharge constitutes non tax-deductible item.

19.11 STAMP TAX:

See category 3 Business Regulation and Commerce, topic 3.02 Bills and Notes.

19.12 TREATIES AND AGREEMENTS:

Double Taxation Treaty exists between Federal Republic of Germany and U.S. with respect to German income tax, corporation tax and trade tax. For details see this treaty in 1989 version. (Federal Law Gazette II, 1991, p. 354) as amended by Protocol of June 1, 2006 (not yet ratified). Besides this, approximately 100 Double Taxation Treaties exist with respect to income taxes. Additionally, relevant EU-Directives have to be applied.

19.13 VALUE ADDED TAX:

Turnover Tax (Umsatzsteuer).

Turnover tax in form of value added tax, is assessed on basis of proceeds received by entrepreneur for deliveries effected or services rendered within Germany. Entrepreneur, however, is allowed to deduct value added tax charged to him by other entrepreneurs (Vorsteuer = input VAT) from amount of tax to be paid by him to tax authorities. In sale or service invoices, value added tax is to be included as separate item. Under this system, net amount of tax payable by entrepreneur depends upon amount of input VAT (Vorsteuer) paid to other entrepreneurs and allowable as tax credit.

Standard tax rate is 19% with effect from Jan. 1, 2007. Reduced rate of 7% is applicable to certain turnovers, such as foodstuffs, agricultural products, printed matter, certain professional services and traffic.

Certain deliveries and services are tax exempt such as export, capital and money circulation, transfer and lease of real estate, transfer of shares and medical services. Additionally, services to non-German tax residents, such as legal (not those of notary), economical and technical advice, granting of licenses, data processing, transfer of know-how, etc. are usually nontaxable. So-called “reverse charge” has to be applied to these services to effect that foreign entrepreneur becomes liable for VAT. “Reverse charge” regime has also to be applied to certain deliveries and services (e.g. construction services) supplied to German entrepreneur by entrepreneur resident outside Germany leading to VAT liability of German recipient. Imports are subject to equalization tax at same rate.

19.14 WEALTH TAX:

Wealth tax (Vermögensteuer) presently is not levied, due to judgment of German Constitutional Court. Reintroduction not likely, but from time to time under political discussion.

20 TRANSPORTATION

20.01 AUTOMOBILES:

See topic 20.02 Motor Vehicles.

20.02 MOTOR VEHICLES:

Operator's license is required. Minimum age is 18 years. Some Länder allow “accompanied driving” for 17 year old youngsters. After trial period of two years following driving test, license becomes valid for lifetime of licensee and must be produced to police on demand. Nevertheless, license may be suspended in case of violations regarding motor vehicles. Aliens may drive within Germany for up to one year after first entry on basis of international operator's license or, in certain cases, of their valid home country's license. German operator's license may be granted to alien after theoretical and practical driving-test, in certain cases on basis of international or home country's license without taking test.

Vehicle Registration.

Every vehicle driven in Germany must be registered; registration plate must be displayed in front and rear and must be of requisite size. Registration tax is to be paid for and during time of registration. Registration card is issued by local authorities upon registration of vehicle and must be produced to police on demand; registration-card has to be surrendered upon deregistration. All vehicles registered in Germany are subject to periodic technical inspections.

Transfers.

Registration book comes with vehicle. Upon registration of vehicle this book is issued by local registration authority, showing name of registered owner; and on transfer of vehicle such book must be sent to authority for registration. Upon transfer, new registration-card is issued by local authority.

Liability.

Registered owner of car is liable for all injury or damage caused by operation of car whether by negligence or not, if vehicle is used with his permission. Owner's strict liability is limited to certain amounts. Owner is not liable if he can prove that accident causing injury or damage was caused solely by other person's negligence.

Insurance is compulsory on motor-vehicle against liability for injury or damages caused by operation of vehicle to third persons. Plaintiff is entitled to action directly against insurer. Upon border crossing into Germany with motor-vehicle registered in foreign country operator must present international insurance-card, with certain exceptions.

20.03 SHIPPING:

All German vessels employed for the transportation of goods or passengers on the sea constitute the German merchant marine.

Vessels which are in exclusive ownership of German nationals are considered as German and as such entitled to show national flag of German merchant marine. When operated by commercial companies, all partners must be Germans; when operated by corporations or other corporate bodies vested with rights of a juristic person, seat of administration must be within Federal Republic of Germany, irrespective of whether capital is owned by Germans or foreigners.

Every vessel must be examined and measured as to its tonnage while under construction and on completion a certificate of admeasurement is issued by the competent authority. Such certificate is one of the so-called ship's papers. Another is the certificate of the vessel, which is issued by the court of her home port and testifies as to registration of the vessel in the ship register.

Owner of a vessel may be an individual, a partnership or a corporation. There is also a form of partnership peculiar to the shipping business, called Reederei. This is distinct from the partnership of the commercial law in many respects and governed by the particular rules of the maritime law. The rights, duties and liabilities of such part owners in relation to each other are placed on flexible basis.

In maritime law, the liability of the owner of a vessel, in many instances, is restricted to the vessel and what belongs to it (appurtenances, freight), while in other cases his personal liability is provided in addition to the liability of the vessel. But even in the case of the restricted liability, there is no such procedure as the suit in rem in American admiralty law, directed against the vessel itself, since in every case the suit can be directed against owner or master, even though no personal liability be asserted.

There are liens peculiar to maritime law, not requiring actual possession of vessel, particular liens being enumerated in maritime code (for claims for wages of master and crew, salvage-money, average, etc.). They have order of their own. There is also special kind of mortgage on ships, registered in ships' register. As regarding law on contract of carriage of goods by sea, Germany is member state to Hague Rules 1924. It has not ratified Hague-Visby Rules 1968 but has incorporated them into German national law.

A special law has been enacted in regard to vessels engaged in navigation on German inland waters. Its principles are very similar to those of the maritime code, though there are many deviations as to particulars.

21 TREATIES AND CONVENTIONS

21.01 TREATIES AND CONVENTIONS:

Federal Republic of Germany is party to, inter alia, following multilateral agreements:

General: International Monetary Fund and International Bank for Reconstruction and Development—IMF (Bretton Woods, 22.7.44); Charter of the United Nations and Statute of the International Court of Justice (26.6.45/20.12.65); Constitution of the Food and Agriculture Organization of the U.N.—FAO (16.10.45); Constitution of the U.N. Educational, Scientific and Cultural Organization—UNESCO (16.11.45); Constitution of the World Health Organization—WHO (22.7.46); Constitution of the International Labour Organization—ILO (9.10.46/25.6.53); General Agreement on Tariffs and Trade—GATT (30.10.47); Convention Establishing a Customs Co-operation Council (15.12.50); Articles of Agreement of the International Finance Corporation (11.55); Convention Establishing the Multilateral Investment Guarantee Agency—MIGA (11.10.85); Statute of the International Atomic Energy Agency (26.10.56); Agreement Establishing the Inter-American Development Bank (8.4.59); Articles of Agreement of the International Development Association—IDA (26.1.60); Convention on the Organization for Economic Co-operation and Development—OECD (14.12.60); Constitution de l'Union postale universelle—UPC (10.7.64/14.11.69/5.7.75); Convention Internationale Des Telecommunications (12.11.65/25.10.73); Agreement Establishing the Asian Development Bank (4.12.65); Convention establishing the World Intellectual Property Organization (Stockholm 14.7.67); Agreement Establishing the International Funds for Agricultural Development (13.6.76); Convention on the International Maritime Satellite Organization—INMARSAT (3.9.76); Convention for the Protection of Human Rights and Fundamental Freedoms (4.11.50); Convention on the Prevention and Punishment of the Crime of Genocide (9.12.48); Statute of the Council of Europe (5.5.49); Treaty Establishing the European Economic Community—EEC—and the European Atomic Energy Community—EURATOM—(Rome 25.3.57); Treaty on the European Union (Maastrich Treaty—7.2.1992); Treaty Establishing the European Coal and Steel Community (18.4.51); European Convention on Establishment (13.12.55); Convention on Securing Aviation “EUROCONTROL” (13.12.1960); Convention for the Establishing of a European Space Agency (30.5.75); Convention for the Establishing of an European Telecommunication Satellite Organisation EUTELSAT (15.7.1982); European Charta of Regional Self Administration (15.10.1985); European Social Charter (18.10.61); North Atlantic Treaty Organization—NATO (4.4.49/17.10.51); European Convention for the Peaceful Settlement of Disputes (29.4.57); Vienna Convention on Diplomatic Relations (18.4.61); Vienna Convention on Consular Relations (24.4.63); Agreement among Government of United States, Governments of Member States of the European Space Agency, the Government of Japan and the Government of Canada on Cooperation in the Detailed Design, Development, Operation and Utilization of the Permanently Manned Civil Space Station (28.09.88); Vienna Convention on the Law of Treaties between States and International Organization or between International Organizations (21.03.86).

International Cooperation in Legal Matters.

Procedure: Statute of the Hague Conference on International Private Law (31.10.51); International Convention Relating to the Arrest of Seagoing Ships (10.5.52); International Convention on Certain Rules Concerning Civil Jurisdiction in Matters of Collision (10.5.52); Hague Convention relating to Procedure in Civil Matters (1.3.54); Convention on the Recovery Abroad of Maintenance (20.6.56); Convention on the Law Applicable to Alimony Obligations to Infants (24.10.56); *Conventions on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters (15.11.65); *Convention Abolishing the Requirement of Legalisation for Foreign Public Documents (The Hague, 5.10.61); European Convention on the Abolition of Legalization of Documents Executed by Diplomatic Agents or Consular Officers (7.6.68); European Convention on Information on Foreign Law (7.6.68); *Convention on the Taking of Evidence Abroad in Civil or Commercial Matters (18.3.70); Convention on Serving of Documents in Administrative Matters (24.11.1977).

Recognition and Enforcement: *United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York 10.6.58); Protocol on Arbitral Clauses in Commercial Matters (24.9.23); Convention on the Enforcement of Foreign Arbitral Awards (26.9.27); European Convention on International Commercial Arbitration (Geneva 21.4.61/Paris 17.12.62); Convention on the Settlement of Investment Disputes between States and Nationals of Other States (18.3.65); Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters (27.9.68—Protocol 3.6.71).

*For text see Selected International Conventions section.

Trade: Convention on the Contract for the International Carriage of Goods by Road—CMR (19.5.56); Convention Providing a Uniform Law for Bills of Exchange and Promissory Notes (7.6.30)—for Cheques (19.3.31); United Nations Convention on Contracts for the International Sale of Goods (01.01.91).

Family: Conventions on Marriage, Divorce and Guardianship (23.6.02); Convention on the Political Rights of Women (New York 31.3.53); Convention on the Nationality of Married Women (New York 20.2.57); Convention on Law Applicable to Child Support Obligations (The Hague 24.10.56); Convention on Recognition and Enforcement of Judgments Concerning Child Support (The Hague 15.4.58); Convention on Jurisdiction and the Law applicable to Protection of Minors (The Hague 5.10.61); Convention on the Conflicts of Laws relating to the Form of Testamentary Dispositions (The Hague 5.10.61); Hague Convention on Civil Rights Aspects of International Kidnapping of Minors (Oct. 25, 1980); UN-Convention on the Rights of the Child (20.11.89).

Intellectual and Industrial Property Rights: Berne Convention for the Protection of Literary and Artistic Works (9.9.1886); Montevideo Convention for the Protection of Literary and Artistic Works (11.1.1889); Madrid Convention on International Registration of Marks (14.4.91) as revised at Stockholm (14.7.67); Madrid Convention on Suppression of False or Misleading Indications of Origin on Goods (14.4.1891) as amended at Stockholm (14.7.67); Hague Convention on International Deposition of Industrial Designs and Models (6.11.25) as amended at Stockholm (14.7.67); Universal Copyright Convention (6.9.52) as amended at Paris (24.7.71); Nice Convention on International Classification of Products and Services (15.6.57) as subsequently revised in Geneva, May 13, 1977 (BGBl. II, 1981, 358); Stockholm Convention Establishing the World Intellectual Property Organization (14.7.67); Patent Co-operation Treaty (19.6.70); Strasbourg Agreement Concerning the International Patent Classification (24.3.71); European Patent Convention (5.10.73).

International Sale of Goods.

United Nations Convention on Contracts for the International Sale of Goods, in force on Jan. 1, 1991. See category 3 Business Regulation and Commerce, topic 3.16 Sales and Part V, Selected International Conventions.

Tax Treaties.

Avoidance of Double Taxation on Income and Property.

Most treaties for avoidance of double taxation on income and property taxes negotiated by Germany follow draft model published by OECD in 1963. They therefore tend to be similar in broad outline although frequently differing in detail. Agreements have been concluded with: Argentina, Armenia, Australia, Austria, Azerbaijan, Bangladesh, Belarus, Belgium, Bolivia, Bosnia and Herzegovina, Brazil, Bulgaria, Canada, China (People's Republic of), Croatia, Cyprus, Czech Republic, Denmark, Ecuador, Egypt, Estonia, Finland, France, Georgia, Greece, Hungary, Iceland, India, Indonesia, Iran, Ireland, Israel, Italy, Ivory Coast, Jamaica, Japan, Kazakhstan, Kenya, Korea (Rep. of), Kuwait, Kyrgyzstan, Latvia, Liberia, Lithuania, Luxembourg, Macedonia, Malaysia, Malta, Mauritius, Mexico, Mongolia, Morocco, Namibia, Netherlands, New Zealand, Norway, Pakistan, Philippines, Poland, Portugal, Romania, Russian Federation, Singapore, Slovakia, Slovenia, South Africa, Spain, Sri Lanka, Sweden, Switzerland, Tajikistan, Thailand, Trinidad/Tobago, Tunisia, Turkey, Turkmenistan, U.K., Ukraine, United Arab Emirates, Uruguay, U.S.A., Uzbekistan, Venezuela, Vietnam, Yugoslavia, Zambia, Zimbabwe.

Inheritance Tax.

Austria, Denmark, Greece, Sweden, Switzerland, U.S.A.

Special Relief Concerning Income from Shipping and/or Air Transportation.

Brazil, Chile, China, Colombia, Hong Kong, Paraguay, Venezuela, Yugoslavia.

Former GDR.

German Democratic Republic—Arts. 11 and 12 of Unification Treaty (cf. Preliminary Note, subhead Reunification Treaty) provides that former national treaties of FRG retain their validity, while former national treaties of GDR be analysed together with respective parties to treaties, allowing for maintenance of confidence and weighing various interests involved according to principles of free and democratic system, so as to establish or achieve their continuation, amendment or annulment, as case may be.

1
GIBRALTAR LAW DIGEST

—Scope —

Revised for 2010 edition by

MESSRS. MARRACHE & CO, of Gibraltar.

(Dependent territory of EU under Article 227[4] of Treaty of Rome)

Note: This revision incorporates legislation through July 1, 2009.

1 INTRODUCTION

1.01 CURRENCY:

Unit of currency in Gibraltar is pound sterling although there is local note and coinage issue which is at par with sterling. Gibraltar was first European Territory to issue ECU based coinage which is legal tender.

1.02 GOVERNMENT AND LEGAL SYSTEM:

General.

Gibraltar has been Crown colony of U.K. since 1713; in 1973 Gibraltar entered European Community as dependent territory under Art. 227(4) of Treaty of Rome following accession to Community of the United Kingdom. Gibraltar enjoys political stability and its sovereignty is safeguarded by Gibraltar Constitution in which British Government has undertaken never to disregard the freely and democratically expressed wishes of Gibraltarians. Gibraltar is self-governing, it enacts its own laws through acts of Parliament (previously termed “Ordinances”) independently of U.K. and, like its motherland, its legal system is based upon Common Law and Statute Law of England and Wales. Normally, U.K. legislation is transposed into Gibraltar Law as necessity dictates (see English Law [Application] Act).

As result of constitutional conference held in late 1960s Gibraltar was granted written Constitution in 1969. This has only recently been superceded by 2006 Gibraltar Constitution, which modernizes many aspects of previous Constitutional regime and introduces new concepts heralding Gibraltar into much more cosmopolitan era both in essence and outlook. Constitution outlines fundamental rights and freedoms of individual, Offices of Governor and Deputy-Governor and among other matters incorporates functions of Legislature, Executive and Judiciary into statute. Gibraltar remains listed as British Overseas Territory in British Nationality Act 1981, as amended by British Overseas Territories Act 2002.

Legislature consists of Governor and Parliament. Latter consists of Speaker, Financial and Development Secretary and 15 other elected members. Chief Minister of Gibraltar calls Parliament on ad hoc and necessity basis.

Executive.

Executive authority of Government of Gibraltar is vested in hands of Governor, on behalf of Her Majesty Queen Elizabeth II. Constitution regulates composition of Gibraltar Council and Council of Ministers.

Judiciary.

Chief Justice, Additional Judges, President of Court of Appeal and Justices of Appeal are appointed by Governor on advice from British Government.

1.03 HOLIDAYS:

New Year's Day, Commonwealth Day, Good Friday, Easter Monday, May Day (1st May), Spring Bank Holiday, Queen's Birthday, Late Summer Bank Holiday, Gibraltar National Day (10th Sept.), Christmas Day and Boxing Day are Bank Holidays in Gibraltar and no business of any kind is transacted, all banks being closed.

If Boxing Day or Christmas Day or both fall on Sat. or Sun., then extra days are taken as holiday in lieu.

No bank transacts business after closing for day i.e. 3:30 p.m.

1.04 OFFICE HOURS AND TIME ZONE:

Gibraltar is in the GMT +01:00 time zone. Office hours are generally from 9 a.m. to 6 p.m.

2 BUSINESS ORGANIZATIONS

2.01 AGENCY:

Common Law Rules apply. In general principal is responsible for acts of his duly authorised agent. Competent person may grant Power of Attorney to another person to act as agent, power continues until revoked.

2.02 CORPORATIONS:

General.

The Gibraltar Companies Act is based almost exclusively on United Kingdom Companies Act of 1929. The Companies Act has been amended throughout the years in accordance with prerequisites that have arisen from time to time. Particularly, Companies Act has been subsequently amended to incorporate EU requirements. Mode of incorporating companies in Gibraltar is similar to that in U.K.

There are four categories of companies which can be incorporated in Gibraltar: (a) Company limited by shares; (b) company limited by guarantee and having share capital; (c) company limited by guarantee and not having share capital; and (d) unlimited company with or without share capital.

For purposes of taxation, there are three categories of companies available in Gibraltar: (i) Gibraltar resident company; (ii) non-resident controlled company; and (iii) exempt company.

With effect from 1 July 2005, no tax is payable on dividends paid by one Gibraltar company to another Gibraltar company. Moreover, previous requirement to withhold tax from company dividends was also abolished. In addition, there is, in general, no withholding tax payable in Gibraltar to nonresident recipient. Only transaction in which tax is withheld is on interest paid by Gibraltar company. In such cases, withholding tax is levied at 30% if recipient is individual and 27% if it is company. Only some loans give rise to this, including debentures mortgages and any loans advanced to company for capital purposes. Nevertheless, above is subject to exemption where situs of loan is deemed to be outside Gibraltar; in such cases, no tax is withheld on interest. Situs of loan is determined on balance of following criteria: (1) Location of debtor; (2) location of creditor; (3) location of security (if any); and (4) location of source from which interest is paid.

(i) Resident Controlled Companies.

These companies are chargeable for taxes on their worldwide income after deduction of all expenses which are wholly and exclusively incurred on production of that income. However, companies may be considered exempt from specific sources of income which have accrued or derived from overseas activities. Current rate of Corporation Tax is at 22%, which represents 5% reduction from last year's rate.

Companies deemed as ``Small'' pay reduced rate of 20% on adjusted profits. Company is ``Small'' if its taxable profits do not exceed £35,000 and at least 80% of its turnover derives from trading. On companies whose taxable profits are between £35,001 and £44,333, full rate is applicable although marginal relief is available at 7.5% on difference between £44,333 and taxable profits.

Capital Allowances are available on eligible expenditure (that which is wholly and exclusively incurred for production of income) on “plant and machinery” (including fixtures and fittings, and commercial vehicles) of 25% per annum on reducing balance. Initial allowance of 100% on first £30,000 of incurred on eligible expenditure on “plant and machinery” is also available, allowance being extended to first £50,000 on IT investment. Capital Allowances on expenditure incurred on industrial buildings are available at 4% per annum, straight line on cost.

Losses can be carried forward indefinitely to be offset against future profits, but cannot be carried back and offset against prior year profit.

(ii) Nonresident Controlled Companies.—Nonresident owned and controlled companies incorporated in Gibraltar which do not trade, earn or remit income to Gibraltar are not liable to company tax. Annual accounts must be submitted to Gibraltar Tax Authorities, together with letter of confirmation of foregoing.

Nonresident company is however taxable on income accruing in, derived from, or received in Gibraltar, as well as on income arising directly or indirectly through their agents, except that nonresidents are not taxable in Gibraltar on: (a) Income from ownership, chartering or operating of any ship (whether registered at Port of Gibraltar or not) and; (b) income from certain Government loans, as specifically exempted by Governor.

Assessments for nonresident companies are made in their own name or in name of their agents in Gibraltar.

(iii) Exempt Companies.—Exempt company is one which is incorporated in Gibraltar and registered under Companies (Taxation and Concessions) Act. Provided following conditions are complied with, such registration entitles company and/or beneficial owner to be exempt from all income tax and estate duty in Gibraltar: (a) No Gibraltar resident is beneficially interested in shares of company. (b) Paid up share capital is minimum of £100 or equivalent in any foreign currency. (c) Company does not, without consent of legal authorities, transact any trade or business in Gibraltar except with other exempt companies or qualifying companies. (d) No changes in beneficial ownership or objects for which company was formed are made without approval of authorities. (e) Register of members must be kept in Gibraltar. (f) Annual tax is first payable on date of application for issue of certificate, and thereafter—in advance—on 1 Apr. in each year of assessment.

Annual tax payable by company is £450.

There are no restrictions on appointment of directors or officers of exempt company and meetings may be held inside or outside Gibraltar thus allowing companies to be managed and controlled from Gibraltar. In addition, exempt company can maintain and administer office premises in Gibraltar to transact business with nonresidents or similar companies. Captive or general insurance companies carrying on business under Assurance Companies Act would fall into this category.

No stamp duty is payable by any person on any document relating to issue, allotment, renunciation, transfer, assignment or disposition of shares in exempt company.

There is secrecy provision in Act that prevents disclosure of details concerning beneficial owners of exempt companies.

2005 Reforms.

Whereas Gibraltar previously provided for tax-exempt companies, legality of same was challenged by EU Commission on grounds of State Aid Rules. In 2005, Gibraltar Government successfully negotiated five-year “phasing out” schedule for exempt companies. At this juncture in schedule, it should be noted that no new tax-exempt company applications are being entertained but that existing tax-exempt companies may retain their status until 31 Dec. 2010 (provided that they do not change ownership and/or activity after 30 June 2006). Tax-exempt companies that will be losing their status on 31 Dec. 2010 will join flat rate 10% tax regime on 1 Jan. 2011.

Re-domiciliation.

Non-Gibraltar company domiciled in relevant European Union state may, if it is domiciled in jurisdiction other than that in which it is incorporated, apply to establish its domicile in Gibraltar. Such application must be accompanied by following: (i) articles of company in respect of establishment of that domicile; (ii) certificate of good standing issued by competent authority; (iii) where company carries on in or from jurisdiction of its incorporation business licensed by competent authority, that authority's consent to re-domiciliation; (iv) evidence of non-commencement of insolvency proceedings; (v) prescribed fee.

Insurance Companies.—The Financial Services (Insurance Companies) Act of 1987 regulates granting of licenses in order to conduct insurance business. Solvency Margin must at least meet minimum EEC requirements. Depending on type of business to be written, Financial Services Commission may require higher level of solvency to be maintained.

Gibraltar enjoys right to passport insurance services throughout European Economic Area, thereby allowing Gibraltar-based insurance firms ability to market their product throughout EEA without having to go through separate licensing procedures.

Taxation.

See category 20 Taxation, topic Taxes.

2.03 PARTNERSHIPS:

Partnerships may be either (1) Ordinary partnerships, which are governed by Partnership Act (based on Partnership Act 1890); or (2) limited partnerships which are governed by Limited Partnership Act (which is based on Limited Partnership Act 1907).

In ordinary partnership each partner impliedly confers upon his co-partners apparent authority to incur debts on behalf of partnership to bind all partners. Limited partnerships are rare; limited partner's liability is restricted to amount of his capital.

3 BUSINESS REGULATION AND COMMERCE

3.01 BANKS AND BANKING:

Banking business in Gibraltar is regulated by Financial Services (Banking) Act 1992, which has been brought in line with all EC banking directives, including Deposit Guarantee Directive. Following UK Government's agreement in 1999 that Gibraltar had implemented necessary standards and regulation to match UK practice, Gibraltar became eligible to take advantage of Single European Passport for Banking, which means that branches of European Community banks may set-up in Gibraltar without need for further authorisation procedures provided that certain requirements, outlined in Financial Services (Banking) Act 1992 are complied with, and thus Gibraltar licensed banks (whether originally from EEC or not) may branch out into Europe with only need for notification between banking supervisory authorities to be effective.

Minimum capital required for new banking licence is 5 million Euros. This requirement is minimum EEC capital required throughout EEC.

Returns.

Annual accounts and auditor's reports of existing licensees are verified and closer collaboration between auditors of banks and Banking Supervisor is encouraged. Act also gives auditors limited indemnity regarding disclosure.

Confidentiality.

Under Act, banking confidentiality is insured under both common law (that existed before Act) and under Part XI of Act. Thus §82(9) of Act makes it criminal offence for person to disclose information subject of course to usual exceptions. Provisions of European Savings Tax Directive have been incorporated into local law. Directive applies as normal to residents of relevant EU States. However, special transitional arrangement has been reached with UK. Transitional arrangement is expected to last until at least 2011 and will bestow election for UK residents earning interest from account in Gibraltar as regards Exchange of Information. Such individuals can elect whether to: (a) Exchange information as normal, (b) present UK Tax Certificate from HMRC to Gibraltar Tax Authorities (in both cases interest will continue to be paid gross), or (c) pay Retention Tax, currently at 20% (will go up to 35%as from 1 July 2011) on interest and savings income earned in Gibraltar. If latter is “chosen” (option [c] is default option, election is made to take up options [a] or [b]), there will be no Exchange of Information.

3.02 BILLS AND NOTES:

Bills of exchange (including cheques) and promissory notes are regulated by Bills of Exchange Act.

Bill of exchange is unconditional order in writing, addressed by one person to another, signed by person giving it, requiring person to whom it is addressed to pay on demand or at fixed or determinable future time sum certain in money to or to order of specified person, or to bearer.

Inland and Foreign Bills.

Inland bill is one which is or on its face purports to be (a) both drawn and payable in Gibraltar or (b) drawn in Gibraltar upon some person resident therein. Any other bill is foreign bill.

Cheques.

Cheque is bill of exchange drawn on banker payable on demand.

Promissory Notes.

Promissory note is unconditional promise in writing made by one person to another signed by maker, engaging to pay, on demand or at fixed or determinable future time sum certain in money, to, or to order of, specified person or to bearer.

3.03 COMMERCIAL REGISTER:

See categories 2 Business Organizations, topic Corporations; Intellectual Property, topic Trademarks and Tradenames.

3.04 CONTRACTS:

Gratuitous promise even though made in writing is not enforceable unless it is made in deed under seal. Otherwise there must be agreement between parties intending to create legal relationship based upon offer and acceptance with consideration moving from promisee to promisor. Adequacy of consideration immaterial but there must be some benefit accruing to promisor.

Privity.

Person not party to contract cannot sue upon it even if it is for his benefit unless it is insurance policy of vendor of property and he is purchaser, or he is principal suing on contract made for him by agent or contract constitutes trust and person seeking to sue is beneficiary thereunder.

Excuses for Nonperformance.

Contract which is not capable of performance when made is in general void. Doctrine of frustration operates to excuse further performance where (i) it appears from nature of contract and surrounding circumstances that parties have contracted on basis that some fundamental thing or state of things will continue to exist or that some particular person will continue to be available or that some future event which forms foundation of contract will take place; and (ii) before breach performance becomes impossible or only possible in very different way to that contemplated without default of either party or owing to fundamental change or circumstances beyond control and original contemplation of parties. To excuse nonperformance impossibility must be in nature of physical or legal one and not merely relative impossibility, i.e. referable solely to ability or circumstances of promiser.

Act of God or Queen's enemies may also excuse performance. Act of God is generally extraordinary occurrence or circumstances which could not have been foreseen or which could not have been guarded against.

Statute may also render performance impossible, which is sufficient excuse.

Rescission.

Contract may be rescinded at instance of party induced to enter it by misrepresentation of facts made by other party. This is so, even if contract performed. Damages may be ordered by court in lieu of or in addition to rescission where this representation is negligent or fraudulent.

Unfair Terms.

Liability for death or personal injury through negligence cannot be restricted by contract if reasonable. Consumer protected against unreasonable exclusion of liability clauses in written standard terms of business; consumer also protected against unreasonable indemnity clauses.

Applicable Law.

Interpretation, performance, rights and obligations are governed by law chosen by parties. Choice must be express or demonstrated with reasonable certainty by contract terms or circumstances of case. Law expressly stipulated will be proper law of contract provided selection is bona fide and there is no objection on grounds of public policy even where law has no real connection with contract. Where parties make no stipulation, courts decide applicable law by considering contract as whole and are guided by certain presumptions, dependent on contract's subject-matter.

Government Contracts.

As result of Crown Proceedings Act or against Crown in contract are, for most part, governed by same rules of procedure as proceedings between subjects.

See also category 19 Property, topic 19.03 Deeds.

3.05 FINANCIAL SERVICES:

See topic 3.11 Securities and Investment.

3.06 FRAUDS, STATUTE OF:

Asset Protection Trust legislation was recently enacted in Gibraltar. Amendments were introduced to Bankruptcy Act providing that if disposition is made into settlement and settlor at time of disposition is not insolvent and does not become insolvent, disposition is not voidable at instance or upon application by any creditor of settlor.

Legislation specifically excludes application to such trusts as are registered thereunder of Fraudulent Conveyances Act 1571 (also known as Statute of Elizabeth) and of §42 of Bankruptcy Act which is identical provision to §42 of Bankruptcy Act of U.K. §42 of Bankruptcy Act 1914 has been replaced by §§339-342 of Insolvency Act 1986. Gibraltar's asset protection trust legislation is therefore unique, as it falls within provisions of bankruptcy law, rather than failing within ambit of fraudulent conveyancing laws.

3.07 INTEREST:

Interest is payable either: (1) pursuant to statute, or (2) by express or implied agreement between parties.

Claim for interest must be specifically pleaded and in absence of statute or contract no interest can be charged.

There are laws against usury in Moneylendering Act and credit bargains may be re-opened if they are extortionate.

3.08 LICENSES, BUSINESS AND PROFESSIONAL:

The Trade Licensing Act of Gibraltar provides for licenses to be required for carrying on trade or business in Gibraltar. Licenses are advertised in official publication The Gibraltar Gazette and in newspapers. Objections are heard before Trade License Committee which will grant or reject license.

3.09 MONOPOLIES, RESTRAINT OF TRADE AND COMPETITION:

There is no statutory regulation of monopolies, but common law rules apply. It is monopoly and against policy of law for any person or group of persons to secure sole exercise of any known trade throughout Gibraltar. Permitted monopolies may come into being by Crown Grant or statute; i.e. Post Office. Therefore agreement may be void as being monopoly or otherwise as being in restraint of trade at common law. Agreement may be illegal at common law if by causing control over trade or industry to pass into hands of individual or group of individuals it creates monopoly calculated to enhance prices to unreasonable extent. Such agreement is merely unenforceable; it is not illegal in any criminal sense, nor does it give any cause of action to third person. Agreements in restraint of trade are illegal to extent that they are unreasonable.

3.10 NEGOTIABLE INSTRUMENTS:

See topic 3.02 Bills and Notes.

3.11 SECURITIES AND INVESTMENT:

Financial Services Act 1998 and Financial Services Commission Act 2007 provide for regulation of investment and certain other services and provide regulatory and licensing framework.

Financial Services Act came into force on 4 June 1998 and has now been consolidated to include Council Directives 93/22/EEC on investment services in securities field and 93/6/EEC on capital adequacy of investment firms. Act's objective is defined as regulating: (a) Carrying out of investment business, and certain controlled activities in Gibraltar, (b) promotion, establishment, and operation of collective investment schemes, and (c) establishment of investment exchanges and clearing houses.

Any investment business or controlled activity may only be carried on pursuant to license being issued by Gibraltar Financial Services Commission which shall have regard to need to protect public and reputation of Gibraltar as financial centre. Thus it is necessary prerequisite in Gibraltar to obtain licence from Financial Services Commission in following categories: (a) investment dealer/broker; (b) investment manager; (c) investment adviser; (d) insurance broker;

(e) professional trustee and (f) company manager.

4 CITIZENSHIP

4.01 ALIENS:

See category 15 Immigration, topic 15.01 Aliens.

4.02 IMMIGRATION:

See category 15 Immigration, topic 15.02 Immigration.

5 CIVIL ACTIONS AND PROCEDURE

5.01 ACTIONS:

It is general rule that any person and or entity may sue or be sued in Courts of Gibraltar, subject to rules of procedure relating to courts. Questions relating to evidence such as competence and compellability of witnesses and methods and sufficiency of proof are matters of procedure governed by rules of evidence that apply in same manner in English courts. As in English courts, courts in Gibraltar cannot take judicial notice of foreign law, onus is on one who asserts difference to prove it. May be proved by expert qualified witness or by reference to code.

Plaintiff resident abroad is normally ordered to pay court in Gibraltar sum that ensures defendant's legal costs will be met by plaintiff if latter fails in action. If plaintiff succeeds as in English courts, Gibraltar courts will refund sum originally paid into court.

5.02 CERTIORARI:

Order of Certiorari is recognised means of procuring through medium of Supreme Court in Gibraltar in order to obtain inspection of proceeding of courts of inferior jurisdiction in order that they may be reviewed and rectified.

Grounds of Issue.

Invoked when there is some defect or informality apparent on face of proceedings, where there is want of jurisdiction, where it is clear and manifest that adjudication has been obtained by fraud, or where there has been denial of natural justice.

Procedure.

Leave must be obtained, application made ex parte to judge and must be accompanied by statement setting out name and description of applicant, relief sought, grounds, and by affidavit verifying facts relied on.

5.03 DEPOSITIONS AND DISCOVERY:

Local provisions are substantially similar to English law. Application to take evidence by deposition in Supreme Court by application under Order 39 of Rules of the Supreme Court 1985, including examination of person outside jurisdiction by special examiner. There are provisions in Evidence Act of Gibraltar for taking of evidence required for proceedings in other jurisdictions.

By Rules of the Supreme Court Order 38 evidence may be given by affidavit: (a) By order of court if in circumstances of case it thinks it reasonable to do so; (b) on any motion, petition or summons including interlocutory applications: (c) in default actions in rem and in references in admiralty actions. Court will not order affidavit evidence where such evidence will be strongly contested and its credibility depends on Court's view of witness.

Court or judge may make any order for examination on oath before court or judge or any officer of court, or any other person, and at any place, of any witness or person and may empower any party to any such cause or matter to give such deposition in evidence therein on such terms as court or judge may direct.

Under Civil Evidence Act 1968, in civil proceedings oral or written statements of witness admissible if witness not called. Appropriate notice of intention to use statement must be given to opponent within 21 days of setting case down for trial (or as ordered by court). However, it should be noted that Police and Criminal Evidence Act 1984 is not applicable in Gibraltar. However, House of Assembly in Gibraltar is currently making preparation to incorporate P.A.C.E. into body of legislation—Criminal Procedure and Evidence Act 2007. More reliance on common law principles most of which are now enacted in Criminal Proceedings Act.

Discovery.

In civil cases after pleadings have closed, each side must send other List of Documents stating in Schedule 1, Part I relevant documents which are in their custody, possession or power, in Part II documents which they refuse to produce described generally and in Schedule 2, documents which party once had but now no longer has.

If one party refuses to give discovery of particular documents, other can apply to court.

Certain matters can be dealt with by interrogatories.

Court can order parties to exchange experts reports before trial.

Usually one does not know how many or who either side is going to call as witnesses. Court may, however, if it thinks fit for disposing fairly and expeditiously of any matter and saving costs, direct that parties serve written statements of oral evidence of witnesses as to fact.

In criminal cases, full committal hearing can be requested in which case summary of evidence is heard and witnesses can be called.

5.04 JUDGMENTS:

Procedure of Gibraltar Supreme Court on its civil jurisdiction is very largely based on English Supreme Court Practice (or “White Book”). Procedure in Court of First Instance was similar to English County Court procedure but increasingly, with advent of changes in law in both England and Gibraltar, becomes more different. (See topic Court of First Instance.)

Gibraltar Courts may award judgment in default if defendant fails to acknowledge service, fails to deliver defence or ignores Court Order. Summary judgment may be obtained where there is no defence Judgments may be enforced by several methods (for examples see category 7 Debtor and Creditor, topic 7.02 Attachment and Execution).

Judgments for fixed amounts obtained in many parts of British Commonwealth and in High Court of England can be registered in Supreme Court and enforced as judgments of Supreme Court. Certain formalities regarding application for registration must be observed and court retains power to cancel registration on certain grounds.

5.05 LIMITATION OF ACTIONS:

Governed by Limitation Act 1939, Law Reform (Limitation of Actions etc.) Act 1954, Limitation Act 1963 and Law Reform (MP) Act 1971 that are relied on by Limitation Act of Gibraltar.

Actions must be commenced within following periods:

Twelve Years: No action to be brought by any person to recover any land after expiration of 12 years from date on which right of action accrued to him; or if it first accrued to some person through whom he claims.

Six Years: None of following actions shall be brought after expiration of six years from date on which cause of action accrued: (a) Actions founded on simple contract or tort: (b) actions to enforce recognisance; (c) actions to enforce award, where submission is not by instrument under seal; (d) actions to recover any sum recoverable by virtue of any enactment, other than penalty or forfeiture or sum by way of penalty or forfeiture.

There are many other special time limits laid down apart from abovementioned ones.

5.06 PRESCRIPTION:

Prescription Act 1832 applies to Gibraltar.

See topic 5.05 Limitation of Actions.

6 COURTS AND LEGISLATURE

6.01 ADMIRALTY:

See category 21 Transportation, topic 21.01 Shipping.

6.02 COURTS:

Magistrates Court.

Criminal matters of less serious nature; committal of more serious cases to Supreme Court and certain civil matters (e.g. matrimonial jurisdiction). Magistrates Courts are presided over by two or three lay Justices or one Stipendiary Magistrate. Judiciary is currently considering creation of Second Magistrate's Court in Gibraltar.

Court of First Instance.

Court of First Instance is no longer in operation (repealed by Administration of Justice Act 2004).

Supreme Court.

It is composed of several jurisdictions. It is presided over by Chief Justice and by additional Judges appointed pursuant to 2006 Constitution: (1) Chancery Jurisdiction—deals with general civil and company matters. (2) Criminal Jurisdiction—hears criminal cases to be tried on indictment and appeals from Magistrates Court. (3) Admiralty Jurisdiction—for maritime matters. (4) Divorce & Matrimonial Jurisdiction. (5) The Supreme Court in its ordinary jurisdiction also hears other general civil matters such as claims in contract, tort, equity, for personal injuries etc.

Court of Appeal hears appeals in its civil and criminal jurisdiction from all matters determined in Supreme Court. It is composed of President and two Justices of Appeal and ordinarily sits twice a year in Feb./Mar. and Sept./Oct. Chief Justice is ex officio Court of Appeal Judge and has jurisdiction in certain matters.

Judicial Committee of Privy Council consists of Lord Chancellor, Lords of Appeal, Privy Counsellors and other members of Privy Council who have held judicial office in U.K. or certain other dependent territories in Commonwealth. It is court of final appeal from Court of Appeal of Gibraltar.

6.03 LAW REPORTS, CODES:

Considered judgments of Supreme Court and Court of Appeal of Gibraltar are collected in Registry. Reports of Gibraltar cases in Supreme Court and Court of Appeal are reported in commonwealth law reports and number of Privy Council decisions have been reported in several British law reports.

6.04 LEGISLATURE:

See category 1 Introduction, topic 1.02 Government and Legal System.

7 DEBTOR AND CREDITOR

7.01 ASSIGNMENTS FOR BENEFIT OF CREDITORS:

By Deeds of Arrangement Act 1914, under which any instrument whether under seal or not, made by, for or in respect of affairs of debtor: (a) For benefit of his creditors generally; or (b) where debtor was insolvent at date of execution of instrument, for benefit of any three or more of his creditors, otherwise than pursuant to Law relating to bankruptcy is deemed to be Deed of Arrangement and subject to provisions of Act. Following classes of instruments particularly included: (a) Assignment of property; (b) deeds of, or agreements for composition; (c) in cases where creditors of debtor obtain control over his property or business, Deed of Inspectorship for purpose of carrying on or winding-up business; (d) letter of licence authorising debtor or any other person to manage, carry on, realise, or dispose of business with view to payment of debts; and (e) any agreement entered into for purpose of carrying on or winding-up debtor's business or authorising debtor or any other person to manage, carry on, realise, dispose or debtor's business, with view to payment of his debts.

Deed of Arrangement is void unless it is registered with Registrar of Deeds of Arrangement within seven clear days after its execution in Gibraltar, or if executed abroad, within seven clear days after time at which it would in ordinary course of post, arrive in Gibraltar if posted within one week after execution thereof.

Deed for benefit of creditors generally is void unless before or within 21 days of registration it receives assent in writing of majority in number and value of creditors. Trustee under deed must file statutory declaration that requirements, that majority of creditors have assented at time of registration or, if deed is assented to, registration within 28 days thereof. He must also give security unless majority of creditors dispense with it.

Debtor is at liberty to make private arrangement with his creditors upon terms to which he can get them to agree, but no creditor is bound to join in such deed unless he thinks proper.

7.02 ATTACHMENT AND EXECUTION:

Attachment and enforcement of debts may be by several methods:

(1) Garnishment (Third Party Debt Order) by attaching monies owing from third party to judgment debtor and obtaining payment of such monies directly from third party to judgment creditor;

(2) Charging Order in court making stocks and shares or fund available to satisfy judgment for ascertained sum of money. On order being made judgment creditor has same powers as though debtor made valid and effective charge in favour;

(3) Stop Order may be obtained in court against fund which gives notice to court of creditor's claim and prevents fund being dealt with without its knowledge;

(4) Stop Notice.—Anyone claiming to be interested in any stock registered in its books may serve notice on company to prevent company dealing with shares without first giving opportunity at asserting claim;

(5) Writ of Fieri Facias.

Writ filed at Court Registry by judgment creditor enabling court bailiff to seize goods of debtor in satisfaction of debt;

(6) Bankruptcy.

Such proceedings may also be available (see topic 7.03 Bankruptcy and 7.06 Insolvency);

(7) Winding-Up/Receivership.

Corporate debts may also be enforced in this manner (see topic 7.03 Bankruptcy and 7.06 Insolvency).

7.03 BANKRUPTCY AND INSOLVENCY:

Corporate Insolvency.

Companies Act 1930.

Winding-up of company may be either (a) by court, (b) voluntary, or (c) subject to supervision of court.

(a) Winding-Up by Court.

Company may be wound up by court if: (i) company has by special resolution resolved that company be wound-up by court; (ii) if default is made in delivering statutory report to Registrar or in holding statutory meeting; (iii) company does not commence its business within a year from its incorporation, or suspends its business for a whole year; (iv) number of its members is reduced, in case of private company, below one, or in case of any other company, below seven; (v) company is unable to pay its debts; (vi) court is of opinion that it is just and equitable that company should be wound up.

(b) Winding-Up Voluntarily.

Company may be wound up voluntarily either by “members voluntary winding-up” or “creditors voluntary winding-up”. In case of former, directors of company must file statutory declaration to effect that company will be able to pay its debts within period not exceeding 12 months from commencement of winding-up.

(c) Winding-Up Subject to Supervision of court.

When company has passed resolution for voluntary winding-up, court may make order that voluntary winding-up shall continue, but subject to such supervision of court, and with such liberty for creditors, contributories or others to apply to court, and generally on such terms and conditions as court thinks just.

Personal Insolvency.

Bankruptcy Act 1934.

Debtor commits act of bankruptcy in Gibraltar in each of following cases: (a) If in Gibraltar or elsewhere he makes conveyance or assignment of his property to trustee or trustees for benefit of his creditors generally; (b) if in Gibraltar or elsewhere he makes fraudulent conveyance, gift, delivery or transfer of his property, or of any part thereof; (c) if in Gibraltar or elsewhere he makes any conveyance or transfer of his property or any part thereof, or creates any charge thereon, which would under Act or any other enactment be void as fraudulent preference if he were adjudged bankrupt; (d) if with intent to defeat or delay his creditors he does any of following things, namely, departs out of Gibraltar, or being out of Gibraltar remains out of Gibraltar, or departs from his dwelling-house, or otherwise absents himself, or begins to keep house; (e) if execution against him has been levied by seizure of his goods under process in action in any court, or in any civil proceedings in Supreme Court, and goods have either been sold or held by marshal for 21 days; (f) if he files in court declaration of his inability to pay his debts or presents bankruptcy petition against himself; (g) if creditor has obtained final judgment or final order against him for any amount, and, execution thereon not being stayed has served on him Bankruptcy Notice and he does not within seven days comply with requirements of notice or satisfy court that he has counterclaim, set off or cross demand which equals or exceeds amount of judgment debt or sum ordered to be paid, and which he could not set up in action in which judgment was obtained, or proceedings in which order was obtained; (h) if debtor gives notice to any of his creditors that he has suspended, or that he is about to suspend, payment of his debts.

Creditor is not entitled to present bankruptcy petition unless: (a) debt owing is for £500 or more; (b) debt is liquidated sum; and (c) act of bankruptcy has occurred within three months before presentation of petition.

7.04 FRAUDULENT SALES AND CONVEYANCES:

Conveyance of property, to any other person other than bona fide purchaser for value without notice of fraudulent intent, made with intent to defraud creditors, is voidable at instance of any person prejudiced thereby. (Statute of Frauds/Elizabeth 1571).

Voluntary disposition of land, made with intent to defraud subsequent purchaser, is voidable at instance of such purchaser.

See also topic 7.03 Bankruptcy and 7.06 Insolvency.

7.05 GARNISHMENT:

Local provisions are substantially similar to English law.

See also topic 7.02 Attachment and Execution.

7.06 INSOLVENCY:

See topic 7.03 Bankruptcy and 7.06 Insolvency.

7.07 LIENS:

Lien is right in one person to retain in his possession goods belonging to another until certain demands of his against owner have been satisfied.

It is personal right and exists only in respect of goods received rightfully, and cannot be transferred. Right may be excluded by express agreement or course of dealing between parties. It is right merely to retain possession and no charges in respect of warehousing may be made, and except in absence of statute (e.g., innkeepers), it confers no right of sale, without legal process against debtor. It must be distinguished from equitable and maritime liens, i.e., rights given to creditors to have certain specific property applied in satisfaction of their demands.

Right of lien is given by law in two classes of cases; (1) to persons who are under common law duty to render services, as e.g., carriers, on goods carried, for price of carriage, and innkeepers, on baggage of their customers, for amount of customer's account; (2) to persons rendering services, spending money, skill or labour, on property of another person employing them for that purpose, as, e.g., all agents and artificers.

Lien may be either; (1) general, for general balance owing to creditor by debtor, e.g. right of solicitor to retain his client's papers for general balance due to him; or (2) particular, right over goods until certain demands are satisfied, e.g., ordinary right of seller to retain particular goods until payment of their price.

Hotel keeper has right, if his account remains unpaid, to sell by public auction any personal effects, goods, or livestock of guest left or deposited with him or in his hotel. But no such sale may be made until he has had goods for six weeks, nor until one month after he has advertised intended sale in one London newspaper and one local newspaper circulating in district in which goods were left.

Banker's lien is right of banker to retain securities belonging to his customer for money due on general balance.

Trustee has equitable lien for expenses lawfully incurred in connection with trust premises; limited liability company may create lien upon its own shares.

Lien may arise through right of subrogation, as where third party to contract for sale uses its money to pay purchase price at purchaser's request.

Right of lien is lost: (1) by discharge of debt; (2) by tender of debt; (3) by taking security for debt under circumstances inconsistent with its continued existence.

It is suspended by taking negotiable instrument as payment. Unless it is taken as absolute satisfaction debt will revive on its dishonour, even though it is in hands of assignees for value.

7.08 PLEDGES:

As in U.K., pledge of personal chattels is transfer by delivery of immediate possession thereof by way of security for advance, whether past or present, pledger remaining owner of chattel but pledgee acquiring right to sell (but not to foreclose) if advance is not repaid on due date.

7.09 RECEIVERS:

Receivers may be appointed by debenture holders and receiver will have powers conferred upon him by instrument under which he was appointed.

8 DISPUTE RESOLUTION

8.01 ALTERNATIVE DISPUTE RESOLUTION:

Dispute resolution in Gibraltar is regulated by Arbitration Act.

Mandatory Dispute Resolution.

Subject to certain provisos disputes may be referred to special referee or arbitrator under Order of Court in any cause or matter (other than criminal proceedings by Crown). Special referee or arbitrator appointed is deemed to be officer of Court and to have authority prescribed by rules of Court or Court direction. Report or award made by special referee or arbitrator on any such reference shall, if adopted by Court, be equivalent to verdict of jury.

Voluntary Dispute Resolution.

Parties may enter into written agreement to submit present or future differences to arbitration whether arbitrator is named therein or not. Such agreement is irrevocable except by leave of Court and shall have same effect in all respects as if it had been made by Court Order.

8.02 ARBITRATION AND AWARD:

See topic 8.01 Alternative Dispute Resolution.

9 DOCUMENTS AND RECORDS

9.01 AFFIDAVITS AND STATUTORY DECLARATIONS:

Affidavits.

Affidavit is written statement of facts sworn by deponent before person authorised to administer oath. They are usually used in judicial proceedings.

Affirmation instead of oath may also be made in manner appropriate to person's religious belief.

For use in Supreme Court affidavits are required to be written, typewritten or printed in black ink, on metric size A4 paper, bookwise, with margin on left side.

Form.

Affidavit is commenced with title of action, e.g.,

Forms

In the Supreme Court of Gibraltar

(initial of plaintiff) No. (in Court index)

(In Chancery, add “In the Matter of the Estate of. . . . . . deceased” or as the case may be)

BETWEEN:

Mr X	Plaintiff
and	
Mr Y	Defendant

Full Christian and surnames and true place of residence of deponent, and his occupation, must then be stated.

Every affidavit should set out facts deposed to in first person in paragraphs numbered consecutively and as far as possible be, confined to distinct portion of subject in chronological order.

Dates, sums and numbers must be expressed in figures not words. Alterations or interlineations must be authenticated by initials of officer before whom affidavit is sworn and, in case of erasure, must be rewritten and signed or initialled in margin by such officer.

Jurat.

Affidavit is formally concluded by jurat, memorandum of place, time and person before whom it is sworn.

Full address sufficient for identification must be given and jurat should follow immediately after end of text. It must not be written on page upon which no part of statements in affidavit appears.

Deponent must sign his usual signature or make his mark at right of jurat, not beneath it, and signature and full official character and description of person before whom affidavit is sworn must follow immediately after jurat, in form as follows:

Forms

Sworn by the deponent. . (Name). . .)

at) (Signature of Deponent)

)

on the day of)

Before me

(Signature of Solicitor/Commissioner

for Oaths)

Solicitor/Commissioner for Oaths

On final page of affidavit one must state: (i) Party on whose behalf it is filed; (ii) date when filed.

For use in other courts affidavits are sworn in same manner as those for use in Supreme Court.

Exhibits.

Any document may be referred to in body of affidavit as exhibit, thus: “the said letter is now produced and shown to me marked “AB” (deponent's initials are generally used).

Where there is more than one exhibit best course is to use as exhibit marks deponent's initials followed by consecutive numbers as thus “AB 1” “AB 2” etc. By this means exhibits to affidavits of several witnesses are readily identified.

Every exhibit referred to in affidavit must be marked with short title of cause or matter, as hereinbefore set out for affidavit and bear certificate signed by officer before whom affidavit is sworn, as follows:

Form

This is the Exhibit marked “AB 2” (or “AB 1”) referred to in the Affidavit of XY sworn in this action (if Chancery, “Matter” not “Action”) this. . . . . . day of. 19

Before me

(Name and Title of Officer)

Statutory Declarations.

Solemn verification of facts, usually used in cases other than judicial proceedings e.g., conveyancing, tax, company matters.

Form.

They must start with:

“I, AB of (Address) do solemnly and sincerely declare as follows. . . . . .”

Last paragraph should read:

“AND I make this solemn declaration believing the same to be true and by virtue of the provisions of the Statutory Declarations Act 1835”.

Remaining requirements are as for Affidavits.

Jurat—

Declared before me at (address) on, Signature of Declarant

(date)

Signature and qualification of person taking declaration.

9.02 NOTARIES PUBLIC:

Notaries Public of Gibraltar are appointed by England and almost same procedure for appointment exists as with Notaries in England. To become Notary Public each applicant must undertake Postgraduate Diploma in Notarial Practice course in U.K. and then apply to Gibraltar Bar Council for admission through committee consideration.

10 EMPLOYMENT

10.01 LABOUR RELATIONS:

See category 4 Citizenship, topic 4.01 Aliens.

11 ENVIRONMENT

11.01 ENVIRONMENTAL REGULATION:

General.

Gibraltar enactment governing environmental control is Public Health Act. Main provisions deal with disposal of sewage, buildings and sanitation, refuse removal, nuisances, offensive trades, noise and supply of water, to name but a few. With regard to recycling of waste, there are no specific provisions Gibraltar law at this time due to fact that as result of its size, there are no facilities in Gibraltar to process waste and possibility of exporting simply for purpose of recycling is likely to be uneconomic venture.

Act is supplemented by numerous subsidiary regulations and these relate to procedure and enforcement of main body of legislation. Scope of legislation can be illustrated by reference to particular examples.

General Nuisances.

Reference is made to statutory nuisances, which include inter alia, accumulation of dust, inadequate ventilation, maintenance of refuse bins and condition of wells and reservoirs concerned with storage of water used for human consumption. Such nuisances are first dealt with through service of abatement notice. If such notice is disregarded, person on whom it was served can be summoned to appear before magistrates' court. There are various courses of action open to court in deciding how to deal with offender, ranging from fine to order that offender execute any works necessary for abatement of nuisance. Should offender still fail to comply with court order, larger fine can be imposed together with daily fine for each day that nuisance continues.

Other forms of statutory nuisance are that of smoke and noise, which can also be controlled in same manner as in preceding paragraph.

Water.

In case of water, Gibraltar law has been brought into line with current EEC directives, dealing with analysis and maintenance of water supply, protection of groundwater, pollution of aquatic environment and quality of bathing water. With regard to water analysis, schedule provides necessary criteria to be applied on analysis. Powers are given to relevant national authority to seek enforcement of these criteria. In any case, water is only supplied by Gibraltar government at this time and therefore there are no independent suppliers to regulate.

General Supervision.

Monitoring of relevant provisions of Public Health Act is carried out through various departments of Environmental Agency, which itself is located at following address: Environmental Health Department, Environmental Agency, 37 Town Range, Gibraltar, Tel: (350) 200 70620, Fax: (350) 200 74119.

12 ESTATES AND TRUSTS

12.01 DEATH:

Presumption of Death.

Application by personal representative must be made to court where it is not certain that death has occurred. Law presumes person to be dead if not reasonably been heard of for seven years but each case is considered as question of fact and period can be less than seven years. There is no legal presumption as to time of death.

Registration.

All deaths must be registered locally.

Actions for Causing Death.

Relatives of deceased may sue within three years if death was caused by some wrongful act, neglect or default. Measure of damages is loss of support suffered. Causes of action subsisting against or vested in decedent shall survive against or as case may be for benefit of his estate.

12.02 TRUSTS:

Law in this area is significantly similar to that of U.K. Virtually all trusts recognised by English rules of equity may be created and enforced. Gibraltar Trustees Act is based on Trustee Act 1933. Trustee Act Variation of Trusts Act 1958 now applies to Gibraltar under Application of English Law Act. Perpetuity and accumulation periods have been fixed at 100 years pursuant to 1986 Perpetuities and Accumulations Act.

Trusts are created in Gibraltar in same way as in England. Formal trust deed is drawn up in Gibraltar and most common forms of trust are discretionary trust and life interest trust.

Gibraltar Trust is completely confidential arrangement which normally is not recorded in any register. However, Registered Trust Act 1999 now allows for registering of trust deed where such registration is required by deed and for keeping of index of names of such trusts. Gibraltar Trusts have no minimum capital requirements, no annual filing fees and there are no provisions for requirements of annual accounts or audits.

Taxation of Trusts.

Income received by any trust or beneficiary under trust is exempt from taxation provided that: (a) It is created by or on behalf of nonresident of Gibraltar; (b) residents of Gibraltar (other than Category 2 Individual) are expressly excluded as beneficiaries either specifically or under discretionary power of trustees; and (c) income is derived from outside Gibraltar, with exception of income from bank deposit accounts, exempt or qualifying companies. Capital of trust is not liable to tax as Gibraltar has no wealth, gift taxes or estate duty.

If trust complies with above conditions it is exempt from Gibraltar tax even if trustees are residents of Gibraltar.

Trusts of public nature are completely exempt from income tax provided that profits are applied solely for purpose of trust.

Asset Protection Trusts in Gibraltar are unique, in that they fall within provisions of bankruptcy laws, rather than falling within ambit of fraudulent conveyancing laws. This means that disposition of property into trust is not to be voidable at insistence of creditor seeing that in order for creditor to commence action in Gibraltar, only direct action which can be commenced is bankruptcy proceeding; standard of intent to defraud that must be met is much narrower and generally more difficult for creditor to satisfy.

12.03 WILLS:

Any adult, male or female, of sound mind, may make will. Infant cannot make will, unless soldier in actual military service or mariner or seaman at sea. Person of unsound mind cannot make valid will, except during lucid interval. Alien has same testamentary capacity as British subject.

Will must be in writing and signed by testator or by some other person in his presence and by his direction and it must appear that testator intended by his signature to give effect to will and such signature must be made or acknowledged by testator in presence of two or more witnesses present at same time and such witnesses must attest and must subscribe will in presence of testator and in presence of each other. Will should not be witnessed by beneficiary or spouse of beneficiary named in will. Upon death of testator where there is no opposition, probate of will may be granted to executors by probate court.

Probate of Foreigner's Will.

Will's Act provides generally that will to be held as validly executed as regards form if it satisfies requirements of internal law of any of following: (a) Territory where it was executed; (b) territory where testator was domiciled, either at time of execution or at death; (c) territory where testator had habitual residence either at time of execution or at death; and (d) in state of which, either at time of execution or at death, he was national.

Allowance for Maintenance Dependents.

Under Inheritance (Provision for Family and Dependents) Act certain persons may make application to court for payment out of deceased's estate. Court may make order for reasonable financial provision for applicant if court considers reasonable financial provision has not been made.

Applicant for provisions must, except with permission of court, be made within six months from date on which representation in deceased's estate first taken out.

13 FAMILY

13.01 ADOPTION:

Legal adoption in Gibraltar regulated by The Adoption Act. Court may, subject to certain provisions in Act on being satisfied with respect to certain matters, authorise applicant to adopt infant (person under 18) who has never been married. Applicants and joint applicants must be at least 21.

Application can be made by two spouses jointly; otherwise no order can be made authorising more than one person to adopt infant nor upon application of one spouse without consent of other, unless court waives such consent, being satisfied that spouses have separated permanently or that other spouse cannot be found or is incapable of giving such consent.

Order cannot be made where sole applicant is male and infant is female unless court is satisfied that there are special circumstances.

Conditions Precedent.

Applicant must be domiciled in Gibraltar. Infants' parents (or mother if illegitimate) must give consent which may only be dispensed with by court if parent cannot be found or adoption is in child's best interest and consent was being withheld unreasonably or parent has consistently neglected child.

Court may impose, in adoption order, such terms and conditions as it thinks fit.

Effect of Adoption.

Upon order being made, all rights, duties, obligations and liabilities of parent or guardian are extinguished and vest in, and are exercisable by and enforceable against, adoptor.

13.02 DIVORCE:

Matrimonial Causes Act governs grounds for divorce and judicial separation provides, inter alia, bar on petitions for divorce within five years of marriage.

Grounds for Divorce.

Provides that sole ground for divorce shall be that marriage has broken down irretrievably. Provides that proof of such breakdown is only afforded if one or more of following conditions are fulfilled: (a) that respondent has committed adultery and that petitioner finds it intolerable to live with him; (b) that respondent has behaved in such way that petitioner cannot reasonably be expected to live with him; (c) that respondent has deserted petitioner for continuous period of at least three years immediately preceding presentation of petition; (d) that parties have lived apart for continuous period of at least three years immediately preceding presentation of petition and respondent consents to decree; (e) that parties have lived apart for continuous period of at least five years immediately preceding presentation of petition.

Jurisdiction.

In order that Gibraltar may have jurisdiction to grant decree of divorce either party to marriage must be domiciled in Gibraltar on date when proceedings are brought or either party must have been habitually resident in Gibraltar for period of one year ending with date proceedings are commenced.

Decree.

At hearing of petition for decree of dissolution or nullity (i.e., trial), decree nisi only is granted. At end of six weeks on application by petitioner, this decree will be made absolute unless in meantime respondent shows why it should not be. Until decree nisi is made absolute, parties are unable to marry again but thereafter there is no restriction on remarriage.

Decree nisi may be made absolute on application of respondent if petitioner does not apply for decree absolute within three months after time when such application could have been made.

13.03 HUSBAND AND WIFE:

Position of husband and wife in law was much modified by Law Reform (Married Women and Tortfeasors) Act 1935.

By §1 married women were placed on footing similar to single women for all purposes connected with holding of property, entering into contracts, torts, judgments and bankruptcy. By Law Reform (Husband and Wife) Act 1962 both parties to marriage have right of action in tort against each other subject to court's discretion in certain circumstances.

§3 of 1935 Act releases husband from liability for his wife's torts and for her antenuptial debts. He still remains liable for postnuptial contracts made as agent.

All these matters are subsumed now into Married Women Act in Gibraltar.

13.04 INFANTS:

Age of majority, 18 for both sexes.

Disabilities:—

Contracts.

Infants contracts are generally voidable at instance of infant, though binding on other party. Exceptions to this rule are contracts for necessaries (e.g., food, clothing, medicine) and certain others (e.g., service and apprenticeships). Even contract which from its nature would be binding on infant may be incapable of being enforced against him on account of its particular terms being prejudicial to his interests or onerous upon him. Contracts obviously prejudicial to infant are wholly void e.g., loan.

Property.

Legal estate in land cannot be held by infant.

General.

Infant is under general incapacity to exercise rights of citizenship or perform civil duties, e.g., voting in parliamentary or local government elections.

Ratification of Contracts.

Voidable contract can be repudiated by infant either during infancy or within reasonable time after he attains full age. However, no action can be brought to charge person upon promise made after attaining full age to pay debt contracted during infancy or upon ratification made after full age of promise or contract made during infancy. This does not apply so as to relieve infant of obligation arising out of contract affecting property of permanent nature.

Actions.

Civil proceedings on behalf of infant must be brought by some person called his next friend: proceedings against infant are defended by guardian ad litem. Any person within jurisdiction and not himself incapable of instituting proceedings can fill above offices, preference being given to parent or guardian.

13.05 MARRIAGE:

This matter is regulated by Marriage Act.

Marriage may be solemnized or contracted: (a) in place of worship (i) after due publication of banns, or exhibition of notice at place or two places or worship, or (ii) under delivery of Bishop's Licence, or (iii) under delivery of Governor's Licence, or (iv) under delivery of Registrar's Certificate; (b) in Registrar's Office (i) after due notice, or (ii) after issue of Registrar's Certificate, or (iii) under delivery of Governor's Licence; (c) at any place under delivery of Governor's Licence.

In every case of marriage intended to be contracted under authority of Registrar's Certificate, one of parties, both having resided in Gibraltar for period of not less than seven days then next preceding, shall give notice of intended marriage in prescribed form making such declaration as may be prescribed to Registrar. On receipt of notice of intended marriage and upon payment of prescribed fee, Registrar shall forthwith enter particulars set forth in such notice, and also date of receipt of such notice, in book they call Marriage Notice Book, and shall post copy of such notice in conspicuous place in office for period of not less than 21 days from time of receipt thereof.

Notwithstanding above at any time after expiration of one clear day next after date of entry of notice, upon payment of prescribed fee, Registrar can issue special certificate. No such special certificate shall be issued unless one of parties to intended marriage shall appear personally before Registrar and shall produce Affidavit or Statutory Declaration made by each of parties, each such Affidavit or Statutory Declaration to contain certain prescribed particulars.

Age of consent for both males and females is 16 years. Consent of parents or guardians is needed if either party is under 18 years.

Prohibited degrees of relationship is same as for U.K.

Jurisdiction for annulment exists as follows: (1) If either party is domiciled in Gibraltar when proceedings commence; or (2) either party resident in Gibraltar for one year ending with date proceedings commenced; or (3) if either party died before proceedings commenced and either was domiciled in Gibraltar or had been habitually resident in Gibraltar for one year ending with date proceedings commenced; or (4) marriage was celebrated in Gibraltar.

Court also has jurisdiction to entertain proceedings for death to be presumed and marriage to be dissolved if and only if petitioner: (a) is domiciled in Gibraltar on date when proceedings have begun; or (b) was officially resident in Gibraltar for period of one year ending with that date.

Following are grounds on which decree of nullity may be made: (a) that either party was permanently impotent or incapable of consummating marriage at time of marriage, or (b) parties are within prohibited degrees of consanguinity or affinity as provided in Marriage Act, (c) that former husband or wife of either party was living at time of marriage and marriage with such previous husband or wife was still in force, (d) that consent of either party to marriage was obtained by force of fraud in any case in which marriage might be annulled on this ground by England, (e) that marriage has not been consummated owing to willful refusal of respondent to consummate marriage, or (f) that either party to marriage was at time of marriage of unsound mind or was then suffering from mental disorder of such kind or to such extent as to be unfit for marriage and procreation of children or subject to recurrent attacks of mental disorder.

14 FOREIGN TRADE AND COMMERCE

14.01 CUSTOMS:

Gibraltar is not subject to value added tax nor to sales tax. Customs duties are levied on most imported goods and these are generally liable to import duty of 12%. Exemptions and significantly lower rates relate mainly to beverages, tobacco, clothing, photographic equipment and motor cars.

Gibraltar is dependent territory of European Community under Art. 227(4) of The Treaty of Rome.

14.02 EXCHANGE CONTROL:

There are no exchange controls and thus capital may be moved in and out of Gibraltar. As result of suspension of exchange controls in U.K. in 1979, Gibraltar also removed all exchange controls. Thus Gibraltar companies, individuals and other entities may hold and operate bank accounts in any currency anywhere in world and may convert funds into other currencies in Gibraltar.

14.03 FOREIGN EXCHANGE:

See topic 14.02 Exchange Control.

14.04 FOREIGN INVESTMENT:

There are no exchange controls and capital may be moved in and out of Gibraltar.

14.05 FOREIGN TRADE REGULATIONS:

See topic 14.02 Exchange Control; categories 2 Business Organizations, topic Corporations; Citizenship, topic Aliens; Introduction, topic Currency.

15 IMMIGRATION

15.01 ALIENS:

If one is registered as Gibraltarian under Gibraltarian Status Act then there is automatic right to reside in Gibraltar. Persons entitled to be registered accordingly are any British national who: (a) Was born in Gibraltar on or before 30 June 1925; (b) is child of person entitled to be registered under paragraph (a) above; (c) is descendant of person entitled to be registered under paragraph (a) or (b) above and whose parent or grandparent was born in Gibraltar; (d) is spouse, widow or widower of person entitled to be registered under paragraph (a), (b) or (c) above; (e) is child of person who has been registered by virtue of order made by Governor; (f) is descendent of person who has been registered by virtue of order made by Governor and whose parent or grandparent was born in Gibraltar; (g) is spouse, widow or widower of person who has been registered by virtue of order made by Minister or who is entitled to be registered under paragraph (e) or (f) above; (h) is born in Gibraltar and is child of person who is registered in register; or (i) is spouse, widow or widower of person entitled to be registered under paragraph (h) above.

Minister may, in his absolute discretion, order registration of any person who satisfies Minister that: (a) He is British Territories Citizen by virtue of his connection with Gibraltar, or Gibraltar or Great Britain is his country of origin; (b) he is British national; (c) he is of good character; (d) he has sufficient knowledge of English language; (e) he has his permanent home in Gibraltar; (f) he has been resident in Gibraltar for periods amounting to not less than 25 years in aggregate including whole of period of ten years immediately preceding date of application; and (g) he intends to make his permanent home in Gibraltar.

Employment Act stipulates that nonresidents of Gibraltar, other than those who are EU nationals, may only obtain employment under work permit issued by Director of Labour and Social Security. Granting of work permits is dependent on following conditions: (a) That no resident of Gibraltar is available for that particular employment; (b) suitable arrangements are made to repatriate employee once employment ceases; and (c) acceptable arrangements for accommodation have been made. Work permits are also required for self-employed persons taking up clerical, manual or allied work.

Where worker is engaged in pursuance of permit, Director of Labour and Social Security issues certificate. It is offence for worker whose employment has terminated to fail to return his certificate within next working day following that on which his employment terminated.

Under Employment Regulation (Offences) Act 1999, employers who fail to obtain work permit for nonresident employee may be subject to fixed penalty fine.

Under Civilians Registration Act there is register of all civilians in Gibraltar. It is duty of Registration Officer to cause card containing prescribed particulars to be issued in respect of every registered person. Individual who is either: (a) British Dependent Territory citizen by virtue of connection with Gibraltar; (b) registered under Gibraltarian Status Act; or (c) British citizen with right of permanent residence in Gibraltar, shall on registration be issued identity card. Individual, who is not visitor, entitled to be resident in Gibraltar and present in Gibraltar is issued civilian registration card.

Identity cards are valid for period of ten years, while civilian registration cards are valid until date specified on cards as date of expiry.

15.02 IMMIGRATION:

Matters of immigration are regulated by Immigration Control Act which stipulates general requirement that no person can remain in Gibraltar unless he is in possession of valid residence permit. Principal Immigration Officer is responsible for issue of permits. However, Governor may also order Principal Immigration Officer to issue permit of residence in certain circumstances such as to any person who in his opinion is of good character where it would be in interests of Gibraltar that he be issued with such permit.

Citizens of Gibraltar or British Dependent Territory Citizens of Gibraltar are exempt from all requirements of Immigration Control Act, which stipulates following: (a) British subjects (plus their families) do not require residence permit while so employed; (b) U.K. citizens may be given permanent certificate of residence if of good standing and asset to community. Act also makes provision for nationals of European Economic Area: EEA national shall be admitted to Gibraltar if upon arrival he produces valid national identity card or passport issued by EEA state. EEA nationals classified as “Qualified Persons” (including workers, self-employed persons, retired persons and students) and their family members are entitled to reside in Gibraltar for as long as they remain qualified persons. Principal Immigration Officer shall—except on grounds of public policy, public security or public health—grant residence permit to qualified person on production of (a) valid identity card or passport issued by EEA State and (b) proof that he is qualified person.

Exceptions of preceding paragraph do not apply to French nationals connected with French overseas dependent territory, nor to Netherlands nationals connected with Surinam or Antilles, whether by birth or otherwise.

Visa requirements for visitors to Gibraltar mirror those for U.K. Countries or territorial entities where nationals or citizens need visas for Gibraltar include China, Cuba, Egypt, India, Pakistan, Philippines, Thailand, US Pacific Trust Territories.

16 INTELLECTUAL PROPERTY

16.01 COPYRIGHT:

The United Kingdom Copyright Act, 1956 (as amended) was extended to Gibraltar by Copyright (Gibraltar) Order of 1960 with certain exceptions and modifications. The Copyright (International Organisations) Order 1957 was also extended to Gibraltar subject to certain modifications. Also extended to Gibraltar have been The Copyright (Taiwan) Order 1985 and The Copyright (Computer Software) Order of 1987 subject to certain exceptions and modifications.

These Orders provide for copyright in original, literary, dramatic, artistic and musical works and in sound recordings, cinematographic films, broadcast and published editions of such works. The Intellectual Property (Copyright and Related Rights) Act enacted in 2005 amends and updates earlier existing law.

16.02 PATENTS:

Governed by Patent's Act of Gibraltar, Act provides for registration of patents that have already been registered in U.K. to be registerable in Gibraltar within three years from date of issue of patent.

Once necessary documentation is received by Registrar of Patents in Gibraltar certificate of registration is issued.

16.03 TRADEMARKS AND TRADENAMES:

Trademarks are regulated under Trade Marks Act of Gibraltar that is based on Trademarks Act 1938, Trademarks (Amendment) Act 1984 and Patents, Designs & Marks Act 1986.

Act provides that any person who is registered proprietor of trademark in U.K. may apply to have trademark registered in Gibraltar.

Apart from prerequisite of registration in U.K. before registering in Gibraltar, law in this area is substantially similar to law in U.K.

Tradenames and/or business names are registered in Gibraltar under Business Names Registration Act that is based on Registration of Business Names Act 1916.

17 LEGAL PROFESSION

17.01 ATTORNEYS AND COUNSELORS:

In Gibraltar, unlike U.K. or Republic of Ireland, Supreme Court (Amendment) Act, 1986 allows "every person holding the office of Attorney General, Law Draftsman, Senior Crown Counsel or Crown Counsel shall, so long as he continues to hold such office, have and enjoy all the rights and privileges of a barrister entitled to practice in Gibraltar." (§28[3]). Furthermore, "every person duly approved, admitted and enroled as a solicitor of the Supreme Court of Gibraltar shall be at liberty to act also as a barrister." (§30[2]).

Jurisdiction over Admissions.

Admissions are regulated by Supreme Court Act, which includes Supreme Court (Amendment) Act 1986.

Eligibility.—So as to be eligible applicant must satisfy educational requirements listed below.

Registration As Law Student.

There is no statutory requirement.

Educational Requirements.

All barristers and solicitors obtain their legal education outside Gibraltar.

For any person to become fully qualified barrister or solicitor in Gibraltar, that person must begin his legal education by becoming law graduate at University in U.K. or Republic of Ireland; or, become non-law graduate in University in U.K. or Republic of Ireland, after which one year Common Professional Examination conversion course must be obtained, at one of the approved institutions.

Before Chief Justice approves, admits and enrolls barrister to Supreme Court of Gibraltar (regulated by §28 of Supreme Court [Amendment] Act, 1986), that person must satisfy following requirements: (a) He has been called to Bar in England and Northern Ireland or Republic of Ireland, or has been admitted as advocate in Court of Session in Scotland; (b) he is not at time of application for admission disbarred, or removed from role of advocates in Scotland, or suspended from practice as such barrister or advocate; (c) since his admission in U.K. or Republic of Ireland, he has completed period of at least six months' pupillage with practising barrister of at least five years professional standing in England, Northern Ireland, Republic of Ireland or Gibraltar, or practising advocate of at least five years professional standing in Scotland, or has completed practical training course approved by Council of Legal Education in England or by equivalent body in Northern Ireland, Republic of Ireland or Scotland; and (d) he intends on admission to practice in Gibraltar either alone or in partnership with another barrister or solicitor.

Before Chief Justice approves, admits and enrolls solicitor to Supreme Court of Gibraltar (under §30 of Supreme Court [Amendment] Act, 1986), that person must satisfy following requirements: (a) He has been admitted as solicitor of Supreme Court of England, or in any court of record in Northern Ireland or Republic of Ireland, or as solicitor admitted to practice in Scotland; (b) he is not at time of his application for admission struck off rolls or suspended from practice as solicitor; and (c) he intends on admission to practice in Gibraltar either alone or in partnership with another barrister or solicitor.

Petition for Admission.

Petitions for admission to Bar are regulated by Supreme Court Act, Barristers and Solicitors Rules, Part II, §§4-6.

Application to be admitted and enroled as barrister or as solicitor, shall be made by petition in form contained in schedule (to Supreme Court Act). It must be verified by oath or by statutory declaration and shall be filed in Registry, with two recent testimonials to good character of applicant.

That person must also deliver to Registry notice intimating that he has so applied, which notice shall (unless Chief Justice shall otherwise allow) be posted and continue to be posted in Supreme Court for 21 days before any order is made on petition.

Examination.

Rules as to examinations are contained in Supreme Court Act, Barristers and Solicitors Rules, Part II, §5.

It is at Chief Justice's discretion as to whether applicant, to be admitted as barrister or solicitor, appears before Admissions and Disciplinary Committee, before hearing of his petition.

It is also discretion of Chief Justice as to whether applicant is admitted to local Gibraltar Bar.

Clerkship.

No statutory provision.

Admission Pro Hac Vice.

Barristers and solicitors who satisfy Educational Requirements, listed above, are normally accepted for admission to Gibraltar Bar, on pro hac vice basis, by Disciplinary and Admissions Committee. Majority of such lawyers are usually Queen's Counsellors who come to Gibraltar from U.K. or Republic of Ireland.

Compensation.

In Gibraltar there is no compensation fund, however, every practitioner must be fully insured.

Disbarment or Suspension.

Disciplinary powers are regulated by §34 of Supreme Court Act. This legislation empowers Chief Justice to act with reasonable cause.

Mandatory Continuing Legal Education.

None.

Speciality Certification Requirements.—None.

Professional Association.—General Council of the Bar in Gibraltar is constituted by its own Constitution and it is governing body of Bar.

Its objectives are to maintain standards, honour independence of Bar, and to promote, preserve and improve services and functions of Bar.

It makes special provisions arising out of peculiar nature of Bar as fused profession and to regulate professional business normally conducted by solicitors and to exercise functions similar to those of Law Society, insofar as they are applicable to Gibraltar.

It represents and acts for Bar generally as well as in its relations with others and also in matters affecting administration of justice.

17.02 BARRISTERS AND SOLICITORS:

See topic 17.01 Attorneys and Counselors.

18 MORTGAGES

18.01 CHATTEL MORTGAGES:

All mortgages of chattels, except inter alia those executed by limited companies which require registration under Companies Act (see category 2 Business Organizations, topic 2.02 Corporations) and mortgages come under Bills of Sale Act. They must be for sum of not less than £30; be registered within seven days, or, if executed out of Gibraltar, within seven clear days after time at which it would in ordinary course of post arrive in Gibraltar if posted immediately after execution and be according to form specified in Act; otherwise such chattel mortgages are void, even against grantor. Copies have to be filed and are open to public inspection. Registration must be renewed every five years.

18.02 MORTGAGES:

Law in this area in substantially similar to that of England. Main enactment that is still law in Gibraltar is Conveyancing and Law of Property Act 1881 as amended.

19 PROPERTY

19.01 ABSENTEES:

In absence of person abroad, person may generally delegate authority to any person of full capacity. It is usual for power of attorney to be granted. As in England, Powers of Attorney Act 1971 applies to and is enshrined in Gibraltar Powers of Attorney Act. Pursuant to this Act it is no longer necessary to file Powers of Attorney in Supreme Court of Gibraltar. Provisions of Powers of Attorney Act are enacted without prejudice to those of §18 of Gibraltar Trustees Act that relate to power to authorise receipts of money by banker or solicitor.

19.02 CONVEYANCES:

See topic 19.03 Deeds.

19.03 DEEDS:

Deeds executed by individuals are to be sealed and witnessed.

Corporation or company executes deed in manner provided by its articles of association but deed executed by corporation aggregate in favour of purchase is sufficiently executed if its seal is affixed thereto in presence of its clerk, secretary or other permanent officer or his deputy and member of governing body of corporation.

Person authorised by power of attorney or any other power to convey interest in property on behalf of corporation sole or aggregate, may execute conveyance by signing name of corporation in presence of witness and in case of deed fixing his own seal.

Deed does usually require registration.

Land in Gibraltar is of either freehold or leasehold tenure.

Stamp Duty on Purchase Deeds.

Conveyance or transfer on sale of any property subject to duty: (1) Where value of whole property subject to duty does not exceed £160,000, sum equivalent to 0% of amount or value of consideration; (2) where value of whole property subject to duty exceeds £160,000 but does not exceed £250,000, sum equivalent to 1.26% of amount or value of consideration; (3) where value of whole property subject to duty exceeds £250,000 but does not exceed £350,000, sum equivalent to 1.6% of amount or value of consideration; (4) where value of whole property subject to duty exceeds £350,000, sum equivalent to 2.5% of amount or value of consideration.

On both share capital (on nominal share capital and increases thereof) and loan capital (on each issue), flat rate of £10 is levied.

Stamp Duty on mortgages is levied at 0.13% on mortgages not exceeding £200,000 and 0.2% on those exceeding £200,000.

19.04 PERPETUITIES:

This area is governed by Perpetuities and Accumulation Act of 1986.

Under this Act, trust may continue for 100 years, if non-charitable and not dealing for valuable consideration in certain options in real property. And under Trusts (Recognition) Act 1990, requirements of forced heirship and/or other Civil Law restrictions on freedom of dispositions of assets by settlor, will be unenforceable in Gibraltar against trustees.

19.05 REAL PROPERTY:

Area substantially same as in England.

See topic 19.03 Deeds.

20 TAXATION

20.01 ADMINISTRATION:

Taxation in Gibraltar is modelled on system in U.K. However due to its status as offshore finance centre, it enjoys more flexible fiscal regime. There is no capital gains tax, wealth tax or inheritance tax in Gibraltar, and although Gibraltar is part of European Union, as dependent territory, it is specifically excluded from Common Agricultural Policy, value added tax and Common Customs Tariff.

20.02 ALCOHOL, BEVERAGES AND TOBACCO TAXES:

In general import duty is 12%, exemptions mainly concern clothing, beverages, tobacco and motor cars. Beverages are free from duty. Duty on alcohol depends on type of drink.

As regards tobacco, duty is levied on net weight of tobacco, excluding wrapping and duty is levied on cigarettes on their net weight, including filter and paper. Cost depends on type of tobacco.

20.03 BUSINESS TAXES:

Taxation of income of both individuals and companies is governed by Income Tax Act as amended by Income Tax (Amendment) Act. Year of assessment runs from 1 July in any year to 30 June of next year.

Non-resident and Qualifying Individuals.

Individuals who are not ordinarily resident or domiciled in Gibraltar and have no income derived in Gibraltar (except income from exempt and qualifying companies) may apply for Qualifying Certificate. Qualifying Individual will be charged to tax on his worldwide income at rate of not less than 2% as may be specified on Certificate, but total amount so charged cannot exceed £20,000.

Non-resident individuals are only subject to income tax in Gibraltar on income derived from, accrued in, or remitted in Gibraltar.

Qualifying (Category 2) Individuals.

Legislation dealing with these individuals has been enacted to encourage acquisition of property in Gibraltar. Worldwide income of individual who meets qualifying requirements is assessed in normal way by Gibraltar tax authorities but tax is levied only on first £70,000 of assessable income, thus maximum tax liability for full year of assessment at current rates would be around £26,000 for full year of assessment. Minimum annual tax payable would be of £18,000.

Prerequisites to qualify as high net worth individual in Gibraltar, officially classified as Qualifying (Category 2) Individual, are (i) individual must have approved residential accommodation in Gibraltar; (ii) said accommodation to be available for exclusive use of individual during whole year of assessment; (iii) individual is not otherwise resident in Gibraltar and has not been so resident in preceding five years (Finance Centre Director may waive this requirement in certain circumstances); (iv) individual has not been engaged for previous five years and will not engage in whilst Category 2 Individual, in any trade, business or employment in Gibraltar (other than duties incidental to any trade, business or employment based outside Gibraltar, duties as director of Exempt Company or providing consultancy services from Gibraltar to companies trading outside Gibraltar where individual has significant shareholding); (v) said individual must also satisfy Finance Centre Director that they are of substantial and sound financial standing; in practice this is usually in excess of £2 million.

Qualifying (Category 3) Individuals and HEPSS

As of 1 July 2007, Category 3 status abolished to new entrants. Existing holders can keep it until end of current certificate or 30 June 2009, whichever later. With effect from 1 July 2007, tax payable rises from £10,000 per annum to £15,000 per annum.

Exempt or qualifying company with physical presence in Gibraltar and certain Statutory Bodies may apply for certificate designating individual as Qualifying (Category 3) Individual. Certificate may be issued for period of up to three years but may be extended for further period of up to three years.

Prerequisites to qualify for Category 3 status are that individual must possess skills or experience which are: (i) essential to operation; (ii) not currently available in Gibraltar; and (iii) important for economic regeneration of Gibraltar. In addition individual must have Gibraltar accommodation available for exclusive use and should not have been employed in Gibraltar during previous five years (as with Category 2 Individuals this final requirement may be waived by Finance Centre Director).

Category 3 Status has been replaced by new “High Executive Possessing Specialist Skills” (HEPSS) status. New scheme is made available to existing Category 3 Individuals who earn more than £100,000 per annum and new applicants who: (i) Possess skills not available in Gibraltar and in Government's opinion are necessary to promote and sustain economic activity of particular economic value to Gibraltar, (ii) will occupy high executive or senior management position, and (iii) will earn in excess of £100,000 per annum, (iv) will have accommodation available for their exclusive use, in Gibraltar, (v) have not been resident or employed in Gibraltar during three years prior to year application is made. HEPSS individuals will pay income tax based on Gross-Income based system (see 20.09) but only on first £100,000 of their per annum income.

Qualifying (Category 4) Individuals.

Category 4 status abolished for new entrants. Existing holders can keep it until expiry of current certificate or 30 June, whichever later. With effect from 1 July 2007, tax payable increased from £5,000 per annum to £7,500 per annum.

Rules and conditions pertaining to this status are similar to those pertaining to Category 3 Individuals (see catchline Qualifying [Category 3] Individuals, supra). However, company making application must also satisfy Government that connected with appointment of Category 4 Individual it has created new and additional employment opportunity in Gibraltar.

Resident Individuals.

Individuals who are ordinarily resident in Gibraltar are generally assessed on their worldwide income. Rates of personal taxation in Gibraltar range from 17% to 40% of taxable income.

See also category 2 Business Organizations, topic 2.02 Corporations.

20.04 CUSTOMS DUTY AND TAX:

Imports and Exports Regulations 1986 provides that any person who imports any goods, or his duly authorised agent, is required to make declaration to Customs concerning any goods imported into Gibraltar. According to category of import there are different rates of import duty.

20.05 EMPLOYMENT TAXES:

Income tax is assessed on most forms of income accruing in, derived from or received in Gibraltar. Tax in any year is normally calculated on income derived from preceding year except income from employment which is subject to deduction on actual basis through Pay As You Earn System.

20.06 ESTATE TAX:

See topic 20.10 Inheritance Tax.

20.07 GASOLINE AND SPECIAL FUELS TAXES:

Duty on petrol in Gibraltar is 25 pence per litre and 7.5 pence per litre for diesel.

20.08 GIFT TAX:

Not applicable.

20.09 INCOME TAX:

As of 1 July 2007, Gibraltar Government introduced new “Dual Taxation” system allowing taxpayer to choose between two systems of taxation:

1. Existing Allowance Based Personal Tax System.

Under this system, taxpayer is taxed at higher rates but is able to take advantage of number of allowances and reliefs to reduce potential tax payable. Top rate of 40% on any income over and above £16,000. Standard rate of 30% on income between £4,001 and £16,000. Reduced rate of 17% on first £4,000 of income. Allowances include personal allowance of £2,735 and spouse allowance of £2,560, basic child relief of £970 on first of any children of taxpayer, disabled persons relief of £2,650 on parent of disabled child, single parent allowance of £2,560.

2. Gross Income Based System.

Every taxpayer may choose between normal system and this new Gross Income Based system and pay under whichever results in lower tax. Gross Income Based system has no allowances and tax rates of: 20% on first £25,000 income, 29% on next £75,000, 35% above £100,000. Rules relating to Gross Income Based system will prevent one family member benefiting from new system and another getting benefits of allowances (e.g. mortgage interest etc.) .

In order to make Gross Income Based System more attractive to low income earners, additional tax rates and bands have been introduced for 2009/10 tax year:

(i) For persons whose gross income does not exceed £16,000 per annum, new tax rate of 10% will be levied on first £10,000 of income.

(ii) For persons with incomes between £16,000 and £25,000, new bands will be added as follows on which tax will be paid at 0 %:

— Income of £16,000 to £17,000, 0% tax rate on first £5000 of income.

— Income of £17,000 to £18,000, 0% tax rate on first £4000 of income.

— Income of £18,000 to £19000, 0% tax rate on first £3000 of income.

— Income of £19,000 to £20,000, 0% tax rate on first £2000 of income.

— Income of £20,000 to £25,000, 0% tax rate on first £1000 of income.

No double tax treaties exist between Gibraltar and any other country. However tax relief may be granted in respect of U.K. income tax paid which would be chargeable to Gibraltar tax on lowest band of Gibraltar tax or U.K. tax. Relief is also given in respect of Commonwealth income tax provided that other country grants corresponding relief for Gibraltar taxes.

20.10 INHERITANCE TAX:

Estate Duties (Repeal and Consequential Provisions) Act provides that no Estate Duty is payable in Gibraltar as from 1 Apr. 1997. However, any individual who died before this date will be subject to Provisions in Estate Duties Act. Estate Duties Act provides that estate will be liable to duty on all personal and real property situated in Gibraltar.

20.11 LOCAL GOVERNMENT TAXES:

Not applicable.

20.12 MOTOR VEHICLE TAXES:

Import duty is levied on brand new motor vehicles, imported by individuals, according to cubic engine capacity and on scale which ranges from 25% for motor vehicle not exceeding 1500cc, to 35% for motor vehicle exceeding 2000cc. Above duties are halved if motor vehicle is imported by licensed local distributor. Vehicles with Gibraltar tourist plates are subject to 5% duty irrespective of engine size, whereas vehicles with Gibraltar tourist export plates are not subject to any duty.

20.13 PROPERTY TAXES:

Law of Property in Gibraltar is based on U.K. system prior to Law of Property Act 1925. See topic Conveyances.

20.14 SALES TAX:

Not applicable.

20.15 STAMP TAX:

See topic 19.03 Property Taxes.

20.16 TAX INCENTIVES AND EXEMPTIONS:

See topic 20.03 Business Taxes.

20.17 TREATIES AND AGREEMENTS:

See topic 20.09 Income Tax.

20.18 VALUE ADDED TAX:

V.A.T. is not applicable in this jurisdiction. Gibraltar occupies VAT-free zone.

20.19 WEALTH TAX:

Not applicable.

21 TRANSPORTATION

21.01 SHIPPING:

Jurisdiction and practice of admiralty law in Gibraltar is very similar to that which applies in England and Wales and is generally governed by Supreme Court Act 1981 and Merchant Shipping Act and Port Act. Courts have discretion to decide on any dispute or claim irrespective of where claim arises or nationality of parties. Most common maritime claims dealt with are in respect of: ownership, possession, mortgages, damages to or caused by ship, carriage of goods, salvage, charter-parties, bills of lading, crews wages and other claims, possessory liens, maritime liens, and pollution. Court of Gibraltar may defer to contract or to consent of parties, in exercising jurisdiction of choice for resolution of any dispute.

22 TREATIES AND CONVENTIONS

22.01 TREATIES:

Gibraltar has no double tax agreements with any country.

Under Art. 227(4) of Treaty of Rome Gibraltar entered European Economic Community in 1973 following accession to Community of the United Kingdom as dependent territory.

By Art. 28 of Accession Treaty acts of Community institutions relating to common agricultural policy and value added tax do not apply to Gibraltar. Gibraltar is also by this Treaty excluded from Customs Union and thus Common Customs Tariff does not apply to Gibraltar.

Brussels and Lugano Conventions in respect of jurisdiction and recognition and enforcement of judgments is now part of Gibraltar Law by virtue of Civil Jurisdiction and Judgments Act 1993 (which came into force in 1998). This Convention sets out code by which tribunals and courts of contracting states may determine questions of jurisdiction and enforceability of judgments of one contracting state to another contracting state. Civil Jurisdiction and Judgments Act 1993 has been updated in 2004 and 2005 in order to comply with Council Regulations No. 44/2001 and No. 2201/2003 on jurisdiction and enforcement of judgments in civil and commercial matters and recognition and enforcement of judgments in matrimonial matters.

1
GREECE LAW DIGEST

—Scope —

Revised for 2009 edition by

DR. TRYFON J. KOUTALIDIS, of Athens.

See category 6 Courts and Legislature, topics 6.02 Law Reports, Codes and 6.05 Statutes.

Greece is member of EU. See also European Union Law Digest.

As of Jan. 1, 1981 Greece is 10th full member of EU by virtue of Treaty of Athens dated 28 May 1979. Treaty was ratified by Law 945 of 27 July 1979.

Note: This revision incorporates legislation through May 31, 2008.

1 INTRODUCTION

1.01 CURRENCY:

According to Art. 1 of Law 2842/2000, as of Jan. 1, 2001, legal currency is EURO replacing drachma. Drachmae stopped circulating as of Feb. 28, 2002.

Foreign Exchange.

Presidential Decrees 96/93, 104/94 and Law 3148/03 harmonized Greek legislation with EU currency regulations.

(1) Foreign exchange and foreign bank-notes are sold and purchased freely.

(2) Greek residents in order to transfer to other EU residents and third countries amounts of money, in [Euro] and in other currencies of value equivalent of or exceeding [Euro]12,500 must produce their Tax Registration Number.

(3) No restriction exists in deposits in or withdrawals of foreign currency for Greek residents or for other EU residents.

(4) Exportation of both foreign and Greek securities, dividends, coupons etc. is free.

(5) Exports and imports are under no currency restrictions.

1.02 GOVERNMENT AND LEGAL SYSTEM:

Following a plebiscite held on Dec. 8, 1974, Greece became parliamentary republic. New constitution entered into force on June 15, 1975. There is unicameral legislature which elects President of Republic and government must have confidence of Legislature. Constitution has been amended, powers of President being curtailed. (Mar. 6, 1986).

By virtue of constitutional amendment of Apr. 6, 2001, role of local administration authorities has been reinforced.

Legislature meets first Mon. of Oct. every year de jure in ordinary session for period of time which may not be less than five months. Ordinary session is mandatorily extended in case budget of state has not been approved. Extraordinary sessions may be held if and when deemed reasonable by President.

Executive power is entrusted to both President and Government. However, country's general policy is determined by Government alone. Organization and function of Greek Government is ruled by Law 1558/85, as amended. Government consists of Prime Minister and Ministers, each of whom is in charge of particular Ministry.

1.03 HOLIDAYS:

Following are legal holidays: Suns.; Jan. 1st; Epiphany; first Mon. of Lent; Mar. 25th; Good Fri.; Easter Mon.; May 1st; Pentecost; Aug. 15th; Oct. 28th; Dec. 25th and 26th.

On legal holidays, bills of exchange and promissory notes cannot be protested, nor summons served. If a bill of exchange falls due on a holiday, it is extended until the following day when it can be protested. All time limits provided for in the civil procedure which fall due on a holiday are similarly extended.

1.04 OFFICE HOURS AND TIME ZONE:

Greece is in GMT +02:00 (Oct.-Mar.), GMT +03:00 (late Mar.-Oct.) time zone. Office hours are generally from 9 a.m. to 5 p.m.

2 BUSINESS ORGANIZATIONS

2.01 ASSOCIATIONS:

Associations are nonprofit organizations governed by Arts. 78-106 of Civil Code. Right to associate is freely admitted but in order to obtain legal personality, association must be recognized by Court and its statutes must be filed with it.

2.02 COMPANIES:

The form of company which corresponds more or less to the stock corporation in the United States is the Anonymos Etairia (Société Anonyme) which will be referred to as “Company Limited by Shares”.

Both domestic and foreign Companies Limited by Shares are subject to supervision of Ministry of Development, Directorate of Trade. Law 3604/2007 introduced provisions limiting scope of such supervision.

Formation of Companies.

For the purpose of forming a Company Limited by Shares, it is first necessary for a notarial act to be drawn embodying statutes of company, that is to say, both memorandum of company and articles of association.

This document must be approved by Ministry of Development, Directorate of Trade and published in appropriate section of Government Gazette. Statutes of a company must provide for certain matters required by law. If any part of capital of company does not consist of cash, it must be assessed by a special committee appointed by Ministry of Development, Directorate of Trade. In case of partial payment of share capital, one-fourth, at least, of share's nominal value (which may not be less than [Euro]0.30) must be paid up within two months from date of constitution of company, balance within five years. Capital of Company Limited by Shares may not be less than [Euro]60,000 (Law 2842/2000). Pursuant to provisions of Law 3606/2007, integrating EC

Directive 2004/39 into Greek Law, various increased minimum share capital limits apply in case of different types of investment firms. This is also case as regards other types of companies specifically stipulated by provisions of law, such as banks and insurance companies.

Under Law 2081/92, statutes of company must be controlled by Chamber of Commerce, as far as name of company is concerned.

Head office of a Greek Company Limited by Shares must be situated in Greece.

Directors' Meetings.

In order to form a quorum, one-half of total number of directors plus one must be represented at all meetings of board of directors, and at least three directors must be physically present. Same director cannot represent at any meeting more than one director, in addition to himself. Drafting and execution of minutes by all members of board of directors is equal to resolution of board of directors even if not preceded by meeting. Statutes may provide for meetings held via teleconference.

Meeting of board of directors can be held at place other than seat of company, in Greece or abroad, if all directors are present or represented and none objects to meeting taking place.

Alien Directors.

With the exception of certain companies governed by special laws, there is no limitation as to the number of aliens who may be directors in a Greek Company Limited by Shares.

General Meetings of Shareholders.

Such meetings may be held abroad if shareholders representing 100% of share capital are present or represented at meeting and none objects to meeting taking place.

In order to have a quorum for a general meeting, there must be present a number of shareholders, representing one-fifth of the company's capital, except in special cases where a number of shareholders representing two-thirds of such capital is required. No resolution can be passed unless an absolute majority is obtained. There are special cases where a majority of two-thirds is required. If quorum is not obtained at first meeting, any number of shareholders is sufficient for quorum, but in certain cases certain minimum number of shareholders is always required for quorum.

Reserve.

At least 5% of the company's annual net profits must be set aside as a regular reserve fund until the reserve fund reaches one-third of the company's capital.

Dividends.

Out of company's net profits there must be deducted first amount required as above for reserve fund, then first dividend of at least 35% of net profits and balance may be distributed as provided in statutes.

Stock Options.

Pursuant to Law 3604/2007 (art. 19, par. 3), options may be granted to Directors and employees of companies limited by shares through participation in company's share capital increase.

By virtue of Law 1731/87 and Presidential Decree 30/1988, company may give out to its employees shares of its own which company purchases for this purpose or issues following share capital increase funded by capitalisation of profits or by existing shareholders.

Foreign Limited Companies.

A foreign limited company may not carry on business in Greece through branch office unless permission is obtained from Ministry of Development, Directorate of Trade, in accordance with art. 50 of Codified Law 2190/1920, which is published in Government Gazette. To obtain such permission, it is necessary to submit application to Ministry of Trade, stating date on which company was incorporated abroad, and to appoint attorney duly authorized to accept service in Greece on behalf of company of all legal process and other documents and agent in this country to represent company generally.

It is also necessary to submit a power of attorney under which such agent has been appointed, and a list of names and surnames of persons qualified to represent the company in company's country.

The accounts of all foreign limited companies must be kept in the Greek language.

Foreign Companies.

Under Compulsory Enactment 89/1967, as amended, privileges and advantages are granted to foreign companies established in Greece exercising activities enumerated therein, subject to provisions of such Compulsory Enactment.

Companies of Limited Liability.

A company of limited liability may be formed under Law 3190 of Apr. 27, 1955. Such company is similar to “Gesellschaft mit beschränkter Haftung” of German law. A company of limited liability may be constituted only by notarial contract, copy of which is filed with respective district court. Summary of contract is published in Bulletin of Limited Companies of Government Gazette. Capital of such a company may not be less than [Euro]18,000. (Law 2842/2000).

By virtue of art. 43a of law 3190/1955, as amended, incorporation of single partner limited liability companies is allowed.

Maritime Companies.

Under Law 791 of July 5/6, 1978, foreign maritime companies establishing themselves in Greece are governed by law of place of their incorporation.

Under Law 959 of 21/24.8.1979 as modified by Law 2987/02, “Concerning a Maritime Company”, special provisions are made for maritime companies whose sole object must be maritime trade. Minimum amount of capital is [Euro]5,000 readjustable by means of Ministerial Decision. Agreement for formation of company must be in writing and company must be registered in Special Registries of Maritime Companies.

Law 3182/2003 provides special regulations on maritime companies whose sole object must be acquisition of property, exploitation or administration of professional pleasure boats under Greek flag. Minimum amount of capital [Euro]10,000 readjustable by means of Ministerial Decision. Agreement for formation of company must be in writing and company must be registered in Special Registry of the Ministry of Merchant Shipping. Citizens or legal entities of countries which are not EU members or do not belong to European Economic Area are not allowed to obtain real rights on shares of aforementioned companies, with certain exceptions.

Taxation.

See category 22 Taxation, topic Taxes.

2.03 CORPORATIONS:

See topic 2.02 Companies.

2.04 JOINT STOCK COMPANIES:

See topic 2.02 Companies.

2.05 PARTNERSHIPS:

There are two forms of commercial partnerships, viz., partnerships in which liability of all partners is unlimited, and those in which, in addition to partners of unlimited liability, there is also at least one partner whose liability is limited to a certain amount. Either form of partnership constitutes a separate corporate entity which is independent from that of partners and may sue or be sued as such.

Formation.

Partnership agreement must be in writing and agreement must be registered with court of first instance within whose jurisdiction head office of partnership is established. If partnership has one or more branch offices, such registration must be repeated in respective court where each branch is situated. A partnership may be formed either under a notarial act or under a private indenture.

Name.

If name of deceased partner is included in tradename after his death it cannot be used without consent of the heirs of deceased.

Rights and Liabilities of Partners Inter Se.

They are determined by the partnership agreement and by certain rules which in some cases supersede the partnership agreement.

Rights and Liabilities of Partners as to Third Persons.

In both forms of partnerships, partners whose liability is unlimited are jointly and severally liable for liabilities of partnership. A limited partner who performs act of administration of partnership business becomes jointly liable with unlimited partners for all obligations of partnership.

Dissolution.

In case of a partner's death partnership may continue between surviving partners. Partners may agree that in event of death of any partner partnership will continue with heirs of deceased partner.

Administration of partnership property is conducted by liquidator or liquidators. If no liquidator has been appointed all partners act jointly as liquidators.

Administration of the Partnership Property.

The administration is conducted by such of the unlimited partner or partners as have been appointed administrators. If no administration has been appointed then all unlimited partners act as administrators.

3 BUSINESS REGULATION AND COMMERCE

3.01 BILLS AND NOTES:

In respect of all bills and notes issued in Greece on or after Apr. 15, 1932, the Convention of Geneva dated June 7, 1930, regarding the uniformity of laws in respect of bills and notes applies. Bills and notes are governed by Law 5325/1932.

Bills of Exchange.

A bill of exchange must contain words "bill of exchange," bear a date, place of issue and payment, a simple and clear mandate to pay a certain sum, name of party which is to pay same and name of party to whose order it is payable, date of maturity and signature of drawer; bills may be drawn at sight. Mere signature of an endorser is sufficient to constitute an endorsement. All those whose signature appears on a bill of exchange are jointly liable to bearer. Bearer must notify endorser within four days of presentation and each successive endorser must notify his endorser within two days from receipt of notification. Payment may be made two days from maturity. Protest must be made within two working days of maturity.

Promissory Notes.

These are subject to rules relating to bills of exchange insofar as these concern maturity, endorsement, joint and several liability, payment, protest and rights and duties of holder. A promissory note must be dated and set forth sum to be paid, must contain name of party to whose order it is payable and date of payment. It must also contain a promise to pay and words "Promissory Note."

In respect of bills of exchange and promissory notes, all actions against acceptor or signatory are barred by limitation after three years from maturity. Actions against endorsers are barred one year from protest.

See also category 6 Courts and Legislature, topic 6.01 Courts.

Checks.

In respect of all checks issued in Greece on or after Jan. 1, 1934, the three Conventions signed in Geneva on Mar. 19, 1931, regarding (a) the uniform law in connection with checks, (b) the settlement of certain conflicts on certain checks and (c) in respect of stamps, apply with certain exceptions. Checks are governed by law 5960/1933.

A check must be payable at sight. It must contain word "check," a simple and clear order of payment of a certain sum, name of person who is to pay check and who must be a banker, place of payment, date and place of issue and signature of drawer. It may be drawn in favour of a specified person or to his order or to bearer.

Provision must exist at time of issue of check, i.e., drawer must have a claim free from all liability and payable on demand against drawee. Any person who draws a check without a provision may be sentenced on conviction to imprisonment.

Rules governing liability of endorsers and drawers are same as those governing bills of exchange. A check must be presented for payment within eight days, if issued and payable in Greece, 20 days if issued in same continent in which it is payable and 70 days if issued in a different continent. Checks issued in Mediterranean countries are deemed to be issued in same continent.

All actions of bearer against endorsers and drawer are barred by limitation six months from date on which time for presentation expires. Protest must be made before date on which time for presentation expires.

A check on which two parallel lines, usually drawn obliquely, have been drawn, must be presented for payment only through a banker.

3.02 COMMERCIAL LAW:

Greek law distinguishes between traders and nontraders. Traders are persons engaged in trading transactions as their regular occupation or certain legal or natural persons designated as traders by statute. Traders must keep certain books which, if regularly kept, may be received as evidence in suits between traders relating to commercial matters. Traders are under conditions liable to personal detention for enforcement of judgment entered against them for their commercial debts. Only traders may be declared bankrupt. Oral evidence may be used as proof in commercial suits.

3.03 COMMERCIAL REGISTER:

Merchants and commercial companies must file certain data with General Commercial Registry as of Jan. 7, 2008.

3.04 CONSUMER PROTECTION:

Under Law 2251/1994 on product liability, manufacturer and his agent, are liable not only when product is not manufactured in accordance with applicable regulations but even in absence of fault if any person (not just consumer) has suffered damage to health. Law 2251/1994 has been modified by Law 3587/2007 which implemented EU Directive 2005/29 regarding unfair commercial practices in internal market.

Presidential Decree 182/1999 implemented EU Directive 94/47 on protection of buyers as to certain aspects of contracts concerning acquisition of right to use properties under time-sharing scheme.

3.05 CONTRACTS:

Principles governing Greek law of contracts differ in many respects from principles prevailing in U.S. Three elements are essential to validity of a contract: (a) consent of the parties; (b) legal capacity to contract of both parties; and (c) an object not contrary to law or public morals. In certain cases, “cause”, the equivalent of consideration, is also required.

Contracts for benefit of third parties are valid and generally the third party acquires a direct right of enforcement against debtor.

The principal claim of the creditor is performance (specific performance in American terminology). A claim for damages is a subsidiary claim.

Contracts may be either oral or in writing. Oral contracts are valid without any formality but oral testimony is not sufficient to prove a claim exceeding [Euro]5,900 unless it is commercial transaction. Further, oral contracts may not be concluding concerning considerable number of transactions such as sale of land, etc. Written contracts may be made either privately as simple contracts or by formal instrument before notary public. Contracts concerning considerable number of transactions such as sale of land, disposal of estates, etc., must be notarial contracts.

Excuse for Nonperformance.

Nonperformance of a valid contract may be excused, mainly (a) if performance of the contract has become impossible due to a cause for which debtor is not responsible, (b) if debtor has retained right to withdraw from the contract, and (c) if the other party is obliged to perform first his prestation and has not done so. Also, nonperformance may be excused in certain circumstances if performance may cause undue hardship to debtor (Art. 388 C.C.) and if to demand performance may be considered as an abuse of a right (Art. 281 C.C.)

Applicable Law.

Under Art. 25 C.C., law applicable to the contract is the law to which parties submitted themselves; failing such submission, contract is governed by "the law appropriate to the contract in view of the specific circumstances," which seems equivalent to English "proper law" doctrine. Greece has ratified International Convention of Rome of 19.06.1980 which determines applicable law in contractual obligations between contracting parties within Member-States of European Union.

Public Contracts.

In certain cases, especially for concessions, public contracts are ratified by law and usually performance bond is required. Greek law acknowledges administrative contracts as special category of contracts, and allocates disputes arising from them to Administrative Courts. (Laws 1406/1983 and 2717/99). Different sets of rules govern award of contracts for supplies, works and services. Presidential Decree 60/2007 implemented EU Directive 2004/18 on coordination of procedures for award of public work contracts, public supply contracts and public service contracts. Presidential Decree 57/2000 as amended by Presidential Decree 104/04, implemented EU Directive 93/38 on coordination of procedures for conclusion of contracts in sectors of water energy, transport and telecommunications. See also topic 3.12 Telecommunications; and category 14 Foreign Trade and Commerce, topic 14.04 Foreign Investment.

Filing with Tax Authorities.

Under Law 4085/1960 as amended by Law 1828/1989, private lease agreements concerning immovable property over certain amount and in certain areas, must be filed with taxation authorities within 30 days, otherwise are invalid.

By virtue of Ministerial Decision 1065606/2000 a detailed list of contracts concluded between parties one of which is engaged in commerce or profession, must be filed until 20th of Jan., Apr., July and Oct. of each year with proper tax authorities, otherwise contracts are invalid.

3.06 FRAUDS, STATUTE OF:

Greece has no statute of frauds. See also topic 3.05 Contracts.

3.07 INFORMATION TECHNOLOGY, INTERNET AND NEW MEDIA:

Computer Software.

Art. 5.2c of Law 1733/1998 on patents provides that computer software is not considered as invention and consequently is not subject to above law.

Software products are protected as copyrights pursuant to Law 2121/1993 on intellectual property which implemented EU directive 91/250/EC on computer software protection. Specific provisions on software exploitation rights are included. Should software be created by employee in course of his employment, exploitation right is transferred to his employer.

Database Protection.

EU directive 96/9/EC on protection of databases of Mar. 27, 1996 is implemented by Law 2819/2000, which introduced art. 45A in Law 2121/1993 on intellectual property and relevant rights.

Digital Signature.

Existing legal framework on electronic signature is quite insufficient. Art. 14 of Law 2672/1998 as amended by Law 3230/04, regulates only electronic mail circulating among public services.

EU directive 1999/93/EC on digital signature, implemented by Presidential Decree, introduces specific procedures of accreditation and certification and recognizes legal effect of electronic signatures.

Domain Names.

The National Committee of Telecommunications and Post Offices is the competent authority for administration of domain names “gr”. However, Committee authorized Technology and Research Foundation (TRF) of Iraklio Crete to manage domain names and is in charge of whole administration procedure (contracts, control of domain names, registration of domain names, etc.). Conditions to register domain name are determined by Committee's decisions. Name must contain at least three and at maximum 24 alphanumeric characters and cannot begin or end with [-]. There is exception to this rule relating to names which are already trademarks of products or services and thus may contain less than three characters.

Geographical names can only be registered on behalf of local administration authorities. In case of conflict, dispute is referred for conciliation before TRF. Failing to resolve conflict dispute is referred to EETT.

If interested parties consider that their dispute is nor properly settled, they may thereafter bring their dispute before court.

As of Apr. 5, 2004 Technology and Research Foundation (TRF) administrates Register for registration of domain names “gr”.

Electronic Commerce.

E-commerce is basically regulated by general provisions of civil and commercial law. All e-commerce services are subject to EU directive 00/31/EC applying only to providers established within EU and providing for establishment of service providers, rules governing on-line contracts, intermediaries liability, commercial communications and procedural matters.

Aforementioned directive has been implemented by Presidential Decree 131/03.

3.08 INTEREST:

Legal interest, as well as interest which is due in case of default of payment, is, as of Sept. 7, 2008, 12.25%. Rate of agreed interest cannot exceed 10.25%.

When no interest has been agreed on, it is not due, as a rule, before proper notice of payment is given to debtor, but there are certain exceptions. Thus interest is due automatically when certain date has been stipulated for payment.

The rate of interest on monies due by the State is 6%, unless otherwise agreed by special contract or an act of Parliament.

Under Geneva Convention, rate of interest on foreign drafts is 6% p.a. Clause contained in draft for payment of interest is invalid under said Convention.

Usury.

An agreement for payment of an usurious rate of interest is invalid as to excess over lawful rate. Usurious interest paid may be recovered.

3.09 LICENSES, BUSINESS AND PROFESSIONAL:

Exercise of most professions and trades as well as the operation of factories etc., are subject to licenses. See also category 17 Intellectual Property, topic 17.02 Patents.

3.10 MONOPOLIES, RESTRAINT OF TRADE AND COMPETITION:

Monopolies.

Law 703 of 26.09.1977, as amended and completed by laws 1934/1991, 2000/1991, 2296/1995, 2837/2000 and 3105/03 is governing control of monopolies and oligopolies and protection of free competition.

Competition Commission is established, as independent administrative authority, which controls application of law and whose decisions are subject to appeal before administrative courts.

Abuse of dominant position in national market shall be prohibited.

Concentration of enterprises (i.e. merger, acquisition of control) is not prohibited as such. However, concentrations have to notify (pre-merger notification) Competition Committee within ten working days from initial agreement to proceed to concentration (if aggregate nationwide turnover of all undertakings concerned is more than [Euro]150 million and at least two of undertakings concerned realise in Greek market each turnover of [Euro]15 million). Concentrations can be prohibited by Competition Committee, in case they restrict competition in national market significantly. Exception can be ordered by Ministers of Commerce and National Economy, if particular reasons exist.

Penalties are inflicted upon those violating provisions of that act.

Concentrations of EU dimension are subject to control by Commission of European Union.

3.11 SALES:

Sale contract is valid if parties are in agreement as to property sold and sale price. For sale of real property and vessels notarial act is required. Sale does not effect transmission of ownership of personal property sold unless latter has been delivered. In case of real property or other real rights ownership passes upon registration of respective contract with proper registry of real property.

Warranties.

Vendor warrants buyer against dispossession. Vendor is responsible if property sold has defects affecting its value or its use or if it does not possess warranted qualifications; but is not responsible for defects known to buyer at time of sale or for absence of warranted qualifications if such absence was known to the buyer.

In all cases where vendor is so responsible, buyer may claim return or reduction of price. Buyer may also claim damages for absence of warranted qualities or for defects which were known to vendor.

Conditional Sales.

A sale may be made on condition that the title remains vested in the vendor until the purchase price has been fully paid.

Notices Required.

As a rule, notice of a sale is required only in the case of sale by forced auction.

Applicable Law.

See topic 3.05 Contracts.

3.12 TELECOMMUNICATIONS:

Greece has implemented EU legislation concerning deregulation of telecommunications sector.

By virtue of Law 2668/1998 as amended by Law 3185/03 on organisation of sector regarding provision of postal services, respective sector has been partially deregulated.

Presidential Decree 156/1999 was issued for amendment of Law 2246/94 and of Presidential Decree 40/96 in compliance with EU Directive 97/51 concerning amendment of Directives 90/387 and 92/44 for adjustment of telecommunications sector to competitive environment.

Presidential Decree 181/1999 implemented EU Directive 98/10 regarding provision of open network (ONP) in voice telephony and for introduction of competitive conditions in provision of universal services.

Presidential Decree 100/2000 harmonised Greek radio-television legislation with provisions of EU Directive 97/36 which amended provisions of EU Directive 89/552 concerning provision of television services.

Organisation and operation of telecommunications is regulated by Law 3431/2006. The National Committee on Telecommunications and Post Offices (EETT) is competent authority for granting licences in sector. EETT issues specific regulations for application of provisions of Law 3431.

By Law 3155/03 Greece ratified Convention concerning International Telecommunication Satellite Organization—ITSO.

4 CITIZENSHIP

4.01 ALIENS:

See category 16 Immigration, topic 16.01 Aliens.

4.02 IMMIGRATION:

See category 16 Immigration, topic 16.02 Immigration.

4.03 NATIONALITY:

See category 16 Immigration, topic 16.02 Immigration.

5 CIVIL ACTIONS AND PROCEDURE

5.01 ACTIONS:

There is no distinction in Greece between law and equity. Code of Civil Procedure, an enactment (Compulsory Law 44/1967) which entered into force on Sept. 16, 1968 forms basis of procedural law. Code has been considerably amended by Law Decrees 657/1971, 958/1971, 490/1974, Law 1478/1984, Law 1562/1985, Law 1649/86, Law 1682/87, Law 1738/87, P.D.

278/87, Law 1816/88, Law 1858/89, Law 1867/89, Law 1868/89, Law 1941/91, Law 2145/93 and recently by Laws 2915/01, 3043/2002, 3084/2002, 3189/03 and 3147/03. Furthermore, Law 3226/04 provides new framework on legal aid.

Commencement.

As a rule, an action is commenced by filing with appropriate court and subsequently by serving same on defendant.

Parties.

Every action must be prosecuted in name of the real or interested party except that guardians and certain other persons authorized by law may sue or be sued in their own name.

Intervention.

Any third party having a lawful interest may intervene in any suit without previously obtaining permission of court.

Limitation of.

See topic 5.06 Limitation of Actions.

Proof of Foreign Law.

Foreign law may be taken cognizance of by courts ex officio but usually proof of what such law consists of must be submitted. Institute for International and Foreign Law of Athens renders opinions on foreign law which courts accept.

Appeal.

As a rule, an appeal against a judgment of a court of first instance lies as of right and no permission of court which issued judgment is required for the exercise of an appeal.

5.02 APPEAL AND ERROR:

See category 6 Courts and Legislature, topic 6.01 Courts.

5.03 DEPOSITIONS AND DISCOVERY:

Depositions may be made under oath either before a notary public or before a Justice of the Peace. It is possible also for a deposition to be made before a U.S. consular officer in Greece for use in the U.S. Greek courts may request American courts and vice versa to take testimony under a “commission rogatoire.” Depositions abroad may be taken before Greek consular officers. See also category 9 Documents and Records, topic 9.02 Affidavits.

5.04 FOREIGN JUDGMENTS:

Code of Civil Procedure provides in Art. 905 for enforcement of foreign judgments in Greece.

Under said Art. 905, a civil judgment issued by a foreign court may be enforced in Greece if it has been previously declared executable by a decision of proper Greek court. Such Greek court is single member court of first instance of domicile, or failing domicile, of residence of judgment debtor or, in absence of either domicile or residence, single member court of first instance of Athens.

Courts will declare a foreign judgment enforceable in Greece if: (a) It is enforceable according to law of state whose courts issued it; (b) it is not contrary to good morals or public policy in Greece; (c) court which issued it was, under Greek law competent to deal with matter; (d) party which lost case was not denied right to defend itself and, generally, to appear before courts, unless such denial was made pursuant to a provision which applies also to nationals of state whose courts issued judgment; and (e) it is not contrary to a previous decision of a Greek court, pronounced in same case and constituting res judicata for litigants between whom judgment was issued. Greece has ratified International Convention of Brussels of 27.09.1968, which determines international jurisdiction of courts of member-states and simplifies recognition and execution of foreign judgments.

It should be noted that Brussels Convention has been replaced (with some exceptions) by Regulation 44/2001 (EC).

Art. 906 of Code of Civil Procedure provides that foreign arbitration awards may be enforced in Greece if provisions of Art. 903 of said Code are met.

Enforcement of Foreign Arbitral Awards.

Greece is party to Geneva Protocol of 1923 and Convention signed in Geneva on Sept. 26, 1927 concerning enforcement of foreign arbitration awards. Greece has also signed and ratified by Law Decree 4220 of 19/19 Sept. 1961 International Convention on the Recognition and Enforcement of Foreign Arbitral Awards, signed in New York on June 10, 1958 and annexed Protocols 1, 2 and 3. Greece applies this convention on basis of reciprocity. Greece has ratified International Convention of Washington of 16.03.1966 for regulation of disputes related to investments between states and foreign citizens.

Law 3171/2003 ratified Hague Convention of 1973 on recognition and enforcement of decisions relating to maintenance obligations.

Subject to provisions of international treaties, under Art. 903 of Code of Civil Procedure, foreign arbitration award is considered as res judicata in Greece provided: (a) Submission to arbitration was validly made, and, according to Greek law, matter may be dealt with by arbitration, (b) award is final and no recourse against its validity is pending, (c) party which lost had not been denied right to defend itself, and (d) award does not conflict with decision of Greek Court on same matter constituting res judicata between parties or with public policy and good morals.

5.05 JUDGMENTS:

See topic 5.04 Foreign Judgments.

5.06 LIMITATION OF ACTIONS:

As a rule the period for limitation of actions in civil and commercial proceedings is 20 years but there are many exceptions. The most important are the following:

Five years limitation applies to claims of tradesmen; industrials and artisans, in respect of goods delivered and work performed; to claims of people who engage professionally in agriculture, breeding of livestock, fishery and forestry for goods supplied; to claims of carriers for goods carried; to claims of hotel keepers and restaurateurs in respect of accommodation and food supplied to their customers; to claims of servants and workers for their salaries and wages; to claims of teachers for their fees; to claims of physicians, midwives, notaries public and attorneys for their fees and costs; to claims for dividends and arrears of interest or rent; to claims for resolution of sale or reduction of sale price or account of defects of goods sold or absence of qualifications stipulated by vendor regarding immovables; and to patents and life insurance claims.

Three years limitation applies to the claim of the bearer against the acceptor of a bill of exchange or the maker of a promissory note, and to claims arising from unlawful competition.

Two years limitation applies to claims for resolution of sale or reduction of sale price or account of defects of goods sold or absence of qualifications stipulated by vendor regarding movables.

One year limitation applies to claims for subsidies due by the state and to claims of the bearer against the drawer and endorsers of a bill of exchange and the endorsers of a promissory note; also to salvage claims.

Six months limitation applies to claims of endorsers against drawer and other endorsers of a bill of exchange.

Commencement of Period.

Period of limitation, as a rule, starts with accrual of claim, but in certain cases, such as insurance claims and salvage, from expiration of year in which claim accrued.

Torts.

Period of limitation for claim arising out of tort is five years commencing from date on which injured party became informed both of damage and of the tort-feaser, but period of limitation cannot exceed 20 years from date of commission of tort. If tort constituted punishable offence which under penal law is subject to longer period of limitation such period applies also to any claim of damages which may accrue as result of such offence.

Limitation is interrupted by commencing an action, by an acknowledgment of the debt, by the registration of a hypothec and by the service of a writ of payment.

5.07 PRESCRIPTION:

See topic 5.06 Limitation of Actions.

5.08 PROCESS:

If service of a writ or any other document is required to be effected in Greece in accordance with the Greek law, it has to be done through a proper process server who is an officer of the court. The process server after the service has been effected issues a certificate of service in which the document served is adequately described. If the process server cannot find at the address of the party to be served any person to whom the document to be served can be duly delivered, the document is affixed at the said address in the presence of one witness.

Both the document to be served and the certificate of the process server have to be in Greek. If a document in a foreign language is desired to be served in accordance with the Greek law by a process server it will have to be translated into Greek.

If service in Greece of a writ or other document before a U.S. court is required and it is sufficient in eyes of that court that document be served in accordance with laws in U.S., practise in Greece is for service to be effected by delivery of document to person to be served therewith and for person effecting service to sign an affidavit before U.S. Consulate. If document to be served cannot be adequately described in affidavit, it must be annexed to same. It is therefore advisable to send to person who will undertake service at least two copies of document to be served.

Greece is party to Hague Convention of Nov. 15, 1965 on Service Abroad of Judicial and Extra-judicial Documents in Civil and Commercial Matters.

5.09 SEQUESTRATION:

Court may order property in dispute, or debtor's property which has been attached, placed in custody of third party or even in custody of one of parties as trustee.

6 COURTS AND LEGISLATURE

6.01 COURTS:

Judicial power is exercised by Courts of Law. Judicial independence is basis for judicial review of constitutionality of laws and of constitutionality and legality of statutory instruments.

There are in Greece, administrative, civil and criminal courts of law. Council of State is administrative court of first and last instance with jurisdiction over applications for review of administrative acts. It is also Supreme Court which decides final appeals against judgments of lower administrative courts. These courts are of first and of second instance.

Civil courts adjudicate all “private disputes” as well as cases of non-contentious proceeding.

As a rule, final judgment of tribunal of first instance is subject to appeal before proper court of appeal having jurisdiction on matter. Against judgment of court of appeal, a further appeal is allowed before Supreme Court (Arios Pagos) of Athens on points of law only. If judgment of court of appeal is reversed by Supreme Court, case is again referred to another court which is, as a rule, a court of appeal other than one which pronounced judgment reversed.

There are no special commercial courts. Petty cases are tried by lower courts called courts of peace.

An action on a bill, a promissory note or check is tried by single member of court of first instance or by a justice of Court of Peace under a summary procedure.

Under Art. 623 of Code of Civil Procedure, an order of payment may be obtained for monetary claims if such claims are based on a public or private document.

Administrative and taxation matters are dealt with by special administrative courts, highest of which is Council of State and are settled by Administrative Procedure Code which came into force on 17.7.1999 by virtue of Law 2717/99.

6.02 LAW REPORTS, CODES:

Greece is a country of codified law, i.e., only provisions set forth in enactments are considered as law; no decisional or judicial law, i.e., law by precedent, exists and doctrine of stare decisis is unknown except now under amendment of law in certain cases of judgments of Supreme Court (Arios Pagos). Lower courts are independent and are not bound by precedent except in above-mentioned case. However, decisions of higher courts are frequently cited and followed by lower courts not as law but on account of their reasoning and persuasive force.

Official publication of all law is made in Government Gazette. There are no official publications of reports or decisions of the courts (except in case of decisions of Conseil d'Etat) but many collections of such decisions exist as well as a considerable number of law journals which publish same.

At present there are various codes in force including a Civil Code, Commercial Code, Criminal Code, Civil Procedure Code, Administrative Procedure Code, etc., and various other codes are being prepared.

6.03 LEGISLATURE:

Under Greek Constitution, legislative power is exercised by Parliament and President of Republic. In normal cases powers of President are confined to promulgating and publishing acts of Parliament. Within limits of Constitution (especially those drawn by provisions on human rights) Parliament is subject to no restraint regarding what and how to legislate.

Delegation is allowed except where Constitution requires "formal Law" that is, act of Parliament, instead of simply a "law", which may also be any statutory instrument.

As a rule, such "formal laws" are needed for imposition of taxes, but also in many important areas, including "exercise and protection of individual rights".

See category 1 Introduction, topic 1.02 Government and Legal System.

6.04 REPORTS:

See topic 6.02 Law Reports, Codes.

6.05 STATUTES:

The Civil Law in Greece was, until recently, the old Roman Law, as amended by the Byzantine Law, but many matters, such as divorce, wills, intestate succession, acknowledgment of illegitimate children, guardianship of minors, insane persons and prodigals, hypothecs, pledges, interest, etc., had been settled by special laws.

A new Civil Code came into force on Feb. 23, 1946. For a brief period in 1946 (Feb. 23 to May 10) another Civil Code was in force but was abrogated retroactively on May 10, 1946. Also, a new Penal Code and a new Code of Criminal Procedure have come in force as from Jan. 1, 1951.

There also is a Commercial Code, a Shipping Code, Bankruptcy Code, and a Code of Civil Procedure.

Where a statutory citation has two dates, first is date of signature, second is day of publication of enactment in Government Gazette.

See also topic 6.02 Law Reports, Codes.

7 DEBTOR AND CREDITOR

7.01 ASSIGNMENTS:

An assignment may be affected by agreement, by operation of law or by judgment of court. Assignment of claim is not binding upon debtor until he receives notice of assignment. As a rule, assignor is responsible for validity of claim assigned but is not responsible for solvency of debtor.

Special rules apply to assignment of negotiable instruments. Claims which cannot be garnished (see topic 7.08 Garnishment) are not assignable.

7.02 ASSIGNMENTS FOR BENEFIT OF CREDITORS:

Assignment and Pledging of Business Claims (Law 2844/2000).

Written assignment or pledge of business claims (except of claims against consumers) may be registered into special book kept at mortgage registry of assignor's or pledger's domicile. Following such registration priority among concurrent assignees or pledgees is governed by date of registration. After notification of registration to debtor, latter is obliged to pay to assignee or pledgee whose right is superior according to time of registration. In case that claim in question extends to price to be paid for future sale of products, which have been sold to claimant with credit by initial seller, pledge or assignment is superior even to prior rights over claim. Object of assignment or pledge by registration may either be future claims, even if their constituting facts have not yet occurred, provided that claims may already be determined, or group of claims, determined as whole, while it is not necessary to determine individual claims.

See topic 7.04 Bankruptcy.

7.03 ATTACHMENT:

A creditor may obtain attachment of his debtor's property by virtue of an executory title. Following are considered executory titles: (a) Final judgments of Greek courts or judgments of Greek courts which have been declared immediately executable, (b) arbitration awards, (c) certain official records of courts, (d) notarial documents, (e) certain special orders of courts, (f) foreign judgments which have been declared executable by Greek courts, and (g) certain other titles recognised as executable by law. Certain assets may not be attached.

7.04 BANKRUPTCY:

Law 3588/2007, ``Bankruptcy Code'', governs insolvency of traders, which term includes also trading corporations (limited partnerships, unlimited partnerships, limited companies, companies of limited liability and co-operative societies). Traders are sole category of persons that may be declared bankrupt. A trader who suspends payment of his debts, or who makes a statement to secretary of proper court that he suspends such payment is in a state of bankruptcy and may be declared bankrupt by court of its own motion, or upon application of such trader or of any of latter's creditors.

A deceased trader may be declared bankrupt within one year from his death if he had suspended the payment of his debts prior to his death. The bankruptcy of a limited or unlimited partnership involves also the bankruptcy of the partners whose liability is unlimited.

Bankruptcy may be fortuitous, culpable or fraudulent. In the two latter cases the bankrupt is liable to prosecution under the penal law, and special provisions apply.

Procedure.

Bankruptcy judgment appoints a rapporteur judge and also a provisional receiver (provisional syndic) pending appointment of definitive receiver (syndic) decrees that bankrupt's property be sealed, fixes date and place of first meeting of creditors for purpose of electing definitive syndic and for declaration of claims, and orders publication of notices relating to bankruptcy. Same judgment may also fix date on which payment of bankrupt's debts is deemed to have been suspended but this date may not be earlier than two years prior to judgment.

Effects of Bankruptcy.

From date of bankruptcy: (1) Bankrupt is divested of administration of his property, which is entrusted to syndic; (2) all proceedings against bankrupt other than such as are instituted by syndic are suspended, with exception of proceedings taken against bankrupt by creditors whose claims have become due and are secured by hypothec, pledge or lien; (3) all claims against bankrupt become due, subject to those secured by hypothec, pledge, or lien; (4) interest ceases to accrue against bankrupt, except interest due on claims which are secured by hypothec, pledge or lien; (5) all transactions concerning estate subject to bankruptcy effected by bankrupt after bankruptcy judgment are void, as far as creditors are concerned.

Transactions Prior to Bankruptcy Judgment.

Certain transactions effected prior to judgment during a period commencing on date on which bankrupt is deemed to have suspended payment of his debts, and ending on date of judgment, are void. Thus, following are void: Transactions without any consideration whereby movable or immovable assets of bankrupt are reduced; all payments whether in cash or by assignment, sale, set off, or otherwise made in respect of debts prior to their maturity, as well as all payments in satisfaction of matured debts other than by cash or by bills of exchange or promissory notes; all hypothecs (whether effected on strength of an agreement or of judgment of court), provisional hypothecs and all pledges constituted on property of debtor which have been obtained for purpose of securing a debt contracted prior to constitution thereof. If however such hypothecs and pledges have been constituted in favour of a bank or certain credit institutions, they are not affected by bankruptcy. Other transactions effected during same period may be declared void by court.

Claims must be submitted for verification to secretary of court or syndic within certain time limits.

If any claims are submitted after expiration of said time limits and are duly verified, they are entitled only to such dividends as are distributed after their submission.

Termination of Bankruptcy Proceedings.

Bankruptcy proceedings, unless a composition is effected under terms of Reconstruction Plan are terminated either by liquidation of bankrupt estate (as whole or asset-by-asset) or by an order of court terminating bankruptcy if no funds are available for continuation of same.

Revocation of Judgment.

Bankruptcy judgment may be revoked by same court which pronounced bankruptcy, on application of bankrupt debtor if all creditors who have filed with court give their consent thereto.

Compositions under Reconstruction Plan.

Under Bankruptcy Code, bankrupt or syndic may draft Reconstruction Plan for enterprise of bankrupt. In such Reconstruction Plan based on analysis of total financial status of enterprise, best solution for future of enterprise is proposed, taking into consideration interests of creditors and amounts they might receive following liquidation of assets of enterprise. Reconstruction Plan might provide for continuation of business of bankrupt, for sale of business as whole, or for liquidation of each of its assets.

Reconstruction Plan is subject to approval by creditors. A composition based on terms of Plan is binding upon creditors only if it is agreed by a 60% majority of total of creditors, which 60% should include at least 40% of creditors secured by hypothec, pledge, or lien.

No composition is binding unless certain formalities have been complied with, and it has been confirmed by the court. Court could reject Plan on various grounds, among which if Plan does not serve best interests of creditors. The Reconstruction Plan may likewise be set aside by the court, if the bankrupt fails to execute the terms of the composition concluded.

Rehabilitation.

A bankrupt is rehabilitated on expiration of ten years after bankruptcy judgment, if latter is followed by a judicial composition, or prior to that date if bankrupt has paid to creditors in full both principal and interest or obtains a complete release from them. Rehabilitation may also be granted by court if bankrupt has fulfilled all terms of composition agreements and in some other special cases. Court might decide that assets acquired by bankrupt after his rehabilitation cannot be attacked by bankruptcy creditors.

Effect of Bankruptcy Proceedings on Rights of Participants to Multilateral System of Transfer of Orders.

Pursuant to Law 2789/2000, insolvency proceedings shall not have retroactive effects on rights and obligations of participant arising from, or in connection with, its participation in multilateral system of transfer of orders, earlier than moment of opening of such proceedings against another participant to system. Moreover, rights of participant to collateral security provided to it in connection with multilateral system, and central banks of Member States of EU or European central bank to collateral security provided to them, shall not be affected by insolvency proceedings against participant or counter-party to central banks of Member States or European central bank which provided collateral security. Such collateral security may be realised for satisfaction of these rights.

Effect of Bankruptcy on Set-off and Derivative Financial Instruments.

In case of bankruptcy or other collective measures or procedures which amount to prohibition or restriction of right to dispose of rights, set-off of mutual claims, including multilateral and close-out netting, resulting out of either transactions between contracting parties, which at least one of them is financial institution, or of transactions on over-the-counter derivative instruments, is valid and enforceable as against all creditors, provided that said set-off is governed by written agreement, concluded prior to initiation of bankruptcy or collective liquidation measures, or proceedings and date of said agreement is placed on record in accordance with special rules provided by law.

See also category 3 Business Regulation and Commerce, topic 3.02 Commercial Law.

7.05 EXECUTIONS:

Enforcement of pecuniary judgments may be obtained by seizure of debtor's immovable and movable property and sale of same under forced auction, and in certain cases by his personal arrest. Judgment in respect of pecuniary debts may also be enforced by means of forced administration of debtor's land property or business by a receiver appointed by court.

As a rule execution of a judgment of court of first instance is stayed pending decision of court of appeal.

Execution proceedings may be stayed by court.

7.06 EXEMPTIONS:

Art. 953, §§ 3 and 4 of Code of Civil Procedure provide for articles exempted from seizure. Further, art. 982 of said Code provides that inter alios, shares of participation in a partnership, wages, pensions, alimony and social insurance dues may not be attached, with certain exceptions when one fourth of same may be seized. See also topic 7.08 Garnishment.

7.07 FRAUDULENT SALES AND CONVEYANCES:

Apart from bankruptcy proceedings (which can be addressed only against traders) an alienation of property can be attacked by a creditor as void against him, if contracted by debtor with intention of prejudicing his creditors, provided that other party in favour of whom alienation was made, was aware of such intention of debtor and provided that debtor's property is not sufficient to satisfy creditor's claims. Knowledge by said third party of creditor's fraudulent intention is presumed if such alienation by creditor is made to a spouse or to certain of creditor's relations. This presumption applies if alienation was made during last year before attack.

7.08 GARNISHMENT:

A garnishment is effected by serving on garnishee of document containing exact description of title and claim under and for which garnishment is effected, amount or object for which garnishment is effected, an order to garnishee not to deliver to debtor and appointment of an address attorney. Garnishee must within eight days declare before justice of peace whether in fact he is in possession of sum or object garnished. Failure to do so within stipulated period is considered as a negative declaration. Garnishee is liable for any damages suffered by garnisher from his negative or incorrect reply.

Property Which May Not Be Garnished.

Salaries, wages, pensions and social insurance payments cannot be garnished unless in respect of certain claims for alimony and then only up to a certain proportion of amount of such salaries or wages.

There are also a number of other debts which cannot be garnished, including salaries with certain exceptions and amounts due to contractors.

Garnishment of Bank and Stock Accounts.

Further to landmark decision of Greek Supreme Court and according to Art. 24 of Law 2915/2001 (in force since Sept. 16, 2001) secrecy of bank and stock accounts is for first time abolished in favor of creditor having right to attach goods of account's holder, and to extent of money's sum, which is required for complete satisfaction of creditor proceeding to execution.

7.09 HOMESTEADS:

Do not exist in Greek law.

7.10 INSOLVENCY:

See topic 7.04 Bankruptcy.

7.11 LIENS:

Liens may be created either by contract (see topic 7.12 Pledges) or by provision of law. There is a considerable number of latter, including in favor of hotelkeeper on effects belonging to guests brought into hotel (Art. 838-839 Civ. Code); on certain agricultural products, including tobacco; for loans granted by banks; on articles brought into leased premises, for the lease (Art. 604-607 Civ. Code); on car which has caused damages for same under Law 3769/1929; on ships in certain cases; etc.

7.12 PLEDGES:

All pledges must be constituted under a notarial document or a private indenture, and in the latter case the date of such a document must be placed on record in accordance with special rules provided by the law.

No pledge is valid unless property pledged is placed in custody of creditor, or of a third person appointed by agreement between pledgor and pledgee (subject to provisions of Law 2844/2000).

In event of nonpayment, creditor may sell property pledged if pledge is confirmed by an executory title, failing which he may apply to court for an order for sale of property. Sale can be effected only by public auction, with exception of stock exchange securities which may be sold in stock exchange. If proceeds of sale are not sufficient to cover debt and costs of sale creditor may proceed against debtor for balance. Any agreement entitling creditor to retain property pledged or to sell same without above formalities is void if contracted before debt becomes payable. Same applies to any agreement whereby debtor is exempted in total or partly from formalities prescribed by law.

An assignable claim may be pledged under a document date of which must be placed on record in manner provided by law and notice of such pledge must be given to debtor.

Special facilities apply to pledges made in favor of certain banks in Greece, and also, subject to the obtention of a special licence from the Government, to pledges made in favor of Greek limited companies whose capital exceeds a fixed minimum, of certain limited or unlimited partnerships under certain conditions and of foreign limited companies.

Pledge on Movable Things Without Delivery of Possession.

In exception to common rules, pledge on movable things (even future ones or group of things) may be constituted without delivery of possession over thing, provided that creditor and debtor are business entities or professionals, and pledge is constituted for professional or business needs of debtor. Such pledge is constituted through registration of written agreement into mortgage register, competent according to domicile of pledger. Pledge constituted according to above procedure is superior to other pledges, subsequently registered, but it is inferior to pledges previously constituted according to common rules. Retention of ownership of title in favor of seller may also be registered according to aforementioned procedure and observation of equivalent formalities.

Applicable Law to Security Interest Over Financial Instruments.

Pursuant to Law 2789/2000, where securities (including rights in securities) are provided as collateral security (i.e. pledge, repurchase or similar agreement, or otherwise, for purpose of securing rights and obligations) to participants to multilateral system of transfer of orders and/or central banks of Member States of EU or European central bank, and their right with respect to securities is legally recorded on register, account or centralised deposit system located in Member State, determination of rights (in particular validity of constitution, enforceability and procedure of execution) of such entities as holders of collateral security in relation to those securities shall be governed by substantive law of that Member State.

7.13 STAY OF EXECUTION:

See topic 7.05 Executions.

8 DISPUTE RESOLUTION

8.01 ALTERNATIVE DISPUTE RESOLUTION:

Disputes of private law are usually resolved by court judgment after action has been brought before court. Alternate dispute resolution is achieved as follows:

Voluntary Resolution.

Compromise is concluded by persons who consent to resolve dispute by mutual concessions. There are two kinds of compromise: judicial compromise is effected by statement before court or notary public, while trial is pending. If statement is made by attorney who represents litigant, special power of attorney is required. After statement of compromise has been made trial is waived and records of trial whereby compromise was recorded constitute enforceable title. (art. 904 of Greek Code of Civil Procedure); extrajudicial compromise is contract which does not waive judicial proceedings but can provoke dismissal of action, if it is invoked as objection.

Mediation is exercised ex officio by judge of court of peace (see category 6 Courts and Legislature, topic 6.01 Courts) before commencement of proceedings. (art. 208 C. Civ. Pr.). Mediation can be also asked before trial by person who intends to bring action. If mediation succeeds, judicial compromise is drawn up. Otherwise judicial proceedings continue or action is finally brought before court.

Arbitration.

See topic 8.02 Arbitration.

Mandatory Resolution.

Effort to Compromise.

(art. 214A of Code of Civil Procedure, as am'd by art. 6, § 2 Law 2479/1997). When action is brought for private dispute which can be subject of compromise and falls within competence of multimember court of first instance, claimant has to invite defendant to try amicable resolution of dispute. If this condition is not fulfilled, action is dismissed. If meeting of litigants turns into compromise, record is ratified by competent judge and constitutes enforceable title. Otherwise judicial proceedings continue.

Obligatory Arbitration.

Disputes which arise between Greek State and investors of foreign capital under application of laws for protection of foreign investments (Laws 2687/51, 4171/61, 849/78, 1262/82, and 1892/90) must be obligatorily resolved by arbitration. See category 14 Foreign Trade and Commerce, topic 14.04 Foreign Investment.

8.02 ARBITRATION:

Arbitration is governed by arts. 867-903 of Code of Civil Procedure, as currently in force.

Private disputes can be resolved by arbitration (except from labour disputes).

Conditions of arbitration are that parties consent in writing (either before or after dispute arises) and that they are free to dispose object of dispute. State can consent to arbitration only after legal opinion by State Legal Council is given and joint decision by Minister of Economy and competent Minister is taken.

Arbitrators can be appointed persons of full capacity to contract and with political rights. Judge can be appointed as only arbitrator or as umpire subject to condition prescribed by Law. Remuneration of arbitrators is determined by law to percentage of dispute's award.

Arbitration procedure is determined by arbitrators. However principle of equality of parties and principle of audi alteram partem must be respected.

Arbitral decision is not subject to appeal but recourse to another arbitral court can be agreed upon. Decision produces precedent and constitutes enforceable title. Annulment of decision for reasons enumerated in law can be asked before Court of Appeal.

Institutional Arbitration.

By Presidential Decrees permanent arbitrations can be constituted in stock and commodities exchanges, in chambers and in professional unions of public law.

International arbitration taking place in Greece is governed by Law 2735/1999, by virtue of which Greece adopted, with minor modification, UNCITRAL Model Law.

Obligatory Arbitration.

See topic 8.01 Alternative Dispute Resolution.

Recognition and Execution of Foreign Arbitral Awards.

See category 5 Civil Actions and Procedure, topic 5.04 Foreign Judgments.

9 DOCUMENTS AND RECORDS

9.01 ACKNOWLEDGMENTS:

Documents acknowledged before a notary public or other authority in a foreign country cannot be used in Greece (in absence of treaty provisions to contrary) unless signature of notary or such other authority has been certified by proper Greek consular officer whose signature, usually, must be authenticated by Ministry of Foreign Affairs.

9.02 AFFIDAVITS:

Affidavits are not strict evidence. They should preferably be sworn before a Greek consular officer. If sworn before a commissioner of oaths, notary public or other authority in a foreign country, signature of such officer must be certified by proper Greek consular officer. Law Decree 105/1969 as supplemented by law 1599/1986, provides simplified form for solemn statement.

9.03 NOTARIES PUBLIC:

A notary public is appointed for life by the Minister of Justice and must be at least 28 years old and an advocate at the time of his appointment. The number of notaries in each town is limited and the powers of a notary are territorially limited.

Special duties of notaries include, inter alios, the engrossment of certain contracts (sale contracts, etc.) and of all the instruments which parties desire to make in authentic form, to preserve same on file as a record and to issue certified copies. They may accept sworn statements and may examine witnesses on commission in certain civil cases.

9.04 RECORDS:

See categories 2 Business Organizations, topic Partnerships; Business Regulation and Commerce, topic Sales; Debtor and Creditor, topic Pledges; Intellectual Property, topic Trademarks; Property, topic Deeds.

9.05 SEALS:

Seals are not used in private contracts. Only public authorities or officials, including notaries public have a seal. Use of seal by private person or corporation has no legal significance. Notarial instruments have most of effects of sealed instruments in U. S. A.

10 EMPLOYMENT

10.01 LABOR RELATIONS:

Minister of Labor supervises enforcement of labor legislation. Labor relations are dealt with both under the Civil Code (Art. 648-680) and under a considerable number of special enactments.

Wages and salaries and conditions of work are subject of written or oral contracts between employers and employees but pay rates cannot be less favorable than the ones provided by the respective Collective Labor Agreements and hygienic and safety conditions must be observed. Collective Labor Agreements are negotiated from time to time between Trade Unions and the respective Employers' Organizations and must be properly registered.

Employees as a rule must be engaged through Government employment agencies.

Minors under age of 14 may not be employed. Minors between ages of 14 and 16 may be employed after medical examination as to their fitness to work and only in certain kinds of work.

Normal working hours are 40 hours per week; in many cases however, shorter working hours are provided for and five day working week has now been established for state, banking and other employees. Persons working at night, overtime, and on Sundays are entitled to additional remuneration. After completing one year's employment, employees are entitled to annual paid holiday. Employees are entitled to pay even if absent from work due to sickness for period up to one month depending on time of their employment.

Employees engaged for a specific period may not be dismissed before expiration of such period unless for proper cause. Employees engaged for indetermined period may be dismissed without cause if they have been employed for over two months provided compensation fixed by law is paid to them; failure to pay such compensation renders dismissal void.

All persons in private employment must be insured with Social Insurance Organization (I.K.A.) and with Unemployment Insurance Fund.

Labor disputes are tried in first instance by special labor tribunals.

As a rule, strikes are permitted and, on principle, right to strike is protected by Constitution. (Art. 23 para. 2). Lock-outs, on principle are not permitted.

Trade unions are based on the right of association which is protected by Constitution and are governed by special legislation and the international conventions of which Greece is a party. Employers have their own organizations in the form of associations and federations which are organized either on a regional basis or by related industries.

Disputes are usually settled either by direct negotiations between employers' organizations and trade unions or by arbitration tribunals.

11 ENVIRONMENT

11.01 ENVIRONMENTAL REGULATION:

Protection of environment is provided by art. 24 of Constitution as mandate of State. Alteration of use of public forests is particularly forbidden, while at same time all forests which are destroyed, have to be obligatorily reafforested.

Centerpiece of Greek environmental law is Law 1650 of 15/16.10.1986, as completed by administrative statutes issued under its authorisation. Law 3010/2002 on harmonization of Greek environmental law with EU Law, transposed EU Directives 97/11 regarding assessment of effects of certain public and private projects on environment and 96/61 concerning integrated pollution prevention and control. Activities and works which may affect negatively environment cannot be permitted unless environmental assessment study is filed with administrative authority and is approved by it.

Air and sound pollution is monitored and combatted. Measures are taken for protection of waters, of land, for management of solid and hazardous wastes, radioactivity etc.

As regards protection of waters Protocol of co-operation to confront sea pollution cases 2000 enforced by Greek law 3100/2003 and Protocol 1997 of amendment of International Convention for Prevention of Ship Pollution 1973 enforced by Law 3104/2003. Moreover, National Programme of gas emission of greenhouse effect was introduced by decision of Cabinet Council No. 5/2003.

Territories of natural beauty and originality and areas of special historical interest can be put in special status of protection.

Rare specimens are protected. Downgraded areas are assisted.

Sanctions are inflicted against violators of provisions of law (imprisonment, fines and indemnity).

12 ESTATES AND TRUSTS

12.01 DEATH:

Presumption of death may be established by an order of court and at application of any person whose rights are dependent on such death. Such presumption is admitted by court if person in respect of which presumption has been applied for has disappeared whilst being in danger of his life or if no information has been received from him for a considerable time. Application cannot be submitted to court prior to lapse of at least one year from date of danger or at least five years from last information. If court considers evidence produced satisfactory, it pronounces party concerned to be presumed to be dead and at same time fixes date as from which such presumption starts operating. Should party presumed to be dead reappear, any person who has received any assets out of estate of presumed decedent is liable to refund same. See also category 21 Property, topic 21.01 Absentees.

Actions for Death.

A party who under law is responsible for decedent's death is liable to pay medical, nursing and funeral expenses to persons who under law have to bear such expenses. He is also liable to pay a compensation to any person who under law was entitled to receive alimony from deceased or to receive certain services from him (for instance those rendered by a wife to her husband by keeping house for him).

Party responsible for deceased's death has further to pay an indemnity to decedent's family. The law is not settled as to what members of such family are entitled to an indemnity, but in accord with a good authority such right is accorded to all members who were closely connected with decedent. The latter is a question of fact which has to be established by the court, but it is generally admitted that parents, spouse, issue, brothers and sisters have such right. These laws apply also to aliens. There is no statutory limit as to amount of indemnity. See also category 5 Civil Actions and Procedure, topic 5.06 Limitation of Actions, subhead Torts.

Death certificate may be obtained by application to the proper civil registry.

12.02 DESCENT AND DISTRIBUTION:

Movable and immovable property of a person dying intestate passes to his heirs in following order, subject, as a rule, to rights of surviving spouse, if any there be, each class of which a member is living taking to exclusion of subsequent classes.

(1) Descendants, which term includes legitimate issue, adopted children and their descendants, also certain classes of illegitimate issue. Descendants of first degree take in equal

shares, with certain exceptions. Descendants of second and following degrees succeed per stirpes, i.e., they step into share of their predeceased parent.

(2) Parents, brothers, sisters and the children and grandchildren of brothers and sisters. The parents, brothers and sisters succeed in equal shares. The children and grandchildren of predeceased brothers and sisters succeed per stirpes. Brothers and sisters of the half blood and their children and grandchildren, if they coinherit with parents or brothers and sisters of the whole blood or with children and grandchildren of such heirs, receive one half of the share of an heir of the whole blood of an equal degree.

(3) Grandfathers and grandmothers of the deceased and their children and grandchildren in the following order. (a) If the grandfather and grandmother of both lines are all alive they succeed in equal shares. (b) If the grandfather or grandmother of the paternal or maternal line are not alive, then the share of such deceased grandparent passes to his children and grandchildren. (c) If there is no surviving child or grandchild, then his share passes to the surviving grandparent of the same line and if such grandparent is not alive, to his children and grandchildren. (d) If there is no surviving grandparent of either the paternal or maternal line and there are no surviving children or grandchildren from such predeceased grandparents of same line then estate passes to surviving grandparents of other line or to children and grandchildren from same. In all above cases children succeed in equal shares and grandchildren per stirpes.

(4) Great grandfathers and great grandmothers of the deceased. These inherit in equal shares, irrespective whether they belong to the same or a different line.

Surviving spouse receives one fourth of estate if deceased leaves descendants; one half and certain personal chattels, if deceased, not leaving descendants, leaves other heirs; and whole of estate if deceased leaves neither issue nor other heirs.

Determination of Heirship.

A certificate of heirship termed “Klironomitirion” is granted by proper district court following a special procedure and at application of heir or heirs.

Advancements during decedent's life are taken into account only in the case of forced heirs. See topic 12.06 Wills.

Liability of Heirs.

Heirs are liable for debts of deceased in proportion to their respective share, but if they have accepted inheritance with “benefit of inventory” their liability is limited to extent of value of estate. An heir may however refuse to accept an undesirable inheritance. Renunciation of such inheritance must be made within certain period and before secretary of proper court.

Escheat.

If intestate left neither surviving spouse nor heirs, estate passes to state.

12.03 EXECUTORS AND ADMINISTRATORS:

See topic 12.02 Descent and Distribution.

12.04 FORCED HEIRS:

See topic 12.06 Wills.

12.05 TRUSTS:

Trusts, exploitation, meaning of American law, are unknown in Greece.

There is only one Greek law referring to Trust: Law 2961/2001 on Inheritance Taxation, Donation Taxation, etc. which in art. 17, para 4 provides that “on assets situated abroad, however acquired and taxed in Greece as long as by last will and testament of the deceased same have been placed under the management of a ‘Trust’ of the Anglosaxon law, the beneficiaries of the sums received from time to time are immediately taxed for such sums, unless they are relieved under another law provision, and the parties to which the estate will finally devolve are taxed for the full ownership acquired by them at the time of such acquisition”.

12.06 WILLS:

Persons mentally incapacitated and minors cannot make will.

Testamentary Disposition.

No limitations except those provided in favour of forced heirs. (See subhead Forced Heirs, infra.)

Form and Execution.

There are three principal forms of wills.

Holographic will must be written entirely by hand of deceased and signed by latter, no attestation being required.

Notarial will must be drawn by a notary public and signed by the testator in the presence of the same notary and three witnesses or one witness and another notary public.

Secret will as a rule must be signed by the testator but may be written by any other person or typed or printed and must be delivered by the testator to a notary public in a sealed envelope, such delivery being duly attested by the notary public in a special document which is signed by the testator, the notary public and the witnesses.

Special rules apply to military wills, to wills drawn on a Greek ship in the course of her journey or in a foreign port and to wills drawn during an epidemic or other extraordinary circumstances.

Probate.

There is no probate in American sense, but a will is published by court.

Witnesses.

A spouse, ascendants or descendants and collateral relations up to the third degree of the testator or a person taking a benefit under a will cannot act as a witness to such will when attesting is required.

Revocation.

A will is revoked by a special act of revocation which is drawn by a notary public in the presence of three witnesses. A holographic will may be also revoked if it is destroyed by the testator in person with the intention of revoking it. A secret will may be also revoked if the testator withdraws such will from the notary with whom it was deposited. Marriage does not affect a will made before marriage or in contemplation of marriage, except in so far as regards rights of spouse as a “forced heir.” (See subhead Forced Heirs, infra.)

Revival.

The revocation of a will whereby a previous will has been revoked effects the revival of such previous will.

Legacies.

Unless testator has provided otherwise a legacy is, as a rule, payable upon death of testator.

Lapse.

Legacy lapses if legatee predeceases testator.

Forced Heirs.

Certain heirs of testator are entitled to receive a portion of estate even against his will. These heirs are called “forced heirs” and their portion “statutory share.” Statutory share is equal to one-half of share which such heirs would have received if testator had died intestate. Such forced heirs are: descendants of testator (including adopted children and such of latter's descendants as were born after adoption, legitimized children and their descendants and certain classes of illegitimate children), and parents and spouse of testator, if such parties would have inherited from deceased if he had died intestate.

The forced heirs succeed to the testator in the same way as the heirs appointed in the will.

Forced heirs may be excluded from the testator's estate if they are properly disinherited by the testator on special grounds prescribed by the law. Under art. 21 of Law 1738/1987, restrictions concerning forced heirs do not apply to Greeks resident abroad for 25 years.

13 FAMILY

13.01 ADOPTION:

Adoption is now governed by Ch. 13 of Civil Code and by Law Decree 610 of 17/21 Aug. 1970 as amended by L. D. 193/1973, Law 1329/1983, Law 2447/1996, and 2721/1999. Adoption is accomplished by court judgment. Adoption must be in interest of adopted person. Adopting parent must have completed his 30th, and in certain cases, his 50th year of age. Court may in special cases allow person below age of 30 to adopt. Between adopting parents and adopted child there must be difference in age of 18 years or in case of adoption by one of spouses of other's child, 15 years.

Two or more minors may be adopted by same person, by same act or successively. If adopter is alien and person to be adopted Greek national, adoption must be effected with assistance of certain social service organisations.

Consent of person being adopted is required; if such person is a minor, consent of his parents, guardian or curator is required. Court may, in certain cases, provide such consent if said persons are unable or unwilling to do so; if person to be adopted is married, consent of spouse of such person is required. If adopting person is married, then consent of his spouse is required. Court can decide exception in certain cases.

Proceedings.

The adoption is effected by an order of the court. If the adopter is married, in addition to his own consent that of his spouse is also necessary. Consent is granted either before court or notary public or, if adopter is abroad, before Greek Consul.

Name.

Adopted person takes surname of adopting parent but he may add his own surname.

Effects of Adoption.

After adoption has been completed, legal liens between adopted person and his natural family are interrupted, with exception of some conflicts concerning marriage. Parental care is exercised exclusively by adoptive parents and never returns to natural parents. Adopted person and his descendants, provided latter have been born after adoption, inherit from adopting parents but not from relatives of adopting parents. Adopter does not inherit from adopted person, nor latter's relatives. Adoption may be dissolved by decree of court on certain grounds. Alien under age of 18, on adoption by Greek national, acquires Greek nationality. On being adopted by alien, Greek minor may be divested of his Greek nationality if by adoption he acquires nationality of his adopter and permission of Minister of Interior is obtained.

Illegitimate child may now be adopted by his illegitimate parent.

13.02 DESERTION:

See topic 13.03 Divorce.

13.03 DIVORCE:

Very considerable changes have been introduced in Divorce Law by Law 1329 of 15/18 Feb. 1983. Now divorce is granted if: (a) Marital relationship has been so strongly disturbed that continuation of marriage is intolerable for petitioner; this is presumed in case of adultery, bigamy, desertion or if attempt on life of spouse has been made; (b) spouses have lived apart for four years; (c) spouse has been declared by court to have disappeared and (d) both parties consent to divorce, provided marriage has lasted for at least one year.

Jurisdiction.

On principle, action for divorce is brought before tribunal of first instance of defendant's domicile; however, Greek courts are always considered competent to pronounce divorce when one of parties to marriage was Greek irrespective of domicile; further, Greek courts are considered competent to dissolve marriage if parties were resident within their jurisdiction.

Greek courts have no jurisdiction to pronounce divorce of aliens if according to law of nationality of both spouses such jurisdiction is not recognized.

Alimony.

Court may compel party to pay alimony if other party is unable to support him- or herself. Extent of such alimony is determined according to means of party liable to pay same and may be altered from time to time by court.

Law 3137/2003 agreement for applicable law to alimony obligations is provided by Greek Law.

Custody of children is determined by court. Parties may agree on terms of custody. Both parents retain right to communicate with child.

Support of Children.

Both parents are responsible for maintenance and care of children.

Foreign Divorces.

According to Greek Civil Code, divorce is regulated by law governing personal liens of spouses at time of initiation of procedure of divorce. Foreign judgments pronouncing divorce of Greek citizens are declared executable if foreign court has applied law governing divorce according to Greek law, if Court is competent pursuant to law of country whose material provisions apply and if such judgment is not contrary to public order.

13.04 HUSBAND AND WIFE:

Under recent enactment, Law 1329 of 16/18 Feb. 1983, there is now complete equality between spouses in marriage. Matters affecting marital life are determined jointly and, in case of disagreement, by court. Wife maintains her maiden surname but for social occasions may use her husband's surname or add it to her own. Each spouse contributes to marital expenses according to his or her means and ability.

Nationality of Wife.

An alien woman marrying a Greek now does not acquire automatically Greek nationality. Following Law 1438/1984 alien woman marrying Greek national who wishes to acquire such nationality must apply for and obtain it.

Property Relations.

Dowry has been abolished by Law 1329/1983.

On principle, on marriage, each spouse retains his or her property, there being as yet no community of property between them. However, on dissolution of marriage personal chattels used in household may be divided amongst spouses and court may award use of marital home to either party, irrespective of ownership of same. Further, there is presumption that 1/3 of property acquired during marriage (except through inheritance) has been acquired by party not owning it and may be claimed by latter.

Maintenance.

Both spouses must contribute to marriage expenses according to their means. If cohabitation is interrupted for proper cause, maintenance expenses are paid to spouse by other if former is unable to maintain him- or herself. Greece has signed and ratified by Law Decree 4421 of 7/11 Nov. 1964 International Convention signed in New York on June 20, 1956 concerning recovery abroad of maintenance.

13.05 INFANTS:

Majority begins with completion of 18th year of age. Minor of 15 may, with general consent of his parents or guardian conclude labor contract.

Actions.

Infant is represented in court by his parents or guardian. Parents may not proceed to certain actions particularly alienation of infant's property, without consent of court.

13.06 MARRIAGE:

Parties to marriage must be 18 years old; court may allow persons less than 18 years old to marry if there are strong reasons militating for this.

Consent required of parent or guardian or tutor for persons under 18 years of age. If they refuse, consent may be granted by court if necessary in interest of infant.

License of Mayor is required in order to perform either civil or Christian orthodox ceremony and is granted at application of proposed spouses and after previous publication of banns. Latter may be omitted if important reasons exist.

Ceremony.

Under Law 1250 of 3/7 Apr. 1982, marriage may be solemnized either by religious service or by civil ceremony. Civil marriages contracted between Greeks abroad prior to Law 1250/1982 are now recognized as valid unless new valid marriage has been contracted.

Annulment of marriage may be decreed by court on various grounds enumerated in Arts. 1350-1352, 1354, 1356-1357, and 1360 of Civil Code. (art. 1 of Law 1250/1982).

Children born out of an annulled marriage are legitimate, but children born out of a prohibited marriage between certain blood relations are assimilated to illegitimate children who have been voluntarily recognised by their fathers.

13.07 MARRIED WOMEN:

See topics 13.04 Husband and Wife, Marriage; category 12 Estates and Trusts, topics 12.02 Descent and Distribution, 12.06 Wills.

Under new constitution there is on principle complete equality between sexes. This has been legislated by Law 1329 of 16/18 Feb. 1983.

14 FOREIGN TRADE AND COMMERCE

14.01 CUSTOMS DUTIES:

Greece entered into EU on Jan. 1, 1981 and after expiration of five-year transitory period it has become full member effective Jan. 1, 1986. Goods imported from other EU countries are basically duty and tax free subject to minor exceptions. Imported goods from outside EU are subject to Common Customs Tariff (CCT) and classified as per Brussels Standard International Trade Classification of Commodities.

Import of products duty-free for manufacturing and reexport is allowed.

Tariff law was revised by Legislative Decree 4088/1960, as amended and currently in force. Rates are fixed either ad valorem or at fixed rates per weight. Classification of imports into above classes is effected in accord with certain rules fixed by above law. For visitors of Greece residing abroad franchise is granted as regards unused personal effects of value not exceeding $150.

14.02 EXCHANGE CONTROL:

See topics 14.04 Foreign Investment, Foreign Trade Regulations; category 1 Introduction, topic 1.01 Currency.

14.03 FOREIGN EXCHANGE:

See topics 14.04 Foreign Investment, Foreign Trade Regulations; category 1 Introduction, topic 1.01 Currency.

14.04 FOREIGN INVESTMENT:

For purpose of encouraging investment in Greece of capital imported from abroad, special facilities and guarantees are provided by Law Decree 2687 of 1953, as implemented by Law Decree 2928 of 1954 and Compulsory Law 916/1971. Term “Foreign Capital” includes not only foreign exchange, but also machinery and material, vessels exceeding 1,500 tons registered under Greek flag, inventions, technical methods and trademarks, provided that they are invested in productive enterprises. Art. 107, para. 1 of Constitution provides for protection of certain foreign investments in Greece.

More important of such facilities and guarantees are the following: (a) Bank of Greece has to provide necessary exchange for repatriation of capital and remittance abroad of interest and profits. Amount however of capital allowed to be repatriated cannot exceed for every year 10% of invested capital. Likewise amount remitted for interest cannot exceed 10% and for profits 12% of said capital. (b) Such enterprises established by investment of foreign capital may employ aliens for the higher posts of their technical and administrative personnel. (c) Certain facilities in respect of taxation, custom duties and municipal and other rates are provided. Also reduction of fees in respect of registration of hypothecs (mortgages), constitution of pledges, and of notarial duties. Following are inter alios also provided: (d) Freedom to export goods produced by such enterprises; (e) exemption from retrospective taxation; (f) right of these enterprises to keep their accounts in foreign currency imported to Greece; (g) equality of treatment with local similar enterprises; (h) exemption from compulsive expropriation; (i) exemption from all kinds of requisitions unless when Greece is in a state of war and then only in consideration of an equitable compensation to be established by agreement between Greek Government and respective investor.

All such facilities and guarantees are established every time by agreement between investor concerned and Greek Government which agreement is confirmed by decree or ministerial order. Such decree or order may not be amended without agreement of such investor.

Special taxation and other facilities have been extended by Law 4171/1961 to important productive investments of a value not less than 150 million drachmae (i.e. [Euro]440,205). Recently promulgated Law 3299/2004 on “Private Investments” provides various incentives and advantages for investors.

Administrative Authorities Competent for Support of Foreign Investments.

Various administrative authorities are competent to support and facilitate realization of foreign investments in Greece. Hellenic Center of Investments (EL.K.E.) in Athens (1) informs interested investors on legal, tax and finance regulatory framework of investments in Greece, (2) triggers beginning of administrative procedures for issuance of permissions necessary for realization of investment, provided either said investment raises to value of at least [Euro]9 million or at least [Euro]3 million of whole investment are foreign capital. In particular, EL.K.E. receives necessary particulars from investor, checks their completeness, forwards them to competent authorities and follows up administrative procedure. Issuance of required permissions is monitored by special Committee of the Ministry of National Economy and Finance and by Ministerial Committee. Later it may decide acceleration of administrative procedures and assign authority to decide to higher administrative levels.

See also topic 14.05 Foreign Trade Regulations; category 1 Introduction, topic 1.01 Currency.

14.05 FOREIGN TRADE REGULATIONS:

Exports.

As a rule a permission of Bank of Greece is required which is granted subject to certain conditions and formalities. Only persons duly registered with the proper Chambers of Commerce or Chambers of Industry may conduct export trade.

Imports.

All imports are now free with exception of certain goods for which proper permission is required, but all imports are subject to various formalities.

See also topic 14.04 Foreign Investment; category 1 Introduction, topic 1.01 Currency.

15 HEALTH

15.01 FOOD AND DRUGS:

Foodstuffs safety is governed by multitude of legislative provisions, emanating from both national and European Union authorities. Market police, special division of National Police, are in charge of control (including veterinary control) of production, distribution and importation of alimentary products. Failure to comply with foodstuffs safety regulation may result in fines or revocation of licenses.

Pharmaceutical products sold in Greece must have stable composition. Generic names of active substances contained in product must appear on label, beside or under commercial name of product. Different regulations apply for over-the-counter pharmaceuticals (OTC).

As for alimentary complements, their composition and production company must be mentioned on package.

Products approved by National Drugs Association (EOF) obtain licenses valid from two to five years and are renewable upon request of beneficiary six months before expiration of validity of license.

15.02 MEDICAL PROFESSION:

Medical professions are subject to regulations of relevant professional associations. Doctors (and other professionals of medical sector) who have obtained their qualification in Member State of EU may freely establish practice in Greece pursuant to presidential decree 84/86 which implemented EU directives 75/362, 75/363, 81/1057 and 82/76 as amended by Presidential Decrees 38/04 and 142/2007.

15.03 SMOKING REGULATION:

Smoking is forbidden in public buildings, however this prohibition is not strictly applied; although recent Ministerial Decision emphasized said prohibition. Steps have been taken for prohibition of smoking in private sector as well. Advertisement of tobacco products, although allowed in press and special road signs, is prohibited on TV and radio. Where allowed, advertisement must contain information on harmfulness of smoking. (See EU directive 2001/37 as implemented by Ministerial Decision Y1/266/2003 of Ministry of Health.) Tobacco products may also be promoted through special campaigns and sponsorships, including distribution of free cigarettes for promotional reasons.

16 IMMIGRATION

16.01 ALIENS:

Disabilities.

Aliens may not be employed or carry on any profession in Greece without special permission of State nor may they attest as witnesses to notarial contracts or be appointed arbitrators or guardians or minors of Greek nationality. They are also subject to a number of other disabilities. After Greece's adhesion to EEC, number of such disabilities have been removed for

EEC nationals. EEC residents are not considered as aliens.

Alien workmen, as a rule, are assimilated to Greek nationals with respect to social insurance and compensation for injuries.

Property.

Aliens may acquire immovable property by purchase or lease in all parts of Greece with exception of certain frontier provinces including number of Greek islands. Legislation has been introduced exempting European Community nationals from these restrictions. Mining rights may, however, be acquired by aliens in such provinces by special permission.

Corporations Owned or Controlled by Aliens.

On principle, Greek corporations may be formed, owned or controlled by aliens. However, foreign-owned corporations, including those formed and established in Greece, may not own land or lease it on long-term leases in frontier areas.

Cross-references.

See also topic 16.02 Immigration; categories 2 Business Organizations, topic Companies; Family, topic Husband and Wife; Transportation, topic Shipping.

16.02 IMMIGRATION:

Greek legislation on immigration differs considerably from such American legislation. Geneva's Convention of 1951 has been ratified by Legislative Decree 3989/1959 and is applicable in Greece. Right for non-EU aliens to enter, reside and work in Greece is subject to procedures provided in Law 2910/01, as completed by Law 3013/02 and Law 3386/2005. This law reflects EEC rules and in particular those enacted in Convention of Schengen. Greece has implemented by Presidential Decree 106/2007 EU Directive 2004/38 ``on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States''. See also topic 16.01 Aliens.

Nationality.

Code of Nationality (as now in force) governs acquisition etc. of Greek nationality. On principle, Greece accepts jus sanguinis. Greek law does not recognize dual nationality if one of nationalities is Greek, i.e., in eyes of Greek law, person with dual nationality, one of which is Greek, is only Greek national. Greek national may not divest himself of his nationality without permission of state. Several other nationality issues are governed by Law 1438/1984 and Law 2130/1993. Aliens residing in Greece may obtain Greek nationality, if they fulfill conditions of art. 58 and following of Law 2910/01.

Greece has signed and ratified by Law 536/3/8.2.1977 International Convention signed in Paris on Sept. 10, 1964 concerning exchange of information on matters regarding acquisition of citizenship.

17 INTELLECTUAL PROPERTY

17.01 COPYRIGHT:

Authors, composers, painters, designers, sculptors, turners and engravers have the exclusive right of publishing and reproducing their works during their lifetime and of assigning their rights to third persons. They have also moral protection right of their personal link with their creation (moral right). (Law 2121/1993).

Such protection extends till end of their life and expires 70 years after their death, counting from end of year of death.

The above protection applies to works in writing or artistic works produced in this country, and may be extended to similar works produced abroad under a special decree on condition of reciprocity. Such protection has been extended to works in writing and artistic works produced in the United States by a decree which came into force on Mar. 1, 1932. Greece is also a signatory of the Convention of Berne dated Sept. 9, 1886, as amended by the Conventions of Berlin, Rome and Brussels dated Nov. 13, 1908, June 2, 1928 and June 26, 1948, respectively and a recent enactment, Law Decree No. 4254 of 11/17 Oct. 1962, has ratified the International Convention signed in Geneva on Sept. 6, 1952 and annexed Protocol Nos. 1, 2, and 3. Greece has also ratified by Law 100/1975 revision of Berne Convention made in Paris in July 1971.

Law 2819/2000 implemented EU Directive 96/9 regarding legal protection of data bases by placing data bases within scope of Law 2121/1993 on protection of intellectual property.

17.02 PATENTS:

Under Law 1733 of 18/22 Sept. 1987 patents are now granted by Industrial Property Organization. Patent is granted for new invention capable of industrial application; invention may refer to product, method or industrial application. Pursuant to presidential decree 321/2001, patent may be granted for biotechnological inventions. Yearly annuity is due for maintaining patent in force.

All documents must be submitted in Greek.

All transfers and permissions for use, or generally for exploitation of a patent, must be registered in Registries of Patents and published in Government Gazette.

Foreign Patents.

In case of application for a patent for an invention already patented abroad, applicant must produce a certificate of foreign authority from which patent was obtained showing that application for patent was submitted to such authority or that a patent has already been granted. Where appropriate, treaty priority may be claimed. This is case for U.S. patent applications.

Duration of protection is 20 years, commencing on the day following the date on which the application for patent was filed. Rights of patentee devolve to his heirs and are transferable by will or by act inter vivos.

Annulment.

Patents may be declared void by a judgment of Court if: (a) Owner of patent is not inventor or latter's assignee, (b) invention is not capable of being patented in accordance with art. 5 of law, (c) description is not sufficient for invention to be applied by expert, and (d) object of patent granted extends beyond protection demanded. Nullity may be partial.

Licenses.

Patentee may grant to third persons a license to use and exploit invention. Under certain conditions licence to use patent may be granted without owner's permission but compensation must be paid.

International Convention.

Greece is member of International Convention of Nov. 19, 1920, regarding Central Office of Patents as well as Convention of Paris concerning Protection of Industrial Property as now in force after its amendment in Stockholm in 1967. Such amendment was ratified by Law

213/15/20.11.1975. Greece has signed and ratified by Law 1607/1986 Convention on the Granting of European Patents signed in Munich on Oct. 5, 1973.

Transfer of technology, including patents for same under European Convention of 5 Oct. 1973 is now governed by Law 1733 of 18/22 Sept. 1987.

17.03 TRADEMARKS:

Trademarks are governed by Law 2239 of 16 Sept. 1994.

Acquisition of right on trademark presupposes application to administrative committee of trademarks, accompanied by ten impresses of trademark (and ten coloured impresses, if trademark is coloured), treasury voucher for government fees, notarial power of attorney and appointment of attorney in fact. Application must also determine categories of products (from total of 34) or of services (from total of eight), by which trademark is categorized.

Right on trademark is acquired from moment that decision of administrative committee of trademarks which accepts it is registered to special registrar, provided that trademark in question disposes distinctive character and does not constitute counterfeit or imitation of duly preregistered and not deleted trademark, which is used for same or similar product.

Beneficiary is entitled to use exclusively trademark in order to distinguish his products or services, and to exclude third parties from its use. Protection of trademark lasts for period of ten years and can be renewed indefinitely by filing, during last year of protection, petition for renewal and upon payment of government fees.

Unlawful use of trademark is punished by at least three months of imprisonment and/or fine.

Courts may grant injunction measures prohibiting unlawful use of trademark.

Right on trademark is transferable by succession, by contract or in case of forced execution, even without transfer of business itself. Beneficiary can also give to third party his written consent, so that another trademark which is identical or similar to preregistered trademark can be registered. Use of trademark can be assigned to third party by written agreement which is registered to special registrar after decision of administrative committee, unless that creates confusion or is opposed to morality and public order.

Right on trademark expires if beneficiary resigns from it or after deletion which is decided by administrative authority in case (inter alios) that beneficiary fails to market products or services within five years from its registration, or has ceased for five years to do so, or if beneficiary's business has ceased to operate for five years.

Right expires automatically if it is not renewed within prescribed time.

Beneficiary of right on trademark can be also cooperative or professional association (collective trademark). This trademark is used by members of association, but its protection can be invoked only by association or cooperative.

Foreign Trademarks.

For registration of a foreign trademark in addition to requirements prescribed for registration of a local one, it is necessary to produce a proper power of attorney and a certificate showing that the foreign trademark has been duly registered in the country of origin accompanied by a Greek translation. Such certificate is not required if country of origin relieves applicants for registration of a Greek trademark from such certificate. A foreign trademark duly registered in

Greece becomes independent from the trademark of the country of origin.

Change of seat or address must be duly registered.

International Convention.

Greece has adhered to International Convention of Paris-Brussels-Washington-Hague-London of 1934 for Protection of Industrial Property as am'd in Stockholm on July 14, 1967. (Law 213/1975). Law 2787/2000 ratified Protocol regarding Madrid Convention on the international registration of trademarks.

Law 2697/1999 ratified Locarno settlement for the international classification of industrial designs and templates.

Priority.

When priority is claimed under the International Convention, the certificate of foreign registration must be submitted within six months of such registration.

18 LEGAL PROFESSION

18.01 ATTORNEYS AND COUNSELORS:

In Greece only one profession of legal representative exists, lawyer, whose legal status is governed by Code of Lawyers. (Law Decree 3026/1954 as currently in force).

Capacity of lawyer is acquired by registration with Bar Association, after having taken oath and been appointed as lawyer by Presidential Decree.

Conditions to become lawyer are Greek or member-state of E.U. nationality. Interested person must be graduate of law school and succeed in practical tests, after having completed 18-month stage. Maximum age is 35 years.

Competences.

Lawyer represents and defends his client in courts, committees, disciplinary councils. He gives legal advice and opinions, he takes legal care of customs, tax and administrative cases, and attends signature of notarial contracts. Lawyer can exercise his profession only before courts of his local Bar, while in other courts he must be assisted by local lawyer. Appearance before court of appeal or Court of Cassation presupposes completion of certain years of practice.

Duties.

Lawyer has duty of confidentiality towards information about his client acquired through exercise of his profession. He is subject to disciplinary power of his Bar.

Incompatibilities.

Lawyer must not, under penalty of being disqualified, undertake salaried civil service or another activity incompatible with profession.

Fees.

Lawyer receives fees which correspond to percentage of value of case's object and cannot be lower than sum prescribed by law. Payment can depend on result of trial. Lawyer can also receive fixed remuneration, if he offers his services permanently to client.

Supply of Legal Aid to citizens with low income is provided by Greek Law 3226/2004.

Law Companies.

(art. 1, § 2, Law 1649/1986—Presidential Decree 81/2005). Lawyers can establish civil law companies with legal personality. Contributions can be in work or in kind. Latter do not influence company share. Partners can be only lawyers. Administration is exercised by administrator. Before third parties company and lawyer who handles cases are fully responsible. Law 2753/1999 reduced income tax rate applicable to such companies to 25%.

Freedom of Supply of Legal Services from Lawyers of EU Member-States.

(Presidential Decree 258/1987—Directive of the European Council 77/249). Lawyers, citizens of member-state of European Union, can appear before Greek court with Greek lawyer in order to support specific case.

Free Establishment of Lawyers of EU Member-States.

(Presidential Decree 52/1992—Directive of the European Council 89/48). Citizens of EU member-states can be appointed as lawyers in Greece. That presupposes graduation from three-year law school and success in test of Greek law. After appointment they become equal to their Greek colleagues.

19 MINERAL, WATER AND FISHING RIGHTS

19.01 ENERGY:

Law 2773/1999 as modified by Greek Law 3175/2003 liberalised electric power market and introduced legal framework for production, transportation, distribution and supply of electric power in Greek territory by private parties. Ministerial decision D6/F1/13310/2007 provides for legal framework, conditions and procedures on granting of licences for generation of electricity power by renewable energy sources.

Greek Regulatory Authority for Energy has issued “Regulations” for licensing of generation and supply of electric energy.

19.02 MINES AND MINERALS:

Mining is governed by Mining Code. Mining rights are separate from right in land. Mining rights can be granted only by state. Special law is required for granting of mining rights concerning precious and certain other metals, and oil.

19.03 WATER:

See category 3 Business Regulation and Commerce, topic 3.05 Contracts, subhead Government Contracts.

20 MORTGAGES

20.01 CHATTEL MORTGAGES:

These do not exist in Greece. See category 7 Debtor and Creditor, topic 7.12 Pledges.

20.02 COLLATERAL SECURITY:

See category 7 Debtor and Creditor, topic 7.12 Pledges.

20.03 MORTGAGES (HYPOTHECS):

In civil law a debt may be secured by a hypothec on alienable immovable property or on a usufruct. The hypothecee's right is accessory to a principal obligation.

For the constitution of a hypothec both a valid title (right) to a hypothec and the registration of such title with the office of the Registrar of Hypothecs are required. Such a title to a hypothec may exist either as a result of a notarial contract between the owner of the hypothecated property (hypothecator) and the hypothecee or on the strength of the law, as in favour of a minor on the immovables of a guardian for any claim arising out of the administration of the minor's property by the guardian or in favour of the state for taxes due. Likewise a judgment of the court or an arbitration award are a proper title to register a hypothec for the sum adjudged.

A provisional hypothec called “prenotation” may also be acquired by a decision of court as security for a claim pending obtaining of a final judgment confirming such claim and effects of prenotation are conditional upon such confirmation. Prenotation is invalidated if, within 90 days from confirmation by court of claim for security of which is was granted, it is not converted into a mortgage.

The hypothec first registered secures a priority over all subsequent hypothecs. A hypothec can be registered only for a specified amount of money.

Under Law 4112/1929 as am'd by Law Decree 4001/1959, banks may obtain mortgage on industrial machinery or plants. Such mortgage extends on machinery or plants installed even if ownership of same has been retained by seller thereof.

In shipping law a debt may be secured either by a hypothec on vessel or by mortgage.

Under Law Decree No. 3899 (1958) a new form of a hypothec on a vessel has been established called “preferred hypothec” under which inter alios creditor may acquire management of the vessel and upon the debtor failing to pay his debt may sell vessel without necessity of resorting to a sale by public auction, as prescribed in the ordinary hypothec.

See also category 7 Debtor and Creditor, topic 7.03 Attachment.

21 PROPERTY

21.01 ABSENTEES:

If a person of full age is absent and of unknown domicile or of known domicile but unable to administer his property, and further if such property is in need of administration, the court may appoint a guardian (administrator) of such property. See also category 12 Estates and Trusts, topic 12.01 Death.

21.02 DEEDS:

A conveyance of real property and a constitution of real rights generally, including hypothecs, is not valid unless effected by notarial act which has to be registered in the proper registry of land property. Also any agreement embodying a promise to conclude a contract regarding any of above matters is not valid unless embodied in a notarial contract.

21.03 DOWRY:

See category 13 Family, topic 13.04 Husband and Wife.

21.04 LANDLORD AND TENANT:

Rent Controls.

Under presidential decree 34/1995 as currently in force, leases of commercial premises are subject to various restrictions.

Leases of residential premises to be used as main residence are subject to rent control minimum duration and certain other restrictions. (Law 1703/1987 as currently in force).

21.05 POWERS OF ATTORNEY:

Powers of attorney executed in this country must, as a rule, be drawn by a notary public. The original document is filed with a notary public and authenticated copies of same are supplied upon application.

Powers of attorney executed abroad on matters requiring notarial power of attorney in Greece are not valid in Greece unless they have been drawn or attested by local notary public. In both cases, they must be authenticated by nearest Greek consular authority or using apostille under Hague Convention.

A power of attorney is cancelled by death of the constituent or by revocation, but it is advisable to limit such power to a fixed period.

21.06 REAL PROPERTY:

Currently procedure has commenced for registering all real property within Greek territory in National Cadastre. (Laws 2308/1995, 2664/1998, 3127/2003).

In certain provinces including a number of islands, real property cannot be transferred without permission of authorities.

Law 2778/1999 introduced real property mutual funds.

See also topic 21.02 Deeds; category 4 Citizenship, topic 4.01 Aliens.

22 TAXATION

22.01 ADMINISTRATION:

"TAXIS", fully computerized system operating since 1999, aims to simplify, accelerate and update all services of tax authorities. All persons or entities resident or having establishment or performing acts with taxation consequences in Greece, must obtain Tax Registration Number.

Failure to file income tax return or filing inaccurate income tax return, failure to pay or submission of inaccurate tax return with respect to V.A.T. and withholding taxes, duties and other charges, as well as issuance of false or inaccurate tax data (e.g. invoices etc.) results in monetary fines and also in criminal sanctions under circumstances described in Law 2523/1999 as in force. According to Art. 20 of Law 1914/1990 Minister of Finance may provide information concerning taxation matters to EU member states. He may also request such information from such states.

Administrative Courts are competent to decide disputes between tax authorities and tax bearer on matter of taxation. (Law 1406/1983). Procedure before administrative courts is set forth in Law 2717/99.

22.02 ALCOHOL, BEVERAGES AND TOBACCO TAXES:

See topic 22.10 Value Added Tax, subhead Alcohol and Tobacco Taxes.

22.03 BUSINESS TAXES:

Greek Corporations.

Net income of Greek limited liability companies and companies limited by shares (listed or not listed on Athens Stock Exchange) shall be subject to taxation, irrespective of whether they have nominal shares or bearer shares at nominal rate of 25%. This tax covers also taxation obligation for dividends distributed to shareholders.

Foreign enterprises are taxed on net income from sources in Greece as well as on net income derived from permanent establishment in Greece at same rate as above.

Various.

Interest from bank deposits is taxed in accordance with conditions set forth in art. 12 of Law 2238/94. Special tax on banking transactions was abolished as from 1.1.2001 pursuant to Law 2873/2000. By Law 2703/99 as amended and in force, 0.15% tax on value of transaction has been imposed on seller of shares listed on Athens Stock Exchange.

Law 2753/99 imposed 5% tax on transfer of shares of companies not listed on Athens Stock Exchange, which tax is assessed on real value of shares. Pursuant to law 3091/2002, this rate can be reduced to 2.4% or 1.2% depending on kinship between seller and purchaser of shares. Same law 3091/2002 imposed on companies yearly special tax at rate of 3% calculated on value of their ownership or usufruct rights over real property situated in Greece. Even though this tax is in principle imposed on all companies in general, series of exemptions have been created so that in end tax intends to affect only offshore companies having ownership or usufruct rights over real estate situated in Greece.

22.04 FOREIGN INVESTMENT TAXES:

See category 14 Foreign Trade and Commerce.

22.05 INCOME TAX:

On principle all natural persons who are domiciled in Greece or earn income from source in Greece and have taxable income of over minimum annual sums set forth in art. 9 of Law 2238/94 are liable to income tax which escalates to 40%.

There are certain supplementary impositions on income tax.

Under Law 2065/92, there is presumption that possession of motor car, yacht, airplane and/or purchase of certain assets including real estate entails certain amount of income as specified by law. Law 2214/94 expanded system of presumptions to other cases also.

Income of wife is declared by husband but is taxed separately. Income of minor child is for taxation purposes added as rule to that of mother or father.

22.06 INHERITANCE AND GIFT TAX:

Under Law 2961/2001 as amended and in force, tax is imposed on inheritance and gifts. Rate of tax depends on relationship of heir or beneficiary to deceased or donor and according to taxable amount. Certain amount of estate is exempted from tax. Tax rate ranges from 5%-40%.

22.07 PROPERTY TAXES:

Tax on income from land property is imposed with deductions for agricultural land and first residence.

New real estate property holding tax has been imposed with effect as from Jan. 1, 2008.

It is collected annually. This tax has very broad base, but allows for certain exemptions such as for main residence, etc. Rate is 1% for real property holders who are natural persons and 6% for entities. Rate for entities is reduced, in certain specific cases, to 1%.

22.08 TAX INCENTIVES:

Main objective of Law 3299/2004 is to provide incentives for new productive investments in business activities specified therein. Incentives are grants, subsidies, tax reliefs, etc. Law 3299/2004 replaced Law 2601/98 which provided under certain conditions various tax incentives including tax exemptions and subsidizations for loan interests, costs, investments, etc.

22.09 TREATIES AND AGREEMENTS:

There are special provisions for avoidance of double taxation and there are also treaties with following countries on this matter: Albania, Armenia, Austria, Belgium, Bulgaria, Croatia, Cyprus, Czech Republic, Denmark, Finland, France, Georgia, Germany, Hungary, India, Israel, Italy, Korea, Luxembourg, Netherlands, Norway, Poland, Portugal, Romania, Russian Federation, Slovakia, Slovenia, South Africa, Spain, Sweden, Switzerland, Turkey, U.K., U.S., Ukraine, Uzbekistan.

22.10 VALUE ADDED TAX:

Law 2859/7.11.2000 codified provisions on V.A.T. in compliance with European Union tax law.

As from 1 Apr. 2005, rate for V.A.T. is 19% and in certain expressly provided cases 9%. These rates are reduced by 30% respectively at certain islands of Aegean Sea.

Special indirect taxes exist for passenger cars and petroleum products.

Alcohol and Tobacco Taxes.

Special tax provisions apply to taxation of alcohol and tobacco products. (Laws 2127/1993, 2093/1992).

23 TRANSPORTATION

23.01 MOTOR VEHICLES:

Vehicle License.

No motor vehicle may be driven without a vehicle license; number plates must be displayed both front and rear and altering plates is an offense. Foreign motor vehicles may circulate with foreign license numbers for six months per twelve-month period.

Driver's License.

No person may drive without a license. Minimum age for obtaining license is 18. Aliens may drive in Greece if they possess an international driving license.

Accidents.

In case of accident, driver must stop, assist injured person, give any information required and report to police; failure to do so is punishable with up to three years imprisonment.

Liability of Vehicle Owner.

Owner is liable for any damages caused by his vehicle even if such damages were not caused by him personally.

Lien.

An injured person has a lien on vehicle which caused the injury.

Traffic Regulations.

Traffic is regulated by Traffic Code. Greece is signatory of international convention signed in Paris on Apr. 24, 1926.

23.02 SHIPPING:

Code of private shipping law became operative on Aug. 28, 1958, and has been embodied in Statute 3816 of 26/28 Feb. 1958. It consists of 297 articles and is too extensive to allow a summary in this digest.

The sale of a vessel is not valid unless effected in writing and registered in proper shipping registry.

The sale or hypothecation (the latter subject to certain exceptions) of the whole or of a portion of a Greek passenger ship of over 500 tons to an alien, without permission of the Greek Government is invalid.

The sale or hypothecation to an alien of cargo boats and tankers with the exception of Liberty ships is free, but permission of the Ministry of Mercantile Marine is required in respect of certain countries which do not include the United States of America, the members of the British Commonwealth, those of Western Europe and Latin America.

See also categories 2 Business Organizations, topic Companies; Taxation, topic Taxes.

24 TREATIES AND CONVENTIONS

24.01 TREATIES:

See categories 3 Business Regulation and Commerce, topic Bills and Notes; Civil Actions and Procedure, topic Foreign Judgments; Family, topic Husband and Wife; Intellectual Property, topics Copyright, Patents, Trademarks; Taxation, topic Taxes.

Pursuant to art. 28.1 of Greek Constitution “The generally acknowledged rules of international law as well as International Conventions, as of the time they are sanctioned by law and become operative according to the conditions therein shall be an integral part of domestic Greek law and shall prevail over any contrary provision of the law”.

Greece is member of European Economic Community since Jan. 1, 1981, by virtue of Treaty of Athens of 28 May 1979. Treaty was ratified by Law 945 of 7/27 July 1979. With Law 2077/92 European Convention of Maastricht has been also ratified and Treaty of Nice has been ratified by Law 3001/2002.

Greece has adhered and ratified by Law 844 of Dec. 21, 1978 European Convention for Abolishing the Legalization of Documents executed by Diplomatic and Consular Agents, signed in London on June 7, 1968.

By Law 1792/1988 (which entered into force on Apr. 1st, 1991) 1980 Rome Convention on Contractual Obligations has been ratified.

By Law 2514/1997 Greece ratified Schengen Convention (14.6.85) for abolition of border control within EU.

By Law 2476/1997 Greece ratified European Energy Treaty (Lisbon, 17.12.1994).

By Law 2480/1997 Vienna Convention on nuclear security (20.9.94) has also been ratified.

By Law 2532/1997 (entered into force on Feb. 1, 1999) Greece ratified Vienna Convention on International Sale of Goods.

See also Selected International Conventions section.

1
GUATEMALA LAW DIGEST

—Scope —

Revised for 2008 edition by

CURTIS, MALLET-PREVOST, COLT & MOSLE LLP, of New York.

(Abbreviations used are: C. C.—Civil Code; C. Com.—Code of Commerce; C. C. P.—Code of Civil Procedure; D.—Decree; J. L.—Judiciary Law; L. C.—Labor Code;L. D.—Legislative Decree; N. C.—Notarial Code. Numbers in code references indicate articles.)

Note: This revision incorporates legislation through Dec. 14, 2007.

1 INTRODUCTION

1.01 CURRENCY:

(Const. art. 132; D.L. 17-2002 of Apr. 24, 2002 and D.L. 16-2002 of Apr. 23, 2002 as am'd).

The monetary unit is the quetzal, divided into one hundred cents. Only the Banco de Guatemala may issue bank notes and coin money which are legal tender for all obligations payable in the country. (See category 14 Foreign Trade and Commerce, topic 14.02 Exchange Control.)

1.02 GOVERNMENT AND LEGAL SYSTEM:

Constitution promulgated on May 31, 1985 as am'd. Legislative power is vested in Congress having single chamber. Congressmen are elected for four years and can be reelected. President of Republic is elected for four years and cannot be reelected.

For administrative purposes, national territory is divided into departments, and these into municipalities. Departments are administered by Governor. Municipalities are autonomous and exercise their powers by Mayor.

Congress meets from Jan. 14 to May 15 and from Aug. 1 to Nov. 30 in ordinary meetings, and in extraordinary meetings whenever it is called by its Permanent Commission or by Executive Power. (Const., Art. 158).

1.03 HOLIDAYS:

(L. C. 127).

Jan. 1 (New Year's); Maundy Thursday*; Good Friday*; Holy Saturday*; May 1 (Labor Day); June 30 (Army Day); Sept. 15 (Independence Day); Oct. 20 (Revolution Day); Nov. 1 (All Saints); Dec. 24 (Christmas Eve, half holiday); Dec. 25 (Christmas); Dec. 31 (New Year's Eve, half holiday).

*These are movable holidays.

1.04 OFFICE HOURS AND TIME ZONE:

Guatemala is in the U.S. Central Time Zone (-06:00 GMT). Office hours are generally from 8 a.m. to 4:30 p.m.

2 BUSINESS ORGANIZATIONS

2.01 AGENCY:

(C. C. 1686-1727; C. Com. 263-291; 303-331).

An agency must be conferred by a public instrument unless amount involved is less than Q. 1,000. Authority to alienate, mortgage, guaranty or compromise must be specifically granted by public instrument. Agent may delegate his powers if expressly authorized to do so, but he is liable if substitute of his own choosing is notoriously incompetent or insolvent. Principal must reimburse agent for his expenses and for damages caused him by agency. Agent is entitled to a compensation if he does not expressly state that his services are gratuitously rendered.

An agency is terminated by: (1) Conclusion of period established for its duration, (2) termination of business for which it was conferred, (3) revocation by principal, (4) resignation of agent, (5) death or interdiction of principal or agent, (6) bankruptcy or principal, and (7) dissolution of entity having conferred agency.

Contracts for independent agency, representation or distribution of products may be terminated only by written mutual consent; termination of agreed period; just cause, as defined; will of representative with three months notice to principal; will of principal at any time, being subject in this case to pay damages to representative. Resolution of disputes arising from agency, representation or distribution contracts may be subject to arbitration. Contracts must be recorded at commercial registry. Individuals and juridical persons acting as independent agents, representative or distributors must be registered at Registry of Agents, Distributors and Representatives.

Factors are those persons that although not merchants, have management of an enterprise or establishment. To be a factor it is necessary to have legal capacity in order to be able to represent another person according to civil laws. Factors must act under agency contract with representation granted by merchant or by written contract of labor. Said contracts must be registered in Commercial Registry to be valid. However, limitations on factor's powers, although recorded in Commercial Registry, shall have no effect against bona fide third parties.

Factors must have special powers to sell or encumber real property, to obtain loans, to represent principal in court and to do all those acts that in general do not pertain to scope of authority granted. Factors must act in name of their principal, otherwise they are personally liable, unless contract refers to objects comprised in an establishment known to belong to another or unless principal ratifies factor's performance. Factor's powers are not terminated by death of principal, but by sale or dissolution of establishment. Neither factors, nor clerks may delegate their powers without principal's consent.

Commercial agents are those persons who act permanently with one or more principals, promoting commercial contracts or executing them in their principal's name. Commercial agents can be: (1) Dependent: if act under principal's instructions, belong to his enterprise and is bound to him by labor contract; (2) Independent: If act through own enterprise and if bound to principal by commercial contract or agency contract.

Commission merchants do not require a formal power of attorney; any written document is sufficient, or a verbal power ratified in writing before transaction is concluded. They may act in their own name, they are not required to give name of their undisclosed principal, but in such case, are liable as though business were their own.

2.02 CORPORATIONS:

(C. C. 15-31-C. Com. 10-58; 86-194).

Foundations, associations and charitable institutions (churches, schools, hospitals, etc.) are governed by principles of civil law found in above-mentioned articles of Civil Code.

Commercial Code applies to corporations and to any type of company seeking to realize profits. Such corporations must be registered in Commercial Registry in order to be an entity different from partners and/or shareholders.

Commercial companies must be governed by their respective charters provided agreement is not in conflict with Commercial Code. Partners and/or shareholders are not allowed to enter into secret agreements or reserve rights not expressly mentioned in charter or by-laws; if so, said secret agreements shall be void.

Articles of incorporation and all amendments of any kind thereto must appear in a public instrument which must be duly recorded in Commercial Registry within a month after said instrument's authorization. Recording act must state: (1) Type of company; (2) name or commercial name, if any; (3) domicile and also domicile of its branches; (4) object; (5) duration; (6) capital; (7) name of notary public that authorizes public instrument of incorporation, place and date; (8) administrative councils, powers of administrators and (9) officers' councils if any. (Art. 337).

Corporation (“Sociedad Anónima,” abbreviated “S.A.”) is a company that has capital divided into and represented by shares. Responsibility of each shareholder is limited to payment of subscribed shares. Authorized capital is maximum amount that corporation can issue in shares, which can be totally or partially subscribed at moment of incorporation and must be expressed in charter of same.

Initial paid-in capital must be at least Q. 5,000. Term begins to run from date of incorporation of company when recorded in Commercial Registry. Commercial companies can be formed for indefinite periods of time. (Art. 24).

Shares (C. Com. 99-131), either registered or to bearer, must be par value shares. All shareholders must have right to vote in proportion to capital represented by their shares, except when articles of incorporation create a special class of shares with limited vote, in which case such shares must have preference upon liquidation and a minimum 6% dividend. Until shares are fully paid up, temporary certificates are issued stating amount paid on account.

All shares must contain following information: (1) Name, domicile and duration of corporation; (2) date of incorporation act, place of execution, name of notary public that authorized it and date of recording in Commercial Registry; (3) name of owner of share, if nominative; (4) amount of authorized capital and way such capital shall be distributed; (5) nominal value; its type and registration number; (6) specific rights and duties inherent in type of shares and also a statement of rights and duties pertaining to other type of shares, if so provided; and (7) signature of administrators that according to by-laws must sign them.

Shareholders' meetings (C. Com. 132-161) must be held at least once every year. Calls are published in official newspaper, called "Diario de Centro América", and in another paper. Dividends may be declared only by shareholders and only from net earnings as shown by accounts and none can be declared until annual reserve payments required by by-laws have been covered.

Management.

(C. Com. 162-183). Directors need not be stockholders. Their powers and liability are governed by provisions of corporate documents, law and general rules of agency. They must render accounts to shareholders.

Limited liability companies (C. Com. 78-85) of not over 20 members may be formed, in which liability of each member is limited to capital contributed by him or such additional amount as may be stipulated. Name of company must be similar to that of a partnership, adding word "Limitada," which can be abbreviated "Ltda." or "Cía. Ltda.," without which company is regarded as a general partnership. Capital must be fully paid before company may be organized, and foreign limited liability companies may not act in Guatemala without proof of such payment. These companies are in general governed by rules relating to partnerships. See topic 2.05 Partnerships.

Foreign corporations (C. Com. 213-221) that have been constituted abroad and that have their seat of administration or principal object of enterprise in territory of Guatemala shall be governed, including validity of requirements of incorporation act, by Guatemala Commercial Code. Form of incorporation act shall be governed by laws of country of origin.

Corporations legally incorporated abroad that wish to establish or operate in any way in Guatemala or wish to have one or more branches must comply with provisions of Commercial Code and must have at least one agent permanently in country. Requirements to operate in Guatemala: (1) Foreign corporations must prove that they have been constituted in accordance with laws of country of incorporation; (2) certified copy of their articles of incorporation and by-laws, if any, as well as any amendments thereto; (3) proof that corporation has passed a resolution through its competent body for this purpose; (4) appoint in Guatemala a representative agent with broad powers to do all kinds of business and to legally represent corporation before courts. If these powers and duties are not granted, he nevertheless will be able to perform them by operation of law; (5) set aside capital assigned for its operations in Guatemala with a clause that corporation will respond for its obligations with its property both in Guatemala and abroad; (6) declaration that corporation will be subject to laws of Guatemala for all acts and transactions executed in country and also a declaration that its representatives or employees shall not invoke foreign laws; (7) declaration that before leaving Guatemala, it shall also comply with legal requirements; and (8) certified copy of latest general annual balance together with a statement of profits and losses.

Insurance corporations must be Guatemalan. No foreign corporations or branches may operate in country. Certain risks must be insured in Guatemala, but if local companies cannot cover risk, Superintendency may permit taking insurance abroad. (Decree-Law 473 of May 4, 1966 as am'd, regulated by Accord of Aug. 14, 1969).

2.03 FOREIGN CORPORATIONS:

See topic 2.02 Corporations.

2.04 LIMITED PARTNERSHIP:

See topic 2.05 Partnerships.

2.05 PARTNERSHIPS:

(C. Com. 14-67).

Commercial Code applies to partnerships and to any type of company seeking to realize profits. Such company must be registered in Commercial Registry in order to be an entity different from partners, and must be governed by incorporation agreement provided same is not in conflict with Commercial Code. Partners are not allowed to enter into secret agreements or reserve rights not expressly mentioned in articles of document; if so, said secret agreements shall be void.

Articles of incorporation and all amendments of any kind thereto must appear in a public instrument which must be duly recorded in Commercial Registry within a month after said instrument's authorization.

Collective Company is entity that exists under a firm name (razón social) and in which all partners are jointly and unlimitedly liable for company's debts.

Firm name must have name of one or more of partners adding words “and Co.” (y Compañía) or letters “S.C.” (Sociedad Colectiva meaning General Partnership).

If a person, that is not a partner, allows his name to appear in firm name, he shall be subject to same obligations and liabilities as partners. Name of a partner who no longer belongs to partnership must be eliminated unless firm name be retained followed by word “Sucesores” which can be abbreviated “Sucs.” (meaning “heirs”). Partners may not on their own account engage in same business as partnership. Partnership can be liquidated where losses are over 60% of capital.

Recording act must state: (1) Type of company; (2) firm name; (3) domicile and domicile of its branches; (4) object; (5) duration; (6) capital; (7) name of notary public that authorizes public instrument of incorporation, place and date; (8) administrative councils; and (9) officer's councils if any. (Art. 337).

Limited partnership or “Sociedad en Comandita Simple” (C. Comm. 68-77), consists of one or more partners who are jointly and unlimitedly liable and one or more partners with limited liability to amount of capital contributed by them.

Firm name can be formed with name of one or two of unlimited partners followed by obligatory inclusion of words “y Compañía, Sociedad en Comandita” which can be abbreviated “y Cía. S. en C.” meaning “and Company, Limited Partnership.”

Limited partner who permits inclusion of his name in firm name becomes as much liable as if he were a general partner.

Participation of limited partners may be represented by shares, in which case, company shall be automatically called “Sociedad en Comandita por acciones” meaning “Limited Partnership issuing shares.” In this event, requirements applicable to corporations shall also apply to this kind of company. (C. Comm. 195-212 as am'd).

3 BUSINESS REGULATION AND COMMERCE

3.01 BILLS AND NOTES:

(C. Com. 441-489).

Bills of exchange must state: (1) Words “bill of exchange” in text of instrument; (2) date and place of issue; (3) rights created by document; (4) place and date of execution or exercise of said rights; (5) signature of drawer. In successive documents signatures can be stamped by any controlled system provided at least one signature is hand written. (Art. 386). It must also state: (1) Unconditional order to pay a determined amount of money; (2) name of drawee; (3) type of maturity.

If no maturity date is expressed, bill is payable at sight (Art. 443); if place of issue is not stated, it is deemed to be domicile of drawer; if place of payment is not stated, it is also deemed to be domicile of drawer. If drawer has several domiciles, or if bill mentions several places of execution, holder of bill may choose among them one most convenient to his interests. (Art. 386).

Bills may be to order of drawer and may be drawn against drawer or for account of a third person and may be payable at domicile of third person. Drawer guarantees acceptance and payment. Bills payable at sight or at days after sight may bear interest; in such case if rate is not expressed, it is 6%. Bills may be drawn payable: (a) On a certain date; (b) a certain period after date; (c) at sight; (d) specified days after sight. They are payable on their maturity date. There are no days of grace.

Endorsements may be in blank, by simple signing of endorser; if blank, holder may transfer document without endorsement. Endorsements are allowed for collection or as pledge. Endorsement after maturity is valid, but if after protest or time for protest, it has effect of a mere assignment of rights.

Bills may be presented for acceptance at any time before maturity. If drawn at days after sight, they must be presented for acceptance within one year, but drawer may vary this period and endorser may shorten time designated. Acceptance may be limited to part of amount. If acceptance be refused, holder must make protest and give notice within two labor days to his assignor or other person obliged to pay. If bill is protested for nonpayment, he must give notice within two labor days to his assignor. If drawer or endorser has waived protest, bill must nevertheless be presented and notice of failure to honor it must be given. Protest for failure to accept exempts from requirement of presentation for payment and protest for nonpayment.

Protests are made before Notary Public; however, if payment is made before end of following day, protest is cancelled.

Protest must include: (1) Literal reproduction of bill and endorsements; (2) demand made on drawer to accept or to pay bill with indication as to whether drawee was present or not; (3) drawee's reasons for denying acceptance or payment; (4) signature of person on whom protest is made, or statement that he could not or would not sign; (5) place, date, hour and signature of authorizing officer and (6) notary public must record officially (protocolizar) such protest.

If bill is presented to a bank, bank's statement regarding denial of acceptance or payment shall have same valid effect as a protest before a notary public.

However, protest shall be necessary only when drawer of bill inserts on bill's reverse side the clause: “with protest.” If such clause is written by a person other than drawer, it shall be considered invalid. If, notwithstanding fact that protest is not necessary any more, holder of bill protests it, expenses and fees shall be paid by him.

Promissory notes (C. Com. 490-493) are governed in general by rules relating to bills of exchange. Conventional interests can be stipulated on note. Payment can also be made through successive amortizations. Maker is obligated in same manner as acceptor of a bill of exchange.

Checks must show: (1) Word “check” in text; (2) unconditional order to pay a specified sum; (3) name of drawer; (4) place of payment; (5) date and place where drawn; (6) signature of drawer. If place of payment is not specified it is deemed to be place of domicile of maker. Checks may be drawn payable to a specified person or to order or to bearer. All checks except those to bearer may be transferred by endorsement but endorsements to bearer are not permitted. Checks must be presented for payment within 15 days. Presentation and nonpayment may be proved by: (1) Protest; (2) statement of drawee written on check showing date of presentation; (3) statement of bank.

There are special provisions regarding “crossed checks,” “checks to be credited on account of holder,” “certified checks,” “guaranty checks,” “cashier's checks,” “traveler's checks,” “checks with receipt stub,” and “checks stating consideration therein.” Checks are also governed in general by rules relating to bills of exchange. (C. Com. 494-543).

3.02 COMMERCIAL REGISTER:

See category 9 Documents and Records, topic 9.04 Records.

3.03 CONTRACTS:

Articles 1517 through 1604 of Civil Code govern civil contracts and are supplementarily applied to commercial contracts.

Civil contracts involving more than 300 quetzales must be in written form. All contracts, which must be registered or recorded in public registries, have to be executed in public deeds whatever their amount may be.

Contracts among merchants and contracts involving commercial matters are governed by articles 669 through 1039 of commercial code. It may be generally said that commercial contracts are much less formally executed than civil contracts. Clauses concerning arbitration are valid even when contracts are not executed in public instruments.

Public Contracts.

(L. D. 57-92 of Oct. 5, 1992 as am'd and Accord 1056-92 of Dec. 22, 1992 as am'd). Contracts executed with government, state agencies and state enterprises are subject to special rules.

3.04 FACTORS:

See category 2 Business Organizations, topic 2.01 Agency.

3.05 FRAUDS, STATUTE OF:

See topic 3.03 Contracts; categories 9 Documents and Records, topic Public Instruments; Employment, topic Labor Relations.

3.06 INTEREST:

Legal interest is calculated by formula based on interest rates of banking institutions. Parties may freely agree on interest rate, but if rate is too high in relation with prevailing market rates, judge may reduce it by taking into consideration legal interest and circumstances of case. Capitalization of interests is prohibited except in commercial transactions when rate is not higher than maximum rate permitted to banking institutions.

Extortion and detention of contractual benefits notoriously prejudicial to another who granted them out of necessity or inexperience or ignorance and give action for restitution with damages. (C. C. 1542, 1947-1949; C. Com. 691).

3.07 MONOPOLIES, RESTRAINT OF TRADE AND COMPETITION:

(Const. art. 130; C. Com. 361; 362; 663; L. D. 06-2003 of Mar. 10, 2003 regulated by Accord 777-2003 of Nov. 28, 2003).

Any kind of monopolies is prohibited. All enterprises must contract with anybody requesting their products or services, observing equal treatment among diverse categories of consumers. Any act contrary to bona fide commerce or to normal and honest development of mercantile activities, shall be considered unfair competition and consequently unjust and prohibited. Following acts, among others, shall be deemed unfair competition: (1) To deceive or to confuse public through false statements regarding origin or quality of products or services or false indication of honors, or prizes obtained by same; (2) to release false news to influence buyer to purchase; (3) to damage another company, through imitation of its products, brands, trade names, or impeding access of customers to its premises.

Seller of enterprise must abstain during next five years from date of sale, from opening new enterprise that due to its object, location and any other circumstance, might divert customers from sold enterprise, thereby constituting unfair competition.

Central American Regulations on Unfair Trade Practices of Dec. 12, 1995 implement principles established by Agreements of World Trade Organization. Central American governments may issue restrictive covenants to temporarily protect their local production from massive import of same or similar products that may cause pecuniary loss to local producers.

Law promotes and defends consumers' rights. Law deals with consumers' rights to be informed; general representation and guaranties, products liability, credit operations, freedom of contracting, fair price, lack of performance, services, penalties for infringement of law and general regulations on subject. There are special regulations for advertisement of goods and services and for rights of suppliers. Law has created public agency in charge of supervising enforcement of laws.

3.08 SALES (REALTY AND PERSONALTY):

(C. C. 1543-1573, 1680, 1790-1851; C. Com. 695-713).

Between parties, sale is perfected and title passes when an agreement is reached as to thing sold and price, though neither has been delivered. If goods were sold specifying their kind and quality, buyer has right to cancel contract if goods are not of kind and quality agreed upon. Sale of real property produces no effect against third parties unless recorded.

In absence of an agreement, price must be paid at time and place of delivery. Buyer may retain price until delivery of thing sold, and in case he is disturbed in his possession or has reason to fear disturbance he may, unless otherwise stipulated, retain as much as necessary of price. In case there is no agreement between parties as to price or manner of determining it, there is no sale. Sales by installments with reservation of ownership until buyer pays entire price, are valid. Such contracts may be cancelled under specific conditions for lack of payment of four or more installments. Buyer is not allowed to impose any encumbrances on property or to alienate his right without seller's written authorization.

Seller warrants against hidden defects which render thing sold useless or diminish its value to such extent that buyer would not have bought it. He must also make good defects which he knew and did not communicate to buyer, but is not liable for visible defects. In case real property is sold by area, any difference between true area and that designated in contract gives rise to proportionate increase or decrease in price; if difference is over 10% buyer has option to rescind contract.

Repurchase clauses in sales contracts are not valid. Promises to sell in future are valid under certain circumstances and may be granted up to two years if relating to real property and up to one year if otherwise. If so stipulated, sale may be rescinded at request of seller if someone makes a better offer within a fixed period of time of not more than six months for real property or three for personal property.

Commercial Sales.

In sales against documents, seller fulfills his obligation when he delivers to buyer documents representing goods sold and any other documents indicated in contract or required by law. Unless otherwise agreed, payment of purchase price must be made when documents are delivered; buyer cannot refuse payment because of defects related to quality of goods, unless he has proof of such defects.

Other provisions of C. Com. relate to sales F.O.B.; F.A.S.; and C.I.F. In sales of mercantile goods parties are free to agree on options to purchase without time limitations.

4 CITIZENSHIP

4.01 ALIENS:

See category 16 Immigration, topic 16.01 Aliens.

4.02 IMMIGRATION:

See category 16 Immigration, topic 16.02 Immigration.

5 CIVIL ACTIONS AND PROCEDURE

5.01 ACTIONS:

See category 12 Estates and Trusts, topic 12.02 Death, subhead Actions for Death.

Limitation of.

See topic 5.04 Prescription, subhead Actions.

5.02 JUDGMENTS:

(J. L. 147-153; C. C. P. 340-346).

Judgments are executed by means of summary executory proceeding. Judgment does not constitute lien on property of debtor except with respect to property attached in course of execution. Levy on real property must be recorded in public registry.

Foreign judgments, in absence of specific treaty, are given same effect as is given in foreign country to Guatemalan judgments. If foreign country does not execute Guatemalan judgments, foreign judgment will not be executed in Guatemala. In any event, following requisites must concur with respect to foreign judgment: (1) That it was rendered in personal action, civil or mercantile; (2) that it was not rendered by default or against reputed absent person who resides in Guatemala; (3) that obligation on which it is based is legal in Guatemala; (4) that it is final judgment; (5) that it is duly authenticated.

5.03 LIMITATION OF ACTIONS:

See topic 5.04 Prescription.

5.04 PRESCRIPTION:

(C. C. 620-654; 1501-1516, 1585; C. C. P. 296; C. Com. 513, 626-628, 916, 1308-1313).

The acquisition of property or rights by virtue of possession and the loss of rights by failure to enforce them is called prescription. Prescription may be waived as far as it has run, but waiver of future prescription is not allowed. Prescription is interrupted: (a) If possessor is deprived of possession or enjoyment for one year; (b) by law suit unless same is withdrawn or dismissed; (c) by express or implied recognition. It does not run: (1) against minors or incompetents while they have no legal representative; (2) between parents and children under parental authority; (3) between guardians and wards; (4) between husband and wife; (5) between co-owners.

Ownership is acquired by positive prescription, elements of which are (a) Public, peaceful and continued possession, (b) a conveyance and (c) good faith when acquiring, which is presumed unless contrary is shown. Real property is acquired by prescription in ten years, personal property in two years.

Actions.

Rights are lost by negative prescription. The prescriptive period in which the power to enforce rights is lost varies according to the nature of the right. The more important are: (a) Actions not otherwise limited, and mortgage actions, ten years; (b) summary actions, accounting actions, actions on maritime loans or insurance, two years; (c) actions for an accounting or against acceptors of bills of exchange, three years; (d) actions for fees, salaries and wages, actions of merchants for sales price, actions of innkeepers for meals, actions to recover pensions and rentals, two years; (e) actions for rescission of contracts, for damages, actions of holders of bills of exchange against drawers and endorsers, actions on advances to vessels or for wages of crew, one year; (f) actions of holders of checks against drawer, actions of endorsers of bills of exchange and checks against each other and against drawer, actions for maritime freight and particular average, six months.

6 COURTS AND LEGISLATURE

6.01 COURTS:

Justice is administered by: (1) A supreme court of justice which hears appeals on questions of law, and also on questions of fact in cases where the court of appeals acted as a court of original jurisdiction; (2) a court of appeals with chambers in different parts of the country, which hears appeals from the courts of first instance and has original jurisdiction in proceedings against certain officials; (3) a contentious-administrative court which decides appeals from administrative officials and questions relating to Government contracts; its decisions may be appealed to the supreme court; (4) judges of first instances who have civil and criminal jurisdiction in all except minor matters and hear appeals from the minor judges; (5) minor judges, comprising justices of peace. Higher courts also have certain administrative functions with respect to judicial matters. (Const. 203-222; J. L. 58-107).

See also category 13 Family, topic 13.06 Infancy.

6.02 STATUTES:

Most of the legal provisions are codified. The principal codifications are the Civil Code, relating to persons, domestic relations, property rights, successions, obligations and contracts;

Code of Commerce; Code of Civil Procedure; Penal Code; Code of Criminal Procedure; Judiciary Law; Fiscal Code; Customhouse Code. The laws are published in a governmental paper entitled "Diario de Centro América".

7 DEBTOR AND CREDITOR

7.01 ASSIGNMENTS:

Choses in action are assignable except when otherwise agreed or when nature of the right does not permit it. If referred to real property or other rights requiring recording in Registry of Property assignment must be made in a public document. When a credit is assigned for a smaller amount debtor may be discharged by paying assignee said smaller amount plus expenses. Assignments do not bind obligor unless judicial or notarial notice or other agreed notice is given to him or when he signifies knowledge. Debtor may oppose to assignee personal defenses he had against assignor before assignment. Assignor warrants existence and validity of the credit at time of the assignment and not solvency of the debtor except if so agreed. In case of document transferable by mere endorsement or delivery these rules do not apply. Assignment of commercial credits respecting assigned enterprise is valid against third persons, although debtor is not notified or has not accepted such assignment, provided assignment is recorded in Commercial Registry. However, bona fide debtor shall be released if he pays debts to assignor. (C. C. 1443-1452; C. Com. 659).

7.02 ASSIGNMENTS FOR BENEFIT OF CREDITORS:

An assignment for benefit of creditors is voluntary abandonment by debtor of all his assets, when in consequence of inevitable accident he cannot pay his creditors. Assignment may be judicial or extrajudicial and it does not transfer title to the property but only right to dispose thereof. When a judicial assignment has been approved, debtor is deprived of administration of his property and if he is an individual, debts are discharged by the payments made even if not covering whole amount, but if debtor is a company, liability of its members continues according to the contract or type of corporate organization. (C.C. 1416-1422; C.C.P. 347-370). See also topic 7.04 Bankruptcy and 7.09 Insolvency.

7.03 ATTACHMENT:

Notice of a suit affecting real property may be recorded as a lien in the registry of property, but the plaintiff may be required to give bond to secure payment of damages should he fail in his action. Attachments may also be requested when there is danger that the property in dispute may be lost or damaged or that the debtor may hide or dispose of his assets; in such cases a bond must be given as determined by the judge. The following authorize a summary action of execution and an attachment without bond: (1) Final judgments; (2) arbitrator's decision not subject to appeal; (3) mortgage credits; (4) mortgage bonds or certificates; (5) pledge credits; (6) formal compromise; (7) agreement arrived at during suit. (C.C.P. 294-326, 523-537; C.C. 1149-1166).

See also topic 7.10 Liens.

7.04 BANKRUPTCY AND INSOLVENCY:

(C.C.P. 347-400; C.C. 1416-1422).

Provisions of Civil Procedure and Civil Codes govern insolvency and bankruptcy, both of merchants and non-merchants. Traditionally, substantive matters related to bankruptcy have been dealt with in Commerce Code and provisions on insolvency have been left to Civil Code and Civil Procedure Code.

Code of Commerce has omitted chapter on bankruptcy and therefore this matter must be governed by general provisions of law.

Insolvency.

Voluntary submission to creditors takes place when an offer is submitted to them by natural or artificial persons, whether merchants or not, who have suspended payments or are about to do so, or who have been declared in bankruptcy, if same is not fraudulent or culpable. Such offer may comprise: (1) assignment of property; (2) administration of property; (3) extensions and discounts. It may be extrajudicial, in which case offer requires acceptance by all creditors and must be done in public instrument. It may also be proposed in court, in which case judge appoints examining committee consisting of two creditors and third person, as well as depositary to intervene in debtor's administration. If committee reports falsehood or fraud debtor is declared in bankruptcy. Otherwise, meeting of creditors is called; notice for foreign creditors being served on their representative or consul. At meeting decisions may be taken by majority of votes representing three-fifths of credits, but larger majorities are required if proposed discount exceeds 50%. Secured creditors need not participate; if they do, they must abide by decision but do not lose their security. If debtor's offer is not accepted he is declared insolvent or bankrupt.

Forced submission to creditors or insolvency occurs: (1) When debtor's offer is rejected by creditors or disapproved by court; (2) when three or more executions are issued against debtor and not enough property is found to satisfy them. Judge appoints investigating committee as in case of voluntary submission, also depositary to take over insolvent estate, and calls meeting of creditors. All debts of debtor mature and interest ceases thereon. If no agreement is reached between debtor and creditors judge declares debtor bankrupt and orders his arrest unless examining committee reports that insolvency was not culpable.

See also topic 7.08 Fraudulent Sales and Conveyances.

7.05 EXECUTIONS:

Execution proceedings are held when petition therefore is based on final judgment or arbitration award, mortgage or pledge credits, bond (certificate or coupons thereof) compromise settlement in public document or stipulation in court. An “executive summary action” lies when based on “executive title” such as public document or private one acknowledged before notary or in court, commercial documents such as bills and notes protested when necessary, or not protested if otherwise; entries on account books certified by notary; insurance, savings and similar policies issued by authorized entities. In all cases documents must show duty to pay amount of money which is determined or determinable by simple arithmetical calculations and past due. In promises to deliver specific property court orders immediate delivery or sequestration if it fails or attachment of other assets to cover damages. In promises to do or perform act court orders performance within discretionary term and upon failure orders attachment of property for estimated damages or for payment to third party chosen by plaintiff to perform for other. If performance consists in granting right by writing judge acts as attorney-in-fact for defendant and executes document. If promise is to forebear court orders reestablishment of things to former state if possible, estimating damages if otherwise or for noncompliance and then ordering attachment and sale of assets to pay such damages or payment for compliance by third person.

In cases of “execution proceedings” no term to file defenses or evidence is granted. In “executive action” five days are granted to file defenses and ten days to prove them. On decision, if against defendant, sale of assets and payment to plaintiff takes place. However, rights of parties may be disputed again in ordinary action.

In both cases appraisal is made of attached property unless parties have agreed on value; in case of real property amount of debt or of tax assessment may be taken as basis. Public auction under court auspices is then advertised. Bidders must deposit 10% of their bids unless relieved from this obligation by plaintiff. Highest bid is accepted, but property may be taken at same price by co-owners, mortgage creditors and plaintiff. No bid is received of less than 70% of appraised value of property; if no such bid is made, another auction is held at which lowest bid may be 60% of appraised value; if there is still no admissible bid, there is another auction at which lowest admissible bid is again reduced 10%; and successive auctions are thus held, rate being reduced each time by 10%. After judicial approval of sale, there is no right of redemption. (C. C. P. 294-339).

7.06 EXEMPTIONS:

(C.C.P. 306-307).

Following property is exempt from attachment: (1) Municipal commons and property granted by government, if the concession prohibits attachment; (2) sums owed to public works contractors, except as to claims of workmen or suppliers of materials, but sums owed after conclusion of the work may be attached; (3) salaries, wages and fees in their entirety, except such percentages as authorized by special laws; (4) present and future amounts payable for support and maintenance; (5) necessary furniture and clothing of debtor and his family and provisions for one month; (6) books, tools and necessary instruments for debtor's profession, art or craft; (7) rights of use and usufruct and other strictly personal rights; (8) state pensions less than Q. 100 per month and pensions to invalids; (9) redemption and proceeds rights from life and accident insurance policies; (10) tombs; (11) property excepted by special laws.

7.07 FORECLOSURE:

See category 20 Mortgages, topic 20.03 Mortgages.

7.08 FRAUDULENT SALES AND CONVEYANCES:

(C. C. 1794, 1795, 1807).

Sale of goods that belong to another is void; seller must return price if he has collected it and must pay damages if he has acted in bad faith.

Representatives of minors, incapacitated persons, or absentees and bailees, administrators, interventors (“interventores”), or liquidators cannot sell goods under their care without complying, in each particular case, with formalities prescribed by law.

If same chattel has been sold to different persons, bona fide buyer in possession of same shall be deemed legitimate owner; if none of them is in possession of it, first sale in time shall be valid.

If thing sold is real property, sale first recorded in Registry shall be valid; if sale is not recorded, then first sale in time shall be valid.

7.09 INSOLVENCY:

See topic 7.04 Bankruptcy and 7.09 Insolvency.

7.10 LIENS:

(C. C. P. 379-397).

Credits other than mortgage and pledge credits are classified in following order: (1) Credits for support and maintenance and for personal services already due, and, regarding merchants, salaries of managers and employees for one year before state of bankruptcy plus time up to its adjudication; (2) credits for expenses of debtor's last illness, will, inventory, funeral and inheritance proceeding; (3) credits recorded on public instruments, in order of their dates of execution; and (4) common credits comprising all other credits not included in above. Cost of judicial and bankruptcy proceedings have first priority.

Mortgage and pledge credits are payable separately from encumbered property and any remaining balance after payment is to be applied for benefit of other creditors.

In cases of exclusion of a partner, company may withhold his share of capital and profits until termination of pending balances up to moment of such exclusion. Term of withholding cannot be longer than three years.

Creditor, when debt is due, may withhold debtor's movable or immovable property that is under creditor's custody or of those goods represented by negotiable instruments of credit.

In case thing withheld is attached, person in possession of it shall have following rights: (1) To keep thing as judicial bailee and to take necessary steps if goods might suffer considerable loss of value; (2) to have preferential right to be paid prior to others if goods withheld were under his custody by means of same contract that created such credit; (3) to be paid prior to creditor that attached property if second credit is originated after withholding.

Innkeepers may also withhold guests' property if after 30 days of termination of lodging contract, hotel bills are not paid; creditor may sell property in public auction. (C. Com. 233; 682; 872).

7.11 PLEDGES:

Pledge contract must be in writing and pledged object must normally be delivered to creditor or a third person designated by parties, except in case of agrarian, cattle and industrial pledges. (See category 20 Mortgages, topic 20.01 Chattel Mortgages.) However, in other cases, creditor may authorize debtor to keep pledged article. Any stipulation that creditor may assume ownership of pledged article in payment is null and void. (C. C. 880-916, Decree 51-2007 of Oct. 24, 2007).

7.12 REDEMPTION:

See topic 7.05 Executions; category 20 Mortgages, topic 20.03 Mortgages.

7.13 USURY:

See category 3 Business Regulation and Commerce, topic 3.06 Interest.

8 DISPUTE RESOLUTION

8.01 ARBITRATION AND AWARD:

(L. D. No. 67-95 of Nov. 17, 1995, C.C.P. 279, 290).

Arbitration.

There are two types of arbitration: de jure arbitration (arbitraje de derecho) and ex aequo et bono arbitration or amiable composition (arbitraje de equidad). In ex aequo et bono arbitration, arbitrators are not bound to decide on basis of rules of law; they may do so according to their best understanding and knowledge. Law is applicable to both domestic and international arbitration. Arbitration is international: (i) when parties to arbitration agreement are domiciled in different States at time of conclusion of that agreement; or (ii) when place of arbitration, place where substantial part of obligations of commercial relationship is to be performed, or place with which subject matter of dispute is most closely connected is located outside of State in which parties have their domicile; (iii) or parties have expressly agreed that subject matter of arbitration agreement relates to more than one State. Resolution of disputes arising from international contracts between private parties are subject to Regulations of International Chamber of Commerce unless parties agree to contrary.

Law applies to any dispute concerning matters which may be legally and freely disposed of by parties and to any other dispute which may be settled by arbitration under other laws, as long as arbitration agreement is valid under this law. By arbitration agreement, parties decide to submit to arbitration all or certain disputes that have arisen or may arise between them from particular legal relationship, contractual or not. Arbitration agreement may be in form of arbitration clause in contract or in separate agreement. Arbitration agreement shall be in writing, in document signed by parties or in exchange of letters, telexes, faxes, telegrams, or other means of telecommunication which provide record of agreement, or in exchange of statements of claim and defense in which existence of agreement is alleged by one party and not denied by other. Arbitration agreement compels parties to respect and observe prior stipulations and prevents judges and courts from entertaining action based on disputes submitted to arbitration, as long as interested party raises defense of lack of jurisdiction. Number of arbitrators should be three, unless parties agree on another number. Arbitrators have right to demand estimated advance payment to cover their fees and expenses of arbitration. Unless payment is made within 15 days of receipt of request, arbitral tribunal may order conclusion or stay of arbitration proceedings. Parties are free to agree on language or languages to be used in arbitral proceedings.

Conciliation.

Parties to dispute related to commercial or any other relationship try to resolve dispute with help of neutral and impartial third party preventing conflict from reaching court or arbitral proceedings. Intervention of third party in conciliation process may be administered by institutions established for such purpose (centros de arbitraje y conciliación) or similar entity. Decision shall be in public writing or in private writing certified by notary or recorded in notarial act, which may be used as evidence in any judicial or arbitral proceeding.

Conventions.

New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958; Inter-American Convention on International Commercial Arbitration, Panama, 1975.

9 DOCUMENTS AND RECORDS

9.01 ACKNOWLEDGMENTS:

Acknowledgment may be made before notary, whose certificate must also be signed by signer and witnesses of instrument acknowledged, and who must make note of matter in his record. (L. D. 314 of Nov. 30, 1946). Usually documents requiring notarial authentication are executed as public instruments before notaries, who retain original in their records and issue certified copies. See topics 9.02 Notaries Public; 9.03 Public Instruments.

Documents executed abroad for use in Guatemala will be accepted if they are executed either in accordance with laws of place where executed or in accordance with Guatemalan laws. Authentications must be obtained from Guatemalan consular or diplomatic officer. (J. L. 37; C. C. P. 190).

9.02 NOTARIES PUBLIC:

(Notarial Code, L. D. 314 of Nov. 30, 1946 as am'd).

The title of notary is obtained by following prescribed educational courses similar to those required for title of lawyer. Notary must possess such title, registers his diploma in Supreme Court, native-born Guatemalan, and of known integrity. He holds office indefinitely but remains under supervision of courts.

Instruments executed before notary must be prepared with certain formalities. They must state date, names of parties, their age, domicile, profession and whether married or single. Notary must declare that he knows parties or that they were identified by witnesses.

Witnesses are required for wills executed before notary and gifts causa mortis, and are optional in other instruments; witnesses must be over 21 years old, know how to read and write, know Spanish, have no manifest interest in matter, not be deaf, dumb or blind, nor relatives of notary, nor relatives of parties except in certain cases. Notary retains original document in protocol and furnishes parties with copies which have effect of originals in court. Upon death of notary his records are deposited in general archive of protocols.

9.03 PUBLIC INSTRUMENTS:

Documents executed with legal formalities before notary public (q.v.) are called public instruments. Authentic documents are most documents issued by public officers. Other documents are private documents. Public and authentic documents are received in court as full proof without further verification. The law requires numerous contracts to appear in public instruments, e.g., articles of incorporation or partnership, mortgages, etc. Document to be recorded must be public document. Commercial contracts for more than Q. 1,000 or other contracts for more than Q. 300 must appear in writing. (C. C. 1574-1578; C. C. P. 177-193; N. C., L. D. 314 of Nov. 30, 1946 as am'd).

9.04 RECORDS:

(C. C. 438-440, 1124-1250, Accord 30-2005 of Jan. 27, 2005, L. D. 90-2005 of Dec. 14, 2005 as am'd, Accord 649-2006 of May 24, 2006, L. D. 51-2007 of Oct. 24, 2007).

There is public registry comprising registries of: (a) Real and personal property, (b) agrarian pledges and chattel mortgages, (c) wills and estate proceedings and (d) special works such as railroads, wharves, vessels, aircrafts, motor vehicles, mines, among others. Registrars do not transcribe entire document but only essential parts and may refuse to record defective documents: appeal may be taken to court from their decision.

There is Registro de las Personas Jurídicas, mercantile registry for certain documents relating to merchants and companies, as well as Registro Nacional de las Personas for recording births, marriages, deaths, divorces and any fact or act amending civil status and legal capacity of natural person.

There is Registro de Garantías Mobiliarias, public registry, where pledged documents are recorded in order to have effect as to third persons.

9.05 SEALS:

Seals are not used in private matters. Document executed before notary has most of effects of sealed instrument in United States.

9.06 VITAL STATISTICS:

See topic 9.04 Records.

10 EMPLOYMENT

10.01 LABOR RELATIONS:

(Const. 101-106; L. C. 18-87).

Individual contracts may be oral only in following cases: (a) agricultural labor; (b) domestic services; (c) temporary work not exceeding two months; (d) trabajo por obra determinada.

Labor contracts must be in written form and executed with three copies.

If employer terminates contract without “just cause” employee is entitled to: (a) indemnification for termination of contract whose amount shall depend upon time employee has worked for such employer; and to (b) damages, for amount equivalent to salaries not received by employee during period included from date of dismissal to date of payment of compensation up to 12 months of salaries and legal expenses.

Besides regular salaries employers must pay workers, according to their performance, annual bonus equivalent to monthly salary.

11 ENVIRONMENT

11.01 ENVIRONMENTAL REGULATION:

(Const. art. 97; Decree 68-86 of Dec. 5, 1986 as am'd regulated by Accord 431-2007 of Sept. 17, 2007).

Law establishes general rules for conservation, protection and improvement of environment to benefit quality of life. Within environmental protection are air, water, hazardous waste and noise pollution. Environmental impact statements are mandatory for any activity that may damage environment. Entry of hazardous waste into country, whether actually or potentially dangerous, and of radioactive waste is prohibited. Administrative or criminal penalties are imposed for violation of law. Administrative sanctions include warnings, fines, temporary or permanent closure of facilities or immediate suspension of activity causing damage, depending on gravity of offense and prior violations. Criminal sanctions include fines and imprisonment as established by Criminal Code. Ministry of Environment and Natural Resources is responsible for enforcing law.

12 ESTATES AND TRUSTS

12.01 ADMINISTRATION:

See topic 12.05 Executors and Administrators.

12.02 DEATH:

If a person's whereabouts be unknown, a guardian may be appointed for his property. Administration may be granted to the absentee's relatives. Three years after administration has been granted to relatives, or five years after date of disappearance, absentee may be declared presumptively dead and his heirs may obtain definitive possession of his estate. This declaration may also be issued after one year of disappearance of a person in case of war or ship wreck or aircraft accident or immediately if he disappeared on occasion of explosion, fire, earthquake, flood, etc. (C. C. 42-77).

Guatemala has adhered to Convention on Declaration of Death of Missing Persons sponsored by United Nations.

Death certificates may be obtained from official in charge of Civil Registry of district where death occurred; a nominal fee is charged.

Actions for Death.

Within provisions of Civil Code on torts, art. 1655 provides that in case of personal injuries victim is entitled to expenses for health recovery and damages resulting from total or partial disability to work estimated in view of duties of victim to support his family and circumstances of victim and capacity of payment of defendant and that in case of death victim's heirs or persons having right to be supported by decedent, may claim indemnity under above rules. Such actions are limited to one year. (art. 1673).

12.03 DECEDENTS' ESTATES:

See topics 12.04 Descent and Distribution, 12.05 Executors and Administrators, 12.08 Wills.

12.04 DESCENT AND DISTRIBUTION:

(C.C. 917-1123).

In absence of testamentary disposition decedent's estate passes, without prejudice to rights of support which other relatives may have, to the following in order named: (1) Legitimate, illegitimate and adopted children and spouse, not having community property rights or having such rights representing less than intestate share, for the deficiency; (2) nearest ascendants and spouse; (3) brothers and sisters, legitimate or illegitimate; (4) collaterals to fourth degree, nearer relatives excluding those more remote; (5) State and Guatemalan universities in equal parts.

Certain persons are excluded from testate or intestate succession, as for example a person who committed or attempted to commit homicide as against the decedent or his spouse, ascendants or descendants, or who by fraud or violence induced the decedent to make a will or prevented him from making one.

Inheritances may be expressly refused or expressly or tacitly accepted. If accepted, heir becomes owner of estate as of time of decedent's death. He is liable for debts and other charges only up to amount of estate.

12.05 EXECUTORS AND ADMINISTRATORS:

(C. C. 1041-1067; C. C. P. 503-511).

An executor or administrator must be over 18 years of age, capacitated to administer property, not incapacitated to acquire property by inheritance, and not holding the office of judge or prosecuting attorney, except for estates of relatives. He ceases in office one year after death of testator unless will provides otherwise. An administrator is appointed only if executor appointed by will cannot act and heirs request the appointment. If will appointed no executor, heirs are charged with carrying out testator's wishes.

The estate vests in the heirs immediately on death of the decedent, but the executor or administrator pays the debts and legacies and has the administration of the property until the heirs take it over. The executor or administrator represents estate in court except if otherwise provided by the will.

12.06 INTESTACY:

See topic 12.04 Descent and Distribution.

12.07 TRUSTS:

(C. Com. 766-793).

Trusts may be established by contract or will. Settlor transfers certain goods or rights to trustee for certain preestablished purposes. Trustee receives them with specific limitation to do only those acts required to fulfill trust's purposes.

Settlor must have legal capacity to administer his patrimony; in case of minors, incapacitated persons, or absentees, a trust can be created by their legal representatives. Beneficiaries must also have legal capacity to receive benefits of trust. Only duly authorized banks established in Guatemala can be trustees. Credit institutions can also act as trustees after having been specially authorized to do so by Monetary Board. Trust established by contract must be prepared before a notary public; it must contain trustee's acceptance and it must also state estimated value of goods given in trust. Maximum duration is 25 years unless beneficiary is an incapacitated person, or suffers an incurable illness, or it is a charitable institution. Trusts may also be extinguished: (1) If purpose of its creation has been fulfilled; (2) if its fulfillment is impossible; (3) if resolutory condition has been complied with; (4) by express agreement between settlor and beneficiary; (5) by settlor's revocation if such right had been expressly reserved in constitutive agreement; (6) by trustee's resignation, nonacceptance, or his removal if he cannot be replaced by another trustee; and (7) by judicial judgment.

Secret trusts and those in favor of several beneficiaries succeeding previous one upon his death are void unless said beneficiaries were alive or conceived at time of settlor's death. Several other provisions govern rights and duties of parties among themselves, and with third persons as well as taxes and fees.

12.08 WILLS:

(C. C. 924-976; C. C. P. 460-477; N. C. 42, 52, 53).

Any person having full civil capacity may dispose of his property by will. Following are incapacitated: (a) Persons declared under interdiction, (b) deaf-mutes and those unable to speak who cannot express themselves in writing and (c) those not under interdiction but not having their mental capacity or full power of volition at time of execution of will. Following cannot be witnesses: (1) Minors below 16 years of age; (2) illiterate persons or those not knowing Spanish; (3) persons evidently interested in will; (4) deaf and dumb or blind persons; (5) notary's relatives.

Wills are common or special. Common wills comprise the open and the closed will.

Open wills are made as public instruments before a notary. They require two witnesses, but if the testator cannot sign or is blind an additional witness is needed, and if he does not know Spanish two interpreters must translate his wishes. The will must state the place, date and hour of signing; it must be read aloud at one sitting before the witnesses by the testator himself or a person designated by him; and be signed by the testator, notary, witnesses, and interpreters, if any.

Closed wills may be written by testator or another person, and must be signed by testator or another at his request. Will is enclosed in envelope which is sealed by testator in presence of notary and two witnesses with statement that it contains his will; if testator cannot sign further witness is required, and if he does not know Spanish two interpreters must be present. On envelope notary writes minute of act, and same is signed by testator, notary, witnesses, and interpreters, if any.

Special wills are open wills made by soldiers in time of war, or open or closed wills made on merchant or war vessels. They are made before certain officers and require presence of two witnesses.

Foreign wills may be made by Guatemalans in accordance with laws of country where they are; or on foreign vessels in accordance with laws of vessel's nationality; except that Guatemalans cannot make joint wills.

Testamentary Dispositions.

Testator may freely dispose of his estate but he must set aside sufficient to support those to whose support he is obligated by law, namely, his minor children, parents, spouse and in certain cases his brothers and sisters. Following are excluded from taking by will: (1) Those excluded from descent benefits (See topic 12.04 Descent and Distribution); (2) ministers of any religion, unless relatives of testator; (3) physicians who assisted testator in his last illness, unless relatives; (4) notary before whom will was made and his relatives; (5) guardian and his relatives if guardianship accounts are unapproved, unless relatives of testator; (6) foreign institutions of any kind.

13 FAMILY

13.01 ADOPTION:

(C. C. 228-251).

Child may only be adopted by single adopting party or by husband and wife when both agree to consider adopted party as their own child. Adoption gives adopted child identical status with that of child, creating lines of kinship between adopted child and adoptive parents. Adoption does not extinguish inheritance rights between adopted child and his natural parents. Adoption permits adopted child to inherit equally in same proportions as child from adoptive parent, and prevents adoptive parent from inheriting from adopted child. Adopting party has custody, legal representation and administration of assets of minor, with restricted powers of disposition. Adoption is terminated by mutual consent when adopted party reaches legal age and by revocation as established by Code.

13.02 ALIMONY:

See topic 13.04 Divorce.

13.03 COMMUNITY PROPERTY:

See topic 13.05 Husband and Wife.

13.04 DIVORCE:

(Const. art. 55, C.C. 153-172, C.C.P. 426-434).

Divorce dissolving marriage bond may be granted at request of innocent party filed within six months of knowledge of facts, on grounds of: (1) Infidelity; (2) cruelty or grave insults; (3) attempt of one spouse against life of other or of children; (4) abandonment or unjustified absence for over one year; (5) wife giving birth to child conceived before marriage and of which husband had no knowledge; (6) incitation of spouse to prostitution or of children to corruption; (7) refusal to perform legal duty to support and assist spouse and children; (8) dissipation of family resources; (9) habits of gambling, intoxication or use of narcotics, when they jeopardize family or cause domestic discord; (10) slanderous accusation or report of crime by other spouse; (11) sentence to over five years imprisonment for crime; (12) incurable disease prejudicial to spouse or descendants; (13) impotence, permanent and incurable; (14) incurable mental illness; (15) separation judicially declared.

Court determines alimony to be paid by guilty party to innocent party. Wife is entitled to alimony while she observes good conduct and does not remarry; husband only if he is incapacitated for work and does not remarry. During divorce action sons over ten years remain in custody of father, other children in custody of mother, unless court decides otherwise.

On judgment of divorce there is liquidation of community property. Spouses may make agreements as to property and custody of children, but cannot abridge rights of children to support and education.

Divorce by mutual consent cannot be requested before a year has elapsed from marriage. With petition for such divorce spouses must file agreement as to alimony and custody and support of children. Court calls hearing at which parties must be personally present if in Guatemala.

Separation may be granted for any cause which is ground for divorce. Separation which has lasted for six months may be converted into divorce on petition of either party, hearing being granted to other.

Annulment of marriage, see topic 13.07 Marriage.

13.05 HUSBAND AND WIFE:

(C. C. 108-143, 278-292).

Spouses owe each other support proportionate to their personal and financial circumstances.

If wife is Guatemalan and husband is foreigner or Guatemalan naturalized citizen, and if either party owns property or has income over certain value, or administrates party of minor or legal incapacitated person, then before marriage, or at marriage ceremony, spouses must enter agreement governing both property owned individually at time of marriage as well as property they may acquire during marriage. Agreement must be recorded and may be amended during marriage. There are three different regimes of matrimonial property: absolute community property where all property owned by spouse at time of marriage and acquired during marriage is community property and divided into equal parts at dissolution of marriage; absolute separate property where each spouse is owner of property acquired before and during marriage and income generated by it; and community property where each spouse retains sole right to property owned before marriage or acquired by bequest, gift or inheritance after marriage, and property acquired during marriage is community property as well as part of income generated by separate property. This community property is divided into equal parts at dissolution of marriage. Under absolute community property and community property regime, spouses have separate or joint administration of matrimonial property; each spouse can freely dispose of property registered under his name, but in case of disposition of community property, he has to account to other spouse for such disposition.

Home furniture belongs to wife, except articles of husband's personal use. Community property is to be used for payment of purchases made by either spouse for use of family and, if insufficient, separate property of spouses must be used. Debts contracted prior to marriage are charge only on separate property of spouse who made them; expenses of illness or funeral of either spouse are charge on community and on separate property.

In marriages of aliens of the same nationality, in default of any agreement, the administration of their property is governed by their national law at the time of marriage; if they are of different nationalities, by the law of the first matrimonial domicile. A change of nationality of either or both spouses does not affect the administration of their property.

13.06 INFANCY:

(Const. art. 50; C. C. arts. 8, 252-277, 293-351, 835, 1251, 1303, 1312, 1976, 2152, 2163).

The age of majority is 18. Ordinarily, contracts by minors are void, but nullity must be claimed within two years after entering into the contract. Minors are subject to parental authority of the father and mother. Parental authority includes custody, legal representation and administration of the real and personal property of the minor, with certain exceptions. In the absence of parents a guardian is appointed. Parents and guardians have restricted powers of disposition.

Law on protection of childhood and adolescence recognizes special rights to minors and children; it also imposes duties and responsibilities. Comisión Nacional de la Niñez y de la Adolescencia is governmental agency in charge of supervising enforcement of law. There is criminal judicial system specialized in minors and adolescent matters. (L.D. 27-2003 of June 4, 2003 as am'd). Regulations on labor protection of childhood and adolescence, among them, minimum working age and salary, special schedules, kind of work, training, medical check-up. (Accord 112-2006 of Mar. 7, 2006).

13.07 MARRIAGE:

(Const. art. 49; C. C. 78-107; 144-152; 173-189).

The marriage ceremony is performed by a mayor, the councilman taking his place, a notary public or a priest or minister duly registered. Marriages by proxy are allowed.

The following marriages are void: (a) Those of persons already married; (b) between ascendants and descendants by consanguinity or affinity; (c) between brothers and sisters of whole or half blood.

Following marriages are prohibited: (1) When male is less than 16 years of age or female less than 14, unless female conceived before said age and consent is given to marriage by person having authority therefore; (2) when either party is less than 18 years of age, unless previous consent is obtained from person authorized to give same; (3) where 300 days have not elapsed since legal dissolution or annulment of previous marriage of female, unless she gave birth within that period or unless spouses were separated before that time; (4) marriages of guardians or their descendants with person under guardianship until after approval of guardianship accounts; (5) marriages of persons having children under their parental authority, without a judicial inventory of the children's property; (6) marriage of adoptive parent with adopted person while adoption is still valid. Such marriages, if performed, are considered valid, but violators are liable according to law.

A marriage may be annulled: (1) When either spouse consented under error, fraud or duress; (2) in case of incurable impotence before marriage; (3) when either party was mentally incapacitated; (4) when one of spouses is guilty of murder of other spouse's spouse.

Consensual unions of persons who have lived together for over three years may be registered and give parties rights and obligations similar to those of husband and wife.

14 FOREIGN TRADE AND COMMERCE

14.01 CUSTOMS:

Customs are regulated by Central American Agreement on Tariff and Customs Regime and its Annex, signed in Guatemala in 1984, and its Protocols. Agreement establishes common regime that includes import tariff based on Brussels nomenclature ad valorem duties, law on Customs Value of Merchandise and its Regulations, Uniform Customs Code and its Regulations, Regulations on Tax Exemptions.

14.02 EXCHANGE CONTROL:

(L.D. 94-2000 of Dec. 19, 2000 as am'd, L.D. 17-2002 of Apr. 24, 2002).

There are no exchange control regulations. Parties may agree to any payment in local or foreign currency.

For importation of most goods no license and no registration is required.

14.03 FOREIGN EXCHANGE:

See topic 14.02 Exchange Control; category 1 Introduction, topic 1.01 Currency.

14.04 FOREIGN INVESTMENTS:

(L. D. 9-98 of Feb. 20, 1998 regulated by Accord 893-98 of Dec. 12, 1998).

Purpose of law is to promote foreign investment defined as foreign source investments made by foreign individual or juridical persons. Foreign investors have same rights and duties as national investors; they may invest in all economic activities. Foreign investment may be made in: freely convertible foreign currency, tangible assets, any form of technology, capitalization of loan, capitalization of profits or investment of profits entitled to repatriation. In case of company liquidation or expropriation for public interest, foreign investors may reexport their invested capital plus any capital gains. Yearly profits may be remitted abroad. Any controversy arising between foreign investor and government may be subject to international arbitration, or any other dispute resolution mechanism, subject to international conventions and local laws.

See topic 14.02 Exchange Control; category 2 Business Organizations, topic 2.02 Corporations.

15 HEALTH

15.01 HEALTH CODE:

(L. D. 90-97 of Nov. 3, 1997 as am'd regulated by Accord 426-2001 of Oct. 16, 2001). Code establishes rights and duties of individuals, among them are rights related to promotion of health, preventive medicine, protection and rehabilitation of health. Code regulates, among others, environment, drinking water, solid waste, cemeteries, burial and exhumation, production, preparation and distribution of food; registration of food products, pharmaceutical products, pharmacies, practice of medicines and related professions and sanctions for infringement of Code. Ministry of Health is in charge of regulating, planning and coordinating public and private activities related to health.

Sanitary control of medicines, plaguicides for domestic use, importation and exportation of controlled substances, pharmacies, prescription and sale of medicines, commercialization, publicity and information of medicines is regulated by Accord 712-99 of Sept. 17, 1999 as amended.

Publicity and consumption of alcoholic beverage are regulated by art. 244 of Health Code and Accord 127-2002 of Apr. 18, 2002 as amended.

Decree 91-96 of Oct. 16, 1996 and Accord 525-2006 of Nov. 3, 2006, regulates donations and transplants of organs and tissues; removal of organs and body parts, from dead and living persons, prohibits commercialization and export of organs and tissues. All transplants are recorded at Registro Nacional de Transplantes.

Use of steroids and other potentially harmful substances is prohibited by Decree 13-2007 of Apr. 12, 2007.

16 IMMIGRATION

16.01 ALIENS:

In general, aliens enjoy same civil rights as citizens. They may engage in industry and commerce and own real property and are not obliged to become citizens or to pay special taxes. Constitution of 1985, arts. 122 and 123 reserves right to establish limitations to foreign ownership of land in zone of 15 kilometers along borders and three kilometers along seashores, but Art. 635 of Civil Code establishes limitations in 15 kilometer zone along both, borders and seashores.

Foreigners with tourist cards may remain in country for a period of one month.

In every business and industry 90% of employees must be Guatemalans. Foreigners need special permit to work within country. (L. C. 13, Accord 528-2003 of Sept. 17, 2003 as am'd).

See also topic 16.02 Immigration; categories 2 Business Organizations, topic Corporations, subhead Foreign Corporations; Mineral, Water and Fishing Rights, topic Mines and Minerals.

16.02 IMMIGRATION:

(D.L. 95-98 of Nov. 26, 1998 and its regulations, Accord 529-99 of July 20, 1999 as am'd).

Law classifies foreigners entering country as: (a) nonresidents and (b) residents. Nonresidents are tourists who can remain in country for up to three months, renewable for equal period, and persons in transit who can remain in country for three days. Residents are temporary residents who can remain in country for two years and engage in any lawful activity, and permanent residents, those permanently domiciled in country. Permanent residence may be obtained, among others, by retired persons or persons with income, investors and temporary residents. Government keeps registry of residents. Residents cannot change residency without advising authorities accordingly. Decree establishes sanctions for foreigners or national employers who do not comply with legal requirements and focuses on expulsion and deportation of foreigner from country.

17 INTELLECTUAL PROPERTY

17.01 COPYRIGHT:

(Const. art. 42; D.L. 33-98 of May 19, 1998, as am'd regulated by Accord 233-2003 of Apr. 9, 2003).

Copyright is granted on literary, scientific and artistic works, including computer programs and musical works, adaptations, arrangements, translations, compendiums, transformations of literary and artistic works. Right comes into existence by mere creation of work without need of deposit, registry or other formality. Law grants moral and proprietary rights to author. Moral rights include recognition of author as such and right to exploit and modify work; such rights are inalienable, non-prescriptible and non-renounceable. Proprietary rights include exclusive right to exploit work personally or by authorized third party; such rights are assignable. Proprietary rights remain in force for author's life plus 75 years. If owner of proprietary rights is legal entity, 75 years are counted from date of first publication, as provided by law. Agreements creating, modifying, transferring or extinguishing proprietary rights must be in writing and recorded with Intellectual Property Registry. Foreigners enjoy same rights of national authors according to law and international conventions. Protection of rights of performers, phonograph producers and broadcasting companies is for 75 years, as provided by law. Infringement of copyright is sanctioned with fines and imprisonment. Action for infringement of rights may be filed before civil and commercial courts, or may be subject to conciliation and arbitration. Precautionary measures may be requested.

Border Measures Against Counterfeit and Pirated Goods.

Law sets standards on customs intervention in relation to importation, exportation and transition of goods suspected of being counterfeit or pirated.

Conventions.

Inter-American Copyright Convention of June, 1946; Convention for Protection of Performers, Producers of Phonograms and Broadcasting Organizations, Rome, 1961; Convention for Protection of Producers of Phonograms Against Unauthorized Duplication of Their Phonograms, Geneva, 1971; Universal Copyright Convention, on July 28, 1964 and Berne Convention for the Protection of Literary and Artistic Works of Sept. 9, 1886, as revised; WIPO Copyright Treaty and WIPO Performances and Phonograms Treaty (WPPT) of Dec. 20, 1996. See also category 24 Treaties and Conventions, topic 24.01 Treaties.

17.02 PATENTS:

(Const. art. 42, D.L. 57-2000 of Sept. 18, 2000 as am'd, regulated by Accord 89-2002 of Mar. 18, 2002 as am'd).

Invention.

Any creation of human mind susceptible of industrial application, novel and that is not within state of art. Scientific theories, mathematics programs, computer program considered separately, literary and artistic works, economic plans, principles and methods used in business, games and mental exercises are not considered inventions. Surgical, therapeutic or diagnostic treatment methods for human beings and animals, among others, are not patentable. Applications may be divided, maintaining original application date. Patents are granted for 20 years from filing date. Term may be extended at applicant's request for period equal to unjustified delay in patent prosecution due to Register's fault; for pharmaceutical products when authorization to commercialize product is granted after three months from filing date. Patent gives exclusive right of exploitation but compulsory license may be granted in case of declared emergency or national security reasons or unfair competition practices. Patent rights are transferable. Patents are subject to cancellation according to law.

Utility Models and Industrial Designs.

Utility models are registrable if they are novel and susceptible to industrial application. Registration term is ten years from filing date. Any new design or new model which may be applied to industrial object may be registered as author's ownership. Industrial designs are new if no publicity thereof has been made in any form. Protection is granted for three years from date first divulged by designer or his successors, without registration. Provisions regarding patents are applicable to industrial designs and utility models.

Unfair Competition and Trade Secrets.

Law regulates unfair competition related to industrial property. Law protects trade secrets and considers them as any confidential information with commercial value, including information required by law in order to grant permits for commercialization of new pharmaceutical products and chemical products used in agriculture, as stipulated by law.

Conventions.

Convention for the Protection of Industrial Property, Paris, Mar. 21, 1883, Stockholm Revision of July 14, 1967 as amended on Sept. 28, 1979; Convention for the Protection of New Varieties of Plants, Paris, Dec. 2, 1961, as amended; Patent Cooperation Treaty (PCT), Washington, June 19, 1970 as amended; Budapest Treaty on the International Recognition of the Deposit of Microorganisms for the Purposes of Patent Procedure, Budapest, Apr. 28, 1977, as amended; Agreement on Trade-Related Aspects of Intellectual Property Rights, Marrakech, Apr. 15, 1994.

17.03 TRADEMARKS:

(D.L. 57-2000 of Sept. 18, 2000 as am'd regulated by Accord 89-2002 of Mar. 18, 2002 as am'd).

Trademarks.

Words or combination of words, letters, numerical characters, monograms, figures, photographs, labels, lines, trimmings, combination of colors, shapes and wrapping of goods, sounds and odors, among others may be registered as marks. No registration may be granted to signs or combinations of signs not sufficiently distinctive to identify goods and services, to usual or necessary shapes of products or denomination and color thereof, to common words or their equivalent in common languages or descriptive denominations, to denominations, signs and emblems of State or its agencies, or international organizations, marks which may be confused with others registered or pending registration; geographical names if their use may suggest origin; terms contrary to law, those against public policy, denomination of protected vegetal varieties, those identical or similar to registered slogans provided under circumstances where public may be confused; those that are reproduction, limitation, translation or total or partial transcription of distinctive signs, locally or internationally, well known, without taking into consideration classification of goods or services concerned; or because of similarity to well-known trademarks causes confusion to public regardless of classification of goods and services for which registration is applied for. Application may be amended or divided, maintaining original application date. Registration of trademark grants ownership thereof and exclusive right to use it during ten years from granting date, renewable. Registrations may be divided, maintaining original registration date. Owner of trademark may grant license to use or exploit it. Licenses may be registered. Trademarks can be cancelled: for nonuse for consecutive five years by owner or licensee, unless nonuse is due to just cause.

Slogans.

Provisions regarding trademarks are applicable to slogans.

Commercial Names.

Those signs used to identify individuals or juridical persons regarding their economic activity are protected by law without requiring registration. Exclusive right to use of commercial name ends with closing of establishment or suspension of economic activity for more than six months. Registration is granted for indefinite period. Provisions regarding trademarks are applicable to commercial names.

Collective Marks and Certification Marks.

Any sign that distinguishes origin or any other common characteristic of products or services of different enterprises. Producers or traders associations may register collective marks. Provisions regarding trademarks are applicable to collective names. Certification marks sign to be applied to products or services used by others whose quality or other specific characteristics have been certified by legal owner of mark. Private or public enterprises, governmental bodies or international organizations may register certification marks. Registration is granted for ten years, but if granted to governmental body, registration is for indefinite period of time. It cannot be encumbered or subject to attachment.

Geographic Indications and Appellations of Origin.

Geographic Indications identify products with geographic location in relation to any characteristic of product. Product can also benefit from good reputation. For appellations of origin, product must come from specific region or geographical zone and which quality or product characteristic are due to geographical environment exclusively, including, natural, human or cultural factors. State of Guatemala owns local origin denominations and may grant authorization for use for ten years, subject to renovation.

Law prohibits unfair competition and penalizes violators.

Conventions.

Convention for the Protection of Industrial Property, Paris, Mar. 21, 1883, Stockholm Revision of July 14, 1967 as amended on Sept. 28, 1979; Nice Agreement Concerning the International Classification of Goods and Services for the Purposes of the Registration of Marks, 1957 as reviewed and amended; Vienna Agreement Establishing an International Classification of the Figurative Elements of Marks, 1973 as amended; Agreement on Trade-Related Aspects of Intellectual Property Rights, Marrakech, Apr. 15, 1994.

18 LEGAL PROFESSION

18.01 ATTORNEYS AND COUNSELORS:

(J. L. 196-204 and D.L. 72-2001 of Nov. 30, 2001 regulated by Accord 0205-2002 of May 2, 2002).

To practice law attorney must be registered with Supreme Court of Justice, hold law degree, be active member of professional association and able to fully exercise citizen rights. Attorney holding law degree from foreign university may practice law if authorized by international convention adopted in Guatemala. Attorneys are responsible for damages caused to clients because of ignorance, negligence or reckless conduct, fault and bad faith.

19 MINERAL, WATER AND FISHING RIGHTS

19.01 MINES AND MINERALS:

(Const. arts. 121 and 125; Decree 48-97 of July 14, 1997 regulated by Accord 176-2001 of May 11, 2001 as am'd).

Mining in General.

State is owner of all mineral resources within national territory, continental shelf and its exclusive economic zone. Mining activity is regarded as public interest. State may grant license for prospective, exploration, exploitation and utilization of mineral resources to individuals, private entities, local or foreign, with exception of certain government officials and their relatives. Mining rights can be transferred by inheritance and can be encumbered.

Prospecting license is granted for six months, renewable once and for area up to 3,000 square kilometers.

Exploration licenses are granted for maximum period of three years, renewable twice and for area up to 100 square kilometers.

Exploitation licenses are granted for period of up to 25 years, renewable once for equal period. Area allocated to exploitation licenses is up to 20 square kilometers. Holder of exploitation license must file environment statement prior to commencing exploitation. Law establishes causes for suspension, cancellation or exploration of mining titles.

Taxation.

Mining rights are subject to surface royalty which varies according to type of right and area allocated. Exploitation licenses are subject to payment of royalties according to volume of mineral product commercialized. Duty free importation of capital goods and raw materials necessary for mining operations is granted.

Exploitation contracts become void when transferred to persons precluded by law to hold ownership over mining operations. In such cases all permanent installations pass on to state without compensation. Contractors must employ Guatemalan technicians when available, and Guatemalan workers up to 80% of total labor employed, accounting for at least 85% of total payroll.

Petroleum.

(Decree-Law 109-83 of Sept. 15, 1983 as am'd and its regulations, A. 1034-83 of Dec. 15, 1983 as am'd by A. 753-92 of Sept. 7, 1992). Hydrocarbon industry, including production, refining, transport and commercialization, is public utility. Expropriation of property may be conducted for development of industry. Primary goal is refining within Guatemala. Hydrocarbon policy is dictated by Ministry of Energy and Mines and by National Petroleum Commission. Ministry of Energy and Mines may execute oil operation contracts for exploration and exploitation of hydrocarbons with private developers under various stipulated arrangements by individual evaluation or creating mixed economy companies with national or foreign companies duly established in country and having signed agreement renouncing all diplomatic recourse. Professional services that need to be performed by Ministry may be performed by itself or by others through oil service agreements. Each contract of exploration is limited to maximum 300,000 hectares onshore and 480,000 hectares offshore and of exploitation is limited to 150,000 hectares offshore and onshore. Companies must also commit themselves to drill at least one well in their first three years, followed by two wells each in fourth, fifth and sixth years of operation, to get to total of seven wells in six years. Reduction of one well each of last three years of operation can be authorized in special circumstances. Companies are permitted to recover all exploration, development and production costs in given contract area before government receives production share of 30% plus royalty payment; all production passes to government after 25 years.

In government participation is included corresponding income tax to be paid by private party and in general any other tax imposed on capital and profits from oil operations of exploitation and production.

State makes express reservation of rights to receive its corresponding participation in kind or in money. In case of monetary participation total amount shall be computed taking as basis price of reference in international market. This price shall be fixed by Executive Branch.

Term of oil operations agreement shall not exceed 25 years. In case private party does not strike hydrocarbons commercially exploitable, before end of sixth year of existence of contract, said contract shall be considered automatically terminated.

It is provided also that private party shall relinquish gradually portions of said area so that at end of fifth year 50% of that area has in fact been relinquished.

Contracts will be made only with private parties which possess sufficient technical and financial capacity and proven experience and which are duly created according to laws of country or authorized to do business in Republic if they are foreigners.

It shall be stipulated in agreements that upon termination of them for any reason, all buildings, permanent installations, machinery, equipment and any other property connected with oil operations shall be transferred in full ownership to State free of any cost or encumbrance.

Private party contracting with government shall be bound to sell to State amounts of hydrocarbons that State may require, in addition to participation above cited and therefore such private party shall only be free to dispose for export of portions exceeding those requirements.

Minimum amount of investment shall be established in each agreement.

Foreign concerns carrying out oil operations pursuant to this law must give option to Guatemalan nationals to participate in those operations with capital contributions of at least 5% of total capital to be invested during first three years of contract. (Accord 09-86 of Jan. 7, 1986). It is possible for private parties to import duty free all machinery and equipment required for oil operations provided that they are not satisfactorily made in country.

Taxes.

Contracting companies pay income tax, as stipulated by law and Accord 412-84 of May 28, 1984 as am'd by Accord 534-85 of July 2, 1985. They are also subject to stamp tax and fees established by arts. 35 and 45 of law. Remittances abroad are exempted of any tax.

20 MORTGAGES

20.01 CHATTEL MORTGAGES:

(C.C. 904-916; Decree 51 of Oct. 24, 2007).

Chattel mortgages may be constituted on many kinds of personal property in form of agrarian, cattle and industrial pledges, and intangibles, present or future, to guarantee any obligation. Pledged property may be delivered to creditor or to third person or remain in custody of debtor. Following, among others, may be so pledged: (1) Machinery, tools and instruments used in agriculture or in any kind of industry; (2) movables used in operation of an industrial establishment or a farm; (3) animals of any kind and their fruits and products; (4) fruits, whether pending, cut or future; (5) any kind of raw material and products of factories or industries, whether finished or unfinished; (6) products of mines and quarries; and (7) products of plants and plants that can only be utilized when cut. Document constituting this type of pledge may be public instrument executed before notary public or private instrument with signatures legalized electronically or by any other means. Pledge has no effect as to third persons unless it is registered. On maturity of obligation, creditor may execute credit as agreed by parties. Parties may agree to submit to arbitration any dispute arising from contract.

Vehicles and other identifiable objects may be pledged without delivery in guarantee of a commercial transaction. Pledge contract must appear in a public instrument (see category 9 Documents and Records, topic 9.03 Public Instruments) and be recorded in real property registry.

20.02 COLLATERAL SECURITY:

See category 7 Debtor and Creditor, topic 7.11 Pledges.

20.03 MORTGAGES:

(C. C. 822-879; C. C. P. 297-306).

Mortgages must be executed in the form of public instruments and may refer only to real property. They affect only the property on which they are constituted and the mortgagor cannot be made personally liable for the debt even by express stipulation. They cover the natural accessions, unpledged crops and rents not collected at their maturity and two annuities of interest prior to foreclosure. Constitution and acceptance of a mortgage must be express. If the mortgaged property diminishes in value the creditor may consider the mortgage matured unless the debtor increases his security.

Foreclosures follow the general rules of execution of judgments, except that no appraisal is made of the property, but the value agreed by the parties or the amount of the mortgage is taken as the value. The debtor has the right of redemption only up to time judicial sale is consummated. No deficiency judgment is allowed.

21 PROPERTY

21.01 ABSENTEES:

See category 12 Estates and Trusts, topic 12.02 Death.

21.02 ADVERSE POSSESSION:

See category 5 Civil Actions and Procedure, topic 5.04 Prescription.

21.03 DEEDS:

(N. C. 29-76, L. D. 37-92 of June 22, 1992 as am'd regulated by Accord 737-92 of Aug. 27, 1992).

Conveyances of real estate to be recorded must be by public instrument and contain true statement of consideration, since state tax on transfer of title is based on real consideration. Deeds must bear stamps depending on amount involved and they must be recorded in registry of property. Both grantor and grantee must sign deed and must therefore be present before notary at same time in person or by attorney-in-fact. An original deed executed in Guatemala remains in files of notary, who gives to either party certified copy which has effect of original in courts of law. See also category 9 Documents and Records, topics 9.02 Notaries Public, 9.03 Public Instruments.

21.04 DOWER:

No dower right. See categories 12 Estates and Trusts, topic Descent and Distribution; Family, topic Husband and Wife.

22 TAXATION

22.01 ADMINISTRATION:

Tax Code (L. D. 6-91 of Apr. 30, 1991, t.o. as am'd) comprises provisions on withholding; tax exemptions; compliance with law and liquidation of tax; surcharges on delinquent payments, tax evasion, violations and sanctions, collection procedures; statute of limitations, taxpayers and their duties; fiscal domicile, registration. Administración Tributaria is in charge of administration, control and collection of taxes.

22.02 ALCOHOL, BEVERAGES AND TOBACCO TAXES:

Alcohol, wine, cider, beer, etc. will pay tax, rate of which varies with each particular item (L. D. 21-2004 of June 23, 2004 regulated by Accord 205-2004 of July 22, 2004); tobacco tax (D. 61 of Dec. 23, 1977 as am'd regulated by Accord of July 4, 1980).

22.03 FREE ZONES:

(L. D. 65-89 of Nov. 14, 1989 as am'd regulated by Accord 242-90 of Mar. 5, 1990). Law regulates establishment of free trade zones in order to promote national development. Most types of industries, trading companies and services are allowed to operate there. In general, they are exempt, among others, from import taxes, sales and consumers tax; stamp tax, income tax, transfer of property tax; income tax exemption varies according to type of activity.

22.04 INCOME TAX:

(L. D. 26-92 of May 7, 1992, t.o. 1997 as am'd and its regulations Accord 26-2004 of July 22, 2004). Tax is applicable to all individuals and juridical entities for income locally obtained. Branches, permanent or temporary establishments of foreign companies or persons, estates, joint ventures, joint ownership, business representation, irregular companies and trusts in country are subject to tax.

Exemptions.

State, Municipalities and government agencies, decentralized government entities, religious institutions, universities, Indian communities, cooperatives and nonprofit organizations, income from pensions, workers compensation, severance, inheritance and donations among others.

Gross income is all revenues from activities as indicated by law. Excluded are, among others, interest from bonds or titles of the Government and its agencies, including municipalities; dividends, including stock dividends, and participations or benefits which had been already taxed in another form during the same period; and are paid to taxpayers locally domiciled.

Net income is gross income minus deductions authorized by law. Deductions include expenses necessary for production of income and cost of same and of the objects sold and of services rendered, including freight, commissions, salaries, for actual services; labor indemnifications and social security benefits; depreciation of assets; interest and finance charges; rents; taxes; all amounts reinvested in housing for laborers and in land for farmers' laborers; medical assistance to laborers; contributions to pensions; losses; bad debts; some charitable gifts; expenses in technical research and royalties up to 5% of gross income.

Following personal expenses are annually deductible: up to Q.36,000, not subject to proof for taxpayer; social security contributions; life insurance premiums, if policies are issued by locally authorized companies; alimony payments; donations; local medical expenses; professional association membership fee; value added tax.

There are guides to estimate net income of export and import trades if returns are not satisfactory. It is irrefutable presumption that net income from international transportation business of foreign companies is 5% of corresponding gross, as indicated by law; that net income of foreign companies from foreign movie production, distribution or intermediation is no less than 30% of gross obtained in Guatemala; that net income from foreign insurance or reinsurance is 10% of premiums and that net income of international news companies is 30% of gross income.

Resident individuals are taxed on their net income on salaries, commissions, bonus and representation expenses not subject to prove less value added tax paid for services and goods for him and his family, according to law.

Rates.

Individuals are taxed on their net income on salaries, commissions, bonus and representation expenses not subject to prove according to law at rate ranging from 15% on first Q.65,000 to 31% on amounts over Q.295,000 annually. Legal entities and self-employed individuals may elect to be taxed according to any of two tax regimes: (i) In which taxable income and without deductions is subject to 5% withholding tax; and their capital gains are taxed at 10%

rate, according to law; (ii) or opt to be taxed on their net income at 31% rate annually.

Following payments to recipients domiciled abroad are subject to withholding taxes, except when taxes are paid at source: Dividends, interests, 10%; technical services, royalties, 31%; any other payment, 31%.

Registry.

Any person or corporation must be registered in Taxpayer Registry.

Tax on Interests.

(L. D. 26-95 of Apr. 25, 1995). Tax at monthly rate of 10% on all interests credited or paid to individuals and legal entities locally domiciled.

22.05 INHERITANCE TAX:

Tax on inheritances depends on amount involved and degree of relationship, ranging from 1% in case of transfers of 50,000 quetzales or less to children and spouse, to 25% in case of transfers of over 500,000 quetzales to unrelated persons. Money in local banks is exempt. Money in banks abroad is subject to tax and to surtax of 3%. (L. D. 431 of Nov. 18, 1947, as am'd; Regulations of Feb. 24, 1964).

22.06 MINES, MINERALS AND FISHERIES:

Mines.

See category 19 Mineral, Water and Fishing Rights, topic 19.01 Mines and Minerals, subhead Mining in General.

22.07 MOTOR VEHICLES TAXES:

Motor Vehicles Tax.

(D.L. 70-94 of Dec. 23, 1994 as am'd regulated by Accord 111-95 of Feb. 24, 1995). Tax is levied on land, air and water vehicles. Tax rate ranges from 1.0% to 0.1% depending on year they were made.

22.08 PROPERTY TAXES:

Real Property Tax.

(D.L. 15-98 of Feb. 26, 1998). Real property, whether urban or rural, is subject to real estate tax on value assessed by taxpayer himself or by tax administration. Value includes constructions, fixtures and permanent cultivations. Tax is calculated on aggregate official value of all real property belonging to same taxpayer. Rates are: for properties over Q.2,000 up to Q.20,000, 0.2%; from Q20,001 to Q.70,000, 0.6%; and for properties over Q.70,000, 0.9%. There is tax on large uncultivated estates. (L. D. 1551 of Oct. 17, 1962 as am'd, regulated by Resolution of Feb. 9, 1963).

22.09 STAMP TAX:

Stamped paper and revenue stamps are required for most contracts and transactions. Amount depends on nature of document and sum involved, general rate being 3%, but special rates apply to numerous other documents. Penalties are provided for failure to comply with provisions of law. (D.L. 37-92 of June 22, 1992 as am'd and its regulations Accord 737-92 of Aug. 27, 1992).

22.10 TAX INCENTIVES:

Special Treatment.

Law Decree 29-89 of June 13, 1989 as amended, and its regulations Accord 533-89 of Aug. 2, 1989 as amended (Export Promotion and Drawback Law) establishes parameters for drawback and export production operations. Detailed investment proposal must be presented for evaluation. During evaluation period, companies may begin importing duty-free capital goods and raw materials for operation, if bond for same amount of deferred taxes is deposited in guaranty to be forfeited if investment proposal is denied. Tax incentives include duty-free importation of capital goods and raw materials necessary for export product, and ten-year tax holiday for those companies whose country of origin does not permit tax credit against foreign taxes paid.

Imported goods must be reexported. Penalties are provided for failure to comply with provisions of agreement; if any imported goods are sold within country fine of double import duties is imposed. Companies that import more goods than necessary for export production must pay full amount of deferred taxes on all unused raw materials or surrender goods to customs for public auction.

22.11 TAX ON DISTRIBUTION OF CEMENT:

Distribution of locally produced or imported cement is taxed at rate of Q. 1.50 per package of 42.5 kilograms. (L. D. 79-2000 of Nov. 21, 2000).

22.12 VALUE ADDED TAX:

(L. D. 27-92 of May 7, 1992 as am'd and its regulations; Accord 424-2006 of July 26, 2006). Tax is applied to: Transfer, sale and importation of goods into country, inter vivos gifts, leasing, corporate capital contributions of real estate, nonpersonal services rendered within country with exceptions established by law. Tax is levied on net price obtained by deducting normal price discounts or other reductions made according to commercial usage. General rate is 12%.

23 TRANSPORTATION

23.01 AIRCRAFT:

Civil Aviation Law, L. D. 93-2000 of Dec. 18, 2000 regulated by Accord 384-2001 of Sept. 14, 2001 as amended regulates civil aviation, including airports, classification and registration of aircraft, lease contracts, national and international commercial aviation, airmen, air transportation contract, liability for injuries to individuals and damage to property, search, rescue and accidents investigation, infringement and penalties. Dirección General de Aeronáutica Civil in government office in charge of enforcing law.

23.02 SHIPPING:

Vessels constructed in or out of Guatemala may obtain Guatemalan registry in ports designated for that purpose. Applicant must present certificate of residence if individual and certificate of mercantile registry if company. Guatemalan vessels must touch at Guatemalan ports at least once or twice yearly. They are divided into five classes: (1) Ocean vessels; (2) vessels for coastwise trade along Guatemala or Central America; (3) fishing boats; (4) boats for port use; (5) vessels under construction. (D. 1329 of Oct. 8, 1932 as am'd). Most important admiralty provisions are found in old Code of Commerce, Arts. 827-1319 with exception of Arts. 1214-1307 that were repealed by C. Com.

24 TREATIES AND CONVENTIONS

24.01 TREATIES:

Multilateral.

Bustamante Code of Private International Law (Havana, Feb. 20, 1928. Latin American Economic System (SELA) Panama 1975); Convention on Practice of Learned Professions. Mexico City, Jan. 28, 1902; Convention on Status of Aliens, Havana, Feb. 20, 1928; Inter-American Conventions on Conflicts of Laws Concerning Bills of Exchange, Promissory Notes, and Invoices; on Conflict of Laws Concerning Checks; on the Taking of Evidence Abroad; on Letters Rogatory; and on the Legal Regime of Powers of Attorney to be Used Abroad, Panama, Jan. 30, 1975; Inter-American Conventions on Conflicts of Laws Concerning Checks; on Execution of Preventive Measures; Additional Protocol to the Inter-American Convention on Letters Rogatory; on Conflicts of Laws Concerning Commercial Companies; on Domicile of Natural Persons in Private International Law; and on Proof of and Information on Foreign Law, Montevideo, Uruguay, May 8, 1979; Inter-American Convention on Personality and Capacity of Juridical Persons in Private International Law, La Paz, Bolivia, May 24, 1984; Inter-American Convention on Support Obligations, Montevideo, July 15, 1989; Inter-American Convention on Serving Criminal Sentences Abroad, Managua, Nicaragua, June 9, 1993; Inter-American Convention Against Corruption, Caracas, Venezuela, Mar. 29, 1996.

Central American Treaties.

Agreement on system of Central American integrated industries. Signed June 10, 1958, Tegucigalpa; Protocol. Signed Jan. 29, 1963, San Salvador; Central American agreement on uniform road signs. Signed June 10, 1958, at Tegucigalpa. (With Costa Rica, Honduras and Nicaragua); General Treaty on Central American economic integration. Signed Dec. 13, 1960, at Managua and its Protocol; Agreement establishing Central American Bank for Economic Integration. Signed Dec. 13, 1960, Managua; Charter of Organization of Central American States. Signed Dec. 12, 1962, Panama City; Central America and Dominican Republic Free Trade Agreement. Signed Apr. 16, 1998, Santo Domingo. Its Protocol. Signed Nov. 29, 1998, Miami; United States of Mexico and El Salvador, Guatemala and Honduras Free Trade Agreement. Signed June 29, 2000, Mexico, D. F.; United States of America-Dominican Republic-Central America Free Trade Agreement. Signed Aug. 5, 2004, Washington, D.C.

1
HONDURAS LAW DIGEST

—Scope —

Revised for 2008 edition by

CURTIS, MALLET-PREVOST, COLT & MOSLE LLP, of New York.

(Abbreviations used are: C. C., Civil Code; C. Family, Code of Family; C. Ch., Code of Childhood; C. C. P., Code of Civil Procedure; C. Com., Code of Commerce; L. C., Labor Code. The numbers refer to the articles of these Codes.)

Note: This revision incorporates legislation through Nov. 26, 2007.

1 INTRODUCTION

1.01 CURRENCY:

(Monetary Law 51 of Feb. 21, 1950, as am'd).

Monetary unit is the lempira which is divided in 100 cents. Obligations in foreign money payable in Honduras are dischargeable by delivering the equivalent amount of lempiras, but obligations in foreign exchange incurred through financial system and stock market and international transactions are excepted. Only Banco Central is authorized to issue bank notes which have value as legal tender.

1.02 GOVERNMENT AND LEGAL SYSTEM:

(Decree 131 of National Constitutional Assembly of Jan. 11, 1982 as am'd). Honduras is centralized republic. Legislative power is vested in Congress; it consists of one Chamber, whose members are elected for four years. Members of Congress are elected on basis of population. President is also elected for four years, no reelection allowed. For administration purposes, country is divided into departments, which are divided into towns administered by municipal councils. Tit. IV refers to Constitutional Guaranties including habeas corpus, habeas data and protection of civil rights. Court of Constitutional Justice is composed of five members of Supreme Court of Justice. Its jurisdiction extends over territory of Republic on constitutional guaranties actions, unconstitutionality of laws, review of final civil and criminal judgments, among others. (Decree 244-2003 of Jan. 20, 2004).

Congress meets from Jan. 25 to Oct. 31 in ordinary meetings, and in extraordinary meetings whenever it is called by Executive Power. (Const. art. 189).

1.03 HOLIDAYS:

Jan. 1 (New Year's); Maundy Thursday* and Good Friday*; Apr. 14 (Panamerican Day); May 1 (Labor Day); Sept. 15 (Independence Day); Oct. 3 (Morazán); Oct. 12 (Columbus Day); Oct. 21 (Armed Forces Day); Dec. 25 (Christmas). (L. C. art. 339).

* These are movable holidays.

1.04 OFFICE HOURS AND TIME ZONE:

Honduras is in the same time zone as the Central standard zone in the United States (-06:00 GMT). Office hours are generally from 8 a.m. to 12 p.m. and from 2 p.m. to 6 p.m.

2 BUSINESS ORGANIZATIONS

2.01 AGENCY:

General power of attorney grants only powers of administration. Power to compromise, sell, mortgage, or perform other acts of ownership must be specifically conferred. Agent appointing substitute is liable for acts of latter if he was not empowered to appoint substitute or if substitute is notoriously incompetent. Agency terminates by: (a) Revocation; (b) resignation of agent; (c) death, incompetency, bankruptcy or insolvency of principal or agent. Commission agents have lien for their expenses on articles consigned to them. (C. C. 1888-1918; C. Com. 355-379, 731-738, 804-841).

Relationship between local agents or distributors of foreign firms and their principals is regulated by Decree 549 of Nov. 24, 1977 amended by Decree 804 of Sept. 10, 1979 regulated by Accord 669-79 of Nov. 16, 1979 as amended. Only Honduran persons or corporations may be agents. Those representing persons dealing with vehicles, electric or electronic equipment or objects or other durable items, must keep spare parts or accessories and service of maintenance and repair, with severe penalties for failure. Agency contract may be exclusive or nonexclusive. Unless exclusive is indicated, nonexclusive is presumed; if no term is indicated, term is of indefinite duration. Agency contract cannot be terminated at will by principal without payment of due compensation based upon specified criteria, unless for “just cause”. Law establishes as “just cause" breach of contract, fraud, continued decrease in sale or distribution of merchandise or services due to negligence of distributor, infringement of trade secrets and confidentiality agreements, bankruptcy of distributor, failure to render account and information as agreed, any act of distributor that prejudices introduction of merchandise on market or sale or services thereof. Statute of limitations is three years. Civil and Commercial Codes must apply in cases not specifically contemplated by law. Decree 546 of Nov. 24, 1977 as amended, Decree Law 16-2006 of Mar. 21, 2006 and Free Trade Agreement between U.S., Central America and Dominican Republic (CAFTA) regulate relationship between local agents or distributors of foreign firms and their principals of contracting parties after CAFTA entered into force. Disputes arising from contracts may be resolved by arbitration and amount of indemnity for termination shall be based on general law of contracts.

2.02 CORPORATIONS:

(Constitution art. 334; C. Com. 13-37, 90-354).

A corporation may be formed by notarial instrument or by public subscription. The articles of incorporation must state: (1) place and date; (2) name, nationality and domicile of founders; (3) kind of company; (4) object; (5) name, which must refer to principal activity of company and be followed by words "Sociedad Anónima" or abbreviation "S. A."; if an individual permits his name to appear in the corporate name, he becomes subject to corporate liabilities; (6) duration or statement that it is indefinite; (7) capital, or minimum capital if amount is variable; (8) contribution of each member or value of assets contributed if not in money; (9) domicile; (10) form of administration and powers of administrators; (11) appointment of administrators; (12) manner of distributing profits and losses; (13) reserves; (14) reasons for dissolution; (15) rules for liquidation; (16) manner of electing liquidators; (17) capital paid in, and capital authorized and subscribed; (18) number, face value and nature of shares; (19) manner of paying unpaid portion of shares. If the corporation is formed by public subscription, the authorization of the Secretary of Finance must be obtained.

A company must have five founders, each subscribing one share. Capital must be at least 25,000 lempiras fully subscribed; at least 25% of value of each share payable in money must be paid in and full value of each share payable in property other than money. At least 25,000 lempiras must be initially paid in.

The instrument of organization must be recorded in the Mercantile Registry. For this purpose, petition is made to civil judge who submits matter to government attorney and after hearing gives his decision.

Capital is represented by shares of a face value of ten lempiras or multiples thereof. Shares may not be issued for less than face value; until fully paid up, they must be registered shares, when paid up they may be exchanged for bearer shares. Shareholders are liable only for unpaid price of shares. Corporations may not acquire their own shares except by judicial order in payment of company credits, nor may they make loans on their shares. There may be special classes of shares. Shareholders have preferential right to subscribe for issues of additional shares. If there are shares with limited voting rights they are entitled to a 7% dividend before a dividend is paid on common shares. There may be founders' participations giving merely the right to a part of the profits for a specified time. New share issues cannot be made until all previous issues are paid in.

Bond issues may be registered, to order or to bearer, in denominations of ten lempiras or multiples thereof. They may be redeemed by lot or above par only if the interest is over 5%. Their amount may not exceed the net assets of the corporation, except for acquisition of property, in which case the limit may be exceeded up to three-fourths the value of such property. Bondholders may designate a common representative, individual or a bank. Meetings of bondholders are subject to rules similar to those governing meetings of shareholders.

Shareholders' meetings must be held at least once a year. Shareholders representing at least 25% of the capital may demand the calling of special meetings. In regular meetings one-half the shares with right to vote must be represented and a majority rules; in special meetings at least three-fourths of the shares must be represented and a majority of one-half the shares rules; but if a second call is necessary, any number of shareholders attending suffices for a quorum.

Administration may be by an administrator or by directors, who need not be shareholders. Their office may not be discharged by proxy and they must give a bond designated in the articles of incorporation. One-half the number of directors form a quorum and resolutions are adopted by vote of a majority of those present. If there are more than three directors, a minority of 25% of the capital may elect one-third of the directors. The shareholders also elect one or more supervisors (comisarios) to supervise the operations of the company.

Foreign corporations in order to do business, must (1) prove that they are legally constituted according to the laws of their country, (2) prove that according to such laws and their by-laws they have the right to establish branches and that the pertinent resolution was validly adopted, (3) keep a permanent representative in Honduras, (4) assign a fund for their activities in Honduras, (5) show that their objects are legal, and (6) agree to submit to courts and laws of Honduras. Petition must be made to Secretary of Finance which may authorize foreign company to do business in Honduras if Secretary considers such action advisable in general interest. In this case it designates term within which company must begin operations in Honduras.

Companies of variable capital are companies whose capital may be increased by later contributions of the shareholders or the entry of new shareholders or decreased by the withdrawal of contributions. Their name must be followed by the words “de capital variable” or the abbreviation “de C. V.” They must have a minimum capital and their shares must always be registered shares.

Fees.

All companies formed under the Code of Commerce pay an incorporation tax of 2/10 of 1% of the authorized capital and the same for every increase of capital and extension of the period of the company. There are also moderate fees for recording in Mercantile Registry, and native corporations require stamped paper and stamps, depending on their capitalization, for their corporate instruments.

2.03 FOREIGN CORPORATIONS:

See topic 2.02 Corporations.

2.04 LIMITED PARTNERSHIP:

See topic 2.05 Partnerships.

2.05 PARTNERSHIPS:

A commercial partnership is a legal entity, but the rights and obligations of the partners are similar to those of partners in the United States.

General partnership (sociedad colectiva) is one in the usual form in which all partners have unlimited liability. It is administered in the manner designated in the partnership articles. The instrument of organization must be recorded in the Public Registry of Commerce; for this purpose a petition is made to the civil judge who submits the matter to the government attorney and after a hearing gives his decision. Any modification must likewise be recorded. (C. Com. 13-57).

Limited partnership is one in which certain partners are liable only for the amount which they have contributed. The special partners can have no part in the management nor can their names appear in the firm name. The firm name must be followed by the words “Sociedad en Comandita” or the abbreviation “S. en C.” (C. Com. 58-65).

Limited partnership with shares is similar to the limited partnership except that its capital is divided into shares at least one-tenth of which must be subscribed by the special partners who may not alienate them without the consent of the other special partners and the majority of the general partners. (C. Com. 271-277).

Cooperative companies may not have more than twenty members. Their capital is divided into legal participations of not less than 25 lempiras. Their name must indicate the purpose of the company and be followed by the words “Sociedad Cooperativa Limitada” or “Sociedad Cooperativa Suplementada” or the abbreviations “S. C. L.” or “S. C. S.” Many rules relating to corporations also apply to cooperatives. (C. Com. 278-298).

Limited Liability Companies occupy a position between a corporation and a partnership. The name must be followed by the words “Sociedad de Responsabilidad Limitada” or the abbreviation “S. de R. L.” Such a company may not have more than twenty-five members; the capital may not be less than 5000 lempiras and the participations must be in amounts of 100 lempiras or multiples thereof. The members are liable only for the amount of their participations. The participations are not represented by documents and may not be transferred without the consent of the other members, who have a preferential right to acquire them, or a majority of the other members if the company articles so provide. The names of the members and transfer of participations must be recorded in the Public Registry. Meetings of members necessarily must be held at least once a year. (C. Com. 66-89).

Civil partnership (sociedad civil) is one constituted for other than mercantile purposes and is governed by the rules of the Civil Code. Unless expressly agreed otherwise the partners are liable for the partnership debts only in the proportion of their interest in the partnership. (C. C. 1782-1887).

3 BUSINESS REGULATION AND COMMERCE

3.01 BILLS AND NOTES:

(C. Com. 449-643).

Instruments drawn in favor of a specific person are presumed drawn to order and are negotiable even though not drawn to order, unless the document or an endorsement contains the words “not to order” or “not negotiable.”

Bills of exchange, if payable after sight, must be presented for acceptance within six months after date, but this period may be reduced by any person obligated or the drawer may amplify the period or forbid the presentation of the bill before a specific date. The presentation for acceptance of bills payable on a certain date or a specific period after date is optional, unless the drawer makes it obligatory. Endorsements must state: (1) endorsee, but endorsement may be in blank and name inserted by holder; (2) kind of endorsement, whether in ownership, for collection or as guaranty; lack of statement on this point establishes presumption that title passes; (3) place and date, but if not stated bill is presumed made at domicile of endorsee and on day he acquired the document, unless there is proof to contrary; (4) signature of endorser.

In case of failure to accept or pay there must be a notarial protest; if for failure to accept, within two days after presentation but before maturity; for failure to pay, within two days after maturity. After protest for failure to accept, it is unnecessary to present bill for payment or to protest for failure to pay. Protest in proper form authorizes a summary action at law.

Promissory notes are generally governed by the rules relating to bills of exchange, except that there is no acceptance, and the maker is generally regarded as acceptor.

Checks may be drawn only on a banking institution duly authorized by the Executive. They may be to order or to bearer. They must be presented within 15 days if payable in the locality where drawn, within one month if drawn elsewhere in the national territory, within three months if drawn abroad, or if drawn in Honduras and payable abroad and if foreign law does not designate a different period; but although a check is not presented or protested in time, the drawee must pay it if there are sufficient funds. The death of the drawer does not excuse the drawee from paying, but notice of drawer's bankruptcy or suspension of payments requires drawee to refuse payment. A holder may not reject a partial payment. A check presented in due time and not paid must be protested within two days. Crossed checks are allowed and checks may be issued solely for credit to account.

Credit Cards.

(L. D. 106-2006 of Sept. 20, 2006). Law regulates authorized companies to issue, process and commercialize credit cards, affiliated businesses and its credit operations.

3.02 COMMERCIAL REGISTER:

See category 9 Documents and Records, topic 9.04 Records.

3.03 CONTRACTS:

Obligations derived from contracts have force of law between parties and must be fulfilled according to terms of agreement.

Civil contracts involving over 200 lempiras must be in writing. Under Arts. 1573 to 1575, following require a public instrument: (a) contracts for creation, transfer, modification or extinction of rights in rem, (b) leases of real property for more than three years, (c) prenuptial agreements.

Commercial contracts are governed by Comm. Code and supplementarily by Civil Code. Special Commercial contracts are: agency; brokerage; certain deposits; trusts; transportation; insurance; commercial surety; copyrights and others.

Contracts with Government and with its agencies are regulated by D.74-2001 of June 1, 2001 as amended regulated by Accord 055-2002 of May 15, 2002 as amended.

3.04 FRAUDS, STATUTE OF:

See category 9 Documents and Records, topic 9.03 Public Instruments.

3.05 INTEREST:

The legal rate for civil transactions is 6%. (C. C. 1367). Legal interest in mercantile transactions is determined by the Secretary of Finance. Compound interest is allowed among merchants. (C. Com. 707, 710).

3.06 MONOPOLIES, RESTRAINT OF TRADE AND COMPETITION:

(Const. art. 339, D. L. 357-2005 of Dec. 29, 2005 regulated by Accord 001-2007 of July 6, 2007.)

Constitution forbids monopolies in favor of private, natural or juridical persons.

Law prohibits acts or conduct that may harm general economic interest, expressed in any form, related to production, distribution, supply or commercialization of goods and services, which purpose is or may be to result in distortion or restriction of competition or access to market. Following are practices which are considered restrictive practices, among others: price arrangement between competitors; market division; combined bids; refusal to sell; underselling; dumping; imposition of resale prices on distributors; retailers and representatives; retaining of products or consumer goods; excessive increase in price or abusive profits. Law is applicable to individuals and public or private entities, associations of individuals or entities, with or without legal representation, which operate in country, and to companies operating abroad whose acts or activities may produce effects in local market. Law is enforced by Comisión para la Defensa de la Competencia, which can collect evidence, order end of restrictive practice and impose fines that may be duplicated in case of second offense. Furthermore, acts and agreements between enterprises that may be considered as economic concentration are subject to notice requirement and to its verification. Failure to report economic concentration is subject to daily fines. Economic concentrations are valid when their purpose is to increase productivity and well-being of consumers.

Central American Regulations on Unfair Trade Practices of Apr. 24, 2007 and Central American Regulations on Restrictive Covenants of Apr. 24, 2007, implement principles established by Agreements of World Trade Organization. Central American governments may issue restrictive covenants to protect temporarily local production from massive import of same or similar products that may cause pecuniary loss to local producers.

Consumer Protection Law.

(D.L. 41-89 of Apr. 19, 1989 as am'd and its regulations, Accords 264-89 of July 25, 1989 and 139-97 of June 11, 1997). Law deals with: Consumers right to be informed; general representation and warranties; credit operations; services; lack of performance; sanctions and fines, and general regulations on subject. Dirección General de Comercio Interior is in charge of enforcement of law.

3.07 NEGOTIABLE INSTRUMENTS:

See topic 3.01 Bills and Notes.

3.08 SALES (REALTY AND PERSONALTY):

(C. C. 1605-1676; C. Com. 691-711, 763-792).

A sale is perfected when the parties have agreed on the object and the price, although neither has been delivered. The seller guarantees the title and warrants against hidden defects, unless otherwise stipulated; if he knew of the defects he is liable in any case.

Conditional sales are allowed as well as sales with reservation of title until price is paid. If the objects sold can be identified such contracts are binding on third persons if recorded in the Public Registry.

4 CITIZENSHIP

4.01 ALIENS:

See category 16 Immigration, topic 16.01 Aliens.

4.02 IMMIGRATION:

See category 16 Immigration, topic 16.02 Immigration.

5 CIVIL ACTIONS AND PROCEDURE

5.01 ACTIONS:

Actions for Death.

See category 12 Estates and Trusts, topic 12.02 Death, subhead Actions for Death.

Limitation of.

See topic 5.04 Prescription, subhead Actions.

5.02 JUDGMENTS:

(C. C. P. 223-241).

Judgments do not constitute a lien except upon property on which execution has been levied and after registration in public registry.

Foreign judgments have the effect provided by treaty; if there is no treaty they have the same effect as is given to Honduran judgments in the foreign country; if the foreign country does not execute Honduran judgments, the foreign judgment cannot be executed in Honduras. If none of these rules apply, the foreign judgment will be executed in Honduras provided: (1) It was rendered in a personal action; (2) it was not obtained by default; (3) the obligation on which it is based is legal in Honduras; (4) the certified copy of the judgment contains the requisites necessary in the foreign country so that it may be considered authentic, and those required in Honduras for its authenticity.

5.03 LIMITATION OF ACTIONS:

See topic 5.04 Prescription.

5.04 PRESCRIPTION:

(C. C. 2263-2303; C. Com. 579, 580, 772, 775, 1317, 1684-1708).

The acquisition of property or rights by virtue of possession and the extinction of obligations by failure to require performance is called prescription. Prescription may be waived as far as it has run, but the waiver of future prescription is void.

In general in order to acquire by prescription it is necessary to possess in good faith, with a legal title, as owner, publicly, quietly and uninterruptedly. Natural interruption occurs when for any reason possession ceases for over a year, and civil interruption in case of the institution of a suit at law. Ownership of personal property is acquired by possession for three years in good faith or six years without other conditions; but ownership of stolen articles cannot be acquired by the guilty person until the right to institute the penal action has been lost by prescription. Real property is acquired by possession for ten years with good faith and a legal title, or for 20 years without these conditions. Prescription does not run against a recorded title except by virtue of another recorded instrument.

Actions.

Prescriptive period in which rights of action are lost varies according to nature of action. Some of more important periods are: (a) 35 years, mortgage action by mortgage banks; (b) ten years, actions to recover real property and personal actions not otherwise limited; (c) six years, actions to recover personal property; (d) five years, actions on mercantile contracts not otherwise provided for; (e) three years, summary actions on negotiable instruments; (f) two years, actions to recover rents or other periodical payments, actions founded on most commercial contracts such as articles of incorporation and partnership, sales, commercial deposits, banking and credit operations, insurance, guaranty, etc.; (g) one year, actions by lawyers, notaries, druggists, servants, innkeepers, storekeepers, for services rendered or merchandise sold, action for annulment of stockholders' resolutions and for enforcement of liability of corporation directors and supervisors, actions on travelers checks and transportation contracts and for hidden defects in goods purchased; (h) six months, summary actions against endorsers of negotiable instruments; actions on checks and for rectification of current accounts, actions for defects of goods guaranteed for definite time. Prescription of actions is interrupted by judicial or extrajudicial demand or by acknowledgment of debt.

See specific topics for special limitations.

6 COURTS AND LEGISLATURE

6.01 COURTS:

Justice is administered by: (1) Supreme Court which hears appeals from courts of appeals, exercises general supervision over judiciary and has jurisdiction in certain other matters; (2) courts of appeals which hear appeals from judges of letters; (3) judges of letters having original jurisdiction in most civil, family and criminal matters; (4) justices of peace. There is Constitutional Court with jurisdiction over constitutional questions, habeas corpus, habeas data, amparo, revision of civil and criminal matters, venue. (Const. Arts. 303-319, Law of Organization and Powers of Courts, Decree 76 of Feb. 8, 1906 as am'd, Decree 71-87 of June 22, 1987, Decree 244-2003 of Jan. 20, 2004). There are Labor Courts of Appeals at Tegucigalpa and S. Pedro Sula.

6.02 LEGISLATURE:

See category 1 Introduction, topic 1.02 Government and Legal System.

6.03 STATUTES:

The more important legal provisions are codified, the principal codifications being: Civil Code; Code of Civil Procedure; Code of Family; Code of Commerce; Penal Code; Law of Criminal Procedure; Law of Organization and Powers of the Courts; Mining Code; Code of Public Instruction; Notarial Law. Copies of other laws are often difficult to obtain. Current laws appear in official newspaper called “La Gaceta.”

7 DEBTOR AND CREDITOR

7.01 ASSIGNMENTS:

The assignment of a right of action is made by delivery of the instrument evidencing it with a signed statement fulfilling certain requisites. The debtor must be notified of the assignment. Bills of exchange and notes to order or bearer are subject to special provisions of Code of Commerce. (C. C. 716, 1666-1676; C. Com. 449-643). See categories 3 Business Regulation and Commerce, topics Bills and Notes, Sales (Realty and Personalty); Documents and Records, topic Public Instruments; Property, topic Deeds.

7.02 ATTACHMENT:

To secure the result of an action one or more of the following measures may be requested if sufficient reasons are proved: (1) Sequestration of the object of the suit; (2) appointment of a supervisor; (3) attachment of specific property; (4) prohibition to do certain things. An attachment may be issued without bond in summary actions, which may be based on certain documents designated in the law, such as: (1) Public instruments; (2) private instruments judicially acknowledged; (3) commercial drafts not attacked as false, etc. Third persons may intervene, but if the intervention relates to real property it must be based on a written instrument. (C. C. P. 270-285, 447-508).

7.03 BANKRUPTCY AND INSOLVENCY:

(C. Com. 1318-1683; C. C. P. 524-654; C. C. 1440-1453).

Bankruptcy (quiebra) relates only to merchants. A merchant who fails to pay his current obligations is considered bankrupt and may be so declared on his own petition or that of any creditor or of the public prosecutor. He thereupon becomes incompetent to manage his affairs, and his debts mature and with certain exceptions cease to bear interest. Bankruptcies are of three kinds: Fortuitous, culpable and fraudulent. Culpable and fraudulent bankrupts are subject to imprisonment. The court appoints a receiver and presides over meetings of creditors called to discuss the approval of claims or offers of settlement. The debtor may at any time make offers of settlement; unless an agreement is reached the estate is liquidated.

Agreements may be made by a majority of the creditors present representing three-fifths of the liabilities. Fortuitous bankrupts are discharged on promising to pay, when able, their debts not extinguished by law; culpable bankrupts, when they have served their imprisonment, if they have paid their creditors, and in case payment was not made in full, then within three years after their imprisonment; fraudulent bankrupts only upon fully paying their debts and after three years have elapsed from their imprisonment.

Suspension of payments may be requested by a merchant before bankruptcy, with a call for a meeting of creditors for the consideration of an agreement to prevent bankruptcy. Creditors' meetings and deliberations are subject to the same rules as applied in cases of bankruptcy.

Insolvency proceedings are voluntary when requested by the debtor, and necessary when demanded by a creditor or in cases where there are three or more overdue obligations or two or more executions pending against the debtor and he fails to make provision therefor or when such proceedings are demanded by a creditor or declared by the court in case the debtor has absconded. In consequence of the proceedings all the assets and liabilities are considered together, a provisional receiver is appointed by the court, a meeting of creditors is called and a definitive receiver is appointed. Unless an agreement is reached with the creditors the estate is liquidated.

See also topic 7.05 Fraudulent Sales and Conveyances.

7.04 EXEMPTIONS:

The following are not subject to attachment: (1) Minimum wage; (2) bed and necessary clothing of the debtor and his children; (3) professional books up to 200 lempiras in value; (4) machinery and instruments used for teaching a science or art, up to 200 lempiras in value; (5) uniforms and equipment of soldiers; (6) utensils of a debtor who is an artisan or farmer; (7) food and combustibles for the debtor and his family for one month; (8) purely personal rights such as that of habitation; (9) municipal buildings and school houses; (10) railroads and their equipment. Workmen's minimum salary, vacation salary and first 100 lempiras of salary and 75% of excess are also exempt. (C. C. 1444; C. C. P. 462; Labor Code, Law 189 of May 19, 1959, art. 371).

7.05 FRAUDULENT SALES AND CONVEYANCES:

Acts of a debtor in fraud of creditors before the declaration of bankruptcy are void if the third party knew of the fraud, and in any case if there was no valuable consideration. Fraud is presumed if the debtor after the date as of which the bankruptcy is declared to have existed alienates property for less than its value or pays unmatured debts, or if after such date and in the absence of good faith of the third party he pays matured debts in a manner not customary or imposes guaranty liens on his property. (C. Com. 1463-1468).

7.06 HOMESTEADS:

(C. Family 82-98).

Homestead exempt from attachment and execution may comprise dwelling house, cultivated property, and industrial and commercial establishments. Maximum value of homestead exemption is 100,000 lempiras.

7.07 INSOLVENCY:

See topic 7.03 Bankruptcy and 7.07 Insolvency.

7.08 LIENS:

(C. C. 2244-2262; C. Com. 704, 1520-1532).

Certain credits have preference over others with respect to specific property.

As regards specific personal property the following are preferred: (a) Credits for construction, repair and purchase price; (b) pledge credits; (c) credits for transportation, on object transported until thirty days after delivery; (d) credits for lodging, on the property of the debtor in the inn; (e) farming credits, on the crops; (f) rent, on the crops of the estate and on the debtor's property thereon. If the personal property has been taken away the creditor may within thirty days claim it from the person in whose possession it is.

With respect to specific real property the following are preferred: (a) State taxes for one year; (b) insurance premiums for two years; (c) mortgages and farming credits duly recorded; (d) judicial attachments duly recorded; (e) unrecorded farming credits.

In general the preferences on property are: (a) Municipal taxes for one year; (b) credits for judicial expenses, funeral expenses, expenses of last illness during one year, salaries and wages during one year, advances for maintenance for one year; (c) credits appearing in public instruments and in judgments.

In bankruptcies there are a few variations of these rules.

7.09 PLEDGES:

The article pledged must be delivered to the creditor or to his representative. As between the parties the contract is effective from the time of such delivery; but in order to affect third persons it must appear in a notarial instrument. In case of default the pledge may be sold judicially or, if the parties have so agreed, by a third person at public sale; any agreement allowing the creditor to appropriate the pledge is void.

Mercantile pledges must likewise be delivered to the creditor or a third person actually or symbolically, but may remain in possession of the debtor when the pledge is given on articles necessary for the operation of the industry. Bills of exchange may be pledged by endorsement in guaranty of pledge. (C. C. 2056-2097; C. Com. 916-928, 1289-1307).

See also categories 3 Business Regulation and Commerce, topic Sales (Realty and Personalty); Mortgages, topic Chattel Mortgages.

8 DISPUTE RESOLUTION

8.01 ARBITRATION AND AWARD:

(Decree 161-2000 of Dec. 29, 2000; Decree 349-2002 of Nov. 20, 2002).

Arbitration.

Law deals with domestic and international arbitration, with recognition and enforcement of foreign arbitral awards and with arbitration in disputes arising between national or foreign party and Honduras Government and its public entities. Law distinguishes between domestic and international arbitration based on party's domicile. Arbitration is international when parties are domiciled in different countries at time of execution of agreement or when parties have same domicile but: have selected different country as domicile for arbitration, place of performance of parties' substantial duties or location of subject of dispute are in another country. Any dispute arising out of specific legal relationship, when such dispute is under proper legal control of parties may be subject to arbitration, with exceptions indicated by law. Arbitration agreement must be in writing, whether in form of arbitral clause in contract or in separate agreement. Invalidity of contract does not extend to arbitration clause contained therein, unless whole contract is held invalid by nonappealable judicial decision. Arbitration agreement can be evidenced by any kind of document or by other means of communication which constitute record of agreement. Arbitrators may be empowered by parties to decide according to rules of law, equity or technical rules. Arbitrators may be individuals in full enjoyment of their rights in instances where decision is ex aequo et bono; where decision is according to rules of law they must be lawyers and where decisions must be according to technical principles, they must be experts in that area. Number of arbitrators should be three unless parties have agreed on different uneven number. Arbitrators have power to make provisional orders including interim measures of protection at request of either party, and to require any party to provide appropriate security in connection with such measures and their fees and expenses. Deadline for arbitrators to issue award is five months counted from day last arbitrator accepted his position.

Controversies arising out of relations between government and private parties may be resolved by arbitration according to law.

Conciliation.

Controversies arising out of matters that can be settled or waived and those matters expressly indicated by law may be resolved by conciliation. Conciliation agreement is considered res judicata and with same execution effect as final judgment. Conciliation could be judicial or extrajudicial. Judicial conciliation is allowed at any time, even when dispute is pending court decision. Prior to taking evidence judge shall propose conciliation, in which case, he may act as conciliator. Justices of the Peace may act as conciliator in any dispute subject to judicial conciliation. Extrajudicial conciliation is before any Center of Conciliation according to law. Conciliation of disputes authorized by specific labor, family, commercial, agrarian and other matters may be resolved by any Center of Conciliation. Conciliation proceedings are confidential.

Conventions.

Convention on the Recognition and Enforcement of Foreign Arbitral Awards, New York, 1958; Inter-American Convention on International Commercial Arbitration, Panama, 1975.

9 DOCUMENTS AND RECORDS

9.01 ACKNOWLEDGMENTS:

Documents are not acknowledged as in the United States, but the legal effect of an acknowledgment is obtained by executing the document before a notary as a public instrument (see topic 9.03 Public Instruments). Foreign instruments are considered valid if executed according to the law of the respective country, but if the Honduras law requires a public instrument no private instrument is admissible. Foreign instruments must be authenticated by a consular or diplomatic officer of Honduras or, if none, of a friendly nation, or by apostille if country of execution is member of Hague Convention of 1961; or by diplomatic representative of respective country in Honduras. (C. C. 15, 16; C. C. P. 325).

9.02 NOTARIES PUBLIC:

(Notarial Law 162 of Mar. 29, 1930 as am'd Code Decree 353-2005 of Dec. 29, 2005, C. C. 1497-1512).

In order to be notary it is necessary to be lawyer, to be national citizen by birth of Honduras, over 30 years old, laic, of good conduct, and have passed special test and be authorized by Supreme Court of Justice. Notaries keep registry containing original of all typed or electronic documents executed before them and issue certified copies of such documents, which copies have force of originals. Once a year they send to Supreme Court duplicate copy of documents authenticated by them during year.

Instruments executed by notaries must be in Spanish, typed or electronic written clearly in long hand without abbreviations or blank spaces. They may require two witnesses of either sex who may not be employees of notary nor relatives within fourth degree of consanguinity or second of affinity of notary or of any of parties. Notary cannot act in instruments containing provisions in his favor or in favor of relative within said degrees of relationship. He must know parties or they must be identified.

Notaries can execute instruments abroad when parties are from Honduras or instruments executed are for use in Honduras.

9.03 PUBLIC INSTRUMENTS:

(C. C. 1497-1512, 1526-1531; C. C. P. 320-337).

Public instruments are instruments authenticated by notary or competent public official. They are proof of their object and date, and as between the parties they are proof of statements made therein. Law designates numerous contracts which must appear in public instruments, such as sales of real estate, mortgages, articles of incorporation, partnerships, etc. Other public documents are documents in public archives, judicial orders and others.

Private documents, when acknowledged before judge, have force of public instruments as between parties and their successors. The date of private document is not effective as to third persons except from death of any of signers or date of registration of document or date when it was delivered to some public officer. Contracts involving over 200 lempiras must be in writing.

9.04 RECORDS:

Unified Property Registry includes: (1) Registry of Real Property; (2) Registry of Personal Property; Mercantile Registry; Intellectual Property Registry; Special Registries and Associated Registries. There is also National Registry of Persons for recording vital statistics. (C. C. 296-387, 2304-2368; C. Com. 384-421; Decree 82-2004 of June 15, 2004 as amended and its regulations Accord 73 of Apr. 13, 2005 and Decree 62-2004 of June 15, 2004).

9.05 SEALS:

Seals are not used in private contracts. Public documents (q.v.) have most of effects of sealed instruments in the United States.

9.06 VITAL STATISTICS:

See topic 9.04 Records.

10 EMPLOYMENT

10.01 LABOR RELATIONS:

Rights of employees and laborers are regulated by Constitution of 1982 (arts. 127-144); Labor Code (Decree 112 of Oct. 29, 1982, Decree 135-94 of Oct. 12, 1994 as am'd and Accord 02-95 of Feb. 6, 1995). Labor regulations are public law and are binding on all employers and employees. Any acts or stipulations which imply renunciation, diminution, or distortion of rights conferred on workers by Constitution, Labor Code, social or welfare laws, are null and void ipso jure even if they are included in labor contract or in any other agreement. Labor contracts may be made between employer or association of employers and workman or union or federation of unions. Employers are prohibited from employing less than 90% of Honduran workers or paying less than 85% of total wages to Hondurans, in their respective enterprises. Both percentages may be changed in certain cases. Government regulates, supervises and controls hiring of local workers to work abroad.

Regular working day has as many hours as is whatever is agreed upon by parties, or in default of agreement, legal maximum. Regular working hours for day's work may not exceed eight hours a day or 44 hours a week, equivalent to 48 hours of wages. Regular working hours for night work may not exceed six hours a day or 36 hours a week. Maximum duration of mixed day of work is seven hours per day or 42 hours a week. There are certain exceptions. Amount of wages may be stipulated freely but may not be lower than legal minimum. Wages must be paid in legal tender. Minimum wage is fixed periodically by Government. Fixing of minimum wage automatically modifies all labor contracts that stipulate lower amount, by raising this to minimum without affecting any other stipulations. Minimum wage cannot be attached. Worker may share in earnings or profits of his employer but never assume his risks or losses. Worker is entitled to: (1) One day of rest, preferably Sun., for every six days of work; (2) to receive pay on holidays or national days fixed by law; (3) to annual paid vacation; and (4) permanent workers to receive two months' pay in June and in Dec. Length and time of vacation is governed by labor law. Minors under 16 are prohibited from working. Minors under 17 are prohibited from performing night work or overtime. Working hours for them may not exceed six hours a day or 30 hours a week. Every pregnant woman worker is entitled to compulsory leave, to be paid at same rate as work, for period preceding childbirth and she retains her employment and all rights under labor contract.

11 ENVIRONMENT

11.01 ENVIRONMENT REGULATION:

(General Law on Environment, Decree 104-93 of June 8, 1993 as am'd regulated by Accord 109-93 of Dec. 20, 1993).

Law establishes general rules for protection, conservation, restoration and management of environment and natural resources and declared them to be of public utility and social interest. Within environmental protection are air, water and hazardous waste. Law regulates generating, handling and treatment of hazardous waste. Registration and authorization must be obtained before generating or handling hazardous waste. Entry of hazardous waste into country is prohibited. Environmental impact statements are required for activities that can negatively affect environment. Administrative sanctions are imposed for violations of law which include fines, suspension or cancellation of registrations, indemnization for damages, repair damage and imprisonment. Penalties are imposed depending on gravity of offense and prior violations, as established by law. Among main environmental authorities created by Law are Secretariat of State for the Environment, National Consultive Council of the Environment, Attorney General for the Environment.

12 ESTATES AND TRUSTS

12.01 ADMINISTRATION:

See topic 12.05 Executors and Administrators.

12.02 DEATH:

Where there is no knowledge of a person's whereabouts he is deemed a mere absentee. Five years after disappearance if absentee is 60 years old by end of five year period, two years if disappearance occurs when taking part in act of war, and one year if disappearance arises under circumstances indicating danger of death, absentee may be declared presumptively dead. Date of presumptive death is last day of second year from date of disappearance. (C. C. 83-89).

A record of deaths is kept by the Civil Register of each district. Death certificates may be obtained from the Chief of the Civil Registry. Nominal fees are fixed by local regulations.

Actions for Death.

There is no statute recognizing the action for wrongful death. However, this action could be supported by the general provisions on torts contained in Civil Code (arts. 2236 et seq.) under which any act or omission causing damages to a person by fault or negligence of another gives right to compensation.

12.03 DECEDENTS' ESTATES:

See topics 12.04 Descent and Distribution, Executors and Administrators, Wills; category 13 Family, topic 13.05 Husband and Wife.

12.04 DESCENT AND DISTRIBUTION:

(C. Family 336, C. C. 958-978).

In the case of intestacy the property passes to the following in the order named, the amount of the several shares varying according to which ones of the relatives mentioned under the several numbers survive the decedent: (1) Descendants; (2) ascendants and spouse; (3) brothers and sisters and spouse; (4) collaterals to sixth degree; (5) municipality. Honduran heir of alien has same rights in alien's estate as he would have according to Honduran law in estate of citizen of Honduras. See also category 13 Family, topic 13.05 Husband and Wife.

12.05 EXECUTORS AND ADMINISTRATORS:

(C. C. 1169-1295; C. C. P. 1019-1045).

The heirs or other legal representatives are the executors and administrators of an estate, and the appointment of an executor is expressly prohibited. If the heirs cannot agree they may appoint an administrator and if there is no accord he is appointed by the judge.

An inheritance may be accepted with or without benefit of inventory. If accepted with benefit of inventory the effect is to make the heir liable only up to the amount shown by the inventory. If accepted freely he is liable generally for the debts of the decedent, in the proportion of his participation in the estate. The creditors may have the right to intervene in the making of the inventory and the heirs may abandon the estate to the creditors.

12.06 FIDUCIARIES:

See topic 12.08 Trusts.

12.07 INTESTACY:

See topic 12.04 Descent and Distribution.

12.08 TRUSTS:

Banks authorized to act as trustees may accept trusts to realize certain acts with respect to certain property. Such trusts may not have a longer term than 30 years, unless the beneficiary be a public or a charitable institution. The benefits may not pass to various persons in succession unless such persons be alive or conceived at the time of the death of the person establishing the trust. Trusts as they exist in the common law are unknown in Honduras. A testator may leave secret instructions to testamentary trustee, who can not be obliged to reveal them or to render accounts. (C. Com. 1033-1062; C. C. 1220-1224, Decree 129-2004 of Sept. 22, 2004).

12.09 WILLS:

(C. C. 979-1167).

All persons may make wills except: (1) Those below the age of puberty; (2) those of unsound mind; (3) those temporarily not in possession of their faculties by reason of intoxication or otherwise; (4) those who cannot clearly express their will orally or in writing. Wills are: (1) Solemn; or (2) privileged. Solemn wills are subdivided into: (1) Open, nuncupative or public wills; and (2) closed or secret wills. The law contains a lengthy list of persons who cannot be witnesses of solemn wills, among them being: (a) Persons below 18 years of age; (b) those of unsound mind; (c) blind, deaf or dumb persons; (d) vicious persons; (e) undomiciled aliens; (f) servants and relatives within the third degree of the testator; (g) persons having an interest in the will; (h) the father confessor.

Open will is made before a notary and three witnesses; it is read aloud and signed by all present. Besides the place and date it must state where the testator was born, his nationality, his domicile, age, the names of the persons whom he has married and the names of his children.

Closed will is a will signed by the testator and enclosed in an envelope which the testator declares before a notary and five witnesses to contain his will. The notary writes a memorandum of such declaration on the envelope and all sign the same.

Privileged wills are: (1) Those made without the intervention of a notary in the case of epidemics or imminent danger of death, but they become void sixty days after the termination of the epidemic or danger of death, or if not proved by the witnesses before a judge within 90 days after the death of the testator; (2) military wills made by soldiers in a campaign; (3) naval wills made on Honduran vessels at sea.

Testamentary Dispositions.

The testator may freely dispose of his property, the only obligatory provisions which he must make being: (a) Provisions for the support of his needy children, parents and others whose support devolves upon him; (b) the marital fourth pertaining to the necessitous surviving spouse (see category 13 Family, topic 13.05 Husband and Wife).

Foreign wills are accepted as valid if made in the form required by the foreign country and if the authenticity of the instrument is duly proved. A Honduran or an alien domiciled in Honduras may also make a will before a diplomat or consular official of Honduras; in such event an open will requires three witnesses and a closed will seven witnesses, all the witnesses being Hondurans, residents in the locality.

13 FAMILY

13.01 ADOPTION:

(Const. 116, C. Family 120-184; C. Ch. 62-72).

Person over 25 and under 51 years of age, in full exercise of his civil rights and of good reputation may adopt minor under 18 years; in any case adopting party must be 15 years older than adopted party. Consent must be obtained from adopted party when it is over 21 years old, tutor, parents and court. Husband or wife may also adopt provided consent of other spouse is given.

Adoption gives adopted person identical status with that of natural child, creating lines of kinship between adopted person and adoptive parent's family. Adoption extinguishes legal bonds between adopted person and his natural parents and family. Only couples married over three years may full adopt. Constitution prohibits adoption by same sex partners. Adoption may not be ended or revoked. There are special requirements for foreign adopting parties.

Conventions: Inter-American Convention on Conflict of Laws in Matter of Adoption of Children signed at La Paz, Bolivia on May 24, 1984.

13.02 ALIMONY:

See topic 13.04 Divorce.

13.03 DESERTION:

See topic 13.04 Divorce.

13.04 DIVORCE:

(C. Family 232-356; C. C. P. 743-752, Decree 353-2005 of Dec. 29, 2005).

Divorce causes dissolution of marriage bond. Following are grounds for divorce: (1) Adultery of spouse; (2) attempt of either spouse against life of other or their children; (3) serious and frequent cruelty by one spouse against other or against children; (4) refusal of one spouse to support other and children; (5) habitual use of narcotics; (6) separation in fact for two years; (7) attempt to corrupt other spouse or their children; (8) abandonment by one of spouses for over two years.

Code does not prescribe any particular length of residence in order to bring action for divorce; but bona fide domicile in Honduras is prerequisite.

Court may make necessary provisional orders, including orders for alimony. In final judgment children are awarded to innocent party. Innocent wife is entitled to alimony.

Divorce by mutual consent may be agreed upon, before notary public, if parties are of age and two years have elapsed from date of marriage. For such purpose they must personally appear before judge, who attempts to reconcile them and if not successful summons them for another appearance in 60 days, at which time matter is finally decided.

Separation in fact of spouses without dissolution of marriage may be decreed after one year of marriage by mutual consent or by request of either party.

13.05 HUSBAND AND WIFE:

(C. Family 41-44, 64-81).

Husband and wife must live together; these provisions do not apply when their observance might cause serious injury to either spouse or their children. Spouses may before marriage, make agreements by notarial instrument as to their property and may modify such agreements. If there is no agreement, each spouse is owner of and may dispose of any property such spouse owned at time of marriage or acquired during marriage. Property possessed by spouses on dissolution of marriage is presumed common property and is equally distributed among them, unless there is proof that it was brought to marriage or acquired by one of spouses.

Spouses must mutually assist each other. They may contract with each other and the wife requires no authorization of her husband or of the judge, to contract or appear in court. They must support their children in proportion to their respective property. A surviving spouse who is in need is entitled to one-fourth, called the marital fourth, in the estate of the deceased spouse. This right cannot be claimed by a spouse who has abandoned the other or who was the guilty party in a separation suit.

13.06 INFANCY:

(C. Family 16, 17, 99-101, 185-198).

The age of majority is 21. Contracts by males under 14 and females under 12 are void and, if over those ages, voidable except some by emancipated minors. Infants are subject to parental authority. Parental authority includes custody, legal representation and administration and enjoyment of usufruct of minor's real and personal property, with certain exceptions. In absence of parents guardian is appointed. Parents and guardians have restricted powers of disposition.

Code of Childhood recognizes special rights to minors and youngsters. National Board of Social Welfare is in charge of protection of children.

13.07 MARRIAGE:

(Const. 112, C. Family 11-63).

Only civil marriages are recognized and persons performing religious marriage without previous performance of civil marriage are liable to punishment. Civil ceremony is performed by mayor or by notary public after publication of notice.

The following cannot marry: (a) Males below 18 and females below 16 years of age; (b) persons of unsound mind; (c) impotent persons; (d) minors who have not obtained consent of their parents or guardians; (e) widow or divorced woman within 300 days after termination of previous marriage unless child is born before. Marriages between following are prohibited: (a) Ascendants and descendants; (b) brothers and sisters; (c) collaterals by consanguinity to fourth degree; (d) convicted adulterers; (e) convicted principals or accessories of death of spouse of either contracting party; (f) guardians and wards. Judge may grant dispensations in number of foregoing cases. Constitution prohibits same sex marriages.

Marriages validly performed in foreign country are valid in Honduras. Aliens wishing to marry in Honduras must give evidence that they are not married and that under their national law they are not incapacitated for marrying. Same sex marriages performed in foreign country are not valid in Honduras.

No action lies for breach of promise of marriage.

Code regulates common-law marriages. Constitution prohibits same sex common law marriages. Same sex common law marriages valid under foreign laws are not valid in Honduras.

13.08 MARRIED WOMEN:

See topics 13.05 Husband and Wife, 13.07 Marriage.

14 FOREIGN TRADE AND COMMERCE

14.01 EXCHANGE CONTROL:

(Decree 53 of Feb. 3, 1950 as am'd; Decree 16-92 of Feb. 24, 1992 as am'd).

All negotiations of foreign exchange must be made through Banco Central de Honduras or for its account. Private parties may maintain assets in foreign exchange. Central Bank may regulate acquisition and negotiation of foreign exchange. Exchange rate is determined in periodical foreign exchange auctions. Remittances of dividends and profits, royalties, interest and principal of loans or repatriation of capital are free.

See also topic 14.04 Foreign Trade Regulations.

14.02 FOREIGN EXCHANGE:

See topic 14.01 Exchange Control; category 1 Introduction, topic 1.01 Currency.

14.03 FOREIGN INVESTMENTS:

(Constitution, art. 336; Decree 80-92 of May 29, 1992 as am'd regulated by Accord 345-92 of Sept. 10, 1992).

Law promotes national and foreign investment and joint ventures. All investments must be registered at Secretaría de Economía y Comercio which issues “Certificado de Inversión” which grants investors right to enjoy all guaranties of investments' law. Law guarantees, among others, availability of foreign currency and authorization to open bank accounts in foreign currency, nondiscrimination rights, access to local financing, freedom of production and commercialization of goods and services, no limitations on ownership of property, registration, use and exploitation of trademarks, patents and other industrial property rights. All investments are subject to tax system in force and must comply with labor and social security laws. Investments in health, national security, and environment preservation areas require prior authorization of Secretaría de Economía y Comercio. See also category 4 Citizenship, topic 4.02 Immigration.

14.04 FOREIGN TRADE REGULATIONS:

(Decrees 212-87 and 213-87 of Dec. 14, 1987 as am'd; and Decree 108-90 of Sept. 20, 1990 as am'd regulated by Accord 0630 of Apr. 11, 2003; Accord 136-92 of Mar. 16, 1992; Accord 023-2003 of Jan. 28, 2003 and Accord 007 of Jan. 28, 2003).

Importers are subject to ad valorem import duties, unless expressly exempted therefrom.

Export requires export declaration filed at Central Bank. Foreign exchange proceeds must be surrendered to Central Bank, except those from exports from free zones and industrial processing zones for export.

Central American Agreement on Tariff and Customs Regime and its Annex establishes common regime that includes import tariff based on Brussels Nomenclature and ad valorem duties, law on customs value of merchandise and its regulations, uniform customs code and its regulations, and tax exemptions regulations.

15 HEALTH

15.01 HEALTH CODE:

(Decree 65-91 of June 14, 1991, as am'd and its regulations, Accord 94 of June 11, 1997).

Code considers health as fundamental right. State has responsibility to protect public health and organize rehabilitation programs. All matters related to biological, ecological, psychological and social well-being of people are regulated by Code, which include, among others, right and duties related to public health; food and drink products; sanitation and safety of work place; medical equipment and pharmaceutical products; import of drugs; health institutions; practice of health-related professions; industrial security; disease control; international sanitary protection; cemeteries and crematoriums; environment, solid waste, air and water pollution; sanctions for infringement of Code.

Accord 06 of Sept. 21, 2005 on sanitary control over products, services and establishments, regulates among others, production, preparation and sanitary registration of food, chemical, pharmaceutical, cosmetic and biological products, issue and cancellation of sanitary licenses; import and export of products, labeling, packaging, storage, transportation of products; advertising; inspecting and sampling, sanctions for infringement of law.

Decree 157-94 of Nov. 15, 1994 as amended is sanitary law for plants and animals which deals with inspection of animals and plants, control and eradication of plant diseases, control of vegetable and animal products, eradication of animal diseases, related professions and companies which purpose is plants and animal health. “Servicio Nacional de Sanidad Agropecuaria” is in charge of enforcing law.

Decree 131 of Nov. 11, 1982, regulates donation and transplant of organs; removal of organs and body parts, from dead and living persons. Fines and imprisonment are imposed to donor and donee if there is any payment involved. Secretaría de Salud Pública is in charge of enforcement of law.

16 IMMIGRATION

16.01 ALIENS:

(Constitution arts. 30-35, 61, 101, 107; Decree 208-2003 of Dec. 31, 2003 regulated by Accord 018-2004 of May 3, 2004 as am'd).

Aliens in general have same civil rights as citizens. They may acquire property and engage in business in accordance with general laws; however they may not own rural real property in a 40 kilometer zone along border and seashore.

Immigrants may lose their status as permanent residents if they leave country for 18 consecutive months or for 90 consecutive days during first two years of permanence in Honduras.

Employers may not have more than 10% of foreign employees and pay them more than 15% of total payroll. (Constitution art. 137).

See also topic 16.02 Immigration; categories 12 Estates and Trusts, topics Descent and Distribution, Wills; Family, topic Marriage; Property, topic Real Property.

16.02 IMMIGRATION:

(National Constitution arts. 30 to 35; Decree 208-2003 of Dec. 31, 2003 regulated by Accord 018-2004 of May 3, 2004 as am'd, Decree 93-91 of Aug. 8, 1991).

For purposes of law aliens may enter country as: (1) Nonresidents; and (2) residents. Among nonresident aliens are: tourist, in transit, commercial agents, business persons, artists, special visitors. Among residents are: investors, retired, with own income, married to Honduran by birth. To apply for resident status, application must be filed before Secretary of Government and Justice if applicant is in country or before diplomatic or consular agent if he is out of country. Aliens must register with Registro Nacional de Extranjeros which issues identification cards according with migratory category. Residents retired and with own income shall have minimum income established by law and are exempted from payment of income tax, and are allowed to import duty free motor vehicle every five years; duty free importation of personal effects is granted once. They must spend at least six months per year in Honduras.

17 INTELLECTUAL PROPERTY

17.01 COPYRIGHT:

(Decree 4-99-E of Dec. 13, 1999 as am'd).

Law grants moral and property rights to author, his successors or assignees regarding literary and artistic works. Copyrights include all kinds of intellectual (including software) literary and artistic creations reproduced by any means. Law also protects translations, adaptations, arrangements and other transformation of intellectual works. Phonogram producers and performers' rights are also protected. “Moral rights” are unassignable, nontransferable and unlimited in time of enjoyment, including right to make work known publicly, use of name or pen name, assert paternity of works, oppose plagiarism, or deformation, mutilation, change or abridgment of work or title. Violation of moral rights gives action for damages. “Property rights” for enjoyment of pecuniary benefits from use of his work, including reproduction, performance and broadcasting, with some exceptions. These rights assignable by inter vivos acts or transferred upon death, or law disposition. Protection is for life of author plus 75 years after his death or last surviving co-author; if author appears to be collective entity or company or in case of audiovisual works protection lasts 75 years from first publication or 50 years from creation. Photographic works and applied art rights last 50 years from last day of year in which they were taken or done or 70 years from last day of year that they were first published. Anonymous and pseudonymous works protected 75 years from first publication or 50 years from creation. Fine and imprisonment may be imposed on violators. Law regulates publishing contracts.

Conventions.—Convention on Literary and Artistic Copyright, Buenos Aires, 1910, Inter-American Convention on Copyright and Literary Property, Washington, 1946. Convention for protection of phonogram producers against nonauthorized reproduction, Geneva, 1971; WIPO Copyright Treaty, Geneva 1996, WIPO Performances and Phonograms Treaty, Geneva 1996.

17.02 PATENTS:

(Decree 12-99-E of Dec. 30, 1999 as am'd).

Invention Patents.

Any invention of products or proceedings which are novel, represent inventive step and are susceptible of industrial application. Invention is novel when it is not within state of art. Scientific theories or theoretical principles, natural biological materials, computer program considered separately, sketches, plans and methods used in business, games and mental exercises, surgical, therapeutic or diagnostic treatment methods, literary or artistic works among others, are not patentable. Patents are granted for 20 years from filing date. Patent gives exclusive right of exploitation but compulsory license may be granted in case of declared emergency or national security reasons and when patent has not been exploited during first three years. Patent rights are transferable.

Utility Models.

Any new model which may be applied to industrial object may be registered as ownership of author. Utility models are new forms of objects or mechanism, which, provided they have practical use, are registrable. Registration term is 15 years from filing date. Provisions regarding patents are applicable to models.

Industrial Designs.

Any new design which may be applied to industrial object may be registered as ownership of author if no publicity thereof has been made in any form. Registration is five years, renewable for two additional five year periods.

Trade Secrets.

Law also protects trade secrets and considers them as any confidential information that is valuable and provides competitive or economic advantages to owner. Information considered trade secret must be expressed in any tangible form.

Conventions.

Convention for the Protection of Industrial Property, Paris, Mar. 21, 1883, Strasbourg Agreement Concerning the International Patent Classification, 1971 as amended; Stockholm Revision of July 14, 1967 as amended on Sept. 28, 1979; Agreement on Trade-Related Aspects of Intellectual Property Rights, Marrakech, Apr. 15, 1994; International Convention for the Protection of New Varieties of Plants, Paris, Dec. 2, 1961, as amended; Patent Cooperation Treaty, Washington, June 19, 1970, as amended; Budapest Treaty on the International Recognition of the Deposit of Microorganisms for the Purposes of Patent Procedure, Budapest, Apr. 28, 1977, as amended.

17.03 TRADEMARKS AND TRADENAMES:

(Decree 12-99-E of Dec. 30, 1999 as am'd).

Trademarks and Slogans.

Trademark is any sign visible and distinctive used to distinguish products or services produced or commercialized by one enterprise from same or similar products or services produced or commercialized by another enterprise. Among those non-registrable are: usual or necessary shapes of products or denominations and color thereof; shapes which provide functional or technical advantages to product or service concerned; signs or indications that may designate or describe any characteristic of products or services concerned; those against morals or public policy or that are intended to deceive consumers regarding nature, origin, type of manufacture characteristic or aptitude to use products or services; those identical or similar to slogans or trade names used by another person provided under circumstances public may be confused; those that are reproduction, imitation, translation, or total or partial transcription of distinctive signs, locally well known, causes confusion to public independent of classification of goods and services for which registration is applied for. Those which may be confused with marks already registered; merely generic or geographic names or names of persons or things. Registration is for ten years, renewable. Marks may be canceled for nonuse in three years unless nonuse is due to just cause or annual fee for rehabilitation purpose has been paid. All remarks and wording part of mark must be translated into Spanish. Licenses must be registered but registry may be denied if it does not provide for control of quality or if it limits exportation or sale prices or if it restricts use of raw materials, equipment, etc., unless necessity of restriction is proved, or for excessive royalties or for obligation to employ certain personnel permanently or for submission to foreign courts. Law protects notorious distinctive signs and indicates relevant circumstances to take into consideration for their determination. Slogans are registered for ten years, renewable as long as trademark used in conjunction therewith remains valid.

Collective Marks.

Any sign that distinguishes origin or any other common characteristic of products or services of different enterprises which use marks under control of their owner.

Certification Marks, Origin Denominations.

Private or public enterprises, governmental bodies or international organizations, national or foreign individuals may register certification marks. Registration is granted for ten years and may be renewed. If granted to governmental body, registration is for indefinite period of time. It cannot be encumbered or subject to attachment. Origin denominations may be registered for indefinite period of time.

Commercial names of enterprises or industrial, commercial or service establishments are protected by law without requiring registration. Proof of existence of enterprises must be filed every five years in order to keep commercial name protected. Origin denominations may be registered for indefinite period of time. Law prohibits unfair competition and penalizes violators.

Conventions.

Convention for the Protection of Industrial Property, Paris, Mar. 21, 1883, Stockholm Revision of July 14, 1967 as am'd on Sept. 28, 1979; Nice Agreement Concerning the International Classification of Goods and Services for the Purposes of the Registration of Marks, 1957 as reviewed and am'd; Locarno Agreement Establishing an International Classification for Industrial Designs, 1968 as am'd; Agreement on Trade-Related Aspects of Intellectual Property Rights, Marrakech, Apr. 15, 1994.

18 LEGAL PROFESSION

18.01 ATTORNEYS AND COUNSELORS:

(Law of Feb. 8, 1906 as am'd and Decree 73 of May 18, 1962).

Universities grant attorney degree, which requires having law degree, being more than 21 years old, Honduran citizen in full exercise of his civil and political rights and passing examination on legal matters.

To practice law he must be member of “Colegio de Abogados de Honduras”.

19 MINERAL, WATER AND FISHING RIGHTS

19.01 MINES AND MINERALS:

(General Mining Law, Decree 292-98 of Dec. 24, 1998*).

Mining in General.

State is owner of all mines within its territory, continental shelf, its exclusive economic zone and continuous zone. Mining activity is regarded as public interest. State may grant concessions to individuals or juridical persons organized under local laws or duly authorized for exercise of commerce in country. Law classifies mining activities into: prospecting, exploration, exploitation, processing and commercialization. Commercialization of mineral products, domestically and abroad is free. Mining concessions may be alienated, transferred, encumbered and must be registered at Public Registry of Mining Rights. Concessions may be terminated by cancellation, nullity and waiver. Law contains environmental protection regulations.

Prospecting is free all over territory of Republic, except in lands covered by a valid permit of exploration, or by a valid concession of exploitation.

Exploration and Exploitation Concessions.

Concessions are divisible and their extension may range from 100 to 1,000 hectares, except in continental shelf where concessions are granted for extensions from 100 to 10,000 hectares. Concessions are metallic, nonmetallic and gems or precious stones. Holders of mining concessions have rights and duties as stipulated by law, including payment of annual fee per hectare paid at filing application and during concession period. Minimum annual production is required after completion of eight years of metallic concession, for other concessions after four years of concession. In case of noncompliance annual fee is increased.

Taxation.

Concession holders in mining activities are subject to annual surface royalty per hectare. They are also subject to income tax law as indicated by art. 73 of mining law and to municipal tax. Duty free importation of capital goods and raw materials necessary for mining operations. State may guaranty by contract, tax stability to holders of mining activities under conditions stipulated by law.

Petroleum.

(Decree 194 of Oct. 31, 1984 as am'd and its regulations, Accord 1276 of June 24, 1985).

State is owner of all petroleum, hydrocarbon and gas deposits within its territory, its exclusive economic zone and continental shelf. Investigation, exploration, exploitation, refining, storage, transportation and commercialization of oil are regarded of public interest. Expropriation of property may be conducted for development of industry. State may carry out this activity by itself or may enter into operation contracts with national or foreign individuals or companies through public bidding or private contracting. In order to execute operation contracts companies must be registered in Registry of Commerce. Foreign companies must additionally designate agent. In its performance of obligations under operation contracts contractor may subcontract some operations keeping control and overall responsibility. Law establishes causes for termination of contracts. All activities and controversies are subject to local law and jurisdiction. Contracting parties must post guaranty to guarantee performance of operation contracts. In most instances at termination of operation contract all equipment and installations must be turned over to State. Investigation permits are granted for up to 18 months. Operation contracts for exploration or exploitation are limited to maximum of 100,000 hectares onshore and 200,000 hectares offshore. Exploration may last four years renewable for two more years. If oil is found contractor company can enter into 20-year exploitation contract renewable for five more years. If commercial exploitation is made State will compensate contractor with crude of up to 85% of net production at price calculated in accordance with art. 56 of Law, until investment and costs incurred during exploration phase are recovered. After total amortization of investment above percentage will be up to 50% of net production. State may request contractor to sell up to 50% of production received by contractor as compensation in order to satisfy local demand.

Operation contracts may be assigned. Operation contracts may be cancelled under conditions indicated by law. Such cancellation results in immediate reversion of area of contract to State and loss of installations and equipment. Guaranty is then enforced. Failure to perform may result in fines.

Taxes.

Exploitation is subject to annual surface rights of ten lempiras per hectare and if contract is renewed 20 lempiras. All activity is subject to income tax and to other general taxes depending on case.

* *Note:* General Mining Law, Decree 292-98 of Dec. 24, 1998 was declared partially unconstitutional by Sentence of Oct. 4, 2006 of Supreme Court of Justice.

20 MORTGAGES

20.01 CHATTEL MORTGAGES:

Chattel mortgages are permitted for various commercial transactions as well as mortgages on mercantile establishments, vessels and aircraft. Such mortgages must be recorded in proper registries. Lien contracts for industrial and agricultural purposes must be recorded both in Commercial and Real Property Registries. (C. Com. 916-928, 1313-1317; Civil Aeronautics Law, Decree 55-2004 of May 19, 2004). See categories 3 Business Regulation and Commerce, topic Sales (Realty and Personalty); Debtor and Creditor, topic Pledges.

20.02 COLLATERAL SECURITY:

See categories 3 Business Regulation and Commerce, topic Sales (Realty and Personalty); Debtor and Creditor, topic Pledges.

20.03 MORTGAGES:

Mortgages must be constituted by notarial instrument and recorded in public registry. Property mortgaged must be definite and amount must be stated. If amount is uncertain estimate must be given. If mortgaged property diminishes in value creditor may demand that further security be furnished or that debt be paid. As against third persons mortgage covers interest of current year and of two preceding years. Mortgage expires ten years after registration, but for mortgages of mortgage banks period is 35 years. (C. C. 2098-2196; C. Com. 1317).

21 PROPERTY

21.01 ABSENTEES:

See category 12 Estates and Trusts, topic 12.02 Death.

21.02 ADVERSE POSSESSION:

See category 5 Civil Actions and Procedure, topic 5.04 Prescription.

21.03 CONVEYANCES:

See topic 21.05 Deeds; category 9 Documents and Records, topics 9.02 Notaries Public, 9.03 Public Instruments.

21.04 CURTESY:

No estate by curtesy.

21.05 DEEDS:

Deeds must be executed as public instruments before a notary public. They must contain a statement as to encumbrances on the property. They are subject to stamp and transfer taxes depending on the actual consideration. See category 9 Documents and Records, topics 9.02 Notaries Public, 9.03 Public Instruments. See also category 22 Taxation, topic Taxes.

21.06 DOWER:

No dower right.

21.07 REAL PROPERTY:

Civil Code, arts. 599 to 927, govern all matters referring to property and property rights.

National Constitution guarantees property rights and establishes that expropriation may be imposed only on grounds of public benefit and after a fair compensation.

22 TAXATION

22.01 ADMINISTRATION:

Tax Code.

(Decree 22-97 of Apr. 30, 1997). Comprises provisions on taxpayers and their duties; withholding; tax exemptions; compliance with law and liquidation of tax; surcharges on delinquent payments, penalties, collection procedures; statute of limitations; smuggling and other regulations applicable to all taxes, except to customs taxes and municipal taxes. Dirección Ejecutiva de Ingresos is in charge of administration, control and collection of taxes.

22.02 EXCISE TAXES:

(Decree 58 of July 29, 1982, as am'd). General rate is 10%, for motor vehicles rates vary from 10% to 50%. Tax is levied on importation and production of certain products.

22.03 FREE ZONES:

(Decree 37-87 of Apr. 7, 1987 as am'd regulated by Accord 684 of July 13, 1987). Law establishes requirements to be complied with by private companies in order to own and manage free zones authorized by Secretary of Economy and Commerce. Companies' owners and managers of free zones are exempted from income tax payment for 20 years, municipal taxes for ten years, and duty free import of equipment, machinery parts, construction materials necessary for construction and operation of free zones which are not produced in country. National or foreign individuals and juridical persons may operate in free zones by entering into contract with administrating company, and their profits are exempted from income tax except for foreign individuals and juridical person who are allowed to credit, in their country, income tax paid in Honduras. Entry of goods to free zones is exempted from all taxes, sales and production in free zones and real property is exempted from state and municipal taxes. Goods and merchandise exported or imported in and from free zones are exempted from all taxes.

22.04 INCOME TAX:

(Law 25 of Dec. 20, 1963 as am'd, regulated by “Acuerdo” 799 of Nov. 19, 1969 as am'd). Tax is imposed on incomes of any individual or corporation, whether national or foreign, having domicile in Honduras, from any kind of property or activities or labor, whether source of income is within or without country or wherever payment of income is made. Nonresident persons and corporations domiciled in Honduras are subject to tax on income from Honduras sources only. Undivided estates and trust are also subject to income tax.

Among exempt items appear the following: insurance proceeds paid by Honduras insurance companies; income from governmental subdivisions; gifts, inheritances and legacies; National Lottery awards. Deductible items include, among others, ordinary and necessary expenses for production of income; certain insurance premiums; interest on loans which, in opinion of Director of Internal Revenue, were obtained for production of income, but interest paid on corporate capital or on loans granted by the owners or close relatives or by members or shareholders of a corporation or legal entity is not deductible; taxes, except income tax; losses from damages to assets; amortization of bad debts; 10% of investment in free housing for laborers and 20% of other constructions for the general welfare of same; salaries; bonuses within limitations; depletion of certain property, within limitations established by Director of Internal Revenue; charitable gifts; certain social security contributions, fees paid to directors and managers of legal entities.

Personal deduction of Lempiras 20,000 for medical, dental and laboratory services rendered to individual taxpayer or to his dependents except when reimbursed by health insurance. Individual taxpayer may also deduct expenses incurred in practice of profession, art or craft or in shop or in production and upkeep of farms, as well as interest on loans for agricultural or cattle production; depreciation of agricultural equipment, machinery and buildings, gifts and legacies donated to State up to amount not exceeding 10% of net taxable income.

Rates.

Individuals residing or domiciled in Honduras are subject to income tax rates ranging from 10% on income from L.70,001 to L.100,000 to 25% on income over L.500,000. First L.70,000 are exempted. Juridical persons domiciled in Honduras are subject to 25% rate on net income. Income in nature of dividends is subject to proportional tax rate of 5%. Interest on securities, on savings accounts and on securities related to nonbanking private sector sold on stock exchange paid to individual or juridical persons, in local or foreign currency, is subject to 10% fixed rate and is excluded from normal taxable income.

Individuals and corporations not residents or domiciled in Honduras are subject to tax to be withheld when possible on incomes from local sources, payable when the income is sent abroad, as follows: 30% on income from real or personal property, 5% on interest from commercial transactions, bonds and other securities, 10% on interest on securities related to nonbanking private sector sold on stock exchange, on interest on savings accounts with banks, savings and credit associations and other financial institutions, 10% on profits or proceeds from aircraft, vessels or land motor vehicles, 5% on income from communications concerns; 10% on royalties from mines or other natural resources; 25% for use of patents, designs, procedures, marks, etc.; 35% on salaries and compensation for services; 5% on income or profits earned by foreign enterprises from their branches or subsidiaries; 15% on insurance premiums and bonds of any kind; 30% on public spectacles; cable t.v., film and video tapes 10%, others 20%. Secretary of Finance may grant total or partial exemption of tax on interest of capitals invested in projects of economic importance for country.

Capital gains earned by individuals or juridical persons domiciled and non-domicile in country are taxable at rate of 10% only. Agricultural and cattle concerns, mining, tourism and manufacturing concerns may request that certain capital losses be accepted as deductible and carried over for up to three years. Capitalization of reserves or profits is exempted from taxes.

Tax on Net Worth.

(Decree 51-2003 of Apr. 8, 2003 regulated by Accord 0948-2003 of May 27, 2003). Tax at annual rate of 1% of value of assets is assessed on all legal entities engaged in commercial activities according to law.

22.05 SALES TAX:

(Decree-Law 24 of Dec. 20, 1963, as am'd, regulated by Accord 0948-2003 of May 27, 2003). General 12% sales tax rate on net price of merchandise and certain services must be paid by importers and industrial concerns. Tax rate is 15% on beer, liquors, cigarettes and tobacco products. This tax is levied only once. Excluded are some items already subjected to special taxes. Exempted services include insurance, professional services, educational and health services, supply of water and electricity. Other exemptions include pharmaceutical products for human and veterinary use, basic food products, fertilizers, textbooks, periodicals and other school materials, imported raw materials, machinery, industrial equipment, accessories and spare parts to be used in production of exempted articles or goods, and imported agricultural equipment, machinery, accessories and spare parts.

Other taxes include: (a) Customs and port duties (Decree 213-87 of Dec. 14, 1987 as am'd); (b) alcoholic beverages, beer, gaseous beverages and other prepared or fermented beverages (Decree 20 of Nov. 30, 1956 as am'd); (c) cigarettes (Decree 51-2003 of Apr. 8, 2003 regulated by Accord 0948-2003 of May 27, 2003); (d) stamp tax and stamped paper (Decree 75 of Apr. 24, 1911 as am'd); (e) real property tax (Decree Law 134-90 of Oct. 29, 1990); (f) real property transfer tax ranging from 2% to 4% (with some exceptions such as acquisition of real estate by Government for public interest or sale of real estate of minors or disabled to provide for their needs) of consideration (Law 76 of Apr. 9, 1957 as am'd). Deeds, mortgages and most documents used in ordinary course of business are subject to stamp tax generally depending on amount involved.

23 TRANSPORTATION

23.01 AIRCRAFT:

Civil Aeronautical Law deals with aircraft classification, nationality, license and permits for operation, registration certificate, ownership, lease, manufacture, attachment, passengers and freight transportation, encumbrance of aircraft and maximum carrier's liability in case of accidents and loss or damage to baggage and freight and penalties for infringement of law. National aircraft must be registered and owners thereof must be domiciled in country. If owner is corporation, must be organized according to local laws. Only individuals and juridical persons from Honduras may register aircraft used for commercial transportation. (Decree 55-2004 of May 19, 2004 regulated by Accord 645-A of Oct. 6, 2005).

23.02 SHIPPING:

The Code of Commerce contains provisions regarding the rights and duties of captains and crews and rules relating to admiralty matters. (C. Com. of 1940, 733-1038; C. Com. of 1950, 1314). Honduran flag may be used by merchant vessels holding permanent or temporary registry. Temporary registry is granted up to nine months, while waiting permanent registry. Applicant may be national or foreign, individual or juridical person, locally domiciled or non-domiciled. Registered vessels are not required to travel to local ports. Vessels are registered at Vessel Registry, but all acts related to ownership and encumbrance of registered vessels must be recorded at Registry of Merchant and Real Property. Coastwise trade is reserved to national vessels which are those registered according to law. (Organic Law of National Merchant Marine Decree 167-94 of Nov. 15, 1994 as am'd).

24 TREATIES AND CONVENTIONS

24.01 TREATIES:

Multilateral.

Havana Convention on Private International Law (Bustamante Code) Havana 1928; Panama Convention on Latin American Economic System (SELA) Panama 1975; Interamerican Convention on Copyright and Literary Property, Washington June 22, 1946; Central American Economic Integration, with Costa Rica, El Salvador, Guatemala and Nicaragua; Multilateral treaty of free trade and Central American economic integration. Signed June 10, 1958, Tegucigalpa; General treaty on Central American economic integration. Signed Dec. 13, 1960, Managua; Agreement establishing the Central American Bank for Economic Integration. Signed Dec. 13, 1960, Managua. Multilateral Trade Negotiations, The Uruguay Round, Final Act (Marrakech, Apr. 15, 1994) and Agreement Establishing the World Trade Organization (Marrakech, Apr. 15, 1994); Free Trade Agreement between Dominican Republic and Honduras, El Salvador, Guatemala, Nicaragua and Costa Rica, Santo Domingo Apr. 16, 1998; North Triangle Free Trade Agreement between Mexico and Honduras, Guatemala and El Salvador, Mexico June 29, 2000; Convention

Abolishing the Requirement of Legalization for Foreign Public Documents. Done at The Hague on Oct. 5, 1961; United States of America-Dominican Republic-Central America Free Trade Agreement. Signed Aug. 5, 2004, Washington, D.C.

Bilateral with U.S.

Treaty of friendship, commerce, and consular rights. Signed Dec. 7, 1927, Tegucigalpa; Trade agreement. Signed Dec. 18, 1935, Tegucigalpa. Entered into force Mar. 2, 1936. Partly terminated Feb. 28, 1961; General agreement for economic and technical cooperation. Signed Apr. 12, 1961, Tegucigalpa; Treaty Concerning the Encouragement and Reciprocal Protection of Investment, with Annex and Protocol. Signed July 1, 1995, Denver.

1

HONG KONG LAW DIGEST

—Scope —

Revised for 2009 edition by

Lehman, Lee & Xu

References to “Cap.” mean the Chapter of the Laws of Hong Kong. Other abbreviations used are: “HKPR”, Hong Kong Permanent Resident; “HKSAR”, Hong Kong Special Administrative Region, The People's Republic of China.

Note: Although many legislative and legal changes relating to the change in sovereignty from U.K. to China have already been implemented, it is a complex and ongoing process. When dealing with areas which may be affected by this process, it is important to check the up-to-date position with a Hong Kong lawyer.

Note: Except where noted otherwise, this revision is as of Mar., 2009.

1 INTRODUCTION

1.01 CURRENCY:

See category 3 Business Regulation and Commerce, topic 3.02 Banking and Currency.

1.02 GOVERNMENT AND LEGAL SYSTEM:

Hong Kong became Special Administrative Region (“SAR”) of China on July 1, 1997 pursuant to 1984 Joint Declaration by United Kingdom and China. National People's Congress of China enacted Basic Law in 1990 as constitution of Hong Kong SAR under Chinese sovereignty.

Joint Declaration and Basic Law embody concept of “one country, two systems”, providing that capitalist system and way of life of Hong Kong will remain unchanged for 50 years and Hong Kong will exercise high degree of autonomy, except in matters of foreign affairs and defence.

Basic Law sets out general principles, relationship to China central government, political structures, individuals' rights and duties, judicial organs, civil servants, and other administrative matters and related procedures. Power to amend Basic Law is vested in National People's Congress of China.

Chief Executive is head of SAR and represents SAR. Powers and duties of Chief

Executive set out in Basic Law with accountability to China's central government and Hong Kong SAR. Term of service is five years with maximum of two terms. Chief Executive appoints Executive Council to assist in policy making and must consult with for important policy decisions.

In accordance with Basic Law, Legislative Council consists of 60 members, 30 returned by geographical constituencies through direct election, and 30, by functional constituencies (elected representatives of specified professions, business and labour). At least one session of Council shall be convened in every calendar year and session shall begin and end on such date as Chief Executive may appoint by notice published in Gazette. (Rule 11, Rules of Procedure of Legislative Council of HKSAR).

Chief Executive selected by 800-member Selection Committee, comprised entirely of Hong Kong permanent residents (Cap.569), appointed by China central government. Basic Law states that ultimate aim is selection of Chief Executive and election of all members of Legislative Council by universal suffrage.

Basic Law (Art. 8) and Hong Kong Reunification Ordinance (Cap. 2601) provide that laws previously in force in Hong Kong, that is common law, rules of equity, ordinances, subordinate legislation and customary law shall be maintained, except for any that contravene Basic Law and subject to amendment by legislature of Hong Kong SAR. Legislative provisions applying English law continue as transitional arrangement pending amendment by domestic legislation.

Common law and rules of equity are in force so far as applicable to Hong Kong circumstances, subject to modification as those circumstances required and to any amendment by Order in Council, or applicable legislation.

Hong Kong's Bill of Rights Ordinance (Cap. 383) enacted in 1991 and provides for application of relevant and provisions of International Covenant on Civil and Political Rights. Existing law which conflicts with Bill of Rights are repealed. Bill binds only government and public authorities and those acting on their behalf and does not apply to inter-citizen rights.

Jurisdiction of Hong Kong courts is preserved under Basic Law including power of final adjudication (see category 6 Courts and Legislature, topic 6.01 Courts). English and Chinese are both official languages.

Hong Kong no longer member of Commonwealth, however, involvement in some Commonwealth events may continue. Privileges conferred on U.K. or other Commonwealth countries no longer effective unless reciprocal (see category 23 Treaties and Conventions, topic 23.01 Treaties).

There is no central bank in Hong Kong. Three banks, Hong Kong and Shanghai Banking Corporation Limited, Standard Chartered Bank and Bank of China (Hong Kong) Limited operate as note-issuers. Duties such as note-issuing, clearing and government banking are carried out by commercial banks, but control of liquidity, stabilization of exchange rate and acting as lender of last resort are responsibility of Monetary Authority. Coinage Ordinance (Cap. 454) empowers Chief Executive in Council to declare, mint, issue and demonetize coins in Hong Kong.

Monetary Authority has also assumed functions of former Commissioner of Banking under Banking Ordinance. (Cap. 155). These include maintaining general stability and effective working of banking and currency systems and supervising licensing and registration of authorized institutions such as banks, local representative offices, deposit-taking companies and restricted license banks.

Monetary unit is Hong Kong dollar. Under “linked rate” system, Exchange Fund sells and redeems debt certificates at fixed rate of HK$7.80 = US$1 and accordingly market rate floats around that level.

1.03 OFFICE HOURS AND TIME ZONE:

Hong Kong time zone is +08:00 GMT. Office hours are generally 9 a.m. to 6 p.m. and 9:00 a.m. to 1:00 p.m. on Sats. Banks generally open 9 a.m. to 5 p.m. and 9:00 a.m. to 12:30 p.m. Sats.

2 BUSINESS ORGANIZATIONS

2.01 ASSOCIATIONS:

See topic 2.06 Partnerships.

2.02 BUSINESS REGISTRATION:

Under provision of Business Registrations Ordinance (Cap. 310), every person carrying on any business must register his business within one month of commencement of business. Requirement is imposed on every company incorporated in Hong Kong or registered as “non-Hong Kong” and individuals and partnerships. Every application must be made on relevant prescribed form together with documentation to prove identity i.e. certificate of incorporation, certificate of registration of foreign company, Hong Kong ID card or passport.

2.03 CORPORATIONS:

Companies Ordinance (Cap. 32), which regulates corporations, is substantially based on U.K. Companies Acts.

Any one or more persons (including bodies corporate) may form limited company. There is no prescribed minimum amount for authorised share capital.

Term, “private company” refers to company which by its articles of association restricts right to transfer its shares, limits number of shareholders to 50 and prohibits any invitation to public to subscribe for its shares or debentures. Company which does not impose such restrictions is public company. Public company may invite public to subscribe for its shares, usually by issue of prospectus. Name of limited company must end with word “limited” or its abbreviation “ltd.”, except under special circumstances where Registrar of Companies may by licence allow word “limited” to be omitted.

Company may be formed as limited company (liability of members limited by shares or guarantee) or unlimited company (liability of members unlimited). Unlimited company can be registered as limited company, but not vice versa.

Public company may choose to become listed company, defined in Companies Ordinance as company which has any shares listed on Hong Kong Stock Exchange Main Board or on The Growth Enterprise Market (“GEM”). Stricter requirements are imposed on listed companies or companies which are members of groups of which listed company is member.

Listed companies are regulated by Rules Governing the Listing of Securities on the Stock Exchange of Hong Kong Limited and Rules Governing the Listing of Securities on GEM of Stock Exchange of Hong Kong Limited (“Listing Rules”) and by legislation, mainly Securities and Futures Ordinance. (Cap. 571). See subhead Registers, infra.

Pursuant to Memorandum of Understanding between Securities and Futures Commission (“SFC”) and The Stock Exchange of Hong Kong Limited (“SEHK”), SEHK is solely responsible for day-to-day administration of all listing related matters while SFC has statutory duty to oversee SEHK to ensure effective and impartial discharge of functions by SEHK. However, certain functions known as “SFC Listing Related Functions” continue to be discharged by SFC. Example is administration of Hong Kong Code on Takeovers and Mergers.

Significant number of listed companies have, in recent years, re-domiciled in off-shore jurisdictions. Additionally, number of sizeable China corporations have listed in Hong Kong under arrangements between SFC and SEHK and relevant Chinese authorities. Companies incorporated in China, with permission of Chinese Government, may list on Stock Exchange of Hong Kong Stock as “H-Shares”. In comparison to other categories of Mainland Chinese Securities (e.g. A-Shares, B-Shares, etc.) listed on Mainland exchanges, H-Shares are denominated in Hong Kong Dollars and are freely tradable by any investors on Hong Kong Stock Exchange.

Company limited by shares must register memorandum of association which includes following information: company name, registered office, statement of liability of members and amount of company's authorised share capital with number and value of shares into which such capital is divided.

Companies almost invariably file articles of association which are rules governing internal regulation, duties of directors, rights of voting, etc. If articles of association are not filed, statutory regulations appended to Companies Ordinance known as “Table A” govern internal management. Table A also applies to supplement company articles of association in certain cases. Applications for registrations of companies are made to Registrar of Companies, to whom proposed memorandum and articles of association are submitted.

Memorandum of association of most companies no longer required to state its objects, providing for abolition of doctrine of ultra vires. Company has same powers as natural person, in addition to what it can do by virtue of its corporate status. Act of company outside its stated objects will not be invalid. Doctrine of constructive notice (as result of Registrar of Companies keeping copy of memorandum or articles or being lodged with return or resolution) has also been abolished.

Prospectus.

Public company issuing prospectus (or if applicable, statement in lieu of prospectus) must set out particulars specified in Companies Ordinance and if applicable must comply with SEHK and SFC requirements. Copy of every such prospectus (or statement) signed by every named director or proposed director or by his agent authorised in writing must be duly delivered to Registrar as required by Companies Ordinance. No prospectus may be issued (or shares or debentures allotted) until this has been done. Every prospectus must be in English language and contain Chinese translation. Registrar takes no responsibility as to contents of prospectus.

Reports.

Every year company must file with Registrar annual return in requisite form signed by director and company secretary containing specified information such as names of members, details of directors, etc. If company has share capital, return must give particulars of share capital including extent to which it is paid up. Public companies are required to file accounts. Overseas corporations which have place of business in Hong Kong are required to be registered under Part XI of Companies Ordinance and need to deliver to Registrar for registration return of any alteration in prescribed particulars and, for public company equivalent corporations, accounts.

In addition to foregoing, company is required to register with Registrar changes in share capital, special resolutions, changes in directors, secretary, registered office etc.

Directors.

Bodies corporate can act as directors of another company provided latter is private company which is not member of group which includes listed company. As to **Disqualification of Directors,** § 168C(1) of amendment Company Ordinance has been amended to clarify that Part IVA of the Company Ordinance applies to non-Hong Kong company.

Secretary of company must, if individual, ordinarily reside in Hong Kong or, if body corporate, have registered office or place of business in Hong Kong.

Registers.

Company must maintain various registers (available for inspection) including registers of members, directors, debenture holders and charges.

Under Securities and Futures Ordinance (Cap. 571) listed company must maintain register of substantial shareholders' interests in its shares (where interest including related parties exceeds 5% of share capital carrying voting rights) and of directors' interests including related parties in its shares and debentures and in those of associated companies. Such information must also be supplied to Stock Exchange.

Registration of Mortgages.

Mortgages and charges falling within categories specified in Companies Ordinance shall, so far as any security is conferred thereby, be void against liquidator and any creditor of company unless prescribed particulars and relevant instrument are delivered to Registrar within five weeks after date of creation. Time is slightly extended for charges created out of Hong Kong comprising property situate outside Hong Kong.

Categories include charges to secure any issue of debentures; charges on uncalled share capital; charges on land or any interest therein; charges on book debts; floating charges on company's undertaking or property; charges on calls made but not paid; charges on ship or any share in ship; and charges on goodwill, on patent, or licence under patent, on trademark or on copyright or licence under copyright. **Relating to Registration of Charges to Non-Hong Kong Companies,** § 91 has been amended to provide that:

(a) Part III of the Company Ordinance does not extend to charges on property in Hong Kong of non-Hong Kong company registered under Part XI if relevant property was not in Hong Kong at time charge was created by company, or at time it was acquired by company subsequent to creation of charge;

(b) Part III also does not apply to non-Hong Kong company registered under Part XI if: (i) non-Hong Kong company sends notice to Registrar under § 339 of fact that it has ceased to have place of business in Hong Kong, (ii) Registrar enters in register of non-Hong Kong companies statement under § 339AA that company has been dissolved, or (iii) name of company is struck off from register of non-Hong Kong companies under § 339A; and

(c) ship or aircraft registered in Hong Kong must be treated as property in Hong Kong regardless of where it is physically located and ship or aircraft registered outside Hong Kong must be treated as property outside Hong Kong.

Control of company is generally vested in its directors. Companies Ordinance contains provisions on liability of directors.

Companies Ordinance and, where applicable, Listing Rules of Stock Exchange make provision for protection of minority shareholders including protection against oppression of minority shareholders, maintenance of capital, restriction on distribution of profits and assets and disclosure of connected and notifiable transactions.

Financial assistance by company for acquisition of its own shares and purchase of such shares are restricted under Companies Ordinance and also by restrictions on distributions. Listing Rules are relevant for listed companies.

Winding Up.

See category 7 Debtor and Creditor, topic 7.08 Insolvency.

Foreign corporations establishing place of business in Hong Kong are required to register under Companies Ordinance and Companies Ordinance (Amendment of Eighth Schedule) Order 2007.

See also category 7 Debtor and Creditor, topics 7.05 Fraudulent Preference, 7.06 Fraudulent Trading.

2.04 NON-HONG KONG CORPORATIONS:

Non-Hong Kong companies registered under Part XI of Companies Ordinance can operate either as Representative Office or as Branch Office. Representative Office is limited to representing company, developing its business, liaising with and servicing customers and suppliers. Company is not permitted to enter into commercial contracts in Hong Kong with exception of entering into lease for office premises, employment contracts for its staff and any other necessary agreements to operate office. All debts and obligations are borne by company since it is same entity. Branch Offices may, through its branch office, enter into commercial agreements. Company is required to appoint representative ordinarily resident in Hong Kong to accept service of official documents on company's behalf. All debts and obligations remain with company. Period in which non-Hong Kong company is required to have authorized representative after it ceases to have place of business in Hong Kong is shortened from three years to one year. (§ 333A[1]).

New § 334 of Cap32 has been added to require every non-Hong Kong company registered under Part XI to file full annual return every year with Registrar to set out full details of company. Annual return must be filed by non-Hong Kong company with Registrar within 42 days after each anniversary of date of registration of company under Part XI.

2.05 LIMITED PARTNERSHIPS:

See topic 2.06 Partnerships.

2.06 PARTNERSHIPS:

There are either ordinary partnerships (Partnership Ordinance—Cap. 38) or limited ones (Limited Partnerships Ordinance—Cap. 37). Partnership Ordinance is based on U.K. Partnership Act of 1890 and Limited Partnerships Ordinance is based on U.K. Limited Partnership Act of 1907. Law is almost identical to English law.

In ordinary partnerships each partner impliedly confers upon his co-partners authority to incur debts on behalf of partnership. In addition, each partner can be jointly bound by all debts of partnership. Limited partnerships are very rare; limited partner's liability is restricted to amount of his capital.

The Partnership firm has no legal personality distinct from members composing it but partners can sue and are liable to be sued in their firm name.

Under limited partnerships, permitted number of partners shall not be more than 20.

3 BUSINESS REGULATION AND COMMERCE

3.01 AGENCY:

Common law rules apply. In general principal is responsible for acts of his duly authorised agent. Agent acting for undisclosed principal is personally liable. Agent acting outside his authority is liable on action for breach of warrant of authority.

3.02 BANKING AND CURRENCY:

There is no central bank in Hong Kong. Three banks, Hongkong and Shanghai Banking Corporation Limited, Standard Chartered Bank and Bank of China (Hong Kong) Limited operate as note-issuers. Note-issuing, clearing and government banking are carried out by commercial banks, but control of liquidity, stabilization of exchange rate and lender of last resort are responsibility of Monetary Authority. Coinage Ordinance (Cap. 454) empowers Chief Executive in Council to declare, mint, issue and demonetize coins in Hong Kong.

Monetary Authority has also assumed functions of former Commissioner of Banking under Banking Ordinance. (Cap. 155). These include maintaining general stability and effective working of banking and currency systems and supervising licensing and registration of authorised institutions, being banks, local representative offices, deposit-taking companies and restricted licence banks.

Monetary unit is Hong Kong dollar. Under “linked rate” system, Exchange Fund sells and redeems debt certificates at fixed rate of HK$7.80 = US$1 and accordingly market rate floats around that level.

See also category 14 Foreign Trade and Commerce.

3.03 BILLS AND NOTES:

Bills of Exchange Ordinance (Cap. 19) is substantially reproduction of English Bills of Exchange Act 1882 and Cheques Act 1957. As in England, rules of common law, save insofar as inconsistent with express provisions of Ordinance, continue to apply to bills of exchange, promissory notes and cheques. Conflict of law rules substantially same as English rules.

3.04 BILLS OF SALE:

Bills of Sale Ordinance (Cap. 20) is substantially reproduction of English Bills of Sale Acts, 1878 to 1891. Bill of sale must be for sum of not less than HK$150, be duly attested and registered within seven days or, if executed outside Hong Kong, within seven days after time at which it would in course of post arrive in Hong Kong. Further, bill of sale will be void unless made in accordance with form specified in ordinance. Registration must be renewed at least once every five years.

See also category 19 Mortgages, topic 19.01 Chattel Mortgages.

3.05 CAPITAL MARKETS:

Hong Kong is internationally recognized financial centre. It is gateway to China, has close trading and other business links with other Asian economies; Hong Kong is considered as high growth region. Organised stock exchange trading of securities has taken place since 1891 in Hong Kong.

The Stock Exchange of Hong Kong was formed in 1980 and has developed from largely disconnected operation to major international stock exchange. Objective of The Stock Exchange of Hong Kong is to promote capital formation and securities trading in Hong Kong and

China whilst providing regulations to provide fair and efficient market place.

Second exchange in Hong Kong is Growth Enterprises Market (GEM), which was recently established by The Stock Exchange of Hong Kong. Similar to Alternative Investments Market of London (AIMS), GEM serves growth enterprises which are not qualified to list on The Stock Exchange of Hong Kong, by providing equity market for such companies to raise capital.

3.06 COMMERCIAL REGISTER:

There is requirement to register businesses and overseas corporations with place of business in Hong Kong. Annual business registration certificate required. The Companies Ordinance (Amendment of Eighth Schedule) Order 2007 has changed definition of “place of business” to include share transfer or share registration office.

Cap32. § 333 has been amended by this order to require non-Hong Kong company applying for registration under Part XI of the CO (“Part XI”) to provide following information in addition to existing requisite information:

(a) Date of establishment of place of business in Hong Kong;

(b) date of appointment of authorized representative and number of his/her Hong Kong identity card (if any) or, in absence of such number, number and issuing country of any passport held by him/her;

(c) where company is not required by (i) law of its place of incorporation, or (ii) laws of any other jurisdiction where company is registered as company, or (iii) rules of any stock exchange or similar regulatory body in any of those jurisdictions, to publish its accounts or to deliver copies of its accounts to any person in whose office they may be inspected as of right by members of public, form to Registrar must include statement stating that fact; and (d) where company has been incorporated for less than 18 mos. prior to date of delivery of form to Registrar and accounts that it is required to publish have not been made up, form must include statement stating that fact.

See also categories 2 Business Organizations, topic Corporations; Intellectual Property, topics Patents, and Trademarks and Passing Off.

3.07 CONTRACTS:

Hong Kong law of contract essentially follows that of England and in many respects English common law and equity apply. See England Law Digest.

See also topic 3.13 Sales.

Applicable Law.

Same as under English law.

Excuses for Nonperformance.

Same as under English law.

Exemption Clauses.

See subhead Unfair Terms, infra; topic Sales, subhead Consumer Protection.

Under Motor Vehicle Insurance (Third Party Risks) Ordinance (Cap. 272) and Employees Compensation Ordinance (Cap. 282) any condition in policy of insurance providing that liability shall be denied by reference to act or omission happening after event giving rise to claim shall be of no effect upon that claim.

Government Contracts.

Proceedings can be taken and enforced against government. Such proceedings are governed by Crown Proceedings Ordinance. (Cap. 300).

Infants Contracts.

Infancy is defence in respect to debts, damages or demand where jurisdiction for such claims falls within Court of First Instance of High Court or Small Claims Tribunal (jurisdiction in respect to claims not exceeding HK$50,000) save and except for (a) necessary goods and services for which infant must pay reasonable price (Sale of Goods Ordinance [Cap. 26]); (b) benefits of permanent nature other than for necessary goods and services unless avoided upon reaching majority or within reasonable time thereafter.

However, in District Court there is no exemption for infant from liability in respect to action for any debt, damages or demand for claim up to HK$60,000.

See also category 13 Family, topic 13.04 Infancy.

Privity.

Same as under English law. See also category 7 Debtor and Creditor, topic 7.01 Assignments.

Rescission.

Essentially same as under English law.

Unfair Terms.

Pursuant to Control of Exemption Clauses Ordinance 1989 (Cap. 71), similar to English law except that limits and reasonableness of unfair terms provisions do not apply to international supply contracts. Also, such provisions do not apply if Hong Kong law is law of contract only by choice of parties but will apply if contract term applies or purports to apply law of another territory in order to evade operation of ordinance or if one party to contract dealt as consumer and was then habitually resident, and contract was essentially made in Hong Kong.

Unconscionable Contracts Ordinance (Cap. 458) empowers Court to refuse to enforce any terms adjudged “unconscionable” as against consumer (having regard to relative bargaining positions, conduct and understanding of parties, duress or unreasonable conditions, and consideration paid).

Misrepresentation Ordinance (Cap. 284) deals with misrepresentations, whether fraudulent or innocent.

Distributorships, Dealerships and Franchises.

No specific legislation on these areas. Position governed by general contract law and by trademark law to lesser extent.

See also category 17 Intellectual Property, topic 17.05 Trademarks and Passing Off.

3.08 FRAUDS, STATUTE OF:

In Hong Kong all that remains of U.K. Statute of Frauds Act is provision relating to formalities for contracts for sale of land, found in § 3 of Conveyancing and Property Ordinance.

(Cap. 219).

Conveyance of property to any person other than bona fide purchaser for value without notice made with intent to defraud creditors is voidable at instance of any person thereby prejudiced.

Voluntary disposition of land made with intent to defraud subsequent purchaser is voidable at instance of such purchaser.

Voluntary settlements, although not fraudulent, are voidable under certain circumstances. (Bankruptcy Ordinance [Cap. 6]).

3.09 GAMBLING:

Gambling is lawful in Hong Kong to extent that it is authorised by or under Broadcasting Ordinance (Cap. 562) or Betting Duty Ordinance (Cap. 108). Betting made through Hong Kong Jockey Club, contributions or subscriptions to authorized cash sweeps and lotteries conducted by Hong Kong Lotteries Board are lawful. It is criminal offence to gamble in unauthorized gambling establishment and any person who gambles in any such place or in public commits offence liable to fine and/or imprisonment.

3.10 INFORMATION TECHNOLOGY, INTERNET AND NEW MEDIA:

Licensing and control of telecommunications, telecommunication services and telecommunications apparatus and equipment are regulated by Telecommunications Ordinance. (Cap. 106). Establishment of means of telecommunications is prohibited, except under licence. Office of the Telecommunications Authority ("OFTA") is regulation authority in Hong Kong responsible for regulating telecommunication section in Hong Kong. OFTA aims to provide fair regulatory environment conducive to business investment and to meet challenges of information age.

Electronic commerce transactions have rapidly increased in Hong Kong and Hong Kong's legal structure has had to facilitate legal issues surrounding concept of electronic commerce with its current laws and to apply them to e-commerce situation.

The Electronic Transactions Ordinance (Cap. 553) facilitates use of electronic transactions for commercial and other purposes, provides matters arising from and related to such use and enables Postmaster General to provide certification services. Since 31 Jan. 2000, Hong Kong Post has established Public Certificate Authority. The Electronic Transactions Ordinance's intention is to provide trusted environment to conduct electronic transactions.

Privacy of individuals in respect of personal data is protected by Personal Data (Privacy) Ordinance. (Cap. 486). Data protection is based on six principles set out in Ordinance which requires companies to collect data fairly, limit use of personal data, ensure accuracy, ensure security, adopt openness and comply with data access and correction requests.

Development of new media has put emphasis on protection of software programs (see also category Intellectual Property). According to § 3 of Prevention of Copyright Piracy Ordinance (Cap. 544), no person shall manufacture optical discs in Hong Kong unless he holds valid licence. Authorized officer may enter and search any place in which he reasonably suspects that there is any optical disc that has been manufactured in contravention of Ordinance. Authorized officer may further seize, remove or detain any optical disc that appears to have been or is likely to have been, manufactured in contravention with Ordinance.

3.11 INTEREST:

Interest can be charged only if agreed between parties.

Claim for interest can be made in any action at such rate and for such period as may have been agreed. In absence of any contractual entitlement for interest, interest is recoverable generally from date of issue of proceedings at rates fixed by Court from time to time.

Under Money Lenders Ordinance (Cap. 163), it is offence to lend or offer to lend money at effective rate of interest which exceeds 60% per annum. Agreement for repayment of loan or interest where rate exceeds 60% per annum not enforceable. Court may reopen loan transactions if interest is extortionate. Loan transaction presumed extortionate if effective interest rate exceeds 48%.

3.12 NEGOTIABLE INSTRUMENTS:

See topic 3.03 Bills and Notes.

3.13 SALES:

Sale of Goods Ordinance (Cap. 26) substantially reproduces U.K. 1979 Act. Ordinance is codification of law on subject and deals with formalities of contract, ascertainment of price, implied undertakings, sale by sample, rights of unpaid sellers, actions for breach of contract and so on.

Contract of sale may be made in writing or by word of mouth, or partly in writing and partly by word of mouth, or may be implied from conduct of parties. Contract for sale of goods is defined as contract whereby seller transfers or agrees to transfer property in goods to buyer for money consideration called price. Contract may be absolute or conditional.

Unless expressly stipulated, time of payment is not deemed to be of essence. Whether any other stipulation as to time is of essence or not depends on terms of contract.

Implied terms include: (1) seller has right to sell goods, (2) in sales by description, goods will correspond with description, (3) for goods sold in course of business, goods are of merchantable quality but not for defects specifically drawn to buyer's attention or if buyer examines goods prior to making contract, which inspection ought to have revealed defects, (4) if buyer makes known purpose for which goods bought, goods are reasonably fit for that purpose except where buyer does not or it is unreasonable for him to rely on seller's skill and judgment, (5) in sale by sample, bulk will correspond with sample in quality; buyer shall have reasonable opportunity to compare bulk with sample and goods are free from defects rendering them unmerchantable which would not be apparent on reasonable examination of sample, (6) goods are free from any charge or encumbrance not disclosed or known to buyer before contract made and buyer will have quiet enjoyment subject to any charge which seller has disclosed.

Unpaid seller entitled to withhold delivery and exercise lien if property has not passed to buyer. See category 7 Debtor and Creditor, topic 7.09 Liens.

Remedies.

If title has passed and buyer has not paid, seller entitled to bring action for price.

If buyer does not accept and pay for goods, seller can claim estimated loss directly resulting from refusal to accept. Measure of damages is usually difference between contract price and market or current price at time goods ought to have been accepted or if no time for acceptance stipulated, at time of neglect or refusal to accept.

Buyer entitled to bring action for damages for nondelivery. Measure of damages is difference between contract and market or current price at time of delivery.

Court can order specific performance of contract.

Seller may be liable for rescission and/or damages in event of misrepresentation. See topic 3.07 Contracts, subhead Misrepresentation Ordinance.

Supply of Services (Implied Terms) Ordinance (Cap. 457) substantially reproduces U.K. supply of Goods and Services Act 1982. Terms implied into contract for services include reasonable care and skill, time for performance and price. Exclusion of implied terms as against consumer is outlawed.

Consumer Protection.

Provisions seeking to exclude liability for breach of contract or negligence not prohibited by statute or contained in international supply contract will only be upheld to extent that they are reasonable. (Control of Exemption Clauses Ordinance [Cap. 71]). Consumer Goods Safety Ordinance (Cap. 456) and Toys and Children's Products Safety Ordinance (Cap. 424) impose safety standards and regulations for range of consumer goods and their packaging.

Unconscionable Contracts Ordinance (Cap. 458) gives court discretion to refuse to enforce, to enforce in part only or to revise or alter consumer contracts for goods or services which are proved wholly or partially unconscionable.

See also topic 3.07 Contracts, subhead Unfair Terms; category 14 Foreign Trade and Commerce, topic 14.05 Trade Descriptions.

3.14 STATUTE OF FRAUDS:

See topic 3.08 Frauds, Statute of.

4 CITIZENSHIP

4.01 ALIENS:

See category 16 Immigration, topic 16.01 Immigration.

4.02 DISCRIMINATION:

Sex Discrimination Ordinance (Cap. 480) renders unlawful certain kinds of sex discrimination, sexual harassment and discrimination on grounds of marital status or pregnancy. Disability Discrimination Ordinance (Cap. 487) renders unlawful discrimination against mental or physical disability or disease. Family Status Discrimination Ordinance (Cap. 527) renders unlawful discrimination against persons on ground of family status. Ordinance also extends jurisdiction of Equal Opportunities Commission to include such discrimination and for connected purposes.

Discrimination rights are also extended under Hong Kong Bill of Rights (Cap. 383) which grants various basic human rights to all persons without distinction for race, colour, sex, language, religion, political opinion, national origin, birth or other status.

4.03 DOMICILE:

Conceptually, approach on domicile is similar to that expressed in England Law Digest.

For purposes of Immigration Department in HKSAR, person settled in Hong Kong is (i) one who is ordinarily resident in HKSAR; and (ii) is not subject to any restriction on period of stay in HKSAR. Person is ordinarily resident in HKSAR if he remains in HKSAR legally, voluntarily and for settled purpose (such as for education, business, employment or residence) whether of short or long duration.

4.04 IMMIGRATION:

See category 16 Immigration, topic 16.01 Immigration.

4.05 NATIONALITY:

Nationality Law of China (adopted on 10th Sept. 1980) defines Chinese Nationality in China and HKSAR. Standing Committee of National People's Congress' Interpretation of Several Questions of Nationality Law of PRC when applying in HKSAR (passed 15th May 1990) basically states: (i) Hong Kong residents of Chinese descent and born in Chinese territory (including Hong Kong), or who satisfy eligibility conditions laid down in Nationality Law for Chinese nationality are Chinese Nationals; (ii) Chinese Nationals in HKSAR with Right of Abode in foreign countries can use documents issued by foreign governments for travel to other states and regions but not entitled to consular protection in HKSAR or other parts of PRC on account of holding such mentioned documents; (iii) to change nationality, Chinese Nationals in HKSAR can make declaration with valid documentation to appropriate authority of HKSAR.

Chinese Nationals residing in HKSAR (including former residents) and holding foreign passport, must make and Register Statutory Declaration for Change of Nationality with Immigration Department to receive consular protection of foreign country; otherwise, not entitled to consular protection of foreign country.

Holders of Hong Kong British Dependent Territories Citizens Passports, British National/Overseas Passports and any other passports who are Chinese Nationals according to Chinese Nationality Law and residents and former residents of HKSAR and of Chinese descent and (if applicable) born in China or HKSAR will be considered Chinese Nationals in HKSAR.

See also topic 4.04 Immigration.

5 CIVIL ACTIONS AND PROCEDURE

5.01 ACTIONS:

Generally, any person may sue or be sued in Hong Kong courts subject to applicable procedural rules.

All causes of action with some exceptions, such as defamation, vested in or against individual survive death of that person for benefit of or against estate.

Action on foreign contract or course of dealings can be brought in Hong Kong if: (a) Any party to action is in Hong Kong; (b) if contract was made or was to be performed in Hong Kong; (c) if there is sufficient connection with Hong Kong; or (d) if court is of view that Hong Kong is appropriate jurisdiction for case to be tried more suitably in interests of parties and for end of justice.

Unsuccessful party to action will pay costs of successful party. Plaintiff not ordinarily resident in jurisdiction may be ordered by court to give security for costs or otherwise give security for amount equivalent to defendant's costs because, in event that plaintiff's action fails, it may be difficult to enforce judgment for costs in foreign jurisdiction. In practice usually only proportion of costs will be recoverable.

Judicial Review.

Certiorari.

Order made on judicial review by Court of First Instance of High Court of decision of inferior court or tribunal or public authority if it concludes that decision should be set aside.

Mandamus.

Order requiring inferior court or tribunal or person or body of persons charged with public duty to carry out its judicial and other public duties. No order lies against government but can lie against officer of government who is obliged by statute to do some ministerial or administrative act which affects rights or interest of applicant.

Prohibition.

Order restraining inferior court or tribunal or public authority from acting outside its jurisdiction.

Application for judicial review can only be made with leave of court and must be made within three months from date when grounds for application first arose unless court is satisfied there are grounds for extending time.

Limitation.

See topic 5.06 Limitation of Actions.

Service of foreign process can be effected in accordance with rules applicable to service of Hong Kong process, e.g., by postal or personal service.

Alternatively, service of process issued in country which is party to civil procedure convention, including Hague Convention, can be effected by written request from Consulate or other authority from that country to Chief Secretary for Administration of Hong Kong requesting that service be effected through High Court.

Proof of Foreign Law.

Where foreign law is pleaded in any action, particulars must be given.

There is presumption that foreign law is same as Hong Kong law unless contrary is proved by party who asserts it is different. Foreign law can be proved by expert giving oral evidence at trial. Finding or decision on question of foreign law can be adduced in evidence on appropriate notice.

See also category 7 Debtor and Creditor, topic 7.04 Executions.

5.02 APPLICABLE LAW:

See category 1 Introduction, topic 1.02 Government and Legal System.

5.03 DEPOSITIONS AND DISCOVERY:

Court may, in any cause or order or if it appears necessary for purposes of justice, make order for examination on oath of any person before judge, officer or examiner of court or some other person.

If person to be examined is out of jurisdiction, application may be made for order of issue of letter of request to judicial authorities of country concerned to take or cause to be taken evidence of any person in that country. Evidence will be taken on deposition by examiner or shorthand writer. Examination shall be conducted as if at trial and person examined may be cross-examined and reexamined. Validity of any objection to answer question will be decided by court.

Deposition taken in above manner shall be received in evidence at trial.

Hong Kong court may, on request being made by foreign court in connection with pending or contemplated proceedings, order witness resident in Hong Kong to be examined by any official, proper person nominated by person applying for order or any other qualified person as court sees fit. Evidence of person to be examined shall be taken on deposition if court is satisfied it has jurisdiction to make order to give effect to request and in exercise of its discretion, it should make such order.

Discovery.

After close of pleadings, each party to action must disclose all documents which are or have been in its possession, custody or power relating to matters in question in action. Documents privileged from production are (1) documents protected by legal professional privilege, (2) documents tending to incriminate or expose to forfeiture party who would produce them, (3) documents privileged on grounds of public policy.

(1) Legal professional privilege: (a) Letters and other communications between party and its legal adviser if document came into existence for purpose of getting and giving legal advice and assistance to client irrespective of whether litigation is contemplated or pending. (b) Documents coming into existence in connection with or for purpose of contemplated or pending litigation. (c) Documents coming into existence for purpose other than to seek advice or to instruct lawyer or expert may not be privileged notwithstanding that litigation may have been contemplated or commenced. (d) Privilege may be waived either voluntarily or by disclosure of privileged document or part on discovery or during course of proceedings.

(2) Documents tending to incriminate or expose party to proceedings or penalty under statute may be privileged.

(3) Documents may be privileged on grounds that production would be injurious to public interest, i.e. that withholding document is necessary for proper functioning of public service.

Other documents protected from disclosure include “without prejudice” communication, namely, any communications between parties for purpose of resolving dispute whether or not marked “without prejudice”.

Further or specific discovery may be ordered by court.

Witness Statements.

Court may, if it thinks fit for disposing fairly or expeditiously of any action or for saving costs, order exchange of written statements of oral evidence relating to issues of fact to be adduced at trial by each party's witnesses. Such statements are to stand as evidence-in-chief. Amendments and supplemental statements can only be served with leave of court.

Evidence in Affidavits or Statements.

Computer or other records made in other legal proceedings or if person is not to be called or who cannot be called as witness may be adduced in evidence with leave of court or by way of hearsay evidence.

5.04 EVIDENCE:

See topic 5.03 Depositions and Discovery.

5.05 JUDGMENTS:

Monetary judgments, awards and orders of Court can be enforced in prescribed manner—see category 7 Debtor and Creditor, topic 7.04 Executions.

Judgment can be entered if defendant fails to acknowledge service, file defence or comply with court order.

Summary judgment may be granted if court is satisfied upon hearing affidavit evidence that there is no defence or no issue which should be tried at trial with oral evidence.

Enforcement of Foreign Judgments.

Under provisions of Foreign Judgments (Reciprocal Enforcement) Order (Cap. 319A) ("Ordinance"), civil and commercial judgments of various reciprocating foreign countries, including Commonwealth and non-Commonwealth jurisdictions, can be registered and enforced in Hong Kong as if it was judgment of Hong Kong court if: (1) Judgment is final and conclusive and not interlocutory or default judgment and no appeal lies against it or is still pending; (2) judgment is for sum of money not being sum payable in respect of taxes or like charges or fine or penalty; (3) bringing of proceedings in overseas court was not contrary to agreement under which any dispute would be settled otherwise than by proceedings in that foreign court; (4) party against whom judgment was given, brought or agreed to bringing of proceedings in overseas court and counterclaimed or otherwise submitted to jurisdiction of overseas court.

Party will not be regarded as having submitted to jurisdiction of overseas court if he appeared only to (1) contest jurisdiction of court; (2) seek dismissal or stay of proceedings on grounds that dispute should be submitted to arbitration or determination of courts in another country; (3) protect or obtain release of property seized or threatened to be seized in proceedings.

No proceedings may be brought by party in Hong Kong on cause of action in respect of which judgment has been given in his favour in proceedings between same parties in court of overseas country unless that judgment is not enforceable or entitled to recognition in Hong Kong.

Application to register judgment is made ex parte on affidavit within six years of date of judgment or, if appeal, last judgment. Judgment, if registered, is enforceable in same manner as judgment of Hong Kong court.

On 1 Aug. 2008, China and Hong Kong entered into *Arrangement on Mutual Recognition and Enforcement of the Judgements of Civil and Commercial Cases with Consensual Jurisdiction by Courts in China Mainland and Hong Kong Special Administrative Region* under which certain Chinese judgments may be enforced in Hong Kong under certain conditions.

Registration of judgment may be set aside if court is satisfied (1) judgment is not judgment to which provisions apply, (2) courts of country of original court had no jurisdiction, (3) judgment debtor did not receive notice of proceedings in sufficient time to enable him to defend action and did not appear, (4) judgment was obtained by fraud, (5) enforcement of judgment is contrary to public policy in Hong Kong, (6) rights of judgment are not vested in person by whom application for registration is made, (7) subject matter of proceedings was immoveable property outside country of original court, (8) judgment debtor was person entitled to immunity in country of original court and did not submit to jurisdiction of that court.

Reciprocal Enforcement of Maintenance Orders.

Maintenance orders made in some reciprocating Commonwealth countries may be registered in Hong Kong if it appears that person to make payment under order was residing in Hong Kong; order may be enforced as judgment made in District Court of Hong Kong subject to

Court's entitlement to refuse to confirm order if payer establishes any defence he may have raised in proceedings in which order was made, or confirm order or make such alterations as it thinks reasonable.

Registered order is enforceable as civil debt. Court has power to vary registered order.

Judgments of nonreciprocating jurisdictions cannot be registered but if final can be sued upon and may be relied upon in such proceedings.

5.06 LIMITATION OF ACTIONS:

Governed by Limitation Ordinance. (Cap. 347).

Actions in contract or tort or to enforce award must be brought within six years from date on which cause of action accrued.

Claims for damages for personal injuries or arising from death must be commenced within three years from date of event from which injuries arose or from death. In limited circumstances, court has power to extend period.

Claims for or in respect of land including claims to secure land or money secured by mortgage must be brought within 12 years. Government is entitled to bring any action in respect of land at any time prior to expiration of 60 years from date on which right of action accrued.

Claims based on fraud or relief from mistake or in circumstances of concealment by defendant of any fact relevant to plaintiff's right of action must be brought within six years of discovery of fraud, mistake or concealment or time when such fraud, mistake or concealment could with reasonable diligence have been discovered. However, no action can be brought to recover property or set aside any transaction where innocent third party has acquired property for valuable consideration since fraud, concealment or transaction took place.

Limitation period in respect of right of action accruing to person under disability is extended to six years from date when person ceased to be under disability or died whichever event first occurred.

6 COURTS AND LEGISLATURE

6.01 COURTS:

High Court of Hong Kong Special Administrative Region consists of Court of First Instance and Court of Appeal.

Court of First Instance consists of Chief Judge, judges appointed by Chief Executive, and Masters.

Court of First Instance is superior court of record, original and appellate jurisdiction. Civil jurisdiction is unlimited save as specifically provided for in any other legislation and includes admiralty, probate and family court jurisdictions.

Court of Appeal consists of Chief Judge and Justices of Appeal appointed by Chief Executive upon recommendation of Judicial Committee and endorsement of Legislative Council.

Court of Appeal is superior court of record. Civil jurisdiction consists of appeals from most judgments and orders of Court of First Instance and such appeals as lie from District Court direct to Court of Appeal.

Criminal jurisdiction consists of appeals from Court of First Instance and District Court including applications and references by Secretary for Justice for review of sentence or on questions of law.

Court of Appeal has authority and jurisdiction of court or tribunal from which appeal was brought to hear and determine any appeal and in relation to amendment, execution and enforcement of any judgment or order made on appeal. Appeals may lie as matter of right to Court of Appeal or may only be brought with leave of court or tribunal in question.

Court of Final Appeal assumed and replaced function of Privy Council on July 1, 1997 as highest court. Court of Final Appeal will hear civil appeals from Court of Appeal as of right where disputed matter amounts to minimum of HK$1,000,000 or at discretion of court if, in its opinion, subject of appeal is of great general or public importance. There will be statutory right of criminal appeal if there is point of law involved or risk of substantial and grave injustice.

District Court.

Civil jurisdiction to hear and determine: (1) any action, counterclaim or set off in contract or tort for amount in excess of HK$50,000 and not more than HK$1,000,000; (2) action for recovery of land where annual rent, ratable value or annual value of land, whichever is least, does not exceed HK$240,000; (3) proceedings in respect of administration of estates, foreclosure and redemption of any mortgage, not exceeding HK$3,000,000 if involved land, otherwise, not exceeding HK$1,000,000; (4) divorce and family proceedings.

Action in which counterclaim exceeds court's jurisdiction can be transferred to Court of First Instance.

District Court has power to grant injunctions in matters affecting moveable property of value not exceeding HK$1,000,000 and in respect of any contractual claim for amount not exceeding HK$1,000,000. Court has similar powers of enforcement to Court of First Instance.

Criminal jurisdiction consists of criminal actions transferred from Magistrates Courts in respect of which maximum sentence of imprisonment on any one charge or aggregate of two or more consecutive terms does not exceed seven years or one year in case of default of payment of fine and certain offences under Labour Tribunal Ordinance (Cap. 25).

Lands Tribunal.

Special Tribunal with jurisdiction to determine applications for new tenancies and possession of leased properties under Landlord & Tenant (Consolidation) Ordinance (Cap. 7). Lands Tribunal has same jurisdiction as High Court or District Court to grant legal and equitable remedies and relief and is also empowered to transfer proceedings to Court of First Instance.

Magistrates Courts.

Presided over by Magistrates. Deal with minor criminal offences punishable on summary conviction where penalty imposed upon conviction for offence does not exceed fine of HK$100,000 and/or imprisonment for 24 months (subject to provisions to contrary, e.g. § 8 of Dangerous Drugs Ordinance, Cap. 134: three years), preliminary investigations of indictable offence prior to transfer to Court of First Instance or District Court and some civil or quasi-civil matters, for example, affiliation proceedings and money lenders licensing.

Small Claims Tribunal.

Civil jurisdiction to hear any monetary claim founded in contract, quasi-contract or tort for amount not exceeding HK$50,000.

Tribunal can on its own motion or application of any party transfer proceedings to District Court or Court of First Instance, including where any counterclaim and/or set off exceeds Tribunal's jurisdiction. Any party, or officer or servant of corporation, has right of audience. Legally qualified persons are prohibited from appearing for any party before Small Claims Tribunal.

Labour Tribunal.

Exclusive jurisdiction for all claims for breach of term, express or implied, of contract of employment including claims for severance payments brought within one year of termination of employment. Tribunal can of its own volition decline jurisdiction and transfer claim to Court of First Instance or District Court. Party or officer or servant of incorporated or unincorporated entity has right of audience. Legally qualified persons do not have right of audience on behalf of claimant or defendant (see category Employment).

6.02 JUDICIARY:

See topic 6.01 Courts.

6.03 LAW REPORTS:

Law Reports published by Hong Kong Government include Hong Kong Tax cases and Inland Revenue Department Board of Review decisions. Official Hong Kong Law Reports & Digest now published by Sweet & Maxwell Asia. Law reports, digests and law commentaries available from commercial printing houses including on CD-Rom.

6.04 LEGISLATURE:

See category 1 Introduction, topic 1.02 Government and Legal System.

7 DEBTOR AND CREDITOR

7.01 ASSIGNMENTS:

Assignments of debts and other legal things in action and equitable assignments of both legal and equitable things in action, similar to law of England.

See England Law Digest.

7.02 ATTACHMENT:

Any sum standing to credit of person in deposit account with recognised financial institution can be attached.

No attachment of wages of judgment debtor except in favour of government in respect of civil debt due to it.

See topic 7.04 Executions.

7.03 BANKRUPTCY:

Law is contained in Bankruptcy Ordinance (Cap. 6). Acts of bankruptcy have been abolished. Creditor's petition can be presented to Court if, (a) debtor is domiciled in Hong Kong, (b) personally present in Hong Kong on day petition is presented to Court, or (c) debtor has at any time in previous three years (prior to day of presenting petition) been ordinarily resident in Hong Kong or had place of residence in Hong Kong or carried on business in Hong Kong and (d) amount or aggregate amount of debts exceeds HK$10,000, (e) debt or debts is for liquidated sum and is unsecured, and (f) debt or debts is debt which debtor appears either to be unable to pay or to have no reasonable prospect of being able to pay.

Inability to pay debt is established if debt is payable immediately and either (a) demand (known as “statutory demand”) requiring debtor to pay debt or to secure or compound it to satisfaction of creditor within three weeks and statutory demand has not been complied with or set aside, or (b) execution or process in respect of judgment or order has been returned unsatisfied. Debtor will appear to have no prospect of being able to pay debt if, debt is not immediately payable and (c) petitioning creditor to whom it is owed has served statutory demand requiring debtor to establish to satisfaction of creditor that there is reasonable prospect that debtor will pay debt when it falls due, (d) at least three weeks have elapsed since statutory demand was served and (e) statutory demand has neither been complied with nor set aside.

Court shall not make order on creditor's petition unless it is satisfied that debt or one of debts in respect of which petition was presented is (a) debt which having been payable at date of petition has been neither paid nor secured nor compounded or (b) debt which debtor has no reasonable prospect of being able to pay when it falls due.

Debtors petition may be presented to Court on ground that debtor is unable to pay his debts. Petition shall be accompanied by statement of affairs setting out debtors assets and liabilities.

Upon Court making bankruptcy order, Official Receiver is constituted receiver of debtor's assets and takes control of them. Assets vest on making of bankruptcy order. Court may, on application of Official Receiver, appoint trustee if satisfied that nature of bankrupt's business so requires.

Power to appoint some fit person as trustee of bankrupt's estate is exercisable by general meeting of bankrupt's creditors. Such appointment takes effect from time specified in creditors' resolution or Court order. This general meeting may be summoned by Official Receiver within 12 weeks of bankruptcy order being made. Creditors' committee can be appointed.

Voluntary arrangement may be entered into where debtor intends to make proposal to Court in which case Court may make interim order. Proposal must provide for nominee to act (either as trustee or otherwise) for supervising implementation of proposed voluntary arrangement. Effect of interim order is that during period in which it is in force (a) no bankruptcy petition relating to debtor shall be presented to Court and (b) no other proceedings, no execution or other legal process and no distress may be commenced or continued against debtor. Nominee may summon creditors' meeting for purpose of approving proposed voluntary arrangement.

Bankruptcy is discharged (a) after four years if person has not previously been adjudged bankrupt and (b) after five years if person has been previously adjudged bankrupt. Both these periods commence with making of bankruptcy order. Discharge may be objected to by creditors or trustee. There is provision for early discharge after three years if person has not previously been adjudged bankrupt.

Bankrupt's estate available for distribution to creditors comprises all property belonging to or vested in bankrupt at commencement of bankruptcy except (a) such tools, books, vehicles and other items necessary for bankrupt to use for his employment business or vocation and (b) clothing, bedding, furniture, household equipment and provisions necessary for satisfying basic domestic needs.

Claims are paid in following general order of priority (a) preferential creditors (including employees' claims and government claims, (b) ordinary creditors (dealt with parri passu), (c) creditors who have claims for interest, (d) deferred claims. Bankrupt's spouse shall not be entitled to claim dividend as creditor in respect of money or other estate lent or entrusted to bankrupt until claims of other creditors have been satisfied.

Court may restore transactions made at under value by bankrupt five years prior to presentation of petition. Unfair preferences to creditors may be set aside if made six months prior to presentation of petition (unless creditor is associate of bankrupt in which case period is two years).

As general rule bankruptcy does not affect rights of secured creditors.

See also topic 7.08 Insolvency.

7.04 EXECUTIONS:

Judgment or order of court, including judgments or awards of foreign courts or arbitrators enforceable in Hong Kong, may be enforced as follows:

1. Writ of Execution.

(i) Writ of fieri facias—order to court appointed officers to take possession of judgment debtor's goods and chattels of value to satisfy judgment and sell such goods at public auction and pay proceeds after deduction of costs of execution to judgment creditor. Property of company liable to seizure includes debentures; (ii) writ of possession—to enforce judgment or order giving possession of land; (iii) writ of delivery—to enforce judgment or order giving delivery of any goods; (iv) writ of sequestration—rarely used process of contempt in cases of disobedience of order or judgment by judgment debtor permitting property to be seized until judgment debtor has purged his contempt and complied with original order.

Execution can be issued to enforce payment of any money or costs by government, any government department or officer of government.

2. Garnishment.

Judgment creditor who has obtained judgment or order for at least HK$1,000 against judgment debtor who is owed any debt or some other sum by third party (garnishee) may seek order that such sum be paid directly to creditor in full or partial satisfaction of judgment or order.

Application is made ex parte by affidavit. Garnishee is required to attend before court to show cause why such sum should not be paid to judgment creditor. If garnishee does not dispute debt, court will make order absolute which can be enforced in same manner as any other order for payment of money. If liability is disputed, court will determine issue summarily or order that any question necessary for determining liability of garnishee be tried.

See topic 7.02 Attachment.

3. Examination of Judgment Debtor.

Court may on application of judgment creditor order judgment debtor to attend before court and be orally examined on oath as to (1) what debts he may have owing to him, (2) what means he has of satisfying judgment or order.

If judgment debtor is body corporate, director or other officer can be ordered to attend and be asked same questions.

Court may order judgment debtor to produce any relevant books or documents.

Failure to comply with order to attend court, refusal to make full disclosure or wilful disposal of assets to avoid satisfying judgment amount is contempt punishable by committal to prison or prohibition from leaving Hong Kong until debt is satisfied.

4. Charging Order.

Judgment creditor may apply ex parte on notice for order imposing charge over any property of judgment debtor or property in respect of which judgment debtor has interest to secure payment.

Interest includes interest held by debtor beneficially or under trust.

Property includes: (1) land; (2) securities including (a) government stock, (b) stock of any body incorporated in Hong Kong or outside Hong Kong being stock registered in register kept in Hong Kong, (c) units of any unit trust in respect of which register of unit holders is kept in Hong Kong; and/or (3) funds in court.

Charge may be extended to cover dividends, interest, other distributions or bonus issues.

Court will take into account personal circumstances of debtor and whether any other creditor of debtor will be unduly prejudiced by such order.

Court will, if satisfied that sums are owed to judgment creditor, make order to show cause as to why charging order should not be granted. On further consideration of matter, court will either make order absolute, with or without modification, or discharge it.

Court has power to order enforcement of charging order by sale of property charged.

5. Stop Notice.

Order obtainable by person claiming to be beneficially entitled to interest in any securities in respect of which charging order can be obtained may seek order prohibiting judgment debtor from disposing of or dealing with securities without notice to judgment creditor of proposed transfer or payment. Similarly court may make order prohibiting transfer of or dealing with securities or payment out of funds in court.

6. Appointment of Receiver.

Court has power to appoint receiver by way of equitable execution which shall operate in relation to all legal estates and interests in land of judgment debtor.

7. Injunctions.

Court of First Instance of High Court may grant interlocutory or final injunction during course of proceedings or following judgment to restrain party to proceedings whether or not domiciled, resident or present in jurisdiction, from removing assets from jurisdiction of Court or otherwise prohibiting removal of assets within jurisdiction. Power of High Court to make rules of court is specifically clarified by Civil Justice (Miscellaneous Amendments) Ordinance 2008.

Party seeking injunction may be required to give undertaking in damages to defendant and undertake to bank or innocent third party to pay any expenses reasonably incurred by them.

Court is also empowered to grant injunction to prevent any threatened or apprehended waste or trespass.

Court has power to order delivery up of goods and restrain disposal of goods, property and assets of debtor or judgment debtor. Court has further power to permit applicant to enter premises and search for and remove articles relating to infringement of applicant's rights.

8. Committal.

Court has power to punish contempt by committal to imprisonment.

9. Bankruptcy; Winding-up of Company.

See topics 7.03 Bankruptcy, 7.08 Insolvency.

10. Prohibition Order.

Court, if satisfied that person owing money or subject to monetary judgment or order will leave Hong Kong thereby obstructing or delaying satisfaction of judgment, may make order prohibiting that person from leaving Hong Kong. Order renewable after one month for total of three months. Order is served on Director of Immigration and Commissioner for Police. Judgment debtor is liable to arrest and to be brought before court in event he seeks to leave Hong Kong. Court can, on application, discharge order or impose such terms as it considers fit including ordering debtor to pay amount into court.

11. Exemptions from Execution.

Tools and equipment necessary for debtor's employment, clothing, bedding, furniture and household equipment necessary for basic needs of debtor and his family may not be seized.

Chattels in which judgment debtor has equitable interest cannot be seized. Property owned by co-owners cannot be seized on behalf of third party unless two persons have separate and different interests in chattel in which case judgment debtor's interest only can be sold. Property on hire cannot be seized.

Person who claims ownership or interest in property seized on execution can intervene and apply to court to determine any question relating to ownership.

7.05 FRAUDULENT PREFERENCE:

See topic Bankruptcy for individual.

Reference to fraudulent preference in Companies Ordinance (Cap. 32) is deemed to be reference to unfair preference consequent to Bankruptcy (Amendment) Ordinance. Any conveyance, mortgage, delivery of goods, payment, execution or other act relating to property made or done by company within six months before commencement of its winding up which for individual would be unfair preference, shall if company is wound up be deemed unfair preference of its creditors and invalid accordingly.

Reference to six months shall be deemed period of two years in case of person who is associate. Associate is (a) partner, (b) director, (c) employee or officer, (d) trustee, if beneficiaries have power that may be exercised for benefit of company, (e) company, if debtor company has control.

7.06 FRAUDULENT TRADING:

Companies Ordinance provides that if in course of winding up company it appears that any business of company has been carried on with intent to defraud creditors or for any fraudulent purpose, court may declare such parties personally responsible without limitation of liability for all debts or other liabilities of company as court may direct.

7.07 GARNISHMENT:

See topic 7.04 Executions.

7.08 INSOLVENCY:

Insolvency law is contained in Companies Ordinance, Companies (Winding Up, Cap. 32H) Rules and Bankruptcy Ordinance (Cap. 6). Companies Ordinance provides for application of bankruptcy law in winding up companies. Companies incorporated in Hong Kong can be placed in either voluntary liquidation or compulsory liquidation by order of court. Voluntary liquidation can be by company, by creditors, or as "members" voluntary liquidation.

Voluntary liquidation by company management may be commenced by resolution of directors supported by statutory declaration that company cannot by reason of its liabilities continue its business.

Basis on which company can be placed in voluntary liquidation is same for both members voluntary and creditors voluntary winding up. Company may be placed in voluntary liquidation if: (a) memorandum and articles of association provide for company to exist for specified duration and that has expired; (b) shareholders resolve by special resolution (75% of those who attend personally or by proxy) to wind up company; (c) shareholders resolve by special resolution that company cannot by reason of its liabilities continue its business and it is advisable to wind it up.

In members voluntary liquidation declaration of solvency must be made and special resolution is required. Liquidator must be appointed at same time as special resolution is passed.

Liquidator will realize assets of company and complete administration and pay dividend(s). Assets do not vest in liquidator; they remain assets of company. Liquidator acts as agent of company and is in fiduciary position to company; and in compulsory liquidation, he also acts as officer of court.

Compulsory liquidation is commenced when petition is filed. Court will hear petition and make winding up order if appropriate. Official Receiver will be appointed as Provisional Liquidator and convene first meeting of creditors and contributories (contributory has been held to be member holding partially or fully paid shares). First meeting of creditors and contributories will vote on appointment of liquidator and whether or not to appoint committee of inspection.

Company may be placed into compulsory liquidation if: (a) Shareholders resolve by special resolution to wind company up; (b) company suspends its business within one year of incorporation or suspends its business for one year; (c) company has no member; (d) company is unable to pay its debts; (e) memorandum and articles of association of company provide that company be wound up on certain event occurring and that event occurs; or (f) it is just and equitable for company to be wound up. Registrar of Companies may petition for winding up if: (a) Company is being carried on for unlawful purpose or for any lawful purpose but which it cannot carry out; (b) in last six months company has not had secretary, or for private company, at least one director, or otherwise, at least two directors; or (c) company has persistently failed to pay statutory fees or been in breach of Companies Ordinance.

At any time after petition has been presented, court may make order staying legal proceedings commenced against company.

After winding up order is made, Official Receiver as Provisional Liquidator takes possession and control of company's property. After winding up order has been made, statement of affairs must be made by director of company. Statement of affairs will include (a) particulars of assets and liabilities, (b) list of secured and nonsecured creditors, and (c) particulars of securities.

Any transfer or mortgage of property to creditor made within six months prior to commencement of winding up, which if done by individual would be fraudulent preference, will be invalid as fraudulent preference. *Note:* Pending legislation replaces "fraudulent preference" concept with "unfair preference"-see topic 7.03 Bankruptcy. See also topic 7.05 Fraudulent

Preference.

If in course of liquidation it appears that any business of company has been carried on with intent to defraud creditors of company or creditors of any other person or for any fraudulent purpose, persons who were knowingly parties can be held responsible for all or any of company's debts without limitation. See topic 7.06 Fraudulent Trading.

Where company is being wound up, floating charge on undertaking or property of company created within 12 months of commencement of winding up shall, unless proved that company was solvent immediately after charge created, be invalid except for cash amount paid to company at or after creation of and in consideration for charge together with prescribed interest.

Preferential claims of unsecured creditors are paid before ordinary creditors. Preferential claims include certain employees' claims and government claims which have become due and payable within 12 months before commencement of winding up. Ordinary creditors' claims are dealt with pari passu. See topic 7.03 Bankruptcy.

If debt did not specifically provide for rate of interest, interest may be recovered at rate of 8% per annum from time debt was repayable up to date of winding up order.

Company incorporated outside Hong Kong whether or not registered as foreign corporation and whether or not carrying on business in Hong Kong may be wound up in Hong Kong if: (a) Company has been dissolved or ceased to carry on business; (b) it is unable to pay its debts; or (c) it is just and equitable that it be wound up.

Most provisions relating to winding up of companies in Hong Kong apply to foreign companies wound up in Hong Kong.

See also topic 7.03 Bankruptcy.

7.09 LIENS:

Lien is legal right entitling person in possession of chattels to retain them until all claims and accounts of person in possession against owner of chattels for services rendered or monies spent or work carried out on property of other have been satisfied.

Lien can be (1) general, i.e., common law right arising from general usage or by express agreement entitling person in possession to retain goods until all claims and accounts of person in possession against owner are satisfied (e.g. solicitor's entitlement to retain client's papers until discharge of all sums due); or (2) particular, i.e., right at common law to retain goods in respect of which charges have been incurred until those charges are paid (e.g., carrier's right to retain goods in respect of which freight remains unpaid).

Lien is unassignable personal right which lasts for as long as possession of goods persists. It is defence and not right of action. There is no entitlement of sale unless provided for by statute.

Lien is lost by (1) tender of payment, (2) abandonment, (3) taking alternative security, (4) loss of possession and (5) in cases of liquidation, receivership and bankruptcy where lien had not fully taken effect at relevant time.

Express entitlement in Sale of Goods Ordinance (Cap. 26) for unpaid seller, i.e., one to whom full price has not been paid or tendered, including seller's agent to whom bill of lading has been endorsed, to exercise lien until payment notwithstanding that title may have passed to buyer. There is limited right of resale where property has not passed from unpaid seller. See category 3 Business Regulation and Commerce, topic 3.13 Sales.

Lien is terminated when (a) unpaid seller delivers goods to carrier or other bailee for purpose of transmission to buyer without reserving right of disposal, (b) buyer or agent lawfully obtains possession of goods, or (c) by waiver.

7.10 PLEDGES:

Same as under England Law Digest.

7.11 RECEIVERS:

See topics 7.04 Executions, 7.03 Bankruptcy, 7.08 Insolvency.

8 DISPUTE RESOLUTION

8.01 ALTERNATIVE DISPUTE RESOLUTION:

In addition to litigation, number of methods of alternative dispute resolution are becoming increasingly used in Hong Kong. These include arbitration, conciliation and mediation.

Arbitration.

The Arbitration Ordinance (Cap. 341) (“AO”) expressly aims to promote arbitral efficiency, speed and economy. If party to arbitration agreement commences legal proceedings such proceedings may, in case of domestic arbitrations, be stayed under § 6 of AO, and must, in case of international arbitration, be stayed under Art. 8 of UNCITRAL Model Law, so that arbitration can proceed. Certain other conditions need to be satisfied before stay is given. Factors affecting whether arbitration agreement is international are (1) parties' place of business; (2) place of substantial part of obligations of commercial relationship; (3) place with which subject matter of dispute is most closely connected; (4) place of business which has closest relationship to arbitration agreement; or (5) habitual residence.

The AO was amended by Civil Justice (Miscellaneous Amendments) Ordinance 2008 which authorizes court to grant interim injunctions or interim measures in relation to existing arbitration proceeding. This amendment stipulates specific interventions by Court, even where arbitration is out of HK.

Hong Kong International Arbitration Centre: The Secretary-General, 38th Floor, Two Exchange Square, 8 Connaught Place, Hong Kong. Tel: (852) 2525 2381; Fax: (852) 2524 2171.

Conciliation.

As per § 2A of AO, where arbitration agreement provides for appointment of conciliator and further provides that person so appointed shall act as arbitrator if conciliation fails, no objection shall be taken to conciliator becoming arbitrator.

Mediation.

Hong Kong Mediation Council operates under auspices of Hong Kong International Arbitration Centre (HKIAC). HKIAC accredits mediators with formal training and experience to HKIAC General and/or Family Panel. Three year pilot Scheme on Family Mediation has now been launched by Judiciary to provide mediation services to separating/divorcing couples. When individual consults solicitor and decides to institute matrimonial proceedings, solicitor shall advise that individual of availability of family mediation and how it may assist in proceedings.

9 DOCUMENTS AND RECORDS

9.01 AFFIDAVITS AND STATUTORY DECLARATIONS:

Affidavits must be expressed in first person and unless directed otherwise by court state deponent's place of residence, occupation and description. If deponent is employee of party to cause or matter in which affidavit is sworn, must state that fact. If deponent is deposing as professional or in business or other occupational capacity, he may state address as being place of work, identifying position held and name of his firm or employer, if any.

Every affidavit must be signed by deponent and jurat completed and signed by person before whom it is sworn. Affidavits must be sworn by deponent personally attending before Hong Kong solicitor, notary public or other officer duly authorised to administer oaths.

Affidavits may be sworn in any part of Commonwealth outside Hong Kong before judge, officer or other person duly authorised, or any commissioner authorised by court. In any other foreign country, affidavit may be sworn before judge or magistrate, being authenticated by relevant official seal, or before notary public or British Consular Officer.

Deponent can affirm his statement in alternative to swearing oath. (Oaths and Declarations Ordinance [Cap. 11]).

Form, content and jurat of affidavits and affirmations similar to that included for England Law Digest.

Statutory declarations may be taken and received by justice, notary, commissioner or other person authorised by law to administer oaths. Declaration shall be made in following format:

Declaration

I, A.B., of , solemnly and sincerely declare [Insert facts]

And I make this solemn declaration conscientiously believing the same to be true and by virtue of the Oaths and Declarations Ordinance.

(Sgd.) A.B.

Declared at

this day of 20

Before me

[Signature and designation]

Affidavit, affirmation or declaration of person who is unfamiliar with English language should contain declaration or oath by interpreter to effect that contents of statement have been interpreted to deponent.

9.02 NOTARIES PUBLIC:

Notaries exercise functions in Hong Kong and are governed by Legal Practitioners Ordinance (Cap. 159, § 40-44) which has same regulations as under English law.

9.03 STATUTORY DECLARATIONS:

See topic 9.01 Affidavits and 9.03 Statutory Declarations.

10 EMPLOYMENT

10.01 LABOUR RELATIONS:

Individual rights are principally governed by Employment Ordinance (Cap. 57), which applies to all employees, but there are limits on amounts payable. Most benefits under Ordinance apply only to employees employed under "continuous contract", i.e., employed under employment contract for four weeks and having worked 18 hours or more in each of those weeks. Any term in contract of employment purporting to reduce employee's benefit under ordinance is void. Employee dismissed because employer intends to extinguish right, benefit or protection conferred by ordinance or for other than valid reason may be granted remedy.

Minor Employment Claims Adjudication Board deals with disputes between employer and employee over wages where amount claimed and number of claimants involved in case does not exceed HK$8,000 per claimant and ten claimants respectively. Labour Tribunal deals with all other employment disputes. See category 6 Courts and Legislature, topic 6.01 Courts, subhead Labour Tribunal.

In absence of contractual provision, contract of employment deemed to be contract for one month renewable from month to month determinable on one month's notice or payment of money in lieu.

Employer is entitled to dismiss summarily, without notice or payment of money in lieu of notice, if employee: (a) Wilfully disobeys lawful or reasonable order; (b) misconducts himself; (c) such conduct being inconsistent with due and faithful discharge of his duty; (d) is guilty of fraud or dishonesty; (e) habitually neglectful of duties; or (f) for any other common law ground entitling termination without notice.

Damages for wrongful termination of contract "is sum equal to" amount of wages that would have accrued during period of notice. Reinstatement, reengagement and award of terminal payments on just and appropriate terms and compensation available under Employment Ordinance.

Employee may terminate contract without notice on various grounds including fear of physical danger by violence, disease not contemplated by employment, being permanently unfit, or subjected to ill-treatment by employer. Contract deemed terminated if employer fails to pay wages for more than one month. Interest may be payable on outstanding wages.

Female employee under "continuous contract" entitled to commence her maternity leave from two to four weeks before expected date of confinement and if employed for more than 40 weeks, will also be paid maternity leave. If length of service under continuous contact is less than 40 weeks immediately before commencement of maternity leave, ten week maternity leave is without pay. One is also entitled to further four weeks where there is resulting illness or disability. Employer not permitted to pay money in lieu of maternity leave. Employment cannot be terminated unless she fails to give requisite notice of pregnancy or is subject to probation.

Employee is entitled to be member of union. Employers are prohibited from preventing exercise of union activities, discriminating against union member when offering employment and terminating employment because of union membership.

Wages are to be paid directly to employee in legal tender. However, with consent of employee, wages may be paid: (a) by cheque, money order or postal order; (b) into account in his name with bank licensed under Banking Ordinance; or (c) to his duly appointed agent.

Employee under "continuous contract" is entitled to: (1) end of year payment equal to one month's salary or proportionate to period of year worked, if such payment is term of contract of employment (presumed annual payment not at employer's discretion unless there is written term in contract to contrary); (2) sickness allowance, if employed for one month or more, accruing at rate of two days for each completed month of employment in first 12 months and thereafter four paid days each month to cumulative total of 120 days; (3) paid leave for public holidays, at least one rest day per week and not less than seven days holidays.

Subject as provided, employee entitled to severance pay if employed for continuous period of 24 months or more and is laid off or dismissed by reason of redundancy, i.e. employer has ceased to carry on business for which employee was employed or requirement of business for employees to carry out work of particular kind has ceased or diminished. Long service payment provisions may be applicable if no liability for severance payment.

Employer is liable to pay compensation for: (a) personal injury by accident or contraction of occupational disease resulting in total or partial incapacity or (b) death arising out of or in course of employment or arising while travelling to or from place of employment or on travelling arranged by employer.

Employer not entitled to employ employee unless insurance policy in force for full amount of liability of employer for injury to employee by accident arising out of or in course of employment. Occupational Safety and Health Ordinance (Cap. 509) makes employer responsible to ensure safety and health of employees.

Occupational Retirement Schemes Ordinance (Cap. 426) (“ORSO”) does not require employer to establish retirement scheme, but affects employer operating or establishing such scheme. Object of ordinance is to set up compulsory registration system for private sector retirement schemes to ensure they are properly funded, operated and monitored. New Mandatory Provident Fund Schemes Ordinance (Cap. 485) (“MPFO”) came into effect on 1 Dec. 2000 and provides for establishment, registration and management of nongovernmental mandatory provident fund schemes. MPFO is distinct from ORSO. MPFO obliges employers and self-employed to set up or join approved scheme and requires employer and employee to each pay 5% of income to scheme (subject to exemptions). Employee or self-employed person whose relevant income remunerated on monthly basis is less than HK$5,000 or for casual employee, HK$160 per day, is not required to contribute in relation to registered scheme, but may, in certain circumstances elect to do so upon notice to employee. Employee or self employed person whose relevant income remunerated on monthly basis is more than HK$20,000 for casual employee, HK$650 per day, is not required to contribute in relation to excess relevant income but may, in certain circumstances, elect to do so upon notice to employer. Person coming from abroad to work for limited period exempted if member of retirement scheme in home country. ORSO regulates operation of voluntary retirement schemes. There is some overlap as MPFO will recognise some voluntary schemes registered under ORSO. Although existing employees in ORSO may be exempted, new employees must join MPFO scheme.

See category 4 Citizenship, topic 4.02 Discrimination.

11 ENVIRONMENT

11.01 ENVIRONMENTAL REGULATION:

Environmental Protection Department (“EPD”) is responsible for implementation of most of measures contained in main pollution control legislation. Existing legislation covers air, water, noise and waste disposal. Failure to comply can attract prison sentences and/or substantial fines.

Air Pollution Control Ordinance (“APCO”) (Cap. 311) controls pollution from stationary sources by establishment of ten air control zones and licensing system. Premises operating “specified process” must be licensed or, if established pre-1983, exempted. Most such premises are, in fact, exempted. Additionally, Town Planning Ordinance (Cap. 131) requires environment to be factor in approval of building plans.

Various regulations limit emission of smoke, sulphur dioxide, nitrogen oxide and particulates from industrial plants as well as open burning of waste, tires and metal salvage. In 2008, Amendment Bill was introduced to progressively tighten caps to ensure that Hong Kong can meet 2010 emission reduction targets as agreed with Guangdong Provincial Government in Apr., 2002.

APCO also requires petrol retailers to take all reasonable steps to stock and sell unleaded petrol. Stringent emission design standards are imposed on post-1992 vehicles.

Ozone Layer Protection Ordinance (Cap. 403) brings into force Vienna Convention for the Protection of the Ozone Layer 1985 and Montreal Protocol on Substances that Deplete the Ozone Layer 1987 by prohibiting manufacture of CFCs and the three halons.

Environmental Impact Assessment Ordinance (Cap. 499) requires those planning project which falls within schedule of designated projects to prepare environmental impact assessment report based on study brief and technical memorandum issued by government. Reports available for public inspection in accordance with set procedure. Designated projects may not be constructed or operated without compliance with Environmental Permit (and conditions).

Noise Control Ordinance (Cap. 400) regulates industrial noise to levels according to area, time of day and impact of other noise sources through permit system.

Civil Aviation (Aircraft Noise) Ordinance (Cap. 312) and subsidiary regulations ensure that subsonic jets are certified in accordance with International Convention on Civil Aviation.

Various regulations limit motor vehicle and railway noise pollution.

Waste Disposal Ordinance (Cap. 354) provides for licensing of waste collection, disposal services (including waste treatment and recycling), land use for waste disposal (excluding landfills operated by Civil Engineering Department), waste importation and control of livestock waste. Chemical waste producers and transporters must register with EPD and provide adequate storage. Waste must be conveyed by licensed collector to licensed site. EPD “trip tickets” monitor waste movement. However, definition of chemical waste is not unequivocal; many textile processing effluents may be said to fall outside definition in ordinance.

Dumping at Sea Ordinance controls disposal of waste at sea and reproduces UK Dumping at Sea Act.

Waste Disposal Ordinance enacted in 1980 was amended in early 1995 to permit control on import and export of waste in line with requirements under Basel Convention on transboundary movement of chemical waste.

Water Pollution Control Ordinance (Cap. 358) prohibits discharge of poisonous or noxious matter into Hong Kong waters, establishes 12 water control zones with individual water-quality objectives, and licenses discharges of pollutants in water control zones only. Those established pre-1981 are exempt from licensing. EPD is empowered to require owner of wastewater treatment facility in water control zone to repair or modify operations.

Building Ordinance (Cap. 123) empowers Building Authority to require construction and maintenance of waste treatment facilities, sewage works and related systems.

Merchant Shipping (Prevention and Control of Pollution) Ordinance (Cap. 413) and its regulations control dangerous and large amounts of oil and other toxic substances carried by tankers in accordance with International Convention for the Protection of Pollution from Ships 1973.

General Supervision.

Environmental Protection Department, Headquarters, 33rd-34th Floors & 46th-48th Floors Revenue Tower, 5 Gloucester Road, Wan Chai, Hong Kong. Tel: (852) 2824 3773, or contact 24th-28th Floors, Southorn Centre, 130 Hennessy Road, Wan Chai, Hong Kong. Tel: (852) 2835 1018, fax: (852) 2838 2155.

12 ESTATES AND TRUSTS

12.01 ADMINISTRATION:

See topic 12.03 Executors and Administrators.

12.02 DESCENT AND DISTRIBUTION:

Distribution of intestates' estates is governed by Intestates' Estates Ordinance (Cap. 73), effective Oct. 7, 1971. Following are rules generally applied on intestacy once letters of administration granted.

Surviving spouse takes whole estate absolutely if deceased leaves no issue and no parent or brother or sister or issue of such brother or sister. If deceased leaves surviving issue, surviving spouse takes sum of HK$500,000 free of death duties and costs with interest at prescribed rate and half residue, issue taking other half residue. If deceased leaves no issue but parent or parents survive, surviving spouse takes sum of HK$1,000,000 free of death duties and costs with interest at prescribed rate and half residue, other half residue passes to such parent or parents absolutely but if no parent survives, half residue passes to brothers and sisters.

Where no surviving spouse, surviving issue take whole estate in equal shares. If no issue but parent, parent takes. If both parents survive, they take in equal shares. If no issue or parent(s), distributed in following priority: (1) brothers and sisters of intestate and their issue; (2) grandparent(s) of intestate in equal shares; (3) uncles and aunts of intestate being brothers and sisters of parents of intestate; (4) government as bona vacantia.

Illegitimate Children.

Where death was after June 19, 1993, illegitimate person entitled to succeed on intestacy under Parent and Child Ordinance (Cap. 429) as would legitimate person. Entitlement extends to legitimate and illegitimate children of illegitimate persons. Similar rules apply to brothers and sisters, nephews and nieces, uncles and aunts and cousins.

See also topic 12.06 Wills; category 13 Family, topic 13.04 Infancy.

Allowance for Maintenance of Dependants.

Deceased's Family Maintenance Ordinance (Cap. 129) has been repealed by Inheritance (Provision For Family and Dependants) Ordinance (Cap. 481) which provides that such person who was wholly or substantially maintained by deceased person including former spouse of deceased, or partner by union of concubinage, may apply for provision of maintenance out of estate of deceased.

12.03 EXECUTORS AND ADMINISTRATORS:

Probate and Administration Ordinance (Cap. 10) and Non-Contentious Probate Rules

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set out law of probate and letters of administration and of administration of estates of deceased persons. Common law rules governing rights and duties of executors and administrators generally apply.

Where deceased left will, person or persons entitled to grant of probate or administration with will annexed determined in following order of priority: executor; residuary legatee or devisee holding in trust for any other person; residuary legatee or devisee for life; ultimate residuary legatee or devisee; specific legatee or devisee or creditor; legatee or devisee on happening of any contingency.

Where person dies wholly intestate, persons having beneficial interest in estate entitled to grant of administration determined in following order of priority: surviving spouse; children of deceased or issue of such child who predeceased deceased; parent of deceased; brothers and sisters of deceased or issue of predeceased brother or sister of deceased; grandparents; uncles and aunts of deceased or issue of any predeceased uncle or aunt of deceased; Official Administrator.

Where deceased died domiciled outside Hong Kong, court may order grant of administration to (a) persons entrusted with administration of estate by court having jurisdiction at place where deceased died domiciled; (b) person entitled to administer estate by law of place where deceased died domiciled; or (c) such person as Registrar may direct in absence of (a) and (b). For application under (b), court will require affidavit as to foreign law sworn by attorney-at-law at place where deceased died domiciled. Without such court order, grant may be issued to executor or person named in will whose duties constitute his/her executor; or in accordance with Hong Kong laws as if deceased died domiciled in Hong Kong, where whole of estate in Hong Kong consists of immovable property.

Grants to Estate of Commonwealth Residents.

Previous arrangement of Hong Kong Probate Registry for resealing grants of probate or letters of administration from Commonwealth countries lapsed on July 1, 1997.

Hong Kong Probate Registry has not expressed any view on resealing for reciprocal non-commonwealth countries. Probate Registry has only announced that U.K., Singa-pore, Sri Lanka, Northern Territory of Australia and Australian States of Tasmania and Victoria continue to accept resealing of Hong Kong Grants and Probate Registry will continue to entertain resealing of grants issued by these countries. Until further direction is given by Probate Registry, no resealing for reciprocal non-commonwealth countries is possible.

Estate Duty.

See category 21 Taxation, topic 21.04 Estate Tax. Revenue (Abolition of Estate Duty) Ordinance 2005 came into effect on 11 Feb. 2006. For person who dies on or after 11 Feb. 2006, no estate duty is chargeable on his assets as this duty has been abolished since that date.

12.04 INTESTACY:

See topic 12.02 Descent and Distribution.

12.05 TRUSTS:

Trustee Ordinance (Cap. 29) substantially follows UK Trustee Act 1925. See England Law Digest.

12.06 WILLS:

Hong Kong law of wills generally follows common law principles which are consolidated and amended in Wills Ordinance (Cap. 30). Under Hong Kong law, person may by will, executed in accordance with Wills Ordinance, dispose of all property to which he is beneficially entitled at time of his death. Valid will shall be in writing and signed by testator, or by some other person in his presence and by his direction before two or more witnesses present at same time. Such witnesses shall attest and sign will or acknowledge their signatures.

Any person in actual naval, military or air force service and any mariner or seaman at sea may make valid will without complying with above formalities.

Document purporting to embody testamentary intentions of deceased person but not executed in aforesaid manner deemed to be duly executed if Court satisfied beyond reasonable doubt that document embodies testamentary intentions of deceased person.

Will is treated as properly executed if execution conforms to internal law in force in territory where it was executed or where testator was domiciled or had his national residence or in state of which he was national at time of its execution or of testator's death.

No valid will can be made by person not attaining full age i.e. 18 years old unless he/she is married person or person in actual naval, military or air force service or mariner or seaman at sea. No valid will can be made by person of unsound mind.

Gifts to witness who attests will or to his/her spouse are void.

If no contrary intention in will, gifts to predeceased child or more remote descendant of testator will not lapse but taken by issue of predeceased child or more remote descendant living at testator's death.

Will or part thereof will be revoked by (i) marriage (except [a] disposition in will in exercise of power of appointment or [b] will made in contemplation of marriage); (ii) another valid will; (iii) written revocation of will; (iv) burning, tearing or otherwise destroying of will by testator or at his direction; provided where one party dies having stood by agreement not to revoke mutual wills, survivor is bound by it and cannot revoke it.

13 FAMILY

13.01 ADOPTION:

Child can be adopted by any parent or relative over 21 or any other person over 25. There are restrictions on single males adopting female children. Persons who are medically unfit or over 45 will not be permitted to adopt. Joint applications to adopt infant cannot be made by persons in de facto relationships. Applicant(s) and child must reside in Hong Kong.

Consent of natural mother or guardian is required unless she has abandoned or otherwise neglected child. Consent of natural father is not required if he was not married to mother at time of birth, nor named in child's birth certificate and has not subsequently had contact with or maintained child. Consent is revocable at any time prior to order being made. Court can dispense with consent.

Child must reside with prospective adoptive parents for six months after giving notice to court and Social Services Department of intention to adopt, before application can be made, or 13 weeks in case of application by natural parent. Social Services Department reports to court on fitness of applicants and whether application is in best interests of child.

It is offence to give or receive any remuneration in respect of adoption. It is also offence to publish without consent of Director of Social Welfare that child is available for adoption.

Upon order being made, natural parents give up all parental rights and child becomes child of adopters. Birth certificate is re-issued in name of adopters. Access by natural parents to child is unlikely to be permitted. If infant is adopted outside of Hong Kong and adoption is legally valid according to law of country in which adoption was granted, adoption shall have same effect as if made in accordance with Hong Kong law.

Adoption Ordinance (Cap. 290) does not effect status or rights of any person adopted in Hong Kong under Chinese Law and Custom before Dec. 31, 1972.

13.02 DIVORCE:

Matrimonial Causes Ordinances (Cap. 179) applies. *Note:* Amendments which came into force June 24, 1996, substantially alter rules in matrimonial proceedings. See below. Presently, Hong Kong court has jurisdiction in proceedings for divorce if: (a) if either party was domiciled in Hong Kong at date of presentation of petition; or (b) either of them habitually lived in Hong Kong for three years immediately prior to filing petition or application.

Jurisdiction for proceedings for judicial separation as for divorce if (1) both parties are resident in Hong Kong at date of petition or (2) either of parties of marriage were domiciled in Hong Kong at date of petition or (3) either of parties to marriage had substantial connection with Hong Kong at date of petition.

Proceedings for divorce cannot be brought within first year of marriage except in cases of exceptional hardship to petitioner or exceptional depravity on part of respondent.

Sole ground for divorce is irretrievable breakdown of marriage on one of following facts: (a) adultery on part of respondent and petitioner finds it intolerable to live with him/her; (b) respondent has behaved in such way that petitioner cannot reasonably be expected to live with him/her; (c) respondent has deserted petitioner for continuous period of at least one year immediately preceding presentation of petition; (d) parties have lived apart for continuous period of at least one year immediately preceding presentation of petition and respondent consents to decree; (e) parties have lived apart for continuous period of at least two years immediately preceding presentation of petition where no consent is forthcoming. Ground (d) proceedings now by way of application, alternative to petition, and Notice of Intention filed 12 months before application is proof of separation.

Petitioner cannot rely on adultery of respondent if parties continue living together for six or more months after date on which petitioner became aware of adultery. For purposes of determining whether parties have been separated for continuous period of one or two years, they must be living separate and apart. No account will be taken of any resumption of living together for period not exceeding six months. Where adultery is alleged, party alleging shall make person alleged to have committed adultery with other party to marriage party to proceedings unless excused by court on special grounds for doing so.

Respondent to petition on grounds of two years separation may oppose grant of decree nisi on grounds that dissolution of marriage will result in great financial hardship and it would be wrong in all circumstances to dissolve marriage. Court will not grant decree absolute until satisfied that petitioner is not required to make financial provision for respondent or financial provision is fair and reasonable or best that can be made in circumstances.

On hearing of petition, court will, if satisfied with facts alleged by petitioner that marriage has irretrievably broken down, grant decree nisi which can be made absolute on expiration of six weeks from date of grant subject to power of court to rescind decree nisi.

Upon decree of judicial separation being granted, petitioner is no longer required to cohabit with respondent. Person shall not be prevented from applying for divorce on same facts as proved in support of grant of decree of judicial separation.

Court can make decree of presumption of death and dissolution of marriage if other party to marriage has been continuously absent from petitioner and petitioner has no evidence to believe other party is alive for period of seven years or more.

Either party to proceedings for divorce or judicial separation may make claim against other for financial provision including maintenance pending suit, periodical payments, secured periodical payments, lump sum, settlement of property, transfer of property or variation of settlement.

On application for order relating to custody of or access to child, court may make such order as it considers fair and which is in best interests of child.

Former spouse, who has not remarried, of person who dies domiciled in Hong Kong may make claim against deceased's estate for financial provision or further financial provision within six months from date of death. Court will take into account what would be reasonable for financial provision for survivor and that person's conduct in relation to deceased and any other matter which appears relevant or material. Similarly wife who has not remarried, infant son or unmarried daughter, or son or daughter who is not capable of maintaining himself or herself because of mental or physical disability may make claim for periodical payments or financial provision from deceased's estate.

Foreign decrees of divorce will be recognised if decree of divorce was obtained in country in which either spouse was habitually resident or national. Decree of divorce or legal separation obtained outside Hong Kong may not be deemed valid if obtained by one spouse without notice to other or if other spouse was not given opportunity to take part in proceedings or if it would be manifestly contrary to public policy to recognise decree.

As of June 24, 1996, no action shall lie for damages for adultery or criminal conversation. There is also new joint application for divorce and in such case, court shall not hold that marriage has broken down irretrievably unless it is satisfied of either one or both of following facts: (1) parties have lived apart for continuous period of one year; and (2) not less than one year prior to making of application notice signed by each party was given to court and notice was not subsequently withdrawn.

13.03 HUSBAND AND WIFE:

Married woman is capable of acquiring, holding and disposing of property, rendering herself and being rendered liable in respect of any tort, contract debt or obligation. Married woman is capable of suing or being sued in tort or contract and is subject to law relating to bankruptcy and enforcement of judgments.

All property belonging to or acquired by woman before or after marriage shall belong to her as if she were unmarried.

Parties to marriage have right of action in tort against each other. However, court may stay action brought during subsistence of marriage if of view that no substantial benefit will accrue to either party.

Court can consider any question between husband and wife as to title and property.

Husband is not, by reason only of being husband of woman, liable for any tort committed by her or any contractual liability or debt incurred by her.

13.04 INFANCY:

Age of majority is 18 years.

Infant can only bring claim in Court of First Instance of High Court through his next friend or guardian ad litem but may sue or defend action within jurisdiction of District Court unless court is of view that infant cannot properly present his case or defend action in which case court can order representation of infant through his next friend or guardian ad litem.

Contracts entered into with minor are generally unenforceable except for necessaries, i.e., objects necessary for infant having regard to his station in life, and registered contracts of apprenticeship. See category 3 Business Regulation and Commerce, topic 3.07 Contracts.

Will made by infant is not valid except for privileged wills, i.e., made under provisions applicable to making of wills by members of armed forces or seamen.

No child under age seven can be guilty of offence. Minor cannot be imprisoned for failing to pay fine. Minor over 16 shall not be imprisoned unless court is of opinion that there is no other method of dealing with that person.

Both father and mother are guardians of infant and have same rights in respect of child. If parents are unmarried, mother is sole guardian; father will only have such rights in respect of child as may have been ordered by court on application brought by father. On death of parent, surviving parent shall be guardian of infant either solely or with any guardian appointed by deceased or, where appropriate, court appointed guardian.

District Court has jurisdiction to hear matters relating to custody, guardianship, wardship and maintenance of child. Court may appoint guardian(s) of child with or to exclusion of parent and give directions in relation to disputes between joint guardians of child.

Illegitimate child is legitimated on marriage of its parents. Also Parent and Child Ordinance has reduced legal disabilities associated with illegitimacy.

Child Abduction and Custody Ordinance (Cap. 512) gives effect to Convention on the Civil Aspects of International Child Abduction signed at the Hague Convention on 25th Oct. 1980. See also category 12 Estates and Trusts, topics 12.02 Descent and Distribution and 12.06 Wills.

13.05 MARRIAGE:

Parties to marriage must be at least 16 years old. If either party is under 21 years of age and not widow or widower, consent of parent with custody is required; alternatively consent of guardian if parents are deceased.

Notice of intended marriage must be given by at least one party appearing before Registrar of Marriages personally and swearing formal affidavit confirming there is no impediment to marriage and if either party was previously divorced, producing decree absolute or certified copy.

After issue of Certificate of Registrar or grant of special licence, parties may contract marriage before Registrar or civil celebrant. Marriage can be celebrated in Office of Registrar or licensed place of worship unless marriage is celebrated by civil celebrant in which case marriage can take place anywhere in Hong Kong except in Office of Registrar or licensed place of worship.

Person not permanent resident of Hong Kong whose previous marriage has been dissolved may not be granted certificate to marry in Hong Kong if dissolution of previous marriage is not recognized in country in which that person is domiciled.

Grounds for marriage being null and void include (a) parties being within prohibited degrees of kindred or affinity (for prohibited degrees of relationships, see England Law Digest); (b) either party under age of 16; (c) marriage was not celebrated in accordance with Marriage Ordinance (Cap. 181); (d) at time of marriage either party was already married.

Grounds for marriage taking place after June 30, 1972 being voidable include (a) not consummated because of incapacity or wilful refusal; (b) either party not validly consenting because of duress, mistake or unsoundness of mind; (c) either party suffering from mental disorder so as to be unfit for marriage.

Decree of nullity will not be granted if respondent satisfies court that petitioner knowing that marriage could be avoided led respondent to believe he or she would not do so, or if it would be unjust to respondent to grant decree.

Voidable marriage shall be treated as if it existed up to time of annulment.

Jurisdiction for nullity proceedings is same as for divorce.

Chinese customary marriages and Chinese modern marriages celebrated in accordance with established rites before Oct. 7, 1971 can be recognised as valid marriages.

See topic 13.03 Husband and Wife.

14 FOREIGN TRADE AND COMMERCE

14.01 CUSTOMS:

Hong Kong is generally perceived as free port. There is no tariff on general imports. There are, however, duties levied on some imports such as liquor, tobacco, hydrocarbon oil and methyl alcohol. For liquor, duty is assessed depending on alcoholic strength if above 30%. For tobacco, hydrocarbon oil and methyl alcohol, rate of duty is fixed per unit. Rates applicable to relevant categories of goods are governed by Dutiable Commodities Ordinance. (Cap. 109).

14.02 EXCHANGE CONTROL:

There are no exchange control restrictions on transfer of funds into or out of Hong Kong.

14.03 FOREIGN EXCHANGE:

No restrictions on foreign exchange. Hong Kong dollar exchange rate is linked to U.S. dollar. See category 3 Business Regulation and Commerce, topic 3.02 Banking and Currency.

14.04 FOREIGN INVESTMENT:

Generally no restrictions on foreign investment.

14.05 TRADE DESCRIPTIONS:

Trade Descriptions Ordinance (Cap. 362) prohibits false trade descriptions, false marks and misstatements in respect of goods provided in course of trade; confers power to require information or instructions relating to goods to be marked on or to accompany goods or to be included in advertisements; restates law relating to forgery of trademarks.

Enforcement of provisions under ordinance is through Customs and Excise Department.

Remedy is by way of criminal prosecution by government. Complainants may institute separate civil proceedings.

15 HEALTH

15.01 COSMETICS:

Registration of cosmetics is necessary if product is classified by Department of Health as pharmaceutical product. (Pharmacy and Poisons Ordinance Cap. 138).

15.02 DRUGS:

The Dangerous Drugs Ordinance (Cap. 134) provides that supply, manufacture and possession of dangerous drugs is prohibited unless authorised under licence. Cultivation of cannabis plant or opium poppy is prohibited.

15.03 FOOD AND DRUG REGULATION AND CONTROL:

The Public Health and Municipal Services Ordinance (Cap. 132) provides that it is offence to publish advertisement which falsely describes or labels any food or drug or is calculated to mislead public as to nature, substance or quality of any food or drug. Authorized officers may take samples of any food or drug or substance capable of being used in preparation of any food or drug intended for human consumption. Appropriate authority may make regulations as to composition of food and drugs. (§§ 55 and 143). There are number of regulations regarding additives and composition of food including Food and Drugs (Composition and Labelling) Regulations; Harmful Substances in Food Regulations; and Preservatives in Food Regulations.

The Pesticides Ordinance (Cap. 133) provides for registration and control of pesticides. It is offence to import, manufacture or sell pesticides without licence.

The Trade Descriptions Ordinance (Cap. 362) makes it offence, in course of trade or business, to apply false trade descriptions to any goods, including food, or to supply or offer to supply any goods, including food, to which false trade descriptions are applied.

Genetically Modified Food.

At present, all pre-packaged food in Hong Kong must be labelled in manner specified in Public Health and Municipal Services Ordinance and Food and Drugs (Composition and Labelling) Regulations. (Cap. 132). There are no specific requirements as to labelling of genetically modified food content. Two options have been proposed in government consultation paper of early 2001 in respect of labelling of genetically modified food, one is voluntary labelling system, other is amendment of Food and Drugs (Composition and Labelling) Regulations of Public Health and Municipal Services Ordinance (Cap. 132) to give effect to mandatory labelling system for genetically modified food. 18-month grace period will be given to genetically modified food trade from enactment of legislation.

15.04 HEALTHCARE AND HEALTH INSURANCE:

Long-term healthcare insurance is developing slowly in Hong Kong. Government released consultation paper in Dec. 2000 to shape future of Hong Kong's healthcare system. Proposals include 1%-2% of salaries of Hong Kong's residents to be contributed to “health protection account scheme”. After retirement, funds can be withdrawn from scheme for medical care or to purchase medical insurance.

15.05 MEDICINE:

Sale and supply of certain antibiotic substances, such as penicillin, other antimicrobial organic substances produced by living organisms or any substance with identical or similar chemical properties but which is not produced by living organisms are controlled by Antibiotics Ordinance. (Cap. 137).

The Pharmacy and Poisons Ordinance (Cap. 138) requires that pharmacists hold licence to sell poisons in duly registered premises by registered pharmacist or under his supervision.

Chemicals related to manufacturing of narcotic drugs or psychotropic substances are regulated by Chemicals Ordinance. (Cap. 145).

The Undesirable Medical Advertisements Ordinance (Cap. 231) restricts certain advertisements relating to medical issues. Ordinance prohibits advertisements relating to certain diseases and dealing with abortion, and sets out various exceptions.

The Chinese Medicine Ordinance (Cap. 549) restricts sale and possession of certain Chinese herbal medicine products. Ordinance provides for licensing system for traders, retailers and wholesale dealers in Chinese herbal medicines. Department of Health has surveillance programme to regularly sample and analyse health food and proprietary Chinese medicine to detect presence of western medicine ingredients. Products containing western medicine are pharmaceutical products and must be registered under Pharmacy and Poisons Ordinance before they are allowed to be put on sale.

Chinese medicine practitioner has to be qualified by passing examination set out and conducted by practitioners board and being registered as Chinese medicine practitioner in Hong Kong. (Chinese Medicine Ordinance Cap. 549).

15.06 RADIATION:

Import, export, possession and use of radioactive substances and irradiating apparatus are controlled by Radiation Ordinance. (Cap. 303). Licence for manufacturing or otherwise producing, selling, dealing with or having in possession or using any radioactive substances and irradiating apparatus can be obtained under Radiation Ordinance.

15.07 SMOKING:

As of 2007, smoking is prohibited in certain designated areas, such as theatres, cinemas, public lifts, banks, supermarkets or shopping malls. Smoking has also been banned on all public transit since 1997. Government authorities have power to expand non-smoking areas to other locations. However, various establishments such as bars, clubs, bathhouses, massage establishments, and mahjong clubs will not be designated as non-smoking areas until after July 1, 2009. (Smoking [Public Health] Ordinance Cap. 371). There are restrictions on printing and publishing of tobacco advertisements, for instance, broadcasting of tobacco advertisement by radio or visual images, and on Internet is prohibited. Any tobacco advertisement in printed form has to carry health warning and tar group designation. Numerous antismoking activities are currently conducted, one of which is setup of new Tobacco Control Office in early 2001.

16 IMMIGRATION

16.01 IMMIGRATION:

Permanent Resident (“HKPR”) of Hong Kong SAR enjoys right of abode there. By paragraph 2 of Art. 24 of Basic Law of HKSAR which was interpreted by Standing Committee of the National Peoples Congress adopted on 26 June 1999 and having effect from 1 July 1997, following persons are permanent residents and enjoy right of abode in HKSAR: (i) Chinese citizen born in Hong Kong before or after establishment of HKSAR to parent who was settled or had right of abode in Hong Kong at time of child's birth or at any later time; (ii) Chinese citizen who has ordinarily resided in Hong Kong for continuous period of not less than seven years before or after establishment of HKSAR; (iii) person of Chinese nationality born outside Hong Kong to parent who is HKPR in above (ii) category, if parent had right of abode in Hong Kong at time of child's birth; (iv) person not of Chinese nationality who entered Hong Kong with valid travel document, has ordinarily resided in Hong Kong for continuous period of seven years or more and has taken Hong Kong as place of permanent residence before or after establishment of HKSAR; (v) person under 21 years of age born in Hong Kong to parent who is HKPR under category (iv) above before or after establishment of HKSAR if at time of child's birth or at any later time before child attains 21 years of age, one parent has right of abode in Hong Kong; (vi) person other than those in (i) to (v), who before establishment of HKSAR had right of abode in Hong Kong only. “Chinese citizen” as stated in category (i) and (ii) means person of Chinese nationality under Chinese Nationality Law which includes Hong Kong residents and former residents and persons of Chinese descent born in Hong Kong or China notwithstanding that they hold or held foreign passport.

HKPR enjoys right of abode in HKSAR, i.e., has right (i) to land in HKSAR; (ii) not to have imposed any condition of stay in HKSAR, and any such condition has no effect; (iii) not to be deported; and (iv) not to have removal order from HKSAR made against him.

Persons from many parts of world continue to enjoy visa-free admission to Hong Kong for periods ranging up to three months. Foreign nationals wishing to take up employment, establish business, study or settle may apply for permission to remain with specific condition of stay, usually for one year initially. Employment applicants must satisfy conditions of Director of Immigration, e.g., inter alia, be sponsored by employer and have special skills, knowledge or expertise of value to, or not readily available in, Hong Kong. After first year, extensions, if approved, normally granted in pattern of two-to-three years. Upon completion of seven years residence, may apply for unconditional stay. British citizens may visit visa-free for up to six months but otherwise requirements applicable to other foreign nationals apply.

17 INTELLECTUAL PROPERTY

17.01 COPYRIGHT AND REGISTERED DESIGNS:

Statute.

Copyright Ordinance (Cap. 528) repealed previous ordinances and became effective from June 27, 1997. It was amended by Intellectual Property (Miscellaneous Amendments) Ordinance 2000; Copyright (Suspension of Amendments) Ordinance 2001 (Cap. 568);Copyright (Amendment) Ordinance 2003; and Copyright (Amendment) Ordinance 2007.

Treaties.

Berne Convention, Universal Copyright Convention, the Phonograms Convention and the World Trade Organization—Agreement on Trade Related Aspects of Intellectual Property Rights extend to Hong Kong, hence convention countries enjoy copyright protection in Hong Kong.

Protection.

Law protects not ideas per se but material form in which they are expressed, namely, in artistic, dramatic, musical and literary works, sound recordings, cinematographic films, television and sound broadcasts and published editions of works. No registration is required and no system for registration is provided.

Copyright can subsist in work if it is original and created by author who is domiciled in Hong Kong or elsewhere, or work has been published in Hong Kong or elsewhere. In other words, there is “open qualification”.

For artistic, dramatic, musical and literary works, copyright extends to reproducing, publishing, performing, broadcasting, retransmitting or adapting work. Software (computer code) is protected as literary work. Monopoly subsists for 50 years after death of author, if author is unknown 50 years from date work was first made or 50 years after first publication. Exception: for artistic works for design which is registrable as registered design, term of copyright protection shall be for 15 years only from first marketing, and 25 years for registered design.

For films, copyright extends to copying, broadcasting or showing in public. Soundtrack associated with film is sound recording which is entitled to separate protection. Monopoly subsists for 50 years from death of last director, author or composer, if they are unknown, 50 years from date first film made or 50 years from first publication.

For television, sound broadcasts or cable programmes, copyright extends to copying or rebroadcasting. Monopoly subsists for 50 years from date of first broadcast.

Ownership.

Author who first puts idea in material form is legal owner, save for works created in course of employment where, in general, copyright is vested in employer. For commissioned works, owner is person expressly provided for in agreement. If there is no agreement, commissioner merely has licence to exploit work, and to prevent use which he can reasonably object to.

Assignment must be in writing signed by or on behalf of assignor.

Licence granted by owner of copyright binds every successor in title to his interest in copyright, except purchaser in good faith for valuable consideration and without notice (actual or constructive) of licence or person deriving title from such purchaser.

Infringement to reproduce copyright work in substantial manner or deal in course of trade with such infringing works. Question of substantial reproduction determined by reference to quality not quantity. Court will determine whether there are objective similarities between copyright work and infringing copy and whether there is causal connection between the two.

For enforcement action, affidavit purporting to have been made by copyright owner before notary public and stating that (i) at time specified therein copyright subsisted in work or other subject matter; (ii) person named therein is owner of copyright in work or other subject matter; and (iii) copy of work or other subject matter exhibited to affidavit is true copy of work or other subject matter, is admissible without further proof in any proceedings under Ordinance.

Parallel imports prohibited subject to statutory defences, and are also criminal offence if committed in relation to products within 18 months of first publication. Under Copyright (Amendment) Ordinance 2003, effective Nov. 28, 2003, parallel imports of computer software products are no longer prohibited.

Civil remedies including injunctions, delivery up of goods, recovery of damages, taking of accounts and discovery are available. Customs detention orders may also be obtained.

There is criminal liability for possession, for purposes of trade or business, infringing copy of work or other subject matter in which copyright subsists. Penalties exist by way of fine as well as imprisonment.

Many exceptions to infringement exist under Copyright Ordinance which include reproduction for educational purposes (teaching, research, etc.), copies made by librarians, for public reading, of computer program for backup purposes and on reasonable assumption of expiration of copyright. In 2007, various further exceptions were provided for making copies of computer programs and of print materials for persons with disabilities.

Registered Designs.

Statute.

Registered Designs Ordinance (Cap. 522), repealing United Kingdom Designs (Protection) Ordinance 1964, effective June 27, 1997.

Treaties.

Paris Convention, World Trade Organisation Agreement.

Procedure.

New system introduced for registration in Hong Kong independent of U.K. effective June 27, 1997. Novel design with features of shape, configuration, pattern or ornament which appeal to eye and which are applied to article or articles whether or not forming set by industrial process can be registered in Hong Kong by application on prescribed form. Multiple designs application and divisional application are possible. No substantive examination, once formal requirements are met, registrar will register design, publish same in Gazette and issue certificate.

Protection.

Registration term 25 years maximum from filing date, subject to renewal at every five year term.

Registered proprietor has exclusive right to deal in articles to which registered design, or design not substantially different, apply and can, after issue of certificate, sue for unauthorized use save for acts done privately for noncommercial purpose or for purpose of evaluation, analysis, research and teaching.

Transactions affecting rights acquired including licensing, assignment and mortgage, etc. must be recorded before damages for infringements, etc. are recoverable. Exclusive licensee can bring infringement proceedings in one's own name but entitlement to damages or account of profits is subject to due recordal of right.

Notice of article being subject of registered design must be given together with registration number or entitlement to damages or account for profits lost if defendant proves that at infringement date he was not aware, and had no reasonable grounds to believe, design to be registered.

Dispute/challenges as to title to, and registrability of, design determined by court which may issue certificate of contested validity of registration if registration is found to be valid.

Infringement.

Test of infringement is whether alleged infringing design is substantially different from that as registered. Objective test based on comparison of features (shape, configuration, pattern and ornament), not functions, of registered and alleged infringing designs.

Remedies and Liabilities.

As per copyright above, plus delivery up of plates and order for disposal. Falsification of register and falsely representing design is registered are offences. Officers of guilty company have personal criminal liability. In Copyright (Amendment) Ordinance 2007 that came into force on 6 July 2007, there is new criminal liability on directors and partners whose organizations have committed end-user offences relating to possession or copying and distribution of infringing copies. Making of groundless threats of proceedings is actionable. Court declaration of non-infringement available upon application.

Transitional Provisions.

U.K. registered designs (i) previously automatically protected in Hong Kong by virtue of repealed ordinance, and (ii) subsisting in U.K. as of June 27, 1997 are deemed registered in Hong Kong. U.K. registrations granted on or after that date whose applications were then pending are also deemed registered in Hong Kong. Continued protection in Hong Kong is secured if design renewed in Hong Kong six months before U.K. renewal date.

Layout-design (Topography) of Integrated Circuits.

Statute.

Layout-design of Integrated Circuits Ordinance (Cap. 445) enacted Mar. 31, 1994.

Protection.

Law gives qualified owner of layout-design (topography) of integrated circuits right to reproduce and commercially exploit that design. Layout-design (topography) means three-dimensional disposition of elements of integrated circuit and of interconnections of integrated circuit or such three-dimensional disposition prepared for integrated circuit intended for manufacture. Law does not protect layout-design created before operation of ordinance. No registration is required.

Ownership.

Must be original and recorded in documentary form or incorporated into integrated circuit.

Rights of Owner.

Infringement of owner's rights if person reproduces part or whole or exploits protected design.

Duration.

Ten years from end of year first commercially exploited anywhere in world with owner's consent. If not exploited with owner's consent, 15 years from end of year of creation.

Assignment must be in writing and signed by or on behalf of assignor.

Licence granted by owner binds each successor-in-title except purchaser in good faith for value without notice and person deriving title from such purchaser.

Remedies.

Civil remedies, including injunction, seizure of goods, recovery of damages, taking of accounts and discovery.

Prevention of Copyright Piracy.

Statute.

Prevention of Copyright Piracy Ordinance (Cap. 544) Law effective May 29, 1998 (in part) and Aug. 29, 1998; amended by Intellectual Property (Miscellaneous Amendments) Ordinance

2000. Ordinance sets out statutory licensing scheme for effective monitoring of optical discs manufacturing activities in Hong Kong in order to stop piracy at source.

Save certain exceptions, anyone involved in manufacture of optical discs is required to obtain licence and failure to do so is offence. Definition of manufacture includes owning, directing, managing or controlling business in Hong Kong which manufactures optical discs. All optical discs produced by licensee are to be marked with unique manufacturer's code designating source of manufacture.

Licence lasts for extendable period of up to three years and can be amended, transferred, revoked or cancelled. Licensee must display licence in conspicuous location at licensed premises open for inspection by authorized officers at all reasonable times without warrant. Authorised officers are empowered to detain samples of optical discs found in licensed premises and books or documents relating to business concerned.

No prosecution for offence under this Ordinance after expiration of three years from date of commission or one year from date of discovery, whichever is earlier.

Effective 29 Dec. 1997, it is offence under Import and Export Ordinance (Cap. 60) to import or export optical discs mastering and replication equipment without appropriate licence.

Prevention of Copyright Piracy (Notices) Regulations came into effect on 1 Apr. 2001. This imposes requirement that notices prohibiting unauthorized possession of video recording equipment in places of public entertainment be displayed. Appearance and location of notices are specified in Ordinance.

17.02 DATA PRIVACY:

Personal Data (Privacy) Ordinance (Cap. 486) was brought into force on 20 Dec. 1996 and is administered and enforced by Office of the Privacy Commissioner. This Ordinance gives living individuals (data subjects) (not companies etc.) rights to personal data held by anyone about them. Requires holders and users of personal data (data users) to comply with six data protection principles relating to (i) collection, (ii) accuracy and erasure, (iii) use, (iv) security, (v) general policies and information, (vi) rights of individual to access and correction. Data users have following responsibilities/obligations: data users must make mandatory statements when collecting personal data from data subject himself; prohibition on use (without consent) of personal data for different purpose than that for which personal data were collected; obligation to keep secure, accurate and to delete when personal data obsolete; prohibition against transfer outside Hong Kong without ensuring requisite compliance; prohibition against data matching, that is, automatic comparison of personal data to take “adverse action” against individual; mandatory statements to be made when direct marketing by fax, letter, phone etc. Data user obligated to provide copy of all personal data held within 40 days of access request by data subject. Also, there is obligation to correct inaccurate data within 40 days of correction request. Contravention may lead to criminal penalties or civil liability to compensate for damage (including injury to feelings).

Specific exemptions include personal data held for domestic or recreational purposes; exemptions from requirement on subject access for certain employment related personal data; and access and use limitations in matters of public concern like security or crime detection.

17.03 INDUSTRIAL PROPERTY RIGHTS:

See topics 17.01 Copyright and Registered Designs; Patents; Trademarks and Passing Off; category 14 Foreign Trade and Commerce, topic 14.05 Trade Descriptions.

17.04 PATENTS:

Statute.

Patents Ordinance (Cap. 514) effective June 27, 1997, repealing Registration of Patents Ordinance. (Cap. 42).

Treaties.

Paris Convention, Patent Cooperation Treaty.

Procedures.

New system, independent of U.K. Patentable inventions which are: (i) new, (ii) involve inventive step and (iii) capable of industrial applications.

Two kinds of patent are available: (a) Standard Patent—patent granted by Designated Patent Offices ("DPO") (U.K. Patent Office, European Patent Office for patents designating U.K., Chinese Patent Office) registrable in Hong Kong by two-stage procedure by filing (i) request to record within six months of publication of application in DPO and (ii) request for registration and grant within six months of DPO grant, both on prescribed forms with supporting documents. Time limit is not extendable. Once formal requirements are met, both request to record and subsequent grant published respectively by registrar and patent takes effect from publication date of grant. Request to record must be maintained with payment of fees until request for grant is filed. (b) Short-term Patents—simple patent with only one independent claim, envisaged for products with short commercial life, can be registered directly in Hong Kong on prescribed form accompanied by, inter alia, international search report. If formal requirements are complied with, registrar will issue grant and publish same in Gazette. Patent takes effect from date of publication. Possible to apply for deferral of grant up to 12 months from date of filing.

Term and Renewal

(a) Standard Patent—20 years, subject to renewal, from deemed date of filing of parent patent and is independent of parent. (b) Short-term Patent—eight years from date of filing, subject to renewal.

Renewal fees payable annually. Six month grace period (subject to penalty fees) for late renewal before respective patents will lapse. Restoration possible within 18 months in some circumstances.

Protection.

Registered proprietor of patent in force has right to prevent unauthorised direct and indirect use of patented invention, save for certain acts, and can sue for infringement after issue of certificate.

Transactions affecting patent rights including licensing, assignment, or mortgage, etc. should be recorded to give priority against earlier unrecorded transactions. Exclusive licensee can bring infringement proceedings in his own name but entitlement to damages or account of profits is subject to due recordal of his right.

Notice of product having been patented must be given together with registration number or entitlement to damages or account for profits is lost if defendant proves that at infringement date he was not aware, and had no reasonable grounds to believe, that patent existed.

Disputes/challenges as to title to, patentability and validity of, patent determined by court which may issue certificate of contested validity of registration if registration found to be valid. If found to be partially valid, relief may be granted as to part so found valid and infringed but damages or costs not recoverable except upon proof of certain matters and subject to court discretion and conditions.

For enforcement proceedings on Short-term Patent, registered proprietor must establish validity of patent. Requirement satisfied upon proof of prima facie validity in absence of evidence to contrary. Where application for interlocutory injunction is granted or refused, court shall on application by any party make order for early trial unless it considers interests of justice would not be so served.

Remedies and Liabilities.

As per copyright, plus declaration of validity and infringement. Infringement includes importation of patented product or product made in accordance with patented process in transit to another destination. Falsification, and for standard patents, making of groundless threats, as per registered designs above.

Transitional Provisions.

Six categories: (i) Existing Hong Kong patent registered under old law with parent patent in force in U.K. as of effective date (June 27, 1997) automatically deemed Standard Patent granted under new law taking effect from then; (ii) patent granted in Hong Kong after June 27, 1997 upon application pending as of June 27, 1997 automatically deemed Standard Patent granted before June 27, 1997 taking effect from then; (iii) existing U.K. patent granted under U.K. Patents Act 1949 or 1977 not applied for in Hong Kong under old law can be registered under new law by June 27, 1998 or within five years of U.K. patent grant date, whichever is earlier, and filing of request to record (or stage-1 procedure) is waived; (iv) pending application in U.K. for 1977 patent published before June 27, 1997 and patent granted after June 27, 1997 may be registered in Hong Kong under new law following 2-stage procedure above. Applicant has until Dec. 27, 1998 to comply with stage-1 procedure; (v) as alternative to (iv), where U.K. patent granted before June 27, 1998, stage-1 procedure is waived and applicant must file request for registration and grant (or stage-2 procedure) within six months of grant; (vi) application in U.K. for 1949 patent pending as of June 27, 1997, patent for which granted thereafter can be registered in Hong Kong following stage-2 procedure only and applicant must file request for grant no later than six months from grant or 20 years from date of filing of complete specification, whichever is earlier. Categories (iii), (iv) and (v) have become spent following lapse of time.

17.05 TRADEMARKS:

Statutes.

Trade Marks Ordinance. (Cap. 559) effective Apr. 4, 2003. Registration of trademarks for both goods and services available.

Treaties.

Paris Convention, World Trade Organisation Agreement. Convention priority may be claimed for applications filed within six months from first application in convention or World Trade Organisation member country.

Trademark is any sign that is capable of distinguishing goods or services of one undertaking from those of other undertakings and which is capable of being represented geographically. Mark may consist of word (including personal name), indication, design, letter, character, numeral, figurative element, colour, sound, smell, shape of goods or their packaging and any combination of such sign.

Trademark can only be registered if it is capable of distinguishing goods or services of owner from those of other traders.

In determining whether trademark is capable of distinguishing goods or services as aforesaid, registrar may have regard to extent to which (a) trademark is inherently capable of distinguishing goods or services and/or (b) by reason of use of trademark or of any other circumstances, it is in fact capable of distinguishing as aforesaid.

Domain Names.

Domain name may also be registered as trademark especially where domain name functions to enhance reputation of services provided on particular web site or, if obtained by another party, has potential to cause serious damage.

Procedure.

Application is made on prescribed form in respect of relevant class(es) of goods/services desired in accordance with Nice International Classification. No power of attorney signed by applicant is required. Examination as to formality, prior conflict and registrability will take place between two to three months and extension of time is required to respond to outstanding objections not otherwise dealt with in initial six-month period. First extension obtainable without query but further extensions have to be justified. Acceptances are published online in Government Gazette for opposition for three months. Certificate will issue if unopposed.

Protection.

Trademark when registered is initially valid for ten years from date of application and can thereafter be renewed indefinitely for successive periods of ten years each. Registered mark must be put to use within three years of grant of registration or it will be vulnerable to cancellation for nonuse from one month before date of application to expunge.

License.

May be general or limited. Must be in writing and signed by or on behalf of licensor. It must be recorded with Trade Marks Registry within six months from date of license; otherwise licensee is not entitled to damages or account of profits in respect of any infringement of registered mark occurring after date of such license and before prescribed particulars of license are registered. Exclusive licensee can sue for infringement in own name and is entitled to remedies concurrent with those of registered proprietor.

Assignment of trademark may be with or without goodwill of business concerned in goods in respect of which mark was registered. It must be in writing and signed by or on behalf of assignor or his personal representative. It must be recorded with Trade Marks Registry within six months from date of assignment; otherwise assignee is not entitled to damages or account of profits in respect of any infringement of registered mark occurring after date of such assignment and before prescribed particulars of assignment are registered.

Well-known Trademarks.

Defined as mark entitled to protection under Paris Convention which is well-known in Hong Kong. Not necessary for owner to carry on business in Hong Kong.

Infringement.

Civil remedies of damages, injunction, delivery up of goods and discovery apply. Law allows relief for unauthorized use of mark not merely in respect of goods/services identical to registered coverage but also to similar goods/services. Specific provisions concerning well-known marks. Parallel importation allowed based on exhaustion of rights principle. Groundless threats of infringement are actionable.

Passing-off.

Common law tortious action of passing-off is available if trademark owner (whether registered or not) can prove (1) trade reputation; (2) infringer has used substantially confusing similar mark; (3) confusion and/or deception has been or is likely to be caused as result of such use and (4) damage is likely or has occurred. Action is not restricted to registered or unregistered trademarks but can be invoked in respect of "any badge of recognition" by which proprietor has become well known, such as packaging, advertising character, shape of product, etc.

Criminal Liability.

Under Trade Descriptions Ordinance (Cap. 362) unauthorized use of trademark may give rise to criminal liability. This covers false application of trademark to goods or services including selling and importing goods bearing forged trademark. Use of domain name to advertise goods or services for which domain is registered as trademark by another party could be offence under Ordinance.

18 LEGAL PROFESSION

18.01 ATTORNEYS AND COUNSELORS:

Legal profession in Hong Kong is divided into solicitors and barristers of Hong Kong Special Administrative Region of the People's Republic of China. Legal profession is governed by Legal Practitioners Ordinance. (Cap. 159).

Solicitor is person whom client consults for legal advice and assistance generally. Solicitors advise on wide range of personal and business matters and appear as advocates in lower courts.

Generally, Hong Kong solicitors hold LL.B degree from University of Hong Kong or City University of Hong Kong (Chinese University of Hong Kong opened its own law school in 2006) or equivalent (or other undergraduate degree plus requisite Common Professional Examination Certificate or Common Professional Examination ("CPE") and have completed Postgraduate Certificate in Laws ("PCLL"). Following PCLL, two-year trainee solicitorship with solicitors' firm, suitable in-house lawyer or with Department of Justice, is required.

For admission as solicitor in Hong Kong, foreign lawyers must show that they are "fit and proper persons", have "good standing" in their own jurisdiction and (i) have resided in Hong Kong for minimum of three months before admission; or (ii) intend to reside in Hong Kong for minimum of three months post-admission; or (iii) are ordinarily resident in Hong Kong for at least seven years; or (iv) have been present in Hong Kong for minimum of 180 days of each of seven or more years. In addition: (i) lawyers from common law jurisdictions must pass The Law Society's Overseas Lawyers Qualification Examination and complete minimum of two years' trainee or post-admission experience; and (ii) lawyers from non-common law jurisdictions with minimum of five years' post-admission experience must pass written and oral examinations to qualify, or otherwise, they must have minimum three years' trainee or post-admission experience and complete requisite CPE or equivalent, plus PCLL.

Solicitors are regulated by Law Society of Hong Kong: 3rd Floor, Wing On House, 71 Des Voeux Road, Central, Hong Kong. Tel.: (852) 28460500; fax: (852)28450387; URL: http://www.hklawsoc.org.hk.

Barristers primarily represent client in court. Clients may not approach barristers directly but must do so via solicitor or other permitted professional.

There are ostensibly three main routes to become barrister. Hong Kong route requires

Bachelor of Laws of University of Hong Kong or City University of Hong Kong and Postgraduate Certificate in Laws (PCLL). U.K. route involves qualification as barrister in England or Northern Ireland or admission as advocate in Scotland. Commonwealth route is used by law graduates from recognised Commonwealth universities, who must obtain PCLL.

Solicitors and barristers may transfer from one branch of profession to other upon satisfying relevant requirements of Law Society or Bar Association, as case may be.

Following PCLL, one-year period of pupillage in barristers' chambers is required. Applicant must also be permanent Hong Kong resident within meaning of Immigration Ordinance (Cap. 115) or Commonwealth citizen or citizen of Ireland who has been ordinarily resident in Hong Kong for at least seven years.

Barristers are regulated by Hong Kong Bar Association: Floor LG2, The High Court, 38 Queensway, Hong Kong. Tel.: (852) 28690210; fax: (852) 28690189; URL: http://www.hkba.org.

Foreign lawyers and law firms wishing to practise foreign law in Hong Kong must be approved and registered by Law Society.

Foreign lawyers must provide documentary evidence of policy of indemnity insurance comparable to that required of solicitors in Hong Kong. They may be employed by registered foreign or local firms.

Foreign firms must prove substantial reputation overseas, as well as substantial reputation of one partner intending to practise in Hong Kong, during preceding five years.

Associations between foreign and Hong Kong law firms must be registered. Member firms of registered associations may share fees, profits, premises, management and staff.

There are no current proposals by Bar Association for relaxing existing restrictions on foreign lawyers wishing to practise as barristers in Hong Kong.

18.02 BARRISTERS AND SOLICITORS:

See topic 18.01 Attorneys and Counselors.

19 MORTGAGES

19.01 CHATTEL MORTGAGES:

Mortgages of personal chattels (as defined), except those executed by companies which require registration under Companies Ordinance (see category 2 Business Organizations, topic 2.03 Corporations), fall within Bills of Sale Ordinance. See category 3 Business Regulation and Commerce, topic 3.04 Bills of Sale.

19.02 COLLATERAL SECURITY:

See category 7 Debtor and Creditor, topic 7.10 Pledges.

19.03 MORTGAGE:

Conveyancing and Property Ordinance (Cap. 219) provides that mortgage of legal estate can be effected in law by charge by deed expressed to be by way of legal charge only.

Mortgagee has following powers: (1) to sell mortgaged property provided that mortgage money has become due and either (a) notice has been served requiring payment and there has been default in whole or part for one month, or (b) interest under mortgage is one month in arrears, or (c) there has been breach of some other covenant in mortgage; (2) to insure mortgaged property against loss or damage by fire; (3) to appoint receiver, which power is exercisable in same circumstances as power of sale; (4) when in possession, to lease or accept surrender of lease of mortgaged property.

Priority of mortgages takes effect in order of date of creation if registered within 30 days (Land Registration Ordinance Cap. 128) (subject to any contrary entries). Registration is deemed to be actual notice to subsequent mortgagee or purchaser of land. Prior mortgagee may make further advances to rank in priority to subsequent mortgagees, legal or equitable, only if (1) such arrangement has been made with consent of subsequent mortgagees; (2) his further advance does not exceed, with any other outstanding advance, maximum amount secured; or (3) where prior mortgagee is authorised institution (as defined in Banking Ordinance Cap. 155) and original mortgage is expressed to secure all moneys which may, from time to time, be owing.

Discharge or Satisfaction.

Receipt written on or annexed to mortgage in respect of all moneys thereby secured operates in case of mortgage by assignment as reconveyance of mortgaged property to person who immediately before execution of receipt was entitled to equity of redemption and in other cases as discharge of mortgage. Receipt must be executed by mortgagee or person in whom mortgage is vested and who is entitled to give receipt.

20 PROPERTY

20.01 ABSENTEES:

See topic 20.05 Power of Attorney.

20.02 DEEDS:

In case of individuals, every deed must be signed, sealed and delivered by party to be bound or by his attorney and as matter of good practice, be attested by at least one witness who must add to his signature his occupation or description. In case of companies, common seal must be used and attestation must be in accordance with company's articles of association.

Conveyancing and Property Ordinance (Cap. 219) states that any deed signed by individual shall be presumed to be sealed as such provided that document describes itself as deed or states that it has been sealed or bears any mark, impression or addition intended to be or to represent seal or position of seal. Further, where deed is executed by corporation in favour of person dealing with it, it will be deemed to have been duly executed if it purports to bear company seal affixed in presence of and attested by its secretary or other permanent officer of company and member of its board of directors or by two members of that board. Furthermore, deed purporting to be executed prior to 9 May 2003 by or on behalf of corporation aggregate; and attested by signatory, where signatory is person who could have authorization under articles of association of corporation, shall, until contrary is proved, be presumed for proof of title to any land to have been duly executed by purported signatory with authority conferred by articles of association.

Person authorised by power of attorney to execute deed on behalf of corporation may execute deed by signing his own name or name of corporation and affixing his seal.

20.03 LANDLORD AND TENANT:

Leases are generally governed by principles of contract but are also subject to Landlord and Tenant (Consolidation) Ordinance. (Cap. 7). Landlord and Tenant (Consolidation) (Amendment) Ordinance 2004 has since 9 July 2004, removed security of tenure provisions for domestic tenancies under Part IV of principal Ordinance. It also removed minimum notice requirement for termination of non-domestic tenancies under Part V of Ordinance. Domestic and non-domestic tenancies created on or after 9 July 2004 will run their course in accordance with their lease terms. Domestic tenancies in existence before 9 July 2004 are subject to transitional arrangements.

Landlord or principal tenant must give his tenant or subtenant receipt for time at time of payment. Person who fails to do so commits offence.

Should tenant refuse to vacate property after tenancy agreement has come to end, landlord should apply for order for possession from Lands Tribunal or other courts before tenant can be made to leave. It is criminal offence for anyone to harass and evict tenant by illegal acts. Subtenants are similarly protected.

20.04 PERPETUITIES:

See category Estate and Trusts, topic Trusts.

20.05 POWER OF ATTORNEY:

Person may generally delegate authority to any person of full capacity, usually by power of attorney. Not necessary to file powers of attorney with any governmental or judicial authority. Power may be limited or unlimited as donor wishes.

As long as permitted by and in accordance with company's constitution, directors may empower any person either generally or in respect of specified matters as company's attorney to execute deeds on its behalf outside Hong Kong. Deed executed by such attorney binds company as if under seal.

20.06 REAL PROPERTY:

Conveyance of legal estate must be by deed only except leases created by parol for term not exceeding three years at best rent which can be reasonably obtained without premium.

In general, apart from system of registration, applicable law is substantially pre-1925 English law of real property as modified by Conveyancing and Property Ordinance (Cap. 219) (which enacted some provisions of English Law of Property Act 1925) but in New Territories (as defined in Interpretation and General Clauses Ordinance [Cap. 1]) Chinese customary law is still relevant. All titles are leasehold derived from government.

Situation is now governed by Joint Declaration of British and Chinese Governments and by Basic Law of Hong Kong Special Administrative Region of China. Leasehold terms expiring after 1997 expected to be renewed for term of 50 years without payment of premium. Government rent payable for renewed term expected to be at 3% of current rateable value of property. See category 1 Introduction, topic 1.02 Government and Legal System.

Land Registration.

Current system of registration is that of deeds and not of title. Except bona fide leases at rack rent for term not exceeding three years, all unregistered deeds and instruments shall be absolutely null and void against subsequent bona fide purchaser for valuable consideration. (Land Registration Ordinance, Cap. 128). Instruments have priority according to instrument date if registered within 30 days after execution. In other cases, priority follows date of registration but charging order only day after registration. Registration deemed to be actual notice to subsequent mortgagee or purchaser. Land Titles Ordinance ("LTO") enacted on July 7, 2004 will change present system of registration to that of title registration. LTO will be implemented in three stages:

Stage One: No implementation. Presently scheduled to last 2 years (from enactment date).

Stage Two: Incubation period with partial implementation of LTO. Presently scheduled to last 12 years.

Stage Three: Total conversion to and implementation of the provisions of LTO.

21 TAXATION

21.01 INTRODUCTION:

There is no total income tax in Hong Kong. Hong Kong's major taxes are profits tax, property tax and salaries tax. Individuals normally resident in Hong Kong may be able to reduce their tax liability under these three tax sources by electing Personal Assessment (see subhead Personal Assessment, infra).

Personal Assessment is not levy of tax. It is relief for certain individual taxpayers who are chargeable to profits tax and property tax. Income from profits tax, property tax and salaries tax is aggregated and from this total following may be deducted: (1) Business losses incurred in year of assessment; (2) losses brought forward from previous years under Personal Assessment; (3) approved charitable donations; (4) interest payments on money borrowed for purpose of producing property income; and (5) personal allowances. Tax at marginal rates (as per salaries tax) will be imposed on balance. Credit is given for tax already paid and refund may be made.

21.02 ALCOHOL, BEVERAGES AND TOBACCO TAXES:

Duty payable on certain products such as alcohol, tobacco and petroleum products under Dutiable Commodities Ordinance. (Cap. 109).

21.03 EMPLOYMENT TAXES:

See topic 21.11 Salaries Tax.

21.04 ESTATE TAX:

Estate duty abolished since 11 Feb. 2006. No estate duty affidavits and accounts need to be filed and no estate duty clearance papers are needed for application for grant of representation in respect of deaths occurring on or after that date.

21.05 GAMBLING AND ENTERTAINMENT TAXES:

Betting Tax.

Betting duty is imposed on bets made through Hong Kong Jockey Club, contributions or subscriptions to authorized cash sweeps and bets made on Lotteries conducted by Hong Kong Lotteries Board. Rate of betting duty on horse race ranges from 12% to 20% whereas on football betting duty rate is 50% on net stake receipts.

21.06 GASOLINE AND SPECIAL FUELS TAXES:

Duty payable on certain products such as alcohol, tobacco and petroleum products under Dutiable Commodities Ordinance. (Cap. 109).

21.07 HOTEL AND RESTAURANT TAXES:

Hotel accommodation tax is levied on all accommodation charges paid by guest at rate of 3%. Where accommodation is provided by nonprofit making society, hotel contains less than ten rooms normally available for lodging guest or if rate of accommodation charge does not exceed HK$15 per day, no tax shall be payable. (Hotel Accommodation Tax Ordinance, Cap. 348).

21.08 INCOME TAX:

See topic 21.09 Profits Tax.

21.09 PROFITS TAX:

Profits tax is generally covered by Inland Revenue Ordinance (Cap. 112). Persons, including corporations, partnerships, trustees and bodies of persons carrying on any trade, profession or business in Hong Kong are subject to tax on all profits arising in or derived from Hong Kong from such trade. There is no distinction between resident and nonresident. Resident may receive profits from abroad without suffering tax; conversely, nonresident may suffer tax on profits arising in Hong Kong, either directly or in name of his agent who is required to retain sufficient money to pay tax. Question of whether profits are derived from Hong Kong is largely one of fact. No tax is levied on profits arising abroad, even if they are remitted to Hong Kong.

Where true profits of nonresident cannot be readily determined, Commissioner of Inland Revenue may compute same on fair percentage of turnover in Hong Kong or where applicable by apportioning overall profits in ratio of turnover of various branches outside Hong Kong.

Persons effecting payment to nonresident sportsmen, entertainers and similar persons who perform in Hong Kong for commercial occasion or event must withhold tax from such payment.

Nonresidents are charged at same rate as residents, but resident consignees are required to provide details of gross proceeds from local sales on behalf of nonresident consignors and pay tax at 1% of gross proceeds or such lesser sums as are agreed. This tax is recoverable from consignor.

Royalties received by nonresidents from exhibition or use in Hong Kong of films, tapes or recordings or for use in Hong Kong of patent, design, trademark or copyright are taxed on gross receipts at effective rate of 1.65% (company) or 1.5% (other). However, as from Mar. 4, 1993, where royalties are paid to associates, effective rates are 16% (company) and 15% (other).

Profits tax is currently chargeable at 16% for unincorporated businesses and at 16.5% for corporations. Tax losses may be carried forward to be offset against future profits of company but corporation carrying on more than one trade may have losses in one trade offset profits of other. Exemptions are made in case of charitable institutions and trusts of public character.

Capital Gains.

Not taxable.

Dividends.

Not taxable on receipt; no withholding taxes on payment.

21.10 PROPERTY TAXES:

Rental income derived from letting of properties situated in Hong Kong is subject to property tax chargeable on net assessable value of properties (net assessable value = rental income - irrecoverable rent - rates paid by owner - statutory allowance for repairs and outgoings [which is 20% of rental income - irrecoverable rent - rates paid by owner]). Corporate lessors of land are not subject to property tax but are subject to profits tax.

21.11 SALARIES TAX:

Taxation on salaries is covered by Inland Revenue Ordinance. (Cap. 112). Chargeable on all income arising in or derived from Hong Kong offices and employments. Separate taxation applies to income of husband and wife but if overall tax liability of any married couple is greater than it would otherwise be under aggregation, they may elect to be jointly assessed. Year of assessment is Apr. 1 to Mar. 31. There is no pay-as-you-earn system.

Salaries tax is charged on net chargeable income computed by deducting from net assessable income approved charitable donations and personal allowances. Tax at progressive rates rising to 19%. Amount of tax charged shall not exceed standard rate of tax applied to net total income without allowances, i.e. total assessable income less total deductions only. Current standard rate is 16%.

Personal Allowances.

In addition to personal allowances for single and married persons, there are various allowances including child allowance, dependant parent allowance and single parent allowance.

21.12 SALES TAX:

No generally applicable value added or sales tax in Hong Kong.

21.13 STAMP TAX:

Stamp duty is levied on various instruments mainly conveyance on sale, agreement for sale of property, property lease and transfer of Hong Kong stock. All rates of stamp duty depend on value of consideration. If instrument is not stamped within specified time period, it may be stamped upon payment of relevant stamp duty and penalty according to stamping delay. Request for deferred payment is permissible whereby stamping of certain instruments can be stamped within three years after execution of instrument.

21.14 TRANSPORTATION TAXES:

Current rate of air passenger departure tax is HK$120 per passenger (12 years of age or above) departing by air from Hong Kong through Hong Kong International Airport, or by helicopter from Hong Kong. (Air Passenger Departure Tax Ordinance, Cap. 140).

21.15 TREATIES AND AGREEMENTS:

No general tax conventions with either U.K. or any other territory, however, Inland Revenue Ordinance allowed credit relief when profits chargeable to tax in Hong Kong had borne tax in another Commonwealth territory (in this context, not including U.K.). Such arrangements expected to end unless reciprocal (see category 23 Treaties and Conventions, topic 23.01 Treaties). There are no special tax incentives for overseas investors.

22 TRANSPORTATION

22.01 AUTOMOBILES:

See topic 22.02 Motor Vehicles.

22.02 MOTOR VEHICLES:

Governed by Road Traffic Ordinance (Cap. 374) and related legislation.

Every motor vehicle must be registered and licensed annually. It conveys right for vehicle to be driven on road. Owner of private car manufactured six years or more before date from which car is to be licensed must obtain certificate of roadworthiness. Similarly, owner of light goods vehicle manufactured one year or more before date from which light goods vehicle is to be licensed must obtain certificate of roadworthiness. Owner must renew certificate annually thereafter.

Every driver must have passed requisite test (or hold valid and current foreign driving licence) and have Hong Kong licence to drive. Full Hong Kong driving licence is valid for ten years and will be issued to persons aged 60 or below. Those aged 60 or above will be issued with full driving licence with validity of less than ten years. Visiting driver from abroad holding valid foreign driving licence may drive for period of 12 months from last date of entry into Hong Kong. Driving license will not be issued to persons under 18.

Any person using or permitting another to use motor vehicle must be insured against third party risks. Rights against insurers of third party risks are conferred on third parties in event of insured becoming insolvent. Motor Vehicles Insurers Bureau has fund to cover hit-and-run injuries where driver/car owner is unknown or third party insurance company wound up. Personal injuries claims must be made within three years.

Tax is charged on first registration of motor vehicles. Dealers must publish retail price list of their vehicles, including standard and optional accessories but excluding first registration tax. Importers and distributors of motor vehicles must register with Commissioner for Transport within 30 days of commencement of business. Importers must file returns on importation of motor vehicles. Electric vehicles exempt from first registration tax for period of three years.

22.03 SHIPPING:

Admiralty jurisdiction is exercised by Court of First Instance of High Court.

Treaties.

Agreement reached for continued application of existing maritime conventions to Hong Kong Special Administrative Region as separate contracting party from China and mechanism for notifying international community (see category 23 Treaties and Conventions, topic 23.01 Treaties). Existing ordinances and subsidiary legislation implement international maritime conventions and codes including relating to safety, collisions, load lines, arrest of sea-going ships, pollution, carriage of goods, liner conferences, salvage, liability for maritime claims etc. Ordinances sometimes implement regulations by reference to U.K. Acts.

Navigation.

Main ordinances governing shipping and navigation are Merchant Shipping Ordinance (Cap. 281) and Merchant Shipping (Safety) Ordinance (Cap. 369) and subsidiary regulations, notices, orders etc. Regulations made under Merchant Shipping (Safety) Ordinance implement International Convention for Safety of Life at Sea 1974 and International Convention on Load Lines 1966. These ordinances deal with seaworthiness, safety, lifesaving appliances, fire appliances and protection, signals of distress and prevention of collision, load lines, certification, discipline and welfare of master, officer and crew, accidents, marine courts, tonnage measurement, construction, survey and safety certificates, etc. Merchant Shipping (Liner Conferences) Ordinance (Cap. 482) implements Convention on Code of Conduct for Liner Conferences 1974.

Registration.

By Merchant Shipping (Registration) Ordinance (Cap. 415), independent Hong Kong Shipping Registry established in 1990 is operated by Government of Hong Kong Special Administrative Region through Marine Department which has over 140 years of experience in ship registration, inspection and survey. Ordinance makes provision for registration of ships and mortgages in Hong Kong (previously governed by English merchant shipping Acts as applied to Hong Kong). Under U.K.-China Joint Declaration, Hong Kong SAR is authorised to continue shipping register and to issue certificates in name of “Hong Kong, China”, and to also continue previous system of shipping management and regulation, in accordance with its own legislation. Hong Kong-registered ships fly Chinese flag directly above Hong Kong SAR flag (both same size). Certificates issued prior to change in sovereignty remain valid until expiry dates. Merchant Shipping (Registration) Ordinance provides ship is registrable if (i) majority interest is owned by one or more qualified person or persons, (ii) it is operated under demise charter by body corporate being qualified person, (iii) is not registered elsewhere and (iv) representative person is appointed in relation to ship. “Qualified person” means any of (i) Hong Kong resident, (ii) Hong Kong incorporated company, and (iii) overseas company registered under Part XI of Companies Ordinance (Cap. 32). Demise charter registration has been introduced. When survey cannot be carried out in time, provisional certificate of registry can be obtained pending completion of survey and issuance of certificate of registry. With provisional registration, ship can commence trading immediately and mortgages can be registered.

As of 1 Feb. 2007, every ship trading to and from Hong Kong, or being used for commercial purpose in waters of Hong Kong, must possess certificate of registry, as per Merchant Shipping Ordinance (Cap. 414), or foreign granted registration certificate equivalent to Hong Kong certification, and certificate of ownership. (Merchant Shipping Ordinance Cap. 281, § 3).

Taxation.

Income derived from international operation of Hong Kong registered ships is exempt from Hong Kong profits tax (see also category Taxation).

Crew.

Previous nationality restrictions for ranks of master, chief mate and chief engineer have been removed. No nationality or residence requirements for master and crew serving on Hong Kong-registered foreign-going ships. Merchant Shipping (Seafarers) Ordinance (Cap. 478) and subsidiary legislation consolidate and amend law relating to seafarers, in particular in relation to registration, employment, discharge, repatriation, conduct and disciplining of seafarers. They also stipulate provisions for examination and certification of officers and other seafarers for employment on Hong Kong ships, manning scale and standards, health, safety, crew accommodation and welfare of seafarers. Ordinance also provides for establishment of (inter alia): (1) Seafarer's Authority (to replace Seaman's Recruiting Authority); (2) Mercantile Marine Office (to replace Seaman's Recruiting Office); (3) Seafarer's Advisory Board (to replace Seaman's Recruiting Advisory Board).

Pilotage.

Pilotage Ordinance (Cap. 84) stipulates compulsory pilotage by licenced pilots except for certain exempted ships, e.g. government ships, vessels engaging in salvage operation, passenger ferries between Hong Kong, Macau and China within river trade limits and other vessels exempted by Pilotage Authority.

Port Control.

Control of vessels, port facilities, dues and clearance, etc. are governed by Shipping and Port Control Ordinance. (Cap. 313). Port State Control as to compliance of vessels with international conventions is exercised in accordance with MOU of Asia-Pacific Maritime Authorities, Tokyo, 1993. Ordinance also restricts and/or heavily regulates various activities on vessels in Hong Kong, such as ship breaking, repairs, using dangerous equipment and discharge of oil. Dangerous Goods (Shipping) Regulations require dangerous goods manifest be furnished at least 48 hours before arrival (if applicable).

Pollution.

Merchant Shipping (Prevention and Control of Pollution) Ordinance (Cap. 413), Merchant Shipping (Liability and Compensation for Oil Pollution) Ordinance (Cap. 414) and subsidiary legislation apply. Regulations made under ordinances implement International Convention for the Prevention of Pollution from Ships and related protocol. Under Shipping and Port Control Ordinance (Cap. 313), offence for vessel to discharge oil or mixture containing oil in Hong Kong waters unless falling within defence including (i) securing safety of vessel, (ii) preventing damage to vessel or its cargo, or (iii) saving life. Charges, penalties, compensation applicable. Offense for vessels in Hong Kong waters to emit smoke in such quantity that nuisance results.

Dumping at Sea Ordinance (Cap. 466) reproduces U.K. Dumping at Sea Act 1974, regulating dumping of waste materials in Hong Kong waters. See also category 11 Environment, topic 11.01 Environmental Regulation.

Carriage of Goods by Sea.

Carriage of Goods by Sea Ordinance (Cap. 462) implements Hague-Visby Rules.

Liens.

Maritime liens recognised under English law are applicable in Hong Kong.

23 TREATIES AND CONVENTIONS

23.01 TREATIES:

Treaties entered into prior to July 1, 1997 were normally entered into by U.K. and extended to Hong Kong Special Administrative Region if desired.

According to Joint Declaration by U.K. and China and Basic Law, Hong Kong SAR is permitted to use name “Hong Kong, China” to maintain and develop relations and conclude and implement agreements with foreign states and regions and relevant international organisations in appropriate fields including economic, trade, financial, monetary, sports and communications. Chief Executive and government is empowered to conduct external affairs within such authorisation.

International agreements to which China is party may be applied to Hong Kong after China Central Government has sought views of Hong Kong SAR Government. In addition, some 200 multilateral treaties formerly implemented in Hong Kong continue to be applied to Hong Kong SAR, including many treaties which do not apply to rest of China. Hong Kong SAR is also able to participate in international organizations in various capacities.

For example, certain human rights conventions to which China is not signatory remains implemented including Hague Convention on Civil Aspects of International Child Abduction; Hong Kong is separate contracting party to World Trade Organisation (WTO) and Multi-Fiber Arrangement (MFA), member of Customs Co-operation Council and Asia Pacific Economic Co-operation (APEC) forum; treaties extended to Hong Kong include International Covenant on Civil and Political Rights, Berne Convention on Copyright, Universal Copyright Convention and Geneva Convention on the Execution of Foreign Arbitral Awards.

Hong Kong is no longer member of Commonwealth; however, involvement in Commonwealth events and affairs continues depending on circumstances of particular matter. Under Hong Kong Reunification Ordinance (Cap. 2601), legislative provisions confer ring privileges on U.K. or other Commonwealth countries have no further effect after July 1, 1997, unless reciprocal.

From July 1, 1997, treaties between Hong Kong SAR and China no longer have effect. To be effective, treaty must have been implemented into respective Hong Kong or Chinese domestic law.

(See categories 1 Introduction, topic Government and Legal System and Taxation, topic Treaties and Agreements.)

1

HUNGARY LAW DIGEST

—Scope —

Revised for 2010 edition by

NAGY & TRÓCSÁNYI, of Budapest and New York.

("C.C." refers to "Civil Code"; "C.P.C." refers to "Civil Procedure Code"; "I.P.L.C." refers to "International Private Law Code".)

(Other abbreviations: BM refers to Minister of Internal Affairs; EEA refers to European Economic Area; ESZCSM refers to Minister of Health, Social and Family Affairs; EüM refers to Minister of Health; ÉVM-EüM refers to [Common Decree of] Minister of Building Affairs and City Development and Minister of Health; FM refers to Minister of Agriculture; FVM refers to Minister of Agriculture and County Development; FVM-ESZCSM-GKM refers to [Common Decree of] Minister of Agriculture and County Development, Minister of Health, Social and Family Affairs and Minister of Transport and Economics; GKM refers to Minister of Transport and Economic Affairs; GKM-BM-KvVM refers to [Common Decree of] Minister of Transport and Economics, Minister of Internal Affairs and Minister of Environmental Protection and Water Management; IHM refers to Minister of Informatics and Telecommunication; IKIM refers to Minister of Industry, Trade and Tourism; IM refers to Minister of Justice; KHVM refers to Minister of Transport, Telecommunication and Water Management; KHVM-BM refers to [Common Decree of] Minister of Transport, Telecommunication and Water Management and Minister of Internal Affairs; KöM refers to Minister of Environmental Protection; KöM-EüM-FVM refers to [Common Decree of] Minister of Environmental Protection, Minister of Health and Minister of Agriculture and County Development; PM refers to Minister of Financial Affairs; SzCsM refers to Minister of Social and Family Affairs.)

Hungary is member of EU. See European Union Law Digest.

Note: This revision incorporates legislation through June 30, 2008.

1 INTRODUCTION

1.01 CURRENCY:

Legal currency of Republic of Hungary is Forint (HUF or Ft), which was introduced in 1946. Right to issue currency notes is vested in Hungarian National Bank, Inc. (Magyar Nemzeti Bank, hereinafter referred to as MNB), whose shares are owned by Hungarian State.

MNB issues official exchange rate of Ft which rate is calculated with respect to rate of 100% in EURO, as of Jan. 1, 2000. While Hungary is member of EU, [Euro] is not adopted yet.

Planned date set for adoption of [Euro] is 2011-2012.

See also category 3 Business Regulation and Commerce, topic 3.02 Banks and Banking; Foreign Trade and Commerce, topics Foreign Exchange, Foreign Investment.

1.02 GOVERNMENT AND LEGAL SYSTEM:

Republic of Hungary.

(Magyar Köztársaság). After common law style constitutional development of basic laws during more than ten centuries, first “written” constitution of country was adopted in 1949, by Act 1949:XX. It has been modified several times, basically in 1972, and fundamentally in 1989 and 1990. Changes since 1989 have resulted in essentially new constitutional structure. Hungary is unitarian, non-federative country; its territory is divided into 19 counties and capital city, Budapest, has county status. Constitution, as amended in 1989, is based on doctrine of separation of powers, where legislature is to make laws, executive is to carry them out and judiciary is to interpret them and to adjudicate disputes under law. Hungary is member of EU.

Parliament.

Legislative power is vested in Parliament (Országgyulés), consisting of one house. Members of Parliament are elected for four years by all Hungarian citizens of full legal capacity.

National Assembly holds two regular sessions annually. One running from Feb. 1 to June 15, other from Sept. 1 to Dec. 15. House also may hold extraordinary session or sitting which shall be convened on request of President of Republic, Government or one-fifth of Members of Parliament. When in session, National Assembly holds sitting weekly. Speaker of Parliament convenes meetings of House.

President of Republic (köztársasági elnök) is elected by two-thirds majority of Parliament for five years. President represents unity of nation and is safeguard of rule of law.

National Auditing Commission (Állami Számvevoszék) of Parliament controls national budget and state property. Its president and deputy presidents are elected by two-thirds majority of Parliament.

Independent Officials.

Attorney General (Legfobb Ügyész), upon proposal of President of Republic, is elected by Parliament and is head of state prosecutors offices. Ombudsmen are elected by Parliament for independent control of rule of law, one ombudsman is for ethnic minorities, one ombudsman is for Civil Right, one ombudsman (official designation: data protection commissioner) is for protection personal data and access to information of public interest and one ombudsman is for future generations and environment. For rights and duties of ombudsman for independent control of rule, see Acts 1993:LIX and 1993:LXXVII (both am'd several times).

Prime Minister is, on proposal of President of Republic, elected by Parliament. As head of executive branch, Prime Minister represents state and is chairman of Government, which consists of 12 ministers. Ministers are appointed by President of Republic, upon recommendation of Prime Minister. Foreign trade and investment falls under authority of Minister of Foreign Affairs and Minister of National Development and Economy. Government controls ministers, and some other authorities and bodies, of importance among them is Hungarian Privatization and State Holding Company (Állami Privatizációs és Vagyonkezelo Rt.). See also category 2 Business Organizations, topic 2.04 Corporations, subhead State Owned Enterprise.

Judiciary.

Constitutional Court is separated from ordinary judiciary. It has right to annul acts of Parliament and other laws if in contravention of constitution.

Supreme Court (Legfelsobb Bíróság) is highest regular court of justice in country, whose President, on proposal of President of Republic, is elected by Parliament. Vice presidents of Court, proposed by President of Court, are appointed by President of Republic. Judges, according to constitution, are independent, governed only by law and are appointed by President of Republic. See also category 6 Courts and Legislature, topic 6.01 Courts.

Bill of Rights.

Constitution incorporates rights adopted in UN Universal Declaration of Human Rights and further supplements them with social and economic rights of citizens. Freedom of competition and enterprise are constitutional rights, which can only be limited by special act, adopted in way otherwise necessary to amend Constitution.

Local Government.

Municipalities are governed by local self-government (helyi önkormányzat). Powers of local government are vested in representative body (képviselotestület) elected by citizens and resident aliens, who are residents thereof. Representative body, headed by mayor (polgármester) who is elected directly by citizens, instructs and overviews local administration. Police, water and environmental protection administration is centralized under ministries. County governments are of similar structure. For capital city and some other bigger cities special rules apply. (Act 1990:LXV as am'd several times).

Jurisdiction of local governments with regard to traffic and water administration, agriculture, cultural activities, public welfare, building administration, environmental protection, zoning, industry and trade, etc. are regulated by Act 1991:XX as amended several times and Gov. Decrees Nos. 19, 20 and 22 of 1992 as amended several times.

1.03 HOLIDAYS:

Legal holidays are Jan. 1 (New Year's Day), Mar. 15 (Anniversary of Independence War of 1848), Easter Monday, Whit Monday, May 1 (Labor Day), Aug. 20 (St. Stephen's Day), Oct. 23 (Anniversary of Revolution of 1956), Nov. 1 (All Saints' Day), Dec. 25-26 (Christmas Days).

1.04 OFFICE HOURS AND TIME ZONE:

Hungary is in Central European Time (CET) (GMT +01:00) zone. Office hours are generally from 9 a.m. to 5 p.m.

2 BUSINESS ORGANIZATIONS

2.01 AGENCY:

Hungarian law lacks exact equivalent to common law theory of agency. Agency-like relations are regulated by law of contracts. For principal's liability see category 5 Civil Actions and Procedure, topic 5.04 Damages.

2.02 ASSOCIATIONS:

Association (Egyesület) is not-for-profit organization (differentiated from “business association”; see topic 2.04 Corporations). As legal entity, it is separate from its members, who are not liable for debts of association. Main rules applying to its civil status are set forth in Civil Code (§§61-64), administrative rules are given by Act 1989:II on Freedom of Association, as amended several times. Although they are not-for-profit organizations, associations may perform additional for-profit activities, and certain profit therefrom will be free from taxation, if devoted to not-for-profit purposes. For-profit and not-for-profit income must be kept separately. Associations may not be of discriminatory nature. Association may be founded by its charter to be adopted by founding members, declaring some special not-for-profit purpose. Upon this charter association is to be registered with associations' register of County Courts. Association has to form its own governing body, which represents it. No preliminary or additional permit or license is required. Separate form of association is public association. (C.C. §65).

Political parties do not fall under legal notion of associations, mainly because of their political purposes; nevertheless, organizational rules applicable to them are analogous to those of associations. (Act 1989:XXXIII, as am'd several times). Act 1999:CXXI on chambers of economy provides special rules on such professional self-governing bodies.

2.03 COOPERATIVES:

Cooperatives were re-regulated by Act 2006:X on cooperatives. Provisions of Act apply to cooperatives established after Act entered into effect and also to existing cooperatives as from date of amendment of their Charter according to new regulation. Cooperatives failing to amend their Charter or transform into business company till June 30, 2007 shall be terminated without legal successor. Members of cooperative may be individuals and also legal entities. Number of legal entity members cannot exceed half of all members. Minimum number of promoting members is seven.

Establishment.

Founding General Meeting has to decide upon founding cooperative and shall adopt Charter (Alapszabály) thereof. Charter shall be public deed or countersigned by attorney at law or in-house legal counsel. Charter and other documents of procedural nature shall be filed with Firms' Register within 30 days of founding for registration and publication. Registration of cooperatives is, however, not only of declarative but also of constitutive nature, i.e. cooperative comes into being legally by decision of Court ordering incorporation (registration), after having carefully checked each foundation document. In case Court rejects registration of cooperative it shall cease its activity. Those who, prior to registration, proceeded in their own names but on behalf of cooperative, have joint and unlimited liability to obligations undertaken. Limitation or exclusion of liability vis-á-vis third persons is not effective. Such liability, however, terminates in case general assembly of cooperative subsequently approves contract.

Representation.

Chairman of Board of Directors or another member of Board as defined by Charter may each individually represent cooperative.

General Meeting consists of members of cooperative. General Meeting is to be called by Board of Directors 15 days before meeting and together with agenda, at least once a year. General Meeting shall be called if: (i) 10% of members or Board of Supervisors proposes meeting, indicating agenda; or (ii) if subject of resolution is in sole competence of General Meeting, and delay may endanger operation of cooperative or may harm any obligation of cooperative defined in law or in Charter.

Delegates' Meeting, Divided General Meeting.

If Charter stipulates, instead of General Meeting, either Delegates' Meeting (küldöttgyulés) or Divided General Meetings (részközgyulés) exercise power thereof.

Board of Directors (igazgatóság) of at least three directors and Chairman thereof is to be elected by members of General Meeting. One Managing Chairman is to be elected if cooperative has less than 50 members. Board (or Managing Chairman) is managing organ of cooperative, which exercises all power not vested in other bodies of cooperative.

Board of Supervisors (Felügyelobizottság) of at least three supervisors is to be elected by General Meeting. Chairman of Board of Supervisors is elected by and among members of Board of Supervisors.

Auditor is elected by General Meeting in case election of auditor is mandatory according to accounting rules, or if Charter so provides.

"Cooperative Bond".

Cooperative Bond (részjegy) certifies members' contribution, or undertaking thereto, to bond capital. Minimum bond capital is stipulated in Charter.

2.04 CORPORATIONS:

As of July 1, 2006 business corporations are regulated by Act 2006:IV (New Business Corporation Act). Hungary has implemented 2157/2001/EC Regulation and 2001/86/EC Directive regarding SE, relevant Hungarian Act is Act XLV of 2004 on Societas Europea, which is being effective since Oct. 8, 2004. Hungary also implemented 1435/2003/EC Council Regulation and 2003/72/EC Council Directive regarding SCE, relevant Hungarian Act is Act LXIX of 2006 on European Cooperative Societies, which is being effective since Aug. 18, 2006.

Hungarian legal notion of "business" (or translated literally: economic) corporations, as collective term, similar to German "Handelsgesellschaft", covers two groups of business entities. One substantially corresponds to American for-profit corporations, other to for-profit partnerships. Corporation-like "business corporations" are (as delineated in numbered subheads, infra): (1) Corporations Limited by Shares, (2) Company with Limited Liability, (3) Joint Enterprise, (4) Business Associations. Partnership-like "business corporations" are: (5) General-Partnership and (6) Limited Partnership.

Although cooperatives and state-owned enterprises are incorporated legal entities with liability to their capital, they are not enumerated under legal notion of "business corporations". Nevertheless, these kinds of business entities are corporations-in-fact, with some special rules concerning shareholders' rights.

Investors, domestic or foreign, private, corporate or public, may, in general, equally form and participate in corporations. As of Jan. 1, 1991, acquisition of foreign majority or unanimous foreign ownership in corporation is not subject of any approval, permission or license, not even that of exchange control. There are no differences between public and private corporations.

Foreign individuals are not exempt from withholding tax on dividends, unlike foreign corporations. (See category 22 Taxation, topic Taxes.) Foreign arbitration and, theoretically, foreign law clauses may be covenanted for in articles of incorporation.

Corporation may be formed for any lawful business purpose or purposes. Purposes, i.e. scope of activity, for which corporation is formed, must appear in articles of incorporation. Regardless of what is contained in articles of incorporation, legal capacity of corporation is unlimited (no ultra vires liability) i.e., contract beyond scope of stated corporate activity will not necessarily be invalid. Corporation has to be registered with Corporation Court within whose jurisdiction its seat is established; and also branch offices are to be separately registered, if located in some other county.

(1) Corporation Limited by Shares (Részvénytársaság; hereinafter referred to as

“Rt”) is corporation corresponding to U.S. M.B.C.A.'s notion of private, domestic for-profit corporations, to German “Aktiengesellschaft” or to French “Societé Anonyme”. Fundamental characteristic of Rt is, that it is separate legal entity, having existence separate from its shareholders, acting through its agents. Liability of Rt is limited to its own capital, i.e. its shareholders are not liable therefor, except that they are to contribute its shares' nominal, or if higher, issue value.

New Business Corporation Act distinguishes between public and private Rt. Rt qualifies as private corporation if its shares are not issued publicly. Rt qualifies as public corporation if its shares are issued publicly in part or in full.

Rt may be promoted by one or more natural or legal persons, who are supposed to act as incorporators, and usually are shareholders. In case of public Rt, registered capital cannot be less than HUF 20,000,000. In case of private Rt, registered capital cannot be less than HUF 5,000,000.

In case of private Rt shareholders must prepare Deed of Foundation.

Deed of Foundation (alapszabály) must contain (i) Company name and stated seat of corporation; (ii) name/company name, address/seat and registration number of shareholders; (iii) scope of activity (main activity and all those required to be listed in registry); (iv) duration of existence (which may be perpetual); (v) registered capital, contribution of shareholders, time and method of payment; (vi) procuration, way of signing for Rt; (vii) name and address of first senior officers (board of directors, unless there is no board of directors, only CEO); name and address of first auditor and supervisory board members if applicable, (viii) amount of stated capital, amount of cash contribution to be paid upon foundation, conditions for paying nominal and par value of; (ix) declaration of shareholders that they take over all shares and portion thereof; (x) classes, number, nominal or par value, way of issue (printed or dematerialized), (xi) number, name and address of first directors; (xii) number, way of calling of shareholders' meeting; way of exercise of voting rights.

In case of public Rt, upon promotion, shares are open for subscription. Subscription takes place in accordance with Formation Memorandum. Formation Memorandum (alapítási tervezet) must contain (i) Company name and stated seat of corporation; (ii) name/company name and address/registered seat of shareholders; name and address of senior officers (board of directors); scope of activity; duration of existence (which may be perpetual); (iii) statement about estimated registered capital; (iv) classes, number, nominal and par value, way of issue (printed or dematerialized) of shares (v) advantages, if any were warranted for promoters; (vi) assets of contribution in kind, if any, number of shares to be subscribed for, name, address of shareholder who contributed in kind, name, address of auditor who supervised appraisal of value of in kind contribution; (vii) way of procedure in case of oversubscription; (viii) minimum number of shares (in case of undersubscription); (ix) mandatory and non-mandatory cases of share-withdrawal; (x) way of convention of Forming Shareholders' Meeting; (xi) estimated costs of formation.

Oversubscription may be refused by promoters according to promotion or at first (Forming) Shareholders' Meeting. Within 60 days from successful subscription, first (Forming) Shareholders' Meeting is to be called. Before opening this Meeting subscribers must pay-in up to 25% of par value. Rest is due not later than one year from incorporation. In kind contribution shall be paid until filing registration to Court of Firms. Forming Shareholders' Meeting will adopt Articles of Incorporation. Articles of Incorporation must include same as Deed of Foundation.

Deed of Foundation and Articles of Incorporation are to be countersigned by attorney at law or legal counselor, i.e. notarial or court deed or record is not required. Original copy of Formation Memorandum shall be drawn up in public document or private document representing conclusive evidence, and any copies thereof must be certified by notary public.

Rt may be formed alone by sole shareholder. Sole shareholder Rt may also be developed by acquiring all shares by one person. In case all shares of public Rt are acquired by one person public Rt shall qualify as private Rt.

Business provisions may be incorporated into articles of incorporation or settled in bylaws, if adopted. Bylaws constitute contract either between Rt and its shareholders or among shareholders themselves. No special form is required for validity of bylaws or any contracts of that kind, unless it is part of articles of incorporation.

Articles of incorporation together with other required documents of procedural nature shall be delivered to Corporation Court (Cégbíróság) for filing within 30 days from adoption. Registration cost (duty and publication fee) for private Rt (like for Kft) is HUF 125,000; for public Rt is HUF 625,000. Rt may operate after signature of articles of Association or Deed of Foundation, however, “under registration” shall be added to corporate name until Court's resolution becomes effective registering corporation into Firms' Register. “Under registration” corporation may begin business-like activities only after application is submitted to Corporation Court as request for registration. Upon coming into force of Court's resolution registering corporation into Firms' Register, level of “de jure” existence is achieved. Same rules apply to “under registration” corporation, however, shareholders may not change, articles of incorporation or deed of foundation may not be amended, litigation may not be initiated for exclusion of any shareholder, dissolution or transformation of corporation may not be decided. In absence of Court's resolution, corporation must conclude its activities, may not assume further obligations and may not acquire further rights.

Shares created and issued by Rt may be of one or more classes, which classes may differ from each other as to right to vote, sharing profit, etc. Shares may be either “payable to bearer” or “registered by name” by nature. Regular share certificates, which are negotiable instruments, may be issued if stated capital is fully paid in. Dematerialized shares may be produced, if decided so by shareholders, instead of share certificate. Shares of public Rt may only be dematerialized shares. Dematerialized shares must be of “registered by name” nature. Shares of private Rt also must be of “registered by name” nature.

Articles of incorporation or deed of foundation may, defining specific conditions thereof, provide for issue of shares of “registered by name” nature which grant certain preferences to their holder over other classes of shares. Preference may relate to: (i) dividends; (ii) liquidation quota; (iii) voting rights; (iv) granting priority in assigning managing director, supervisory board member; (v) granting pre-emptive rights for shares of private Rt; and (vi) other preferential rights in accordance with other specific legislation.

Par value of preferred shares, in total, may not exceed 50% of stated capital.

Special registered shares may be issued with designation that these shares will be passed from original shareholder to public interest foundation or association, after period of time defined in articles of incorporation (“trust shares”). This public interest foundation or association usually serves interest of employees. Nevertheless, surplus difference between par value and market price of trust shares at moment of transfer of them to public interest foundation or association will be allocated to original shareholder. If this foundation or association is formed for benefit of more than 50 employees, dividend or any part of it might also be distributed to foundation or association, even before passing shares themselves.

If capital surplus, i.e. excess of net assets over stated capital, is converted to stated capital, 15% of total stated capital may be issued as “employee shares”. Employee shares may be transferred only to other employees or previous employees already retired. Specific restrictions on transfer of employee shares may be defined in articles of incorporation or deed of foundation.

Fixed interest rate shares may also be issued up to 10% of stated capital. For these shares, besides or instead of dividend, prefixed rate of interest is to be paid.

Redeemable shares may also be issued up to 10% of stated capital. Upon these shares shareholder has put option and Rt has call option with regards to redeemable shares.

Not exceeding 50% of stated capital, bonds of “registered by name” nature (profit sharing or not) may be issued with right to be converted into shares, whenever bondholder requests so (convertible bonds), or with option to subscribe for shares when issued in future (subscription bonds).

Private companies (Rt) shall not be entitled to subscribe for shares issued by company itself (own shares) while being founded. Unless otherwise prescribed in Company Act, private limited companies may acquire their own shares only if able to finance it from its assets other than of share capital.

Own shares may be acquired upon general meeting authorizing management board to acquire them with defined conditions. Prior authorization is not required (i)for acquisition of private limited company's own shares if acquired by way of court proceeding or non-judicial proceedings for settlement of any legitimate claim of company, and (ii) acquisition of private limited company's own shares if acquired in connection with transformation. Upon acquisition of own shares as described above, private limited company shall alienate part of these shares which are in excess of ten percent of share capital within three years following date on which they were acquired, or shall retire them by way of decreasing share capital

Where private limited company has acquired its own shares illegaly, shares involved must be alienated within one year of date on which they were acquired, or company shall retire them by way of decreasing share capital.

Rt, except sole member Rt, may purchase its own shares, nevertheless these shares must be either sold or redeemed and canceled within one year.

In general, increase of stated capital may occur in four ways: (i) By issuing new shares, (ii) by converting surplus to stated capital, (iii) by issuing employee shares, (iv) by converting convertible bonds to shares. When issuing share (részvény) privately, Articles of Incorporation, if increasing capital resolution on increase, (ISIN) code and draft text of share and preliminary declaration of intent of potential subscribers to take over shares must be submitted to Corporation Court and State Supervision of Financial Organizations (http://www.pszaf.hu). In case conditions of private issue are not satisfied, rules of public issue shall be applied. In case of public issue, prospectus must be prepared and, with few exceptions, investment firm must be entrusted to prepare and execute public issue. (See also category 3 Business Regulation and Commerce, topic 3.15 Securities.) In each case Shareholders' Meeting is to decide, but Board of Directors if authorized in Articles of Incorporation also has right to increase stated capital by converting surplus to stated capital or by issuing new shares. All shares must be fully paid before issuing new ones, except if issuance is for contribution in kind. Shareholders' Meeting may reduce stated capital by redemption of shares owned by Rt itself, if any; or by determining reduced par value (exchange, overprinting or fusioning of shares); or by redemption and cancellation of shares (with obligation of fusioning of shares); or by redemption and cancellation of shares (with obligation to refund). Public notice of intention to adopt resolution reducing stated capital must be given twice. After that, within 30 days from publishing second notice, creditors may present claims against Rt to meet its obligations even if not yet due, or may demand guaranties. Before filing reduction in stated capital, Court will require Rt to perform settlements with creditors, who presented claims. Stated capital must be reduced if Rt's assets are less than two-thirds of stated capital.

Shareholders' Meeting is basic forum for shareholders to exercise their property rights. Unless shorter period is required by articles of incorporation, Shareholders' Meeting is to be called at least annually. In case of public Rt, Meeting to be called upon published notice and agenda, which are to be served not later than 30 days before Meeting, in case of private Rt, notice and agenda are to be sent by mail to shareholders not later than 15 days before Meeting. Upon request of shareholders representing not less than 10% of stated capital, Meeting must be called within 30 days. Shareholders' meeting may be held via electronic equipments, providing full conversation and debate between shareholders, and providing possibility to recognize shareholders. If required by members to hold such meeting, articles of association shall provide for possibility and set forth detailed rules. Shareholders may vote in classes, in person or by proxy, unless articles of association requires personal attendance. Shareholder may enter into contract with investment firm to give general power to represent shareholder in capacity as defined in such contract. Investment firm then as general proxy is registered in book of shares and authorized to act on behalf of shareholder (see also category 3 Business Regulation and Commerce, topic 3.15 Securities). Majority constitutes quorum, unless Act, articles of incorporation or bylaws require more. According to Act three-fourths quorum is required to amend articles of incorporation, to decide on change of form of operation of Rt, to decide on merger, consolidation or voluntary dissolution or any variety thereof, to decide on privileges and limitations of series of shares, to decide on transformation of classes or types of shares. These three-fourths quorum items, and voting for directors, members of Supervisory Board, auditor, voting for balance sheet (which includes profit and loss statement), distributing profit, transformation of type of shares, transformation of printed share into dematerialized share, distribution of dividend advance, issuing of convertible and subscription bonds, increase and reduction of stated capital, exclusion of exercising right of preference subscription, decision of acquisition of own shares and voting for acquisition of treasury shares are subject to decision of Shareholders' Meeting. When limiting any rights of classes of shares, concerned shareholders must give consent as set forth by Rt's Deed of Foundation or Articles of Incorporation. Decisions of Shareholders' Meeting are to be delivered to Corporation Court within 30 days. Each shareholder, director or member of Supervisory Board may bring action against Rt, demanding Corporation Court supervise any unlawful decision of Shareholders' Meeting.

Board of Directors, consisting of not less than three and not more than 11 directors, is to be elected by Shareholders' Meeting for not more than five years. Directors may be reelected at any time. Board or any director may be removed by Shareholders' Meeting with or without cause at any time. Unless otherwise stated in articles of incorporation, directors jointly, i.e. Board of Directors as body, manage business and act on behalf of corporation. There is no citizenship or residence requirement for act on behalf of corporation. There is no citizenship or residence requirement for directors, but articles of incorporation or bylaws may prescribe such requirements or establish other qualifications. Decision making process and operational procedure of Board of Directors must be laid down in charter of Board and is adopted by Board itself. Board appoints its chairman or president, and may remove her without cause. For private Rt's possibility is provided not to elect Board of Directors, but single executive officer (general director, CEO) (vezérigazgató) executes rights of Board of Directors.

Supervisory Board is required for all public Rt's, except for those having single management system (“one-tier system”), and for those private Rt's where shareholders keeping at least 5% of voting rights require to have supervisory board. It consists of three to 15 members (supervisors), who must be elected by Shareholders' Meeting. Supervisory Board members may be elected for different time period than managing directors of company, and if managing directors are elected for indefinite period than Supervisory Board members may also be elected for indefinite period. Position of members is renewable. Each member of Board may be removed with or without cause at any time. If annual average number of full-time employees exceeds 200, one-third of supervisors are to be appointed by factory council. Supervisor shall not be director or auditor of Rt. There is no citizenship or residency requirement for supervisors, but articles of incorporation or bylaws may prescribe such requirements or establish other qualifications. Supervisory Board elects its chairman, and with consent of Shareholders' Meeting sets forth its procedural charter. Supervisory Board, as body or through its members, supervises management and operation of business, and if it finds it necessary, may employ experts. Supervisory Board prepares reports to Shareholders' Meeting, and if deemed necessary, Supervisory Board may call Shareholders' Meeting.

For public Rt's possibility is provided not to elect separate managing and supervisory body, but only single management (igazgatótanács) responsible for both management and supervisory issues. (“One-tier system”).

Deed of foundation of private Rt's may provide that election, withdrawal and stating remuneration of managing directors, also approval of some resolutions fall in competence of Supervisory Board.

Auditor.

At least one auditor is to be elected by Shareholders' Meeting from among individuals or companies qualified and licensed as auditors in Hungary. Auditor may not be director or employee of Rt. Apart from this qualification, same rules apply to election of auditor, as apply to directors. Auditor has to control accounting and corporate finance, and is to consolidate annual balance sheet, as condition for its adoption.

Consolidation, merger, split-up (with dissolving parent-corporation), transformation from one “business corporation” form to another, or voluntary dissolution of Rt may be decided with three-fourths quorum of Shareholders' Meetings, and generally rules of capital reduction are applied, if corporation would be less capitalized after.

If member of private Rt. after foundation acquires 75% of voting rights in Rt (“qualified majority”), must report such acquisition to Firm's Register within 15 days of date of acquisition. Failure of reporting acquisition results in unlimited liability if, in case of bankruptcy, Rt's assets are not enough for creditors' claims. If, as result of dominant corporation's influencing interest amounting to qualified majority, controlled Rt pursues permanently detrimental business policy, and as consequence of this, assets are not enough for creditors' claim, and upon legal suit initiated therefor, unlimited liability may be established by court. These special rules and additional rules apply in case of private Rt and Kft.

Strict rules are in force governing acquisition of interest in public Rt's: Act 2001:CXX provides major regulation.

To be dissolved, corporation has to be liquidated by person or persons, possibly other than directors, appointed by Shareholders' Meeting or, if not, by Court. Liquidator is not entitled to conduct new business, being rather trustee for purpose of winding up affairs and discharging Rt debts. Remaining assets may be distributed only after deletion of corporation from firm registry.

Unless otherwise prescribed in articles of incorporation, remaining assets are to be distributed among shareholders in proportion to their shares and according to classes.

Investment firms may only be created in form of Rt consisting of shares registered by name or in form of branch office. Commodities exchange agent corporations may only be created in form of Rt, Kft, cooperative or in form of branch office. Banks may only be formed as Rt. See also category 3 Business Regulation and Commerce, topics 3.04 Brokers, 3.15 Securities.

(2) Company with Limited Liability (Korlátolt Felelosségu Társaság, hereinafter referred to as Kft) is another form of business corporation, corresponding to company under Limited Liability Company Act of 1992 of Delaware (c. 18), German “Gesellschaft mit bescränkter

Haftung", or French "Societé à Responsabilité Limitée". Although Kft has no precise equivalent in American law, it can be characterized as simpler form of for-profit corporation. Liability of Kft is limited to its registered capital, i.e. liability of members corresponds to that of shareholders in Rt. In other words, and only for purpose of explanation, Kft can be described as limited partnership of only limited partners, without general partner.

Even one member is enough to form Kft (member or partner is "quota holder" of Kft, corresponding to German "Gesellschafter" or French "associé"). Registered (authorized) capital cannot be less than HUF 500,000. At least 50% of all in-cash contribution must be paid-in until filing registration of Court of Firms, remaining of in-cash contribution is due as defined in articles of association but not later than one year after incorporation. Non-cash contribution shall be paid as defined in articles of association, but not later than three years after incorporation. If non-cash contribution reaches 50% of registered capital, all shall be paid-in at time of incorporation. In case of sole member Kft, whole registered capital is due immediately.

Ownership rights of each member towards company are embodied in "business parts" (Quota) (corresponding to "limited liability company interest" under Delaware law, or to German "Geschäftsanteil"), which may differ in value from one another, but each must be of par value not less than HUF 100,000. (Nevertheless, business parts may be owned jointly.) Business parts, as such, are subject to transfer, unless prescribed otherwise in articles of incorporation. Members have preemptive rights over business part for sale to others. Multi-member Kft, authorized by vote of three-fourths quorum of Members' Meeting, may purchase its own business parts (which may not exceed one-third of all business parts) represent no right to vote and must be sold or redeemed in one year. Business part is not kind of security, i.e. no shares may be issued on stated capital or to represent owners' rights, and if issued, will be invalid.

To form Kft, members conclude articles of incorporation corresponding to certificate of formation under Delaware law (társasági szerzodés) or instead, sole member issues charter of company, which is to be countersigned by attorney at law or legal counselor, i.e. neither notarial nor court deed or record is needed. For limited liability companies registration form is provided as appendix of Act 2006:V ("Company Registration Act"). If using form, registration procedure is shorter. Articles of incorporation, together with other documents of procedural nature, must be delivered to Corporation Court for filing, within 30 days from their adoption. Effect of incorporation is same as with Rt.

Articles of incorporation must contain: (i) Company name, (ii) seat of Kft, (iii) name/company name, address/seat,/registration number of members, (iv) scope of activity (main activity and all those required to be listed in registry), (v) registered capital, business parts of quota holders, time and method of payment; (v) procuration, way of signing for Kft, (vi) name and address of first senior officers (managing directors, directors); company name/name and registered seat/address (and registration number) of first auditor and supervisory board members if applicable, (vii) duration of existence (if definite), (viii) capital contribution of each quota holder, (ix) voting rights at Members' Meeting (which do not necessarily correspond to proportion of business parts), procedure to resort to in case of tie votes. If members agree on following dispositions, they are also to be settled in articles of incorporation: contribution in kind and its value; additional services provided by members besides stated capital; authorization of Members' Meeting to prescribe additional payments; business parts securing distinct membership rights; exclusion or restriction on transferability of business parts, and making transfer of such parts subject to Kft; in case of succession, exclusion of devolution or division of business parts; permitting redemption of business parts; employees' business parts and preferred rights attached thereto; rules on quorum and method of passing resolutions; rules of calling of members meeting at place other than seat of Kft; value limit above which transactions fall into exclusive competence of members meeting; distribution of after-tax profits, and proportion of assets due to members upon termination of Kft; authorization of all members for management and representation; limiting managing director's capacity to represent company; establishment of Supervisory Board and appointment of auditor, if not otherwise obligatory; in case of initial capital increase, method of exercising preferred rights.

Members' Meeting is governing body of Kft and forum for members to exercise their property rights. Unless otherwise required in articles of incorporation, it is to be called annually, similar to Rt's Shareholders' Meeting, with exception that notice and agenda need not be published. Members' Meeting may be held via electronic equipments, providing full conversation and debate between quota holders, and providing possibility to recognize quota holders. If required by members to hold such meeting, articles of association shall provide for possibility and shall set forth detailed rules. Unless otherwise required by law or by articles of incorporation, majority constitutes quorum. Decision on some subjects belongs to discretion of Meeting as of right, most notably decision on balance sheet, increasing and reducing registered capital, distribution of profit, spin-off and redemption of business parts, expelling member, voting for directors, supervisors and auditor, and removing them; generally contracts with members or directors or contracts concluded with members or their close relatives; claims against promoting members, directors and supervisors; (three-quarters quorum) voting for amending articles of incorporation, dissolution, transformation to another corporation form, consolidation, merger and spin-off decisions on establishing other corporations. Members, if there is no dissent among them, may in writing decide these matters without formal Members' Meeting, but only if articles of association provides possibility of written resolutions. Member, managing director or supervisor may sue concerning any unlawful decision of Meeting.

Managing director or directors are to be elected by Members' Meeting for period of not more than five years, and may be reelected. As in case of Rt, there are no citizenship or qualification requirements for directors. Meeting can remove directors, with or without cause, at any time. Managing director and directors, unless otherwise required in articles of incorporation, jointly manage business and act on behalf of company.

Supervisory Board.

If annual average number of full-time employees exceeds 200, Supervisory Board must be elected.

Auditor must be elected if Accounting Act orders company to use accounting services or if articles of association provides for election.

Rules to be applied to Supervisory Board and auditor are similar to those of Rt. Rules to protect creditors' interests, similar to those described for Rt, apply to procedures of dissolution, reduction of stated capital or any restructuring with same effect.

(3) “Nonprofit Public Limited Liability Company” (Nonprofit Korlátolt Felelosségu Társaság, hereinafter referred to as Kht) is not-for-profit, limited liability company with legal entity, established for serving public purposes and interests. Kht may perform for-profit activity only for supporting its nonprofit activity but its profit may not be distributed. Rules applicable to Kft shall be applied to Kht with certain exceptions. Public benefit organizations (Közhasznú Társaság) may not be established after 1 July 2007. Public benefit organizations shall have option to amend their memorandum of association within period of two years following July 1, 2007 to continue operating in form of nonprofit private limited liability companies (Nonprofit korlátolt felelosségu társaság), or may convert into other forms of nonprofit business associations or terminate without succession.

(4) “Business association” (Egyesülés) is not-for-profit, non-limited (full and joint) liability corporation of entities for lobbying, organizing and coordinating joint activities in furtherance of their business. Although legal entity, its financing and liability rules are similar to those of general partnership. As form of business corporation it is of less importance.

(5) “Joint enterprise” (Közös Vállalat) is for-profit, non-limited liability corporation of entities, being separate legal entity. Its members are liable for its debts in proportion to their contributions. Although still existing in relatively great numbers, as surviving corporate form, it is of declining importance. After July 1, 2006, new joint enterprises may no longer be established.

(6) General partnership (Közkereseti Társaság, hereinafter referred to as Kkt) is in Hungarian law qualified as business corporation, nevertheless, it widely corresponds to American notion of general partnership, as defined by U.S. U.P.A. §6; modelled after German “Offene Handelsgesellschaft” and functionally similar to French commercially active “Societé en Participation”. As far as same basic rules apply to all forms of business corporations, these rules apply to General and Limited Partnerships (e.g. to capitalization, regulated procedure for increase and reduction of stated capital, arbitration, necessity of countersigned articles of incorporation, duration, court registration and supervision, balance sheet, appraisal, taxation, tax allowances, liquidation, etc.).

In general, partnership is association of two or more individuals or entities to carry on business for profit as co-owners. (Individuals may be unlimited liability [general] partners or members only in one business corporation.) Although not separate legal entity, nevertheless, in contractual relations partnership may be party to contracts, and in its name it may be entitled and obliged, own property, and sue or be sued (possibly together with its partners). Partners are jointly and severally liable for debts not covered by assets of partnership. Incoming partner, who joins established partnership, will be liable for obligations already existing only to extent of her supplied capital. Retiring partner will not be liable for debts incurred after retirement. If license is required (e.g. driving license for truck driving) for conduct of business, one of partners or employees must have it. Personal activity of each partner is presumed; in transactions they all are agents for partnership unless otherwise prescribed in articles of partnership.

Articles of Partnership.

Partnership is to be created by articles of partnership (társasági szerzodés; i.e. partnership agreement or contract). For its formalities see catchline Articles of Incorporation in subhead (2) Company with Limited Liability, supra. Same basic rules apply as with Kft. Partnership must be capitalized as much as necessary, i.e. there is no legal requirement for minimum amount of registered capital or for procedures for its distribution. Partners decide transactions and matters of partnership, generally by vote of majority of quorum. Law requires unanimous quorum for amending articles, for transactions beyond scope of usual activity, for decision on transformation into other form of business corporation, and for decision on dissolution of partnership. Removal or withdrawal of any partner does not affect dissolution of partnership.

(7) Limited partnership (Betéti Társaság, hereinafter referred to as Bt) differs from general partnership in that it has one or more limited partners, whose liability to creditors of partnership is limited to amount invested or payable as registered capital by her in partnership. Bt corresponds to American notion of limited partnership, as defined by U.S. U.L.P.A. §1, German “Kommanditgesellschaft” or French “Societé en Commandite Simple”. Apart from limited partners' liability and fact that limited partners have no right to represent or manage Bt, rules applying to Bt are those of Kkt.

State Owned Enterprise.

For practical reasons state owned enterprises (hereinafter referred to as SOE) may be defined as specially formed and operated for-profit corporations owned by state. (Act 1977:VI on State Enterprises, as am'd several times). There are two basic forms of SOEs: enterprises under direct administrative control (over 30% of SOEs) and those that are not directly controlled (over 50%). Modifications of Act on SOEs in 1984-1985 abolished direct state control over majority of SOEs. In short, state is legal owner of both kinds of enterprises, but in case of direct control SOEs state exercises ownership rights, while in case of nondirect control SOEs special management body of enterprise itself exercises these rights.

Direct Controlled SOEs.

There are two types of direct controlled SOEs: public enterprises (utilities), and other enterprises. Decisions over transforming separate departments (shops) within enterprise into legally separate entities, dissolution of enterprise, and merger with other enterprises are made by founder (appropriate ministry).

Nondirect Control SOEs.

There are two types of nondirect control SOE: enterprises led by enterprise council (of employees, managers and one member appointed by founder), and enterprises led by employees' representative body (characteristic of smaller enterprises). Decisions over transformation are within authority of enterprise council or representative body.

Since Jan. 1, 2008, management of national assets is performed by state through National Asset Management Council (Nemzeti Vagyongazdálkodási Tanács), which is governing body of Hungarian National Asset Management Zrt (Magyar Nemzeti Vagyonkezelo Zrt). (Act 2007:CVI).

Change of corporate form within and among business corporations is possible, if special requirements of corporation to be formed by transformation are fulfilled. In interest of creditors, transformation has to be duly published and according to nature of transformation, change in capitalization rules of capital reduction apply.

2.05 FOUNDATIONS:

Foundations (Alapítvány) (§§74/A-74/G C.C.) are civil law entities.

Foundation may be formed for any long-term public interest, charitable, or religious purpose by charter of foundation, executed by founder or founders, which is subject to court registration. Foundation may commence its activity only when court decision on registration becomes final. Purpose of foundation is to be set forth in its charter, and unless governing body of foundation (usually curatorium) is established in charter, court will appoint one. In case of dissolution, assets of foundation are to be distributed for purpose established in charter, or if there is none, to another purpose which is similar to that of foundation.

Donations to incorporated foundations or for public interest purposes can be deducted only if foundation is registered by tax authority as receiver of tax deductible donations, i.e. they serve following purposes: curing/prevention of disease, scientific research, environmental protection, protection of monuments, culture, education, student or popular sport, religion, protection of public order or security, or above mentioned purposes on behalf of old or disadvantaged people, national and ethnic minorities in Hungary, ethnic Hungarian groups abroad, or asylum-seekers. Donations serving acquisition or promoting predetermined financial advantages are excluded.

2.06 PARTNERSHIPS:

Commercial partnerships, i.e. General and Limited Partnerships, are discussed under topic Corporations. (There is no for-profit “silent or secret partnership”, like “Stille Gesellschaft” in German law.)

Not-for-profit partnership (corresponds to German “Bürgerliche Gesellschaft”, or French noncommercial “Societé en Participation” ``polgári jogi társaság'') is regulated by §§568-578 of Civil Code. It is voluntary association of persons, not considered separate legal entity, and may be organized by agreement written or oral, for purposes other than for profit. All partners are classified as general partners, having unlimited liability. For construction association and common law marriage, partnership rules are to be applied.

3 BUSINESS REGULATION AND COMMERCE

3.01 ADVERTISEMENTS:

Advertisement activities are regulated by Act 2008:XLVIII on Advertising Activities. Advertisement Act applies to advertisers, advertising service providers and publishers of advertising in connection with their commercial advertising activities, to sponsorship and to codes of conduct applied in connection with these activities. According to Advertisement Act, commercial advertising means any form of communication, information or making of representation in any form with aim or having direct or indirect effect of promoting supply of goods of fungible nature that are capable of being delivered, including natural resources that can be utilized as capital goods, including money, securities and financial instruments (hereinafter referred to collectively as ``product''), and services, immovable property, rights and obligations (all of above hereinafter referred to collectively as ``goods''), or in connection with this objective, representation of name, trade mark or activities of producer of goods or provider of services. Text of advertisements, including slogans but with exception of corporate names and indications, as well as goods or service marks, announced in printed media published in Hungarian, or in Hungarian language radio or television program, or on outdoor advertisement media, shall be indicated in Hungarian language independently from method of announcement. This requirement shall be deemed to be fulfilled if, in addition to foreign text, Hungarian equivalent thereof is also indicated in same advertisement at least in same measure and perceptibility as such foreign text. (See Act XCVI of 2001.) Other rules in connection with advertisements: Act 2008:XLVII on Prohibition of Unfair Business-to-Consumer Commercial Practices, Act 1997:XI on Protection of Trademarks and Geographical Indications, Act 1999:LXXVI on Copyright.

General Restrictions.

Advertisement Act prohibits advertisements which (i) Generate violence or develop behavior which is harmful to personal or public safety; or (ii) develop behavior which is harmful to environment and nature (iii) would jeopardize children's physical, mental or moral development; (iv) are addressed to children under 18, and which may have negative influence on physical, intellectual or moral development of children or juveniles including in particular advertisements which show violence and situations with sexual emphasis (v) which show children or juveniles in dangerous or violent situations or in situations with sexual emphasis (vi) are pornographic advertisement. (In case of advertising on sexual goods or inside of sex shops, pornographic advertisement, advertisement of any sexual services, and goods are not prohibited.) Advertisement Act prohibits hidden and consciously non-perceptible advertisements and advertisements regarding goods of which production or trade is illegal. Advertisement Act prohibits misleading advertisements. Comparative advertisement is prohibited unless it complies with various provisions of Act.

Specific Restrictions.

Among others, advertisement of weapon, ammunition and explosive or other substance which are harmful to public is prohibited, except for professional purposes as defined by Act. Advertisement Act prohibits advertisement (i) of dangerous dogs and animal fight, (ii) of human organ and tissue for any consummation, (iii) of abortive treatment (including tools and institutions). Advertisement of medicines available in pharmacies without prescription and curative products which do not qualify as medicines is permitted under conditions. Advertisement on medicine may not be announced if it is intended for children or falls into other restrictions defined by Act. Regarding advertising of medicines see also EüM (Minister of Health) Decree No. 3/2009 (II.25).

Direct or nondirect advertisements of tobacco products are prohibited except advertisements (i) to distributors for professional purposes; (ii) in publications printed or issued and to be marketed mainly outside of Hungary (iii) at separated sales locations in shops as described by Act. In connection with alcohol products, New Advertisement Act prohibits advertisement of such products which (i) is for children under 18; (ii) displays children under 18; (iii) encourages excessive alcohol consumption. (See Act 2008:XLVIII on essential conditions of business advertising §18.) It is prohibited to publish any advertisements of alcohol products (i) on cover-page of publication (on opening page or home page); (ii) in theaters, movie-theaters before 8 o'clock p.m., and immediately before, immediately after or during any performance which is for children under 18; (iii) on toy and package thereof; and (iv) in educational or public health institution, and within 200 meters of its entrance on outdoor advertising media.

Advertisement Act prohibits advertisement related to gambling operations addressed to children under 18. Advertisement related to gambling operations is prohibited to be published in any printed matter that is primarily targeted to children and juveniles.

It is prohibited to advertise burial services described by Act. (See Act 2008:XLVIII on essential conditions of business advertising §22.)

Consumer Protection Supervision (regarding medicines National Institute of Pharmacy [OGYI] as well) controls advertising activities. Supervision proceeds against such persons who violate provisions of Act. If Supervision declares that illegality has occurred, it may order to cease illegal status, forbid to pursue illegal activity, and impose fine on person being in breach.

3.02 BANKS AND BANKING:

As of Jan. 1, 1987 Hungarian National Bank, Inc. (Magyar Nemzeti Bank Rt.) is regulated as Western-style central banks are. Pursuant to successive reforms, commercial domestic banks, banks with foreign participation and banks with unanimous foreign ownership have been established.

As of Jan. 1, 1997 Act 1996:CXII as am'd several times, came into force on credit institutions and financial enterprises (jointly: ``financial institutions''; pÉnzÜgyi intÉzmÉnyek), harmonizing with EU rules. Act 2001:LVIII ensures that special provisions applicable to Hungarian National Bank as central bank are also harmonized with EU regulations.

Core financial services are activities pursued in business-like way, with either Hungarian Forint or other foreign currency or exchange:(i) Collection of deposits and acceptance of other repayable monetary instruments from general public in excess of equity capital; (ii) credit and loan operations; (iii) financial leasing; (iv) financial transaction services; (v) issuing electronic money and cash-substitute payment instruments and performing services related thereto; (vi) providing surety bonds and bank guarantees, as well as other banker's obligations; (vii) commercial activities in foreign currency, foreign exchange - not including currency exchange activities - bills and checks on own account or as commission agents; (viii) intermediation of financial services (agency); (ix) account management services, safety deposit box services; (x) credit reporting services; (xi) money transmission services.

Non-core financial services are activities pursued in business-like way, with either Hungarian Forint or other foreign currency: (i) exchange; (ii) clearing operations (clearing transactions); (iii) money broking; or (iv) financial broker service.

Credit institutions grant credits and loans and collect deposits or accept other repayable funds from public (except issuing public bonds). Collection of deposits and acceptance of other repayable funds from public exceeding own capital without bank or state guarantee, as well as money transmission services, unless otherwise regulated by law, issuance of cash substituting payment instrument and related services, with certain exception, and money exchange activity may only be performed (with exceptions) by credit institutions. There are three types of credit institutions defined in Banking Act: (i) banks; (ii) specialized credit institutions; and (iii) credit unions.

Banks are credit institutions which accept deposits and other repayable funds, exceeding own capital, from public, grant credit and loans, and pursue money transmission services in business-like way. Only banks may be authorized to pursue all core financial services.

Specialized credit institutions (szakosított hitelintézet) may operate in accordance with separate legal rules but may not be authorized to perform all of core financial services. Separate legal rules are already in force on housing savings banks (lakástakarékpénztár) (Act 1996:CXIII as am'd several times), on mortgage-management corporations (jelzálog-hitelintézet) (Act 1997:XXX as am'd) on Hungarian Export-Import Bank Corporation (Act 1994:XLII) and on Hungarian Development Bank (Act 2001:XX).

Credit unions (szövetkezeti hitelintézet) are institutions which may not pursue certain financial service activities and they may pursue certain other financial service activities in HUF only.

Financial enterprises are: (i) Financial institutions that perform one or more financial service activities except those which may only be performed by credit institutions; (ii) financial holding companies; and (iii) clearing houses for credit institutions. Banks and specialized credit institutions may only operate as corporations limited by shares (részvénytársaság) or branch offices, credit unions as cooperatives (szövetkezet) and financial enterprises may operate as corporations limited by shares, branch offices, foundations or cooperatives).

Banks may be established with paid-in capital of at least HUF 2 billion. Specialized credit institutions may be established with minimum capital specified by applicable separate regulation. Credit unions may be established with paid-in capital of at least HUF 250 million. Financial institutions except financial holdings and clearing houses for credit institutions may be established with paid-in capital of at least HUF 50 million. Special rules apply to branch offices. (See Act 1996:CXII §§9-10.) Branch office of third-country credit institution may be established with minimum of HUF two billion in endowment capital, unless otherwise prescribed by law. Financial holding companies may be founded with at least HUF two billion in subscribed capital. (§9).

State Supervision on Financial Organizations (Pénzügyi Szervezetek Állami Felügyelete) controls operation of financial, banking and insurance market. Authorization of financial service activities is mainly in competence of Supervision, while Hungarian National Bank takes part in authorization as well.

Special rules apply to prudent operation, owners, managers and employees, secrets, accounting, representations, insolvency, outsourcing and consumer protection. Hungarian financial legislation introduced regulation on money laundering. (See 2007:CXXXVI on prevention and combating of money laundering and terrorist financing.).

Other rules in connection with banking: Gov. Decree No. 47/1997 (III.12) on general terms and conditions of housing savings banks; Gov. Decree No. 41/1997 (III.5) on calculating interest rate and publication thereof; Gov. Decree No. 250/2000 (XII.24) on special accounting regulation for credit and financial institutions; and PM (Minister of Financial Affairs) Decree 12/2002 (II.20) on fees payable to State Supervision on Financial Organizations.

See also topic 3.15 Securities.

3.03 BILLS AND NOTES:

See topic 3.06 Commercial Paper.

3.04 BROKERS:

According to Act CXXXVIII of 2007 (on investment firms and commodity dealers, and on regulations governing their activities; with effect on Dec. 1, 2007), investment firm shall mean any legal person whose regular occupation or business is provision of one or more investment services to third parties and/or performance of one or more investment activities for consideration by authorization granted under this Act, exclusive of what is contained in Section 3 of Act. Investment firms may only operate in form of public limited companies or branches, and commodity dealers may only operate in form of public limited companies, private limited-liability companies, cooperative societies or branches. (§16).

See also topic 3.15 Securities.

3.05 COMMERCIAL LAW:

Commercial law is regulated by Act 2005:CLXIV. Major topics of Act are: (i) General conditions of commercial activity; (ii) business hours; (iii) regulations applicable for commercial entities having significant market power; (iv) participation of interest representation organizations; (v) oversight of trading activities and legal consequences. Act 1875:XXXVII on Commercial Code is in force only with respect to promissory notes. Warehousing is governed by Act 1996:XLVIII as amended several times. For-profit corporations are regulated by Act IV:2006. Private entrepreneurs are governed by Act 1990:V (as am'd several times). These acts seem to be stable, governing commercial matters liberally.

See also topic 3.13 Monopolies, Restraint of Trade and Competition; categories 2 Business Organizations, topic Corporation; Foreign Trade and Commerce, topic Foreign Trade; Treaties and Conventions, topic Treaties and Conventions.

3.06 COMMERCIAL PAPER:

Commercial papers are drafts or bills of exchange (váltó), checks (csekk), several forms of certificates of deposit (letéti jegy, kincstárjegy) and several “promissory” notes (takarékbetétfajták, szövetkezeti részjegy, célrészjegy), regulated separately by types.

Both sight and time drafts are commonly used. Bank drafts (bank checks) and cashier's checks are used primarily in international transactions. Certificates of deposit and notes vary concerning negotiability and interests.

See also topics 3.02 Banks and Banking, 3.15 Securities.

3.07 COMMERCIAL REGISTER:

All business entities, including business partnerships, must be, and even private entrepreneurs may be, registered in one of Firms Registers (Cégjegyzék) held and maintained by Corporation Courts (Cégbíróság), which are organized within County Courts. Registration is not only of declarative, but with some exceptions, of constitutive nature, i.e. corporations or other business entities come into being by decision of Court ordering their incorporation (registration) after having carefully checked corporate documents. Business corporations may begin operation after signing of articles of incorporation (contract of association or deed of foundation), however, “under registration” (bejegyzés alatt) shall be added to corporate name until Court's resolution becomes effective registering corporation into Firms' Register and “under registration” corporation (elotársaság) may begin business-like activities only after application is submitted to Corporation Court as request for registration. Upon coming into force of Court's resolution registering corporation into Firms' Register, level of “de jure” existence is achieved. Same rules apply to “under registration” corporation as “de jure” corporations, however, in case of “under registration” corporations, shareholders or members may not change, articles of incorporation or deed of foundation may not be amended, litigation may not be initiated for exclusion of any shareholder or member, dissolution or transformation of corporation may not be decided. In absence of Court's resolution, corporation must conclude its activities, may not assume further obligations and may not acquire further rights.

Apart from identification data, main business information must be registered, including names and addresses of agents.

On request Corporation Court issues certificate of existence (similar to that of U.S. MBCA §1.28; “cégkivonat”), which is public document containing most important data concerning firm. (See Act 2006:V, as am'd several times.)

For patent and trademark registering, see category 18 Intellectual Property, topics 18.02 Patents, 18.03 Trademarks.

Documents Required for Registering Company.

For forms of companies, see category 2 Business Organizations, topic 2.04 Corporations.

I. General Requirements (Regardless of Form of Company), in case any missing, registration is rejected without additional filing.

(1) Completed registration request form. (2) Articles of Incorporation (articles of association, deed of foundation) of company, and, if modified, restated version thereof. (3) Resolution of supreme body. (4) License for establishment, if applicable. (5) Copy of decision on name reservation, if applicable. (6) Where so prescribed by specific other legislation, in case foreign legal person member is involved, company extract not older than three months with official translation, or certification and official translation that legal person is duly registered in accordance with its own jurisdiction, and official document proving right of representation. (7) If delivery agent had been appointed, documentation evidencing authorization and acceptance. 8) Declaration of acceptance from officers. (9) If auditor company had been appointed, declaration of acceptance of auditor personally responsible for auditing. (10) In case real estate is involved as in kind contribution, title deed of real estate not older than three months. (11) Power of attorney. (12) Certification of payment of duty and publication fee. (13) Declaration regarding VAT.

II. Special Requirements for Public Rt's.

(1) Formation Memorandum, (2) brochure approved by State Supervision on Financial Organizations, (3) form for subscription of shares, (4) proof of publication of invitation for forming general meeting, (5) minutes and attendance sheet of forming general meeting.

III. Special Requirements for Private Rt's.

Statement by founders containing obligation to pay-up shares subscribed.

IV. Special requirement for all Rt's.

(1) Certificate of bank or other financial institution of payment of portion of subscribed capital payable upon foundation, (2) statement by founders on availability of in kind contributions.

V. Special Requirements for Kft's.

(1) List of quota holders, (2) certificate of credit institution or certificate from Managing Director(s) (in notarial document, or by document justified by lawyer) in which it is declared that cash contributions have been paid in, or statement by Managing Director(s) that all in kind contribution(s) are available to company, (3) declaration of auditor on contribution in kind (apport).

VI. Special Requirements for Branch Offices of Foreigners (fióktelep).

(1) Articles of incorporation of foreign company or consolidated text of such document including all amendments (verification of such company being entered in commercial register in its own country) and official translation in Hungarian thereof, (2) resolution on foundation of branch office and its authorized representative, and official translation in Hungarian thereof; (3) statements prescribed under Subsection (2) of Section 23 of Act CXXXII of 1997 (according to termination of Branch Office).

VII. Special Requirements for Commercial Representative Offices of Foreigners (kereskedelmi képviselet).

(1) Articles of incorporation of foreign company or consolidated text of such document including all amendments (verification of such company being entered in commercial register in its own country) and official translation in Hungarian thereof, (2) resolution on foundation of representative office and its authorized representative, and official translation in Hungarian thereof; (3) statements prescribed under Section 30 of Act 1997:CXXXII (according to termination of Commercial Representative Office).

3.08 COMMODITIES:

Commodities are negotiable articles with economic value and natural resources that can be utilized in same way as goods. Financial instruments, i.e. investment instruments (see topic 3.15 Securities) and currency, however, may not be considered as commodities. Act 2007:CXXXVIII, on investment firms and commodity dealers, and on regulations governing their activities, effective as of Dec. 1, 2007, regulates commodities exchange and related activities.

Commodities Exchange.

Commodity exchange services (árutozsdei szolgáltatás) may pertain to: (i) Goods, including warehouse warrants and dockets detached from warehouse warrants, marketable rights, and their derivatives; (ii) options, futures and any other derivative contracts relating to greenhouse gas emission allowance units and other rights of emission of air polluting substances; and (iii) financial instruments defined under Act. (2007:CXXXVIII). Commodity dealers (árutozsdei szolgáltató) may provide following services within framework of regular business activities relating to decribed instruments: (i) Receiving and transmitting client orders; (ii) execution of orders on behalf of clients; (iii) dealing on own account; (iv) agency activities as defined in CIFE by way of authorization granted under CIFE for intermediation of financial services; (v) insurance mediation under Insurance Act, acting as agent; (vi) intermediation of investment services and ancillary services, acting as tied agent.

Commodities exchange services may be performed by commodities exchange firms/commodity dealers and investment firms (see topic 3.04 Brokers) and are generally subject to approval of State Supervisory of Financial Organizations.

Nonresident investment firm shall be allowed to provide commodity exchange services in Republic of Hungary only through establishment of branch.

3.09 CONCESSION:

Operation of state or local government owned properties or exercise of state or local government owned activities may be granted to private entity through contract of concession or through founding economic organization with state or local government majority ownership. Permissible concessions are as follows: (i) operation of countrywide public roads, canals, regional public utilities, (ii) local government owned public roads and utilities, (iii) mining research and exploitation, (iv) pipeline transport and storage, (v) production and turnover of fissile materials, (vi) organization and performance of games of chance/gambling, and (vii) establishment and

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operation of electronic public procurement system. (See Act 1991:XVI on Concession.)

For special industries Ministries' rules (ágazati törvény) may allow performance of certain actions of above mentioned activities without contract of concession (liberalized actions). Examples of such special rules are Act 1993:XLVIII (as am'd) on Mining and Act 2007:LXXXVI on Electric Power.

Contract of concession should be awarded by competition invited by state or local government. Winner's articles of incorporation should contain activities stated in contract of concession. Party of contract of concession may be Hungarian or foreign natural persons or corporate bodies, or company thereof without legal personality. Contract is valid for fixed time but not more than 35 years. Property rights concerning state or local government properties do not change, but Ministries' rules concerning exploited natural resources may provide differently. Legal disputes should be regulated by Hungarian courts, but in case of foreign party, international court of arbitration may also act.

Competitive process awarding concession is public unless national defence or security interests require exclusivity. Call for competition must be announced in two national newspapers and in local papers at least 30 days before opening day of competition.

Corporation which receives concession (koncessziós társaság) should be formed by parties within 90 days after having signed contract of concession, to perform actions permitted by concession. If it also needs authority's permit, corporation's activity may only be performed after having received permits, but in case of withdrawal thereof contract of concession will not be considered invalid for six months. Corporation's purposes are limited to activities needing concession or closely related to them. Corporation is entitled to possess and use certain state or local government owned properties or make profit thereof, but cannot alienate utilization right or assign right to other corporation without state or local government permission.

3.10 CONTRACTS:

Definitions and Basic Concept.

General rules of “law of obligations” are set forth in §§198-338 of Civil Code. Essentially, contract is agreement between two or more persons creating obligations to do or not to do particular things. Unless otherwise required by law (e.g. in case of real estate, corporation, business partnership, foreign trade) contracts may be concluded either in writing or orally. Contract implied in fact is true contract, evidenced by conduct of parties. Contract is made by any proper expression of mutual consent (consensual contract), i.e. offer and its acceptance. Consideration is not required. Contract itself affects transfer of ownership, except in case of real estate, ownership to which will be transferred by its registration in Land Register. There are no special requirements of law for contracting party when contracting with Government or municipalities; i.e. authorities themselves are responsible for their legal capacity.

Categories classified by Civil Code (like contracts for sale, lease, enterprise, mandate, insurance, gift, foundation, etc.) are not obligatory types. Parties may create any obligation that is legally enforceable expressing their consent at least with regard to essential or qualified as essential questions. Pre-contract creates legal obligation to enter into contract at later time. Contracts might be, inter alia, blanket (covering number of items), certain (depending on will of someone), hazardous (depending on uncertain event), commutative or independent, conditional, open ended, etc. Unlawful contracts are void, and as such, unenforceable by either parties to contract, and if performed or executed, restoration of status quo may be asked (in integrum restitutio), without time limit. Voidable contract may be voided by party by reason of defense such as duress, undue influence, fraud, infancy, mistake in facts; generally within five years from performance. It is worth noting, that referring to changes of essential circumstances (clausula rebus sic stantibus) may be proper defense against and before performance.

Legal Capacity to Enter into Contract.

Persons 18 years of age and over have full capacity. Minors over 14 and persons judicially declared to be of limited competence may enter into contracts with consent or subsequent approval of their guardian. Consent is not required if contract is of lesser importance or does not impose duty on them. Minors under 14 and persons who are judicially declared incompetent or are incompetent as matter of fact may not enter into contracts, and if nevertheless such contract is made it will be void. Entities are fully capable (no ultra vires liability), except in relations which are obviously characteristic of human beings.

Some contracts, e.g. those between spouses, those forming partnership and company (articles of incorporation are of contractual nature) and real property purchase contracts need to be countersigned by attorney at law or legal counselor.

As far as legal capacity of foreigners is concerned, their domestic laws are to be applied in order to determine legal capacity, unless they are contrary to Hungarian public order. Party's personal law shall apply to his legal and disposing capacity. Non-Hungarian citizen who has no disposing capacity or has restricted disposing capacity according to his personal law but who would have disposing capacity according to Hungarian law shall be regarded as person who has disposing capacity before Hungarian courts or other authorities. (I.P.L.C., §64). See also category 5 Civil Actions and Procedure, topic 5.06 Foreign Law.

Contractual Rights.

If two or more persons together constitute one party to contract, these two or more persons jointly promise to perform contract's obligation. If obligation is divisible into separate items, each contractor is obliged to be liable for her part. If contract is not divisible, each contractor is liable for full performance. Unless otherwise expressed in contract, divisibility is to be tested according to joint or several nature of contract.

Third party beneficiary for whose benefit promise was made, will be directly entitled only if so stipulated in contract itself, i.e. unless otherwise declared, beneficiary may not maintain action against promisor.

Assignment of rights, except if contract involves personal element or if prohibited by statute, may be performed between assignor and assignee, without consent of obligor, who needs only to be given notice. Once notice has been given, obligor is to carry out obligation only towards assignee. Contract of assignment may be made without consideration.

Party may perform duties through delegate, unless otherwise stipulated or other party has substantial interest in having original promisor perform. Party delegating remains liable under original contract. Delegation of duties discharging delegator needs consent of obligee. Novation by three-party agreement may have same effect, i.e. discharging delegator and substituting third party delegatee.

Discharge and Remedies for Breach of Contract.

Normally contract is terminated by performance of terms of agreement. Discharge by rescission places each party in original position by returning any property or money that has been delivered or paid (in integrum restitutio). Waiver, relinquishing rights for future, leaves parties in position where they are at that time. Confusion of parties, and in certain contracts death, results in discharge. Any kind of alteration or modification may discharge contract or some duties thereof. Repudiation may be legal way of discharging and also breach of contract, depending on nature of contract. Party suffering damages by breach of contract is entitled to bring action for damages or if it is minor breach, i.e. promisee received substantial benefit, may sue for cure or price adjustment, if still interested in performance.

Applicable Law.

In international transactions parties have free choice as to applicable law. If such stipulation is lacking, law to which contract has its closest connection is applicable. Thus, unless otherwise chosen by parties, according to Hungarian international private law, in contractual disputes generally law of vendor, donor, testator, entrepreneur, etc. is to be applied, i.e. more generally, law of party whose performance is specific in contract. Lex loci is to be applied in real estate cases, and lex fori if conflict cannot otherwise be solved or in public law interest case. See category 14 Foreign Trade and Commerce, topic Foreign Law.

Definitions of International Chamber of Commerce (INCOTERMS), as revised in 2000, are customarily used in trade. See category 14 Foreign Trade and Commerce, topic 14.04 Foreign Trade.

3.11 INFORMATION TECHNOLOGY, INTERNET AND NEW MEDIA:

Computer programs are protected by Act 1999:LXXVI on Copyright which implements provisions of EU directive 1991/250/EEC on legal protection of computer programs. Within meaning of Act, protection covers computer programs and related documentation recorded in any form including user applications and operation systems. (§1[2c] of Act). However, ideas, principles, procedures, operational methods and mathematical operations, including those constituting basis of computer program interfaces, may not be subject of copyright protection. Translation to other programming language is protected, without prejudice to rights of author of original computer program, provided that it has individual, original nature. Property rights relating to computer programs are transferable. User may not be prevented from making one backup copy if required for use. One having right to use computer program may, without author's permission, observe, study and test computer program to determine ideas and principles which underlie any element of computer program if he does so while performing any of acts of loading, displaying, running, transmitting or storing. In certain cases, author's permission is not required for reproduction or translation when it is indispensable to obtain information necessary to achieve interoperability of independently created computer program with other programs. Use of information is limited by Act. In case of purchasing computer program in course of commercial circulation, putting license agreement in written form is, contrary to general rule, not mandatory. For general rules of copyright law, see category 18 Intellectual Property, topic 18.01 Copyright.

Data Protection.

According to Act 2003:C on electronic telecommunication, service providers may manage personal data of subscribers and users necessary to conclude, amend and perform telecommunication contract, invoicing or enforcing any related claims. (§154[1] of Act). Service provider must ensure by appropriate technical and organisational measure secrecy of data and communication transmitted and must obstruct as much as possible illegal interceptions. (§155[1] of Act). Service provider may only store or get to know contents of any communication technically necessary for providing such services. (§154[3] of Act).

Personal data are protected by Act 1992:LXIII. Personal data include data which may be linked to particular natural person (interested party) and any conclusion relating to interested party that can be drawn from such data. Personal data may be handled upon consent of interested party or in case it is provided by law and only for definite purpose, in order to exercise right or fulfil obligation. All stages of data handling shall comply with this purpose. (§§2[1], 3[1] and 5[1] of Act). Personal data that are indispensable for realization of and appropriate for purposes of data handling may be handled only but only in extent and for period required for realization of such purposes. (§5[2] of Act). Mandatory provision of data may only be ordered for public purposes. (§5[3] of Act). Interested party must, prior to collection of data, be informed that provision of data is voluntary or mandatory. In case of mandatory provision of data law prescribing such provision must be indicated. (§6[1] of Act). Interested party must be informed also on purpose and legal base of data handling, who will handle and process data and for how long data will be kept and who can get to know data. (§6[2] of Act). Act regulates also forwarding of data to third persons, rights and obligations of interested party and party handling data, liability rules. Party handling data must, prior of commencement of such activity, notify Parliamentary Commissioner for Data Protection (adatvédelmi biztos) on purpose of handling data; types of data and legal basis of their handling; scope of interested parties; source of data; type and address of data to be forwarded and legal basis of forwarding; deadline of deletion of particular type of data; name and address (seat) of person handling and processing data, effective place of handling and processing, data handling activity of person handling data, name and contact information for internal data protection officer. (§28[1] of Act). Certain types of data handling (e.g. registering employees or clients, data handling prescribed by churches, etc.) do not require notification. (§30 of Act). Person handling data, at time of first registration, receives registration number that must be indicated in all forwardings, publications and disclosures. (§29[1] of Act).

Hungary is party to Council of Europe convention for protection of individuals with regard to automatic processing of personal data (ETS 108) and provisions of this convention are implemented in Act 1995:CXIX on handling data on names and addresses to be used for research and direct marketing. Act provides that scientific researcher, public opinion researcher, market researcher and organization performing direct marketing, as well as agents thereof, may collect data on names and addresses for purpose of contacting only from following sources: (a) data of interested parties with whom handler of data had previous relationship (e.g. client [``ügyfél''] or supporting party), but within meaning of direct mailing such party has to initiate contact intentionally (see §17[2] of Act); (b) data from directories lawfully created and published (e.g. telephone books, yellow pages, etc.) provided that interested parties have been previously informed about possibilities of use of data in way other than originally agreed, as well as about right to unsubscribe; (c) data received from person or organization performing same activity provided that such forwarding of data, after preliminary notification, was not objected to or prohibited by interested party; (d) data from record of names and addresses of individuals as defined by and according to provisions of Act 1992:LXVI. (§3[1] of Act). Data obtained from record mentioned under (d) may be used or forwarded within six months as from application therefor. (§4[4] of Act). Act provides that data handler shall, prior to commencement of activity, notify Parliamentary Commissioner for Data Protection (see above). (§6[3] of Act). When processing answers of public opinion research or market research absolute anonymity of persons questioned and voluntary replying shall be ensured in all stages of processing. (§14[1] of Act). Special rules apply to foreign public opinion researchers and market researchers and forwarding processed data abroad (see §16[1] of Act). Data collected for market research may not be forwarded for direct marketing purposes. (§16[2] of Act). Data on names and addresses included in direct marketing mailing list may only be forwarded to third persons, with certain exemptions, for direct marketing or other purposes if interested parties consented thereto in writing being aware of name and activity of such third person. (§18[1] of Act). Direct marketing mailing list may not be linked to data collected for market research purposes. (§18[3] of Act). Special rules apply to foreign direct marketing organizations, data handling activity and forwarding data abroad. (§19 of Act). Act regulates also rights of interested parties and unsubscription list.

Databases are protected by Act 1999:LXXVI on Copyright which partially implements provisions of EU directive 1996/9/EC on legal protection of databases. Act protects collection work (gyujteményes mu) if selection, arrangement or edition of its contents is of individual, original nature. Protection is extended to collection works, parts or components of which are not or may not be protected by copyright. (§7[1] of Act). Protection of databases, operated by either computer technique or any other way, which are qualified as collection works is not extended to data and other components being content of database. (§7[3] of Act). Property rights relating to databases are transferable. (§61[2] of Act). Performance by lawful user of database qualified as collection work of any act necessary to access to and normal use of content of database does not require author's permission. Where right of use is obtained to part of database only, previous provision is applicable only to that part. (§62[1-2] of Act). For general rules of copyright law, see category 18 Intellectual Property, topic 18.01 Copyright.

Domain Names.

Country Code Top-Level Domain (ccTLD).hu is administered by Council of Hungarian Internet Providers (CHIP) (Magyarországi Internet Szolgáltatók Tanácsa Tudományos Egyesület). CHIP does not provide direct services to registrants (users); these are performed by authorized registrars (see http://www.nic.hu/iszt and http://www.domain.hu). Registrar shall be either legal entity, business association with no legal entity or private entrepreneur registered in Hungary, shall fulfill certain technical and other conditions and shall enter into franchise agreement with ISZT Kht, public purpose company (see http://www.domain.hu/domain/franchise). Franchising fee currently amounts to flat fee of HUF 700,000 and yearly HUF 200,000. CHIP's statute and code on registration rules, and recent amendments thereof, were examined by competition authority but no violation of law was established (see cases 135/1998 VJ and 189/2000 VJ). Registrant of delegation directly under.hu public domain can be any Hungarian citizen or any natural person with permission to reside in Hungary, or any organization or enterprise with geographical address (seat or premises) in Hungary or owner of trademark registered by Hungarian Patent Office even in case he/she is not Hungarian citizen. Registrant of delegation directly under second level public domain can be any Hungarian or foreign natural or legal person or organization with no legal entity.

Electronic signature (elektronikus aláírás) according to Public Key Infrastructure (PKI) concept is introduced, with effective date of Sept. 1, 2001, by Act 2001:XXXV on electronic signature complying with provisions of EU directive 1999/93/EC on community framework for electronic signature and §2 of Art. 9 of EU directive 2000/31/EC on electronic commerce. Parties in contractual relationship may establish different rules on acceptance of electronic documents by organizations (persons) in closed circle but even in such case following two fundamental provisions of Act shall be kept: (i) denial of acceptance of electronic signature, electronic data or document, including its use as evidence in legal proceedings, or contesting its capability of giving legal statement or resulting legal effect is not possible solely on grounds that particular signature, data or document exists only in electronic form; and (ii) in legal relationships governed by family law or by law of succession it is not possible to use exclusively electronic signature or prepare exclusively electronic data or document excluding non-electronic documents. (§§1[2], 3[1-2] of Act). Act is not applicable, except its previously cited provision (i), to electronic signatures not qualifying for advanced electronic signatures. (§3[1] of Act). Act provides, however, that law, except for act regulating procedure of taxation, regulating provisions of procedure of court of firms, regulating on amendments of regulations implemented to enhance security of legal transactions, and regulation provisions for procedures of data disclosure to Hungarian Financial Supervisory Authority, may not prescribe mandatory use of electronic signature by party in above proceedings. (§3[7] of Act). As general rule, if written form is prescribed by law to particular legal relationship, other than to those excluded by Act, such requirement shall be fulfilled by creating electronic document provided that advanced electronic signature is attached thereto. (§4[1] of Act). If advanced electronic signature created by secure-signature-creation device and for purpose of which qualified certificate was issued (qualified electronic signature) is attached to electronic data, other than electronic data qualifying for electronic statement, and no other conclusion may be drawn from results of verification, it shall be deemed that contents of electronic data has not changed since its signing. (§4[2] of Act). Provisions concerning probative force of electronic version shall not be applicable to printed form of electronic data provided with advanced electronic signature or qualified electronic signature. (§4[3] of Act). If particular electronic-signature product holds certificate issued by accredited organization as defined by Act, it shall be deemed, unless contrary is proved, that such electronic-signature product is secure and fulfills requirements defined in its certificate. (§4[4] of Act). If signature-creation data is created on signature-creation device by service provider which, at time of creation is registered as qualified service provider, it shall be deemed, unless contrary is proved, that signature-creation data is in user's exclusive possession. (§4[5] of Act). In case time stamp is created by service provider which, at time of time stamping, is registered as qualified service provider and no other conclusion may be drawn from result of verification of time stamp, it shall be deemed, unless contrary is proved, that data contained by document has not changed since creation of time stamp. (§4[6] of Act). Above provisions and other provisions of Act shall be applicable to certifications issued by foreign certification-service-providers in case (i) international treaty provides accordingly; (ii) domestic certification-service-provider assumes responsibility for certifications issued by such foreign certification-service-provider as defined by Act; or, to be applied as from effective date of joining EU by Hungary; (iii) seat or residence of foreign certification-service-provider is in one of EU member states; (iv) certification-service-provider as defined under previous (iii) assumes responsibility for certifications issued by foreign certification-service-provider; or (v) foreign certification-service-provider fulfills provisions of relevant EU directive and is accredited in one of EU member states by voluntary accreditation. (§5[1-2] of Act). Services relating to electronic signature are as follows: (i) provision of certification-service relating to electronic signature; (ii) time stamping; (iii) creation of signature-creation-data on signature-creation-device; and (iv) electronic archiving. (§6[1] of Act). Such services may be provided jointly or separately, and under certain conditions (e.g. extent of liability) defined by service provider. (§6[5] of Act). For validity of service agreement it shall be concluded in writing. (§6[6] of Act). Detailed conditions of and provisions on providing services are enumerated by Act. Within scope of providing certification services relating to electronic signature certification-service-provider shall ensure that both signature-creation data and signature-verification data are unique and may be used by complementing each other if both originate from certification-service-provider. (§9[5] of Act). User shall be entitled to use pseudonym. (§9[4] of Act). Signature-certification-data shall be communicated to public by certification-service-provider by means of public purpose telecommunications networks. (§9[6] of Act).

E-Commerce.

Act 2001:CVIII on electronic commerce and information society services complies, with few exceptions, with Directive 2000/31/EC of European Parliament and of Council. Information society service is defined as service provided by electronic means to remote recipients generally in exchange of consideration. (§2f of Act). Scope of Act includes information society services rendered from territory of Hungary and those being directed to territory of Hungary, i.e. any service which is, based on language, currency and other circumstances, supposed to be reached by recipients of Hungary. (§1[1]a of Act). Permission is not required for providing information society services. This, however, does not affect: (i) Qualification or licensing rules applicable to activities constituting particular information society service, or (ii) licensing or notification requirement prescribed by Act C of 2003 on Electronic Communication or by any other legal regulation based on this Act's authorization. (§3 of Act). Act contains detailed regulations on provision of information regarding service provider, its services and process of conclusion of contract electronically (see §4 and 5 of Act). Service provider shall acknowledge receipt of recipient's order (``megrendelés'') without delay and by electronic means. In case such acknowledgment is not received by recipient within honorable time, at least 48 hours from placing order, recipient's obligation with regard to order shall cease to be effective. Order and acknowledgment shall be deemed to be received by service provider and by recipient when they are able to access it. (§6 of Act). Service provider is liable under general rules of civil law for damage caused by illegal information transmitted, stored, or made accessible in course of information society service but special rules apply to mere conduit, caching, hosting and providing search engines (see §§7-12 of Act). Act implemented “no general obligation to monitor” rule as well. Act contains special procedure applicable when information made accessible by service provider violates someone's rights under Copyright Act (see §13 of Act).

Distance contracts in general are regulated, as part of consumer protection regime, by Government Decree No. 17/1999 (II.5) on distance contracts which is harmonized with EU directive 1997/7/EC on protection of consumers in respect of distance contracts. Scope of Decree includes contracts concluded by and between supplier (including foreign supplier through its Hungarian branch) and consumer in scope of supplier's activity of selling goods or providing services exclusively by means of one or more telecommunications devices unless particular contract is otherwise regulated by law. (§1[1-2] of Decree). Decree is not applicable to contracts on certain financial services; sales from vending machines; contracts concluded through public pay phone with telephone company providing service; contracts on construction; contracts on acquisition of ownership or other rights of real estate, with exception of leasing; contracts concluded on auctions. (§1[3] of Decree). Only certain provisions of Decree are applicable to contracts on home delivery of goods of daily consumption; travel contracts and contracts on time shared use of real estate. (§1[4] of Decree). Within meaning of Decree telecommunications device shall be any device which is suitable to make contractual statement in order to conclude contract between distant parties including but not limited to addressed or unaddressed printed material; standard letter; press advertising with order form; catalogue; telephone; automatic calling machine; radio; videophone; videotex (microcomputer with screen) with keyboard or touch screen; electronic mail (e-mail); facsimile machine (telefax) and television. (§1[5] of Decree). In good time prior to conclusion of distance contract supplier shall, in clear, unambiguous and precise manner appropriate to means of particular telecommunication device used, inform consumer on its firm name, seat, registration number, tax number and telephone number; main characteristics of subject of contract; price (consideration) including any additional payment related to it; delivery costs, where appropriate; conditions of payment, delivery or other conditions of performance; rights to rescission; costs of use of telecommunication device if it is calculated other than at basic rate; period for which offer or price remains valid; where appropriate, minimum duration of contract in case of contracts performance of which is permanent or recurrent. (§2[1-2] of Decree). In good time prior to but at least at time of conclusion of distance contract supplier shall provide consumer with above details by form of written information or other document confirming oral information. (§3[1] of Decree). Such document shall, in addition to those enumerated above, contain following information: conditions, procedure and consequences of and provisions on exercising right of rescission including cases where no rescission may be exercised; address of place of business of supplier where consumer may address complaints; conditions of guarantee and information on after-sale services (supplying parts, repair service); possibilities of termination of contract if it is concluded for indefinite period of time or duration exceeding one year. (§3[2] of Decree). Consumer may, without giving any reason, rescind contract within eight working days from receipt of goods or, in case of performing services, concluding contract. (§4[1-2] of Decree). If supplier failed to fulfill its obligation on giving information, right of rescission may be exercised within three months from receipt of goods or, in case of performing services, conclusion of contract. (§4[3] of Decree). In case above described information is given by supplier to consumer within above three months period, rescission period of eight working days shall start from receipt of information. In certain cases (e.g. computer program is unsealed by consumer, marketing newspapers, etc.) no right of rescission may be exercised unless otherwise agreed. (§5 of Decree). In case of rescission amount paid by consumer shall be repaid by supplier immediately but not later than 30 days. Consumer shall only bear costs of returning and, if applicable, damages originated from abnormal use. (§4[5] of Decree). If parties did not agree as to time of performance, supplier shall perform its contractual obligations at time that can be determined undoubtedly on strength of function of service, failing previous agreement on or within time indicated in consumer's written notification, or failing notification within 30 days from receipt of consumer's order, at latest. (§7[1] of Decree). In case goods ordered are out of stock or services are unavailable consumer shall be informed immediately and amount paid by consumer shall be repaid immediately but not later than 30 days. This provision does not affect other consequences arising from supplier's breach of contract. (§7[2] of Decree). Supplier may not claim payment from consumer in case of goods or services not ordered. Absence of response does not constitute consent. (§8[1-2] of Decree). Unless it is consented by consumer in advance, automatic calling systems and facsimile machines may not be used by supplier for purpose of concluding contract. In absence of consumer's clear objection telecommunications devices allowing direct connection other than those previously enumerated may be used by supplier. (§9[1-2] of Decree). Burden of proof concerning supplier's obligation of providing information, complying with time-limits and obtaining consumer's consent is placed on supplier. (§10 of Decree). Consumer may not waive its rights guaranteed by Decree. Provisions of Decree may be departed for consumer's benefit only. (§11[1-2] of Decree).

B2C activities often fall into definition of mail-order activity which applies when consumer is provided by supplier with information sheet or catalogue of goods, or supplier calls attention to goods in advertisement or commercial, and it supplies (or causes to supply) to designated address goods chosen and ordered by consumer based on such information sheet or advertisement/commercial (see GKM Decree No. 25/2007 [II.28]). Mail-order activity is governed by Gov. Degree No. 133/2007 (VI.13). Special requirements are applicable to sale of certain goods (e.g. food, medicinal herbs, etc.) through mail-order activity (see e.g. Gov. Degree No. 133/2007 [VI.13]), while certain goods which can be marketed legally (e.g. gas sprays, sport or game hunting bows, etc.) may not be sold through mail-order activity (see e.g. §4[3] of Gov. Decree No. 175/2003 [X.28]).

On-Line Advertising.

Advertising is regulated by Act 2008 of XLVIII on Basic Requirements and Certain Restrictions of Commercial Advertising Activities and Act 1996:LVII on Competition. None of Acts defines which means of announcement of advertisements falls into their scope but it has been tested several times before competition authority that rules relating to misleading consumers shall be applicable to statements and advertisements published on Internet (see e.g. 116/2000 VJ, 154/2000 VJ). Unless otherwise provided by other specific legislation, advertisements may be conveyed to natural persons by way of direct contact (hereinafter referred to as ``direct marketing''), such as through electronic mail or equivalent individual communications, only upon express prior consent of person to whom advertisement is addressed. Statement of consent may be withdrawn freely any time, free of charge and without any explanation. In this case, all personal data of person who has provided statement must be promptly erased from records mentioned in Subsection (5), and all advertisements mentioned in Subsection (1) must be stopped. Advertisement material may be sent by mail in accordance with Act CI of 2003 on Postal Services to natural persons within framework of direct marketing in absence of prior express consent of person to whom it is addressed; advertiser and advertising service provider, however, are required to provide facilities for person to whom advertisement is addressed to unsubscribe at any time from receiving further advertisement material, freely and at no cost to addressee. Such unsolicited advertisement material may not be sent by way of direct marketing to person affected. Advertisers, advertising service providers and publishers of advertising shall maintain records on personal data of persons who provided statement of consent referred to in Subsection (1) to extent specified in statement. Data contained in aforesaid records - relating to person to whom advertisement is addressed - may be processed only for purpose defined in statement of consent, until withdrawn, and may be disclosed to third persons subject to express prior consent of person affected. Notice of withdrawal mentioned in Subsection (3) and notice to unsubscribe as specified in Subsection (4) may be transmitted by way of postal service or by electronic mail, with facilities to ensure that person sending notice is clearly identifiable. In advertisement disseminated by way of means specified in Subsections (1) and (4), clear and prominent statement shall be inserted to inform person to whom it is addressed concerning address and other contact information to which statement of consent for receiving such advertisement and aforesaid notice to unsubscribe has to be sent, furthermore - in case referred to in Subsection (4) - advertisement material must contain return envelope for sending notice to unsubscribe in form of registered mail with postage prepaid and with notice of delivery. (§6[1] and [3]-[7] of Act 2008 of XLVIII). Advertisement relating to product to be sold in Hungary through mail ordering (see subhead E-Commerce, supra) shall contain in identifiable manner name and seat or address of store of advertiser (i.e. person for whose benefit advertisement is published or who orders publication of advertisement for its own interest), as well as registration number as determined by law. (§3[3] of Act on advertising). For identification purposes this provision shall be applicable accordingly to foreign advertisers or those having no domestic branch and tax registration number. (§3[4] of Act on advertising). Certain principles on on-line advertising are included in Hungarian Code of Advertising Ethics as well (see website http://www.mrsz.hu of Hungarian Advertising Association). Definition of advertisement is explicitly extended by Code to advertisements sent by e-mail and advertising tools used on Internet (including but not limited to websites, banners, buttons, pop-up windows, interstitials, superstitials linked to companies, products or services). (§2[3] of Code). It is prescribed that in case advertising is combined with possibility of purchase or ordering service particular attention shall be paid to precise and fair provision of information. It is not allowed to limit consumer's possibilities of navigation in misleading way (e.g. by applying splash screen). (§5[4] of Code). Advertising through SMS and telefax is allowed only upon prior consent of consumer. (§10[4] of Code). Advertisement by e-mail may only be sent to consumer whose address was lawfully obtained by sender and consumer expressly consented to sending. Such advertisement may only be sent according to provisions of law and under consumer's consent to subject, quantity and frequency. It shall be clearly indicated in all mails how consumer may unsubscribe i.e. how further receipts may be prevented. Advertisement mails may be sent with no limitations to e-mail addresses which were published explicitly for purpose of receiving information as much as possible not limited to specific subject. (§10[5] of Code). When advertising on Internet attention shall be paid to those advertisements (including e-mails) intended explicitly for adults and age limit advertisement materials, as well as contents linked thereto shall not be reached by children. (§11[13] of Code). In case advertising on Internet is combined with possibility of purchase or ordering service special attention shall be paid to children who obtain their parents' consent before making legal statements relating to purchase of goods or ordering services. (§11[14] of Code). See also subheads E-Commerce and Data Protection, supra and topic Advertisements.

Telecommunications.

According to Act 2003:C on electronic telecommunication, operating or providing electronic communication services may be carried out by any natural person, legal entity and business association not having legal entity. (§74[1] of Act). Before commencement, such intention must be reported to National Telecommunication Authority (Authority) for registration. (§76[1] of Act). Operator or service provider of telecommunication network must notify Authority on main characteristics of network or subscriber interfaces required for telecommunication activity or providing services. Such information must also be published (§82[1] of Act). Special licence is required for certain radio equipment, telecommunication building, radio station and network. (§84[1] of Act). Act contains detailed provisions on universal telecommunication services and on service providers with significant market power. Regarding notification of interfaces see also IHM (Minister of Informatics and Telecommunication) Decree No. 9/2004. (IV.22). IHM Decree No. 16/2003 (XII.27) provides on detailed rules on subscriber contracts. See also Gov. Decree No. 78/2006 (IV.4) on tenders on frequency license and regarding telecommunications network contracts see Gov. Decree No. 277/2003 (XII.24).

3.12 INTEREST:

In contractual relations interest is to be paid, except in private relations among individuals unless otherwise stipulated. Interest on interest is prohibited among individuals. Unless other rate is stipulated, rate of interest is same as central bank base rate. (Last official central bank base rate was 8% with effect on Aug. 25, 2009.)

Pursuant to Section 65 of Act CXVII of 1995 on personal income tax, tax on interest income shall be 20%.

Interest income shall mean: (a) any interest credited and/or capitalized based on contract made between private individual and credit institution under advertised conditions in connection with balance of any deposit account or other bank account; (b) in connection with debt securities and investment units which are offered and traded publicly and if they fit definition contained in Act on the Capital Market—in due observation of what is contained in Subsection (5) of Section 65—(ba) income paid to the private individual under title of interest and/or yield, other than those mentioned in Subparagraph (bb); (bb) gains achieved when called, redeemed, or transferred to extent established according to provisions on capital gains; (c) by way of derogation from Paragraphs (a)-(b), if interest income established according to Paragraphs (a)-(b) represents any asset (e.g. merchandise awarded in connection with prize drawing deposits, or securities) from which tax cannot be deducted, amount that remains after tax referred to in Subsection (2) is deducted and it equals fair market value of asset (amount of prize pool); (d) income received by virtue of residual rights attached to insurance contract, or part of income received as lump sum payment from life assurance with maturity of less than ten years or from pension insurance with maturity of less than three years that exceeds premium paid by private individual himself or by another private individual on his behalf (except if it was claimed by private individual himself or by said other private individual as cost), or amount of taxable insurance premium; however, above-specified income received under insurance policy where any portion of paid premium(s) is treated as tax-exempt under this Act shall not be treated as interest, (e) in connection with cooperatives and (f) employer pension sponsored institutions.

3.13 MONOPOLIES, RESTRAINT OF TRADE AND COMPETITION:

Antitrust rules applicable to companies with limited liability and corporations limited by shares were governed by new Company Act §§52-64. (See also subhead Competition, infra.)

Prohibition of insider trading of securities is laid down by §§199-205 of Act 2001:CXX on capital market and §299/A of Penal Code. See also topic 3.15 Securities.

Consumer Protection.

Act on Consumer Protection (Act 1997:CLV as am'd several times) contains provisions harmonized with EU law. Act provides that manufacturer (or importer) assures that product is safe and accordingly distributor is prohibited to sell unsafe products. Product is considered to be safe if it does not endanger consumers' life, health or corporeal integrity during normal or reasonably expected life of product, unless otherwise specified by law.

Act protects consumers' property rights by imposing sanctions to manufacturers and/or distributors violating laws applicable to producing, measuring, packing, labelling, storing, transporting and distributing product; causing loss or damage by wrongful measuring, calculation or by depreciating quality of product; violating opening hours rules; unlawfully refusing sale of product; distributing defected product; etc.

Conditions of purchase credit granted to consumer must be fixed in written contract which must include certain mandatory provisions.

Act also defines manufacturer's obligations relating to users' manual, labelling, quality certification and packing and also distributor's obligations relating to indication of price. If manufacturer fails to fulfill above obligations distributor must be liable for them.

Consumer may enforce rights against manufacturer or distributor depending on choice. Settlement in consumer protection debates is facilitated by conciliatory body.

Consumer Protection Supervision, associations protecting consumers' rights, State Supervision on Financial Organizations or public prosecutor may bring suit to protect consumers' rights even if identity of injured consumers may not be established (“actio popularis”).

All above rules apply to services as appropriate.

For consumer protection see also Gov. Decrees Nos. 370/2004 (XII.26), 79/1998 (IV.29), 89/1998 (V.8), 18/1999 (II.5), 20-22/1998 (IV.17) IKIM (Minister of Industry, Trade and Tourism) and Decree No. 62/2004 (IV.24) GKM (Minister of Transport and Economic Affairs). See also category 5 Civil Actions and Procedure, topic 5.09 Product Liability, and Act 1996:LVII on

Competition. For contracts concluded with consumers by telecommunication devices, see Gov. Decree 17/1999 (II.5).

Competition.

Act 1996:LVII on Competition (as am'd several times) includes market attitude of natural persons and legal entities, as well as of unincorporated economic associations, displayed in territory of Hungary. Market attitude displayed by corporations abroad also falls under scope of Competition Act in case such attitude may have effect in territory of Hungary.

Unfair competition is prohibited. Competition Act bans in general conducting economic activities in unfair manner, violating or jeopardizing lawful interest of competitors, clients and consumers. Competition Act specifies which activities qualify as violation of prohibition of unfair competition.

According to Act XLVII of 2008, procurer, customer and user qualifies as consumer (with effect on Sept. 1, 2008). Client is person not qualified as consumer.

It is prohibited to influence unfairly client's decisions. Competition Act prohibits misleading consumers in unfair manner and consequently to influence consumer's decisions. It is prohibited to employ business methods unjustifiably restricting consumer's freedom of choice or misrepresent purchase as highly advantageous bargain.

Competition Act prohibits vertical and horizontal agreements which restrict competition. Agreements of minor importance and agreements concluded by related corporations are not subject to prohibition. Related corporations are considered as one corporation (undertaking-group). Corporation belongs to undertaking-group with those undertakings: (i) Which are controlled directly or indirectly independently by it, (ii) which control it directly or indirectly, (iii) which are controlled directly or indirectly by undertaking mentioned in points (i-ii), (iv) which are controlled directly or indirectly by at least two undertaking and undertakings mentioned in points (i-ii-iii).

Abuse of dominant position is prohibited, but existence of dominant position on its own is not subject to prohibition. Corporation is in dominant position on related market if it may perform its business activity independently from others without having to consider, when deciding on its own market behaviour, market behaviour of its competitors, suppliers, buyers or other business partners.

Competition Act controls interlocking of corporations, i.e. (i) merger of two or more previously unrelated corporations; (ii) acquisition of direct or indirect control by one or more corporations over part of or whole other independent corporation(s); (iii) establishing corporation by several corporations to be controlled by them. Permission of Competition Council (Versenytanács) should be obtained in case in previous business year net sales revenue of interlocked corporations exceeds HUF 15 billion, provided that other conditions on net sales revenues of interlocked corporations as enumerated by Act exist.

To proceed in actions against Competition Act is in competence of Competition Council, except violation of prohibition of unfair competition, which is in competence of courts of law.

If anti-competitive behaviour has community dimension, EU Competition Law is directly applicable. Office of Economic Competition (Versenyhivatal) handles all duties conferred upon competition authorities of EU Member States by rules of competition of Communities. For purposes of Arts. 81 and 82 of EC Treaty, Office of Economic Competition cooperates with European Commission and with competition authorities of Member States in manner specified in EC Regulation 1/2003.

3.14 PUBLIC PROCUREMENT:

Act 2003:CXXIX (as am'd) on Public procurement requires central government, local municipalities, public bodies, public foundations, central governmental and municipal budgetary institutions to request bids on purchases if such purchases are directly related to public activity and are over certain limits. Based on value of acquisitions, Act contains separate provisions on acquisitions over community value limit and on acquisitions over national value limit (Public procurements). Limit may be subject to amendment. Subjects of Public procurements are purchase of goods or services, construction investment, construction concession, concession of services. Types of Public procurements are open, invitation, negotiation and competitive dialogue-based, centralised, expedited, simplified, project planned and acquisitions within framework agreement. Type of public procurements cannot be changed during procedure.

Following community value limits apply in 2009: (i) Purchase of goods by Ministries, Prime Minister Office, organisations entitled to centralised acquisitions or acquisitions of defence goods listed in Annex 2 of Act—[Euro]133,000; (ii) purchase of services related to publicly subsidised construction investments, research and development, telecommunication and interconnection, television or radio broadcasts, certain services listed in Annex 4 of Act (e.g.: transportation, legal services, etc.) or acquisitions other than acquisitions of Ministries, Prime Minister Office, organisations entitled to centralised acquisitions or acquisitions of Ministries, Prime Minister Office, organisations entitled to centralised acquisitions of defence goods not listed in Annex 2 of Act—[Euro]206,000; (iii) purchase of services listed in Annex 3 (e.g.: financial or accounting services, (etc.) by Ministries, Prime Minister Office, organisations entitled to centralised acquisitions—[Euro]133,000; (iv) purchase of services listed in Annex 3 by other public institutions listed in paragraph (iv)—[Euro]206,000; (v) construction investments—[Euro]5,150,000;(vi) construction concession—[Euro]5,150,000.

Following national value limits apply in 2009 (from Jan. 1, 2009 until Dec. 31, 2009): (i) Purchase of goods—HUF 30,000,000; (ii) purchase of services—HUF 25,000,000; (iii) construction investment—HUF 90,000,000; (iv) construction concession—HUF 100,000,000; (v) concession of service—HUF 25,000,000. Following national value limits apply in 2009 (from Apr. 1, 2009 until Dec. 31, 2009): (i) Purchase of goods—HUF 8,000,000; (ii) purchase of services—HUF 8,000,000; (iii) construction investment—HUF 15,000,000; (iv) construction concession—HUF 100,000,000; (v) concession of service—HUF 25,000,000.

For simplified acquisitions following national value limits apply in 2007: (i) Purchase of goods—HUF 8,000,000; (ii) purchase of service—HUF 8,000,000; (iii) construction investment—HUF 15,000,000.

For water, energy, transportation and electronic communication procurements following national value limits apply in 2009: (i) Purchase of goods—HUF 50,000,000; (ii) purchase of service—HUF 50,000,000; (iii) construction investment—HUF 100,000,000.

Acquisition value can not be separated into parts or be underestimated to avoid tender. Tender announcer if prescribed by Act must publish in official gazette “News of Public Procurement” (Közbeszerzési Értesíto) or in case of acquisitions over community value limit in “TED database” that it intends to purchase goods or services or to make investments falling within scope of Act (tender).

Disputes arising out of public acquisitions are settled by Public Procurement Arbitration Committee, consisting of three public acquisition officers or by Mediation Committee of Public Procurement, consisting of three mediators. (See http://www.kozbeszerzes.hu regarding official gazette [Közbeszerzési Értesíto] and decisions of Arbitration Committee.)

Detailed provisions as to construction investments are included in Gov. Decree No. 162/2004. (IV.29) and to project planned acquisitions in Gov. Decree No. 137/2004 (IV.29).

3.15 SECURITIES:

Securities are either evidence of obligations to pay money (e.g. bonds) or of rights to participate in earnings and distribution of corporate and other property (e.g. shares). Other negotiable instruments such as commercial papers (in UCC's term) are not considered securities. (See topic 3.06 Commercial Paper.)

Act 2001:CXX on capital market, hereinafter referred to as Capital Market Act, is effective as of Jan. 1, 2002 and incorporated and unified previously existing specific regulations applicable on service providers and main organs of capital market. Capital Market Act is in full compliance with respective EU regulations as well. Act applies to stock exchange, core and non-core investment services, private and public issue of securities and take-over of public corporations limited by shares. It does not apply to securities not issued in series (e.g. bills of exchange, cheques).

Stock Exchange (tozsde).—Organized and uniform trading of exchange instruments (i.e. investment instruments, currency and commodities) may only be performed by exchanges established and operated according to Capital Market Act (for commodities exchange see also topic 3.08 Commodities). Exchanges may not perform activities other than trading of exchange instruments and certain related activities enumerated by law. Stock exchange may be established with capital of at least HUF 500 million, which shall be contributed in cash, and in form of corporation limited by shares holding solely dematerialized shares or as branch office of foreign stock exchange. Both establishment and commencement of operation are subject to approval of State Supervision of Financial Organizations. Stock exchange determines general rules of its own activities in its charter accepted by its board of directors. Necessary details of exchange charter which must be approved by State Supervision of Financial Organizations are listed in §317 of Capital Market Act. Special ownership rules applicable to stock exchange are enumerated by law.

According to Act 2007:CXXXVIII on investment firms and commodity dealers, and on regulations governing their activities, **investment services** are following: (i) Receiving and transmitting client orders, (ii) execution of orders on behalf of clients, (iii) dealing on own account, (iv) portfolio management, (v) investment advice, (vi) placement of financial instruments, including commitment for purchase of assets (securities or other financial instruments) (underwriting guarantee); (vii) placement of financial instruments without any commitment for purchase of assets (financial instruments), (viii) operation of multilateral trading facilities.

Non-core sevices are: (i) Safekeeping and administration of financial instruments for account of clients, (ii) safe custody services relating to securities for account of clients, including safekeeping and administration of printed securities for account of clients, (iii) granting credits and loans to investors, (iv) advice to companies on capital structure, industrial strategy and related matters and advice and services relating to mergers and purchase of companies, (v) foreign exchange services where these are connected to provision of investment services, (vi) investment research and financial analysis, (vii) services related to underwriting guarantees, (viii) investment services and activities as well as ancillary services defined by Act.

Investments instruments are: (i) Transferable securities, (ii) money market instruments, (iii) securities issued by collective investment trusts, (iv) options, futures, swaps, forward rate agreements and any other derivative contracts relating to securities, currencies, interest rates or yields, or other derivatives instruments, financial indices or financial measures which may be settled physically or in cash, (v) options, futures, swaps, forward rate agreements and any other derivative contracts and instruments relating to commodities that must be settled in cash or may be settled in cash at option of one of parties (otherwise than by reason of default or other termination event), (vi) options, futures, swaps, and any other derivative contract relating to commodities that can be physically settled provided that they are traded on regulated market and/or on multilateral trading facilities, (vii) options, futures, swaps, forwards (carried out on OTC basis or exchange-traded) and any other derivative contracts relating to commodities, that can be physically settled not otherwise mentioned in Paragraph (vi) and not being for commercial purposes, which have characteristics of other derivative financial instruments, having regard to whether, inter alia, they are cleared and settled through recognized clearing houses or are subject to regular margin calls, (viii) derivative instruments for transfer of credit risk, (ix) financial contracts for differences, (x) options, futures, swaps, forward rate agreements and any other derivative contracts and instruments relating to climatic variables, freight rates, greenhouse gas emission allowance units and other rights of emission of air polluting substances, inflation rates or other official economic statistics that must be settled in cash or may be settled in cash at option of one of parties (otherwise than by reason of default), (xi) any other derivative contracts and instruments relating to assets, rights, obligations, indices and measures not otherwise mentioned under Paragraphs (i)–(x), which have characteristics of other derivative financial instruments, having regard to whether, inter alia, they are traded on regulated market or multilateral trading facilities, are cleared and settled through recognized clearing houses or are subject to regular margin calls, furthermore, derivative contracts referred to in Article 39 of Commission Regulation (EC) No. 1287/2006.

Investment Firms.

See topic 3.04 Brokers.

Private Issue.

Issue of securities qualifies as private issue when securities are offered only to qualified investors; securities are offered to less than 100 persons in each Member State, and if these persons are not qualified investors; securities are offered to investors, each purchasing for at least fifty thousand EUROs, or its equivalent in any other currency, from securities offered; nominal value of securities offered is at least fifty thousand EUROs, or its equivalent in any other currency; or par value of all securities offered shall not exceed one hundred thousand EUROs, or its equivalent in any other currency, within 12 months from date of public announcement; public limited liability company is created by transformation of cooperative and its shares are offered only to members and shareholders of predecessor cooperative. For private issue of shares see category 2 Business Organizations, topic 2.04 Corporations, subhead Corporation Limited by Shares.

Public Issue.

Only dematerialized securities—with exception of government securities—registered by name may be subject to public issue. Except for treasury or government securities, issuer of bonds must be in business for not less than 12 months unless bonds are guaranteed by state or secured by assets. Prospectus must be published, which is subject to preliminary approval of State Supervision of Financial Organizations and, with few exceptions, investment firm shall be engaged to prepare and execute issue. Capital Market Act prescribes contents of prospectus, and how it shall be announced. If subscription is obligatory or desired, conditions and period open for subscription must be duly published. Such period shall be at least three working days. Issuer may close subscription period earlier than was published if all securities have been subscribed and prospectus included possibility of such early closing. For public issue of shares see category 2 Business Organizations, topic 2.04 Corporations, subhead Corporation Limited by Shares.

Reporting.

Except for treasury or government securities, issuer of publicly issued securities must inform public on main data of its finances, assets and operation. Regular reporting: issuer must prepare and send to State Supervision of Financial Organizations its non-audited report in 45 days from end of each business year and business half-year and audited annual report in 120 days from end of each business year. Within such deadlines, announcement that report has been prepared and place and date of publication and inspection thereof must be published in nationwide daily newspaper and in either electronic data-forwarding system operated or accepted by State Supervision of Financial Organizations or daily newspaper specialized in financial and capital market news published or accepted by State Supervision of Financial Organizations. Non-audited reports and extract of audited reports must be published within seven days after announcement. Issuer is liable for contents of annual and semiannual non-audited reports and audited annual report. Extraordinary report is to be published and sent to State Supervision of Financial Organizations within one business day on any information directly or indirectly affecting security's value or profitability. (For reporting see §§52-57 of Capital Market Act.)

Dematerialized Securities.

Issuer may decide whether to print securities or record securities on security-account only. Issuer of dematerialized securities must issue instrument containing all data as enumerated in Capital Market Act and place it in central clearing house. Such document does not qualify as security. See also Gov. Decree No. 284/2001 (XII.26) and §§180-181 and 196-203 of New Business Corporation Act.

Security Certificates.

Gov. Decree No. 98/1995 (VIII.24) as am'd applies to printing, administration and physical nullification of (printed) securities issued in series in Hungary, as well as securities-like (printed) debt instruments issued by financial institutions in Hungary.

Take Over.

Acquisition of influencing interest exceeding 33% in public company limited by shares (see category 2 Business Organizations, topic 2.04 Corporations, subhead Corporations Limited by Shares) requires public offer of purchase. If none of shareholders (except for one intending to acquire influence) hold more than 10% of voting rights, above limit for obligatory public offer is 25%. Acquiring influence through public offer must be executed through investment firm.

Other Rules in Connection with Securities.

Gov. Decree No. 214/2000 (XII.11) on special accounting rules for deposit insurance funds, institution funds and consumer protection funds; Gov. Decree No. 251/2000 (XII.24) on special accounting rules for investment firms; PM (Minister of Financial Affairs) Decree No. 9/2002 (II.20) on data to be provided to State Supervision of Financial Organizations by organizations performing clearing house activities; PM (Minister of Financial Affairs) Decree No. 5/2004 (II.12) on data to be provided to State Supervision of Financial Organizations by investment firms; Gov. Decree 22/2008 (II. 7) on obligatory elements of bylaws of investment firms; Gov. Decree No. 283/2001 (XII.26) on conditions to meet when pursuing investment service, commodities exchange service, securities custody, securities safekeeping, and clearing house activity; PM (Minister of Financial Affairs) Decree No. 37/1996 (XII.28) on elements of code of securities; PM (Minister of Financial Affairs) Decree No. 27/2007 (XII.20) on fees payable to State Supervision of Financial Organizations; Gov. Decree No. 348/2004 (XII.22) on specifics of accounting and bookkeeping obligations of enterprises conducting activities of stock exchanges and clearing-houses; PM (Minister of Finance) Decree No. 28/2005 (VIII.26) on circumstances to be taking into account at supervision of conducts referring to market-influence, process of determining acknowledged market practice and provisions relating to delaying to disclose insider information in legitimate interest. (§§338/A-338/D of Hungarian Civil Code).

See also topic 3.02 Banks and Banking.

3.16 VENTURE CAPITAL:

As from June 16, 1998 special rules apply to venture capital and venture capital funds (kockázati tokealap) including minimum capital requirements, permission procedure, organizational and functional regulations reporting obligations. See §§296/G-296/P of Act CXX of 2001 (Capital Market Act) and PM (Minister of Financial Affairs) Decree No. 29/1998 (X.21).

4 CITIZENSHIP

4.01 ALIENS:

See category 16 Immigration, topic 16.01 Aliens.

4.02 IMMIGRATION:

See category 16 Immigration, topic 16.02 Immigration.

5 CIVIL ACTIONS AND PROCEDURE

5.01 ACTIONS:

Every legal person, whether individual, or any legal entity may sue and be sued. “Quasi entities” of Hungarian law, like partnerships, press bodies or administrative authorities as far as they may be directly subjects of rights and duties, may also sue and be sued solely in their name or jointly with their partners or members. Hungarian Government and its agencies do not enjoy either civil law or procedural immunity within Hungary, unlike foreign states or governments. (Those, their diplomats and other officials of same status are immune from Hungarian jurisdiction.) Rules governing civil procedure are set forth in Code of Civil Procedure, Act 1952:III, as amended several times.

There is only one form of civil action. All actions are commenced by filing statement of claim with court. Service of process on defendants is accomplished ex officio by court. Parties do not have to be represented by attorney at law before courts, except for party appealing to Supreme Court, Court of Appeal and for party registering or amending articles of incorporation for corporations before Corporation Court. Incapable persons are represented by guardian who exercises their powers. Unless otherwise regulated by law, Hungarian State is represented by Minister of Finance in civil actions.

Security for Costs.

Foreign plaintiffs, unless privileged by international agreement or reciprocal practice of law, upon request of defendant, may be required to deposit costs of defendant in advance. (§§89-92 C.P.C.). Hungarian citizens, even if domiciled and citizen of another country are not considered foreigners with regard to security. (See category 24 Treaties and Conventions, topic 24.01 Treaties and Conventions, subhead General of Private Law Nature.)

Appropriate Forum.

On subject matter jurisdiction, see category 6 Courts and Legislature, topic 6.01 Courts. Appropriate venue is generally domicile of defendant individual and seat of defendant entity. Lack of domicile or seat results in venue based on residence, or, if unknown, last known residence. Alternative appropriate venues may be place of work, study, service, performance of contract, damage, real estate, sits of assets against defendants lacking even temporary residence or place of company's branch. Parties also may stipulate exclusive competence of court by competence clause. According to regulations of I.P.L.C., foreign laws are generally applied if foreign elements in claim are stronger than Hungarian ones. (See topic 5.06 Foreign Law.)

Costs.

Court filing fee is generally 6% of value of claim, but minimum HUF 7,000 and maximum HUF 900,000. Filing fee is to be paid by plaintiff when filing claim with Court, unless allowances based generally on plaintiff's needy circumstances or on law are applicable. (Act 1990:XCIII, as am'd several times.) Losing party has to bear all costs, including filing fee, lawyers' fees and reasonable costs of winning party. According to IM (Minister of Justice) Decree No. 32/2003

(VIII.22) lawyers fee is determined in court proceedings based on retainer agreement concluded between lawyer and client but courts are free to reduce fee to reasonable amount. Fees for witnesses and expert witnesses are considered court costs, and are to be deposited in advance by parties upon order of judge.

Limitation of.

See topic 5.08 Limitation of Actions.

Lack of Jurisdiction.

See category 6 Courts and Legislature, topic 6.01 Courts.

5.02 APPEAL AND ERROR:

Judiciary.

Practically all final judgments and orders of trial courts (first instance courts) are subject to appeal, for reason of fact or law. Appeal (fellebbezés) in civil cases may be taken within 15 days (in drafts or bills of exchange cases within three days) after service of copy of judgment or order. Cross-appeal may be taken within eight days after service of notice of appeal. Upon appeal execution of first instance decision will be stayed, except e.g. for child alimony. There is one stage of appeal. Appellate decision is binding. No appeal may be taken from decision of appellate court. However, within 60 days of binding judgment or decision of appellate court, party or person affected by decision or prosecutor may, in certain cases petition for further review under supervision procedure (felülvizsgálat), which will be adjudged by three judge panel of Supreme Court. Appellate courts or Supreme Court may remand case back for further consideration or may modify decision. (§§233-275 C.P.C.). Special rules apply to appeals where claim does not exceed HUF 200,000. Within six months of binding judgment or decision of court party may initiate re-opening of case for reason of fact or law if special requirements exist (perújítás). Regarding proceeding courts see category 6 Courts and Legislature, topic 6.01 Courts.

Administrative Decisions.

Resolutions of central or local administrative bodies are subject to administrative appeal, in which case higher level administrative organ will decide. Administrative appeals may generally be taken within ten business days of initial decision. Judicial complaints may usually be filed within 30 days of final administrative decision, and will be adjudged in generally one, in certain cases two stage civil procedure. (§50[2] Constitution, §§324-341 C.P.C., as am'd several times). New Act came into force regarding administrative proceeding as from Nov. 1, 2005. Main changes are: (i) Introduction of data protection rules for authorities, (ii) introduction of official mediator, (iii) detailed regulation regarding objection by prosecutor, (iv) detailed regulation regarding enforcement of decisions, (v) prescriptions regarding electronic administration.

5.03 COSTS:

See topic 5.01 Actions.

5.04 DAMAGES:

Like other “civil law” or “continental law” systems, Hungarian civil law sets apart damage caused in connection with contract or contractual relation (breach of contract) from damage out of contract (tort). For breach of contract see category 3 Business Regulation and Commerce, topic 3.10 Contracts.

Torts.

Intentional torts (like assault, battery, false imprisonment, infliction of emotional distress, or trespass to land or to chattels, conversion of chattels) and also unintentional torts (like negligence and those of special duties) are listed under legal notion of damage-out-of-contract (§339 and supra, C.C.). According to theory of damage-out-of-contract, anyone who causes damage to anyone else unlawfully, has to compensate for it. It is to be understood that there is only one cause of action. Damages are always compensatory and never punitive. Elements of cause of action are: (i) Act or omission by defendant, (ii) unlawful intent or negligence of defendant, (iii) damage to plaintiff, both actual loss (damnum emergens) and lost profit (lucrum cessans), (iv) causation between i-iii. General defense is that defendant exercised reasonable diligence. Degree of diligence required for defendant depends on identity of defendant and all circumstances, as deliberated by Court. Injured party must act reasonably to minimize damage and where damages are unnecessarily aggravated or increased through failure to do so, additional damages are not recoverable.

Strict liability applies to (i) abnormally dangerous activities (including activity endangering human environment and causing damage), (ii) activities carried out by ward under care of guardian, (iii) activities carried out by employee, member of cooperative, representative or agent, (iv) falling objects from buildings and (v) keeping wild animals. (§§345-353 C.C.).

(i) One who carries out dangerous activity, or in practice, maintains dangerous condition (e.g. operates car) will be liable for harm it causes to person or property of others, unless she can prove cause of harm was out of scope of her activity. If both plaintiff and defendant were carrying out some dangerous activity, strict liability rule does not apply. Limitation of action is three years.

(ii) Guardian will be liable for harm caused by ward under her care, unless she proves behavior was reasonably diligent.

(iii) Employer, cooperative, or individual will be jointly and severally liable for harm caused by agent.

This rule applies to harm caused by employee of government, its agencies, and other authorities as well. Defense of government bodies can be that plaintiff had not exhausted regular remedies available within administrative or judicial process.

(iv) Owner of building or condominium will be liable for harm caused by objects falling from building, unless she proves reasonable diligence. For damage caused by object hung on building, liability falls on person in whose interest object had been hung.

Keeping wild animals carries strict liability.

5.05 EVIDENCE:

System of evidence before courts is regulated by Civil Procedure Code (Act 1952:III, as am'd several times; §§163-211). There is no limitation on what courts may consider as evidence in civil procedure, i.e. witnesses, expert witnesses, documents, electronic documents and papers, etc. In criminal procedure tainted evidence may not be considered. As far as presentation of evidence is concerned, Courts' role is more determinative than it is under U.S. rules of evidence.

Witnesses.

Witness in civil or criminal or any other official procedure is to be called by and questioned before Court or some other authority. Declarations, whether under oath or not, given in advance will be considered by Court and will have same value as any written evidence, without being preferred in any sense.

See also categories 3 Business Regulation and Commerce, topic Contracts, and

Estates and Trusts, topic Wills.

5.06 FOREIGN LAW:

In international conflicts of law, in substantive questions, laws of foreign countries may be applied in Hungary, as regulated by Act-Order 1979:13 on International Private Law as amended several times, usually referred to as International Private Law Code. Applicable procedure is lex forum.

Disputes on ownership, possession, mortgage, or in general “in rem” claims are to be decided under lex loci, i.e. law of place where subject of claim is located. (§21).

In law of contracts or obligations, system of choice of law is following: (i) Parties are free to stipulate law to be applied to their dispute (§24) and (ii) absent stipulation by parties, in dispute on sale, personal law of vendor applies; on lease, law of lessor; on copyright and industrial property rights, law of purchaser; on deposit, law of bailee; on mandate, law of mandator; on commission, law of commissioner; on agency, law of agent; on transportation, law of transporter; on banking, financing and credit, law of lender or creditor; on insurance, law of insurer; and on gift, law of donor (§25). In case of real estate contracts lex loci applies; of entrepreneurship, securities, and alimony, law of place of performance (lex loci contractus) applies. (§§26, 28). Disputes on stock exchange, bid, and corporations shall be decided according to lex loci. (§27). Shares and bonds are to be adjudged by law of issuer (§28). If rules cited here under (i) and (ii) do not apply to contract, applicable law is that of residence or seat of party who is obliged. If this additional rule is inapplicable, law to which transaction of contract has its closest connection is to be applied. (§29).

For recognition of foreign judgments see also topic 5.07 Judgments. For exclusive jurisdiction of Hungarian courts and for lack of Hungarian jurisdiction see also category 6 Courts and Legislature, topic 6.01 Courts.

5.07 JUDGMENTS:

According to International Private Law Code of Hungary (Act-Order 1979:13), decision of foreign court or authority may not be recognized when Hungarian court or authority has exclusive jurisdiction, except in case final decision ruling on dissolution of marriage of Hungarian citizen if recognition is requested by former spouse holding Hungarian citizenship provided that recognition can not be denied (see below) (§70 of I.P.L.C.). Final decision of foreign court or authority made in case in which jurisdiction of Hungarian court or authority is excluded must be recognized in Hungary unless rules on denial of recognition shall be applied. In all other cases decision of foreign court or authority must be recognized if (i) jurisdiction of foreign court or authority was appropriate according to Hungarian rules; (ii) such decision is final according to rules of country where decision was made; (iii) reciprocity does exist between such country and Hungary (no reciprocity is required in case foreign decision relates to status of person or property law provided in latter case that jurisdiction of foreign court is based on stipulation of parties and such stipulation complies with provisions of I.P.L.C.); and (iv) provisions on denial of recognition are not applicable. Foreign decision can not be recognized if (i) it violates public order; (ii) person against whom decision was made was not involved, either personally or through attorney, in procedure due to fact that summoning and complaint (or other document being basis of initial of procedure) were not delivered appropriately to his/her domicile or residence in good time for being able to prepare defense; (iii) decision was made on basis of procedure which violated fundamental principles of Hungarian procedural law; (iv) lis pendens exists in Hungary which was initiated earlier than foreign procedure; or (v) case is considered res judicata in Hungary. (§72 of I.P.L.C.). Recognition of foreign decisions does not require separate procedure, however, such procedure may be initiated before court but judicial review on merits is not possible. Issue of recognition of foreign decision is examined in procedure where it arises. (§74 of I.P.L.C.). In case conditions required for recognition of foreign decision are fulfilled it may be enforced in Hungary according to provisions relating to enforcement of domestic decisions. (§74/A of I.P.L.C.).

Foreign Arbitration Awards.

See categories 8 Dispute Resolution, topic Arbitration and Award; Treaties and Conventions, topic Treaties and Conventions.

5.08 LIMITATION OF ACTIONS:

Statute of limitations is defense which prevents claimant only from enforcing right but does not extinguish obligation itself, and court cannot recognize “limitation of action” ex officio. Thus, party performing in spite of statute of limitations may not reclaim. Further, claim barred by statute of limitations may be asserted against claim of debtor arising from similar or same relation; or claimant may obtain satisfaction from security of debtor, if there was any.

Regular period of statute of limitations is five years. Period shorter than one year may be extended to one year in writing. Any act of claimant to force debtor to perform interrupts time period, which is to start again from beginning. Expiration of period will be suspended for not more than one year, if claimant, for acceptable reasons, cannot enforce claim. (§§324-327 C.C.).

5.09 PRODUCT LIABILITY:

Act 1993:X on product liability (as am'd) is in compliance with European Community Directive issued in 1985 (and am'd in 1999) on same subject. Product means all movables and electric power. Manufacturer is producer of end product, interim product and raw material, as well as any person indicating himself as being manufacturer of product by labeling same with his name, trademark or other distinctive marking. In case of imported products, obligations of manufacturer must be applied to importer. Distributor is also qualified as manufacturer when actual manufacturer and/or importer of product is untraceable or until distributor informs injured person of person, manufacturer or distributor from whom product had been acquired.

Damage is qualified as follows: pecuniary and non-pecuniary loss or damage caused by death, bodily injury or illness; and loss or damage exceeding [Euro]500 to other property caused by defective product, provided other property in question is designated as subject of personal use or consumption, and has been used by injured for such purposes.

Product is defective when it does not provide safety generally expected with special regard to purpose of product, reasonably expected use of product, information related to product, date of marketing of product, as well as state of art and technology. Fact that another product with higher safety is subsequently marketed, does not make product defective.

Manufacturer of product has strict liability for loss or damage caused by deficiency of product. Injured is required only to prove loss or damage, deficiency of product and causation.

Contractual limitation or exclusion of liability towards injured is null and void. Manufacturer is discharged from liability if it proves that: product was not marketed by it, product was not manufactured for commercial marketing and/or was not manufactured or marketed in its field of business, product was not defective at time of marketing and became defective later, deficiency of product at time of marketing by manufacturer was beyond recognition given state of art and technology, or deficiency of product was caused by law or compulsory regulation.

Statute of limitations is ten or three years starting when injured person learns of deficiency of product or cause of deficiency and identity of manufacturer.

Act does not impair contractual or extra-contractual rights for compensation of injured person, or any other remedial possibilities provided by separate legislation.

Act came into force on Jan. 1, 1994, and applies only to products marketed after this date. Rules of general liability apply to products marketed prior to this date.

National Consumer Protection Authority (Nemzeti Fogyasztóvédelmi Hatóság) is independent authority with general competence having power of public authority. In order to protect consumers' interest and quality protection, Authority exercises control over compliance with rules and regulations related to commercial activities and consumers' services, as well as enforcing quality standards, and informs consumers of its findings—especially of results of product comparison examinations—as well as fosters enforcement of consumer rights and imposes penalties defined by separate legislation.

For instance, Authority is authorized to prohibit or impose certain conditions on marketing of products falling under quality objections, to prohibit marketing of products without compulsory preliminary quality control, to order closing of store in case of circumstances threatening life and health of consumers, etc. See Act 1997:CLV on Consumer Protection and Gov. Decree No. 336/2007 (XII.13).

6 COURTS AND LEGISLATURE

6.01 COURTS:

System.

Being unitary, non-federal state, Hungary has unified court system, wherein only Constitutional Court is separate from system of Courts. First level of regular courts is that of local courts, second is 20 County Courts, third is as from July 1, 2003 Courts of Appeal and fourth is Supreme Court. Labor courts are organized beside County Courts.

Constitutional Court.

(Alkotmánybíróság). It was established by Act 1989: XXXII as amended by 1994:LXXVIII on amendment of Constitution. Eleven judges of Court are elected by Parliament by two-thirds majority for nine years. Court's competence includes review of acts and orders, and it has right to annul them (cassation).

Local Courts (or named Municipal Court in towns; Helyi Bíróság or Városi Bíróság) exercise first instance civil (up to HUF 5,000,000) and criminal (misdemeanors and minor felonies) jurisdiction.

County Courts (named in Budapest Metropolitan Court; Megyei Bíróság and Fovárosi Bíróság) act as appellate court in appeals from local courts and labor courts, exercise first instance jurisdiction in business, civil (over HUF 5,000,000) and criminal (more serious felonies) matters and perform administrative judicial review. At County Courts, as appointed by Parliament, separate Military panels are set up.

Labor Courts (Munkaügyi Bíróság) are first instance courts. Labor Court decisions are reviewed by County Court.

Courts of Appeal (Ítèlotàbla) as of July 1, 2003 review decisions of county courts in civil law cases as appellate courts.

Supreme Court (Legfelsobb Bíróság) reviews binding judgments and final orders in supervision procedure. It never exercises first instance jurisdiction and acts as second instance only in exceptional cases. (See category 5 Civil Actions and Procedure, topic 5.02 Appeal and Error.)

Judges.

President of Supreme Court is elected by Parliament, other judges are appointed by President of Republic. Judges are to be professionals with law degree, legal experience and qualifications. First instance courts, as general rule, consist of one professional judge; however, in cases enumerated by law, courts proceed in "council", which regularly consist of one professional judge and two laymen (ülnök). Professional judge and laymen have same rights concerning final judgments and orders, i.e. majority decides. Second instance courts generally consist of three professional judges, and majority decision controls.

Jurisdiction.

Hungarian courts may proceed in all cases where defendant's domicile, residence or seat is in Hungary provided that jurisdiction is not excluded by I.P.L.C. Hungarian courts also may proceed in following cases: if legal dispute relates to contract and location of performance is in Hungary; if conduct, resulting in damage to another party outside of contractual relationship or in non-contractual relationship, occurs in Hungary or effect of such conduct is felt in Hungary; if foreign defendant company has Hungarian branch or representative office and dispute relates to activity thereof; in property claims if defendant has no Hungarian residence or domicile but has property in Hungary (including any claim against debtor whose domicile or residence is in Hungary) which is suitable for enforcement; and in other cases enumerated by I.P.L.C.

Exclusive Jurisdiction.

Only Hungarian court or other authority may proceed (i) in in rem actions relating to real estate located in Hungary and contracts on lease of such real estate; (ii) in probate procedure relating to estate located in Hungary of Hungarian citizen testator; (iii) in procedure initiated against Hungarian State or Hungarian state organ (with few exceptions); (iv) in procedure initiated against Hungarian citizen proceeding abroad as diplomatic representative or otherwise exempted from jurisdiction provided that immunity is expressly waived by Hungarian State; (v) in proceeding related to destruction of document or security issued in Hungary; (vi) in proceedings relating to registration, extension or termination of domestic industrial property rights; (vii) in procedures relating to establishment, insolvency, termination of business company with or without legal entity registered in Hungary and validity of contract or Articles of Association being basis of registration of legal entity and judicial review of decisions made by organs of legal entity; (viii) in procedure relating to registration of rights, facts or data into official records kept in Hungary; (ix) in procedures relating to enforcement in Hungary; (x) in proceedings, with exceptions, related to personal status of Hungarian citizen. (§§62/A and 62/B of I.P.L.C.).

Lack of Jurisdiction.

Hungarian court or other authority may not proceed (i) in in rem actions relating to real estate located abroad and contracts on lease of such real estate; (ii) in probate procedure relating to estate located abroad of foreign citizen testator; (iii) in procedure initiated against foreign state or foreign state organ, unless immunity is expressly waived or subject of procedure is certain civil law relationship of foreign state or foreign state organ; (iv) in procedure initiated against foreign citizen proceeding in Hungary as diplomatic representative or otherwise exempted from jurisdiction provided that immunity is expressly waived by foreign state; (v) in proceeding related to destruction of document or security issued abroad; (vi) in proceedings relating to registration, extension or termination of foreign industrial property rights; (vii) in procedures relating to establishment, insolvency, termination of business company with or without legal entity registered abroad and validity of contract or articles being basis of registration of legal entity and judicial review of decisions made by organs of legal entity; (viii) in procedure relating to registration of rights, facts or data into official records kept abroad; (ix) in procedures relating to enforcement abroad; (x) in proceedings, with exceptions, related to personal status of foreign citizen. (§§62/C and 62/D of I.P.L.C.). Foreign states (or state organs) are not exempted from jurisdiction of Hungarian courts or authorities (i) in procedure subject of which is right or obligation arising from civil law contract provided that location of performance is in Hungary except if other contractual party is foreign state or organ thereof; and (ii) in other procedures enumerated by I.P.L.C. (§62/E of I.P.L.C.).

Submission.

With regard to property law cases, parties may stipulate, for their legal debate or future legal debate arising from particular legal relationship, jurisdiction of courts or particular court of state. I.P.L.C. regulates form of submission and provides that submission is invalid if foreign jurisdiction is stipulated for cases falling into exclusive jurisdiction and Hungarian jurisdiction is stipulated for cases where Hungarian courts and authorities lack jurisdiction. (§62/F of I.P.L.C.). If in law suit defendant, without referring to lack of jurisdiction, makes statement on merit, jurisdiction of Hungarian court shall be established provided that it is not excluded by provisions of I.P.L.C. (§62/H of I.P.L.C.).

6.02 LAW REPORTS, CODES:

In Hungary, as civil law country, law is codified, and only provisions set forth in acts and orders are considered to be law. Nevertheless Constitutional Court is entitled by constitution to exercise judicial review of acts and orders and to annul them. Judgments are not of stare decisis nature by law, nevertheless, opinions of higher courts serve as measure for practice. As from Oct. 1, 1997 Supreme Court occasionally issues guiding decisions (jogegysègi határozat), which are of obligatory nature to all courts. Supreme Court in its periodical, “Bírósági Határozatok”, publishes number of its decisions (and sometimes those of other courts) supposed to be “leading cases”. Supreme Court publishes also official collection of Supreme Court decisions (“Legfelsobb Bíróság Határozatainak Hivatalos Gyujteménye”). Regarding Supreme Court guiding and other decisions see http://www.lb.hu in Hungarian.

No act or order may be in force without being officially published. Official publication of acts, Parliament resolutions, orders and decrees of Government, Ministers and other government agencies, decisions of Constitutional Court and guiding decisions of Supreme Court appear in “Magyar Közlöny”, official gazette of Republic of Hungary.

Each ministry has its own official gazette. Annual official collection of all acts and orders of previous year is published by Ministry of Justice and Government Office, under title “Törvények és Rendeletek Hivatalos Gyujteménye”. Ministry of Justice publishes six-eight volume collection of acts and orders in force and in use under title “Hatályos Jogszabályok Gyujteménye”.

There are other collections and periodicals, e.g. Hungarian-English-German language monthly “Hatályos Magyar Jogszabályok”, which republishes acts and orders thought to be of interest to foreigners.

6.03 LEGISLATION:

See category 1 Introduction, topic 1.02 Government and Legal System.

7 DEBTOR AND CREDITOR

7.01 ASSIGNMENTS:

Assignment as separate document is not required by law. Transfer of any property, real or personal, is affected by contract of parties, unless otherwise required by contract itself. Nevertheless, if wording of contract requires separate assignment, transfer of property cannot be performed without it.

For assignment of rights and delegation of duties see category 3 Business Regulation and Commerce, topic 3.10 Contracts, subhead Contractual Rights.

7.02 ATTACHMENT:

For purpose of securing execution of future judgment on money claim or in order to secure claim in real estate, attachment may be granted by court prior to judgment.

7.03 BANKRUPTCY:

Bankruptcy is regulated by Act 1991:XLIX as amended several times. This Act is similar to U.S. Bankruptcy Law and contains provisions as to bankruptcy and liquidation. Voluntary dissolution, although being earlier part of Bankruptcy Act, is provided for by Act 2006:V.

Bankruptcy, liquidation and voluntary dissolution proceedings include all assets of companies. During bankruptcy or liquidation proceedings, within eight days of receiving request debtor and liquidator or trustee of assets should inform creditors about finances and assets of economic organization and inform employees about issues concerning them. These two proceedings fall into debtor's County Court's jurisdiction.

Bankruptcy Proceedings (csooeljárás).—Debtor may declare bankruptcy with prior approval of General Meeting or other main governing body of debtor. Court at expense of debtor appoints trustee of assets. Trustee manages and supplies information on assets and finances of organization. Debtor gets maximum of 365 days grace period from payment of debts during which time debtor must propose suitable program to restore its solvency, propose plan of agreement and call for negotiations with creditors. Final agreement regarding grace period is reached if more than ½ of creditors having voting rights in each agree to granting grace period. If agreement is made during grace period, Court declares procedure finished. If not, liquidation procedure may commence. Under agreement creditors or third parties may assume debt, obtain assets from debtor or guarantee its obligations. Agreement must contain list of participant creditors, program approved by creditors, mode of procedure and control; possible rescheduling of payment deadlines, canceling or assuming creditors' claims, and anything parties think important to restore debtor's solvency. If no agreement is concluded, Court starts liquidation proceedings ex officio.

Liquidation proceedings (felszámolási eljárás) start ex officio or on debtor's, creditor's or liquidator's request or upon order of Company Court (Court of Registry) or Criminal Court. Debtor may request liquidation if it is not able or does not intend to start bankruptcy proceeding. If creditor requests liquidation, reasons must be stated. Debtor may accept or deny request. When debtor denies request, Court examines case and announces solvency or insolvency. In latter case Court may grant grace period for not more than 30 days. When resolution of insolvency goes into effect, Court orders corporation's liquidation, orders announcement thereof, appoints liquidator and notifies various authorities, such as competent tax authority, labor office and all financial institution where debtor's accounts are held. Director of corporation must prepare inventory, annual or simplified report or balance sheet and submit it to liquidator and tax authority and further must prepare report on remaining or hidden environmental damages. Director may be fined sum not exceeding 50% of his income received from corporation or HUF two million, if his income is not specified in year preceding liquidation if he fails to comply with its duties mentioned above. At beginning of liquidation proceedings all debts become due. Agreement between creditor(s) and debtor may be concluded during liquidation proceedings. On debtor's request Court can call negotiations with liquidator participating. During negotiations Court determines on liquidator's proposal, assets concerning agreement; debtor and creditors may agree on order of satisfaction, modes, proportion and modification of deadlines, or anything parties think important to restore debtor's solvency. Agreement needs approval of at least 50% of creditors in each group (groups [b], [d], [e], [f] and [g] and also mortgagees, see subhead Order of Satisfaction of Claims, infra), if their claims amount to at least two-thirds of claims of parties entitled to agree. Liquidator assesses finances of and claims against corporation, informs debtor and creditors, may terminate all contracts (excluding lease-contracts, contracts for educational support, labor contracts, collective bargaining contracts or loan agreements entered into in ordinary course of business with private persons), collects claims due debtor and sells its assets at highest possible price.

Liquidator exercises employer's rights. When money is sufficient to pay creditors, liquidator can make interim liquidation balance, and such balance shall be approved or disapproved by Court. In latter event, procedure must continue. Reserves must be created to satisfy liquidation costs and disputed claims of creditors. At end of liquidation proceedings, but not later than two years from beginning thereof, final balance, account, report and tax return must be prepared by liquidator and filed with Court and tax authority. If creditor does not agree with final balance or report, Court hearing is scheduled with participation of creditor and liquidator. If no objection is raised Court decides on costs, satisfaction of creditors' claims (see subhead Order of Satisfaction of Claims, infra), bank accounts and other duties of liquidator, closing liquidation proceedings and liquidation of debtor and its affiliated companies, if any.

Order of satisfaction of claims is: (a) costs of liquidation (including wages and salaries, severance payments); (b) claims secured before beginning of proceedings by lien as provided by law; (c) allowances, damage- and life-annuity; (d) private claims from non-economic activity (i.e. damages, guarantees); (e) social insurance and private old-age pension debts, taxes, repayable subsidies, public debts; (f) other claims; (g) default interests as mentioned above and effective from liquidation; (h) claims held by (ha) member or shareholder having debtor's majority control, (hb) any executive officer of debtor, (hc) employee in leading position as defined in Labor Code, (hd) and their close relatives (C.C. §685), (he) economic operator under debtor's majority control (C.C. §685/B), (hf) claims resulting from debtor's gratuitous commitment.

If assets are not sufficient to satisfy all claims, those qualified under (a) and (b) must be fully satisfied, then those under (c) and (d) proportionally.

If assets are not sufficient to satisfy all claims under (e), (f) and (g), satisfaction of these creditors' claims should be performed proportionally.

If assets are not sufficient to satisfy all claims under (e), social insurance debts should be fully satisfied, others proportionally.

Simplified liquidation proceedings must start at liquidator's request when assets do not even cover costs of liquidation or when realization of proceedings is technically not possible because of deficiency in bookkeeping or recording.

Voluntary dissolution (végelszámolás) is performed when economic organization is dissolved without legal successor, other than in liquidation proceeding. Decision on voluntary dissolution should be filed with Corporation Court by director of corporation and also with Land Registry Office, tax and Social Security Authority, labor and environmental office, affected banks and competent archives. Creditors must present their claims within 40 days after announcement of final settlement. Settler's duty during proceedings is similar to liquidator's.

7.04 BONDS:

See category 3 Business Regulation and Commerce, topic 3.15 Securities.

7.05 LIENS:

As of Sept. 1, 2001 Act 2000:CXXXVII amended C.C. and introduced restated regime on liens. Lien is of collateral nature. Based on lien entitled party may seek satisfaction from lien item serving as security of his/her claim determined or determinable in money prior to any other claim unless otherwise regulated by law. Lien may be created on future or conditional claims as well, but may not secure unenforceable claim. Extent of liability with lien item corresponds to claim which is secured by lien item. It includes interests, costs of enforcement of claim and lien and necessary expenses related to lien item. Transfer of claim results in transfer of lien. Lien may be transferred along with claim only unless otherwise regulated by law. (§251 of C.C.). Subject of lien can be anything that can be possessed, assignable rights or accounts receivable. Lien includes, unless otherwise agreed by parties, benefits arising from lien item. Lien may be created by contract, provision of law, court judgment and decision of authority. Contract on lien shall be in writing. (§254 of C.C.). Satisfaction from lien item may only be enforced pursuant to court judgment unless otherwise regulated by law. (§255[1] of C.C.). Types of lien are: pledge (pignus), registered pledge (or mortgage) (hypotheca), floating charge, lien on rights and receivables and independent lien.

Pledge (Pignus).

To create pledge, item shall be transferred to possession of creditor or third person. Portion of item or proportion of ownership of item may not be pledged.

Registered Pledge (Hypotheca/Mortgage).

Portion of item may not be pledged by registered pledge but in case of joint ownership of item registered pledge can be based on proportion of ownership of debtor. In case of real property, which may only be mortgaged, whole parcel of land as described in land registry or debtor's proportion of ownership may be mortgaged. To give mortgage legal effect it shall be recorded in land registry. Registered pledge created on items other than real property shall be included in public document created by notary public and shall be recorded into lien register kept by Hungarian National Chamber of Notaries Public. (§§261[3] and 262[1] of C.C.; IM Order No. 11/2001 [XI.1] on detailed rules of lien registration).

Floating charge may be created on entire property of business company with or without legal entity without enumerating particular assets, rights, receivables belonging thereto or only on part of property which may be operated as independent economic unit. Floating charge shall be included in public document created by notary public and shall be recorded into lien register. Floating charge includes property acquired after date of conclusion of contract on floating charge as from date debtor obtains ownership right to item, but excludes item if it is withdrawn from debtor's property. Creditor may transform floating charge over entire property into separate registered pledges over all or certain items of such property by written declaration. (§266[1] of C.C.).

Lien on Rights and Receivables.

In case right or claim is registered in official register and law provides that lien on such right or claim shall be registered as well such lien will be legally effective upon its registration only. (§267[1] of C.C.).

Independent lien is created when lien item is charged without any personal claim, i.e. such lien has no collateral nature but is principal obligation. To seek satisfaction, unless otherwise agreed by parties, such lien shall be terminated by either debtor or creditor. Termination period is six months unless otherwise agreed by parties. (§269[1-2] of C.C.).

8 DISPUTE RESOLUTION

8.01 ALTERNATIVE DISPUTE RESOLUTION:

Mediation.

Act on Mediation (Act 2002:LV) provides for special conciliation procedure in civil cases, with some exceptions prior to litigation or arbitration. Aim is to reach written agreement by involvement of independent mediator without prejudice to parties' right to seek judicial or arbitral decision in dispute. Mediators to be appointed are registered by Ministry of Justice.

8.02 ARBITRATION AND AWARD:

Parties may voluntarily agree to submit disputes to arbitration, in advance or at later time, if at least one party is engaged in business. However, parties may not agree to submit their disputes to arbitration if they may not freely alienate, encumber or otherwise dispose of disputed property or dispute is regulated by special procedure of CPC. Arbitration agreement or arbitration clause must be in writing. Agreement is considered to be in writing if made in letter, telefax, telegram or similar means. Similarly, it is written agreement if one of parties declares it to be in petition to court and other party does not object. Requirement of written agreement satisfied if written agreement between parties refers to other enforceable document containing arbitration clause and such written agreement states that latter forms part of it.

Parties may appoint sole arbitrator or panel of arbitrators according to their agreement or may turn to permanent court of arbitration. Panel shall decide by majority vote. If agreement does not provide applicable procedural rules, arbitrator(s) may establish own rules of procedure or may refer to rules of procedure of any permanent court of arbitration. Unless parties otherwise agree, language of procedure is Hungarian. Panel may ask assistance of local court and authorities in enforcement, taking evidence, etc.

If referral of dispute to arbitration is duly made, courts have no jurisdiction to decide matter. Awards need no special recognition procedure and are to be enforced by ordinary county courts. Exceptionally, arbitral awards may be set aside upon claim initiated before court if (i) party that concluded arbitration agreement had no legal capacity or capacity to act; (ii) arbitration agreement is invalid according to applicable law; (iii) party was not properly informed on arbitral proceedings or appointment of arbitrator or was otherwise unable to present his case; (iv) award exceeded scope of arbitration agreement; (v) composition of arbitral tribunal or its procedure violated agreement of parties or, in lack of such agreement, violated law; (vi) subject matter of dispute may not be settled by arbitration under Hungarian law; or (vii) award violates public order. For procedural rules and competencies of arbitration panel, see Act 1994:LXXI as am'd several times.

Court of Arbitration attached to Hungarian Chamber of Commerce and Industry (Magyar Kereskedelmi és Iparkamara, http://www.mkik.hu) has jurisdiction for resolution of disputes arising from domestic or international commercial matters of individuals or entities under agreement of parties made in writing or if stipulated by international convention. Chamber has concluded agreements with U.S., Korean, Italian, Austrian and Swiss Chambers of Commerce on arbitration. (See optional arbitration clause suggested by American Arbitration Association and Hungarian Chamber of Commerce in Memorandum of Agreement of Sept. 7, 1984 for U.S.-Hungarian joint ventures.) Rules of procedure for Court of Arbitration are available upon request from Chamber, which rules correspond to rules of other internationally accepted arbitration fora. Progressive fee rate applies to value of claim as indicated in following chart.

Court of Arbitration's fees in HUF:

Registration fee: 25,000,-Ft

Administrative expenses:

AMOUNT IN DISPUTE (in HUF)		ARBITRATION FEE (in HUF)	
0-	5,000,000:		2.6%, minimum 40,000
5,000,001-	10,000,000:	130,000 +	2.2% of the amount over 5,000,000
10,000,001-	25,000,000:	240,000 +	1.8% of the amount over 10,000,000
25,000,001-	50,000,000:	510,000 +	1.36% of the amount over 25,000,000
50,000,001-	125,000,000:	850,000 +	1% of the amount over 50,000,000
125,000,001-	250,000,000:	1,600,000 +	0.8% of the amount over 125,000,000
250,000,001-	1,250,000,000:	2,600,000 +	0.4% of the amount over 250,000,000
1,250,000,001-	5,000,000,000:	6,600,000 +	0.2% of the amount over 1,250,000,000
5,000,000,001-	above:	14,100,000 +	0.007% of the amount over 5,000,000,000

Arbitrator's fee:

AMOUNT IN DISPUTE (in HUF)			ARBITRATION FEE (in HUF)
0-	5,000,000:		2.4%, minimum 40,000
5,000,001-	10,000,000:	120,000 +	2% of the amount over 5,000,000
10,000,001-	25,000,000:	220,000 +	1.6% of the amount over 10,000,000
25,000,001-	50,000,000:	460,000 +	1.2% of the amount over 25,000,000
50,000,001-	125,000,000:	760,000 +	0.8% of the amount over 50,000,000
125,000,001-	250,000,000:	1,360,000 +	0.4% of the amount over 125,000,000
250,000,001-	1,250,000,000:	1,860,000 +	0.2% of the amount over 250,000,000
1,250,000,001-	5,000,000,000:	3,860,000 +	0.12% of the amount over 1,250,000,000
5,000,000,001-	above:	8,360,000 +	0.007% of the amount over 5,000,000,000

In respect of chart, arbitration fee consists of aggregate amount of administrative expenses and arbitrator's fee. Arbitrator's fee means fee payable to arbitrator. In case of arbitral tribunal, arbitrator's fee shall be multiplied by number of members of arbitral tribunal. Arbitrator's fee of presiding arbitrator and of sole arbitrator shall be increased by 30% of arbitrator's fee. Administrative expenses also include fees payable to local government and social security contribution of 11% on arbitrator's fee.

State revenue to be paid is 1% of value of subject matter but minimum HUF 5,000 and maximum HUF 250,000. (Act 1990:XCIII as am'd).

Both U.S. and Hungary are parties to U.N. Convention on Recognition and Enforcement of Foreign Arbitral Awards of 1958.

9 DOCUMENTS AND RECORDS

9.01 ACKNOWLEDGMENTS:

Acknowledgments are to be taken before Hungarian notary public. If document is to be used abroad, signature shall be certified by Ministry of Justice and Law Enforcement and further by Ministry of Foreign Affairs. Acknowledgments may be taken abroad before Hungarian consular or diplomatic officials, whose signature will suffice without further certification.

Unless otherwise required by international agreement, foreign acknowledgments intended for use in Hungary are to be certified in usual diplomatic way, and finally by Hungarian official authority.

Both U.S. and Hungary are parties to Hague Convention of 1961 on abolishing the requirements of legalization for foreign public documents. Acknowledgments for U.S. use may be taken before U.S. consular officer in Budapest. For countries not parties to 1961 convention, Hague Conventions of 1905 and 1954 apply. “Apostille” for foreign use is executed in Hungary by Ministry of Justice and Law Enforcement (Igazságügyi és Rendészeti Minisztérium), Budapest and Ministry of Foreign Affairs (Külügyminisztérium), Budapest, depending on nature of public document to be executed.

9.02 AFFIDAVITS:

Formal affidavit, confirmed by oath or affirmation of party, taken before person having authority to administer it, is unknown in domestic Hungarian law. Nevertheless, like any written or printed declaration or statement of facts made voluntarily, affidavit taken abroad may be used as evidence before Hungarian court, and will be subject of deliberation by judge.

Affidavit for foreign use, depending on requirements of respective foreign law, with or without being sworn, may be executed before notary public, in Hungarian or in other languages spoken by notary public having “language permission” issued by Ministry of Justice (usually available languages are those of neighboring nations, English and French).

9.03 NOTARIES PUBLIC:

Notaries' activities are regulated by Act 1991:XLI (as am'd), IM (Minister of Justice) Decrees Nos. 13, 14, 15/1991 (XI.26) (as all amended). Notary Public (közjegyzo) is private entrepreneur, who must be qualified lawyer. Notary may attest and certify legal documents, make wills and notarize legal documents, also in electronic forms, exercise first stage probate jurisdiction and perform certain official acts. Notary may also administer oath or statement “en lieu” of oath, if required for foreign use.

9.04 SEALS:

Only public seal, used by public authorities, is legally recognized in Hungary. Although use of “private” seal of corporation or person has no legal effect, it is widely used and commonly belongs to signatures of firms.

10 EMPLOYMENT

10.01 LABOR RELATIONS:

Labor law (Act 1992:XXII as am'd several times) was enacted in 1992 to create new labor relationships appropriate to changed conditions. Labor Act is specifically oriented to accommodate free market conditions in labor market. In general, Act covers labor relationship when work is performed in Hungary, or if abroad in Hungarian company's employ. Act does not cover unless otherwise regulated by it, labor relationship when work is performed by foreign employer's employee in Hungary based on foreign employment, posting of workers or temporary employment relationship.

Act prescribes, in detail, rules of operation and powers of trade unions in workplace. Collective bargaining agreements, that are mandatory to observe for nonmembers of trade unions, are entered into at workplaces. Workers' Councils (Üzemi Tanács) must be elected at workplaces with over 50 employees. Councils have approval rights in matters affecting welfare monies and assets as set forth in collective bargaining agreements. Councils have rights to express opinions on matters of, inter alia, reorganization, restructuring, privatization, modernization, training, rehabilitation of workers, annual vacation plan, internal rules affecting important interests of workers, etc. Councils have rights to request information from employer on issues relating to workers' economic and social interest with regard to labor relationship, as well as on compliance with provisions on nondiscrimination. Provision of information may not be denied by employer. Provisions of Act on European Works Council came into force on May 1, 2004.

Act also prescribes rules for entering into labor relation between employer and employee, contents of labor contract, modes of performing work, full and part time work, modification of labor contract, etc. Special provisions apply to posting of workers and temporary employment relationship (including where foreign employer's employee works in Hungary) and employees under age 18.

Labor relationship terminates upon (a) employee's death, (b) dissolution of employer without successor, or (c) conclusion of definite period of labor relationship; and may terminate upon re-qualification of employer as public service organization. Labor relationship can be terminated by (a) mutual agreement, (b) ordinary termination, (c) extraordinary termination and (d) without notice during tryout period. Fixed time labor relationship can only be terminated by mutual agreement, extraordinary termination or by employer by paying average salary to employee for remaining time of contract (max. one year). Ordinary termination can be made by either employer or employee. In case of ordinary termination, unless otherwise regulated by Act, employer must give cause regarding capacity or behavior of employee or cause concerning operation of employer. Ordinary termination by employer is not possible in case employee shall be considered as pensioner, during illness, unpaid leave to tend to ill child, pregnancy plus three months, army service or nursing close relative. Very special cause need be given for termination during five years before retirement. Notice for termination is minimum 30 days and maximum one year. Notice period is determined by number of years of employment. During half of notice period, employee need not actually work. Ordinary termination warrants severance payment. Extraordinary termination is possible by either employer or employee if other willfully or out of gross negligence substantially breaches important obligation or otherwise behaves in way that makes employment impossible. Extraordinary termination is possible within 15 days from obtaining knowledge of such breach or behavior but maximum within one year of occurrence of such breach or behavior. Act also prescribes special rules for mass reduction of workplaces.

Apart from national holidays, employees are entitled to 20-30 work days as holidays annually, depending upon their age. Extra holidays must be given for special circumstances (e.g. minors, parents, disabled persons, etc.). Special paid and unpaid holidays must be given during and after pregnancy. Liability of employer or employee for damage caused in relation to employment is also regulated. Special rules apply to employees in managerial or executive positions.

Social Security is governed by Acts 1997:LXXX-LXXXIII all amended by Act 1999:XCIX.

Free medical care is citizen's right in Hungary, financed by Social Security Fund, which obligations are state guaranteed. Fund covers pensions, sick-list payments (generally 70% of wages), family allowances (payment to families for minors, HUF 12,200-25,900 per child monthly, Act 1998:LXXXIV), child-welfare subsidies (sick-list payment for mother or father, if one of them is not working in order to be able to care for their child of less than three years of age), and other social security subsidies of less importance.

Main incomes of Fund are employers' pay-in (as of Jan. 1, 2002: 29% after wages), (as from Jan. 1, 2007: 26%), (as from July 1, 2009: after double minimal wage 26%, after amount above double minimal wage: 29%) and employees' pension and health insurance pay-in (as of Jan. 1, 2004: 12.5% of wages) (as of July 1, 2009: 9.5 % or 1.5 % of wages as pension contribution and 6% of wages as health insurance contribution). Self-employed pays these two payments, alone after her income. For covering unemployment payments, employees shall pay employee's contribution in amount of 1.5 per cent of health insurance contribution base. This provision shall not apply to persons receiving old-age pension, invalidity or accident-related disability pension or who have become eligible therefore. Employers shall pay employer's contribution for each employee, in amount of 1 per cent of social security contribution base if this base is no higher than double minimal wage, and above this limit, in amount of 3 per cent of social security contribution base. (Act 1991:IV).

Insurance companies offer additional domestic and foreign services.

Dismissal Indemnity.

Indemnities are payable in event of dismissal of employees, based on Labor Code (Act 1992:XXII as am'd several times) which stipulates conditions under which indemnities are required to be paid. Indemnities must be paid if employment relationship is terminated by employer or if employer ceases to exist and there is no successor. Notwithstanding above requirement, no indemnities are required if (a) employment relationship is terminated by employer because employee “deliberately or out of gross negligence breached in substantial way some essential obligation required by and related to employment relationship" or employee's behavior or conduct makes it impossible to continue employment relationship, or (b) employee shall be regarded as pensioner.

Further condition of eligibility for indemnities is that employment relationship must have been in existence for specific period of time as indicated in following table.

Amount to be paid as indemnity is defined by reference to employee's "average" salary:

Duration of Employment	**Indemnity**
At least 3 years	1 months salary
At least 5 years	2 months salary
At least 10 years	3 months salary
At least 15 years	4 months salary
At least 20 years	5 months salary
At least 25 years	6 months salary

Amount of indemnity must be increased by three months average salary if employment relationship is terminated within five years preceding age for retirement.

10.02 SOCIAL SECURITY:

See topic 10.01 Labor Relations.

11 ENVIRONMENT

11.01 ENVIRONMENTAL REGULATION:

Act 1995:LIII on General Rules on Environmental Protection as amended several times declares main principles on protection of environment, including protection of land, water, air and nature. There are separate laws on protection of land, forests, fishing, building construction, water management, air pollution, waste management, mining, etc., establishing quality standards and detailed rules of protection.

As far as protection of water is concerned, Act 1995:LVII as am'd contains rules protecting clean and healthy water. Supplementing legislation is Gov. Decree No. 123/1997 (VII.18) on protection of water resources, Gov. Decree No. 160/1995 (XII.26) on water management corporations, Act 1993:XLII on Streams and Lakes of International Importance and 21/2002 (IV.25) Ministry of Transport and Water Management Decree on operation of public water utilities. There are separate rules on protection of Hungarian lakes such as lakes Balaton and Velencei and rivers such as Danube and Tisza. Hungary is party to international agreement on protection of rivers Tisza and Danube. Protection of water against nitrate pollution is regulated by Gov. Decree No. 27/2006. (II.7).

Trees and forests are protected by Acts 2006:XXXVII and 1996:LV. Detailed rules on use of wood and government plans regarding maintenance and development of forests are found in ÖM (Minister of Local Municipalities) Decree No. 4/2008 (VIII.1), FM (Minister of Agriculture) Decree 29/1997 (IV.30), etc. There are territories declared part of Hungarian national heritage or otherwise of distinguished importance; separate decrees of Ministry of Environmental Protection and Water are devoted to protect those areas.

As to protection of clean air, Gov. Decree No. 21/2001 (II.4) (integrated into 13/2001 [V.9] KöM), Decree No. 14/2001 (V.9) KöM-EüM-FVM *(Common Decree of)* Minister of Environmental Protection, Minister of Health and Minister of Agriculture and County Development and Decree No. 17/2001 (VIII.3) KöM (Minister of Environmental Protection) declares behavioral rules, and contains list of materials likely to cause air pollution, on countrywide system of measuring air pollution, etc. Hungary is party to 1979 Geneva Convention on Prevention of Transborder Air Pollution. Prevention of air pollution caused by nuclear plants is regulated by Decree No. 15/2001 (VI.6) Köm (Minister of Environmental Protection).

Safe utilization of nuclear energy is regulated by Act 1996:CXVI on Nuclear Energy and Decree No. 16/2000 (VI.8) EÜM (Minister of Health) on execution thereof. Zoning and housing rules in neighborhood of nuclear plants are found in Gov. Decree No. 213/1997 (XII.1). See also Gov. Decrees No. 240,124/1997, IRM (Minister of Justice and Law Enforcement) Decrees No. 7/2007 (III.6), IKIM (Minister of Industry Trade and Tourism) Decree 62/1997, KHVM (Minister of Transport, Telecommunication and Water Management) Decree No. 14/1997 (IX.3). Hungary is party to European Nuclear Research Institute and International Nuclear Energy Agency.

As far as storage and disposal of solid and liquid waste is concerned, main rules are found in Decree No. 1/1986 (II.21) ÉVM-EÜM *(Common Decree of)* Minister of Building Affairs and City Development and Minister of Health and in Decree No. 16/2002 (IV.10) EÜM (Minister of Health). As far as dangerous waste is concerned, Gov. Decree No. 180/2007 (VII. 3) and Gov. Decree No. 98/2001 (VI.15) contain rules on control of such materials.

In general, anyone violating rules on protection of environment, may be subject to fine, civil damages and criminal sanctions. Furthermore, person causing such harm is obliged to reorganize activities in order to avoid such harm in future.

Environmental protection is coordinated by Government and Ministry of Environmental Protection and Water. Minister of Environmental Protection and Water is responsible for establishing long run projects for preservation and development of human environment and issues orders therefor. Ministry is supported by Environmental Protection Superintendence responsible for establishing standards, issuing licenses, and imposing sanctions on violators. Some authority of minister is delegated to municipalities which, in frame of such authority, may issue municipal orders regulating protection of regional environment. See Gov. Decree 347/2006 (XII.23).

Act 2003:LXXXIX provides for environmental load charges. Charge must be paid by persons who pursue activities subject to environmental licensing, in case they discharge materials into environment: air, water or soil.

12 ESTATES AND TRUSTS

12.01 DEATH:

Missing person may be declared dead by Court. Procedure may start after five years have elapsed from disappearance. It is up to Court to fix day of death. Declaring someone's death has same effect as death itself. If found to be living, or real date of death discovered, Court annuls or modifies declaration of death. (§§22-25 C.C.).

12.02 TRUSTS:

Trust, as legal institution and title to property right, held by one party for benefit of another, is unknown in Hungarian law. Since it is not prohibited by law, property relations of trust nature may nevertheless be created by contract.

12.03 WILLS:

Wills and contracts of inheritance are governed by §§623-672 of Civil Code. Although interpretation of will by Court follows principle of favor testamenti, lack of any of formalities makes will invalid. Last will and testament may be public or private; private may be holographic or autographic, or in emergency, declared orally. Minor age 14-18 or person with otherwise limited capability may only make public will to which consent of guardian or of any authority is not required. One who is blind, illiterate or in condition of incapability to read or to sign cannot make either holographic or autographic will. Even if document in which will was incorporated was lost or destroyed, except if intentionally destroyed by testator, will remains in force.

Public will (közvégrendelet) may be executed before notary public or local court in official way of public records, and is deposited with notary public or Court, although fact of deposit with notary or Court has no legal effect. Notary, witness or court official may not profit from public will. Testator may deposit unwitnessed private autographic or holographic will with notary public, however, this deposition does not affect private nature of will. Revocation of will may be effected by express declaration of revocation in form of will, by destroying or by execution of new will. Taking back will from notarial deposit will not effect revocation.

Private holographic will must be named as such, handwritten, dated (month, day, year and place) and subscribed entirely by testator with her own hand, and need not be witnessed or notarized.

Private autographic will, apart from same formalities of holographic will (except for requirement of handwriting), has to be witnessed by two uninterested persons of full legal capacity, i.e. will has to be subscribed or acknowledged as such in joint and continuous presence of witnesses, who have to subscribe it.

Oral, private will may be done in life-threatening emergency, if written will is impossible or virtually impossible to make. Oral will has to be performed and directly announced as such in joint and continuous presence of two witnesses, who are not beneficiaries, in language they understand. If after three months testator is still alive and will is not repeated in another form, will is no longer in force.

Joint or mutual will is entirely invalid. Disposition about change of heir to estate, conditioned by certain event or date is also invalid. Nevertheless, conditional legacy or bequest is valid. Invalid disposition does not effect validity of will, as a whole. Only someone who is interested in will may claim invalidity of will or any disposition thereof.

Contract of inheritance must satisfy formal requirements of will. Spouses, as testators, may be jointly one party to contract. Revocation or modification of contract needs consent of both parties.

Compulsory portion is statutory claim in estate of descendents or, if there is no descendent, of parents, for half of estate, which in absence of will would be inherited by them. Compulsory portion of spouse and (from Jan. 1, 2009) of registered companion is life long usufruct of estate, limited to her/his personal needs. In exceptional cases, based on some significant cause, testator may deprive compulsory heirs of inheritance.

As for validity of foreigners' will, testator's personal law, or in the lack of such, lex loci actus are to be applied.

Inheritance Tax.

See category 22 Taxation, topic Taxes.

13 FAMILY

13.01 DISSOLUTION OF MARRIAGE:

See topic 13.02 Divorce.

13.02 DIVORCE:

According to Family Law Code (Act 1952:IV, am'd several times), marriage may be dissolved either by annulment or by divorce. Grounds for divorce are complete and irremediable deterioration of married life. No grounds for divorce are needed after certain time living separately. Declarations of annulment and divorce may be issued only by Court. There is no legal status comparable to separation.

As far as domestic relations law is concerned, Hungary is not title theory jurisdiction. Consequently, title theory of alimony between spouses does not exist. However, equitable distribution of marital property is warranted unless otherwise stipulated in prenuptial or separation agreement of spouses.

When child custody is to be provided for, both spouses and (from July 1, 2009, see Act XXIX of 2009) registered companions theoretically enjoy equal rights and legal practice tends to keep siblings together. In any matrimonial action or in independent action for child support, Court shall order either parent to pay temporary child support or child support without requiring showing of immediate or emergency need. Court shall not consider misconduct of either party but shall make its award for child support after consideration of all relevant factors. See also topic 13.05 Marriage.

13.03 HUSBAND AND WIFE:

See topics 13.02 Divorce and 13.05 Marriage.

13.04 INFANTS:

For legal capacity of minors see category 3 Business Regulation and Commerce, topic 3.10 Contracts. For child support see topic 13.02 Divorce.

13.05 MARRIAGE:

Age of marriage, for both males and females, is 18. Marriage is to be solemnized before local municipality, after waiting period of 30 days from registration. Religious marriage is of no legal effect unless solemnized in other country where that form of marriage is recognized (lex loci actus). Medical examinations or blood tests are not required. One who has previously divorced has to produce certified health advice. If in doubt, foreigners may be required to prove their legal capacity. Marriage by proxy is not possible; presence of parties is required.

Marriage is prohibited between close relatives and where there is existing prior marriage or (from Jan. 1, 2009) registered companion relationship of either party. Prohibition of being under age of consent may be cured.

Prenuptial agreement, before or after marriage ceremony, may cover questions of marital property, children's and wife's family name, or other matters considered necessary.

Husband and wife have equal rights within marriage; they are to decide together on parental powers, property matters, domicile, etc.

For dissolution of marriage see topic 13.02 Divorce.

Act 2009:XXIX established registered companion relationship from Jan. 1, 2009. Unless otherwise regulated by law, provisions concerning marriage shall be applied to registered companion relationship.

14 FOREIGN TRADE AND COMMERCE

14.01 CUSTOMS:

As of May 1, 2004, Hungary is member state of EU and as such applies EU customs law. Execution of EU customs law is regulated by Act 2003: CXXVI and PM (Minister of Finance) Decree No. 15/2004 (IV.5) on its execution. See also topic 14.04 Foreign Trade and European Union Law Digest, category 14 Foreign Trade and Commerce, topic Custom Duties. See also http://www.vam.hu.

14.02 FOREIGN EXCHANGE:

Unless otherwise regulated by Act or Gov. Decree, transactions with foreign exchange, foreign currency, HUF or money claims relating to HUF by Hungarian persons both in Hungary and abroad and by foreign persons in Hungary may be performed without limitations. (See Act 2001:XCIII on abolishment of restrictions on foreign exchange.)

14.03 FOREIGN INVESTMENT:

Foreign Investment Act 1988:XXIV (as am'd several times) comprises basic rules with regard to investment of foreigners in Hungary. For foreign corporations see category 2 Business Organizations, topic 2.04 Corporations; for tax allowances see category 22 Taxation, topic Taxes; see also topics 14.05 Investment Protection, Customs; category 4 Citizenship, topic Aliens.

Apart from regular foreign investments following mostly EEC standards which are governed by general rules of several branches of law, privatization of state owned property continues to offer attractive investment possibilities in coming couple of years. (See also topic 14.05 Investment Protection.)

Privatization of State Owned Property.

Systematic privatization is concluded. State Privatization and Property Holding (hereinafter referred to as ``ÁPV Zrt'') is terminated on Dec. 31, 2007. Privatization of state owned property is conducted by legal successor of ÁPV Zrt, Hungarian National Asset Management Company (hereinafter referred to as ``MNV Zrt.''). ÁPV Rt is corporation wholly owned by Hungarian State and operating in form of Zrt. MNV Zrt is managed by National Property Management Council (hereinafter referred to as ``Council'') consisting of seven members appointed by Hungarian President. Operation of MNV Zrt. is controlled by Supervisory Board consisting of not more than 11 members.

MNV Zrt shall, inter alia, prepare and execute decisions of Council relating to State owned property, utilize State owned property directly or through civil contracts, regularly control management of contracting persons and legal entities in connection with State owned property, represent State in civil relations in connection with State owned property.

State owned property shall be managed by MNV Zrt or may be transferred under contract (such as rent, lease, property management) to legal entities or persons. Main reason of contracts for utilization of State owned property is to improve efficiency of management of State owned property.

Unless otherwise regulated by law, MNV Zrt has exclusive right to transfer State owned property. Depending on nature of property, transfer may be performed either directly or indirectly. MNV Zrt shall attempt to transfer State owned property by way of invitation for tender, unless Act or Gov. Decree provides otherwise.

U.S. Investors.

U.S. SEED Act from Nov. 1989 entitled Private Overseas Investment Corporation (OPIC), U.S. government agency, to participate in Eastern European Growth Fund, and provided for creation of Hungarian-American Enterprise Fund of $60,000,000. This Act authorized U.S. Agency for International Development (AID) to permit expansion of Trade and Development Program (TDP) into Hungary. AID also develops and implements training and expert program for Hungary. U.S. Department of Commerce opened information center in 1990 to provide information to companies seeking to do business in Hungary. §§303 and 304 of SEED Act authorized Export-Import Bank of U.S. to include Hungary fully in Eximbank programs, providing direct loans to U.S. exporters and Hungarian purchasers of U.S. products, guaranties to U.S. banks financing U.S. exports, and insurance against nonpayment. As member of EU, Hungary no longer receives SEED Assistance.

14.04 FOREIGN TRADE:

Since Hungary is member of EU, law is specifically made subject to provisions of EU law. Special rules regarding foreign trade are regulated by Act-Order 1978:8 on Application of Civil Code in Foreign Trade (as am'd several times). Foreign trade authority rests within Ministry of National Development and Economy.

Foreign Trade Activity.

All for-profit or not-for-profit entities and private entrepreneurs may engage in foreign trade, i.e. in export and import of products, services, and rights. For foreign trade activity no permission and no registration is needed.

Licensing.

Import or export license issued by Hungarian Commercial Licensing Authority (Magyar Kereskedelmi Engedélyezési Hivatal; (http://www.mkeh.gov.hu) is required only in exceptional cases for products enumerated by law. Gov. Decree No. 110/2004 (IV.28) and GKM (Minister of Economy and Transport) Decree No. 67/2004 (IV.28) on its execution set forth rules concerning trans-border and trans-customs frontier commerce of goods, services and valuable rights. This Gov. Decree determines import-export of products that are subject to licences, i.e.: from Hungary to non-EU country or vice versa: gunpowder, handguns, etc. Import-export, re-export and transportation of military engineering, protected animals and plants, dangerous animals, troglodytic creatures are subject to license in any case. (See also Gov. Decree No. 50/2004 (III.23).

Branch Offices and Representative Offices.

Foreign business entity may perform business activity in Hungary through its branch office(s); however, from 1 May, 2004 nationals of European Economic Area and companies registered in European Economic Area may perform cross-border services without settlement for business purposes. Branch office must be registered at competent Registry Court. Generally, all rules applicable to domestic business entities are applicable to such branch offices. Foreign business entity shall continuously contribute to activity and financial obligations of its branch office. Branch office may not perform representation activity on behalf of foreign individual or business entity. Special procedure shall be followed in case of insolvency. Special rules apply to branch offices performing financial activities.

For purpose of trade, foreign business entities may also establish permanent direct representative offices in Hungary. Such representative office, after its registration at Registry Court, may mediate foreign trade contracts, participate in preparation of contracts and perform promotional activities. Representative offices may not engage in other business activities and may not provide lawyers' services or perform foreign legal counseling activity as set forth in other laws. Relevant regulation is Act 1997:CXXXII on Hungarian Branch Offices and Commercial Representative Offices of Foreign-Registered Companies.

14.05 INVESTMENT PROTECTION:

Foreign investments are protected by domestic law, international treaties and encouraged by administrative measures, corporation, trade, tax, customs laws. From point of view of privileges and advantages, all public or corporate entities are considered foreign if their seat is abroad; and all individuals, even Hungarian emigrants, are considered foreigners if they are permanent foreign residents.

Domestic Guaranties.

Act 1988:XXIV on Investments of Foreigners, as amended several times, declares, that "investments and business establishments of foreigners enjoy full protection and security". This act offers guaranties against nationalization and expropriation. This act insures that withholding of capital and profit cannot be limited and must be perfected in currency of investment. State itself is responsible for all these provisions.

International Guaranties.

Hungary has concluded investment guaranties agreements (Bilateral Investment Treaties) with U.S., all EEA countries, except Iceland, Ireland, Estonia and Slovenia; and also with Australia, Albania, Argentina, Bosnia-Herzegovina, Canada, Chile, China, Croatia, Cuba, Egypt, Former Yugoslav Republic of Macedonia, India, Indonesia, Israel, Kazakhstan, Kuwait, Lebanon, Malaysia, Moldova, Mongolia, Morocco, Russia, Paraguay, Serbia, Singapore, South Korea, Switzerland, Thailand, Tunisia, Turkey, Ukraine, Uruguay, Uzbekistan, Yemen and Vietnam. All these agreements offer protection against expropriation and guaranties for withdrawing invested capital and profit. As of Apr. 21, 1988, World Bank's Multilateral Investment Guarantee Agency (MIGA) offers investment guaranties for foreign investments in Hungary. See also topic Treaties and Conventions.

15 HEALTH

15.01 COSMETICS:

Production of cosmetics may be performed by natural persons, legal entities or associations with no legal entity and it must be preliminary notified to State Service of Public Health and Medical Officer (Állami Népegészségügyi és Tisztiorvosi Szolgálat) under control of qualified professional leader. (§§2 and 3 of EüM (Minister of Health) Decree No. 40/2001 [XI.23]). Producer is liable for quality and shall continuously perform quality controls. (§4[1] of Decree). Marketing of domestic and foreign cosmetics requires also preliminary notification to National Scientific Institute of Dietetics and Nutrition (Országos Élelmezés- és Táplálkozástudományi Intézet). (§12 of Decree). Special provisions apply to advertising, ingredients and conditions of production.

15.02 DRUGS:

Production of drugs, with exception of magistral medicines produced in pharmacies, requires license issued by National Institute of Pharmacy (Országos Gyógyszerészeti Intézet) with approval of Hungarian Commercial Licensing Authority. (§4[1] of Act 2005:XCV on Medical Products for Human Use and Amendment of Several Acts Regulating Medical Market). To obtain license producer must comply with various requirements enumerated by law. Unless otherwise provided by law, medicinal products, not including magistral medicines, may only be marketed and may only be dispensed after having been registered in medicinal product registration file and approved for marketing by competent authority or (in accordance with Regulations [EC] No. 726/2004, 1901/2006, 1394/2007) by European Commission.(§5[1] of Act). Registration procedures must be concluded within 210 days of date of submission of application. (§5[6] of Act). License thus obtained is valid for five years. Authority accepts results of examinations conducted in States other than those which are parties to EEA (European Economic Area)-Agreement in case international treaty regulates accordingly or it is established that method of execution and control of examinations conducted abroad is in compliance with Hungarian requirements. (§5[3] of Act). Act regulates also temporary marketing, packaging and labeling, wholesale distribution, distribution by pharmacies, supervision by authorities and liability issues. Producer's (importer's) prices and retail prices shall be published in official gazette of Ministry of Health. (§26[4] of Act).

15.03 FOOD:

Commencement of food producer's operation requires notification to competent Animal Health and Food Control Station (Állategészségügyi és Élelmiszerellenorzo Állomás). Operational license must be obtained in cases and from food inspection authority defined by separate rules. (§5 of Act 2008: XLVI on Activities Related to Food and Food Inspection). Food must be safe and of good quality. For marketing new food license of food inspection authority must be obtained. (§5 of Act). Foods for special nutritional uses must be notified to National Scientific Institute of Dietetics and Nutrition before marketing. (§8 of EszCsM (Minister of Health, Social and Family Affairs) Decree No. 36/2004 [IV.26]). Packaging must protect food from dirt and from effects decreasing its quality, safety and nutritional value. Packaging cannot endanger consumer's health. (§9 of Act). Labeling must be in Hungarian, clear, unambiguous and legible. (§10 of Act). Labeling must contain: (i) name of food, (ii) list of ingredients, (iii) quantity of certain ingredients, (iv) net quantity, (v) best before date, (vi) special storage or use conditions, (vii) name and address of producer or (if seated in EEA country) distributor, (viii) place of origin if its absence can mislead consumer, (ix) guide for use (if needed), (x) alcohol content in (% by volume) if higher than 1.2%. (§4 of FVM [Minister of Agriculture and County Development]-EszCsM [Minister of Health, Social and Family Affairs]-GKM [Minister of Transport and Economic Affairs] Decree No. 19/2004 [II.26]). Other important labeling rules can be found in Codex Alimentarius Hungarici ("Magyar Élelmiszerkönyv") (http://www.omgk.hu). Codex Alimentarius Hungarici contains WHO/FAO and national obligatory standards and recommendations regarding food.

15.04 HEALTH REGULATIONS:

Health in general is regulated by Act 1997:CLIV on health. Act defines rights of patients (such as right to medical treatment, human dignity, maintaining contacts, leaving hospital, obtaining information and medical documentation, right to self-determination, right to refusal of medical treatment, right to be informed on medical files, right to medical secrecy) and obligations of patients. Act defines framework of public health which includes prevention (family and women care, care of youth, sport), environmental health, food health, radiation health, labor health and epidemics. Act defines and regulates basic services, outpatient services and hospital services, as well as auxiliary services such as duty services, rescue services, transport of patients, nursing, hospice services, rehabilitation, supply of medical equipment and drugs, psychotherapy and clinical psychology and non-conventional procedures. Act prescribes professional requirements of health services, rights and obligations of health workers and state tasks. Human medical experiments and research, procedures relating to human reproduction, as well as treatment and nursing of psychiatric patients are also regulated by Act. Act contains provisions also on transplantations and blood supply.

15.05 SMOKING:

Act 1999:XLII on protection of nonsmokers and rules on consumption and marketing of tobacco products provides that, with exception of designated smoking areas, smoking is prohibited in closed sections of institutions open for public; public transport vehicles; public events organized indoors and workplaces as defined by law and employer's instructions. (§2[1] of Act). Smoking areas may not be designated in rooms of hospitals and pharmacies open for public; kindergarten and school rooms used by children; communal areas of children's welfare, children's protection institutes and certain social institutes; local public transport vehicles, local trains, scheduled domestic intercity buses; confined areas of sport facilities where sports activity takes place. (§2[2] of Act). Smoking is allowed, unless prohibited by fire protection provisions, in pubs, bars and other amusement places provided that no hot or cold meal or confectionery is served. (§2[3] of Act). Tobacco products may not be sold in schools, social institutes, children's welfare and children's protection institutes and public health institutions. (§5[1] of Act). Tobacco products may not be sold to persons under age of 18. (§16/A[3] of Act 1997:CLV on Consumer Protection). Detailed rules of production, marketing and control of tobacco products are regulated by FVM (Minister of Agriculture and County Development) Decree No. 102/2005 (X.31).

16 IMMIGRATION

16.01 ALIENS:

Substantive status of aliens in Hungary is equal with that of Hungarian nationals with respect to basic human rights. Nevertheless this does not apply to citizen rights and some social rights, such as right to vote and free social security. Aliens with permanent residence may vote in local elections. Act 2001:LXII provides cultural, scientific, health service advantages and easier employment conditions to persons of Hungarian origin and their relatives living in neighboring countries, on presentation of “Hungarian Certificate” issued on demand to such persons.

For entering country, permanent residence, for-profit occupation; see topic 16.02 Immigration; category 14 Foreign Trade and Commerce, topic 14.03 Foreign Investment.

16.02 IMMIGRATION:

Visitors for business or pleasure may enter Hungary with valid passport and visa, as tourists or for long term. Visas are available at Hungarian embassies and consulates in person or by mail, or when entering country by land or by air. There is no visa requirement for visit of up to 90 days for nationals of U.S.A.; and all nationals of EEA (including Andorra, Liechtenstein, Monaco, San Marino and Vatican); and all nationals of Argentina, Australia, Brazil, Brunei, Canada, Chile, Costa Rica, Croatia, El Salvador, Guatemala, Honduras, Hong Kong, Israel, Japan, Macao, Malaysia, Mexico, New Zealand, Nicaragua, Panama, Paraguay, Singapore, South Korea, Switzerland, Uruguay and Venezuela. For other visa information see http://www.kulugyminiszterium.hu.

Gainful Activities.

Performing some jobs requires work card, work permit (available at local Labor Centers in Hungary) and visa or residency permit for work. Employment based on civil law contract between foreigner and Hungarian employer is also considered as labor relation. Maximum number of foreigners authorized to work in Hungary is published each year by Minister of Social Affairs and Labour in Official Gazette. There is no need for work permit among others for board members of Hungarian corporations with foreign participation. Request for work permit must be filed by employer with foreigner's health and qualification certificate in Hungarian attached. Work permit is valid for not more than two years, but can be extended. If civil law contract based on competitive bidding is basis for foreigner's employment, employer may apply for group-frame-permit (“csoportos keretengedély”) listing number, qualification of foreigners and their future activity. This permit is valid until termination of civil law contract. Work permits based on frame-permit are also available at Labor Centers. (See SzCsM [Minister of Social and Family Affairs] Decree No. 8/1999 [XI.10].)

For self-employment no work permit is required, nevertheless, for obtaining residence permit, registration or application thereof, as self-entrepreneur or that of company, is usually required. For immigration with purpose of self entrepreneurship, in case of EU citizens: see Act 1998:LXXII.

Residence permit may be granted to those staying in Hungary with valid visa for maximum of two years (conform to period of education in case of studies, three years for gainful activities) for first time and may be prolonged for additional periods of maximum of two years (two years for studies, three years for gainful activities). Residence permits may also be granted for family unification and humanitarian reasons. After three years of continuous and lawful living in Hungary, with financial means assured, foreign nationals may apply for settlement permit or immigration permit. For further information, see Act 2007:II on entry and stay of nationals of third countries in Hungary.

In accordance with EU regulation 562/2006/EC, residence permit may be granted to those staying in Hungary with valid visa for maximum of two years. Residence permits may be granted for family unification, studies, research, gainful activities, volunteer work, official duty, reasons of state, medical treatment purposes, personal visits, keeping of Hungarian cultural heritage, and humanitarian reasons. Foreigners may also apply for settlement permit, provisional settlement permit, or national settlement permit, if they wish to settle indefinitely in Hungary. After five years of continuous and lawful living in Hungary, with financial means assured, foreign nationals may apply for EC settlement permit. For further information, see Act 2007:II on entry and stay of nationals of third countries in Hungary.

Permanent residency if not for gainful occupation, is available for persons who are able to support themselves and their dependents, as well as persons receiving asylum, where standards of international agreements are to be applied. (Act 2007:LXXX on asylum; Act—Order 1989/15 on implementation of UN Convention on Refugees).

Naturalization.

Act 1993:LV governs acquisition of Hungarian nationality. Certification of naturalization may be granted to alien who has been resident of Hungary for eight years, who has clean record, who is able to support himself and his dependents, whose naturalization does not interfere with interest of state and who successfully completes basic course on constitutional law. Course and exam are in Hungarian. This duration can be reduced to three years if, for example, alien's spouse or child is Hungarian citizen, or recognized as refugee by Hungarian authorities. Alien may be exempt from certifying Hungarian domicile, ability of self-support and from basic course on constitutional law if important interest of Hungarian Republic is involved. Decision on granting certificate of naturalization to alien is made by President of Republic of Hungary upon presentation by Minister of Justice and Law Enforcement.

17 INSURANCE

17.01 INSURANCE COMPANIES:

Insurance is regulated in Hungarian law by Civil Code provisions concerning contracts. Parties determine exact conditions in insurance contract (insurance policy). Insurable events include (a) damaging event defined in contract; (b) death or reaching certain age; or (c) accident causing injury, disability or death. Insurance contract can only be created in writing. Insurance policy also comes into existence automatically, if insurer does not respond to offer within 15 days. Filling out insurance policy (certificate, insurance stamp) replaces written agreement or declaration of acceptance of insurer. Insurer and insured are necessarily parties to insurance contract. Insured person need not necessarily be identical with person obliged to pay insurance premium. In life or accident insurance, beneficiary may be appointed. First insurance premium is due on conclusion of contract, all other premiums are due on first day of each period covered by premium.

Property damage insurance may be concluded by person who is interested in protection of property or who concludes contract to benefit interested person. Sum of insurance shall not exceed real value of insured property. Insured is obliged to mitigate damages. Insurer is exempt from payment if it proves that damages have been caused illegally by (a) insured and/or contracting party; (b) relative living in their household; or (c) employees and/or agents of insured who hold positions listed in regulations; or if damages have been caused deliberately or by gross negligence by members or organs of insured, listed in regulations.

In case of liability insurance, insurer shall not be exempt from payment to injured or damaged person even if injury or damage is caused by deliberate or grossly negligent conduct of insured. Settlement agreement between insured and injured or damaged person shall bind insurer if insurer acknowledges it.

In life insurance contracts, beneficiary may be (a) person named in contract; (b) holder of insurance policy; or (c) heir of insured.

Concerning accident insurance, rules of life insurance and property insurance shall be applied.

Insurance activity and insurance companies are governed by Act 2003:LX as amended several times.

18 INTELLECTUAL PROPERTY

18.01 COPYRIGHT:

Copyrights are regulated by Civil Code (§§86-87) and by Act 1999:LXXVI on Copyright and Government Decrees.

Copyright covers authorship of literary, academic, scientific, and artistic works including but not limited to musical, dramatic, choreographic, graphic, sculptural, audiovisual works, sound recordings, and intellectual works of same original, creative nature, fixed in any media of expression. Also computer software, and databases are protected under copyright. Generally term of copyright protection expires 70 years from death of author, including right to maintain integrity of work and right not to disclose work to public. Dealings in copyright do not effect author's moral right to be recognized as author, and as such, this moral right is not subject to expiration. Explicit authorization by author is required for licensing of most commercial aspects of copyrights, exceptions are e.g. cases of free utilization as provided by Act 1999:LXXVI and works made for advertising purposes; person or company producing work owns commercial rights for film works, databases, and software.

Copyright protection is granted ipso jure by creation of work. To be subject of copyright, work has to be perfected to certain level, i.e. ideas, procedures, concepts, principles, discoveries may not be protected by copyright. Nevertheless, these works may be protected under Civil Code.

ARTISJUS Hungarian Author Copyright Office Association (ARTISJUS Magyar Szerzoi Jogvédo Iroda Egyesület) is agency dealing with registration and protection of copyrights, and also provides services to authors.

See also category 24 Treaties and Conventions, topic 24.01 Treaties and Conventions.

18.02 PATENTS:

Patents are granted by Hungarian Patent Office (Magyar Szabadalmi Hivatal), for new inventions based on inventing activity that may be utilized in industry or agriculture. Following, among others, may not be considered inventions: discovery; scientific theory; mathematical method; esthetical work; plan, rule or procedure relating to intellectual activity, game or business operation; computer software; displaying of information. Newly created plant varieties, however, can be patented. For effect of patent see Paris Union. In short, by patent granted to inventor, exclusive rights to make, use and sell invention are secured. Patent protection lasts for 20 years. (§§86-87 C.C.; Act 1995:XXXIII on Protection of Inventions by Patents as am'd several times).

Patent protection process starts with application, which is required to contain accurate description of patent. In patent process party may be represented by patent attorney or attorney at law. Upon request Patent Office examines application before publishing it in periodical Patent Journal (Szabadalmi Közlöny). Publication without search results in temporary protection. Patent may be issued by and upon search of Patent Office and is to be published and entered into Patent Register kept by Patent Office. Permanent licenses and rights (e.g. royalty, term of licence, limitations) may be entered in Patent Register. Licenses may be granted prior to issuance of patent.

Special rules and contract between employer and employee apply to inventions of employees.

Design patent on models and designs are regulated by Act 2001:XLVIII.

For patent suits, County Courts have jurisdiction. Judicial revision of National Patent Office's decisions comes under exclusive jurisdiction of Metropolitan Court (Fovárosi Bíróság). For tax treatment of patents see category 22 Taxation, topic Taxes, subhead Personal Income Tax. See also category 24 Treaties and Conventions, topic 24.01 Treaties and Conventions.

18.03 TRADEMARKS:

Trademarks are regulated by Act 1997:XI as amended several times. (Trademark Act). Any sign which is capable of being delineated graphically, provided that such sign is capable of distinguishing goods or services, can be registered as trademark in Hungary. Trademark may contain any word, word-composition, names, letter, numeral, figure, picture, horizontal or solid figure, color, light-signal, hologram, or sound, or combination thereof. Sign, being in conflict with earlier trademark, may be registered with consent of proprietor of earlier trademark. Trademark is considered as invalid or incapable of registration if it is merely description of product, contrary to public morals, identical to state, or religious symbol, may confuse consumers or infringe personality rights.

Trademark protection may be acquired by any natural person, legal entity or other corporation even without pursuing business activities. Hungarian Patent Office issues certificate of trademark. Protection of trademark is ten years, which may be renewed for period of further ten years. Registered trademark gives proprietor exclusive rights. Rights of proprietor may be exhausted. Right of proprietor may be limited in case proprietor fails to use his registered trademark. If proprietor does not begin to use or fails to use his trademark for uninterrupted period of five years, unless there are proper reasons for nonuse, protection of such trademark may be revoked. Acquiescence in use of later trademark may limit rights of proprietor of earlier trademark. If proprietor of earlier trademark acquiesces in use of later trademark in Hungary for five successive years, such proprietor will no longer be entitled to apply for declaration that later trademark is invalid or to oppose use of later trademark.

Trademark protection rights may be conferred on more than one proprietor. United protection was not permitted previously in Hungary.

See also category 24 Treaties and Conventions, topic 24.01 Treaties and Conventions.

19 LEGAL PROFESSION

19.01 ATTORNEYS AND COUNSELORS:

Lawyers practicing law in Hungary are either attorneys at law or in-house legal counselors. (Act 1998:XI and Act-Order 1983:3, as both am'd). Attorneys at law either may undertake solo practice or be partners or associates of law firms, which are to be organized in form of professional companies (Ügyvédi Iroda). Attorneys at law are fully licensed, i.e. they are authorized to perform both civil and criminal functions for clients, including drafting and countersigning legal documents, giving legal advice and representing clients before courts, administrative authorities, mediation, etc. Only attorneys are entitled to be engaged in such activities on regular basis and for remuneration.

Qualifications.

Practicing lawyer has to be holder of university degree in law, and has to have passed Bar Examination. Applicant is allowed to sit for examination after not less than three years of Hungarian legal practice. To practice as attorney at law, one has to be citizen of EU Member State, be admitted to county bar except attorney at law in any EU member state, and meet certain other requirements. Membership of county bar is open for all qualified lawyers satisfying above requirements. As of date of accession of Hungary to EU, May 1, 2004, attorneys of any EU member state (European Community jurists) can also practice law in Hungary. Permanent practice in Hungary can only be conducted by registered European Community jurist. European Community jurist can also be admitted to Hungarian bar if he/she has conducted practice in connection with Hungarian law for three years, speaks Hungarian and satisfies some other requirements. Assistant attorney is one who practices law based on employment relation with attorney or law firm. Assistant attorneys must be registered at county bars.

Attorney-client privilege and duty means that attorney has right to and is obliged to protect all data and facts he learned in connection with his retainer and confidential communications with clients.

To be active in Hungary foreign lawyer has to conclude cooperation agreement with Hungarian lawyer or law firm, be registered at Hungarian bar and meet certain further requirements. Thus he may advise clients on laws of country of his bar membership, EU law and international law. No other legal services may be provided by foreign lawyer in Hungary and he must express during his activity that he is not Hungarian lawyer nor member of Hungarian bar. Foreign lawyer may not be registered at Hungarian bar if he or his law firm has already established representative office in Hungary.

20 MORTGAGES

20.01 CHATTEL MORTGAGES:

Chattel mortgage has no equivalent in Hungarian law. Security interest may be secured in some other contractual way.

See categories 3 Business Regulation and Commerce, topic Contracts; Debtor and Creditor, topic Liens.

21 PROPERTY

21.01 ABSENTEES:

Person who is absent, removed, or away from domicile or usual place of residence, may generally delegate authority to any person of full legal capacity. Exceptions apply in cases of citizenship or family status. Before court, absentee may in most cases be represented only by attorney at law, guardian, close relative, or by someone who is joint party with absentee in procedure. (§§474-487 C.C.; §§66-74 C.P.C.).

If absentee's whereabouts are unknown or absentee is otherwise impeded in managing her own affairs, upon request of any party, local municipality will appoint temporary or permanent curator to oversee interests of absentee. Curator's authority towards property is substantially same as that of guardian's. (§224 C.C.).

21.02 CURTESY:

Does not exist in Hungarian law. See category 12 Estates and Trusts, topic 12.03 Wills.

21.03 REAL PROPERTY:

Real estate is accurately registered at counties' Land Office (Földhivatal). Ownership of and any rights to real estate, including mortgages, civil procedure affecting estate, administrative limitations (e.g. building restrictions due to cultural value, closeness of water, sewage or electrical installations, etc.) are to be entered in real estate register (ingatlan-nyilvántartás), therefore these rights are evidenced by register. Thus title search is relatively easy to do, and title insurance is not customary. (Gov. Decree No. 338/2006 [XII.23] on Land Offices). Act 1997:CXLI on real estate registration (as am'd several times) came into force as from Jan. 1, 2000.

Zoning rules are to be adopted by published administrative orders. Local municipality has authority to issue building permits, which are required for practically all work not in-house. (Act 1997:LXXVIII as am'd several times).

See also FVM (Minister of Agriculture) Decree No. 109/1999 (XII.29) on execution of Act on Real Estate Registration and 85/2000 (XI.8) FVM (Minister of Agriculture and Rural Development) on Formation of Sites.

Land Act (Act 1994:LV as am'd several times) limits acquisition of farmland by both domestic and foreign individuals and entities.

Under Act, Hungarian individuals may acquire maximum of 300 hectares of farmland or farmland valued at 6,000 Golden Crown (Golden Crown is old measure showing value of land). Hungarian legal entities or corporations which are not legal entities may not acquire farmland. However, this rule does not apply to state, municipalities or public foundations.

Foreign individuals or legal entities may not acquire farmlands, except those EU or EEA citizens who live and pursue agricultural activity for more than three years in Hungary and intend to settle in Hungary as private agricultural entrepreneurs.

These rules do not affect acquisition and ownership of land acquired before this Act entered into force and certain types of acquisition as enumerated by law (e.g. intestate succession, prescription, etc.).

Farmland may be leased for long term (maximum of 20 years) by Hungarian and foreign individuals, legal entities or corporations without legal entity. Hungarians, foreign individuals and legal entities may acquire up to 300 hectares or 6,000 Golden Crown. Cooperatives and corporations, however, may acquire maximum of 2,500 hectare or 50,000 Golden Crown for right of use and usufruct restrictive rules on acquisition shall be applied accordingly.

Other rights connected to farmland, i.e. easements, riparian rights etc. are regulated by Civil Code.

Ownership by Foreigners.

Acquisition by foreigners of real property not designated as farmland or protected nature area is permitted by Act 1994:LV on Arable Land and Gov. Decree No. 7/1996 (I.18) (both am'd several times). This decree introduced more liberal rules than earlier laws. Except concerning property that is inherited, any foreign individual or legal entity may acquire ownership of real property not designated as farmland or protected nature area after receiving permission of head officer of city and county administrative office where property is located. Permission shall be granted if foreign ownership does not interfere with interests of municipality or other public interests and: (i) real property of foreigner has been acquired pursuant to Act 2007:CXXIII on expropriation, or (ii) foreigner exchanges domestic real estate for other domestic real estate, or (iii) acquisition terminates prior co-ownership, or (iv) foreigner has been legitimately living in Hungary for at least five years for working purposes.

Permission may be withheld if foreigner's state does not afford same rights to Hungarian citizens or legal entities as it affords its own residents on basis of reciprocity or international treaty. Permission shall be granted to foreign individual residing in Hungary as private entrepreneur if acquisition is necessary for his business activity to be performed in Hungary. Application for permission is filed with head officer of local administrative office. Following documents shall be attached to application: (i) documentation certifying citizenship of foreigner; (ii) copy of contract of sale for real property; (iii) copy of pertinent entry of land registry, not more than three months old.

Acquisition of real property by diplomatic or consular representative or international organization is regulated by Ministry of Foreign Affairs, which grants permission on basis of reciprocity or international treaty.

22 TAXATION

—Scope —

Developments during last few years have resulted in tax structure that is highly comparable to that of EU. Also, improvements in systemizing accounting and auditing regulations, as well as appraisal methods, have enabled foreign auditor firms to maintain network of accounting and auditing. Hungarian state revenues are theoretically structured on basis of three basic taxes as enumerated in subheads below: (1) personal income tax, (2) corporate tax, and (3) turnover tax. There are no taxes like capital tax, capital stock tax, stock transfer tax, sales or trade tax (other than value added turnover tax), excess profit tax, license tax, stamp tax, special franchise tax.

Other state revenues that are of less economic importance are following: (i) item differentiated consumption tax, (ii) estate transfer duty, and (iii) inheritance and gift tax.

22.01 ADMINISTRATION:

Tax administration and procedures are separated from regular local administration. All tax administration decisions are subject to regular judicial review.

22.02 ALCOHOL, BEVERAGES AND TOBACCO TAXES:

Mineral oils, alcohol and alcoholic beverages, beers, wines, sparkling wines, intermediate alcoholic products, tobacco products are subject to excise tax (jövedéki adó), regulated by Act CXXVII of 2003. Importer or Hungarian producer of referred products shall pay fixed tax, rated to amount of goods. Suspension of tax liability is available for example, for goods stored by authorized tax warehouse operator in his tax warehouse or by exempted user in his plan or warehouse.

22.03 BUSINESS TAXES:

See topic 22.14 Local Government Taxes.

22.04 CONSUMPTION TAXES:

Consumption tax (fogyasztási adó) is regulated by no longer effective Act 1991: LXXVIII (as am'd) cancelled as from date of Hungary's accession to EU, May 1, 2004. Consumption tax must be paid if obligation arose earlier than this date.

Registration tax (regisztrációs adó) is regulated by Act 2003:CX. Registration tax must be paid when car (or caravan) or motorcycle is placed into traffic first time in Hungary. Exempted are cars of international organizations' and diplomatic corps' personnel and their family, classic passenger cars, cars are not placed into service. (§12 of Act). Regarding rate of tax see Appendix of referred Act.

22.05 CUSTOMS DUTY AND TAX:

See category 14 Foreign Trade and Commerce, topic 14.01 Customs.

22.06 EMPLOYMENT TAXES:

No employment tax exists but business entities are to pay Technical Training Contribution (szakképzési hozzájárulás), which is in general 1.5% of annual gross wages and salaries paid by company. (Act 2003:LXXXVI). In addition, based on Act IV of 1991 on Job Assistance and Unemployment Benefits employers must pay employer's (unemployment) contribution (munkáltatói járulék) which is in general 3% of gross wages paid to employees. On other hand, employees are to pay employee's (unemployment) contribution (munkavállalói járulék), which is 1.5% and counted also on basis of gross wages paid by employers.

22.07 ESTATE TAX:

Act 2005:CXXI introduced so called ``luxury tax'' overruled by Constitutional Court of Republic of Hungary, non-effective as from Dec. 17, 2008.

22.08 EXCISE TAXES:

See topic 22.02 Alcohol, Beverages and Tobacco Taxes.

22.09 FOREIGN INVESTMENT TAXES:

None.

22.10 GASOLINE AND SPECIAL FUELS TAXES:

See topic 22.02 Alcohol, Beverages and Tobacco Taxes.

22.11 GIFT TAX:

Gift tax is regulated by Act 1990:XCIII as amended several times. Based on Act, gifts of real property, gifts of movable property and gratuitous creation of rights of pecuniary value, surrender of such rights or exercise thereof without consideration and waiver of such rights without consideration are subject to gift tax payment obligation. In case of value up to 18 million, gift tax is 11% in relation to immediate relatives, 15% among wider circle of relatives and 21% for others, on value between 18 and 35 million 18%, 21% or 30% and on what is in excess of 35 million 21%, 30% or 40% respectively depending on relation of parties. If gift is apartment, tax on value up to 18 million is 5%, 8% or 10%, on value between 18 and 35 million 8%, 10% or 21% and on what is in excess of 35 million 12%, 16% or 30% respectively depending on relation of parties. Certain other allowances and exemptions also apply. (§12).

22.12 INCOME TAX:

(1) Personal income tax (személyi jövedelemadó) is regulated by Act 1995:CXVII as amended several times. It is direct tax levied on income of individuals who are or considered to be Hungarian residents (generally after stay of 183 days in a year in Hungary) and on nonresidents' income originating from Hungary. All income is taxable, theoretically no matter what origin or source is, including but not limited to employment, business or profession, investment, rents and annuities, transfer of estates, etc., unless exempted by law. Generally, exempt incomes are state provided family allowances, child-welfare subsidy, social security allowances, scholarships, fellowships, alimony or child support. Donations to incorporated foundations and churches or for public interest purposes are partially deductible if recipient is registered by tax authority as tax deductible donation receiver. Individuals pursuing business activities (egyéni vállalkozó) are subject to Personal Income Tax Act or as to their decision EVA (see subhead Simplified Entrepreneurial Tax, infra), but tax on their income is payable in accordance with Corporation Tax Act. Tax on dividends is 25 or 35% and on capital gains is 25%. Interest revenues shall be regarded as income on which rate of tax is 20%.

Progressive tax rate applies to tax base incomes, i.e. to personal income reduced by exemptions and deductions, as follows in HUF: : if amount of income is between HUF 0 and HUF 1,900,000, 18%; from HUF 1,900,001, it is HUF 342,000 plus 36% of part above HUF 1,900,000.

There is no special or excess profit rate for extraordinary incomes.

Certain kinds of real estate mortgage interest payments, social security and private pension fund payments, tuition allowances, charitable donations or life insurance fees are tax deductible and special deduction applies to handicapped individuals.

Income from stock exchange transactions is taxed at special rate of 20%. “Income from stock exchange transactions” shall mean income private individual has achieved by way of transaction conducted in exchange market in accordance with Act on Capital Market, or in market of another Member State of European Union or in Member State of Organization for Economic Cooperation and Development (OECD) following 31 Aug. 2006, meaning: (i) capital gains realized upon transfer of securities, other than interest; and (ii) profit on combined or derivative transactions.

Net income originating from real estate transfer is taxed at special rate of 25%. If transfer is made after ownership of six years or more, taxable base is reduced by 10% for each year. No tax shall be paid if transfer is made after ownership of 15 years or more. Part of net income used for acquisition of home within five years is exempt from tax.

Some types of income (wages or wage-like income, interest, etc.) are, at least partially, taxed at and by sources of income. Tax already deducted this way is to be credited against tax payable when filing tax return.

(2) Corporate tax (társasági adó) is regulated by Corporate Tax Act (Act 1996:LXXXI as am'd several times) as of Jan. 1, 1997. Corporate Tax Act differs from previous corporate tax laws inasmuch as it deletes supplementary tax while establishing dividend tax. Corporate Tax is direct tax levied on profit of corporations, or more generally, on profit of any for-profit activity, i.e. production or service. All enterprises, whether private, municipal, or state owned, any form of corporation, not-for-profit organizations in respect of their for-profit activities with some exceptions, and partnerships, are equally subject to this tax. Foreign entities, even without permanent establishment in Hungary, are also subject to corporation tax with regard to income from their for-profit activities carried out in Hungary. However, treaties on avoidance of double taxation may regulate otherwise.

Tax base is profit resulting from difference between gross income and costs and expenditures, depreciation of assets, and some special deductions. Dividend income of corporation is exempt from tax base. Carry-forward of net operating losses is permitted by law, generally for five years. Losses of year of establishment and following three fiscal years of newly established entities may be forwarded for unlimited period. General rate of corporation tax is 16%

of tax base. In case of compliance with certain criteria laid down in Act corporate tax shall be 10% of positive tax base up to HUF 50,000,000 and 16% of part above HUF 50,000,000.

Enterprises subject to corporate tax are also subject to 4% surtax payment obligation.

Special rules apply to foundations, associations, public purpose companies, venture capitals, etc.

Tax allowances are available in case of large investments, regional investments and in certain other cases.

Off-shore: Regulation on off-shore companies is not in force from May 1, 2005, and existed off-shore companies could operate until Jan. 1, 2006.

(3) Simplified entrepreneurial tax (EVA) is mixed tax type instead of V.A.T., Corporate tax and in case of individual entrepreneurs personal income tax regulated by Act 2002:XLIII. It is optional for corporations under gross return from sales HUF 26 million.

22.13 INHERITANCE TAX:

Property acquired on basis of inheritance, devise or bequest, compulsory share of inheritance and gifts causa mortis are subject to inheritance tax. If value of inheritance is up to 18 million, inheritance tax is 11% in relation to immediate relatives, 15% among wider circle of relatives and 21% for others. Tax on value between 18 and 35 million is 15%, 21% or 30% and on what is in excess of 35 million 21%, 30% or 40% respectively depending on relation of parties. If inheritance is apartment, tax on value up to 18 million is 2.5%, 6% or 8%, tax on value between 18 and 35 million is 6%, 8% or 12% and on what is in excess of 35 million 11%, 15% or 21% respectively depending on relation of parties. (See Act 1990:XCIII.) In case of farmland 50% of general rates is applicable, in case inheritor qualifies as family estate farmer 25% of general rate is applicable. Certain other allowances and exemptions also apply. Citizenship or residency of parties does not affect rates to be applied.

22.14 LOCAL GOVERNMENT TAXES:

Local taxes are to be regulated by Act 1990:C as am'd several times and are levied by local governments or municipalities. Nature of these taxes may be either communal, property tax or entrepreneurship tax. Communal (public utilities) tax of companies cannot exceed HUF 2,000 per employee a year. Property tax on buildings cannot be more than HUF 900 per square meter or 3% of value per year, on land HUF 200 per square meter or 3% of value per year. Entrepreneurship tax (local business tax) cannot exceed 2% of companies' annual net income.

22.15 MOTOR VEHICLE TAXES:

Motor vehicle taxes are regulated by Act 1991:LXXXII as amended several times. Act provides for tax payment obligation for vehicles with Hungarian number plates. Tax base in case of passenger transporting motor vehicles not including autobus is power thereof indicated in official registry. Tax rate is HUF 300/kilowatt for first three years following year of production, HUF 260/kilowatt between fourth and seventh year following year of production, HUF 200/kilowatt between eighth and eleventh year following year of production, HUF 160/kilowatt between twelfth and fifteenth year following year of production, HUF 120/kilowatt from sixteenth year following year of production. In case of trucks, buses tax base is weight thereof, rate is HUF 1200/100 kg.

In case of motor vehicles registered abroad, above tax is also to be paid depending on purpose of transportation and weight of vehicle.

22.16 PROPERTY TAXES:

Purchaser of real estate has to pay real estate transfer duty (Act 1990:XCIII, as am'd), which is 10% of market price (in case of apartment 2% on portion of purchase price below HUF 4,000,000 and 6% on part exceeding HUF 4,000,000).

22.17 SALES TAX:

None.

22.18 STAMP TAX:

None.

22.19 TAX INCENTIVES:

See respective tax topics.

22.20 TREATIES AND AGREEMENTS:

Hungary has tax treaties or conventions of OECD Model Treaty type for avoidance of double taxation of income with great number of countries, including U.S. and most EEC members, which treaties overrule regular tax rules if more favorable to taxpayer.

See category 24 Treaties and Conventions, topic 24.01 Treaties and Conventions, subhead Taxation.

22.21 VALUE ADDED TAX:

Turnover tax (Általános Forgalmi Adó; hereinafter referred to as V.A.T.) is regulated by Act 2007:CXXVII, as amended several times. Since 1988 it is EU modeled value added tax, payable regularly on distribution or supply (including import) of all goods and services, on base and in percentage of and together with price or fee by customer. There from grantor of service will be allowed deduction for tax paid by and charged by suppliers. Basis of V.A.T. in case of import is distributor's or supplier's price including transportation, customs, and customs duty together. (§§74–75). Customs free import generally is free from V.A.T. with some exceptions. Rate of V.A.T. applicable is 5%, 18% or 25% depending on items. (§§82–84 and Annex #3). 25% rate might be taken as standard, nevertheless, there are preferred rates and exemptions to be applied to certain goods and services, as well as certain tax free services, enumerated by law.

Enumerated by law, number of services (e.g. financing, social security, research and development, social and cultural services), export of goods and with some exceptions, import, if being custom-free, are free from V.A.T.

Since Hungary is member of EU further exemptions apply in compliance with EU law (i.e. exemptions regarding distribution and supply of goods and services inside EU).

22.22 WEALTH TAX:

Act LXXVIII of 2009 on Tax Burdening High Value Properties becomes effective as of Jan. 1, 2010.

23 TRANSPORTATION

23.01 AUTOMOBILES:

See topic 23.02 Motor Vehicles.

23.02 MOTOR VEHICLES:

Vehicle registration is required. Before and after registration periodical inspection is prescribed for all vehicles. Upon inspection and registration, vehicle license is to be issued by local document offices. License plates on front and rear are necessary. See Act 1999:LXXXIV on traffic registration.

Operator's license is required. License is available upon examination and driving test for persons of 17 or over. Health conditions effecting driving abilities must be checked from time to time. International licence is valid in Hungary. In case of suspension of driver's license or series of violations of Highway Code, driver must attend courses with programs regarding nature of violation (deficiency in traffic qualification or behavior, drunk-driving etc.). See BM (Ministry of Interior) Decree No. 35/2000 (XI.30).

Insurance covering strict liability of owner, i.e. all damages to third persons, is required for operation of vehicle, including foreign ones. All domestically owned or operated vehicles are necessarily insured against damage to others. (Government Decree No. 190/2004. [VI.8] Korm). Foreigners may be asked to prove their insurance at border when entering country, unless required otherwise by international agreement. If existence of insurance is not proved, foreigner is obligated to make insurance with respective Hungarian insurance company for entering Hungary.

Liability of owner covers all injuries and damage to third persons caused by operation of car. This strict liability permits very few defenses.

Environmental checking should be performed first at time of putting vehicle into traffic and afterward periodically depending on age and engine type of vehicle (see GKM-BM-KvVM *(Common Decree of)* Minister of Transport and Economics, Minister of Internal Affairs and Minister of Environmental Protection and Water Management joint Decree No. 7/2002 [VI.29] and also GKM Ministry of Economics and Transport Decree No. 91/2004 [VI.29]).

24 TREATIES AND CONVENTIONS

24.01 TREATIES AND CONVENTIONS:

Hungarian Republic is party to, inter alia, following multilateral agreements:

General of Public Law Nature: Charter of U.N. and those of its specialized organizations, FAO, ILO, UNESCO, WHO, and Statute of the International Court of Justice, Convention for the Protection of Human Rights and Fundamental Freedoms, European Social Charter Convention on the Prevention and Punishment of the Crime of Genocide; General Agreement on Tariffs and Trade—GATT, including Customs Valuation Code, Free Trade Agreement with EFTA, Association Agreement with EU as of Jan. 1, 1994, OECD; Anti-dumping Code, Agreement on Technical Barriers to Trade, that on Import Licensing Procedures, that Regarding Bovine Meat; International Bank for Reconstruction and Development—Worldbank, including International Monetary Fund—IMF, Articles of Agreement of the International Finance Corporation—IFC, Convention Establishing the Multilateral Investment Guarantee Agency—MIGA, Articles of Agreement of the International Development Association—IDA; Statute of International Atomic Energy Agency; Constitution de l'Union postale universelle—UPC; Convention Internationale des Telecommunications; Convention Establishing the World Intellectual Property Organization; Hague Convention for the Peaceful Settlements of Disputes; Vienna Convention on Diplomatic Relations; Vienna Convention on Consular Relations; Geneva Convention relating to status of refugees (with geographical limitation), New York Convention on Racism, European Convention on Extradition and Strasbourg Convention on Prevention of Torture, Convention on Marine Search and Rescue, Convention Concerning Prohibition and Immediate Action for Elimination of Worst Forms of Child Labor, Unidroit Convention on Stolen or Illegally Exported Cultural Objects, United Nations Convention against Corruption.

General of Private Law Nature: Hague Conventions relating to Procedure in Civil Matters, 1905, 1954; Hague Convention Abolishing the Requirement of Legalization for Foreign Public Documents 1961; Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958; UN Convention on Contracts for the International Sale of Goods 1980.

Family Law: Convention on the Political Rights of Women 1953; International Convention on Enforcement of Judgments Concerning Child Support 1956; Convention on the Nationality of Married Women 1957; Convention on Recognition and Enforcement of Judgments Concerning Child Support 1956; Convention on the Civil Aspects of International Child Abduction 1980; Convention on Protection of Children and Co-Operation in Respect of Intercountry Adoption 1993.

Financial Law: Unidroit Conventions on international factoring and financial leasing, Convention on Money Laundering.

Investment Protection.

Agreements on protection of investments have been concluded with following countries: Albania, Argentina, Australia, Austria, Belgium, Bosnia and Herzegovina, Canada, Chile, China, Croatia, Cyprus, Czech Republic, Denmark, France, Germany, Great Britain, Greece, Indonesia, Israel, Italy, Kuwait, Latvia, Lebanon, Luxembourg, Macedonia, Malaysia, Mongolia, Morocco, Netherlands, Norway, Republic of Kazakhstan, Republic of Moldova, Republic of Yemen, Romania, Russian Federation, Singapore, Slovenia, South Korea, Spain, Sweden, Switzerland, Thailand, Turkey, Uruguay, and U.S.A., former Yugoslavia; agreements also with OPIC and MIGA.

Intellectual and Industrial Property: Paris Convention for the Protection of Industrial Property Rights; Berne Convention for the Protection of Literary and Artistic Works; Madrid Convention on International Registration of Marks; Rome Convention for the Protection of Performers, Phonogram Products and Broadcasting Organizations; Munich Convention for the European Patents.

Taxation.

Most treaties and conventions on avoidance of double taxation on income and property tax follow model drafted by OECD. Agreements have been concluded with following countries: Australia, Austria, Belgium, Brazil, Canada, China, former CMEA Countries, Croatia, Cyprus, Denmark, Germany, Egypt, Finland, France, Great Britain, Greece, Iceland, India, Indonesia, Ireland, Israel, Italy, Japan, S. Korea, Kuwait, Luxembourg, Macedonia, Malaysia, Malta, Mongolia, Morocco, Netherlands, Norway, Pakistan, Philippines, Poland, Portugal, Republic of Kazakhstan, Republic of Moldova, Russia, Singapore, Slovakia, Slovenia, South Africa, Spain, Sweden, Switzerland, Thailand, Tunisia, Ukraine, Eastern Republic of Uruguay, and U.S.A., former Yugoslavia.

Trade.

Convention Relating to a Uniform Law on the Formation of Contracts for the International Sale of Goods; International Convention Concerning the Transport by Rail-road of Merchandise (CIM) and of Persons and Baggage (CIV); Convention on the Contract for the International Carriage of Goods by Road (CMR); Budapest Convention on the Contract for the Carriage of Goods by Inland Waterway (CMNI); Convention Relating to Temporary Admission. Most important bilateral trade agreements have been concluded with EEC, Fed. Rep. Germany, and South Korea.

International Sale of Goods.

United Nations Convention on Contracts for the International Sale of Goods, in force on

July 19, 1987. See Part V, Selected International Conventions.

1
INDIA LAW DIGEST

—Scope —

Revised for 2010 edition by

MULLA & MULLA & CRAIGIE BLUNT & CAROE, Solicitors, Mumbai, Bangalore and New Delhi.

See category 6 Courts and Legislature, topics Law Reports, 6.02 Codes; 6.06 Statutes.

Note: This revision incorporates legislation through October 30, 2009.

1 INTRODUCTION

1.01 CURRENCY:

Indian currency is “Rupee” and “Paise” and is expressed in short form as “Rs.” and “Ps.”. One rupee is equivalent to 100 paise. Currency is issued by Reserve Bank of India. “Lac” means 100,000 (one hundred thousand), ten lacs is one million and “crore” means 10,000,000 (i.e. ten million).

1.02 GOVERNMENT AND LEGAL SYSTEM:

India is Sovereign Socialist Secular Democratic Republic within Commonwealth of Nations formerly known as British Commonwealth.

The Constitution of India is a written one, adopted and enacted by an elected Constituent Assembly with the declared object of securing to all its citizens justice, social, economic and political; liberty of thought, expression, belief, faith and worship, equality of status and opportunity, and fraternity assuring dignity of individual and unity and integrity of nation. It came into force on 26th Jan. 1950. It is elaborate and comprehensive document containing 395 articles divided into 22 parts and 12 Schedules.

Indian Union is Union of 31 States and seven Centrally administered Union Territories.

Main Features of the Constitution.

The Constitution has both federal and unitary features. It provides for autonomy of the Constituent States and division of powers and responsibilities between the Union and the States. Though there is such a division of powers there are provisions for control by the Union both over the administration and legislation of the States. The Constitution even empowers the Union to entrust its executive functions to a State by its consent (Art. 258) and a State to entrust its executive functions to the Union (Art. 258A).

During normal times the federal features of the Constitution prevail but in emergencies the Constitution enables the Government at the centre to assume powers and to exercise controls which only a unitary system of Government can do. In normal times the Union Executive is entitled to give directions to the State Governments in regard to specified matters only (Art. 257) but when a proclamation of emergency is made by President, power of Union Executive to give directions extends to all matters. Constitution takes care to provide for unity in basic matters which are essential to maintain unity of country namely (a) a single judiciary, (b) uniformity in fundamental civil and criminal laws and (c) common all-India Services.

Part I of the Constitution declares that India shall be Union of States and centrally administered Union territories and that Indian Parliament may by law add or form new States and alter areas, boundaries or names of existing States.

Citizenship.

The subject of citizenship is dealt with in Part II. There is only one citizenship for the whole of India—the Indian Citizenship. There is no State Citizenship. Every person who at commencement of Constitution had his domicile in India and who was born in India, or either of whose parents was born in India, or who had been ordinarily resident in India for not less than five years immediately preceding such commencement, would be citizen of India. (Art. 5). Art. 8 provides for citizenship by registration of persons of Indian origin residing outside India.

Article 11 gives power to Parliament to make provision regarding all matters relating to citizenship. Accordingly Parliament has passed an Act called the “Citizenship Act, 1955” which supplements the provisions of the Constitution. It provides that Citizenship may be acquired by (a) birth, (b) descent, (c) registration, (d) naturalisation and (e) integration of territory, and may be lost by (a) renunciation. (b) voluntary acquisition by an Indian citizen of citizenship of another Sovereign State and (c) deprivation by order of the Central Government. The Act makes special provision for Commonwealth citizenship and provides that every person who is a citizen of any of the Commonwealth Countries, would by virtue of that citizenship have the status of Commonwealth Citizenship in India.

Fundamental Rights.

Part III of Constitution is an important Part and deals with fundamental rights. Article 13 as it originally stood declared all laws inconsistent with or in derogation of the fundamental rights, void. By 24th Amendment Act, Art. 13 has been amended, by which this Article will not apply to any amendment made in Constitution under Art. 368, which deals with procedure for Amendment of Constitution.

The fundamental rights conferred by the Constitution are:

(1) Right to equality (Arts. 14 to 18);

(2) Right to freedom (Arts. 19 to 22);

(3) Right against exploitation (Arts. 23 and 24);

(4) Right to freedom of religion (Arts. 25 to 28);

(5) Cultural and educational rights (Arts. 29 and 30);

(6) Certain rights in relation to property (Arts. 31A and 31B). Right to hold property which was formerly available under Arts. 19(1)(f) and 31 has ceased to be fundamental right by Constitution 44th Amendment Act, 1978 and same is now, under Art. 300A, one of constitutional rights;

(7) Right to constitutional remedies (Arts. 32 to 35).

Some of the fundamental rights are available only to Citizens, viz.: (1) protection against discrimination on grounds only of religion, race, caste, sex or place of birth (Art. 15); (2) equality of opportunity in matters of public employment (Art. 16); (3) freedom of speech, assembly, association, movement, residence, property and profession (Art. 19); (4) cultural and educational rights of minorities (Arts. 29, 30).

Other fundamental rights can be claimed by all persons, citizens or foreigners.

In order to secure social equality conferment of titles by States has been abolished. (Art. 18).

Free and compulsory education has been made Fundamental Right for all children in age-group six-14 years and included in Part III (Fundamental Rights) of Constitution through Constitution (86th Amendment) Act 2002 as Art. 21A, enacted in Dec. 2002.

Right to information is fundamental right in India.

Right to Information Act (RTI Act) came into force on 12 Oct. 2005 (120th day of its enactment on 15 June, 2005). Some provisions have come into force with immediate effect viz. obligations of public authorities (§4[1]), designation of Public Information Officers and Assistant Public Information Officers (§5[1] and 5[2]), constitution of Central Information Commission (§12 and 13), constitution of State Information Commission (§15 and 16), non-applicability of Act to Intelligence and Security Organizations (§24) and power to make rules to carry out provisions of Act (§27 and 28).

Act extends to whole of India except State of Jammu and Kashmir. (§[12]).

Information means any material in any form including records, documents, memos, e-mails, opinions, advices, press releases, circulars, orders, logbooks, contracts, reports, papers, samples, models, and data material held in any electronic form and information relating to any private body which can be accessed by public authority under any other law for time being in force but does not include ``file notings''. (§2[f]).

It includes right to: (1) Inspect works, documents, and records; (2) take notes, extracts, or certified copies of documents or records; (3) take certified samples of material; and (4) obtain information in form of printouts, diskettes, floppies, tapes, video cassettes, or in any other electronic mode or through printouts. (§2[j]).

Following is exempt from disclosure (§8): (1) Information, disclosure of which would prejudicially affect sovereignty and integrity of India, security, strategic, scientific or economic interests of State, relation with foreign State or lead to incitement of offence; (2) information which has been expressly forbidden to be published by any court of law or tribunal or disclosure of which may constitute contempt of court; (3) information, disclosure of which would cause breach of privilege of Parliament or State Legislature; (4) information including commercial confidence, trade secrets, or intellectual property, disclosure of which would harm competitive position of third party, unless competent authority is satisfied that larger public interest warrants disclosure of such information; (5) information available to person in his fiduciary relationship, unless competent authority is satisfied that larger public interest warrants disclosure of such information; (6) information received in confidence from foreign Government; (7) information, disclosure of which would endanger life or physical safety of any person or identify source of information or assistance given in confidence for law enforcement or security purposes; (8) information which would impede process of investigation or apprehension or prosecution of offenders; (9) cabinet papers including records of deliberations of Council of Ministers, Secretaries, and other officers; (10) information which relates to personal information, disclosure of which has no relationship to any public activity or interest, or which would cause unwarranted invasion of privacy of individual; and (11) notwithstanding any of exemptions listed above, public authority may allow access to information, if public interest in disclosure outweighs harm to protected interests.

Following public authorities are excluded: Central Intelligence and Security agencies specified in the Second Schedule like IB, R&AW, Directorate of Revenue Intelligence, Central Economic Intelligence Bureau, Directorate of Enforcement, Narcotics Control Bureau, Aviation Research Centre, Special Frontier Force, BSF, CRPF, ITBP, CISF, NSG, Assam Rifles, Special Service Bureau, Special Branch (CID), Andaman and Nicobar, Crime Branch-CID-CB, Dadra and Nagar Haveli and Special Branch, and Lakshadweep Police. Agencies specified by State Governments through Notification will also be excluded. Exclusion, however, is not absolute and these organizations have obligation to provide information pertaining to allegations of corruption and human rights violations. Further, information relating to allegations of human rights valuations could be given but only with approval of Central or State Information Commission, as case may be. (§24).

Public Information Officers (PIOs) are officers designated by public authorities in all administrative units or offices under it to provide information to citizens requesting for information under Act. Any officer, whose assistance has been sought by PIO for proper discharge of his or her duties, must render all assistance and for purpose of contraventions of provisions of this Act, such other officer must be treated as PIO.

PIO must deal with requests from persons seeking information and where request can not be made in writing, to render reasonable assistance to person to reduce same in writing.

If information requested for is held by or its subject matter is closely connected with function of another public authority, PIO must transfer, within five days, request to that other public authority and inform applicant immediately.

PIO may seek assistance of any other officer for proper discharge of his/her duties.

PIO, on receipt of request, must as expeditiously as possible, and in any case within 30 days of receipt of request, either provide information on payment of such fee as may be prescribed or reject request for any of reasons specified in §8 or §9.

Where information requested for concerns life or liberty of person, same must be provided within 48 hours of receipt of request.

If PIO fails to give decision on request within period specified, he must be deemed to have refused request.

Where request has been rejected, PIO must communicate to requester: (i) Reasons for such rejection, (ii) period within which appeal against such rejection may be preferred, and (iii) particulars of Appellate Authority.

PIO must provide information in form in which it is sought unless it would disproportionately divert resources of Public Authority or would be detrimental to safety or preservation of record in question.

If allowing partial access, PIO must give notice to applicant, informing: (1) That only part of record requested, after severance of record containing information which is exempt from disclosure, is being provided; (2) reasons for decision, including any findings on any material question of fact, referring to material on which those findings were based; (3) name and designation of person giving decision; (4) details of fees calculated by him or her and amount of fee which applicant is required to deposit; and (5) his or her rights with respect to review of decision regarding non-disclosure of part of information, amount of fee charged or form of access provided.

If information sought has been supplied by third party or is treated as confidential by that third party, PIO must give written notice to third party within five days from receipt of request and take its representation into consideration.

Third party must be given chance to make representation before PIO within ten days from date of receipt of such notice.

Procedure for requesting information: (1) Apply in writing or through electronic means in English or Hindi or in official language of area, to PIO, specifying particulars of information sought for; (2) reason for seeking information are not required to be given; and (3) pay fees as may be prescribed (if not belonging to below poverty line category).

Time limit to get information is: (1) 30 days from date of application; (2) 48 hours for information concerning life and liberty of person; (3) five days must be added to above response time, in case application for information is given to Assistant Public Information Officer; (4) if interests of third party are involved then time limit will be 40 days (maximum period + time given to party to make representation); and (5) failure to provide information within specified period is deemed refusal.

Grounds for rejection: (1) If it is covered by exemption from disclosure. (§8). (2) If it infringes copyright of any person other than State. (§9).

Fees: (1) Application fees to be prescribed which must be reasonable; (2) if further fees are required, then same must be intimated in writing with calculation details of how figure was arrived at; (3) applicant can seek review of decision on fees charged by PIO by applying to appropriate Appellate Authority; (4) no fees will be charged from people living below poverty line; and (5) applicant must be provided information free of cost if PIO fails to comply within prescribed time limit.

Penalty provisions.

Every PIO will be liable for fine of Rs. 250 per day, up to maximum of Rs. 25,000/-, for: (1) Not accepting application; (2) delaying information release without reasonable cause; (3) malafidely denying information; (4) knowingly giving incomplete, incorrect, or misleading information; (5) destroying information that has been requested; and (6) obstructing furnishing of information in any manner.

Information Commission (IC) at Centre and State levels will have power to impose this penalty. Information Commission can also recommend disciplinary action for violation of law against erring PIO. (§20).

Jurisdiction of courts.

Lower Courts are barred from entertaining suits or applications against any order made under this Act. (§23). However, writ jurisdiction of Supreme Court and High Courts under Arts. 32 and 225 of Constitution remains unaffected.

Property.

Right to property is not fundamental right and property may be acquired by competent authorities in exercise of powers statutorily conferred. Quantum of moneys awarded on such acquisition is not justiciable except on grounds specified if acquisition is under Land Acquisition Act.

Limitations on Fundamental Rights.

It may be mentioned that the fundamental rights are not absolute. They are subject to limitations if (a) the Security of the State, (b) public order, (c) decency and morality, (d) friendly relations with foreign States so require. Thus there can even be preventive detention in the interest of the security of the State both in normal times as well as in times of emergency.

In order to adequately protect fundamental rights and make them effective, Constitution has conferred on Supreme Court of India which is apex court in hierarchy of Indian judiciary, concurrently with High Courts of States, power to grant effective remedies in shape of issue of Writs of Habeas Corpus, Mandamus, Prohibition, Quo Warranto and Certiorari whenever such rights are violated. Hence person whose fundamental right is violated or interfered with can apply either to Supreme Court under Art. 32 or to High Court under Art. 226 for issue of appropriate writ without filing suit.

Preventive detention is permissible under special statutes. Strict compliance by authorities with terms of such special statutes is mandatory. Where detention is irregular, courts will interfere by issue of high prerogative writs under constitution.

The Fundamental Rights can be suspended in an emergency declared by the President.

Directive Principles of State Policy.

The Constitution lays down certain principles, which Art. 37 declares to be fundamental in the governance of the country and which it shall be the duty of the State (i.e., the Government and Parliament of India and the Government and the legislature of each State) to apply in making laws. These directive principles, unlike fundamental rights, are not justifiable. They embody aims and aspirations of State. Most of these directive principles are intended to help in establishing economic and social democracy and guide State, which aims at being “Welfare State,” to secure and protect “a social order in which justice, social, economic and political shall inform all the institutions of the national life”. (Art. 38). Part IV of Constitution accordingly requires State to direct its policy towards securing:

(a) adequate means of livelihood for citizens (Art. 39[a]);

(b) control and distribution of material resources of the community so as best to subserve the common good (Art. 39[b]);

(c) that the operation of the economic system does not result in concentration of wealth and means of production to the common detriment (Art. 39[c]);

(d) equal pay for equal work by both men and women (Art. 39[d]);

(e) living wage for workers (Art. 43);

(f) right to work and to education (Art. 41);

(g) protection of child and youth against exploitation and against moral and material abandonment (Art. 39[f]);

(h) just and humane conditions of work and maternity relief (Art. 42);

(i) early childhood care and education to children below age of six years (Art. 45);

(j) raising of the level of nutrition and the standard of living and improvement of public health (Art. 47);

(k) public assistance in case of unemployment, old age, sickness and disablement and in other case of undeserved want (Art. 41);

(l) conditions of work ensuring a decent standard of life and full enjoyment of leisure and of social and cultural opportunities (Art. 43);

(m) free legal aid (Art. 39A);

(n) participation of workers in management of industries (Art. 43A);

(o) protection and improvement of environment and safeguarding of forests and wildlife (Art. 48A).

Other important objectives laid down are:

(1) Establishment of uniform Civil Code for all citizens (Art. 44); (2) Organisation of village Panchayats (Committees) as units of self government (Art. 40); (3) Separation of the judiciary from the Executive (Art. 50); (4) Prohibition of the consumption of intoxicating drinks and drugs except for medicinal purposes (Art. 47); (5) Organisation of agricultural and animal husbandry and prohibition of slaughter of useful cattle (Art. 48); (6) Promotion of international peace and security, maintenance of just and honourable relations between nations; fostering respect for international law and treaty obligations; encouraging settlement of international disputes by arbitration (Art. 51[a] to [d]).

Although these principles are not legally enforceable in any Court, they have been recognised as guiding principles in matters of judicial interpretation. By Constitution (25th Amendment) Act 1971, new Article 31C was inserted, which provided, inter alia, that no law giving effect to provisions of Part IV of Constitution would be void on ground that it was inconsistent with fundamental rights relating to equality, freedom and property. It was further provided that if such law contained declaration that it was for giving effect to said provisions, it could not be called in question on ground that it did not do so. This Amendment Act has been upheld in substance by Supreme Court in case of His Holiness Keshavnanda Bharti v. The State of Kerala and another. However, Court struck down provision which prohibited Court from going into question whether law was in fact enacted to give effect to said provisions.

Fundamental Duties.

New chapter (Part IVA) on subject of Fundamental Duties of the Citizen was added in year 1977, which consists of ten duties.

Constitution (93rd Amendment Act) allowing State to make special provision by law for socially and economically backward classes of citizens in relation to admission to educational institutions has come into effect.

The Union Executive.

The President is the Executive head of the Indian Union. He is elected by an electoral college consisting of the elected members of both Houses of Parliament (i.e., Council of States and House of People), and elected members of Legislative Assemblies of States. (Art. 54). Executive powers of Union are vested in President. He has to exercise them in accordance with Constitution (Art. 53[1]) with aid and advice of Council of Ministers (Art. 74[1]). He is also Supreme Commander of defence forces. (Art. 53[2]).

He holds office for a term of five years and is eligible for reelection.

The Vice President is elected by the members of both Houses of Parliament assembled at a joint meeting. (Art. 66). He also holds office for a term of five years. (Art. 67). He has to act as the Ex-Officio Chairman of the Council of States. The Vice President acts as President and discharges the functions of the President during casual vacancy in the office of the President.

Powers of the President.

The President has, under the Constitution, the following powers:

(1) *Administrative Powers.*—These include the power to appoint and remove the Prime Minister and other Ministers of the Union, the Governor of a State, etc., and also to appoint the Judges of the Supreme Court and various High Courts after consulting prescribed constitutional functionaries as he may deem necessary (Arts. 124[2], 217[i]) and remove them on address of Parliament. All executive action of Union must be taken in name of President and all contracts and transfers of property made on behalf of Central Government must be expressed to be made by President.

(2) *Legislative Powers.*—All bills passed by the Parliament require the assent of the President before they become effective and he can withhold his assent to all bills other than money bills. He can issue ordinances which would have the same effect as Acts of Parliament when the Parliament is not sitting. He has the power of summoning and prorogation of the Houses of Parliament and to dissolve the House of the People. (Art. 85).

(3) *Emergency powers arising out of war or internal disturbance or failure of the Constitution:* The President may issue a proclamation of emergency for two months. This period can be extended by the Houses of Parliament. The proclamation would turn the federal constitution into a unitary one and the Parliament can then make laws for the whole of India and even in respect of matters which are within the exclusive jurisdiction of the States, and if a State Government cannot be carried on in accordance with the Constitution, the President may issue a proclamation and assume to himself all functions of the State and declare that the Powers of the State Legislature shall be exercised by or under the authority of Parliament. (Art. 356[1][a] and [b]). Such a proclamation will have to be approved by the Parliament. (Art. 356[3]).

(4) *Power of Pardon.*—The President can grant pardons, reprieves, respites or remissions of punishment to persons convicted by courts. (Art. 72).

(5) *Miscellaneous Powers.*—As the head of the Executive, the President has been vested by the Constitution with certain miscellaneous powers. For instance:

(a) Power to make rules and regulations relating to various matters;

(b) Power to give instructions to a Governor of a State to promulgate an ordinance, if it requires the previous sanction of the President (Art. 213[1]);

(c) He can refer any question of public importance for the opinion of the Supreme Court (Art. 143);

(d) He can appoint commissions to report on specific matters.

Council of Ministers.

Though all executive powers are vested in the President, the Constitution requires him to act as the constitutional head of the Executive and exercise his powers in accordance with the aid and advice of the Council of Ministers, with the Prime Minister as its head. The Prime Minister is appointed by the President; the other Ministers on the advice of the Prime Minister. The Council of Ministers is collectively responsible to the House of the People and all ministers must within six months of their appointment be members of either House of Parliament; at expiration of that period, cease to be minister. See subhead The Union Legislature, infra.

The Attorney General.

The Constitution provides for an Attorney General of India to offer legal advice to the Union Government. He is appointed by the President and can be dismissed by the President alone.

Comptroller and Auditor-General of India.

There shall be Comptroller and Auditor-General of India to be appointed by President under Art. 148(1) and may be removed by impeachment. His duty is to be guardian of purse and to see that no part of it is spent without authority of Parliament.

The Union Legislature.

The Indian Parliament consists of the President and the two Chambers, viz., the Lower House known as the Lok Sabha (i.e., the House of the People) which represents the people of the entire country, and the Upper House known as the Rajya Sabha or the Council of States which represents the constituent units. The Lok Sabha, or the House of the People, consists of not more than 530 members directly elected by the voters in the States (Art. 81[1][a]) and 20 to represent Union territories.

The Council of States consists of not more than 250 members, of whom 12 are nominated by the President from persons having special knowledge or practical experience in Literature, Science, Art and Social Service (Art. 80[1] and [3]); remainder representatives of States and Union territories. Representatives of States are elected by elected members of Legislative Assembly and representatives of Union territories are chosen in such manner as Parliament may by law prescribe (Art. 80).

The House of the People chooses two members of the House to be respectively Speaker and Deputy Speaker. The Vice President is the ex-officio Chairman of the Council of States. (Art. 89).

Bill, other than money or financial bill, may be introduced in either of Houses of Parliament (Art. 107[1]) and requires passage in both houses before it can be presented for President's assent. When a bill is passed in one House it is sent to other House. Latter may reject bill altogether in which case provisions regarding joint sitting of Houses may be applied by President. (Art. 108). When bill is passed by both Houses of Parliament either singly or at joint meeting it is presented to President for his assent. If he withholds his assent there is an end to bill. If he gives his assent bill becomes Act from date of his assent. President may return bill except money bill for reconsideration of Houses. If Houses pass bill with or without amendments it is presented to President for his assent after such reconsideration, in which case he has no power to withhold his assent. (Art. 111).

A money bill can be introduced only in House of People and not in Council of States. (Art. 109[1]). Council of States cannot reject money bill nor amend it. It must, within 14 days from date of its receipt, return bill to House of People with its recommendations. That House may either accept or reject all or any of recommendations.

Legislative Lists.

The Constitution contains three Legislative Lists in the Seventh Schedule. The first is called the “Union List” which enumerates under 97 heads, the subjects over which the Union Parliament has exclusive control. In this list are included such important matters as defense, external affairs, preventive detention, war and peace, citizenship, post and telegraphs, currency and banking, foreign loans, insurance, etc.

The second is called the “State List” and enumerates under 66 heads, the subjects over which the State Legislatures have exclusive control.

The third list, called the “Concurrent List,” enumerates under 47 heads the subjects upon which both Union and State Legislatures can make laws.

In a conflict between Union and State laws on concurrent subjects, the Union Law prevails. (Arts. 251, 254). However, exception is made in respect of laws passed by State legislatures that are reserved for assent of President and receive his assent, insofar that they prevail in State concerned. (Art. 254[2]).

In order to ensure harmony between Union and State, Constitution lays down that executive power of every State shall be so exercised as to ensure compliance with laws made by Parliament and is not to impede or prejudice executive power of Union. (Art. 256).

Inter-State Council.

President has power to appoint Inter-State Council for purpose of achieving inter-state co-ordination. Such Council would have power: (a) To inquire into and advise upon disputes between States; (b) to investigate and discuss subjects of common interest to Union and States; and (c) to make representations for better coordination of policy or action on any subject. (Art. 263).

State Executive.

Executive power of a State is vested in “Governor” and all executive actions in each State are taken in his name. Governors of States are appointed by President. Governors appoint Ministers, Advocate General of State and members of Public Service Commission of State. He has to assent to bills and has power to promulgate ordinances, but in practice all his powers are exercised by Ministers. Union Government represented by President consults State Government before choosing a Governor and Governor is usually chosen from outside State of which he is appointed Governor.

Council of Ministers.

Every State has a Council of Ministers led by the Chief Minister to advise the Governor in the exercise of his function except in regard to his discretionary powers. The Governor must choose as the Chief Minister the person who leads the majority party in the State Legislature, or to select the person who can in his opinion command a workable majority in the State Legislature. The other Ministers are appointed by the Governor on the advice of the Chief Minister. The State Chief Minister has a position somewhat equal to that of a Prime Minister inside his own State. He is the leader of the party in power and chooses the ministers.

Advocate General of the State.

The Constitution provides for the appointment of the Advocate General of a State. He is appointed by the Governor. (Art. 165[1]), [3]). He can attend legislative sessions and take part in discussions on matters in which expert legal knowledge is required. (Art. 177). His duty is to advise Government on legal matters pertaining to his State. (Art. 165[2]).

State Legislatures.

Legislative Council.

In some of the States the legislature consists of two Houses, called the Legislative Assembly and the Legislative Council. In the rest, there is only one house, viz., the Legislative Assembly. (Art. 168). The Constitution provides for a simple procedure by which a State may abolish the Legislative Council or create one by a resolution of the Legislative Assembly of the

State concerned, passed by a two-thirds majority of members present and voting, followed by an Act of Parliament. The membership of the Council is not to exceed one-third of the total number of members in the Legislative Assembly provided the total number shall in no case be less than 40. (Art 171). The members of the Legislative Council of a State are partly nominated and partly elected, 5/6th of the total number being elected and 1/6th nominated by the Governor: (1) One-third are to be elected by electorates consisting of members of Municipalities, District Boards and other local authorities in the State; (2) 1/12th by the University Graduates and persons possessing equivalent qualifications; (3) 1/12th by teachers in educational institutions within the State; (4) One-third by members of the Legislative Assembly from amongst persons who are not members of the Assembly; (5) The remainder are to be nominated by the Governor on the basis of their special knowledge and practical experience in respect of such matters as literature, science, art, co-operative movement and social service.

Legislative Assemblies.

The Legislative Assembly of each State is mainly composed of members chosen by direct election on the basis of adult suffrage from territorial constituencies. The Governor however has power to nominate one member of Anglo-Indian Community as he deems fit, if they are inadequately represented in Assembly. (Art 333).

The duration of the Legislative Assembly is five years, but it may be dissolved sooner by the Governor and the term of five years may be extended in case of proclamation of emergency by the President of the Union.

The Legislative Assembly has its Speaker and Deputy Speaker and the Legislative Council its Chairman and Deputy Chairman. The Legislative procedure in a State Legislature having two chambers is broadly similar to that in Parliament except in certain respects.

So far as money bill is concerned Legislative Council has no power apart from making recommendations to Assembly for amendments or withholding bill for period of 14 days. Assembly may accept or reject such recommendations. (Art. 198). As regards other bills Council can only interpose some delay in passage of such bills for period not exceeding three months. If Council does not consent to bill Assembly sends it back to Council, but ultimately view of Assembly prevails. (Art. 197).

The position of the Legislative Council is weaker than the Council of States at the Centre. In case of disagreement between two Houses of the Union Parliament it is resolved by a joint sitting. There is no such provision for solving differences between the two houses of the State Legislature but the view of the Assembly prevails. After a bill is passed by the Houses of the Legislature it must go before the Governor who may give his assent to the bill in which case it becomes law at once. He may, in the case of a bill other than a money bill, return the bill for reconsideration to the House with his recommendation, but if the bill is again passed by the Legislature it would be incumbent upon the Governor to give his assent to the bill which will thereupon become law. The Governor may even reserve the bill for the consideration of the President. The Governor would be bound to do so where the law would derogate from the powers of the High Court of the State under the Constitution. (Art. 200).

Courts.

Supreme Court of India which is highest legal tribunal of land consists of Chief Justice of India and not more than 25 other judges who are appointed by President. (Art. 124).

Supreme Court has: (a) Original jurisdiction (Arts. 32, 131, 143, 363); (b) appellate jurisdiction, (1) in constitutional matters (Arts. 132, 133), (2) civil matters (Art. 133), (3) criminal matters (Arts. 134, 136); (c) advisory jurisdiction (Arts. 143, 145).

High Courts in States.

There is a High Court for each State (Art. 214) consisting of Chief Justice and other judges as President may from time to time appoint. (Art. 216).

High Court has power: (a) To issue writs (Art. 226); (b) have superintendence over all courts and tribunals under it (Art. 227); (c) to withdraw cases to itself (Art. 228); (d) to appoint officers and servants of High Court (Art. 229); (e) to control subordinate courts (Art. 235).

Administration of justice, including Constitution and organisation of all courts, except Supreme Court and High Courts, is concurrent subject and can be legislated by either Union or State.

Election Commission.

Part XV of Constitution deals with election. Election Commission consists of Chief Election Commissioner and other Election Commissioners all of whom shall be appointed by President. Chief Election Commissioner acts as Chairman of Election Commission. (Art. 324[3]).

Functions of Election Commission are: (a) Superintendence, direction and control of preparation of electoral rolls; (b) conduct of all elections to Parliament and to Legislature of every state; (c) of elections to offices of President and Vice President. (Art. 324[1]). Art. 329 of Constitution bars interference by Courts in electoral matters.

Election petitions are to be filed in High Court and an appeal to lie to Supreme Court.

Amendment of the Constitution.

The Constitution allows amendments to be made therein without much difficulty.

Alterations of certain provisions of the Constitution are declared by the Constitution itself as not to be deemed to be amendment of the Constitution. These provisions can be altered by the Union Parliament in the ordinary course by passing legislation by a simple majority. Apart from the provisions which relate to the federal scheme, hereinafter referred to, the other provisions of the Constitution may be amended by the Union Parliament without ratification of the amendment by State Legislatures, only by adopting the procedure prescribed by Art. 368.

Amendment.

From procedure laid down in Constitution for its amendment it could be said that Indian Constitution is partly flexible and partly rigid. Constitution provides for three methods of amendments of its provisions: (1) Certain provisions of Constitution can be amended by bare majority which is required for passing of any ordinary law. Amendments contemplated in Arts. 4, 169 and 240 fall within this method and they are specially excluded from purview of Art. 368 and procedure laid down in Art. 368 is not applicable to them; (2) all constitutional amendments other than those referred to in (1) above may be initiated by introduction of bill in either House of Parliament. When bill is passed in each House by majority of total membership of that house and by majority of not less than two-thirds of members of that House present and voting, it is presented to President for his assent. Upon receiving President's assent to bill, Constitution stands amended in accordance with terms of bill (Art. 368); (3) if Constitutional amendments mentioned in (2) above seek to make any changes in vital provision of Constitution regarding (a) manner of election of President (Arts. 54 and 55), (b) extent of executive power of Union (Arts. 73 and 162), (c) High Courts for Union Territories (Art. 241), (d) Union Judiciary (Ch. IV of Part V), (e) High Courts in State (Ch. V of Part VI), (f) legislative relation (Ch. I of Part XI), (g) any of list in Seventh Schedule, (h) representation of States in Parliament, or (i) provisions of Art. 368, amending bill shall also require to be ratified by Legislatures of not less than one-half of States by resolution to that effect passed by those Legislatures before Bill is presented to President for his assent (Art. 368).

Constitution has been amended several times.

1.03 OFFICE HOURS AND TIME ZONE:

India is in the +05:00 and +06:00 GMT time zones. Office hours are generally from 9 a.m. to 5 p.m.

2 BUSINESS ORGANIZATIONS

2.01 AGENCY:

Law of Principal and Agent is found in §§182 to 238 of Indian Contract Act. Law is substantially same as in England. (See England Law Digest.) Consideration is not necessary to create agency. Any person can become agent except minor and person of unsound mind who will not be responsible to principal in accordance with provisions of Act. Agent's authority may be express or implied. Agent's authority includes every lawful thing necessary to execute it. In an emergency agent has authority to do all such acts for purpose of protecting his principal from loss as would be done by a person of ordinary prudence in his own case under similar circumstances. Sections 190-195 deal with appointment of sub-agent, principal's responsibility for sub-agent's acts and relation between principal and sub-agent. When sub-agent is properly appointed, principal is responsible for sub-agent's acts as regards third party, though agent is responsible to principal for sub-agent's acts. Principal may ratify act done by another without his authority and if he ratifies act, same effects follow as if act had been performed by his authority. Knowledge, however, is requisite for valid ratification. Sections 201-210 deal with termination and revocation of agent's authority. If agent disregards instructions of his principal and a loss be sustained, he must make good loss to principal. Amount of skill and diligence required for an agent is amount of skill and diligence possessed by persons engaged in similar business. Agent dealing on his own account in business of agency, without consent of principal, must make good to principal benefit resulting therefrom. In absence of contract to contrary, agent has lien on property and papers of principal received by agent, for remuneration due to him. A principal is bound to indemnify agent against consequences of lawful acts performed by agent. In absence of any contract to that effect, agent cannot personally enforce contracts nor be bound by contracts on behalf of principal. Such contract as mentioned would be presumed where contract is made by agent for sale or purchase of goods for merchant resident abroad or where agent does not disclose name of his principal or where principal though disclosed, cannot be sued. Person falsely contracting as agent is not entitled to performance of contract but is liable for damage which other side incurs by such dealings. If principal induces belief in third persons that agent's unauthorised acts were authorised, principal would be liable to third persons as if acts and obligations were within scope of agent's authority.

Distributorship, Dealership and Franchises governed by contractual terms and under Contract Act. No special features/restrictions exist. Special considerations apply under Foreign Exchange Management Act, 1999 (see category 14 Foreign Trade and Commerce, topic 14.01 Exchange Control). Public limited company cannot appoint sole selling agent for term exceeding five years and with approval of company in General Meeting. Central Government has power to call for information of terms of appointment of sole selling agent, and if Government of opinion that such terms are prejudicial to company's interest, it has power to vary terms. Government also has power to prohibit, by gazette notification, appointment of sole selling agents where Government believes demand of any goods is in excess of supply. In certain cases, sole selling agents of companies are precluded from claiming compensation for loss of office.

2.02 ASSOCIATIONS:

Registration of associations is not compulsory but is desirable under Indian Law which provides for registration of two types of associations: (1) Labour Trade Unions; and (2) Societies.

Under Societies Registration Act XXI of 1860 any society formed for promotion of literature, science, fine arts, diffusion of useful knowledge or political education or for charitable purposes may be registered as society under Act. Minimum number of persons required to form a society is seven. Memorandum of association in which names of founder-members and objects of society are stated may be filed with Registrar. Copy of rules of society, as amended from time to time, must also be filed. Payment of fee is required upon registration, and annual list of members must also be filed.

Advantages of registration as a society are as follows: (a) Members of association may sue or be sued as a society in name of president, chairman, trustees or such other persons as are appointed for purpose; (b) judgment may be passed by or against society and not against representative person in his private capacity nor against his personal property; (c) society has power to sue any member; (d) society has power to alter, extend or abridge its objects; (e) it is exempt from payment of certain taxes under Indian Income Tax Act 1961; (f) it has perpetual existence.

Dissolution.

Three-fifths of total membership of society must vote for society to be validly dissolved. In certain cases, government consent is also required. No member may receive any profit from society's assets, which latter cannot be distributed among members; but assets may be given to some other society. Society may also be wound up as “unregistered association” under §582 of Companies Act, 1956.

For Trade Unions refer to category Employment, topic Industrial and Labour Laws.

2.03 CORPORATIONS OR COMPANIES:

Introduction.

Provisions governing management and administration and regulating companies are governed by Companies Act 1956 which has been amended from time to time keeping in mind ever-changing and dynamic economic scenario prevailing in India.

Companies Act 1956 is longest legislation in India consisting of 658 sections and 15 Schedules.

Government of India constituted expert committee on company law on Dec. 2, 2004 under chairmanship of Dr. JJ Irani to make recommendations on: (a) Issues arising from revision of Companies Act, 1956; (b) responses received from various stakeholders on concept paper; (c) reducing size of Act and removing redundant provisions; (d) enabling easy and unambiguous interpretation by recasting provisions of law; (e) providing greater flexibility in rule making to enable timely response to ever evolving business modules; and (f) any other issue related or incidental to above. Committee has presented its report to government on 31 May, 2004.

Producer Companies.

Companies Amendment Act, 2002 which came into effect on 6th Feb. 2003 has introduced new Part, IX-A. Producer companies have been defined as body corporate having objects or activities specified in §581-B and registered as producer company under this Act. Producer means any person engaged in any activity connected with or related to any primary produce.

Companies Second Amendment Act, 2002 has introduced several important changes. Chief amongst them are as follows:

National Company Law Tribunal (NCLT).

§10 FA has been inserted which dissolves Company Law Board. Part 1B and 1C have been inserted constituting National Company Law Tribunal and Appellate Tribunal respectively. All matters or proceedings pending before Company Law Board shall be transferred to National Company Law Tribunal. Appeals from orders of tribunal shall lie to Appellate Tribunal. Further appeal lies to Supreme Court.

NCLT has not yet been constituted as certain provisions in respect of NCLT have been declared unconstitutional and invalid in Thiru R. Gandhi vs. UOI (2004) 52 SCL 79 (Mad HC DB).

Sick Industrial Companies.

New Part VI-A has been introduced which deals with revival and rehabilitation of Sick Industrial Companies. Board of Directors of Industrial Company which has become Sick Industrial Company are to make reference to Tribunal. Reference can be by Central Government, R.B.I., State Government, public financial institutions or state level institution or scheduled bank and order of Tribunal shall be final. Board of Directors are to prepare scheme of revival and rehabilitation. Tribunal can also make inquiry regarding Sick Industrial Company. Tribunal can also order winding up of Sick Industrial Company if it finds that revival would be unviable and that it is just and equitable to do so.

Government Supervision.

Government Officers who exercise supervision over corporations and companies, are Registrar of Companies and Regional Director of the Government of India, in each state, Department of Revenue and Company Law Board, Ministry of Finance, Department of Company Affairs, SEBI in case of companies listed on Stock Exchanges, RBI in case of banking companies and nonbanking finance companies. Companies Act, 1956 provides for various returns to be filed with and notices to be given to Registrar of Companies, such as return of allotment of shares, annual returns, notice regarding consolidation or division or increase of share capital etc. Registrar in each state acts in consultation with Regional Director of that state.

Act contains several sections which provide for obtaining of sanction or approval of Central Government, such as approval to increase number of directors of public company in cases where increase in number makes total number of directors more than 12, amendment of any provision relating to appointment or reappointment of managing or wholetime director. Such applications for approval or sanction must be made in certain matters to Registrar of Companies or Regional Director of State concerned and in other matters to Secretary, Company Law Board, Ministry of Finance, Department of Revenue and Company Law Board, New Delhi. Act also contains several provisions by which powers are conferred upon Company Law Board in respect of following, among other, matters: (a) Rectification of Register of Members, (b) restraining fraudulent persons from managing companies, (c) production of documents and evidence before inspector appointed under act, (d) granting of relief in cases of oppression and mismanagement, (e) conducting enquiry referred to it by government where there are circumstances suggesting (i) that any person concerned in conduct and management of affairs of company is or has been in connection therewith guilty of fraud, misfeasanse, persistent negligence or default in carrying out his obligations and functions under law or breach of trust; or (ii) that business of company is not or has not been conducted and managed by such person in accordance with sound business principles or prudent commercial practice; or (iii) that company is or has been conducted and managed by such person in manner which is likely to cause or has caused serious injury to interest of trade, industry or business to which such company pertains; or (iv) that business of company is or has been conducted or managed by such person with intent to defraud its creditors, members or any other persons or otherwise with fraudulent or unlawful purpose or in manner prejudicial to public interest. Powers are conferred on Company Law Board and also on Government in appropriate cases to remove from office any director or any other person concerned in conduct or management of affairs of company who is in breach of duties and in suitable cases, to appoint such number of persons as directors as it may think fit and necessary to effectively safeguard interests of company or its shareholders or public interest, in order to prevent oppression to any members of company or mismanagement thereof. Government may in fit case direct company to amend its articles of association to provide for adopting principle of proportional representation for appointment of directors to extent of at least two-thirds of total number of its directors, appointment to be made once in every three years and on such appointment being made, no change in board of directors shall be made by members or directors of company, unless change be confirmed by Government.

Company Supervision.

Is in Board of Directors. Subject to superintendence, control and direction of board of directors, a company can appoint a Managing or whole-time Director or a Manager to manage its business and affairs. Every public company with paid-up share capital of Rs. 5,00,00,000 or private company which is subsidiary of public company must have managing or whole-time director or manager.

See also subheads Directors, Officers, Subsidiaries, infra.

Purposes.

All commercial, trading and industrial purposes to extent authorised by Memorandum of Association. Any activities undertaken by company beyond objects set out in its Memorandum will be considered ultra vires and illegal. No change in memorandum of association can be made with respect to its purposes or objects, unless special resolution is passed by its members by three-fourths majority voting at general meetings of company in person or by proxy.

Name.

Every company must use the word “Limited” at the end of its name, except as next stated. As to an “Unlimited Company,” see subhead Stockholders' Liabilities, infra, item (a).

Kinds.

A Company having 50 members or less and, prohibiting issue of its shares to the public, restricting transfer of its shares and prohibiting acceptance of deposits from public is called “Private” Company. All other companies are “Public” Companies. “Private” Company must use words “Private Limited” at end of its name. No Company can be registered by name which Government considers undesirable or which is identical with or too nearly resembles existing Company. Company may change its name with approval of Government and by Special Resolution passed by its members, which requires to be passed by three-fourth majority of votes, by show of hands or proxy, at General Meeting of Company.

See also subhead Subsidiaries, infra.

Term of Corporate Existence.

Perpetual.

Incorporators.

At least two persons in case of Private Company and seven in case of Public Company.

Prospectus.

Every company which intends to offer shares or debentures to public for subscription by issue of prospectus must compulsorily make application to one or more recognised Stock Exchanges for permission that shares and debentures be dealt with on Stock Exchange. See subhead Stockholders' Liabilities, item (c), infra.

Certificate or Articles of Incorporation.

Every Company must file a Memorandum of Association with the Registrar of Companies. It must be stamped and signed by the minimum number of members required to form it and must state:

(a) its name;

(b) the State (within India) in which its Registered Office is to be situate;

(c) the objects or purpose of the Company;

(d) that in case of a Company limited by shares, that the liability of its members is limited;

(e) the amount of its share capital and the division thereof into shares of a fixed amount.

There are Regulations prescribed by Act for management of public Company and are contained in Table "A" thereto. Company can, however, have its own "Regulations" which should conform to provisions of Act, and generally for sake of convenience most public Companies have their own Regulations which are embodied in their Articles of Association which must be registered with Registrar of Companies. Articles of Company must be stamped and signed by subscribers to its Memorandum and can be altered by Special Resolution of its members. Only one stamped copy of Memorandum and Articles of Association of Company need be filed and on registration thereof. Registrar issues Certificate that Company is incorporated.

Filing of Certificate or Articles.

The Certificate is not filed with the Registrar but is issued by him to the Company which has to preserve it forever. The Memorandum and Articles have to be filed with the Registrar as above.

Incorporation Tax or Fee.

Fee of about Rs. 30,000 is payable to Registrar for registration of company having share capital of Rs. 1,000,000. Fees increase on graduated scale up to maximum fee of Rs. 20,000,000. *Note:* Under relevant state laws stamp duty on Memorandum and Articles of Association (generally in proportion to authorised capital) is also payable.

Filing Fees.

Nominal fee has to be paid to Registrar for filing some formal papers depending on nominal capital of company.

Companies (Amendment) Act, 2006 passed to make legislative changes for introduction of e-governance through Ministry of Corporate Affairs. Scheme is popularly known as MCA-21 which provides public, corporate entities and others easy and secure online access to corporate information, including filing of documents and public access to information required to be in public domain under statute, at anytime and from anywhere.

License to Do Business.

Public Company cannot commence business or exercise any borrowing powers, unless:

(a) Shares to be subscribed for in cash have been allotted to amount not less in whole than minimum subscription. Minimum subscription means amount stated in Prospectus of Company as minimum amount which, in opinion of Directors, must be raised by issue of share capital in order to provide for: (i) Purchase price of any property purchased or to be purchased by Company, (ii) any preliminary expenses payable by Company and commission for subscribing for shares, (iii) repayment of any monies borrowed by Company in respect of any of foregoing matters, (iv) working capital, and (v) any other expenditure required for purposes of Company;

(b) every Director has paid for his shares in cash;

(c) no money is liable to be repaid to applicants for any shares offered for public subscription by reason of any failure to apply for, or to obtain, permission for shares to be dealt in on any recognised Stock Exchange; and

(d) there has been filed with Registrar of Companies Declaration signed by one of directors or secretary that above clauses (a), (b) and (c) have been complied with. Before commencing business, Company must either file Prospectus or Statement in Lieu of Prospectus with Registrar of Companies.

For few industrial concerns, mentioned in Schedule to Industries Development & Regulations Act (see category 3 Business Regulation and Commerce, topic Industries [Development and Regulation] Act) sanctions and licenses have to be obtained from Central Government under that Act.

Organization.

Every public company must hold statutory meeting within period of not less than one month nor more than six months from date on which Certificate is issued to it by Registrar for commencing business, and Statutory Report must be presented thereat setting out particulars as to shares allotted, share subscriptions and other amounts received by company, particulars of preliminary expenses incurred by it, particulars of its directors and secretary and certain other particulars. Every company must hold annual general meeting in every financial year within 15 months of date of last annual general meeting (first annual general meeting being required to be held within 18 months from date of incorporation), for passing its balance-sheet and profit and loss account, declaring dividend (if any), appointing directors in place of those retiring by rotation and appointing auditors and fixing their remuneration. Balance sheet and profit and loss account should relate to period beginning with day immediately after period for which account was last submitted and ending with day which shall not precede day of meeting by more than six months or where extension has been granted by Registrar by more than six months from extension so granted. Extraordinary general meeting of company may be held for transacting any extraordinary business. There are various statutory provisions as to length of notice for same, place of holding meeting, quorum thereat, voting by show of hands and proxies, and taking of poll. Body corporate (whether Indian or foreign company) may, by resolution of its board of directors, authorise any person as it thinks fit to act as its representative at any such meeting. In certain matters, Act requires special resolution to be passed by members of company. Such resolution is required to be passed by three-fourths majority of votes in person or by proxy, of persons present and entitled to vote at that meeting. All other resolutions are called ordinary resolutions and may be passed by bare majority.

Paid-up Capital Requirements.

Minimum paid-up capital prescribed for Private Limited Company is Rs. 100,000 and for Public Limited Companies Rs. 500,000.

Amendment of Certificate or Articles.

Certificate of Incorporation is never required to be amended except when name of Company is changed. Every alteration in Memorandum or Articles of Association of Company is required to be registered with Registrar of Companies and copies of amendments are to be incorporated in each copy of Memorandum and Articles issued after date of relevant amendment. For listing purposes Articles must comply with relevant listing requirements.

Increase or Decrease of Authorised Capital Stock.

Company may increase its capital, if so expressly authorized by its Articles, by passing ordinary resolution (see subhead Organization, supra). If out of authorised capital, new shares are to be issued from time to time, then no such resolution is necessary, but such shares must be issued to existing members in proportion to their existing holdings, unless company in general meeting gives any directions to contrary by means of special resolution. This latter provision does not apply to preference shares. On any proposed increase of capital of company, whether by issue of rights shares or bonus shares or otherwise, none of them can be issued or allotted to foreign individual or corporation, whether already member of company or not, without permission of Reserve Bank of India, under Foreign Exchange Management Act, but foreign equity participation up to 74% is now permissible and provisions have been introduced to permit capital increase to bring foreign collaborators' holding to 74%. In some notified industries foreign investment is allowed up to 100%. Issue of shares to promoters/collaborators should be, broadly stated, at market related prices. Capital of Company can be decreased or reduced by passing Special Resolution and by obtaining Order of competent court confirming reduction.

Buy-Back of Shares.

Previously, Company was prohibited from buying its own shares. However Companies (Amendment) Act, 1999 permits Company to purchase its own shares or other specified securities out of (i) its free reserves or (ii) securities premium account or (iii) proceeds of any shares or other specified securities, subject to compliance with certain terms and formalities therein provided.

Bye-Laws.

Articles of Association of Company are its Bye-Laws or Regulations. See subhead Certificate or Articles of Incorporation, supra.

Stock.

Only two kinds of shares can be issued by a public Company, namely, Preference Shares and Equity Shares. Nonvoting shares are prohibited. A private Company (see subhead Name, supra) may issue any other kind of shares also, such as founder's shares or deferred shares. By Amendment Act, 1999, now permits Company to issue what is termed as “Sweat Equity Shares” of class of Equity Shares already issued to its employees and directors at discount or otherwise. Amendment Act, 2000 read with Rules framed for this purpose enables company, to issue capital with differential rights as to dividend, voting or otherwise provided, company has distributable profits for three financial years preceding year of issue of such shares, company has not defaulted for preceding three financial years in filing annual accounts and annual returns, has not failed to repay its deposits or interests thereon or redeem its debentures. Articles of Association of company should authorise issue of such shares. Conviction of company for any offence arising under, SEBI Act, 1992, Securities Contracts (Regulating) Act, 1956, FEMA, 1999 will act as bar on company to issue shares with differential rights. Company shall have to address investors' grievances. Company for purpose of such issue has to obtain approval of shareholders. Notice of meeting for passing resolution of such issue must be accompanied by explanatory statement stating (a) Rate of voting right, (b) proportion in which voting right will vary, (c) equity capital not to be converted to equity share capital with differential voting right and vice versa, (d) such shares shall not exceed 25% of total share capital issued, (e) members of company holding equity shares with differential voting rights shall be entitled to bonus shares, right shares of same class, and (f) holder of such shares shall enjoy all other rights excepting right to vote as in (a) above.

Generally, companies in India do not issue stock, but only shares. See also subhead Stockholders—(General Rights), infra.

Preference shares can be issued only if so authorised by Articles. They are entitled to preference over equity shares in respect of payment of a fixed dividend which may be cumulative or noncumulative and of return of capital in case of a winding-up. Preference shares are generally given a voting right only on resolutions which directly affect rights attached to them, for example, if dividend thereon remains in arrears for at least two years or on a resolution for winding-up of company or for re-payment or reduction of its share capital. No company limited by shares can after 15 June 1988 issue any preference shares which are irredeemable or are redeemable after expiry of period of ten years from date of issue.

Global & American Depository Receipts etc.

Government, by administrative guidelines, has permitted Indian companies meeting prescribed norms to issue Global/American Depository Receipts (GDR/ADR); debt instruments, EURO Bonds (EB) and convertible bonds (CB) which are all designated in U.S. Dollar terms. In contrast, underlying equity (for GDR/ADR) is designated in Indian currency. For such issue, requisite resolutions of shareholders (and amendments to Articles of Association, where necessary) have to be passed/made, increasing capital (where necessary), permitting creation of GDR/ADR; EB; CB, authorising directors to make requisite arrangements, including accepting conditions as may be imposed by authorities and in principle approval obtained from Ministry of Finance, Government of India, New Delhi. After in principle approval, arrangements with Lead Managers, issue structure, coupon rate etc. are made, final approval from Finance Ministry is required. If foreign equity after DR issue exceeds 51% or if issuer company implements projects beyond Annexture III of 1991 Industrial Policy (see category 3 Business Regulation and Commerce, topic Industries [Development and Regulation] Act) approval of Foreign Investment Promotion Board (FIPB) is essential. Reserve Banks' approval under Foreign Exchange Management Act, 1999 is necessary, but generally would follow on government's approval. Issue and filing prospectus with Securities & Exchange Board of India (SEBI), Registrar of Companies is also necessary. GDR/ADR/EB/CB (which are quoted on international exchange, generally Luxembourg) are freely transferable to nonresidents outside India, Indian residents cannot acquire such securities. GDR/AR holders may redeem DRs to underlying equity at any time (company may prefer initial lock-in period, usually 45 days) through overseas depository which will, on redemption of DR obtain equity from local custodian. Pending redemption, depository is registered holder of shares on company's records. To protect controlling interest company may require depository to have voting agreement. Bonds issues may also have put or call options attached. Holders of GDR/ADR may transfer underlying equity only through stock exchange in India, with requisite Reserve Bank approval. Pending redemption issuing company remits dividend/interest to depository which, in turn, pays out holders of GDR/ADR/EB/CB. Withholding tax on dividend and interest on bonds is 10%. Long term capital gains on transfers in India are also 10%. No Indian capital gains arise on transfers outside India.

Now, as per amendments made, with view to increase flow of foreign currency, unlisted companies can also float EURO/ADR issues provided they fulfill three year track record eligibility requirement and comply with standard requirement for listing on domestic stock exchanges within three years of earning profits.

Issuance of Indian Depository Receipts.

Rules have been framed for issuance of IDR. Foreign companies can now issue IDRs in India. IDR will be issued as per Companies (issues of Indian Depositories Receipts) Rules of 2004 as framed by Government of India.

Stock Certificates.

A certificate issued under the Common Seal of the Company specifying any shares held by a member are prima facie evidence of his title to such shares. A certificate must be issued within three months after the allotment of any shares, and within two months after the application for registration of the transfer of any shares in the books of the Company. Shares in a public Company cannot be allotted for the first time unless a Prospectus or a Statement in Lieu of Prospectus is filed with the Registrar of Companies. Several matters must be stated and Reports set out in the Prospectus or in the Statement in Lieu of Prospectus, as per various details set out in the long schedules annexed as Schedules II and III respectively to Act. Return as to allotments must be made and filed with Registrar within one month after allotment. In case of shares allotted for consideration other than cash, contract in writing constituting title of allottee to allotment with certain other relevant documents must be filed with Registrar.

Issuance of Stock.

Shares may be issued for cash or in consideration of property or machinery, etc., sold to company or for services rendered or for technical assistance or know-how made available to company or in lieu of royalty for trademark or patent rights or other noncash, considerations. In case of subsequent allotments, unless contrary direction is given by company in General Meeting, all new shares must first be offered to holders of equity shares in proportion to their holdings at date of each offer. See also subheads Capital Issues, infra; and Increase or Decrease of Authorised Capital Stock, supra.

Transfer of Stock.

A transfer cannot be registered except on production of the relevant share certificate with proper instrument of transfer (in prescribed form) duly stamped and executed by transferor and transferee or on production of probate or other legal representation or decree of court, etc., showing transmission of share by operation of law. Board of directors are entitled, if so authorised by articles, to refuse to register transfer or transmission even in case of private company, appeal to Company Law Tribunal is possible, but in case of public company or private company which is subsidiary of public company, appeal may be made to Company Law Tribunal against any such refusal, and after duly hearing parties, Tribunal may direct either that transfer or transmission be registered and award damages or that it need not be registered by company. §22-A deleted by Depositories Act, 1996.

Moreover, certain restrictions exist on any individual firm, group (as defined in Act) constituent of group, body corporate or bodies corporate under same management (as defined in Act) acquiring equity shares in public company, or private company which is subsidiary of public company exceeding 25% of paid up equity share capital of such company. In such cases, shares of company in question cannot be acquired without previous approval of Central Government. There are similar restrictions on transfers by body corporate or bodies corporate under same management holding 10% or more of subscribed equity share capital of any other company without previous approval of Central Government as also transfers by body corporate or bodies corporate under same management holding 10% or more of equity share capital of foreign company having established place of business in India to any Indian citizen or any body corporate of India without previous approval of Central Government. Aforesaid restrictions, however, come into play only in cases of acquisition or transfer of shares by or to person who or which is registered under provisions of Monopolies and Restrictive Trade Practices Act, 1969 or would be as result of acquisition or transfer of shares, undertaking registrable under that Act. See category 3 Business Regulation and Commerce, topic 3.08 Monopolies, Restraint of Trade and Competition.

Stock Transfer Tax.

Stamp duty on market value of share is levied on each transfer under relevant state stamp laws, but none on transmission by operation of law. Company may, after giving at least seven days advertisement in newspaper close its Register of Members for period or periods not exceeding 45 days in each year, but not exceeding 30 days at any one time.

Stockholders—(General Rights).

(a) Preference Shares must carry a preferential right to be paid a fixed amount of dividend, subject to income-tax, and also carry, on a winding-up, or repayment of capital, a preferential right to be repaid the capital paid up thereon. It is optional for any Company to give any further or additional rights to preference shareholders, both as regards dividends and as regards return of capital.

(b) A member holding an Equity Share can vote on every resolution placed before the Company, in proportion to his share of its paid-up capital. A member holding a Preference Share has, however, only a restricted right to vote in the cases mentioned above. No Company can issue shares (not being Preference Shares) which carry voting rights or rights as to dividend, capital or otherwise which are disproportionate to the rights attaching to the holders of other shares (not being Preference Shares).

(c) Where different classes of shares are issued by a Company, the rights attached to any class of shares may, if so authorised by its Memorandum or Articles, be varied with the consent of the holders of at least three-fourths of the issued shares of that class or by a special resolution passed at a separate meeting of the holders of those shares. Any dissenting shareholders holding in the aggregate at least 10% of the issued shares of that class may, however, apply to the Tribunal to have variation cancelled, and decision of court on any such application shall be final.

(d) Every member is entitled to inspection of the Minutes of every General Meeting and to be furnished with a copy thereof on payment of a nominal fee. This right, however, does not extend to the Minutes of the meetings of Directors.

(e) Every member is entitled to be furnished with every balance-sheet and profit and loss account, Auditors' Report and Directors' Report of a Company but company whose shares listed on stock exchange makes available these documents for inspection at its registered office for 21 days preceding meeting and forwards to all members salient features of such documents, company then need not furnish these documents to members except those who specifically request.

(f) Member may appoint nominee in whose name shares should be transferred on death of such member.

(g) Small shareholders of Public Limited Company having paid up capital of Rs. 5,00,00,000 or more and having 1,000 or more small shareholders, may have director elected in manner as may be prescribed by Central Government. “Small shareholders” for this purpose means shareholders holding shares of nominal value of rupees 20,000 or less. Companies appointment of Small Shareholders' Directors Rules, 2001 have been framed, which prescribe manner in which director may be elected by small shareholders, and matters connected therewith.

Stockholders' Liabilities.

(a) A Company not having the liability of its members limited by the Memorandum to an amount, if any, unpaid on its shares, is termed an “unlimited Company” and the liability of the members to contribute towards the debts and liabilities of the Company is unlimited, but such Companies are rarely formed in India.

(b) If in case of a public Company, the number of members falls below seven, or in case of a private Company, below two, and if the Company carries on business for more than six months while the number is so reduced, every member who is cognisant of this fact, shall after such six months be personally liable for the payment of the whole debts of the Company contracted thereafter.

(c) Every promoter or director of company who authorises issue of prospectus inviting persons to subscribe for shares in or debentures of company, shall be liable to pay compensation to every subscriber of its shares or debentures for any loss or damage sustained by such subscriber who subscribes on faith of such prospectus by reason of any untrue statement included therein.

(d) Any person who, either by knowingly or recklessly making any statement, promise or forecast, which is false, deceptive or misleading or by any dishonest concealment of material facts, induces or attempts to induce another person to subscribe for or underwrite shares or debentures, is punishable with an imprisonment of five years or with a fine up to Rs. 100,000/—or both.

Stockholders' Meetings.

See supra under subhead Organization. As to proxies, every member of Company, is entitled to appoint proxy, but proxy cannot speak at meeting. Every Resolution, unless poll is demanded, must be decided on show of hands. Proxy is entitled to vote only on poll being demanded. Proxy must be deposited with Company at least 48 hours before meeting. Proxy must be in writing and signed by appointer, and in case of body corporate, it must be under its seal or be signed by officer or attorney duly authorised by it. In case of public company, before or on declaration of result of voting, poll may be ordered to be taken by chairman of meeting on his own motion and must compulsorily be ordered to be taken by him on demand made: (a) By any member or members present by proxy and holding shares in company (i) which confer power to vote on resolution not being less than one-tenth of total voting power or (ii) on which aggregate sum of not less than Rs. 50,000 has been paid up. However in case of private company such poll could be demanded by one member if not more than seven such members are personally present and two such members present if more than seven such members are personally present. In case of private company, poll may be demanded by one member present in person, if seven such members are personally present, and by two such members, if more than seven such members are personally present. Member in arrears in respect of calls made on shares is not entitled to vote in respect thereof. On poll, member is entitled to as many votes as shares held and member entitled to more than one vote, may use or cast all his votes in same way or in different ways in respect of different shares held by him. New §192A has been introduced by Companies (Amendment) Act, 2000, with effect from 13.12.2000 whereby listed company may on its own and shall if Central Government requires, get any resolution passed only by postal ballot instead of transacting business in general meeting. Company is required to send notice of meeting with draft resolution to be sent to all shareholders for taking their assent or dissent in writing within 30 days of posting letter. In case of postal ballot, resolution passed by requisite majority will suffice. Fraudulently defacing or destroying ballot paper is offence punishable with imprisonment up to six months or with fine or with both. “Postal ballot” includes “voting by electronic mode” also. Department of Company Affairs has issued Companies (Passing of the Resolution by Postal Ballot) Rules, 2001, which provide for following matters, inter alia, in respect of which voting by postal ballot may be made: (1) Alteration of object clause of Memorandum; (2) alteration of Articles of Association for amending private company's provisions; (3) buy-back of own shares; (4) issue of shares with differential voting rights; (5) change of registered office; (6) sale of undertaking of company; (7) giving loans or extending guarantee, etc.

Directors.

A public Company or a private Company which is a subsidiary of a public Company, must have at least three Directors. A private Company must have at least two directors. The maximum number of directors of a Company is fixed by the Articles. No company shall appoint or reappoint any individual as Director unless he has been allotted Director Identification Number under §266B, application for which has to be made online. There is no restriction in the Act as to citizenship or residence of directors. Directors need not be stockholders or shareholders. However, a Company has the option to prescribe by its Articles that a director must hold certain qualification shares not exceeding in all 5,000 rupees in value. In default of and subject to any regulations in the Articles, the subscribers of its Memorandum of Association shall be deemed to be the directors of the Company, until the directors are duly appointed as hereinafter mentioned. Not less than two-thirds of the total number of directors of a public Company, or of a private Company which is a subsidiary of a public Company, shall (a) be persons whose period of office is liable to determination by retirement of directors by rotation, and (b) be appointed by the Company in General Meeting. The remaining directors in the case of any such Company, and the directors generally in the case of a private Company which is not a subsidiary of a public Company, shall, in default of and subject to any regulations in the Articles, also be appointed by the Company in General Meeting. At the first Annual General Meeting of a public Company or a private Company which is a subsidiary of a public Company, held next after the date of the General Meeting at which the first directors are appointed by the Company as aforesaid and at every subsequent annual General Meeting, one-third of such of the directors for the time being as are liable to retire by rotation, or the number nearest to one-third, shall retire from office. A retiring director is eligible for re-election. Maximum of 12 can be appointed by public company without necessity of obtaining prior government consent. Consent is required for appointments exceeding 12. Board can also fill in any casual vacancies. Additional director appointed by board can hold office only until next annual general meeting of company, and director appointed by them to fill in casual vacancy can hold office only up to date up to which director in whose place he is appointed would have held office. Appointment of any director must be voted on individually. Articles may provide for appointment of not less than two-thirds of total number of directors of public company or of private company which is subsidiary of public company, according to principle of proportional representation, whether by single transferable vote or by system of cumulative voting or otherwise, appointments being made once every three years and interim casual vacancies being filled in accordance with provisions, mutatis mutandis, of Act, with regard to filling in of other casual vacancies by board. There is no age limit for retirement or appointment of directors.

See also subhead Subsidiaries, infra.

Disqualifications of Directors.

§274 provides that person shall not be capable of being appointed as director if: (a) he is of unsound mind; (b) he is undischarged insolvent; (c) he has applied to be adjudicated as insolvent; (d) he has been convicted by court; (e) he has not paid call in respect of shares held by him; (f) order has been passed by court disqualifying him.

New subsection (g) has been introduced in §274, by Companies (Amendment) Act 2000 with effect from 13.12.2000, which disqualifies director from being appointed as director, for period of five years, if he is presently director of public company which has failed to file annual return or annual accounts for any continuous period of three years, with effect from 01.04.1999 or has failed to repay deposit and/or interest thereon on due date or to redeem debentures on due dates or failed to pay dividend for continuous period of one year.

Directors' Meetings.

A meeting of board of directors must be held at least once in every three calendar months and at least four such meetings must be held in every year. It may be held anywhere. Notice of every meeting of board should be given in writing to every director for time being in India, and at his usual address in India to every other director. Quorum for a meeting of board is one-third of its total strength (any fraction contained in that one-third being rounded off as one) or two directors whichever is higher. For this purpose, “total strength” means total strength of board, after deducting therefrom number of directors, if any, whose places may be vacant at time. Where at any time number of interested directors (that is, directors whose presence cannot be counted for purpose of forming quorum at meeting of board, by reason of their being interested in any contract or transaction discussed or voted upon thereat) exceeds or is equal to two-thirds of total strength, number of directors who are not interested, shall be quorum during such time. Resolutions can be passed by circular (that is, without board meeting) by circulating draft of resolution, together with necessary papers, to all directors then in India (not being less in number than quorum fixed for meeting of board) and to all other directors at their usual address in India, and such resolution must be approved by such of directors as are then in India, or by majority of such of them, as are entitled to vote on resolution.

Powers and Duties of Directors.

The Board of Directors are entitled to exercise all such powers and to do all such acts and things as the Company is authorised to exercise and do except to the extent to which such powers are to be exercised and acts and things are to be done by the Company in General Meeting according to the relevant provisions of the Act in that behalf.

The following powers can be exercised only at a meeting of the Board and not by circular Resolution: (a) power to make calls on shareholders for monies unpaid on shares; (b) power to issue debentures; (c) power to borrow monies otherwise than on debentures; (d) power to invest the funds of the Company; and (e) power to make loans.

The powers specified in sub-clauses (c), (d) and (e) may be delegated to the extent authorised by the Board in a certain manner.

Certain powers of the Directors must be exercised only at Board meetings duly assembled, but other powers may be exercised even by circular Resolution. The following powers cannot be exercised by the Board of Directors of a public Company or of a private Company which is a subsidiary of a public Company, without the consent of such Company in General Meeting, namely: (a) power to sell, lease or otherwise dispose of substantially the whole of the undertaking of a Company; (b) power to remit or give time for repayment of any debt due by a Director except in case of renewal or continuance of an advance made by a banking company to its directors in ordinary course of business; (c) power to invest, otherwise than in trust securities, the sale proceeds resulting from the acquisition of any undertaking of the Company; (d) power to borrow monies (apart from temporary loans obtained from the Company's bankers in the ordinary course of business) in excess of the paid-up capital of the Company and its free reserves; and (e) power to contribute to charitable and other funds not directly relating to the business of the Company or the welfare of its employees, any amounts in excess of Rs. 50,000/—or 5% of its average net profits during three immediately preceding financial years, whichever is greater. Contributions to political parties or purposes are permissible within same limit, but disclosure must be made in company's accounts. Government companies or companies not in existence for three financial years cannot make such contributions.

Director must not vote at a board meeting on any contract or arrangement to be entered into on behalf of company if he is directly or indirectly concerned or interested therein, but he may do so at a shareholders' meeting, and he should disclose his interest therein before same is entered into. Director cannot hold any office or place of profit under company or its subsidiary other than that of a managing director, manager or legal or technical adviser, without previous consent of company accorded by a special resolution. For purposes of Act, a company is deemed to be a subsidiary of another, if (a) that other controls composition of its board of directors, or (b) that other holds more than half in nominal value of its equity share capital.

See also subhead Subsidiaries, infra.

Liabilities of Directors.

Each director must disclose to company particulars of office held by him in any other body corporate as a director, managing director, manager or secretary of any other body corporate. He must also disclose particulars of his shares or debentures in company. He cannot assign his office as director of company. He cannot appoint an alternate director during his absence from India for meetings of board which are ordinarily held during that period, but board may appoint alternate director during his absence. Generally, such alternate director is appointed with consent of absent director. Person can be managing director or manager of only two companies. Central government may however permit any person to be appointed as managing director of more than two companies if central government is satisfied that it is necessary that companies should for their proper working function as single unit and have common managing director. No compensation can be paid to director for loss of office as such, except to managing or whole-time director, and that too subject to various restrictions. Director is bound to comply with various detailed provisions relating to disclosures and statements to be made in prospectus or statement in lieu of prospectus to be filed by a public company, otherwise he can be exposed to civil and criminal proceedings for suppression of material facts from or misrepresentations therein. Every director will be liable to punishment if to his knowledge dividend declared by company is not paid within 42 days from date of declaration, to its shareholders. Directors are responsible for proper books of account being kept by company, and for proper balance-sheets and profit and loss accounts of company being made out for each financial year of company and for same being laid before every annual general meeting of company. They are bound to lay before every such general meeting their report as to state of company's affairs, and other particulars laid down in Act. Penalties are prescribed for contraventions of such provisions of Act. If affairs of any company are mismanaged by directors, central government or Company Law Tribunal has power to hold investigation in respect of same and take proceedings against delinquent directors, and such proceedings can be taken even at instance of certain minimum prescribed minority of shareholders. Suitable orders for setting right affairs of company can be made by government or court, without company being wound up.

Remuneration of Directors.

Remuneration of directors can be determined either by articles or by a resolution of company in general meeting, subject to following restrictions: (a) Remuneration of a managing or whole-time director must not exceed 5% of net profits of company, or where there is more than one such director, 10% for all of them together; (b) remuneration of any other director shall not exceed 1% of the net profits of company, if there be a managing or whole-time director or manager of company, and it must not exceed 3% of net profits of company, if there be no managing or whole-time director or manager of company; (c) if there be managing director or manager, remuneration of all of them and of other directors of company must not exceed 11% of net profits of company. There are detailed provisions in Act for determining mode in which net profits of a company are to be arrived at. Approval of Government for appointment and remuneration of managing director/manager/whole-time director is not required except where guidelines under Schedule XIII to Act are not followed.

See also subhead Subsidiaries, infra.

New §292A has been inserted by Companies (Amendment) Act 2000, with effect from 13.12.2000 which provides that every public company having more than Rs.5 Crores and paid up capital should constitute “Audit Committee” of Board. Audit Committee should consist of not less than three directors of which two-thirds shall be other than Managing Director or Whole Time Director. Terms of reference or scope of Audit Committee should be specified in writing by Board and annual report to disclose composition of Audit Committee. Auditors, Internal Auditors and Director of Finance should attend meeting and Audit Committee should discuss with Auditors scope of audit and internal control systems. Audit Committee should also review half yearly and annual financial results before submission to Board and ensure compliance of internal control systems. Chairman of Audit Committee shall attend annual general meeting to clarify matters relating to audit to shareholders. Recommendations on financial management and audit report of

Audit Committee shall be binding on Board of Directors.

Officers.

Directors, managing directors, managers, secretary or any person in accordance with whose directions or instructions Board of Directors or one or more directors are accustomed to act are officers. Managing Director is director entrusted with substantial power of management, subject to superintendence control and direction of Board. Manager has management of whole or substantially whole of affairs of company. Director may also be appointed manager. Only individuals can be director, managing director, manager, secretary.

A company cannot appoint at same time more than one of following categories of managerial personnel viz., (a) managing director and (b) manager.

(b) Secretary and Other Officers.—Secretary must have prescribed qualifications and is appointed to perform certain duties as specified in Act or any other ministerial or administrative duties. No tax free remuneration can be paid to any secretary or other officer. Secretary or other officer may be entrusted with keeping of books of account and other registers and records of company and with work of making and filing Returns and other prescribed particulars with Registrar of Companies, and for otherwise complying with various provisions prescribed by Act. Contraventions thereof may expose them to penalties laid down in Act, and proceedings may also be taken by Government or competent court for their acts of omission and commission. Every company having paid-up share capital of at least Rs. 5,000,000 shall have whole-time secretary.

See also subhead Subsidiaries, infra.

§383A has been amended by Companies (Amendment) Act 2000, with effect from 13.12.2000, which provides that Secretarial Compliance Certificate must be obtained from secretary in wholetime practice, to companies whose paid up capital is between 10 lakhs and 50 lacs. Compliance certificate should also be filed with ROC and be attached with directors' report sent to all shareholders.

Principal Office.

It is the Registered Office of the Company of which notice is registered with the Registrar of Companies. It cannot be removed outside local limits of any city, town or village where it is situated without a special resolution passed by the company. If the registered office of the company is to be transferred from one state to another in India, special resolution and confirmation of Central Government is necessary.

General Powers of Corporations.

These are laid down in the Memorandum of Association of a Company and cannot be exceeded. See also subhead Purposes, supra.

Dividends.

No dividend shall be declared except out of profits of company and except to registered shareholders, or their authorised agents. A dividend must be paid within 30 days of its declaration. No higher dividend can be declared by company in general meeting than that recommended by directors. Directors may declare interim dividend before end of any financial year. No dividend shall be declared by company except after transferring to its reserves such percentage of its profits up to 10% thereof as may be prescribed by Government.

Sale or Transfer of Corporate Assets.

Board of directors of a public company or its subsidiary in general meeting cannot, except with consent of company in general meeting, sell, lease or otherwise dispose of whole, or substantially whole, of undertaking of company.

Intercorporate Loans and Investments.

Company can directly or indirectly give any loan or give guarantee or security on behalf of any third party subject to limits and conditions provided by Act. Similarly, Company may acquire shares and securities of any Body Corporate within prescribed limit subject to limits and conditions prescribed therein.

Books and Records.

Every Company should keep the following Books and Records:

(a) Minutes of General Meetings,

(b) Minutes of Board Meetings,

(c) Register of Members,

(d) Transfer Register,

(e) Register of Debenture-holders,

(f) Register of Mortgages and Charges,

(g) Register of Directors, Manager and Secretary,

(h) Register of Directors' Shareholdings,

(i) Register of Investments,

(j) Register of Contracts or arrangements in which Directors are interested or concerned, and

(k) the usual Books of Account.

The above Registers and Books should be kept at the Registered Office of the Company.

Any member of the Company can inspect any of the above registers and books, except the Minute Books of the Directors and the Books of Account. Some of these registers and books may be inspected by creditors of the Company and some by other persons also.

Reports.

The Directors of a Company must make their Report every year as to the state of the Company's affairs and attach the same to every Balance-Sheet laid before the Company in General Meeting. Report of Directors must contain: (a) State of Company's affairs; (b) amounts, if any, proposed to be carried to any reserves; (c) amount, if any, which it recommends should be paid by way of dividends; (d) material changes if any, affecting financial position of Company which have occurred between end of financial year to which balance-sheet relates and date of report; (e) conservation of energy, technology absorption, foreign exchange earnings and outgo; (f) reasons for failure if any, to complete buy-back of its shares within time specified; (g) certain particulars regarding Employees Stock Options Scheme, if any. (See category 3 Business Regulation and Commerce, topic 3.11 Securities, subhead SEBI [Employees Stock Options Scheme and Employee Stock Purchase Scheme] Guidelines, 1999.) (See subhead Buy-Back of Shares, supra.) Report of the Auditors of Company on its accounts and on every balance sheet and profit and loss account should be attached thereto. Auditor's Report should state: (a)

Whether he has obtained all information and explanations necessary for purpose of his audit; (b) whether proper Books of Account have been kept by Company, as required by law, and (c) whether Company's balance sheet and profit and loss account dealt with by report are in agreement with books of account of Company. §217 has been amended by Companies (Amendment) Act 2000, with effect from 13.12.2000, which provides that Directors' Report circulated to all members should also include Directors' Responsibility Statement (DRS). DRS should state that, while preparing accounts, directors have followed applicable accounting standards and given explanation for material departures, have selected and applied accounting policies consistently, made reasonable judgments and estimates for reflecting true and fair view of accounts, taken care for maintenance of adequate accounting records to safeguard assets of company and prevent frauds and irregularities and prepared annual accounts on going concern basis.

Copies of the Directors' Report and of the Auditor's Report must be sent to every member of the Company (subject to exception—see subhead Stockholders—[General Rights], supra) and must be filed with Registrar of Companies.

Corporate Bonds or Mortgages.

Company may create a charge or mortgage on any of its properties and assets, including its book debts, uncalled share capital, goodwill, trade mark, patent or other intangible assets. It can also create a charge for purpose of securing any issue of debentures. All such charges and mortgages must be registered with Registrar of Companies within 30 days after creation thereof.

Merger and Consolidation.

If the Memorandum of Association of any Company empowers it to amalgamate with another Company, it can be amalgamated or consolidated with or merged into another Company. This can be done by taking proceedings in the Tribunal for purpose, and certain formalities must be gone through before Tribunal makes order for such amalgamation. Domestic Corporation cannot be amalgamated with foreign Corporation, except that domestic Corporation may be allowed to subsist as subsidiary of foreign Corporation. There is no prescribed percentage vote of stock-holders or shareholders required for approving amalgamation Scheme, but generally substantial majority vote is accepted by Tribunal before it exercises its discretion in favour of accepting scheme. There are no taxes payable on amalgamation of two Companies.

Dissolution.

A Company can be wound up either by the court or voluntarily by its members. There are detailed provisions in the Act setting out the circumstances under which a Company may be wound-up, and what steps and proceedings should be taken before it can be finally dissolved.

Supervision of Courts.

Jurisdiction regarding liquidation and amalgamation and other powers of High Court are now exercisable by Tribunal following Second Amendment Act.

Insolvency and Receivers.

Liquidation of insolvent companies is also governed by Act. Receiver of Company or of its assets is not generally appointed by Tribunal, but instead Liquidator is appointed by approval of Tribunal or Central Government to wind up Company and its affairs. There are various detailed provisions laid down in Act about manner in which affairs of insolvent Company are to be wound up by its liquidators.

Foreign Corporations.

There is no prohibition in the Companies Act against foreign corporations doing business in India. Permission under Foreign Exchange Management Act, 1999 is essential. Employment of foreign nationals is no longer restricted by Foreign Exchange Management Act. However, residence of foreign nationals is regulated by Home Ministry by granting visas. Foreign Corporation can establish its branches in India, but it must file with Registrar of Companies, within one month of establishment of its place of business within India: (a) certified copy of Charter defining its constitution; (b) full address of its principal office; (c) list of its Directors and Secretary; (d) name and address of any person resident in India, authorised to accept on its behalf any notice or other documents required to be served on it, and (e) full address of its principal place of business in India. It must inform Registrar from time to time of any changes which may occur in any of above particulars to be filed with him. It must also file with Registrar copies of its balance sheet and profit and loss account in prescribed form and should comply with certain other formalities laid down in Act, which are not of very important nature. Certain amount of stamp duty and fees have to be paid on registration of Corporation in India, but amount thereof is comparatively nominal. If any foreign corporation fails to comply with these provisions, it and each of its officers or agents, who is in default, shall be punishable with fine up to Rs. 10,000/—and in case of continuing offence, with additional fine of Rs. 1,000/—per day during which default continues. If any foreign corporation ceases to have place of business in India, it should forthwith give notice of fact to Registrar. Except as aforesaid, none of provisions of Companies Act apply to any foreign corporation. There are, however, restrictions under Foreign Exchange Management Act, 1999 which require prior approval for foreign body corporate establishing branch in India.

See also subhead Subsidiaries, infra.

Subsidiaries.

Broadly speaking, a Company is deemed to be a subsidiary of another if, but only if, that other controls the composition of its Board of Directors or that other exercises or controls more than half of the total voting power of such Company, or holds more than half in nominal value of its equity share capital. Composition of Board of Directors deemed to be controlled by another company if that company has power, exercisable at its discretion without consent or concurrence of any other person, to appoint or remove all or majority of directors. Further, if one Company is subsidiary of another, then Company which is subsidiary of subsidiary, is also subsidiary of said other Company.

See also category 14 Foreign Trade and Commerce, topic 14.01 Exchange Control.

Capital Issues.

Effective Feb. 1992, Securities Exchange Board of India (“SEBI”) statutorily constituted. Broadly, SEBI's functions are to protect investor interests in securities; to promote development of securities market and to regulate securities market including: (a) regulating business in stock exchanges or other securities markets, (b) registering and regulating business of stockbrokers, merchant bankers, underwriters, portfolio managers, bankers to issue and other intermediaries in any manner associated with securities market, (c) regulating and registering mutual funds, (d) promoting and regulating self-regulatory organisations, (e) prohibiting fraudulent and unfair trade practices relating to securities market, (f) investors' education and training of intermediaries in securities market, (g) prohibiting inside trading, (h) regulating substantial acquisition of shares and takeovers, (i) inspecting and auditing of stock exchanges and other self-regulating bodies, (j) performing functions and exercising powers as delegated by Government Securities Control (Regulation) Act.

SEBI guidelines for issue provide: (1) Companies listed on exchange which have made at least one issue in past and have paid dividend continuously can determine price of new issue. (2) New companies making issue for first time, must issue at par. (3) Existing unlisted companies issuing shares may offer at premium, if company has three years track record of profitability. (4) Companies issuing shares to increase promoters' holding, including nonresident participation to

51% (or inviting nonresident participation) (see topic Foreign Investment) may issue shares at price determined by shareholders by special resolution, such price not being lower than price calculated per prescribed formulae i.e. 10% over average price prevailing over preceding six months.

Guidelines for underwriting, reserved quota, listing on exchanges must be complied with.

Take Over Code.

See category 3 Business Regulation and Commerce, topic 3.11 Securities.

Green Shoe Option (GSO).

Concept for Green Shoe Option has been introduced for first time in Indian Stock Market, by inserting new c. VIII-A in SEBI (DIP) Guidelines. It has been extended to all public issues and not only IPO, w.e.f. 28-05-2004.

Green Shoe Option means option allocating shares in excess of shares included in public issue and operating as post-listing price stabilizing mechanism in accordance with provisions of c. VIII-A of said guidelines.

2.04 PARTNERSHIPS:

Law of partnership formerly contained in Contract Act, is now codified by Indian Partnership Act 1932. English Act on this subject has been taken as model. Partnership is result of contract between two or more persons agreeing to share profits of business carried on by one or more acting for all. Minors cannot contract and therefore cannot be partners but may be admitted to benefits of partnership but incur no personal liability. Partners are principals as well as agents of each other for purpose of business. Firms for non-banking purposes can have maximum of 20 partners, while for banking purposes maximum is ten. Proposed amendments in Company Law seek to increase number of partners in professional firms to 50. Chapter III deals with relations of partners inter se but is subject to contract to contrary.

Chapter IV deals with relations of partners with third parties. Section 19 vests in partners authority to carry on business and enumerates certain acts which do not fall within authority implied by section. §19 read with §20 contains important principle in §5 of English Partnership Act, which defines general extent of partner's agency, namely, that act of partner will bind firm, if done as partner in usual business of partnership and in usual way of business. Chapter V deals with admission, retirement, expulsion and insolvency of partners etc.; liability of estate of deceased partner; rights of outgoing partner; and revocation of continuing guarantee by change in firm.

Registration.

Under Code of Civil Procedure a partnership firm can sue or be sued in firm name but it has been provided in Indian Partnership Act that in order to entitle a firm to sue it must have been registered as a firm with Registrar of Firms appointed by Government for purpose. It is therefore advisable for every partnership firm in India to get itself registered with Registrar of Firms and any changes in constitution of firm should similarly be notified to Registrar and entered in his Register. Registration under Partnership Act is now mandatory in some states. Any statement, intimation or notice recorded in Register of Firms shall, as against any person by whom or on whose behalf such statement, intimation or notice was signed, be conclusive proof of any fact therein stated. Certified copy of entry relating to firm in books of Registrar of Firms may be produced in proof of fact of registration of firm and of contents of any statement, intimation or notice recorded therein.

Note.— Income Tax Act earlier contained separate provisions for registration of firms under that Act for income tax purposes. Registration under Partnership Act is distinct from income tax registration.

Dissolution.

Chapter VI deals with dissolution, i.e., breaking up of firm. Firm may be dissolved: By agreement of all partners (§40); (2) by adjudication of all or all but one partner as insolvent; (3) by business becoming unlawful (§41); (4) subject to contract between partners by efflux of time; (5) completion of its purpose; (6) death of partner or adjudication of partner as insolvent (§42); (7) by notice in case of partnership at will; (8) and by intervention of court on grounds set out in §44. Insolvent partner ceases to be partner on date on which adjudication order is made whether firm is thereby dissolved or not. Where under a contract between partners, firm is not dissolved by adjudication of partner as insolvent, estate of partner so adjudicated is not liable for any act of firm nor is firm liable for any act of insolvent after date of order of adjudication.

In order that public may have notice it is required under §72 of Act that notice relating to retirement or expulsion of partner or dissolution of registered firm should be given to Registrar of Firms and should also be published in local Official Gazette and in at least one vernacular newspaper circulating in district where firm has its principal place of business.

3 BUSINESS REGULATION AND COMMERCE

3.01 BILLS AND NOTES:

Law relating to issue and negotiation of bills and notes, i.e., promissory notes, bills of exchange and cheques has been codified by Negotiable Instrument Act 1881. This Act like other Indian statutes relating to mercantile transactions is based on English Common Law. Promissory note is required to be in writing, containing unconditional undertaking of maker who signs it, to pay certain sum of money only, to certain person or his order, or to bearer of note not being currency note or bank note. (§4). §31 of Reserve Bank of India Act 1934 places restriction on issue of bills and notes payable to bearer on demand; though cheques, drafts, and hundis which are payable to bearer on demand may be drawn on person's account with banker, shroff or agent. Section further prohibits issue of bearer promissory note except by Bank or Central Government. Bill of exchange differs from promissory note in that it contains unconditional order directing certain person to pay certain sum of money only. Cheque is bill of exchange payable on demand and is drawn on bank and includes cheque in electronic form. (§6). All indigenous negotiable instruments in vernacular languages are termed as “hundi.” Hundi is subject to local usages and is unaffected by provisions of Act. Bill of exchange is accepted by drawee by signing his assent hereon and delivering it or giving notice of his assent, and thereupon his liability accrues on bill. Bills and notes must be supported by consideration (for consideration see topic 3.03 Contracts). Bill of exchange must be presented for acceptance when it is payable, after sight. Promissory note payable at certain period after sight must be presented to maker for acceptance. In no other cases is presentment for acceptance necessary. Cheques, being payable on demand, no presentment for acceptance is necessary. Bills and notes payable to bearer are negotiable by delivery while those payable to order are negotiable by endorsement and delivery. Such bills and notes may be further negotiated unless right of negotiation is restricted or excluded. They cannot be negotiated only for part of sum appearing due thereon. Endorser of bills and notes becomes liable thereon unless he expressly excludes his liability. Promissory notes and bills of exchange (not cheques) should be stamped in accordance with Indian Stamp Act. Unstamped instrument is not admissible in evidence.

Days of Grace.

Bills and notes not payable on demand, at sight or on presentment, are at maturity on third day after day on which they are expressed to be payable. Provisions relating to maturity and days of grace are contained in §§22 to 25. If day on which instrument matures is public holiday as defined it shall be deemed to be due on next preceding business day.

Special Requirements (re Consideration).

Bills and notes must be supported by consideration (see topic 3.03 Contracts). If there is no consideration or if it subsequently fails, no obligation of payment is created between parties to transaction. But if such party has transferred instrument to holder for consideration such holder and every subsequent holder may recover amount due on instrument; §§44 and 45 provide for proportionate reduction of liability under instrument in case of part failure of consideration which consists of cash or kind. It is presumed, until contrary is proved that instrument was made, drawn, accepted, indorsed, negotiated or transferred for consideration.

Compensation.

§117 lays down rules for payment of compensation to holder or indorser in case of dishonour of bills or notes. Holder is entitled inter alia to expenses properly incurred in presenting, noting and protesting it while indorser is inter alia entitled to expenses caused by dishonour and nonpayment. Holder is entitled to amount due and expenses. Endorser is entitled to amount paid plus interest at rate of 18% per annum from date of payment until tender or realisation thereof together with all expenses caused by dishonour or nonpayment.

Summary of Main Provisions of Act.

Person capable of contracting may bind himself by being party to instrument but minor may bind all parties except himself. Corporation cannot be party to instrument unless it is so empowered under law. (§26). Person may bind himself by duly authorised agent. Agent who indicates clearly that he signs as an agent does not render himself personally liable. Legal representative of deceased person who signs, is personally liable unless he restricts his liability to extent of assets received by him. §§30 to 38 deal with liability of parties to instrument, e.g., drawer, drawee, maker and acceptor. §58 deals with rights of possessor or indorsee of lost instrument or one obtained by offence or fraud or unlawful consideration.

Chapter IX lays down manner in which dishonoured bills and notes may be noted and protested. Noting and protest of dishonoured instrument is not necessary under Act, but there are certain advantages in noting and protest. Foreign bills of exchange must be protested for dishonour if such protest is required by laws of place where drawn. (§104).

Chapter XVI deals with foreign instruments. In absence of contract to contrary, liability of maker or drawer of instrument is determined by law of place where it is made or drawn, and liability of acceptor or indorser by law of place where instrument is payable. Law of place where instrument is payable determines what is dishonour and whether such notice is necessary. §104 deals with protest of foreign bills of exchange. If foreign instrument is made, drawn, accepted or indorsed outside India but in accordance with Indian law, then any subsequent acceptance or indorsement made in India would not be invalidated by fact that agreement evidenced by such instrument is invalid according to law of foreign country concerned.

This is in nature of exception to general principle that person cannot give better title than what he has. Thus, person who finds lost instrument gets no title to it. So is case where person obtains instrument by theft or fraud, for unlawful consideration, or forges instrument. However, except in case of forgery, possessor or indorsee who is holder in due course or claims through any person who is holder in due course is entitled to receive amount due under instrument.

Where cheque payable to order purports to be endorsed by payee, bank is discharged by payment in due course even though signature of payee may have been forged. (§85). Section however gives no protection to banker when drawer's signature on cheque is forged and if any payment is made pursuant to such cheque, banker cannot debit customer's account.

Prosecution For Dishonour.

(§§138-142). Negotiable Instruments Act, provides that dishonour of cheques is offence punishable by imprisonment for term which may extend to two years and/or fine which may extend to twice the value of cheque dishonoured, provided following conditions are met: (i) Cheque has been dishonoured either for insufficiency of funds or for exceeding arrangements with banks; (ii) cheque has been presented for payment within six months from date on which drawn or within period of validity of cheque, whichever is earlier; (iii) payee makes within 30 days of dishonour, written demand on drawer of cheque to make payment on cheque; (iv) drawer of cheque fails to make payment within 15 days of receipt of such notice.

Act prescribes that prosecution in event of dishonour as aforesaid must be commenced within one month of date of failure of drawer to make payment of amount of cheque returned.

Courts have laid down principle that issuing “stop-payment” instructions to banker after drawing cheque amounts to offence under §138. Earlier, courts took view that if drawer intimated to payee as to fact that he had issued “stop-payment” instructions to his banker, then he would not be guilty of offence under §138. However, in 1998, Supreme Court has reversed this position and held that intimation by drawer of factum of “stop-payment” instructions issued to bankers, to payee would not absolve him of liability under §138. *Note:* (i) company includes a firm, (ii) prosecution must be commenced within one month of date on which cause of action arises viz. failure by drawer to make payment within 15 days of receipt of notice by written complaint to competent Magistrate, (iii) in such prosecution it is not open to drawer to set up defence that at time of issuing cheque he had no reason to believe that cheque would be dishonoured, (iv) offence of dishonor is to be tried summarily.

The Prevention of Money Laundering Act, 2002, imposes obligations on banking companies, financial institutions and intermediaries to verify identity of their clients, to maintain records and to furnish information to Financial Intelligence Unit-India (FIU-IND). Whoever directly or indirectly attempts to indulge or knowingly assists or knowingly is party or is actually involved in any process or activity connected with proceeds of crime and projecting it as untainted property, is deemed to be guilty of offence of money laundering. No civil court has jurisdiction to entertain any suit or proceeding which authorities constituted under Act are empowered to determine. Offence is punishable with rigorous imprisonment for three to seven years and with fine up to Rs. 5 lakhs.

Conflict of Laws.

See topic 3.03 Contracts.

3.02 COMMERCIAL REGISTER:

Companies Act 1956 provides for registration of companies (see category 2 Business Organizations, topic 2.03 Corporations or Companies) and Partnership Act for registration of partnership firms (see category 2 Business Organizations, topic 2.04 Partnerships). There is no statutory requirement in India for businessmen to be registered on a commercial register.

3.03 CONTRACTS:

Introduction.

Law of contract has been codified and is to be found in Indian Contract Act IX of 1872. Indian Contract Act is based on English common law on subject. Sale of Goods and Partnership are governed by separate statutes. See topic 3.09 Sale of Goods; category 2 Business Organizations, topic 2.04 Partnerships.

General Considerations.

Concepts of proposal, promise, consideration, voidable contract and void agreements, free consent, undue influence, fraud, misrepresentation and other similar concepts in Act are similar to those in English law. Unlike English common law, consideration may proceed from promisee or any other person. (§2[1][d]). Section 63 of Act which provides that promisee may dispense with or remit wholly or in part, performance of promise made to him, makes wide departure from English common law. Contract with minor is void under Indian law, and not voidable, as in England.

Agreements made by free consent of parties competent to contract, for lawful consideration with lawful object and not expressly declared to be void are valid contracts. (§10). Agreement, consent to which has been obtained by coercion, fraud, misrepresentation or undue influence, is voidable at option of party whose consent was so caused. Coercion may include unfair bargaining position or economic duress, particularly in contracts of employment. Under §23 of Act, consideration or object of an agreement is lawful unless it is forbidden by law or is of such a nature that if permitted, it would defeat provisions of any law or is fraudulent or involves or implies injury to person or property of another or court regards it as immoral or opposed to public policy. Inadequacy of consideration does not by itself avoid an agreement if consent was freely given by promisor but the inadequacy of consideration is taken into account by court in determining question whether consent was freely given. See, however, subhead When Writing Required, infra.

An agreement in restraint of the marriage of any person other than a minor is void. Similarly under §27 every agreement by which one is restrained wholly or partially, from exercising a lawful profession, trade or business of any kind is to that extent void. But one who sells the goodwill of a business may agree with the buyer to refrain from carrying on a similar business, within specified local limits provided such limits appear to the court reasonable, regard being had to the nature of the business. This section invalidates many agreements which may be held good under English common law.

Likewise an agreement in restraint of legal proceedings, is void. §28 makes void every agreement by which any party is restricted absolutely from enforcing rights under contract by usual legal proceedings in ordinary Tribunals, by which time is limited to enforce rights, or by which rights of any party are extinguished or discharged. Wagering agreements are also void and no suit can be brought for recovering anything alleged to be won on any wager.

Where both parties (and not merely one party) are under mistake of fact essential to agreement, agreement is void. Mistake as to an Indian law will not make contract voidable. Mistake as to foreign law has same effect as mistake of fact.

Liability under joint contracts has been made joint and several and where two or more persons have made joint promise, release of one of such persons does not discharge other joint promisor. These sections are variation of rules of English law on subject.

Chapter V of Act deals with certain relations resembling those created by contract. For example, §70 in this chapter provides that where a person does anything for another not intending to do so gratuitously and such other person enjoys benefit thereof, latter is bound to make compensation to former. This section is considered to go far beyond English common law.

Supreme Court in recent judgment, ONGC Ltd. vs. Saw Pipes Ltd. (2003) 5 SCC 705, has held that when liquidated damages are provided for in contract and there is breach of such contract, burden of proof lies on party who has committed breach to show that in fact other party has not suffered loss crystallized as liquidated damages in contract.

Breach.

Chapter VI of Act deals with consequences of breach of contract. On breach of contract, party in default is liable for loss or damage which naturally arose in usual course from breach or which parties knew likely to result from breach. Party entitled to compensation for breach is obliged to minimise or diminish loss or damage arising from breach, by means available to him, and he is entitled to receive reasonable compensation but not exceeding sum if any mentioned in contract as payable on breach. Measure of damages generally is difference between contract price and market price of goods at date of breach.

Excuses for Nonperformance.

Sections 51 to 58 deal with and set down circumstances in which party to contract may not perform his part of contract. Section 56 provides that agreement to do an impossible act is void. If act becomes impossible or unlawful subsequently, contract becomes void. But if party knew or could have known with reasonable diligence that obligation to be performed by him was impossible or unlawful, he must compensate other party for loss caused through nonperformance. Further, party who is himself responsible for frustrating event cannot take advantage of §56. War condition and strike of workers may, depending on special circumstances and nature of contract discharge parties to contract. Commercial impossibility, e.g., exorbitant rise in price of goods contracted to be supplied, will not determine contract. If time is of essence of contract, and party fails to do it within time, contract is voidable at instance of other party.

Sureties, etc.

Chapter VIII of Act deals with subject of indemnity and guarantee, surety, principal debtor and creditor, surety's liability, continuing guarantee, discharge of surety, the law being substantially same as in England. Consideration is necessary to support a guarantee; anything done or any promise made for benefit of principal debtor is sufficient consideration for giving guarantee. Liability of surety is coextensive with that of principal debtor. Surety would be discharged by any variance (except variation to surety's benefit) in contract between principal debtor and creditor, without consent of surety, or by act or omission on part of creditor which would affect remedy of surety or if principal debtor is discharged or if creditor released security to extent or value thereof. Surety upon payment or performance of all that he is liable is vested with all rights of creditor and is entitled to benefit of security available to creditor. Guarantee obtained by misrepresentation or concealment of material circumstances renders guarantee invalid.

Bailments and Pledges.

Chapter IX of Act deals with bailments and pledges. Bailment is delivery of goods for some purpose on condition that goods would be returned when purpose is accomplished. Pledge is bailment of goods as security for payment of debt or performance of promise.

Bailor bound to disclose defects in goods otherwise he would be liable for damages. (§150). Bailee bound to take care of goods as ordinary man of prudence. (§151). Bailee making unauthorised use of goods is liable for damage to goods. (§152). Sections 155 to 157 deal with effect of mixture of goods by bailee with his goods. Increase or profit accruing from goods must be returned to bailor. Section 170 deals with liens of bailee who has rendered service involving exercise of labour and skill in respect of goods bailed. Under §171 of Act, bankers, factors, wharfingers, attorneys of High Court and policy brokers have right to retain as security for general balance of account, any goods bailed to them in absence of contract to contrary. Goods pledged cannot be retained for purpose other than for which they are pledged. (§174). If pledgor makes default in payment of debt or performance of promise, pledgee may either file suit or sell goods after giving notice and if sale proceeds are not sufficient, recover balance from pledgor. (§176).

Bonafide Purchasers.

The rights of persons acting in good faith with mercantile agents who are with the consent of owner in possession of goods or documents of title to goods have been protected under §178 of Act. This is exception to common law principle that no person can give better title than he himself has.

See category 2 Business Organizations, topic 2.01 Agency.

When Writing Required.

An agreement is not necessarily required to be in writing but if agreement is made without consideration and is made on account of natural love and affection between parties standing in near relation to each other then Act requires that it should be in writing and also registered under Indian Registration Act. Similarly agreement without consideration is valid if it is promise to compensate wholly or in part person who has already voluntarily done something for promisor or something which promisor was legally compellable to do. If it is promise to pay wholly or in part debt which would otherwise have been time-barred, and is made without consideration, it is required to be in writing and signed by promisor. (§25).

Interest in Immovables.

Under the Indian Registration Act, all instruments of gifts of immovable property and all non-testamentary instruments purporting or operating to create, declare, assign, limit or extinguish, whether in present or in future, any right title and interest of the value of Rs. 100/—or more to or in immovable property must be registered with the Sub-Registrar of Assurances.

Applicable Law.

Principles of private International Law as practiced in England are applied in India.

General rule is proper law of contract governs all matters of essential and formal validity, interpretation, construction, implementation and effect, but not capacity to contract. Proper law is law of country which parties intended contract to be governed by, provided intention was bonafide and legal; if no intention existed or could be implied from terms of contract, proper law is objectively determined as law of country with which contract has closest connection in fact. (see Dicey: Conflict of Laws).

Distributorships, Dealerships and Franchises.

See category 2 Business Organizations, topic 2.01 Agency.

See also category 2 Business Organizations, topic 2.04 Partnerships.

3.04 E-COMMERCE:

The Information Technology Act.

Act has been enacted to implement resolution of U.N. that all states should give favorable consideration to Model Law adopted by U.N. Commission while enacting or reviving their laws on e-commerce. Act provides legal recognition for transactions carried out by means of electronic data interchange and other means of electronic communication, commonly referred to as “electronic commerce”, which involve use of alternatives to paper-based methods of communication and storage of information, to facilitate electronic filing of documents with Government agencies (e-governance) and for matters connected therewith or incidental thereto.

(I) Act is to be administered by Controller appointed by Central Government. Act provides for determining who is originator of electronic records. It also provides for manner in which receipt of electronic record shall be acknowledged unless form of receipt has been agreed to between originator and addressee and also as to time and place of dispatch and receipt of electronic records.

Application has to be made to Controller for obtaining license, to issue Digital Signature Certificate (DSC) and Act provides for manner in which person to whom period for which such license may be issued and events in which license may be suspended or revoked. It sets out procedure and for procedure and basis for and circumstances in which license for issue of Digital Signature Certificate (DSC), may be granted and may be suspended or cancelled.

Person who has been issued Digital Signature Certificate (DSC) can authenticate electronic records by affixing his digital signature in manner as prescribed by Act. Act provides that anywhere law requires that any information or matter should be in writing, it may be made available in electronic form, and if any information or matter is to be authenticated it may be done by means of digital signature. Similarly all forms, applications, other documents, issue of license, permit etc., receipt or payment of money in particular manner provided to be done under any law may be done and effected by means of electronic forms as may be prescribed by Central Government.

Central Government is authorized to make rules in regard to manner and format and type of digital signature and for procedures to ensure security and confidentiality of electronic records or payments and for matters necessary to give legal effect to digital signature.

(II) Control is exercised over certifying authority by providing penal consequences for contravention of law. Penalties, prosecution and confiscation measures are provided in law to deal with civil and criminal liabilities arising out of breach of law.

(III) To seek advice of experts, provision is made for constitution of Cyber Regulations Advisory Committee.

(IV) Consequential amendments have also been made to Indian Penal Code, Indian Evidence Act, 1872, The Bankers Books Evidence Act, 1891 and Reserve Bank of India Act, 1934 to give effect to objects of Information Technology Act, 2000.

Recently, PC to PC Internet Telephony has been introduced and Internet Service Providers (ISPs) are now allowed to offer Internet Telephony. Government is in process of finalizing proposal to effect that companies providing Internet Telephony require ISP License, resulting in higher tariffs being payable by consumer.

3.05 FRAUDS, STATUTE OF:

See topic 3.03 Contracts.

3.06 INDUSTRIES (DEVELOPMENT AND REGULATION) ACT:

Provisions have been greatly relaxed (see, infra, subhead Relaxation).

The Government of India has passed the Industries (Development and Regulation) Act, 65 of 1951 to provide for the development and regulation of certain industries. The Act extends to whole of India. Industries which are covered by Act are mentioned in First Schedule to Act. Broadly, following categories of industries are included in First Schedule viz: (1) Metallurgical industries (ferrous and non-ferrous); (2) fuels; (3) boilers and steam generating plants; (4) prime movers; (5) electrical equipment; (6) telecommunications; (7) transportation; (8) industrial machinery; (9) machine tools; (10) agricultural machinery; (11) earth-moving machinery; (12) miscellaneous mechanical and engineering industries; (13) commercial office and household equipment; (14) medical and surgical appliances; (15) industrial instruments; (16) scientific instruments; (17) mathematical, surveying and drawing instruments; (18) fertilizers; (19) chemicals (other than fertilizers); (20) photographic raw film and paper; (21) dye stuffs; (22) drugs and pharmaceuticals; (23) textiles (including those dyed printed or otherwise processed); (24) paper and pulp including paper products; (25) sugar; (26) fermentation industries; (27) food process industries; (28) vegetable oils and vanaspati; (29) soaps, cosmetics and toilet preparations; (30) rubber goods; (31) leather, leather goods and pickers; (32) glue and gelatin; (33) glass; (34) ceramics; (35) cement and gypsum products; (36) timber products; (37) defence industries; (38) cigarettes, linoleum, zip fasteners, etc.

The above-mentioned industries are hereinafter referred to as the Scheduled industries.

Central Advisory Council.

Chapter II of Act provides for establishment of Central Advisory Council for purpose of advising Central Government on matters concerning development and regulation of Scheduled industries and Development Council consisting of representatives of owners of industrial undertakings and of employees employed therein and of consumers to perform such functions as may be assigned to it for increasing efficiency or productivity in Scheduled industries for which it is established.

Registration, etc.

Chapter III of Act provides for registration of existing industrial undertakings, not belonging to Central Government, appertaining to Scheduled industries and issuing of certificates of registration; licensing of such new industrial undertakings and laying down of conditions of its operations and locations; issue of license for producing or manufacturing new articles; revocation and amendment of licenses in certain cases; issue of license for effecting substantial expansion or changing location of industrial undertaking which has been registered; procedure for grant of license or permission; power to Central Government to cause investigation to be made into scheduled industries or industrial undertakings where there has been or is likely to be substantial fall in volume of production or marked deterioration in quality of production or rise in price of any article or class of articles relatable to that industry or there is necessity to take action to conserve any resources of national importance. On completion of investigation Central Government, if satisfied, may issue directions for regulating production or stimulating industry or prohibiting any practice which might reduce undertaking's production capacity or economic value or controlling prices and regulating distribution of any article or class of articles.

Control.

Chapter IIIA contains provisions regarding direct management or control of industrial undertakings pertaining to Scheduled industries by the Central Government in certain cases, namely where such industrial undertaking has failed to comply with its directions or where an industrial undertaking in respect of which an investigation has been made is being managed in a manner highly detrimental to the scheduled industry or public interest. An order issued in this behalf shall have effect for such period not exceeding five years normally as may be specified but Central Government may direct that the order may be extended even after five years if it is in public interest to do so. On the issue of such order all persons in charge of the management shall be deemed to have vacated their offices as such and any contract of management between the undertaking and any managing agent or director shall be deemed to have terminated without compensation for loss of office or premature termination.

Chapter III AA has been introduced to provide for management or control of industrial undertakings owned by companies in liquidation. Under new Chapter III AB power is given to Central Government to provide that in cases of such undertakings, all or any of following Acts, viz. Industrial Employment (Standing Orders) Act, Industrial Disputes Act and Minimum Wages Act, shall not apply or shall apply with specified modifications, additions or omissions. In such cases, Central Government may also declare that operation of all or any contracts, assurances, agreements, settlements, awards, standing orders or other instruments shall remain suspended as specified by its order. New Chapter III AC deals with liquidation and reconstruction of companies.

The Central Government is authorised under Chapter IIIB of the Act, so far as it appears to it to be necessary or expedient for securing the equitable distribution and availability at fair price of any article or class of articles relatable to any scheduled industry, to make an order providing for regulating the supply and distribution (including control over the price) of all such articles and of trade and commerce therein.

For the purpose of ascertaining the position or working of any "Industrial Undertaking" to which the Act applies the Central Government may authorise any person to enter and inspect any premises or to order the production of any book, document, register or record or to examine any person having the control of or employed in connection with any "Industrial Undertaking."

Section 29C of the Act provides that no suit or prosecution or other legal proceeding shall lie against any person for anything which is done in good faith or against the Government for any damage caused or likely to be caused by anything done in good faith in pursuance of the Act.

If any person contravenes or attempts to contravene or abets the contravention of certain provisions of the Act he would be punishable with imprisonment which may extend to six months or with fine which may extend to Rs. 5,000/—or with both and in the case of a continuing contravention with an additional fine which may extend to Rs. 500/—for every day during which such contravention continues after conviction for the first such contravention.

Relaxation.

By Notification No. 477(E) dated July 25, 1991, Government has abolished licensing for all industrial undertakings and necessity for obtaining consequent approvals of Government for substantial expansion of existing industrial undertakings and for manufacture of new articles, subject to fulfillment of certain conditions. Notification has three Schedules; Schedule I lists industries reserved for public sector; Schedule II gives list of industries which are reserved for compulsory licensing; Schedule III is list of industries reserved for small scale ancillary sector.

Industries Reserved for Public Sector.

Following categories of industries are reserved for public sector: (1) Arms and ammunition and allied items of defence equipment, defence aircraft and warships; (2) atomic energy; (3) coal and lignite; (4) mineral oils; (5) mining of iron ores, manganese ore, chrome ore, gypsum, sulphur, gold and diamond; (6) mining of copper, lead, zinc, tin, molybdenum and wolfram; (7) minerals specified in Schedule to the Atomic Energy (Control of Production and Use) Order, 1953; and (8) railway transport.

Industries in Respect of Which Industrial Licensing is Compulsory.

Industrial Licenses are regulated under Industries (Development & Regulation) Act, 1951. Requirements of Industrial license has been progressively reduced. At present industrial license for manufacturing is required only for following: industries retained under compulsory licensing; items reserved for small scale sector; and when proposed location attracts locational restriction.

Following industries require compulsory industrial license: distillation and brewing of alcoholic drinks; cigars and cigarettes of tobacco; and manufactured tobacco substitutes.

Electronic Aerospace and defence equipment: all types.

Industrial explosives including detonating fuses, safety fuses gun powder, nitrocellulose, and matches.

Hazardous chemicals: (a) Hydrocyanic acid and its derivatives; (b) phosgene and its derivatives; and (c) isocyanates and di-isocyanates of hydrocarbon, not elsewhere specified (example: Methyl Isocyanate).

Drugs and Pharmaceuticals (according to modified Drug Policy issued in Sept. 1994 and subsequently amended in Feb. 1999).

Industrial undertaking is defined as small-scale unit if capital investment in plant and machinery does not exceed Rs 10 million. Small-scale units can get registered with Directorate of Industries/District Industries Centre of State Government. Such units can manufacture any item, and are also free from locational restrictions. Government has reserved certain items for exclusive manufacture in small scale sector. List is subject to periodic review and items are de-reserved.

Non-small scale units can manufacture items reserved for small scale sector only after obtaining industrial license. In such cases, non-small scale unit is required to undertake obligation to export 50% of production of SSI reserved items.

Small scale unit can not have more than 24% equity in its paid up capital from any industrial undertaking, either foreign or domestic. If equity from another company (including foreign equity) exceeds 24%, even if investment in plant and machinery in unit does not exceed Rs 10 million, unit loses its small-scale status.

Industrial undertakings are free to select location of project. Industrial License is required if proposed location is within 25 km of Standard Urban Area limits of 23 cities having population of 1 million as per 1991 census. List of such cities is at Annexure IX. Locational restriction does not apply if unit were to be located in area designated as ``industrial area'' before 25 July 1991.

In case of Electronics, Computer software and Printing and any other industry, which may be notified in future as ``non polluting industry'', location of industrial units is subject to applicable local zoning and land use regulations and environmental regulations.

Industrial License is granted by Government of India in the Secretariat for Industrial Assistance (SIA) on recommendation of Licensing Committee. Application for industrial license is required to be submitted in prescribed form. (Form FC-IL). This form is available in Public Relation and Complaint Section (PR&C) of the SIA, all outlets dealing in Government Publications, Indian Embassies, and can also be downloaded from website http://dipp.nic.in.

Application accompanied with crossed demand draft of Rs.2500/- (appr. US$ 55) may be submitted to Entrepreneur Assistance Unit (EAU) of Dept. of Industrial Policy & Promotion.

FDI in SSI Units Locational Restrictions Procedure for obtaining industrial License-manufacture of items reserved for Small-Scale Sector.

Industrial undertakings exempt from industrial license are only required to file Industrial Entrepreneur Memoranda (IEM) in Part `A', in prescribed format, with Secretariat of Industrial Assistance, and obtain acknowledgement. No further approval is required. Immediately after commencement of commercial production, industrial undertaking is required to file with SIA, Part B of the IEM.

Form for filing IEM is available at Public Relation and Complaint Section (PR&C), all outlets dealing in Government publications, Indian Embassies, and can also be downloaded from website http://dipp.nic.in.

IEM can be filed with PR&C either in person or by post. IEM should be submitted along with crossed demand draft of Rs.1000/- (appr. US$ 22) for up to ten items proposed to be manufactured. For more than ten items, additional fee of Rs. 250 (appr. US$ 6) for up to ten additional items needs to be paid.

On filing IEM, acknowledgement containing SIA Registration Number, for future reference, is issued. In case IEM is sent by post, acknowledgement is sent by post and no further approval is required. IEM would stand cancelled if proposal requires compulsory license.

Upon commencement of commercial production, industrial undertakings need to file information in Part `B' of the IEM to PR&C Section in SIA. No fee is to be paid for filing Part B. All industrial undertakings whether or not exempt from compulsory industrial licensing, are statutorily required to submit monthly production return in prescribed proforma every month. This should reach Industrial Statistics Unit (ISU) of Dept. positively by tenth of following month.

Small- scale units by virtue of their natural growth may exceed investment limits prescribed for small-scale units. In such cases, these units need to obtain Carry-on-Business (COB) License based on best production in preceding three years. No export obligation is fixed on capacity for which COB license is granted. Application for COB licence should be submitted in revised form ``EE'', along with crossed demand draft of Rs.2500/- (appr. US$ 55). However, on further expansion of its capacity beyond capacity included in COB license, unit would need to obtain industrial license.

Procedure for filing IEM Procedure on Commencement of Commercial Production Carry on Business (COB) License Policy for Industries exempt from licensing Industrial Entrepreneurs Memorandum (IEM).

Fee prescribed for various applications, licenses are to be paid through crossed demand draft drawn in favour of Pay & Accounts Officer, Dept. of Industrial Policy & Promotion, Ministry of Commerce & Industry, payable at New Delhi.

Entrepreneurs are required to obtain statutory clearances relating to Pollution Control and Environment, as may be necessary for setting up industrial project for 31 categories of industries in terms of Notification (SO 60(E) dated 27.1.94) issued under Environment (Protection) Act, 1986 from Ministry of Environment & Forest, Government of India. This list includes petrochemical complexes, petroleum refineries, cement, thermal power plants, bulk drugs, fertilisers, dyes, paper, etc.

However, if investment in project is less than Rs. 1 billion, such Environmental clearance is not necessary, except in cases of pesticides, bulk drugs and pharmaceuticals, asbestos and asbestos products, integrated paint complexes, mining projects, tourism projects of certain parameters, tarred roads in Himalayan areas, distilleries, dyes, foundries and electroplating industries. Further, any item reserved for the small-scale sector is also exempt from obtaining environmental clearance from the Central Government. Powers have been delegated to State Governments for grant of environmental clearance for certain categories of thermal power plants. Setting up industries in certain locations considered ecologically fragile (e.g. Aravalli Range, coastal areas, Doon valley, Dahanu, etc.) are guided by separate guidelines issued by Ministry of Environment and Forests, Government of India.

3.07 LICENSES, BUSINESS AND PROFESSIONAL:

See topic Industries (Development and Regulation) Act.

3.08 MONOPOLIES, RESTRAINT OF TRADE AND COMPETITION:

Monopolies and Restrictive Trade Practices Act, 1969 (in nature of anti-trust legislation) enacted to ensure that operation of economic system does not result in concentration of economic power to common detriment, for control of monopolies, for prohibition of monopolistic, restrictive and unfair trade practices and for matters incidental thereto. Commission has been appointed under Act, with powers of civil court, to conduct inquiries and hearings and to advise Government under Act. Provisions relating to Registration of Undertakings; prior approval for substantial expansion; setting up of new undertakings; mergers, amalgamations have been deleted. Central Government and Commission are given power to pass any orders to remedy or prevent mischief resulting from monopolistic trade practices. All agreements relating to restrictive trade practices falling within categories specified in Act are to be registered with Registrar of Restrictive Trade Practices. Commission has powers to inquire into restrictive trade practices and pass orders if it is of opinion that practice is prejudicial to public interest. Commission also has similar powers in respect of trade practices which amount to unfair trade practices under Act. Commission also has power to grant temporary injunction in certain cases and award compensation. Competition Act 2002 has been passed to replace MRTP Act. Competition Act aims at regulating “combinations” (including acquisitions and mergers). However, only certain sections dealing with establishment of competition commission have come into force.

3.09 SALE OF GOODS:

The sale of goods is regulated by the Indian Sale of Goods Act III of 1930. The Sections now enacted by the Indian Sale of Goods Act originally formed part of the Indian Contract Act Chapter VII. (See topic 3.03 Contracts.) Contract of sale may be oral or in writing.

The Act makes a distinction between conditions and warranties, a condition being a stipulation essential to the main purpose of the contract, the breach of which gives the right to repudiate the contract, whereas a warranty is a stipulation collateral to the main purpose of the contract, the breach of which gives rise to a claim for damages, but not to the right to reject the goods or repudiate the contract. The Act lays down specific rules as to when the property in the goods passes from the seller to the buyer. It also deals with the right of an unpaid seller against the goods and gives him a lien to retain possession of the goods until payment, if the goods are in his possession, and if the goods are not in his possession there is also a right in an unpaid seller to stop the goods in transit. In cases of breach the party in default may be sued for the price of the goods or for damages and in case of failure to deliver specific or ascertained goods the court may decree specific performance of the contract if the contract is such as should be specifically enforced.

Warranties.

In a contract for sale of goods, there is no implied warranty or condition as to quality or fitness for any particular purpose (§16 of Sale of Goods Act) unless: (1) Buyer has, relying on seller's skill or judgment, made known to him particular purpose for which goods are required and seller ordinarily deals in such goods; or (2) sale is by description from seller who deals in goods of that description; or (3) such implied warranty is annexed by usage of trade. Any express warranty or condition does not negate warranty or condition implied by Sale of Goods Act, unless inconsistent therewith.

See also category 2 Business Organizations, topics 2.01 Agency and 2.04 Partnerships.

Applicable Law.

See topic 3.03 Contracts.

Sales Tax.

See category 21 Taxation, topic Taxes.

3.10 SALES:

See topic 3.09 Sale of Goods.

3.11 SECURITIES:

India has extensive set of legislations, rules, regulations etc. governing transactions relating to securities. Most important of them is Securities Exchange Board of India Act, 1992. This Act provides for creation of Securities Exchange Board of India (SEBI) which is prime regulatory authority in relation to transactions involving securities. As extensive analysis of various provisions of aforementioned Act and related Acts and all Rules, Regulations and Guidelines framed under them would be extremely lengthy, following are most significant aspects of Securities Laws of India: (1) SEBI act, 1992; (2) Securities Contract Regulations Act, 1956; (3) SEBI (Substantial Acquisition of Shares and Takeovers) Regulations, 1997; (4) SEBI (Insider Trading) Regulations, 1992. Recent amendments to Companies Act, 1956 has entrusted SEBI with powers relating to public issues and transfers including power to prosecute defaulting companies and their directors.

Depositories Act, 1996.

Act has been enacted for purpose of encouraging and establishing paperless trading in shares and securities, which is commonly known as dematerialisation of security. Act provides for and regulates manner in which securities are to be dematerialised, trading in such securities under dematerialised mechanism without actual and physical transfer of securities and other matters connected therewith.

Shares of listed companies are to be compulsorily traded in demat form. Dematerialization of shares is optional and investor can still hold shares in physical form. However, he/she must demat shares if he/she wishes to sell same through Stock Exchanges. Similarly, if investor purchases shares, he/she will get delivery of shares in demat form only.

3.12 BUY BACK OF SHARES:

Company can buy back its shares in any of following manner: (1) From existing shareholders on proportionate basis through tender offer and (2) from open market through: (1) book building process and (2) stock exchange.

1. From odd lot holders.

Company may buy back its shares without shareholders' resolution, to extent of 10% of its paid up equity capital and reserves. However, if company intends to buy back its shares to extent of 25% of its paid up capital and reserves, then same has to be approved by Shareholders Resolution as specified in §77A of Companies Act, 1956.

1. Listed companies are required to intimate stock exchange of general meetings and resolutions passed thereof. Hence, information on companies proposing to buy back shares may be obtained from stock exchanges.

2. When buy back offer document or public announcement is filed with SEBI, SEBI issues press release and offer document is put on SEBI website under primary market page under head ``buy back''.

In case shares of company are tradable compulsorily in demat segment, acceptances from any investor must be on proportionate basis irrespective of number of shares tendered in buy back, and irrespective of whether shares are in physical or demat form.

If shares are not in compulsory demat segment, first entire shares tendered being less than minimum market lot must be accepted in full. Thereafter, acceptances will be on proportionate basis in manner to ensure that acceptances are in market lot. In such case, draw of lots must be done, as in case of public issues.

SEBI Act, 1992.

Primary objective of this Act was to create regulatory authority with wide ranging powers in order to govern, monitor transactions relating to securities in India with underlying object being protection of rights of investors against fraudulent dealings in securities. Act confers following significant powers and functions on SEBI: (a) To protect interest of investors in securities and to promote development of, and to regulate securities market by such measures as it thinks fit; (b) regulating business in Stock Exchanges and other securities market; (c) to act as registering, monitoring and regulating authority in relation to various aspects that have bearing on securities markets; (d) power to issue such directions to such persons as may be required for carrying out above mentioned functions; (e) SEBI also has Power of Civil Court for purposes of calling for information from, undertaking inspection, conducting inquiries and audits of stock exchanges, mutual funds intermediaries and self regulatory organizations and banks in securities market; (f) to frame rules, regulations and guidelines from time to time as may be required for effectively carrying out above mentioned functions. Board can, pending investigation or inquiry or on completion, (a) Suspend trading of any security in recognized stock exchange; (b) restraining persons from accessing securities market and prohibit any person associated with securities market to buy, sell or deal in securities; (c) suspend any office bearer of any stock exchange or self-regulatory organization from holding such position; (d) impound and retain proceeds or securities in respect of any transaction which is under investigation; (e) attach, after passing of order on application made for approval by J.M.F.C. having jurisdiction, for period not exceeding one month, one or more bank account or accounts of any intermediary or any person associated with securities market in any manner involved in violation of any of provisions of this Act, or rules or regulations made there under; (f) direct any intermediary or any person associated with securities market in any manner not to dispose of or alienate asset forming part of any transaction which is under investigation. Board is to regulate or prohibit issue of prospectus, offer document or advertisement soliciting money for issue of securities. New chapter has been inserted which deals with prohibition of manipulative and deceptive devices, insider trading and substantial acquisition of securities or control.

SEBI Act also prescribes penalties for any failure to comply with any of provisions mentioned therein and also for various offences specified therein.

Securities Contract Regulations Act, 1956 ("SCRA") was enacted with objective of regulating various aspects of dealings in securities in stock exchanges. It sets out extensive procedure for grant of recognition to stock exchanges, lays down various requirements to be complied with by stock exchanges etc. In order to ensure compliance with various procedural requirements laid out therein, Central Government has been conferred with powers to monitor operations of stock exchanges, including inter alia, powers to make rules governing stock exchanges, power to suspend business of recognised stock exchanges, etc. Apart from this, SCRA has also conferred certain powers on SEBI, like power to make and amend bye-laws of recognised stock exchanges.

SCRA also lays down extensive powers on Central Government to regulate, restrict or prohibit certain kinds of contracts relating to securities. These powers are very wide and Central Government has absolute discretion to permit or prohibit any kind of contract relating to securities, depending on interests of economy.

SCRA also provides for various procedures to be complied with in relation to listing of companies in recognised stock exchanges. Again, Central Government has been given power to compel public companies to list their securities in any or all of recognised stock exchanges in India. This Act has been amended to recognise derivatives, i.e. securities derived from debt instrument, share, loan etc., and dealing and trading in such derivative.

Securities Contracts (Regulation) (Manner of Increasing and Maintaining Public Shareholding in Recognised Stock Exchanges) Regulations 2006, makes it mandatory for recognised stock exchange to ensure that at least 51% of its equity share capital is held by public. It further provides various shareholding and transferability restrictions as also obligations upon recognised stock exchange.

Securities Laws Amendment Act, 2004.

Amendment Act makes significant changes in Security Contract (Regulation) Act, and some changes in Depositories Act. Amendments in Depositories Act in respect of penalties, punishments and appeals. Amendment Act became effective on 12-10-2004. Highlights of amendments include amendments to Securities Contract (Regulations) Act, 1956 for structural transformation of Stock Exchange from mutual organisational form to demutualised, corporate form. §4A makes it compulsory for demutualisation and corporatisation of stock exchange on and from appointed date, §4B provides for procedure for corporatisation and demutualisation. §5(2) provides for derecognition of stock exchange not corporatised or demutualised on appointed date.

SEBI (Substantial Acquisition of Shares and Takeovers) Regulations, 1997. (Takeover Code).

Takeover Code was framed by virtue of powers granted to SEBI under §11 of SEBI Act. Primary objective of Takeover Code is to protect interest of small investors in event of takeover situation. Takeover Code prescribes various requirements to be met by any person or any persons acting in concert in event of such persons acquiring more than 5% of equity of company. When persons shareholding in company exceeds 5% such person has to give intimation to SEBI and Stock Exchange of such fact. If person acquires more than 15% of equity in company, under Takeover Code such person is required to make public announcement of such acquisition. Person holding 15% or more but less than 55% of shares or voting rights in company shall acquire additional shares or voting rights entitling him to exercise more than 5% of voting rights of that company. If acquirer holds shares or voting rights of 55% or more but less than 75%, he will not acquire additional shares without public announcement. Acquirer who has made public offer shall not acquire such shares during period of six months from date of closure of public offer at price higher than offer price, unless acquisition is made through stock exchange (creeping acquisition).

However, Takeover Code also exempts certain categories of acquirers from observing requirements laid out therein. Few examples falling within exempted category are: (i) issue of GDR's and ADR's; (ii) preferential allotment of shares provided that it does result in change of control of company; (iii) sale of shares by banks to enforce pledges.

SEBI (Issue of Capital and Disclosure Requirements) Regulations, 2009.

Any company making public issue of its equity shares (Initial Public Offering or Qualified Initial Public Offering) or limited company making rights issue is required to file draft offer document with SEBI in accordance with these Regulations.

SEBI (Insider Trading) Regulations, 1992.

Insider trading is as such prohibited under SEBI Act. However, to clearly lay down provisions relating to insider trading, SEBI has framed Insider Trading Regulations, 1992. Under said regulations, use of “unpublished price sensitive information” by “an insider” amounts to insider trading which is offence punishable under SEBI Act. “Unpublished price sensitive information” as defined under regulations would mean and include all information which has not been published or otherwise made accessible to public investors, and which would have significant bearing on price of scrips in secondary market, to which only few people are privy. Insider as defined under Regulations is any person who by virtue of his position vis-á-vis company, stock exchange, or any other organisation or in any other manner as provided by Regulations, has access to information, which would not be generally available but for special position that he holds and he is prohibited from dealing with such securities. Any person, guilty of insider trading may be punished as laid down under SEBI Act.

SEBI (Employees Stock Options Scheme and Employee Stock Purchase Scheme) Guidelines, 1999.

Companies are allowed to offer their shares to their employees under Employees Stock Options Scheme (ESOS) by following above Guidelines. Company is at liberty to determine pricing of shares under ESOS. Above guidelines provided for first time, for issue of shares of company as therein defined to employee of company, its subsidiary or holding as set out in guidelines, pursuant to option granted to employee. Option is right but not obligation granted by company to apply for shares of company at predetermined price. Option so granted to employee is not transferable i.e. it cannot be pledged, hypothecated, mortgaged or otherwise alienated in any manner. Option is to be exercised in manner provided by guidelines. Shareholders of company have to approve ESOS by passing Special Resolution and ESOS cannot be altered by promoters of company as to be detrimental to employees. Directors' Report of the Company shall include certain particulars regarding ESOS as prescribed in Guidelines.

SEBI (Central Listing Authority) Regulations, 2003.

Central listing authority of India or CLA has been setup to address issue of multiple listing of security. It also aims to bring about uniformity in due diligence process by scrutinizing all listing applications on any stock exchange in India. Functions of CLA are enumerated in SEBI Central Listing Regulations which inter alia include: (1) Processing application made by any body corporate, mutual fund or collective investment scheme for letter of recommendation to list at stock exchange; (2) making recommendations as to listing conditions; (3) making suggestions with respect to investor protection development and regulation of securities market and disclosures to be made in offer documents and (4) other functions as may be specified by SEBI from time to time.

SEBI (Ombudsman) Regulations, 2003.

Office of Ombudsman has been established to redress grievances of investors in securities.

SEBI (Delisting of Securities) Guidelines, 2003.

Listed company can be delisted under these provisions which govern voluntary and compulsory delisting of shares of Indian companies from stock exchanges.

SEBI Board has approved on 26.6.2006 guidelines for Real Estate Mutual Funds (REMFs). Such funds will be allowed to invest directly or indirectly in real estate properties within India, mortgage (housing lease) backed securities, equity shares/bonds/debentures of listed or unlisted companies, which deal in properties and also undertake property development in India and in other securities.

Corporate Governance.

In order to improve standards of corporate governance, SEBI had constituted committee on corporate governance under Chairmanship of Shri. N.R. Narayanmurthi, (of Infosys). Based on recommendations of committee, SEBI has, through Clause 49 of Listing Agreement, advised all stock exchanges to incorporate conditions in respect of corporate governance. Code prescribes details about compositions of Board of Directors of Audit Committee, disclosure about Directors remuneration, board meetings, restriction on membership of committee, committees of Directors, Corporate Governance Report, etc.

Whistle Blower Policy.

This concept is being introduced in corporate governance borrowed from Western thinking. Presently it is not mandatory. Concept is that company may establish mechanism for employees to report to management concerns about unethical behaviour, actual or suspected fraud or violation of company's code of conduct or ethics policy.

4 CITIZENSHIP

4.01 ALIENS:

See category 15 Immigration, topic 15.01 Aliens.

4.02 IMMIGRATION:

See category 15 Immigration, topic 15.02 Immigration.

5 CIVIL ACTIONS AND PROCEDURE

—Scope —

NOTE:

New Amendments. Code of Civil Procedure has been amended by amendments of 1999 and 2002. Amendments have made it mandatory for Court to dispose of civil cases within one year. Amendments seek to compress time frame for disposal of all civil cases within one year by setting time limit for every stage of litigation. It also restricts party to litigation from seeking more than three adjournments. There would be no second appeal in money suits where value does not exceed Rs.25,000. New amendments have considerably reduce litigation time, which previously used to extend beyond ten years in many cases. General power of courts to extend time prescribed in Civil Procedure Code is now restricted to 30 days. Besides, on filing of revision application against orders of subordinate court, its records shall not be called unless High Court specifically so directs.

5.01 ACTIONS:

See also category 6 Courts and Legislature, topic 6.01 Admiralty Jurisdiction.

Civil Actions are governed by Code of Civil Procedure V of 1908 as am'd. Code applies to Supreme Court and High Courts of every State within India, District Courts subordinate to High Courts, and Inferior Courts within Districts; also partly to Revenue Courts, Provincial Small Cause Courts and Presidency Small Cause Courts in Bombay, Madras and Calcutta. Different courts have framed their own rules and regulations in addition to or modification of provisions of Code of Civil Procedure, for regulating procedure in such courts regarding civil action. Constitution of India also confers upon Supreme Court, as well as High Courts, powers to entertain petitions by way of writ against Government and its agencies in regard to constitutional matters. These writs may be in nature of habeas corpus, mandamus, prohibition, quo warranto and certiorari. High Court may also entertain writs in certain matters other than constitutional matters. However, some courts e.g. consumer courts are not strictly bound by provisions laid down in Code of Civil Procedure. Recording of evidence by way of video conferencing is allowed so long as party and/or his pleader is present when evidence is so recorded.

Jurisdiction and Res Judicata.

Courts subject to certain provisions have jurisdiction to try all suits of civil nature including those regarding rights to property, office, including religious office, caste property, temple property, rights of worship, burial, religious processions; except suits of which cognizance is either expressly or impliedly barred viz revenue matters, matters within ambit of Criminal Procedure Code 1898, and landlord and tenant suits, or some other matters such as industrial relations etc. for which special courts are provided by special statutes. Criminal defamation comes under Indian Penal Code. Courts cannot proceed with trial of any suit in which matter in issue is directly and substantially same as in previously instituted suit between same parties which is pending in any other court; but pendency of suit in foreign court does not preclude Indian Courts from trying suit founded on same cause of action. (§§9, 10). Courts cannot try any suit in which matter in issue is directly and substantially same as in former suit between same parties which has been heard and finally decided. (§11).

Foreign judgments are conclusive regarding any matter directly adjudicated upon between same parties except in following cases: (1) Where judgment has not been pronounced by Court of competent jurisdiction; (2) where it has not been given on merits of case. Under §13(2) of Code of Civil Procedure of 1908 (C.P.C. 1908), only foreign judgment/decree which is passed on merits is enforceable in India. ([2001] 5 Supreme Court Cases 265 in International Woollen Mills vs. Standard Wool [U.K.] Limited). Honorable Bombay High Court in recent judgment, 2006 (5) Bom. C.R. 555 (O.S.), held that law is well settled and it is not that every decree of foreign court is conclusive as presumed under §14 of C.P.C. 1908. Condition of §44A of C.P.C. 1908 have to be complied with before any foreign judgment can be executed; (3) where it appears on face of proceedings to be founded on incorrect view of International Law or refusal to recognise law of India where applicable in any such case; (4) where proceedings were contrary to natural justice; (5) where judgment was obtained by fraud; (6) where it sustains claim founded on breach of any law in force in India. (§13).

Enforcement.

Foreign judgments may be enforced by proceedings in execution in certain specified cases only (where reciprocity exists between India and foreign country; see subhead Reciprocity, infra); or by suit in India upon judgment. Limitation period for such suit is three years from date of judgment. (Limitation Act 1963, Sch. 1, Art. 101). Pendency of appeal in foreign country will not bar suit in India on foreign judgment. But where foreign court applying lex fori holds suit is not barred by its own law of limitation, it cannot be said to have refused to recognise law of India simply because suit was barred here.

Suits on Foreign Awards.

Foreign awards recognised pursuant to Convention on Recognition & Enforcement of Foreign Awards done at New York, 1958 or Protocol on Arbitration clauses signed at Geneva in 1923 and convention on the Execution of Foreign Arbitral Awards may be enforced by proceedings under Arbitration and Conciliation Act, 1996. These enforcement proceedings are summary in nature. Foreign awards may also be enforced by instituting action on awards in India. (See category 8 Dispute Resolution, topic 8.01 Arbitration and Award, subhead Arbitration, catchline Foreign Awards.)

Presumption.

Indian Courts presume upon production of any document purporting to be certified copy of foreign judgment that such judgment was pronounced by court of competent jurisdiction unless contrary appears on record. Presumption can be disproved by facts. (§14).

Place of Suing.

Every suit must be instituted in court of lowest grade competent to try it by pecuniary value of suit. (§15). Subject to pecuniary or other legal limitation, suits regarding immovable properties must be instituted where such property is situate. (§16). Suits for compensation for torts or actionable wrongs done to person or movable property may be instituted, at option of plaintiff, either in court within whose local limits wrong occurred or court within whose jurisdiction defendant resides, or carries on business, or works personally for gain. (§19). Subject to above, other suits must be instituted in court within whose jurisdiction either defendant resides or carries on business or cause of action arises. (§20). Corporation is deemed to carry on business at its sole or principal office in India. Objection to jurisdiction must be lodged at earliest possible opportunity in court of first instance and will not be entertained later at Appellate or Revisional Stage. (§21).

Institution of Suits.

Every suit must be instituted by presentation of plaint or other manner prescribed. (§26[1]). Once suit is duly instituted, summons must be issued to defendant to appear and answer claim. Summons may be issued and served in manner prescribed on such day not beyond 30 days from date of institution of suit. (§27 and Order 5). In every plaint, facts shall be proved by affidavit. (§26[2]).

Service of Foreign Summonses.

Summons and other process issued by (1) Any civil or revenue court in India to which Code does not extend; (2) any civil or revenue court established or continued by Central Government authority outside India; or (3) any civil or revenue court outside India to which Code applies by Central Government notification, may be sent to courts in territories to which Code extends and may be served as if they were summons issued by such courts. (§29).

Courts have power to order discovery and inspection of documents, and issue summons to persons to attend to give evidence or order any facts to be proved on affidavit. (§30). Court has power to compel attendance. (§32).

Issues.

At first hearing court ascertains material propositions of fact or of law in respect of which parties are at variance, and thereupon proceeds to frame and record issues on which right decision of case appears to depend. (Order 14). Court may amend issues anytime before passing decree or strike out issues wrongly framed.

Disposal of Suit at First Hearing.

Court may at once pronounce judgment where it appears that parties are not at issue on any question of law or of fact. (Order 15).

Summoning and Attendance of Witnesses.

On or before date fixed parties present in court list of witnesses whom they propose to call and obtain summonses to such persons for their attendance in court. Any parties without applying for summons may bring any witness to give evidence or to produce documents. Court has power to issue proclamation, warrant with or without bail for arrest, order for attachment of property where court has reason to believe that such evidence or production is material and witness has without any lawful excuse, failed to comply with summons. No witness can be ordered to attend in person to give evidence unless he resides within certain limits. (Order 16).

Hearing of Suit and Examination of Witnesses.

Parties on day fixed shall, in their respective order, state their case and produce evidence in support of issues they are bound to prove. Examination in chief of witness is on affidavit. Court prepares panel of commissioners for recording evidence who are advocates by profession. Evidence (cross examination and reexamination) may either be taken by court or by Commissioner appointed by it. Court may recall any witness who has been examined and put such questions to him as court thinks fit. (Order 18).

Judgment and Decree.

After hearing case, court must pronounce judgment and decree. (§33). Where decree is for payment of money court may order interest on principal sum payable not exceeding 6% per annum. Where liability in relation to sum adjudged arises out of commercial transaction (i.e. transaction connected with industry, trade or business of party incurring liability) court may award interest at rate exceeding 6% but not exceeding contractual rate of interest, if any, or rate at which moneys are lent or advanced by nationalised banks in relation to commercial transactions. (§34).

Costs.

See topic 5.02 Costs.

Limitation of Actions.

Limitation Act XXXVI of 1963 prescribes period of limitation for various actions and applications. Period of limitation in majority of cases for filing civil suit is three years from date when cause of action arises. Government however can (except in suit before Supreme Court in exercise of its original jurisdiction) file suit within 30 years from time when cause of action arose.

Execution.

Decree may be executed either by court which passed it, or by court to which it is sent for execution. (§38). Court which passed decree may send it to another court for execution if person against whom decree is passed: (1) Actually and voluntarily resides or carries on business or works within local limits of jurisdiction of such other court; (2) has property within jurisdiction of such other court; (3) has immovable property within such jurisdiction and order is regarding sale or delivery of such property; or (4) for any other reason recorded by court in writing. (§39). Other court must be in India, and it must certify fact of execution of such decree. (§41). All questions arising out of execution are determined by court executing decree. (§47).

Reciprocity.

Enforcing of Decree or Judgment from Foreign Court.

In India, Code of Civil Procedure, 1908 governs execution of decrees, be it from Indian or Foreign Court. At times, Decree-holder may not be able to seek desired relief in event of there being any conditions laid down in laws of country for execution and/or enforcement of. any judgement or decree passed by foreign court.

Foreign Court is defined as court situated outside India and not established or continued by authority of Central Government and Foreign Judgment means judgment of foreign court. §13 and 14 of C.P.C. legislate rule of res judicata in case of foreign judgments. These provisions embody principle of private international law that judgment delivered by foreign court of competent jurisdiction can be enforced by Indian court and will operate as res judicata between parties thereto except in cases mentioned in §13.

Civil Procedure Code, 1908 provides two modes of enforcing foreign judgement/decree in India. Where reciprocity exists between India and foreign country, judgments of such foreign country may be enforced by proceedings in execution in India or by filing suit in India upon such foreign judgment.

In other words, if foreign court whose judgment/decree is sought to be enforced in India, is of any reciprocating country, then by filing Execution petition under §44 of C.P.C. However, if foreign court whose decree/judgment is sought to be enforced in India, is not of any reciprocating country(s), then remedy available to decree holder is to file fresh suit based upon such decree.

§44A reads as follows:

44A. Execution of decrees passed by Courts in reciprocating territory—(1) Where a certified copy of decree of any of the superior Courts of any reciprocating territory has been filed in a District Court, the decree may be executed in India as if it had been passed by the District Court.

(2) Together with the certified copy of the decree shall be filed a certificate from such superior Court stating the extent, if any, to which the decree has been satisfied or adjusted and such certificate shall, for the purposes of proceedings under this section, be conclusive proof of the extent of such satisfaction or adjustment.

(3) The provisions of section 47 shall as from the filing of the certified copy of the decree apply to the proceedings of a District Court executing a decree under this section, and the District Court shall refuse execution of any such decree, if it is shown to the satisfaction of the Court that the decree falls within any of the exceptions specified in clauses (a) to (f) of section 13.

Explanation 1 - ``Reciprocating territory'' means any country or territory outside India which the Central Government may, by notification in the Official Gazette, declare to be a reciprocating territory for the purposes of this section; and ``superior Courts'', with reference to any such territory, means such Courts as may be specified in the said notification.

Explanation 2 - ``Decree'' with reference to a superior Court means any decree or judgment of such Court under which a sum of money is payable, not being a sum payable in respect of taxes or other charges of a like nature or in respect to a fine or other penalty, but shall in no case include an arbitration award, even if such an award is enforceable as a decree or judgment.

Following countries have been declared as reciprocating territories by Indian Government: Malaysia and High Court and Courts of Appeal as Superior Court; Colony of Aden and Supreme Court of Aden as Superior Court; New Zealand and Cook Islands, Territory of Western Samoa and Supreme Court of New Zealand as Superior Court; Sikkim and High Court of Sikkim or any other court whose jurisdiction is not limited to pecuniary jurisdiction; Burma and all civil and revenue courts as Superior Courts; United Kingdom of Great Britain and Northern Ireland and House of Lords, Court of Appeals, High Court of England, Court of Sessions in Scotland, High court in Northern Ireland, Court of Chancery of County Panlatine or Lancaster and Court of Chancery of County Palantine or Durham as Superior Courts; Colony of Fiji and Supreme Court of Fiji as Superior Court; Hong Kong and Republic of Singapore; Trinidad and Tobago; Papua New Guinea and Supreme Court as Superior Court; Bangladesh and Supreme Court and Courts of District and subordinate judges as Superior Court; and Canada and Supreme Court of Ontario.

By whatever mode decree is sought to be enforced, be it under §44A C.P.C. or by filing of suit, it has to clear inquest as provided in §13 of C.P.C. which provides exceptions as to when foreign judgment is not conclusive.

Foreign judgments are conclusive in Indian Courts regarding any matter directly adjudicated upon between same parties. Judgment of foreign court is rendered inconclusive and resultantly unenforceable/unexecutable in India, in following cases: where Foreign Judgment has not been pronounced by Court of competent jurisdiction; where Foreign Judgment has not been given on merit of case; where it appears on face of proceedings that Foreign Judgment has been founded on incorrect view of International Law and refused to recognize applicable law of India; where proceedings in foreign Court on which Foreign Judgment is based were contrary to natural justice; where Foreign Judgment was obtained by fraud; and where Foreign Judgment sustains claim founded on breach of any law in force in India.

Limitation Period for Execution.

Twelve years from date of decree sought to be executed or date of default in making payment or delivery under decree. Court may waive limitation in cases of fraud or force. Limitation Act applies. (§48).

Transferees and Legal Representatives.

Transferee of decree subject to equities which judgment debtor might have enforced against original decree holder. Legal representatives of deceased judgment debtor are liable only to extent of properties held by representative. (§§49, 50).

Means of Execution.

Court has large powers to enforce execution of decree by attachment and sale of property, arrest and detention in prison (power of arrest and detention is very rarely exercised e.g. fraudulent disposal of assets to evade execution), appointment of receiver, etc. (§51). Where any property has been attached, any private alienation of it is void (§64) as against all claims enforceable under attachment. Transfer after attachment pursuant to contract entered before attachment is not void. There are large number of safeguards for execution of decrees, especially against immovable properties, including prevention of benami purchases at court sales.

Court has power to distribute assets among all decree-holders. (§73).

Suits Against Foreign Rulers, Ambassadors and Envoys.

No ruler of foreign state may be sued in any court in India without written consent of Central Government, and subject to several other conditions. No ruler can be arrested under code, or any decree be executed against property of such ruler. It applies to ambassadors, envoys, High Commissioners, and members of staff or retinue of rulers. (§86). Foreign ruler may sue and be sued in name of his State. (§86).

Special provisions exist for procedure, including statutory notice, in bringing suits against (1) government; (2) government officers. (§§79, 80).

Charities.

Special provisions are made regarding suits concerning public charitable trusts. (§92).

Commissions.

Court may issue commission to: (i) examine any person, (ii) make local investigation, (iii) examine or adjust accounts, (iv) make partition, (v) hold scientific, technical or expert investigation, (vi) conduct sale of property which is subject to speedy and natural decay which is in custody of court pending determination of suit, (vii) to perform any ministerial act. (§75).

Appeals.

Provision is made regarding appeal from original decree to court exercising appellate jurisdiction and for appeals from appellate decrees. (§§100-103). Appeal lies to Supreme Court from any judgment, decree or final order passed by High Court in exercise of its appellate or original jurisdiction which is certified to be fit for appeal to Supreme Court (§109); High Court has also powers of review, reference and revision (§§113-115). Supreme Court may in its discretion, grant special leave to appeal from any judgment, decree, determination, sentence, or order in any cause or matter passed or made by any court or tribunal in territory of India.

Reference.

Any court may state case and refer same for opinion of High Court, and High Court may make such order as it thinks fit. (§113).

Review.

Any person considering himself aggrieved by: (i) decree or order from which appeal is allowed by code, but where no appeal has been preferred, (ii) by decree or order from which no appeal is allowed by code, (iii) by decision on reference from court of small causes, may apply for review of judgment to court which passed decree or order. (§114).

Revision.

High Court may call for record of any case which has been decided by any subordinate court and in which no appeal lies thereto, and if such subordinate appears to have (i) exercised jurisdiction not vested in it by law, (ii) failed to exercise jurisdiction so vested, (iii) acted in exercise of its jurisdiction illegally or with material irregularity, and pass such order as High Court thinks fit.

Inherent Power.

Courts have inherent power to make such orders as may be necessary for ends of justice or to prevent abuse of process of court. (§151).

Exemptions.

Women who according to custom of country are not to be compelled to appear in public (e.g. women in pardah) are exempt from appearing in person before court. (§132). President, Vice-President of India, Speaker of Lower House of Parliament, Ministers of Central Cabinet, Judges of Supreme Court, Governors of States, administrators of Union Territories, Speakers of State Legislative Assemblies, Chairman of same, Ministers of States, Judges of High Court and certain other persons are privileged to claim exemption from personal appearance. Members of either House of Parliament and Legislative Assembly and council of Legislative Assemblies are exempt from civil arrest during continuance of meeting of House of Parliament or houses of States and 40 days before and after Assemblies are in sessions.

All persons may be joined in one suit as plaintiffs in whom any right to relief in respect of or arising out of same transaction or series of actions or transactions is alleged to exist whether jointly, severally or in alternative where if such persons brought separate suits, any common question of law or fact would arise (Order 1, Rule 1) and all persons may be joined as defendants against whom any right etc. exists where if separate suits were brought any common question of law or fact would arise (Order 1, Rule 3). Persons under disability (i.e., minors, lunatics) may be served by next friend or guardian ad litem. (§147).

Suit must be framed to include whole claim. (Order 2, Rule 1-3). Person entitled to more than one relief in respect of same cause of action may sue for all or any of such relief, but if he omits, except with leave of court, to sue for all such relief, he shall not afterwards sue for such omitted relief.

Summons must be served on defendant and defendant must appear at date and place fixed by summons. (Order 5). Where defendant resides out of India and has no agent in India, summons must be addressed to defendant at place of his residence and sent by post, fax, email (if postal communication exists). (Order 5). Service in foreign territory is otherwise through court of area where defendant resides or through political agent if Central Government has appointed such person in such territory under powers vested in it. Where defendant is member of armed forces service is to commanding office, copy retained by defendant. (Order 5). Civil Procedure Code follows generally principles of English Rules of Supreme Court. (See England Law Digest.)

Proof of Foreign Law.

India follows principles of English law of evidence. (See England Law Digest.) All questions of foreign law are treated as questions of fact and must be so proved. As regards foreign claims, principles of Private International Law as followed in England generally apply.

See also category 12 Estates and Trusts, topic 12.01 Death.

5.02 COSTS:

Under the Code of Civil Procedure applicable in India, the costs of all suits and applications are in the discretion of the court and the courts have full power to determine by whom or out of what property and to what extent such costs should be paid.

Security for costs may be ordered by court (at any stage of proceedings for reasons to be recorded) in favour of defendant. Order for security shall be made where plaintiff or plaintiffs are residing out of India and do not possess any immoveable property. If order for security is not complied with, court makes order dismissing suit but suit may be restored, after notice to defendant, if plaintiff shows sufficient cause for noncompliance.

5.03 INJUNCTION:

In India in certain criminal matters Criminal Procedure Code 1973 provides for relief by way of granting of injunctions. In civil matters, law relating to grant of injunction is contained in Civil Procedure Code (Code) and Specific Relief Act, which supplements Code and occupies middle ground between substantive law on one hand, and procedure on other. Granting of perpetual injunctions is regulated by c. VIII of Specific Relief Act of 1963, while temporary injunctions which are intended generally to preserve status quo pending final decision and which may be granted at any stage of suit are treated as in nature of procedure and are therefore regulated by Code and c. VIII of Specific Relief Act.

Plaintiff who has established that his legal rights have been violated is entitled to injunction to prevent recurrence of that violation and damages may be given in substitution of injunction only if injury to plaintiff's right is such that it can be compensated in money and granting of injunction is oppressive to defendant. Sometimes provision of damages incorporated in statute might be insufficient to redress wrong and so it does not take away right to injunction. Although grant of injunction is discretionary remedy exercised by courts, courts are generally guided by following principles: Prima facie case of infraction of legal rights, such infraction causes irreparable loss and injury to plaintiff, and injury is of such nature that it cannot be compensated by way of damages.

Issue of grant if injunction is to be decided by whether, on refusal of injunction, plaintiff would suffer irreparable loss or injury, keeping in view strength of parties' case. Balance of convenience or inconvenience is also another requirement but no fixed rules or notions are observed by courts. Since relief is flexible, its grant depends on facts and circumstances of each case.

In any cause or matter in which injunction has been or might have been granted plaintiff may before or after judgment apply for injunction to refrain defendant from repetition or contrivance of wrongful act or breach of contract complained of or from commission of any injury or breach of contract.

Injunction cannot be granted when conduct of applicant or his agent has been such as to disentitle him to assistance of courts. This is based upon two well-known principles: (1) He who seeks equity must do equity; (2) he who comes into equity must come with clean hands. He who comes to court asking for relief of equity must come with clean hands. (Code of Civil Procedure, 1908 has been sought to be amended by Code of Civil Procedure [Amendment] Act, 1999, which has been passed by both houses of Parliament. However, it awaits President's assent. There has been strong representation against assent being given to this Bill.)

5.04 JUDGMENTS:

See topic 5.01 Actions, subhead Foreign Judgments.

5.05 LIMITATION OF ACTIONS:

See topic 5.01 Actions.

5.06 PROCESS:

See topic 5.01 Actions.

6 COURTS AND LEGISLATURE

6.01 ADMIRALTY JURISDICTION:

Admiralty jurisdiction is essential aspect of judicial sovereignty which under Constitution and laws is exercised by High Court as Superior Court of record administering justice in relation to persons and things within its jurisdiction. Power to enforce claims against foreign ships is essential attribute of admiralty jurisdiction and it is assumed over such ships while they are within jurisdiction of High Court by arresting and detaining them.

Clause 32 of the Letters Patent confers jurisdiction on Bombay, Madras, Calcutta High Courts to exercise Admiralty Jurisdiction.

Law in India relating to arrest of ship and obtaining security for claims arising from transactions regarding ship, flowing either from contract or from tort are governed by Admiralty Court Act 1861(24 Vict C. 10) legislated by British Parliament (1861 Act was extension of Admiralty Court Act, 1840). Jurisdiction was extended by (English) Colonial Court of Admiralty Act, 1890. In exercise of powers conferred under said 1890 legislation, Colonial Courts of Admiralty (India) Act, 1891 was legislated.

Under provisions of Admiralty Courts Act 1861, High Courts in India are conferred with admiralty jurisdiction to entertain claims relating to: (a) Repairing, building, equipping vessel, if at commencement of action vessel or its sales proceeds are under arrest; (b) necessaries supplied; (c) physical damage to goods carried into Indian port by vessel; (d) damage caused by vessel; (e) ownership, possession, employment and earning of Indian vessel; (f) seaman's/crew wages earned on vessel; (g) mortgage claim if vessel or its sales proceeds under arrest.

Law has since been expanded considerably by few decisions of Supreme Court of India, post M.V. ELIZABETH Judgement of the Supreme Court of India, Admiralty Jurisdiction of High Courts has been expanded. In M.V. Elizabeth case, Supreme Court of India held that India is lagging behind many centuries in ratifying and adopting beneficial provisions of various conventions intended to facilitate international trade. Although these conventions have not been adopted by legislation, principles incorporated in conventions are themselves derived from common law of nations as embodying of felt necessities of international trade and are as such part of common law of India and applicable for enforcement of maritime claims against foreign ships.

By virtue of this, principles of Brussels Convention on Arrest of Sea Going Ships 1952 has been applied by Admiralty Courts in determining disputes as well as jurisdiction of Admiralty Courts. Supreme Court of India in the Sea Success case (2004) 9 SCC 512 held that unpaid P&I call money constituted maritime claim entitling P&I Club to arrest vessel to secure and recover its claim. Supreme Court of India also held that principals of Geneva Convention 1999 can be applied by Admiralty courts. Admiralty Jurisdiction is invocable against sister vessel applying principles of Brussels Convention on arrest of Sea Going Ships 1952. Though India is not signatory to this convention, principles of said convention are applicable to India. This has held in M.V. Elizabeth case and been reaffirmed by Bombay High Court in matter of ``M.V. Mariner IV" in Dec. 1997.

In matter of SNP Shipping, Supreme Court 1998(5) SCC 328, that in event of collision amongst vessels on high seas, in international waters, Indian Admiralty Courts had no jurisdiction to permit suit by owners of vessel for setting up of Limitation Fund; when no part of cause of action accrued in India and all claims had been filed in other countries.

Limitation Act, 1963 applies to all claims within Admiralty Jurisdiction of High Courts, and provides three year limitation period for such claims.

(See also category 22 Transportation, topic 22.04 Shipping.)

Division Bench of the Bombay High Court has held that navigability of ship is dominant feature in her arrest and if ship is imported for demolition, it ceases to be vessel and is not liable to be arrested. If vessel is breached for demolition, it ceases to be vessel. This issue is now pending for final determination by Supreme Court of India.

Division Bench of the Bombay High Court in case of M.V. UMANG has held that vessel is liable to be arrested by Bombay High Court as long as it is within territorial waters of India regardless of whether it is lying and being at port which falls within jurisdiction of Bombay High Court. Ahmedabad High Court and Madras High Court have taken contrary view. Issue is now pending before Hon'ble Supreme Court. As of date however, Bombay High Court continues to exercise jurisdiction of vessel is in Indian territorial waters.

Supreme Court of India in matter of Epoch Enterepots V/s. m.v. ``WON FU" (AIR 2003 SC 24) has dealt with attributes of maritime lien and has held that maritime lien can be said to exist or restricted to of following categories viz: (a) damage done by ship; (b) salvage; (c) seamen's and master's wages; (d) master's disbursements; (e) bottomry, and in event maritime lien exists in aforesaid five circumstances, right in rem is said to exist. Maritime lien survives change of ownership and follows vessel even in hands of bonafide purchaser for value without notice.

6.02 CODES:

See topics Law Reports, 6.02 Codes; 6.06 Statutes.

6.03 COURTS:

See category 1 Introduction, topic 1.02 Government and Legal System.

6.04 LAW REPORTS, CODES:

Decisions of Supreme Court are reported in All India Reports and Supreme Court Reports. Supreme Court Cases & Judgements Today. Supreme Court Reports are officially recognised reports. Its decisions are binding upon all High Courts and subsidiary courts of every State in India. Decisions of High Courts of each State are separately reported in Law Reporter for that State, e.g., Maharashtra Law Journal, Bombay Cases Reporter and Bombay Law Reporter for Bombay High Court decisions, Madras Law Journal for Madras High Court decisions etc., and in All Indian Reports. These decisions are binding on High Court and subsidiary courts of particular State, but have only persuasive value in High Courts of other States. Following is list of chief law reports: All India Reports (AIR); Supreme Court Reports (SCR); Bombay Law Reporter (BLR); Bombay Cases Reports (B.C.R.); Maharashtra Law Journal (Mah.L.J.); Madras Law Journal (MLJ); Calcutta Weekly Notes (Cal.WN); Company Cases (Co.Cas); Indian Law Reports

(ILR); Gujarat Law Reporter (GLR); Labour Law Journal (LLJ); Income Tax Reports (ITR); Sales Tax Cases (STC); Sales Tax Reports (STR); Excise Law Times (ELT); Criminal Law Journal (CrLJ). Since 1996, computerised law information database and search program covering Supreme Court case law, from 1950 onwards on all topics, has been made available for subscription, with updates every year. It is called SCC ONLINE.

Codes are reported officially in Government Official Gazettes (Government of India Gazette and Gazette of each State) and can also be found in Civil Court Manual; All India Reporter Civil Manual; Criminal Court Manual and AIR Criminal Manual.

See also topic 6.06 Statutes.

6.05 LEGISLATURE:

See category 1 Introduction, topic 1.02 Government and Legal System.

6.06 STATUTES:

Acts of Parliament relating to matters falling within Central Government list and concurrent list are enacted by Parliament (both Upper and Lower Houses) passing bill which receives President's sanction. Central Government Statutes are published in Official Gazette, bearing serial number, name and date of enactment. Each State within India also has law-making power for matters falling within State Governments' and concurrent lists. Legislation is passed by Legislative Assembly of each State. Enactments are officially published in State Official Gazette in similar manner.

Civil Court Manual and All India Reporter (AIR) Manual contain comprehensive collection of all Central Government legislative enactments on civil matters. Criminal Court Manual contains similar collection of criminal law enactments.

See also category 1 Introduction, topic 1.02 Government and Legal System.

7 DEBTOR AND CREDITOR

7.01 ASSIGNMENTS:

Transfers of rights, debts and choses in action or actionable claims are governed by Transfer of Property Act IV of 1882, §§130 et seq.

Procedure.

Transfer of actionable claim whether with or without consideration is effected only by execution of instrument in writing signed by transferor or his duly authorised agent and is complete and effectual upon the execution of such instrument. Thereupon all rights and remedies of transferor, by way of damages or otherwise, vest in transferee whether notice is given or not; provided that every dealing with the debt or other actionable claim by debtor or other person from or against whom transferor would but for such instrument of transfer as aforesaid have been entitled to recover or enforce such debt or other actionable claim is (save where debtor or such other person has received express notice of the transfer) valid as against such transfer.

Transferee of an actionable claim may upon execution of such instrument of transfer as aforesaid sue or institute proceedings for same in his own name without obtaining transferor's consent. Section does not apply to transfer of marine or fire policy of insurance.

Notice.

Every notice of transfer of an actionable claim shall be in writing signed by transferor or his agent duly authorised or in case transferor refuses to sign by transferee or his agent, and must state name and address of transferee.

Transferee's Liability.

Transferee of actionable claim takes subject to all liabilities and equities to which transferor was subject in respect thereof at date of transfer. Where transferor of a debt warrants solvency of debtor, the warranty, in absence of contract to contrary, applies only to his solvency at time of transfer and is limited, where transfer is made for consideration, to amount or value of such consideration. Where debt is transferred for purpose of securing existing or future debt, debt so transferred if received by transferor or recovered by transferee is applicable first in payment of cost of such recovery, secondly in or towards satisfaction of amount for time being secured by transfer and residue if any belongs to transferor or other person entitled to receive same.

Above provisions do not apply to stocks, shares, debentures or negotiable instruments.

7.02 ATTACHMENT:

Code of Civil Procedure V of 1908, §§60 to 63, Order 21, Rules 41-57 provide for attachment of property. Movable and immovable property of judgment-debtor is liable to attachment and sale in execution of decree as set out in §60.

Where decree is for payment of money, decree holder may apply to court for an order that: (a) Judgment debtor or (b) any officer of corporation, or (c) any other person be orally examined as to whether any or what debts are owing to judgment debtor and whether judgment debtor has any and what other property or means of satisfying decree; and court may make an order for attendance and examination of such judgment debtor, or officer or other person and for production of any books or documents.

Where decree for payment of money has remained unsatisfied for period of 30 days, Court may, on application of decree-holder and without prejudice to its power under sub-rule (1), by order requiring judgment-debtor or, where judgment-debtor is corporation, any officer thereof, to make affidavit stating particulars of assets of judgment-debtor.

In case of disobedience of any order made under sub-rule (2), Court making order, or any Court to which proceeding is transferred, may direct that person disobeying order be detained in civil prison for term not exceeding three months unless before expiry of such term Court directs his release. (Rule 41).

Where decree directs an enquiry as to rent or mesne profits or any other matter, property of judgment debtor may, before amount due from him has been ascertained, be attached as in case of an ordinary decree for payment of money. (Rule 42).

Where property to be attached is movable property other than agricultural produce in possession of judgment debtor, attachment shall be made by actual seizure and attaching officer shall keep property in his own custody or in custody of one of his subordinates and shall be responsible for due custody thereof, provided that when property seized is subject to speedy and natural decay or when expense of keeping it in custody is likely to exceed its value, attaching officer may sell it at once. (Rule 43). For attachment of agricultural produce specific procedure is provided.

In case of (a) Debt not secured by negotiable instrument or (b) share in capital of corporation or (c) other movable properties not in possession of judgment debtor except property deposited in or in custody of any court, attachment shall be made by written order prohibiting (1) In case of debt, creditor from recovering debt and debtor from making payment thereof until further order of court; (2) in case of shares, person in whose name share may be standing from transferring same or receiving any dividend thereon; (3) in case of other movable property except as aforesaid, person in possession of same from giving it over to judgment debtor. (Rule 46).

Copy of such order shall be affixed on some conspicuous part of courthouse and another copy be sent, in case of debt, to debtor; in case of share, to proper officer of corporation; in case of other movable property (except as aforesaid), to person in possession of same.

Debtor prohibited under (1) above may pay amount of debt into court and such payment shall discharge him as effectually as payment to parties entitled to receive same.

Where property to be attached consists of share or interest of judgment debtor in movable property belonging to him and another as co-owners, attachment shall be made by notice to judgment debtor prohibiting him from transferring share or interest or charging it in any way. (Rule 47).

Where property to be attached is salary or allowance of a servant of (1) Government or (2) railway company or (3) local authority, court, whether or not judgment debtor or disbursing officer is within local limits of court's jurisdiction, may order that amount shall, subject to provisions of §60 be withheld from such salary or allowance either in one payment or by monthly installments as court may direct; and upon notice of order to such officer as appropriate Government may by notification in Official Gazette appoint in this behalf.

Save as otherwise provided by this rule, property belonging to partnership shall not be attached or sold in execution of decree other than decree against firm, or against partners in firm as such. (Rule 49, sub-rule 1).

Court may, on an application of holder of decree against partner, make order charging interest of such partner in partnership property and profits with payment of amount due under decree and may, by same or subsequent order, appoint a receiver of share of such partner in profits (whether declared or accruing) and of any other money which may be coming to such partner in respect of partnership, and direct accounts and enquiries and make an order for sale of such interest or other orders as may have been directed or made if a charge had been made in favour of decree holder by such partner, or as circumstances of case may require. (Rule 49, sub-rule 2).

Remaining partners are at liberty to redeem interest charged, or in case of sale being directed, to purchase same. (Rule 49, sub-rule 3).

Every application for order under sub-rule 2 shall be served on judgment debtor and on his partners or such of them as are within India. (Rule 49, sub-rule 4).

Every application made by any partner of judgment debtor under sub-rule 3 shall be served on decree holder and on judgment debtor and on such of other partners as do not join in application and as are within India. (Rule 49, sub-rule 5).

Service under sub-rule 4, or 5, shall be deemed to be service on all partners and all orders made on such applications shall be similarly observed. (Rule 49, sub-rule 6).

Where a decree has been passed against a firm, execution may be granted (a) Against any property of partnership; (b) against any person who has appeared in his own name under Rule 6 or 7 of Order 30, or who has admitted on pleadings that he is, or who has been adjudged to be, a partner; (c) against any person who has been individually served as a partner with a summons and has failed to appear, provided that nothing in this sub-rule affects or limits provision of Sec. 247, Indian Contract Act. (Rule 50, sub-rule 1).

Where decree holder claims to be entitled to cause decree to be executed against any person other than such a person as is referred to in sub-rule 1 clauses (b) and (c) as being a partner in firm, he may apply to court which passed decree for leave and where liability is not disputed such court may grant such leave or where liability is disputed may order liability of such person to be tried and determined. (Rule 50, sub-rule 2).

Where liability of any person has been tried and determined under sub-rule 2, order made thereon has same force and is subject to same conditions as to appeal or otherwise as if it were a decree. (Rule 50, sub-rule 3).

Save as against any property of partnership, decree against a firm shall not release, render liable or otherwise affect any partnership therein unless he has been served with a summons to appear and answer. (Rule 50, sub-rule 4).

Where property is a negotiable instrument, not deposited in court, nor in custody of public officer, attachment shall be made by actual seizure and instrument shall be brought into court and held subject to further orders of court. (Rule 51).

Where property to be attached is in custody of any court or public officer, attachment shall be made by a notice to such court or officer requesting that such property and any interest or dividend becoming payable thereon may be held subject to further orders of court from which notice is issued. Provided that where such property is in custody of court, any question of title or priority arising between decree holder and any other person, not being judgment debtor, claiming to be interested in such property by virtue of any assignment, attachment or otherwise, shall be determined by such court. (Rule 52).

Where property to be attached is a decree, either for payment of money or for sale in enforcement of a mortgage or charge, attachment shall be made: (a) If decrees were passed by same court, then by order of such court; and (b) if decree sought to be attached was passed by another court, then by issue to such other court of notice by court which passed decree sought to be executed, requesting such other court to stay execution of its decree unless and until: (1) court which passed decree sought to be executed cancels notice; or (2) holder of decree sought to be executed or his judgment debtor applies to court receiving such notice to execute its own decree. (Rule 53, sub-rule 1).

Where court makes an order under clause a of sub-rule 1 or receives an application under subhead 2 of clause b of said sub-rule, it shall on application of creditor who has attached decree or his judgment debtor, proceed to execute attached decree and apply net proceeds in satisfaction of decree sought to be executed. (Rule 53, sub-rule 2).

Holder of a decree sought to be executed by attachment of another decree of nature specified in sub-rule 1 shall be deemed to be representative of holder of attached decree and to be entitled to execute such attached decree in any manner lawful for holder thereof. (Rule 53, sub-rule 3).

Where property to be attached in execution of decree is a decree other than a decree of nature referred to in sub-rule 1, attachment shall be made by notice by court which passed decree sought to be executed to holder of decree sought to be attached prohibiting him from transferring or charging same in any way; and where such decree has been passed by any other court also by sending to such other court a notice to abstain from executing decree sought to be attached until such notice is cancelled by court from which it was sent. (Rule 53, sub-rule 4).

Holder of decree attached under this rule shall give court executing decree such information and aid as may reasonably be required. (Rule 53, sub-rule 5).

On application of holder of decree sought to be executed by attachment of another decree, court making an order of attachment under this rule shall give notice of such order to judgment debtor bound by decree attached and no payment or adjustment of attached decree made by judgment debtor in contravention of such order after receipt of notice thereof, either through court or otherwise, shall be recognised by any court so long as attachment remains in force. (Rule 53, sub-rule 6).

Attachment of immovable property: (1) Where property is immovable, attachment shall be made by order prohibiting judgment-debtor from transferring or charging property in any way, and all persons from taking any benefit from such transfer or charge, such order shall take effect, where there is no consideration for such transfer or charge, from date of such order, and where there is consideration for such transfer or charge, from date when such order came to knowledge of person to whom or in whose favour property was transferred or charged.

Order shall also require judgment-debtor to attend Court on specified date to take notice of date to be fixed for settling terms of proclamation of sale.

Copies of order shall also be forwarded to Collector with request that appropriate entries showing attachment levied on property may be caused to be made in revenue records, city survey records or village panchayat records as may be required in particular case.

Where (a) Amount decreed with costs and all charges and expenses resulting from attachment of any property are paid into court; or (b) satisfaction of decree is otherwise made through court or certified to court; or (c) decree is set aside or reversed, attachment shall be deemed to be withdrawn and in case of immovable property, withdrawal shall, if judgment debtor so desires, be proclaimed at his expense and copy of proclamation shall be affixed in manner prescribed by last preceding rule. (Rule 55).

Where property attached is current coin or currency notes, court may at any time during continuance of attachment direct that such coin or notes or a part thereof sufficient to satisfy decree be paid over to party entitled under decree to receive same. (Rule 56).

Where any property has been attached in execution of a decree but, by reason of decree holder's default, court is unable to proceed further with application for execution, it shall either dismiss application or for any sufficient reason adjourn proceedings to a future date. Upon dismissal of such application, attachment shall cease. (Rule 57).

At any stage of suit, if court is satisfied, by affidavit or otherwise, that defendant with intent to obstruct or delay execution of any decree that may be passed against him, (i) is about to dispose of whole or any part of his property, or (ii) is about to remove whole or any part of his property from local limits of jurisdiction of court, it may direct defendant, within time to be fixed by it, either to furnish security, in such sum as may be specified in order, to produce and place at disposal of court, when required, said property or value of same, or such portion thereof as may be sufficient to satisfy decree or to appear and show cause why he should not furnish security. Attachment shall be made in manner provided for attachment of property in execution of decree as detailed above. (Order 38, Rule 5-11A).

7.03 EXECUTIONS:

See category 5 Civil Actions and Procedure, topic 5.01 Actions.

7.04 GARNISHMENT:

See category 5 Civil Actions and Procedure, topic 5.01 Actions. Civil Procedure Code 1908 Order 21, Rule 46, deals with garnishee orders. Rule provides special procedure for attachment of debt not secured by negotiable instrument share in capital of corporation and movable property not in possession of judgment debtor. Court may issue notice to garnishee liable to pay debt calling upon him either to pay in court debt due from him to judgment debtor or so much thereof to satisfy decree and costs of execution or to appear and show cause why he should not do so. Where garnishee disputes liability, court may order that any issue or question necessary for determination of liability shall be tried as if it were issue in suit.

Where garnishee admits debt, court would order payment of debt or so much of it as is admitted to be due into court. Court cannot make an order on garnishee before debt has become payable. Payment by garnishee under any such order or notice shall be valid discharge.

See topic 7.02 Attachment.

Garnishee Order Regarding Company in Liquidation.

Where judgment is recovered against a company which is in voluntary liquidation, invariable practice of courts is to stay execution of judgment unless there are very exceptional reasons for exercising its discretion otherwise.

Appropriation of Payments.

Indian Contract Act contains certain provisions regarding appropriation of payment. Where there are several debts due to one person, any payment made by debtor either with express intimation or under circumstances from which intimation may be implied, must be applied to discharge of debts in manner intimated or which can be implied from circumstances and only in absence of both can creditor have option to make application according to his discretion. If neither party makes any appropriation, payment shall be applied in discharge of debts in order of time, even though barred by limitation of suits. Where debts are of equal standing payment is to be applied proportionally. (§§49-61).

7.05 LIENS:

Indian Contract Act, 1872 contains certain provisions. Bankers, factors, wharfingers, attorneys-at-law and policy brokers are entitled to retain, as security for general balance of account, any goods bailed (see subhead Bailments and Pledges under category Business Regulation and Commerce, topic Contracts) to them. (§171). Bailee of goods who has rendered service involving exercise of labour or skill in respect of goods bailed, has, in absence of contract to contrary, right to retain such goods until he receives due remuneration for service rendered in respect of such goods. (§170). Finder of goods has lien over goods until owner gives compensation for trouble and expense voluntarily incurred by finder to preserve goods and to find owner (though finder has no right to sue for such compensation). (§168). Pawnee is entitled to retain goods pledged for payment of debt (or performance of promise) for interest on debt and all necessary expenses incurred by him in respect of possession or preservation of goods pledged and where owner has offered specific reward for return of goods lost finder may sue for such reward, and may retain goods until he receives it. (§173). In absence of contract to contrary, agent is entitled to retain goods, papers and other moveable and immoveable property of principal received by him until amount due to himself for commission, disbursements and services in respect of same has been paid or accounted for. (§221).

Sale of Goods Act, 1930, empowers unpaid seller of goods, who is in possession of them, to retain possession until payment or tender of price in three cases, viz., (a) where goods are sold without stipulation as to credit, (b) where goods are sold on credit, but term of credit has expired, and (c) where buyer becomes insolvent. (§47). Seller may exercise his right of lien notwithstanding that he is in possession of goods as agent or bailee for buyer.

Companies may, by virtue of their articles of association (or under Regulation 9 of Table A of Companies Act, 1956) have a first and paramount lien (a) on every share (not being a fully-paid share) for all moneys whether presently payable or not called or payable at fixed time in respect of that share, and (b) all shares (not being fully-paid shares) standing registered in name of single person for all money presently payable by him or his estate to company.

7.06 MORTGAGES AND CHARGES:

See category 20 Property, topic 20.01 Real Property, subhead Mortgages and Charges.

7.07 PLEDGES:

Indian Contract Act §172 et seq. (see category 3 Business Regulation and Commerce, topic 3.03 Contracts) defines pledge as bailment of goods as security for payment of a debt or performance of a promise. Pawnee may retain goods pledged not only for payment of debt or performance of promise but for interest on debt and all necessary expenses incurred by him in respect of possession or for preservation of goods pledged. Pawnee may not retain pledge for debt or promise other than that for which goods are pledged. Defaulting pawnor may redeem goods even after time stipulated for payment of debt or performance of promise has passed, before actual sale of goods, but he must in addition, pay any expenses which have arisen from his default. Act confers general rights on pawnee in event of pawnor's default.

8 DISPUTE RESOLUTION

8.01 ARBITRATION AND AWARD:

Arbitration.

Law of arbitration prior to passing of Arbitration and Conciliation Act, 1996 (“Act”) was Arbitration Act, 1940. For quite some time need was felt for modelling arbitration law on international standard and for introduction of arbitration law of international standards, and government felt need for introduction of mechanism of conciliation as effective alternative mode of dispute resolution mechanism. Accordingly government enacted 1996 Act.

Arbitration law in India is now based on UNCITRAL Model Law on International Commercial Arbitration, 1985, and UNCITRAL Conciliation Rules of 1980. New Act covers both domestic, as well as international commercial arbitration. Provisions of Act apply in case arbitration agreement is established. Arbitration agreement is established if there is document signed by both parties or on exchange of letters, telex, telegrams or any other ways of telecommunication or if it is exchange of statement of claim and defence in which existence of agreement is alleged by one and not denied by other party in writing.

Act gives arbitration precedence over judicial proceeding. All awards made under Act shall be construed to be domestic award for purposes of enforcement. Interim relief in nature of preservation, custody or sale of goods, securing amount in dispute, detentions, preservation or inspection of property, interim injunction, appointment of receiver or other interim measures or protection as may be appropriate can be obtained from appropriate court, either before, during or any time after award becomes decree for enforcement. §17 vests power with arbitral tribunal to provide for interim relief as arbitral tribunal may consider necessary in respect of subject matter of dispute. However, if agreement between parties excludes jurisdiction of arbitral tribunal to award interim measures, it will have no power to grant interim measures of protection in respect of party making such request.

Constitution of Arbitral Tribunal and procedure for appointment of member of tribunal are matters to be chosen by parties under arbitration agreement. Parties cannot appoint two arbitrators or in any other even numbers. Arbitrators will be either one or three. If parties fail to reach consensus on constituting of arbitral tribunal, they may apply to Chief Justice of appropriate Court or any person or institution designated by such Chief Justice may constitute arbitral tribunal. In appointing arbitral tribunal Chief Justice shall take into consideration various special conditions which may have been prescribed under arbitration agreement between parties who refer matter for arbitration. Under “Appointment of the Chief Justice of India Scheme 1996” modalities of submission of request to CJ and subsequent rejection thereof or appointment of arbitrator are laid down. Composition of arbitration tribunal can be challenged on certain grounds, e.g. that there are sufficient justifiable doubts as to independence or impartiality of arbitrator. Appointment of arbitrator by parties can also be challenged on grounds which may arise after appointment has been made. Arbitral tribunal has wide powers including power to adjudicate on jurisdiction, and to grant interim reliefs during pendency of arbitration proceedings.

Procedure to be adopted in arbitration proceeding can be chosen by parties and rules prescribed under Code of Civil Procedure 1908, and Indian Evidence Act, 1872 are not mandatory. Limitation Act, 1963 applies place of arbitration and language for arbitration is left to choice of parties. Manner of oral or written pleadings in arbitration proceedings can be agreed upon by parties and is subject to tribunal's discretion. Arbitral award can be passed ex parte in certain cases. Examination of witness, recording of evidence, expert evidence and issue of process during proceedings with assistance of appropriate court is also permitted.

Law Applicable in Arbitration Proceeding.

In case of domestic arbitration, arbitration is to be held in accordance with substantive law of India. In international commercial arbitration law applicable shall be one chosen by parties and failing this law which arbitral tribunal considers as appropriate. Arbitral award can be passed with consent of parties. Such arbitral award shall be on same status as arbitral award passed in matter adjudicated upon by arbitral tribunal. Manner in which arbitration award can be implemented or enforced is also prescribed by Act. Upon passing of award, or arbitral tribunal being unable to act in proceeding or upon agreement between parties, arbitral proceeding stands terminated.

Parties can seek interpretation, correction, amendment or addition to arbitral award within specified period of time and such interpretation amendment, addition or correction shall be granted by tribunal within specified period of time in order to enable parties to successfully give effect to arbitral award.

Arbitral award passed by arbitral tribunal can be challenged before court of appropriate jurisdiction upon application inter alia on ground that party was incapacitated, arbitral tribunal was in excess of jurisdiction, that procedure was abrogated, that subject matter of dispute was not capable of settlement under law in force and award is in conflict with public policy of India. Recent case of ONGC Ltd. vs. Saw Pipes Ltd. (2003) 5 SCC 705, widened scope of challenging award in appropriate court. Arbitral award is considered as decree passed by civil court under Code of Civil Procedure, 1908 and shall be final and binding on parties if not challenged on appeal. Provisions of execution of decree apply to enforcement of award. Interim applications before arbitral tribunal or appropriate Court for interim reliefs and award passed by arbitral tribunal can be appealed upon by either of parties before appropriate Court which has jurisdiction to hear such appeal.

Foreign Awards.

Certain foreign awards are recognised and enforceable if they are passed in any of countries which are signatories to New York Convention of 1961 or Geneva Convention of 1923 and if Central Government has notified in Official Gazette that any of these conventions applies to such countries. These enforcement proceedings are summary in nature. Other foreign awards may also be enforced by instituting action on awards in India (see subhead Foreign Judgments, topic Actions.

Foreign awards if valid are treated on par with decree passed by Indian civil court and same are enforceable by court having jurisdiction as if decree has been passed by such court.

Enforcement of foreign awards could be rejected by appropriate court on ground mentioned in §44A of Indian Code of Civil Procedure, 1908.

There are powers vested in High Courts of various states to frame rules regarding procedure before such court. Central Government may by notification prescribe rules with regard to arbitration and conciliation. §89 of Civil Procedure Code, 1908 provides that where there exist possibility of settlement between parties court can refer dispute to arbitration or conciliation.

Conciliation.

Arbitration and Conciliation Act, 1996 (Act) also provides for important alternate dispute resolution mechanism viz. Conciliation. Act enables parties in defined legal relationship whether constitutional or not to refer particular dispute for conciliation. Such conciliation could be with assistance of one or more conciliators. Conciliator(s) could be appointed by agreement between parties. It is stipulated that conciliator(s) shall assist parties to reach amicable settlement of their dispute and while doing so conciliator is to follow principles of objectivity, fairness and justice while giving consideration to rights and obligations of parties under their contract and is required to take into consideration commercial practices and circumstances surrounding disputes. As regards procedure to be followed in conciliation proceedings there are no strict rules prescribed. However maintenance of confidentiality of information disclosed during conciliation is mandatory. Settlement arrived upon in conciliation proceedings shall have same effect as arbitral award and accordingly it shall be treated as decree passed by Court.

9 DOCUMENTS AND RECORDS

9.01 AFFIDAVITS:

Purpose of affidavit is to set out facts on oath in writing and is sworn before person who has authority to administer such on oath. In certain court proceedings, including writs, facts are allowed to be put on affidavits instead of leading oral evidence, and hearing proceeds on basis of such affidavits.

9.02 NOTARIES PUBLIC:

Profession of notaries is regulated in India by Notaries Act LIII of 1952 which came into effect on 14/2/53. Power to appoint notaries is vested in Central Government which may appoint notaries for whole or any part of India; and in State Government which may appoint for whole or any part of State. (§3).

Persons Who May be Appointed.

Legal practitioners or other persons who possess such qualifications as may be prescribed. (§3).

Registration.

Central and State Government must maintain registers of notaries appointed under Act. Every register includes following particulars: (1) Notary's full name, date of birth, residential and professional address; (2) date on which his name is entered in register; (3) his qualifications; (4) any other prescribed particulars. (§4).

Requirements.

Every notary who intends to practise as such may be entitled, on payment of necessary fees, to have his name entered in register and to certificate authorising him to practise for period of five years from date of issue of certificate. This certificate is renewable for further period of five years at time at its expiry by application to appropriate Government and payment of necessary fees. (§5). Annual list of notaries is published by each State and Central Governments in official gazette. (§6).

Seal.

Every notary must use a seal of prescribed form and design. Every exercise of any undermentioned powers must be under his official seal and power. (§§7, 8).

Powers and Duties.

Notary has power to do following acts: (1) Verify, authenticate, certify, attest to execution of any instrument; (2) present any promissory note, hundi or bill of exchange for acceptance or payment or demand better security; (3) note or protest dishonour by nonacceptance or nonpayment of any promissory note, hundi or bill of exchange or protest for better security or prepare acts of honour under Negotiable Instrument Act 1881 (XXVI of 1881) or serve notice of such note or protest; (4) note and draw up ship's or boat's protest or protest relating to demurrage and other commercial matters; (5) administer oath to, or take affidavit from any person; (6) prepare bottomry and respondentia bonds, charter parties and other mercantile documents; (7) prepare, attest or authenticate any instrument intended to take effect in any country or place outside India in such form and language as may conform to law of place where such deed is intended to operate; (8) translate and verify translation of any document from one language to another; (9) act as commissioner to record evidence in any civil or criminal trial if so directed by any court or authority; (10) any other act which may be prescribed. (§8). None of foregoing shall be deemed to be Notarial Act except when done by Notary under his signature and Official Seal.

Authentication.

Before 1952, see England Law Digest. After 1952, notary may authenticate, certify or attest execution of any instrument. No separate forms of endorsement in this respect have been prescribed.

Limitations on Practice.

No person may practice as a notary or do any act under an official notarial seal unless he has a certificate as mentioned above. (§9). Exceptions exist under Act.

Expiration of Commission.

Government appointing notary may remove his name from register on following grounds; (1) If so requested by notary; (2) if he has not paid prescribed fee; (3) if he is an undischarged insolvent; (4) if he has been found guilty of professional or other misconduct.

Persons who falsely represent themselves as notaries or do any notarial act in contravention of §9 are punishable by one year imprisonment and/or fine. (§§10, 12).

Recognition of Acts Done by Foreign Notaries.

Where Central Government is satisfied that any country outside India whether by its law or practice, recognises notarial acts done by notaries within India, Central Government has power to declare by notification in official gazette that notarial acts done lawfully by notaries within such a country shall be recognised in India. At present such recognition is extended to U. K., Isle of Man and Channel Islands; and Hungary. (§14).

10 EMPLOYMENT

10.01 INDUSTRIAL AND LABOUR LAWS:

Preferatory Remarks.

Industrial expansion after independence resulted in considerable and increasing industrial regulation and labour legislation. Legislation has sought to regulate employer-employee relationship in its various aspects (including welfare of workers); machinery for settlement of disputes; and for formation and activities of trade unions. Statutes do not cover entire field, and reference to case law is essential.

Detailed summary of numerous Acts is impossible. Nevertheless in order to give general view of industrial and labour laws reference may be made in broad outlines to some of important subjects such as: (1) Fixation of wage scales, (2) “dearness allowance” paid to workmen to compensate for rise in cost of living, (3) “bonus” which has come to be regarded as employees right to participate in surplus profits to earning of which they have contributed by reference to statute and case law.

Central and State Legislation.

Under Constitution of India, both Central Government and State Governments have powers to legislate on matters relating to labour. Parliament legislates on subjects which are of All India character and require uniformity throughout country, but in most of its Acts, States are given powers to prescribe rules, so that each State can frame rules to meet its own particular requirements. However rules framed under State Act should not, of course, be derogatory of or inconsistent with provisions of Parliament Act.

The Central Government Acts.

It would be impossible to deal with all Acts passed by States. Reference is made here to only some of most important Central Acts which have all India operation. These Acts are:

(1) Industrial Disputes Act, 1947.

(2) The Factories Act, 1948.

(3) Industrial Employment (Standing Orders) Act, 1946.

(4) Workmen's Compensation Act.

(5) Payment of Wages Act.

(6) Indian Trade Unions Act, 1926, as amended by Act of 1947.

(7) Employees' State and Insurance Act, 1948.

(8) Payment of Bonus Act, 1965.

(9) Administrative Tribunals Act, 1985.

Industrial Disputes Act, 1947.

This Act makes provisions for investigation into and settlement of industrial disputes and also provides for setting up Works Committees of representatives of employers and employees and prohibition of strikes and lockouts closure of industry; retrenchment of surplus labour and other ancillary matters. Act is in operation in whole of India except State of Jammu and Kashmir.

Industry to Which the Act Applies.

What is “industry” to which the Act applies often gives rise to nice questions of law.

Industry means any systematic activity carried out by cooperation between employer and his workmen (including agency and contract employment) for production, supply or distribution of goods or services with view to satisfy human wants or wishes whether or not any capital has been invested for purpose of carrying on such activity or such activity is carried on with motive to make any gain or profit and definition now also includes dock workers and any activity relating to production of sales or business or both carried out by establishment. Agricultural operations; educational, scientific and research institutions; noncommercial institutions owned/managed by charitable/social/philanthropic organizations; government activity of sovereign nature; domestic service; and cooperative activities (subject to exceptions) are not “industry”. (§2[j]).

Works Committee.

In any industrial establishment in which 100 or more workmen are employed, in last 12 months Government has right to pass order requiring employer to constitute Works Committee consisting of representatives of employers and workmen engaged in establishment. Duty of Works Committee is to promote measures for securing and preserving amity and good relations between employers and workmen and to that end to comment upon matters of their common interest and endeavour to compose any material difference of opinion in respect of such matters. (§3).

Machinery for Settlement of Disputes.

Grievance Settlement Authority.

Any industrial establishment in which more than 50 workmen are employed or were employed in last 12 months shall provide for grievance settlement authority for settlement of industrial disputes of individual workman employed. (§9C).

Conciliation.—Whenever demands are made by labour or industrial disputes arise or are apprehended, the matter is taken up by officer, is appointed by Government who is designated as Conciliation Officer. He may act on his own initiative, or on being approached by any party. He is charged with duty of mediating in and promoting settlement of industrial disputes. He is, however, not invested with power to direct parties to settle their disputes in any particular manner. Conciliation Officer may call for and inspect any document which he has ground for considering to be relevant to industrial dispute. (§11). Strike or lock-out during pendency of conciliation proceedings is illegal except in specified circumstances.

If a settlement of the dispute is arrived at in the course of conciliation proceedings, the officer sends a report to the Government together with a Memorandum of Settlement signed by the parties. If no such settlement is arrived at, the Conciliation Officer sends to the Government a full report setting forth the steps taken by him for ascertaining the facts relating to the disputes and for bringing about an amicable settlement and the reasons why a settlement could not be reached. If on a consideration of the report the Government is satisfied that there is a case for reference to the Tribunal then it makes such a reference.

Government may constitute one or more Labour Courts for adjudication of industrial dispute relating to matters specified in 2nd schedule appended to Act. They have to submit their report to Government.

Industrial Tribunals.

The Government has constituted several Industrial Tribunals for adjudication of industrial disputes. The right to constitute a Tribunal is in the State Governments and disputes usually referred to them are of industries located in a particular state. The Central Government has also a right to constitute a National Tribunal for adjudication of industrial disputes involving questions of national importance or where industrial establishments are situate in more than one state are likely to be interested in or affected by such disputes. Reference of industrial disputes may be made by Government or parties to dispute may agree voluntarily to refer disputes to Tribunal by written agreement. (§10A).

Procedure and Powers of Tribunals.

The tribunal has same powers as a Civil Court (a) for enforcing attendance of any person and examining him on oath; (b) compelling production of documents; (c) issuing commission for examination of witnesses outside its jurisdiction. The tribunal is also empowered to appoint one or more persons having expert knowledge to advise it in the matter.

Procedure.

On a matter being referred to a Tribunal, either by the Government or by agreement of parties, it issues notices to the contestants, who are required to file their respective statements, after which parties are heard and they are at liberty to adduce such evidence oral or documentary as may be thought necessary. On conclusion of the proceedings, the Tribunal proceeds to give an Award. Any Award or decision given by the Tribunal is subject to an appeal to the Supreme Court of India but unless a substantial question of law is involved the Court is generally not inclined to entertain appeals. The award is published in the Government Gazette and the parties are supplied with copies thereof.

Award.

The award becomes enforceable on the expiry of 30 days from the date of its publication. However, the Government may on public grounds affecting national economy or social justice declare that the whole or any part of the award shall not become enforceable on the expiry of 30 days.

Period of Operation of the Award Settlement.

Award generally remains in operation for period of one year after it becomes enforceable. Government may before expiry of period extend operation by any period not exceeding one year at time but so that total period does not exceed three years. Notwithstanding expiry of period of operation, award continues to be binding on parties until period of two months elapses from date on which Notice is given by any party to other intimating its intention to terminate award. (§19).

Strikes and Lock-Outs.

The right to strike is a legitimate weapon in the hands of the workmen to serve their legitimate demands and ventilate their grievances. The expression “strike” is defined to mean a cessation of work by a body of persons employed in the industry acting in combination or a concerted refusal to work of any number of persons employed in the industry. (§2 [q]). The expression “lock-out” is defined to mean temporary closing down of place of employment or suspension of work by employer or refusal to continue employment of any employee already employed.

Prohibition of Strikes and Lock-outs.

No workman who is employed in any industrial establishment can go on strike in breach of contract, and no employer of any such workmen can declare a lock-out: (a) during the pendency of proceedings before the Tribunal or Arbitrator and two months after conclusion of such proceedings, or (b) during any period in which settlement or Award is in operation in respect of any of matters covered by such settlement or Award. (§23). During period of strike wages may be deducted. No person employed in public utility service shall go on strike except provided under Act.

A strike or a lock-out which contravenes the above provisions is illegal. However, a lock-out declared in consequence of an illegal strike, or a strike declared in consequence of an illegal lock-out, is not to be considered as “illegal.” (§24). No person can expend or apply any money in direct furtherance or support of any illegal strike or lock-out (§25).

Notice of Change.

No employer can affect any change in the conditions of service of workmen in respect of any of the matters specified in the next paragraph (a) without giving to the workmen a notice in the prescribed manner of the nature of the change proposed, or (b) within 21 days of giving such notice. However, no notice is required when the change is effected in pursuance of any settlement or award. The matters requiring the notice of change are:

(a) Wages; (b) contribution to Provident Fund either by the workmen or by the employers; (c) compensatory and other allowances; (d) hours of work and rest intervals; (e) leave with wages and holidays; (f) starting, alterations or discontinuance of shifts; (g) classification of employees by grades; (h) withdrawal of any customary concession or privilege or change in usage; (i) introduction of or alterations in rules of discipline; (j) rationalisation or standardisation or employment of plant or technique likely to lead to retrenchment; (k) any increase or reduction (other than casual) in the number of persons employed in any occupation or process or department or shift not due to forced matters. (§9A).

Layoff and Retrenchment.

“Lay Off” is defined to mean the failure, refusal or inability of an employer on account of shortage of coal, power or raw materials or accumulation of stocks or breakdown of machinery or for any other reason to give employment to workmen.

Compensation for Lay Off.

Whenever a workman who has completed not less than one year's continuous service is laid off, he is to be paid for all days during which he is laid off, compensation equal to 50% of his wages and dearness allowance provided that compensation during any period of 12 months shall not be for more than 45 days. (§25C).

No compensation is payable to a workman who has been laid off: (a) If he refuses to accept any alternative employment in same establishment or any other establishment belonging to same employer situate in same town or village or within radius of five miles from establishment; (b) if he does not present himself for work at appointed time once a day and (c) if such laying off is due to strike or slowing down of production in another part of establishment. (§25E).

The provisions relating to lay-off compensation do not apply to: (a) Industrial establishment in which less than 50 workmen at an average per working day are employed in the preceding calendar month or (b) industrial establishments which are of seasonal character or in which the work is performed only intermittently.

Retrenchment.

“Retrenchment” is defined to mean the termination by an employer of the services of a workman for any reason whatsoever otherwise than as a punishment by way of disciplinary action. This expression does not include (a) voluntary retirement, (b) retirement of the workmen on reaching the age of superannuation if the contract of employment contains a stipulation in that behalf, (c) termination of services of workmen on ground of continued ill health, or (d) termination of service as result of nonrenewal of contract of service on its expiry.

Conditions of Retrenchment.

No workman in any industry who has been in continuous service for not less than one year can be re-trenched until: (a) Workman is given one month's notice indicating reasons for retrenchment or workman is paid in lieu of such notice wages for period of notice, (b) workman is paid at time of retrenchment, compensation equivalent to 15 days average pay for every completed year of service or any part thereof in excess of six months, and (c) notice in prescribed manner is served on Government.

Procedure for Retrenchment.

In the absence of any agreement, the employer has ordinarily to retrench the workman who was the last person to be employed in the category in which retrenchment takes place unless for reasons which are to be recorded by employer. In other words principle, in cases of retrenchment, is "First come last go and last come first go." Where retrenchment takes place and later employer proposes to take into employ any person, he must give opportunity to retrenched workmen to offer themselves for re-employment who will have preference over other persons.

Retrenchment Compensation in Case of Transfer of Undertakings.

Even where the ownership or management of an undertaking is transferred from one employer to another, every workman in continuous service for not less than one year becomes entitled to notice and compensation in accordance with the rules discussed above. However, no such notice or compensation would be necessary in cases of transfer if the following conditions are fulfilled: (a) the service of the workman is not interrupted by such transfer; (b) the terms and conditions of such service after such transfer are not in any way less favourable to the workmen than those applicable to them immediately before the transfer; (c) the new employer is under the terms of such transfer legally liable to pay to the workmen in the event of their retrenchment at a future date, compensation on the basis that their services have been continuous and are not interrupted by the transfer. (§25FF).

Retrenchment Compensation on Closure.

Where an undertaking was closed down for any reason, every workman becomes entitled to notice and compensation in accordance with provisions indicated above, provided that if undertaking is closed down on account of unavoidable circumstances beyond control of employer, compensation is not to exceed workman's average pay for three months. (§25FFF).

Conditions of Service of Workmen to Remain Unchanged under Certain Circumstances.

During the pendency of proceedings before a Conciliation Officer or a Tribunal or Arbitrator in respect of Industrial Dispute no employer can, in regard to any matter connected with dispute, alter to prejudice of workmen concurred conditions of services applicable to them. Similarly, during pendency of such proceedings, no workmen connected in such dispute can be discharged or punished for misconduct connected with dispute except with express permission in writing of authority before which such proceedings are pending.

However, during the pendency of such proceedings an employer may in accordance with the standing orders: (a) alter in regard to any matter not connected with the dispute the conditions of service applicable to that workman or (b) for any misconduct not connected with the dispute discharge or punish the workman provided that such workman is paid wages for one month and an application is made by the employer to the authority before whom the proceedings are pending for approval of the action taken by the employer. (§33).

Before any disciplinary action is taken against any workman resulting in dismissal or discharge or other penalty, it is necessary to observe the rules of natural justice, but as this topic is covered by case law, discussion on the subject will be found under a suitable heading.

Representation of Parties.

A workman who is a party to a dispute, may be represented by: (a) An officer of a

Registered Trade Union of which such workman is a member or (b), an officer of a Federation of a Trade Union to which the Trade Union concerned is affiliated or (c), where the workman is not a member of any Trade Union, by an officer of any Trade Union connected with the industry in which the workman is employed or by any such workman employed in such industry.

Any employer may be represented in any such proceedings by: (a) an officer of an Association of employers of which he is a member or, (b) an officer of a Federation of Association of employers to which such Association is affiliated, and (c) where an employer is not a member of any such association of employers, by an officer of any Association connected with the industry concerned.

No party is entitled to be represented by a legal practitioner in any conciliation proceedings. In any proceedings before a Tribunal a party may be represented by a legal practitioner with the consent of the other parties to the proceedings and with the leave of the Tribunal. (§36).

Act also provides for penalties to be enforced for contravening provisions of this Act.

Unfair labour practices have been specified in Fifth Schedule.

The Indian Factories Act, 1948.

Act is enacted to consolidate and amend law regulating health, safety and welfare of labour in factories and makes provisions for hours of work, holidays, lighting and ventilation, meal time and overtime, regulations as to health and safety devices for protection of workmen employed in factories.

The object which the Act seeks to achieve is implementation of as many provisions of the International Labour Organization Code of Industrial Hygiene as are applicable under Indian conditions. The provisions relating to the periodical medical examinations of young persons and the submissions of plans for factory buildings to the authorities have also been taken from the International Labour Conventions.

A "Factory" is defined to mean any premises whereon ten or more workers are working or were working on any day of preceding 12 months and in any part of which manufacturing process is being carried on with aid of power, and where manufacturing process is carried on without aid of power number of workers should be 20 or more. (Person charged with duty of carrying out provisions of Act is referred to as "occupier" in Act.) "Occupier" is defined to mean person who has ultimate control over affairs of factory.

Approval, Licensing and Registration of Factories.

Pursuant to the powers given by this Central Act, various State governments have made rules requiring (a) the previous permission in writing of the State government for the site on which the factory is to be situated, (b) the submissions of plans and specifications of the proposed factory to be submitted to Central Government and (c) registration and licensing of factories and fees payable for same and for renewal of licenses. (§6).

Implementation of the Act.

In order to implement the provisions of the Act, the States are authorised to appoint Inspectors who have wide powers such as (a) to enter any place which is used as a factory, (b) to make examination of the premises, the plant and machinery and require the production of documents relating to the factory, and (c) to exercise such powers as may be prescribed by the Government for carrying out the purposes of the Act. (§§8, 9).

Health.

Every factory must be kept clean and free from effluvia arising from any drain or other nuisance. (§11). Effective and suitable provisions must be made for adequate ventilation by circulation of fresh air and keeping up a certain temperature in the factory premises according to the prescribed rules. (§13). Rules have also been made in respect of factories in which humidity of the air is artificially increased. No part of any factory shall be overcrowded to extent injurious to health of workers. Every factory must also provide and maintain sufficient and suitable lighting (natural or artificial or both). (§§11-20).

Safety.

In every factory the machinery, handling of which may cause injury, must be securely fenced by safeguards of substantial construction in accordance with the rules framed. No young person (i.e. one who has not completed his eighteenth year of age) can work on any machine unless he is fully instructed as to the dangers arising in connection with the machine and only after receiving sufficient training. In every factory all floors, steps, stairs, passages, etc., must be of sound construction and properly maintained and provision must be made for safe means of access to every space at which a person is required to work. Every factory must also provide suitable means of escape in case of fire and there must also be effective and clearly audible means of giving warning in case of a fire. (§§21-41).

Provisions Relating to Hazardous Processes.

State Government may appoint Site Appraisal Committee for grant of permission for location of factory involving hazardous process. Occupiers of such factories must maintain proper and up-to-date health records and provide medical checkup for its workers. Occupier must further set up “safety committee” to promote co-operation between workers and management in maintaining proper safety and health.

Welfare of Workers.

Every factory must provide adequate and suitable facilities for washing and for keeping clothing not worn during working hours. It is also obligatory to provide and maintain first-aid boxes or cupboards equipped with the prescribed contents. Rules may be made requiring certain factories employing more than 250 workers to run canteen for their use. Factory employing more than 150 workers must provide adequate and suitable shelters or rest rooms and suitable lunch room with provision for drinking water for workers. (§§42-50).

Working Hours For Adults.

An “Adult” is defined in the Act to mean a person who has completed his 18th year of age. (§2A). No adult worker can be required or allowed to work in the factory for more than 48 hours in any week. Subject to this over all limit no adult worker can be required or allowed to work for more than nine hours in a day. This bar is an absolute one and mere payment of overtime wages cannot get over the bar. (§§51, 54).

The periods of work each day must be so fixed that no period shall exceed five hours at a time. The effect of this is that hours of work during the day should be suitably spaced so as to allow adequate rest to worker. No worker should be made to work for more than five hours before he has an interval of rest of at least half an hour. (§55).

Weekly Holidays.

Every worker working in a factory must be given one day's rest in seven. The day of rest need not necessarily be a Sunday. The day of rest may also not necessarily be the same day in each week. One day may be substituted for the other for rest provided that such substitution should not result in any worker working more than ten days continuously without a holiday for a whole day. (§52).

Overtime Payment.

Where a worker works in excess of the hours prescribed, he is entitled to wages at the rate of twice his ordinary rate of wages. (§59). The State government may make rules and provide for exemption from the above restrictions in case of persons holding position of supervision or management or those employed in a confidential position. (§64).

Employment of Women.

Cabinet has decided to amend Factories Act 1948 in order to allow women workers to work between 10 p.m. to 6 a.m. However, State Government has been authorised in specified cases to permit women workers to work between 7 p.m. to 6 a.m.

Employment of Young Persons.

A child under the age of 14 years cannot work in any factory. However, a child above the age of 14 years to completion of 18 years is permitted to work in any factory but cannot work: (a) For more than four and one-half hours a day and (b) during night.

Leave.

Every worker who has worked for a period of 240 days or more in a factory during a calendar year must be allowed during the subsequent calendar year leave with wages as follows: (a) If adult, one day for every 20 days of work performed; (b) if child, one day for every 15 days of work performed during previous calendar year. (§79).

A worker who has been allowed leave for not less than four days, in the case of an adult, and five days in case of a child, can claim payment of wages in advance for the leave period. (§81).

Penalties and Procedure.

Different kinds of penalties are prescribed for contravention of the provisions of the Factories Act, and in many cases criminal prosecution may also be launched and if certain facts are established, the result may be either imposition of fine or imprisonment of the person found guilty of the offence or both.

Industrial Employment (Standing Orders) Act, 1946.

It is Act to require employment in industrial establishments formally to define conditions of employment under them. Expression "Standing Orders" means set of rules governing conditions of recruitment, discharge, disciplinary action, holidays, leave, etc. Act applies to industrial establishments employing 100 or more workmen and to such other industrial establishments as Government may notify.

The employers and the employees are normally bound by the terms of the contract of service. However, the agreement stands modified by the Standing Orders.

Employer must submit, within one year from date on which Act becomes applicable, to officer appointed in that behalf, draft of Standing Orders on various matters set out in Schedule appended to Act.

Some of the important items in the Schedule are: (a) Classification of workmen, e.g., permanent, temporary, etc.; (b) hours of work, holidays, pay days and wage rates; (c) termination of employment and the notice to be given for the purpose by either party; (d) suspension or dismissal for misconduct; (e) means of redress of workmen against unfair treatment.

When the draft of Standing Orders is submitted to the officer concerned, he forwards a copy to the Trade Union, if there be any, or if there is no Trade Union to the workmen in a certain prescribed manner. (§5). Thereafter he proceeds to call a meeting of the parties and after hearing them the draft of the Standing Orders is settled and certified. Any person aggrieved by the order of the officer certifying the draft can prefer an appeal to the appellate authority constituted under the Act.

Date of Operation.—The Standing Orders come into operation on the expiry of 30 days from the date they are certified, and where there is an appeal, on the expiry of seven days from the date of the Order passed in appeal.

Posting of Standing Orders.—The text of the certified Standing Orders must be prominently posted by employer in English and in language understood by majority of workmen in establishment on special boards at or near entrance. (§9).

Duration of Standing Orders.—Standing Orders cannot, except by agreement, be modified until expiry of one year from date on which they become operative or last modified. (§10). Government has powers to exempt any industrial establishment from all or any of provisions of Act if it is satisfied that in interest of industry or for any cogent reasons it should be so done.

Workmens' Compensation Act, 1923.

Employers have absolute liability to compensate workman for injuries sustained by him in course of employment and rules governing payment of such compensation are to be found in this Act.

When a claim is made it is not open to an employer to contend that there was contributory negligence on the part of the employee or that the employee alone was negligent or that injury was due to negligence of fellow-employee nor is it open to employer to say that when employee entered employment he assumed risk or ought to have known of risk and therefore nothing should be paid to him.

The general principle is that compensation should ordinarily be given to workmen who sustain personal injuries by accident arising out of and in course of their employment. Compensation is also given in certain cases when a workman contracts certain kinds of occupational disease peculiar to his employment.

The rates of compensation payable are set out in one of the Schedules appended to the Act. Injury sustained by a workman may result either in partial disablement or total disablement. “Partial disablement” is where it is of a temporary nature and reduces the earning capacity of a workman in any employment in which he was engaged at the time of the accident, and where the disablement is of a permanent nature, it reduces his earning capacity in every employment which he was capable of undertaking at that time. “Total disablement” means such disablement, whether of a temporary nature or a permanent nature, as incapacitates a workmen for all work which he was capable of performing at the time of the accident. The rates of compensation for different kinds of disablements discussed above vary materially from each other.

Employers Liability.—If personal injury is caused to a workman by accident arising out of and in the course of his employment his employer is liable to pay compensation in accordance with the provisions hereafter discussed, provided that the employer is not liable: (a) In respect of injuries not resulting in total or partial disablement of a workman for a period exceeding three days; (b) in respect of any injury caused by an accident which is directly attributable to (1) the workmen having been at the time under influence of drinks or drugs, (2) wilful disobedience of the workman to an order expressly given, or a rule expressly framed, for the purpose of securing the safety of the workmen or (3) wilful removal or disregard by the workman of any safety guard or other device which he knew to have been provided for the purpose of securing safety of workman. (§3).

Amount of Compensation.—The amount of compensation payable to a workman is made to depend on two factors. The first factor is where the accident causes death or where it results in injury. If injury results then the question arises whether such injury produces partial disablement or total disablement. The amount of compensation also depends on whether the workman injured is an adult or a minor; the second factor on which compensation depends is the monthly wages drawn by the workman injured. The distinction is also made between an adult and a minor. An adult workman is entitled to higher compensation than the workman who is a minor.

Different kinds of injuries for which compensation becomes payable have also been set out at length in one of the schedules to the Act, such as (a) loss of right arm above or at the elbow, (b) loss of leg at or above the knee, (c) loss of one eye, (d) loss of thumb, (e) loss of one phalanx of thumb, (f) loss of any finger, etc. In this Schedule, each injury set out also indicates the percentage of loss of earning capacity for the purpose of determining the extent to which the disablement is partial because the amount of compensation also depends on the extent of disablement caused by the injury.

The amount of compensation payable to workmen for death or disablement also depends on monthly wages earned by the workman concerned.

Occupational Diseases.—Some of the occupational diseases for which compensation is payable are: (a) poisoning by nitrous fumes, (b) chrome, ulceration or its sequelae, (c) pathological manifestations, due to radium and other radioactive substances, (d) X-rays, (e) primary epitheliomatous cancer of the skin and (f) asbestosis.

The compensation for any occupational disease is payable only if any particular disease is contracted in the course of a specified employment. (§4). If a worker were to contract any occupational disease while not in the specified employment, he can recover no compensation from his employer.

Payment and Distribution of Compensation.—Compensation payable in respect of a workman whose injury has resulted in death or compensation payable to a woman or a person under a legal disability (e.g., a minor) has to be deposited with the Commissioner for Workmens Compensation and no such payment can be made directly even if payment made is deemed to be no payment at all. Compensation deposited in respect of deceased workman is apportioned among his dependants in such proportion as Commissioner may think fit. In other cases compensation deposited is paid to workman entitled thereto in such manner as Commissioner may direct. (§8).

Notice and Claim.—No claim for compensation may be entertained by Commissioner unless notice of accident is given as soon as practicable after happening thereof and unless claim is preferred before Commissioner within two years of occurrence of accident or in case of death within two years from date of death. (§10).

Powers of the Commissioner.—The provisions of the Act are administered by an officer appointed by the Government designated as the Commissioner for Workmens Compensation for particular area as notified.

Some of the powers with which the Commissioner is invested are: (a) when he receives information that a workman has died as a result of an accident, he may require the employer to submit a statement giving the circumstances attending the death of the workman and (b) all the powers of a civil Court for taking evidence on oath and compelling production of documents and material objects. No Civil Court shall have jurisdiction to secure, decide or deal with any such question which is under this Act required to be settled, decided or dealt with by Commissioner.

Medical Examination.—Where a workman gives notice of an accident, he is bound to submit himself to medical examination if the employer desires to have him examined at his own cost by a qualified medical practitioner. The Commissioner has also powers to direct medical examination of an injured employee. If the employee refuses to submit himself to such examination or in any way obstructs the same, his right to compensation is suspended during the continuance of such refusal or obstruction. (§11).

Remedies of Employer Against Strangers.

Where a workmen recovers compensation from his employer and the circumstances are such as to give rise to a legal liability of some third party, then the employer after making payment, can claim to be indemnified by the person so liable and may recover from such party the amount of compensation which the employer has already paid. (§13).

Contracting Out.

Any contract or agreement, whereby workman relinquishes his right of compensation from employer for personal injury is null and void in so far as it purports to remove or reduce liability to pay compensation under Act. (§17).

Appeal.

Any party dissatisfied with a decision given by the Commissioner, may file an appeal to the High Court of the State, but only certain specified orders are appealable. (§30).

Payment of Wages Act, 1936.

This Act is passed for regulating payment of wages to certain classes of workmen employed in industries. Object of passing Act was to avoid delays which occur in payment of wages to employees and to regularise practice of imposing fines on them.

Responsibility for Payment of Wages.

Every employer is responsible for payment to persons employed by him of all wages required to be paid under the Act. (§3). The person responsible for payment of wages must fix periods (referred to in the Act as Wage Periods) in respect of which wages are payable. No wage period can exceed one month. (§4).

Time of Payment of Wages.

The wages of every person employed in a factory or industrial establishment in which less than 1,000 persons are employed must be paid before the expiry of the seventh day after the last date of the wage period. In any other establishment wages must be paid before the expiry of the tenth day after the last date of the wage period.

When the employment of any person is terminated the wages earned by him must be paid before the expiry of the second working day from the date on which such employment is terminated. (§5).

All wages must be paid only in current coin or currency notes or in both.

Permissible Deductions.

The general rule is that the wages of an employee must be paid to him without any deductions of any kind. However, certain deductions are authorised such as: (a) Fines (imposed and realised in the manner hereinafter stated); (b) for absence from duty to the extent and in the manner prescribed by §9 of the Act; (c) for damage to or loss of goods entrusted to the employee or for loss of money for which he is accountable in the manner prescribed by §10 of the Act; (d) for housing accommodation supplied; (e) for such amenities and services supplied by the employer as may be authorised by the Government in the manner prescribed by §11; (f) for recovery of advances or for adjustments of over-payments, as prescribed by §12; (g) for income tax payable by an employee; (h) deductions required to be made by an order of a court; (i) for subscriptions to any Provident Fund to which the Provident Act of 1925 applies, or any other Provident Fund approved by the State Government; (j) for payment to co-operative Societies approved by the State Government in the manner prescribed by §13 of the Act; (k) deductions made with the written authorisation of the employee for payment of any premium on his Life Insurance Policy. (§7).

Fines.

An employer must exhibit on the premises of his factory a notice specifying such acts and omissions on the part of the employees rendering them liable for payment of fines. Previous approval of the State Governments or of the prescribed authority must be taken before specifying such acts and omissions.

Fine can only be imposed on an employee in respect of acts and omissions specified in notice set out above and no other. No fine can be imposed on employee until he has been given opportunity of showing cause against imposition of fine.

The total amount of fine in any wage period may not exceed amount equal to 3% of wages payable in respect of that wage period. No fine can be imposed on employee who is under age of 15 years, nor can fine be recovered by installments or after expiry of 90 days from date on which it was imposed.

All fines and realisations thereof must be recorded in a special register and all realisations must be applied only to such purpose beneficial of the persons employed in the factory or establishments as are approved by the prescribed Authority.

Remedies for Aggrieved Employee.

Any employee whose wages have been illegally deducted or the payment of whose wages have been delayed may file a claim with the Authority constituted under §15 of the Act. Such claim must be presented within 12 months from the date on which the deduction is made or from the date on which the payment of the wages had become due. The authority has been empowered to condone the delay for a sufficient cause.

On receiving a claim the Authority proceeds to give notice to the employer concerned, and after hearing the parties passes Orders according to law.

Powers of Authority.

The Authority appointed to investigate claims has all the powers of a civil Court for the purpose of taking evidence, and of enforcing the attendance of witnesses and to compel production of documents.

Appeal.

Any party aggrieved by the Order of Authority may prefer an appeal within 30 days of date of order to Court of Small Causes or District Court. (§17).

Bar of Suits.

No civil Court may entertain any suit for the recovery of wages or for any deductions from wages in so far as the sum so claimed: (a) forms the subject of an application under the Act and which is pending before the Authority, or (b) could have been recovered by an application under the Act.

Contracting Out.

Any contract or agreement whereby an employee relinquishes any right conferred by the Act is null and void in so far as it purports to deprive him of his such right.

The Indian Trade Unions Act, 1926.

This Act provides for registration of Trade Unions and in certain respects defines the law relating to registered Trade Unions.

A *"Trade Union"* within the meaning of the Act means any combination whether temporary or permanent formed primarily for the purpose of regulating the relations between workmen and employers or between workmen and workmen or between employers and employers or for imposing restrictive conditions on the conduct of any trade or business and includes any federation of two or more Trade Unions. (§2[h]).

Registration of Trade Unions.

Any seven or more persons by subscribing their names to the rules of the Trade Union and otherwise complying with the provisions of the Act can apply for registration of a Trade Union. (§4).

The application for registration is made to the Registrar appointed under the Act and this application must comply with certain requirements of the Act and must contain particulars prescribed in that behalf, such as names and occupations of the members, name of the Trade Union, etc. (§5).

The Registrar, on being satisfied that the Trade Union has complied with all the requirements of the Act registers it by entering in a register the particulars relating to it and issues a certificate of registration. (§§8, 9).

Cancellation of Registration.

A certificate of registration may be withdrawn or cancelled on the application of the Trade Union, or if the registrar is satisfied that the certificate of registration has been obtained by fraud or mistake, or that the Trade Union has ceased to exist or that it has wilfully contravened any of the provisions of the Act. (§10).

Body Corporate.

Every registered Trade Union becomes a body corporate by the name under which it is registered and has perpetual succession and a Common Seal with power to acquire and hold properties and to enter into contracts.

Rights and Liabilities of Registered Trade Unions.

The general funds of a Registered Trade Union can be spent only on specified objects, the main being the conduct of trade disputes on behalf of the Union or any member thereof and payment of compensation to members for loss arising out of trade disputes. (§15). However, it is open to a Trade Union to constitute a separate fund from volunteers' contributions received from members for promotion of civic and political purposes. (§16).

Immunity from Legal Proceedings.

No suit or legal proceedings shall be maintained in any civil court against any Registered

Trade Union or any officer or members thereof in respect of any act done in contemplation or furtherance of trade dispute on ground only that such act induces some other persons to break contract of employment or that it is interference with trade, business or employment of some other person. Registered Trade Union cannot be made liable in any suit or other legal proceedings in any civil court in respect of any tortious act done in contemplation or furtherance of trade dispute by agent of Union if it is proved that such person acted without knowledge of or contrary to expressed instructions given by representatives of Union.

Minor of age of 14 years and above is entitled to become member of Trade Union but is disqualified from being office bearer.

Annual Returns.

A Trade Union must send every year to the Registrar a general statement audited in the prescribed manner of all receipts and expenditure together with a statement showing all changes of officers of the Union during the year.

Rights of Recognised Trade Unions.

The executives of a Recognised Trade Union are entitled to negotiate with the employers in respect of matters connected with a trade dispute and to carry on correspondence with the employers. The executives of a Recognised Trade Union are entitled to display notices of a Trade Union in any premises in which its members are employed and the employers must afford reasonable facilities for that purpose.

Employees State Insurance Act, 1948.

This Act provides for certain benefits to employees in case of sickness, maternity and employment-injury. Under the Act, a Statutory Corporation has been set up called “Employees State Insurance Corporation” (hereinafter referred to as “the Corporation”) which administers the Scheme propounded in the Act. (§3). The Scheme is one of the compulsory State Insurance providing for the benefits conferred by the Act on the employees and enumerated herein below. In pursuance of the Scheme as envisaged in the Act, all employees in the factories or establishments to which the Act applies are insured.

Medical Benefit Council established under Act must advise corporation on matters relating to administration of medical benefit.

Contributions.

The employees and employers both must make contributions and all contributions go to the Corporation and are paid in to a fund called “Employees State Insurance Fund.” (§26). The moneys in the Fund are to be principally applied for payment of the monetary benefits and for providing medical treatment and attendances to the insured persons and where medical benefit is extended to the families by the Act for giving such medical facilities to the families.

The rates at which the employers and the employees have to make contributions are specified in the first Schedule appended to the Act.

Wage period is unit in respect of which all contributions are payable under Act and such contributions fall due on last day of wage period. (§39).

No employee whose average daily wages are below prescribed limit by Central Government has to make any contribution but even in such case employer is required to make contribution according to rules prescribed. (§42).

Benefits.

Benefits given to the insured persons under the Act are governed by certain rules found in the Act and are of different kinds, the chief of them being the following: (a) periodical payment in case of sickness certified by a duly appointed medical practitioner; (b) periodical payments in case of confinement to an insured woman certified to be eligible for payment by the authorities concerned; (c) periodical payments to a person suffering from disablement as a result of employment injury duly certified; (d) periodical payments to dependants of an employee who dies as a result of employment injury; (e) medical treatment for attendance on employees.

The rates at which these monetary benefits are given have been set out in the Second Schedule appended to the Act.

A right to receive payment of such benefit is not transferable or assignable nor can any such benefit be attached or sold in execution of an order of the Court.

No employee may claim sickness benefit or maternity or disablement benefit in respect of any day on which he works and receives wages.

A recipient of sickness or disablement benefit must observe certain conditions, namely: (a) remain under medical treatment at a hospital or clinic provided under the Act and carry out the instructions given by the medical officer; (b) do nothing which might retard or prejudice his chance of recovery; (c) cannot leave the area in which medical treatment is given without the permission of the medical officer; (d) submit to examination by duly appointed medical officer.

Right to receive payment or benefit under this Act shall not be transferable or assignable.

Corporation's Right to Recover Damages.

Where an employment injury is sustained by an insured person, by reason of negligence of the employer to observe any of the safety rules or by reason of any wrongful act of the employer, the Corporation becomes entitled to be reimbursed by such employer in such amount as the Corporation is liable to pay to the employee under the Act. Such amounts may be recoverable as arrears of land revenue.

Adjudication of Disputes.

Under the Act a court has been set up called “Employees Insurance Court” which decides claims and questions of liability arising between the Corporation, employees and employers.

Exemption.

The Government has been given a right to exempt any factory or establishment from the provisions of the Act in proper cases.

Payment of Bonus Act, 1965.

See subhead Case Law, catchline Bonus, infra.

Administrative Tribunals Act, 1985.

This Act makes provision for adjudication or trial of disputes and complaints with respect to recruitment and conditions of service of persons appointed to public service and posts in connection with affairs of Union or of any State or any local or other authority within territory of India or of any corporation owned or controlled by Government notified for purpose and for matters connected therewith.

§29 has made specific provision for transfer of pending cases. It lays down that every suit or other proceeding pending before any court or other authority immediately before date of establishment of Tribunal under this Act, being suit or proceeding, cause of action whereon it is based is such that it would have been if it had arisen after such establishment within jurisdiction of such tribunal, shall stand transferred on that date to such Tribunal provided that nothing in section shall apply to any appeal pending before a High Court or Supreme Court. Act does not apply to: (a) Any member of naval, military or air forces or any other armed forces of Union; (b) any person governed by provisions of Industrial Disputes Act 1947 in regard to such matters in respect of which he is governed; (c) any officer or servant of Supreme Court or of any High Court; (d) any person appointed to Secretarial staff of either House of Parliament or to Secretarial staff of any State Legislature or House thereof or in case of Union territory having Legislature, of that Legislature.

From any order or decision of Administrative Tribunal any appeal will lie only to Supreme Court under Art. 136 of Constitution of India.

Jurisdiction.

Central Administrative Tribunals will have jurisdiction over all matters relating to recruitment of civil services, etc.

Case Law.

Some of more important aspects of Labour and Industrial Laws have been evolved by Tribunals and Courts and Case Law covers very vast field. Some important subjects are: (a) Fixation of Wage Scales; (b) Dearness Allowance; (c) Bonus; (d) disciplinary action against employees for misconduct.

Fixation of Wage Scales.

The Wage fixation is governed by the following principles:

(1) In the fixation of rates of wages which include within its compass the fixation of scales of wages also, the capacity of the industry to pay is one of the essential circumstances to be taken into consideration except in cases of bare subsistence or minimum wage where the employer is bound to pay the same irrespective of such capacity;

(2) The capacity of the industry to pay is to be considered on an industry-cum-region basis after taking a fair cross-section of the industry, and

(3) The proper measure of gauging the capacity of the industry to pay should take into account the elasticity of demand for the product, the possibility of tightening up the organization so that the industry could pay higher wages without difficulty and the possibility of increase in the efficiency of the lowest paid workers resulting in increase in production considered in conjunction with the elasticity of the demand for the product, no doubt against the ultimate background that the burden of the increased rate should not be such as to drive the employer out of business.

Dearness Allowance.

“Dearness allowance” is intended to provide for an increase over the basic pay in order to meet a rise in the cost of living where it is expected that it will be only of a temporary character. Instead of having revisions of wage scale to meet such contingencies, practice has been to fix basic wage at level below which prices will not go down so far as can reasonably be foreseen. Increase over and above this point due to rise in cost of living is provided for by grant of dearness allowance.

Soon after the commencement of the World War II in 1939, the system of dearness allowance came into existence due to a steep rise in cost of living.

In India there are two principal methods providing for dearness allowance. The first method is to fix flat rates or definite percentages of basic salary as dearness allowance varying, if need be, with the scale of salaries and with slabs. The second method is to link dearness allowance with rise or fall of cost of living index figures.

For various towns and centres index figures are published in the Indian Labour Gazettes. Various other Commercial Bodies such as Bombay Mill Owners Association also publish such figures from time to time. Apart from this, the Government also publishes All India Cost of Living Index Figures.

Bonus.

Term “bonus” is applied to cash payment made in addition to wages and is governed by Payment of Bonus Act 1965.

By this Act every employer in private sector (with few statutory exceptions) and certain employers in public cum private sector must pay bonus to every employee. (§10).

Bonus must be paid to every employee. Maximum ceiling of salary is Rs. 2,500/-per month. Minimum rate of bonus is 8.33% of employees' earned salary or Rs. 100-per year, whichever is higher. Maximum bonus payable under Act is 20% of employee's wages.

Bonus is paid out of available surplus of gross profit of every accounting year. Available surplus is gross profit for that accounting year after deduction of certain sums specified in §6 of Act. Where available surplus exceeds minimum bonus fixed under Act, it must be utilised in payment of higher rate of bonus up to maximum of 20% of earned basic salary.

Before bonus becomes payable employee must have worked for at least 30 working days minimum in that accounting year. Working days include those on which employee was on leave under Industrial Employment Act 1946 or Industrial Disputes Act 1947 or on leave with salary, or absent due to temporary disablement caused by accident in course of employment or on maternity leave with salary. Bonus must be paid within eight months of close of accounting year.

Establishment which is newly set up need not pay bonus until accounting year in which employer derives profit from establishment or from sixth year following that accounting year in which employer first sells goods produced by him, whichever is earlier.

Employee must be disqualified from receiving bonus if he is dismissed from service for fraud, violent or riotous behaviour, theft, etc.

Disciplinary Action.

If an employee is found guilty of any misconduct, he may be dismissed, discharged, censured or be subjected to a proper penalty.

However, before taking any action against an employee for misconduct, it is necessary that the employer observe principles of natural justice and this is done by adopting the following procedure: (a) An employee against whom disciplinary action is to be taken should be given a charge sheet setting forth the circumstances appearing against him; (b) a date should be fixed for enquiry giving sufficient time to the employee to prepare his explanation and to produce any evidence which he wishes to tender in his defence; (c) he be permitted to appear before the officer conducting the enquiry to cross examine any witnesses on whose evidence the charge rests and to examine witnesses and produce other evidence in his defence.

On the conclusion of such enquiry if the management comes to the conclusion that the employee concerned is guilty of the charge, then steps may be taken for disciplinary action. Employee must be given opportunity to show cause against punishment proposed to be imposed.

If the rules indicated above are not complied with then the order of dismissal may be attacked by the employee as bad in law giving rise to a claim for reinstatement and back wages.

It may also be stated that even if the procedure indicated above is adopted and yet it is found that an employer in taking disciplinary action has not acted bona fide and his motives in taking the action were to victimize the employee, say for example, for his Trade Union activities then the Industrial Tribunal has powers to enquire into the matter and in proper case set aside the order passed by the management and direct reinstatement of the employee with such compensation as may be thought proper.

10.02 LABOUR RELATIONS:

See topic 10.01 Industrial and Labour Laws.

11 ENVIRONMENT

11.01 ENVIRONMENTAL REGULATION:

In Constitution of India, it is clearly stated that it is duty of state to ``protect and improve the environment and to safeguard the forests and wildlife of the country''. It imposes duty on every citizen ``to protect and improve the natural environment including forests, lakes, rivers, and wildlife''. Reference to environment has also been made in Directive Principles of State Policy as well as Fundamental Rights. Dept. of Environment was established in India in 1980 to ensure healthy environment for country. This later became Ministry of Environment and Forests in 1985.

Constitutional provisions are backed by number of laws—acts, rules, and notifications. EPA (Environment Protection Act), 1986 came into force soon after Bhopal Gas Tragedy and is considered umbrella legislation as it fills many gaps in existing laws. Thereafter, large number of laws came into existence as problems began arising, for example, Handling and Management of Hazardous Waste Rules in 1989.

Following is list of environmental legislations that have come into effect: General, Forest and wildlife, Water, and Air.

1986 - Environment (Protection) Act authorizes central government to protect and improve environmental quality, control and reduce pollution from all sources, and prohibit or restrict setting and /or operation of any industrial facility on environmental grounds.

1986 - Environment (Protection) Rules lay down procedures for setting standards of emission or discharge of environmental pollutants.

1989 - Objective of Hazardous Waste (Management and Handling) Rules is to control generation, collection, treatment, import, storage, and handling of hazardous waste.

1989 - Manufacture, Storage, and Import of Hazardous Rules define terms used in this context, and sets up authority to inspect, once per year, industrial activity connected with hazardous chemicals and isolated storage facilities.

1989 - Manufacture, Use, Import, Export, and Storage of hazardous Micro-organisms/ Genetically Engineered Organisms or Cells Rules were introduced with view to protect environment, nature, and health, in connection with application of gene technology and microorganisms.

1991 - Public Liability Insurance Act and Rules and Amendment, 1992 was drawn up to provide for public liability insurance for purpose of providing immediate relief to persons affected by accident while handling any hazardous substance.

1995 - National Environmental Tribunal Act has been created to award compensation for damages to persons, property, and environment arising from any activity involving hazardous substances.

1997 - National Environment Appellate Authority Act has been created to hear appeals with respect to restrictions of areas in which classes of industries etc. are carried out or prescribed subject to certain safeguards under EPA.

1998 - Biomedical waste (Management and Handling) Rules is legal binding on health care institutions to streamline process of proper handling of hospital waste such as segregation, disposal, collection, and treatment.

1999 - Environment (Siting for Industrial Projects) Rules, 1999 lay down detailed provisions relating to areas to be avoided for siting of industries, precautionary measures to be taken for site selecting as also aspects of environmental protection which should have been incorporated during implementation of industrial development projects.

2000 - Municipal Solid Wastes (Management and Handling) Rules, 2000 apply to every municipal authority responsible for collection, segregation, storage, transportation, processing, and disposal of municipal solid wastes.

2000 - Ozone Depleting Substances (Regulation and Control) Rules have been laid down for regulation of production and consumption of ozone depleting substances.

2001 - Batteries (Management and Handling) Rules, 2001 rules shall apply to every manufacturer, importer, re-conditioner, assembler, dealer, auctioneer, consumer, and bulk consumer involved in manufacture, processing, sale, purchase, and use of batteries or components so as to regulate and ensure environmentally safe disposal of used batteries.

2002 - Noise Pollution (Regulation and Control) (Amendment) Rules lay down such terms and conditions as are necessary to reduce noise pollution, permit use of loud speakers or public address systems during night hours (between 10:00 p.m. to 12:00 midnight) on or during any cultural or religious festive occasion.

2002 - Biological Diversity Act is act to provide for conservation of biological diversity, sustainable use of its components, and fair and equitable sharing of benefits arising out of use of biological resources and knowledge associated with it.

Forest and wildlife.

1927 - Indian Forest Act and Amendment, 1984, is one of many surviving colonial statutes. It was enacted to ``consolidate the law related to forest, the transit of forest produce, and the duty leviable on timber and other forest produce''.

1972 - Wildlife Protection Act, Rules 1973 and Amendment 1991 provides for protection of birds and animals and for all matters that are connected to it whether it be their habitat or waterhole or forests that sustain them.

1980 - Forest (Conservation) Act and Rules, 1981, provides for protection of and conservation of forests.

Water.

1882 - Easement Act allows private rights to use resource that is, groundwater, by viewing it as attachment to land. It also states that all surface water belongs to state and is state property.

1897 - Indian Fisheries Act establishes two sets of penal offences whereby government can sue any person who uses dynamite or other explosive substance in any way (whether coastal or inland) with intent to catch or destroy any fish or poisonous fish in order to kill.

1956 - River Boards Act enables states to enroll central government in setting up Advisory River Board to resolve issues in inter-state cooperation.

1970 - Merchant Shipping Act aims to deal with waste arising from ships along coastal areas within specified radius.

1974 - Water (Prevention and Control of Pollution) Act establishes institutional structure for preventing and abating water pollution. It establishes standards for water quality and effluent. Polluting industries must seek permission to discharge waste into effluent bodies. CPCB (Central Pollution Control Board) was constituted under this Act.

1977 - Water (Prevention and Control of Pollution) Cess Act provides for levy and collection of cess or fees on water consuming industries and local authorities.

1978 - Water (Prevention and Control of Pollution) Cess Rules contains standard definitions and indicate kind of and location of meters that every consumer of water is required to affix.

1991 - Coastal Regulation Zone Notification puts regulations on various activities, including construction, are regulated. It gives some protection to backwaters and estuaries.

Air.

1948 - Factories Act and Amendment in 1987 was first to express concern for working environment of workers. Amendment of 1987 has sharpened its environmental focus and expanded its application to hazardous processes.

1981 - Air (Prevention and Control of Pollution) Act provides for control and abatement of air pollution. It entrusts power of enforcing this Act to CPCB.

1982 - Air (Prevention and Control of Pollution) Rules defines procedures of meetings of Boards and powers entrusted to them.

1982 - Atomic Energy Act deals with radioactive waste.

1987 - Air (Prevention and Control of Pollution) Amendment Act empowers central and state pollution control boards to meet with grave emergencies of air pollution.

1988 - Motor Vehicles Act states that all hazardous waste is to be properly packaged, labelled, and transported.

Judicial Activism.

Supreme Court has been taking active role to protect environment and in several cases has passed directions as also authorised appropriate authority to close down industries violating environmental regulations.

The National Environment Policy 2004.

It is response to our national commitment to clean environment, mandated in Constitution in Arts. 48A and 51A(g), strengthened by judicial interpretation of Art. 21. It recognizes that maintaining healthy environment is not state's responsibility alone, but also that of every citizen. NEP, 2004 is also intended to be statement of India's commitment to making positive contribution to international efforts towards maintaining and enhancing quality of environment. It also seeks to stimulate partnerships of different stakeholders, i.e. public agencies, local communities, investment community, and international development partners, in harnessing their respective resources and strengths for environmental management.

The National Environment Policy 2006.

The National Environment Policy seeks to extend coverage and fill in gaps that still exist in light of present knowledge and accumulated experience. It does not displace but builds on earlier policies. Emphasis of this policy is on conservation of environmental resources.

12 ESTATES AND TRUSTS

12.01 DEATH:

Presumption.

Under Indian Evidence Act, when person is not heard of for seven years by persons who would have naturally heard of him, burden of proof that he is alive is on person who affirms that he is alive.

Corollary of this proposition by Indian Evidence Act §114 is that person not heard of for seven years by persons mentioned in proposition is presumed to be dead in proceedings where such presumption is required (and justified by circumstances), e.g., in application for representation to his estate, proceedings in respect of marriage or divorce in which he was involved, etc.

Registration.

Death of person has to be registered with prescribed authority. When required, such authority issues extract relating to relevant entry in deaths register on payment of small fee.

Actions.

When person dies, representation to or administration of his estate may have to be obtained. If deceased was party to a suit and cause of action survives in law, his heirs or legal representatives will have to be brought on record of suit.

When person dies as result of accident arising out of and in course of his employment as workman defined in Workmen's Compensation Act, his dependants are entitled to apply for payment of compensation by his employer to Commissioner for Workmen's Compensation within two years from date of death or further time granted by Commissioner on sufficient cause for delay being shown. When person dies of accident arising due to wrongful act, neglect or default of another person, his representatives are entitled to sue such other person for benefit of wife, husband, parent and child of deceased, for damages in competent court of law under Fatal Accidents Act. When death arises by reason of accident involving motor vehicles, claim for compensation should be made to Motor Accidents Tribunal within six months. Tribunal has power, for sufficient cause to condone delay. In practice Tribunal liberally exercises its powers to condone delay in filing claim application.

Tax.

See category 21 Taxation, topic Taxes, subhead Estate Duty.

12.02 DESCENT AND DISTRIBUTION:

How property of person devolves after his death depends on religion professed by deceased. Therefore different sets of rules apply according to whether deceased was Hindu, Mohammedan, Parsi, Christian, etc.

Hindus.

Until 1956, Hindus were governed by traditional Hindu Law derived from original texts given by sages of antiquity, custom and usage and as interpreted by various courts.

Hindu Succession Act, 1956 codified law to very large extent.

Basic concept of Hindu law that Hindu was joint in his estate with other members of his family and so on death of male member of joint and undivided Hindu family his interest in property devolved by survivorship on continuing male members has been altered to permit Hindu to bequeath his share of joint family property, share being ascertained as if on death there was notional partition. Female heirs are put on par with male heirs; widow's limited interest (right of enjoyment with limited power of disposal) is abolished; classes of heirs (on intestacy) are prescribed, proximate class excluding remoter class. Hindu Succession (Amendment) Act, 2005 passed by both houses of parliament in Aug. 2005, assented on 5th Sept. 2005 and came into force on 9th Sept. 2005. It removes discrimination in §6 of Hindu Succession Act, 1956 by giving equal rights to daughters in “Hindu Mitakashara Coparcenary Property” as sons have. It has omitted §13 to remove disability on female heir with regard to getting share of ancestral property. Andhra Pradesh, Tamil Nadu, Karnataka & Maharashtra have already made necessary changes in law giving equal rights to daughters in ancestral property.

Parsis.

In matter of succession and inheritance Parsis are governed by Indian Succession Act, 1925, in same way as Christians, Jews and even in some respects Hindus and Mohammedans.

However there are certain special rules which exclusively govern Parsis in matter of intestate succession specifically dealt with in §§50 to 56 of Indian Succession Act, 1925.

Devolution of property on intestacy: (a) Where Parsi dies leaving widow or widower and children, property is so divided that share of each of them receive equal shares and (b) where such Parsi dies leaving children, but no widow or widower, then among children in equal shares.

However in either of above cases, where Parsi dies leaving one or both parents in addition to widow or widower and children, then property is so divided that parent or each of parents must receive share equal to half of share of each child.

Where Parsi dies leaving any lineal descendant, or if Parsi dies without leaving any lineal descendant but leaving widow or widower, then Indian Succession Act makes elaborate and exhaustive provisions for distribution of estate of Parsi who dies intestate.

In case Parsi dies without lineal descendants or widow or widower then his property devolves on next-of-kin according to elaborate rules made in Act. These rules are framed on basis of “degree of consanguinity”, that is nearness of blood. Scheme of distribution is that first paternal relatives are to be exhausted up to paternal great grandfather and paternal great grandmother and their lineal descendants, then relatives from maternal side are to be exhausted.

Muslims are governed by traditional Mohammedan law.

Except as above, succession and testamentary disposition is under Indian Succession Act, which prescribes how wills are to be made, executed, attested, revoked, construed; rules governing legacies, bequests, grant of probate and letters of administration, succession certificates and intestate devolution; rights, duties and power, and disability of executors/administrators; when legal representation to deceased's estate mandatory etc.

12.03 EXECUTORS AND ADMINISTRATORS:

Indian Succession Act, 1925 (XXXIX of 1925) makes statutory provision for law relating to executors and administrators.

Executor is person to whom execution of last will of deceased person is, by testator's appointment, confided (§2[c]) and administrator is person appointed by competent authority to administer estate of deceased person when there is no executor (§2[a]).

Powers of Executor or Administrator.

Executor or administrator has same power to sue in respect of all causes of action that survive deceased and may exercise same power for recovery of debts as deceased had when living. (§305). All demands whatsoever and all rights to prosecute or defend any action or special proceedings existing in favour of or against person at time of his death, survive to and against his executors or administrators except (1) Causes of action of defamation and assault as defined in Indian Penal Code; (2) or other personal injuries not causing death of the party; and (3) where after death of party, relief sought could not be enjoyed or granting it would be nugatory. (§306).

Executor or administrator has power to dispose of property of deceased in such manner as he thinks fit. (§307).

Executor or administrator may incur expenditure (1) On any acts necessary for proper care and management of estate; and (2) with sanction of High Court on such religious, charitable and other objects and on improvements of property as may be reasonable and proper. (§308).

When there are several executors or administrators, powers of all may, in absence of direction to contrary, be exercised by any one of them who has proved will or taken out administration. (§311).

Upon death of one or more of several executors or administrators, in absence of any direction to contrary in will or grant of letters of administration, all powers of office become vested in survivors or survivor. (§312).

Administrator of properties unadministered has, with respect to such properties, same powers as original executors or administrators. (§313).

Administrator during minority has all powers of ordinary administrator. (§314).

When grant of probate or letters of administration is made to married woman, she has all powers of ordinary executor or administrator. (§315).

Duties of Executor or Administrator.

(1) To provide funds for performance of necessary funeral ceremonies of deceased in manner suitable to his condition, if property sufficient was left for purpose (§316); (2) must (a) within six months from grant of probate or letters of administration, exhibit in court inventory containing full and true account of all property in possession and all credits and also all debts owing by any person to which executor or administrator is entitled in that character; and (b) within

one year from grant exhibit account of estate showing assets which have come to his hands and manner in which they have been applied or disposed of. Intentional omission of exhibiting inventory ordered by court or intentional exhibition of false inventory are offences under §§176 and 193 respectively of Indian Penal Code (§317); (3) must collect with reasonable diligence, property of deceased and debts that were due to him at time of his death (§319) and pay thereout, in following order: (a) reasonable funeral expenses, according to status of deceased; death-bed charges, including fees for medical attendance; boarding and lodging charges incurred one month prior to his death (§320); (b) expenses of obtaining probate or letters of administration and costs incurred in those proceedings (§321); (c) wages for services rendered to deceased within three months prior to his death by any labourer, artisan or domestic servant (§322); and (d) debts of creditors of deceased equally and ratably as far as assets of deceased will extend (§323); (4) may pay off legacies only after payment of all debts of deceased (§325).

Disabilities.

Executor or administrator cannot receive commission or agency charges at scale higher than that fixed in respect of Administrator General by or under Administrator General Act 1963 (§309); nor directly or indirectly purchase property of deceased. If he does so, transaction becomes voidable at instance of any other person interested in property sold. (§310).

Executor of His Own Wrong (Executor de son tort).

Person who intermeddles with estate of deceased, or does any other act which belongs to office of executor, while there is no rightful executor or administrator in existence, thereby makes himself an executor "of his own wrong." But intermeddling for purpose of: (1) preserving goods of deceased; (2) providing for his funeral; (3) providing for immediate necessities of his family or properties; or (4) dealing in ordinary course of business with goods of deceased received from another; does not make executor "de son tort." (§303).

Executor de son tort is liable to (1) rightful executor or administrator; (2) any creditor of deceased; (3) any legatee under will to extent of assets which may be coming to his hands after deducting: (a) payment made to rightful executors and administrators; (b) payments made in due course of administration. (§304).

Liability for Devastation.

When executor or administrator misapplies estate of deceased or subjects it to loss or damage he is liable to make good loss or damage so occasioned. This sort of conduct on part of executor or administrator is technically called "devastavit," i.e., wasting of estate, and such executor or administrator is called "devastant." (§368). When he occasions loss to estate by neglecting to get in any part of property of deceased, he is liable to make good the amount. (§369).

Miscellaneous Provisions.

Assent of executor or administrator is necessary to complete legatee's title to his legacy. (§332). Executor or administrator is not bound to pay or deliver any legacies until expiration of one year from testator's death, even if testator desires that it should be paid earlier. This is known as executor's year. (§337).

12.04 SUCCESSION AND INHERITANCE:

See topic 12.02 Descent and Distribution.

12.05 WILLS:

The statutory law relating to Wills is embodied in the Indian Succession Act, being Act No. XXXIX of 1925. The formal requirement of wills follows the English pattern.

Capacity.

Every person, male or female, of sound mind, not being a minor, may dispose of his or her property by will. A married woman may dispose by will any property which she could alienate by her own act during her life. Deaf or dumb or blind persons are not incapacitated for making a will if they are able to know the implication of it. A person who is ordinarily insane may make a will during a lucid interval but no person can make a will while he is in such a state of mind whether arising from intoxication or from illness or from any other cause, that he does not know what he is doing. (§59).

No person having nephew or niece or any near relative has power to bequeath any property to religious or charitable uses except by will executed not less than 12 months before his death and deposited within six months of its execution in place provided by law, namely, office of Sub-Registrar of Assurances of district for safe custody of wills of living persons. (§118 of Indian Succession Act). This is now of limited application. It does not apply to Hindus, Buddhists, Sikhs, Jains, Mohammedans and Parsis.

Aliens, whether friends or enemies, if not disqualified by mental incapacity or minority, may dispose of property by will.

Hindus.

By virtue of the Hindu Succession Act, 1956, being Act No. XXX of 1956, any Hindu can, by will, dispose of any property in accordance with the provisions of the Indian Succession Act, 1925, including his interest in joint family property, subject to the right of maintenance of minor sons and unmarried daughters, the widow, the parents and the widowed daughter-in-law. (§30 of the Hindu Succession Act).

Mohammedans.

The Indian Succession Act does not apply to Mohammedans. They are governed by their own personal law. Every Mohammedan of sound mind and not a minor can dispose of his property by will which may be either verbal or in writing. A Mohammedan cannot by his will dispose of more than one-third of the surplus of his estate after payment of funeral expenses and debts. Bequest by a Mohammedan in excess of the legal third cannot take effect unless all the heirs consent thereto after the death of the testator. Also, a Mohammedan cannot bequeath anything to an heir and the bequest to an heir will be invalid unless the other heirs consent after the testator's death. A Mohammedan Will is not required to be probated.

Execution.

An unprivileged will (see catchline A Holograph Will, infra) must be in writing and every testator must sign or affix his mark to the will or it must be signed by some other person in his presence and by his direction. The signature or mark of the testator or the signature of the person signing for him must be so placed that it shall appear that it was intended thereby to give effect to the writing as a will. The will must be attested by two or more witnesses each of whom has seen the testator sign or affix his mark to the will or has seen some other person sign the will in the presence of and by the direction of the testator or has received from the testator a personal acknowledgment of his signature or mark, or of the signature of such other person; and each of the witnesses must sign the will in the presence of the testator, but it is not necessary that more than one witness be present at the same time and no particular form of attestation is necessary. (§63 of the Indian Succession Act).

A holograph will, that is, one written and signed by the testator himself, is included in the definition of an unprivileged will. It must be attested by two witnesses. Persons governed by the Indian Succession Act are not competent to make a nuncupative or oral will, though Mohammedans may make an oral will as stated above.

Revocation.

A will may be revoked or altered by the maker of it at any time when he is competent to dispose of his property by will. An unprivileged will is revoked by the marriage of the maker or by another will or codicil declaring an intention to revoke the same and executed in the same manner in which an unprivileged will is required to be executed or by burning, tearing or by destroying the same by the testator or by some person in his presence and by his direction with the intention of revoking the same. (§70 of the Indian Succession Act).

In Military Service, etc.

Any soldier or airman employed in an expedition or engaged in actual warfare or any mariner at sea may, if he has completed the age of 18 years, make a privileged will. (§65 of the Indian Succession Act). A privileged will may be in writing or by word of mouth. If it is verbal, it must be declared before two witnesses, present at the same time. A verbal will shall be null and void at the expiration of one month after the testator shall have ceased to be entitled to make a privileged will. If it is a written will and it is written wholly by the testator, neither the signature of the testator nor attestation is necessary. If it is written by some other person wholly or in part, the signature of the testator is necessary but attestation is not. A privileged will may be revoked by an unprivileged will or by an act expressing an intention to revoke accompanied by such formality as would be sufficient to give validity to a privileged will and by other ways as prescribed for revoking an unprivileged will. (§66 of the Indian Succession Act).

If a beneficiary named in the will witnesses the will, its validity is not affected, but the benefiting witness and the respective husband or wife of the witness loses all interest under the will. (§67 of the Indian Succession Act).

A will relating to immovable property in India must comply with the provisions of the Indian Succession Act as mentioned above. The validity of a will relating to movable property in India will depend upon the general law of the domicile of the deceased at the date of his death.

Foreign Wills.

Wills made by persons who are not domiciled in India so far as same relate to immovable property situate within India must be in accordance with law relating to execution of wills in India. (See subhead Execution, supra.) Will made by person who is not domiciled in India, so far as it relates to movable property of such person whether in India or elsewhere, must be executed in accordance with law of his domicile at time of his death wherever will may be executed, and courts in India will deal with instrument exactly as court of testator's domicile would deal with it. If foreign will has been proved and is deposited in court of competent jurisdiction outside India and properly authenticated copy of will is produced, letters of administration may be granted with copy of such copy of will annexed. No further proof is required as to due execution of will. “Authenticated copy” does not mean that copy of will should be under seal of foreign court, notarially certified copy would do. If foreign will is not so proved, courts in India on receipt of authenticated copy will take evidence as to due execution of will according to law of country in which testator was domiciled, and in case of movable property court will satisfy itself as to law relating to execution of wills in force in such country.

No probate can be granted in India in the case of a will executed in India by a foreigner, which only disposes of property outside India.

If a foreigner has left property in India, letters of administration must be obtained from a competent Indian court in respect of such property although deceased may have had his domicile in a country in which law relating to succession differs from law in India. Grant of administration by a foreign court or even by a court in British Dominions outside India is not sufficient.

See also topic 12.02 Descent and Distribution.

13 FAMILY

13.01 ADOPTION:

There is no statutory enactment in India providing for adoption of child by persons other than Hindus. Adoption among Hindus is governed by Hindu Adoptions and Maintenance Act (LXV VIII of 1956). However, other persons like Indian Muslims, Christians, Parsis, Jews and foreign nationals can resort to provisions of Guardian and Wards Act, 1890 for purpose of facilitating such adoption by being declared guardians of child sought to be adopted. At present inter-country adoption or adoption by foreigners can only be processed under Guardian and Wards Act, 1890.

Hindu Adoption and Maintenance Act LXV VIII of 1956.

A Hindu family must have male heir, inter alia, for performing funeral rites. When married Hindu has no son, grandson (son's son) or great grandson (son's son's son) born to him or her, he or she may adopt son. When married Hindu has no daughter or granddaughter (son's daughter) born to him or her, he or she may adopt daughter. Act overrides customary law. Person giving in adoption and adopter must have capacity. Adoption must comply with requirements of Act.

Guardian and Wards Act, 1890.

Act enacted for providing for appointment of guardian of person or property or both of minor. When court is satisfied that it is for welfare of minor that order should be made appointing guardian of his person or property or both or declaring person to be such guardian, then it may so order. (§7[1]). Applications with regard to guardianship of person of minor are to be made to District Court having jurisdiction in place where minor ordinarily resides. (§9[1]). On application (by petition), court, if satisfied that there is ground for entertaining, will fix date for hearing and cause notice of application and of date fixed for hearing to be served on parents of minors if residing in any State to which Act extends, persons, if any, named in application as having custody or possession of person of minor, person proposed in application to be appointed guardian and any other person to whom special notice in opinion of court should be given. (§11). In appointing guardian of minor, court will be guided by what appears to, in circumstances, be for welfare of minor, having regard to age, sex, religion of minor, character and capacity of proposed guardian, wishes of any deceased parent, any existing or previous relations of proposed guardian with minor or his property. (§17). Guardian of person of minor appointed by court unless he is collector or is guardian appointed by will or other instruments shall not, without leave of court by which he was appointed, remove ward from limits of its jurisdiction except for such purposes as may be prescribed.

Inter-Country Adoption.

Procedure.

Provisions of Guardian and Wards Act, 1890 Act VII of 1890 as noted above are to be followed for purpose of carrying through inter-country adoption as there is no law of adoption. Intending foreign adopter makes application to court for being appointed guardian of person of destitute and abandoned child whom he/she wishes to adopt and for leave of court to take child to country of adopter on being appointed such guardian.

Under Bombay High Court (Original Side) Rules, when foreigner applies for being appointed guardian of Indian child applicant or his advocate must furnish copy of application to Secretary, of Indian Council of Social Welfare, Bombay and inform Secretary of date of hearing requesting that any representation which Council may make be submitted in duplicate to Prothonotary & Senior Master of High Court at least four days before hearing. Court may, while passing order on application, direct applicant to pay costs of Council and in such event

Prothonotary and Senior Master shall not issue certified copy of order on application made until applicant produces Council's receipt for payment of costs. When foreign nationals are declared guardian of Indian children with permission to remove such children out of India, copy of such order shall be endorsed to Government of India, Ministry of Education & Social Welfare (Department of Social Welfare).

Requirement of Foreign Adopter: (1) Application from intending foreign adopter desiring to adopt must be sponsored by social or child welfare agency recognised or licensed by government of country in which foreign applicant is resident; (2) social or child welfare agency which sponsors application must get home study report prepared by professional worker indicating basis why application is sponsored and whether foreigner wishing to adopt is fit and suitable and has capacity to adopt; (3) application must be accompanied by: (a) recent photograph of family, (b) marriage certificate of foreigner and his or her spouse, (c) declaration concerning their health with certificate of medical fitness duly certified by medical doctor, (d) declaration of financial status with employer certificate, if applicable, income tax assessment orders, bank references and particulars of property owned, (e) declaration stating their willingness to be appointed guardian and undertaking to adopt child according to law of their country within period of two years from date of arrival of child in their country, and to give intimation of adoption to court appointing them guardian and also to social or child welfare agency in India, further that they would maintain child and provide education according to their status and send reports of progress of child with photographs quarterly during first two years and thereafter half yearly for three years, (f) power of attorney of foreigner wishing to adopt in favour of officer of social or child welfare agency in India processing case authorising attorney to handle case on behalf of foreigner in case he/she is not in position to come to India; (4) social or child welfare agency sponsoring application must certify that foreigner seeking to adopt is permitted to do so according to law of his country; (5) all certificates, declaration and documents accompanying application of foreigner to be notarised by notary public whose signature should be attested by officer of Ministry of External Affairs or Justice or Social Welfare of country of foreigner or by officer of Indian Embassy or High Commission or Consulate; (6) social or child welfare agency sponsoring application must undertake when forwarding application to social or child welfare agency in India that it will ensure adoption of child by foreigner according to law of adopter's country within two years and will send two certified copies of adoption order to social or child welfare agency in India through which application for guardianship is processed so that one copy is filed in court and other remains with agency; (7) social or child welfare agency sponsoring application must agree to send to social or child welfare agency concerned progress reports of child, quarterly during first year and half yearly for subsequent year or years until adoption is effected; (8) social or child welfare agency sponsoring application of foreigner must undertake that in case of disruption of family of foreigner before adoption it will care for child and find suitable alternative placement with approval of concerned social or child welfare agency in India and report such alternative placement to court handling guardianship proceedings so that court and concerned social and child welfare agency in India can pass information to Secretary of Ministry of Social Welfare, Government of India.

Practice.

Recognised social and child welfare agency must consider which child would be suitable for being given to foreign applicant and would fit with his family and environment and send photograph and child study report of such child to foreign applicant for his approval. There must be specific approval for specific child. After receipt of such approval application for appointment of foreigner as guardian of child can proceed. Guardianship order shall make provision for deposit of sum of money or bond to enable child to be repatriated should it become necessary. Guardianship order may permit social or child welfare agency which has taken care of child pending selection for adoption to receive such amount as court thinks fit from foreigner appointed as guardian of such child. Guardianship order to have photograph of child countersigned by officer of court has been made mandatory. Proceedings are as far as possible to be disposed of within two months from filing application. Proceedings are held in camera. Register of names and particulars of children where order for appointment of guardians has been made together with addresses and particulars of adoptive parents is to be maintained by Ministry of Social Welfare, Government of India. Government of India will send to Indian Embassy or High Commission in country of prospective adopter names, addresses and particulars of prospective adoptive parents together with particulars of children taken so that there is watch over welfare and progress of children adopted.

13.02 DIVORCE:

Marriage and divorce go together in most statutory enactments on personal law in India. See topic Marriage for relevant Acts.

Note: Family Courts Act has been enacted (generally lawyers are not permitted to represent parties) to bring about amicable resolution between parties. This legislation is new. Following principles still apply.

Hindu Divorce.

Any Hindu marriage may be dissolved by petition presented by either spouse on any of following grounds: other party (1) has had voluntary sexual intercourse with any person other than spouse; (2) has ceased to be Hindu by conversion to another religion; (3) has been incurably of unsound mind or has been suffering continuously or intermittently from mental disorder (including mental illness, arrested or incomplete development of mind, psychopathic disorder or disability including schizophrenia) to such extent that spouse cannot be reasonably expected to live with other; (4) is suffering from virulent and incurable form of leprosy; (5) is suffering from venereal disease in communicable form; (6) has renounced world by entering any religious order; (7) has not been heard of as being alive for seven or more years by persons who would have naturally heard from party concerned; (8) has treated spouse with cruelty; (9) has deserted spouse for two years immediately prior to petition. Either spouse may petition for divorce on ground that there has been no resumption of cohabitation for one year or more after decree for judicial separation or decree for restitution of conjugal rights. Petitioning wife has additional grounds for divorce viz. (1) where marriage was solemnized prior to Act, husband had second wife by second marriage contracted prior to commencement of Act provided other wife is alive at date of presenting petition, (2) husband has been guilty of rape, sodomy or bestiality after marriage, (3) order for maintenance of wife has been passed against husband under §18 of Hindu Adoption & Maintenance Act or under §125 of Code of Criminal Procedure and since such order, cohabitation between parties has not been resumed for one year or more, (4) her marriage (whether consummated or not) was solemnized before she attained age of 15 years and she has repudiated marriage after attaining age of 15 years but before attaining age of 18 years. (§13). On petition for dissolution of marriage by decree of divorce, Court may, if it considers it just, issue instead decree for judicial separation. (§13A).

Divorce may also be obtained by mutual consent of both spouses on ground that: (1) They have been living separately for period of one year or more, (2) they have not been able to live together, (3) they have mutually agreed that marriage should be dissolved. (§13B).

Procedure.—Petition cannot be presented within one year of marriage (§14) with exception in cases of exceptional hardship or depravity (§14). Divorced persons may re-marry after period of appeal has expired. (§15). Divorce is by petition to District Court within whose jurisdiction marriage was solemnised or parties last resided together. (§19). Petition must state ground of divorce and also that no collusion exists between parties. (§20). Petition must be verified by petitioner. (§20). Divorce proceedings are governed by Civil Procedure Code 1908. (§21). Court must consider following before granting decree: (1) Petitioner is not taking advantage of his or her own wrong or disability; (2) has not connived at or condoned acts complained of; where ground is cruelty, that such cruelty has not been condoned; (3) there is no collusion between parties; (4) no unnecessary or improper delay in presenting petition; (5) there is no legal ground why relief should not be granted. (§23). Court must endeavour to reconcile parties before granting divorce. Court may order respondent to pay maintenance for either husband or wife pendente lite (§24) or subsequently permanent alimony and maintenance (§25). Court may make any order regarding custody, maintenance and education of minor children consistently with their wishes. (§26). Court may make orders regarding disposal of joint marriage properties. (§27). Appeals lie from decision of District or High Court in ordinary way on all points except costs of parties. (§28).

Restitution of Conjugal Rights and Judicial Separation.—When either spouse has without reasonable cause withdrawn from society of other, aggrieved party may apply by way of petition to District Court for restitution of conjugal rights; court may grant decree on being satisfied of truth of statements in petition, and on there being no legal ground why petition should not be granted. (§9). Either spouse may petition court for decree of judicial separation on any of following grounds available for divorce listed at (1) to (9) supra. Wife may also petition for judicial separation on three additional grounds for divorce available only to petitioning wives (supra). (§10). Court has power to rescind decree of judicial separation if it considers it just and reasonable to do so, upon petition by either party. (§10).

Muslim Divorce.

Divorce among Muslims is governed by Muslim customary law. As with marriage there are slight differences between the various communities but following principles are applicable to all Muslims. In addition there is Dissolution of Muslim Marriages Act VIII of 1939 which enables divorce by wife.

The “Nikha” or contract of marriage may be dissolved in any one of following ways: (1) By husband at his will without intervention of court, known as Talak; (2) by mutual consent of spouses without intervention of court, known as Khula; (3) by wife without husband's consent according to terms of contract made before marriage known as Mubara'at; (4) by judicial decree under Act, at suit of either spouse.

Talak.

Any Muslim of sound mind who has attained puberty may divorce his wife whenever he desires, without assigning any cause. Talak may be effected either orally by spoken words or by written document called Talaknama. No particular form of words is required for oral talak; if words are express, or clear, no proof of intention to divorce is required; but proof of intention is required where words are ambiguous. It is not necessary that talak be pronounced in presence of wife, or even addressed to her; but wife should know of it for purposes of dower and her alimony may continue until she is informed although divorce is valid even without her knowledge. Talak in writing is effected by Talaknama which may be deed by which divorce is effected or may only be record of fact of an oral talak. Deed may be executed in presence of Kazi (priest) or wife's father or other witnesses. Deed may be in customary form, i.e., properly superscribed and addressed so as to show name of writer or person addressed, called “manifest” if it can be easily read and understood. Intention of divorce is then presumed and no proof required. But if deed is not in customary form or not manifest then intention must be proved; if deed is manifest and in customary form it takes effect immediately even if wife is not informed. But for purposes of dower, wife must be informed. Talak may be effected in following ways: (1) Talak ahsan, consisting of single pronouncement of divorce made during a “tuhr” (period between menstruations) followed by abstinence from sexual intercourse for period of “iddat,” (2) Talak hasan, consisting of three pronouncements made during successive “tuhrs,” no intercourse taking place during any of the three “tuhrs”; (3) Talak-ul-bidat or talaki-badai, consisting of three pronouncements made during a single tuhr either in one sentence (e.g. I divorce thee thrice) or in separate sentences, e.g., (I divorce you; I divorce you; I divorce you) or of a single pronouncement made during a “tuhr” clearly indicating an intention irrevocably to dissolve marriage, e.g., “I divorce thee irrevocably.” Talak in ahsan form becomes irrevocable and complete on expiration of iddat period. Talak in hasan form becomes irrevocable on third pronouncement irrespective of iddat period. Talak in badai form becomes irrevocable immediately upon pronouncement irrespective of iddat. Until talak becomes irrevocable, husband has option to revoke it, either expressly or impliedly as by resuming intercourse. Talak in writing becomes irrevocable and takes effect immediately on its execution, provided there are no words showing a different intention. Husband has power to divorce, but may delegate this power to wife or third person absolutely or conditionally, and for a particular period or permanently. Delegate may then pronounce divorce accordingly. Temporary delegation of power is irrevocable; permanent delegation may be revoked. However, wife may by agreement either before or after marriage stipulate for liberty to divorce herself in specified contingencies provided these are reasonable and not opposed to policy of Muslim law. This power is irrevocable and may be exercised at any time. All India Muslim Personal Law Board has disapproved practice whereby husbands could divorce their wives by simply reciting talaq, talaq, talaq. New talaqnama drafted by Board disapproves age-old three talaq system and replaces it with Shariat approved “phased talaq”. Under new talaqnama, separating couples would be given minimum of three months to reconsider their decision and if they insist on separation even after expiry of said period, Qazi is empowered to formalize talaq as per new talaqnama. Muslim women who virtually had no separation rights till now, have also been given equal rights to approach Qazi for separation against their erring husbands. Board is also recommending increase in “mehr” which is fixed at time of marriage.

Ila is a species of constructive divorce whereby husband abstains from intercourse for minimum period of four months pursuant to vow. Fulfilment of vow does not per se operate as divorce but gives wife right to demand judicial divorce.

Zihar is a form of inchoate divorce; when husband compares his wife to his mother or any female within prohibited degrees, wife can refuse intercourse with him until he performs penance. In default of penance, wife can apply for judicial divorce.

Khula is a divorce by consent and at instance of wife. Wife gives or agrees to give consideration to husband for her release from marriage tie; terms of bargain are matters of arrangement between spouses and wife may release her dower and other rights for benefit of husband as consideration. Failure to pay consideration does not invalidate divorce; though husband may sue wife for recovery of consideration. Form is commercial: offer by wife to compensate husband if he releases her from marital ties and acceptance of offer by husband. Acceptance completes contract and operates as divorce. Execution of deed (Khula-nama) is customary. Khula divorce is by consent, but aversion is on wife's side and she desires divorce.

Mubara'at.

When aversion is mutual and both sides want divorce, it is called mubara'at. Either side may offer divorce, but once accepted it is complete. No need for written document; however, wife is obliged to observe “iddat.”

In both Khula and Mubara'at divorces, wife relinquishes her dower, usually, but husband is obliged to maintain her during iddat, and also maintain any children by her.

Judicial Divorce at Suit of Wife.

Under Dissolution of Muslim Marriages Act VIII of 1939; wife can sue for divorce on following grounds: (1) Whereabouts of husband unknown for period of four years; (2) failure by husband to provide maintenance for wife for two years; (3) sentence or imprisonment on husband for seven years or more; (4) failure without reasonable cause to perform marital obligations for three years; (5) impotence of husband; (6) insanity of husband; (7) repudiation of marriage by wife; (8) cruelty of husband; (9) husband suffered from leprosy or virulent venereal disease; (10) any other ground recognised by Muslim law, e.g., she was married by father before 15 years and repudiated marriage before 18 years of age. (§2). Incompatibility of temperament is not ground for divorce under (10) but cruelty and desertion are.

On valid divorce being effected, wife may marry another husband on completion of "Iddat" period if marriage was consummated; if unconsummated she may marry immediately. Husband may re-marry up to four wives immediately. Wife becomes entitled to payment of dower immediately if marriage was consummated. If unconsummated and dower was fixed, she is entitled to half fixed amount, but Act does not affect customary law rights to dower. (§5). Divorced Muslim woman can claim iddat during iddat period. (Muslim Woman Protection of Rights on Divorce Act, 1986). As soon as divorce becomes irrevocable, mutual rights of inheritance cease and cohabitation and intercourse are unlawful. If intercourse does occur, offspring is illegitimate, but parties may remarry by observing certain customs.

Parsi Divorce.

Parsis may be divorced only under Parsi Marriage and Divorce Act III of 1936 (except where Special Marriage Act applies i.e. marriage is not registered under Parsi Marriage & Divorce Act but under Special Marriage Act). If either spouse is continually absent from other for seven years without any person who would naturally hear from parties concerned having done so, marriage may be dissolved at instance of either party. (§31). Either spouse can sue for divorce on any of following grounds: (1) That marriage has not been consummated within one year of solemnisation owing to wilful refusal of defendant; (2) defendant has been of unsound mind at date of marriage and has been habitually so until commencement of suit; but plaintiff must be ignorant of this fact at date of marriage and suit must be filed within three years of marriage; (3) defendant has been incurably of unsound mind for period of at least two years prior to commencement of proceedings or has been suffering continuously or intermittently from such mental disorder so that plaintiff cannot reasonably be expected to live with defendant; (4) defendant was pregnant by some man other than plaintiff at time of marriage; but plaintiff must be ignorant of fact at time of marriage; intercourse must not have taken place after he came to know; suit must be filed within two years of date of marriage; (5) defendant has committed adultery, fornication, bigamy, rape or an unnatural offence after marriage; suit must be filed within two years of plaintiff coming to know of fact; (6) defendant since solemnization of marriage has treated plaintiff with cruelty or has behaved in such way as to render it improper to compel plaintiff to live with defendant; (7) defendant has voluntarily caused grievous hurt, after marriage, to plaintiff or infected plaintiff with venereal disease, or caused (wife) plaintiff to submit to prostitution; suit must be filed within two years of each offence; (8) defendant is undergoing imprisonment of seven or more years for offence under Indian Penal Code; defendant must have served one year's sentence prior to suit being filed; (9) defendant has deserted plaintiff for at least two years; (10) decree or order has been passed against defendant by magistrate awarding separate maintenance to plaintiff, and parties have not had marital intercourse for minimum one year since date of decree or order; (11) defendant has ceased to be Parsi by conversion to another religion. Either spouse may sue for divorce: (1) On ground that there has been no resumption of cohabitation for at least one year after decree for judicial separation or (2) that there has been no restitution of conjugal rights for at least one year after decree for restitution of conjugal rights. Provided however, that no decree for divorce on ground mentioned in (1) if plaintiff has not complied with order of maintenance passed against him either under §40 of Act or under §125 of Code of Criminal Procedure.

Divorce by mutual consent may also be obtained if: (1) Spouses have been living separately for at least one year; (2) they have not been able to live together; and (3) they have mutually agreed that marriage should be dissolved. No suit for divorce by mutual consent would lie until at least one year has expired from date of marriage. (§32B).

Procedure.

Where ground for divorce is adultery, plaintiff must make person with whom adultery is alleged to have been committed co-defendant; where petitioner is husband, court may order such co-defendant to pay costs of proceedings. (§33). Court may grant decree after being satisfied of following points: (1) Act or omission complained of has not been condoned; (2) spouses are not colluding together; (3) plaintiff has not connived at or been accessory to act or omission; (4) there has been no unnecessary or improper delay in instituting suit; (5) there is no legal ground why relief should not be granted. (§35). Defendant may counterclaim for any relief under Act. (§37). Court has power to grant alimony pendente lite to wife or husband and permanent alimony subsequently. Court may dispose of joint matrimonial property as deemed just and proper. (§42). Proceedings shall be "in camera." (§43). Trial must be in presence of three Parsi delegates in Parsi Chief Matrimonial Court or District Court; Civil Procedure Code 1908 governs Procedure. (§44). All questions of law and procedure shall be determined by judge, but decision on facts must be that of majority of delegates before whom case is tried; where delegates are evenly divided judge has casting vote. (§46). Appeal lies to High Court on certain grounds only. (§47). When time for appeal has expired parties are free to marry again. (§48). Court has power to make orders regarding custody, maintenance and education of children under 18 years of age. (§49). If divorce is on ground of wife's adultery, court has power to order settlement of wife's property for benefit of children. (§50).

Restitution of Conjugal Rights and Judicial Separation.

Where either spouse has deserted or without lawful excuse ceased to co-habit with other spouse, offended party may sue for restitution of his or her conjugal rights. Court may grant decree if satisfied of truth of allegations in plant and if there is no just ground why relief should not be granted. (§36). Any married person may sue for judicial separation on same grounds as for divorce or on ground that defendant has been guilty of such cruelty towards plaintiff or their children, or used such personal violence, or has behaved in such a way as to render it improper in judgment of court to compel plaintiff to continue to live with defendant. (§34).

Divorce Under Special Marriage Act XLIII of 1954.

This Act applies to dissolution of marriage contracted under Act. Petition for divorce may be presented by either spouse to District Court on any of following grounds: that respondent (1) has after solemnization of marriage, had voluntary sexual intercourse with any person other than spouse; (2) has deserted petitioner without cause for period of two years minimum immediately prior to presentation of petition; (3) is undergoing prison sentence of seven or more years for offence under Indian Penal Code; (4) has treated petitioner with cruelty since solemnisation of marriage; (5) has been incurably of unsound mind or has been suffering continuously or intermittently from mental disorder (including mental illness, arrested or incomplete development of mind, psychopathic disorder or disability including schizophrenia) to such extent that spouse cannot be reasonably expected to live with other; (6) has been suffering from venereal disease in communicable form; (7) has been suffering from leprosy (not contracted from petitioner); (8) has not been heard of as alive for seven years by person who would be likely to hear from party. Either spouse may petition for divorce on ground that there has been no resumption of cohabitation for one year or more after decree for judicial separation or there has been no restitution of conjugal rights for one year or more after decree for restitution of conjugal rights. Further ground for wife petitioner: (1) That husband has since solemnisation of marriage been guilty of rape, sodomy or bestiality; (2) order for maintenance of wife has been passed under §18 of Hindu Adoption Maintenance Act or under §125 of Code of Criminal Procedure and since such order cohabitation between parties has not been resumed for one year or more. (§27).

Divorce may also be obtained by mutual consent of both parties on ground that: (1) They have been living separately for period of one year or more; (2) they have not been able to live together; (3) they have mutually agreed that marriage should be dissolved.

Procedure.

Petition may not be filed within one year of marriage with certain exceptions. (§29). Petition must be to District Court within whose jurisdiction marriage was solemnised or spouses last resided together. (§31). Petition must state ground for divorce and also that no collusion exists between spouses. (§32). Statement must be verified. (§32). Proceedings shall be “in camera.” (§33). Court must ascertain following points before granting decree: (1) Ground for relief exists; (2) where ground is adultery, petitioner has not in any manner been accessory to or connived at or condoned adultery; (3) where ground is cruelty, petitioner has not condoned it in any manner; (4) when divorce is by mutual consent, such consent has not been obtained by force, fraud or undue influence; (5) petition is not presented or prosecuted in collusion with respondent; (6) there was no unnecessary or improper delay in instituting proceeding; (7) there is no legal ground why relief may not be granted. (§34). Court must endeavour to reconcile parties before granting decree. (§34).

Where respondent opposes divorce on ground of petitioner's adultery, desertion or cruelty, court may grant respondent same relief as if he or she had presented petition. (§35). Court has power to order husband to pay alimony pendente lite (§36) and permanent alimony and maintenance subsequently (§37). Such orders may be varied subsequently. (§37). Court has power to make orders for custody, maintenance and education of children in accordance with their wishes; such order may be subsequently revoked, varied or suspended. (§38). Appeals lie to High Court; procedure is governed by Civil Procedure Code. (§§39, 40). High Court has power to make rules regulating procedure. (§41).

Restitution of Conjugal Rights and Judicial Separation.

When either spouse has, without reasonable excuse, withdrawn from society of other, aggrieved party may apply by way of petition to District Court for restitution of conjugal rights. Court may order decree if it is satisfied of truth of statements in petition and if there are no legal grounds why application should not be granted. (§22).

Petition for judicial separation may be presented to District Court by either spouse on same grounds as for divorce above; and further on ground of failure to comply with decree of restitution of conjugal rights. On decree being granted, it will no longer be obligatory for petitioner to co-habit with respondent; but court may on application by either spouse rescind decree if it thinks it just and reasonable to do so. (§23).

Divorce Act IV of 1869.

Christian marriages may be dissolved under this Act, and marriages of persons domiciled in India at time of petitioning for divorce; decrees of nullity may be obtained where marriage was solemnised in India and petitioner is resident here at time of petition; any other decree, e.g., restitution of conjugal rights of judicial separation, alimony, settlements or custody of children, can only be granted if petitioner resides in India at date of petition. (§2).

High Courts and District Courts have jurisdiction. (§§4, 5). (§7). (Repealed).

Grounds.

Husband may petition for divorce on ground of wife's adultery after marriage. Wife may petition on following grounds: (1) After her marriage her husband has changed his religion and gone through form of marriage ceremony with another woman; (2) is guilty of incestuous adultery; (3) or bigamy with adultery; (4) or marriage with another woman with adultery; (5) or rape, sodomy or bestiality; (6) or adultery coupled with cruelty which would otherwise entitle her to divorce a mensa et thoro; (7) or adultery coupled with desertion without reasonable excuse for two years or more. (§10).

Procedure.

Petition must state ground of dissolution. (§10). Where husband petitions he must make alleged adulterer a co-respondent except in following cases with court's consent (1) Respondent leads prostitute's life and petitioner does not know of any single person with whom adultery was committed; (2) name of alleged adulterer is unknown despite efforts to discover; (3) alleged adulterer is dead. (§11). Court must be satisfied of facts stated on petition and also be satisfied petitioner was not accessory to or connived at second form of marriage, or adultery, or has not condoned same. Court must also enquire into any counter-charges against petitioner. (§12). If court is not satisfied by requirements it can dismiss petition. (§13). If court is satisfied on evidence that petitioner's case is proved and there was no connivance or condonation it can pronounce divorce decree provided that petitioner has not committed adultery during marriage or been guilty of unreasonable delay in presenting or prosecuting petition or guilty of cruelty towards spouse, or has deserted or wilfully separated from spouse without reasonable excuse or acted in any way conducive to adultery complained of. (§14). If respondent opposes petition on certain grounds court may award respondent some relief as is prayed against him or her. (§15). Court must first pronounce a decree nisi which may be made absolute after minimum period of six months, during which it may be set aside by proof of collusion. (§16). Decree granted by District Court judge must be confirmed by High Court. (§17).

Restitution of Conjugal Rights and Judicial Separation.

When either spouse has without reasonable excuse withdrawn from society of other, offended spouse may apply by petition to District Court for restitution of conjugal rights. Court, on being satisfied of truth of statements in petition and that there are no legal grounds why application should not be granted may grant decree. (§32). Any ground for divorce or nullity may be pleaded in answer to petition. (§33).

In lieu of a decree a mensa et thoro (which is no longer available) either spouse may obtain decree of judicial separation on ground of adultery, cruelty, or desertion for more than two years. (§22). Application is by way of petition to District Court. (§23).

Effect.

Separated wife is considered as unmarried regarding any property acquired by or devolving upon her; and she may dispose of such property as if she were unmarried, even if she subsequently co-habits with her husband. She has same rights of action as unmarried woman (see topic 13.04 Husband and Wife) but is entitled to alimony. (§§24, 25). Decree of judicial separation may be reversed by application to court which granted decree on ground it was obtained in petitioner's absence or there was reasonable ground of desertion. (§26).

Nullity.

Any spouse may petition District Court to declare marriage null and void (§18) on following grounds: (1) Respondent impotent at date of marriage and institution of suit; (2) parties are within prohibited degrees of consanguinity or affinity; (3) either party was lunatic or idiot at time of marriage; (4) either party was already validly married to third person at date of so-called marriage; (5) that marriage was obtained by force or fraud. (§19). (Repealed). When marriage is pronounced nullity on grounds (3) or (4) above, children of marriage are deemed legitimate and can succeed to estate of parent competent to contract marriage. See also topic 13.06 Marriage, subhead Christian Marriages, infra.

Alimony, Costs, Damages, and Settlements.

Repealed. Court has power to order alimony pendente lite to be paid to wife (§36) and subsequently permanent alimony (§37) on monthly or weekly basis, directly or to trustee (§38). (Repealed). Court has power to make enquiries into any ante or post nuptial settlements. (§40).

Custody of Children.

Court has power to make orders regarding custody, maintenance and education of minor children during and on making decree in a suit for judicial separation (§41) and may also make such orders after decree on petition, on behalf of children (§42). Court has similar powers to make orders in respect of divorce and nullity decrees, and may further, if it deems fit, place children under protection of court. (§§43, 44).

13.03 GUARDIAN AND WARD:

This is governed by Guardians and Wards Act VIII of 1890.

Jurisdiction.

Court of Wards, High Courts and District Courts have jurisdiction. (§§3, 4A).

Selection and Appointment of Guardian.

Act does not interfere with personal law governing power to appoint guardians of person and property of minors. (§6). Court may appoint guardian, where it is in interest of minor's welfare to do so, of his person or property or both. (§7). Any person who desires to be, or claims to be, guardian of minor, or any friend, or relative, or District Collector of area where minor ordinarily resides or has property, or Collector having authority over class of persons to whom minor belongs may apply to court to have order issued appointing him guardian. Where application is for guardianship of minor's person, District Court where minor ordinarily resides has jurisdiction; and where it is for guardianship of property, District Court where minor ordinarily resides or place where he has property. If any other court is approached it may return application to proper District Court. (§§7, 8, 9).

Form of Application.

Where applicant is not Collector, petition is signed and verified in same way as plaint under Civil Procedure Code 1908. (§10). Number of details such as name, age, sex, description of property and others must be stated in petition. (§10). Court must be satisfied that there is ground for application; it fixes date for hearing and serves notice to all parties concerned. (§11). Court may make interim order for protection of minor and interim protection of person and property pending hearing (§12) and after hearing evidence may make order of appointment (§13). Separate guardians may be appointed for person and property of minor. If minor has several properties, Court may appoint separate guardians for any one or more properties. (§15). Court must take into consideration whether appointment of particular guardian is in interest of minor, e.g., age, sex, religion, character, capacity, relationship with and wishes of minor's deceased parents, minor's choice if minor is old enough to form intelligent preference etc. (§17). Guardian cannot be appointed in following cases: (1) Where minor's property is under superintendence of a Court of Wards; (2) where minor is married female whose husband is not unfit to be guardian of her person; (3) where minor's father is alive and is not unfit to be guardian of minor's person. (§19).

Powers and Duties.

Guardian stands in fiduciary relation towards ward and save as provided by will or other instrument appointing him, must not make any profit out of his office. This relationship extends to purchases by guardian of property of ward and by ward of property of guardian immediately upon or soon after ward ceases to be minor, and to all transactions between them while influence of guardian still lasts or is recent. (§20). Minor is incompetent to act as guardian except of his own wife or child. (§21). Guardian is entitled to such remuneration as the court thinks fit. (§22).

Duties of Guardian of Person.

(1) Look to ward's support, health and education and such other matters as personal law of ward requires (§24); (2) if ward leaves or is removed from guardian's custody, court may make order for his return if it deems fit to do so (§25). Guardian may not remove ward to place outside appointing court's jurisdiction (§26) except with court's leave.

Duties of Guardian of Property.

(1) Guardian is bound to deal with ward's property as carefully as man of ordinary prudence would deal with his own; (2) he may do all acts which are reasonable and proper for realisation, protection or benefit of property. (§27). In case of testamentary guardian, his power to mortgage, charge, transfer by sale, gift, exchange or otherwise, immovable property belonging to ward is subject to restrictions imposed by will unless he has been declared guardian under Act and court permits otherwise by specific order. (§28). In case of guardian other than Collector or testamentary guardian, court's permission is required before doing following: Mortgage or charge, or transfer by sale, gift, exchange or otherwise, any part of ward's immovable property, or lease such property for terms exceeding five years, or exceeding more than one year after date on which ward ceases to be minor. (§29). Transfers made contrary to §§28 and 29 above are voidable at instance of any other person affected thereby. (§30). Court will not grant permission unless transfer is in ward's interest and certain requirements are complied with (§31); court may vary powers of such guardian (other than Collector) from time to time (§32). Guardian has right to apply by way of petition to court for opinion, advice or direction on management or administration of ward's property. (§33).

Qualification.

Such guardian of property may be required to give bond, before being appointed, to duly account for ward's property or make statements at fixed periods regarding administration of such property (§34) or exhibit his accounts to court, or pay balance of moneys into court, as court directs, or apply for maintenance, education and advancement etc. of ward or such persons as are dependant on ward (§34A).

Liabilities of Guardian.

Where guardian has given administration bond to court, any person may petition court that bond is not properly observed. Court may, if it thinks fit, transfer bond to some proper person who may sue on it directly in his own name and is entitled to recover on it as trustee for ward for any breach of bond. (§35). Where no bond was given any person may as next friend of ward during ward's minority, with leave of court, sue guardian or his representative for account of ward's property and may recover as trustee of ward, such amount as is payable by guardian. (§36). Guardian is also generally liable to ward. (§37).

Termination of Guardianship.

Where there are two or more joint guardians, guardianship continues to survivors until fresh appointment by court. (§38). Court may remove guardian on application of any person interested or on its own accord for any of following causes: (1) Abuse of trust; (2) continued failure to perform trust duties; (3) incapacity to perform trust duties; (4) ill-treatment or neglect of ward; (5) contumacious disregard of provisions of Act or any order of court; (6) conviction of offence which court thinks renders him unfit to continue as guardian; (7) for having interests adverse to faithful performance of his duties; (8) for ceasing to reside within limits of its jurisdiction; (9) in case of guardian of property only, for bankruptcy or insolvency; (10) by reason of guardianship ceasing under personal law to which ward is subject; but (7) and (8) do not apply to guardians appointed by will except under certain conditions. (§39). Guardian may apply to court to be discharged. (§40).

Cessation of Guardianship.

Powers of guardian of person cease (1) By his death, removal or discharge; (2) by Court of Wards assuming superintendence over minor; (3) by ward ceasing to be minor; (4) in case of female ward by marriage to person not unfit to be her guardian; (5) where ward's father was previously unfit to be guardian but subsequently becomes fit.

Powers of guardian of property cease on same grounds as (1), (2) and (3) above, but court may require him to deliver possession of property or render accounts of property held in past, belonging to ward. (§41). Court may appoint fresh guardian as successor to guardian who is dead, discharged or removed. (§42).

Hindu Minority and Guardianship Act XXXII of 1956.

This Act made special provisions for guardianship of Hindu children and prevailed over Hindu customary law. Natural guardians of Hindu minor in respect of his person and property are: (1) Father, then mother, where minor is boy or unmarried girl provided that custody of minor who has not completed age of five years shall ordinarily be with mother; (2) mother and then father in case of illegitimate boy or unmarried girl; (3) husband in case of married girl. (§6). But guardian must be Hindu who has not completely and finally renounced the world. (§6). Natural guardianship of adopted son lies in adoptive father and after him adoptive mother. (§7).

Powers of Guardian.

To do all acts which are necessary, reasonable or proper for benefit of minor or for realisation, protection or benefit of minor's estate. (§8). Guardian cannot bind minor by personal covenant. (§8). Natural guardian must have prior permission from court to do following: (1) Mortgage, charge, transfer by sale, gift, exchange or otherwise part with any immovable property of minor; (2) lease such property for more than five years or for term extending more than one year beyond date on which minor will attain majority. (§8).

Minor cannot act as guardian of property of another minor. (§10). De facto guardian cannot deal with minor's property. (§11).

13.04 HUSBAND AND WIFE:

Married woman's capacity to hold property is governed by Married Women's Property Act III of 1874 as am'd, but Act does not apply to women or their husbands who professed Hindu, Muslim, Buddhist, Sikh or Jain religions at time of marriage. (§2).

Disabilities of Married Women.

Cannot acquire separate domicile of choice different from that of husband. Disabilities are governed by personal law to which married woman is subject.

Separate Property.

Wages or earnings of any married woman in any employment, occupation or trade carried on by her and not by her husband are her separate property. (§4). Also any money or separate property acquired by her through exercise of literary, artistic or scientific skill; also all savings from and investments of such wages, earnings and property. Married women can effect separate insurance policies independently of husband (§5); this enures as separate property. Contract is valid. Insurance policy taken out by husband on his own life for benefit of wife is deemed to be trust for her benefit and does not form part of his estate. Provisions of this section apply even when policy of insurance is effected by male Hindu, Muslim, Buddhist, Sikh or Jain. Various requirements and limitations exist, differing from State to State. (§6).

Hindu Married Women.

By Hindu Adoptions and Maintenance Act LXXVIII of 1956. Hindu wife is entitled to be maintained by her husband during her lifetime. (§18). She is so entitled even if living separately from husband if: (1) He is guilty of desertion, or abandons her without reasonable cause, and without her consent or against her wish or wilfully neglects her; (2) he has treated her with cruelty or she reasonably fears to live with him; (3) he is suffering from virulent form of leprosy; (4) he has another wife living; (5) he keeps woman in loco uxoris in same house in which wife habitually resides, or lives with such concubine elsewhere; (6) he has been converted to another religion; (7) there is any other cause justifying her living separately. (§18). But Hindu wife is not entitled to maintenance if she is unchaste or ceases to be Hindu by conversion to another religion. (§18).

Hindu wife is entitled to maintenance after her husband's death by her father-in-law, provided she is unable to maintain herself out of her own property or earnings or from her husband's, own mother's or own father's estate or from her son or daughter or their estates, and if father-in-law is able to maintain her. (§19).

Hindu man or woman is bound to maintain his or her legitimate or illegitimate children and his or her aged or infirm parents (§20) until children become majors, and so long as parents are unable to maintain themselves (§20). Heirs of deceased Hindu are bound to maintain dependants of deceased out of estate inherited from deceased. (§22).

Muslim Women.

By Muslim Personal Law Shariat Application Act XXVI of 1937 all questions regarding special properties of women including personal property inherited or obtained under contract, by way of gift, marriage, dissolution of marriage including talaki, ila, zihar, lian khula and imbara'at (see topic 13.02 Divorce, subhead Muslim Divorce) maintenance, dower, guardianship, gifts, trusts, trust properties, and wakfs are governed by Muslim Personal law. (§2).

Desertion and Nonsupport.

Christian deserted wives (under Divorce Act IV of 1869, see topic 13.02 Divorce) may apply to court for protection of any properties acquired after marriage and after being deserted. Court may, if satisfied that desertion was without excuse and that wife is maintaining herself by her own industry or property, order protection of her earnings against husband and his creditors. (§28). But order may be subsequently varied or terminated at behest of husband if court thinks fit to do so. (§29). If husband seizes or uses wife's property after order is made, wife can sue him for return or delivery of specific property or its pecuniary value. (§30). Wife is in same position as if she were unmarried in all other respects. (§31).

Contracts.

Capacity to contract (see category 3 Business Regulation and Commerce, topic 3.03 Contracts) depends partly upon personal law of person concerned. See subheads Hindu Married Women; Muslim Women; Desertion and Nonsupport, supra.

Maintenance.

Husband having sufficient means, is bound to maintain his wife who is unable to maintain herself. (§125 CRPC). Amount of maintenance under this section not to exceed Rs.500/-. Wife includes woman who has been divorced and has not remarried.

Actions.

Married women may bring action for such property as if its her separate property under Indian Succession Act 1865 or of M. W. Property Act, 1874, in her own name against all persons for protection and security of such property. She is liable for suits, processes and orders regarding such property as if she were unmarried. (§7 M. W. Property Act). Married women also liable on contracts regarding separate property. (§8). Husband is not liable for wife's ante nuptial debts (§9) nor for breach by wife of any trustee, executrix or administratrix position unless he has intermeddled (§10).

By Civil Procedure Code 1908 (Order 31, R. 3) husband is not necessary party to suit by or against married woman in her capability as executrix, administratrix or trustee.

Marriage of female plaintiff or defendant does not cause suit to abate and decree against female defendant may be executed against her alone.

Husband also may with permission of Court, be held liable for judgment decree against wife only in those cases where he would be liable for her debts. Decree in favour of wife may, with permission of Court, be executed on application of husband, where husband is by law entitled to subject matter of decree. (Order 22, R.7).

Agency.

By Indian Contract Act IX of 1872 §187, liability of husband for a wife's debts depends upon principles of agency and husband is only liable when it is shown that he expressly or impliedly sanctioned what wife has done. This is a question of fact in each case.

13.05 INFANTS:

Age of Majority.

By Indian Majority Act IX of 1875 as am'd every person domiciled in India attains majority on completing 18 years of age. (§3). But minor who has guardian appointed of his person or property by court of justice or court of wards attains majority on completion of 21 years of age. (§3). Notwithstanding above, act does not have any effect regarding capacity of any person to act in following matters: (1) Marriage; (2) dower; (3) divorce; (4) adoption; (5) religion or religious rites and usage of any class of citizens; (6) capacity of any person who has attained majority under law applicable to him before this Act came into force. (§2). Requisite ages of capacity for above differ and are prescribed by relevant governing statutes or customs.

Actions.

Governed by Order 32 of Civil Procedure Code 1908. Every suit by minor is instituted in his name by person called next friend. If this is not done, defendant may apply to have suit struck off with costs payable by filing attorney. Minor may defend suit by guardian ad litem appointed by court for purposes of suit. Appointment may be made on application in name or on behalf of minor or by plaintiff. Such application must be supported by affidavit stating guardian has no interest in suit adverse to minor and is fit person to be so appointed. Notice of application to appoint guardian ad litem must be served on minor, and minor's guardian, or father or other natural guardian. Any person who is major and of sound mind and has no interest adverse to minor may be appointed guardian ad-litem. No person shall, without his consent in writing, be appointed guardian for suit.

Adoption.

See topic 13.01 Adoption.

Limitations.

Minor's contract in India is absolutely void ab initio (not voidable). See category 3 Business Regulation and Commerce, topic 3.03 Contracts. But minor may hold shares in company through guardian on his behalf. See category 2 Business Organizations, topic 2.03 Corporations or Companies.

Child Labour (Prohibition and Regulation) Act, 1986.

It is prohibited to employ children under 14 years of age to work in certain occupations such as transport of passengers, goods or mails by railway or with port authority within port limits, etc. Children under 14 years of age cannot be employed in workshops, wherein certain processes, such as carpet weaving, manufacture of explosives, fireworks, etc. are carried on.

Factories Act.

No person who has not completed his 14th year, shall be allowed to work in factory. Person between ages of 14 and 18 shall not be permitted to work in factory unless he is certified to work in factory after examination by certifying surgeon. No child (i.e. person below 15 years) shall be permitted to work in factory at night or for more than four and a half hours in a day.

See also category 3 Business Regulation and Commerce, topic 3.03 Contracts.

13.06 MARRIAGE:

Personal law in India depends to large extent upon customary law of community to which person belongs. Laws relating to marriage are to be found partly in statutes, Indian Special Marriage Act XLIII of 1954, Hindu Marriage Act XXV of 1955, Christian Marriage Act XV of 1872, Parsi Marriage and Divorce Act III of 1936 and partly in customary law of Muslims, Hindus, Buddhists, Jains, Sikhs, Parsis, Christians, Jews etc.

Hindu Marriages.

Hindu may get married either under customs of his tribe or caste or under provisions of Hindu Marriage Act XXV of 1955, but Act prevails where customary law conflicts with its provisions.

Capacity.

Marriage can be validly solemnised between two Hindus if: (1) Neither party has legal spouse living at time of marriage; (2) parties are not lunatics or idiots; (3) husband has completed 21 years and bride 18 years of age; and (4) parties are not within prohibited degrees of relationship (§5); severe penalties may be inflicted if these requirements are not observed (§18).

Ceremonies.

Eight types of marriage, are recognised by customs; where customs of two parties differ, marriage may be solemnised in accordance with customs of either party.

Registration.

Section 8 provides for registration of Hindu marriages in Hindu Marriage Registers kept in each state of India. Exact requirements differ according to each State's legislative provisions; but in any case, validity of Hindu marriage is in no way affected by omission to make entry in register.

Void and Voidable Marriages.

Marriage is void if either party has spouse living at time of marriage (i.e. union must be monogamous); and if parties marry within prohibited degrees.

It is voidable on following grounds: (1) Respondent was impotent at time of marriage and continued to be so until institution of suit; (2) either party was an idiot or lunatic at time of marriage; (3) where consent is required, it was obtained by fraud or force; (4) respondent was pregnant by some other man at time of marriage. Section 12 provides procedural safeguards to render a voidable marriage a nullity by decree of court.

Polygamy and Polyandry.

Hindu marriages after commencement of Act are strictly monogamous. Bigamy is severely punishable. (§17).

Effect of Void and Voidable Marriages.

Children of such marriages are legitimate but they forego any rights in property of their parents which they might otherwise have been entitled to. (§16).

Muslim marriages are governed entirely by Mohammedan customary law. Variations in ceremonies and formalities exist among various Muslim communities, such as Bohras, Khojas (followers of H.H. The Aga Khan), Ithnasheris etc., but basic principles set out below apply to all communities:

Marriage is contract performed by way of Nikah ceremony which has for its object the procreation and legalization of children.

Capacity.

Every Muslim of sound mind who has attained puberty may enter into Nikah or contract of marriage. Lunatics and minors who have not attained puberty may be validly contracted in marriage by the guardians. Marriage of Muslim who is of sound mind and has attained puberty is void if it is brought about without his consent, i.e., consent of majors is required, but not that of minors, as parties to marriage. However, after Restraint of Child Marriages Act it is doubtful whether “child marriages” can be validly performed even among Muslims.

Essentials.

It is essential for valid Muslim marriage that proposal is made by or on behalf of one of parties to marriage (usually husband's side) and acceptance of proposal is given by or on behalf of other party (usually wife's side) in presence and hearing of two males or one male and two female witnesses who are adult Muslims. Usually, father of would-be husband approaches father of would-be bride and makes offer ceremonially or formally; and father of would-be bride accepts offer. Marriage is contract between families of two parties as much as between parties themselves. Proposal and acceptance must both be expressed at one meeting. Proposal made at one meeting and acceptance made at another meeting do not constitute valid marriage. Writing is not essential, nor is any religious ceremony essential. But it is customary that consent or on behalf of parties be recorded before Kazi (Priest) and consenting parties appear before him. Usually three Nikha forms are signed by or on behalf of each of parties to marriage; one is kept by husband or party on his behalf; one by wife or party on her behalf and one by Kazi or recording officer.

No other marriage except a marriage by way of Nikha is recognised in Muslim law.

Dower.

In Nikah contract, sum is specified by way of “mahr” (roughly dowry) which is sum of money or other property which wife is entitled to receive from husband in consideration of marriage. It is not necessary for husband to pay this immediately; payment may be made in installments during course of their married life. Amount specified may be increased after marriage. But if husband wishes to dissolve marriage he must pay wife full amount specified in Nikah contract before he does so. Widow has right to retain possession of her husband's estate in lieu of dower. Dower becomes confirmed upon consummation of marriage, or by valid retirement or by death of either spouse.

Prohibited Degrees.

Person may not marry his or her father, mother, sister, daughter, son, brother, aunt, uncle, niece, nephew, grandfather, grandmother, grandson or granddaughter. Man may not marry his wife's mother or grandmother, his wife's daughter or granddaughter, wife of his father or paternal grandfather, wife of his son, or his son's son or his daughter's son.

Polygamy and Polyandry.

Muslim male may not have more than four wives at same time; if he marries a fifth when he already has four the marriage is not void, merely irregular.

Muslim woman cannot have more than one husband at any time.

Valid, Irregular and Void Marriages.

Muslim marriage which complies with all essentials is valid. Other marriages may be irregular or void. "Irregular marriage" is one which is not unlawful in itself but unlawful for something else, i.e., where irregularity arises from external circumstances, e.g., lack of witnesses. "Void marriage" is one which is unlawful in itself, prohibition being absolute and perpetual.

Following are irregular: (1) Marriage contracted without required number of, or without any, or not in presence of witnesses; (2) marriage to fifth wife when four are already validly married and existing; (3) marriage with woman undergoing "iddat" (iddat is compulsory period of seclusion for woman whose marriage has been dissolved by either divorce or death); (4) marriage of Muslim man with "Kitabia," i.e., a Jewess or Christian or another Muslim woman is valid, but that with a non-Kitabia (i.e., Zoroastrian) is irregular; (5) man may not have at same time two wives who are so related to each other by consanguinity, affinity, or fosterage that if either of them were a male, they could not have lawfully intermarried, but if a man does so marry two wives, marriage is irregular, not void.

Following marriages are void: (1) Marriage of Muslim of sound mind who has attained puberty, to which he or she has not consented; (2) marriage to woman whose husband is alive and not validly divorced; (3) marriage to person within forbidden degrees of relationship.

Effect of Irregular and Void Marriages.

Void marriage is no marriage at all; it creates no civil rights or obligations between parties; offspring are illegitimate. Irregular marriage is terminable at will by either party before or after consummation by words showing intention to separate, e.g., "I have relinquished you." Marriage has no legal effect before consummation; after consummation wife is entitled to dower; must observe iddat; and issue are legitimate. But no mutual rights of inheritance between spouses are created by such marriage.

Parsi marriages are governed by Parsi Marriage and Divorce Act III of 1936. Act codifies Parsi customs, and is applicable to all Parsis throughout world.

Capacity.

Both parties to marriage must be born Parsis (Zoroastrians). Parties must not be related to each other in any of degrees of consanguinity or affinity which are prohibited. Parsi male must have completed 21 years of age and Parsi female must have completed 18 years of age. (§3). Schedule lists 66 prohibited degrees of relationship.

Essential Validity.

Marriage must be solemnised according to Parsi form of ceremony called "Ashirvad" by Parsi priest in presence of two other Parsi witnesses. This is not merely a matter of formal validity. Marriage is invalid if this essential is not observed. (§3).

Prohibition of Bigamy.

Parsi marriages are strictly monogamous. Bigamy is a criminal offence and severely punishable. (§§4, 5). Officiating priest is also penalised (§11) for participating in such a marriage.

Other Prohibitions.

Parsi may not contract marriage during lifetime of his or her wife or husband until such marriage has lawfully been declared null and void, or has been dissolved by divorce, declaration or dissolution under 1936 Parsi Marriage and Divorce Act.

Void Marriages.

Suit for declaration of nullity of marriage may be brought if consummation of marriage is through natural causes impossible.

Christian Marriages.

Marriages between persons professing Christian faith in India are governed by Indian Christian Marriage Act XV of 1872. Certain sections, however, do not apply to persons professing Roman Catholic faith, although they be Christians for purpose of Act.

Capacity.

It is only necessary for one of parties to profess Christian faith in order to get married under Act. (§4).

Consent.

Parental consent is not required where parties are majors. Consent of any of following persons is required if either party is a minor (i.e., under 18 years): father if living; or guardian; if no guardian, then mother; if no such person exists in India, consent is not required. (§19).

Persons Who May Solemnise Marriages.

Every marriage under this Act must be solemnised by one of following persons, or marriage is void: (1) Any minister who has received episcopal ordination, so long as marriage is according to rules, rites, ceremonies and customs of his church; (2) any clergyman of Church of Scotland provided marriage is to be solemnised according to rules, etc. of that church; (3) any minister of religion licensed under Act to solemnise marriages; (4) by or in presence of marriage registrar appointed under this Act; (5) any person licensed to grant certificates of marriage between Indian Christians. (§§4, 5).

Special Marriage Act XLIII of 1954.

This act facilitates marriage between persons not belonging to same communities, or having different religions or nationalities. Scope of Act extends to whole of territory of India as well as to intending spouses who are both Indian citizens domiciled abroad.

Capacity.

Man must have completed 21 years and woman 18 years of age. Neither party should be lunatic or idiot, or have legal spouse living at time of marriage. Neither party should be within prohibited degrees of relationship mentioned in First Schedule of Act.

Notice.

Parties to marriage must give notice of their intention to solemnise marriage under this Act in specified form to marriage officer of district in which at least one of parties has resided for period of not less than 30 days immediately preceding date upon which such notice is given. (§5). Notice is entered into Marriages Notice Book which is open to inspection on payment of small fee; if one party does not permanently reside within district, notice is sent to respective district office and displayed there. (§6). Any person may, before expiry of 30 days from date on which notice has been published, object to marriage but only on grounds that parties lack capacity.

Marriage may be solemnised on expiry of 30 days from date of notice.

Procedure.

Marriage officer cannot solemnise marriage if objection has been lodged until he has enquired into objection and is satisfied that it ought not to prevent solemnisation of marriage. Inquiry must be completed within 30 days from date when objection was lodged. If objection is unheld, parties can appeal to District Court. Marriage officers have all powers vested in a civil court under Code of Civil Procedure 1908 in carrying out enquiry. (§9).

Foreign Procedure.

Where objection is lodged before marriage officer outside India, in respect of marriage outside India, he cannot solemnise marriage but must transmit all records together with his own statement to Central Government, Delhi; decision of Central Government is final. (§10).

Procedural Formalities.

Before marriage is solemnised, parties and three witnesses must in presence of marriage officer sign declaration in form specified and declaration must be countersigned by marriage officer. (§11). Marriage must be solemnised at office of marriage officer or at such other place within reasonable distance therefrom as parties may desire, and upon such condition and payment of such additional fees as may be prescribed. Marriage may be solemnised in any form which parties choose to adopt. But it will not be complete and binding on parties unless and until parties say to each other in presence of marriage officer, three witnesses and in any language understood by parties. “I (A) take you (B) to be my lawful (wife or husband). (§12).

Marriage Certificate.

After marriage is solemnised, marriage officer must enter certificate thereof in form specified in book called Marriage Certificate Book. Certificate must be signed by parties and three witnesses. Once certificate is entered into book by officer, certificate is deemed to be conclusive evidence of fact that marriage under this Act has been solemnised and that all formalities respecting signature of witnesses have been complied with. (§13).

Default.

Whenever marriage is not solemnised within three months from date on which notice of it was given to marriage officer, or where appeal has been filed to District Court, then within three months from date of decision of District Court, or where records were sent to Central Government, within three months from date of Government's decision, notice and all other proceedings shall be deemed to have lapsed; marriage officer cannot solemnise marriage until fresh notice has been given and other procedure followed. (§14).

Effect.

Marriage under this Act severs parties from being members of undivided (joint) Hindu, Buddhist, Sikh or Jain family. (§19).

Persons do not acquire any special rights of succession by virtue of Act which they would not otherwise have had vested in them. (§20).

Nullity (Void and Voidable Marriages).

Marriages are void on following grounds under this Act: (1) Respondent was impotent at time of marriage and at time of institution of suit; (2) either party had spouse living at time of marriage; (3) either party was lunatic or idiot; (4) man was under 21 years and woman under 18 years at time of marriage; (5) parties were within prohibited degrees of relationship. (§24).

Following marriages are voidable: (1) Unconsummated marriage due to wilful refusal of respondent; (2) if respondent was pregnant by some person other than petitioner at time of marriage; (3) consent of either party was obtained by coercion or fraud. Act provides procedural safeguards for bringing suit for nullity in appropriate district court. (§25).

Effect of Such Marriages.

Any child of marriage begotten before decree of nullity is made who would have been legitimate otherwise, shall be deemed to be legitimate notwithstanding nullity decree. But such children cannot acquire rights in property of any persons other than their parents which they could have acquired only by reason of being legitimate children of their parents. (§26).

Scope of Act.

This act is not of mandatory nature. Persons may elect to make use of facilities provided by it in order to get married, but they do not necessarily have to observe it. Marriage not celebrated in accordance with this Act is not thereby rendered invalid. (§42). Act prohibits bigamy. (§§43, 44).

Registration.

Any marriage in India may be registered under Special Marriage Act. (§15). Certain requirements must be fulfilled. Parties must apply to marriage officer by form jointly signed by both, to have their marriage registered. Officer must give public notice of this, and after 30 days must, if satisfied that all requirements are fulfilled, enter certificate of marriage in Marriage Certificate Book. This Certificate must be signed by spouses and three witnesses. (§16). If officer refuses to register, aggrieved person may within 30 days from date of refusal appeal to district court whose decision is final. (§17). Effect of such registration is that marriage shall be deemed to be solemnised as under Special Marriage Act; all children born of marriage shall be deemed to be legitimate children. But children are not entitled thereby to property of any person other than their parents to which they would otherwise have not been entitled. (§18).

By Indian Matrimonial Causes (War Marriages) Act XL of 1948 where marriages were solemnised during war period between husband who at time of marriage was domiciled out of India and wife who was domiciled in India, Indian High Courts have jurisdiction to hear divorce, nullity cases as if parties were domiciled in India. See topic 13.02 Divorce.

14 FOREIGN TRADE AND COMMERCE

14.01 EXCHANGE CONTROL:

(See also topic 14.04 Foreign Trade Regulations.)

Exchange control was first introduced in 1939 by rules framed under Defence of India Act, 1939 and was continued by enactment of Foreign Exchange Regulation Act, 1947 since repealed by Foreign Exchange Regulation Act 1973 which came into effect from 1st Jan. 1974 but substantially relaxed which in turn has been substituted by Foreign Exchange Management Act, 1999 (FEMA) which came into force from 1 June 2000 and which has substantially relaxed rigorous earlier statute. §1(3) provides that Act shall also apply to all branches, offices and agencies outside India owned or controlled by person resident in India and also to any contravention thereunder committed outside India by any person to whom this Act applies. Since Feb. 1993 Rupee is freely convertible on trade account and foreign exchange may be freely purchased for import of goods and services. Remittances for other purposes require Reserve Bank permission.

Residents of India as defined in FEMA cannot without permission, general or special, from Central Government and/or Reserve Bank of India (a) deal in or transfer any foreign exchange or foreign securities to any person not being authorized person; (b) make any payment to or for credit of any person resident outside India in any manner; (c) receive otherwise through authorised person, any payment by order or on behalf of any persons resident outside India in any manner; (d) enter into any financial transaction in India as consideration for or in association with acquisition or creation or transfer of right to acquire, any asset outside India by any person; (e) acquire, hold, own, possess or transfer any foreign exchange, foreign security or any immovable property situated outside India; (f) borrow or lend in foreign exchange; (g) export, import or hold any foreign currency or currency notes, transfer any immovable property outside India.

Indian residents can now obtain International Credit Cards, which enable them to meet expenses on visits outside India, subject to specified limits.

Capital Account Transactions.

As regards capital account transactions same requires RBI approval and RBI has from time to time specified classes of capital account transactions which are permissible and limit up to which foreign exchange can be drawn for such transactions. Person resident in India may hold, own, transfer or invest in foreign currency, foreign security or any immovable property situated outside India if such currency, security or property was acquired, held or owned by such person when he was resident outside India or inherited from person who was resident outside India. Person resident outside India may hold, own, transfer or invest in Indian currency, security or any immovable property situated in India if such currency, security or property was acquired, held or owned by such person when he was resident in India or inherited from person who was resident in India. RBI also may prohibit, restrict, or regulate establishment in India of branch, office or other place of business by person resident outside India, for carrying on any activity relating to such branch, office or other place of business.

Indian residents are now permitted to make direct investment for setting up joint venture entity (JV) or wholly owned subsidiary (WOS) outside India, subject to certain formalities being complied with.

To further promote Indian investments abroad and to enable Indian companies to reap benefit of globalization, Indian companies are now permitted to invest up to 300% of net worth in overseas JVs and/or WOSs in any bona fide business activity under automatic route.

Presently, only Indian promoter corporates are permitted to offer guarantees on behalf of their overseas WOS or JV, under automatic route. Issue of personal, collateral and third-party guarantees requires prior approval of Reserve Bank and is considered on case-by-case basis. With view to simplify procedure, it has now been decided to enlarge scope of guarantees covered under automatic route. Accordingly, Indian entities may offer any form of guarantee: corporate or personal, primary or collateral by promoter company, guarantee by group company, sister concern or associate company in India, provided that all financial commitments including all forms of guarantees are within overall prescribed ceiling for overseas investment of Indian party, no guarantee is open ended, and all corporate guarantees are required to be reported to RBI.

Export of Goods and Services.

§7 provides that every exporter of goods shall furnish to RBI declaration containing material particulars including full export value or if export value is not ascertainable, value which exporter expects to receive and such other information for purpose of ensuring realisation of export proceeds. RBI may, for ensuring that full export value of goods is received, direct any exporter to comply with such requirements as it deems fit. Every exporter of services shall furnish to RBI declaration containing material particulars in relation to payment for such services.

Realisation and Repatriation of Foreign Exchange.

§8 provides that where any amount of foreign exchange is due or has accrued to any person resident in India such person shall take all reasonable steps to realise and repatriate to India such foreign exchange within such period and in such manner as may be specified by Reserve Bank.

Appointment of Authorized Dealer.

§10 authorises persons known as authorised persons, to deal in foreign exchange or in foreign securities, as authorised dealer, money changer or offshore banking unit. Such authorised persons shall comply with directions and orders of Reserve Bank of India (RBI) in all dealings in foreign exchange or foreign securities. Authorisation granted may be revoked by RBI if (a) it is in public interest so to do; or (b) authorised person has failed to comply with condition subject to which authorisation was granted or has contravened any of provisions of Act or any rule, regulation, notification, direction or order made thereunder. Except with previous permission of Reserve Bank, authorised person shall not engage in any transaction involving any foreign exchange or foreign security which is not in conformity with terms of his authorisation under this section. Authorised person shall, before undertaking any transaction in foreign exchange on behalf of any person, require that person to make such declaration and to give such information as will reasonably satisfy him that transaction will not involve any contravention of provisions of this Act, and where said person refuses to comply with any such requirement, authorised person shall refuse in writing to undertake transaction and shall report matter to Reserve Bank.

Enforcement of Exchange Control Laws.

§36 authorises Central Government to establish Directorate of Enforcement to exercise powers of gathering facts, obtaining and examining any information, books, documents etc. in possession of any person, investigation into contravention of Act, search and seizure etc.

Penalties and Offences.

FEMA introduces less stringent punishments for offences committed under it as compared to earlier statute. Criminal proceedings have been replaced by civil proceedings for various offences. §13 provides that any person who contravenes provisions of FEMA for any rules, regulations, notifications, direction or order issued under FEMA, shall be liable to penalty thrice same involved in such contravention or where sum is not quantifiable up to Rs. 200,000 and further penalty of Rs.5,000 per day for continuing offences. Section also provides for confiscation of currency security or any other money or property over and above any penalty which is up to three times sum involved. §14 provides for civil imprisonment if any person fails to make full payment of penalty imposed on him under §13, or; order of arrest and detention can be made by adjudicating authority only after serving notice upon defaulter calling upon him to appear before authority and show cause why he should not be detained. §15 provides for compounding of offences by Directorate of Enforcement. This power is to be exercised in accordance with Foreign Exchange (compounding proceedings) Rules 2000. FEMA provides for appeal to Special Director (Appeal) against order of adjudicating authorities. §18 provides for establishment of Appellate Tribunal for Foreign Exchange to hear appeals against orders of adjudicating authorities and Special Directors (Appeals).

Investments in India by Nonresident Indians.

Investment by Nonresident Indians (NRIs)/Overseas Corporate Bodies (OCBs).

Investment by NRIs in which NRIs hold at least 60% equity is treated as foreign direct investment. For all sectors excluding those falling under Government approval NRIs are eligible to bring investment through automatic route of RBI. All other proposals which do not fulfil any or all of criteria for automatic approval are considered by Government through FIPB.

NRIs are allowed to invest in housing and real estate development sector. They are allowed to hold even 100% equity in civil aviation sector in which otherwise foreign equity only up to 49% is permitted. Similarly for banking sector, NRIs can hold 49% equity inclusive of foreign direct investment. Equity participation by foreign banking companies, foreign financial companies, and multilateral institutions as copromoter and/or technical collaborator is also permitted up to 20%. Multilateral institutions have special dispensation to invest beyond 20% to extent of shortfall in NRI contributions, subject to overall limit of 40%. Investment made by NRIs are fully repatriable except in case of real estate, which has ten year lock-in period on original investment.

Nonresident Indians are those who come under any of following categories: (a) Indian citizens who stay abroad for employment or for carrying on business or vocation or any other purpose in circumstances indicating indefinite period of stay outside India; (b) Government servants deputed abroad on assignments with foreign Governments or regional/international agencies like World Bank (IBRD), IMF, World Health Organisation (WHO), and Economic and Social Commission for Asia and the Pacific (ESCAP); (c) officials of State governments and public sector undertakings deputed abroad on temporary assignments or posted to their branches or offices abroad.

Nonresident Indians become residents of India only when they come back to country for employment or for carrying on in India any business or vocation or for any other purpose indicating indefinite period of stay in India. They are not regarded as persons resident in India during their short visits to India, say, for holidays, business visits, etc. Indian citizens who take up jobs on completion of their higher studies abroad are regarded as nonresidents only from time they take up jobs abroad.

Persons of Indian Origin.

Person is deemed to be of Indian origin if he at any time held Indian passport or he or either of his parents or grandparents was Indian and permanent resident in undivided India at any time. Wife of citizen of India or of person of Indian origin is also deemed to be of Indian origin even though she may be of non-Indian origin.

Bank Accounts.

Indian nationals and persons of Indian origin resident abroad can open bank accounts in India freely out of funds remitted from abroad or foreign exchange brought in from abroad or out of funds legitimately due to them in India. Reserve Bank has granted general permission to banks in India which are authorised to deal in foreign exchange ("Authorised Dealers") to open such accounts freely.

Investment in India.

Liberal facilities are available for nonresidents of Indian nationality or origin for investment in India. Their funds brought in through normal banking channels as well as amounts lying in their nonresident accounts can be invested in Government securities, units of UTI, proprietory and partnership concerns and in shares of public and private limited companies. Various investment schemes are described below:

(i) Investment without Repatriation Facilities.

(a) Investment in proprietory/partnership firms: Nonresidents of Indian nationality or origin are permitted to invest in proprietory/partnership firms by inward remittance or out of Non-Resident External Rupee Account (NRE)/Foreign Currency Non-Resident (FCNR)/Non-Resident Ordinary Rupee (NRO) accounts maintained with Authorised Dealers provided they undertake not to seek at any time repatriation of their capital investment and income earned thereon. Investment can be made subject to firm/proprietory concern not engaged in any agricultural/plantation or real estate business with view to earning profit or income thereof. Such investments are allowed up to 100% of issued capital of investee firm without any obligation on part of nonresident investors to associate any resident investors as partners. No prior permission of Reserve Bank will be necessary.

(b) Investment in Government Securities: NRIs/PIOs may without limit, purchase on non-repatriation basis government securities (other than bearer securities) treasury bills, units of domestic mutual funds, units of Money Market Mutual Funds in India or National Plan/Savings Certificate.

(c) Investment in shares of companies through stock exchange: Investments in shares and debentures of companies through recognised stock exchange in India by nonresidents of Indian nationality/origin are permitted freely without any limit on quantum or value of investment, provided nonresident investor furnishes undertaking not to seek repatriation of capital invested and income earned thereon. Payment for such investments can be made either by remittances from abroad or from investor's nonresident (external) rupee account/FCNR account or nonresident ordinary rupee account. Such investments are, however, subject to ceiling of 10% of total paid up equity capital of company concerned or 10% of total paid up value of each series of convertible debentures by all eligible nonresident investors taken together. If, however, company concerned so resolves, aforesaid ceiling of 10% may be raised to 24%. These ceilings apply to purchases of equity shares and convertible debentures through stock exchange on both non-repatriation and repatriation basis. In order to avoid references for specific approval for each transaction, Reserve Bank grants general permission to investor's bank in India which he may authorise to undertake purchase and sale of shares/debentures on this behalf.

(d) Direct investment in new issues of Indian companies: Nonresidents of Indian nationality or origin who undertake not to seek at any time repatriation facilities are permitted to subscribe under automatic approval route of Reserve Bank of India freely to new issues of shares of any public or private limited company engaged in any business activity except chit fund company, nidhi company or real estate business, other than development to townships, construction of residential/commercial roads, bridges etc. dealing in land and immovable property for commercial purposes with view to making profits or deriving income therefrom and agricultural/plantation activities or construction of farm house or dealing in Transfer of Development Rights, subject to other conditions being maintained. Such investments are allowed up to 100% of issued capital of investee company without any obligation on part of nonresident investors to associate any resident Indian in equity capital of company at any time.

(e) Investments with Indian Companies, Body Corporates, Proprietary concern or Partnership Firm: NRIs are allowed to place deposits with Indian Companies, Body Corporates, Proprietary concerns and Partnership Firms on non-repatriation basis. Company is allowed to accept deposits either through private arrangement or through public deposit scheme. Maturity period allowed is three years. Such deposits can be received by debit to Non-Resident Ordinary (NRO) account only provided that such amount does not represent inward remittances or transfer of funds from NRE/FCNR (B) accounts into NRO account.

Investment can be made either by remittances from abroad or from investor's nonresident (external) rupee account/FCNR account or ordinary nonresident rupee account. In such cases Indian companies proposing to issue shares to nonresidents of Indian nationality or origin may apply to office of Reserve Bank under whose jurisdiction Head/Registered Office of company is situate, together with non-repatriation undertaking obtained from each nonresident investors. It is not necessary for nonresident investors to seek separate permission from Reserve Bank to purchase shares of company.

Authorised Dealer (AD) banks have been delegated powers to deal with transfer of shares/convertible debentures from residents to nonresidents and vice-versa in respect of transfer of shares/convertible debentures of Indian company, engaged in activity earlier covered under FIPB/SIA route but now falling under Automatic Route of RBI, but not engaged in any activity in financial service sector (i.e. banks, NBFCs and insurance), by resident to nonresident, and transfer of shares by nonresident to Indian company under buy-back and/or capital reduction scheme of company.

(ii) Investment on Repatriation Basis.

(a) Investment in Units of UTI, Government securities: Nonresidents of Indian nationality or origin may freely purchase units of UTI, Government dated Securities/treasury bills/units of domestic mutual funds by effecting remittances from abroad or by withdrawing from their nonresident (external) rupee accounts or FCNR accounts. Dividend/interest income from investment as well as sale proceeds/maturity proceeds of securities purchased by remittances from abroad can be remitted outside India or may be credited to investors' nonresident (external) rupee accounts with prior approval of Reserve Bank which is granted freely. Where such investments are made by withdrawing funds from nonresident (external) rupee accounts, dividend/interest/sale proceeds/maturity proceeds may be freely credited to those accounts. Nonresidents of Indian nationality or origin may also invest in India development Bonds. Interest on these Bonds will be computed in dollars/pounds, as case may be and repayment of bonds on maturity will also be at the then dollar/pound rate. Investment in Shares in PSU's being disinvested by Government of India, is permitted, provided purchase is in accordance with terms and conditions stipulated in notice inviting bids.

Entire income from UTI units purchased by remittances from abroad or out of funds held in nonresident (external) rupee accounts or FCNR accounts is exempt from Indian income tax.

Investments in National Savings Certificates and India Development Bonds are free from Indian income tax, wealth tax and gift tax.

(b) Portfolio investment in shares and debentures: Nonresidents of India nationality/origin can make portfolio investment in shares (both equity and preference) and convertible debentures quoted on stock exchange in India with full benefits of repatriation of capital invested and income earned thereon, provided: (A) Shares/convertible debentures are purchased through stock exchange; (B) purchase of shares/convertible debentures in any one company by each nonresident investor does not exceed 5% of paid up value of equity capital/convertible debentures of company with proviso that investor can purchase debentures up to 5% of total value of each debenture series, if company has issued convertible debentures in different series and (C) payment for such investments is made either by fresh remittances from abroad or out of funds held in investor's nonresident (external) rupee account/FCNR account with bank in India.

NRIs should submit application to designated branch of authorized dealer.

Only secondary market purchase and sale of shares/convertible debentures of Indian Companies by NRIs are within ambit of Portfolio Investment Scheme. Securities purchased as resident individual are not covered under this scheme.

If nonresident investor has already acquired shares in particular company with repatriation benefits under any of schemes outlined above to full extent of permissible limit mentioned at (B) above, he will not be eligible to acquire any further shares of that company through stock exchange with repatriation benefit. He can, however, acquire additional shares on non-repatriation basis.

Portfolio investment in non-convertible debentures through stock exchange as well as direct investment in new issues of such debentures will be allowed with full benefits of repatriation of capital and income earned thereon without any monetary limit on investment.

Under general permission granted by Reserve Bank, designated banks of investors can now purchase equity shares/convertible debentures without specific approval of Bank for each transaction, subject to overall ceiling of: (i) 10% of total paid-up equity capital of company concerned and (ii) 10% of total paid-up value of each series of convertible debentures, as case may be. Overall ceiling of 10% will apply to purchases of equity shares and convertible debentures through stock exchange on both repatriation and non-repatriation basis and will cover such purchases by all categories of eligible nonresident investors, viz., individuals of Indian nationality/origin. If issuing company so resolves, nonresident investors can acquire shares/debentures through stock exchange under portfolio investment scheme. Such investment limited to 24% of issued capital or 24% of total paid-up value of each series of convertible debentures issued by company, subject to same conditions as above. Limit of 24% may be enhanced by company with approval of Board of Directors followed by approval by special resolution in General Meeting of company.

In case of investments on repatriation basis, payment for purchase of shares/debentures should be by way of debit to investor's NRE account.

Net sale/maturity proceeds of shares/convertible debentures, after payment of taxes shall be remitted abroad/credited to investor's NRE/NRO account if investment was made on repatriation basis.

(iii) Deposits with Indian Companies, Body Corporates or State Legislatures.

Nonresident Indians who have already deposit money with companies incorporated in India on repatriation basis under public deposit scheme prior to 24 Apr. 2004 may be permitted to renew their deposits on repatriation basis, subject to terms and conditions set out in Foreign Exchange Management (Deposit) Regulations, 2000, as amended from time to time. If company is nonbanking finance company, rate of interest shall be in conformity with guidelines/directions issued by RBI. In other cases rate of interest shall not exceed ceiling rate prescribed under Companies (Acceptance of Deposit) Rules, 1975. Maturity period must not exceed three years and amount of aggregate deposits accepted by company must not exceed 35% of its net owned funds. Repayment may be made by remittance from India through authorised dealer or by credit to depositor's NRE/FCNR Account.

(iv) Investment in Immovable Property.

The Foreign Exchange Management (Acquisition and Transfer of Immovable Property in India) Regulation 2000 provides under §3 that person resident outside India who is citizen of India may: (a) Acquire any immovable property in India other than agricultural/plantation/farm house, (b) transfer any immovable property in India to person resident in India, and (c) transfer any immovable property other than agricultural or plantation property or farm house to person resident outside India who is citizen of India or to person of Indian origin resident outside India. Further person of Indian origin resident outside India may acquire any immovable property other than agricultural land/farm house/plantation property out of (i) funds received in India by way of inward remittance from any place outside India or (ii) funds held in any nonresident account maintained or (iii) by way of gift from person resident in India or who is citizen of India or person of Indian origin or (iv) by way of inheritance from person resident outside India. It is also allowed to transfer any immovable property in India other than agricultural land/farm house/plantation property, by way of sale to person resident in India or transfer agricultural land/farm house/plantation property in India by way of gift or sale to person resident in India who is citizen of India or transfer residential or commercial property in India by way of gift to person resident in India or to person resident outside India who is citizen of India resident outside India. They may however remit sale proceeds of immovable property (acquired other than by way of inheritance/legacy/settlement) only after sale proceeds are held/retained as eligible investments cumulatively for minimum period of ten years.

All persons whether resident in or outside India, who are citizens of Pakistan, Bangladesh, Sri Lanka, Afghanistan, China, Iran, Nepal or Bhutan require prior permission of RBI for acquiring/transferring any immovable property in India. NRIs can freely rent out their immovable property in India without seeking any permission from RBI.

In event of sale of immovable property, other than agricultural land/farm house/plantation property in India by person resident outside India, who is citizen of India, or PIO, authorized dealer may allow repatriation of sale proceeds outside India provided all prescribed conditions are fulfilled.

NRI/PIO is permitted to remit amount not exceeding USD one million, per calendar year, out of balances held in NRO accounts/sale proceeds of assets/assets in India acquired by him by way of inheritance/legacy, on production of certain documents. Limit of USD one million per financial year includes sale proceeds of immovable properties held by NRIs/PIOs.

It has now been decided to extend facility available under legacy/inheritance to arrangement under “settlement” whereby property is passed on to legatees, during lifetime of owner/parent who normally retains life interest in property. Property under settlement passes to beneficiary on death of owner/parent without any legal procedures and helps in avoiding delay and inconvenience in applying for probate. Remittance facility would be available only on demise of settler.

If foreign national who is not of Indian origin is residing in India, then he does not require any permission to acquire immovable property in India. To be defined as residing in India under FEMA, foreigner would have to be presently employed in India, pursue vocation or profession here or be here for indefinite period. Additionally, Foreign Embassy/Diplomat/Consulate General may purchase or sell immovable property in India other than agricultural land/plantation property/farm house provided: (i) Clearance from Government of India, Ministry of External Affairs is obtained for such purchase/sale, and (ii) consideration for acquisition of immovable property in India is paid out of funds from abroad through banking channel.

Regulation 3 of Foreign Exchange Management (Establishment in India of Branch or Office or other Place of Business) Regulations, 2000 provides that no person resident outside India shall, without prior approval of Reserve Bank, establish in India branch or liaison office. However general permission would now be granted to insurance companies incorporated outside India to establish liaison offices in India, which have obtained prior approval from Insurance Regulatory and Development Authority (IRDA).

At present, AD banks are required to obtain Reserve Bank's approval for opening of foreign currency accounts of project offices set up in India by foreign companies. In order to further liberalise procedure for project offices, it has been decided to allow authorised dealers to open foreign currency accounts for project offices (established under general/specific approval of Reserve Bank), as well as to permit intermittent remittances by project offices without Reserve Bank approval.

Foreign Currency Convertible Bonds and Ordinary Shares (Through Depositary Receipt Mechanism) Scheme, 1993 has been amended to bring about certain changes to guidelines on Global Depository Receipts (GDRs)/American Depository Receipts (ADRs) to bring ADR/GDR guidelines in alignment with guidelines on domestic capital issues framed by Securities and Exchange Board of India (SEBI). With regard to listed companies, Indian company, which is not eligible to raise funds from Indian Capital Market including company which has been restrained from accessing securities market by SEBI will not be eligible to issue: (i) Foreign currency convertible bonds; and (ii) ordinary shares through GDRs under Foreign Currency Convertible Bonds and Ordinary Shares (Through Depositary Receipt Mechanism) Scheme, 1993.

Unlisted companies, which have not yet accessed GDR/Foreign Currency Convertible Bond route for raising capital in international market would require prior or simultaneous listing in domestic market, while seeking to issue: (i) Foreign Currency Convertible Bonds; and (ii) ordinary shares through GDRs under Foreign Currency Convertible Bonds and Ordinary Shares (Through Depositary Receipt Mechanism) Scheme, 1993.

Liberalized Remittance Scheme.

Reserve Bank of India have announced Liberalized Remittance Scheme (Scheme) in Feb. 2004 as step towards further simplification and liberalization of foreign exchange facilities available to resident individuals. As per Scheme, resident individuals may remit up to USD 200,000 per financial year for any permitted capital and current account transactions. Scheme was operationalised vide A.P. (DIR Series) Circular No. 64 dated Feb. 4, 2004. Reserve Bank of India has received feedback on Scheme from Authorised Dealer banks and Foreign Exchange Dealers Association of India and based on discussions, clarifications on various operational issues of Scheme are being given below:

Remittance under Scheme is available to resident individuals for any permitted current or capital account transactions or combination of both. Under Scheme, resident individuals can acquire and hold immovable property or shares or debt instruments or any other assets outside India, without prior approval of Reserve Bank. Individuals can also open, maintain, and hold foreign currency accounts with banks outside India. However, it was clarified that remittance from India for margins or margin calls to overseas exchanges/overseas counterparty are not allowed under Scheme.

Remittance facility under Scheme is also not available for following: (i) Remittance for any purpose specifically prohibited under Schedule-I (like purchase of lottery/sweep stakes, tickets proscribed magazines etc) or any item restricted under Schedule II of Foreign Exchange Management (Current Account Transactions) Rules, 2000. (ii) Remittances made directly or indirectly to Bhutan, Nepal, Mauritius or Pakistan. (iii) Remittances made directly or indirectly to countries identified by Financial Action Task Force (FATF) as ``non co-operative countries and territories'' from time to time. (iv) Remittances directly or indirectly to those individuals and entities identified as posing significant risk of committing acts of terrorism as advised separately by Reserve Bank to banks.

Facility under Scheme is in addition to those already available for private travel, business travel, studies, medical treatment, etc. as described in Schedule III of Foreign Exchange Management (Current Account Transactions) Rules, 2000. Scheme can be also be used for these purposes. However, gift and donation remittances can not be made separately and have to be made under Scheme only. Accordingly, resident individuals can remit gifts and donations up to USD 200,000 per financial year under Scheme.

Investor can retain and reinvest income earned on investments made under Scheme. Currently, residents are not required to repatriate funds or income generated out of investments made under Scheme.

Remittance under this Scheme is on gross basis.

Facility is available to all resident individuals including minors.

Remittances under facility can be consolidated in respect of family members subject to individual family members complying with terms and conditions of Scheme.

Remittances under Scheme can be used for purchasing objects of art subject to provisions of other applicable laws such as extant Foreign Trade Policy of the Government of

India.

Remittance against gifts and donations can not be made separately and have to be made under Scheme only and therefore no separate limits for gift and donation are available.

AD will be guided by nature of transaction as declared by remitter and will certify that remittance is in conformity with instructions issued by Reserve Bank.

Scheme can also be used for remittance of funds for acquisition of ESOPs.

Remittance under Scheme is in addition to acquisition of ESOPs linked to ADR/GDR.

Remittance under Scheme is in addition to acquisition of qualification shares.

Resident individual can invest in units of Mutual Funds, Venture Funds, unrated debt securities, promissory notes, etc. under this Scheme. Further, resident can invest in such securities out of bank account opened abroad under Scheme.

Individual who has availed of loan abroad while non-resident can repay same on return to India, under this Scheme as resident.

It is mandatory to have PAN number to make remittances under Scheme.

Outward remittance by way of issuance of demand draft (either in his own name or in name of beneficiary with whom he intends putting through permissible transactions) at time of his private visit abroad, whether against self declaration of remitter such outward remittance can be effected against declaration by resident individual in format prescribed under Scheme.

14.02 FOREIGN EXCHANGE:

See topics 14.01 Exchange Control and 14.04 Foreign Trade Regulations.

14.03 FOREIGN INVESTMENT:

The Industrial Policy 1991 welcomes foreign investment and technology collaboration to obtain high technology to increase exports and expand production base.

Introduction.

Secretariat of Industrial Assistance (SIA) has been set up by Government of India in Department of Industrial Policy and Promotion in Ministry of Industry to provide single window for entrepreneurial assistance, investor facilitation, processing all applications which require Government approval, assisting entrepreneurs and investors in setting up projects (including liaison with other organizations and State Governments) and in monitoring implementation of projects.

Foreign Investment Promotion Board (FIPB).

FIPB is nodal, single window agency for all matters relating to Foreign Direct Investment (FDI) as well as promoting investment into country. It is chaired by Secretary, Industry (Department of Industrial Policy and Promotion). It promotes FDI by undertaking investment promotion activities, facilitating investment by international companies, NRIs and other foreign investors, negotiating/discussing with potential investors, early clearance of proposals submitted to it and review policies, rules and procedures and guidelines for investment promotion and approvals.

FOREIGN TRADE REGULATIONS:

Foreign company planning to set up business operations in India has following options: as incorporated entity by incorporating company under Companies Act, 1956 through Joint Ventures or Wholly Owned Subsidiaries and as office of foreign entity through Liaison Office/Representative Office, Project Office, and Branch Office.

Such offices can undertake activities permitted under Foreign Exchange Management (Establishment in India of Branch Office or other place of business) Regulations, 2000.

Foreign company can invest in India as under:

Automatic Route.

FDI up to 100% is allowed under automatic route in all activities/sectors except following which require prior approval of Government: (i) Where provisions of Press Note 1 (2005 Series) issued by Government of India are attracted; (ii) where more than 24% foreign equity is proposed to be inducted for manufacture of items reserved for Small Scale sector; (iii) FDI in sectors/activities to extent permitted under Automatic Route does not require any prior approval either by Government or Reserve Bank of India; and (iv) investors are only required to notify Regional Office concerned of Reserve Bank of India within 30 days of receipt of inward remittances and file required documents along with form FC-GPR with that Office within 30 days of issue of shares to non-resident investors.

Government Route.

FDI in activities not covered under automatic route requires prior Government approval and are considered by Foreign Investment Promotion Board (FIPB), Ministry of Finance. Application can be made in Form FC-IL. Plain paper applications carrying all relevant details are also accepted. No fee is payable.

General permission of RBI under FEMA.

Indian companies having foreign investment approval through FIPB route do not require any further clearance from Reserve Bank of India for receiving inward remittance and issue of shares to non-resident investors. Companies are required to notify concerned Regional Office of the Reserve Bank of India of receipt of inward remittances within 30 days of such receipt and submit form FC-GPR within 30 days of issue of shares to non-resident investors.

Following sectors where FDI is not allowed in India, under Automatic Route as well as Government Route are as under:

FDI is prohibited under Government as well as Automatic Route for following sectors: (i) Retail Trading (except single brand product retailing); (ii) Atomic Energy; (iii) Lottery Business; (iv) Gambling and Betting; (v) Business of Chit Fund; (vi) Nidhi Company; (vii) Agricultural or plantation activities (cf Notification No. FEMA 94/2003-RB dated June 18, 2003); (viii) Housing and Real Estate business (except development of townships, construction of residential/commercial premises, roads or bridges to extent specified in Notification No. FEMA 136/2005-RB dated July 19, 2005); and (ix) Trading in Transferable Development Rights (TDRs).

After investment is made under Automatic Route or with Government approval, there is two-stage reporting procedure that has been introduced for this purpose.

On receipt of money for investment:

Within 30 days of receipt of money from non-resident investor, Indian company will report to Regional Office of the Reserve Bank of India, under whose jurisdiction its Registered Office is located, containing details such as: name and address of foreign investor/s; date of receipt of funds and their rupee equivalent; name and address of authorised dealer through whom funds have been received; and details of Government approval, if any.

Upon issue of shares to non-resident investors, within 30 days from date of issue of shares, report in Form FC-GPR, PART A together with following documents should be filed with concerned Regional Office of the Reserve Bank of India: Certificate from the Company Secretary of company accepting investment from persons resident outside India certifying that: company has complied with procedure for issue of shares as laid down under FDI scheme as indicated in Notification No. FEMA 20/2000-RB dated 3 May 2000 as amended from time to time; proposal is within sectoral policy/cap permissible under automatic route of RBI and it fulfills all conditions laid down for investments under Automatic approval route namely: (a) Non-resident entity/ies (other than individuals) to whom it has issued shares does/do not have any existing joint venture or technology transfer or trade mark agreement in India in same field; (b) company is not investing in SSI unit and investment limit of 24% has been observed/requisite approvals have been obtained; (c) shares have been issued on rights basis and shares are issued to non-residents at price that is not lower than that at which shares are/were issued to residents; (d) shares issued are bonus shares; or (e) shares have been issued under scheme of merger and amalgamation of two or more Indian companies or reconstruction by way of demerger or otherwise of Indian company, duly approved by court in India.

Certificate from Statutory Auditors or Chartered Accountant indicating manner of arriving at price of shares issued to persons resident outside India.

There are guidelines for transfer of existing shares from non-residents to residents or residents to non-residents as under:

Transfer from Non-Resident to Resident:

Term `transfer' is defined under FEMA as including ``sale, purchase, acquisition, mortgage, pledge, gift, loan or any other form of transfer of right, possession or lien''. (§2(ze) of FEMA, 1999).

FEMA Regulations give specific permission covering following forms of transfer, i.e. transfer by way of sale and gift. These permissions are discussed below:

A. Transfer by way of sale:

Person resident outside India can freely transfer share/convertible debenture by way of sale to person resident in India as under:

Any person resident outside India (other than NRIs/OCBs) can transfer by way of sale shares/convertible debentures to any person resident outside India; subject to condition that acquirer or transferee does not have any previous venture or tie up in India in same field or sector.

Non-resident Indian (NRI) or erstwhile Overseas Corporate Body may transfer by way of sale, shares/convertible debentures held by him to another NRI only.

Any person resident outside India may sell share/convertible debenture acquired in accordance with FEMA Regulations, on recognized Stock Exchange in India through registered broker.

B. Transfer by way of Gift:

Person resident outside India can freely transfer share/convertible debenture by way of gift to person resident in India as under:

Any person resident outside India, (not being non-resident Indian or erstwhile overseas corporate body), can transfer by way of gift shares/convertible debentures to any person resident outside India; subject to condition that acquirer or transferee does not have any previous venture or tie up in India in same field or sector.

Non-resident Indian (NRI) may transfer by way of gift, shares/convertible debentures held by him to another NRI only.

Any person resident outside India may transfer share/convertible debenture to person resident in India by way of gift.

Transfer from Resident to Non-Resident:

A. Transfer by way of sale - General Permission under Regulation 10 of Notification No. FEMA 20/2000-RB dated May 3, 2000.

Person resident in India may transfer to person resident outside India any share/convertible debenture of Indian Company whose activities fall under Automatic Route for FDI subject to Sectoral Limits, by way of sale subject to complying with pricing guidelines, documentation, and reporting requirements for such transfers, as may be specified by Reserve Bank of India, from time to time.

This general permission is not available where Indian Company whose shares or convertible debentures are proposed to be transferred is in financial service sector (financial services sector means service rendered by banking and non-banking companies regulated by Reserve Bank, insurance companies regulated by Insurance Regulatory and Development Authority (IRDA) and other companies regulated by any other financial regulator, as case may be) and transfer falls within provisions of SEBI (Substantial Acquisition of Shares and Takeovers) Regulations, 1997.

B: Transfer by way of gift:

Person resident in India can transfer by way of gift shares to person resident outside India in following ways:

Person resident in India who proposes to transfer to person resident outside India (other than erstwhile OCBs) any security, by way of gift, must make application to Central Office of the Foreign Exchange Dept., Reserve Bank of India furnishing following information, namely: name and address of transferor and proposed transferee; relationship between transferor and proposed transferee; and reasons for making gift. Gifts are permissible up to limit of: (i) 5% of paid up capital of company per donee and (ii) amount does not exceed USD 25,000 per calendar year for each donor. Valuation of these shares must be in accordance with pricing guidelines prescribed.

In case transfer does not fit into any of above, either transferor (resident) or transferee (non-resident) can make application for Reserve Bank's permission for transfer. Application has to be accompanied with following documents: copy of FIPB approval (if required); consent letter from transferor and transferee clearly indicating number of shares, name of investee Company and price at which transfer is proposed to be effected; present/post transfer shareholding pattern of Indian investee company showing equity participation by residents and non-residents category-wise; copies of Reserve Bank of India's approvals/acknowledged copies of FC-GPR evidencing existing holdings of non-residents; if sellers/transferors are NRIs / OCBs, copies of Reserve Bank of India's approvals evidencing shares held by them on repatriation/non-repatriation basis; Open Offer document filed with SEBI if acquisition of shares by non-resident is under SEBI Takeover

Regulations; Fair Valuation Certificate from Chartered Accountant indicating value of shares as per following guidelines:

In case of unlisted shares, fair value is worked out as per erstwhile Controller of Capital Issue/s.

For listed shares, price worked out is not less than higher of average weekly high and low quotations for six months and average of daily high and low quotation or two weeks preceding 30 days prior to date of making application to FIPB.

REPATRIATION:

All foreign investments are freely repatriable except for cases where NRIs choose to invest specifically under non-repatriable schemes. Dividends declared on foreign investments can be remitted freely through Authorised Dealer.

Guidelines on issue and valuation of shares in case of existing companies.

Allotment of shares on preferential basis must be as per requirements of Companies Act, 1956, which will require special resolution in case of public limited company.

In case of listed companies, valuation must be as per Reserve Bank of India /SEBI guidelines as follows:

Issue price must be either at: (i) Average of weekly high and low of closing prices of related shares quoted on stock exchange during six months preceding relevant date or (ii) average of weekly high and low of closing prices of related shares quoted on stock exchange during two weeks preceding relevant date.

In case of unlisted companies, valuation must be done in accordance with guidelines issued by erstwhile Controller of Capital Issues.

ADRs and GDRs by Indian Companies.

Indian companies are allowed to raise capital in international market through issue of ADRs/GDRs. They can issue ADRs/GDRs without obtaining prior approval from RBI if it is eligible to issue ADRs/GDRs in terms of Scheme for Issue of Foreign Currency Convertible Bonds and Ordinary Shares (Through Depository Receipt Mechanism) Scheme, 1993 and subsequent guidelines issued by Ministry of Finance, Government of India.

After issue of ADRs/GDRs, company has to file return in proforma given in Annexure `C' to the RBI Notification No. FEMA.20/ 2000-RB dated May 3, 2000. Company is also required to file quarterly return in form specified in Annexure `D' of same regulations.

There are no end-use restrictions on GDR/ADR issue proceeds, except for express ban on investment in real estate and stock markets.

Sponsored ADR/GDR: Indian company may sponsor issue of ADR/GDR with overseas depository against shares held by its shareholders at price to be determined by Lead Manager. Operative guidelines for same have been issued vide A.P. (DIR Series) Circular No.52 dated Nov. 23, 2002.

Two-way fungibility Scheme: Under limited Two-way fungibility Scheme, registered broker in India can purchase shares of Indian company on behalf of person resident outside India for purpose of converting shares so purchased into ADRs/GDRs. Operative guidelines for same have been issued vide A.P. (DIR Series) Circular No. 21 dated Feb. 13, 2002. Scheme provides for purchase and re-conversion of only as many shares into ADRs/GDRs which are equal to or less than number of shares emerging on surrender of ADRs/GDRs which have been actually sold in market. Thus, it is only limited two-way fungibility wherein headroom available for fresh purchase of shares from domestic market is restricted to number of converted shares sold in domestic market by non-resident investors. So long ADRs/GDRs are quoted at discounts to value of shares in domestic market, investor will gain by converting ADRs/GDRs into underlying shares and selling them in domestic market. In case of ADRs/GDRs being quoted at premium, there will be demand for reverse fungibility, i.e. purchase of shares in domestic market for re-conversion into ADRs/GDRs. Scheme is operationalised through Custodians of securities and stockbrokers under SEBI.

FCCBs.

FCCBs can be issued by Indian companies in overseas market in accordance with Scheme for Issue of Foreign Currency Convertible Bonds and Ordinary Shares (Through Depository Receipt Mechanism) Scheme, 1993.

FCCB issue needs to conform to External Commercial Borrowing guidelines, issued by RBI vide Notification No. FEMA 3/2000-RB dated May 3, 2000 as amended from time to time.

PREFERENCE SHARES:

Foreign investment through preference shares is treated as foreign direct investment. Foreign investment in preference share is considered as part of share capital and fall outside External Commercial Borrowing (ECB) guidelines/cap.

Preference shares to be treated as foreign direct equity for purpose of sectoral caps on foreign equity, where such caps are prescribed, provided they carry conversion option. If preference shares are structured without such conversion option, they would fall outside foreign direct equity cap.

Shares issued against Lumpsum Fee, Royalty and ECB.

Issue of equity shares against lump sum fee, royalty and external commercial borrowings (ECBs) in convertible foreign currency are permitted, subject to meeting all applicable tax liabilities and sector specific guidelines.

Other general permissions are available under RBI Notification No.FEMA 20 dt.3-5-2000 as under:

Issue of shares under ESOP by Indian companies to its employees or employees of its joint venture or wholly owned subsidiary abroad who are resident outside India directly or through Trust up to 5% of paid up capital of company.

Issue and acquisition of shares by non-residents after merger or de-merger or amalgamation of Indian companies.

Issue shares or preference shares or convertible debentures on rights basis by Indian company to person resident outside India.

As per regulations/guidelines issued by Reserve Bank of India/Government of India, investment can also be made in unlisted shares of Indian companies.

II - Foreign Technical Collaboration.

ROYALTY:

Payment for foreign technology collaboration by Indian companies are allowed under automatic route subject to following limits: lump sum payments not exceeding US$ 2 million and royalty payable being limited to 5% for domestic sales and 8% for exports, without any restriction on duration of royalty payments.

Royalty limits are net of taxes and are calculated according to standard conditions.

Royalty will be calculated on basis of net ex-factory sale price of product, exclusive of excise duties, minus cost of standard bought-out components and landed cost of imported components, irrespective of source of procurement, including ocean freight, insurance, custom duties, etc.

RBI has delegated powers to ADs to make payment of royalty under such agreements. Requirement of registration of agreement with Regional Office of Reserve Bank of India has been done away with.

Proposals, which do not satisfy parameters prescribed for automatic route of RBI, require clearance from Dept. of Industrial Policy and Promotion, Ministry of Commerce and Industry, Government of India.

III - Foreign Portfolio Investment.

FIIs.

Investment by FIIs is regulated under SEBI (FII) Regulations, 1995 and Regulation 5(2) of FEMA Notification No. 20 dated May 3, 2000. FIIs include Asset Management Companies, Pension Funds, Mutual Funds, and Investment Trusts as Nominee Companies, Incorporated / Institutional Portfolio Managers or their Power of Attorney holders, University Funds, Endowment Foundations, Charitable Trusts and Charitable Societies.

SEBI acts as nodal point in registration of FIIs. Reserve Bank of India has granted General Permission to SEBI Registered FIIs to invest in India under Portfolio Investment Scheme (PIS).

Investment by individual FIIs cannot exceed 10% of paid up capital. Investment by foreign registered as sub accounts of FII can not exceed 5% of paid up capital. All FIIs and their sub-accounts taken together can not acquire more than 24% of paid up capital of Indian Company. Indian Company can raise 24% ceiling to Sectoral Cap/Statutory Ceiling, as applicable, by passing resolution by its Board of Directors followed by passing Special Resolution to that effect by their General Body.

NRIs/PIOs.

Non Resident Indian (NRIs) and Persons of Indian Origin (PIOs) can purchase/sell shares/convertible debentures of Indian companies on Stock Exchanges under Portfolio Investment Scheme. For this purpose, NRI/PIO has to apply to designated branch of bank, which deals in Portfolio Investment. All sale/purchase transactions are to be routed through designated branch.

NRI or PIO can purchase shares up to 5% of paid up capital of Indian company. All NRIs/PIOs taken together cannot purchase more than 10% of paid up value of company. (This limit can be increased by Indian company to 24% by passing General Body resolution).

Sale proceeds of repatriable investments can be credited to NRE/NRO, etc. accounts of NRI/PIO whereas sale proceeds of non-repatriable investment can be credited only to NRO accounts.

Sale of shares will be subject to payment of applicable taxes.

IV - Investment in Government Securities and Corporate debt.

Under FEMA Regulations, only NRIs and SEBI registered FIIs are permitted to purchase Government Securities/Treasury bills and Corporate debt. Details are as under:

A. Non-resident Indian can purchase: (1) (i) Government dated securities (other than bearer securities) or treasury bills or units of domestic mutual funds, (ii) bonds issued by public sector undertaking (PSU) in India, (iii) shares in Public Sector Enterprises being disinvested by Government of India; (2) They can also invest, on non-repatriation basis, in dated Government securities (other than bearer securities), treasury bills, units of domestic mutual funds, units of Money Market Mutual Funds in India, or National Plan/Savings Certificates on non-repatriation basis. Guidelines for these schemes are framed by concerned Government agencies.

B. SEBI registered Foreign Institutional Investor may purchase, on repatriation basis, dated Government securities/treasury bills, non-convertible debentures/bonds issued by Indian company and units of domestic mutual funds either directly from issuer of such securities or through registered stock broker on recognised stock exchange in India. FIIs is required to ensure that: (i) FII allocation of its total investment between equity and debt instruments (including dated Government Securities and Treasury Bills in Indian capital market) should not exceed ratio of 70:30 and (ii) in case FII is set-up as 100% debt FII, it can invest entire corpus in dated Government Securities including Treasury Bills, non-convertible debentures/bonds issued by Indian company subject to limits, if any, stipulated by SEBI in this regard.

Investment in Government Securities/Treasury bills and Corporate debt is subject to ceiling decided in consultation with Government of India. Investment limit for FIIs as group in Government securities currently is USD 3.2 Billion. Limit for investment in Corporate debt is USD 1.5 billion. At present, FIIs can also invest in Innovative instruments such as Upper Tier-II capital up to limit of USD 500 million.

V - Foreign Venture Capital Investment.

SEBI registered Foreign Venture Capital Investor with general permission from Reserve Bank of India can invest in Venture Capital Fund or Indian Venture Capital Undertaking, in manner and subject to terms and conditions specified in Schedule 6 of RBI Notification No. FEMA 20/2000-RB dated May 3, 2000 as amended from time to time.

VI - Branch/Project/Liaison Office.

Foreign company can set up Liaison/Branch Offices in India after obtaining approval from Reserve Bank of India. Reserve Bank of India has given general permission to foreign companies to establish Project Offices in India subject to certain conditions.

Liaison office can carry on only liaison activities, i.e. it can act as channel of communication between Head Office abroad and parties in India. It is not allowed to undertake any business activity in India and can not earn any income in India. Expenses of such offices are to be met entirely through inward remittances of foreign exchange from Head Office abroad. Role of such offices is, therefore, limited to collecting information about possible market opportunities and providing information about company and its products to prospective Indian customers.

Companies desirous of opening liaison office in India may make application in form FNC-1 along with documents mentioned therein to Foreign Investment Division, Foreign Exchange Department, Reserve Bank of India, Central Office, Mumbai.

Permission to set up such offices is initially granted for period of three years and this may be extended from time to time by Regional Office in whose jurisdiction office is set up. Liaison/Representative offices have to file Activity Certificate on annual basis from Chartered Accountant to concerned Regional Office of the Reserve Bank of India, stating that Liaison Office has undertaken only those activities permitted by Reserve Bank of India.

Foreign companies are granted projects in India by Indian entities. General Permission has been granted by Reserve Bank of India vide Notification No. FEMA 95/2003-RB dated July 2, 2003 to foreign companies to open Project Office/s in India provided they have secured from Indian company, contract to execute project in India, and project is funded directly by inward remittance from abroad; or project is funded by bilateral or multilateral International Financing Agency; or project has been cleared by appropriate authority; or company or entity in India awarding contract has been granted Term Loan by a Public Financial Institution or bank in India for project.

However, if above criteria are not met, or if parent entity is established in Pakistan, Bangladesh, Sri Lanka, Afghanistan, Iran or China, such applications have to be forwarded to Central Office of the Foreign Exchange Department of the Reserve Bank at Mumbai for approval.

Reserve Bank permits companies engaged in manufacturing and trading activities abroad to set up Branch Offices in India for following purposes: to represent parent company/other foreign companies in various matters in India e.g. acting as buying/selling agents in India; to conduct research work in area in which parent company is engaged; to undertake export and import activities and trading on wholesale basis; to promote possible technical and financial collaborations between Indian companies and overseas companies; rendering professional or consultancy services; rendering services in Information technology and development of software in India; and rendering technical support to products supplied by parent/Group companies.

Branch office is not allowed to carry out manufacturing, processing activities directly/indirectly. Branch Office is also not allowed to undertake Retail Trading activities of any nature in India. Branch Offices have to submit Activity Certificate from Chartered Accountant on annual basis to Central Office of FED. For annual remittance of profit, Branch Office may submit required documents to authorised dealer.

Permission for setting up branch offices is granted by Reserve Bank of India. Reserve Bank of India considers track record of Applicant Company, existing trade relations with India, activity of company proposing to set up office in India as well as financial position of company while scrutinising application.

External Commercial Borrowing.

In India, External Commercial Borrowings (ECBs) are being permitted by Government for providing additional source of funds to Indian corporates and Public Sector Undertakings (PSUs) for financing expansion of existing capacity and as well as for fresh investment, to augment resources available domestically. ECBs can be used for any purpose (rupee-related expenditure as well as imports) except for investment in stock market and speculation in real estate.

External Commercial Borrowings (ECBs) are defined to include: commercial bank loans, buyer's credit, supplier's credit, securitised instruments such as floating rate notes, fixed rate bonds etc., credit from official export credit agencies, commercial borrowings from private sector window of multilateral financial institutions such as IFC, ADB, AFIC, CDC etc., and Investment by Foreign Institutional Investors (FIIs) in dedicated debt funds.

Applicants are free to raise ECB from any internationally recognised source like banks, export credit agencies, suppliers of equipment, foreign collaborations, foreign equity - holders, international capital markets, etc.

REGULATOR:

Dept. of Economic Affairs, Ministry of Finance, Government of India with support of Reserve Bank of India, monitors and regulates Indian firms access to global capital markets. From time to time, they announce guidelines on policies and procedures for ECB and Euro-issues.

ECB GUIDELINES:

Important aspect of ECB policy is to provide flexibility in borrowings by Indian corporates, at same time maintaining prudent limits for total external borrowings. Guiding principles for ECB Policy are to keep maturities long, costs low, and encourage infrastructure and export sector financing which are crucial for overall growth of economy.

ECB policy focuses on three aspects: 1. Eligibility criteria for accessing external markets; 2. total volume of borrowings to be raised and their maturity structure; and 3. end use of funds raised.

Detailed guidelines were announced in July 1999. Thereafter, various modifications had been made in Guidelines by government and RBI.

14.04 FOREIGN TRADE REGULATIONS:

Imports and Exports are governed by Imports and Exports Policy of Government generally valid for five years at a time. Government has power to ban import/export of any commodity at any time, such ban operates prospectively not affecting commitments made (e.g. letter of credit established) prior to date of ban. Imports are under licenses. Open General Licenses i.e. without restrictions as to user or individual licenses which may be reserved for specific commodities, value of import and specific user. As incentive to exports, import licenses are available to persons who have affected exports. Remission/refund of excise duty may also for available on exported Goods.

Under §7 of Foreign Exchange Management Act, 1999 Government has power to prohibit exports unless exporter furnishes declaration of full export value and undertakes to repatriate such value. Export, without permission of Reserve Bank, is precluded from doing or refraining to do anything whereby payment is delayed beyond prescribed period or made otherwise than in prescribed manner or sale proceeds do not represent full export value.

With view to further liberalise facilities available to exporters and simplify procedure for export, it has been decided to delegate powers to authorised dealer banks for grant of approval in cases where goods are being exported for re-import after repairs/maintenance/testing/calibration, etc. subject to condition that exporter shall produce relative bill of entry within one month of re-import of exported item from India.

Foreign Contributions (Regulations) Act, 1976.

Under provisions of this Act certain organisations in India carrying on certain activities, e.g. economical, educational, religious or social activities, cannot receive contributions from persons or organisations outside India without prior approval of Government of India.

Government of India has exempted contributions given by certain agencies of U.N. and other international agencies or organisations from provisions of above Act.

14.05 MEDIA AND ENTERTAINMENT LAW:

Foreign investment is allowed in Indian entities: (a) Publishing scientific/technical and speciality magazines/periodicals/journals is 100%; and (b) publishing newspapers, periodicals dealing in news and current affairs up to limits and subject to fulfilment of certain criteria and subject to approval of Ministry of Information & Broadcasting (MIB), and also governmental approval.

Clearance from Foreign Investment Promotion Board (FIPB) would be required in cases of both Foreign Direct Investment (FDI) and Foreign Institutional Investments. In cases of portfolio investments, applicants would only require Reserve Bank of India (RBI) approval irrespective of whether foreign investment is routed as FDI or Foreign Institutional Investments. Investors are under obligation to obtain No Objection Certificate from MIB.

In Print Media, Government of India (GOI) has allowed 100% FDI for full, facsimile editions of foreign newspapers and periodicals to be printed in India. These editions will not have any local content nor have access to Indian advertising revenue streams.

On domestic front, GOI has permitted increase in syndicated foreign news content from 7.5% to 20%, per issue excluding global stock quotations and foreign news taken from newswires like Reuters etc.

At present all foreign investments in media sector are in FDI. However, nonresident Indians, persons of Indian Origin and foreign institutional investors may now pick up stakes in media companies printing Indian newspapers and international editions of foreign newspapers up to 26%.

Government has permitted granting of communication facility to Foreign News Agencies under policy which is governed by Cabinet Decision of 1956. Government has also permitted foreign investment in broadcasting sectors such as production of software; marketing of TV rights, air time etc.; satellite communication in India; use of foreign satellites; Internet Service Providers; up-linking of TV Channels from India; Direct-To-Home (DTH) broadcasting service. There are different levels of investments permitted in these various broadcasting sectors subject to certain criteria being met and subject to governmental approval.

Currently, sectoral cap of 20% FDI is allowed in private FM radio and DTH. Government of India has announced Phase II of programme for expansion of FM radio broadcasting services through private agencies to supplement and complement efforts of All India Radio by operationalising radio for providing programmes with local content and relevance, improving quality of fidelity in reception and generation, encouraging participation by local talent and generating employment. GOI has now decided to permit foreign investment, including Foreign Direct Investment, NRI and PIO investments and portfolio investments up to 20% equity for FM Radio's Broadcasting Services subject to such terms and conditions as specified from time to time by MIB for grant of permission for setting up of FM radio stations.

GOI introduced stabilizing measures by setting out capital adequacy norms for new entrants in television to obtain licenses for setting up of up-linking hubs or teleports and for seeking approvals for up-linking TV channels from India. GOI has made available 14 free-to-air channels on its national DTH platform with proposed addition of 17 more channels to produce moderating influence and fair competition in DTH market through improved technology, coupled with value-added services like pay-per-view.

FDI up to 49% would now be permitted with prior approval of GOI for setting up up-linking HUB/teleports.

FDI up to 100% would be allowed with prior approval of GOI for up-linking non-news and current affairs TV channel.

100% foreign investment is permitted in film industry, subject to certain qualifications and criteria, such as minimum capitalisation, background of investor, etc.

Foreign investment is permitted in advertising sector up to 100%.

15 IMMIGRATION

15.01 ALIENS:

Position of aliens in India is governed by Foreigners Act XXXI of 1946. Act describes “foreigner” as person who is not a citizen of India. India however recognises a quasi-dual citizenship. Persons who are citizens of Commonwealth Countries are also thereby “Commonwealth Citizens of India.” See category 1 Introduction, topic 1.02 Government and Legal System, subhead Citizenship.

Central Government has power to make orders for prohibiting, regulating or restricting entry of foreigners into India or their departure therefrom or their presence or continued presence therein.

Acquisition, Holding etc. of Immovable Property.

Persons who are not citizens of India and companies (other than banking companies) which are not incorporated in India are required to obtain prior permission of RBI to acquire, hold, transfer or dispose of by sale, mortgage.

However, Reserve Bank of India has recently granted general permission to foreign citizens of Indian origin, whether resident in India or abroad, to purchase immoveable property in India for their bonafide residential purpose. Consideration for such purchasers should be met either out of inward remittances in foreign exchange through normal banking channels or out of funds from amounts known as N R I, F C N R Accounts maintained by such persons with banks in India.

Such properties can also be disposed of and repatriation of original investments in respect of property purchased, on or after 26th May, 1993, is permitted up to amount of consideration originally remitted from abroad, provided property is sold after period of three years from date of final purchase deed or from date of payment of final installments of consideration amount, whichever is later.

Applications for repatriation are required to be made within 90 days of sale in prescribed form. See category 14 Foreign Trade and Commerce, topic 14.01 Exchange Control.

Corporations Owned or Controlled by Aliens.

See categories 2 Business Organizations, topic Corporations or Companies, subheads Foreign Corporations, and Subsidiaries; Foreign Trade and Commerce, topics Exchange Control, Foreign Investment.

15.02 IMMIGRATION:

Migration to India has been held to mean “…coming to India with the intention of residing in India permanently”. However, mere migration is not conclusive proof of having obtained Indian citizenship unless qualifications as stipulated by Constitution for acquisition of citizenship are fulfilled. Law relating to citizenship is governed by Citizenship Act, 1955 which was recently amended by Citizenship (Amendment) Act, 2003. Citizenship (Amendment) Act, 2003 received assent of President of India on 7th Jan. 2004 and came into force on 3rd Dec. 2004.

§§3, 4, 5 and 6 of Citizenship Act, 1955 prescribe mechanism for acquisition of Indian citizenship by birth, descent, registration and naturalisation.

Citizenship by Birth.

§3 of Citizenship Act, 1955 as amended by new Act provides that subject to exceptions contained therein every person born in India shall acquire citizenship by birth.

Citizenship by Descent.

§4 provides for acquisition of citizenship by descent, if person is born outside India, provided conditions stated therein are satisfied.

New Amendment requires person whose parents are citizens by descent to be registered at Indian Consulate.

Minor who is citizen of India by descent and also citizen of other country loses Indian citizenship if he does not renounce citizenship or nationality of other Country within six months of acquiring majority.

Citizenship by Registration.

Persons not being illegal migrants and belonging to any of following categories may apply for registration as Indian citizens: (a) Persons of Indian origin, who are ordinarily resident in India for seven years immediately prior to making application for registration; (b) persons of Indian origin who are ordinarily resident in any country or place outside undivided India; (c) persons married to Indian citizens and ordinarily resident in India for seven years immediately prior to making application for registration; (d) minor children of persons who are Indian citizens; (e) person of full age and capacity whose parents are registered as citizens of India under clause (a) mentioned above or have acquired citizenship by naturalization; (f) persons of full age and capacity who, or either of his parents, were earlier citizen of independent India, and residing in India for one year before making application for registration and (g) persons of full age and capacity registered as overseas citizen of India for five years and residing in India for two years before making application for registration.

Citizenship by Naturalisation.

Persons not being illegal migrants may acquire Indian citizenship by naturalisation provided they meet following qualifications: (i) such persons are not subjects or citizens of any country where Indian citizens are prevented by law or practice prevalent in that country from becoming subjects or citizens of that country by naturalisation; (ii) such persons have, if citizens of any country, renounced citizenship of that country in accordance with local laws and have communicated such renunciation to Central Government; (iii) such persons have resided in India or been in employ of a Government in India, or partly one and partly other, throughout period of 12 months immediately preceding date of application; (iv) such persons have during period of 12 years immediately prior to period of 12 months referred to above, either resided in India or have been in service of Government of India, or partly one and partly other, for periods aggregating to at least nine years; (v) such persons are of good moral character; (vi) such persons have adequate knowledge of certain languages specified in Indian Constitution, including English; (vii) such persons, upon being granted certificate of naturalisation, intend to reside in India, or to enter into or continue in service under Government of India or under society or body of persons established in India.

Amendment to Act provides for registration of any person as overseas citizen of India on application subject to prescribed conditions and restrictions including condition of reciprocity. Central Government may compulsorily register every Indian citizen and issue national identity cards. Provision for maintenance of national Register of Indian citizens and establishment of National Registration Authority have also been made.

Dual Citizenship.

Ordinance was passed on June 28, 2005 paving way for dual citizenship by amending Citizenship Act, 1955. Under this amendment eligible persons inter alia having Indian origin or Indian linage can now register as Overseas Citizen of India (OCI). Amendment further reduces period of stay to one year as opposed to prior provision, which required OCI to stay for period of two years in India before becoming eligible for Indian citizenship. Citizenship (Amendment) Act, 2005 came into force on 24th Aug. 2005 which sought to replace and give effect to above ordinance.

Foreigners.

Foreigners Act, 1946 has no application to citizens of India as it applies only to foreigners, i.e. persons who are not citizens of India. This Act confers upon Central Government certain powers in respect of foreigners. For e.g. foreigner may not enter country at all or may enter country only at certain specified times and through certain specified routes; that such foreigner shall not depart from India at all or through specified routes; that foreigner may not remain in country, etc.

Under §14 of Act, any person who attempts to contravene provisions of Act, is liable to be sentenced to imprisonment for term which may extend to five years or both may be penalised with fine.

Related provisions include Passport (Entry into India) Act, 1920. §3 provides that Central Government may make rules prohibiting entry of any person who does not have in his possession valid passport. (New Subsection (3) is added in §3 under which person who enters India without valid passport is punishable with imprisonment and/or fine, as therein provided); Registration of Foreigners Rules, 1939, which enjoins upon foreigner, in certain instances, to report to concerned official certain details such as his age, sex, place of birth, and address or intended address, etc.

16 INSURANCE

16.01 PUBLIC LIABILITY INSURANCE:

See category 11 Environment, topic 11.01 Environmental Regulation, subhead Public Liability Insurance Act, 1991.

17 INTELLECTUAL PROPERTY

—Scope —

India is signatory country and has ratified Paris Convention for the Protection of Intellectual Property, administered by World Intellectual Property Organisation (WIPO) which has as its object, inter alia, protection of patents, utility models, industrial designs, trademarks, service marks, etc. (See topic 17.03 Trademarks, subhead Infringement.)

17.01 COPYRIGHTS:

International Copyright.

India is signatory member of Berne Copyright Convention, and of Universal Copyright Convention (Geneva) which became effective here in Jan. 1958. Copyright (Amendment) Act 1999 which has come into force recently has introduced some changes in Copyright Act of 1957. In §38 of Principal Act, in subsection (2), states that performers' right will subsist for 50 years from year of performance instead of 25 years. (§§40-43, Indian Copyright Act, 1957).

Copyright Law in India was governed by The Copyright Act 1914 which implemented English Copyright Act 1913 in British India, and is presently governed by Copyright Act XIV of 1957 which again largely follows English Copyright Act 1956. (See England Law Digest.) Act provides for copyright office and appointment of Registrar and Deputy Registrar of Copyrights (at Education Ministry North Block, Secretariat, New Delhi) and Copyright Board. Central Government is empowered to apply provisions of c. (VIII) (work of Joint Authorship) to broadcasting organisations and performers in other countries in certain circumstances therein specified. (§42A). Central government is empowered to restrict rights of foreign broadcasting organisations and performers. Registration is not compulsory (§45) but author in India may ask for registration by application in prescribed form and Registrar, after making due enquiries, enters particulars in Register (§45). Register is open to inspection (§47) and is prima facie evidence of particulars entered therein (§48). Copyright Board has certain powers similar to those of civil courts when trying suit for infringement of copyright (§§74, 75); civil courts also have jurisdiction to grant all remedies such as injunction, damages, accounts etc. Registrar has powers to prevent importation of works constituting infringement of copyright in India. (§53).

Assignment and Licensing of Copyright.

Assignment of copyright in work by owner of such copyright can be done wholly or partially, generally or subject to limitations and either for whole term of copyright or part of such term, and thereafter, assignee in respect of rights so assigned is treated as owner of copyright vis-à-vis those rights (§18). Any assignment of copyright has to be in writing and signed by assignor or his duly authorised agent, and has to specify work in which such copyright has been assigned, rights assigned, duration, territorial extent of assignment and royalty payable, if any. (§19). Non-exercise of rights by assignee, post-assignment, for period of one year from date of assignment results in lapse of assignment on expiry of said period. (§19[4]). Where, period of assignment is not specified, it is deemed to be five years from date of assignment (§19[5]), and where territorial extent of assignment is not specified, it shall be presumed to extend within whole of India (§19[6]).

Licensing of owner of copyright in any work in terms of any interest in such right, is to be in writing and signed by owner or his duly authorised agent. (§30). Such requirements as to assignment of copyright (supra §19) must apply with necessary adoptions and modifications to license. (§30A). Compulsory licensing in respect of Indian works withheld from public and unpublished Indian works have also been provided for under Act.

Following Acts Constitute Breach of Copyright.

Any act which (1) infringes exclusive rights of owner; (2) permits public communication of copyrighted work for profit (which constitutes breach), unless alleged infringer was not aware and had no reasonable ground for believing public communication to constitute such breach; (3) makes for sale, hire, or sells, or lets for hire or by way of trade displays or offers for sale or hire, or distributes either for purpose of trade or to such extent as is prejudicial to owners of copyright, or exhibits in public by way of trade, or imports otherwise than for private and domestic use, any copies infringing copyrighted work. (§51). Certain acts done in good faith with bona fide intentions and not with profit making intention do not constitute infringement. (§52). Copyright also exists in translations, performance rights and broadcasts.

To control audio and video piracy stringent provisions exist including display labels on record/cassettes/CDs and name and address of person making record/cassette/CDs, declaration that maker has obtained necessary license or consent of owner of copyright etc. (§52A) and prescribing penalty by way of imprisonment up to term of three years and fine for contravening these provisions (§68A). India ranks fifth in International Piracy List with losses worth US$433 million. India is also on priority watch list for 2006. IT industry, in association with NASSCOM, is mooting possibility of creating piracy regulatory body, for restricting software piracy rate in India.

Police officers are empowered to seize without warrant all copies of infringing work and plates used for making infringing copies and have to produce same before Magistrate as soon as practicable. (§64). Knowledge of infringement of copyright or abetment of same by alleged infringer, is mandated by Act, for commission of offence of infringement, attracting penal imposition. (§63).

17.02 PATENTS:

Changes have been made in Patents Act, 1970 by Patents (Amendment) Act, 2005. Amendment provides that product patent can be issued in respect of food, drugs and medicines. Provisions in respect of “Process Patents” for these goods is abolished. Assignment of patent valid even if not registered, but registration of assignment of patent still required. Further provisions of sealing of patents has been omitted. Patents (Amendment) Act provides for uniform patent protection of 20 years. Act provides for parallel import of patented products. Appellate Board has been established for speedy disposal of appeals and rectification of register of patents. Act had been amended by Patents (Third Amendment) Act, 2003 which brought about significant changes viz. Product Patent regime for all classes of products without discrimination and deleting provisions regarding exclusive marketing rights while providing transitional provisions for safeguarding exclusive marketing rights already granted.

Patent Amendment Act provides for granting of patent for any inventions, whether products or processes, in all fields of technology, provided they are new, involves on inventive steps (nonobvious) and are capable of industrial application (useful). Exceptions are chemicals (including alloys, optical glass, semiconductor and intermetallic compound), diagnostic, therapeutic and surgical methods of treatment of humans and animals, plants and animals other than microorganism, and essentially biological processes for production of plants or animals. Inventions are excluded from patentability if their commercial exploitation is prohibited for reasons of public order or morality. Product patents can now be granted for agricultural chemical and pharmaceuticals including medicines and drugs. New Act provides for exclusive marketing rights, compulsory licensing in respect of such rights, right to sale or distribute subject to such conditions as Government may prescribe. Act omits restrictions regarding Indians applying for patents abroad. By amendment passed in 2004, registered designs shall also bind government and will have like effect as against any person and provisions of c. XVII of Patents Act, 1970 shall apply to registered design, as they apply to patents.

Term of patent granted after commencement of Patents (Second Amendment) Act, 2002 and term of every patent not expired and not ceased to have effect on commencement date shall be 20 years from filing of application.

In case of infringement of patent legal proceedings by way of suit can be commenced by registered proprietor of patent, co-owner of patent, exclusive licensee, or licensee under provisions relating to compulsory licensing for preventing infringement and also for damages for infringement. Burden of proof that patent is not infringed will be on alleged infringer.

Appeal shall lie to Appellate Board from decision, order or direction of Controller of Central Government under various sections in Act.

Recently, Los Angeles based Yoga guru has claimed intellectual property rights over 26 Yoga postures, and United States Patent and Trademark Office (USPTO) has granted 131 patents on Yoga devices and accessories. Department of AYUSH, Ministry of Health & Family Welfare, which is nodal Department for Yoga, has already written to Indian Ambassador in Washington to take all necessary steps to address issue of misappropriation of Indian Yoga system, being ancient Indian art, through USPTO.

Following rejection of patent application in India for anti-cancer drug Glivec, Novartis filed Writ Petition 24754 of 2006 (Novartis AG, Switzerland vs. Union of India & Ors.) before Madras High Court challenging constitutionality of Indian patent law, in particular §3(d). Clause stipulates that modifications of already known medicines cannot be patented unless they make drug significantly more effective. Novartis disagrees and says any modification that has commercial utility should be allowed. Honorable court is expected to rule shortly on case that could have profound impact on patients' costs to affordable generic medicines in India and in developing countries around world.

Memorandum of Understanding (MOU) on Bilateral Cooperation in IPRs has been signed on 10 Apr. 2007, between Office of Controller General of Patents, Designs and Trademarks (CGPDTM) and European Patent Office (EPO). This provides programmes for human resource development, automation and data exchange between two offices.

17.03 TRADEMARKS:

Trade Mark Act 1999 has come into force. Act has brought about some significant changes from old Act, which has been repealed by this Act.

Register of Trade Marks is kept at head of Trade Marks Registry, wherein all registered trade marks with names, addresses, description of proprietors, notifications of assignment, transmission of names, addresses, description of registered users, conditions, limitations and relevant particulars, are entered. It is kept under control and management of Registrar of Trade Marks.

Said Act prohibits registration of mark: (a) Which is likely to deceive public or cause confusion; (b) which would be contrary to any law in force; (c) which contains scandalous or obscene matter; (d) which is likely to hurt religious sentiments of any class or section of citizens of India; (e) which would be disentitled to protection in court; (f) which is identical or deceptively similar to another already registered mark in respect of same goods or description of goods (except in case of honest concurrent use or of other special circumstances); (g) which consists of word which is commonly used and accepted name of single chemical element or compound; (h) which falsely suggests connection with any living or recently dead person (except with consent of such person or his legal representative).

Mere fact that trade mark has been registered in foreign country does not entitle it to be registered in India, nor does rejection of mark by foreign country debar its registration in India.

Any person claiming to be proprietor of trademark used or proposed to be used by him may apply to Registrar for registration.

Every application for registration, which fulfils necessary requirements specified in Act, is advertised in Trade Marks Journal. Any person interested in opposing registration of mark may do so by giving notice in writing within three months from date of advertisement and in prescribed manner to Registrar of opposition to registration. Registrar serves copy of notice of opposition on applicant for registration who must file his counter-statement within two months of receipt thereof. Both applicant for registration and opponent may submit in prescribed manner evidence on which they rely and then same is heard by Registrar, if they so desire, before Registrar decides whether and subject to what conditions and limitations, if any, registration is to be permitted. (§21).

Trademark may be limited wholly or in part to combination of colours. Trademark registered without limitation of colour shall be deemed to be registered for all colours. (§10).

When application for registration has been accepted, Registrar shall register trademark in Register and trademark shall then be registered as on date of application for registration. (§23).

Registration holds for ten years and is renewable every ten years on application within prescribed time before expiration of last registration. (§25).

Registration of trademark gives its registered proprietor exclusive right to use of such trademark in relation to goods and services in respect of which trademark is registered and to obtain relief in respect of infringement of trademark. (§28).

Non use of trademark for period of five years or more (except in case of special circumstances in trade which prevent use of mark) makes mark liable to be removed from Register or to have limitations imposed on its registration. (§47).

Mark which is adopted in relation to any goods to distinguish in course of trade, goods certified by any person in respect of origin, material, mode of manufacture, quality, accuracy or other characteristic, from goods not so certified, may be registered as certification trademark (§71) on certain conditions being fulfilled.

Any person aggrieved by any contravention or failure to observe condition relating to entry, or by absence or omission from Register of Trade Marks or by any entry made in Register without sufficient cause or wrongly remaining on it, or by any error or defect on any entry, may apply to Registrar or to Appellate Board in prescribed manner and Tribunal may pass on appropriate order for making, expunging or varying the entry as it thinks fit. (§57).

Assignment.

Subject to restrictions and conditions contained in §§41-43 registered and unregistered trademark can be assigned and transmitted, with or without goodwill, of business concerned and in respect of all goods and services in respect of which trademark has been registered or of some of them. (§§38, 39).

A person other than registered proprietor may be registered as registered user of trademarks under certain conditions. (§§48 & 49). However, registered user does not have right of assignment or transmission. (§54).

Infringement is use by person who is not registered proprietor or registered user of mark identical with or deceptively similar to registered trademark in relation to any goods or services in respect of which trademark is registered and in such manner so as to render use of mark likely to be taken as being used as trademark. (§29).

No person shall be entitled to institute any proceeding to prevent or recover damages for infringement of unregistered mark. But nothing in Act shall be deemed to affect rights of action against any person for passing off goods as goods of another or remedies in respect thereof. (§27).

In suit to restrain infringement or passing off, court may grant injunction and, at option of plaintiff, court may order either damages or account of profits together with or without order to return infringing labels and marks for destruction or erasure. (§135).

Use of trademark for purpose of reasonably indicating that goods are adopted for use in particular manner does not constitute infringement (§30), nor does use by person of his own name or that of his place of business or of name of place of business of any of his predecessors or use of any bona fide description of character or quality of goods amount to infringement or passing off (§35). Where any person has used his mark before date of registration of trademark and also before date of first use of such latter mark, use of prior mark cannot be restrained. (§34).

Penal provisions are also included in Act (§103 et seq.) for use of mark deceptively similar to another's mark which may amount in specify cases to falsifying or applying false trademark or for selling goods to which false trademark is applied, etc. Supreme Court in number of recent decisions has recognised transborder reputation of trademarks in suits for infringement and passing-off. India by its notification dated 3-12-1998 has declared list of countries that recognises as members of Union for purpose of Paris Convention. Said notification, issued under Trade and Merchandise Marks Act, 1958, affords protection of certain rights to applicants of member countries, which include U.S., U.K., China etc.

Implied Warranty.

On sale or in contract for sale of any goods to which trademark or mark or trade description is applied, seller shall be deemed to warrant that mark is genuine mark and not falsely applied that trade description is not false trade description, unless contrary is expressed in writing and signed by or on behalf of seller and accepted by or on behalf of buyer. (§126).

Reciprocity.

Where Indian citizen has made application for registration of trademark in country which affords similar privileges as granted to its own citizens, and that person or his legal representative or assignee makes application for registration of trademark in India within six months after date on which application was made in other country, trademark shall, if registered under this Act, be registered as of date on which application was made in other country. (§154).

All indexes maintained by Registrar of Trade Marks. Notices of opposition, counter-statements and similar documents are open to public inspection. (§148).

Related Acts.

Some cognate Acts are Patents Act, 1970 and Designs Act, 1911, Emblems and Names (Prevention of Improper Use) Act, 1950, Indian Standards Institution (Certification Marks) Act, 1952 and Indian Copyright Act, 1957.

The Trade and Merchandise Act, 1958, has been sought to be replaced by new Act being The Trademark Bill, 1999 (see Introductory Note, supra).

18 LEGAL PROFESSION

18.01 ATTORNEYS AND ADVOCATES:

The High Courts at Bombay, Calcutta and Madras exercise Original Civil Jurisdiction. Original Civil Jurisdiction of the High Court at Bombay extends to Greater Bombay. Exercise of Original Civil Jurisdiction comprises all civil suits amount in which exceeds Rs. 50,000, and applications, petitions and Writs and also comprises Admiralty and Vice-Admiralty suits and proceedings, Insolvency and Company winding-up business, Testamentary and Intestate matters, Land Acquisition References, References and applications under Income Tax Act, Wealth Tax Act, Gift Tax Act, Sales Tax Act, Customs Act, Central Excise and Salt Act, Gold Control Act, etc.

Supreme Court in Jamshed N. Guzdar vs. State of Maharastra & Ors, 2005 1 scale 192, has upheld notification wherein pecuniary jurisdiction of Small Causes Court has been increased and that of Bombay City Civil Court has been made unlimited. State Government is in process of preparing report as to whether necessary infrastructure is in place and thereafter it would be notified. Notification is yet to be made effective.

Attorneys (Advocates).

Advocates Act (XXV) of 1961 governs all matters regarding Advocates in all states of India.

Earlier there was what was called dual system of Solicitors and Advocates prevailing on Original Side of Mumbai (previously called Bombay), Kolkata (previously known as Calcutta) and Chennai (previously called Madras) High Courts. This system was abolished in Chennai long ago. Dual system was also abolished in Mumbai and Kolkata in 1976 but respective Law Societies in Mumbai and Kolkata conduct Solicitors exam and in both cities of Mumbai and Kolkata there are Solicitor firms which continue to exist and practice in both as Solicitors (as they were doing with dual system that was in existence) and also as Advocates.

Advocates.

Advocates Act XXV of 1961 governs all matters regarding Advocates in all States of India. Dual system of Solicitors and Advocates prevailing, on original side of Bombay & Calcutta High Courts has been abolished since 1976.

General.

Act envisages a single class of practitioners at Bar of all States of India, namely advocates. It also envisages Common Roll of Advocates for whole of India (§20) whereby advocate registered on Roll of Bar Council of one State would be entitled to practice in every State in India. High Courts of various states have framed rules for purposes of advocates “acting” in causes. As general rule advocate registered with Bar Council of one state cannot “act” in cause in another state but he can appear in any cause if he is instructed by advocate registered in such other state.

Persons Who May be Advocates.

Once student obtains law degree from any university in India, he can apply to Bar Council of state of such university and get certificate of enrollment immediately on payment of requisite fees. Barristers who have been called to Bar of England or of Scotland before Dec. 31, 1967 may be enrolled as advocates of any State Bar Council on payment of necessary fees. Members of foreign bars may also be allowed to appear with permission of Chief Justice in particular cases.

Citizenship and Other Requirements.

It is not necessary to be citizen of India to be enrolled as advocate. Citizen of any country which permits duly qualified Indian citizen to practice in its courts is entitled to be enrolled as advocate. (§24). Advocates must be not only majors (i.e., over 18 years of age) but also have completed 21 years. (§24).

As to Advocates on record of Supreme Court, they must make application to Supreme Court to be enrolled as Advocates and to “act” in Supreme Court and admission is governed by Rules made by Supreme Court. Any advocate enrolled in any of High Courts is entitled as of right to appear in Supreme Court without making any special application.

The tendency in the country now is to have a uniform or integrated Bar for the whole of India. As stated above, the High Courts of Maharashtra and Calcutta are the only Courts in India which exercise Original Civil Jurisdiction and are thus the only Courts where the dual system, viz., an Advocate being instructed by an Attorney, still prevails in practice. Frequently, advocate, instead of being instructed by attorney, is instructed by advocate on record. All other High Courts exercising Appellate Jurisdiction, that is, hearing of appeals and revision applications from all Courts subordinate to High Court in State have what is known as unitary system where Advocate can appear by himself without being instructed by anyone else. As matter of practice, however, in every important appeal there is always senior and junior Advocate and costs of two Advocates are generally allowed to successful litigant against his opponent. Details of admission requirements may be obtained from Bar Councils of relevant States (for Maharashtra and Goa—The Bar Council, High Court Annexe, Bombay 400 001).

19 MORTGAGES

19.01 CHATTEL MORTGAGES:

See categories 2 Business Organizations, topic Corporations or Companies; Business Regulation and Commerce, topic Contracts.

Transfer of Property Act refers to mortgages of immovable property and Indian Contract Act refers to pledges of moveable property. Neither Act deals with mortgages of moveable property. It has been held that under Indian Law there can be valid mortgage of moveables (in India). Such mortgage when not accompanied by delivery of possession is still operative save and except against bona fide purchasers without notice. Mortgagee of movable property is entitled to decree for sale just as much as mortgagee of immovable property. Mortgagee of movable property in possession has right to sell property without intervention of Court, if after proper notice mortgagee fails to pay mortgage money.

20 PROPERTY

20.01 REAL PROPERTY:

In India words, immovable property, include, inter alia, all that is meant by real property in English law. Transfer of Property Act does not give any definition of immovable property beyond excluding standing timber, growing crops and grass.

In Act, transfer of property means an act by which a living person conveys property to one or more other living persons, and words, living person, include a company or association or body of individuals, whether incorporated or not.

Sales and Exchanges.

A transfer by way of sale or exchange in case of tangible immovable property (i.e., corporeal hereditament of English law) of value of Rs. 100 and upwards, or in case of a reversion or other intangible thing (i.e., incorporeal hereditament of English law) can be made only by registered instrument. Other such transfers may be made by delivery. A contract that sale of immovable property shall take place on terms settled between parties does not, of itself, create any interest in or charge on such property.

Mortgages and Charges.

Legal mortgages in statutory modes in which immovable property is transferred for securing loan, debt or pecuniary liability of Rs. 100 or upwards can be effected only by a registered instrument signed by mortgagor and attested by two witnesses. Other such mortgages may be made by delivery. But equitable mortgages are recognised and where a person in towns of Calcutta, Madras and Bombay and any other Government notified town delivers to creditor or his agent documents of title to immovable property, with intent to create a security thereon, transaction is called a mortgage by deposit of title-deeds. Legal charge is created where immovable property of one person is by act of parties or operation of law made security for payment of money to another, and transaction does not amount to a mortgage.

Leases.

Under Act, a lease of immovable property from year to year or for any term exceeding one year, or reserving a yearly rent, can be made only by a registered instrument executed by both lessor and lessee. Other leases may be made by oral agreement accompanied by delivery of possession.

Note.— Under Income Tax Act sale, lease or other disposition (except gift) of immovable property for consideration mentioned in document exceeding Rs. 1 million in certain specified metropolitan areas requires prior permission of tax authorities. Different areas have different ceilings specified. These authorities have power to acquire property on payment of consideration mentioned in document and on such acquisition property vests in Government free from encumbrances.

Gifts.

For making a gift of immovable property, transfer must be effected by registered instrument signed by or on behalf of donor and attested by at least two witnesses, but a gift of movable property may be made by delivery.

Tenancy in Common and Joint Tenancy.

Both tenancy in common and joint tenancy of immovable property are recognised in India. However, contrary to English law, presumption is in favour of tenancy in common.

Registration.

Registration of documents of transfer is to be with Registrar of Assurances under Indian Registration Act. Under Income-Tax Act, 1961, where any document required to be registered under Indian Registration Act, purports to transfer, assign, limit or extinguish right, title or interest of any person to or in any property (other than agricultural land) valued at more than Rs. 200,000 no registering officer is to register any such document unless the Income-Tax Officer certifies that such person has either paid or made satisfactory provision for payment of all existing liabilities under Income-Tax Act, 1961, Excess Profits Tax Act, Business Profits Tax Act, Indian Income-Tax Act, 1922, Wealth Tax Act, and Gift Tax Act or that registration of document will not prejudicially affect recovery of any existing liability under any of aforesaid Acts.

Stamping.

Relevant act is Indian Stamp Act, 1899, applicable to whole of India, except where States have passed their own stamp legislation and received assent of President, in which case such State legislation will apply to documents executed in such State, insofar as their operation within. However, in respect of stamp duty on certain types of negotiable instruments, States have no power to legislate, as it is solely Union subject.

All documents entered into or executed in connection with any property or other contractual transaction in India, or State, but brought into India, or any State for being acted upon is subject to payment of stamp duty, except documents executed on behalf of Government, testamentary documents and documents required to be made for and filed in judicial and quasi-judicial proceedings. Rates of stamp duty on documents differ from State-to-State and are also frequently revised.

Document chargeable with stamp duty, that is not stamped or insufficiently stamped is not admissible in evidence, unless, party seeking to rely on it, pays necessary stamp duty along with any penalty that may be imposed.

Sanctions.

Under Acts pertaining to public trusts, it is necessary to obtain prior sanction of Charity Commissioner in respect of transfer of immovable property by public charitable trusts. Under Acts pertaining to agricultural lands, it is necessary to obtain prior sanction of Collector in respect of transfer of land used for agricultural purposes to person who is not an agriculturist. *Note:* Recently in Maharashtra, requirement for obtaining Collector's sanction prior to sale of agricultural lands, has been dispensed with, when land is being purchased for industrial use, provided certain conditions are complied with. For sale of property belonging to minors or Hindu undivided family, court's sanction is taken to show that proposed sale is beneficial to minor/members of Hindu undivided family.

Ceiling Area.

Under Acts pertaining to agricultural lands, there is a prescribed maximum limit or ceiling on holding of agricultural land to provide for more equitable distribution amongst peasantry.

Urban Land (Ceiling and Regulation) Repeal Act, 1999.

Urban Land (Ceiling and Regulation) Act, 1976 (ULC Act) has been repealed by Urban Land (Ceiling and Regulation) Repeal Act, 1999 (“Repealing Act”). Repealing Act has protected exemption orders granting exemption to hold land under §20(1) of ULC Act. Where any land is vested under ULC Act in Government, but possession of such land was not taken unless money paid for acquisition is refunded to Government, land will continue to vest with Government. Some of States which had adopted ULC Act have also repealed same, while some of States have so far not repealed ULC Act.

21 TAXATION

21.01 ESTATE TAX:

Estate Duty.

Estate Duty Act, 1953, came into force in India on Oct. 15, 1953. It was based on U.K. Finance Acts relating to levy of death duties. Estate duty was abolished in India with respect to deaths occurring on and after Mar. 16, 1985.

21.02 EXCISE TAXES:

Central Excise Law and Procedures.

Levy.

They are levied and collected by Central Excise Department under authority of Central Excise Act, 1944. Central Excise Rules, 1944 have been superseded and instead new set of rules have come into effect from July, 2001. §3 is charging section which in turn derives power to impose this tax from Entry 84 of Union List (List I) under Seventh Schedule read with Art. 246 of Constitution of India. Entry empowers Central Government to levy duty of excise on all articles produced or manufactured in India. Power to collect excise duty on alcohol and opium has been assigned to States and it is called state excise duty as against union excise duty or central excise duty levied and collected by Central Excise Department on rest of articles.

Registration of Manufacturers and Dealers.

Every manufacturer of excisable goods is required to get himself registered before commencing production.

There is no fee for registration and factory or unit is to be registered once only i.e. there is no requirement of renewing registration. Registration is valid only for premises for which it is granted.

Registration certificate is to be granted within seven days of receipt of application and if same is not granted within such period, it shall be deemed to have been granted.

Manufacturer desiring to start production of new product should get Registration Certificate duly endorsed to this effect.

Distinction between various types of controls has been done away with such as “physical control”, “self-removal procedure”, “production based control” and “record based control”. Now there is only one procedure. Only exception is of assessment of duty on cigarettes. On assessment, invoice in relation to them is required to be countersigned by Inspector/Superintendent of Central Excise before cigarettes are removed.

Relaxations for Small Scale Sector.

Small Scale Industries can claim exemption from duty up to Rs.150 lakhs. For computing ceiling/monetary limits of clearances under SSI notifications in respect of commodities whose assessable value is determined under §4A (MRP less notified rebate), such assessable value will be taken as value. Facility to pay duty by SSI units with turnover ranging from Rs.100 lakhs to Rs.3 crore, on monthly basis has also been introduced with effect from 1st June, 1999.

Goods and Intermediate Goods.

Before central excise duty can be imposed on any article, it must satisfy two basic conditions: (i) article should be “goods”, and, (ii) it should have come into existence as result of “manufacture”.

If either of above two conditions is not satisfied, central excise duty cannot be levied. Even semifinished or substandard articles, by-products, residue, process scrap, articles in unassembled or CKD condition would be goods once marketability is established.

Manufacture under Central Excise.

(1) To levy central excise duty, it is necessary that new article should come into existence as result of manufacturing activity (unless there is finding of manufacture, excise duty is not attached). Expression “manufacture” has been defined in §2(f) of Act; (2) onus to establish “manufacture” is on Excise Department.

Manufacturer Liable for Payment of Duty.

Since excise duty is on manufacture or production, liability to pay duty is on manufacturer or producer. Unless in particular case, law provides for transfer of said liability to customer. However, as excise is indirect tax same is passed on to ultimate consumer.

Tariff and Rates of Excise Duty.

(1) Rates of central excise duty are specified in Schedule to Central Excise Tariff Act, 1985 which is sister enactment of Central Excise Act, 1944 and is commonly referred to as Central Excise Tariff. It contains 96 chapters grouped in 20 sections and is selectively aligned with Harmonised System of Nomenclature (HSN). Cc. 50 to 90 of Central Excise Tariff relating to textiles, metals, machinery etc. and engineering and electrical goods have greater degree of such alignment as compared to other chapters. Explanatory notes to HSN have persuasive value where chapters and entries in Tariff have been fully or broadly aligned with HSN; otherwise not; (2) for determining rate of duty for product, assessee has to first ascertain relevant Tariff heading or subheading under which said article is covered. Against each Tariff heading or subheading, rates of excise duty are specified which are commonly known as Scheduled Rates of Duties or more simply as Tariff rates. Duty is payable at these scheduled rates if there is no exemption pertaining to goods in question. However, in cases where there are exemptions which are made known (notified) by notifications issued from time to time actual rate of duty (effective rate of duty) is to be worked out after taking into consideration relevant exemption notification. Such notifications constitute subordinate legislation under specific power contained in present Act to grant such exemptions by notifications.

Exemption from Duty.

(1) Under §5A, Central Government has power to grant exemption, full or partial, from payment of duty either generally by issue of notification or in specific case by means of special order. Power is exercisable in public interest. Exemptions are granted to achieve varied socioeconomic objects, such as encouragement to small scale industries, village industries and handicrafts, promoting use of nonconventional raw materials, relieving export production of burden of home taxes and freeing goods donated for flood/earthquake relief etc. Central Government is empowered to grant exemption restricted to goods of strategic or secret nature or for charitable purpose. Of late, there is effort to reduce number of exemptions as they complicate Tariff but their sweep is still very large; (2) rules and notifications take effect from date on which relevant Official Gazette containing them is made available to public; (3) §11C contains provision for waiver of duty for specified past period in cases where there was general practice of non-levy or partial exemption but such practice is later found to be erroneous; (4) it is open to Government to grant different levels of exemption for different classes of manufacturers or for different classes of goods provided it is done in public interest. In terms of General Clauses Act, 1897, power to exempt includes power to modify or withdraw exemption. Government can at any time withdraw even time bound exemption if “public interest” so demands. Burden to establish eligibility to exemption is on claimant.

Crucial Date for Determination of Rate of Duty.

Question of relevant date for determination of rate of duty assumes importance because in India rates of duty have been changing quite frequently, though of late stability in rates is being promised. Relevant date in most cases is date of removal from place of manufacture i.e. factory or from warehouse.

Remission of Duty.

Rule 21 of Central Excise Rules, 2001 provide for remission of duty in case of lost or destruction of manufactured goods by natural causes or by unavoidable accident before their clearance from factory or warehouse.

Valuation of Goods for Purpose of Excise Duty.

(1) Where rates of duty are ad valorem (expressed as percentage of value of goods), which is now increasing trend, assessable value of goods has to be found out before amount of duty leviable thereon is determined and paid; (2) now assessee determines and declares value of goods on invoice and pays duty on that basis; though value of goods is required to be declared in assessee's invoice, invoice value or sale price is not necessarily acceptable value for levy of excise duty.

Present law of valuation accepts fully commercial price charged by assessee from independent wholesale customer for delivery of goods at factory gate or other place of sale, i.e. depot etc.

Valuation for purposes of excise duty has been highly litigated issue. With view to reduce scope for dispute, new rule of valuation has been introduced called Maximum Retail Price (MRP) Scheme. Method of valuation under this Scheme only applies to such packaged products as are required, under Standard Weights and Measures Law or other law, to permit MRP at which article is offered for sale to ultimate customer. “Assessable value” for such goods, which have to be specified by notification will be MRP as reduced/abated by such percentage of MRP as Government promulgates by notification from time to time.

CENVAT Credit.

MODVAT scheme has been renamed CENVAT w.e.f. 1-4-2000. CENVAT Credit Rules, 2002 have been notified independent of Central Excise Rules. These new rules have come into effect from 1-3-2002. CENVAT Scheme covers all capital goods and all inputs barring Motor Spirit (Petrol) and High Speed Diesel Oil. All final products except Matches are covered.

Adjudication.

Contravention of provisions of central excise law are punishable departmentally by way of confiscation of goods and imposition of penalty. Such adjudication is done mainly by officers at or above rank of Assistant Commissioner.

However, under newly introduced §§11AB, 11AC and amended Rule 57-I assesses evading duty or misusing CENVAT scheme through suppression, willful misstatement, fraud etc. are liable to draconian penalty equal to amount of duty evaded or credit wrongly availed (as increased or reduced by appellate authority or court). Interest at such rate not below 10% and not exceeding 36% per annum is also levied retrospectively from first day of month succeeding month in which duty ought to have been paid or in which credit was wrongly taken.

Advance Rulings—Customs and Central Excise.

Scheme of advance rulings was introduced by Finance Act, 1993, C. XIX-B of Income-tax Act, which deals with advance rulings, came into force with effect from 1-6-1993. Under scheme, power of giving advance rulings has been entrusted to independent adjudicatory body. Accordingly, high level body headed by retired judge of Supreme Court has been set up. This is empowered to issue rulings, which are binding both on Income-tax Dept. and applicant. Procedure prescribed is simple, inexpensive, expeditious, and authoritative.

Advance Ruling, means written opinion or authoritative decision by Authority empowered to render it with regard to tax consequences of transaction or proposed transaction or assessment in regard thereto. It has been defined in §245N(a) of Income-tax Act, 1961 as amended from time to time. Under §245N, ruling can be obtained by applicant (who may be either non-resident or resident having transaction with non-resident) in respect of any question of law or fact in relation to tax liability of non-resident arising out of transaction undertaken or proposed to be undertaken.

Salient features:—

a. Available only for Income-tax:—

Procedure of advance ruling is available only under Income-tax Act, 1961.

b. Must relate to transaction entered into or proposed to be entered into by applicant: -

Advance ruling is to be given on questions specified in relation to such transaction by applicant.

c. Questions on which ruling can be sought:—

i. Even though word ``question'', it is clear that non-resident can raise more than one question in one application. This has been made amply clear by Column No. 8 of form of application for obtaining advance ruling (Form No. 34C).

ii. Though word ``question'' is unqualified, it is only proper to read it as reference to questions of law or fact, pertaining to income tax liability of non-resident qua transaction undertaken or proposed to be undertaken.

iii. Question may be on points of law as well as on fact; therefore, mixed questions of law and fact can also be included in application. Questions should be so drafted that each question is capable of brief answer. This may need breaking-up of complex question into two or more simple questions.

iv. Questions should arise out of statement of facts given with application. No ruling will be given on purely hypothetical question. No question not specified in application can be urged. Normally, question is not allowed to be amended but in deserving cases Authority may allow amendment of one or more questions.

v. Subject to limitations to be presently referred to, question may relate to any aspect of non-resident's liability including international aspects and aspects governed by double tax agreements. Questions may even cover aspects of allied laws that may have bearing on tax liability such as law of contracts, law of trusts and like, but question must have direct bearing, on and nexus with interpretation of Indian Income-tax Act.

d. Time limit for ruling:—

Authority must pronounce its advance ruling within six months of receipt of application.

e. Binding nature of advance ruling:—

Effect of ruling is stated to be limited to parties appearing before authority and transaction in relation to which ruling was given. This is because ruling was rendered on set of facts before Authority and can not be of general application.

Question precluded: Under §245R, certain restrictions have been imposed on admissibility of application, if question concerned is pending before other authorities. According to it, authority must not allow application where question raised by non-resident applicant (or resident applicant having transaction with non-resident) is already pending before any income-tax authority or appellate Tribunal or any court of law. Further, authority must not allow application where question raised in it: i. Involves determination of fair market value of any property or ii. it relates to transaction or issue which is designed prima facie for avoidance of income-tax.

Procedure of application for advance ruling: Applicant desirous of obtaining advance ruling should apply to Authority in prescribed form stating question on which ruling is sought. Application has to be made in quadruplicate in Form Nos: 34C - applicable for non-resident applicant and 34D - applicable for resident having transactions with non-resident.

Application is to be accompanied by account payee demand draft for 2,500 Indian rupees drawn in favour of Authority for Advance Rulings and made payable at New Delhi.

Application may be withdrawn within 30 days from date of the application.

21.03 GIFT TAX:

Gift Tax Act, 1958.

At present Gift-Tax is chargeable on taxable gifts at flat rate of 30% in hands of donor. Gifts to relatives at time of marriage are exempt to extent of Rs.1 lac. Foreign nationals are exempt of Gift Tax on non-Indian assets. Other exemptions are listed in §5 of Act. In view of new Finance Act, gifts made on or after 1.10.1998 will not attract any gift-tax. It is left to discretion of tax assessing officer of donor to determine whether gift claimed by donor is genuine gift or not.

21.04 INCOME TAX:

Income tax is normally payable for “assessment year” at rates fixed by annual Finance

Acts and is based upon total income of "previous year." Previous year is period of 12 months from 1 Apr. to 31 Mar. In case of newly set up business or profession or source of income newly come into existence, previous year will be period from date of setting up of business and would end on 31 Mar. Assessment year is from 1 Apr. to 31 Mar. following end of previous year.

Tax is on income of previous year and not on income of assessment year. Though tax is assessed in succeeding year upon results of year before, tax is actually paid on most incomes before assessment year begins by withholding at source or by way of advance payment.

Rates of tax are not provided for by Act, but are enacted every year by annual Finance Act. Tax system is "slab system," so that successive slabs of income are charged at progressively higher rates of tax. Surcharges are also levied on amount of income tax.

Indian income tax is annual tax both in its imposition and structure, each previous year being a separate unit. Income and losses in prior years are irrelevant, unless they come under special provisions concerning the carry forward of business losses, loss from hours property, capital losses or similar provisions.

Imposition of Tax.

Tax is imposed on every person, which includes individual, Hindu undivided family, company, firm, association of persons or body of individuals (whether incorporated or not); local authority and every artificial juridical person not falling within any of preceding categories.

"Company" means: (1) Any Indian company; or (2) any body corporate incorporated by or under laws of country outside India; or (3) any institution, association or body which is or was assessable or was assessed as company for any assessment year under Indian Income Tax Act, 1922 (11 of 1922), or which is or was assessable or was assessed under 1961 Act as company for any assessment year commencing on or before first day of Apr., 1971; or (4) any institution, association or body whether incorporated or not and whether Indian or non-Indian, which is declared by general or special order of Board to be company; provided that such institution, association or body shall be deemed to be company only for such assessment year or assessment years (whether commencing before first day of Apr., 1971 or on or after that date) as may be specified in declaration. Foreign companies other than those mentioned above do not fall within definition of "company," but they can apply to Central Board of Direct Taxes to be so declared. Though such declaration cannot be obtained as of right, normally there is no difficulty in case of foreign public limited companies. Foreign companies not obtaining such declaration are liable to pay tax as association of persons.

Total Income.

Tax is on total income of entity, which includes capital gains. However, distinction between capital receipt and income receipt is relevant for determining rate of tax, capital gains normally being taxed at lower rates.

Tax depends upon, and is determined by, whether taxpayer is resident in India. Individual is resident in India if he: (a) Is in India in previous year for period or periods amounting in all to 182 days or more; (b) having within four years preceding previous year been in India for period or periods amounting to 365 days or more, is in India for period or periods amounting in all to 60 days or more in previous year. However, citizen of India who leaves India for purpose of taking up employment outside India or who is member of crew of Indian ship would be treated as resident in India, only if he is in India for 182 days or more. It is further provided that citizen of India or person of Indian origin who is outside India and comes on visit to India, shall be treated as resident if he is in India for more than 182 days. Company is resident if: (a) It is Indian company or (b) if control and management of its affairs are situated wholly in India in previous year.

Resident pays tax on his entire (global) income regardless of place of receipt or accrual. Nonresidents pay tax on income which is received or is deemed to be received in India or which accrues or arises or is deemed to accrue or arise in India.

There is a third category of assessees, viz., person who is resident, but not ordinarily resident in India. Persons who are resident but not ordinarily resident are assessed in exactly same manner as persons who are resident and ordinarily resident, but subject to one special exemption. Residents who are not ordinarily resident are exempt from tax in respect of income accruing outside India, unless it is derived from business controlled in or profession or vocation set up in India or is received or deemed to be received in India. Individual is said to be not ordinarily resident in any previous year if he has not been resident in India in nine out of ten previous years preceding that year or has not during the seven previous years preceding that year been in India for period or periods amounting in all to 730 days or more.

Receipt of Income.

Income received in India is subject to tax even if income accrued outside India. Receipt may be by taxpayer or his agent and can be in cash or kind. If income is received in India, entire amount is taxable, there being no provision for apportionment as there is in cases where income accrues in India.

Receipt as a basis of liability refers to first occasion when recipient gets money under his control. Once amount is received as income, any remittance or transmission of amount to another place does not result in “receipt” at other place. Therefore, if nonresident receives income outside India, he would not be subject to Indian tax when he remits or transmits it to India (unless same is of course accrued in India at first instance).

Accrual of Income.

Under Indian Act, receipt is not sole test of taxability. Taxpayer may be taxed on income which has accrued. Income accrues when taxpayer acquires right to receive it. Income once taxed on accrual cannot be taxed again when it is received. No general test can be laid down to determine place where income accrues. Question is to be decided on facts of each case. In case of a business of buying and selling goods, profits accrue as general rule at place where contract is entered into and sale is made. Where contract is made in one place and sale is effected in another place, profits should be apportioned between two locations. In business of manufacturing and selling goods, profits must be apportioned between place of manufacture and place of sale. Salaries and pensions accrue in India if they are earned there. Dividends paid by Indian company accrue in India even though they be declared and paid outside India.

§9 enumerates certain categories of income which are deemed to accrue or arise in India as follows: (1) Income falling under head “Salaries” if it is earned in India; (2) salary income paid by Government to Indian citizens for rendering services outside India; (3) dividend paid by Indian company outside India; (4) interest payable on money lent and brought into India—however force of this provision is considerably relaxed by various exemptions in respect of foreign borrowings; (5) royalty payable by Government or by resident or by nonresident—basically royalty income consists of consideration for right to exploit product know-how; (6) income by way of fees for technical services payable by Government or by resident or by nonresident. Fee for technical services has been defined as meaning consideration for rendering of managerial, technical or consultancy services including provision of services of technical or other personnel; (7) income accruing or arising directly or indirectly from or through any property in India or source of income in India or through transfer of capital asset situated in India; (8) income accruing or arising from or through any “business connection” in India. Term “business connection” has not been defined in Act. Dealing with this term, Supreme Court of India observed that “business connection” involves relation between business carried on by nonresident which yields profits or gains and some activity in taxable territories (India) which contributes directly or indirectly to earning of those profits or gains. Its prerequisite is element of continuity between business of nonresident and activity in taxable territories, stray or isolated transaction not being normally regarded as business connection. Expression “business connection” postulates real and intimate relation between trading activity carried on outside taxable territories and trading activity within territories, relation between two contributing to earning of income by nonresident in his trading activity. Examples of business connection are: (1) Maintaining branch office; (2) appointing agent in India for systematic and regular purchase or sale of goods or for other business purpose. In case of nonresident, however, no income is deemed to accrue in India from operations confined to purchase of goods in India for export. Mere canvassing of offers by resident taxpayer and communication thereof to nonresident for acceptance and execution has been held not to constitute business connection; (3) forming local subsidiary company to sell products of foreign parent company; (4) close financial association between Indian and foreign concern; and (5) grant of continuing license to Indian concern to exploit for profit asset belonging to foreign concern, e.g. license for use of patent. In case of business connection where some of operations are carried out within and some outside India, profits of business should be apportioned and only that portion of profits attributable to operations carried out in India are taxable in India.

Royalty income and income from fees for technical services which are received by nonresident in pursuance of agreement executed on or after 31 May, 1997 but before 1 June, 2005 are taxed at rate of 20%, and where agreement is executed on or after 1 June, 2005 are taxed at rate of 10%, of gross royalty or gross amount of fees for technical services. No deduction in respect of any expenditure is allowed while computing royalty income and income from fees for technical services. However, if different rates are prescribed in Double Taxation Avoidance Agreements (DTA) entered into between India and various foreign countries, then rate which is more beneficial to assessee will prevail.

Certain concessional rates of tax are prescribed for nonresidents, foreign institutional investors etc. in order to attract foreign investment.

Dividend income received from Indian company by nonresident is taxed at rate of 20% of gross dividend income. Here again if different rates are prescribed in DTA, then rate more beneficial to assessee will prevail. Finance Act, 1997 introduced new provision (§115-O) levying tax on distributed profits of domestic companies, which was in addition to income-tax payable by domestic company. Domestic company had to pay tax at rate of 15% on any amount declared, distributed or paid by such company by way of dividends within 14 days of date of declaration, distribution or payment, whichever was earliest. In view thereof, no tax would be paid by shareholders in respect of dividend income received by them. With enactments of Special Economic Zones Act, 2005 there shall be no tax on distributed profits of enterprise or undertaking in Special Economic Zones subject to compliance of provisions thereof.

Dividend income received on units of specified mutual funds or units of Unit Trust of India which are purchased by Overseas Financial Organisation in foreign currency and long-term capital gain arising from transfer of such units purchased in foreign currency, shall be taxed at rate of 10%. No deduction shall be allowed in computing dividend income or long-term capital gain. “Overseas Financial Organisation” has been defined as meaning any fund, institution, association, or body incorporated outside India which has entered into arrangement for investment in India with public sector bank or public financial institution or specified mutual fund where such arrangement is approved by SEBI established under SEBI Act, India.

From 1-4-2002 if total income of nonresident includes interest on bonds purchased in foreign currency from Indian company or from Public Sector company or dividend income from Indian company or from GDR issued under approved Scheme same shall be taxed at 10%. This also includes income by way of long-term capital gains on their transfer. Income received by person from investments in venture capital company or venture capital fund shall be taxed in same manner as if it were income received by such person had he made investment directly in venture capital undertaking.

Tax will be deducted at source from dividend income payable to nonresidents and to foreign institutional investors and from capital gains arising to nonresident.

Exemptions.

Several exemptions are offered by Act, apart from special tax reliefs, rebates and incentives to new industrial undertakings hereinafter mentioned. Chief of these exemptions are in respect of: (a) Income derived from property held under trust wholly for public charitable purposes. Exemption is subject to following main conditions: (i) Income is applied to such charitable purposes in India, (ii) charitable trust is registered with Commissioner of income-tax, (iii) charitable trust does not undertake any business activity, (iv) trust funds are invested in specified Government securities, (v) no portion of income or property of trust enures for benefit of settlors/trustees, their relations etc., (vi) charitable trust is non-communal in nature; (b) income derived from property held under trust which is applied wholly for religious purposes in India provided that other conditions laid down in (i) to (v) above are satisfied; (c) agricultural income; (d) in case of nonresident or income from specified Central Government securities or bonds specified in Official Gazette before 1.6.2002 as also interest income on amount standing to credit of nonresident external account of nonresident individual; (e) value of any Leave Travel Concession or Assistance received from employer subject to such conditions as may be prescribed including conditions regarding number of journeys and maximum amount that may be exempted; e(i) death-cum-retirement gratuity subject to such limits as may be specified which, at present, is specified at Rs. 3,50,000; (f) payments in commutation of pension; (g) payment received as cash equivalent of leave salary at time of retirement, superannuation etc., amount exempt being lowest of following (i) Rs.3,00,000/-, (ii) 30 days salary for every year of completed services rendered, (iii) ten months salary and (iv) amount actually received; (h) retrenchment compensation subject to maximum of Rs.5,00,000; (i) payments from provident funds to which Provident Fund Act applies and payment from other recognised provident funds; exemption of amount received by employee on voluntary retirement is extended to employee of Government; (j) payments from approved superannuation funds; (k) house rent allowance subject to following limits, viz, 50% of salary, if accommodation is in Bombay, Calcutta, Delhi or Madras and 40% of salary if accommodation is at any other place or amount by which rent actually paid exceeds 10% of salary or actual house rent allowance received by employee whichever is least; (l) scholarships for meeting cost of education; (m) income of university or other nonprofit educational institutions; (n) income of hospital existing solely for philanthropic purposes and not for purposes of profit; (o) enrollment fees, subscription and other income of professional institutions or associations; (p) income of authorities, administrating places of public religious worship like temples, churches etc.; (q) income of trade union; (r) income of Trustees of Provident Fund, superannuation fund, gratuity fund etc.; (s) interest income on certain specified Government securities, National Defence gold bonds, special bearer bonds, National Savings certificate etc.; (t) interest received by nonresident Indian citizens or persons of Indian origin on specified savings certificates issued by Central Government; (u) any payment received in pursuance of awards given by Government for literary, scientific or artistic work or for proficiency in sports and games; (v) any gallantry award approved by Central Government; (w) annual value of one palace owned by former ruler; (x) income of Scientific Research Association; (y) amount of subsidy received for scheme of replantation or replacement of rubber, coffee, cardomn plants; (z) income of industrial undertaking which is established in free trade zone (entire production of such undertaking has to be exported); and (z1) any profits and gains derived from 100% export oriented undertaking i.e. industrial undertaking approved by Central Government and which exports its entire production. Income is exempt for period of five years; (z2) any dividend income or unit income of specified mutual fund; (z3) any income earned by way of dividend or long term capital gains by venture capital company or venture capital fund of its investments in approved venture capital undertaking which follows prescribed conditions or investments in undertaking engaged in generation and distribution of power and providing telecommunication services development maintaining infrastructure company or other activities specified by Central Government; (z4) any income earned by VCC and VCF for arranging funds for venture capital undertaking, provided VCF and VCC have been granted certificate from SEBI in this behalf; (z5) income of Investors Protection Fund set up by recognised stock exchanges in India.

Following income derived from export is exempt from tax (a) profit and gain derived by undertaking from export of articles and things; (b) profits and gains derived from export of computer software up to 1.4.2010 by undertaking located at free trade zone of export processing zone or special exemption zone; (c) profits derived by newly established 100% Export Oriented Undertaking so approved by Central Government up to 1.4.2010. Government has enacted Special Economic Zones Act, 2005 which has come into force w.e.f. 10 Feb. 2006. Various fiscal incentives by way of exemptions, drawbacks, concessions, tax breaks etc. have been provided to developers and units set up in Special Economic Zones, subject to compliance of provisions thereof. Further in §10AA of Income Tax Act there are offered special provisions in respect of newly established units in Special Economic Zones, i.e., (i) 100% income tax exemption for block of five years, (ii) 50% income tax exemption for next consecutive five years, (iii) amount of profits and gains debited to P&L A/C and credited to reserve account not exceeding 50% of profits and gains for next five consecutive assessment years.

Nonresidents, foreign citizens and foreign companies are given further exemptions. Following income of nonresident is exempt from tax: (a) Interest income on specified Central Government securities; (b) interest or premium on redemption of bonds issued by Central Government under loan agreement with International Bank For Reconstruction and Development or Development Loan Fund of U.S.A.; (c) interest on bonds issued by industrial undertaking or financial corporation in India under loan agreement with above Bank or fund which is guaranteed by Central Government; (d) interest on moneys standing to credit of nonresident (external) account in any bank in India in accordance with foreign exchange regulations; (e) interest on specified savings certificates issued by Central Government; (f) interest payable by Government or local authority on moneys borrowed outside India; (g) interest payable by industrial undertaking on loans taken from financial institution in foreign countries provided approval of Central Government is obtained; (h) interest payable by industrial undertaking on moneys borrowed or debt incurred outside India for purchase of raw materials or capital equipment provided approval of Central Government is obtained; (i) interest payable by certain specified financial institutions in India on moneys borrowed outside India provided agreement approved by Central Government, etc.; (j) profit derived from 100% export oriented undertaking which produces or exports computer programmes and computer software.

In case of foreign citizens, further exemptions are given in respect of: (a) Passage monies received by employee for his children studying outside India and travelling to India during vacations, (b) remuneration received by ambassador, high commissioner, envoy, minister, chargé d'affaires, commissioner consular, or secretary, advisor or attaché of embassy, high commission, legation or commission of a foreign state; (c) Government of foreign state or foreign enterprise deriving income from Indian company engaged in business of operation of aircraft as consideration of acquiring aircraft or aircraft engine or lease under agreement entered after 31.3.1997 but before 1st Apr. 1999 as entered into after 31st Mar. 2006 and approved by Central Government and tax on such income is payable by Indian company under terms of that agreement to Central Government. Tax so payable is exempted. (d) remuneration received as consul de carriere; (e) remuneration received by trade commissioner or other official representative of foreign government, provided reciprocal arrangement for exemption exists between the two countries; (f) income of members of staff of officials referred to in items (b), (c) and (d) above if member is subject of country represented and is not engaged in any business, profession, vocation or employment in India and in case of staff of trade commissioner or other official representative, provided reciprocal arrangement for exemption exists between the two countries; (g) remuneration received by employee of foreign enterprise for services rendered in

India provided foreign enterprise is not engaged in any trade in India, his stay does not exceed 90 days and such remuneration is not deductible from income chargeable to tax in India; (h) in case of technician who is employed after 31st Mar., 1993 by Government, local authority, Scientific Research Institute or business carried on in India and who was not resident in the four financial years preceding year in which he arrived in India and tax on his remuneration is paid by employer then tax so paid by employer for period not exceeding 48 months from date of his arrival in India would be exempt from tax; (i) salaries received by nonresident in connection with his employment on foreign ship where his stay in India does not exceed 90 days in previous year; (j) salaries received for services rendered as professor or other teacher in university or other educational institution for period of 36 months from date of arrival, provided such individual is not resident in India in any of four financial years preceding year of arrival and his contract of service is approved by Central Government; (k) remuneration received for undertaking any research work in India for period of 24 months, provided research work is in connection with scheme approved by Central Government and payment is made directly or indirectly by foreign government or body; (l) remuneration received by individual, who is nonresident and noncitizen of India, but comes to India in connection with shooting of cinema film and for rendering services in connection with such shooting.

Deduction of part of profit is also allowed in cases of undertaking which are inter alia engaged in developing, maintaining and operating infrastructural facilities (which expression has been defined as “a road, bridge, airport, port, inland water ways, rail systems, highway project, water project, irrigation project, water treatment system, drainage and sewerage systems”) or undertaking providing telecommunication services or which develops industrial part or undertaking engaged in generating powers or commence transmission or distribution of power, benefit has been extended from 31.3.2006 to 31.3.2010.

Heads of Charge.

Income is charged under heads salaries, income from house property, profits and gains of business or profession, capital gains and income from sources other than those specified above. Each head of income has its own separate rules of computation of income and deductions allowable while computing income. These are briefly discussed below:

Salary Income.

Salary due from employer or advance salary paid by employer (though not due) and arrears of salary paid (if not charged to tax for earlier previous year) would be chargeable to tax. Salary income is charged to tax if it is earned in India, that is services are rendered in India, irrespective of whether salary is paid or payable in India or outside India. Monetary value of certain perquisites like rent-free accommodation, accommodation provided at concessional rent, value of any benefit or amenity provided free of cost, value of any specified security allotted or transferred, directly or indirectly free of cost or at concessional rate, is taxable as salary income. Income Tax Rules provide for computation of monetary value of any other fringe benefit or amenity of such perquisites. Value of any benefit or amenity granted free of cost or at concessional rate will not be treated as perquisite if income of employee under head salary does not exceed Rs.50,000/-. Employees drawing salary up to Rs.100,000/- per annum are not required to submit voluntary return of income. All other individual taxpayers whose income exceeds Rs.100,000/- per annum are required to file such return of income.

Expenses on medical treatment reimbursed by employer are presently exempt from income tax in hands of employees to maximum limit of Rs.15,000 per annum.

Government Employee shall be allowed deduction equal to 1/5th of salary or Rs.5,000, whichever is less on entertainment allowance.

Income from House Property.

Annual value of house property that is any buildings or lands appurtenant thereto is chargeable under this head. Annual value has been defined as sum for which property might reasonably be expected to let from year to year. In case actual rent received is in excess of annual value, rent actually received would be assessable. In places where rent control or rent restriction laws are in force annual value cannot exceed standard rent which landlord can recover from tenant. Income from self-occupied property is not taxed. In computing income under this head, expenditure on repairs and collection charges (standard amount being 30% of annual value), insurance premium, annual charge, ground rent and interest on moneys borrowed for acquisition or construction of property are deductible.

In respect of self-occupied property, deduction in respect of borrowed capital for purchase, construction or repairs of house is allowed up to maximum of Rs. 1,50,000/- for loans taken after 1.4.1999 and relevant purchase/construction is completed between 1.4.1999 and 1.4.2003.

Profits and Gains from Business or Profession.

Profits and gains of any business or profession which is carried on at any time during previous year is taxable under this head. In computing business income, all revenue expenditure (not being personal expenditure) laid out or expended wholly and exclusively for purpose of business or profession would be allowed as deduction. However, certain categories of expenditure are statutorily disallowed either wholly or partially. Important among these are: (a) any expenditure incurred in excess of Rs.20,000/- in respect of which payment is made otherwise than by way of crossed cheque drawn on bank or bank draft; (b) expenditure incurred or payment made to persons related to or connected with assessee where income tax officer is of opinion that expenditure is excessive or unreasonable having regard to fair market value of goods or services; (c) amount accrued but not paid by due date of filing return next towards taxes, duties, bonus due to employees, contribution to gratuity and superannuation funds, interest due to banks and approved institution.

In computing business income, depreciation on building, plant, machinery etc. is allowed. Earlier, intangible assets such as Knowhow, Patent Right, Copyright, Trade Marks, Licenses, Franchise or other business or commercial rights of similar nature were liable to be amortized over period of six years in case of knowhow and 14 years in case of patent and copyright. Now depreciation on such intangible assets is allowed and will form separate block for purposes of depreciation, rate thereof being 25%.

Depreciation is computed on basis of written down value of block of assets. Sale proceeds of any assets sold during year is deducted from value of block of assets and similarly cost of assets purchased is added to value of block of assets for computing depreciation. If sale proceeds exceed written down value of block of assets, then difference is taxed as short term capital gain. If such depreciation remains unutilized on account of insufficient profits same can be carried forward for eight succeeding assessment years to be set off against subsequent years profits (irrespective of continuity of business in which depreciation was incurred).

Certain special provisions have been made for computing business income of nonresident companies. Important among these are: (a) Limited allowances for Head Office expenditure; (b) royalty income; (c) income from shipping business; (d) income from oil exploration business; and (e) income from operation of aircraft.

Deduction claimed by nonresident companies for head office expenditure is limited to 5% of adjusted total income office expenditure attributable to business of nonresident company in India whichever is least. Head office expenditure includes executive and general administrative expenditure incurred outside India including expenditure on rent, rates, taxes, repairs, insurance of premises outside India, salaries, wages, travelling expenses of employees outside India etc.

Where nonresident is engaged in business of operation of ships, sum equal to 7½% of freight paid or payable to him or to any person on his behalf on account of carriage of passengers, livestock, mail or goods shipped at any port in India shall be deemed to be income and chargeable to tax in summary manner. However, assessee has option to claim that assessment shall be made on his total income and tax payable on such basis shall be determined in accordance with provisions of Income Tax Act and if such claim is made, then payment made on basis of 7½% of receipts shall be treated as payment in advance of tax leviable and difference between sum so paid and amount of tax payable shall be paid by assessee or refunded to him as case may be.

Before departure of any ship from any Indian port, master of ship shall prepare and furnish to Income Tax Officer return of amount of freight paid or payable to owner on account of carriage of passengers, livestock, mail or goods shipped at that port. Tax on 7½% of such freight is payable by master of ship. Port clearance is not granted till Customs Officer is satisfied that income tax payable has been duly paid or that satisfactory arrangements have been made for payment of tax. In practice, agents or regular steamship companies give indemnity or guaranty for payment of tax.

Where assessee is engaged in business of providing services or facilities in connection with or supplying plant and machinery on hire to be used in prospecting extraction and production of mineral oil in India then 10% of aggregate of amounts paid or payable to (whether in or out of India) or received or deemed to be received by assessee on account of provision of services and facilities in connection with supplying plant or machinery to be used for prospecting, extraction and production of mineral oil would be taxable as business income.

Where nonresident is engaged in business of operation of aircraft sum equal to 5% of aggregate of amounts paid or payable (whether in or out of India) on account of carriage of passengers, livestock, mail or goods from any place in India or amounts received in India on account of carriage of passengers, livestock, mail or goods from any place outside India shall be deemed to be profit of business.

Where foreign company is engaged in business of civil construction or erection of plant and machinery or testing or commissioning thereof in connection with turn-key power project approved by Central Government, then 10% of consideration paid or payable shall be deemed to be profits and gains of business and foreign company shall be taxed accordingly.

No income shall be deemed to accrue or arise to nonresident, who is engaged in running news agency or publishing newspapers, magazines or journals or conducting activities for collection of information in India for transmission thereof outside India. Income of news agency set up in India solely for collection and distribution of news as may be notified by Government is exempt from tax. Exemption is subject to condition that news agency applies its income and accumulates its income for application solely for collection and distribution of news and does not distribute its income among its members.

Further no income shall be deemed to accrue or arise to nonresident from operations which are concerned with shooting of any cinema film in India.

Income received by sportsmen who are not citizens of India and are nonresidents for participation in games or sports or for advertisement or contribution of articles relating to game or sport in magazines, newspapers, journals are taxed at rate of 10%. However, no deduction in respect of expenditure or allowances is given. Hitherto where total income of any “Company” fell below 30% of profit under Companies Act (before tax related adjustment) 30% of net profit was considered as taxable profit.

However with effect from 1.4.2007, where tax payable by company is less than 10% of book profit tax payable by company will be 10% of book profit.

Capital Gains.

Any profits or gains arising from transfer of capital assets are chargeable to tax under this head. Further, transfer of assets from proprietorship or partnership to company, by virtue of succession will not attract Capital Gains Tax. Capital gains are computed by deducting from consideration received for transfer of assets: (a) All expenditures incurred wholly and exclusively in connection with transfer, and (b) cost of acquisition and cost of improvements to capital asset.

Capital assets are either short term capital assets or long term capital assets. Long term capital assets are assets held by assessee for period of three years prior to date of transfer. However where capital asset is share in company then period of holding is reduced to one year. Short term capital assets are those held for less than three years (one year in case asset is share in company) or units of Unit Trust of India or other approved mutual funds prior to date of transfer. Gains arising from transfer of long term capital assets other than shares are taxed at concessional rates, viz., 20% for individuals and HUFs, and for other assessees like firms, associations of persons, body of individuals, etc.

In cases of assets acquired prior to 1st Apr. 1981, assessee can substitute fair market value of assets on 1st Apr. 1981 for cost of acquisition and improvement.

The Finance Act, 2004 has introduced new Act called “Securities Transaction Tax”. Tax would be levied at rate of 0.015% in respect of sale of equity share in company or unit of equity oriented mutual fund in case where transaction of sale was entered into in recognized stock exchange. This rate of 0.015% has been enhanced by 25% w.e.f. 1.4.2006. This tax is collected by stock broker from his client who may be purchaser/seller. In view of levy of Securities Transaction Tax, capital gains on sale of shares held for more than one year (long term asset) is exempt from tax and capital gains on sale of shares held for less than one year is taxed at rate of 10%.

Capital gains are not charged to tax in certain cases, principal among these are where: (a) Entire net sale proceeds of residential house owned for more than three years are utilised for purchase or construction of another residential house within stipulated time; (b) entire net sale proceeds of agricultural lands are utilised for purchase of other agricultural lands within stipulated time; (c) entire net sale proceeds of capital assets other than residential house held for more than three years which are invested in purchase of residential house provided assessee does not own more than one residential house in addition to new residential house purchased/constructed; (d) sale proceeds of land, building, machinery, etc. owned by industrial undertaking situated in urban area are utilised within period of one year from date of transfer for purpose of acquiring land, constructing buildings, purchasing land and machinery etc. resulting from shifting of business undertaking from such urban area; (e) from 1.4.2000 amount of long term capital gain will be exempt from tax if same is invested for three years in prescribed bonds (of National Bank for Agricultural and Rural Development or National Highway Authorities of India); (f) capital gains from transfer of long-term capital asset being listed securities or units.

Conversion of capital assets into stock in trade of business will also be taxable under head “capital gains”. Profit and gains arising from receipts of insurance claim on account of destruction or damage of capital asset as result of fire, flood, earthquake, civil disturbance, war etc., shall be deemed to be capital gains and taxes in year of receipt.

Income from Other Sources.

Income from sources other than those specified above, like dividend income, interests on securities, if securities are not held as assets of business, board meeting fees, income from letting out machinery, plant etc. are chargeable to tax under this head.

The Finance Act, 2004 has introduced, with effect from 1 Apr. 2005, tonnage tax. Assessee, who derives income from business of operating qualifying ships, may, at its option pay tonnage tax as prescribed in Act.

Only Indian Company, whose place of effective management is in India and owns at least one qualifying ship and whose main object is to carry on business of operating ships, can opt to pay tonnage tax.

Qualifying ship means sea going ship or vessel of at least 15 tons net tonnage, registered under Merchant Shipping Act, 1958 and must possess valid certificate indicating its tonnage. Fishing vessels, factory ships, pleasure crafts, harbour and river ferries, offshore installations, dredgers, would not be qualifying ship. Besides, qualifying ship which is used as fishing vessel for period of more than 30 days would also not be qualifying ship.

Under §115VG specifies daily tonnage income of qualifying ship, which depends on net tonnage of qualifying ship. Daily tonnage income has to be multiplied by number of days in previous year to arrive at tonnage income which is chargeable to tax under head “profits and gains of business or profession”. If qualifying ship is used only for part of previous year, daily tonnage income has to be multiplied by number of days for which qualifying ship was so operated in previous year.

The Finance Act, 2005 has introduced Banking Cash Transaction Tax Act with effect from 1 June 2005. Under this Act, any withdrawal from account (other than savings bank account) maintained with any scheduled bank: (a) By individual, HUF exceeding Rs.25,000/-; (b) by firm, company, etc. exceeding Rs.100,000/- on any one day would attract tax at rate of 0.1% on value of cash withdrawal.

The Finance Act, 2005 has introduced new tax called “fringe benefit tax” (FBT) which is in addition to income-tax charge under Act in respect of fringe benefits provided or deemed to have been provided by employer to its employees during previous year at rate of 30% of value of fringe benefits. Fringe benefit tax is only payable by “employer” which is defined as meaning company, firm, AOP, BOI and local authority. Individuals and HUFs do not have to pay fringe benefit tax (§115WA). Fringe benefit has been defined as meaning any privilege, service, facility, or amenity directly or indirectly provided by employer (whether by way of reimbursement or otherwise) to its employees, value of any free or concessional travel provided by employer for private journey of employee and his family members, contribution to approved superannuation fund, any specified security or sweat equity shares allotted or transferred directly or indirectly by employer free of cost or at concessional rate to his employees, etc. Fringe benefits are also deemed to have been provided by employer to employees if inter alia employer in course of his business activities has incurred any expenditure on or made payment for various purposes specified in section which includes entertainment, provision of hospitality, conference expenses, sales promotion expenses, employees' welfare, conveyance tour and travel expenses, use of hotels, boarding and lodging facilities, repair, running (including fuel) maintenance of motor cars and aircraft and depreciation thereon, use of telephones (including mobile phones), guest house accommodation, festival celebrations, use of health clubs or any other club facilities, gifts and scholarships. Value of fringe benefit is calculated on percentage of expenditure incurred by employer on provision of Fringe Benefits. Fringe benefit tax would be payable at 30% of value of fringe benefits with effect from Apr. 1, 2006 under FBT (i) Free or subsidized transport for journey of employees from residents to place of work and vice-versa is exempt from tax. (ii) Contribution to super annuation fund where it does not exceed Rs. 1,00,000 per employee is totally exempt from FBT. (iii) Base value in respect of tour and travel expenditure including foreign travel has been reduced from 20% to 50%. (iv) Certain benefits extended to advertisement expenditure, aircraft and shipping industry.

Other Peoples Income.

Following income of other persons is included in income of taxpayer: (a) Income arising by virtue of revocable transfer; (b) income arising to person by virtue of transfer where there is no transfer of assets from which income arises; (c) all income accruing or arising to minor child will be added to income of that parent whose total income is greater; or where marriage does not subsist, with income of parent who maintains minor child. However, child's income accruing or arising on account of personal exertion or exercise of skill or specialised knowledge will not be added; (d) income arising to spouse of taxpayer from assets transferred directly or indirectly to spouse otherwise than for adequate consideration or in connection with agreement to live apart.

Transfer Pricing.

In order to plug tax avoidance, if any, in inter-group transactions entered into by associated enterprises of multinational corporations, these new provisions have been made to come into effect from 1.4.2002. Income arising from international transactions shall be computed on basis of arm's length price. Costs or expenses allocated among associated enterprises also will be determined on basis of arm's length prices. (§92). §92A defines associated enterprise. §92B defines international transaction. §92C prescribes determination of arm's length price. §92CA has reference to transfer pricing officer. §92D prescribes maintenance of information and documents relating to international transaction. §92E prescribes that persons entering into international transaction should get audit report in prescribed form and furnish same before specified date. §92F defines terms “accountant”, “arm's length price”, “enterprise”, “specified date” and “transaction”.

Some Special Tax Reliefs, Rebates, Incentives Etc.

(1) 20% of deduction in respect of profits and gains relating to execution of “foreign project” undertaken by assessee who is either Indian company or person resident in India, in pursuance of contract entered with Government of foreign state or any statutory or other public authority or agency in foreign state, or foreign enterprise, is allowed but is reduced in phased manner so as to be nullified by assessment year 2005-2006; (2) for assessee being Indian company or person resident in India and engaged in business of hotel or tour operator approved by prescribed authority, deduction of (i) sum equal to 25% of profits derived by him from services provided to foreign tourists and (ii) 25% of remaining profits as is debited to profit and loss account of previous year and debited to reserve account to be utilised for purpose of assessee's business in manner laid down in section to be nullified by assessment year 2005-2006; (3) deduction of 20% of income from execution of housing project is available to Indian company or person resident in India. This is available for execution of housing project awarded on global tender basis by World Bank. This deduction is going to be reduced in phased manner so as to be nullified by 2005-2006; (4) deduction of 50% of profits from business of export of software is allowed to Indian company or person resident in India which is reduced in phased manner to be nullified by 2005-2006; (5) in relation to any profits and gains derived by assessee from: (i) industrial undertaking which begins to manufacture or produce articles on things or to operate its cold storage plant or plants, or (ii) ship which is first brought into use, or (iii) business of hotel which starts functioning on or after 1st day of Apr. 1990 but before 1st day of Apr. 1991, there shall, in accordance with and subject to provisions of this section, be allowed deduction from such profits and gains amount equal to 25%. In case of company being assessee, deduction allowed is 30%; (6) deduction in respect of royalty, commission or fees received by Indian company or resident person from foreign Government for use outside India of any patent, invention, design or registered trademark and which is received in convertible foreign exchange shall be 20% of such income which again is reduced in phased manner to be nullified by 2005-2006; (7) profits and gains from business of printing and publication of books are allowed deduction of 20%; (8) deduction in respect of export turnover of assessee obtained in convertible foreign exchange is equal to 50% of profits from export of goods or merchandise which again is reduced in phased manner to be nullified by 2005-2006; (9) deductions in respect of profits and gains derived from business of: (A) industrial undertaking carried on by assessee being (i) cooperative society - 25% for 12 assessment years, (ii) company - 30% for ten assessment years, (iii) any other assessee

25% for ten assessment years; (B) operation of ship - 30% for ten assessment years; (C) hotel (i) in hilly area - 50% for ten assessment years; (ii) at any other place - 30% for ten assessment years; (D) for production of mineral oil - 100% for seven assessment years; (E) for generation and distribution of power - 100% for five assessment years and 25% for five next assessment years; (F) for multiplex theatre - 50% for 5 assessment years; (10) income by way of dividend received by domestic company from another domestic company shall not be taxable to extent to which recipient company distributes dividend to its shareholders before due date of furnishing its return.

Procedure for Assessment.

Every assessee if his total income exceeds maximum amount chargeable to tax has obligation to file return of income in prescribed form on or before specified dates which are as follows: (a) Companies—31st Oct.; (b) assessees having income from business or profession, whose accounts have to be audited under Income Tax Act or under any other law—31st Oct.; (c) all other assessees—31st July. For delayed filing of return—interest at 12% per annum or part thereof is chargeable. Before filing return, all taxes, interests etc. due on basis of returned income must be paid.

Prior to assessment year 1989-90 assessment had to be made by Income-tax Officer before expiry of two years from end of assessment year for which income was assessable. Under revised procedure in more than 90% of cases returns filed will be accepted and intimation sent to assessee. In remaining cases, Income-tax Officer has to serve notice within six months from time return is furnished calling upon assessee to produce evidence and materials in support of return. Such assessments should be completed within one year from end of assessment year in which return was filed.

If assessee has not furnished return under Income Tax Act and is residing in such area as may be specified by Board in this behalf by notification in Official Gazette and who at any time during previous year fulfills any one of following conditions viz: (i) Is in occupation of immovable property exceeding specified floor area, whether by way of ownership, tenancy or otherwise, as may be specified by Board in this behalf; (ii) is owner or lessee of motor vehicle; (iii) has incurred expenditure for himself or for any other person's travel to any foreign country; (iv) is holder of credit card not being “add on Credit Card” issued by any bank or institution or is member of club where entrance fee is charged is Rs.25,000/- or more, shall furnish return on his income during previous year.

w.e.f. 1-4-03, every, (a) scientific research association referred to in clause (21) of §10; (b) news agency referred to in clause (22B) of §10; (c) association or institution referred to in clause (23A) of §10; (d) institution referred to in clause (23B) of §10; (e) fund or institution referred to in sub-clause; (iv) or trust or institution referred to in sub-clause; (v) or any university or other educational institution referred to in sub-clause; (vi) or any hospital or other medical institution referred to in sub-clause (via) of clause (23C) of §10; (f) trade union referred to in sub-clause (a) or association referred to in sub-clause (b) of clause (24) of §10, shall also file their returns in prescribed form as specified in act.

Appeals.

First appeal against any assessment order lies to Commissioner of Income Tax (Appeals). Such appeal to be filed within 30 days of receipt of assessment order. Second appeal can be filed with Income Tax Appellate Tribunal either by assessee or Income Tax Officer from order of first appellate authority within 60 days of receipt of appellate order. Decision of tribunal on disputed questions of fact is final. Chief Commissioner or Commissioner or assessee aggrieved by any order passed by Appellate Tribunal may file appeal to High Court within 120 days from date on which order appealed against is received by assessee or Chief Commissioner or Commissioner.

Authority for Advance Rulings has been set up. Such authority shall consist of eminent persons and chaired by retired Judge of Supreme Court. Nonresident applicant who is desirous of obtaining advance ruling (which has been defined as determination by authority of question of law or fact specified in application in relation to transaction which has been undertaken or is proposed to be undertaken by applicant) should make application in prescribed form and accompanied by fee of Rs.2,500/-. Such application cannot be made in case question raised is pending before any Income Tax Authority, Appellate Tribunal or Court or involves determination of fair market value of property or relates to transaction which is designed for avoidance of income tax.

Authority after examining application and further material and hearing applicant shall pronounce its advance ruling on question specified in application within six months from date of receipt of application. Such advance ruling shall be binding not only on applicant but also on Income Tax Department.

This facility is extended to certain notified resident assessees of such class as may be notified by Gazzette to seek decisions in respect of disputes arising from issues in assessment years pending before Income-tax Authority or Tribunal and to residents in respect of tax liability of nonresident arising from transactions with nonresidents.

Rate of tax is annually prescribed by Finance Acts. For assessment year 2010–2011 i.e. year ended 31.3.2010 rates are as follows:

In case of every individual or Hindu Undivided Family or association of persons or body of individuals whether incorporated or not or every artificial and juridical person:

A.

Personal tax rates are as under:

Taxable Income (Rs.)	**Tax Rate (%)**
Up to Rs.160,000*	Nil
160,001* to 3,00,000	10
300,001* to 5,00,000	20
500,001 and above	30

**Threshold exemption for resident woman is Rs.190,000 and for any resident individual aged 65 years or more at any time during financial year (i.e. senior citizens) is Rs.240,000.*

Notes:

(i) No surcharge where total income does not exceed Rs.1,000,000.

(ii) Education Cess of 2% is to be levied on aggregate of income tax plus surcharge where applicable.

(iii) Additional secondary and higher education cess of 1% is leviable on aggregate amount of income-tax plus surcharge where applicable.

Tax rate for registered firms is 30%.

Tax rate for Domestic Company is 30% of taxable income.

In case income exceeds Rs.1 crore(Rs.10 million), there is additional surcharge of 10% of income tax which brings total rate to 33%.

Education Cess as above will also be payable.

Tax rate for foreign company is 40%.

In case income exceeds Rs.1 crore (Rs.10 million), there is additional surcharge of 2.5% of income tax which brings rate to 41%.

Education Cess as above will also be payable.

Deduction of Tax at Source.

Provision is made for deduction of tax at source in respect of various kinds of income such as salary income, interest on securities, dividend income, income by way of winnings from lotteries, puzzles, horse races and other interest payables to contractors, payments to professionals etc., at differing rates. Tax deducted at source is subsequently taken into account and adjusted at time of final assessment.

21.05 SALES TAX:

In interest of national economy certain amendments were made in Constitution by Constitution (Sixth Amendment) Act, 1956, whereby (a) taxes on sales or purchases of goods in course of inter-State trade or commerce were brought expressly within purview of legislative jurisdiction of Indian Parliament and (b) restrictions could be imposed on powers of State legislatures with respect to levy of taxes on sale or purchase of goods within State where goods are of special importance in inter-State trade or commerce.

The amendments at the same time authorised Parliament to formulate principles for determining when a sale or purchase takes place in the course of inter-State trade or commerce or in the course of export or import or outside a State in order that the legislative spheres of Parliament and the State Legislatures become clearly demarcated.

Accordingly the Central Sales-Tax Act, 1956 (hereinafter called “the Act”) was passed by Parliament. It formulates principles for determining when a sale or purchase of goods (a) takes place in the course of inter-State trade or commerce or (b) outside a State or (c) in the course of import into or export from India. It provides for the levy, collection and distribution of taxes on sales of goods in the course of inter-State trade or commerce which, under the constitution, are beyond the powers of the State governments to tax; and declares certain goods to be of special importance in inter-State trade or commerce and specifies the restrictions and conditions to which State laws imposing taxes on the sale or purchase of such goods of special importance, shall be subject.

Inter-State Sales.

Section 3 of the Act provides that a sale or purchase of goods shall be deemed to take place in the course of inter-State trade or commerce if the sale or purchase (a) occasions the movement of goods from one State to another, or (b) is effected by a transfer of documents of title to the goods during their movement from one State to another. A sale “occasions the movement” of goods, if movement is result of covenant or incident of contract. (1960, 11 STC, 655).

The tax payable by any dealer on sales of goods effected by him in the course of inter-State trade or commerce, whether such sales fall within sub-clause (a) or (b) of the above-mentioned Section is levied, collected and retained by State from which movements of goods commence.

Intra-State Sales.

Section 4(1) provides that subject to the provisions contained in Sect. 3, when a sale or purchase of goods is determined in accordance with Sub-section (2) thereof to take place inside a State, such sale or purchase shall be deemed to have taken place outside all other States.

Sub-section (2) of §4 provides that a sale or purchase of goods shall be deemed to take place inside a state if the goods are within the State (a) in the case of specific or ascertained goods, at the time the contract of sale is made; and (b) in the case of unascertained or future goods, at the time of their appropriation to the contract of sale by the seller or by the buyer, whether assent of the other party is prior or subsequent to such appropriation.

Sales in Course of Export or Import.

Section 5 of the Act provides that a sale or purchase of goods shall be deemed to take place in the course of the export of the goods out of or import of the goods into the territory of India only if the sale or purchase either occasions such export or import or is effected by a transfer of documents of title to the goods after the goods have crossed the customs frontiers of India, in case of export and before the goods have crossed the customs frontiers of India in case of import.

The Central Sales-Tax Act, broadly speaking, authorises the imposition of tax on sales in the course of inter-State trade or commerce at the rate of 4% in case of sales to Government, of any goods and sales to registered dealer other than Government of goods specified in his registration certificate. Goods declared to be of importance in inter-State trade are charged at twice rate applicable inside State, while other goods are charged at rate of 10% or at State rate, whichever is higher. Goods exempted from tax under State law or subject to tax at rate less than 4% are exempt or, as case may be, charged at lower State rate.

Goods mentioned in §14 of the Act such as coal, cotton, cotton-fabrics, cotton-yarn, hides and skins, iron and steel, jute, rayon, oil, seeds, sugar, tobacco, woolen fabrics, and silk are declared to be of special importance in inter-State trade or commerce and accordingly it is provided that every sales-tax law of a State shall, in so far as it imposes or authorises imposition of a tax on sale or purchase or such goods, be subject to following restrictions, viz.: that rate of tax shall not exceed 4% of sale or purchase price and it shall not be levied at more than one stage.

State Sales Tax.

Sales or purchases of goods taking place inside a State are within the powers of that particular State to tax. Sales outside State, or in course of import or export, or in course of inter-State trade are outside State's power of taxation.

Almost every State within the Union of India has enacted a Sales Tax Act imposing sales and purchase taxes at specified rates on dealers within the State having specified yearly turnovers, in respect of intra-State sales and purchases, that is sales and purchases which would be deemed to take place inside that State according to the principles formulated by the Central Sales Tax Act. Hire purchase and leasing of goods and equipment is now very prevalent, particularly for commercial/industrial users in view of income tax benefits. Lease as opposed to sale entails no passing of property and obviates sales tax liability. Most Indian states have now enacted special sales tax laws levying sales tax even on hire purchase/leasing transactions. (See topic 21.09 Value Added Tax.)

21.06 SERVICE TAX:

Service Tax is levied on specified taxable services and responsibility of payment of same is cast upon service provider. Systems of self-assessment of service tax returns by service tax assessees has been introduced with effect from 1 Apr. 2001. Power to verify correctness of assessed returns is vested with jurisdictional superintendents of Central Excise. Tax returns are expected to be filed half yearly. Service tax at present is being levied on about 106 services including telephone, general insurance, stock brokers, advertising, radio paging, air travel agents, consulting engineer, manpower recruitment, tour operators, architects, interior decorators, underwriters, credit rating, chartered accountants, security, management consultants, scientific & technical cons, convention services, telegraphic services, online information, broadcasting, insurance auxiliary, banking & other financial, intellectual property other than copyright and TV or radio programme production, renting of immovable property for commercial use, legal consultancy services, etc.

At present upper limit of rate of service tax being charged is 10% plus 3% education on value of taxable services.

21.07 STAMP TAX:

Stamp duties are regulated by the Indian Stamp Act, 1899. Each State has power under Entry No. 63 of List II in the Seventh Schedule of the Constitution of India to make laws with respect to a stamp duty payable in that State on every instrument, excepting bills of exchange, cheques, promissory notes, bills of lading, letters of credit, policies of insurance, transfer of shares, debentures, proxies and receipts. Under Entry No. 91 of List I in the Seventh Schedule of the Constitution rates of Stamp Duties on these last mentioned instruments can be prescribed only by the Union Government.

Several States have enacted laws with respect to Stamp Duty payable in respect of instruments other than bills of exchange, cheques etc., as mentioned above.

All instruments chargeable with duty must be stamped before or at the time of the execution. Any instrument whether executed or not and whether previously stamped or not may be sent to the Stamp Office for adjudication, and in case of documents already executed within one month from the date of execution. Any instrument which bears the certificate of the Stamp Office that the full duty with which it is chargeable has been paid or that no duty is chargeable will be deemed to be duly stamped or not chargeable to duty as the case may be and such certificate will be conclusive. Instruments executed abroad must be stamped within three months after being received in India.

If an instrument chargeable with duty of ten naye paise only, or bill of exchange or promissory note is not stamped or not properly stamped, it cannot be admitted in evidence. Any other instrument not properly stamped may be admitted in evidence on payment of duty with which same is chargeable and penalty which may be imposed thereon. Penalty may amount to ten times amount of proper duty or deficient portion thereof. If any instrument chargeable with duty and not duly stamped by accident, mistake or urgent necessity, not being instrument chargeable with duty of ten naye paise, or bill of exchange or promissory note, is produced by any person of his own motion before Stamp Office within one year from date of execution thereof, Stamp Office may, on payment of duty with which it is chargeable and penalty, if any, levied thereon, certify by endorsement that proper duty and penalty have been paid.

21.08 TREATIES AND AGREEMENTS:

Treaties Avoiding Double Taxation.

See category 22 Transportation, topic Double Taxation Avoidance Agreements.

21.09 VALUE ADDED TAX:

Value Added Tax (VAT) as proposed in Union Budget presented on 28th Feb. 2005 came into effect across all States and Union Territories from 1st Apr. 2005, barring seven states.

VAT which replaces present Sales Tax in India is multi point levy on each of entities in supply chain with facility of set off of input tax i.e. tax paid at stage of purchase of goods by trader and on purchase of raw material by manufacturer.

However, VAT Act applies only to sales within State. Following sales will not be governed by VAT Act: (a) Sales in course of interstate trade or commerce which shall continue to be liable to tax under Central Sales Tax Act, 1956; (b) Sales which take place outside State; (c) Sales in course of export or import.

21.10 WEALTH TAX:

This tax was introduced by Wealth Tax Act, 1957. It came into force on Apr. 1, 1957. It is chargeable for every financial year in respect of net wealth on corresponding valuation date of every individual or Hindu undivided family and company.

Valuation date in relation to any year for which assessment is to be made means last date of previous year as defined in Income-tax Act. Previous year under Income-tax Act is 31st of Mar. for all assessees. Therefore valuation date for all assessees will be 31st of Mar.

Wealth tax is payable at flat rate of 1% on value of following assets in excess of Rs.30 lakhs: (1) Any building or land appurtenant thereto (hereinafter referred to as “house”), whether used for residential or commercial purposes or for purpose of maintaining guest house or otherwise including farm house situated within 25 kilometers from local limits of any municipality (whether known as Municipality, Municipal Corporation or by any other name) or Cantonment Board, but does not include: (a) house meant exclusively for residential purposes and which is allotted by company to employee or officer or director who is in whole-time employment, having gross annual salary of less then five lakh rupees, (b) any house for residential or commercial purposes which forms part of stock-in-trade, (c) any house which assessee may occupy for purposes of any business or profession carried on by him, (d) any residential property that has been let-out for minimum period of 300 days in previous year, (e) any property in nature of commercial establishments or complexes, (f) any residential house forming part of stock-in-trade; (2) motor cars other than those used in assessee's business of hiring motor cars or used as stock-in-trade; (3) jewellery, bullion and furniture, utensils or other articles made wholly or partly of gold, silver, platinum or other previous metal other than those used as stock-in-trade; (4) yachts, boats and aircraft other than used by assessee for commercial purposes; (5) urban land, i.e. land within jurisdiction of municipality or cantonment board and within 8 kilometers from local limits of such municipality or cantonment board as may be notified but excluding (i) land on which construction is not permissible, (ii) land on which building is constructed with approval of appropriate authority, (iii) unused land held by assessee for industrial purposes for period of two years from date of acquisition, (iv) any land held by assessee as stock-in-trade for period of ten years; (6) cash in hand in excess of Rs. 50,000/- of individuals and HUF and in cases of other assessees any amount not recorded in books of accounts.

These assets are alone chargeable to wealth tax. In computing net wealth, debts owed by assessee on valuation date, if incurred in relation to such assets, shall be deducted.

Further, wealth of minor child is added to that of parent who has greater net wealth; or where marriage of parents does not subsist, with that of parent who maintains minor. Foreign Nationals are exempt from wealth tax on Non-Indian Assets. Assets acquired by minor child from self earned income and held on valuation date will not be added.

Schedule to Wealth-tax Act lays down rules for determining values of certain assets. Immoveable property is normally valued at 12.5 times net maintainable rent (i.e. municipal rateable value of property less deductions on account of municipal taxes and further deduction of amount equivalent to 15% of such rateable value on account of repairs, insurances, expenses on collection of rent, etc.). If property is let out and rent actually received is more than rateable value, then rent actually received is to be considered for determining net maintainable rent for purposes of valuation. If any property is purchased or acquired after 1st Apr. 1974 and its cost of acquisition is more than value arrived at on basis of capitalised value of net rental income, then value of property will be cost of acquisition. This provision however does not apply to self occupied residential house, where cost of acquisition is less than Rs.50 lacs if house is situated at Bombay, Delhi, Calcutta, Madras and Rs.25 lacs if house is situated in any other place.

22 TRANSPORTATION

22.01 AIRCRAFT:

India is a signatory to Warsaw Convention of 1929, and to protocol to said convention signed at Hague in 1955, an international convention for unification of certain rules relating to international carriage by air. Convention governs, and in most cases limits, liability of carriers for death or personal injury and in respect of loss or damage to baggage as well as cargo. Rules embodied in Convention and protocol thereto have been given statutory recognition in India by Carriage by Air Act, 1972. Though Act applies to international carriage by air, it has been made statutorily applicable to domestic carriage as well, subject to certain modifications. Liability of air carrier in respect of death of passenger undertaking domestic carriage is now fixed, subject to certain exceptions, at Rs. 7,50,000. Aircraft Act, 1934 as amended by Aircraft (Amendment Act, 2000), makes provision for control of manufacture, possession, use, operation, sale, import and export of aircraft. India has passed Aircraft (Carriage of Dangerous Goods Act) 2003, which casts liability over Indian aircraft or aircraft flying over India to ensure that if it is carrying any dangerous goods same are conspicuously marked, packed leak-proof and away from passengers, as per provisions provided thereunder.

Anti-Hijacking Act, 1982.

In recent years, there has been increase in offences by way of unlawful seizure of aircraft or hijacking. Convention for Suppression of Unlawful Seizure of Aircraft was drawn up at diplomatic conference held at The Hague in Dec., 1970 for adoption of States, by representatives of 77 Governments. For dealing more effectively with offences involving unlawful seizure of aircraft or hijacking, India has ratified this Convention and passed Anti-Hijacking Act, 1982 and amended by Anti-Hijacking (Amendment) Act, 1994.

Suppression of Unlawful Acts against Safety of Civil Aviation Act, 1982.

India is signatory to Convention drawn up at diplomatic conference held at The Hague in Dec. 1970 for dealing with hijacking and Convention adopted at diplomatic conference held at Montreal in 1971 for Suppression of Unlawful Acts against the Safety of Civil Aviation. Rules embodied in Convention have been given statutory recognition and effect in India by Suppression of Unlawful Acts against Safety of Civil Aviation Act, 1982 and amended by Suppression Of Unlawful Acts Against Safety Of Civil Aviation (Amendment) Act, 1994.

The Immigration (Carriers Liability) Act, 2000 provides that where competent authority (appointed under Act) is of opinion that any carrier (meaning person engaged in business of transporting persons by water or air) has bought person into India in contravention of provisions of Passport (entry into India) Act, 1920 and rules made thereunder, competent authority may impose penalty of Rs.1,00,000/- on such carrier after giving carrier opportunity of being heard. Provisions are also made in Act for appeals and for recovery of penalty. This Act has been amended by Immigration (Carriers' Liability) Amendment Act, 2005 which provides that if Central Government is of opinion that it is necessary or expedient in public interest or to fulfill international obligations, it may exempt any carrier or class of carriers from operations of all or any of provisions of Act.

22.02 COLLISIONS:

See topic 22.04 Shipping.

22.03 MOTOR VEHICLES:

In India, rules and regulations related to driving license, registration of motor vehicles, control of traffic, construction and maintenance of motor vehicles are governed by Motor Vehicles Act of 1989 (amended in 1994 effective 14th Nov. 1994) and Central Motor Vehicles Rules 1989.

Driver's License.

No person can drive motor vehicle in India unless he has effective license issued to him in person. Persons under 18 years of age may not drive in public places; and persons under 20 years may not drive transport vehicles in public places, subject to exceptions. However motor cycle with engine capacity not exceeding 50cc may be driven in public place by person after attaining age of sixteen years.

Duration.

Driver's license is valid for maximum five years before renewal is necessary.

Tests.

Appropriate state licensing authority may specify tests before issuing license. If applicant holds license issued by competent authority of any country outside India, no test is required.

Insurance.

Every vehicle must be insured at least against third-party claims. Driving vehicle without such insurance is offence.

Silence Zones and Parking.

Certain Indian cities have silence zones where motor vehicle horns may not be sounded. Entry into such areas is marked by road sign of black horn with large white cross running diagonally across it. Parking in demarcated areas may be prohibited or otherwise restricted.

Vehicle Registration.

Every vehicle driven in India must be registered, and have its registration plate suspended easily visible from vehicle. Registration is in state where vehicle is normally kept.

Renewal of Registration.

Vehicles over 15 years old must undergo prescribed test for road-worthiness.

Diplomatic Corps Vehicles.

Special rules issued by Central Government from time to time govern registration, import, sale, transfer and export of vehicles belonging to diplomatic or consular officers. (§42).

Temporary Registration.

Persons may apply for vehicles to be temporarily registered for period not exceeding one month (not extensible). (§43).

Effective Registration.

Vehicle effectively registered in one place in India need not be registered anywhere else in India. (§46).

Transfer of Ownership.

Transferor must report to registration authority within 14 days of transfer and send copy to transferee. Transferee must report with copy to registration authority within whose jurisdiction he resides, and obtain fresh registration. (§50).

Compensation for Accidents.

Motor accidents Claims Tribunals are established under Act to adjudicate upon and award compensation for loss of life/limb arising out of motor accidents. Quantum of compensation would depend upon earning capacity of victim, disability suffered etc. Whether victim had contributed to accident is also relevant factor to be considered while awarding compensation, subject to exception of “no fault” liability.

Act has also introduced concept of “no fault liability”. Where fatality results, heirs of victim are entitled to compensation of Rs. 50,000 (earlier Rs. 25,000) in first instance irrespective of whether or not victim was guilty of negligence. Similarly for injury resulting in permanent disability, compensation of Rs. 25,000 (earlier Rs. 12,000) is awarded to victim whether or not owner of vehicle or any other person was guilty of negligence. No fault liability compensation payable in first instance and/or in second instance will be adjusted against any further compensation awarded to victim/his heirs against owner/insurer of vehicles. Question of negligence on part of tort feasor and/or contributory negligence on part of injured/victim is needed to be gone into only if claim is made for further additional compensation, i.e. in addition to aforesaid compensation in first and second instance.

Claim for compensation must be filed with Tribunal within six months. Tribunal has powers, for sufficient cause shown, to condone delay in filing claim. In practice Tribunal is quite liberal whilst considering applications for condonation of delay.

Note: Statutory obligation on driver of vehicle involved in accident to arrange medical help for injured and to report accident at earliest to nearest police station.

Amended Act has introduced new provision for speedy disposal of cases under §163A (which is alternative to §140) under which compensation is to be paid in full as per structured formula on principle of no fault liability.

Central Motor Vehicles Rules, 1989 have been amended in 2005, pursuant to which time limits for various functions discharged by licencing and registering authorities and appellate authorities under Motor Vehicles Acts and Rules have been specified. It has been made mandatory for manufacturer to supply protective headgear conforming to BIS Standards at time of sale of two-wheelers. Type approval rules for CNG/LPG vehicles have been rationalized. Further, States have been empowered to prescribe special provisions such as fog lamp, power steering, defogging and demisting systems in transport vehicles plying in hill areas.

Tourist Information.

Central Government has power to make rules regarding import, export and transfer of vehicles into or out of India. These rules are subject to frequent change; and copy of latest rules and information should be obtained from Ministry of Transport or External Affairs Ministry Secretariat, New Delhi or from nearest High Commission or Embassy by persons intending to bring a car into India. It is advisable to write at least six months in advance of importing car into India. Vehicles in India are driven on left hand side of road.

The Carriers Act, 1865.

This is Act relating to rights and liabilities of Common Carriers. “Common carrier” denotes person, other than Government engaged in business of transporting property under multimodal transport document or of transporting for hire property from place to place, by land or inland navigation, for all persons indiscriminately.

The Railways Act, 1989.

Object of Act is to consolidate and amend law relating to railways. Said Act inter alia governs carriage of passengers, carriage of goods and responsibilities of railway administrations as carriers etc. By Railways (Amendment) Act, 2005 new chapter i.e. Chapter II A has been inserted which provides for establishment of railway land development authorities.

The Multimodal Transportation of Goods Act, 1993.

Act to provide for regulation of multimodal transportation of goods, from any place in India to place outside India, on basis of multimodal transport contract and for matters connected therewith or incidental thereto.

22.04 SHIPPING:

Carriage of goods by sea governed by (i) Merchant Shipping Act, 1958, (ii) Indian Carriage of Goods by Sea Act, 1925 and (iii) Indian Bill of Lading Act, 1856 and also general statutes like Marine Insurance Act, 1963, Indian Ports Act, 1908, Major Port Trusts Act, 1963, Customs Act, 1962 etc.

Three acts govern registration of ships in India. Merchant Shipping Act, 1958 (“MSA”), Coasting Vessels Act 1838 (“CVA”), and Inland Vessels Act, 1917 (IVA). Sea going ships not fitted with mechanical means of propulsion are registered with Mercantile Marine Department (“MMD”) under CVA. Inland mechanically propelled vessels are not permitted to proceed on voyage or be used in any service, unless they are registered under IVA. Sea going ships fitted with mechanical means of propulsion of 15 tons net and above can be registered under Part V of MSA.

Merchant Shipping Act, 1958.

Act deals with registration of Indian ships, transfer and mortgages of ships or shares, national character and flag, employment of seamen, provisions regarding ship's survey, granting of certificates, maintenance of records on board, safety at sea, fire fighting appliances, construction of ships including nuclear ships, rules regarding loadline (in conformity with International Loadlines Conventions, 1966), radio requirements according to International Radio regulations, collisions, accidents at sea, liability, wreck, salvage, limitation of shipowner's liability, navigation, prevention of pollution, investigation and enquiries. No ships other than Indian ships can ply in coastal waters except under license granted by Director General under §407(1), part XIV of Act. Ship can be registered under Indian flag only if all ten shares in vessel are held by Indian entity. It is mandatory that vessel must wholly belong to Indian individual or corporate entity, either singly or jointly. Prior approval of Director General of Shipping (“DG”) for acquisition of ship is not required. DG must however be notified regarding acquisition.

Ship which is built or acquired out of India by person qualified to own Indian ship, i.e. owner or Master of ship would have to apply to Indian Consular Officer at port where ship is located for issue of provisional certificate of Indian registry for ship and such officer, on production of satisfactory proof of ownership, would grant provisional registration certificate to owner or Master.

Certificate of provisional registration is valid for six months or until arrival of ship at Indian port to concerned Registrar, whichever is earlier, prior to which final registration of ship at Port of Registry in India must be affected.

Indian ships can be acquired by availing loan from Indian/foreign lenders to whom ship can be given as security. Ship mortgages in India are governed by Companies Act, 1956 (“CA”) and MSA which requires charges upon vessel to be registered with Registrar of Companies and to be registered in Register of Ships maintained by MMD.

Mortgages can now be created on provisionally registered ships, registrar would enter said mortgage on permanent registration thereof. Priority of mortgages is determined on basis of order in which mortgages appear in Register of Ships maintained by MMD. Mortgagees usually prefer to be sole registered mortgagees as §51 of MSA empowers sole mortgagee to foreclose and sell mortgaged ship without approaching High Court.

All accidents and loss of Indian ships must be reported to Central Government; and rules as to division of loss, damages for personal injuries and right of contribution.

MSA was amended in year 2002 to implement provisions of Limitation of Liability for Maritime Claims (LLMC), 1976. By virtue of this amendment, limits of liability of shipowner is now in line with LLMC, 1976.

Prior to Multimodal Transportation of Goods Act 1993 shipowner's liability was limited up to aggregate amount not exceeding amount equivalent to (a) 1,000 francs for each ton of vessel's tonnage where there are property claims only; (b) 3,100 francs per ton where there are personal claims only; (c) 3,100 francs per ton where there are both personal and property claims, first portion equivalent to 2,100 francs for each ton exclusively appropriated towards payment of personal claims and second portion equivalent to 1,000 francs for each ton shall be appropriated towards payment of property claims, provided where first portion is insufficient to pay personal claims unpaid balance shall rank rateably against second portion relating to property claims. By this Act Carriage of Goods by Sea Act has been amended with result that Art. IV has been amended as follows: (1) for words and figures “amount exceeding 1001 per package or unit”, words and figures “amount exceeding 666.67 Special Drawing Rights per package or unit or two Special Drawing Rights per kilogram of gross weight of the goods lost or damaged, whichever is higher” shall be substituted.

By virtue of this shipowners' liability which was originally as per Hague Rules has now been brought to level as prescribed by Hague Visby Rules.

Amendment of §89 of Merchants Shipping Act 1958 provides for transmission of complaint of any dispute of foreign seaman of vessel, registered in country other India in Indian territorial waters, with master owner, or agent to competent authority at country of registration and copy of such complaint shall be forwarded to Director General International Labour Organisation office. §138A provides that ordinary hours of work for all seamen shall not exceed 48 hours in week.

Chartering of foreign flag vessels and trade by vessels in coasting waters of India are governed under §§406 and 407 of MSA. Last year Government has issued guidelines for grant of §§406 and 407 license under MSA to LNG vessels vide its circular dated 5 July 2004, subject to introduction of tonnage tax regime. GOI has changed its LNG Shipping Guidelines allowing overseas carriers to bid alone for shipment contracts. Earlier guideline, which was issued by DG on 5th July, 2005 with retrospective effect from 1st Apr. 2004 (date when tonnage tax regime was introduced in India), required any venture bidding for LNG shipping contract in India to have local shipping partner with stake of at least 26%. Further transfer of technology to Indian shipping partner had to be completed within five years from date of registration of vessels and subsequently vessels were required to be migrated to Indian flag. This policy, which effectively allowed only ships with Indian flags to bring LNG into country, has been kept in abeyance.

All self-propelled vessels engaged in offshore operation and carrying more than 12 offshore personnel on board are required to be certified either as passenger ship under provisions of International Convention for the Safety of Life at Sea, 1974 (SOLAS 1974) or as special purpose ship under provisions of Code of Safety for Special Purpose Ships. Insofar as non-propelled vessels, such as accommodation barges, are concerned, their hull, equipments, auxiliary machinery, structural fire arrangement, stability/damage stability and safety equipment should comply with relevant provisions of Special Purpose Ship Safety Code and certifying letter to this effect from vessel's class (holding IACS membership) or flag should be available on board.

LNG Policy is still awaited. In order to regularize and deal with number of projects coming up in this field, DG laid down guidelines for grant of permission for chartering of LNG vessels for import, coastal trade as well as implementation of projects. Government's aim is to promote Indian tonnage in general and LNG tonnage in particular.

Important features of guidelines are: (1) Owners to submit unconditional undertaking to convert vessel into Indian flag vessel within one year after introduction of tonnage tax (which has now been introduced by finance budget of 2004-2005 to be made effective from 1 Apr. 2005). (2) Licenses would only be granted: (i) To Indian flag vessels; or (ii) unless Indian partner owns LNG vessel wholly or not less than 26% of ownership of company owning said LNG vessel. (3) LNG vessel which is granted license on long term charter would have to employ minimum two Indian officers, one on engineering side and other on deck side. (4) LNG importer may fix vessel on spot basis provided total cargo carried on such spot vessels shall not exceed 10% of total annual imports during financial year for each project/regasification terminal. (5) Technology should be transferred to Indian partner, such that within five years from date of registration of subject LNG vessel, owned by transporter and used for transportation of LNG to or within India, vessel would be owned, managed and operated by Indian partner through Indian crew/personnel.

Tonnage tax has been introduced in India during 2004-2005 financial budget giving option to Indian Shipping Companies to opt either for tonnage tax (which option would be for minimum ten years) or current corporate tax. Under Tonnage Tax regime (TTR), shipping company's tax liability is determined by tonnage of its fleet, not profits from its shipping operations, rate being between 1.5% to 2%.

Migration to TTR is conditional upon compliance with following eligibility requirements: (1) Place of management of company must be in India. (2) Company should own at least one qualifying ship. (3) Main object of company must be business of operating sea-going ships.

Companies opting for this scheme are tied in for ten years. Those opting out will stay out for ten years. On complying: (1) Company will have to pay tax even if it incurs losses in a year. (2) Such company will have to transfer not less than 20% of its book profits every year into Tonnage Tax Reserve Account to be utilized for exclusive purpose of acquiring new ships within eight years. Companies must comply with minimum training requirement i.e. compulsorily providing training to Indian seafarers of one officer for every 15 employees on board. (3) Benefits under TTR are available only on shipping income, while other incomes would continue to attract 35% Corporate Tax.

In view of TTR having been introduced, foreign flag LNG vessels chartered for delivery of LNG to India are required to migrate to Indian flag within one year of Tonnage Tax regime.

Chapter XII-G of Income Tax, 1961 containing special provisions for taxation of income of shipping companies from qualifying ships, has been amended and dredgers will now be rendered as qualifying ships for purposes of tonnage tax scheme.

Indian Carriage of Goods by Sea Act, 1925.

Act governs carriage of goods by sea, follows English Carriage of Goods by Sea Act 1924 and contains Hague Rules regulating rights/obligations of parties to Contract of Carriage.

Indian Bills of Lading Act, 1856.

Act prevents Master or other person signing from questioning Bill of Lading in hands of bona fide holder for value on ground that goods have not been laden. Rights under Bills of Lading to vest in consignee or endorsee and does not affect right of stoppage to transit or claim for freight and renders Bill of Lading in hands of consignee etc. conclusive evidence of shipment against Master etc.

Major Port Trusts Act, 1963.

Act makes provision for constitution of port authorities for certain major ports in India, and vests administration, control and management of such ports in such authorities. Supreme Court has held in matter of BPT vs. IOC and Anr, Apr. 1998, that port authorities have paramount lien over vessel for recovery of rates and charges of port. Right stands above right of secured and unsecured creditors of company in winding up. Lien cannot be extinguished or vessel sold by any other authority under directions of court or otherwise, unless harbour authority consents to such sale.

Supreme Court has considered powers of port in fixing quantum of damages for damage caused to port property and has held that port has unilateral powers to assess damage and that there is no limitation to ship owners liability (based on tonnage or value of vessel) and in order to release vessel, security for damage must first be deposited; owner may only thereafter challenge quantum of damages.

The Major Port Trusts (Amendment) Act, 2000 (act to amend major port Trusts Act 1963) has amended §42 provided that board constituted under this Act may with previous approval of Central Government, enter into any agreement (whether by way of partnership or joint venture or in any other manner) with any body corporate or any other persons to perform any of services and functions assigned to board under this Act.

International Conventions.

India has ratified International Convention for Prevention of Pollution of Sea by Oil, 1954 as amended from time to time.

India is not party to (i) International Convention for the Unification of Certain Rules of Law relating to Bills of Lading, Brussels 1924; (ii) Brussels Protocol of 1968 (adopting Hague-Visby Rules); (iii) United Nations Convention on the Carriage of Goods by Sea Act, 1978 (adopting Hamburg Rules); (iv) International Convention relating to the Arrest of Sea-going Ships, Brussels, 1952; (v) Brussels Conventions of 1952 on civil and penal jurisdiction in matters of collision; (vi) Brussels Convention of 1926 and 1967 relating to maritime liens and mortgages. However, Supreme Court in M.V. ELIZABETH decided in Feb. 1992 held that principles incorporated in these conventions are themselves derived from common law of nations as embodying felt necessities of international trade and are as such part of common law of India and applicable for enforcement of maritime claims.

Double Taxation Avoidance Agreements.

India has signed Double Taxation Avoidance Agreements with several countries throughout the world including USA, Canada, Cyprus, Mauritius, etc. Pattern of all Agreements is broadly uniform, though special provisions necessitated by unique intercountry activities are incorporated in some of Agreements. Governing principle in every Agreement is provision of moderate level of taxation in country of source, with residual right to taxation in country of residence/domicile. All conventions unanimously levy tax on foreign enterprise only if it has permanent establishment in Contracting State.

(See also categories 6 Courts and Legislature, topic Admiralty Jurisdiction; Taxation, topic Taxes.)

1
INDONESIA LAW DIGEST

—Scope —

Revised for 2010 edition by

ANDREW I. SRIRO, ESQ., in affiliation with Dyah Ersita & Partners, of Jakarta.

Note: This revision incorporates legislation through Aug. 29, 2009.

1 INTRODUCTION

1.01 CURRENCY:

Governing Law.

Currency is governed by Law No. 23 of 1999 dated 17 May 1999 concerning Bank Indonesia as lastly am'd by Law No. 6 of 2009 dated 13 Jan. 2009 concerning Stipulation as Law of Government Regulation in lieu of Law No. 2 of 2008 concerning Second Amendment to Law No. 23 of 1999 concerning Bank Indonesia.

Monetary Unit is Rupiah (Rp).

Bank Indonesia, central bank, is only institution authorized to issue, revoke and withdraw bank notes and coins which are legal tender. Any act pertaining to money or having objective of payment or any obligation which has to be fulfilled through use of money, if performed in Indonesia, shall be carried out in Indonesian Rupiah unless otherwise expressly provided by law.

1.02 GOVERNMENT AND LEGAL SYSTEM:

Constitution.

Indonesia is constitutional republic. Republic is based on five principles of Pancasila: Belief in one supreme G-D, just and civilized humanity, united nation, democracy guided by inner wisdom derived by unanimous agreement through consensus of People's representatives, and social justice throughout Republic.

Constitution guarantees right to live and to preserve life; equality among citizens; right to work, earn decent living and receive just, fair and decent treatment in work relationship; freedom of religious practice; right to education and self-enhancement; right to establish family and propagate through legal marriage; children's rights to live, to grow, to enhance and to be protected from violence and discrimination; right to be acknowledged by, to be protected by and to be fairly and justly treated by law; right of citizenship status; right to communicate and obtain information; right to protect one's self, family, honor, dignity and property under his/her power; right to be free from treatment in manner degrading to human dignity; right to obtain political asylum from another country; right to live and to prosper mentally and physically; right to have residence; right to good and healthy living environment; right to health care services; and right to defend Republic.

Constitution of 1945 divides Government power into legislative, judicial and executive branches.

Legislature.

Governing Law.

Legislature is governed by Law No. 27 of 2009 dated 29 Aug. 2009 concerning People's Consultative Assembly (MPR), House of People's Representatives (DPR), Regional House of Representatives (DPD) and Provincial House of People's Representatives (DPRD Provinsi).

People's Consultative Assembly (MPR) is required to meet at least once every five years. MPR's principal purposes are to: (i) Amend Constitution; (ii) inaugurate President and Vice President based on results of general elections; (iii) decide on proposals of House of People's Representatives (DPR) (see catchline House of People's Representatives [DPR], infra) to impeach President and/or Vice President during their terms after Constitutional Court decides that President and/or Vice President are proven to have conducted violations of law in form of treason, corruption, bribery, other serious criminal acts, or disgraceful acts and/or proven that President and/or Vice President no longer fulfill requirements as President and/or Vice President; (iv) inaugurate Vice President to become President if President dies, stops/discontinues/resigns, is impeached or is unable to implement his/her responsibilities during term; (v) elect Vice President from two candidates which are submitted by President in event of vacancy of post of Vice President during term within but not longer than 60 days and, *inter alia* (iv) elect President and Vice President if both pass away, stop/discontinue/resign, being discontinued or fail to conduct their obligations together during term, from two sets of candidates for President and Vice President which are proposed by political parties or federation of political parties which set of candidates for President and Vice President achieve first and second most votes in prior election until end of term. MPR has power to amend Constitution. MPR is composed of members of DPR and members of Regional House of Representatives (four members from each province with total not exceeding one-third of total members of DPR), all elected by general election.

House of People's Representatives (DPR) is required to meet annually. DPR's principal purposes are to: (i) Formulate legislation; (ii) adopt State Budget; (iii) withhold or grant consent to Presidential declarations of war or peace; and, *inter alia* (iv) supervise Government. DPR is composed of 560 members elected through general elections. Promulgation of all laws requires approval of DPR and President.

DPR annual sessions start on 16 Aug. and end on 15 Aug. of each year. Annual sessions are divided into four assembly terms. Each assembly term includes meeting periods and recess periods.

Regional House of Representatives (DPD) consists of maximum of 186 members elected by general election (four members from each province with total not exceeding one-third of total members of DPR (see catchline House of People's Representatives [DPR], supra). DPD's principal purposes are to: (i) Supervise enforcement of certain laws; (ii) submit bills to DPR on regional autonomy, central and regional Government relationships, management of natural and other economic resources, and matters related to central and regional government financial equilibrium; and (iii) submit opinions to DPR concerning bills on State Budget, taxes, education and religion.

DPD annual sessions start on 16 Aug. and end on 15 Aug. of each year.

Provincial House of People's Representatives (DPRD Provinsi) is governed by Law No. 27 of 2009 dated 29 Aug. 2009 concerning People's Consultative Assembly, House of People's Representatives, Regional House of Representatives and Regional House of People's Representatives. Provincial House of People's Representatives consists of members of political parties participating in general elections based on results of general elections with total not less than 35 and not more than 100 members. DPRD Provinsi's principal purposes are to: (i) Formulate provincial regional regulations through discussions with and mutual consent of governor; (ii)discuss/deliberate and provide agreement to bills of regional regulations concerning provincial regional budgets which are submitted by governor; (iii) conduct supervision concerning enforcement of (provincial) regional regulations and provincial regional budgets; (iv) propose appointment of and dismissal of governor or deputy governor to President; (v) convey opinions and considerations, and provide agreement to provincial Government concerning execution of international agreements related to regional interests; and (vi) request governor accountability information reports relating to implementation of provincial regional administration.

Session years are divided into three terms. Terms include meeting periods and recess periods except if during last session from one period of provincial DPRD Provinsi membership recess period is nullified.

Judiciary.

Governing Law.

Judiciary is governed by Law No. 4 of 2004 dated 15 Jan. 2004 concerning Judiciary. Judiciary is vested with power to adjudicate cases. Constitutional principles expressly declare independence of judiciary.

Hierarchy of courts is as follows: (i) District Court is civil and criminal court of first instance; (ii) High Court is civil and criminal court of first appeal; and (iii) Supreme Court is highest judicial tribunal for all matters decided by adjudicative process except for: (i) Matters decided by Constitutional Court concerning constitutional review of laws, disputes over authority of State institutions, dissolution of political parties and disputes over results of general elections; (ii) disputes over jurisdiction to adjudicate between District Courts in jurisdictional territory of one High Court (which disputes are adjudicated at first and final instance by High Court); and (iii) certain disputes decided by Industrial Relations Court.

Court system also includes: (i) Constitutional Court governed by Law No. 24 of 2003 dated 13 Aug. 2003 concerning Constitutional Court; (ii) Administrative Courts governed by Law No. 5 of 1986 dated 29 Dec. 1986 concerning State Administrative Judicature as amended by Law No. 9 of 2004 dated 29 Mar. 2004 concerning Amendment to Law No. 5 of 1986; (iii) Commercial Courts governed by Law No. 37 of 2004 dated 18 Oct. 2004 concerning Bankruptcy and Suspension of Debt Payment Obligations; (iv) Tax Courts governed by Law No. 14 of 2002 dated 12 Apr. 2002 concerning Tax Court; (v) Religious Courts governed by Law No. 7 of 1989 dated 29 Oct. 1989 concerning Religious Court as amended by Law No. 3 of 2006 dated 20 Mar. 2006 concerning Amendment to Law No. 7 of 1989; (vi) Children's Courts governed by Law No. 3 of 1997 dated 3 Jan. 1997 concerning Children's Court; (vii) Military Courts governed by Law No. 31 of 1997 dated 15 Oct. 1997 concerning Military Court; (viii) Industrial Relations Courts governed by Law No. 2 of 2004 dated 14 Jan. 2004 concerning Settlement of Industrial Relations Disputes; (ix) Courts of Fishery Affairs governed by Law No. 31 of 2004 dated 6 Oct. 2004 concerning Fishery Affairs; (x) Criminal Corruption Court governed by Law No. 30 of 2002 dated 27 Dec. 2002 concerning Commission on Eradication of Corruption (see Decision of Constitutional Court No. 012-016-019/PUU-IV/2006 dated 18 Dec. 2006, holding that creation of Criminal Corruption Court was unconstitutional; provided, however, that Criminal Corruption Court would continue to possess binding legal power until Art. 53 of Law No. 30 of 2002 is amended which amendment must occur within three years following 18 Dec. 2006); (xi) Criminal Corruption Court governed by Law No. 30 of 2002 dated 27 Dec. 2002 concerning Commission on Eradication of Corruption; (xii) Human Rights Court governed by Law No. 26 of 2000 dated 23 Nov. 2000 concerning Human Rights Court; and (xiii) Islamic Syari'ah Court in Nanggroe Aceh Darussalam Province governed by Law No. 18 of 2001 dated 9 Aug. 2001 concerning Special

Autonomy for Special Region of Aceh as Nanggroe Aceh Darussalam Province as last amended by Law. No. 11 of 2006 dated 1 Aug. 2006 concerning Aceh Government. Each of foregoing court sub-systems possess authority over separate and exclusive jurisdictional domains.

Executive.

President: (i) Holds governmental authority; (ii) holds highest authority as Commander of Army, Navy and Air Force; (iii) is empowered, with agreement from House of People's Representatives, to declare war, make peace and enter into agreements with other states; (iv) may declare state of danger/peril; (v) appoints ambassadors and consul (in appointing ambassadors, President must take into account considerations of House of People's Representatives); (vi) receives ambassadors from other states (in receiving placement of ambassadors from other states, President must take into account considerations of House of People's Representatives; (vii) grants clemency, amnesty, abolition and rehabilitation; and (viii) grants titles, decorations and other marks of honor. President holds five year term, with term limit of two terms.

President is assisted by Ministers of State who are appointed and dismissed by President. Every Minister must be expert in particular division of governmental administration. State ministries assist President in creating policy and conducting coordination functions in specific administrative matters. Coordinating Ministers assist President in coordination of planning and formulation of policy, as well as synchronization of implementation of policy in their sectors.

President and Vice President are elected to five year terms with limit of two terms by direct, general, free, confidential, honest and fair elections by registered voters who must be Indonesian State citizens.

Government Levels.

Government is divided into following: (i) Central Government headed by President; (ii) Provinces headed by Governors; (iii) Regencies headed by Regents; (iv) Municipalities headed by Mayors; (v) Districts headed by District Heads; and (vi) Sub-Districts/Villages headed by Sub-District Heads/Village Chiefs.

Provincial Government.

There are 33 Provinces including four special administrative districts including national capital, Jakarta. Provinces are represented by members of DPD who also represent provinces in MPR.

Departments.

Administration is conducted through departments headed by Ministers. Departments are subdivided into: (i) Ministers; (ii) Secretariate Generals headed by Secretary Generals; (iii) Directorates Generals headed by Director Generals; (iv) Inspectorates Generals headed by Inspector Generals; (v) Boards and/or Centers; and (vi) Expert staff. Non-departmental governmental institutions are formed to assist President in certain specific fields of administration.

Legal Pluralism.

Three major categories of law govern different aspects of Indonesian society.

Adat law is unwritten customary law which is still applicable to Indonesian State citizens. As nation composed of numerous cultural, religious, social and ethnic groups with their own customs and lifestyles, Adat law varies throughout archipelago. While its applicability has been reduced through increasing dominance of modern legislation, Adat law may have effects on commercial transactions involving property rights and upon interpretation of national laws.

Dutch Law.

Dutch laws became applicable in Indonesia during 352 year period of Dutch colonization and colonial codes still serve as current Commercial Code (Wetboek van Koophandel voor Indonesië) (Kitab Undang-undang Hukum Dagang, KUHD), Civil Code (Burgerlijk Wetboek voor Indonesië) (Kitab Undang-undang Hukum Perdata, KUHPer) and Criminal Code (Wetboek van Strafrecht) (Kitab Undang-undang Hukum Pidana, KUHP).

To avoid legal vacuum, Art. I of Transitional Provisions of Constitution of 1945 proclaims that all laws in force at time of declaration of independence would remain valid until replaced by new laws in accordance with Constitution of 1945.

Art. 163 of Indische Staatsregeling (Constitution for Netherlands East Indies) divided Indonesian community into three basic population groups: (i) Europeans (which also includes Japanese and all persons who are neither European, Japanese, indigenous Indonesian or East Asian who are subject to family laws which share main principles of Dutch family law and descendants of Non-Dutch Europeans, Japanese and all persons who are neither European, Japanese, indigenous Indonesian or East Asian who are subject to family laws which share main principles of Dutch family law; (ii) indigenous Indonesians who have not moved to another population group and other persons who previously belonged to another population group and then merged themselves into indigenous Indonesian population group; and (iii) East Asians (which includes all persons who are not included in European and indigenous Indonesian population groups).

Concordance Principle.

In field of civil and commercial law: (i) Members of European population group are subject to same laws as are in effect in The Netherlands, provided however, that if special circumstances in Dutch East Indies require or if legislators deem it necessary to create regulations which will be in effect for more than one population group or parts of population groups, exception may be imposed concerning application of laws of The Netherlands to members of European population group in civil and commercial matters; and (ii) members of indigenous Indonesian, East Asian and parts of aforementioned population groups are subject to regulations of law based on their religions and customs, provided however, that exceptions may be created in relation to aforementioned law in matters of public interest and for their social needs, in which case European law may also be applied.

In creation of legislation which produces criminal law, law of civil procedure and law of criminal procedure which is in effect exclusively for European population group, legislators shall heed requirement that law should be same as law which is included in regulations in effect in The Netherlands, provided however, that if special circumstances in Dutch East Indies requires exceptions, then from that need law should be created. In event regulations are intended to be in effect also for other population groups or for parts of those groups based on joint regulations, then that legislation shall only be implemented in accordance with aforementioned matters.

In event law in effect for indigenous Indonesian population group and for East Asian population group is not same as law in effect for European population group, then members of indigenous Indonesian and East Asian population groups have authority to voluntarily subject themselves to regulations of European civil and commercial law which is not otherwise in effect for them, for all legal acts or for only certain legal acts.

Civil and commercial law which is now in effect for indigenous Indonesian population group and for East Asian population group (law based on their religions and customs) continues to be in effect so long as that law has not yet been changed by legislation which is created in relation to matters of public interest and for social needs, in which case European law may also be applied.

These distinctions are technically valid to date though applied in extremely limited circumstances. However, Government has taken steps to progressively reduce importance and frequency of these distinctions.

Modern Legislation.

Indonesian legislation is based on following hierarchy: (i) Constitution; (ii) Laws and Government Regulations in lieu of Laws; (iii) Government Regulations; (iv) Presidential Regulations; and (v) Regional Regulations.

Other kinds of legislation issued by People's Consultative Assembly (MPR), House of People's Representatives (DPR), Regional House of Representatives (DPD). Supreme Court, Constitutional Court, Finance Auditor Body (BPK), Bank Indonesia, Ministers, heads of bodies, institutions or commissions at same level formed by laws or by Government based on instruction of laws, Provincial House of People's Representatives, Governors, Regency/Municipal House of People's Representatives, Regents/Mayors, Village Chiefs or others at same level are acknowledged and shall have legally binding power to extent they are instructed by other regulations of law of superior hierarchy.

1.03 HOLIDAYS:

Governing Law.

Holidays are governed by Presidential Decree No. 251 of 1967 dated 16 Dec. 1967 concerning National Holidays as last amended by Presidential Decree No. 3 of 1983 dated 19 Jan. 1983 concerning Amendment to Presidential Decree No. 251 of 1967 concerning Holidays as last amended by Presidential Decree No. 10 of 1971; Joint Decree of Minister of Religious Affairs No. 1 of 2009, Minister of Manpower and Transmigration No. KEP. 227/MEN/VIII/2009 and Minister for Enhancement of Efficiency of State Apparatus No. SKB/13/M.PAN/8/2009 dated 7 Aug. 2009 concerning National Holidays and Collective Leave in 2010.

Public holidays include: 1 Jan. (New Year's Day); Chinese Lunar Year; New Year of 1431 Hijriyah; Day before Hindu New Year; Good Friday; Birthday of Prophet Muhammad SAW (Rabi'ul 12); Ascension Day; Anniversary of Buddha's Birth, Enlightenment and Death; National Independence Day; Ascension Day of Prophet Muhammad SAW (Rajab 27); Id'ul Fitri (1431 Hijriyah); 25 Dec. (Christmas Day); Id'ul Adha (1431 Hijriyah).

1.04 OFFICE HOURS AND TIME ZONE:

Indonesia spans GMT +07:00 to +09:00 time zones. Office hours are generally from 8:00 a.m. to 4:00 p.m. Mon. through Fri.

2 BUSINESS ORGANIZATIONS

2.01 AGENCY:

Governing Law.

Agency, or mandates, is governed by Indonesian Civil Code (Arts. 1792 through 1819 of Indonesian Civil Code [Kitab Undang-undang Hukum Perdata] [KUHPer] [Burgerlijk Wetboek voor Indonesië] [Staatsblad 1847:23]).

Mandates are agreements whereby one person, principal, empowers another, agent, to act for and on behalf of principal. To be effective, agent must accept mandate.

Mandates may be created by: (i) Notarial deed; (ii) letter signed under hand; (iii) letter; or (iv) verbally. Acceptance may be tacit and evidenced by performance.

Mandates may relate either to general or specific matters. Mandates worded in general terms are deemed only to relate to management acts. In order to alienate or encumber property, to undertake compromise or to undertake any other act regarding interests in property, specific authority must be granted.

Minors may serve as agents subject to extensive restrictions.

Agents must report and account to their principals for all of their activities and all that they receive with regards to mandate.

Agents are obligated to perform their duties until they are relieved of them. Agents are liable for costs, damages and interest which might arise upon nonperformance of their mandates. Agents are responsible for both intentional and negligent acts and omissions in carrying out their mandates. However, gratuitous agent will be held less accountable for negligence than agent who receives compensation.

Where principal appoints more than one agent, each agent is not responsible for acts and omissions of others unless expressly provided. In event agent is appointed by more than one principal for representation of principals' mutual business interests, principals will be jointly and severally liable to mandate for all good faith advances, losses, expenses, interest and compensation to which agent is entitled.

Agent is not liable to third parties with whom he contracts provided that third party is informed of agency relationship and provided that agent has not bound himself personally to obligation.

Principal is bound by agreements entered into by agent within course and scope of mandate. Principal will also be bound by agreements made outside scope of agent's mandate if principal expressly or tacitly conforms.

Mandates terminate by: (i) Revocation by principal following notice to agent; (ii) termination by agent following notice to principal; (iii) death, subjection to guardianship, bankruptcy or other obvious incompetence of either principal or agent; or (iv) appointment of new agent for performance of same subject matter as referred to in previous mandate.

Principal may revoke mandate at his discretion and, if principal deems it appropriate, he may demand return of any documents evidencing mandate. Revocation of mandate does not reduce rights of third persons dealing with agent in good faith and without notice of revocation. However, agent will be responsible for any damages incurred by principal due to agent's unauthorized acts. Agent is further responsible for damages to principal arising out of termination of mandate by agent if notice of termination is delivered to principal in untimely manner or if injury to principal is due to other causes owing to fault of agent.

2.02 COMPANIES:

Limited liability companies are governed by Law No. 40 of 2007 dated 16 Aug. 2007 concerning Limited Liability Companies.

Limited liability companies are legal entities which take form of unity of capital, is established on basis of agreement, conducts business activities with entirety of authorized capital divided into shares and fulfills conditions which are stipulated in Law No. 40 of 2007 and its implementing regulations.

Shareholders of company are not personally liable for obligations which are made in name of company and are not responsible for losses of company in excess of shares they own.

Exceptions.

Aforementioned provision is not effective if: (i) Conditions of company as legal entity are not yet effective or are not fulfilled; (ii) relevant shareholder, whether directly or indirectly, in bad faith, exploits company for personal interests; (iii) relevant shareholder is involved in action against law which is conducted by company; or (iv) relevant shareholder, directly or indirectly, in manner against law, uses company assets which has effect that company assets become insufficient to pay company debts.

Minister of State Owned Enterprises is vested with authority to act as shareholder on behalf of State for all limited liability companies wherein State holds equity interest except that Minister of Finance is vested with authority to act as shareholder on behalf of State for those limited liability companies conducting certain infrastructure related activities and/or activities providing services to broad spectrum of society.

Cooperatives are governed by Law No. 25 of 1992 dated 21 Oct. 1992 concerning Cooperatives.

Cooperatives are defined as business entities which have natural persons or cooperative legal entities as members with core of their activities based upon principal of cooperatives as well as community economic power based upon family values.

Primary cooperatives are composed of at least 20 individuals. Secondary cooperatives are composed of at least three cooperatives. Function and role of cooperatives are to: (i) Develop economic potential and capabilities of members in particular and community in general to promote economic and social welfare; (ii) take active role in efforts to improve quality of human and social existence; (iii) strengthen/solidify community economy as basis for strengthening and securing national economy with cooperatives as central pillar; and (iv) endeavor to form and develop national economy through cooperative efforts based on family values and democratic economics.

Membership is voluntary and open, management is democratic and distribution of profit is in proportion to services rendered by each member. Membership in cooperatives is restricted to Indonesian citizens.

Cooperatives are established in accordance with deed of establishment which sets forth articles of association. Articles of association stipulate at least list of founders, name and domicile of cooperative, objective and business purpose, rules of membership, meetings and management, capitalization, period of establishment, methodology for distribution of profits and sanctions for violations of rules.

Organizational structure of cooperatives consists of: (i) Meetings of members; (ii) board of management; and (iii) board of supervisors. Resolutions adopted at meetings of members constitute highest level of authority.

Cooperatives may act as savings and loan institutions for their members and for other cooperatives.

Permanent Establishments are defined in Law No. 7 of 1983 dated 31 Dec. 1983 concerning Income Tax as already amended by Law No. 7 of 1991 dated 30 Dec. 1991, Law No. 10 of 1994 dated 9 Nov. 1994, Law No. 17 of 2000 dated 2 Aug. 2000 and Law No. 36 of 2008 dated 23 Sept. 2008.

Permanent establishment is form of enterprise used to carry out business or activities in Indonesia by individuals not residing in Indonesia or individuals present in Indonesia for not more than 183 days in 12 month period or entities not set up or domiciled in Indonesia, in any form similar to following: (i) Management domicile; (ii) branch office; (iii) representative office; (iv) office building; (v) factory; (vi) workshop; (vii) warehouse; (viii) space for promotion and sales; (ix) mine or quarry of natural resources (x) work area for oil and natural gas mining; (xi) fishing area, livestock breeding area, agricultural area, plantation or forest area; (xii) construction project, installation or assembly project; (xiii) provision of services by employee or other person for more than 60 days in 12 month period; (xiv) individual or organization acting as agent with dependent position; or (xv) agent or employee of insurance company neither formed nor domiciled in Indonesia which receives insurance premiums or insures risks in Indonesia.

State Owned Enterprises.

Two forms of State owned enterprises include: (i) Public Companies (PERUM); and (ii) State Limited Liability Companies (PERSERO).

Public Companies (PERUM).

PERUM is governed by Law No. 19 of 2003 dated 19 June 2003 concerning State Owned Enterprises and Government Regulation No. 45 of 2005 dated 25 Oct. 2005 concerning Establishment, Management, Supervision and Dissolution of State Owned Enterprises.

Purpose of PERUM is to provide benefit to public in form of provision of high quality goods and/or services while at same time pursuing profit based on principle of healthy company management.

Entire capital of PERUM is owned by State and is not divided into shares.

Minister of State Owned Enterprises is responsible for acting on behalf of Government in matters related to capital of PERUM. Minister acts as representative of Government as capital owner of PERUM vested with authority to stipulate policy for development of PERUM with aim to stipulate direction in achievement of purposes of company from perspectives of investment policies, enterprise finance, funding sources, utilization of profits from company activities and other developmental policies.

PERUM is managed by board of directors responsible for management interests and purposes of PERUM and represents PERUM in and out of court. Supervisory board is responsible for supervision of and provision of advice to board of directors in performing PERUM management activities of board of directors. PERUM also includes internal supervisory unit headed by chairman responsible to President Director and charged with assisting President Director with internal examinations of operations, finance, management, implementation of PERUM and provision of advice to improve foregoing matters.

Minister of State Owned Enterprises is not responsible for every legal action conducted by PERUM and is not responsible for losses of PERUM which are in excess of value of State wealth allocated to PERUM unless Minister: (i) Directly or indirectly and in bad faith benefits from PERUM exclusively for personal interests; (ii) is involved in unlawful acts undertaken by PERUM; or (iii) directly or indirectly makes use of assets of PERUM in unlawful manner.

PERUM is established by Government Regulations, must be domiciled in Indonesian territory and exists for period of time as stipulated in articles of associations.

State Owned Limited Liability Companies (PERSERO).

PERSERO is governed by Law No. 19 of 2003 dated 19 June 2003 concerning State

Owned Enterprises, Law No. 40 of 2007 dated 16 Aug. 2007 concerning Limited Liability Companies and Government Regulation No. 45 of 2005 dated 25 of Oct. 2005 concerning Establishment, Management, Supervision and Dissolution of State Owned Enterprises.

Purposes and aims of establishment of PERSERO are: (i) Provision of high quality and strongly competitive goods and/or services; and (ii) pursuit of profit in order to increase value of company.

Capital of PERSERO is divided into shares and at least 51% of capital of PERSERO is owned by State.

Minister of State Owned Enterprises is vested with authority to act as shareholder on behalf of State for limited liability companies wherein State holds equity interest; while for PERSERO engaged in activities vital to State interests, Minister of Finance is vested with authority to act as shareholder on behalf of State.

PERSERO is managed by board of directors responsible for management interests and purposes of PERSERO and representing PERSERO in and out of court. Board of commissioners is organ of PERSERO based on provisions and principles in effect for limited liability companies with duty to conduct supervision and provide advice to board of directors in performance of activities of management of PERSERO. Appointment and discharge of directors and commissioners is carried out by general meeting of shareholders. PERSERO also includes internal supervisory unit headed by chairman responsible to President Director and charged with assisting President Director with internal examinations of operations, finance, management, implementation of PERSERO and provision of advice to improve foregoing matters.

Public PERSERO is PERSERO with capital and number of shareholders fulfilling certain criteria or PERSERO that conducts public offering in accordance with regulations of law in capital market sector.

Individual Company-Sole Proprietorship.

Individuals may form business enterprises on their own behalf without incorporation.

2.03 PARTNERSHIP:

Civil General Partnership (Maatschap).

Civil general partnership is governed by provisions of Arts. 1618 through 1652 of Indonesian Civil Code (Kitab Undang-undang Hukum Perdata) (KUHPer) (Burgerlijk Wetboek voor Indonesië) (Staatsblad 1847:23).

Partnership is agreement between two or more persons who promise to contribute something to that partnership with intention that benefits obtained by partnership will be shared among themselves.

It is impermissible to provide that one partner shall be entitled to all benefits of partnership. However, one partner may assume all liability of partnership.

One partner may be granted authority to manage partnership's affairs and must carry out management functions in good faith. If more than one partner is granted management authority without specifying their individual scopes of authority, each will have equal power to undertake management actions. In absence of express stipulation concerning method of partnership management: (i) Each partner is deemed to have granted authority to other partners to undertake management actions and to bind others by those actions; (ii) each partner is entitled to utilize assets of partnership in manner in which those assets are ordinarily intended provided that assets are not used in manner contrary to interests of partnership or to exclusion of other partners' rights of use thereof; (iii) each partner is empowered to obligate other partners to contribute to costs necessary to preserve assets belonging to partnership; and (iv) no partner may renew rights in immovable assets of partnership based on reason that such renewal will benefit partnership without consent of other partners. Each partner is liable to partnership for all damages which partner causes due to own fault.

Partners are not severally responsible for whole of partnership's debt. One partner cannot obligate others without having received authorization. Creditor may bring claim against partners with whom creditor contracted, claiming against each partner in equal proportion of debt unless partner's individual liability is expressly stipulated in undertaking to be based on each partner's proportionate partnership interest. Any obligation undertaken for account of partnership shall only commit partner who made it unless other partners have given contracting partner authority to bind them or if undertaking renders profit to partnership. Partnership is entitled to claim implementation of agreements undertaken by one partner on behalf of partnership.

Partnerships end upon expiration of their intended terms, upon destruction of goods or accomplishment of actions constituting primary purposes of partnership, upon desire of one or more of partners or upon death, placement under guardianship or bankruptcy of one of partners. Partnerships formed with express stipulations of duration of their existence cannot be terminated earlier by one of partners without consent of others unless for valid reason such as failure of another partner to fulfill its responsibilities due to continuous disability or other reason. In order to prematurely terminate partnership, application must be made to court. For partnerships formed without express stipulations of duration of their existence, partner may not terminate partnership in bad faith for purpose of appropriating that which would otherwise constitute partnership profits.

General Partnership (Firma) (Fa).

Firma is governed specifically by Arts. 15 through 18 and Arts. 22 through 35 of Indonesian Commercial Code (Kitab Undang-undang Hukum Dagang) (KUHD) (Wetboek van Koophandel voor Indonesië). Provisions of Indonesian Civil Code (Kitab Undang-undang Hukum Perdata) (KUHPer) (Burgerlijk Wetboek voor Indonesië) regarding Civil Partnership apply to Firma unless provisions relating to Civil Partnership are in direct contradiction to provisions specifically relating to Firma. See subhead Civil General Partnership (Maatschap).

Firma is partnership which operates under one name, formed by notarial deed which is published in State Gazette and registered in Company Registry. Each partner is jointly and severally liable for all obligations of Firma. Each partner has authority to contract on behalf of and otherwise bind Firma.

Limited Partnership (Commanditaire Vennootschap) (CV).

CV is governed by Indonesian Commercial Code (Kitab Undang-undang Hukum Dagang) (KUHD) (Wetboek van Koophandel voor Indonesië) and Indonesian Civil Code (Kitab Undang-undang Hukum Perdata) (KUHPer) (Burgerlijk Wetboek voor Indonesië).

CV is partnership consisting of one or more active partners and one or more silent partners. Active partners act as managing partners with joint and several personal liability between them. Silent partners contribute capital to partnership but do not participate in loss beyond amount they contribute or are bound to contribute. Third parties dealing with CVs may sue active partners. Silent partners may only be sued if they engage in managerial acts and/or in some circumstances if their name is included in name of partnership.

3 BUSINESS REGULATION AND COMMERCE

3.01 BANKS AND BANKING:

Central Bank.

Law No. 23 of 1999 dated 17 May 1999 concerning Bank Indonesia as lastly am'd by Law No. 6 of 2009 dated 13 Jan. 2009 concerning Stipulation as Law of Government Regulation in lieu of Law No. 2 of 2008 concerning Second Amendment to Law No. 23 of 1999 concerning Bank Indonesia governs Central Bank.

Bank Indonesia is central bank, independent institution constituted as legal entity. Bank Indonesia has head office in Jakarta, is permitted to have satellite offices throughout Indonesia and may have representatives and correspondents abroad. Bank Indonesia is capitalized with minimum of Rp 2,000,000,000,000.

Mandate of Bank Indonesia is to maintain stability of value of Rupiah, stipulate and implement monetary policy, regulate and manage system of payments and regulate and supervise banks.

Bank Indonesia is responsible for development and management of national banking system and sets conditions on solvency and liquidity of banks. Bank Indonesia is empowered to: (i) Stipulate monetary targets taking into account inflation rate targets; (ii) implement monetary controls through utilization of methods which include but are not limited to open market operations in money market both in Rupiah and foreign currencies, stipulating discount rates, minimum reserve obligations and regulating credit or financing; (iii) provide credit or financing based on Syari'ah principles for periods of time of not longer than 90 days to banks to overcome short term financial difficulties of relevant banks; (iv) stipulate provisions concerning maximum limits for credit or financing grants based on Syari'ah principles, providing guarantees, negotiable instrument investment placements or other matters of similar form, which may be conducted by banks to borrowers or group of related borrowers, including to companies within same group with relevant bank; (v) grant and revoke bank business licenses; (vi) approve ownership and management of banks; (vii) grant permit for bank to conduct certain activities; (viii) require reports and information and conduct audits of banks; (ix) order temporary cessation of certain transaction activities; and (x) develop and manage inter-bank information systems.

Bank Indonesia conducts foreign exchange policy in accordance with foreign exchange management plans, acts as Government treasury holder, accepts foreign loans, and manages and settles Government financial claims and obligations with foreign parties. Bank Indonesia is prohibited from extending loans to Government.

President as head of Government administration is empowered to manage State finances through delegation of authority to Minister of Finance who acts as State General Treasurer.

Bank Indonesia is managed by Board of Governors consisting of at least one governor, at least one senior deputy governor and not less than four nor more than seven deputy governors. Governors must be Indonesian citizens of high integrity, character and morals possessing expertise and experience in fields of economics, finance, banking or law. Bank Indonesia is independent State institution free from intervention by Government or other parties except as provided by law. Board of Governors represents Bank Indonesia in and out of court.

National banking system is governed by Law No. 7 of 1992 dated 25 Mar. 1992 concerning Banking System as amended by Law No. 10 of 1998 dated 10 Nov. 1998 concerning Amendment to Law No. 7 of 1992; and Law No. 21 of 2008 dated 16 July 2008 concerning Syari'ah Banking.

Indonesian banking system is composed of commercial banks and peoples' credit banks.

Commercial banks may engage in: (i) Mobilization of funds from society in form of deposits; (ii) provision of credits; (iii) issuing documents of acknowledgment of indebtedness; (iv) buying, selling or underwriting bills of exchange, letters of credit and commercial paper, State Treasury paper and Government guarantee instruments, Bank Indonesia Certificates, bonds and commercial paper and other negotiable instruments with validity periods of up to one year; (v) transferring funds; (vi) placing funds at, borrowing funds from or lending funds to other banks through letters, telecommunications facilities, bills of presentment, checks and other means; (vii) receiving payments from claims on negotiable instruments; (viii) providing place for storing goods and negotiable instruments; (ix) acting as custodians; (x) placing customer funds with others in form of negotiable instruments which are not listed on stock exchange; (xi) providing factoring, credit cards and trust agency services; (xii) providing financing and other activities based on Syari'ah principles; (xiii) engaging in foreign currency transactions; (xiv) engaging in participation in capital of other banks and finance companies including leasing, venture capital, securities companies, insurance, and clearing settlement and depository agencies in accordance with Bank Indonesia regulations; (xv) engaging in capital participation for limited periods of time for purposes of overcoming effects of credit failures or Syari'ah based financing failures provided that capital participation is withdrawn in accordance with fulfillment of provisions which are stipulated by Bank Indonesia; and (xvi) founding and managing pension funds or pension fund management agencies.

Commercial banks are prohibited from engaging in insurance business activities. Special license from Bank Indonesia is required in order to permit foreign exchange operations. Capital adequacy requirements based upon prevailing regulations apply.

Bank Indonesia sets legal lending and Syari'ah based financing limits for commercial banks. Maximum limit with respect to parties unrelated to ownership or control of commercial banks is 30% of capital of commercial banks. Maximum limit with respect to parties related to ownership or control of commercial banks is 10% of capital of commercial banks.

Commercial banks are obligated to maintain minimum statutory reserves in accounts with Bank Indonesia.

Peoples' credit banks may: (i) Mobilize funds through deposits; (ii) provide credit; (iii) engage in Syari'ah based financing arrangements; and (iv) place funds in Bank Indonesia certificates, term deposits, deposit certificates and savings at other banks. Peoples' credit banks may not: (i) Receive deposits in form of credit transfers and participating in payment traffic; (ii) engage in foreign currency transactions; (iii) engage in capital participation; (iv) engage in insurance business activities; or (v) undertake other business activities except those specifically stipulated.

Licenses.

Persons engaged in banking activities must obtain licenses from Bank Indonesia. Qualifications are set regarding organizational and managerial structure, capital, ownership, expertise, feasibility of work plans and other matters. Domestic and overseas branch offices of Indonesian commercial banks may be opened after obtaining permit from Bank Indonesia. Foreign banks opening branches in Indonesia must obtain permits from Bank Indonesia.

Legal status of commercial banks and peoples' credit banks may be limited liability companies, cooperatives and regional administration owned companies.

Ownership.

With exception of publicly listed banks, commercial banks shall only be established by: (i) Indonesian citizens and/or Indonesian legal entities; or (ii) Indonesian citizens and/or Indonesian legal entities in partnership with foreign citizens and/or foreign legal entities. Foreign citizens or foreign legal entities may hold up to 99% of nonpublicly listed commercial banks. Peoples' credit banks shall only be established by Indonesian citizens and/or Indonesian legal entities wholly owned by Indonesian citizens, regional administrations or combination of three.

Commercial banks may issue up to 99% of their shares through Indonesian stock exchange and foreign citizens and/or legal entities may purchase up to 100% of listed stock. Unlisted 1% minimum shares must be held by Indonesian citizens and/or Indonesian legal entities.

Domestic Branch Offices.

Opening domestic branch offices of commercial banks requires license from Bank Indonesia.

Inter-bank mergers, consolidations and acquisition require license from Bank Indonesia.

Investigations and Audits.

Bank Indonesia, in its supervisory capacity, has broad powers to conduct investigations into and audits of activities of banks. Information obtained in investigations and audits is deemed confidential.

Banks Experiencing Difficulty.

If based on Bank Indonesia's evaluation bank is considered to be in difficulties constituting endangerment of continuity of its business, Bank Indonesia can insist that bank take measures such as: (i) Increasing shareholder capitalization; (ii) shareholder replacement of members of boards of directors and/or commissioners; (iii) writing off bad credits including defaulted Syari'ah financings as losses against its capital; (iv) mergers or consolidations with other banks; (v) sale of shares to buyers prepared to take over all liabilities; (vi) transferring management of part or all of business activities of bank to other parties; and (vii) selling part of assets and liabilities of bank to other banks or other parties.

If condition of bank endangers banking system or previously described measures are insufficient to rescue bank from its difficulties, Bank Indonesia may revoke bank's business license and order board of directors to hold general meeting of shareholders to liquidate bank. If bank's board of directors fails to implement general meeting of shareholders to liquidate bank, Bank Indonesia may request court to issue order dissolving bank's status as legal entity, appointing liquidation team and ordering implementation of liquidation in accordance with prevailing law.

If based on Bank Indonesia's evaluation banking system is experiencing difficulties constituting endangerment to Indonesian national economy, based upon Bank Indonesia's request and after consultation with House of People's Representatives (see category 1 Introduction, topic 1.02 Government and Legal System, subhead Legislature, catchline House of People's Representatives [DPR]), Government may form temporary special body, for purpose of improving health of banking system and specifically designated banks, vested with authority to: (i) Take over and conduct all rights and authorities of bank's shareholders including rights and authorities exercisable in general meetings of shareholders; (ii) take over and conduct all rights and authorities of bank's board of directors and board of commissioners; (iii) take over, manage and conduct ownership activities over bank's assets or rights, including assets of bank's existing with any party, both within and outside of territory of Indonesia; (iv) review, revoke, terminate and/or amend contracts binding bank with third parties which according to opinion of temporary special body cause losses to bank; (v) sell or transfer assets of bank, assets of members of bank's board of directors and commissioners and assets of certain shareholders, both within and outside territory of Indonesia, directly or indirectly through public offering; (vi) sell or transfer bank's claims and/or transfer management of claims to other parties without necessity of obtaining consent from bank's debtor customer; (vii) transfer management of bank's assets and/or management of bank to other party; (viii) conduct temporary capital participation in banks through direct participation or through conversion of temporary special body's claims into capital participation in banks; (ix) issue letters of enforcement for definite claims of banks; (x) conduct eviction over land and/or buildings owned by or subject to rights of banks which are under authority of other parties, both by temporary special body itself or with assistance of authorized state law enforcement instrumentalities; (xi) conduct investigations and examinations to obtain all necessary information relating to bank in restructuring program, and relating to any other parties involved or reasonably alleged to be involved or known to have activities which caused loss to banks in restructuring programs; (xii) calculate and stipulate losses sustained by banks in restructuring programs and impose those losses on bank's capital, and if those losses are due to fault or negligence of members of board of directors and/or commissioners and/or shareholders, then impose losses on related party; (xiii) stipulate amount of additional capital obligated to be paid by shareholders; and (xiv) conduct other activities which may be necessary to support implementation of foregoing authority.

Upon temporary special body's request, banks under restructuring programs are obligated to furnish all information and explanations relating to their businesses including provision of opportunity to inspect related books and documents. Other parties are obligated to furnish information relating to banks involved in restructuring programs to temporary special body. Temporary special body is required to provide reports of its activities to Minister of Finance. If according to Government's assessment temporary special body has completed its task, Government shall dissolve temporary special body.

Government Guarantee Bank Obligations.

Pursuant to Law No. 24 of 2004 dated 22 Sept. 2004 concerning Deposit Guarantee Institution as am'd by Law No. 7 of 2009 dated 13 Jan. 2009 concerning Stipulation as Law of Government Regulation in lieu of Law No. 3 of 2008 concerning Amendment to Law No. 24 of 2004 concerning Deposit Guarantee Institution, Government Regulation No. 66 of 2008 dated 13 Oct. 2008 concerning Amount of Deposit Guaranteed by Deposit Guarantee Institution, Presidential Decree No. 26 of 1998 dated 26 Jan. 1998 concerning Guarantee over Repayment Obligations of Commercial Banks as last amended by Presidential Decree No. 95 of 2004 dated 18 Oct. 2004 concerning Amendment to President Decree No. 26 of 1998 and Regulation of Minister of Finance No. 17/KMK.05/2005 dated 3 Mar. 2005 concerning Requirements, Procedures and Implementing Provisions on Government Guarantee over Repayment Obligations of Commercial Banks as am'd by Regulation of Minister of Finance No. 58/PMK.05/2005 concerning Amendment of Regulation of Minister of Finance No. 17/PMK.05/2005 concerning Conditions, Procedures and Implementing Provisions on Government Guarantee over Payment Obligations of Commercial Banks, Government guarantees repayment obligations of Indonesian commercial banks owed to depositors for deposits denominated in Rupiah and/or foreign currencies.

Maximum amount of deposit which is guaranteed per customer per bank is Rp 2,000,000,000. Amount of deposits which are guaranteed may be amended if one or more criteria are fulfilled: (i) Occurrence of withdrawal of bank funds in large amount at same time; (ii) occurrence of high rate of inflation in several years; (iii) number of customers whose deposits are fully guaranteed becomes less than 90% of number of depositing customers in all banks; or (iv) occurrence of threat of crisis which may result in depreciation of societal trust in banking and endangering financial system stability. Amendments to amount of deposits which are guaranteed shall be determined by Government regulation and subseqently reported to House of People's Representatives (DPR).

Foreign currency obligations may be paid in Rupiah at rate of exchange quoted by Bank Indonesia on guarantee payment date.

Deposit Guarantee Institution (LPS).

Pursuant to Law No. 24 of 2004 as lastly am'd by Law No. 7 of 2009, independent institution was established with function of implementing guarantee of bank repayment obligations and taking active part in maintaining stability of national banking system. All banks operating in Indonesia except for village credit agencies are obligated to joint guarantee program managed by LPS. LPS is capitalized with minimum capital of Rp 4,000,000,000,000 and maximum of Rp 8,000,000,000,000. LPS capital comes from separated State assets.

LPS has duty to: (i) Create and stipulate policy for implementation of guarantee over deposits in banks; (ii) implement guarantee over deposits in banks; (iii) create and stipulate policy in framework of taking active part in maintaining stability of national banking system; (iv) create, stipulate and implement resolutions for policy of settlement (winding up) of failing banks (defined as banks having financial difficulties jeopardizing their own business and declared unsound by Bank Indonesia or financial sector supervisory authority) which do not cause systemic impact; and (v) implement management of failing banks that cause systemic impact.

LPS is vested with authority to: (i) Stipulate and collect guarantee premiums from participating banks; (ii) stipulate and collect contributions for banks joining mandatory guarantee program for first time; (iii) manage assets and liabilities of LPS; (iv) obtain bank customer information, bank healthiness data information, bank financial reports and reports of bank investigations as long as not in violation of bank confidentiality obligations; (v) conduct reconciliations, verifications and/or confirmations over bank customer information, bank healthiness data information, bank financial reports and reports of bank investigations as long as not in violation of bank confidentiality obligations; (vi) stipulate requirements, procedures and regulations relating to payment of claims; (vii) appoint, empower and/or assign other parties to act for and on behalf of LPS to conduct certain activities; (viii) explain and inform banks and public regarding guarantee over deposits in banks; (ix) issue administrative sanctions; (x) take over and implement all rights and authorities of shareholders of failing banks including rights and authorities of general meetings of shareholders; (xi) control and manage assets and liabilities of saved failing banks; (xii) review, revoke, terminate and/or amend contracts binding saved failing banks with third parties which cause losses to failing banks; (xiii) sell and/or transfer assets of banks without approval from debtors and/or liabilities of banks without approval from creditors.

Indonesian Bank Restructuring Agency (IBRA).

Pursuant to Presidential Decree No. 27 of 1998 dated 26 Jan. 1998 concerning Establishment of Indonesian Bank Restructuring Agency and Government Regulation No. 17 of 1999 dated 27 Feb. 1999 concerning Indonesian Bank Restructuring Agency as lastly amended by Government Regulation No. 47 of 2001 dated 8 June 2001 concerning Fourth Amendment to Government Regulation No. 17 of 1999, IBRA was established on 26 Jan. 1998 to administer guarantees granted by Government to commercial banks. (See subhead Government Guarantee Bank Obligations, supra.)

IBRA was empowered to control, settle and improve solvency and restructure banks declared unsound by Bank Indonesia. IBRA was authorized to take over management and assets of troubled banks, execute mergers, consolidations and/or acquisitions and demand compensation from shareholders who were directly or indirectly involved in causing losses.

IBRA's authorities were terminated on 27 Feb. 2004 and IBRA was dissolved on 30 Apr. 2004 by Presidential Decree No. 15 of 2004 dated 27 Feb. 2004 concerning Termination of Duty and Dissolution of IBRA. State assets previously under IBRA management were transferred to management of Minister of Finance with following basic arrangement: (i) State assets which are not in dispute and not directly utilized by Government in conducting executive function are managed by State share company organized to engage in activities in field of asset management, PT. Perusahaan Pengelolaan Aset (Persero); (ii) State assets which are still being disputed in court are managed by IBRA Settlement Team; and (iii) State assets in dispute relating to executions of mortgages and other executions are managed by State Debt Management Committee.

IBRA Settlement Team was terminated and dissolved as of 27 Dec. 2005. Unresolved settlement matters of IBRA Settlement Team were transferred to responsibility of Minister of Finance. State assets related to mortgage attachments and other executorial attachments were transferred to State Debt Management Committee. Following additional duties of IBRA Settlement Team were also transferred to Minister of Finance in coordination with Coordinating Minister in Economic Sector, Attorney General and Chief of Police of State of Republic of Indonesia: (i) Handling and completion of transactions concerning settlement of shareholder obligations for (bank shareholders) who have signed agreements for settlement of shareholder obligations and acknowledgments of indebtedness and/or agreements for temporary settlement of obligations and acknowledgments of indebtedness where those shareholders have: (a) Made partial payment of obligations to IBRA before IBRA was dissolved; or (b) conveyed plans of settlement of obligations to IBRA Settlement Team; and (ii) handling and completion of transaction concerning settlement of shareholder obligations for (bank) shareholders who have conveyed plans for settlement of obligations to Minister of Finance after 27 Dec. 2005.

Finance Companies are financing institutions operating in one or more fields of leasing, venture capital, securities trading, factoring, credit cards and consumer financing. Foreign entities may own up to 85% of paid-up capital of finance companies.

Finance companies are prohibited from: (i) Drawing funds directly from public in form of credit transfers, deposits, savings and/or other forms of foregoing; (ii) issuing promissory notes except as guarantees of indebtedness to their creditor banks; or (iii) granting guarantees in any form to other parties.

Interest Rate Regulation.

Bank Indonesia sets policy concerning rate and structure of interest.

3.02 BILLS AND NOTES:

Bills of exchange are governed by Indonesian Commercial Code (Kitab Undang-undang Hukum Dagang) (KUHD) (Wetboek van Koophandel voor Indonesië). Bills of exchange must contain: (i) Name “Bill of Exchange” in text of bill itself; (ii) unconditional order to pay certain sum of money; (iii) name of drawee; (iv) date for payment; (v) place of payment; (vi) name of person to whom or to whose order payment must be made; (vii) date and place of issue; and (viii) signature of drawer. If any of above is lacking, document will not be bill of exchange except that: (i) If date for payment is not mentioned, payment is due on presentment; (ii) if specific place is not mentioned, payment shall be deemed to be required at address of drawee as mentioned in bill and that address shall be deemed drawee's domicile; and (iii) if bill does not mention place of its making, place of making shall be deemed to be address of drawer as mentioned in bill.

Bill of exchange may stipulate maturity at sight, on certain date after sight, during certain period after certain date or on certain date after issuance. Bill maturing at sight or on certain date after sight may bear interest. Bills fixing payments in other manner or in installments does not constitute bill of exchange.

Drawer guarantees bill of exchange will be accepted and paid. Drawer must provide that drawee will have funds for payment at maturity.

Transfer.

Bills of exchange are transferable by endorsement and delivery except if bill is issued “not to order” in which case bill is transferable by ordinary principles of assignment (cessie).

Endorsements must be unconditional. Holders of bills are considered lawful holders if rights are evidenced by uninterrupted chain of endorsements unless last endorsement is in blank (in which case uninterrupted chain need not be established) and unless holder acquired bill in bad faith. Unless otherwise provided, endorser bears responsibility for acceptance and payment of bill.

Presentment for Acceptance.

Holders may present bill for payment during designated period, on or prior to maturity. Word “accepted” should be noted on bill and acceptor/drawee should sign it. By acceptance, drawee commits to make payment at maturity. Presentment for payment of bill payable on certain day, after certain period or after sight shall occur either on day it becomes payable or within two subsequent work days.

Exchange Rate.

Bill of exchange payable in currency different from currency of country of place of payment may be paid in currency of country of place of payment at exchange rate fixed according to custom of place of payment, unless payment in another currency is specified.

Protest for Nonacceptance or Nonpayment.

Refusals of acceptance or payment must be stated in authentic deed. (See category 9 Documents and Records, topic 9.03 Notaries.)

Liability.

Drawer, acceptor, endorser and signatory of bill of exchange are jointly and severally liable to holder.

Guarantee of Payment.

Third party may guarantee payment by writing “good for aval” or other similar expression on bill and signing.

Promissory notes must contain: (i) Term “Promissory Note"; (ii) unconditional promise to pay sum certain; (iii) date of maturity; (iv) name and place for payment; (v) name of person to whom or to whose order payment must be made; (vi) date and place of issue; and (vii) signature of issuer.

Commercial Paper Traded through Commercial Banks.

Short term, unsecured promissory notes, transacted at discount, issued by non-banks and traded through banks or security companies are referred to as commercial paper. Commercial paper which may be issued and traded through commercial banks must include: (i) Words “dapat diperdagangkan” (negotiable), “surat berharga komersial” (commercial paper), “surat sanggup” (promissory note), “tanpa protes” (without protest) and “tanpa biaya” (without fee) in Indonesian language; (ii) unconditional promise to pay sum certain; (iii) date of payment; (iv) place of payment; (v) name of payee; (vi) date and place of issue; (vii) signature of issuer; (viii) name and address of issuing agent; (ix) name and address of paying agent; (x) serial number; (xi) credit risk rating obtained through Capital Market Supervisory Board (BAPEPAM); (xii) method of calculating cash value; (xiii) statement regarding blank endorsements without right of regression with clause “untuk saya kepada pembawa tanpa hak regress; and (xiv) information on method to convert commercial paper to cash. Presentment to paying agents must be made within six months from date of maturity and presentment thereafter must be made directly to issuer.

Checks must contain (i) Name “check”; (ii) unconditional order to pay sum certain; (iii) name of person who must pay (payor); (iv) place for payment; and (v) date of signing and place of drawing; and (vi) signature of drawer. Checks must be drawn on banker managing funds for

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drawer with check writing privileges. Checks may be transferred by endorsement.

3.03 COMMERCIAL REGISTRATION:

Commercial Registration is governed by Law No. 3 of 1982 dated 1 Feb. 1982 concerning Company Registration Obligations; and Regulation of Ministry of Trade and Industry No. 37/M-DAG/PER/9/2007 dated 4 Sept. 2007 concerning Implementation of Company Registration.

Every business organization, limited liability company, partnership, individual company (employing more than one person) and other business organization including every branch office, subsidiary company as well as every agent and representative thereof domiciled and operated in Indonesia must register with Company Registry. Records of Company Registry are public. Every interested party who has paid administration fee stipulated by Minister of Trade, has right to obtain information which may be required by obtaining official copy or quotation from information in Company Registry which is legalized by authorized official of office of Company Registry.

Procedure for registration includes filing form as stipulated by Minister of Trade with Company Registry within three months following commencement of business. Following information and amendments thereto must be registered within three months of occurrence: (i) Existence of business entity, business trademark, establishment date, maximum duration of existence, business purposes, business permits in effect, principal and branch office addresses; (ii) full name, identity number, address, date and place of birth, nationality, date of commencement of occupancy of position and signatures of managers, directors, commissioners, members and partners of business; (iii) authorized, issued and paid-up capital, nominal value of shares, in-kind contributions; and (iv) copies of articles of association if applicable.

Penalty.

Penalties for failure to register include maximum of three months in jail or penalties up to Rp 3,000,000.

3.04 CONTRACTS:

Applicable Law.

Indonesian contract law is governed by two separate systems, modern legislation inclusive of Indonesian Civil Code (Kitab Undang-undang Hukum Perdata) (KUHPer) (Burgerlijk Wetboek voor Indonesië) (Staatsblad 1847:23) and Adat law (see category 1 Introduction, topic 1.02 Government and Legal System, subhead Legal Pluralism, catchline Adat Law). Conflicts of law issues arise in domestic transactions due to application of different laws to persons of different social groups. Contracting parties are generally free to expressly designate governing law, foreign or domestic. All agreements made in accordance with law in effect constitute law between parties.

Adat Law.

Largely customary and unwritten, Adat law is applicable to transactions between indigenous Indonesians where written law does not otherwise address relevant issues. Adat law differs from region to region, with approximately 17 primary areas identified. Adat law differs from modern legislation and Civil Code in many respects, including contract formation, risk of loss prior to delivery and remedies for breach. Differences arise based upon cultural variations in perspectives of community relationships, property rights and religious principles.

Understanding of Adat law provides insight into interpretation of rights, responsibilities and performances in commercial transactions governed by modern legislation and codes. General distinguishing principles of Adat law include lack of distinction between: (i) Real and personal rights; (ii) privity of contract; (iii) movable and immovable property (except land itself which is deemed immovable); (iv) public and private law; and (v) civil and criminal offenses.

Specific and important distinction prevailing in Adat law is that enforceable obligations do not arise on executory basis. Rather, contracts are formed only upon delivery of subject matter, either party remaining free to withdraw without obligation prior to delivery. Disputes are generally resolved by equitable considerations seeking maintenance of and return to state of equilibrium and harmony.

Adat law is generally viewed as inappropriate for modern commercial transactions. For modern transactions between indigenous Indonesians, courts generally apply modern legislation and code law. Where aliens are involved, Adat law will not be applied, however, Adat law principles may have some interpretative effect over Indonesian adjudications.

Civil Code.

Book III of Indonesian Civil Code (Kitab Undang-undang Hukum Perdata) (KUHPer) (Burgerlijk Wetboek voor Indonesië) covers most aspects of obligations.

Formation.

Obligations arises upon agreement between parties or by operation of law.

Contract formation requires consent, legal capacity, certainty of subject and lawful purpose. No consideration is required for creation of obligations. Gratuitous and conditional promises are enforceable.

Consent must be given without fraud, mistake or duress.

According to Art. 108 of Indonesian Civil Code (Kitab Undang-undang Hukum Perdata) (KUHPer) (Burgerlijk Wetboek voor Indonesië) (Staatsblad 1847:23), married woman does not have capacity to contract unless her husband is present or has provided written approval. Supreme Court has issued circular letter stating that this rule is no longer in force.

Obligation can arise for purposes of provision of something, for performing particular act or for abstaining/refraining in performance of particular act. Object of contract must be certain or contract is voidable. Object of performance and performance itself must be stipulated. Quantity and exact object of performance need not be specified if reasonably determinable. Object of contract need not be in existence at time of contracting. Contract is void if performance is impossible.

Contracts which are for unlawful or for immoral purposes or against public policy are void.

Avoidance.

Consent is invalid and contract becomes voidable if induced by fraud, mistake or duress. Suit to avoid contract on grounds of duress, mistake or fraud must be brought within five years of discovery of fraud or mistake or within five years of discontinuance of duress.

Default.

Failure to perform permits claim for payment of those costs, losses, and expenses foreseeable at time of contracting (unless breach involved fraud) and directly consequential to breach plus interest. Specific performance is also available remedy. Nonperformance due to unforeseen cause in absence of bad faith exculpates defaulting party from obligation to provide compensation.

Right to rescission upon default is implied in all reciprocal contracts. Rescission only arises by court decision even if contract expressly states non-performance shall constitute grounds for rescission of contract. Contractual stipulations of penalties in event of nonperformance are enforceable.

3.05 FRAUDS, STATUTE OF:

There is no statute of frauds in Indonesia. However, following documents and actions must be evidenced by notarial deed: (i) Pre-marital agreements; (ii) gifts by third parties to prospective husbands and/or wives in connection with premarital agreements; (iii) acknowledgment of child born out of wedlock (if not acknowledged in civil birth registry); (iv) sale, donation, division, encumbrance or transfer of immovable goods; (v) testamentary dispositions other than testamentary disposition made in holographic deeds or made in secret deeds or closed deeds; (vi) agreements for division of inherited property; (vii) minutes of refusal by Estate Property Bureau to agree to division of inherited property; (viii) gifts and donations of property (other than movables and bearer instruments directly and immediately transferred between parties); (ix) agreement between husband and wife to restore marital property; (x) renunciation of wife's rights over marital property; (xi) notarial will; (xii) revocation of partial or entire testament in event revocation is not conducted by subsequent testament; (xiii) hypothecation over immovable goods; (xiv) all provisions regulating marital separation governing husband and wife including but not limited to implementation of parental authority and management of their children's welfare and education; (xv) agreement to conduct division and separation of property obtained through descent distribution; (xvi) transfer by sale, delivery and donation of part of debt subject to hypothecation; (xvii) power of attorney to expunge recordation of hypothecation; (xviii) refusal of acceptance or payment of promissory notes; (xix) agreement to arbitrate post occurrence of dispute in event parties are unable to sign written agreement; (xx) mortgages and grants of authority to mortgage immovable property; (xxi) release of mortgage rights by creditor; (xxii) transfer of trade secrets; (xxiii) establishment of limited liability companies; (xxiv) amendment of articles association of limited liability companies; (xxv) establishment of general partnerships (firma); (xxvi) encumbrance by fiduciary guarantees over movable and intangible property; (xxvii) transfer of copyrights; (xxviii) transfer of protection of plant varieties; (xxix) transfer of rights to cultivate (HGU) through sale and purchase except sale and purchase through auction, exchange, capital participation and donation; (xxx) bestowal of rights to build (HGB) over ownership rights; (xxxi) transfer of rights to build (HGB) through sale and purchase except sale and purchase through auction, exchange, capital participation and donation; (xxxii) bestowal of rights to use over rights of ownership; (xxxiii) transfer of rights to use through sale and purchase except sale and purchase through auction, exchange, capital participation and donation; and, among others, (xxxiv) transfer of housing rights.

Following documents and actions must be evidenced by writing: (i) Holographic will which authorizes executors to make funeral arrangements and to distribute personal belongings; (ii) revocation of holographic wills which authorizes executor to make funeral arrangements and to distribute personal belongings; (iii) delivery of indebtedness and other intangibles in favor of particular persons; (iv) marital agreements; (v) agreements to arbitrate prior to dispute; (vi) agreements to arbitrate post occurrence of dispute (where parties are able to sign); (vii) appointment of arbiters; agreements on procedures of arbitration; (viii) settlement agreements resulting from direct settlement meetings between parties in alternative dispute resolution mechanisms; (ix) settlement agreements resulting from mediation in alternative dispute resolution mechanism; (x) appointment of testamentary executors and administrators; (xi) novations; (xii) license agreements concerning plant variety protection rights; (xiii) license agreements concerning trade secrets; (xiv) transfers of industrial design rights; (xv) license agreements concerning industrial design rights; (xvi) transfers of integrated circuit layout design rights; (xvii) license agreements concerning integrated circuit layout design rights; (xviii) transfers of patents; (xix) patent license agreements; (xx) transfers of marks; (xxi) mark license agreements; (xxii) copyright license agreements; (xxiii) apprenticeship agreements; (xxiv) collective labor agreements; (xxv) settlement agreements in civil litigation case; (xxvi) transfers of rights to build over rights of management; (xxvii) transfers of rights to build over ownership rights; (xxviii) transfers of rights to use over rights of management; (xxix) transfers of rights to use over ownership rights; (xxx) house occupancy lease agreements; and, among others, (xxxi) re-insurance agreements.

3.06 INTEREST:

Interest rates charged by nonbank and nonfinancial institutions are not subject to regulatory restrictions except that contractual undertakings regarding interest rates must be set forth in writing. For interest rate regulations regarding banks, see topic 3.01 Banks and Banking, subhead Interest Rate Regulation.

3.07 MONOPOLIES, RESTRAINT OF TRADE AND COMPETITION:

Prohibitions against monopolistic practices and unfair business competition are governed by Law No. 5 of 1999 dated 5 Mar. 1999 concerning Prohibition against Monopolistic Practices and Unfair Business Competition.

Definitions.

Monopoly means command over production and/or marketing of specific goods and/or use of specific services by one business actor or one group of business actors.

Monopolistic practices means concentration of economic power by one or more business actors which has result of controlling production and/or marketing of specific goods and/or services resulting in unfair competition which may damage public interests.

Concentration of economic power means actual control over relevant market by one or more business actors resulting in ability to stipulate price of goods and/or services.

Dominant position means circumstance where business actor does not have any meaningful competitors in relevant market in relation to market share controlled, or business actor has highest position among its competitors in relevant market in relation to financial capacity, capacity to access supplies or sales as well as capacity to adjust supplies of or demand for specific goods or services.

Business actor means every natural person or business entity, both in form of legal entity or non-legal entity which is established and resides or conducts activities within legal territory of Republic of Indonesia, whether individually or in cooperation through agreement, implementing various business activities in economic sector.

Unfair business competition means competition among business actors in conduct of activities of production and/or marketing of goods and/or services in manner that is dishonest or unlawful or obstructs business competition.

Agreement means act of one or more business actors to bind themselves to one or more other business actors under whatever name, whether in writing or not in writing.

Business intrigue or business conspiracy means form of cooperation which is conducted by business actor with another business actor with intention to control relevant market for interests of conspiring business actors.

Market means economic institution where all buyers and sellers both directly and indirectly are able to conduct transactions for trade of goods and/or services.

Relevant market means market which is related to specific marketing scope or area of business actor over goods and/or services which are same or of one kind or substitution for said goods and/or services.

Market structure means condition of market which provides indications/guidelines concerning aspects which possess important influence in relation to behavior of business actors and market performance, including but not limited to number of sellers and buyers, barriers to market entry and exit, variety of products, distribution system and control over market share.

Market behavior means activities which are conducted by business actors in their capacity as suppliers or buyers of goods and/or services for achievement of business purposes, among others achievement of profit, growth of assets, sales targets and methods of competition utilized.

Market share means percentage of value of sales or purchases of specific goods or services which are controlled by business actor in relevant market in specific calendar year.

Market price means price to be paid in transaction for goods and/or services in accordance with agreement between all parties in relevant market.

Consumer means every wearer and/or user of goods and/or services both for needs of itself as well as for needs of other parties.

Goods means every thing, both tangible as well as intangible, both movable as well as immovable, which may be traded by, worn by, used by or which may benefit consumer or business actor.

Services means every service which takes form of work or performance which may be traded within community for benefit of consumers or business actors.

Business Competition Supervisory Commission means commission which is formed to supervise business actors in performance of their business activities in order that monopolistic practices and/or unfair business competition are not conducted.

District Court means court, as meant in regulations of law in effect, with jurisdiction over legal domicile and business of business actor.

Prohibited Agreements.

Persons and entities are prohibited from entering into agreements tending to establish following types of market conditions:

Oligopolies.

Business actors are prohibited from entering into agreements with other business actors for purposes of cooperatively exercising control over production and/or marketing of goods and/or services which may give rise to occurrence of monopolistic practices or unfair competition. Business actors should be alleged or deemed to cooperatively exercise control over production and/or marketing of goods and/or services if two or three business actors or group of business actors control more than 75% of market share of one specific kind of good or service.

Price Fixing.

Business actors are prohibited from entering into agreements with competing business actors to stipulate prices which must be paid by consumers or subscribers for goods and/or services in same relevant market. Foregoing prohibition does not apply to agreement made within business joint venture or agreement based on laws in effect.

Price Discrimination.

Business actors are prohibited from entering into agreements which result in requiring one purchaser paying price which is different from price which must be paid by another purchaser for same goods and/or services.

Predatory Pricing.

Business actors are prohibited from entering into agreements with their business competitors to set prices below market price if that pricing may result in occurrence of unfair business competition.

Control over Re-sale Pricing and Supply.

Business actors are prohibited from entering into agreements with other business actors which contain conditions that recipient of goods and/or services may not re-sell or re-supply goods and/or services which are received with price which is lower than pre-agreed price if that condition may result in unfair business competition.

Market Segmentation and Carving.

Business actors are prohibited from entering into agreements with business competitors with intention of dividing marketing territory or allocating market relating to goods and/or services if that division or allocation may result in unfair business competition.

Boycott.

Business actors are prohibited from entering into agreements with business competitors which may hinder other business actors from engaging in same business, both for purposes of marketing domestically as well as internationally. Business actors are prohibited from entering into agreements with competitors to reject sale of any good and/or service of any other business actor if aforementioned may: (i) Cause loss or may be alleged to cause loss to another business actor; or (ii) limit another business actor in sale or purchase of any good and/or service in relevant market.

Cartel.

Business actors are prohibited from entering into agreements with business competitor with intention of influencing prices by regulating production and/or marketing of goods and/or services if aforementioned may result in occurrence of monopolistic practices and/or unfair business competition.

Trust.

Business actors are prohibited from entering into agreements with other business actors to engage in cooperative work in formation of larger federation of businesses or companies while at same time protecting and securing continuing existence of each business or company member with goal of controlling production and/or marketing of good and/or service if aforementioned may result in occurrence of monopolistic practices and/or unfair business competition.

Oligopsony.

Business actors are prohibited from entering into agreements with other business actors with goal of jointly controlling purchases or receipts of supplies in order to manage price of goods and/or services in relevant market if aforementioned may result in occurrence of monopolistic practices and/or unfair business competition. Business actors should be alleged or deemed to jointly control purchases and/or receipts of supplies if two or three business actors or group of business actors control more than 75% market share of one specific kind of good and/or service.

Vertical Integration.

Business actors are prohibited from entering into agreements with other business actors with goal of controlling production of number of products which are included in production series of specific goods and/or services where each production series constitutes product of manufacturing or continuing processing, whether in direct or indirect series if aforementioned may result in occurrence of unfair business competition and/or cause loss to public.

Tying Agreements.

Business actors are prohibited from entering into agreements with other business actors which include condition that party who receives goods and/or services will only supply or not re-supply goods and/or services to particular party and/or to particular place. Business actors are prohibited from entering into agreements with other parties which contain conditions that party who receives certain goods and/or services must be prepared to buy other goods and/or services from supplier. Business actors are prohibited from entering into agreements regarding particular pricing or discount pricing on goods and/or services which include conditions that business actor who receives goods and/or services from supplier: (i) Must be prepared to buy other goods and/or services from supplier; or (ii) will not buy same or similar goods and/or services from other business actors who compete with supplier.

Foreign Parties.

Business actors are prohibited from entering into agreements with foreign parties which contain provisions which may result in occurrence of monopolistic practices and/or unfair business competition.

Prohibited Activities.

Monopolistic Practices.

Business actors are prohibited from exercising control over production and/or marketing of goods and/or services which may result in occurrence of monopolistic practices and/or unfair business competition. Business actors should reasonably be alleged or deemed to exercise control over production and/or marketing of goods and/or services if: (i) There are no substitutes for relevant goods and/or services; (ii) other business actors are unable to enter into business competition in relation to same goods and/or services; or (iii) one business actor or one group of business actors controls more than 50% market share for one specific kind of good or service.

Monopsony.

Business actors are prohibited from controlling receipt of supplies or becoming exclusive purchaser of goods and/or services in relevant market which may result in occurrence of monopolistic practices and/or unfair business competition. Business actors should reasonably be alleged or deemed to control receipt of supplies or to be exclusive purchaser if one business actor or one group of business actors control more than 50% of market share of one specific kind of good or service.

Market Control.

Business actors are prohibited from conducting one or more activities, whether individually or together with other business actors which may result in occurrence of monopolistic practices and/or unfair business competition in form of: (i) Rejecting and/or obstructing specific business actor from conducting business activities which are same in relevant market; (ii) hindering consumers or subscribers of business competitor from engaging in business relationships with business competitor; (iii) limiting circulation and/or sale of goods and/or service in relevant market; or (iv) conducting discriminatory practices in relation to specific business actors.

Business actors are prohibited from supplying goods and/or services in manner of selling at loss or setting prices which are with intention of eliminating or extinguishing business of competitor in relevant market which may result in occurrence of monopolistic practices and/or unfair business competition.

Business actors are prohibited from committing deceit in setting costs of production and other costs which become part of price of component goods and/or services which may result in occurrence of unfair business competition.

Conspiracy.

Business actors are prohibited from conspiring with other parties to: (i) Regulate and/or determine winner of tender which may result in occurrence of unfair business competition; (ii) obtain information on business activities of competitors which are classified as company secrets which may result in occurrence of unfair business competition; or (iii) impede production and/or marketing of goods and/or services of business competitors with intent that goods and/or services to be offered or supplied to relevant market become less whether in amount, quality and/or determination of time goods and/or services are required.

Dominant Position.

Business actors are prohibited from utilizing dominant position whether directly or indirectly to: (i) Set conditions of trade with goal to restrain/prevent and/or obstruct consumers from obtaining competing goods and/or services both from perspective of price and/or quality; (ii) limit markets and development of technology; or (iii) obstruct other business actors with potential to be competitors to enter relevant market. Business actors possess dominant positions if: (i) One business actor or one group of business actors controls 50% or more market share of one particular kind of good or service; or (ii) two or three business actors or group of business actors control 75% or more market share of one particular kind of good or service.

Dual Position.

Person who holds position as director or commissioner of one company is prohibited from holding position as director or commissioner of another company at same time if companies: (i) Exist in same relevant market; (ii) possess close relationship in sector and/or kind of business; or (iii) jointly are able to control market share in specific goods and/or services which may result in occurrence of monopolistic practices and/or unfair business competition.

Share Ownership.

Business actors are prohibited from owning majority of shares in several companies of same kind which conduct business activities in same sector of same relevant market or establish several companies with same business activities in same relevant market if ownership could result in: (i) One business actor or one group of business actors controlling more than 50% market share of one particular kind of good or service; or (ii) two or three business actors or group of business actors controlling more than 75% market share in one particular kind of good or service.

Merger, Consolidation and Acquisition.

Business actors are prohibited from conducting mergers, consolidations or acquisitions of shares of business entities which may result in occurrence of monopolistic practices and/or unfair business competition. Mergers or consolidations of business entities or acquisitions of shares which effect value of assets and/or value of sales exceeding amount stipulated by government regulation must be reported to Business Competition Supervisory Commission within 30 days from date of merger, consolidation or acquisition.

Business Competition Supervisory Commission formed as independent agency free from influence and control of government or other party and responsible to President for supervision of implementation of Law No. 5 of 1999.

Membership.

Commission consists of chairman, vice chairman and at least seven members. Members of Commission are appointed and terminated by President with consent of DPR. Term of members of Commission is five years and may be renewed for one additional term. If as result of end of term vacancy arises in membership of Commission, term of member may be extended until new member is appointed.

Qualifications for membership on Commission include: (i) Indonesian citizen of at least 30 years of age and at most 60 years of age at time of appointment; (ii) committed to Pancasila and Constitution of 1945; (iii) belief in Almighty GD; (iv) honest, fair and of good behavior; (v) domiciled in territory of Republic of Indonesia; (vi) experienced in business sector or having knowledge and expertise in field of law and/or economics; (vii) never convicted of crime; (viii) never declared bankrupt by court; and (ix) not affiliated with business entity.

Termination.

Membership on Commission terminates due to: (i) Death; (ii) resignation at member's own request; (iii) domicile outside territory of Republic of Indonesia; (iv) continuous mental or physical illness; (v) end of term as member of Commission; or (vi) having been terminated.

Framework of Commission, organizational structure, duties and functions are stipulated by Presidential Decree. For facilitation of duties, Commission may be assisted by secretariat. Commission may form working groups. Provisions concerning organizational structure, duties and functions of secretariat and working groups is regulated by decrees of Commission.

Duties of Commission include: (i) Conducting evaluation of agreements which may result in occurrence of monopolistic practices and/or unfair business competition; (ii) conducting evaluation of business activities and/or actions of business actors which may result in occurrence of monopolistic practices and/or unfair business competition; (iii) conducting evaluation in relation to existence or non-existence of improper use of dominant position which may result in occurrence of monopolistic practices and/or unfair business competition; (iv) taking action in accordance with Commission's authorities (see catchline Authorities, infra); (v) providing suggestions and considerations concerning government policy related to monopolistic practices and/or unfair business competition; (vi) composing directives and/or publications related to Law No. 5 of 1999; and (vii) providing periodic reports regarding working results of Commission to President and DPR.

Authorities of Commission include: (i) Receiving reports from community and/or from business actors regarding allegations of occurrence of monopolistic practices and/or unfair business competition; (ii) conducting research into allegations of existence of business activities and/or actions of business actors which may result in occurrence of monopolistic practices and/or unfair business competition; (iii) conducting inquiries and/or examinations in relation to cases alleging monopolistic practices and/or unfair business competition which are reported by community or by business actors or which are discovered by Commission as result of its research; (iv) summarizing results of inquiries and/or examinations regarding existence or non-existence of monopolistic practices and/or unfair business competition; (v) summoning business actors who are alleged to have conducted violations of provisions of Law No. 5 of 1999; (vi) summoning and causing presence of witnesses, expert witnesses and any persons deemed to have knowledge of violations relating to provisions of Law No. 5 of 1999; (vii) requesting assistance of investigator to cause presence of business actor, witness, expert witness or any person deemed to have knowledge of violations relating to provisions of Law No. 5 of 1999 where such persons are not willing to comply with summons of Commission; (viii) requesting information from government agencies related to inquiries and/or examinations in connection with business actors who violate provisions of Law No. 5 of 1999; (ix) obtaining, researching and/or evaluating letters, documents and other items of evidence used in investigation and/or examination; (x) deciding and determining existence or non-existence of loss of another business actor or community; (xi) informing business actor who has been alleged to have conducted monopolistic practice and/or unfair business competition of decision of Commission; and (xii) declaring imposition of administrative sanctions on business actors who violate provisions of Law No. 5 of 1999.

Costs for implementation of duties of Commission are imposed upon State Budget and/or other sources obtained in accordance with regulations of law in effect.

Case Management Procedures.

Reports.

Any person with knowledge that violation of Law No. 5 of 1999 occurred or is reasonably alleged to have occurred may report it to Commission in writing with clear information concerning occurrence of violation and identity of reporting party. Parties who suffer loss as result of occurrence of violation relating to Law No. 5 of 1999 may submit written reports to Commission with complete and clear information concerning occurrence of violation along with loss arising and identity of reporting party. Identity of reporting party must be kept confidential by Commission. Commission establishes procedures for submission of reports.

Examination.

On basis of report, Commission is obligated to conduct preliminary examination and within no longer than 30 days after receipt of report, Commission is obligated to determine need or lack of need to conduct further examination. However, Commission may conduct examination in relation to business actor without need for prerequisite report in event there is suspicion that there is violation of Law No. 5 of 1999. In continuation of examination, Commission is obligated to conduct examination relating to business actor reported. Commission is obligated to guard secrecy of information obtained from business actor which may be categorized as company secrets. If deemed necessary by Commission, Commission may hear information from witnesses, expert witnesses and/or other parties. In conduct of continuance of examination activities, Commission members are to be provided with official letter of duty.

Business actors and/or other parties who are examined are obligated to provide items of evidence required in examination and investigation. Business actors may not reject examination, reject provision of information needed in inquiry and/or examination or delay/obstruct inquiry and/or examination process. Violations of obligation to cooperate with inquiry and/or examination process are to be conveyed to investigator for conduct of investigation in accordance with regulations in effect.

Evidence.

Items of evidence for examination by Commission take following forms: (i) Witness information; (ii) expert information; (iii) letters and/or documents; (iv) clues; and (v) business actor information.

Proceedings.

Commission is obligated to complete examination in at most 60 days from date of conduct of continuing examination. If necessary, period of time for continuing examination may be extended for at most 30 days. Commission is required to determine whether violation of Law No.

5 of 1999 occurred or did not occur within at most 30 days from date of completion of continuing examination.

Decision of Commission must be read in hearing open to public and immediately notified to business actor. Within 30 days of date business actor receives notice of decision of Commission, business actor is required to implement decision and deliver report of implementation to Commission. In event business actor fails to implement decision and deliver report of implementation to Commission, Commission may provide decision to investigator for implementation of investigation in accordance with regulations of law in effect. Decision of Commission constitutes sufficient preliminary evidence for investigator to conduct investigation.

Objections.

Business actor may submit objection to District Court at latest 14 days after receipt of notice of decision of Commission. Business actor is deemed to accept decision of Commission if business actor does not submit objection within time limit.

District Court must examine objection of business actor within 14 days from receipt of objection. District Court must give decision within 30 days from date of commencement of examination of objection.

Supreme Court Appeal.

Party who objects to decision of District Court may submit appeal to Supreme Court within 14 days. Supreme Court must give decision within 30 days of receipt of petition for appeal.

Execution.

If there is no objection, decision of Commission obtains final and binding force. Final and binding decision of Commission may be basis of request for execution order from District Court.

Administrative Action.

Commission is authorized to issue sanctions in form of administrative actions in relation to business actor who violates provisions of Law No. 5 of 1999. Administrative actions may take form of: (i) Stipulation of cancellation of prohibited agreements; (ii) order to business actor to discontinue vertical integration; (iii) order to business actor to discontinue activities proven to result in monopolistic practices and/or unfair business competition and/or loss to community; (iv) order to business actor to discontinue misuse of dominant position; (v) stipulation of cancellation of decision relating to merger or consolidation of business entity and acquisition of shares; (vi) stipulation to pay compensation of loss; and/or (vii) imposition of fines of at least Rp 1,000,000,000 and at most Rp 25,000,000,000.

Criminal Provisions.

Violations concerning prohibited agreements concerning oligopolies, market segmentation and carving, boycotts, cartels, trusts, oligopsonies, vertical integrations and agreement with foreign parties and prohibited activities concerning monopolistic practices, monopsonies, market control relating to rejection and/or obstruction of business actor from conducting same business activities in relevant market or hindering consumers or subscribers of business competitor from engaging in business relationships with business competitor, dominant positions, share ownership and mergers, consolidations and acquisitions, are punishable with criminal fines of at least Rp 25,000,000,000 and at most Rp 100,000,000,000 or light criminal imprisonment up to maximum of six months in substitution for monetary penalty.

Violations concerning prohibited agreements concerning price fixing, price discrimination, predatory pricing, control over resale pricing and supply and tying agreements and prohibited activities concerning market control relating to supplying goods and/or services in manner of selling at loss or setting prices with intention of eliminating business of competitor or committing deceit in setting costs of production and other costs which may become part of price of component goods and/or services, holding dual positions or conspiracies with other parties to: (i) Regulate and/or determine winner of tender which may result in occurrence of unfair business competition; (ii) obtain information on business activities of competitors which are classified as company secrets which may result in occurrence of unfair business competition; or (iii) impede production and/or marketing of goods and/or services of business competitor with intent that goods and/or services to be offered or supplied to relevant market are reduced whether in amount, quality and/or impedance of business competitor in meeting product and/or service delivery time requirements are punishable with criminal fines of at least Rp 5,000,000,000 and at most Rp 25,000,000,000 or light criminal imprisonment up to maximum of five months in substitution for monetary penalty.

Violations concerning obligation to cooperate with inquiry and/or examination process are punishable with criminal fines of at least Rp 1,000,000,000 and at most Rp 5,000,000,000 or criminal imprisonment up to maximum of three months in substitution for monetary penalty.

Additional criminal sanctions may include: (i) Cancellation of business license; (ii) prohibition to business actor who has already been proven to have conducted violation of Law No. 5 of 1999 for taking position of director or commissioner for at least two years and at most five years; or (iii) termination of specific activities or actions which give rise to loss to other parties.

Exceptions to provisions of Law No. 5 of 1999 include: (i) Acts and/or agreements for purposes of enforcing prevailing laws; (ii) agreements related to intellectual property rights such as licenses, patents, trade marks, copyrights, industrial product designs, integrated circuits, trade secrets and agreements related to franchising; (iii) agreements regarding stipulations of technical standards for goods and/or services which do not restrain and/or impede competition; (iv) agreements in framework of agencies with contents which do not include provisions for re-supply of goods and/or re-supply of services with prices which are lower than price which has already been agreed; (v) research cooperation agreements designed to raise or improve community-wide living standards; (vi) international agreements ratified by Government; (vii) agreements and/or activities targeting export markets without disturbance to needs and/or supplies of domestic markets; (viii) business actors classified as small scale businesses; (ix) activities of business cooperatives specifically concentrating on services to members; and (x) monopolies and/or centralization of activities related to production and/or marketing of goods and services which control basic needs of many people as well as production sectors deemed important to State regulated by law and implemented by State owned enterprises and/or entities or institutions formed or appointed by government.

3.08 SALES:

Governing Law.

Sales are governed by Indonesian Civil Code (Kitab Undang-undang Hukum Perdata) (KUHPer) (Burgerlijk Wetboek voor Indonesië).

Sales involve agreement to deliver good for payment of price. Ownership is transferred upon delivery of good.

Obligations of Seller.

Seller obligated to safeguard and deliver goods. No obligation for delivery arises without payment of sales price and seller does not give permission for deferment. Failure to deliver through seller's negligence permits rescission of contract by buyer by application to court. Goods must be delivered in same condition as of time of sale with all products deriving from goods belonging to buyer from time of delivery.

Obligations of Buyer.

Buyer must pay purchase price at agreed time and place or if no agreement, at time and place of delivery. Buyer must pay interest on purchase price if goods produce or yield other income. If buyer fails to pay purchase price, seller may seek court action for rescission of agreement unless sale involved movable goods or furniture in which case rescission occurs as matter of law and without notice following expiration of agreed time for collection of goods.

Immovable Goods.

If sale mentions extent and contents of immovable goods along with certain price, seller must deliver quantity expressed or, otherwise seller must accept proportionally reduced price. If seller delivers more than 105% of quantity expressed in sales agreement, buyer has right to either rescind that purchase or pay proportionally increased price.

Warranties.

Sellers warrant quiet and peaceful possession of goods sold and absence of concealed defects or grounds for rescission of that purchase agreement. Warranties may be waived in whole or in part except for waiver of liability for injury caused by acts of seller itself.

Eviction (Loss of Possession).

Seller is required to reimburse price, costs, damages, interest and products of goods to buyer in case of eviction unless buyer at time of purchase had knowledge or assumed risk of possible eviction. Partial evictions permit cancellation of entire purchase if material to buyer or claim for compensation equals value of goods subject to eviction based on evaluation at time of eviction. Rules for partial eviction and undisclosed servitudes are treated similarly. Buyer has right to defer payment of purchase price until seller eliminates disturbance to quiet enjoyment or reasonable threat of disturbance. Defense to action against seller for eviction arises where buyer accepts court sentence for eviction without calling seller and seller thereafter proves enough grounds to deny eviction claim.

Defects.

Warranty for concealed defects includes warranty that defect will not render goods unfit for particular purpose intended or reduce usefulness for intended purpose to degree that buyer would not have purchased goods for purchase price if buyer had knowledge of defect at time of sale. No liability for defects detectable by buyer. Seller is liable for defects even if seller had no knowledge of defect at time of sale. Seller's liability for defects unknown to seller includes return of purchase price plus costs of purchase and delivery in exchange for return of goods or reimbursement of part of purchase price determined by judge after expert testimony. If seller knew of defects, seller is liable for reimbursement of purchase price plus all costs, damages and interest.

Repurchase.

Right of seller to repurchase goods may be provided by contract to maximum of five years. Time is of essence of stipulated period for repurchase. Seller's right to repurchase burdens second buyer even without notice in second sales agreement. Buyer purchasing with seller's right to repurchase obtains all rights of seller including right to use any lapse of time against true owner or other person claiming right or interest in goods sold. Repurchasing seller must refund entire original purchase price plus cost of repairs, renovations and other causes resulting in appreciation plus all legitimate purchase and delivery expenses. Until appropriate compensation is paid, reselling buyer has no obligation to tender possession of goods. Returned goods must be free of encumbrances undertaken by reselling buyer.

Indebtedness and Other Intangibles.

Sales of indebtedness include transfer of all securities, privileges and mortgages related to indebtedness. Seller implicitly warrants existence of indebtedness at time of delivery. However, seller does not guarantee that debtor has sufficient resources to satisfy debt unless expressly undertaken and then only to extent of consideration for transfer of indebtedness. If debtor has discharged obligations prior to transfer of indebtedness, debtor shall be deemed discharged as against buyer. (See category 12 Estates and Trusts, topic Descent and Distribution regarding transfers of rights to inheritance.)

Barter involves reciprocal exchange of goods. All things which can be sold may be subject of barter transaction. Proof by one barterer that other barterer did not own goods exchanged confers right to refuse to deliver goods promised along with obligation to return goods received. Loss of goods obtained by barter through eviction confers right to elect to either demand compensation of costs, damages and interest or return of goods delivered. Loss of good through no fault of owner prior to barter transfer shall cause nullification of barter agreement, conferring on performing barterer right to return of goods delivered. General provisions of Indonesian Civil Code (Kitab Undang-undang Hukum Perdata) (KUHPer) (Burgerlijk Wetboek voor Indonesië) governing sales apply to barter transactions.

Delivery of movables, excluding intangibles, occurs by actual transfer by or on behalf of owner, or by handing over keys to building in which goods are located. Delivery is not required if intended receiver already possesses right in subject of transfer. Delivery of indebtedness in favor of particular persons and other intangibles is made by means of either authentic deed or signed agreement of transfer. Delivery of indebtedness is not binding on debtor until debtor has received notice thereof or has accepted or acknowledged transfer in writing. Delivery of indebtedness in favor of bearer is made by delivery of document of indebtedness. Delivery of indebtedness payable to order is made by endorsement and delivery of document of indebtedness. Delivery or assignment of immovable goods takes place with public notice of deed.

3.09 SECURITIES:

Governing Law.

Law No. 8 of 1995 dated 10 Nov. 1995 concerning Capital Market and Government Regulation No. 45 of 1995 dated 30 Dec. 1995 concerning Implementation Activities in Field of Capital Market as amended by Government Regulation No. 12 of 2004 dated 2 Mar. 2004 concerning Amendment to Government Regulation No. 45 of 1995 govern capital markets.

Securities are broadly defined to include documents of acknowledgment of indebtedness, commercial paper, shares, bonds, debentures, collective investment agreement participation units, futures contracts related to securities and, among others, derivatives thereof.

BAPEPAM.

Minister of Finance is empowered to stipulate capital market implementing general policies. Capital Market Supervisory Agency (BAPEPAM) acts under authority of Minister of Finance to regulate and govern day-to-day supervision of activities of Capital Market. BAPEPAM focuses on maintenance of orderly, appropriate and efficient capital market activities and protection of investor and community interests.

Permits and Registrations.

Stock exchanges, clearing and guarantee institutions, depository and settlement institutions, security administration bureaus and securities companies must be formed as limited liability companies holding permits from BAPEPAM. Securities companies may engage in activities of underwriters, broker-dealers and/or investment managers. Persons or entities engaged in underwriting, broker-dealer and/or investment management activities involving debt with maturity of not more than one year, deposit certificates, insurance policies, securities issued or guaranteed by Indonesian Government or other securities designated by BAPEPAM shall not be required to obtain business license as securities company. Otherwise, securities underwriters, broker-dealers and investment managers must obtain business licenses from BAPEPAM. Natural person representatives of underwriters, representatives of broker dealers and representative of investment managers must obtain permits from BAPEPAM. Capital market supporting professions include accountants, legal consultants, appraisers, and notaries, and other professions stipulated by Government Regulation. Supporting professions must be registered with BAPEPAM and must be qualified in accordance with relevant government regulations.

Registration Statements.

Issuers of securities through public offerings must file registration statement with BAPEPAM. Companies with shares owned by not less than 300 persons and with not less than Rp 3,000,000,000 paid-up capital ("Public Companies") must also file registration statements. Registration statements are not required for public offerings involving debt with maturity of not more than one year, deposit certificates, insurance policies, securities issued or guaranteed by Indonesian Government or other securities designated by BAPEPAM.

Joint and several liability runs to all parties signing registration statement containing false material information or omitting relevant material facts provided however that accountants, legal consultants, appraisers, notaries, and other professionals designated by Government Regulation are only liable for opinions or information they provide. Joint and several liability also runs to directors and commissioners of issuer, underwriters, capital market supporting professionals and other parties who have provided opinions or information and who have consented to publication of their opinions and information in registration statement.

Material facts or information are defined as important relevant facts concerning events, incidents and facts with potential to influence prices of securities and/or decisions of investors, potential investors or other parties with interest in such facts and information.

Prospectus.

Sellers of publicly offered securities must obtain statement from purchasers on form of securities order that purchasers have received or had opportunity to read prospectus related to securities concerned prior to placing of purchase orders.

Prospectus is defined as any written information relating to public offer with intent of encouraging purchase of securities. It is unlawful for prospectus to contain false information concerning material fact, or to omit truthful information concerning material fact, publication of which is necessary in order to ensure that prospectus is not misleading. Each party offering securities for sale through use of false material facts or information or material omissions, whether oral or written, and for which party is or should be aware, is liable for losses incurred in related transaction.

Reports.

Stock exchanges, clearing and guarantee institutions, depository and settlement institutions, mutual funds, securities companies, investment advisors, security administration bureaus, custodian banks, trusted agents and other parties holding licenses, approvals or registrations from BAPEPAM are required to submit periodic and incidental reports to BAPEPAM. Directors and commissioners of issuers and public companies must report their share ownership to BAPEPAM. Parties with 5% or greater share ownership in issuer or public company must report their holdings to BAPEPAM. All information reported to BAPEPAM is available to public, except as otherwise stipulated by BAPEPAM.

Insiders.

Parties possessing inside information relating to issuer or public company are prohibited from purchasing or selling securities of issuer or public company concerned as well as other companies engaging in transactions with issuer or public company concerned. Insiders are further prohibited from influencing other parties to purchase or sell securities concerned or providing information to other parties in position to use such information to purchase or sell securities concerned. Securities companies with inside information relating to issuer may sell securities of issuer in accordance with orders from clients provided securities company does not convey recommendations concerning shares to client.

Penalties.

Parties involved in violation of capital markets laws or regulations are subject to administrative sanctions and criminal liability.

4 CITIZENSHIP

4.00 Governing Law.

Citizenship and immigration are governed by Constitution of Republic of Indonesia, Law No. 12 of 2006 dated 1 Aug. 2006 concerning Citizenship of Republic of Indonesia, Law No. 9 of 1992 dated 31 Mar. 1992 concerning Immigration Affairs, Indonesian Civil Code (Kitab Undang-undang Hukum Perdata) (KUHPer) (Burgerlijk Wetboek voor Indonesië), and Government Regulation No. 2 of 2007 dated 2 Jan. 2007 concerning Procedures for Obtaining, Losing, Cancellation and Re-obtaining Citizenship of Republic of Indonesia.

4.01 ALIENS:

See category 15 Immigration, topic 15.01 Aliens.

4.02 CITIZENSHIP:

Citizens are persons who are native born Indonesians and persons of other nationalities who became Indonesian citizens through statutory naturalization process. All citizens are deemed equal under law.

State citizens of Indonesia include: (i) Persons who have already become Indonesian State citizens based on regulations of law and/or by agreement between Government of Republic of Indonesia with other states prior to effective date of Law No. 12 of 2006; (ii) children who are born from legal marriage between mother and father who are State citizens of Indonesia; (iii) children who are born from legal marriage between father who is State citizen of Indonesia and mother who is foreign state citizen; (iv) children who are born from legal marriage between father who is foreign state citizen and mother who is State citizen of Indonesia; (v) children who are born from legal marriage between mother who is State citizen of Indonesia and father who is stateless or whose state of origin does not grant citizenship to aforementioned child; (vi) children born from legal marriage within time limitation of 300 days after father dies and father is State citizen of Indonesia; (vii) children who are born outside of legal marriage from mother who is State citizen of Indonesia; (viii) children who are born outside of legal marriage from foreign state citizen mother who are acknowledged by father who is Indonesian State citizen as his children and that acknowledgment is made prior to children reaching 18 years of age or prior to marriage; (ix) children who are born in territory of State of Republic of Indonesia where citizenship status of mother and father at time of birth is unclear; (x) newborn children who are found in territory of State of Republic of Indonesia so long as identity of mother and father is not known; (xi) children who are born in territory of State of Republic of Indonesia when mother and father are stateless or whereabouts of parents is not known; (xii) children who are born outside of territory of State of Republic of Indonesia from mother and father who are State citizens of Indonesia who, because of provisions of state of place of birth of child, grant citizenship to aforementioned child; or (xiii) children from mother or father whose citizenship application has been granted, though subsequently father or mother dies prior to declaration of oath or pledge of allegiance.

Indonesian State citizen children who are born outside of legal marriage, who have not yet reached age of 18 years, who have not yet married and who are legally acknowledged by father who has foreign citizenship continue to be acknowledged as Indonesian State citizens.

Indonesian citizen children who have not yet reached age of five years who are lawfully adopted by foreign state citizens based upon court decision continue to be acknowledged as Indonesian State citizens.

In event status of citizenship of Republic of Indonesia results in dual citizenship in relation to following categories of children, after age of 18 years or after aforementioned child has married, child must declare choice of one citizenship: (i) Children who are born from legal marriage between father who is State citizen of Indonesia and mother who is foreign State citizen; (ii) children who are born from legal marriage between father who is foreign State citizen and mother who is State citizen of Indonesia; (iii) children who are born outside of legal marriage from foreign state citizen mother where child is acknowledged by father who is Indonesian State citizen as his child and that acknowledgment is conducted prior to child reaching 18 years of age or prior to marriage; (iv) children who are born outside of territory of State of Republic of Indonesia from mother and father who are State citizens of Indonesia where, because of provisions of state of place of birth of child, grant citizenship to aforementioned child; (v) Indonesian State citizen children who are born outside of legal marriage who have not yet reached age of 18 years and who have not yet married and who are legally acknowledged by father who has foreign citizenship; and (vi) Indonesian State citizen children who have not yet reached age of five years who are lawfully adopted by foreign state citizens based upon court decision.

Declaration of choice of citizenship is to be made in writing and delivered to official with attachment of documents which are stipulated by regulations of law. Declaration of choice of citizenship must be delivered within three years after child reaches age of 18 years or has already married.

Every person who is not Indonesian State citizen is to be treated as alien.

Residential identity cards, family identity cards, birth certificates or official reports regarding taking of oath of allegiance to Indonesia are sufficient evidence to prove Indonesian citizenship.

4.03 IMMIGRATION:

See category 15 Immigration, topic 15.02 Immigration.

4.04 NATURALIZATION:

Governing Law.

Naturalization is governed by Law No. 12 of 2006 dated 1 Aug. 2006 concerning Citizenship of Republic of Indonesia, Presidential Decree No. 57 of 1995 dated 14 Aug. 1995 concerning Procedures for Indonesian Naturalization and Presidential Decree No. 56 of 1996 concerning Evidence of Citizenship of Republic of Indonesia dated 9 July 1996.

Naturalization application may be submitted by applicant if applicant fulfills following conditions: (i) Has already reached age of 18 years or has already married; (ii) at time of submission of application has already resided in territory of Republic of Indonesia for at least five years on continuous basis or at least ten years on non-continuous basis; (iii) is of sound mind and body; (iv) is able to speak Indonesian language and acknowledges that Pancasila as basis of State and Constitution of State of Republic of Indonesia of 1945; (v) has never been convicted of criminal act with sanctions of criminal imprisonment for one or more years; (vi) dual citizenship does not occur by virtue of obtaining citizenship of Republic of Indonesia; (vii) has occupation and/or consistent income; and (viii) has paid naturalization fee to National Treasury.

Foreign state citizens who enter into lawful marriages with Indonesian State citizens may obtain citizenship of Republic of Indonesia by delivering declaration to become State citizen before official. Declaration to become State citizen may be conducted if related person has already resided in territory of State of Republic of Indonesia for at least five continuous years or at least ten years on non-continuous basis, except if obtaining Indonesian citizenship will result in dual citizenship.

Aliens who have already served State of Republic of Indonesia or for reasons of State interest may be granted citizenship of Republic of Indonesia by President after obtaining considerations of House of People's Representatives of Republic of Indonesia except when grant of Indonesian citizenship will result in related person obtaining dual citizenship.

Work Permits.

Aliens working in Indonesia are subject to Law No. 13 of 2003 dated 25 Mar. of 2003 concerning Labor Affairs.

Employers utilizing foreign workers must obtain written permission of Minister of Manpower or appointed official prior to undertaking employment within Indonesia. Permits for utilization of foreign workers are issued for purposes of utilization of foreign workers conducted selectively in framework of enhancing utilization of Indonesian manpower in maximum manner. Employer must obtain plan for utilization of foreign workers containing: (i) Reason for utilization of foreign worker; (ii) intended position of foreign worker within employer's organizational structure; (iii) projected duration of utilization; and (iv) appointment of Indonesian State citizen as assistant to foreign worker. Employers are obligated to implement education and job training and technology transfer programs and transfer skills which are in accordance with qualifications of position of foreign worker.

Immigration Permits.

Aliens entering Indonesia are required to possess visa, to obtain valid entry permit and to enter and exit through examination by immigration official at immigration check point.

Permanent resident permits may be granted to aliens by Director General of Immigration on behalf of Minister of Law and Human Rights.

Aliens already obtaining limited residence permits who reside in Indonesia continuously for two or more years may apply for permanent resident permits.

5 CIVIL ACTIONS AND PROCEDURE

—Scope —

Indonesian civil actions and procedure are governed by Renewed Indonesian Code (Reglemen Indonesia yang Diperbarui) (Het Herziene Indonesisch Reglement, Staatsblad 1941:44), Code of Procedure for Areas Outside Java and Madura (Reglemen Acara untuk Daerah Luar Jawa dan Madura) (Reglement Tot Regeling Van Het Rechtswezen in de Gewesten Buiten Java en Madura, Staatsblad 1927:227), Indonesian Civil Code (Kitab Undang-undang Hukum Perdata) (KUHPer)

(Burgerlijk Wetboek voor Indonesië), Indonesian Code (Reglemen Indonesia [E.R.]), Code of Civil Procedure (Reglemen Acara Perdata) (Reglement op de Rechtsvordering, Staatsblad 1847:52), Law No. 4 of 2004 dated 15 Jan. 2004 concerning Judiciary, Law No. 14 of 1985 dated 30 Dec. 1985 concerning Supreme Court as lastly am'd by Law No. 3 of 2009 dated 12 Jan. 2009 concerning Second Amendment to Law No. 14 of 1985 and Law No. 2 of 1986 dated 8 Mar. 1986 concerning General Judicial System as amended by Law No. 8 of 2004 dated 29 Mar. 2004 concerning Amendment to Law No. 2 of 1986.

5.01 ACTIONS:

Commencement of Actions.

Civil actions commence by filing of letter of claim which is signed by plaintiff or proxy with national civil court of general jurisdiction known as District Court. In practice, District Court asserts personal jurisdiction over party plaintiffs regardless of nationality, race, creed, color, religion, age or sex provided subject matter over claim and personal jurisdiction over defendant is available. Claims may be submitted either orally (for illiterate) or in writing.

Jurisdiction.

Indonesian law generally protects elections of jurisdiction of and venue in foreign courts and choice of foreign law made by contractual parties pursuant to provisions of Arts. 24 and 1338 of Indonesian Civil Code (Kitab Undang-undang Hukum Perdata) (KUHPer) (Burgerlijk Wetboek voor Indonesië). Parties may elect domiciles other than their actual domiciles with elected location deemed location for prosecution of claims either specifically or generally described. Agreements made in accordance with law constitute law between contracting parties. If defendant has agreed in writing to submit to venue other than his/her residence or domicile, then plaintiff may, but is not required to, select that elected jurisdiction as venue for claim.

Even where valid election of foreign jurisdiction, venue, and choice of law have been made by contracting parties, plaintiffs who oppose application and performance of such elections often file suits in Indonesian courts casting claims as torts or criminal acts rather than contractual breaches. Indonesian courts often, though not uniformly, view tort claims as falling outside of parameters of provisions of foreign jurisdiction, venue and choice of law elections on basis of restrictive contractual interpretation, social policy, sovereignty principles and view that parties do not contemplate commission of torts in performance of contractual undertakings.

Domicile.

Residence is location of person's current place of dwelling. Domicile is determined by place of residence combined with intention to remain proven by declaration to government or from facts of situation. Married women are deemed to reside with their husbands. Minor children are deemed to reside with parent exercising primary authority over them or residence of their custodians. Adults who are subject to custodial care are deemed to reside at residence of their custodians. Employees (other than married women) living in homes of their employers are deemed to reside in their employer's home. To extent and on terms desired by written agreement between disputing parties, domicile other than actual residence may be freely and validly elected for purposes of civil case proceedings.

Jurisprudence.

Supreme Court decision states that jurisprudence is source of procedural law. However, no written law to that effect is found in constitution or other legislation. Indonesia follows civil law system where substantive precedent of higher courts are not binding on lower courts.

Equity.

Courts possess broad jurisdictional powers and obligation to use discretion to decide cases unsupported by specific controlling law on point.

Foreign laws are proven by expert testimony and other evidence of laws of foreign country.

Summons and Notice.

Bailiff of District Court is viewed as official responsible for providing notice to defendant of date, time, place and subject of hearing based upon lawsuit filed by plaintiff. Notice includes copy of complaint filed by plaintiff and summons to appear at prescribed date, time and place.

Time between date of hearing and date notice is provided to party may not be less than three working days unless urgent matters are involved.

Foreign defendants should be provided with minimum of two months notice prior to date of hearing.

District Court serves notice on foreign defendants through submission of request for service of process through Indonesian Department of Foreign Affairs. Department of Foreign Affairs then forwards summons and complaint to Indonesian embassy or consulate with jurisdictional territory covering country of domicile of each defendant. Indonesian embassy or consulate delivers documents to defendant located in jurisdictional territory of respective Indonesian diplomatic mission.

Where domicile of defendant is unknown, Indonesian customary practice permits notice through announcement in newspaper of general distribution. However, for foreign defendants, it is unclear whether publication must be distributed in country of defendant's citizenship or in Indonesia.

First Session.

If plaintiff or plaintiff's attorney fails to appear at first properly noticed court session, and if defendant or defendant's attorney appears at first session, then plaintiff's lawsuit is discharged without prejudice to right of plaintiff to refile and recommence suit.

If defendant or defendant's attorney fails to appear at first properly noticed court session, then lawsuit may be examined without appearance of defendant. This may lead to default judgment unless lawsuit is without prima facie merit. However, normally, District Court will attempt to serve defendant three times prior to rendering default decision.

If there are two or more defendants and one of defendants fails to appear at first court session, District Court may adjourn first session. If one of defendants fails to appear at next session, District Court may decide to further examine case without appearance of absent defendant.

Defendants subject to default judgments are free to submit objections to District Court and, in event of adverse judgment on objection, appeal to High Court and thereafter to Supreme Court.

Defendant's Responses.

Defendants may respond in one of four basic ways by: (i) Attacking competence of court based upon lack of subject matter jurisdiction (known as absolute competence exceptions); (ii) attacking competence of court based upon lack of personal jurisdiction (known as relative competence exceptions); (iii) certain other procedural exceptions (also known as relative competence exceptions); and/or (iv) attacking substance of plaintiff's case through answers and counter-claims.

Absolute Competence Exceptions.

Defendant has right to object to and obtain decision concerning subject matter jurisdiction of District Court prior to entering substantive defenses. Defendant may also submit absolute competence objections at any time during proceedings or on appeal and court is required to dismiss action even without submission of arguments concerning lack of absolute competence where court lacks jurisdiction.

Absolute competence exceptions are filed in writing by defendant. Plaintiff has opportunity to submit written reply and defendant is afforded one additional opportunity to respond to plaintiff's reply. Hearing is then held whereat District Court announces its decision on jurisdictional objections raised by defendant. Oral argument is significantly limited and is often not part of this phase of litigation.

Exceptions relating to absolute competence are generally considered prior to consideration of substantive aspects of case. In event defendant wins exception, case is dismissed based upon lack of court authority. Plaintiff may appeal result through High Court and then Supreme Court. If defendant loses exception, defendant may file appeal to High Court and, failing victory in High Court, defendant may appeal to Supreme Court.

During pendency of defendant's appeals, District Court usually commences consideration of substantive aspects of lawsuit.

Relative Competence Exceptions.

Defendant has right to contest personal jurisdiction at time of first hearing. Failure to submit personal jurisdiction objections at time of first hearing shall constitute waiver of personal jurisdiction objections.

Other Procedural Exceptions.

In addition to disputes relating to jurisdiction, other grounds for procedural exceptions categorized as relative competence exceptions include: (i) Claims that case concerned has already been decided by court and that decision has obtained permanent legal effect (ne bis in idem); (ii) claims that case concerned is currently being examined by District Court, High Court or Supreme Court; (iii) claims that plaintiff has no capacity/power to act; (iv) claims that plaintiff has failed to join necessary parties to action; (v) claims that plaintiff's complaint is obscure; (vi) claims that plaintiff's claims are not yet ripe and thus relief cannot be granted; and, among others (vii) claims that court is prevented from granting requested relief.

Exceptions other than those relating to jurisdictional competence must be submitted in answer of defendant or they are waived. Decision on relative competence exceptions is decided with substantive merits of case.

Defenses and Counter-Claims.

In event District Court rules against defendant in relation to exceptions on absolute competence, defendant must submit its relative competence exceptions, if any, along with its answer to substantive merits of plaintiff's causes of action.

Defendant is also entitled to raise counter-claims against plaintiff at time of submission of defendant's answer.

Plaintiff's Reply.

Plaintiff is provided opportunity to file response to defendant's relative competence exceptions, substantive answer and counter-claims.

Defendant's Rejoinder.

District Court may provide defendant with opportunity to file rejoinder to plaintiff's reply.

Proof.

Following conclusion of above referenced filings of written arguments, District Court will engage in process of examining evidence through stage known as formal proof. District Court will not rely upon arguments of litigants alone, but will decide matters before bar based upon evidence submitted during court session.

Burden of proof is generally placed on litigant making claim to right or incidences/occurrences. However court does exercise discretion resulting in shifting of burdens of proof on many occasions.

There are five types of admissible evidence: (i) Documents; (ii) witnesses; (iii) suspicions/inferences; (iv) acknowledgments/confessions; and (v) statements made under oath.

Electronic Evidence.

Electronic information and/or electronic documents and/or print outs thereof constitute valid legal evidence in accordance with law of procedure in effect in Indonesia provided that electronic information and/or electronic documents are created utilizing electronic systems in accordance with provisions stipulated in Law. No. 11 of 2008.

Electronic information means electronic data, including but not limited to writings, sound, drawings, maps, designs, photos, electronic data interchanges (EDI), electronic mail, telegrams, telexes, telecopies or things similar thereto, letters, markings, numbers, access codes, symbols or perforations which have been processed which possess meaning or can be understood by people who are capable of understanding.

Electronic document means every electronic information which is created, forwarded, transmitted, received or stored in form of analog, digital, electromagnetic, optic or forms similar thereto, which can be seen, displayed and/or heard through computers or electronic systems, including but not limited to writings, sounds, drawings, maps, designs, photos or things similar thereto, letters, markings, numbers, access codes, symbols or perforations.

Electronic system means group of equipment and electronic procedures which have function to prepare, collect, process, analyze, store, display, announce, transmit and/or disseminate electronic information.

Provisions concerning electronic information and/or electronic documents which constitute valid legal evidence are not in effect for: (i) Letters which in accordance with law shall be made in writing; and (ii) letters together with documents which in accordance with law shall be made in form of notarial deed or deed made by official deed creator.

Closing Arguments, Conclusion.

Conclusion is court session where plaintiff and defendant make closing arguments on facts and arguments raised in court during previous sessions. Those arguments are generally delivered in writing and read out in open court.

Decision.

After plaintiff and defendant have closed their arguments, District Court will render decision over case. There are three types of decisions: (i) Declaratory decisions (decision describing and/or confirming legal condition); (ii) constitutive decisions (decision nullifying or creating legal condition); and (iii) condemnatory decisions (decision mandating punishment).

Decision of District Court must contain, at minimum, following: (i) Brief description of lawsuit and claims and defenses of litigants; (ii) legal grounds forming basis of panel of judge's decision; (iii) decision of District Court concerning substantive case; (iv) decision of District Court concerning cost of case; (v) attendance of plaintiff and defendant; (vi) if decision is rendered on basis of definitive laws and regulations, those laws and regulations should be mentioned; and (vii) signature of chairman of panel of judges and clerk.

Preliminary Injunctions.

District Court may grant preliminary injunctions upon request of party to litigation. Preliminary injunctions must be based upon evidence in form of authentic notarial deeds, writings signed by parties but not notarized which are admitted by party bearing burden of injunction or final and binding decisions of Indonesian court that have become non-appealable.

Preliminary injunctions are technically not enforceable without first obtaining review by and permit from High Court.

High Court Appeals.

Decision of District Court may be challenged as matter of right to High Court. High Court is first court of appeal. Petitions to appeal may be submitted by any party to High Court through clerk of District Court.

Application for Appeal must be submitted within 14 days from issuance of District Court's decision or in event applicant does not appear at time of issuance of decision, 14 days from date applicant received District Court's decision. Appellant may also submit memorandum of appeal containing legal argumentation although law does not stipulate this as requirement.

Court clerk will then provide notice of appeal to other parties. Other parties have option of submitting counter memoranda to High Court through District Court.

After receiving complete documents from both parties, District Court will provide notice to parties that documents are available for review for 14 days. District Court must send dossier to High Court within one month after receipt of request for appeal.

High Court will then examine and decide case based on documents delivered by District Court. High Court will not ask parties to appear in High Court, unless High Court deems such appearances necessary to request further documents or information from parties, for example, evidence.

After examining case concerned, High Court will issue its decision, which will be delivered to parties through District Court.

Supreme Court Appeals.

Parties objecting to decision of High Court are entitled, as matter of right, to submit further appeal to Supreme Court. Filing of appeal is made through District Court in two steps: (i) 14 days after receiving decision of High Court, appellant must submit application for appeal; and (ii) 14 days following date of submission of application for appeal, appellant must submit memorandum of appeal.

District Court is responsible for notification of other parties concerning filing of appeal. Other parties have option to submit answer to memoranda of appeal within 14 days as of date of notification.

District Court must deliver complete document set to Supreme Court within 30 days of receipt.

Decision of Supreme Court is intended to be final and binding upon parties and thus allows for execution of judgment.

Judicial Review.

Indonesian Civil Procedure permits one further review of final and binding court decisions for following reasons: (i) If decision is founded upon misrepresentations or fraud of opposing party which become known following decision of District Court or if evidence is determined by criminal court to be fraudulent; (ii) if new and decisive written evidence is found after case has been examined which evidence was previously unavailable; (iii) if court grants decision exceeding extent of claim; (iv) if one part of claim has not yet been decided for no reason; (v) if same court or court at same level has granted decision which is contrary to decision in question, provided that case involves same parties, same matters and same grounds; or (vi) if in decision, there exists negligence or manifest error of judge.

Enforcement of Court Decisions.

Decisions in civil matters can be enforced after they attain permanent legal status. There are four types of enforcements: (i) Forced payment of money; (ii) injunctions; (iii) forced sale of asset; and (iv) imprisonment for bad faith civil debtor.

Enforcement is made through application to District Courts with geographic jurisdiction over party bearing burden of court decision.

Enforcement of Foreign Judgments.

Indonesian judicial system does not recognize foreign judgments as having binding effect on Indonesian courts. Rather, Indonesian court is free to give foreign judgment evidentiary weight Indonesian court deems appropriate in its sole discretion.

Thus, in any jurisdiction outside of Republic of Indonesia with policy regarding enforcement of foreign judgments based upon principles of reciprocity, such other jurisdiction would not generally enforce Indonesian court decision.

Class Actions.

Class action claims are governed by Regulation of Supreme Court No. 1 of 2002 dated 26 Apr. 2002 concerning Class Action Claims Procedures.

Class action claims may be submitted by representative of class of large number of persons provided there are substantial common questions of facts or circumstances and law, and common kinds of claims between representative of class and members of class.

Representative of class must possess honesty and sincerity required to ensure protection of interests of members of class.

Court first considers whether complaint meets legal requirements of class action claim and, if complaint fails to meet legal requirements, judges are obligated to immediately dismiss complaint.

Class action claim must contain: (i) Complete and clear information concerning class representative; (ii) specific and detailed definition of class without naming each member of class; (iii) information concerning class members required in relation to obligation to provide notice; (iv) clear and detailed statement of basis of claim from both class representative and class members; (v) classification of class into sub-classes if claims differ in nature and damages sustained; and (vi) clear and detailed plea for damages incorporating proposal regarding mechanism or procedures for distribution of compensation to all members of class including proposal to establish team or panel to assist distribution of compensation.

If judge determines complaint states valid class action claim, judge shall order representative to propose notification model for approval. Notification may be conducted through mass media, sub-district or village offices, court or directly to class members provided class members can be identified. Notification must contain: (i) Registration number of complaint, identity of class representative and defendants; (ii) brief explanation of case; (iii) explanation of class definition; (iv) explanation of implications of joining as class members; (v) explanation of possibility of members of class who are included in definition of class to elect not to be included in class; (vi) explanation concerning month, date and hour for submission of notice of election to be excluded from class; (vii) explanation of address for submission of exclusion notification; (viii) place and contact details to obtain additional information; (ix) form of exclusion notification; and (x) explanation concerning amount of compensation demanded.

5.02 DEPOSITIONS AND DISCOVERY:

No discovery of right.

5.03 EVIDENCE:

Governing Law.

Substantive evidence law is governed by Renewed Indonesian Code (Reglemen Indonesia yang Diperbarui) (Het Herziene Indonesisch Reglement, Staatsblad 1941:44), Code of Procedure for Areas Outside Java and Madura (Reglemen Acara Hukum untuk Daerah Luar Jawa dan Madura) (Reglement Tot Regeling Van Het Rechtswezen in de Gewesten Buiten Java en Madura, Staatsblad 1927:227), Book IV of Indonesian Civil Code (Kitab Undang-undang Hukum Perdata) (KUHPer) (Burgerlijk Wetboek voor Indonesië). Procedural evidence law is governed by principles found in Renewed Indonesian Code (Reglemen Indonesia yang Diperbarui) (Het Herziene Indonesisch Reglement, Staatsblad 1941:44), Code of Procedure for Areas Outside Java and Madura (Reglemen Acara Hukum untuk Daerah Luar Jawa dan Madura) (Reglement Tot Regeling Van Het Rechtswezen in de Gewesten Buiten Java en Madura, Staatsblad 1927:227) and Code of Civil Procedure (Reglemen Acara Perdata) (Reglement op de Rechtsvordering, Staatsblad 1847:52).

Parties bear burden of proving incidences/occurrences.

There are five kinds of evidences: (i) Written evidence; (ii) witnesses testimony; (iii) suspicions/inferences; (iv) acknowledgments/confessions; and (v) statements made under oath.

Judiciary bears burden of applying correct law.

Electronic Evidence.

Electronic information and/or electronic documents and/or print outs thereof constitute valid legal evidence in accordance with law of procedure in effect in Indonesia provided that electronic information and/or electronic documents are created utilizing electronic systems in accordance with provisions stipulated in Law. No. 11 of 2008.

Electronic information means electronic data, including but not limited to writings, sound, drawings, maps, designs, photos, electronic data interchanges (EDI), electronic mail, telegrams, telexes, telecopies or things similar thereto, letters, markings, numbers, access codes, symbols or perforations which have been processed which possess meaning or can be understood by people who are capable of understanding.

Electronic document means every electronic information which is created, forwarded, transmitted, received or stored in form of analog, digital, electromagnetic, optic or forms similar thereto, which can be seen, displayed and/or heard through computers or electronic systems, including but not limited to writings, sounds, drawings, maps, designs, photos or things similar thereto, letters, markings, numbers, access codes, symbols or perforations.

Electronic system means group of equipment and electronic procedures which have function to prepare, collect, process, analyze, store, display, announce, transmit and/or disseminate electronic information.

Provisions concerning electronic information and/or electronic documents which constitute valid legal evidence are not in effect for: (i) Letters which in accordance with law shall be made in writing; and (ii) letters together with documents which in accordance with law shall be made in form of notarial deed or deed made by official deed creator.

5.04 JUDGMENTS:

Default Judgments.

Failure to appear in person or by proxy following proper summons results in issuance of warning of impending default judgment unless claim is clearly without merit. Defendant may respond to warning of default by written application directed to discretion of District Court.

Defaults take effect eight days following delivery by registered mail of notice of warning of impending decision of default or 14 days following oral pronouncement of warning of impending decision by judge to defendant.

Foreign judgments are not binding upon Indonesian courts who exercise sovereign jurisdiction. Foreign judgments are viewed as some evidence in trial on merits of claims.

Execution of judgments are governed by Arts. 195-224, 225 and 227 of Renewed Indonesian Code (Reglemen Indonesia yang Diperbarui) (Het Herziene Indonesisch Reglement, Staatsblad 1941:44) and Arts. 206-258, 259 and 261 of Code of Procedure for Areas Outside Java and Madura (Reglemen Acara Hukum untuk Daerah Luar Jawa dan Madura) (Reglement Tot Regeling Van Het Rechtswezen in de Gewesten Buiten Java en Madura, Staatsblad 1927:227). There are four kinds of executions/enforcements: (i) Forced payment of money; (ii) injunctions; (iii) forced sale of asset; and (iv) imprisonment for bad faith civil debtor.

Seizure.

District Court has power to order executorial seizure of judgment debtor's property in event judgment debtor fails to pay judgment. Law does not limit seizure power merely to assets held in possession of debtor and thus may be interpreted to include garnishment from third party holders of debtor's assets. Judge is obligated to prioritize by first seizing and selling at government sponsored auction movable goods and if movable goods are insufficient to pay judgment debt, then immovable goods.

Seizure is performed by clerk of District Court or other willing and capable person appointed by judge and recommended by local head of administration. Seizure procedure is applicable to cash and negotiable instruments but cannot be applied to animals and tools of necessity to livelihood of judgment debtor. (See category 7 Debtor and Creditor, topic 7.06 Homesteads.)

Clerk of District Court or person appointed as substitute is obligated to evaluate situation and use discretion to either permit possessor of goods which are subject of seizure to continue his possession of goods subject to obligation to preserve goods for benefit of judgment creditor or to move goods to appropriate place.

Buildings not attached to land cannot be moved to other locations.

Mandatory Injunctions.

District Courts are empowered to enjoin actions. Failure of party to comply with injunction of court entitles party benefiting from injunction to apply to court for order compelling party burdened to pay cost of performance.

5.05 VENUE:

Civil claims in first instance are filed by submission of letter of claim signed by plaintiff or his agent/proxy to chairman of District Court in jurisdiction of defendant's domicile, or if domicile is unknown, in defendant's residence. If there are multiple defendants who are not domicilliaries of same jurisdiction, then venue is proper in jurisdiction of at least one of defendant's domicile which may be chosen by plaintiff.

Where some defendants are primary obligors joined with defendants with obligations derivative of those of primary obligors, plaintiff must choose venue from among residences of primary obligor defendants except in limited circumstances.

If residence and domicile of defendant are unknown or if identity of defendant is unknown, venue is proper in jurisdiction where plaintiff is domiciled or where subject matter of dispute involves immovable goods, in jurisdiction where immovable goods are located.

If defendant has agreed in writing to submit to venue other than his residence or domicile, then plaintiff may, but is not required to, select that elected jurisdiction as venue for claim.

6 COURTS AND LEGISLATURE

6.01 COURTS:

Governing Law.

Indonesian judicial system is governed by Law No. 4 of 2004 dated 15 Jan. 2004 concerning Judiciary and Law No. 14 of 1985 dated 30 Dec. 1985 concerning Supreme Court as lastly am'd by Law No. 3 of 2009 dated 12 Jan. 2009 concerning Second Amendment to Law No. 14 of 1985.

Indonesian judicial system is composed of following categories of courts: (i) Supreme Court (governed by Law No. 14 of 1985 dated 30 Dec. 1985 concerning Supreme Court as lastly am'd by Law No. 3 of 2009 dated 12 Jan. 2009 concerning Second Amendment to Law No. 14 of 1985); (ii) National Civil Courts of General Jurisdiction composed of District Courts as courts of first instance (governed by Law No. 2 of 1986 dated 8 Mar. 1986 concerning General Judicial System as am'd by Law No. 8 of 2004 dated 29 Mar. 2004 concerning Amendment to Law No. 2 of 1986) and High Courts as court of first appeal (governed by Law No. 2 of 1986 as am'd by Law No. 8 of 2004); (iii) Constitutional Court (governed by Law No. 24 of 2003 dated 13 Aug. 2003 concerning Constitutional Court); (iv) Administrative Courts (governed by Law No. 5 of 1986 dated 29 Dec. 1986 concerning State Administrative Judicature as am'd by Law No. 9 of 2004 dated 29 Mar. 2004 concerning Amendment to Law No. 5 of 1986); (v) Commercial Courts (governed by Law No. 37 of 2004 dated 18 Oct. 2004 concerning Bankruptcy and Suspension of

Debt Payment Obligations); (vi) Tax Courts (governed by Law No. 14 of 2002 dated 12 Apr. 2002 concerning Tax Courts); (vii) Religious Courts (governed by Law No. 7 of 1989 dated 29 Dec. 1989 concerning Religious Courts as am'd by Law No. 3 of 2006 dated 20 Mar. 2006 concerning Amendment to Law No. 7 of 1989); (viii) Children's Courts (governed by Law No. 3 of 1997 dated 3 Jan. 1997 concerning Children's Courts); (ix) Military Court (governed by Law No. 31 of 1997 dated 15 Oct. 1997 concerning Military Court); (x) Industrial Relation Courts (governed by Law No. 2 of 2004 dated 14 Jan. 2004 concerning Settlement of Industrial Relations Disputes); (xi) Courts of Fishery Affairs (governed by Law No. 31 of 2004 dated 6 Oct. 2004 concerning Fishery); (xii) Criminal Corruption Court governed by Law No. 30 of 2002 dated 27 Dec. 2002 concerning Commission on Eradication of Corruption (see Decision of Constitutional Court No. 012-016-019/PUU-IV/2006 dated 18 Dec. 2006 holding that creation of Criminal Corruption Court was unconstitutional provided however that Criminal Corruption Court would continue to possess binding legal power until Art. 53 of Law No. 30 of 2002 is amended which amendment must occur within three years following 18 Dec. 2006); (xiii) Criminal Corruption Court (governed by Law No. 30 of 2002 dated 27 Dec. 2002 concerning Commission on Eradication of Corruption); (xiv) Human Rights Court governed by Law No. 26 of 2000 dated 23 Nov. 2000 concerning Human Rights Court; and (xv) Syari'ah Islam Court in Nanggroe Aceh Darussalam Province governed by Law No. 18 of 2001 dated 9 Aug. 2001 concerning Special Autonomy for Special Region of Aceh as Nanggroe Aceh Darussalam Province as am'd by Law No. 11 of 2006 dated 1 Aug. 2006 concerning Aceh Government.

National Civil Courts of General Jurisdiction.

National Civil Courts are divided into District Courts (courts of first instance), High Courts (courts of first appeal, as matter of right) and Supreme Court.

District Court is empowered to examine, decide and settle criminal and civil cases in first instance.

Supreme Court accepts appeals based on questions of jurisdiction and questions of law. Supreme Court judges by panels of at least three justices and delivers verdict in open public court.

Military courts in environment related to military matters consist of Military Court, High Military Court (court of first appeal), Prime Military Court and Combat Military Court. Military court is authorized to adjudicate criminal actions alleged to have been committed by soldiers or persons deemed soldiers for special purposes or other persons based upon approval of Minister of Law and Human Rights and to decide military administrative disputes.

State Administrative Courts.

Composed of State Administrative Court and State Administrative High Court. State Administrative Court is empowered to hear and decide State administrative disputes. State administrative disputes include those arising between persons and/or civil legal entities and State administrative agency and/or official either at national or regional level. Appeals from State Administrative High Court are reviewed by Supreme Court.

Islamic Religious Courts.

Composed of District Religious Courts and High Religious Courts. Islamic Religious Courts are empowered to hear, decide and settle civil cases between Muslims in fields of marriage, inheritance, testament, donative transfers, and syari'ah economy substantively in accordance with Islamic law and procedurally in accordance with civil procedural law applied in National Civil Courts of General Jurisdiction, with certain exceptions. Appeals from High Religious Court are reviewed by Supreme Court.

7 DEBTOR AND CREDITOR

—Scope —

All of property of person, whether movable or immovable, whether already in existence or later acquired, constitutes security for all of person's obligations.

7.01 ASSIGNMENT:

Assignments of claims payable to named person and other intangible goods are effected by means of making either authentic deed or deed signed under hand delegating rights over those things to another party. Assignments are not binding on debtor until debtor has received notice thereof or has accepted assignment in writing or acknowledged assignment in writing. Assignment of indebtedness in favor of bearer is made by delivery of document of indebtedness. Assignment of indebtedness payable to order is made by endorsement and delivery of document of indebtedness.

7.02 ATTACHMENT:

See category 5 Civil Actions and Procedure, topic 5.04 Judgments, subhead Execution of Judgments, catchline Seizure.

7.03 BANKRUPTCY:

Bankruptcy is governed by Law No. 37 of 2004 dated 18 Oct. 2004 concerning Bankruptcy and Suspension of Debt Payment Obligations.

Definitions.

Bankruptcy means general seizure over all wealth of bankrupt debtor with management and settlement thereof conducted by curator under supervision of supervising judge.

Creditor means person who has claim based on agreement or law, fulfillment of which may be demanded before court.

Debtor means person who has debt arising out of agreement or law, satisfaction of which may be demanded before court.

Bankrupt debtor means debtor which has been declared bankrupt by Commercial Court decision.

Curator means Estate Property Bureau or individual person who has been appointed by Commercial Court to manage and settle estate of bankrupt debtor under supervision of supervising judge.

Debt means obligation which has been expressed or may be expressed as sum of money, whether in Indonesian currency or foreign currency, whether immediately or arising on later date or contingency, which arises out of agreement or law and which debtor is obligated to fulfill and if not fulfilled grants right to creditor to obtain fulfillment from property of debtor.

Commercial court means commercial court within sphere/domain of general judicature.

Supervising judge means judge appointed by Commercial Court in bankruptcy decision or decision to suspend debt payment obligations.

Day means calendar day and if last day of period of time falls on Sun. or holiday, next day is effective day.

Period of time means duration of time which must be calculated without inclusion of commencement date of relevant period of time.

Every person means individual persons or corporations including corporations which are formed as legal entities as well as those which are not legal entities in liquidation.

Bankruptcy.

Debtor who has two or more creditors and has not paid at least one debt which has already fallen due and payable may be declared bankrupt by decision of Commercial Court, either by petition submitted by debtor itself or by petition of one or more of debtor's creditors.

Public prosecutor of Republic of Indonesia also has standing to submit bankruptcy petition in interests of public.

In event debtor is bank, bankruptcy petition may only be submitted by Bank Indonesia.

Only Capital Markets Supervisory Board may file bankruptcy petition against debtor who is party who conducts business activities as: (i) Securities company (defined in Art. 1[21] of Law No. 8 of 1995 dated 10 Nov. 1995 concerning Capital Markets as party who conducts business activities as: (a) Underwriter; (b) broker-dealer; and/or (c) investment manager); (ii) Stock exchange (defined in Art. 1[4] of Law No. 8 of 1995 dated 10 Nov. 1995 concerning Capital Markets); (iii) clearing and guarantee institute (defined in Art. 1[9] of Law No. 8 of 1995 dated 10 Nov. 1995 concerning Capital Markets); or (iv) depository and settlement institutions.

In event debtor is insurance company, reinsurance company, pension fund or State-owned enterprise engaging in field of public interest, bankruptcy petition may only be submitted by Minister of Finance.

Venue.

Decisions on petitions for declarations of bankruptcy and other matters in relation to and/or regulated by Law No. 37 of 2004 are decided by Commercial Court with territorial jurisdiction encompassing legal domicile of debtor. In event debtor has left territory of Republic of Indonesia, Commercial Court with authority to render decision on petitions for declarations of bankruptcy is Commercial Court with territorial jurisdiction encompassing last legal domicile of debtor. In event debtor is participant in general partnership, Commercial Court with territorial jurisdiction encompassing legal domicile of general partnership also has authority to render decision on petitions for declarations of bankruptcy. In event debtor is not domiciled in territory of Republic of Indonesia but conducts profession or business in territory of Republic of Indonesia, Commercial Court with authority to render decision on petitions for declarations of bankruptcy is Commercial Court with territorial jurisdiction encompassing legal domicile or central office from which debtor conducts its profession or its business within territory of Republic of Indonesia. In event debtor is formed as legal entity, its legal domicile is as set forth in its articles of association.

Applications.

In event petition is submitted by debtor still bound in legal marriage, petition submission may only occur with consent of petitioner debtor's husband or wife. Foregoing spousal consent requirement is not applicable if there is no communal property.

Bankruptcy petitions against general partnership must include names and residences of each participant who is bound in joint and several manner for entirety of debts of general partnership.

Bankruptcy petitions are submitted to chairman of Commercial Court.

Hearing Timeline.

Court clerk registers bankruptcy petition on date relevant petition is filed, and petitioner is provided written receipt which is signed by authorized official with date of registration. Court clerk must deliver bankruptcy application to chairman of Commercial Court within at most two days after date petition is registered. Within period not longer than three days after date bankruptcy petition is registered, Commercial Court must study petition and set hearing date. Hearing for examination of bankruptcy petition must be conducted within period of not more than 20 days after date petition is registered.

Notice of Petition.

Commercial Court is required to notify debtor in event bankruptcy petition is submitted by creditor, public prosecutor, Bank Indonesia, Capital Markets Supervisory Board or Minister of Finance. Commercial Court may notify creditors in event bankruptcy petition is submitted by debtor and there is doubt that conditions for declaration of bankruptcy are fulfilled, namely, that debtor has two or more creditors and has not paid at least one debt which has already fallen due and payable.

Notice must be given by court bailiff by registered express mail no later than seven days before first hearing is to be conducted.

Decisions.

Petition for declaration of bankruptcy must be granted if facts or circumstances are found to exist by simple proof/evidence that debtor has two or more creditors and has not fully paid at least one debt which has already fallen due and payable.

Court must pronounce its decision concerning bankruptcy petition no more than 60 days after date bankruptcy petition is registered.

Decision must contain reference to specific article from relevant regulations of law and/or sources of unwritten law which constitute basis of adjudication as well as legal considerations and opinions which differ from among members or chairman of panel of judges.

Decision setting forth complete legal considerations upon which decision is based must be announced in hearing open to public and such decision may be implemented/executed immediately notwithstanding submission of legal remedies in relation to decision.

Copies of court decision must be delivered by court bailiff through registered express mail to debtor, parties who submitted bankruptcy petition, curator and supervising judge no later than three days after date decision is pronounced.

Notice of Declaration of Bankruptcy.

Within period of not more than five days after date of receipt of bankruptcy declaration decision by curator and supervising judge, curator must publish abstract of bankruptcy declaration decision in State Gazette of Republic of Indonesia and at least two daily newspapers designated by supervising judge. Abstract must contain: (i) Debtor's name, address and employment; (ii) name of supervising judge; (iii) name, address and employment of provisional creditors committee, if already appointed; and (iv) place and time for conducting first creditors meeting.

Preliminary Attachments and Provisional Curators.

Prior to pronouncement of decision on bankruptcy petition, every creditor, public prosecutor, Bank Indonesia, Capital Markets Supervisory Board or Minister of Finance may submit petition to court for: (i) Imposition of conservatory attachment over all or part of wealth of debtor; or (ii) appointment of provisional curator to supervise management of debtor's business and payments to creditors, transfers/assignments or encumbrances over wealth of debtor which would fall within authority of curator in event of bankruptcy. Imposition of conservatory attachment or appointment of provisional curator may only be granted if necessary to protect interests of creditors. If granted, court may stipulate prerequisites requiring petitioning creditor to post security deemed reasonable by Commercial Court.

Supreme Court Appeal.

Legal remedy which may be submitted in relation to decision on bankruptcy petition is appeal to Supreme Court. Petitions for appeal must be filed no later than eight days after date decision to be appealed is pronounced. Registration of petition for appeal is made with clerk of Commercial Court which adjudicated bankruptcy petition. In addition to submissions by debtor and creditor who constitute parties to court proceedings in first instance, petitions for appeal may also be submitted by other creditors who are dissatisfied with bankruptcy petition decision.

Court clerk is required to register petition for appeal on date petition is submitted. Court clerk is also required to provide written receipt signed by clerk dated same date as date of acceptance of registration.

Petitioner on appeal is required to deliver its memorandum of appeal to Commercial Court clerk on date petition for appeal is to be registered. Court clerk is obligated to send petition for appeal and memorandum of appeal to respondent on appeal no later than two days after petition for appeal has been registered.

Respondent on appeal may submit contra-memorandum of appeal to Commercial Court clerk no later than seven days after date respondent on appeal receives memorandum of appeal. Commercial Court clerk is required to deliver contra-memorandum of appeal to petitioner on appeal no later than two days after contra-memorandum of appeal is received.

Court clerk is required to deliver petition for appeal, memorandum of appeal and contra-memorandum of appeal as well as case file to Supreme Court no later than 14 days after date petition for appeal is filed.

Supreme Court is obligated to study petition for appeal and set day for hearing no later than two days after date petition for appeal is received by Supreme Court. Hearing to examine petition for appeal must be conducted no more than 20 days after date petition for appeal has been received by Supreme Court.

Decision on petition for appeal must be pronounced no later than 60 days after date petition for appeal is received by Supreme Court. Decisions on petitions for appeal contain complete legal considerations upon which decision is based and must be pronounced in hearing open to public. In event there are differences in opinions of members and chairman of panel of judges, those differences must be included in decision.

Supreme Court clerk is required to deliver copy of decision on appeal to clerk of Commercial Court no later than three days after decision on appeal has been pronounced. Bailiff of Commercial Court is obliged to deliver copies of decision on appeal to petitioner on appeal, respondent on appeal, curator and supervising judge no later than two days after decision on appeal is received.

Supreme Court Reconsideration.

With respect to decisions on bankruptcy petitions which have already become legally final and binding, motion for reconsideration may be submitted to Supreme Court.

Petitioner for reconsideration is required to deliver memorandum for reconsideration to

Commercial Court clerk on date petition for reconsideration is to be registered. Court clerk is obligated to send petition for reconsideration and memorandum for reconsideration to respondent for reconsideration no later than two days after petition for reconsideration has been registered.

Respondent for reconsideration may submit contra-memorandum for reconsideration to Commercial Court clerk no later than seven days after date respondent for reconsideration receives memorandum for reconsideration. Commercial Court clerk is required to deliver contra-memorandum for reconsideration to petitioner for reconsideration no later than two days after contra-memorandum for reconsideration is received.

Court clerk is required to deliver petition for reconsideration, memorandum for reconsideration and contra-memorandum for reconsideration as well as case file to Supreme Court no later than 14 days after date petition for reconsideration is filed.

Supreme Court is obligated to study petition for reconsideration and set day for hearing no later than two days after date petition for reconsideration is received by Supreme Court. Hearing to examine petition for reconsideration must be conducted no more than 20 days after date petition for reconsideration has been received by Supreme Court.

Decision on petition for reconsideration must be pronounced no later than 60 days after date petition for reconsideration is received by Supreme Court. Decisions on petitions for reconsideration contain complete legal considerations upon which decision is based and must be pronounced in hearing open to public. In event there are differences in opinions of members and chairman of panel of judges, those differences must be included in decision.

Supreme Court clerk is required to deliver copy of decision on reconsideration to clerk of Commercial Court no later than three days after decision on reconsideration has been pronounced. Bailiff of Commercial Court is obliged to deliver copies of decision on reconsideration to petitioner for reconsideration, respondent for reconsideration, curator and supervising judge no later than two days after decision on reconsideration is received.

Cancellation of Bankruptcy Declaration Decision on Appeal or Petition for Reconsideration.

In event bankruptcy declaration decision is overturned/cancelled as result of appeal or petition for reconsideration, all acts which have been conducted by curator prior to or on date curator receives notice regarding cancellation of decision remain valid and binding on debtor.

Within period of not more than five days after date of receipt of decision on petition for appeal or decision on petition for reconsideration which cancels bankruptcy declaration, curator must publish abstract of decision in State Gazette and at least two daily newspapers designated by supervising judge. Abstract must contain: (i) Debtor's name; (ii) name of supervising judge; (iii) name, address and employment of provisional creditors committee, if already appointed; and (iv) place and time for conducting first creditors meeting.

Panel of judges canceling bankruptcy declaration decision must stipulate bankruptcy costs and compensation for services of curator. These costs are to be imposed upon bankruptcy petitioner or upon petitioner and debtor in proportionate amounts determined by panel of judges. In order to collect bankruptcy costs and compensation for services of curator, chairman of Commercial Court may issue execution order upon application of curator.

In event bankruptcy declaration decision is cancelled, settlements/reconciliations which may have been reached are void as matter of law.

Curator.

Within bankruptcy declaration decision, curator must be appointed and supervising judge must be designated from among judges of Commercial Court. In event neither debtor, creditor or other party with competence to submit bankruptcy petition submits proposal for appointment of curator to Commercial Court, then Estate Property Bureau will be appointed as curator.

Curators must be independent, may not have conflicting interests with debtor or creditor, and may not be engaged in handling of more than three bankruptcy and payment obligation suspension cases.

Management of Bankruptcy Estate.

Curator has authority to implement bankruptcy estate managerial and/or settlement tasks from date bankruptcy decision is announced notwithstanding that appeal or motion for reconsideration has been submitted in relation to bankruptcy decision.

Estate Insufficient to Cover Costs.

In event bankruptcy estate is insufficient to pay bankruptcy costs, Commercial Court, upon proposal of supervising judge, and after hearing position of provisional creditors committee if any, as well as after legal notice to or hearing debtor, may decide to cancel bankruptcy declaration decision. Such decisions must be pronounced in hearing open to public. Court clerk is required to publish court decision concerning order canceling bankruptcy declaration decision in State Gazette and at least two daily newspapers designated by supervising judge.

Panel of judges ordering cancellation of bankruptcy must stipulate amount of bankruptcy costs and compensation for services of curator. Total bankruptcy costs and compensation for services of curator are to be imposed on debtor. These costs and compensation for services are granted preference above all other debts which are not secured by collateral. No legal recourse may be submitted in relation to decision of panel of judges regarding bankruptcy costs and compensation for services of curator. In order to collect bankruptcy costs and compensation for services of curator, chairman of Commercial Court may issue execution order upon application of curator with knowledge of supervising judge.

Petitions for appeal and/or petitions for reconsideration may be filed in relation to decisions canceling bankruptcy declarations.

In event another petition for declaration of bankruptcy is submitted after decision canceling bankruptcy declaration is pronounced, debtor or petitioner is obligated to prove that there are sufficient assets to pay bankruptcy costs.

Public Registry.

Commercial Court clerk is required to implement public registry to record every bankruptcy case in individual manner. Public registry is open to public and may be viewed by every person free of charge. Public registry must contain following information in orderly manner: (i) Abstract of bankruptcy decision or decision canceling declaration of bankruptcy; (ii) summary of contents of settlements/reconciliations and legalization decisions thereof; (iii) cancellations of settlements/reconciliations; (iv) amounts of divisions in settlements; (v) cancellations of bankruptcy declaration decisions due to insufficient estate assets to pay bankruptcy cost; and (vi) rehabilitations. Further provisions concerning form and content of public registry are subject to stipulation by decision of Chairman of Supreme Court.

Effect of Bankruptcy.

Bankruptcy includes all of wealth of debtor at time bankruptcy declaration decision is pronounced as well as all that is obtained during bankruptcy with exception of following: (i) Goods, including animals which are truly needed by debtor in connection with his or her job, equipment/supplies, medical equipment used for health purposes, bed and equipment/supplies which are used by debtor and his or her family, and food supplies for 30 days for debtor and his or her family which are found at his or her place; (ii) anything earned by debtor from his or her own work as salary for position or service, as compensation, pension, allowance, support or alimony to extent determined by supervising judge; or (iii) money which is given to debtor to fulfill obligation to provide basic necessities in accordance with law.

Bankrupt debtor includes wife or husband of bankrupt debtor where they are married in communal property.

Debtor by law loses right of authority and management over debtor's wealth which becomes subject to bankruptcy estate from date bankruptcy declaration decision is pronounced. Date of decision commences from midnight local time.

In event funds transfer through bank or non-bank institution is implemented prior to pronouncement of bankruptcy decision, transfer must be continued. In event securities transaction has been implemented on securities exchange prior to pronouncement of bankruptcy decision, transaction must be completed.

All obligations of debtor which arise after bankruptcy declaration decision may not be paid from bankruptcy estate, except obligations which benefit bankruptcy estate.

Claims regarding rights and obligations which relate to bankruptcy estate must be submitted by or against curator. In event claim is to be submitted or continued by or against bankrupt debtor, then if that claim results in penalty against bankrupt debtor, aforementioned penalty will not impose legal effect upon bankruptcy estate.

7.04 EXECUTIONS:

See category 5 Civil Actions and Procedure, topic 5.04 Judgments, subhead Execution of Judgments.

7.05 GARNISHMENT:

See category 5 Civil Actions and Procedure, topic 5.04 Judgments, subhead Execution of Judgments, catchline Seizure.

7.06 HOMESTEADS:

Homestead is bankruptcy concept not specifically recognized in Indonesian bankruptcy law. However, personal exemptions from execution against debtors' property include: (i) Animals related to debtor's work; (ii) personal bed and clothing; (iii) tools relating to official duties; (iv) medical equipment needed by debtor; (v) food supplies for 30 days; (vi) wages; (vii) pension funds; (viii) copyrights; (ix) sum of money decided by supervisory judge for necessities; (x) sum of money provided to debtor to fulfill mandatory requirements to provide basic necessity of life.

7.07 LIENS:

Liens over Movables and Intangibles.

Fiduciary guarantees are governed by Law No. 42 of 1999 dated 30 Sept. 1999 concerning Fiduciary Guarantee, effective as of 30 Sept. 1999.

Pre-30 Sept. 1999.

Prior to promulgation of Law No. 42 of 1999, Indonesian law did not expressly recognize concept of non-possessory liens over movables and intangibles. Instead, custom and practice led to development of concept of fiduciary transfers for security purposes in financings. In fiduciary transfer, debtor transferred to creditor title to goods intended to secure debt with agreement that debtor would be permitted to maintain possession and use of goods as long as he did not default, that possession would be maintained in trust for creditor, that upon satisfaction of outstanding debt creditor would re-convey goods to debtor and that in event of default, creditor would have right to execute goods for satisfaction of secured debt.

As of 30 Sept. 1999, Law No. 42 of 1999 became applicable to all fiduciary guarantees.

Security Interests Granted Prior to 30 Sept. 1999.

Encumbrances over goods in form of fiduciary transfers for security purposes prior to 30 Sept. 1999 continue to be valid provided that contractual provisions governing those security interests do not contravene Law No. 42 of 1999. Encumbrances arising prior to 30 Sept. 1999 must have been adjusted to comply with provisions of Law No. 42 of 1999 within period of not longer than 60 days following establishment of Fidusia Registry Office (see subhead Definitions, catchline Registration, infra) except that obligation to create deed of fiduciary guarantee (see subhead Definitions, catchline Deed of Fiduciary Guarantee, infra) is not required. Failure to make necessary adjustments shall result in loss of security interests over subject goods.

Definitions.

Fidusia means transfer of rights of ownership in certain goods on basis of trust with provision that goods transferred remain under control of their owner.

Fiduciary guarantee means security interest over both movable, either tangible or intangible goods, and immovable goods (particularly buildings which are not able to be encumbered by mortgage rights as intended in Law No. 4 of 1996 concerning Mortgage Rights) which remain under control of fiduciary provider as security for payment of specific debt and which provides priority position to fiduciary recipient over other creditors.

Claim means right to receive payment.

Goods means all things which are able to be owned or to be transferred, both tangible and intangible, whether or not registered, movable or immovable and which are not able to be encumbered by mortgage rights or hypothecation.

Fiduciary provider means natural person or corporation owning property which is object of fiduciary guarantee.

Fiduciary receiver is natural person or corporation possessing claim with right to payment guaranteed by fiduciary guarantee.

Debt means obligation which is or is able to be denominated in either Indonesian or foreign currency, whether direct or contingent.

Creditor means party possessing right of claim arising out of agreement or by law.

Debtor means party possessing debt arising out of agreement or by law.

Person means natural person or corporation.

Exclusions from Law No. 42 of 1999.

Law No. 42 of 1999 does not apply to: (i) Mortgage interests in connection with land and buildings to extent that provisions of law in effect require registration of security interests in goods; (ii) hypothecations over registered ships with gross volume measurements of 20 cubic meters (m3) or more; (iii) hypothecations over aircraft; and (iv) pledge/pawn security.

Derivative Nature of Obligation.

Fiduciary guarantee is form of agreement which is derivative of principle underlying agreement which creates obligation for parties to fulfill certain performances including obligation to give something, to do something or to refrain from doing something where each such performance is capable of being valued in monetary terms.

Deed of Fiduciary Guarantee.

Fiduciary guarantees must be made in form of notarial deeds and are known as deeds of fiduciary guarantee. Fees charged by notaries for deeds of fiduciary guarantee are subject to stipulation by Government Regulation. Deeds of fiduciary guarantee must be made in Indonesian language.

Deeds of fiduciary guarantee must at least contain following: (i) Day, date and hour of making of deed; (ii) identity of fiduciary provider and fiduciary receiver, including (a) full names, (b) religions, (c) addresses or domiciles, (d) place and date of birth, (e) gender, (f) marital status, and (g) employment/work; (iii) data on underlying agreement including kind of agreement and identification of debts secured by fidusia; (iv) description of goods serving as object of fiduciary guarantee (descriptions of goods are deemed sufficient where goods are identified and clarification is provided regarding documentary evidence of ownership) (in event goods serving as object of fiduciary guarantee are in form of stock/inventory which are subject to continuous change and/or are not fixed, such as stocks of basic commodities, finished products or portfolios of securities companies, then deed of fiduciary guarantee must include description of kind, brand and quality of goods); (v) value of guarantee; and (vi) value of goods serving as object of fiduciary guarantee.

Qualifications of Debts.

Settlement of following types of debts may be secured by fidusia: (i) Existing debts; (ii) contingent debts arising at future date though subject to present agreement as to total amount to become due (such debt may take form of bank guarantee given by creditor to bank on behalf of debtor); or (iii) assessable debts including debts in amounts that are calculable at time of execution of fiduciary guarantee based upon underlying agreement giving rise to obligation to fulfill commitment such as payment of interest and other costs stipulated in loan agreement.

Multiple Fiduciary Receivers.

Fiduciary guarantees may be given to more than one fiduciary receiver or to agents/proxies or representatives of fiduciary receivers. This provision is intended to insure that fiduciary guarantees are available for benefit of credit financing consortiums.

Multiple Fiduciary Guarantees Prohibited.

Fiduciary providers may not provide multiple fidusias over same goods which are already object of registered fiduciary guarantees. Fiduciary guarantee by its nature transfers ownership to fiduciary receiver and thus multiple ownership transfers are conceptually impossible.

Multiple Goods.

Fiduciary guarantees may be granted over one or more kinds of goods, including claims, whether already in existence at time of granting of security interest or arising later. Separate agreement is not required in order to perfect security interests in goods and claims arising after granting of fiduciary guarantee.

Products of Goods and Insurance Proceeds.

Unless otherwise agreed, fiduciary guarantees are deemed to include products of goods subject to fiduciary guarantee as well as any insurance claims available in event goods are insured.

Registration.

Goods encumbered by fiduciary guarantee must be registered in Fidusia Registry Office. Obligation to register covers goods located outside of territory of Republic of Indonesia. Registration process is intended to fulfill publicity principle concerning granting of fiduciary guarantees as well as to provide notice to other creditors regarding goods subject to fidusia encumbrances.

Fiduciary guarantee is deemed effective on date of recording of fiduciary guarantee in Fidusia Registry Book.

Registration of fiduciary guarantee is done at Fidusia Registry Office. Fidusia Registry Office is dependent division of Department of Law and Human Rights. Provisions regarding establishment of Fidusia Registry Offices in other areas and designation of their working territories are governed by Presidential Decree. Fidusia Registry Office must be established within one year following 30 Sept. 1999.

Fiduciary guarantees must be registered with Fidusia Registry Office. First Fidusia Registry Office is established in Jakarta with operational area covering entire territory of Republic of Indonesia. Law No. 42 of 1999 provides that Fidusia Registry Offices will be established in capital cities of other provinces throughout Indonesia in staged manner.

Request for registration of fiduciary guarantee is conducted by fiduciary receiver or his proxies or representatives. Request for registration is conducted by attachment of declaration of registration of fiduciary guarantee. Declaration of registration of fiduciary guarantee must contain following: (i) Identities of fiduciary provider and fiduciary receiver; (ii) date and number of deed of fiduciary guarantee and name and domicile of notary who made deed of fiduciary guarantee; (iii) data on underlying agreement secured by fidusia; (iv) description of goods encumbered as objects of fiduciary guarantee and value of those goods; and (v) value of guarantee.

Date of Registration.

Fidusia Registry Office must enter fiduciary guarantee in Fidusia Registry Book on same date as date of receipt of request for registration.

Evaluation of Truth of Contents.

Fidusia Registry Office does not undertake to evaluate truth of contents of declaration of registration. Rather, duty of Fidusia Registry Office is limited to checking that contents of declaration of registration are complete.

Public Nature of Registration.

All information regarding goods which have become object of fiduciary guarantee and which are registered at Fidusia Registry Office are open to public.

Registration fees and procedures are subject to Government Regulation.

Certificates.

Fidusia Registry Office publishes and delivers certificate of fiduciary guarantee to fiduciary receiver on same date as date of receipt of request for registration. Certificate of fiduciary guarantee takes form of copy of Fidusia Registry Book containing notation of contents of declaration of registration. Certificate must contain words “DEMI KEADILAN BERDASARKAN

KETUHANAN YANG MAHA ESA” in capital letters which translates to “FOR SAKE OF JUSTICE BASED ON ALMIGHTY G-D.”

In event of change in matters denoted within certificate of fiduciary guarantee, fiduciary receiver is obligated to file request for registration of modifications with Fidusia Registry Office. Expression of modifications in form of notarial deed is not required. Notice of modifications to certificate of fiduciary guarantee must be provided to all parties. Fidusia Registry Office is required to enter modifications on same date as date of receipt of request for modification and to publish declaration of modification as inseparable part of certificate of fiduciary guarantee.

Executorial Power.

Certificate of fiduciary guarantee possesses same executorial power as court decision which has become final and binding.

Right of Sale.

In event debtor breaches its obligations, fiduciary receiver has right to sell goods which are object of fiduciary guarantee based on fiduciary receiver's own authority.

Transfers of rights to claims secured by fidusia have effect of transferring by law rights and obligations of fiduciary receiver to new creditor. New creditor is required to register transfer of fidusia guarantee with Fidusia Registry Office. Fiduciary guarantees continue to encumber goods following transfer of goods to other persons except that goods categorized as stock or inventory do not continue to be encumbered by fiduciary guarantee following transfer provided that transfer of stock or inventory which is object of fiduciary guarantee is in accordance with customs and practices followed in ordinary course of trading businesses. Fiduciary provider may not transfer stock or inventory which is object of fiduciary guarantee if debtor and/or third party fiduciary provider is already in breach of contract at time of transfer.

Fiduciary provider is obligated to replace stock and inventory already transferred with goods of equivalent kind and value. Buyers of stock or inventory which is object of fiduciary guarantee are free from legal claims even though buyer knows of existence of fiduciary guarantee; provided that buyer has already tendered payment for purchase of goods at market price. Market price is price which is actually in effect in market at time of sale of goods, thus not justifying impression of existence of deceit by fiduciary provider in sale of goods.

In event that fiduciary provider is in breach of contract, products of transfer and/or claims arising from transfer of objects of fidusia automatically become objects of fiduciary guarantee by operation of law.

If fiduciary receiver agrees that fiduciary provider may use, combine, mix or transfer goods or products of goods which are object of fiduciary guarantee, or agrees to collect or compromise claims, agreement does not mean that fiduciary receiver has released fiduciary guarantee.

Fiduciary provider is prohibited from transferring, pledging or leasing to another party goods which are object of fiduciary guarantee (other than stock or inventory) unless fiduciary provider obtains prior written consent of fiduciary receiver. Goods which are not in form of stock or inventory include, for example, production machinery, private cars or private homes.

Liability of Fiduciary Receiver.

Fiduciary receivers do not bear responsibility for consequences of actions or negligence of fiduciary provider either arising from contractual relationships or arising from violations of law in connection with use or transfer of goods which are objects of fiduciary guarantee.

Termination of Fiduciary Guarantees.

Fiduciary guarantees terminate for following reasons: (i) Termination of debt which is guaranteed by fidusia examples of termination of debts include, among other things, payment of debt and evidence of release of debt in form of official statement made by creditor existence of fiduciary guarantee is dependent upon existence of underlying debt; (ii) release of right to fiduciary guarantee by fiduciary receiver; and (iii) destruction of goods which are object of fiduciary guarantee except that insurance claims are not terminated upon destruction of goods claim for insurance replaces goods as object of fiduciary guarantee.

Fiduciary receiver is required to inform Fidusia Registry Office regarding termination of fiduciary guarantee by submitting statement regarding termination of debt, release of right or destruction of goods which are object of fiduciary guarantee. Upon termination of fiduciary guarantee, Fidusia Registry Office is required to delete notation of fiduciary guarantee from Fidusia Registry Book. Fidusia Registry Office is required to publish letter of information stating that relevant certificate of fiduciary guarantee is no longer effective.

Priority Rights.

Fiduciary receivers have priority rights over other creditors to satisfaction of claim through payment from proceeds of execution of goods which are object of fiduciary guarantee. Priority right of fiduciary receiver commences on date of registration of goods in Fidusia Registry Office. In event that goods which are object of fiduciary guarantee are encumbered by more than one fiduciary guarantee, priority right over goods is given to fiduciary receiver who has registered first at Fidusia Registry Office.

Priority right of fiduciary receiver does not terminate as result of bankruptcy or liquidation of fiduciary provider.

Execution of Fiduciary Guarantees.

Upon default of debtor or fiduciary provider, execution against goods which are object of fiduciary guarantee may be done in accordance with following procedures: (i) Implementation of executorial title granted by virtue of obtaining certificate of fiduciary guarantee; (ii) selling goods which are object of fiduciary guarantee based upon power of fiduciary receiver itself through public auction along with obtaining settlement of claim from proceeds of sale; or (iii) private sale performed based upon agreement between fiduciary provider and fiduciary receiver if through this method highest price for goods benefiting both parties is able to be obtained. Any agreement to execute fiduciary guarantee over goods in manner in conflict with foregoing is void as matter of law.

Implementation of private sale may be done after period of one month following provision of notice in writing by fiduciary provider and/or fiduciary receiver to interested parties and publication of notice in at least two newspapers circulated in relevant geographical area.

In event goods which are object of fiduciary guarantee consist of goods of trade or shares which may be sold in market or at stock exchange, sale may be performed at relevant place in accordance with regulations of law in effect.

Any agreement purporting to grant authority to fiduciary receiver to own goods which are object of fiduciary guarantee if debtor defaults is void as matter of law.

Surrender of Goods.

Fiduciary provider is obligated to deposit goods which are object of fiduciary guarantee in framework of implementation of execution. In event that fiduciary provider does not deposit goods at time of implementation of execution, fiduciary receiver has right to take goods and if necessary to request assistance from authorized parties.

Surplus Proceeds, Return.

In event proceeds of execution exceed value of guarantee, fiduciary receiver is obligated to return surplus proceeds to fiduciary provider.

Insufficient Proceeds, Debtor's Obligation.

In event proceeds of execution are insufficient to settle debt, debtor continues to be obligated for that part of debt which remains unpaid.

Criminal Sanctions.

Information Manipulation.

Any person intentionally falsifying, modifying, eliminating or with any other method giving misleading information, which if matter is known to party will not produce agreement of fiduciary guarantee, shall be subject to criminal imprisonment of at least one year and at most five years and fines of at least Rp 10,000,000 and at most Rp 100,000,000.

Transfer, Pledge or Lease.

Fiduciary provider who transfers, pledges or leases goods which are object of fiduciary guarantee without obtaining prior written consent of fiduciary receiver is subject to criminal imprisonment of up to two years and fines of as much as Rp 50,000,000.

Mortgages over Land and Buildings.

See category 18 Mortgages.

7.08 PLEDGES:

Pledges are defined as deposit of movable property including bearer debt instruments as security for debt by delivery of property by debtor to creditor until debt is repaid. Pledge right on commercial paper made to order is established by both endorsement and physical delivery of paper. Pledge grants priority security interest over other creditors.

Pledges are subject to proof in same manner allowed for proof of underlying obligation. Pledges are void if movable property or bearer debt instrument is under control of debtor or pledgor or returned to debtor or pledgor with consent of pledgee. Pledge rights on intangible movable property are established by written notice to persons with rights in subject of pledge.

Unless otherwise permitted by court decision, pledgee may not directly appropriate ownership interests in pledge upon enforcement sale and any contractual stipulation of right of appropriation is void. Unless otherwise agreed by parties, pledge may be sold through public sale in accordance with rules and procedures customary in location of sale following breach of underlying obligation with application of amount received toward satisfaction of debt plus interest and costs. If pledge consists of marketable goods or securities, sale may occur at relevant market, provided that goods are sold at relevant market through two intermediary brokers experienced in trading similar goods.

Pledgee may elect to apply to court for administration of sale, or pledgee may apply to court for direct transfer of ownership interests in pledge. Pledgee is obligated to provide legally valid written notice of alienation of pledge to pledgor. Pledgee is responsible for wasting of pledge to extent caused by pledgee's negligence. Pledgor is required to compensate pledgee for useful and necessary expenses incurred in relation to preservation of pledge.

8 DISPUTE RESOLUTION

8.01 ALTERNATIVE DISPUTE RESOLUTION:

Adat Dispute Resolution—Customary Methods.

Adat law arises out of custom, practice and tradition. It varies across different regions of country and across different cultural and religious groups. (See category 1 Introduction, topic 1.02 Government and Legal System, subhead Legal Pluralism.)

Adat law dispute resolutions are obtained through customary methods of social and physical threat or pressure, negotiation, mediation, arbitration and adjudication. Adat law applied to particular dispute may be mixture of various and differing Adat laws and Islamic law.

Adat settlement procedures are generally unwritten. These procedures employ various forms of negotiation and deliberation to achieve consensus between parties to dispute or between adjudicators. Various penalties may be applied to party who is found to be at fault, such as required apology while having meal with party aggrieved, banishment from one's neighborhood, public embarrassment or payment of fine.

Civil Law Alternative Dispute Resolution mechanisms are governed by Law No. 30 of 1999 dated 12 Aug. 1999 concerning Arbitration and Alternative Dispute Resolution.

Alternative dispute resolution is defined as institute for resolution of dispute or other difference of opinion through procedure which is agreed by parties to dispute, such as out-of-court settlement through consultation, negotiation, mediation, conciliation or expert evaluation. Alternative dispute resolution regulations provide means to attempt settlement of disputes through amicable and less adversarial procedures than arbitration or District Court litigation.

Alternative dispute resolution mechanisms governed by Law No. 30 of 1999 apply provided that parties to dispute have entered into arbitration agreement stipulating that all disputes or differences of opinion in connection with particular legal relationship shall be settled through arbitration or alternative dispute resolution mechanism.

Failure to settle disputes through alternative dispute resolution mechanisms within predefined period of time may result in further referral to arbitration institute or ad hoc arbitration mechanisms agreed in writing by parties. Upon written agreement of parties, attempts to settle dispute or difference of opinion shall be made through one or more expert advisors or through mediator.

Stages.

First stage of alternative dispute resolution requires direct settlement meetings between parties for period not exceeding 14 days. Date of commencement of 14 day period is not defined in Law No. 30 of 1999. Results of direct settlement meetings must be set forth in written agreement.

Second stage of alternative dispute resolution mechanism arises upon failure of parties to settle their dispute or difference of opinion through direct meetings. In event of failure to reach settlement agreement through direct meetings within 14 days, parties may enter into written agreement for appointment of one or more experts or mediator to assist in settlement of their dispute or difference of opinion. Date of commencement of 14 day period is not defined in Law No. 30 of 1999.

Third stage of alternative dispute resolution mechanism arises upon failure of expert advisors or mediator to achieve settlement among parties, parties may refer dispute or difference of opinion to mediation through arbitration or alternative dispute resolution institute for appointment of mediator.

Mediation must commence within seven days following appointment of mediator by arbitration or alternative dispute resolution institute.

Confidentiality must be strictly maintained throughout mediation.

Achievement of written agreement signed by all involved parties must be achieved within maximum of 30 days. Written settlement agreements are final and binding on parties. Settlement agreements must be implemented in good faith. Settlement agreements must be registered with District Court with jurisdiction over respondent within period not exceeding 30 days from signing. Settlement agreements must be completely performed within period not exceeding 30 days from registration with District Court with jurisdiction over respondent.

In event that parties fail to resolve their dispute or difference of opinion through direct meetings, expert advice or ad hoc or institutional mediation, parties may, by written agreement, submit their dispute for settlement through institutional or ad hoc arbitration. (See topic 8.02 Arbitration and Award.)

8.02 ARBITRATION AND AWARD:

Arbitration is governed by Law No. 30 of 1999 dated 12 Aug. 1999 concerning Arbitration and Alternatives Dispute Resolution. This law is binding upon parties to dispute who have entered into arbitration agreement that firmly states that all disputes or differences of opinion that have arisen or may arise in connection with particular legal relationship shall be settled through arbitration.

Transitional Application of Law.

Law No. 30 of 1999 specifically revokes provisions of Arts. 615-651 of Code of Civil Procedure (Reglemen Acara Perdata) (Reglement op de Rechtsvordering, Staatsblad 1847:52), Art. 377 of Renewed Indonesian Code (Reglemen Indonesia yang Diperbarui) (Het Herziene Indonesisch Reglement, Staatsblad 1941:44) and Art. 705 of Code of Procedure for Areas Outside Java and Madura (Reglemen Acara untuk Daerah luar Jawa dan Madura) (Rechtsreglement Buitengewesten, Staatsblad 1927:227); except that, for those disputes already referred to arbitration and already under review but not yet decided as of 12 Aug. 1999, Law No. 30 of 1999 shall be of no force and effect and provisions of Arts. 615 through 651 of Code of Civil Procedure (Reglemen Acara Perdata) (Reglement op de Rechtsvordering, Staatsblad 1847:52), Art. 377 of Renewed Indonesian Code (Reglemen Indonesia yang Diperbarui) (Het Herziene Indonesisch Reglement, Staatsblad 1941:44) and Art. 705 of Code of Procedure for Areas Outside Java and Madura (Reglemen Acara untuk Daerah luar Jawa dan Madura) (Rechtsreglement Buitengewesten, Staatsblad 1927:227) shall continue to govern. See subhead Previous Law, infra, describing provisions of Arts. 615-651 of Code of Civil Procedure (Reglemen Acara Perdata) (Reglement op de Rechtsvordering, Staatsblad 1847:52) and Art. 377 of Renewed Indonesian Code (Reglemen Indonesia yang Diperbarui) (Het Herziene Indonesisch Reglement, Staatsblad 1941:44) and Art. 705 of Code of Procedure for Areas Outside Java and Madura (Reglemen Acara untuk Daerah luar Jawa dan Madura) (Rechtsreglement Buitengewesten, Staatsblad 1927:227). Law No. 30 of 1999 is applicable to disputes already referred to arbitration but not yet under review as of 12 Aug. 1999. For disputes already decided and attaining permanent legal force, enforcement is conducted in accordance with Law No. 30 of 1999.

Definition of Arbitration.

Arbitration is defined as method for resolution of civil dispute which is adjudicated outside of general judicial system based upon written arbitration agreement between parties involved in dispute.

Subject Matter Permissible.

Disputes subject to settlement through arbitration are only those disputes in trade/commercial sector concerning rights which according to prevailing laws and regulations are fully controlled by parties to dispute. Matters deemed to be within scope of commercial law include, among other fields: (i) Matters arising in field of trade and commerce; (ii) banking matters; (iii) finance matters; (iv) investment matters; (v) industrial matters; and (vi) intellectual property rights.

Dispute is not subject to settlement through arbitration if dispute cannot be settled peacefully according to prevailing laws and regulations. Law No. 30 of 1999 does not provide further clarification of this principle. Parties may agree to settlement of both existing or potential disputes through arbitration.

Agreements to Arbitrate must be expressed in written document signed by parties and may be entered into either before or after dispute arises.

Agreements to arbitrate arising subsequent to occurrence of dispute must contain: (i) Description of matter in dispute; (ii) full names and addresses of parties; (iii) full names and addresses of arbitrator or arbitral tribunal; (iv) venue where arbitrator or arbitral tribunal will make its decision; (v) full name of secretary; (vi) period of dispute resolution; (vii) declaration of preparedness of arbitrator; and (viii) declaration of preparedness of parties involved in dispute to bear responsibility for all expenses arising out of conduct of dispute resolution activities through arbitration. In event that any of above elements are missing from written agreement to arbitrate arising subsequent to existence of dispute, agreement is void as matter of law.

Law, Choice of.

Parties to arbitration agreement are entitled to determine choice of law to be applied to resolution of their dispute. If parties do not otherwise specify applicable law, law of venue of arbitration is deemed to apply to resolution of dispute.

Equitable Determinations.

Parties are permitted to enter into agreement obligating arbitrator or arbitral tribunal to render its decision based on strict principles of law or based on equitable principles of fairness and propriety (ex aequo et bono). In event arbitrator is granted freedom to employ equitable principles in determination of resolution of dispute, applicable laws and regulations may be set aside by arbitrator or arbitral tribunal. However, in certain matters where law is mandatory (dwingende regels), law must be applied and may not be set aside by arbitrators. In event that authority is not given to decide matter based upon equitable principles, arbitrators must render their decision based upon material legal norms as would be applied by judge.

Annulment of Agreements.

Arbitration agreements cannot be annulled/rescinded as result of following conditions: (i) Death of party; (ii) bankruptcy of party; (iii) novation/assignment/obligation renewal; (iv) insolvency of party; (v) inheritance; (vi) application of termination provisions of principal agreement underlying dispute; (vii) assignment of performances of principal agreement underlying dispute to third party even where other party to agreement has given its consent to assignment; or (viii) expiration or rescission of principal agreement underlying dispute.

Jurisdiction of Court.

Existence of written arbitration agreement eliminates right of parties to submit settlement of dispute or difference of opinion which is included within agreement to District Court for resolution.

Arbitrators.

Authority of Arbitrators.

Agreement providing authority to settle disputes through arbitration is interpreted to provide authority to arbitrator to determine rights and responsibilities of parties within decision of arbitrator if those rights and responsibilities are not specifically governed within their agreement.

Appointment.

Arbitrators may be appointed by parties to dispute, by District Court with jurisdiction over residence of respondent or by arbitration institute. Where parties are unable to reach agreement on selection of arbitrators or where there are no provisions setting forth rules relating to appointment of arbitrators, chairman of District Court with jurisdiction over respondent is empowered to appoint arbitrator or arbitral tribunal.

Single Arbitrator.

In cases where parties have agreed that dispute will be reviewed and decided by single arbitrator, parties are obligated to reach agreement regarding appointment of single arbitrator. Claimant (by registered letter, telegram, telex, facsimile, e-mail or courier) must submit to respondent name of person claimant proposes to appoint as sole arbitrator. If parties are unable to reach agreement regarding appointment of sole arbitrator within period of 14 days after respondent receives claimant's proposal, then upon request of one of parties, chairman of District Court may appoint arbitrator. Chairman of District Court conducts appointment of sole arbitrator based on list of names submitted by parties or based upon list of names obtained from arbitration organization or institute with consideration given to recommendations and objections filed by parties concerning proposed arbitrators.

Three Arbitrators.

Appointment of two arbitrators by parties vests authority in two arbitrators appointed to choose and appoint third arbitrator as chairman of arbitral tribunal.

If one of parties has not appointed person to be member of arbitral tribunal within period of not longer than 30 days after respondent's receipt of notice of commencement of arbitration (see subhead Procedures of Arbitration, catchline Notice of Commencement of Arbitration, infra), arbitrator appointed by other party will act as sole arbitrator and his decision will bind both parties.

In event that two arbitrators appointed by parties do not succeed in appointing third arbitrator within period of not longer than 14 days after last arbitrator is appointed, then based upon request of one of parties, chairman of District Court may appoint third arbitrator. Appointment of third arbitrator by chairman of District Court is not subject to filing of claim for cancellation.

Acceptance or Rejection.

Persons appointed as arbitrators may accept or reject their appointments by informing parties in writing within 14 days from date of appointment.

Civil Agreement.

Written appointment by parties of arbitrator or arbitral tribunal along with written acceptance of appointment constitutes civil agreement between arbitrator and party appointing him. This civil agreement obligates arbitrator to render decision honestly, justly and in accordance with regulations in effect. Civil agreement also binds parties to accept decision as final and binding as if it arose by mutual agreement.

Qualifications.

Persons eligible for appointment as arbitrators must fulfill following qualifications: (i) Appointees must be capable of taking legal action; (ii) women and men are deemed equally competent to serve as arbitrators; (iii) appointees must be at least 35 years of age; (iv) appointees may not have blood or marital relationship with any of parties closer than second degree of familial descent; (v) appointees may not have financial or other interest in outcome of arbitration decision; (vi) appointees are obligated to inform parties of presence of any matter that may have potential to impair their freedom or cause partisanship with respect to decision to be issued; (vii) appointees must possess substantial active experience and mastery in relevant field for minimum of 15 years (Law No. 30 of 1999 does not stipulate definition for “relevant field”); and (viii) judges, prosecutors, clerks of court or other judicial officials are not qualified to serve as arbitrators.

Withdrawal.

Following arbitrator's written acceptance of appointment, withdrawal is prohibited without approval of parties. Arbitrators desiring to withdraw must submit written application to parties. In event parties refuse to release arbitrator seeking withdrawal, arbitrator may apply for relief from chairman of District Court with jurisdiction over residence of respondent.

Liability.

Arbitrators may be held liable to compensate parties for loss and expense arising out of failure of arbitrators to render their decision within designated time limit without legitimate reason. Unless ill will/bad faith can be proven, arbitrators do not bear legal liability of any kind for any act taken during hearing process in relation to performance of duties as arbitrators.

Refusal Right.

Parties may submit claims of refusal against arbitrator if there is sufficient authentic evidence raising doubt concerning unfettered non-partisan performance of arbitrator's duties in rendering decision. Claim for refusal may also be lodged against arbitrator if proven there is family, financial or working relationship with one of parties or their proxies. Submission of claim demanding refusal against sole arbitrator or member of arbitral tribunal must state grounds for refusal and must be made in writing to arbitrator concerned, other arbitrators and other party. Claim of right of refusal must be submitted within period not exceeding 14 days from appointment of arbitrator concerned or within 14 days of date matters constituting grounds for refusal become known. Where arbitrators are appointed without court stipulation, parties are deemed to have waived their right of refusal based upon grounds known to them at time of their appointment of arbitrator concerned. However, right of refusal continues to be exercisable if new grounds come to attention of party following acceptance of arbitrator concerned.

Right of refusal against arbitrator appointed by chairman of District Court must be submitted to District Court with jurisdiction over residence of respondent. Where arbitrators are appointed with court stipulation, right of refusal may only be exercised by party based upon grounds known after acceptance of court stipulation of arbitrator concerned.

Obligation to Withdraw.

In event party agrees with another party's claim of right of refusal, arbitrator concerned must withdraw and alternate arbitrator must be appointed in accordance with Law No. 30 of 1999. (See catchline Alternate Arbitrators, Appointment of, infra, regarding rules of appointment of alternate arbitrators.) In event claim of refusal which is submitted by one party is not approved by other party and arbitrator concerned refuses to withdraw, party exercising its right of refusal may file claim with chairman of District Court with jurisdiction over residence of respondent. Following review of arguments, District Court is empowered with discretion to either accept or reject party's claim of refusal based upon whether claim is found to be reasonable. If claim for refusal is found to be reasonable, alternate arbitrator must be appointed in accordance with Law No. 30 of 1999. If claim for refusal is found to be unreasonable, arbitrator concerned will continue in his or her role as arbitrator. Decision of chairman of District Court is binding on both parties and decision final in nature and non-appealable.

Death of Arbitrator.

Arbitrator's authority cannot be cancelled upon death of arbitrator and said authority is continued by alternate arbitrator appointed in accordance with Law No. 30 of 1999. (See catchline Alternate Arbitrators, Appointment of, infra, regarding rules of appointment of alternate arbitrators.)

Termination of Arbitrator.

Arbitrators may be relieved of their duties if they are proven to be partisan or to have behaved in improper manner.

Replacement Due to Death, Incapacity or Withdrawal.

If arbitrator dies, becomes incapacitated or withdraws during course of review of dispute, alternate arbitrator will be appointed in manner applicable to appointment of arbitrator who has died, become incapacitated or withdrawn. Where sole arbitrator or chairman of arbitral tribunal is replaced, review of dispute must be repeated. If member of tribunal other than chairman is replaced, review of dispute need only be repeated in orderly manner among arbitrators. Review may continue based on minutes of hearings, letters in evidence and conclusions previously made.

Alternate Arbitrators, Appointment of.

In event of death of arbitrator, acceptance of claim of refusal or termination of one arbitrator or more, all parties must appoint alternate arbitrator. If parties fail to agree on appointment of alternate arbitrator within period of not longer than 30 days, then chairman of District Court with jurisdiction over residence of respondent is obligated to appoint alternate arbitrator upon request of one of parties.

End of Duties of Arbitrators.

Duties of arbitrators shall end in following circumstances: (i) Arbitration decision has been issued; (ii) time period stipulated in arbitration agreement or as already extended by parties has expired; or (iii) parties agree to revoke appointment of arbitrator.

Death of Party.

Death of one of parties will not cause termination of tasks of arbitrators.

Arbitration Fees.

Arbitrator determines arbitration fee. Arbitration fee shall include: (i) Honorarium for arbitrator; (ii) travel and other costs and expenses incurred by arbitrator; (iii) costs of witnesses and/or expert witnesses needed for review of dispute; and (iv) administrative fees. Arbitration fee shall be for account of losing party. In event that claim is only partially granted, parties shall bear equal responsibility for payment of arbitration fee.

Arbitration Institutes are organizations chosen by parties to dispute to issue decisions regarding certain dispute and/or chosen by parties to issue binding opinions regarding legal relationships where disputes have not yet arisen.

Jurisdiction and Authority of District Court.

District Court has no authority (lacks absolute competence) to adjudicate disputes arising between parties to arbitration agreements. District Court is required to reject and refrain from interference in settlement of disputes subject to agreements to arbitrate, except in matters which are otherwise specifically regulated in Law No. 30 of 1999. Where District Court lacks absolute competence over subject matter, District Court is required to declare that it is without absolute competence to adjudicate civil case upon request of party at any time during pendency of litigation.

Binding Law between Parties.

From contractual perspective, Indonesian Civil Code (Kitab Undang-undang Hukum Perdata) (KUHPer) (Burgerlijk Wetboek voor Indonesië) provides that all agreements which are made in accordance to law are effective as law for those who make them.

New York Convention of 1958.

Indonesia is signatory to New York Convention of 1958 on Recognition of Foreign Arbitral Awards. New York Convention requires contracting States such as Indonesia to recognize and enforce arbitration agreements and courts of contracting States are required to refer parties to arbitration upon request of one of parties.

Jurisprudence.

Following decisions were issued by Supreme Court of Republic of Indonesia ruling that District Court lacked jurisdiction to adjudicate disputes and ruling in favor of enforcement of arbitration clauses: (1) Ahju Forestry Company Limited v. Mr. Sutomo, Director of PT. Balapan Jaya is decision of Supreme Court of Republic of Indonesia, in Case No. 2924/K/Sip/1981 dated 22 Feb. 1982 enforced validity and binding nature of arbitration provisions undertaken by parties in agreement concerned; (2) PT. Maskapai Asuransi Ramayana v. Sohandi Kawilarang is decision of Supreme Court of Republic of Indonesia, in Case No. 455K/Sip/1982 dated 27 Jan. 1983 provides guidelines for District Courts to determine whether they have jurisdiction over case stating that in event parties have agreed that any dispute between them shall be referred to arbitration, District Court shall refer such case to arbitration and reject adjudication of merits thereof; (3) PT. Arpeni Pratama Ocean Line v. PT. Shorea Mas is decision of Supreme Court of Republic of Indonesia, in Case No. 3179 K/Pdt/1984 dated 4 May 1988 rectifies decision of lower court based on reason that District Court concerned had no absolute competence to adjudicate claim because parties concerned had agreed that such dispute would be referred to arbitration; (4) Dato Wong Heck Guong and PT. Metropolitan Timbers Ltd., against Andries Gerardus Pangemanan/ Director of PT. Gapki Trading Co. Ltd. is decision of Supreme Court of Republic of Indonesia, in Case No. 255 K/Sip/1976, dated 30 Sept. 1983 expressly states that arbitration clause serves as binding law between parties and therefore required District Court to direct parties to file their case at International Arbitral Tribunal in Singapore in accordance with United Nations Commission on International Trade Law (UNCITRAL) Arbitration Rules.

Procedures of Arbitration.

Notice of Commencement of Arbitration.

In event party desires to commence arbitration proceedings, that party ("claimant") must inform other party ("respondent") by registered letter, telegram, telex, facsimile, e-mail or by courier that conditions of arbitration stipulated by parties are in effect.

Contents of Notice.

Notice of commencement of arbitration must clearly state: (i) Name and address of each party; (ii) reference to arbitration clause or arbitration agreement in effect; (iii) agreement or matter in dispute; (iv) basis of claim and amount claimed, if any; (v) method of resolution preferred; and (vi) agreement in effect regarding number of arbitrators or if there is no such agreement, submission of proposal regarding odd number of arbitrators.

Venue for arbitration is designated by arbitrator or arbitral tribunal unless parties have designated venue themselves. Arbitrator or arbitral tribunal may examine witnesses and hold other meetings deemed necessary at places other than designated venue of arbitration based on considerations such as place of residence of relevant witness and subject to provisions of code of civil procedure. Arbitrator or arbitral tribunal may conduct examinations at location of goods or other matters related to dispute under review and, if deemed necessary, parties shall be summoned in legally valid manner in order to provide them with opportunity to be present at review.

Venue of arbitration may determine law to be applied in resolution of dispute.

Written Proceedings.

In principle, arbitration proceedings are conducted in writing unless there is agreement among parties to conduct oral proceedings or unless arbitrator or arbitral tribunal deems oral review necessary. In event it is agreed, dispute settlement through arbitration may be conducted by exchange of letters, telexes, telegrams, facsimiles, e-mails or other forms of communications transmissions. Notations of receipt of communication transmissions by parties are obligatory.

Claim Submission.

Within period designated by arbitrator or arbitral tribunal, claimant must submit its letter of claim to arbitrator or arbitral tribunal. Letter of claim must include following information: (i) Full name and residence or domicile of parties; (ii) brief description of dispute along with attachment of relevant evidentiary exhibits; (iii) copy of arbitration agreement; and (iv) clear statement of claim including total monetary compensation requested, if any.

Answer.

Following receipt of claim, arbitrator or chairman of arbitral tribunal is required to deliver copy of claim to respondent along with instruction that respondent must submit its answer in writing within period not longer than 14 days from date respondent receives copy of claim. Immediately following receipt of answer from respondent on instruction of arbitrator or chairman of arbitral tribunal, copy of answer must be delivered to claimant.

Counter Claim.

In respondent's answer or not later than first hearing, respondent is entitled to submit its counter claims and opportunity to respond thereto must be provided to claimant. Respondent's counter claims must be reviewed and ruled upon by arbitrator or arbitral tribunal together with primary dispute.

First Hearing.

At time of delivery of respondent's answer to claimant, arbitrator or chairman of arbitral tribunal is required to instruct parties or their duly appointed proxies to appear at first arbitration session designated to be held within period of not longer than 14 days following issuance of instruction to appear.

Failure to Answer.

In event that respondent fails to submit its answer in writing within period of 14 days from date respondent receives copy of claim, arbitrator or chairman of arbitral tribunal is required to issue instruction ordering parties or their duly appointed proxies to appear at first arbitration session which shall be designated to be held within period of not longer than 14 days following issuance of instruction to appear.

Failure to Appear.

If claimant fails to appear on day designated for first hearing without any lawful reason and after receiving proper notice, letter of claim shall be declared null and void and duties of arbitrator or arbitration board shall be deemed completed. If respondent fails to appear on day designated for hearing without any lawful reason and after receiving proper notice, arbitrator or arbitral tribunal must immediately issue another notice for subsequent hearing set to occur not later than ten days after respondent receives notice. In event respondent fails to appear at both first scheduled hearing and subsequent hearing without lawful reason, review of claimant's claim shall continue in absence of respondent and claimant's claim shall be accepted in its entirety unless: (i) Claim is unreasonable; or (ii) claim is not based on law.

Settlement of Dispute.

In event parties appear on designated day, arbitrator or arbitral tribunal is obligated to attempt to assist parties to achieve agreement for settlement of their dispute. In event that parties agree to settlement of their dispute, arbitrator or arbitral tribunal is required to prepare deed of settlement. Deed of settlement is deemed final and binding on parties. Arbitrator or arbitral tribunal is required to order parties to fulfill provisions of settlement. Review of matters in dispute shall be continued in event that efforts to achieve settlement agreement are unsuccessful.

Clarification Statement.

Prior to continuation of review of dispute following failure to achieve settlement agreement, parties are given final opportunity to submit written statements of clarification of their respective positions along with further evidence deemed necessary by parties in support of their positions. Arbitrator or arbitral tribunal determines period during which parties are entitled to submit clarification statements. Arbitrator or arbitral tribunal has right to request that parties submit additional statements of clarification, documents or other evidence deemed necessary within period of time designated by arbitrator or arbitral tribunal.

Revocation of Claim.

Prior to submission of respondent's answer, claimant may withdraw its request for settlement of dispute through arbitration.

Amendment to Claim.

Following submission of respondent's answer, claimant may only amend or add to its letter of claim with approval of respondent and only to extent that amendment or addendum relates to matters of factual nature and not to legal basis of claim.

Witnesses.

One or more witnesses or one or more expert witnesses may be called to testify upon request of parties or upon instruction of arbitrator or arbitral tribunal. Costs relating to calling of witnesses and costs relating to their transportation are borne by party requesting testimony. Examinations of witnesses, including expert witnesses, are conducted in accordance with law of civil procedure. Witnesses and expert witnesses are obligated to take oath prior to providing information. Oath is made in accordance with witness's religion and includes statement that testimony will be true.

Arbitrator or arbitral tribunal is entitled to request assistance of one or more expert witnesses for purposes of providing written information regarding particular aspects of dispute. Parties are obligated to provide any and all information required by expert witnesses. Arbitrator or arbitral tribunal must forward to parties copies of all information given to or received from expert witnesses in order to enable parties to respond in writing to such information. In event party deems matter to be unclear, party concerned is entitled to request that relevant expert witness testify in arbitration hearing in presence of parties or their proxies.

Minutes of Review and Hearing.

Minutes of review and hearings are prepared by secretary of arbitrator or arbitral tribunal. Appointment of secretary and provision of opportunity to review and dispute minutes prepared is not regulated by Law No. 30 of 1999.

Confidential Review.

All examinations of dispute by arbitrator or arbitral tribunal are conducted in closed manner in order to preserve confidentiality.

Language.

Arbitration proceedings shall be conducted in Indonesian language except that, with agreement of arbitrator or arbitral tribunal, parties may choose to use another language. Arbitrator or arbitral tribunal may require that each document or proof be accompanied by translation into language designated by arbitrator or arbitral tribunal.

Equal Opportunity to Parties.

Parties shall have same rights and opportunities to express their respective opinions.

Attorneys and Proxies.

Parties are entitled to elect to be represented by proxies holding special powers of attorney.

Third Party Joinder.

Third parties may join in arbitration proceeding if third parties have related interests and if parties to existing arbitration agree to joinder and if arbitrator or arbitral tribunal approves joinder.

Rules of Procedure.

Where parties do not stipulate rules of procedure, provisions of Law No. 30 of 1999 apply. Rules of procedure governing arbitration process may be determined by parties to dispute provided such rules are incorporated into specific written agreement and provided those rules are not contrary to provisions of Law No. 30 of 1999.

Venue and Time Limitation.

Where parties have designated procedure of arbitration, parties must also designate venue and period of time for conduct of arbitration. In event that parties have not designated either venue or period of time for conduct of arbitration, arbitrator or arbitral tribunal shall designate them.

Closure of Review.

Upon completion of review of matters in dispute, review must be closed and hearing date must be designated for purpose of pronouncement of arbitration decision.

Death of Party.

Death of one of parties shall extend period for completion of review and continuation of duties of arbitrators for not longer than 60 days from date of death of party.

Institutes of Arbitration, International or National.

Resolution of disputes may be conducted through use of national or international arbitration institutes upon agreement of parties to dispute. Regulations and procedures of institute chosen shall govern arbitration unless otherwise agreed by parties.

Time Limitation.

Unless otherwise agreed by parties, review of dispute must be completed within period of not longer than 180 days counting from date of appointment of arbitrator or formation of arbitral tribunal. 180 day period of time designated for completion of review of dispute may be extended by agreement of parties and by authority of arbitrator or arbitral tribunal. Arbitrator or arbitral tribunal has authority to extend period of time for review if: (i) One of parties files request for extension due to certain special circumstances, for example, existence of related or incidental lawsuit outside primary dispute such as request for enforcement of guarantee; (ii) extension is necessary as result of issuance of provisional decision or preliminary order; or (iii) arbitrator or arbitral tribunal deems extension of time to be necessary in interests of review.

Interpretive Opinions.

Even in absence of dispute, parties to arbitration agreement have right to request binding opinion from arbitration institute concerning particular legal connection arising under agreement. For example, parties may request binding opinion regarding, among other things, interpretation of unclear or ambiguous provisions of agreement or need for amendment or addition to agreement in view of unforeseen situations.

Interpretive opinions are binding on parties and become part of underlying agreement between parties. Act in contradiction to interpretive opinion constitutes breach of underlying agreement.

Parties are prohibited from taking any action in nature of appeal or other form of resistance through any other legal remedies against mandates of binding interpretive opinion.

Preliminary Orders.

At request of one of parties, arbitrator or arbitral tribunal is empowered to issue provisional decisions or other preliminary orders in order to provide for orderly proceeding of review of dispute. Provisional decisions and preliminary orders may include decrees for collateral confiscation, orders for bailment to third parties or sale of perishable goods.

Decisions.

Contents.

Arbitration decisions must contain following elements: (i) Title of decision must contain words “DEMI KEADILAN BERDASARKAN KETUHANAN YANG MAHA ESA” in capital letters which translates to “FOR SAKE OF JUSTICE BASED ON ALMIGHTY GD"; (ii) full names and addresses of parties; (iii) brief description of dispute; (iv) description of stances of parties; (v) full names and addresses of arbitrators; (vi) considerations and conclusions of arbitrator or arbitral tribunal regarding entire dispute; (vii) opinion of each arbitrator in event that there is difference of opinion among members of arbitral tribunal; (viii) specific orders, commands and/or injunctions of decision; (ix) time period for enforcement of order; (x) venue and date of decision; and (xi) signature of arbitrator or arbitral tribunal.

Failure of one of members of arbitration board to sign arbitration decision on account of illness or death does not impact strength of decision provided that decision states reasons for failure of arbitrator to sign.

Pronouncement of Decision.

Upon completion of review of matters in dispute, review must be closed and hearing date must be designated for purpose of pronouncement of arbitration decision. Pronouncement of decision must be made with 30 days after review has been closed.

Corrections.

Within period of not longer than 14 days after receipt of decision, parties may submit applications to arbitrator or arbitral tribunal requesting correction of administrative errors and/or modification of overly broad and/or deficient decisions. Right to request correction of administrative error encompasses corrections in nature of typographical errors, errors in spelling of names and addresses of parties or arbitrators and other such errors that do not have effect of modifying substance of decision. Right to request correction of overly broad or deficient decisions encompasses claims that, among other things: (i) Decision grants relief that was not requested; (ii) decision omits resolution of one or more issues raised for adjudication; or (iii) decision contains binding provisions that are contradictory to one another.

Final and Binding Nature of Decisions.

Arbitration decisions are of final nature, binding upon parties. As such, arbitration decisions are not subject to appeal or judicial review.

Enforcement of Arbitration Decisions.

National Arbitrations.

Within period of not longer than 30 days from date of pronouncement of arbitration decision, arbitrator or his/her proxy must submit and register original decision or authentic copy thereof with clerk of District Court with jurisdiction over residence of respondent. Submission and registration is performed by notation and signing at end of section or margin of decision by clerk of District Court with jurisdiction over respondent and arbitrator or his/her proxy who has made submission. Notation constitutes deed of registration. Arbitrator or his/her proxy is obligated to submit arbitration decision to clerk of District Court with jurisdiction over residence of respondent. Arbitrator or his proxy is obligated to submit original or authentic copy of arbitrator's appointment as arbitrator to clerk of District Court with jurisdiction over residence of respondent. Failure to register arbitration decision with clerk of District Court with jurisdiction over residence of respondent has effect of preventing enforcement of arbitration decision. All costs arising in connection with creation of deed of registration of arbitration decision shall be borne by parties.

Enforcement.

In event that parties fail to implement arbitration decision voluntarily, decision will be enforced based on order of chairman of District Court with jurisdiction over residence of respondent at request of one of parties. Chairman of District Court with jurisdiction over residence of respondent must order enforcement of arbitration decision within not longer than 30 days following registration of one of parties request for enforcement. Prior to issuance of order for enforcement, chairman of District Court with jurisdiction over residence of respondent is required to review whether arbitration decision is founded upon enforceable arbitration agreement, whether dispute is one that is legally subject to resolution through arbitration and whether arbitration decision is not contradictory to public order and decency/morality.

Chairman of District Court with jurisdiction over residence of respondent is prohibited from reviewing reasons or considerations of arbitration decision. Chairman of District Court is prohibited from reviewing reasons and considerations forming basis of arbitration decision in order to ensure that arbitration is truly independent, final and binding.

In event that chairman of District Court rules that arbitration decision is not founded upon enforceable arbitration agreement, that proper authorization of arbitrator or arbitral tribunal had not been given, that dispute is not one that is legally subject to resolution through arbitration or that arbitration decision is contradictory to public order and decency/morality, request for enforcement will be denied. Decision to refuse to order enforcement is final and non-appealable.

Form of Order.

Order of chairman of District Court must be in writing on original arbitration decision and on authentic copy of arbitration decision issued. Arbitration decisions bearing written enforcement order of chairman of District Court must be enforced in manner of enforcement of decisions in civil cases that have attained permanent legal force.

International Arbitrations.

International arbitration decision is decision rendered by arbitration institute or individual arbitrator outside of legal territory of Republic of Indonesia, or decision of arbitration institute or individual arbitrator that is regarded as international arbitration decision according to provisions of law of Republic of Indonesia.

Central Jakarta District Court is institution authorized to administer recognition and enforcement of international arbitration decisions.

International arbitration decision may be acknowledged and enforced in legal territory of Republic of Indonesia only if it fulfills following conditions: (i) International arbitration decision is issued by arbitrator or arbitral tribunal in country which is bound to bilateral or multilateral agreement with Republic of Indonesia concerning recognition and enforcement of international arbitration decisions; (ii) international arbitration decision must be limited in scope to those matters considered of trade/commercial nature pursuant to Indonesian law; (iii) international arbitration decision must not be contrary to public order; (iv) international arbitration decision must have obtained enforcement order from Central Jakarta District Court; and (v) international arbitration decision, where it involves State of Republic of Indonesia as party, must have obtained enforcement order from Supreme Court of Republic of Indonesia, which order is subsequently delegated to Central Jakarta District Court. Decision of Supreme Court regarding recognition and enforcement of international arbitration decision involving Government of Republic of Indonesia as party is final in nature and no legal remedies of opposition may be submitted.

Registration of Decisions.

Request for enforcement of international arbitration decision is made following submission and registration of decision by arbitrator or his proxy to clerk of Central Jakarta District Court. Delivery of dossier of request for enforcement of international arbitration decision must include following: (i) Original or copy of international arbitration decision authenticated in accordance with regulations relating to authentication of foreign documents along with official translation of decision into Indonesian language; (ii) original or copy of arbitration agreement authenticated in accordance with regulations relating to authentication of foreign documents along with official translation of agreement into Indonesian language; and (iii) statement of information from Indonesian diplomatic representative in country from which international arbitration decision was issued stating that applicant's country is bound by either bilateral or multilateral agreement with Republic of Indonesia concerning recognition and enforcement of international arbitration decisions.

Law No. 30 of 1999 does not provide rules governing situation where venue of issuance of arbitration decision is located in territory of nation different from nationality of applicant. Law also fails to state whether it is sufficient that either country of venue or country of applicant are parties to bilateral or multilateral agreements concerning recognition and enforcement of international arbitration decisions.

Enforcement Order.

Issuance of enforcement order obtained from Central Jakarta District Court in relation to international arbitration decision is final in nature and no appeal may be submitted.

In event chairman of Central Jakarta District Court refuses to acknowledge and enforce international arbitration decision, interested party may appeal District Court's refusal. Supreme Court is required to consider and rule upon each submission of appeal against refusal to acknowledge and enforce international arbitration decision within period of not longer than 90 days after request for appeal has been received by Supreme Court.

Delegation to District Court in Relevant Jurisdiction.

After chairman of Central Jakarta District Court issues enforcement order for international arbitration decision, order is delegated to District Court with relative competence (venue jurisdiction over party subject to enforcement—enforcement respondent) to carry out enforcement. Enforcement through confiscation may be conducted against assets and property of enforcement respondent. Procedure for both asset and property confiscation and other means of enforcement of international arbitration decision is conducted in accordance with Indonesian law of civil procedures.

Cancellation of Arbitration Decisions.

Parties are entitled to submit requests for cancellation of arbitration decision if decision is alleged to contain following elements: (i) Letters or documents submitted in review are admitted or stated to be false following issuance of arbitration decision; (ii) following issuance of arbitration decision, documents of decisive nature are found to have been hidden by party; or (iii) ruling is derived out of product of deceit of one of parties.

Requests for cancellation of arbitration decisions may only be submitted against arbitration decisions which have already been registered with District Court with jurisdiction over residence of respondent.

Request for cancellation of arbitration decision must be made in writing during period of time not exceeding 30 days following date of delivery and registration of arbitration decision to clerk of District Court with jurisdiction over respondent. Request for cancellation of arbitration decision must be submitted to chairman of District Court with jurisdiction over residence of respondent. Chairman uses court decision regarding proof of grounds for cancellation as basis for determining whether to grant or deny cancellation request. Chairman must issue his decision regarding arbitration decision cancellation request within period of not longer than 30 days following submission of request by interested party.

Upon acceptance of request for cancellation of arbitration decision, chairman of District Court is required to determine further effect of cancellation on arbitration decision including whether cancellation is complete or partial. Upon acceptance of cancellation request, chairman also has authority to determine whether same arbitrators or other arbitrators will review dispute again or whether it is impossible to resolve dispute through arbitration.

Appeal against Cancellation Decision.

Decision of chairman of District Court relating to request for cancellation is appealable at first and last level to Supreme Court. Supreme Court is obligated to consider and issue its decision on appeal of decision of chairman relating to request for cancellation within period of not longer than 30 days following receipt by Supreme Court of request for appeal.

International Conventions.

In 1968, Indonesia ratified International Convention on Settlement of Investment Disputes between States and between Nationals of other States. In 1981, Indonesia became contracting party to New York Convention on Recognition and Enforcement of Foreign Arbitral Awards of 1958.

Previous Law.

Governing Law.

Arts. 615 through 651 of Code of Civil Procedure (Reglemen Acara Perdata) (Reglement op de Rechtsvordering, Staatsblad: 1847:52), Art. 377 of Renewed Indonesian Code (Reglemen Indonesia yang Diperbaharui) (Het Herziene Indonesisch Reglement, Staatsblad 1941:44) and Art. 705 of Code of Procedure for Areas Outside Java and Madura (Reglemen Acara untuk Daerah luar Jawa dan Madura) (Reglement Tot Regeling Van Het Rechtswezen in de Gewesten Buiten Java en Madura, Staatsblad 1927:227) constituted governing law prior to enactment of Law No. 30 of 1999 dated 12 Aug. 1999 concerning Arbitration and Dispute Resolution Alternatives.

Agreement to Arbitrate.

Arbitration is recognized as binding under Indonesian law if parties agree to binding nature of obligation in advance. Agreement by all parties effected by dispute is required in order to adopt arbitration as resolution mechanism. Parties may enter into agreement before or after dispute arises. Arbitration agreements must be made in writing and signed by all concerned parties. If party is unable to sign, arbitration agreement must be executed as notarial deed. Arbitration agreement must include subject of dispute, names and domiciles of all parties and names and domiciles of arbitrators.

Prohibited Subject Matter.

Arbitrations of disputes regarding gifts and testamentary bequests for necessities of life, housing or clothing, separation of husbands and wives, division of marital property and disputes regarding person's status are prohibited. Arbitration awards purporting to resolve these issues are void.

Arbitrators.

All persons are competent to serve as arbitrators except judges, prosecutors, clerks of court, women and children. Odd number of arbitrators must be appointed. If parties fail to agree upon selection of arbitrators at time of dispute, one party may request appointments to be made by judge of District Court that would have had jurisdiction over dispute absent agreement to arbitrate.

Acceptance of duties of arbitrator must be made in writing signed by arbitrator concerned.

During designated period of time for hearing dispute, arbitrators cannot be replaced except by agreement of parties.

Arbitrators cannot resign from their duties without permission from parties or from judge of District Court that would have had jurisdiction over dispute absent agreement to arbitrate.

Rules of Procedure.

Arbitration proceedings are conducted in manner stipulated in arbitration agreement or, if no stipulation is provided, in manner determined by arbitrators.

Decisions.

Arbitration agreements may stipulate time period for rendering arbitration decision. If no time period is specified, arbitration decision must be rendered within six months commencing from date of acceptance of appointment of arbitrators. If parties fail to present evidence during arbitration period, arbitrators may decide to extend proceedings or provide notice that their duties have concluded.

Following expiration of period for decision, arbitrators are required to render decision based upon evidence presented as of expiration of period.

Arbitration decisions must include: (i) Date and place of decision; (ii) signature of arbitrators (if arbitrator in minority refuses to sign decision, other arbitrators must mention refusal in decision); (iii) given names, full names and domiciles of all parties; (iv) summary of positions of parties; (v) legal basis of decision; and (vi) decision itself.

Enforcement.

Decision signed by majority of arbitrators is enforceable. Arbitrators' decision must be sent to clerk of District Court of jurisdiction wherein decision is rendered. Each of arbitrators must provide original deed of their appointments along with their decision to clerk. Decision of arbitrators is enforced based on order of chairman of District Court. Decision is then enforced in accordance with procedures for enforcement of District Court judgments.

Appeal.

Arbitration decision is appealable if dispute concerns sum in excess of 500 gulden. Parties may waive their right to appeal.

Cancellation of Decision.

Even where there is no right to appeal, cancellation of arbitration decisions may be requested for following reasons: (i) Decision is beyond scope of authority of arbitration agreement or arbitration generally; (ii) arbitration agreement is invalid; (iii) decision is made in violation of arbitration procedures; (iv) decision relates to something which is beyond claim of party; (v) decision is contradictory; (vi) arbitrators were negligent in their decision; (vii) decision was rendered based on evidence proven fraudulent; (viii) new evidence which was intentionally withheld by party is discovered; or (ix) decision was based on fraud or deceit.

Claims for cancellation must be submitted to District Court issuing enforcement order or with jurisdiction over place of arbitration hearing within six months following announcement of arbitration decision.

Preliminary Decisions.

Arbitrators are empowered to render preliminary judgments which are enforceable upon issuance.

Witnesses.

If witnesses are uncooperative, party may apply to District Court with jurisdiction over witness requesting that District Court conduct examination of witness. During period of examination by District Court, arbitration time period is suspended.

Equitable Adjudication.

Unless arbitration agreement authorizes arbitrators to apply equitable principles in rendering their decision, arbitrators are restricted to strict application of law to fact.

9 DOCUMENTS AND RECORDS

9.01 ACKNOWLEDGMENTS:

With exception of documents requiring notarial act (see category 3 Business Regulation and Commerce, topic 3.05 Frauds, Statute of), Indonesian law does not require acknowledgment of signatures on private instruments. In notarial instruments, parties thereto acknowledge before notary to have knowledge of contents of instrument, whereas signature of notary constitutes certification of signature of parties.

Signatures on private instruments may be certified by notary, and, if required, signature of notary can be certified by foreign consular officers.

9.02 IDENTIFICATION:

Identification is governed by Presidential Decree No. 52 of 1977 dated 20 Sept. 1977 concerning Resident Registration. Indonesian citizens and aliens who are permanent residents are required to complete civil registration, implementation of which includes completing formalities for and obtaining family identity cards and resident identity cards and recordation concerning every change which arises. Indonesian citizens may request certificates of citizenship from Department of Law and Human Rights.

9.03 NOTARIES:

Governing Law.

Notaries are governed by Law No. 30 of 2004 dated 6 Oct. 2004 concerning Notarial Duties.

Definitions.

Notary means public official with authority to make authentic deeds and with other authorities as intended by Law No. 30 of 2004.

Temporary notarial officer means person who is temporarily appointed as notary to conduct duties of notary who has died, been terminated or suspended.

Substitute notary means person who is temporarily appointed as notary to replace notary who is on holiday, sick or temporarily prevented from conducting notarial duties.

Special substitute notary means person who is appointed to be special notary for making certain deeds as mentioned in letter of appointment of notary, in event in particular regency or city there is only one notary who, according to Law No. 30 of 2004 is prohibited from making relevant deed.

Organization of notaries means notary professional organization which takes form as association which is legal entity.

Supervisory committee means body which possesses authority and responsibility to implement cultivation and supervision in relation to notaries.

Notarial deed means authentic deed which is made by or in presence of notary according to form and procedure stipulated by Law No. 30 of 2004.

Minutes of deed means original notarial deed.

Copy of deed means verbatim copy of entirety of deed with phrase "provided as copy with same content" included at bottom part of copy of deed.

Quotation of deed means verbatim quotation of one or several parts of deed with phrase "provided as quotation" included on bottom part of quotation of deed.

Deed originali means deed for: (i) Payment of rent, interest and pensions; (ii) offers to pay cash; (iii) protests relating to non-payment or non-receipt of negotiable instruments; (iv) letters of authority/powers of attorney; (v) official statements of ownership; or (vi) other deeds based upon regulations of law.

Executorial deed means copy of deed for acknowledgment of indebtedness which possesses executorial power with words "DEMI KEADILAN BERDASARKAN KETUHANAN YANG MAHA ESA" which translates to "FOR SAKE OF JUSTICE BASED ON ALMIGHTY G-D" included on head of deed.

Notary post formation means determination of number of notaries needed in particular notarial territory.

Notarial protocol means collection of documents which constitutes State records which must be stored and maintained by notary.

Minister means Minister with duties and responsibilities in field including notaries.

Appointment and Termination.

Notaries are appointed and terminated by Minister.

Appointment.

Conditions for qualification for appointment to be notary are: (i) Indonesian citizen; (ii) pious toward almighty G-D; (iii) at least 27 years of age; (iv) of sound mind and body; (v) certified graduate of university level legal education and graduate of masters level of notarial education; (vi) already engaged in apprenticeship or actually already worked as employee of notary for 12 continuous months after graduating from masters level of notarial education at notary office of own initiative or on recommendation of organization of notaries; and (vii) not having status as State civil servant, State official, advocate or not in process of administering another position which by law is prohibited to be concurrent with post of notary.

Oath.

Prior to conducting post of notary, notary is obligated to pronounce oath/promise in accordance with notary's religion in presence of Minister or appointed official with following words:

"I swear/promise: That I will obey and be loyal to State of Republic of Indonesia, Pancasila and Constitution of State of Republic of Indonesia of 1945, Law concerning Notary Duties as well as other regulations of law; that I will conduct my duties with commitment, honesty, accuracy, independence and without bias; that I will preserve/guard my demeanor, my behavior, and will conduct my responsibilities according to professional code of ethics, honor, status, and my responsibility as notary; that I will hold secret contents of deed and information provided in conduct of my duties; that I, for appointment to this post, either directly or indirectly, in any name or pretext, have never and will never give or promise anything to anyone."

Foregoing oath/promise must be pronounced within not more than two months of date of decision of appointment as notary. Failure to pronounce oath within specified time period may result in revocation of notary appointment by Minister.

Notices.

Within 30 days of date of taking notarial post oath/promise, notary is obligated to: (i) Actually conduct duties; (ii) deliver minutes of notarial post oath/promise to Minister, organization of notaries and regional supervisory committee; and (iii) deliver address of office, signature exemplar and initials along with imprint of seal/stamp in red color to Minister and other official with responsibility in field of agrarian/land affairs, organization of notaries, chairman of District Court, regional supervisory committee as well as regent or mayor in place of notarial appointment.

Honorable Termination.

Notaries are terminated from their post with honor due to: (i) Death; (ii) reaching age of 65; (iii) self request; (iv) incapacity of mind and/or body for implementation of duties of post of notary in continuous manner for more than three years; or (v) concurrent post as State civil servant, State official, advocate or in process of administering another position which by law is prohibited to be concurrent with post of notary. 65 year age limit may be extended to 67 years upon consideration of health of relevant notary.

Notaries may be temporarily terminated from their posts due to: (i) Being in process of bankruptcy or suspension of debt payment obligations; (ii) being under guardianship/custodianship; (iii) conducting disgraceful acts; or (iv) conducting violations relating to responsibilities and prohibitions of duties. Prior to termination, notary is given opportunity to defend himself before supervisory committee through every level of proceeding starting in regional supervisory committee, then in territorial supervisory committee and finally in central supervisory committee. Temporary termination of notary is conducted by Minister on suggestion of central supervisory committee.

Notaries who are temporarily terminated due to bankruptcy, suspension of debt payment obligations or guardianship/custodianship may be reappointed as notary by Minister after restoration of their rights. Temporary termination based on conduct of disgraceful acts or violations relating to responsibilities and prohibitions of duties is effective for at most six months. Notaries who are temporarily terminated due to conduct of disgraceful acts or violations relating to responsibilities and prohibitions of duties may be reappointed as notaries by Minister after end of period of temporary termination.

Notaries who are appointed as State officials are obligated to take leave. Leave becomes effective for period notary administers post as State official. Notaries taking leave are obligated to appoint substitute notaries. In event notary fails to appoint substitute notary, regional supervisory committee will appoint another notary, with legal territory including place of domicile of notary appointed as State official, to receive notarial protocol. Notary appointed by regional supervisory committee constitutes holder of temporary notarial protocol. Notaries who no longer hold posts as State officials may return to conduct of notary duties and notarial protocol will be returned to them.

Dishonorable Termination.

Notaries will be terminated dishonorably from their posts by Minister on proposal of central supervisory committee if: (i) Declared bankrupt based on final court decision; (ii) existence of guardianship/custodianship for three or more continuous years; (iii) conducts acts which disparage honor and status of notarial post; or (iv) conducts severe violations relating to responsibilities and prohibitions of post. Notaries will also be terminated dishonorably by Minister due to imposition of criminal imprisonment based on final court decision due to conduct of criminal acts which are punishable with criminal imprisonment of five years or more.

Authorities.

Notaries are authorized to produce authentic deeds regarding all acts, agreements and stipulations which are required by regulations of law and/or which are desired by those who are interested to be stated in authentic deeds, to guarantee definitive date of making of deed, to store deeds, to give executorial deeds, copies of deeds and quotations of deeds, provided that production of those deeds is not also assigned to or excluded from another official or another person stipulated by law.

Notaries are also authorized to: (i) Legalize signatures and stipulate definitive dates of letters signed under hand with registration in special book; (ii) enter registration of letters signed under hand in special book; (iii) make copies of original letters signed under hand in form of copies containing explanations to be written and illustrated in relevant letter; (iv) conduct confirmation of conformity of photocopies with original letters; (v) provide legal information related to productions of deeds; (vi) produce deeds related to land; (vii) produce auction minute deeds; and (viii) other authorities pursuant to regulations of law.

Responsibilities.

In conduct of duties, notary is obligated to: (i) Act honestly, accurately/thoroughly, independently, unbiased and preserve interests of parties related to legal act; (ii) produce deeds in form of minutes of deeds and store them as part of notarial protocol (storage requirement does not apply when notary issues deeds originali form); (iii) issue executorial deeds, copies of deeds or quotations of deeds based on minutes of deeds; (iv) provide services in accordance with provisions of Law No. 30 of 2004 except if there are reasons to refuse; (v) keep secret all matters regarding deeds made and all information which is obtained for purposes of production of deed in accordance with oath/promise of post, except if law stipulates otherwise; (vi) bind deeds made within one month into books which contain not more than 50 deeds, and if deed cannot be contained in one book, deed may be bound in more than one book, and number of minutes of deed, month and year of its making recorded on cover of every book; (vii) make list of protest deeds relating to nonpayment or non-receipt of negotiable instruments; (viii) make list of deeds which relate to wills and testaments according to time sequence for making of deeds every month; (ix) send list of deeds relating to wills and testaments or nil list relating to wills and testaments to Department of Wills Central Registry with functions and responsibilities in notarial sector within five days of first week of every following month; (x) record in repertorium date of sending wills registry at end of every month; (xi) have seal/stamp which contains symbol of State of Republic of Indonesia and in space which encircles it, name, position and related domicile form and measurements of seal/stamp are stipulated by Regulation of Minister; (xii) read deeds in presence of parties with presence of at least two witnesses and signed at that time by parties, witnesses and notary reading is not required if parties desire that deed not be read because it has already been read by parties themselves and they know and understand its contents provided that in this matter it is expressed in closing of deed and every page of minutes of deed are initialed by parties, witnesses and notary; and (xiii) receive notary candidate apprentices.

If requirements: (i) To read deeds in presence of parties with presence of at least two witnesses and signed at that time by parties, witnesses and notary; or (ii) in event reading is not required if parties desire that deed not be read because it has already been read by parties themselves and they know and understand its contents provided that in this matter it is expressed in closing of deed and every page of minutes of deed are initialed, witnessed and notarized, are not met with respect to any deed except will and testament, related deed shall only possess evidentiary power of deed signed underhand.

More than one copy of deeds originali may be made, to be signed at same time, in same form with same contents, with stipulation on every deed that words “effective as one and one effective for all” are written on every deed. Only one copy may be made of deeds originali with contents granting authorities which do not yet contain name of recipient of authorization.

Prohibitions.

Notaries are prohibited from: (i) Conducting duties outside territory of their posts; (ii) leaving territory of their posts for more than seven consecutive days without valid/legal reason; (iii) concurrently serving as State civil servant; (iv) concurrently serving as State official; (v) concurrently serving as advocate; (vi) concurrently serving as management or official of State owned enterprise, regional owned enterprise or private enterprise; (vii) concurrently serving as land conveyancer official outside territory of notary's post; (viii) being substitute notary; or (ix) conducting other work in conflict with religious, ethical or equitable norms, which may influence respect and prestige of notarial post.

Honorarium.

Notaries are entitled to receive honorarium for legal services provided in accordance with their authorities. Size of honorarium to be received by notary is based on economic and social valuation of every deed they produce.

Economic valuation is determined from object of every deed as follows: (i) Up to Rp 100,000,000 or equivalent grams of gold as appropriate, honorarium to be received is at most 2.5%; (ii) above Rp 100,000,000 up to Rp 1,000,000,000 honorarium to be received is at most 1.5%; or (iii) above Rp 1,000,000,000 honorarium to be received is to be based on agreement between notary and all parties, provided that it is at most 1% from object for which deed is to be made.

Social valuation is determined based on social function of object of every deed with honorarium to be received at most Rp 5,000,000.

Notaries are obligated to provide legal services in notarial sector on pro bono basis to persons without means.

Notarial Deeds.

Every notarial deed consists of: (i) Forward or head of deed; (ii) body of deed; and (iii) end or close of deed.

Forward or head of deed consists of: (i) Title of deed; (ii) number of deed; (iii) hour, day, date, month and year; and (iv) full name and domicile of notary.

Body of deed consists of: (i) Full name, place and date of birth, citizenship, work, post, domicile and residence of all attending parties and/or persons who they represent; (ii) information regarding position of acting parties; (iii) contents of deed which constitute desires and wishes of parties in interest; and (iv) full name, place and date of birth, as well as work, post, position and residence of every identification witness.

End or close of deed consists of: (i) Explanation concerning reading of deed in presence of parties with presence of at least two witnesses (reading is not required if parties desire that deed not be read because it has already been read by parties themselves and they know and understand its contents provided that in this matter it is expressed in closing of deed and every page of minutes of deed are initialed by parties, witnesses and notary); (ii) explanation concerning signing and place of signing or translation of deed if any; (iii) full name, place and date of birth, work, post, domicile and residence of every witness to deed; and (iv) explanation concerning nonexistence of modifications arising in production of deed or explanation concerning existence of modifications which may take form of additions, deletions or amendments.

Deeds of substitute notaries, special substitute notaries and temporary notarial officers must also include number and date of appointment as well as appointing official.

Party appearing before notary must fulfill following conditions: (i) Be at least 18 years of age or already married; and (ii) have capacity to conduct legal act Party must be known to (a) Notary; or (b) be known to two identifying witnesses who are at least 18 years of age or already married and who have capacity to conduct legal act; or (c) be known to two other parties. Identification must be expressly stated in deed.

Every deed which is to be read by notary must be read in presence of at least two individual witnesses, except if regulations of law otherwise provide. Witnesses must fulfill following conditions: (i) Be at least 18 years of age or already married; (ii) have capacity to conduct legal act; (iii) understand language utilized in deed; (iv) able to inscribe signature and initials; and (v) does not possess marital relationship or blood relationship in vertical line above or below or horizontal line up to third degree with notary or any parties. Witnesses must be known to notary or be introduced to notary or be informed regarding identity and authority of witnesses to notary by parties. Introduction or declaration concerning identity and authority of witness must be expressly stated in deed.

In event provisions of Arts. 39 and 40 of Law No. 30 of 2004 concerning Qualifications and Identification of Parties and Witnesses are not fulfilled, deed will only possess evidentiary force as deed signed under hand.

Notarial deeds are to be written with clarity in relation to other inseparable deeds and abbreviations cannot be used. Spaces and empty intervals within deed are to be clearly struck through (marked with lines) prior to signing of deed, except for deeds which are printed in format of forms based on regulations of law except with respect to letters of authority/powers of attorney which do not yet specify name of recipient of authorization/powers All sums for determination of their amounts or totals of things which are mentioned in deed, mentioning date, month and year are to be declared with letters and preceded by numbers.

Deeds are to be made in Indonesian language. In event party does not understand language used in deed, notary is obligated to translate or clarify/explain contents of that deed in language which is understood by party. If notary is unable to translate or clarify/explain contents, deed must be translated or clarified/explained by official translator. Deed may be made in another language if understood by notary and witnesses if party in interest desires so long as law does not stipulate otherwise. In event deed is made in language other than Indonesian, notary is obligated to translate it into Indonesian language.

Immediately after reading deed, deed must be signed by every party, witness and notary, except if there are parties who are not yet able to inscribe their signature with mention of reason. Reason must be expressly stated in deed. Deeds translated or clarified/explained by official translator where notary is unable to translate or clarify/explain contents must be signed by parties, notary, witnesses and official translator. Reading, translation or clarification/explanation and signatures must be expressly stated at end of deed.

In event party has interest only in certain part of deed, only that part of deed mentioned must be read to party. If that part is to be translated or clarified/explained, party must inscribe initials and sign that part. Reading, translation or clarification/explanation and signatures must be expressly stated at end of deed.

In creation of registration of property estate or minutes regarding certain act or event, party may: (i) Reject inscribing signature (with statement in deed with open statement of reason); or (ii) not appear in close of deed, so long as party has not yet signed deed; provided in that event it must be stated in deed and deed still constitutes authentic deed.

Authentic letters of authority/powers of attorney or other documents which become basis of authority to make deed which is issued in originali form or letters of authority/powers of attorney signed under hand must be attached to minutes of deed and must be explained in deed unless letter of authority/power of attorney has already been attached to deed made before same notary and that matter is expressed in deed.

Contents of deed may not be modified or supplemented, whether in form of writing which overlaps, is inserted, is scratched off or erased and substituted with other writing. Modifications of deeds in form of supplements, substitutions or excoriation in deed are only legal/valid if modification is initialed or other insignia of legalization is given by parties, witnesses and notary.

Every modification of deed must be made on left side of deed. If modification cannot be produced on left side of deed, modification is to be produced at end of deed, before close of deed, with reference to part changed or with insertion of supplementary sheets of paper. Modifications done without reference to part modified render modification void.

If within deed, deletion of word, letter or numeral is required, this matter may be accomplished in such way that which was inserted previously can be read and amounts in words, letters or numerals which have been deleted are to be stated at side of deed. Deletions become legal/valid after they are initialed or other insignia of legalization/validation is given by parties, witnesses and notary. If another modification arises in relation to word, letter or numeral, that modification is to be done on left side of deed or, if modification on left side cannot be done, modification is to be produced at end of deed, before close of deed, with reference to part changed or with insertion of supplementary sheets of paper. At close of every deed number/quantity of modifications, deletions and supplements must be stated.

Notaries are authorized to correct written or typed errors found in minutes of deed which have already been signed. Corrections are to be done by production of minutes and provision of notation regarding matter in original minutes of deed with reference to date and number of deed of correction minutes. Copy of deed of correction minutes must be delivered to all parties.

Notaries are not permitted to produce deeds for themselves, their wives/husbands or other persons who have family relationship with notary whether due to marriage or blood relation in ascending or descending vertical line without limitation to degree, as well as in horizontal line to third degree, or become party in deed whether in personal capacity, in other capacity or with intermediary of agent/proxy. Provisions of Art. 52(1) of Law No. 30 of 2004 do not apply in event wife/husband of notary or other persons who have family relationship with notary, whether due to marriage or blood relation in ascending or descending vertical line without limitation to degree, as well as in horizontal line to third degree, become parties in public sale, provided public sale can be conducted before notary, public rental, public contracting or if such persons become members of meetings for which minutes are made by notary. Violation of Art. 52(1) of Law No. 30 of 2004 has consequence that such deed shall only possess evidentiary force as deed signed under hand in event such deed signed by party, without limiting obligation of notary who made such deed to pay cost, compensation and interest to aforesaid party.

Notarial deeds may not contain stipulations or provisions which grant right and/or benefit to: (i) Notary, wife or husband of notary; (ii) witness, wife or husband of witness; or (iii) persons who have family relationship with notary or witness whether due to blood relation in ascending or descending vertical line without limitation to degree, as well as marital relationship in horizontal line to third degree.

Notaries may only provide, show or give information concerning contents of deed, executorial deed, copies of deed or quotation of deed to persons with direct interest in deed, heirs or persons who obtain rights, except as otherwise stipulated by regulations of law.

Notaries who issue executorial deeds must make notation in minutes of deed concerning recipient of executorial deed and date of issuance and notation aforementioned must be signed by notary. Executorial deeds of acknowledgment of indebtedness which are made in presence of notary are copies of deeds which have executorial force. Executorial deeds of acknowledgment of indebtedness must contain phrase “DEMI KEADILAN BERDASARKAN KETUHANAN YANG MAHA ESA” which translates to “FOR SAKE OF JUSTICE BASED ON ALMIGHTY G-D” at head of deed and end or close of deed must contain phrase “given as first executorial” with mention of name of person requesting it and for whom executorial deed is issued as well as date of its issuance. Second and additional executorial deeds may only be given to persons with direct interest in deed, heirs or persons who obtain rights, except as otherwise stipulated by regulations of law based upon court order/stipulation.

Imprint of seal/stamp of notary must be affixed to deeds originali, executorial deeds, copies of deeds or quotations of deeds which are issued by notary. Imprint of seal must also be affixed to copies of letters attached to minutes of deed. Letters signed under hand which are validated or legalized, letters signed under hand which are registered and photocopies confirmed by notary must be given imprint of seal/stamp as well as initials and signature of notary.

Executorial deeds, copies of deeds, quotations of deeds of notaries or validation/legalization of letters signed under hand which are attached to deeds which are to be stored in notarial protocol may only be issued by notary who made them, substitute notary or legal/valid holder of notarial protocol.

In interest of judicial process, investigators, general prosecutors or judges, with agreement of regional supervisory committee, are authorized to: (i) Take photocopies of minutes of deed and/or letters attached to minutes of deed or notarial protocol stored by notaries; and (ii) call notaries to appear for examination related to deeds made by them or notarial protocol which is stored by notary. Taking of photocopies of minutes of deed or letters is to be done with transfer minutes.

Sanctions.

Following violations conducted by notaries may result in deed only possessing evidentiary power of deed signed under hand or deed becoming void as matter of law and may constitute grounds for party who suffers loss to claim compensation for expenses, losses and interest from notary: Failure to send list of deeds relating to last wills and testaments or nil list related to testaments to Department of Wills Central Registry with functions and responsibilities in notarial sector within five days of first week of every following month; Failure to possess seal/stamp which contains symbol of State of Republic of Indonesia and in space which encircles it, name, position and related domicile; Failure of party to fulfill conditions of: (i) Being at least 18 years of age or already married; (ii) having capacity to conduct legal act; (iii) being known to (a) Notary; or (b) being known to two identifying witnesses who are at least 18 years of age or already married and who have capacity to conduct legal act; or (c) being known to two other parties; Failure to read every deed which is to be read by notary in presence of at least two witnesses (except if regulations of law otherwise provide) where witnesses are: (i) At least 18 years of age or already married; (ii) have capacity to conduct legal act; (iii) understand language utilized in deed; (iv) able to inscribe signature and initials; and (v) do not possess marital relationship or blood relationship in vertical or horizontal straight line up to third degree with notary or any parties; Where witnesses are known to notary or have been introduced to notary or notary has been informed regarding identity and authority of witnesses to notary by parties, failure to expressly state identification or declaration concerning identity and authority of witness in deed; Failure of every party, witness, notary and official translator (where necessary) to sign deed immediately after reading deed, except if there are parties who are not yet able to inscribe their signature with mention of reason; Modification or supplementation of contents of deed, whether in form of writing which overlaps, is inserted, is scratched off or erased and substituted with other writing without initialing or providing other insignia of legalization given by parties, witnesses and notary; Failure to make every modification of deed on left side of deed or, if modification cannot be produced on left side of deed, failure to produce modification at end of deed, before close of deed, with reference to part changed or with insertion of supplementary sheets of paper; If within deed deletion of words, letters or numerals is required, this matter may be accomplished in such way that words, letters or numerals which were inserted previously can be read and amounts in words, letters or numerals which have been deleted are to be stated at side of deed. Deletions become legal/valid after they are initialed or other insignia of validation is given by parties, witnesses and notary. If another modification arises in relation to words, letters or numerals, that modification is to be done on left side of deed or, if notation on left side cannot be done, modification is to be produced at end of deed, before close of deed, with reference to part changed or with insertion of supplementary sheets of paper. At close of every deed number/quantity of modifications, deletions and supplements must be stated.

With respect to deletion of words, letters or numerals, failure to accomplish modification in such way that words, letters or numerals which were inserted previously can be read and amounts in words, letters or numerals that have been deleted are stated at side of deed, deletions are initialed or other insignia of legalization is given by parties, witnesses and notary.

With respect to modification in relation to words, letters or numerals, failure to produce modification on left side of deed or, if modification on left side cannot be done, failure to produce modification at end of deed, before close of deed, with reference to part changed or with insertion of supplementary sheets of paper and failure to state at close of every deed, number/quantity of modifications, deletions and supplements; (1) Failure of notary to correct written and/or typed errors found in minutes of deed which have already been signed by production of minutes and provision of notation regarding matter in original minutes of deed with reference to date and number of deed of correction minutes and deliver copy of deed of correction minutes to all parties; or (2) production by notaries of deeds for themselves, their wives/husbands or other persons who have family relationship with notary whether due to marriage or blood relation in ascending or descending vertical line without limitation to degree, as well as in horizontal line until third degree, or become party to deed whether in personal capacity, in other capacity or with intermediary of proxy/agent except in relation to provisions of Art. 52[2] of Law No. 30 of 2004.

Following violations subject notary to sanctions of: (i) Oral warning; (ii) written warning; (iii) temporary termination; (iv) honorable termination; or (v) dishonorable termination: (a) Failure to conduct, within 30 days after date of taking notarial post oath/promise: (1) Actual conduct of duties; (2) delivery of minutes of notarial post oath/promise to Minister, organization of notaries and regional supervisory committee; and (3) delivery of address of office, signature exemplar and initials along with imprint of seal/stamp in red color to Minister and other officials with responsibility in field of agrarian/land affairs, organization of notaries, chairman of District Court, regional supervisory committee as well as regent or mayor in place of notarial appointment; (b) failure to act honestly, accurately/thoroughly, independently, unbiased and preserve interests of parties related to legal act; (c) failure to produce deeds in form of minutes of deeds and store them as part of notarial protocol (storage requirement does not apply when notary issues deeds originali form; (d) failure to issue executorial deeds, copies of deeds or quotations of deeds based on minutes of deeds; (e) failure to provide services in accordance with provisions of Law No. 30 of 2004 except if there are reasons to refuse; (f) failure to keep secret all matters regarding deeds made and all information which is obtained for purposes of production of deed in accordance with oath/promise of post, except if law stipulates otherwise; (g) failure to bind deeds made within one month into books which contain not more than 50 deeds, and if deed cannot be contained in one book, binding of deed in more than one book, and number of minutes of deed, month and year of its making recorded on cover of every book; (h) failure to make list of protest deeds relating to nonpayment or non-receipt of negotiable instruments; (i) failure to make list of deeds which relate to last wills and testaments according to time sequence for making of deeds every month; (j) failure to send list of deeds relating to last wills and testaments or nil list related to testaments to Department of Wills Central Registry with functions and responsibilities in notarial sector within five days of first week of every following month; (k) failure to record in repertory date of sending wills registry at end of every month; (l) failure to have seal/stamp which contains symbol of State of Republic of Indonesia and in space which encircles it, name, position and related domicile (form and measurements of seal/stamp as stipulated by Regulation of Minister; (m) conducting duties outside territory of their posts; (n) leaving territory of their posts for more than seven consecutive days without valid/legal reason; (o) concurrently serving as State civil servant; (p) concurrently serving as State official; (q) concurrently serving as advocate; (r) concurrently serving as management or official of State owned enterprises, regional owned enterprises or private enterprises; (s) concurrently serving as land conveyancer official outside territory of notary's post; (t) being substitute notary; (u) conducting other work in conflict with religious, ethical or equitable norms, which may influence respect and prestige of notarial post; (v) conducting post in form of civil partnership without ensuring independence and lack of bias; (w) failure to submit request for leave of absence in writing along with proposal for appointment of substitute notary; (x) failure to deliver notarial protocol to substitute notary during leave of absence; (y) failure to provide pro bono legal services to persons without means; (z) providing, showing or giving information concerning contents of deed, executorial deed, copy of deed or quotation of deed to persons without direct interest in deed, persons who are not heirs or persons who have not obtained rights, except as otherwise stipulated by regulations of law; (aa) failure to create and maintain registry of deeds, registry of documents signed under hand which have been validated/legalized, registry of letters signed under hand which are to be booked and registry of other documents as required by Law No. 30 of 2004; (ab) failure to create and maintain on monthly basis in alphabetical order register of deeds and documents signed under hand which have been validated/legalized; and/or (ac) failure to deliver notarial protocol to appropriate instrumentality under certain conditions specified by Arts. 62 and 63 of Law No. 30 of 2004.

Void Regulations.

Following regulations have been declared null and void: (i) Notary Law in Indonesia (Reglement op Het Notaris Ambt in Indonesie) (State Gazette 1860:3) as last amended at State Gazette of Republic of Indonesia of 1945 No. 101; (ii) Ordonantie dated 16 Sept. 1931 concerning Notary Honorarium; (iii) Law No. 33 of 1954 dated 13 Nov. 1954 concerning Vice Notary and Temporary Vice Notary (State Gazette of Republic of Indonesia of 1954 No. 101, Supplement to State Gazette of Republic of Indonesia No. 700); (iv) Art. 54 of Law No. 8 of 2004 concerning Amendment to Law No. 2 of 1986 concerning General Judicial System (State Gazette of Republic of Indonesia of 2004 No. 34, Supplement to State Gazette of Republic of Indonesia No. 4379); and (v) Government Regulation No. 11 of 1949 concerning Oath/Promise of Notary Duties.

9.04 RECORDS:

Government maintains registries of births, marriage reports, marriage permits, marriages and divorces, changes of family names and deaths.

Presidential Cabinet Instruction No. 31/U/IN/12/1966 provides that, prior to promulgation of civil registry law of national nature, population group distinctions (see category 1 Introduction, topic 1.02 Government and Legal System, subhead Legal Pluralism, catchline Dutch Law [describing population groups]) will not be applied at Civil Registry offices throughout Indonesia except with respect to distinction between Indonesian State citizens and aliens. However, in practice, Civil Registry offices maintain separate registries for births, marriage reports, marriage permits, marriages and divorces, changes of family names and deaths for following population groups: (i) Europeans (which also includes Japanese and all persons who are neither European, Japanese, indigenous Indonesian or East Asian who are subject to family laws which share main principles of Dutch family law and descendants of non-Dutch Europeans, Japanese and all persons who are neither European, Japanese, indigenous Indonesian or East Asian who are subject to family laws which share main principles of Dutch family law); (ii) indigenous Indonesians who have not moved to another population group and other persons who previously belonged to another population group and then merged themselves into indigenous Indonesian population group; and (iii) East Asian (which includes all persons who are not included in European and indigenous Indonesian population groups).

Population Registry is maintained in regencies, municipalities and in Jakarta and includes following information: (i) Registration of heads of families and family members; (ii) issuance of family identity cards; (iii) registration of residents who are entitled to obtain resident identity cards; (iv) issuance of resident identity cards; (v) provision of principle residence numbers; (vi) inclusion of principle residence numbers in every document and deed of residents; (vii) registration of births; issuance of birth certificates; (viii) registration of marriages for non-Muslim residents; (ix) issuance of marriage certificates of non-Muslim residents; (x) registration of divorces for non-Muslim residents; (xi) issuance of certificates of divorces for non-Muslim residents; (xii) registration of deaths; (xiii) issuance of death certificates; (xiv) registration and issuance of deeds of acknowledgment of children; and (xv) registration of validations of children.

Registrations of marriages, divorces and reconciliations based on religion of Islam are kept by officer of Marriage Registrar appointed by Minister of Religious Affairs.

Registration of marriages solemnized outside of Indonesia must occur at Marriage Registry offices in municipality of husband and wife's domicile within one year following return of husband and wife to Indonesia.

10 EMPLOYMENT

10.01 LABOR RELATIONS:

Labor Affairs are governed by Law No. 13 of 2003 dated 25 Mar. 2003 concerning Labor Affairs and Law No. 2 of 2004 dated 14 Jan. 2004 concerning Settlement of Industrial Relations Disputes.

Definitions.

Employee/Laborer means every person who works for receipt of pay/wages or compensation in any form.

Employer means natural person, entrepreneur, legal entity or other body who employs labor with payment of pay/wages or compensation in any form.

Employee/Laborer union means organization which is formed from, by and for employees/laborers both from within and outside of company, which is free, open, independent, democratic and responsible for struggling for, defending of and protection of rights and interests of employees/laborers and improvement of welfare of employees/laborers and their families.

Employment agreement is agreement between employee/laborer with entrepreneur or employer which includes conditions of work, rights and responsibilities of parties.

Employment relationship means relationship between entrepreneur with employee/laborer based on employment agreement, which possesses elements of job, compensation and orders.

Employment relationship termination means ending of employment relationship due to specific matter which results in ending of rights and obligations between employee/laborer and entrepreneur.

Entrepreneur means: (i) Natural person, federation/partnership or legal entity which operates company it owns; (ii) natural person, federation/partnership or legal entity which independently operates company it does not own; or (iii) natural person, federation/partnership or legal entity located in Indonesia and representing either kind of preceding two types of companies which are domiciled outside of territory of Indonesia.

Foreign labor means foreign citizens holding visas with intention of working in territory of Indonesia.

Labor means every person who is capable of performing work in order to produce goods and/or services both for fulfillment of needs of one's self as well as for needs of society.

Labor affairs means all matters related to labor prior to, during and after period of work.

Lockout means action by entrepreneur to reject all or part of employees/laborers for conduct of work.

Pay/Wages means right of employee/laborer which is received in form of money as compensation from entrepreneur or employer to employee/laborer which is to be stipulated and paid in accordance with employment agreement, agreement or regulations of law, including support/aid/subsidies for employee/laborer and his/her family for work and/or services which have already been or will be performed.

Strike means action by employee/laborer which is planned and implemented jointly and/or by employee/laborer union for cessation or delay of work.

Principles.

Development of labor affairs are based on principles of Pancasila and Constitution of 1945.

Foundation.

Development of labor affairs is to be implemented on basis of integrity through coordination of central and regional sectoral functions.

Goals of development of labor affairs are: (i) Empowerment and efficient utilization of labor in optimal and humane manner; (ii) creation of even distribution of work opportunities and supply of labor in accordance with needs of national and regional development; (iii) provision of protection to labor through creation of welfare; and (iv) improvement of welfare of labor and their families.

Equal Opportunity and Treatment.

All labor possesses equal opportunity without discrimination in obtaining work and equal treatment from entrepreneur. All labor possesses equal rights and opportunities to choose, obtain or change work and obtain reasonable benefits within or outside of country.

Training is to be implemented and directed towards provision, enhancement and development of work competence in order to increase capabilities, productivity and welfare.

Training is to be implemented in step-by-step manner with consideration of needs of labor market and business world both within and outside of work relationship on basis of training programs which refer to work competence standards set by Ministerial Decree.

All labor is entitled to obtain and/or enhance and/or develop work competence through training.

Training is to be conducted by government and/or private training organizations. Private training organizations must obtain permit or register with instrumentalities responsible in field of labor affairs in relevant Regency or City (Kota). Provisions regarding procedures for issuance of permits and registration of training organizations are to be regulated by Ministerial Decree. Training operators are required to fulfill following requirements: (i) Provision of training personnel; (ii) existence of curriculum in accordance with level of training; (iii) provision of tools and infrastructure for training; and (iv) provision of financing for performance of training operational activities.

Utilization of Foreign Labor.

Every employer who employs foreign labor is required to possess written permit from Minister or authorized official. Representative of foreign nations are exempt from obligation to possess written permit for utilization of foreign labor as diplomatic and consular officials.

Foreign labor may only be employed in Indonesia in employment relationship for specific positions and specific periods of time in accordance with Ministerial Decree. Foreign labor whose period of work has expired and cannot be renewed may be replaced by other foreign labor.

Employers who utilize foreign labor must possess foreign labor utilization plans which must be legalized by Minister or authorized official via procedures regulated by Ministerial Decree. Government instrumentalities, international organizations and representatives of foreign countries are not required to possess foreign labor utilization plans.

Obligations of Employer.

Employers of foreign labor are required to appoint Indonesian citizen labor as working associate/colleague of foreign labor employed for transfer of technology and transfer of expertise from foreign labor except that employers are not required to appoint Indonesian citizen labor as working associate/colleague of foreign labor holding positions as directors and/or commissioners. Employers are required to implement job education and training of Indonesian labor in accordance with qualifications of position of foreign labor.

Employers are required to pay compensation for every foreign labor employed except that obligation to pay compensation is not applicable to government instrumentalities, representatives of foreign states, international bodies, social agencies, religious agencies and certain positions in educational agencies regulated by Ministerial Decree. Amount of compensation and its utilization are subject to Government Regulation.

Employers who employ foreign labor are obligated to repatriate foreign labor to their country of origin after end of employment relationship.

Prohibitions.

Employers who are natural persons are prohibited from employing foreign labor. Foreign labor may not hold positions with duties concerning personnel management and/or other positions specified by Ministerial Decree.

Employment Agreements.

Employment relationships arise out of existence of employment agreement between entrepreneur and employee/laborer. Employment agreements may be made in writing or orally provided that written employment agreements must arise in accordance with regulations of law in effect. Employment agreements must be made on basis of: (i) Agreement between both parties; (ii) capability or capacity to conduct legal act; (iii) existence of work which is subject of agreement; and (iv) absence of conflict between work which is subject to agreement and public order, decency and regulations of law in effect.

In event employment agreement fails to fulfill aforementioned requirements of mutual agreement and capacity set forth in Art. 52(1)(a) and (b) of Law No. 13 of 2003 concerning Labor Affairs, employment agreement may be cancelled. In event employment agreement fails to fulfill aforementioned requirements of existence of work and public policy set forth in Art. 52(1)(c) and (d) of Law No. 13 of 2003 concerning Labor Affairs, employment agreement is void as matter of law.

Conflicts between Provisions and Regulations.

Provisions within employment agreement regarding “pay/wages” and “rights and obligations” as set forth in Art. 54(1)(e) and (f) of Law No. 13 of 2003 concerning Labor Affairs cannot conflict with company regulations, collective labor agreements and regulations of law in effect.

Specified Term employment agreements may only be made for certain work which according to its kind and nature or activity of work will be completed in specified term, namely: (i) Work completed once or of temporary nature; (ii) work which may be completed within period of time which is not longer than three years; (iii) seasonal work; or (iv) work related to new product, new activity or additional product which is still in trial or development/testing.

Employment agreement for specified term may not exist for work which is of continuous nature.

Employment agreement for specified term may be extended or renewed. Employment agreement for specified term may exist for maximum of two years and may only be extended once for term of not longer than one year.

Specified term employment agreements are not subject to trial periods.

Termination of Employment Agreements.

Employment agreements terminate if: (i) Worker dies; (ii) term of employment agreement ends; (iii) there is final and binding decision from court and/or final and binding decision or determination of organization for settlement of industrial relations disputes; or (iv) specific situation or event arises which is included within employment agreement, company regulation or collective labor agreement which causes termination of employment relationship.

Employment agreement does not end due to death of entrepreneur or transfer of rights in company arising out of sale, inheritance or bequest.

If one of parties terminates employment relationship before end of term stipulated in employment agreement for specified term, or party terminates employment relationship for reason other than those set forth in Art. 61(1) of Law No. 13 of 2003 concerning Labor Affairs, party terminating employment relationship becomes obligated to pay compensation to other party in amount of pay/wages of employee/laborer through end of term of employment agreement.

Outsourcing Work.

Company may transfer part of implementation of work to another company through work or employee/laborer service (outsourcing) agreement made in writing if work fulfills following conditions (which may be supplemented by Ministerial Decree): (i) Work must be implemented in manner which is separate from primary activities; (ii) work is implemented with direct or indirect instruction from employer; (iii) work constitutes supporting activity of company in holistic manner; and (iv) work does not impede production process in direct manner.

Company appointed to implement work or employee/laborer service supply agreement must be in form of legal entity. Business enterprise of provider of employee/laborer services must take form of legal entity. Business enterprise of provider of employee/laborer services must possess permit from instrumentality responsibility in field of labor affairs.

Work protection and conditions for employees/laborers working for other company appointed to implement work or employee/laborer service supply agreement are at least same as work protection and conditions of company giving work or in accordance with regulations of law in effect.

Employees/laborers from company providing employee/laborer services (outsourcing company) cannot be utilized by employer for performance of principal activities or activities which are directly related to production process, except for supporting service activities or activities which are not directly related to production process.

Disabilities.

Entrepreneur employing labor inflicted with disability is obligated to provide protection in accordance with kind and degree of disability in accordance with regulations of law in effect.

Children.

Entrepreneurs are prohibited from employing children, subject to following exceptions: prohibition against employing children may be excepted for children between ages of 13 and 15 years for conduct of light work provided such work does not disturb child's physical, mental and social health and development provided following conditions are met: (i) Written permission is obtained from child's parent or guardian (except if work is in family business); (ii) employment agreement exists between entrepreneur and child's parent or guardian (except if work is in family business); (iii) maximum work time is three hours; (iv) work is implemented during daylight and does not disrupt school time; (v) work safety and health; (vi) existence of clear employment relationship (except if work is in family business); and (vii) receipt of pay/wages in accordance with stipulations in effect.

Child of at least 14 years of age may conduct work in place of work which forms part of education and training curriculum which has been legalized by authorized official provided following conditions are fulfilled: (i) Clear guidelines/instructions are given regarding method of performance of work and guidance and supervision in performance of work; and (ii) work safety and health protection is provided.

Female employees/laborers under age of 18 years are prohibited from being employed between hours of 11 p.m. and 7 a.m.. Entrepreneurs are prohibited from employing pregnant female employees/laborers if according to statement of doctor work could endanger health and safety of fetus or mother when work is to occur between hours of 11 p.m. and 7 a.m. Pursuant to Ministerial Decree providing further detail, entrepreneur who employs female employees/laborers between hours of 11 p.m. and 7 a.m. is obligated to: (i) Provide nutritious food and drink; and (ii) safeguard female employee's/laborer's moral decency and safety at all times while she is at place of work. Pursuant to Ministerial Decree providing further detail, entrepreneur is obligated to provide transportation to and from work for female employees/workers who work between hours of 11 p.m. and 5 a.m.

Working Hours.

Every entrepreneur is required to implement provisions concerning working hours. Subject to certain exceptions defined by Ministerial Decree, normal working hours include: (i)

Seven hours per one day and 40 hours per one week for six work day week; or (ii) eight hours per one day and 40 hours per one week for five work day week.

Subject to certain exceptions defined by Ministerial Decree, entrepreneur who employs employees/laborers in excess of normal working hours must fulfill following conditions: (i) Agreement of relevant employee/laborer; and (ii) overtime may not exceed more than three hours in one day and 14 hours in one week. Entrepreneur employing employee/laborer in excess of normal working hours must pay overtime pay/wages.

Pay/Wages.

Every employee/laborer has right to obtain income which fulfills reasonable human needs of life in accordance with form stipulated by government.

Employee/Laborer Unions.

Every employee/laborer has right to form and become member of employee/laborer union. In implementation of industrial relations, employee/laborer unions, in carrying out their functions of performing work as their obligation, protecting orderly and correct conduct for perpetuation of productivity, channeling aspirations in productive manner, developing skills and expertise and joining in progress of company and struggling for welfare of its members and their families, have right to collect and manage funds as well as to account for organization's funds including strike funds.

Company Regulations.

Entrepreneur employing at least ten employees/laborers is obligated to produce company regulations unless company already possesses cooperation agreement. Company regulations become effective upon legalization by Minister or appointed official. Company regulations are to be arranged by and are responsibility of related entrepreneur. Entrepreneur is obligated to provide notice and explanation of contents of, and give manuscript of, company regulations or modifications of them to employees/laborers.

Company regulations must at least contain following: (i) Rights and obligations of entrepreneur; (ii) rights and obligations of employees/laborers; (iii) work conditions; (iv) company rules and regulations; and (v) term of effectiveness of company regulations. Maximum term of effectiveness of company regulations is two years and company regulations are required to be renewed at end of their terms. Provisions of company regulations may not conflict with provisions of regulations of law in effect.

Industrial Relations Disputes.

Law No. 2 of 2004 dated 14 Jan. 2004 concerning Settlement of Industrial Relations Disputes governs resolution of industrial relations disputes. Effective date of Law No. 2 of 2004 was postponed by Government Regulation in lieu of Law No. 1 of 2005 dated 13 Jan. 2005 concerning Postponement of Enforcement of Law No. 2 of 2004 on Settlement of Industrial Relations Disputes. Law No. 2 of 2004 became effective on 14 Jan. 2006.

Following are types of industrial relations disputes: (i) Rights disputes; (ii) interest disputes; (iii) employment relationship termination disputes; and (iv) disputes between employee/laborer unions from only one company.

Entrepreneurs and employees/laborers or employee/laborer unions are required to engage in bipartite discussions to reach agreement for settlement of industrial relations disputes.

In event bipartite discussions fail to reach settlement agreement within 30 days from date of commencement of discussions, or in event one of parties refuses to engage in bipartite settlement discussions, bipartite discussions will be deemed to have failed. In event of failure of bipartite discussions, either or both disputing parties may submit their disputes for settlement through conciliation or arbitration process.

Resolution of disputes through conciliation is to be conducted for resolution of interest disputes, employment relationship termination disputes or disputes between employee/laborer unions.

Resolution of disputes through arbitration is to be conducted for resolution of interest disputes or disputes between employee/laborer unions.

In event bipartite negotiations fail to produce settlement of industrial relations dispute, one or both parties may register dispute with local government agency responsible for field of labor affairs. Party submitting dispute to local government agency responsible for field of labor affairs must attach evidence that effort to settle dispute through bipartite discussions have already been conducted. In event party fails to submit such evidence, local government agency responsible for field of labor affairs must return documents for completion within seven days from date of receipt of returned documents.

After local government agency responsible for field of labor affairs receives registration of industrial relations dispute from one or more parties, local government agency is obligated to offer all parties opportunity to agree to choose to resolve their disputes through conciliation or arbitration.

In event all parties do not declare their election to settle their industrial relations dispute through conciliation or arbitration within seven working days, local government agency responsible for field of labor affairs is required to delegate resolution of industrial relations dispute to mediator.

In event process of settlement of industrial relations dispute through mediation or conciliation does not achieve settlement agreement, any one of parties may submit complaint to Industrial Relations Court.

Duties and authorities of Industrial Relations Court with respect to final and binding nature of decisions issued in relation to particular types of industrial relations disputes are as follows: Industrial Relations Court has duty and authority to examine and decide rights disputes at first level. In event party would like to appeal decision of Industrial Relations Court concerning rights disputes, appellant must submit its appeal to Supreme Court within 14 working days from reading of decision of Industrial Relations Court by judge at hearing (with respect to parties who are present at that hearing) or within 14 working days from receipt of notice of decision of Industrial Relations Court (with respect to parties who were not present at hearing whereat Industrial Relations Court judge read decision).

Industrial Relations Court has duty and authority to examine and decide interest disputes with decisions issued of final and binding nature. Decisions of Industrial Relations Court in relation to interest disputes are final and binding and thus not subject to appeal to Supreme Court.

Industrial Relations Court has duty and authority to examine and decide employment relationship termination disputes at first level. In event party would like to appeal decision of Industrial Relations Court concerning employment relationship termination disputes, appellant must submit its appeal to Supreme Court within 14 working days from reading of decision of Industrial Relations Court by judge at hearing (with respect to parties who are present at that hearing) or within 14 working days from receipt of notice of decision of Industrial Relations Court (with respect to parties who were not present at hearing whereat Industrial Relations Court judge read decision).

Industrial Relations Court has duty and authority to examine and decide disputes between employee/laborer unions from only one company with decisions issued of final and binding nature. Decisions of Industrial Relations Court in relation to disputes between employee/laborer unions from only one company are final and binding and thus not subject to appeal to Supreme Court.

Strikes as basic right of employees/laborers and employee/laborer unions are to be conducted in legal, orderly and peaceful manner as effect of failure of negotiations. Employees/laborers and/or employee/laborer unions who intend to invite other employees/laborers to strike at time strike is to take place must be conducted without contravening law. Employees/laborers who are invited to strike may comply with or reject invitation to strike. Conduct of strike for employees/laborers who work in companies serving public interest and/or companies with kinds of activities which endanger human life are to be regulated in such form so as to not disturb public interest and/or endanger safety of other persons. Conduct of strike by employees/laborers who work in companies serving public interest and/or companies with kinds of activities which endanger human life which fail to regulate strike in such form so as to not disturb public interest and/or endanger safety of other persons, constitutes as unlawful strike.

Not less than seven working days prior to implementation of strike, employees/laborers and employee/laborer unions are obligated to provide written notice to entrepreneur and local government instrumentality with responsibility over field of labor affairs with following minimum informational content: (i) Time (day, date and hour) of commencement of and end of strike; (ii) place of strike; (iii) reasons and causes giving rise to need to conduct strike; and (iv) signatures of chairman and secretary and/or each chairman and secretary of employee/laborer unions as parties responsible for strike. In event strike will be conducted by employees/laborers who are not members of employee/laborer union, notice must be signed by representative of employees/laborers appointed as coordinator and/or responsible party for strike. Strike failing to satisfy notice requirements constitutes unlawful strike.

In event strike is implemented without notice to entrepreneur, entrepreneur may take following temporary actions for purposes of safeguarding tools of production and assets of company: (i) Prohibit all employees/laborers who are on strike from being at location of production process activities; or (ii) prohibit employees/laborers who are on strike from being at location of company.

Prior to and during strike, government instrumentality with responsibility over field of labor affairs is obligated to settle problems which give rise to strike by uniting and conferring with all parties who are in dispute.

No one may hinder right of employees/laborers and employee/laborer unions to utilize strikes which are conducted in legal, orderly and peaceful manner. Everyone is prohibited from conducting arrests/seizures and/or detentions in relation to employees/laborers and management of employee/laborer unions who implement strikes which are conducted in legal, orderly and peaceful manner in accordance with regulations of law in effect.

In connection with lawful strikes conducted in accordance with performance of mandatory notice, entrepreneurs are prohibited from: (i) Replacing employees/laborers who strike with other employees/laborers from outside of company; or (ii) imposing sanctions or retaliatory actions in any form on employees/laborers and management of employee/laborer unions during and after conduct of strike.

In event employees/laborers conduct lawful strikes in presentation of claims for normative rights which have actually been violated by entrepreneur, employees/laborers are entitled to receive pay/wages.

Lock-out constitutes basic right of entrepreneur for rejection of employees/laborers in whole or in part for conduct of work as result of failure of negotiations provided that lock-outs must be conducted in accordance with regulations of law in effect. Entrepreneur may not legitimize lock-out as act of retaliation in connection with normative claims of employees/laborers and/or employee/laborer unions. Lock-outs are prohibited for companies serving public interest and/or companies with kinds of activities which endanger human life, including hospitals, clean water networks, centers for telecommunications management, centers for provision of electric power, oil and natural gas processing and trains.

Not less than seven working days prior to implementation of lock-out, entrepreneur is obligated to provide written notice to employees/laborers, employee/laborer unions and local government instrumentality with responsibility over field of labor affairs with following minimum informational content: (i) Time (day, date and hour) of commencement of and end of lock-out; (ii) reasons and causes giving rise to need to conduct lock-out; and (iii) signatures of entrepreneur and/or manager of relevant company.

Notice is not required if: (i) Employees/laborers or employee/laborer union have violated notice procedures relating to strikes; or (ii) employees/laborers or employee/laborer union have violated normative provisions stipulated in employment agreement, company regulations or regulations of law in effect.

Prior to and during lock-out, government agency with responsibility over field of labor affairs is authorized to settle problems which give rise to lock-out by uniting and conferring with all parties who are in dispute.

Employment Relationship Terminations.

Provisions concerning employment relationship terminations set forth in Law No. 13 of 2003 concerning Labor Affairs cover employment relationship terminations which occur in business organizations which are legal entities or non-legal entities, owned by individual natural persons, owned by federations/partnerships or owned by legal entities, both owned privately and owned by state, whether for social activities or other activities which have management and employ other persons with payment of pay/wages or compensation in other forms.

Entrepreneurs, employees/laborers, employee/laborer unions and government with all efforts must try to avoid employment relationship terminations.

In event all efforts have already been conducted, but employment relationship terminations cannot be avoided, then intentions concerning employment relationship terminations must be discussed by entrepreneur and employee/laborer union or with employee/laborer if relevant employee/laborer is not member of employee/laborer union. In event parties fail to reach agreement on employment relationship termination, entrepreneur can only terminate employment relationship with employee/laborer after obtaining decision from institution for settlement of industrial relations disputes (see subhead Industrial Relations Disputes, supra).

Entrepreneur is prohibited from implementing employment relationship terminations based on following reasons: (i) Employee/laborer is hindered in entering work due to illness according to statement of doctor for period of time not exceeding 12 consecutive months; (ii) employee/laborer is hindered in performing work due to performance of obligation concerning State according to provisions of regulations of law in effect; (iii) employee/laborer conducts devotional practice which is required by his or her religion; (iv) employee/laborer marries; (v) female employee/laborer becomes pregnant, gives birth, miscarries or nurses her baby; (vi) employee/laborer has blood relationship and/or marital obligation with another employee/laborer in same company, except if already regulated in labor agreement, company regulations or collective labor agreement; (vii) employee/laborer establishes, becomes member of and/or manages employee/laborer union, employee/laborer engages in employee/laborer union activities outside of working hours, or during working hours based upon agreement of entrepreneur or based on provisions set forth in labor agreement, company regulations or collective labor agreement; (viii) employee/laborer complains about entrepreneur to authorities concerning entrepreneur's conduct which constitutes charge of felonious criminal act; (ix) due to differences in understandings, religion, political ideology, ethnic group, skin color, class, gender, physical condition or marital status; or (x) employee/laborer is in condition of permanent disability, is ill as result of work related accident or is ill due to employment relationship which is in accordance with statement letter of doctor with period of time for recuperation which cannot be specified. Employment relationship terminations implemented based upon aforementioned reasons are void as matter of law and entrepreneur is required to re-employ relevant employee/laborer.

Decision from industrial relations dispute settlement organization is not required in following circumstances: (i) Employee/laborer is still within trial period, if trial period has been stipulated in writing; (ii) employee/laborer submits written request to resign based upon his/her own desire and without existence of indications of pressure/intimidation from entrepreneur; (iii) end of employment relationship in accordance with employment agreement for specified time for first time; (iv) employee/laborer reaches age of retirement in accordance with stipulations of employment agreement, company regulations, collective labor agreement or regulations of law; or (v) employee/laborer dies.

In event of employment relationship termination, entrepreneur is obligated to pay severance money and/or work period appreciation money and money for replacement of rights which should be received.

Art. 158 of Law No. 13 of 2003 provides that entrepreneur may terminate employment relationship of employee/laborer if there is cause arising out of employee/laborer's commission of following major faults: (i) Conduct of fraud, theft or embezzlement of goods or funds belonging to company; (ii) providing false information or falsifying information resulting in loss to company; (iii) drunkenness, drinking hard drinks which are intoxicating, using and/or distributing narcotic, psychotropic and other addictive substances in work environment; (iv) conduct of immoral act or gambling in work environment; (v) attacking, battering/torturing/mistreating, threatening or intimidating co-workers or entrepreneur in work environment; (vi) tricking/cheating/persuading co-workers or entrepreneur to conduct act which is against regulations of law; (vii) acting with impropriety/indecency/immorality/ carelessness or intent to damage/ruin or permit/allow/neglect things/goods possessed by company to remain in dangerous situation resulting in loss to company; (viii) acting with impropriety/indecency/immorality/carelessness or intent to permit/allow/neglect of co-worker or entrepreneur in dangerous situation in work place; (ix) disclose or leak company secret which should be maintained confidential except in interests of State; or (x) conduct other acts in company environment which are subject to criminal punishment of imprisonment of five or more years. However, Art. 158 of Law No. 13 of 2003 has been declared unconstitutional and of no legal effect by Constitutional Court Decision No. 12 PUU I 2003 dated 26 Oct. 2004.

11 ENVIRONMENT

11.01 ENVIRONMENTAL REGULATION:

Environmental protection is governed by Law No. 23 of 1997 dated 19 Sept. 1997 concerning Environmental Management and wide range of other environmental legislation including regulation of spatial arrangement and industrial planning and permits, water, noise, air and odor pollution, liquid and other forms of hazardous and toxic wastes and administration of Blue Skies and Clean Rivers Programs.

Earth and water and natural resources are controlled by State and are utilized for greatest possible public welfare. Government determines national policies on environmental management and spatial management taking into account religious and cultural values and values which exist in society.

Air pollution refers to materials, energy and other components entering into ambient air due to human activities resulting in decline in ambient air quality. National ambient air quality objectives have been established as maximum ambient air quality limits to prevent air pollution for number of air pollutants including particulate, carbon monoxide, sulfur dioxide, nitrogen oxides, and ozone. Vehicle emissions standards have been promulgated.

Water pollution refers to entry of living organisms, materials, energy and/or other components into water due to human activities resulting in decline in water quality. National discharge standards have been set for industrial and domestic effluent entering water resources by ministerial decree in observance of input from related instrumentalities.

Hazardous waste and poison refers to residual material from efforts and/or activities which contain dangerous materials and/or which because of their nature and/or concentration and/or amount, may pollute and/or harm environment and/or endanger health, sustainability of human life or other living creatures, whether directly or indirectly. Procedures and technical requirements for storage and collection of waste are also regulated.

12 ESTATES AND TRUSTS

12.01 DEATH (PRESUMPTIONS OF AND ACTIONS FOR):

Person is presumed dead if proved that he has been absent from his residence for: (i) Five years without leaving letter authorizing representative to manage absentee's wealth, property, affairs and interests; (ii) ten years if absentee has left letter authorizing representative to manage absentee's wealth, property, affairs and interests; (iii) one year if person was member of crew or passenger of lost ship or airplane.

Before presumption of death is declared by judge of District Court, general summons must be published three times in newspapers specified by District Court, posted on main doors of District Court and main doors of Regent's office of last known residence of absentee. Declaration of presumption of death is announced in same newspaper publishing summons. After announcement of declaration of presumption of death, heirs of deceased, by inheritance or testamentary disposition, have right to control wealth of deceased. Heirs bear burden of guarantee implied in law that they will not transfer any interests in corpus of estate. Rights of heirs are merely that of use. After passage of 30 years from date declaration of presumption of death is announced by judge or after passage of 100 years after birth date of person presumed dead, then distribution of assets to heirs apparent vests.

Married person whose spouse is missing may petition District Court to give permission for marriage to another person if missing spouse has been absent for period of ten years commencing on day spouse left his/her domicile and there has been no news regarding life or death of missing spouse.

Decision of presumption of death must be recorded in Civil Registry.

12.02 DESCENT AND DISTRIBUTION:

Civil Code.

Descent and distributions of decedent's who are not of Islamic faith are governed by Indonesian Civil Code (Kitab Undang-undang Hukum Perdata) (KUHPer) (Burgerlijk Wetboek voor Indonesië). If deceased leaves no issue, no spouse and no brothers or sisters, decedent's estate is divided into two equal shares between blood relatives of maternal and paternal heirs in ascending line. If deceased leaves no issue and no spouse and deceased leaves both parents and only one brother or sister, each share equally. If deceased leaves both parents and more than one brother or sister, each parent will obtain one-fourth of inheritance with remainder divided between brothers and sisters. If deceased leaves no issue and no spouse and leaves only one parent and only one brother or sister, each obtains half of estate. If deceased leaves no issue and no spouse and leaves only one parent and two siblings, each share equally. If deceased leaves no issue and no spouse, leaves only one parent and leaves more than two siblings, parent will get one-fourth and siblings will share equally. If deceased leaves no issue, no spouse and no parents, brothers and sisters of deceased will inherit entire estate in equal proportions. If deceased leaves no issue, no spouse and no siblings and leaves one parent, parent obtains entire estate. If deceased leaves illegitimate but acknowledged issue along with legitimate issue or spouse, illegitimate child will inherit one-third of share of legitimate child. If deceased leaves neither legitimate issue nor spouse but only blood relations in ascending line or siblings and illegitimate issue, illegitimate issue will obtain one-half of inheritable estate. If deceased only leaves kinsfolk of greater distance, illegitimate child will obtain three-quarters of inheritance. If deceased leaves no legal heirs, illegitimate child will obtain entire inheritable estate.

Every heir has right to demand distribution of decedent's estate. Agreements concerning prohibition against distribution of estate are void, provided that distribution may be postponed for maximum of five years subject to renewal. Creditors with claims against deceased have right to payment prior to distribution of estate. Method of distribution may be determined by heirs if all of heirs are competent and they are all present at time of distribution. Matters pertaining to distribution must be evidenced in notarial deed.

12.03 EXECUTORS AND ADMINISTRATORS:

Appointment, Resignation and Removal.

Testator may appoint one or more executors and administrators based on will or appointed by notarial act. If executors and administrators are unable to carry out or are impeded in carrying out administration or distribution according to will and testator has not appointed substitute executors and administrators, District Court may appoint replacement upon hearing public prosecutor. District Court may remove executors and administrators based upon following reasons: (i) Misuse of authority or neglect of obligation; (ii) immoral acts; (iii) final and binding sentence of crimes relating to origin of marriage, decency, abandonment of person in need of assistance, crimes against freedom, crimes against life and cruel treatment/torture against children who are under their guardianship, testator and/or heirs; (iv) irrevocable criminal sentence of imprisonment of two or more years); (v) has been convicted by final and binding court judgment due to intentional aiding and abetting or conspiring to commit criminal offense against children who are under their guardianship, testator and/or heirs; (vi) has been terminated from guardianship or parental guardianship or position as executor or administrator due to misuse of authority or neglect of obligation or immoral acts; (vii) in state of bankruptcy; or (viii) having dispute in court against interest of testator.

Qualifications.

Minors and persons of unsound mind under guardianship and persons incompetent to enter into agreements cannot be executors or administrators.

Powers and Duties.

Executors are authorized to take possession of all or part of estate of deceased. Authority is limited to one year from date of possession. Executors are prohibited from selling property with intention of division among heirs. Testators may appoint administrators to manage their estates for benefit of heirs for fixed period of time or throughout lives of heirs.

12.04 TRUSTS:

Indonesian law does not specifically define concept of trusts or separation of legal from beneficial interests in property. However legal relationships similar to trusts arise in many areas of Indonesian law.

12.05 WILLS:

Civil Code.

Wills of persons not of Islamic faith are governed by Indonesian Civil Code (Kitab Undang-undang Hukum Perdata) (KUHPer) (Burgerlijk Wetboek voor Indonesië).

Testamentary Capacity.

Wills made by persons under age of 18 are not permitted. To make or revoke testament, one must be in full possession of his or her faculties. Competence of testator is judged as to state of his or her condition at moment testament is made.

Capacity to Benefit.

Persons benefiting from wills must exist at moment of death of testator. Child in gestation is deemed to exist every time child's interest requires it.

Forms of Wills.

Holographic wills must be signed and written entirely in testator's handwriting and given to notary in presence of two witnesses either open or under sealed cover. If holographic will is given openly, notary with assistance of two witnesses draws up deed of deposit at foot of testament. If holographic will is given under sealed cover, cover must contain note written and signed by testator stating that will contained within was made by testator and notary draws up deed of deposit on separate paper. Holographic wills which merely authorize executors generally to make funeral arrangements and to distribute personal belongings need not be delivered to notary or witnessed to be effective.

Notarial wills are made by notaries based on testator's wishes in presence of two witnesses. Notarial wills must be signed by testator, notary and witnesses.

Closed or secret wills made by testator outside of presence of notary must be written in testator's or testator's representative's handwriting, signed by testator personally and given to notary in presence of four witnesses.

Revocation.

Wills cannot be entirely or partially revoked except by later testament or extraordinary notarial deed specifically stating intention of revocation. Revocation made either expressly or by implication by later testament shall be entirely valid although new testament is invalid due to incompetence or rejection of heirs.

Lapse.

Testamentary dispositions lapse if heir refuses to accept devise or if heir is incompetent to receive devise.

Islamic Law.

Wills are only permissible once testator reaches age of 21. Testator may only bequeath one-third of his or her property without consent of heirs apparent.

13 FAMILY

13.01 ADOPTIONS:

Adoption is governed by Law No. 23 of 2002 dated 22 Oct. 2002 concerning Child Protection; Government Regulation No. 54 of 2007 dated 3 Oct. 2007 concerning Implementation of Adoptions; Decree of Minister of Social Affairs No. 44/HUK/1997 dated 31 July 1997 concerning Fostering of Children Welfare through Adoption; Decree of Minister of Social Affairs No. 2/HUK/1995 dated 25 Jan. 1995 concerning Completion of Attachment to Decree of Minister of Social Affairs No. 13/HUK/1993 concerning Implementation of Adoption; Supreme Court Circular Letter No. 2 of 1979 dated 7 Apr. 1979 concerning Adoption; and Supreme Court Circular Letter No. 6 of 1983 dated 30 Sept. 1983 concerning Completion of Supreme Court Circular Letter No. 2 of 1979 concerning Adoption.

Adoptions may only be implemented if in best interests of adoptive child and in accordance with local custom and regulations of law in effect. Adoptive parents must have same religion as adoptive child. Adoption by foreign citizens may only be conducted as last resort. Government and society provide guidance and supervision relating to adoptions.

Three categories of adoptions are recognized in Indonesia: (i) Adoptions of Indonesian State citizens by Indonesian State citizens which include: (a) Adoptions in accordance with local customs, and (b) adoptions in accordance with regulations of law in direct manner or through child care institutions; (ii) adoptions of Indonesian State citizens by non-Indonesian State citizens; and (iii) adoptions of foreign citizens in Indonesia by Indonesian State citizens. Adoptions must be approved by Minister of Social Affairs and registered with Department of Social Affairs.

Adoptions of Indonesian State citizens by Indonesian State citizens in accordance with local customs may be conducted with application for court stipulation. Adoptions of Indonesian State citizens by Indonesian State citizens in accordance with regulations of law in direct manner or through child care institutions shall be conducted through court stipulation. Adoptions of Indonesian State citizens by foreign state citizens and adoptions of foreign state citizens in Indonesia by Indonesian State citizens shall be conducted through court decision.

Prospective adoptive children include those children who: (i) Have not yet reached 18 years of age, provided that prospective adoptive children who are: (a) below 6 years of age shall be given first priority; (b) between 6 years and 12 years of age shall be considered so long as urgent grounds/reasons exist; and (c) between 12 and 18 years of age shall be considered so long as special/specific protection is required for that prospective adoptive child; (ii) are abandoned childred; (iii) ares in care of foster family or child care institution; or (iv) need special/specific protection.

Prospective adoptive parents must: (i) Be of sound mind and body; (ii) be at least 30 and at most 55 years of age; (iii) have same religion as adoptive child; (iv) be of good behaviour and never convicted of any criminal act; (v) have been married for at least five years unless a doctor's letter certifying impossibility of having children is submitted with adoption application; (iv) not constitute a homosexual/gay couple; (vii) have no child or only have one child; (viii) be of sound financial and social condition; (ix) obtain agreement from adoptive child; (x) provide written statement stating adoption is conducted for child's best interest, welfare and protection; (xi) provide social report from local social worker; (xii) have taken care of adoptive child for at least six months since issuance of adoption permit; and (xiii) obtain approval from minister who implements governmental affairs in social sector and/or head of social instrumentalities.

Foreign adoptive parent applicants must: (i) obtain written approval from state government of which they hold citizenship through embassy or state representative in Indonesia; (ii) obtain written approval from minister who implements governmental affairs in social sector; (iii) submit application through child care institution; (iv) have been living legally in Indonesia for at least two years, supported by statement letter issued by authorized official; and (v) provide period statement on child's development to Ministry of Foreign Affairs of Republic of Indonesia through representative of Republic of Indonesia in adoptive parent's respective country at least once a year until adoptive child has reached 18 years of age.

Indonesian State citizen adopting foreign state citizen child must: (i) Obtain written approval from Government of Republic of Indonesia; and (ii) obtain written approval from state government of which child holds citizenship.

Adoptions by single parents may only be conducted by Indonesian State citizen upon obtaining approval of minister who implements governmental affairs in social sector.

13.02 DIVORCE:

Civil Law applies to divorce not based on Islamic law. Divorce must be conducted before Court. Divorce may only be conducted before court after relevant court attempts and does not succeed in reconciling differences of parties.

There must be valid reason for divorce. Valid reasons include: (i) One spouse commits adultery or becomes drunkard, addict, gambler or any other incurable ill-manner; (ii) one spouse leaves other for two consecutive years without permission of other spouse and without legal reason or cause beyond spouse's control; (iii) one spouse becomes subject to sentence of imprisonment for five or more years following marriage; (iv) one spouse commits acts of cruelty or mistreatment endangering other spouse; (v) one spouse is inflicted with physical defect or disease resulting in inability to serve as spouse; or (vi) there is no hope for spouses to live harmoniously due to continuous disputes and conflicts between them.

Divorced parents remain obligated to care for and educate their children. Court settles disputes regarding control and custody over children.

If husband and wife who have been divorced remarry each other and then get divorced for second time, they may not remarry each other again unless specifically permitted by their respective religions and faiths.

Islamic divorce is applicable for Islamic marriages in accordance with Islamic law.

Alimony.

Civil Law.

Court may obligate ex-husband to pay alimony to his ex-wife.

Islamic Law.

Ex-wife has right to alimony if divorce was not based on her fault. Alimony given is in amount of wife's living costs during 90 days Iddah period. Besides alimony, ex-wife also has right to be paid Mut'ah in form of money or property. Mut'ah is paid in accordance with ability of ex-husband.

13.03 HUSBAND AND WIFE:

Civil Law.

Rights of husband and wife in family and social life are deemed equal with each party entitled to take legal action. Spouses are obligated to love one another, give mutual respect, be loyal and provide assistance to one another. Husband is obligated to give protection to his wife and to provide livelihood according to his capabilities. Wife is obligated to take care of household matters according to her best efforts. Neglect by either husband or wife is grounds for suit in court.

Community Property.

Property obtained during marriage is considered marital property. Property brought into marriage by each spouse, and property obtained by each spouse through gift or inheritance is considered separate property of spouse bringing property into marriage or receiving gift or inheritance. Dispositions of marital property require consent of both spouses. Each spouse is empowered to take any legal action with regards to respective spouse's separate property.

Islamic Law.

Rights and duties of husband and wife are equal in family and social life, and both have right to take legal action. Marital domicile is determined by mutual agreement. Husband has duty to provide place to stay for his wife and children, to protect his wife and provide for all necessities of household life in accordance with his capabilities and to provide his wife with religious education. Wife has duty to serve husband based on Islamic law and to arrange for daily household needs.

Adat Law.

Husband and wife commit themselves to live together. Husband and wife decide permanent matrimonial domicile together. Husband has duty to protect his wife and maintain her according to his social and economic abilities.

13.04 INFANTS:

Age of Majority varies for different purposes. Generally, age of majority is 21 years.

Parental Guardianship.

Age of majority is 18 years for children who have not yet reached age of 18 years or who have never married are under authority of their parents provided parental authority has not been annulled.

Citizenship Matters.

Children are deemed Indonesian citizens if they are born outside of legal marriage from foreign State citizen mother who is acknowledged by father who is Indonesian State citizen as his child and that acknowledgment is made prior to child reaching 18 years of age or prior to marriage. Children are deemed Indonesian citizens if they are born outside of legal marriage, have not yet reached age of 18 years, have not yet married and are legally acknowledged by father who has foreign citizenship.

Notarial Deeds.

Party appearing before notary must be at least 18 years of age or already married.

Female Employees.

Female employees/laborers under age of 18 years are prohibited from being employed between hours of 11 p.m. and 7 a.m.

Wills made by persons below age of 18 years are void.

Marriage.

Aspiring husband must have attained age of 19 years and wife must be at least 16 years, however one may petition court for dispensation. Aspiring spouses may marry without permission from their parents if they have reached age of 21 years. See also Art. 156(d) of Compilation of Islamic Law approved for use by Presidential Instruction No. 1 of 1991 dated 10 June 1991 (providing that divorce obligates father to provide support to children until children become adults and are able to take care of themselves; deemed to occur at age of 21).

Contracting.

Contracts made by persons below age of majority are voidable.

13.05 MARRIAGE:

Civil Law.

Marriage is governed by Law No. 1 of 1974 dated 2 Jan. 1974 concerning Marriage. Marriage is considered legal if conducted in accordance with rules of respective religion and faith of parties. For non-Islamic marriages, marriage may be conducted after passing of ten days from date of announcement of intent to marry by Civil Registry Official. At moment after marriage ceremony in accordance with aforementioned ten-day announcement period, both bride and bridegroom sign marriage deed which is prepared by Civil Registry Official based on provisions in effect.

In principle, man may only have one wife and woman may only have one husband. However, Court may give permission for man to have more than one wife if desired by respective parties. Permission is only granted if wife is unable to serve her husband, if wife is inflicted with physical defect or incurable disease, or if wife is barren.

Marriage is relationship of mutual consent. For persons under age of 21 years, parental permission is required. Men under 19 years of age and woman under 16 years of age may not marry without dispensation from Court.

Marriages are prohibited between parents and their children, brothers and sisters, parent's brother or sister or brother or sister of respective grandmothers. Marriages are prohibited between people who are related by marriage including parents-in-law, stepchildren, sons and daughters-in-law and stepparents and between persons with relation by breast feeding.

Marriages may be prevented by objection to Court tendered by immediate family members or prospective spouse's guardians if it is apparent that marriage would bring suffering to either prospective spouse. Marriage may not proceed until application of objection is revoked by applicant or denied by Court.

Under certain circumstances, marriages may be annulled by application to Court by husband or wife or immediate family members of husband or wife if parties are not suitable for marriage.

Marriages dissolve by reason of death, divorce or other Court decision.

Marriages occurring outside of Indonesian territory between two persons of Indonesian citizenship or of Indonesian citizen and foreign citizen must be processed in accordance with prevailing law of country in which marriage took place, provided that Indonesian spouse may not engage in marriage proceeding infringing upon mandates of Indonesian law. Within one year after spouses return to Indonesia, marriage certificate must be recorded at Marriage Registry Office. Marriages between Indonesian citizens and foreign citizens within Indonesia require proof that legal conditions of marriage applicable to laws of foreign citizen's country have been fulfilled as well as fulfillment of other Indonesian legal requirements.

Courts referred to under this heading are either Religious Court for Muslim marriages or National District Court for non-Muslim marriages.

Civil servants must notify relevant officials of their marriage within one year after their marriage. Civil servants must also obtain permits for divorce.

Islamic Law.

Marriage is contract concluded between bridegroom and guardian of bride in presence of two witnesses. It is contract in which “idjab-kabul” (offer and acceptance) of marriage is concluded in sacramental words. Mahar, gift from bridegroom to bride, is given at ceremony or after bride agrees. Bride is represented by wali who is bride's father, or if he is unavailable, another male relative from father's side of family. If no male relative from father's side of family is available, substitute for male family member may act upon appointment by Minister of Religious Affairs or appointed official after decision of religious court.

Adat Law.

Marriage in Adat law sphere gives rise to intercession of clan heads, village chief and parents. Marriage ceremonies conclude when chiefs of community officially announce marriage to community.

Formation.

Marriage is usually preceded by proposal made by parents of aspiring bridegroom to parents of intended bride. If proposal is accepted, result is usually not directly marriage but first engagement or betrothal. With acceptance of engagement, parties promise to marry and promise becomes binding when presents are exchanged. Gifts may be transferred from aspiring bridegroom to intended bride or vice versa depending on relevant cultural group. Engagement is usually followed by feast attended by members of families involved.

Support.

Civil Law.

Father is obligated to provide for all of his children's living costs and education. If father is unable to provide support, court may also obligate mother to support her children.

Islamic Law.

Father is obligated to give support called Hadhanah according to his ability until his children reach age of 21 years. Children also have right to receive child support from mother until age of 21 years.

14 FOREIGN TRADE AND COMMERCE

14.01 CUSTOMS:

Customs is governed by Law No. 10 of 1995 dated 30 Dec. 1995 concerning Customs as am'd by Law No. 17 of 2006 dated 15 Nov. 2006 concerning Amendment to Law No. 10 of 1995 concerning Customs and Law No. 11 of 1995 dated 30 Dec. 1995 concerning Excise as am'd by Law No. 39 of 2007 dated 15 Aug. 2007 concerning Amendment to Law No. 11 of 1995 concerning Excise.

Customs means all matters connected with control of flow of goods entering or leaving customs area as well as imposition of import duties and export duties. Customs area means territory of Republic of Indonesia including territorial land, waters and air space, as well as certain locations in exclusive economic zones and continental shelf. Minister of Finance through Directorate General of Customs and Excise is implementing element of principle duties and functions of Department of Finance in field of customs and excise. Goods entering into Indonesian customs area are treated as imports upon which import duty may be assessed. Goods which have already been loaded onto means of transportation for departure from Indonesian customs area are deemed as already exported and treated as exported goods.

Anti-Dumping and Countervailing Duties.

Imported goods may be subject to: (i) Anti-Dumping penalties if price of imported goods is lower than their normal value in country of export and if imported goods cause or threaten to cause losses; or (ii) countervailing duties if price of imported goods reflects benefits from subsidies by government or state and if imported goods cause or threaten to cause losses to Indonesian domestic industries producing goods of same or similar type.

Duty free imports are available for import of goods for use by officials connected with diplomatic missions of foreign states, provided those foreign states provide reciprocal benefits.

Foreign diplomatic representative offices may import up to 16 assembled four-wheeled motor vehicles. Foreign diplomatic consular offices may import up to six assembled four-wheeled motor vehicles.

Goods for representatives of foreign states and their officials who are assigned to Indonesia based on reciprocity of benefits, goods for international organizations and for their officials who are assigned in Indonesia, scientific books, goods shipped as gifts/donations for religious interests or public, charity, social, cultural requirements or for interests of tackling/preventing natural disasters, goods for needs of museums, zoos and other similar places open to public, as well as goods for nature conservation, goods for needs of scientific research and development, goods for special needs of blind persons and others burdened with handicap, armaments, ammunition, military and police equipment including spare parts for State defense and security requirements, goods and materials which are to be utilized for production of goods for needs of State defense and security, sample goods not for sale, coffins or other packaging which contain corpses or ash remains, tools and equipment related to moving of goods, personal goods of passengers, crew members, border crossers and shipped goods up to certain customs value limitations and/or totals, medication which is to be imported utilizing Government budget which is to be allocated for interests of community/society, goods which have already been exported for requirements of repair, employment and testing, goods which have already been exported which are thereafter to be re-imported of same quality as quality at time of export; and materials for human therapy, blood groups and tissue classification.

Personal and Other Import Duty Exemptions.

Personal goods carried with maximum FOB value of US$250 per person or US$1,000 per family for every trip shall be exempted from import duties and not be charged with import related tax. In addition to grant of aforementioned exemption, excisable goods in form of 200 cigarettes, 25 cigars, 100 gm of chip tobacco and one liter of ethyl alcohol drinks are exempted from obligation to pay excises for adults. Import duties and import related tax must be paid on excess values. If excisable goods carried by any passenger exceed amount as above mentioned, excess of excisable goods shall be destroyed with or without being witnessed by relevant passenger.

Crew members are limited to value of FOB US$50 and must pay import duty on excess value. In addition to grant of this exemption, excisable goods in form of 40 cigarettes, 10 cigars, 40 grams of chip tobacco and 350 liters of ethyl alcohol drinks are exempted from obligation to pay excises for any crew members.

Post.

Shipped goods with maximum FOB value of US$50 for any individual per shipment shall be exempted from import duty and import related tax.

Customs officials shall stipulate customs rates and values, as well as calculate import duties and import related tax which must be paid for goods shipped by post.

14.02 EXCHANGE CONTROL:

No foreign exchange restrictions are imposed on flow of foreign exchange except with regard to offshore commercial loans. See subhead Offshore Commercial Loans, infra.

Limitations on right to transport Indonesian Rupiah into or out of territory of Indonesia provide that each person may carry up to Rp 100,000,000 across Indonesian borders without obtaining permit from Bank Indonesia. Those transporting cash in excess of Rp 100,000,000 must obtain permit from Bank Indonesia which must be reported to customs authority at departure point. Violations of aforementioned provisions are subject to administrative sanctions equivalent to 10% of amount of cash transported with maximum sanction of Rp 300,000,000.

Offshore Commercial Loans.

Team for coordination and management of offshore commercial loans serves to manage utilization of offshore commercial loans in order to prevent pressure on international balance of payments of Indonesia, avoid confusion in entering international capital markets and ensure that offshore loan repayment obligations are kept within limits of Indonesia's economic capacity. Tim PKLN is governed by Presidential Decree No. 39 of 1991 dated 4 Sept. 1991 concerning Coordination on Management of Offshore Commercial Loan. Tim PKLN is responsible for determining total amount of offshore loans to be procured from international capital market in fiscal year, stipulating guidelines regarding requirements for commercial offshore loans, determining order of priority for usage of commercial offshore loans for financing development projects, fixing schedules for procurement of loans to avoid capital market confusion and monitoring plans and realization and utilization of offshore commercial loans.

Types of loans requiring coordination with Tim PKLN include: (i) Loans connected with development projects whose financing is of nature of non-recourse loans, limited recourse loans, advance payments, trustee borrowings, leasing and others of similar nature; and (ii) loans connected with development projects whose financing is based on build, operate and transfer, build and transfer and other similar arrangements.

Types of loans excluded from purview of Tim PKLN's approval authority include: (i) Offshore commercial loans for trading needs of short term nature; (ii) offshore commercial loans procured by private companies for development project financing having nothing to do with government or State owned enterprises (including Government banks and State oil and gas company, Pertamina) in form of Government capital participation, guarantees for basic material supplies, guarantees for purchase of results of production or activities of any form; and (iii) other offshore commercial loans as determined by Tim PKLN.

Prospective borrowers must submit applications to Tim PKLN to obtain approval to procure offshore commercial loans.

Bank Indonesia Reporting Obligations.

Banks, non-bank companies and individuals which have offshore loans are required to report every offshore loan periodically to Bank Indonesia in complete, accurate and timely manner which includes: (i) primary data of offshore loan and/or its amendments containing information on identity of borrower, type of loan, loan amount and condition of loan; and (ii) offshore loan realization data concerning drawing, repayment and late repayment information.

Offshore Loans of Non-Bank Companies.

Types of offshore loans of non-bank companies which must be reported include: (i) Loans in Rupiah and foreign currencies which are conducted based on loan agreements with non-residents; (ii) documents of indebtedness in foreign currencies which are issued in international financial markets through public offerings; (iii) documents of indebtedness in Rupiah and foreign currencies which are issued through private placements to non-residents; (iv) documents of indebtedness in foreign currencies which are issued in domestic financial markets through public offerings; (v) documents of indebtedness in foreign currencies which are issued through private placements to residents; and (vi) other obligations to non-residents both in foreign currencies and Rupiah other than types of offshore loans of non-bank companies aforementioned.

Non-bank company means: (i) State owned enterprises; (ii) regional owned enterprises; and (iii) private companies, which include: (a) public companies; (b) issuers; (c) foreign capital investment companies of which at least 10% of their shares are owned by non-residents; and (d) other private companies with assets or gross sales in one year of at least Rp 100,000,000,000.

Non-bank companies are planning to obtain long term offshore loans are required to submit correct and complete reports to Bank Indonesia which include: (i) Financial ratios; (ii) financial reports; (iii) rating evaluations; (iv) reports of plan of offshore loan of non-bank companies for one year; and (v) results of analysis of risk management of companies.

Non-bank companies which are planning to obtain long term offshore loans are required to have rating evaluations from national or international rating institutions, with exception to: (i) Private companies which obtain long term offshore loans direcly from parent companies or shareholders; and (ii) State owned enterprises and regional owned enterprise with assets or gross sales in one year of less than Rp 100,000,000,000.

Non-bank companies are required to report changes in plans concerning long term offshore loans of non-bank companies and or changes in result of analysis of risk management of companies.

Non-bank companies which have positions in short term and/or long term offshore loans are required to submit correct and complete reports to Bank Indonesia concerning: (i) Financial ratios; and (ii) financial reports.

Long term offshore loans of non-bank companies means offshore loans of non-bank companies with terms of more than one year obtained either directly from creditors or financial markets or indirectly through other affiliated parties and other non-affiliated parties.

Short term offshore loans of non-bank companies means offshore loans of non-bank companies with terms of up to one year obtained either directly from creditors or financial markets or indirectly through other affiliated parties and non-affiliated parties.

14.03 FOREIGN EXCHANGE:

See topic 14.02 Exchange Control.

14.04 FOREIGN INVESTMENT:

Governing Law.

Foreign capital investments are governed by Law No. 25 of 2007 dated 26 Apr. 2007 concerning Capital Investment.

Scope of Law.

Provisions in Law No. 25 of 2007 are effective for capital investment in every sector in territory of State of Republic of Indonesia. Capital investment in every sector in territory of State of Republic of Indonesia means direct capital investment and does not include indirect or portfolio capital investment.

Generally.

Foreign persons or entities are encouraged to participate in all or part of share capital of limited liability companies based upon obtaining approval of President and: (i) Minister of Finance for finance and insurance sector activities; or (ii) Investment Coordinating Board (BKPM); or (iii) provincial Governor for other activities.

Definitions.

Capital means assets in form of money or other forms other than money which are owned by capital investor which has economic value.

Capital investment means all forms of activities of capital investment, both by domestic capital investors and foreign capital investors for conduct of business in territory of State of Republic of Indonesia.

Capital investor means person or business entity which conducts capital investment which may take form of domestic capital investor or foreign capital investor.

Foreign capital means capital which is owned by foreign states, individual foreign state citizens, foreign business entities, foreign legal entities and/or Indonesian legal entities with capital which is partly or entirely owned by foreign parties.

Foreign capital investment means activities of capital investment for conduct of business in territory of Republic of Indonesia which are implemented by foreign capital investors, whether through utilization of foreign capital entirely or through formation of joint venture with domestic capital investors.

Foreign capital investor means individual foreign state citizen, foreign business entity, and/or foreign government which conducts capital investment in territory of State of Republic of Indonesia.

One-door integrated services means activities of operation/management of licensing and non-licensing authority which may be delegated from instrumentalities or institutions which possess licensing and non-licensing authority which manage process which commences from application stage until and including document issuance stage which is conducted/implemented in one place.

Form of Business Entity.

Foreign Capital Investments.

Foreign capital investment must take form of limited liability companies based on Indonesian law and domiciled in territory of State of Republic of Indonesia unless otherwise stipulated by law.

Limited Liability Companies.

Foreign capital investors which undertake capital investment in form of limited liability companies are to be conducted with: (i) Subscription to part of shares at time of limited liability company establishment; (ii) purchase of shares; and (iii) implementation of other methods in accordance with provisions of regulations of law.

Nationalization and Expropriation.

Compensation.

In event Government conducts acts of nationalization or acquisition/expropriation of ownership rights, Government will provide compensation in amount which is determined on basis of market prices.

Asset Transfers.

Capital investors may transfer assets which are owned by them to parties who are desired by capital investors in accordance with provisions of regulations of law.

Labor Affairs.

Prioritization of Indonesian Labor.

In fulfillment of labor requirements, capital investment companies must prioritize Indonesian State citizen labor.

Foreign Expert Labor.

Capital investment companies are entitled to use foreign state citizen expert labor for certain positions and expertise/know-how according to provisions of regulations of law.

Capital investment companies employing foreign labor are obligated to implement training of and conduct technology transfer to Indonesian State citizen labor in accordance with provisions of regulations of law.

Open and Closed Business Sectors.

All business sectors or business categories are open for capital investment activities, except for business sectors or business categories which are declared closed or open subject to conditions.

Criteria and conditions for business sectors which are closed and those which are open subject to conditions and list of those business sectors are governed by Presidential regulations.

Rights of Capital Investors.

Every capital investor is entitled to obtain: (i) Certainty of rights, law and protection; (ii) open information concerning business sectors within which they engage; (iii) right to services; and (iv) various forms of facilities in accordance with provisions of regulations of law.

Obligations of Capital Investors.

Every capital investor is required to: (i) Adhere to principles of good corporate governance; (ii) implement company social responsibilities; (iii) make reports concerning capital investment activities and deliver them to Capital Investment Coordinating Board; (iv) respect cultural traditions of society in locality of capital investment business activities; and (v) fulfill all provisions of regulations of law.

Responsibilities of Capital Investors.

Every capital investor is responsible for: (i) Guaranteeing availability of capital which originates from sources which are not in violation of provisions of regulations of law; (ii) bearing responsibility for and settling all obligations and losses in accordance with provisions of regulations of law if capital investor unilaterally discontinues or leaves or abandons its business activities; (iii) creating business climate of healthy/fair competition, preventing monopolistic practices and other matters which cause loss to State; (iv) protecting sustainable environment; (v) creating worker safety, health, security and prosperity; and (vi) fulfilling all provisions of regulations of law.

Investment Facilities.

Government provides facilities to capital investors who implement capital investments.

Criteria.

Capital investment facilities may be granted to capital investments which: (i) Undertake business expansion; or (ii) conduct new capital investments.

Capital investments which obtain aforementioned facilities are those which at least fulfill one of following criteria: (i) Absorb large amount of labor; (ii) include high priority scale; (iii) include development infrastructure; (iv) implement technology transfers; (v) conduct pioneering industries; (vi) are located in remote/isolated areas, underdeveloped areas, border areas or other areas which are deemed necessary; (vii) protect environmental preservation; (viii) implement research, development and innovation activities; (ix) partner with micro, small, medium or cooperative businesses; or (x) involve industries which utilize capital goods or machines or equipment which are produced domestically.

Types of Facilitation.

Facilitation of objectives granted to capital investment may take form of: (i) Income tax through reduction of net profits up to certain levels in relation to total amount of capital investment which is undertaken within certain time; (ii) exemption or relief/reduction from import duties on capital goods, machines or equipment for production requirements which are not yet capable of being produced domestically; (iii) exemption or relief/reduction of import duties on basic commodities or auxiliary materials for production requirements for certain periods of time and on certain conditions; (iv) exemption or postponement of value added tax on imports of capital goods or machines or equipment for production requirements which are not yet capable of being produced domestically for certain period of time; (v) accelerated depreciation or amortization; and/or (vi) relief/reduction from tax on land and buildings especially for certain business sectors in certain territories or regions or zones.

Simplified Services.

In addition to aforementioned facilities, Government provides simplified services and/or licensing to capital investment companies to obtain: (i) Rights over land; (ii) immigration service facilities; and (iii) import permit facilities.

Beneficial Ownership Void.

Domestic and foreign capital investors which implement capital investment in form of limited liability companies are prohibited from making agreements and/or statements which express that ownership of shares in limited liability company is for and in name of another person.

Representative Offices.

Regional Representative Offices are utilized by foreign companies and groups of foreign companies for purposes of: (i) Supervising, negotiating with and coordinating affiliated companies; and/or (ii) preparing establishment and development of foreign investment company in Indonesia and in other countries.

Trade Representative Offices are utilized to act as selling agents, manufacturing agents and/or buying agents.

Construction Company Representative Offices are utilized by foreign construction services companies to obtain business licenses to engage in construction services in Indonesia with Indonesian participant through Joint Operation.

15 IMMIGRATION

15.01 ALIENS:

Aliens are defined as all persons who are not Indonesian citizens.

15.02 IMMIGRATION:

Governing Law.

Law No. 9 of 1992 dated 31 Mar. 1992 concerning Immigration Affairs governs immigration affairs as am'd by Government Regulation in lieu of Law No. 3 of 2009 dated 17 July 2009 concerning Amendment to Law No. 9 of 1992 concerning Immigration.

Travel into and out of territory of Indonesia is matter of right for Indonesian citizens. To travel in or out of territory of Indonesia, every traveler must have travel documents.

Departure permits issued by immigration officials are required in order to permit travel across Indonesian territorial borders. Entry permits issued by immigration officials are required in order to permit entry into Indonesian territorial borders.

All trans-territorial travelers must pass examination by immigration officials at immigration check points. Immigration check points are located at ports, airports and other places determined by Minister of Law and Human Rights.

Every alien entering Indonesian territory is required to possess visa except: (i) Aliens who are state citizens of country/state excluded from visa requirements by Presidential Decree; (ii) aliens having reentry permits; (iii) captains and crew of ships and airplanes for purposes of anchoring or landing; and (iv) transit passengers at ports or airports provided they do not leave designated transit areas.

Immigration officials may refuse or not issue entry permit to aliens who: (i) Do not have valid passports and visas; (ii) apparently suffer from mental disorders or infectious diseases which endanger public health; (iii) do not have reentry permits or permits to enter another country; or (iv) have given false information relating to obtaining passports or visas.

Aliens present in Indonesia are required to possess immigrations affairs permits for purposes of: (i) Transit (temporary stay while continuing journey to another country); (ii) visits (for brief periods for government assignments, tourism, socio-cultural activities or business); (iii) residence for limited periods; and (iv) permanent residence.

Authority to prevent departure of persons from Indonesia is vested with: (i) Minister of Law and Human Rights for matters concerning immigration affairs; (ii) Minister of Finance for matters concerning debts owed to State; (iii) Attorney General concerning criminal prosecutorial matters; and (iv) Commander-in-Chief of Armed Forces concerning national security, with implementation of orders of exit prevention undertaken by Minister of Law and Human Rights or immigration official appointed for that purpose.

Authority to prevent entry of aliens into Indonesia is vested with: (i) Minister of Law and Human Rights for matters concerning immigration affairs; (ii) Attorney General concerning criminal prosecutorial matters; and (iii) Commander-in-Chief of Armed Forces concerning national security, with implementation of orders of departure prevention undertaken by Minister of Law and Human Rights or immigration official appointed for that purpose.

Entry to aliens may be denied if, among other reasons: (i) It is known or suspected that alien is involved in international crime syndicate activities; (ii) alien has shown enmity toward Government of Indonesia or Nation; (iii) alien is suspected of having committed acts contradictory to security and public order, decency, religion or customs of people of Indonesia; (iv) request of another country, alien is wanted for crime for which alien would also be subject to criminal penalty under Indonesian law; (v) alien has been expelled or deported from Indonesia; or (vi) other immigration affairs related reason further stipulated by Government Regulation.

Authority to prevent entry of Indonesian citizens into Indonesia is vested with team headed by Minister of Law and Human Rights including members from: (i) Armed Forces; (ii) Attorney General's Office; (iii) Department of Foreign Affairs; (iv) Department of Home Affairs; (v) National Stabilization Assistance Coordinating Body; and (vi) State Intelligence Agency.

Entry to Indonesian citizens may be denied if: (i) Citizen has been absent from Indonesia for long time or continuously stays or becomes domiciliary of another country and has shown enmity toward Government of Indonesia or Nation; (ii) citizen's presence in Indonesia is likely to disrupt process of development, lead to national disunity or disrupt national stability; or (iii) citizen's presence in Indonesia is likely to threaten own safety or safety of family.

Investigators from Indonesian State Police and immigration officials are empowered to: (i) Receive reports on occurrence of criminal actions concerning immigration matters; (ii) summon, examine, search/frisk, arrest and detain persons suspected of committing criminal acts concerning immigration matters; (iii) examine and/or confiscate documents, letters, travel documents or other objects connected with criminal acts concerning immigration matters; (iv) summon persons as witnesses; (v) search certain places where it is suspected that letters, documents, travel documents or other objects connected with criminal acts concerning immigration matters may be found; and (vi) take fingerprints and pictures of suspects.

Departure taxes are imposed on individual domestic tax obligors who do not have primary tax obligor number and have reached 21 years of age, including wives, family members by blood and by marriage in vertical line as well as adopted children which become burden of relevant tax obligor traveling across Indonesian territorial borders as follows: (i) Rp 2,500,000 for every person departing by aircraft; (ii) Rp 1,000,000 for every person departing by ship; and (iii) no departure tax for persons departing over land borders.

Violations of immigration law are criminal offenses subject to fines and/or imprisonment.

16 INTELLECTUAL PROPERTY

16.01 COPYRIGHT:

Governing Law.

Copyrights are governed by Law No. 19 of 2002 dated 29 July 2002 concerning Copyrights.

Law No. 19 of 2002 is effective with respect to: (i) All creations of citizens, residents and legal entities of Indonesia; (ii) all creations of those who are not Indonesian citizens, not residents of Indonesia and not legal entities of Indonesia provided creation has been published for first time in Indonesia; (iii) all creations of those who are not Indonesian citizens, not residents of Indonesia and not legal entities of Indonesia provided that (a) state from where creation originated has bilateral agreement concerning protection of copyrights with Republic of Indonesia, or (b) state from where creation originated is party to or participant in same multilateral agreement concerning protection of copyrights.

Definitions.

Copyright means exclusive right of creator or receiver of rights for publication or duplication of creations or granting of license for publication or duplication of creation.

Creator means one or more persons acting together who based upon their inspirations bring into existence creation based upon capabilities of thoughts, imagination, adroitness/dexterity, skills or expertise which are poured forth into form which is of special characteristic and which is of personal nature.

Creation means result of every creator that exhibits originality in fields of scientific knowledge, art or literature.

Holder of copyright means creator as owner of copyright, or parties who receive copyright from creator, or other parties who receive rights extending from copyright of parties who have received copyright.

Publication means readings, broadcasts, exhibits, sales, circulations or distributions of creation through utilization of any means/instruments/tools including Internet media or any means resulting in creation being capable of being read, heard or seen by other persons.

Duplication means increases in number/amount of creation, both in its entirety as well as in substantial parts, through utilization of materials which may or may not be same, including transformations of permanent or temporary manner.

Portrait means picture of face of person who is drawn, whether or not together with other parts of person's body, which is created in any manner and by any means/instruments/tools.

Computer program means compilations of instructions which take form of language, code, sketches or other forms, which if united with media which is capable of being read by computer will enable computer to work conducting specific functions or to achieve specific results, including set-up within layout of aforementioned instructions.

Related rights means rights which are interrelated to copyright, for example exclusive rights of actor to duplicate or broadcast performance/exhibition/show; of voice recording producer for duplication and lease of voice recording works or sound recording works; and of broadcasting agencies for making, duplicating or broadcasting of broadcast works.

Actor means actors, singers, musicians, dancers or those who bring forward, exhibit, show, sing, deliver, recite or play musical, drama, dance, literary, folklore or other artistic work.

Voice recording producer means persons or legal entities who record and have responsibility for conduct of voice or sound recordings for first time, both recordings from performance as well as voice or other sound recordings.

Broadcast agency means broadcast operator organizations in form of legal entities which conduct broadcasts of broadcast works through utilization of transmissions with or without cable or through electromagnetic systems.

License means permit which is granted by holder of copyrights or holder of related rights to another party for publication and/or duplication of creation or product of related rights upon certain provisions.

Minister means Minister in charge of department with scope of duties and responsibility covering developments in field of intellectual property rights including copyrights.

Directorate General means Directorate General of Intellectual Property Rights which exists under department which is headed by Minister.

Nature of Copyrights.

Copyrights constitute exclusive rights of creators or holders of copyrights for publication or duplication of their creations which arise automatically after creation is brought into existence without lessening limitations set forth in prevailing regulations of law. Copyrights are deemed as movable assets.

Creators and/or holders of copyrights in cinematographic and computer programs possess rights to grant permission or prohibit other people who without their consent rent creation for interests which are of commercial nature.

Transfers.

Copyrights are transferable in whole or in part by: (i) Inheritance; (ii) gift; (iii) testamentary disposition; (iv) written agreement; or (v) other means of transfer authorized in accordance with provisions of law including, for example, transfers in accordance with final and binding court decisions. Transfers of copyrights may not be accomplished orally, but must be conducted via writing which may but need not take form of notarial deed.

Protected Creations.

Creations which are subject to protection are creations in fields of scientific knowledge, art and literature including: (i) Books, computer programs, pamphlets, layouts, published written works and all other products of written work; (ii) talks, speeches and other creations of that kind; (iii) mock-ups, visual aids made for needs of education and scientific knowledge; (iv) songs or music with or without text; (v) dramas, musical dramas, dances, choreography, things pertaining to wayang (shadow plays with leather puppets often dramatizing themes from Hindu epics) and pantomimes; (vi) fine arts in all forms such as paintings, drawings, carvings, calligraphy, engraving, sculptures, collages and applied arts; (vii) architecture; (viii) maps; (ix) batik art; (x) photography; (xi) cinematography; and (xii) translations, explanations of passages of literature (by supplying additional information), adaptations, anthologies, databases and other works which are results of transformation of form.

Unprotected Works.

Copyrights do not arise in: (i) Minutes of open meetings of State agencies; (ii) regulations of law; (iii) State speeches or speeches of Government officials; (iv) court decisions or judicial decrees; or (v) arbitration decisions or other decisions of same kind.

Permissible Use.

Following are not deemed violations of copyrights: (i) Publication and/or duplication of State symbols and national anthem according to their original characteristics; (ii) publication and/or duplication of everything which has been published and/or duplicated by or in name of Government, except if copyrights are declared to be protected, whether by provisions of law or by declaration in creation itself or at time creation was published and/or duplicated; (iii) use/taking of actual news whether in whole or in part from news office, broadcasting agency and newspapers or other similar sources, provided that source of news must be cited in complete form; and for following, on condition that source is cited or attached; (i) utilization of creations of other parties for interests of education, research, scientific written works, compilations of reports, literary critiques and analysis of problems, without causing loss to reasonable interests of creators; (ii) use/taking of creations of other parties, both in entirety or in part, for use for interests of defending within or outside of court; (iii) use/taking of creations of other parties, both in entirety or in part for use for interests of (a) talks which are exclusively for purposes of education and scientific knowledge, or (b) exhibitions or performances which do not reap payment provided that it does not inflict losses to creator's reasonable interests; (iv) duplication of creation in field of scientific knowledge, art and literature in Braille for use for interests of blind, except if duplication is of commercial nature; (v) duplication of creation other than computer program, in limited manner by any methods or with any tools or with similar process by public library, scientific or educational institution or noncommercial documentation centers solely for purposes of its activities; (vi) modifications which are made based upon technical implementation considerations in architectural works, such as creation of buildings; and (vii) creation of reserve/back-up copies of computer programs by owner of computer programs which are conducted only for personal use.

Prohibited Creations.

Government may prohibit publication of every creation which is in conflict with Government policies in fields of religion, national defense and security, ethics and morality and public law and order after listening to considerations of Copyright Board.

Government Publication.

Publication of creation which is conducted by Government for national interests through radio, television and/or other means of broadcast may be implemented without requesting permission from holder of copyrights provided that it does not cause loss to reasonable interests of holder of copyrights and provided that holder of copyrights is given fair compensation.

Creators.

Except if there is evidence to contrary, those who are deemed to be creators are: (i) Persons whose names are registered in Public Registry of Creations maintained by Directorate General (though registration is not required to obtain copyrights); (ii) persons whose names are mentioned in creation or persons whose names are published as creator of creation; (iii) except if there is evidence to contrary, for lectures/talks/presentations which do not utilize written materials and do not provide information identifying creator, persons who lecture/talk/present are deemed to be creator of lecture/talk/presentation; (iv) if creation consists of several individual/separate parts which were created by two or more persons, person who is deemed creator is person who leads and supervises completion of entire creation, or in event no such person exists, person who is deemed creator is person who compiles/assembles creation without diminishing copyrights in each of respective parts of creation; (v) if creation is designed by person and brought into reality/given shape and carried out/performed by another person under leadership and supervision of designer, creator is person who designed creation; (vi) if creation is produced in connection with official duties (by order) of civil servant and his or her relevant government agency with another party within scope of his/her work, holder of copyrights is government agency for whom creation was carried out (unless there is another agreement between both parties in manner which does not reduce rights of creator when utilization of that creation is broadened beyond scope of official duties); (vii) party who produces creative work is deemed to be creator and holder of copyrights in creations made within work relations or made based upon orders of other parties (except if there is another agreement between parties); (viii) if legal entity publishes that creation is originated by that legal entity without mentioning individual as creator, then that legal entity is deemed as creator (unless there is evidence to contrary); (ix) State holds copyrights in prehistoric, historic and other national cultural relics; and (x) State holds copyrights in folklore and community cultural productions which are jointly possessed such as stories, tales, fairy tales, legends, histories/chronicles, songs, handicrafts, choreography, dances, calligraphy and other artistic works.

Portraits.

For duplication or publication of creations, holders of copyrights in portraits of person must first obtain permit from portrayed person, or permit from portrayed person's heirs within period of time of ten years from date of death of portrayed person. It is not deemed to be violation of copyrights if portrait of actor in public performance is made even though publication is of commercial nature, except if there is different declaration by interested party. For interests of public safety and/or for needs of criminal court processes, portrait of person in any situation may also be duplicated and published by relevant authorized governmental institutions.

Term of Protection.

Lifetime Plus 50 Years.

Copyrights are valid for duration of life of creator and for additional 50 years thereafter for following creations: (i) Books, pamphlets and all other written work products; (ii) dramas or musical dramas, dances and choreography; (iii) all forms of fine art, such as paintings, carvings and sculptures; (iv) batik art; (v) songs or music with or without text; (vi) architecture; (vii) lectures, speeches and other similar creations; (viii) mock-ups, visual aid tools; (ix) maps; and (x) translations, explanations of passages of literature, adaptations and anthologies. In event foregoing creations are possessed by two or more persons, copyrights are valid for duration of life of creator who dies last and for additional 50 years thereafter.

50 Years.

Copyrights are valid for period of 50 years from date of first publication for following creations: (i) Computer programs; (ii) cinematography; (iii) photography; (iv) databases; and (v) works resulting from transformations.

Layout/Setting.

Copyrights for layout/setting of published written works are valid for period of 50 years from date of first publication.

Legal Entities.

Copyrights held exclusively by legal entities are valid for period of 50 years.

Folklore and Community Cultural Productions.

Copyrights held by State in folklore and community cultural productions such as stories, tales, fairy tales, legends, histories/chronicles, songs, handicrafts, choreography, dances, calligraphy and other artistic works are valid for unlimited period.

Unpublished Creation and Unknown Creator.

Copyrights held by State in unpublished creations by unknown creators are valid for period of 50 years from first time creation is publicly known.

Published Creation, Unknown Publisher and Unknown Creator.

Copyrights held by State in creations which have already been published by unknown creators and/or publishers are valid for period of 50 years from date creation is first publicly known.

Published Creation, Known Publisher and Unknown Creator.

Copyrights held by publishers in creations which have already been published by known publishers but by unknown creators are valid for period of 50 years from date creation is first published.

Creations Announced in Series.

Period of validity of copyrights in creations which are announced part by part commences on date of publication of last part.

Multiple Volumes.

In determination of validity period of copyrights in creations consisting of two or more volumes, as well as for summaries and news published in series and at different times, each volume, summary and news is deemed to be separate creation.

Registration.

Directorate General maintains Registry of Creations and makes entries in Public Registry of Creations. Public Registry of Creations may be viewed by any person without imposition of fees. Provisions concerning registration do not create obligation to register as condition for obtaining copyrights.

Licensing.

Licenses are permits which are granted by holder of copyrights or holder of related rights to another person for publication and/or duplication of creation or product of related rights upon certain provisions. Except if otherwise agreed, scope of license includes all acts of publication and duplication continuing for term of license and effective throughout entire territory of Republic of Indonesia. Except if otherwise agreed, implementation of publication and duplication of creation pursuant to license obligates licensee to pay royalty to holder of copyrights. Except if otherwise agreed, holder of copyrights continues to be entitled to use copyrights or to grant licenses to other parties for implementation of acts of publication and duplication of creation.

License agreements may not contain provisions which could have effect of causing loss to Indonesian economy or creating unhealthy competition as regulated in accordance with prevailing regulations of laws.

License agreements must be registered with office of Directorate General or grant of license will not be deemed legally effective in relation to third parties.

Related Rights.

Related rights are rights which are interrelated to copyright. For example, exclusive rights of actor to duplicate or broadcast performance/exhibition/show; of voice recording producer for duplication and lease of voice recording works or sound recording works; and of broadcasting agencies for making, duplicating or broadcasting of broadcast works.

Actors possess exclusive right to grant permission or to prohibit other parties who, without consent, make, duplicate or broadcast voice recordings and/or image/picture/drawing presentations. Producers of voice recordings possess exclusive right to grant permission or to prohibit other parties who, without consent, duplicate and/or lease voice or sound recording works. Broadcasting agencies possess exclusive right to grant permission or to prohibit other parties who, without consent, make, duplicate and/or re-broadcast broadcast works through transmissions with or without cable or through other electromagnetic systems.

Dispute Resolution.

Holders of copyrights have right to submit claims for compensation to Commercial Court in relation to violations of their copyrights. Holders of copyrights may request confiscation of things which are published and duplications of their creations. This right does not apply to creations held in good faith by party exclusively for personal interests and not for use in relation to activities of commercial nature.

Holders of copyrights have right to apply to Commercial Court for order for transfer of all or part of results obtained from lectures, scientific meetings and shows or exhibits of works which constitute violation of copyrights. This right does not apply to creations held in good faith by party exclusively for personal interests and not for use in relation to activities of commercial nature.

Prior to issuance of final decision and for prevention of further losses to party whose rights have been violated, judge may order violator to discontinue its activities of publication and/or duplication of creation or goods which constitutes violation of copyrights. This right does not apply to creations held in good faith by party exclusively for personal interests and not for use in relation to activities of commercial nature.

Upon request of party who deems itself to have suffered loss, Commercial Court may issue written decision which is immediately effective to: (i) Prohibit continuing copyright violation, especially to prohibit entry of goods which are alleged to be violations of copyrights or related rights into channels of commerce, including import activities; (ii) store evidence related to violation of copyrights or related rights for purposes of avoiding loss of evidence; (iii) request party who deems itself to have suffered loss to provide proof of rights to copyrights or related rights and proof of infringement of those rights.

Commercial Court decisions may only be contested by appeal to Supreme Court.

Parties may elect to settle their disputes through arbitration or alternative dispute resolution mechanisms.

Filing of claim does not limit State's authority to criminally prosecute copyright violations.

Criminal Sanctions.

Those who intentionally infringe on copyright are subject to criminal sanctions of imprisonment for terms of up to seven years and/or fines of up to Rp 5,000,000,000. Creations or goods which form product of criminal acts related to copyrights or related rights along with tools/instruments used in performance of relevant criminal acts are subject to seizure and destruction by State, provided that if creation is of artistic and unique nature, preservation may be considered by State.

16.02 INDUSTRIAL DESIGNS:

Governing Law.

Industrial designs are governed by Law No. 31 of 2000 dated 20 Dec. 2000 concerning Industrial Designs.

Definitions.

Application means request for registration of industrial design which is submitted to Directorate General of Intellectual Property Rights.

Date of receipt means date of receipt of application which already fulfills administrative requirements.

Designer means one or more persons who produce industrial design.

Expression means expression/disclosure made through printed or electronic media, including those expressions disclosed in exhibition.

Industrial design rights means exclusive rights which are given by State of Republic of Indonesia to designer over results of designer's creation to be exploited by designer for duration of certain period of time or given by agreement of designer for exploitation by another party.

Industrial design means creations concerning forms, configurations or compositions of lines or colors, or lines and colors, or combinations thereof which have three dimensional or two dimensional shapes which give aesthetic impressions and are able to be manifested within three dimensional or two dimensional patterns/models/systems of how something is to be done and which is able to be used for production of certain product, good, industrial commodity or handicraft.

License means permit which is given by holder of industrial design rights to another party through agreement based upon granting of right (not transfer of right) for enjoyment of economic benefits of industrial design which is to be granted protection for certain period of time and pursuant to certain conditions.

Scope of Rights.

Holders of industrial design rights possess exclusive right to exploit industrial design rights they possess and to prohibit other persons who, without holder's agreement, produce, use, sell, import, export, and/or distribute goods granted industrial design rights.

Exclusions.

Use of industrial designs for purposes of research and education are excluded from scope of industrial design rights provided that there is no loss to reasonable interests of holder of industrial design rights.

Objects of Protection.

Industrial design rights are granted for new industrial designs. Industrial design is deemed to be “new” if, on date of receipt, industrial design is not same as expression made at earlier time. Industrial design is deemed to have been subject of previous expression if previous expression: (i) Occurred before date of receipt; (ii) occurred before date of priority if application is submitted with priority right; or (iii) expression was previously made public or in use in Indonesia or outside of Indonesia. Industrial design is not deemed to have already been made public if within maximum period of six months prior to date of receipt, industrial design has already been: (i) Exhibited in national or international exhibition in Indonesia or international exhibition outside of Indonesia which has been officially conducted by Government or conducted by members of community but obtaining official acknowledgment or consent of Government; or (ii) used in Indonesia by designer within framework of experimentation for purposes of education, research or development.

Exclusion, Objects of Protection.

Industrial design rights cannot be granted if industrial design contravenes provisions of laws in effect, public order, religion or morality.

Subjects of Protection.

Those persons with right to obtain industrial design rights are designers or persons receiving industrial design rights from designers.

Group of Designers.

In event designer consists of several persons collectively, industrial design rights are to be granted to those persons jointly except if there is agreement to contrary.

Official Duties.

In event industrial design is made in connection with official duties with another party within work environment or in accordance with order which is to be executed in connection with official duties, holder of industrial design right is party for whom and/or within whose official duties industrial design is to be worked, except if there is different agreement between both parties without reducing rights of designer if utilization of industrial design is to be broadened beyond scope of official duties.

Working Relations.

In event industrial design is created within employment relationship or on basis of order, person creating industrial design is deemed to be designer and holder of industrial design rights except if there is agreement to contrary between parties.

Application for Registration.

Industrial design rights are granted based upon applications. Arts. 10-30 of Law No. 31 of 2000 concerning Industrial Designs dated 20 Dec. 2000 set forth procedures for submission of applications and registration of industrial designs.

Registration Cancellation.

Registrations of industrial designs may be cancelled by Directorate General of Intellectual Property Rights based upon written request submitted by holder of industrial design rights.

Transfer.

Industrial design rights may be transferred by: (i) Inheritance; (ii) donation; (iii) testamentary disposition; (iv) written agreements; or (v) other manners which are condoned by provisions of law.

Licensing.

Holders of industrial design rights are vested with right to grant licenses to other parties based upon license agreements for implementation of all actions intended within scope of industrial design rights except to extent that license agreement provides otherwise. License agreements must be registered in General Registry maintained at office of Directorate General of Intellectual Property Rights or grant of license will not be deemed effective in relation to third parties.

Dispute Resolution Forums.

Forums for resolution of disputes relating to industrial design rights include Commercial Court, arbitration or alternative dispute resolution mechanisms.

Infringement.

Industrial design right infringers are subject to criminal sanctions of imprisonment for up to four years and/or fines of up to Rp 300,000,000.

16.03 INTEGRATED CIRCUITS:

Governing Law.

Integrated circuit layout designs are governed by Law No. 32 of 2000 dated 20 Dec. 2000 concerning Integrated Circuit Layout Designs.

Definitions.

Applicant means party who submits application.

Application means request for registration of integrated circuit layout design which is submitted to Directorate General of Intellectual Property Rights.

Designer means one or more persons who produce integrated circuit layout design.

Integrated circuits means products which take form of finished or partially finished products, within which various active elements are found, part or all of which are mutually related/linked to one another and which are integrated within semiconductor material which is intended to produce electronic function.

Layout-designs means creations in form of three dimensional layout of various elements (at least one of which is active element) which is partly or entirely interconnected within integrated circuit and three dimensional layout designed for purposes of preparing for production of integrated circuits.

General Registry of Integrated Circuit Layout Designs is not expressly defined in Law No. 32 of 2000. However, Law No. 32 of 2000 implies that General Registry of Integrated Circuit Layout Designs is maintained by Directorate General of Intellectual Property Rights for recordation of integrated circuit layout design rights.

Holder of rights means holder of integrated circuit layout design rights which is designer or recipient of rights from designer which are registered in General Registry of Integrated Circuit Layout Designs.

Integrated circuit layout design rights means integrated circuit layout design rights are exclusive rights which are given by State of Republic of Indonesia to designer for results of designer's creation to be exploited by designer for duration of certain period of time or given by agreement of designer for exploitation by another party.

License means permit which is given by holder of rights to another party through agreement based upon granting of right (not transfer of right) for enjoyment of economic benefits of integrated circuit layout design which is to be granted protection for certain period of time and pursuant to certain conditions.

Scope of Right.

Holders of rights possess exclusive rights to exploit integrated circuit layout design rights which they possess and to prohibit others who, without holder of right's consent, make, use, sell, import, export, and/or distribute goods which contain in whole or in part designs which are already subject of grants of integrated circuit layout design rights.

Use of integrated circuit layout designs for purposes of research and education are excluded from scope of integrated circuit layout design rights provided that there is no loss to reasonable interests of holder of rights.

Term of Protection.

Integrated circuit layout design rights protection is granted for period of ten years.

Objects of Protection.

Integrated circuit layout design rights are granted for original integrated circuit layout designs. Integrated circuit layout design is deemed to be original if design is made up of results of work of designer. Integrated circuit layout design will not be deemed original if, at moment integrated circuit layout design is created, design is something which is general for all designers. Integrated circuit layout design will not be deemed original if it is imitation of results of work of another designer.

Exclusion, Objects of Protection.

Integrated circuit layout design rights cannot be granted if integrated circuit layout design contravenes provisions of laws in effect, public order, religion or morality.

Subjects of Protection.

Those persons with right to obtain integrated circuit layout design rights are designers or persons receiving integrated circuit layout design rights from designers. In event designer consists of several persons collectively, integrated circuit layout design rights are to be granted to those persons jointly except if there is agreement to contrary.

In event integrated circuit layout design is made in connection with official duties with another party within work environment or in accordance with order which is to be executed in connection with official duties, holder of rights is party for whom and/or within whose official duties integrated circuit layout design is to be utilized. Exception to foregoing arises in event of agreement between parties. Foregoing does not reduce rights of designer if utilization of industrial design is to be broadened beyond scope of official duties. In event integrated circuit layout design is created within employment relationship or on basis of order, person creating integrated circuit layout design is deemed to be designer and holder of rights, except if there is agreement to contrary between parties.

Application for Registration.

Integrated circuit layout design rights are granted based upon applications.

Registration Cancellation.

Registrations of integrated circuit layout designs may be cancelled by Directorate General of Intellectual Property Rights based upon written request submitted by holder of rights.

Transfer.

Integrated circuit layout design rights may be transferred by: (i) Inheritance; (ii) donation; (iii) testamentary disposition; (iv) written agreement; or (v) other manners which are condoned by provisions of law.

Licensing.

Holders of integrated circuit layout design rights are vested with right to grant licenses to other parties based upon license agreements for implementation of all actions intended within scope of integrated circuit layout design rights except to extent that license agreement provides otherwise. License agreements must be registered in General Registry of Integrated Circuit

Layout Designs at office of Directorate General of Intellectual Property Rights or grant of license will not be deemed effective in relation to third parties.

Dispute Resolution Forums.

Forums for resolution of disputes relating to integrated circuit layout design rights include Commercial Court, arbitration or alternative dispute resolution mechanisms.

Infringement.

Integrated circuit layout design rights infringers are subject to criminal sanctions of imprisonment of up to three years and/or fines of up to Rp 300,000,000.

16.04 INTERNATIONAL INTELLECTUAL PROPERTY CONVENTIONS:

Indonesia is signatory to:

Paris Convention for Protection of Industrial Property dated 20 Mar. 1883 as already several times amended latest being on 14 July 1967 in Stockholm, Sweden, (Paris Convention) based on Presidential Decree No. 24 of 1979 concerning ratification of Paris Convention for Protection of Industrial Property and Convention for Establishing World Intellectual Property Organization.

Indonesia withdrew its reservations relating to Arts. 1-12 of Paris Convention by Presidential Decree No. 15 of 1997. Indonesia maintains its reservation with regards to Art. 28 paragraph (1) of Paris Convention.

Patent Cooperation and its Regulations.

Indonesia has ratified Patent Cooperation and its Regulations resulting from State Members of World Intellectual Property Organization meeting in Washington on 19 June 1970 with reservation as to Art. 59 of Treaty.

World Trade Organization.

Indonesia has ratified Agreement Establishing World Trade Organization and adopted principle agreement of Trade Related Aspects of Intellectual Property Rights, including Trade in Counterfeit Goods/TRIPS as part of Agreement Establishing World Trade Organization.

Trademark Law Treaty.

Indonesia has accepted Trademark Law Treaty dated 27 Oct. 1994 as drawn up by State Members of World Intellectual Property Organization in Geneva, Switzerland.

16.05 PATENTS:

Governing Law.

Patents are governed by Law No. 14 of 2001 dated 1 Aug. 2001 concerning Patents.

Definitions.

Invention means idea of inventor which is poured forth into activity which solves specific problem in field of technology and is able to take form of product or process or to perfect/finish and develop product or process. Term “invention” does not include: (i) aesthetic creations; (ii) schemes; and (iii) rules and methods for conducting following activities: (a) Mental activities, (b) games, (c) business; (iv) rules and methods regarding computer programs; and (v) presentations concerning certain information.

Inventor means person who either independently or in cooperation with other persons jointly implements idea which is poured forth into activity which produces invention.

License means permit which is given by patent holder to another party based upon agreement granting rights for enjoyment of economic benefits deriving from patent which is protected for certain period of time and on certain conditions.

Patent means exclusive rights which are granted by State to inventor over results of inventor's invention in field of technology which is to be exploited by inventor for duration of certain period of time or given by agreement of inventor for exploitation by another party.

Patent holder means inventor who possesses patent or party who receives rights in patent from possessor of patent or another party who further receives those rights, each of which is recorded in General Registry of Patents.

Scope of Rights.

Patent holders possess exclusive rights to exploit patents they possess and to prohibit other parties who without patent holder's agreement: (i) In case of product patents, make, use, sell, import, rent, transfer or provide for sale or rent or transfer products which have been granted patents; (ii) in case of process patents, utilize production processes which have been granted patents for production of goods or for use, sale, import, rent, transfer or provision for sale or rent or transfer of products which have been granted patents.

Exclusions.

Utilization of patents for interests of education, research, experimentation or analysis by non-patent holders is permissible provided that such use does not cause loss to reasonable interests of patent holder.

Production/Utilization Obligation.

Patent holders are obligated to make products or utilize processes in Indonesia in relation to which patents have been granted.

Dispensation of Indonesian Production/Utilization Requirement.

In event production or utilization of patent is only viable on regional basis, patent holder may submit written request for dispensation from production or utilization obligation to Directorate General of Intellectual Property Rights stating reasons for request and submitting evidence given by relevant governmental instrumentalities with authority over sector implicated by patent.

Term of Protection.

Patents are granted for period of 20 years starting from date submission of patent application is received, except for simple patents, which are granted for period of ten years starting from date submission of patent application is received.

Objects of Patents.

Patents are granted for inventions which: (i) Are new; (ii) contain inventive step; and (iii) are capable of industrial application.

Exclusions from Patents.

Patents are not granted for: (i) Inventions relating to processes or products, publication and use or application of which contradict regulations of law in effect, religious morality, public order or decency/morality; (ii) inventions relating to methods of examination, treatment, medication and/or surgery applied to human beings and/or animals (excluding health equipment, substances and medication); (iii) inventions of scientific or mathematical theories or methods; or (iv) inventions of all living creatures except microorganisms and biological processes that are essential to produce plants or animals except for non-biological processes or microbiological processes.

Subjects of Protection.

Those persons with right to obtain patents are inventors or persons receiving patent rights from inventors. In event invention is result of efforts of several persons acting collectively, patent rights in invention will be possessed jointly by all inventors. Those persons with right to obtain patents in relation to invention which is result of work relationship are parties who provide work unless there is agreement to contrary.

Transfer.

Patents may be transferred in whole or in part by: (i) Inheritance; (ii) donation; (iii) testamentary disposition; (iv) written agreement; or (v) other manners which are condoned by provisions of law.

Licensing.

Patent holders are vested with right to grant licenses to other parties based upon license agreements for implementation of actions intended within scope of patent rights. License agreements must be registered with office of Directorate General of Intellectual Property Rights or grant of license will not be deemed effective in relation to third parties.

Patent Cancellation.

Patent may be rescinded or declared rescinded as matter of law on following grounds: (i) Patent holder fails to pay annual fees within time specified by law; (ii) upon written request of patent holder submitted to Directorate General of Intellectual Property Rights; or (iii) decision of Commercial Court.

Dispute Resolution Forums.

Forums for resolution of disputes relating to patents include Commercial Court arbitration or alternative dispute resolution mechanisms.

Infringement.

Criminal Sanctions.

Patent rights infringers are subject to criminal sanctions of imprisonment for terms of up to four years and/or fines of up to Rp 500,000,000.

16.06 PROTECTION OF PLANT VARIETIES:

Governing Law.

Protection to plant varieties is governed by Law No. 29 of 2000 dated 20 Dec. 2000 concerning Protection of Plant Varieties.

Definitions.

Certificate of plant variety protection rights means official notice of Office for Protection of Plant Varieties agreement to grant of plant variety protection rights.

General Registry for Plant Variety Protection means official recording registry for all stages and activities in management of plant variety protection.

Holders of plant variety protection rights means plant breeders or persons or legal entities or other parties who have subsequently received plant variety protection rights from holders of plant variety protection rights.

License means permit which is granted by holder of plant variety protection rights to another person or legal entity for exploitation of all or part of plant variety protection rights.

Obligatory license means license which is granted by holder of plant variety protection rights to applicant based upon decision of District Court.

Plant breeders means persons who conduct plant breeding.

Plant variety protection means special protection granted by State (which in this matter is represented by Government and implemented by Office of Plant Variety Protection) in connection with plant varieties which are produced by plant breeders through their plant breeding activities.

Plant seeds means plants and/or parts of plants which are used for reproduction and/or proliferation of plants.

Plant varieties means group of plants from certain species which is indicated by form of plants, growth of plants, leaves, flowers, fruits, seeds and expressions of genotype characteristics or combinations of genotypes which can be differentiated from same kinds or species by minimum of one characteristic which does not change/holds constant and does not experience change upon reproduction.

Plant breeding means series of research activities and tests or activities of invention and development of plant variety in accordance with standard methodologies for production of new plant varieties and maintenance of purity of seed variety to be produced.

Office for Protection of Plant Varieties means organizational unit included within Department of Agriculture implementing duties and responsibilities in field of plant variety protection.

Plant variety protection rights means special rights which are granted by State to breeders and/or holders of plant variety protection rights for exploitation of varieties resulting from breeding by breeders and holders themselves or for granting of agreements to other persons or legal entities for exploitation of those rights for duration of specified period of time.

Scope of Rights and Obligations.

Holder of plant variety protection rights possesses right to exploit and grant agreements to other persons or legal entities to exploit plant varieties in form of: (i) Seeds which are products of harvests which are to be used for propagation, use of results of harvests of protected plant varieties for propagation must obtain agreement from holder of plant variety protection rights; (ii) essential plant variety generations whose origins come from plant varieties which are protected or plant varieties which have already been registered and given name, use of essential plant variety generations which are protected or plant variety which has already been registered and given name must obtain agreement from holder of plant variety protection rights and/or owner of original plant variety upon following conditions: (a) Essential plant variety generation originates from plant variety which has already obtained plant variety protection rights or is planted based upon regulations of law in effect and not in form of previous essential plant variety generations,

(b) basic nature of plant variety maintains expression of essential characteristics from original plant variety, but may be differentiated in clear manner from characteristics of original plant variety which arise from actions of descent itself, and (c) essential plant variety generation may be obtained from natural or inductive mutation, cloning, individual plant selection, cross pollination and genetic engineering from original plant variety; (iii) plant varieties which are not able to be differentiated in clear manner from protected plant varieties constituting "new" kinds of species of plants which are "unique", "uniform", "stable" and named; and (iv) plant varieties which are to be produced through exploitation of protected plant varieties.

Actions of Right.

Right of exploitation of plant varieties includes: (i) Production or multiplication of seeds; (ii) preparation for purposes of propagation; (iii) advertising; (iv) offering; (v) sale or trade; (vi) exporting; (vii) importing; and (viii) reserving/setting aside/planning for requirements of foregoing.

Objects of Protection.

Plant varieties which may be granted plant variety protection include plant varieties from "new" kinds of species of plants which are "unique", "uniform", "stable" and named.

Plant variety is deemed "new" if, at moment of receipt of application for plant variety protection rights, substance/material or products of harvest of plant variety: (i) Have never been traded in Indonesia or they have already been traded but trading has not been ongoing for more than one year; or (ii) have already been traded outside of Indonesia but trading has not been ongoing for more than: (a) Four years for single season plants; and (b) six years for perennial plants.

Plant variety is deemed "unique" if plant variety is different in clear manner from other plant varieties which: (i) Already exist at time of receipt of application for plant variety protection rights; and (ii) are known to public at time of receipt of application for plant variety protection rights.

Plant variety is deemed "uniform" if primary or important characteristics of plant variety are proven to be uniform even though variations arise as result of differences in method of cultivation and environment.

Plant variety is deemed "stable" if: (i) Its characteristics do not experience change after repeated cultivation; or (ii) it is reproduced through special reproductive cycles and does not experience change at end of every relevant cycle.

Names.

Plant varieties which may be subject of grant of plant variety protection must be given names which thenceforth become name of relevant plant variety, with provision that: (i) Name of plant variety may continuously be used even though period of protection has already expired; (ii) name given may not have effect of causing confusion in connection with plant variety characteristics; (iii) cultivation of plant variety is conducted by plant variety protection rights applicant and is registered with Office of Plant Variety Protection; (iv) local plant varieties are owned by community, controlled by State and implemented by Government. Government is required to provide name with respect to local plant varieties under their administration.

Exclusion.

Plant varieties are not entitled to be granted plant variety protection if exploitation of plant variety contravenes regulations of law in effect, public order, morality, health, religious norms, and preservation of living environment.

Subjects of Protection.

In event plant variety results from basis of work contract, party who grants work will be holder of plant variety protection rights except if there is agreement to contrary between two parties without depreciating rights of plant breeder.

In event plant variety results from basis of order, party who issues order will be holder of plant variety protection rights except if there is agreement to contrary between two parties without depreciating rights of plant breeder.

Officials of Office for Protection of Plant Varieties.

For so long as person (including other persons who, because of their duties, work for and in name of Office for Protection of Plant Varieties) has active official duties and for period of one year following person's pension or discontinuation for whatever reason of person's duties with Office for Protection of Plant Varieties, person is prohibited from submitting applications for plant variety protection rights, obtaining plant variety protection rights in any manner or holding rights which are related to plant variety protection (except if plant variety protection rights are obtained by transfer due to inheritance).

Trademarks.

Plant variety names may also be submitted as trademarks in accordance with regulations of law in effect.

Term of Protection.

Terms of plant variety protection are: (i) 20 years for single season plants; and (ii) 25 years for perennial plants.

Applications for Protection.

Place of Application Submission.

Applications for plant variety protection rights are submitted to Office for Protection of Plant Varieties. Applications for plant variety protection rights must be submitted in writing and in Indonesian language. Applications must be accompanied by payment of fees in amounts stipulated by Minister of Agriculture.

Date of Submission.

Applications for plant variety protection rights are deemed to have been submitted on date of receipt of letter of application by Office for Protection of Plant Varieties and upon satisfaction of payment of application fee. Date of receipt of letter of application is date at time Office for Protection of Plant Varieties receives letter of application which completely fulfills application requirements.

Recording of Date of Receipt.

Date of receipt of letter of application for plant variety protection rights must be recorded in General Registry for Plant Variety Protection by Office for Protection of Plant Varieties.

Amendments to Applications.

Applications for plant variety protection rights may be amended prior to and during examination.

Recalling Applications.

Letters of applications for plant variety protection rights may be recalled upon submission of written request to Office for Protection of Plant Varieties.

Granting or Rejection of Applications.

Office for Protection of Plant Varieties must decide whether or not to grant or reject application for plant variety protection rights within time period of not longer than 24 months counting from date of application for substantive examination.

Certificates of Rights.

In event report of Office for Protection of Plant Varieties regarding examination results with respect to plant variety being requested for plant variety protection rights concludes that plant variety in question is in accordance with requirements of provisions of Law No. 29 of 2000, then Office for Protection of Plant Varieties must issue official notice of granting of plant variety protection rights to applicant in form of "Certificate of Plant Variety Protection Rights".

Rejection of Application.

In event application for plant variety protection rights and/or results of examination determine that application does not fulfill provisions of Arts. 2, 11 and 14 of Law No. 29 of 2000, Office for Protection of Plant Varieties must reject application for plant variety protection and issue notification of rejection in writing to applicant. Appeal requests may be filed in connection with rejection of applications related to reasons of substantive nature.

Recording of Protection.

Once plant variety protection rights have been granted, notation of grant must be recorded in General Registry for Plant Variety Protection.

Publication.

Once plant variety protection rights have been granted, publication of grant must be made in Official Plant Variety Protection Gazette.

Examinations.

Authorized Agency.

Substantive examinations are conducted by investigators for Protection of Plant Varieties. Substantive examinations comprise investigations into characteristics of newness, uniqueness, uniformity and stability. Requests for substantive examinations in relation to applications for plant variety protection rights must be submitted to Office for Protection of Plant Varieties in writing within one month following end of publication period.

Confidentiality.

Counting from date of receipt of letter of application for plant variety protection, all employees in sphere of Office for Protection of Plant Varieties are obligated to protect plant variety secrecy and all documents comprising application for plant variety protection rights until date of publication of relevant application.

Transfer.

Plant variety protection rights may be transferred by: (i) Inheritance; (ii) donation (hibah); (iii) testamentary disposition; (iv) written agreements in form of notarial deeds; or (v) other manners condoned by provisions of law.

Recordation.

Every transfer of plant variety protection rights must be recorded at Office for Protection of Plant Varieties in General Registry for Plant Variety Protection.

Licensing.

Holders of plant variety protection rights have right to grant licenses to other persons or other legal entities based on license agreement letters.

Residual Rights.

Unless there is agreement to contrary, holders of plant variety protection rights continue to be entitled to implement plant variety protection rights themselves or to grant licenses to other third parties.

Recordation.

License agreements must be recorded at Office for Protection of Plant Varieties in General Registry for Plant Variety Protection.

Third Parties.

In event license agreement is not recorded with Office for Protection of Plant Varieties, license agreement has no legal effect upon third parties.

Compulsory Licenses.

Every person or legal entity, after elapse of 36 months from date of granting of plant variety protection rights, may submit request for compulsory license to District Court for exploitation of relevant plant variety protection rights. Implementation of compulsory licenses is accompanied by obligation imposed upon holder of compulsory license to pay royalties to holder of plant variety protection rights in amount and in accordance with procedures which are to be stipulated by District Court. Holder of compulsory license is required to record compulsory license received with Office for Protection of Plant Varieties in General Registry for Plant Variety Protection.

Termination of Rights.

Plant variety protection rights terminate in following events: (i) Expiration of term; (ii) cancellation/nullification; or (iii) revocation by Office for Protection of Plant Variety Protection. Cancellation/nullification of plant variety protection rights is implemented by Office for Protection of Plant Variety Protection.

Cancellation/nullification.

Plant variety protection rights may be cancelled/nullified based upon following exclusive grounds: (i) Failure to meet conditions of newness and uniqueness at time of granting of plant variety protection rights; (ii) failure to meet conditions of uniformity and stability at time of granting of plant variety protection rights; or (iii) plant variety protection rights were granted to party who did not have entitlement thereto.

Revocation of plant variety protection rights is implemented by Office for Protection of Plant Variety Protection. Plant variety protection rights may be revoked based upon following grounds: (i) Holder of plant variety protection rights has not fulfilled obligation to pay annual fees within time period of six months; (ii) conditions/characteristics of protected plant varieties have already changed or are no longer in accordance with provisions of newness, uniqueness, uniformity or stability; (iii) holder of plant variety protection rights is not capable of providing and preparing seed samples of plant varieties which have already been granted plant variety protection rights; (iv) holder of plant variety protection rights does not make available seeds for plant varieties which have already been granted plant variety protection rights; or (v) holder of plant variety protection rights submits request to Office for Protection of Plant Varieties for revocation of its plant variety protection rights in writing setting forth reasons for request.

Civil Claims.

In event plant variety protection rights are granted to person or legal entity other than person or legal entity which should be entitled to plant variety protection rights, person or legal entity with entitlement to plant variety protection rights may file claim to District Court. Right to claim on grounds of issuance of grant without entitlement arises as of date of issuance of certificate of plant variety protection rights.

Holders of plant variety protection rights or holders of licenses or holders of compulsory licenses are entitled to submit claims for compensation through District Court against anyone who intentionally and without right exploits and grants agreements to other persons or legal entities to exploit variety in form of seeds and products which are used for propagation.

Temporary Injunctions.

In order to prevent greater loss to party whose rights have been violated, judge may order violator of plant variety protection rights to temporarily cease in exploitation of activities which are subject of claim during pendancy of examination of case by District Court.

Criminal Infringement.

Whoever intentionally conducts one of following acts without agreement of holder of plant variety protection rights is guilty of crime punishable by imprisonment of up to seven years and fines of up to Rp 2,500,000,000: (i) Production or multiplication of seeds; (ii) preparation for purposes of propagation; (iii) advertising; (iv) offering; (v) sale or trade; (vi) exporting; (vii) importing; or (viii) reserving/setting aside/planning for requirements of foregoing.

Following persons who commit following acts or omissions are guilty of crimes with criminal sanctions of imprisonment of up to five years and fines of up to Rp 1,000,000,000: (i) Plant variety protection consultants who intentionally: (a) Fail to register with Office for Protection of Plant Variety Protection, or (b) fail to protect confidentiality of plant varieties and all documents comprising application for plant variety protection rights until date of publication of application for plant variety protection rights; (ii) employees of Office for Protection of Plant Varieties who intentionally fail to protect plant variety secrecy and all documents comprising application for plant variety protection rights commencing from date of receipt of letter of application for plant variety protection through date of publication of relevant application; (iii) whoever intentionally for commercial purposes: (a) Uses products of harvest from plant variety which is protected; (b) uses plant variety which is protected for activities related to research, plant breeding and combinations of new plant varieties; or (c) uses plant variety which is protected within framework of Government use for food and medication procurement/supply policy without taking into account economic rights of holders of plant variety protection rights; or (iv) whoever intentionally fails to fulfill secrecy protection obligations arising in context of examination based upon application for plant variety protection rights.

Actions constituting crimes are deemed to be felonies.

Exclusion from Infringement.

Following forms of exploitation of plant variety protection rights are not deemed to constitute infringements: (i) Use of part of products of harvest from plant variety which is protected provided that use is not for commercial purposes; (ii) use of plant variety which is protected for activities related to research, plant breeding and combinations of new plant varieties; and (iii) use by Government of plant variety which is protected within framework of food and medication procurement/supply policy with care taken for economic rights of holders of plant variety protection rights.

Civil Claims and Criminal Prosecutions.

Right to file civil claims does not limit right of State to prosecute criminal offenses related to plant variety protection rights infringements.

16.07 TRADEMARKS:

Governing Law.

Trademarks and service marks are governed by Law No. 15 of 2001 dated 1 Aug. 2001 concerning Marks and Government Regulation No. 51 of 2007 dated 4 Sept. 2007 concerning Geographical Indications.

Definitions.

Applicant means party who submits application.

Application means request for registration of mark which is submitted in writing to Directorate General of Intellectual Property Rights.

Collective mark means mark which is utilized for goods and/or services with same characteristics which are to be traded by one or more persons or legal entities acting jointly for differentiation with other goods and/or services of same kind.

License means permit which is given by holder of rights to registered mark to another party through agreement based upon granting of right (not transfer of right) for exploitation of mark, both for all or part of kinds of goods and/or services which are registered for certain period of time and upon certain conditions.

Mark means sign which takes form of picture, name, words, letters, numbers, compositions of colors or combinations of aforementioned elements which possess distinguishing characteristics and are to be utilized in activities relating to trade in goods or services.

Service mark means mark which is utilized for services which are to be traded by one or more persons acting jointly or legal entity for differentiation with other services of same kind.

Trademark means mark which is utilized for goods which are to be traded by one or more persons acting jointly or legal entity for differentiation with other goods of same kind.

Scope of Right.

Rights in marks are exclusive rights which are granted by State to mark owners which are registered in General Registry of Marks for certain period of time for utilization by holder of mark itself or for utilization by another party to whom permission for utilization of mark has been granted.

Term of Protection.

Registered marks enjoy protection for period of ten years from date of receipt of registration of mark concerned. Extension of ten year period of protection is available upon application if mark is being used in trade and manufacture of goods and services.

Objects of Protection.

Marks protected under Law No. 15 of 2001 include trademarks and service marks.

Registration Exclusions.

Marks may not be registered if they: (i) Are based upon application which has been submitted by applicant in bad faith; (ii) contravene provisions of laws in effect, religious morality, decency or public order; (iii) do not possess distinguishing characteristics; (iv) have already become part of public domain; or (v) take form of information or relate to goods or services for which registration has already been applied.

Application Rejection.

Directorate General of Intellectual Property Rights must reject any application if mark: (i) Bears basic or complete resemblance to mark which is possessed by another party and which has been previously registered for same type of goods and/or services; (ii) bears basic or complete resemblance to well known mark possessed by another party for same type of goods and/or services; (iii) bears basic or complete resemblance to well known geographical indication; (iv) constitutes or resembles names of well known individuals, photographs or names of legal entities belonging to others, except if there is written agreement from entitled person; (v) constitutes copy or resembles name or abbreviation of name, flag, emblem or symbol of state or of national or international agency, except if there is written agreement from authorized party; or (vi) constitutes copy or resembles official sign or stamp or insignia used by Government institution, except if there is written agreement from authorized party.

Geographical Indication Exceptions.

Geographical indications are subject to protection to extent that they are signs which show area of origin of certain good which, because of geographical environmental factors, including natural factors, human factors or combination of those two factors, gives certain characteristic and quality to good which is produced.

Geographical indications may be protected after registration on basis of request filed by: (i) Institutions representing community in area of production of relevant goods which consist of: (a) parties exploiting goods which take form of products of nature or natural wealth; (b) producers of agricultural products; (c) producers of handicrafts or industrial products; (d) traders who sell goods; (ii) authorized institutions; or (iii) consumer groups of related goods.

Collective Mark Registration.

Collective marks may be registered if application for registration contains statement of intention to use mark as collective mark.

Application for registration of collective mark must include copy of provisions regulating exploitation of mark as collective mark. Regulations governing exploitation of mark must be signed by all holders of rights in mark. Collective mark exploitation regulations must include: (i) Nature, general characteristics and quality of goods or services related to mark; (ii) provisions relating to rights of holder of rights in collective mark to conduct effective supervision over use of mark; and (iii) sanctions for violation of exploitation regulations. Amendments to exploitation regulations relating to collective marks must be submitted to Directorate General of Intellectual Property Rights for recordation.

Transfer.

Rights in registered marks may be transferred by: (i) Inheritance; (ii) testamentary disposition; (iii) donation; (iv) agreement; or (v) other manners condoned by provisions of law. Requests for recordation of transfers of rights in marks in General Registry of Marks must be submitted to Directorate General of Intellectual Property Rights.

Licensing.

Holders of rights to registered marks are vested with right to grant licenses to other parties through agreements that receiver of license will exploit mark for part or all of kinds of goods or services. License agreements are effective throughout entire territory of Republic of Indonesia, unless otherwise agreed, for period of time which is not longer than period of time of protection of registered mark.

Deletion of Registration.

Registered marks may be deleted from General Registry of Marks upon: (i) Initiative of Directorate General of Intellectual Property Rights; (ii) application of relevant holders of rights to mark; or (iii) submission by third parties of lawsuit to Commercial Court.

Registrations of marks may be deleted on initiative of Directorate General of Intellectual Property Rights if: (i) Mark is not used in connection with trade in goods and/or services for three consecutive years from date of registration or last use, unless there is reason which is deemed acceptable by Directorate General of Intellectual Property Rights including: (a) Import prohibitions, (b) prohibitions which are related to licenses for distribution of goods which use relevant mark or provisional/temporary decisions from authorized parties, (c) other prohibitions, forms of which are stipulated by Government regulation; or (ii) mark is used for kinds of goods and/or services which are not in accordance with kinds of goods or services which were subject of registration request.

Cancellation Claims.

Interested parties may file claims for cancellation of registration of mark if registration: (i) Is based upon application which has been submitted by applicant in bad faith; (ii) contravenes provisions of laws in effect, religious morality, decency or public order; (iii) does not possess distinguishing characteristics; (iv) has already become part of public domain; (v) takes form of information or relates to goods or services for which registration has already been applied; (vi) bears basic or complete resemblance to mark, rights in which are held by another party and which has already been previously registered for same type of goods and/or services; (vii) bears basic or complete resemblance to well known mark, rights to which are held by another party for same type of goods and/or services; or (viii) bears basic or complete resemblance to well known geographical indication.

Claims for cancellation of registration of marks are filed by interested parties with Commercial Court.

Cancellation claims may only be filed within period of five years from date of registration of mark. Cancellation claim is not subject to five year statute of limitations if claim is based upon contravention of religious morality, decency or public order.

Dispute Resolution Forums.

Forums for resolution of disputes relating to marks include Commercial Court, arbitration or alternative dispute resolution mechanisms.

Claims.

Holder of registered mark may file claim against another party who, without right, exploits mark which in principle or in totality is of same kind as goods or services related to registered mark of holder. Holder of registered mark may request compensation of damages and/or cessation of all activities related to exploitation of mark.

Preliminary Injunctions.

During pendency of claim, in order to prevent greater loss, upon request of plaintiff (either holder of rights in mark or holder of license rights), judge may order defendant to cease production, distribution, entry and/or trade in goods or services which are exploiting mark in manner without right. Judge of Commercial Court may also order seizure of evidence related to mark violation. Evidence must be sufficient.

Licensee Claims.

Holders of license over registered mark may submit claims independently or together with relevant holder of registered mark.

Appeals of decisions of Commercial Court may only be filed in Supreme Court.

Infringements.

Criminal Sanctions.

Intentional exploitation without right of mark which is totally same as that of registered mark owned by another party for goods and/or services of kind which are produced and/or traded is guilty of commission of criminal offence with penalties of up to five years imprisonment and/or fines of up to Rp 1,000,000,000.

Intentional exploitation without right of mark which is of same basic type as that of registered mark owned by another party for goods and/or services of kind which are produced and/or traded is guilty of commission of criminal offence with penalties of up to four years imprisonment and/or fines of up to Rp 800,000,000.

Intentional exploitation without right of insignia/sign which is totally same as geographical indication owned by another party for goods which are same or of same kind as goods which are registered is guilty of criminal offence with penalties of up to five years imprisonment and/or fines of up to Rp 1,000,000,000.

Intentional exploitation without right of insignia/sign which is basically same as geographical indication owned by another party for goods which are same or of same kind as goods which are registered is guilty of criminal offence with penalties of up to four years imprisonment and/or fines of up to Rp 800,000,000.

Trade in goods and/or services which are known or should have been known to constitute goods and/or services which are product of mark infringements are guilty of criminal offence with penalties of up to one year imprisonment and/or fines of up to Rp 200,000,000.

16.08 TRADE SECRETS:

Governing Law.

Trade secrets are governed by Law No. 30 of 2000 dated 20 Dec. 2000 concerning Trade Secrets.

Definitions.

License means permit which is granted by holder of trade secret rights to another party through agreement based upon granting of right (not transfer of right) for enjoyment of economic benefits of trade secret which is granted protection for certain period of time and pursuant to certain conditions.

Trade secrets means information which is not known to public in field of technology and/or business, which has economic value because of its utilization in business activities and which is protected as secret by owner of trade secret.

Trade secret rights means rights in trade secrets which arise under Law No. 30 of 2000.

Scope of Right.

Scope of protection of trade secrets includes methods of production, methods of processing, methods of sale or other information in field of technology and/or business which possesses economic value and which is not known to general public.

Rights of Owner.

Owner of trade secret possesses right to: (i) Exploit trade secret; (ii) provide license or prohibit other parties from exploiting trade secret; or (iii) provide license or prohibit other parties to disclose trade secret for interests of commercial nature.

Subject of Protection.

Trade secrets are subject of protection if: (i) Information is of secret nature (information is considered secret if it is only known to certain parties or if it is not known to public); (ii) information has economic value (information is considered to possess economic value if it is information which is secret in nature and if it is able to be used for conduct of activities or efforts which are commercial in nature or which are capable of increasing economic profits); and (iii) secrecy of information is protected through proper efforts (secrecy of information is considered to be protected if owner or all parties who are authorized by owner have taken reasonable and proper steps to protect it).

Transfer.

Trade secret rights may be transferred by: (i) Inheritance; (ii) donation; (iii) testamentary disposition; (iv) written agreement; or (v) other manners condoned by provisions of law.

All forms of transfers of trade secret rights must be recorded with Directorate General of Intellectual Property Rights. Transfers of trade secret rights which are not recorded with Directorate General of Intellectual Property Rights do not have legal effect upon third parties.

Licenses.

Holders of trade secret rights are vested with right to grant licenses to other parties based upon license agreements for implementation of (unless otherwise agreed): (i) Exploitation of trade secret; (ii) granting licenses or prohibition of other parties from exploiting trade secret; (iii) granting licenses or prohibition of other party to disclose trade secret for interests of commercial nature.

Unless otherwise agreed, holder of trade secret right itself continues to be able to implement trade secrets or grant licenses to third parties for implementation of: (i) Exploitation of trade secret; (ii) granting licenses or prohibition of other parties from exploiting trade secret; (iii) granting licenses or prohibition of other parties to disclose trade secret for interests of commercial nature.

License agreements must be recorded with Directorate General of Intellectual Property Rights. Trade secret license agreements which are not recorded with Directorate General of Intellectual Property Rights do not have legal effect upon third parties.

Civil Claims.

Holders of trade secret rights or recipients of licenses may file claims against anyone who intentionally and without right engages in: (i) Exploitation of trade secret; (ii) granting licenses or prohibition of other parties from exploiting trade secret; (iii) granting licenses or prohibition of other parties to disclose trade secret for interests of commercial nature; (iv) repudiation of agreement or written or oral obligation for protection of trade secret; or (v) obtaining or controlling trade secret in manner which violates regulations of law in effect.

Person will not be deemed to have infringed upon trade secret by disclosing trade secret or repudiating agreement or written or oral obligation for protection of trade secret if: (i) Act of disclosure of trade secret or exploitation of trade secret is based upon interests of national defense and security, health or public safety; or (ii) act is derived out of process of reverse engineering of product produced from exploitation of trade secret owned by another person which is conducted for exclusive purpose of further development of relevant product.

Dispute Resolution Forums.

Forums for resolution of disputes relating to trade secret rights include District Court, arbitration or alternative dispute resolution mechanisms. Upon request of all parties in criminal or civil proceeding, judge may order that hearings be conducted in closed manner.

Infringement.

Criminal Sanctions.

Anyone who intentionally and without right: (i) Exploits trade secret of another party; (ii) discloses or prohibits disclosure of trade secret; (iii) repudiates agreement or written or oral obligation for protection of trade secret; or (iv) obtains or controls trade secret in manner which violates regulations of law in effect, is guilty of criminal offense and may be punished by up to two years imprisonment and/or fines of up to Rp 300,000,000.

17 LEGAL PROFESSION

17.01 LEGAL PROFESSION:

Governing Law.

Legal profession is governed by Law No. 18 of 2003 dated 5 Apr. 2003 concerning Advocates.

Definitions.

Advocate means persons engaged in profession of providing legal services, both within and outside of court, who fulfill requirements pursuant to provisions of Law No. 18 of 2003.

Legal services means services given by advocate in form of giving legal consultations, legal assistance, implementing authorizations, representing, accompanying, defending and engaging in other legal actions for legal interests of client.

Client means persons, legal entity or other organization who receives legal services from advocate.

Organization of advocates means professional organization established based on Law No. 18 of 2003.

Supervision means technical and administrative actions related to advocates for protection in order to ensure that profession is conducted in accordance with code of professional ethics of advocates and regulations of law regulating profession of advocates.

Self protection means right and opportunity which is granted to advocates to put forth reason as well as to protest/oppose things that cause loss to advocate in performance of advocate's profession or in relation to organization of advocates.

Honorarium means compensation for legal services received by advocate based on agreement with client.

Foreign advocate means foreign citizen who is advocate who conducts profession within territory of Republic of Indonesia based upon conditions stipulated in regulations of law.

Legal aid means legal services which are provided by advocate without charge (pro bono) to clients who are not financially capable to pay honorarium.

Minister means Minister with duties and responsibilities which include field of law and legislation. Minister responsible for field of law and legislation is Minister of Law and Human Rights.

Qualifications.

In order to be deemed to have been appointed as advocate, person must: (i) Hold degree with background of higher legal education; (ii) participate in advocate special professional education program conducted by, and pass test administered by, Organization of Advocates; (iii) hold Indonesian citizenship; (iv) reside in Indonesia; (v) not carry status of State civil servant or State official; (vi) be at least 25 years of age; (vii) apprentice for minimum of two continuous years in advocate's office; (viii) never convicted of crime of ill will (felony) that is punishable by imprisonment of five years or more; and (ix) be of good behavior, honest, responsible, fair and possess high integrity.

Oath.

Prior to conducting professional activities, advocate is obligated to swear oath in accordance with his/her religion or sincerely and wholeheartedly promise in public hearing at High Court in territory of advocate's domicile.

Status of Advocates.

Advocates have status as upholders of law, free and independent as guaranteed by law and regulations of law.

Sanctions.

Advocates may be subject to sanctions based upon following reasons: (i) Ignoring/disregarding/neglecting or abandoning interests of his/her client; (ii) acting or behaving in manner which is not proper/fitting/decent in relation to opponents or professional colleagues; (iii) displaying attitude, behaving, speaking or issuing statements indicating behavior disrespectful of law, legislative regulations or courts; (iv) acting in manner conflicting with professional responsibility, honor, dignity, prestige or status; (v) conducting violations of regulations of law and/or acting disgracefully; or (vi) violating advocate's oath or promise and/or code of professional ethics of advocates.

Forms of sanctions that may be imposed on advocate include following: (i) Verbal warnings; (ii) written warnings; (iii) temporary suspension from profession for period from three to 12 months; or (iv) permanent suspension from profession.

Provisions regarding type and level of conduct subject to aforementioned sanctions is further regulated by decree of Honorary Committee of Organization of Advocates.

Honorarium.

Advocates are entitled to receive honorariums for legal services already given to clients in reasonable amount based upon agreement of parties.

Legal Aid—Pro Bono.

Advocates are obligated to provide legal aid without charge to persons seeking justice who are not financially able to pay honorarium.

Foreign advocates may not appear in court hearings in Indonesia. Foreign advocates may not practice and/or open legal services office or representative office in Indonesia.

Advocate offices may employ foreign advocates as employees or expert staff in field of foreign law based upon permit from Government with recommendation from organization of advocates.

Foreign advocates are required to give free (pro bono) legal services for specified period of time within realm of legal education and research. Foreign advocates providing legal services in Indonesia in violation of law may be subject to criminal sanctions including imprisonment.

Code of Ethics.

Organization of advocates must compose code of professional ethics of advocates in order to protect dignity and honor of profession of advocates. Advocates are obligated to submit to and to comply with code of professional ethics of advocates and stipulations of Honorary Committee of organization of advocates.

Criminal Sanctions.

Art. 31 of Law No. 18 of 2003 provides that any person who intentionally engages in advocate profession and holds himself/herself out as if he/she is advocate though he/she is not advocate pursuant to provisions of Law No. 18 of 2003 may be punished by up to five years imprisonment and fines of up to Rp 50,000,000. However, Art. 31 of Law No. 18 of 2003 has been declared unconstitutional and of no legal effect by Constitutional Court Decision No. 006/PUU-II/2004 dated 8 Dec. 2004.

18 MORTGAGES

18.01 CHATTEL MORTGAGES:

See category 7 Debtor and Creditor, topic 7.07 Liens, subhead Liens over Moveables and Intangibles (Fidusia Guarantees).

18.02 MORTGAGES:

Governing Law.

Mortgages on land and land related object is governed by Law No. 4 of 1996 dated 9 Apr. 1996 concerning Rights to Mortgage, Land and Things which are Related to Land.

Mortgage on land and land related objects must be prepared by land conveyancer official (PPAT) in writing in form of deed of grant of mortgage. PPATs are Government licensed public officials vested with authority to draw up deeds of transfer of right over land, encumbrance of rights over land and grant of power of attoney to mortgage. PPAT has responsibility to record grant of mortgages with Land Affairs Office within seven days following signing of deed of grant of mortgage, failing which PPAT is subject to oral warning, written warning, temporary suspension and ultimately termination of PPAT license.

Grant of mortgage must be registered and mortgage certificate must contain words "DEMI KEADILAN BERDASARKAN KETUHANAN YANG MAHA ESA" which translate to "FOR SAKE OF JUSTICE ON BASIS OF ONE AND ONLY G-D" to have force of final legal judgment execution order.

Land Affairs Office issues mortgage certificate in accordance with regulations of law in effect.

Mortgages may be made over several land titles as security for single debt, specifying that payment in installments releases land titles as debt is satisfied in accordance with their values. Single mortgage may cover one or more debts to one or more creditors.

Mortgages may be imposed at time of or following time underlying obligation arises.

Mortgages may be conveyed over rights to ownership, rights to cultivate or rights to development of land and may also encumber fixtures. Multiple mortgages are permitted with priority of each mortgage is based on date of registration with Land Affairs Office. If two competing mortgages bear same registration date, date of mortgage deed determines priority. Mortgages run as burden with transfer of ownership benefits in mortgaged property.

Upon default of underlying obligation, first mortgagee has right to sell property through public auction and apply proceeds to sale of mortgagor's outstanding obligations. Mortgagee is not authorized to directly own object of mortgage if debtor defaults and any provisions to contrary are void as matter of law.

Grant of mortgage is preceded by promise to mortgage as security for satisfaction of particular debt. Promise is expressed in underlying agreement creating secured obligation. Power of attorney authorizing imposition of mortgage without right of substitution is also required.

Government provides model deed of mortgage. Deed of grant of mortgage must contain following information: (i) Name, identity and Indonesian domicile (foreign parties may elect domicile in Indonesia); (ii) description of debts secured; (iii) value of security; and (iv) clear description of object of mortgage.

Deed may include: (i) Restrictions on mortgagor's authority to lease or modify leases or receive advance rent relating to property; (ii) restrictions on mortgagor's authority to modify condition of property; (iii) grant of authority to mortgagee to manage property following default by mortgagor; (iv) grant of authority to mortgagee to secure property if necessary for implementation of enforcement or to prevent loss of rights in property; (v) grant of right to first mortgagee to sell upon its own authority upon default; (vi) promise by first mortgagee that object of mortgage will not be released from mortgage; (vii) promise that mortgagor will not release his/her rights over object of mortgage without prior written approval from mortgagee; (viii) grant of right to mortgagee to receive compensation in event of condemnation action by State; (ix) promise that mortgagee will obtain all or part of insurance funds which are received by mortgagor for satisfaction of claim; (x) promise by mortgagor to vacate property upon enforcement of mortgage; and (xi) promise that mortgagee will return land title certificate upon satisfaction of underlying obligations.

Mortgages are transferable in interests of law in event of assignment of underlying obligation, by subrogation, by inheritance or by similar circumstances. Transferees must register their transfers with Land Affairs Office.

If mortgagor breaches its pledge, property may be sold by first mortgagee through public auction. Mortgagor and mortgagee may agree to sale executed informally/without auction if in this way highest price can be obtained, provided that sale may only be executed after: (i) Passage of one month from (a) notification in writing by mortgagor and/or mortgagee to concerned parties, and (b) announcement in at least two newspapers circulating in area concerned; and (ii) during publication period there is no objection from any party.

Buyer of property sold by mortgage at public auction imposed by injunction of chairman of District Court or in informal voluntary transaction may request mortgagee to release property which is purchased from all mortgage encumbrances which exceed purchase price.

Mortgages cancel due to: (i) Cancellation of underlying obligation; (ii) release by mortgagee; (iii) clearance based on decision of priorities by chairman of District Court; or (iv) cancellation of underlying land title. Cancellation of underlying land title does not cancel underlying obligation. Land Affairs Office expunges record of mortgage from land book of titles and nullifies mortgage certificate. Creditor must provide written statement of settlement or other relinquishment of mortgage to enable Land Affairs Office to nullify mortgage lien. Otherwise, interested parties must obtain District Court order for expungement directed to Land Affairs Office. If dispute regarding underlying obligation is before another court, expungement suit is removed to that other court.

19 PROPERTY

19.01 ABSENTEES:

If person has been absent without leaving another with power of attorney to manage absentee's affairs, upon request of interested parties or upon demand of public prosecutor, District Court with jurisdiction over domicile of absentee shall order Estate Property Bureau to manage property and represent absentee's interests.

If property and interests of absentee are few, upon request of interested parties or on demand of public prosecutor, District Court may vest spouse or one or more blood or other relations of absentee with authority to manage property and represent absentee's interests. Spouse or other relation exercising authority is obligated to return goods or their value after deduction of debts incurred in process of administration upon return of absentee.

Estate Property Bureau is required to: (i) Take inventory and describe property entrusted to it; (ii) provide report to public prosecutor; and (iii) produce securities, negotiable instruments and documents concerning management of property.

If absentee returns following declaration of presumption of death or if proof that absentee is still alive is received within period of 15 years after day of presumption of death, those who have enjoyed product or income of absentee's property must return one-half of value of product, income and property. If absentee returns after 15 years but prior to 30 years, one-fourth must be returned. For return of absentee after 30 years, see category 12 Estates and Trusts, topic Death (Presumptions of and Actions for).

19.02 DOWER AND CURTESY:

Dower and curtesy are not provided under Indonesian law.

19.03 LANDLORD AND TENANT:

Housing Premises.

Housing leases are governed by Law No. 4 of 1992 dated 10 Mar. 1992 concerning Housing and Dwelling, Government Regulation No. 44 of 1994 dated 26 Dec. 1994 concerning Residential Dwelling by Non-Owners and Indonesian Civil Code (Kitab Undang-undang Hukum Perdata) (KUHPer) (Burgerlijk Wetboek voor Indonesië). Non-owner possessors of house must obtain approval or permission from owner. Duration of lease term may not exceed duration of right in land held by lessor. Lease agreements must stipulate rental rate, term and rights and obligations of parties. Properties that are subject of dispute may not be leased.

Lessor's responsibilities include: (i) Delivery of leased premises to lessee; (ii) maintenance of premises in condition to serve purpose for which it is intended; and (iii) insuring quiet enjoyment of lessee for leased premises during term of lease.

Lessor is responsible for all patent and latent defects of rented property preventing use thereof and lessor is required to provide compensation for damages arising from those defects.

Upon complete destruction of leased premises due to occurrences which are not intended by lessor or lessee, lease agreement terminates. Upon partial destruction, lessee may request reduction of rental rate or cancellation of lease but is not entitled to claim other damages.

During term of lease, lessor is not permitted to alter physical structure of leased premise.

Lessor is not responsible for unlawful acts of third parties effecting lessee's quiet enjoyment. Lessee is entitled to claim proportionate reduction in rent if his enjoyment is disturbed by lawsuit relating to ownership of demised premises provided that lessor is given valid notice of disturbance.

Lessee's responsibilities include obligation to utilize premises in accordance with purposes stipulated in lease agreement and pay rent on time as stipulated. If lessee utilizes leased premises for purposes not intended in lease agreement or for purposes which can cause loss for lessor, lessor may terminate lease.

Upon termination of lease, lessee is obligated to return house to lessor in vacant and good condition. Lessee is responsible for all damages to leased property during rental period except for those proven not to be lessee's fault. If damage results from fire, lessor bears burden of proving lessee's fault.

19.04 POWER OF ATTORNEY:

See category 2 Business Organizations, topic 2.01 Agency.

19.05 REAL PROPERTY:

Governing Law.

Land ownership and rights are governed by Law No. 5 of 1960 dated 24 Sept. 1960 concerning Basic Agrarian Law; Law No. 16 of 1985 dated 31 Dec. 1985 concerning Multi-level Housing; Law No. 41 of 2004 dated 27 Oct. 2004 concerning Wakaf; Government Regulation No. 40 of 1996 dated 17 June 1996 concerning Right to Cultivate, Right to Build and Right to Use Land; and Government Regulation No. 28 of 1977 dated 17 May 1977 concerning Wakaf Title.

Only Indonesian citizens may hold full rights to land, air and water. No distinction is made between rights of men and women.

Agrarian law in effect in relation to land, water and airspace is adat law to extent not in conflict with State and national interests, on basis of unified nation in accordance with Indonesian socialism as well as regulations set forth in Law No. 5 of 1960 and other regulations of law derived from Law No. 5 of 1960 with attention given to elements which are based on religious law.

Right of Ownership is most powerful and fullest right in land which may be possessed by person.

Right of ownership is alienable and devisable only to Indonesian citizens. Government may stipulate legal entities with capacity for ownership.

Aliens, including former Indonesian citizens, who inherit or otherwise obtain right of ownership due to commingling of property from marriage must transfer or release right within one year or right reverts to State.

Right of ownership terminates if right is voluntarily relinquished, if land is abandoned, if land is deemed destroyed or State condemns land for reasons of public interest upon payment of just compensation.

Right of ownership can be object of mortgage.

Right to Cultivate is right to organize farm, plantation, animal husbandry and/or fishing enterprises on land. Right to cultivate is authority granted directly by State.

Restrictions on size of land conveyed by right to cultivate vary based on use and circumstances with minimum conveyance of five hectares.

Only Indonesian citizens and legal entities established pursuant to Indonesian law and domiciled in Indonesia may hold right to cultivate. Other individuals or legal entities obtaining right to cultivate must relinquish or transfer right to qualified person within one year.

Right to cultivate is mortgagable.

Right to cultivate is conveyed for periods of between 25 and 35 years depending on intended use. 25-year renewals are available based on needs of relevant circumstances.

Right to cultivate terminates as result of expiration of validity period, termination due to failure of qualifications, relinquishment by holder, condemnation for public interests, abandonment, destruction of land or failure to release or transfer right within one year period after holder no longer fulfills nationality qualifications to hold right to cultivate.

Right to Build is right to construct and possess buildings above land which do not personally belong to possessor. Land owned by State or privately may be subject to right to build.

Right to build may initially be granted for maximum of 30 years with 20 year extension available upon application.

Only Indonesian citizens and legal entities established pursuant to Indonesian law and domiciled in Indonesia may hold right to build. Other individuals or legal entities obtaining right to build must relinquish or transfer right to qualified person within one year.

Right to build is mortgagable, alienable, devisable and inheritable.

Right to build terminates upon expiration, termination due to failure of qualifications, relinquishment by holder, condemnation for public interests, abandonment, destruction or failure to release or transfer right within one year period after holder no longer fulfills nationality qualifications to hold right to build.

Creation, transfer and cancellation of right to build must be registered with Land Registry Office.

Right to Use is right to use and/or to collect products of land. Right to use may be obtained from State or from private land owners.

Right to use may be given for maximum of 25 years and may be extended for unspecified period of time for so long as land is used for particular needs if: (i) Land is still utilized in productive manner according to its nature and aims of grant of right; (ii) holder has fulfilled conditions of qualification as holder of right; and (iii) holder remains personally qualified to hold right to use.

Right to use may be granted for unlimited duration to governmental organizations, representatives of foreign countries and international, religious and social institutions.

Right to use may be transferred gratuitously, for fee or in exchange for service.

Right to use may be held by Indonesian citizens, aliens domiciled in Indonesia, legal entities formed pursuant to laws of and domiciled in Indonesia or legal entities formed pursuant to foreign laws and domiciled in foreign countries so long as foreign entity has representative in Indonesia. Government, representatives of foreign governments and international institutions and social and religious institutions may also hold right to use.

Right to use may only be transferred on land under State control if permitted by State and for land privately owned if permitted by agreement of owner.

Right to use terminates upon expiration, cancellation, termination due to failure of qualifications, voluntary relinquishment by holder, condemnation for public interests, abandonment, destruction or failure to release or transfer right within one year period after holder no longer fulfills nationality qualifications to hold right to use.

20 TAXATION

20.01 CONSUMPTION TAXES:

See topic 20.06 Value Added Tax.

20.02 EMPLOYMENT TAXES:

See topic 20.04 Income Tax.

20.03 GIFT TAX:

Lottery prizes, gifts and awards are taxable through withholdings which are final in nature with respect to foreign recipients and which are creditable against year end tax liability for domestic recipients.

20.04 INCOME TAX:

Governing Tax.

Income tax is governed by Law No. 7 of 1983 dated 31 Dec. 1983 concerning Income

Tax as already amended by Law No. 7 of 1991 dated 30 Dec. 1991 concerning Amendment to Law No. 7 of 1983; Law No. 10 of 1994 dated 9 Nov. 1994 concerning Amendment to Law No. 7 of 1983; Law No. 17 of 2000 dated 2 Aug. 2000 concerning Third Amendment to Law No. 7 of 1983; Law No. 6 of 1983 dated 31 Dec. 1983 concerning General Tax Provisions and Procedures as already amended by Law No. 9 of 1994 concerning Amendment to Law No. 6 of 1983 dated 9 Nov. 1994; Law No. 16 of 2000 dated 2 Aug. 2000 concerning Second Amendment of Law No. 6 of 1983; and Law No. 28 of 2007 dated 17 July 2007 concerning Third Amendment to Law No. 6 of 1983 concerning General Tax Provisions and Procedures (effective 1 Jan. 2008).

Tax subjects include all individuals, private and State owned and regional owned enterprises, general partnerships, limited partnerships, organizations, consortiums, limited liability companies, cooperatives, commercial associations, federation/partnerships, foundations, mass organizations, socio-political organizations, institutes, mutual funds, pensions funds, other forms of business units including foreign entities deemed to be present in Indonesia through permanent establishments and undivided unitary estates comprised of groups of individual heirs ("Tax Subjects"). See category 2 Business Organizations, topic 2.02 Companies, subhead Permanent Establishments for definition of "Permanent Establishment".

Representative agencies of foreign countries, officials of diplomatic missions and consulates, and international organizations designated by Minister of Finance who are not engaged in business or other income earning activities in Indonesia are excluded from definition of tax subjects.

Tax subjects are categorized as resident or nonresident. Resident tax subjects include any individual residing or present in Indonesia for more than 183 days in period of 12 months, organizations set up or domiciled in Indonesia and unitary estates. Other persons, including permanent establishments, are characterized as nonresident tax subjects.

Taxable income includes any economic benefit received or earned by tax subject from within as well as outside Indonesia in whatever name or form, including: (i) Compensation or rewards received or earned in connection with work or services including but not limited to salaries, wages, allowances, honorariums, commissions, bonuses, gratuities and pensions; (ii) prizes from lotteries or work or activities and awards; (iii) business profits; (iv) gains from sale or transfer of property; (v) tax refunds already calculated as costs; (vi) interest including premiums, discounts and compensation due to debt repayment guarantees; (vii) dividends including those paid by insurance companies to policyholders and payments of business profits of cooperatives; (viii) royalties; (ix) rents and other income connected with use of property; (x) annuities received or accrued; (xi) gains due to cancellation of debt except up to certain amounts stipulated by Government Regulation; (xii) surplus differences due to revaluation of assets; (xiii) insurance premiums; (xiv) contributions received or accrued by association from its members which consist of tax subjects who perform business or independent work; (xv) increases in net assets from income not yet subject to tax; and (xvi) foreign currency gains.

Nontaxable income includes: (i) Aid and contributions so long as aid and contributions are unrelated to business, work, ownership or control; (ii) gifts received by family members related by blood or religious organizations or educational institutions or social organizations or small scale business units or cooperatives sanctioned by Minister of Finance so long as gift is unrelated to business, work, ownership or control; (iii) transfers by inheritance; (iv) property including cash payments received by entities as substitute for shares or in place of capital participation; (v) compensation or rewards in connection with work or services received or earned in kind and/or fringe benefits from tax subject or government; (vi) payments from insurance companies to individuals in connection with health insurance, accident insurance, life insurance, endowment insurance and scholarship insurance; (vii) dividends or other distributions of profits received or earned by resident taxpayer limited liability company and specific other similar bodies from capital participation in Indonesian business entity; (viii) pension fund contributions and income earned by certain pension fund investments; (ix) profit distributions received by members of limited partnerships, associations, general partnerships and consortiums; (x) bond interest received by mutual fund companies during first five years since establishment or grant of business permit; and (xi) income received or earned by venture capital companies.

Rules applying to taxation of permanent establishments are designed to capture tax on worldwide income of related organization earned in direct connection with activities of permanent establishment, while excluding other unrelated activities.

Untaxed income for individuals includes first Rp 13,200,000 earned with additional Rp 1,200,000 for married taxpayers, additional Rp 13,200,000 for wife whose income is consolidated with income of her husband and additional Rp 1,200,000 for each immediate family member who is full dependent, up to maximum of three. These amounts are adjustable by Minister of Finance.

Government assumes income tax obligation on first Rp 1,000,000 per month earned by private individuals working in Indonesia and earning not more than Rp 2,000,000 per month.

Taxable income is calculated by deducting costs and expenses, depreciation, amortization, claims which cannot be collected, pension fund contributions, capital losses, foreign currency exchange losses, costs of research and development conducted in Indonesia, and costs of scholarships, apprenticeships and training from gross income.

Following are not deductible in calculation of taxable income: (i) Payments of profits in whatever names or forms; (ii) costs charged for personal interests of shareholders, partners or members; (iii) accumulation of reserves (except bad debt claims reserves for banks and related to lease options, reserves for insurance business and mining reclamation costs); (iv) health, accident, life, endowment and scholarship insurance premiums paid by individual taxpayers (except for employers paying on behalf of employees and treating premiums as employee income); (v) compensation or rewards in connection with work or services paid in kind and as fringe benefits except as otherwise specified by Decree of Minister of Finance; (vi) excessive compensation paid to shareholders or parties with special relationships in connection with work performed; (vii) donations, aid, inheritance; (viii) income taxes; (ix) costs paid or incurred for personal interests of tax subjects or their dependents; (x) salaries paid to members of federations, general partnerships or limited partnership whose capital is not divided into shares; and (xi) tax related administrative and criminal sanctions.

Tax rates applied to resident tax subjects who are individuals are 5% for first Rp 25,000,000 (subject to applicable exclusions); 10% for next Rp 25,000,000; 15% on income above Rp 50,000,000 up to Rp 100,000,000; 25% on income above Rp 100,000,000 up to Rp 200,000,000; and 35% on income exceeding Rp 200,000,000.

Tax rates applied to resident tax subjects who are domestic entities and permanent establishment are 10% for income up to Rp 50,000,000; 15% for income above Rp 50,000,000; and 30% for income exceeding Rp 100,000,000.

Taxes are paid on monthly basis through withholdings by income paying parties and payments by tax subjects directly. Income paid by resident tax subjects and permanent establishments to resident tax subjects or permanent establishments is subject to tax withholding of 15% of gross amount of: (i) Dividends; (ii) interest, including premiums, discounts and compensations for loan repayment guarantees; (iii) royalties; and (iv) gifts or rewards.

Interest earned on savings paid by cooperatives is subject to withholding at rate of 15% and is final in nature. Withholding of 15% of net income estimates are required for: (i) Rents and other income connected with use of property; and (ii) compensation connected with technical, management, construction, consulting and other services other than those received by individual taxpayers and already subject to withholding by their employers.

There is no withholding for: (i) Income paid or owed to banks; (ii) rents paid or owed in connection with leases with purchase options; (iii) dividends paid between domestic companies; (iv) interest on bonds earned by investment fund companies; (v) profit distributions received by members of limited partnerships, associations, general partnerships and consortiums; (vi) residual from business activities of cooperatives paid to its member; and (vii) interest on deposits not exceeding limit stipulated by Minister of Finance.

Income paid by resident tax subjects or permanent establishments to nonresident tax subjects are subject to 20% withholding tax, deemed final in nature (subject to certain exceptions), on following: (i) Dividends; (ii) interest, including premiums, discounts and compensation for loan repayment guarantees; (iii) royalties, rents and other income connected with use of property; (iv) compensation for services, work and activities; (v) gifts and awards; and (vi) pensions and other periodic payments.

Tax liabilities run to managers of entities; curators of entities which have been declared bankrupt; persons or entities charged with duty to conduct settlement (winding up); liquidators of entities in liquidation; heirs, executors and managers of undivided estates; and guardians of minors. These representatives are personally and severally liable for payment of taxes due unless they can prove and convince Director General of Taxation that they should not be held liable due to their relevant position and activities.

20.05 INHERITANCE TAX:

Inheritance tax is not imposed in Indonesia.

20.06 VALUE ADDED TAX:

Governing Law.

Value added tax is governed by Law No. 8 of 1983 dated 31 Dec. 1983 concerning Value Added Tax on Goods and Services and Sales Tax on Luxury Goods as last am'd by Law No. 18 of 2000 dated 2 Aug. 2000 concerning Second Amendment to Law No. 8 of 1983 concerning Value Added Tax on Goods and Services and Sales Tax on Luxury Goods.

Value added tax is imposed on goods and services which are used by or performed or provided by someone within territory of Indonesia.

21 TRANSPORTATION

21.01 MOTOR VEHICLES:

Car ownership is allowed for aliens. Car rental with or without driver is readily available at reasonable rates.

Indonesian or international drivers license is needed to drive in Indonesia. To obtain drivers license, following are required: (i) Copies of identity card and certificate of good health; (ii) certificate of blood type; (iii) recent photograph; and (iv) driving and rules of road test Indonesian drivers licenses are valid for five years. International drivers licenses are valid for one year and cannot be extended. Drivers licenses are issued by traffic unit of Department of Police. Minimum age for motorcycle drivers license is 16 years and for cars minimum age is 17 years.

There is no obligation to underwrite risk of loss through insurance except with respect to public transportation. Registration is required for all vehicles used on road.

21.02 SHIPPING:

Indonesian admiralty and maritime law is founded on principles of international conventions (see category Treaties and Conventions), Indonesian Commercial Code (Kitab Undang-undang Hukum Dagang) (KUHD) (Wetboek van Koophandel voor Indonesië) regulating mortgages and other liens, master and seamen, pilotage and towage, wrecks and salvage and carriage of goods (which is also covered by United Nations Convention on Carriage of Goods by Sea of 1978 and Law No. 17 of 2008 dated 7 May 2008 concerning Shipping regulating registration, safety and pollution, inspection and control, masters and seaman and wreck and salvage).

Ship Registration.

Ships qualified for Indonesian registry are those which are at least with gross tonnage of 7 gross tons, owned by Indonesian citizens or Indonesian legal entities, established pursuant to laws of Indonesia and domiciled in Indonesia or Indonesian legal entities which constitute as joint venture with majority of their shares owned by Indonesian citizens provided joint venture entity has at least one vessel of minimum of 5,000 gross tonnes.

Collision.

Indonesia has ratified 1972 International Regulation for Preventing Collisions at Sea.

22 TREATIES AND CONVENTIONS

22.01 TREATIES:

Multilateral Treaties and Conventions.

Indonesia is signatory to numerous multilateral treaties and conventions, examples of which are: (i) Charter of United Nations and Statute of International Court of Justice, 26 June 1945; (ii) International Covenant on Civil and Political Rights; (iii) International Covenant on Economic, Social and Cultural Rights; (iv) Convention on International Civil Aviation, 7 Dec. 1944; (v) Convention on Privileges and Immunities of United Nations, 13 Feb. 1946 (vi) Convention on Privileges and Immunities of Specialized Agencies, 21 Nov. 1947; (vii) Vienna Convention on Diplomatic Relations and Optional Protocol to Vienna Convention on Diplomatic Relations concerning Acquisition of Nationality, 1961; (viii) Vienna Convention on Consular Relations and Optional Protocol to Vienna Convention on Diplomatic Relations concerning Acquisition of Nationality, 1961 and Vienna Convention on Consular Relations and Optional Protocol to Vienna Convention on Consular Relations concerning Acquisition of Nationality, 1963; (ix) Convention on Special Missions, 8 Dec. 1969; (x) Convention on Elimination of All Forms of Discrimination against Women, 18 Dec. 1979; (xi) Convention against Torture and other Inhumane or Degrading Treatment or Punishment, 10 Dec 1984; (xii) International Convention against Apartheid in Sports, 10 Dec. 1985; (xiii) Convention on Rights of Child, 20 Nov. 1989; (xiv) International Opium Convention, 11 Dec. 1946; (xv) Single Convention on Narcotics Drugs of 1961; (xvi) Protocol Amending Single Convention on Narcotics Drugs of 1961, 25 Mar. 1972; (xvii) United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, 20 Dec. 1988; (xviii) Constitution of World Health Organization, 22 July 1946; (xix) General Agreement on Tariffs and Trade, 30 Oct. 1947 (Indonesia became member of GATT on 24 Feb. 1950; (xx) Agreement Establishing Asian Development Bank, 4 Dec. 1965; (xxi) Constitution of United Nations Industrial Development Organization, 8 Apr. 1979; (xxii) Charter of Asian and Pacific Development Centre, 1 Apr. 1982; (xxiii) Agreement to Establish South Centre, 1 Sept. 1994; (xxiv) Customs Convention on Containers, 2 Dec. 1972; (xxv) Customs Convention on International Transport of Goods under Cover of TIR Carnets (TIR Convention), 14 Nov. 1975; (xxvi) Convention on International Maritime Organization, 6 Mar. 1948 (Indonesia became member of IMO in 1961); (xxvii) Convention on Code of Conduct for Liner Conferences, 5 Feb.

1975; (xxviii) Statutes for International Centre for Genetic Engineering and Biotechnology, 13 Sept. 1983; (xxix) Convention on Political Rights of Women, 31 Mar. 1953; (xxx) Agreement Establishing Asian Coconut Community, 12 Dec. 1968; (xxxi) Agreement Establishing Southeast Asia Tin Research and Development Centre, 28 Apr. 1977; (xxxii) Agreement Establishing Common Fund for Commodities, 27 June 1980; (xxxiii) Sixth International Tin Agreement, 26 June 1981; (xxxiv) International Natural Rubber Agreement, 20 Mar. 1987; (xxxv) Terms of Reference of International Tin Study Group, 7 Apr. 1989; (xxxvi) Terms of Reference of International Copper Study Group, 24 Feb. 1989; (xxxvii) International Agreement on Jute and Jute Products, 3 Nov. 1989; (xxxviii) International Tropical Timber Agreement, 26 Jan. 1994; (xxxix) International Coffee Agreement, 28 Sept. 2000; (xl) Convention on High Seas, 29 Apr. 1958; (xli) Convention on Fishing and Conservation of Living Resources of High Seas, 29 Apr. 1958; (xlii) Convention on Continental Shelf, 29 Apr. 1958; (xliii) United Nations Convention on Law of Sea, 10 Dec. 1982; (xliv) Convention on Recognition and Enforcement of Foreign Arbitral Awards, 10 June 1958; (xlv) Agreement Establishing Asia Pacific Institute for Broadcasting Development, 12 Aug. 1977; (xlvi) Constitution of Asia-Pacific Tele-Community, 27 Mar. 1976; (xlvii) Convention on Prohibition of Development, Production, Stock Piling and Use of Chemical Weapons and on their Destruction, 13 Jan. 1993; (xlviii) Vienna Convention for Protection of Ozone Layer, 22 Mar. 1985; (xlix) Basel Convention on Control of Trans-Boundary Movements of Hazardous Wastes and their Disposal, 22 Mar. 1989; (l) United Nations Framework Convention on Climate Change, 9 May 1992; (li) United Nations Convention on Biological Diversity, 5 June 1992; (lii) Convention on Stamp Laws in Connection with Checks, 10 Mar. 1931; (liii) Agreement on Common Effective Preferential Tariff (CEPT) Scheme for ASEAN Free Trade Area (AFTA), 15 Dec. 1995; (liv) Framework Agreement on Enhancing ASEAN Economic Cooperation, 28 Jan. 1992; (lv) Protocol Amendment to Memorandum of Understanding concerning Brand-to-Brand Complementation on Automotive Industry under Basic Agreement on ASEAN Industrial Complementation, Mar. 1995; (lvi) Southeast Asia Nuclear Weapon Free Zone Treaty, Dec. 1995; (lvii) Agreement Establishing World Trade Organization, 15 Dec. 1993; (lviii) Convention of Paris for Protection of Industrial Property, 14 July 1967; (lix) Guadalajara Convention, 18 Sept. 1961; (lx) International Labor Organization Convention No. 182 concerning Prohibition and Immediate Action for Elimination of Worst Forms of Child Labor; (lxi) International Labor Organization Convention No. 138 concerning Minimum Age for Admission to Employment; (lxii) International Labor Organization Convention No. 105 concerning Abolition of Forced Labour; (lxiii) ILO Convention No. 81 concerning Labour Inspection in Industry and Commerce, 25 July 2003; (lxiv) Protocol 9 Dangerous Goods, 20 Sept. 2002; (lxv) Protocol on Notification Procedures, 7 Oct. 1998; (lxvi) Protocol to Implement Third Package of Commitments under ASEAN Framework Agreement on Services, 31 Dec. 2001; (lxvii) Second Additional Protocol to Constitution of Asian-Pacific Postal Union, 18 Dec. 2000; (lxviii) Agreement on Augmentation of ASEAN Science Fund, 8 Apr. 2000; and (lxix) Framework Agreement on Comprehensive Economic Co-Operation between Association of South East Asian Nations and People's Republic of China, 4 Nov. 2002; (lxx) International Treaty on Plant Genetic Resources for Food and Agriculture; (lxxi) Agreement on Network of Aquaculture Centres in Asia and Pacific as amended by Governing Council at its 14th Meeting 28 Mar.—1 Apr. 2003, Yangoon, Myanmar; (lxxii) Protocol to Amend Basic Agreement on ASEAN Industrial Cooperation Scheme; (lxxiii) Agreement between Governments of Member Countries of Association of Southeast Asian Nations and Government of Russian Federation on Economic and Development Cooperation; (lxxiv) Convention for Safeguarding of Intangible Cultural Heritage; (lxxv) Agreement on Information Exchange and Establishment of Communication Procedures; (lxxvi) Protocol to Implement Fourth Package of Commitments on Air Transport Services under Asean Framework Agreement on Services; (lxxvii) International Labor Organization Convention No. 185 concerning Revising the Seafarers' Indentity Documents Convention, 1958; (lxxviii) Agreement on Trade in Services of Framework Agreement on Comprehensive Economic Co-operation between Association of Southeast Asian Nations and People's Republic of China; (lxxix) Agreement to Establish and Implement ASEAN Single Window and Protocol to Establish and Implement ASEAN Single Window; (lxxx) Universal Postal Convention and Final Protocol to Universal Postal Convention; (lxxxi) Protocol to Implement Fourth Package of Commitments on Financial Services under ASEAN Framework Agreement on

Services; (lxxxii) Multilateral Agreement among D-8 Member Countries on Administrative Assistance in Customs Matters; (lxxxiii) Statute of International Institute for Unification of Private Law; (lxxxiv) Memorandum of Understanding on Establishing ASEAN-Korea Centre between Member Countries of Association of Southeast Asian Nations and Republic of Korea; (lxxxv) ASEAN Framework Agreement on Visa Exemption; (lxxxvi) ASEAN Framework Agreement for Integration of Priority Sectors; (lxxxvii) Amendments to Agreement Establishing ASEAN Promotion Centre on Trade, Investment and Tourism; (lxxxviii) Charter of Association of Southeast Asian Nations; (lxxxviii) United Nations Convention against Transnational Organized Crime; (lxxxix) Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children, Supplementing United Nations Convention against Transnational Organized Crime; (xc) Protocol against Smuggling of Migrants by Land, Sea and Air, Supplementing United Nations Convention Against Transnational Organized Crime; (xci) Stockholm Convention on Persistent Organic Pollutants; (xcii) Agreement for Implementation of Provisions of United Nations Convention on Law of Sea of 10 Dec. 1982 Relating to Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks.

Trade and Investment Agreements.

Indonesia is signatory to numerous trade and investment agreements with following countries: People's Democratic Republic of Algeria; Argentine Republic; Australia; People's Republic of Bangladesh; Kingdom of Belgium; Bosnia and Herzegovina; Republic of Bulgaria; Kingdom of Cambodia; Canada; Republic of Chile; People's Republic of China; Republic of Colombia; Republic of Cuba; Czech Republic; Kingdom of Denmark; Arab Republic of Egypt; Republic of Finland; French Republic; Federal Republic of Germany; Republic of Hungary; Republic of India; Republic of Iran; Republic of Iraq; Italian Republic; Japan; Hashemite Kingdom of Jordan; Kyrgyz Republic; Democratic People's Republic of Korea; Republic of Korea; Lao People's Democratic Republic; New Zealand; Malaysia; Republic of Mauritius; Mongolia; Kingdom of Morocco; Kingdom of The Netherlands; Kingdom of Norway; Islamic Republic of Pakistan; Independent State of Papua New Guinea; Republic of Philippines; Republic of Poland; Qatar; Romania; Russian Federation; Republic of Singapore; Slovak Republic; Republic of South Africa; Kingdom of Spain; Democratic Socialist Republic of Sri Lanka; Republic of Sudan; Republic of Suriname; Kingdom of Sweden; Swiss Confederation; Syrian Arab Republic; Republic of Tajikistan; Kingdom of Thailand; Tunisian Republic; Republic of Turkey; Turkmenistan; Ukraine; United Kingdom of Great Britain and Northern Ireland; United States of America; Republic of Uzbekistan; Socialist Republic of Vietnam; Republic of Yemen; and Republic of Zimbabwe.

Tax Treaties.

Indonesia has signed and ratified bilateral tax treaties with following countries: People's Democratic Republic of Algeria; Australia; Republic of Austria; People's Republic of Bangladesh; Kingdom of Belgium; Brunei Darussalam; Republic of Bulgaria; Canada; People's Republic of China; Czech Republic; Kingdom of Denmark; Arab Republic of Egypt; Republic of Finland; French Republic; Federal Republic of Germany; Hungarian People's Republic; Republic of India; Italian Republic; Islamic Republic of Iran; Japan; Hashemite Kingdom of Jordan; Democratic People's Republic of Korea; Republic of Korea; State of Kuwait; Grand Duchy of Luxembourg; Malaysia; Republic of Mauritius; United Mexican States; Mongolia; Kingdom of The Netherlands; New Zealand; Kingdom of Norway; Islamic Republic of Pakistan; Republic of Philippines; Republic of Poland; Portuguese Republic; Romania; Russian Federation; Kingdom of Saudi Arabia; Republic of Seychelles; Republic of Singapore; Slovak Republic; Republic of South Africa; Kingdom of Spain; Democratic Socialist Republic of Sri Lanka; Republic of Sudan; Syrian Arab Republic; Kingdom of Sweden; Swiss Confederation; Kingdom of Thailand; Republic of Turkey; Republic of Tunisia; Ukraine; United Arab Emirates; United Kingdom of Great Britain and Northern Ireland; United States of America; Republic of Uzbekistan; Socialist Republic of Vietnam; and Bolivarian Republic of Venezuela.

IRELAND LAW DIGEST

—Scope —

Revised for 2010 edition by

SCHOOL OF LAW, University College Dublin, National University of Ireland.

(Statutes are cited by reference to their short titles if any and calendar years in which they passed, or by their latest collective citations [where applicable].)

Ireland is a member of the EU. See also European Union Law Digest.

Note: Revisions reflect law as of Dec., 2009.

1 INTRODUCTION

1.01 CURRENCY:

Ireland is member of “Euro-zone” and adopted EURO as its official working currency from 1 Jan. 2002. EURO replaced Irish Pound (Punt) and was regarded as a success.

See also category 15 Foreign Trade and Commerce, topic 15.03 Foreign Exchange, Investments and Trade.

1.02 EUROPEAN UNION:

See category 25 Treaties and Conventions, topic 25.02 Treaties; also European Union Law Digest.

1.03 GOVERNMENT AND LEGAL SYSTEM:

Name of State is Éire, or, in English language, Ireland. It is declared by Republic of Ireland Act, 1948, that description, as opposed to name, of State shall be Republic of Ireland.

Irish language is first official language of State. English is second official language. Irish became 21st official language of EU from 1 Jan. 2007 and Ireland is known as “Éire Ireland” at EU summits.

Constitution of Ireland is written and contained in The Constitution of Ireland Act, 1937 as amended 23 times in subsequent referenda, most recent being referendum passed in 2004 relating to Citizenship.

Sole and exclusive power of making laws, known as Statutes or Acts, is vested in legislature, known as Oireachtas, which consists of President and two houses, House of Representatives, otherwise called “Dáil Éireann”, and Senate, otherwise called “Seanad Éireann”. Oireachtas sits in Dublin.

All citizens who have attained age of 18 years and who have otherwise complied with electoral laws have right to vote at all elections for Dáil, Éireann, European and local elections and in referenda. British citizens may also vote at Dáil European and local elections. Other EU citizens may vote at European and local elections. Non-EU citizens may vote at local elections only.

Seanad Éireann consists of 11 members nominated by Prime Minister, six members elected by certain University graduates, and 43 members chosen by limited electorate from five specially constituted panels.

Executive power of State is exercised by Government, which consists of not less than seven nor more than 15 members (Ministers), who are appointed by President on nomination of Prime Minister. Government is responsible to Dáil Éireann. Head of Government is Prime Minister, otherwise called “An Taoiseach”. Government meets and acts as collective authority and is collectively responsible for Departments of State administered by members of Government who are empowered to make statutory rules, orders and regulations.

For purposes of local government, State is divided into county and city council areas and local government is carried on by urban district councils and town commissioners which have power to strike rates and generally to provide for local conditions, upkeep, repair of roads, etc. Constitutional recognition for role of local government was provided by Twentieth Amendment of the Constitution Act, 1999.

Both Houses resume in mid to late Sept. and take break at Christmas for approximately one month and Easter for two weeks. Both Houses sit until early July.

1.04 HOLIDAYS:

There are nine public holidays in Ireland. Jan. 1; Mar. 17 (St. Patrick’s Day); Easter Mon.; 1st Mon. in May; 1st Mon. in June; 1st Mon. in Aug.; last Mon. in Oct.; Christmas Day (Dec. 25) and Dec. 26. See category 11 Employment, topic 11.05 Labor Relations.

1.05 OFFICE HOURS AND TIME ZONE:

Ireland is in Greenwich Mean time zone. Office hours are generally from 9 a.m. to 5 p.m. 7th EU Council Directive on summertime arrangements has been adopted into Irish law by Winter Time Order, 1994.

2 BUSINESS ORGANIZATIONS

2.01 AGENCY:

Common Law principles govern this relationship. Relationship may arise through agreement (express or implied); through estoppel; by operation of law (e.g. necessity); or by ratification. Sole or exclusive agencies will not be implied but must be agreed expressly. Agents owe contractual and fiduciary duties to their principals. Agents are entitled at law to indemnity against expenses incurred and to remuneration as agreed or as is reasonable in absence of agreement. Identity of principal need not generally be disclosed. Authorized acts of agent identified as such will normally bind principal.

European Communities (Commercial Agents) Regulations, 1993 and 1997 govern rights and duties of commercial agents, but not other agents. Commercial agents are those engaged in purchase or sale of goods. Regulations regulate termination of agency contracts, minimum notice period for termination, provision of compensation, and right to commission.

2.02 ASSOCIATIONS:

Incorporation of business associations as registered companies is common. Unincorporated associations formed for gain will be regarded as partnerships and will be regulated by Partnership Act, 1890. Trade unions may also be formed in accordance with Trade Union Acts. Any association whose object is gain which has more than 20 members must be incorporated under Companies Acts. Exceptions are partnerships of accountants or solicitors. Companies (Auditing and Accounting) Act, 2003 permits Minister to exempt other categories by order. In 2004, partnerships formed for purpose of, and whose main business consists of, provision of investment and loan finance and ancillary facilities and services to persons engaged in industrial or commercial activities were exempted by Ministerial Order: Companies (Amendment) Act, 1982 § 13(2) Order, 2004 (SI No. 506 of 2004).

Art. 40 of Irish Constitution safeguards right to form, join or not join associations.

See topics 2.04 Corporations, Partnerships and category 11 Employment, topic 11.05 Labor Relations.

2.03 BUILDING SOCIETIES:

Law on building societies is contained in Building Societies Act, 1989. Such bodies were typically founded to facilitate building schemes based on mutual contribution of members. Modern societies also offer interest bearing deposit facilities, lending, and may engage in ancillary activities including insurance, hire purchase and foreign exchange. Larger building societies have become public companies. Building societies are regulated by Central Bank and overseen by Irish Financial Services Regulatory Authority, also known as "Financial Regulator"—see http://www.ifsra.ie and http://www.financialregulator.ie.

2.04 CORPORATIONS:

Law pertaining to corporations is contained in Companies Acts, 1963 to 2009 and ancillary statutory instruments—see http://www.irishstatutebook.ie. Two principal categories of company are envisaged—private and public—and legal requirements as to membership, minimum capital, and preparation of accounts and filing of annual returns differ accordingly. Private companies are restricted in size of membership and in transferability of their shares but small and medium-sized private companies are exempted from many reporting and auditing requirements with which larger public companies must comply.

Liability of members may be limited (by shares or guarantee or both) or unlimited. Private companies limited by shares account for 89% approximately of companies registered in Ireland; public limited companies limited by shares for only 0.6%, and guarantee and unlimited companies account for most of balance.

Private company is one which has share capital and which by its articles: (a) restricts right to transfer its shares; (b) limits number of its members (exclusive of present or past employees) to 50; and (c) prohibits any invitation to public to subscribe for shares or debentures. Since Oct. 1994, under European Communities (Single Member Private Limited Companies) Regulations 1994, private limited company may have only one member.

Public limited company requires seven or more members and must have minimum issued share capital of [Euro]38,092 and at least one-quarter of nominal value of such shares and all of share premium (if any) must be paid up.

Company having limited liability must have word "limited" or "Ltd." (in Irish language "Teoranta" or "Teo.") as last word of its name or "public limited company" or "p.l.c." ("cuideachta phoibli theoranta" or "c.p.t.") if it is public limited company, unless it is not for profit company promoting commerce, art, science, education, religion or charity.

Enforcement of company law is conducted by Director of Corporate Enforcement who has power to appoint inspectors to companies and to prosecute offences under Acts. See Director's website at http://www.odce.ie for more details.

Draft Heads of Bill of new Consolidated Companies Act were published in 2007 and Bill is expected late in 2009—see Company Law Review Group's website at http://www.clrg.org for full details.

Taxation.

See category 23 Taxation, topic 23.07 Tax Incentives and Exemptions, subhead Tax Relief.

Formation of Companies.

All companies must have two or more directors and company secretary (who may also be director) and must register memorandum of association stating: (1) name of company; (2) objects and powers of company; (3) how liability is limited; and (4) amount of nominal capital and number and value of shares into which same is divided. Printed copy of articles of association or by-laws (if any) must be lodged in Companies Registration Office. If there are none, then form of articles set out in first schedule to 1963 Act and known as "Table A" applies and becomes articles of company by default. Articles and Memorandum may subsequently be amended by resolution of members provided requirements of Companies Acts are adhered to.

Companies may be purchased "off-the-shelf" from formation agencies, or directly by incorporators or their agents through Companies Registration Office which operates number of methods (1) "Ordinary List", which can take over one month; (2) "Company Incorporation Scheme" for private companies, which takes ten days; and (3) "CRODisk" scheme which takes five days. Latter two can only be formed by participating agents registered with Companies Registration Office.

Registration Fees.

Details of fees payable can be found on Companies Registration Office web site http://www.cro.ie.

Prospectus.

Public company issuing prospectus must comply with requirements of Prospectus Directive (2003/71/EC) Regulations 2005 and Part V of Investment Funds, Companies and Miscellaneous Provisions Act, 2005.

Annual Return.

Every company having share capital must make annual return to Registrar of Companies within 28 days of its "Annual Return Date" containing following particulars (inter alia): (1) address of registered office; (2) situation of registers of members and debenture holders; (3) summary of share capital and debentures, distinguishing between shares issued for cash and shares issued as fully or partly paid up otherwise than in cash; (4) particulars of indebtedness in respect of mortgages and charges; (5) list of past and present members; (6) particulars of directors and secretaries. There must be annexed to annual return certified copies of balance sheet and of auditor's report on, and directors' report accompanying, such balance sheet. Companies (Amendment) Act, 1986 requires balance sheet and profit and loss accounts to be detailed and in form prescribed by statute, with lesser requirements for small/medium sized companies. European Communities (Fair Value Accounting) Regulations 2004 and European Communities (International Financial Reporting Standards and Miscellaneous Amendments) Regulations 2005 S.I. No. 116 of 2005 provide for adoption of International Accounting Standards.

European Communities (Branch) Disclosures Regulations, 1993 and European Communities (Accounts) Regulations, 1993 require filing of financial statements by external companies with Irish branches and certain unlimited companies and partnerships where liability of members or ultimate members is limited. They continue harmonization of reporting requirements under Companies Acts, European Communities (Companies: Group Account) Regulations, 1992 and European Communities (Credit Institution Accounts) Regulations, 1992.

Companies may be struck off register by Companies Registration Office for failing to file annual return. Effect of striking off company is that company no longer exists and title to its assets reverts to State. Reinstatement procedures are available upon proper filing and payment of penalty fee or fine.

Audit.

Every company must appoint auditor to inspect and certify annual accounts of company. Since 2001 auditors are additionally required to report discrepancies to Director of Corporate Enforcement. Small companies may elect to dispense with requirement to have auditor.

Part II of Companies (Auditing and Accounting) Act, 2003 establishes Irish Auditing and Accounting Supervisory Authority having supervisory functions and regulating auditors; see http://www.iaasa.ie.

Borrowing.

Company cannot borrow for any purpose other than those set out in its memorandum of association or reasonably incidental thereto. Any such attempted borrowing is ultra vires and void, except as against any person who was not actually aware of want of capacity or who was acting in good faith.

Borrowing powers of directors or other agents of company may additionally be subjected to limitations set out in company's memorandum and articles of association, though excesses may be ratified retrospectively by company. In any event, excess of authority will not be held against person who had no actual or constructive notice of excess, or who was acting in good faith.

If security in form of mortgage or charge of company property is given, particulars of security will have to be delivered to Registrar of Companies for registration in accordance with § 99 of Companies Act, 1963 within 21 days of creation of security. Section lists types of security that require such registration, including charges or mortgages of land, book debts, ships, aircraft, shares and stock in company, goodwill and intellectual property. Failure to deliver particulars within time limit will render security (but not loan) void as against any other creditor and any liquidator of company. High Court may, however, extend period for delivery of particulars.

Directors/Officers.

Every company must have at least two directors. Directors must be natural persons, and at least one must be resident in Ireland unless company provides [Euro]25,394.76 bond or is granted certificate stating that company has real and continuous link with one or more economic activities carried on in Ireland.

Every company must additionally have secretary, who may concurrently be one of directors. Body corporate can act as secretary.

Directors owe fiduciary duties to company at common law or to its creditors if company is insolvent. Companies Acts impose, in addition, duties of transparency in dealings between companies and their directors, preventing insider dealing and imposing duty of disclosure on directors in respect of their interest in contracts, shares and debentures of company. Acts also impose personal liability on officers of company for reckless or fraudulent trading. Indemnities and insurance are often obtained. Companies (Auditing and Accounting) Act, 2003, § 56 removes doubt about legality of Directors and Officers insurance.

Stock transfer tax is payable on purchase of stocks, calculable as percentage of purchase price or amount of market value. See category 23 Taxation, topic 23.06 Stamp Tax, subhead Stamp Duty.

Winding Up.

Company may be wound up in three ways: (1) compulsorily by court; (2) voluntarily, by company either as members' voluntary winding up or (3) as creditors' voluntary winding up. In compulsory winding up liquidator is appointed by, and is answerable to, High Court, whereas in voluntary winding up members and creditors retain greater control of liquidation. Liquidator's function is to identify assets of company, to call them in and to realize them, and to settle obligations of company to its creditors before distributing residue (if any) to members in accordance with their entitlements. Certain debts are given priority (e.g. liquidation expenses, costs of petition to court to windup) and secured creditors additionally enjoy priority in respect of subject of their security. Revenue Commissioners and certain other creditors (in some cases employees) are given priority over holders of floating charges.

High Court may order related companies to be wound up as if they were one company.

Fraudulent Preference.

Basic concept is same as in bankruptcy i.e. disposition or transaction designed to prefer one creditor over another in insolvency contrary to pari passu principle of distribution. Burden of proof of dominant intention to prefer rests on liquidator except in case of connected person.

Fraudulent Transfer of Assets.

High Court can order return of property to company being wound up where property which was disposed of to perpetrate fraud on company, its members or creditors, if it is just and equitable to so order.

Reckless/Fraudulent Trading.

Receiver, creditor, contributory or liquidator may apply to Court for order that directors or other knowing parties are guilty of fraudulent or reckless trading and should be held responsible for some or all of company's debts and liabilities. Fraudulent and reckless trading also constitute criminal offence.

Receiverships.

Receiver may be appointed to company under debenture or on application by debenture holder to Court. Receiver's function is to receive and get in all assets of company and dispose of them to pay principal sum and interest due to debenture holder. Receiver may also be appointed manager of company's affairs. Receiver under floating charge must respect rights of preferential creditors.

Court Protection.

Companies (Amendment) Act, 1990 facilitates survival of company in financial difficulties by enabling it to be placed under protection of High Court, and Examiner may be appointed to report to Court and present proposals and scheme of arrangement on whether company has viable future. Court will decide whether it is to be implemented or not.

Examiner may be appointed where company is unable, or is unlikely to be able, to pay its debts as they fall due. Appointment will prevent company being wound up or placed in receivership during period of examinership, and creditors are prevented from enforcing their securities during that period. Receiver appointed within three days prior to appointment of Examiner will be removed pending examinership.

Manufacturing Companies.

It is policy of Irish Government to encourage foreign investment in industry and manufacturing companies and certain companies based in Shannon Airport and Dublin Customs House Docks areas are subjected to lower rate of corporation tax. See http://www.revenue.ie and category Taxation, topic Income Tax, subhead Corporation Tax.

Foreign Corporations.

Every company incorporated outside Republic of Ireland establishing place of business within Republic of Ireland is required, within one month, to file with Registrar of Companies: (1) certified copy of its charter or memorandum and articles or by-laws written in English; (2) list of directors and secretary; (3) name of person resident in Ireland on whom process against company may be served and company's principal place of business in Ireland; and (4) balance sheet and profit and loss accounts and, if company is holding company, group accounts. All alterations in above particulars must be notified and filed at once. Statement or balance sheet must be filed every year. Non-compliance with requirements listed above subjects company and its officers and agents to heavy penalties.

See category 8 Debtor and Creditor, topic 8.04 Bankruptcy.

See also topic 2.03 Building Societies.

2.05 JOINT STOCK COMPANIES:

See topic 2.04 Corporations.

2.06 PARTNERSHIPS:

Law on partnerships is found primarily in Partnership Act, 1890 and to lesser extent Limited Partnerships Act, 1907 and Investment Limited Partnerships Act, 1994. Partnership is defined as "relation subsisting between two or more persons carrying on business in common with a view of profit". Whether partnership exists is de facto question independent of intention of partners. Except for partnerships of solicitors and accountants, partnership for purpose of gain may not have more than 20 partners. Any greater number must incorporate as company. See topic 2.02 Associations. Companies (Auditing and Accounting) Act, 2003 permits Minister to exempt other categories by order.

Partnerships which adopt firm name other than true names of partners must register that name as business name with Registrar of Companies under Registration of Business Names Act, 1963.

Property (real or personal) bought with partnership money is prima facie partnership property. In absence of agreement to contrary each partner is entitled to participate in management of partnership.

In absence of agreement to contrary all partners are personally liable, jointly and severally, on partnership contracts and debts.

Each partner has authority to bind firm. Agreements between partners to limit authority of individual partners may not operate to disadvantage of third parties dealing with partner who have no knowledge or belief that his or her authority is restricted.

Partners stand in fiduciary relationship to each other. Partnership will dissolve on death or bankruptcy of partner unless contrary is agreed between partners. Likewise, any partner can call for dissolution of partnership unless there is prior contrary agreement.

It is possible under Limited Partnerships Act, 1907 to form partnerships which extend limited liability to one or more partners, but there are severe restrictions. In addition to limited partners there must be one or more “general partners” whose liability is unlimited. Limited partner cannot take part in management of business without losing his or her immunity from liability. Limited partnerships must be registered with Registrar of Companies. In practice, very few such partnerships are formed in Ireland. Investment Limited Partnerships Act, 1994 overcomes problems affecting limited partnerships under 1907 Act as it relates to mutual funds: see category 3 Business Regulation and Commerce, topic 3.01 Banks and Banking.

2.07 UNIT TRUSTS:

These are regulated by Unit Trusts Act, 1990. Act provides for control of unit trust schemes in line with international practice. Central Bank has authority to veto and approve or reject unit trust schemes (and advertising relating to schemes). Act provides criteria for deciding whether or not to accept scheme. Competence and sufficiency of financial resources are guiding principles. Appeal lies to High Court.

3 BUSINESS REGULATION AND COMMERCE

3.01 BANKS AND BANKING:

This is governed by Central Bank Act, 1942 as amended and number of Statutory Instruments, particularly 395 and 396 of 1992—see http://www.irishstatutebook.ie—and supervised, since May 1, 2003, by Irish Financial Services Regulatory Authority, also known as “Financial Regulator”—see http://www.financialregulator.ie. These provide for licensing and supervision of banks including restriction on carrying on of banking business to bankers holding license and maintaining deposit in Central Bank. Central Bank administers deposit protection account which compensates depositors in part in event of insolvency of license holder. Approval of Central Bank is necessary requirement for acquisition of shareholdings in banks above specified percentage. Regulatory role of IFSRA extends to number of other financial activities other than banks, including building societies, bureaux de change and investment intermediaries, credit institutions established under Statutory Instrument 395 and those establishing in International Financial Services Center, Futures and Options Exchange and Moneybrokers. Credit institution established and licensed in one Member State of EU may carry on any activity listed in Second Banking Coordination Directive of EU in another Member State without obtaining license. Other activities outside scope of Directive will require license.

Part IV of Criminal Justice Act, 1994 as amended by Criminal Justice (Miscellaneous Provisions) Act, 1997 imposes duties on banks, other financial institutions and designated persons to prevent money laundering. They must establish identity of their account holders, maintain adequate records and inform authorities of suspicious transactions, and train employees to recognize and report suspicious transactions. Handling of property with knowledge or in belief that it is proceeds of criminal activity is offence.

Investment Limited Partnerships Act, 1994 allows fund managers in Ireland to provide investment opportunities to foreign investors in more attractive and convenient forms. Act overcomes problems affecting limited partnerships under 1907 Act, as it relates to mutual funds.

Consumer Credit Act, 1995 revises and extends law relating to consumer credit, hire purchase and hiring. It sets out requirements for advertising of credit and for form and content of credit agreements. Consumers are given right to withdraw from credit agreement within ten day “cooling-off” period. Persons engaging in business of money lending must hold license granted by Director of Consumer Affairs.

Investment Intermediaries Act, 1995 provides for authorization and supervision of investment business firms and investment product intermediaries by Central Bank.

Financial Services Ombudsman Bureau, http://www.financialombudsman.ie, established by statute in 2004 handles consumer complaints against banks.

See topic 3.02 Bills and Notes; categories 2 Business Organizations, topic Building Societies; Introduction, topic Currency.

3.02 BILLS AND NOTES:

Law as to bills of exchange, promissory notes and cheques is codified by Bills of Exchange Act, 1882 extended by Cheques Act, 1959. Rules of common law, save insofar as they are inconsistent with express provisions of Act, continue to apply to bills of exchange, promissory notes and cheques. Conflict of law rules are same as English rules. See England Law Digest.

Cheques Act, 1959 protects bankers from liability for paying cheques on which there is irregular or no endorsement (§ 1), and protects bankers who collect payment of instruments for their customers who have no title to instrument.

See also category 23 Taxation, topic 23.06 Stamp Tax, subhead Stamp Duty.

3.03 BILLS OF SALE:

See category 21 Mortgages, topic 21.01 Chattel Mortgages.

3.04 COMMERCIAL REGISTER:

Under Registration of Business Names Act, 1963 any person or company carrying on business under name other than his or her own must register. Register is maintained by Companies Registration Office. See http://www.cro.ie from where further information and appropriate forms can be obtained. If carrying on business under its corporate name without any addition, company registered under Companies Act, 1963 need not register.

See also category 2 Business Organizations, topic 2.06 Partnerships.

3.05 CONDITIONAL SALES:

See topic 3.13 Sales.

3.06 CONSIGNMENTS:

See topic 3.13 Sales.

3.07 CONTRACTS:

Law of contracts is derived mostly from Common Law and provisions of Statute of Frauds and Sale of Goods Act, 1893 (as amended by Sale of Goods and Supply of Services Act, 1980).

See also topics 3.08 Frauds, Statute of, Sales; category 14 Family, topic 14.05 Infancy.

Excuses for Nonperformance.

Breach of contract by other party, force majeure.

Applicable Law.

This is governed by Contractual Obligations (Applicable Law) Act, 1991. This gives effect to Rome Convention on Contractual Obligations. Basic principle is that contract shall be governed by law chosen by parties. In absence of choice of law provision contract shall be governed by law of country with which it is most closely associated. Consumer contracts and employment contracts are amongst important exceptions to this principle.

Government Contracts.

Government and public authorities are required to comply with EU public procurement regulations and procedures relating to tender, especially Directives 2004/17/EC and 2004/18/EC operative 1 Jan. 2006. Public bodies are also obliged under Prompt Payment of Accounts Act, 1997, to pay on or before contractually agreed date, or in absence of agreed date, within 45 days of delivery or receipt of invoice. Automatic entitlement to interest on late payments is introduced.

See topic 3.09 Interest.

Unfair Terms.

European Communities (Unfair Terms in Consumer Contracts) Regulations 1995 apply to consumer contracts entered into after 31.12.94 which have not been individually negotiated (e.g. preprinted standard form documents). Term “unfair” is defined. Use of plain, intelligible language is required. Provision is made for severance of unfair term. Director of Consumer Affairs is empowered to apply to court for order prohibiting use of unfair term. This has reference to Directive 2005/29/EC on “Unfair Commercial Practices”. (Cross ref. see p. 63).

3.08 FRAUDS, STATUTE OF:

§ 2 of Irish Statute of Frauds, 1695, requires that three classes of contracts must be supported by written evidence, signed by party against whom enforcement is sought or their lawfully authorized agent, namely: (a) contracts of guarantee; (b) contracts for sale of lands or interest therein; (c) contracts not to be performed within one year.

See also topic 3.13 Sales.

3.09 INTEREST:

Penalty interest will become payable if payments for commercial transactions are not met within 30 days, unless otherwise specified, in contract or agreement. (Late Payment in Commercial Contracts Regulations, 2002). Unless otherwise specified in agreed contract, penalty interest rate is European Central Bank main refinancing rate plus seven percentage points. ECB rates in force on 1 Jan. and 1 July apply for following six months in each year. Only one rate will apply to late payment—that is rate in force on payment date.

Judgments for money carry interest at judgment rate of interest (currently 8% p.a.) from their date.

Money lenders are required to be authorized and licensed under Consumer Credit Act, 1995. If Director of Consumer Affairs deems rate of interest charged to be excessive, authorization may be refused or withdrawn.

3.10 LICENCES, BUSINESS AND PROFESSIONAL:

Certain professions (e.g. solicitor) and certain types of businesses (moneylenders, pawnbrokers, bookmakers and betting shops, chemist shops, sale of intoxicating liquors) are licensed and controlled under specific statutes.

Motor Vehicles and Driving Licences.

See category 24 Transportation, topic 24.01 Motor Vehicles.

Hotels.

Innkeepers Acts and Hotel Proprietors’ Act, 1963. Information on registration and licensing requirements are available from Fáilte Ireland, Baggot Street Bridge, Dublin 2. See http://www.failteireland.ie.

3.11 MONOPOLIES, RESTRAINT OF TRADE AND COMPETITION:

Competition Act, 2002 consolidates existing competition legislation into one Act. Competition regime in Ireland is modeled closely on competition provisions in Arts. 81 and 82 of Treaty Establishing the European Community. Competition Authority established under Act has general supervisory and investigatory powers. See Authority's web site at http://www.tca.ie.

Anticompetitive agreements, decisions and concerted practices which distort trade in State or in any part thereof are prohibited and void by § 4 unless subject of declaration from Competition Authority or contributing to improvement in production or distribution of goods or services. Offending provisions may be severed by court from otherwise valid contract. Court may order recovery or restitution of money or property passed in void transaction. Contravention of § 4 is also criminal offence, though due diligence type defenses are provided for.

Abuse of dominant position in trade for any goods or services in State is prohibited by § 5, and contravention is also crime.

Maximum penalty on conviction for offence is fine of [Euro]4,000,000 or 10% of turnover, whichever is greater. In case of individual convicted of hardcore cartel restraint under § 6(2) maximum penalty may include term of imprisonment not exceeding five years in addition to or in lieu of fine.

Any person aggrieved by breach of § 4 or 5 may further pursue any undertaking which is party to agreement or any director or other officer thereof, for relief by way of injunction, declaration or damages which may include exemplary damages. Competition Authority also has right of action under § 14 for relief by way of injunction or declaration.

Mergers and acquisitions are further regulated by Act. Special provision is made for media mergers. Where worldwide turnover of each of two of undertakings involved, and turnover in Ireland of one of undertakings involved, equals or exceeds [Euro]40,000,000, merger or acquisition must be notified to Competition Authority who must, within one month, declare whether it is of opinion that merger is not anticompetitive or that it intends to carry out full investigation of merger. Following full investigation Authority may allow proposal, or prohibit it, or attach conditions, via written determination. Breach of determination is criminal offence. Appeal lies to High Court.

Competition (Amendment) Act, 2006 revokes Restrictive Practices (Groceries) Order 1987, removes ban on below cost sale of groceries.

Irish Takeovers Panel Act, 1997 established Irish Takeovers Panel to monitor and supervise takeovers and other acquisitions of substantial shareholdings in Irish public limited companies whose securities are listed on stock exchanges.

3.12 NEGOTIABLE INSTRUMENTS:

See topic 3.02 Bills and Notes.

3.13 SALES:

Sales of goods are regulated by Sale of Goods Act, 1893 and Sale of Goods and Supply of Services Act, 1980. See http://www.irishstatutebook.ie and Restatement http://www.attorneygeneral.ie/index_en.html. European Directives on Doorstep Sales and Distance Selling also apply. Ireland has not ratified Vienna Convention on the International Sale of Goods ("CISG").

No contract for sale of any goods of value of [Euro]12.70 or upwards is enforceable by action unless buyer accepts part of goods so sold and actually receives same or gives something in earnest to bind contract or in part payment, or unless some note or memorandum in writing is made and signed by party to be charged or agent on his behalf.

Property in goods sold passes when parties intend it to pass. In absence of agreement to contrary, property in goods is presumed to be intended to pass at time of contracting where contract is for sale of specific goods in deliverable state and no conditions precedent are attached—despite any postponement in delivery or payment.

In conditional sales, or where goods are unascertained or have to be put in deliverable state, property is presumed to pass only when condition is fulfilled, or goods become specific or ascertained, or when they are put in deliverable state. When goods are shipped and by bill of lading goods are deliverable to order of seller or his agent, seller is prima facie deemed to reserve right of disposal. Where seller draws on buyer for price and transmits bill of exchange and bill of lading to buyer (together) to secure acceptances or payment of bill of exchange, buyer is bound to return bill of lading if he does not honor bill of exchange and if he wrongfully retains bill of lading without honoring bill of exchange property in goods does not pass to him.

Unless otherwise agreed, goods remain at seller’s risk until property therein is transferred to buyer, but when such property is so transferred goods are at buyer’s risk whether or not delivery has been made. This latter rule is subject to proviso that if delivery has been delayed through fault of either buyer or seller, goods are at risk of party in fault as regards any loss which might not have occurred but for such fault.

Where seller is authorized to send goods to buyer, delivery to carrier or shipper for transmission to buyer is prima facie deemed to be delivery to buyer; even though carrier is ordinarily agent of buyer to receive goods he is not his agent to accept. Goods are liable to be stopped in transit.

Goods may by arrangement be accepted conditionally and acceptance may in such case be withdrawn on failure of condition. Resale by buyer is strong evidence of acceptance. Where goods which he has not previously examined are delivered to buyer he is not deemed to have accepted them unless and until he has had reasonable opportunity to examine them, and (unless otherwise agreed) when seller tenders delivery to buyer seller is bound, on request, to afford buyer reasonable opportunity to examine goods.

Where seller is bound to send goods to buyer but no time for sending them is fixed, seller is bound to send them within reasonable time, which is question of fact.

Delivery of goods and payment of price (unless otherwise agreed) are concurrent conditions.

Breach by seller of condition of contract for sale of goods entitles buyer to reject goods and treat contract as repudiated, unless he has “accepted” goods, then he can only treat breach of condition as breach of warranty entitling him to damages.

Buyer is deemed to have accepted goods when he so intimates to seller or when goods have been delivered to him and he does any act in relation to them which is inconsistent with ownership of seller, or when after lapse of reasonable time he retains goods without intimating to seller that he has rejected them.

Applicable Law.

See topic 3.07 Contracts.

Notices Required.

Buyer is not generally required to give written notice of non-conforming delivery in order to enforce his rights against seller. But where goods are delivered to buyer, which he retains in his possession but does not accept, he should intimate (not necessarily in writing) to seller that he has rejected them, in which case he will not be bound to return them, nor will he be deemed to have accepted them.

Warranties.

1893 Act, as amended by 1980 Act, implies conditions as to vendor's title and warranties of buyer's quiet possession and freedom from undeclared charges; if sale is by description, condition is implied that goods correspond with description. Warranties of quality and fitness are implied: (a) where buyer makes known to seller purpose for which goods are required, so as to show that buyer relies on seller's skill and judgment, and goods are of description which it is in course of seller's business to supply; (b) where goods are bought by description from seller who deals in goods of that description (provided that if buyer has examined goods, there shall be no implied condition as regards defects which such examination ought to have revealed); (c) by usage of trade.

Express warranty or condition does not negate warranty or condition implied by Act unless it is inconsistent therewith.

When sale is by sample there are implied conditions (1) that bulk shall correspond with sample in quality; (2) that buyer shall have reasonable opportunity of comparing bulk with sample; (3) that goods shall be free from any defect rendering them unmerchantable which would not be apparent on reasonable examination of sample.

When sale is by seller acting in course of business there is further implied condition that goods supplied will be of merchantable quality—i.e. fit for purpose for which goods of that type are commonly supplied, and as durable as is reasonable to expect having regard to price and other circumstances of sale. Condition will not extend to defects drawn to buyer's attention or which could have been discovered upon reasonable inspection prior to sale.

Merchandise Marks Act, 1887 (§ 17) provides, inter alia, that on sale of goods to which trade description has been applied, vendor shall be deemed to warrant that trade description is not false trade description within meaning of this Act.

Consumer Credit Act, 1995 creates implied warranties that hirer shall enjoy quiet possession and that goods are free from charges, and implied conditions as to vendor's title and that goods are of merchantable quality. Where hirer makes known particular purpose for which goods are required, there shall be implied condition that goods shall be reasonably fit for such purpose.

Consumer Protection Act, 2007 establishes National Consumer Agency to monitor consumer affairs generally. National Consumer Agency established in May 2005: http://www.irishconsumer.ie and prohibits inducing persons to participate in pyramid selling schemes.

Sales of Land.

Subject to conditions of sale which are generally restrictive purchaser is entitled to be given 40 years title by vendor. Special provisions apply in case of registered land as folio is conclusive proof of vendor's ownership but there may be unregistered rights dating from time before holding was put on register which rights are protected by note as to equities and unless this note is cancelled, purchaser must investigate pre-registered title. See http://www.landregistry.ie

3.14 STATUTE OF FRAUDS:

See topic 3.08 Frauds, Statute of.

4 CITIZENSHIP

4.01 ALIENS:

See category 16 Immigration.

In general, person may acquire Irish citizenship in each of following ways:

Citizenship Through Birth in Ireland.

Irish citizenship formerly guaranteed to those born in Ireland by Art. 2 of Constitution ("Every person born in the island of Ireland, its islands and its seas, has an entitlement and birth right to be part of the Irish nation") now qualified by 27th Amendment ratified June 2004 inserting new Art. 9.2 "Notwithstanding any other provision of this Constitution, a person born in the island of Ireland, which includes its islands and seas, who does not have, at the time of birth of that person, at least one parent who is an Irish citizen or entitled to be an Irish citizen is not entitled to be an Irish citizen, is not entitled to Irish citizenship or nationality, unless provided for by law".

Irish Nationality and Citizenship Act, 2004 amended law on citizenship. Came into effect on 1 Jan. 2005. Persons born on island of Ireland prior to 1 Jan. 2005 are entitled to Irish citizenship. Certain persons born prior to that date must make declaration on specific form available from Department of Justice, Equality and Law Reform or from their nearest Irish embassy or consular office. These categories include: (1) Person born in island of Ireland to non-national who at time of that person's birth was entitled to diplomatic immunity within State; (2) person born in Irish sea or air space to non-national on foreign ship or in foreign aircraft; (3) person born in island of Ireland who has made declaration of alienage under § 21 of Irish Nationality and Citizenship Act 1956 (i.e. declared that she or he is no longer Irish citizen). Such person is still entitled to Irish citizenship and can resume citizenship by making declaration in prescribed form.

Person born on island of Ireland on or after 1 Jan. 2005 is entitled to Irish citizenship provided that at least one of that person's parents is either: (a) Irish citizen (or entitled to be Irish citizen); (b) British citizen; (c) resident of island of Ireland who is entitled to reside in either Republic or in Northern Ireland without any time limit on that residence; and/or (d) legal resident in Ireland for three out of four years preceding child's birth. (However time spent as student or seeking asylum does not count for this purpose).

Citizenship by Descent.

Detailed rules regarding citizenship by descent are provided by Irish Nationality and Citizenship Acts 1956 to 2004.

Naturalization is also provided for by Irish Nationality and Citizenship Acts 1956 to 2004. In general, person who fulfils particular conditions, including that of having resided in State for at least five years (as per § 16A of Irish Nationality and Citizenship Act 1956—as inserted by Irish Nationality and Citizenship Act 2001) and who is of good character may apply to Minister for Justice, Equality and Law Reform for certificate of naturalization.

Postnuptial Citizenship.

Irish Nationality and Citizenship Act 2001 sets forth provisions governing situation of persons seeking to obtain Irish citizenship through marriage to Irish citizen. Since 30 Nov. 2005, citizenship by marriage must be acquired through normal naturalization process. Residence requirement is reduced from five years to three years for spouse of Irish citizen.

Sources.

General information regarding entitlement to citizenship in all of above subheads is available on government information website: http://www.citizensinformation.ie.

Version of Irish Nationality and Citizenship Act 1956, incorporating all of amendments made to it by Acts of 1986, 1994, 2001 and 2004 is accessible on website of Department of Justice, Equality and Law Reform at http://www.justice.ie. Irish Nationality and Citizenship (Fees) Regulations 1993 to 1996 are accessible at http://www.irishstatutebook.ie as are Irish Nationality and Citizenship Regulations 2005.

Corporations Owned or Controlled by Aliens.

Whilst it is government policy to encourage such corporations, there is requirement introduced by Companies (Amendment) (No. 2) Act, 1999 on incorporation of new companies that cannot be shown to have “real and continuous link with one or more economic activities that are being carried out in the State” that at least one director of such company must be resident in State. This requirement is waived if companies enter into bond of [Euro]25,394.76. To obtain grant benefits, it is necessary to register company in Ireland. Shares in it can be held by parent corporation.

See also category 2 Business Organizations, topic 2.04 Corporations, subhead Foreign Corporations.

4.02 DOMICILE:

Common Law prevails but there is no domicile of dependence in case of married women who can acquire their own domicile.

5 CIVIL ACTIONS AND PROCEDURE

5.01 ACTIONS:

See topic 5.07 Judgments; categories 6 Courts and Legislature, topic Courts; Estates and Trusts, topic Death.

Limitation of.

See topic 5.09 Limitation of Actions.

5.02 APPEAL AND ERROR:

See category 6 Courts and Legislature, topic 6.01 Courts.

5.03 DAMAGES:

Common Law prevails. The Civil Liability Act, 1961 as amended by 1964 and 1996 Acts and Civil Liability and Courts Act, 2004 allows court to apportion damages. Damages may be awarded by court in respect of pecuniary loss, non-pecuniary loss and property damage. They may also be determined by arbitrator appointed under provisions of contract agreed to between parties to dispute.

Personal Injuries Assessment Board Act, 2003 established body to recommend compensation awards for personal injury and property damage in defined circumstances. Application to Board is mandatory and award if accepted is binding on parties. Applicant may reject award and apply to court for damages. Purpose of Act is to obviate need to institute legal proceedings.

See categories 13 Estates and Trusts, topic Death; Dispute Resolution.

Criminal Injury.

There is limited provision for awarding compensation from ratepayers of locality to applicant on proof of injury to property being malicious. Notice within seven days of injury is required. Regulated by Malicious Injuries Acts, 1981 and 1986. Covers only damage in excess of [Euro]127 caused by riots or acts of terrorism. Under Criminal Damages Act, 1991, persons who intentionally and recklessly damage property belonging to another may be ordered to pay compensation in addition to or instead of fine or imprisonment. Compensation is assessed on basis of damages that are recoverable in civil action.

5.04 DEPOSITIONS AND DISCOVERY:

Discovery is governed by Order 31, Rule 12 of Rules of Superior Courts 1986 as amended and substituted by S.I. No 233 of 1999. Firstly letter seeking voluntary discovery has to be sent. This letter must specify precise categories of documents in respect of which discovery is sought and must also set out reasons why each category is required. If voluntary discovery is refused notice of motion and affidavit are issued and matter is resolved in Master's Court. Affidavit must verify that discovery sought is necessary for disposing fairly of matter or for saving costs and must furnish reasons why each category of document sought is required.

Where it appears to court in Ireland that any tribunal of competent jurisdiction in foreign country before which any civil or commercial matter or any criminal matter not of political character is pending, requires testimony of any witness within jurisdiction of Irish court, court will on application of person duly authorized by foreign tribunal make such order as is necessary for obtaining evidence of witness.

Application is made under Foreign Tribunal Evidence Act, 1856, and may be obtained ex parte from Master of High Court in civil matters and from judge in chambers in criminal matters. General practice of court is to appoint one of its own examiners to take evidence of witnesses. Evidence taken in pursuance of Act need not be limited to what is admissible in Irish law. Witnesses may be subpoenaed.

Court may, where necessary, order examination on oath before court, or any officer of court, or any other person, and at any place, of any witness, and may allow deposition of such witness to be adduced in evidence on such terms as court may direct. In general, no deposition may be given in evidence without consent of opposite party unless deponent is dead, beyond jurisdiction, or unable due to sickness or other infirmity to attend.

5.05 EVIDENCE:

Most rules of evidence applied in this jurisdiction in civil cases are based on case law. Some recent statutes have reformed law in respect of certain types of case. For example, § 9 of Competition Act 2002 provides that expert opinion evidence is admissible if following criteria are met: (i) Witness appears to court to possess appropriate qualifications or experience as respects matters to which his or her evidence relates; (ii) evidence is in respect of matter that calls for expertise or special knowledge; (iii) evidence is in respect of matter that is relevant to proceedings.

In particular evidence may relate to effects of types of agreements and to any relevant economic principles. Court is given discretion to exclude such expert evidence in "the interests of justice".

Evidence is given orally and may not be given on affidavit except in interlocutory matters and in exceptional circumstances. Documents must be proved usually by production of originals under best evidence rules. See topic 5.04 Depositions and Discovery.

5.06 INJUNCTIONS:

Under Common Law, courts make interim, interlocutory, perpetual, mandatory and prohibitory injunctions.

5.07 JUDGMENTS:

Where judgment or order directs person to pay any money or deliver up or transfer any property, real or personal to another, he is bound to obey such judgment or order on being duly served with same, without demand.

Enforcement.

Ordinary money judgment may be enforced by fieri facias (see category 8 Debtor and Creditor, topic 8.07 Executions) on being registered as mortgage against lands under Judgment Mortgage (Ireland) Act, 1850 and Judgment Mortgage (Ireland) Act, 1858. Judgment for recovery or delivery of possession of land may be enforced by writ of possession. Mandatory order or injunction may be enforced by writ of sequestration or order for attachment for contempt of court.

Foreign Judgments.

Judgment of foreign court is not entitled to recognition except for simple contract debt. Duly authenticated copy of judgment or certificate thereof can be used to ground action. Defendant must have expressly or impliedly submitted to jurisdiction of foreign court. Note I.A.C. v. L.C. Ltd. (1965) I.R. 264.

European Convention on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters became effective in Ireland from 1 June 1988 and judgments obtained in contracting States can be enforced elsewhere in EU or EFTA States by ex parte application for enforcement order. Governed by Jurisdiction of Courts and Enforcement of Judgments Act 1998. See category 25 Treaties and Conventions, topic 25.02 Treaties.

5.08 JUDICIAL REVIEW:

Rules of Court allow application to High Court for judicial review seeking certiorari, mandamus, prohibition or quo warranto. Court has power to grant declarations or injunctions on judicial review and can also award damages. Procedure is by way of application in first instance ex parte to seek leave to apply for judicial review on stated grounds within three months except where order of certiorari is sought when application is made within six months unless Court extends period for good reason. Review of planning decisions must be made within two months of decision which is subject of complaint. If leave is granted, matter proceeds to full hearing, commonly on affidavit.

§ 50 of Planning and Development Act 2000 stipulates special judicial review procedure for certain decisions of planning authorities and An Bord Pleanala (Irish Planning Appeals Board). For example, application for leave to apply for judicial review is not ex-parte but is on notice to certain prescribed parties.

5.09 LIMITATION OF ACTIONS:

Statute of Limitations 1957 as amended by Statute of Limitations (Amendment) Act 1991 provides that no action can be brought for breach of contract or in tort after six years have elapsed since accrual of right of action; limitation is two years where claim arises for personal injuries (Civil Liability and Courts Act, 2004) and three years for defamation. Relevant date in personal injuries' actions is two years (Civil Liability and Courts Act, 2004) from date of accrual or date of knowledge (as defined by 1991 Act) of person injured.

Actions for recovery of possession of land are barred and title to land is extinguished after 12 years have elapsed since right of action accrued under doctrine of adverse possession. Period is 30 years where State Authority is suing to recover land.

Where person entitled is under disability (i.e. lunacy or infancy) these limitation periods are extended. But mere overseas absence does not give rise to any extension of these periods.

Claim to estate of deceased person must be brought within six years of accrual of right. Actions against deceased persons must be brought against estate within two years of death.

Statute of Limitations (Amendment) Act 2000 extends period of limitations for persons claiming to be victims of child sexual abuse.

Prescription operates as defense to private nuisance actions where nuisance is actionable for continuous period of 20 years.

5.10 PRESCRIPTION:

See topic 5.09 Limitation of Actions.

5.11 PRODUCTS' LIABILITY:

EC Directive on products' liability was incorporated into Irish law by virtue of Liability for Defective Products' Act, 1991. Act introduced strict liability for defective products which will operate simultaneously with principles of common law and negligence in relation to manufacture and supply of defective products. Directive 1999/34 EEC, OJ L141 makes "primary agricultural product" product for purposes of Liability for Defective Products Act, 1991 because of fears relating to CJD.

At common law, liability attaches for negligent manufacture, sale or repair of goods which would be dangerous to reasonably foreseeable user and if there was lack of reasonable care in work.

Act provides that producer (as defined by Act) shall be liable for damages in tort for damage caused wholly or partly by defect in his product. Right of action under Act is extinguished after ten years from date product is put into circulation. Producer cannot exclude or limit his liability by any term of contract, notice, or in any other manner.

5.12 SEQUESTRATION:

See topic 5.07 Judgments, subhead Enforcement.

6 COURTS AND LEGISLATURE

6.01 COURTS:

Courts of Justice in Ireland are established by Courts (Establishment and Constitution) Act, 1961 and are further regulated by Courts (Supplemental Provisions) Acts, 1961 to 2000, Courts and Court Officers Acts 1995 to 2009 and Courts Acts and Civil Law (Miscellaneous Provisions) Act 2008.

In cases of contract or tort (1) District Court has jurisdiction up to [Euro]6,348.69 and there is right of appeal to Circuit Court: (2) Circuit Court has jurisdiction in such cases up to [Euro]38,092.14 or unlimited jurisdiction by consent of all parties and there is right of appeal to High Court: (3) High Court has unlimited jurisdiction and appeal lies to Supreme Court. Courts and Court Officers Act, 2002 makes provision for increase in jurisdiction of District Court to [Euro]20,000 and that of Circuit Court to [Euro]100,000, but there is no indication as to when this change will be made.

Rules of Superior Courts (Commercial Proceedings), 2004 establish commercial court having specialized expertise and case management before which commercial disputes above [Euro]1 million and certain other claims including those concerning intellectual property rights may be litigated. See further http://www.courts.ie.

Courts and Court Officers' Act 1995 established Judicial Appointments Advisory Board, facilitated judicial training and extended powers of Master of High Court.

In equity suits Circuit Court has jurisdiction where market valuation of land does not exceed [Euro]3,000,000 (Valuation Act, 2001 and Civil Liability and Courts Act, 2004) or amount of personalty involved does not exceed [Euro]38,092.14. High Court has unlimited jurisdiction in equity while Circuit Court may exercise unlimited jurisdiction where parties consent.

Procedure for processing small claims under [Euro]634.87 in District Court other than through Civil Summons was introduced in 1991. Certain cases are excluded from procedure. It empowers clerk to attempt to reach compromise between parties. In event of continued dispute, matter can be referred to judge of District Court for resolution.

See also category 5 Civil Actions and Procedure, topic 5.08 Judicial Review.

Admiralty jurisdiction is exercised by High Court.

6.02 LAW REPORTS, CODES:

Official Irish Law Reports are published by Incorporated Council of Law Reporting for Ireland (address Four Courts, Dublin 7).

See topic 6.05 Statutes.

6.03 LEGISLATURE:

See category 1 Introduction, topic 1.03 Government and Legal System.

6.04 REPORTS:

See topic 6.02 Law Reports, Codes.

6.05 STATUTES:

Statutes passed in each year are subsequently published together in single volume. No compilations or codifications exist but statutes are available in slight arrears from Government Stationery Office and on website of Attorney General. All Statutes, statutory orders and regulations and Index are published by Government Publications (address: Sun Alliance House, Molesworth Street, Dublin 2). Irish Statute Book (ISB) on web includes full-text of Acts of Oireachtas and Statutory Instruments as well as Chronological Index to Statutes (1922-2001) in searchable format. See http://www.irishstatutebook.ie.

7 CRIMINAL LAW

7.01 CRIMINAL LAW:

Bail.

Right under common law (State v. O'Callaghan, [1966] I.R. 504) varied by amendment to Constitution and implemented by Sixteenth Amendment of Constitution Act, 1996 and Bail Act, 1997 which entitles court to refuse bail if necessary to prevent commission of any of scheduled offences on grounds set out in 1997 Act. Criminal Justice Acts, 1964, 1984 and 1994 and Criminal Procedure Act, 1967 as amended by Criminal Justice Act 1999 govern criminal law and procedure including giving of notice of alibi evidence, agreeing evidence, majority verdicts in court trials and provisions concerning offences committed on bail. Criminal Justice Act, 2007 makes further amendments to bail laws.

Legal Aid.

Criminal Justice Act, 1962 provides for rudimentary State aid in criminal cases. Civil Legal Aid Act, 1995 provides for establishment of Legal Aid Board to provide rudimentary State aid which is available in certain civil cases depending on parties' means.

Juries are governed by Juries Act, 1976. All persons over 18 years of age are liable for service unless disqualified or excused.

Recent Developments.

Compared to previous decades, last ten years have witnessed comparatively large amount of criminal law reform. What follows is brief list of major developments of last decade: (1) Criminal Justice (Public Order) Act 1994 abolished certain common law offences relating to public order and replaced them with new statutory offences; (2) in relation to sexual offences Criminal Law (Sexual Offences) Act 1993 decriminalized buggery between parties of 17 years or more and codified law against prostitution. In addition, it reformed outdated law on protection of mentally impaired persons from sexual exploitation. Criminal Law (Incest Proceedings) Act 1995 dealt with question of how to balance right of victims of incest to anonymity with right of press to report on criminal proceedings. Sexual Offences (Jurisdiction) Act 1996 made it possible to prosecute in Ireland child sex tourists who commit their offences against children abroad. Child Trafficking and Pornography Act 1998 was first Act in history of State to specifically target child pornographers and was drafted so as to bring pedophiles who use Internet within its scope. Criminal Law (Human Trafficking) Act, 2008 gives effect to Council Framework Decision, OJ L203 of 1.08.2002, to combat trafficking of human beings and to give effect to United Nations Protocol on prevention, suppression and punishment of trafficking of persons, especially women and children, which supplements United Nations Convention on Transnational Organised Crime done at New York 15 Nov. 2000, and Council of Europe Convention on trafficking in human beings done at Warsaw 16 May 2005. Sex Offenders Act 2001 has created scheme for post-release monitoring and supervision of those convicted of sexual offences. It also provides for limited legal representation for complainants in trials of sexual offences; C.C. v. Ireland, [2006] IESC 33 declared § 1.1 Criminal Law (Amendment) Act 1935 unconstitutional in not providing defense of mistake as to age relating to offence of statutory rape (unlawful carnal knowledge with girl under age of 15). Criminal Law (Sexual Offences) Act 2006 re-enacts offence of statutory rape but provides for defense of reasonable belief as to age; (3) Criminal Law Act 1997 abolished distinction between felonies and misdemeanors. It also repealed large number of obsolete criminal statutes, such as Garrotters Act 1863 and Whipping Act 1862; (4) Non-Fatal Offences Against The Person Act, 1997 codified law as to assault, as well as dealing with syringe attacks, poisoning, endangering others and false imprisonment. It also made harassment criminal offence. In addition Act codified defense of self defense. This is first time since founding of State that general defense has been codified in this manner; (5) other developments centered around attacking proceeds of crime. Criminal Law Act 1994 outlaws money laundering and provides for forfeiture of criminal assets after conviction. More radical Proceeds of Crime Act 1996 permits seizure of proceeds of crime even if no conviction has been recorded. It has proved very effective in damaging operations of so called "godfathers" of crime who had previously believed themselves to be untouchable; (6) Criminal Justice (Theft and Fraud) Offences Act 2001 repealed Larceny Act 1916. Act recasts law in relation to theft, handling, forgery and counterfeiting. It also implements Convention on

Protection of European Communities' Financial Interests; (7) Company Law Enforcement Act 2001 creates office of Director of Corporate Enforcement which is granted wide powers of investigation. Act also amends substantive company law offences and imposes reporting requirements on auditors; (8) Competition Act 2002 makes involvement in cartel criminal offence. Act makes number of procedural and evidential changes in order to make it easier to secure prosecutions for anticompetitive behavior. In particular it gives jurisdiction for certain offences to Central Criminal Court. Prior to Act despite value of EURO involved, criminal trial took place in either District Court or Circuit Court; (9) International Criminal Court Act 2006 provides for punishment by courts-martial of genocide, crimes against humanity, war crimes and other offences within jurisdiction of International Criminal Court and assists Court in investigation or prosecution of offences; (10) Criminal Justice Act 2006 updates law in relation to many offences such as firearms, fireworks, organized crime, misuse of drugs and in particular supply of controlled drugs to prison or place of detention. Part 3 of Act allows previous witness statement to be admissible in evidence of fact contained in statement. Part 10 of Act provides for changes in relation to sentencing such as statutory basis for suspending sentences, imposition of fine and deferral of custodial sentence, restriction of movement and electronic monitoring. Part 11 of Act allows court to make civil anti-social behaviour order which if breached creates criminal offence. Similar provisions apply to children in Part 13; (11) Criminal Justice Act 2007 amends laws relating to bail by providing for electronic monitoring of accused while on bail. Part 2 deals with applications for bail to be accompanied by signed written statement detailing occupation, sources of income, property, criminal record detailing any offences committed while on bail and any previous applications for bail. Part 3 concerns sentencing and provides minimum sentence for repeat offence. Criminal Justice (Mutual Assistance) Act 2008 provides for international cooperation in relation to: information on financial transactions for criminal purposes; intercepting telecommunication messages; freezing, confiscating and forfeiture of property. Also makes provision for taking evidence of prisoners, use of television and telephone links to give evidence. Also provides for service of documents and examination of objects and sites. Criminal Justice (Surveillance) Act 2009 provides for conducting of surveillance by Garda Siochána (Police) in detecting and investigating crime. Court must grant authorization to conduct surveillance and conditions can be imposed with authorization. Tracking device may be used to track movement of persons and vehicles. Information obtained through surveillance and tracking devices is confidential but is admissible as evidence.

Extradition.

Extradition (European Union Conventions) Act 2001 is intended to streamline extradition procedures. European Arrest Warrant Act 2003 is designed to make surrender of persons wanted by other member states of E.C. by providers for execution of European arrest warrants in jurisdiction.

8 DEBTOR AND CREDITOR

8.01 ASSIGNMENTS:

Legal formalities (typically written instrument and, in some cases, notification of interested parties) for assignment must be met in case of assignments of land and interests therein, also choses in action—Supreme Court of Judicature Act, 1877. Equitable assignment is possible without need for legal formalities.

8.02 ASSIGNMENTS FOR BENEFIT OF CREDITORS:

Assignments by way of security constitute mortgages and are regulated as such. They may accordingly require registration as company charges or as bills of sale. Likewise, assignments by way of deed of arrangement with creditors.

Conveyances or assignments for benefit of creditors in insolvency may also constitute act of bankruptcy when executed, and any creditor or creditors for over [Euro]63.50 not being party or parties to deed may avail thereof. Declaration of trust would not, however, appear to be within this category.

8.03 ATTACHMENT:

See topics 8.07 Executions, Garnishment; category 5 Civil Actions and Procedure, topic 5.07 Judgments.

8.04 BANKRUPTCY:

Law as to bankruptcy is codified by Bankruptcy Act, 1988, and special provisions relating to companies are contained in Companies Acts, 1963-2006. See category 2 Business Organizations, topic 2.04 Corporations, subheads Winding Up, Receiverships, Court Protection.

Debtor can be adjudicated bankrupt on his own petition by filing declaration of insolvency, but for purpose of doing so he must prove that he is possessed of assets worth [Euro]1,905.

Creditors can make debtor bankrupt in several ways. Most usual way is where creditor to whom debtor is indebted in sum of at least [Euro]1,905 obtains “bankruptcy summons” which issues from court of bankruptcy. This summons is served on debtor who, if trader, has to satisfy claims against him within 14 days. Failure to pay amount claimed by bankruptcy summons (unless debt is disputed) constitutes “act of bankruptcy” and creditor may then present and file in court petition for adjudication of debtor as bankrupt.

Following are acts of bankruptcy: (a) failure to answer bankruptcy summons within prescribed time; (b) that debtor has, in Ireland or elsewhere, made conveyance of his property to trustees for benefit of his creditors generally; (c) that debtor has, with intent to defeat and delay his creditors, departed from Ireland or being out of Ireland has remained out of Ireland, has departed from his dwelling house or otherwise absented himself; (d) that execution issued against debtor on any legal process for purpose of obtaining payment of not less than [Euro]1,905 has been levied by seizure and sale of his goods or return of “no goods” has been made by sheriff; and (e) if debtor makes fraudulent conveyance of any part of his property.

Irish law (in addition to steps taken to obtain full bankruptcy) provides for condition of insolvency short of bankruptcy in only two ways. First of these is one which is entirely outside jurisdiction of bankruptcy court and is controlled by creditors of debtor themselves, viz., creditors’ trust deed. This deed must be registered as bill of sale (see topic 8.02 Assignments for Benefit of Creditors) and constitutes act of bankruptcy, of which any creditor for over [Euro]63.50, not party to deed, may avail himself. Second method is by filing of petition in court of bankruptcy for arrangement with creditors. This is method generally resorted to by debtors in embarrassing circumstances who are anxious to avoid stigma of bankruptcy.

Either in full bankruptcy or in arrangement with creditors under court official assignee/trustee adjudicates on claims of creditors. Creditor whose claim is rejected at instance of official assignee has right of appeal. Secured debts are protected as to security while certain other debts have priority which include: (1) one year’s local rates or taxes; (2) one year’s income tax; (3) four months’ salary of clerk or servant not exceeding [Euro]3,175; and (4) four months’ wages of laborer or workman not exceeding [Euro]3,175. In case of winding up of company, preferential payments include: (1) one year’s local rates; (2) one year’s assessment of all assessed taxes, including income tax and corporation profits tax; and (3) four months’ salary or wages of clerk, servant, workman or laborer not exceeding [Euro]3,175 together with all accrued holiday money.

First sitting before court in all arrangement matters is invariably preceded by meeting of creditors when debtor attends and is examined and submits offer of composition for consideration of his creditors, latter having before them condensed balance sheet. In addition to this balance sheet, debtor is bound to file in court full statement of his affairs verified by oath.

Whether creditors at preliminary meeting agree to or dissent from debtor's offer whole matter must come before court at "private sitting" and then proposal of debtor is fully discussed before judge by counsel. If three-fifths in number and value of creditors vote in favor of accepting offer, it is passed; but if voting by number and value is hostile to debtor's offer, judge may turn proceedings at once into full bankruptcy or may adjourn matter for further consideration on debtor's request to improve on offer submitted.

In full bankruptcy proceedings are public and "public sittings" are held.

Expression "private" conveys that proceedings, though held in open court, are technically regarded as confidential and it is contempt of court for any newspaper to report them. This reporting veto does not apply to proceedings in bankruptcy and notice of sittings and proceedings are actually published in Iris Oifiguil and newspapers.

Debtor in arrangement matter may apply to court, on report from registrar that he has carried out terms of resolution and that his creditors have been satisfied in accordance with tenor thereof, for certificate of conformity.

In full bankruptcy debtor will as rule obtain discharge if: (a) he has paid all fees, expenses and preferential creditors and has obtained consent of all his creditors; (b) when debtor's estate has been fully wound up and (i) his creditors have received 50% dividend or (ii) 12 years have elapsed since bankruptcy commenced.

Fraudulent Preferences.

Every conveyance or transfer of property or charge thereon made, every payment made, every obligation incurred and every judicial proceeding taken or suffered by any person unable to pay his debts, in favor of any creditor or any person in trust for any creditor, with view to giving such creditor or any surety or guarantor preference over other creditors, shall, if person making, taking, paying or suffering same is adjudged bankrupt on petition presented within six months, be deemed fraudulent and void against his assignees or trustees. In addition any conveyance, mortgage, delivery of goods, payment, execution or other act relating to property made or done by or against company within six months before commencement of its winding up which, had it been made or done by or against individual within six months before presentation of bankruptcy petition on which he is adjudged bankrupt, would be deemed in his bankruptcy fraudulent preference, shall in event of company being wound up be deemed fraudulent preference of its creditors and be invalid. Furthermore any conveyance or assignment by company of all its property to trustees for benefit of all its creditors is void. If any of above transactions apply to connected person within two years of winding up they shall be deemed to be fraudulent preferences unless contrary is shown. Floating charge created within 12 months before commencement of winding up is invalid except in amount of any cash paid to company at time of, or subsequent to creation of charge, unless it is proved that immediately after creation of charge company was solvent. Where floating charge is created in favor of connected person, and is created within two years before winding up, it shall be invalid.

8.05 BONDS:

Common Law prevails. § 27 of Insurance Act, 1989 now permits licensed banks to issue bonds in course of their banking business. Where bank issues bond at request of customer it will obtain counter-indemnity from customer authorizing bank to debit customer's account with such payment.

8.06 CHARGES ON ASSETS:

Much commercial lending is secured by mortgage or charge. Charges are more commonly created by companies as security for loans. Creation of charges by individuals is possible though awkward in practice because of detailed registration requirements imposed by Bills of Sale Acts.

Company charges are usually categorized as fixed (or “specific”) or as floating. Assets that are subject to fixed charge may not be disposed of without permission of chargee; but assets that are subject to floating charge may be disposed of in ordinary course of business without further permission until crystallization occurs—typically, when receiver is appointed or winding up commences.

Certain charges and mortgages may require registration in order to be perfected - and there is no single register for this purpose. Accordingly, charges and mortgages of land by deed, registered land, Irish ships and agricultural stock will variously require registration in Registry of Deeds, Land Registry, Ships Register, and Agricultural Chattel Mortgages Register. Effect of failure to register varies from register to register, and in some cases—e.g. charge by company over its registered land—charge may require registration in multiple registers.

Revenue Commissioners and preferential creditors have priority in receivership or winding-up over holders of floating charges. Moreover, Revenue Commissioners may notify holder of fixed charge over book debts to pay outstanding amounts in respect of tax on due demand. (Taxes Consolidation Act, 1997). Fixed charge holder’s liability is limited to amount received by him from company after he has been notified. If fixed charge holder notifies Revenue Commissioners within 21 days of creation of charge his liability is further confined to amount which company fails to pay after he has been notified by Revenue Commissioners.

Priorities in Insolvency.

This is governed principally by date of creation, or date of registration in case of Registry of Deeds, Land Registry, or Ships Register. Notably, date of registration in Company Charge Register or Bills of Sale Register does not affect priority, though failure to register as required will render security void. Priority of successive assignments in choses in action is governed not by date of creation but by date of notification of debtor under rule in Dearle v. Hall. ([1828] 38 ER 495).

8.07 EXECUTIONS:

Term “writ of execution” includes writs of fieri facias, elegit, sequestration and attachment. Writ of execution remains in force for 12 months but may be renewed by order for further period of 12 months.

When plaintiff obtains money judgment, debtor’s goods may be seized under writ of fieri facias, which directs sheriff to cause amount of debt to be realized by sale of debtor’s effects.

Supplementary Proceedings.

If sheriff reports that debtor has no goods plaintiff may apply to court for order to have defendant brought up and orally examined as to his means and also as to what debts (if any) are due to him.

Debtor may also be ordered under § 6 of Debtors Act, 1872 to pay judgment by such installments as court may direct; on failure to pay installment which debtor is shown to have had means to pay, he may be imprisoned for six weeks. If debtor is not legal owner of, but merely has equitable interest in goods, plaintiff may apply to court to have himself or some other person appointed receiver by way of equitable execution.

8.08 GARNISHMENT:

Plaintiff who has obtained ordinary money judgment may execute it as against debts due to defendant by other parties within jurisdiction of court. Procedure is by way of garnishment or attachment of debt.

See topic 8.07 Executions.

8.09 INSOLVENCY:

See topic 8.04 Bankruptcy.

8.10 LIENS:

Possessory liens are common in respect of contractual entitlements to payment for goods or services, though less common in respect of lending. They can be particular or general. Particular lien is right to retain goods in respect of which debt arises; general lien is right to retain goods in respect of general balance on account. Attorney's lien is of two kinds: (a) general lien on title deeds and documents to ensure payment of his fees and costs; (b) particular lien on funds recovered for his client for payment of costs of suit.

Non-possessory liens arise commonly in case of purchase/sale of lands, and unpaid vendor will enjoy lien over property in respect of balance of purchase price, whilst purchaser who has not received title will enjoy corresponding lien for purchase price. Such liens are treated as charges, though they do not require registration under Companies Acts or Bills of Sale Acts. Consensual non-possessory liens are uncommon as mortgages and charges are preferred in practice.

Bankers' liens also operate, whereupon banker may offset credit balances in one account against debit balances in another. Where provided for by express contractual agreement, it would appear that such liens survive insolvency of customer or bank.

8.11 PLEDGES:

Pledges of goods and documents of title to goods are possible though not common in commercial practice save in consumer lending by pawnbrokers etc. Latter is governed by Pawnbrokers Acts, 1964 and 1965 as amended by Consumer Credit Act, 1995.

8.12 SUPPLEMENTARY PROCEEDINGS:

See topic 8.07 Executions.

9 DISPUTE RESOLUTION

9.01 ALTERNATIVE DISPUTE RESOLUTION:

Mediation and conciliation are increasingly common in commercial dispute resolution particularly in engineering and construction disputes where mediation/conciliation is invariably contractual prerequisite to arbitration. Mediation is also commonly used in marriage breakdown disputes. Rules of Superior Courts (Commercial Proceedings), 2004 envisage extensive recourse to Arbitration and Alternative Dispute Resolution in commercial cases brought before Commercial Court.

9.02 ARBITRATION:

Commercial Arbitration.

Governed by Arbitration Act, 1954, Arbitration Act, 1980, and Arbitration (International Commercial) Act, 1998. See http://www.irishstatutebook.ie. Arbitration Bill 2008 will, if enacted, replace all existing arbitration legislation with single Act and will apply UNCITRAL Model Law, as amended, to domestic and international arbitration. See http://www.justice.ie. Both Chartered Institute of Arbitrators (see http://www.arbitration.ie) and American Arbitration Association (now International Center for Dispute Resolution—see http://www.adr.org) operate out of Dublin. Arbitration is widely used in construction and engineering, insurance, and maritime disputes.

Domestic Arbitration.

This is governed principally by 1954 Act which applies to most arbitrations save those in relation to terms and conditions of employment or industrial relations. Act applies where arbitration agreement has been made or evidenced in writing. Any litigation before courts relating to matter within scope of agreement will be stayed on application by any party thereto pending arbitration unless arbitration agreement is null and void, inoperative, incapable of performance, or there is not in fact any dispute.

Arbitration is deemed to commence when one side notifies other in writing to appoint or concur in appointment of arbitrator. Statutes of limitation apply.

Act provides for appointment of arbitrator in default of agreement of parties, for removal of arbitrator in cases of misconduct or failure to use reasonable dispatch, and spells out powers of arbitrator. Arbitrator (or parties if arbitrator refuses) may apply to High Court by way of case stated during currency of arbitration for direction on point of law, but High Court will only accede to request for case stated if it is of substance, material, and is not adequately covered by authority.

Arbitrator’s award is enforceable summarily with permission of High Court and enjoys same status as High Court judgment or order.

International Arbitration.

Ireland is party to Geneva Protocol and Convention; New York Convention, 1958; and Washington Convention, 1960. 1998 Act adopts UNCITRAL Model Law, 1985 with virtually no amendment, and further provides for immunity of arbitrators and parties to arbitration; and allocation of costs in arbitrations.

Mandatory Arbitration.

This is uncommon in absence of agreement between parties, save in case of Acquisition of Land (Assessment of Compensation) Act, 1919; Minerals Development Acts, 1940 to 1979; § 260 of Companies Act, 1963 in combination with Companies Clauses Consolidation Act, 1845; Industrial Relations Acts, 1946 to 1990. In such cases Arbitration Acts continue to apply save where inconsistent with principal legislation.

Litigation before commercial division of High Court may, since 2004, be adjourned by trial judge pending review of suitability of case for arbitration or ADR. Failure to cooperate in review may have costs implications.

10 DOCUMENTS AND RECORDS

10.01 ACKNOWLEDGMENTS:

See category 22 Property, topic 22.05 Deeds.

10.02 ADMISSIBILITY OF DOCUMENTS:

Admissibility of documents in civil proceedings is governed by general law of evidence. In criminal cases, admissibility is governed by Criminal Evidence Act, 1992. Certain other statutes provide for admissibility of documents in particular types of case. For example, Competition Act, 2002 provides following tools for admission and use of documents: (a) document that purports to have been created by person shall be presumed to have been created by that person (§ 12[2]); (b) statement in document that purports to have been created by person shall, unless document expressly attributes its making to some other person, be presumed to have been made by that person (§ 12[2]); (c) where document purports to have been created by person and addressed and sent to second person, it shall be presumed that document was created and sent by first person and received by second person. It shall also be presumed that any statement in such document was made by first person (unless document expressly attributes its making to some other person) and came to notice of second person (§ 12[3]); (d) where document is received from electronic storage and retrieval system, it shall be presumed that author of document is person who ordinarily uses that electronic storage and retrieval system in course of his or her business (§ 12[4]).

§ 13 of Act goes even further and provides for admissibility of statements contained in certain documents.

See topic 7.01 Criminal Law, Recent Developments.

10.03 AFFIDAVITS:

Sworn before Commissioner for Oaths.

Under Solicitor's (Amendment) Act, 1994 every solicitor who holds Practising Certificate is authorized to have documents sworn before him provided he has no interest in proceedings.

See topic 10.04 Notaries Public.

10.04 NOTARIES PUBLIC:

Are officers of Supreme Court of Justice before whom affidavits are sworn which are intended to be used in foreign courts of law.

10.05 PEDIGREE:

Information from Genealogical Office, National Library of Ireland, Kildare Street, Dublin 2 or see http://www.nli.ie/.

10.06 RECORDS:

Registry of Deeds, Henrietta Street, Dublin 1.

Land Registry and Public Records Office, Chancery Street, The Setanta Center, Nassau Street and The Irish Life Center, Lower Abbey Street, Dublin or see http://www.landregistry.ie/.

Certificates of birth, marriage and death under Births and Deaths Registration Acts, 1863 to 1994 from Registrar, 8/11 Lombard Street East, Dublin 2 or see http://www.groireland.ie. Fee, [Euro]10 (full) or [Euro]10 (short). Registration of Births Act, 1996 governs format of birth certificate.

Stillbirths Registration Act, 1994 provides for registration of enduring power of attorney.

11 EMPLOYMENT

11.01 EMPLOYEE PARTICIPATION:

Employees (Provision of Information and Consultation) Act 2006 implements European Community Directive 2002/14/EC on Arrangements for Informing and Consulting Employees. Information and Consultation Act of 2006 (§ 3) establishes right of employee employed in undertaking employing 50 or more employees to information and consultation. Employer of undertaking to which legislation applies is required to negotiate information and consultation arrangement—"negotiated agreement". This arrangement (§ 8) must be in writing, and approved by employees employed in undertaking, either through ballot in which workers participate or by approval of employees' representatives. "Negotiated agreement" (§ 8) must deal with subjects for information and consultation, method and time frame by which information is to be provided and consultation conducted. As alternative to establishing individual "negotiated agreement" parties may adopt set of standard rules regulating process and content of consultation detailed in Schedule 1 of 2006 Act. These rules require information and consultation relating to recent and probable development of undertaking's activities and economic situation; on changes in employment or threats to employment; decisions likely to lead to changes in work organization, or in contractual relations.

Concurrent with 2006 Act, Transnational Information and Consultation of Employees Act, 1996 implements Directive 94/45/EC on establishment of European Works Councils into Irish Law. Act applies to Irish community wide enterprises. Threshold requirement to application of Act is that enterprises have 1,000 employees and at least 150 in two member states. Where legislation applies central management and "the special negotiating body (SNB) of a community scale undertaking" may agree to establish either (i) European Employees' Forum (EEF); or (ii) information and consultation procedure; or (iii) in default of agreement, European Works Council (§ 13[I][2]).

Worker participation on company boards of state run commercial bodies is established by Worker Participation (State Enterprises) Act, 1977-2001. In addition to participation at board level, Worker Participation (State Enterprises) Act, 1988, provision was made for sub-board works councils in public commercial bodies.

11.02 EMPLOYMENT RIGHTS:

Employment Regulation Orders.

Minimum standards in particular sectors may be established through mechanism of employment regulation orders made by Labor Court under Industrial Relations Acts, 1946. Such Employment Regulation orders have statutory effect, and their infringement constitutes criminal offence. Court before which employer is prosecuted may order employer to compensate employees for noncompliance with employment regulation order. (§ 45 of Industrial Relations Act, 1946). Legislation also provides for establishment of special inspectors to enforce compliance with employment regulation orders.

Holidays.

Entitlement to minimum paid holidays is provided by Organization of Working Time Act, 1997. Basic entitlement, which is laid down in § 19(1), is either: (a) four working weeks in leave year in which employee works at least 1,365 hours; (b) one-third of working week for each month in leave year in which he or she works at least 117 hours; or (c) 8% of hours worked in leave year (subject to maximum of four working weeks).

Nine public holidays are currently recognized under Irish law. These days are detailed in Second Schedule of Organization of Working Time Act, 1997. There is no right to leave on public holiday. Employer is given discretion as to whether employee is to be entitled to day's leave on that public holiday, or merely to some compensating benefit instead. § 21(1) provides that employee shall, in respect of public holiday, be entitled either (a) to paid day off; or (b) to paid day off within month of that day; (c) additional day of annual leave; or (d) additional day's pay.

Working Time.

Directive 94/107/EC on Organization of Working Time has been implemented into Irish law by Organization of Working Time Act, 1997. Most important of rights constituted by Directive, daily rest period (art. 3), 24 hour weekly rest period (art. 5) and 48 hour week limit (art. 6) have been implemented in §§11, 13 and 15 of 1997 Act.

Work on Sun. must be contractually authorized. In case where contract of employment does provide for Sun. work, and employee is required to work on Sun., worker must be compensated, either (a) by payment of allowance of reasonable amount; or (b) by increasing employee's pay by reasonable amount; or (c) by granting employee compensatory paid time off; or (d) by combination of these means.

Protection of Young Persons.

Regulated by Protection of Young Persons (Employment) Act, 1996. No child under 14 may be employed, except in limited circumstances, or in accordance with legislation. Children who have reached age of 14 may do light work outside school term or during term time as part of approved work experience. Children over 15 can work up to eight hours per week during school term time.

Unfair Dismissals.

Unfair Dismissals Acts, 1977-2007 provide that employees protected by legislation may not be dismissed except where there are substantial grounds justifying dismissal. Provisionally substantial grounds are prescribed in § 6: conduct, capability, qualifications, competence, redundancy, or some other substantial reason. There must be substantial grounds justifying dismissal; dismissal must be administered in accordance with fair procedures and be proportionate. Principal qualification for protection by legislation is that employee has acquired more than one year's service with employer. (Employee who is not protected by Act may, nonetheless, have remedy at common law, or by way of application under Industrial Relations Acts, 1946-2004.) Remedies available where employee has been unfairly dismissed are reinstatement, re-engagement or compensation (§ 7); in practice compensation is most common remedy.

Trust and Confidence.

In addition to their statutory rights, employees have one important common law right: right to have relationship administered in way which respects trust and confidence of employee. Right of trust and confidence can be undermined by oppressive conduct by employer or by failure of employer to restrain unpleasant conduct by co-employees. Failure to respect trust and confidence may entitle employee to treat himself as having been constructively dismissed, and to redress under unfair dismissals code (above).

Redundancy.

Redundancy Payments Acts, 1967-2007 provide statutory entitlement to redundancy payment for employees who have been dismissed by reason of redundancy. § 10 of Redundancy Payments Act, 2003 sets rate of payment as two weeks statutory redundancy pay for every year of service and sum equivalent to employee's normal weekly remuneration. Qualification for such redundancy payment is conditional on employee having accumulated period of 104 weeks continuous employment with employer. Employer must provide redundancy certificate (§ 18) at time of providing redundancy payment; default may render any payment as null and void. Employer must give employee notice of impending redundancy. Right to redundancy payment may be lost where employee unreasonably refuses offer of suitable employment made by employer, or by successor in ownership to original employer.

Collective Redundancies.

Protection of Employment Act, 1977-2007 as supplemented by Protection of Employment Order, 1996 (S.I. No. 370 of 1996) and by European Communities (Protection of Employment) Regulations, 2000 (S.I. No. 488 of 2000) implement European collective redundancies directive, Council Directive 98/59. Provisions apply in case of collective redundancy; redundancy to be effected within period of 30 days in establishment employing over 20 employees where it is proposed that more than 10% of employees will be made redundant. Dismissing employer is obliged to initiate discussion with employees' representatives as to means of avoiding redundancies and as to administration of redundancy.

Exceptional Collective Redundancies.

Protection of Employment (Exceptional Collective Redundancies) Act, 2007 protects against feigned redundancies contrived to replace existing workforce with workforce, recruited elsewhere, which is prepared to accept inferior terms and conditions of employment. "Exceptional Collective Redundancy" defined (§ 4,16) as applying where: (i) Employer implements collective redundancy as defined in Protection of Employment Act 1977 (above); (ii) where dismissed workforce is to be replaced by workforce undertaking same functions; (iii) where terms and conditions of other workforce is materially inferior to that of dismissed workforce. Where Labour Court determines that proposed redundancy corresponds to Exceptional Collective Redundancy, series of sanctions may be imposed on responsible employer: it may be denied normal rebate in making redundancy payments, and compensation of amount equivalent to 260 weeks' wages may be made to employee of over 20 years' service; 208 weeks in case of employee with less than 20 years' service (§ 9).

Transfer of Undertakings.

European Communities (Safeguarding of Employees' Rights on a Transfer of Undertakings) Regulations 2003 (S.I. 131 of 2003) implement Council Directive No. 2001/23/EC of 12 Mar. 2001 on protection of acquired right of employees. Regulations prohibit dismissal of employees or transfer connected reasons, provide for continuity of rights enjoyed in previous workplace, and provide for consultation with employees' representatives on transfer of undertaking.

Employment Equality.

Employment Equality Act, 1998-2007 outlaws discrimination in employment on grounds of sex (including maternity), disability, age, sexual orientation, religious belief, or membership of traveling community. Prohibition applies to direct and indirect discrimination. Direct discrimination is defined in § 6(1) of 1998 Act as amended by § 8 of Equality Act, 2004: "where person is treated less favourably than another person is, has been or would be treated in comparable situation on grounds (of sex)." Four conditions must be established in order to establish direct discrimination on grounds of sex under § 6 of Employment Equality Act, 1998. These are (i) Imposition of some less favorable treatment than is imposed on another person. (ii) Fact that comparator would not have been so treated. Legislation refers to claimant being treated less favorably "than another is, has been, or would be treated". Comparator may, therefore, be actual, or hypothetical. Hypothetical comparator is identified by hypothesizing how person of opposite sex, with same relevant characteristics as claimant would be treated in same employment situation. (iii) fact that treatment was on grounds of sex. (iv) fact that none of limited defenses to direct discrimination on grounds of sex apply. §§25 and 26 lay down number of circumstances in which less favorable treatment is not regarded as discrimination: where being of particular sex is genuine occupational requirement, or certain posts in Garda Siochána (Irish police force). Indirect discrimination is defined in § 22 of 1998 Act (as am'd by § 13 of Equality Act, 2004) as occurring in circumstances where employment practice or measure: (a) Puts persons of particular protected status at particular disadvantage; (b) measure cannot be objectively justified by legitimate aim, and means of achieving that aim are appropriate and necessary.

Harassment of employee by reference to any of prescribed grounds, or sexual harassment is deemed to constitute direct discrimination: § 14, 14(a) Employment Equality Acts, 1998-2007.

Minimum Notice.

Under Minimum Notice and Terms of Employment Act, 1973 employees are required to be given notice of proposed dismissal of length according to their length of service. Minimum statutory periods are prescribed by § 4: (a) if employee has been in continuous service of his employer for less than two years, one week; (b) if employee has been in continuous service of his employer for two years or more, but less than five years, two weeks; (c) if employee has been in continuous service of his employer for five years or more, but less than ten years, four weeks; (d) if employee has been in continuous service of his employer for ten years or more, but less than 15 years, six weeks; (e) if employee has been in continuous service of his employer for 15 years or more, eight weeks. Minimum statutory notice periods may, and quite frequently are superseded by more generous contractual notice periods.

Safety, Health and Welfare at Work Act, 2005.

Safety, Health and Welfare at Work Act, 2005 establishes Health and Safety Authority. Principal duties are laid down in § 8 of 2005 Act which obliges employer to ensure, so far as is reasonably practicable, safety, health and welfare at work of his or her employees. Under § 13 all employees are required to take reasonable care to protect health and safety of other persons who may be affected by their acts. Employer is required to formulate safety statement (§ 20 of 2005 Act). These statutory duties exist concurrently with series of common law duties requiring that employers ensure protection of safety and health of their employees. Contents of these obligations are detailed in Safety, Health and Welfare at Work (General Application) Regulations 2007 (S.I. No. 299 of 2007).

By § 16 of Public Health (Tobacco) (Amendment) Act, 2004 smoking of tobacco in place of work is prohibited. Where prohibition is infringed both person who smokes and occupier, manager and any other person in charge of place is guilty of criminal offence. Series of premises, other than places of work, are excluded from prohibition: dwelling; prison; hospice; nursing home; part of premises that is uncovered by any roof; hotel bedroom; room that in furtherance of charitable purposes is used for provision of living accommodation.

Payment of Wages Act, 1991 provides employees with cheap, informal method of redress in event of nonpayment of wages: application to rights Commissioner or to Employment Appeals Tribunal. Legislation also regulates conditions under which wages may be deducted on grounds of act or omission of employee, requiring that there be contractual authority for deduction, that deduction be carried out within six months, that it not exceed employer's loss and that it be reasonable. (§ 5).

National Minimum Wage.

National Minimum Wage Act, 2000 provides for national minimum wage. § 14 of Act provides that "an employee who has attained the age of 18 years shall … be remunerated by his employer in respect of the employee's working hours in any pay reference period at an hourly rate of pay that on average is not less than national minimum hourly rate of pay". National Minimum Wage Act, 2000 provides that as from 1 July 2007 national minimum hourly rate is [Euro]8.65.

Pensions.

Pensions Acts, 1990 to 1996 protect accrued pension entitlements of persons changing employment, protecting accumulated entitlements of such persons in their previous employment.

Maternity Protection.

§ 8 of Maternity Protection Act, 1994 (as am'd by Maternity Protection Act 2004) creates basic entitlement of 18 weeks unpaid maternity leave. Unlike other forms of leave, like holiday leave, timing of leave is at discretion of employee (though it may not commence later than four weeks before expected date of confinement nor conclude earlier than four weeks after end of expected week of confinement [§ 10]). That basic 18 week period may be then extended in two cases: (i) In event of late confinement: where date of confinement occurs later than expected, period of maternity leave may be extended by equivalent period. (§ 12). (ii) Where employee avails of opportunity to take additional maternity leave (§ 14): That section provides that employee who has taken maternity leave shall, if she so wishes, be entitled to further leave period, known as "Additional Maternity Leave" for maximum period of eight consecutive weeks. At conclusion of maternity leave employee is entitled to return to same employment as she held immediately before taking leave. (§ 26). Any disability imposed as result of pregnancy of employee is, as matter of European and Irish law also viewed as prohibited from discrimination on grounds of sex.

Parental Leave.

Parental Leave Act of 1996 as amended by Parental Leave (Amendment) Act 2006 implements Directive 96/34/EC on Framework Agreement on Parental Leave.

Basic entitlement is described in § 6 (as am'd by 2006 Act): employee who is natural or adoptive parent of child is entitled to 14 working weeks to enable him to look after child; entitlement applies to each child of which he or she is "relevant parent". It is condition to entitlement that employee have completed one year's continuous service with employer from whose employment leave is taken. Where employee has completed three weeks' employment, employee is entitled to one week's parental leave for each month of continuous service. Form in which parental leave is taken may either be continuous period of 14 weeks (§ 7[1][a]) or be broken down into days or hours equivalent to number of hours during which employee worked in employment in period of 14 weeks before commencement of leave (§ 7[2]).

Right of force majeure leave is described in § 13 of 1996 Act: employee is entitled to take leave where, for urgent family reasons, owing to illness or injury to close family relative, employee's return is indispensable. (§ 13[1]). Force majeure leave is paid. However, force majeure leave is not indefinite: it may not exceed three days in any period of 12 months, or five days in any period of 36 consecutive months. (§ 13[4]).

Carer's Leave Act, 2001.

Carer's Leave Act, 2001 provides for taking by employees of extensive leave in order to look after persons requiring full time care. Employee may take up to 65 weeks leave in order to look after person certified by Department of Social, Community and Family Affairs as in need of full time care. (§ 6). Conditions relating to carer's leave are: that employee has been continuously employed for more than 12 months; that person for whom employee intends to take leave to look after is certified by Department of Social, Community and Family Affairs as in need of full-time care. (§ 6). Notice of employee's intention to take carer's leave must be given not less than six weeks before date when it is proposed to commence period of leave.

Part-time Workers.

Protection of Employees (Part-Time Work) Act, 2001 provides for extension of employment protection legislation to part-time workers, and forbids less favorable treatment of part-time worker. "Part-time worker" is defined (§ 7) in very broad terms encompassing worker whose hours of work are less than worker doing comparable work, either in same business or in undertaking in same sector.

Fixed-term Workers.

Protection of Employees (Fixed-Term Work) Act, 2003 implements EC Directive No. 1999/70/EC. 2003 Act proscribes less favorable conditions of employment of employees who work under fixed-term contract by comparison with employees who work under permanent contract. It is provided (§ 6) that employee working under fixed-term contract shall not be treated less favorably than comparable permanent employee, unless that less favorable treatment 'can be justified on objective grounds'. Burden shifts to employer when fixed-term employee can show less favorable treatment than 'comparable permanent employee'. § 5 defines employee is comparable when both undertake similar work or work of equal value, and where both parties work for same, or associated employer, and both work in same industry or sector of employment. There are restrictions on employer's right to use fixed-term contract type. Where employer purposes to renew fixed-term contract employee must be informed in writing of objective grounds justifying use of fixed-term contract, and of reason why indefinite contract is not being renewed. (§ 8). § 9 prohibits employer from employing employee under successive fixed-term contracts for period greater than four years. After four years employer is only entitled to use fixed-term device where there are 'objective grounds justifying such a renewal'. Where there are not such objective grounds fixed-term element is deemed ineffectual and contract is treated as permanent.

11.03 IMMIGRATION AND EMPLOYMENT:

Employment Permits Act, 2003-2006 prohibits non-national from (a) entering service of employer, or (b) being in employment except in accordance with work permit granted by Minister for Enterprise, Trade and Employment. It also prohibits employer from employing non-national except in accordance with employment permit. (§ 1). Breach by either employer or employee of these provisions is criminal offence triable either summarily or on indictment. Non-national is defined as person who is not citizen of Ireland. (§ 1). However, prohibition does not apply to persons entitled to enter State pursuant to treaties governing European Communities (with exception of national of Republic of Bulgaria or Romania) and to persons granted refugee status. (§ 3 [as am'd by § 3 of 2006 Act]). § 14 of 2006 Act permits Minister to make regulations prescribing maximum numbers of employment permits in particular sectors, and qualifications and skills that foreign national is expected to possess. Application for employment permit is submitted to Minister for Trade Enterprise and Employment. In considering whether to grant employment permit, Minister may, inter alia, take into account: Whether grant would be consistent with economic policy of Government; abuse of immigration control by foreign national applicant; commission of crime by foreign national applicant; whether reasonable steps made by undertaking seeking permit to recruit among nationalities not affected by employment permit requirement.

11.04 INDUSTRIAL DISPUTES:

The Industrial Relations Act, 1990.

Persons who organize, or engage in, industrial disputes, are usually liable for series of common law wrongs: typically torts of direct and indirect inducement of breach of contract, and in case of participants in picket, tort of private nuisance. However, Industrial Relations Act, 1990 mitigates common law liabilities of persons engaging in industrial action. It removes vicarious liability of trade union for act of its officers and employees for civil wrongs committed in course of trade dispute. Act creates limited entitlement to picket. Legislation also prohibits courts from granting injunction to restrain industrial action where secret ballot has been held.

11.05 LABOR RELATIONS:

Labor Court and Industrial Relations Commission.

Industrial Relations Acts, 1946 to 2001 establish principal machinery by which trade disputes may be referred. Labor Relations Commission was established by Industrial Relations Act, 1990. Commission's conciliation functions are activated by occurrence of "trade dispute".

"Trade dispute" is defined (in § 8 of Industrial Relations Act, 1990) as "any dispute between employers and workers which is connected with employment, or non-employment, or terms or conditions of, or affecting employment of any person." Labor Relations Commission may, at request of one or more of parties to trade dispute, or on its own initiative, offer parties its appropriate services with view to bringing about settlement of dispute. (§ 25[2] of Industrial Relations Act, 1990).

Above Labor Relations Commission sits Labor Court, more senior institution established by Industrial Relations Act, 1946. Labor Court is conceived of as institution of last resort, with jurisdiction to adjudicate only where applications to Labor Relations Commission have failed. Labor Court does not (except in case where parties invite Labor Court to investigate dispute, and undertake to accept recommendation of Court [§ 20 of Industrial Relations Act, 1969]) have power to bind parties and there is no obligation to participate in such investigations.

11.06 SOCIAL INSURANCE:

Employers and employees are required under Social Welfare (Consolidation) Act, 2005 (§ 13) to pay contribution of employee's gross reckonable salary for purpose of entitlement to social insurance (Pay Related Social Insurance). Most employments are in Class A (industrial, commercial and services sectors) where employee PRSI rate is 6% and employer rate is (subject to deductions) between 8.50% and 10.75%.

12 ENVIRONMENT

12.01 ENVIRONMENTAL REGULATION:

General Supervision and Enforcement.

Department of Environment, Heritage and Local Government is government supervisory body for quality of environment. It operates under direction of Government Ministers. It monitors quality of environment in areas from housing, roads, water and other services. Its functions are carried out in partnership with local authorities and others with areas as diverse as litter and planning. For further information, see website http://www.environ.ie.

Environmental Protection Agency (EPA) has responsibilities for wide range of licensing, enforcement, monitoring and assessment activities associated with environmental protection. Office of Environmental Enforcement (OEE) within Environmental Protection Agency (EPA) is dedicated to implementation and enforcement of environmental legislation in Ireland and it aims to improve compliance with environmental legislation in Ireland and ensure that those who flout legislation and cause environmental pollution are held to account. For further information, see http://www.epa.ie.

Local authorities and other public sector bodies are involved in enforcement activities, these include Fisheries Boards, Health Service Executive, an Garda Siochana, Criminal Assets Bureau, Revenue Commissioners and Office of Corporate Enforcement.

Prohibited Acts of Pollution.

See media specific areas below.

Waste.

Waste Management Act, 1996 (as amended by Waste Management [Amendment] Act, 2001 and Protection of Environment Act, 2003) consolidates and updates existing waste law in Ireland. It is framework piece of legislation implementing and facilitating future implementation of both national and international legislation. It, inter alia, reorganizes functions of public authorities in regard to waste, introduces system of licensing collection, disposal and recovery of hazardous and non-hazardous waste; imposes obligations on producers, distributors, retailers and holders of waste; and promotes recycling, reuse of waste and waste minimization in general. 2003 Act creates presumption that unauthorized waste disposal on land has occurred with consent of landowner. More detailed provision is provided by over 20 Ministerial Regulations promulgated under 1996 Act as amended. Waste Management (Packaging) Regulations, 2003, introduced under 1996 Act, implement EU Packaging Directive. Waste Management (Use of Sewage Sludge in Agriculture) Regulations, 1998 and 2001; Waste Management (Movement of Hazardous Waste) Regulations, 1998 and Waste Management (Farm Plastics) Regulations, 2001, Waste Management (Packing) Regulations 2007 also implement EU Directives.

Waste Management (Waste Electrical and Electronic Equipment) Regulations 2005 mean from 13 Aug. 2005, “producers” (including manufacturers, importers, exporters and distance sellers) will be responsible for financing collection, treatment and environmentally sound management of WEEE. Waste Management (Restriction of Certain Hazardous Substances in Electrical and Electronic Equipment) Regulations 2005 seek to minimise waste from hazardous substances by restricting use of hazardous materials, including heavy metals in electrical and electronic equipment. Regulations provide that new electrical and electronic equipment on market after 1 July 2006 cannot, other than permitted trace levels, contain lead, mercury, hexavalent chromium, polybrominated biphenyls (PBB) or polybrominated diphenyl ethers (PBDE).

Mining waste is governed by Minerals Development Act, 1940 and Petroleum and other Minerals Development Acts, 1960-1979. Foreshore Acts, 1933 and 1992 govern deposit of waste on foreshore. Waste Management (Shipments of Waste) Regulations 2007 give effect to Regulation (EC) No. 1013 of European Parliament on shipment of wastes to streamline administration of transfrontier shipment of waste legislation.

Water.

Principal statutes controlling water pollution are Local Government (Water Pollution) Acts, 1977 and 1990 which mainly concern inland water pollution but also extend to aquifers and tidal waters. Fisheries (Consolidation) Act, 1959 and Dumping at Sea Acts, 1981-1996 concern, inter alia, pollution of inland and coastal waters. Water Services Act 2007 is comprehensive modern legislative code governing functions, standards, obligations and practice in relation to planning, management, and delivery of water supply and waste water collection and treatment services. It both consolidates and modernizes legislative code governing water services. Act focuses on management of water “in the pipe”, as distinct from broader water resources issues such as river water quality, etc. Foreshore Acts, 1933 and 1992 contain provisions protecting seashore and foreshore. Oil Pollution of Sea (Civil Liability and Compensation) Act, 1988 and 2003 and Sea Pollution Acts, 1991 and 1999 deal with prevention and control of pollution of sea by oil, noxious and harmful substances, sewage or garbage. Various domestic regulations and EU legislation apply including new Sea Pollution (Prevention of Oil Pollution) (Amendment) Regulations 2003 amending 1994 and 2002 Regulations. Nitrates are regulated by numerous pieces of legislation, most recently EC (Good Agricultural Practice for Protection of Waters) Amendment Regulations 2007 which amend EC (Good Agricultural Practice for Protection of Waters) Regulations 2006 (more usually referred to as “Nitrates Regulations”).

Legislation listed above creates series of offences, penalties and duties. System of licenses in respect of discharges to waters and discharges to sewers is in existence. Local and sanitary authorities are granted certain powers, such as power to require steps to be taken to prevent or abate water pollution, power to take action or prevent or abate water pollution, certain powers of entry and inspection and power to recover costs incurred in taking proceedings for offences under legislation. Local authorities may, and in certain circumstances must, make water quality management plans. Application may be made to courts to order termination, mitigation or to remedy effects of entry or discharge into waters together with recovery of certain costs. Provision also exists under legislation for obtaining water pollution injunction. In certain circumstances civil liability for pollution is imposed. Minister for Environment has approved several projects for development of River Basin Management Systems pursuant to obligations imposed by EU Water Framework Directive.

Air.

Air pollution is governed principally by Air Pollution Act, 1987 (as amended by Environmental Protection Agency Act, 1992). System of control is similar to that set up by legislation governing water pollution. Local authorities have power to declare area to be special control area and can, and must in certain circumstances, prepare air quality management plan. Minister for Environment has power to specify air quality standards and emission limit values (in respect of petrol and diesel fuels). New standards introduced by Environmental Specification for Petrol and Diesel Fuels Regulations 2003 and Large Combustion Plants Regulations, 2003.

Noise.

Regulation of noise pollution is governed by Environmental Protection Agency Act, 1992. Under Environmental Protection Agency Act, 1992 (Noise) Regulations, 1994, Minister for Environment has power to make various regulations to prevent or limit noise pollution. Environmental Protection Agency ("EPA") (see subhead Environmental Protection Agency), infra and local authorities are given power to require steps to be taken to prevent or limit noise pollution.

Complaints procedure by means of application to District Court is available in certain circumstances.

Common Law.

In addition to statutory control of environmental pollution both at domestic and EU level, law of tort provides source of legal environmental control in Ireland. Main areas of claim are in areas of nuisance, negligence, trespass and under rule in Rylands v. Fletcher (this rule provides for strict liability in certain circumstances where property owner allows something which he has introduced, or allowed to remain on his property, to escape causing damage to other property).

Integrated Pollution Control.

System of integrated pollution control was introduced by Environmental Protection Agency Act, 1992 (amended by Protection of Environment Act, 2003) which system, in respect of specified categories of activities, departs from old approach requiring separate licenses for discharges to separate media. Any activity of class specified in this Act (apart from established activities) must not be carried out after date prescribed by regulation without valid integrated pollution control license ("IPC License"). Activities not so specified continue to be subject to existing licensing requirements unless Minister for Environment otherwise directs by order. Established activities are subject to IPC License requirement on phased basis. IPC License will not be granted unless activity complies with BAT (best available technologies) specifications established by EPA.

2003 Act introduces new Part IV into 1992 Act establishing Integrated Pollution Prevention and Control (IPPC) licensable activities across 13 sectors implementing 1996 Directive. Act increases regulatory powers and penalties. Presumptions introduced in respect of certain serious offences.

Environmental Protection Agency.

EPA was established by Environmental Protection Agency Act, 1992. It is independent supervisory body. Its functions include, inter alia, licensing, regulation and control of activities for environmental protection, monitoring quality of environment, establishment and maintenance of databases of information, making arrangements for dissemination and availability of such information to public, provision of support and advisory services for purposes of environmental protection to local and other authorities, promotion and coordination of environmental research and liaison with European Environmental Agency. EPA prepares various reports, codes of practice, quality standards, emission limit values and guidelines. It has power to supervise local authorities in performance of their statutory functions in respect of environmental protection and has powers in respect of preparation of hydrometric programs and environmental monitoring programs.

Number of powers of public authorities to control air and water pollution have been extended to EPA in respect of IPC licensed activities. These powers include power to apply to court for order requiring prohibition, termination or reduction of emission or discharge; prosecution of offences in respect of air and water pollution; power to require steps to be taken to prevent or abate pollution, and certain powers of entry and inspection and recovery of costs incurred in taking proceedings. Powers extended by 2003 Act in respect of IPPC licensable activities.

Office of Environmental Enforcement.

OEE is branch with EPA known as Office of Environmental Enforcement and is dedicated to implementation and enforcement of environmental legislation in Ireland. It has responsibility to improve compliance with environmental legislation in Ireland. Enforcement Policy on EPA website http://www.epa.ie sets out general principles that Office of Environmental Enforcement (OEE) follows in relation to enforcement and prosecution. OEE delivers enhanced enforcement in two ways: It is directly responsible for enforcing EPA licenses issued to waste, industrial and other activities; it supervises environmental protection activities of local authorities by auditing their performance, providing advice and guidance, and, in appropriate cases, giving binding directions. In this respect, OEE is resource for members of public who have exhausted all other avenues of complaint. They work with local authorities and other public sector bodies involved in enforcement activities, including Fisheries Boards, Health Service Executive, an Garda Siochana, Criminal Assets Bureau, Revenue Commissioners and Office of Corporate Enforcement.

Penalties.

Environmental Protection Agency Act, 1992 introduced more stringent penalties and fines in respect of pollution offences. Penalties for offences under Act itself range from maximum fine of [Euro]1,269.74 and/or imprisonment for one year on summary conviction to maximum fine of [Euro]12,697,400 and/or imprisonment for ten years on conviction on indictment.

Environmental Impact Statements.

Pursuant to Planning and Development Act, 2000 and Planning and Development Regulations, 2001, any planning application for specified developments within meaning of regulations must be accompanied by environmental impact statement ("EIS"). In addition, local authorities have discretion, in certain circumstances, to call for EIS. Planning and Development Act, 2000 amended 1992 Act so that planning authorities and Board will be able to refuse planning permission on basis that development is unacceptable on environmental grounds, even where subject to IPC License requirement.

European Communities (Natural Habitats) Regulations, 1997 introduced further dimension to functions which EIS serves where development has defined effect. Wildlife (Amendment) Act, 2000 provides mechanism for giving statutory protection to Natural Heritage Areas by permitting Minister for Environment to designate same.

Access to Information.

Environmental Regulations, 1998 establish procedures for public access to environmental information. Greater public access to documents relating to applications to EPA for

IPC Licenses has been provided by subsequent regulations. Freedom of Information Act, 1997 (amended by 2003 Act) entitles access, to greatest extent possible consistent with public interest and right to privacy, to information and records of specified public bodies, including EPA. Access to information on Environmental Regulations (AIE) 2007 provides access to information on environment not obtainable under other legislation from EPA.

EU Ecomanagement and Audit Scheme.

This has been introduced into Ireland and is part of EU-wide voluntary scheme for recognition of environmental management systems at management sites.

Climate Protection

Climate Change Bill 2007 is draft legislation to ensure reduction of greenhouse gas emissions by setting annual target and long term targets; places duty upon Minister to achieve targets; specify reporting procedures and action to be taken if targets are not met for connected purposes. Further information at http://www.epa.ie/downloads/advice/air/climate%20change/name,23131,en.html. Bill establishes new expert commission on climate change to oversee application and enforcement of provisions of Bill and to advise and assist Minister in carrying out relevant functions. Bill requires National Greenhouse Gas Emissions Plan for years 2010 – 2050 drafted by figure to be based on 3.00% reduction in greenhouse gas emissions for each year from 2010 to 2050. Minister required to lay before Government houses annual climate change report. Bill specifies action to be taken if annual targets are not met.

http://www.foe.ie/download/pdf/climate_protection_bill.pdf

Email:climatechangeinfo@environ.ie

13 ESTATES AND TRUSTS

13.01 ADMINISTRATION:

See topic 13.04 Executors and Administrators.

13.02 DEATH:

Common law rules apply: if it has been established that no news of person has been received for period of seven years by those who would ordinarily hear from him, if he were living, and that enquiries, suitable to circumstances have been made, there arises rebuttable legal presumption that such person is dead. There is, however, no legal presumption that such person died on any particular date during such period of seven years, or that he was alive at its commencement.

Survivorship.

Succession Act 1965, § 5 provides that where two or more persons died in circumstances rendering it uncertain which of them survived other, for purpose of distribution of their estates, they are deemed to have died simultaneously.

Actions for Death.

Civil Liability Act, 1961, as amended by 1964 and 1996 Acts, provides that where death of person is caused by wrongful act (including crime) of another such as would have entitled party injured, but for his death, to maintain action and recover damages in respect thereof, person who would have been so liable is liable in action for damages for benefit of deceased's dependants. Any family member of deceased who suffers injury or mental distress is dependant for this purpose. Only one action for damages may be brought against same person in respect of death.

It must be commenced within two years (Civil Liability and Courts Act 2004) of death, and must be brought for benefit of all dependants. It may be brought by personal representative of deceased or, if at expiration of six months from death there is no personal representative or no action has been brought by personal representative, by all or any of dependants. Damages will be amount which judge considers proportionate to injury resulting from death to each of dependants respectively, for whom or on whose behalf action is taken. There is no statutory limitation on amount which may be awarded (except in case of damages awarded for mental distress, where these are recoverable). In assessing damages no account is taken of any sum payable on death of deceased under any contract of insurance, or of any pension, gratuity or other like benefit payable in consequence of death. (§ 50 of 1961 Act). In addition, damages may be awarded in respect of income undeclared to Revenue Commissioners (§ 27 Courts and Civil Liability Act, 2004), funeral and other expenses actually incurred by deceased, his dependants, or personal representatives by reason of wrongful act. (§ 49 of 1961 Act). These provisions apply to actions brought in Ireland in respect of death in Ireland of persons from another country.

Death Certificates.

See category 10 Documents and Records, topic 10.06 Records.

13.03 DESCENT AND DISTRIBUTION:

This is regulated by Succession Act, 1965, which became effective on Jan. 1, 1967. It should be noted that old law would affect estates of persons who died before Succession Act came into effect.

Under Succession Act (§ 10) all of estate, whether real or personal, of deceased person devolves and becomes vested in personal representative of deceased, notwithstanding any testamentary disposition.

Illegitimate Children.

Since coming into effect of Status of Children Act, 1987, for purposes of adducing relationships, all children (including non-marital children) are included within definition of “children” for purposes of Succession Act 1965, unless contrary intention is shown.

Where person whose father and mother have not married each other dies intestate, rebuttable presumption is to be made that child has not been survived by his father, or by any person related to him through his father.

Rights Where There is No Will.

If deceased dies intestate leaving (1) spouse and no issue, spouse takes whole estate; (2) spouse and issue, spouse takes two-thirds of estate and remainder goes to issue equally, unless all issue are not in equal degree of relationship to deceased, in which case distribution is per stirpes; (3) issue and no spouse, entire estate is distributed among issue as above; (4) neither spouse nor issue, estate is distributed between his parents in equal shares if both survive intestate but if only one survives that parent takes entire estate; (5) neither spouse, nor issue, nor parent, his estate is distributed between his brothers and sisters in equal shares and if any brother or sister does not survive intestate, surviving children of deceased brother or sister shall, where any other brother or sister of deceased survives him, take in equal shares share that their parent would have taken if he or she had survived intestate; (6) neither spouse, nor issue, nor parent, nor brother, nor sister, his estate shall be distributed in equal shares among children of his deceased brothers and sisters; (7) neither spouse, nor issue, nor parent, nor brother, nor sister, nor children of any deceased brother or sister, his estate shall be distributed in equal shares among his next of kin who are persons who at date of death stood nearest in blood relationship to deceased; relatives of half blood shall be treated as, and shall succeed equally with, relatives of whole blood in same degree.

In default of any person taking estate of intestate under foregoing, State shall take estate as ultimate intestate successor.

Rights Where There is Will.

Succession Act provides that even when deceased has made will, surviving spouse is entitled to one half of estate if deceased leaves no children and to one-third of estate if deceased leaves spouse and children. (§ 111). If testator has failed in his moral duty to make provision for child, such child can apply to court for order that provision be made for him or her out of estate. (§ 117). Spouse can give up his or her legal right share during lifetime of deceased by signing document to this effect. (§ 113).

Special Right of Spouse to Dwelling House.

Surviving spouse may require personal representative to appropriate dwelling house and any household chattels of deceased in or towards satisfaction of his or her legal right share. (§ 56). This right must be exercised within six months from receipt by spouse of written notification of right from personal representative (which they are bound to give) or within one year from taking out of grant of representation, whichever is later.

Unworthiness to Succeed.

Rights of surviving spouse and children to share in estate as legal right or on intestacy or (in case of children) to have provision made by court may be lost e.g. where spouse has been guilty of desertion continuing up to death for two years or more or spouse or child has been guilty of serious offence against deceased or any spouse or child of deceased.

13.04 EXECUTORS AND ADMINISTRATORS:

Upon death of person, all his real and personal estate vests in his personal representative. Where deceased dies testate, estate vests on date of death in executor, but where deceased dies intestate, estate vests initially in President of High Court and only vests in administrator upon date of his appointment. Upon death of testator, at least 14 days must elapse from date of death before grant of probate can issue unless otherwise ordered by court or probate officer.

Personal representative may insert proper advertisements for creditors and so obtain protection against personal liability for any debts of which there may be no notice. It is duty of personal representative to collect all debts due and to discharge all liabilities due by deceased and generally to do everything necessary to reduce personal assets to cash with view to winding up estate as quickly as possible. He is allowed one year from date of death within which to do this, and legatee or next of kin cannot demand payment of or sue for his legacy or distributive share until after expiration of this period, unless will provides to contrary.

Personal representatives are not allowed any statutory fee for their service, nor are they entitled to charge for same. They cannot delegate discretionary part of their duties, but they may delegate more formal part thereof and employ lawyers, auctioneers, bankers, etc., who are paid by estate.

Administrator with or without will must, prior to appointment, enter into bond with President of High Court in double amount or value of personal estate and produce two sureties (or one surety if arranged through insurance company) for due and lawful administration of estate. Executor need not enter into such bond or produce sureties.

In ordinary administration proceedings are outside court. Personal representative lodges with Revenue Commissioners verified inventory of assets and liabilities as of date of decedent's death. This is referred to as "Inland Revenue affidavit". Estate duty is then assessed and having paid tax or having been allowed to defer tax, personal representative completes necessary papers and files them in Probate Office of High Court with his application for grant of probate or letters of administration. If everything is in order grant will issue and personal representative administers estate which is under his sole control or under joint control if there are two or more acting executors or administrators.

Where unusual difficulty arises in administration of estate or is anticipated by personal representative, he may apply to court for order to have administration carried out under control of court. Similarly legatee, devisee, next of kin or creditor of deceased may take this step. Court, if satisfied as to necessity for its intervention will make order accordingly and at same time will direct such inquiries and accounts to be made and taken in chambers, if necessary. In this event creditors' claims are carefully scrutinized by examiner attached to court and every step in administration is carried out under supervision of court.

Executor may retain debt due by deceased to himself out of assets. Similarly administrator may do likewise where there is provision made for this in administrator's bond. This right of retainer may be exercised by personal representative in accordance with order of priority he would have occupied had he not been personal representative of deceased. This right will not be exercisable where estate of deceased is insolvent. (§ 46[2][a] 1965 Act).

13.05 TRUSTS:

Law regulating trusts and trustees is now governed by Land and Conveyancing Law Reform Act 2009 and large body of decided case law.

Trusts arise where one person is under equitable obligation to hold property, whether real or personal, for benefit of others (of whom he may himself be one) and any of whom may enforce obligation. Trusts may be express i.e., created by actual terms of instrument or declaration, or they may be implied from circumstances, as is case with resulting trust, or implied by court, as in case of constructive trust. All trusts and settlements of land when and however created are governed by Land and Conveyancing Law Reform Act 2009 except for charitable trusts.

Express trust is irrevocable unless settlor reserves right of revocation, but it may be set aside in certain circumstances.

Duties of Trustees.

Trustees' duties will vary according to instrument setting up trust and amount of discretion granted them by trust deed. Equity requires trustees upon appointment to: (1) follow settlor's directions and ensure trust property has properly vested in them; (2) invest trust funds; (3) keep accounts and produce them at request of beneficiary; (4) on occasion duty to convert trust property; and (5) not put themselves in position where there may be conflict of interest between their own interests and that of trust.

Power of Trustees.

Land and Conveyancing Law Reform Act 2009 governs powers of trustees and provides trustee has power of owner of land to convey or otherwise deal with land. Trustee has specific power to permit beneficiary to occupy or make other use of land on such terms as trustee thinks fit and power to sell land and to reinvest proceeds, in whole or in part, in purchase of land, whether or not situated in State, for such occupation or use. Power of trustee is subject to duties of trustee and any restrictions imposed by any statutory provision or general law of trusts or by any instrument or court order relating to land.

Liability of Trustees.

Trustee will be personally as opposed to vicariously liable for breaches of trust committed by him. (§ 24 Trustee Act, 1893). However this indemnity will be lost where trustee's conduct or omission amounts to willful default on his part, i.e. failure on part of trustee to intervene in circumstances where he ought to, can be regarded by court as sufficient grounds for imposing liability. Right of contribution exists between guilty co-trustees, resulting in trustees who may not be equally blameworthy being equally liable. However, trustee may be liable to indemnify his co-trustees in situation where: (a) guilty trustee is also beneficiary and has participated in breach; or (b) breach is committed solely in reliance on advice of solicitor trustee, who has exercised controlling influence over other trustees; or (c) one trustee alone benefits from breach or breach reflects fault of one trustee in his particular area of expertise.

Variation of Trusts.

Without court approval, variation of trust is possible where beneficiaries are all of full age and capacity and between them absolutely entitled to entire beneficial interest of trust. Court has limited jurisdiction to sanction variation of trust outside these circumstances. It may sanction variation (a) in cases of necessity to avoid destruction of or to ensure preservation of trust property; (b) in order to effect compromise of disputes as between claims of various beneficiaries; or (c) in order to provide for payment of maintenance out of interest directed to be accumulated.

13.06 WILLS:

Testamentary Capacity.

Any person of sound disposing mind who has attained age of 18 years or who has been married may make valid will. Person of unsound mind cannot make will, except during lucid interval. Burden of proving unsoundness of testator's mind rests on those alleging it.

Execution.

Will must be in writing and signed at foot or end thereof by testator or by some other person in his presence and by his direction. Such signature or acknowledgment of signature should be made by testator in presence of each of two witnesses and each witness shall attest by his signature, signature of testator in presence of testator but no form of attestation shall be necessary nor shall it be necessary for witnesses to sign in presence of each other. (§ 78 Succession Act, 1965).

Revocation.

§ 85 provides for revocation of will in three ways: (a) by subsequent marriage of testator (unless will was made in contemplation of that marriage); (b) by making of new will which revokes earlier will; or (c) by destruction of earlier will.

Gifts to Witnesses.

Testamentary gifts to attesting witnesses or their spouses will be void, although such witnesses will be competent to prove due execution of will. (§ 82). Witness may however take gift if given under secret trust.

Foreign Executed Wills.

Testamentary disposition shall be valid as regards form if its form complies with internal law (a) of place where testator made it; or (b) of nationality possessed by testator, either at time when he made disposition, or at time of his death; or (c) of place in which testator had his domicile either at time when he made disposition, or at time of his death; or (d) of place in which testator had his habitual residence either at time when he made disposition, or at time of his death.

14 FAMILY

14.01 ADOPTION:

Domestic and foreign adoptions are governed by Adoption Acts, 1952-1998 which established Board (Adoption Board) empowered, subject to certain conditions, to make adoption order in case of child who is at least six weeks old who is legitimate, non-marital, legitimated, orphaned or abandoned. Board along with courts considers child's welfare as first and paramount consideration in any matter relating to arrangements for adoption or making of adoption order. In addition to being resident in State and being morally and financially suitable, applicant must be married and at least 21 years old. Single applicant (widow, widower, separated or deserted spouse and relative) may adopt. Where mother, father or relative of child is married, only one must be 21 years old. Board cannot make adoption order without first obtaining consent of mother, father (where married before or after birth, unmarried but guardian or custodian) or custodian. Consent of spouse to adoption is necessary unless applicant is deserted or separated (legally or judicially). Adoption order has effect of rendering adopted child natural child born to adoptive parents; creates parent child relationship (affecting property and succession rights) between them; and terminates natural parent's rights and duties towards adopted child. Adoption Child Register is kept. Payments to or by parents and adopters are prohibited.

Involuntary adoption order can be made by court under 1988 Adoption Act where parents have failed in their moral duty toward child and where such failure amounts to abandonment of all parental rights.

1991 Act provides for recognition of foreign adoption as where adopters are domiciled, habitually resident or ordinarily resident in foreign jurisdiction. For purposes of recognition, foreign adoption order must have same legal effect as domestic adoption in terminating and creating parental rights and duties in respect of child. Register of Foreign Adoptions is kept.

It is criminal offence to remove child under age of 17 who is Irish citizen from Ireland unless (1) non-marital child under age of one by or with approval of mother or, if deceased, of relative for purpose of residing with relative outside Ireland or (2) any child under age of seven by or with approval of parent, guardian or relative of child. Guardian must be appointed by will or court order.

Adoptive Leave Act, 1995, confers adoptive leave on employed adoptive mother and, in certain circumstances, for employed adoptive father. Social Welfare Act, 1995 provides for adoptive leave benefit similar to maternity leave benefit. Redundancy Payment Act 1967 and Minimum Notice and Terms of Employment Act, 1973 have been extended to adoptive employees. (Adoptive Leave Act, 1995). Unfair Dismissals Act, 1997, affords protection.

Adoption Act, 1998 confers upon unmarried father statutory right to notify adoption agency of desire to be consulted in relation to placement of child for adoption and right to notify adoption agency of desire to be consulted after placement of child for adoption. Adoption agency statutorily obliged to notify unmarried father where identity is known of proposed placement and adoption of child. Adoption agency may, in limited circumstances, refuse to notify unmarried father. Statutory obligation on adoption agency to counsel mother of child about revealing identity of natural father where parents are unmarried.

14.02 ALIMONY:

See topic 14.03 Divorce.

14.03 DIVORCE:

High Court and Circuit Court exercise jurisdiction in matrimonial matters and are governed by Matrimonial Causes and Marriage Law Amendment Act 1870-1871. Fifteenth Amendment to Constitution Act, 1995 removed constitutional ban on divorce. This Act and Family Law (Divorce) Act, 1996 govern granting of divorce decrees. Spouses must be living apart for four of preceding five years prior to applying for divorce. Court must be satisfied that no reconciliation is possible and that proper provision exists or will be made available to dependent spouse and children.

Judicial Separation and Family Law Reform Act, 1989 and Family Law Act, 1995 govern judicial separation. Grounds for decree are adultery, unreasonable behavior, desertion, separation for three years or one year with consent and absence of normal marital relationship for one year. For either divorce or judicial separation, applicant must be domiciled or resident within jurisdiction for one year preceding application.

Court is conferred with wide powers to determine financial and property issues and make orders for dependent spouse and child concerning: guardianship, custody and access of children; periodic and lump sum payments (alimony), secured or unsecured; property (capital and assets) adjustment order; orders concerning family home (occupation, sale and protection); pension and financial compensation (life assurance policies) adjustment orders. Orders for spousal protection (barring, protection and safety orders) and pretrial orders are provided for. Spousal statutory right to inherit under Succession Act, 1965, may remain unless extinguished or blocked. District and Circuit Courts exercise jurisdiction in maintenance, custody and domestic violence matters.

Jurisdiction of Courts and Enforcement of Judgments Acts 1988 and 1993 give effect to Brussels and Lugano Conventions on enforcement of civil judgments (maintenance) and Maintenance Act, 1994 gives effect to Rome and New York Conventions on recovery abroad of maintenance.

Foreign divorce may be recognized if one of spouses was domiciled in jurisdiction granting divorce. Family Law Act, 1995 authorizes court to declare status of marriage.

Council Regulation No. 2201/2003 on jurisdiction, recognition and enforcement of judgments in matrimonial matters and matters of parental responsibility came into effect on 27 Nov. 2003.

14.04 HUSBAND AND WIFE:

Married Women's Status Act, 1957 provided that married woman can acquire separate property, contract, sue and be sued in tort and contract and be made bankrupt as if she were unmarried. These rights and liabilities apply between her and her husband inter se. Act (§ 11) abolished husband's liability for torts, contracts or debts committed, entered into or incurred before or after marriage. Family Home Protection Act, 1976 renders void conveyance of any interest in family home without prior written consent of other spouse. Provisions of Domestic Violence Act, 1996 affords spousal protection.

14.05 INFANCY:

Children Act, 2001 (§ 52) raised age of criminal responsibility of child to 12. Children under age of 14 and over age of 12 are presumed (rebuttable) incapable of committing offence. Generally minors (i.e. persons under 18) cannot make contracts enforceable against themselves unless contract is shown to be for advantage of minor. Minor cannot be party to civil action and must sue by "next friend" and defend by "guardian ad litem". Guardianship of Infants Act, 1964 (as amended by Children Act, 1997) makes child's welfare court's primary consideration in any proceedings. Child Abduction and Enforcement of Custody Orders Act, 1991 gives effect to Convention on Civil Aspects of International Child Abduction signed at Hague on 25 Oct. 1980 which provides legal mechanism for return of wrongfully removed or retained children in breach of custody rights.

14.06 MARRIAGE:

All marriages are registered in Customs House, Dublin. Persons can only enter into marriage over age of 18 having given three months notice to Registrar of Marriages. (§§46 and 47 of Civil Registration Act, 2004). Marriage may be void: lack of capacity (same sex, prior marriage, statutory requirements), lack of consent (insanity, intoxication, duress, informed consent), fraud; mistake and misrepresentation. Marriage may be voidable: impotence and inability to enter into normal marital relationship (insanity, gross immaturity and homosexual orientation).

15 FOREIGN TRADE AND COMMERCE

15.01 CUSTOMS:

Customs duties are levied on many imports. Different rates apply to various categories of goods and in many cases vary according to country of origin. As there are so many categories and also frequent changes in rates, it is desirable to check position on any individual commodity which it is sought to import. See http://www.revenue.ie. In many cases licenses can be obtained for free importation of goods. Customs duties do not generally apply within EU.

Generally speaking tourists can bring in all their personal belongings intended for their own use.

See also topic 15.03 Foreign Exchange, Investments and Trade.

15.02 EXCHANGE CONTROL:

See topic 15.03 Foreign Exchange, Investments and Trade; category 1 Introduction, topic 1.01 Currency.

15.03 FOREIGN EXCHANGE, INVESTMENTS AND TRADE:

There are no controls exercised by State over foreign exchange dealings. However, UN sanctions apply in respect of certain countries.

State sanction is required for importation of certain classes of goods. Some goods require import licenses from Departments of Enterprise and Employment or Agriculture and Food. Certain tax free concessions are permitted to nonresidents investing capital in mineral developments.

See also category 1 Introduction, topic 1.01 Currency.

15.04 FOREIGN INVESTMENT:

See topic 15.03 Foreign Exchange, Investments and Trade.

15.05 FOREIGN TRADE REGULATIONS:

See topics 15.01 Customs, Foreign Exchange, Investments and Trade; category 1 Introduction, topic 1.01 Currency.

16 IMMIGRATION

16.00 In General

Aliens Act 1935, Aliens Order 1946 as amended, Immigration Act 2004 and regulations made thereunder, together with regulations implementing European Union Rights of Residence Directives, govern admission and residence of non-nationals into State. In addition, Immigration Act 1999 provides for principles and procedures governing deportation of non-nationals from State. There are number of exceptions to main statutory scheme:

Common Travel Area.

Ireland operates special agreement with U.K. whereby citizens of both jurisdictions may move freely within two jurisdictions without being required to carry passport. Citizens are also entitled to establish themselves and enter employment market freely in either jurisdiction. This "common-travel area" arrangement is implemented in Ireland pursuant to particular provisions of Aliens Order 1946 (as amended) as it applies to arrivals from U.K.: see Art. 5(7) of Aliens Order 1946 (SR & O 1946 No. 395), as amended by Aliens (Amendment) Order 1975 (S.I. No. 128 of 1975) and Aliens (Amendment) (No. 2) Order 1999 (S.I. No. 25 of 1999). Isle of Man and Channel Islands are included in these arrangements. Maintenance in force of this special arrangement with U.K. was preserved by Ireland when it ratified Amsterdam Treaty through State's negotiation of special protocol to that Treaty enabling Ireland to remain outside main provisions of Schengen Convention acquis. (See category, Treaties and Conventions, topic European Union.)

European Union Citizens.

As member of European Union (EU) (see category Treaties and Conventions), Ireland is obliged to allow freedom of movement and right to work to all EU citizens, and in certain circumstances to family members who are not EU nationals, within terms of EU Treaties and relevant EU Directives and Regulations. See Metock v. Minister for Justice, Equality and Law Reform (2008) EUECJ C-127/08 in relation to EU Directive 2004/38/EC holding that non—EU citizen entering host EU Member State before marrying has right to remain in host Member State after marrying EU citizen.

European Economic Area Nationals.

Above EU provisions also apply to non-nationals from European Economic Area (EEA). EEA consists of 15 member states of EU plus Norway, Iceland and Liechtenstein.

Swiss nationals also have same rights as EEA nationals with regard to entry into and residence in State pursuant to European Communities and Swiss Confederation Act 2003 which came into effect on 1 June 2002.

Asylum Seekers and Refugees.

Distinct legal regime operates in respect of asylum seekers and refugees. Refugee Act 1996 (as amended) implements Ireland's international obligations in respect of asylum seekers and refugees under 1951 Convention Relating to the Status of Refugees 1951 and its 1967 Protocol. That Act has been amended by § 11 of Immigration Act 1999 and by particular sections of Illegal Immigrants (Trafficking) Act 2000. Further amendments have been made to asylum procedure by Immigration Act 2003. Removal of failed asylum applicants is governed by terms of Immigration Act 1999.

16.01 PROPERTY:

Non-national may hold real and personal property (except shares in Irish ship or aircraft in case of non-national of non-reciprocating state) in same manner as Irish citizen. (Aliens Act, 1935, § 3). See, however, category Property, topic Real Property, subhead Purchases of Land.

16.02 REQUIREMENTS FOR LEGAL IMMIGRATION:

Visas.

Immigration Act 2004 authorises Minister for Justice, Equality and Law Reform to declare, by ministerial order, members of specified classes of non-nationals who are required to be in possession of valid Irish visa when landing in State, as well as those who are not. Citizens of common travel area and EEA citizens are not required to be in possession of visas. Process of issuing visas is dealt with on administrative basis. Person may make application for visa to Department of Foreign Affairs in Ireland or at diplomatic or consular post abroad. Visa for purposes of entry to State may be granted for variety of purposes including employment, self-employment, study, visits and family reunification.

Where non-EEA national seeks permission to enter State for purposes of employment, his or her prospective employer must first obtain work-permit from Minister for Enterprise, Trade and Employment. Work permit should be obtained before application for visa is made. Special arrangements are in place for “working visas” for certain sectors. Details are accessible on website of Department for Enterprise, Trade and Employment: http://www.entemp.ie. Where non-EEA national seeks to establish him or herself as self-employed person in State, he or she must apply to Minister for business permission in advance of, or at same time, as applying for visa. Relevant details concerning business permission are set forth on website of Department of Justice, Equality and Law Reform: http://www.justice.ie. Latter also provides information as regards student visa requirements.

Leave to Land on Arrival in State.

All persons arriving in State, including those in possession of valid visa, are subject to immigration control on arrival. Relevant statutory provision pertaining to entry into State is Art. 5 of Aliens Order 1946 (SR & O 1946 No. 395) as amended by Aliens (Amendment) Order 1975 (S.I. No. 128 of 1975) and Aliens (Amendment) (No. 2) Order 1999 (S.I. No. 25 of 1999). Art. 5(2) of that Order sets forth principal reasons for which immigration officer may refuse leave to land to non-EEA national, viz. insufficient funds, no work permit, no visa, existence of deportation or exclusion order, no valid passport, evidence of intention to travel to U.K. where person in question does not qualify for entry to that jurisdiction, national security or public policy grounds, or if immigration officer has reason to believe that person seeks to enter State for purpose other than that stated by him or her. Art. 5(6) of Order provides that where leave to land is granted, immigration officer may attach conditions as regards length of stay and engagement in business.

While there is no specific requirement on persons arriving from common travel area (see above) to present him or herself to immigration officer for leave to land in State, Art. 5(7) of Aliens Order 1946 gives immigration officer optional power to inspect any such person. This is of particular relevance to non-EEA nationals who arrive in State from U.K. Art. 5(7) provides that immigration officer may refuse leave to land to non-EEA national arriving from common travel area on any of grounds set forth in Art. 5(2) of Order. Where no such check is conducted on non-EEA national arriving from common travel area upon entry into State, he or she must obtain permission from Minister to remain in State for employment or self-employment purposes within one month of arrival; or within three months for other purposes. European Communities (Aliens) Regulations 1977 and European Communities (Right of Residence for Non-Economically Active Persons) Regulations 1997 also apply as regards free movement of EEA nationals for work and other purposes. These provide that EEA nationals may only be refused leave to land if they are suffering from scheduled disease(s) or disability, or if “his or her personal conduct has been such that it would be contrary to public policy or would endanger public security” to grant leave to land.

Citizens of non-EEA states are required to register within three months of arrival in State with their local immigration registration officer. (§.9 Immigration Act, 2004). They must also renew their registration and permission to remain in State before expiry of current permission to remain. Permission to remain may be renewed for specific periods and eventually, person may be given permission to remain “without condition as to time”. Special regime in respect of registration operates as regards EEA nationals and their dependants: European Communities (Aliens) Regulations 1977 and European Communities (Right of Residence for Non-Economically Active Persons) Regulations 1997.

Readmission Agreements.

Ireland has concluded readmission agreements with Romania, Nigeria, Poland and Bulgaria. As member of EU, Ireland is also party to readmission agreements concluded by EU with third countries under Art. 63(3)(b) of EC Treaty.

Termination of Status and Deportation.

Where non-national leaves State voluntarily or where permission to remain in State expires, his or her status as non-national in State will also terminate. Non-national's status as such may also expire where he or she acquires citizenship (see category Citizenship), or where he or she becomes subject to deportation order. Process and procedure governing deportation is set forth in § 3 of Immigration Act 1999.

17 INSURANCE

17.01 INSURANCE COMPANIES:

Insurance in Ireland is governed by national regulations implementing EU Directives. These Directives ensure that nationals of one Member State of EU can establish insurance undertaking or branch of undertaking in any other Member State. Insurance companies and insurance intermediaries are, since May 1, 2003, supervised by Irish Financial Services Regulatory Authority—see http://www.financialregulator.ie.

Member State is obliged to permit undertaking duly authorized in one Member State, and complying with specific requirements, to operate in its territory in providing direct non-life insurance and direct life assurance where initiative is taken by policy holder. In all other cases of insurances Member State where service is to be provided is permitted to require undertaking to obtain authorization.

Life Assurance and Non-Life Insurance Regulations 1994 give effect to European Directives which provide for single authorization systems of supervision of insurance undertakings operating throughout EU. Key requirements of Regulations are filing of annual return, annual actuarial investigation in case of life assurance and introduction of mandatory 15 day "cooling off" period for most life assurance policy holders.

Under Insurance Act, 1964 as amended, Insurance Compensation Fund was established to protect non-life policy holders. Compulsory contributions must be made by solvent non-life insurers.

Regulation of insurance intermediaries is governed by Insurance Act, 1989 where they are required to be bonded once their turnover exceeds specific thresholds.

Health Insurance Act, 1994 provides for establishment of Health Insurance Authority.

18 INTELLECTUAL PROPERTY

18.01 COMMON LAW PROTECTION:

Statutory trademark system is supplemented by law of passing off which provides protection in tort against use by others of trader's distinctive name or get-up, and which is not dependent on any registration. Trader must prove that defendant has made misrepresentation in course of trade which damages his goodwill. Trader does not need to show that defendant intended to deceive. If trader seeks to prevent use of word which describes goods or services, or of place name, he must show that words in question have acquired secondary meaning as denoting his business. Trader may be protected under Irish law of passing off even if he does not trade in jurisdiction, if he has customers within jurisdiction. Even if trader has ceased trading, he continues to be protected by law of passing off if name continues to attract goodwill. Law of passing off may be invoked against unauthorized commercial use of celebrity name or image, and against use of Internet domain name.

Equity prevents disclosure or use of confidential information imparted in context of relationship creating obligation of confidence, where such disclosure or use is to detriment of person who communicated it. This equitable duty of confidence may be used to prevent others using valuable technical information which is not subject of patent rights. Action in confidence may also be used to protect creative or artistic information which is not protectable under law of copyright. Action may also be availed of to protect celebrities against publication of unauthorized photographs or of personal information where such publication would tend to damage merchandising and endorsement opportunities. Duty of confidence is not enforceable where public interest requires disclosure of information in question.

18.02 COPYRIGHT:

Copyright is governed by Copyright and Related Rights Act 2000.

Act confers exclusive rights on author of original literary, dramatic, musical or artistic work and on author of original database provided such work has been recorded in writing or otherwise. Generally low qualitative threshold is applied in determining if work is sufficiently original and it is usually sufficient that work was not copied. However, author of database must show that selection or arrangement involved causes it to be original intellectual creation. Act also confers exclusive rights on authors of films, sound recordings, broadcasts, cable programs and typographical arrangements of published editions. There is no registration requirement.

Copyright lasts for life of author plus 70 years in case of original literary, dramatic, musical or artistic work and in case of original database, subject to following exceptions (i) if author cannot be identified copyright lasts for 70 years from first public availability; (ii) if work is one of joint authorship copyright expires 70 years after death of last-surviving author; (iii) in case of certain official publications copyright lasts only for 50 years from first creation; (iv) in case of previously unpublished work in respect of which copyright has expired, person making work available enjoys copyright protection for 25 years.

Copyright in film expires 70 years after death of last-surviving of director, screenplay author, dialogue author and composer of music. If film was first released during 70-year posthumous period, copyright expires 70 years after that first release. Copyright in sound recording lasts for 50 years from making available of recording provided this occurs within 50 years of making of recording. Broadcasts are protected for 50 years from first transmission, cable programs for 50 years from first inclusion in cable program service and typographical arrangements for 50 years from first public availability.

Author is first owner of copyright except (i) in case of certain official publications, (ii) where statute confers copyright on some other person, (iii) where author created work in course of employment, in which case and subject to contrary agreement, copyright vests in employer.

Copyright-owner has exclusive right to copy work, to make work available to public, to adapt work (and to copy adaptation or make adaptation publicly available). Person who carries out any of these acts in relation to protected work (or substantial part of same) without consent of owner infringes copyright in work. Person commits secondary infringement if he knowingly (i) deals in infringing works, (ii) provides machinery for making infringing copies, (iii) provides premises or machinery for infringing public performance.

Act provides for numerous permitted acts/defenses to infringement.

Of particular interest to media is (i) defense of fair dealing for purposes of criticism or review, (ii) fair dealing for purposes of reporting current events and (iii) right of employee journalist to reuse his work for any purpose other than inclusion in newspaper or periodical.

In relation to uses in education, Act provides for following permitted acts: (i) fair dealing for purposes of research or private study, (ii) non-reprographic copying of literary, dramatic, musical or artistic work or of typographical arrangement for purposes of instruction, (iii) making of single copy of sound recording, film, broadcast, cable program or of original database for purposes of instruction, (iv) use of work for purposes of setting examination or answering examination question, (v) use of short passage from literary, dramatic or musical work, original database or typographical arrangement in collection for use in educational establishments, (vi) performance of play or musical work before pupils and teachers, (vii) playing or showing film, broadcast, cable program or sound recording before teachers and pupils for purposes of instruction, (viii) reprographic copying by educational establishment for educational purposes of up to 5% in year of literary, dramatic or musical work, typographical arrangement or original database, (ix) lending of copies of work by prescribed educational establishment.

Act also creates defenses for making of copies by librarians in prescribed libraries where copy is required by single student or researcher, or where copying is for replacement or preservation purposes, or where it is for insurance, security, cataloguing or exhibition purposes. Act also provides defenses for copying for purposes of parliamentary or judicial proceedings, or for statutory inquiry. Act also provides “time-shifting” defense where broadcast or cable program is fixed to facilitate viewing at another time.

Act makes provision for moral rights: author of literary, dramatic, musical or artistic work or of film has (i) paternity right (right to be identified as author), (ii) integrity right (right to object to any distortion, mutilation or other modification of, or other derogatory action in relation to work which would prejudice his reputation), (iii) right to privacy in photographs and films commissioned for private and domestic purposes, (iv) right not to have work of another falsely attributed to him.

Act protects computer programs as original literary works. Lawful user of program does not infringe copyright if he makes copy of program in order to achieve interoperability of programs or if making of copy is necessary for use of program in accordance with its intended purpose. Act also provides for performers’ rights and for separate database right.

Act was amended by Copyright and Related Rights (Amendment) Act 2004, which provides, for avoidance of doubt, that placing on display of literary or artistic work in place to which public has access, does not constitute copyright infringement. Act was further amended by Copyright and Related Rights (Amendment) Act 2007, which made provision for public lending right and gave full effect to Directive 92/100/EEC on “Rental Right and Lending Right” (following Court of Justice’s declaration that Ireland had failed to properly implement Directive: see Case C-175/05, Commission v. Ireland [11 Jan. 2007]).

2000 Act gave effect to most of provisions of Directive 2001/29/EC on harmonization of certain aspects of copyright and related rights in information society. This transposition was completed by adoption of European Communities (Copyright and Related Rights) Regulations 2004. (S.I. No. 16 of 2004).

Droit de suite Directive (2001/84/EC) was transposed by European Communities (Artist’s Resale Right) Regulations 2006. (S.I. No. 312 of 2006).

18.03 DATA PROTECTION:

Data protection law in Ireland is concerned with rights of individual persons to regulate extent to which other persons, including corporations, may collect, store, use and distribute personal data. Irish law is largely shaped by international legal texts in form of Council of Europe Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data (1981) and two EU directives on personal data protection which date from 1995 and 2002 respectively. 1995 Directive is general directive while 2002 directive is concerned with data protection in telecommunications sector, including internet data protection. European sensitivities on data privacy as human right are based in part upon European Convention on Human Rights and these legal texts are intended to balance privacy with freedom of expression and at same time to ensure that commercial and state organizations can function effectively. Legislation requires data controllers to observe number of data protection principles. Personal data must be processed fairly, obligation that generally requires controller to inform individuals of fact that such data is being collected and for what purposes. Data must be accurate and kept up to date, must be kept for no longer than is necessary and must not be disclosed to persons who have no right to access this data. Appropriate security measures, both technological and physical, must be observed. If agency processes data for data controller that agent will not be data controller but will be data processor and is bound by security obligation. Both data controllers and data processors will generally have to register with Office of Data Protection Commissioner, independent statutory entity charged with enforcement of law. Number of criminal offences may be committed if legislation is not complied with. Data subjects have right to access and obtain copies of their data and can, for example, insist on being deleted from direct marketing lists. Breach of duty of care by data controller is actionable by data subject as tort. There are exceptions to these rules; for instance access rights to criminal files held by police or revenue authorities during active investigation cannot be obtained and disclosure of information, e.g., to police may be permitted. Data Protection Act 1988 gave effect to 1981 Convention. 1995 EU Council Directive was transposed by Data Protection (Amendment) Act 2003, with effect from 1 July 2003. 2003 Act includes manual files as well as computerized records and provided for exceptions in relation to journalists, etc. 1995 Directive provides that if data is distributed within EEA national authority cannot interfere with that transfer if law of (EEA) country of origin is complied with. By same token Directive blocks export of personal data to non-EEA countries unless importing country affords adequate level of protection or transfer is within one of exceptions, e.g., data subject has consented, transfer is necessary for performance of contract to which data subject is party, or transfer is supported by contract giving legally enforceable guarantees. EU has decided that in USA law does not afford adequate level of protection and transfers from EEA to USA should take place on foot of model contract or within safe harbor agreement negotiated between EU and US Department of Commerce in 2000. 2002 Directive on data protection in telecommunications sector was transposed by European Communities (Electronic Communications Networks and Services) (Data Protection and Privacy) Regulations 2003 (S.I. No. 535 of 2003), which Regulations came into effect on 6 Nov. 2003.

Note: Directive 2006/24/EC amending 2002 Directive is subject of legal challenge to validity of 2006 Directive, see Digital Rights Ireland Ltd v. Minister for Communications, Marine and Natural Resources et al (Rec. No. 3775P).

18.04 ENFORCEMENT OF INTELLECTUAL PROPERTY RIGHTS:

Directive 2004/48/EC on “Enforcement of Intellectual Property Rights” was transposed (on 5 July 2006) by European Communities (Enforcement of Intellectual Property Rights) Regulations 2006 (S.I. No. 360 of 2006).

18.05 INDUSTRIAL DESIGNS:

Industrial Designs Act 2001 facilitates registration by creator of design (appearance of whole or part of product resulting from features of product itself or its ornamentation). Creator must show that design is new (no design which is identical or different only in immaterial details has been made known in relevant sector) and that it has individual character (produces different overall impression on informed user as compared with previously available designs). Act provides successful applicant with exclusivity in manufacture and sale of products incorporating identical design or design which does not create different overall impression. Design right lasts for five years and is renewable for four further five year periods up to maximum of 25 years.

Unregistered design right (UDR) under Council Regulation (EC) No. 6/2002 on Community Designs [2002] OJ L 3/1 was considered in *Karen Millen v. Dunnes Stores* (2007) IEHC 449 (21.12.2007). Irish High Court ruled on allocation of burden of proof where defendant challenged plaintiff's entitlement to invoke UDR in infringement action. Irish High Court ruled that comparison (to be made by court 'donning spectacles' of informed user) must be between overall impression created by whole challenged Community design and overall impression created by one or more specified earlier designs made available to public. Irish High Court ruled that notional informed user in this context was woman with keen sense of fashion, good knowledge of designs of relevant women's clothing previously available, alert to design and with basic understanding of functional or technical limitations on relevant designs.

18.06 PATENTS:

Patents Act 1992 gives inventor exclusive right to work his invention for 20 years from filing date. Act requires patentable invention to be new, to involve inventive step and to be susceptible of industrial application. Invention is considered to be new if it has not previously been made available to public in State or elsewhere. Novelty is not destroyed by disclosure resulting from breach of confidence or by applicant's display of his invention at recognized exhibition, provided patent application is filed within six months of such disclosure. Invention involves inventive step if it is non-obvious to person skilled in that art.

Act excludes certain subject-matter from patentability: (a) discovery, (b) scientific theory, (c) mathematical method, (d) aesthetic creation, (e) scheme, rule, or method for performing mental act, playing game or doing business, (f) computer program, (g) presentation of information, where patent application relates to such subject-matter or activities as such. Methods for treatment of human or animal body by surgery or therapy and diagnostic methods are not patentable. However, pharmaceutical products, including new medical uses of known substances, are patentable.

Biotechnological inventions are governed by European Communities (Legal Protection of Biotechnological Inventions) Regulations 2000. (S.I. No. 247 of 2000). These Regulations confirm that inventions involving biological material are prima facie patentable. Inventions concerning plants or animals are patentable if technical feasibility of invention is not confined to particular variety. Process for modifying genetic identity of animals may not be patentable if it is likely to cause animals suffering without any substantial medical benefit to man or animal. Human biological material (including gene sequence or partial gene sequence) is patentable if isolated from human body or otherwise produced by technical process. However, human body at various stages of formation, processes for cloning human beings and processes for modifying germ line genetic identity of human beings are not patentable. Biotechnological invention is not patentable if its commercial exploitation offends public order or morality. Exclusive rights extend to biological material derived through propagation or multiplication from protected biological material except where (a) propagation or multiplication necessarily results from application for which biological material was marketed or (b) use is by farmer on his own farm.

Right to patent belongs to inventor save where (a) invention was made by employee in course of his employment where nature of employee's duties was such that he might reasonably have been expected to arrive at invention or (b) where employee has very senior position such that employer places particular trust in him and reasonably expects him to act at all times in interests of employer.

Only limited examination is carried out by Patents Office. In particular there is no examination as to novelty, inventiveness and susceptibility of industrial application, only as to whether application relates to excluded subject-matter. Invention's compliance with three substantive criteria may be tested by revocation proceedings following grant.

Grant of patent gives patentee exclusive rights in product or process claimed. Patent claims are read purposively rather than literally. Wording of claims will be interpreted by courts from point of view of audience assumed to have been addressed by patentee.

Act also provides for short-term or "petty" patents which last for ten years from date of filing. Act sets less onerous non-obviousness requirement for petty patents and it is sufficient that invention is not clearly lacking inventive step. Applicant for petty patent may include maximum of five claims in specification. There is no search requirement at application stage. However, search must be carried out before infringement proceedings can be brought.

Supplementary protection certificates (for extension of term) are available in respect of medicinal products pursuant to European Communities (Supplementary Protection Certificate) Regulations 2008 (S.I. No. 307 of 2008).

Patents Act 1992 was amended by Patents (Amendment) Act 2006. 2006 Act amended 1992 Act in order to bring it in line with revisions to European Patent Convention (agreed in 2000), and with TRIPs obligations (particularly as regards compulsory licensing).

18.07 TRADEMARKS:

Trade Marks Act 1996 permits registration as trademark of any sign capable of being represented graphically which is capable of distinguishing goods or services of one undertaking from those of another. Act specifically provides that words, personal names, designs, letters, numerals, and shape of goods or of their packaging are registerable. Courts have also found colors to be registerable as trademarks under Irish law.

Application to register sign as trademark will be refused if sign is devoid of distinctive character, is descriptive of product or of its place of geographic origin or if sign is customary in language or practices of trade, unless it has acquired distinctive character through use. Application shall be refused if sign consists of shape resulting from nature of goods, of shape necessary to obtain technical result or of shape which gives substantial value to goods. Application shall also be refused if resulting trademark would be contrary to public policy or morality, if mark would deceive public as to nature or geographic origin of goods, if use of mark is prohibited by any other rule of law, or if application is in bad faith. State emblems are specially protected and application for mark consisting of, or closely resembling, such emblem, shall be refused without leave of Minister for Enterprise, Trade and Employment.

Application to register sign as trademark shall also be refused in absence of evidence of honest concurrent use (i) if sign would infringe earlier mark (including well-known trademark protected under Paris Convention and any Irish trademark or Community Trade Mark with earlier application or priority date) or (ii) if use of sign would infringe any other statutory or common law intellectual property right.

Registered trademark is infringed by (i) use of identical sign on identical goods or services, (ii) use of similar sign on identical goods or services, use of identical sign on similar goods or services, use of similar sign on similar goods or services where there exists likelihood of confusion, (iii) use of identical or similar sign on similar or dissimilar goods or services where trademark has reputation in State and such use, without due cause, takes unfair advantage of, or is detrimental to, distinctive character or reputation of trademark.

Act provides defenses to infringement for (i) honest use by person of his own name or address, (ii) honest use of indications describing goods or services or indicating geographic origin of goods or services, (iii) honest use of trademark to indicate purpose of goods or services in particular in relation to spare parts, (iv) use of trademark in comparative advertising which is not misleading, (v) user of sign in particular locality where pre-existing user can be shown, (vi) use of sign on goods placed on market by trademark owner in another EEA state unless condition of goods has been impaired.

Act permits any person to apply for revocation of registered trademark on grounds (i) that mark has become generic, (ii) that mark has not been put to any, or any genuine, use, or (iii) that mark has been put to misleading use. Act permits any person to seek declaration of invalidity on grounds that mark should not have been registered because it did not meet substantive requirements for registration.

Trade Marks Act 1996 was amended in certain minor respects by Patents (Amendment) Act 2006.

Directive 2005/29/EC on “Unfair Commercial Practices” was transposed by Consumer Protection Act 2007 (which entered into force on 1 May 2007).

Directive 2006/114/EC on “Misleading and Comparative Advertising” was implemented by European Communities (Misleading and Comparative Marketing Communications) Regulations 2007 (S.I. No. 774 of 2007).

19 LEGAL PROFESSION

19.01 ATTORNEYS AND COUNSELORS:

Irish legal profession is divided into solicitors and barristers. Solicitors act as legal advisers to clients and conduct legal proceedings on their behalf, instructing barristers when necessary. They have right of audience before all courts but rarely use it in higher courts. Many cases before District Court are conducted by solicitors as advocates.

Intending solicitors must obtain university degree or other educational requirements; pass entrance examination to commence “apprenticeship”, work for minimum of two years as trainee in offices of established solicitor, and take further examinations, including one of competence in Irish language, before being admitted as solicitor.

Professional body of solicitors profession is Law Society of Ireland (LSI). Solicitors are required to obtain yearly practicing certificate issued by LSI and are regulated under Solicitors Acts. For more detailed information, see Law Society’s website http://www.lawsociety.ie. Certain disciplinary functions are exercised by Solicitors Disciplinary Tribunal. See: http://www.distrib.ie/

Barristers are sole practitioners and act both as advocates with right of audience in all courts and as legal consultants. They usually accept instructions directly from Irish solicitors although in matters which are not subject of litigation in Ireland they may be instructed by lawyers qualified to practice in other EU states.

After obtaining degree at university, or meeting other specified educational requirements, and becoming member of Honorable Society of King’s Inns (which requires sitting of entrance examination), intending barristers must undergo course of studies provided by King’s Inns. Legal Practitioners (Irish Language) Act 2008 requires LSI and King’s Inns to provide registers and courses in Irish for solicitors and barristers who can conduct legal services through Irish. (See http://www.kingsinns.ie.) Course is one-year intensive program or part-time two—year program (latter option available from 2008-2009). They may then be called to Bar by Chief Justice. If they intend to practice, they must serve minimum one year period of apprenticeship (“devilling”) with established barrister before being permitted to practice alone.

Discipline over Bar is exercised by Benchers of King's Inns and interests of profession are catered for by General Council of Bar, elected representative body of Bar (see www.lawlibrary.ie).

Foreign lawyer is free to act as legal consultant provided that he does not represent himself to be solicitor or barrister advising on Irish law. Certain activities e.g. conveyancing and administration of estates of deceased persons, are reserved by statute to solicitors. EU lawyers may appear and plead in Irish courts provided that they do so with assistance of Irish qualified lawyer. When they appear in court they must be instructed by Irish solicitor.

Law Society of Ireland, Blackhall Place, Dublin 7 assists foreign lawyers seeking local counsel.

19.02 BARRISTERS AND SOLICITORS:

See topic 19.01 Attorneys and Counselors.

20 MINERAL, WATER AND FISHING RIGHTS

20.01 FISHERIES:

Law relating to fisheries has been codified by Fisheries Acts, 1959 to 2006.

20.02 MINES AND MINERALS:

These are regulated by Acts including Minerals Development Acts, 1940 to 1999, and Continental Shelf Act, 1968. See also category 11 Employment, topic 11.05 Labor Relations.

21 MORTGAGES

21.01 CHATTEL MORTGAGES:

Chattel mortgages are more usually referred to as bills of sale. Governed by Bills of Sale (Ireland) Acts 1879-1883, chattel mortgages are form of security available only to individuals, and come in two forms—absolute bills of sale and security bills, i.e. bill of sale to secure payment of money. Former are less common in practice and are governed solely by 1879 Act; latter are governed by combination of both Acts.

Prerequisites for Absolute Bills of Sale.

In case of absolute bills of sale, document in question must state consideration given and must be duly attested by solicitor to effect that effect of bill was explained by solicitor to grantor prior to its execution and then registered in Central Office of High Court within seven clear days of being made. Failure to so register bill within time provided will render it void as against trustees or assignees in bankruptcy of grantee, and against sheriffs' officers seizing chattels on foot of court order, but not as against grantee himself. Failure to register or incomplete registration can be rectified only upon successful application to judge of High Court who may grant extension of time for registration to take place. Registration must be renewed every five years by filing affidavit with Registrar giving details of bill, parties to it, and statement that bill is still subsisting.

Prerequisites for Security Bills of Sale.

Security Bills of Sale must be in form prescribed by Bills of Sale Acts 1879-1883. Execution of bill must be attested by one or more credible witnesses not being parties to bill and bill must be registered in Central Office of High Court within seven clear days of its execution. Non-compliance with particulars prescribed in legislation will result in bill being void as against all parties, including grantor and grantee. 1883 Act requires bill to contain details of parties to bill, amount loaned, interest rate payable and chattels affected by bill, listed by way of inventory to bill. There is no provision requiring renewal of registration of security bill.

Seizure of Chattels.

While there are no limitations on grantee's rights to take possession of chattels covered by absolute bill of sale, as grantee is owner of them by virtue of bill, in case of security bills grantee may only take possession in circumstances covered by 1883 Act (namely [a] if grantor becomes bankrupt; [b] if execution has been levied against good under judgment at law; [c] if grantor has defaulted in making payment of sum secured by bill or has breached any other covenant in bill; [d] if grantor fraudulently either removes goods from his premises or allows same to be removed; or [e] if grantor fails without reasonable excuse to produce his last receipt for rent, rates and taxes, when demand is made in writing by grantee). Upon seizure of goods covered by security bill, grantor has five days in which to make application to High Court for relief, during which time goods must remain on premises where seized.

Company Charges.

Where company creates charge over company property in favor of creditor, this is governed by § 99 Companies Act 1963. Particulars of charge created in this manner must be registered in Companies Registration Office within 21 days of its creation. Non-compliance will result in charge being void as against liquidator and any creditor of company. In case of agricultural chattel mortgages over company property, these may be registered under Companies Registration System and do not have to be registered separately. (Re Castlemann Poultry Products, High Court, 13 Dec., 1985).

Agricultural Chattel Mortgages.

Agricultural Credit Act, 1978 creates different regime for agricultural chattel mortgages (i.e. security bills of sale for farm stock) by providing that bill of sale of stock shall be void and incapable of registration under Bills of Sale (Ireland) Acts 1879 and 1883. Recognized borrowers for purposes of Act are not limited to farmers and can include companies. Agricultural chattel mortgage can take form of either (a) specific chattel mortgage, (b) floating chattel mortgage (to avail of this borrower must own land over which it is situate) or (c) combination of (a) and (b).

Prerequisites for Agricultural Chattel Mortgages.

Chattel mortgage must be registered, within one month of its creation, in register of chattel mortgages in Circuit Court Office in area in which land is situated. Upon repayment of principal, interest and costs mortgagee is under statutory duty to have mortgage removed immediately from register. Register is not open to general public and may only be inspected by Circuit Court Office employees, recognized lenders, sheriff or county registrar, or any person in service of State who is duly authorized by either Minister for Finance or Agriculture. Failure to register will result in loss of priority for mortgagee in relation to other registered mortgages. (§ 26[5] Agricultural Credit Act 1978).

Seizure of Agricultural Chattels.

In case of duly registered specific chattel mortgage where principal or interest remain unpaid for 14 days after appointed redemption date or where mortgagor has committed breach of any covenant or condition in mortgage, mortgagee may serve seizure order under § 28(1) of 1978 Act requiring sheriff to seize all or any of stock comprised in mortgage. Upon seizure sheriff has statutory duty to sell stock as soon as possible.

Floating chattel mortgage creates ambulatory and shifting charge over agricultural stock prohibiting mortgagor from selling such stock except in ordinary course of business and obliging mortgagor to maintain level of stock on land as equivalent as possible to value of stock subject to chattel mortgage. Where value of stock falls below value of mortgage through sale of stock which is not replaced within one month by mortgagor, latter will be obliged to reduce level of principal owed as mortgagee may require.

Regardless of nature of chattel mortgage, mortgagee has statutory right where money is owing (§ 29[1]) to enter land in daylight hours on any day on which civil process may be served and take inventory of stock.

21.02 MORTGAGES:

It is possible to create legal mortgages of either registered or unregistered land in Ireland. In respect of mortgages of unregistered land is governed by Land and Conveyancing Law Reform Act 2009 making charge sole method of creating legal mortgage, whereas creation of charge over registered land is governed by provisions of Registration of Deeds and Title Acts 1964 and 2006.

Creation.

Legal mortgages over unregistered land can be created by charge over land (Land and Conveyancing Law Reform Act 2009) or through rarely used facility of statutory mortgage. Conveyance (or assignment if only leasehold term is held) with proviso for redemption, through mortgage by demise (or sub-demise in case of leasehold) abolished by Land and Conveyancing Law Reform Act 2009. Equitable mortgages of unregistered land are also possible through deposit of title deeds with mortgagee, entering into agreement for legal mortgage or transfer of equitable interest in land by way of security for loan.

Where land in question is registered land, legal charge may be created by registering charge against land in Land Registry, which charge is valid from date of registration and not date of execution. Under Registration of Deeds and Title Act 2006 land certificates and certificates of charge for registered land will no longer be issued. Effect of this abolition is that it will not be possible in future to create equitable mortgages of registered land. Existing certificates will cease to have effect three years after commencement of § 73(2) of 2006 Act. Holders of such liens will instead be entitled to register their interests as burdens affecting registered land under § 69 of 1964 Act.

Powers of Mortgagee.

Mortgages created by deed attract provisions of Land and Conveyancing Law Reform Act 2009, which provide mortgagees with number of statutory powers. Apart from common law right of mortgagee to possession (note strict duty on mortgagees in possession to account to mortgagor both for income received and income that would have been received but for his default), Act confers on mortgagee right to insure property, power to appoint receiver and power of sale (which arises when money owed becomes due and is exercisable when one of three criteria are satisfied: either [a] notice requiring payment is served on mortgagor and he/she is in default for at least three months after service; or [b] interest on mortgage is in arrears and unpaid for at least two months; or [c] breach occurs of provisions of mortgage or Act, other than repayment). Statutory power of foreclosure abolished by Land and Conveyancing Law Reform Act 2009.

While statutory powers contained within Land and Conveyancing Law Reform Act 2009 apply to mortgages created by deed and therefore would exclude charges of registered land, Registration of Title Act, 1964 (§ 62[6]) confers on owner of registered charge all rights and powers of mortgagee implied in mortgage by deed under Conveyancing Acts.

Assignment.

Mortgages may be assigned by either party in any of ways in which they were created.

Priority.

Registered charges of registered land rank in priority according to order in which they were registered in Land Registry. Priority of mortgages of unregistered land depends on whether transaction has been recorded in registry of deeds. Registration of Deeds and Title Act 2006 (which repeals Registration of Deeds [Ireland] Act 1707) provides that registered deeds rank in priority among themselves according to serial number allocated to them by Property Registration Authority. Thus, registered memorial will rank in priority over later or earlier existing registrable but unregistered mortgages. Where there is no record in Registry of Deeds, rules developed by common law and equity in relation to priority will apply: (a) Legal mortgage followed by legal mortgage or legal mortgage followed by equitable mortgage or equitable mortgage followed by equitable mortgage, first mortgage in time will prevail; (b) equitable mortgage followed by legal mortgage, later legal mortgage will take priority if latter legal mortgagee is bona fide, takes for value and is without notice of earlier equitable mortgage.

Tacking.

With regard to registered land, registered owner of prior charge is entitled to priority over any subsequent charge where prior chargee makes further advances, except where those further advances are made after date of subsequent charge and with express notice in writing of it.

In relation to unregistered land, it is possible for pre-existing legal mortgagee, who is unaware of existence of another equitable mortgage created in meantime, to tack further advances by advancing more money, intended to be on same security and thereby gain priority over intervening equitable mortgage.

Discharge or Satisfaction.—Registered Land: Registered charge is discharged where Registrar enters note of satisfaction of charge on Property Registration Authority. Receipt or signed release by chargee will be sufficient proof of discharge or satisfaction. In case of unregistered land, mortgage will be discharged by reconveyance of freehold or reassignment of leasehold with relevant deed containing receipt for mortgage redemption money. Statutory form of receipt endorsed on mortgage deed will act both to discharge mortgage and reconvey interest in question without necessity of formal conveyance. Where mortgage is created by demise or sub-demise Satisfied Terms Act, 1845 will apply to effect that where purpose for which term was created (in this case security) is fulfilled it becomes “satisfied term” and merges automatically with reversion expectant upon it.

22 PROPERTY

22.01 ABSENTEES:

Presumption of Death.

See category Estate and Trusts, topic Death.

22.02 ADVERSE POSSESSION:

See category 5 Civil Actions and Procedure, topic 5.09 Limitation of Actions.

22.03 CONVEYANCES:

See topic 22.05 Deeds.

22.04 CURTESY:

Tenancies by curtesy were abolished by Succession Act 1965, effective Jan. 1, 1967. See, however, category Estates and Trusts, topic Descent and Distribution.

22.05 DEEDS:

Deeds, executed by individuals must be signed sealed and delivered and should be executed in presence of two credible witnesses, who, in addition to signing their names should subscribe their addresses and descriptions, businesses or occupations. Deeds executed by companies under common seal should be countersigned usually by two directors or one director and company secretary, subject to individual requirements of company's memorandum and articles of association. Date should be inserted at time of execution in words and not in figures. If any alteration, interlineation, or erasure appears on face of deed it should be noted in attestation subscribed by witnesses and also that same was made previous to execution.

Certain statutes require execution to be verified by affidavit attached to and made part of document.

In practice it is advisable to have all deeds for execution outside Ireland and U.K. executed in presence of: (1) Irish consul, vice-consul, pro-consul, or consular agent; or (2) notary public, in which case certificate of secretary of roll of notaries or clerk of court or other responsible officer certifying appointment and identifying signature of such notary public should be attached to deed; also signature of secretary of roll of notaries or clerk of court or other responsible officer should be duly authenticated by Irish consul. Deed may be executed in presence of two witnesses, one of whom should make appropriate affidavit of subscribing witness before Irish consul.

Stamp duties are payable on deeds once deed falls within First Schedule of Stamps Act, 1891 as amended. See category 23 Taxation, topic 23.06 Stamp Tax.

22.06 DOWER:

Dower was abolished by Succession Act, 1965 effective Jan. 1, 1967. See, however, category Estates and Trusts, topic Descent and Distribution.

22.07 LANDLORD AND TENANT:

Regulated by Landlord and Tenant Acts, 1860, and 1967 to 2008, Rent Restrictions Acts 1960 and 1967, Housing (Private Rented Dwellings) Acts, 1982 and 1983, and Housing (Miscellaneous Provisions) Act 1992 and Common Law. Landlord and Tenant (Amendment) Act 1994 extended continuous occupancy requirement of commercial tenancy from three years to five years before right to renew lease to maximum of 20 years passes to tenant. Civil Law (Miscellaneous Provisions) Act 2008 §§47 and 48 amend Landlord and Tenant (Amendment) Acts 1980 and 1994 to enable parties to business tenancy to contract out of provisions of Part II of 1980 Act, conferring right to new tenancy, provided that tenant has received independent legal advice. Residential Tenancies Act 2004 provides for implementation of reforms of private rented sector. It introduces measure of security of tenure for tenants with Part 2 of Act specifying minimum obligations applying to landlords and tenants. § 150 provides for establishment of Private Residential Tenancies Board to resolve disputes arising in sector; operate system of tenancy registration; and provide information and policy advice. Legislation also contains provisions dealing with rent setting and reviews (Part 3) and procedures for termination of tenancies (Part 5), including gradated notice periods linked to duration of tenancy.

Fee Farm Grant.

Land and Conveyancing Law Reform Act 2009 abolished fee farm grants.

Kinds of Tenancy.

Lease for term of years under seal. Tenancies from year to year, month to month or week to week may be made by oral agreement.

22.08 PERPETUITIES:

Common Law applies.

22.09 REAL PROPERTY:

It is possible in Ireland to create following freehold estates in estates in fee simple. Estates in fee tail, life estates and estates pur autre vie abolished by Land and Conveyancing Law Reform Act 2009. Land held by two or more persons can be held by them as joint tenants (survivorship) or as tenants in common (no survivorship) at law or in equity.

Owner in fee simple of real property may alienate it during his lifetime by writing or by his will, subject to Succession Act, 1965.

Purchases of Land.

Land Act 2005 repeals previous requirement found in Land Act 1965 and Irish Land Commission (Dissolution) Act 1992 that all “non-qualified persons” must get consent of Minister for Agriculture before acquiring interest in “agricultural land” (i.e., land not situate in county borough, borough, urban district or town).

Whereas previously agricultural land could not be subdivided without consent, formerly of Land Commission (§ 45[12] Land Act 1965) and then of Minister for Agriculture and Food (§ 4 Irish Land Commission [Dissolution] Act 1992), Land Act 2005 provides for repeal of control of letting, subletting, and subdivision of all agricultural holdings.

Rule in Shelley’s Case is recognized.

Right to Purchase Fee Simple.

Landlord and Tenant Acts, 1967 to 2008 give lessees holding under certain types of long leases and some yearly tenants right to purchase fee simple. Tenant serves notice on landlord and pays compensation. Landlord and Tenant (Ground Rents) Act 1978 prevents creation of new leases reserving ground rents on dwellings. It also empowers Property Registration Authority, for prescribed fee, to undertake to do legal work of completion of purchase of fee simple and entrusts Authority with administration of scheme.

Property Registration Authority is empowered to vest fee simple in tenants of dwelling houses, provided application is duly made in accordance with Part II of 1978 Act. Fee simple is vested by way of vesting certificate which operates as conveyance of fee simple and of any intermediate interests, free from encumbrances.

Overall effect of 1978 Act is to give lessees of certain categories of property right to acquire fee simple subject to conditions and exemptions detailed in that Act. § 4 provides that this right does not apply in case of properties leased from Minister of Government, Commissioners of Public Works or Irish Land Commission. Landlord and Tenant (Ground Rents) Act 2005 revises definition of “state authorities” by deleting reference to Irish Land Commission (which no longer exists) and by adding three new bodies that are not bound by Landlord and Tenant (Ground Rents) Act 1978 in order to protect interest that State holds in property that has been acquired for industrial purposes by Industrial Development Agency (Ireland), Shannon Free Airport Development Company and Udarás na Gaeltachta.

Land Purchase Act 2005 discharges all land purchase annuities/land reclamation annuities amounting to [Euro]200 or less per annum including arrears. Effect of this provision is to reduce number of such annuities and to increase full ownership of this land without ongoing state involvement. Land Purchase Act 2005 also provides for land annuities/land reclamation annuities buyout scheme for amounts greater than [Euro]200 per annum by allowing farmers to clear their existing annuities at discount of 25% subject to all outstanding arrears being paid in full. Under Act, Property Registration Authority has power to refuse to register transfer of land or part of land subject to land purchase or land reclamation annuity when annuity is in arrears.

Registration of Title.

Regulated by Registration of Deeds and Title Acts, 1964 and 2006 and Land Registration Rules 1972 to 2006, under which registration of title to land is compulsory in certain limited cases: (1) Where freehold land has been at any time sold and conveyed to or vested in any person under any of provisions of Land Purchase Acts or Laborers Acts, 1883 to 1962; (2) where either freehold or leasehold land is acquired by statutory authority; or (3) where land is in area designated by Minister as area subject to compulsory registration.

Registration in land registry is conclusive evidence of title and any right, privilege, appurtenance or burden appearing thereon, subject to statutory exceptions outlined in Registration of Title Act, 1964 such as overriding interests. (§ 72).

23 TAXATION

23.01 ADMINISTRATION:

All taxation is imposed by Irish Parliament (Oireachtas).

Anti-Avoidance.

Finance Act 1989, now consolidated in Taxes Consolidation Act 1997, introduced general anti-avoidance provisions which can allow Revenue to look through transactions entered into primarily for tax avoidance reasons. There are also specific anti-avoidance provisions in Irish law.

Finance Act 2008 extends power of Revenue Commissioners to request information from agents in receipt of rental income from foreign properties. It also empowers Revenue Commissioners to question suspects in garda custody in cases of serious indictable offences under Revenue Law.

23.02 CUSTOMS DUTY AND TAX:

Customs duties are applied at varying rates to wide range of commodities imported from outside EU. Following Ireland’s accession to EU, customs duties between Ireland and other member States have been largely eliminated.

Excise duties are Irish taxes which are levied at varying rates on certain goods whether imported from other EU countries or from outside EU. There are various reliefs from customs and excise duties.

23.03 INCOME TAX:

Individuals.

Legislation on income tax in Ireland is contained in Taxes Consolidation Act 1997. Income tax is charged for year of assessment. With effect from 1 Jan. 2002 year of assessment is aligned with calendar year and runs from 1 Jan. to 31 Dec.

Self-assessment was introduced for individuals from 1988/89. Provision is made for, “single assessment” for single individuals and divorced persons and joint or separate assessment for married persons.

Individuals must file tax return not later than 31 Oct. in year following tax year. Due date for payment of preliminary tax is 31 Oct. in year of assessment. Preliminary tax is usually 90% of final tax payable for that year or 100% of tax liability for previous year. For example preliminary tax for tax year 2007 is payable on 31 Oct. 2007. Balance of income tax is payable in following year by 31 Oct.

Unified system of personal taxation applies which makes no distinction between earned and unearned income. System provides that having ascertained income for tax purposes, there are to be deducted various allowances, reliefs and deductions to arrive at figure, which represents taxable income.

Taxable income is then subjected to rates of tax, which graduate from lower (20% for income up to [Euro]35,400 for single person for tax year 2009 and subsequent years) to higher (41% for income over [Euro]35,400 for single person for tax year 2009 and subsequent years) levels depending on taxable income. Relief is then granted for any tax credits. Full tax credit system was introduced with effect from 6 Apr. 2001, which replaced old tax-free allowance based system. For year2008, tax credit for single person is [Euro]1,830 and married couple [Euro]3,660. Income levy introduced in supplementary budget in 2006 with 2% levy on first [Euro]75,036, 4% on next [Euro]99,994 and 6% on balance. Full details of all rate bands and credits for income tax purposes are set out in Irish Revenue Commissioners website at http://www.revenue.ie.

Individual’s liability to Irish income tax, capital gains tax and capital acquisitions tax is determined by concepts of “residence”, “ordinary residence” and “domicile”.

Individual is regarded as resident in Ireland if either of following applies: individual is present in country for total of 183 nights or more in tax year; individual is present in country for total of 280 nights or more in current and preceding tax years. However, if person is in country for not more than 30 nights in tax year, person is not resident for that year.

If individual does not satisfy these tests, he may still exercise option in certain limited circumstances to be treated as Irish resident, subject to agreement with Revenue Commissioners.

Resident individual is usually subject to Irish income tax on worldwide income and to capital gains tax on any disposals of taxable assets wherever situated.

Individual who is resident, but not domiciled, in Ireland is subject to income tax or capital gains tax on income or gains arising in Ireland and in U.K., and on income or gains arising outside Ireland and U.K. only to extent of amounts remitted to Ireland. With effect from 1 Jan. 2006, remittance basis of assessment is no longer available in respect of employment income insofar as employment is exercised State. As and from 1 Jan. 2009, remittance basis for Case III income has been extended to UK source income. However, exclusion of remittance basis in relation to UK source, chargeable gains continues.

Double tax treaties with other countries may modify effect of preceding rules in relation to residence and domicile.

Individual is ordinarily resident in Ireland from commencement of fourth tax year if he has been resident for each of three preceding tax years.

Individual leaving Ireland will not cease to be ordinarily resident until he has been nonresident for three preceding tax years.

Where individual is not resident in Ireland, but ordinarily resident, he will be subject to Irish tax on Irish source income and foreign income excluding income derived from trade or profession no part of which is carried on in Ireland or from office or employment all duties of which are performed outside Ireland. If investment income is [Euro]3,810 or less in any year it is exempt.

Where Irish person is ordinarily resident in Ireland, but is also resident in another country, he may be entitled to relief from Irish tax under double taxation agreement. Full details of double taxation agreements in force as at 1 Jan. 2009 are detailed below and may be found on Irish Revenue Commissioners website at http://www.revenue.ie.

Domicile is determined under general law, not tax law. Individual's domicile depends on facts of particular case. In general, Irish law recognizes that individual acquires domicile of origin at birth, generally that of father, and retains it unless positive steps are taken to change it to domicile of choice, which may itself be changed at later date. Domicile of married woman is determined by her circumstances and is not dependent on that of her husband.

Individual, who is nonresident in Ireland for tax purposes, is subject to Irish income tax only on income arising in Ireland.

Tax is withheld at standard rate, currently 20%, from rent on land or premises paid to nonresidents.

Individuals who are not domiciled and not resident in Ireland are not taxed on interest from securities issued by Irish government and by certain public utility corporations owned by Irish government. Irish banks do not withhold deposit interest retention tax (DIRT) on interest paid to nonresidents provided necessary documentation is completed.

Resident individual is usually subject to Irish income tax on worldwide income. Income from various sources is grouped for assessment purposes under various schedules. Special rules apply for calculating taxable income from each source and for determining timing of tax charge. Under schedule system various sources of income are divided as follows:

SCHEDULE C

This schedule applies mainly to financial institutions

SCHEDULE D

Case I

Trading income

Case II

Income from vocations and professions

Case III

Investment income, foreign rental income and income from foreign employments and possessions, provided they have not suffered Irish standard rate income tax at source. Foreign trading income.

Case IV

Irish deposit interest, which has suffered DIRT. Income not taxed under SCHEDULE E or F or under any other case of SCHEDULE D and income received under deduction of Irish income tax at standard rate, currently 20%.

Case V

Rents from property in Ireland.

SCHEDULE E

Income derived from employments, directorships and pensions arising in Ireland.

SCHEDULE F

This applies to dividends and other distributions paid by Irish resident companies.

For computing income under different schedules allowed charges, which depend on schedule income is qualified under, are deducted.

Income arising from qualifying patent (subject to maximum of [Euro]5,000,000 per annum from 1 Jan. 2009) and certain earnings of artists are exempt from taxation. Conditions which must be satisfied to avail of these exemptions are set out in information leaflets on Irish Revenue Commissioners website at http://www.revenue.ie.

There are also exemptions for certain other activities i.e.,forests/woodlands or greyhound stud fees. (See 23.07 Tax Incentives and Exemptions: Tax Relief.)

Social Security Taxes and Employee Taxes.

All employers must register with Irish Revenue Commissioners and follow procedures for deduction of employees' tax at source known as "Pay As You Earn" (PAYE) and Pay-Related Social Insurance (PRSI).

Employees pay PRSI at rate of 4% on income up to [Euro]52,000 (first [Euro]127 of weekly income is exempt) and 2% health levy on gross income up to [Euro]100,100. However, no employee PRSI applies where weekly earnings are less than [Euro]352 per week and no health levy applies where annual earnings are less than [Euro]26,000. Employers pay PRSI of 8.5% if income is [Euro]365 per week or less and 10.75% if income is greater than [Euro]365 per week.

Reliefs.

Business Expansion Scheme allows tax deduction of up to [Euro]150,000 per annum ([Euro]31,570 up to 31 Dec. 2006), which may be claimed for investment in certain manufacturing and grant aided companies or qualifying companies. From 1 Jan. 2007 maximum amount of investment eligible for tax relief has been increased from [Euro]1,000,000 to [Euro]2,000,000 subject to maximum of [Euro]1,500,000 to be raised in 12-month period. Relief also extends to certain approved tourism activities. Maximum amount of relief allowed to individual in lifetime is no longer limited to any amount. Shares must be held for five years to avoid partial claw back. This scheme is due to run until Dec. 2013.

Seed Capital Relief.

Scheme whereby individual who leaves employment to start their own business (or unemployed person) may claim refund of tax on previous income for up to six tax years in respect of investment in new business. Maximum relief which can be claimed is [Euro]100,000 per annum at individual's top rate of tax. This scheme is due to run until Dec. 2013.

Employees who purchase shares in their employer company or 75% subsidiaries can claim once off tax deduction for cost up to [Euro]6,350. There is claw back of relief if shares are disposed of within three years.

Employees of certain companies may receive ordinary shares up to value not exceeding [Euro]12,700 per annum under approved profit share scheme without charge to income tax. Trustees must hold shares on behalf of employees for minimum period of two years (or until employee leaves employment, retires or dies). In addition, employees will become liable to income tax if shares are disposed of within three years of being appropriated to employees.

Tax relief is available for both individuals and companies for donations to charities and other approved bodies. Minimum donation is [Euro]250 in any one year. If individual is associated with approved body, relief is restricted to 10% of individual's total income for tax year.

Heritage items, with minimum value [Euro]100,000, donated by individual or company to certain approved bodies may be used to discharge income, capital gains, gift/inheritance or corporate tax liabilities arising in year in which gift is made.

Corporation Tax.

All Irish incorporated companies, subject to certain exceptions, are automatically deemed to be tax resident in Ireland and Irish incorporated company which is regarded as resident in treaty country and not resident in Ireland for purposes of treaty between that country and Ireland will be regarded as not resident in Ireland.

Corporation tax is charged on income and chargeable gains which together constitute "profits" of companies. Period for which corporation tax is charged is accounting period. Profits of company are taxed by reference to various schedules and cases which also apply for income tax purposes and are set out above.

Most active trading income under Case 1 of Schedule D (excluding rental and some other specific trades) will be taxed at standard rate of corporation tax (for financial year 2008 standard rate is 12.5%).

Higher rate of 25% applies to passive income taxable under Cases III, IV and V of Schedule D as detailed above.

Rate of 20% applies to chargeable gains and to profits or gains arising on disposal of residential land. Rate of 10% continues to apply to manufacturing operations established on or before 23 July 1998 until 31 Dec. 2010.

Corporation tax liability is determined by self-assessment. Company must estimate its own liability and pay at least 90% of liability as preliminary tax. This preliminary tax is due on 21st day of month before end of accounting period. Small companies can elect to pay 100% of their final tax liability of previous accounting period.

Any balance of tax due must be paid by due date for filing return which is normally nine months after company's accounting period. However, where nine-month period ends on or after 21st day of month, 21st day of that month becomes due date for filing of annual return and for payment of any balance of corporation tax due. If company does not comply with this filing obligation it is subject to one of various surcharges. In addition, company is liable to reduction in certain tax reliefs.

Corporation tax is not charged on dividends or other distributions of Irish resident company received by another Irish resident company. Such income is referred to as Franked Investment Income (FII). Such Irish dividends are not liable to corporation tax as they are paid out of profits, which have suffered Irish Corporation Tax.

No deductions are allowed for dividends paid by company when computing taxable profits.

Dividends paid to nonresidents may be subject to dividend withholding tax at standard rate of income tax, currently 20%. This is subject to extensive exemptions where recipient is resident in EU member state or in country with which Ireland has double taxation treaty.

There is tax credit for certain Research & Development expenditure of qualifying companies other than in respect of expenditure on buildings. Tax credit of 20% of qualifying incremental expenditure against company's corporation tax liability in period in which expenditure is incurred.

Capital Gains Tax.

Individuals, trusts, unincorporated bodies etc., are chargeable to capital gains tax (CGT). Capital gains of companies are chargeable to corporation tax. Individual who is resident or ordinarily resident (as detailed in subhead Individuals, supra) in Ireland for year of assessment is chargeable to CGT on chargeable gains made on disposal of assets wherever situated.

Nonresident individual or nonresident company is subject to CGT on its chargeable capital gains from following assets located in Ireland: lands and buildings; minerals and mineral rights; exploration or exploitation rights in continental shelf; unquoted shares deriving majority of their value from such assets; and assets used in business carried on in Ireland through branch or agency.

Company that ceases to be tax resident in Ireland is deemed to have disposed of all of its assets at market value. Company is subject to CGT on any gains resulting from such deemed disposals (exit charge). Tax is calculated in accordance with normal rules under capital gains tax legislation.

Exit charge does not apply if 90% of exiting company's share capital is held by foreign companies resident in jurisdiction with which Ireland has concluded double tax treaty or persons who are directly or indirectly controlled by such foreign companies.

Individual who is resident, but not domiciled, in Ireland is liable to CGT on chargeable gains on disposal of assets situated outside Ireland and U.K. only to extent that chargeable gains are remitted to Ireland. Losses accruing on disposal of such assets are not allowable losses for CGT purposes.

Capital gains tax is payable on chargeable gains arising on disposal of assets after 5 Apr. 1974. Relief (up to 31 Dec. 2002) is provided for inflation content of chargeable gains accruing on disposal of assets owned for more than 12 months prior to date of disposal. Certain restrictions apply to disposal of development land on or after 28 Jan. 1982.

Exemptions/reliefs from CGT include following: transfers of assets between husband and wife; first [Euro]1,270 of taxable gains derived by individual during tax year; gain on disposal of taxpayer's principal private residence; gain arising on disposal of family business or farm or shares in family company by taxpayer who is 55 years of age or older for less than [Euro]750,000 subject to conditions for relief being satisfied and with marginal relief available above this limit; gain on transfers of wasting chattels (tangible moveable property with useful life of less than 50 years), gains arising from betting, Lotteries, sweepstakes, bonuses payable under National Installments Savings Schemes and Prize Bond winnings, transfer of site from parent to child for purposes of constructing child's principal private residence, where sites value does not exceed [Euro]500,000.

Chargeable capital gains for tax year 2008 are subject to Capital Gains Tax at rate of 25% (with exception of certain foreign life assurance policies where rate is 40%).

Individual must pay 100% of CGT on disposals by 31 Oct. of that tax year if disposal was made on or before 30 Sept. If disposal is made between 1 Oct. and 31 Dec. CGT must be paid by following 31 Jan. Individual must file CGT return on or before 31 Oct. of year following disposal.

Inheritance Tax.

Gift tax is payable on certain gifts made during lifetime of donor. Inheritance tax is payable on certain inheritances. Both taxes are called Capital Acquisitions Tax (CAT) and are payable by person receiving gift or inheritance (beneficiary).

If person making gift or bequest or donee or successor is resident or ordinarily resident in Ireland (as detailed in subhead Individuals, supra), worldwide assets are taxable. If person making gift or bequest and donee or successor are resident outside Ireland, only gifts or bequests of Irish assets are taxable.

Where disposer or donee/successor is non-domiciled (as detailed in subhead Individuals, supra), he/she will not be considered to be resident or ordinarily resident in Ireland unless date of gift /inheritance is after 1 Dec. 2004 and donee/successor has been resident for five years at that date.

For purposes of CAT, assets are valued at market value, reduced by any relevant debt or other liability and by amount of any consideration paid by beneficiary. Value of certain business assets is reduced by 90% and agricultural property is reduced by 90% if beneficiary is domiciled at date of gift/inheritance and stays resident in Ireland for three years after date of gift/inheritance.

Certain assets are exempt from tax, including following: gifts or inheritances transferred from one spouse to other; first [Euro]3,000 of taxable value of gifts (but not inheritances) from each person from whom beneficiary receives gifts in calendar year; employee’s retirement benefits; proceeds of approved insurance policies designed to pay CAT; and dwelling house received by beneficiary who has lived in house for three years prior to gift/inheritance and will remain there for six years after gift/inheritance.

Exemption is also given if cumulative value of all benefits within each group received by beneficiary after 5 Dec. 1991 does not exceed certain thresholds. Thresholds for 2009 are: [Euro]434,000 for group I (spouse, child or minor child of deceased child of disponer); [Euro]43,400 for group II (linear ancestor, linear descendant, brother, sister, or child of brother or sister of disponer); [Euro]21,700 for group III (not entitled to either group I or group II).

Rate of CAT applicable to taxable part of gift or bequest is 25%. CAT is self-assessment tax; return must be delivered within four months of valuation date where aggregate of all taxable gifts exceed 80% of relevant group threshold. Tax must accompany the return.

Pre Finance Act 2005, unilateral credit relief for foreign tax on gift or inheritance was only available if property was situated in foreign territory imposing tax. Finance Act 2005 provides for credit relief to be available for gifts and inheritances taken on or after Dec. 2004 irrespective of where property is situated.

Probate Tax.

Abolished from 6 Dec. 2000.

23.04 MOTOR VEHICLE TAXES:

Automobiles.

See category 24 Transportation, topic 24.01 Motor Vehicles.

23.05 PROPERTY TAXES:

Residential Property Tax.

Annual Residential Property Tax was abolished as of 5 Apr. 1997 et seq. but is imposed for prior taxable years at rate of 1.5% of excess of market value over [Euro]101,000 for year ending 5 Apr. 1996. Household income must also exceed [Euro]30,100 per annum. Tax reduced for number of children up to maximum of ten by T x c/10 where T = Tax and c = number of children. Territoriality rules are by reference to his domicile (not his residence).

23.06 STAMP TAX:

Stamp duty is charged on certain documents, including deeds of transfer, leases, insurance policies, share certificates, mortgages, bonds, debts, covenants, letters of credit, bills of exchange and cheques, regardless of where they are drawn up. Stamp duty is not imposed on certain Irish and U.K. government securities, wills, and transfers between spouses or bills of exchange and promissory notes drawn up outside Ireland.

Stamp duty rates generally range from 1% to maximum rate of 9% depending on nature and value of property involved. From 31 Mar. 2007, first time purchasers of residential property are, subject to certain conditions, exempt from stamp duty. First time purchaser is person who: (1) Has not previously purchased or built on his own behalf dwelling house; and (2) property purchased is occupied by purchaser (or by person on his behalf) as his principal place of residence; and (3) where, subject to certain exceptions, no rent is derived from property for five years after date of purchase.

Stamp duty rates payable by first time buyers who are owner occupiers of second hand residential property on instruments executed prior to 1 Mar. 2007 are as follows:

Value	**First Time Buyers**	
	Instrument executed before2 Dec. 2004	Instrument executed on or after 2 Dec. 2004
Up to [Euro]127,000	Nil	
[Euro]127,001 - [Euro]190,500	Nil	
[Euro]190,501 - [Euro]254,000	3.00%	
[Euro]254,001 - [Euro]317,500	3.75%	
[Euro]317,501 - [Euro]381,000	4.50%	
[Euro]381,001 - [Euro]635,000	7.50%	
Over [Euro]635,000	9.00%	
Up to [Euro]127,000	Nil	
[Euro]127,001 - [Euro]190,500	Nil	
[Euro]190,501 - [Euro]254,000	Nil	
[Euro]254,001 - [Euro]317,000	Nil	
[Euro]317,001 - [Euro]381,000	3.00%	
[Euro]381,001 - [Euro]635,000	6.00%	
Over [Euro]635,000	9.00%.	

Instrument executed on or after 31 Mar. 2007: Stamp duty has been abolished for all owner-occupying first time buyers of houses and apartments, whether new or second hand subject to certain restrictions.

Rates of stamp duty for residential property effective from 6 Dec. 2001 for all other purchasers are as follows:

Value	**Owner Occupiers/Investors**
Instrument executed on or after 31 Mar. 2007	
Up to [Euro]127,000	Nil
[Euro]127,001 - [Euro]190,500	3.00%
[Euro]190,501 - [Euro]254,000	4.00%
[Euro]254,401 - [Euro]317,500	5.00%
[Euro]317,501 - [Euro]381,000	6.00%
[Euro]381,001 - [Euro]635,000	7.50%
Over [Euro]635,000	9.00%
First [Euro]125,00	Nil
Next [Euro]875,000	7.00%
Excess over [Euro]1,000,000	9.00%

Stamp duty rates applicable to nonresidential property, including commercial land and buildings, debts, goodwill and intellectual property, also range from 1% to 9% but if value of property being transferred is over [Euro]150,000 rate of duty is 9%. Transfers of shares attract rate of 1% of value of consideration or, where transfer constitutes voluntary disposition, at rate of 1% of market value of shares. Various reliefs from stamp duty are available for company reconstructions. Finance Act 2006 abolishes Capital Duty (previously 0.5%) from 7 Dec. 2005 which prior to that date was chargeable on actual value of capital contributed for shares of Irish capital companies that have their registered office or central place of management in Ireland.

Finance Act 2008 provides for introduction of e-stamping of instruments for stamp duty purposes and payment of taxes and submission of tax returns online. Service is expected to commence in mid 2009.

See also category 11 Employment, topic 11.06 Social Insurance.

23.07 TAX INCENTIVES AND EXEMPTIONS:

Tax Relief.

Mining companies get free depreciation for cost of plant and machinery, allowances for abortive exploration, annual depletion allowance and allowances for cost of exploration. Allowance is also available for expenditure incurred by person on rehabilitation of site of qualifying mine following closure of mine.

Profits or gains from occupation of woodlands are exempt from tax, however, exemption in respect of stallion services will not apply after 31 July 2008.

Depreciation allowance may be deducted in computing profits; there is single rate annual wear and tear allowance of 12.5% given on straight line basis over eight years for plant and machinery provided after 4 Dec. 2002. This applies to both new and second hand plant and machinery. Allowances are available at various rates in respect of industrial buildings, hotels, and farm buildings.

Profits or gains arising out of publications, production or sale of original and creative work written, composed or executed either solely or jointly by individual in State and not elsewhere are exempt from income tax, provided that Revenue Commissioners determine that work has either cultural or artistic merit or is generally recognized as having cultural or artistic merit. “Work” means book or other writing, play, musical composition, painting or other like picture or sculpture. Relief is now extended to individuals who, though not resident in State, are ordinarily resident and domiciled in State and not resident elsewhere.

Income from patent royalties accruing to Irish residents from certain qualifying patents devised in Ireland (prior to 1 Jan. 2008) or in European Economic Area (“EEA”) (after 1 Jan. 2008) by those residents are exempt from tax and patent dividends paid on certain qualifying shares are also exempt from Irish tax. From 1 Jan. 2008, this relief is subject to annual limit of [Euro]5,000,000. Relief is restricted where royalties are from connected persons.

Tax deductions are available to individuals for investments in qualifying Irish film companies. Deduction available is 80% of investment made, subject to maximum investment of [Euro]31,750 per annum. Finance Act 2008 extends qualifying period from 31 Dec. 2008 to 31 Dec. 2012 and also increases overall ceiling on qualifying expenditure for any one film from [Euro]35 million to [Euro]50 million. This is subject to EU clearance.

Finance Act 2006 limited extent to which individuals can shelter income tax for tax year 2008 and subsequent years. Provision operates so as to restrict benefit to individual taxpayers of certain specified reliefs so that individual cannot obtain benefit where broadly amount of specified reliefs in any one tax year exceeds 50% of their adjusted income.

Unilateral credit relief is available for taxes on profits in branches located in countries where Ireland does not have tax treaty, or where treaty may not provide for credit relief. Where Irish company has branches in more than one country, Irish company can pool its foreign tax credits between different branches. Company can carry forward excess credits on dividends, but not on branch profits.

Tax credit may be claimed in Ireland for capital gains tax suffered in country with which Ireland has tax treaty, even though treaty may not provide for such credit. Countries are Belgium, Cyprus, France, Germany, Italy, Japan, Luxembourg, the Netherlands, Pakistan and Zambia.

Finance Act 2007 introduced incentive scheme for tourism facilities in mid-Shannon region, effective from 1 June 2008. Relief consists of entitlement to accelerated capital allowances over seven years for expenditure incurred on conversion, refurbishment or construction of certain buildings and structures. Qualifying period is three years from date of commencement of scheme.

23.08 TREATIES AND AGREEMENTS:

Double Taxation Relief.

Ireland has double tax treaties with 45 countries. Tax treaties take precedence to extent they conflict with Irish law. Treaties generally follow 1977 model treaty of OECD. List of agreements in force on 1 Jan. 2008 is as follows: Albania, Australia, Austria, Bahrain, Belarus, Belgium, Bosnia & Herzegovina, Bulgaria, Canada, China, Chile, Croatia, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Georgia, Germany, Greece, Hungary, Iceland, India, Israel, Italy, Japan, Korea (Rep. of), Latvia, Lithuania, Luxembourg, Macedonia, Malaysia, Malta, Mexico, Moldova, Netherlands, New Zealand, Norway (revised), Pakistan, Poland, Portugal, Romania, Russia, Serbia, Slovak Republic, Slovenia, South Africa, Spain, Sweden, Switzerland, Turkey, U.K., U.S., Vietnam, Zambia.

New treaties with Armenia, Kuwait, Montenegro, Morocco, Saudi Arabia, Thailand, United Arab Emirates and protocol with South Africa are concluded and expected to be signed soon. Negotiations for new agreements with Argentina, Azerbaijan, Egypt, Hong Kong, Singapore, Tunisia and Ukraine at various stages. Existing treaties with Cyprus, France, Germany, Italy, Korea and Pakistan are in process of re-negotiation.

23.09 VALUE ADDED TAX:

Value added tax (VAT) is levied on value added at each stage of production and distribution cycle. It is chargeable on supply of certain goods and services within Ireland. Goods imported into Ireland from countries outside EU are subject to VAT at point of entry at same rate that applies to sale of similar goods within Ireland.

VAT is not payable at point of entry on goods imported by Irish registered traders from another EU State. Instead this constitutes intra community acquisition precipitating simultaneous charge and reclaim, for Irish trader.

Any person, other than employee, who supplies taxable goods or services within Ireland in course of business and whose annual turnover exceeds, or is likely to exceed, [Euro]37,500 ([Euro]35,000 prior to Finance Act 2008) from services or [Euro]75,000 ([Euro]70,000 prior to Finance Act 2008) from goods must account for VAT. Person whose annual taxable turnover is below threshold is not required to account for VAT but may voluntarily elect to account for VAT. Person who supplies only goods or services that are exempt from VAT is not eligible to account for VAT or to register voluntarily.

In computing amount of VAT payable, taxable person may deduct VAT paid on purchase of most goods and services as well as VAT paid on imported goods that are used for purposes of taxable business.

Persons who obtain, for business use, certain services from abroad, including advertising, banking, legal and insurance services, must account for VAT on amount charged for those services, as if they had supplied services.

VAT rates vary as follows: standard rate is 21.5%; 13.5% for construction services, hotel accommodation, short-term car rentals, newspapers, electricity, hotel and restaurant meals, cinema admission, general agricultural and veterinary services, driving tuition, and general repair and maintenance services etc.; 4.8% for livestock, live greyhounds and hire of horses; 0% on necessities, including children’s clothing, food, oral medicines, certain books, certain medical equipment and appliances, and exported goods etc. Exempted activities include insurance services, medical, dental and optical services, certain banking and stock exchange activities.

VAT is not payable on imports from other EU states by VAT registered persons.

In addition, traders who export 75% or more of their goods can import goods free of VAT. They may also be entitled to receive goods and services from suppliers at zero rates.

Finance Act 2008 introduces new measures in relation to supplies made by subcontractor to principal contractor in that these will now be accounted for by principal on reverse charge basis, i.e. principal contractor, as recipient of supplies, accounts for, self declares and pays taxes on such services.

Transactions involving buildings and land are subject to specific and complex provisions. Major changes have been implemented in relation to how VAT is applied to sale and lease of commercial property, effective from 1 July 2008, in effort to simplify and provide greater clarity and certainty in this area. There are extensive transitional rules in effect relating to existing properties. Supply of residential property remains unchanged in that first supply of residential property is always liable to VAT.

23.10 WEALTH TAX:

Annual Wealth Tax.

None.

24 TRANSPORTATION

24.01 MOTOR VEHICLES:

Motor vehicles must be licensed and annual road tax paid according to level of CO2 emission calculated in grams per kilometer as follows: less than 120g at [Euro]100; 121g – 140g at [Euro]150; 141g – 155g at [Euro]290; 156g – 170g at [Euro]430; 171g – 190g at [Euro]600; 191g – 225g at [Euro]1,000 and over 225g at [Euro]2,000. Goods vehicles are taxed at progressive rates. Vehicles over 30 years pay reduced tax of [Euro]50.

Imported motor vehicles must also be registered with Revenue Commissioners and vehicle registration tax paid. Registration tax is paid on CO2 emission level of vehicle in grams per kilometer. For cars and certain mini-buses, rates of vehicle registration tax for vehicles are as follows: 0g – 120g at 14.00%; 121g – 140g at 16.00%; 141g – 155g at 20.00%; 150g – 170g at 24%; 171g – 190g at 28.00%; 191g – 225g at 32.00% and over 225g at 36.00%. There are temporary and permanent reliefs available where person is transferring his residence.

Fee for driving license is [Euro]15 for three years or [Euro]25 for ten years and there is test.

Owners of motor vehicles must insure against third party risks including injuries to passengers. Road Tax and Insurance Discs must be displayed on vehicles.

25 TREATIES AND CONVENTIONS

25.01 EUROPEAN UNION:

EU law has direct effect in Ireland and takes precedence over domestic law. Ireland became member of European Economic Community (EEC), European Coal and Steel Community (ECSC) and European Atomic Energy Community (EURATOM)—collectively known as “three communities”—on 1 Jan. 1973. In 1987, Ireland ratified Single European Act which amended constitutional treaties of European Communities and set about completing internal market. Ireland ratified Treaty on European Union (“Maastricht Treaty”) on 23 Nov. 1992 which came into effect on 1 Nov. 1993. It gave rise to change in terminology whereby former EEC Treaty is now referred to as European Community Treaty (ECT). Secondly, newly created “European Union” comprises three “pillars”. Three Communities (EC, ECSC and EURATOM) form first pillar; Common Foreign and Security Policy (CFSP) forms second pillar; and Common Justice and Home Affairs (CJHA) forms third pillar. Other new powers and policy areas introduced by Treaty include Economic and Monetary Union (EMU), European Citizenship, Consumer Policy and Education and Health. Ireland ratified Amsterdam Treaty on 22 May 1998 which entered into force on 1 May 1999. That Treaty permits accommodation of varying degrees of participation by Member States of EU in particular agreed EU policy areas and strengthens commitment to social and fundamental rights. Constitutional referendum enabling Ireland to ratify Nice Treaty was passed on 19 Oct. 2002 and State ratified Treaty on 18 Dec. 2002. Treaty aimed to modifying aspects of organization of EU so as to facilitate enlargement of Member States. It entered into force on 1 Feb. 2003. Ireland did not ratify Treaty establishing Constitution for Europe prior to its de facto abandonment. “Reform Treaty” agreed at European Council meeting of 22-23 June 2007 at Lisbon was submitted to electorate for ratification on 12 June 2008 but was rejected by 53.4% to 46.6% Second referendum held on 2 Oct. 2009 carried by 67.1% for and 32.9% against.

25.02 TREATIES:

Art. 29.5.1 of Irish Constitution provides that Irish government, exercising its executive power, may enter into international agreements (including treaties and conventions), but such agreements must be laid before Dáil Éireann. If terms of agreement involve charge on public funds, State is not bound by agreement unless its terms have been approved by Dáil. (Art. 29.5.2). Latter requirement does not apply in case of agreements or conventions of technical or administrative nature. (Art. 29.5.3).

Domestic effect of international agreements is governed by Art. 29.6 of Irish Constitution which takes pronounced dualist stance. It provides that no international agreement shall be part of domestic law of State except as may be determined by legislature. Accordingly, for international treaty to be source of law in domestic legal context, it must have been specifically incorporated into domestic law, by means of legislative enactment or constitutional amendment. Various constitutional amendments have been necessary to enable Ireland to participate in EU and to ensure direct applicability and supremacy of EC law in domestic law (see topic 25.01 European Union).

Ireland is not party to Vienna Convention on the Law of Treaties. However, since terms of Convention form part of customary international law, State’s practice generally follows rules set out in Convention.

Bilateral Agreements between Ireland and various other countries, too numerous to mention, have been entered into. These include agreements for avoidance of double taxation with respect to taxes on income, entered into with various countries. (See category 23 Taxation, topic 23.08 Treaties and Agreements, subhead Double Taxation Relief.)

Ireland is party to (1) Brussels and Lugano Conventions on Jurisdiction and Enforcement of Judgments; (2) Rome Convention on Contracts; (3) Hague Convention on the Service of Documents in Other Jurisdictions; (4) Convention on Service Abroad of Judicial and Extra Judicial Documents in Civil or Commercial Matters; (5) United Nations Convention on Recognition and Enforcement of Foreign Arbitral Awards; (6) Convention Abolishing the Requirement of Legalization for Foreign Public Documents.

There is no authoritative list of treaties and conventions to which Ireland is party in existence, although most are published in Irish Treaty Series published by Department of Foreign Affairs. UN treaty collection website contains information on Ireland’s participation in multi-lateral treaties concluded under auspices of that organization: http://untreaty.un.org. Ireland’s participation in European treaties concluded under auspices of Council of Europe can be verified by accessing European Treaties Series website: http://www.conventions.coe.int.

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ISRAEL LAW DIGEST

—Scope —

Revised for 2009 edition by

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See category 6 Courts and Legislature, topics 6.02 Law Reports, Codes; 6.05 Statutes.

Note: This revision incorporates legislation through Dec. 31, 2007 and some *2008* legislation.

1 INTRODUCTION

1.01 CURRENCY:

Unit of currency is Israel New Shekel (NIS). Currency Law of 1985 changes old currency, Israeli Shekel (IS) to New Shekel, with banking system converting to new currency on Jan. 1, 1986. One thousand IS equals one NIS. Since 1955 the Bank of Israel is the central state bank and is the issuing bank of the Government. Currency Control Law 1978 has been amended to authorize dealings in foreign currency by all Israeli residents.

Exchange Control is now governed also by 1998 Currency Control Permit and Regulations, as amended from time to time.

1.02 GOVERNMENT AND LEGAL SYSTEM:

A formal Constitution of State of Israel has not yet been promulgated. Present Constitution is based on Declaration of Establishment of State of Israel, dated 14th May, 1948, on Law and Administration Ordinance, 1948, and on Transitional Law of 1949. By a resolution of 13th June, 1950, Knesset resolved to impose upon Constitution, Law and Justice Committee the task of preparing a draft constitution. Constitution would thus be built up chapter by chapter. So far, 11 such chapters have become law: Basic Law—The Knesset (1958), Basic Law—Israel Lands (1960), Basic Law—President of the State (1964), Basic Law—The Government (1992), Basic Law—The State Economy (1975), Basic Law—The Army (1976), Basic Law—Jerusalem Capital of Israel (1980), Basic Law—State Comptroller (1988), Basic Law—Freedom of Occupation; and Basic Law—Human Dignity and Liberty (1992). Further Basic Law (1980) substituted reference to principles of Jewish Traditional Law for reference to U.K. common law and equity as prescribed by §46 of Provisional Order in Council 1922 now repealed. (Basic Law—Appointment of Judges [1984]).

The Knesset.

Basic Law—the Knesset, and Knesset Election Law, 1955 combine all previous laws in reference to sovereignty and elections of Knesset, the legislature of Israel. Knesset is elected by all Israeli citizens over age of 18 years in direct, national election by party list. Knesset consists of only one chamber, in which there are 120 members. Instead of country being divided into election districts, any person or group of persons who meet criteria provided by law can present their candidacy for Knesset. Generally, each party presents list of its candidates for Knesset. Party chooses members of list and order of them. Voters have no influence as to composition of lists, and may merely choose whether or not to vote for it. Term of Knesset is four years. Term may be shortened by adoption of special law dissolving Knesset and fixing date for elections. Except where term is shortened, elections take place on same day all over country and election day (fixed by law as third Tues. in Hebrew month of Cheshvan, which is usually Nov.) is public holiday. Knesset holds two sessions a year, one beginning within four weeks after Hanukkah (usually close to Christmas), other beginning within four weeks after Israel's Independence Day (5th day of Hebrew month of Iyar, usually May). Aggregate duration of two sessions is not less than eight months. Knesset can also be convened upon demand of 30 members. Limits in reference to election propaganda are provided by law, and State officials, army officers, judges, etc., are not allowed to participate in election campaign. Recent amendment forbids those party lists from standing for election which call for negating of Israel's Jewish or democratic character, or which incite racism.

President of Israel is elected by Knesset for a period of seven years. 1964 Law forbids holding of office of President for more than one period of seven years. President's main powers are (1) to sign laws; (2) receive reports from government; (3) receive and accredit ambassadors; and (4) sign treaties and grant pardons.

Government consists of Prime Minister and Ministers of State. Prime Minister is elected directly by all Israeli citizens over age of 18, in national elections. Elected Prime Minister then selects ministers of his Government. Government which does not enjoy confidence of Knesset must resign. If Prime Minister proves unable to form government, new elections will be held. All powers which were formerly vested in British Crown or Mandatory Government, are now vested in Government of Israel, and are exercised through various Ministers of State. Balance is created by empowering majority of members of Knesset to vote no confidence in government with at least 61 votes and to vote no confidence in Prime Minister with 80 or more votes, which allows for mere changing of Prime Ministers without having to dissolve Knesset. Latter, in certain circumstances and with consent of President can order dissolution of then sitting Knesset and holding of new elections.

Law and Administration.

Laws which existed on date of establishment of State of Israel on 14th May, 1948, continue to be effective insofar as they are not inconsistent with establishment of State, and insofar as they have not been abrogated or modified by laws passed since establishment of the State of Israel.

Citizenship.

The Law of Return, 1950, as amended, sets forth entitlement of Jew to acquire Israeli citizenship. For purpose of this Law, Jew is (1) anyone born of Jewish mother or who converts to Judaism and (2) who is not member of another religion. Under Citizenship Law, 1952, as amended, Israeli citizenship is acquired in one of following ways: (1) Any Jew who has emigrated or emigrates to Israel and expresses his desire to settle there, may acquire Israeli citizenship unless (a) he ceased to reside in Israel before July 14, 1952 or (b) being a foreign citizen he makes or has made a declaration that he does not desire to be an Israel citizen and in case of an infant, his parents have made such a declaration; (2) former Palestine citizen becomes an Israel citizen if he was resident in Israel on July 14, 1952 and fulfils certain other conditions; (3) any person born in Israel is an Israel citizen if his mother or father is an Israel citizen; (4) stateless person born in Israel after setting up of State may acquire nationality by filing a request to such effect between his 18th and 21st birthdays provided he has resided in Israel five years continuously prior to application; (5) Israel citizenship may also be acquired by naturalization, conditions being (a) residence in Israel at time of and for three out of five years prior to application, (b) intention to reside permanently in Israel, (c) some knowledge of Hebrew language and (d) renunciation of any other citizenship. An infant who is a resident of Israel or one of whose parents is an Israel citizen may apply for grant of citizenship. Israel citizen living abroad may renounce his citizenship. Citizenship acquired by naturalization, may be lost in certain circumstances. Save in case of naturalization, Israel citizenship does not require giving up of any former citizenship.

Freedom of Information Law—1998.

According to this law every Israeli citizen and resident has right to receive information from public authority. Law provides for appointment of certain people to handle giving of information to public when needed and will also handle requests from public in accordance with law.

Law obligates government to publicize list of all public authorities required to comply with Law and must also publicize information as to its role and how to access person responsible for providing information hereunder.

Law specifies nature of information which must be made available as well as that which need not be made available. Before providing information which may be injurious to third party public authority is obliged to inform such third party in writing as to nature of information requested and providing him with opportunity to object. In event of third party objection, person requesting information has right to petition Administrative Court to overrule objection. Should requested information be ruled to be privileged, decision will be referred to Supreme Court. Law lists various bodies not covered by provisions of Law (e.g. Army). Law does not override any previous legislation governing provision of information by public authorities.

1.03 HOLIDAYS:

The following are public or legal holidays for the purpose of the Bills of Exchange Ordinance: Independence Day (also day of rest); Jewish holidays (Passover, first and last days, Pentecost, New Year's, two days, Day of Atonement, and First and Eighth day of Feast of Tabernacles); Christian holidays (New Year's Day—according to both Gregorian and Julian calendar, Ascension Day, Christmas Day, and Easter Monday); Moslem holidays (Shaker Bairam, three days, Qurban Bairam, four days, and Maulid al Nabi, one day).

There are also legal rest days. The Jewish rest days are the days mentioned above under “Jewish holidays,” as well as Saturdays. These need not be the rest days for non-Jews, as they may rest on their respective holidays and other religious days.

Election day is a public holiday.

Anniversaries of deaths of Prime Minister Yitzhak Rabin and Rehavam Zeevi, former Minister in government, are both recorded by various events. They are not legal or public holidays.

1.04 OFFICE HOURS AND TIME ZONE:

Israel is in the Central European (GMT +02:00) time zone. Office hours are generally from 9 a.m. to 5 p.m.

2 BUSINESS ORGANIZATIONS

2.01 AGENCY:

Comprehensive code covering law of principal and agent was promulgated as Agency Law of 1965. Law sets out duties and rights of agents. No special formality is required to establish any agency relationship, and agent may be granted unlimited or limited authority. Corporation may be appointed as agent.

Agents for purchase of military equipment of all kinds for Israel Army or Defence Ministry may not receive commission unless permit granted by Defence Minister.

2.02 ASSOCIATIONS:

Following classes and forms of corporate associations are recognized:

Public corporations are public bodies incorporated according to specific public administration laws, as instruments in implementation and performance of various public activities. Powers and obligations of such corporations are specified in respective laws according to which they were incorporated. Examples of such corporations in Israel are: Bezek, Israel Telecommunications Company, Postal Authority, Bank of Israel, Ports and Rail Authority, etc.

Private Nonprofit Corporations.

(A) Associations ("Amutot").

Associations having two or more members for nonprofit purposes are incorporated according to "Amutot Law" of 1980, and registered at Registrar of Associations, which is body within Ministry of Interior. Other corporations may be members of association. Registration fee is payable. Associations may accrue profits, however same may not be distributed among members. Governing regulations must contain provision for annual meetings, presentation of audited accounts and proper supervision of activities. Associations may acquire "Non-Profit Organization" status ("Malkar") which entitles them to certain tax benefits.

(B) Ottoman Societies.

Form of nonprofit association which preceded "Amutot" (see catchline (A) Associations ("Amutot"), supra). Ottoman Societies are, when compared to "Amutot", subject to less extensive internal and external regulatory and supervisory mechanisms and requirements. After promulgation of "Amutot Law" of 1980 most Ottoman Societies were transformed to associations, with few notable exceptions. One such exception is General Labor Association. New Ottoman Societies may not be incorporated today.

(C) Public Benefit Companies.

Nonprofit companies incorporated according to Companies Law 5759-1999, are in essence "regular" private or public companies (see subhead Private For-Profit Corporations, catchline Private and Public Companies, infra).

Private For-Profit Corporations.

(A) Private and Public Companies.

Principal law governing companies is Companies Law 5759-1999. Companies may assume all legal rights, duties and acts permitted by law as of their date of association.

Private Company.

Any one or more members may form private company which is defined, by way of default, as any company formed pursuant to Companies Law and which is not public company. Private company must include in its Articles of Association following provisions: (a) transferability of shares is limited, (b) public offering of company shares is prohibited.

Public Company.

Any one or more members may form public company. Public company is defined as any company formed pursuant to Companies Law and whose shares are listed for trade in stock exchange market or were offered to public by way stated in company prospectus and are held by public. Public companies are subject to certain duties concerning presentation of audited accounts and proper supervision of activities, and may make public offerings of shares, subject to provisions of Securities Law 1968, which include, inter alia, publishing and filing of prospectus with Securities Authority.

Memorandum of Association is no longer required.

Articles of Association.

Both classes of companies must file Articles of Association upon formation of company with Registrar of Companies, body within Ministry of Justice.

Articles of Association must contain following information with respect to company: (a) name, (b) objects, (c) registered capital, (d) limitation of members' liability.

Company's purpose is to operate according to business considerations for production of profits, and among those considerations may also be taken into account interests of its creditors, employees and public interest. Company may approve promoter's acts, carried out in name of company prior to its incorporation. Name of company, in which liability of shareholders is limited shall at end include notation “Limited” or “Ltd”.

Companies Law factually abolished ultra vires doctrine. Now, company is entitled to be engaged in any legal commercial activity. Moreover, Articles of Association may exclude particular areas or, alternatively, specify certain areas of business. Memorandum of Association no longer required.

Where servant of company acts outside scope of his authority on behalf of company, such acts have no validity vis-à-vis company, unless subsequently authorized by general meeting of company, or by decision of board of directors, where director has acted outside scope of his authority.

Should company wish to alter Articles of Association, alteration may be effected by resolution of ordinary majority of votes at general meeting of company and comes into force at day of adoption of resolution.

Liability of members may be either (a) limited by shares, (b) limited by guarantee, (c) limited by shares and by guarantee, (d) unlimited, (e) limited by either shares or by guarantee with unlimited liability of directors. In company limited by shares, liability of members is limited to amount, if any, unpaid on shares respectively held by them. In company limited by guarantee, liability of members is limited by Articles of Association to such amount as members may respectively thereby undertake to contribute to assets of company in event of company being wound up. In companies limited by shares and by guarantee, liability of members is combination of both amount, if any, unpaid on shares respectively held by members, and amount members may respectively undertake in its Articles of Association to contribute to assets of company in event of company being wound up. Company not having any limit on liability of its members or directors is unlimited company. By far most common form of company is limited by shares.

Companies Law provides for split vote whereby shareholders may vote one way for portion of their shares and other way for rest of their shares at company meetings.

Directors and officers owe duty of care and good faith to company and must disclose any personal interest in contracts of company. Company whose Articles of Association expressly permit same may insure liability of directors and officers and indemnify them, in certain specified circumstances.

Companies Law requires public companies to include as members of their Board of Directors, two individuals known as “external directors”, who are otherwise not connected with company or with interested parties. External director is appointed by general meeting. General Manager is appointed and dismissed by Board of Directors. Boards of such companies are also required to establish control committees, which have extensive review and supervisory powers and are composed of not less than three members of Board, including all of public directors, and excluding chairman of board, managing director, general business manager, comptroller, secretary or any other officer employed by company.

Registration fees are payable in form of registration fees and capital duty. Every company must file annual return with Registrar of Companies containing statutory information in regard to share capital, charges and directors. Public company must also file annual accounts.

Recent Amendments to Companies Law.

Companies Law provides framework according to which company is permitted to indemnify its directors and officers. Companies Law also lists cases in respect of which company is permitted to purchase Directors & Officers (D&O) liability policy for its directors and officers. These provisions are cognitive and cannot be stipulated against. On Mar. 7, 2005 Companies Law was amended and various changes relating, inter alia, to insurance and indemnification of D&O's came into force. Another provision was amended in respect of piercing corporate veil against D&O of company.

Indemnification During Investigation Proceedings.

In respect of indemnification by company for legal expenses, §260 of Companies Law provides that company may indemnify its D&O with regard to reasonable expenses, including lawyers' fees which D&O incurred or with which he or she was charged by court in criminal prosecution in which he or she was acquitted or convicted of offence which does not require proof of criminal intent.

2005 amendment to Companies Law adds new provision under which company is permitted to indemnify its D&O for legal expenses incurred during investigation or proceedings conducted against D&O by authority which was concluded without filing criminal indictment and without imposing monetary liability (i.e. fine or penalty) on D&O, as alternative to criminal proceedings. If fine or penalty is imposed on D&O for felony that does not require criminal intent, then indemnification will be allowed in respect of D&O for his or her legal expenses. In this respect all investigations initiated by authorities in Israel (except for disciplinary proceedings) are considered criminal.

This new amendment was required in order to avoid unreasonable interpretation of Companies Law, according to which Companies Law did not permit indemnification for legal expenses incurred during criminal investigation that did not lead to indictment.

Companies Law does not relate in any way to purchase of D&O policy in respect of coverage for legal expenses of D&O in criminal or other investigation proceedings.

Insurance and Indemnification in Respect of Wrongful Act Perpetrated with Recklessness.

Companies Law (§263) provides that company will not be permitted to purchase D&O insurance policy or to indemnify D&O for breach of duty perpetrated with intent or with recklessness. New amendment clarifies that reckless wrongful act which was perpetrated with negligence can be subject to coverage under D&O insurance policy as well as to indemnification by company. Companies Law does not define “recklessness”, however Israeli courts have interpreted this term as “element” which requires more than pure negligence, but less than intent. (See C.A. 56/77 La Nationale Insurance Co., Ltd. vs. Starplast Industries [1967] Ltd., PDI 33 [1] 337.)

Exemption from Liability.

Under §259 of Companies Law, company may, in advance, exempt its D&Os from all or some of their liability for damage due to breach of duty toward company. New amendment clarifies that, in case of breach of trust by D&O, even if perpetrated in bona fide, company may not exempt D&O from liability. Moreover, in case of breach of duty by D&O with regard to wrongful allocation of shares, new amendment provides that company may not exempt D&O from liability.

Piercing Corporate Veil.

Under §54(b) Companies Law provided that court has authority to pierce corporate veil, and to relate rights and obligations of company to D&O under specific conditions as detailed by Companies Law. This provision has been deleted in new amendment to Companies Law, i.e. court will only have authority to pierce corporate veil as far as shareholder of company is concerned, while court will not have such authority in respect of D&O. Nevertheless, court has authority, under Companies Law, to impose personal liability in tort on D&O. This issue was discussed in several court precedents in Israel, leading judgment being in C.A. 407/89 Zukor vs. Car Security Ltd., and others PDI 48 (5) 661. In said judgment, Supreme Court ruled that principle of personal liability according to which individual must be responsible for his wrongdoing, is basis of Israeli jurisprudence. Personal liability is substantially different from piercing corporate veil, in that personal liability preserves separate legal entity of company. Supreme Court determined that injured party does not need to be disadvantaged by fact that wrongdoing was perpetrated by company. Court ruled that such damage may not be sufficient to pierce company's veil, but justifies imposition of personal liability in tort on D&O.

(B) Foreign Companies.

Companies Law defines foreign company as being all companies and associations, except partnerships, which have been formed or registered outside Israel. No minimal number of members is specified. Foreign company which establishes place of business in Israel must apply to Registrar of Companies for registration as foreign company. Annual return must be filed.

Application for registration by foreign company has to be made within one month from establishment of place of business and is accompanied by following documents: (a) Certified copy and Hebrew translation of incorporation documents, including Articles of Association; (b) list of directors; (c) names and addresses of one or more persons resident in Israel authorized to accept, on behalf of company, service of processes and any notices required to be served on company; (d) certified copy of power of attorney enabling person, ordinarily resident of Israel, to act for company in Israel.

Fee.

NIS 2,200, plus publication fee, or in case of corporation not constituted for purposes of profit of NIS 2,200, is payable on registration of foreign company. For certification of copies of Articles of Association, fee of NIS 2 per page is payable.

(C) General and Limited Partnerships.

Partnership is defined in Partnership Ordinance (New Version) 1975, as relation which exists, regardless of registration, between two to 20 persons carrying on business together with view to profit. Every partnership in Israel must be registered with Registrar of Partnerships—a body within Ministry of Justice—however it is unclear as to whether unregistered partnership may not be considered separate legal entity. Small registration fee is payable. Partnerships may be of general form, in which case all members are jointly and severally liable for all debts of partnership, or of limited form, in which case one or more general partners are liable for all debts of partnership, whereas one or more limited partners are not liable for debts of partnership beyond amounts contributed by them as capital. Companies may be partners in partnership whether limited or general. It is noteworthy that Limited Company (see catchline (A) Private and Public Companies, supra) may be general partner in limited partnership. Partnerships of accountants and attorneys are permitted to consist of 50 partners.

(D) Cooperative Societies.

Seven or more members may form Cooperative Society, objects of which are promotion of thrift, self-help and mutual aid between people of mutual economic interests, according to Cooperative Societies Ordinance. Members may be other corporate forms. No single member may hold over one-fifth of aggregate capital of Society. Registrar of Cooperative Societies is body within Ministry of Labor, and holds extensive authority concerning regulation and winding-up of Cooperative Societies as well as resolution of disputes among Cooperative Societies. Registration fees are nominal. Many agricultural communities, associated enterprises, and joint ventures are incorporated as Cooperative Societies.

Government companies are either private or public companies (subhead Private For-Profit Corporations, catchline (A) Private and Public Companies, supra) in which Government of Israel holds more than half of voting power or right to appoint more than half of directors. Subsidiaries of Government companies, in which Government company holds more than half of voting power or right to appoint more than half of directors, are subsidiary Government companies.

Government Companies Law of 1975 regulates formation, management and winding-up of government companies and subsidiary Government companies and also provides for compensation for minority shareholders in companies which become subject to Law, appointment of directors on behalf of State and of managing directors, and appointments to Government companies of accountants, legal advisers and internal comptrollers. Resolutions of Government companies on certain matters require Government ratification. Some of provisions of Law also apply to companies in which State has not more than half voting power, or right to appoint not more than half directors. Various requirements of this Law may be waived by Government, if necessary, to enable offering abroad of shares of Government company.

See also category 3 Business Regulation and Commerce, topic 3.14 Securities.

2.03 BUSINESS NAMES:

Under the Registration of Business Names Ordinance 1935, every individual or firm carrying on business under a business name, i.e., name which does not consist of true surname of individual, or of true names of all partners, must register name as business name. Particulars required to be furnished under Ordinance have to be furnished within 15 days after person or firm commences business under business name. Nominal fee is payable.

3 BUSINESS REGULATION AND COMMERCE

3.01 BANKS AND BANKING:

No banking business may be transacted in Israel except by a bank registered under provisions of Companies Law (which replace Companies Ordinance). Foreign company may transact banking business if registered as foreign company under Companies Law.

Bank may not operate in Israel unless licensed by Governor of Bank of Israel, under Banking Law (Registration) 1981, subject to compliance with Banking Ordinance 1941, as am'd. Purchase and sale of controlling rights in banks require permit of Governor. Banks Law provides for fulfilment of certain conditions preliminary to registration especially by fixing minimum of authorized and paid-up capital of banks operating in Israel. There are also provisions in regard to returns to be furnished. Under Bank of Israel Law 1954, which constituted Bank of Israel—The Central State Bank—Bank of Israel is given certain powers in regard to control of banking institutions, especially in respect of liquidity, grant of credits, reserves, and rates of interest. 1976 amending law provides for discharge of liabilities, postponement of payments, addition of interest and linkage differences when banking services are disrupted by labour disputes. Banking Law (Service to Customer) 1981 places obligation on banks to give customers proper banking services with penalties for misleading or unfair actions. Rules governing use, validity and rights and obligations of issuers and holders of credit cards have been embodied in new law adopted June 1, 1986.

Legislation has been adopted to prevent money laundering.

Investment advisors must be licensed. Banks are obliged to sell pension, provident and higher education funds previously owned and operated by them. Operators of and advisors to such funds must be licensed.

3.02 BILLS AND NOTES:

Principal statute governing Bills and Notes is Bills of Exchange Ordinance (New Version) 1957 (as amended) which follows substantially English Bills of Exchange Act of 1882.

Inland and Foreign Bills.

An inland bill is one which is, or on its face purports to be (a) both drawn and payable within Israel, or (b) drawn within Israel on some person resident therein. Any other bill is a foreign bill.

Inland bills must be stamped before execution. Foreign bills can be stamped after execution, before presentation for payment. Bill of exchange which has been dishonoured by nonacceptance can now be executed by summary procedure whereby bill of exchange, promissory note or cheque may be executed as though judgment had been given. Amount stated in bill shall be collected in accordance with 1968 Execution Amendment Law with addition of interest so fixed therein, and if no interest is fixed therein, with addition of interest at rate fixed in Adjudication of Interest Law 1961 from date of payment of bill or from date of its presentation for payment. Person wishing to execute bill shall file application to Execution Office supported by affidavit verifying facts stated therein. Debtor may oppose application and Chief Execution Officer shall stay application and refer matter to court. For purposes of hearing in court, opposition shall be regarded as application for leave to defend in summary proceedings under Civil Procedure Regulations 1984. When bill has been dishonoured by nonacceptance, or by nonpayment, notice of dishonour must be given to drawer and each indorser, subject to limited exceptions. Notice of dishonour may be given either to party himself, or to his agent in that behalf. It must be given within a reasonable time, which normally is three days after dishonour of bill.

The provisions in regard to presentment for acceptance, acceptance, and issue of bills in a set do not apply to promissory notes.

The provisions in regard to presentment for payment apply to promissory notes, only where the promissory note is in the body of it made payable in a particular place, in which case it must be presented for payment at that place, in order to render the maker liable.

Limitation of Actions.

No action on a bill of exchange, cheque or promissory note can be maintained against any party thereto, other than an indorser, after expiration of seven years, or against an indorser after expiration of two years from time when cause of action first accrued to the then holder against such party. Where a bill is payable after sight, presentment for acceptance is necessary in order to fix maturity of instrument. When a bill payable after sight is negotiated, holder must either present it for acceptance, or negotiate it within a reasonable time, provided always that a bill payable after sight must be presented for acceptance within six months of its date, or such shorter period stipulated for either by drawer or by an indorser, or such longer period not exceeding 12 months as may be stipulated by drawer. Failure in regard to presentment discharges drawer and all indorsers prior to holder.

A bill must be presented for payment in accordance with the following rules: (a) where a bill is not payable on demand, presentment must be made on the date it falls due; (b) where a bill is payable on demand, then presentment must be within a reasonable time after its issue, in order to render the drawer liable and within a reasonable time after its endorsement, in order to render the indorser liable. Presentment must be made at a reasonable hour, on a business day, at the proper place, excluding therefore legal holidays. The legal holidays include the State holidays and certain religious days of Jewish, Moslem and Christian communities.

Conflict of Laws.

Where a bill drawn in one country is negotiated, accepted or payable in another the rights, duties and liabilities of the parties are determined as follows: (1) Validity of the bill as regards requisites of form is determined by the law of the place of issue; validity of a supervening contract (e.g., acceptance, endorsement, etc.) is determined by the law of the place where such contract was made. (2) Interpretation of the drawing, endorsement or acceptance is determined by the law where the contract was made, provided that where an inland bill is indorsed in a foreign country the endorsement must, as regards the payer, be interpreted according to the law of Israel.

3.03 BROKERS:

There is limited legislation in regard to brokers. Brokers must be licenced by District Commissioner. Licences are renewable annually. Tariff of brokerage fees for licenced brokers is fixed by law. Usual fees range from 1% to 5% of price of object sold. When selling companies, brokers may receive securities instead of or in addition to monetary brokerage fees.

3.04 COMMERCIAL REGISTER:

No special registration required but see topic Licences, Business and Professional; category 2 Business Organizations, topics 2.02 Associations, 2.03 Business Names.

3.05 CONSUMER PROTECTION:

Consumer Protection Law of 1981 forbids dealer in goods or services to mislead consumer by act or failure to act, in writing or verbally in any material matter affecting transaction, inter alia re quality, nature, quantity and type of goods and/or services, measure, weight, form, components, date of delivery of goods or supply of services.

Dealers are also required, when advertising special sale, to mention exact amount of items offered on special sale and amount of items offered for lowest price as long as price of goods or service does not rise above 50 NIS and must hold reasonable stock of goods offered on sale.

Dealer is likewise forbidden to exploit in any way, reduced circumstances, physical or mental deficiency, ignorance, language, lack of experience or to exercise undue influence to induce transaction on unreasonable or abnormal terms.

Dealer is obliged also to disclose material defects known to him.

Misleading advertisements, or packaging are forbidden.

Dealers are obliged to provide personal (not mechanical or electronic) telephone arrangements for complaints by customers.

Detailed Regulations govern credit sales, interest calculation, marking of goods on package and advertising directed at reaching minors. In 2005 law was amended to require disclosure of dealer's policy with respect to return of merchandise.

Representative action (class action) can, with permission of court hearing matter, be submitted by consumer or consumer organization.

3.06 CONTRACTS:

Israeli Law broadly follows English rules of common law and equity. There are also relics of Turkish laws and there is a growing body of legislation on contracts. Contract is formed by offer and acceptance. To great extent Israeli legislation has either codified English Common Law or borrowed from models such as American Uniform Commercial Code. One notable departure is absence of any requirement of consideration as basis for contract. (The Gift Law 1968 however retains concept of consideration where gift is defined as ownership of property otherwise than for consideration.) What is paramount under Contracts Law 1973 is intention of parties to enter into agreement.

Several laws have replaced Turkish legislation and lay down general rules in respect of various types of contract. These are Agency Law 1965, Guarantee Law 1967, Pledges Law 1967, Bailees Law 1967 and Sale Law 1968. It is always possible to contract out of these Laws.

Contract Law.

Contracts (General Part) Law, 1973, contains codification of general part of law of contract, which broadly follows principles of English Law of Contract which have hitherto been accepted by courts. However, there are some departures from English law, e.g., consideration is no longer required to create enforceable contract. Law came into force on Jan. 1, 1974.

See also topics 3.05 Consumer Protection, Restrictive Trade Practice, Sales; categories 2 Business Organizations, topic Agency; Debtor and Creditor, topic Pledges; Mortgages, topic Mortgages; Property, topics Landlord and Tenant, Moveables.

Excuses for Nonperformance.

Contract is void in case of fundamental mistake by one of parties to contract, illegality and impossibility of performance. Impossibility must be literal impossibility. Presence of a material misrepresentation, duress or undue influence may make contract voidable by non-offending party.

Notices Required.

Notice of cancellation of contract for fundamental breach must be given within reasonable time after party becomes aware of breach. If breach is not fundamental, party in breach is given period of grace to remedy breach and if necessary notice of breach is given within reasonable time of elapse of such period. Period of grace is not required to be notified in writing. (Law of Contracts [Remedies for Breach of Contract] 1970 §§7-8).

Notice is required for set-off in case of money debts owed by one party to another in same transaction whether liquidated or not, and if not in same transaction, in case of liquidated debts only. (Law of Contracts [General Part] 1973, §53).

Purchaser of goods must give immediate notice to vendor after inspection required to be made on delivery if goods are found not to be as ordered, or as soon as defect discovered if concealed, otherwise purchaser has no claim against vendor. (Law of Sale 1968, §14).

Vendor must give notice to purchaser of any third party claim against goods supplied which he knew of or should have known of before delivery. (Law of Sale 1968, §18).

Applicable Law.

English rules of conflict of laws apply and “proper law of the contract” is applicable law: If parties choose a law in contract, this will almost invariably be applicable law. As regards contracts for sale of goods Uniform International Commercial Code applies from Aug. 18, 1972.

Government Contracts.

There are no special forms and Government is generally liable for its contracts and can be sued on them although injunction and specific performance are not available against State. Obligatory Tenders Law (1992) requires Government companies and bodies to carry out public tenders as condition for contracting.

Remedies for breach of contract have been given statutory force by Contracts (Remedies for Breach of Contract) Law 1970. Subject to provisions of Law, injured party may claim enforcement or rescission of contract and/or damages. Enforcement is similar to equitable remedy of specific performance and is granted except where contract is incapable of performance, where enforcement requires compelling carrying out of personal work, where enforcement requires unreasonable amount of supervision by court or it is inequitable in circumstances of case. Rescission is permissible in case of fundamental breach but where breach is not fundamental, reasonable time must first be given to party in breach to remedy breach. Damages are granted for injury caused by breach and its consequences and which party breaking contract foresaw or should have foreseen as a probable consequence of breach at time contract was made.

Breach of Contract.

Supreme Court has summed up 1970 Law regarding relief on breach of contract (a) that breach of contractual condition, including date of payment, agreed as being “basic” is fundamental breach; (b) on fundamental breach injured party may, and on ordinary breach, he must give an extension which other party may use to fulfil his contractual obligation within reasonable time of grant of extension; (c) right to regard contract as void and must be exercised within reasonable time after lapse of such reasonable period, in case of ordinary breach or immediately in case of fundamental breach; (d) right to regard as void, revives if extension given, even if not obligatory by law, after lapse of reasonable extension period. Supreme Court has also held that in cases where contract is not voided, injured party is entitled to profits realized by party in breach as consequence of breach.

Form.

In general, form of contract is immaterial but certain contracts need to be in writing in order to be enforceable, in particular contracts relating to land and to lending of money and partnerships and agreements with building contractors.

Contractors' Agreements.

1974 law regulates work undertaken by a contractor who is not an employee of person ordering work. It regulates liability of contractor to repair defects, contractor's right to refuse delivery until paid according to agreement, and liability to pay contractor.

Distributorships, Dealerships and Franchises.

There is no specific legislation which regulates distribution and marketing contracts, dealerships or franchises. These contracts are regulated by different legislative enactments, such as Law of Contract, Agency etc.

Contracts on these subjects which do not expressly state period of time during which they will be in force can be revoked at any time by one party communicating to other notice of revocation or termination, given in advance, stipulating reasonable period of time until termination will take effect. Question of reasonableness is decided by courts based on period of time during which contract was in force prior to termination, investments by parties, etc.

Israeli Supreme Court ruled that exclusive distributor to whom exclusive rights were granted in certain area, is not capable of preventing third parties, who purchased their products from source other than original supplier or manufacturer, from distributing their products in same area.

Israeli courts will not normally force parties to continue relationship of principal and distributor, marketing agent or franchisee but will award damages to injured party in case of unjustified termination or insufficient notice.

Warranties.

§11 of Law of Sale 1968 provides that vendor has failed to fulfill his obligations under sale agreement if only part of goods or larger or smaller quantity than agreed upon is delivered, if article supplied differs in kind or description from agreement, if article lacks quality or characteristics required for normal or commercial use thereof or for special purpose for which agreement implies it was purchased, or if article is not, by reference to type, description, quality or characteristics, according to sample or specimen submitted by vendor, unless so submitted without any undertaking of conformity to sample. If vendor does not within reasonable time of receiving notice from purchaser, remedy deficiency in fulfilment of his obligations, purchaser may claim specific performance, rescission or deduct from price payable value of deficiency. (§28 of Law of Sale).

3.07 FRAUDS, STATUTE OF:

See topic 3.06 Contracts.

3.08 INFORMATION TECHNOLOGY, INTERNET AND NEW MEDIA:

The Computer Law of 1995 recognized series of offences related specifically to computers and permitted and forbidden use of computerized information and databases.

In 2001 new law was adopted—The Electronic Signature Law, designed to deal with developments in this field.

Laws dealing with intellectual property have been amended to conform with requirements of Agreement on Trade Related Aspects of Intellectual Property Rights, Including Trade in Counterfeit Goods. Inter alia, these laws provide that computer software will be given same status as literary material for purposes of intellectual property and copyright.

The Companies Law of 1999 permits distribution on Internet of various reports and notices. Various laws require publication on Internet of certain notices by governmental agencies and bodies, subject to regulations governing protection of privacy. Most of courts of Israel publicize judgments on Internet and many laws, regulations and orders are now available on Internet.

3.09 INTEREST:

Under law of 1957, rate of interest chargeable is restricted. Minister of Finance may by order approved by Finance Committee of Knesset (Israel Legislature) fix maximum rate of interest chargeable in respect of commercial transactions of various categories. Where repayment is linked to index, maximum permitted rate is 13%. Courts are authorized to reopen usurious transactions and penalties are provided in case of any breach of law.

3.10 LICENSES, BUSINESS AND PROFESSIONAL:

Business Licencing Law of 1968, empowers Minister of Interior in consultation with Minister of Health to issue Orders requiring certain businesses to obtain licences in order to ensure proper environmental and health conditions, prevention of public nuisances and observation of Town Planning regulations, public safety, prevention of pollution and diseases in livestock. Special provisions are laid down for sale of intoxicating liquors and public entertainments. Comprehensive list of businesses requiring licence has been drawn up in Registration Order of 1973 covering close to 200 kinds of business. Licencing authority is local government or such authority as Minister of Interior may determine. Fine or imprisonment is imposed for noncompliance. Companies pay double fine. Court may order temporary or permanent closing of business convicted for noncompliance. Use of fuels with high sulphur content is prohibited.

See also category 15 Foreign Trade and Commerce, topic 15.05 Foreign Trade Regulations.

Architects.

Under 1958 law all architects must be entered in a register. Qualification: (a) Diploma of Technion, Technical High School; (b) registration abroad entitling to work as architect; (c) actual work for 12 years and examination.

Brokers.

See topic 3.03 Brokers.

Real Estate Agents.

All practicing real estate agents must pass qualification examinations and be licensed by Real Estate Agents Registrar. Agents licence may be revoked if he does not abide by rules of law which inter alia strive to maintain minimal code of ethics.

3.11 MONOPOLIES, RESTRAINT OF TRADE AND COMPETITION:

See topic 3.12 Restrictive Trade Practice.

3.12 RESTRICTIVE TRADE PRACTICE:

Under Restrictive Trade Law, 1988, replacing prior law of 1959, every “restrictive arrangement”, or agreement (i.e., any arrangement or agreement which includes restrictive instructions in reference to price, profits, division of market, quantity or quality of goods) must be registered and receive approval thereof by court, or exemption from compliance with law, from appraiser appointed by Government to oversee restrictions on trade. Failure to comply with provisions of this law constitutes offense punishable by two years imprisonment or heavy fines for each day that offense continues. This law also defines and deals with monopolies and provides that monopolist may not refuse to supply commodity or service, in respect of which monopoly exists.

3.13 SALES:

Sales Law 1968 governs sales of all assets whether movable or immovable but may be contracted out. Usage of parties or of trade may govern sale. Seller is bound to deliver property and transfer ownership therein, delivery being by putting property at disposition of purchaser. If no time is set for delivery there is an implied condition of reasonable time and delivery takes place at place of business of seller. Seller does not fulfil his duty if he does not deliver amount ordered or property of a different nature than that ordered or which does not comply with sample or to accepted usage or which in any other way does not comply with contract. Purchaser may not rely on such unsuitability if he knew of it at time of signing of contract. Purchaser has a duty to inspect property on receipt and must advise vendor immediately of unsuitability. In case of latent defects in goods, purchaser has two years within which to give notice of unsuitability.

Remedies are same as for ordinary breach of contract. In case of unsuitability, purchaser also has right of deduction from price.

International Sale of Goods.

Sale (International Sale of Goods) Law 1971 adopted, for Israel, Uniform Law on International Sale of Goods. Law is now in force. Parties to contract may stipulate that this law will not apply.

Purchaser's Bona Fides.

Rule that a bona fide purchaser of movables in ordinary course of vendor's business, acquires clear ownership, is not affected by fact that said movable was pledged and notice was entered in Register of Pledges. Bona fides for purpose of law of sales, is not necessarily excluded by omission to examine Register of Pledges, even if such omission is negligent.

Sale of Flats.

Special 1974 Law regulates mode of securing monies paid by a purchaser of a flat to seller by providing that if purchaser pays more than 7% of price of flat, seller must either give purchaser a bank guarantee securing all sums paid if for any reason transfer cannot take place, or obtain a policy of insurance from an insurance company covering liability to repay in such a case to purchaser sums paid by him or mortgage flat or a proportional part of area on which it is to be built to secure such repayment or enter a note of sale in Land Registry books provided no mortgage is registered, or transfer ownership to purchaser.

Law provides penalties for breach of this provision.

Protection of Consumers Law 1981 provides penalties for exploitation and misleading of customers in sales and services for private purposes. Customers are to be given full and correct information, regarding goods sold and price thereof in credit and installment sales.

Real Estate Agents Law-1996.

All practicing real estate agents must pass qualification examinations and be licensed by Real Estate Agents Registrar. Agents licence may be revoked if he does not abide by rules of law which inter alia strive to maintain minimal code of ethics.

Price Control.

Price Control Law of 1996 applies to various goods to be specified in Minister's ordinances, whose offices deal, or are concerned with, said goods. These goods must belong to at least one of following categories: (i) their price is not normally controlled by market forces due to monopolistic nature of manufacturer or purchaser; (ii) their manufacture or sale is supported by Government funds; (iii) are deemed “Vital Commodities”; (iv) are scarce; (v) control of their price is instrumental in inflationary control. Where Minister is responsible for such regulated goods, he may establish maximum prices and profits for sale of such regulated goods.

Debits Card Law 1986 regulates use of credit and debit cards issued mainly by banks and extensively used for consumer payments and bank withdrawals.

See also topic 3.06 Contracts.

3.14 SECURITIES:

Under Mutual Investment Trust Law, 1961, company, objects of which are to make as trustee mutual investment in securities, must have certain minimum amount of paid capital and must be connected with another company which will deal with securities.

Securities Law 1968 sets up a Securities Authority to watch over interests of public investing in securities. Offer of securities to public is forbidden except by way of a prospectus permitted by Authority. Law imposes civil liability on directors and experts to purchasers in respect of contents or prospectus. Any person purchasing securities relying on an erroneous statement in prospectus has a right of rescission within a reasonable time. Provisions of law also apply to securities in Israeli companies offered abroad. Authority has power to waive provisions of law in respect of securities of a company registered abroad if satisfied that laws of country of registration adequately safeguard Israeli investors.

By 1981 Amendment “insider trading” by persons holding 10% or more in corporation where shares issued to public or dealt in on Stock Exchange, and by persons holding position in such corporation giving them access to inside information becomes criminal offence punishable by imprisonment or fine; excepted are bona fide transactions, e.g. purchase of qualifying shares, transactions by trustee, liquidator, receiver, transactions by bona fide written contract.

1984 Law protects savings invested in approved savings schemes, Government bonds, provident funds and insurance policies issued in Israel, by forbidding Government expropriation or deterioration of conditions of such savings as to amount and date of redemption, rate and due date of interest, linkage basis and rate of tax.

3.15 WAREHOUSEMEN:

There are no special provisions in regard to warehousemen, except in respect to licensed warehouses approved by the Director of Customs. There are two classes of licensed warehouses, viz., (a) general warehouses to be used for the warehousing of goods generally, and (b) private warehouses to be used only for the warehousing of goods which are the property of the licensee. Licensed warehouses are only warehouses in which dutiable goods may be warehoused prior to the payment of the duty.

General rules as to bailment are now governed by Bailees Law, 1967.

4 CITIZENSHIP

4.01 ALIENS:

See category 17 Immigration, topic 17.01 Aliens.

4.02 IMMIGRATION:

See category 17 Immigration, topic 17.02 Immigration.

4.03 NATIONAL SERVICE:

The Security Service Law, 1959, replaces all previous laws in this connection. Under provisions of law, every male resident of Israel (other than Christians and Moslems) from age of 18 to 26 must serve 30 months compulsory service in Army (extended by Order to 36 months), and from age of 27 to 29, 24 months.

Unmarried women from the age of 18 to 26 must serve 24 months. The Reserve Service Law 2008 rules number of days reserve soldiers can serve in every period of three years. Officer can serve up to 84 days, commander who is not officer can serve up to 70 days and ordinary soldier up to 54 days.

5 CIVIL ACTIONS AND PROCEDURE

5.01 ACTIONS:

Civil procedure is governed by Civil Procedure Rules, 1984. In general, courts will only exercise jurisdiction over persons within territorial limits of state and assumption of jurisdiction will depend on validity of service of process. Rules give a list of events in which courts may grant leave to serve outside jurisdiction. Foreign claims are proved in same way as local claims. Foreign law is a question of fact and is proved by evidence of an expert in law in question. See also topics 5.04 Limitation of Actions, Practice; category 13 Estates and Trusts, topic 13.02 Death.

Limitation of.

See topic 5.04 Limitation of Actions.

Death.

See category 13 Estates and Trusts, topic 13.02 Death.

5.02 DEPOSITIONS AND DISCOVERY:

See also category 10 Documents and Records, topics 10.01 Acknowledgments, 10.02 Affidavits.

For Use Within Israel.

The court or a judge may at any time order that any particular fact or facts be proved by affidavit, or that the affidavit of any witness be read at the hearing, on such conditions as the court or judge thinks reasonable. Where it appears that either party bona fide desires the production of a witness for the court's examination and that such witness can be produced, an order will not be made authorizing evidence of the witness to be given by affidavit.

Affidavits must be in the first person, divided into paragraphs and confined to such facts as the deponent is able of his own knowledge to prove, except on interlocutory applications, in which a statement of the deponent's belief may be admitted provided that the grounds thereof are stated.

Amendment to Evidence Law permits minors to be questioned and cross-examined under special conditions approved by judge in certain penal matters, where minor is not suspect. This can be done without knowledge of parents. Persons with mental disabilities may only be questioned by people with special training.

Within Israel for Use Elsewhere.

Under Legal Assistance Between Foreign States Law, 5758-1998, court may, at request of foreign judicial authority, submitted in form and manner prescribed by regulations, order taking of evidence, production and seizure of documents or other articles, carrying out of search or performance of any other legal act, all subject, unless otherwise provided in this Law, to provisions of any law applying in Israel to performance of these acts. Court may permit witness to be examined by a representative of party to foreign proceedings, if court is satisfied that such representative in competent to examine witness in foreign country. Certain restrictions apply. Minister of Justice is charged with implementation of Law and is authorized to make regulations as to any matter relating to such implementation. In accordance with such authority, Minister of Justice promulgated Regulations for the Enforcement of the Hague Convention 1970 (Taking of Evidence), 5737-1977. Regulations specify required content of request for taking of evidence. Letter of Request should be submitted to Director of Courts in Jerusalem, who will direct same to appropriate court.

Under the Extradition Ordinance, depositions or statements on oath taken in a foreign state, and copies of such original depositions or statements and foreign certificates or judicial documents, stating the fact of conviction may, if duly authenticated, be received in evidence in proceedings for extradition.

Outside Israel for Use Within Israel.

On the application of any party to any civil proceedings, the court may make an order for examination upon oath before any person in any place outside jurisdiction of any witness, and court may give directions as to matters connected with examination. Person directed to take any examination may administer oath and report to court on examination, and conduct of any witness.

5.03 JUDGMENTS:

Enforcement of Foreign Judgments.

Israel is party to bilateral treaties for enforcement of foreign judgments with Austria, U.K. and Germany. By law of 1958, judgments of foreign courts are enforceable if they were given in foreign country by court having jurisdiction to act, and are final and not subject to appeal, and their contents are not in contradiction to laws of Israel or public policy in Israel and they are capable of execution in country in which they were given. Jurisdiction is based upon mutuality and special rules have been provided. See category 8 Debtor and Creditor, topic 8.04 Executions.

5.04 LIMITATION OF ACTIONS:

Actions must be brought within following periods after respective causes of action, including civil wrongs, accrue: (a) in respect of a debt or chattels, within seven years; (b) in respect of unregistered land, 15 years. There is now no limitation period in respect of registered settled land. (c) parties may agree in writing, in separate document, to extend period in case of land, and either to extend it or shorten it in case of movables.

Supreme Court decided in 1955 that suits for specific performance are not barred by any limitation period, but only by laches (delay causing damage).

See categories 3 Business Regulation and Commerce, topic Bills and Notes; Insurance, topic Insurance Companies; also category 23 Property, topic Adverse Possession.

In respect to crimes the following are the periods of prescription: felonies, ten years; misdemeanours, three years; contraventions, one year. Period of prescription runs from date of commission of offence or from date of last step taken in investigation or prosecution of offence in question in respect of felonies or misdemeanours; and in respect of contraventions, from date of commission of offence.

Time limits for bringing of actions under Nazis and Nazi Collaborators (Punishment) Law 1950 and under Genocide (Prevention and Punishment) Law 1950 were abolished in 1966.

Customs prosecutions must be instituted within five years.

Lost Property Law of Return.

Person finding lost property must either return it to its owner or notify police and may keep property or deliver it to police unless police require such delivery, in which case he must comply with requirement. If owner has not been found within four months, he is presumed to have forfeited ownership, in which case it passes into finder's ownership. If, however, finder did not notify police it becomes State property. Previous owner may, however, within a year redeem lost property on paying its value at time of redemption. Goods liable to destruction or live stock may be sold after notifying police and provisions of Law apply to proceeds.

5.05 PRACTICE:

Consolidated and revised Rules of Court in civil actions came into effect on Oct. 1, 1984. Actions are commenced by a statement of claim, answered by statement of defense. English procedure is closely followed with rights of request for further particulars, discovery of documents and interrogatories. New rules provide for preliminary settling of issues by court where necessary. Procedure in cases against Government is same as for other cases.

5.06 PRESCRIPTION:

See topic 5.04 Limitation of Actions; category 23 Property, topic 23.02 Adverse Possession.

6 COURTS AND LEGISLATURE

6.01 COURTS:

The courts of Israel consist of the following: (1) Magistrates' Courts, which deal with civil matters in which the subject matter is of NIS 2,500,000 or less, and recovery of possession and partition of immovable property of any value, and in criminal matters with contraventions and misdemeanours. Claims not exceeding NIS 17,800 where claimant appears in person may be dealt with in Small Claims Court. Minister of Justice may, by Order, empower Magistrates' Court to act as Court of Local Matters and deal with defined matters, mainly municipal and local laws and offences. (2) Family Affairs Courts, which have jurisdiction in all matters of personal status (with exception of matters of administration of absentee property), claims concerning inheritance, maintenance, determination of parentage, custody, guardianship, legal capacity, child adoption, domestic violence, change of names, determination of age, surrogacy, and financial relations between spouses. Also any and all civil disputes irrespective of subject matter or amount of claim, which are result of family conflict, and in which opposing parties are related, are dealt with in Family Affairs Courts. (3) District Courts, which have jurisdiction in all matters save as expressly vested in any other courts, e.g., magistrates' courts, and serve as Appellate Courts for Magistrates' Courts decisions. There are five District Courts, one in each of following cities: Jerusalem, Tel-Aviv, Haifa, Beer Sheva and Nazareth. Admiralty jurisdiction formerly vested in Supreme Court, is now vested in district court sitting in Haifa. There is right of appeal to Supreme Court. (4) Supreme Court, which has jurisdiction as High Court of Justice to which application in nature of mandamus, petition of right, habeas corpus and any other petition against Government, or government officer or any other public authority can be made and also as Court of Appeal, i.e., appellate tribunal from decisions of district court. (5) Municipal Courts, which have jurisdiction over any offences against municipal regulations or bylaws and over certain other specified minor offences. (6) Anti-profiteering courts are attached to each Magistrates' Court and District Court. Tribunal is composed of professional judge or magistrate, and two members of public. (7) Rent Tribunals constituted under 1954 Tenant Protection Law, consisting of magistrate and two members of public, assess rent and value of services in relation to tenancies. (8) By Labour Courts Law 1969 court was set up to deal with all matters arising from employer/employee relationships including national insurance claims. Special Juvenile Tribunals were constituted for first time in 1955. (9) Administrative Courts—The Administrative Courts Law (1992) governs operation of those courts from whose decision appeal lies, of right, to District Courts. (10) Administrative Matters Court. Under new law adopted in 2000, jurisdiction of District Court will gradually be expanded to include power to hear administrative matters that are presently heard by High Court of Justice. Judges of District Court will receive special appointments for this purpose and special rules of procedure will be developed. Administrative Matters Courts will hear (i) appeals against decisions of governmental and quasi-governmental authorities related to municipal taxes, freedom of information, education, tenders, nonprofit societies, licensing of businesses, professional bodies, tourism, planning and building; (ii) administrative appeals relating to cooperative societies, transportation, local authorities, building and planning and antiquities; (iii) administrative suits for damages where cause of action relates to public tenders.

Since 1957 Chief Justice may order criminal case to be reheard either by Court of Appeal or by district court if new facts have come to light, another person has been convicted for same offence, or evidence relied on has been declared false or forged. Chief Justice can also decide to rehear any matter decided by Supreme Court if it involves question of importance, difficulty or novelty.

The religious courts of several recognized religious communities have jurisdiction in matters of marriage and divorce of residents. In other matters of personal status these courts have jurisdiction with consent of the parties concerned. The religious courts have no jurisdiction over foreigners except by consent of all parties.

Courts are empowered by Legal Assistance Between Foreign States Law 1998 to collect testimony, seize documents or articles, conduct searches or carry out other legal proceedings at request of legal authority of foreign country. All such proceedings are to be conducted according to Israel Law. Court is entitled to refuse request for such aid if it is convinced that proceedings are of political character. Law does not apply to extradition proceedings prior to trial or serving of sentence.

See also category 11 Employment, topic 11.02 Labour Relations.

6.02 LAW REPORTS, CODES:

There are official law reports of cases in Supreme Court and in district courts and there are also official reports of cases in rabbinical courts and certain specialised reports such as tax cases.

Certain branches of the law are codified and may be found in books of Mandatory Ordinances and Israeli Statutes. See also topic 6.05 Statutes.

6.03 LEGISLATURE:

See category 1 Introduction, topic 1.02 Government and Legal System.

6.04 REPORTS:

See topic 6.02 Law Reports, Codes.

6.05 STATUTES:

Statutes are published regularly in Official Gazette and there are annual volumes. Justice Ministry publishes English translations of laws.

7 CRIMINAL LAW

7.01 CRIMINAL LAW:

Penal Law 1977 effected comprehensive codification of criminal law and came into force on Apr. 1, 1978. New general and preliminary section came into force on Aug. 8th, 1995, dealing with basic tenets of criminal responsibility. Criminal procedure is codified in Criminal Procedure Law (Consolidated Version) 1982.

Magistrates' Courts can deal with crimes for which penalty is a fine only or imprisonment up to seven years. All other offences are within jurisdiction of district courts. In respect of limited offences, private complaint may be filed, otherwise Attorney-General or his representative is in charge of criminal proceedings on behalf of state.

Capital punishment for murder was abolished in 1954, except in respect of a limited number of offences under Nazis and Nazi Collaborators (Punishment) Law, 1950 and it is still in force under Genocide (Prevention and Punishment) Law 1950 and in respect of treason under §96 of Punishments Law. Law Forbidding Denial of the Holocaust 1986 provides penalties of imprisonment (up to five years) for persons convicted of denying occurrence of Nazi holocaust or publishing praise of and/or identification with acts committed by Nazi regime. 1995 Public Defence Law establishes Public Defence Bureau intended mainly for indigent defendants.

Law of Serving Prison Sentence in the State of the Prisoner's Citizenship.

Law provides for transfer of convicted prisoner to Israel from another State and from Israel to another State in order to serve prison sentence, providing prisoner is citizen of State to which he is transferred.

Said transfer of prisoner shall be carried out only following consent of prisoner, State of Israel and other State. Israeli Court shall take into account period of imprisonment served abroad and period of detention served abroad and in Israel in relation to offence. If foreign judgment imposes sentence of imprisonment which is harsher than maximum sentence of imprisonment in Israel, then period of imprisonment to be served in Israel shall be maximum period of imprisonment provided for by Penal Law of Israel.

See also category 5 Civil Actions and Procedure, topic 5.04 Limitation of Actions.

Law Forbidding Laundering of Capital 2000.

This law formally creates and recognizes various offences related to concealing or disguising source of forbidden property. Forbidden property is defined as property whose source, directly or indirectly, is one of crimes defined in law (crimes related to illegal drugs, trade in weapons, prostitution, gambling, bribery, motor vehicle theft, counterfeiting of money, smuggling etc.). Law provides for punishments that increase with seriousness of offense.

Law Forbidding Discrimination with Respect to Products, Services and Admission to Places of Entertainment and Public Places 2000.

This law forbids discrimination with respect to any of above matters. It provides for penalties for offences.

Criminal Law: Victims' Rights Law, 2001 provides victim of criminal offence with various rights. For example, protection from accused as well as safeguarding victims' residence. Furthermore this law provides victim with information concerning procedures taken in prosecution of accused.

Release on Bail Law 2001 provides terms on which accused may be released on bail and deals with procedures for prisoner pleas as well as pleas by Attorney General against decisions of Release Committees.

8 DEBTOR AND CREDITOR

8.01 ASSIGNMENTS:

Under Assignment of Obligations Law, 1969, right of a creditor, including a conditional or a contingent right, may be assigned without consent of debtor, may be of whole or part of debt and may be conditional or by way of charge. Debtor retains same rights against assignee as he had against assignor and if he pays assignor before receiving notice he is exempt from further payment. Debtor can also assign debt in whole or in part to another with consent of creditor.

8.02 ATTACHMENT:

An application for an attachment may be made in all civil actions whether in contract or in tort. It must be based on a written document or other satisfactory proof as to reasonableness of claim, in which an amount of money is claimed.

An application for attachment may be made prior to or simultaneously with institution of civil proceedings. It can be granted ex parte or in presence of the respondent. It must be supported by an affidavit. A bond or other security is invariably required. Real and personal property may be attached. Property attached may include monies due or property held by third party.

Except in special circumstances such as perishables, property attached cannot be sold before final judgment in action.

Third party claims in opposition to attachment can be heard upon motion in proceedings.

Respondent may obtain release of an attachment against adequate security.

See topic 8.04 Executions.

8.03 BANKRUPTCY:

The principal law governing bankruptcy proceedings is Bankruptcy Ordinance (New Version) of 1980, which follows substantially English Bankruptcy Acts of 1914 and 1926.

A debtor is liable to be declared bankrupt and to have his property administered under the Bankruptcy Law upon committing any of the following acts, which are termed Acts of Bankruptcy: (1) If he makes a fraudulent gift or transfer of his property, or any part thereof; (2) if he makes any transfer of his property, or any part thereof, or creates any charge thereon which would be void as a fraudulent preference if he were adjudged bankrupt: (3) if, with intent to defeat or delay his creditors, he departs out of Israel, or being out of Israel remains out of Israel or departs from his dwelling house or absents himself from his usual place of business or abode; (4) if any of his property has been attached and sold in the execution of the decree of any court; (5) if he files in the court a declaration of his inability to pay his debts or petitions to be adjudged bankrupt (debts in such case must exceed NIS.10,000 due to at least two creditors); (6) if he gives notice to any of his creditors that he has suspended, or that he is about to suspend payment of his debts; (7) if creditor has obtained final judgment against him for any amount, and execution thereon not having been stayed, has served on him in Israel or by leave of court elsewhere bankruptcy notice requiring him to pay judgment debt, or to secure or compound for it, and he does not within seven days after service of notice (or in case service is effected out of Israel, then within time limited) either comply with requirements of notice or satisfy court that he has counterclaim, set-off or cross demand which equals or exceeds amount of judgment debt, and which he could not set up in action in which judgment was obtained.

The expression “debtor” includes any person of not less than 18 years of age of whatever nationality who at the time when any act of bankruptcy was done or suffered by him: (a) was personally present in Israel; or (b) ordinarily resided or had a place of residence in Israel; or (c) was carrying on business in Israel personally, or by means of an agent or manager; or (d) was a member of a firm or partnership which carried on business in Israel.

A creditor is unable to present a bankruptcy petition against a debtor unless: (a) the debt owing by the debtor to the petitioning creditor, or, if two or more creditors join in the petition, the aggregate amount of debts owing to the several petitioning creditors amounts to NIS.50,000, (b) debt is liquidated sum, and (c) act of bankruptcy on which petition is grounded has occurred within three months before presentation of petition. It is also required that debtor be domiciled in Israel, or within a year before date of presentation of petition that debtor (a) has ordinarily resided, or (b) had dwelling house, or (c) place of business, or (d) has carried on business personally or by means of agent or manager, or (e) is or has been member of firm or partnership of persons which has carried on business by means of partner, agent or manager in Israel.

A creditor's petition must be verified by affidavit of the creditor or of some person on his behalf having knowledge of the facts.

At the hearing the court requires proof of the debt of the petitioning creditor, of the service of the petition, and of the act of bankruptcy. A creditor's petition cannot, after presentment, be withdrawn without the leave of the court.

8.04 EXECUTIONS:

Execution Law 1967 provides for various methods of enforcing judgments and for securing defendant's property during course of an action (see topic 8.02 Attachment). Judgment debtor can be detained or prevented from leaving country if Chief Execution Officer considers he intends to impede execution. There is power to attach movable property but certain items such as foodstuffs for subsistence of debtor and family for 30 days, vital household effects and clothes, religious articles and trade implements are exempt. Attached property may be sold after seven days from date of attachment. Immovable property may also be attached and sold after 30 days. Dwelling house is exempt unless it can be shown that debtor has somewhere else to go. Agricultural land required for subsistence is also exempt. There are also provisions for attachment of property in hands of a third party which includes debts due to judgment debtor. There are certain exemptions, most important being wages up to a certain amount. In certain limited circumstances a debtor, who has not, after an inquiry into his means, paid the ordered instalments of his debt, can be arrested. Further form of execution commonly used is appointment of a receiver similar in nature to remedy of equitable execution used in Anglo-Saxon systems.

By virtue of a 1968 amendment to Law, bill of exchange may be enforced directly by execution without obtaining judgment.

Execution of Foreign Judgments.

Under Foreign Judgments Enforcement Law 1958, foreign judgment may be enforced in Israel either by action thereon before a district court or by grant of an exequatur issued by a district court. A “judgment” for this purpose means any judgment or order given by a court outside Israel in any civil proceedings, whereby a sum of money is made payable and includes an award in any arbitration, if award is, in pursuance of law enforced in place where it was made. It is enforceable in same manner as a judgment given by a court in that place. Judgment to which an exequatur has been accorded is executory in Israel. There are certain conditions required for enforcement, particularly reciprocity and that judgment was given according to rules of natural justice.

By amendment to above Law in 1977, foreign judgment will be recognized by Israel Court only if following conditions are satisfied: (a) Agreement with country where judgment was given; (b) Israel undertook by such agreement to recognize judgments of same class; (c) such undertaking applies only to judgments enforceable by Israel Law; (d) all conditions of agreement are fulfilled.

By same amendment debts in foreign currency may be paid in that currency or in Israel currency at rate of exchange in force at time of payment.

Special provisions in regard to the enforcement of foreign awards are contained in the (Arbitration) Foreign Awards Ordinance of 1934. The provisions of this ordinance apply only in respect of territories which have made reciprocal provisions. There is as yet no provision for the reciprocal enforcement of awards between Israel and the United States, but it would seem that an award issued and confirmed in the United States may be enforced in Israel under the Enforcement of Foreign Judgment Rules.

8.05 EXEMPTIONS:

The following are exempt from attachment: (1) a minimum income sufficient to provide the debtor with the necessities of life; (2) things necessary for the support, clothing and lodging of the family of the debtor; (3) machinery and implements used by the debtor in exercising his trade; (4) amount of salary of employees per month (different for single and married persons), but not more than 80% of earnings; (5) dwelling house of debtor unless reasonable substitute dwelling is available.

8.06 GARNISHMENT:

See topics 8.02 Attachment, 8.04 Executions.

8.07 LIENS:

There are various forms of liens which basically follow English Law. Maritime liens are provided by Shipping (Vessels) Law 1960.

8.08 PLEDGES:

Law of pledges is contained in a law with effect from Oct. 1, 1967.

Pledge is a charge on chattel as security for debt and creditor may recoup from pledge if debt not discharged. Pledge is created by agreement between debtor and creditor. Pledge serves as security for interest, costs and damages due from debtor. Debtor may repledge chattel to a further creditor, but prior creditor takes precedence; if, however, prior creditor agrees, later creditor may have equal rights (pari passu).

Any profits from pledge are subject to pledge unless agreed otherwise.

In case of nonpayment, execution is obtained by court order, except in case of banks where such order is not required.

On cessation of debt, rights of pledge terminate and debtor may demand return of pledge.

8.09 RECEIVERS:

A comprehensive code in regard to liquidators is contained in the Companies Ordinance in respect of winding up of companies. Receivers may be appointed in pending proceedings by way of interlocutory remedy or by judgment. Receivers may also be appointed under a debenture according to its terms. Receivers appointed by a court are officers of the court and must submit certain periodical returns and obtain the discharge from the court. See also topic 8.04 Executions.

9 DISPUTE RESOLUTION

9.01 ALTERNATIVE DISPUTE RESOLUTION:

Courts Law (Consolidated Version) of 1984, §79a-79c, provides three alternate methods of dispute resolution: Arbitration, compromise and mediation.

9.02 ARBITRATION:

Now governed by Arbitration Law, 1968. All disputes may be submitted to arbitration. No particular form of submission is required, except that submission must be in writing. Award may be enforced by leave of court in same manner as a judgment or order of court to same effect. Award may be set aside if it has been improperly procured, or if arbitrator has misconducted himself or award is evidently bad. Court will usually stay action brought in dispute which it has been agreed should be submitted to arbitration. Where international convention to which Israel is party, applies to arbitrators, court will stay action, in accordance with such convention. Schedule is attached to law containing rules relating to procedure of arbitration which will apply unless contrary intention appears in agreement.

A foreign award is enforceable as a local award and may be relied upon in any legal proceedings. In order that a foreign award may be enforceable in Israel, it must have been (a) made in pursuance of an agreement for arbitration which was valid under the law by which it was governed, (b) made by the tribunal provided for in the agreement or constituted in manner agreed upon by the parties, (c) made in conformity with the law governing arbitration procedure, and (d) has become final in the country in which it was made, and (e) is in respect of a matter which may lawfully be referred to arbitration under the law of Israel, the enforcement thereof not being contrary to the public policy or the law of Israel.

See also category 8 Debtor and Creditor, topic 8.04 Executions.

9.03 COMPROMISE:

All disputes may, with approval of parties, be resolved by court by way of compromise ruling. Approval by parties may be conferred either in advance, during preliminary hearings, or ad hoc, during subsequent hearings upon such compromise ruling being proposed by court.

9.04 MEDIATION:

All disputes may, with approval of parties, be submitted to mediation. Court will appoint mediator who is either mutually agreed upon by parties, or is selected by court from list of available mediators. Court will stay action brought in dispute, for determined period. Mediation will end and actions will resume in court upon request of either of parties or mediator, or upon expiration of stay. Mediator will attempt to mediate between parties until mutually agreed solution or compromise is reached. Matters discussed by parties during mediation may not later be presented as evidence in court should mediation fail. Court may give agreement attained through mediation force of judgment.

10 DOCUMENTS AND RECORDS

10.01 ACKNOWLEDGMENTS:

Any deed, power of attorney or other instrument in writing made or executed in any place outside of Israel may be proved in any civil cause or matter in Israel if authenticated (a) before an ambassador, minister, chargé d'affaires or secretary of an embassy or legation, or any consul, vice-consul, pro-consul or consular agent of Israel, and attested by a certificate under the hand of such officer and his official seal, or (b) before a notary public and attested by a certificate under his hand and notarial seal and authenticated by any Israel officer mentioned under (a). (Evidence Ordinance [New Text] §33). Certain public documents such as court and administrative documents and notarial acts, are exempt from this requirement because Israel is party to Convention Abolishing the Requirement of Legalisation for Foreign Public Documents. See also categories 10 Documents and Records, topic Affidavits; Treaties and Conventions, topic Treaties.

10.02 AFFIDAVITS:

The jurat, which is a memorandum in regard to the place, time and person before whom the affidavit is made, should be without interlineation, alteration, erasure or obliteration, immediately at the foot of the document to be sworn, and towards the side of the paper, and should be signed by the person administering the oath, at the side of the date of the swearing and the place where the document or the instrument is sworn, and should state that the document or the instrument was sworn before the person administering the oath and that warning was given that document was executed under penalty of perjury. See also topic 10.01 Acknowledgments.

The last paragraph of the affidavit should use words to the following effect: I swear by Almighty God (or I solemnly and sincerely declare and affirm) that this is my name and signature, and that the contents of this, my affidavit (or affirmation of declaration, as the case may be), are true.

In case of a declaration, there should be added the following words: I make this solemn declaration conscientiously believing the same to be true. Declarations may be signed before any advocate authorized to practise in Israel and have same force as an affidavit.

10.03 NOTARIES PUBLIC:

All existing laws and regulations governing Notaries Public have been repealed by a 1976 Notaries Law. Notary must be Israeli citizen, member of Bar, who practises as an advocate in Israel 15 years or, if he is 65 years of age, or is a new immigrant, ten years. New law defines authority of notary, lays down procedure to be followed and code of professional ethics, confers on his confirmations status of lawfully sufficient proof of their contents; and enumerates acts which must be confirmed by him. Notary may be tried in an action before disciplinary courts of Bar, with appeal to Supreme Court. Israel diplomatic and consular representatives overseas are authorised to act as Notaries.

10.04 RECORDS:

The only system of formal records is the recording at the District Land Registry of land dispositions, including sales, exchanges, leases exceeding three years and mortgages. There is a limited system of recording of documents before the Public Notary (power of attorney and pledges), and for registration of ships (transfers of ships and mortgages), registration of patents and designs, and registration of trade marks. See also categories 19 Intellectual Property, topics Patents, Trademarks and Tradenames; Transportation, topic Shipping.

10.05 SEALS:

There is no necessity for seals on private instruments. Corporations are required to have an official seal which is to be fixed on deeds and other documents which by virtue of the statutes of the particular corporation require the corporate seal.

Municipal corporations have a corporate seal. The seal of the State of Israel is affixed to particular instruments of a very special class. The Minister of Justice is in charge of the State Seal.

11 EMPLOYMENT

11.01 HIRE:

See category 23 Property, topic 23.06 Landlord and Tenant.

11.02 LABOUR RELATIONS:

Employment Agencies Law 1996 requires that employment agencies be licensed. Manager of agency must (1) have at least three years experience in field; (2) show that in past five years he has not committed any crimes of moral turpitude. Also agency must present bank guarantee, guaranteeing its financial obligations towards its employees. Employment conditions must be specified in written agreement. Agency may not demand fees for its services from employee. Employment of foreigners or by foreigners requires special permit.

Wages.

1958 Wage Protection Law provides that wages must be paid in cash. Other modes of payment are allowed only under collective agreement; only small portion may be paid in food and lodging. Payment must be directly to labourer. Fixed amount is free from attachments. Time for payment fixed and if delayed, additional sum is payable. This rule was made applicable to compensation for dismissal by 1977 Amendment. Debts due from labourer to employer can be deducted only within limits. 1976 Sickness Pay Law provides for payment of 75% of normal wage in case of sickness for period up to 1½ days for each month of service, unless provided otherwise under Collective Agreement. The Minimum Wage Law (1987) forbids payment of wages below specified levels. The Equal Wages for Male and Female Employees Law forbids discrimination in this area.

Employment of Children.

Employment of children and young persons is governed by Law of 1953 Relating to Employment of Youth and Apprenticeship Law of 1953. Employment of persons under age of 14 is forbidden. Minister of Labour has power to prohibit or limit employment of infants in specific occupations or to fix age for employment in certain employments. Minister may also fix work hours and conditions of employment.

The employment of women is also strictly governed by the Employment of Women Law 1954, which restricts the employment and working hours and makes provisions for the protection of women employed in the various undertakings. Maternity leave is also granted to adoptive mother. Vacation without pay is granted to natural mother, as well as to her husband. Employment of women at night hours or on weekends after her giving birth for four months is forbidden unless she agreed to this in writing.

The Prevention of Sexual Harassment Law—1998.

Aim of Law is to forbid sexual harassment in order to protect person's dignity, liberty and privacy and to promote equality between sexes. Penalties for offenses range from two-four years imprisonment and/or 50,000 NIS fine. Law also contains guidelines as to how employer is to proceed in cases of alleged sexual harassment. Such offenses fall under jurisdiction of Labour Courts (see subhead Labour Courts, infra).

The Law for Equal Pay for Men & Women—1996.

This law is aimed at prevention of discrimination between men and women who are employed by common employer in virtually identical positions. Law provides procedure for taking action against discriminating employers. Such action may be initiated by labour unions, women's rights movements and employee.

Sick-leave Law (Absence Due to Pregnancy and Birth of Spouse) 2000.

Employee is entitled to charge up to seven days of sick leave to which employee is otherwise entitled, to absences for treatments and examinations relating to pregnancy of spouse or to giving birth by spouse, in accordance with rules that Minister of Labor and Welfare will adopt.

National Insurance Law (Consolidated Version) 1995 as amended contains comprehensive code in regard to payment of old age pensions, payments in respect of compensation to workmen injured by accident, maternity payments, unemployment payments, death benefits and child allowances.

National Insurance Law provides for old age pensions to males of over 67 and females over 62 or 70 and 65 respectively in relation to high-income workers and for compensation in respect to death or injury during work both to workmen and to independent earners. It also provides certain benefits in respect to childbirth and burial expenses. Law is administered by National Insurance Board which levies fixed premium on all residents. Premiums vary according to income and premiums due from employed persons are deducted by employers from their salaries.

Assurance of Income Law, 1980 provides for persons resident in Israel who are unable to work or support themselves sufficiently and who are not eligible for benefits under National Insurance Law. All claims are subject to specific conditions.

National Employment Service.

By the 1959 law, employment agencies have been erected on a national basis and no labourers may be employed except through those agencies, with the exception of certain highly specialized professions or administrative employment. 1976 amending law provides youth occupational guidance and requires notification of dismissals of ten or more employees at one time.

Equal Employment Opportunity Law, 1988 now makes it unlawful for employer to discriminate between his employees or between those requesting work, because of their sex, marital status or status as parents, as regards: (1) Receipt of employment; (2) conditions of employment; (3) promotion; (4) education or vocational training; (5) dismissal and severance pay. See also subhead Wages, supra.

The Authority for the Improvement of the Status of Women Law, 1998, is aimed to promote equality of sexes in Israel, to coordinate various bodies dealing with status of women in Israel to promote education, legislation and enforcement in this area, to promote activities for prevention of violence against women, to give governmental authorities instruments and information needed to promote and advance said aims and to set up central authority to implement these principles.

Collective Agreements.

Collective agreements may be entered into between employer or organization of employers and between organized labour, regarding conditions and terms of work. Labourers' rights under such agreements cannot be waived, and Minister of Labour may extend its application to employers that are not parties to collective agreements.

Labour Disputes.

There is no provision in regard to compulsory settlement of disputes between employers and labourers, but the Department of Labour has power to assist the employers and labourers in the settlement of their industrial disputes and it normally intervenes in such disputes with a view of securing an amicable settlement. In case of labour disputes provision is made for settlement by mediation, the mediator possessing far-reaching powers to assemble the parties and ascertain the nature of the dispute. Certain matters are passed to compulsory arbitration, the decision of the arbitrators being binding. There is now a Labour Court which deals with labour disputes.

Under Civil Wrongs Ordinance (New Version) 1963, as amended, employer is liable for acts of his employee if he authorized or ratified act or if it was committed by servant in course of his employment.

By Amendments to Law of Settlement of Labour Disputes, following limitations were introduced on right to strike: (a) By §5a of 1969 Amending Law a 15 day notice must be given of any intended strike both to Commissioner of Labour Relations and to employer; (b) by §37 b-d of

1972 Amending Law, special provisions governing public service were introduced. Term "public service" includes labour relations in service of Government, municipalities and local councils, health services, primary and higher education, aviation, oil, water and electricity. In a public service a strike declared without legal notice above-mentioned or whilst a collective agreement is in force is (with few exceptions) an "unprotected strike." Participation by individual labourer in an unprotected strike deprives him of protection granted by Collective Agreements Law to effect that a participation in a strike does not constitute a breach of personal agreement of labourer. Person causing labourers to participate in an unprotected strike is liable for procuring a breach of contract. Labour Courts are entitled to issue an injunction prohibiting individual labourers to participate in an unprotected strike. By amending law 1976, Labour Courts are empowered to order proportionate wage reduction in case of unprotected "go-slow" strike in public services. See also category 3 Business Regulation and Commerce, topic 3.01 Banks and Banking.

See also subhead National Insurance Law, supra.

Compensation for Dismissal.

By a 1963 law an employee who has worked continuously for a minimum period of one year with same employer in same job is entitled on dismissal to compensation amounting to a sum equal to one month's pay for each full year of service. No compensation is payable if employee is dismissed for dishonesty. In certain cases, such compensation may be paid even where employee resigns of his own accord, e.g., for health reasons. Female worker who leaves her employment within nine months after birth or adoption of child by her in order to attend to such child is entitled to compensation. The Wage Protection Law provides for surcharge of 20% per month for failure to timely pay compensation for dismissal.

See also subhead Wages, supra.

Right of Dismissal.

Supreme Court, as High Court of Justice, set aside a judgment of Labour Court of Appeal ordering an employer to continue employing an employee whom he had dismissed. Rule that court does not order specific performance of a contract of personal employment, is not affected by fact that employment is governed by a collective agreement.

Under Protection of Employees Law (Exposure of Offenses and Moral and Administrative Offenses) of 1997, employers may not dismiss or otherwise harm working conditions of "whistle blowing" employees who expose offenses committed at their place of work.

Labour Courts.

By a 1969 Law, special Labour Courts were created and given exclusive jurisdiction in all matters dealing with or arising from labour relations.

There are now five District Labour Courts located in Jerusalem, Tel-Aviv, Haifa, Beer Sheva and Nazareth, as well as State Court in Jerusalem. In every Court there are professional judges and two members of the public, one nominated by employers' association and one by employees' association. In State Court there are three professional judges and two members of public appointed as above. District Courts have exclusive primary jurisdiction in all matters between employers and employees and in collective agreement disputes arising from a special collective agreement (i.e., one dealing with one or a limited number of employers). State Court has primary jurisdiction in disputes arising from general collective agreements (i.e., agreements covering all employers of a certain category) and an appeal jurisdiction from District Court. Both courts have criminal jurisdiction too.

There is no appeal from State Court. It is subject however to a limited "High Court jurisdiction."

Trade Unions.

Supreme Court refused to interfere with decision of Labour Association not to create a trade union consisting of workmen of one branch in certain towns. Labour Association is a voluntary body and, hence, law courts would refrain from interference with a decision, which prima facie constitutes a valid exercise of Association's discretion.

12 ENVIRONMENT

12.01 ENVIRONMENTAL REGULATION:

Environmental legislation in Israel is extensive and includes Abatement of Nuisances Law, Hazardous Substances Law, Planning and Building Law, Water Law, laws governing Prevention of Sea Pollution and regulations adopted pursuant to said laws. Law governing Prevention of Sea Pollution was amended in 2006 to provide that permit is required for any disposal of wastes in sea, provides penalties for such disposal without permit, and empowers Minister of Environment to seek injunctive relief preventing or reducing pollution of sea. These laws are administered primarily by Minister of the Environment. With respect to radiation, standards of International Radiation Protection Agency have been adopted. Environmental legislation sets emission standards, standards for disposal of hazardous wastes, limitations on noises, etc. Standards of U.S. Environmental Protection Agency have been adopted in certain areas (such as with respect to nitrogen emissions) while in others (such as those dealing with particle emissions and sulfur dioxide emissions) standards are similar to those in Germany. As condition for obtaining building permits for industrial plants, power plants, etc., Planning and Building Law requires submission of plan-specific environmental impact statements to authorities, based on guidelines promulgated by Minister of the Environment. In addition Businesses Licensing Law includes provisions related to environmental matters, which must be satisfied as condition for receiving license to operate business.

13 ESTATES AND TRUSTS

13.01 ADMINISTRATION:

See topics 13.04 Executors and Administrators and 13.03 Descent and Distribution.

13.02 DEATH:

The Declaration of Death Law implements the United Nations Convention on the subject of declarations of death of persons who disappeared in Europe during the Nazi regime. The same law also provides for declarations of death in a case of persons dying a natural death or through accident and of whom all traces have been lost for more than two years. Application by an interested person, as defined by the Law, is to be made to the competent court, which is the Jerusalem District Court. (Book of Laws, No. 93, of 13.3.53).

A copy of death certificate of a person dying in Israel is obtainable on application to the local authorities of the area in which the death took place.

Actions.

On death of any person any cause of action in respect of a civil wrong subsisting against or vested in him survives against or, as case may be, for benefit of his estate.

Where death is caused by a civil wrong and such person would, had death not ensued, have been entitled at time of his death to recover compensation in respect of bodily injury caused to him by such civil wrong, the husband, wife, parent and child of such deceased person may recover compensation from person responsible for such civil wrong.

These laws, like all other laws, apply equally to foreigners.

See also category 5 Civil Actions and Procedure, topic 5.04 Limitation of Actions.

13.03 DESCENT AND DISTRIBUTION:

Comprehensive succession law was enacted in 1965—Inheritance Law of 1965. Former limitations on power of testamentary dispositions in respect of certain classes of immovables were abolished (see topic 13.06 Wills). Subject to any testamentary dispositions, following are legal heirs entitled to succession: (1) Spouse of deceased; (2) children and their descendants and parents of deceased and their descendants.

Note: A comprehensive amendment has been made to Inheritance Law of 1965. One of aims of amendment is to lighten load on courts in respect of matters of inheritance by empowering administrator general to grant succession orders and probate in simple, undisputed cases. Administrator general is in charge of inheritance matters nationwide, and all of his/her deputies are trained as Magistrates' Court judges to act as Registrars of Inheritance Matters. This amendment will come into effect from Sept. 1, 1998.

Spouse is entitled to movable property, including passenger vehicle and contents of home and, as to remainder of estate: (1) If deceased left children or their descendants, or parents—one-half; (2) if deceased was survived by siblings or their descendants or grandparents—two-thirds; provided, however, that if at time of death of deceased, spouse had been married to deceased for three years or more and lived with him in apartment included, wholly or partly in estate, spouse takes whole apartment or share of deceased therein and two-thirds of estate. If deceased was not survived by any of above-named relatives, except spouse, spouse inherits entire estate.

State succeeds in absence of relations.

Adopted child is entitled to same share as natural child. New provisions are embodied in 1965 law entitling needy spouse, needy child or needy surviving parents to maintenance out of estate. Court is entitled to allow widow or widower a one-time grant or periodical maintenance.

Maintenance in respect of children may be granted until they reach age of 18 and in special cases up to 23 years of age, and to parents for life.

Administrator may be appointed by court to administer estate, and court may confirm as administrator an executor appointed by will.

Creditors have to be satisfied first before any distribution is made to heirs.

Spouse, children or parents who lived with deceased in his place of residence are entitled to continue to reside in same premises as lessees of legal heirs for such duration and subject to such terms as may be settled with heirs or as settled by court.

Competent court is entitled to deal with estate of any person who resided in Israel on date of his death or has left property in Israel.

Applicable law is law of residence of deceased on date of his death, except in respect of assets which devolve in accordance with lex situs. Competent court is district court (civil court) where deceased resided at time of his death, or in case of nonresident court having jurisdiction where any assets of deceased are situated in Israel.

Religious courts may exercise jurisdiction when all parties consent to such jurisdiction.

See also category 14 Family, topic 14.07 Marriage.

13.04 EXECUTORS AND ADMINISTRATORS:

See also topic 13.03 Descent and Distribution.

An administrator may be appointed on the application of any person entitled to an interest of the estate. An administrator is personally liable at the instance of persons beneficially entitled for any wrong committed by him in the course of his administration. An administrator is required to give security, whilst an executor may be exempted from furnishing any security for the due administration of the estate. Executors or administrators are required to file returns in regard to their administration and the discharge is obtained on proper application after the conclusion of the administration or by leave of the court even before the winding up of the estate. The court will, on the application of an administrator, give such direction as may from time to time be required as to the administration of the estate.

The application for probate of a will or for the appointment of an administrator of an estate of a deceased person is made by petition to the court having jurisdiction in the area where the deceased had his last usual residence or place of business; and if the deceased had no place of residence or place of business in Israel, then the petition may be addressed to the court within whose area any part of the estate is to be found.

13.05 TRUSTS:

Nature of trusteeship, duties of trustees, formation of private trusts, charitable trusts and public trusts are defined in Law of Trusteeship 1979.

Trusteeship is defined as relationship to asset requiring trustee to hold such asset or act on behalf of beneficiary or for any other object. Trusteeship may be created by law, by agreement with trustee or by deed of charitable trust, which must be in writing signed in presence of notary or created by will in writing, or bequest under will. If trust is of public nature, registration (with Registrar of Trusts) and publication required. Law also provides for creation of companies for advantage of community requiring licence from Minister of Justice, approval as public institution for tax purposes, declaration by court that its objects are charitable; registration is necessary.

Duties of trustees and supervisory powers of courts are referred to in Law generally, but more detailed regulations are laid down for trusteeship in special cases, e.g. under Law of Inheritance, Law of Guardianship and Legal Capacity.

Trust (Mutual Investment Funds).

Mutual Investment Funds Law of 1961 allows establishment of mutual investment funds. It regulates constitution of fund and its operations and, subject to compliance with provisions of law, exempts income of fund from company tax, and income tax does not exceed 29%. Income derived from realisation of securities of approved mutual fund is free from income tax.

13.06 WILLS:

Detailed provisions in regard to capacity to make will and appropriate form of will are contained in Inheritance Law 1965.

Will may be in writing or may be made verbally. Holograph will need not be attested. Any other written will must be signed by testator in presence of two witnesses at least. Witnesses must confirm execution of will by testator in their joint presence.

Will may be declared or signed before judge or registrar of civil court or before judge of religious court.

There is no limitation on right of disposition by will. Earlier limitations were abolished.

Capacity to make will is determined by law of place of residence of testator at time will is made, but will is valid in form if made in accordance with Israeli law or in accordance with law of place where it was made or law of residence of deceased when will was made or at time of his death. When testator is not a resident of Israel, will is valid if it is in accordance with form recognised by national law of deceased.

Spouses are no longer permitted to make mutual wills, where each one declares his or her agreement with will of other.

14 FAMILY

14.01 ADOPTION:

Adoption is permitted subject to an order of Family Affairs Court. Procedure to be followed is set out in The Children Adoption Law, 1981, and in Civil Procedure Rules. See category 5 Civil Actions and Procedure, topic 5.05 Practice. Interest of child to be adopted is given paramount consideration. Adopted child must be under 18 years of age. Normally adoption of child will not be allowed if adopting parents live abroad or intend to take child abroad. Secrecy is observed and neither natural parents nor adopting parents know identity of each other unless otherwise ordered by court.

Religion of child and adoptive parents must be same (procedure for conversion of child in certain instances set forth in law).

Note:—Recent amendments to law permit courts to grant adoption order even if adopting parent is not of same religion as child as long as this will not harm welfare of child. Amendments establish special procedure and recognition of special agencies for adoption of children from foreign countries. Central committee, headed by chief welfare officer (appointed by Minister for Labor and Social Affairs), is set up for interterritorial adoption, in accordance with Hague Convention for the Protection of Children and Cooperation in Inter-territorial Adoption, 1993. Interterritorial adoption is carried out by Amuta (see category 2 Business Organizations, topic 2.02 Associations, subhead Private Nonprofit Corporations) sole purpose of which shall be activities relating to interterritorial adoption. Amuta must act in good faith, with dedication, in accordance with law, ensuring child's best interests and respect for child's basic rights including those internationally recognized rights. Applications are handed in to Amuta for processing.

Surrogacy Law (1996).

Surrogacy agreements must be approved by special surrogacy commission. Surrogate mother must be (i) unmarried (this requirement may be waived under certain circumstances); (ii) not relative of any of biological parents; (iii) of same religion as biological mother; (iv) over 18. Law deals only with situation in which no biological material is contributed by surrogate. Seven days after birth court order declaring parentage of newborn is sought. Under special conditions surrogate may withdraw from agreement.

See also category 13 Estates and Trusts, topic 13.03 Descent and Distribution.

14.02 DIVORCE:

Rabbinical Courts have exclusive jurisdiction in regard to divorce where both parties are Jews, and are either domiciled in Israel or Israeli citizens. Christian recognized Religious

Courts have exclusive divorce jurisdiction in regard to Christians who are Israeli citizens. Moslem Religious Courts have exclusive divorce jurisdiction in regard to Moslems who are Israeli citizens or foreigners who, under law of their nationality, are subject in such matters to jurisdiction of Moslem Religious Courts.

Law of Jurisdiction in Dissolution of Marriage in Special Cases, 1969, authorises Chief Justice to direct that an application for divorce (which is not in jurisdiction of any Religious Court) be dealt with either by Family Affairs Court or Religious Court. As result, it is now possible in case of mixed marriages where parties belong to different religious communities, for marriage to be lawfully dissolved. Law also repealed limitation of jurisdiction in divorce cases of foreigners.

Maintenance.

By 1972 Law to ensure payment of maintenance where judgment for maintenance is given in favour of a spouse, a minor child or a parent, resident in Israel, party entitled may apply to be paid by National Insurance Institute, thereby saving himself necessity of execution proceedings. Amount payable is sum adjudged, subject to overriding maximum fixed by regulations. Rights under judgment are subrogated to Institute which may recover from defendant under judgment. Apart from right to maintenance legal separation is not recognized.

Division of Property of Spouses in Divorce.

In absence of agreement each spouse is entitled by 1973 Law of Financial Relations between Spouses to half of total property of both spouses excluding such property as either had before marriage or received as gift or by way of inheritance during marriage or non-assignable rights or property which parties agreed should not be taken into consideration.

14.03 GUARDIAN AND WARD:

Legal Capacity and Guardianship Law of 1962 governs appointment and duties of guardians. Legal acts of persons under 18 and other equally incapacitated persons are subject to ratification by court and where property rights are involved to consent of court. Management of affairs of and care of legally incapacitated persons is entrusted to guardian, subject to general supervision of court. Jurisdiction is vested in Family Affairs Court but religious courts have jurisdiction if all parties so desire. Law of domicile applies but court has powers over incapacitated person living in Israel or over legal acts performed in Israel relating to property of incapacitated person.

14.04 HUSBAND AND WIFE:

See topics 14.02 Divorce, 14.07 Marriage.

14.05 INFANCY:

Age of legal maturity of both sexes is 18. Parents of minor (person under 18) are natural guardians. Natural guardians or any guardians appointed by court may consent to or ratify contract made by minor but unless made with such consent or until ratified, contract may be repudiated by minor or by his guardians or by Attorney General. Consent or ratification need not be in writing.

Certain acts of a guardian, such as transfer of real property, charges or mortgages, gifts, donations, guarantees and transactions between a minor and his guardian or his parents, require the approval of court.

An infant is represented in court by his guardian. Court may appoint a guardian ad litem.

Adoption.

See topic 14.01 Adoption.

See topic 14.03 Guardian and Ward.

14.06 MAINTENANCE:

See topic 14.02 Divorce, subhead Maintenance.

14.07 MARRIAGE:

Matters of marriage are considered as matters of personal status, which are within exclusive jurisdiction of Rabbinical religious courts in respect of all Jews and religious courts of other denominations in respect of non-foreigners who are members of respective recognized religious communities. In respect of foreigners, who are not Jews, their national law applies, and local courts will recognize as valid any marriage which is valid according to national law.

General consuls, vice-consuls and any other competent consular authority may officiate at marriages where at least one of the parties is of the consul's nationality.

No marriage of a girl under 17 is permitted unless court orders otherwise in special circumstances.

Every marriage must be registered by person performing marriage. Registration is effected by filing a copy of record with District Commissioner of district where marriage is performed. Failure to register involves considerable penalties.

Financial Relations Between Spouses.

1973 Law which came into force on Jan. 1, 1974 provides that spouses may regulate their financial relations by an agreement which requires approval by Family Affairs Court or by Religious Court having jurisdiction in matters of marriage and divorce of spouses. Failing such an agreement, financial relations and ownership of property of spouses will be regulated as follows: (a) Entry into marriage or its subsistence do not affect spouse's ownership rights and do not confer upon either spouse any right in other spouse's property or any liability for other spouse's debts: (b) upon dissolution of marriage whether by divorce or by death of one spouse, each spouse is entitled to half of total property of both spouses excluding such property as either had before marriage or received as gift or by way of inheritance during marriage or non-assignable rights or property in respect of which parties agreed that they are not to be taken into consideration. In event of death of spouse, his heirs succeed to his rights under Law.

Law further contains provisions as to details of assessment of value, of preventing attempts of alienation in order to defeat provisions of law, and confers extensive jurisdiction upon court in application of provisions. Law does not affect such jurisdiction as is conferred upon Religious Courts but these Courts must apply provisions of Law unless both parties agreed to be judged by Religious Law. Law makes necessary amendments in Law of Succession in order to secure spouses rights according to provisions of this Law.

See also topic 14.02 Divorce.

15 FOREIGN TRADE AND COMMERCE

15.01 CUSTOMS:

See category 24 Taxation, topic Taxes, subhead Customs Duty.

15.02 EXCHANGE CONTROL:

See topic 15.05 Foreign Trade Regulations; categories 1 Introduction, topic Currency; Taxation, topic Investment Law and Incentives.

15.03 FOREIGN EXCHANGE:

See topic 15.05 Foreign Trade Regulations; categories 1 Introduction, topic Currency; Taxation, topic Investment Law and Incentives.

15.04 FOREIGN INVESTMENT:

See category 24 Taxation, topic 24.08 Investment Law and Incentives.

15.05 FOREIGN TRADE REGULATIONS:

Exchange Control Regulations were imposed during World War II. Although Regulations of 1941 were substantially relaxed, dealings in foreign currency and export of foreign currency are controlled by regulations. Contracts with nonresidents required to be approved by Controller of Foreign Exchange. Tendency in recent years has steadily been a relaxation in control and the streamlining of procedures. Similarly, while for many years all imports were subject to import licences due to exchange control and for protection of local industry, present tendency is towards liberalization of imports including elimination of necessity for import licences on an ever-increasing number of goods and materials. Treaties of friendship and commerce have been concluded with many countries and are renewable annually or at other regular intervals. In Nov. 1977 necessity for import licences was virtually abolished.

Israel has concluded trade and customs agreements with European Union.

See also categories 1 Introduction, topic Currency; Taxation, topics Investment Law and Incentives, Taxes.

Free Trade Zone.

1985 Law establishes Southern Port City of Eilat as Free Trade Zone with substantial reductions in taxes on goods and services purchased by residents and tourists. Income tax benefits and employers' tax benefits were also granted under Law establishing Zone, but abolished under 1990 tax reform and made subject to new set of rules under Income Tax Ordinance.

See also category 24 Taxation, topic Taxes.

16 HEALTH

16.01 HEALTH LAWS AND REGULATIONS:

Laws and regulations related to health are divided between two main areas: (A) those dealing with prevention of disease and health improvement; (B) those dealing with medical treatment.

(A) Many laws and regulations deal with prevention of disease and health improvement, sanitation, prevention of pollution, labeling of medicines and food products, purification of waste water, etc. The Water Laws deal specifically with these matters as they relate to water, including testing, etc. Extensive set of regulations deals with food products, permissible ingredients, labeling, etc. There are also laws dealing with prevention and treatment of communicable diseases. Finally, there are laws and regulations dealing with protection of environment and pollution, and exposure to magnetic fields, such as in area of cellular telephone antennae.

(B) In addition to laws and regulations dealing with licensing of doctors and medical institutions, levels of treatment, patient rights, protection of privacy of patients, professional secrecy obligations, etc., National Health Insurance Law of 1984 secures right of all residents to treatment and provides for system of taxation to cover these services. One objective of this law is to ensure treatment for all regardless of ability to pay.

Smoking is prohibited in public buildings and offices except in designated rooms.

Law for the Rehabilitation in the Community of Emotionally Incapacitated People 2000.

This law is designed to achieve goal indicated by its title, while protecting personal honor of incapacitated persons. National rehabilitation body will be set up under this law, consisting of 23 persons from all relevant areas.

Genetic Information Law 2000.

This law establishes mandatory arrangements for carrying out genetic examinations, advising individuals being treated and protecting their privacy.

Law adopted in 2005 deals with terminally ill people and possibility of “mercy killing”.

17 IMMIGRATION

17.01 ALIENS:

Except in regard to voting in national election, aliens who are residents of Israel are under no disability. Aliens wishing to enter Israel must secure Traveler's Visa. See category 1 Introduction, topic 1.02 Government and Legal System, subhead Citizenship.

Corporations Owned or Controlled by Aliens.

Nonresidents may buy and sell shares and securities of Israeli companies. There are no restrictions on ownership or control of Israeli corporations by aliens.

17.02 IMMIGRATION:

Every Jew has right to come to Israel. For purposes of Law of the Return - 1952, “Jew” means person who was born to Jewish mother or was converted to Judaism and who is not member of another religion. Substantial rights are granted to new immigrants including income tax concessions, customs and purchase tax exemptions on personal and household effects, investment assistance and housing facilities. Entry of person, other than Israeli national, or “oleh” under Law of the Return - 1952, into Israel shall be by visa. Jews may apply for residency visas under Entry Into Israel Law - 1952, or citizenship, under Nationality Law - 1952.

See also category 1 Introduction, topic 1.02 Government and Legal System, subhead Citizenship.

18 INSURANCE

18.01 INSURANCE COMPANIES:

The 1981 Insurance Contracts Law has basically legislated much of common law position and now governs law of Commercial (as opposed to State) Insurance in Israel.

Scope.

Law regulates law pertaining to life insurance; personal accident; sickness and disability insurance; regular commercial insurance; and vehicle insurance. (However, 1970 Motor Vehicle Insurance Ordinance is still applicable.) Law does not however apply to Maritime Insurance where 1863 Ottoman Maritime Trade Law still applies (insofar as it has not been repealed). Law does not apply to air insurance, nor does it apply to re-insurance treaties.

1981 Law repeals 1976 Law dealing with rights of third parties but incorporates protection of third parties in case of insolvency of insured. 1981 Law also repeals 1904 Ottoman Insurance Law which dealt with property insurance.

1981 Law provides that should one of parties wish to cancel contract in accordance with said Law or by virtue of conditions of contract, contract is terminated 15 days after notice has been sent to other party.

Claim for insurance payment prescribes three years after occurrence of event insured against.

1981 Law applies concurrently with 1951 Insurance Business (Superintendence) Law. Latter regulates and limits carrying on of insurance business in Israel, deals with grant of licences, lodging of returns by insurance companies and payment of deposits by persons engaging in insurance business in Israel.

See also categories 3 Business Regulation and Commerce, topic Consumer Protection; Employment, topic Labour Relations.

19 INTELLECTUAL PROPERTY

19.01 COPYRIGHT:

English Copyright Act of 1911 is incorporated into Israeli Copyright Ordinance.

Nature of Copyright.

Copyright is sole right to produce or reproduce work of literature, music, drama or art or any substantial part thereof in any material form in public. Copyright in lecture exists in delivery. If work is unpublished, it is sole right to publish it wholly or partially and includes sole right to produce, reproduce, perform or publish any translation of work. Copyright exists in conversion of dramatic work into novel or vice versa; and in making of any record, perforated roll, cinematograph film or other contrivance by means of which literary, dramatic or musical work may be mechanically performed or delivered. Publication of any work means issue of copies of work to public. Law states that ideas, processes, systems, methods of operation, mathematical terms, facts, concepts and news are excluded from copyright protection. However copyright clearly protects their expression. Any unauthorised person who performs above acts infringes copyright. According to 1953 Copyright Amendment Ordinance, copyright in unpublished work exists where author was at time of creation national or resident of Israel.

According to amendment of Copyright Ordinance introduced in Correction of Intellectual Property Rights Law (Harmonization with the TRIPS Agreement) 5759-1999, letting for hire of computer program for trade purposes is protected by Copyright Ordinance, save where computer program constitutes part of other article that is principal object to be let.

Infringement.

Copyright in work is infringed when person without copyright owner's consent does anything, sole right to do which, is conferred on owner. Thus copyright is infringed when unauthorised person sells work or lets it for hire or by way of trade exposes or offers it for hire; or where he distributes work either for trade or in manner that prejudices owner of copyright; or when he exhibits work by way of trade in public; or when he imports for hire or sale any work which to his knowledge infringes copyright; or where he for his private profit knowingly permits theatre or other place of entertainment to be used for performance of work without copyright owner's consent.

There are the following exceptions to copyright infringements: (a) Fair dealing with any work for purposes of private study, research, criticism, review or newspaper summary; (b) use by author of work of any mould, cast, sketch, plan, model or study made by him where he is not copyright owner, provided that he does not repeat or imitate main design: (c) making paintings, drawings, engravings or photographs of work of sculpture if permanently situate in public place; (d) publication of non-copyright matter for bona fide use of schools as long as not more than two passages from works by same author are published within five years and source from which passages are taken is acknowledged; (e) publication of report of lecture delivered in public unless printed notice of prohibition of publication is given; (f) reading or recitation in public by one person of any reasonable extract from any published work; (g) copying or recording work on audio or video recordable media, with exception of recordable media intended for use by computer, for private domestic noncommercial use.

Term of copyright is for life of author and for 50 years from Jan. 1st after his death. Same position obtains in case of any anonymous or pseudonymous work.

Ownership of Copyright.

Author of work is first owner of copyright therein except: (a) In case of engraving or photograph where plate or original was ordered by some other person and was made for valuable consideration in pursuance of that order where person who orders original is first owner; (b) where author was in employ of some other person under contract of service and work was done in course of his employment, employer (in absence of any contrary agreement) is first owner. This position does not obtain where work is some contribution to newspaper, magazine or periodical where (unless there is contrary agreement) ownership of copyright remains vested in author.

Assignment.

There are no special forms for assignments or licences nor does copyright require registration.

Civil Remedies.

Where there is infringement, owner is entitled to injunction, damages or otherwise as may be conferred by law for infringement of right. Costs are in absolute discretion of court. In action for infringement plaintiff is presumed to be owner unless defendant puts existence of copyright or owner's title in issue. Even if damage resulting from infringement is not proved court may award compensation of not less than NIS 10,000 and not more than NIS 20,000 for each infringement. (Copyright Ordinance §3A). Another significant novelty inserted into Law is order for destruction of infringing articles.

Copyright Owner's Rights.

All infringing copies and plates used or intended to be used for production of such copies are deemed to be property of copyright owner who may take proceedings for recovery of possession or conversion, except as regards architectural restriction where interdict or injunction cannot be obtained or where demolition cannot be ordered. Infringing structure is not deemed to be property of copyright owner.

Prescription of Action.

According to Prescription Law of 1958 action for copyright infringement expires after seven years from date of infringement.

Protection of Foreign Works.

Where convention relating to copyright protection has been concluded between Israel and another country, or where Israel has acceded to convention, Minister of Justice may direct that works for which protection is required by such convention shall be protected. Israel is signatory of Stockholm B, Brussels and Unesco Conventions. Protection granted by Minister shall not exceed any protection were such work to have been published in Israel. Work published simultaneously in Israel and several other countries shall be considered as having been first published in Israel provided that there is no “colourless” publication.

Privacy.

By an amending Statute of Law of Civil Wrongs, use of name, connotation picture or voice of a person for commercial purposes, constitutes a civil wrong (a tort) rights to relief being given to person affected and after his death to his heirs.

Moral Right.

By 1981 Amendment, author of work has moral right in accordance with Berne Convention to have his work published without distortion, defect or alteration prejudicing its value, or his good name. Infringement of this right is compensated even if financial damage not proved.

Performer's Rights.

1984 Law grants performers, including actors, singers, musicians, dancers or other performers protection for 50 years against recording, televising, sale, renting, import or possession of such recording etc. for commercial purposes without consent of performer. Provisions of this Law will not apply to broadcasting following 25 years after year of original broadcasting. If performance protected is given in course of performer's employment, protection is granted to employer.

19.02 DESIGNS:

See topic 19.03 Patents.

19.03 PATENTS:

Patent Law was enacted in 1967.

Application.

An inventor or any person deriving title to an invention under him, whether product or process which is new, useful and susceptible of industrial or agricultural application may apply for grant of patent. Patent is granted to person who first validly applied for it in Israel, except that where owner's application for protection has already been filed in one of Convention countries, date of foreign application is deemed to be date of application filed in Israel, if application in Israel has been filed within 12 months after filing of other application.

Patent application is filed at office of Registrar of Patents in Jerusalem, and may be filed through an attorney.

Term of a patent is 20 years from date of application for patent provided that renewal fees are paid on their due dates.

Certain exploitation rights are reserved in favour of persons who prior to application date, have in good faith exploited invention in Israel.

Concept of novelty applied is that of universal novelty.

Opposition and Revocation.

Opposition to grant of a patent may be made within three months from date of publication of application in Reshumot (Government Official Gazette).

Patent may be revoked by Registrar on grounds on which opposition to grant of patent may be made, namely that invention is not patentable or that opponent and not applicant is owner of invention or if there exists another reason for which Registrar is entitled to refuse application in accordance with provisions of Law.

Licences may be granted by patentee. A licence under a patent is not effective in respect of any party other than parties to licence unless licence has been registered.

Certain rights are reserved to State in respect of use of patents which are required for security of State. Appropriate Minister may permit exploitation of patent by Government departments if it is necessary to do so in interest of defence of State or maintenance of essential supply and services. However, when such permission is given, owner of invention is entitled to compensation whether in form of royalties or otherwise, as detailed in Law. If Registrar is satisfied that owners of a patent have a monopoly which is misused he may grant a licence to exploit patent to a person who has applied for and paid prescribed fee, provided application is filed after expiration of three years from date on which patent was granted, or four years from date of filing of patent application, whichever is later.

Compulsory licence may also be ordered if it is necessary to assure public of a reasonable quantity of medical supplies. Detailed provisions are contained in Law in regard to factors to be taken into account in granting a compulsory licence, conditions of licence including payment of royalties.

Patents are assignable. Patentee may also charge patent or income thereof. Assignment and charge have to be registered.

Designs can be registered under Patents and Designs Ordinance of 1925 as am'd in respect of one or more class or classes of goods. A certificate of registration is granted by Registrar. On registration of a design proprietor of design is entitled to copyright in design for five years, and period may be renewed from time to time for five years up to three cycles of five years each.

An amendment to Ordinance brings Israel law in line with Hague International Convention for Protection of Industrial Property to which Israel has now become a signatory. A design may no longer be eliminated from Register because it is in use abroad, and not in Israel. Registration in Israel of a patent or design registered abroad receives preference over an application registered after date of foreign application, if registered in Israel within 12 or six months respectively after registration in any of signatory countries of convention. (Book of Laws, No. 99, of 12.6.52).

19.04 TRADEMARKS AND TRADENAMES:

Under Trade Marks Ordinance (New Version), 1972, trademarks are registered with Registrar of Trade Marks. Trademark is defined as mark used upon or in connection with goods for purpose of indicating that they are goods of proprietor of such mark by virtue of manufacture, selection, survey, or dealing with or offering for sale. Trademarks capable of registration must consist of characters, devices or marks or combinations thereof which have distinctive character. Application for registration is advertised, and opposition may be made within three months of advertisement. “Well-known trademark” is new concept which enables citizen, resident or owner of business in Member State, although such trademark is unregistered in Israel, to assert trademark protection, provided that this trademark is well-known to circles specialized in sector concerned. Among other remedies available, order for destruction of articles to which registered trademark has been applied, may be granted. Period of duration of trademark rights is seven years from date of registration, but this period may be renewed for 14 years from expiration of original registration, or of last renewal.

Under Trade Mark Ordinance, trademark may be transferred even if goodwill connected therewith is not transferred. Further, licence to use trademark may be granted by owner of mark. Such licence is subject to registration with Registrar of Trade Marks. In addition, following Lisbon Treaty of 1958, use of name of place of origin with reference to quality may be protected if product originates from such place and its qualities are connected therewith.

Under §16 of Ordinance, introduced in 1965, Registrar may, subject to certain qualifications, allow registration of mark registered in its country of origin, notwithstanding that it might not otherwise qualify for registration.

Tradenames.

See category 2 Business Organizations, topic 2.03 Business Names.

20 LEGAL PROFESSION

20.01 ATTORNEYS AND COUNSELORS:

Chamber of Advocates Law of 1961 regulates admission of members to Israel Bar. Israel Bar has been constituted as recognised entity by virtue of 1961 Law, and it vested in elected bodies of members of Bar right to admit members to Bar, to regulate discipline and make other appropriate provisions affecting practice of law in Israel.

Only persons who have qualified as lawyers, are residents of Israel, and have reached age of 18 may be admitted to Israel Bar. Persons who qualify as lawyers may be graduates of Law Faculty or qualified college in Israel or persons who are admitted to foreign Bar and practiced abroad for not less than two years and/or are graduates of foreign law school. Normal period of apprenticeship prior to admission to local Bar is now 12 months from date of fulfillment of requirements for graduation with reductions for foreign lawyers related to prior experience. There are special provisions for apprenticeship preliminary to admission to local Bar.

Israeli Bar examination consists of two parts, written and oral. Only after having passed written examination is candidate entitled to take oral examination. Bar examinations are held twice yearly and recent regulation has provided for two additional dates for oral examination.

A licence to practice as an advocate is renewable annually against the payment of an appropriate fee.

A foreign advocate or attorney may not appear even for the purposes of a particular case, unless he was nominated to defend a foreign citizen accused of a capital punishment crime, and was approved by the Ministry of Justice.

There is a special registration for pleaders before the Rabbinical courts. All advocates may be inscribed on this list upon paying a registration fee.

Under Patents Law, 1967, with leave of court, patent agent has right to plead in patent actions, on nonlegal point.

Chamber of Advocates Regulations (Advertisement) 2001, provides regulations as to manner in which advocates may advertise their services, and information that must and may be included in such advertisement.

The Israel Bar which assists foreign lawyers seeking local counsel; Jerusalem address, telephone and telefax numbers: The Israel Bar, 1 Chopin Street, Jerusalem 92190, Israel, Telephone: 972-25-660271, Telefax: 972-2-5610062. Tel-Aviv address, telephone and telefax numbers: The Israel Bar, “Beit Hapraklit”, 10 Daniel Frisch Street, Tel-Aviv 64731, Israel, Telephone: 972-3-6918691, Telefax: 972-3-6918696. Haifa address, telephone and telefax numbers: The Israel Bar, 6 Ben Gurion Ave., P.O. Box 8354, Haifa 31083, Israel, Telephone: 972-4-8537017, Telefax: 972-4-8553033.

21 MINERAL, WATER AND FISHING RIGHTS

21.01 MINES:

Mines and minerals are the property of the state and their exploitation is governed by the Mining Ordinance of 1925, as amended. Licences for prospecting or exploring mines or for minerals may be obtained from the competent government department, and concessions are granted by the State. Mining rights or mining leases are obtainable on terms to be agreed with the State.

Oil.

The Oil Law of 1952 provides for prospecting and mining licences and regulations in regard to exploitation of mineral resources in Israel, particularly in respect of prospecting for oil and oil concessions.

Natural Gas.

Law of Natural Gas Sector of 2002 regulates development of natural gas sector, importation, purchase and sale of natural gas, transmission system, licencing, encouraging use of natural gas, etc. Natural Gas Authority set up in Ministry of National Infrastructures. Israel Natural Gas Limited, Government company, handles many activities of natural gas sector.

National Energy Authority.

Set up by 1977 law to plan, develop and regulate sources and consumption of energy in Israel, taking over Governmental functions under Mining Ordinance and Petroleum Law.

Public Services Authority - Electricity (“PUA”).

Set up by Electricity Sector Law in 1996 to regulate all aspects of electricity sector, including generation, transmission and distribution of electricity, licencing, rates, etc. Law replaced Electricity Ordinances of 1929 which had given exclusivity to The Israel Electric Corporation Limited. Some powers are subject to consent of Minister of National Infrastructures, with or without Minister of Finance. Law repeatedly amended to restructure electricity sector and encourage competition.

See also category 24 Taxation, topic Taxes.

21.02 WATER:

Under the Water Law, 1959 the State acquired ownership of all the water resources in the country. The law entitles all persons to use water only in accordance with the provisions of the law. The objects of the law are to preserve water supplies, to prevent their decrease and pollution and to utilise the water resources for development purposes of the country.

22 MORTGAGES

22.01 CHATTEL MORTGAGES:

See topic 22.03 Mortgages; category 8 Debtor and Creditor, topic 8.08 Pledges.

22.02 CHATTELS:

See category 23 Property, topic 23.07 Moveables.

22.03 MORTGAGES:

Immovable property may be mortgaged to secure any debt or obligation. Mortgage of immovable property requires registration at District Registry in which land is situate. Mortgage on immovable property not registered is not valid. Mortgage on land is realized by order of court or of Execution Office. Any provision denying mortgagor right to repay loan at any time is invalid. Unlike under U.S. law (outside of bankruptcy proceeding), secured creditor under Israeli law generally does not have right to foreclose directly upon assets securing its obligations but must rely on actions of court appointed receiver or liquidator.

Any mortgage pledge or charge created by company and not registered with Registrar of Companies within 21 days is void against a liquidator or any creditor.

English law governing “floating charges” is applied in Israel. Companies generally secure obligations by granting “fixed charges” (equivalent to mortgages) or “floating” charges on their assets. Floating charge, although effective when charge documentation is executed and filed with Registrar of Companies, floats over subject assets until certain events occur which cause it to attach to assets. Floating charge attaches or “crystallizes” either (a) automatically upon company entering into liquidation, whether voluntarily by way of resolution of shareholders, or involuntarily upon liquidation order being entered by court, or (b) upon appointment of receiver over some or all of assets of company upon application to court by creditor following event of default on indebtedness or other obligations. Until occurrence of crystallization event, company that has granted floating charge over its assets may continue to use, sell, transfer or otherwise dispose of charged assets in ordinary course of its business (as defined under Israeli law) and use proceeds from sale, transfer or other disposition of such assets for any purpose, including making payments in respect of any indebtedness or other obligations. Upon occurrence of crystallization event, floating charge converts to fixed charge, and thereafter company may only act with respect to assets subject to charge in accordance with directions of receiver or liquidator, acting pursuant to court orders. In such capacity, receiver or liquidator has broad powers to act with respect to charged assets, and typically is granted authority: (a) To operate company's business so as to maximize proceeds of sale of company's assets, (b) to incur and to collect obligations on behalf of company, or (c) to sell or otherwise dispose of assets of company and distribute proceeds therefrom according to preferences provided by applicable law. Floating charge gives creditors priority in bankruptcy, provided, it was registered at least three months before bankruptcy or longer if court holds that floating charge was granted under fraudulent conditions.

For mortgage of chattels see category 8 Debtor and Creditor, topic 8.08 Pledges.

Israel ships may be mortgaged by documents executed: (a) abroad, before an Israel diplomatic or consular delegate and approved by him; (b) in Israel, before Registrar of harbour of registration of ship. Mortgages must be recorded with Registrar of Ships. Mortgage on a ship is foreclosed or executed by order of Admiralty Court.

23 PROPERTY

23.01 ABSENTEES:

Apart from Absentees' Property Law, 1950 which deals basically with local problem of care and custody of property belonging to persons who left country at time of 1948 war, there are no specific provisions regarding absentees. Power of attorney may be given for all purposes and, if executed abroad, should be authenticated. See category 10 Documents and Records, topic 10.01 Acknowledgments.

Under Protection of Deposited Property Law, 1965 where management or control of property has been committed to another, written notification thereof in form set out in Law, must be given to Administrator General if ten years have elapsed from authorisation or appointment.

23.02 ADVERSE POSSESSION:

Land Law 1969 has virtually abolished whole of existing Ottoman legislation and there are now no provisions relating to acquisition of title by adverse possession. See also category 5 Civil Actions and Procedure, topic 5.04 Limitation of Actions.

23.03 CONVEYANCES:

See category 8 Debtor and Creditor, topic 8.01 Assignments.

23.04 DEEDS:

See topic 23.05 Land.

23.05 LAND:

Under the “Basic Law—Land of Israel 1960,” all the lands which belong to the State Development Authority or J.N.F. are considered as the lands of Israel, the ownership whereof cannot be assigned either by sale or by any other way. Land includes land, houses, buildings and all other appurtenances belonging thereto. Under the Land of Israel Law, 1960, several transactions in reference to these lands are exempted from the prohibition of transfer. There are seven permissible transactions wherein transfer of ownership of lands belonging to State of Israel can be effected. Special authorities were created in order to manage lands and to supervise execution of provisions of law.

Law regarding rights in land is now virtually codified by Land Law, 1969. Ottoman and Mandatorial laws regarding land have not been totally abolished. They are still in operation regarding: (1) Statute of Limitations for unsettled land (§§20 and 78 of Ottoman Land Law of year 1274 of Hegerrah); (2) various laws pertaining to lands belonging to religious trusteeships (§162 Land Law); (3) transfers of land and obligations to transfer land executed prior to effective date of law (Jan. 1, 1970) and (4) any right in land existing prior to effective date of law, Ottoman Law still prevails. By §8 of Land Law, obligation to transfer land must be in form of written document. Equitable rights in land have been abolished, although law itself fashions such rights. (§9). In Occupied Territories, Ottoman, Mandatorial, Jordanian Law applies.

Owner of land has right to claim possession against wrongful occupier. Joint tenancies may only be over an undivided whole. Any joint tenant may require dissolution of joint tenancy which may be carried out by agreement or by order of court. Court may order partition or sale.

Settlement.

Land registration now covers most of country however, unsettled lands exist in parts of entire country, as well as in various other urbanized areas. Occupied Territories are not settled at all.

Cooperative Houses.

Cooperative Houses Law has been repealed but has been incorporated in Land Law. It facilitates registration of separate dwellings in a jointly-owned house and regulates rights between owners. Urban housing in Israel is largely based on cooperative housing.

Sale of Apartments Law 1973 came into force on 1/10/73 and provides that a sale of an apartment which has been built or is about to be built must be accompanied by a specification in a form prescribed by Minister of Housing. Any deviation from specification or from applicable town planning regulations is regarded as a noncompliance conferring upon purchaser all rights under Sales Law 1968. (See category 3 Business Regulation and Commerce, topic 3.13 Sales.)

Special provisions apply to sale of an apartment in a condominium house or in a property designated to be registered as a condominium house requiring all relevant details as to management of house. Default in attaching specification is punished with considerable financial penalty.

See also category 3 Business Regulation and Commerce, topic 3.13 Sales, subhead Sale of Flats.

Securing Purchasers of Apartments.

By 1974-76 Law of Sale (Apartments) (securing investments of apartment purchasers) vendor or lessor by lease for more than 25 years, of an unbuilt apartment, may not receive from purchaser more than 15% of purchase price unless he gave purchaser bank guarantee securing refund of all monies paid, in event of non-delivery of apartment to purchaser as agreed, or has insured himself with an authorised insurance company against such event, with purchaser as beneficiary under policy, or has transferred ownership or long lease of apartment to purchaser or encumbered same in his favour. Alternatively, vendor may give to purchaser security by way of registering notice of warning at office of Land Registry in favor of purchaser.

Transfers.

In order to register transaction in Land Registry, there must be filed in connection therewith certifications regarding Betterment Tax, Acquisition Tax, Property Tax (which latter tax applies only with regard to unimproved lands, but not including agricultural lands, cultivated and used as such) and authorization from Local Authority. Immovable property can only be transferred by execution of a deed which has to be signed either at competent Land Registry in Israel or before any lawyer in Israel who authenticates signatures on deed. Deed is executed before District Land Registrar, when appropriate fees must be paid. Transferee's title is entered on Register in substitution for title of transferor. All transfers of immovable property must now be reported for Betterment Tax purposes. Transfer and registration of settled land is effected under Torrens System, whereas unsettled land is registered under Deed of Title System.

Development Authorities' lands may be leased in perpetuity (or for automatically renewable periods of 49 years) in lieu of outright sale of said land which is prohibited under Basic law: Land of Israel 1960.

Recuperation Areas Authority.

By 1973 Statute this authority is set up and authorised to recommend that a certain area having qualities that would attract persons recuperating, be declared a recuperation area, of one of various categories, and any restrictions on undertakings within area. It can also encourage research, advance level of services of existing recuperation areas, encourage housing, supervise and generally regulate exploitation of area. This law contains full supplementary provisions regarding effect of such declaration, and any ensuing rights and liabilities. There is also law dealing with repair of buildings and maintenance thereof.

Radio and Television Aerial Masts.

Local Authorities (Radio and Television Aerial Masts) Law 1975 empowers local authorities to limit number of radio and television aerial masts on buildings and to require erection of central masts on apartment buildings with compensation for persons aggrieved and financial penalties for infringements. Permits should be obtained from local building authorities.

See category 24 Taxation, topic Taxes. See also topics 23.02 Adverse Possession, Landlord and Tenant; categories 5 Civil Actions and Procedure, topic Limitation of Actions; Mortgages, topic Mortgages.

23.06 LANDLORD AND TENANT:

Land Law 1969 requires written document and registration in Land Registry to effect lease if for more than five years or with option to renew beyond five years. Registration not required for lease of dwellings or business premises unless for period exceeding in all ten years. Subject to agreement lease may be charged with mortgage or easement and tenant may transfer lease or sublet. See also subhead Hire and Loan Law 1971, infra.

Duties of landlord to provide services and effect repairs are laid down in Tenants Protection Law 1972. This Law also consolidates previous legislation regarding control of rentals and protection against eviction for tenants of residential and business premises occupying under leases prior to Aug. 20, 1968 which have expired or who paid key-money. Protection extends to surviving spouse, children or parents who occupied premises with tenant at least six months prior to decease. Protected tenant continues to hold on terms of expired lease as varied by agreement or by Law. Rights of inheritance of protected tenant are limited in accordance with provisions of §§20-30 of Law (i.e., can have one transfer of rights and in certain circumstances second transfer, but no more).

Rentals of premises within Law may not be increased except within the limits fixed by Regulations issued periodically. In event of dispute between landlord and tenant, local Rent Tribunals have power to fix rental. Regulations state that regarding certain types of business premises, ceiling for rent will not apply.

Outgoing tenant is entitled to share of key-money to be paid by incoming tenant, amount of which depends on whether his tenancy began before or after 1958, period of occupation and whether he himself paid key-money. Special procedure is provided to settle outgoing tenant's share if disputed.

Law ceases to apply to premises falling vacant and does not apply to buildings completed and let after 1968, nor to buildings of Approved Undertakings (see category 24 Taxation, topic 24.08 Investment Law and Incentives).

Principal grounds for eviction of protected tenant are nonpayment of rent, breach of original lease justifying eviction, wilful damage, use of premises for unlawful purpose, molesting neighbours, premises required for own purposes or rebuilding by landlord, public body requiring premises for public purpose. In last two cases alternative accommodation must be provided.

Hire and Loan Law 1971.

Law in respect of hire applies to both moveables and immoveables where contrary intention does not appear in agreement. Object hired must comply with specifications in agreement unless lessor knew otherwise at date of agreement or lessee did not notify lessor of unsuitability within reasonable time. Lessor has liability to repair. Where object hired is a chattel, lessor may exchange defective chattel so as to comply with his obligations. Where repair not carried out, lessee may repair and debit lessor with expense or reduce rent in accordance with defect. Where object leased is land and lessee cannot use it for reasons connected with land or access thereto, he is not liable to pay rent. Lessee must give lessor facilities to inspect and repair.

Lessor may assign his rights but must notify lessee. Lessee may not assign without lessor's consent, but if lessor unreasonably withholds consent, in case of land lessee may assign without lessor's consent, and in case of any object court may order transaction.

See also category 3 Business Regulation and Commerce, topic 3.13 Sales, subhead Sale of Flats.

23.07 MOVEABLES:

Moveables Law 1971 grants to owner of moveables same rights against wrongful possession and trespass as Land Law 1969 grants in respect of immoveables. Joint ownership is over undivided whole with right to claim partition. See topic 23.06 Landlord and Tenant.

23.08 POWERS OF ATTORNEY:

Power of attorney authorising person to act as agent in respect of lands or rights in land must be in writing and in certain cases, especially if irrevocable, copy of power of attorney has to be deposited with Land Appreciation Tax Authority and may be subject to payment of Land Appreciation Tax.

Person entrusted with possession of assets or their management, is required, if ten years have passed since grant of authority, to advise Administrator-General of existence of the power or authority. No transaction relating to immovables may be given effect by virtue of power of attorney after expiration of ten years from date of appointment, except with authority of appointor or with leave of court.

23.09 REAL PROPERTY:

See topic 23.05 Land.

24 TAXATION

24.01 BUSINESS TAXES:

National Health Insurance Law.

In 1994 National Health Insurance Law (“NHIL”) was adopted. NHIL imposes direct tax based on employee's individual monthly salary up to certain amount. Rate of tax under NHIL ranges from 3.1% to 4.8%. All residents are permitted to choose health maintenance organization (“HMO”) from which they wish to receive services and HMO's are paid in accordance with standard approved tariff. Exemptions granted for instance to those who were recognized by “Yad Veshem” Institute as Jewish saviours provided they reside in Israel.

Companies Tax.

Israel imposes income tax on taxable income of corporations. Generally speaking, taxable income is computed in manner common to most developed tax systems of the world (see also topic 24.07 Income Tax). Concept which directs Israeli taxation of transnational transactions is mixture of territorial principle and of taxation on worldwide basis.

On June 29, 2004, Knesset adopted amendment to Income Tax Ordinance, pursuant to which, inter alia, corporate income tax will be gradually reduced in years 2004 to 2007 from 36% to 30%. In 2004 corporate tax rate was 35%. It has been reduced to 29%. Dividend distributions to individuals are taxed at rate of 25%, withheld at source. Withholding rate may be reduced by tax treaties. Under United States-Israel Tax Treaty, said rate is reduced under certain circumstances (same applies to tax treaties with other countries). There is special tax regime relating to capital gains tax which derives from fact that in Israel substantial portion of nominal "capital gain" may be attributed to inflation and devaluation of Israeli currency. (See catchline Negating Effect of Inflation on Tax Accounting, infra.) Because of relatively high rate of inflation from which Israeli economy suffers from time to time, Israel developed very sophisticated legal mechanism to avoid on one hand taxation of inflationary gains and on other hand abuse of tax system by claiming ordinary deductions based on inflationary financing without corresponding recognition of ordinary income. (See catchline Negating Effect of Inflation on Tax Accounting, infra.) Extensive new legislation entered into force in 1994, enabling tax-free transfers, mergers and splits.

Negating Effect of Inflation on Tax Accounting.

Nominal tax accounting has serious adverse effects during period of rapid inflation. Beginning in early 1980's, and, with regard to foreign investors, beginning in late 1970's, Knesset (Israeli legislature) has tried to solve this problem. Several attempts at finding solution have been made and main body of law dealing with problem is Income Tax Law (Adjustment for Inflation), 5745-1985 (referred to as "Law").

This highly complicated Law was introduced in 1985 as Temporary Measure for tax year 1985 replacing Income Tax Law (Taxation in Inflationary Conditions), 5742-1982. 1986 Amendment extended Law beyond tax year 1985. 1987 Amendment made Law permanent measure except that Finance Minister with approval of Knesset Finance Committee may announce, within three months of any given tax year, that this Law does not apply to said tax year. Law has been abolished but still applies to income, expenses, assets, liabilities, and financial statements of companies for tax years prior to its termination.

Two major problems that Law attempted to redress are following: (1) Erosion of taxpayer's equity invested in current assets during period of high inflation. Such equity is likely to be eroded if taxpayer's nominal gain from sale of such assets is taxed at ordinary tax rates. (2) Loss of government tax revenues resulting from full deduction of nominal inflation-linked interest expenses incurred on debt used to finance acquisition of long-term assets. Sale of such assets is subject to special capital gains tax regime largely negating effect of inflation by limiting tax on gains resulting from inflation accumulated until 1/1/94 to mere 10% and exempting gains resulting from inflation and accumulated after 1/1/94. Taxpayers would therefore enjoy windfall if they were allowed to deduct full, nominal amount of their inflation-linked interest payments against income taxed at ordinary rates. (Maximum rate of capital gains tax for individuals is now 20% on "real" gains and 10% on "inflationary" gains.)

Law attempted to solve these two problems by protecting that portion of taxpayer's total equity invested in current assets while offsetting deductibility of nominal interest on that portion of taxpayers' liabilities attributable to investments in fixed assets.

This was accomplished by granting taxpayer additional deduction with regard to equity invested in current assets, while imputing additional income to taxpayer with regard to its debt financed fixed assets.

Calculation of these amounts was accomplished as follows:

Taxpayer must calculate his "total capital" which consists of "sum of capital" minus "sum of fixed assets". These sums are based on balance sheet figures of capital and fixed assets as of beginning of tax year. List of items to be taken into account in calculating each sum appears in Supplements A & B to Law. Special adjustments are made to reflect differences between financial accounting and tax accounting. In addition "total capital" includes figures reflecting changes in "sum of capital" and "sum of fixed assets" during tax year. If "total capital" is positive figure it is "protected" against erosion by inflation, by allowing deduction equal to "total capital" multiplied by increase in cost of living index during tax year, up to 70% of taxable income (excess may be carried forward). Protection is needed because positive “total capital” means that capital has been invested in current assets. If “total capital” is negative figure it is multiplied as above and result is added to income because it means that fixed assets have been debt-financed and, while all financing expenses including their inflationary element (linkage differences) are fully deductible, inflationary element of appreciation of fixed asset accumulated until 1/1/1994 is taxed only at 10% and if accumulated thereafter is exempt.

Law and regulations thereunder provide mechanism to ensure that depreciation deductions retain their real value even during inflationary period. Law and regulations supplement, and in many cases replace, depreciation rates and/or systems provided under other tax laws.

Law provides for adjustment of closing inventory values and of advances from customers and to suppliers, but application of these provisions has been postponed.

Law provides that Stock Exchange gains may be taxed even if not realized, and that if value of securities owned by taxpayer does not increase at rate equal to rate of inflation taxpayer is “punished” for investing protected capital and/or for debt-financing purchase and carrying of such securities. “Punishment” takes form of including in income difference between value of said securities, and said value increased at rate of inflation, and value actually attained. Law overrides exemption normally provided for Stock Exchange transactions.

Special deduction is provided to compensate taxpayers for erosion of current earnings.

Above rules apply to vast majority of companies and to vast majority of partnerships and individuals required to maintain and report on double entry system. Less complex rules apply to other taxpayers and many taxpayers are not subject to Law at all (e.g. taxpayers who do not claim financing expenses and are not subject to reporting under double entry system).

Foreign owned companies and partnerships may be exempt from application of Law by electing to report their income in foreign currency under set of Regulations protecting them from effect of inflation.

24.02 CUSTOMS DUTY AND TAX:

Customs Duty.

Customs are payable in respect of import of commodities subject to substantial list of exempted articles. Duty is either fixed or ad valorem. Method of valuation has recently been adapted by GATT. Israel adopted legislation relating to dumping and equalizing levies.

Israel has concluded trade and customs agreements with European Economic Community and customs duties have been progressively reduced on imports from member nations as from 1/1/87. Israel has concluded Free Trade Area Agreement with U.S. under which customs duties have been progressively reduced. Israel has also concluded customs agreement with EFTA countries. Under all three agreements most goods are currently exempt from customs duties. However, goods must meet Rules of Origin requirements in order to enjoy benefits of agreements. Said Rules differ from one agreement to another.

24.03 EMPLOYMENT TAXES:

Employer's Tax.

Employer pays tax on payroll. Exemption granted to industrial undertakings within Encouragement of Industry (Taxes) 1969 Law, farms, companies where 70% of goods sold are exports of Israel industrial or agricultural products, hotels, housing construction, certain computer services companies and certain R & D funds. Tax is paid together with income tax deducted from payroll by employer. Eilat employers exempted in respect of workers employed in Free Trade Zone. (See category 15 Foreign Trade and Commerce, topic 15.05 Foreign Trade Regulations, subhead Free Trade Zone.) Currently rate is set at 0% for all employers except public institutions, not for profit organizations and entities treated as the State, which are subject to 4% tax.

24.04 ESTATE TAX:

Repealed in relation to estates of persons deceased after 31/3/81. Capital Profit Tax and Land Appreciation Tax Law adjusted so that profit on sale of asset inherited after 31/3/81 includes increment accrued during lifetime of deceased. See subhead Capital Gains Tax, supra. Estate Tax Law was completely abolished in Dec. 1987.

24.05 FOREIGN INVESTMENT TAXES:

See topic 24.08 Investment Law and Incentives.

24.06 FREE ZONES:

Eilat—Free Trade Zone.

By 1985 Law exemption from customs duty, purchase tax, excise, levies and customs deposits on imports from abroad and from Israel, also from VAT except electronic equipment, dishwashers, clothes driers, deep freezers and private cars. Special income tax benefits and employer's tax benefits provided by Law in respect of work performed in Eilat and to residents of Eilat.

24.07 INCOME TAX:

Income Tax Ordinance was codified in 1961. New version of Ordinance brings up to date and incorporates in a comprehensive code the provisions of 1947 Ordinance and subsequent amendments.

Income tax is payable on income of any person arising in, derived from or received in Israel from any business, profession or employment as well as from dividends, interest and linkage differences, annuities, rents, premiums, royalties and other profits or gains. Special provisions impose tax on gains from share redemption, bond-washing, waiver of debts, stock options, fringe benefits of employees and imputed interest. Noncapital business expense of obtaining income is deductible, including depreciation on cost of business assets (see also subhead Companies Tax, infra), interest and linkage differences on business loans. Deduction of travel and entertainment expense is restricted. Special regulations determine amounts of personal expenses of foreign experts which are recognized as deduction.

Tax and accounting year is calendar year except for four classes of assessees who may apply for special period of assessment.

All businesses and professions are required to keep accounts in accordance with rules. Noncompliance involves penalties and loss of tax benefits under law.

Expenses (including capital expense) on approved research projects in industry, agriculture, transport or energy allowed as deduction. If project not approved, expense allowed in three equal annual instalments from year of outlay.

Rates.

Individuals pay tax on taxable income at progressive rates, i.e.: for 2007: 30% on first NIS

133,680; 35% on next NIS 133,681 up to NIS 192,000; 36% on next NIS 192,001 up to NIS 413,400; 48% on income above NIS 413,400. Certain types of income are subject to lower rates of tax (e.g. certain dividends, rental income). Amounts charged at each rate are adjusted periodically for index changes. Tax credits are allowed for resident taxpayer and wife. Additional credits allowed for various taxpayers (e.g. youngsters, new immigrants, holders of degree from institution of higher education). From 1996 special additional credit applies to women. Rates on personal income up to NIS 133,680 are lower for individuals who are at least 60 years old.

Tax credit of 35% is allowed for donations to recognized charitable bodies totaling more than NIS 380, subject to ceiling of lower of 30% of chargeable income or NIS 4,000,000 (for tax year 2007), or together with Research and Development deductions 50% of chargeable income before deducting expenses of participation in Research and Development. Amounts in excess of allowable tax credit may be carried forward for three years.

Exemptions.

The following persons and institutions are exempt from income tax either totally or partially: municipal and local councils; public institutions for promotion of religion, charity, education, culture, science, health, sport or any other approved purpose and charitable trusts; pension funds: cooperative societies not deriving their income from nonmembers; blind and certain handicapped persons in respect of earned income not exceeding certain ceiling or other income not exceeding certain ceiling; diplomatic representatives and consular officers in regular service of foreign states in respect of salaries and emoluments payable for such services provided such foreign state grants similar relief to Israel; war invalids, victims of hostile action or Nazi persecution and dependents of deceased members of fighting services in respect of pensions payable by government; temporary resident in respect of income derived from sources abroad, provided he did not reside in Israel for more than six months in year preceding to year of assessment and does not intend to stay permanently in country; linkage differences received by individuals on sale of assets, compensation on expropriation of assets, cancellation of sale of assets, claims for damages, private loans to another individual, provided such linkage differences are not liable as trade or professional income; linkage differences on Government loans not held for trading; linkage differences on loans made to company by controlling shareholder (shareholder having 5% of certain rights) under certain circumstances; exchange differences on individual's foreign currency deposits if not business income; on loan from nonresident; on foreign currency deposits of payments by nonresidents on account of share purchases; income of nonresident from employment in Israel is exempt for limited period and sum if employed by foreign employer; new residents in respect of income received from abroad for first seven years of residence; nonresidents in respect of interest on certain types of securities and loans, income from investments in foreign currency in securities quoted on Tel-Aviv Stock Exchange provided investor receives no double taxation relief or if Double Taxation Agreement with investor's country allows “tax-sparing”; monthly payments received by Gentiles who saved Jews during Holocaust; linkage differentials on Index linked deposits made by individuals or trust funds provided such linkage differentials are neither part of individuals business income nor derived from deposits which must be registered in his business records; trust fund income derived from exchange rate differentials on bond redemption provided bond is foreign security; payment received by orphan whose state was caused by violent act committed by family member. See also topic 24.08 Investment Law and Incentives. *Note:* Above list of exemptions is incomplete. Rents from lease of residential apartments are exempt from tax up to ceiling.

Special taxing arrangements exist for Real Estate Investment Funds established in Israel and controlled mainly by Israeli permanent residents and for Israeli holding companies. Under certain conditions, shareholders in Israeli holding company are exempt from tax on receipts from company.

All arrears of tax are charged with interest and linkage differences which are not allowed as deductions from income. Interest and linkage differences are allowed on overpayment and are exempt from tax.

Capital Gains Tax.

Capital gains are taxed under special tax regime provided for in Income Tax Ordinance which in effect taxes real gains at regular income tax rates and gains resulting from inflation at flat rate of 10% for inflationary gains accumulated before 1994, and exempts such gains accumulated after 1994. Rate of 35% applies to real gains on sale of foreign securities by trust fund and by individuals. From Jan. 1, 2007, rate is 15%.

Briefly, in calculating capital gain tax due “purchase price” (cost minus depreciation deductions) of asset is divided by cost of living index at time of purchase, and multiplied by cost of living index at time of resale. This is called “adjusted purchase price”. That part of profit on sale, which equals difference between original purchase price and adjusted purchase price is called “inflationary sum” and is taxed at rate of 10% of such difference for inflationary sum accumulated before 1994 and 0% for inflationary sum accumulated thereafter. Foreign residents are entitled to calculate “inflationary sum” based on currency of investment. Balance of profit on sale is called “real capital gain” and is taxed at regular tax rates (corporate or individual). Where asset sold was acquired by inheritance after 31 Mar., 1981, cost of original purchase by deceased is taken for calculating profit on sale. Amounts spent on improvements of asset sold are deductible and brought into calculation of adjusted purchase price after index adjustment.

Capital gains on sale of stock traded on Tel Aviv Stock Exchange Ltd. (“TASE”) are exempt from tax except for gains in certain first sales after registration of stock for trade. Exemption does not apply to certain taxpayers subject to Income Tax Law (Adjustment for Inflation). Similar exemptions apply to sales of certain stock of Israeli companies listed and traded on overseas stock exchanges. Nonresidents are exempt from 10% tax on “inflationary sum” on all sales of stock (even if not traded), provided they calculate “inflationary sum” based on currency of investment.

Similar tax regime (i.e. separation between “inflationary sum”, taxed at 10% or exempt, and “real capital gain”, taxed at regular rates) is provided by Land Appreciation Tax Law, 5723-1963 for taxation of capital gains upon disposition of interests in real estate or real estate companies.

24.08 INVESTMENT LAW AND INCENTIVES:

The Encouragement of Capital Investment Law 5719-1959 (“ECIL”).

This law, as am'd, provides incentives for capital investments. It succeeds earlier legislation with respect to encouragement of investments. Substantial reliefs and exemptions from income tax are allowed by ECIL. ECIL provides program under which Investment Center (“Center”), established pursuant to ECIL, may grant status of “approved enterprise”, “approved asset”, “approved investment” or “approved loan”, to subject of investment plan approved by Center (“approved plan”). On Mar. 29, 2005, Israeli Knesset passed amendment to ECIL that restructures tax incentives for future industrial and hotel investments. Tax holiday package can now be elected for up to 15 years for “Privileged Enterprise” if certain conditions are met, without needing to obtain approval. Higher level of foreign investment results in greater tax benefits.

Foreign currency invested through approved plan and profits earned thereon may be repatriated in foreign currency by foreign investor.

Several types of legal entities may be approved as owners of “approved enterprise”. In order to provide appropriate taxation of foreign corporations enjoying ECIL benefits, ECIL provides for 15% “branch tax” on income of foreign corporations owning “approved enterprise”. Income Tax Commissioner is authorized to forego branch tax if satisfied that income subject to tax was reinvested in corporation's business in Israel.

In order to provide appropriate taxation for this new approach, ECIL was amended in Feb., 1992, to provide for 15% “branch tax” on income of foreign corporations owning “approved enterprise”. Amendment authorizes Income Tax Commissioner to forego branch tax if satisfied that income subject to tax was reinvested in corporation's business in Israel.

ECIL has undergone major revisions in recent years. Currently, ECIL provides owners of “approved enterprises” with “standard” and “alternative” sets of benefits, which are summarized as follows:

(a) Sets of Benefits under ECIL.

“Standard” set of benefits focuses primarily on extending government grants to investor and lowering his tax rate. “Alternative” set of benefits provides investor with complete tax holiday in lieu of government grants.

“Standard” set of benefits consists of grants computed as percentage of total capital invested in approved enterprise. Percentage varies in accordance with “development zone” in which enterprise is located, and type of enterprise. Following table describes current rates (in percentages) of above grants:

Development zone	Industry	Hotels	Other Tourism Enterprises
A	20* +4%**	20 +4%	10 +5%**
B	10***	10	—

* In 1999 percentage is 22 for enterprises approved plan of which does not exceed NIS 140,000,000.

** May be granted by Israel Lands Authority with Government approval.

*** In 1999 percentage is 22 for enterprises approved plan of which does not exceed NIS 140,000,000.

In addition to said grants, owner of “approved enterprise” is entitled to tax benefits. Major tax benefit is lower tax rate on profits of enterprise and on dividends paid out of such profits (if owner is corporation). Corporate tax rate is reduced from ordinary 36% to 25%. (Zero for first two years in development zone A).

All grants are received subject to meeting terms of approval issued by Investment Center.

(b) Enhancement of Tax Benefits to Foreign Investors.

ECIL enhances above tax benefits when foreign investors form substantial portion of owners of corporation, which in turn owns “approved enterprise”. Tax rate on such corporation is lowered gradually as function of increase in foreign investor's holding thereof. In addition, period for which tax benefits are granted is extended in case of corporations with substantial foreign investment.

Following table summarizes tax rates imposed on corporations, substantial portion of whose owners are foreign investors:

Percentage of Foreign

Investment in Taxable Year	Maximum Rate Year of Tax
49 - less than 74	20%
74 - less than 90	15%
90 or more	10%

Percentage of foreign investment is defined in relation to five different rights: (1) rights to profits, (2) voting rights, (3) rights to appoint directors, (4) percentage of share capital plus shareholders' loans to corporation, and (5) percentage of share capital only.

If foreign investors have more than 50% of second, third and fifth type of rights, then second and third rights are not taken into account in calculating percentage of foreign investment in taxable year.

As indicated above, tax rate for corporations that do not have above-mentioned amount of foreign investment is 25% (zero during first two years in development zone A).

(c) Duration of Benefits.

As with tax rates, duration of benefits also varies according to whether or not corporation is substantially owned by foreign investors. Corporations not substantially owned by foreign investors enjoy “standard” set of tax rate benefits for seven years. Dividends from income entitled to benefits are taxed at only 15% for 12 years.

Corporations with more than 25% foreign investment are entitled to tax rate benefits under “standard” set of benefits for ten years, and special tax rate for dividends paid from benefit entitled income applies in such case with no time limitation.

Above rules apply both to corporations entitled to gradually reduced tax rates (i.e. corporations with 49% or more foreign investment) and to corporations having substantial foreign investment which is less than 49% (i.e. corporations with more than 25% and less than 49% foreign investment whose income is subject to tax rate of 25%).

For purposes of duration of incentives, more than 25% foreign investment threshold is calculated by method slightly different from that used in computing foreign investment for purposes of entitlement to the gradually reduced tax rates.

Corporation meeting said threshold is defined as “foreign investment corporation”. “Foreign investment corporation” which meets certain timing requirements with regard to approval of its “approved enterprise” is defined as “foreign investors corporation”. Only “foreign investors corporation” is entitled to gradually reduced tax rates, provided that percentage of foreign investment reaches at least 49% (see table above). Under certain circumstances, duration of tax rate benefits may be extended by Center for additional five years for corporations having more than 74% foreign investment (calculated in same manner as more than 25% threshold for purpose of definition of “foreign investment corporation” is calculated. See above).

(d) “Alternative” Set of Benefits.

Only legal entity which is entitled to “alternative” set of benefits under ECIL is corporation owning approved enterprise. Such corporation must forego grants and tax benefits under “standard” set of benefits described above. Instead, such corporation is granted complete tax holiday for period which varies in accordance with development zone in which enterprise is located.

Periods of tax holiday are as follows:

DEVELOPMENT ZONE	PERIOD OF TAX HOLIDAY (YEARS)
A	10
B	6

After expiration of period of tax holiday, corporation is entitled to tax benefits under "standard" set for remainder of term of benefits. Under "alternative" set of benefits, if dividends are paid out of exempt income, distributing corporation is taxed at rates equal to tax rate which would have been imposed had corporation not chosen "alternative" set. In addition, withholding tax is imposed on shareholder. Only corporations with no substantial capital investment expecting high profits in their early years of operation and planning reinvestment of such profits should choose "alternative" set of benefits.

(e) Accelerated Depreciation.

Granted under all sets of benefits.

(f) Preventing Foreign Investment Erosion Due to Currency Devaluation.

Certain corporations with foreign shareholders which had "approved enterprises" as of certain date can still elect to use, for dealing with income from such enterprises, certain accounting methods which assure that foreign investment is not eroded due to Israeli currency devaluations. Generally, today, to achieve above purpose, "foreign investment corporations" may elect to handle their tax accounting in U.S. dollars.

The Encouragement of Investment (Capital Intensive Companies) Law, 5750-1990.

This law, ("Law") adds to array of investment incentives. Tax benefits under Law apply to Capital Intensive Corporations. Capital Intensive Corporations ("CIC") are corporations with paid-up capital of at least $30 million, of which 75% or more is employed in qualifying activities. In addition, all shareholders of CIC must be nonresidents and purpose of CIC must be to engage in business in qualifying activities or invest in Israeli corporations engaged primarily in said activities.

"Qualifying activities" are establishing or expanding industrial, agricultural, tourism, transportation, building, water, energy, communication or computer enterprises and performing research and development in aforementioned areas. Tax benefits provided by Law are: (1) 25% tax rate on "real capital gain" from disposition of stock or fixed assets used in qualifying activity. (2) 25% tax rate on ordinary income derived from qualifying activities. (3) 15% tax rate on dividends from distributing company engaged primarily in qualifying activities. (4) Special tax regime which applies to distribution of dividends—25% withholding tax is imposed on recipient shareholder. However, upon distribution, CIC receives refund for corporate tax paid by it. Refund amounts to full 25% of corporate tax when shareholder is subject to full 25% withholding rate. If withholding rate is reduced by treaty then refund to CIC is reduced correspondingly so that combined tax rate will always be 25%. (5) No further taxes are imposed on CIC or its shareholders.

Duration of benefits under Law is 30 years.

Since CIC may also enjoy benefits under ECIL, and since combined tax rate on 90% or more foreign-held corporation and its shareholders is only 23.5% (10% on "foreign investors corporation", and 15% on distributed dividend), main benefits of Law are as follows: (a) Ability to enjoy reduced tax rates for substantial period of time after period of ECIL benefits will have expired. (b) Shift of tax burden from corporation to its shareholders, which may enable individual shareholders to receive foreign tax credits in their countries of residence, for what otherwise would be underlying corporate tax credited only to corporate shareholders. (c) Reduced capital gains tax upon disposition of investment (such reduced rate is not available under ECIL).

In addition, Law is very beneficial to corporations not entitled to benefits under ECIL.

The Encouragement of Industry (Taxes) Law 5729-1969.

This Law extends several tax benefits to Industrial Corporations. Industrial Corporation is corporation, income of which consists 90% or more of income from industrial enterprise owned by it. Industrial enterprise is enterprise activities of which consist principally of manufacturing activities.

Tax benefits provided include: accelerated depreciation of intangibles, deduction of expenses borne in issuing stock for trade on stock exchange, possibility to file consolidated tax return with certain other industrial corporations or certain corporations holding industrial corporations.

§16A of Income Tax Ordinance.

This section authorizes Minister of Finance to grant refund of Israeli income tax to nonresidents, to extent that latter do not receive foreign tax credit for Israeli tax, in their country of residence. Advance commitment by Minister of Finance that he will exercise his said authority should be secured.

Incentives for Research and Development (“R&D”).

Main incentives for performing R&D in Israel include those under (a) Encouragement of Research and Development in Industry Law, 5744-1984, (b) general tax law, (c) special tax regime for CIC's, (d) BIRD Foundation Program, and (e) Canada-Israel Industrial Research and Development Foundation (CIIRDF).

(a) Encouragement of Research and Development in Industry Law, (5744-1984) (“ERDL”).

Certain benefits for encouragement of R&D are granted under provisions of ERDL.

ERDL regulates awarding of grants, loans and tax benefits to those carrying out R&D schemes which have received proper authorization. Schemes eligible for authorization under ERDL are generally yearly or multi-year schemes that result in development of know-how, processes or methods for production of new products or new processes or in substantive improvement of existing products or processes. Main benefits granted by ERDL are: (a) Grants, calculated as specified percentage of R&D expenses. Ordinary percentage is 50%. (b) Authorized loans, granted instead of above-mentioned grants. (c) Tax relief to scientific workers employed in accordance with authorized schemes.

ERDL also provides for royalties which promoter is obliged to pay to Israeli Treasury from sales of developed product.

(b) Tax Benefits under General Tax Law.

Tax benefits are granted under general tax law with regard to R&D expenses. Certain R&D expenses may be deducted on current basis, even if they are of capital nature. (See also topic Taxes, subhead Income Tax.)

(c) Special Tax Regime for CIC's.

See subhead The Encouragement of Investment (Capital Intensive Companies) Law, 5750-1990, supra.

(d) BIRD Foundation.—Israel-United States Bilateral Industrial R&D Foundation provides funding for joint ventures between Israeli and U.S. firms for performance of industrial R&D, aimed at developing new product or process.

Research and Development—2005 Amendment to Law for Encouraging of Industrial Research and Development.

Research and development grants and assistance programs are available through Ministry of Industry and Trade. To attain such grants or assistance, which can provide as much as 66% of research and development costs, proposal must be submitted by entity conducting research and development activity to Office of Chief Scientist in Ministry of Industry and Trade. If research and development project results in salable product, funding will generally be repaid as royalties at 3% of product's sales revenues. Product developed as result of such grant must be produced in Israel, except if otherwise approved by Research Committee of Office of Chief Scientist. Similarly, up to 50% of industrial research and development costs of joint ventures between Israeli and U.S. companies may be underwritten by Binational Industrial Research and Development Foundation (BIRD), and funds for agricultural projects are available from Binational Agricultural Research and Development Foundation (BARD), both of which are sponsored by Israeli and U.S. governments. Furthermore, Canada-Israel Industrial Research and Development Foundation (CIIRDF) was established by governments of Canada and Israel to promote collaborative research and development between companies in those two countries. CIIRDF will contribute up to 50% of research and development costs of joint feasibility studies, pilot projects or full scale projects.

Israel has, in addition, entered into binational financing agreements with France, The Netherlands, Spain and U.K. and is negotiating such agreements with Belgium and Portugal. U.S., Israel and Jordan have recently initiated TRIDE program, now in its pilot stages. Each TRIDE project would be joint venture involving private companies from all three countries, which will draw on complimentary strength in research and development, manufacturing, and marketing to develop new products and technologies for domestic and international markets. These three governments will support up to 50% of direct costs needed to bring new product to market. Israel is member of European Community's Fourth RTD Framework Program. Program funds research and technological developments and has total budget of more than US$10 billion. Chief Scientist is also responsible for Incubator Technology Centers which offer infrastructure support at reduced or no cost and finance 85% of approved budget for technology based startup businesses. Incubator Centers have been very successful in starting out several new technologies that have gone on to become highly successful businesses.

Additional Incentives to Special Activities.—In addition to above, specific incentive schemes are granted to investors engaged in certain special activities. These may be tax or other incentives to activities in construction, agriculture, oil exploration, film production, investments in securities traded on Tel Aviv Stock Exchange (“TASE”) and international trade.

(a) Construction.—ECIL provides tax benefits to investors in construction if at least 50% of building space is rented for residential purposes during specified time period. Benefits include imposition of low tax rates provided under ECIL on both “real capital gain” realized at time of sale of building and on rental income, accelerated depreciation and other benefits. In 1992, legislation generally expanded benefits to investors in construction. Among major changes were increase in annual rate of depreciation from 10% to 20%, ability to partially or totally shift tax benefits associated with construction between developer and purchaser of building, shortening of minimum required rental period and ability to apply law to portions of buildings.

With regard to foreign corporations investing in construction main feature of 1992 legislation was imposition of “branch profit tax” at rate of 15%. Unlike comparable “branch tax” provision adopted under ECIL, such tax may not be waived.

Legislation also provides tax regime with regard to real estate corporations ("REC's"). Regime applies if certain conditions are met, including: (a) REC is "Real Estate Association" under Land Appreciation Tax Law 5723-1963 i.e. it owns primarily real estate. (b) REC is approved by Income Tax Commissioner for purposes of regime. (c) All of stockholders are nonresident individuals at time they purchased stock. (d) None of stockholders owns 5% or more of stock of REC. (e) Number of stockholders is at least 50. (f) Main activity of REC is construction, leasing or selling of buildings. (g) REC owns at least 50 apartments. REC may be either foreign or domestic corporation. If REC meets requirements described above, neither purchase of stock in REC nor disposition thereof is subject to tax. Under normal circumstances, purchase of stock in "real estate association" is subject to purchase tax and disposition thereof is subject to land appreciation tax. Disposition of residential units by individuals may be exempt under Land Appreciation Tax Law 5723-1963. But this exemption is limited by number of apartments owned or disposed of by individual during given period of time. Exemption from tax under new regime is not limited and thus may present attractive vehicle for nonresident individuals to purchase apartments in Israel.

Finally, 1992 legislation deals with investments in real estate through entities listed on TASE or through investment funds. First, legislation provides exemptions from purchase tax and from land appreciation tax upon purchase and disposition of units in partnerships listed on TASE, whose main activity is construction or leasing of apartments (before 1992 amendment similar exemptions were granted only to purchase and disposition of stock in corporations). Second, legislation enables investment funds to invest in real estate and provides tax principles relevant to such investment.

(b) Agriculture.

Encouragement of Capital Investments in Agriculture Law, 5741-1980 ("ECIAL") provides special tax and other incentives for investments in agriculture made according to "approved plan". Incentives include lower tax rate on income generated by "approved agriculture enterprise", accelerated depreciation, capital grants and other incentives. In Mar., 1992, legislation introduced "alternative" set of benefits for investments in agriculture which is very similar to "alternative" set of benefits under ECIL (see above) i.e. main feature is complete tax holiday.

(c) Oil Exploration.

Special tax benefits are granted under Income Tax Regulations (Deductions from the Income of Owners of Oil Rights), 5716-1956 and Income Tax Regulations (Principles for Computing Tax because of the Holding and Sale of Participation Units in an Oil Exploration Partnership), 5749-1988, to persons engaged in oil exploration in Israel or holding units in oil exploration partnerships, which units are traded on TASE. Eligible partnerships are partnerships which spend most of their expenses in oil exploration and development and are approved by Income Tax Commissioner. Benefits include current deduction of exploration costs and substantial depletion deduction.

(d) Film Production.

Special tax benefits are granted under Income Tax Regulations (Deductions from Income of Investors in a Film in Israel) 5750-1990, to holders of units in film production partnerships, which units are traded on TASE. Eligible partnerships are partnerships which are engaged solely in production of film and which have rights to income from film at reasonable level compared to their share of production costs. Tax benefits include current deduction of production costs spent in Israel and deferral of recognition of certain income from sale of film.

(e) Investments in Securities Listed on TASE.

Exemption from capital gain tax on disposition of stock listed on TASE is described below. Similar exemption is provided for other types of securities. These incentives are granted only to persons not engaged in investment in stock exchange as business activity. However, either first listing of stock on TASE or first sale of said stock is not exempt from tax. Exemption is not available to certain taxpayers who are subject to Income Tax Law (Adjustment for Inflation), 5745-1985.

(f) International Trade.

Under ECIL foreign corporation based in Israel and engaged in international trade which does not include import to or export from Israel, may be granted by Minister of Finance reduction or even complete exemption from Israeli corporate tax. Same reduction or exemption may apply to dividends distributed by said corporation to foreign stockholders. In addition, capital gains of corporation from sale of assets located outside Israel and capital gains of foreign stockholders disposing of their stock in corporation may also be exempted.

(g) Sports and Journalism.

Under special regulations tax rate on taxable income of foreign athletes and reporters is fixed at 25% and in computing taxable income certain maintenance and living expenses are allowed.

24.09 LOCAL GOVERNMENT TAXES:

Municipal Rates.

Under Municipalities and Local Authorities Ordinances local governments impose tax on buildings and occupied land. Tax is based on area of chargeable assets, location, use and type of building and is payable annually by occupier. Arrears are charged with interest and linkage differences. In recent years increases in rates have been limited by special laws. Reductions are granted for some tenants based on age or social condition.

24.10 PROPERTY TAXES:

As from 1/4/81 Property Tax is charged only on market value of unimproved land, but not agricultural lands designated as such or used as such by owner who owned land as of 1/1/1995. Valuation date is Oct. 1 of preceding year. As from 25/7/1995 temporary measures grant certain exemptions as incentive to rapid building of residential apartments.

Land Appreciation Tax.

Imposed on sales of land, real estate and rights in land (including lease of more than 25 years and also lease of shorter period when relating to state land). This tax is calculated on substantially same basis as Capital Gains Tax (see subhead Capital Gains Tax, supra). Sale of private dwellings exempted provided owner has either not owned simultaneously two residential properties in previous four years and not executed tax exempt disposition of residential property in previous 18 months; or not executed tax exempt disposition of residential property in previous four years. To qualify for exemption property must be used for residential purposes either 80% of period of time for which appreciation is computed, or for period of four years immediately preceding disposition. Purchase tax of up to 4.5% is imposed on purchase of real property. Regarding purchase of apartment and 4.5% there is progressive purchase tax starting from 0.5% to 4.5%.

Betterment Levy is payable in event there has been advantageous change in building rights which increase value of property, as result of official rezoning. Rate of levy is 50% of betterment. Levy is payable on issue of building permit or on disposition of property.

24.11 SALES TAX:

Purchase tax may be applied by the Minister of Finance to certain commodities and services. It has been applied to large range of commodities at percentage of wholesale price.

24.12 STAMP TAX:

Stamp Duty.

Comprehensive system of taxes in form of stamp duty was fixed by Stamp Duty on Documents Law, 1961, which provided for stamps to be affixed on certain classes of documents. Rates of duty were either fixed or ad valorem. Law was abolished commencing Jan. 1, 2006.

24.13 TAX INCENTIVES:

See topic 24.08 Investment Law and Incentives.

24.14 TREATIES AND AGREEMENTS:

Double Taxation.

Agreements are in force with U.K., Sweden, France, Finland, Germany, Denmark, Norway, Austria, Singapore, Holland, Italy, Belgium, Canada, Jamaica, South Africa, Hungary, Poland, Japan, Czech Republic, U.S.A., China, Ireland, India, Thailand, Greece, South Korea, Philippines, Bulgaria, India, Turkey, Mexico, Slovak Republic, Spain, Poland, Romania, Switzerland, Belarus, Russian Federation, Uzbekistan, Uruguay (in form of exchange of letters), Ukraine, Italy, Argentina, Ethiopia, Brazil, Jamaica, Luxembourg, Latvia, Lithuania, Slovenia, and Croatia. Negotiations taking place with several countries. Mutual exemption has been agreed with many countries with regard to shipping and aviation profits. Unilateral relief may also be granted in certain circumstances.

Implementation of Agreement Concerning Jericho and the Gaza Strip (Economic Arrangements and Miscellaneous Provisions) Law (5735-1994).

This law was enacted in Dec., 1994 to implement economic arrangements between State of Israel and Palestine Liberation Organization (“PLO”), based on Jericho and Gaza Strip Agreement. Law and Agreement (concerning Preparatory Transfer of powers to the Palestinian Authority) provides, inter alia, arrangements concerning employment of Palestinian workers in Israel, “customs envelope” of Israel over relevant territories and other matters of direct and indirect taxation.

Implementation of Agreement Concerning Preparatory Transfer of Powers to the Palestinian Authority (Amendments of Law and Miscellaneous Provisions Law) (5736-1995) enacted in May 1995, to implement arrangements concerning preparatory transfer of powers and responsibility to Palestinian Authority, as provided by Agreement, signed between Israel and Palestinian Authority in Aug. 1994. Law provides arrangements concerning transfer of tax revenues to Palestinian Authorities which taxes have been collected by Israel on activities of residents of Territories who are not citizens. Law also discusses other tax affairs such as supply of information concerning residents of Palestinian Authority to Palestinian Authority.

24.15 VALUE ADDED TAX (VAT):

Tax imposed in Israel from July 1, 1976. Tax is charged on all taxable transactions in Israel and on imports to Israel. Taxable transaction includes sale of asset or supply of services by taxable person in course of his business and also sale of asset used by taxable person in course of his business. Taxable person is person who sells asset or supplies services in course of his business. Isolated transactions of commercial nature and any sale of real estate to taxable person other than financial institution or nonprofit organization are also included.

Tax is paid by taxable person as percentage of sale price of asset sold or of service supplied and amount of tax is included in invoice given to customer. Customer in his turn may if he himself is taxable person deduct tax included in invoice and paid by him from amount of any tax which he himself has to pay on sales or services supplied by him. If customer is not taxable person he cannot set off tax which he paid at time of purchase or receipt of services against any other VAT.

Rate of tax presently in effect is 15.5%. There are number of transactions exempted from tax such as letting of living accommodation for period not exceeding ten years, letting of any property for key money, transactions of business with annual turnover of less than certain amount (adjusted for inflation) sale of assets where tax paid when assets were purchased could not be set off and import of goods exempt from customs duty by virtue of international treaties and import of goods for diplomatic staff insofar as exempt from customs.

Certain other transactions are not charged with tax and are described as "zero-rated." These include goods imported by person entitled to purchase them free of Purchase Tax, e.g. an immigrant, hotel accommodation and services including car-hire supplied to foreign tourists, purchase of air and sea tickets (and land tickets to bordering countries), air and sea transport, sale of specified fruit and vegetables. Minister of Finance was authorized to determine as "zero rated" sale of goods to bodies contributing to Palestinian Authority, as long as such goods are destined for development or humanitarian, noncommercial purposes in Territories. Where taxable person has effected zero-rated transaction as distinct from an exempt transaction, he is entitled to set off any VAT paid by him in connection with any purchases made or services provided by him in connection with such zero-rated transaction.

Financial institutions such as banks and insurance companies are taxed on different basis, namely on percentage of their income chargeable to tax under the Income Tax Ordinance and also on percentage of total salaries and wages as assessed to income tax. Present rate is 17%. Nonprofit organizations are also liable on amount of salaries and wages paid by them unless such amount is below threshold adjusted for inflation. Present rate is 8.5%.

25 TRANSPORTATION

25.01 MOTOR VEHICLES:

Motor vehicles have to be licensed annually. Drivers are also licensed biennially by reference to type of vehicle driven. Age limit is 17, in respect of all vehicles other than motorcycles. While in first half year, or until age of 17½, young drivers are required to be accompanied by experienced driver (at least five years driving license, 24 years old or more, etc.). Age limit in respect of motorcycles is 16. All vehicles must carry third party insurance. Transfers of vehicles are effected by Deed of Sale recorded with licensing authority. Identification marks are applied to various types of vehicles, by reference to registry offices. Speed limit is 50 kilometres in built-up areas, 80 kilometres in open country and 100 kilometres (at present restricted to 90 km) on fast motorways. There is detailed road-code and substantial penalties for breaches. Security belt law enacted for front and rear seats of automobiles and all seats in autobuses. Every motor vehicle must be equipped with fluorescent jacket to be used by driver, person doing repairs or otherwise exiting vehicle, when vehicle is stopped on public highway.

Certain restrictions apply temporarily in regard to the transfer of vehicles as a result of present war conditions. Normally bona fide transactions are approved. Special provisions apply in regard to public vehicles including omnibuses and taxis, and their transfer is substantially restricted.

25.02 SHIPPING:

A substantial part of the shipping law was embodied in the Shipping (Vessels) Law 1960 dealing primarily with shipping registration and ships' mortgages. Certain parts of the (English) Merchant Shipping Act 1894 have been applied and still apply to Israel.

Ministry of Communications is in charge of maritime matters including the enforcement of the shipping laws. See also category 22 Mortgages, topic 22.03 Mortgages.

Under Ports Authority Law of 1961, Ports Authority was constituted as a separate legal entity and, pursuant to said law, control of ports and their management is vested in Ports Authority.

Shipping (Sailors) Law 1973 regulates conditions necessary to become a sailor both of Israeli and non-Israeli citizens. It provides means of supervision and disciplinary action. Council is appointed to plan, control and supervise examinations. Law defines authority and rights of captain, and regulates his duties both on land and on high seas. It also regulates discipline, and work distribution, salary and other rights of crew and deals with offences.

26 TREATIES AND CONVENTIONS

26.01 TREATIES:

Civil Procedure.

Israel is party to Convention on Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters, and to Convention on Taking of Evidence Abroad in Civil or Commercial Matters. (Regulation for the execution of the Hague Convention [Civil Procedure] 1954).

Israel is party to United Nations Convention on Recognition and Enforcement of Foreign Arbitral Awards.

Extradition Treaties.

Israel has signed following bilateral Extradition Treaties: Belgium (1956), Italy (1956), Luxembourg (1956), Netherlands (1956), France (1958), Switzerland (1958), South Africa (1959), United Kingdom (1960), Austria (1961), U.S.A. (1961), Sweden (1963), Canada (1967), Swaziland (1970), Fiji (1972) and Australia (1975).

Double Taxation.

§196 of Income Tax Ordinance empowers Minister of Finance to issue Order giving effect to Treaty made with another State for Relief of Double Taxation, regardless of anything contrary thereto in Ordinance. For list of countries parties to double taxation treaties with Israel, see category 24 Taxation, topic Taxes, subhead Double Taxation.

Customs Duty.

Israel is party to General Agreement on Trade and Tariffs (GATT), and to many Conventions affecting customs duties of which principal ones are Convention concerning creation of International Union for Publication of Customs Tariffs (Brussels) effective 1956, Lisbon Names of Origin Convention effective 1966, Brussels Convention on Nomenclature for Classification of Goods in Customs Tariffs effective 1970, Kyoto Convention for Simplification and Harmonisation of Customs Formalities effective 1977. Israel has signed customs, trade and free trade area agreements with EEC, U.S.A. and EFTA countries. (See also category 24 Taxation, topic Taxes, subhead Customs Duty.)

Public Documents.

Israel is party to Convention Abolishing the Requirement of Legalisation for Foreign Public Documents.

Many bilateral treaties affecting aerial and maritime navigation, commerce, tourism, economic, scientific and cultural.

1

ITALY LAW DIGEST

—Scope —

Revised for 2010 edition by

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(Abbreviations used are: C. C.—Civil Code; C. C. P.—Code of Civil Procedure; C. N.—Code of Navigation; P. C.—Penal Code; R. D.—Royal Decree; D. M.—Ministerial Decree; D. L. L. T.—General Lieutenant Decree; G. P.—General Provisions of Civil Code; D. L.—Law Decree; D. P. R.—Decree of President of Republic; D.P.C.M.—Decree of President of Council of Ministers)

Italy is member of EU. See also European Union Law Digest.

Note: Unless differently specified, revisions reflect law as of July 31, 2009.

1 INTRODUCTION

1.01 CURRENCY:

Former legal currency was the Italian lira. Bank of Italy holds monopoly on issuance of currency notes. Furthermore, Bank of Italy exercises limited control on transactions between residents and nonresidents and/or involving foreign currency. Nonresident foreigners when in Italy are practically subject to no control at all or currency restrictions.

As of Jan. 1, 1999 owing to European Monetary Union (“EMU”) entering its third stage (so-called “transition period” which lasted up to Feb. 28, 2002), national currency was gradually replaced with single currency called “EURO”. Conversion rate between Italian Lira and EURO was irrevocably fixed at 1 EURO = 1,936.27 ITL. As from Jan. 1, 2002 EURO notes and coins were issued and only EURO is deemed official currency of EMU. EURO is therefore valid for both cashless and conventional payments transactions as legal tender of each of the 12 countries who joined EMU from outset (i.e. Austria, Belgium, Finland, France, Germany, Greece, Ireland, Italy, Luxembourg, the Netherlands, Portugal, Spain). To date, EMU countries are 16, including Slovenia, Cyprus, Malta and Slovakia which have recently joined EMU.

Eurosystem which is formed by the 16 national central banks in EURO area and European Central Bank (“ECB”) is responsible, inter alia, for defining and implementing monetary policy of EURO area and issuing banknotes. ECB which was established on June 1, 1998 is independent of national central banks and central governments of European Union Member States and has its own budget.

See also category 15 Foreign Trade and Commerce, topic 15.04 Foreign Investments.

1.02 GOVERNMENT AND LEGAL SYSTEM:

Established by the Constituent Assembly on Dec. 22, 1947 which enacted Constitution which was amended by subsequent Constitutional laws (references to articles in this topic are to Italian Constitution).

Basic Principles.

Italy is a democratic republic, founded on work. The sovereignty belongs to the people, and is to be exercised pursuant to forms and limits of Constitution. (art. 1). All citizens have equal social dignity and are equal under law without discrimination for sex, race, language, religion, political opinions, personal or social status. (art. 3). State and Catholic Church, within their own status, are independent and sovereign. Their relations are regulated by Lateranensys Pacts. (art. 7). All religions and confessions are free under law. Juridical status of foreigners is regulated by law, in compliance with international treaties and rules. Foreigner, who in his country cannot have effective exercise of democratic liberties guaranteed by Italian Constitution, enjoys right of asylum in Republic's territory. No extradition of foreigner is allowed for political crimes. (art. 8-10). Italy repudiates war as offensive instrument against liberty of other peoples. On equal footing with other States, Italy allows limitations to its sovereignty necessary for purposes of peace and justice among nations. (art. 11).

Civil Rights.

Personal liberty and domicile are inviolable, except where arrests, searches or seizures are officially authorized by the judiciary. (arts. 13-14). Freedom of movement, meeting, association, religion, speech, writing and press are safeguarded. (art. 16 to 21). Every person may act in lawsuit for protection of his rights and interests. (art. 24). No one may be held criminally liable except under law enacted before punishable crime is committed. (art. 25). Criminal liability is personal. Accused person is not deemed guilty until final judgment is handed down. (art. 27).

Economic Rights.

The Republic protects labor in all forms and applications and takes care of the formation and professional elevation of the workers. (art. 35). The worker has right to a wage in proportion to the quality and quantity of his work, and in every case the wage must assure to him and to his family a free and dignified existence. (art. 36). Compensation, unemployment insurance, old age benefits are established. (art. 38). Organization of “unions” is free. But the organization must be on a democratic basis, and the unions must register with the local or central offices of the government, according to law. (art. 39). The right to strike is recognized, within the limits established by law. (art. 40). Private initiative is free. (art. 41). Private ownership is recognized and safeguarded, but property may be expropriated against payment of an indemnity where the public interest so requires. (art. 42).

Political Rights.

All citizens of full age (18 years), men and women, are electors. Ballot is personal, equal, free and secret. Its exercise is civic duty. (art. 48). All citizens have right to form or join political party. (art. 49). They have right to petition Chambers (Chamber of Deputies and Senate). Defense of Fatherland is sacred duty of citizen. Military service is compulsory within limits established by law. (art. 52). Every citizen is obliged to contribute to public expenses according to his ability to pay. (art. 53).

Parliament consists of two Chambers (Houses): Chamber of Deputies and Senate of the Republic. (art. 55). Chamber of Deputies (630 deputies) is elected by direct, universal suffrage: one deputy for every 90,000 inhabitants. All electors who have reached age of 25 years on election day are eligible for Deputy. (art. 56). Senate of the Republic (315 senators) is elected on regional basis. Each Region elects one Senator for every 180,000 inhabitants. No Region can have less than seven Senators but for Molise Region (two Senators) and Valle d'Aosta Region (one Senator). (art. 57). Senators are elected by direct, universal suffrage. Electors for Senate are those who have attained 25 years of age. Electors who have attained 40 years of age are eligible for Senator. (art. 58). Former Presidents of Republic are de jure Senators for life. (art. 59). Both Chamber of Deputies and Senate are elected every five years. (art. 60). Further to referendum aimed at repealing prevailing electoral law, new electoral procedure was enacted in 2005 for election of both Chamber of Deputies and Senate with reintroduction of proportional system but subject to certain aspects of former majority system being kept to grant stability. Two Chambers must be convened for first session within 20 days after elections. According to art. 62 of Italian Constitution, two Chambers must be convened by law on first working day of Feb. and Oct. Each Chamber may also hold special sessions at request of its President, President of Republic or one-third of its members. Legislative function is exercised collectively by the two Chambers (Deputies and Senators). (art. 70). Laws are promulgated by President of the Republic. (art. 73). Before promulgating, President may ask Chambers to reconsider; but if Parliament approves law again, promulgation is mandatory. (art. 74).

The President of the Republic is elected jointly by the two Chambers (Parliament). Three delegates from every region take part in election. Ballot is secret and majority of two-thirds of assembly is required. After third ballot absolute majority is sufficient. (art. 83). To be elected President of Republic citizen must have attained 50 years of age. (art. 84). President is elected for term of seven years. (art. 85). Whenever President of Republic cannot fulfill his functions, same are exercised by President of Senate. In case of permanent impediment or death or resignation of President of Republic, President of Chamber of Deputies orders election of new President of Republic. President of Republic is head of state and represents national unity. He orders elections of new Chambers; authorizes presentation of bills by government; promulgates laws; orders popular referendums according to constitution; appoints state officers in such cases as provided by law; accredits diplomatics and ratifies international treaties; is Chief of Armed Forces; declares state of war following deliberations of Chambers; is chairman of Superior Council of Judiciary; gives pardons and reduces penalties. (art. 87). He may dissolve either or both Chambers. (art. 88). In order to be valid his acts must be countersigned by proponent minister and in case of laws by President of Council as well. (art. 89).

The Government of the Republic consists of the President of the Council and of Ministers who form, together, Council of Ministers. President of Council is appointed by President of Republic, who also appoints Ministers under proposal of President of Council. (art. 92). Government must seek and obtain vote of confidence from Chambers.

The Judiciary.

Justice is administered in the name of the People. (art. 101). The judicial power is vested in the ordinary justiciary. Extraordinary or special justiciaries may not be created. (art. 102). The Council of State and the other administrative judiciaries are qualified to adjudicate on matters concerning the protection of the individual interests from the action of the executive and also the civil right in the cases indicated by law. The Court of Accounts has jurisdiction over matters of public accounts. (art. 103). Military Tribunals in war time have special jurisdiction established by laws; in peace time they have jurisdiction only for military crimes perpetrated by members of Armed Forces. Judiciary constitutes autonomous order, independent from any other power. Appointments, transfers, promotions, disciplinary provisions, removals, relative to judges are vested in Superior Council of Judiciary, whose chairman is President of Republic. (art. 104).

Constitutional Court decides on controversies relating to constitutional legality of laws, on conflicts of jurisdiction between powers of State, between State and Regions as well as between Regions. It also has jurisdiction over indictments against President of Republic and Ministers. (art. 134). Constitutional Court is composed of 15 judges appointed as follows: one-third by President of Republic; one-third by Parliament and one-third by Supreme Judiciaries.

Their term is nine years. (art. 135). When Court declares constitutional illegitimacy of law, latter ceases to have effect day following publication of decision. (art. 136). There is no appeal against decisions of this Court. (art. 137).

Regions, Provinces, Municipalities.

Republic is divided into Regions, Provinces, and Municipalities. They are autonomous institutions with own by-laws, powers and functions; regions of Sicily, Sardinia, Trentino-Alto Adige, Friuli Venezia Giulia, and Valle d'Aosta enjoy special autonomy. (arts. 114 to 116). Provinces and Municipalities represent decentralized subdivisions of State.

Amendments of the Constitution may be adopted by each Chamber through two successive resolutions, second to be adopted not earlier than three months from first resolution. Second resolution must be approved by absolute majority of members of each Chamber. (art. 138). Upon requisition being made by qualified majority of each Chamber, five regional Councils or 500,000 electors, any such law is to undergo “referendum” approved by two thirds majority over second poll. Republican form cannot be subject to constitutional revision. (art. 139).

1.03 HOLIDAYS:

Holidays are generally computed in time for payment but if time limit is due to expire on statutory holiday it shall be postponed to next business day by operation of law. (art. 2963 C.C. and 155 C.C.P.).

Following is list of recognized public holidays: All Sundays, Jan. 1, Epiphany (Jan. 6), Apr. 25, Labour Day (May 1), Easter Monday, Republic Day (June 2), Assumption Day (Aug. 15), All Saints' Day (Nov. 1), Conception Day (Dec. 8), Christmas Day (Dec. 25), Boxing Day (Dec. 26). (Law No. 260 dated May 27, 1949, as am'd and supplemented).

1.04 OFFICE HOURS AND TIME ZONE:

Italy is in the +01:00 GMT time zone, subject to variations in case of daylight saving time.

Office hours are generally from 9 a.m. to 5 p.m. Public offices are generally open to public from 9 a.m. to 1:00 p.m. and are open in afternoon on certain days from 2:30 p.m. to 4:30 p.m. Banks are generally open from 8:30 a.m. to 1:30 p.m. with brief open period later in afternoon. Post offices are open from 8:30 a.m. to 2:00 p.m. with some of them providing certain services until later in the day.

2 BUSINESS ORGANIZATIONS

2.01 AGENCY:

Mandate (Power of Attorney).

The mandate is a contract whereby one party commits to effect one or more transactions on behalf of another. (C. C. 1703). Agent or attorney in fact is empowered to carry out not only transactions which he has been specifically authorized to do but also to perform any other acts that may be required in order to fulfil mandate. (C. C. 1708). Agent, however, may not exceed powers conferred upon him by principal without incurring personal liability, although principal may subsequently ratify such ultra vires acts.

The agent may, however, depart from the instructions originally received when confronted with unforeseen circumstances unknown to principal and such as cannot be communicated to him in reasonable time, on assumption that principal would have given his approval. (C. C. 1711). Agent may not entrust others with performance of mandate without authority of principal; if he does, he is answerable for acts of such substitutes. (C. C. 1717). Mandate terminates on following grounds, viz., (a) when its duration has expired or object for which it was intended has been achieved, (b) when it has been revoked by principal or renounced by agent, or (c) when either principal or agent has died or become incompetent. (C. C. 1722). In cases referred to under (b) above, principal and agent are respectively liable for damages to other if revocation or renunciation of mandate was unjustified.

A mandate given also in the interest of the agent or of third parties is irrevocable.

If agent had been given power to act in name of principal formal requirements of instrument evidencing power of attorney must be same as those that are required for transactions which are object of power of attorney. (C. C. 1392). Powers of attorney executed abroad may be required to be authenticated and legalized or apostilled, pursuant to Hague Convention, Oct. 5, 1961. See categories 10 Documents and Records, topic Acknowledgments; Treaties and Conventions.

Contract of Commission.

When agent is appointed with understanding that he must purchase or sell property for account of principal and in name of agent, so-called “contratto di commissione” arises. Principal is called “committente” and agent “commissionario.” Effect of this contract is that third persons cannot sue principal and vice versa. “Committente” must give “commissionario” commission (provvigione), that is, percentage on business transacted. (C. C. 1731-1736).

Sales Agency.

By sales agency agreement, evidence of which, pursuant to Legislative Decree No. 65 of Feb. 15, 1999, is to be given in writing, agent undertakes permanently to promote making of contracts for account of principal within specified territory. Exclusivity is implied. Any agreement attributing to agent liability for default by any third party is not allowed pursuant to Law No. 526 of Dec. 21, 1999. Agent is entitled under some circumstances to commission on contracts concluded and to severance allowance upon termination not exceeding one year of commissions computed on average of last five years or of years of life of contract if less. Sales agency agreements may be entered into only with such persons or companies as are only enlisted on register of professional agents (“agenti o rappresentanti di commercio”) kept by appropriate Chamber of Commerce. (C. C. 1742-1753, Legislative Decree No. 303 of Sept. 10, 1991 and Law No. 204 of May 3, 1985 as subsequently am'd and supplemented). However, European Court of Justice held that insofar as it provides that sales agency agreements are void if entered into with persons not registered with Chamber of Commerce, such Italian legislation is contrary to rules set out in EU Directive No. 86/653.

2.02 ASSOCIATIONS AND FOUNDATIONS:

Associations and foundations can be granted status of legal entities by registration with register of legal entities appropriately kept by prefectures. (D.P.R. No. 361 of Feb. 10, 2000, repealing Art. 12 C.C.). Associations and foundations must be established by public act. Associations and foundations are governed by relevant provisions of Civil Code and by their own Memorandum and Articles of Association. Foundations can also be established by will. (C. C. 14). Associations and foundations may acquire property, accept gifts or inheritances or receive legacies without any governmental authorization. As to companies, see topic 2.03 Corporations and 2.05 Partnerships.

2.03 CORPORATIONS AND PARTNERSHIPS:

These are dealt with in Arts. 2247 to 2554 of Civil Code as replaced by Legislative Decree No. 6 of Jan. 17, 2003 as am'd by Legislative Decree No. 37 of Feb. 6, 2004 (“Legislative

Decree No. 6”) which has introduced major reform to corporate legislation. Reform has entered into force as of Jan. 1, 2004. Legislative Decree No. 6 might still be subject to further amendments.

Different forms of corporations and partnerships are provided for therein, as shown in following breakdown:

Società per Azioni.

This is the form that is closest to the American concept of a corporation. Certain formalities must be complied with in connection with incorporating one. Currently, società per azioni may be incorporated by contract or by unilateral deed. The Memorandum and Articles of Association must be executed before notary public. Pursuant to Arts. 2327 and 2346 of Civil Code as replaced by Legislative Decree No. 6, capital subscribed for by shareholders cannot be less than [Euro]120,000 and shares may be without denomination. As of Jan. 1, 2004, shareholders are required to pay at time of incorporation 25% of initial subscribed capital and, in case of one shareholder only, entire subscribed share capital. Each shareholder's liability is limited to shares subscribed by him. Sole shareholder's liability is limited to shares subscribed by him provided that (i) entire subscribed share capital has been paid at time of incorporation and (ii) ownership of all shares has been properly disclosed by filing declaration with Register of Enterprises failing which sole shareholder will be liable without limitation in case of insolvency of company for obligations of company which arose in period in which shares have belonged to such sole shareholder. Shares can be issued in registered or in bearer form, at option of shareholder, unless otherwise provided by articles of association or by special laws. Each share carries one vote. Preferred shares may be issued entitling holders to privileges in connection with distribution of company's profits, and in reimbursement of capital upon dissolution of company, but they may in no event carry more than one vote. Preferred shares may be limited in voting rights, but in such case may not exceed 50% of share capital. Corporations are entitled to issue shares, even if not preferred, without voting rights or with limited voting rights, but value of such shares shall not exceed 50% of share capital. In no event, shares will carry more than one vote. Legislative Decree No. 6 has also introduced wide range of new types of shares attributing different kind of rights as well as financial instruments, other than shares, to be issued in favor of employees of company and attributing certain economic and administrative rights. Such financial instruments do not attribute, however, rights to vote in shareholders' meetings save for specific items provided by articles of association. Furthermore as of Jan. 1, 2004, on one hand, it is no longer required that number of shares attributed to each shareholder is proportional to portion of share capital subscribed, while, on other hand, it is possible to issue shares linked to economic profits of specific area falling within corporate business. Companies whose shares are listed in Stock Exchange may issue saving-shares without voting rights. Saving-shares may be issued in bearer form. There is generally no limitation as to amount of capital that may be subscribed by foreigners or to foreigners being directors or officers of company. See categories 4 Citizenship, topic Aliens; Foreign Trade and Commerce, topic Foreign Investments.

As of Jan. 1, 2004, corporations have possibility to segregate one or more assets to be exclusively destined for specific business. Pursuant to such new rules, corporations' creditors who do not challenge within 60 days from registration of relevant resolution with Register of Enterprises have no recourse on separate patrimony. In any case, corporations are entitled to establish segregate assets with aggregate value not higher than 10% of net total assets of corporation.

Shareholders' meetings are “ordinary” and “extraordinary”. In order to attend meeting articles of association may require shareholders to deposit their shares with company or designated bank at least five days prior to date of meeting. Before Jan. 1, 2004 “ordinary” meetings dealt on majority vote of those present or on such different quorums and majorities as provided in C.C. or in articles of association, with approval of annual accounts, appointment of directors and auditors, and their relevant remunerations and with such other matters as were reserved to their jurisdiction by articles of association or submitted to them by directors. “Extraordinary” meetings dealt with changes in articles of association, issuance of debentures and appointment of liquidators; their resolutions are generally valid if passed by holders of more than half of capital stock, or such other majorities as provided in C.C. or in articles of association.

As of Jan. 1, 2004, functions of shareholders' meetings vary depending on model of management selected in articles of association. In corporations which opt for appointment of supervisory council, “ordinary” meeting has less power and do not deal with approval of annual accounts. In corporations without supervisory council, “ordinary” meetings maintain almost same powers as before Jan. 1, 2004, but no reservation of matters are provided any more by articles of association, and directors are no longer entitled to submit matters to shareholders' meetings unless expressly authorized by articles of association and without prejudice to their personal liability. In both cases, ordinary meetings must be convened at least once a year within term set forth in articles of association and no later than 120 days from end of fiscal year. Pursuant to Legislative Decree No. 6, “extraordinary” meetings do not deal with issuance of debentures, unless otherwise provided by special laws or by articles of association. Extraordinary meetings' resolutions are generally valid if passed by holders of more than half of capital stock or such higher majorities as provided in articles of association. Directors are competent for issuance of debentures.

Before Jan. 1, 2004 management of company was vested in one or more directors, appointed by ordinary shareholders' meeting for maximum term of three years. Appointment could be renewed.

Each company must have Board of Auditors (Collegio Sindacale) composed of at least three members (individuals, partnerships or companies) chosen from Register of Official Auditors and appointed for period of three years, whose duties included examination of administration of company and of its books, certification of balance sheets, etc. (C.C. 2397-2409, as supplemented and am'd).

Pursuant to Legislative Decree No. 6, as of Jan. 1, 2004, companies have option amongst three different models of managements: if it is not otherwise provided by articles of association, model of management is very similar to previous one, with board of directors or sole director and board of auditors which however is charged with examination of companies' books and certification of balance sheets by virtue of express provision of articles of association only and in companies whose shares are not listed on stock exchange. In other cases, accounting supervision is exercised by external auditors registered with appropriate records.

Companies, however, are entitled to opt for either (a) model of management consisting of management board (composed of at least two members) and supervisory board (composed of at least three members) which deals, inter alia, with approval of annual accounts (dualistic system) or (b) model of management consisting of management board and supervisory board whose members are appointed by management board among its own directors (monistic system).

Companies whose shares are quoted on stock exchanges must file accounts, minutes and other data with Stock Exchange and Securities National Commission and are subject to investigation by such Commission. In said companies some of main tasks normally performed by board of auditors are entrusted to auditing firms. (See category 3 Business Regulation and Commerce, topic 3.12 Securities.) Minimum share capital for companies operating investment funds (Società di Gestione di Fondi Comuni di Investimento) and of investment companies with floating share capital (SICAV) is [Euro]1,000,000 from Jan. 1, 1999. Other special regulations for companies whose shares are listed on Stock Exchange, for companies operating investment funds and for investment companies with floating share capital are set forth in Law No. 58 of Feb. 24, 1998 as am'd (see also category 3 Business Regulation and Commerce, topic 3.12 Securities, subhead Intermediation).

Società a responsabilità limitata.

It is equivalent of German G.M.B.H. and does not substantially differ from preceding form in that shareholders have limited liability, except: (a) company's stock must not be less than [Euro]10,000; (b) each share is called “quota,” no certificate thereto being issued by company and no public offering of financial instruments in connection therewith being allowed, and company's charter may provide for them to be untransferable. Otherwise shares may be negotiated through assignments recorded in company's books. Currently, società a responsabilità limitata may be incorporated by contract or by unilateral deed. As of Jan. 1, 2004: (a) it is not necessary to specify duration of company; (b) board of auditors or external auditor are required only for company of this type with company's stock being [Euro]120,000 or more; (c) company may issue debentures to extent provided in its articles of association. Company may be organized by unilateral act and may have only one quotaholder. Under certain conditions, and in case of insolvency, sole quotaholder is personally liable above company stock for company's obligations.

Società in accomandita per azioni and *Società in accomandita semplice.*—These involve combination between limited and unlimited liability of partners, “soci accomandanti's” liability being limited to their shares whereas “soci accomandatari” are liable jointly and without limitation. No substantial change applies to company of this kind as result of entering into force of Decree No. 6.

Società in nome collettivo.

This is a general partnership whose members have unlimited liability for its obligations. The memorandum of association containing all the partnership's and individual partners' relevant data must be deposited with the Registrar of Business Enterprises. The powers and duties relative to the operation of the partnership may be conferred upon one or more of the partners who are answerable to the other partners.

Società semplice.

This is simplest form of partnership in that it requires no formalities. Unless otherwise provided by agreement between partners, and such agreement is made public or known to third parties, operation of partnership, which however may not engage in industrial or commercial activities, is conducted severally by each of partners, each having full and unlimited liability for obligations of partnership.

Effective as of Jan. 1, 2004, transformation of either società in nome collettivo or società semplice into any kind of stock companies needs to be approved by majority of partners of company.

Finally there are two forms that stand out by themselves; these are:

Associazione in partecipazione.

This is practically a capitalization deal that may be formed as a result of one party (“associante”) agreeing to accept the contribution (“apporto”) of another party (“associato”) against a share in the profits. The “associante” retains the operation of the business. The “associante” acquires all rights and assumes all obligations with third parties, but the “associato” may be made to share in the losses in direct proportion to his shares of the profits, although in no event may his losses exceed the value of his contribution.

Società Cooperative.

Cooperative Societies may be incorporated with a limited or unlimited liability. They are subject to several restrictions and government controls, such as that their board of directors may on determined grounds be ousted by the appropriate government authorities and replaced by a commissioner appointed to carry on the business, or by a receiver entrusted with winding it up. In addition to above, pursuant to Decree No. 6, recourse before courts are possible against directors in certain circumstances.

Each of the partners may not hold more than [Euro]50,000 worth of shares and these may be assigned only with consent of board of directors whose approval is also required for admission of any new member. Effective as of Jan. 1, 2004, each of partners may hold up to [Euro]100,000 for Societies other than operating in agricultural fields or formed for work or production purposes. In Cooperative Societies with more than 500 partners, such limit may be increased up to 2% of share capital.

Special provisions are set forth in respect of transformation, merger and split off of companies. (C. C. 2498-2504-decies). New provisions apply also in such connection following entry into force of Decree No. 6 including, inter alia, possibility of transformation of companies pending insolvency proceeding.

Foreign corporations are regulated by law of State where procedure for constitution has been perfected, in particular in respect of: juridical nature; name; constitution, transformation and dissolution; capacity; organs' powers and organization; representative powers; members' rights, duties, access and exclusion; liabilities for corporations' obligations; consequences of breach of law and by-laws. (Art. 25 of Law No. 218 of May 31, 1995 as am'd and supplemented). However, Italian law will be applicable if corporation's main office or main activities are located in Italy. Corporations organized in foreign countries which establish in Italy one or more branches with permanent representation must comply with provisions of Italian law in respect of deposit and registration of articles of association, publication of their balance-sheet and of names of representatives, and of operation of their business. (C. C. 2507-10). No substantial changes have been made to existing provisions as result of entering into force of Decree No. 6 except that application and interpretation of Italian legislation on foreign corporations is to be made pursuant to principles of European communities' system. See categories 3 Business Regulation and Commerce, topic Commercial Register; Citizenship, topic Aliens; Foreign Trade and Commerce, topic Foreign Investments; and European Union Law Digest, category 2 Business Organizations, topic Corporations.

Taxes.

See category 20 Taxation, topic Taxes, subhead Direct Taxes, catchlines Legal Entities Income Tax (IRPEG) and Local Income Tax (ILOR).

2.04 FOREIGN CORPORATIONS:

See topic 2.03 Corporations and 2.05 Partnerships, subhead Foreign Corporations.

2.05 PARTNERSHIPS:

See topic 2.03 Corporations and 2.05 Partnerships.

3 BUSINESS REGULATION AND COMMERCE

3.01 BILLS AND NOTES:

Drafts or promissory notes must be dated and it must be specifically stated therein whether it is a promissory note (vaglia cambiario) or bill of exchange (cambiale tratta). It must have written therein sum to be paid, date of maturity and place of payment, and must be signed by drawer or maker with his name and surname. (R. D. Dec. 14, 1933, n. 1669 as am'd).

Provisions in promissory notes for payment of interest are of no effect except in cases where these are payable by sight or at certain time after sight. Promissory notes may be endorsed by one or more persons who are all individually liable for their payment. Payment may be guaranteed by any person, even by the endorser, who must sign his name and the word “avallante” or “per avallo” and is liable if acceptor or maker and the assured endorser fail to pay.

If note is not paid the same must be protested by notary or by an authorized officer within two days after day of maturity. Notes can be enforced by summary execution. Notice of protest must be sent to endorser and to drawer within four days from day of protest, otherwise endorser is not subject to summary execution proceedings.

Promissory notes which do not comply with the stamp tax law are valid in all respects except that they cannot be enforced by summary execution. Forms of promissory notes bearing the appropriate stamp duty are available for purchase. The limitation for actions on promissory notes against acceptor is three years from the day of maturity, for actions against drawer and endorser it is one year from the day of the protest. Any endorser who has paid notes or against whom an action for redress is instituted by another endorser, has action for redress against drawer and any prior endorser; limitation of foregoing action is six months from day of payment or, alternatively, from day when above-mentioned action for redress was commenced. If limitation terms have expired, action for unjust enrichment may be brought against acceptor, drawer or endorser within a year from when action for redress is lost.

Law No. 43 of Jan. 13, 1994 introduced new instrument called “cambiale finanziaria” which is payable to order and issued in series by companies, entities and enterprises and having maturity of not less than three months and not more than 12 months from issue date. As to legal requirements and applicable provisions, this instrument is equivalent to ordinary promissory note; it can be endorsed only with clause “without guarantee” or equivalent; it must contain wording “cambiale finanziaria”, other elements required by law for promissory note and indication of return of any kind agreed upon.

Issue of “cambiali finanziarie” is considered “collection of savings” pursuant to provisions and subject to limitations of Banking Law.

Italy is party to Geneva Convention of June 7, 1930 on promissory note and bill of exchange subject matter. Such convention was implemented in Italy by R.D. of Aug. 25, 1932 No. 1130.

3.02 COMMERCIAL REGISTER:

All those (inclusive of individuals, partnerships and corporations) who exercise activity organized for production or exchange of goods or services shall be registered in register, called “Registro delle imprese”. (C.C. 2188). Rules for implementation of above Register—which is instituted within structure of each Chamber of Commerce—have been issued pursuant to Art. 8 of Law No. 580, Dec. 29, 1993 (see D. P. R. No. 581 of Dec. 7, 1995 as am'd). In preceding period Register was substituted, for business carried out by companies (inclusive of partnerships and corporations), by records kept by special offices of Tribunals.

Pursuant to Law No. 340 of Nov. 24, 2000, subscription requests and acts relating thereto may be filed by enterprises, with exception of individuals, through electronic supports.

3.03 CONTRACTS:

Under Italian law “a contract is the agreement of two or more parties to establish, regulate or extinguish a patrimonial legal relationship among themselves”. (C.C. 1321). There is general power in all competent persons to freely enter into contractual agreements, limited only by public policy and unlawful motives. There is also general power in same persons “to make contracts that are not of the types that are particularly regulated, provided that they are directed to the realization of interests worthy of protection according to the legal order”. (C.C. 1322).

The necessary requisites of a contract are: (1) agreement of parties, to be reached as described below under subhead Formation of Contracts; (2) causa, which is economic reason for contract. Unlawful causa will affect validity of contract. Causa is unlawful when contrary to mandatory rules, public policy or moral or when contract constitutes means for evading application of mandatory rules; (3) object, which must be possible, lawful, determined or determinable (C.C. 1346); (4) form, when prescribed by law under penalty of nullity (e.g.: contracts that transfer ownership of immovables must be made by public act or private writing). (C.C. 1325). See also category 10 Documents and Records, topic Electronic Signing.

Parties may condition effectiveness or termination of contract upon future and uncertain event (respectively suspensive and resolutive condition) and may also set forth initial or final time limit.

Formation of Contracts.

Contract is formed when he who made offer has knowledge of acceptance of other party (C.C. 1326); acceptance which does not conform to offer is equivalent to new offer. Both offer and acceptance may be revoked provided, as to latter, that revocation comes to knowledge of offeror before acceptance and, as to former, that contract is not performed. If performance in good faith is begun by acceptor, offeror is bound to indemnify him for expenses and losses sustained.

Parties in conducting negotiations and formation of contract must conduct themselves according to good faith, subject to being exposed to pre-contractual liability.

Dissolution of contracts providing for mutual counterperformance may occur in case of important nonperformance of its own obligation by party who has already received counterperformance. However, nonperformance may be excused by supervening impossibility of performance, by all cases of force majeure and in event that, due to extraordinary and unforeseeable facts, performance has become exceedingly burdensome.

Dissolution of contracts may also occur when parties have agreed to insert in contract express resolutive clause (C.C. 1456) providing that contract will be resolved if specified obligations are not performed in designated manner, or when time fixed for performance by one of parties is of essence in interest of other (C.C. 1457). Another case of dissolution of contract occurs when other party serves on defaulting party written notice to perform within appropriate time, declaring that, unless performance takes place within such time, contract shall be deemed dissolved. (C.C. 1454).

Nullity of Contracts.

Contract is void if contrary to mandatory rules except where otherwise provided by law, if one of requisites set out in C.C. §1325 is missing, if causa is unlawful, if motives common to both parties of contract are unlawful, if object lacks in requisites listed above and in any other case established by law. (C.C. 1418). Relevant action is not time barred and can be instituted by anyone who has interest in it or can be declared by court of its own motion.

No validation of void contract is possible unless provided by law. Nevertheless, void contract can produce effects of different contract of which it has requisites of substance and form, whenever, considering objective sought by parties, it is to be deemed that they would have wished it if they had known of nullity. (C.C. 1424).

Voidable Contracts.

Contract is voidable if, at time of execution, one of parties was legally incapable of contracting, if it was incapable of understanding or intending and such contract results in grave prejudice to it, provided that other party acted in bad faith. (C.C. 1425). Furthermore, annulment of contract can be demanded by contracting party whose consent was given by mistake, extorted by duress or obtained by fraud. (C.C. 1427).

Action for annulment can only be instituted by those persons in whose interest it is established by law and within five-year prescription period.

Rescission of Contract.

Contracts entered into in state of danger (i.e.: unfair conditions because of necessity, known by other party, of saving itself or others from present danger of serious personal injury) (C.C. 1447) or entered into at unfair conditions and such disproportion being result of state of need of one party of which other availed itself for its advantage (C.C. 1448) can be rescinded upon demand of injured party and within one year period from formation (C.C. 1449).

Applicable Law.

Obligations arising from contracts are governed by Rome Convention of June 19, 1980 (made effective by Law No. 975, Dec. 18, 1984) without prejudice to other applicable treaties. See category 5 Civil Actions and Procedure, topic 5.03 Conflict of Laws.

Government contracts are, as a rule, awarded on basis of bids, while system of direct negotiations is admitted exceptionally, in view of particularity of contract. Contracts are normally entered into on basis of general conditions and specifications and performance bond is usually required.

Distance Selling Contracts.

New legislation for consumers' protection in distance selling contracts subject matter has recently been enacted by Legislative Decree No. 206 of Sept. 6, 2005 (“Consumption Code”) which has repealed Legislative Decree No. 185 of May 22, 1999. Provisions aim at providing consumers with wider protection by setting out, inter alia, specific pieces of information to be made available to them prior to execution of contract and right of withdrawal from contract. Rights conferred upon consumers by such decree cannot be disposed of. Freedom in choosing law other than Italian to govern distance selling contract cannot import derogation of principles for consumers protection embodied in said decree.

3.04 FRAUDS, STATUTE OF:

The following contracts are void unless they are in writing and subscribed by the parties: sales of immovables, contracts of co-ownership of immovables, contracts establishing or cancelling easements and other rights in immovables, contracts establishing endowments, leases for more than nine years, settlement agreements, etc. (C.C. 1350). Preliminary contracts are void unless entered into in same form prescribed by law for relevant definitive contract. (C. C. 1351). If parties agree that certain contract be entered into in specific form, such form is deemed essential for validity of contract. (C. C. 1352).

Oral testimony is in general not sufficient to prove contracts exceeding [Euro]2.58 in value. (C. C. 2721). Such limit to be overridden in cases provided by law.

3.05 INFORMATION TECHNOLOGY, INTERNET AND NEW MEDIA:

Electronic Signing.

Through Law No. 59 of Mar. 15, 1997 and relevant implementation provisions, general reform aimed at recognizing effects of electronic signatures has been enacted.

Very innovative principle contained in Law No. 59 is that deeds, data, documents and contracts made by public entities or private individuals or companies by means of electronic or telecommunication instruments as well as their filing or transmission through electronic or telecommunication instruments are valid and binding in all respects, provided that certain criteria set forth in relevant implementation provisions of Law No. 59 are met. Subject to compliance with such implementation provisions, electronic document to which electronic signature has been affixed has same value (also for purposes of evidence) as document drafted on ordinary paper and signed by hand. It will be possible, pursuant to new legislation, to confer special time validation to documents which will constitute evidence, also against third parties, of date and time of documents.

Complex technical requirements and specifications encircle concept of electronic signing. Solution chosen in order to assure genuineness of documents processed through electronic data processors is based on cryptography with two asymmetrical keys (one of which is of public domain while other is known only by holder) by which document can be coded or encoded, respectively, or vice versa. Correspondence between public keys and relevant holders shall be assured by appropriate certification given by authorized companies registered in public register.

By Presidential Decree No. 445 of Dec. 28, 2000 consolidated act on administrative documentation has been adopted containing, inter alia, rules which electronic documents and transmission through electronic means, even in relations amongst private individuals or companies, must comply with in order to be deemed as valid and binding. Most of provisions of that Decree have been repealed as of Jan. 1, 2006, pursuant to provisions of Legislative Decree No. 82 of Mar. 7, 2005: Code on electronic management.

3.06 INTEREST:

The legal rate of interest is currently equal to 3% and may be subject to yearly updating by way of Ministry of Economy and Finance Decree. Any rate above this threshold must be evidenced in writing otherwise interest is due at legal rate. (C. C. 1284).

Law authorizes Government to establish limits beyond which interest rate is to be considered usurious in relation to types of transactions. Pursuant to Art. 644 P.C., as amended by Law No. 108 of Mar. 7, 1996, interest rate, although lower than such mentioned limits, is deemed usurious if, having regard to characteristics of specific transaction and to average interest rate applied to similar transactions, unbalance should result in relation to loan, also taking into account economical and financial difficulties of person owing payment of interest.

If usurious interest rate is agreed between parties of loans, relevant clause is void and interest shall not be payable thereunder. (C. C. 1815).

On Dec. 29, 2000, Italian Government has issued Law Decree No. 394, converted into Law No. 24 of Feb. 28, 2001, which provides that loan interest rates are deemed to be usurious only if interest rate agreed by parties exceeds limit provided by law at time such interest rate was agreed irrespective of time of its payment, pursuant to such Law Decree, as amended by decision of Constitutional Court, rates applicable on interest on fixed rate loans entered into before Dec. 31, 2000 that are payable after Dec. 31, 2000 will be automatically substituted, if usurious, by substitute rate set forth by decree.

Pursuant to Legislative Decree No. 231 of Oct. 9, 2002 new rules have been introduced with respect to default interest to be applied in commercial transactions either between enterprises, including, but not limited, to professionals, or between enterprises and public administration. Payments to be made under such commercial transactions are subject to default interest accruing, unless differently agreed by parties, as from day following due date at rate equal to rate of main refinancing instrument of Central European Bank applied to its most recent refinancing transaction entered into on first day of relevant semiannual period increased by spread of seven basis points. Moreover, any agreement between parties derogating to provisions of law is void if, taking into account certain circumstances including, but not limited to, fair trading practice, nature of goods or services to which specific contract relates, status of parties and commercial relationships between them, such agreement results to be seriously disadvantageous for creditor.

3.07 LICENSES, BUSINESS AND PROFESSIONAL:

Among Governmental licenses are: licenses (abilitazioni) for the exercise of intellectual professions (architects, engineers, doctors, etc.); driving licenses; passports; licenses for operating motor vehicles; licenses to carry weapons; licenses to operate bars and places of entertainment; licenses for discharge of sewage waters, etc.

Licenses to operate stores, trade licenses, etc. are issued by local Chambers of Commerce and by municipalities. Legislative Decree No. 114 of Mar. 31, 1998 introduced new rules pursuant to which in cases and subject to conditions contemplated therein, simplified procedure may be adopted to obtain license to operate stores by submission of application to competent local authorities certifying that relevant legal requirements have been complied with. Failure by such authorities to expressly negate said requisition within prescribed time limits is to be construed as grant of license being requested.

3.08 MONOPOLIES, RESTRAINT OF TRADE AND COMPETITION:

No Italian law provided specific provisions for antitrust rules until enactment of Law No. 287 of Oct. 10, 1990 setting out “Rules for the Protection of Competition and of Market”. Law No. 287 as integrated by D.P.R. No. 217 of Apr. 30, 1998, by Law No. 57 of Mar. 5, 2001 and by Law Decree No. 223 of July 4, 2006 converted into Law No. 248 of Aug. 4, 2006 substantially parallels to Arts. 85 and 86 of EEC Treaty as well as Council's Regulation No. 4064 of Dec. 21, 1989 as replaced by Council's Regulation No. 139 of Jan. 20, 2004, concerning mergers and acquisitions having community dimension, by prohibiting within Italian domestic market (i) undertakings between enterprises having purpose or resulting in prevention, restriction or distortion of competition (art. 2); (ii) abuses of dominant position (art. 3); (iii) concentration operations having effect of creating or strengthening dominant position so as to eliminate or reduce competition in substantial and lasting manner (art. 6).

Undertakings may, while concentration operations falling within certain quantitative thresholds, must, be communicated in advance to Antitrust Authority. Failure to file any such mandatory prior communication results in company being liable to fine.

When banks or broadcasting and publishing industries are concerned, some ad hoc Authorities are entitled to carry out Antitrust Authority's duties.

Against administrative measures adopted by Antitrust Authority appeal before Regional Administrative Court competent for Region of Lazio may be lodged. Law No. 287 applies both to private and, subject to certain exceptions, to public undertakings as well as to those with prevalent State participation, which are significant portion of Italian market. See topic 3.13 Unfair Competition and European Union Law Digest, category 3 Business Regulation and Commerce, topic 3.08 Monopolies, Restraint of Trade and Competition.

Law No. 249 of July 31, 1997 as amended and supplemented instituted “Authority for guarantees in communications and rules on telecommunications and radio-television systems” which is entrusted, among other things, with functions of regulating relationships between operators and users of telecommunication infrastructures; promotes interconnection of domestic telecommunication system with those of other countries; and controls dominant positions in radio and television sector.

3.09 NEGOTIABLE INSTRUMENTS:

See topic 3.01 Bills and Notes.

3.10 SALES:

Seller's principal obligations include delivery of goods or other property sold, transfer of all ownership rights, warranties that goods or property have qualities promised or necessary for proper use, and are exempt from defects. (C. C. 1476).

Buyer's principal obligation is payment of price. (C. C. 1498). When defects are discovered, buyer may request either voidance of sale or reduction of price. (C. C. 1492). In case of voidance of sale, seller must return consideration received, as well as expenses and disbursements incurred by purchaser in connection with sale and, in any event, buyer is entitled to damages. (C. C. 1494).

Sale may be rescinded on account of “lesione enorme” in price; that is, when price agreed upon is less than one-half equitable price, and in effecting purchase, buyer took advantage of seller's state of need. (C. C. 1448).

Warranties.

Unless parties have expressly agreed otherwise, seller is by law bound to hold purchaser harmless from eviction, in form of redress of damages in addition to reimbursement of purchase price. (C. C. 1483). Purchaser summoned by third party, who claims to have rights with respect to goods sold, must, however, in turn summon seller, otherwise he forfeits warranty.

Seller is furthermore bound to warrant that goods sold are exempt from defects. (C. C. 1490). Purchaser must notify seller of any possible faults within eight days from date of discovery of same (unless different term is agreed by parties or provided by law), under penalty of forfeiture of claim. Statute of limitation for related action is one year from delivery. (C. C. 1495). Also, such warranty can be contractually excluded, provided there is no bad faith by seller. (C. C. 1490-1491). New provisions aimed at providing consumers with higher protection have been introduced by Legislative Decree No. 206 of Sept. 6, 2005 (“Consumption Code”) which has repealed Arts. 1519 bis to 1519 nonies of Italian Civil Code. See also European Union Law Digest, category Civil Actions and Procedure, topic Product Liability.

Notices Required.

See subhead Warranties, supra.

Applicable Law.

See topic 3.03 Contracts.

International Sale of Goods.

United Nations Convention on Contracts for the International Sale of Goods (Wien Convention of Apr. 11, 1980) was brought into force in Italy as from Jan. 1, 1988, by Law No. 765 of Dec. 11, 1985. See category 22 Treaties and Conventions, topic 22.01 Treaties and Part V, Selected International Conventions.

3.11 SALES AGENCY:

See category 2 Business Organizations, topic 2.01 Agency, subhead Sales Agency.

3.12 SECURITIES:

General.

By Law No. 216 of June 7, 1974, as repeatedly amended and supplemented, Stock Exchange and Companies National Commission (Commissione Nazionale per le Società e la Borsa, commonly referred to as “CONSOB”) has been established. Its main functions and powers are, as restated also by Legislative Decree No. 58 of Feb. 24, 1998 as am'd: to establish stock exchange calendar, to authorize operations of companies carrying out intermediation for trade of securities (SIM, q.v.), to adopt second-tier legislation to implement Legislative Decree No. 58, to act as intermediary companies' watchdog in conjunction with Bank of Italy, to approve systems of quotation and price listing of securities, stocks, bonds, etc., to investigate into companies of which shares are listed on stock exchange and to authorize listing of shares of new companies, to establish regulations for and to authorize public offerings of securities. Powers of CONSOB have been strengthened and widened pursuant to Law No. 62 of Apr. 18, 2005 as amended. Activity of organization and administration of regulated markets of financial instruments is in nature of enterprise and is run by Borsa Italiana S.p.A., company limited by shares.

Revised and up-to-date rules relating to markets organized and managed by Borsa Italiana S.p.A., to take into account relevant principles set out in Consolidated Laws in Financial Intermediation subject matter (Legislative Decree No. 58 of Feb. 24, 1998 as am'd), have been implemented by Regulation revolved by meeting of Borsa Italiana on Jan. 15, 2009 and approved by CONSOB Resolution No. 16848 of Mar. 25, 2009. Any such Regulation sets out, inter alia, conditions for bringing securities to listing on Stock Exchange.

Insider Trading.

Pursuant to Consolidated Laws on Financial Intermediation (Legislative Decree No. 58 of Feb. 24, 1998 as am'd [latest amendment by Legislative Decree No. 101 of July 17, 2009]) persons who hold confidential information by virtue of their membership of administrative, management or supervisory bodies of company, or their shareholding in company's capital or by reason of their job, profession or office are prohibited from: (a) Acquiring, selling or carrying out other transactions for their own account or for account of third party involving, directly or indirectly, financial instruments using such information; (b) disclosing such information to others outside normal exercise of their job, profession, or office; or (c) recommending or inducing others, on basis of such information, to carry out any of transactions referred to in subparagraph (a). Such prohibition shall apply also to any person who, possessing inside information by virtue of preparation or execution of criminal activities, carries out any of actions referred to in paragraphs (a), (b) and (c). In event of violation of said prohibitions, person who is responsible for such violation will be punished with imprisonment between one and six years and fine between [Euro]20,000 and [Euro]3,000,000 (such sanctions must be doubled pursuant to Law No. 262 of Dec. 28, 2005 within limits referred to in Italian Criminal Code). Without prejudice to penal sanctions applicable when action constitutes criminal offence, pecuniary administrative sanction between [Euro]100,000 and [Euro]15,000,000 shall also be applied. Administrative sanction shall also apply to any person who, possessing inside information and knowing or being capable of knowing through ordinary diligence its inside nature, carries out any of above mentioned actions.

Market Manipulation.

Pursuant to new provisions introduced by Law No. 62 of Apr. 18, 2005 in Consolidated Laws on Financial Intermediation, imprisonment for period between one and six years and fine between [Euro]20,000 and [Euro]5,000,000 (such sanctions must be doubled pursuant to Law No. 262 of Dec. 28, 2005 within limits referred to in Italian Criminal Code) shall be imposed on any person who diffuses false information or carries out simulated transactions or other devices likely to produce significant alteration to price of financial instruments. Without prejudice to penal sanctions applicable when action constitutes criminal offence, pecuniary administrative sanction between [Euro]100,000 and [Euro]25,000,000 shall be imposed on any person who, through media, including Internet, or through any other means, diffuses information, rumors or false or misleading news that give or are likely to give false or misleading indications on financial instruments.

Intermediation.

Legislative Decree No. 58 of Feb. 24, 1998 as am'd, ("Legislative Decree 58/98") which came into effect as from July 1, 1998, repealed Legislative Decree No. 415 of July 23, 1996 and rearranged provisions relating to financial intermediaries, investment services, collective savings management, financial markets and issuers of financial instruments. Major reform of provisions contained in Legislative Decree 58/98 has been introduced by Legislative Decree No. 164 of Sept. 17, 2007 ("Decree No. 164"). Furthermore, Legislative Decree 58/98 has been recently amended by Legislative Decree No. 101 of July 17, 2009. New rules have entered into force on Aug. 18, 2009. Investment services (following activities where they concern financial instruments: dealing for own account, subscription, placement, portfolio management, execution, reception and transmission of orders, investment consultancy, management of multilateral trading facilities) and accessory services (such as safekeeping and administration of financial instruments and related services, safe custody services, granting loans to investors for transactions relating to financial instruments to which lender intervenes, advice to undertaking on capital structure, industrial strategy and related matters, services ancillary to issue and placement of financial instruments, investment research and financial analysis or other forms of general recommendation regarding transactions on financial instruments, exchange intermediation in connection with rendering of investment services) may be carried out only by (A) investment companies and (B) banks authorized pursuant to Legislative Decree 58/98.

Investment companies may be (i) SIMs authorised by CONSOB, having heard opinion of Bank of Italy, provided that certain capital adequacy and operational requirements are complied with; (ii) EU investment companies operating through permanent establishment in Italy or on cross border basis subject to prior communication to CONSOB given by home country supervisory entity; (iii) non-EU investment companies authorized by CONSOB, having heard opinion of Bank of Italy, subject to compliance with certain requirements.

Banks may be (i) Italian authorized banks; (ii) EU banks operating in Italy through permanent establishment or on cross border basis subject to prior communication to Bank of Italy given by home country supervisory entity; (iii) non-EU banks authorized by Bank of Italy having heard opinion of Minister for Foreign Affairs, subject to compliance with certain requirements. Financial intermediaries registered with special register held by Bank of Italy may only exercise following activities: (i) Dealing with derivatives for own account; (ii) execution of orders for clients relating to derivatives; (iii) subscription and/or placement with firm commitment, underwriting or standby commitments to issuers; (iv) placement without firm or standby commitment to issuers. Bank of Italy and CONSOB exercise supervisory powers over investment companies, banks and financial intermediaries.

Legislative Decree 58/98 has been implemented by CONSOB Regulations (i) No. 11971 of May 14, 1999 as finally amended by CONSOB Resolution No. 16840 of Mar. 19, 2009; No. 16850 of Apr. 1, 2009; No. 16893 of May 14, 2009 and No. 17002 of Aug. 17, 2009, containing provisions on issuers; (ii) No. 16190 of Oct. 29, 2007 as amended, on intermediaries; (iii) No. 16191 of Oct. 29, 2007 as finally amended by CONSOB Resolution No. 16850 of Apr. 1, 2009, on markets.

Public Offerings.

Those who wish to proceed through public offering with purchase, sale or offer for subscription and exchange of securities such as shares, debentures whether convertible or not or other instruments or rights shall notify CONSOB, publish prospectus and observe rules laid down by Legislative Decree 58/98 as supplemented by CONSOB Regulation No. 11971 of May 14, 1999, as amended.

Pursuant to Legislative Decree No. 51 of Mar. 28, 2007 implementing EU Directive 2003/71/EC, expression “public offering” means any communication in any form and by any means of sufficient information on terms of offer and securities to be offered so as to enable investor to decide to purchase or subscribe securities, including placement through authorized imtermediaries.

Those who wish to purchase or exchange securities listed in stock exchange or traded on so-called “restricted market” such as shares, convertible debentures or other instruments or rights entailing acquisition of voting rights, as well as those who wish to take over listed company shall comply with additional rules set out by Legislative Decree 58/98 and comply with specific rules and procedures laid down by CONSOB. Specific rules and procedures are applicable to public offerings in context of privatisation proceedings.

Reporting.

Pursuant to art. 117, paragraph 1 of CONSOB Regulation on issuers, as amended, any acquisition of shareholding in listed issuers, with Italy as home member State, must be reported to CONSOB and to company whose shares are purchased, if shareholding is (i) more than 2% (ii) equal or more than 5%, 10%, 15%, 20%, 25%, 30%, 35%, 40%, 45%, 50%, 66,6%, 75%, 90% and 95%.

Notification requirement applies also when shareholding is reduced below above percentage. Reporting to CONSOB is to be made within five days after entering into of transaction.

Furthermore, is to be notified to CONSOB any acquisition by listed issuers, with Italy as home member State, of shareholding exceeding 10% represented by shares with right of vote in non-listed company or represented by quota in limited liability company.

Pursuant to Legislative Decree 58/98, home member State is identified as follows: (i) For issue of EU financial instruments other than equity securities, nominal unit value of which is at least [Euro]1,000, EU member State is where issuer's registered office is located or in which EU financial instruments have been or shall be destined for admission to trading on regulated market or in which EU financial instruments are offered to public, as decided by issuer, offeror or person requesting admission, as required; (ii) for all EU issuers of financial instruments other than those under (i), EU member State is where issuer has its registered office.

Any acquisition or disposal of “qualified” shareholding in share capital of SIM, of investment company with floating share capital (SICAV) and of company for management of savings (SGR), is subject to prior communication to Bank of Italy. “Qualified” shareholding is defined as to SICAV and SGR by Bank of Italy Regulation of Apr. 14, 2005 and as to SIM by Bank of Italy Regulation of Aug. 4, 2000.

3.13 UNFAIR COMPETITION:

The law on unfair competition (concorrenza sleale) is primarily based on judicial decisions interpreting Civil Code. Under art. 2598 to 2601 C. C., use of another firm's distinctive name, use of symbols for purpose of confusing customers, spreading rumors as to quality or value of competitor's goods, for purpose of discrediting it or doing of any act not in conformity with normal ethical standards of business is prohibited. Cease and desist order, as well as damages, may be obtained by successful plaintiff. See category 17 Intellectual Property, topic 17.03 Trademarks and European Union Law Digest, category 3 Business Regulation and Commerce, topic 3.08 Monopolies, Restraint of Trade and Competition.

4 CITIZENSHIP

4.01 ALIENS:

See category 16 Immigration, topic 16.01 Aliens.

4.02 CITIZENSHIP:

See category 16 Immigration, topic 16.01 Aliens.

4.03 IMMIGRATION:

See category 16 Immigration, topic 16.02 Immigration.

5 CIVIL ACTIONS AND PROCEDURE

5.01 ACTIONS:

Rules governing procedure of civil actions are set forth in Code of Civil Procedure (C.C.P.). Courts must decide all civil cases on basis of law, except in certain cases, or upon request of parties on rights which may be disposed of by parties, when decisions may be adopted on basis of equity. Civil actions are commenced normally by service of summons. Special actions (especially in matters of urgency) are commenced by filing application with competent court. Parties must be represented before courts and magistrates (except in certain cases before Justice of Peace, and before Tribunal in certain cases of personal separation of spouses and labor matters) by attorney who acts by virtue of proxy.

Specific court proceedings are set forth in C.C.P. for litigation in labor and social security disputes.

Foreign law, if embodied in statutes, is proved by producing copy of the statutes, as contained in official publications (Official Gazette, Codes, etc.). If foreign law is not statutory, it is proved by production of cases, law reports and opinions.

Foreign claims are proved by written evidence or by testimony (see topic 5.04 Depositions and Discovery).

See also topic 5.06 Limitation of Actions; category 6 Courts and Legislature, topic 6.01 Courts.

5.02 APPEAL AND ERROR:

Any judgment rendered in first degree may be appealed to next higher court (save for few minor cases). Against second degree judgment appeal may be filed with supreme court (Court of Cassation) but only on points of law. Second degree judgment may also be appealed before same court (so-called “revocation”) which issued it when: (1) it is result of *dolus* of one of parties against other; (2) it is result of false testimony or evidence; (3) after judgment new essential documents are found which party was prevented from exhibiting before because of force majeure or of act of other party; (4) there is error in fact, resulting from documents; (5) judgment is inconsistent with another judgment between parties; (6) judgment is result of *dolus* of magistrate.

5.03 CONFLICT OF LAWS:

Conflicts of laws and scope of Italian jurisdiction are regulated by Law No. 218, May 31, 1995:

(a) Status and competency of persons are governed by their national law. (art. 20).

(b) Corporations, associations, foundations and any other private or public entity are regulated by law of State where their procedure of constitution has been perfected. Italian law is however applicable if main office or main business of such entities are located in Italy. (art. 25). (See category 2 Business Organizations, topic 2.03 Corporations and 2.05 Partnerships, subhead Foreign Corporations.)

(c) Personal relations between husband and wife having same citizenship are governed by their national law and those between husband and wife of different citizenship are governed by law of State where their matrimonial life is mainly located. (art. 29). Patrimonial relations between husband and wife are governed by law applicable to their personal relations; however, parties may agree in writing to apply national law of one of them or law of State where at least one of them is resident. (art. 30).

(d) Personal relations between parents and children are governed by national law of children. (art. 36).

(e) Prerequisites, constitution and revocation of adoption are governed by national law of adopting person or persons (if common) or by law of State wherein both adopting persons reside, or mainly conduct their matrimonial life at time of adoption. However, Italian law shall always apply when adoption of minor which attributes to him status of legitimate child is applied for to Italian court. (art. 38).

Patrimonial and personal relations between adopted and adopting person/persons and their relatives are governed by national law of adopting person or persons (if common) or by law of State wherein both adopting persons reside or mainly conduct their matrimonial life. (art. 39).

(f) Inheritance is governed by national law of deceased at time of death. However, testator may, by testament, expressly choose applicability of law of State where he is resident. (art. 46).

(g) Formalities for execution of testament are governed by law of place where instrument is executed or by national law of testator or by law of State where testator was resident or domiciled at time of execution or death. (art. 48).

(h) Personal property (movables) and real properties (immovables) are governed by law of place of their location. (art. 51).

(i) Gifts are governed by national law of donor at time of donation. However, donor may, by express declaration inserted in or attached to instrument of donation, choose applicability of law of State where he is resident. (art. 56).

(j) Formalities for execution of gifts are governed by law applicable to them or by law of State where instrument was executed. (art. 56).

(k) Obligations ex contractu are governed by Rome Convention of June 19, 1980 (made effective by Law No. 975, Dec. 18, 1984) without prejudice to other applicable treaties. (art. 57). Noncontractual obligations are governed by law of place where they arose. (arts. 58, 61, 62).

On Jan. 11, 2009, EC Regulation No. 864/2007 on law applicable to non-contractual obligation in civil and commercial matters (``Rome II Regulation'') has entered into force into all EC Member states (except Denmark).

On Dec. 17, 2009, EC Regulation No. 593/2008 of June 17, 2008 on law applicable to contractual obligations (``Rome I Regulation'') shall enter into force replacing Rome Convention of June 19, 1980.

Foreign law is not applicable if its effects are contrary to public order. In this case, alternative foreign laws shall be applied if provided by above-mentioned rules or, in their absence, Italian law shall be applied. (art. 16).

5.04 DEPOSITIONS AND DISCOVERY:

Taking of evidence in EU Member State, directly by judge of another Member State or indirectly by judge of Member State where evidence has to be taken on commercial and civil matters is regulated by EC Regulation No. 1206/2001 of May 28, 2001.

When depositions are to be taken outside of the country and EC Regulation No. 1206/2001 does not apply, request (letters rogatory) is sent by court through Foreign Ministry, to Italian Consulate of state or place where witness is living. Testimony is taken directly before Italian consul (when witness is Italian citizen) or transmitted by consul to proper authority in foreign state (when witness is foreigner). (C.C.P. 204).

Italy is party to Convention on the Taking of Evidence Abroad in Civil or Commercial Matters signed in The Hague on Mar. 18, 1970.

5.05 JUDGMENTS:

The decisions emanating from a judge in Italy are of three classes:

(a) Ordinanze.—All orders in the course of a suit on the instance made by one party with citation of the other party or ex officio.

(b) Decreti.—Orders made on instance of a party without summoning the other or ex officio.

(c) Sentenze.—Decisions or opinions based upon facts and points of law (judgments). A judgment is “contumaciale” if rendered by default; “non definitiva” (interlocutory) when given in course of suit upon some intermediate object, without finally deciding suit.

There are not, in the Italian law system, all the specifications and definitions of judgments provided in the American statutes. The decision is given upon the facts and the demands brought by the parties.

Foreign Judgments and Arbitration.

Foreign judgments are recognized in Italy without need of resorting to any proceeding when: (i) judge who pronounced it could take cognizance of case in accordance with Italian principles on jurisdictional competence; (ii) document introducing proceedings was made known to defendant pursuant to provisions of law of place where proceedings were held and essential rights of defense were not infringed; (iii) parties entered appearance in conformity with laws of place of proceedings or their failure to appear was declared in conformity with that law; (iv) judgment became res judicata in accordance with law of place where it was pronounced; (v) judgment is not contrary to another judgment rendered by Italian judge and which became res judicata; (vi) no proceedings are pending before Italian judge for same matter and between same parties which were initiated prior to foreign proceedings; (vii) its provisions do not produce effects contrary to public policy. (art. 64, Law No. 218 of May 31, 1995).

In case of noncompliance with or objection to recognition of foreign judgment, or when it is necessary to proceed with forceful execution, any person in interest may apply to court of appeals of location of implementation for determination of existence of prerequisites for recognition.

Foreign judgment jointly with decision allowing application referred to above, constitute entitlement to implementation and forceful execution.

If objection to foreign judgment is raised in context of other proceedings, decision on objection is made by judge with effect limited to those proceedings only.

Special regime is set forth by EC Regulation No. 44/2001 of Dec. 22, 2000 concerning jurisdiction, recognition and enforcement of decisions on civil and commercial matters which substituted, among Member States of European Union, with exception of Denmark and such territories, forming part of Member States which are excluded pursuant to Art. 299 of EU Treaty ("Member State"), Brussels Convention of Sept. 27, 1968 ("Brussels Convention") on jurisdiction and enforcement of decisions on civil and commercial matters, ratified and brought into force in Italy by Law No. 804 of June 21, 1971. Under EC Regulation No. 44/2001 no prior special proceedings are required with view to recognizing and enforcing decisions, provided that: (1) decision is not contrary to public policy of Italy; (2) summons has been properly and timely served on defendant who did not enter appearance in proceedings; (3) decision does not conflict with any other decision rendered between same parties in Italy or with another decision rendered abroad, which may be recognised in Italy; (4) court of foreign state has not contravened provisions of EC Regulation No. 44/2001, paragraphs 3, 4, and 6.

Party seeking enforcement of decision in Italy pursuant to EC Regulation No. 44/2001 shall have to file with competent Court of Appeal request together with following documentation: (a) authenticated copy of decision; (b) statement pursuant to Arts. 53, 54 and Annex V of EC Regulation No. 44/2001. Any party may challenge decision on such request submitting recourse to competent Court of Appeal, which decision, in turn, can be challenged before Court of Cassation.

Awards.

Recognition of foreign arbitration awards is subject to filing of application with Presiding Judge of Court of Appeal of place of residence of other party (or, if such party is not resident of Italy, with Presiding Judge of Rome Court of Appeal) together with certain documents. Foreign award is declared enforceable by decree (against which opposition may be filed) except when: (i) dispute could not be settled by arbitration under Italian law; or (ii) award contains provisions contrary to Italian public policy. (C.C.P. 839).

5.06 LIMITATION OF ACTIONS:

Actions must be brought within ten years with the following principal exceptions (C. C. 2946-2962):

Five Years.

Actions to recover damages, annuities, incomes for life, rent or interest due; allowances due by reason of termination of employment; actions on partnership agreements.

Two Years.

Actions to recover damages arising from the driving of vehicles.

Eighteen Months.

Actions against carriers if shipment was made elsewhere than in Europe.

One Year.

Actions to recover broker's commission; actions against forwarders; actions to recover damages by reason of collision of ships, insurance on shipping or breach of chartering contract; actions against carriers if the shipment was made in Europe.

Certain actions, like those by employees and teachers (under salary for period exceeding one month), professionals or notaries are subject to rebuttable presumptive prescription after lapse of three years.

See also categories 3 Business Regulation and Commerce, topic Bills and Notes; Property, topic Adverse Possession.

5.07 PRESCRIPTION:

See topic 5.06 Limitation of Actions.

5.08 REPLEVIN:

"Azioni possessorie" are those actions which lie to regain possession not only of movables (personal chattels) but even of immovables, whose possession has been taken violently or by stealth. Furthermore this action is aimed at protecting possession of immovables against disturbance. Action must be brought within one year from dispossession. Recovery or reintegration is ordered by Tribunal upon petition, without stay and swiftly against any person even against owner of goods. (C. C. 1168-1170).

5.09 SEQUESTRATION:

See category 8 Debtor and Creditor, topic 8.02 Attachment and Sequestration.

6 COURTS AND LEGISLATURE

6.01 COURTS:

Giudice di Pace (Justice of Peace) only has jurisdiction in civil matters involving movable property whose value is not in excess of [Euro]5,000, or involving circulation of vehicles or boats and not exceeding [Euro]20,000 in value, and in certain special proceedings. (C.C.P. art. 7).

Tribunali Civili e Penali (Civil and Penal Tribunals) have general jurisdiction, civil and penal, and appellate jurisdiction as to Justice of Peace's judgments.

Corte d'Appello (Court of Appeals) has appellate jurisdiction over judgments of tribunals. A section of this court is named Corte d'Assise (Court of Assise) for trial by jury of the gravest penal proceedings. A Corte d'Assise d'Appello (Appeal Court of Assise) has been set up in 1951 to deal with appeals from judgments of the Corte d'Assise.

Corte di Cassazione (Court of Cassation) is the supreme judicial court of final resort. Its jurisdiction is confined to matters of law, taking the facts as found by the lower courts.

Corte Costituzionale (Constitutional Court).—See category 1 Introduction, topic 1.02 Government and Legal System, subhead Constitutional Court.

Tribunali per i Minorenni (Juvenile Courts) have jurisdiction over minors for adoption, affiliation, and for crimes committed by minors.

Tribunali Amministrativi (Administrative Courts).—There are a number of administrative courts having jurisdiction over specific matters.

Admission to Judiciary.

Except for Justice of Peace and Honorary Judges of Tribunal, admission takes place by national contest among doctors of jurisprudence, and post is for life.

6.02 JURISDICTION:

The rules on jurisdiction in civil matters are set out in Law No. 218 of May 31, 1995 and it is outside scope of this digest to render any summary thereof. Following rules are, however, of interest to foreigners:

Voluntary Waiver of Italian Jurisdiction.

When jurisdiction does not exist on basis of residence or domicile in Italy or of applicability of criteria set forth in EC Regulation No. 44/2001, it nevertheless applies if parties have accepted it by agreement and such acceptance is proved in writing, or if defendant appears in proceedings without pleading lack of jurisdiction in his first defence motion.

Italian jurisdiction may be derogated from by agreement in favor of foreign judge or foreign arbitration if derogation is proved in writing and litigation involves disposable rights.

Derogation is without effect if designated judge or arbitrators decline jurisdiction or cannot take cognisance of litigation in any case.

Italian Jurisdiction over Foreigners.

A foreign national may properly be summoned before an Italian court if, inter alia: (1) he is a resident of or domiciled in or has a representative in Italy specifically authorized to appear in court or has accepted Italian jurisdiction (provided such acceptance is evidenced in writing or defendant enters appearance without alleging lack in jurisdiction); (2) criteria, set forth in §§2, 3 and 4 of Title II of 1968 Brussels Convention on Jurisdiction and Enforcement of Judgments in civil and commercial matters apply, even if defendant is not domiciled in territory of contracting state, when one of matters covered by scope of convention is involved; (3) criteria set forth in EC Regulation No. 44/2001 apply.

6.03 LAW REPORTS:

See topic 6.06 Statutes.

6.04 LEGISLATURE:

See category 1 Introduction, topic 1.02 Government and Legal System.

6.05 REPORTS:

There are no official reports in Italy with exception of judgments of Constitutional Court which are published on “Gazzetta Ufficiale della Repubblica Italiana.” See category 1 Introduction, topic 1.02 Government and Legal System, subhead Constitutional Court. Reports are voluntary. Usually jurisprudential reports are contained in reviews edited by well known jurists. Following is a list of most authoritative reports: Il Foro Italiano, La Giurisprudenza Italiana, Il Massimario delle Decisioni Civili della Corte di Cassazione, La Rivista Penale, La Rivista di Diritto Commerciale, La Rivista di Diritto Internazionale.

Laws and statutes are published by Government in “Gazzetta Ufficiale della Repubblica” and in “Raccolta delle Leggi e Decreti della Republica d'Italia.”

6.06 STATUTES:

All Italian law is embodied in statutes. The fundamental statutes are the five codes (civil code, code of civil procedure, penal code, code of penal procedure, code of sea and air navigation). In addition, several Unified Texts of law exist which contain a codification of various statutes relating to one specific matter.

All other matters are governed by individual statutes. All statutes are published in the Official Gazette of the Republic.

Laws other than those establishing taxation, approving state budget, amnesties or international treaties may be repealed as a consequence of a referendum.

7 CRIMINAL LAW

7.01 CRIMINAL LAW:

Whereas bulk of criminal law is governed by Penal Code there is huge number of crimes and offences provided in many other statutory instruments also not having criminal nature. Criminal Procedure is regulated by Code of Penal Procedure. See category 1 Introduction, topic 1.02 Government and Legal System, subhead Civil Rights.

8 DEBTOR AND CREDITOR

8.01 ASSIGNMENTS:

Rights, credits, debts and choses in action may be assigned by contract. Certain rights, such as those relative to maintenance or support, are not assignable. Rights as to which dispute is pending before court cannot be assigned to judges, clerks, process servers, lawyers, and notaries discharging their functions within jurisdiction of that court. (C.C. 1261).

Notice to a debtor or his acceptance thereof are necessary for the assignment of rights to become fully effective and operative in debtor's respect, but the latter's consent is not required. (C. C. 1264).

Unless assignment is made without consideration, assignor is answerable to assignee for existence of his title at time when assignment is effected, but normally he has no liability as regards debtor's solvency.

Assignment of debts or contracts by a debtor or one party to a contract are of no effect on the creditor or the other party unless their consent thereto is previously obtained.

Assignment for Benefit of Creditors.

A debtor may assign the whole or part of his assets to his creditors, but the assignment is operative only in respect of those creditors who have agreed thereto and is void unless it is made in writing. The creditors may dispose of the assets assigned to them as they see fit and share in the proceeds of the liquidation thereof in proportion to their respective credits, but the debtor retains the right to control the management and receive the accounts relative thereto. The creditors may not levy execution on the debtor's assets other than those assigned until the liquidation of the latter has been completed. (C. C. 1977-1986).

Assignment of Receivables to Banks, Factoring Companies and other Financial Intermediaries.

These assignments are regulated by Law No. 52, Feb. 21, 1991 (as am'd by Legislative Decree No. 385, Sept. 1, 1993) when following conditions occur: (a) assignor is entrepreneur; (b) assigned receivables arise from contracts entered into by assignor within course of his business; (c) assignee is bank, factoring company or other financial intermediary, whose by-laws include purchase of receivables.

Assignment of Receivables Towards State and other Public Entities.

When debtor is State or other public entity, assignment of receivables, if permitted by law, must, unless expressly accepted by it, be notified to debtor and executed by public deed or private deed with signatures authenticated by notary pursuant to art. 69 of Royal Decree No. 2440 of Nov. 18, 1923.

Securitization Law.

Law No. 130 of Apr. 30, 1999 amended applies to securitization transactions made through assignment for consideration of cash receivables (either existing or future receivables), provided that sums payable by assigned debtors are exclusively destined to satisfaction of rights incorporated in securities issued to finance purchase of such receivables and that assignee is company having sole purpose of performing one or more securitization transactions (SPV). Receivables related to each transaction constitute in all respects autonomous patrimony independent from that of SPV and from those receivables pertaining to other securitization transactions. Enforcement against each portfolio of receivables can only be made by holders of notes issued to finance purchase of receivables which constitute such portfolio of receivables, with exclusion of any other creditor.

Special provisions have been also provided for in order to limit negative effects of bankruptcy: no claw back action towards payments made by assigned debtors is permitted while general period for setting aside currently equal respectively to one year and six months is reduced for “securitization transactions” respectively to six or three months. SPV must be financial intermediary and comply with relevant legislation and supervisory regulations, but minimum stock capital requirement will not apply. In addition general provision of law applicable to corporations pursuant to which not listed companies other than banks cannot issue notes for aggregate amount exceeding twice as much their assets does not apply to SPV. Assignment of receivables becomes effective against debtors and third parties upon publication on Official Gazette and deposit with Register of Enterprises of notice of assignment. New law requires drafting of prospectus even if securities to be issued are offered to qualified investors and, in case of public offer, transaction must be given rating by rating agency.

Notes issued by SPV benefit of provisions of Legislative Decree No. 239 of Apr. 1, 1996 as amended and supplemented pursuant to which payment of interest and other proceeds under notes may be made without withholdings or deductions to certain categories of noteholders and subject to compliance with certain procedures.

Above-mentioned provisions, pursuant to recent amendments to Law No. 130 of Apr. 30, 1999 introduced by Law Decree No. 35 of Mar. 14, 2005 converted into Law No. 80 of May 14, 2005, apply also to transactions pertaining to assignment of land and mortgage receivables, of receivables toward public entities or guaranteed by them as well as securities issued under securitization transactions pertaining to receivables having same nature, carried out by banks in favor of companies having sole purpose of purchasing such receivables and securities, through financing granted or guaranteed also by same originator banks.

Under new provisions, assignments of receivables toward public entities will become effective upon publication on Official Gazette in derogation of Arts. 69 and 70 of Royal Decree No. 2440 of Nov. 18, 1923.

Pursuant to joint provisions of Law Decree No. 351 of Sept. 25, 2001 as amended, converted into law by Law No. 410 of Nov. 23, 2001 and Law Decree No. 63 of Apr. 15, 2002 converted into law by Law No. 112 of June 15, 2002, public company has been incorporated by Republic of Italy which will perform securitization transactions having as their object proceeds from transfer of State real estate patrimony. In derogation to Law No. 130, collection of such proceeds may be made by State and other public entities in addition to banks and financial intermediaries.

Pursuant to art. 84 of Law No. 289 of Dec. 27, 2002 (Budget Law for year 2003), regions and local entities are authorized to incorporate, also through third parties, limited liability companies for purpose of finalizing securitization transactions having as their object proceeds from transfer of their respective real estate patrimony.

8.02 ATTACHMENT AND SEQUESTRATION:

There is “sequestro convenzionale” (attachment ex contractu) which corresponds to the American-English sequestration in contracts; that is, a species of a thing in controversy is deposited by two or more persons with a third person, who binds himself to restore it, when the litigation is over, to the party to whom it has been adjudged. (C. C. 1798).

Another form is the “sequestro giudiziario” whereby the court authorizes the seizure: (1) of real or personal property, title to which is controversial, and (2) of books, ledgers, documents, samples or any other thing which may be used as evidence of a credit. (C. C. P. 670).

The third form of sequestration (“sequestro conservativo”) may be authorized by the court upon the creditor's demand whenever the creditor has founded reasons for suspecting that the guaranty of his credit may be prejudiced. (C. C. P. 671). Precautionary function of sequestration is fully discharged and opens way to forceful execution when judgment on merits, ascertains foundation of claimant's right.

Sequestration can be granted in context of pending litigation but if application is filed prior to institution litigation proceedings on merits Court's order granting sequestration must set peremptory deadline not exceeding 60 days in order to commence such litigation. Both “sequestro conservativo” and “sequestro giudiziario” may be granted by court without hearing debtor. No lien or preference in respect of other creditors is created by attachment.

8.03 BANKRUPTCY:

Major reform of existing bankruptcy legislation contained in Royal Decree No. 267 of Mar. 16, 1942 (“Royal Decree No. 267”) has been introduced by Legislative Decree No. 5 of Jan. 9, 2006 (“Decree No. 5”). New rules have entered into force on July 16, 2006. Provisions contained in Royal Decree No. 267 has been amended by Legislative Decree No. 169 of Sept. 12, 2007 (“Decree No. 169”) which has entered into force on Jan. 1, 2008.

Only traders (persons or concerns ordinarily engaged in business of medium or large dimension) are subject to or can invoke bankruptcy law. He who is not able to discharge his obligations or pay his debts is in state of insolvency and may be declared bankrupt at his own instance or at instance of one or more creditors, or upon request of Public Prosecutor.

Before enactment of reform introduced by Decree No. 5, appointed judge and trustee (receiver) were administrators of bankruptcy while according to new rules, appointed judge is entrusted with supervisory powers. Trustee acts under surveillance of appointed judge designated by tribunal and creditors' committee. He is specifically charged with assessment of assets and liabilities of bankrupt. Committee of three to five creditors, whose powers have been widened, supervises conduct of receiver, authorizes its acts and releases opinions provided by law.

Gifts and donations made by bankrupt within two years prior to bankruptcy are null and void against creditors' rights. New provisions on claw-back have been introduced by Law Decree No. 35 of Mar. 14, 2005 converted into law by Law No. 80 of May 14, 2005 (“Decree No. 35”) which has entered into force on Mar. 17, 2005 and will apply to all bankruptcy procedures declared after entry into force of Decree No. 35. According to such provisions, abnormal transactions and payments made without money or other ordinary means within one year prior to bankruptcy are revoked, unless other party can prove that he was not aware of insolvency of bankrupt. Normal transactions and payments made six months prior to bankruptcy are also revoked, if receiver proves that other parties were aware of insolvency of bankrupt.

Abnormal transactions have been defined as all those transactions where obligations of bankrupt exceed more than one-fourth his consideration.

Furthermore, certain exemptions from claw-back have been introduced by Decree No. 35, as amended by Decree No. 169 including, inter alia, payments of goods and services made during course of ordinary activities according to customs; remittances on bank accounts to extent not reducing substantially and permanently indebtedness of bankrupt toward bank; purchases of houses and preliminary purchases registered pursuant to art. 2645-bis, performed at fair value and destined to be inhabited by purchaser or by his relatives or relatives-in-law within third degree and payments of performances rendered by bankrupt's employees or other collaborators.

Claims are submitted to appointed judges and, if accepted, included in an official list. When list is completed and assets are sold, claims are settled in following order: (1) preferential claims are paid in full (claims of mortgages, pledges, tax collectors' claims, social insurance agencies' claims, labor claims); (2) all ordinary claims are settled pro-rata with remaining funds.

During bankruptcy procedure, accrual of interest on receivables is suspended and execution proceedings to be initiated by individual creditors are prohibited.

One or more creditor or third party may file application for settlement (concordat). Pursuant to Decree No. 169, settlement may be proposed by bankrupt only after one year from bankruptcy and within two years from decree of enforceability of bankruptcy's liabilities. If proposed settlement is not approved by creditors or if, after approval, it is defaulted by bankrupt, then regular winding up follows (alienations, collections, distributions, etc.).

Preliminary Concordat.

Entrepreneur who is in state of economic crisis may propose to his creditors preliminary concordat on basis of plan providing for: (a) restructuring of his debts and payment of creditors by several means including, inter alia, assignments of assets or attribution of shares or bonds convertible in shares or other financial or debt instruments; (b) assignment of activities of enterprises interested by proposal of concordat to person who assumes obligations under concordat; (c) division of creditors into different classes on basis of their juridical position and their economical interests; (d) different treatments of creditors belonging to different classes.

Tribunal, by decree not subject to appeal, decides whether application may be accepted, and if it is, it orders meeting of creditors to be held before judge within 30 days, appoints trustee to take care of administration of assets and fixes term to entrepreneur, within 15 days, to deposit, with office of court's clerk, amount equal to 50% of expenditures expected necessary to entire proceeding, or minor amount fixed by Judge. Concordat must be approved by creditors representing majority of credits admitted to vote and, if creditors are divided into classes, by majority of such classes. If tribunal ratifies concordat, decision binds every creditor. According to new provisions introduced by Decree No. 35, as amended by Decree No. 169, moreover, debtor may file, together with application for concordat, agreement for restructuring of his debts entered into with creditors representing at least 60% of all credits and accompanied by report on feasability of same agreement prepared by expert. Within 30 days as from publication of agreement, creditors may oppose it and tribunal will decide on such oppositions and on approval of agreement.

The Procedure of Controlled Administration under which entrepreneurs, individuals or companies in temporary financial difficulties were allowed to apply to tribunal for control of their business operations and for administration of their assets for period not exceeding two years has been repealed by Decree No. 5.

Forceful Administrative Liquidation.

Insurance companies, banks, certain companies controlled by State, consortiums and other special legal entities may not be subject to normal bankruptcy proceedings and, in case of insolvency, they are liquidated by commissioner appointed by court.

Extraordinary Administration.

Legislative Decree No. 270 of July 8, 1999 as amended and supplemented ("Legislative Decree No. 270") has enacted new legislation on extraordinary administration of large enterprises in state of insolvency replacing previous Law Decree No. 26 of Jan. 30, 1979 (better known as "Legge Prodi") with aim of overcoming problems created by previous legislation, some of which were object of infringement procedure against Italy started by European Commission.

New procedure is divided into following main stages:

(i) *Declaration of State of Insolvency.*—State of insolvency is declared by competent Tribunal, upon filing of petition, by debtor himself, or by one or more creditors, or by public prosecutor or ex-officio, subject to existence of following requirements: (a) enterprise, which should be engaged in business operations, not being public entity; (b) enterprise having more than 200 employees for one year; (c) debts of enterprise being higher than two thirds of its assets and of its revenues of latest exercise; (d) enterprise being in state of insolvency. With same judgment Tribunal appoints, inter alia, one or three judicial commissioner(s), in compliance with indication of Ministry of Economic Development. During this first stage enterprise is managed by entrepreneur or by judicial commissioner(s). Within 30 days from declaration of insolvency, judicial commissioner(s) will have to file report on real chances of rebalancing business.

(ii) *Opening of Extraordinary Administration Procedure.*—If Judge verifies, on basis of report drafted by judicial commissioner(s), that there are real chances of rebalancing business, he declares extraordinary procedure open otherwise Judge declares bankruptcy. During this stage enterprise is managed by commissioners appointed by Ministry of Economic Development.

(iii) *Assessment of Liabilities.*—During extraordinary administration liabilities of enterprise are assessed. Existing contracts may be determined by judicial commissioner(s) and enforcement actions by creditors are suspended.

(iv) *Definition and Carrying Out of Programme for Transfer of Business or Recovery of Enterprise.*—Administration procedure may be carried out either by way of programme for transfer of business, which should be completed, in whole or in part, within one year; or by means of restructuring programme aimed at recovering enterprise from insolvency state, which should be completed within two years.

(v) *Distribution of Revenues Deriving Under Programme.*—Revenues deriving from transfer of business or from operations of enterprise are distributed among creditors.

(vi) *Termination of Procedure.*—Procedure may terminate either with completion of programmes (of transfer of business or of recovering of enterprise), with declaration of bankruptcy or with composition with creditors.

Setting aside of transactions can take place to extent that programme for transfer of business is approved or procedure is converted into bankruptcy.

Industrial Recovery of Large Enterprises in State of Insolvency.

Specific provisions have been introduced by Law Decree No. 347 of Dec. 23, 2003 converted into Law No. 39 of Feb. 18, 2004, as am'd and supplemented by Law Decree No. 119 of May 3, 2004, by Law Decree No. 281 of Nov. 29, 2004 and by Law Decree No. 134 of Aug. 28, 2008, with respect to large enterprises in state of insolvency which want to accede to programme of recovery provided by Legislative Decree No. 270 and have following requirements: (a) not less than 500 employees during prior year at least; and (b) debt being equal or higher than [Euro]300 million.

(i) Admission to Extraordinary Administration Procedure.

Enterprise having above requirements may request Ministry of Economic Development (formerly Ministry of Productive Activities) to be admitted to extraordinary administration procedure through economic and financial recovery programme. Upon such request and after evaluation of existence of necessary requirements, Ministry of Economic Development admits by Decree requesting enterprise to extraordinary administration procedure and appoints extraordinary commissioner.

(ii) Declaration of State of Insolvency.

After having received communication of Ministerial Decree, competent Tribunal declares state of insolvency and assumes consequent provisions. If Tribunal ascertains that there is no state of insolvency, Ministerial Decree becomes ineffective.

(iii) Concordat.

During management of recovery programme, commissioner may decide to pay creditors through concordat, specifying in detail conditions and any guarantees.

(iv) Claw-Back Provisions.

Claw back of transactions can take place even in case of authorization to execution of recovery programme to extent that such claw back is of benefit for creditors.

Penal Sanctions.

The debtor who has ceased making his payments and finds himself in any of the following conditions is declared a “simple bankrupt” and may be punished by from six months to two years imprisonment: (a) If his personal expenses or those of his family exceeded his income according to his financial conditions; (b) if he has spent a large part of his income in gambling or manifestly imprudent operations; (c) if, for the purpose of delaying bankruptcy, he has used other ruinous means; (d) if he has caused further prejudice to his financial condition by abstaining from applying for a bankruptcy declaration or by any other grave fault; (e) if he has failed to discharge the obligations agreed to in a previous concordat; (f) if during the three years preceding the bankruptcy declaration he has not kept the books and papers prescribed by the law or has kept the same in an irregular or incomplete manner and has failed to appear before the referee, or trustee or committee of creditors. An entrepreneur who continues to resort to credit dissimulating his insolvency may be punished with imprisonment from six months to three years.

A bankrupt is guilty of “fraudulent bankruptcy” if (i) to damage creditors he has destroyed or hidden assets, or declared himself debtor of sums not due; (ii) he has destroyed or falsified his accounting books to damage creditors or obtain unfair benefit. Those guilty of fraudulent bankruptcy may be punished by imprisonment from three to ten years. In case of bankruptcy of company, directors and statutory auditors are personally liable under simple or fraudulent bankruptcy penal rules.

8.04 EXECUTIONS:

Titles for execution are (C. C. P. 474): (a) Final decisions and other special orders issued by courts; (b) private deeds authenticated by notary for payment of sums of money, promissory notes and other payment orders; (c) documents drawn by notary public. In order to execute above titles it is necessary to obtain a copy of them with a special certification of enforceability, issued by competent court. (C. C. P. 475).

Execution can affect both movable and immovable property of debtor, on basis of a special procedure, which is concluded by public sale of said property (C. C. P. 503) and payment of creditor (C. C. P. 510).

8.05 EXEMPTIONS:

The following property is exempt from levy: Beds, wearing-apparel, kitchen utensils, nuptial rings, household movables, dining tables and chairs, wardrobes, cases, except when of great artistic value, refrigerators, heating stoves, gas or electric stoves, washing machines, letters, registers, family papers, books, tools, fuel and food needed by debtor's family for one month. Salaries can be levied only to extent of one-fifth thereof except in special cases. (C. C. P. 514-515-545).

8.06 FRAUDULENT SALES AND CONVEYANCES:

Creditors may void assignments made by debtors in order to defraud them. (C. C. 2901).

8.07 GARNISHMENT:

A third party is summoned to appear before Executing Judge and either personally or by attorney must state what goods or money is in his possession or he owes to defendant. If he refuses to appear or to make any declaration or if objections arise about latter, Executing Judge, on party's motion, instructs proceedings pursuant to applicable provisions of Code of Civil Procedure. In meanwhile garnishee is bound to keep money or goods in his possession as judicial trustee. When third party owes money which may be exacted immediately or within 90 days, money is, by Executing Judge, assigned to creditors. Otherwise goods or credits are sold in interest of creditors by public judicial auction. (C. C. P. 543-554).

8.08 HOMESTEADS:

Concept of homestead does not exist in Italian law. Only certain items of personal property are exempt from execution or forced sale.

8.09 INSOLVENCY:

See topic 8.03 Bankruptcy.

8.10 JUDGMENT NOTES:

See category 3 Business Regulation and Commerce, topic 3.01 Bills and Notes.

8.11 LIENS:

The debtor's property is the common security of his creditors, who therefore have an equal right on the same, excepting the case of legitimate preferred or privileged claims. Preference is established by privileges (liens), chattel mortgages and mortgages. (C. C. 2740-2741).

Privileges on movables are: (1) General privilege covering the entire property of the debtor as security for judicial expenses, undertaker's expenses, sickness expenses, wages, professional fees, food, state's credits for taxes etc.; (2) special privilege, covering only determinate movables, as security for custom duties on merchandise, taxes on rent, lease, pledges, hotel bills, carrier's fares etc. (C. C. 2751-2755); (3) special privilege which may only be taken by banks as security for medium or long term loans and may only cover certain present and future movables (such as existing or future plants and works, raw materials, stock, assets purchased with proceeds of medium or long term loan in respect of which special privilege is intended to be granted, existing or future receivables arising from sales of all assets listed in art. 46 of Legislative Decree No. 385 of Sept. 1, 1993).

Privileges on immovables are those arising from judicial expenses (art. 2770); from land tax and other taxes due to the State, to the Provinces, to the Municipalities (art. 2771); from payments due to the State for licences or contributions (art. 2774-2775).

8.12 PLEDGES:

See category 18 Mortgages, topic 18.01 Chattel Mortgages.

9 DISPUTE RESOLUTION

9.01 ALTERNATIVE DISPUTE RESOLUTION:

Alternative dispute resolution is limited to conciliation and arbitration (see topic 9.02 Arbitration).

9.02 ARBITRATION:

Arbitration proceedings may be instituted in all controversies except in certain special matters such as those concerning personal status, domestic relations, certain labour disputes which must be brought before ordinary courts and, in general, those concerning rights which parties are not entitled to dispose of (C. C. P. 806).

Arbitrators to a controversy must be odd in number and unless otherwise provided by parties, their procedure and awards made in Italy are governed by Italian law.

Proceedings for voidance of arbitration awards may be instituted before civil courts on certain specific grounds (C. C. P. 829), e.g., when arbitrators have exceeded sphere of jurisdiction conferred upon them by parties or if arbitration agreement is not valid and/or has not been complied with.

Code of Civil Procedure also regulates international arbitration and recognition and enforcement of foreign arbitral awards. Above mentioned provisions are without prejudice to applicability of international conventions, infra.

Awards may also be contractual in nature if so provided by parties in arbitration agreement. In such case, award is binding as a contract between parties but is not enforceable unless a judgment has been entered upon award.

Chambers of Conciliation have recently been set up under care of Council of the Bar Association and under care of some Chambers of Commerce.

Pursuant to Convention on the Recognition and Enforcement of Foreign Arbitral Awards signed in New York on June 10, 1958, to which Italy is a party, awards rendered abroad are recognised in Italy regardless of parties' nationality or domicile. Since Italy ratified said Convention without adopting possible limitations contemplated by Art. 1.3 thereof, awards rendered abroad are recognized in Italy even if rendered in country which is not party to Convention and if subject matter of dispute is not of commercial nature.

There are some further conventions on arbitration to which Italy is party, most important being: European Convention on International Commercial Arbitration signed in Geneva on Apr. 21, 1961, Convention on settlement of investment disputes between states and nationals of other states signed in Washington on Mar. 18, 1965, Convention of Geneva dated Sept. 24, 1923, Convention of Geneva of Sept. 26, 1927. See also Agreement of Sept. 26, 1961, supplementing Italian-U.S. Treaty of Friendship, Commerce and Navigation of Feb. 2, 1948.

10 DOCUMENTS AND RECORDS

10.01 ACKNOWLEDGMENTS:

Documents may be drafted, inter alia, on paper, through electronic and telecommunication instruments and their filing and transmission may be made by way of electronic and telecommunication systems, using specific technical requirements (based on cryptography with two asymmetrical keys by which documents could be coded and encoded) to assure genuineness and time validation. (D.P.R. No. 445 of Dec. 28, 2000 as am'd). This legislation on electronic documents has been implemented by Legislative Decree No. 82 of Mar. 7, 2005, Legislative Decree No. 82 of Mar. 7, 2005 as subsequently amended by Legislative Decree No. 159 of Apr. 4, 2006 and implemented by D.P.C.M. of Apr. 1, 2008 and D.P.C.M. of Mar. 30, 2009, introduces code for use and management of electronic documents within Public Administration and access to public documents through use of information technologies. (See category 5 Civil Actions and Procedure.)

Italian law sets forth that certain acts or contracts shall be made or proved through private writings, authenticated private writings and public acts. (C. C. arts. 2699 and subsequent).

Private writings constitute full proof, unless judicially declared false, of origin of declarations contained therein from person who executed such writing.

Electronic documents, duly executed with electronic signatures, have same validity as private writings. (art. 15, second paragraph, of Law No. 59 of Mar. 15, 1997, D.P.R. No. 445 of Dec. 28, 2000 and Legislative Decree No. 82 of Mar. 7, 2005).

Signatures on private writings can be authenticated by notary public (see topic 10.03 Notaries Public) or by other authorized public official. Authentication consists of certification by public official that signature was written in his presence. Public official must previously verify identity of person who signs it.

Public act is instrument drawn with required formalities by notary public (see topic 10.03 Notaries Public) or by another public official authorized to confer to such instrument validity towards third parties and that constitutes full evidence, unless judicially declared false, to have been drawn by public official who drew it, as well as declarations of parties and of other facts which public official certifies to have taken place in his presence.

Public acts and private writings authenticated abroad must have in order to be valid in Italy signature of notary public (i) legalized by competent authority abroad or, when applicable, certified by apposition of apostille pursuant to The Hague Convention of Oct. 5, 1961, to which Italy, as well as many other countries including U.S., is party unless legalization or certification is not required pursuant to specific conventions entered into between Italy and relevant country; and (ii) deposited, save in certain circumstances, with Italian notary public.

10.02 AFFIDAVITS:

Creation, release, keeping, management and transmission of administrative documents, i.e. documents representing, even in electronic form, content of administrative acts or used for purpose of administrative activity, as well as filing of documents and acts with public administration are regulated by D.P.R. No. 445 of Dec. 28, 2000, as amended and supplemented by Legislative Decree No. 82 of Mar. 7, 2005 (as subsequently am'd) which, inter alia, enables Italian and EU citizens and, in certain circumstances, non-EU citizens, to file affidavits of relevant person in lieu of certificates.

Affidavits rendered by relevant person are valid to certify his (a) date and place of birth, (b) residence, (c) nationality, (d) entitlement to civil and political rights, (e) marital status, (f) family status, (g) existence in life, (h) birth of son or daughter, death of husband or wife or relatives, (i) registration with registers kept by public administrations, (j) admission to professional registers, (k) education, (l) professional qualification, (m) income status, (n) welfare position, (o) tax code and V.A.T. numbers, (p) unemployed status, (q) retirement status, (r) student status, (s) legal status, (t) registration with associations, (u) accomplishment with military service, (v) absence of any convictions, (w) civil status of dependent person, (x) all data contained in registers of civil status, (y) absence of bankruptcy, winding up, or of petition for composition with creditors. (art. 46 of D.P.R. No. 445 of Dec. 28, 2000).

Facts, personal statuses or qualities within knowledge of interested party may be stated by means of declaration made and signed before officer entrusted to receive relevant documentation, notary, court's clerk, town clerk or any other officer so empowered by Mayor. Any such individual receiving declaration is to authenticate relevant signature.

Certificates of origin, of CE compliance and those inherent to health and veterinary matters cannot be replaced by any other document unless otherwise provided by relevant statutes. (art. 49 of D.P.R. No. 445 of Dec. 28, 2000).

10.03 NOTARIES PUBLIC:

In Italy notaries have the qualification and standing of public officials whose organization and functions are similar to those of the French system. A notary must be a University graduate of law in order to be admitted to pass a special competitive examination which is a prerequisite of his subsequent appointment to his office by the appropriate court. The number of notaries is limited and each can practice only within a determined district (Collegio notarile). To be admitted to practice each notary is also required to give a bond. Each notary must keep a record of all instruments drawn before and acknowledged by him and is specifically required to keep the originals of the deeds drawn by him. On his death, or retirement, all documents on file in his office are delivered to Notarial Archive maintained under State supervision. He issues certified copies of documents on file in his office. He is empowered to take affidavits under oath but only jointly from minimum of four deponents and as to matters of common knowledge. Art. 24 of Legislative Decree No. 82 of Mar. 7, 2005, provides for validity of documents digitally signed subject to specific conditions being met. D.P.R. No. 445 of Dec. 28, 2000 also entitles notaries to authenticate any such digital signature. See also topic 10.01 Acknowledgments.

10.04 RECORDS:

In Italy there are various public registers created by specific laws in order either to (i) provide information on facts, acts or contracts to public, or (ii) make effective towards third parties certain facts, acts or contracts, or (iii) create rights of priority or presumptions.

Among these registers there are Civil Status Register, Register of Enterprises, Register of Associations and Foundations, Register of Immovables, Register of Registered Movables, Italian Office for Patents and Trademarks, Register of Motion Picture and other registers specific for certain categories of companies (such as banks, financial intermediaries and insurance companies).

10.05 SEALS:

In instruments, seals of witnesses are not required, except in notarial deeds of gift (atti di donazione).

11 EMPLOYMENT

11.01 LABOR RELATIONS:

This matter is covered by Arts. 36 to 40 of Constitution (see category 1 Introduction, topic 1.02 Government and Legal System, subhead Economic Rights), by Book Five of Civil Code, by special laws concerning employment agencies, social insurance, labor trials and assistance, by collective (i.e., trade union) bargains and by usage; by Law No. 300 of May 20, 1970 as amended new provisions have been enacted with respect to hiring of workers and protection of their freedom and honour. Said provisions also pertain to rights of labor unions and to unions' activities within places of employment.

Legislative Decree No. 276 of Sept. 10, 2003 as amended (so-called “Biagi Law” or “Riforma Biagi”), has introduced wide range reform of Italian labor market aimed at increasing flexibility and job opportunities. Biagi Law has introduced new regulation of intermediation in labor relationships, through which leasing of workforce is allowed, being such service provided by special purpose companies. Such companies hire workforce placing it at disposal of requesting entrepreneur. Pursuant to Law No. 247 of Dec. 24, 2007 (“Welfare Law”), contracts for supply of workforce without maximum time limits are not allowed. Biagi Law has also introduced wide range of new labor contracts (i.e., job sharing, intermittent job, job on call) andhas deeply reformed part-time and apprenticeship contracts. New rules on part-time job have been introduced by Welfare Law, according to which it is not anymore allowed to agree, through individual labor agreement, part-time working solution if such option is not set forth in relevant collective contract. Riforma Biagi has also provided for new kind of contract, so called job on project (“lavoro a progetto”) whose nature falls between subordinate and autonomous labor contracts and replaces (in private sector) existing contract of same kind (“collaborazioni coordinate e continuative”). It should be noted however that job on project is subject to limits which are stricter compared to those applicable to replaced kind of labor contract (i.e., “collaborazioni coordinate e continuative”). Finally, Biagi Law provides for certification procedure of labor contracts to be made before specific public commissions. Such certification is aimed at pinning down and clearing scopes and nature of most part of labor contracts introduced by Biagi Law and at reducing possible relevant controversies and litigations. Biagi Law adds to reform of fixed term contracts made by Legislative Decree No. 368 of Sept. 6, 2001, through which new provisions were introduced allowing much greater freedom and flexibility in use of those kinds of contracts. Nevertheless, pursuant to Welfare Law, fixed-term contracts become by operation of law open-term contracts if their duration exceeds 36 months, including renewals and extension. This provision has been introduced in order to limit prolonged use of fixed-term contracts. New rules on fixed-term contacts have also been introduced by Law Decree No.112 of June 25, 2008, converted into Law No. 133 of Aug. 6, 2008 (“Law Decree No.112”), pursuant to which collective contracts may allow extension of beyond 36-month duration. It should be noted however that above trend of reform (started with Law No. 196 of June 24, 1997, most part of which has been replaced by Biagi Law), on one hand, applies to minor part of Italian labor market and, on other hand, has not yet achieved to reform Art. 18 of Law No. 300 of May 20, 1970 on dismissal in standard tenure employment contracts (by far most common kind of labor contracts in Italy) in companies employing more than 15 employees. Said Art. 18 provides (together with other provisions of Italian law; see “Dismissal” section below) for extreme level of protection to employees in case of dismissal, making such occurrence (together with critical inefficiencies of Italian judicial system to be involved in case of litigation) major economic and managing challenge for relevant employer.

Categories of Employees.

Employees are classified into executives, intermediates, clerks and workmen. (C.C. 2095).

Hours of Work.

Significant efforts have been recently made in order to allow better flexibility of amount and distribution of hours of work, mainly through constant changes to existing legislation on subject (recently further regulated by Legislative Decree No. 66 of Apr. 8, 2003 as am’d also by Law Decree No. 112) as well as through introduction of new provisions on part-time (Legislative Decree No. 61 of Feb. 25, 2000 as am'd and supplemented).

Hours of work cannot exceed, in general, 40 hours per week. (art. 3 of Legislative Decree No. 66 of Apr. 8, 2003). In any case, hours of work cannot exceed 48 hours per week, including overtime work. Overtime work cannot exceed 250 hours per year. All employees are entitled to 11 hours of consecutive rest every 24 hours (unless otherwise provided by collective contracts, pursuant to Law Decree No. 112), to average of consecutive 24 hours of holiday per week, preferably on Sundays to be calculated on basis of time period not exceeding 14 days (Art. 9 of Legislative Decree No. 66 of Apr. 8, 2003), and to period of vacation of at least four weeks every year with right of being paid (Art. 36 of Constitution and Art. 10 of Legislative Decree No. 66 of Apr. 8, 2003). Collective bargaining agreements have important and increasing role in determining amount and distribution of hours of work.

Wages.

May be determined by time or by job. They cannot be lower than minimum provided by collective bargains.

Italian case law provides always for application, on basis of equity, of minimum wage set forth in relevant collective bargains.

Labor Unions.

Recognized under Italian Constitution. (art. 39). They may enter into collective bargains which, if Labor Union has been registered with competent local authority and has legal personality, are compulsory for all employers and employees of category, regardless of their membership in respective associations or unions. Actually law implementing registration provisions for Labor Unions has never been adopted, and collective bargains have nature of ordinary contracts.

Nevertheless substantial role is unanimously recognized to collective bargains, whose minimum terms and conditions cannot be ignored in any employment relationship.

Legislative Decrees No. 74 of Apr. 2, 2002 and No. 186 of Aug. 19, 2005 have implemented EC Directive No. 45 of Sept. 22, 1994 on European Works Councils and on community-scale companies, or groups, undertakings for informing and consulting employees.

Dismissal.

Subject to notice which varies according to category of employees and duration of employment. (C.C. 2118). However, enterprises, except for few cases, cannot dismiss any of them without “giusta causa” or “giustificato motivo”, i.e., specific reason of complaint. (C.C. 2119; Law No. 300 of May 20, 1970 and Law No. 604 of July 15, 1966 as am'd). Reason of complaint must be notified to employee in writing and five days term must be given for employee's answer. Only after receipt of such answer or elapsing of five days term can dismissal be validly notified to employee. If existence of “giusta causa” or “giustificato motivo” is denied by court, employer shall be (i) condemned to pay compensation of damages equal to wages and social contributions accrued from date of wrongful dismissal up to date of court's ruling and (ii) to reinstate dismissed employee (unless he/she accepts indemnity in lieu). However, for enterprises with more than 15 employees, reinstatement of employee is mandatory, unless employee requests payment of indemnity. Special provisions regulate collective dismissals. (Law No. 223 of July 23, 1991).

Severance Bonus.

All employees are entitled to severance bonus in proportion to length of employment, payable upon termination of same.

Trial Period.

Valid only if agreed in writing or stated in writing in hiring letter. See also European Union Law Digest, category Employment, topic Labor Law.

Protection of Motherhood and Fatherhood.

Existing legislation has been reorganized in consolidated text of law approved by Legislative Decree No. 151 of Mar. 26, 2001 as amended.

Public Sector.

Labor relations and related matters like, for instance, payment of severance allowances or pensions, are in general differently regulated in public as distinguished from private sector. However, major reform of public sector was started by Legislative Decree No. 29 of Feb. 3, 1993, subsequently amended and followed by several decrees for its implementation. Reform was mainly aimed at abolishing privileges accorded to public employees, and to establish uniform rules for public and private employment even though certain differences will necessarily be maintained, in view of official role played by public employees. New collective bargaining system for public sector has also been established and has central role in determining regulation of public employment contracts. As completion of above-mentioned process, jurisdiction on public labor matter has been transferred (by Legislative Decree No. 80 of Mar. 31, 1998) from special administrative courts to ordinary civil labor courts.

Strike.

It is a right recognized by Constitution and “can be exercised within the limits set forth in the laws which regulate it”. (Art. 40 of Constitution). For time being there is no law governing this matter save for Law No. 146 of July 12, 1990 which has introduced some controls and regulations for strikes affecting public services deemed to be essential to community and which has been amended by Law No. 83 of Apr. 11, 2000.

Such law instituted Authority (“Commissione di Garanzia”) which is authorized to fix minimum standards of activity for workers in case of strike and, generally, to supervise compliance with applicable legislation.

Pensions.

Public compulsory pension system is funded through mandatory contributions paid by employers and in part, but also through employers, by employees. Upon satisfaction of certain requirements, pensions are payable for old age retirement; or for retirement after certain number of years of employment; or for disability. Social allowance (“pensione sociale”) is also payable, upon satisfaction of certain requirements, as extreme remedy, regardless of payment of any kind of contributions by or on behalf of person to whom it is paid. Legislative Decree No. 124 of Apr. 21, 1993 (“Legislative Decree No. 124”) introduced supplemental pension funds which may be established in addition to public compulsory pension system. Major reform has been introduced by Legislative Decree No. 252 of Dec. 5, 2005, amended by Legislative Decree No. 28 of Feb. 6, 2007 and entered into force on Jan. 1, 2007, which has repealed Legislative Decree No. 124 and provided for new means of funding of supplemental pension. Law No. 335 of Aug. 8, 1995 as amended has introduced new methods of pension computation together with gradual abolition of early retirement. Further reform of old age pension system has been introduced by Law No. 245 of Aug. 25, 2004, as amended by Law No. 247 of Dec. 24, 2007. Such new reform, inter alia, tightens significantly requirements to qualify for old age pension benefits (i.e., by increasing contribution seniority needed to qualify for it and raising standard minimum legal age to retire as from Jan. 1, 2008). For time being, incentives are provided for those employees who decide to postpone their retirement and continue to work.

Industrial safety, as set forth by art. 2087 of C.C., is currently implemented by Legislative Decree No. 81 of Apr. 9, 2008 as subsequently amended ("Legislative Decree No. 81") which provided complex and detailed regulation on industrial health and safety matters based mostly on prevention and information requirements rather than on restoration of damages. In more detail, Legislative Decree No. 81 essentially provides for (i) appointment of qualified professionals to be allocated within industrial structure (such as doctor and officer in charge of risks prevention), (ii) employers' duty of keeping workers informed on risks related to their work through drafting of detailed schedule on such risks, (iii) employers' duty of assuring adequate levels of work through appropriate measures and (iv) criminal penalties for employer in event of violation of such duties.

12 ENVIRONMENT

12.01 ENVIRONMENTAL REGULATION:

In Italian environmental legislation general definition of environment is currently missing. Hence, regulation of whole matter can be inferred from individual pieces of legislation which have been enacted to regulate specific fields. It must be pointed out that Ministry of Environment (currently Ministry of Environment and for Safeguard of Land and Sea) exists since 1986, having been established by Law No. 349 of July 8, 1986 for "the promotion, conservation and recovery of environmental conditions consistent with the basic interests of the public and with the quality of life, for the recovery and the improvement of the national heritage and the preservation of the national resources from pollution." Ministry of Environment shall, in agreement with Regions, draw up and realize plans to reduce pollution. Law No. 93 of Mar. 23, 2001, Law No. 179 of July 31, 2002 and Legislative Decree No. 152 of Apr. 3, 2006 as subsequently amended have introduced amendments to existing legislation on environment.

Legislative Decree No. 152 of Apr. 3, 2006 recently supplemented by Legislative Decree No. 4 of Jan. 16, 2008, introduced major and overall reform of environmental matter, reorganizing, coordinating and supplementing preexisting legislation, also through adoption of eight directives of European Community which were not yet adopted. It represents first Italian code on environment regulating following main environmental sectors: water pollution; protection of land from desertification; management of water resources; management of waste materials and decontamination of polluted lands; air pollution and reduction of injurious emissions in atmosphere; procedure for recovery of environmental damages based on principle that whoever causes pollution must repay consequential damages.

Decree also provides for procedure for evaluation of environmental effects of specific plans and programs approved by Government or local authorities.

Further, Legislative Decree No. 195 of Aug. 19, 2005 implemented EC Directive 2003/4/CE, providing general principles on environmental information, granting right of all to gain access to environmental information kept by public authorities, subject to terms and conditions provided therein and guaranteeing that environmental information be publicly available also through use of communication and information technologies in formats that can be easily approached.

Protection of natural environment is granted, inter alia, by Legislative Decree No. 42 of Jan. 22, 2004 as amended and by Law No. 394 of Dec. 6, 1991 as amended which sets forth basic rules to realize "protected areas", register of which has been laid down by Ministerial Decree of May 10, 1991. Several parks and natural reserves exist all over Italian territory. As to protection of flora and fauna several international conventions and EC Directives apply.

Interministerial Decree of May 3, 2001, as superseded by Ministerial Decree of Jan. 8, 2002, has set up special register in which commercial enterprises have to be registered, including circuses and zoos, and in general whoever trades or uses for profit specimens of fauna and flora, in order to avoid their illegal, illegitimate or uncontrolled exploitation. Same objectives are pursued by specific legislation which includes, as amended, sanitary laws of 1934, legislation on water and electric power plants of 1933 as amended, law on hunting of 1939 as amended and law on fishing (other than in sea) of 1931 as amended, art. 6 whereof prohibits fishing by explosives and electricity and throwing into water of any substance able to benumb or kill fishes or other water animals, and law on sea-fishing of 1965 as amended which contains similar provisions. Specific laws regulate fishing of protected species in different areas of Mediterranean Sea. Legislative Decree No. 372 of Aug. 4, 1999 as repealed by Legislative Decree No. 59 of Feb. 18, 2005 has implemented EC Directive 96/61/CE on combined prevention and reduction of pollution deriving from specific industrial activities, while Legislative Decree No. 238 of Sept. 21, 2005 has implemented EC Directive 2003/105/CE on control over danger of serious accidents connected with dangerous substances. Against spread of animal virus, Legislative Decree No. 146 of Mar. 26, 2001 has implemented EC Directive 98/58/CE on protection of animals health inside farms, establishing specific provisions to protect breeding of animals against danger of contagious diseases such as sponging encephalopathy.

Waste Materials and Dangerous Substances.

Legislative Decree No. 22 of Feb. 5, 1997 which implemented EEC Directives 91/156/CEE, 91/689/CEE and 94/62/CE and introduced specific provisions on disposal and reconversion of waste materials and dangerous waste materials and on packages and disposal of waste packages has been superseded by Legislative Decree No. 152 of Apr. 3, 2006. It reorganizes and coordinates provisions contained in preexisting legislation, confirms parameters currently in force to qualify site as polluted and procedure to decontaminate polluted site, redetermines order of precedence in management of waste materials in compliance with EC legislation, establishes Authority for waters and waste materials and recognizes role of Provinces in management of waste materials.

In addition, Legislative Decree No. 36 of Jan. 13, 2003 as recently amended by Law No. 101 of June 6, 2008, has implemented EC Directive 99/31/CE on dumping. Law No. 257 of Mar. 27, 1992 (as am'd and supplemented) prohibits import, export, trade and in general production of asbestos, save in certain circumstances. Commission has been established having task to supervise environment and consider health risks connected with exploitation of asbestos.

Legislative Decree No. 52 of Feb. 3, 1997 (as am'd and supplemented) has implemented EEC Directive 92/32/CEE on classification, packaging and labeling of dangerous substances.

Water Pollution is governed by Legislative Decree No. 152 of Apr. 3, 2006 as amended (“Legislative Decree No. 152”) which reorganized preexisting legislation such as, inter alia, Law No. 319 of May 10, 1976, as amended and supplemented (better known as “Legge Merli”) as well as Legislative Decree Nos. 130, 131 and 132 of Jan. 27, 1992 and No. 152 of May 11, 1999 which as consequence have been repealed.

Legislative Decree No. 152, implementing EC Directive 2000/60/CE, purports to set out overall discipline for safeguard of surface, marine and underground waters aiming at following goals: (i) to prevent and reduce water pollution as well as to restore polluted waters; (ii) to achieve enhancement of status of waters as well as appropriate safeguards for those destined to special uses; (iii) to pursue sustainable and long lasting uses of water sources, priority being given to potable waters; (iv) to maintain natural self-cleansing capacity of waters as well as their capacity to sustain ample and diversified animal and vegetal forms of life.

Specific targets of environmental quality are to be pinpointed on local basis in accordance with quality standards set out in attachment to Legislative Decree No. 152. Discharge, as defined in Legislative Decree No. 152, of waters on ground, on underground and underground waters, on surface waters etc. must comply with such standards and is in principle prohibited subject to prior authorization, specific exceptions and controls aimed at ensuring that such discharges do not exceed maximum pollution standards laid down in detail in relevant attachment to Legislative Decree No. 152. Distinction is drawn between urban and industrial sewage whose discharge is subject to some prior authorizations and is to comply with specific pollution thresholds.

In compliance with EC Directive 2000/60/CE, establishment of two specific authorities for waters (authority for basin zones and authority for waters and waste materials) is provided. Legislative Decree No. 152 divided Italy into seven basin zones and confirms principle that waters are common heritage.

Failure to comply with above requirements makes responsible party liable to fine. Discharges of industrial waters without, or exceeding ambit of, proper authorization, those which do not conform with current laws and those of industrial waters containing those dangerous substances listed in attachments to Legislative Decree No. 152 without due care, are punished with criminal sanctions.

Further, Legislative Decree No. 31 of Feb. 2, 2001 (as am'd by Legislative Decree No. 27 of Feb. 2, 2002) implemented EC Directive 98/83/CE on purity of water for human consumption, fixing parameters which have to be met to define water “potable”.

In addition, mention should be made of large number of international Conventions to which Italy is party and which are aimed at establishing international cooperation to prevent water pollution. Among others, Convention for the protection of the Mediterranean Sea signed in Barcelona on Feb. 16, 1976 and ratified by Law Jan. 25, 1979 No. 30, Convention for the prevention of sea pollution due to discharge of waste signed in London, Mexico City, Moscow and Washington on Dec. 29, 1972 and ratified by Law No. 305 of May 2, 1983 and Brussels Convention on liability for damages arising from pollution caused by hydrocarbons signed on Nov. 29, 1969 and ratified by Law No. 185 of Apr. 6, 1977. See also category 21 Transportation, topic 21.04 Shipping.

Air pollution is governed by Legislative Decree No. 152 of Apr. 3, 2006 which superseded Law No. 615 of July 13, 1966, known as anti-smog law. Such new legislation coordinates all measures provided in preexisting laws to prevent air pollution. It promotes recourse to most efficient technologies available to prevent and restrain pollution arising from heating systems, industrial plants and any other activity producing dangerous emission, requests wider efforts to individuate and exploit renewable sources in compliance with targets of Kyoto Protocol especially providing incentives to South of Italy to use renewable energy and determines limits for dangerous emissions. All plants producing emissions able to cause air pollution must be authorized to operate by competent authority. Authorization remains valid for fifteen years.

As to heating systems, law sets forth certain technical and building prerequisites for those having power exceeding 30,000 Kcal/h. As to industrial plants, it is provided that they must have devices able to reduce dangerous emissions.

As to protection of ozone layer, mention should be made of Law No. 549 of Dec. 28, 1993 as amended by Law No. 179 of June 16, 1997 and EC Reg. No. 2037/2000.

Air pollution is also regulated by Legislative Decree No. 351 of Aug. 4, 1999 as amended which implemented EC Directive 96/62/CE on measurement and management of environmental air quality. As to emission from motor vehicles they may not exceed certain limits set out in applicable rules. In particular, Ministerial Decree No. 60 of Apr. 2, 2002 which implemented EC Directives 99/30/CE and 00/69/CE fixes limit for emission of certain polluting substances such as sulphur dioxide, benzene, lead and carbon monoxide. Emissions beyond such limits, along with some further circumstances, may lead mayors of greater towns to adopt those measures to restrict motor vehicles' circulation as they think fit. Legislative Decree No. 152 of Aug. 3, 2007 introduced provisions to monitor concentration in air and deposits on land of arsenic, cadmium, mercury, nickel and polycyclic hydrocarbons.

Legislative Decree No. 171 of May 21, 2004 implemented EC Directive 01/81/CE which is aimed at protecting environment and human health from injurious effects arising from acidification, euthrofication of land and ozone presence at land level.

Air pollution is also regulated by several international conventions (Geneva Convention on long-distance air pollution through borders, signed on Nov. 13, 1979 and ratified by Law No. 289 of Apr. 27, 1982 and Vienna Convention for the protection of the ozone layer, signed on Mar. 22, 1985 and ratified by Law No. 277 of July 4, 1988) to which Italy is signatory.

Smoking in public places is forbidden pursuant to Law No. 584 of Nov. 11, 1975 as amended by Law No. 3 of Jan. 16, 2003 and advertising tobacco is also prohibited by Law No. 165 of Apr. 10, 1962 (as am’d).

Acoustic pollution is governed by Law No. 447 of Oct. 26, 1995 (as am'd). Legislative Decree No. 262 of Sept. 4, 2002, which implemented EC Directive 00/14/CE regulates environmental acoustic pollution of engines and devices operating in open space.

Electromagnetic pollution is regulated by Law No. 36 of Feb. 22, 2001 (as am'd), following scientific searches on electromagnetic fields, which demonstrated danger for human health of electromagnetic fields.

Said law regulates and supervises utilization of electromagnetic apparatus and national register of fixed and mobile sources has been created with purpose of identifying location of said sources over land and consequently making periodic surveys on levels of electromagnetism.

13 ESTATES AND TRUSTS

13.01 ADMINISTRATION:

See topic 13.06 Executors and Administrators.

13.02 DEATH:

If a person remains absent from his domicile or residence and gives no news for ten years then a presumption of death arises and this is declared by the court on the application of the heirs of the absent person or at instance of public prosecutor. Presumptive death may be declared irrespective of the prior declaration of absence. (C. C. 58). See category 19 Property, topic 19.01 Absentees.

A presumption of death arises also in the following cases (C. C. 60): (a) Of persons who have disappeared in the course of war operations or have been taken prisoner by the enemy, no news of them being forthcoming after two years from the Peace Treaty or three years after the cessation of hostilities; (b) of persons who have disappeared as a result of an accident, no news from them being forthcoming for two years from the date of the accident. When legal consequence depends on survival of one person by another and it is not known who died first, both are deemed to have died at same time. (4 C. C.).

Upon the issuance by competent court of declaration of presumptive death heirs succeed in estate and deceased's spouse may remarry (C. C. 63-65) but new marriage is declared void should person declared dead return or evidence be found that he is alive (C. C. 68). In latter case, estate must be returned to him in condition in which it is at such time. He also has right to demand performance of obligations deemed extinguished in accordance with effect of declaration of death. Such person may also recover price accruing from sale of property (if price is yet due) or new property into which such price may have been invested. (C. C. 66).

Under the special provisions of the Code of Navigation, in case of disappearances arising from sea or air accidents the appropriate port or consular authority issues a statement. If such statement is positive as to the death, same is declared to all effects; if the statement contains only a presumption then the normal provisions referred to above are to apply.

Actions for Death.

There are no special procedures concerning actions for death. Any person who suffered damages as a consequence of a wrongful death may claim the same through ordinary action.

Death certificates cannot be obtained by mailed request but an application prepared on appropriate stamped paper must be actually filed with the office of vital statistics of the place where deceased died. Usually the procurement of such certificates is handled by specialized agencies with branches or correspondents throughout the country.

13.03 DECEDENTS' ESTATES:

See topics 13.04 Descent and Distribution, 13.06 Executors and Administrators, 13.10 Wills.

13.04 DESCENT AND DISTRIBUTION:

In case of intestacy estate devolves in this order to: (a) husband or wife; (b) lawful and natural descendants; (c) lawful ascendants; (d) collaterals; (e) other relatives; (f) State. (C. C. 565).

The parents are succeeded by their legitimate and natural children who share equally. (C. C. 566). Legitimate or natural children include those legitimized and those adopted. (C. C. 567). If decedent has no children, brothers, sisters or their descendants, his father and mother inherit in equal shares. (C. C. 568). If there are no children, parents, brothers or sisters or their descendants, half of estate goes to ascendants of paternal line and other half to ascendants of maternal line. But if ascendants are not of same degree, inheritance goes to nearest kin. (C. C. 569).

If there are no children and no parents or other ascendants, brothers and sisters inherit in equal shares. Half-blood brothers and sisters are entitled to half of the share taken by the full-blood brothers and sisters. (C. C. 570). If decedent leaves only parents and full-blood brothers and sisters, all inherit per capita, provided that the share of the parent or parents shall in no event be less than one half. If there are half-blood brothers and sisters each one inherits half of the share inherited by the full-blood brothers and sisters. (C. C. 571).

If decedent leaves no descendants, parents or other ascendants, brothers and sisters or their descendants, inheritance goes to the nearest kin, without distinction of line, but inheritance cannot go beyond the sixth degree. (C. C. 572). If natural child dies without children or spouse, his estate goes to parent who recognized him. If he was recognized by both parents, estate goes to them in equal proportions. (C. C. 578). If natural child dies without leaving children or parents, his spouse inherits all the estate. If there are parents, inheritance goes: two-thirds to his spouse and one-third to his parents. (C. C. 579).

Surviving spouse is entitled to one half of estate if there is only one child or one-third if there are two or more children. (C. C. 581). Surviving spouse is entitled to two thirds if there are only legitimate ascendants or brothers and sisters or both. (C. C. 582). However ascendants are in any event entitled to one fourth of estate. Should there be no children, ascendants, brothers or sisters, surviving spouse inherits entire estate. (C. C. 583). Spouse who has not been held responsible for separation by final decree has same inheritance rights as nonseparated spouse. If spouse has been held responsible for separation by final decree, he/she is entitled to life annuity if at time of other spouse's death he/she received only from spouse support allowance. Life annuity can in no event exceed support allowance. (C. C. 585).

When there is no kin entitled to the inheritance, the State inherits. (C. C. 586).

Non-donable Shares.

Where a will exists, the following limitations as to disposition of the estate must be complied with by decedent who is survived by legitimate children, legitimate ascendants, natural children or spouse, having due regard to the fact that: (a) Adopted children have the same rights as legitimate children, and (b) there is a right of representation in favor of the descendants of legitimate or natural children. (C. C. 536).

As regards children reserve portion (the portion that cannot be freely disposed of by testator) is one-half of decedent's estate if only one child is left or two-thirds if children left are two or more. (C. C. 537). If decedent does not leave legitimate children, but legitimate ascendants, the reserve is one-third of estate. (C. C. 538).

Reserve in favor of surviving spouse is one half of estate of other spouse if no children are left.

When decedent leaves children and his spouse, if there is only one child, portion of estate reserved to latter is one-third, another third goes to surviving spouse. When children are two or more, portion of estate reserved to surviving spouse is one fourth and that reserved to children is one half of estate. (C. C. 542). Surviving spouse is in any event entitled to lifetime use of family home and furnishings, if owned by decedent or by husband and wife jointly. (C. C. 540).

When decedent leaves only legitimate ascendants and his spouse, latter is entitled to one half of estate, and ascendants to one-quarter of estate. (C. C. 544). There is no reserve for spouse who has been found guilty of having culpably triggered separation by final judgment unless he/she was granted alimony. In this case he/she is entitled to lifetime annuity that, in any event, cannot exceed alimony. (C. C. 548). See topics 13.06 Executors and Administrators, Wills; category 10 Documents and Records, topic 10.02 Affidavits.

13.05 ESTATES:

See category 19 Property, topic 19.11 Real Property.

13.06 EXECUTORS AND ADMINISTRATORS:

There is nothing in the Italian legislation which corresponds to the American probate court. Estates vest directly into the heirs. There are provisions for guardians, and executors may be named. The succession opens at the moment of decedent's death in the place of his last residence. (C. C. 456).

Testator may name one or more executors. They must be persons capable to contract. Minors are excluded. (C. C. 700). Testator may grant to executors the right to take immediate possession of the estate, but such possession cannot exceed the period of one year from date of executor's acceptance. Court may extend period by one more year only once. If there are infants, absentees or persons deprived of civil rights among heirs, executor, upon notice, must cause property to be sealed and make inventory of same in presence of heirs. At end of administration, executor must account. All expenses in connection with administration of estate are chargeable to estate. (C. C. 703-705-709-712).

The heir entitled to receive the property of a decedent may obtain same from the executor by furnishing him a sum of money sufficient to pay legacies or by furnishing him evidence of having satisfied them as directed by testator in his will. (C. C. 707). Italian death duties are payable on world-wide estate except when deceased at time of death was domiciled abroad. In this case death duties are payable only on such portion of estate, as is located in Italy.

13.07 FIDUCIARIES:

See topics 13.06 Executors and Administrators, 13.09 Trusts.

13.08 INTESTACY:

See topic 13.04 Descent and Distribution.

13.09 TRUSTS:

A trust, in the technical sense and in the manner contemplated in America, does not exist in the Italian legal system because a beneficial title different from the legal title is unknown to Italian law.

Nonetheless, trusts have been recently regulated in Italian legal system when Financial Law for 2007 introduced new regulation on taxation of trusts.

From tax' point of view, trusts are distinguished on basis of identification of beneficiaries: (i) if beneficiaries are identified, any income deriving from trust is attributed to them and taxed accordingly; (ii) if beneficiaries are not identified, trust will be subject to corporate income tax being trust taxable entity.

By different means the same results as those of American trusts can be often obtained, for anybody may appoint an attorney or an administrator for dispositions directed to benefit a third person.

Italy is party to Hague Convention of July 1, 1985, on law applicable and recognition of trusts, which has come into effect on Jan. 1, 1992 by Law No. 364 of Oct. 16, 1989.

13.10 WILLS:

A will cannot be made by one who has not attained full age (18 years) or is not mentally sound (C. C. 591), or by one who was for any reason incapable of understanding or intending at moment when he made will.

A will may be holographic or notarial and in this latter case it may be secret or public. Will may also be special.

(a) A holographic will must be entirely handwritten, dated and signed by the testator. (C. C. 602).

(b) A public will is drawn before a notary public in the presence of two witnesses. (C. C. 603).

(c) A secret will may be written by the testator or by a third person. If it is written by the testator, it must be signed at the bottom. If written partly or wholly by third persons or mechanically, it must be signed by the testator at the bottom and on every page. In either case it must be sealed up and handed to notary in presence of two witnesses. Notary draws up statement to effect that will has been handed to him, and such statement must be signed by testator, witnesses and notary. (C. C. 604-605).

(d) Special wills are those made during prevalence of contagious diseases or in case of public calamity or accident. Such wills become void after three months have elapsed since cessation of the extraordinary circumstances under which they were made. (C. C. 609). Special wills are also those made on high seas or on board aircraft (C. C. 611-616) and those made by soldiers in zones of war operations. Such wills become void when three months have elapsed since testator has returned to place where ordinary will can be drawn up. (C. C. 618).

Whoever is in possession of a holographic will must deposit the same with a notary public for publication as soon as he becomes aware that testator is dead. Publication is made by notary, who draws up certificate thereof in presence of two witnesses. (C. C. 620).

A secret will must be opened and published by the notary as soon as he receives notice of the death of the testator, in the presence of two witnesses. (C. C. 621).

The notary who has received a public will must communicate the existence of the same to the heirs as soon as he has knowledge of the testator's death; the same communication to heirs and legatees must be done by notary after publication of holographic or secret will. (C. C. 623).

Wills executed by two or more persons in the same instrument whether in favor of a third person or for mutual benefit (survivorship clause) are prohibited. (C. C. 589). See topic 13.04 Descent and Distribution.

14 FAMILY

14.01 ADOPTION:

Persons wishing to effect adoption when adoptee is of age must: (a) Have no legitimate descendants, or have descendants of age consenting to adoption, and (b) have attained 35 years of age and be at least 18 years older than adoptee. (C. C. 291).

Persons wishing to effect adoption when adoptee is under age must: (a) Be married for three years or more, (b) not be judicially or de facto separated, (c) be able to educate and support adoptee, (d) be no less than 18 years and no more than 45 years older than adoptee (both such limits may be exceeded under some circumstances). (Law No. 184 of May 4, 1983, as am'd and supplemented also by Law No. 149 of Mar. 28, 2001).

Children born out of wedlock may not be adopted by their parents. (C. C. 293).

Consent Required.

Adopter's and adoptee's consent is required, but if adoptee is under age of 18, Juvenile Court must declare that adoptee may be adoptable. Such declaration is subject to ascertaining that parents of adoptee died or cannot be found or refused to appear in Court or showed to be unable and unwilling to assist and support adoptee. Same declaration is not required in special circumstances, such as adoption by relatives or persons living with adoptees before death of parents, etc. If adoptee is over age of 12, he must be personally interviewed by court; if he is between age of 14 and 18 his consent is required. In case of adoption of person over age of 18, if adoptee or adopter are married, assent of other spouse is also required and in any event adoptee's parents' assent is also necessary. (C. C. 296-297). Failing such consent adoption can be authorized by court if same is proved to be in interest of adoptee.

Jurisdiction upon adoption proceedings pertains to tribunal or Juvenile Court of district where adoptee resides.

Name.

Adoptee takes surname of adopter and adds his own to it. If adoptee is under age or was born out of wedlock and was not recognized by his natural parents, he takes only adopter's name. If adoption is made by husband and wife adoptee takes surname of husband. (C. C. 299).

Revocation.

Adoption may be revoked: (a) By adopter on grounds of unworthiness of adoptee when latter has made attempt upon life of adopter, his spouse, his ascendants or descendants, or if adoptee has been found guilty of crime in their respect, involving prison term of no less than three years. Death of adopter at hands of adoptee give rise to legitimate claim on part of those persons who would have had title to adopter's estate in absence of adoptee; (b) by adoptee on same grounds stated above. (305-307 and 309 C. C.).

Effect of Adoption.

Adoptee, when he is over 18, maintains all his rights and duties towards his original family, except that guardianship (potestá genitoria) is vested in adopter. No civil rights arise between adopter and adoptee's family and likewise between adoptee and adopter's family. (C. C. 300). If adoptee is under age of 18 he acquires status of legitimate son of adopter and all relations with his family of origin cease to exist, except for prohibition to marry natural relatives.

Except upon specific approval of appropriate authorities adopter and adoptee may not marry each other. (C. C. 87).

Adoptee enjoys same rights of inheritance from adopter as legitimate child (see category 13 Estates and Trusts, topic 13.04 Descent and Distribution) but he does not enjoy any right of inheritance from family of adopter. (C. C. 567).

Special Adoption.

Special rules are set forth by Law No. 184 of May 4, 1983, as amended and supplemented by Law No. 476 of Dec. 31, 1998 and by Law No. 149 of Mar. 28, 2001 for adoption of foreigners under age or for adoption by foreigners of minor Italian children.

International adoption is governed by Hague Convention of May 29, 1993 for protection of minors and cooperation in international adoption matters ratified by Law No. 476 of Dec. 31, 1998. D.P.R. No. 492 of Dec. 1, 1999 has set rules relating to organisation, constitution and working of “Commission for International Adoption” pursuant to Art. 7 of Law No. 476 of Dec. 31, 1998.

D. M. June 28, 1985 provides for principles and criteria to grant authorisation to nonprofit entities, having legal personality, to deal with organization and promotion of adoption of foreigners under age.

14.02 DIVORCE AND SEPARATION:

Grounds for Divorce.

Either spouse may obtain a divorce on any of following grounds: (1) When other spouse has been sentenced to life imprisonment or to imprisonment for more than 15 years; (2) when other spouse has been sentenced to imprisonment for any period of time as a consequence of serious crimes against other spouse or certain other members of family or as consequence of certain serious crimes against third parties; (3) when other spouse has been acquitted on grounds of mental insanity from crimes against other spouse or certain other members of family; (4) when husband and wife have been living apart for at least three years since separation hearing, as result of judgment of separation issued by court; (5) when husband and wife have been living apart as matter of fact since at least two years before Dec. 18, 1970; (6) when other spouse has carried out actions referred to in (2) above (except for case of injuries to other spouse and/or certain other members of family), although this has not resulted in his being convicted; (7) when spouse is foreign national and has obtained abroad divorce or annulment of marriage, or has remarried; (8) when there was no marital intercourse and (9) when judgment certifying change of sex has become final.

Jurisdiction and Proceedings.

Application for divorce must be filed with court of place of residence of defendant or, if defendant resides abroad, with court of place of residence of plaintiff or, finally, should both spouses reside abroad, with any Italian court. Judgment granting divorce provides also for custody of children and for alimony from husband to wife or vice versa, according to circumstances. Alimony obligation ceases in case of remarriage of spouse in whose favor it was granted.

Name.

Final judgment of divorce is registered in public vital statistics records and woman loses right to use husband's surname, unless specific authorisation is granted by court to add such surname to her maiden family name, whenever she has specific interest for herself or for her children; after such registration each spouse may remarry. (Law No. 898 of Dec. 1, 1970 as am'd by Laws No. 436 of Aug. 1, 1978 and No. 74 of Mar. 6, 1987).

Annulment of civil or non-Catholic marriages is granted by civil courts, of Catholic marriages by Ecclesiastical Courts in conformity with Lateran Treaty executed between Italy and Vatican on Feb. 11, 1929 as amended and supplemented by agreement executed between Italy and Vatican on Feb. 18, 1984. Grounds for annulment are substantially: (a) Infirmity of mind of either spouse; (b) either spouse's consent having been extorted by use of violence or being result of an error in identity; (c) either spouse's impotentia coeundi antecedent to marriage and unknown to other spouse.

Separation, a mensa et thoro, between husband and wife may be granted because of any reasons rendering unbearable their life in common or being prejudicial to education of children. (C. C. 150-151). Separation may also be based on mutual consent to be expressed before court and ratified by same. (C. C. 158). Subsequent cohabitation between parties to a separation voids decree of separation. (C. C. 157).

Law No. 54 of Feb. 8, 2006 introduces new provisions on joint custody of children during separation period for purpose of ensuring children their rights to be brought up by both parents.

14.03 HUSBAND AND WIFE:

Marital property can be governed by a contract (matrimonial articles). Where no such contract exists, property of spouses acquired after marriage is under joint ownership (“comunione”). See topic 14.05 Marriage; category 19 Property, topic 19.06 Dower and Dowry.

14.04 INFANCY:

Age of majority is 18 for both sexes. (C. C. 2).

A minor is represented jointly by his father and mother or his guardian or by parent who has exclusive parental authority over minor; these have also management of his goods and properties. (C. C. 320).

Extraordinary contracts and transactions concerning minor and his properties are to be authorized by the “Giudice Tutelare” or by Tribunal (C. C. 320) and in absence of authorization may be voided upon request of parents having parental authority, minor or his heirs or successors. (C. C. 322).

14.05 MARRIAGE:

Both spouses must be 18 years old. But marriage at age of 16 years may be permitted by decree of court upon request of interested party, having determined his psychophysical maturity and grounds of reasons submitted. (84 C. C.).

Marriage can be celebrated only after due publication of the bans by the appropriate officer. (C. C. 93).

Widow may remarry 300 days after death of her husband. The same period must elapse in case of annulment (except for impotence) or dissolution of the marriage. (C. C. 89).

Marriage is prohibited between certain categories of persons, such as: (1) Ascendants and legitimate or natural children; (2) affinities of the same line; (3) lawful or natural brother and sister; (4) affinities of the same degree; (5) uncle and niece or aunt and nephew; (6) an adopter and person adopted or their descendants. (C. C. 87). Marriages indicated Nos. (4) and (5) may be permitted by the appropriate authorities. (C. C. 87).

Marriage can only be proved by certified extract from the records of the Office of Vital Statistics. (C. C. 130).

Marriage by proxy is permitted to soldiers in time of war and also when one of the spouses resides abroad and serious motives exist as assessed by the Attorney General. The proxy must be made by a public instrument. The marriage cannot be celebrated after 180 days have elapsed since issue of the proxy. (C. C. 111).

A foreigner who wants to marry in Italy must present to the Office of Vital Statistics an affidavit from the competent authorities of his country (practically his local consul), stating that according to his law there is no impediment to the marriage. (C. C. 116).

By virtue of the Concordat between the Vatican and Italy, February 11, 1929, as amended on Feb. 18, 1984, marriage may be celebrated by Catholic minister and must be notified to Office of Vital Statistics. Non-Catholic marriages are celebrated by relevant non-Catholic minister authorized by Office of Vital Statistics. Civil marriages are celebrated by appropriate municipal officers (mayor, etc.). Annulments of matrimony pronounced by ecclesiastical authorities must be approved by decree of Supreme Tribunal of Signature and then filed for execution before court of appeals, which orders recording of judgment in records of Office of Vital Statistics. See topic 14.02 Divorce and 14.07 Separation.

14.06 MARRIED WOMEN:

See topics 14.03 Husband and Wife, 14.05 Marriage.

14.07 SEPARATION:

See topic 14.02 Divorce and 14.07 Separation.

15 FOREIGN TRADE AND COMMERCE

15.01 CUSTOMS:

Imports from foreign countries are subject to custom duties and in some cases to a special import licence. Rates of duties, which vary depending on categories of goods, are set forth in Customs Tariff. European Union imports are subject only to very limited administrative duties. Italy is a party to General Agreement on Tariffs and Trade.

See also European Union Law Digest, category Foreign Trade and Commerce, topic Customs Duties.

15.02 EXCHANGE CONTROL:

See topic 15.04 Foreign Investments; category 1 Introduction, topic 1.01 Currency.

15.03 FOREIGN EXCHANGE:

See topic 15.04 Foreign Investments; category 1 Introduction, topic 1.01 Currency.

15.04 FOREIGN INVESTMENTS:

In keeping with deregulatory process in foreign exchange matters, Law No. 43 of Feb. 7, 1956 has been repealed by D.P.R. No. 148 of Mar. 31, 1988 as subsequently am'd according to which, with respect to its relevant monetary provisions, investments of foreign capital, imports and exports of goods and economic and financial transactions have been fully liberalised and investments of foreign capital fully liberalised. As rule, no authorisation of Italian Currency Control Authorities is any longer required for foreign loans, guarantees and foreign trade transactions.

15.05 FOREIGN TRADE REGULATIONS:

Italy is a signatory of Convention relating to a Uniform Law on the International Sale of Goods of Wien of Apr. 11, 1980, which has become effective on Jan. 1, 1988.

See topic 15.04 Foreign Investments; also category 1 Introduction, topic 1.01 Currency.

16 IMMIGRATION

16.01 ALIENS:

Alien or stateless person, whose father or mother or one of whose direct ascendants in second degree were citizens by birth, becomes citizen of Italy: (a) if he enters active military service for Italian State and prior thereto declares that he intends to acquire Italian citizenship; (b) if he accepts public employment from State, even if abroad, and declares that he intends to acquire Italian citizenship; (c) if upon reaching full age he has resided legally in territory of Republic for at least two years and declares within one year after attaining full age that he intends to acquire Italian citizenship. (art. 4, Law No. 91 of Feb. 5, 1992 as am'd and supplemented).

Pursuant to art. 1 of Law No. 94 of July 15, 2009 which amended Law 91/1992, alien or stateless spouse of Italian citizen acquires Italian citizenship after two years if he resides in Italy or three years after date of marriage if he resides abroad, provided there was no dissolution or annulment of marriage and no divorce or separation, upon presentation of specific documentation as required by Art. 1 of D. P. R. No. 362 of Apr. 18, 1994 as amended and supplemented and upon payment of [Euro]200.

Application may be denied if applicant has been found guilty of certain political crimes or of crimes for which law provides punishment maximum of which is not less than three years' imprisonment.

Citizenship may be granted by presidential decree on favorable opinion of State Council and recommendation of Minister of Internal Affairs to: (a) alien whose father or mother or direct ascendant within second degree was citizen by birth, or who was born in Republic and in both cases, has legally resided in Italy for at least three years; (b) alien who is of age and is adopted by Italian citizen who after adoption resides legally in Italy for at least five years; (c) alien who has been in Italian government service for at least five years, even if abroad; (d) alien who is citizen of member state of European Union and has legally resided in Italy for at least four years; (e) stateless person who has legally resided in Italy for at least five years; (f) alien who has legally resided in Italy for at least ten years. In exceptional and special cases Government may grant citizenship to persons not having above requisites. (art. 9, Law No. 91 of Feb. 5, 1992 as am'd and supplemented).

See also topic 16.02 Immigration and European Union Law Digest, category 15 Foreign Trade and Commerce, topic Internal Market, subheads Free Movement of Workers and Freedom to Provide Services.

Corporations Owned or Controlled by Aliens.

Italian corporations may be, in general, owned or controlled by aliens without limitations. Italian corporations owning and operating aircraft or vessels, however, must be under control and management of Italian citizens; furthermore, Italian corporations engaging in motion pictures production are not eligible for certain government subsidies unless their management is entrusted to Italian citizens.

See also category 19 Property, topic 19.11 Real Property.

16.02 IMMIGRATION:

EU nationals enjoy freedom of movement and establishment within Italian territory in pursuance of relevant provisions of EU Treaties.

Italian legislation on immigration provides that non-EU nationals wishing to enter Italy must hold valid passport (or equivalent document) and access visa to be granted by either Italian Consulate or diplomatic delegation based in foreigner's country of origin. (Consolidated Laws on immigration and status of aliens: Legislative Decree No. 286 of July 25, 1998 as am'd and supplemented also by Legislative Decrees No. 3 and No. 5 of Jan. 8, 2007 (“Legislative Decrees No. 3 and No. 5”) and D.P.R. No. 394 of Aug. 31, 1999 as am'd and supplemented). Sojourn permit must be obtained from police authorities within eight business days from entry into Italy. Length of permit varies according to specific purpose of stay. Sojourn permit may also be granted by police authorities in course of certain investigations to those who have offered certain kind of cooperation (art. 2, D. L. No. 144 of July 27, 2005). Pursuant to Legislative Decrees No. 3 and No.5, EU sojourn permit for benefit of staying for long time (before called sojourn card)bearing unlimited validity may be issued by police authorities to those (i) who have regularly held, and duly renewed, their sojourn permit for at least five years starting from their initial entry (ii) who may provide evidence of income sufficient to meet their needs and those of their families and (iii) who have appropriate accommodation. Furthermore, pursuant to Law No. 94 of July 15, 2009, EU sojourn permit for benefit of staying for long time is subject to knowledge of Italian language. “Sportello Unico per l’immigrazione” may release permit for purpose of families rejoining to those who (i) have regular sojourn card or sojourn permit of at least one year or EU citizenship, (ii) provide evidence of income as required by Legislative Decree No. 286 of July 25, 1998, as amended and supplemented and (iii) have duly certified accommodation in Italy. See also topic 16.01 Aliens and European Union Law Digest, category 15 Foreign Trade and Commerce, topic Internal Market, subheads Free Movement of Workers and Freedom to Provide Services.

17 INTELLECTUAL PROPERTY

17.01 COPYRIGHT:

Protection of copyrights is governed by Law No. 633 of Apr. 22, 1941 as amended and supplemented also by Legislative Decree No. 68 of Apr. 9, 2003 implementing EC Directive No. 29 of May 22, 2001, by Legislative Decree No. 72 of Mar. 22, 2004, by Legislative Decree No. 30 of Feb. 10, 2005, by Legislative Decree No. 118 of Feb. 13, 2006, by Legislative Decree No. 140 of Mar. 16, 2006 by D. L. No. 248 of Dec. 31, 2007 and by Law No. 2 of Jan. 9, 2008. Furthermore, pursuant to Art. 19 of Law No. 248 of Aug. 18, 2000 committee of Presidency of Council of Ministers together with Ministry for Arts and Culture has been created to fight violations of copyrights. Author of creative pieces in fields of science (including computer software), literature, figurative arts, music, architecture, theater, cinema, radio and television has exclusive right to publish and to exploit his works. (art. 12). These rights include reproduction in any way and by any means (art. 13), performance in public (art. 15), broadcasting (art. 16), trading (art. 17), translation and adaptation (art. 18) of protected works. Aforesaid rights may be purchased, sold, transferred or assigned (art. 107) independently one from another. Furthermore, author, as well as his heirs, has “moral right” over his works, i.e., right to assert his authorship and to restrain anyone from altering works in manner prejudicial to his honour or reputation. (art. 20). Such right is of personal nature, not transferable and not subject to time limitations.

Duration of protection of economic (as opposed to “moral”) rights is throughout life of author and for 70 years after his death. (art. 25 implementing EC Directive No. 98 of Oct. 29, 1993). So far as concerns motion pictures, said term is to start from day on which whom among persons deemed to be their co-authors dies last. (art. 32 as am'd by Legislative Decree No. 154 of May 26, 1997).

New works need not be deposited for them to be protected under Law, but register is in use, and registration is normal procedure followed.

New legislation aimed at implementing EU directive No. 96/9/CE on legal protection of data banks, has been enacted by Legislative Decree No. 169 of May 6, 1999 by way of supplementing existing Copyright Law. Such statutory instrument enables any individual who creates data bank, that is to say any collection of works, data or other independent items which are systematically and methodically organized, to benefit from exclusive right to carry out or authorize (i) reproduction; (ii) translation, adaptation as well as any other alteration; (iii) any form of distribution to public of copy; (iv) any sort of presentation, demonstration or communication to public thereof. Duration of protection conforms with general provisions under Copyright Law. No authorization for data bank's exploitation is to be sought when latter is due to educational or scientific needs, to fulfil public security reasons as well as to needs arising from administrative or judicial proceedings.

Protection is further recognized (to last 15 years from Jan. 1 of year following one when data bank has been completed or disclosed to public), and is to cover excerption or reutilization, in whole or in part, of data bank contents, also to “constitutor” of data bank (i.e. individual or corporate body making relevant investments with view to establishing data bank).

Copyrights Law applies only to Italian citizens or residents. Protection of foreign works is subject to reciprocity and is often governed by International Conventions. Works of American citizens or residents are protected now in Italy under the Universal Copyright Convention which came into effect in Italy under Law July 19, 1956, No. 923.

See also European Union Law Digest, category Intellectual Property, topic Copyright.

17.02 PATENTS:

Patents are governed by Legislative Decree No. 30 of Feb. 10, 2005 as amended and supplemented (“Code of the Industrial Property”).

Objects of the patents are all new inventions, which may have industrial exploitation (art. 45).

Application for patents must be filed with “Ufficio Italiano Brevetti e Marchi” by inventor or those having right (art. 147). Patents have duration of 20 years, from date of application and may not be renewed (art. 60). All rights relative to and deriving from patents are freely assignable and transmissible. Patents' assignments and licenses must be recorded with “Ufficio Italiano Brevetti e Marchi” (art. 147) to become enforceable against third parties. Rights on patents are attributed from date of publication of relevant applications. (art. 53).

Italy is member of existing International Convention on patent protection (so-called “Union de Paris,” last revised at Stockholm July 14, 1967, ratified under Law No. 424, Apr. 28, 1976 and relevant Protocol signed in Madrid on June 27, 1989 ratified by Law No. 169 of Mar. 12, 1996) and is signatory of International Convention regarding deposit of models and industrial designs (so-called “Arrangement de La Haye” last revised in Geneva on Aug. 29, 1975 and ratified by Law No. 37, Jan. 25, 1983).

Italy is also signatory of Patent Cooperation Treaty signed in Washington on June 19, 1970 as amended on Feb. 3, 1984 (ratified by Law No. 260 of May 26, 1978 as supplemented by Law No. 890 of Dec. 21, 1984) providing international registration for patents and of Munich Convention of Oct. 5, 1973 last revised through act of Nov. 29, 2000, ratified by Law No. 224 of Nov. 29, 2007 on European patents. EU patents are governed by Luxembourg Convention of Dec. 15, 1975 ratified by Law No. 260 of May 26, 1978.

See also European Union Law Digest, category Intellectual Property, topic Patents.

17.03 TRADEMARKS:

Trademarks are governed by Code of the Industrial Property.

All new words, designs, sounds and/or emblems which may be able to identify products or goods on market may be registered as trademarks and are protected upon such registration for renewable period of ten years from date of application. Under certain conditions, de facto use of unregistered trademark is also protected.

In order to be enforceable against third parties, assignments and licences of trademarks must be recorded with “Ufficio Italiano Brevetti e Marchi”.

Applications for registration must be filed with “Ufficio Italiano Brevetti e Marchi” by person who has right to obtain it. (art. 147). Trademarks must be used actually within ten years from registration of relevant application (art. 15), and their use may not be suspended for period of ten years, without losing protection (art. 16).

Italy is signatory of existing International Convention on trademarks protection (so-called “Union de Paris”, last revised at Stockholm, July 14, 1967, ratified by Law No. 424, Apr. 28, 1976), of “Madrid Arrangement for the International Registration of Trademarks” (last revised at Madrid, June 27, 1989, and ratified by Law No. 169, Mar. 12, 1996).

EU trademarks are governed by Reg. No. 207/2009 of Feb. 26, 2009 which repealed Reg. No. 40\1994 of Dec. 20, 1993.

By Law No. 102 of Mar. 29, 1999, Italy has also ratified International Treaty on the Trademark Law signed in Geneva on Oct. 27, 1994.

18 MORTGAGES

18.01 CHATTEL MORTGAGES:

Personal property may not be mortgaged in Italy. The practical effects of chattel mortgages are, however, obtained by means of pledges (C. C. 2784-2807), which become valid and operative upon physical possession of the property passing to the creditor or to a trustee appointed by both parties. The pledge must be evidenced by a duly registered written instrument if the credit which it secures exceeds the sum of [Euro]2, and the creditor who holds such a pledge is entitled to preference over other unsecured creditors on the proceeds of the sale of the pledged property, but he may in no way appropriate this property; nor can the creditor use or otherwise dispose of the pledged property without the pledgor's consent.

18.02 COLLATERAL SECURITY:

See topic 18.01 Chattel Mortgages.

18.03 MORTGAGES:

Mortgages attach to real property only and to registered movables, such as vessels, aircraft and automobiles. There are three kinds of mortgages: legal, judicial and voluntary. (C. C. 2808).

The legal mortgage is created by law (C. C. 2817) and attaches among others to (a) property sold as security to seller against buyer's failure to fulfil obligations arising from sale, (b) property of co-heirs, partners and other co-partitioners as security for payment of adjustments required as result of partition; (c) property of criminal defendant, as security to State in respect of expenses of trial, recovery of damages thereof, etc. (provisions of penal code about legal mortgage having been repealed, any such kind of mortgage formerly arising from penal rules is to be replaced by preserving sequestration). Judicial mortgage is that which can be filed on property of one against whom judgment is rendered carrying order to pay sum or to perform another obligation or to compensate for damages to be subsequently liquidated. Voluntary mortgage is originated by unilateral deed or by agreement entered into between parties as evidenced by written instrument. Mortgage must clearly set forth sum of money secured. Priority of mortgage is determined by date of its filing in office of register of mortgages. It continues as lien for 20 years, and unless renewed prior to expiration of this period it loses any priority it might have had on other liens which have attached to property since filing of mortgage. (C. C. 2847). Mortgage can be cancelled by limitation, or release or satisfaction by creditor. Release must be expressly stated in writing by creditor. (C. C. 2878, 2879). See topic 18.01 Chattel Mortgages.

19 PROPERTY

19.01 ABSENTEES:

Should any person fail to appear at place of his last domicile or residence and no news thereof be available, interested parties or heirs of such person may obtain from court the appointment of an administrator to transact absent person's business. (C. C. 48). Declaration of absence may be obtained from court in event of protraction of absence for two years or more. (C. C. 49). Upon issuance of said declaration heirs, under will or by operation of law, may be granted temporary possession of absent person's estate. (C. C. 50). Those that have thus been granted temporary possession of estate may not dispose of it, but they may retain income deriving therefrom to variable extent depending upon degree of kinship with absentee. Should absentee return or evidence be found that he is alive his estate must be restored, but those in temporary possession may retain any and all benefits legitimately accrued to them until that time. (C. C. 56). See also category 13 Estates and Trusts, topic 13.02 Death.

19.02 ADVERSE POSSESSION:

Acquisition of title through possession of real estate inconsistent with title of another is subject to the following: (a) possession is not protected if acquired by means of fraud or violence; and (b), possession usually continues uninterrupted for 20 years or for ten years, but in latter case only if real estate was acquired in good faith from one not being owner, by appropriate instrument duly recorded. (C. C. 1158–1159).

19.03 CONVEYANCES:

See topic 19.05 Deeds.

19.04 CURTESY:

Unknown to Italian legal system. Wife and husband have same rights as to inheritance. See topic 19.06 Dower and Dowry; category 13 Estates and Trusts, topic 13.04 Descent and Distribution.

19.05 DEEDS:

Conveyances of real estate, easements, leases or partnerships whose term exceeds nine years, perpetual or life incomes, settlements and other contracts provided by law in order to be valid instruments must be in writing. (C. C. 1350). All instruments relating to creation or assignment of rights with respect to real property must also be recorded in books of Conservatore dei Registri Immobiliari (Keeper of Real Property Records). Acts subject to said recording are those specified by law. See also category 20 Taxation, topic 20.14 Stamp Duties and Registration Taxes, subhead Registration Taxes.

19.06 DOWER AND DOWRY:

Property of spouses acquired after marriage are under a joint ownership (comunione). Income accruing from properties must be used for support of family. (C. C. 177-197). Management of joint property pertains to husband and wife severally. Extraordinary management and disposal of joint ownership pertain to husband and wife jointly. However, an agreement may be entered into between spouses to keep all respective properties separate. In this case neither spouse acquires any rights in property of other, whether personal or real, as result of marriage, except for rights of each of them to distributive share of estate of deceased spouse. (C. C. 215-219). See category 13 Estates and Trusts, topic 13.04 Descent and Distribution. Husband and wife or a third person may constitute a family patrimony which cannot be alienated and income arising therefrom goes to family. (C. C. 167-171).

19.07 ESCHEAT:

See category 13 Estates and Trusts, topic 13.04 Descent and Distribution.

19.08 GIFTS:

Donation inter vivos must be made by notarial instrument executed in presence of two witnesses and must be accepted by donee in same act or in a subsequent public instrument. (C. C. 782). Small gifts of movables are valid without public instrument, provided there has been actual delivery thereof. Moderate value of gift must be evaluated according to financial situation of donor. (C. C. 783). Gift can be revoked for ingratitude or as result of birth of children to donor. (C. C. 800). See also category 5 Civil Actions and Procedure, topic 5.03 Conflict of Laws.

19.09 LANDLORD AND TENANT:

Leases in General.

Term of lease cannot exceed 30 years. Lease agreement need not be in writing unless term exceeds nine years, in which case agreement must be in written form and cannot be claimed against third parties unless recorded in books of Conservatore dei Registri Immobiliari

(Keeper of Real Property Records). Paragraph 346 of Law No. 311 of Dec. 30, 2004 has provided that lease agreements which are not recorded in books of Conservatore dei Registri Immobiliari (Keeper of Real Property Records) when required by law, are considered void. Subleasing is permitted subject to contrary provisions in lease agreement.

Lessor's Main Obligations.

Lessor must: (1) Deliver property to lessee in good state of repair; (2) keep it in condition such as will be suitable for use agreed; (3) ensure its peaceful enjoyment throughout lease.

Lessee's Main Obligations.

Lessee must: (1) Take delivery of property and observe diligence of bonus pater familias in using it for agreed purposes; (2) pay rent on dates agreed; (3) return property to lessor upon termination of lease in same condition as originally delivered, subject to normal wear and tear.

Loss or Deterioration of Property.

Lessee is liable for loss or deterioration of property, even as result of fire, unless he proves that loss or deterioration occurred for reason not ascribable to him.

Improvements.

Lessee is not entitled to compensation for his improvements to property unless such improvements were consented to by lessor.

Term.

Leases for specified term terminate at expiration thereof without notice. Leases for indefinite term terminate upon giving by either party to other of notice agreed or required by custom. If upon termination lessee is left in possession of property, lease is deemed to have been renewed for indefinite period.

Special Legislation.

Ordinary rules set forth in Civil Code in respect of leases were affected for many years by special legislation consisting mainly of rental freezing and forceful extension of lease agreements. Law No. 392 was enacted on July 27, 1978, which, as result of Law No. 431 of Dec. 9, 1998 as supplemented by Ministerial Decrees of Mar. 5, 1999, Dec. 30, 2002 and Mar. 10, 2006 and by Law No. 2 of Jan. 8, 2002, substantially affects lease of commercial premises with some general provisions thereof still being applicable to both residential and commercial leases. Main features of such law, as amended and supplemented, are as follows: (a) commercial leases cannot last less than six years or nine years in case of hotel leases; (b) subject to certain specific needs of landlord, duration of leases is automatically renewed at first expiration date for further six or nine years, as case may be; (c) increases of rent cannot exceed preset index-linked threshold.

Law No. 431 of Dec. 9, 1998 as implemented by Law No. 269 of Nov. 12, 2004 has introduced new Legislation in relation to leases of residential premises whose basic principles are: (i) Lease agreements must be in writing and recorded in books of keeper of Real Property Records; (ii) duration of agreements is not to be less than four years subject to automatic renewal for further four years unless specific needs of landlord arise; (iii) different arrangements as to duration may be agreed upon in compliance with those provisions set out in standard agreements to be entered into, on local basis, between organisations for residential property and most representative organisations of tenants. Duration of such different lease agreements, however, should not be less than three years, and can be renewed for further two years unless different agreement is reached between lessor and lessee.

Law Decree No. 240 of Sept. 13, 2004 converted into Law No. 269 of Nov. 12, 2004 and subsequently amended by Law No. 148 of July 26, 2005, introduces specific lease agreement containing favorable conditions to lessees in distress and having burden of elderly or handicapped relatives.

Agricultural Leases.

These are governed mainly by special legislation and by Law No. 203 of May 3, 1982 (as am'd by Legislative Decree No. 228 of May 18, 2001). Agricultural leases cannot last less than 15 years and rent cannot exceed amount determined on basis of parameters established from time to time by governmental commission.

19.10 PERPETUITIES:

Generally they are prohibited. When the property is vested, the same goes into the exclusive possession of the other person without any limitation as to disposition. A benefit may be granted to a third person for the usufruct, but only for life, or for 30 years in case of legal person.

19.11 REAL PROPERTY:

The Italian Civil Code divides all properties into “beni immobili” (immovables) and “beni mobili” (movables). Former corresponds to real property. (C. C. 812-819).

Beni immobili are lands, whatever is erected on land, trees, crops, rivers and springs.

There are no restrictions on foreigners and nonresidents for purchase, ownership or sale of real property.

20 TAXATION

20.01 ADMINISTRATION:

Tax administration is conducted by Ministry of Economy and Finance, save for minor taxes which sometimes are managed by other entities. Ministry of Economy and Finance is organized in four departments each having central and local offices. Central offices do not have direct contact with taxpayers, but coordinate local offices and carry out various activities such as interpretation of tax legislation, drafting of bills for legislative tax reforms and acquisition of data. Legislative Decree No. 300 of July 30, 1999 as subsequently amended has enacted major reform of Ministry of Economy and Finance. Such reform has introduced tax agencies having legal personality which have inherited all functions discharged by ministerial departments. After having transferred its functions to said tax agencies, Ministry of Economy and Finance has maintained supervisory, control, coordination, guidance and policy roles only.

In Italy, tax controls are performed also by military corps of “Guardia di Finanza” originally created for customs administration purposes and, from then on, increasingly utilized for accountancy inspections and for legal interpretation.

Assessment of taxation is made by competent offices exclusively pursuant to facts and legislative provisions. No discretionary powers to mediate public or private interests or to consider other needs or factors may be exercised in connection therewith.

Major reform of sanctions and penalties was enacted through Legislative Decree No. 472 of Dec. 18, 1997 as amended which reorganized existing legislation and set forth general principles governing fiscal sanctions' subject matter.

Legislative Decree No. 344 of Dec. 12, 2003 (“Legislative Decree No. 344”) as amended, implementing Delegation to Government contained in Law No. 80 of Apr. 7, 2003, has introduced wide reform of Italian Tax Regime amending consolidated act on income taxes adopted by D.P.R. No. 917 of Dec. 23, 1986.

20.02 ALCOHOL, BEVERAGES AND TOBACCO TAXES:

See topic 20.06 Excise Taxes.

20.03 BUSINESS TAX:

See topic 20.09 Income Tax.

20.04 CONSUMPTION TAXES:

See topic 20.06 Excise Taxes.

20.05 CUSTOMS DUTY AND TAX:

Collection of customs duties and taxes is not sole purpose of customs legislation which is aimed at pursuing various targets which include supervision over international trade, monetary control as well as health and hygienic control. Customs legislation is mainly set forth in consolidated laws on customs enacted through D.P.R. No. 43 of Jan. 23, 1973, as amended and supplemented. European customs code has been introduced with EC Regulation No. 450/2008 of Apr. 23, 2008.

20.06 EXCISE TAXES:

Indirect imposts on production or consumption of national goods and corresponding cross border taxes for imported goods, are denominated “excises” according to EU terminology.

Global reorganization of national legislation and EU provisions were implemented by Legislative Decree No. 504 of Oct. 26, 1995 (so-called “consolidated laws on excises”) as amended and supplemented in respect of following imposts on: production of alcohol and on beers; production of energy products; consumption of electricity; consumption of natural gas; consumption of lubricants and on bitumen.

Imposts on production of tobacco and matches were excluded from such reorganization.

System of tax application on refined tobacco was enacted through and is governed by Law No. 76 of Mar. 7, 1985, as amended and supplemented, inter alia, by D.L. No. 331 of Aug. 30, 1993 and D.M. No. 67 of Feb. 22, 1999 and by D.L. No. 24 of Jan. 30, 2004 converted into Law No. 87 of Mar. 31, 2004.

Impost is due on production of matches pursuant to R.D. No. 560 of Mar. 11, 1923. EU provisions have been implemented, inter alia, through Law No. 198 of May 13, 1983, D.L. No. 331 of Aug. 30, 1993 and D.M. July 4, 1994.

20.07 GASOLINE AND SPECIAL FUELS TAXES:

See topic 20.06 Excise Taxes.

20.08 GIFT TAX:

Gift tax was repealed by Law No. 383 of Oct. 18, 2001 (“Law No. 383”) and recently reintroduced by Law Decree No. 262 of Oct. 3, 2006 (“Law Decree No. 262”), converted into Law No. 286 of Nov. 24, 2006.

According to Law Decree No. 262: (i) transfers in favour of spouses and direct descendants or direct ancestors are subject to gift tax applied at rate of 4% on value of gift exceeding [Euro]1,000,000 for each transferee; (ii) transfers in favour of brothers/sisters are subject to gift tax applied at rate of 6% on value of gift exceeding [Euro]100,000 for each transferee; (iii) transfers in favour of relatives to fourth degree or relatives-in-law to third degree are subject to gift tax applied at rate of 6% on entire value of gift; and (iv) any other transfer is subject to gift tax applied at rate of 8% on entire value of gift.

Gift of certain assets (such as termination of employment allowance) is subject to fixed rate tax of [Euro]168.

Moreover, anti-avoidance rule is provided by Law No. 383 for any gift of securities, which is sold for consideration, that would give rise to capital gains subject to imposta sostitutiva provided for by Legislative Decree No. 461 of Nov. 21, 1997. In particular, if donee sells securities for consideration within five years from receipt thereof as gift, donee is required to pay relevant imposta sostitutiva on capital gains as if gift had never taken place.

20.09 INCOME TAX:

Personal income tax (IRE—formerly IRPEF) is imposed on net income produced in Italy or elsewhere deriving from any sources accruing to any person even if residing outside Italy (nonresidents, however, are taxed only on income produced in Italy or related to property located in Italy).

Certain incomes such as those of minor children are deemed to be taxpayer's and are added to latter's income. Taxable income is divided, depending on source, as follows: from immovable property, capital, employment, business enterprises and other sources.

Aggregate taxable income results from sum of net incomes pertaining to each category, after deduction of expenses incurred for production thereof as well as of certain taxes, social security contributions, and few types of other expenses. 19% of, inter alia, amounts paid as premiums on life, accident insurances, and as non-compulsory social security contributions, not to exceed [Euro]1,291.14, interest on mortgage loans granted for purchase of main living house, not to exceed [Euro]4,000, medical and funeral expenses, school and university fees (subject to ceilings) may be deducted from tax due.

Relief is granted for support of wife, children and close relatives, by deducting from tax due fixed amount for each person. Credits are available, to some extent, for taxes paid in foreign country where income is produced. Few types of occasional income (such as proceeds from sale of going business and termination of employment allowance), are in most cases taxed separately at average rate applicable to taxpayer for two preceding years. Current tax rates are shown in following table:

From 2007

Income	*(EURO thousands)*			*Rate*
Up to	15			23%
From	15	to	28	27%
From	28	to	55	38%
From	55	to	75	41%
Over	75			43%

Companies Income Tax (IRES) from Jan. 1, 2004 Companies Income Tax (IRES) has replaced Legal Entities Income Tax (IRPEG).

IRES is imposed on net aggregate income accruing in Italy or abroad, to corporations and other private or public legal entities, having their registered or administrative office or main business in Italy, and on net aggregate income accruing in Italy to companies and bodies, whether legal persons or otherwise, not having their registered or administrative office in Italy.

According to Law No. 296 of Dec. 27, 2006, IRES is also imposed on trust.

Taxable income is profit resulting from profit and loss account, to be prepared according to rules established by tax laws. Expenses and costs necessary for production of income are deductible.

Five year carry-forward is permitted, in certain cases, for losses incurred. Credits are available to some extent for taxes paid in foreign country where income is produced.

Starting from Jan. 1, 2008,IRES is levied at rate of 27.5%.

Main amendments introduced through IRES are following: (1) elimination of Tax Credits on distributed dividends; (2) detaxation up to 95% of dividends received by persons subject to IRES, in order to compensate above elimination; (3) introduction of option for (i) Joint Stock Companies (Società di Capitali) wholly and solely participated by other Joint Stock Companies and (ii) Limited Liability Companies (Società a Responsabilità Limitata) whose profits do not exceed certain limit and being wholly and solely participated by individuals in number no greater than ten or 20 in case of Cooperative Companies (Società Cooperative), to decide for taxation on Shareholders or Quota Holders, as case may be (so called Taxation for Transparency); (4) exemption from taxation of capital gains deriving from transfers of participations in certain companies or entities—so called participation exemption—(such exemption is now equal to 95%); (5) introduction of faculty for companies' group to opt for taxation on basis of consolidated budget (National or Worldwide); and (6) new regime of deductibility of interest payable (interessi passivi).

Art. 30 of Law No. 724 of Dec. 23, 1994 as subsequently and repeatedly amended, attributes presumed income to all companies (which are considered as dormant companies or “società di comodo”), provided that company's proceeds are less than aggregate amount resulting from application of following percentages: (i) 2% of shares or quotas to some specific categories of entities (Art. 85 [previously Art. 53] D.P.R. No. 917 of Dec. 23, 1986 as am'd); (ii) 6% to value of real estate assets; and (iii) 15% to value of other assets. For such companies, IRES shall be levied on presumed income equal to not less than amount resulting from application of following percentages: (i) 1.50% in relation to value of shares or quotas to some specific categories of entities; (ii) 4.75% in relation to value of immovable assets; and (iii) 12% in relation to value of other assets.

To override such presumption company is entitled to provide tax authorities with evidence that, owing to extraordinary and objective circumstances, actual income has in fact been lower.

Dual Income Tax (which was introduced by Legislative Decree No. 466 of Dec. 18, 1997) has been repealed by Legislative Decree No. 344 with effect from Jan. 1, 2004.

Regional Impost on Production Activities (IRAP) was introduced by Legislative Decree No. 446 of Dec. 15, 1997 (as am'd) in lieu of several taxes like, inter alia, local income tax (ILOR), government tax for determination of V.A.T. code number, impost on net worth of enterprises and tax on National Health Service. IRAP is payable, on net production value, by persons who usually produce or exchange goods or render services. General rate for IRAP is equal to 3.9%. Regions can vary tax rate within range of 0.92%, graduating rate according to activity and category of taxpayers. Different rates are applicable to entities operating in farming sector for which rate is currently equal to 1.9%. For banks, financial companies and insurance companies rate applicable is currently equal to 3.9%. (Regions can vary tax rate within range of 0.92%.)

European Court of Justice, before which proceeding on alleged illegitimacy of IRAP was pending, has declared that IRAP complies with provisions of VI European Directive on VAT, which prohibits Member States from imposing taxes on volume of business activity.

Taxation of Nonprofit Entities.

Legislative Decree No. 460 of Dec. 4, 1997 (as am'd) reorganized in general tax principles for nonprofit entities and introduced, for taxation purposes, new category of “ONLUS” (nonprofit organizations of social relevance). ONLUS must be registered in special list held by Ministry of Finance and benefits from several deductions and exemptions both from direct and indirect taxes.

Assessment of Direct Taxes.

Annual return shall be filed each year by taxpayer either by July 31 if filed by way of direct computer transmission, (or, if physically delivered, between May 1 and June 30) of subsequent year or such later date that Ministry of Economy and Finance may fix from time to time, or by seventh month after end of relevant taxable period (when taxpayer is subject to IRES). Also foreign corporations not having office or permanent establishment in Italy must file their tax return in respect of income produced in Italy or related to property located in Italy, indicating name and address of representative.

Tax returns are subject to review by tax authorities, who have broadest powers of investigation (also with banks, under certain circumstances) and may, whenever appropriate, assess actual income. Authorities' right to assess income taxes is normally prescribed if notice of assessment is not served by Dec. 31, of fourth year following year in which relevant return was submitted (period is five years in case of omitted return). Omission to file tax return or to report all income is punished by fines and, in some instances by penal sanctions. Major reform of administrative fines for breach of tax provisions has been enacted through Legislative Decree Nos. 471, 472 and 473 of Dec. 18, 1997 (as am'd and supplemented).

Taxation by Way of Withholding.

Withholding of taxes is provided, with few exceptions, in respect of income deriving from salaries and wages, pensions, compensations for services and brokerages, professional fees, interest and income from capital, dividends and prizes, interest in respect of loans, bonds and similar securities.

Matter has been restructured by Legislative Decree No. 461 of Nov. 21, 1997 (as am'd). Withholding on dividends is, as rule, applicable at rate of 12.50% on account of tax eventually due, or 27% as final tax only when recipient is nonresident person (other than companies) residing in EU State or in State of European Economic Space which allows exchange of information for tax purposes or is legal entity not subject to IRES tax. When recipient is nonresident legal entity subject to companies income tax and residing in EU State or in State of European Economic Space which allows exchange of information for tax purposes withholding is applicable at rate of 1.375% as final tax. Foreign recipient is under special circumstances entitled to partial refund of taxes on dividends paid in his country. Withholding on interest in respect of bonds is, as a rule, applicable at rate of 12.50%, or 27% for bonds having maturity of less than 18 months. Pursuant to Legislative Decree No. 239 of Apr. 1, 1996 (as am'd) payments of interest in respect of bonds issued by banks, listed companies and certain entities specifically indicated therein, are subject to “imposta sostitutiva” applicable at rate of 12.50% unless payments are made: (1) to Italian legal entity (with certain exceptions); or (2) Italian resident collective investment funds, Italian resident pension funds referred to in Legislative Decree No. 252 of Dec. 5, 2005 and certain Italian resident real estate investment funds as provided for by Law Decree No. 351 of Sept. 25, 2001 converted into law by Law No. 410 of Nov. 23, 2001 (“Law Decree No. 351”) (c.d. gross recipients); Interest and any other proceeds deriving from notes paid to non-

Italian residents residing in State which allows adequate exchange of information for tax purposes are exempt from imposta sostitutiva.

Tax on Capital Gains.

Major reform of fiscal regime of capital gains and other income from capital, has been enacted through Legislative Decree No. 461 of Nov. 21, 1997 as amended.

Aim of such reform is to distinguish various forms of income deriving from capital and to levy appropriate taxes thereon on basis of three different procedures which taxpayer could choose.

As general rule, capital gains received on sale of qualified participation are subject to ordinary taxes on income while capital gains deriving from sale of non-qualified participation are subject to “imposta sostitutiva” at rate of 12.5%.

Gains received from sale of non-qualified participations by nonresidents are exempt from taxation, provided that recipient is resident in country with which Italy has entered into double taxation treaty containing provision allowing adequate exchange of information with Italy.

Starting from Jan. 1, 2006, three different procedures can be followed in respect of taxation of capital gains received from sale of only certain non-qualified participations: (1) persons having appointed financial intermediaries for management of assets including cash not relating to their enterprise may opt, giving written notice thereof to managing entity, for application by intermediaries of “imposta sostitutiva” (which shall be applied in lieu of any income tax) on accrued results (“Risparmio Gestito” regime); (2) persons having deposited securities, quotas or certificates in custody or under management of certain financial intermediaries may opt giving written notice thereof to financial intermediary, for application of “imposta sostitutiva” on each of capital gains from time to time accrued (“Risparmio Amministrato” regime); (3) failing one of above options, tax return shall be filed by taxpayer identifying capital gains and capital losses obtained during each fiscal year (which may be set-off between each other) and “imposta sostitutiva” shall be paid concurrently with filing of such tax return (“Tax Declaration” regime).

Tax Declaration regime is mandatory with regard to taxation of capital gains received from sale of other non-qualified participations (such as securities of companies whose shares are not admitted to trading in regulated markets).

Italy has implemented EU directive No. 2003/48/EC regarding taxation of savings income through Legislative Decree No. 84 of Apr. 18, 2005 (“Decree No. 84”). Under Decree No. 84, subject to number of important conditions being met, in case of interest paid starting from July 1, 2005 (including case of interest accrued on Notes at time of their disposal) to individuals which qualify as beneficial owners of interest payment and are resident for tax purposes in another Member State, Italian paying agents (i.e., banks, società di intermediazione mobiliare [SIMs], fiduciary companies, società di gestione del risparmio [SGRs] resident for tax purposes in Italy, permanent establishments in Italy of nonresident persons and any other economic operator resident for tax purposes in Italy paying interest for professional or commercial reasons) shall report to Italian tax authorities details of relevant payments and personal information on individual beneficial owner. Such information is transmitted by Italian tax authorities to competent foreign tax authorities of State of residence of beneficial owner. In certain circumstances same reporting requirements must be complied in respect of interest paid to entity established in another Member State, other than legal persons (with exception of certain Finnish and Swedish entities), entities whose profits are taxed under general arrangements for business taxation and, in certain circumstances, UCITS recognised in accordance with Directive 85/611/EC as amended.

20.10 INHERITANCE TAX:

Inheritance tax was repealed by Law No. 383 and recently reintroduced through Law Decree No. 262.

Pursuant to Law Decree No. 262, transfers of any valuable asset as result of death are taxed as follows: (i) Transfers in favour of spouses and direct descendants or direct ancestors are subject to inheritance tax applied at rate of 4% on value of inheritance exceeding [Euro]1,000,000 for each transferee; (ii) transfers in favour of brothers/sisters are subject to 6% inheritance tax on value of inheritance exceeding [Euro]100,000 for each transferee; (iii) transfers in favour of relatives to fourth degree or relatives-in-law to third degree are subject to inheritance tax at rate of 6% on entire value of inheritance; (iv) any other transfer is subject to inheritance tax applied at rate of 8% on entire value of inheritance.

20.11 LOCAL GOVERNMENT TAXES:

Pursuant to art. 119 of Constitution of the Republic of Italy as am'd by Law No. 3 of Oct. 18, 2001 (“Constitutional Law No. 3”), Regions, Municipalities, Provinces and Metropolitan Cities enjoy financial autonomy and have powers to apply their own taxes in compliance with Italian Constitution and according to principles of coordination of State Finance and tax system and benefit from portion of State taxes referable to their territory. Legislative Decree No. 446 of Dec. 15, 1997, as amended and supplemented, introduced substantial amendments to taxation system by decentralizing taxation from State to Regions and by providing them with sufficient financial autonomy. Such reform also introduced Regional Impost on Production Activities (IRAP) and reorganized other local government taxes.

Pursuant to Law No. 42 of May 5, 2009, Italian Government is required to enact legislative decrees, within 24 months since entering into force of such law, which shall introduce major reform of local government taxes (c.d. fiscal federalism).

Pursuant to Legislative Decree No. 446 of Dec. 15, 1997, provinces and municipalities have power to rule their own revenues, including tax revenues, save for determination of taxable events, of taxpayers and of maximum rate of each tax, to be determined exclusively by State laws.

Fiscal federalism was implemented also through enactment of Legislative Decree No. 56 of Feb. 18, 2000 as amended which introduced new local taxes in compensation of reduction of transfers from State entitling, inter alia, regions to percentage of V.A.T.

20.12 MOTOR VEHICLE TAXES:

Deeds of sale or deeds of statement in respect of motor vehicles are subject to local taxes payable upon recording relevant deed in Public Register of Motor Vehicles.

Property tax is due on cars depending on power of engine and irrespective of circulation of vehicle. Such tax is currently payable at annual rate of [Euro]2.58 per each Kilowatt or [Euro]1.90 per each hp (save for certain regions where annual rate is different).

Different rates and modalities apply to other vehicles and additional taxation is provided for diesel engines not complying with environmental legislation.

20.13 PROPERTY TAXES:

Income Tax.

All real property is subject to income tax unless exempt by law.

Value of land used for farming purposes is, for purposes of inclusion of relevant income in annual tax returns, determined on basis of assessment attributed in real estate records to each property revalued on basis of parameters approved from time to time by Ministry of Economy and Finance. Income derived from buildings is, for purposes of inclusion of relevant income in annual tax returns, determined on basis of assessment attributed in real estate records to each property revalued on basis of parameters approved from time to time by Ministry of Economy and Finance or, if leased, on basis of rent received by landlord. Income deriving from buildings exclusively destined to exercise of cult to extent that they are not leased and real estate for which refurbishment licenses have been obtained for period of refurbishment works and to extent that real estate property is not used during such period is not taxable.

Tax on Real Property Imposed by Municipalities (ICI).

This tax affects immovable property located in State, including property which is instrumental to exercise of enterprise or which is object of business activity of enterprise. ICI is due by owner, or holder of usufruct, use or habitation right, even if nonresident. It is fixed and imposed by Municipalities where real property is located and is levied on basis of value of real property as resulting from cadastral registers. Amounts payable for ICI are not deductible from taxpayer's income for purposes of determining taxable base for IRE and IRES. With reference to main house of taxable person used for living purposes (with exclusion of luxury houses), Legislative Decree No. 93 of May 27, 2008 converted with amendments into Law No. 126 of July 24, 2008, has repealed tax on real property imposed by municipalities (ICI) starting from 2008.

Tax on Purchases.

Registration tax together with real estate registration taxes or, alternatively, V.A.T. is payable at time of purchase of real estate dependent upon fact that seller is private individual or company. Registration tax payable by purchaser on transfer of (i) land not having farming destination is equal to 8% and (ii) land with farming destination 15%. Reduced registration taxes are applicable in event of purchase of first and sole property to be used for living purposes. For V.A.T. see topic 20.18 Value Added Tax.

20.14 STAMP DUTIES AND REGISTRATION TAXES:

Stamp duties are imposed pursuant to D.P.R. No. 642 of Oct. 26, 1972 (as am'd) and are due on all documents, deeds and instruments listed in tariff annexed thereto. Stamp duties are payable, at rate specified in said tariff, upon execution or in case of use of any such document, deed or instrument, depending on type of document.

Stamp duties can be paid virtually or by payment of tax to authorized intermediary which issues special receipt. Bills of exchange will not be drafted anymore on special stamped paper and only special receipt will be required to be affixed thereon.

Normally stamp taxes are payable on document at fixed amount but in some cases are due, at fixed rate, in proportion of value indicated in document, deed or instrument (e.g., bills of exchange and promissory notes).

It is general principle of applicable stamp legislation that any document relating to transactions subject to V.A.T. shall be, in any case, exempt from stamp duties.

Contribution is payable una tantum on judicial acts (contributo unificato) at rate proportional with value of case from minimum of [Euro]30 up to maximum of [Euro]1,110 (or [Euro]2,000 for certain judicial proceedings before administrative tribunals).

Registration taxes apply to all deeds and contracts made in Italy having civil, commercial and judicial nature, to verbal agreements of lease of real estate located in State and of transfers or lease of business located in State, to incorporations or transfers of foreign companies in State and capital increases thereof, as well as to deeds made abroad, concerning transfer of immovable property, real estate or other rights and leases of real estate located in State. This tax may be proportional or in fixed amount according to nature of act involved. If act refers to goods or services already subject to V.A.T., this tax will be applied in fixed amount.

Proportional rates, which are based on “value” (which in many instances is subject to assessment by tax authorities) of contract, vary from minimum of 0.50% to maximum of 15% according to type of contract.

20.15 STAMP TAX:

See topic 20.14 Stamp Duties and Registration Taxes.

20.16 TAX INCENTIVES:

New incentives are adopted, on continuous basis, in accordance with social needs and political trends. In general, special provisions are contained in various laws providing for tax exemptions or reductions or other incentives for nonprofit entities, for companies hiring new personnel, for disabled people and for building industry. In addition, other laws provide adequate tax incentives for specific transactions like, for instance, transfer of businesses or securitization of receivables.

20.17 TREATIES AND AGREEMENTS:

Avoidance of Double Taxation on Income and Property.

Such treaties, bilateral by their very nature, are structured on basis of 1963 OECD draft model, as revised in 1977 and 2008, and tend, therefore, to be similar in broad terms albeit different in detail. Treaties for avoidance of double taxation are currently in force between Italy and those States which allow adequate exchange of information for tax purposes (included in white list) and which are: Albania, Algeria, Argentina, Australia, Austria, Bangladesh, Belgium, Byelorussia (former treaty with USSR to be applied), Brazil, Bulgaria, Canada, China (People's Republic of), Croatia (former treaty with Yugoslavia to be applied), Cyprus, Czech Republic, Denmark, Egypt, Ecuador, Estonia, Finland, France, Germany, Greece, Hungary, India, Indonesia, Ireland, Israel, Ivory Coast, Japan, Kazakhstan, Kuwait, Lithuania, Luxembourg, Macedonia, Malaysia, Malta, Mauritius, Mexico, Moldova (former treaty with USSR to be applied), Morocco, Netherlands, New Zealand, Norway, Pakistan, Philippines, Poland, Portugal, Romania, Russia (former treaty with USSR to be applied), Russian Federation, Singapore, Slovakia (Republic of), Slovenia (former treaty with Yugoslavia to be applied), South Africa, South Korea, Spain, Sri Lanka, Sweden, Switzerland, Tanzania, Thailand, Trinidad and Tobago, Tunisia, Turkey, Ukraine (former treaty with USSR to be applied), U.A.E., U.K., U.S.A., Uzbekistan (former treaty with USSR to be applied), Venezuela, Vietnam, Zambia. Some States previously included in above list have been eliminated by D.M. Dec. 14, 2000.

New white list should be approved in future through enactment of new decree by Ministry of Economy and Finance as provided in 2008 Financial Law.

Italy is also signatory of European Convention on double taxation signed in Brussels on July 23, 1990.

Treaties between U.S. and Italy cover income (Law No. 20 of Mar. 3, 2009) and inheritance (Law No. 943 of July 19, 1956) taxes. By Treaty, individual, corporation or other entity of one of contracting States shall not be subject to taxation by other contracting State in respect of its industrial and commercial profits unless it is engaged in trade or business in such other State through permanent establishment situated therein. Inter alia Treaty broadly provides, subject to certain qualifications, that royalties, accrued from sources within one contracting State to resident or corporation or other entity of other contracting State are exempt from taxation in former State. Income from real property is taxable in State where such property is situated. Compensation for personal services including salaries (other than governmental salaries) and professional fees are, subject to certain qualifications, taxable in State where such services are rendered.

Avoidance of Double Taxation on Inheritance Tax.

Bilateral treaties are currently in force between Italy and: Denmark, France, Greece, Israel, Sweden, U.K. and U.S.A.

20.18 VALUE ADDED TAX:

This tax has replaced turnover tax (I.G.E.) as of Jan. 1, 1973. Tax is levied on proceeds received by business firms, corporations and professional persons for goods sold or services rendered within Italy and for goods imported from abroad. Entrepreneur or professional person is allowed to deduct added value tax charged to him by his suppliers from V.A.T. levied on amounts he receives from his clients; therefore, burden of this tax will ultimately rest upon final buyer or client. Ordinary rate of V.A.T. is 20% reduced to 10% or 4% for most food, agricultural products, houses in certain circumstances and other essential items. V.A.T. is not applicable to transactions of financial nature, loans change of foreign currency, sales of shares and securities, sales of business, leases of immovable property, city transports, hospital services, schooling when recognized by State etc.

21 TRANSPORTATION

21.01 AIR LAW:

Ownership, registration and operation of aircraft is regulated by Second Part of the Code of Navigation (see topic 21.04 Shipping) which, subject to certain amendments, has been in force since 1942. Aircraft is classified as “registered movables”, i.e. as personal property that, like vessels and motor vehicles, is subject to certain publicity and registration requirements.

Ownership of aircraft is evidenced by certificate of matriculation issued by ENAC (National Agency for Civil Aviation), public entity subject to Minister of Transport control and supervision. Title to and other property rights in aircraft must be recorded for public notice purposes in register maintained by ENAC and known as Registro Aeronautico Nazionale (National Aircraft Register). Hence, any transaction capable of constituting, extinguishing or transferring title to, or any other property or security rights in, Italian aircraft can be asserted against third parties only if properly recorded in National Aircraft Register.

Save as stated under subhead Financing/Leasing infra, aircraft can be registered in National Aircraft Register only if it is owned by Italian State, or Italian or EU public or private entity, or by Italian or EU nationals or by company incorporated or having its main office in Italy or in EU. For registration in name of company, two conditions are to be met: (1) that most share capital of company is held by Italian or EU nationals; and (2) that chairman and most directors (including managing director) and general manager are Italian nationals.

Italy is party to most international conventions on uniform air law among which are: Warsaw convention of 1929 on carriage by air (and related Hague Protocol of 1955); Chicago convention of 1944 on international air navigation; Geneva convention of 1948 on recognition of rights in aircraft; Rome convention of 1952 on surface damages by aircraft to third parties; Tokyo convention of 1963 on infringements and other acts committed on board aircraft; Montreal convention of 1999 on unification of certain rules for international carriage by air. General principles on execution of air traffic agreements with third countries were enacted by Decree of Ministry of Transport of July 7, 2000.

Any agreement submitted to National Aircraft Register in connection with initial recording or transfer of title to or any other property or security right in aircraft must, if written in foreign language, be accompanied by sworn Italian translation.

Airworthiness/Operations.

By Legislative Decree No. 250 of July 25, 1997 as amended ("Legislative Decree No. 250") Ente Nazionale per l'Aviazione Civile (i.e. ENAC) was established. Such agency is to perform all functions and duties formerly carried out by Registro Aeronautico Italiano (Italian Aircraft Register) and Ente Nazionale per la Gente dell'Aria, which have therefore both been superceded. Accordingly ENAC is charged with, inter alia, verifying fitness of aircraft to fly and to be used for particular type of service. National Agency for Civil Aviation issues Certificate of Airworthiness, which is to be kept with aircraft at all times, and carries out periodic checks of aircraft. Certificate of Airworthiness is to be issued also if aircraft is to be exported.

Legislative Decree No. 250 has also given to Direzione Generale dell'Aviazione Civile (General Department for Civil Aviation) new denomination of Dipartimento dell'Aviazione Civile (Civil Aviation Department) who is to take over all functions of former while waiting for EU Directive No. 94/56/CE to be implemented. Accordingly above department is also charged with performance of investigations in connection with air accidents. Legislative Decree No. 66 of Feb. 25, 1999 established Agenzia Nazionale per la Sicurezza del Volo (National Agency for Safety on Flight) charged, among other functions, with inquiries on accidents for civil aircraft.

Operation of air services on EU routes is subject to license granted by ENAC. As a rule, license may be accorded only to companies established in Italy and controlled also by majority shareholding by EU State or nationals having carriage by air as principal activity and having availability of aircraft also on basis of use agreement approval in advance by ENAC.

All crew members must obtain licence for performance of their individual services and must be chosen from personnel registered in lists kept by above-mentioned ENAC. However, D.P.R. No. 560, dated Dec. 30, 1992 as am'd and supplemented (implementing EC Directive No. 91/670) provides for mutual recognition of professional licences granted within EU territory. Accordingly, European citizens who have been granted licence in their home countries may apply to Italian Ministry of Transport for its confirmation.

Mortgages/Liens.

Mortgages on aircraft are established by agreement and must be recorded in National Aircraft Register. To obtain such recording agreement must be in form of either notarial instrument ("atto pubblico") or notarised private writing. Notation of mortgage must be made on aircraft's matriculation certificate.

Mortgage can be taken as security for any financial obligation of owner of aircraft or of any third party, secured by owner.

In addition to preventing mortgage from being asserted against third parties, failure to record in National Aircraft Register affects very validity of security as between mortgagor and mortgagee.

Unless mortgagee's rights are satisfied or mortgagor provides alternative security as directed by court of competent jurisdiction, aircraft against which mortgage has been recorded cannot be cancelled from National Aircraft Register.

Financing/Leasing.

(a) Subject to nationality requirements referred to under heading Ownership/Registration, purchase of aircraft by Italian residents may be secured by mortgage on aircraft.

There are no significant foreign exchange restrictions in Italian system, so that no previous consent is required with respect to external borrowings or deferred sales arrangements.

(b) As mentioned, it is still basic rule, under Art. 756 of Code of Navigation as amended lastly by Legislative Decree No. 96 of May 9, 2005, that registration of aircraft in National Aircraft Register can only be made in name of owner of all or major parts of aircraft and that owner must be either Italian or EU national or juristic person meeting certain nationality requirements.

However, pursuant to Art. 756, licensed airlines may be authorised to register aircraft in their names in National Aircraft Register when they have exclusive and effective availability of aircraft, even though not being their owner.

In this case both National Aircraft Register and matriculation certificate must, in addition to usual information, contain reference to legal basis (other than ownership) on which registration has been effected. Thus, since lessee operating licensed air services has full availability of leased aircraft, latter can be registered in National Aircraft Register. In this regard, lease agreement must be approved by ENAC and, upon maturity of at least six months, must be registered in National Aircraft Register.

21.02 AUTOMOBILES:

See topic 21.03 Motor Vehicles.

21.03 MOTOR VEHICLES:

There exists a presumption of guilt upon the drivers of motor vehicles as a result of which they are liable for all damages caused by the operation thereof, unless they can prove having done everything possible to avoid causing the damage. Where more than one vehicle is involved in accident, presumption of liability is shared equally among the drivers thereof. The owner of a motor vehicle is liable jointly and severally with the driver unless he can prove that the vehicle was being operated against his will. (C. C. 2054).

Compulsory third-party liability insurance is governed by Legislative Decree No. 209 of Sept. 9, 2005 (Code on private insurances) which repealed Law No. 990 of Dec. 24, 1969. Code on private insurances contemplates (a) institutes obligation of insurance for third-party liability upon all owners or users of licenced vehicles, (b) in case of accident grants damaged party direct action against insurer.

Highway Code.

New highway code has been adopted by Legislative Decree No. 285 of Apr. 30, 1992 (as am'd) implemented by D.P.R. No. 495 of Dec. 16, 1992. New provisions on registration of vehicles have been adopted by Decrees of Ministry of Transport of Feb. 10, 2000 and Feb. 14, 2000.

21.04 SHIPPING:

This matter is governed by Code of Navigation, enacted by Royal Decree No. 327, dated Mar. 30, 1942 as amended. Specific matters are governed by specific statutes, among which, fisheries, special credit to shipping enterprises, and certain aspects of crew employment contracts and connected topics. Law Decree No. 457 of Dec. 30, 1997, converted—with amendments—into Law No. 30 of Feb. 27, 1998 as am'd ("D.L. No. 457") instituted "Registro Internazionale" (International Register) whereby ships exclusively destined to international trade are to be registered, pursuant to specific authorization to be given by Minister of Transport.

Ships may fly Italian flag, provided that: (a) they belong, at least for 12 shares of value of ship, to Italian or EU nationals, juristic persons or other entities; (b) they are newly built, or registered in non-EU register, and belong to non-EU nationals, juristic persons or entities which are in direct charge or operation of ship by means of permanent organization based within Italian territory and run by Italian or EU national, or juristic person, that is to be held liable for operation of ship. (Art. 143, C.N.).

Italian ships must be recorded in special registers, kept by appropriate administrative authorities. (art. 146, C. N.). Whenever nationality requirements no longer exist, ship must change its flag (art. 156-162, C. N.) and be stricken off register (art. 163, C. N.). Further provisions are given as to seaworthiness of ship (art. 164-168, C. N.) and documents of navigation (art. 169-178, C. N.). Master of a ship may act as registrar of births, marriages and deaths taking place on board (art. 203, C. N.), subject to particular conditions and regulations. Art. 318, C.N. provides that crew of Italian ships is to be composed of Italian or EU citizens in its entirety.

Title to property of a ship may be acquired by construction (art. 232, C. N.) or contract; more co-proprietors may organize a peculiar kind of unlimited partnership (società di armamento fra i comproprietari) (art. 278-286, C. N.). Specific provisions are laid down in Code for contracts of lease of a ship (art. 376-383, C. N.), affreightment (art. 384-395, C. N.) carriage of persons (art. 396-418, C. N.) and carriage of goods (art. 419-468, C. N.), which must be all in writing. Bills of lading (art. 460, C. N.) are issued either for carriages in a general ship, or under charter-party.

Code further governs general average (art. 469-481, C. N.) collision (art. 482-488, C. N.), and salvage (art. 489-513, C. N.); law of marine insurance is rather different from general provisions on insurance of Civil Code (art. 514-547, C. N.). Ships may be mortgaged (art. 565-577, C. N.), upon filing of deed of mortgages in register where ship is recorded (art. 569, C. N.); liens are granted for specific credits upon ship, freight (art. 552-560, C. N.), and cargo (art. 561-564, C. N.).

Pleasure boats are subject to compulsory insurance similar to that provided for vehicles (see topic 21.03 Motor Vehicles). Law No. 171 of July 18, 2005, has introduced new administrative regime concerning construction, registration and operation of leisure boats. Air navigation is governed by second part of Code. (art. 687-1037, C. N.). (See topic 21.01 Air Law.)

Italy is party to most international conventions on uniform shipping law, including, inter alia: Brussels conventions of 1910 on salvage and collision; Protocols signed in Brussels on Feb. 23, 1968 and on Dec. 21, 1979 to Brussels Convention on bills of lading of Aug. 25, 1924; Brussels convention of 1952 relating to arrest of sea-going ships; London convention of 1954 against pollution of hydrocarbons at sea; Geneva convention of 1958 on high seas; London convention of Apr. 9, 1965 on facilities for the international maritime traffic; Brussels convention of 1969 on civil liability for oil pollution damage (including 1976 London Protocol); Brussels convention of 1971 on the establishment of an international fund for compensation for oil pollution damage; L.D.C. Dumping Convention of 1972 on the prevention of the sea pollution caused by dumping; London Convention of 1973 for the prevention of pollution from ships, (including 1978 Protocol); London convention of 1974 on safeguard of human life at sea (including 1978 Protocol); London convention of 1978 on drilling, qualification and guarding standards for seamen; Montego Bay convention of 1982 on the law of the sea; London convention of 1989 on salvage; Geneva Convention of 1993 on maritime liens and mortgages; London Convention of 2001 on liabilities for damages due to pollution of hydrocarbons at sea.

22 TREATIES AND CONVENTIONS

22.01 TREATIES:

Republic of Italy is party to (i) Treaty establishing the European Economic Community

(EC), Rome, Mar. 25, 1957 as amended and supplemented by Nice Treaty of Feb. 26, 2001 and Lisbona Treaty of Dec. 13, 2007 (latter will enter into force on Jan 1, 2009), (ii) Treaty establishing the European Coal and Steel Community, Paris, Apr. 18, 1951 (as amended by Luxembourg Treaty of Oct. 27, 1956), (iii) Treaty establishing the European Atomic Energy Community (EURATOM), Rome, Mar. 25, 1957, (iv) European [unique] act, Luxembourg, Feb. 17, 1986, (v) Treaty on the European Union, Maastricht, Feb. 7, 1992 as amended and supplemented by Nice Treaty of Feb. 26, 2001 and Lisbona Treaty of Dec. 13, 2007 (latter will enter into force on Jan 1, 2009), (vi) Agreement and Protocol of adhesion to the Agreement of Schengen of June 14, 1985, Paris, Nov. 27, 1990, (vii) Treaty introducing European Constitution which is not entered into force yet.

Competent bodies within above mentioned organizations have been enacting extensive number of rules affecting many fields of Italian legislation, since they took office.

Italy is also party to many treaties and conventions, mainly multilateral, selected list of which is reported below. Bilateral conventions are listed as to avoidance of double taxation on income and property subject matter.

International law aspects of treaties are regulated by Convention on law of treaties, signed in Vienna, on May 23, 1969, ratified in Italy by Law No. 112 of Feb. 22, 1974. Republic of Italy is not party to Convention on the law of treaties between States and International Organization or between International Organizations, signed in Vienna, Aug. 23, 1978.

General Agreements: Convention for Peaceful Settlement of Disputes, The Hague, July 29, 1899; Convention establishing the International Labor Organization (ILO), Versailles, June 28, 1919 (as repeatedly amended in Paris, Nov. 7, 1945, Montreal, Oct. 9, 1946 and Geneva, June 25, 1953); Convention establishing the International Institute for the Unification of Private Law (UNIDROIT), Rome, Mar. 15, 1940; Charter of United Nations (U.N.) and statute of the International Court of Justice, San Francisco, June 26, 1945; Constitution of the U.N. Educational, Scientific and Cultural Organization—UNESCO, London, Nov. 16, 1945; Agreement creating the International Monetary Fund (IMF), Washington, Dec. 27, 1945; Agreement creating the International Bank for Reconstruction and Development (IBRD), Washington, Dec. 27, 1945; Convention on immunities of U.N., New York, Feb. 13, 1946; Constitution of World Health Organization (WHO), New York, July 22, 1946; Convention creating an International Maritime Organization (IMO), Geneva, Mar. 6, 1948; Convention on prevention and punishment of the crime of genocide, New York, Dec. 8, 1948; North Atlantic Treaty, Washington, Apr. 4, 1949; Statute of the Council of Europe, London, May 5, 1949; European Convention for protection of human rights and fundamental freedoms, Rome, Nov. 4, 1950 (with Protocol, Paris, Mar. 20, 1952); European convention on establishment, Paris, Dec. 13, 1955; Statute of the International Atomic Energy Agency, New York, Oct. 26, 1956; European Convention for the Peaceful Settlement of Disputes, Strasbourg, Apr. 29, 1957; Conventions on high seas and territorial seas, Geneva, Apr. 29, 1958; Agreement establishing the Inter-American Development Bank, Washington, Apr. 8, 1959; Articles of agreement of the International Development Association (IDA), Washington, Jan. 26, 1960; Convention concerning the organization for economic co-operation and development (OECD), Paris, Dec. 14, 1960; Convention on diplomatic relations, Vienna, Apr. 18, 1961; European Social Charter, Turin, Oct, 18, 1961; Convention on consular relations, Vienna, Apr. 24, 1963; Constitution of the Universal Postal Union (UPU), Vienna, July 10, 1964 (as supplemented by protocols Tokyo, Nov. 14, 1969 and Losanna, July 5, 1974); International Agreement concerning economic, social and cultural rights, New York, Dec. 16, 1966; International convention of telecommunications, Malaga, Oct. 25, 1973; Convention establishing the European Space Agency, Paris, May 30, 1975; Convention for protection of people against automatic treatment of personal data, Strasbourg, Jan. 28, 1981; Convention establishing the European Telecommunication Satellite Organization (EUTELSAT), Paris, July 15, 1982; U.N. Convention on law of the sea, Montego Bay, Dec. 10, 1982; Convention establishing the Multilateral Investment Guarantee Agency (MIGA), Granada, Oct. 11, 1985;

Unidroit Conventions on international factoring and on international financial leasing, Ottawa, May 28, 1988; Agreement establishing the European Bank for reconstruction and development (EBRD), Paris, May 29, 1990; European Social Charter, Strasbourg, May 3, 1996; Convention of the European Council on the protection of the human rights, Oviedo, Apr. 4, 1997; International convention on repression of terrorist attacks, New York, Dec. 15, 1997;Amsterdam Treaty amending Treaty of European Union, Oct. 2, 1997; Agreement enacting the International Criminal Court, Rome, July 17, 1998; International convention on repression of financial support to terrorism, New York, Dec. 9, 1999; Treaty of Nice Amending the Treaty of the European Union, Feb. 26, 2001; treaty to adopt European Constitution, Rome, Oct. 29, 2004; Treaty of Lisbona amending Treaty of the European Union, Dec. 13, 2007 not entered into force yet.

Conventions Concerning Bills of Exchange, Promissory Notes and Checks: Convention concerning bills of exchange and promissory notes, Geneva, June 7, 1930 (with protocol A); Convention on stamp duty on bills of exchange and promissory notes, Geneva, June 7, 1930 (with protocol C); Convention relating to checks, Geneva, Mar. 19, 1931; Convention on stamp duty on checks, Geneva, Mar. 19, 1931.

Conventions Concerning Conflicts of Law and Jurisdiction: International Convention on conflict of laws on marriage, divorce and separation, The Hague, June 12, 1902 (and following Protocol, The Hague, Nov. 28, 1923); Convention on conflicts of law concerning bills of exchange and promissory notes, Geneva, June 7, 1930 (with protocol B); Convention on conflicts of law concerning checks, Geneva, Mar. 19, 1931; Convention on law applicable to alimony obligations to infants, The Hague, Oct. 24, 1956; Convention on jurisdiction and the law applicable to Protection of Minors, The Hague, Oct. 5, 1961; Convention on jurisdiction and the enforcement of judgments in civil and commercial matters, Brussels, Sept. 27, 1968 (with Protocol of June 3, 1971 and subsequent Conventions of June 3, 1971, Oct. 9, 1978, Oct. 25, 1982, Sept. 16, 1988, May 26, 1989); Convention on the law applicable to contractual obligations, Rome, June 19, 1980; Convention concerning the law applicable to trusts and their recognition, The Hague, July 1, 1985.

Conventions Concerning Family and Wills: Convention for protection of children, The Hague, June 12, 1902 (and following Protocol, The Hague, Nov. 28, 1923); Convention concerning the interdiction and similar protection measures, The Hague, July 17, 1905 (and following Protocol, The Hague, Nov. 28, 1923); European convention on adoption of minors, Strasbourg, Apr. 24, 1967; European convention on registration of wills, Basle, May 16, 1972; Convention on formal requirements of international will, Washington, Oct. 26, 1973; UN-Convention on the Rights of the Child, New York, Nov. 20, 1989; Convention for the protection of minors and co-operation for international adoption's matters, The Hague, May 29, 1993; EU-Convention on rights of children, Strasbourg, Jan. 25, 1996; Optional protocols to convention on rights of children, New York, Sept. 6, 2000.

Conventions Concerning Nationality: Convention on statute of refugees, Geneva, July 28, 1951 and following Protocol, New York, Jan. 31,1967; Convention on statute of stateless, New York, Sept. 28, 1954.

Conventions Concerning Intellectual and Industrial Property: Convention for the protection of industrial property, Paris, Mar. 20, 1883 (as amended and supplemented by following conventions Brussels, Dec. 14, 1900; Washington, June 2, 1911; The Hague, Nov. 6, 1925; London, June 2, 1934; Lisbon, Oct. 31, 1958; Stockholm, Sept. 14, 1967); Convention for the protection of literary and artistic works, Bern, Sept. 9, 1886 (as amended by following conventions Berlin, Nov. 13, 1908; Rome, June 2, 1928; Brussels, June 26, 1948; Stockholm, Sept. 14, 1967; Paris, July 24, 1971); Agreement on suppression of false or misleading indication of origin on goods, Madrid, Apr. 14, 1891 (as amended by following conventions Washington, June 2, 1911; The Hague, Nov. 6, 1925; London, June 2, 1934; The Hague, Nov. 28, 1960, Stockholm, July 14, 1967); Agreement on international deposit of industrial designs and models, The Hague, Nov. 6, 1925 (as amended by following conventions London, June 2, 1934; The Hague, Nov. 28, 1960, Stockholm, July 14, 1967); Universal copyright convention, Geneva, Sept. 6, 1952; Convention on international registration of trademarks, Nice, June 15, 1957 (as subsequently revised in Geneva, May 13, 1977); Convention on unification of legislation on patents, Strasbourg, Nov. 27, 1963; Convention establishing the World Intellectual Property Organization, (as amended in 1979), Stockholm, July 14, 1967; Patent co-operation Treaty, Washington, June 19, 1970 (as amended in Oct. 2, 1979 and Feb. 3, 1984); Agreement concerning the international patent classification, Strasbourg, Mar. 24, 1971; Universal Convention on copyrights, Paris, July 24, 1971; European convention on European patents, Monaco, Oct. 5, 1973; International treaty on trademarks law, Geneva, Oct. 27, 1994.

Conventions Concerning International Co-operation in Legal Matters.—

Procedure: International convention on the seizure of aircrafts, Rome, May 29, 1933; Statute of the Hague Conference on International Private Law, The Hague, Oct. 31, 1951; International convention relating to the seizure of seagoing ships, Brussels, May 10, 1952; International convention on civil jurisdiction in matters of collision, Brussels, May 10, 1952; Convention relating to the civil procedure, The Hague, Mar. 1, 1954; Convention on the recovery abroad of maintenance, The Hague, June 20, 1956; European convention on extradition, Paris, Dec. 13, 1957; European convention on the judicial assistance in criminal matters, Strasbourg, Apr. 20, 1959; Convention Abolishing the Requirement of Legalization for Foreign Public Documents, The Hague, Oct. 5, 1961; Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters, The Hague, Nov. 15, 1965; European convention on the abolition of legalization of documents executed by diplomatic agents or consular officers, London, June 7, 1968; European convention on information on foreign law, London, June 7, 1968 (with Protocol of Strasbourg Mar. 15, 1978); Convention on Taking of Evidence Abroad in Civil and Commercial Matters, The Hague, Mar. 18, 1970; International convention to avoid unlawful seizures of aircrafts, The Hague, Dec. 16, 1970; Convention on the exemption of certain acts from legalization, Athens, Sept. 15, 1977; Convention on serving of documents in administrative matters, Strasbourg, Nov. 24, 1977; Convention for the abolishment of legalization of act within EU, Brussels, May 25, 1987; Convention on mutual administrative assistance for fiscal matters between EU members and OCSE members, Strasbourg, Jan. 25, 1988; European convention on collection of alimony obligations, Rome, Nov. 6, 1990; OCSE Convention concerning conciliation and arbitration, Stockholm, Dec. 15, 1992; Convention on the service of judicial and extra-judicial documents within EU in civil or commercial matters, Brussels, May 26, 1997 (including 1997 protocol).

Recognition and Enforcement: Protocol relating to arbitral clauses in commercial matters, Geneva, Sept. 24, 1923; International convention for the enforcement of foreign arbitral awards; Geneva, Sept. 26, 1927; Convention on recognition and enforcement of judgments concerning alimony obligations towards children, The Hague, Apr. 15, 1958; United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, New York, June 10, 1958; European convention on international commercial arbitration, Geneva, Apr. 21, 1961 (as amended by Agreement, Paris, Dec. 17, 1962); Convention on the settlement of investment disputes between states and nationals of other states, Washington, Mar. 18, 1965; Convention on jurisdiction and the enforcement of judgments in civil and commercial matters, Brussels, Sept. 27, 1968 (with Protocol of June 3, 1971 and subsequent Conventions of June 3, 1971, Oct. 9, 1978, Oct. 25, 1982, Sept. 16, 1988, May 26, 1989); Convention on recognition of divorces and separations, The Hague, June 1, 1970; Convention concerning recognition and enforcement of alimony obligations decisions, The Hague, Oct. 2, 1973; Convention on recognition and enforcement of custody decisions on minors and restitution of custody, Luxembourg, May 20, 1980; Convention concerning the law applicable to trusts and their recognition, The Hague, July 1, 1985.

Conventions Concerning International Sale of Goods: United Nations convention on contracts for the international sale of goods, Vienna, Apr. 19, 1980.

Tax Treaties.

See category 20 Taxation, topic 20.17 Treaties and Agreements.

Conventions Concerning Transports and Environment: International agreement on salvage and collision, Brussels, Sept. 23, 1910; Protocols, signed in Brussels on Feb. 23, 1968 and on Dec. 21, 1979, to the Convention on bills of lading, Brussels, Aug. 25, 1924 (as amended); International convention of road traffic, Paris, Apr. 24, 1926; Convention on air transport, Warsaw, Oct. 12, 1929 (as supplemented by the Guadalajara Convention of Sept. 18, 1961 and amended by Protocol of Montreal Sept. 25, 1975); Agreement on international aircrafts services, Chicago, Dec. 7, 1944; International convention relating to the international civil aviation (ICAO), Chicago, Dec. 7, 1944; Convention relating to the international recognition of rights on aircrafts, Geneva, June 19, 1948; Convention of road traffic, Geneva, Sept. 19, 1949; Protocol relating to the road signs, Geneva, Sept. 19, 1949 (supplemented by European Agreements, Geneva, Sept. 16, 1950); Convention against pollution of hydrocarbons at sea, London, May 12, 1954; Convention on international contract of transport of goods by road (CMR), Geneva, May 19, 1956; European agreement on international transport of dangerous goods on road, Geneva, Sept. 30, 1957; Convention on securing aviation (EUROCONTROL), Brussels, Dec. 13, 1960 (with Protocol Brussels, July 6, 1970); London Convention of Apr. 9, 1965 on facilities for marine traffics, as consolidated; Conventions on road traffic and road signs, Vienna, Nov. 8, 1968; Convention on civil liability for oil pollution damage, Brussels, Nov. 29, 1969 (with Protocol London Nov. 19, 1976); Convention on the establishment of an interna-tional fund for compensation for oil pollution damage, Brussels, Dec. 18, 1971; Convention to prevent collision at sea, London, Oct. 20, 1972; Convention on the prevention of the sea pollution caused by dumping, London, Dec. 29, 1972; Customs Convention on international transport of goods, Geneva, Nov. 14, 1975 (as am'd); Convention on international railway transports (COTIF), Bern, May 9, 1980 (as am'd by protocol Bern, Dec. 20, 1990); Convention on the Sea Law, Montego Bay, Dec. 10, 1982; Convention on international effects deriving from industrial incidents, Helsinki, Mar. 17, 1992; Convention on maritime liens and mortgages, Geneva, May 6, 1993; Convention on the protection of the Mediterranean Sea from the pollution, Barcelona, June 9-10, 1995; Agreement on the main navigable ways of international relevance, Geneva, Jan. 19, 1996; Protocol of Kyoto to UN-Convention on climatic variations, Kyoto, Dec. 11, 1997; Protocol on amendment of convention on civil international aviation, Montreal, Oct. 1, 1998; Convention to standardize some rules on the international air transport, Montreal, May 28, 1999; EU-Convention on the landscape, Florence, Oct. 20, 2000; Convention on liabilities for damages due to pollution of hydrocarbons at sea, London, Mar. 23, 2001.

1
JAPAN LAW DIGEST

—Scope —

Revised for 2010 edition by

BLAKEMORE & MITSUKI, of Tokyo.

(Abbreviations used are: B. L. for Bankruptcy Law; C. for Constitution; C. C. for Civil Code; C. L. for Copyright Law; C. C. P. for Code of Civil Procedures; C. E. L. for Civil Execution Law; Com. C. for Commercial Code; Com. A. for Companies Act; C. T. for Code of Trusts; C.P.E.L. for Civil Preliminary Execution Law; C. T. L. for Court Law; F. E. T. L. for Foreign Exchange and Foreign Trade Law; L. B. N. for Law of Bills and Notes; L. C. for Law of Checks; L. G. R. A. L. for Law Concerning General

Rule of Application of Law; P. L. for Patent Law; T. L. for Trademark Law.)

Note: This revision incorporates legislation which came into force through Aug. 31, 2009.

1 INTRODUCTION

1.01 CURRENCY:

Legal currency is yen. Its exchange rate has been floating since Feb. 13, 1973.

1.02 GOVERNMENT AND LEGAL SYSTEM:

Japan was occupied by Allied Powers from Sept. 2, 1945 to Apr. 28, 1952, during which time new Japanese Constitution replaced Meiji Constitution of 1889. New Constitution retains institution of monarchy, but defines imperial role as devoid of governmental power except on purely ceremonial matters. (C. 4, 7). Diet of two houses is declared to be supreme organ of state and sole law-making agency. (C. 41, 42). This Diet selects from among its membership Prime Minister who heads and names Cabinet. (C. 66, 67). Majority of Cabinet in turn must be named from Diet members. (C. 68). Cabinet resigns upon vote of nonconfidence or of rejection of confidence of House of Representatives, except when House is dissolved within ten days thereafter. (C. 69). Independent judiciary headed by Supreme Court is given power of judicial review over legislative and executive acts. (C. 76, 81). Selections to Supreme Court are made by Cabinet, but appointees are subject to recall vote of public at next general election and at ten-year intervals. (C. 6, 79). Elaborate bill of rights is contained in Constitution, as well as unique provision renouncing war. (C. 9, 10 through 40).

Japanese Cabinet consists of one Prime Minister and Ministers of State of no more than 14 in number; provided that up to three additional ministers may be added if necessary. Directly under Cabinet, which is headed by Prime Minister, are, at present, Cabinet Office, Ministries of Justice; Foreign Affairs; Finance; Education, Culture, Sports, Science and Technology; Defense; Health, Labor and Welfare; Agriculture, Forestry and Fisheries; Economy, Trade and Industry; Land, Infrastructure and Transport; Environment; and Internal Affairs and Communications. Prime Minister appoints head of each Ministry from among Ministers of State. Japan is divided into prefectures which in turn are subdivided into municipalities. Both prefectures and municipalities possess certain powers of self-government which are determined by Diet. (C. 92, 94).

1.03 HOLIDAYS:

Legal holidays are, Jan. 1, 2d Mon. of Jan., Feb. 11, Vernal Equinox, Apr. 29, May 3, May 5, 3d Mon. of July, 3d Mon. of Sept., Autumnal Equinox, 2d Mon. of Oct., Nov. 3, Nov. 23 and Dec. 23. In case any of these days falls on Sun., next Mon. becomes legal holiday. When day other than Sun. or holiday falls between two legal holidays, such day becomes holiday.

When final day for performance of legal obligation, or making of designation, delivery, or act of execution falls on legal holiday, or Sunday, period of time is extended through following day, either through specific provision of law or custom. (C. C. 142; Com. C. 520; L. B. N. 72, 77; L. C. 60; C. C. P. 95; Code of Criminal Procedures 55; Law of National Taxation General Rules 10).

In addition to legal holidays, Jan. 2, Jan. 3, Dec. 31 and Sats. are bank holidays.

1.04 OFFICE HOURS AND TIME ZONE:

Japan is in the +09:00 GMT time zone. Office hours are generally from 9 a.m. to 5 p.m.

2 BUSINESS ORGANIZATIONS

2.01 AGENCY:

Valid declaration of intention by agent, made within scope of his authority and with showing that he acts for a principal, binds or accrues to benefit of principal. (C. C. 99). Similar declaration of intention made in absence of revelation of principal, as a general rule, binds only agent unless opposite party knows or should have known of principal's relationship. In commercial transactions, principal is bound but opposite party may demand performance of contract from agent if he does not know of principal's relationship. (C. C. 100; Com. C. 504). In noncommercial transactions, contract made as agent by one without authority is not valid against principal unless ratified. (C. C. 113). Opposite party may request ratification within reasonable time and has right of cancellation until ratified. (C. C. 114, 115). When authority cannot be provided or ratification obtained, agent is bound at option of opposite party either to perform or to pay damages. (C. C. 117).

Role of agent may be assumed by person who has no legal capacity. (C. C. 102). Unless specified, powers of agent are limited to performance of acts of preservation, utilization or improvement which do not change fundamental nature of object of agency. (C. C. 103). Creation of a subagency is not permitted except with permission of principal or where unavoidable reason exists. (C. C. 104). No agent may act for both parties unless so authorized, or unless in discharge of obligation. (C. C. 108). Person who has represented to third parties creation of agency relationship is responsible for acts done by ostensible agent within ostensible scope of authority; provided, however, that this shall not apply if third party knows, or does not know, without gross negligence, that power of attorney has not been afforded. (C. C. 109). If agent acts beyond his authority and opposite party has reasonable grounds to believe agent is acting within his authority, principal is responsible for such act by agent. (C. C. 110). Agency ceases with: (1) Death of principal (except when principal dies in case of commercial agency), (2) bankruptcy, death or adjudication of incompetency of agent, and (3) upon completion of term provided by contract. (C. C. 111; Com. C. 506).

Product Liability.

Product Liability Law ("P.L.L.") took effect on July 1, 1995. P.L.L. provides for special rules to be applied to case of product liability in preference to general negligence principle under Civil Code, which otherwise would apply. Under P.L.L. party which manufactured, processed or imported product as business ("manufacturer") is made liable for damages if product which manufacturer delivered, i.e., released to market, injured another party's life, body or property because of "defect" in product, i.e., lack of safety which product is supposed to provide. Also, liable under P.L.L. in same way as "manufacturer" are (a) party which placed its name, mark or other feature on product to represent that party is "manufacturer" of product, (b) party which made representation on product which would mislead others that party is "manufacturer" of product and (c) party which is comparable to "manufacturer" under circumstances. Manufacturer or deemed manufacturer shall be exempt from liability under P.L.L. (a) in case where defect could not have been discovered in light of state of scientific or technical knowledge at time when product was placed in market or (b) in case where product was used as part of raw material of another (primary) product, where defect in part or material was result of design directed by primary manufacturer and where manufacturer or deemed manufacturer was not negligent regarding defect.

Right to damages under P.L.L. shall be extinguished by prescription after three years from time that injured party or his/her legal representative became aware of injury and of party who is liable under P.L.L. Also, action for damages under P.L.L. is not available ten years after manufacturer or deemed manufacturer delivered product, except for action for damages caused by material harmful to human health when it is accumulated in human body or for damages which can be recognized after certain incubation period, for which ten-year period shall be counted from time that damages are recognized.

2.02 ASSOCIATIONS:

See topic 2.03 Corporations.

2.03 CORPORATIONS:

Legal personality may be acquired by means of procedures outlined in Civil Code, Companies Act, or special acts of legislation, as well as by means of special legislative charter. Although legal persons are classified in many ways such as private and public, or for profit and for public welfare, all are grouped together for convenience under title “corporations”.

Legal Persons Under Civil Code.

Under pre-amendment system, Civil Code recognizes two categories of legal persons (often termed ``juridical persons'') which are organized in public interest—associations (Shadan) and foundations (Zaidan). Association is formed by a group of persons, and is governed by articles of association prepared at time of its organization. (C. C. 37). However, Civil Code revised concept of legal persons. Other rules are provided in Act on General Incorporated Associations and General Incorporated Foundations. Incorporated associations and incorporated foundations are nonprofit juridical persons whose purpose is not dividends or surplus. They get juridical personalities with registrations. Some of above juridical persons become public interest incorporated associations and public interest incorporated foundations if they get certifications of competent authorities.

Legal Persons Under Companies Act and Certain Special Acts.

Business corporations are legal persons organized under Companies Act and certain special acts.

Four classes of business corporations or companies are provided by Companies Act—partnership companies (Gomei Kaisha), limited partnership companies (Goshi Kaisha), limited liability corporations (Godo Kaisha) and joint stock corporations (Kabushiki Kaisha). Certain special acts provide for specified purpose company (Tokutei Mokuteki Kaisha) whose business purpose is securitization of specified assets, and investment company (Toshi Hojin) whose business purpose is to invest in specified assets. Each may be organized without special act of government approval through compliance with legal conditions of formation and subsequent registration; provided that each of specified purpose company and investment company must file registration statement with competent authorities prior to its commencement of business (or, in case of investment company, its incorporation). All business corporations or companies must establish principal office and register that fact as well as subsequent creation of branch offices. All varieties of business corporations or companies are subject to judicial dissolution, and as legal persons, all may sue and be sued.

Partnership companies (Gomei Kaisha) are fundamentally different from Anglo-American partnerships in that new and independent legal personality results from this form of commercial association. (Com. A. 2, 3). Partnership company is formed through articles of incorporation which state, among other items, value of contribution to be made by each member of company and are signed by each member. (Com. A. 576). Although one or more managers may be appointed through majority vote of members, each member (unless otherwise provided in articles of incorporation) has both right and duty to administer any of affairs of company. (Com. A. 590). Allocation of profits or losses may be provided in articles of incorporation, which may provide that such allocation shall be made in accordance with ratio different from share of contribution made by each member. Unless otherwise provided in articles of incorporation, all members must, except for certain exceptions, consent to alteration of articles of incorporation and to transfer of interest of any individual members. (Com. A. 637, 585). Managing members are prohibited from conducting business which competes with that of company or assuming positions of managing members or directors of competing concerns or those of officers of competing concerns which are Committee Establishment Corporations (defined below) unless with consent of all other members of company or unless otherwise provided in articles of incorporation. (Com. A. 594). All members are jointly and severally liable for obligations of firm in event of insufficiency of assets. (Com. A. 580). Admission to company is accompanied by liability for all obligations incurred prior thereto. (Com. A. 605). Members may withdraw at end of any business year with six-months' prior notice from partnership company whose term is for indefinite period or for life of certain member, unless otherwise provided in articles of incorporation. (Com. A. 606). Membership may be terminated upon occurrence of event provided in articles of incorporation, upon consent of all members, or upon death, merger (in case relevant member ceases to exist), decision to commence bankruptcy procedures, dissolution other than that arising from such merger or decision, adjudication of incompetency and expulsion of member concerned. (Com. A. 607). Member's failure of contribution constitutes reason for expulsion. Expulsion requires judicial process. (Com. A. 859). Withdrawing members are entitled to compensation for services rendered and contributions made to partnership company unless successor to relevant withdrawing member becomes member by inheritance or merger under Art. 608 of Companies Act. (Com. A. 611). Partnership company itself may be dissolved upon expiration of term or occurrence of any other cause of dissolution provided in articles of incorporation, consent of all members, amalgamation, diminishing of membership to one, decision to commence bankruptcy procedures or court order. (Com. A. 641). Liquidation is accomplished through legally outlined procedures. (Com. A. 668, etc.).

Limited Partnership Company (Goshi Kaisha).—Limited partnership company resembles partnership company in most respects but differs in that members may have either unlimited or limited liability for corporate obligations. (Com. A. 576). Liability status of each member must be specified in articles of incorporation, and members with limited liability must make their contributions in form of money or property or, in case of members with unlimited liability, other things. (Com. A. 576). Members have, unless otherwise provided in articles of incorporation, rights and duties of representation similar to those of members of partnership company, while, in case managing members are provided in articles of incorporation, member other than managing member, although unable to act on behalf of company, is entitled to inspect and supervise. (Com. A. 590, 592). Termination of membership by all members of either category is ground for dissolution. (Com. A. 641).

Limited Liability Corporation (Godo Kaisha).—Limited liability corporation resembles limited partnership company in most respects but differs in that members may have only limited liability for corporate obligations. (Com. A. 576).

Joint Stock Corporations (Kabushiki Kaisha).—This form of corporate organization is most common in business circles and one which most closely resembles Anglo-American stock company or business corporation.

Joint Stock Corporation.

Incorporation requires formulation by one or more promoters of articles of incorporation which provide business object, trade name, value or minimum amount of property contributed on occasion of incorporation, seat of principal office, and name and residence of each promoter. (Com. A. 26, 27). Number of shares to be issued at time of incorporation may not be less than ¼ of number of shares authorized to be issued unless articles of incorporation make transfer of shares subject to corporation's consent. (Com. A. 37). There is no distinction between par value and nonpar value shares and no minimum issue price per share is required. Other matters, such as corporation's duration, special benefits to promoters, contribution in kind, property to be taken over after incorporation, various classes of shares (preferred, common or deferred and voting or nonvoting), etc., are optional, but not effective unless stated in articles of incorporation. (Com. A. 28, 108, 641). Also, number of shares authorized to be issued is optional, but must be provided in articles of incorporation, by amendment thereto with consent of all promoters, at or before time of incorporation. (Com. A. 37). Acknowledgment of articles of incorporation by notary public is mandatory. (Com. A. 30). There is no restriction on minimum amount of capitalization. Incorporation occurs upon registration which, in case of incorporation by way of offering shares to persons other than promoters, follows inaugural meeting of shareholders. (Com. A. 49, 65). Liability, if any, of promoters, time-of-incorporation directors and time-of-incorporation auditors resulting from acting as such in course of incorporation will continue after incorporation. (Com. A. 53). Any persons are permitted to make payment for stock by property contributions subject to court confirmation of its delivery and valuation. However, if value of contribution is not more than five million yen, or if contribution is marketable securities, real property evaluated by licensed real property appraiser and certified by attorney, or other property certified by attorney, court confirmation is not required. (Com. A. 28, 33, 34).

Shares must be in nonbearer form. Corporation may, by articles of incorporation, provide that it shall issue share certificates. (Com. A. 214). In case of corporation which provides, by articles of incorporation, that it shall issue share certificates, shareholders who do not wish to possess certificates may require corporation not to issue certificates for their shares. If, in such case, share certificates have already been issued, such certificates must be returned to corporation. (Com. A. 217). Shares are freely transferable, but articles of incorporation may make transfer of shares subject to board of corporation's consent. (Com. A. 107). When such consent is not given to specifically proposed transfer, transfer is consummated by procedures provided by Companies Act. (Com. A. 136, 137, 139, 140, 142, 144, 145, 309, 461). In case of corporation which provides, by articles of incorporation, that it shall issue share certificates, transfer of shares may be effected simply by delivering share certificates, but cannot take effect against corporation unless registered in shareholders' registry. (Com. A. 128, 130, 131). In case of corporation which provides, by articles of incorporation, that it shall issue share certificates, transfer of shares may be effected by agreement of parties, but cannot take effect against corporation and third parties unless registered in shareholders' registry. (Com. A. 130).

Corporation may acquire its own shares with, except for certain exceptions, authorization of shareholders' meeting or, in case of Board Establishment Corporation (see catchline Board of Directors, infra) if articles of incorporation so provide, by resolution of board of directors, in respect of acquisition in securities markets or through tender offers. (Com. A. 156, 165). Aggregate acquisition price shall not exceed sum of: (i) profit amount available for dividends; and (ii) aggregate amount of profit in respect of relevant period in case extraordinary settlement procedures are followed, and consideration of such own shares disposed of during such period, deducted by sum of (a) book value of such own shares (at time of calculation of such sum being deducted), (b) consideration of such own shares disposed of after end of last business year, (c) amount of loss in respect of relevant period, in case extraordinary settlement procedures are followed, and (d) other amounts prescribed by Ministry of Justice ordinance. (Com. A. 461).

Unit Share System: Corporation may, by articles of incorporation, adopt system of unit share, consisting of certain number of shares not exceeding number of shares prescribed by Ministry of Justice ordinance, under which one unit has one voting right. (Com. A. 188).

System of Registration for Loss of Share Certificates: In event shareholder has lost share certificates, he may, for purposes of avoiding such certificates being acquired by person acting in good faith and without negligence, make them null and void by following procedures involving corporation for registration of loss thereof. (Com. A. 223, 228). In order to avoid double issuance of share certificates, corporation may not re-issue them until such certificates have become null and void in accordance with such procedures, but, if and when such certificates have so become null and void, must re-issue such certificates. (Com. A. 228).

New shares within number of shares authorized to be issued, or treasury shares, may be issued or sold at any time by Special Resolution of meeting of shareholders (shareholders may, by Special Resolution of their meeting, assign relevant authorization to directors [or, in case of Board Establishment Company, board of directors]) or, in case of corporation whose articles of incorporation do not require approval of corporation in respect of assignment of its shares ("Public Corporation"), resolution of board of directors. (Com. A. 2, 199, 200, 201, 309). Issuance of new shares, or treasury shares, at particularly favorable price is subject to special approval of shareholders. (Com. A. 199, 201, 309).

Shareholder's Liability: Once subscription price is paid, subscriber becomes shareholder, and, together with successors or assignees, is not personally liable for debts of corporation. (Com. A. 104).

General assembly of shareholders, which is principal organ of corporation, is held once each fiscal term in regular sessions and upon call in extraordinary sessions. (Com. A. 296). At regular sessions this assembly approves balance sheet, loss and profit statement, statement of change in shareholders' holdings (these three documents shall collectively be referred to as "financial statements"), except that, in case of Accountant Auditor Establishment Company other than Board Establishment Company, such documents need not be approved by such assembly (reporting contents thereof by directors to such assembly is sufficient), if relevant financial statements approved by its board of directors satisfy those requirements provided in relevant Ministry of Finance ordinance. (Com. A. 438, 439). Each shareholder has one vote for each share or each unit of shares. However, corporation is not entitled to vote in respect of its own shares, and no person whose management is substantially controlled by joint stock corporation through, among other things, its holding 25% or more of voting rights of all shareholders of each person, as provided in relevant Ministry of Finance ordinance, is entitled to vote in respect of its shares in such joint stock corporation. (Com. A. 308). Shareholders holding two or more shares on behalf of others may cast split votes by giving prior notice. (Com. A. 313).

Quorum for general assembly cannot be less than majority (or, if ratio of one-third or more is provided in articles of incorporation, such ratio) of all voting rights held by those shareholders who can exercise thereat their voting rights, for election or dismissal of directors, auditors or accounting councilors (Kaikei Sanyo). Approval of majority (or, if ratio greater than majority is provided in articles of incorporation, such ratio or more) of those attendees thereat who satisfy requirements of such quorum is required for that purpose. (Com. A. 329, 341). In case of amendment of articles of incorporation, capital decrease (except certain exceptions), issuance of new shares to nonshareholders at particularly favorable price, issuance of bonds convertible into stock on particularly favorable conversion terms to nonshareholders, merger, transfer of whole or important part of corporation's business or acquisition of whole of business of another company, and certain other major events, approval of two-thirds (or, if ratio greater than two-thirds is provided in articles of incorporation, such ratio) or more of those attendees at relevant assembly who satisfy requirements of quorum which constitutes majority (or, if ratio of one-third or more is provided in articles of incorporation, such ratio or more) of all voting rights held by those shareholders who can exercise thereat their voting rights. (Com. A. 309). Quorum for other situations may be provided specially in articles of incorporation. In absence of special provisions in articles of incorporation, quorum for resolutions is more than one-half of all voting rights held by those attendees at relevant assembly who can exercise thereat their voting rights and resolutions are adopted by more than one-half of voting rights held by attendees, simple majority of votes cast, in absence of special provision in articles of incorporation. (Com. A. 309).

Minority shareholders holding not less than 3% (or, if ratio less than 3% is provided in articles of incorporation, such ratio) of voting rights held by all shareholders (those shares held by shareholders who cannot exercise their voting rights in respect of matters which constitute agenda of relevant assembly are not counted) only in case of Public Corporation for preceding six consecutive months (or, if period less than six consecutive months is provided in articles of incorporation, such period) are entitled to call general assembly of shareholders, with court permission. (Com. A. 297). In case of corporation other than Board Establishment Corporation, shareholders may propose matters to be discussed at general assembly of shareholders. In case of Board Establishment Corporation, shareholders holding not less than 1% (or, if ratio less than 1% is provided in articles of incorporation, such ratio) of voting rights held by all shareholders or 300 (or, if number less than 300 is provided in articles of incorporation, such number) voting rights (those shares held by shareholders who cannot exercise their voting rights in respect of matters which relevant shareholders requested to constitute agenda of relevant assembly, are not counted) only in case of Public Corporation, for preceding six consecutive months (or, if period less than six consecutive months is provided in articles of incorporation, such period) may propose matters to be discussed at general assembly of shareholders. (Com. A. 303).

Board of directors may be established if articles of incorporation so provide. (Com. A. 326). Corporation which has board of directors is referred to as "Board Establishment Corporation". (Com. A. 2). Board of directors must be established in cases of Public Corporation, Board of Auditors Establishment Corporation (see catchline Auditors) and Committee Establishment Corporation. (Com. A. 327). Board of directors takes charge of (i) in case of Board Establishment Corporation, determination of business operation, (ii) supervises execution of business operations undertaken by directors, and (iii) election and dismissal of representative directors. (Com. A. 362). Board of directors may delegate authority to decide matters that should be decided by it (excluding certain major events) to directors. (Com. A. 362). Board Establishment Corporation may, by its articles of incorporation, deem that, if proposal in respect of matters which constitute agenda of meeting of board of directors has been consented to in writing or by electronic records (in case of Auditor Establishment Corporation [defined below], on condition that no auditor raises any objection to such proposal), by all directors (excluding those, if any, who cannot participate in voting), resolution of board of directors approving such proposal has been adopted. (Com. A. 370). However, meetings of board of directors in respect of representative director(s) and operation-execution directors (Gyomu Shikko Torishimariyaku) (or, in case of Committee Establishment Corporation, officers [Shikkoyaku]) regularly (once or more per three-month period) reporting in respect of status of execution of operations must be held. (Com. A. 363, 372, 417). Resolutions of board of directors' meetings are adopted by affirmative votes of majority (if ratio more than majority is provided in articles of incorporation, such ratio) of those shareholders who are attendees thereof and constitute majority (if ratio more than majority is provided in articles of incorporation, such ratio) of directors who can participate in vote. (Com. A. 369). However, in case of Board Establishment Corporation (except Committee Establishment Corporation) which has six or more directors, one or more of whom are directors outside corporation, board of directors may determine that resolutions of board of directors' meetings shall be adopted by affirmative votes of majority (if ratio more than majority is determined by board of directors, such ratio) of those three or more directors ("Special Directors") elected in advance who constitute majority of those Special Directors who are able to participate in vote. (Com. A. 373). Any joint stock corporation may become Committee Establishment Corporation (Iinkai Settchi Kaisha; "Committee etc. Establishment Corporation") by establishing, in accordance with provisions of its articles of incorporation, three committees for nomination, audit and remuneration. (Com. A. 2, 326). Each committee is comprised of three or more directors. More than one-half of members of each committee shall be directors outside corporation who are not its current or former officers (Shikkoyaku) or employees of relevant corporation or any of its subsidiaries, or former directors inside such corporation or any of its subsidiaries. (Com. A. 2, 400).

Directors must be one (or, in case of Board Establishment Corporation, three) or more in number, elected at shareholders' assembly or at time of incorporation, may hold office for term ending upon adjournment of annual general assembly of shareholders in respect of last of business years ending within two years (or, in case of Committee Establishment Corporation, one year); provided, however, that (i) such term may be shortened by articles of incorporation or resolution of shareholders' assembly; (ii) in case of joint stock corporation other than Public Corporation and Committee Establishment Corporation, such term may, by articles of incorporation, be extended to adjournment of annual general assembly of shareholders in respect of last of business years ending within ten years; and (iii) such term shall expire if and when articles of incorporation have been amended for the purpose of (a) corporation becoming Committee Establishment Corporation; (b) corporation ceasing to be Committee Establishment Corporation; or (c) corporation other than Public Corporation and Committee Establishment Corporation becoming Public Corporation. (Com. A. 326, 331, 332). Board of Directors of joint stock corporation other than Committee Establishment Corporation must appoint one or more representative directors from among themselves to represent corporation. (Com. A. 362, 416). Corporation is bound as against third persons acting in good faith for acts done by director with title of president, vice president, senior managing director or managing director even though he is not representative director. (Com. A. 354). Cumulative voting is available for election of two or more directors unless otherwise provided in articles of incorporation. (Com. A. 342). Liability of director against corporation is primarily based on negligence. (Com. A. 423). Liability of director may be exempted by consent of all shareholders. (Com. A. 424). In case director has acted in good faith and without gross negligence, liability of such director may be exempted, to extent of amount in excess of sum of (i) his/her annual salary multiplied by four (or, in case of representative director and director outside corporation, six or two, respectively); and (ii) his/her benefits arising from new-share subscription rights (or, in case of in-advance liability restriction agreement referred to below, to extent of greater of (a) amount fixed by corporation and not greater than amount provided in articles of incorporation; and (b) sum of amounts set forth in (i) and (ii) above), by (I) Special Resolution of assembly of shareholders, (II) in case of Auditor Establishment Corporation having two or more directors or of Committee Establishment Corporation, consent of majority of directors other than director in question (or, in case of Board Establishment Corporation, resolution of board of directors) if exemption by such method is provided in its articles of incorporation, or (III) in case director in question is director outside corporation, in-advance liability restriction agreement between corporation and such director outside corporation if articles of incorporation provides that such corporation may enter into such agreement with director outside corporation. (Com. A. 309, 425, 426, 427).

Auditors (Kansayaku), who should not be confused with independent public accountants, may be established if articles of incorporation so provide. (Com. A. 326). Corporation which has auditor(s) (except those, scope of whose audit is limited to accounting by articles of incorporation) is “Auditor Establishment Corporation”. (Com. A. 2). Auditors are elected at shareholders' assembly and hold office for term ending upon adjournment of regular assembly of shareholders for last business year ending within four years after assumption of office; provided, however, that (i) in case of joint stock corporation other than Public Corporation such term may, by articles of incorporation, be extended to adjournment of annual general assembly of shareholders in respect of last of business year ending within ten years; (ii) such term of auditor, who was elected to fill vacancy of office of auditor who resigned before expiration of his/her term, may, by articles of incorporation, be shortened to time of expiration of term of such auditor who resigned; and (iii) such term shall expire if and when articles of incorporation have been amended for purpose of (a) ceasing establishment of auditor(s); (b) establishing committees; (c) abolishing provisions of articles of incorporation limiting scope of audit by auditor to accounting; or (d) joint stock corporation other than Public Corporation becoming Public Corporation. (Com. A. 329, 336). Auditors of corporations are required to attend board of directors' meetings, and, if deemed necessary, to give opinions; provided, however, that, in case there are two or more directors and there are provisions in respect of resolutions by Special Directors, auditors may elect, by mutual vote, those auditors who attend meetings of board of directors at which only Special Directors attend. (Com. A. 383). Auditors have authority to audit performance of duties by directors (or, in case of Accounting Councilor Establishment [defined below]), directors and accounting councilor(s). (Com. A. 381). Auditors have authority to examine business and financial condition of corporation and its subsidiaries. (Com. A. 381). Notwithstanding foregoing, articles of incorporation of joint stock corporation other than Public Corporation, Committee Establishment Corporation and Accounting Auditor Establishment Corporation, may provide that scope of audit by its auditor(s) shall be limited to accounting. (Com. A. 389). Auditors have duty to examine those bills, documents and other things prescribed in relevant Ministry of Finance ordinance which are intended to be submitted to assembly of shareholders, and, if violation of law or articles of incorporation or existence of extremely undue matter is found (or, in case of such joint stock corporation other than Public Corporation, Committee Establishment Corporation and Accounting Auditor Establishment Corporation, on every occasion), to make report thereof to assembly of shareholders. (Com. A. 384, 389). Committee Establishment Corporation must have accountant auditor (Kaikei Kansanin), who shall be elected at assembly of shareholders. (Com. A. 327, 329). Board of Auditors Establishment Corporation must have three or more auditors, at least half of whom must be individuals who have not served as director, accounting councilor (or, in case accounting councilor is legal person, member thereof who is to perform its duties), officer (Shikkoyaku), manager or other employee of corporation or any of its subsidiaries. (Com. A. 335). Accountant auditors audit financial statements, exhibits thereto, extraordinary financial statements and consolidated financial statements, and prepare accounting audit reports. (Com. A. 396). In case of Committee etc. Establishment Corporation, there are no auditors. “Board of Auditors Establishment Corporation” means joint stock corporation which has board of auditors or is required to establish board of auditors under Companies Act. (Com. A. 2). Articles of incorporation of joint stock corporation may establish accounting councilor(s). (Com. A. 326). Accounting councilors shall be elected at assembly of shareholders. (Com. A. 329). Principal duties of accounting councilors are preparation of financial statements in cooperation with directors or officers (Shikkoyaku). (Com. A. 374).

Bonds other than those with share options (``Straight Bonds'') may be issued by resolution of board of directors (or, in case of joint stock corporation other than Board Establishment Corporation, decision by directors). (Com. A. 362, 348, 676). There is no other restrictions on issuance of Straight Bonds; provided that in case of secured Straight Bonds, they shall be subject to provisions of Secured Bonds Trust Act. Company that issues bonds must, with certain exceptions, nominate commissioned company for bond holders (“shasaikanrikaisha”), to handle receipt of payments, etc., and to protect rights and interests of bond holders. (Com. A. 702). Assembly of bondholders may adopt resolutions on matters provided by statute which relate to their interests. (Com. A. 716).

Share Options or Bonds with Share Options (any right which entitles holder to acquire shares in Stock Company by exercising right against such Stock Company) may be issued at any time by Special Resolution of meeting of shareholders. Shareholders may, by Special Resolution of their meeting, assign relevant authorization to directors (or, in case of Board Establishment Company, board of directors) or, in case of Public Corporation, resolution of board of directors. (Com. A. 238, 239, 240, 309). Issuance of share options at particularly favorable prices is subject to Special Resolution of meeting of shareholders. (Com. A. 238, 240, 309). Share options or bonds with share options may be issued to any persons, including directors and employees.

Statutory reserves consist of capital reserve, earnings reserve and other reserves provided by relevant Ministry of Justice ordinance. Capital reserve includes portion of issue price not to be credited against stated capital. (Com. A. 445). Such portion in no event can exceed one-half of amount of payment or contribution by each subscriber for shares or new shares. (Com. A. 445). At least one-tenth of distributions paid from profits must be set aside as capital reserve or earnings reserve in accordance with relevant Ministry of Justice ordinance. (Com. A. 445). Capital decrease requires, in principle, Special Resolution of assembly of shareholders. (Com. A. 309, 447). If (i) such resolution is adopted at annual assembly of shareholders, and (ii) amount of capital being decreased does not exceed amount of deficit calculated, in accordance with method provided in relevant Ministry of Justice ordinance, as of, in principle, date of such annual assembly, capital decrease may be conducted by ordinary resolution of assembly of shareholders. In case capital is decreased, capital being decreased, in whole or in part, may be transferred to reserves comprised of capital reserve and earnings reserve. (Com. A. 445, 447).

Dividends may be declared at any time and any number of times by ordinary (or, in certain exceptional cases, special) resolution of assembly of shareholders. (Com. A. 453, 454, 309). Joint stock corporation satisfying certain conditions may, if its articles of incorporation so provide, determine distribution of surplus by resolution of board of directors. (Com. A. 459). Notwithstanding such conditions, Board Establishment Corporation may, if its articles of incorporation so provide, make distribution of surplus (by cash only, not in kind) by resolution of board of directors only once in middle of business year. (Com. A. 454).

Merger and consolidation may be made upon resolution at shareholders' meeting, with certain exceptions including those applicable to mergers involving relatively small amounts of assets of merged corporation. (Com. A. 783, 795, 796, 804). Corporate separation may be made by way of incorporating new corporation or absorption by another corporation upon resolution at shareholders' meeting, with certain exceptions including those applicable to corporate separations involving relatively small amounts of assets being separated. (Com. A. 783, 784, 795, 796, 804, 805). Corporation may become wholly-owned subsidiary of another existing or newly established corporation upon resolution at shareholders' meeting, with certain exceptions including those applicable to cases of corporation becoming wholly-owned subsidiary of newly established corporation, involving relatively small amounts of assets of such corporation. (Com. A. 783, 795, 796, 804). Consideration to be delivered in connection with merger, corporate separation by way of absorption by another corporation, or corporation becoming wholly-owned subsidiary of another existing corporation, shall be money and/or other assets, namely, not only money but also anything that has commercial value, including shares or debts (regardless of whether they are listed) of Japanese or foreign companies. (Com. A. 749, 751, 758, 760, 768, 770). Triangular merger has become possible. (Com. A. 800). Consideration to be delivered in connection with consolidation, corporate separation by way of incorporating new corporation, or corporation becoming wholly-owned subsidiary of newly established corporation, shall be (i) shares, bonds or share options of new joint stock corporation established in case of consolidation, new joint stock corporation established in case of corporate separation, or newly established parent corporation, or (ii) shares or bonds of new business corporation, other than joint stock corporation, established in case of consolidation, or new business corporation, other than joint stock corporation, established in case of corporate separation. (Com. A. 755, 763, 765, 773). Such consideration becoming flexible as described came into force on May 1, 2007.

Amendment of articles of incorporation requires two-thirds (or if ratio of more than two-thirds is provided in articles of incorporation, such ratio) majority vote of shareholders present at general assembly of shareholders, with those shareholders who hold majority (if ratio not less than one-third is provided in articles of incorporation, such ratio or more) of voting rights of all shareholders who can exercise their voting rights at such assembly (and, if articles of incorporation requires affirmative vote of certain number of shareholders or any other condition, such condition must be satisfied) ("Special Resolution"). (Com. A. 309, 466). If class stock is outstanding, special consent of general assembly of class shareholders also is required for amendments to articles of incorporation which are adverse to their class shareholder interests. (Com. A. 322, 324). In order to amend articles of incorporation so as to require board of directors' consent to transfer of shares by shareholder, resolution shall be made by majority (in cases where higher proportion is provided for in articles of incorporation, such proportion or more) of shareholders entitled to exercise their votes at such shareholders' meeting, being majority of two-thirds (in cases where higher proportion is provided for in articles of incorporation, such proportion) or more of votes of such shareholders. (Com. A. 309)

Dissolution may occur because of expiration of time or any other event provided in articles of incorporation, merger (only in case corporation ceases to exist), court order of commencement of bankruptcy procedures, court order of dissolution, and decision of assembly of shareholders. (Com. A. 471). Except in case of merger (only in case corporation ceases to exist) and court order of commencement of bankruptcy procedures (only if such procedures have not been finished), dissolution is followed by liquidation in which court will, in certain cases, take special steps to protect interests of creditors and shareholders. (Com. A. 475 et seq.).

Limited Liability Companies (Yugen Kaisha) created under former Limited Liability Companies Act will continue to exist as joint stock company, under Companies Act. (Law in Respect of Arrangement, etc. of Related Laws, Arising from Enforcement of Com. A. 2).

Specified Purpose Company (Tokutei Mokuteki Kaisha).—Specified purpose company is limited liability entity organized under Law concerning Securitization of Specified Assets by Specified Purpose Companies. Its stated capital must be one yen or more. Specified purpose company must include words "Tokutei Mokuteki Kaisha" in its trade name, and file registration statement before company commences doing business relating to securitization of specified assets.

Investment Company (Toshi Hojin).—Investment company is limited liability entity organized under Law in respect of Investment Trusts and Investment Companies, for purpose of investing assets contributed by investors in securities, real properties and/or other assets. Many provisions applicable to joint stock corporations apply *mutatis mutandis* to investment companies.

Other Legal Persons.

Certain acts of special legislation afford legal personality to associations and organizations as distinct from provisions of Civil Code or Companies Act. Trade associations and labor unions are examples. In addition, public law provides that many public agencies, such as municipalities, have legal personality. In few instances Diet has enacted special charters for public corporations such as The Bank of Japan.

General incorporated association or general incorporated foundation (ippan shadan hojin or ippann zaidan hojin) may be organized as legal person under Law of General Incorporated Association or General Incorporated Foundation for any purpose except for distributing surplus to its members.

Subsidiaries of Foreign Corporation.

See category 14 Foreign Trade and Commerce, topic 14.03 Foreign Investments.

Foreign Corporations.

Except for treaty provisions, the only foreign bodies recognized as legal persons in Japan are states, administrative divisions of states, and commercial companies. (C. C. 35). However, a recognized foreign legal person enjoys same rights and capacities as similar legal person does under Japanese law, unless there are treaty or law provisions to contrary. (C. C. 3, 35). At present, such treaty or law provisions are nonexistent.

Foreign corporation which intends to do business in Japan on continuing basis must appoint its representative in Japan and make registrations and, unless such foreign corporation is corporation required to submit securities reports under Financial Instruments and Exchange Act of Japan, Art. 24, paragraph 1, give public notice in respect of its balance sheet. (Com. A. 817-819). Such foreign corporation must register its place of business, name and address of its legal representative, law under which it has been established and various related facts following procedures similar to those used by Japanese corporations in registering branch offices. (Com. A. 933). If foreign corporation has no business office in Japan, relevant registration shall be made using address of its representative in Japan. (Com. A. 933). Foreign corporation must register its representative(s) in Japan within three weeks from day on which such foreign corporation designated its representative(s) for first time in Japan. (Com. A. 933). If foreign corporation which had not established business office in Japan established its business office in Japan after it has been registered under Companies Act, it must register fact that such business office has been established, within three weeks thereafter using address of its representative in Japan, and also register matters required to be registered within four weeks using place of such business office; provided that, if such business office is established within jurisdiction of registry office competent at address of its representative in Japan, it must only register establishment of such business office. (Com. A. 936). In case where foreign corporation having business offices in Japan has closed all of them after they have been registered, it must register closure thereof within three weeks at addresses thereof, and also register required matters within four weeks at addresses of its representatives in Japan, except where all representatives in Japan of such foreign corporation are to retire from their offices; provided that, if addresses of representatives in Japan are located within jurisdiction of registry office competent at place of relevant business office, it must only register closure of such business office. (Com. A. 936). If matters to be registered occurred in foreign country, relevant period within which such matters are to be registered is computed from time when notice thereof has reached its representative in Japan. (Com. A. 933). Foreign corporation doing business in Japan on continuing basis, must comply with mandatory registration requirements. Until that foreign corporation is properly registered, it is not authorized to do business in Japan on continuing basis, and any person violating such provisions is jointly liable with corporation. (Com. A. 818). Foreign corporation which has made registration of foreign corporation and has nature which is same as that of joint stock corporation or to which that of joint stock corporation is most similar, must, under relevant Ministry of Justice ordinance, give public notice in Japan whereby it will disclose document of nature equivalent to that of balance sheet (or, method of public notice by such foreign corporation is publishing in Official Gazette or daily newspaper publishing matters relating to current events, gist of such document) without delay, after having followed procedures of nature same as or similar to that of those required for approval of balance sheet at ordinary general meeting of shareholders; provided that foregoing shall not apply if (i) such foreign corporation shall, under relevant Ministry of Justice ordinance, arrange to have information set forth in such document continuously, electronically available for many unspecified persons, for five years after such procedures have been finished, or (ii) such foreign corporation is corporation required to submit securities reports under Financial Instruments and Exchange Act of Japan, Art. 24, paragraph 1. (Com. A. 819). In addition, foreign corporation which has made registration of foreign corporation must, if all of its representatives in Japan whose addresses are located in Japan are to retire from their offices, give public notice through Official Gazette to its creditors to effect that, if they have any objections to such retirement, they should notify corporation of such objections within certain period of time (which shall not be less than one month) and give such notice individually to each of such creditors known to such corporation. (Com. A. 820). Failure to engage in business within one year without legitimate reasons, engaging in business for illegal purpose, cessation of payment without legitimate reasons, and continuing act that goes beyond or abuses authority of foreign corporation prescribed by laws and regulations or violations of criminal laws in defiance of warnings issued by Minister of Justice are grounds for issuance of court order for cessation of doing business in Japan on continuing basis and closure of business offices. (Com. A. 827). Not only foreign corporation which was ordered by court to cease doing business in Japan on continuing basis or to close all of its offices in Japan but also foreign corporation which voluntarily has ceased doing business in Japan on continuing basis may be ordered to commence procedures for liquidation of all of its properties in Japan. In event that foreign corporation is ordered to commence procedures for liquidation of all of its properties in Japan, such corporation need not give public notice or individual notice to its creditors, in relation to retirement of all of its representatives in Japan whose addresses are located in Japan. (Com. A. 822). Foreign corporation whose head office is located in Japan or whose principal purpose is doing business in Japan is not able to do business in Japan on continuing basis. Any person who did business in violation of such prohibition clause must, as against counter-party, be liable jointly and severally with such foreign corporation in respect of any damage incurred by such counter-party. (Com. A. 821). However, enforcement of Companies Act Art. 821 shall be made in way not to adversely affect foreign corporations doing business in Japan for legitimate business purposes. (Supplementary Resolutions adopted by House of Councilors, Legal Committee on June 28, 2005, paragraphs 15 and 16). Fines not to exceed 1,000,000 yen are provided for various infractions of registration requirements. (Com. A. 976).

Establishment of branch in Japan or substantial change in kind or business purpose of branch in Japan by foreign corporation (excluding financial and public utility corporations) is categorized as inward direct investment under Foreign Exchange and Foreign Trade Law, and ex post facto report must be filed or, in exceptional cases of investment from certain countries or for certain industries, prior notification must be filed. Remittances to and from branch office can be made freely and subject to possible restriction under extraordinary circumstances. See category 14 Foreign Trade and Commerce, topics 14.02 Foreign Exchange and Foreign Trade; and 14.03 Foreign Investments.

2.04 JOINT STOCK CORPORATIONS:

See topic 2.03 Corporations.

2.05 LIMITED PARTNERSHIP:

In Japan, there exists no form of limited partnership substantially equivalent to that in U.S. law, except for limited partnership for investment business (Toshi Jjigyo Yugen Sekinin Kumiai) which is limited partnership organized under Law concerning Limited Partnerships for Business of Investment. Liability of limited partner of limited partnership for investment business to its creditors is limited to extent of amount of his contribution in consideration of such limited partner not being awarded right of management thereof, while general partner of limited partnership for investment business bears unlimited liability to its creditors. In addition, limited liability partnership (Yugen Sekinin Jigyo Kumiai) may be organized in Japan under Law concerning Limited Liability Partnership Agreements. Limited liability partnership has limited partners only. Unlike limited partnership for investment business, purpose of limited liability partnership is that of any business other than certain exceptional businesses. Both limited partnership for investment business and limited liability partnership are tax-through entities and neither of them is required to pay tax. Partners (all of whom have limited liability only) of limited liability partnership and general and limited partners of limited partnership for investment business are required to pay tax in respect of their respective incomes arising from limited liability partnership and limited partnership for investment business, respectively.

2.06 PARTNERSHIPS:

Partnership (Kumiai) organized under Civil Code closely resembles general partnership (or, simply, partnership) under U.S. law. In addition to partnership, limited partnership for investment business and limited liability partnership (see topic 2.05 Limited Partnership), there is anonymous partnership (Tokumei Kumiai) prescribed in Commercial Code. From legal point of view, anonymous partnership is not a kind of general or limited partnership but is contractual relationship. However, from economic point of view, anonymous partnership functions in way similar to that in which limited partnership functions. Parties for real property transactions may take advantage of partnership or anonymous partnership in accordance with Real Property Specified Cooperation Business Law.

Partnership is created when several parties contract to contribute to common undertaking. (C. C. 667). One or more managing partners may be designated, and thereafter managing partners who are also partners may not resign or be removed without cause. (C. C. 672). Partnership acts through majority vote of its partners or, if managing partners have been designated, managing partners, but every partner or, if managing partner has been designated, such managing partner, is empowered to transact ordinary affairs on behalf of partnership, unless objections are raised by other partners or managing partners. (C. C. 670). Profits and losses are shared in proportion to respective contributions of partners unless otherwise provided in partnership contract, although creditor may exercise rights against each partner equally if he has no knowledge of actual ratio of assumption of loss. Each partner's liability to creditors in respect of relevant ratio of loss is unlimited. (C. C. 674, 675). Claims of partnership against third party cannot be offset by latter's claims against individual partners. (C. C. 677). When duration of partnership is not fixed, or is fixed to last during lifetime of partner, any partner may withdraw at any time, except when, unless unavoidable cause exists, this withdrawal would prejudice partnership. (C. C. 678). Withdrawal of partner also occurs upon death, bankruptcy, incompetency, or expulsion. (C. C. 679). Upon withdrawal of partner, accounting must be made between partnership and withdrawing partner. Dissolution of partnership occurs when object of its creation has been accomplished, or becomes impossible to attain. (C. C. 682). Upon dissolution, affairs of partnership are liquidated and assets are distributed. (C. C. 685 through 688).

Anonymous partnership (Tokumei Kumiai) is created when parties agree that one of them (anonymous party) makes contribution toward business of other (referred to as proprietor) and that they divide profits arising from such business. (Com. C. 535). As stated above, from legal point of view, anonymous partnership is not general or limited partnership (see subhead Partnership, supra). Contractual relationship exists between proprietor and each anonymous party. There is no contractual relationship among anonymous parties. Contribution made by anonymous party becomes property of proprietor of business and anonymous party neither acquires rights nor incurs obligations with regard to third persons through acts of proprietor. (Com. C. 536). Anonymous party may not demand any share of profits until after reduction of contribution by losses has been recovered. (Com. C. 538). When duration of anonymous partnership is not fixed, or is fixed to last during lifetime of one of parties, either party may terminate agreement at end of business year, with six months' notice. No matter whether duration is fixed or not, either party may terminate agreement at any time in case unavoidable reasons exist. (Com. C. 540). Agreement is also ended upon completion or impossibility of completion of business, death of proprietor, bankruptcy of proprietor or anonymous party, or incompetency of proprietor. (Com. C. 541). Upon termination of agreement, proprietor returns value of contribution or balance in case contribution has been diminished by losses. (Com. C. 542).

3 BUSINESS REGULATION AND COMMERCE

3.01 BILLS AND NOTES:

In Japan bills (Tegata) are classified as bills of exchange (Kawase Tegata) and promissory notes (Yakusoku Tegata) and are distinguished from checks (Kogitte). Japanese law in regard to bills, notes and checks is in conformity with Geneva International Conventions on Uniform Law of 1930 and 1931.

Bills of Exchange.

Essential provisions of a bill of exchange are: (1) Expression “bill of exchange” in body of instrument, (2) unconditional order for payment of fixed sum of money, (3) name of drawee, (4) designation of maturity, (5) designation of place for payment, (6) name of person to whom or to whose order payment is to be made, (7) date and place of issuance, and (8) signature of drawer. Lack of any of above-mentioned elements is fatal except that: (a) Payment is deemed to be at sight when no maturity is designated, (b) if no place of payment is designated but name of drawee is accompanied by place, such place is, unless otherwise indicated, deemed to be place of payment and residence of drawee, and (c) such place is deemed to be place of issue when it is not mentioned. Bill of exchange may be payable to drawer, his order, or for account of third person. (L. B. N. 1 through 3).

Endorsements may be either in blank or contain a designation. They must be unconditional. Even though not drawn to order, every bill of exchange may be transferred by endorsement. Acceptance and payment is guaranteed by endorsement in absence of any contrary stipulation. (L. B. N. 11 through 13, 15).

Presentment for acceptance of bills payable at expiration of fixed period after sight must occur within one year after date of issuance. Presentment must be at residence of drawee and at a time prescribed by drawer or endorsers. (L. B. N. 21 through 23).

Acceptance may occur simply from signature of drawee on face of instrument. When bill is payable at expiration of fixed period after sight, acceptance must be dated. Acceptance may be for part of sum payable, but must be unconditional. Third party may guarantee payment of bill —act accomplished simply by his signature on face of instrument. (L. B. N. 25, 26, 30, 31).

Payment of bill of exchange may be: (1) At sight, (2) at expiration of fixed period after sight, (3) expiration of fixed period after issue date, and (4) at fixed date. (L. B. N. 33). Bill of exchange at sight is payable on presentment and presentment must occur within one year of date of issuance. (L. B. N. 34). Holder of bill of exchange payable on fixed date or at expiration of fixed period after issue date or sight must present for payment on due date or within two business days following due date. (L. B. N. 38). There are no days of grace. (L. B. N. 74). Unless specially provided payment is to be in currency of country where payment will occur, although rate of exchange and similar matters may be specified. (L. B. N. 41). Words prevail over figures in event of discrepancy as to amount, and as between more than one amount in either figures or words, smallest sum is deemed sum payable. (L. B. N. 6).

Recourse may be had by holder of bill of exchange against endorsers, drawer and other parties if payment has not been made at maturity. Holder has similar right before maturity: (1) if there has been total or partial refusal of acceptance, (2) if drawee has become bankrupt, or (3) if drawer (of nonacceptable bill) has become bankrupt. (L. B. N. 43). Default must be established through an officially authenticated instrument. Except for bill of exchange payable at sight, protest for nonpayment must come within two business days after bill is payable. (L. B. N. 44). Holder must give notice of nonacceptance or nonpayment within four business days, and endorser must relay information to person from whom he received bill within two business days following date of notice. (L. B. N. 45).

Liability of persons signing bill is not affected by invalidity of one or more signatures of other persons thereon. (L. B. N. 7). Person signing bill as agent is personally bound if lacking in authority. (L. B. N. 8). Both acceptance and payment are guaranteed by drawer, although by specific provision in bill the former responsibility may be escaped. (L. B. N. 9).

All drawers, acceptors, endorsers and guarantors are jointly and severally liable to holder who may proceed individually or collectively in any order. (L. B. N. 47). Holder's recovery includes amount of unaccepted or unpaid bill, interest at 6% per annum from maturity, and expenses. (L. B. N. 48, 49). Upon expiration of time limits set for presentment for protest or presentment for payment, holder loses rights of recourse against all parties other than acceptor. (L. B. N. 53). Presentment, prevented by vis major or legal prohibition, may be made at later date without delay after termination of cause for delay. (L. B. N. 54).

Capacity of person to bind himself is determined by law of the country of his nationality, except that person lacking capacity nevertheless is bound if his signature is affixed in a country wherein he would have capacity. (L. B. N. 88). Acts performed by Japanese in foreign countries are valid as against other Japanese if in accordance with Japanese law. (L. B. N. 89). Laws of foreign country will govern in regard to obligations of acceptor as well as formalities for protest, when location of payment or act of protest is in that foreign country. (L. B. N. 90, 93).

Claims of holder arising out of bill of exchange expire three years from date of maturity as against acceptor, and one year from date of protest as against endorsers and drawer. Claims of endorser against other endorsers expire six months from date of payment or suit by endorsee. (L. B. N. 70).

Promissory Notes.

Essential provisions of a promissory note are: (1) Expression “promissory note” in body of instrument, (2) unconditional promise to pay fixed sum of money, (3) designation of maturity, (4) designation of place for payment, (5) name of person to whom or to whose order payment is to be made, (6) date and place of issuance, (7) signature of maker. (L. B. N. 75). As in case of bills of exchange, lack of essential elements renders instrument invalid save in certain exceptional cases. (L. B. N. 76). Rules governing bills of exchange are made applicable by analogy to promissory notes. (L. B. N. 77).

Checks.

Essential provisions of a check are: (1) Expression “check” in body of instrument, (2) unconditional order to pay fixed sum of money, (3) name of drawee, (4) designation of place of payment, (5) date and place where check is drawn, and (6) signature of drawer. (L. C. 1). Lack of enumerated elements renders check invalid, except in instances similar to those governing bills of exchange. (L. C. 2). Check must be drawn on banker holding funds at disposal of drawer. (L. C. 3). Check is payable at sight. (L. C. 28). It must be presented for payment within ten days after issuance if in country of issuance, within 20 days if place of issue and payment are in same continent, and 70 days when places are in different continents. (L. C. 29). Crossed check may be paid by drawee only to banker or to customer of drawee. (L. C. 38).

Claims of holder against endorsers, drawer and other parties to check expire six months from last day of period in which presentment must be made, and claims of parties to check other than holder, such as endorsers, against other parties, such as other endorsers, expire six months from date of payment by or suit against such claimants. (L. C. 51). There is no acceptance. (L. C. 4). Subject to above-mentioned differences, provisions of law governing checks are similar to those pertaining to bills of exchange.

Special simplified civil procedures are provided for certain actions arising out of bills, notes and checks. (C. C. P. 350 through 367). Evidence in special procedures is exclusively documentary, except for testimony of parties regarding authenticity of instrument and fact of its presentation. In these procedures, defendant's cross-action is not allowed. Plaintiff may shift to ordinary procedures at any time during trial. No appeal is allowed from final judgment that issues under special procedures, but losing party has opportunity to have case retried under ordinary procedures. A monetary judgment on bill, note or check, whether issuing after ordinary or special procedures, always is accompanied by provisional execution order. (C. C. P. 259). Actions may be brought in court having geographical jurisdiction over place of payment designated on instrument, in addition to court of jurisdiction over place where obligor resides or has an office. (C. C. P. 4, 5).

Revenue stamps must be affixed by drawer to bills and notes (but not checks) having face amount of 100,000 yen or more. Stamp tax rate varies with face amount. If amounts are stated in foreign currency, flat rate of 200 yen is applied. Failure to affix revenue stamps does not affect validity of documents, but does expose obligated party to criminal sanctions.

Choice of law rules are provided in Law of Bills and Notes and Law of Checks. (L. B. N. 88 through 94; L. C. 76 through 81). Form of any legal act in respect to bill and note is governed by law of place where instrument signed. (L. B. N. 89; L. C. 78). Validity of acceptance of bills of exchange or issuance of promissory notes is governed by law of place where instruments are payable. (L. B. N. 90). Validity of other acts in respect to bill or note, such as endorsement is governed by law of place of signature affixed. (L. B. N. 90; L. C. 79); provided that limits of time to recourse are governed by law of issuance.

3.02 COMMERCIAL REGISTER:

See category 9 Documents and Records, topic 9.03 Records.

3.03 CONTRACTS:

A contract is a legal act which creates an obligation by agreement of two or more persons. Both natural and legal persons may be parties to contract. A number of standard forms of contracts, namely, gift, sale, exchange, loan for consumption, loan for use, lease, employment, contract for specific work, mandate, bailment, partnership, life annuity and compromise, are governed by special provisions of Civil Code. Number of standard forms of commercial transactions, namely, sale, account current, undisclosed association, brokerage, commission agency, forwarding agency, carriage, deposit and insurance, are governed by special provisions of Commercial Code. However, these provisions may be modified by agreement of parties to contract.

Formation.

A contract arises through acceptance of an offer. An offer which recites a fixed time for acceptance cannot be withdrawn before termination of stated period. (C. C. 521). Dispatch of acceptance gives rise to contract, as also does occurrence of act which can be deemed declaration of intention to accept offer. (C. C. 526). Conditional acceptance of contract offer constitutes both refusal and counter-offer. (C. C. 528). Certain special provisions are applied to commercial transactions. (Com. C. 507 through 509).

Effect.

Either party to bilateral contract may refuse performance until other party tenders performance, except in situations where obligation to perform is not due. (C. C. 533). Once created under contract in favor of third parties, rights of third parties cannot be changed or extinguished by actions taken by original parties to contract. (C. C. 538). In case of bilateral contract for establishment or transfer of property right to specified property, when property is lost or damaged for reasons or cannot be performed for intervening cause not attributable to assignor, loss falls on assignee. (C. C. 534).

Rescission.

Right of rescission (*Kaijo*) may arise out of terms of contract, or by provisions of law. Normally its exercise is preceded by a formal demand for performance made on delinquent party. (C. C. 541). Rescission serves to restore matters to state in which they were prior to formation of contract. (C. C. 545). Usually it is effected by declaration of intention to opposite party, although this formality is not required in all cases. (C. C. 540). Rescission does not preclude a demand for damages. (C. C. 545). Each of multiple persons who constitute single party to contract must join in notice of rescission and each must receive notice of rescission from opposite party. (C. C. 544).

Excuses for Nonperformance.

With exception of monetary obligation, nonperformance for reasons not attributable to responsibility of obligor, such as force majeure, can be invoked as defense for nonperformance. (C. C. 415, 419). Unless specifically prohibited by law, such as that of contract for carriage by sea, parties can limit responsibility for nonperformance by special agreement. (C. C. 420; Com. C. 739; Consumer Contract Act 8 through 10).

Applicable Law.

Validity of contract is determined by law of place expressly or implicitly chosen by parties. (L. G. R. A. L. 7). In event of no choice governing law is that of place which had closest nexus with relevant legal act when such act was conducted. (L. G. R. A. L. 8).

Government Contracts.

In order to produce budgetary conformity, certain special statutory requirements exist for contracts to which government, either national or prefectural, is a party. These provisions generally take form of regulations of actions of government contracting officials, such as requiring competitive bidding, use of written contracts and inclusion therein of certain matters required by law, plus performance bonds of at least 10% of amount of contract, which they may waive under certain circumstances. (National Accounting Law 29 through 29-12).

Distributorships, Dealerships and Franchises.

There are no special rules applicable to formation and termination of these types of business arrangements. However, there are several judicial precedents where court decided in favor of distributor by restricting termination by seller without cause, although no rules or criteria for such decisions have been established.

3.04 FRAUDS, STATUTE OF:

Although Japan has no specific statute of frauds, certain forms of expression of intention, such as wills and corporate instruments, must be in writing or executed before notaries. (C. C. 968, 969, 970, 972; Com. A. 30).

3.05 INFORMATION TECHNOLOGY, INTERNET AND NEW MEDIA:

Computer programs are qualified for copyright protection as “works of programs” under Japanese Copyright Law, if they are original works created by authors, in short, if they are created independently and not copies of other computer programs. However, to be considered creative, minimum creativity is enough, and other criteria such as quality or performance are not applicable to copyright protection. Related documentations of computer programs are also protected by copyright as literary works.

Authors of computer programs have exclusive right to reproduce, publicly transmit, prepare any derivative works of computer programs and to transfer or lease copies of computer programs. Employer becomes author of computer programs created or developed by its employees as works made for hire, in course of their employment, and employer owns all copyrights in and to computer programs as well as moral rights thereto. (C. L. 15). Copyright merely protects creative expression, and any ideas and algorithms underlying code of computer programs are not protected by copyright but by trade secret. Japanese copyright law provides nothing with regard to reverse engineering of computer programs. Accordingly, effect of agreement which prohibits reverse engineering of computer programs is not clear under law.

Integrated Circuits.

Rights to use circuit layouts can be protected by registering them under Law Concerning Circuit Layouts of Integrated Circuits. Circuit layout to be registered must be applicant's own work. Such work does not lose its registrability even if it is same as one already created by another person, so long as there is no imitation involved. Employer becomes creator of circuit layout created by employees as works made for hire, in course of their employment, unless otherwise contracted or provided in working regulations. Application for registration of right to use circuit layout must be submitted by its creator or its successor within two years from day immediately following day when he, in his course of business, assigned or lent such circuit layout, or displayed or imported it for assignment or lease thereof. Person who registered circuit layout has exclusive right to produce, assign or lend copies thereof, and to display or import them for assignment or lease thereof, under this law. Duration of protection of right to use circuit layout is ten years from registration thereof. In this law, there are certain restrictions on validity of rights to use circuit layouts. For example, Art. 12-2 of this law provides that reverse engineering of circuit layouts does not infringe right to use them.

E-Commerce.

Providing E-Commerce services per se does not require public license or approval, as rule.

E-Commerce is regulated to some extent by Specified Business Transactions Law (“Law”). Law applies to contracts on delivery of goods or provision of services defined by Law as having been entered into with consumers who are offered contracts exclusively by means of telecommunication media, such as electronic letters and catalogues, telephone, fax or email, as well as by means of door-to-door sales. Law regulates advertisement and solicitations of such goods and services and process of execution of contracts. Amended Law, which will be effective on Dec. 1, 2009, provides that companies will be prohibited to send advertisement to any consumers without their prior consent and that consumers will be entitled to cancel contract concerning internet transactions within eight days from effective date of contract in case terms and conditions regarding cancellation of contract are not represented in its advertisement. Also, Presentation concerning Internet transactions or provision of premiums over Internet is regulated by Act Against Unjustifiable Premiums and Misleading Presentations.

E-Commerce is also subject to Installment Sales Law, which applies to contracts on delivery of goods or provision of services defined by this law whose price is paid in installments with credit card or other credit methods.

In addition, E-Commerce is subject to Consumer Contract Act (May 12, 2000), which grants consumer right to cancel order for goods or services for six months from time he can confirm such order for five years from execution of contract if such order has been made due to entrepreneur's misrepresentation of essential matters concerning transaction. Consumer Contract Act also invalidates certain exemption clauses in consumer contracts.

Database Protection.

Database is identified as “Collection of essays, numerical values, charts and other information which are arranged systematically so as to search for such information by means of computers”. (C. L. 2). Databases having creativity by virtue of selection of information or systematic arrangement are protected by copyright as works of authorship. (C. L. 12-2). Duration of copyright protection is 50 years after death of author in principle (in case of movies, duration of copyright protection will be extended to 70 years from its first publication or 70 years from creation, if it has not been published, under amendment to Copyright Law that will take effect on Jan. 1, 2004), and in case of works of authorship, including databases, authorship of which belongs to legal person or any other association, copyright protection continues for 50 years from their first publication (or 50 years from creation, if they have not been published). (C. L. 51, 53). Sui generis right of databases does not exist under Japanese law.

Digital signature and certification services were introduced by Law concerning Electronic Signatures and Certification Services (May 31, 2000). This law grants presumption that electronic information recorded in electronic-magnetic media with digital signature of originator has been truly prepared by originator and grants digital signature same effect as signature or registered stamp. And this law provides recognition system of “Certification Services” meeting certain standards for services, because third party certification authorities are required to implement “Public Key Infrastructure”, currently accepted technology for ensuring validity of digital signatures. However, obtaining such recognition by authority is not necessarily required for providing such services.

Telecommunications business is regulated by Telecommunications Business Law. There are two types of telecommunications businesses in terms of this law, i.e., Type 1 and Type 2. Type 1 is that kind of telecommunications business run by common carriers, i.e., those providing telecommunication services using their own telecommunication circuit facilities (circuit lines, switching and other related facilities). Type 2 is telecommunications business other than Type 1 business, that is, telecommunications business utilizing communications circuit facilities owned by common carrier. Internet services provided by provider that is not common carrier falls under category of Type 2 telecommunications business.

Type 1 telecommunications business is subject to approval of Ministry of Public Management, Home Affairs, Posts & Telecommunications (Public Management Ministry) under

Art. 9 of this law.

Type 2 telecommunications business is divided into Special Type 2 and General Type 2 telecommunications businesses, depending on facilities to be used for telecommunication services and whether services involve international communications. Special Type 2 telecommunications business is subject to requirements for registration with Public Management Ministry and General Type 2 telecommunications business is subject to reporting to requirements for Public Management Ministry.

Construction of network using radio equipment by telecommunications carrier is regulated by Radio Law.

Law concerning Restriction on Telecommunications Services Providers' Liability for Damage and Disclosure of Sender's Information (Nov. 30, 2001) clarifies responsibility of provider, etc. and restricts its liability for certain damages, and entitles person, whose right is violated by distribution of information through telecommunication services, to demand disclosure of sender's information from provider, subject to certain requirements.

3.06 INTEREST:

Loan interest rates may not exceed 20% per annum if principal is less than 100,000 yen, 18% if 100,000 yen or over and less than 1,000,000 yen, and 15% if 1,000,000 yen or over. If not specified, rate is 5% per annum on civil transactions and 6% on commercial transactions. (C. C. 404; Com. C. 514; Usury Law 1).

According to court precedents, if interest has been paid voluntarily at rates over above maximum rates prescribed in Usury Law, excess is deemed to have been applied toward principal repayment.

If interest for one year or more is not paid despite payment request, it may be added to principal of obligation and compound interest may be charged. (C. C. 405).

Contract for or actual receipt of interest at rates exceeding limits prescribed in Law Concerning Control on Acceptance of Contributions, Deposits and Interest Rates, Etc. is punishable. (Law Concerning Control on Acceptance of Contributions, Deposits and Interest Rates, Etc. 5).

Under this law, maximum permissible interest rate to be charged by money-lending traders, in their course of business, is 0.08% per day or 29.2% (or, in case of leap year, 29.28%) per year and maximum permissible interest rate to be charged by persons who lend money other than in their course of business is 0.3% per day or 109.5% (or, in case of leap year, 109.8%) per year.

Subject to certain requirements, interest paid voluntarily to money-lending traders, in their course of business, at rates over maximum rates under Usury Law but not exceeding maximum permissible rates under Law Concerning Control on Acceptance of Contributions, Deposits and Interest Rates, Etc. is deemed to be valid interest notwithstanding provisions of Usury Law. (Law of Restrictions, Etc. on Money-Lending Business 43).

3.07 LICENSES, BUSINESS AND PROFESSIONAL:

See category 17 Intellectual Property, topic 17.02 Patents. Licensing of industrial know-how concerning certain kinds of technology is regulated as element of foreign investment. See also category 14 Foreign Trade and Commerce, topics 14.02 Foreign Exchange and Foreign Trade, and 14.03 Foreign Investments.

3.08 MONOPOLIES, RESTRAINT OF TRADE AND COMPETITION:

Private monopolization, unreasonable restraint of trade and unfair business practices are prohibited under Law Relating to Prohibition of Private Monopoly and Methods of Preserving Fair Trade (“Anti-Monopoly Law” or “AML”). Japan Fair Trade Commission (``JFTC''), consisting of five members enforces provisions of this Law. Its findings are subject to review by Tokyo High Court. JFTC checks business transfers, mergers and shareholding status (including that of foreign firms), all of which are subject to certain restrictions. Holding company is permitted under certain conditions. Amendment of AML became effective as of Jan. 1, 2006. Amended AML (``2005 Amended AML'') increases surcharge, introduces leniency program, amends JFTC hearing procedures and introduces compulsory investigations. Change is dramatic. For example, under 2005 Amended AML, JFTC may issue cease and desist orders without formal hearings. Supplementary provision of 2005 Amended AML provides that government shall examine surcharge system, procedures for cease and desist orders and hearing procedures, and shall take necessary measures based on result of such examination within two years of enforcement of 2005 Amended AML. On basis of such provision, discussion sessions with experts relating to 2005 Amended AML were held from July 2007, and Diet passed further amendment bill which will become effective as of Jan. 1, 2010 (``2009 Amended AML''). 2009 Amended AML provides that exclusionary types of private monopolization and certain types of unfair business practices will be additionally subject to surcharges: such practices are concerted refusal to trade, discriminatory pricing, unjust low price sales, resale price restriction, and abuse of superior bargaining position. Statute of limitations for administrative order, including surcharge order, will be extended from three years to five years. 2009 Amended AML will also revise regulations on business combinations: prior notification system for share acquisitions will be introduced, percentage thresholds will be simplified from three-step thresholds (10%, 25% and 50%) to two-step thresholds (20 % and 50% on basis of voting rights held by ``corporate group'' as whole: group of corporations consisting of ultimate parent company of acquiring corporation and its subsidiaries), and minimum yen threshold of acquiring company will be revised to 20 billion yen on basis of total domestic turnover of corporate group and that of acquired company to 5 billion yen.

3.09 NEGOTIABLE INSTRUMENTS:

See topic 3.01 Bills and Notes.

3.10 SALES:

Nature.

Sale is form of contract created when one person agrees to transfer property right to another party and other party agrees to pay price for it. (C. C. 555). Where option contract does not provide option period, option grantor may urge option grantee to exercise option by giving reasonable option period. (C. C. 556). When neither party has yet begun to perform contract of sale in which bargain money (Tetsuke) has been given, purchaser may rescind contract of sale by forfeiting that sum and conversely vendor may rescind by refunding double amount of bargain money. In both cases, further claims for damages are barred. (C. C. 557).

Warranties.

Following warranties exist in respect to sales, and even express provision for freedom therefrom will not release vendor if his liability arises out of facts of which he had knowledge but did not reveal to purchaser (C. C. 572) or if breach results from creation or assignment of rights by vendor to third persons: (1) Vendor has obligation to acquire and transfer to purchaser right of third person which has been made subject of sale. (C. C. 560). Failure of vendor to perform his obligation entitles purchaser to rescind contract, and to receive damages if he had no knowledge, at time of contract, that particular right did not belong to vendor. Vendor has similar right to rescind, upon payment of damages, if he lacked knowledge, at time of contract, of fact that he did not possess that right. (C. C. 561, 562). (2) Purchaser may demand reduction in price if thing sold is deficient in stipulated quantity, or if vendor is unable to transfer full right because part thereof belongs to another person. Or, if purchaser having acted in good faith would not have bought remaining part alone, he may rescind contract. Reduction in price or rescission still leaves vendor liable for damages to purchaser acting in good faith. (C. C. 563, 565). All rights to obtain reduction, to rescind, or to claim damages, must be exercised within one year of purchaser's knowledge of fact, if he acted in good faith or one year from day of contract if he acted in bad faith. (C. C. 564, 565). (3) If object of sale is subject to superficies, emphyteusis, servitude, lien or pledge, or contains latent defect of which purchaser had no knowledge at time of contract, purchaser may rescind contract, providing encumbrance or defect prevents attainment of objective for which contract was made; otherwise purchaser has right for damages alone. Both recovery of damages and rescission are barred one year after purchaser obtains knowledge of fact. (C. C. 566, 570). (4) If purchaser loses ownership of immovable as result of exercise of preferential right or mortgage covering property, he may rescind and claim damages as well. (C. C. 567).

Price.

Expenses in connection with sales must be borne equally by both parties. (C. C. 558). Date fixed for delivery of subject of sale is presumed to be date of payment. (C. C. 573). Fruits of thing sold but not delivered belong to vendor. Purchaser is liable for interest on purchase price from date of delivery, unless another date for payment has been provided. (C. C. 575). If right is asserted by third party in respect to subject of sale, purchaser may refuse to pay whole or part of purchase price unless vendor furnishes suitable security. (C. C. 576). If preferential right exists or right of pledge or mortgage is registered in respect to immovable which is subject of sale, purchaser may refuse to pay purchase price until process to remove encumbrance (Tekijo) has been completed. (C. C. 577).

Repurchase.

This is type of security device in which vendor of immovable may, by special provision in sale agreement, be provided with right of repurchase, through exercise of which he may rescind sale through repayment of purchase price plus expenses. Unless contrary provision is made, fruits of immovable and interest on purchase price are deemed to offset one another in event of repurchase. (C. C. 579). Term in which repurchase is possible cannot exceed ten years, and in absence of specifically provided term, repurchase must occur within five years. (C. C. 580). When creditor of vendor seeks to exercise vendor's right of repurchase, purchaser may retain ownership of property by discharging vendor's obligation out of excess value of property over and beyond purchaser's price plus expenses and returning any remaining excess to vendor. (C. C. 582). If one co-owner has sold his share in immovable with provision for repurchase, and immovable later is partitioned, former co-owner (vendor) may repurchase that part of property received by purchaser in division. (C. C. 584). If purchaser received payment upon later auction of co-owned immovable, vendor (former co-owner) may assert claim to extent of proceeds less purchase price and expenses. (C. C. 584).

Special Rule Between Merchants.

In case of sale between merchants as defined in Commercial Code including business corporations, if purchaser refuses or is unable to accept delivery of subject of sale, vendor may deposit it with government deposit office or may sell it at public auction after notifying purchaser to accept it within reasonable time. Perishable goods may be sold at public auction without notification. Vendor has right to appropriate whole or part of proceeds of sale to satisfaction of purchase price but must deposit remainder with government deposit office. (Com. C. 524). If, according to nature of sale or any declared intention of parties, object for which contract was made cannot be attained unless performed at fixed time or within fixed period, and such time has elapsed without either party not having performed his obligation, other party is deemed to have rescinded contract unless he demands performance immediately. (Com. C. 525). Purchaser must examine subject of sale without delay upon taking delivery, and must notify seller of any defect or shortage in quantity. Failure to take action provided above prevents purchaser from rescinding contract or demanding reduction in price or damages. Immediate notification also must be given in situations where hidden defects are discovered within six months, if purchaser is to preserve similar rights. Bad faith on part of vendor, however, removes purchaser's obligation to give immediate notification in cases mentioned above. (Com. C. 526). When purchaser rescinds, custody of subject of sale is at expense of vendor. When there is danger of loss or deterioration of subject of sale following rescission, purchaser must obtain order of court and sell goods at auction; proceeds of sale shall be placed in public deposit or kept in purchaser's custody and vendor given immediate notice of auction sale, if he does not reside or do business in same city, town or village as purchaser. (Com. C. 527). Similar rules apply when delivered goods differ from those ordered or are delivered in excessive amount. (Com. C. 528).

Notices Required.

No written notice is required for claim of nonconformity against seller after delivery.

Applicable Law.

Choice of law rules follow those of contracts in general (see topic 3.03 Contracts) but with regard to property rights or other rights to be registered in respect of real properties or personal chattels, law of location of relevant property or chattels governs. (L. G. R. A. L. 7, 13).

4 CITIZENSHIP

4.01 ALIENS:

See category 16 Immigration, topic 16.01 Aliens.

4.02 IMMIGRATION:

See category 16 Immigration, topic 16.02 Immigration.

5 CIVIL ACTIONS AND PROCEDURE

5.01 ACTIONS:

Service of process is in all cases court's responsibility. Service can be made through competent government office or Japanese consular officials in foreign country. (C. C. P. 108). Evidence may be obtained from overseas by letters rogatory or by means of testimony taken before Japanese consular officials commissioned by court. (C. C. P. 184). Documents prepared by governmental officials in exercise of their functions, even officials of foreign government, are presumed to be authentic, but authenticity of private documents, including depositions taken by private attorneys, must be proved. (C. C. P. 228). Foreign law is presumed to be within court's knowledge. In case of uncertainty court obtains expert testimony or makes inquiry directly of public or private organization competent to respond. (C. C. P. 186, 218). Japan is party to certain conventions relating to civil procedures. (See category 23 Treaties and Conventions, topic 23.01 Treaties.)

See also category 3 Business Regulation and Commerce, topic 3.01 Bills and Notes.

Discovery is not available under Japanese law.

5.02 COSTS:

The successful party generally recovers costs although these may be apportioned at court's discretion. (C. C. P. 61-74). Such costs do not include attorneys' fees except for tort actions. Nonresident plaintiff may be required to provide security to cover potential costs unless he is national or corporation of country which is party to Convention Relating to Civil Procedures of Mar. 1, 1954 having made no reservation. (C. C. P. 75-81). Filing fees for civil actions are relatively high and are based upon amount of relief.

5.03 EVIDENCE:

Witness examination must be conducted as intensively as possible after classifying issues and other evidence. (C. C. P. 182). Court order to produce certain document is widely available and exception is limited in such order in relation to refusal right to testify or when solely for possessor's use. (C. C. P. 223, 220). Whether or not such exception is applicable is determined by in-camera procedure. (C. C. P. 223).

Testimony for use in foreign countries is available through letters rogatory only when these are forwarded to Japanese court through diplomatic channels on reciprocal basis and are accompanied by full Japanese translation. Present official interpretation of Japanese law is that depositions may not be taken before foreign consular officials in Japan, unless otherwise specifically provided in consular treaty such as that with U.S.A.

5.04 INJUNCTIONS:

See category 7 Debtor and Creditor, topic 7.03 Attachment and Injunctions.

5.05 JUDGMENTS:

Final judgment issued by a foreign court is recognized as binding only when: (1) Jurisdiction of foreign court is not denied by Japanese law or treaties, (2) service was made on defeated party by other means than publication or the like, or he appeared without such notice, (3) judgment is not contrary to public order and good morals of Japan, and (4) foreign government reciprocates through recognition of Japanese judgments. (C. C. P. 118). Execution of final and conclusive foreign judgment meeting with above conditions is possible only when competent Japanese court has affirmed validity of that judgment in special action. (C. E. L. 24). Full reciprocity does not exist with U.S.A. by treaty, but reciprocity will be afforded upon proof of recognition of Japanese judgments in foreign jurisdiction.

5.06 LIMITATION OF ACTIONS:

Time limitations are individually provided in various laws and operate automatically. Such limitations differ from extinctive prescription (see topic 5.07 Prescription) whereunder assertion must be made in litigation in order to be effective; also effect is retroactive. (C. C. 145, 144). Seller's warranty regarding sales contract of movables is subject to one year limitation of actions. (C. C. 564 through 566, 570).

5.07 PRESCRIPTION:

Japanese concepts distinguish extinctive prescription, acquisitive prescription and limitation of actions. Prescription must be asserted to obtain court recognition and its benefits cannot be waived in advance. (C. C. 145, 146).

Period for extinctive prescription is ten years in case of personal obligations in general, five years for obligations arising from commercial transactions, or 20 years for all other property rights excluding ownership. (C. C. 167; Com. C. 522). However, following special terms are provided: (1) Five years for obligation to deliver money or other things which will become due periodically once a year or at shorter intervals, or monetary claim in general of or against government (e.g. tax obligation); (2) three years for obligations in favor of doctors, construction engineers, contractors, etc.; (3) three years for tort liability after awareness of damage and identity of tortfeasor; (4) two years for obligations in favor of lawyers, Legal Profession Corporation and notaries when arising out of their duties (dated from completion of services) or five years in regard to performance of any particular service by such persons; (5) two years for obligations in favor of producers, wholesalers, retailers, masters and teachers, etc.; (6) one year for obligations for wages of workers by month or lesser period and professional entertainers, freight charges, for rooms and lodgings, rent of movables; (7) one year for claims arising from general average or from collision between ships, etc.; and (8) six months, one year or three years for various liabilities arising out of bills, notes and checks. (C. C. 167 through 174, 724; Com. C. 798; L. B. N. 70, 77; L. C. 51). See category 3 Business Regulation and Commerce, topic 3.01 Bills and Notes.

Interruption of prescriptive period results from: (1) Demand, such as occurs through judicial action which is not dismissed or withdrawn, participation in bankruptcy, or formal demand notice if followed within six months by institution of action; (2) seizure, attachment or injunction; and (3) acknowledgment. (C. C. 147 through 156). Prescription which has been interrupted commences to run anew from time when cause of such interruption was concluded. (C. C. 157).

Suspension of effects of prescription may also occur for six months following recovery of capacity or appointment of guardian, if minor or full-age guarded person had no legal representative during six months preceding end of prescriptive period. (C. C. 158). Likewise actions between husband and wife may be brought within six month period following divorce. (C. C. 159). Prescription also is suspended in respect to inherited property until six months after confirmation of successor, selection of administrator for property, or adjudication of bankruptcy. (C. C. 160). When natural calamity has prevented interruption of prescription, prescriptive period does not mature until two weeks following removal of the impediment. (C. C. 161).

Acquisitive prescription of ownership is accomplished in 20-year term in respect to possession of property in general, and ten-year period when possession initially was acquired in good faith. (C. C. 162, 163). See topic 5.06 Limitation of Actions.

5.08 SEQUESTRATION:

Court may issue ancillary attachment order for purpose of preservation of enforcement of monetary claims or restraining order for purpose of preservation of rights which are liable to change and adversely affect interests of litigant.

6 COURTS AND LEGISLATURE

6.01 COURTS:

Supreme Court, high courts, district courts, family courts and summary courts comprise the judicial institutions in Japan. There are no local or special courts in Japan. (C. 76, C. T. L. 2).

Supreme Court consists of a Chief Justice who is appointed by Emperor upon designation by Cabinet and 14 Associate Justices who are appointed by Cabinet, subject to recall public vote at next general election and at ten-year intervals. (C. 79, C. T. L. 5). Court operates through petty benches of three or more justices except that grand bench of all justices acts in cases involving constitutional questions and cases referred from petty bench requiring change in established precedents when petty benches have expressed different opinions, when opinions of justices in petty bench are equally divided, or when petty bench deems it proper for grand bench to handle case. (C. T. L. 9, 10; Rules Concerning Disposition of Judicial Business of Supreme Court 9). Court's consideration of appeals is limited. By constitutional provision it has rule-making power over procedures and practice, which is interpreted as being subordinated to statutory enactments. (C. 77).

With minor exceptions high court's function is purely appellate, and for many cases its decisions are final. High court normally operates through panels of three judges. (C. T. L. 16, 18).

District courts constitute principal trial courts. They exercise general jurisdiction over all civil and criminal actions not specifically given to other courts. However, they, together with summary courts, have jurisdiction over civil actions concerning real property even if claims involved are not more than 1,400,000 yen. (C. T. L. 24, 33). Normally district court maintains a number of branches, which are territorial. District court operates through three judges or through single judge, depending on nature and importance of case involved. (C. T. L. 26).

Family court parallels district court and has jurisdiction over domestic matters and juvenile delinquency cases and criminal actions involving protection of juvenile interest. (C. T. L. 31-3).

Summary court handles minor civil actions involving claims of not more than 1,400,000 yen, and criminal actions in which punishment is limited to not more than three years imprisonment for certain types of cases and to fine or lesser penalty. (C. T. L. 33). Single judge of summary court has broad latitude in conduct of trials. (C. T. L. 35).

6.02 LAW REPORTS, CODES:

See topics 6.04 Reports, 6.05 Statutes.

6.03 LEGISLATURE:

See category 1 Introduction, topic 1.02 Government and Legal System.

6.04 REPORTS:

Judicial decisions are persuasive but not formally binding as precedents. Selected cases from the Supreme Court and inferior courts are published.

6.05 STATUTES:

The principal codes are the Constitution, Civil Code, Penal Code, Commercial Code, Companies Act, Code of Criminal Procedure, Code of Civil Procedure and Civil Execution Actg. Provisions of special statutes when applicable will supersede general codes but not Constitution.

7 DEBTOR AND CREDITOR

7.01 ASSIGNMENTS:

Assignment of property right, whether real or personal property, may be made by means of agreement between parties. (C. C. 176). However, in order for assignment to be effective against third persons, assignment of immovables must be recorded, and those of movables must be accompanied by delivery. (C. C. 177, 178). Obligations may be assigned if their character renders assignment possible, unless parties have expressed contrary intention. (C. C. 466). Specifically named obligee must give notice of assignment to obligor or secure his consent in order to assert assignment against either obligor or other third party. Notice of assignment or consent to assignment must be in writing and bear officially confirmed date (kakutei hizuke) in order to assert assignment against third party other than obligor. (C. C. 467). Under Law Prescribing Exceptions, etc. to Requirements for Perfection of Assignment of Claims under Civil Code (“Perfection Law”) perfection of assignment of monetary nominated claims (shimei saiken) by legal entity (hojin) against third party can be achieved by registering assignment with Tokyo Legal Affairs Bureau. Perfection Law obviates, in relation to third party, need of delivering notice to or receiving consent from obligors and having such notice or consent date stamped.

7.02 ASSIGNMENTS FOR BENEFIT OF CREDITORS:

See topic 7.04 Bankruptcy.

7.03 ATTACHMENT AND INJUNCTIONS:

Attachment is available before judgment (or even before institution of an action) upon proof (a) of existence of creditor's claim for money, and (b) that satisfaction of judgment will be impossible or extremely difficult unless attachment occurs. (C. P. E. L. 20). Attachment normally is issued ex parte without examination of or notice to debtor and as general rule requires posting by creditor of bond to secure debtor. (C. P. E. L. 14). Attachment order may be attacked by debtor on ground that it was issued without any reason, that it has been rendered unnecessary by change in circumstances, and that action on principal claim was not instituted within proper and prescribed period of time. (C. P. E. L. 26, 37, 38). Attachment may be dissolved by deposit of prescribed amount in cash. (C. P. E. L. 22). Same general procedures apply to injunctions.

7.04 BANKRUPTCY:

Term “insolvency” as used in Bankruptcy Law has restricted meaning of simply debtor's inability to make payments. (B. L. 15). Joint stock company's inability to pay its debts without resulting in great difficulty in continuing its business also forms basis for institution of extensive reorganization processes under Company Reorganization Law. (Company Reorganization Law 17). Fear of insolvency on reasonable ground can be basis for still other reorganization procedures under Commercial Code. (Com. C. 381). In event there exists (i) any circumstances which would cause extreme obstacle to performance of liquidation of stock company, or (ii) any doubt as to solvency of stock company, court may order commencement of special liquidation proceedings in respect of such stock company, under Commercial Code. (Com. C. 431). Petition for commencement of civil rehabilitation proceedings may be made under Civil Rehabilitation Law, in event (A) there exists any fear of occurrence of event constituting cause of bankruptcy on part of obligor, or (B) obligor cannot pay its debt due without experiencing extreme difficulty in continuing its business (in case of such petition by creditors, only item [A] shall apply). (Civil Rehabilitation Law 21).

Petitions.

Bankruptcy proceedings are instituted through petition to district court having jurisdiction over principal place of business or legal residence of debtor who may be either natural person or juridical person. Bankruptcy proceedings are instituted through petition to district court having jurisdiction over principal place of business or legal residence of debtor who may be either natural person or juridical person. Exceptions are provided. For example, where bankruptcy proceedings are pending with certain district court against principal debtor, bankruptcy proceedings against guarantor may be instituted with same court which otherwise would have no jurisdiction over guarantor. (B. L. 5). Petitions may be made by creditors or by debtor himself. (B. L. 18). In case of legal person its director or liquidator also may make petition. (B. L. 19). Ground for bankruptcy is debtor's inability to make payments, or (in case of legal person) excess of liabilities over assets. (B. L. 15, 16). Debtor's suspension of payments on debts is treated as prima facie evidence of inability to make payments.

Administration.

Upon adjudication of bankruptcy (commencement of bankruptcy proceedings), court appoints receiver, orders report of claims and requires assembly of creditors. (B. L. 31). Assembly of creditors may appoint advisers to receiver, grant allowances to debtor, make decisions regarding continuation of business operations, and consent to important acts in liquidation of bankrupt estate. (B. L. 170, 194). As consequence of adjudication of bankruptcy, bankrupt person is immediately deprived of control over such of his property as is subject to legal attachment. (B. L. 34, 78).

Outstanding Obligations.

Obligations of bankrupt to third parties become due upon adjudication of bankruptcy. (B. L. 17). If performance of both parties to outstanding bilateral contract has not been completed, receiver may rescind such contract or demand performance by opposite party after performing bankrupt's obligation. (B. L. 59). Opposite party to bilateral contracts may call on receiver to make election regarding performance or rescission, and in event of failure of answer within reasonable period, rescission is presumed. (B. L. 59).

Powers of Receiver.

Power to administer and dispose of bankrupt estate belongs exclusively to receiver. (B. L. 78). Receiver represents bankrupt estate in litigation. (B. L. 80). Application may be made to him for restoration of property of third persons and also for payment of preferential claims against bankrupt estate in general or existing in regard to specific items of property included therein. He also may institute action to disapprove legal acts of debtor taken before issuance of adjudication of bankruptcy which were intended to prejudice creditors. (B. L. 162).

Preferential Payment.

Lien holders, mortgagees or pledgees on specific property included in bankrupt estate are entitled to be satisfied separately from such property outside receiver's control and to participate in bankruptcy proceedings only to extent of any deficiency. (B. L. 65, 66). Persons whose own property has come under receiver's control as bankrupt estate can regain such property from his control. (B. L. 62 through 64). Certain tax liabilities of bankrupt person can be paid by receiver outside of bankruptcy proceedings. (B. L. 148, 151). After these preferential treatments and payments are completed, lien holders on general property of bankrupt person receive distributions preferentially from bankrupt estate ahead of ordinary creditors. (B. L. 98). Receiver may deny and restore to bankruptcy estate repayments by bankrupt persons to creditors at certain time prior to occurrence of insolvency or application filed for bankruptcy or those simply prior to adjudication of bankruptcy if mala fides on part of repaid creditor is proven to affect adversely other creditors. (B. L. 160 et seq.).

Illegal Preferences.

See subheads Powers of Receiver and Preferential Payment, supra.

Termination.

Normally bankruptcy proceedings are terminated with distribution of assets to creditors. Distributions may be intermediate, final or supplemental. (B. L. 193 et seq.). However, decree in bankruptcy may be dissolved with consent of all creditors. (B. L. 218 et seq.). Bankruptcy proceedings also may be ended upon judicial finding that value of bankrupt estate is not sufficient to repay costs of liquidation. (B. L. 216, 217).

Disabilities of Bankrupt Persons.

A person against whom an adjudication of bankruptcy is outstanding is subject to certain losses of rights, such as right to hold public office, and to practice law. However, these disabilities may be removed by court decree of rehabilitation in event of full payment of indebtedness, decision of discharge, or lapse of ten years without being punished for fraudulent bankruptcy. (B. L. 255, 256, 367).

Reorganization.

A reorganization proceeding permits creditors and shareholders of joint stock corporations to present plan for reorganization of company to court for approval. Decisions made by majority (usually from one-half to four-fifths) of each class of creditors, shareholders or mortgagees are binding upon all persons within that class. (Company Reorganization Law, also see Com. C. 381 through 403).

Rehabilitation.

The Civil Rehabilitation Law allows any person, regardless of whether such person is natural person or legal entity (hojin), to file petition for rehabilitating, rather than liquidating, such person's business or economic life. See also introductory paragraph of this topic.

Foreigners.

Bankruptcy procedures apply uniformly to Japanese and foreigners. (B. L. 3).

7.05 EXECUTIONS:

Execution follows from judgment of court, from settlement made in court or through conciliation procedures, from court order of payment or decree for provisional execution or from certain categories of contracts which provide for payment of fixed amount of money or securities and which are executed before notary public. (C. E. L. 22). (See category 9 Documents and Records, topic 9.02 Notaries Public, subhead Officially Authenticated Instrument). In all of above cases, however, execution certificate which certifies as to existence and maturity of obligation, must be obtained either from clerk of court issuing order or notary public certifying as to contract. (C. E. L. 25 through 27). Execution is conducted by bailiff or court, according to nature of claim or property. (C. E. L. 2, 3, 44, 113, 122, 143, 167).

Claim of a monetary nature may be satisfied through seizure of cash, seizure and sale at auction of property in debtor's hands, or through court order for assumption of management of real property. (C. E. L. 43, 112, 134). Obligations calling for surrender of particular item of property may be satisfied by seizure and transfer to creditor and obligations requiring merely legal action may be ordered by court. (C. E. L. 168, 169, 173). Specific performance is not available for obligations which can be performed only by debtor or through his inaction. See topic 7.08 Garnishment.

Creditors entitled to execute their monetary claims by themselves and certain other specified creditors may apply for share in distribution of sales proceeds of real property, vessels and airplanes during period specified by court. (C. E. L. 49, 51, 121 and Civil Execution Rules 84).

Holders of preferential rights and pledgees may apply for share in distribution before seizure of cash or before receipt by bailiff of sales proceeds of movables. (C. E. L. 133, 140).

See also topic Preferential Rights.

Exemptions from Execution.

See topic 7.07 Exemptions.

7.06 EQUITABLE LIEN:

Equitable lien is real right (i.e., right in thing) which affords its holder position superior to other creditors in respect to satisfaction of obligation from either entire property of debtor or from some particular item of his property. (C. C. 303). It arises by operation of law rather than by agreement. All equitable liens are specifically provided by statute. (C. C. 306 through 341). Their enforcement requires auction sale of property concerned. (C. E. L. 181, 189, 190). Provisions concerning auction sale for execution of judgment of court (see topic 7.05 Executions) are generally applicable in enforcement of equitable lien. (C. E. L. 188, 189, 192).

General equitable liens are those which attach to all of property of debtor. Those provided by Civil Code arise in regard to: (a) expenses incurred for common benefit of all creditors in connection with preservation, liquidation or distribution of debtor's property, (b) last six months of wages for servants, (c) funeral expenses of debtor or of relatives for whose support he is liable, and (d) last six months' supply of comestibles, and firewood, charcoal and oil necessary for debtor, his servants, and his relatives living with him and to whom he owes a duty of support. (C. C. 306 through 310). Order of priority of above-mentioned equitable lien is that given. However, as between these liens and special equitable liens, latter prevail. (C. C. 329). Order of recourse to property of debtor in enforcement of general equitable lien is (1) movables, and (2) immovables which are not subject of special security. (C. C. 335).

Special equitable lien differs in respect to movables and immovables. Equitable lien may exist in respect to following categories of movables: (1) Movables which belong to or are attached by lessee to land or buildings (i.e., fixtures), movables employed in use of land, and fruits of land which remain in possession of lessee, (2) baggage in possession of hotel, in respect to bill of guest, servants and animals, (3) luggage in possession of carrier, in regard to fare of traveler, cost of transportation of luggage and other miscellaneous expenses, (4) bonds deposited by public official, in respect to obligations arising as result of negligence in performance of his duty, (5) movables in respect to costs of their preservation, (6) movables in respect to purchase price for which they were acquired, (7) fruits derived from land for period of one year, in respect to seeds, seedlings and fertilizer supplied for use on land, and similar right to silk products in case of supply of silkworms or mulberry leaves, and (8) fruits or manufactured articles which are product of labor, in respect of agricultural wages for one year, and for industrial wages for three months. (C. C. 311 through 324). Priorities between special preferential rights pertaining to same movables are set by statute, although in certain instances knowledge of prior right serves to disqualify holders of otherwise superior right which was created later. (C. C. 330).

Special equitable liens pertaining to immovables are ranked as follows: (1) Money necessary for their preservation or for enforcement of rights required for their preservation, when registered immediately; (2) work done by artisans, engineers, or contractors, in regard to increase in value effected thereby when registered in advance of performance; and (3) sale price with interest, if registered at time of a contract for sale. (C. C. 326, 337, 327, 338, 328, 340). See category 22 Transportation, topic 22.02 Shipping.

7.07 EXEMPTIONS:

Exemptions from execution are following: clothing and household equipment needed by debtor; food and fuel for debtor and his family for two month period; cash not exceeding 210,000 yen; implements and tools of technicians, laborers, farmers, and other varieties of professional men; three-fourths (in principle) of income derived from pensions and remuneration of workmen; seals, decorations and awards, genealogical materials and objects of worship; unpublished manuscripts or unrevealed inventions; and school books. (C. E. L. 131, 152 and Civil Execution Enforcement Ordinance 1).

In addition court is empowered to provide additional exemptions when necessary to afford debtor proper means with which to recoup himself. (C. E. L. 132, 153).

7.08 GARNISHMENT:

Outstanding claim of debtor may be attached by his creditor through court order of garnishment which prohibits garnishee from discharging his obligation to original debtor, and also forbids debtor to dispose of or accept payment for obligation. (C. E. L. 145). Payment in violation of this court order cannot be set up against garnisher.

Exemptions from garnishment are as stated under topic Exemptions.

7.09 INSOLVENCY:

See topic 7.04 Bankruptcy.

7.10 LIENS:

Lien is right of retention of object (movable or immovable), which is security for obligation created in relationship to that object. (C. C. 295). It affords lien holder initially right to deprive owner of possession until obligation is performed and right to apply for auction sale of property concerned to collect his claim, although he has no priority in distribution of sales proceeds. Provisions concerning auction sale for enforcement of preferential rights are applied to auction sale applied for by holder of lien. (C. E. L. 195). See topic Preferential Rights. Holder of lien arising out of commercial transactions is entitled to priority over unsecured creditors in event of bankruptcy of debtor. (Com. C. 51, 521, 557, 562, 589, 753; B. L. 93). Retention of possession is essential for most types of liens. In case of immovables possession under lien is valid by virtue of possession alone and therefore constitutes exception to usual requirement for registration of real rights. In commercial transactions, scope of lien is extended to give possessor power of detention pending satisfaction of any commercial claims. (Com. C. 521). Lien holder is entitled to apply fruits of retained object toward satisfaction of outstanding indebtedness in priority to other creditors, and to repayment for sum of necessary expenses or improvements. (C. C. 297, 299). However, he may not use, lease, pledge or encumber object without consent of owner. (C. C. 298). Lien may be extinguished through offer of reasonable security in substitution thereof. (C. C. 301).

7.11 PLEDGES:

Pledge is a real right (i.e., a right in a thing) created by contract and is form of encumbrance on property on which creditor obtains possession of right or object as security for an indebtedness and thereby gains preferential position over unsecured creditors in regard to proceeds which can be realized from sale of property by auction. (C. C. 342). In general, any item of property, movable, immovable, or obligation, may be pledged, although specific statutory prohibitions exist in respect of certain specific rights or objects. (C. C. 343; Com. C. 850; Agricultural Land Law 3, 5, etc.). Except in case of pledges arising out of commercial transactions, pledgor may not contract before maturity of obligation for acquisition of ownership by pledgee or for disposition of ownership by means other than those provided by law. (C. C. 349; Com. C. 515). A thing once pledged may be re-pledged or, in case of immovable, may be used by pledgee for his own benefit. (C. C. 348, 356). In return, pledgee must answer for all changes in object and in case of immovable, may not demand repayment of sum of management expenses nor demand interest for claim secured. (C. C. 348, 357, 358; however, see 299). Pledges of movables require continuation of possession by pledgee in order to be perfected against third party. (C. C. 352). Pledges of immovables are limited to ten years, subject to another ten years renewal. (C. C. 360). When claim is subject of pledge, notice must be given to obligor or his consent obtained in order for pledge to be perfected against obligor or third party except in cases of shares of stock. (C. C. 364). Pledges on monetary nominated claims of legal entity (hojin) may be perfected under Perfection Law. Pledgee may collect pledged claim directly. (C. C. 367). When object pledged is warehouse receipt if payment is not made when due, holder of instrument for pledge must cause certificate of rejection of payment to be prepared according to procedures applicable to bills of exchange. (Com. C. 609). After one week from day of preparation of such certificate, holder may demand sale by auction of goods deposited in warehouse. (Com. C. 610). If sale is insufficient, satisfaction may be obtained from endorsers or debtor. (Com. C. 613). Recourse against endorsers may be made if application for sale of goods is made within two weeks from preparation of such certificate. (Com. C. 614).

Enforcement of pledges requires auction sale of property concerned (C. E. L. 181, 189, 190) in same manner as enforcement of preferential rights. (See topic Preferential Rights.)

8 DISPUTE RESOLUTION

8.01 ALTERNATIVE DISPUTE RESOLUTION:

Mandatory Dispute Resolution.

Japanese law does not have system whereby dispute shall be referred to alternative dispute resolution procedure, except that domestic disputes, such as divorce, and certain other disputes, including claim for increase or decrease of rent for land leases or building leases, shall first be subjected to conciliation procedures.

Voluntary Dispute Resolution.

Forms of voluntary dispute resolution under Japanese law include arbitration and conciliation.

Agreement to settle disputes between parties by means of arbitration, either in Japan or in foreign country, precludes parties from bringing suit in court to resolve disputes that are covered by agreement. Arbitration award rendered either in Japan or in foreign country has same effect as final and conclusive decision of court and is made enforceable in Japan when it is endorsed by Japanese court in form of "enforcement judgment", which is granted without reexamination of merits of award (Law Concerning General Pressing Notice and Arbitration Procedures 800, 802). Japan is party to Convention on the Execution of Foreign Arbitral Awards (Geneva Convention) and Convention on Recognition and Enforcement of Foreign Arbitral Awards (New York Convention).

Conciliation.

See topic of Conciliation.

Also system of settlement before summary court with no lawsuit being filed is noted. Either of parties who made out-of-court settlement may, with agreement of other party, apply to summary court for enrollment of settlement agreement into court record. When registered in court record, settlement has same effect as final and binding decision of court. (C. C. P. 275).

8.02 CONCILIATION:

Japanese jurisprudence possesses a highly developed system of conciliation whereby disputes are settled under court supervision but through nonjudicial methods. Parties may request application of conciliation procedures prior to institution of formal actions, and court also may order resort to conciliation at any time in course of formal proceedings, when it appears that such procedures might result in proper settlement. (Civil Conciliation Law 2, 20). Conciliation procedures are simple and relatively inexpensive. Conciliation panel consisting of judge and two or more individuals of good standing hears contentions of both sides and explores possibility of settlement. (Civil Conciliation Law 5 through 7). When agreement satisfactory to both parties is obtained, it has binding and enforceable effect which is similar to compromise accepted by court. (Civil Conciliation Law 16; C. C. P. 203). Conciliation is widely used.

9 DOCUMENTS AND RECORDS

9.01 ACKNOWLEDGMENTS:

Formality of acknowledgment is not, as a rule, essential to validity of an instrument. However, acknowledgment of notary authenticates the performance of a legal action and the identity of acting parties, and thereby affords to an otherwise private instrument a presumption of genuineness which is similar to that of an official document. Acknowledgment of original articles of incorporation in case of organization of joint stock corporations and limited corporations is made mandatory by statute. (Com. C. 167; L. C. L. 5). Frequently instruments to be recorded are both drafted and certified by notaries. See topic 9.02 Notaries Public.

At present time, acknowledgments for use in U.S. or by U.S. citizens or corporations may be taken before American consular officials and certain designated Army officers. Acknowledgments for use in other countries usually may be taken by diplomatic representatives of those countries who are accredited to Japanese government.

Japan is party to Convention Abolishing the Requirement of Legalisation for Foreign Public Documents. (See category 23 Treaties and Conventions, topic 23.01 Treaties.)

9.02 NOTARIES PUBLIC:

Notaries are officials whose principal functions are preparation and authentication of instruments.

Notaries may act only in localities for which they are licensed, and are liable for damages which result from intentional or negligent acts performed in course of duty.

Instruments which notary prepares must be in Japanese language and must not provide for void or illegal act. Notary may act only on behalf of parties personally known to him or those whose identity is proved by official certificate as to seal or officially issued certificate of identification, such as passport or alien registration in case of foreigner, or those whose identity can be established by two persons with whom notary is personally acquainted.

Officially authenticated instrument is document either prepared or authenticated by notary in course of his official duties. Officially authenticated instrument has two qualities which distinguish it from private documents. As result of formalities under which it was executed, it carries strong presumption of validity which resembles that accompanying official record or official document. Also, when purport of instrument is a claim for delivery of a fungible or payment of a fixed sum of money or transfer of fixed amount of negotiable securities, instrument itself is sufficient to obtain an immediate execution against obligor if statement is made therein that obligor, at time of preparation of instrument, agrees to execution in event of default. (C. E. L. 22). Officially authenticated instrument prepared in one locality has force and effect in other parts of Japan, but similar instruments prepared in other countries may not form basis for execution.

Copies of officially authenticated instruments are preserved by notaries and may be inspected by officials or parties of interest.

9.03 RECORDS:

Registration offices under Ministry of Justice are located in all parts of Japan and maintain records relating to property and commercial matters. Family register records, although also under general supervision of Ministry of Justice, are maintained separately at every municipal office and are in custody of local officials. Registers of patents, trademarks, designs and utility models are kept by Patent Office in Tokyo.

Real rights in immovables subject to registration include ownership, lease, and easement. Certain forms of encumbrances on immovables, such as pledge, mortgage, and lien, may also be placed on record. (Real Property Registration Law 3). Although unrecorded real rights are actionable as between parties to their creation, they must be placed on record to be set up against third persons. (C. C. 177). Same is true of rights of ownership in vessels. (Com. C. 687). Peculiar feature of Japanese law permits separation of ownership of buildings from land on which erected and can result in maintenance of separate records regarding buildings. (C. C. 86). Provisional registration system affords protection against subsequent transfers of property to third parties through recording of contractual arrangements or incomplete assignments. (Real Property Registration Law 105, 106).

Commercial matters upon which registration is made are: business names, seals, business activities by minors, guardianship, managerial positions and details relating to incorporated concerns. (Commercial Registration Law). Registration must be made with registry office of place of business. Foreign corporation is prohibited from doing business on continuous basis prior to registration of first business place in Japan. (Com. A. 817, 818). Valid registration of designated facts normally provides defense against third parties. (Com. C. 9).

Registration is required of contracts between husband and wife in respect to their property if terms of contracts are other than as provided by law. (C. C. 755, 756).

Injunctions prohibiting disposition of registered rights and attachments of registered property as well as adjudications of bankruptcy and commencement of reorganization procedures are also recorded. (C. E. L. 48; C. P. E. L. 53, 47; B. L. 257 et seq.).

9.04 SEALS:

Extensive use is made of seals in Japan and most transactions are consummated through seals rather than signatures. Certain categories of important seals may or must be registered at municipal office of possessor or at registry office of corporation. Once registered, municipal office or registry office will issue certificate of seal, which may be used to identify person attaching seal to instrument. Although some form of consular verification often is required for special transactions, foreigners may substitute signatures for seals.

10 EMPLOYMENT

10.01 REGULATIONS ON EMPLOYMENT:

Rules of Employment.

Rules of employment must be established by every employer of ten or more workers in compliance with minimum standards of law. (Labor Standards Law 89). Establishment of such rules requires first a presentation to representative employees and then filing with Prefectural Labor Standards Supervising Office. Such rules must deal with wage programs and scales, working hours, time off, holidays, paid vacations, discharge, and to extent that these are customary in line of business concerned, with retirement allowances, safety, sanitation, accident compensation, etc. (Labor Standards Law 89, 90). It is not required by laws but employment practices in Japan make provisions of retirement age, retirement allowances and substantial bonuses virtual necessity under lifetime employment practice.

Employment Contracts.

Employment contract need not be in writing. (Employment Contract Act 6). However, employer must show main terms and conditions of contract. (Labor Standards Law 15). Law itself does not require those terms and conditions to be in writing, however, clarification is delegated to regulation of Ministry of Labor and regulation requires that basic employment conditions such as duration of contract, place and nature of work, working time, rest time, holidays, terms regarding wages and retirement, etc., shall be clarified in writing and such document shall be delivered to employees. This requirement is equally applied to regular workers, temporary workers and part-time workers. If it is necessary, reasonable and adequate, amendment of rules of employment individual employment contract can be modified. (Employment Contract Act 10). However, required level of necessity, reasonableness and adequacy is very high and thus, agreement with Labor Union and/or individual workers are strongly recommended.

Termination of employment contract during its term need unavoidable reason (Employment Contract Act 17) and employment contract without any term can be terminated only when there is reasonable reason and social acceptability (Employment Contract Act 16). Termination against these requirements shall be null and void. In addition, at least 30 days' notice or pay in lieu of notice is necessary for discharge. (Labor Standards Law 20).

Dispatched Workers.

Dispatching workers had been prohibited before enactment of Act for Securing Proper Operation of Worker Dispatching Undertakings and Improved Working Conditions for Dispatched Workers (so called ``Dispatched Workers Act'') in 1986 allows it with respect to certain limited jobs and limited periods. Permitted scope of jobs and periods has been gradually expanded and number of dispatched workers has gradually increased. Dispatched workers are under supervision of enterprise who accepts Dispatched Workers; there is no employer-employee relationship between accepting enterprise and dispatched workers. Under law, dispatched workers will have employment relationship only with their dispatching employer and main obligations under relevant employment regulations shall be applied to dispatching employer.

Dispatched Workers Act has prohibited accepting enterprise from using dispatched workers more than three years except certain prescribed types of jobs such as secretaries, system engineers, designers, etc. (Dispatched Workers Act 40-2). In addition, Act requires accepting enterprises to offer employment contract to dispatched worker when employer plan to hire employee in same type of work after expiration of permitted periods. (Dispatched Workers Act 40-5).

Minimum Requirement of Terms and Conditions.

Article 24 of Labor Standards Law provides that wages should be paid in cash and paid directly to employees at least once a month on designated payment day. However, payment through bank can be made with each employee's consent. Employers are thus prohibited from setting off wages against advances to employees or requiring employees to deposit funds with employers. (Labor Standards Law 17, 18). Article 26 of Labor Standards Act requires employers to pay 60% of daily wages where employers grant employees day off for company reasons. Failure to comply with these requirements constitutes criminal offence.

Article 32 of Labor Standards Law prescribes 40 hours per week, 8 hours per day as maximum working hours. As result, various working hour systems were adopted so as to allow employers to adjust to new reductions in maximum number of working hours, such as averaging of working hours on monthly basis (Labor Standards Law 32-2), averaging of working hours on annual basis (Labor Standards Law 32-4), averaging of working hours on weekly basis (Labor Standards Law 32-5) or flexible working hours (Labor Standards Law 32-3).

Employers may not order their employees to work more than maximum working hours unless they have special agreement with employees' representative and such agreement must be filed at Labor Standards Supervising Office (Labor Standards Law 36). Employers must also pay over time allowances which is 25% of average wage if they order employees to work over time (Labor Standards Law 37) and 35% of average wage if they order employees to work on holiday (Labor Standards Law 37).

Employer must allow employees at least one rest day per week, or at least average of one rest day per week in four-week period. (Labor Standards Law 35). In addition, after six months from hiring, employer must provide ten days of annual leave with pay and for each consecutive year of service thereafter required numbers of days gradually increase. (Labor Standards Law 39). Required maximum number of days of annual leave with pay by Labor Standards Act is 20 days in one calendar year. Employer cannot pay employee money in lieu of taking annual leave with pay. Unused annual leave with pay can be carried over for only succeeding year. Employees can use annual leave with pay at any time in year. Employers may not refuse employee's request unless particular timing of leave would disturb operation of business. In such case, employer may order employee to change his/her schedule to take annual leave at another date.

There are other various requirements regarding child labor, maternity protections and arrangements for nursing, minimum wage, health and safety, etc., by relevant employment laws and regulations.

10.02 LABOR RELATIONS:

Organizing labor union is one of fundamental human rights under Constitution (28). Unfair labor practices by employers, such as unfavorable treatment of unionist, interference of union activity and refusal of collective bargaining are prohibited. (Labor Union Law 7). Lawfully organized union can seek for remedy against such unfair labor practice at Labor Relation Committee. (Labor Union Law 27).

Collective agreements can be made between company and lawfully organized union. When collective agreements become applicable to at least three-fourths of regular workers of plant or office, their terms then become applicable to all workers. (Labor Union Law 17). Collective agreements do not require government approval. Injunctions and suits for civil damages are available for breaches of agreements. Collective agreements may be for three years or less and, unless term is provided therein, may be terminated by at least 90 days notice. (Labor Union Law 14, 15, 17).

Employers are prohibited from setting off wages against advances to employees or requiring employees to deposit funds with employers. At least 30 days notice or pay in lieu of notice is necessary for discharge. (Labor Standards Law 17, 18, 20).

11 ENVIRONMENT

11.01 ENVIRONMENTAL REGULATION:

Environment Protection Act (E.P.A.) stipulates policies for protection of environment and clarifies responsibility of central and local governments, business entities and citizens for preservation of environment. Government shall state basic policies in order to promote protection of environment comprehensively and systematically (E.P.A. 15), shall state standards concerning air, water and soil pollution and noise (E.P.A. 16), and shall instruct local governments to make plans to prevent pollution in areas in which such plans must be implemented (E.P.A. 17). Central and local governments shall have environment committees to deal with matters regarding protection of environment (E.P.A. 41, 43) and environmental pollution measures committee shall be established in Ministry of Environment (E.P.A. 45). Central government or local government may take measures to ensure that those whose activities caused necessity for implementation of environmental protection projects shall share financial burden. (E.P.A. 37). Under Environment Protection Act, there are many laws and regulations which put actual policies into practice, such as Environmental Pollution Dispute Settlement Act, Pollution Protection Project Cost Enterprise Bearing Act, Environment Effects Assessment Act, Air Pollution Prevention Act, Noise Control Act, Waste Management & Public Cleaning Act, Soil Contamination Control Act, Law for Special Measures against Dioxin, Ozone Layer Protection Act, Promotion of Use of Recycling Source Act, etc.

12 ESTATES AND TRUSTS

12.01 ADMINISTRATION:

See topic 12.04 Executors and Administrators.

12.02 DEATH:

Family court may, on application of interested party, issue an adjudication of disappearance when it is unknown for seven years whether absentee is living or dead or for one year in case person has been missing in war zone, has been on board a vessel which has sunk, or otherwise has encountered perils which might have been cause of death. (C. C. 30). Person whose disappearance has been adjudicated is deemed to have died at expiration of seven-year term referred to above or at extinguishment of perils referred to above. (C. C. 31). Such adjudication of disappearance can be revoked by court upon proof that individual is living or died at time different from that determined previously. (C. C. 32). Death reports also may be made through administrative findings in case of unusual disasters.

Death certificate of Japanese national may be obtained from municipal office having custody of deceased's family register. (See category 9 Documents and Records, topic 9.03 Records.) Although foreigners have no family register records, certificate can be obtained from municipal office of area where foreigner died stating that notification of death has been duly received.

Actions for Death.

Separate actions for wrongful death may be brought by heirs and by near relatives. General tendency of court decisions is to regard right to claim damages for mental anguish and suffering as a property right subject to inheritance. (C. C. 710, 887, 889, 890). Right given to parents, spouse and children of deceased includes compensation for mental anguish. (C. C. 711).

Simultaneous Death.

Simultaneous death is presumed by statutory provision when it is not clear that anyone among many could have survived. (C. C. 32-2).

12.03 DESCENT AND DISTRIBUTION:

Single system of succession applies to all estates, regardless of sex or family status of ancestor or successor, and to property of all descriptions.

Order of succession is as follows: (1) Children; (2) lineal ascendants; (3) brothers and sisters. (C. C. 887, 889). When child of deceased is survived by lineal descendant or when brother or sister of deceased is survived by child, such descendant or child is entitled to share per stirpes in estate of ancestor. (C. C. 887, 889). Surviving spouse always is regarded as successor and takes one-half share when children (or their lineal descendants) are co-successors, two-thirds share when lineal ascendants are co-successors, and three-fourths share when brothers and sisters (or their children) are co-successors. (C. C. 890, 900). Two or more lineal descendants or lineal ascendants or brothers and sisters share equally. (C. C. 900). Illegitimate child receives one-half of share of legitimate lineal descendant, and half-brothers and sisters receive one-half of share of full brothers and sisters. (C. C. 900).

Special Contribution.

Special contribution by any co-successor to maintenance or increase of decedent's properties shall be valued by co-successors' agreement, deducted from estate prior to partition between co-successors and added to share of successor making contribution. Family court shall determine value in absence of agreement by co-successors. (C. C. 904-2).

Acceptance or Renunciation.

Within three months after becoming aware of commencement of succession, successor must either unconditionally accept estate, accept it conditionally with all other successors (i.e., with reservation that obligations and legacies of ancestor will be paid only to extent of property acquired by reason of the succession) or renounce it entirely. (C. C. 915, 920, 922, 938). If no decision is expressed within three months, unconditional acceptance is presumed. (C. C. 921). When succession is accepted conditionally, public notice to creditors and legatees must be given within five days, and at least two months must be allowed for submission of claims against estate. (C. C. 927).

Separation of Property.

A creditor or legatee may apply within three months from date of succession for separation of succession property from successor's own property. (C. C. 941).

Co-successors acquire ownership in common (C. C. 898) and estate may be partitioned among co-successors on basis of their respective share by their mutual agreement. If they fail to reach agreement, family court decides manner of partition upon application of any co-successor. (C. C. 907). If so specified by ancestor, partition of estate may be suspended for five years or less. (C. C. 908).

Disinheritance.

Ancestor may disinherit presumptive successor in case of cruelty, gross insult or misconduct on part of successor, with permission of family court. (C. C. 892).

Gifts inter vivos to successors in connection with marriage or adoption are to be included within estate of succession, unless a contrary intention is expressed by ancestor. (C. C. 903).

12.04 EXECUTORS AND ADMINISTRATORS:

Executor may be appointed by will, by person commissioned to do so by will, or by family court. (C. C. 1006, 1010). Person nominated may receive proper compensation for services rendered, but may not serve if declared bankrupt or minor. (C. C. 1009, 1018). Upon refusal of designated executor or in event of failure of testator to nominate executor, appointment is made by family court. (C. C. 1010). If more than one executor is selected, dispositions are made by majority vote, unless contrary intention was provided in will. (C. C. 1017). Failure of proper discharge of duties is grounds for removal of executor. (C. C. 1019).

Administrators of estates in Anglo-American sense are virtually unknown, since heirs usually assume control immediately of all estates in event of intestate succession. See topic 12.03 Descent and Distribution.

12.05 TRUSTS:

One of the unusual features of Japanese jurisprudence is a codified law of trusts which is modeled on Anglo-American concepts but modified to conform with principles of continental law. Trust rights are sui generis, being neither real rights nor obligations, although weight of authority regards them as being in nature of obligations. Although trusts may be created by operation of law, this is rare occurrence, and in practice they arise from private acts and agreements. (C. T. 1, 2). Essential parties to trust are creator, trustee and beneficiary, although trust inspector whose duty is to check upon trustee may be appointed either by creator or by court. (C. T. 131).

Trust property may consist of movables, immovables or obligations. Causes of action may not be object of trust, and trusts created to defraud creditors are also prohibited. (C. T. 11, 12). As protection to third parties, act of creation of trust must be placed on record at appropriate office if involving real property, patents, mining rights, shares of stock, etc. In case of assignment of beneficiary's interest against trustee, beneficiary of trust must give notice of assignment to trustee or secure his consent. Notice of assignment or consent to assignment must be in writing and bear officially confirmed date (kakutei hizuke) in order to assert assignment against third party other than trustee. (C. T. 14, 94).

Trust may be created by will, in which case court may supply certain deficiencies which would prove fatal to establishment of trust relationship between living persons. (C. T. 4).

Trustee has duty to separate trust property from property owned by him personally and administer trust property in accordance with stated purposes of trust. (C. T. 34). Unless otherwise provided he may not resign as trustee except with consent of beneficiary and creator, or upon bankruptcy, death, guardianship, tutelage, removal by court for cause, etc. (C. T. 56, 57). Liability of trustee is that of good and faithful custodian, plus certain additional responsibilities to interested parties for restitution and replacement of property improperly removed. (C. T. 29, 30, 31, 40). Unless specifically provided, trustee (other than professional trustee) serves without compensation. (C. T. 54). Disposition of property in trust by trustee contrary to purpose of trust may be cancelled by beneficiary. (C. T. 27).

12.06 WILLS:

Persons 15 years or older may, if possessed of testamentary capacity, make will. (C. C. 961, 963). Adult ward may make will during lucid interval and with attendance of two or more physicians who attest his lucidity at time of making. (C. C. 973). By means of will, testator may acknowledge an illegitimate child, create trust and dispose of property, etc. (C. C. 781, 964, etc.).

Execution.

Civil Code provides form and ceremonies which must be used, and recognizes holographic wills, wills drafted by notaries (see category 9 Documents and Records, topic 9.02 Notaries Public) and secret wills, envelopes of which are acknowledged by notaries. (C. C. 967 through 970). In addition, certain exceptional situations are enumerated in which different formalities may be applied, such as oral will at deathbed which is reduced to writing, acknowledged by three witnesses and confirmed by registration with family court within 20 days, and wills made in quarantine or aboard ship. (C. C. 976 through 982).

In foreign countries, Japanese consul may perform functions of notary in regard to wills. (C. C. 984).

Testamentary Disposition.

Testator may dispose of any portion of his estate, but disposition in excess of legally secured portions of heirs is subject to later adjustment upon demands from heirs other than brothers and sisters. (C. C. 1031). For purpose of calculation of value of estate, gifts made within one year of death or gifts made in anticipation of death may be included. (C. C. 1030). Legally secured portions in estates, as provided in Civil Code are: (1) one-third for all of successors in case where they are all lineal ascendants, and (2) one-half in other case, such as when spouse alone is successor or when successors are all lineal descendants or spouse and lineal descendants. (C. C. 1028).

Legacies may be burdened and in turn may be renounced by legatee. (C. C. 986).

Governing law as to existence and effect of wills is law of country of testator at time of execution, and rescission of wills is governed by law of country of testator at time of rescission. (L. G. R. A. L. 37). Wills are deemed effective if lawfully made in accordance with any of: (1) Lex loci actus; (2) lex patriae; (3) lex domicili or law of place where testator maintained permanent residence at time of establishment of will or testator's death; or (4) in case of will concerning real property, lex loci rei sitae of property. (Law concerning Choice of Laws in respect to Formalities of Wills 2).

13 FAMILY

13.01 ADOPTION:

Ordinary Adoption.

Any person attaining majority may adopt another person, provided person to be adopted is not lineal ascendant or older than adopting party. (C. C. 792, 793). Married person may adopt or be adopted either jointly with spouse or acting alone but in general with consent of spouse. (C.C. 796). However, married person may not adopt minor except jointly with spouse. (C. C. 795). Consent of Family Court is generally required in adoption of minors. (C. C. 798). Adoption may be dissolved through judicial dissolution (1) upon grounds of malicious desertion, (2) where it is unknown whether party to adoption is dead or alive for three years or more or (3) for any other reason making difficult continuation of adoptive relationship. (C. C. 814). Adoption may also be dissolved upon mutual consent of parties. (C. C. 811).

Special Adoption.

Family Court may create special adoptive relationship if deemed especially necessary for benefit of person to be adopted where special certain circumstances supporting such adoption exist, after taking into consideration outcome of period of custody by adopting party of person to be adopted, which period shall be, in general, six months or more. (C. C. 817-2, 817-7, 817-8). Other requirements are: (1) Adopting party shall be married person (C. C. 817-3), 25 years of age or older (C. C. 817-4), and in general (2) husband and wife shall jointly adopt (C. C. 817-3), (3) person to be adopted shall be under six years of age (C. C. 817-5) and (4) natural parents of person to be adopted shall give consent to adoption (C. C. 817-6). Once special adoptive relationship is created, legal family relationship between adopted person and natural parents and other relatives by blood ceases to exist. (C. C. 817-9). Special adoptive relationship may be dissolved only by family court if deemed especially necessary for benefit of adopted person where certain conditions warranting such dissolution are met. (C. C. 817-10).

Applicable Law.

In case of adoption in Japan involving divergent nationalities, requisites for adoption and its dissolution are determined by law of country of adopting party. If law of country of adopted party requires consent of that party or third party, permission of public authorities or other disposition for adoption, such requirements must also be met. (L. G. R. A. L. 31).

13.02 DIVORCE:

Divorce may be either consensual or judicial.

Consensual divorce is obtained through the entry upon Family Register Record (see category 9 Documents and Records, topic 9.03 Records) of mutual agreement of parties to divorce. (C. C. 763). No formalities are required unless dispute arises as to custody of children or division of property, in which case referral is made to family court. (C. C. 766, 768).

Judicial divorce is of two categories, that obtained through formal trial and that through a process peculiar to Japan called conciliation.

In case of formal trial, an action is instituted in family court upon grounds of (1) unchastity, (2) malicious desertion, (3) where other spouse is not known to be dead or alive for not less than three years, or (4) incurable insanity. Court may dismiss action for divorce if all circumstances call for continuance of marriage. Court also may grant divorce in absence of any of above grounds upon finding of grave reasons which make difficult continuation of marriage. (C. C. 770).

Conciliation procedures permit voluntary submission of divorce action to family court which, after investigation, is authorized to confer on divorce agreement acceptable to parties, formal judicial sanction equivalent to adjudicated decree of divorce. (Domestic Matter Adjudication Law 21). No particular grounds must be alleged or proved to obtain divorce by conciliation.

Alimony as such is not recognized, although distribution of jointly owned property which has similar objective may be granted by court. (C. C. 768).

In case of foreigners, divorce is governed by law of country of parties if they have same nationality. If they have different nationalities, it is governed by law of habitual residence of parties if they have same habitual residence. If they do not, it is governed by law of place most closely associated with parties. However, in case either party is Japanese having habitual residence in Japan, Japanese law governs. (Horei 16).

13.03 HUSBAND AND WIFE:

Wife has full legal capacity, and rights and obligations equal to her husband to participate in care, support and education of children.

Property.

Prior to marriage husband and wife may provide for property relationship different from that fixed by law, but such special provision cannot be set up against their successors or third persons unless registered. (C. C. 756).

Property relationship provided for by aliens is governed by law which governs effect of marriage. However if husband and wife in document signed by them choose law of country of husband or wife or law of place of habitual residence of husband or wife or law of location of immovables, that chosen law governs. Property relationship provided for pursuant to law of foreign country cannot set up judicial acts in Japan and properties in Japan against bona fide third persons. In such case property relationship with such third persons is governed by Japanese law. Notwithstanding foregoing, property relationship contract entered into pursuant to law of foreign country can be set up against third persons if such contract is registered. (L. G. R. A. L. 26).

Legal property system requires husband and wife to share expenses of married life, and to assume mutual liability for acts pertaining to household matters. Notice to third person of contrary intent, however, relieves noncontracting spouse from obligation. (C. C. 760, 761). Property acquired by either spouse prior to marriage continues to be his or her separate property. (C. C. 762). Property may be acquired separately by either spouse in course of marriage, although upon divorce division of property acquired by joint efforts of spouses may be ordered by family court regardless of location of formal legal title. (C. C. 762, 768). Property whose ownership is not clear is presumed to be owned by husband and wife jointly. (C. C. 762).

Contracts between husband and wife may be cancelled in so far as not injurious to rights of third persons. (C. C. 754).

Japanese married to alien may change family name to spouse's by reporting to ward office within six months after marriage.

13.04 INFANTS:

Age of majority is 20 for both sexes. (C. C. 3).

Emancipation occurs upon marriage. (C. C. 753).

Disabilities.

Minor can act only with consent of legal representative (parents, in absence of parents, guardian). (C. C. 818, 819, 839, 841 through 846). Contracts made by minor without legal representative's consent are revocable until ratified. (C. C. 4). However, if proved that minor made use of fraudulent methods to make opposite party believe he had capacity, such contracts are irrevocable. (C. C. 20). Minor has full capacity in respect to transactions concerning property for which disposition has been authorized, to transactions within scope of business for which minor has been given full authority or acts of merely discharging liability or obtaining rights without incurring any obligation. (C. C. 4 through 6).

Ratification of contract of minor is made only by legal representative until minor attains majority, and after majority minor can ratify his own contract. Opposite party to contract may demand from minor, after majority, answer within period not shorter than one month as to whether he ratifies it and, in absence of reply within period, ratification is conclusively presumed. (C. C. 19).

Actions.

Minor may sue or be sued. However, in actions, minor must be represented by legal representative. (C. C. P. 31).

Service of process in action against minor must be made on his legal representative. (C. C. P. 102).

Wages.

Minor has right to claim directly and independently wages for his labor. (Labor Standards Law 59).

13.05 MARRIAGE:

If parental consent is obtained marriage may be effected by males who have attained age of 18 and females who have attained age of 16. (C. C. 3, 731, 737). Both males and females who have reached age of majority (20) may marry without parental consent and guardian's consent is not required for marriage of incompetent. (C. C. 738).

Prohibited marriages consist of those between lineal relatives, collateral blood relatives within third degree of relationship, and marriage of adopted children to lineal ascendants by adoption. (C. C. 734 through 736). Woman may not remarry until six months following dissolution or annulment of previous marriage. (C. C. 733). No restrictions exist regarding marriage between Japanese and aliens.

Ceremonies of religious nature, although customary, are not required and produce no legal effect.

Marriage occurs upon acceptance for registration of notification of marriage signed by both parties and witnessed by two persons. (C. C. 739). Act of acceptance by family registrar of notification of marriage must be preceded by his/her finding that no legal bars to creation of marriage exist. (C. C. 740). Despite record status, marriage is invalid if parties lacked an intention to marry because of mistaken identity or other reason. (C. C. 742).

Annulment may occur upon showing of existence of any other legal bar except failure of parental consent. (C. C. 743 through 748). Through act of marriage, minors automatically attain majority. (C. C. 753).

In case of marriage between persons of different nationalities, capacity for marriage is determined by law of parties' respective countries. (L. G. R. A. L. 24). Form and manner of celebration is determined by law of place of marriage. However, marriage in compliance with form and manner of law of either party's country is valid, except for case where marriage took place in Japan and either party is Japanese. (L. G. R. A. L. 24). Effect of marriage is governed by law of country of parties if they have same nationality. If they have different nationalities, it is governed by law of habitual residence of parties if they have same habitual residence. If they do not, it is governed by law of place most closely associated with parties. (L.

G. R. A. L. 25). Customary practice in Japan is for marriages between foreigners to be registered with Japanese authorities after their religious or consulate marriages have taken place in Japan.

14 FOREIGN TRADE AND COMMERCE

14.01 EXCHANGE CONTROL:

See topic 14.02 Foreign Exchange and Foreign Trade.

14.02 FOREIGN EXCHANGE AND FOREIGN TRADE:

Foreign Exchange and Foreign Trade Law ("Law") is cornerstone for international transactions in (or with) Japan, and wide areas are regulated by Law, such as: (1) Payments directed abroad, payments to or receipts of payment from "exchange nonresident", and settlements of account between "exchange resident" and "exchange nonresident"; (2) transactions between "exchange resident" and "exchange nonresident" concerning creation, modification or liquidation of claimable assets arising from deposit, trust or monetary loan or guaranty or contract providing for purchase of foreign means of payment or claimable assets; and transactions between "exchange resident" and another "exchange resident" concerning creation, modification or liquidation of claimable assets payable in foreign currency arising from such contracts; (3) acquisition by "exchange resident" of foreign securities from "exchange nonresident"; acquisition by "exchange nonresident" of securities from "exchange resident"; issuance or flotation by "exchange resident" of securities in foreign country or of foreign securities in Japan; issuance or flotation by "exchange nonresident" in Japan of securities, and in foreign country securities expressed or payable in Japanese currency; (4) acquisition by "exchange resident" of immovables in foreign country or rights related thereto or acquisition by "exchange nonresident" of immovables in Japan or rights related thereto; (5) receipt and payment of funds between office in Japan of corporation and its office outside Japan; (6) certain service contracts between "exchange resident" and "exchange nonresident"; (7) acquisition of shares of Japanese corporation by "foreign investor" and its consent to substantial change in business purpose of Japanese corporation in which it holds not less than one-third of issued shares; (8) establishment of branch, etc., in Japan or substantial change in its kind or business purpose; (9) conclusion of technology introduction contract between "exchange resident" and "exchange nonresident"; and (10) export and import trade, including export and import of means of payment, securities, and precious metals. (Law, Arts. 16 through 54). "Exchange residents" mean all natural persons who have their permanent place of abode or who customarily live in Japan, and also juridical persons (corporate bodies, enterprises) having their seat or place of administration in Japan. Branches, local offices and other offices in Japan of exchange nonresidents are considered to be exchange residents irrespective of whether or not they have legal authority to represent "exchange nonresidents" and even if their headquarters are located abroad. "Exchange nonresidents" mean all persons, natural or juridical, other than "exchange residents". (Law, Art. 6). No approvals or prior notifications are required in principle for conducting above transactions, but filing of post facto reports is required in most of those transactions with certain minimum amount (generally ¥100 million) except for those conducted through authorized banks and securities companies.

See topic 14.03 Foreign Investments.

14.03 FOREIGN INVESTMENTS:

Foreign Exchange and Foreign Trade Law ("Law") regulates transactions set forth below.

Acquisition of Shares.

For regulatory purposes, manner of share acquisition is divided into two types: (a) Inward direct investment and (b) portfolio investment.

Inward direct investment type of share acquisition by foreign investors involves post report (in principle, within 15 days), or in exceptional cases prior notification and possible issuance of recommendation of or order for alteration of contents or suspension of notified share acquisition. Foreign investor is defined to include exchange nonresident individual, foreign corporation, any corporation one-half or more of whose issued shares are directly or indirectly held by exchange nonresident individuals or foreign corporations, and any juridical person majority of whose directors or of whose officers having authority to represent it are nonresident individuals. Foreign investor desiring to acquire shares of Japanese corporation must in principle file ex post facto report with Minister of Finance and ministers having authority over business concerned (collectively "competent ministers"). In case shares to be acquired are listed on stock exchange or are designated by government as similar to listed shares, this report or prior notification is not required, unless ratio of holding by single foreign investor of shares (including both presently held and to be newly acquired) is 10% or more. Prior notification must be filed with competent ministers in exceptional cases of investment from certain countries or for certain limited industries, in which cases foreign investor must be subject to recommendation (or order) of competent ministries in light of whether, if shares were acquired as notified: (a) Safety of Japan would be impaired, maintenance of public order would be disturbed or public safety would be hindered, or (b) smooth operation of Japanese economy would be very harmfully influenced, or whether it is deemed necessary to alter contents of share acquisition or suspend it: (a) in order to treat notified share acquisition on substantially equal basis with treatment of Japanese investors in country to which foreign investor belongs and with which Japan has not concluded treaty concerning direct investment, or (b) because whole or part of notified share acquisition is found to fall into category of capital transactions for which approval must be obtained in view of use of funds and other factors. (Law, Arts. 26, 27).

Portfolio investment type of share acquisition involves post report (in principle, within 20 days), and in case of certain extraordinary circumstances portfolio investment may be made subject to approval.

Technology Introduction Contracts.

With respect to certain technologies relating to aircraft, arms, gunpowder, nuclear energy, space development, any exchange resident desiring to conclude, renew or alter terms of contract with exchange nonresident (including branch, etc., in Japan of exchange nonresident) under which nonresident transfers industrial property rights or other rights concerning technology, establishes rights to use these rights or advises on technology concerning operation of business must under certain conditions file prior notification with competent ministers and must be subject to recommendation (or order) of competent ministries. (Law, Art. 30).

Repatriation Right.

Under Foreign Exchange and Foreign Trade Law, overseas payment is generally free from any regulation, subject to certain exceptions, such as payment to certain countries or entities controlled by resident of such countries, etc. (Law, Art. 9).

14.04 FOREIGN TRADE REGULATIONS:

Foreign trade is regulated by Foreign Exchange and Foreign Trade Law. Export of goods is permitted with minimum of restrictions, insofar as it is consistent with objective of Law. (Law, Art. 47). Export of goods of certain type, or to certain destination, or under certain method of transaction may be subject to approval from Minister of International Trade and Industry. (Law, Art. 48). When Minister of Economy, Trade and Industry deems it urgently necessary, he may place embargo by specifying type or destination of goods for period not exceeding one month. (Law, Art. 51). Import of goods may be subject to approval in certain circumstances for purpose of sound development of foreign trade and national economy. (Law, Art. 52).

See topics 14.02 Foreign Exchange and Foreign Trade; 14.03 Foreign Investments.

15 HEALTH

15.01 DRUGS, COSMETICS AND MEDICAL DEVICES:

One who places drugs, quasi-drugs, cosmetics or medical instruments on market must have pertinent business license issued by regulatory agency (Ministry of Health, Labor & Welfare) under Pharmaceutical Affairs Law. There are Class 1 and Class 2 business licenses for drugs. For marketing of prescription drugs, Class 1 business license is required. Business license is granted when applicant meets quality control standards required of category in which subject drugs, etc., are classified.

Further, in order to market drugs, etc., holder of business license must have drug, etc., registered with regulatory agency, except for certain products which regulatory agency exempts from registration. Application for registration of drug, etc., must be accompanied by clinical and other data as required by regulatory agency. Such data must be developed in accordance with Good Clinical Practice (GCP) and Good Laboratory Practice (GLP) prescribed by regulatory agency. In principle, clinical trials must be approved by regulatory agency in advance.

15.02 FOODS AND FOOD ADDITIVES:

Manufacturing, processing and importing of foods and food additives are regulated by Food Sanitation Law. Only food additives designated by regulatory agency (Ministry of Health, Labor & Welfare) can be manufactured, imported or sold. Natural flavors and food additives generally used as foods are not subject to such restrictions. Standards for manufacture, processing, use or preservation of foods or food additives for sale are prescribed by regulatory agency. Foods or food additives for sale must be manufactured, processed, used or preserved in accordance with such standards. Foods or food additives manufactured or processed not following such standards cannot be sold, imported, processed or used.

Import or sale of foods produced by genetic engineering process or import or sale of foods containing foods produced by such process is subject to screening procedures for their safety prescribed by regulatory agency.

16 IMMIGRATION

16.01 ALIENS:

Supported by strong constitutional guarantees, alien is now afforded virtually all rights of Japanese except those of political nature. Aliens who have obtained visa must register at municipal offices having jurisdiction over their places of stay within 90 days from entry. (Alien Registration Law 3). Aliens' entry into Japan is subject to governmental approval except for members of U.S. Armed Forces, U.N.'s agencies, diplomats, consuls and their dependents, and public officials of foreign governments and international organizations recognized by Japan. Alien has equal access to courts, but in case of certain kinds of tort actions against Japanese government, he is equally treated only if country of his nationality extends same right to Japanese nationals. (State Tort Claims Act 6). By virtue of Security Treaty between U.S. and Japan and Administrative Agreement in implementation thereof, alien members of U.S. Armed Forces, including civilian components, together with dependents, are subject to criminal jurisdiction of Japanese courts under certain circumstances, and to civil jurisdiction of Japanese courts in all instances apart from execution of judgments of Japanese courts rendered on claims arising out of performance of official duty.

Acquisitions of real estate or rights related thereto by nonresident aliens shall be on basis of reciprocity, and be reported to Minister of Finance within designated term. In case of certain extraordinary circumstances such acquisition may be made subject to approval. (F.E.C.L.

20 through 22, 55-3).

Corporations owned or controlled by aliens are regarded as “foreign investors” for purpose of inward direct investments including acquisition of shares. (F.E.C.L. 26). See category 14 Foreign Trade and Commerce, topic 14.03 Foreign Investments. See also category 2 Business Organizations, topic 2.03 Corporations, subhead Foreign Corporations.

16.02 IMMIGRATION:

Alien's authorized period of stay varies with his immigration status and is renewable with some exceptions and limitations. Three-year (sometimes one year) investor/business manager visa may be given to aliens who engage in business in Japan. Intracompany transferee visa, engineer visa or specialist in humanities/international services visa may be also available for applicable businessman usually on year by year basis. Instructors at educational institutions, aliens who are sent by foreign religious organization to engage in religious activities in Japan, foreign news reporters and aliens who are invited by public or private Japanese organization for provision of advanced or specialized industrial technologies may also be given three-year period of stay. Students, researchers and skilled laborers normally are admitted on year by year basis. Tourists and other aliens who intend to stay for short period may be given 90 or 15 day visa. Minister of Justice has discretionary powers to authorize other statuses and periods of stay up to three years.

Nationals of countries which have reciprocal visa exemption agreements with Japan may enter into and stay in Japan without visa for short period (generally three months; otherwise six months or 14 days).

Entry-check, procedures for status change or renewal, and deportation process are provided in Immigration Control and Refugee Recognition Law. For registration requirements, see topic 16.01 Aliens.

Japan is party to Convention Relating to Status of Refugees of July 28, 1951.

17 INTELLECTUAL PROPERTY

17.01 COPYRIGHT:

Creation.

Copyright is afforded automatically without application or grant from government upon creation of works of authorship in literary, scientific, artistic musical fields except for certain categories of materials whose free republication is in public interest (for example, statutes, orders or ordinances of public authorities, court decisions, etc.). (C. L. 2, 13, 17). Included are literary works, musical works, choreography, pantomimes, artistic works, architectural works, and maps, as well as diagrammatical works of scientific nature, cinematographic works, photographic works and computer program works. (C. L. 10). Compilation and database works can also be copyrighted. (C. L. 12, 12-2). Similar to European concept of droit moral, moral rights are afforded to author to protect him/her from unauthorized publication of his/her work not released to public. (C. L. 18). Moral rights also cover rights to determine whether or not author's name, true name or pseudonym, should be indicated as author of work, and rights to maintain integrity of his/her works and titles. (C. L. 19, 20). Copyright holder has rights of reproduction, performance, screen presentation, public transmission (including broadcasting, wire-broadcasting and interactive transmission), recitation of literary works, exhibition of artistic and photographic works, distribution, making derivative works, and exploitation of derivative works. (C. L. 21 through 28). Transfer or pledge of copyright cannot be asserted against third persons unless registered with Director-General of Agency for Cultural Affairs, or agent designated thereby for computer program works. (C. L. 77).

Neighboring rights are afforded to performers, producers of phonorecords, and broadcasting and wire-broadcasting organizations. (C. L. 89). Performers' rights include exclusive rights to make sound or visual recordings of their performances, to broadcast and wire-broadcast their performances, to make their performances transmittable, and to offer their performances to public by transferring ownership of sound or visual recordings of their performances or by rental of commercial phonorecords in which their performances have been sound recorded. (C. L. 91, 92, 92-2, 95-2, 95-3). In addition to neighboring rights, performer also has moral rights, such as right to determine whether or not performer's name, true name or pseudonym, should be indicated as performer of his/her performance, and right to maintain integrity of performance. (C. L. 90-2, 90-3). Rights of producers of phonorecords include rights to reproduce phonorecords, to make phonorecords transmittable, and to offer phonorecords to public by transferring ownership of reproductions of phonorecords or by rental of commercial phonorecords in which phonorecords have been reproduced. (C. L. 96, 96-2, 97-2, 97-3). Broadcasting organizations' rights include rights to reproduce, rebroadcast and wire-broadcast programs, to make programs transmittable, and to transmit programs to public using special equipment to enlarge images. (C. L. 98 through 100). Wire-broadcasting organizations' rights include rights to reproduce, broadcast and re-wire-broadcast programs, to make programs transmittable, and to transmit programs to public using special equipment to enlarge images. (C. L. 100-2 through 100-5).

Duration.

Copyright protection continues for either lifetime of author plus 50 years after his/her death, 50 years after publication if published under a nom de plume, or 50 years after publication for works published as product of organization. Copyright protection for cinematographic works lasts for 70 years after publication. (C. L. 51 through 54). Aforementioned 50 or 70-year term counts from beginning of year following death of author, making public of work or creation of work, as case may be. (C. L. 57). Moral rights are exercisable only by author and performer. (C. L. 59, 101-2). However, bereaved family of deceased author or performer may petition for injunction or for appropriate measures to restore honor and reputation of deceased against act which would constitute act of infringement upon moral rights of author or performer if author or performer was alive. (C. L. 60, 101-3, 115, 116). Duration of neighboring rights begins at moment when performance took place, first fixation of sound was made for phonographic recordings, or broadcast or wire-broadcast took place, and expires at end of 50 years commencing with year immediately following year when performance took place, when first fixation of sound was made for phonographic recording, or when broadcasting or wire-broadcasting took place, as case may be. (C. L. 101).

Publication.

Holder of right of reproduction may establish right of publication, which is exclusive right to reproduce original work by means of printing or other mechanical or chemical processes. (C. L. 79, 80). Unless otherwise agreed, holder of publication right must publish work within six months after receipt of manuscripts and must publish work continuously in conformity with business practice. (C. L. 81). If holder of publication right fails to abide by these obligations, holder of right of reproduction may terminate publication right. (C. L. 84). Unless otherwise provided, publication right expires at end of three years following day of first publication. (C. L. 83). Publication right is not effective against third persons unless registered with Director-General of the Agency for Cultural Affairs. (C. L. 88).

Limited assignment of portions of copyright is possible. (C. L. 61). Thus, all or each of attributes of copyright, such as reproduction right, public transmission right, performance right, etc., may be assigned or licensed. (C. L. 21 through 28, 61, 63).

Infringement of copyright not only gives rise to rights to injunction and damages, but also, if infringement is of moral rights, right to petition for appropriate measures for recovery of author's honor and reputation accrue. (C. L. 112, 115 through 118). Infringement also constitutes criminal offense. (C. L. 119, et seq.).

Copyright Treaties.

Japan is party to Berne Convention, UNESCO Treaty, Convention for Protection of Producers of Phonograms against Unauthorized Duplication of Their Phonograms, International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations, Agreement on Trade-Related Aspects of Intellectual Property Right (TRIPS), WIPO Copyright Treaty (WCT), and WIPO Performance and Phonograms Treaty (WPPT).

17.02 PATENTS:

Patent right comes into force upon registration of its establishment with Patent Office. (P. L. 66). Non-Japanese persons residing in Japan can apply for patents on same footing as Japanese citizens, while those living abroad may enjoy patent right or other rights related to patent under reciprocity principle or treaty. (P. L. 25). Nonresident applying for patent or taking procedures to obtain or secure patent must be locally represented by patent administrator, agent domiciled or resident in Japan acting for nonresident in handling matters related to person's patent. (P. L. 8). Both licensed attorneys (*bengoshi*) and patent agents (*benrishi*) may perform this representation.

Patentability is afforded to inventions, meaning highly advanced creation of technical ideas utilizing law of nature. (P. L. 2). However, those potentially injurious to public order, morality or public health are not patented. (P. L. 32). With certain exceptions, including six months' grace period, invention publicly worked, known, described in distributed publication, or made available to public through electronic telecommunications lines in Japan or any foreign country before filing of application for patent, or invention identically described in another patent application which has been filed earlier, is regarded as lacking novelty. (P. L. 29[1], 29-2, 30). Moreover, invention is not patented if, prior to filing of patent application, person ordinarily skilled in art of invention would have been able to easily make invention based on invention publicly worked, known, described in distributed publication, or made available to public through electronic telecommunications lines in Japan or elsewhere. (P. L. 29[2]). If two or more patent applications claiming identical inventions have been filed on different dates, only applicant who filed patent application first is entitled to obtain patent for invention claimed. If such multiple applications have been filed on same date, no applicant is entitled to obtain patent for invention claimed unless agreement is reached by consultation among applicants as to who is entitled to obtain patent. (P. L. 39).

Applications for patents are made to Commissioner of Patent Office in Japanese, and patent applicant may attach to application English-written specifications, scope of claims, drawings (where required) and abstracts on condition that applicant submits Japanese translations thereof within 14 months from date of filing of patent application. (P. L. 36-2). Examination of patent application is initiated by examiner of Patent Office after filing of request for examination. (P. L. 47, 48-2). Request for examination can be made by any person within three years from filing date of patent application. (P. L. 48-3). Examiners render decision to effect that patent is to be granted unless they find no reasons for refusal patent. (P. L. 51). Patent application is disclosed to public in Patent Gazette upon elapse of 18 months from date of filing of patent application. (P. L. 64). Public disclosure mentioned above entitles patent applicant to claim compensation against person who has worked invention as business after receiving written warning by patent applicant and prior to registration of establishment of patent right, and amount of compensation is equivalent to amount applicant would have been entitled to receive for working of invention if invention were patented. This claim is exercisable only after registration establishing patent right is effected. (P. L. 65).

Patent Office jurisdiction covers trial decisions in respect to request for trial: (1) Against examiner's decision of refusal, (2) for patent invalidation, (3) for invalidation of registration of extension of duration of patent right, and (4) correction with regard to correction of specification, scope of claims or drawings attached to application for which patent was granted. (P. L. 121, 123, 125-2, 126). Actions contesting such trial decisions come under exclusive jurisdiction of branch of Tokyo High Court, namely Intellectual Property High Court. (P. L. 178). Courts in litigation where infringement of patent right is disputed can also dismiss case by recognizing that said patent would be invalidated by trial for patent invalidation. (P.L. 104-3).

Technical Scope of patented invention is determined on basis of description in scope of claims attached to application, and meaning of each term used in scope of claims is interpreted in consideration of description in specification and drawings attached thereto, but description in abstract attached thereto should not be taken into consideration. (P. L. 70). Interested person may apply for Patent Office's opinion as to technical scope of patented invention, which opinion is merely advisory and not binding in court. (P. L. 71).

Term of patent rights is 20 years from filing date of patent application (effective on July 1, 1995). This is applicable to both patent rights and patent applications which are effective on that date. Term of patent may be extended for maximum period of five years, by application, where patented invention cannot be worked because approval prescribed by relevant Acts that are intended to ensure safety, etc., or any other disposition under Agricultural Chemicals Control Law or Pharmaceutical Affairs Law, must be obtained for working of patented invention. (P. L. 67). As property rights, patent rights are subject to transfer, inheritance, pledge, etc., but all such acts, except inheritance, cannot take effect unless registered. (P. L. 98). Consent of all other co-owners is necessary for co-owner of patent right to license patent or to assign or transfer said co-owner's own share. (P. L. 73). Right to obtain patent may be transferred. (P. L. 33). Once acquired, patents may be extinguished through various processes such as final and binding trial decision for patent invalidation by Patent Office, failure of payment of patent fees, or abandonment.

Patent licenses consist of ``*Sen'yo Jisshi-Ken*'' (exclusive licenses) and ``*Tsujo Jisshi-Ken*'' (non-exclusive licenses). Exclusive license arises only from contract and requires registration to take effect. (P. L. 77, 98). In other words, unregistered exclusive license is not regarded as *Sen'yo Jisshi-Ken* but *Tsujo Jisshi-Ken* under Patent Law, even if exclusiveness of license is agreed upon by and between parties. Registered exclusive license affords exclusive rights to licensee to work patented invention as business even against patent owner to extent permitted by contract granting license; also licensee can seek injunctive relief and civil damages for injury to his/her own interest. (P. L. 77, 100, 106). Non-exclusive license may arise from contract, from compulsory order of Commissioner of Patent Office or Minister of Economy, Trade and Industry, or from operation of law (such as employer's right to work his/her employee's invention under certain circumstances). (P. L. 35, 78 through 83, 92, 93). Non-exclusive licensee cannot act to enjoin infringement but may possibly sue for damages. Registration of non-exclusive license is not required but affords certain benefits, primarily making license perfect right. Without such registration, non-exclusive license arising from contract has no effect against third party who is recorded as assignee of patent. (P. L. 99). Person having right to obtain patent may establish and register preliminary exclusive/non-exclusive license, with respect to patent right to be obtained under right to obtain patent. Based on registration of preliminary license, licensee could compete with third party who is recorded as assignee of right to obtain patent after patent is duly issued and registered. (P.L. 34-2 and 34-3).

Compulsory license may be granted by Commissioner of Patent Office in case patented invention has not been appropriately worked for three consecutive years or longer in Japan, or by Minister of Economy, Trade and Industry in case working of patented invention is particularly necessary for public interest. (P. L. 83, 93). Owner of improvement patent may also request Commissioner of Patent Office for award granting non-exclusive license for another patent, utility model and design on which his/her own patented invention is based, in event that no agreement is reached by consultations or no consultations can be held. (P. L. 92).

Employee rights are protected by Patent Law which renders void assignments or exclusive license commitments made in advance of invention, unless such invention is achieved by act(s) categorized as past or present duty of employee within scope of employer's business (``employee's invention''). Employee is entitled to reasonable consideration in case of subsequent exclusive license or assignment to employer of employee's invention. Whether or not consideration would be reasonable must be determined in light of various factors, such as negotiation between employer and employee, opinions of employee, and so on. (P. L. 35).

Utility model rights are related to devices, meaning creation of technical ideas utilizing law of nature, which are governed by separate statute called Utility Models Law. New device, which is not required to be as highly advanced as invention that is subject to patent, but has practical utility in regard to shape or structure of article or combination of articles, can be registered, and owner of registered utility model is afforded protection similar to that held by patent holder. Utility model rights last for ten years from filing date of application for utility model registration. (Utility Models Law 15). Unlike patent, utility model is registered without process of examination by Patent Office examiner for substantial requirements. In order to exercise utility model rights, registrant must give warning to alleged infringer in Report of Utility Model Technical Opinion (Utility Models Law 29-2), which is issued by Commissioner of Patent Office subsequent to request for technical opinion as to registrability of registered utility model. (Utility Models Law 12). Utility model may be invalidated by Patent Office through trial for invalidation to be filed with Patent Office by interested party. (Utility Models Law 41, P. L. 125). When utilization of patent requires concurrent use of utility model, license may be requested for said utility model right (P. L. 92), and vice versa when utilization of utility model requires concurrent use of patent or another utility model. (Utility Models Law 22).

Designs also are afforded legal protection through process of registration. (Design Law 20). Design to be registered must be of new variety and of industrial nature, and must relate to shape, patterns or colors, or any combination thereof, of article or part thereof, which creates aesthetic impression through eye. (Design Law 2). Designs are distinguished from utility models and patents in that they may concern ornaments instead of objects having practical use. Unlike patents, however, design is registered without prior disclosure to public and examination is conducted without request for examination. Registration of design may be challenged on ground of lack of statutory requirements. (Design Law 48). Design rights are valid for 20 years following registration. (Design Law 21).

Improvements in plant variety and circuit layout of semiconductor integrated circuits are afforded certain legal protection through process of registration. (Law 83 of May 29, 1998 and Law 43 of May 31, 1985).

Patent Treaty.

Japan is party to following treaties: Paris Convention; Patent Cooperation Treaty (PCT); Budapest Treaty; WIPO Convention; Strasbourg Agreement; and Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS).

17.03 TRADEMARKS:

Trademarks are any written characters, figures, signs, three-dimensional shapes, or any combinations thereof, or any combinations thereof and colors which are used in connection with goods of person who produces, certifies, or assigns such goods in commerce, or with services of person who provides or certifies such services in commerce. (T. L. 2). However, only trademarks filed with Patent Office for registration, examined by examiner of Patent Office, and duly registered with Patent Office, are entitled to be protected as trademark rights under Trademark Law. Registration is not permitted if trademarks do not meet statutory requirements, e.g., trademarks which are not distinctive, which resemble marks of international organizations, governmental insignia, Red Cross mark, those which are apt to be injurious to public morals, or those which resemble registered or widely known trademarks for identical or similar goods. (T. L. 3, 4).

Trademark rights continue for ten years commencing on date of registration, with subsequent ten-year renewals possible. (T. L. 19). Official fees for Patent Office such as application for registration, renewal of registration, etc., are discounted at half price from June 2008. Trademark rights can be transferred independently from transfer of business unless trademark owner is non-profit enterprise undertaking business for public interest. (T. L. 24-2). In case, there are two or more items of designated goods or designated services, trademark right may be divided or transferred to third party separately for each such item. Division and transfer of trademark right cannot take effect without registration. (T. L. 24, 24-2, 35, P. L. 98). Consent of all other co-owners is necessary for co-owner of trademark right to assign or transfer said co-owner's own share or to license trademark. (T. L. 35, P. L. 73). Trademark license can be granted either as ``*Sen'yo Shiyo-Ken*'' (exclusive license) or as ``*Tsujo Shiyo-Ken*'' (non-exclusive license). Exclusive license arises only from contract and requires registration to take effect. (T. L. 30, 35, P. L. 98). In other words, unregistered exclusive license is not regarded as *Sen'yo Shiyo-Ken* but *Tsujo Shiyo-Ken* under Trademark Law, even if trademark owner grants license as exclusive. Registered exclusive license affords exclusive rights to licensee to use trademark in commerce even against trademark owner to extent permitted by contract granting license; licensee also can seek injunctive relief and civil damages for injury to his/her own interest. (T. L. 36 though 39). Non-exclusive license may arise from contract. (T. L. 31). Non-exclusive licensee cannot act to enjoin infringement but may possibly sue for damages. Registration of non-exclusive license is not required but affords certain benefits, primarily making license perfect right. Without such registration, non-exclusive license arising from contract has no effect against third party who is recorded as assignee of trademark. (T. L. 35, P. L. 99).

In case use of registered trademark in particular matter in connection with its designated goods or designated service conflicts with another person's right to patent, utility model, or design for which application has been filed prior to filing date of application of said registered trademark or upon another person's copyright arising prior to filing date of same, such trademark cannot be used in same manner on conflicting part of designated goods or designated service. (T. L. 29). Infringement of trademark exposes party to injunction, action for damages and criminal prosecution. (T. L. 36 through 38, 78). Any person may file request for trial for invalidation of registration of trademark which fails to satisfy requisites for registration. (T. L. 46). Also application for cancellation of trademark can be filed for reason of improper use either by its owner or by licensee and for nonuse for three consecutive years or longer. (T. L. 50, 51). Foreign trademark may be registered in Japan.

Trademark Treaty.

Japan is party to Nice Agreement and Trademark Law Treaty. Also Japan is contracting party to Protocol Relating to the Madrid Agreement Concerning the International Registration of Marks (Mar. 14, 2000).

17.04 UNFAIR COMPETITION:

Unfair competition is act of business tort listed in Unfair Competition Prevention Act. (``UCPA''). Article 2, Paragraph 1 of UCPA provides for 15 types of unfair competition such as passing off indication of goods or business of other's as one's own, imitating configuration of goods, acquiring trade secret by wrongful means, misappropriation of trade secret, cybersquatting, false advertisement, commercial disparagement, etc. Remedies for infringement of business interest by unfair competition are identical to those available for infringement of industrial property rights such as patent, utility model, design, and trademark: injunction, compensation for damages, necessary measures for restoring business reputation, and criminal prosecution. (UCPA 3, 4, 14, 21). Japan is party to Madrid Agreement (Indications of Source).

18 LEGAL PROFESSION

18.01 ATTORNEYS AND COUNSELORS:

Jurisdiction over Admissions.

Practicing attorney in Japan (Bengoshi) must be admitted by Japan Federation of Bar Associations (J.F.B.A., Nichibenren) and local bar association. Foreign attorney who has practiced law in his/her own country for three or more years may be admitted by J.F.B.A. to practice only his/her country's law and international arbitration in Japan.

Eligibility.

Graduates of Legal Training and Research Institute (L.T.R.I.), and others qualified under Art. 5 of Japanese Practicing Attorneys Act (J.P.A.A.), such as those who, after passing bar examination, have served for five years or longer as professors of law faculties, or legal officers or clerks who have served for seven years or longer, are eligible to be admitted by J.F.B.A. (J.P.A.A. 4, 5). One who has been sentenced to imprisonment, has been found guilty by Court of Impeachment of Judges, has been expelled by J.F.B.A. or other professional associations, or has been found to be incompetent or quasi-incompetent, or bankrupt, cannot be admitted by J.F.B.A. (J.P.A.A. 6).

Educational Requirements.

Except for those qualified under Art. 5 of J.P.A.A., it is necessary to be graduate of L.T.R.I. Only successful candidates of uniform Bar Examination are admitted to L.T.R.I.

Examination.

Uniform Bar Examination is held once a year by National Bar Examination Administration Commission under supervision of Minister of Justice.

License.

When practicing lawyer is first admitted by J.F.B.A. or by Minister of Justice (in case of foreign lawyers), registration fee must be paid. There are annual membership fees for J.F.B.A. and local bar association membership fees must be paid as long as one is practicing law. Amount of fees varies from case to case.

Advertisement.

Attorney's advertisement has been widely permitted from Oct. 1, 2000.

Disbarment or Suspension.

In case of violation of J.P.A.A., disciplinary committee of J.F.B.A. will decide whether to give warning or to prohibit lawyer from practicing law for maximum of two year term, or to have lawyer removed from J.F.B.A. and to strike his/her name from J.F.B.A. register, depending upon violation of J.P.A.A. (J.P.A.A. 56, 57). Law regarding foreign lawyers has similar provisions.

Unauthorized practice of law for compensation is prohibited and subject to criminal punishment. (J.P.A.A. 72, 73, 74).

Exclusion.

Testimony of attorney regarding privileged communications with client is excluded.

19 MORTGAGES

19.01 CHATTEL MORTGAGES:

See topic 19.02 Mortgages.

19.02 MORTGAGES:

In order to avoid complicated and time-consuming mortgage foreclosure procedures, provisional registration on basis of conditional sale or preliminary transfer of ownership in lieu of performance of monetary obligation is widely used for purpose of securing performance of obligation. Law Concerning Security by Means of Provisional Registration provides protection for debtors under such arrangement against undue profits of creditors.

Mortgage is encumbrance on specific item of property whereby creditor obtains preferential position in regard to settlement of obligation out of proceeds which could be realized from sale of the property, but without obtaining transfer of title or possession. (C. C. 369). Mortgages can be created only for purpose of securing performance of obligation which must be specifically described. Under Civil Code, mortgages may be created only on real rights of ownership, superficies, and emphyteusis, of immovables, although special legislation provides for mortgages on standing timber, ships, factory foundations, mining rights, fishing rights, agricultural implements, aircraft and automobiles, etc., subject to these being duly registered with competent agency. With respect to movables, on which mortgages may not be created, title may be transferred for purpose of security (Joto Tampo). Courts recognize such transfer as valid security. Transfer of movables by corporation may be registered under special legislation. Mortgages may be created to secure specific obligation or unspecified obligations arising from series of transactions or same kind of transactions with obligor. (C. C. 369, 398-2).

Mortgage rights extend to fixtures and items attached to mortgaged property, as well as to funds or substitute items which constitute consideration for sale of, or compensation for damage to, the mortgaged property. (C. C. 304, 370, 372).

Recording, although not legal requirement, is virtually essential since through this means alone can mortgage be asserted against third party having due interest in mortgaged property. (C. C. 177).

Priority as between mortgages on same item of property is determined by dates of registration. (Real Property Registration Law 4).

Assignment of mortgage to another creditor independently of obligation which it secures is possible, but in order to assert against principal debtor or mortgagor as well as their related parties of interest, consent of principal debtor must have been obtained or notice must have been given. (C. C. 376, 377).

Discharge.

Third party who purchases mortgaged property may discharge mortgage by paying proper amount to mortgagee. (C. C. 378).

Foreclosure.

Mortgage is enforced through application to a district court for auction sale of mortgaged property. (C. E. L. 181 through 188). Provisions concerning auction sale of real property are generally applied to auction sale for enforcement of mortgage. (C. E. L. 188). Only that portion of interest on an obligation which has become due in previous two-year period may be satisfied from proceeds of mortgage sale in priority to third parties' claims, unless registration of interest followed maturity of obligation which it secures. (C. C. 375).

Mortgage certificates may be issued by registration offices in regard to land, buildings or superficies. These certificates incorporate and combine both mortgage and obligation secured thereby, and are negotiable instruments. They are irrevocable, and are transferred by endorsement. System of mortgage certificates was introduced in 1931 but has been used only to a very slight extent.

20 PROPERTY

20.01 ABSENTEES:

Subject to such restrictions as may be imposed under foreign exchange controls, nonresidents are permitted to own and utilize property to same degree as residents. Authority may be exercised by proper power of attorney.

Care of property, if not specifically entrusted by voluntary act of owner, can be directed by court order. (C. C. 25). Persons assuming control over property without legal duty are held responsible to strict standards of conduct. (C. C. 697).

Service of process may be made on agents in respect to matters within their scope of authority.

Escheat follows in event of absence of known heirs of sufficiently close relationship to permit inheritance and of eligible persons having special connections with decedent. (C. C. 959).

20.02 CONVEYANCES:

See topic 20.04 Deeds.

20.03 CURTESY:

Does not exist in Japanese law.

20.04 DEEDS:

Although title to immovables, as with all other forms of property, may be transferred simply by means of agreement between parties, registration is necessary if this fact is to be set up against third parties. (C. C. 176, 177). Abstracts of title and title searches, in American sense, do not exist, and ownership normally can easily be determined from registration record, although not decisive. (Real Property Registration Law). See category 9 Documents and Records, topic 9.03 Records.

20.05 DOWER:

Does not exist in Japan.

20.06 REAL PROPERTY:

No property rights can be created other than those provided for in Civil Code or other laws. (C. C. 175). Following are rights that exist: (I) Ownership (Shoyuken) is complete property right; (II) possession (Senyuken) is condition which will be protected against parties without rights. Possession is presumed bona fide and legal; (III) superficies (Chijoken) is right to use land of another for purpose of owning structures or trees thereon; (IV) emphyteusis (Eikosakuken) is right to use another's land for cultivation or grazing; (V) servitude (Chiekiken) is right to use another's land for benefit and convenience of one's own land and corresponds to easement in American law; (VI) commonage (Iriaiken) is based on old custom whereunder residents of village use forest or plain in common. (C. C. 180, 206, 265, 270, 280). There are four types of security interests in property: (A) Lien (Ryuchiken) which is form of possessory lien; (B) preferential right (Sakidori Tokken), which is statutory lien; (C) pledge (Shichiken), and (D) mortgage (Teitoken). (C. C. 295, 303, 342, 369). See categories 7 Debtor and Creditor, topics Liens, Pledges, Preferential Rights, Mortgages, topic Mortgages.

Certain provisional or contingent rights may be regarded as quasi-property rights in that they can be recorded. Examples are an enforceable promise to sell and resell an immovable. Although lease is not yet considered property right, trend in recent legislation and litigation is to give it similar qualities. (C. C. 605; Land Lease and Home Rent Law 2, 10, 31). However, its continuing classification as contractual obligation still produces inability of lessee to assign or sub-lease without lessor's permission, although lessor will not be able to withhold permission unduly if lessee assigns to another lease together with building on leased land. (C. C. 612; Land Lease and Home Rent Law 19). Also lessee cannot record lease without consent of lessor. Owner of recorded building on leased land can assert lease against person acquiring title to land, and lessee of house who has been delivered possession of house can assert his lease against person acquiring title to house, even though lease itself is unrecorded. (Land Lease and Home Rent Law 2, 10, 31).

With regard to alien ownership of real estate, see category 4 Citizenship, topic 4.01 Aliens.

21 TAXATION

—Scope —

Taxation is both local and national. Limits both as to extent of local taxes and as to categories of local taxes are imposed by national law. Ad valorem taxes are levied on real property of various categories. There is no special personal property tax with certain exceptions.

21.01 ALCOHOL, BEVERAGES AND TOBACCO TAXES:

Liquor taxes are levied at rates provided by law.

21.02 BUSINESS TAXES:

Corporation tax is payable by Japanese corporations, including almost all types of juridical persons, such as those having religious, educational, medical and social welfare objectives, as well as labor unions, and also including informal associations having no status as legal entities but having representative. (See subhead An Informal Association under category Business Organizations, topic Partnerships.) Partnership under Anglo-American concepts thus is not subject to corporation tax, although its partners are individually subject to income tax. Foreign corporation is liable to corporation tax only for Japanese-source income. Uniform tax rate of 30% applies to income of business corporation having capital exceeding 100,000,000 yen. With respect to business corporation with capital not more than 100,000,000 yen and informal association without status as legal entity but with representative, tax rate is 18% for taxable income up to 8,000,000 yen and 30% for taxable income in excess of 8,000,000 yen. For other types of corporations, uniform rate of 22% applies. Foreign tax credit may be obtained in accordance with certain formulae and under certain conditions.

Registration and franchise tax is payable in respect to matters required or permitted by law to be registered and various franchises, permits, designations and certain certificates with respect to one's qualifications. In general, tax to be imposed for commercial registration runs from 1,000 yen to 150,000 yen or 0.1% to 0.7%. (Registration and Franchise Tax Law).

21.03 CONSUMPTION TAXES:

Consumption tax at rate of 5% is levied on all, with certain exceptions, sales and leasing of assets and provision of services effected in Japan for compensation by business enterprises and foreign goods received from bonded areas. Export transactions are exempt from consumption tax. Consumption tax must be paid by business enterprises and those who receive deliveries of foreign goods from bonded areas. Small enterprises stipulated by law are exempt from taxation.

21.04 GASOLINE AND SPECIAL FUELS TAXES:

Gasoline taxes are levied at rates provided by law.

21.05 GIFT TAX:

Gifts made by individuals are subject to gift tax payable by: (1) Recipients domiciled in Japan; (2) recipients domiciled elsewhere but who acquire assets located in Japan. Top bracket gift tax rate is 50% for taxable amounts of over 100,000,000 yen. (Inheritance Tax Law).

21.06 INCOME TAX:

Income tax is payable by individuals domiciled or resident in Japan (“resident” persons accompanying or attached to U.S. Armed Forces are exempt) in respect to all income although certain exemptions are allowed to residents of not more than five years who do not intend to reside permanently in Japan. Income of nonresidents is also taxable to extent derived from sources within Japan. Top bracket income tax rate is 40% for net income of over 18,000,000 yen. Also, withholding taxes of 20% are payable under Income Tax Law by nonresident individuals and corporations in respect to most types of Japanese source income, such as royalties, interest on loans, and dividends unless otherwise stipulated in applicable tax treaty. Foreign tax credit may be obtained in accordance with certain formulae and under certain conditions. Under tax convention between Japan and U.S.A., rates of tax on royalties, interest and dividends paid to U.S. residents or corporations, having no permanent establishment in Japan, are: (1) 0% on royalties; (2) 10% on interest with certain exceptions; and (3) 10% on dividends; provided, however, if U.S. corporation owns 10% or more of shares of Japanese corporation, tax rate on dividend paid on such shares is reduced to 5% (and 0% under certain conditions) with certain exceptions. See subhead Special Taxation Measures, infra.

21.07 INHERITANCE TAX:

Inheritance tax is payable by: (1) recipients domiciled in Japan at time of inheritance; (2) recipients domiciled elsewhere but who acquire assets located in Japan through inheritance. Top bracket inheritance tax rate is 50% for taxable amounts of over 300,000,000 yen. Surviving spouse is exempt from tax that would accrue on decedent's net estate up to net estate value of 160,000,000 yen or if greater his or her statutory share of decedent's net estate. (Inheritance Tax Law).

21.08 LOCAL GOVERNMENT TAXES:

Local Tax.

There are separate prefectural and municipal taxes. Prefectural taxes are inhabitants' tax, enterprise tax, real property acquisition tax, golf course tax, automobile tax, etc. Municipal taxes are inhabitants' tax, fixed assets tax, etc. Inhabitants' tax is payable by both natural persons and corporations and is calculated at specified rate of amount of income in case of natural persons or at specified rate of corporation tax in case of corporations, in addition to small head tax. Enterprise tax is also payable by both natural persons and corporations. Standard rates of fixed assets tax and real property acquisition tax are 1.4% and 3% through 4%, respectively.

Automobile is subject to tax running from 7,500 to 111,000 yen per year in general. In addition, acquisition of automobile is subject to automobile acquisition tax at 3% (5% in case of acquisition of private car excluding light car) of purchase price. (Local Tax Law). Furthermore, automobiles are subject to automobile weight tax which is national tax and imposed in accordance with types of automobiles and their weight. (Automobile Weight Tax Law).

21.09 STAMP TAX:

Stamp duties are payable on documents enumerated by statute, which include certain deeds or contracts, bills and notes, share certificates and certain other investment securities, articles of incorporation, merger contract deeds, bills of lading, warehouse receipts, receipts of money, bank deposit books, etc. Amount runs from 200 yen to 600,000 yen per taxable document. (Revenue Stamp Tax Law).

21.10 TAX INCENTIVES AND EXEMPTIONS:

Special Taxation Measures.

Various forms of favorable treatment in taxation or tax exemptions are provided in Special Taxation Measures Law for purpose of stimulating capital investment and developing important and useful industrial techniques, etc. They include: separate taxation on interest and dividends and reduced tax rates thereon; recognition of accelerated or inflated depreciation on certain machinery; special treatment of income derived from certain overseas technological transactions. Inter-company transfer pricing rules covering cross border transactions between Japanese company and its foreign affiliated company include sales, purchase, loan, technical assistance and consultation transactions, etc. Under these rules transactions are deemed to have been consummated at arm's length transaction price. Also, thin capitalization rules which are somewhat similar to earnings stripping rules for debt-to-equity ratio in excess of 3 to 1.

21.11 TREATIES AND AGREEMENTS:

Tax treaties for purposes of avoidance of double taxation and prevention of evasion from taxation have been concluded and are effective with Australia, Austria, Bangladesh, Belgium, Brazil, Brunei, Bulgaria, Canada, Czech Republic, Denmark, Egypt, Fiji, Finland, France, Germany, Hungary, India, Indonesia, Ireland, Israel, Italy, Kazakhstan, Luxembourg, Malaysia, Mexico, Netherlands, New Zealand, Norway, Pakistan, People's Republic of China (except Hong Kong and Macao), Philippines, Poland, Romania, Russia and certain other countries which used to constitute USSR, Singapore, Slovak Republic, South Africa, South Korea, Spain, Sri Lanka, Sweden, Switzerland, Thailand, Turkey, U.K., U.S.A., Vietnam, and Zambia.

22 TRANSPORTATION

22.01 MOTOR VEHICLES:

With certain exceptions, such as motor vehicles used by national and local governments, U.S. military personnel or foreign diplomats, all motor vehicles used on road must carry liability insurance covering up to 30,000,000 yen. For personal injuries arising from operation of motor vehicles, injured party may claim damages not only from drivers, but also, in many cases, from owners, those for whose benefit vehicles were driven or those who controlled operation of vehicles. In latter cases, exoneration is possible only if defendant proves that he/she and driver paid due care to operation, that injury was caused by intentional or negligent acts of injured person or third party other than driver, and that no mechanical defects existed in vehicle. (Law No. 97 of 1955, Art. 3).

Holder of international driver's permit issued pursuant to Geneva Convention on Road

Traffic may drive motor vehicles in Japan during one year period following his entry into Japan. (Road Traffic Law 107-2).

Japan is member of Convention on Road Traffic of 1949.

See also category 21 Taxation.

22.02 SHIPPING:

Principal features of shipping and maritime law are contained in Book III of Commercial Code, Law of Ships, Ship Registration Rules, Marine Collisions Prevention Act, Ship Employees Act, Ship's Tonnage Act, Maritime Transportation Act, International Carriage of Goods by Sea Act, Act relating to Limitation of Liability of Owners, etc. of Ships, and other ordinances and regulations issued incidental thereto.

Ships have Japanese nationality if they belong to Japanese government, to Japanese citizens or commercial companies whose principal offices are in Japan and whose directors are Japanese or to legal persons whose principal office is in Japan and whose legal representatives are Japanese. (Law of Ships 1). A roster of ships at Maritime Office contains information regarding type, name, port of registry, construction and tonnage of all Japanese ships, except those of less than 20 tons gross and sailing boats. (Com. C. 686; Law of Ships 4, 20). In addition, records relating to ownership and rights in vessels of 20 tons gross or over are to be found at registration office having jurisdiction over home port of ship. Registration of ships produces results similar to registration of immovables. See category 9 Documents and Records, topic 9.03 Records.

Matters relating to use of ship are decided by majority of votes based on value of interest of each co-owner. (Com. C. 693). Any owner dissenting to extensive repairs or a new voyage may require co-owners to purchase his interest. (Com. C. 695). Any owner, except ship's husband, may transfer his interest without consent of co-owners, but should transfer of interest or loss of nationality by co-owner result in loss of Japanese nationality by ship, other co-owners may either purchase interest at reasonable price or have interest sold at auction. (Com. C. 698, 702). Profits and loss are apportioned at end of each voyage. (Com. C. 697). Sale in course of voyage transfers profits and losses to purchaser unless otherwise specified. (Com. C. 688).

Ship's husband may represent owners on all matters except: (1) Transfer, (2) lease or mortgage, (3) insurance, (4) new voyages, (5) extensive repairs, and (6) borrowing money. (Com. C. 700). Ship's master has authority to do all acts necessary for voyage (subject to certain limitations while ship is in home port), but may not, except in order to defray expenses necessary for continuance of voyage: (1) Mortgage ship, (2) borrow money or (3) sell or pledge whole or part of cargo (subject to certain exceptions when done in interest of cargo owner). If ship becomes unrepairable in course of voyage, master may sell it by auction. Limitations on master's authority will not bind third persons acting in good faith. (Com. C. 712 through 715, 717). Shipowner has no liability for damages to money, negotiable instruments and other valuables unless these are declared by consignor. Successive participants in carriage are jointly and severally liable for damage to cargo. (Com. C. 578, 579, 766).

Act relating to Limitation of Liability of Owners, etc. of Ships adopts system of limiting amount of damages arising during voyage which must be paid by liable shipowners, etc., structured to conform with Convention on Limitation of Liability for Maritime Claims, 1976. Limits of total liability of shipowner or his employees are: (a) Where claims are for loss of life or personal injury to passengers of ship, amount of 46,666 Units of Account (Special Drawing Rights as defined by International Monetary Fund) multiplied by authorized number of passengers or 25,000,000 Units of Account, whichever is less; and (b) where all claims are for property damage, 167,000 Units of Account plus, where applicable, 167, 125 and 83 Units of Account for each ton from over 300 up to 30,000 tons, from over 30,000 up to 70,000 tons and in excess of 70,000 tons, respectively. In other cases limits of liability are provided in patterns similar to (b), but amounts are approximately three times those in (b). Salvors and their employees are now eligible for limitation of liabilities. Certain claims are excepted from limitation and certain kinds of conduct bar limitation. Diet passed law to raise limits as per Convention as amended in 1996 subject to Japan's ratification of 1996 Protocol for amendment of 1976 Convention.

Liability of consignee for freight and other expenses arises upon receipt of cargo. Failure to accept cargo empowers shipowner to deposit. (Com. C. 753, 754). Also shipowner may, in event of failure of payment of charges, and with approval of court, sell cargo at auction for two-week period following date of delivery, as long as no third person has acquired possession. (Com. C. 757).

Full charterer may rescind carriage contract before commencement of voyage, upon payment of one-half of freight. (Com. C. 745). Part charterer who rescinds independently before commencement of voyage must pay full amount of freight, less freight earnings from other sources. (Com. C. 748). Damages or expenses occurring from disposition by master to save ship or cargo from a common danger are shared by all persons of interest in accordance with stated rules of general average. (Com. C. 789). Liability of contribution in case of general average is limited by value remaining at time of arrival of ship or delivery of cargo. (Com. C. 790, 791). Salvage is recognized, amount being determined by court on basis of circumstances. (Com. C. 800, 801).

Preferential right exists against ship, her appurtenances and unpaid freight for voyage for: (1) Expenses of a sale of ship and her appurtenances at public auction and expenses of preservation after commencement of proceedings for public sale; (2) expenses of preservation of ship and its appurtenances at last port; (3) fees and dues payable for ship in respect to voyage; (4) pilotage and towage; (5) expenses for assistance in distress and salvage and for ship's portion of any general average; (6) obligations which have arisen from necessity of continuing voyage; (7) obligations in favor of master or other mariners arising out of contract of hiring; and (8) obligations arising from sale or building and outfitting of ship effected prior to commencement of voyage, and for outfitting, supplies and fuel for her last voyage (Com. C. 842); and (9) claims for compensation of damage arising during voyage subject to possible limitation under Act relating to Limitation of Owners, etc. of Ships (Act relating to Limitation of Owners, etc. of Ships 95). Priority exists in order given, except that in cases (4), (5), and (6), later claims take precedence over earlier claims and later voyages over earlier voyages. (Com. C. 844). Assignee of ship must, after registering assignment, call on holders of preferential rights for notification within one month. Preferential rights take precedence over mortgages and last for one year following creation. (Com. C. 846 through 849).

Under Japanese International Carriage of Goods by Sea Act, preferential right against ship and her equipment is given to person who has right to claim compensation for damages to cargo arising within scope of master's duties when contract of carriage has been made with reference to whole or part of a ship and charterer in turn makes a contract of carriage with third person. Priority given to this preferential right is in same order as (9) above. (International Carriage of Goods by Sea Act 19).

Oil Pollution Damage Compensation Law implements International Convention on Civil Liability for Oil Pollution Damage, 1969 and its supplementary Convention to which Japan is party.

23 TREATIES AND CONVENTIONS

23.01 TREATIES:

Treaties or agreements that relate to commerce are in effect with the following: Greece

(1899), Spain (1901 and 1915), Sweden (1911), Switzerland (1911), Denmark (1912), France (1912, 1964, 1995, and 2007), Germany (1928), Netherlands (1913), Finland (1926), Turkey (1934), Uruguay (1940), Iran (1941), U.S.A. (1953), Canada (1954), Cambodia (1956), Russia and other countries which used to constitute U.S.S.R. (1956, 1958, 1991 and 2000), Norway (1957), Australia (1957, 1970, and 2008), India (1958), New Zealand (1958), Ethiopia (1958, 1968 and 1997), Yugoslavia (1959), Malaya (Malaysia) (1960), Cuba (1961), Pakistan (1961 and 2008), Peru (1961), Benelux (1962), Indonesia (1963), U.K. (1963), Haiti (1963), El Salvador (1964), Argentina (1967), Central African Republic (1968), Malta (1968), Mexico (1969 and 1996), Bulgaria (1970), Rumania (1970), Ivory Coast (1970), Malawi (1970), Zaire (1971), People's Republic of China (1974), Congo (1975), Hungary (1976), Poland (1980), Philippines (1980 and 2007), Albania (1988), Mongolia (1990 and 2002), Israel (1993), Czech Republic (1992) and Slovak Republic (1992).

Japan is a signatory to Convention on Settlement of Investment Disputes between States and Nationals of Other States of Mar. 18, 1965, Convention on Service Abroad of Judicial or Extrajudicial Documents, Convention Relating to Civil Procedures, Convention on Recognition and Enforcement of Foreign Arbitral Awards, Convention Abolishing the Requirement of Legalisation for Foreign Public Documents, Convention on Elimination of All Forms of Discrimination against Women and Marrakesh Agreement Establishing the World Trade Organization.

See also Selected International Conventions section.

Copyright Treaties.

See category 17 Intellectual Property, topic 17.01 Copyright.

Patent Treaty.

See category 17 Intellectual Property, topic 17.02 Patents.

Tax Treaties.

See category 21 Taxation, topic 21.11 Treaties and Agreements, subhead Tax Treaties.

Trademark Treaty.

See category 17 Intellectual Property, topic 17.03 Trademarks and Trade Names.

REPUBLIC OF KOREA LAW DIGEST

—Scope —

Revised for 2009 edition by

KIM & CHANG, of Seoul.

(Abbreviations used are: A.L. for Arbitration Law; A.P.W.P.C. for Act of the Promotion of Worker Participation and Cooperation Act; B.N.A. for Bills and Notes Act; C. for Constitution; C.A. for Copyright Act; C.C. for Civil Code; C.C.P. for Code of Civil Procedure [N.C.C.P. for newly revised C.C.P. effective from July 1, 2002]; C. Crim. P. for Code of Criminal Procedure; C.E.A. for Civil Execution Act; C.L.A. for Conflict of Laws Act; C.O.A. for Court Organization Act; Com. C. for Commercial Code; C.P.A. for Consumer Protection Act; C.R.L. for Company Reorganization Law; E.E.C.A. for Exit and Entry Control Act; E.N.I.N.A. for Electronic Note Issuance and Negotiation Act; F.E.T.L. for Foreign Exchange Transaction Law; F.I.P.L. for

Foreign Investment Promotion Law; F.T.L. for Foreign Trade Law; L.D.A.L. for Labor Disputes Adjustment Law; L.M.C.L. for Labor Management Council Law; L.S.A. for Labor Standards Act; L.U.L.R.A.A. for Labor Union and Labor Relations Adjustment Act; M.R.F.T.A. for Monopoly Regulation and Fair Trade Act; M.V.C.L. for Motor Vehicles Control Law; P.A. for Patent Act; R.T.L. for Road Traffic Law; S.E.L. for Security Exchange Law; T.A. for Trademark Act; U.C.P.T.S.P.L. for Unfair Competition Prevention and Trade Secret Protection Law; UIL for Unified Insolvency Law; U.M.A. for Utility Model Act. *Note*: Abbreviations used in category Environment are explained in that section.)

Note: This revision incorporates legislation through Dec. 31, 2008.

1 INTRODUCTION

1.01 CURRENCY:

Legal currency is Won. (F.E.T.L. Art. 3). In May 1964, Korea adopted unitary floating exchange rate system pegged to U.S. dollar in place of fixed rate system. Korean government introduced special basket pegged system on Feb. 27, 1980. In Mar. of 1990, special basket pegged system was replaced by market-average foreign exchange rate system, which determines daily exchange rate based on exchange rates and volumes in interbank market. On Dec. 16, 1997 Korea shifted to free floating exchange rate system due to recent currency crisis.

1.02 GOVERNMENT AND LEGAL SYSTEM:

Constitution.

Korean constitution was adopted on July 17, 1948 after independence from Japanese colonial rule and has since been amended nine times. It declares principles of human rights and provides for basic principles of organization and administration of government. Korea is declared to be democratic republic. Sovereignty is held by people and all governmental authority is derived from people. (C. 1). Legislative power is bound by Constitution; executive and judicial powers are bound by law. Korean nationals of both sexes who have reached 19 years of age are qualified to vote on referenda or elections pursuant to statutes. (C. 24).

Legislative power is exercised by National Assembly. Members of National Assembly are elected in general, direct, and popular elections every four years. (C. 40–42). To pass bill, attendance of majority of members on register and concurrence of majority of members present are required. (C. 49). President may veto any bill passed by National Assembly for reconsideration. If National Assembly repasses bill with more than half of members on register and with concurrence of two-thirds or more of members present, then bill becomes law. (C. 53).

In Korea, regular session of National Assembly shall be convened from every Sept. 1, to date decided by National Assembly. Extraordinary sessions of National Assembly shall be convened upon request of president or one-fourth or more of total members. Period of regular sessions shall not exceed 100 days, and that of extraordinary sessions, 30 days.

Executive Power.

President is chief of state and heads Executive Branch which is vested with all executive powers. (C. 66). President is elected by general, direct, and popular elections held every five years. (C. 67, 70). No person can be elected President more than once. (C. 70).

President is vested with substantial and independent powers to initiate and implement government policies. President's important powers include command of National Armed Forces, taking of emergency measures in times of financial or economic crisis subject to ex post facto approval of National Assembly, proclaiming martial law, appointing important public officials including ministers and judges of Supreme Court, and right of pardon. (C. 74, 76 through 79, 104).

Judicial Power.

Judges are granted independent position. They are bound solely by Constitution and law and are not subject to any other orders or authority. (C. 103). Judges, other than Supreme Court justices, are appointed by Chief Justice of Supreme Court; their term of office is ten years. Supreme Court justice's term is six years. (C. 104, 105). Courts have authority to declare any decree or executive act unconstitutional or unlawful and void. However, authority to declare statutes passed by National Assembly unconstitutional and void is vested in Constitutional Court. (C. 111).

Law.

Korean law is based on Civil Law. Laws are codified and court precedents are not granted official status as law.

International Law.

Treaties which Korea has entered into with other states and generally recognized rules of international law have same impact as domestic statutes. (C. 6).

1.03 HOLIDAYS:

Government holidays are: Sundays; Jan. 1 (New Year); 30th day of 12th lunar month and 1st and 2d day of 1st lunar month (Lunar New Year Holidays); Mar. 1 (Samiljeol—Mar. 1 Independence Movement); 8th day of 4th lunar month (Budda's Birthday); May 5 (Children's Day); June 6 (Memorial Day); Aug. 15 (Liberation Day); 14th, 15th and 16th day of 8th lunar month (Choosuk—Thanksgiving); Oct. 3 (National Foundation Day); and Dec. 25 (Christmas). Mandatory holidays of private sectors are one day per week (customarily, Sun.) and May 1 (Labor day), but many private companies are also closed on above-mentioned government holidays.

1.04 OFFICE HOURS AND TIME ZONE:

The Republic of Korea is in the +09:00 GMT time zone. Office hours are generally from 9 a.m. to 6 p.m.

2 BUSINESS ORGANIZATIONS

2.01 AGENCY:

Agent acting within scope of his authority and under proclamation of acting on principal's behalf binds principal by any manifestation of intent. (C.C. 114). Agent binds himself personally without such proclamation, unless other party knows or should have known of agent's status. In commercial transactions, principal is nevertheless still bound and additional performance by agent may be demanded. (C.C. 115, Com. C. 48). Noncommercial contracts made by agent acting beyond his authority bind agent but not principal until ratified. (C.C. 130). Ratification may be requested within reasonable period by another party. Until ratified, contract may be cancelled by another party at any time unless another party knows that agent has no authority. When only agent is personally bound, other party may demand either performance or damages. (C.C. 135).

Individual with no legal capacity may be agent. (C.C. 117). Unless otherwise provided for, agent may only perform acts of preservation or improvement of object of agency but may not alter it. (C.C. 118). Agent may not appoint subagent without consent of principal unless unavoidable reason exists. (C.C. 120). One may not be agent for both sides of legal act without consent, but performance of existing obligations is not subject to foregoing restriction. (C.C. 124). If agent acts beyond scope of his authority but third party reasonably believes agent has authority, principal is bound by acts of agent. (C.C. 126). Death of principal (other than in case of commercial transactions) or agent, bankruptcy, or adjudication of agent's incompetency, completion of terms of contract all terminate agency relationship. (C.C. 127, 128).

Commission merchant is person who effects sales or purchases of goods or of valuable instruments in his own name for account of another person. (Com. C. 101). By sale or purchase effected for his principal, commission merchant directly acquires rights and incurs obligations with regard to other party to transaction. (Com. C. 102). Goods or negotiable instruments which have been received by commission merchant from his principal, or acquired through sales and purchases, shall be deemed to belong to principal insofar as relationship between principal and commission merchant, and creditors of commission merchant are concerned. (Com. C. 103). As relationship between principal and commission merchant is mandate, commercial merchant owes general duty to properly manage affairs entrusted to him with due care. He is also under special obligations stipulated in Commercial Code. (Com. C. 104, 105, 106, 108). Commission merchant has right to demand remuneration, right of retention, right for deposit and auction of subject matter, and right to intervene. (Com. C. 61, 67, 91, 107).

2.02 CORPORATIONS:

Legal persons must come into existence in accordance with provisions of Civil Code, Commercial Code, special acts of legislation, or special legislative charter. (C.C. 31). Although classified as private and public, or for profit and for nonprofit, etc., they are grouped together for convenience under title “Corporations”.

Legal Persons Under Civil Code.

Civil Code has two kinds of legal entities or juridical persons, associations and foundations. Natural persons may form association through articles of association which is managed by directors elected by general assembly. (C.C. 40, 58). Foundation is created by endowment of property for particular purpose and managed by self-perpetuating or court appointed directorate. (C.C. 43, 44). Both may be incorporated as legal persons subject to permission of competent authorities dealing with science, religion, charity, art, social intercourse or other nonprofit enterprises. (C.C. 32). Both act only through authorized representatives, and are liable for acts done by them if within scope of their duties. (C.C. 34, 35, 57, 58, 59). Damages incurred as result of ultra vires act are joint and several liability of those members, directors and other representatives who have acted or supported resolutions for such ultra vires acts. (C.C. 35). Both associations and foundations may be dissolved upon expiration of period of duration, fulfillment of objectives or impossibility thereof, occurrence of any cause of dissolution specified in articles of incorporation, bankruptcy, or annulment of permission for incorporation. Associations may also be dissolved if no member remains, or by resolution of general assembly. (C.C. 77).

Companies and legal persons organized under Commercial Code, are associations incorporated for purposes of engaging in commercial transactions and acquisition of gains. (Com. C. 169). Four kinds of companies are provided for by Commercial Code: Partnership Companies (hapmyong-hoesa), Limited Partnership Companies (hapcha-hoesa), Stock Companies (chusik-hoesa), and Limited Companies (yuhan-hoesa). (Com. C. 170). If organized in compliance with all legal preconditions and properly registered, no government approval is necessary.

Partnership companies create new and independent legal entities. (Com. C. 171). Partnership companies are created by articles of incorporation with signature of each member stating value of respective contributions. (Com. C. 179). Managers are appointed by majority vote. (Com. C. 203). Each member must see to administration of company's business; however, articles may remove this duty. (Com. C. 200). Consent must be unanimous for changes in articles of incorporation or transfer of any individual member's share. (Com. C. 197, 204). Members may not conduct or assume official positions in competing business without consent. (Com. C. 198). Members have joint and several liability for obligations in excess of company's assets. (Com. C. 212). Members subsequently admitted to company incur liability for all prior obligations. (Com. C. 213). Members may, with six months notice, withdraw from partnership at end of any fiscal year if company was established for indefinite period or for life of partner. Also members may withdraw at any time should unavoidable circumstances exist. (Com. C. 217). Membership may be terminated upon occurrence of any causes specified in articles of incorporation, unanimous consent, death, adjudication of incompetency, bankruptcy, and expulsion. (Com. C. 218). Failure to make contributions is cause for expulsion which requires court order. (Com. C. 220). Withdrawing members can be reimbursed for services and credits rendered as contributions unless otherwise provided by articles of incorporation. (Com. C. 222). Partnership companies may be dissolved upon occurrence of any cause of dissolution specified in articles of incorporation such as expiration of prescribed term or unanimous consent, loss of all except one member, merger, bankruptcy or court adjudication. (Com. C. 227). Statutory liquidation is supervised by court. (Com. C. 250 et seq.).

Limited partnership companies resemble partnership companies but differ in liability each member has in terms of company obligations. (Com. C. 268). Liability of each member must be provided in articles of incorporation, and those with limited liability may not make their contribution in form of personal services or credit. (Com. C. 270, 272). Members with unlimited liability have similar responsibilities as in partnership companies. Members with limited liability may not represent company, but may inspect and supervise its operations. (Com. C. 273, 277, 278). Loss of all members of either class requires dissolution. (Com. C. 285).

Stock companies are most common form of business organization in Korea. One or more promoters create company by adopting articles of incorporation and meeting following legal requirements. Articles must state business objective, trade name, total number of shares authorized, amount of each share, total number of shares to be issued at time of incorporation, address of principal office, manner of giving company's public notices, and full name and domicile of each promoter. (Com. C. 288, 289). Following must be in articles to have legal effect: Company's duration, special promoter benefits, contributions in kind, property to be acquired upon incorporation. (Com. C. 227, 290). Articles of incorporation must be acknowledged by notary public. (Com. C. 292). Company comes into existence upon registration after inaugural general meeting of shareholders if there are shareholders other than promoters. In certain cases, such as in-kind contribution, etc., court inspection will precede company's existence. (Com. C. 299, 299-2, 300, 308, 309, 310, 311 through 314, 316, 317). Incorporation does not limit liability of promoters from acts which occurred in course of incorporation. (Com. C. 322).

Capital of stock company must be 50,000,000 Won or greater, and is divided into shares. Only par value shares may be issued and each share should be of equal value of at least 100 Won. (Com. C. 329, 329-2). Shares are usually nonbearer but articles of incorporation may provide for bearer certificates. (Com. Co. 357). Those holding nonbearer shares and not wanting certificates may request that certificates not be issued and return any certificates already issued. (Com. C. 358-2). Company may issue two or more classes of shares which differ in respect to distribution of profits, interest, or surplus assets. Such particulars and numbers of each class of shares must be determined by articles of incorporation. (Com. C. 344). Transfer of shares may be restricted, requiring board approval under articles of incorporation. (Com. C. 335). Transfer before issuance of share certificates is not effective against company (this does not apply more than six months after incorporation or payment for new shares). (Com. C. 335). Company cannot purchase its own shares nor hold them as pledgee in amount exceeding 1/20 of total number of shares issued and outstanding. Company in which more than 50% of shares are held by another company (parent company) cannot acquire shares of such parent company, except in special circumstances as where company must dispose of shares immediately. (Com. C. 341, 341-3, 342, 342-2). Transfer of shares becomes effective upon delivery of certificates. However, nonbearer shares must be registered in stockholders' registry to be treated as transferred by company. (Com. C. 336, 337).

Authorized shares may be issued at any time by resolution of board of directors unless articles of incorporation require resolution of stockholders. (Com. C. 416). Each stockholder has preemptive rights to new shares according to number of shares he owns, and such rights may be made transferable by resolution of board of directors or, if articles of incorporation so provide, by stockholders. (Com. C. 416, 418). Transfer of preemptive rights to new shares must be done by delivery of subscription warrant. (Com. C. 420-3). Newly issued shares may be allocated to any third party other than existing shareholders if there is specific exception provided for in company's Articles of Incorporation, such as for purpose of introducing new technology and for improving company's financial structure.

Stockholder's Liability.

After subscription price is paid, stockholder has no other personal liability for obligations of company. (Com. C. 331).

Rights of Minority Shareholders.

Shareholders who hold certain amounts varying from one hundredth to one tenth of issued and outstanding shares are granted several rights under Commercial Code, including right to request board of directors to convene extraordinary general meeting of shareholders, right to request company to file suit against director claiming his liability, right to demand court order to dissolve company under extreme circumstances, etc. (Com. C. 363-2, 366, 382-2, 385, 466, 467, 402, 403, 520).

Stock options may be granted to director, auditor, employee of company if so provided for in articles of incorporation and by resolution of meeting of shareholders but cannot exceed amount of one tenth of total shares issued and outstanding. Those who execute influence in-fact on substantial matters of business of company, such as appointment and removal of directors and auditors, and certain family members of those described above, cannot be granted these rights. (Com. C. 340-2).

Organs of stock company are general meeting of stockholders, directors, board of directors, and auditors. General meeting of stockholders may resolve only matters provided for in Commercial Code or articles of incorporation. (Com. C. 361). Ordinary general meetings must be convened at least once each fiscal term and extraordinary general meetings may be convened whenever necessary. (Com. C. 365). Each stockholder has one vote for each share. However, company is not entitled to vote its own shares. Company more than 10% of whose issued shares are held by another company or by both parent and subsidiary company or subsidiary company is not entitled to vote its shares in such other company or parent company. (Com. C. 369). Split votes may be cast with prior notice. (Com. C. 368-2).

Resolutions are adopted by simple majority of shares present, which should be at least one-quarter of total number of shares issued and outstanding. (Com. C. 368). Major resolutions require two-thirds majority of shares present, which should be at least one-third of total number of shares issued and outstanding (e.g., amendment of articles of incorporation, capital reduction, merger, transfer of whole or important part of company's business, taking over business of another company, dissolution, or removal of directors or auditors [Com. C. 374, 385, 415, 434, 438, 518, 520-2, 522]).

Stock Swap System.

Company may become parent company which holds all issued and outstanding shares of subsidiary or it may incorporate such parent company by means of stock swap system in accordance with shareholders' approval.

Proxies.

Shareholders may vote by proxy. Proxy statements must be filed at general meeting to establish power of representation. (Com. C. 368). Shareholders may vote in writing without attending shareholder meeting, which shareholders could do only by attending meeting or submitting proxy. (Com. C. 368-3).

Board of directors' duties include execution of business, appointment or removal of managers, establishing, moving or closing branch offices, and supervision of performance of individual directors. (Com. C. 393). Resolutions of board of directors are adopted by majority vote if more than one-half of all directors are present unless articles of incorporation have stricter requirements. (Com. C. 391). Unless articles of incorporation specify otherwise, directors may convene board of directors' meeting through video conferencing. (Com. C. 391). Commercial Code allows board of directors to establish various committees, which are delegated board's power to conduct relevant functions. (Com. C. 393-2).

There must be three or more directors, elected at general meeting by stockholders, and each may hold office for term usually not exceeding three years. However, if total of face value of issued shares is less than 500,000,000 Won, such stock companies may have one director or two directors. (Com. C. 383). One or more directors with authority to represent company must be appointed from among directors by resolution of board or, if articles so provide, by stockholders. (Com. C. 389). Company has liability for any acts of director who has held any title such as president, vice-president, chief director or managing director though not authorized representative if third party concerned acted in good faith. (Com. C. 395). No director may, without consent of board of directors, effect transaction for himself or third persons or become partner (other than limited) or director of another company in same kind of business. (Com. C. 397).

There must at least be one auditor, appointed at general meeting of stockholders. In selecting auditors, individual stockholder although owning stock, may not vote more than 3% of total number of issued voting shares. (Com. C. 409). Commercial Code allows company to have either audit committee or statutory auditor (but not both). Audit committee must consist of at least three directors. In addition, directors involved in management may not constitute more than one-third of members of audit committee. In order to have audit committee, company must specifically provide for it in its articles of incorporation. (Com. C. 415-2). Auditors serve until adjournment of ordinary general meeting of stockholders for final settlement of accounts held within three years from assuming office. (Com. C. 410). Auditors may not concurrently assume office of director, manager or other employee of company or subsidiary of company. (Com. C. 411). Auditors may attend board of directors' meetings, may supervise directors' performance of duties, may at any time require directors to file business reports, and may examine business and financial conditions of company. Auditors may request to board that general meeting of stockholders be convened. Auditors of parent company have power to examine business and financial conditions of subsidiary. (Com. C. 391-2, 412, 412-2, 3, 4). Auditors have duty to report on and examine financial statements and business reports prepared by directors issued to general meeting. (Com. C. 413, 413-2).

Amending articles of incorporation requires two-thirds majority vote present, which should be at least one-third of total number of shares issued and outstanding and at general meeting of stockholders. (Com. C. 434). If, company has issued two or more classes of shares, and certain class of stockholders is prejudiced by proposed amendment, resolution of meeting of such class of stockholders is required in addition to that of general meeting of stockholders. (Com. C. 435).

Statutory reserves are capital and earned surplus reserves. Capital surplus reserve is amount applied to stated capital and is limited to excess of issue price over par. (Com. 459). Ten percent of cash dividends paid out of profits each fiscal period must be credited to statutory earned surplus account until such account is one-half value of stated capital. (Com. C. 458).

Statutory reserve funds can be transferred to stated capital to increase it or remove deficiencies. (Com. C. 460, 461).

Dividends to extent that net assets exceed stated capital, statutory reserves (capital surplus reserve and earned surplus reserve), and required amount of retained earned surplus reserve may be declared each fiscal period. (Com. C. 462). Company can pay dividends with new shares by resolution of general meeting of stockholders. Stock dividends cannot exceed one-half of total sum of dividends. (Com. C. 462-2).

Bonds may be issued by resolution of board of directors. (Com. C. 469). Total value of bonds may not exceed four times value of net assets of company stated in latest balance sheet. (Com. C. 470). Company may issue convertible bonds and bonds with warrants to subscribe for new shares. (Com. C. 513, 516-2). Bondholders may convene meeting to adopt resolutions with court approval if their interests are being prejudiced unless provided for otherwise in Commercial Code. (Com. C. 490).

Corporate division of company may result in incorporation of one or several companies, or merger with one or several existing companies, or incorporation of and merger with one or several companies simultaneously. (Com. C. 530-2). Contract stipulating statutory provisions must be approved of by resolution of shareholders' meeting. (Com. C. 232, 527-5, 530-11).

Merger is provided in Commercial Code. (Com. C. 174). Contract stipulating statutory provisions must be approved by resolution of shareholders' meeting. (Com. C. 522 through 525). Shareholders against merger have appraisal rights. (Com. C. 522-3).

Company may be dissolved by expiration of term in articles of incorporation, merger, bankruptcy, court order and resolution of general meeting of stockholders. (Com. C. 517). Except in mergers, liquidation supervised by court follows dissolution. (Com. C. 531 et seq.).

Limited companies are created by one or more but less than 50 members who jointly execute articles of incorporation which provide business objectives, trade name, name and residence of each member, capitalization, value of each unit of contribution, number of units of contribution made by each member, and principal office. (Com. C. 543, 545). Capitalization of 10,000,000 Won or greater and at least 5,000 Won per unit of contribution are required. (Com. C. 546). Transfer of units to nonmember must be approved by general meeting. (Com. C. 556). Directors, elected by general meeting, are company's business representatives. Directors may not compete against business of company. (Com. C. 397, 547, 562, 567). Limited company is otherwise similar to stock company.

Other Legal Persons.

Certain acts of special legislation distinct from Civil or Commercial Code may create associations and other legal entities such as trade associations and labor unions. Municipalities are also legal entities. Special charters for corporations such as The Bank of Korea have been passed by National Assembly.

Foreign corporations are those which have addresses abroad or are incorporated in compliance with foreign laws. There are no provisions in Civil Code about foreign corporations but generally they enjoy same rights and powers as similar domestic corporations under Korean law, absent treaty or provisions to contrary; for example, foreign corporations cannot acquire real property rights without advance report to competent provincial authority. (Alien Land Acquisition Act 6).

Commercial Code contains detailed provisions concerning foreign corporations. Foreign company which intends to engage in commercial transactions must appoint representative in Korea, establish business office and, in respect to establishment of its office of business, register office in same manner of registration as that of branch office of same or similar kind of company incorporated in Korea. (Com. C. 614). Company which establishes its principal office in Korea or whose chief objective is to carry on business in Korea must, even though incorporated in foreign country, comply with same provisions as company incorporated in Korea. (Com. C. 617). Foreign company must also register with law under which it had been incorporated, as well as full name and permanent residence of its representative in Korea. (Com. C. 614). Until it is registered, foreign company cannot engage in commercial transactions, and persons doing so are jointly and severally liable along with company. (Com. C. 616).

Failure to commence business within one year after registration, engaging in illegal business, and acting in contravention of law, decree, good moral or other public order by representative or any other person administering affairs of company are grounds for issuance of court order for termination and liquidation of business. (Com. C. 619, 620).

Except as otherwise provided, foreign company is deemed to be company formed in Korea either of same nature or kind which it most closely resembles, insofar as other laws apply. (Com. C. 621).

2.03 PARTNERSHIPS:

Partnership becomes effective when two or more persons agree to carry on joint undertaking by making mutual contribution thereto. Money, property, or services may be made object of contribution. (C.C. 703).

Affairs of partnership are conducted by majority of partners or, if several managers have been designated, by such managers. But ordinary affairs may be conducted by any partner or any manager acting alone, unless objections are raised by other partners or managers. (C.C. 706). One or more managers may be designated by partnership contracts or be elected with affirmative votes of two-thirds or more of all partners, and thereafter, managers who are also partners may not resign without due reason or be removed without unanimous consent of other partners. (C.C. 706, 708).

Value of profit and loss to be shared is proportional to each partner's contribution in absence of specific agreement between partners. But creditor who was not aware of proportion of liability among partners at time when his claim arose may exercise his right against each partner in equal shares. (C.C. 711, 712). Debtor of partnership may not set off his claim against partner from his obligation to partnership. (C.C. 715).

When duration of partnership is not fixed, or is fixed at lifetime of partner, each partner may retire at any time. However, such partner may not, in absence of any unavoidable reason, retire at time which would be unfavorable to partnership. Even when duration of partnership is fixed, each partner may retire, if any unavoidable reason exists for doing so. (C.C. 716). Partner is deemed to have retired also in event of death, bankruptcy, adjudication of incompetency, or expulsion. (C.C. 717). Accounts between retired partner and other partners are based on status of property of partnership at time he retires, but accounting of matters not yet completed at that time may be made when completed. (C.C. 719).

Causes for dissolution of partnership are fulfilment of object of creation, impossibility of such fulfilment, or expiration of duration set by partnership contract. Upon dissolution, affairs of partnership are liquidated and assets distributed proportionally to each partner's contribution. (C.C. 721 through 724).

3 BUSINESS REGULATION AND COMMERCE

3.01 BILLS AND NOTES:

Korea is in conformity with Geneva International Conventions on Uniform Law of 1930 and 1931.

Bills of Exchange.

Bill of exchange must contain: (1) Term “bill of exchange”; (2) unconditional order for payment of specified sum of money; (3) name of drawee; (4) maturity (payment is deemed to be at sight when no maturity is stated); (5) designation of place for payment (unless otherwise stated, place of payment is deemed residence of drawee); (6) name of payee; (7) date and place drawn if absent deemed address of drawer; and (8) name and seal, or signature of drawer. Bills of exchange may be payable to drawer, his order, or to account of third person. (B.N.A. 1 through 3).

Indorsements must be unconditional but may have designations or may be blank. All bills of exchange may be transferred by indorsement unless drawer has included term “no transfer by indorsement.” on time billing exchange. (B.N.A. 11 through 13, 15).

Bills payable at specified period after sight must be presented for acceptance within one year after date of issue at residence of drawee. Drawers or indorsers prescribe time of presentment. (B.N.A. 21 through 23).

Name and seal, or signature of drawee on face of instrument is deemed to be sufficient means of acceptance. Bills payable at specified period after sight must have dated acceptance. Acceptance must be unconditional but may be only for part of total sum payable. Third parties may guarantee bills or notes by affixing name and seal or signing on their face or tag. (B.N.A. 25, 26, 30, 31).

Bills of exchange may be paid: (1) At sight; (2) at specified period after sight; (3) at specified period after date of issue; and (4) at specified date. (B.N.A. 33). Sight bills of exchange are payable on presentment within one year of issue date. (B.N.A. 34). Bills of exchange payable on specified date or period after issue or sight must be presented for payment on due date or within two business days after due date. (B.N.A. 38). There is no grace period. (B.N.A. 74). Bills of exchange payable in currency other than currency of place of payment, may be paid in currency of place of payment. Exchange rate will be that on day of maturity or payment. (B.N.A. 41). Words prevail over figures, and smallest amount is amount payable. (B.N.A. 6).

Indorsers, drawer and guarantors are liable on bills of exchange if payment is not made at maturity or before maturity in events of: Total or partial refusal of acceptance; drawee becoming bankrupt or insolvent; or drawer of bill of exchange prohibited from presentment for acceptance becoming bankrupt. (B.N.A. 43). Instrument to prove default must be officially authenticated. When bill becomes payable, nonpayment must be protested within two business days from due date, except for sight bills. (B.N.A. 44). Notice of refusal of acceptance or payment must be given to drawer and endorser within four business days, indorser must notify party from whom he received instrument within two business days of indorser's receipt of notice. (B.N.A. 45).

Invalid signatures on instrument do not remove liability of persons who actually signed bill. (B.N.A. 7). Agent signing bill is personally liable if he had no authority to do so. (B.N.A. 8). Drawer guarantees acceptance and payment, but may disclaim guarantee of acceptance. (B.N.A. 9).

Drawers, acceptors, indorsers and guarantors have joint and several liability. Holder may sue each individual without regard to order of liability or join all in one action. (B.N.A. 47). Holder may recover any amount unpaid on bill, 6% per annum interest from date of maturity, plus expenses. (B.N.A. 48, 49). If time limit for presentment for protest or payment passes, holder has no recourse against any party except acceptor. (B.N.A. 53). Presentment prevented by vis major or any other legal prohibition may be made after cause for delay has terminated. (B.N.A. 54).

Capacity is determined according to law of party's nationality, but he may still be bound if he signed in country wherein he had capacity. (C.L.A. 51). Formal acts required for bill of exchange, promissory note or check are governed by law of place where it is signed. Checks may follow requirements of law of place of payment. (C.L.A. 53). Obligations of acceptor of bills of exchange and issuer of promissory notes will be governed by law of place of payment. Obligations on checks will be governed by law of place of signing. (C.L.A. 54).

Holder's claims on bill of exchange against acceptors lapse three years from date of maturity, and against indorsers and drawers are actionable only one year from date of protest. Claims of indorser against other indorsers and drawers are actionable six months from date of payment or commencement of action by indorsee. (B.N.A. 70).

Promissory notes must, with certain exceptions, contain: (1) Term “promissory note”; (2) unconditional promise to pay specified sum of money; (3) maturity date; (4) place of payment; (5) name of payee; (6) date and place issued; and (7) name and seal, or signature of maker. (B.N.A. 75). Rules governing bills of exchange apply mutatis mutandis to promissory notes. (B.N.A. 77). Promissory notes may also be issued and negotiated electronically pursuant to Electronic Note Issuance and Negotiation Act (“E.N.I.N.A.”) which went into effect on Jan. 1, 2005. Such electronically issued notes must contain: (i) Items (1), (2), (3), (5) and (6) of B.N.A. 75 above; (ii) financial institution to whom electronic note will be presented for payment; (iii) information indicating identity of electronic note; and (iv) information indicating identity of relevant parties (including maker and payee) relating to electronic note. (E.N.I.N.A. 6). Endorsements of and guarantees for electronic note and exercise of rights arising out of electronic note shall be permitted only through use of electronic documents under E.N.I.N.A. (E.N.I.N.A. 5).

Bills of Lading.

Carrier must, upon demand by charterer or shipper, furnish him with bill of lading in one or more parts after receipt of goods carried. Carrier must, upon demand by charterer or shipper, furnish him with shipped bill of lading in one or more parts after loading of goods, or must show effect of such loading on bill of lading mentioned in preceding sentence. (Com. C. 813[I][II]). Carrier may authorize master or any agent to furnish bills of lading or show above effect mentioned in preceding sentence. (Com. C. 813[III]).

Bill of lading must contain following particulars and be accompanied by name and seal or signed by issuer: (1) Name, nationality and tonnage of ship; (2) type, weight or volume of goods, types, number and marks of packages, noted in writing by shipper; (3) external appearance of condition of goods; (4) full name or trade name of charterer or shipper; (5) full name or trade name of consignee; and notify party; (6) port of loading; (7) port of discharging; (8) freight; (9) place where and date when bill of lading was made; and (10) if bill of lading has been made in two or more parts, their number. (Com. C. 814).

At designated port of discharging, master may not refuse to deliver goods carried, even though holder of only one of two or more parts of bill of lading demands such delivery. If holder of only one of two or more parts of bill of lading has taken delivery of goods carried, other part or parts shall lose their effect. (Com. C. 816). At places other than designated port of unloading, master may not deliver goods carried except upon receipt of all parts of bill of lading. (Com. C. 817). If two or more holders of bill of lading have demanded delivery of goods carried, master must without delay deposit goods with competent authority and dispatch notice thereof to each holder who has demanded such delivery. (Com. C. 818).

As to goods deposited with competent authority, holder of bill of lading to whom bill of lading was handed over earliest from assignor of bills of lading common to all holders, may exercise his right in preference to other holders of bill of lading. In regard to bill of lading delivered to absentee, time when bill of lading has been dispatched will be deemed as time when it has been handed over. (Com. C. 819).

Checks must contain: (1) Term “check”; (2) unconditional order to pay specified sum of money; (3) name of drawee; (4) place of payment; (5) date and place where check is drawn; and (6) name and seal, or signature of drawer. (Checks Act 1). Absence of any element invalidates check with certain exceptions as in bills of exchange. (Checks Act 2). Check must be drawn on bank with funds controlled by drawer. (Checks Act 3). Check must be payable at sight and presented for payment within ten days after issuance. (Checks Act 28, 29). If presented for payment outside country but on same continent of place issued it must be presented within 20 days, 70 days if on different continents. (Checks Act 29). Crossed check may be paid by drawee only to banker or to customer of drawee. (Checks Act 38).

Holder's claims against indorsers, drawer and guarantors lapse six months from last day when presentment must be made. Claims of other parties lapse six months from date of payment or commencement of proceedings. (Checks Act 51). Checks are not accepted. (Checks Act 4). All other rules governing checks coincide with those governing bills of exchange.

Person who may become drawee of check shall be governed by law of place of payment. Even if check is invalid because person who may not become drawee according to law of place of payment has become drawee, obligations arising from signature which was affixed in another country in which there is no such law shall not be affected. (C.L.A. 52).

Days of grace, whether legal or judicial, are not permitted. (Checks Act 62).

Warehouse Receipts.

Warehouseman must, upon demand by bailor, furnish him with warehouse receipt. (Com. C. 156[1]). Warehouse receipt shall contain following particulars, and be accompanied by name and seal or signed by warehouseman: (1) Description, quality, quantity of goods bailed, and description, number and marks of packages; (2) full name or trade name, place of business or domicile of bailor; (3) place of storage; (4) storage fee; (5) period for storage, if such has been fixed; (6) amount insured, period of insurance, full name or trade name, and place of business or domicile of insurer, in case goods bailed have been insured; and (7) place where and date when warehouse receipt has been made. (Com. C. 156[2]). Holder of warehouse receipt may return such instrument and may demand warehouseman to divide goods bailed and furnish him with warehouse receipt in respect of each portion of goods thus divided. (Com. C. 158).

If, even in cases where goods bailed have been pledged by means of warehouse receipt, pledgee has given his consent, bailor may demand return of part of goods bailed even prior to maturity of debt. In such case warehouseman shall enter on warehouse receipt description, quality and quantity of goods thus returned. (Com. C. 159).

3.02 COMMERCIAL REGISTER:

Commercial matters to be registered shall be entered in Commercial Register maintained by court having jurisdiction over place of business. (Com. C. 34). Business names, seals, business activities by minors, guardianships, managerial positions, and details relating to corporate matters must be registered (Commercial Registration Regulations). If foreign company intends to engage in commercial transactions in Korea, it shall effect same registration as that of branch office of company incorporated in Korea either of same nature or of kind which it most closely resembles, and also register full name and permanent residence of representative and governing law under which it had been incorporated. (Com. C. 614). Foreign company may not engage in commercial transactions on continuing business until it has effected above registration. (Com. C. 616). Valid registration may provide defense as against third parties. (Com. C. 37).

3.03 CONTRACTS:

Contracts create legal obligations by agreement between two or more parties. Legal entities as well as natural persons may enter into contract. Civil Code provisions govern many standard contract forms: Gift, sale, exchange, loan for consumption, loan for use, lease, employment, contract for specific performance, mandate, bailment, partnership, life annuity, and compromise. Many standard commercial transactions are governed by special Commercial Code provisions: Sales, current accounts, undisclosed associations, brokers, agency commissions, forwarding agencies, carriers, deposits, and insurance. Parties may modify these forms.

Formation.

Contract exists when offer is accepted. Offer specifying period for acceptance shall expire unless offerer receives notice of acceptance within such period. (C.C. 528). Offer which does not specify period for acceptance shall expire within reasonable period. (C.C. 529). Contract arises when acceptance is sent. (C.C. 531). Any act which can be deemed declaration of intent to accept will also give rise to contract. (C.C. 532). There is no conditional acceptance, only refusal with counter-offer. (C.C. 534).

Effect.

One of parties to bilateral contract may refuse performance of his own obligations until other party tenders performance of his obligation. However, this shall not apply in event that obligation of other party is not due. (C.C. 536). In case of contract under which one party is obligated to perform its obligation to benefit of third party beneficiary, original contracting parties cannot take away vested rights of third party beneficiary. (C.C. 541). In contract to create or transfer real rights in identified property, if that property is lost or damaged or performance becomes impossible due to intervening causes not attributable to assignor and assignee, assignor absorbs loss. (C.C. 537).

Rescission.

Right of rescission may be included in contract, or be implied by law. Formal demand for performance is usually required before rescission. (C.C. 544). Rescission restores parties to same condition they were in prior to contracting. (C.C. 548). Declaration of intention to rescind is made to opposite party. (C.C. 543). Rescission does not extinguish right to damages. (C.C. 551). Where one party or parties to contract are composed of multiple persons, notice of rescission must be sent or received by all multiple persons. (C.C. 547).

Excuse for Nonperformance.

Nonperformance, except for payment of money, may be excused if causes are not attributable to or are not responsibility of obligor. (C.C. 390, 397). Parties may limit liability for nonperformance except where specifically prohibited by law.

Conflict of Laws.

According to provisions of Conflict of Laws Act (C.L.A.), issue of execution and enforceability of contract is to be decided by law expressly or implicitly chosen by parties. In absence of such choice, those prevailing in place where act creating contractual relationship takes place will apply; rights to chattels or real estate are governed by law prevailing in place where subject asset is located; legal effect of assignment of claim between relevant parties and against third parties is to be decided by law prevailing over claim itself; and most admiralty issues including ownership of vessel are to be decided by law of country where vessels concerned are registered. (C.L.A. 17, 19, 25, 34, 60).

Set-off.

If two persons have obligations to each other of same subject-matter, both of which have become due, each obligor may set-off amount corresponding to extent of his obligation, unless nature of obligation does not so permit. (C.C. 492). Set-off is effected by manifestation of intent to opposite party; such manifestation may not be conditional nor limited in time. Obligations are deemed to be extinguished, by manifestation of intent, to extent they are set off. (C.C. 493). However, if obligation has arisen from intentional tort or is prohibited from attachment, obligation may not be set off. Obligor of obligation garnished by creditor of obligee under such obligation may not set off obligation against any after-acquired claim against obligee. (C.C. 496 through 498).

Government contracts contain certain statutory requirements for competitive bidding, use of written contracts with specifically required provisions, and performance bonds. (Law regarding Agreements to which Government is Party 4 through 12, Enforcement Decree thereunder 4 through 53).

3.04 FRAUDS, STATUTE OF:

Korea has no clearly stated requirements similar to statute of frauds; however, certain documents, such as certain type of will or article of incorporation, must be subscribed by testator or authentificated by notary in accordance with concerned statutes. (C.C. 1068, 1069; Com. C. 292).

3.05 INTEREST:

Agreement on payment of interest and interest rate is valid and enforceable. Absent agreement on interest rate, rate of 5% per annum is applicable to normal private transactions (C.C. 379) and of 6% per annum to commercial transactions (Com. C. 54). Statutory interest at rate of 20% per annum is payable from time when court judgment is given ordering payment of money. (Special Law on Expedition of Court Proceedings, Etc. 3).

3.06 MONOPOLIES, RESTRAINT OF TRADE AND COMPETITION:

Unfair Trade Practices.

No enterprise shall engage in any act which Fair Trade Commission (“FTC”) deems detrimental to fair trade and publicly announces as constituting unfair trade practice: (1) unreasonably refuse to transact with or discriminate against certain parties; (2) unreasonably engage in activities designed to eliminate competitors; (3) unreasonably induce or coerce competitor's customers to deal with oneself; (4) unreasonably take advantage of one's bargaining position in transacting with others; (5) transact with others on terms and conditions which unreasonably restrict or disrupt business activity thereof; (6) unreasonably provide assistance to affiliates or others through granting advances or loans, dispatching workforces, providing real estate, securities or other intellectual property, or by transacting on substantially advantageous basis; or (7) act in any manner which may hinder fair trade. (M.R.F.T.A. 23). Enterprise which has committed unfair trade practices is subject to civil, administrative or criminal sanctions. (M.R.F.T.A. 24, 24-2, 56, 67).

Market Abuse.

Enterprises which meet criteria provided for by Presidential Decree for “market-dominating” enterprises shall not engage in any of following acts of abuse: (1) Unreasonably fixing, maintaining, or altering price of goods or services; (2) unreasonably controlling sales of goods or services; (3) unreasonably interfering with business activities of others; (4) unreasonably interfering with entry of new competitors; and (5) unreasonably transacting in order to eliminate competitors or damaging interest of consumers. (M.R.F.T.A. 3-2).

Restriction on Business Combination and Economic Concentration.

Enterprises which meet criteria provided for by Presidential Decree must report to FTC within 30 days of date of acquisition, acquiring or holding 20% (15% in case of shares of Korea Exchange listed companies or KOSDAQ listed companies) or more outstanding shares of companies, concurrent holding of officer's position in another company, merger, take-over, lease of all or substantial part of another firm, or incorporation of new company (“acquisition”). If acquiring entity meets certain conditions, report must be filed prior to acquisition in which case waiting period follows. (M.R.F.T.A. 7, 12). Cross-shareholding among affiliates of designated conglomerates is prohibited. (M.R.F.T.A. 9). Any company (excluding financial or insurance company) that belongs to conglomerate (selection criterion: total assets exceeding ten trillion won) should not hold shares in any other domestic companies if sum of acquisition value of such investments exceeds 40% of net asset of concerned company. (M.R.F.T.A. 10). Extension of loan guaranties to financial institutions by company belonging to designated conglomerate (selection criterion: total assets exceeding five trillion won) to its affiliates is also prohibited. (M.R.F.T.A. 10-2). Company belonging to conglomerate (selection criterion: total assets exceeding five trillion won) that desires to engage in large-scale intragroup transactions shall be subject to approval by board of directors and must comply with public disclosure requirements. (M.R.F.T.A. 11-2).

Undue Collaborative Activities.

Any agreement to undertake any of following is, in principle, prohibited: (1) Fixing, maintaining, or altering prices; (2) determining terms and conditions for sale of goods or services, or terms and conditions for payment; (3) restricting production, delivery, transportation, or sales of goods or services; (4) restricting sales territory or trade of customers; (5) restricting new establishment, expansion of facilities, of installation or equipment for production of goods or services; (6) restricting type or specifications of goods at time of production or sale; (7) establishing new companies or the like in order to manage or control major parts of business collaboratively; (8) rigging bids; and (9) substantially restricting competition by interfering with business activities of others. (M.R.F.T.A. 19).

Restrictions on International Agreements.

No enterprise or trade association (with some exceptions) may enter into international agreement or international contract which constitutes undue collaborative activities, resale price fixing or unfair trade practices, as defined by relevant guidelines. (M.R.F.T.A. 32).

Claim for Compensation.

Any consumers or enterprisers may claim compensation for damages caused by enterpriser's violation of M.R.F.T.A. with court. (M.R.F.T.A. 56).

3.07 SALES:

Nature.

Sale is contract for transfer of property rights in exchange for purchase price. (C.C. 563). Unless otherwise dictated by agreement or custom, transfer and payment must be made simultaneously. (C.C. 568). Unless otherwise agreed by parties, when neither party has begun to perform contract of sale in which earnest money has been paid, purchaser may rescind contract of sale by waiving that sum and vendor may rescind by refunding double that amount. This bars further claims for damages. (C.C. 565).

Warranties.

Following warranties are made in sales, and even express disclaimers will not release vendor if he had knowledge of defects but did not reveal them to purchaser or if breach results from rights given to or established for third persons by vendor (C.C. 584): (1) Vendor must acquire from third persons and transfer to purchaser all rights that are subject of sale (C.C. 569). If vendor fails to do so, purchaser may rescind contract, and receive damages if at time of contracting he did not know that right did not belong to vendor. Vendor may also rescind, if he did not know that he did not possess such right, but must pay damages (C.C. 570, 571); (2) purchaser may request reduction of price if goods are not up to stipulated quantity, or if vendor cannot transfer all rights. He may rescind contract if (in good faith) he would not have entered into contract if he had such knowledge. However, vendor is still liable for damages if purchaser acted in good faith. (C.C. 572, 574). All these rights must be exercised within one year of purchaser's knowledge of fact, if he acted in good faith, or one year from date of contract if not (C.C. 573); (3) if object of sale is subject to superficies, servitude, registered lease right (chunse-kwon), pledge or lien, or contains defect of which purchaser had no knowledge at time of contract, purchaser may rescind contract if it thwarts purpose for which contract was made; otherwise purchaser may only seek damages. Damage claims and rescission are not allowed after one year from discovery (C.C. 575, 580); (4) if purchaser loses ownership of immovable as result of exercise of preferential right or mortgage or registered lease right (chunse-kwon) covering property, he may rescind contract and claim damages as well (C.C. 576).

Price.

Expenses of sale are divided equally between parties. (C.C. 566). Once purchase contract is formed, fructus (fruit) incurred from object of purchase belongs to vendor even after purchase but before delivery. Absent credit arrangement purchaser must pay interest on purchase price after delivery. (C.C. 587). If third party asserts right to goods, purchaser may refuse or withhold payment until vendor provides suitable security. (C.C. 588).

Repurchase.

Vendor may, by special provision in sales contract have right to repurchase goods through repayment of purchase price plus expenses or other agreed amount. Unless otherwise agreed, upon repurchase, fructus of immovable and interest on purchase price are deemed to offset one another. (C.C. 590). Right to repurchase cannot exceed five years for immovables and three years for movables, and in absence of specifically provided term, repurchase must be made within such corresponding periods. (C.C. 591). When creditor of vendor seeks to exercise vendor's right of repurchase, purchaser may retain ownership of property by paying to vendor's creditor debt owed by vendor, from appraised value of property exceeding purchase price, and expenses. Remaining sum, if any, must be paid to vendor. (C.C. 593). If one co-owner has sold his share in property with provision for repurchase, which is later partitioned, former co-owner (vendor) may repurchase that part of property received by purchaser in division. If purchaser receives payment upon auction of co-owned property, former co-owner (vendor) may assert claim against proceeds. (C.C. 595).

Resale.

Between merchants, if purchaser refuses or is unable to accept delivery, vendor may deposit goods with government deposit office or sell goods at public auction if vendor has given purchaser notice and waited for reasonable period thereafter. Perishable goods may be sold without notification. Vendor must deposit proceeds of sale after deduction of expenses with government deposit office but has right to proceeds of sale for satisfaction of purchase price. (Com. C. 67). If purpose for which contract was entered into cannot be fulfilled unless performed at specified time or period, and it has lapsed without performance of one party, other party is deemed to have rescinded contract unless he immediately demands performance. (Com. C. 68).

Inspection and Rescission.

Between merchants, purchaser must examine goods upon delivery, and give notice of all defects or shortages if he later wishes to rescind, claim damages, or seek price reductions. Vendor must be notified immediately of hidden defects found within six months, if purchaser also wishes to preserve those rights. There is no such requirement of immediate notification if vendor has acted in bad faith. (Com. C. 69). When purchaser rescinds, goods are to be kept or deposited at expense of vendor. If goods may lose value or deteriorate after rescission, purchaser must obtain court order and sell goods at auction; proceeds must be deposited or kept by purchaser in his custody under approval of court. Vendor must be notified immediately of auction sale, if he does not reside or do business in same area as delivery place. (Com. C. 70). Similar rules apply to goods differing from or more than those ordered. (Com. C. 71).

Notices Required.

In general, no written notice is required for claim of nonconformity against vendor after delivery (however, see subhead Inspection and Rescission, supra).

Applicable Law.

Conflicts of Laws Act follows rules of contracts in general (see topic 3.03 Contracts) but with regard to transfer of title, law of place where property is located governs. (C.L.A. 19).

Consumer Protection.

Consumer Protection Act ("C.P.A.") provides administrative power to protect consumers and provides for mediation of disputes by Consumer Protection Board. Civil remedies must be pursued through general principles of existing civil law. Manufacturers, importers, or packagers are required to mark goods with any necessary information. (C.P.A. 16). Competent government agencies may advise or order collection, destruction or other measures with respect to goods which may cause harm to consumers. (C.P.A. 17-4).

Installment Sales.

Any sale in which payments are made in installments, usually monthly, is installment sale. Subject goods may be delivered upon final payment of total purchase price. However, they are usually delivered prior to payment of initial installment or upon payment thereof.

Seller may take certain steps to assure full payment by purchaser. Seller usually retains title to subject goods until payment of purchase price is made in full and then he transfers it to purchaser upon receipt thereof. If payment of installments is delayed seller can terminate purchase agreement and demand return of subject goods. Also, if any installment payment is missed, seller can accelerate remaining installment payments and demand lump sum payment of remaining purchase price. Seller must try to avoid actions based on grounds of violation of public order or abuse of rights. (C.C. 103, 2). According to Installment Sales Act ("I.S.A.") which applies to sales of movables and services, purchaser may rescind sales contract at his discretion within seven days from delivery of written agreement or subject goods. (I.S.A. 5).

Fraudulent Sales.

If obligor willfully disposes his assets knowing such act is harmful to obligee (e.g. sale at substantially undervalued price) and there remains no sufficient asset to satisfy obligee's claim, obligee may apply to court to have such sale rescinded. Sale for purpose of defrauding creditors (e.g., sale at price substantially undervalued) may be declared void by court and property returned.

3.08 SECURITIES:

Regulation and Registration.

Note: This section incorporates Financial Investment Services and Capital Markets Act which came into effect since Feb. 4, 2009

Financial Investment Services and Capital Markets Act ("FSCMA"), Enforcement Decree of FSCMA ("E.D.") and various regulations thereunder regulate securities business in Korea. FSCMA grants administrative powers to Financial Services Commission ("FSC"), Securities & Futures Commission ("SFC"), and Financial Supervisory Service ("FSS"). FSC has power to give "financial investment business license" to those who desire to engage in financial investment business (FSCMA 12) and to register financial investment business of those who desire to engage in investment advisory business or discretionary investment business (FSCMA 18). FSC has also power to accept registration statement filed by issuer in connection with public offering or sale of securities (FSCMA 119). Every financial investment business entity must receive inspections conducted by FSS Governor (FSCMA 419). Same applies to Korea Exchange ("KRX"), Korea Financial Investment Association ("KFIA"), Korea Securities Depositary ("KSD"), foreign collective investment business entities, and other security related institutions (FSCMA 410, 292, 306, 281, etc.). FSC (or SFC in certain cases) can require FSS Governor to inspect account books, documents, and other materials if there is violation of FSCMA or if it is necessary to maintain sound order in trading (FSCMA 426). SFC can exercise part of FSC's authority if it is delegated by FSC (FSCMA 438), and in certain cases SFC is to be referred to for deliberation by FSC (FSCMA 439). Under instruction and supervision of FSC or SFC, FSS executes various operations in compliance with FSCMA (FSCMA 440). According to FSCMA, "financial investment instruments" are classified as follows: (1) "Securities" and (2) "derivatives": (a) exchange-traded derivatives and (b) over-the-counter derivatives (FSCMA 3)."Securities" include Debt securities, Equity securities, Beneficiary certificates, Investment contract securities, Derivatives-combined securities, and Securities depositary receipts (FSCMA 4)."Derivatives" are contractual rights falling under any of following: (1) Contract in which it is agreed to deliver money or similar at specific time in future, which must be computed on basis of underlying assets, price of underlying assets, interest rate, indicator, unit, or index based on any of aforesaid factors; (2) contract in which parties agree to grant, by either party's unilateral expression of willingness, right to effectuate transaction of delivering and accepting money or similar, which must be computed on basis of underlying assets, price of underlying assets, interest rate, indicator, unit, or index based on any of aforesaid factors; and (3) contract in which parties agree to exchange money or similar during certain period of time in future at predetermined price, which must be computed on basis of underlying assets, price of underlying assets, interest rate, indicator, unit, or index based on any of aforesaid factors (FSCMA 5).

Anyone must not engage in financial investment business (excluding investment advisory business and discretionary investment business which need to be registered by FSC) without license issued by FSC. Those who desire to receive financial investment business license must meet certain requirements. For example, foreign financial investment business entity must have branch office or business office in Korea and adequate capital investment, good financial standing, and social credibility (FSCMA 12). If total amount of securities reaches or exceeds certain amount which is prescribed by E.D., those securities can not be publicly offered or sold, unless and until registration statement filed by issuer is accepted by FSC (FSCMA 119).

Public Tender Offer.

If person intends to purchase stocks outside securities exchange market from ten or more persons (this number of sellers includes number of sellers who have sold their share of stocks to purchaser or specially related person thereof during six months prior to purchase day), and if number of stocks held by him/her or his/her specially related persons reaches or exceeds 5% or more of total number of stocks, that person must make "public tender offer" (FSCMA 133, E.D. 140). Person who makes tender offer must provide public notice of tender offer pursuant to E.D. Tender offeror should file pulic tender statement with FSC and KRX on same day above mentioned public notice is provided (FSCMA 134). Additionally, offeror must send copy of tender offer statement to each of issuers of stocks, etc. subject to tender offer without delay (FSCMA 135).

Solicitation for Proxy.

If person wishes to solicit another person to exercise voting rights by proxy for listed stocks, he/she must deliver proxy form and reference documents to other person ("solicited voting right holder"). Proxy form must be prepared so that it allows each solicited voting right holder to express whether he/she approves or disapproves each item on agenda to be raised at general meeting of shareholders (FSCMA 152). See also category 2 Business Organizations, topic 2.02 Corporations.

Shareholding Restrictions.

In general (but with exceptions), any person whose number of listed stocks held by him/her and his/her specially related persons reaches or exceeds 5% of total number of stocks (i.e. "bulk holder") has to report status of stocks in hand, purpose of holding them, details of contract regarding stocks in hand, and etc. to FSC and KRX within five business days from date on which number of stocks reaches or exceeds above mentioned 5%. (FSCMA 147). Moreover, any change in aggregate number of stocks in hand to extent of 1% of total number of stocks must be reported to FSC and KRX within five business days from date such change occurs. (FSCMA 147). FSC and KRX must also disclose reports through their Internet homepages, etc. (FSCMA 149). Violation of above duty of reports may deprive violator of his/her right to exercise voting rights for certain portion of stocks during certain period of time pursuant to E.D., and FSC may issue order to dispose of portion held in violation within given period of time, not exceeding six months. (FSCMA 150). To foreigners, restriction may be placed on limit of acquisition, etc. of securities of public purpose corporation or exchange-traded derivatives following guidelines prescribed by E.D. (FSCMA 168). In particular, acquisition limit per item on foreigners as whole is 40% of total number of equity securities of public purpose corporation of item concerned. (E.D. 187).

Secured Bonds.

While it is in interest of bond holder that his/her bond is sufficiently secured, it also is impracticable to provide secured mortgage to each individual bond holder. Thus, Secured Bonds Trust Act ("SBTA") enables bond issuing companies to provide collective mortgage to its bond holders as whole. Person who wishes to issue secured mortgage bond must do it through trust agreement between bond issuing company and trust company (SBTA 3). Under such trust agreement, trustee (trust company) has to provide secured mortgage, maintain same on behalf of all bond holders, execute mortgage and distribute tender pari passu to bond holders proportional to face value of bonds that they hold (SBTA 60, et seq.). Meanwhile, in case person intends to issue secured mortgage stock, he has to get approval from FSC (SBTA 4).

3.09 STATUTE OF FRAUDS:

See topic 3.04 Frauds, Statute of.

4 CITIZENSHIP

4.01 ALIENS:

See category 15 Immigration, topic 15.01 Aliens.

4.02 IMMIGRATION:

See category 15 Immigration, topic 15.02 Immigration.

5 CIVIL ACTIONS AND PROCEDURE

5.01 ACTIONS:

Applicable Law and Forum.

Primary source of law regarding civil procedure is Code of Civil Procedure (“CCP”), which was enacted in 1960 and revised several times since then. In 2002, CCP was once again revised extensively and newly revised CCP is effective from July 1, 2002 (N.C.C.P.). Following civil law tradition, no court is legally bound by views and judgments of another court. However, there are certain exceptions to this principle. When lower court's ruling has been reversed by Supreme Court and remanded to lower court, such lower court must follow interpretation of law rendered by Supreme Court in particular case. Established opinions of higher courts, especially Supreme Court, have significant influence to lower court rulings. Civil action may be initiated in first level courts, which include district court, branch court of district court, or municipal court. Domicile of defendant, among others, is main test to determine forum among first level courts. Parties to action may also choose forum by agreement.

Proceeding before the Trial.

Representative.

If necessary, plaintiff as well as defendant may employ attorney-at-law as his/her representative during trial proceedings, including during pleading process and hearings. However, when amount in controversy does not exceed 50 million Korean Won (approximately US$41,600), each party with court's prior permission may appoint person who is not attorney-at-law to be his/her representative.

Filing Complaint.

Action is commenced by filing written complaint to courts. (N.C.C.P. 248). Complaint is statement describing nature of claim and demand for relief. When filing civil action, plaintiff must pay stamp tax to court, which is proportionate to value of claims. When complaint involves corporate parties, documents such as verified copy of company register are required to be attached to complaint in order to identify corporate parties. In case complaint is filed by lawyer representing plaintiff, lawyer must submit power of attorney establishing authority. Complaint must state names of parties and/or legal representatives, cause of action, and demand for relief. (N.C.C.P. 249).

Service of Process.

Upon receiving complaint, court delivers copy of complaint to defendant. (N.C.C.P. 255).

Submitting Answer.

When defendant contests complaint, he submits written answer to court within 30 days from date copy of complaint was received. (N.C.C.P. 256). If defendant does not submit answer within 30 days, court can render default judgment without trial.

Pretrial Pleading.

In order to make trial efficient and expeditious, court, before trial, is to request parties to: (1) exchange written documents including plaintiff's complaint, defendant's answer, and any reply plaintiff or defendant may file and (2) submit evidence. (N.C.C.P. 258, 279, 280). During pleading, court may set hearing date and summon parties to clarify and organize issues and evidence. (N.C.C.P. 282).

Trial.

Trial.

N.C.C.P. focuses on pretrial pleading and centralized rule of evidence. When issues and evidence are well clarified and organized through pretrial pleading, court sets trial date. At trial, parties state result of pretrial pleading and court hears testimony of witnesses and admits or excludes evidence. Under previous Code of Civil Procedure, practice was to have several hearing dates for trial set by court at four to six week intervals. Reason for that practice was that issues and evidence were not efficiently organized before trial. However, N.C.C.P. encourages court and parties to have only one hearing date for trial if possible. (N.C.C.P. 287).

Small Claim Trial.

To handle small claims expeditiously and effectively, civil cases involving claims not exceeding 20,000,000 won are brought to small claim trial. (Small Claim Trial Act 1, 2). In this trial, plaintiff can file action by making oral statement to court clerk instead of filing written complaint. Strict rules of evidence and procedure are waived to considerable extent.

Class action does not exist in Korean legal system. *Note:* However, Act on Securities Related Class Action has been enacted on Jan. 20, 2004 which will come into effect as of Jan. 1, 2005. Petition has been presented to Korean legislature for general class action bill, which has been causing heated debate and strong opposition from business sector.

Appeal.

Losing party who is dissatisfied with findings of facts or conclusions of law by trial court can appeal against judgment rendered by trial court within two weeks from date judgment is served. In general, High Courts hear appeals with exception that appellate panels of District Courts hear appeals when amount in controversy does not exceed 50 million Korean Won (approximately US$41,600). Appeal proceedings are similar to trial proceedings, and party is granted opportunity to make new allegations and to produce new evidence.

Party who is dissatisfied with judgment of court of appeals may appeal to Supreme Court, court of last resort, within two weeks from date judgment is served. As Supreme Court hears only matters of law, appeal cannot be lodged with Supreme Court unless judgment of court of appeals erred in conclusion of law or appeal proceedings were in grave contravention of law.

ADR.

Civil conciliation is legal proceeding whereby judge or conciliation committee hears allegations of parties in dispute, and taking various factors into account, either advises them to make mutual concessions and to seek compromise solution or renders compulsory decision to that effect. Civil conciliation proceedings are very useful way of dispute resolution in that they are more convenient, expeditious and inexpensive than legal proceedings, and lead to ultimate resolution of disputes through agreement by parties. Supreme Court encourages and takes various steps for more frequent use of conciliation proceedings. Number of civil cases resolved in conciliation proceedings has been steadily increasing year by year. About 50,000 civil cases were disposed of in conciliation proceedings as of 2000.

5.02 COSTS:

Court cost shall be borne by defeated party although it may be apportioned at discretion of court. (N.C.C.P. 98, 99).

Security Deposit for Court Cost.

If plaintiff has no domicile, office, or place of business in Korea, court shall, upon motion of defendant, order plaintiff to furnish security deposit for court cost. (N.C.C.P. 117). However, once defendant has defended case at pretrial pleading session or at trial, he is deprived of right of such motion. (N.C.C.P. 118).

Legal Aid.

Court may grant aid on motion of party who does not have means to defray court cost and legal fee, unless prospect of losing case is obvious. (N.C.C.P. 128).

5.03 DISCOVERY:

Discovery system does not exist in Korean civil procedure. However, parties may apply to court for order submitting evidentiary documents addressed to person in possession of them. By court order holder of such document shall submit document to court in specific cases: (1) when party of case possesses document party has referred to; (2) when applicant of motion is entitled by law to see document; and (3) when document has been made out for benefit of applicant or from transaction between applicant and holder of document. (N.C.C.P. 344). When court orders party to produce document and party does not comply with order or intentionally destroys document, court may deem true argument of other party concerning document. (N.C.C.P. 349, 350). When third party fails to comply with order, court may impose fine on him not exceeding 5,000,000 won. (N.C.C.P. 351).

Preservation of Evidence.

Even before civil action commences, upon motion of party, court may investigate evidence if necessary. (N.C.C.P. 375). Expenses regarding preservation of evidence shall be part of court cost. (N.C.C.P. 383).

5.04 EVIDENCE:

Facts That Do Not Need Evidence.

Facts, except for generally well known facts and fact that opposing party admits, are required to be proven with evidence. (N.C.C.P. 288).

Witness.

Every person is competent to be witness except as otherwise provided in laws and regulations. (N.C.C.P. 303). Before testifying, every witness shall be required to declare that he will testify truthfully by oath administered by presiding judge. (N.C.C.P. 319). Court must obtain approval of ex or incumbent President, Chairman of National Assembly, Chief Justice of Supreme Court or Chief Justice of Constitutional Court when any of these officials is required to testify regarding official secrets. (N.C.C.P. 304). Court must obtain approval of National Assembly or State Council when member of either organization is required to testify regarding official secrets. (N.C.C.P. 305).

Testimony by Expert.

If scientific, technical, or other specialized knowledge is necessary to understand evidence or to determine fact in issue, witness qualified as expert by knowledge, skill, experience, training, or education, may testify in form of opinion. (N.C.C.P. 334). Before testifying, every expert shall be required to declare that he will testify truthfully by oath administered by presiding judge. (N.C.C.P. 338).

Evidentiary Documents.

To prove content of writing, recording, or photograph, original writing, recording, or photograph is required; however, duplicate is admissible to same extent as original unless genuine question is raised as to authenticity of original. Authentication of identification of contents of private record is necessary as condition precedent for admissibility. (N.C.C.P. 357).

Inspection by Court.

Party may apply to court for inspection in order to use such inspection record as evidence. (N.C.C.P. 364).

Testimony by Party.

Court can, by discretion or by motion of either party, interrogate plaintiff or defendant. (N.C.C.P. 367). Before testifying, party shall be required to declare that he will testify truthfully by oath administered by presiding judge. (N.C.C.P. 373).

5.05 INJUNCTIONS:

Injunctions and Provisional Attachments.

Provisional or pretrial injunction is available before judgment or before suit is commenced upon establishing prima facie case concerning: (1) Existence of petitioner's legal right supporting action or inaction to be ordered and (2) necessity to preserve status quo; to prevent substantial damages on lasting relation of right; or to avoid imminent violation thereon or conspicuous damages. (Civil Enforcement Act 300, “C.E.A.”, valid from July 1, 2002). Provisional injunction is usually issued without inter parties' hearings, upon payment of security deposit into court by petitioner for protection of respondent.

Respondent in provisional injunction may: (1) Bring appeal causing court to review merits of case; (2) bring motion seeking cancellation of injunction by establishing special circumstances justifying cancellation; or (3) request court to direct petitioner to bring suit for decision on merits of case (usually within seven days). First two alternative actions are usually heard and decided by judge(s) who initially issued injunctive order. In case petitioner fails to bring suit, court will cancel injunctive order issued. Above rules generally apply to provisional or pretrial attachment, under which assets owned by respondent will be attached and prevented from being disposed. Usually court would not require petitioner to demonstrate necessity warranting provisional attachment if petitioner establishes claim to be protected. Provisional attachment order is usually issued in ex parte proceeding.

5.06 JUDGMENTS:

Civil Action.

Final judgment must be rendered upon completion of trial. (N.C.C.P. 198). Court may, however, when it has concluded hearings on part of suit, render final judgment as to that part. (N.C.C.P. 200). Also interlocutory judgment may be issued when trial on independent means of attack or defense, or any other intermediate issue has been concluded. (N.C.C.P. 201). Same shall apply to cause of action where there exists dispute concerning both cause and amount thereof.

Foreign Judgments.

Korea does not adhere to any multilateral or bilateral treaties concerning enforcement of foreign judgments. Thus, enforceability of foreign judgment is determined solely by reference to local statutes. Foreign judgment is enforced in Korea through obtaining enforcement judgment from Korean court in whose jurisdiction defendant has domicile or assets. (C.E.A. 26). However, Korea is party to Convention on the Recognition and Enforcement of Foreign Arbitral Awards.

Foreign judgment must meet following requirements in order for enforcement judgment to be obtained: (1) It must be proven that foreign judgment is final and conclusive (C.E.A. 27[II] Item 1); (2) jurisdiction of court rendering judgment must be recognized by law or treaty (N.C.C.P. 217, Item 1). Korea has no express provision in any law or treaty which denies all or any part of jurisdiction of any foreign court. It is established that item (2) relates to situation where exercise of jurisdiction by court rendering judgment was inconsistent with any provision of Code of Private International ("CPI") or general rules of civil procedure concerning jurisdiction. Korean court has jurisdiction in actions involving foreigners when cases or parties in actions are substantially related to Korea. (C.P.I. 2). Korean courts recognize jurisdiction of Korean court over foreign defendant when parties have agreed to such jurisdiction. Korean courts, inter alia, will apply above rules in reviewing basis for exercise of jurisdictional power by foreign court; (3) defendant named in judgment, if he was Korean national (at commencement of such action), was either served with summons necessary to commence procedure by means other than publication, or voluntarily appeared (N.C.C.P. 217, Item 2); (4) judgment is not in violation of good morals or social standards of Korea (N.C.C.P. 217, Item 3). This test will be applied by examining judgment as well as reason for such adjudication; (5) there is guarantee of reciprocity (N.C.C.P. 217, Item 4). Supreme court has ruled that foreign country is deemed to guarantee reciprocity when such country recognizes force of Korean judgments by provisions of its laws or treaties without reviewing merits thereof, under same or more generous conditions as Korean laws would recognize foreign judgment under art. 217 of Code of Civil Procedure. If foreign judgment does not meet these requirements, motion for enforcement judgment will be dismissed. (C.E.A. 27[II]).

5.07 LIMITATION OF ACTIONS:

Lapse of time mostly affects substantive rights rather than procedurally barring actions. When prescribed period under extinctive prescription lapses during inaction by creditor, claim is deemed extinguished. Prescription as above does not serve as bar to action but may be asserted in litigation to defeat claim. There are statutes establishing time limitations on institution of litigation and such statutes are checked ex officio by court. This statute of limitation may not be extended by agreement between parties.

Personal Property.

If person possesses personal property with intent to own for ten years or more peacefully and openly, he shall acquire ownership of such property. (C.C. 246 [I]). If possession by such person commences in bona fide manner and without negligence, ownership shall be acquired after five years have elapsed. (C.C. 246 [II]).

See also topic 5.08 Prescription; category 20 Property, topic 20.03 Real Property.

5.08 PRESCRIPTION:

Legal concept in Korea distinguishes extinctive prescription, acquisitive prescription, and limitation of action.

Extinctive Prescription.

In general, claims lapse after ten years. Monetary claims arising from commercial transactions lapse after five years. However, property rights other than ownership and claim lapse after 20 years. (C.C. 162; Com. C. 64). Claims mentioned hereafter shall lapse if not exercised within three years: (1) Interest, support fees, salaries, rent, and other claims for delivery of money or other things made within one year; (2) claims of medical practitioners, midwives, nurses and pharmacists, in respect to medical treatments, professional services, or dispensation of medicines; (3) claims of contractors, engineers, and persons engaging in planning or supervising works, in respect of execution of works; (4) claims against attorneys, patent agents, notaries, public accountants, and judicial scriveners for return of documents kept in connection with their duties; (5) claims of attorneys-at-law, patent agents, notaries, public accountants, and judicial scriveners, in respect to their services; (6) prices of products and merchandise sold by producers and merchants; and (7) claims of artisans and manufacturers, in respect to their work.

Extinctive prescription for tort liability shall lapse three years after claimant becomes aware of damages and identity of tortfeasors or ten years after tort was committed. Claims mentioned hereafter shall lapse if not exercised within one year: (1) Right to claim for lodging, food, admission fees, price of articles of consumption and disbursement thereof, rental fees, and entertainment; (2) claims for renting clothing, bedding, funeral necessaries, and other movables; (3) claims for wages of manual workers and public performers and price of articles supplied by them; and (4) claims of owners of school properties, keepers of boarding schools, teachers, for education, clothing, food, and lodging of pupils and apprentices.

Extinctive prescription is six months, one year or three years for various liabilities arising out of bills, notes and checks. (C.C. 163, 164, 766; B.N.A. 70, 77).

Prescriptive period may be interrupted by: (1) Acknowledgment, (2) seizure, attachment, or injunction, or (3) demand, including demands by judicial actions following formal demand notice given six months earlier and which are not dismissed or withdrawn. (C.C. 168 through 177). Prescription commences to run anew upon conclusion of interruptive causes. (C.C. 178).

If minor or incompetent had no legal representative during last six months of prescriptive period, effects of prescription may be suspended for six months following recovery of capacity or appointment of guardian. (C.C. 179, 180). Likewise, actions between husband and wife may be brought within six months following divorce. (C.C. 180). Prescription regarding inherited estate is also suspended for six months after confirmation of successor, selection of administrator for estate, or adjudication of bankruptcy. (C.C. 181). When natural calamity has prevented interruption of prescription, prescriptive period does not mature for one month following removal of impediment. (C.C. 182).

Acquisitive prescription in general is 20 years for person who has peacefully and openly possessed immovable property with intention to own and ten years for person who has possessed it peacefully, openly with intention to own, in good faith and without negligence and has registered as being owner. Prescriptive period for movable property is ten years for person in possession of it peacefully and openly with intention to own and five years if possession by such person commences in bona fide manner and without negligence. (C.C. 245, 246).

Limitation of Actions.

Time limitations on institution of litigation operate automatically, and cannot be extended without prior consent between parties. (Com. C. 811, 842, 848). Rights to damages, reduction of purchase price, and rescission of sales contract for seller's warranty are subject to one year or six months limitation of actions. (C.C. 573, 575, 582). See also topic 5.07 Limitation of Actions.

Set-off.

See category 3 Business Regulation and Commerce, topic 3.03 Contracts.

5.09 PROCESS:

Service of process in litigation is made ex officio only by court and, in principle, by personal service through court sheriffs or by mail. (N.C.C.P. 174 through 176). Service of process to party represented by attorney will be made to attorney of record.

Supplementary Service.

In case person on whom service is to be made is not at place of service, document may be delivered to clerk, employee, or cohabitant who has sufficient capacity. If person who is to be served documents has, without justifiable reasons, refused receipt thereof, such documents may be left behind at place where service is to be effected. (N.C.C.P. 186). In case service cannot be effected by means of supplementary service described above, court clerk may dispatch document by registered mail. (N.C.C.P. 187).

Method of Service in Foreign Country.

Service to be effected in foreign country shall be effected upon entrustment thereof by presiding judge to Korean Ambassador, Minister or Consul or competent government authorities of that country. (N.C.C.P. 191).

Service by Publication.

In event that domicile, residence or other place of service of party is unknown, or it is deemed impossible or ineffective to effect service in foreign country, presiding judge may, upon his own authority or upon motion of parties, order service by public notice. Service by publication shall be made by placing document to be served in custody of court clerk and by putting up notice to that effect on bulletin board of court. (N.C.C.P. 194, 195).

Agent for Service of Process.

Party to litigation shall designate place for service and agent for service of process and make report thereof to court. (N.C.C.P. 184).

5.10 SEQUESTRATION:

Court may issue orders for provisional or prejudgment attachment in order to preserve monetary claims or restraining orders in order to preserve rights which may adversely affect interests of litigant.

5.11 TORTS:

Any person who causes damage to another intentionally or negligently by any unlawful act shall remedy such damages. (C.C. 750). Elements of tort action are: Negligence or intent; breach of legal duty; and injury or damages. Damages to body, freedom, honor, property, or life of another may be compensated by payment of money. Guardian (or parent) who is liable for supervising mentally incompetent person (including infants) shall be liable for damages such person causes. (C.C. 755). Employer is liable for his employee's tort if employee is acting within scope of his or her employment. (C.C. 756). Joint tortfeasors are jointly and severally liable. (C.C. 760).

6 COURTS AND LEGISLATURE

6.01 COURTS:

Court system of Korea has six component units: Supreme Court, high courts, district courts, family courts, patent courts and administrative courts. (C.O.A. 3).

Supreme Court consists of Chief Justice and 13 Associate Justices who are appointed by President for term of six years. Only Chief Justice is prohibited from being reappointed. (C. 104, 105). Supreme Court is highest court for cases. (C.O.A. 11, 14). However, judicial review of laws is handled by Constitutional Court.

Appeal from decisions by military courts are heard by Appellate Military Courts with final appeal available to Supreme Court. Appeals from decisions by single judge of district courts fall under jurisdiction of collegial department of district court paneled by three judges. Appeals from decision by first level of collegial department of district courts are heard by three judges of High Courts which also function as court of first instance for some administrative actions such as litigation against Fair Trade Commission or against Local Autonomy and which also decide such other cases as are designated by law. Appeals from decision by second level of district courts or from decision of High Courts are heard by Supreme Court. (C.O.A. 26 through 28).

District courts have both criminal and civil jurisdiction. There is no right to jury in any Korean court but there is right to jury in some serious criminal cases as are designated by law, when accused wants trial by jury from Jan. 1, 2008. In civil actions, depending on amounts involved, case will be heard by single judge or by three judge collegiate body in first instance. Based on severity of applicable statutory punishment, criminal cases in like manner can be tried either by single judge or by three judge collegiate body. District courts are primarily courts of general original jurisdiction, except in cases under exclusive jurisdiction of other specialized courts.

Chief Justice may set up city courts to handle small civil claims and charges of misdemeanor. These minor cases are handled by summary proceedings. District court also has jurisdiction over various noncontentious cases such as reorganization or liquidation of business corporations, and registration of real property and corporate matters. Bankruptcy and conciliation proceedings also come under district courts' jurisdiction. (C.O.A. 29 through 36).

Family court is specialized court that deals with family affairs as well as juvenile delinquency. (C.O.A. 37 through 40).

Appeal and Error.

In civil actions, parties who are dissatisfied with decisions by first level of courts have liberty to bring appeal without cause. Trial by appellate courts is to some extent de novo and appellate court conducts new fact finding based on evidence already submitted in first level of courts as well as evidence newly submitted to appellate court.

Appeal from decision made by appellate court to Supreme Court must be based on errors in law or causes which are prescribed as absolute grounds for reappeal. (C.C.P. 423, 424).

General Forum.

Civil suit is basically subject to jurisdiction of court located at place of general forum of defendant; general forum of person shall be determined by his domicile. However, if person has no domicile in Republic of Korea, or his domicile is unknown, general forum shall be place of his residence, and if he has no place of residence, or his residence is unknown, it shall be determined by his last domicile; if ambassador or minister or any other citizen of Korea who enjoys extraterritoriality abroad has no general forum, it is deemed to be place where Supreme Court is located; general forum of legal entity is its principal place of business, or if there is no such place, domicile of principal person in charge of its affairs is its general forum; general forum of Republic of Korea shall be place of government office that represents Republic with regard to suit, i.e., Ministry of Justice or place where Supreme Court is located. (C.C.P. 2 through 6).

Special Forum.

Suit against person who continues to work in office may be brought before court which has jurisdiction over place where such office is located; suit regarding property right may be brought before court of place of residence or of performance; suit on bills or checks may be brought before court of place of payment; suit regarding property right against crew may be brought before court of place of registry of vessel. Suit regarding property right against member of armed forces or its civilian component may be brought before court of place where military office and/or installation is located, or at place of registry of military vessels; suit regarding property right against person who has no domicile in Korea, or whose domicile is unknown, may be brought before court of place where subject matter of claim or security therefor, or any attachable property of defendant is situated; suit against person maintaining office or other place of business may, if it concerns business affairs of such office or place of business, be brought where it is situated; suit concerning vessel or voyage against owner, or any other person utilizing vessel may be brought before court of place of registry of vessel; suit based on claim against vessel or any other claim secured on vessel may be brought before court of place where vessel is located; suit by company or any other association against its member, or by member against another member may, if based on his status as member be brought before court of place where general forum of company or association is located; suit regarding tort may be brought before court of place where act was committed. Suit for damages due to collision of vessels, including aircraft, or any other accident at sea may be brought before court of place where damaged vessel first touched after accident; suit relating to salvage may be brought before court of place where salvage was effected or place where salvaged vessel first touched after salvage; suit relating to immovables may be brought before court of place where object is located; suit relating to registration may be brought before court of place where registration office is located; suit relating to succession right, testamentary gift, or any other act that takes effect by death may be brought in court of place where general forum of deceased was located at time of commencement of succession (C.C.P. 7 through 22); in following cases, immediately superior court common to all courts concerned shall, upon motion of parties or concerned courts, designate jurisdictional court by ruling: (1) If court having jurisdiction is legally or actually unable to exercise jurisdiction; or (2) if jurisdictional district is not clear. No appeal may be made against ruling as mentioned above. Parties to suit may agree to first instance jurisdictional court. When defendant proceeds orally to merits of suit or makes statements in preliminary proceedings without questioning wrong jurisdiction in court of first instance, said court shall have jurisdiction. Thereon, court may conduct examination of evidence upon its own authority to establish jurisdiction. (C.C.P. 28 through 30).

Korea has no long-arm statute. Case may be transferred to another court based on causes prescribed in law.

6.02 LAW REPORTS:

See topic 6.04 Reports.

6.03 LEGISLATURE:

See category 1 Introduction, topic 1.02 Government and Legal System.

6.04 REPORTS:

Supreme Court periodically publishes its decisions and also publishes important decisions by lower courts. Decisions by courts are also published in various private publications.

7 DEBTOR AND CREDITOR

7.01 ASSIGNMENTS:

Assignment of property may be made by agreement between assignor and assignee and, for real property, registration of transfer of title, and, for personal (tangible) property, delivery of possession. Assignment of credits will be effective upon agreement between assignor and assignee; however, to be effective against obligor assignor must give notice of assignment to such obligor or have his consent. (C.C. 450 [I]). Notice of assignment or consent must bear officially confirmed date in order to assert assignment against third parties other than obligor. (C.C. 450 [II]).

7.02 ATTACHMENT:

Attachment of chattels, real estate, or accounts receivable is effected upon judgment or enforcement judgment of arbitral award as first step of execution of judgments. Where it is shown to satisfaction of court that without provisional attachment execution of future money judgment might be frustrated or rendered difficult, provisional attachment may be granted prior to judgment. Security deposit for protection of respondent is usually required to be paid before court issues order. Amount of deposit is within court's discretion and ranges between two-fifths and one-tenth of amount sought to be protected by provisional attachment. See also category 5 Civil Actions and Procedure, topic 5.05 Injunctions.

7.03 BANKRUPTCY:

Insolvency in bankruptcy means inability to make debt payments. (Act concerning Rehabilitation and Bankruptcy of Debtor, “ARBD” 305). Stock company's inability to pay debts but continue in business are grounds for reorganization.

Petition.

Bankruptcy process is begun by submitting petition to district court having jurisdiction. (UIL 3). Petitions may be made by debtor or creditors. (Global Change “ARBD” 294). Petition of juridical person may be submitted by its director or liquidator. (Global Change “ARBD” 295). Debtor's failure to make debt payments is prima facie evidence of his inability to make payments and grounds for adjudication of bankruptcy. (UIL 305). Juridical persons may be bankrupt when liabilities exceed assets. (UIL 306).

Administration.

After adjudication of bankruptcy, court appoints receiver, orders listing of claims, and sets up meeting of creditors. (UIL 302). Creditors may appoint advisers, decide whether to continue operating business and consent to important acts of liquidation of estate. (UIL 377, 489, 492). Consequently, bankrupt is immediately deprived of control over his property involved in bankruptcy proceedings. (UIL 382, 384).

Outstanding Obligations.

Debtor's obligations to third parties become due and owing as of adjudication of bankruptcy. (UIL 423). If debtor and another party to contract have not completed performance, receiver may complete debtor's performance and demand other party to fulfill its obligation or may cancel contract. (UIL 355). Other party may demand election by receiver of performance or rescission. Failure to answer within reasonable period creates presumption of rescission. (UIL 355).

Power of Receiver.

Receiver has exclusive power to administer and dispose of bankrupt estate. (UIL 384). Receiver is bankrupt estate representative for litigation. (UIL 359). Restoration of third person's properties and payments of preferential claims are accomplished by application to receiver. Receiver may also institute actions to avoid and annul acts of debtor intentionally prejudicial to creditors taken before adjudication of bankruptcy. (UIL 391).

Preferential Payment.

Lien holders, pledges, mortgagees of specific property or lessee of house who is protected by law of protection for house lessee in bankrupt estate may receive satisfaction from property independently of bankruptcy proceeding and may be involved in bankruptcy proceedings only to make up deficiencies. (UIL 411, 415). Person whose property has not come under receivership as part of bankrupt estate can get it back. (UIL 407, 410). Receiver can pay certain claims such as taxes, wages of employee. (UIL 473, 475). Receiver declares payments made to creditors by bankrupt within certain period prior to, or after insolvency or filing of application for bankruptcy, and restores them to estate; also any payments made in bad faith purposely to adversely affect other creditors. (UIL 391 et seq.).

Termination.

Distribution of assets to creditors terminates bankruptcy proceedings. Creditors may unanimously consent to dissolution of bankruptcy proceedings. (UIL 538 et seq.). Bankruptcy proceedings may also be terminated if costs of liquidation are greater than value of bankrupt estate. (UIL 317, 545). Petty bankruptcy may be used for estates less than 500,000,000 Won in which court makes decisions usually made by assembly of creditors and is generally simplified. (UIL 549 through 555).

Disabilities of Bankrupt.

Person against whom adjudication of bankruptcy is pending loses certain rights. Full payment of indebtedness, discharge, or lapse of ten years absent fraud will allow court to remove all disabilities. (UIL 574, 575).

Foreigners are treated in same manner as Koreans. (UIB 2). Bankruptcy procedure is pending outside Korea can be respected under certain circumstances together with court approval. (UIL 631, 632, 633).

7.04 EXECUTIONS:

Execution or realization of secured interests held by mortgagees, lien holders, pledgees, or Chonse-Kwon holders (special type of statutory lease involving key money for lease) are made generally through auctioning chattels. Such auction procedure is conducted by court according to Civil Execution Act upon application from secured creditors. (C.E.A. 264 through 275).

Code of Civil Execution provides various means of execution of judgments. In order to execute judgment or other enforceable instruments, judgment creditors in general must obtain certification of enforceability on face of certified copy of judgment. (C.E.A. 29). Movable assets of judgment debtor are seized and auctioned off by court bailiff. Credits owned by judgment debtor are attached, and collected by or transferred to judgment creditors by court decrees. Execution on real estate or immovable properties of judgment debtor is effected by attachment and public sale by court decree.

Arbitration awards or foreign judgment may be executed after local court permits execution by issuing enforcement judgment. (C.E.A. 26). Settlements made and recorded in court or special types of payment orders by court are enforceable and executable. Based on special legislation, settlements between parties to pay sum of money, securities or fungibles, and promissory notes or checks notarized and confirmed that immediate execution is possible by notary public, are enforceable upon acquiring certification of enforceability from notary public without requiring judgment. (C.E.A. 56).

Judgment requiring specific performance by debtor may be enforced by employing others to do required performance in place of debtor and holding judgment debtor responsible for costs. (C.E.A. 260). Specific performance which by nature may not be performed by anyone other than judgment debtor himself may not be specifically enforced. If judgment debtor fails to do as ordered, judgment creditor can apply to court to fix appropriate period to make performance and to order, in case judgment debtor defaults performance within period, to make reparation of certain amount in proportion to period of delay or in lump sum immediately.

Fieri facias shall be granted when judgment has become final and conclusive or when provisional execution order has been given. (C.E.A. 30).

7.05 GARNISHMENT:

As means of execution of money judgment, outstanding credits of judgment debtor may be attached by judgment creditor through court order of garnishment, which prohibits garnishee from discharging debts to original debtor and also forbids judgment debtor from disposing of or accepting payment for credit. Payment made in violation of garnishment order will not have legal effect against garnisher.

7.06 INSOLVENCY:

ARBD which consolidates Corporate Reorganization Law and Bankruptcy Law became effective from Apr. 1, 2006.

UIL includes special rehabilitation procedure for individuals and has combined corporate rehabilitation procedure and composition procedure to make single rehabilitation procedure. Bankruptcy (or liquidation) procedure was by and large left intact as in former Bankruptcy Law. UIL also has specific provisions pertaining to cross-border insolvency matters.

7.07 LIENS:

Liens.

Lien is statutory right to retain possession of movable until certain credit owed is paid. There are two different types of liens created under Civil and Commercial Code; in former credit secured by lien should be related to object; in latter object must be owned by debtor but not necessarily related to debt owed. There are no other types of liens such as supplier's lien or equity liens. Certain statutory right of receiving payment from proceeds of certain objects in priority over general creditors must be differentiated from liens.

Lien affords holder right to deprive owner of possession and maintain possession until payment obligation is performed and affords holder right to apply for auction sale of concerned property for collection of debt owed. Retention of possession is essential for most types of liens. See also category 19 Mortgages, topic 19.02 Mortgages.

7.08 PLEDGES:

Pledge is real right created by contract and delivery. Creditor obtains possession as security for indebtedness and gains preference to proceeds from sale by auction over general creditors. (C.C. 329 through 355). Any item of personal property or property right may be pledged with some statutory prohibitions. Except for pawn shops, pledgor may not agree before obligation becomes due and owing for any disposition of pledged property other than that provided by law. (C.C. 339). Pledges of movables require continuous possession by pledgee and pledgor may not hold item on behalf of pledgee. (C.C. 332). When claim is being pledged, obligor must be notified or his consent obtained to make pledge valid against such obligor or third party. Pledgee may collect pledged claim. (C.C. 353). Negotiable instrument must be endorsed upon delivery to establish pledge. (C.C. 350). Pledge may be satisfied by sale by auction or upon appropriation with reason upon application to court. (C.C. 338).

7.09 REHABILITATION PROCEDURES:

Petition.

Company, creditors (holding claims of 1/10 or more of company's paid-in capital amount), or shareholders (holding 1/10 or more of company's issued and outstanding shares) may file petition for rehabilitation proceeding. (UIL 34).

Preservation and Commencement.

Court must decide whether it will issue preservation order within seven days after application. (UIL 43). Court may issue comprehensive or specific stay order, prohibiting all or specific creditors from taking actions to enforce their claims or foreclosing their security interest. (UIL 54 through 47). Court must decide whether it will commence rehabilitation proceedings within one month after application. (UIL 49).

Administration.

Court should appoint receiver. In principle, court should appoint representative of debtor company as receiver. (UIB 74). Receiver has right of investigation on debtor's asset and debt, representation of debtor in litigation or avoidance.

Rehabilitation Plan.

In case court determines that going concern value exceeds liquidation value, court shall order receiver to prepare and submit draft rehabilitation plan within period decided by court. (UIB 220). Creditors holding 50% or more of rehabilitation claims may submit prepackaged plan before 1st interested parties' meeting. (UIB 223). Mandatory items to be included in Plan: any modifications of rights of secured creditors, unsecured creditors and shareholders; payment of administrative expenses; manner of securing fund for payment of debt; usage of extraordinary profits, etc. Optional items to be included in Plan: transfer of business and assets; modification of Articles of Incorporation; reduction of capital; issuance of new shares and bonds; merger; establishment of new company.

Consents from 2/3 of unsecured creditors, ¾ of secured creditors, and (only if total assets of company exceed its total liabilities) majority of shareholders are required. (UIL 237).

Termination of Proceeding.

In case court determines that liquidation value exceeds going concern value, court can terminate proceeding before submissions of draft of rehabilitation plan. (UIB 285). In addition, in case court determines that debtor cannot perform its obligation under rehabilitation plan, court also terminates proceeding. (UIB 288). In those cases, court renders adjudication of bankruptcy if there is cause of bankruptcy proceeding. (UIB 6).

7.10 Proceedings under Corporate Restructuring Promotion Law

Corporate Restructuring Promotion Law ("CRPL") was enacted in Nov. 2007 and will remain in effect until Dec. 31, 2010. Purpose of proceedings under CRPL is to restructure indebtedness of debtor pursuant to out-of-court workout arrangement.

Eligibility for CRPL Proceeding

CRPL proceedings apply to debtor company which has received "credit" 1 from financial institutions 2 licensed under relevant Korean laws and/or certain other entities designated by presidential decree of CRPL (all such creditors are hereinafter called "Financial Institution Creditors") if total amount of outstanding credit is not less than 50 billion Won and if such company is determined by its prime bank or creditors council which is comprised of Financial Institution Creditors to be unable to repay its debt without financial assistance from outside or special borrowings (excluding borrowings made in ordinary course of its business).

First Meeting of Council and Suspension of Exercise of Creditors' Rights

Prime bank of debtor company may or (upon request by Financial Institution Creditors collectively holding more than one-fourth of total amount of claims held by all Financial Institution Creditors) must call meeting of creditors council by sending out written notice regarding first meeting. At first meeting of creditors council, Financial Institution Creditors must determine whether to suspend exercise of creditors' rights (including enforcement of security interest) and period for such suspension. Suspension period may be up to one month (or three months if investigation of debtor company's financial status is necessary). This suspension period may be extended by creditors council for additional one month.

Approval of Workout Plan

Creditors council may approve plan for rehabilitation of debtor company and enter into agreement with debtor company for implementation of rehabilitation plan. For such purpose, creditors council may adopt debt restructuring plan and/or assistance with new credit with approval of: (i) At least 3/4 of total amount of claims held by all Financial Institution Creditors and (ii) at least 3/4 of total amount of secured claims held by all Financial Institution Creditors. Creditor who did not participate in creditors council meeting or exercised dissenting vote in writing against commencement of CRPL proceedings or debt restructuring (including new credit assistance) will have right to require assenting Financial Institution Creditors to purchase its claims pursuant to provisions of CRPL.

1 The term “credit” is defined to include loans, promissory notes and claims, equipment lease, guarantee, payment of guarantee or any other transaction under which a financial institution may incur losses upon payment default of the counterparty and is to be further defined in the regulations to be promulgated by the Financial Supervisory Service.

2 In the case of foreign financial institutions licensed in Korea, the CRPL proceeding affects their branches licensed in Korea and does not affect the head office or any offshore branches of such foreign financial institutions.

8 DISPUTE RESOLUTION

8.01 ALTERNATIVE DISPUTE RESOLUTION:

Alternative dispute resolution mechanisms are scattered in individual statutes and are mandatory or voluntary depending on provisions therein.

Voluntary Dispute Resolution.

Voluntary dispute resolutions take one of following three forms: mediation, conciliation and arbitration:

Arbitration.

Party or parties in dispute may petition for arbitration, outcome of which, arbitral award, is binding on both parties. See also topic 8.02 Arbitration and Award.

Mediation.

Party or parties in dispute may petition for mediation. Outcome of mediation, proposal of mediator, is not binding on either party. Mediation takes one of following forms: negotiation, independent expert appraisal, moderation and facilitation. Environment Dispute Adjustment Act (Arts. 27 through 29) provides for mediation.

Conciliation.

Voluntary conciliation and other similar dispute resolution mechanisms are provided for in many statutes: Environment Dispute Adjustment Act, Trade Union and Labor Relations Adjustment Act, Copyright Act, Act Concerning Establishment of Financial Supervisory Organizations, etc., Medical Services Act, Construction Industry Basic Act and Male and Female Equal Employment Act.

Civil Conciliation Law (1990) was enacted for purpose of utilizing conciliation as means of ADR since even though there exist conciliation systems in number of statutes it is seldom used.

Under Civil Conciliation Law, party may petition for conciliation to court. (C.C.L., Art. 2). Court to which lawsuit was filed may transfer case to conciliation if it deems such action necessary. (C.C.L., Art. 6). Judge in charge of conciliation may handle case himself or form committee to do so; provided, in case that parties request for committee, conciliation shall be handled by conciliation committee. (C.C.L., Art. 7). Judge in charge may investigate facts and evidences in appropriate manner at his discretion if he deems necessary to hear testimony of parties in dispute or interested parties. (C.C.L., Art. 22). Judge in charge may at his discretion terminate conciliation proceedings if he finds that nature of dispute is not suitable for conciliation or that party in dispute has petitioned for conciliation for improper reasons. Parties may not appeal ruling of termination of conciliation proceedings. (C.C.L., Art. 26). Conciliation is completed when parties record their agreements and settlement in writing. (C.C.L., Art. 28). Outcome of conciliation embraces enforceability equal to that of court settlement. (C.C.L., Art. 29). Petition for conciliation shall suspend statutes of limitation. (C.C.L., Art. 35). Proceeding fees shall be paid by both parties if conciliation is reached in absence of any agreement as to such, and proceeding fees shall be paid by petitioning party if conciliation is not reached. (C.C.L., Art. 37).

Other Means of Alternative Dispute Resolution.

In addition to arbitration, mediation and conciliation, there are other means of dispute resolution within formal procedures.

Summary procedure under Code of Civil Procedure: with regard to claim based on monetary payment or on delivery of certain quantity of any other fungibles or negotiable instruments, court may, upon motion of creditor, issue payment order, to which debtor may raise objection within two weeks.

Summary procedure under Special Act Concerning Summary Proceedings for Civil Cases: joint law office prescribed by provisions of Art. 9 of Act or notary public may draw notarial deed on note, check or slip affixed thereto authorizing it to be immediately executable, which is regarded as writ of execution against drawer and endorser.

Compromise (court settlement): there are two types of compromise. Under first type, party to civil dispute may file motion, before lawsuit is actually filed, for settlement before district court located in place where general forum of other party exists, by setting forth allegations and ground for claim as well as actual circumstances of dispute. (Code of Civil Procedure, Art. 355). In event that settlement is not reached, party may apply for institution of suit. Under second type, where lawsuit is already in progress, compromise negotiations may be initiated either by parties or court at any stage of oral argument. In both types of compromise under Code of Civil Procedure, where agreement has properly been entered into protocol, compromise has same effect as final and conclusive judgment.

Mandatory Dispute Resolution.

Non-exhaustive list of Korean laws which require some form of nonjudicial dispute resolution mechanisms before parties resort to arbitration or litigation is as follows: State Compensation Act (Art. 9 requires claimant for damages against government entity to confront responsible party before appropriate committee), Domestic Affairs Procedure Act (Art. 50 requires that before proceeding may be adjudicated by courts, conciliation procedures must be applied for, and in case parties fail to petition for conciliation, family court shall return case to conciliation, unless court accepts that parties cannot be summoned or case cannot be settled by conciliation), and Act concerning Fairness of Subcontracting Transactions (Art. 24 requires that conciliation commission shall confirm or conciliate case referred by Fair Trade Commission or parties).

8.02 ARBITRATION AND AWARD:

Arbitration Law was amended and became effective on Dec. 31, 1999. In most parts of amended Arbitration Law, UNCITRAL Model Law has been adopted.

Written agreement to submit any controversy thereafter arising between parties or any existing controversy to arbitration is enforceable. Furthermore, dispute under arbitration agreement is not allowed to be litigated. (A.L. 9). There is only one institutional arbitration body, Korean Commercial Arbitration Board. Arbitration award has same legal effect as that given to final judgment but may be enforced only after enforcement judgment is made by court. Enforcement judgment will be entered unless any of following prescribed grounds for setting aside award are found: (1) When there is incapacity of party or invalidity of arbitration agreement under governing law, or in absence of governing law under Korean law; (2) when there is lack of proper notice of appointment of arbitrator or arbitral proceedings or otherwise inability to present case on substantive issues; (3) when award deals with dispute which is not subject matter of arbitration agreement, or which is beyond scope of arbitration agreement; (4) when composition of arbitral tribunal or arbitral procedure was not in accordance with agreement of parties, which is not against mandatory provisions of Korean law, or in absence of such agreement, was not in accordance with Korean law. (A.L. 38).

Korea, party to UN Convention on Recognition and Enforcement of Foreign Arbitral Awards of June 10, 1958, will enforce arbitration awards rendered in another contracting state.

9 DOCUMENTS AND RECORDS

9.01 ACKNOWLEDGMENTS:

Formal acknowledgment is not usually necessary to validate instrument. Acknowledgment of notary does, however, authenticate identity of parties, verify required performance of party and creates presumption of genuineness to private instruments similar to official documents. Acknowledgment by notary public of articles of incorporation of joint-stock and limited liability companies is mandatory. (Com. C. 292, 543[3]). In civil actions, some papers submitted to court require acknowledgments. (C.C.P. 89[2], 355[1]). Recorded instruments are usually written and certified by notaries. See topic 9.02 Notaries Public.

Acknowledgments for use in other countries usually may be taken by diplomatic representatives of those countries who are accredited to Korean government.

Authentication.

Private documents must be authenticated unless acknowledged by opposite party. (C.C.P. 357). In civil procedure practice, however, documents submitted to court need to be authenticated irrespective of whether they are private or not. Documents prepared by public officials, including foreign public officials in exercise of their duties evidenced by form and purport thereof, or private documents bearing signature or seal of principal or representative, shall be presumed to be authentic. (C.C.P. 356, 358). Authenticity of document may be proven by comparison of handwriting or seal impressions (C.C.P. 359) or, more generally in civil procedure, by witness.

Seals.

Most transactions in Korea are consummated by use of seals rather than signatures. Some seals may be registered with municipal office of owner (registry office in case of commercial transactions). Certificate of seals may be issued as to such seals. For foreigners, signatures may substitute seals although some kind of consular verification may be required, except in case when such foreigner has signature and seal system in his country. (Foreigner's Signature and Seal Act).

9.02 NOTARIES PUBLIC:

Notaries public, appointed by Minister of Justice, are public officials of district public prosecutor's office. Notaries public, upon commission of party or other persons, prepare and authenticate instruments, deeds signed by private citizens, or articles of incorporation of company.

Notaries may act in localities where they are licensed to act and are liable for damages which result from their intentional or negligent acts performed in course of discharging their duties. Documents prepared or authenticated by notaries carry strong presumption of authenticity. When purport of instrument is claim for delivery of fungible or payment of sum certain or transfer of negotiable instruments, instrument itself is sufficient to obtain immediate execution against obligor if statement is made therein that obligor, at time of preparation of instrument, agrees to execution in event of default.

Under special legislation, attorneys practicing in groups may obtain license to act as notaries public. Lawyer's professional corporation is entitled to act as notary public.

9.03 RECORDS:

Registration offices are established under courts to maintain records relating to registrable property including ships and commercial transactions and are located throughout Korea. Family register records are maintained at municipal offices in custody of local officials. Patent Office in Taejon maintains registers of patents, trademarks, designs, and utility models.

Real rights in immovables requiring registration include ownership, superficies, servitude, deposit lease (Chonse-gwon) and mortgage. Creation or transfer of real rights in immovables requires registration of such rights with relevant record office. In Korea, separation of ownership of buildings and land upon which it is erected and maintenance of separate records thereof is possible. Provisional registration system affords protection against subsequent transfers of property to third parties through recording of contractual arrangements or incomplete assignments.

Records are required of injunctions prohibiting disposition of registered rights, attachments of registered property, adjudications of bankruptcy, and commencement of reorganization procedures.

See also category 3 Business Regulation and Commerce, topic 3.02 Commercial Register.

10 EMPLOYMENT

10.01 LABOR RELATIONS:

Labor Standards Act (L.S.A.) provides legal minimum labor standards in Korea. L.S.A. applies to all employers regardless of number of employees; however, employers having less than five employees are subject only to following major provisions of L.S.A.: working conditions for part-time employees; period for work-related sickness and/or maternity leave and restriction on dismissal within 30 days thereafter; prior notice on dismissal; priority in reimbursing salary receivable; recess periods and holidays, etc.

Under L.S.A., standard working hours for company in accordance with L.S.A. is limited to 40 hours per week. At least one day off per week is required. (L.S.A. 55).

Wages and Salaries.

Amount of wage is determined by individual employment agreement or collective bargaining agreement. Attachment of right to receive wage is limited to protect livelihood of laborers. (Civil Execution Act 246). In accordance with L.S.A. employer cannot set off wage by debt which employee owes to him. (L.S.A. 21). Wages and salaries are preferred claims having priority over other creditors of employers except for claims secured by mortgages or pledges provided, however, that claim for wages of last three months, severance allowances of last three years and accident compensation allowance shall be paid in preference to any claims secured by mortgages or pledges on whole property of employer, taxes, public charges and other claims. (L.S.A. 38). Wages must be paid directly to employees, in full, in legal tender. (L.S.A. 43[1]). With certain exceptions, wages must be paid once per month or more frequently on fixed day. (L.S.A. 43[2]).

Leave.

15-25 days of paid annual leave must be granted, in principle, provided that, among other things, company will be exempt from compensating employees for unused days of paid annual leave if company takes certain steps set forth in L.S.A. One day menstruation leave per month with pay must be granted to requesting female employees under L.S.A (L.S.A. 73). Maternity leave of 90 days must be given to pregnant employees. (L.S.A. 72).

Child Labor.

With certain exceptions, minors under 15 years of age may not be employed. (L.S.A. 64). Pregnant employees, female employees having given birth in last year, and minors under 18 years of age may not be employed in occupations detrimental to their morality or health. (L.S.A. 65[1]). Female employees who are not pregnant and who are 18 years of age or more, may not be employed in occupations detrimental to their pregnancy or childbirth. (L.S.A. 65[2]).

Discharge.

Employers may not discharge employees without just reasons. (L.S.A. 23). With certain exceptions, at least 30-days notice, or pay in lieu thereof, is necessary for discharge. (L.S.A. 26). Employers may lay off employees due to urgent managerial needs such as transfer, acquisition and merger of business, to prevent deterioration of business. (L.S.A. 24).

Rules of employment in compliance with minimum standards of law must be established by all employers with ten or more workers. (L.S.A. 93). Establishment of such rules requires presentation of rules to more than half of employees or chairman of labor union which consists of more than half of employees and then filing with Ministry of Labor. If rules of employment are amended adversely to interest of employees, employer is required to obtain employees' majority group consent (or majority union's consent, if such union exists) to such amendment. (L.S.A. 94). Such rules must deal with wage programs and scales, working hours, time off, holidays, paid vacations, discharge, retirement allowances, safety, sanitation, accident compensation, and other matters applicable to all employees. (L.S.A. 93).

Occupational Injuries and Diseases.

Employers must, at their expense, provide medical care for employees suffering from occupational injury or illness. (L.S.A. 78). Employers must pay compensation in amount provided for in L.S.A. for loss of wages, physical impairments, or death due to occupational illnesses. Employers having one or more employees must subscribe to industrial accident compensation insurance with certain exceptions.

Insurance.

Object of Industrial Accident Compensation Insurance Act (I.A.C.I.A.) is to protect employees by compensating for damages caused by occupational disasters and establishing or administrating insurance facilities necessary for such compensation. (I.A.C.I.A. 1).

Proprietor of enterprise shall automatically become insurer. (I.A.C.I.A. 7). Insurance allowances shall be as follows: Allowances for treatment and recovery, leaves, inconvenience, permanent physical impairment, mental anguish suffered by family members, and funeral expenses. (I.A.C.I.A. 40). Premiums to be paid by employers are product of total compensation multiplied by factor set by Ministry of Labor for applicable industry.

Labor Unions.

Employees have right of self organization, to form, join or assist labor unions, to bargain collectively through their own representatives. Rights of governmental officials and employees working at state-run enterprises, defense industries, and public utilities which have serious impact on national economy may be restricted or denied with respect to labor unions.

Collective Bargaining.

In accordance with Art. 29 of Labor Union and Labor Relations Adjustment Act (L.U.L.R.A.A.), collective bargaining agreements are made between employer or employer's organization and lawfully organized union. When collective bargaining agreements become applicable to at least one-half of regular workers of plant, their terms then become applicable to all regular workers of that plant. (L.U.L.R.A.A. 35). Those parts of rules of employment or employment agreement in violation of terms provided in collective bargaining agreements are null and void. (L.U.L.R.A.A. 33). Duration of terms of collective bargaining agreements may be for two years or less. (L.U.L.R.A.A. 32).

Unfair Labor Practice.

It is considered unfair practice for employer to: (1) Discharge or discriminate against employee because employee becomes member of labor organization or is about to organize labor union; (2) require employees or potential employees not to join company union or to join company union which represents less than two thirds of total employees; (3) refuse to bargain collectively with employees' representatives without justifiable reason; (4) interfere with or dominate employee organization and pay wages to full-time officials of trade union or pay administrative expense for labor organization; and (5) discharge or disadvantage employee because he has participated in collective action or has notified governmental agency of fact that employer committed above violations. (L.U.L.R.A.A. 81). Commission of unfair labor practices by employers may be punished by imprisonment or fines. (L.U.L.R.A.A. 90).

Labor Disputes.

L.U.L.R.A.A. provides matters necessary to settle disputes between employer and employees. Among workers who are engaged in major defense corporations which are subject to Special Act on Defense Industry, those who are involved in electricity, water or business which produces mainly defense goods, shall not be allowed to take industrial action. Scope of those workers who are engaged in business which produces mainly defense goods shall be determined by Presidential Decree. (L.U.L.R.A.A. 41[2]). Industrial action shall not be taken in form of violence or destruction, or by occupation of production facilities or installations related to important business or equivalent thereof as determined by Presidential Decree. (L.U.L.R.A.A. 42[1]). Act of dispute shall not be taken without completing adjustment procedures of Labor Relations Committee which are commenced upon request for adjustment from one of parties to labor relations. (L.U.L.R.A.A. 45). Adjustment period is ten days for general businesses and 15 days for public services. (L.U.L.R.A.A. 54). If labor disputes are not resolved, Labor Relations Committee shall arbitrate them if: (1) Both parties jointly apply for arbitration, (2) either party applies for arbitration pursuant to collective bargaining agreement, or (3) Chairman of Labor Relations Committee decides to refer dispute, in matters of essential public services, to arbitration upon recommendation of special Mediation Committee. (L.U.L.R.A.A. 62).

Labor Management Council is organized within each business with 30 or more employees in accordance with Act of the Promotion of Worker Participation and Cooperation (A.P.W.P.C.) for purposes of improving welfare of employees and to help sound development of businesses. (A.P.W.P.C. 3[1]). Council consists of three to ten representatives to employer and employees. Council may debate on following affairs: (a) Improvement of productivity and gain sharing; (b) recruitment, placement, education and training of workers; (c) prevention of industrial disputes; (d) workers' grievance handling; (e) improvement of occupational safety and health measures and working conditions and promotion of workers' health; (f) institutional improvement for personnel management; (g) general rules of employment adjustment such as relocation, retraining, dismissal for managerial or technological reasons; (h) administration of working hours and break time; (i) improvement of system by which remuneration is paid, classified, structured, etc.; (j) introduction of new technology and machinery, or improvement of work processes; (k) setting up or amendment of work rules; (l) employees' stock ownership program and other assistance to increase workers' property; (m) compensation for employees with respect to work-for-hire, i.e. invention made by employee within scope of employment; (n) improvement of welfare of workers; and (o) other matters as to cooperation between workers and employers. (A.P.W.P.C. 20). Employers shall seek resolution of Council on each of following subparagraphs: (a) Establishment of employees education and training plan, and skill development scheme; (b) establishment and administration of welfare facilities; (c) establishment of employee welfare funds; (d) matters not resolved by Grievance Handling Committee; or (e) establishment of various labor-management cooperative committees. (A.P.W.P.C. 21). Agreement among two-thirds of members present, which should be more than one-half, is necessary to pass resolutions. (A.P.W.P.C. 15).

Unemployment compensation exists in Korea through Unemployment Insurance Act which has been in effect since July 1, 1995. Under National Pension Act, company which has one or more employees must join government administered national pension program. Amount transferred from severance reserves to national pension fund, if any, will be deducted from final amount of severance payment mandatorily payable to employees.

Minimum Wage Act provides minimum wage system. Since Jan. 1, 2009, employers with one or more employees must pay at least 4,000 Won per hour, and 32,000 Won per day. Minimum wage system applies to all enterprises and workplaces.

Equal Employment Treatment for Males and Females Law provides plan for enhancing welfare of female employees and establishment of Female Employees Committee. It also prohibits discrimination against women in regard to employment, training opportunity, assignments, wages, promotions, retirement, and dismissal with punishment of fine and imprisonment in case of violations. To prevent sexual harassment, employers must provide their employees with training, general discussions, and audio-visual education at least once a year. Appropriate disciplinary actions including transfer, warning, reprimand, suspension, unpaid leave, order of waiting and dismissal should be taken against harasser based on severity and frequency as well as duration of sexual harassment.

Employment Promotion and Vocational Rehabilitation of Disabled Persons Act provides that employer shall perform several statutory obligations in order to enhance welfare of handicapped persons, including employing certain ratio of handicapped persons where employer maintains 50 or more employees.

Act Relating to Protection, etc. for Dispatched Workers.

Person who wishes to conduct temporary worker dispatch business shall obtain permission from Ministry of Labor under Dispatched Workers Protection Act (D.W.P.A.). Under D.W.P.A., work to be performed by dispatched worker must fall under permitted list of 32 job categories set forth at Presidential Decree of D.W.P.A. In addition, maximum term for dispatch is two years and violation of this term limit will result in dispatched worker being deemed regular employee of recipient company.

11 ENVIRONMENT

11.01 ENVIRONMENTAL REGULATION:

Laws and Regulations.

Environmental issues are addressed by following laws: Basic Environmental Policy Act and its Enforcement Decree, Act on Environmental Impact Assessment, Liability for Environment Improvement Expenses Act, Environment Dispute Mediation Act, Natural Environment Preservation Act, Noise and Vibration Regulation Act, Water Quality and Aqua-Ecosystem Preservation Act, Noxious Chemical Substance Control Act, Atmospheric Environment Preservation Act, Offensive Odor Prevention Act, Sea Environment Management Act and its Enforcement Decree, Wastes Management Act, Soil Environment Preservation Act, Drinking Water Control Act, Law Relating to Trans-boundary Movements of Waste and Its Disposal, Indoor Air Quality Control in Public Facilities Act, Act Relating to Promotion of Economy and Reutilization of Resources, Act on Resources Recycling of Electrical/Electronic Products and Vehicles and Special Act on Air Environment in Metropolitan Area. Basic Environmental Policy Act (" *BEPA*") sets forth general principles, fundamental policies, and administrative frameworks for environmental preservation and remediation. BEPA is merely declaratory in nature; however, other acts and decrees related thereto specify detailed regulation of matters related to environmental issues. Enterprises are required to take measures necessary for preventing environmental pollution and cooperate with government policies and regulations. (BEPA 5). BEPA contains general principles, viz., polluter pays principal, which is that anyone who causes environmental pollution must bear costs of restoring environment. (BEPA 7). Government is mandated to set environmental standards (BEPA 10) and investigate situations of environmental pollution (BEPA 15). Ministry of Environment ("MOE") is obliged to establish every ten years governmental long-term comprehensive plan for preserving environment (BEPA 12). MOE may restrict any utilization of land and installation of facilities in special countermeasure area (Decree 5), which is designated by MOE (BEPA 22). Also, MOE may designate environmental influence zone (Decree 6). BEPA adopts strict liability standard for harms caused by environmental pollution, which applies to civil liabilities under all Korean environmental laws (BEPA 31). When there is more than one business place, and if it is impossible to find which business place causes damage to environment, then each enterprise should indemnify for it jointly and severally (BEPA 31). Arts. 37 and 38 establish Environmental Preservation Advisory Committee and Environmental Preservation Association.

Act on Environmental Impact Assessment ("EIA") requires that, in certain situations, environmental impact statement be submitted to MOE before new project that may affect environment begins. EIA requires any entity, public or private, intending to construct project that can affect environmental quality (e.g., urban development, industrial sites, apartment complexes, or energy resource developments), to assess environmental impact and seek comments from MOE in advance.

Atmospheric Environment Preservation Act ("AEPA") regulates emission of pollutants into air. Offensive Odor Prevention Law ("OOPL") regulates emission of offensive odors into air. Noise and Vibration Control Act ("NVCA") regulates generation of noise and vibration. Water Quality and Aqua-Ecosystem Preservation Act ("WQAEPA") regulates effluents released into surface waters. WQAEPA does not apply to groundwater contamination, which is regulated by Groundwater Act. Sea water is protected and governed by Sea Environment Management Act ("SEMA"), which regulates oil, poisonous liquid substance, etc., and wastes discharged into sea from ships and sea facilities. When ocean environment is damaged by discharge of oil or poisonous liquid substance, government can recover amount corresponding to damage from person who is responsible for such discharge (SEMA C. 4 through 6). Pollutants regulated under

AEPA include sulfuric oxides, nitric oxides, carbon monoxide, and particulates, whereas pollutants regulated under WQAEPA include biochemical oxygen demand, chemical oxygen demand, floating material, chrome, copper, and zinc. AEPA and WQAEPA ministerial decrees set emission and effluent standards. AEPA and WQAEPA require permits from local government prior to installation of facilities that will emit air pollutants or discharge wastewater, provided that such facilities meet certain standards, such as size or capacity (AEPA 23 and WQAEPA 33). AEPA and WQAEPA are enforced through administrative, criminal, and civil sanctions. Criminal penalties set by these laws include imprisonment for not more than seven years or fines not exceeding 50 million Won, depending on type of violation (AEPA 89 through 95; WQAEPA 75 through 82). Areas designated as “Offensive Odor Areas” by local government agencies shall be subjected to strict monitoring. (OOPL 4).

Waste Management Act (“WMA”) regulates generation and discharge of solid wastes. WMA divides solid wastes into two categories: General waste and specified waste. Specified waste is waste created from business activities that is hazardous to public health and environment. WMA requires business entity that discharges specified waste to file report with MOE and to treat its specified waste property according to standards set forth by MOE. General waste is any waste other than specified waste. Noxious Chemical Substance Control Act (“NCSCA”) regulates manufacture and importation of virtually all chemicals, whether harmful or not. NCSCA requires that any business that manufactures, distributes, holds, stores, or transports toxic substances register with MOE, with certain exceptions (NCSCA 20), and any business that manufactures, imports and uses management restricted toxic substances acquire approval from MOE, with certain exceptions (NCSCA 33, 34). Manufacturers or importers of chemical substances must self-certify as to whether or not particular chemical substance is subject to any restriction (e.g., new chemical substance) and report results thereof to Minister of Environment. (NCSCA 9, effective as of Jan. 1, 2006). Minister of Environment may evaluate potential hazards effects to humans or ecosystems that are exposed to such substances. (NCSCA 18, effective as of Jan. 1, 2006). Ministry of Labor (“MOL”) provides technical guidelines and environmental standards that are necessary to protect workers' safety and health. MOL has jurisdiction over Industrial Safety and Health Law (“ISHL”).

Soil Environment Preservation Act (“SEPA”) regulates soil contamination. Individuals or businesses who cause soil contamination must report such contamination to relevant authority. (SEPA 11, effective as of July 1, 2005). To install or operate soil contaminating facilities, report should be filed with local government prior to installation. (SEPA 12). Contaminated soil must be cleaned up subject to standard and method specified in Enforcement Decree of SEPA and such clean-up must be performed by entrusted entities who obtain proper license. (SEPA 15-3, effective as of July 1, 2005). In case of clean-up of contaminated soil which exceeds certain designated size limit, clean-up procedure and results thereof must be inspected by agency that specializes in such matters. (SEPA 15-6, effective as of Jan. 1, 2006). Local government should establish and carry out countermeasure plan to preserve soil of designated countermeasure areas. (SEPA 18). Local government may order contaminator to carry out all or part of remediation program. (SEPA 19). Definition of contaminator includes owner or user of soil containing facilities at time of contamination, and acquirer of soil contaminating facilities. (SEPA 10-3). Site where soil contaminating facilities are installed and its surrounding vicinity must be subject to periodic leak test as well as soil contamination investigations conducted by soil specialist pursuant to official methods prescribed by MOE for test of soil contamination. Furthermore, investigations are required upon cessation of use, closure, lease or transfer of soil contaminating facilities (SEPA 13).

Water Qualtity and Aqua-Ecosystem Preservation Act (WQAEPA) regulates public water contamination. Person who intends to install discharge facilities shall obtain permit thereon from Minister of Environment or report thereon to Minister of Environment (WQAEPA 33). Wastewater discharging facilities with “No Wastewater Discharging System” are permitted to be established in previously restricted areas, subject to satisfactory fulfillment of prescribed conditions (WQAEPA 34). Person who has obtained permit or permit on modification, or who has made report or report on modification, installs or alters discharge facilities concerned, shall install water pollution preventive facilities in order to discharge pollutants discharged from said discharge facilities under level of permissible discharge standards with certain exceptions (WQAEPA 35). In case where enterpriser has transferred ownership of his discharge and preventive facilities, or is dead, or where juristic persons have been merged, transferee, successor, juristic person who continues to exist after merge, or juristic person who has newly been established by merge shall succeed to rights and duties of said enterpriser incidental to permit, permit on modification, report or report on modification (WQAEPA 36). In order to prevent or reduce potential damage, coming from water pollutants, to water environment, Minister of Environment shall impose and collect discharge dues on enterpriser who discharges pollutants, or on person who installs or modifies discharge facilities without having obtained permit or permit on modification or having made report or report on modification (WQAEPA 41). Any person who intends to install nonpoint source pollution such as development business of city or industrial complex, steel manufacturing facility and fiber dyeing facility, etc., must file installation report and install preventive facility for nonpoint source pollution under WQAEPA (WQAEPA 53; effective as of Apr. 1, 2006).

Drinking Water Control Act ("DWCA") regulates quality of drinking water. DWCA requires that any business which manufactures drinking water acquire approval from MOE. (DWCA 21). Business for manufacturing or importing of water purifier (should report to MOE) and business which imports drinking water should register with MOE (DWCA 21).

Indoor Air Quality Control in Public Facilities Act ("IAQCA") regulates quality of indoor air in public facilities, including apartment houses. IAQCA prohibits use of building materials known to contain carcinogens (i.e. formaldehyde) in public facilities (IAQCA 11). Construction company or builder of newly built apartment houses to conduct indoor air quality testing and to notify occupants of apartment houses of test results prior to move-in (IAQCA 9). Special Act on Air Environment in Metropolitan Area ("SAAEMA") went into effect on Jan. 1, 2005. SAAEMA strictly regulates emissions in areas designated as "Air Quality Management Area" of metropolitan areas including Seoul, Incheon and Kyunggi Province through focused emissions control, which may affect air quality of Metropolitan Area. Plants that produce pollutants (NOx, SOx, and dust) through various emission sources will be assigned with total quantity acceptable for discharge as adjusted every five years (SAAEMA 16).

General Supervision.

Ministry of Environment (MOE) has jurisdiction over environmental laws. MOE may appoint environmental supervisors or delegate its authorities to directors of regional environment offices. Address of MOE is Kwanmunno 88 (1, Chungang-dong), Kwacheon-city, Kyungki-province, Republic of Korea.

12 ESTATES AND TRUSTS

12.01 DEATH:

Adjudication of Disappearance.

Missing person may be declared dead by court through adjudication of disappearance proceedings commenced on application by interested party or prosecutor. In order for court to declare missing person dead, no information must have been received on whether such person is living or not for five years. However, if person had been missing in war zone, on vessel which sank, or on aircraft which crashed, or otherwise through perils which might have caused his death, necessary term of missing is one year after event has transpired. (C.C. 27). Person declared dead is deemed to have died upon lapse of such five or one year period. (C.C. 28). If it has been proved that person against whom declaration of disappearance has been made is alive or died at time different from that prescribed above, court shall, upon application of person himself, any party interested, or prosecutor, annul declaration of disappearance. In such case, all effects of deemed death such as inheritance and dissolution of marriage become null and void retroactively. Any act done in good faith after declaration of disappearance and prior to revocation, however, remain valid. Person who acquired property in good faith as direct result of declaration should return property to extent that he still remains enriched. Person who has acquired property in bad faith, however, should return such property together with interest thereon and pay any damages. (C.C. 29). As long as missing person is not declared dead by adjudication of disappearance, such person is presumed live. See category 13 Family, topic 13.02 Divorce.

Simultaneous Death.

In event that two or more persons died of same peril, it is presumed that they died simultaneously. (C.C. 30).

Actions for Wrongful Death.

Person who wrongfully causes death of another must pay damages to deceased's heirs and close relatives, such as spouse, parents and children. Such damages may include lost earnings of deceased and mental anguish and sufferings of both deceased and his close relatives. (C.C. 750 through 752).

12.02 DESCENT AND DISTRIBUTION:

Rules governing descent and distribution apply to property of all descriptions including real estate and personal property. Orders of succession are as follows: (1) Lineal descendants; (2) lineal ascendants; (3) brothers and sisters; and (4) other relatives within fourth degree of consanguinity. Presence of relatives in previous order excludes rights of relatives in more distant order. If there are two or more persons standing in same rank, those nearest in degree of kinship would have priority. Persons belonging to same order and standing in same degree of kinship share rights equally. (C.C. 1000). If lineal descendant, or brother or sister of deceased, who would have become successor had he or she been alive, has died or has become disqualified before opening of succession and there exists his or her lineal descendants, such lineal descendants will receive shares which would have been distributed to their lineal ascendant if ascendant had been alive or qualified. (C.C. 1001). If there exist such successors as deceased's lineal descendant or his lineal ascendants, wife of deceased becomes co-successor in same order of succession as his lineal descendants or his lineal ascendants. (C.C. 1003).

Legitimate Portions.

Co-successors equally share in estate except that inheritance portion of wife of deceased shall be that of lineal descendants plus 50% thereof or that of lineal ascendants plus 50% thereof in case she succeeds jointly with lineal descendants or lineal ascendants respectively. (C.C. 1009). If any of co-successors has received from deceased gift or testamentary gift and value of gifted property is short of his share in succession, he shall be entitled to shares in succession within limit of such shortage. (C.C. 1008). Each successor is, however, provided with certain legally secured portions of estate taking precedence over donee's testamentary gift. Legally secured portions of successors are as follows: (1) As for lineal descendant or spouse of person succeeded to, one-half of legal inheritance portion; (2) as for lineal ascendant or brothers and sisters of person succeeded to, one-third of legal inheritance portion. (C.C. 1112).

Acceptance or Renunciation.

Successor may within three months from time he learned of opening of succession, effect acceptance, either absolute or qualified, or renunciation. However, such period may be extended by court upon application of person interested or public prosecutor. Successor may make survey of property to be succeeded to before effecting such acceptance or renunciation mentioned above. Notwithstanding foregoing, if successor has given his absolute acceptance without knowing within given three months of fact that debt to be succeeded exceeds property to be succeeded, then, successor may effect qualified acceptance within three months of learning such fact, provided that successor has not committed acts of gross negligence. (C.C. 1019).

Successor shall be deemed to have effected absolute acceptance if he has taken act of disposition with regard to property succeeded to, or if he has failed to effect either qualified acceptance or renunciation within three months from time he learned of opening of succession, or if he has concealed or fraudulently consumed, or failed on purpose to enter in inventory property succeeded to after having effected qualified acceptance or renunciation. (C.C. 1026).

Partition of Estate.

If there exist two or more successors to property, they own property succeeded to in common. Person succeeded to may by will determine mode of partition of estate succeeded to, or forbid partition for period not exceeding five years from time of opening of succession. Except cases mentioned above, co-successors may, at any time, effect partition of estate succeeded to by their agreement. (C.C. 1012, 1013).

Separation of Property.

Obligee of property succeeded to, or testamentary donee, or obligee of person succeeded to, may within three months from time of opening of succession, apply to court for separation of property succeeded to, from inherent property of successor. As long as successor has not accepted or renounced pertinent succession, application may be filed with court for separation of property even after period mentioned above elapsed. In case where separation of property has been ordered, right and duty of successor to deceased with respect to property shall not be extinguished. (C.C. 1045, 1050).

12.03 EXECUTORS AND ADMINISTRATORS:

Testator may by will appoint executor or commission third-person to designate one. If no designated executor exists or designated person refuses to accept designation, heirs become executors. If heirs refuse or are unable to serve, court should appoint executor upon application of person interested. (C.C. 1093 through 1096). If more than one executor exists, conduct of their duties shall be decided by majority. However, each executor is entitled to do acts of preservation. (C.C. 1102).

Executor has right and obligation to manage property which is subject matter of testamentary gift and to perform acts necessary to carry out will. (C.C. 1101). Executor by designation or appointment shall be deemed to be representative of heirs. (C.C. 1103).

12.04 WILLS:

Persons 17 years or older may make last will and testament. (C.C. 1061). Even incompetent may make will during lucid interval in presence of physician who will attest to his lucidity at that time. (C.C. 1063). Testator may, in his will, acknowledge illegitimate children and dispose of property, etc. (C.C. 859, 1074, etc.).

Execution.

Civil Code provides required forms and formalities for holographic wills, wills by voice recording, wills drafted by notaries, and secret wills (envelopes of which are acknowledged by notaries) are all recognized. (C.C. 1066 through 1069). If will cannot be made in one of four forms due to illness or any other extenuating circumstances, oral will may be made in presence of two or more witnesses provided that it is transcribed by witness. (C.C. 1070).

In foreign countries, Korean consul may perform functions of notary in regard to wills. (Act Concerning Notarial Acts by Diplomatic Missions Abroad 3).

Testamentary Disposition.

Testator may dispose of any portion of his estate, but disposition in excess of legally secured portions of heirs is subject to adjustment upon demand from heirs. (C.C. 1115). For purpose of calculating value of estate, gifts made within one year of death or gifts made and taken by parties who knew that such gift making would harm rights of heirs to legally secured parties may be included. (C.C. 1114). Legally secured portions of estate are: (1) One-half for spouse or lineal descendants, and (2) one-third for lineal ascendants or brothers or sisters. (C.C. 1112). See topic 12.02 Descent and Distribution.

Legacies may be burdened and in turn may be renounced by legatees. (C.C. 1074, 1088).

Governing law of will is law of testator's nationality at time of will and amendment or withdrawal of will is governed by law of testator's nationality at time of its amendment or withdrawal. (Private International Act 50).

13 FAMILY

13.01 ADOPTION:

Person other than minor may adopt another person. (C.C. 866). Married persons must be joined by their spouse to adopt. If married person adopts another, he or she must obtain his or her spouse's consent. (C.C. 874). Consent of adopted person's parents is generally required for adoption, and if parents or other lineal ascendants do not exist and minor is to be adopted, consent of guardian is required. (C.C. 870, 871). Adoption may be dissolved upon mutual agreement of parties. (C.C. 898). Adoption may also be dissolved through judicial proceedings: (1) If either adoptive parent or child has committed acts of gross negligence, impairing reputation of family or squandering family fortune; (2) if either party has been extremely maltreated by other or by his lineal ascendants; (3) if any lineal ascendant of one party has been extremely maltreated by other party; (4) if adopted child is not known to be alive or dead for three years or longer; or (5) if there is any other significant cause making it difficult to maintain adoptive relationship. (C.C. 905). Adoption and its dissolution are determined in accordance with law of adopting parent's nationality effective at time when adoption is made. (C.L.A. 43).

13.02 DIVORCE:

Divorce may either be made by mutual consent or granted by court.

Divorce by mutual consent becomes effective through entry in Family Register Record after confirmation by family court of mutual agreement of parties to divorce. (C.C. 834, 836). Measures necessary for fostering children shall be decided by mutual consent. If mutual agreement has not been reached or is impossible, either party may petition to court to decide on appropriate measures necessary for fostering children. (C.C. 837).

Divorce may be granted if one party institutes action against other party upon grounds of: (1) Unchastity, (2) malicious desertion, (3) extreme maltreatment by other party or his lineal ascendants, (4) extreme maltreatment of instituting party's lineal ascendants by other party, (5) if it is unknown whether other party is living or dead for three years or more, or (6) any other significant cause rendering continuation of marriage difficult. (C.C. 840).

When action for divorce is filed, court-administered pretrial procedures for conciliation should generally be followed. If divorce agreement is reached in such procedures, it will have same effect as court decision. If such agreement is not reached, court will hold trial and decide. (Domestic Matter Procedure Act 50, 59, 60).

Even in cases where alimony is not awarded, one spouse may still demand division of property. If agreement is not reached with respect to division of property, family court shall decide on amount and method of division considering amount of assets acquired through efforts of both parties and other circumstances. (C.C. 839-2).

Effect of divorce is determined in accordance with law stipulated in following order: (i) law of common nationality of both parties; (ii) law of common permanent residence of both parties; and (iii) law which is most related to both parties. Notwithstanding above, effect of divorce is governed by Korean law if either party is Korean national and has permanent residence in Korea. (C.L.A. 39, 37).

13.03 HUSBAND AND WIFE:

Property.

Husband and wife may make property agreement prior to their marriage. Such agreement is not valid as against their successors or third parties unless it is registered prior to marriage and cannot be altered during marriage without justifiable cause and court's permission thereon. (C.C. 829). Absent such agreement, property acquired by either spouse prior to marriage continues to be separate property. Property may be acquired separately by either spouse during marriage. If it is not clear which spouse owns which property, it is presumed to be owned jointly by husband and wife. (C.C. 830). Each spouse may separately manage, use, and take profit from his/her own property. (C.C. 831).

Living expenses for cohabitation of husband and wife must be borne by both parties, unless otherwise agreed to by both parties. (C.C. 833). Husband or wife is granted authority by operation of law to represent other in daily household matters. Each spouse is jointly and severally liable for legal obligations entered into by other with respect to daily household matters unless third party is otherwise notified in advance. (C.C. 832). Contracts between husband and wife may be cancelled by either spouse at any time during marriage but may not prejudice rights of third parties. (C.C. 828).

Personal relations between husband and wife are ruled by principle of equality of rights. Husband and wife should cohabitate, support, and aid each other, provided that each spouse should tolerate living apart if justifiable cause requires temporary separation. (C.C. 826). Marriage does not have any effect on family name of either spouse. (Family name of Korean national cannot be changed.)

Conflict of Laws.

Effect of marriage is governed by law that would apply to parties in divorce proceeding. (C.L.A. 37).

See also topic 13.05 Marriage.

13.04 INFANTS:

Minority lasts until person reaches 20 years of age. (C.C. 4).

Emancipation takes place upon marriage. (C.C. 826-2).

Disabilities.

Minors must have consent from legal representative (parent or guardian) unless such act is advantageous to minor. (C.C. 5, 909 through 911, 928 through 938). Contracts made by minor without such consent are revocable. (C.C. 5). If minor uses fraudulent methods to induce another party to believe he has capacity to contract, such contract is irrevocable. (C.C. 17). Minor has full capacity: (1) In disposition of property, for which authorization has been given by legal representative; (2) in acts of business, for which authorization has been given by legal representative; or (3) in entering employment contracts as employee. (C.C. 6, 8; L.S.A. 65).

Ratification of contract of minor is made by his legal representative prior to or by minor after having attained majority. Other party to contract may demand revocation or ratification by legal representative or minor who has attained majority within period designated by party not shorter than one month. In absence of reply within such period, ratification is deemed to have been made. (C.C. 15, 140, 143).

Actions.

Minors may sue and be sued. In legal proceedings, minor must have legal representative. (C.C.P. 55). For example, service of process in action against minor must be made on his legal representative. If child does not have sufficient intellectual capacity to comprehend consequences of his actions, parents or guardian may be held liable for damages. (C.C. 753, 755).

Wages.

Minor has right to make claim for payment of wages for his labor independently. (L.S.A. 66).

13.05 MARRIAGE:

Marriage becomes effective upon acceptance by family registrar of notification of marriage signed by both parties and two witnesses having attained majority. (C.C. 812). Ceremonies are, although customary, not required. Despite record status, marriage is invalid if parties lack intention to marry. (C.C. 815). Supreme Court precedents generally take position that even if notification of marriage has not been made, effects similar to those of marriage are created if it is deemed that parties in fact maintain marital relationship.

Minimum age requirement for marriage is 18 years for both males and females. (C.C. 807). Minors need consent of their parents or guardian. (C.C. 808).

Prohibited Marriages.

Important prohibitions are: There can be no marriage between lineal relatives; between relatives within eighth degree of consanguinity. (C.C. 809, 815). There used to be specific provision in C.C. prohibiting marriage between those of same surname with common origin. Provision, however, was no longer effective from Jan. 1, 1999 following Constitutional Court decision finding provision unconstitutional. No marriage can be entered into by person who presently has spouse.

Annulment may be made upon showing of existence of any legal defect (e.g. violation of any prohibition previously discussed). (C.C. 815 through 825).

Foreign Laws.

Requirements for marriage are determined by laws of parties' respective nationality. Manner of marriage, however, is determined by law of place of marriage or law of parties' respective nationality; provided that manner of marriage is governed by Korean law if marriage takes place in Korea and either party is Korean national. (C.L.A. 36).

See also topic 13.03 Husband and Wife.

14 FOREIGN TRADE AND COMMERCE

14.01 FOREIGN EXCHANGE:

Foreign Exchange Management Law was replaced with Foreign Exchange Transaction Law (F.E.T.L.) from Apr. 1, 1999, which is most comprehensive act controlling contractual relationship, payment and receipt, borrowing and lending, portfolio investment, guarantee, etc. between “residents” and “nonresidents”. (“Residents” means all natural persons who have their domicile or residence in Korea and also juridical persons having their main office in Korea. [F.E.T.L. 3-1-12]. Branches, local offices and other offices in Korea of nonresidents are considered to be residents irrespective of whether or not they have legal authority to represent “nonresidents” and even if their main office is located abroad. “Nonresidents” means all persons, natural or juridical, other than “residents”. [F.E.T.L. 3-1-13].)

F.E.T.L. has taken “negative system” as basic method regulating noncapital foreign exchange transaction, where it is understood that F.E.T.L. has taken “positive system” as basic method regulating capital foreign exchange transaction although it is not entirely clear.

Noncapital transactions between residents and nonresidents are generally permitted under negative system, unless specifically subject to prior approvals from, or prior reporting to, different foreign exchange authorities such as Ministry of Strategy and Finance, Bank of Korea or foreign exchange banks as enumerated by enforcement decree and regulations depending on contents of transactions. In case of capital transactions, since many restrictions were eliminated after occurrence in Korea of IMF financial crisis in Nov., 1997, it is generally viewed that although most capital transactions between residents and nonresidents are permitted, they are still regulated under positive system and some capital transactions need prior reporting to, different foreign exchange authorities such as Ministry of Strategy and Finance, Bank of Korea or foreign exchange banks as enumerated by enforcement decree and regulations depending on contents of transactions.

Failure to obtain necessary foreign exchange approvals or file necessary foreign exchange reports does not affect validity of transaction between parties. However, in case where foreign exchange approvals or reports regarding transactions are required, relevant overseas payment without such approvals or reports will not be permitted. Failure to obtain requisite foreign exchange approval or file requisite foreign exchange report is also criminal violation under F.E.T.L. and may be subject to substantial fines and/or imprisonment (F.E.T.L. 27 through 32).

14.02 FOREIGN INVESTMENT:

Person, natural or juridical, who intends to invest in Korea must report its investment to one of banks (Bank) delegated by Ministry of Knowledge Economy (MOKE) and obtain confirmation of such report from Bank authorized under Foreign Investment Promotion Law (F.I.P.L.) to receive such reports. Investment is permitted in all except following fields: (1) Business which undermines national security or maintenance of public order; (2) business which causes injury or harm to public health or environment, or is significantly at odds with public morals; and (3) business which results in infringement of laws of Korea. (F.I.P.L. 4). Bank should confirm report of investment by foreigners immediately. When foreign investors acquire additional shares through merger of company, amalgamation or partition of shares, change of reserves to capital, etc., they must report to Bank. (F.I.P.L. 7). Upon completion of investment procedures, foreign investors or foreign invested enterprises must register with MOKE as Foreign Invested Enterprise. (F.I.P.L. 21). Business is subject to regulation by Korean government. Certain tax benefits are granted for seven years to foreign investors and companies invested in by foreigners if certain criteria are met. Such tax benefits have been and will be gradually increased pursuant to Korean governmental policy.

Korean and juridical persons who enter into any technology inducement agreement such as license agreement whose scope is prescribed by Enforcement Decree of F.I.P.L. 31 with foreigners or changed contents of previously reported agreement must report to relevant ministry and obtain acceptance of such report from that ministry under F.I.P.L. Agreement becomes enforceable when report is accepted by relevant ministry. Royalties received by foreign party are exempt from income and corporation taxes for five years if technology meets high technology criteria. (F.I.P.L. 25, 26).

Repatriation Right.

All dividends of foreign investors, proceeds from sale of shares, or royalties from technology inducement agreements may be repatriated. (F.I.P.L. 3). Other rights of foreign investors related to investment in Korean industry are same as those of Koreans. (F.I.P.L. 3).

14.03 FOREIGN TRADE REGULATIONS:

Foreign trade in Korea is basically regulated by Foreign Trade Law (F.T.L.) and Enforcement Decrees and regulations thereof. Prior requirements that businesses engaged in international trading should report to relevant authorities are abolished. Any restrictions on international trade are listed in Export and Import Notice and Consolidated Notice issued by Ministry of Knowledge Economy. Notices adopt Harmonized Commodity Description and Coding System for classification of items. Export control is done for some items, including items on Wassenaar Arrangement, which can be used for military purposes.

Some imported items are required to mark originating country for protection of consumers. Safeguard system is established in Korea for import damage relief whereby imports can be restricted if damage to any domestic industry concerned occurs.

15 IMMIGRATION

15.01 ALIENS:

Aliens are persons not of Korean nationality or of no nationality. Aliens are now afforded virtually all rights of Koreans with limited exceptions. In general, aliens are permitted to own property and to contract without governmental approval but cannot practice in professions of quasi-public character (e.g., law and public accounting). Aliens may not own mines or register aircraft or vessels in Korea. Acquisition of land or rights related thereto require government approval or report. (Alien Land Acquisition Act). Fishery business license requires consent from National Assembly. Aliens having no residence in Korea may not enjoy patent rights, with certain exceptions.

Aliens with arrival card granting long-term stay of over 90 days must register with immigration office having jurisdiction over their residence within 90 days from entry. Entrance into Korea is subject to governmental approval except for members of U.S. Armed Forces, UN's agencies, diplomats, consuls and their dependents, and public officials of foreign governments and international organizations recognized by Korea. By virtue of Agreement under Art. 4 of Mutual Defense Treaty between Republic of Korea and U.S. regarding Facilities and Areas and Status of U.S. Armed Forces in Republic of Korea, alien members of U.S. Armed Forces, including civilian military personnel, together with their dependents, may be subject to criminal jurisdiction of Korean courts with respect to crimes committed in Korea which are punishable under Korean law. Aliens have equal access to courts in bankruptcy, compulsory composition proceedings and certain tort actions against Korean government; they are equally treated only if country of their nationality provides same treatment to Korean nationals.

Corporations owned by or controlled by aliens are regarded as “foreign investors” for purpose of inward direct investments including acquisition of shares, restrictions on acquisition and registration of mines, land, aircraft, vessels, fishery business licenses and patent rights. See also category 2 Business Organizations, topic 2.02 Corporations, subhead Foreign Corporations.

15.02 IMMIGRATION:

In order to enter Korea, aliens must obtain entry visa specifying period of stay and purpose of stay. (E.E.C.A. 7, 10). Ministry of Justice has power to grant entry visa, but most short term visas (up to 90 days) are delegated to Korean consuls stationed outside of Korea. (E.E.C.A. 8). However, aliens of some countries who enter Korea for tourism may enter Korea without visa and stay up to 90 days. (E.E.C.A. 7). Aliens entitled to stay in Korea for more than 90 days must report and register their residence with local Immigration Office. (E.E.C.A. 31, 32). Aliens can stay in Korea up to period specified in their entry visa but such period is extendable with some exceptions. (E.E.C.A. 17, 25). However, aliens who enter Korea with short-term entry visa or without any visa may not obtain extension of stay in excess of 90 days. Status and period of stay vary according to alien's activity or purpose in entering Korea. (E.E.C.A. 10, 17).

16 INSURANCE

16.01 INSURANCE COMPANIES:

No one may operate insurance business without license obtained from Financial Service Commission under Insurance Business Act. Pursuant to Insurance Business Act, articles of incorporation, business operation manual, terms of insurance policies, calculation method of insurance premiums and policy reserves should be approved by Financial Service Commission. Insurance Business Act regulates development and sale of insurance products, asset management, solvency margin of insurance companies and other business activities and operations of insurance companies. Qualifications of offices for officers of insurance companies are also governed by Insurance Business Act. Financial Supervisory Service, executive arm of Financial Service Commission, conducts day-to-day supervision and inspection of operations and financial status of insurance-related institutions including insurers. Foreign insurance company may conduct business in Korea after establishing branch or subsidiary and obtaining business license.

Certain types of insurance products can be sold by non-licensed foreign insurers through mail, phone or computer communication. Insurance agents, brokers or solicitors who are authorized to sell insurance products need to be registered with regulators under Insurance Business Act.

17 INTELLECTUAL PROPERTY

17.01 COPYRIGHT LAW:

On Apr. 29, 2003, Korean National Assembly passed amendment to Copyright Act; amendment is effective July 1, 2003.

Previously, only database that was deemed creative received protection under Copyright Act. Amendment, however, now provides sui generic protection for database, without requiring creativity as element, so long as considerable investment has been made to create, renew or supplement database. Under amendment, creator of such database for period of five years from next year of date of creating or renewal is protected.

Amendment also provided for exemption of online service provider liabilities for hosting third party contents posted through Internet, including exemption from liabilities for third party infringement of another's copyright on Internet, if online service provider has taken requisite remedial measures under Copyright Act.

Further, under amendment, any act that weakens technical protection measures for preventing illegal reproduction of copyright material, or removes or changes copyright management information, for which copyright owner imposes for effective use of his own work, constitutes copyright infringement and subject to criminal penalties.

In past, where number of infringing material copied was indefinite or difficult to determine, there was rebuttal presumption that 5,000 infringing copies were made in case of published works or 10,000 infringing copies were made in case of phonograms. However, from now on, when copyright infringement has been established, but damages stemming from such amount equal to standard royalty or profit derived from infringing conduct based on arguments and evidence in record.

Electronic transmission right of performer and phonograph record producer is newly established in Arts. 64-2 and 67-3 of Copyright Law amended on Oct. 16, 2004.

Note: Newly amended Copyright Act (the Act) was promulgated on Dec. 28, 2006 and became effective on June 29, 2007. These full-scale amendments are intended to increase applicability of Act in this digital and Internet technology environment, and provide new protection for certain legitimate copyrights and neighboring rights in accordance with international treaties. Notable amendments can be summarized as follows:

Creation of the “Right of Communication to the Public” Granted to Copyright Holders.

Newly created definition of “communication to the public” includes broadcasting/transmission/digital phonic transmission and this right of communication to public is granted to copyright holders. “Communication to the public” under amended Act means transmitting copyrighted works or making them available to public, including performance/phonogram/broadcasting or databases for purpose of enabling public to receive and access same via wireless or wired communications. Under previous Act, it is disputed whether certain use of copyrighted works by way of communicating through computer networks (i.e., real-time web casting) falls under broadcasting or transmission. Thus, amended Act is intended to resolve any constructive disputes by introducing above concept, i.e., right of communication to public.

Defining “Digital Phonic Transmission” and Granting Remuneration Right to Neighboring Right Holders.

It has been disputed whether digital phonic transmission falls under “broadcasting” or “transmission” under previous Act, amended Act stipulates that digital phonic transmission is “the phonic transmission in the digital way as a public transmission, which is commenced by the request of members of the public for the purpose of enabling the public to receive the same simultaneously; provided, transmission is excluded”. Further, granting exclusive right to digital phonic transmission copyright holders in form of right of communication to public, amended Act also grants remuneration right to its performers and phonogram producers for digital phonic transmission.

Amendment to the Provisions Regarding Limitations on Economic Rights.

Amended Act systematized provisions regarding restrictions on economic rights in order to increase strength of existing copyrights and foster fair use. Some significant related amendments are as follows: (1) Public political speeches may be freely used; however, editing and/or using such speeches of single author is prohibited; and (2) articles and editorials on current events appearing in newspapers and Internet newspapers may be reproduced, distributed and broadcasted by other mass media (except in case where expressly prohibited in relevant article or editorial).

Strengthening Neighboring Rights and Extension of Protection for Rights of Foreign

Performers and Phonogram Producers.

Amended Act highly enhances degree of protection of neighboring rights, rights of foreign performers and phonogram producers.

First, performers have been newly granted with “right of paternity” and “integrity right” which fall under moral rights and right to distribute reproduction of their performance.

Second, phonograms produced by national of country which has acceded to or ratified treaty on protection for phonogram producers, which Republic of Korea has also acceded to or ratified, shall be protected; and term of protection will be calculated from “the date of release of the phonogram,” not from “the date, when the sound is first fixed in the phonogram”.

Lastly, foreign performers and phonogram producers may be entitled to receive remuneration for broadcasting of their commercial phonograms subject to principle of reciprocity (prior to amendments, their remuneration right was not recognized); provided, such claim may be invoked only through entities designated by Minister of Culture and Tourism. In particular, performers and phonogram producers shall be granted with remuneration rights for digital phonic transmission regardless of their nationality, as national treatment without any limitations and such claim may be invoked through designated entities.

Amendments Related to On-line Service Providers (OSP).

When person claiming his/her right demands discontinuance of service for possible infringement, OSP shall discontinue reproduction and/or transmission of works “immediately” (as opposed to previous Copyright Act, under which OSP shall discontinue reproduction and/or transmission of works “without delay”). Upon copyright holder's requests, OSP whose main purpose is to transmit copyrighted works among users through its computer networks, shall take technical measures to block illegal transmission of concerned work.

Amendment to Penalty Provision.

Repetitive acts of copyright infringement for profit may be subject to criminal punishment even without copyright holder's accusation. This amendment reflects that it is necessary to hold infringer accountable even without filing of complaint by aggrieved right holder, since such infringing acts are likely to harm order in use of copyrighted works as well as industrial order.

Others.

Minister of Culture and Tourism, mayor or county magistrate may collect and destroy any illegal or unauthorized reproduction of copyrighted works, and Minister of Culture and Tourism may order deletion of such illegal or unauthorized reproduction available on-line.

17.02 GENERAL:

Brief Introduction to Intellectual Property Rights.

(1) Patent.

Invention is protected upon grant of patent pursuant to Patent Act (“P.A.”). Invention must satisfy basic criteria of intellectual applicability, novelty and inventiveness. And invention must be “a high level creation of a technical idea utilizing the law of nature”.

(2) Utility Model.

Device on shape, structure or assembly of article is protected upon registration of utility model pursuant to Utility Model Act (“U.M.A.”). Device also must satisfy same basic criteria of invention and be creation of technical idea utilizing laws of nature.

(3) Design.

Design protected by Design Act is defined as "the shape, pattern, color or any combination thereof in the article" which produces impression in sense of sight. Term "article" is generally considered as tangible, movable and independent thing.

(4) Trademark and Service Mark.

Trademarks and service marks (Trademark hereinafter) may be protected by Trademark Act. Trademark under Trademark Act is "a sign, character, figure, three-dimensional shape or any combination thereof or those with colors which is used on goods or service by a person who produces, manufactures, processes, sells or certifies such goods or services in order to distinguish his goods or services from those of others".

(5) Copyright.

According to Act amended on Dec. 28, 2006 (which enters into force after lapse of six months from promulgation), work is defined as "creative production which expresses the ideas and feelings of human beings."

(6) New Forms of Intellectual Properties.

Trade secrets, computer program, semiconductor chip layout designs, database, new plant varieties etc. In 1991, statutory basis was provided for protection of trade secrets by amendment to Unfair Competition Prevention and Trade Secret Protection Act. In 1987, Computer Program Protection Act was passed, providing sui generis protection for computer software. For protection of semiconductor chip layout designs, Government passed Semiconductor Chip Layout Design Act in 1992, which became effective in Sept. 1993. Databases and certain related rights of copyrighted works have been afforded protection by amendments to Copyright Act in 1993 and 1995. In 1995, special law, effective at end of 1997, was passed to provide protection for new plant varieties.

17.03 PATENTS:

Korea is member of Paris Convention for Protection of Industrial Properties ("Paris Convention") and Amendment to Patent Cooperation Treaty ("PCT"). Patent rights become effective when patent application is granted by and registered with Korean Industrial Property Office ("KIPO"). Foreigners residing or doing business in Korea may also apply for patent with KIPO. Nonresident foreigners may also apply for patents based on Paris Convention or if foreign country allows grant of patents to Korean nationals. (P.A. 25). Foreign applicants may claim priority on basis of foreign filing by making filing in Korea within one year from first foreign application date and satisfying procedural requirements. (P.A. 54). Nonresidents taking action involving patent rights are required to be represented by local patent attorney. (P.A. 5).

Patentable inventions must be ones which are "highly creative results of a technical idea utilizing the laws of nature" (P.A. 2), and be novel and inventive. Inventions which are likely to injure public order, morality or health are unpatentable. (P.A. 32). Internationalization of industrial activities and advancement of means of information and communication is reflected and thus, arts publicly known or worked in foreign country prior to filing of patent application may not be patentable, which were patentable in past differently from arts described in publication. (P.A. 29[1]).

Inventions may be protected as utility models, which have duration of ten years from application filing date. According to Act amended on Mar. 3, 2006 (which entered into force on Oct. 1, 2006), as registration-after-examination system of utility model comes into force again, dual application is abolished and system of conversion application (application of patent can be converted into that of utility model and vice versa within scope of original specification and drawings) is introduced. (P.A. 53, U.M.A. 10).

When several applications are made for identical inventions, first application is entitled to patent regardless of which applicant first conceived or completed invention. If multiple applications are made for identical invention on same date, applicant chosen by agreement among competing applicants will be entitled to patent, and, in absence of such agreement, none of the applicants will be entitled to patent. (P.A. 36). In relation to this, in case of old act, when patent or utility model registration application is rejected prior to application laid-open publication, such application was not able to be applied again. However, in case of amended act, such application can be applied again through amendment of descriptions of art. Thus, there are more opportunities for applicant to get patented. (P.A. 36[4]). KIPO under direction of Minister of Commerce, Industry and Energy, is responsible for receiving and processing patent applications, granting patents, conducting trials for correcting, invalidating or confirming scope of claims of patent and reviewing appeals from rejected applications. Korea adopts so-called “domestic priority claim system” wherein benefit of earlier filing date of co-pending national application can be claimed in subsequent application if such subsequent application is made by same inventor(s). (P.A. 55).

Applications obviously relating to national security or falling within fields indicated by defence agencies cannot be filed in foreign countries without government approval. (P.A. 41).

Patent application is subject to substantive examination by examiners only when request for examination thereof is filed. Such request may be filed by its applicant or any third parties and must be made within five years after filing. In absence of request for examination during such period, application lapses. (P.A. 57, 59).

Unless sooner published or rejected, every patent application will be subject to early publication in Patent Laid-open Gazette of Early Patent Publication after 18 months from filing date (or priority date, if convention priority is claimed). Further, upon request by applicant, patent application may be published in Laid-open Gazette within 18 months from filing date. (P.A. 64). Applicant for patent is entitled to send warning letters to infringers after application is laid-open. Applicant may demand person, who has commercialized or industrialized invention by manufacturing or marketing it after being warned or having known that invention has been laid-open, to pay compensation in amount equivalent to reasonable royalty during period from warning or time when he knows that application has been laid-open to time of registration of patent. (P.A. 65). This claim is based on early publication and can only be exercised when application is published for granting of patent. (P.A. 64, 65).

Appeal from final rejection of patent application may be filed with Industrial Property Tribunal of KIPO within 30 days from receipt of notice of final rejection. (P.A. 132-3). If such appeal is brought and amendment/correction to specification, claims and/or drawings of application may be made within 30 days from filing date of appeal, Industrial Property Tribunal of KIPO must return application file to examiner who rejected application so that he can reconsider or reexamine application based on amendment/correction. If examiner decides to allow application, he must withdraw his rejection. If he does not find reason to withdraw his rejection, then Industrial Property Tribunal will consider whether examiner's rejection was proper. (P.A. 173 through 175).

Once any grounds for rejection are overcome, patent application will be granted registration and then published for public inspection and opposition purposes in Official Gazette of Patent Publication. (P.A. 66, 69).

Point that correction of patent in opposition overlapped with patent invalidation trial caused delay in confirming right and increase of litigation fee. Thus, in amended act, it is simplified and only patent invalidation trial exists.

Term of patent is 20 years from date of application. Patent rights, being property rights, may be transferred, inherited or pledged, etc., but all such acts except inheritance take legal effect only upon registration. (P.A. 88, 101). Patent term may be restored up to five years from expiration of original term, depending on nature of invention involved, pretesting and other variables. (P.A. 89 through 92, 95). Patents may be subject to invalidation for various causes, such as wrongful patenting or nonworking by means of trial initiated by interested party and/or by examiners.

According to Act amended in 2006, provisions on “work-for-hire” inventions set forth in Patent Act are deleted, which are stipulated in Invention Promotion Act (“IPA”) on unifying basis. (IPA 8 through 14-4).

Patent may be licensed exclusively or nonexclusively. Exclusive license gives licensee exclusive rights for patent (even excluding patentee). (P.A. 100, 102).

Patentee or its exclusive or nonexclusive licensee may not work his patented invention if such working would require use of another's prior patent, registered utility model or registered design unless consent of prior patentee, etc. is obtained or unless nonexclusive license is granted as result of trial therefor. (P.A. 98). In order to obtain nonexclusive license by means of such trial, owner of later patent must prove that later invention represents significant technical progress over prior invention. (P.A. 138[2]).

Person who wishes to use another's patented invention may do so by making request with Commissioner of KIPO if patented invention: (1) has not been substantially used in business in Korea for more than three consecutive years; (2) has not met domestic needs to appropriate extent on appropriate terms for more than three consecutive years; (3) must be used for public interest; or (4) must be used or applied to correct acts deemed to be unfair competition actions; (5) in event that it is required to enforce patented invention to export medical supplies (including active ingredients for manufacture and diagnostic kits necessary for use of such medicines) to country wishing to import them for purpose of curing diseases threatening health of large mass of its people (newly enacted on May 31, 2005). (P.A. 107). Person who wishes to use another's patented invention is first required to negotiate with patentee or its exclusive licensee for grant of non-exclusive license before petitioning Commissioner of KIPO. If no agreement is reached or no consultation is possible, person who wishes to use invention may petition Commissioner of KIPO to render mediation decision granting non-exclusive license. In case of latter two instances—in event that patent is enforced non-commercially for benefit of public and in any case falling under (4), no such prior agreement/consultation is required and person interested in using patented invention may simply petition Commissioner to use patented invention. In first two cases at issue, four years must have passed from filing of patented invention before compulsory patent license can be requested. Upon filing of such petition, Commissioner must serve duplicate copy of petition on patent holder, giving him opportunity to reply. (P.A. 108). Official decision on petition must specify: (i) Scope and term of nonexclusive license to be granted, if any, and (ii) royalty to be paid by licensee and manner and time for payment thereof (P.A. 110); (iii) in case of adjudication pursuant to Art. 107.(1).5, Internet address to publicize medicines supplied by patentee, exclusive licensee or nonexclusive licensee (excluded if adjudication ordered so) of patented invention, externally distinguished packages/marks and matters set forth in adjudication (newly enacted on May 31, 2005); (iv) any requirement that those who received adjudication should comply with for purpose of performing of applicable laws and regulations and treaties in enforcing patented invention (newly enacted on May 31, 2005). Decision must take into account comments and views of Industrial Property Council of KIPO. Failure to pay royalties as required can result in cancellation of decision. (P.A. 113). If nonexclusive licensee fails to use patented invention within scope of nonexclusive license, Commissioner may, on motion by interested party or on his own motion, cancel decision, resulting in termination of nonexclusive license. (P.A. 107

through 114).

Applicant for international patent under PCT may submit its application translated into Korean to KIPO up to 30 months from earliest priority date in order to enter national phase in Korea. (P.A. 201). However, in present amended act, term for submission of translation for international application is extended to “31 months” from “30 months” from first application date; and revision of specification of international application is changed so that it may be made “after the request for examination” and not “the day after the request for examination” as in past for applicant's convenience. (P.A. 201[1] and 208[1]).

Note: Several amendments to P.A. and U.M.A. went into effect recently.

Under current P.A. and U.M.A., if request for international preliminary examination was not filed during international stage of application, then window for entering Korean national phase was shortened to 20 months. Under amendment which went into effect on Mar. 11, 2003, translation of PCT application can be submitted to KIPO within 30 months from PCT filing date, regardless of whether or not request for international preliminary examination was filed.

Further, pursuant to amendments that went into effect on May 11, 2003, new ground for cancellation or invalidation of patent or utility model registration, derived from PCT application, is introduced. According to amendment, if description in translation of PCT application of registered patent or utility model is different from that originally filed, then patent or utility model registration granted based on translation may be canceled in opposition proceeding or invalidated in invalidation action.

Finally, P.A. and U.M.A. were amended to protect legitimate interests of IP right holders against inadvertent loss of its rights due to failure to pay prescribed registration or annuity fees on time. Under amendment that went into effect on May 11, 2003, commissioner of KIPO must issue notice of deficient payment and order to supplement payment to applicant or right holder when full amount of registration or annuity fees are timely paid. Applicant or right holder may then supplement deficient payment. Previously, if applicant or right holder does not pay full amount of prescribed registration or annuity fees, then registration is deemed abandoned or expired.

Timing of Amendments.

(P.A. 47). Applicants are able to amend patent application prior to receipt of notice of allowance: Provided, in cases that fall under any of following clauses, applicants are able to amend application within time limit prescribed in clauses: (1) Where applicants receive notice of first preliminary rejection, time limit designated for submission of opinion against notice thereof; (2) where applicants receive notice of reasons for rejection on amendment made in response to notice of first preliminary rejection issued under clause 1, time limit designated for submission of opinion in response to said notice; or (3) where applicants file action against final rejection, within 30 days from filing date of action.

Allowable Scope of Amendments.

Amendment of scope of patent application is only within scope of disclosures in originally filed specification and drawings.

If grounds for preliminary rejection are based on amendment that was filed in response to earlier preliminary rejection, allowable scope of amendment to claims is limited to: (i) reduction of claim scope; (ii) correction of erroneous descriptions; and (iii) clarification of indefinite descriptions.

If applicant chooses to file amendment to overcome final rejection within 30 days from filing date of action against final rejection, amendable content is limited solely to that which was pointed out by Examiner in preliminary rejection and limitations applied to claims. Addition of new subject matter amounts to grounds for rejection, opposition or invalidation.

Appeal Against Final Rejection of Application.

If applicant receives final rejection and files amendment, applicant is only required to file notice of appeal, and does not have to file detailed appeal brief. Appeal brief can be filed at later time if and when Examiner decides to maintain final rejection and returns application to IPT.

Correction of Patent.

Patentee seeking to correct patent cannot bring separate action for correction if invalidation action is pending before IPT. Instead, he can make request for corrections in invalidation action within period designated by IPT for filing response to demand of invalidation action or for stating opinion on ex officio examined matter. (P.A. 133-2). According to Act amended on Jan. 3, 2007 (which entered into force on July 1, 2007), respondent of invalidation action may file correction of claim within designated period, in event that it is admitted to be necessary to give respondent defensive opportunity to file such correction due to petitioner's production of new evidences. Further, if correction of claim is filed in course of invalidation action, previous filing of correction of invalidation action is withdrawn. In addition, requirements for patent registration are not judged when judging whether correction is recognized; however, requirement for patent registration is judged when judging whether invalidated so that prompt procedure can be made as to invalidation trial. (P.A. 133-2[4]).

Priority Claims.

Applicant may make additions or corrections to priority claim after filing of patent application within 16 months from earliest priority date if application is filed within one year from earliest priority date. (P.A. 54).

Inventions Not Considered to be Publicly Known etc.

Applicant's specific act of announcement within six months prior to application was excluded from grounds for refusal in past. However, scope is expanded so that applicant's any acts of announcement within six months prior to application shall be excluded in future. (P.A. 30[1]).

Revival of Lapsed Patent Rights.

(P.A. 81-3). If patentee or any person wishing to register patent right has failed to observe time limit for late payment or supplement of patent fees due to unavoidable circumstances, he may make late payments or supplement of patent fees within 14 days after said reason ceases to exist.

Effects of revived patent right, however, do not extend to infringing activities of third party if acts were committed between date of lapse and date of revival. Non-exclusive license for patent may be granted to person who was, in good faith, engaged in business of practicing or preparing to practice patented invention between time of lapse and time of revival. Such non-exclusive license is granted within scope of business that licensee was engaged in or preparing to engage in. Licensee is required to pay reasonable amount in compensation to patentee. (P.A. 81-3).

Reinforcement of Patent Right Protection.

Amount of damages can be presumed to be number of infringing goods multiplied by estimated amount of profit that patentee could have obtained by selling products if there had been no infringing activity.

If facts relevant to amount of damages in infringement action cannot be proven, court may decide at its own discretion amount of damages after considering all arguments and evidence submitted by parties. (P.A. 128).

Maximum penalty for infringement has been increased from imprisonment of no more than five years or fine of no more than 50 million Won to imprisonment of up to seven years or fine of up to 100 million Won. (P.A. 225).

Partial Abandonment of Claims.

P.A. allows applicant to abandon claims when submitting payment of registration fees.

RECENT KEY CHANGES TO KOREAN PATENT ACT

Korean National Assembly recently passed new bill that implements several key changes to Korean Patent Act. These changes will give applicants more options and increased flexibility, especially at final rejection (or “last preliminary rejection”) stage of prosecution before Korean Intellectual Property Office (“KIPO”).

Relaxation of Amendment Rules at Final Rejection Stage

Under new rule, applicant will generally have greater flexibility in amending claims after final rejection (or “last preliminary rejection”). One limitation under current Korean Patent Act is in situation where applicant submits amendment in response to first office action and examiner issues further office action rejecting claims (so-called “last preliminary rejection”).

Under current rule, permissible scope of claim amendments after final rejection (or “last preliminary rejection”) is strictly limited to those for narrowing scope of claims, correcting typographical errors, or clarifying ambiguous description (indicated by examiner), and such amendments may not result in substantive enlargement or change in claim scope.

According to report issued by KIPO, about 56% of amendments made by applicants after last preliminary rejection were disallowed based on violation of these strict requirements limiting scope of permissible amendments. For example, practical effect of these strict requirements was that even amendments narrowing claim scope by adding new features supported by specification were often disallowed because such addition of new features resulted in substantive change in claim scope. KIPO reports that about 30% of all disallowed amendments were based on this ground. As result, it was difficult for applicants to cure procedural problems or minor errors after final rejection (or “last preliminary rejection”).

New rule clarifies that these types of narrowing amendments will no longer be viewed as changing claim scope, generally allowing applicants greater flexibility when amending claims after final rejection (or “last preliminary rejection”).

Furthermore, new rule will narrow application of rule restricting amendment of ambiguous description to only those instances indicated by examiner. Impact of these rule changes is expected to be significant. KIPO estimates that about 83% of amendments likely to be disallowed under current rule will be permissible under new rule.

This new procedure will apply to amendments filed after effective date of revised Act (July 1, 2009).

Introduction of “New” Reconsideration by Examiner Procedure

New rule provides procedural change that will make it easier for applicants to capture allowable claims and to make minor amendments after final rejection. Currently, to make any amendments to application after final rejection, applicant needs to first file Notice of Appeal with

Intellectual Property Tribunal ("IPT"), and amendment can only be made within 30 days of such filing. When there is any amendment to application after filing appeal to IPT, case is returned to Examining Division (examiner) for reconsideration, but procedurally, appeal to IPT needs to be filed. Thus, even when final rejection is likely to be overcome with simple amendment to application (such as deleting rejected claims while keeping allowable claims), applicant needs to file Notice of Appeal to make such amendment. This effectively forces applicant to appeal case, even though appeals to IPT were unnecessary in most cases. KIPO reports that about 73% of appealed cases matured into granted patents at examiner's reconsideration stage (after applicant submitted amendments and filed Notice of Appeal).

New rule will allow applicants to file amendment after final rejection while simultaneously requesting reconsideration of claims based on amendment, without having to file Notice of Appeal with IPT. In other words, after final rejection, applicant will have option of appealing final rejection to IPT (i.e., proceeding directly to IPT for adjudication) or filing amendment to application with Request for Reconsideration (for further consideration by examiner).

This new system is substantively very similar to existing procedure (i.e., filing notice of appeal and filing amendment that triggers reconsideration by examiner), but will streamline procedure by eliminating need to file notice of appeal if applicant intends to amend application requesting examiner reconsideration, and will also save appeal costs for applicant.

This new procedure will apply to applications filed after effective date of the revised Act (July 1, 2009).

Greater Ability to File Divisional Applications

New rule will provide additional time period to file divisional application after "new" examiner reconsideration stage, allowing greater opportunity to pursue potentially allowable claims and/or to otherwise maintain pendency of application. Under current rule, divisional application can only be filed within prescribed period for filing amendments. Thus, applicant's last opportunity to file divisional application is within 30 days of filing Notice of Appeal after final rejection. Upon reconsideration of amended claims, if examiner maintains rejection(s) for some claims, entire application is forwarded to IPT for appeal even if some of remaining claims are allowable. At this stage, where claims are rejected again after reconsideration by examiner, applicant cannot make any further amendments to application (even those deleting finally rejected claims for pursuing only allowable claims), and applicant cannot file divisional application for finally rejected claims. New rule is intended to address this situation where applicants are left without many options for continuing prosecution, aside from proceeding with appeal.

Under new rule, applicants will have additional opportunity to file divisional application, even after examiner's reconsideration of amended claims, per "New" Request for Reconsideration procedure. New rule will allow applicant to file divisional application within 30 days of receiving notice that examiner further rejected claims after reconsideration.

This new procedure will apply to applications filed after effective date of revised Act (July 1, 2009).

Introduction of ex officio correction

New rule will provide authority to KIPO examiners to correct obvious errors on behalf of applicants. If examiners have no reason to reject application, except for obvious errors (e.g. clear typographical errors, and inconsistent reference numbers), examiners may correct these errors ex officio. In such cases, examiners may unilaterally correct these errors, issue Notice of Allowance, and notify applicants of corrections made. Applicants will then be provided opportunity to object to corrections by submitting response within certain timeframe. This new system is expected to provide cost-effective way of correcting errors in application and is aimed at reducing delays in prosecution due to unnecessary issuance of office actions.

This new procedure will apply to applications that mature into granted patents after effective date of the revised Act (July 1, 2009).

Introduction of “Pro Rata” Late Fees for Payment of Registration Fees and Annuities

Under current rule, if registration fee or annuity is submitted after deadline, applicants are required to pay late fee equal to 100% of registration fee or annuity respectively, within six months after deadline, regardless of how long fee is overdue. New rule will allow applicants to pay “pro rata” late fees that are generally proportional to lateness of payment (e.g., 20% of late fee within one month, 50% within two to three months, and 100% within four to six months). KIPO will announce implementation details of “pro rata” late fee system soon.

This new procedure will apply to registration fees or annuities to be paid after effective date of revised Act (July 1, 2009).

KIPO expects that these new changes to Korean Patent Act will address problems applicants have frequently encountered during patent prosecution. These rule changes demonstrate KIPO's further efforts to reinforce customer-tailored patent system and are expected to ultimately provide applicants with greater flexibility, especially in final stages of prosecution.

17.04 TRADEMARKS AND TRADENAMES:

Trademark Act Further Harmonized with International Standards.

On Jan. 9, 2001, Korean National Assembly passed amendment to Korean Trademark Act (TMA) that further harmonized Korean trademark practice law with international standards set forth under Madrid Protocol Concerning the International Registration of Marks (“Madrid Protocol”), Trademark Law Treaty (TLT), and Agreement on Trade-Related Aspects of Intellectual Property Rights (“TRIPs Agreement”).

TMA provisions of Act that have been criticized for being obscure or contextually confusing have also been revised. Amended TMA took effect on July 1, 2001.

The Madrid Protocol.

Amended TMA contains new chapter on Madrid Protocol, providing various new mechanisms necessary for implementing international trademark application system in Korea. Amendment sets forth procedure for designating Korean Intellectual Property Office (KIPO) as Office of Origin and Office of Designated Contracting Party.

It also adds right to request compensation for actual business losses that occur after sending of warning, but prior to obtaining registration for trademark, with publication of trademark application or presentation of copy of trademark application.

Trademark Law Treaty.

In anticipation of Korea's adoption of Trademark Law Treaty, amendments provide for more simplified trademark application system. For example, documentary and description requirements for trademark application have been minimized, and separate procedure for conversion is proposed wherein designated goods no longer have to be reclassified under NICE system. (See category 23 Treaties and Conventions, topic 23.01 Treaties, subhead Intellectual Property.)

Prior to this amendment, designated goods in renewal application for mark that was registered before 1998 had to be reclassified under NICE system (prior to 1998, Korea used its own National Classification System). Amendment abolishes this requirement since conversion at time of renewal is not possible under Trademark Law Treaty.

Instead, separate procedure for conversion is proposed. Amendment also includes provision whereby member countries of TLT will enjoy same treatment as that enjoyed by those of Paris Convention.

Geographical Names.

Prior to amendment, trademark registration could not be obtained for mark that indicated geographic name. Amended TMA allows registration of geographic indication where it can be shown that name has acquired secondary meaning through use. (TMA 6[2]).

In recent amended act, trademark registration may be made even including trademark such as production center or remarkable geographical name, etc., which is not distinguishable if such trademark is applied as group mark indicating geography. (TMA 6[3]).

As complementary measure to abolishment of substantive examination system for renewal applications, new provision was added to allow for invalidation of trademarks that have lost distinctiveness after registration. (TMA 71[3]).

Reduced Burden in Proving Damages.

Amendment provides for alternative method for calculating damages where trademark infringement has been established. New provision provides that amount of total sales of infringing goods should be multiplied by plaintiff's estimated profit per product. This provision is expected to significantly reduce plaintiff's burden in proving damages in trademark infringement actions. (TMA 67).

Increased Penalties for Infringement.

Under existing TMA, any person who has infringed trademark right or exclusive license is subject to imprisonment of up to five years or fine of up to 50 million Won. Amendment increased this penalty to seven years of imprisonment or fine of up to 100 million Won (approximately US$90,000). (TMA 93).

Trade Names.

Individuals may use business name or not, but business organizations must use trade name to conduct trade. Trade name need not include name of proprietor or refer to type of business involved. However, trade names of business organizations must include descriptor as prescribed in Commercial Code (“Com. C.”), such as joint stock company (Com. C. 19), etc., and such descriptors may only be used when actually applicable. Company can do business only under single trade name. None may use trade name which is likely to cause confusion, with trade name of another for improper purposes. Civil liability may arise from such activity. (Com. C. 23).

Trade names may be registered with civil district court having jurisdiction over main and/or branch offices of business. (Com. C. 34). Registration in one judicial district cannot be used to attack or prevent registration of similar trade name in different district. Transfer of trade name must be registered in commercial register to be enforceable against third parties. (Com. C. 25).

Pursuant to recent amendment to TMA, applicant or right holder is not given right to supplement deficient payment of registration fees. Previously, if applicant or right holder does not pay full amount of prescribed registration fees, then registration is deemed abandoned or expired. Under amendment that went into effect on May 11, 2003, commissioner of KIPO must issue notice of deficient payment and order to supplement payment. Applicant or right holder may then supplement deficient payment. Thus, amendment protects legitimate interests of IP right holders against inadvertent loss.

17.05 UNFAIR COMPETITION:

Recent Amendment to Unfair Competition Prevention and Trade Secret Protection Act.

On Dec. 22, 2003, Korean National Assembly passed amendment to Korean Unfair Competition Prevention and Trade Secret Protection Act.

Amendment provides that registration, possession, transfer or use of domain name which is identical or similar to another's famous mark for purpose of gaining advantage or with intent to cause injury to others will be seen as unfair competition. Further, amendment provides that act of selling, renting and otherwise disposing of product that imitates party's product design is unfair competition.

In past, penalty for trade secret infringement was applied only to past and present officers, and scope of trade secret protection was limited to technical trade secrets. However, amendment expands punishment to all violators, and scope of protection now includes managerial trade secrets in addition to technical trade secrets. Further, penalty amount for trade secret infringement has been increased.

Provision on Dilution Added to Amended Unfair Competition Prevention and Trade Secret Act.

On Jan. 9, 2001, Korean National Assembly passed amendment to Korean Unfair Competition Prevention and Trade Secret Act. Amended Act is designed to harmonize existing laws with WTO/TRIPs provisions and Paris Convention, and lay groundwork to prepare for adoption of Trademark Law Treaty.

Amendment comprises supplementary provisions relating to unfair competition and trade secrets as well as new provisions to counter trademark dilution. In particular, amendment is expected to harmonize Korean practice with international standards with regard to dilution of famous marks, Internet domain names, and trademark infringement. Amended Act took effect on July 1, 2001.

Trademark Dilution.

Amendment establishes trademark dilution as kind of unfair competition and as independent, actionable ground for legal action. Previously, unfair competition action was available only where use of infringing mark caused consumer confusion. Amended Act expands scope of protection for famous marks.

Newly inserted Art. 2.1(iii) of amended Act states that, other than conduct prohibited under sub-paragraphs (i) or (ii) in this Act, “act of unfair competition” is:

> “an act of causing injury to the distinctiveness or reputation of another party's mark by using a mark that is similar or identical to such party's name, trade name, trademark, container or package of goods or any other mark that indicates the goods or business of said party which is widely known in Korea, or by selling, distributing, importing or exporting the goods with such marks, unless said act is non-commercial or otherwise authorized under a Presidential Decree.”

Thus, revised Act prohibits diminishment of famous trademark's distinctiveness through unauthorized use of mark, even in instances where there is no likelihood of confusion by such use. Injured trademark owner whose trademark has been diluted may seek injunctive relief.

Amended Act, moreover, provides for monetary damages and/or restoration of goodwill of injured famous mark holder. To obtain remedies for monetary damages and/or restoration of reputation, however, new legislation requires proof of intent of junior user.

Overall, owners of famous marks now have means to curb those activities that would diminish goodwill and distinctiveness associated with such marks. Amended Act enables famous trademark owner to enjoin use of mark as domain names where associated web site is used to carry out activities that are unrelated to goods and services offered under famous marks. As result, amendment is expected to be instrumental in enforcement against domain name piracy cases.

New Provisions Comply with Paris Convention.

New provision has been included in amended Act in order to comply with obligations of Art. 6.7.2 of Paris Convention, Art. 2.1 of WTO/TRIPs, and Art. 15 of Trademark Law Treaty. Newly created Art. 2.1(vii) adds following to list of prohibited unfair competition activities: Use of mark registered in member countries of Paris Convention, WTO or Trademark Law Treaty or other marks similar thereto on goods identical or similar to designated goods of mark, or act of selling, distributing, importing or exporting goods using such mark by agent of trademark owner or former agent within one year from termination of agency, without justifiable reason and without obtaining consent of trademark owner. This provision relates to Art. 23.1(III) of Trademark Act, which prohibits filing of trademark application by agent or former agent within a year from termination of agency without consent of trademark owner. Art. 73.1(VII) of Trademark Act further stipulates that where trademark is registered in violation of Art. 23.1(III), trademark owner has right to bring invalidation action against registration within five years of registration date.

Calculation of Damages.

Art. 14.2 of amended Act provides for alternative method of calculating damages whereby amount of infringing products sold are multiplied by plaintiff's estimated profit per product.

Prior to amended Act, plaintiff was required, among other things, to prove actual damages or profits gained by defendant. Proving such damages, however, was often difficult due to lack of extensive discovery system under Korean law and to difficult nature of obtaining relevant data. Amendment is thus expected to reduce plaintiff's burden in proving such damages and enable more effective remedies against cases of unfair competition.

Procedures under Rules of Internet Address Dispute Resolution for Recovery of Internet Address that Includes Famous Trademark.

Korean Ministry of Information and Communication recently established Internet Address Dispute Resolution Committee (“IDRC”). IDRC, which is sub-body of Korean Network Information Center (“KRNIC”), local agency responsible for domain name registration, was established to provide effective dispute resolution mechanism for Internet domain names whose ccTLD is “kr.” Rules of the Internet Address Dispute Resolution and related regulations (collectively, “Rules”), which became effective on Jan. 27, 2005, govern dispute resolution proceedings brought before IDRC.

Under Rules, person whose rights have been infringed by registration of local-level domain name (i.e., domain name with “kr” suffix) can file complaint with IDRC with payment of required dispute resolution fees. Panel decides case on base of criteria in IDRC Policy: (1) If respondent's use of domain name infringes upon complainant's rights to trademark or service mark registered in Korea; (2) if respondent's use of domain name causes confusion with complainant's goods or services that are widely known in Korea; (3) if respondent's use of domain name damages distinctiveness or reputation of complainant's personal name, trademark, service mark or trade name that is widely known in Korea; or (4) if respondent's domain name is identical with or similar to complainant's personal name, trademark, service mark or trade name that is widely known domestically or internationally, and respondent's main purpose for registering domain name is to interfere with complainant's registration of his/her personal name, trademark, service mark or trade name as domain name. Complaint should contain complainant's grounds for cause of action, relief sought (for example, de-registration of offending domain name and/or transfer of domain name), other required material (such as copy of corporate registry in case of corporate complainant) and supporting evidentiary materials. Complainant should also specify in its complaint whether it would like single-member panel or three-member panel to preside over case. Complaint may be filed as written submission or electronically via email to IDRC. While KRNIC Guideline for Domain Name Registration requires that entity seeking to obtain registration for “kr” level domain name should have local presence, Rules do not provide for such requirement.

Once complaint is filed, IDRC will serve complaint on respondent, i.e., owner of domain name against which complaint has been filed. Respondent is required to file response with IDRC within 14 days after receiving complaint unless respondent can show good cause for extension of time to file such response. However, Rules provide that extension of filing response cannot be granted for more than one month, regardless of number of extensions granted. If respondent fails to file response within prescribed period, IDRC, through appointed dispute resolution panel, shall proceed with examining case without such response. Further, Rules stipulate that transfer of disputed domain name or change of registration agency of such domain name is strictly prohibited after complaint has been filed with IDRC.

Upon timely filing of response (or failure to respond within prescribed time frame), IDRC establishes dispute resolution panel consisting of one member or three members depending on parties' election and meeting qualifications under Rules (such as, no member of panel should have any conflict of interest). Establishment of dispute resolution panel is not expected to take long since Rules require that IDRC panel complete examination of case and publish its decision within 14 days after receiving response from respondent. However, if it is difficult for panel to render decision within the 14-day period, panel may communicate reasons for possible delay and expected date of decision to IDRC. In principal, IDRC proceedings are adjudicated based on review of written submissions by parties such as complaint, response, and related documentary evidence, rather than through live hearing.

When decision has been issued by panel, IDRC publishes decision on its website and serves copy of decision upon both parties, with notice stating that decision shall be enforced unless losing party files objection within designated time frame. Any party who objects to panel's decision may file petition for objection with competent court or arbitral institution agreed upon by parties within 14 days after receipt of panel's decision. If objection is not raised within 14-day period, copy of panel's decision is sent to relevant domain name registration agency to enforce disposition set out in decision.

Internet Address Resources Management Act.

Purpose of Act is to establish orderly system for management and usage of Internet address resources. Act established mechanisms for registration and maintenance of local level Internet addresses, prevention of cybersquatting and efficient resolution of Internet address related disputes, thereby guaranteeing public with sound and orderly usage of Internet addresses.

Act creates Korean Internet Promotion Center which will be solely responsible for managing Internet addresses.

Act prohibits occupation of Internet address for purpose of unfair gain or interfering with other's business and provides grounds to seek de-registration of infringing domain names.

Act also establishes committee for resolution of disputes involving Internet addresses and sets forth detailed procedures for such dispute resolution.

Act takes effect on July 30, 2004.

18.01 ATTORNEYS AND COUNSELORS:

Persons who graduate from Judicial Research and Training Institute attached to Supreme Court are admitted to practice in any court in Korea after registering with Korean Bar Association. (Lawyers Act 7). In order to be admitted to Judicial Research and Training Institute, one must pass national bar examination. (Lawyers Act 4).

Minister of Justice may decide details of national bar examination. (Presidential Decree for National Bar Examination Act 2). National bar examination is held once a year.

There are various examinations for licenses to practice as scriveners, patent agents, tax agents, customs agents, admiralty counselors, or realtors. Attorney is entitled to practice in any legal area without separate license. Attorney Disciplinary Committee censures, suspends or removes any attorney from office for professional misconduct, malpractice, fraud, deceit, crime, or misdemeanor. (Lawyers Act 90 through 108).

When group of attorneys satisfies certain requirements and obtains license from Minister of Justice, they may perform duties of notary public. Attorneys may also incorporate their business or form partnerships pursuant to procedures and requirements prescribed in Lawyers Act. (Lawyers Act 40 through 58-31).

Minister of Justice has authority to issue lawyer's license to foreign lawyer when it is deemed appropriate. (Lawyers Act 6). Foreign lawyer who is granted lawyer's license may practice law in Korea with permission from Minister of Justice, only in cases where his country recognizes qualifications of and permits legal practice by Korean nationals qualified as lawyers. However, foreign lawyer shall in no case handle matters other than those related to foreign laws. (Lawyers Act 6).

Nevertheless, foreigners who pass national bar examination can be admitted to handle legal matters related to Korean law as well as foreign law as attorney after registering with Korean Bar Association.

Contact addresses, phone and facsimile numbers of national and major local bar associations are as follows: (1) Korean Bar Association, address: 1718-1, Seocho-dong, Seocho-ku, Seoul, Korea, telephone: (02) 3476-4000, facsimile: (02) 3476-4008; (2) Seoul Bar Association, address: 1718-1, Seocho-dong, Seocho-ku, Seoul, Korea, telephone: (02) 3476-6000, facsimile: (02) 3476-8091/5; (3) Pusan Bar Association, address: 1490-1, Geoje-1-dong, Yeonje-ku, Pusan, Korea, telephone: (051) 506-8500/2, facsimile: (051) 506-8511.

19 MORTGAGES

19.01 CHATTEL MORTGAGES:

See topic 19.02 Mortgage

19.02 MORTGAGES:

Mortgage is encumbrance on specific item of property whereby creditor obtains preferential position in order to settle obligation out of proceeds which could be realized from sale of property without transferring title or possession. (C.C. 356). Mortgages may be created only on real rights of ownership. They may be established on immovables and movables which may be registered with court or public registration office. Therefore, along with real estate, there may be mortgages on timber, ships, factory foundations, mining rights, fishing rights, agricultural implements, aircraft and automobiles. Additionally, some movables may be included in mortgage with registrable property; equipment may be object of mortgage together with land and factory building or as part of vessel. Movables on which mortgage may not be created may have security interest created by transfer of title ("Yangdo Tambo": title being put in name of creditor while obligor retains possession). Mortgages may be created to secure specific or unspecified obligations arising from series of similar transactions with obligor. (C.C. 357). Mortgage rights extend to fixtures and items attached to mortgaged property, as well as funds or substitute items which constitute consideration for sale of, or compensation for damage to mortgaged property. (C.C. 342, 358, 359, 370). Both recordation and agreement between parties are required to make mortgage legally enforceable. Priority of mortgages on same property is determined by sequence order of registration. (Registration of Real Estate Act). Mortgage may be assigned together with obligation it secures, but not independently. (C.C. 361). If obligation secured is fully performed or otherwise ceases to exist, mortgage becomes invalid whether there has been deregistration or not. Third party who purchases mortgaged property may discharge mortgage by paying proper amount to mortgagee. Foreclosure of mortgaged property shall be made through sale by auction. Proceeds shall be applied first to cover expenses of sale, and second, to cover mortgages in order of their priority. Court may take into account any nonperformance of obligation or impairment of collateral by creditor and thereby adjust liability of obligor.

20 PROPERTY

20.01 CURTESY:

Does not exist under Korean law.

20.02 DOWER:

Does not exist in Korea.

20.03 REAL PROPERTY:

Only property rights provided for in Civil Code or other laws including customary laws can exist (C.C. 185) and include following: (i) Ownership (fee simple); (ii) possession, superior to parties without rights and is presumed bona fide and legal; (iii) superficies are right to another's land while owning structures or trees on it; (iv) easement is right to use another's land for benefit and convenience of one's own land; (v) deposit lease (chonse-gwon) is right to use and take profits from immovable owned by another person in accordance with nature of immovable, by taking possession of immovable and upon payment of lease deposit; and (vi) commonage is based on old custom of use of forest or plain in common (C.C. 192, 211, 279, 291, 302, 303). There are two types of security interest in property: (a) Possessory liens, and (b) mortgage. (C.C. 320, 356). See categories 7 Debtor and Creditor, topic Liens; Mortgages, topic Mortgages.

Certain provisional or contingent rights such as future sale or repurchase are quasi-property rights and can be recorded. Lease is not considered property right. (C.C. 621, Housing Lease Protection Act 1). Lease cannot be recorded without consent of lessor. Owner of recorded building on leased land can demand without record lease against individuals who acquire title to land. (C.C. 622).

Tenancy in common is form of ownership whereby each owner holds undivided interest in property. If property is owned jointly by two or more persons in proportion to their share, ownership thereof shall be joint-ownership. (C.C. 262). Joint-owners are entitled to dispose of their own shares and may make use of or take profits of whole of that which is owned jointly in proportion to their share. (C.C. 263). Each joint-owner shall pay expenses of administration and bear all other charges relating to property jointly owned in proportion to his share. (C.C. 266). No joint-owner may dispose of or make any alteration in property jointly owned without consent of other joint-owners. (C.C. 264).

Adverse Possession.

If person possesses immovable with intent to own it for 20 years or more, peacefully and openly, she/he may acquire ownership of such property by making registration thereof. (C.C. 245 [I]). Person who is registered as owner of immovable and possesses it for ten years or more, peacefully and openly, in good faith and without any fault or negligence related to such possession shall acquire ownership of such property. (C.C. 245[II]).

Alienation of Property (Restrictions on).

Immovable is transferred by agreement between parties upon registration of transfer of title in court (or registration office of court). (C.C. 186). Movable is transferred by agreement between parties upon transfer of possession. (C.C. 188).

Condominiums.

Separate ownership of individual units is permitted for aggregate buildings (e.g., apartment). Unit owners have joint ownership of common portion with other owners and also have undivided interest in right to use common portion. In addition, unit owners also have rights to use land on which building is located. Such undivided interest in common portion and land may not be disposed of separately from ownership of unit. (Act on the Ownership and Management of Aggregate Buildings).

21 TAXATION

—Scope —

Korean taxes are classified into national taxes imposed by central government (i.e. Korean National Tax Service and Korean Customs Duty Office) and local taxes imposed by local authorities. National taxes are composed of individual income tax, inheritance tax and gift tax, corporation tax, value added tax, special excise tax, liquor tax, stamp tax, securities transaction tax, comprehensive real estate holding tax, agricultural and fishery communities special tax, education tax, and customs duties. Local taxes are composed of acquisition tax, registration tax, license tax, inhabitant tax, property tax, automobile tax, fuel consumption tax, farm income tax, slaughterhouse tax, leisure tax, tobacco sales tax, city planning tax, community facility tax, area development tax, local education tax, and business place tax. Taxpayer's tax liabilities are specified in relevant tax laws, enforcement decrees, and enforcement regulations.

21.01 ADMINISTRATION:

Penalty taxes on national taxes except for customs duties are generally regulated under one umbrella of National Tax Basic Law. Penalties are for failure to file tax return, for underreporting of tax base, for over-refund request, and interest on unpaid-tax/underpayment/overrefund. Failure to file tax return by due date results in penalty tax amounting to 20% of calculated tax and if such failure, all or in part, falls into category of unjustifiable failures such as double bookkeeping or producing false evidence/record/document, penalty of 40% shall apply; for corporation, 20% (40% for unjustifiable failure) of taxes due or

0.07% (0.14%) of gross revenue, whichever is greater. If tax base in tax return falls short of amount that should have been declared, penalty tax for underreporting of tax base of 10% of calculated tax attributable to underreported tax base is imposed and higher penalty of 40% shall apply to tax base underreported in unjustifiable way; for corporation, 40% for unjustifiably underreported tax amount or 0.14% of unjustifiably underreported gross revenue, whichever is greater. Overrefund request in tax return results in penalty tax generally at 10% of overrefunded tax and at 40% for unjustifiably overrefunded tax. Failure to pay tax within due date or underpayment/overrefund request of tax results in penalty tax at interest rate of 0.03% per day from due date. Other types of penalties are prescribed in each tax law. For example, some penalty taxes prescribed in Corporation Tax Law are as follows: Failure to withhold taxes at source or to pay such taxes to government results in penalty tax of greater of (a) 0.03% per day up to maximum 10% of unpaid or underpaid withholding tax or (b) 5% of unpaid or underpaid withholding tax. Failure to support payments by any qualified evidentiary documents such as tax invoice or credit card invoice result in penalty tax of 2% of transaction amount. Apart from penalty taxes under each relevant tax law, person who evades taxes through fraudulent or unjust actions is subject to imprisonment up to three years and/or fines up to three or five times amount of tax evaded under Tax Criminal Punishment Law. Tax Criminal Punishment Law additionally specifies provisions for imprisonment up to three years and/or fines for failure to meet obligations specified in tax laws. Under Specified Criminal Additional Punishment Law, person who evades taxes in amount not less than 1,000,000,000 Won per year may be subject to imprisonment for five years or more or for life. Any person who evades taxes in amount anywhere from 500,000,000 Won to 1,000,000,000 Won may be subject to imprisonment for three years or more, and fines amounting between two to five times evaded tax amount for both cases.

Amended tax return can be made by taxpayers to correct errors or complete omissions contained in originally filed tax returns if it is done before tax authority sends tax payment notice to taxpayers. If amended tax return is filed within six months after filing deadline of original tax return, amended tax return will eliminate penalty tax liability for underreporting of tax base by 50%. If amended tax return is filed after six months from filing deadline but within year, penalty tax liability must be reduced by 20% and if it is filed after year but within two years from filing deadline, 10% of penalty tax liability must be exempted.

Tax appeals at administrative and judicial levels are available in Korea. Tax appeal at administrative level is prerequisite for appeal on judicial level. First level administrative appeal of national tax claiming illegal or improper administrative disposition or lack of necessary administrative disposition must be filed with Tax Office or Regional Office of National Tax Service (Customs Office, in case of customs duties) within 90 days after taxpayer learns of administrative disposition. Taxpayer may bypass first level appeal and file second level appeal directly to National Tax Service or Tax Tribunal (Office of Customs Administration, in case of customs duties) within same deadline applicable to first appeal. If first level appeal was made, second appeal must be made within 90 days after taxpayer receives or is deemed to have received decision of first level appeal. Instead of filing administrative appeal mentioned above, taxpayer may file appeal with Board of Audit and Inspection within 90 days. Local tax appeal procedures are similar to those described above but with different authorities. If final administrative disposition is not satisfactory after exhausting all appeals at administrative level, taxpayer can proceed to judicial level appeal within 90 days after taxpayer receives or is deemed to have received decision from relevant authority. Judicial appeal is available on three levels, i.e., Administrative Court, High Court and Supreme Court. In case of local tax, taxpayer may bypass administrative level appeal and file judicial level appeal directly with Administrative Court.

21.02 BUSINESS TAXES:

Corporation tax is payable by juridical persons under Corporation Tax Law. Nonprofit associations and foundations are also liable for corporation tax but only on income accruing from profit-making businesses. Foreign corporations are subject to corporation tax to extent of their Korean source income. Nonprofit corporations and foreign corporations are not liable while domestic profit corporations are liable to pay corporation tax on liquidation income. Corporation tax rate is applied as follows including inhabitant surtax:

Income bracket	2009	2010 and after
KRW 200 million or less	12.1%	11.0%
Over KRW 200 million	24.2%	22.0%

Nonprofit corporations are subject to same corporation tax rate to extent of their income from business profit, if any. To discourage corporation from holding real estate, not directly used for business, additional tax (11%, 22%, 33% or 44%, including inhabitant surtax) will be imposed on capital gains earned from sale of non-business purpose real estate. Foreign corporations which maintain domestic place of business or earn real estate income, or timber income are taxed in manner similar to domestic corporations. If foreign corporation does not maintain domestic place of business, it is subject to Korean taxation upon its domestic source income through withholding, except for corporation tax liability upon real estate or timber income, which is determined in same manner as domestic corporations. Foreign corporations earning real estate income or timber income, however, are subject to Korean taxation in same manner as domestic corporations regardless of whether they maintain domestic place of business or not. Withholding corporation tax rate applicable to foreign corporations is similar to withholding income tax rate applicable to nonresident individuals. 20% withholding tax rate is applied to interest (14% for interest on certain bonds issued by governments and domestic corporation), dividends, royalties, and other income; 2% to business income and income from leasing vessels, aircraft, etc.; 20% to certain personal service income; 10% of transaction price or 20% of profit whichever is less of the two amounts, to income from transfer of securities. Inhabitant tax amounting to 10% of corporation tax is also withheld as surtax. Withholding tax rates are also modified by tax treaties. Foreign tax credits may be obtained in accordance with certain formulae and under certain conditions.

21.03 CUSTOMS DUTY AND TAX:

Customs duties are imposed upon imported goods. Average basic customs duties rate for 2005 is about 8.6%. Actual customs duties are modified by temporary customs duties, anti-dumping customs duties, retaliatory customs duties, emergency customs duties, adjustment customs duties, countervailing customs duties, beneficial duties, price parity customs duties, and tariff quotas, etc. VAT rate of 10% is also levied on imported goods. Special excise tax or liquor tax are also levied on such taxable imported goods. Customs Duties Law specifies certain exemptions.

21.04 EXCISE TAXES:

Special excise tax is imposed upon sales of jewelry, manufacture and sales of passenger cars, certain luxurious goods such as watches, furniture etc., importation of above goods, and management of casinos, golf courses, etc., at rates varying up to 28%. Education tax amounting to 15% or 30% of special excise tax is imposed as surtax.

21.05 GIFT TAX:

Gift tax is payable by residents who acquire property by gift, and by nonresidents who acquire property located in Korea by gift, at rates ranging from 10% to 50%. Highest gift tax rate of 50% is applied to taxable base exceeding 3,000,000,000 Won. Corporations except for nonprofit corporations are not subject to gift taxes. Rules on gift taxes are specified in Inheritance Tax and Gift Tax Law.

21.06 INDIVIDUAL INCOME TAX:

Income tax is payable by resident individuals in Korea based upon their worldwide income, while income of nonresidents is taxable only to extent derived from Korean sources.

Income is classified into global income, retirement income, and capital gains income. Global income is composed of interest, dividends, real estate income, business income, salary income, pension income and other income. Global income tax rate is progressive from 6% to 35%(33% from 2010 and thereafter) and applies to total of global income components, and retirement income. Top global income tax bracket is applied to annual global income over 88,000,000 Won. 10% Inhabitant Surtax is added to income tax. Tax liabilities on capital gains income are determined apart from global income tax liabilities using tax rates ranging from 6% to 70%. Inhabitant Surtax is also imposed upon these taxes. Retirement income, capital gains income of nonresidents is taxed in same manner as residents. Global income of nonresidents who maintain domestic place of business (similar to "permanent establishment") or earn income from real estate are also taxed in same manner as residents. If nonresidents do not maintain domestic place of business and if they do not earn income from real estate, global income of nonresidents is taxed through withholding method. Withholding tax rate differs depending upon nature of income. 20% withholding tax rate is applied to interest (14% for interest on certain bonds issued by governments and domestic corporation), dividends, royalties, and other income earned by nonresidents; 2% for business income and income from leasing vessels, aircraft, etc.; 20% for certain personal service income; 10% of transaction price or 20% of profit, whichever is less, on income from transfer of securities; 6% to 35% (33% from 2010 and thereafter) for salaries. Inhabitant tax amounting to 10% of income tax is also withheld as surtax. Withholding tax rates modified by tax treaties are applied to income of nonresidents of country with which Korea has entered into tax treaty. Foreign tax credit may be obtained in accordance with certain formulae and under certain conditions. Income Tax Law specifies various nontaxable income, exemptions from income tax, income deductions and income tax credits.

21.07 INHERITANCE TAX:

Inheritance tax is payable by residents who acquire property by inheritance and by nonresidents who acquire property located in Korea by inheritance at rates ranging from 10% to 50%. Top inheritance tax bracket of 50% is applicable to taxable base exceeding 3,000,000,000 Won. Certain deductions and credits are specified in Inheritance Tax and Gift Tax Law.

21.08 TAX INCENTIVES AND EXEMPTIONS:

Special taxation measures are provided in Tax Incentives and Limitation Law for fiscal policy purposes. They include provisions for nontaxable income, tax credit, income deductions, tax exemptions, and tax refunds for public corporations, small enterprises, defense industries, overseas businesses, etc. In addition, above law (formerly, Foreign Investment Promotion Law) provides tax benefits for corporation tax, income tax, certain local taxes, customs duties, VAT, special excise tax, and surtaxes thereon, applicable to foreign invested enterprise projects where equity investment is made by foreign investors for foreign technology provided or where foreign invested enterprise operates in foreign investment zone, etc. Such benefits are granted to foreign investor, foreign invested enterprise, and foreign technology provider under certain conditions, e.g. high technology.

21.09 TREATIES AND AGREEMENTS:

Tax Treaties.

As of Dec. 31, 2008, 73 tax treaties to avoid double taxation and to prevent fiscal evasion are effective with Australia, Austria, Bangladesh, Belarus, Belgium, Brazil, Bulgaria, Canada, Chile, China, Croatia, Czech Republic, Denmark, Egypt, Fiji Island, Finland, France, Germany, Greece, Hungary, Iceland, India, Indonesia, Ireland, Israel, Italy, Japan, Jordan, Kazakhstan, Kingdom of Saudi Arabia, Kuwait, Laos, Lithuania, Luxembourg, Malaysia, Republic of Malta, Mexico, Mongolia, Morocco, Myanmar, Nepal, The Netherlands, New Zealand, Norway, Oman, Pakistan, Papua New Guinea, Algeria, Philippines, Poland, Portugal, Albania, Republic of Azerbaijan, Republic of South Africa, Romania, Russia, Singapore, The Slovak Republic, Slovenia, Spain, Sri Lanka, Sweden, Switzerland, Thailand, Tunisia, Turkey, UAE, U.K., Ukraine, U.S.A., Uzbekistan, Venezuela and Vietnam. Such tax treaties provide foreign corporations or individuals with protection against Korean taxation with respect to corporation taxes, income taxes (and surtaxes thereon depending on treaty).

21.10 VALUE ADDED TAX:

Value-added tax ("VAT") is imposed upon supply of goods, services, and importation of goods at rate of 10%. Businesses are required to collect and pay to government VAT collected from purchasers (output VAT). VAT paid by businesses to vendors (input VAT) is deducted from output VAT or is refunded by government. VAT imposed upon importation of goods is collected by customs authorities. Certain goods such as basic life necessities, land, coal, books, and services such as education, financing, and social welfare are exempt from VAT. Goods for exportation, services provided outside Korea, international transportation by ships and aircraft, and certain goods or services supplied for foreign exchange earnings are subject to zero-rate VAT.

22 TRANSPORTATION

22.01 MOTOR VEHICLES:

Drivers' licenses are required. Minimum age to obtain driver's license is 18 years. License is valid for life, but licensee is required to take aptitude test once every seven years. Aliens with international drivers' license may drive in Korea for up to one year after their initial entry. (R.T.L. 68, 70, 74, 80).

Vehicle Registration.

Every vehicle driven in Korea must be registered with competent local authority. Registration plate must be attached to vehicle and must be of prescribed size. All vehicles registered in Korea are subject to periodic mechanical inspections. (M.V.C.L. 5, 10, 43).

Transfers.

Transfer of title of vehicle does not become effective until transfer is entered on vehicle registry. (M.V.C.L. 6).

Tax.

Registration tax must be paid for registration of any vehicle on vehicle registry. Acquisition tax is to be paid for any acquisition of vehicle. Vehicle tax is to be paid every six months during period in which vehicle is owned by person. (Local Tax Law 124, 132-2, 196-3).

Liability.

Driver is liable for personal injuries or death caused by operation of motor vehicle. In cases where victim is not passenger, exoneration is allowed if driver proves that (1) he exercised due care, (2) that injury or death was caused by intentional or negligent behavior of victim or third party other than driver, and (3) that mechanical defect of motor vehicle did not exist. In cases where victim is passenger, exoneration is allowed when injury or death is caused by victim's intentional behavior or suicide. (Enforcement Ordinance of Motor Vehicle Caused Damages Compensation Act 3).

Insurance coverage for liability is compulsory for damages caused by operation of motor vehicle. Insurance coverage amount is between 20,000,000 Won and 80,000,000 Won in case of death and is subject to scale in case of injury. (Enforcement Ordinance of Motor Vehicle Caused Damage Compensation Act 3). Comprehensive insurance is available from insurance companies to cover all liability to third persons caused by operation of motor vehicle. If such insurance has been obtained, criminal liability is exempted for injuries (not death) except in cases of gross negligence as specified in statutes (e.g. driving without license). (Special Measure Law for Handling Traffic Accident 3, 4).

22.02 SHIPPING:

Primary features of shipping law are contained in Part V of Korean Commercial Code.

Korea has not ratified Hague-Visby Rules but majority of provisions of Hague-Visby Rules have been translated and incorporated into Commercial Code. As result, relevant provisions are same as Hague-Visby provisions with very few exceptions, such as, Commercial Code extends scope of application to time of delivery while Hague-Visby Rules apply to “tack to tackle”. Similarity with Hague-Visby Rules has increased with amendments to Part V of Commercial Code as of July 3, 2007 and which became effective on Aug. 4, 2008 (one year from date of promulgation), such as (1) amount of package limitation, which will be increased from SDR 500 to SDR 666.67 and (2) addition of weight limitation of 2 SDR per kilogram (there was previously no limitation on weight of cargo), although latter provision will be effective three years from date of promulgation (i.e., Aug. 4, 2010).

Korea has not ratified 1976 Limitation Convention (1976 LLMC) but provisions of 1976 LLMC have been incorporated into Commercial Code with few exceptions such as scope of limitable claims. Provisions of international conventions for collision, general average and salvage form part of Commercial Code and there is no major discrepancy between Korean and these international conventions. Korea has ratified International Convention on Civil Liability for Oil Pollution Damage of 1969 and International Convention for the Establishment of an International Fund for Compensation for Oil Pollution Damage.

Maritime lien extends to ships, appurtenances thereof, and unpaid freight for: (1) Legal expenses incurred in interest of creditors, expenses incurred in respect to auction sale of ships and their appurtenances, taxes levied on ships in respect to voyage, pilotage and towing fees, and cost of maintenance and survey of ship and its appurtenances at last port; (2) claims arising from contract of employment of mariners and other employees of ship; (3) salvage remuneration and general average contributions; (4) indemnities for collision damages, for damages caused to navigational installations, harbour facilities or navigable ways by collision between ships or any other accident, for loss of lives or for personal injuries to mariners or passengers, and for damages caused to cargo and luggage. (Com. C. 861).

23 TREATIES AND CONVENTIONS

23.01 TREATIES:

International Conventions.

Treaties duly concluded and promulgated in accordance with Constitution and generally recognized rules of international law have same effect as domestic laws of Korea. (Const. 6[1]).

Admiralty.

International Convention on Load Lines, 1930 (5/7/30), Convention on the International Maritime Organization (IMO) (6/3/48), International Convention for the Safety of Life at Sea, 1948 (SOLAS, 1948) (10/6/48), International Convention for the Prevention of Pollution of the Sea by Oil, 1954 (as am'd in 1962 and in 1969) (12/5/54), International Convention for the Safety of Life at Sea, 1960 (SOLAS, 1960) (17/6/60), International Regulations for Preventing Collision at Sea, 1960 (17/6/60), Amendment to the Convention on the International Maritime Organization (1964) (15/9/64), Convention on Facilitation of International Maritime Traffic (9/4/65), Amendment to the

Convention on the International Maritime Organization (1965) (28/9/65), International Convention on Load Lines, 1966 (5/4/66), International Convention on Tonnage Measurement of Ships, 1969 (23/6/69), International Convention on Civil Liability for Oil Pollution Damage (CLC, 1969) (29/11/69), International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage (FUND, 1971) (18/12/71), Convention on the International Regulation for Preventing Collisions at Sea, 1972 (COLREG, 1972) (15/7/77), International Convention for Safe Containers (2/12/72), Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matters (29/12/72), Convention on a Code of Conduct for Liner Conferences (6/4/74), Amendment to the Convention on the International Maritime Organization (1974) (17/10/74), International Convention for the Safety of Life at Sea, 1974 (SOLAS, 1974) (1/11/74), Amendment to the Convention on the International Maritime Organization (1975, 1977) (14/11/75), Operating Agreement on the International Mobile Satellite Organization (INMARSAT) (16/7/79), Convention on the International Mobile Satellite Organization (16/7/79), Protocol to the International Convention on Civil Liability for Oil Pollution Damage, 1969 (19/11/76), Protocol to the Treaty concerning the Permanent Neutrality and Operation of the Panama Canal (7/3/77), Amendment to the Convention on the International Maritime Organization (1977) (17/11/77), Protocol of 1978 relating to the International Convention for the Safety of Life at Sea, 1974 (SOLAS PROT, 1978) (17/2/78), Protocol of 1978 relating to the International Convention for the Prevention of Pollution from Ships, 1973 (MARPOL PROT, 1978) (17/2/78), International Convention on Standards of Training, Certification and Watchkeeping for Seafarers, 1978 (STCW, 1978) (7/7/78), International Convention on Maritime Search and Rescue, 1979 (SAR, 1979) (27/4/79), Amendment to the Convention on the International Maritime Organization (1979) (15/11/79), Protocol of 1988 relating to the International Convention for the Safety of Life at Sea, 1974 (SOLAS PROT 1988) (11/11/88), Protocol of 1988 relating to the International Convention on Load Lines, 1966 (11/11/88), Amendments to the Operating Agreement to the International Maritime Satellite Organization (19/1/89), Amendments to the Convention on the International Maritime Satellite Organization (INMARSAT) (19/1/89), International Convention on Oil Pollution Preparedness, Response and Cooperation, 1990 (OPRC, 1990) (30/11/90), Protocol of 1992 to Amend the International Convention on Civil Liability for Oil Pollution Damage, 1969 (CLC PROT, 1992) (27/11/92), Protocol of 1992 to Amend the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage, 1971 (FUND PROT, 1992) (27/11/92), Amendment to the Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matters (12/11/93), Amendments to the International Convention on Maritime Search and Rescue, 1979 (18/5/98).

Agriculture and Food.

Constitution of the Food and Agriculture Organization of the United Nations (FAO) (25/11/49), International Agreement for the Creation of an International Office of Epizootics in Paris (18/11/53), International Plant Protection Convention (8/12/53), Statute of International Cotton Advisory Committee (1/3/54), Constitution of the Afro-Asian Rural Reconstruction Organization (AARRO) (19/2/63), Protocol for the One Year Extension of the International Wheat Agreement, 1962 (16/7/65), Protocol for the One Year Extension of the International Wheat Agreement, 1962 (16/7/66), 1967 Protocol for the Further Extension of the International Wheat Agreement, 1962 (16/7/67), Protocol Extending the Arrangement regarding International Trade in Cotton Textiles of 1 October 1962 (1/10/67), Agreement Establishing a Food and Fertilizer Technology Centre for the Asian and Pacific Region (11/6/69), International Sugar Agreement, 1968 (20/12/72), Charter of the Asian Vegetable Research and Development Centre (with Memorandum of Understanding) (29/1/73), Convention Placing the International Poplar Commission within Framework of the Food and Agriculture Organization of the United Nations (16/1/73), Protocol for the Extension of the Wheat Trade Convention, 1971 (1/7/74), Protocol for the Further Extension of the Wheat Trade Convention, 1971 (1/7/75), Extension of the International Sugar Agreement, 1973 (1/1/76), Further Extension of the International Sugar Agreement, 1973 (7/3/77), Agreement Establishing the International Fund for Agricultural Development (26/1/78), 1978 Protocols for the Fourth Extension of the Wheat Trade Convention and Food Aid Convention Constitutiong the International Wheat Agreement, 1971 (1/7/78), 1979 Protocol for the Fifth Extension of the Wheat Trade Convention, 1971 (1/7//79), 1981 Protocol for the Sixth Extensionof the Wheat Trade Convention, 1971 Constituting the International Wheat Agreement, 1971 (1/7/81), Amendments to the International Plant Protection Convention (4/4/91), Plant Protection Agreement for the Asia and Pacific Region (4/11/81), (changed from Plant Protection Agreement for the South East Asia and Pacific Region, 1979), 1983 Protocol for the Further Extension of the Wheat Trade Convention, 1971 and the Food Aid Convention, 1980, Constituting the International Wheat Agreement, 1971 (1/7/83), International Sugar Agreement, 1984 (1/1/85), Memorandum of Understanding to Confer upon the Committee for Co-ordination of Joint Prospecting for Mineral Resources in Asian Offshore Areas Status as an Intergovernmental Organization (29/8/87), Amendments to the Plant Protection Agreement for the Asia and Pacific Region (23/5/90), International Sugar Agreement, 1992 (15/4/93), Grains Trade Convention, 1995 (4/3/96), Agreement Recognizing the International Legal Personality of the International Rice Research Institute (IRRI) (17/5/96), International Tropical Timber Agreement, 1994. (ITTA, 1994) (1/1/97), Protocol Extending the Arrangement regarding International Trade in Cotton Textiles of 1 Oct. 1962 (1/10/70), International Convention for the Protection of New Varieties of Plants (7/1/02), and International Plant Protection Convention (2/10/05).

Atomic Energy.

Statute of the International Atomic Energy Agency (IAEA) (8/8/57), Amendment of Article VI.A.3 of the Statute of the International Atomic Energy Agency (31/1/63), Amendment of Article VI of the Statute of the International Atomic Energy Agency (1/6/73), Regional Co-operative Agreement for Research, Development and Training Related to Nuclear Science and Technology (RCA) (9/10/74), Agreement to Extend the Regional Co-operative Agreement for Research, Development and Training Related to Nuclear Science and Technology, 1972 (21/7/78), Second Agreement to Extend the Regional Co-operative Agreement for Research, Development, and Training Related to Nuclear Science and Technology of 1972 (8/12/82), Regional Co-operative Agreement for Research, Development and Training Related to Nuclear Science and Technology, 1987 (RCA, 1987) (24/12/87), Convention on Assistance in the Case of a Nuclear Accident or Radiological Emergency (9/7/90), Convention on Early Notification of a Nuclear Accident (9/7/90), Agreement to Extend the Regional Co-operative Agreement for Research Development and Training Related to Nuclear Science and Technology, 1987 (4/12/92), Agreement on the Establishment of the Korean Peninsula Energy Development Organization (KEDO) (9/3/95), Convention on Nuclear Safety (24/10/96), Second Agreement to Extend the 1987 Regional Co-operative Agreement for Research, Development and Training Related to Nuclear Science and Technology (RCA) (11/6/97), Agreement on Cooperation Among the Original Members of Korean Peninsula Energy Development Organization (19/9/97), Protocol Amending the Agreement on the Establishment of the Korean Peninsula Energy Development Organization (19/9/97), Joint Convention on the Safety of Spent Fuel Management and on the Safety of Radioactive Waste Management (15/12/2002), Framework Agreement for International Collaboration on Research and Development of Generation IV Nuclear Energy Systems (28/11/2005), and Fourth Agreement to Extend the 1987 Regional Cooperative Agreement for Research, Development, and Training Related to Nuclear Science and Technology (3/7/2007).

Aviation.

Convention on International Civil Aviation (7/12/44), Protocol Relating to Certain Amendments to the Convention on International Civil Aviation (14/6/54), Protocol Relating to an Amendment to the Convention on International Civil Aviation (14/6/54), (21/6/61), (15/9/62), (12/3/71), (7/7/71), (16/10/74), (6/10/80), (10/5/84), (26/10/90), International Air Services Transit Agreement (7/12/44), Protocol to Amend Convention for Unification of Certain Rules relating to International Carriage by Air Signed at Warsaw on Oct. 12, 1929 (28/9/55), Protocol on Authentic Trilingual Text of Convention on International Civil Aviation (24/9/68), Convention on Offenses and Certain Other Acts Committed on Board Aircraft (14/9/63), Convention for Suppression of Unlawful Seizure of Aircraft (16/12/70), Convention for Suppression of Unlawful Acts Against

Safety of Civil Aviation (23/9/71), Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation, Supplementary to the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, done at Montreal on Sept. 23, 1971 (24/2/88), Protocol Relating to an Amendment to the Convention on International Civil Aviation (FINAL CLAUSE, RUSSIAN TEXT) (30/9/77), Protocol on the Authentic Quadrilingual Text of the Convention on International Civil Aviation (30/9/77), Protocol Relating to the Amendment to the Convention on International Civil Aviation (Art. 93 bis) (27/5/47), Protocol Relating to the Amendment to Article 56 of the Convention on International Civil Aviation (6/10/89), and Convention for the Unification of Certain Rules for International Carriage by Air (28/5/99).

Culture.

Constitution of United Nations Educational, Scientific and Cultural Organization (14/6/50), Statutes of the International Bureau of Education (27/2/62), Statutes of International Center for the Study of the Preservation and Restoration of Cultural Property (22/7/68), Agreement Establishing Cultural and Social Center for the Asia and Pacific Region (1/8/68), Notification in terms of Article V bis 1 of the Universal Copyright Convention as revised at Paris on 24 July 1971 (Deposited on 5/11/87), Amendment to the Convention Establishing the World Intellectual Property Organization (25/5/84), Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property (14/5/83), Amendment to the Patent Cooperation Treaty (1/1/85), Convention Relating to International Exhibitions and Protocol to amend the Convention Signed at Paris on 22nd Nov. 1928 relating to International Exhibitions (19/5/87), Universal Copyright Convention as revised at Paris on 24 July 1971 (1/10/87), Protocol 1 Annexed to the Universal Copyright Convention as revised at Paris on 24 July 1971 concerning the Application of that Convention to works of Stateless Persons and Refugees (1/10/87), Protocol 2 Annexed to the Universal Copyright Convention as revised at Paris on 24 July 1971 concerning the Application of that Convention to the works of certain International Organizations (1/10/87), Convention for the Protection of Producers of Phonograms against Unauthorized Duplication of their Phonograms (10/10/87), Convention for the Protection of the World Cultural and Natural Heritage (14/12/88), Regional Convention on the Recognition of Studies, Diplomas and Degrees in Higher Education in Asia and the Pacific (29/9/89), Agreement concerning the Establishment of the International Institute for Central Asian Studies (12/3/96).

Customs.

Customs Convention on Temporary Importation of Packings (6/10/60), Customs Convention Concerning Facilities for Importation of Goods for Display or Use at Exhibitions, Fairs, Meetings or Similar Events (8/6/61), Customs Convention Concerning Welfare Materials for Seafarers (1/12/64), Customs Convention on A.T.A. Carnet for Temporary Admission of Goods (6/12/61), Customs Convention on Temporary Importation of Professional Equipments (8/6/61), Convention Establishing Customs Cooperation Council, with Annex and Protocol (15/12/50), Convention on Valuation of Goods for Customs Purposes (15/12/50), Convention on Nomenclature for Classification of Goods in Customs Tariffs (15/12/50), Convention Concerning Formation of an International Union for Publication of Customs Tariffs, Regulations of Execution, and Final Declarations (5/7/1890), International Convention to Facilitate the Importation of Commercial Samples and Advertising Material (7/11/52), Customs Convention on the International Transport of Goods under cover of TIR Carnets (14/11/75), Customs Convention on the Temporary Importation of Scientific Equipment (11/6/68), Customs Convention on the Temporary Importation of Pedagogic Material (8/6/70), International Convention of the Simplification and Harmonization of Customs Procedures (18/5/73), Annex concerning the Temporary Storage of Goods (Annex A2) (18/5/73), Annex concerning the Customs Warehouses to the International Convention on the Simplification and Harmonization of Customs Procedures (18/5/73), Customs Convention on Containers, 1972 (2/12/72), Annex A1 (Annex concerning Customs Formalities prior to the Lodgement of the Goods Declaration) to the International Convention on the Simplification and Harmonization of Customs Procedures (18/5/73), Annex E1

(Annex concerning Customs Transit) to the International Convention on the Simplification and Harmonization of Customs Procedures (18/5/73), Amendment to the Annex of the Convention on Nomenclature for the Classification of Goods in Customs Tariffs (30/6/77), The International Commentary Agreement (9/5/58), the Third International Commentary Agreement (21/3/67), General Agreement on Tariffs and Trade (14/4/67), Protocol Supplementary to the Geneva (1967), Protocol to the General Agreement on Tariffs and Trade (18/6/68), Agreement on Implementation of Articles VI, XVI and XXIII of the General Agreement on Tariffs and Trade and the Protocol Thereto (10/7/80), Agreement on Implementation of Article VII of the General Agreement on Tariffs and Trade and the Protocol Thereto (6/1/81), Protocol Supplementary to the Geneva (1979), Protocol to the General Agreement on Tariffs and Trade (6/2/86), Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade (26/3/86), International Convention on the Harmonized Commodity Description and Coding System and the Amending Protocol (1/1/88), Second Geneva (1987) Protocol to the General Agreement on Tariffs and Trade (1/1/88), Annex concerning Outright Exportation (9/8/90), Annex concerning Clearance for Home Use (9/8/90), Annex concerning Re-importation in the Same State (9/8/90), Annex concerning Documentary Evidence of Origin (9/8/90), Annex concerning Temporary Admission Subject to Re-exportation (9/8/90).

Diplomatic and Consular Relations.

Vienna Convention on Diplomatic Relations (18/4/61), Optional Protocol to Vienna Convention on Diplomatic Relations Concerning Compulsory Settlement of Disputes (18/4/61), Optional Protocol to Vienna Convention on Diplomatic Relations Concerning Acquisition of Nationality (18/4/61), Vienna Convention on Consular Relations (24/4/63), Optional Protocol to Vienna Convention on Consular Relations Concerning Compulsory Settlement of Disputes (24/4/63), Optional Protocol to Vienna Convention on Consular Relations concerning Acquisition of Nationality (24/4/63).

Disarmament.

Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare (17/6/25), Treaty Banning Nuclear Weapon Tests in the Atmosphere, Outer Space and Under Water (24/7/64), Treaty on the Non-Proliferation of Nuclear Weapons (NPT) (23/4/75), Treaty on the Prohibition of the Emplacement of Nuclear Weapons and Other Weapons of Mass Destruction on the Sea-bed and the Ocean Floor and in Subsoil Thereof (25/6/87), Convention on the Prohibition of the Development Production and Stockpiling of Bacteriological (Biological) and Toxic Weapons and on Their Destruction (BWC) (10/4/72), Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques (10/12/76), Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction (CWC) (13/1/93).

Disputes Settlement.

Convention on Settlement of Investment Disputes between States and Nationals of Other States (18/3/65), U.N. Convention on Recognition and Enforcement of Foreign Arbitratal Awards (10/6/58), Agreement Establishing an Economic Cooperation Centre for the Asian and Pacific Region (19/6/70), Agreement for Registry of Scientific and Technical Services for the Asian and Pacific Region (16/7/71).

Economic Cooperation and Development.

Framework Agreement for Trade and Cooperation between the Republic of Korea, on the one hand, and the European Community and its member states on the other hand (1/4/01), Agreement Establishing the Middle East Desalination Research Center (22/12/96), Charter of the Asian and Pacific Development Center (1/7/83), Constitution of the United Nations Industrial Development Organization (21/6/85), Agreement for Registry of Scientific and Technical Services for the Asian and Pacific Region (16/7/71), Agreement Establishing an Economic Cooperation Center for the Asian and Pacific Region (19/6/70), Decision of the Council Establishing a Development Center of the Organization (23/4/92), Convention on the Asian Productivity Organization (30/6/61), Convention on the Organization for Economic Cooperation and Development (12/12/96), Articles of Agreement of the International Development Association (18/5/61), Constitution of the Colombo Plan Council for Technical Cooperation (29/1/63), Fundamental Clauses of the United Nations Economic and Social Commission for Asia and the Pacific (20/10/54), Agreement on an Energy International Program (28/3/02), Agreement Establishing the Middle East Desalination Research Center (22/12/96), Memorandum of Understanding on Environmental Principles Governing the Tumen River Economic Development Area and Northeast Asia (19/4/96), Agreement on the Establishment of the Consultative Commission for the Development of the Tumen River Economic Development Area and Northeast Asia (19/4/96), and Memorandum of Understanding on Establishing the Asean-Korea Centre between the Republic of Korea and the Member Countries of the Association of Southeast Asian Nations (3/12/08)

Environment.

Convention on the Conservation of Antarctic Marine Living Resources (28/4/85), The Antarctic Treaty (28/11/86), Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques (2/12/86), Vienna Convention for the Protection of the Ozone Layer (27/5/92), Montreal Protocol on Substances that Deplete the Ozone Layer (27/5/92), Amendment to the Montreal Protocol on Substances that Deplete the Ozone Layer (1990) (10/3/93), United Nations Convention to Combat Desertification in Those Countries Experiencing Serious Drought and/or Desertification, Particularly in Africa (15/11/99), International Convention on Oil Pollution Preparedness, Response and Cooperation, 1990 (OPRC, 1990) (9/2/00), International Plant Protection Convention (8/12/53), The International Convention for the Protection of New Varieties of Plants (7/1/02), International Convention for the Conservation of Atlantic Tunas (28/8/70), Convention for the Conservation of Southern Bluefin Tuna (17/10/01), International Convention for the Regulation of Whaling (29/12/78), Protocol to the International Convention for the Regulation of Whaling (29/12/78), International Convention for the Prevention of Pollution of the Sea by Oil, 1954 (as am'd in 1962 and in 1969) (31/10/78), International Convention on Civil Liability for Oil Pollution Damage (CLC, 1969) (18/3/79), Plant Protection Agreement for the Asia and Pacific Region (4/11/81), Protocol of 1978 relating to the International Convention for the Prevention of Pollution from Ships, 1973 (MARPOL PROT, 1978) (23/10/84), Amendments to the International Plant Protection Convention (4/4/91), Protocol to the International Convention on Civil Liability for Oil Pollution Damage, 1969 (8/3/93), International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage (FUND, 1971) (8/3/93), Adjustments to the Montreal Protocol on Substances that Deplete the Ozone Layer (22/9/93), Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES) (7/10/93), Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matters (20/1/94), Amendment to the Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matters (20/2/94), United Nations Framework Convention on Climate Change (21/3/94), Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal (29/5/94), Convention on Biological Diversity (1/1/95), Amendment to the Montreal Protocol on Substances that Deplete the Ozone Layer (1992) (2/3/95), Adjustments to the Montreal Protocol on Substances that Deplete the Ozone Layer (1995) (5/8/96), Protocol Amending the International Convention for the Conservation of Atlantic Tunas (1984) (19/1/97), Convention on Wetlands of International Importance Especially Waterfowl Habitat (28/7/97), Protocol on Environmental Protection on the Antarctic Treaty (14/1/98), Annex V to the Protocol on Environmental Protection to the Antarctic Treaty (24/5/02), Protocol of 1992 to Amend the International Convention on Civil Liability for Oil Pollution Damage, 1969 (CLC PROT, 1992) (15/5/98), Protocol of 1992 to Amend the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage, 1971 (FUND PROT, 1992) (15/5/98), Adjustments to the Montreal Protocol on Substances that Deplete the Ozone Layer (1997) (4/6/98), Amendment to the Montreal Protocol on Substances that Deplete the Ozone Layer (1997) (10/11/99), Adjustments to the Montreal Protocol on Substances that Deplete the Ozone Layer (1999) (28/7/00), Convention on the Conservation and Management of Pollock Resources in the Central Bering Sea (4/1/96), Convention on the Conservation on the Living Resources of the Southeast Atlantic (19/2/81), Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade (24/2/2004), Annex IV of the Protocol of 1978 relating to the International Convention for the Prevention of Pollution from Ships, 1973 (28/2/2004), Amendment to the Montreal Protocol on Substances that Deplete the Ozone Layer (8/4/2004), Convention Concerning Safety in the Use of Chemicals at Work (ILO Convention No. 170) (11/4/2004), Convention for the Conservation of Anadromous Stocks in the North Pacific Ocean (27/5/2003), Amendments of the Limits of Compensation in the Protocol of 1992 to Amend the International Convention on the Establishment of an International Fund for Compensation for Oil Pollutions Damage, 1971 (1/11/2003), Amendments of the Limitation Amounts in the Protocol of 1992 to Amend the International Convention on Civil Liability for Oil Pollution Damage, 1969 (1/11/2003), Kyoto Protocol to the United Nations Framework Convention on Climate Change (16/2/05), Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES) (7/10/93), Amendments to Annexes VIII and IX of the Basel Convention (8/10/05), Protocol of 1978 Relating to the International Convention for the Prevention of Pollution from Ships, 1973 (Annex III, IV) (28/5/96), Protocol of 1997 to Amend the International Convention for the Prevention of Pollution from ships, 1973, as Modified by the Protocol of 1978 Relating thereto (20/7/06), Stockholm Convention on Persistent Organic Pollutants (25/4/07), Convention on the Conservation and Management of Highly Migratory Irish Stocks on the Western and Central Pacific Ocean (25/11/04), Protocol Amending the International Convention for the Conservation of Atlantic Tunas (1992) (10/3/05), and Cartagena Protocol on Biosafety to the Convention on Biological Diversity (1/1/08).

Finance.

Articles of Agreement of International Monetary Fund (27/12/45), Proposed Amendment to the Articles of Agreement of the International Monetary Fund (31/5/68), Second Proposed Amendment to the Articles of Agreement of the International Monetary Fund (4/5/76), Proposed Third Amendment of the Articles of Agreement of the International Monetary Fund (28/6/90), Articles of Agreement of International Bank of Reconstruction and Development (27/12/45), Articles of Agreement of International Finance Corporation (25/5/55), Agreement Establishing Asian Development Bank (4/12/65), Agreement Establishing Asian Reinsurance Corporation (11/12/76), Agreement Establishing the African Development Fund (29/11/72), Agreement Establishing the African Development Bank (7/5/82), (29/5/01), Agreement Establishing the European Bank for Reconstruction and Development (29/5/90), Convention Establishing the Multilateral Investment Guarantee Agency (11/10/85), Agreement Establishing the Common Fund for Commodities (27/6/80), Agreement Establishing the Inter-American Development Bank (8/4/59), Agreement Establishing the Inter-American Investment Corporation (19/11/84), Agreement Establishing the Multilateral Investment Fund (11/2/92), Agreement for the Administration of the Multilateral Investment Fund (11/2/92).

Fisheries and Law of Sea.

International Convention for the Regulation of Whaling (2/12/46), Agreement for the Establishment of the Indo-Pacific Fisheries Council (26/2/48), Protocol to the International Convention for the Regulation of Whaling (19/11/56), International Convention for the Conservation of Atlantic Tunas (14/5/66), Convention on the Conservation on the Living Resources of the Southwest Atlantic (23/10/78), United Nations Convention on the Law of the Sea (10/12/82), Convention for a North Pacific Marine Science Organization (PICES) (12/12/90), Convention for the Conservation of Southern Bluefin Tuna (10/5/93), Agreement for the Establishment of the Indian Ocean Tuna Commission (25/11/93), Convention on the Conservation and Management of Pollock Resources in the Central Bering Sea (16/6/94), Protocol Amending the International Convention for the Conservation of Atlantic Tunas (1984)

(9/7/94), Agreement relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea of 10 Dec. 1982 (28/7/94), Convention on the Conservation on the Living Resources of the Southeast Atlantic (19/2/81).

Government.

Agreement on Government Procurement (1/1/97).

Health and Tourism.

Constitution of the World Health Organization (17/8/49), Statute of the World Tourism Organization (2/1/75), Amendments to the Constitution of the World Health Organization (25/10/60), Amendments to Articles 24 and 25 of the Constitution of the World Health Organization (1959) (25/10/60), Amendments to Articles 24 and 25 of the Constitution of the World Health Organization (1967) (21/05/75), Amendments to Articles 34 and 55 of the Constitution of the World Health Organization (1973) (3/2/77), Amendments to Articles 24 and 25 of the Constitution of the World Health Organization (1976) (20/1/84), Amendments to Articles 24 and 25 of the Constitution of the World Health Organization (1986) (11/7/94), Framework Convention on Tobacco Control (14/8/05), Amendments to Articles 24 and 25 of the Constitution of the World Health Organization (1998) (15/9/05), Agreement on the Establishment of the International Vaccine Institute (29/5/97), International Convention Against Doping in Sport (1/4/07), and Memorandum of Understanding among the Federative Republic of Brazil Represented by the Ministry of External Relations and the French Republic Represented by the Ministry of Foreign Affairs and the Republic of Chile Represented by the Ministry of External Relations and the Kingdom of Norway Represented by the Ministry of Foreign Affairs and the United Kingdom of Great Britain and Northern Ireland Represented by the Dept. for International Development and the World Health Organization Concerning the Hosting of the International Drug Purchase Facility-UNITAID (6/12/07).

Humanitarian Law.

Convention with Respect to the Laws and Customs of War on Land (Hague II) (29/7/1899), Convention for the Adaptation to Maritime Warfare of the Principles of the Geneva Convention of Aug. 22, 1864 (Hague III) (29/7/1899), Convention for the Exemption of Hospital Ships, in Time of War, from the Payment of All Dues and Taxes Imposed for the Benefit of the State (21/12/04), Geneva Convention for the Amelioration of Condition of the Wounded and Sick Armed Forces in the Field of Aug. 12, 1949 (12/8/49), Geneva Convention for the Amelioration of the Condition of the Sick, Wounded and Shipwrecked Members of Armed Forces at Sea of Aug. 12, 1949 (12/8/49), Geneva Convention Relating to the Treatment of the Prisoners of War on Aug. 12, 1949 (12/8/49), Geneva Convention Relating to the Protection of Civilian Persons in Time of War of Aug. 12, 1949 (12/8/49), Protocol Additional to the Geneva Convention of 12 Aug. 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I) (8/6/77), Protocol Additional to the Geneva Convention of 12 Aug. 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II) (8/6/77), Amendment to the Protocol Additional to the Geneva Convention of 12 Aug. 1949, and Relating to the Protection of Victims of International Armed Conflicts (1/12/93), Protocol Relating to the Status of Refugees (4/10/67), Convention Relating to the Status of Stateless Persons (6/6/60), Convention Relating to the Status of Refugees (22/4/54), Declaration on Art. 90 International Fact-Finding Commission of Protocol Additional to the Geneva Conventions of 12 Aug. 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol 1), 8 June 1977 (8/6/1977).

Human Rights.

Convention on the Prevention and Punishment of the Crime of Genocide (9/12/48), Convention for the Suppression of the Traffic of Persons and of the Exploitation of the Prostitution of Others and Final Protocol (21/3/50), Convention on Political Rights of Women (31/3/53), International Convention on the Elimination of All Forms of Racial Discrimination (21/12/65), International Covenant on Economic, Social and Cultural Rights (16/12/66), International Covenant on Civil and Political Rights (16/12/66), Optional Protocol to the International Covenant on Civil and Political Rights (16/12/66), Convention on the Elimination of All Forms of Discrimination against Women (18/12/79), Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (10/12/84), Convention on the Rights of the Child (20/11/89), Declaration on Article 14 of International Convention on the Elimination of All Forms of Racial Discrimination (5/3/97), Amendment to Art. 43(2) of the Convention on the Rights of the Child (12/12/95), Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography (25/5/00), Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict (25/5/00), Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Woman (6/10/99), International Convention on Civil and Political Rights, Art. 14, Par. 5 (16/12/66), International Covenant on Civil and Political Rights, Art. 23, Par. 4 (15/3/91), International Covenant on Civil and Political Rights, Art. 14, Par. 7 (21/1/93), Convention on the Elimination of All Forms of Discrimination against Women, Art. 16, Par. 1 (c), (d), and (f) (15/3/91), Withdrawal of Art. 9 Par. 3 of the Convention on the Rights of the Child (20/11/89), and Convention on the Rights of Persons with Disabilities (13/12/06)

Intellectual Property.

Amendment to the Convention Establishing the World Intellectual Property Organization (WIPO) (25/5/84), Budapest Treaty on the International Recognition of the Deposit of Microorganisms for the Purposes of Patent Procedure (28/3/88), Convention for the Protection of Producers of phonograms against Unauthorized Duplication of their Phonograms (10/10/87), Berne Convention for the Protection of Literary and Artistic Works (21/8/96), Paris Convention for the Protection of Industrial Property (4/5/80), Amendment to the Patent Cooperation Treaty (1/1/85), Nice Agreement Concerning the International Classification of Goods and Services for the Purposes of the Registration of Marks (8/1/99), Fifth Protocol to the General Agreement on Trade in Services (1/3/99), Fourth Protocol to the General Agreement on Trade in Services (5/2/98), Strasbourg Agreement Concerning the International Patent Classification (8/10/99), Protocol Relating to the Madrid Agreement Concerning the International Registration of Marks (10/4/03).

Labor.

The Constitution of the International Labor Organization (ILO) (28/6/19), Convention concerning Equality of Treatment for National and Foreign Workers as regards Workmen's Compensation for Accidents (ILO Convention No. 19) (5/6/25), Convention concerning the Medical Examination of Seafarers (ILO Convention No. 73) (29/6/46), Convention concerning Labor Inspection in Industry and Commerce (ILO Convention No. 81) (11/7/47), Convention concerning Equal Remuneration for Men and Women Workers for Work of Equal Value (ILO Convention No. 100) (29/6/51), Convention concerning Discrimination in respect to Employment and Occupation (ILO Convention No. 111) (25/6/58), Convention concerning Employment Policy (ILO Convention No. 122) (9/7/64), Convention concerning Minimum Age for Admission to Employment (ILO Convention No. 138) (26/6/73), Convention concerning Vocational Guidance Training in the Development of Human Resources (ILO Convention No. 142) (23/6/75), Convention concerning Tripartite Consultations to Promote the Implementation of International Labour Standards, 1976 (ILO Convention No. 144) (21/6/76), Convention concerning Labour Administration: Role, Function and Organization (ILO Convention No. 150) (26/6/78), Convention concerning Vocational Rehabilitation and Employment (Disabled Persons) (ILO Convention No. 159) (20/6/84), Convention concerning Labour Statistics (ILO Convention No. 160) (25/6/85), Convention concerning the Medical Examination of Seafarers (ILO Convention No. 73) (9/6/93).

Law.

Statute of International Institute for the Unification of Private Law (UNIDROIT) (15/3/40), Statute of the Hague Conference on Private International Law (31/10/51), Statutes of the Asian-

African Legal Consultative Committee (AALCC) (15/11/56), Constitution of the Eastern Regional Organization for Public Administration (20/6/58), Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters (15/11/65), Amendment to Article 16(1) of the Statute of the International Institute for the Unification of Private Law (9/11/84), Amendment to Article 6(1) of the Statute of the International Institute for the Unification of Private Law (12/12/89), and Convention Abolishing the Requirement of Legalization for Foreign Public Documents (5/10/61), and Statute of the Hague Conference on Private International Law (30/6/05).

Legal Counselling.

Statutes of Asian-African Legal Consultative Committee (15/11/56).

Meteorology.

Convention of World Meteorology Organization (11/10/47).

Narcotic Drugs.

Protocol for Limiting and Regulating the Cultivation of the Poppy Plant, the Production of, International and Wholesale Trade in, and Use of Opium (8/3/63), Single Convention on Narcotic Drugs, 1961 (13/12/64), Protocol Amending the Single Convention on Narcotic Drugs, 1961 (8/8/75), Convention on the Psychotropic Substances (12/4/78), United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (28/3/99).

Nationality.

Convention Relating to the Status of Stateless Persons (20/11/62), Convention Relating to the Status of Refugees (3/3/93), Protocol Relating to the Status of Refugees (3/12/92).

Patents.

See category 17 Intellectual Property, topic 17.03 Patents.

Privileges and Immunities.

Agreement on the Privileges and Immunities of the International Atomic Energy Agency (17/1/62), Convention on the Privileges and Immunities of the Specialized Agencies (13/5/77), Protocol on INTELSAT Privileges, Exemption and Immunities (9/10/80), Convention on the Privileges and Immunities of the United Nations (9/4/92), Agreement on the Privileges and Immunities of the International Tribunal for the Law of the Sea (25/11/04), and Agreement on the Privileges and Immunities of the International Criminal Court (17/11/06), and Agreement on the Privileges and Immunities of the ITER International Fusion Energy Organization for the Joint Implementation of the ITER Project (24/10/07).

Postal Matters.

Constitution of the Universal Postal Union and Final Protocol (UPU) (10/7/64), Additional Protocol to the Constitution of the Universal Postal Union (1969) (14/11/69), Second Additional Protocol to the Constitution of the Universal Postal Union (1974) (5/7/74), Third Additional Protocol to the Constitution of the Universal Postal Union (1984) (27/7/84), Fourth Additional Protocol to the Constitution of the Universal Postal Union (1989) (14/12/89), Fifth Additional Protocol to the Constitution of the Universal Postal Union (1994) (14/9/94), Sixth Additional Protocol to the Constitution of the Universal Postal Union (15/9/99), General Regulations of the Universal Postal Union (15/9/99), Universal Postal Convention and Final Protocol (15/9/99), Constitution of the Asian-Pacific Postal Union (APPU) (4/12/85), Additional Protocol to the Constitution of the Asian-Pacific Postal Union (12/9/95), General Regulations of the Asian-Pacific Postal Union (6/12/90), General Regulations of the Asian-Pacific Postal Union (12/9/95), Postal

Payment Services Agreement (15/9/99), Second Additional Protocol to the Constitution of the Asian-Pacific Postal Union (18/9/00), Asian-Oceanic Postal Convention (21/2/72), Additional Protocol to the Constitution of the Asian-Pacific Postal Union (18/9/00), Postal Payment Services Agreement (5/10/04), Universal Postal Convention and Final Protocol (5/10/04), Seventh Additional Protocol to the Constitution of the Universal Postal Union (5/10/04).

Public Administration.

Constitution of Eastern Regional Organization for Public Administration (20/6/48), Charter of the United Nations (24/9/91), Statute of the International Court of Justice (24/9/91).

Space and Astronauts.

Convention on International Civil Aviation (7/12/44), Protocol Relating to Certain Amendments to the Convention on International Civil Aviation (14/6/54), Protocol Relating to an Amendment to the Convention on International Civil Aviation (14/6/54), Protocol Relating to an Amendment to the Convention on International Civil Aviation (21/6/61), Protocol Relating to an Amendment to the Convention on International Civil Aviation (1962) (15/9/62), Protocol Relating to an Amendment to the Convention on International Civil Aviation (1971) (12/3/71), Protocol Relating to an Amendment to the Convention on International Civil Aviation (1971) (7/7/71), Protocol Relating to an Amendment to the Convention on International Civil Aviation (16/10/74), Protocol Relating to an Amendment to the Convention on International Civil Aviation (1980) (6/10/80), Protocol Relating to an Amendment to the Convention on International Civil Aviation (1984) (10/5/84), Protocol on the Authentic Trilingual Text of the Convention on International Civil Aviation (24/9/68), International Air Services Transit Agreement (7/12/44), Protocol to Amend the Convention for the Unification of Certain Rules relating to International Carriage by Air Signed at Warsaw on 12 Oct. 1929 (28/9/55), Convention on Offenses and Certain Other Acts Committed on Board Aircraft (14/9/63), Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies (27/1/67), Agreement on the Rescue of Astronauts, the Return of Astronauts and the Return of Objects Launched into Outer Space (22/4/68), Convention for the Suppression of Unlawful Seizure of Aircraft (16/12/70), Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation (23/9/71), Convention on the International Liability for Damage Caused by Space Objects (29/3/72), Convention on Registration of Objects Launched into Outer Space (12/11/74), Operating Agreement on the International Mobile Satellite Organization (INMARSAT) (3/9/76), Convention on the International Mobile Satellite Organization (3/9/76), Amendments to the Operating Agreement to the International Maritime Satellite Organization (19/1/89), Amendments to the Convention on the International Maritime Satellite Organization (INMARSAT) (19/1/89), Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation, Supplementary to the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, Done at Montreal on 23 Sept. 1971 (24/2/88), Letter of Notification of Association with the International Cospas-Sarsat Programme as a Ground Segment Provider (17/8/95), Memorandum of Understanding for Cooperation in Small Multi-Mission Satellite Project and Related Activities (22/4/98), Protocol Relating to an Amendment to the Convention on International Civil Aviation (1990) (26/10/90), Protocol Relating to an Amendment to the Convention on International Civil Aviation (FINAL CLAUSE, RUSSIAN TEXT) (17/8/99), Protocol Relating to an Amendment to the Convention on International Civil Aviation (Art. 93 bis) (27/5/47), Protocol on the Authentic Quadrilingual Text of the Convention on International Civil Aviation (30/9/77), Protocol Relating to an Amendment to Art. 56 of the Convention on International Civil Aviation (6/10/89), and Convention for the Unification of Certain Rules for International Carriage by Air (28/5/99).

Telecommunications and Satellites.

Agreement relating to the International Telecommunication Satellite Organization (INTELSAT) (20/8/71), Amendment to the Agreement Relating to the International Telecommunications Satellite Organization “INTELSAT” (31/8/95), Operating Agreement relating to the International Telecommunications Satellite Organization (INTELSAT) (20/8/71), Amendment of the Operating Agreement Relating to the International Telecommunications Satellite Organization “INTELSAT” (4/4/95), Regional Agreement Concerning the Use by the Broadcasting Service of Frequency Bands in Region 1 and 3 and in the Low Frequency Bands in Region 1 (22/11/75), Final Acts of the World Administrative Radio Conference for the Planning of the Broadcasting Satellite Service in Frequency Bands 11.7-12.2GHz (in Regions 2 and 3) and 11.7-12.5GHz (in Region 1) (13/12/77), Constitution of the Asia-Pacific Telecommunity (APT) (27/3/76), Amendment to Article 3(5) and Article 9(8) of the Constitution of the Asia-Pacific Telecommunity (29/11/91), Agreement Establishing the Asia-Pacific Institute for Broadcasting Development (12/8/77), Agreement Establishing the Asia-Pacific Institute for Broadcasting Development Concluded at Kuala Lumpur on Aug. 12, 1977 as Amended (21/7/99), Operating Agreement on the International Mobile Satellite Organization (INMARSAT) (3/9/76), Convention on the International Mobile Satellite Organization (3/9/76), Protocol on INTELSAT Privileges, Exemption and Immunities (19/5/78), Amendments to the Operating Agreement to the International Maritime Satellite Organization (19/1/89), Amendments to the Convention on the International Maritime Satellite Organization (INMARSAT) (19/1/89), Optional Protocol on the Compulsory Settlement of Disputes relating to the Constitution of the International Telecommunication Union to the Convention of the International Telecommunication Union and to the Administrative Regulations (22/12/92), Convention of the International Telecommunication Union (22/12/92), Instrument Amending the Convention of the International Telecommunication Union (Geneva, 1992) (14/10/94), Instrument Amending the Convention of the International Telecommunication Union (Geneva, 1992) (6/11/98), Constitution of the International Telecommunication Union (ITU) (22/12/92), Instrument Amending the Constitution of the International Telecommunication Union (Geneva, 1992) (14/10/94), Instrument Amending the Constitution of the International Telecommunication Union (Geneva, 1992) (6/11/98), Letter of Notification of Association with the International Cospas-Sarsat Programme as a Ground Segment Provider (17/8/95), Agreement by the Governments of the People's Republic of China, Japan, the Republic of Korea and the Russian Federation on an International Program for the Establishment of a Joint Radionavigation Service in Far Eastern Waters Using Loran-C and Chakya Stations (22/12/00), Amendment to the Operating Agreement on the International Mobile Satellite Organization (24/4/98), Amendment to the Convention on the International Mobile Satellite Organization (24/4/98), Agreement Establishing the Asia-Pacific Institute for Broadcasting Development Concluded at Kuala Lumpur on 12 Aug. 1977 as amended (21/7/99), Instrument Amending the Constitution of the International Telecommunication Union (Geneva, 1992) (18/10/02), Instrument Amending the Convention of the International Telecommunication Union (Geneva, 1992) (18/10/02), Agreement Relating to the International Telecommunications Satellite Organization (17/11/00).

Terrorism.

Convention on Offenses and Certain Other Acts Committed on Board Aircraft (14/9/63), Convention for the Suppression of Unlawful Seizure of Aircraft (16/12/70), Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation (23/9/71), Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation, Supplementary to the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, Done at Montreal on 23 Sept. 1971 (24/2/88), Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents (14/12/73), International Convention against the Taking of Hostages (17/12/79), Convention on the Physical Protection of Nuclear Material (8/2/87), Convention on the Safety of the United Nations and Associated Personnel (9/12/94), Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (21/11/97), Convention on the Marking of Plastic Explosives for the Purpose of Detection (1/3/91), Rome Statute of the International Criminal Court (17/7/98), Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation (10/3/88), Protocol for the Suppression of Unlawful Acts Against the Safety of Fixed Platforms Located on the Continental Shelf (10/3/88), International Convention for the Suppression of the Financing of Terrorism (9/12/99), International Convention for the

Suppression of Terrorist Bombings (15/12/97), Convention on the Transfer of Sentenced Persons (21/3/83), Amendments to the Technical Annex of Convention on the Marking of Plastic Explosives for the Purpose of Detection (19/12/05), Regional Cooperation Agreement on Combating Piracy and Armed Robbery against Ships in Asia (11/11/04), and United Nations Convention against Corruption (31/10/03).

Trade and Commerce.

General Agreement on Tariffs and Trade (GATT) (30/10/47), Geneva (1967) Protocol to the General Agreement on Tariffs and Trade (30/6/67), Agreement on Interpretation and Application of Article VI, XVI, and XXIII of the General Agreement on Tariffs and Trade (Subsidies and Countervailing Duties Code) (12/4/79), Agreement on Implementation of Article VII of the General Agreement on Tariffs and Trade and the Protocol Thereto (12/4/79), Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade (12/4/79), Protocol Supplementary to the Geneva (1979) Protocol to the General Agreement on Tariffs and Trade (22/11/79), Second Geneva (1987) Protocol to the General Agreement on Tariffs and Trade (5/10/87), International Tin Agreement (1/3/54), Third International Tin Agreement (9/12/66), Fourth International Tin Agreement (15/5/70), Protocol Relating to Trade Negotiations among Developing Countries (8/12/71), Agreement on the Global System of Trade Preferences among Developing Countries (13/4/88), Arrangement Regarding International Trade in Textiles (20/12/73), Protocol Extending the Arrangement Regarding International Trade in Textiles (1977), Protocol Extending the Arrangement Regarding International Trade in Textiles (1981) (22/12/81), Protocol Extending the Arrangement Regarding International Trade in Textiles (1986) (31/7/86), Protocol Maintaining in Force the Arrangement Regarding International Trade in Textiles (1991) (31/7/91), Protocol Maintaining in Force the Arrangement Regarding International Trade in Textiles (1992) (9/12/92), Protocol Maintaining in Force the Arrangement Regarding International Trade in Textiles (9/12/93), First Agreement on Trade Negotiations Among Developing Member Countries of the Economic and Social Commission for Asia and the Pacific (31/7/75), Agreement on Technical Barriers to Trade (12/4/79), Arrangement Establishing the International Textiles and Clothing Bureau (13/12/83), Marrakesh Agreement Establishing the World Trade Organization (WTO) (15/4/94), Agreement on Government Procurement (15/4/94), Second Protocol to the General Agreement on Trade in Services (6/10/95), Fourth Protocol to the General Agreement on Trade in Services (15/2/97), Fifth Protocol to the General Agreement on Trade in Services (12/12/97), Framework Agreement for Trade and Cooperation between the Republic of Korea, on one hand, and European Community and its members States on other hand (28/10/96), United Nations Convention on Contracts for the International Sale of Goods (11/4/80), Certification of Modifications and Rectifications to Schedule LX—Republic of Korea (12/4/05), Amendment to the First Agreement on Trade Negotiations among Developing Member Countries of the Economic and Social Commission for Asia and the Pacific (2/11/05), Free Trade Agreement Between the Republic of Korea and the EFTA States (15/12/05), Agreement on Dispute Settlement Mechanism under the Framework Agreement on Comprehensive Economic Cooperation among the Governments of the Republic of Korea and the Member Countries of the Association of Southeast Asian Nations (9/12/05), Agreement on Trade in Goods under the Framework Agreement on Comprehensive Economic Cooperation among the Governments of the Republic of Korea and the Member Countries of the Association of Southeast Asian Nations (24/8/06), Framework Agreement on comprehensive Economic Cooperation among the Governments of the Republic of Korea and the Member Countries of the Association of Southeast Asian Nations (13/12/05), Letter of Understanding among the Parties to the Agreement on Trade in Goods under the Framework Agreement on Comprehensive Economic Cooperation among the Governments of the Member countries of the Association of Southeast Asian Nations and the Republic of Korea on the Back-to-Back Certificate of Origin (1/6/07), and Letter of Understanding among the Parties to the Agreement on Trade in Goods under the Framework Agreement on Comprehensive Economic Cooperation among the Governments of the Member Countries of the Association of Southeast Asian Nations and the Republic of Korea on the Tariff Rate Quota (1/6/07).

Traffic.

Convention on Road Traffic (19/9/49), with Annexes (19/9/49), Convention Road Traffic (8/11/68), Agreement Concerning the Establishment of Global Technical Regulations for Wheeled Vehicles, Equipment and Parts Which Can Be Fitted and/or Be Used on Wheeled Vehicles (25/6/98), Agreement concerning the Adoption of Uniform Technical Prescriptions for Wheeled Vehicles, Equipment and Parts which can be fitted and/or be used on Wheeled Vehicles and the Conditions for Reciprocal Recognition of Approvals Granted on the Basis of These Prescriptions (20/3/58), Intergovernmental Agreement on the Asian Highway Network (18/11/03).

Treaty Law.

Vienna Convention on Law of Treaties (23/5/69).

Weights and Measures.

Meter Convention (20/5/1875), Convention Concerning Creation of an International Office of Weights and Measures, Regulations and Transient Provisions (20/5/1875), Convention Establishing International Legal Metrology (12/10/55).

Bilateral treaties number more than 1,067.

1
REPUBLIC OF LATVIA LAW DIGEST

—Scope —

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(Abbreviations used are: CL, Civillikums, Civil Law of the Republic of Latvia, adopted on Jan. 28, 1937, as am'd and CPL, Civilprocesa Likums, Law of Civil Procedure of the Republic of Latvia, adopted on Oct. 14, 1998, as am'd.)

Republic of Latvia is member of EU. See also European Union Law Digest.

Note: This revision incorporates legislation through Dec. 1, 2009.

1 INTRODUCTION

1.01 CURRENCY:

National currency is Lats (Ls or LVL), which equals 100 Santimi. Central bank, Latvijas Banka, was established by Law ``On the Bank of Latvia'' (adopted May 19, 1992, not am'd) and granted monopoly rights to issue national currency.

1.02 GOVERNMENT AND LEGAL SYSTEM:

Preliminary Note.

Republic of Latvia, independent from 1918 until 1940, was forcibly occupied in 1940 by U.S.S.R. Supreme Council of Latvian S.S.R. declared Republic's de jure independence on May 4, 1990 and reinstated fundamental provisions of Republic's prewar constitution. De facto independence took effect on Aug. 21, 1991 when Latvian Saeima declared renewed independence. In 1995, Latvia became member of Council of Europe and on May 1, 2004 became Member State of European Union.

Based on Satversme (Constitution) of Feb. 15, 1922 as amended, Latvia is independent democratic Republic. Sovereign power of Republic of Latvia is exercised by Latvian people. Territory of Republic of Latvia consists of regions of Vidzeme, Latgale, Kurzeme, and Zemgale.

Legislative Power.

Unicameral Saeima (Parliament) consists of 100 representatives of Latvian people. Representatives are elected in general, equal, direct, secret, and proportional elections. All citizens of Republic of Latvia who have reached 18 years of age are entitled to vote. Saeima is elected for term of four years. Saeima, among other powers, has power to pass laws, amend constitution, ratify international treaties, approve state budget, confirm appointment of judges, and elect President.

Executive Power.

President represents Republic of Latvia internationally and signs international treaties upon Saeima's approval, and may suggest legislation and dismissal of Saeima. All of President's decisions additionally have to be signed by Prime Minister or relevant minister who assumes all responsibility for such decisions. President is elected by Saeima in secret elections by 51 or more votes by Saeima members for no more than two consecutive terms of four years each.

Supreme executive body is Cabinet of Ministers. Cabinet of Ministers consists of Prime Minister and ministers appointed by Prime Minister. Prime Minister, who is appointed by President, and Cabinet of Ministers must receive vote of confidence of Saeima's majority. Cabinet of Ministers submits to Saeima's authority.

Judicial Power.

While constitution provides that all citizens are equal before law and courts, Law ``On the Power of the Courts'' (adopted Dec. 15, 1992, as am'd) provides that all persons, regardless of citizenship, are equal before law and courts and have equal rights to protection by legal system. Judges are independent and submit to no authority except for that of law. Supreme Court Judges are appointed by Saeima for life terms.

Constitution provides for constitutional court, structure, and responsibilities of which are based on Law ``On the Constitutional Court'' (adopted June 5, 1996). Based on Law ``On the Power of the Courts'' (see supra), judicial power is exercised by rajonu tiesas (District Courts), apgabaltiesas (Regional Courts), Augstaka tiesa (Supreme Court), and Satversmes tiesa (Constitutional Court), but in state of emergency or during war judicial power exercised by war courts (functions regulated by ``War Courts Law'' adopted Apr. 1, 2005). Law further provides that Republic of Latvia guarantees independence of courts and rights of person to defend his or her rights. Court hearings are public. See also category 6 Courts and Legislature, topic 6.01 Courts.

1.03 HOLIDAYS:

Based on Law ``On Holidays and Commemoration Days'' (adopted Oct. 3, 1990, as am'd), following are legal holidays in Republic of Latvia: Jan. 1 (New Year's Day), Good Friday, Easter, Easter Monday, May 1 (Labor Day, Convocation of the Constituent Assembly of the Republic of Latvia), May 4 (Proclamation of the Sovereignty of the Republic of Latvia), June 23 (Midsummer's Eve), June 24 (Midsummer's Day), Nov. 18 (Independence Day—Proclamation of the Republic of Latvia in 1918), Dec. 24, 25, 26 (Christmas), and Dec. 31 (New Year's Eve).

If holidays—May 4 and Nov. 18—fall on Sat. or Sun., next working day must be designated as holiday.

1.04 OFFICE HOURS AND TIME ZONE:

Republic of Latvia is in Eastern European (GMT +02:00) time zone. Office hours are generally from 9 a.m. to 5 p.m. or 6 p.m.

2 BUSINESS ORGANIZATIONS

2.01 AGENCY:

See category 18 Property, topic 18.02 Powers of Attorney.

2.02 ASSOCIATIONS:

Establishment and activities of associations and foundations are regulated by Law on Associations and Foundation (adopted on Oct. 30, 2003; in effect as of Apr. 1, 2004). Association is voluntary union of persons founded to achieve goal specified in articles of association, which must not have profit-making nature. Foundation, also fund and testamentary foundation, is aggregate of property which has been set aside for achievement of goal specified by founder, which must not have profit-making nature. Associations and foundations obtain status of legal person as of moment they are entered in Register of Associations and Foundations. Associations and foundations are liable for their obligations to extent of all of their property. Associations and foundations have right to perform economic activity in form of complementary activity, which pertains to maintenance and use of their own property, as well as to perform other economic activity to achieve goals of association or foundation. Founders of associations can be natural and legal persons or partnerships with legal capacity and number of founders must not be less than two. Associations may have their own territorial or other organizationally independent divisions. Divisions of associations are not legal persons. Foundations can be established by one or several persons. If there are several founders in foundation then they must exercise their rights of founders only jointly. Activities of political parties, religious organizations, trade unions, professional organizations and their associations which are autonomous entities under public law, as well as activities of public foundations (funds) are regulated by other laws. If purpose of activity stated in articles of association or foundation is public benefit activities then they may apply for status of public benefit organization in accordance with Law on Public Benefit Organizations (adopted on June 17, 2004; in effect as of Oct. 1, 2004). Public benefit organizations are entitled to tax relief provided for by law and they have other rights as stated by law. Persons who make donations to public benefit organizations are entitled to tax relief provided for by law, except for cases when they withdraw their donations. State Revenue Service decides on granting status of public benefit organization.

2.03 COMMERCIAL ACTORS:

Merchants shall be divided into three groups: From Jan. 1, 2005, business organization can be described as system containing following types of persons: (1) Merchants (``komersanti'') and individual merchants; (2) merchant (``individualais komersants'') and commercial companies; and (3) cooperative society.

Individual merchants are natural persons, who are registered with Commercial Register as merchants.

Commercial companies are subdivided into company (``komercsabiedriba''), partnership (``personalsabiedriba''), general partnership (``pilnsabiedriba''), limited partnership (``komanditsabiedriba''), capital companies, and partnerships. Capital companies involve company (``kapitalsabiedriba''), limited liability companies (``sabiedriba ar ierobezotu atbildibu''), stock companies (``akciju sabiedriba''), as well as a European Company (``Eiropas komercsabiedriba"). In turn, the partnerships are subdivided in a general partnership (``pilnsabiedriba") and a limited partnership (``komanditsabiedriba").

Pursuant to the Law on Cooperative Societies (adopted on Feb. 5, 1998; in effect as of Mar. 10, 1998), certain cooperative societies also can have a status of a merchant. A cooperative society is an association of legal and natural persons, the aim of which is to provide services in order to facilitate economic activity of its members. However, it should be noted that cooperative societies have virtually no significance in the business environment.

2.04 CORPORATIONS:

Commercial Law stipulates the most important and most frequently used business organization forms—individual merchant, partnership (general partnership and limited partnership), and capital company (limited liability company and joint stock company). Besides, there is a possibility to establish the European Company (Societas Europaea, SE) according to the provisions of EU Regulation No.2157/2001.

Commercial Law also provide possibility to register branches of Latvian and foreign companies, as well as their representative offices without rights to perform business activities, i.e., for non-commercial purposes only. Branches and representative offices are not legal persons.

In general, business persons are free to choose most desirable form for them. Most popular form of business in Latvia is a limited liability company. However, the use of a joint stock company is advisable to facilitate more sophisticated structuring and financing, and the use of a joint stock company is mandatory for some large-scale operations involving liability toward the public, e.g. banks and insurance companies. Only joint stock companies can be publicly listed.

General Provisions of Commercial Activity.

The main act regulating commercial activity is the Commercial Law. According to the Commercial Law, a commercial activity is an economic activity that is performed by a merchant in his own name with a purpose of making a profit. Economic activity is any systematic, independent activity for remuneration. All economic activity performed by merchant is considered to be commercial activity.

Merchants.

Individual Merchant.

Individual merchant is natural person who is registered as such with Commercial Register. Natural person must apply to Commercial Register to be registered as individual merchant if annual sales of performed economic activities are in excess of 200,000 lats or if economic activities performed comply with activities of a broker, activities of a commercial agent or with at least two features specified in law. Individual merchant, by means of its firm name, may enter into transactions connected with business activity, and the merchant is liable for his obligations to extent of his entire property.

Partnerships.

Partnerships fall into two categories: general partnerships and limited partnerships.

General partnership is partnership in which two or more members engage in commercial activity jointly using one firm name. Members operate according to company agreement and have unlimited liability toward company's creditors. Changes in firm name of company, as well as entry of new members, must be filed with Commercial Register. Each representative of company has right to represent company in relationships with third parties, unless it is specifically disallowed by company agreement.

Limited partnership is partnership in which two or more persons engage in commercial activity jointly, using one firm name and based on company agreement, if liability of at least one member of company (limited partner) is limited with respect to company's creditors to extent of his investment. However, personal liability of other members is not limited. Limited partner is not entitled to represent company in relationships with third parties. Scope of liability of limited partner towards company's creditors is limited to amount of his investment registered with Commercial Register.

Capital Companies (In General).

Capital company is commercial company which has share capital consisting of nominal value of all issued shares. Capital companies may be limited liability companies (hereafter, LTD) and joint stock companies (hereafter, JSC). LTD is closed company, shares of which are not subject to public circulation. JSC can be open company, shares of which are in public circulation. These companies may be established by one or more founders.

Foundation documents of capital company are its articles of association and foundation agreement. Articles of association must specify: name of company; term or purpose of company (if company is established for definite period of time or performance of definite purpose); amount of share capital; number and face value of shares; number of board of directors members, right of board members to represent company jointly or separately or in some other combination in accordance with law; number of members of supervisory board (if supervisory board is provided for company); special provisions for disposal of shares (if such are provided for); and other provisions considered by founders to be material and which are not contrary to law.

Articles of association of JSC must also incorporate following: if company has several classes of shares, classes of shares (specifying rights of each class of shares) and number and face value of each class of shares; whether shares are registered shares or bearer's shares and if articles of association specify conversion of registered shares into bearer's shares and vice versa, conversion regulations; whether shares are in paper form or dematerialised, and, conversion regulations if articles of association envisage conversion of shares in paper form into dematerialised shares and vice versa; and the main types of commercial activity of the company..

Capital company is regarded as established and acquires status of legal entity as of date of its registration with Commercial Register. Company's share capital may be paid through monetary or non-monetary investment. Non-monetary investment into LTD must be confirmed by expert who has been approved by Commercial Register except cases when assessment of non-monetary investment is conducted by founders themselves, if contributions do not exceed LVL 4,000, and their total value does not exceed 1/2 of share capital. At the end of accounting year, board of directors prepares, signs, and promptly submits company's annual report to auditor and supervisory board (if established). Annual report of company is approved by shareholders' meeting to be convened by board of directors upon receipt of auditor's report; if company has supervisory board, shareholders' meeting is called after board receives report of supervisory board. Approved annual report is submitted by board of directors to the State Revenue Service (tax authority in Latvia). Portion of net profits may be paid out in dividends. Dividends are paid to shareholders in proportion to sum of face values of shares owned by each shareholder.

Limited Liability Company (LTD).

Minimum share capital for LTD is LVL 2,000. Prior to submission of registration application, at least 50% of share capital must be paid up; share capital must be fully paid up in one year from moment of registration of LTD in Commercial Register. Participant may sell shares he owns at freely determined price, but if he intends to give, change, or otherwise dispose of his shares, such transfer is subject to approval of participants' meeting unless otherwise provided by articles of association. Commercial Law prescribes preemptive right of other shareholders in case of sale of shares; nonexistence of such preemptive rights may be specified in articles of association. Each share provides for one vote at participants' meeting, unless the articles of association provide otherwise. Management institutions of LTD are participants' meeting, board of directors, and supervisory board (optional). Commercial Law determines competence of participants' meeting, which may also decide on matters which fall within competence of board of directors or supervisory board, however in such case, shareholders who voted for this decision shall be liable for any losses incurred as result of such decisions. Participants' meeting may pass resolutions if more than half of share capital with voting rights is present at participants' meeting. Board of directors is executive institution of company that manages and represents company. It may consist of one or more members. If LTD establishes supervisory board and includes this institution in its articles of incorporation, provisions of Commercial Law that apply to supervisory board of JSC are applicable.

Joint Stock Company (JSC).

Minimum share capital of JSC is LVL 25,000. Amount of share capital stated in articles of association at meeting must be fully paid up within one year of date of signing foundation agreement. Face value of shares is specified in articles of association and expressed in lats. Shares may be registered shares or bearer shares. Registered share can be in paper format or dematerialised. Bearer shares can be only dematerialised. Different types of shares may be issued which establish different rights relating to: (1) Receiving dividends; (2) receiving liquidation quota; and (3) voting at shareholders' meeting. JSC may also issue preference shares that grant shareholder specific rights with respect to receipt of dividends and/or liquidation quota. However, these shares are without voting rights. While shareholder may freely dispose of his shares, articles of association may provide for exceptions with regard to registered shares. Disposal of these shares may be subject to prior approval of any institution of JSC. Subsidiary of JSC may not subscribe to shares in controlling company. Company may issue convertible bonds which may be exchanged by bondholder for shares in company at specified conditions.

JSC is managed by shareholders' meeting, supervisory board, and board of directors. Shareholders' meeting may pass resolutions, regardless of amount of share capital with voting rights represented at meeting unless otherwise provided by the articles of association. It passes resolutions by majority of votes of shareholders with voting rights who are present at meeting if law or articles of association does not specify larger number of required votes. For certain decisions (for example, amendments to articles of association, issuance of convertible bonds, reorganisation of company, etc.), Commercial Law requires majority of at least three-quarters of attending voting shareholders.

Supervisory board represents interests of shareholders between shareholders' meetings and supervises activities of board of directors. Supervisory board is entitled at any time to request report on company's position from board of directors and to familiarize itself with all activities of board of directors. Articles of association may also state that board of directors requires supervisory board's consent to implement significant decisions. Minimum number of members on supervisory board is three, unless shares are in public circulation, in which case there must be at least five. There may not be more than 20 members on supervisory board. Supervisory board may pass decisions if more than half of its members are present.

Board of directors is executive institution of company which manages and represents company. Board of directors may consist of one or several members of board of directors. If stock of company is in public turnover, minimum number of members of board of directors shall be three members. Separate or joint representation of JSC by one or several members of board of directors is effective with regard to third parties only if these rights are directly and clearly defined in articles of association and recorded with Commercial Register. Board of directors may pass decisions if more than half of its members are present.

European Company (Societas Europaea, SE).

As of Oct. 8, 2004, a new commercial company can be established in Latvia – European Company (Societas Europaea, SE), which can transfer is registered address from one European Union member state to another without performing winding up and foundation of a new company in another EU member state. SE can be transferred not only from Latvia to EU and vice versa, but also to Iceland, Norway, and Lichtenstein. Registration of SE is performed by the Register of Enterprises.

Foundation of SE is established by EU Council Regulation No. 2157/2001 of Oct. 8 2001 on the Statute for a European Company. The minimum share capital of the SE is EUR 120,000. EU Regulation prescribes four ways to establish such companies. It is possible: (1) By merger of national companies from different member states; (2) by the creation of a joint venture between companies in different member states; (3) by the creation of a SE subsidiary of a national company; and (4) by the conversion of a national company into a SE.

Reorganization of Commercial Companies.

Commercial Law specifies three types of reorganization: amalgamation, splitting, and reorganization.

Amalgamation of companies may be performed either by acquisition or merger.

Splitting is process under which company transfers its assets to one or several companies by means of splitting or separation.

Reorganization is process under which company is transformed into another type of company.

If two or more existing companies participate in reorganization, they enter into reorganization agreement and each company involved in reorganization prepares reorganization prospectus. Ja Draft reorganization agreement is inspected by auditor from list approved by Commercial Register. The auditor does not have to audit the reorganization agreement, if all shareholders approve that. Each company involved in reorganization must inform all known creditors in writing. Information regarding reorganization must be published in official newspaper (Latvijas Vestnesis). Reorganization is considered to be effective as of moment of registration in Commercial Register regarding all companies involved in reorganization, including newly established companies.

In 2008, Directive 2005/56/EC of the European Parliament and the Council on cross-border mergers of limited liability companies was implemented into Latvian Commercial Law. In compliance with the new regulations, the participants of the cross-border transactions may be at least two capital companies, one of which has to be registered in the Republic of Latvia, but the rest of the companies – in a European Union member state, Lichtenstein, Norway, or Iceland.

3 BUSINESS REGULATION AND COMMERCE

3.01 ANTI-TRUST LAWS:

See topic 3.09 Monopolies, Restraint of Trade and Competition.

3.02 BILLS AND NOTES:

Governing law in respect of bills of exchange (vekseli) is law ``On Bills of Exchange'', passed on 27 Sept., 1938. This law distinguishes between drawn bill of exchange (trata) and simple bill of exchange (vienkarsais vekselis).

Drawn bill of exchange must contain following: (1) Statement that it is drawn bill of exchange in such language as bill is drawn, (2) unconditional order to pay defined sum, (3) name of drawee, (4) time of payment, (5) place where payment is to be made, (6) name of payee, (7) date and place of drawing up of bill, and (8) signature of drawer. If any of aforementioned requisites are missing, document is not considered to be bill of exchange. There are certain exceptions to this rule, most significant being that where no date for payment is stated, bill is considered to be payable on sight. Bill may be drawn on drawer or to his order, or it may be on account of third party. Drawer may state that discount applies in respect of bill of exchange which is payable on sight or certain time after sight. Percentage of such discount must be included in bill.

Drawer of bill is liable for its acceptance and payment, although he can eliminate this liability. Bills of exchange can be transferred by endorsement, unless words ``not to order'' or other such similar words have been included in bill by drawer, in which case bill may only be transferred by way of formal assignment.

Bills of exchange may be guaranteed by third parties or by any of signatories of bill. Guarantees are either written on bill or attached to bill and must state identity of guarantor who signs ``as guarantor'', or with other similar words. Guarantee must state for whose benefit guarantee is being given; failing which, it is considered to be on behalf of drawer.

Where bill has been accepted and payment is not made, holder of bill is entitled to claim sum specified in bill plus any interest if so provided in bill, interest at 6% from date when payment is due, costs of protest and other expenses, and commission of one-third of 1% of sum of bill. Any discounts in respect of early payment must be included. In respect of any such claims, drawer, acceptor, endorser, or guarantor of bill are jointly and severally liable and claims can be submitted against any one of these without priority.

Simple bill of exchange must contain following: (1) Statement that it is simple bill of exchange in such language as bill is drawn, (2) unconditional order to pay defined sum, (3) time of payment, (4) place where payment is to be made, (5) name of payee, (6) date and place of drawing up of bill, and (7) signature of drawer. Other provisions in respect of simple bill are analogous to those in respect of drawn bill of exchange.

Checks are governed by law ``On Checks'' (adopted Sept. 27, 1938). Checks must contain following information: (1) Statement that it is check in such language as check is drawn, (2) unconditional order to pay defined sum, (3) name of drawee, (4) place where payment is to be made, (5) date and place of drawing up of check, and (6) signature of drawer. If any of aforementioned requisites are missing then, with certain exceptions, document is not considered to be check.

Checks may only be drawn on bankers who hold assets of drawer and only if drawer has authority to issue such checks. Check not drawn on banker is not valid even if it is stated that it is check.

Checks are payable on sight and can be made drawn on indicated person with provision ``to order'' or without any provision, on indicated person with provision ``not to order'' or with similar words, or to bearer. Checks without indication are considered to be checks to bearer. Checks may be to own order. Checks which have been drawn to indicated person with provision ``to order'' can be transferred by endorsement. Endorsements must be unconditional.

Checks may be guaranteed for full sum of check or for part. Check may be guaranteed by third parties, other than drawee, or by any of signatories of check. Guarantees are either written on check or attached check and must state identity of guarantor who signs ``as guarantor'', or with other similar words. Guarantee must state for whose benefit guarantee is being given; failing which, it is considered to be on behalf of drawer.

Checks drawn and which are payable in same country must be presented within eight days. Checks which are drawn in country which differs from that in which it is payable must be presented within 20 to 70 days, depending on which country check is drawn and in which it is payable.

Crossed checks without specific banker being named may only be paid to banker; whereas, checks crossed with name of specific banker can only be paid to that banker, unless such banker is drawee himself. Drawer or holder of check may write on front of check ``for deposit only'' thereby preventing payment in cash.

Conflict of laws in respect of bills of exchange and checks is determined by nationality of persons assuming obligations in respect of such. Form of obligation is governed by law of country in which bill or check is signed. Obligations of Latvian nationals incurred towards other Latvian nationals are binding within Latvian territory if form of bill or check corresponds to requirements of Latvian law. Substantive law applicable to acceptor of drawn bill of exchange and of drawer of simple bill of exchange is law of country in which payment is to be made. Other persons whose signatures are found on bill of exchange are governed by law in which signature was appended. Laws of country in which payment is to be made govern whether bill may be accepted only in part and whether holder must accept partial payment. Laws of country in which bill was issued determine time within which recourse must be claimed; whereas, laws of country in which protest is to be lodged determine form and limitation for submission of protests.

With respect to checks, laws of country in which payment is to be made determine following: whether check is payable on presentation or after certain time; time for presentation; whether check can be accepted, certified or confirmed; whether holder of check can request or be required to accept partial payment; whether check can be crossed; whether holder is entitled to repayment and in what form; whether drawer can recall check or object to its payment, and action in event of loss or theft; and whether protest is required for claims.

Latvia has not signed either Geneva Convention on Bills of Exchange or Geneva Convention on Checks.

3.03 COMMERCIAL LAW:

Commercial Law is statutory regulation of Latvia adopted by Saeima (Parliament) in Apr. 13, 2000, as am'd, effective as of Jan. 1, 2002, which provides for legal norms of business activities. It defines notions of business person, business activity, commercial register and other notions, conditions and restrictions related to business activities (business). In its main aspects, Commercial Law conforms to majority of similar laws and other statutory regulations used in legal practice of European Union Member States.

3.04 COMMERCIAL REGISTER:

Commercial Register is database consisting of particular information and documents. Commercial Register is managed by authorized state institution Register of Enterprises (``Uznemumu registrs''). Commercial Register contains information and documents about merchants (``komersanti''). Records of Commercial Register are publicly reliable; therefore, third persons can refer to, rely on, and use them. Any person has right to become acquainted with records of Commercial Register and documents filed with Register of Enterprises. Upon written request and payment of state fee, any individual is entitled to receive extract from records of Commercial Register, as well as extracts or copies of documents within registration file of merchant. At request, accuracy of extract or copy is certified by official's signature and seal of Register of Enterprises, indicating date of issue. At request, official of Register of Enterprises issues notice stating that particular record in Commercial Register has not been amended, or that such record has not been made.

Following information must be recorded in Commercial Register:

(1) **Individual merchant:** firm name, given name, surname, personal identity number and residential address of merchant, legal address, and branch firm name, if it is different from firm name of merchant, and its legal address;

(2) **Partnership:** firm name; type of partnership; amount of contribution by each limited partner and total amount of limited partner contributions; members and limited partners personally liable for partnership (given name, surname, personal identity number and residential address for natural persons, and firm name, registration number, and legal address for legal persons); rights of partnership members to represent partnership jointly or severally (given name, surname, personal identity number and residential address for natural persons, firm name, registration number, and legal address for legal persons); legal address; in case partnership is established for definite time period or for pursuing particular aim—time period for which it is established or aim; and branch firm name, if it is different from firm name of partnership, and its legal address;

(3) **Capital company:** firm name; type of capital company; given name, surname, personal identity number, residential address and office held of members of board of directors and members of council (if capital company has formed council); rights of members of board of directors to represent capital company jointly or severally; amount of equity capital, separately indicating subscribed and paid-up amounts of equity capital; legal address; if capital company is established for definite time period—time period for which it is established; and branch firm name, if it is different from firm name of capital company, and its legal address;

(4) **Branch of foreign merchant:** branch firm name, if it differs from firm name of foreign merchant, and firm name of foreign merchant; legal address of branch and location of foreign merchant (legal address); register where foreign merchant is registered, and registration number, if law of state of foreign merchant location provides for recording of merchant in register; type of foreign merchant; and amount of equity capital of foreign merchant, separately indicating subscribed and paid-up amounts of equity capital, if foreign merchant is capital company and this information is recorded in state register in which foreign merchant is recorded;

(5) **Additional information:** (a) Given name, surname and personal identity number of procurist, as well as reference to joint procura or branch procura if such procura is issued, and reference to granting of rights referred to in Commercial Law (rights to deal with real estate) if such rights are granted, as well as right of procurist to represent company severally or jointly with one or more members of board of directors or partnership members; (b) given name, surname, personal identity number, residential address, and scope of authorization of persons authorized to represent merchant (foreign merchant) with respect to activities associated with branch; (c) information on reorganization of merchant (foreign merchant); (d) information on appointment of administrator (given name, surname, personal identity number, and residential address); information on performance and termination of the legal protection proceedings of the merchant (foreign merchant), on announcement and termination of the insolvency proceedings, information on completion of the bankruptcy proceedings; (e) information on suspension or restoration of the economic activity of the merchant; (f) information on termination of activities or liquidation of merchant (foreign merchant), as well as on appointment of liquidator (given name, surname, personal identity number, residential and office address for natural persons, and firm name, registration number, and legal address for legal persons); (g) information on entry into, amending or termination of corporation agreement, indicating dominating and depending firm name, registration number, and date of entry into agreement; (h) given name, surname, personal identity number, and residential address of guardian or trustee of individual merchant; and (i) date of entry of each record.

Special procedures are prescribed for decision and record making at Commercial Register. In Commercial Register, records are made based on either application of person concerned or court ruling. Register of Enterprises reviews submitted applications (documents) and resolves to: (a) Make respective records in Commercial Register, (b) adjourn committal of record giving time for eliminating inaccuracies in submitted documents, or (c) refuse (reject) committal of record. Person concerned is entitled to appeal resolution of Register of Enterprises.

3.05 CONTRACTS:

Civil Law contains general statutory principles applicable to contracts as well as specific provisions applicable to particular types of contracts, such as sale, barter, lease, etc. For instance, in order to enter into valid contract offer, acceptance and mutual consent of parties, as well as complete agreement of parties on essential elements of contract are required. Contract is void, inter alia, in following cases: (a) Contract is entered into by person lacking legal capacity or capacity to act; (b) object of contract is removed from scope of private law or is totally indefinite; (c) intent to enter into contract is expressed for appearances only, unless unlawful deceit of third person has taken place; (d) contract is entered into based on substantial mistake; or (e) goal of contract is illegal, immoral, or intended to circumvent legal provisions. Contract is voidable, inter alia, if contracting party was induced by fraud to enter into contract.

Offer and Acceptance.

Contract is considered finally concluded when parties have reached complete agreement on essential elements of transaction. According to Civil Law, offeror is bound by offer for time period determined by offeror. If offeror has not specified time period, offeror may recall offer in case other party is delaying its response. Courts decide whether offeree delayed response in given case. In commercial matters, it is deemed that offeree delayed its response if it was not communicated unhesitatingly. It should be noted that in case offer is recalled, but offeree does not and cannot know of such recalling or is not at any fault for delay in responding to offer, offeror is obliged to compensate damages caused to offeree due to reliance that offer remained valid. Between absent parties, contract is deemed finally concluded when offeree communicates its acceptance, regardless of when offeror receives notice of acceptance. Silence may neither be deemed to mean acceptance nor rejection of offer, unless provided otherwise by law.

Fraud.

Under Civil Law, fraud means illegal deceit of third person in order to induce person to perform acts contrary to its interests or to abstain from such acts. Regulation of fraud under Civil Law includes following provisions. In case it was (should have been) easy for person to detect fraud, this person should not be considered defrauded in legal sense. Person who entered into transaction based on fraud is entitled to request cancellation of transaction. However, in case fraud was cause for some terms and conditions only, defrauded person may only request compensation for losses. Finally, following should be noted: in case in bilateral transaction both parties deceived each other, neither of them has right to bring action against other; in case contract has not yet been performed, performance thereof may not be required by either party; but in case contract is performed, neither party may claim compensation for losses from other.

Form.

Contracts can be executed in following forms: (1) Orally; (2) by concludent activities; (3) in writing; and (4) certified by sworn notary public. Oral contracts are valid unless certain form of contract is statutorily required. Contracts, the precondition of the validity of which is a written format, are not valid. Each party is entitled to withdraw from contract unilaterally until contract is executed in required form. However, if law requires written (not notarized) form, but parties have agreed orally on contract's essential elements, each party has right to demand of other execution of corresponding contract in written form. Electronic signature is gradually being used in closing transactions as well; however, now it is not general practice and is rather seldom used.

Repudiation.

Civil Law explicitly provides that contract, once concluded, obliges parties to perform their respective contractual duties, and neither special difficulty nor complications arising at later time are grounds for repudiation of contract. One party may not withdraw from contract without other party's consent even if other party does not fulfill its contractual obligations and due to its failure to fulfill such obligations. Nevertheless, unilateral termination of contract is permissible - in case such termination is based on contract's nature, is permitted by law, or such right is explicitly agreed on by parties.

Excuses for Nonperformance.

No liability for nonperformance arises if performance becomes impossible by accident (for reasons beyond parties' power) or by force majeure. However, party in default bears risk of accidental loss or damage. In sales contracts, after entry into contract, but prior to delivery of sold object, buyer bears risk of accidental loss or damage, with certain exceptions. (See topic 3.10 Sales.)

Applicable Law.

In determining laws governing given contract, Latvian courts will respect parties' express agreement as to choice of law. Choice of law is in effect to extent that mandatory provisions of Latvian law are not circumvented. If parties have not agreed on choice of governing law, Latvian court is to assume that governing law must be that of jurisdiction in which contract is to be performed. If place of performance cannot be determined, court is to apply law of country in which contract was executed.

Questions regarding contract's formal validity are governed by law of jurisdiction effective at place of execution or place of performance of contract. Form of contracts related to real property located in Latvia is governed exclusively by Latvian law.

Foreign law is not to be applied if foreign law conflicts with Latvian order, public or mandatory provisions of Latvian law. Provisions of Civil Law dealing with conflicts of law apply where not provided otherwise by international treaties binding on Latvia, such as Treaty of Rome governing contractual obligations in cross-border transactions. Latvia is party to UN Convention on Contracts for the International Sale of Goods (Apr. 11, 1980). (See category 20 Treaties and Conventions, topic 20.01 Treaties.)

3.06 FRAUDS, STATUTE OF:

Republic of Latvia has no Statute of Frauds, but see topic 3.05 Contracts.

3.07 INFORMATION TECHNOLOGY, INTERNET AND NEW MEDIA:

Computer programs and databases are copyright protected in accordance with Copyright Law (adopted Apr. 6, 2000 as am'd).

Computer Programs.

Copyright protection with respect to computer programs is established as soon as it is created, but not necessarily completed. In addition, copyright protection of computer programs does not depend on their type, form of expression, value, and tasks of operation.

It is stated in Copyright Law that economic rights of author to computer program belong to employer who created program within scope of employment, unless otherwise provided for in contract. Author of computer program has exclusive right to distribute program, make it available to public, to lease, rent, publicly lend or reproduce program, as well as to translate, adapt and alter it in any other manner, and to reproduce results obtained as result of translation, adaptation, or altering of computer program.

Furthermore, unless otherwise provided by contract and if right to use computer program was lawfully obtained, no special author's permit is required for reproduction, translation, adaptation, or alteration in any other manner of computer program, as well as for reproduction of results so obtained, as long as above actions are necessary for intended purposes of computer program operation. Moreover, it is not permissible to prohibit making of back-up copies necessary for use of computer programs when entering into contract with lawful user of computer program.

Person having right to use computer program can, without permission of copyright owner, observe, investigate, or inspect functioning of computer program in order to disclose ideas and principles on which any components of program are based, if such activities are performed when installing, displaying, executing, transmitting, or storing computer program. Finally, no permission of copyright owner is needed if it is impossible to obtain necessary information without reproducing program's code or changing its form in order to ensure interface of independently created computer program with other software.

Databases.

Special statutory regulation is provided for with respect to copyright protection of databases. In general, it is stated that databases are copyright protected if substantial qualitative or quantitative investment (financial resources or consumption of time and energy) was made into their establishment, acquisition, inspection, or demonstration.

Author of database has exclusive right to publish, demonstrate and distribute database, make it available to public, as well as to reproduce, translate, adapt, or alter it in any other manner, and to reproduce, distribute, publish, demonstrate, or show results obtained as result of reproduction, translation, adaptation, or altering.

Without permission of database author, lawful user of database or its copy is allowed to conduct activities necessary to gain access to and use contents of database. In case lawful user of database or its copy is permitted to use only part of database, above refers only to respective part of database. It is important to note that, as stated in Copyright Law, agreement contrary to above will be void.

User of publicly available database is entitled to obtain and repeatedly use part of database contents, which can be evaluated quantitatively and qualitatively. Nevertheless, user of publicly available database is prohibited to conduct activities contrary to normal use of database or which unreasonably encroach on legal interests of creator of such database.

Without consent of creator of publicly available database, legal database users may: (a) Obtain contents of non-electronic database for personal needs; (b) obtain material part of database contents for educational and research purposes, and only to extent necessary for such purposes by indicating source mandatory; and (c) obtain or repeatedly use material part of database contents for state security, as well as administrative or court action purposes.

Rights of creator of database to control resale of database in European Union expire as of moment of first sale of database in EU, if performed by database creator himself or with his consent. Rights of creator of database to prevent acquisition or repeated use of database are limited to 15 years starting from following year after: (i) Database is created or (ii) became available to public.

Data protection is governed by Personal Data Protection Law (adopted Mar. 23, 2000). Personal Data Protection Law protects data of individuals collected and processed in private and public databases. According to Law, personal data includes any information related to identifiable natural person. All state and municipal institutions, natural, and legal persons who process or wish to start personal data processing, must register it with State Data Inspectorate. Registration of personal data processing system is not necessary, if administrator (i.e. natural or legal person, state or municipal institution, stating purposes of personal data processing and means of processing, as well as being in charge for personal data processing) appoints personal data processing expert, who meets certain requirements set by law. Administrator registers personal data protection expert with State Data Inspectorate. Register of personal data protection experts is publicly available.

Personal data processing is permitted only if at least one of following conditions exist: data subject has given his/her consent; personal data processing results from contractual obligations of data subject or is necessary for entry into such contract at request of data subject; data processing is necessary to system controller for performance of his/her lawful obligations; data processing is necessary to protect vitally important interest of data subject, including life and health; data processing is necessary in order to ensure compliance with public interest or to implement tasks of public authority, for implementation of which personal data are submitted to system administrator or are transferred to third party; or personal data processing is required to exercise lawful interests of system administrator or third person, to which data are disclosed, provided that basic rights and freedoms of data subject are observed.

When collecting personal data, system administrator has obligation to provide data subject with following information: name and address of system administrator and personal data operator; and intended purpose for and justification of personal data processing. At request of data subject, system administrator must provide following additional information: possible recipients of personal data; rights of data subject to access his/her data and rectify same; and whether providing answer is mandatory or voluntary, and consequences of failing to provide answer.

Person has right to obtain all information that has been collected concerning himself in any system for personal data processing, unless disclosure of such information is prohibited by law in national security, national defense, and criminal law fields.

Person has right to request that his/her personal data be supplemented or rectified, that processing of data be suspended or that data be destroyed if personal data are incomplete, outdated, false, unlawfully obtained or no longer necessary for purposes for which they were collected.

Person has right to challenge and system administrator has obligation to review individual decision which has been taken only upon basis of data processed automatically. Person has right to object to processing of his/her personal data if such will be used for commercial purposes.

E-commerce.

The most important law regulating e-commerce and implementing Directive 2000/31/EC of the European Parliament and of the Council on requirements for electronic commerce is the Information Society Service Law (adopted Nov. 4, 2004). Pursuant to this law, the information society service is a distance service, which is usually provided for a charge using electronic communication means (electronic information processing and storage equipment, including digit compression equipment) and upon individual request of the receiver of the services. The information society services include: electronic trade of goods and services; sending of commercial messages; offers of options for information search, access thereto and acquisition of information; services providing transmission of information within the electronic communications network or access to the electronic communications network; and storing of information. The law stipulates information to be indicated on mandatory basis, which has to be indicated by the service provider upon providing the information society services. Likewise, the law stipulates requirements for information, which must be indicated in the commercial message, as well as restrictions for sending the commercial messages. The law also prescribes liability and duties of the mediation service provider (i.e. provider of information society services, which ensures transmission of information within the electronic communications network, access to the electronic communications network or storage of information). Circulation of the information society services are supervised by the Consumer Rights Protection Center, the Data State Inspectorate, as well as other supervisory and control authorities.

With respect to E-commerce, applicable legal acts are also Civil Law, Consumer Rights Protection Law (adopted Mar. 18, 1999), Cabinet of Ministers Regulations ``On Distance Agreements'' (adopted May 28, 2002), Law on Electronic Documents (adopted Oct. 31, 2002), Personal Data Protection Law (adopted Mar. 23, 2000), Advertising Law (adopted Sept. 20, 1999), Cabinet of Ministers Regulations regarding Procedures for Submission and Review of Consumer Claims Regarding Non-Conformity of Goods or Services with Contract Provisions (adopted Aug. 1, 2006), Regulations regarding Procedures for Calculation and Payment of Value Added Tax for Electronically Supplied Services in the Territory of the European Union (adopted Apr. 15, 2004), and number of other legal acts. E-commerce is also introduced in banking and securities trading among banks and brokers pursuant to Bank of Latvia and Finance and Capital Market Commission regulations.

Teleservices, including Internet, are governed among others, by Law on Information Society Services (adopted Nov. 4, 2004), Electronic Communications Law (adopted Oct. 28, 2004), Consumer Rights Protection Law (adopted Mar. 18, 1999, as am'd) and Cabinet of Ministers Regulations No. 207 On Distance Agreements (adopted May 28, 2002), and Radio and Television Law (adopted Aug. 24, 1995).

Following information should be included in distance agreement and offer communicated to customer: (a) Name (firm name), registration number and date, given name, surname and, if pre-payment is required, also address of seller or service provider; (b) characterization of goods or services; (c) price of goods and services (including applicable taxes); (d) delivery charges (if such charge is provided for); (e) terms and procedures of payment, delivery and fulfillment of agreement; (f) information on right of refusal; (g) charges for use of means for distance information delivery or transmission (if different from tariffs accepted by State); (h) validity term of offer or price; and (i) minimum term of validity of agreements for continuous or repeated delivery of goods or rendering of services.

Term for usage of right of refusal depends on information provided to customer. In case all statutorily required information (including information on warranties, after-sale services, and possible termination of agreement) is provided to customer at entry into distance contract, customer is entitled to unilaterally withdraw from contract within 14 days, unless parties have agreed on longer term for withdrawal. However, in case said information has not been provided to customer, he or she is entitled to unilaterally withdraw from contract within 90 days. In any case, term of unilateral withdrawal commences on delivery date of goods and services, or on date of services agreement or goods purchase agreement, in case payment for goods is made by providing credit to customer in full or in part. If consumer exercises right of withdrawal, seller or service provider has obligation to repay to consumer all installments made by him or her as soon as possible but not later than within 30 calendar days from day when consumer has sent written withdrawal, or within seven calendar days after receipt of documents confirming costs.

Information technology systems of state and municipalities are governed by Law on State Information Systems (adopted on May 2, 2002), which provides for common rules with respect to establishment, registration, maintenance, reorganization and liquidation of such systems, regulates cooperation of system administrators, determines functions of holder of system as well as rights and obligations of data subjects of system, regulates administration of security of public information systems and establishes requirements to be followed for protection of crucial public information systems and public information system connectors. This Law applies to state information systems: (i) Which are used for exchange of information for purpose of fulfillment of those functions provided by law or international treaties binding for Latvia or (ii) which are administered by municipalities as part of state information system.

Coordination of state information system within integrated information system of state is entrusted to Ministry of Regional Development and Municipal Affairs which shall co-ordinate activities of State information systems within framework of integrated State information systems, implementing unified State policy in field of development and maintenance of State information systems.

3.08 LICENSES, BUSINESS AND PROFESSIONAL:

License is required for certain kinds of commercial activity if included in special legal acts.

Activities requiring license include, among others: insurance operations; operation of lotteries and gambling facilities; activities in securities market; stock brokerage; investment company operations; manufacture and sale of medicine and other pharmaceutical products; production and sale of tobacco products and products containing alcohol; land, air, water and rail traffic services, commercial passenger transportation services, domestic and international; public telecommunications services; postal services; detective and private security services; land surveying; manufacture and sale of weapons and explosives; banking services; buying and selling of foreign currency; fishery; trading with plant protection products; television and radio broadcasting; production of electricity; supply of heat, electricity and gas; waste management; operation of education institutions; import, export or transit of products, services or technologies of strategic meaning; and others. In addition, Cabinet of Ministers Regulations (adopted on Aug. 20, 2002) regulate specifically operations with precious metals and stones and goods made from them.

Operation of private practices in fields of medicine, pharmacy, veterinary medicine, civil engineering, valuation of real estate, and certified auditing services is subjected to obtaining of license or certificate from respective professional society or in some cases, competent Ministries.

3.09 MONOPOLIES, RESTRAINT OF TRADE AND COMPETITION:

This topic is governed by Competition Law (adopted Oct. 4, 2001) which took effect on Jan. 1, 2002, as well as Regulations passed by Cabinet of Ministers. This law applies to all physical or legal persons performing entrepreneurial activity in territory of Latvia. It includes also foreign persons who perform or intend to perform business activity in territory of Latvia or whose activities have or may have impact on competition in territory of Latvia. Dominant position of market participant is defined (as from 1 Oct., 2008) as exceptional economic position whereby it has possibility to significantly prevent, restrict, or distort competition in relevant market by acting in full or partial independence from competitors, customers, or purchasers.

To promote development of free and fair competition and to achieve objectives of this law, Competition Council is to be established. This Council shall consist of five members who are appointed for five year term by Cabinet of Ministers upon recommendation of Minister of Economy. Among Council's duties are: supervision of observance of prohibitions against abuse of dominant position, abuse of dominant position in retail (this is specific regulation applicable only to operators acting in retail level and holding substantial market power), prohibited agreements; to ascertain violations of this law; and adopt decisions about mergers and opinions of draft normative acts. Council may decide on violations of this law and assess fines. Decisions of Council are binding on market participants and may be appealed. Procedures observed by Council when conducting its investigations are set out by Competition Law. There are special regulations issued by Cabinet of Ministers regarding investigation of merger applications and block exemption of restrictions set by Competition Law.

Law also provides for establishment of Executive Directorate which acts as unit of Council and undertakes investigations, negotiates with violators, and prepares draft opinions for Council. Officials and employees of Council and Executive Directorate are prohibited from disclosing any information they have received in execution of their duties and they are personally liable for any such disclosure.

Law sets out various types of restrictive agreements which must be prohibited and considered null and void. Council may permit these types of agreements if Council decides that it ultimately benefits consumer and certain other conditions are met. Violations of these restrictive agreement provisions may result in fines in amount from 250 LVL up to 10% of previous financial year's turnover of undertaking. In accordance with Cabinet of Ministers regulations, certain horizontal and vertical agreements are exempted from prohibition imposed by Law.

Law makes it illegal for market participant to abuse dominant position in territory of Latvia. Such abuse may include following: refusal to enter into agreements with market participants without objective justification, limiting production or distribution, markets or technical development to detriment of consumers without objective justification, requiring that agreements with other market participants be subject to terms which have no connection with subject matter of contract, imposition of unfair purchase or selling prices or other unfair trading conditions, or applying dissimilar conditions to equivalent transactions with other market participants. Violation of provisions prohibiting abuse of dominant position may result in fines of 5% or 10% of previous financial year's turnover.

Law calls for Council to review mergers if combined turnover of merging companies in territory of Latvia is at least 25 million lats during previous financial year or combined market share of merger participants in any relevant market in Latvia exceeds 40% threshold. However, if turnover of at least one of two merging companies does not exceed 1.5 million lats merger must not be reviewed by Council. Besides, even the above mentioned criterion is met, but, none of the merger participants acts on the same or vertically related relevant market and the combined market share of the merger participants does not exceed 15% in any of the relevant markets, the parties have the right to submit the ``short form'' merger notification.

After receipt of complete notification, Council must within 30 days adopt one of following decisions: prohibit merger, permit merger on certain conditions, and permit merger or commence in-depth investigation. If Council has decided to commence in-depth investigation, its final decision must be adopted within four months from date of submission of complete notification in case if ``full'' notification was submitted or within three months from the date of submission of the complete notification in case if ``short form'' notification was submitted.

Merger is deemed permitted if Council has not acted within four months of receipt of ``full'' notification and three months in case of ``short'' notification. Cabinet of Ministers Regulations No. 800 (adopted Sept. 29, 2008) describes manner in which Council should be provided with notifications and substance of such notifications. These Regulations also provide substantive guidelines as to factors Council will use to reach its decision and how to calculate turnover figures requested as part of notification.

Law also contains section prohibiting unfair competition. Infringements of unfair competition are examined by Courts. Unfair competition may take various forms as described by law, such as use or imitation of another market participant's name or other features, or imitation of packaging of goods, or spread of false or distorted information about another market participant.

See European Union Law Digest, category Business Regulation and Commerce, topic

Competition Rules.

3.10 SALES:

General contractual principles contained in Civil Law (see topic 3.05 Contracts) apply to sales contracts, unless specified otherwise in provisions on sales contracts. Commercial sales contracts are governed by Commercial Law.

Any object or right with respect to which ownership rights can be transferred can be object of sales contract, including movable and real property claims, and rights. Seller promises to deliver object to buyer, and buyer promises to pay agreed consideration. Rights to movable and real property are not transferred by sales contract itself, which only creates obligation on seller to confer ownership of object on buyer. Title to movable property passes to buyer upon delivery. Title to real property is transferred upon registration in Land Book. (See category 18 Property, topic 18.04 Real Property.)

Upon conclusion of sales contract, even if sold object has not yet been delivered to buyer, buyer bears risk for accidental loss or damage of object. Foregoing does not apply if, among other exceptions: seller has agreed to bear risk until delivery to buyer, if loss or damage can be deemed to be seller's fault, or if seller is in default.

Following provisions are contained in Civil Law, and apply to any contract in which one party delivers object to another party for money, including, in particular, sales contracts; seller is held liable if third party obtains title to sold object before delivery, or if item has hidden defects, or lacks any of characteristics that can be assumed, or have been explicitly confirmed by seller. This applies regardless of whether or not this issue is addressed in contract.

Seller is liable not only for defects known to seller, but also for hidden, unknown defects. This does not apply to: (1) Minor defects that do not impede intended use of object or (2) defects known to buyer. Seller is liable only for defects that existed before conclusion of contract. Seller is liable in any case for defects nonexistence of which seller explicitly confirmed. Although seller, by agreement, can exclude above-mentioned liability for defects, liability cannot be excluded if seller acted with malicious intent.

Consequence of seller's liability in case of malicious intent or express confirmation of given characteristic of sold object is that buyer can demand consequential damages. In all other cases of defects, buyer can choose only between rescission of contract and reduction of purchase price. Right to demand rescission of contract expires six months from date of contract's conclusion or from date seller gave explicit warranty. Right to demand reduction of purchase price expires one year from these dates.

Consumer protection is governed by Consumer Protection Law (adopted Mar. 18, 1999, as am'd). Legal entities may be protected in limited way under Law to extent purchase is not directly related to its entrepreneurial activity. Both offer of services and sale of goods are covered by Law, including professional services provided by individuals, complimentary services, as well as sale through agents.

Law states that rights of customer are violated in following cases: (a) Customer's freedom of choice and will has not been observed when purchasing goods or services; (b) principle of equality of contracting parties is not observed and contractual terms and conditions are unfair; (c) incomplete information is provided on goods or services or their price; (d) goods and services, which are insecure or do not conform to contractual terms, are sold/rendered to customer; (e) price, weight, or amount of goods is incorrectly stated, as well as no possibility to verify price, weight, or amount of goods is provided for; (f) contractual obligations are not duly fulfilled; (g) consumer is deprived of right to refusal or right to cancel or amend concluded contract, or consumer is deprived of any other lawful or contractual rights; and (h) document attesting transaction is not issued to customer.

Furthermore, contract is considered to be in contradiction with principle of equality of contracting parties if following is included therein: (a) Reduction of statutory liability standards of parties; (b) limitation of consumer's right to enter into agreements with third parties; (c) provision for advantages to producer, seller, or service provider, and restrictions to customer; (d) statement that consumer waives its statutory rights; or (e) placement of consumer in inequitable position and contract is contrary to bona fide requirements.

Consumer Protection Law provides for special rules in respect to credits, repayment of which is secured by real estate mortgage. Provider of credit shall have no right to request following from user which has not committed material breach of contract: 1) Additional security for issued credit on grounds that value of real estate included in security of credit has decreased due to changes in real estate market; 2) revaluation of any expense on security of mortgage during validity period of contract; 3) early termination of issued credit.

Material breach of contract shall be: 1) Default of repayment of credit or interest payment for more than 60 days or more frequently than three times year, where each time is more than 30 days; 2) failure to use credit for purpose established in contract.

If user which has not committed material breach of contract requests so, provider of credit has obligation to review proposal of user on extension of repayment term of credit or change of currency of credit. In event of rejection, provider of credit shall give substantiated response to user within 30 days. Changes in contractual provisions shall not be more disadvantageous than market conditions existent at time of proposing changes to be made in contract. Provider of credit shall have no right to request any compensation for making such changes, save for substantiated and proportionate fee for administrative costs of service.

If sales contract regarding goods and/or securities is executed by merchant then it is governed by Commercial Law. Seller is entitled to transfer goods for storage in public warehouse or in other safe place at buyer's expense and risk for reasonable remuneration, immediately notifying buyer thereof, if buyer fails to accept goods. If buyer admits delay, seller is entitled to sell goods in voluntary public auction with intermediation of bailiff.

If buyer and seller are merchants then following rules on duty to check goods apply. Buyer has duty to check goods as soon as possible after receipt thereof. In determining deficiencies of goods, buyer has duty to notify seller regarding them without delay, indicating their type and scale. If buyer fails to notify seller regarding deficiencies of received goods, it shall be considered that buyer has accepted goods and he or she loses right to request cancellation of purchase agreement or reduction of price for goods under Civil Law, except case when goods have hidden deficiencies which were impossible to determine during checking of goods. If hidden deficiencies of goods are determined later, buyer has duty to notify seller immediately after determination thereof. If buyer fails to notify seller regarding deficiencies of received goods, it shall be considered that buyer has accepted goods with these hidden deficiencies. These rules shall not be applicable if seller has concealed or hidden deficiencies of goods in bad faith or convincingly asserted that goods have certain properties.

Consumer credit agreements must be executed in writing. In case purchase price of goods or services to be financed by credit exceeds LVL 18,000 (approximately EUR 23,000), issuer of credit is obliged to request notice on legal income of consumer, and consumer himself is obliged to cover 10% of purchase price (these requirements do not apply to crediting of transactions pursued with help of financial instruments). In addition, credit secured with mortgage may not exceed 90% of value of mortgaged real property. These requirements are not effective, if credit is issued to nationals of other states; provided however, that such credit is not issued for purchase of real estate or any other property registered with public registers of Republic of Latvia.

Upon request of consumer, unfair contract terms must be declared null and void, but contract in most cases will remain effective. Agreements that are entered into from distance by expression of consent through use of television, telephone, facsimile, electronic mail, Internet, reply mailing, or catalogue are effective only if such means of communication had been incontestably approved by consumer. Time for performance of such agreements must not exceed 30 days as of date of order.

Law also provides quality requirements and guarantee responsibilities of seller. All guarantee descriptions must be in writing. Manufacturer must be identified on packaging material of product. Product description in foreign languages must be translated to Latvian language. Consumer claims may be raised either against seller or against manufacturer no later than two years as of date of purchase. If there is guarantee, consumer entitled to submit claim according to term of guarantee; however, this may not reduce protection granted by Law. Remedies include right to reduce purchase price, right to cure defects, right to replace defective product, or to avoid agreement and receive original purchase price, and such do not exclude further right to claim damages or payment of contractual penalty.

Latvia is party to UN Convention on Contracts for the International Sale of Goods. Latvia has made reservation under Convention stating that writing is required for international agreements to be effective between Latvian individual or entity and foreign counterparty.

Advertising of products and services is specifically regulated by Advertising Law (adopted Dec. 20, 1999 as am'd) which took effect Jan. 24, 2000. Advertisements must be: legal, true and objective, made in accordance with good advertising practices, and must correspond to principles of fair competition. Following items, among others, are prohibited from being included in advertisements: discrimination based on person's race, gender, age, religion, political views, social status or other capabilities, use of fear, fraud, level of education, comments about negligence of another person or services or products of another person, use of another person's trademarks, and other illegal content. Specific regulations apply to advertisement aimed at children. Purchaser of advertisement is liable for compliance of advertisement with applicable law.

3.11 SECURITIES:

Securities trading is governed by Laws ``On the Market for Financial Instruments'' (adopted Dec. 11, 2003, as am'd), ``On Stock Exchanges'' (adopted Jan. 28, 1992 as am'd), and ``Finance and Capital Market Commission'' (adopted June 20, 2000, as am'd).

Riga Stock Exchange (RSE) is sole licensed stock exchange. Securities are continuously traded on-line at variable prices via licensed banks and brokerage companies that maintain investors' securities accounts. RSE is owned by OMX Exchanges Group, which is owned by ``NASDAQ OMX Group, Inc.'' - one of the largest exchange companies linking exchanges in Riga, Tallinn, and Vilnius and providing single access to Nordic exchanges.

Majority of securities currently listed on RSE are issued by privatised companies. OMX Riga Index (OMRX) report RSE listed shares trading activity.

Latvian Central Depository (LCD) has been granted national depository status for securities registration, custody, and settlement. LCD organises clearing and settlement for trades concluded on RSE. LCD is supervised by Finance and Capital Market Commission. All publicly issued securities must be registered with LCD. Decision of public securities registration is made by LCD's Board of Directors. LCD participants have corresponding securities accounts with LCD. Cash positions are cleared with Central Bank of Latvia according to instructions of LCD. LCD issues its regulations and instructions which are binding on all RSE participants. Foreign investment funds can be released into public circulation in Latvia after permission of Finance and

Capital Market Commission pursuant to Law ``On the Market for Financial Instruments'' and Law ``On Investment Management Companies''.

Repurchase Offer.

Law ``On the Market for Financial Instruments'' also provides for responsibility of majority shareholders of public joint stock companies to purchase publicly traded shares of minority shareholders. Any person who has directly or indirectly acquired shares of public joint stock company in amount of at least 50% of share capital of company has obligation to give offer to remaining shareholders to purchase their shares. Offer to purchase shares of other shareholders must also be made by shareholders who have voted in favor of and passed resolution to withdraw company's shares from public trading.

Law ``On the Market for Financial Instruments'' governs procedure for offer and acceptance of share repurchase. Repurchase offer with attachments is to be submitted to Finance and Capital Market Commission for its approval. Approval of investor's repurchase offer is published in official newspaper and reported to stock exchange which posts the repurchase prospectus in its internet homepage. Period of repurchase offer may not be less than 30 days, and may not exceed 70 days from the day of making offer. Law also state that any investor may voluntarily issue offer to purchase shares of remaining shareholders even if shareholding of such investor does not exceed 50% of company's share capital. However, such voluntary offer may be expressed only for purchase of shares representing at least 10% of company's voting share capital. Voluntary offer to purchase shares of remaining shareholders can also be issued in response to offer to repurchase shares (``competing offer'') if person making competing offer is not connected to person making first offer.

Mandatory repurchase offer must be given within ten days as of date of acquisition of 50% of shares in public joint stock company or within ten days of date of registration with Commercial Register of resolution to withdraw shares from public trading. Regulations provide that repurchase price may not be less than either of following amounts: (1) Price for which investor has acquired its shares in company; if shares have been acquired for different prices, highest price for last 12 months prior to date of acquisition of control by investor is to be taken as basis; (2) average weighted price of company's shares traded at stock exchange for last 12 months prior to date of acquisition of control by investor; and (3) net book value of assets which is calculated by dividing company's equity with number of shares issued less shares held by company itself, according to their nominal value.

During term of repurchase offer, company may not: issue new shares, change nominal value of its shares, merge or split its shares, or make dividend payments. Settlement between investor offering to repurchase shares and shareholders selling shares is performed within five business days after end of term of offer. Any investor which fails to issue repurchase offer of shares may not exercise its voting rights at company's general meeting.

In event that investor acquires shares giving direct or indirect control of at least 95% of voting shares, investor may make offer for remaining shares following resolution to remove company's shares from regulated market has been passed; in this case, remaining shareholders are required to sell shares to investor.

Takeover procedure is governed by Law ``On Groups of Companies'' (adopted Mar. 23, 2000) which took effect on Apr. 13, 2000. Law provides that general meeting of acquiree company may adopt resolution on its acquisition by acquiring company (acquiror), if acquiror has acquired all shares in acquiree company.

Acquiror must adopt resolution at its general meeting on acquisition if at least three-quarters of share capital that is present at general meeting vote in favor of resolution. Acquiree is considered to have become part of acquiror once acquisition is registered with Latvian Register of

Enterprises.

Acquiree may also adopt resolution at its general meeting on its acquisition by acquiring company if acquiror has acquired at least 90% of acquiree's available shares (number of shares that acquiree holds itself and number of shares that are held by another person for benefit of acquiree are deducted from this number).

Acquiror will offer its shares as compensation to shareholders who lose their shares in acquiree, and will provide additional monetary compensation in case of any share exchange inequalities. Notice must be given of this offer in agenda of general meetings of both companies. Acquisition is subject to mandatory inspection by auditor appointed by acquiror's executive body.

All shares of acquiree that are not owned by acquiror must be transferred to acquiror once acquisition is registered with Register of Enterprises. If these shares are issued as registered or bearer papers (i.e., securities printed on paper), they afford only right to reimbursement until they have been surrendered to acquiror.

Removed shareholders have right to receive compensation in form of exchange of their shares with shares of main company. If acquiror is itself dependent company, removed shareholders may choose between exchange of shares or payment of corresponding cash compensation. Compensation in form of share exchange is considered to be proper if shares are exchanged in same proportion as would be granted in event of merger between companies. Any differences must be adjusted by means of additional cash payment. Acquiror and acquiree are jointly and severally responsible for payment of cash compensation. Any removed shareholder may make claim regarding amount of compensation within three months of date on which acquisition's registration with Register of Enterprises is published in official newspaper.

If acquiror has directly or indirectly acquired at least 90% of shares in acquiree, each of acquiree's minority shareholders may request acquiror to redeem his shares. Minority shareholder must first submit this request to acquiree, which in turn delivers it to acquiror. Within one month of date of receipt of request to buy out minority shareholder, acquiror must propose share purchase agreement to minority shareholder. Acquiror must notify minority shareholder of whether it has redeemed any shares from other minority shareholders, and upon what conditions this has been done, within one year of delivering proposal to minority shareholder.

4 CITIZENSHIP

4.01 ALIENS:

See category 15 Immigration, topic 15.01 Aliens.

4.02 IMMIGRATION:

See category 15 Immigration, topic 15.02 Immigration.

5 CIVIL ACTIONS AND PROCEDURE

5.01 ACTIONS:

Any person or legal entity, whether or not citizen of Republic of Latvia, may sue or be sued in Latvian courts subject to rules of procedure. Rules governing procedure in civil actions are set forth in Law of Civil Procedure (adopted Oct. 14, 1998 as am'd). All actions are commenced by filing statement of claim with competent court. Appropriate venue generally is defendant's domicile or seat. Appropriate venue also may be following: place of tort, place of performance, situs of real property, or place of company's branch or representative office, if litigation involves business of such branch or representative office.

Court costs are determined by schedule set forth in Law of Civil Procedure. Attorneys' fees are determined by fee schedule adopted by Council of Sworn Attorneys, unless client agreement with attorney provides otherwise. Losing party has to bear all costs, including court costs and fees for witnesses and experts, as well as winning party's attorneys' fees, up to amount equaling 5% of successfully litigated sum.

Republic of Latvia is party to following treaties regarding judicial actions: Hague Convention on Questions of Procedure in Civil Matters (Mar. 1, 1954), Hague Convention Abolishing the Requirement of Legalization for Foreign Public Documents (Oct. 5, 1961), Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters (Nov. 15, 1965), Convention on the Taking of Evidence Abroad in Civil or Commercial Matters (Mar. 18, 1970), European Agreement on the Transmission of Applications for Legal Aid (Jan. 27, 1977), and Convention on International Access to Justice (Oct. 25, 1980). Latvia is Member of EU and is bound by laws of EU and conventions adopted by EU. See also category 6 Courts and Legislature, topic 6.01 Courts.

5.02 DEPOSITIONS AND DISCOVERY:

Law of Civil Procedure provides for witnesses' testimony and taking of evidence before Latvian courts, and in 2009, amendments were made to Civil Procedure Law supplementing it with chapters on international cooperation in taking evidence under civil procedure in accordance with EU Council Regulation No. 1206/2001 on co-operation between courts of Member States in taking of evidence in civil or commercial matters, as well as on taking evidence in accordance with international agreements binding on Republic of Latvia and taking evidence in case there is no agreement with foreign country providing for cooperation in taking evidence.

5.03 LIMITATION OF ACTIONS:

Actions based on contractual claims after limitation period has passed are not only barred as matter of procedure, but as matter of substantive law. Civil Law provides that such claims cease to exist after lapsing of limitation period. However, if debtor has fulfilled claim after limitation period has lapsed, he cannot demand restitution. General limitation period for contractual claims is ten years, unless provided otherwise in specific context. In particular, shorter limitation periods apply to claims arising from contracts involving delivery of goods; if goods are defective, claims for withdrawal from contract and claims for reduction of purchase price expire in two years from date of contract's execution. Obligation's rights registered in Land Book are not subject to any limitation period. Reminder to, or admission by, debtor of claim suspends passing of limitation period.

5.04 PRESCRIPTION:

See topic 5.03 Limitation of Actions.

6 COURTS AND LEGISLATURE

6.01 COURTS:

Following courts exist in Republic of Latvia: (1) Constitutional Court (Satversmes tiesa); (2) District (City) Courts; (3) Five Regional Courts (Apgabaltiesa); (4) Supreme Court (Augstaka tiesa); (5) Administrative District Court (Administrativa rajona tiesa); (6) Administrative Regional Court (Administrativa apgabaltiesa); and (7) Military Court (in state of emergencies or during war).

Constitutional Court (Satversmes tiesa) is independent judicial authority which, within jurisdiction specified in Constitution of Republic of Latvia and in Constitutional Court Law, must adjudicate matters regarding compliance of laws and other regulatory enactments with Constitution, as well as other matters regarding which jurisdiction is conferred upon it by

Constitutional Court Law.

Pursuant to ``Law On the Power of the Courts'' (adopted Dec. 15, 1992, as am'd), courts of first instance in matters of civil and criminal law are District (City) Courts (rajona [pilsetas] tiesas) and Administrative District Court for matters of arising out of administrative legal relationships. Law of Civil Procedure, Criminal Procedure and Administrative Procedure must determine civil matters, criminal matters, and administrative matters, which are within jurisdiction of District (City) Courts and Administrative District Court.

Regional Court is court of first instance for those civil matters and criminal matters, which are within jurisdiction of regional courts in accordance with law. Pursuant to Law of Civil Procedure, Regional Court is first instance court for following civil matters: (1) Matters regarding protection of trademarks, patents, and geographical indications; (2) disputes regarding title to real property; (3) claims exceeding Ls 150,000.00; and (4) matters regarding insolvency and liquidation of credit institutions; (5) civil lawsuits, where case files contain state secrets. Administrative Regional Court, which is deemed to be sixth Regional Court, is appeal instance court for matters arising out of administrative legal relationships.

Regional Court is court of appeal instance for civil matters, criminal matters and Administrative Regional Court for administrative matters, which have been adjudicated by District (City) Courts or Administrative District Court.

Supreme Court has been divided in Senate and two Judicial Panels (Civil Matter Panel and Criminal Matter Panel). Panel of Supreme Court is court of appeal instance for matters, which have been adjudicated by regional courts as courts of first instance.

Senate of Supreme Court is court of cassation instance of all matters, which have been adjudicated by District (City) Courts, Regional Courts and/or Panel of Supreme Court.

Senate of Supreme Court is court of first instance for matters concerning decisions of Council of State Audit Office, decisions of Minister of Interior Affairs on inclusion of foreigners in list of persons which are prohibiting entry into Republic of Latvia.

See also category 1 Introduction, topic 1.02 Government and Legal System.

6.02 LAW REPORTS, CODES:

In general, law is codified. Official texts of codified statutory law, treaties, administrative regulations, etc. are published in Latvijas Vestnesis (The Latvian Herald). Use of precedents is very limited. There is directly binding effect only regarding those precedents between same parties or precedents of criminal cases in respect to proving of wrongful actions. In § 5, ¶6 of Law of Civil Procedure, it is provided that court must take into account case law; however, term ``taking into account'' does not mandate application.

6.03 LEGISLATURE:

See category 1 Introduction, topic 1.02 Government and Legal System.

7 DEBTOR AND CREDITOR

7.01 ASSIGNMENTS:

Any claim may be assigned to third party, including conditional, future, and uncertain claims. However, claim may not be assigned if such claim, pursuant to statutory law or parties' agreement, hinges upon creditor's person, or if claim's contents would completely change upon assignment to third party. There are no formal requirements for agreement effecting assignment of contractual claim. Notice to debtor is advisable to prevent bona fide debtor from discharging debt by payment to assignor; because before such notice, assignor retains right to claim payment from debtor. Debtor retains all objections against claim.

7.02 ATTACHMENT:

At any time before or during legal proceedings, plaintiff may request court to take measures to secure object of claim. Plaintiff must prove to satisfaction of court that if such measures are not taken, execution of judgment will be more difficult or impossible. Court, at its discretion, may, among other measures: attach debtor's property or bank accounts, prohibit debtor from disposing of his property, or prohibit other persons from making payments owed to debtor.

7.03 BANKRUPTCY:

Bankruptcy is included in Insolvency Law (adopted Nov. 22, 2007).

Bankruptcy is defined as solution of the state of insolvency proceedings which manifests itself as a concentrate complex of financial, lawful, and organizational measures, the purpose of which is to satisfy creditors' claims as completely as possible and liquidate a debtor.

Decision on initiating bankruptcy proceedings is adopted by creditors' meeting by majority vote. The matter on initiation of bankruptcy procedure is reviewed by the creditors' meeting, if the proposal regarding recovery has been rejected or recovery plan not adopted or the adopted recovery plan has not been approved.

Assets of bankrupt are to be sold by administrator through public auction, unless other laws provide for specific means of alienating certain types of assets. With approval of creditors' meeting, administrator may use other means of alienating movable property of bankrupt.

Cost of administration and manner of satisfying debts is drawn by administrator and approved by creditors' meeting.

Funds allocated by Insolvency administration for compensation of the costs of insolvency proceedings covered first by cash received through bankruptcy and then the rest costs of insolvency administration. Remaining funds from bankruptcy are used to satisfy creditors (only principal debt without interest) according to following priority: (each group of claims must be satisfied in full before succeeding group is paid and, within each group, creditors are repaid proportionately): (1) employee claims; (2) claims for unpaid taxes and duties; (3) claims of unsecured creditors submitted within the term of submission of creditors' claims determined by the court; (4) claims of other un secured creditors which are submitted after the term determined by court but within one year from the day when insolvency was registered in public register; and (5) by-claims of unsecured creditors. Secured creditors do not fall under any of mentioned categories and their claims are handled separately; however, unsecured amount of claims of secured creditors in their uncompensated amount would be in group (3) or (4) depending on timing when their claim was submitted.

Any remaining funds are distributed to shareholders of bankrupt.

Special circumstances apply to credit institutions (banks) in liquidation and bankruptcy.

See also topic 7.06 Insolvency.

7.04 EXECUTIONS:

Execution in civil matters is granted on basis of: court judgments, court-approved settlements, arbitral decisions, decisions by commissions in labor disputes, and decisions by other tribunals and commissions established by law. Execution of judgments of foreign courts and foreign arbitral awards is ensured by Latvian Civil Procedure Law, European Union regulations, and international treaties (see category 20 Treaties and Conventions, topic 20.01 Treaties). In order to execute foreign judgment or foreign arbitral award, it must be first submitted for recognition in Latvian court.

Court having jurisdiction over domicile of debtor grants writ of execution (izpildu raksts) based on judgment or other decision listed above.

Court may grant writ of execution from date such judgment or other decision has become unappealable under Latvian law and for ten years thereafter. Execution may be effected by: attachment and sale of debtor's property; garnishment of debtor's salary, pension, stipends, or other sources of income; or by other methods provided by law. Based on writ of execution, bailiff, after notifying debtor of commencement of execution proceedings and granting debtor ten day grace period within which to fulfill judgment voluntarily, proceeds to execute judgment.

7.05 GARNISHMENT:

Attachment of monetary debts may be effected by court decree, pursuant to which persons owing payments to debtor must withhold certain percentage of such payments and transfer such withheld payments to creditor, up to amount of creditor's claim. (CPL, § 557 et seq.).

7.06 INSOLVENCY:

Insolvency is governed by Insolvency Law (adopted Nov. 22, 2007).

Insolvency is defined as court-determined status of debtor in the process of legal protection or insolvency process. The legal protection proceedings is a complex of the measures of a legal character for protection of the interests of commercial company in case of limited paying capacity, in order to renew its paying capacity in full. Insolvency proceedings is a complex of measures in order to: (1) Renew paying capacity of the insolvency subject and protect the interests of the body of creditors, by applying settlement or recovery or (2) by applying bankruptcy procedure. Debtor may be declared insolvent if court finds at least one of following criteria: (1) It has not been possible to implement the court order regarding the debt recovery from the debtor by applying compulsory implementation means; (2) debtor has not cleared one or several debts in amount exceeding LVL 1,500 for whom the term has expired; (3) debtor has not fully disbursed the work remuneration or other related compensations or payments within two months from the day settled for disbursement; (4) debtor is not able to clear the debt commitment, which term is due and his debt commitment exceed its assets; (5) at the beginning of liquidation financial statement is evidencing the lack of assets to satisfy all creditors claims; and (6) debtor is not able to meet obligations determined by the plan of measured of legal protection proceedings.

There is no separate insolvency or bankruptcy court and insolvency matters are heard in general court system. Jurisdiction is in first instance court of debtor's legal address. Participants in insolvency procedure are creditors' meeting, administrator, insolvency agency, debtor, and debtor's representatives.

Administrator must have certain qualifications and certificate, and is appointed by court upon recommendation by State Agency ``Insolvency Administration'' which recommendation is made by special Regulations determining random selection. Law states duties and powers of administrator both before and after declaration of insolvency, which include handling debtor's property, investigation of financial affairs of debtor and investigation of creditor claims. Administrator is accountable to both creditors' meeting and State Agency. Administrator must have security (insurance of his/her civil liability) against actions which may cause losses to creditors and is fully liable for all such losses.

Insolvency proceedings may be initiated by debtor itself or by creditor (group of creditors) except secured creditors, administrator in legal protection proceeding, the liquidator of main procedure (according to EU Regulation 2000/1346).

Property of debtor which has been provided as collateral for verified secured creditors is removed from corpus of debtor property subject to secured creditors' claims. Secured creditors may realize their claims against collateral after resolution of insolvency status, but subject to restrictions in Insolvency Law and in coordination with administrator.

Certain prior transactions of debtor described in law may be reviewed and declared void by court upon request of administrator.

Amicable settlement is permissible at any time during insolvency proceedings until auction of debtor's property has begun. Amicable settlement plan is submitted to administrator who must then present same to creditors' meeting. At the first creditors' meeting the settlement must reviewed and can be approved by majority vote, and then compose written amicable settlement agreement within the term of two months. If either possibility or written agreement is not approved in creditors' meeting, meeting must then decide on application of recovery. If plan and agreement are approved in creditors' meeting, court must approve such.

Creditors' agreement on recovery is considered by creditors' meeting if: (1) Possibility of amicable settlement is rejected; (2) amicable settlement is not concluded or concluded settlement is not approved; or (3) the creditors may decide on the possibility of recovery until the completion of a bankruptcy procedure.

Creditors' agreement on recovery is performed by administrator according to decision adopted by creditors' meeting and submitted to for approval to the court. Period within which creditors' agreement on recovery is to be completed is determined in recovery plan and adopted by creditors' meeting and may be extended by approval of creditors' meeting. Total period of recovery plan cannot be longer than five years although it can be prolonged for two years by adoption of creditors meeting.

Secured creditors have certain protections stated in law in event of either amicable settlement or creditors' agreement.

Law provides for special proceedings for insolvency of agricultural producers and of physical persons.

Law provides for special legal protection proceedings. Legal protection proceedings are a set of legal measures for protection of the interests of a commercial company in case of limited solvency in order to restore its solvency in full. The limited solvency is a status, when a commercial company temporarily is short of moneys in order to perform obligations, which are due or will be due in the nearest future. In the meantime of legal protection proceedings, management of company remains and role of administrator is to supervise process of legal protection proceedings.

The legal protection proceedings must be applicable to the commercial companies and not applicable to following finance and capital market participants – insurers, insurance brokerage companies, exchanges, brokerage companies, depositories, investment companies, credit unions, credit institutions, and private pension funds.

The legal protection proceedings may be initiated if company has operated and submitted annual accounts for the last three years to the respective registry.

The decision on the Legal Protection Proceedings must be adopted by the court and after the initiation, the secured creditors are forbidden to request the sale of the secured property, while the non-secured creditors – to submit an application for insolvency proceedings. Initiation of the proceedings also results in suspension of enforcement procedure of a judgment on collection of the amounts and forced performance of obligations.

Development of a program for the legal protection proceedings must be carried out by the company itself. In order to implement the plan, consent of the non-secured creditors is necessary, total of the claims of which constitute at least half of their liabilities.

The program shall be valid, when approved by the court and must be supervised by the administrator. The court judgment must serve as basis for suspension of a contractual penalty, interest raise, default interest raise, and default interest of tax liabilities. Sale of secured property must be executed according to the approved program.

Law also provides for out-of-court legal protection proceedings. Out-of-court legal protection proceedings are accelerated legal protection proceedings, which are subset of above mentioned legal protection proceedings. These amendments prescribe that debtors and creditors may mutually agree on further fulfillment of obligations and thereafter bring this agreement to court for approval. Once court approves proposed program of out-of-court legal protection proceedings, provisions of law concerning legal protection proceedings (as described above) will apply. In contradiction to approval of plan of legal protection proceedings, plan of out-of-court legal protection proceedings may be approved by secured creditors.

Special circumstances apply to credit institutions in liquidation and insolvency.

See also topic 7.03 Bankruptcy.

7.07 LIENS:

Civil Law states that parties may agree on securing liabilities by contractual penalty, guarantee, or down payment.

Contractual Penalty.

In accordance with Civil Law, if parties agree on contractual penalty, party which fails to fully or partially fulfill its obligations must pay contractual penalty, even in cases when termination of agreement has not caused losses to other party. Amount of contractual penalty is stated by mutual agreement between parties and it is not limited to amount of losses which may be anticipated in event of nonfulfillment of agreement. If debtor partially fulfills obligations, contractual penalty must be paid by debtor in full amount. In event of nonfulfillment of agreement, creditor may only claim either fulfillment of agreement or payment of contractual penalty, if agreement does not state otherwise. Party may ask to reduce claimed contractual penalty to reasonable amount, if it is incommensurate, as compared to losses caused by failure to fulfill or duly fulfill performance or in light of other circumstances. However, amount of reduced contractual penalty may not be less than losses caused to other party.

Guarantee.

Civil Law states that guarantee is established on basis of written agreement. Liability of guarantor corresponds to liability of primary debtor; therefore, it may not exceed amount of primary debt.

If creditor raises claim against guarantor, with some exceptions, guarantor may demand that creditor first direct claim to debtor. In event of debtor's default on his liabilities, creditor has equal right to choose against whom to direct claim, debtor or guarantor, if guarantor has undertaken liabilities against creditor to same extent as those of debtor (``as the debtor itself"). Claim can promptly be made against guarantor: if debtor is absent, or if insolvency of main debtor is proved, or if auction is opened on his property. In response to creditor's claim, guarantor may use all objections which debtor might have against creditor. If guarantor satisfies creditor, claims against debtor are transferred to guarantor in amount that has been paid to creditor.

Down payment is paid by one party to another party upon execution of agreement not only as evidence of final execution of agreement but also as security for its fulfillment.

Down payment rights are only established upon actual delivery. Down payment may be given not only in money, but in other valuables as well. When agreement which is secured by down payment is fulfilled, down payment can be either refunded to payer or included in his fulfillment of agreement. If agreement is not fulfilled because of fault of payer of down payment, payer loses right to return of down payment; but if agreement is not fulfilled by party which has received down payment, receiver must refund same to down payment payer in double amount. In addition, party at fault must compensate other party for its losses.

7.08 PLEDGES:

Civil Law states that pledge is creditor's right to debtor's property based on which this property secures creditor's claim. In event of debtor's failure to fulfill obligations, pledge must secure to creditor satisfaction of his claim. Pledge can be established on movable object, immovable object (mortgage), as well as nonphysical object (rights).

Possessory pledge is established by debtor transferring movable object into possession of creditor. In order to establish pledge rights, debtor must be entitled to freely dispose of pledged object. Pledgee must, while pledge is at his disposal, maintain it as his own property. Pledgee may not use object pledged to him without special permission to do so.

If movable or immovable object is transferred as pledge into possession of creditor, in accordance with Civil Law it is deemed to be pledge of use. With regard to pledge of use, creditor has not only right but also obligation to collect income.

Commercial Pledges.

Law ``On Commercial Pledge'' (adopted Oct. 21, 1998) states that company, in order to secure its obligations, may pledge property owned by it: movable property (both physical and nonphysical) and shares in joint stock company, capital shares, and bonds which are not traded on exchange. Law also allows company to pledge itself provided company is registered in its entirety in Latvia. Shareholders may pledge their shares owned in company. Commercial pledge is deemed to be established and binding against third parties as of date of its registration with Commercial Pledges Registration Dept. of Register of Enterprises. Commercial pledge has priority over unregistered pledge of movable property.

Commercial pledge is registered with Commercial Pledges Registration Dept. of Register of Enterprises based on notary approved application of both pledgee and pledgor. If based on court decision, only pledgee need to sign application. State fee is imposed on registration of commercial pledge. If pledgor does not submit respective application, pledgee is entitled to claim registration of pledge at court. At registration of commercial pledge, amount of secured claim is stated, as well as restrictions regarding permitted activities with respect to object of commercial pledge.

In order to register new commercial pledge to assets already pledged, approval of existing pledgees is required. If assets of enterprise are pledged to several creditors as commercial pledge, priority of satisfying creditors' claims is stated according to their registration dates. Pledgee is entitled to assign claims secured by commercial pledge. If pledgor alienates pledged object without consent of pledgee, transferee takes pledged object subject to claims and defenses of pledgee, if transferee did not act in good faith. If transferee acted in good faith, transferee takes pledged object free of pledgee claims.

Commercial pledge is cancelled based on notary approved application of pledgee or based on decision of court, or five years have passed since the commercial pledge registration date and no written notification has been submitted to the Register of Enterprises from the commercial pledgee about the extension of the term.

Financial Collateral.

Law on Financial Collateral (adopted Apr. 21, 2005) provides for special regulation regarding issuing, receiving, and usage of financial collateral in cases when at least one of parties is state or municipality (including institutions), financial institution (amongst others—central bank, depository, banks), or several other national and international entities.

Financial collateral is financial resources (money [except coins and notes], which in any currency has been credited to account [including all types of deposits]) or financial instruments (amongst others—transferable securities, promissory notes, deposit certificates, derivatives) which on contractual basis are used as collateral in securing fulfillment of financial obligations.

8 DISPUTE RESOLUTION

8.01 ARBITRATION AND AWARD:

Disputes arising from civil matters may be submitted to arbitration where provided by Latvian law, bilateral or multilateral international treaties or parties' agreement. Parties may submit any dispute to arbitration, except for: matters of family law, inheritance law and certain matters related to rights of things in respect of real property; if ruling relates to person who is not party to arbitration agreement; if one of parties is state or municipal authority; if dispute is related to amendments to the Civil Records Registry, matters of ejection from living accommodations; certain matters relating to labor law; and matters relating to rights or duties of insolvent persons. Agreement to arbitrate must be in writing. An award of an arbitration court is mandatory for the parties and must be executed voluntarily by them within the time period stipulated in such award. *Awards* of a permanent arbitration court may be executed compulsory after court of general jurisdiction has issued writ of execution with respect to award granted by arbitral tribunal. In cases specified by Civil Procedure Law, court of general jurisdiction has right to deny issuance of writ of execution for compulsory enforcement of arbitral award. Republic of Latvia is party to New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (June 10, 1958).

9 DOCUMENTS AND RECORDS

9.01 ACKNOWLEDGMENTS:

See topic 9.02 Notaries Public. Republic of Latvia is party to Hague Convention Abolishing the Requirement of Legalization for Foreign Public Documents (Oct. 5, 1961).

9.02 NOTARIES PUBLIC:

Operation of Notaries Public is regulated by Law ``On Sworn Notaries Public'' (adopted on June 1, 1993, as am'd). Sworn notaries public are appointed for life term by Minister of Justice upon recommendation of Council of Sworn Notaries of Republic of Latvia. Sworn notaries public: must be citizens of Republic of Latvia, must have law degree (as from 2012 masters degree in law will be required), and must have acquired relevant experience by working as assistant to notary public or by performing any other legal work. Sworn notaries public are members of legal system operating within designated jurisdiction of regional court.

Direct supervision of operation of sworn notaries public is performed by regional court in whose jurisdiction respective notary public is located.

Main tasks of public notaries are: to prepare certifications by certifying acts (notarial deeds), to certify compliance of copies and translations with original documents, to certify signatures, to certify that person is alive, to certify presence or non-presence of counterparts for execution of legal transactions or performance of other duties, to certify contents of safes and other storages, to certify time of presentation of documents, and to certify statements of claims.

Furthermore, duties of public notaries include legal consultations, preparation of acts, including agreements, acceptance of money, securities and documents for storage, and preparation of projects for distribution of property.

Several of sworn notaries' functions can also be performed by assistants to sworn notary.

Acts and certifications prepared by sworn notaries public are public documents.

Following amendments to law, as of Jan. 1, 2003, notaries also deal with inheritance matters which earlier were within competence of court. Furthermore, form of certification of documents was changed, imposing personal responsibility on notaries for correctness of certified documents and compliance thereof with requirements of law.

10 EMPLOYMENT

10.01 LABOR RELATIONS:

Labor laws of Republic of Latvia apply to all employees and employers, irrespective of their legal status, if labor relations are based on employment contract. (Labor Law, adopted on June 20, 2001; effective from June 1, 2002).

Employment contract is written agreement between employee and employer pursuant to which employee undertakes to fulfill certain work in compliance with internal work regulations and directions of employer; employer undertakes to ensure salary and fair, safe, not harmful to health labor conditions.

Employer is entitled to enter into employment contracts with: citizens of Republic of Latvia; persons having residence permit; and foreigners and apatrides (persons without citizenship), if they have permit to work. Persons under 15 years of age and persons who are under age 18 and continue to study at elementary school are not allowed to be employed in permanent work. School students of age of 13 years and older may be employed in easy work which is not harmful to their health, safety and development, or morals in time free of studies. Such work may be undertaken only upon consent of one of parents or guardians.

Employment contracts are entered into for indefinite period of time. Employment contract may be entered into for definite period of time only in cases specified in law in order to perform short-term work. Term of employment contract, extensions included, may not exceed three years. If upon expiry of term, neither party has required termination of employment contract and employment actually is continued, employment contract is considered as entered into for indefinite period of time. Employment contracts: (i) That cannot be executed for definite period of time by law and (ii) that do not specify period for which they are executed are considered to be entered into for indefinite period of time. Transitional Provisions of Labour Law permit that employment contract entered into for definite period retains its validity, if it has been executed prior to effective date of Law.

Upon entering into employment contract, employer may determine trial term for employee, in order to clarify whether employee suits assigned position. Trial period must be stated in employment contract otherwise absence of trial period is presumed. Trial period is not imposed on persons under age of 18 years. Trial term may not exceed three months, excluding period of temporary disability and period of time of absence of employee due to plausible reason. If trial term provided for in employment contract has expired, but employee continues to work, it must be acknowledged that employee has passed trial and future termination of employment contract at initiative of employer may occur only in compliance with general regulations.

All employees are entitled to annual vacations without impact on their work place (position) and average earnings.

Duration of annual vacation is determined in amount of not less than four calendar weeks, not counting state holidays. Employee may request and employer must allocate vacation in full amount for first year of employment if employee has been employed by respective employer not less than six months without interruption. Vacations for second and subsequent employment years may be allocated at any time during year in accordance with vacation schedule set by employer after consultation with representatives of employee or in accordance with mutual agreement between employer and employee. Compensation of vacation time in money is prohibited, except in those cases when legal relations between employer and employee are terminated and employee has not used vacation. It is prohibited to divide annual vacation into parts such that one part is shorter than two uninterrupted calendar weeks.

Employees who are entitled to additional vacation are as follows: those who work in hazardous conditions; who have three or more children under age 16; and who raise handicapped child. Persons under age 18 are entitled to longer vacation period, usually one month.

Labour Law prescribes that annual supplementary leave must be at least three days. Other cases may also be specified in Collective Labor Agreement or employment contract when supplementary leave should be granted to employee. Employer may allocate to employee unpaid vacation after receipt of such request from employee.

Employment contract is terminated if: parties agree thereon; term of employment contract has expired; employee initiates termination; employer initiates termination in cases specified in law; parents (guardians) or State Labour Inspectorate require in writing termination of employment with person who is under 18 years of age if such person performs work which jeopardizes his safety, health or morals or negatively affects his development or education; and death of individual employer occurs, if performance of work has only been connected personally with employer.

Employee is entitled to terminate employment contract at employee's own initiative, giving one month prior written notice or disregarding one month notice term if serious reason exists. Employment contract can be terminated earlier than one month after notice if parties agree thereon.

Employment contract may be terminated at employer's initiative, if: employer is liquidated; number of employees is reduced; employer states that employee does not have sufficient professional skills; employee cannot proceed with respective work by reason of health; employee is restored to work place which employee has been occupying before; employee has been in work place under influence of alcohol, narcotics or drugs; employee has without justified cause significantly violated employment contract of employment or specified working procedures; employee, when performing work, has acted illegally and therefore has lost trust of employer; and employee, when performing work, has acted contrary to moral principles and such action is incompatible with continuation of employment; employee has grossly violated labour protection regulations and has jeopardized safety and health of other persons.

11 ESTATES AND TRUSTS

11.01 DEATH (PRESUMPTION OF AND ACTIONS FOR):

Court having jurisdiction over missing person's last domicile can declare missing person dead upon request of interested party or of absentee's court-appointed curator. This request can be made if ten years have elapsed since end of year in which information about now missing person was last heard. If missing person was 70 years or older, such period is reduced to five years. Court arranges for public notice in newspapers requesting missing person or third persons having knowledge of missing person to report to court. If court does not receive further information, it declares missing person dead by judgment.

Missing person may be declared dead according to above provisions if missing person's last domicile was in Latvia. If person has left property in Latvia, Latvian provisions apply to this property even if missing person was not domiciled in Latvia.

11.02 DESCENT AND DISTRIBUTION:

Decedent's estate consists of decedent's real and movable property, rights and obligations at time of decedent's death. Estate is legal entity and may acquire rights or undertake obligations.

If decedent does not provide otherwise by testament, following statutory rights to intestate succession take effect:

Surviving spouse becomes decedent's heir regardless of marital property regime in effect during marriage. Surviving spouse receives share equal to each child's share, if there are fewer than four children. If there are four or more children, surviving spouse receives one-fourth of estate.

Right to intestate succession is based on blood relationship or adoption and does not extend to in-laws. Decedent's relatives inherit in certain order that is based on kind and proximity of relationship. Four classes of heirs are: (1) All direct descendants, (2) decedent's parents, siblings, and children of siblings, if such sibling died before decedent, (3) decedent's half-siblings and children thereof, if such half-sibling died before decedent, and (4) remaining more distant sideline relatives. Member of lower class does not become heir if any member of higher class is still alive. (CL, § 398 et seq.).

Above provisions apply to estates located in Latvia. Estate's assets may be distributed to heirs residing abroad only after statutory rights of all persons residing in Latvia have been satisfied. (CL, §§ 16, 17).

See also topic 11.05 Wills.

11.03 EXECUTORS AND ADMINISTRATORS:

Testament is executed by executor named therein. If testator has not named executor, heir named in testament functions as executor. If testator has not named heir, competent court appoints administrator.

Executor has rights and obligations specified in testament. If testament contains no such specifications, executor's obligation is only to ensure that testator's last will is realized. As there is no division of law and equity, executor does not acquire title to estate. Executor has neither right nor obligation to manage estate's assets, if testator has not specifically provided for such management. If, however, heir designated in testament has not yet accepted inheritance, or if testator has named no heirs, executor manages estate's assets until competent court has appointed administrator.

If statutory heirs of decedent who has not left testament, or testamentary heirs of testator, are known, have legal capacity and can be contacted, court does not take measures for estate's administration, unless one of heirs expressly so requests. Court must designate administrator on its own in following cases: if one or all of heirs are not known or cannot be contacted, if heirs have not accepted inheritance, if one of heirs lacks legal capacity, or if it is known that estate is burdened by debt and creditors' rights are endangered.

11.04 TRUSTS:

Trusts within meaning of law of equity are not known in Latvian law, since there is no distinct system of equity comparable to that known in Common Law. Similar aims can be reached by civil law constructs such as guardians, administrators, and executors. Law of descent and distribution does not provide for division of title comparable to division between trustee and holder of equitable right under Common Law.

11.05 WILLS:

Wills (testaments) and contracts of inheritance are governed by Civil Law. Minor may make valid testament if minor is at least 16 years of age. Testament may be executed as public testament before notary public, rural district court, or before Latvian Consul abroad before two witnesses. Private testament must be in writing and made before two witnesses who also must sign testament. However, if testator has written and executed testament in his own hand, testament is valid without witnesses.

Heirs are deemed to have accepted inheritance if they do not expressly reject inheritance within time period determined by testator or, if testator has not determined such time period, within one year of being informed of opening of probate proceedings.

Testator may dispose of all of his property by testament; however, his statutory compulsory heirs must receive their respective statutory shares of estate. Compulsory heirs are surviving spouse and direct descendants, and, if above do not exist, testator's living parents. Compulsory shares are determined by number of compulsory heirs alive. Compulsory statutory share equals half of such heir's intestate share (see topic 11.02 Descent and Distribution).

Testator may name legatees with respect to separate items of estate; such legatees, without becoming heirs to estate as whole, have right to demand receipt of items from heirs or executor.

12 FAMILY

12.01 ADOPTION:

Adoption of minor is permitted if adoption is in minor's best interests and if adoption will result in true parent-child relationship. Adopter must be at least 25 years old and be at least 18 years older than adoptee. Upon adoption, adopted child and its descendants acquire same personal and property rights as children born in adopted parents' marriage. Adopted child's relationship with its natural parents ends.

12.02 DIVORCE:

Marriage is dissolved by court based on application of one or both spouses. Marriage can be dissolved if it is frustrated. Marriage is deemed to be frustrated if spouses live separately for at least three years. If spouses live separately for less than three years then marriage can be dissolved only in following cases: (1) Continuance of marriage for spouse who has applied for divorce is impossible due to reasons related to other spouse and due to which reasons conjugal life with him or her would be cruelty to spouse who has applied for divorce; (2) both spouses have applied for divorce or one spouse agrees to claim of other spouse regarding divorce; and (3) one spouse has started cohabitation with another person and child is born or is expected in this cohabitation.

Marriage is not dissolved although it is frustrated if and to extent that maintenance of marriage in exclusive cases and due to special reasons is necessary in interests of minor child born in wedlock. Marriage is not dissolved if spouses have not agreed on custody over child born in wedlock, child maintenance, and dividing of joint property.

Upon request of interested person, marriage may be annulled on following grounds: lack of registration, lack of legal capacity, and in cases of consanguinity.

Above provisions apply if Latvian court is to grant divorce or annul marriage, regardless of spouses' citizenship. Divorce or annulment by foreign court will be recognized in Latvia according with Civil Procedure Law of Republic of Latvia.

12.03 HUSBAND AND WIFE:

If spouses do not agree otherwise by contract, each spouse retains separate ownership and management of assets owned by that spouse before marriage as well as property he or she acquires during marriage—separate property of each spouse is property owned by spouse before marriage, or property spouses have, by contract, designated as separate property; articles, which are suitable only for personal use of one spouse, or are required for his or her independent work, property, which was acquired *gratis* during marriage by one of spouses, income from separate property of spouse that is not assigned to needs of family and joint household finances and property that replaces property referred to above. Assets acquired jointly or by one spouse with financial or other assistance of other spouse during marriage become joint marital property. Both spouses are responsible for fulfilling contracts into which one or both spouses entered and object of which was related to family household. If spouses live separately, spouse not responsible for separation is entitled to financial support from other spouse, unless spouse requesting support avoids supporting him- or herself for no important reason. If real property is separate marital property, this fact must be registered in Land Book.

By contract, spouses can agree on system of separate marital property or of joint marital property. Separate marital property means that even during marriage, all property remains separate. One spouse may not manage, use, or dispose of other spouse's property without other spouse's permission.

Joint marital property means that even property acquired before marriage becomes spouses' joint property. Concluding marriage contract which provides joint ownership of property, spouses may specify defined property as separate property of each spouse. In contract establishing joint property, spouses agree whether one or both spouses will manage property. If real property is spouses' joint property, this fact must be registered in Land Book. Joint property regime ends upon spouses' agreement or by court decision, or upon death of one spouse, divorce, or bankruptcy of one spouse. Restrictions on spouse to dispose of other spouse's property are effective as against third parties only if restriction is registered in marital property register at spouses' domicile.

Above provisions apply if spouses' domicile is in Latvia. If spouses' property is located in Latvia, Latvian law applies to such property, even if spouses' domicile is not in Latvia.

12.04 INFANTS:

Minority lasts until person reaches 18 years of age. Minors have no legal capacity.. In exceptional circumstances and for especially good cause, when guardians and closest kin of minor attest that behavior of minor is irreproachable, and he or she is able to independently protect and defend his or her rights and perform his or her duties, minor may be declared as adult even before he or she has attained age of 18, but not earlier than before he or she fully attains age of 16. As contracts entered into by persons lacking legal capacity are void, minors must be represented by parents or guardians. By default, parents are guardians of their minors. If one parent dies, other takes over guardianship. If both parents are deceased or their guardianship has been suspended, competent court appoints guardian. Parents can appoint guardians for their children by testament. Guardian appointed by parents' testament or by court manages minor's assets and is responsible to court.

Person's legal capacity is determined by jurisdiction in which person is domiciled. If person has several domiciles and one domicile is in Latvia, person's legal capacity is determined by Latvian law.

12.05 MARRIAGE:

Spouses must both be at least 18 years of age. Spouse less than 18, but at least 16 years of age can marry with his or her parents' or guardian's consent. Marriage is prohibited if court has declared spouse to be without legal capacity due to mental illness. Marriage also is prohibited between relatives related in direct line, between full or half siblings, between persons of same sex, between adopted parents and children, or where marriage would result in bigamy.

These provisions apply if marriage is entered into in Latvia.

Based on Law ``On Civil Status Acts'' (adopted Mar. 17, 2005, as am'd), which replaces former Law ``On Acts Regarding Civil Status'' (adopted Oct. 21, 1993, as am'd), if foreigner at time of entering into marriage is legally residing in country, he or she may enter into marriage with citizen of Latvia or noncitizen of Latvia, or foreigner who has valid permanent residence permit. Upon entering into marriage, foreigner must submit personal identification documents, documents on annulment of previous marriage (if any) and, in addition, also submit document issued by competent foreign institution that there are no obstacles to this person to enter into marriage in Republic of Latvia.

13 FOREIGN TRADE AND COMMERCE

13.01 CUSTOMS DUTIES:

As Latvia since May 1, 2004 is Member State of European Union, all national legislation governing customs duties lapsed and from EU accession date EU custom regulations apply. Accordingly, customs tariffs are applied in accordance with EU regulation and as general rule only are applicable to goods imported from non-EU states.

On Mar. 18, 2004, Customs Law was adopted (entered into force on May 1, 2004) which governs customs issues within national competence such as operation of custom brokers, customs bail, etc.

13.02 EXCHANGE CONTROL:

There are no foreign currency exchange controls applicable to repatriation of profits from Latvia.

13.03 FOREIGN EXCHANGE:

Business of purchase and sale of foreign currency cash in Republic of Latvia is permitted to companies (enterprises) registered in particular manner and only upon receipt of license issued by Bank of Latvia, as well as credit institutions which have right to render respective financial services in Republic of Latvia. Companies must obtain license for each particular place of purchase and sale of foreign currency. After receipt of license, company which is engaged in foreign currency purchase and sale transactions must adopt and follow certain standards in order to identify and prevent suspicious and unusual transactions with foreign currency. Company does not have right to carry out other types of commercial activity at places of purchase and sale of foreign currency.

Bank of Latvia has right to perform audit at registered address of company purchasing and selling foreign currency or in place of purchase and sale of foreign currency, or examine documents submitted by company, in order to assure that all requirements of law and Bank of Latvia are complied with (see ``Regulations on Purchase and Sale of Foreign Currency Cash'', approved on May 13, 2009 by Supervisory Board of Bank of Latvia). In case of certain violations, Bank of Latvia has right to annul issued licenses.

13.04 FOREIGN INVESTMENT:

In general, attitude toward foreign investments in Latvia is favorable and, therefore, any form of foreign investment is freely permitted, for which national regime is being guaranteed; foreign investors have same rights and obligations as those of Latvian business persons. There are no special laws regulating foreign investments in Latvia, but these investments are performed and protected under general procedure, subject to principle of equal protection, principle of equal treatment, as well as principle of equal business activity. Even though there is no separate regulation on forms of foreign investments in Latvia, nevertheless, following forms of foreign investments can be derived from general regulation and overall practice: (1) By foundation or acquisition in any other way of interest in capital company (limited liability company or joint stock company) or personal company; (2) by opening branch of foreign company in Latvia, through which regular business activity can be performed on behalf of this company; (3) by purchasing different types of securities or financial instruments of other kind; (4) by creating or acquiring different types of properties and other assets; and (5) by lending cash funds or transferring into use different types of assets owned by foreign investor.

Foreign investors can choose most appropriate and beneficial form of investment at their own discretion.

Foreign investors may repatriate their profits from Republic of Latvia after payment of all taxes provided for in laws of Republic of Latvia.

Relief from import duties and value added tax may be available for goods imported into Latvia as fixed assets which are not intended for sale subject to certain restrictions.

After settlement of obligations to creditors, foreign investor may freely remove its investment in Republic of Latvia enterprise from Republic of Latvia.

Investment protection treaties are currently in force with following countries: Austria, Armenia, Azerbaijan, Belarus, Belgium, Bulgaria, Canada, China, Croatia, Czech Republic, Denmark, Egypt, Estonia, Finland, France, Georgia, Germany, Great Britain (including its dependencies, Isle of Man, Isle of Guernsey and Isle of Jersey), Greece, Hungary, Iceland, Israel, Kazakhstan, Korea, Kuwait, Kyrgyzstan, Lithuania, Luxembourg, Moldova, Netherlands, Norway, Poland, Portugal, Romania, Singapore, Slovakia, Spain, Sweden, Switzerland, Turkey, Ukraine, U.S.A., Uzbekistan, and Vietnam.

All disputes with respect to foreign investments are settled in Latvia under general procedures or in compliance with international treaties entered into by Latvia, including Convention adopted in 1965 on the Settlement of Investment Disputes between States and Nationals of other States.

13.05 FOREIGN TRADE REGULATIONS:

As Member State of European Union, Latvia is bound by Common Commercial policy of EU. It means that agreements on free trade or economic cooperation concluded by Latvia before May 1, 2004 lapsed and on this date entered into force EU agreements on most-favoured-nation treatment. There are no restrictive limitations in circulation of goods between Latvia and another EU Member State although quantitative restrictions could be applied on import of particular kinds of goods from non-EU Member States (steel, textiles, etc.).

Along with EU, Latvia is member of World Trade Organization (WTO) since 10 Feb. 1999.

In protection of internal market EU and WTO legislation applies and admissible are following instruments: (1) Antidumping measures; (2) anti-subsidy measures; and (3) protection against increasing volume of imported goods.

14 HEALTH

14.01 FOOD:

In accordance with the Law On Supervision of the Handling of Food Law (adopted Feb. 19, 1998, as am'd), handling of foodstuffs must comply with quality and mandatory harmlessness requirements. Food companies whose activities include meat processing, food processing, producing, freezing, storing, and packing must be inspected and certified for each and every activity by Food and Veterinary Service. Food companies with activities other than those must be registered in special food producers' register with Food and Veterinary Service. Such registration is granted upon evidence that producer may permanently ensure compliance of its activities and manufacturing with effective requirements. Certification and registration confirms that food producer is able to ensure conformity of its activities and production to legal requirements and is subject to supervision and control of state and is periodically inspected by authorities. Food producer must prevent any activity or process which adversely affects harmlessness of food, and to ensure harmlessness procedures or control measures for relevant handling of food, and their implementation in food preservation and testing. Materials and objects which are in contact or which may come into contact with food, as well as with water intended for human consumption, must be manufactured in accordance with good manufacturing practices. Certain means of transportation need special permits before food may be transported. In general, it is prohibited to use radiation sterilisation in handling of food. Mandatory harmlessness requirements for food (at all food handling stages) with respect to admissible level and content of food contamination are determined by Cabinet of Ministers Regulations on Food Contamination (adopted Apr. 20, 2004 as am'd).

Information and advertisement on label may not mislead and may not attribute qualities to food products that they do not possess. Food producer, which has manufactured or prepackaged food, or distributor of food, if they have changed original prepackaging or labeling or have attached new label, must be responsible for conformity of labeling with actual indicators and prepackaged contents. In accordance with Law ``On Protection of Consumer Rights'' (adopted on Mar. 18, 1999), food must correspond to certain quality requirements, including proper labeling. Rights of consumers are violated if information on particular product is inadequate, incomplete or misleading, false or unclear thereby rendering product unfit for intended purpose. In accordance with Cabinet of Ministers Regulations on Labeling of Food Products (adopted Nov. 23, 2004), all foodstuffs to be sold either wholesale or retail must have labeling showing name of product as well as information on components and quantity of each constituent component or group of components, net weight or volume of packaged food products, minimum validity term, special provisions regarding storage or use (if necessary), name and address of producer, packager or importer (name and address may be abbreviated, if abbreviation allows identification of producer or importer) registered in EU, information regarding place of origin (if lack of such information may seriously mislead consumer), detailed instructions concerning use (if necessary), volume of alcohol in beverages which contain more than 1.2% by volume of alcohol, calorific value and nutrient value (if necessary.), and some specific food products might require additional indications, in accordance with special laws. Labeling must be in conspicuous place on packaging or attached to packaging. Information on labeling must be clearly legible and non-erasable. Product name, net mass or volume, and minimum or final validity date (as well as alcohol content, if any) must be included within same visible area of labeling. Use of indication ``diet'' on foodstuffs is subject to special regulation. If food product has been prepared in particular physical format (e.g. powderized, concentrated, granulated, etc.) or has been ionized or genetically modified, or contains sweeteners, poliol, high concentration of caffeine (except drinks made from tea or coffee); packed using packaging gasses; this must also be stated on label. Contents of foodstuffs must be stated according to product name; however, if product consists of only one food product and product name is same as food product, then content need not be listed. If product contains any artificial additives, then these must also be indicated. All information which applies to particular food product must be provided in Latvian language.

State supervision and control of handling of food is ensured by relevant state supervision and control authorities (Food and Veterinary Service) who have right to perform control and conformity assessments of handling of food and food producers and to certify that they are operating in compliance with regulatory enactments in force and provisions of good working practices. Officials of such authorities may impose sanctions on persons held liable for violations, and to confiscate food, if it is harmful to human health, life, or environment, or is being distributed illegally. In worst case scenario, the FVS officials are also entitled to suspend the operations of a food company and would also oversee its reinstitution of operations.

14.02 MEDICAL TREATMENT:

Medical treatment in Latvia is determined by Medical Treatment Law (adopted on June 12, 1997 as am'd) and—with respect to operations with medical devices—also by Law ``On Radiation and Nuclear Safety'' (adopted on Oct. 26, 2000 as am'd) and Law ``On Technical Supervision of Dangerous Equipment'' (adopted on Sept. 24, 1998 as am'd). Number of legislative bills issued on basis of above laws provides legal requirements to be followed in order to register, import, and sell medical products and devices in Latvia, including decrees that authorize Inspection Institutions to Inspect Dangerous Equipment; Cabinet of Ministers Regulations ``Procedure of Registration, Conformity, Assessment, Distribution, Exploitation and Technical Supervision of Medical Equipment'' (adopted on Aug. 2, 2005 as am'd), Cabinet of Ministers Regulations ``Registration Proceedings of Dangerous Equipment'' (adopted on Nov. 17, 2009), Cabinet of Ministers Regulations ``Procedure of Issue of Special Permits (licenses) and permits for activities with sources of ionic radiation and procedure of public discussion of establishment of ionic radiation objects of state importance or Performance of significant changes therein'' (adopted on July 3, 2001 as am'd), Cabinet of Ministers Regulations ``Regarding Protection Against Ionising Radiation in Medical Exposure'' (adopted on Mar. 5, 2002 as am'd), Cabinet of Ministers Regulations ``On Certification of Medical Practitioners'' (adopted on Dec. 23, 1997 as am'd), ``On Certification of Healthcare institutions and its structural units'' (adopted March 20, 2001), ``On Register of Healthcare institutions'' (adopted Mar. 8, 2005), ``On Formation, Supplementing and Maintenance of Healthcare Practitioners and their Support Staff Register'' (adopted Feb. 2, 2009), and Cabinet of Ministers Regulations on Mandatory Requirements for Medical Treatment Institutions and its structural units (adopted Jan. 20, 2009).

In accordance with above legislation, every medical practitioner and medical institution in Latvia must register within special registers and undergo certification. The use of medical devices in medical practice might be subject to prior notification; whereas, medical technologies would require prior approval and comply with registration requirements of medical products and devices. Registration proceedings with respect to medical products and devices are carried out by State Agency of Medicines. Same institution also maintains register of medical devices, where devices that must be notified of are listed. However, verification of new medical technologies used in medical treatment (meaning methods, procedures, actions, manipulations and required medical devices, products and medicaments) is carried out by Health Economy Centre.

Use, sale, and distribution of medical products are only permitted if they are duly registered. Issued registration certificate must constantly be with its holder. Holder of registration certificate is directly responsible for ensuring and activation of precautionary system of medical equipment and products. If medical equipment or products have become dangerous and may cause threat to health or life of persons, issued registration certificate can be annulled, in order to ensure precautionary system and terminate their sale or distribution.

Any entrepreneurial activity in Latvia with radioactive substances and other sources of ionized radiation in medicine is subject to receipt of all necessary regulatory approvals and licenses. Special regulations provide a set of rules how equipment with ionic radiation must be used in medical practice.

Medical equipment that may endanger health or life of persons, environment, and property is regarded as dangerous and is subject to state supervision and control. Consumer Rights Protection Centre holds list of dangerous equipment which is updated by duly licensed and accredited inspection institutions.

14.03 PHARMACY:

Pharmaceutical activities are determined by Pharmacy Law (adopted on Apr. 10, 1997, as am'd), Law ``On Precursors'' (adopted on May 9, 1996 as am'd) and Law ``On the Manner of Lawful Turnover of Narcotic and Psychotropic Substances and Medicine'' (adopted on May 9, 1996 as am'd), as well as by number of legislative bills acts providing manner of operations with pharmaceuticals in Latvia. In respect to pharmaceuticals (medicines), the main supplementary legislative acts are: (a) Cabinet of Ministers Regulations of ``Procedure for Registration of Pharmaceuticals'' (adopted on May 9, 2006 as am'd), (b) Cabinet of Ministers Regulations ``On lists of controllable narcotic and psychotropic substances and precursors in Latvia'' (adopted on Nov. 8, 2005), (c) Cabinet of Ministers Regulations ``On Supervision of Side Effects Caused by Use of Pharmaceuticals'' (adopted on Dec. 6, 2005 as am'd), (d) Regulations On Import and Export of Pharmaceuticals'' (adopted June 26, 2007 as am'd), (e) Regulations On Distribution and Quality Control of Pharmaceuticals'' (adopted June 26, 2007 as am'd), (f) Cabinet of Ministers Regulations ``On Order of Purchase, Storing, Use and Stock-taking Accounting of Pharmaceuticals within Medical Treatment and Social Care Authorities Institutions'' (adopted on Mar. 27, 2007 as am'd), (g) Cabinet of Ministers Regulations ``Procedure of Advertising of Pharmaceuticals and Manner for Manufacturer of Medicines to Provide Free Samples of Medicines to Physicians'' (adopted Mar. 6, 2007 as am'd), (h) Cabinet of Ministers Regulations ``Procedures for Issuance, Suspension, Re-Registration and Annulment of Special Permit (license) for Pharmaceutical and Veterinary-Pharmaceutical Activity, Payment of State Duty for its Issuance and Re-Registration, as well as Procedures for Assessment of Conformity and Good Distribution Practices of Pharmacies Pharmacy Stores and Medicinal Products Manufacturing Companies'' (adopted June 26, 2007 to be replaced on Apr. 1, 2010), (i) Cabinet of Ministers Regulations ``Procedure for labeling of medicinal products and requirements in respect of instructions of use of medicinal products'' (adopted Jan. 17, 2006 as am'd), (j) Cabinet of Ministers Regulations ``On Performance of Clinical Research and Use of Pharmaceuticals, Marking of Pharmaceuticals for Research and Procedures for Assessment of Conformity to Requirements of Good Clinic Practices (adopted Feb. 28, 2006 as am'd to be replaced on Apr. 1, 2010), and (k) Cabinet of Ministers Regulations ``on Procedures for Production and Control of Pharmaceuticals, on Qualification Requirements and Professional Experience of Officials Responsible for Production of Pharmaceuticals, and on Procedures for Issue of Good Manufacturing Practice Certificates to Medicinal Products Manufacturing Companies (adopted Apr. 18, 2006 as am'd). In respect to precursors, narcotic and psychotropic substances and medicines, the main supplementing acts are: (a) Cabinet of Ministers Regulations ``On controllable narcotic and psychotropic substances and precursors in Latvia'' (adopted on Nov. 8,

2005) and (b) ``On procurement, receipt, storage, distribution, dispense, accountancy and disposal of narcotic and psychotropic substances and medicines in manufacture of medicines and veterinary medicines by pharmacies and wholesalers of medicines and veterinary medicines'' (adopted June 17, 2008).

The above legislation sets forth the general principles of pharmaceutical activities in Latvia. The state policy and supervision in pharmacy sector is performed by Ministry of Health, State Heath Inspectorate, and State Agency of Medicines; and any pharmaceutical activity in Latvia (such as import, export, distribution, wholesale, manufacture, operation of pharmacy, etc) is subject to receipt of all necessary regulatory approvals (licenses, permits, or notifications). Only medicine and pharmaceutical products (including cures—mineral waters, toothpastes, mechanic contraceptives, cosmetics, and food supplements) registered and included in the Latvian Register of Medicines (including those registered under national procedure, or through European mutual recognition or centralized procedure) or Register of Veterinary Medicines respectively may be distributed in the territory of Republic of Latvia. Registration (aka marketing authorization) is not necessary, except cases when pharmaceuticals: (i) Are produced at pharmacy according to prescriptions issued by physicians or certified veterinarian or medical institutions or veterinary institutions for specific patients, (ii) are intended for scientific research or clinical examinations approved by State Agency of Pharmaceuticals Medicines or, in respect of veterinary medicine, by State Veterinary Service, (iii) are intended for production of other pharmaceuticals, and (iv) are intended to be produced at pharmacy for specific use by specific patient. State Agency of Medicines/State Food and Veterinary Service is entitled to issue special permission for import of non-registered pharmaceuticals registered abroad in other particular exceptional cases, when medicine/veterinary pharmaceutical product to be imported: (i) Is essential for specific course of treatment of specific patient or animal, who may not use medicine/veterinary pharmaceutical product included in Latvian Register of Medicine/Latvian Register of Veterinary Medical Products due to medical indications and provided that appropriate prescription is issued, (ii) is necessary for treatment of specific illness or for performance of particular medical procedure within particular medical institution and medicine, veterinary, pharmaceutical or medicinal products included in Latvian Register of Medicine/Latvian Register of Veterinary Medical Products is not suitable or might be used partially for such treatment due to medical indications and further provided that motivated application of above medical institution is submitted to Agency, accompanied, if necessary, by opinion of respective professional association of doctors/Professional Section of Latvian Veterinary Association, and (iii) is necessary for treatment in cases of natural disasters and catastrophes or epidemics break-outs of animal infectious diseases and provided that order of Minister of Health is issued (in case of medicine). Free samples of medicines can be provided only to physicians, but not more than 1,000 samples to all physicians a year altogether. Donation of medicines to healthcare institutions is subject to special regulation and reporting. The formation of pricing of medicines is also regulated. Certain medicines, under special procedures, might be eligible to be included within the list of state compensated medicines. Only non-prescription medicines can be marketed to general public and any marketing materials must be first confirmed with relevant authorities. Medicinal products registered under centralized registration procedure of European Agency for the Evaluation of Medicinal Products can be distributed without registration of these medicinal products.

15 IMMIGRATION

15.01 ALIENS:

In Latvian legislation, term ``aliens'' is attributed to: (1) Foreign citizens, (2) persons without citizenship, and (3) noncitizens, i.e. permanent residents of Latvia.

Legal status of aliens is regulated by ``Citizenship Law'' (adopted July 22, 1994, as am'd), ``Immigration Law'' (adopted Oct. 31, 2002, as am'd), as well as other specific laws and regulations.

If one of newborn's parents is foreign citizen, child becomes citizen of Latvia if it is born in territory of Latvia, or if it is born outside territory of Latvia and one of parents has permanently lived in Latvia prior to date of birth. If one of parents is citizen of Latvia and another is person without citizenship, then newborn becomes citizen notwithstanding place of birth.

Citizenship does not change for citizens of Latvia as result of marriage with foreign citizen or with person without citizenship, or following divorce. Person's citizenship does not change if spouse acquires or loses Latvian citizenship.

When obtaining Latvian citizenship double citizenship is prohibited.

In accordance with Citizenship Law, for person to obtain Latvian citizenship (under general procedure), he must: (1) Pass test for fluency in Latvian language; (2) show knowledge of basic principles of Constitution, text of National Anthem and history of Latvia; (3) on date of submission of application for naturalization person must have resided in Latvia for five years; (4) have legal source of income; and (5) renounce former citizenship.

15.02 IMMIGRATION:

Immigration issues are regulated by Immigration Law (adopted Oct. 31, 2002, as am'd), Cabinet of Ministers Regulations No. 586 Procedure, under which citizens of Member States of EU countries of European Economic Area and Confederation of Switzerland and their family members immigrate and reside in Republic of Latvia (adopted July 18, 2006), Cabinet of Ministers Regulations No. 44 Regulations Regarding Work Permits for Foreigners (adopted Jan. 20, 2004 as am'd), Cabinet of Ministers Regulations No. 116 Procedures for Employment of Foreigners and Stateless Persons in Latvia (adopted Mar. 28, 2004 as am'd), Cabinet of Ministers Regulations No. 813 Regulations on Residence Permits (adopted Oct. 3, 2006, as am'd), Cabinet of Ministers Regulation No. 22 Regulation on state fee for reviewing of documents necessary for application for a visa, residence permit or permanent resident status of European Community in the Republic of Latvia and services related thereto (adopted Apr.1, 2008), Cabinet of Ministers Regulation No. 591 Regulation on health insurance of foreigners (adopted Jul.28, 2008*)*, and other laws and regulations. Immigration of foreigners is regulated by Office of Citizenship and Migration Affairs (OCMA), State Border Guard, diplomatic and consular missions of Republic of Latvia, and Consular Department of Ministry for Foreign Affairs.

Foreigner has right to enter and reside in Republic of Latvia, if he or she has: (1) Valid travel document; (2) valid visa or residence permit; (3) valid health and life insurance policy; and (4) there are necessary financial resources to stay in Latvia and to return to country of origin or to travel to third country which person is entitled to enter. Taking into account purpose of entry, following documents can be issued to foreigner: (1) Visa (entry visa, transit visa, or airport transit visa) if foreigner will reside in Latvia for less than 90 days in period of six months and (2) residence permit (temporary residence permit or permanent residence permit) if foreigner will reside in Latvia for more than 90 days in period of six months.

In event that foreigner wishes to work in Latvia, he will need to obtain visa or temporary residence permit (depending on duration of stay of person in Latvia) and work permit. Work permit is not required if person has obtained permanent residence permit.

Starting from May 1, 2004, citizens of Member State of European Union and countries of European Economic Area and their family members enter and stay in Republic of Latvia according to laws and regulations of EU. Procedure of their application is set by Cabinet of Ministers. When residing in Latvia for less than 90 days, EU citizens and their family members do not have to register with OCMA. In order to enter territory of Latvia, only valid traveling document (personal identification document) is required. In event that family member of EU citizen who resides in Latvia for less than 90 days is not EU citizen, he or she upon arrival in Latvia will have to present not only valid traveling document, but also residence permit or visa issued to family member of EU citizen in any EU Member State. If EU citizen wishes to reside in Latvia for more than 90 days (counting from date of first entry) and he or she is employed in Latvia as employee, self-employed person, employee, or service supplier in EU, EEA, or by business person of Swiss Confederation which performs his activities in Latvia and other persons listed by law, he or she must register with OCMA in order to receive registration certificate. In event that EU citizens and their family members who are also EU citizens reside in Latvia on permanent basis, OCMA issues to them permanent residence certificates. In turn, if EU citizen's family member residing in Latvia is not EU citizen, he or she must obtain residence permit. If citizen of EU wishes to establish employment legal relationships by entering into employment contract or other civil agreement or to become self-employed person, he or she does not have to obtain work permit.

16 INTELLECTUAL PROPERTY

16.01 COPYRIGHT LAW:

On Apr. 6, 2000, new Copyright Law was adopted which substitutes previous ``Law on Copyright and Associated Rights''. Law has been amended three times, latest on Dec. 6, 2007.

Law states that copyright is owned by author as of moment of creation of work regardless of whether work has been completed, assigned its value, form, or type of manifestation. No registration, special documentation, or observance of any other formality is necessary to affirm copyright ownership. Copyright has nature of moral and economic rights, and as to legal regime it is comparable to rights respecting movable property, but it cannot be object of property claim.

Copyright to works disclosed or not disclosed in Latvia, but which are located in Latvia in any materialized form, is enjoyed by author or his heirs, as well as his other successors in interest. Copyright applies to following works: (1) Literary works (including software); (2) dramatic and musical dramatic works, scripts, literary projects of audiovisual works; (3) choreographic works and pantomime; (4) musical works with or without text; (5) audiovisual works; (6) drawings, paintings, sculptures, graphic art and other works of art; (7) works of applied art, decorations and stage design works; (8) design works; (9) photographic works and works executed in form similar to photographs; (10) sketches, drafts and plans for buildings, structures and architectural works, models of buildings and structures, other architectural designs, city construction plans and models, as well as fully and partly constructed buildings and implemented city construction or landscape objects; (11) geographic maps, plans, sketches and spatial representations, which pertain to geography, topography, and other sciences; and (12) other works of authors.

Derivative works also are protected without any encroachment on author's rights to original works.

If author while employed by employer has created work fulfilling his work duties, moral, and economic rights to such work are owned by author. In accordance with contract, economic rights of author may also be transferred to employer. With regard to employee who has developed software, economic rights of author are owned by employer, unless otherwise provided in employment contract.

Author has inalienable moral rights of author to: (1) Authorship; (2) decision whether and when work will be disclosed; (3) disclaimer of work; (4) name; (5) inviolability of work; and (6) opposition.

None of said rights may be transferred to another person during lifetime of author.

Author has following exclusive economic rights: (1) To disclose work; (2) to publish work; (3) to perform work in public; (4) to distribute work; (5) to transmit work; (6) to retransmit work; (7) to make work available to public by wire or wireless means, in such way that members of public may access them from any place and at time individually chosen by them; (8) to rent, lease or publicly lend originals or copies of work except three-dimensional architectural works and works of applied art; (9) to directly or indirectly, actually, or potentially reproduce work; (10) to translate work; and (11) to arrange, dramatize, cinematize, or otherwise change work. Authors of computer programs and databases have different exclusive economic rights.

Heirs of author receive right to disclose and use work and receive royalties for permission to use work, as well as for use of work. Heirs have duty to protect moral rights of author. Other successors in interest to copyright, including legal entities, may receive only economic rights of author.

Copyright is effective throughout entire lifetime of author and 70 years after his death. Works with expired copyright term may be freely used, subject to inviolability of name and work.

To acquire right to use work, users must, with regard to each type and time of utilization of work, obtain permission of copyright owner issued in form of license contract or license.

Natural person may reproduce one copy of legally obtained film or phonogram or visual work for personal needs, without permission of author, but by paying compensation for data carriers.

Associated rights are rights enjoyed by performers (actor, singer, musician, dancer, etc.), producers of sound recordings, film producers, and broadcasting organizations. Object of associated rights is performance and its fixation, sound recording, film and broadcasting program. Sound recording producers, film producers, and broadcasting organizations exercise their rights subject to rights of authors.

Associated rights are in force for 50 years following first performance. Moral rights of performers are retained as long as economic rights are in force.

Law also states special provisions for database protection. Developer of database, which has been developed, inspected, or completed as result of material qualitative or quantitative contribution is individual or legal entity that has undertaken initiative and borne risk while developing database.

Action which impinges moral or economic rights of subject of copyright or associated rights, including fixation of protected objects, their publication, making public, reproduction, and distribution in any manner without consent of subject of rights is infringement of copyright and associated rights. Work copies produced as result of illegal actions are counterfeit copies. Copyright holder may seek enforcement of his exclusive right of ownership together with request that his claim be secured by means of injunction or otherwise. Copyright holder may also claim damages, including moral damages.

16.02 INDUSTRIAL DESIGN PROTECTION:

Industrial design protection is governed by ``Law On Industrial Designs'' (adopted Oct. 28, 2004, as am'd).

Law provides for registration, exploitation, and protection of industrial designs. This Law is not exclusive; certain other normative acts can be applied to industrial designs such as Law on Copyright.

Law defines industrial design as external appearance of article or its part created as result of its peculiarity, especially its lines, form, color, configuration, surface structure, or specifics of materials used. Article is defined as any industrial or artisan creation, including parts intended to be connected or used in complex article, packaging, decoration, graphic symbols, or typographic shrifts. Industrial design is granted legal protection if it is new and has individual character.

Right to industrial design belongs to designer (author of industrial design) or his legal successor. If industrial design has been created during performance of employment duties, rights to industrial design belong to designer unless employment contract provides otherwise.

Law defines designer as author of industrial design, physical person, whose creative efforts have resulted in creation of industrial design. Independently of identity of industrial design owner or applicant, designer has moral rights which may not be transferred to another person. These are: (1) Right to authorship and (2) right to name.

To obtain exclusive rights to industrial design, owner must submit to Republic of Latvia Patent Office respective application and other documents specified in Law to have industrial design registered. Foreign applicants submit applications and arrange correspondence with Patent Office via industrial design agent. Law acknowledges convention and exhibition priorities in accordance with Paris Convention. Consideration of application is performed within three month period from filing date and results in decision to grant or refuse registration. If decision is positive, written announcement regarding industrial design registration is notified to applicant and after payment of fee industrial design is registered and published.

Registration grants owner exclusive rights to utilise or forbid others to utilise industrial design. Utilisation is defined loosely in Law but is said to especially include manufacturing, offering for sale, commercializing, importing, exporting, using and storing for said purposes articles of industrial design.

Within three months after date of publication of industrial design in official bulletin of Patent Office, any interested person may oppose registration of industrial design by submitting opposition to Board of Appeals of Patent Office and paying State fee. Submitted opposition must be in writing and with references to relevant legal provisions.

Industrial design registration is valid for period of five years following application date, but thereafter, term can be extended by paying relevant State fee for successive five-year periods until maximum of 25 years after application date has been reached.

Economic rights to registered or applied-for industrial design can be transferred to another person, jointly with enterprise or its part, or independently. Rights to use industrial design may be granted entirely or partially by license.

Disputes relating to industrial designs are reviewed by court in manner specified in law. Claim in industrial design must be raised within three years from date on which person has become aware of infringement.

Any use of industrial design which is contrary to exclusive rights of design owner is infringement of his rights, and court may award infringer to compensate losses (including moral damages and lost profit), and compensate legal fees. In addition, court may order injunction for stoppage of infringing actions. In order to eliminate further infringement, court may impose duty to destroy illegal articles as well as equipment used in their manufacture or transfer them for charitable purposes.

16.03 PATENTS:

Issues regarding patents of inventions, their use, and protection in Latvia are regulated by ``Law On Patent'' (``Law'') adopted on Feb. 15, 2007.

In accordance with Law, patent must be granted for invention which is new, possesses invention level and is industrially applicable. Law also lists objects of invention to be protected under this Law which incorporates device, process, substance, substance composition, biological material, etc., and non-patentable objects which include discoveries, scientific theories, mathematical methods, aesthetic solutions, intellectual activity methods, plans, computer programs, etc.

Right to patent must be enjoyed by inventor or successor in interest. Priority rights specified in Paris Convention must be acknowledged in Latvia (within period of 12 months after submission of application).

Person who wishes to acquire patent for invention, must submit application to Patent Office. Foreign applicants may submit their applications solely via patent agent registered with Patent Office. Applicant may only request patent for one invention in one application form.

In accordance with Law, application review is performed in two stages—preliminary review of application and examination of application. Preliminary review of application is performed within three months from filing of application. Publishing of application accepted by Patent Office is performed 18 months after application priority date. Upon applicant's request and payment of fee, announcement of application may be published before expiry of 18-month period but not before preliminary review has been performed. After such publication any third party may review application materials at Patent Office, and application obtains preliminary protection.

After publication date of announcement, Patent Office must pass resolution regarding granting or refusal of patent, without any application examination with regard to patentability of invention pursuant to provisions of Law. If resolution is positive, Patent Office must prepare publication of entire application and issue patent.

If resolution of expert examination of Patent Office is negative, applicant has right, within three months, to appeal this resolution of Patent Office at Board of Appeal of Patent Office.

Within nine months from date announcement of grant of patent is published, any person, upon payment of fee, must have right to file with Board of Appeal of Patent Office substantiated opposition against grant of patent which must be delivered to applicant by Board of Appeal and reviewed by same within three months after receipt of response of applicant.

Law also contains specific provisions regarding international applications under Patent Cooperation Treaty and European patent applications under European Patent Convention.

Law defines concept of exclusive rights, stating that third parties must not be allowed, without consent of patent owner, to perform following acts: (1) To make patented product, to offer it on market, to use, etc.; (2) to use patented process; (3) to offer on market, to put into economic circulation, or to import, export, store, or use product which has been obtained by using patented process; and (4) to supply or to offer for supply essential elements of patented product.

Extent of exclusive rights must be determined by formula of invention. Exclusive rights come into force to their full extent as of date patent is granted and expire no later than 20 years from filing date of patent application upon payment of relevant State fee each year.

Any patent or patent application, as well as rights based on patent, in respect of legal regime are equivalent to personal movable property.

Law also provides for possibility to transfer use rights to patented invention to any other person by execution of license agreement.

Law defines use of patent and requirements to be observed upon execution of license agreement regarding use of patented invention, as well as cases where enforced execution of license agreement may be required from owner of patent.

Any violation of exclusive rights, if such has taken place within period of validity of patent must be deemed to be violation of patent. Claim against patent violator must be raised within three years after date when injured party has become aware or should have become aware of patent violation fact.

If violation fact is proven, court may apply to party at fault one of the following sanctions: (1) Termination of use of invention; (2) seizure of patented products and delivery of products to injured party; (3) compensation of loss and moral damages (including lost profit); (4) full or partial granting to injured party of profit earned as result of illegal use; and (5) payment of court expenses.

16.04 TRADEMARKS:

On June 16, 1999, Republic of Latvia law ``On Trademarks and Geographic Origin References'' (hereinafter referred to as ``Law'') was adopted and on July 15, 1999 came into effect. Law has been amended three times, latest on Feb. 8, 2007. This Law regulates legal relationship in field of trademark registration and use and protection of trademarks and geographic origin references. Law states that if international treaties ratified by Saeima contain provisions different from provisions of this Law, provisions of international treaties must be applied.

Law states that any description represented graphically and able to distinguish goods and services of one enterprise from goods and services of other enterprises may create trademark. Rights to trademark may be obtained by any legal or natural person. Law also allows use of non-registered trademarks, but only within scope of fair competition and to extent that such use does not violate rights of other persons and provisions of laws and other normative acts. Law states that person in whose name trademark is registered, must have exclusive rights to prohibit other persons to use following descriptions in commercial activity: (1) Description which is identical to registered trademark with respect to identical goods and services and (2) any description which due to its identity or similarity to registered trademark and identity or similarity of goods and services may be mistaken by consumers as trademark or considered as relative to trademark.

In Latvia, owners of well known trademarks are entitled to prohibit other persons to use in commercial activity any description in which well known trademark is confusingly reflected, imitated, interpreted, or transliterated both with respect to goods and services which are identical or similar to goods and services marked by well known trademark, and with respect to goods and services which are not similar to those, but in this event only with provision that consumers consider use of this description as reference to relation between such goods and services and owner of well known trademark and that such use may violate interests of owner of well known trademark.

Rights to trademark which are based on registration or registration application are equivalent to rights to movable property in meaning of Republic of Latvia Civil Law but cannot be object of property claim.

Law states absolute grounds for refusal of trademark registration and acknowledgment to be invalid (for example, lack of distinction, descriptive nature, common name, etc.) and earlier trademarks as basis for acknowledgment of registration to be invalid, and well known trademarks as basis for refusal of registration or acknowledgment to be invalid.

Law describes in detail trademark registration procedure itself, as result of which Patent Office does not inspect existence of conflicts with earlier trademarks and other earlier rights (except conflicts with well known trademarks). Foreign applicants may submit their applications solely via patent agent registered with Patent Office.

Law provides for possibility of applicant to request both convention priority or exhibition priority in accordance with provisions of Paris Convention.

In event that applicant disagrees with decision of Patent Office with regard to examination results of trademark or preliminary examination results of application, applicant may within three months after date of adoption of decision submit to Appeal Board of Patent Office its appeal. Within three months after date of publication of trademark in official edition of Patent Office, any interested persons may submit to Appeal Board oppositions against registration of trademark. In event that decision of Appeal Board is not satisfactory to any party, such party may, within three months, appeal decision at Court.

Owner of trademark is entitled to transfer its trademark to any other person both together with enterprise or any portion thereof which uses this trademark and irrespective of transfer of enterprise. Trademark transfer agreement takes effect with regard to third parties as of date when information regarding this agreement is published in official edition of Patent Office. Owner of trademark may transfer to any other person rights to use its trademark by execution of license agreement.

Any violation of exclusive rights of trademark owner must be deemed to be illegal use of trademark. If trademark violation fact is proven, trademark owner may demand following sanctions: (1) Termination of illegal use of trademark; (2) compensation of caused damage, including moral damages and lost profit; and (3) payment of court expenses and agent fees, etc.

Law also expressly states that in event that compensation of loss is not requested, claimant may nevertheless, request court to apply enforcement. In cases, where trademark has been willingly or maliciously violated, faulty parties may be called to administrative or criminal responsibility. Law also allows claims on provisions of law or other normative acts regarding unfair competition.

Law contains special section regarding international registration of trademarks which regulates activities of Patent Office with regard to international registration of trademarks in accordance with Madrid Agreement on international registration of trademarks. Law states international registration of trademark which has entered into force with respect to Latvia, has same effect as trademarks which are registered in accordance with national registration procedure.

Distinct section in law is devoted for European Community trademarks which states that exclusive rights to Community trademark in Latvia are maintained by Community trademark registration. Any Community trademark registered or applied for before May 1, 2004 automatically receives protection in Latvia from this date onwards. Community trademark protection ambit is determined by Council Regulation 207/2009.

Law also contains special section regarding geographic origin references, stating that they are protected without registration. Law prohibits use in commercial activity of false geographic origin references or any geographic names or descriptions of geographic nature or similar descriptions, use of which may mislead consumers with regard to geographic origin of goods or services. Any use of description which contradicts this provision must be deemed to be unfair competition.

17 MORTGAGES

17.01 CHATTEL MORTGAGES:

See category 7 Debtor and Creditor, topics 7.07 Liens, 7.08 Pledges.

17.02 MORTGAGES OF REAL PROPERTY:

Mortgage on real property is form of pledge. Mortgage is established by agreement, by testament, or by court judgment. Mortgagee may exercise rights only after registration of mortgage in Land Book. Mortgagor must be registered in Land Book as property owner. Mortgage is registered only in definite amount and only with respect to definite parcel of real property. Mortgage may be established as security for claim which in future may arise in respect of credit granted to debtor.

If debtor alienates immovable property to third person, mortgage right remains effective. Upon paying off mortgage, respective record must be made in Land Book, without which pay off of mortgage is not effective with respect to third persons. Land Book allows more than one mortgage to be registered on parcel of real property in sequential priorities.

As with pledges in general, creditor has right to seek satisfaction from mortgage and sell mortgaged property if debtor fails to pay off underlying debt within set term. Creditor has no right to keep mortgaged property as his property. Creditor may only sell mortgaged property for freely determined price at an auction if debtor has granted him right to do so. Pledged real property must be sold in accordance with provisions on voluntary sale at auction through court. If creditor has not been granted such specific rights, mortgaged property must be sold at auction through mediation of court.

Due to financial crisis and considerable slow-down of real estate market, new provisions to Consumer Rights Protection Law were added, to safeguard those customers whose credit liability was secured with mortgage over purchased real estate. As value of such real estate was determined during real estate boom, creditors are now prohibited to request consumers to provide any additional collateral for previously issued credits, re-evaluation of real estate at expense of customer, and early repayment of credit, provided consumer has not materially violated credit agreement. For purposes of said Law, material violation is failure to timely pay credit or interest, or use of credit for non-envisaged purposes. Consequently, credit institutions are limited in their possibility to ensure satisfaction of their possible claims to consumers, as they are forced to live with excessively valued mortgages, market value of which is considerably lower.

18 PROPERTY

18.01 ABSENTEES:

During absence abroad, person may delegate authority to any person having full legal capacity by granting person delegated universal power of attorney. (See topic 18.02 Powers of Attorney.)

If absentee has not designated representative, last court having personal jurisdiction over absentee may appoint curator to protect and manage absentee's assets upon request of interested person and in event of necessity. Curator does not have right to decide any but most urgent matters.

18.02 POWERS OF ATTORNEY:

Civil Law provides for following three kinds of power of attorney based on agency contract: ``special'' power of attorney granted for distinct and specific matters, ``universal'' power of attorney covering all of principal's matters, and ``general'' power of attorney, covering all matters of certain kind or category.

Principal is bound by agent's actions only if agent has acted within limits of power of attorney granted to agent. Actions taken in transgression of powers granted to agent are void. Third parties may claim damages for losses in such cases only from agent.

Power of attorney expires upon: (1) Mutual agreement, (2) completion of certain matter for which power of attorney was granted, (3) principal's or agent's revocation of agency contract between them, (4) death of principal or agent, and (5) expiration of time period specified in power of attorney.

Notarized power of attorney can be revoked only by notary and by publication in official government bulletin.

18.03 PRIVATIZATION:

Currently, it is acknowledged at governmental level that purpose of mass privatization carried out in Latvia is basically achieved and therefore conceptual decision has been made to finalize privatization of state and municipal property. New Law ``On Completion of Privatization of the State and Municipal Property and Use of Privatization Vouchers'' has entered into force accordingly, which must be main law in course of completion of privatization process. After completion of privatization process, state and municipal property must be further disposed in accordance with procedures set by Law on Alienation of the State and Municipal Property.

Procedure for privatization of state and local government property objects is provided for by Law ``On Completion of Privatization of the State and Municipal Property and Use of Privatization Vouchers'', adopted on June 16, 2005, and Law ``On Privatization of State and Local Government Property Objects'', adopted on Feb. 17, 1994, as amended.

Purpose of privatization is by means of changing owner of state or local government property object to create beneficial environment for operation of private capital in interests of development of Latvia's national economy and to narrow activities which are performed by state and local governments as entrepreneurs. State or local government property objects which are subject to privatization are enterprises, companies, real property, portions of these enterprises, companies, and real property which are owned by state or local government. State or local government owned property object may be privatized together with parcel of land if this is property of state or local government. Together they constitute one object to be privatized.

Privatization of state and local government property may be performed applying, inter alia, following privatization methods: (1) Sale of state or local government property object (also capital shares) to privatization subject; (2) investment of state or local government property object as nonmonetary investment into entrepreneurial company which has private capital; (3) increase of share capital of state or local government company by attraction of private capital; (4) substitution of debt owed to creditors of state or local companies by stock or capital shares; (5) merger of state or municipal capital company with capital company having private capital; and (6) sale of shares in companies to members of management bodies of such companies, but management buyout amount of sold shares must not exceed 25% of share capital of company.

Any physical or legal person may be privatization subject who is authorized to acquire movable and/or real property in Latvia. In course of privatization of state or local government property object, neither state, nor local government, nor state or local government company, nor company share capital of which contains 25% or less of private capital, may be privatization subject. Privatization Agency performs privatization of state property objects on behalf of state. Local government property objects are privatized by local government property privatization commission. Payments for property objects are made in: (1) Lats and (2) privatization vouchers.

In relation to completion of privatization process, term for any physical or legal person to initiate privatization of state or local government property object expired on Aug. 31, 2006. Resolution regarding delivery of state or local government property objects to be privatized is adopted by Cabinet of Ministers or local government.

New owner of privatized object is responsible for guarantees of employment of labor and investment commitments which new owner has undertaken under agreement.

Privatization Agency or local government has right of return purchase with regard to privatized object if purchaser fails to use object for purposes and in manner described in agreement.

In cases specified by law, Privatization Agency or local government retains right of first refusal with regard to privatized object if privatization subject resells respective object.

Owner of parcel of land is obliged to enter into lease agreement with new owner of privatized object. Any disputes regarding terms and conditions of lease agreement are considered by court.

Privatization of residential premises owned by state and local governments is determined by Law ``On Privatization of State and Local Government Owned Residential Buildings'', approved on June 21, 1995. This law determines procedure of privatization of state and local government owned residential buildings and purpose is to develop real property market and to promote putting in order of residential buildings and protecting interests of inhabitants. Two types of privatization exist: privatization of entire residential building through privatization of apartments which is lengthier process and assignment of apartments in ownership which is quicker and allows owners of apartments to freely dispose of their apartments. Persons who are entitled to privatize apartments, commercial premises, artist studios, as well as one-apartment and multi-apartment buildings are as follows: (1) Owners of privatization vouchers: citizens of Latvia, noncitizens and persons who have obtained permanent residency permits and (2) owners of privatization vouchers, legal entities who are entitled to purchase land in accordance with existing laws, except state, local governments, and companies in which state or local government owned capital shares, separately or in aggregate, exceed 50%. Payment for privatized object must be made in privatization vouchers and Lats.

Note: At this time, privatization of almost all small and medium-sized formerly state- or municipally-owned companies has been completed, and only privatization of certain largest state-owned companies and natural monopolies has not yet been completed.

18.04 REAL PROPERTY:

Ownership of and other rights pertaining to real property must be registered in Zemesgramata (Land Book). Registration confirms title to and other rights in connection with real property. ``Land Book Law'' (adopted Dec. 22, 1937, as am'd) provides that registration is effected after formal request for confirmation of given right to real property. Power of attorney for such request to confirm by registration must be certified by sworn notary public. Term for review of documents at Land Book has been reduced from 15 to ten days following submission. In addition, payment of state and other duties was simplified in 2009 to allow for credit card transactions at POS terminals of Land Book, State Land Service and other state institutions.

Buildings erected on and connected to land are deemed to be part of land and owned by owner of land. However, separate ownership of buildings is possible based on agreement between respective owners or because separate ownership previously existed.

Leases terminate upon change in ownership of leased premises. (CL, § 2168). However, if lease is registered in Land Book, new owner is bound by lease for its intended term.

Rights to real property are determined by law of jurisdiction in which real property is located. If real property is located in Latvia, form and contents of acquisition, change in contents or termination of real property rights is determined by Latvian law, regardless of which persons are parties to agreements and where agreements were made. Same applies to form and contents of contractual rights on basis of which rights to real property are to be acquired, amended, or terminated. (CL, § 18).

There are certain restrictions for aliens to acquire real property in border areas and areas close to coast or public waterways, and forest and agricultural land but it is expected that these restrictions will lapse in 2011.

It is planned to introduce new system for real estate tax collection, which may have impact on determination of real estate purchase price in future. Namely, it is planned that as of 2010 no change in real estate title will be registered provided real estate tax for both preceding and new taxation period is not fully paid up.

18.05 RESTITUTION AND DENATIONALIZATION OF PROPERTY:

Restitution and denationalization of property is related to property reform in Latvia. Its purpose is to restore ownership rights of former owners or their heirs to land, buildings, and enterprises which were nationalized or otherwise dispossessed under Soviet regime. In Republic of Latvia, this issue is regulated by following laws: ``On Denationalization of Buildings in Republic of Latvia'' (adopted Oct. 30, 1991, as am'd), ``On Restitution of Buildings to Their Lawful Owners Thereof'' (adopted Oct. 30, 1991, as am'd), ``On Restitution of Ownership Rights to Enterprises and Other Property Objects'' (adopted Mar. 30, 1993, as am'd), ``On Restitution of Property to Religious Organizations'' (adopted May 12, 1992, as am'd), ``On Land Privatization in Rural Areas'' (adopted July 9, 1992, as am'd), and ``On Land Reform in the Cities of the Republic of Latvia'' (adopted Nov. 20, 1991, as am'd). These laws apply to real property objects constructed prior to July 21, 1940. In accordance with Latvian legislation, term of application of former owners or their heirs and term of submission of documents evidencing affinity have expired (June 1, 1994).Under certain circumstances, ownership rights to a land plot may be restituted by court decision, if the application to the court has been submitted until Sept. 1, 2008.

In general, current law provides that land reform is in the completion stage; however, certain aspects of the reform may still affect individual properties.

19 TAXATION

19.01 ADMINISTRATION:

System of taxes and duties in Latvia is regulated by umbrella Law ``On Taxes and Duties'', adopted on Feb. 2, 1995, as amended. Taxes and duties system consists of: (1) State taxes; objects on which such taxes are imposed and their tariffs are stated by Saeima (Parliament), (2) state duties which are imposed in accordance with this law, other laws and regulations of Cabinet of Ministers, (3) municipality duties which are imposed in accordance with this law and binding regulations issued by council of each municipality, and (4) taxes provided for by directly applicable European Union laws and regulations. In Latvia, there are following state taxes: personal income tax, company income tax, real property tax, value added tax, excise tax, customs tax, natural resources tax, drawing and games of chance tax, compulsory social insurance contributions, automobile and motorcycle tax, and electric power tax.

19.02 CUSTOMS DUTY AND TAX:

Customs Tax.

Starting from May 1, 2004, application of customs tax in Republic of Latvia is regulated by laws and regulations of European Union. That is why customs tax and trade policy measures are applied only with regard to goods imported from countries which are not Member States of EU. Customs tax and trade policy measures do not apply to transportation of goods within territories of Member States of EU, except for cases when goods are not cleared by customs in EU, they are not put into free circulation. Applicable customs tax rate is set according to type or value of good. Besides customs tax, imported good can be subject to quotas, tariff ceilings, antidumping payments, agricultural payments, e.g., restrictions.

19.03 EMPLOYMENT TAXES:

Social Insurance Payment.

Current effective law ``On State Social Insurance'' (adopted Oct. 1, 1997, as am'd) states that object of compulsory social security payment is all income received by employee in course of performing salaried work on which income tax is payable. Amount of social insurance payment is currently 33.09% of income received by employee, of which 24.09% is payable by employer and 9% by employee.

19.04 ENVIRONMENTAL TAXES:

Natural Resources Tax.

``*Natural Resources Tax Law'' was adopted on Dec. 15, 2005 and is in force as of Jan. 1, 2006. Taxpayers are persons who: (1) Have received or in accordance with regulations on environment protection or use of subterranean depths had duty to receive permit, license, or C category polluting activity certificate as specified by laws of Latvia and who in territory of Latvia, continental shelf, or exclusive economic zone performs business activity having straight connection with use of natural resources as set by law; (2) first in territory of Latvia is to perform specific activities set by law as sales of goods harmful to environment*, coal, coke, lignite, as well as the packaging added to the body of goods or products (purchase) packaged or not packaged due to convenience of the consumer or advertising design*; use of harmful goods as collateral for own business; provides packaging to product; for purpose of ensuring its economic activity, uses coal, coke and lignite (brown coal) which are taxable upon sale thereof; (3) sells disposable tableware and accessories which are manufactured from plastic (polymers), paper, cardboard, and composite materials thereof (laminates) with polymer or metal components, metal foil and wood pulp or other natural fibres; (4) utilizes in its activities radioactive substances thus creating radioactive waste, which it is necessary to store or to dispose of in territory of Latvia; and (5) registers vehicles permanently for first time in Latvia. Tax rates applicable or methods of calculation of tax for each taxable category of goods or services are set by law.*

19.05 EXCISE TAXES:

Law ``On Excise Tax'', adopted on Oct. 30, 2003, provides procedure according to which excise tax is applicable to alcoholic beverages, tobacco products, oil products, non-alcoholic beverages, and coffee. Taxpayers are: (1) Importer; (2) warehouse keeper; (3) certified trader, non-certified trader, commissioned trader, or representative of taxpayer; (4) person who imports to Republic of Latvia or receives from another Member State excised goods, which are already put into free circulation in another Member State; and (5) other persons. Tax rates are set in compliance with law according to type, quantity, and other criteria of taxable good. Following items are exempted from taxation: (1) Alcoholic beverages, used for quality assessment, medicinal needs, and spirit for production of medicinal products; (2) tobacco products used for quality assessment and denaturized products; and (3) oil products, supplied and utilized with purposes other than motor fuel and fuel purposes; e.g., products. Alcoholic beverages and tobacco products are branded by special excise tax brands, and oil products can also be specially marked out.

19.06 GAMBLING AND ENTERTAINMENT TAXES:

Drawing and Games of Chance Taxes and Duties.

Law on ``Drawing and Games of Chance Taxes and Duties'', adopted on 16 June, 1994, as amended. This tax is paid by enterprises which have received special license for organization and maintenance of drawing and games of chance. Tax rates applicable to lottery and gaming are set in compliance with Law.

19.07 INCOME TAX:

Personal Income Tax.

Law ``On Personal Income Tax'', adopted on Nov. 5, 1993, as amended. Personal income tax is imposed on income earned by natural persons and it consists of: (1) Payroll tax which is calculated and paid on income received by employee from employer; (2) fixed income tax on income from economic activity*; and (3) tax on income from entrepreneurial activity, if such income is not subject to company income tax, from individual work, property, and other sources. Tax is calculated and paid to budget in two manners: in advance, including by means of payroll tax and patent payment, and also by making annual income declaration. Tax is paid by: (1) Natural persons—residents, who during taxation period have earned income in Republic of Latvia and/or abroad; (2) natural persons who, in accordance with Latvian laws, are foreign taxpayers (non-residents) and who have obtained income in Republic of Latvia during taxation period; and (3) natural persons—owners of individual undertakings, also owners of agricultural and fishery farms who have acquired income upon which enterprise income tax has not been imposed during taxation period (calendar year). Foreign natural persons are considered to be residents: (1) If they stay in Republic of Latvia for 183 days or more within any period of 12 months which starts or ends within taxation year; (2) natural persons—nonresidents, who during taxation year have earned profit in Latvia; and (3) natural persons—owners of individual enterprises, also private farms which during taxation period (calendar year) have earned income on which company income tax is not imposed. Annual income of payer is total of all money, material value, and services received during taxation period. Tax rate imposed on taxable income* in general *is 26%*. It is considered that the natural person as taxpayer gains income, for which the payroll tax is payable in the amount of 26%, if at least one of the following indications is established:

(1) Economic dependency of the taxpayer from the person, whom he provides services to;

(2) failure to bear the financial risk in case of performance of unprofitable work or lost trade receivables;

(3) integration of the taxpayer in the enterprise, which he provides his services to;

(4) existence of actual holidays and paid leaves of the taxpayer and connection of disposition thereof with the internal rules of procedure of the enterprise or work schedule of other natural persons employed at the enterprise;

(5) activity of the taxpayer is performed under supervision or control of another person, the taxpayer does not have a possibility to involve his own personnel or use subcontractors in performance of the works;

and (6) the taxpayer is not an owner of the fixed assets, materials, and other assets used in economic activity (this criterion does not apply to the personal vehicles or certain personal tools used for performance of the work assignments).

Since Jan. 1, 2010, there are considerable and extensive amendments to tax laws in effect in Latvia, including in respect to application of income tax. According to new regulation, tax rate of 10% on capital income shall be imposed (income, which is not capital gains), whereas tax rate on capital gains is 15%. And benefit provided to employee by employer from use of vehicle in possession or holding of employer for personal needs of employee is subject to personal income tax in amount and under procedure established by Cabinet of Ministers according to engine capacity.

Company Income Tax.

Law ``On Income Tax of Enterprises'', adopted on Sept. 2, 1995, as amended. Payers of company income tax are as follows: (1) Domestic enterprises which perform entrepreneurial activity, public organizations and institutions financed from state budget which earn profit from commercial activity—residents; (2) foreign enterprises, entrepreneurial companies, natural persons, and other persons—nonresidents; and (3) permanent representative offices (permanent establishments) of nonresidents. With regard to residents, taxes are imposed on profit earned in Latvia and abroad during taxation period. Tax rate is 15% of this profit. With regard to permanent representative offices, tax is imposed on independently earned profit within taxation period in Latvia and foreign countries. Tax rate is 15% of this profit. With regard to nonresidents, tax is imposed on profit earned from entrepreneurial activity or activities related thereto in Latvia. Tax is withheld from payments which are made by residents and permanent representative offices to nonresidents, including to natural persons if no personal income tax has been withheld from such payments. Tax rates are from 2 to 15% depending upon type of income.

19.08 PROPERTY TAXES:

Real Property Tax.

Law ``On Real Property Tax'' was adopted on June 4, 1997 and entered into force on Jan. 1, 1998. Tax applies to objects located in Republic of Latvia which cannot be moved from one location to another without affecting their outer substance—land and buildings (hereinafter—``Real Property''). The real property tax rate is as follows:

(1) 1.5% of cadastral value of land, buildings or parts thereof, engineering structures;

(2) 0.1 to 0.3% of cadastral value for single-family or double-family residential houses, multi-apartment houses (parts thereof) regardless of fact whether they are divided into apartment properties, parts of non-residential buildings, which are functionally used for living and which are not used for performance of economic activities.

Non-cultivated land for agricultural use is taxed by additional rate of real estate tax at rate of 1.5%, except for land area of which does not exceed one hectare or which has restrictions for agricultural activities imposed by laws and regulations.

Cadastral value is assessed by State Land Service and amount of applicable tax is set by municipalities. Taxation period is calendar year.

19.09 TRANSPORTATION TAXES:

Annual Duties for Transport Vehicles.

Law ``On Annual Duties for Transport Vehicles'', adopted on Nov. 22, 2001. Duties are paid by all legal and natural persons having transport vehicles registered in their name in Republic of Latvia in their possession or ownership (except for tractor vehicles), or to which transit number signs are issued. Duties are paid each year prior to annual technical inspection of transport vehicle. Applicable rates are set by law.

Automobile and Motorcycle Tax.

Law ``On Automobile and Motorcycle Tax'' was adopted on Oct. 30, 2003, in effect as of May 1, 2004. Taxpayers are all legal and natural persons, in name of which automobiles and motorcycles are registered in Latvia. Tax for automobiles is calculated according to (1) age of automobile (counting from first year of registration abroad) and volume of engine of vehicle pursuant to rates set by law or (2) for passenger vehicles not registered before and passenger vehicles which have been first registered abroad after 1 Jan. 2009 - by applying rate depending on volume of emissions of carbon dioxide (CO2) per one kilometre. Tax for motorcycles is calculated according to (1) age of motorcycle (counting from first year of registration abroad), multiplying by 0.25% corresponding rates for automobiles or (2) for motorcycles not registered before and motorcycles first registered abroad after 1 Jan. 2009 - depending on capacity of motorcycle's engine by applying rate of 0.10 LVL per each cubic centimetre of engine's capacity. Tax exemption applies to: (1) Automobiles and motorcycles, which are exempted from tax pursuant to European Union Regulation No. 918/83; (2) automobiles and motorcycles which are older than 25 years; (3) sports automobiles and motorcycles, specially designed for sports; and (4) other vehicles set by law. Tax calculated pursuant to this law is paid by person into state budget before registration of relevant automobile or motorcycle with Road Traffic Safety Directorate.

19.10 VALUE ADDED TAX:

Law ``On Value Added Tax'' adopted on Mar. 9, 1995, as amended. Transactions taxable by value added tax are following performed within framework of economic activity: (1) Supply of goods, including home consumption; (2) provision of services, including home consumption; (3) import of goods, as well as (4) supply of goods in territory of European Union as transfer of goods of taxable person from one Member State to inland in order to provide entrepreneurial activity of this person inland; (5) supply of goods in territory of EU as transfer of goods of taxable person from inland to another Member State in order to provide entrepreneurial activity of this person in another Member State; and (6) purchase of new vehicles performed by non-taxable persons in territory of EU. Taxpayers are natural and legal persons, as well as any person of another Member State or person not registered in territory of EU who is registered in one of places of transaction performance in Republic of Latvia. If total value of goods supplied or services rendered by those persons or groups of persons on which tax is imposed has reached or exceeded 10,000 lats within previous 12 mos., they must register with State Revenue Service as taxable persons. If for nontaxable legal person or nontaxable natural person who performs economic activities, value of goods without tax acquired in territory of EU reaches or exceeds 7,000 lats in current calendar year, then relevant person by 15th of month following taxation period in which prescribed threshold was exceeded, shall register with State Revenue Service Register of Value Added Tax Taxable Persons. If another Member State taxable person performs distance supply of goods in territory of EU and goods are received in Latvia, and total amount of such supply of goods without taxes in current calendar year reaches or exceeds 24,000 lats, then such other Member State taxable person must, within period of 30 days, register with State Revenue Service Register of Value Added Tax Taxable Persons.

Basic rate of value added tax is 21% and reduced rates applicable to specific categories of goods and services are 10% and 0%.

20 TREATIES AND CONVENTIONS

20.01 TREATIES:

Republic of Latvia is party to, inter alia, following international treaties:

General.

International Monetary Fund and International Bank for Reconstruction and Development—IMF (July 22, 1944); Convention on the Establishment of the International Civil Aviation Organization (Dec. 7, 1944); Constitution of the World Health Organization—WHO (July 22, 1946); Convention on the International Maritime Organization (Mar. 6, 1948); Statutes of the Council of Europe (May 5, 1949); Convention Establishing a Customs Cooperation Council (Dec. 15, 1950); European Convention on Culture (Dec. 19, 1954); Vienna Convention on the Law of Treaties (May 23, 1969); Convention on the International Maritime Satellite Organization—INMARSAT (Sept. 3, 1976); European Charter of Regional Self-Administration (Oct. 15, 1985); European Energy Charter (Dec. 17, 1991); Regulation on the Railway Cooperation Organization (OSZD) (1957); Statutes of the World Tourism Organization (Sept. 27, 1970); and World Trade Organization.

Human Rights.

Universal Declaration of Human Rights (Dec. 10, 1948); Convention on the Prevention and Punishment of the Crime of Genocide (Dec. 9, 1948); Convention on the Political Rights of Women (Dec. 20, 1952); Convention on the Nationality of Married Women (Feb. 20, 1957); International Covenant on Civil and Political Rights (Dec. 16, 1966); International Covenant on Economic, Social and Cultural Rights (Dec. 16, 1966); Convention on Abolishing the Discrimination of Women (Dec. 18, 1979); UN Convention on the Rights of the Child (Nov. 20, 1989); European Convention on Human and Basic Rights (Nov. 4, 1950); Hague Convention on International Access to Courts (Oct. 25, 1980); Convention on Stateless Status (Sept. 28, 1954); European Social Charter (Oct. 18, 1961); European Convention on Adoption of Children (Apr. 4, 1967); Hague Convention on the Civil Law Aspects of International Kidnapping of Children (Oct. 25, 1980); Council of Europe Convention on Application of Children's Rights (Jan. 25, 1996); Framework Convention for the Protection of National Minorities (Feb. 2, 1995); and European Agreement Relating to Persons Participating in Proceedings of the European Court of Human Rights (Mar. 5, 1996).

Consular and Diplomatic Relations.

Vienna Convention on Diplomatic Relations (Apr. 18, 1961) and Vienna Convention on Consular Relations (Apr. 24, 1963).

International Cooperation in Legal Matters.

Hague Convention on Questions of Procedure in Civil Matters (Mar. 1, 1954), Hague Convention Abolishing the Requirement of Legalization for Foreign Public Documents (Oct. 5, 1961), Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters (Nov. 15, 1965), Convention on the Taking of Evidence Abroad in Civil or Commercial Matters (Mar. 18, 1970); and European Convention on the International Validity of Criminal Judgments (May 28, 1970).

Arbitration.

New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (June 10, 1958); 1992 Convention on Conciliation and Arbitration within ESCO; and European Convention on International Commercial Arbitration (Apr. 21, 1961).

International Transportation and Trade.

Protocol amending the Warsaw Convention of Oct. 12, 1929 on the Unification of Some Rules Concerning International Aviation Transportation (Sept. 28, 1955); International Convention on Contracts for the International Carriage of Goods by Road—CMR (May 19, 1956) and its Protocol of July 5, 1978; Convention on Contracts for the International Carriage of Passengers and Baggage by Road—CVR (Mar. 1, 1973) and its Protocol of July 5, 1978; International Convention on a Harmonized System for the Description and Codification of Goods (June 14, 1983). UN Convention on Contracts for the International Sale of Goods (Apr. 11, 1980); 1988

UNCITRAL Convention on International Financial Leasing, 1988 UNCITRAL Convention on International Factoring, Bern Convention on International Railway Transport (COTIF) (May 9, 1980); World Trade Organization; Protocol amending the Convention on International Civil Aviation (1980); Protocols amending the Convention on International Civil Aviation; Istanbul Convention on Temporary Import (June 26, 1990); Convention on Limitation of Liability on Maritime Claims (LLMC 1976); International Convention for the Unification of Certain Rules Relating to Bills of Lading (Hague Regulations) (Aug. 25, 1924); International Convention on the Harmonization of Frontier Controls of Goods (Oct. 21, 1982); and Montreal Convention 1999 (carriage by air).

Environment.

Helsinki Conventions on the Protection of the Baltic Sea Environment (1974 and 1992); Convention Regarding Wetlands of International Significance (Feb. 2, 1971); Vienna Convention on the Protection of the Ozone Layer (Mar. 22, 1985) with Montreal Protocol (1987); Basle Convention Regarding the Transportation Across Borders and Removal of Hazardous Waste (Mar. 22, 1989); UN Framework Convention on Climate Changes (May 9, 1992); Rio de Janeiro Convention on Biological Diversity (May 9, 1992); Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (June 25, 1998); Convention on Environmental Impact Assessment in a Transboundary Context (Feb. 25, 1991); and Protocol of 1997 to Amend the International Convention for the Prevention of Pollution from Ships, 1973, as modified by Protocol of 1978 relating thereto (Annex VI of MARPOL 73/78).

Protection of Intellectual Property.

Paris Convention for the Protection of Industrial Property Rights (Mar. 20, 1883), as revised at Stockholm (July 14, 1967); Madrid Convention on the International Registration of Trademarks (Apr. 14, 1891), as revised at Stockholm (July 14, 1967); Berne Convention for the Protection of Literary and Artistic Works (Sept. 9, 1886), as revised at Stockholm (July 14, 1967); Washington Patent Cooperation Treaty (June 19, 1970), Rome Convention (Oct. 26, 1961); Locarno Agreement Establishing an International Classification for Industrial Designs (Oct. 8, 1968); Geneva Convention for Protection of Producers of Phonograms Against Unauthorized Duplication of their Phonograms (Oct. 29, 1971), Madrid Protocol to Madrid Convention on International Registration of Trademarks (June 27, 1989); 1994 Convention on Trade Mark Contract; and Geneva Act of the Hague Agreement Concerning the International Registration of Industrial Designs of Nov. 6, 1925 (July 2, 1999); Geneva Patent Law Treaty (June 1, 2000).

Taxation.

Treaties for avoidance of double taxation are currently in force with following countries: Armenia, Austria, Azerbaijan, Belarus, Canada, China, Czech Republic, Denmark, Finland, France, Georgia, Germany, Great Britain, Greece, Hungary, Iceland, Ireland, Israel, Kazakhstan, Lithuania, Luxembourg, Former Yugoslav Republic of Macedonia, Moldova, Netherlands, Norway, Poland, Romania, Serbia and Montenegro, Slovakia, Slovenia, Spain, Sweden, Switzerland, Ukraine, and Uzbekistan.

Treaties for avoidance of double taxation with respect to income tax alone are in force with Belgium, Bulgaria, Croatia, Estonia, Korea, Kyrgyzstan, Malta, Morocco, Portugal, Singapore, Turkey, and U.S.A.

Treaties for avoidance of double taxation with respect to income tax and capital tax alone are in force with Albania, Italy and Tajikistan.

Investment protection treaties are currently in force with following countries: Austria, Azerbaijan, Armenia, Belarus, Belgium, Bulgaria, Canada, China, Croatia, Czech Republic, Denmark, Egypt, Estonia, Finland, France, Georgia, Germany, Great Britain, Greece, Hungary, Iceland, Israel, Kazakhstan, Korea, Kuwait, Kyrgyzstan, Lithuania, Luxembourg, Moldova, Netherlands, Norway, Poland, Portugal, Romania, Singapore, Slovakia, Spain, Sweden, Switzerland, Turkey, Ukraine, U.S.A., Uzbekistan, and Vietnam.

Free Trade.

Latvia is Member State of European Union and European Economic Area as from May 1, 2004; therefore, EU conventions apply in Latvia.

1

LEBANON LAW DIGEST

—Scope —

Revised for 2010 edition by

KHAIRALLAH & CHAIBAN of Beirut.

(C. O. C. indicates Code of Obligations and Contracts; C. C. P., Code of Civil Procedure; C. C., Code of Commerce; C. C. M., Code of Maritime Commerce; C. P., Penal Code; C. P. P., Code of Penal Procedure; C. A. L., Lebanese Air Code; I. C. W., International Convention of Warsaw [Air].)

1 INTRODUCTION

1.01 CURRENCY:

Monetary unit is Lebanese pound. Its value in relation to U.S. dollar is fixed at rate of dollar on open market at 1,507.50 to 1,515 to dollar. Since then, its value fluctuates with that of U.S. dollar on open market. Only State Bank, Bank of Lebanon, may issue bank notes with unrestricted legal tender value although U.S. dollar widely, but unofficially, accepted as payment unit. Paper currency in actual circulation is 1,000, 5,000, 10,000, 20,000, 50,000 and 100,000 pound notes. Coins in actual circulation are 50, 100, 250 and 500 pounds. Foreigners when in Lebanon are not subject to any control, or currency restrictions. Lebanese nationals and residents may keep foreign currency up to any amount. (Law Aug. 1, 1964). Incoming money through bank's transfers more than 10,000 U.S.D. requires justification enclosures to prevent money laundering. (Law 308/2001).

See also categories 2 Business Organizations, topic Corporations; Foreign Trade and Commerce, topic Foreign Investments.

1.02 GOVERNMENT AND LEGAL SYSTEM:

Lebanon is multi-religious Republic which came into existence in 1920, and was endowed by French High Commissioner under Mandate with Constitution similar to that of France before World War II. It became independent state in 1943 but it was not until 1946 that French and British armies cleared Lebanese soil. Lebanon is one of first states which signed United Nations Charter. Its National Independent Day is Nov. 22.

Civil war broke out in Apr. 1975 and ended Oct. 1989. Its immediate cause was increasing number of Palestinian refugees living in precarious conditions and presence of heavily armed Palestinian forces, which led to emergence of various Lebanese militias taking side for or against. Intervention of Syrian armed forces called in by Lebanese Government overwhelmed by situation, largely contributed to end of hostilities. Lebanon and Syria have since developed very close relations, especially in security and international fields. In 2005, Syrian army was compelled by international pressure to withdraw from Lebanon and entrances of Palestinian camps are again under strict control of Lebanese army.

Lebanese Constitution was amended after civil war in accordance with resolutions taken at meeting held in Ta'ef (Saudi Arabia) between parties concerned, and keeps balance between Christian and Moslem communities. Under Constitution, powers in state are three: legislative, judicial, and executive.

Legislative power is vested in the Chamber of Deputies. There is at present no second chamber. The deputies are elected by universal suffrage, and their mandate is for four years. At present there are 128 deputies equally shared by Moslem and Christian communities. Chamber enacts laws on proposal of deputies or Council of Ministers. Chamber of Deputies meets twice a year in two ordinary sessions, one from first Tues. following Mar. 15 to end of May, and other from first Tues. following Oct. 15 to end of Dec. (Art. 32 of Constitution).

Judicial Power.

See category 6 Courts and Legislature, topic 6.01 Courts.

Executive Power.

President of Council of Ministers is appointed by President of Republic who has to consult with President of Chamber of Deputies. He is Head of Government and responsible with his Ministers to Chamber of Deputies.

President of Republic is Head of State. He is elected by Chamber of Deputies for period of six years and may not be reelected until expiration of six years thereafter. He may preside over Council of Ministers whenever he wishes but has no voting right. He signs laws and treaties with approval of President of Council of Ministers. He is Head of Armed Forces and Guardian of Constitution and of Independence, Unity and Safety of State.

For transitory period, representation in Chamber of Deputies, appointment of Ministers and holding of high office are based on religious affiliation. Seats in Chamber of Deputies are provided in proportion to number of various communities, equally shared between Christians and Moslems.

Constitutional Council.

Control of constitutionality of laws, and settlement of disputes regarding election of President of Republic and of Deputies are vested in Constitutional Council.

1.03 OFFICE HOURS AND TIME ZONE:

Lebanon is in the +02:00 GMT time zone. Office hours are generally from 9 a.m. to 5 p.m., except Administration Departments for which office hours are from 8 a.m. to 2 p.m.

2 BUSINESS ORGANIZATIONS

2.01 AGENCY:

Commercial Representation.

(Law No. 34, promulgated Aug. 5, 1967).

Commercial representations are reserved to Lebanese natural or juristic persons; companies owned or controlled by foreigners are considered as foreign for purposes of Law, however exception is made regarding foreigners who were acting as commercial representatives before Feb. 12, 1975 or who may prove laws of their country authorize Lebanese nationals to act as commercial representatives. (Art. 1 as am'd by Decree No. 9639 of Feb. 6, 1975). Contract of representation must be in writing. It may restrict representation to one person; but in such case restriction is not binding on third parties unless recorded in Register of Commerce; no restriction is admitted in principle on foodstuff. (Art. 2 as am'd by Decree No. 9639 of Feb. 6, 1975). Contract of representation is deemed to be entered into for mutual benefit of contracting parties. It cannot, therefore, be annulled by unilateral act of principal, in absence of any mistake by representative, or in absence of any legitimate cause; otherwise representative will be entitled to indemnity for damage suffered by him, and also to lucrum cessans, so that if contract is for definite period, and period expires, he may in event of nonrenewal demand indemnity if his activities led to promotion of interests of principal. However, only loss of representative in Lebanese markets is taken into consideration. (Art. 4). Competent court in disputes arising out of contract is court of place where representative exercises his activities, to exclusion of all other courts, in spite of any agreement to contrary. (Art. 5). Law applies immediately on contracts in force on date of promulgation.

2.02 ASSOCIATIONS:

Association is group of persons with non-lucrative aim. To form association, interest group must submit to Ministry of Interior its by-laws in duplicate with petition specifying name, object and head office of association; name, occupation, nationality and domicile of officers of association.

Foreign association cannot be established, or function in Lebanon before obtaining authorization from Minister of Interior after complying with requirements set forth in preceding paragraph.

Association may sue and be sued, may possess and administer property it holds, collect annual subscriptions from its members; own real property strictly necessary for accomplishment of its object. Foreign associations must comply with legislation in force governing acquisition of real property.

Association is deemed to be foreign when its head office is situated in foreign country; and also if situated in Lebanon it is affiliated with foreign institution; and if it is administered in fact by board having one-fourth of its members foreigners.

Association may be recognized as one of public interest and receive gifts, donations and legacies after approval of Government.

2.03 CORPORATIONS:

Founders must be three or more in number. They are jointly responsible for the engagements taken, and the disbursements made before the constitution of the society. (C. C. 79).

Incorporation.

Except for number of activities for which authorization of government is still required by special laws and regulations (e.g., banking, insurance), corporation (société anonyme) is now constituted without such authorization. By-laws must be deposited and registered with notary public; same procedure applies to any amendment to by-laws. (C. C. 80 as am'd).

Corporations constituted for exploitation of public service must have one-third of capital in name of Lebanese subscribers; these shares may not be ceded to other than Lebanese citizens. (C. C. 78 as am'd).

Corporations constituted for exploitation of banking activities must have one-half of capital registered in name of Lebanese subscribers; these shares may not be ceded to other than Lebanese citizens. (Art. 132 of Statute on Currency and Credit as am'd by Decree Law No. 77 of June 27, 1977).

Head Office.

Every corporation founded in Lebanon must have its head office in Lebanon and is always of Lebanese nationality despite any clause to contrary. (C. C. 78 as am'd).

Capital cannot be inferior to 30,000,000 Lebanese Pounds, all subscribed. (C. C. 83 as am'd).

Reserve.

The board of directors must constitute a reserve fund by setting aside 10% of the net profits realized, and keep doing so until the reserve fund shall be equivalent to one-third of the capital. (C. C. 165).

Publication of Notice.

Before any appeal for subscriptions can be made to public, notice must be inserted in Official Journal, in one local newspaper and in one financial paper, bearing signature and address of each of founders, and indicating, among other things, name and seat of corporation and of its branches, its object, period, capital, number of directors and their fees, conditions requisite for the distribution of dividends. (C. C. Art. 81 as am'd).

Stock.

The minimum face value of each share cannot be inferior to 1,000 Lebanese pounds. (C. C. 84). Contributions made in kind must be valued by an expert designated by the President of the Court of First Instance. (C. C. 86). There are no founders' shares. (C. C. 103).

Bonds.

Corporations may issue loan-bonds, as well as bonds convertible into stock at option of bondholders. (C. C. 103 as am'd). Bonds so issued may not exceed in total twice amount of capital of issuing corporation, as it appears, in last approved balance sheet. (C. C. 124 as am'd).

Increase of Capital.

In the event of increasing the capital, the shareholders have a right of preference to subscribe the projected increase proportionally to the shares held by them, unless the general assembly convened for the purpose should decide otherwise. (C. C. 112, 113).

Directors.

Board of directors consists of not less than three and not more than 12 members of whom majority must be Lebanese, unless otherwise provided for by special laws. (C. C. 144 as am'd). Original directors named in by-laws of corporation hold office for five years; those elected by general assembly, for three years. (C. C. 149 as am'd).

Dissolution.

The loss of the reserve fund and one-half of the capital will bring about the dissolution of the society.

Limited liability companies (Legislative Decree No. 35, promulgated Aug. 5, 1967, as annex to Code of Commerce, Book II, Sec. VII) are formed between partners whose number may not be less than three or more than 20. Partners may not be charged with losses beyond their contribution to the capital. In case of devolution of shares by way of inheritance, number of partners may exceed 20, but not beyond number of 30. (Arts. 1 and 5).

Limited liability companies may engage in any commercial enterprise other than insurance, economic, savings, regular air transport, banking and investments for others. (Art. 4).

Capital.

Minimum capital is 5,000,000 Lebanese pounds divided into equal shares. (Art. 7). It should be completely paid up. Shares of partners may not be converted into notes capable of circulation, and company may not issue for its own account by way of open subscription or promissory notes any movable property or promissory notes, or founders shares (Art. 3) under penalty of prosecution for fraud (Art. 36). Contributions to capital may be either in cash or specific objects, and in latter case, specific objects must be appraised in same manner as in societes anonymes (Art. 9), and partners contributing specific objects and first directors are jointly liable to third parties for period of five years commencing with formation of company for any improper appraisal of specific objects (Art. 10), and any person who through maneuvers appraises specific objects at a figure exceeding by 20% their real value will be liable for fraud (Art. 35).

Capital may be increased by vote of partners who represent at least three-fourths of capital. (Arts. 26 and 27). Assembly of partners representing same majority may diminish capital, always provided such diminution safeguards rights of third parties. (Art. 29).

In event of a loss equivalent to at least three-fourths of capital, partners should take a resolution by a majority of three-fourths either to dissolve company, or to reduce capital by an amount equivalent to loss; if they fail to do so, any person having an interest may petition court for dissolution of company. (Art. 33).

It is permissible for partners representing three-fourths of capital to cede shares to a nonpartner; however, preference is given to company, or to one or more partners to purchase such shares. (Art. 15).

Capital must in its entirety be paid up and deposited in a bank chartered by government.

Name is determined by object of Company, or by name of one or more of partners provided there is added thereto phrase “limited liability,” and provided capital is named, all under penalty of holding partners fully responsible without any limit, and to a fine varying between 100,000 to 300,000 Lebanese pounds. (Art. 6).

Formation.

Company may be formed by an ordinary or by an official deed duly recorded in Register of Commerce (Art. 2) and it is subject to same publicity as société anonyme (Art. 10). Company is not deemed to be duly constituted until distribution of shares among partners and determination of number of shares held by each of them, until shares are fully paid up and sum is deposited in a bank (Art. 8).

Management is entrusted to one or more directors from among partners, or others determined by by-laws of company, or by a subsequent deed, and that for a definite or an indefinite period. (Art. 16). Director or directors are clothed with powers which are requisite and necessary for management of company. (Art. 16). Director or directors may not be dismissed without a plausible cause; otherwise they may demand damages for unjust dismissal. (Art. 16). Director or directors may not withdraw sums deposited in bank in name of company before it is recorded in Register of Commerce (Art. 8) under penalty of fraud (Art. 35). Director or directors are responsible severally or jointly to company and to third parties for any contravention of provisions of legislative decree and by-laws for their mistakes, and any partner may bring action any clause in by-laws to contrary notwithstanding. (Art. 19).

General assembly is convened annually to pass on and approve acts of directors and budget and inventory, and whenever necessity calls, by a summons given by director or auditor, if there is one, and if they fail, any partner may petition court for designation of a person to convene assembly. (Arts. 21 and 23).

Every partner has so many votes as shares he holds or represents. No partner may appoint a proxy other than a partner, unless by-laws authorize same. Resolutions are passed by votes of partners representing at least one-half of shares, and if such majority is not attained, resolution may be passed by a second assembly summoned subsequently, and by a simple majority of capital it represents whatever it may be. (Art. 25). However, changing nationality of company or forcing of a partner to increase his contribution to capital, or his obligations to company requires a unanimous vote, and no amendment of by-laws is permissible except by a majority representing three-fourths of capital. (Art. 26).

Auditors.

Partners shall designate one or more auditors if: (1) Their number is over 20; (2) capital exceeds 50,000,000 Lebanese pounds; (3) required by one or more partners representing at least one fifth of capital.

Holding Companies (created by Decree Law No. 45 of June 24, 1983).—Holding company is corporation objects of which are limited to following: Own shares in corporations and limited liability companies within and without Lebanon; participate in formation of corporations and limited liability companies, manage same, lend money and give its guarantee to same; own patents, licenses and trademarks and lease same to establishments within and without Lebanon; own chattels and real estate required by its activities (subject to law on acquisition of real property by foreigners: See category 4 Citizenship, topic 4.01 Aliens, subhead Acquisition of Real Property).

Holding companies may not lend money to companies operating in Lebanon if their participation in equity of same is less than 20%.

Holding companies may not own directly participation exceeding 40% in capital of more than two companies operating within Lebanon in same industrial, commercial or noncommercial field if such ownership is meant to defraud law on monopolies (see category 3 Business Regulation and Commerce, topic 3.11 Monopolies, Restraint of Trade and Competition); this limitation does not apply to investments without Lebanon.

Capital of holding companies may be expressed in foreign currency.

Board of directors of holding companies may not include Lebanese physical or moral persons (Law 772 C. C. am'd on Nov. 11, 2006), but its president may be foreigner and need not have work permit if he is nonresident.

Holding companies must have a registered office, but need not have place of business, in Lebanon; they must appoint at least one resident Lebanese auditor, and must keep their books and file their tax returns in accordance with Lebanese law. (For income tax, see category 20 Taxation, topic Taxes, subhead Holding Companies.)

Off-shore companies (created by Decree Law No. 46 of June 24,1983).—Off-shore company is corporation objects of which are limited to following: Negotiate and sign contracts concerning operations and deals to be performed without Lebanon on goods and materials located abroad or in customs free zone; use free zone facilities for storage and reexport of imported good; lease offices in Lebanon and own real property required for its activities (subject to law on acquisition of real property by foreigners: See category Citizenship, topic Aliens, subhead Acquisition of real property); make studies and give consultations at request of nonresident establishments, to be used without Lebanon.

Off-shore companies may not engage in any industrial, banking, insurance or holding business, or carry out any commercial operations within Lebanon other than those listed in their objects as above defined.

Requirements regarding board of directors, it may be constituted of non-Lebanese persons (Law No. 19 of 5/9/2008). Auditors and bookkeeping are similar to those mentioned for holding companies. (See subhead Holding Companies, supra.)

For income tax, see category Taxation, topic Taxes, subhead Off-Shore Companies.

Foreign corporations (Sociétés anonymes) and partnerships having a silent partner, whose capital is evidenced by shares of stock (sociétés en commandite par action), before they can open up branches or agencies in the Lebanese Republic are required to submit to the Lebanese Administration a declaration, backed by their by-laws, and by their charter or act of incorporation. They should likewise name a duly authorized agent or agents to speak in the name of the corporation and represent it in all matters. Any subsequent modifications in the by-laws or charter, and any change of the agent or agents should be notified to the Administration.

All corporations (sociétés anonymes), and limited liability companies, whether Lebanese or foreign, doing business in Lebanon by means of branch office or agency established on Lebanese territory, must appoint Lebanese attorney-at-law paid on basis of yearly retainer fee. (Art. 63, of Law No. 8/70 of Mar. 11, 1970 as am'd by Law No. 18/78).

Foreign corporations must be registered at the clerk's office of the Court of First Instance.

Failure to comply with the preceding requirements will expose the delinquent foreign corporation to incapacity to appear as plaintiff before the courts, and the payment of a fine. Foreign corporations that comply with these requirements are treated in all respects on a footing of equality with national corporations and societies.

Foreign insurance companies (Decree No. 9812 of May 4, 1968) cannot do business in Lebanon unless authorized by Decree issued by Ministry of National Economy. No authorization may be granted unless following conditions are complied with: (1) Foreign insurance company should be a corporation (société anonyme) with a fully paid capital of at least 100,000,000 Lebanese pounds or its equivalent in foreign currency, Lloyd's Group and Mutual Funds are exempted from this condition (Art. 4); (2) petition submitted to Ministry of National Economy must be accompanied by its by-laws, charter or act of incorporation, an exposé of its intended activities, a certificate establishing amount of paid-up capital, a certificate establishing deposit of required bond, a certificate proving that Lebanese insurance companies are permitted to do business in foreign countries to which they belong, a balance sheet for financial year preceding date of petition (Arts. 3, 4); (3) company should have capacity to do same kind of business in its own country; (4) it should elect domicile in Lebanon; (5) it should submit for approval of Ministry of National Economy name of its duly authorized Agent to represent it in all matters (Art. 4). Any subsequent modification in declaration or in documents submitted as well as any change of agent should be notified to Ministry of National Economy. (Art. 5).

Free Exchange.

See category 14 Foreign Trade and Commerce, topics 14.03 Foreign Exchange, 14.04 Foreign Investments.

Income Tax.

See category 20 Taxation, topic Taxes, subhead Tax Holiday.

2.04 FOREIGN CORPORATIONS:

See topic 2.03 Corporations.

2.05 LIMITED LIABILITY COMPANIES:

See topic 2.03 Corporations.

2.06 PARTNERSHIPS:

There are three kinds of partnership: (1) general partnership (société en nom collectif); (2) limited partnership (société en commandite simple); (3) limited partnership by shares (société en commandite par action).

Partnerships are either commercial or civil according as the object thereof is commercial or other operations. The distinction is important in that only commercial partnerships may be adjudicated bankrupt.

General partnership is formed by agreement between two or more persons, and carried on under a firm name and style containing the names of one or all of the partners, and followed by "& Co." The liability of the partners is unlimited.

Limited partnership is formed by one or more general partners with unlimited liability, and one or more special partners, who are liable for the partnership debts only to the amount they have agreed to contribute, and who cannot participate in the management of the concern. If the special partner authorizes the use of his name as a member of the firm, he becomes a general partner with unlimited liability. The business is carried on under the firm name and style of the general partners or of one or more of them.

Limited partnership by shares occupies a medial position between a simple partnership and a corporation (société anonyme). It is governed, however, by laws and regulations governing special partnership, and is carried on by general partners, who manage its affairs under supervision of a special committee appointed by shareholders. Profits are distributed in form of dividends. These partnerships, for their constitution, are subject to same rules governing constitution of corporations (société anonyme). (C. C. 234 as am'd). See topic 2.03 Corporations, subhead Incorporation.

Partnership agreements must be deposited with the court; entered in a special register, and a special number given which must be printed on all letterheads, invoices and papers.

Limited Liability Companies.

See topic 2.03 Corporations.

3 BUSINESS REGULATION AND COMMERCE

3.01 BANKS AND BANKING:

Banking activities can be exercised by institutions established in form of Corporations (public limited companies, i.e., sociétés anonymes). Foreign banking institutions which are considered in their country of origin as banks are not subject to this requirement. (Statute on Currency and Credit of Aug. 1, 1963, Art. 126).

All shares in Lebanese banks must be registered and owned in proportion of at least 51% by Lebanese citizens or by Lebanese corporations having at least 51% of their shares registered and owned by Lebanese citizens. Foreigners may own shares in Lebanese banks only if law of their country of origin gives same right to Lebanese. (Arts. 1 and 3 of Decree Law No. 87 of Sept. 16, 1983).

All foreign banks, which desire to open branch in Lebanon, must submit demand to that effect to Committee of Bank of Lebanon before they begin any publicity required by Decree of Dec. 30, 1926 and by Art. 29 of Code of Commerce. (Art. 130 as am'd by Decree Law No. 77 of June 27, 1977). Foreign banks may open branch in Lebanon only if law of their country of origin gives same right to Lebanese banks. (Art. 1 of Decree Law No. 87 of Sept. 16, 1983). Foreign banks may also be authorized to open representative offices in Lebanon, provided they do not deal with individuals but only with banks, financial institutions, companies, private and public bodies. Representative offices must file with Bank of Lebanon semiannual reports describing their activities; failure to do so entails withdrawal of license.

Committee has discretionary power to accept or reject demand taking into consideration public policy. (Art. 131 as am'd by Decree Law No. 77 of June 27, 1977).

Assets of foreign banks branches may consist of following: preestablishment expenses, equipment and furniture, built-in real property in Lebanon, Lebanese Government bonds or bonds guaranteed by Lebanese Government, and stock in Lebanese corporations wherein Lebanese Government is stockholder. Investment of branches in built-in real property is not subject to previous governmental decree authorizing acquisition of real property by aliens. (Art. 6 of Law 28/67 of May 9, 1967 as am'd by Decree Law No. 38 of Feb. 23, 1977).

If branch of foreign bank shall cease payment, creditors of branch operating in Lebanon shall have preference over other creditors of said foreign bank. (Art. 7 of Law 28/67 of May 9, 1967).

Mixed body has been created to guarantee deposits in banks (Art. 12) that do not exceed amount fixed by decree, when bank shall cease payments.

Special Laws Governing Banks that Cease Payment.

(Law No. 2/67, promulgated Jan. 16, 1967).

Shall be deemed to have ceased payment: every bank that declares that it has ceased payment, or that shall fail to pay a debt owing by it to Bank of Lebanon, or that shall draw a check on Bank of Lebanon without provision, or if it did not provide sufficient provision to cover a debit balance resulting from a clearing chamber operation. (Art. 2). Every bank may demand competent court for application of provisions of law either before cessation of payment, or during period of ten days that follow cessation. (Art. 3). Every creditor likewise may demand application of this law to any bank that shall cease payment of its commercial debts, or that consolidates confidence in it by unlawful means. (Art. 4).

Competent court shall immediately appoint a temporary manager to manage routine work, and will then examine demand in Deliberation Chamber, and if it grants demand, it will appoint an administrative committee of six to ten persons to take place of bank's board of directors, and by such an appointment administration of person appointed temporarily shall cease. (Arts. 5-7).

Administrative committee assumes powers of board of directors that has been relieved, and will represent creditors. (Art. 10). If it appears to administrative committee in period of six months that bank is in a condition to resume its operations, it will submit matter to court for a decision to call shareholders to elect a new board of directors; but if it appears that bank is not in such a condition, it will be placed under liquidation which shall be effected by a liquidation committee.

All property belonging to members of board of directors of bank that has ceased payment, as well as property belonging to Controllers of Accounts shall be deemed attached provisionally without necessity of a court decision. (Art. 13). Measures taken against bank shall not obstruct action against those responsible for operations of bank pursuant to provisions appertaining to bankruptcy with regard to their civil and penal responsibility. (Art. 14).

Banking Free Zone.

Banking free zone was created by Decree No. 29, dated Feb. 5, 1977 with respect to nonresident banking accounts in foreign currency. Accrued interest on such accounts is not subject to income tax.

Banking secrecy strictly applied and may only be lifted if account holder gives authorization or is bankrupt, or if account suspected opened or used for money laundering. (Law No. 318 of Apr. 30, 2001).

3.02 BILLS AND NOTES:

Bills of Exchange.

A bill of exchange must be dated and contain an order to pay a certain sum of money, the name of the drawer, time and place of payment, consideration, place where drawn, name of the drawee, and whether it is the first, second, third or fourth copy. On the due date, the drawer must have made “provision” for its payment, equivalent to at least its amount. Acceptance presupposes “provision” and is considered sufficient proof of such in receipt to endorsers. The drawer and endorsers are jointly liable. The acceptor becomes primarily liable even though the drawer becomes bankrupt before its acceptance. Acceptance must contain the word “accepted” and be signed, and it cannot be conditional. It must be made on presentation, or at least 24 hours thereafter. There are no days of grace. Bills falling due on a holiday are payable on the next succeeding business day. Endorsements must be dated. Antedating an endorsement is forgery. All persons whose signatures appear on a bill of exchange, and acceptors are jointly liable.

Bills of exchange may be presented for acceptance until date of maturity. Bills made payable at a certain date after sight must be presented for acceptance within a maximum of one year from their date unless otherwise provided for by drawer. Presentation for payment should be made on due date. Protest for nonacceptance must be made within period required for presentation to acceptance, or in case presentation was made last day, within following 24 hours. Protest for nonpayment must be made within two working days following due date. Protest for nonacceptance releases holder from presentation for payment and from protest for nonpayment. Failure to observe all above periods does not release drawee, but releases endorsers and drawer who proves that provision existed on due date. Action of holder against drawee must be brought within a period of three years from date of maturity, and his actions against endorsers and drawer within a period of one year. Actions of endorsers against each other, and against drawer must be brought within six months from date payment was made by endorser or action is brought against him by holder.

Promissory notes are subject to the rules governing bills of exchange as regards maturity, liability, endorsement, payment, protest, and rights and duties of the holder. They should be dated and signed by the maker, and contain an order to pay a certain sum of money, the name of the payee, time and place of payment, and the consideration.

Revenue Stamps.

Bills of exchange and promissory notes issued in Lebanon are subject to affixation of revenue stamps equal to 3 per thousand of face value (1.50 per thousand between merchants). Non-affixation of stamps does not affect negotiability; however no enforcement granted by Court until after payment by holder of stamps and penalties. Negotiable instruments issued abroad are only subject to revenue stamps if and when used in Lebanon.

Checks.

A check should contain word "check" and unconditional order to pay a certain sum of money, name of drawee, place of payment, date and place where drawn, and signature of issuer. There must be "provision" at time of issue. Absence of "provision" renders drawer liable to criminal proceedings. (See subhead Penalties for Issuing Checks without Provision, infra.) Check may be drawn in favor of a specified person or to his order or to bearer, and must be drawn on a banker. It must be payable at sight, and should be presented for payment within eight days if place of issue and payment are in Lebanon, within 20 days if place of issue is in one of neighboring countries, or in Europe, or in one of Mediterranean countries, and within 70 days if place of issue is in some other country. Crossed checks may be presented for payment only through a bank. Actions of holder against endorsers and drawer must be brought within six months from termination of period of presentation. Actions of endorsers against each other and against drawer must be brought within six months from date payment was made by endorser or action is brought against him by holder. Action of holder against drawee must be brought within a period of three years from termination of period of presentation.

Penalties for Issuing Checks without Provision.

(Law No. 30/67, promulgated May 16, 1967).

Persons issuing checks without provision, or without sufficient provision, or who withdraw part or all of the provision after issuing a check, or who order nonpayment of a check for a cause other than loss of check or bankruptcy of holder are liable to a penalty of three months to three years prison, and a fine of 1,000,000 to 4,000,000 Lebanese pounds, together with face value of check and damages. (Art. 1). In addition to above penalties, name of client will be listed on schedule of non-paying customers Central Department at Bank of Lebanon and this client will be deprived from use of checkbook according to regulations enclosed in Decision No. 6060 issued by BDL Governor on 25 Nov. 1995 subject to circular to banks dated 25 Nov. 1995.

Whoever accepts a check knowing that it is without provision is liable to same penalty. (Art. 2).

Drawee is obliged to pay value of check even after expiration of delay for presentation. (Art. 3).

3.03 COMMERCIAL ESTABLISHMENTS:

(Law No. 11, promulgated July 11, 1967).

A commercial establishment consists of nonmaterial and material elements, comprizing firm name, trade name, lease, clientele and business site. (Art. 15). Contracts affecting commercial establishment must be evidenced in writing, and they cannot be enforced against third parties unless registered in Register of Commerce. (Art. 3). Establishment may be sold or assigned (Arts. 5-21); it may be mortgaged (Arts. 22-28); attached (Arts. 29-36). Contracts for its management by an agent, or by a simple employee, or by an independent management in guise of a lease thereof by a person with a view to operating same for his own account, are permissible. (Arts. 38-46).

3.04 COMMERCIAL REGISTER:

Commercial Register is kept in records office of court of first instance. Merchants, companies and corporations doing business in Lebanon must be registered in Register of Commerce.

Full information concerning capital, nature of business, persons in charge of management and having right to sign for firm are noted in Register. (Arts. 22-29 C. C.).

Registration is carried out by a petition submitted by person responsible for business, or his agent, to Registrar of Records Office of Court of First Instance where business is located. Unless otherwise specifically provided for in Code of Commerce, Registration should be carried out within period of one month of date of act or fact that needs to be registered. (Art. 31 C. C.). Failure to carry out registration within period specified subjects person responsible therefor to a fine ranging from 5,000 Lebanese pounds to 100,000 Lebanese pounds. (Art. 37 C. C. as am'd). Any false information wilfully submitted for registration subjects responsible person to fine ranging between 25,000 and 50,000 Lebanese pounds. (Art. 38 C. C. as am'd). These penalties are applicable without prejudice to fact that any information registration of which is required by law under pain of nullity cannot be enforced against third parties. (Art. 39 C. C.).

3.05 CONTRACTS:

Excuses for Nonperformance.

Force majeure; extinction of principal obligation entails extinction of accessory obligations and of mortgages given as guarantee; prescription; impossibility of execution. (Arts. 254, 290, 291, 341, C. O. C.).

Applicable law is law agreed upon between parties, provided contract is not contrary to public policy of state.

If contract contains no express agreement as to law applicable, court will seek to ascertain intention of parties, and will decide accordingly.

Normally, law applicable is that of country more closely connected with contract.

Where contract is one for sale of real property, law applicable is law of situs of property.

Government Contracts.

Only contractors inscribed on List of “Accepted Contractors” are permitted to make offers for government contracts. For enterprises of a large magnitude, international bids are called for. With offer, contractor must deposit a sum equivalent to 3% of total amount of works involved. Certified check on a recognized bank is acceptable.

3.06 FRAUDS, STATUTE OF:

In civil contracts oral testimony is not sufficient to prove a claim amounting to over 40,000 Lebanese pounds. This rule does not apply to commercial transactions, or when material fact is involved, as in cases of quasi contract, or where there is commencement of proof in writing, or where it is not possible for creditor to obtain written evidence, or where creditor proves to satisfaction of court that written evidence was lost, or where fraud to Law is involved. In all these cases, oral testimony is admissible regardless of amount. (Arts. 254-257 C. C. P.).

3.07 INDUSTRIAL ESTABLISHMENTS:

(Law No. 30 promulgated Aug. 15, 1967 for Organization and Development of Industrial Establishments.)

Definition.

All industries run by motor force and employing five employees, and value of motor equipment exceeds 50,000 Lebanese pounds, and intended for transformation of first materials in semi-manufactured or fully-manufactured products, or intended for transformation, or assemblage of semi-manufactured into fully manufactured articles or for repairing of manufactured articles or parts thereof, or for preparation of articles, or for packing them or preserving them, are deemed to be industrial establishments. (Art. 1).

Declaration of Foundation.

All persons, or companies intending to establish a plant in sense of Art. 1 must submit a declaration to General Director of Industry if value of motor equipment does not exceed 5,000,000 Lebanese pounds, and to Ministry of Oil and Industry if above that amount giving following information: Name, nature of ownership, name of owner of establishment, situs of plant, head office, kind of industry, area of land and of building, their value and value of equipment and machinery, nature of materials employed, capital and other details pertaining to work. (Art. 2).

Person making declaration shall wait three months from date of submission of declaration, before commencing work. (Art. 3).

Any alteration whatsoever in factory shall be subject to a declaration made before execution of same. (Art. 5).

Petitioner for creation of a new industrial establishment must submit with declaration a technical study of project to a special bureau. Special bureau must give its opinion within three months, and if it appears to it that project is sound and advantageous, it will give its observations about extent and conditions of protection to be given to it by authorities: but if it appears to it that project does not comply with requirements, and it gives an adverse opinion, and if notwithstanding such an opinion project is executed, it will be deprived of any assistance or protection. (Art. 6).

Ministry of National Economy, pursuant to proposition of Minister of National Economy, may prevent establishment of new plants in any field of industry. (Art. 7).

Any contravention of Art. 5 subjects contravener to a fine of 100,000 to 500,000 Lebanese pounds.

3.08 INFORMATION TECHNOLOGY, INTERNET AND NEW MEDIA:

No special legislation; governed under contract law.

3.09 INTEREST:

Legal rate of interest is 9%.

3.10 LICENSES, BUSINESS AND PROFESSIONAL:

See topic 3.07 Industrial Establishments; categories 2 Business Organizations, topic Corporations; Citizenship, topic Aliens; Foreign Trade and Commerce, topic Foreign Investments; Transportation, topic Motor Vehicles.

3.11 MONOPOLIES, RESTRAINT OF TRADE AND COMPETITION:

Official monopolies may be created for a limited period by a special law. (Art. 89, Constitution). Only official monopoly in existence is tobacco monopoly.

Dumping Law.

(Law No. 31, Aug. 5, 1967).

Articles imported into Lebanon for prices below wholesale prices in country of origin at time of importation, or for prices below price of same articles exported to other destinations, or for prices below cost of production plus a reasonable profit and cost of distribution, shall be subject to an impost, after investigation, over and above customs dues. Dumping impost shall be equal to value of dumping price, provided importation of article into Lebanon causes prejudice to existing Lebanese industry or hinders establishment of an industry in process of formation. (Arts. 2, 3, 4, 6).

Anti-Monopoly and High Cost of Living Law.

(Law No. 32, Aug. 5, 1967).

Every monopoly for production, purchase, or importation, or distribution of articles in Lebanon, which tends to curtail competition, and every act tending to corner market shall be deemed null and void. (Arts. 1, 2).

Whosoever shall undertake or attempt to undertake such acts is amenable to a term of prison from six months to three years, and a fine of 1,000,000 to 10,000,000 Lebanese pounds, or either of these penalties, and to confiscation of articles. (Art. 4).

See also categories 2 Business Organizations, topic Corporations; Citizenship, topic Aliens; Foreign Trade and Commerce, topic Foreign Investments.

3.12 NEGOTIABLE INSTRUMENTS:

See topic 3.02 Bills and Notes.

3.13 SALES:

The contract of sale is complete between the parties, and ownership passes the moment the agreement is concluded relative to the thing sold and the price. (C. O. C. 388). When goods are sold by weight, measure or number, the risk is borne by the seller until the goods have been weighed, measured or counted. (Art. 390). In the case of goods that are sold subject to taste, the sale is not complete until the buyer has tasted and approved the goods. (Art. 392). Sale of realty is not perfect until recorded in the land registry. (Art. 393).

The chief obligations of the seller consist in the delivery of the thing sold and in warranting to the buyer peaceful possession and freedom from latent defects. (Arts. 401, 428). Latent defects are those which render the thing sold unfit for the use for which it was intended, or which appreciably diminish its value. (Art. 442). If the seller is aware of the defects, he is liable for the restitution of the price and for damages; if ignorant of same, he is only liable for the return of the price. (Art. 449). The seller is not liable for patent defects, or those which the buyer was or could have easily discovered by the exercise of reasonable care, unless he declares that they do not exist. (Art. 460).

The principal obligations of the buyer are the payment of the price and the taking of delivery of the thing sold. (Art. 465). If he is troubled in his possession or finds himself in imminent danger of such trouble because of a previous sale of the thing by the seller to another, the buyer may keep the price until such trouble or danger of trouble shall cease. (Art. 470). The buyer should take delivery at the time and place designated by the contract. In the absence of any stipulation to the contrary, the buyer must take delivery of the thing without undue delay. (Art. 472).

In sales with an option or repurchase (vente à réméré), the option cannot be stipulated for a period exceeding three years: any longer delay is reduced to three years.

Notices Required.

When immovable property is concerned no notice is required by law, but buyer must file his action within 365 days from delivery. (Art. 463, C. O. C.).

When movable property is concerned, buyer must examine goods on delivery and notify seller with any patent defect within a period of seven days following delivery. If defects are latent or if buyer was prevented, by some cause, from examining goods, notification must be sent to seller immediately after discovery. (Art. 446, C. O. C.). In any case, action will have to be filed within 30 days. (Art. 463, C. O. C.).

Applicable Law.

See topic 3.05 Contracts, subhead Applicable Law.

Warranties.

See beginning of topic, second introductory paragraph.

4 CITIZENSHIP

4.01 ALIENS:

See category 16 Immigration, topic 16.01 Aliens.

4.02 IMMIGRATION:

See category 16 Immigration, topic 16.01 Aliens.

5 CIVIL ACTIONS AND PROCEDURE

5.01 ACTIONS:

Limitation of.

See topic 5.05 Limitation of Actions.

5.02 DEPOSITIONS AND DISCOVERY:

The Lebanese courts, by comity, will execute letters rogatory. If issued by an American court, these should be transmitted through the ordinary diplomatic channels. A more expeditious way is to send a commission to the American Consulate General in Beirut. The power of the courts and the American Consulate is more limited than under the Anglo-American practice.

5.03 EXEQUATUR:

See topic 5.04 Judgments.

5.04 JUDGMENTS:

Foreign Judgments (Art. 1009 to 1022 C. C. P.).—Foreign judgments may not be executed until they are clothed with exequatur. However, pending grant of exequatur they may be used as evidence, or as a means for precautionary measures such as inscription of an annotation on title deeds, judicial custody, demand of trustee in bankruptcy of debts owing to bankrupt estate, or intervening as a party in actions of bankrupt, precautionary attachment, attachment in hands of third parties.

Petition for exequatur is equivalent to an action for confirmation of attachment, or of a debt. (Art. 1010 C. C. P.).

Judgments rendered by foreign administrative or penal bodies and courts are not subject to this law unless they embody a civil obligation, and then only to extent of such civil obligation. (Art. 1011 C. C. P.).

Foreign judgments in matters of capacity, personal status, and those rendered as a matter of grace upon simple petition of a person without summoning other parties in interest (Ordonnance sur Requête) do not need exequatur for their execution in Lebanon unless they are subject to any pending dispute or opposition where rendered. Examples of such judgments or decrees: Processes of recording or rectifying a record, radiation of entries in records of Lebanese vital statistics, or domestic relations. (Art. 1012 C. C. P.).

Petitions for exequatur are made directly to President of Civil Court of Appeal of domicile of defendant, or of his residence if his domicile is unknown, or of situs of property upon which execution is to be enforced; otherwise they must be made to President of Civil Court of Appeal at Beirut. Order of President of Court of Appeal granting or refusing exequatur may be appealed from before Court itself. (Art. 1013 C. C. P.).

Any court may give effect to foreign judgment used as evidence in matter pending before it, provided conditions of Arts. 1014 and 1015 C. C. P. are fulfilled; it may also grant such judgment exequatur if expressly requested by either party. (Art. 1020 C. C. P.).

Conditions for Grant of Exequatur.

(1) Judgment must be rendered by a court of competent jurisdiction under laws of country where rendered, always provided such competence is not based on nationality of plaintiff only; and in case of two foreign judgments on same subject rendered by two foreign sovereignties, exequatur will be granted to judgment which conforms with rules laid down by Lebanese law regarding international competence. (2) Judgment must have acquired status of res judicata, and be executory under law of country where rendered. However, the exequatur may be granted to gracious decrees (Ordonnance sur Requête) and to interlocutory judgments if executory in country where rendered. (3) Defendant must have been served with process, and been granted right to defend himself. (4) Judgment must have been rendered in name of state whose laws permit execution of Lebanese judgments through similar procedures or otherwise. (5) That they are not contrary to public policy of state. (Art. 1014 C. C. P.).

It is not permissible for Lebanese courts seized with a demand for exequatur to reexamine foreign judgment on merits at request of defendant except in following cases: (1) If it is established that foreign judgment has been rendered on instruments which were subsequently deemed or declared to be false; (2) if subsequent to rendering of judgment pertinent and decisive documents are discovered whose production has been withheld or obstructed by either party; (3) if judgment contains contradictory statements in decision rendered; (4) if it is established that laws of country where rendered order a revision on merits of judgments rendered by Lebanese courts before granting exequatur. (Art. 1015 C. C. P.).

Causes for Refusal of Exequatur.

Grant of exequatur will be denied in following cases: (1) If in same dispute a final judgment has been rendered by a Lebanese court; (2) if in same dispute and between same parties an action is pending before a Lebanese court, which was commenced before action which led to foreign judgment. (Art. 1016 C. C. P.).

Necessary Documents.

Party petitioning for exequatur must submit following documents: (1) Duly authenticated copy of judgment, which must satisfy and embody all conditions imposed by laws of country where rendered, which establishes its validity; (2) documents establishing that judgment is executory in country where rendered; (3) duly authenticated copy of summons addressed to defaulting party if judgment is rendered by default, and of service of same upon him; (4) translation of these documents into Arabic, the official language, duly legalized pursuant to Lebanese law. (Art. 1017 C. C. P.).

Exequatur of Foreign and International Arbitral Awards (Arts. 793 to 797 and 814 to 818 C. C. P.).—Foreign and International Arbitral Awards are given effect and are granted exequatur, provided party wishing to use same produces evidence of their existence, and they are not clearly contrary to public policy. Party seeking exequatur must produce original copy of award together with original of agreement to arbitrate, or true copy of both documents legalized by arbitrators or any other competent authority, and duly translated into Arabic.

Exequatur is granted by order of Court of First Degree of Beirut for awards rendered without Lebanon.

Exequatur may only be refused for following reasons: (1) Award was rendered without agreement to arbitrate, or such agreement was null or had lapsed; (2) award was rendered by arbitrators who have not been appointed in conformity with provisions of applicable law; (3) award covers dispute which is outside scope of arbitral agreement; (4) parties have not been guaranteed right to defend themselves; (5) award does not contain statement of parties' demands and defenses, or does not indicate name of arbitrators or grounds on which it was rendered, or is not dated and signed by arbitrators; (6) award is contrary to public policy.

Order granting or refusing exequatur may be appealed from. However, order granting exequatur may only be appealed from for following reasons: (1) Award was rendered without agreement to arbitrate, or such agreement was null or had lapsed; (2) award was rendered by arbitrators who have not been appointed in conformity with provisions of applicable law; (3) award covers dispute which is outside of scope of arbitral agreement; (4) parties have not been guaranteed right to defend themselves; (5) award is contrary to international rule of public policy.

Exequatur of Foreign Writs of Execution (Arts. 1023 and 1024 C. C. P.).—Exequatur may be granted if such writs satisfy following conditions: (1) That they are given by official who is competent under lex loci; (2) that they satisfy formal requirements of lex loci; (3) that they do not contravene public policy; (4) that they are executory under lex loci.

5.05 LIMITATION OF ACTIONS:

Civil Cases—Realty.

Distinction must be made between realty that has, and has not, been surveyed (cadastre). For realty that has been surveyed and recorded in the Land Registry, there is no prescription, and adverse possession, no matter how long, cannot give title. For realty that has not been surveyed, the period is five and 15 years, depending on certain conditions in the title.

Civil Cases—Personalty.

As a general rule actions are barred by the lapse of ten years. Exceptions: Five-year rule for the following: arrears, interest, dividends, rent (rural and urban), and generally all prestations payable annually or at shorter periods, actions issuing from the partnership contract. Two-year rule, among others, for the following: professors, servants and workmen, for services and wages; hotel keepers, for board and lodging; physicians, lawyers, contractors and engineers, for services rendered.

Commercial Cases—General.

Ten years.

Commercial Cases—Bills of Exchange, Notes to Order.

All these, whether made by merchants or by nonmerchants, are deemed to be commercial, three years.

Commercial Cases—Checks.

For actions against drawer and endorsers, among endorsers, and by endorsers against drawer, six months; against drawee, three years. (C. C. 442).

Insurance.

Two years. (C. O. C. 985).

Civil actions for damages based on felony are open to injured party and his heirs and next of kin, but are barred by lapse of ten years. (Art. 438, C. P. P.).

Civil actions for damages based on misdemeanor are barred by lapse of three years. (Art. 439 C. P. P.). See, however, subheads infra.

Civil actions for damages based on contraventions are open to heirs and next of kin, but are barred by lapse of one year. (Art. 440 C. P. P.).

Carriage by Air.

Actions against carrier in case of injury to persons are barred by lapse of ten years (Art. 10, C. A. L.), except contracts subject to Convention of Warsaw where the statute is two years (Art. 29:1, I. C. W.). Actions for injury to goods are barred by lapse of one year (Art. 70, C. A. L.), and for contracts subject to Convention of Warsaw, two years (Art. 29:1, I. C. W.).

Carriage by Sea.

Actions against carrier are barred by lapse of one year. (Art. 231, C. C. M.). Collision actions are barred by lapse of two years. (Art. 244, C. C. M.). Actions against insurer are barred by lapse of two years. (Art. 380, C. C. M.).

Motor Accidents.

If there is a contract of carriage, action against the carrier in case of injury to persons is barred by lapse of ten years. Action for injury to goods is barred by lapse of one year. (Art. 687, C. O. C.). If there is no contract of carriage, actions against wrongdoer based on delictual negligence are barred by lapse of three years; but action against owner of motor vehicle is barred by lapse of ten years.

Persons Entitled to Claim Damages.

Actions for damages are open to injured party and to his heirs and next of kin.

5.06 PRESCRIPTION:

See topic 5.05 Limitation of Actions.

6 COURTS AND LEGISLATURE

6.01 COURTS:

Judicial Power.

There are three degrees of courts, viz., Courts of First Instance, Appeal, and Cassation-Revision.

Courts of First Instance are of two kinds: (1) Sole Judge Courts having jurisdiction of all civil actions, real and personal, with exception of bankruptcies, under 100,000,000 Lebanese pounds. All actions under 800,000 Lebanese pounds are final and not open to any appeal. (2) District Courts of First Instance, one in each of the Five Districts of Lebanon: consisting of three judges. These Courts have general jurisdiction in all civil matters not specifically attributed to the sole Judge Courts of First Instance.

Courts of Appeal, five in number, one for each District. Composed of three Judges. These courts have authority to pass on questions of fact and questions of law.

The Cour de Cassation-Revision passes on questions of law exclusively.

Criminal Courts.

In criminal cases there are degrees viz., the Criminal Court of First Instance. Appeal is taken therefrom directly to the “Cour de Cassation”. Trial by jury does not exist. This court passes on questions of fact, and applies the law.

Administrative Courts.

Claims against the government and the administrative departments are decided by a special court called “Conseil d'Etat”.

See also category 10 Employment, topic 10.01 Labor Relations.

6.02 LAW REPORTS, CODES:

Since its severance from the Ottoman Empire in consequence of the First World War, the Republic of Lebanon has enacted a series of Codes, a Code of Obligations and Contracts, a Code of Civil Procedure, a Code of Commerce, Penal Code, Code of Labor, Code of Social Security, and has shown a marked progressive tendency to keep up with the social and economical developments of modern life. Very little remains from the old Ottoman Law. The Personal Status Law and Domestic Relations are still governed by the Canon Law, each community having its own canon courts and codes.

6.03 LEGISLATURE:

Regular Sessions.

Lebanese Parliament holds two regular sessions. First session starts on Tues. following 15th day of Mar. and continues until end of May. Second session starts on Tues. following the 15th day of Oct. and continues until end of year; this second session is limited to discussion of the budget before the discussion of any other subject. (Art. 32 of the Constitution).

Special or Extraordinary Sessions.

President of Republic may call Parliament for an extraordinary session by a Presidential Decree indicating the beginning of the session and its termination, and the subjects to be discussed. President of Republic is bound to call Parliament for an extraordinary session if he is requested by majority of members of Parliament. (Art. 33, Constitution).

6.04 REPORTS:

No official law reports. See also topic 6.05 Statutes.

6.05 STATUTES:

The laws of the Republic of Lebanon, generally, are codified, all with the exception of the Personal Status Law governing marriage, divorce, separation, filiation and guardianship, which are still governed by the Canon Laws of the various communities. In many instances, these have been codified.

The civil and commercial codes are based on the Ottoman and French Codes (the Ottoman Codes are practically translations of the old French Codes). In recent years, the Lebanese Code of Obligations and Contracts, Code of Maritime Commerce, Code of Commerce, Labor, and Social Security, were promulgated. In the absence of a text, the tendency of the courts is to apply the French Code, and to be inspired by French jurisprudence.

7 DEBTOR AND CREDITOR

7.01 ASSIGNMENTS:

The consent of the debtor is not necessary for the assignment of a claim by the creditor to a third person, except where the law or agreement prohibits the assignment, or where the claim is unassignable by nature. The assignment of a chose in action is only possible with the consent of the debtor. As against third persons, and more particularly the debtor, the assignment exists only as of the date of the notice thereof made to the debtor or of his acceptance thereof in a notarial act. So long as these formalities are not accomplished, if the debtor pays the claim to the assignor, or to a previous assignee, he is discharged. The assignor warrants the existence of the claim at the time of the assignment, but not the solvency of the debtor, unless otherwise expressly stipulated. The assignee acquires all the rights and privileges of the assignor excepting those of a personal nature. (C. O. C. Arts. 280-286).

7.02 ATTACHMENT:

Creditor wishing to attach property of debtor must petition Chief of Bureau d'Exécution for order or writ of attachment; if claim is not evidenced by executory writ (titre exécutoire) creditor may be required to furnish bond, and must, within five days from issuance of writ, begin suit in confirmation of attachment and for its conversion into execution proper. (Arts. 866:876; 881:899; 900:917; 948:996 C. C. P.).

7.03 BANKRUPTCY:

Foreigners doing business in Lebanon are subject to the bankruptcy law on the same basis as Lebanese subjects. A foreign decree in bankruptcy may be enforced in Lebanon after obtaining the Exequatur.

7.04 EXECUTIONS:

There are several forms: “Saisie arret” to attach debts, sums of money of personal property, belonging to the debtor and held by third persons; “saisie immobiliere,” which operates on realty owned by the debtor; “saisie brandon,” which operates on growing crops; “saisie conservatoire,” resorted to as a safeguard to prevent the debtor from disposing of his property and rendering any judgment which may be recovered by the creditor of little or no value. It operates on all property owned by the debtor. Each of these forms has its special procedure, which is formalistic and complicated.

See also topic 7.06 Garnishment; category 5 Civil Actions and Procedure, topic 5.04 Judgments.

7.05 EXEMPTIONS:

Following are exempt from seizure: (1) State property; (2) property belonging to foreign states; (3) rights attached to person of debtor; (4) private correspondence; (5) rights of author over his literary and artistic creations before publication; (6) wakfs; (7) bedding of debtor and his family and their necessary clothing, and objects necessary for exercise of worship; (8) consumables, combustibles and income necessary for maintenance of debtor and his family for two months; (9) equipment and tools relating to, and books necessary for debtor's profession or trade up to value of 800,000 Lebanese pounds; (10) implements and instruments used in teaching or practice of arts and sciences up to value of 800,000 Lebanese pounds; (11) one cow or six sheep or ten goats and food sufficient for them for two months; (12) alimony allowed by courts, family allowance, allowance for high cost of living, and sums granted to workers and employees as matter of aid; (13) end of employment compensation for civil servants and their retirement fees; (14) sums of money or articles given or bequeathed under condition that they shall not be seized or disposed of, during period of maximum of ten years from date on which beneficiary enters into possession of same (only persons who become creditors of beneficiary after expiration of this period may seize such sums or articles); (15) provisions for commercial bills and notes in circulation; (16) ships ready to sail unless debt concerns pending voyage; (17) commercial establishments as whole (unless pledged) or their intangible elements, always provided bankruptcy provisions are observed.

7.06 GARNISHMENT:

Garnishment is applicable to all personalty (including sums of money, but excluding deposits in banks due to banking secrecy law) belonging to debtor and in possession in hands of garnishee. (Art. 881 C. C. P.). Creditor must petition judge presiding over Bureau Executif for garnishment order. (Art. 882 C. C. P.). If debt is not liquid, presiding judge will make provisional estimate of sum due. (Art. 883 C. C. P.). Decree denying garnishment may be appealed from. Garnishment order, or provisional estimation of sum due, may be revoked by judge at demand of one of parties after hearing both parties to litigation. (Art. 885 C. C. P.). Garnishee must within five days of service of garnishment order, submit to Bureau Executif declaration showing sum or personalty belonging to debtor in his possession. Failure to do so without reasonable excuse makes him responsible personally for sum forming basis of garnishment. (Arts. 888-890 C. C. P.).

7.07 INSOLVENCY:

See topic 7.03 Bankruptcy.

7.08 LIENS:

Liens may be contractual as in pledges (gages) and “antichresse” and “nantissements” (C. O. C. Law No. 46/L, Art. 1, Arrete 3339, Arts. 91, 100, 101), or they may arise out of contracts as in the following cases: Ready money sales, where the vendor has a lien until the price is paid (C. O. C. 407, 408); sales on credit, where the vendor may retain the thing sold if the vendee becomes bankrupt, is unable to pay or has diminished the value of the security (C. O. C. 410); vente a remere, or sale with right to repurchase, if the purchase price is not refunded (C. O. C. 473); bailments (C. O. C. 571, 582); transport (C. O. C. 686); freight, where the captain has a lien on the freight; mortgages (Art. 120, Arrete 3339); workman who works with materials of others (C. O. C. 677); stolen goods bought at the market or from a merchant dealing in similar goods until payment of the price paid (C. O. C. 309). See also category 18 Mortgages, topic 18.01 Chattel Mortgages.

7.09 PLEDGES:

If value of pledge exceeds 100 Lebanese pounds it must be established by a registered act, otherwise pledgee can claim no preference. In event of default in payment, creditor holding pledge may not dispose of it or appropriate it without a court order. Any convention between pledgor and pledgee which authorizes creditor to appropriate or dispose of thing pledged, without court order is null and void. Creditor may retain thing pledged until payment in full. (C. O. C. Law 45/L of Nov. 7, 1932).

8 DISPUTE RESOLUTION

8.01 ALTERNATIVE DISPUTE RESOLUTION:

Mandatory Dispute Resolution.

There exists no mandatory dispute resolution except in matters regarding labor relations (see category 10 Employment, topic 10.01 Labor Relations, subhead Labor Disputes).

Voluntary Dispute Resolution.

Parties with full legal capacity may always agree to submit disputes to arbitration. For enforcement, original of arbitral award must be recorded in Records Office of Court of First Instance within which jurisdiction arbitration was carried out. Enforcement is granted by order of President of said Court.

For foreign arbitral awards see category 5 Civil Actions and Procedure, topic 5.04 Judgments, subhead Exequatur of Foreign and International Arbitral Awards.

8.02 ARBITRATION AND AWARD:

See category 5 Civil Actions and Procedure, topic 5.04 Judgments.

9 DOCUMENTS AND RECORDS

9.01 ACKNOWLEDGMENTS:

Acknowledgments may be made before a notary public. Identity of acknowledger is established by an identity card, issued to each inhabitant by Ministry of Interior, or by testimony of two identifying witnesses, or notary public's statement that acknowledger is personally known to him. Copy of instrument acknowledged is kept in archives of notary public, and another copy is given to acknowledger for use wherever necessary. Instruments acknowledged in this way are admitted to record or received in evidence without further proof.

Authentication for use outside the country requires the authentication of the notary's signature by the Ministry of Justice and the Ministry of Foreign Affairs, and the visa of the consular officer of the country where the instrument is to be used.

Documents acknowledged before a notary, which are intended for use in Lebanon, should be made and executed in accordance with the lex loci. The notary's signature must be certified by the competent authority (such as the county clerk in the United States). The signature of the competent authority must be certified by a Lebanese diplomatic or consular officer.

9.02 NOTARIES PUBLIC:

Their duty is to draw up instruments, verify and make a record of all documents which the parties desire to make in authentic form, preserve the same on file as a record, and issue certified copies for execution; legalize translations of documents; receive deposits; protest notes; legalize wills and signatures; draw up powers of attorney, deeds and chattel mortgages.

10 EMPLOYMENT

10.01 LABOR RELATIONS:

Labor relations are governed by two forms of contracts, individual contracts freely entered into between employer and employee, and collective contracts.

Law of Sept. 2, 1964, instituted collective conventions. These are negotiated and entered between employers and labor unions. (Art. 1). All unions and employers who enter into the collective conventions, and all members of the groups that adhere thereunto are bound by the provisions thereof. (Arts. 12 and 13). Duration of collective convention is two years, renewable for a similar period. (Art. 7).

Labor Disputes.

Disputes between employer and employee, as individuals, are settled by a special court called Arbitration Labor Council, which is composed of three members, a judge, who presides, a representative of the workers, and a representative of the employers. (Art. 77, Labor Code). Judgments rendered by Council are final and not open to any appeal. (Art. 80).

Collective disputes between employer and employees are settled by a special committee composed of nine members, presided over by a judge. (Art. 49; Law Sept. 2, 1964). Award rendered is final and not subject to any appeal. (Art. 61; Law Sept. 2, 1964).

Hours of Labor.

Maximum number of hours for workers of both sexes, over 16 years of age, with exception of agricultural work, is 48 hours a week. (Art. 31, Labor Code). This may be increased or decreased by a decision of Ministry of Social Affairs. It may be increased by employer to 12 hours a day provided notice is given to Ministry of Social Affairs, and provided employees and workers are paid an addition of 50% per extra work hour. (Art. 33). Children under 16 years of age cannot be made to work over seven hours a day. (Art 23).

Child Labor.

It is not permissible to employ children under 13 years of age. Children under 15 cannot be employed in any industry or in any exhausting, or health detrimental works. Children under 16 cannot be employed in works dangerous by nature, or which may constitute danger to life or health or morality.

Minors (namely under 18 years of age) working in industry, or in any exhausting, health detrimental, or dangerous works, cannot be employed for more than seven hours a day, as well as between 7 p.m. and 7 a.m.

Minors are entitled to resting period equal to minimum of 13 consecutive hours between two working periods.

Female Labor.

Females cannot be employed in industrial plants at night, or in any of the hazardous trades set forth in Annex 1 of Labor Code, same as adolescents.

Labor Unions.

Labor unions are recognized by Labor Code (Art. 83) and unions may confederate with approval of Ministry of Social Affairs. (Art. 86). Unions are controlled by government which may dissolve them for contraventions of the duties imposed upon them or for any ultra vires acts. (Art. 105).

Wages and Salaries.

Minimum wages are fixed at 500,000 Lebanese pounds a month, payable for employees monthly, and workers fortnightly. (Art. 47). Wages earned and unpaid at termination of service may be claimed within two years, otherwise they will be barred by prescription. (Art. 351, C. O. C.). In case of bankruptcy of employer, unpaid wages of last year of service are privileged and take priority after debts to FISC, judicial costs and legal mortgages. (Art. 48, Labor Code).

Notice of Termination of Service.

Either party to contract of employment may terminate same at any time provided he gives notice of termination to other party. Period of notice is one month if less than three years service; between three years and six years, two months; between six and 12 years, three months; over 12 years, four months. Notice must be in writing. Failure by either party to give notice subjects him to payment of special compensation equal to salaries employee would have earned had such notice been given. Any misuse by either party of his right of termination subjects him to payment of additional compensation to be assessed by courts between two and 12 months salary. (Art. 50 of Labor Code as am'd by Decree No. 9640 of Feb. 6, 1975).

Notice of termination may not be given while employee is on annual or sickness leave, or while female employee is pregnant or on maternity leave.

Indemnity on Termination of Service.

Rights and obligations of employee upon termination of service are governed by Code of Social Security of Sept. 23, 1963. Upon termination of service, employees are entitled to indemnity provided they have served for period of 20 years, or that they suffer from ailment that diminishes their usefulness by 50%, or if they attain age of 64, and for unmarried women if they marry. (Art. 50). Indemnity is fixed at one month's pay for each year of service. Additional one-half month's pay is granted for each year of service over 20 years. (Art. 51). Indemnity is paid by Department of Social Security, and borne by employer and paid by him to Department. Contribution to be paid by employer has been determined at 8.50% of month's pay. (Art. 71).

Foreign employees who do not benefit from Lebanese Social Security Plan are entitled to receive upon termination of their service by their employer indemnity equal to one month salary per year of service calculated on basis of last salary received. If termination is caused by employee no indemnity is due.

Family Allowances.

Married employees are entitled to family allowance paid to them by employer on behalf of Department of Social Security. Contribution to be paid by employer has been determined at 7% of that part of month's pay that does not exceed 1,500,000 Lebanese pounds. Family allowance paid by employer is deducted from contribution to Social Security.

Medical and Maternity Insurance.

Employees enjoy medical and maternity insurance covering 70% of costs, and provided by Social Security. Contribution to be paid has been determined at 6% of that part of month's pay that does not exceed 1,500,000 Lebanese pounds.

See also topic 10.02 Social Security.

10.02 SOCIAL SECURITY:

(Statute of Sept. 26, 1963).

Social Security comprises insurance against sickness, maternity, accidents, professional injuries, family allowances and indemnities at termination of services.

Beneficiaries.

All workers including those engaged in agricultural enterprises enjoy benefits which statute confers.

Foreign Workers.

Foreign workers enjoy all benefits of the statute only if their national laws accord reciprocal treatment to Lebanese workmen, and provided they hold Lebanese permits. However, members of family of a foreign worker, who do not reside in Lebanon, do not enjoy benefits of the statute other than the indemnity given at termination of the service. (Arts. 9, 10).

11 ENVIRONMENT

11.01 ENVIRONMENTAL REGULATION:

Ministry of Environment, organized by Decree No. 5591 of Aug. 30, 1994, includes five departments, namely: Administration, Protection of Nature, Protection of Inhabited Environment, Prevention of Consequences of Technology and Risks of Nature, Intervention and Repression.

Hunting is regulated by order No. 110/1 of May 18, 1995 meant to protect all kinds of birds and land animals.

Lebanon adhered to Basel International Convention of Mar. 22, 1989 on Control of Movement of Dangerous Waste across Borders, and to Convention of London of 1954, as am'd, for the Prevention of Pollution of the Sea by Oil.

See category 22 Treaties and Conventions, topic 22.01 Treaties and Conventions.

12 ESTATES AND TRUSTS

12.01 ADMINISTRATION:

See topic 12.05 Executors and Administrators.

12.02 DEATH:

There is no presumption of death. In the case of long absence of a person, oral testimony may be received, though not conclusively, to the effect that all such person's contemporaries in the locality have died.

Certificates of death may be obtained from the Department of Vital Statistics, Ministry of Interior. However, such certificates are generally given upon presentation of a power of attorney from a party entitled to same. It is more expeditious to obtain certificates through a local attorney.

Actions for Death.

See category 5 Civil Actions and Procedure, topic 5.05 Limitation of Actions.

12.03 DECEDENTS' ESTATES:

See topic 12.05 Executors and Administrators.

12.04 DESCENT AND DISTRIBUTION:

The Moslem Community—Devolution of Property Owned in Fee.

The heirs at law are called in the following order:

(1) Those Having a Legal Reserve.

The quantum of the legal reserve is fixed and must be satisfied before the residue of the estate can be distributed. The following are the legal reservists and their reserve.

(a) The Father.—In the presence of male descendants, son, son of a son, how low soever, one-sixth of the estate. In the presence of sole female descendants, daughter, daughter of a daughter, one-sixth as legal reservist and two-sixths as residuary. In the presence of two or more female descendants, one-sixth as legal reservist, and one-sixth as residuary. In the absence of any male or female descendants, the father takes the entire estate.

(b) The Mother.—In the presence of descendants, or of two or more brothers and sisters, one-sixth of the entire estate, and in their absence, one-third thereof. In the absence of descendants and of two or more brothers and sisters, but in the presence of husband and wife, one third of the residue after the husband or wife has received his or her legal reserve.

(c) The Grandfather.—In the absence of the father, the grandfather takes the legal reserve of the father, with the following difference, however: (x) In the presence of the father, the father's mother has no legal reserve, but with the grandfather, she has; (y) in the presence of the father and a husband or wife, the father's mother receives one-third of the residue after the payment of the legal reserve of the husband and wife; with the grandfather, she receives one-third of the entire estate.

(d) The Grandmother.—One-sixth of the estate. She is barred by the mother.

(e) The Sister German or of the Whole-Blood.—If sole, one-half of the entire estate; if two or more and no male heir, two-thirds thereof. If she comes with male heir (brother german), the male gets double the portion of the female. If she comes with the sole daughter, the daughter takes her legal reserve of one-half of the estate, and the sister german the residue. If she comes with two daughters, the two daughters receive two-thirds and the sister german takes the residue. If she comes with the daughter and the daughter of a predeceased son, the daughter receives one-half, the daughter of the one one-sixth and the sister german the residue. If she comes with a son, or the son of a son, how low soever, or with the father or grandfather, how high soever, she is barred.

(f) The Consanguine Sister.—If sole, one-half of the estate, if two or more, two-thirds thereof. If she comes with the consanguine brother, the male gets double the portion of the female. If she comes with the daughter, or the daughter of a son, these receive their legal reserves and the residue goes to the consanguine sister. If she comes with two or more sisters german, or with the son, the son of the son, the father, the grandfather, or the brother german, she is barred.

(g) The Daughter.—If sole, one-half of the estate; if two or more, two-thirds thereof. If she comes with the son, the male gets double the portion of the female.

(h) The Daughter of the Son.—If sole, one-half of the estate; if two or more, two-thirds thereof. If she comes with the son of the son, the male gets the double of the portion of the female. She is barred by the two daughters unless she comes with a male heir, or unless she comes with the son of the son, she is likewise barred by the son.

(i) Children of the Mother from a Former Marriage.—If sole, one-sixth of the estate, if two or more, one-third thereof. They are barred by descendants and by male ascendants. The distinction between the portions of the male and the female does not exist here.

(j) The Husband.—In the absence of any children, one-half of the estate; in their presence, one-fourth thereof.

(k) The Wife.—In the absence of children, one-fourth of the estate, in their presence, one-eighth thereof.

(2) Universal Heirs or Residuaries.

These are the consanguine relations who inherit the entire estate in the absence of legal reservists, or who take the residue after the legal reservists have been paid.

(3) Reversionists.

These are the legal reservists who receive the remainder of the estate, each in proportion to his or her legal reserve, in the absence of residuaries.

(4) Uterine Heirs.

These are the relations of the decedent who do not belong to the class of legal reservists, or to the class of universal heirs or residuaries, as the son of the daughter, son of a sister, father of the mother.

(5) Legatees.

For that portion of their legacies which exceeds the one-third of the estate.

(6) The State.

In the absence of all these foregoing heirs, the estate escheats to the state.

Devolution of Miri and Wakf Lands.

Miri lands are state domains. Wakf is mortmain. In both of these classes the dominium plenum is in the state, while the legal possession and use, together with the right to transmit to heirs, and to alienate inter vivos are in the tenant. The Miri lands and Wakf devolve on the heirs in the following order: (1) The children, male and female, share and share alike; (2) the grandchildren, male and female, share and share alike, per stirpes; (3) the father and mother; (4) brothers and sisters german or of the whole blood; (5) brothers and sisters consanguine; (6) brothers and sisters uterine; (7) the surviving spouse.

The children of a predeceased son or daughter inherit by representation the part of their predeceased parent. The father and mother, if they come concurrently with the children and grandchildren, have a legal reserve of one-sixth. The surviving spouse, if he or she comes concurrently with the heirs of the first class, has a legal reserve of one-fourth, and if with the heirs of the second class, one-half.

Non-Moslem Community—Christians and Jews.

The Inheritance Law of June 23, 1959, introduced new legislative provisions for the Christians and Jews. (Citations under the subhead are to Articles thereof). It placed the sexes on a footing of equality, established the right of representation, and amended the distributive share of the surviving spouse.

Classes of Heirs.

Under the new law heirs are divided into three classes: (1) the issue and their issue in line descending; (2) father and mother and their ascendants; (3) brothers and sisters and their issue. (Art. 14).

Legal Reserves.

Legal reserves have been established as follows: One-sixth to the parents and the survivor of them. (Art. 19); one-fourth to the surviving spouse in the presence of issue; one half to the surviving spouse in the absence of issue and the presence of father, mother, brothers and sisters; five-sixths to the surviving spouse in the presence of grandparents only; the whole in the absence of any of these heirs. (Art. 20).

The residue, after deduction of funeral expenses, debts and legacies, is distributed as follows: (1) issue and their issue in line descending (Art. 15); (2) the father and mother in the absence of issue, in equal shares; and if either predeceases the decedent, his or her share passes to his or her issue by representation; and in the absence of issue, the share passes to the other parent. If both parents predecease the decedent, their shares pass to their issue, but among such issue the right of representation is limited to the issue of the predeceased brother or sister (Art. 16); (3) in the absence of issue and parents and their issue, the estate passes to the grandparents in equal shares, the share of a predeceased grandparent passing to his or her issue by representation; and in the absence of such issue, to the grandparent on the same side, paternal or maternal; and in the absence of paternal and maternal grandparents, to their issue. (Art. 17).

Adopted Child.

The adopted child is treated on a footing of equality with the legitimate child. (Art. 23).

Illegitimate Child.

The illegitimate child inherits from the person who voluntarily acknowledges its parenthood. Its distributive shares is fixed as follows: (1) one-fourth of the portion of legitimate child in the presence of legitimate issue; (2) one half, in the presence of legitimate parents and brothers and sisters and their issue; (3) three-fourths, in the absence of these and the presence of other legitimate heirs; (4) the entire estate in absence of legitimate heirs. (Art. 24).

Posthumous Child.

Inherits if born within 300 days of the demise of the decedent.

Determination of Heirship.

The heirs are determined in a proceeding of “Devolution of Succession.” If several persons perish in the same accident, the court will determine the dates of their respective deaths, taking into consideration the attending circumstances, age, physical condition and other relevant considerations. If it is not possible to determine the dates, all are deemed to have perished simultaneously. (Art. 6).

Nationality.

Difference of nationality is no impediment to inheritance if the national law of the alien accords reciprocal treatment to Lebanese citizens. (Art. 8). Difference of religion is an impediment (Under the Moslem Shar'i Law, a Moslem cannot inherit from a Christian, and vice versa.).

Escheat.

The estate escheats on the failure of heirs.

12.05 EXECUTORS AND ADMINISTRATORS:

There is no procedure which corresponds exactly to probate and the grant of letters of administration. The estate vests directly in the heirs, who administer it themselves.

Moslem Community.

The competent court is the Shar'i court, which upon the petition of an heir or a creditor will render a decree designating the heirs and their distributive shares. The heirs administer the property. If voluntary partition is not possible, partition is made by the court, and the transfers of realty registered in the Land Registry.

Non-Moslem Communities—Christians and Jews.

(References below are to the Law of Inheritance, promulgated June 23, 1959 affecting estates of Christians and Jews.) The succession is opened at last domicile of decedent irrespective of where property is situated. A married woman is deemed to have the same domicile as her husband; a minor, at the domicile of his guardian, and in the absence of a guardian at the situs of the bulk of the property. (Arts. 2, 3).

Settlement of the Estate at Request of a Party in Interest.

The competent court is the court of the place where the succession or estate is opened. It has jurisdiction over the making of the inventory, the distribution of the assets, and the partition of the estate among the heirs and persons having a right therein. (Arts. 93, 95).

The inventory may be made: (1) upon the petition of an heir, or a person having a right in the estate, or the executor; (2) if among the heirs or the persons having a right in the estate there is a minor who has lost his father, or if he is a person lacking capacity, or an absent one who has no agent to act for him. (Art. 94). The petition is heard by the judge of the court of first instance in chambers: objection to his decree may be made by any person who is harmed thereby. The opposition to the decree does not suspend the operation of inventory taking if the petitioner for the taking of same furnishes the necessary bond. The court may demand a bond from the person making the opposition. (Art. 95). The inventory is taken by an expert appointed by the judge. (Art. 96).

Settlement and Partition.

When the inventory is taken, the judge summons the heirs and persons having a right in the estate to appear before him on a fixed date with the evidence of their title or right, and a declaration as to whether or not they accept the inheritance. (Art. 98). If the parties in interest agree to remain in a state of indivision, the court will order the delivery of the assets to those entitled thereto against their receipt. Special legacies are paid to the legatees. Creditors may attach the property held in common, and reserve the right to pursue the heirs and legatees in proportion to their shares and legacies. (Art. 99). If one of the heirs demands partition, a notice is published in the Official Journal and one or more newspapers, and a copy thereof is posted at the door of the court or at some place near the domicile of the decedent, inviting all the parties in interest and the creditors to submit evidence of their rights within six months of the insertion of the notice in the Official Journal. (Art. 100). Upon the expiration of this delay, the court will summon the parties in interest and creditors to a meeting to discuss an amicable settlement (Art. 101), which if arrived at, the judge will confirm by decree rendered in chambers; if no settlement is arrived at each party having a claim must bring action within a delay which the court will fix (Art. 102). If action is commenced within the delay fixed, the judge will set a date for a hearing to examine whether or not to suspend the settlement and partition. (Art. 103). If the settlement pursues its course, the heirs may agree among themselves to partition the estate in the manner they may choose. (Art. 104). If they do not agree, the judge will draw up a plan for partition, calling in expert opinion if necessary. If the plan is approved, the judge will confirm it by decree rendered in chambers. (Art. 105). If one of the heirs rejects the plan, he will be asked to submit his opposition thereto, and the judge will render a judgment that shall not be open to any appeal or other recourse. (Art. 106). If the property does not lend itself to partition, it is sold at public auction. (Art. 107).

Settlement of Estate When Heirs are Unknown.

When the heirs are unknown, the “Mukhtar” (Civil officer of the Administration) of the locality where the decedent was domiciled notifies the court of the death, and the judge will render a decree in chambers for settlement of the estate. (Art. 110). After taking of the inventory, the court will deposit cash and other valuables in a bank, and deliver the remainder to a custodian to administer the same. The custodian or administrator may be required to furnish bond. Perishable goods are sold and the proceeds deposited in the bank. (Art. 111). If after five years no heirs present themselves, the judge will decree in chambers the delivery of the property to the State. (Art. 112). The custodian or administrator renders an account of his administration to the court, which will fix his fee, pay the same, and order the delivery of the residue to the State. (Art. 113). If thereafter an heir appears, he may claim the estate from the State. (Art. 114).

Settlement of Estate When One of Heirs Is a Minor or Lacks Capacity.

In such cases, the court on its own motion or upon information may decree the settlement of the estate. (Art. 119). It may appoint a guardian. (Art. 120). After taking inventory, proper measures are taken to safeguard the interests of the minor and the incapable, and then if no heir demands it, the court will determine if settlement is to be proceeded with, and the share of the minor and/or the incapable will be deposited in a bank. (Art. 121). If the judge finds it to the interest of the minor and/or the incapable to partition the estate, the guardian will represent his ward; however, all the contracts he may execute must be ratified by the judge. (Art. 122).

Executors.

The powers of the executor may be defined by the testator, and if same are not so defined, the executor will administer the estate, pay the debts and legacies and deliver other property according to the terms of the will. (Art. 82). If several executors are designated, they will act jointly unless otherwise specified in the will; all are jointly responsible for the assets of the estate. (Art. 83). The heirs may not dispose of the assets, or interfere with the administration in the presence of an executor. (Art. 85). Actions are brought against the executor. (Art. 86). The executor must promptly notify his acceptance of the charge to the heirs, give them a statement of the assets and liabilities, and inform them of the date of the settlement of the estate. (Art. 87). The heirs may demand the submission of yearly accounting if the period of services is long. (Art. 89). An executor may not be released of responsibility for his administration. (Art. 90). If the executor's fee is not fixed by the testator, he may demand a reasonable fee. (Art. 91).

The executor may be dismissed upon the complaint of an heir for failure to perform his duties, or if he becomes unfit for the performance of the same. (Art. 92).

In all cases, whether the person dies testate or intestate, the procedure consists of a party in interest—heir, next of kin, or creditor—petitioning the court for a decree determining the heirs and the distributive share of each. For Christian and other non-Moslem Communities competent court is Civil Court; for Moslem Community it is Shar'i.

If a person dies intestate, the administration is in the hands of the heirs and the distributive share of each will serve a copy of same on the Land Registrar for transfer of real property. If person of non-Moslem Community dies testate, Decree of Devolution of Succession will certify presence of will, and distribution of estate pursuant to testator's wishes. Will is then deposited together with certified copy of Decree of Devolution of Succession in Bureau d'Execution for execution according to its tenor. If there are minors, or if there is any contest, matter is referred to court.

12.06 INTESTACY:

See topic 12.04 Descent and Distribution.

12.07 TRUSTS:

See category 19 Property, topic 19.07 Wakfs.

12.08 WILLS:

Moslem Community.

A testator may dispose by last will and testament of one-third of his estate only. A legacy or legacies in excess of this one-third is reducible to the one-third unless approved by the heirs. A legacy to an heir is invalid, unless approved by the heirs.

Non-Moslem Communities—Christians and Jews (References below are to the Law of Inheritance, promulgated June 23, 1959).—Testator must be of sound and disposing mind and memory, and must have completed his eighteenth year. (Art. 39). Legacies may be made to heirs and nonheirs, and to the child conceived, provided there is no legal impediment. (Art. 40). A will made in the last sickness in favor of attending physician is invalid, unless physician is an heir: however, the will may be valid if the legacy is in payment of services due consideration being taken of the size of the legacy, the size of the estate and the value of the services rendered. (Art. 43). Legacy to an alien is not valid unless the national law of the alien accords reciprocal treatment to Lebanese citizens. (Art. 44). Legacies to places of worship, philanthropic institutions, educational and public establishments having legal capacity are valid. (Art. 46). Legatee must be designated by the testator himself; legacy to a legatee who cannot be determined at the time of testator's death is invalid. (Art. 48). Legacy of nude property to one person, and of the use to another is valid provided the use does not tie up the alienability of the property held in fee simple for a longer period than the life of the legatee and his issue. (Arts. 50, 51). Will partitioning the estate among the heirs, specifying the share of each is valid: however, if the legacy to any heir exceeds his distributive share in the estate, the excess is reduced to the portion thereof which may be disposed of by will. (Art. 49).

Testamentary Disposition.

The excess over the portion reserved for the issue, father, mother and surviving spouse is reduced to the quantum permitted by law. (Art. 58). The reserve for the issue is 50% of the estate, to be divided equally among the living, share and share alike, the issue of a predeceased heir being given the share of their author by representation. (Art. 59). The reserve of the surviving spouse is 30% (Art. 60); that of the father and mother, 30%, share and share alike, and the entire 30% to the survivor of them (Art. 61).

In the presence of issue with the surviving spouse and the father and mother and the survivor of them, the reserve for the issue is 30%; that of the surviving spouse, 10%; that of the parents and the survivor of them, 10%. (Art. 62). In the presence of issue with a surviving spouse, or with the father and mother and the survivor of them, the reserve for the issue is 40%, that of the surviving spouse, or the father and mother of the survivor of them 10%. (Art. 63). If testator leaves a surviving spouse, father and mother or the survivor of them only, the reserve of the spouse is 20%, that of the father 15%, and that of the mother 15%. (Art. 64). If the legacies exceed the legal reserve, they are reduced to the level thereof: the demand for such reduction is only permissible to the heirs having a legal reserve and their universal heirs, and agents. (Art. 65).

To determine the legal reserve, there must be added to the net assets, after deduction of debts, the gifts inter vivos valued as at the date they were made. (Art. 66). If the legacy is of a Use, or an annuity, or of the nude property, the value thereof is estimated, taking into consideration the age of the legatee, his physical condition and other attending circumstances. (Art. 67). If the legacies exceed the sum which may be disposed of by will, or the portion thereof that remains after deduction of gifts inter vivos, the reduction is made without distinction between general and special legacies. (Art. 68).

Form and Execution.

Wills executed in Lebanon may be made in the official manner, or they may be holographic.

Official Form.

A will made in the official form must be drawn up by a Notary Public. (Art. 55). It must be filed with the Notary and mention thereof made in a special register.

Holographic Wills.

Holographic wills must be written, signed and dated entirely by the testator's own hand, and deposited by him personally, or by his special agent with the Notary Public, enclosed in an envelope, sealed with sealing wax, and the seal authenticated by the Notary Public, and an entry thereof made in the special register. (Art. 56).

Nuncupative Wills.

The will of a soldier on the battlefield may be made before an officer of the rank of lieutenant or above. It becomes null and void at the expiration of three months following the return of the soldier to a locality where the will could be made in the proper way. (Art. 57).

Revocation.

Testator may revoke his will wholly or in part. (Art. 69). Revocation may result from the execution of a subsequent will, deed, or letter written by the testator's hand and deposited with the Notary Public. (Art. 70). A subsequent will which does not contain an express revocation may tacitly annul the provisions of the former will which are in contradiction therewith. (Art. 71). Revocation may result from the sale of the property bequeathed, devised, and up to the value of the thing sold. Such revocation may be upheld even though the sale is annulled for the absence of proper consent, or the return of the property bequeathed to the testator. (Art. 72). Revocation may be decreed at the demand of an heir or a legatee in the following cases; (1) nonperformance of the conditions of the will; (2) if the legatee commits a crime which bars him from the inheritance (Art. 73), always provided action is commenced within one year from the demise of the testator, or from the date on which the cause became known (Art. 74).

Lapse.

Legacies lapse in the following cases; (1) death of the legatee before the testator; (2) death of the legatee before the performance of the conditions of will during his lifetime; (3) return of the legacy by the legatee, or by his incapacity to receive the same; (4) destruction of the thing bequeathed during the lifetime of the testator. (Art. 75).

Acceptance of Will.

The legacy becomes binding by the express or implied acceptance of the will by the legatee. For the child conceived, the minor, and the person lacking capacity, acceptance may be made by the guardian. (Art. 77). It is permissible to accept the whole, or a part only, of the legacy, and it may be accepted by some legatees and rejected by others. (Art. 78). Acceptance takes effect as of the date of the testator's death. (Art. 79).

Children.

Children may not be deprived of their legal reserve in the estate. Children born after the execution of the will, or their issue if they predecease the testator, regardless of whether or not they are provided for in the will, receive their share of the legal reserve.

Foreign Executed Wills.

Wills executed without Lebanon may be drawn and authenticated pursuant to the provisions of the Lebanese law, or in the form in which official deeds and documents are authenticated under the foreign law (Art. 54); and they may be deposited with a Notary Public or a Lebanese consul. (Art. 56).

Foreign Probated Wills.

Decree probating the will may be granted to the executor if the foreign law grants reciprocal treatment to Lebanese decrees.

Probate.

Probate as understood by American courts, whereby attesting witnesses appear before the competent court officer to be examined is not a part of the procedure in Lebanon. The precautions attending the execution of the will, and deposit of same with the Notary Public, and entry thereof in the special register kept by the Notary Public render the examination of witnesses unnecessary. The will is executed according to its tenor by the Bureau Executif of the court. In the case of any opposition, the contest is heard by the Civil Court.

See also topic 12.05 Executors and Administrators, subhead Settlement and Partition, catchline Executors.

13 FAMILY

13.01 DIVORCE:

Divorce is governed by the Canon Law. Each community has its canon or ecclesiastical courts. Causes differ with the different communities. No uniform civil law is possible owing to the presence of so many religions and religious courts, each guarding jealously the privileges and rights enjoyed from times past.

Moslem Community.

The majority is Sunnite and follow the Hanafi Rite. The law concedes to the husband the right to dissolve the marriage. He can, therefore, put an end to the marriage at his uncontrolled option (the wife may do so only if the husband has conferred such power on her in the marriage contract, which is rarely, if ever, done). The dissolution of the marriage by the husband's own act is called Talak, repudiation, divorce. Talak is of two kinds, Raj'ai or revocable, which permits the husband to resume the conjugal relations, and Ba'en or irrevocable or absolute. A divorce which is revocable in its inception becomes irrevocable if the `Iddat (period of probation, three menstrual periods) is allowed to elapse without the husband having revoked his act either expressly or tacitly. Divorce is effected by the husband making a declaration of the following sentence thrice at one and the same time: “I have divorced thee,” or by saying at one and the same time: “I have divorced thee thrice.”

Apart from the dissolution of the marriage by the husband's own act, the law allows the dissolution in certain cases by a decree of the court. Such dissolution is called “furkat.” If furkat is decreed for a cause imputable to the wife, it has the effect of annulment.

Remarriage.

A woman who is divorced is prohibited from marrying within three menstrual periods or, if pregnant, until she gives birth to a child, and if past the age of menstruation, within three months from the divorce. The husband who divorces his wife cannot remarry her until she has been married to another man, and such second marriage has terminated after consummation (tahlil) and the period of probation ('Iddat) on account of her second marriage has elapsed.

As to dower in case of dissolution of marriage or separation, see category 19 Property, topic 19.02 Dower.

Children.

Custody of children of tender years, boys until the age of seven, girls until nine, is accorded of the wife. These ages passed, custody is given to the husband.

Catholic and Maronite Communities.

Communities under the jurisdiction of the Church of Rome. Jurisdiction is in the canon, or ecclesiastical courts of the Catholic and Maronite communities. The applicable law is the Canon Law of the Church of Rome, under which the marriage is indissoluble. Annulment or separation may be had in certain cases.

Protestant Community.

Jurisdiction is in the canon courts of the community. Law applicable is the personal status of the Protestant community.

Causes of Divorce.

(1) Adultery; (2) incurable insanity of either spouse; (3) attempt against the life of either spouse by the other; (4) adoption by either spouse of a religion other than the Christian religion; (5) five years absence; (6) refusal by either spouse to cohabit with the other for a period of five years continuously, without a legitimate cause.

Action may not be maintained where: (1) The offense was committed by procurement, or with the connivance of the plaintiff; (2) the offense has been condoned either expressly or tacitly; (3) the action was not commenced within six months after the discovery of the offense charged, or five years after its occurrence.

Separation.

Separation forever or for a limited time may be granted for cruel and inhuman treatment or unsafe and improper conduct which renders the continuance of married life insupportable. Damages are awarded in the discretion of the court to the party in whose favor the decree is rendered.

Children.

The court may make directions for custody of the children pending the action and thereafter. If they are of tender years and the wife is unworthy, the court may entrust the custody of the nearest relative on the father's side.

Remarriage.

The guilty party may not remarry for five years following issuance of the decree. After the expiration of this period, he or she may remarry only with a special decision of the court which rendered the decree, and provided his or her conduct has been exemplary. A divorced woman may not remarry within nine months from the issuance of the decree or, if pregnant, until she gives birth to the child.

Greek Orthodox Community.

The husband may sue for divorce for the following causes: (1) Discovery that the wife is not a virgin; (2) wilful destruction by the wife of the husband's seed; (3) if the wife sleeps outside of the conjugal home, attends banquets or bathes with men in mixed baths, all against the husband's orders; (4) if she goes to the races, theaters, or gambling halls surreptitiously or against the husband's orders; (5) adultery; (6) refusal for three years to obey a court order to cohabit with the husband; (7) refusal to obey the husband's repeated orders not to visit a special person or house.

The wife may sue for divorce for the following causes: (1) Impotence of the husband; (2) if he accuses her of adultery and fails to prove the charge; (3) if the husband encourages the wife to prostitution; (4) if he neglects her for three years; (5) adultery of the husband in the conjugal home and refusal by the husband to mend his ways.

Both husband and wife may sue for divorce for the following causes: (1) Incurable insanity; (2) joining the monastic orders; (3) attempt by either spouse against the life of the other; (4) sentence of imprisonment for five years or more for a defamatory offense; (5) adoption of another religion.

Remarriage.

Both may remarry; however, the wife may not do so before the expiration of four months.

Aliens.

Foreigners are subject to their national laws in matters of divorce, separation, alimony, and the custody of the children. All actions are brought before Civil Courts. Duly certified copy of national law must be submitted to court.

13.02 HUSBAND AND WIFE:

Husband and wife have their separate estates. The wife has full control of her property and can manage it without any assistance or interference from her husband. She can sell it, lease it, mortgage it or dispose of it by will or otherwise as she pleases without consent of her husband.

13.03 INFANTS:

The age of majority is 18. (C. O. C. art. 215).

(References below are to the Law of Inheritance, promulgated June 23, 1959, affecting the estates of non-Moslems such as Christians and Jews.)

Illegitimate Children—Acknowledgment.

Parenthood of an illegitimate child may be established by voluntary acknowledgment, or by a declaration embodied in the birth certificate pursuant to the requirements of the registration of vital statistics, or in a notarial act. Voluntary acknowledgment is not permissible after the child attains the age of majority. (Art. 24). Voluntary acknowledgment binds only the person making it. (Art. 25). If either spouse acknowledges an illegitimate child in the marriage act, when the child is born before the solemnization of the marriage, the presence of such an illegitimate child will have no effect upon the rights of the other spouse and the issue of the marriage. (Art. 26). It is permissible for the illegitimate child to establish its paternity before the competent court in the following cases: (1) forceful carrying off, or rape, if pregnancy occurs during such period; (2) fraudulent inducement as in the case of abuse of authority, promise of marriage; (3) if there is a commencement of proof in writings from the alleged father embodying an unequivocal acknowledgment of paternity. (Art. 27). It is not permissible: (1) if it is proved that during the legal period of pregnancy the mother's conduct was bad, or if she had relations with another person; (2) if the alleged father during the period of pregnancy was not in a position to be the father because he was away, or was suffering from an accident. (Art. 27). The action may be brought by the child only, and if an infant, by the mother even though she be a minor. In the latter case the action must be brought within two years from the date of delivery. If the action is not brought during the minority of the child, the child may bring it within the year immediately following its majority; the delay will be two years following majority if the mother fails to acknowledge the child during its minority, or if she is incapable. (Art. 28). The child may trace its maternity before the competent court. The action, however, will not be heard unless brought within two years following the child's majority. Oral evidence is not admissible unless there is a commencement of proof in writing, or if there is a convincing presumption. (Art. 29). See also category 12 Estates and Trusts, topic 12.04 Descent and Distribution.

See also category 12 Estates and Trusts, topic 12.05 Executors and Administrators, subhead Settlement and Partition, catchline Settlement of Estate When One of Heirs Is a Minor or Lacks Capacity.

13.04 MARRIAGE:

Marriage is governed by the Canon Law. Each community has its own law. However, irrespective of specificity of law governing each community, each of parties to contract of marriage has to produce to officer in charge of celebration pro nuptiae medical certificate showing diseases and impediments, if any, that may influence consent of other party; officer is bound to communicate contents of such certificates to parties concerned before celebration. (Decree Law No. 78 of Sept. 9, 1983).

Moslem Community.

Marriage is founded on contract, for which the consent of the parties is essential. Its validity does not depend on the observance of any religious rite or ceremony other than being witnessed by two properly qualified witnesses. In general, however, the contract is made before the ma'azoun.

Capacity.

Age, the male, 18; the female, 17. The male who has not completed his 18th year may marry with the authorization of the Cadi, and the female who has not completed her 17th year, with the authorization of the Cadi and the consent of the guardian. It is not permissible to marry a male infant who has not completed his 17th year or a female who has not completed her ninth year. It is not permissible to marry the insane except in case of necessity and with the authorization of the Cadi.

Plurality of Wives.

The Moslem law sanctions the predominance of the husband and concedes to a man the right to have more than one wife, not exceeding four, at one and the same time, provided he is able to deal with them on a footing of equality and justice.

Prohibitions and Impediments.

These are of a perpetual or a temporary nature. Perpetual prohibitions are based on consanguinity, affinity, or fosterage. Temporary impediments are: (1) Radical difference in religion, as between a Moslem and polytheist woman, until she embraces Islam; but a Moslem man may marry a Christian woman or a Jewess, but a Christian or Jew may not marry a Moslem woman; (2) two wives who are so closely related that if one of them had been a man, there could have been no marriage between them on account of relationship (a man cannot marry at the same time an aunt and niece or two sisters); (3) more than four wives at one and the same time; (4) a woman in the ‘Iddat or period of probation. See also topic 13.01 Divorce.

Catholic and Maronite Communities.

These are governed by the Canon Law of the Church of Rome. Marriage is solemnized by the authorized and ordained priest.

Protestant Community.

The marriage is a contract for which the consent of the parties is necessary. If either party is under age, the consent of the guardian is necessary. The ceremony must be performed by an authorized and ordained pastor of the church.

Conditions.

Both parties must: (1) Be mentally and physically competent; (2) be free from venereal diseases, consumption and incurable insanity; (3) have attained the age of marriage, 18 for the male, 16 for the female; (4) be not within the prohibited degree of relationship; (5) be not united by the bonds of a former marriage not yet dissolved; (6) if Christians, at least one of them must be a Protestant. An infant male who has not attained the age of 18 or a female that of 16, may be married in exceptional cases by a special court order. Each of the parties must submit a certificate from his or her spiritual chief that there is no impediment to the marriage, a medical certificate that he or she is free from the diseases enumerated above and from deformities which prevent the consummation of the marriage, and written consent of the guardian, if under age.

Greek Orthodox Community.

Marriage requires the consent of the parties and if under the age of consent (18 for a male, 15 for a female), the consent of the guardian is necessary. Marriage must be solemnized by a duly ordained priest.

Prohibitions.

Marriage is prohibited between blood relations in line ascending and line descending, and between godparents and godchildren; between collaterals in the fifth degree; the same prohibition in the case of relationship of affinity. Marriage between a man and a married woman with whom he has had sexual intercourse is forbidden. Marriage of ordained priests is forbidden.

Aliens are governed by his or her national law.

14 FOREIGN TRADE AND COMMERCE

14.01 CUSTOMS DUTIES:

Goods entering Lebanon are subject to a customs duty calculated in the basis of ad valorem value of the goods, or in their weight, depending on nature of the goods. Generally, valuable goods are taxed ad valorem—luxury articles, precious metals, jewelry, etc., but bulky, heavy goods are taxed by weight. Automobiles are taxed on weight or ad valorem depending on which is more advantageous to Treasury. Goods necessary for Lebanese industries are generally exempt.

14.02 EXCHANGE CONTROL:

See topic 14.03 Foreign Exchange.

14.03 FOREIGN EXCHANGE:

There is no restriction on the importation or exportation of foreign currency. Lebanon enjoys a regime of free exchange.

14.04 FOREIGN INVESTMENTS:

There are no restrictions on foreign investments. Foreigners whose investments are made by converting their national currency into Lebanese currency may repatriate them in same or other foreign currency. Dividends and profits derived from investments made in new productive enterprizes, or in enterprizes already in operation, may be taken out of country without any let or hindrance or limitation as to time and amount. In case of disinvestment, proceeds may be repatriated in any foreign currency in circulation in the country.

Lebanon is party to Convention with European Common Market Countries for Commercial Exchange and Technical Collaboration.

Guarantee of New Investments.

Decree Law No. 3 of Jan. 15, 1977 as am'd has created National Institute for Guarantee of New Investments against risks of war and warlike operations, civil war, civil commotions, riots and revolutions. Only material losses resulting directly from above-mentioned risks are covered, provided they exceed 50,000 Lebanese pounds or 10% of total guaranteed amount. Institute receives from insured premium at rate fixed in Jan. of each year, provided same does not exceed two per mil with respect to mandatory insurance policies. Duration of insurance contract is one year renewable at option of insured for similar period(s) up to maximum of ten years. Institute undertakings are guaranteed by State.

See also categories 2 Business Organizations, topic Corporations; Business Regulation and Commerce, topic Industrial Establishments; Citizenship, topic Aliens; Introduction, topic Currency.

14.05 FOREIGN TRADE REGULATIONS:

See topic 14.04 Foreign Investments.

15 HEALTH

15.01 DRUGS:

Importation, exportation, storage, sale and manufacture of drugs are subject to licence delivered by Public Health Department. Drugs may only be sold to public in pharmacies and under medical prescription. Medical doctors may give own patients free drug samples. Hospitals allowed to store drugs in sufficient quantities and distribute same for use of in-house patients.

Violation of above rules is punished as misdemeanor.

Hard drugs are of three classes: class 1 includes very dangerous drugs with no medical benefit (e.g. heroin and cannabis); class 2 includes very dangerous drugs with medical benefit (e.g. cocaine, morphine, opium); class 3 includes dangerous drugs with medical benefit (e.g. ephedrine, acetone).

Importation, exportation, manufacture, growing, storage, sale and use of hard drugs of class 1 are absolutely prohibited.

Importation, exportation, manufacture, growing, storage, sale and use of hard drugs of class 2 and 3 are prohibited, save for medical purposes and in latter case subject to licence delivered by Public Health Department.

Violation of prohibition is crime subject with respect to class 1 and 2 to life hard labour sentence, and for class 3 to five years hard labour.

Holding of hard drugs for personal use, if not covered by medical prescription when applicable, is misdemeanor punishable by three years imprisonment for class 1 and 2, and by maximum of two years for class 3.

Addicts who accept to follow medical treatment are not prosecuted nor sentenced.

15.02 FOODS:

Importation, exportation, manufacture, storage and sale of foods and bottled water are controlled through health inspectors delegated by Public Health Department, with special attention to sales in public places like restaurants, canteens and supermarkets.

16 IMMIGRATION

16.01 ALIENS:

An alien is a person who is not a Lebanese citizen.

Visitors.

Visitors are allowed to make a temporary stay in the country: the length of stay depends upon nature and object of visit. Visitors desiring to make an extended stay must obtain residence permits from Sûreté Générale.

Aliens Desiring to Work in Lebanon.

Aliens desiring to work in Lebanon should obtain in advance an authorization from Ministry of Social Affairs, all with the exception of artists, who should obtain the permit from Sûreté Générale. In the sense of the statute, artists are persons who appear in an artistic manner in establishments which dispense alcoholic beverages, or where shows are given accompanied by music. (Art. 13). Foreign merchants who desire to establish themselves in Lebanon should submit evidence of bank guarantee equal to amount determined by Ministry of Social Affairs before they can obtain permit. Permit is subject to an annual tax. Citizens of U.S.A., U.K., the Swiss Confederation, France, Italy and Iraq are freed from this requirement. (Decree No. 6613, May 11, 1961; Decree No. 6931, June 16, 1961; Decree No. 7155, July 17, 1961). At beginning of each year Minister of Social Affairs publishes list of jobs and activities reserved to Lebanese citizens.

Acquisition of Real Property (Law No. 11614 of Jan. 4, 1969 as am'd).—No alien, whether natural or moral person, can acquire inter vivos real property, or long term leases of over ten years, or very long term leases of over 20 years, without previous authorization granted by governmental decree. (Arts. 1 and 3). Exception is made of built or constructible property area of which does not exceed 3,000 sq. meters on whole Lebanese Territory, and of mortgages: Holder of mortgaged property may acquire same at public auction provided he sells property so acquired to Lebanese within period of two years; and provided, if he is not bank, that no Lebanese bidder takes part in bidding at first public auction at bidding price or at price exceeding amount of debt. (Art. 5). Foreign natural and moral persons can with authorization acquire realty, provided aggregate areas acquired by foreigners does not exceed 3% of whole Lebanese Territory and 10% of Beirut total area; and provided person granted authorization starts to build on acquired property within period of five years after registration of land in Land Registry. (Art. 7). Authorizing decrees remain effective during one year after their publication in Official Journal and period is suspended during any litigation. (Art. 10). Deemed to be foreign companies are: Partnerships, private limited companies which are not completely owned by Lebanese; Lebanese corporations (public limited companies), and Lebanese limited partnerships by shares, shares of which are not fully registered and owned by Lebanese. (Art. 2).

Every legal act contrary to this law is absolutely null and void, and parties thereto and all who participate in registration thereof with knowledge are punishable by hard labor for time and penalty varying between value of realty and three times such value even if act is done under name of another person. (Art. 16).

Law is not retroactive. (Arts. 18, 19, 23).

Foreign Workers.

See category 10 Employment, topic 10.02 Social Security.

Foreign Banks.

See category 3 Business Regulation and Commerce, topic 3.01 Banks and Banking.

Corporations Owned or Controlled by Aliens.

See categories 2 Business Organizations, topics Agency, Corporations; Business Regulations and Commerce, topic Banks and Banking.

17 INTELLECTUAL PROPERTY

17.01 COPYRIGHT:

See topic Protection of Commercial, Industrial, 17.03 Literary and Artistic Property.

17.02 INVENTIONS (PATENTS):

See topic Protection of Commercial, Industrial, 17.03 Literary and Artistic Property.

17.03 LITERARY AND ARTISTIC PROPERTY:

See topic Protection of Commercial, Industrial, 17.03 Literary and Artistic Property.

17.04 PATENTS:

See topic Protection of Commercial, Industrial, 17.03 Literary and Artistic Property.

17.05 PROTECTION OF COMMERCIAL, INDUSTRIAL, LITERARY AND ARTISTIC PROPERTY:

Subject is governed by Decree 2385, Jan. 17, 1924, as revised by Decree 170, Dec. 6, 1937; Decree 177, Mar. 23, 1942; Decree 185, Apr. 16, 1943; Law, Feb. 26, 1946; Law, Dec. 10, 1946. Lebanon adhered to Berne Convention of Sept. 2, 1886, as revised by Rome Convention of June 3, 1928; it adhered to Paris Convention of Mar. 30, 1883, as revised by Brussels Convention of Dec. 14, 1900, Washington Convention, June 2, 1911, The Hague Convention of Nov. 26, 1925, and London Convention, June 2, 1934.

Inventions (Patents).

Petition should be addressed to Director, Office of Protection of Commercial, Industrial, Literary and Artistic Property, Beirut, by inventor, or his agent. (Art. 5). Petition should be accompanied by following documents: (1) Power of attorney duly executed and authenticated, and viséd by Lebanese Consul for use in Lebanon, if registration is to be made by an agent; (2) two copies of each of the following documents: (a) description of invention; (b) designs and drawings; (c) schedule of documents. (Art. 6).

Petition should be drawn up in Arabic, but petitioner may submit description of invention in foreign language, giving full name of inventor, his age, occupation, nationality, domicile, and those of his agent, if any; name and subject of invention; measurements in metric system. Petition should comprize only one invention. (Art. 7).

Fee for at least first year's registration should be paid in advance. (Art. 9).

Modifications, alterations, and additions to original invention are permissible, subject to supplementary fee. (Arts. 22, 23, 29).

Transfer, Assignment, and License.

Inventor may transfer, or assign, or license whole or part, or use, of the invention. (Art. 30). All transfers and assignments should be in writing, and registered at Office of Protection. (Art. 31).

Attachment.

Creditors may attach the right of inventor. (Art. 35).

Period of Protection.

Fifteen years.

Industrial Property (Sketches, Drawings, Models).

Materials with printed, painted, or woven designs and patterns, pictorial paper for mural decoration, models of dresses, cloaks, hats, caps, personal adornment trinkets, shoes, stays, socks and stockings, perfume phials and crystals, liquor bottles, cardboard containers, etc. may be protected. (Arts. 48, 50). Drawings and models should be deposited in Protection Office.

Petition should contain following details: Full name, domicile, nationality of petitioner, and same of agent if represented by one; number and quality of objects deposited, provided they do not exceed 100 for every deposit; period of protection desired. (Art. 53).

Petition must be accompanied by registration fee and two copies of description of each object; model of the seal stamped on containers. (Art. 34).

Trademarks and Tradenames.

Period of protection is 15 years, renewable for similar periods. (Art. 78).

Petition for registration should give following details: full name, domicile of petitioner, and those of agent if registration is made by one; nature of trade or industry; brief description of trademark or trade name with specimens of same; goods on which it is printed or woven; mention of registration in other countries; four copies of model specifying color and dimensions; original power of attorney if registration is made by an agent; brass cliché of trademark or trade name; one copy of certificates of registration in other countries. (Art. 79).

Petition must be accompanied by registration fee.

Literary and Artistic Property (Copyright).

Authors, composers, painters, designers, sculptors, engravers, etchers enjoy exclusive right of publication and reproduction of their work. They and their heirs and assigns alone have right to authorize translation or exhibition or reproduction in any form. (Arts. 138, 145). Protection accorded to creator of work during his lifetime, and 50 years thereafter to his heirs. (Art. 143).

Adherents to Berne Convention are protected within Lebanon without need of registration in Lebanon. (Art. 158).

Petition should give following details: Name and nature of work; name and address of author or creator of work, and those of his agent if necessary; three copies of publication; for paintings and statuary, three photographs taken from different positions; for cinematographic films, dances, pantomimes, three copies of pamphlet giving description of work. (Art. 160).

Petition should be accompanied by registration fee.

17.06 TRADEMARKS AND TRADENAMES:

See topic Protection of Commercial, Industrial, 17.03 Literary and Artistic Property.

18 MORTGAGES

18.01 CHATTEL MORTGAGES:

Chattel mortgages exist in a limited number of cases provided for by special acts. Chattel mortgages may be taken on motor vehicles (see category 21 Transportation, topic 21.01 Motor Vehicles); on ships (Arts. 61-72 C. C. M.); on airplanes (Art. 19 C. A. L.). However, these chattel mortgages have no effect even between parties thereto unless they are registered in special registry provided for purpose. (Art. 20 C. C. M.; Art. 19 C. A. L.).

Law of Mar. 27, 1963 constitutes within certain conditions a lien in favor of sellers of chattels sold on instalment, and evidenced by a notarized contract. Such liens are not valid for more than two years, and cannot be enforced against a bona fide assignee of the mortgage.

It is to be noted that chattel mortgage does not give mortgagee right to take possession of mortgaged chattel; he only has right to demand sale of mortgaged article at public auction, and to participate in bidding.

18.02 COLLATERAL SECURITY:

See category 7 Debtor and Creditor, topic 7.09 Pledges.

18.03 MORTGAGES:

Mortgages are of three classes: (1) contractual; these may be created by an instrument formally executed before the Land Registrar, or his auxiliaries (in localities where there is no Land Registry, the official in charge is the Sole Judge of the Court of First Instance); (2) legal mortgages; such as those accorded by law to a minor against the property of his guardian; the married woman against the realty of her husband for the dower; the state, municipalities and other public administrations, against the realty of their accountants and receivers; the vendor, barterer, and the party to partition, against the realty sold, bartered, or partitioned, when no contractual mortgage was made, for the price; the creditors and legatees of an estate; (3) judicial; arising from a judgment against a debtor.

The property subject to mortgage and the amount due must be specifically described and stated in the instrument. Mortgages have priority according to the date of their registration at the Land Registry. Mortgages may be canceled by releases formally executed before the Land Registrar or his auxiliary. A mortgage executed abroad cannot create a lien on property, but with a power of attorney may be given to a representative in Lebanon to make and record the mortgage. (Arrete 3339, Arts. 120-143).

Mortgages may be released by cancellation in the Land Registry in the following cases: (1) extinction of the obligation which they guarantee; (2) formal renunciation of the mortgage. (Arrete 3339, Arts. 150-157).

Antichresis is a contract by which the debtor places his creditor or a third person designated by the parties to the contract in possession of the debtor's realty, or a part thereof, by virtue of which the creditor may retain the same and collect its revenues until the debt is fully paid. (Arrete 3339, Arts. 101-116).

19 PROPERTY

19.01 ABSENTEES:

(References below are to the Law of Inheritance, promulgated June 23, 1959, affecting the estates of non-Moslems such as Christians and Jews am'd by Law 434 on 15 May 1995.)

The death of the absent may be decreed if his disappearance continues for at least four years from time of his absence and upon demand of any person of serious interest. (Art. 34). The court will only decree death after exhaustive investigations have been made, and advertisements inserted in local, and whenever possible in foreign newspapers designated by the court, especially in the country where the absentee is presumed to reside. (Art. 35).

Property of the Absent.

The heirs of the absent may enjoy the use of the property, but may not perform any acts translative thereof, or establish a servitude thereon until six years have passed after issuance of the decree. (Art. 36). The distributive share of the absent in the estates of others, or legacies made to him, will be held in suspense for five years after the decree certifying his death; then the share or legacy will revert to the heirs of the decedent or testator. (Art. 37). If the heir is absent and has no agent to represent him, the judge, in chambers, upon the recommendation of the "Mukhtar" (a civil servant of the state) of the locality, or a relation of the absent, will order the taking of an inventory of the estate. (Art. 115). The assets are then handed over to the heirs present upon furnishing bond for the share of the absent; but if they refuse to furnish bond, the valuables are deposited in a bank, and the remainder of the property is delivered to a custodian to administer for the benefit of all. The custodian may be required to furnish bond. (Art. 116). If one or more of the heirs present ask for settlement of the estate, and it is possible to ascertain the domicile of the absent, the court will serve notice on him and give him sufficient delay to appoint an agent. If he then should fail to appear or appoint an agent, the settlement of the estate would be made in the presence of the custodian. If the domicile is not known, he will be served in the manner prescribed in the Civil Procedure Code (publication), and then the custodian will represent him. (Art. 117). The judge may issue a decree in chambers for the sale of perishable goods and may order the share of the absent therein and in the cash assets to be deposited in a bank. (Art. 118).

See also category 12 Estates and Trusts, topic 12.05 Executors and Administrators, subhead Settlement and Partition, catchline Settlement of Estate When Heirs are Unknown.

19.02 DOWER:

Dower (mahr) is a sum of money to which the wife becomes entitled by the marriage. The right of the wife thereto is perfected on consummation of the marriage or valid retirement (khulwa Sahiha). In case of dissolution of marriage by the husband or separation for some cause attributable to the husband (see category 13 Family, topic 13.01 Divorce) dower becomes due and payable to wife.

19.03 ESCHEAT:

See category 12 Estates and Trusts, topic 12.04 Descent and Distribution.

19.04 PERPETUITIES:

See topic 19.07 Wakfs.

19.05 POWERS OF ATTORNEY:

Powers of attorney may be in a language other than Arabic, the official court language in the Republic of Lebanon, but in such a case they must be accompanied by a sworn translation before they can be used in judicial proceedings. The sworn translation is generally authenticated by a notary public. If executed in a foreign country, they must be viséd by Lebanese consular officer.

19.06 REAL PROPERTY:

See categories 2 Business Organizations, topic Corporations; Citizenship, topic Aliens.

19.07 WAKFS:

Wakf is a form of alienation made by the unilateral act of the grantor. It is constituted by the appropriation or tying up of certain property so that no proprietary rights may be exercised over the corpus, but over the usufruct only.

Kinds.

Wakfs are either charitable, or private or family wakfs. The former are settled on pious institutions, churches, mosques, schools, hospitals, rest houses for travelers, and the poor generally, or some other unfailing purpose of that character. The latter are meant for the grantor's family or descendants.

Amendment of the Law.

The law was amended by statute promulgated on Mar. 10, 1947. Under the amendment, the charitable wakfs were left untouched, in that once properly created they are irrevocable and inalienable, except in certain cases and under special circumstances, they may be exchanged or sold by special court order. The private or family wakfs constituted after the promulgation of the new law are confined to two generations only, and when the grantor designates the beneficiaries specifically, to those designated who will be treated as one class. Further, the grantor may revoke the wakf wholly or in part, and may modify the terms and conditions, or change the beneficiaries, and upon the extinction of the two generations, or the death of the specifically designated beneficiaries, the wakf reverts to the grantor, if still alive, or to his heirs of the first and second generation, if dead.

Scope.

Outside of the limitations imposed on the private or family wakfs, the new law places no restraint on the grantor as to the nature of the uses he creates, or the disposal of the income. His directions are binding.

Conditions Required in Act Creating Wakf.

The creation of a wakf does not require the use of any particular terms, but the intention to settle property in perpetuity must be made clear. The wakf cannot be made conditional or contingent on a future event; it cannot be confined to a limited or terminable purpose, or for a particular period of time; it cannot be dependent on an option; there must be an intention, express or by implication, to settle property in perpetuity.

Conditions Required in Property Settled.

(1) It must answer to the description of tangible property in commerce (mal mutakawem); (2) it must be in existence and well determined at the time of the creation of the wakf; (3) it must be owned by the grantor; (4) it must be productive or capable of being used without the substance being consumed.

No question can arise with regard to the wakf of realty owned in fee, and of personalty permanently fixed to realty. The general rule would, therefore, exclude movable property including money. However, by consensus of opinion, a few specified articles (for example, books for mosques and churches), and such movables with respect to which a prevalent practice to make wakf has been established in the particular country in which the grantor resides, are exempted from the operation of the rule.

20 TAXATION

20.01 BUSINESS TAXES:

Holding companies are exempt from income tax and from tax on distribution of dividends.

Holding companies are subject to fixed annual tax equal to 6% of that part of total equity (including reserves) that does not exceed 50,000,000 Lebanese pounds, 4% on that part between 50,000,000 and 80,000,000 Lebanese pounds, and 2% on that part that exceeds 80,000,000 Lebanese pounds, always provided that aggregate annual tax does not exceed 5,000,000 Lebanese pounds.

Holding companies remain however subject to following taxes: 6% on capital gain resulting from sale of assets within Lebanon (tax does not apply on sale of assets located abroad); 10% on earnings resulting from leases of establishments located in Lebanon, or of patents or other similar rights within Lebanon; 5% on management and service fees received from affiliate companies in Lebanon.

Off-shore companies are exempt from income tax and from tax on dividends. However, they are subject to payment of annual fixed tax of 1,000,000 Lebanese pounds and to tax of 6% on capital gain resulting from sale of assets within Lebanon.

20.02 GIFT TAX:

See topic 20.05 Inheritance and Gift Taxes.

20.03 INCOME TAX:

(Decree Law No. 14-4 of June 12, 1959 as modified by various amendments). Income tax is imposed on net profits realized in Lebanon during preceding year. (Art. 6). Net profit consists of all income subject to tax, after deduction of all expenses and burdens which exercise of commerce, industry or trade necessitates. These include: (1) Price of commodities and services rendered during year; (2) rent of premises; (3) interest on loans; (4) salaries, wages, compensation for dismissal from services, social security contribution; (5) reserve fund for dismissal from service; (6) premium of insurance for employees; (7) irrecoverable debts; (8) amortization of tangible fixed assets; (9) donations to charities within limit of 15,000 Lebanese pounds a year. Are not included: Taxes paid to foreign government on income earned in Lebanon (unless covered by treaty on double taxation), and losses incurred abroad by branches and agencies when head office of firm is in Lebanon. (Art. 7).

To determine amount of net profit subject to tax, taxpayer must submit declaration of real profits realized, or of gross income. In latter case administration fixes net profits subject to tax. Active partner in partnerships is personally responsible for submission of declaration. (Art. 10). Declaration of net profits is obligatory on following: (1) Partnerships, corporations (sociétés anonymes), limited liability companies, partnerships with silent partners (commandites), cooperative associations not exempted by special provision of law; (2) branches established in Lebanon by companies having their head office abroad; (3) factories and industrial establishments; (4) banking houses and exchange offices; (5) exporters and importers, commission agents, representatives of firms and factories, maritime, air and land travel agencies; (6) retail merchants employing more than four employees; (7) pharmaceutical and chemical depots; (8) hotels of first and second class; (9) theaters and cinemas of first and second class; (10) racing establishments; (11) flour mills other than those run by air and water power. (Art. 11).

If, in any year there shall be loss, same shall be carried to following year and deducted from its profits. (Art. 16).

Failure to submit declaration exposes defaulter to fine equivalent to 10% of tax for every month's delay, but accumulated sum shall not exceed 50% of total amount of tax.

Failure to keep regular books entails fine of 50% of tax.

Exemptions.

Each person is entitled to exemption equal to 7,500,000 Lebanese pounds, plus 2,500,000 Lebanese pounds if married, and 500,000 Lebanese pounds per male child under 18 years of age, or under 25 years of age if pursuing studies at university, or completely handicapped, and per female child whatever her age may be provided she is single, or widow or divorced, and dependant, within limit of maximum of five children.

Rate on Corporations, Limited Liability Companies and Special Partnerships by Share.

Income tax is paid on net profits at flat rate of 15%. For application of rate, dividends received as consequence of holding shares in other companies are deducted from profits, but remain subject to tax on dividends (see subhead Dividends, infra).

In addition, Lebanese corporations are subject to annual lump sum tax of 2,000,000 Lebanese pounds payable per head office and per each branch office, regardless of their financial results.

Likewise annual lump sum tax payable by other corporations, limited liability companies and partnerships by share, is equal to 750,000 Lebanese pounds.

Holding companies and offshore companies are exempted from said tax.

Rate on Physical Persons and Simple Partnerships.

After deduction of exemption, tax is paid on remaining profits at following rates (each partner in partnership is considered separately and taxed on his own share):

	Commercial and Noncommercial Trades
Up to 9,000,000 Lebanese pounds	4%
Section between 9,000,000 and 24,000,000	7%
24,000,000 and 54,000,000	12%
54,000,000 and 104,000,000	16%
Over 104,000,000	21%

In addition to above, commercial and noncommercial trades are subject to annual lump sum tax of 550,000 Lebanese pounds payable per head office and per each branch office, regardless of their financial results.

Rate on Employees.

Each employer must submit list of his employees during preceding six months, with their salaries, wages and other increments and bonuses they may receive. (Art. 47). Employer deducts tax from salaries and wages, and is responsible for its payment to Treasury. Income tax on employees is assessed at following rates after deduction of exemption:

Up to 6,000,000 Lebanese pounds	2%
Section between 6,000,000 and 15,000,000	4%
15,000,000 and 30,000,000	7%
30,000,000 and 60,000,000	11%
60,000,000 and 120,000,000	15%
Over 120,000,000	20%

Dividends.

Distributed dividends of companies having their operation in Lebanon are taxed at flat rate of 10% (all profits made by foreign company out of its operation in Lebanon are considered as distributed dividends).

Stocks and Bonds.

All foreign stocks and bonds owned by individuals and companies residing in Lebanon, both Lebanese and foreigners, are taxed at flat rate of 10% of dividends distributed. Bank or any other person paying dividends in Lebanon shall deduct same and pay it to Treasury.

By Decree No. 5439 dated Sept. 20, 1982, interest paid on bonds issued by Lebanese corporations (see topic Corporations, subhead Bonds) are exempt from 10% withholding tax, but remain subject to income tax when received by other banking, financial or commercial institutions and included in their books as part of their income.

20.04 INHERITANCE TAX:

See topic 20.05 Inheritance and Gift Taxes.

20.05 INHERITANCE AND GIFT TAXES:

(Law No. 64, promulgated June 12, 1967).

Earlier Law concerning transfer tax on personal and real property has been amended as follows: Transfer tax imposed on all rights and personal and real property devolving upon others by inheritance, testament, wakf donation or any other mode with no return equivalent to its real value. (New Art. 1). Tax covers: (1) All personal and real property situated in Lebanon passing from a Lebanese or foreigner wheresoever he may be resident; (2) all personal and real property situated outside Lebanon and passing from a Lebanese residing in Lebanon; (3) all personal and real property situated outside Lebanon passing from a foreigner residing in Lebanon. This tax may be avoided by international conventions. (New Art. 3).

Exemptions.

40,000,000 Lebanese pounds to each of issue, husband and wife and father and mother; 16,000,000 Lebanese pounds unto each of other ascendants, brothers and sisters; 8,000,000 Lebanese pounds unto each of other heirs. There shall be added to exempted portion of issue 24,000,000 Lebanese pounds if issue is afflicted with a permanent ailment which prevents it from work, 1,600,000 Lebanese pounds per annum for each year or part of a year which separates it from completing 18th year; 16,000,000 Lebanese pounds to wife if child is married and 8,000,000 pounds unto each child under age of 18, always provided total does not exceed 40,000,000 pounds. (New Art. 9).

Rates.

	Issue Husband & Wife	Father & Mother	Grand Parents Brothers & Sisters	Uncles Aunts Nephews Nieces	Others
Up to 30,000,000 Lebanese pounds	3%	6%	9%	12%	16%
Section between 30,000,000 and 60,000,000	5%	9%	12%	16%	21%
60,000,000 and 100,000,000	7%	12%	16%	21%	27%
100,000,000 and 200,000,000	10%	16%	20%	26%	33%
200,000,000 and 350,000,000	12%	18%	24%	31%	39%
Over 350,000,000	12%	18%	24%	36%	45%

20.06 TAX INCENTIVES:

Profits of newly established industrial establishments founded in Lebanon as of Jan. 1, 1980 are exempt from income tax for maximum period of ten years from start up of production, provided certain conditions are complied with; chief among which is condition that they are located in area which government wishes to develop, that they produce new articles and materials not produced in Lebanon before 1980, that value of new establishment, realty and fixtures invested in new plant and devoted to production, is not inferior to 50,000,000 Lebanese pounds, that total amount of profits exempted from tax during entire period of exemption does not exceed value of fixed assets (before amortization) invested up to date of start up of production.

Exemption is granted by governmental decree.

Industrial establishments founded before Jan. 1, 1980 may use up to 50% of their net profits, and for four consecutive years, to cover investments in new equipment meant to increase their production capacity, or in housing projects for their employees. Percentage may be raised to maximum of 75% of net profits if investment made in areas which government wishes to develop. Amount of investment is deducted from taxable profits.

Distributed dividends remain subject to special taxation (see subhead Dividends, supra).

20.07 VALUE ADDED TAX:

Value added tax at rate of 10%, created by Law No. 379 of Dec. 14, 2001, effective Feb. 1, 2002, is levied on deliveries and importations of goods and services in Lebanon, with exception of: live cattle, poultry and fish, agricultural feeding products sold in natural state of origin, essential foodstuffs (e.g. bread, flour, sugar, salt, vegetal oil, baby food), books, newspapers, magazines, printing paper and cardboard, domestic gas, seeds, fertilizers, fodder and pesticides, agricultural machines, medicines and pharmaceutical products, medical instruments and apparatus, precious stones and pearls, paper money and coins, yachts and other pleasure or sport boats over 15 meters long owned by foreigners, air transport means used for carriage of persons and goods, medical and hospital services, education, insurance and reinsurance, health coverage, banking and financial services, activities of nonprofit making associations and institutions, public transport and taxi services, lotteries and games of chance, real estate transactions and dwelling rentals services, farmers' activities when delivering own farm products.

All individuals and entities having independent economical activities with minimum yearly turn over of 500 million Lebanese pounds are subject to value added tax.

Burden of tax generally lies on final consumer.

21 TRANSPORTATION

21.01 MOTOR VEHICLES:

Vehicle License.

No motor vehicle can circulate without a special license to be delivered by Traffic Department. (Art. 117 of the Traffic Code). License is renewed once a year on payment of a special fee.

On registration, vehicles receive number plates. Colour of plates is black for private cars and red for taxis.

Operator's License.

No person is allowed to drive a vehicle without a driving license delivered by Department of Registration of Vehicles. (Art. 143). Lebanese driving licenses are not delivered to nonresidents. (Art. 149). License for persons over 50 is valid for five years, to be renewed on presentation of a copy of judicial record of operator and of a medical certificate of fitness. (Art.163). Minimum age for driving license is 18. (Art. 146).

Exempted from obligation of Lebanese license: Members of Armed Forces and Security Forces; persons in possession of a license of kind described in annex 9 of International Geneva Convention of Sept. 19, 1949; persons in possession of an international driving license; tourists in possession of a driving license delivered by their country, provided they have their license viséd, free of charge, by Department of Registration of Vehicles; and persons in possession of licenses delivered by countries with which there exists a special convention. (Art. 167).

Foreigners in possession of international licenses, of licenses of kind described in annex 9 of International Geneva Convention, may exchange their license for a Lebanese license, validity of which will not extend beyond validity of license exchanged. (Art. 168).

Sales.

Transfer of titles of motor vehicles has no effect with regard to third parties and State unless made at Registration Department by civil servant in charge of such formalities, and duly registered in a special register. (Art. 271).

Liens.

Motor vehicles can be pledged to a creditor without dispossession if pledge contract clearly provides for same. (Art. 272). However, pledge has no effect with regard to third parties and State unless made at Registration Department by civil servant in charge of such formalities, and duly registered in a special register. (Art. 271). Pledge gives creditor a lien on motor vehicle. (Art. 4 of Decree No. 46/L of Oct. 22, 1932).

Traffic Regulations.

Drivers must keep to right unless they wish to overtake. (Arts. 5, 13 of the Traffic Code). Priority is given to ambulances, fire vehicles and vehicles of Security Forces. (Art. 29). When two vehicles meet at a crossing, vehicle coming from left must give priority to the other. (Art. 26).

Accidents.

There is a duty on operator of a car involved in an accident to give assistance. Operator who fails to do so will be arrested and fined. (Art. 566, Penal Code). In case of death or bodily injury penalties provided for in Arts. 564 and 565 of Penal Code will be increased by one-half. (Art. 567, Penal Code).

Liability of Owner.

Person liable for accidents caused by a motor vehicle is the keeper, i.e., person who has intellectual use, control and direction of vehicle. (Art. 131 C. O. C.). Normally, owner is considered as being keeper of vehicle, but this is not always the case.

Masters are liable for accidents caused by their servants. (Art. 127, C. O. C.). Parents and tutors are liable for accidents caused by minor children living under roof and placed under their power. (Art. 126, C. O. C.).

Guests.

Guests injured are entitled to damages. There is no limitation to liability of owner or operator.

Insurance.

Insurance of third party liability covering physical injury is mandatory. (Decree Law No. 105 of June 30, 1977).

Foreign Vehicles.

Nonresident owners, members of touristic associations recognized by Lebanese Customs, may introduce their vehicles temporarily into Lebanon, free of charge (with exception of customs duty to be paid on gasoline), after obtaining a special circulation booklet to be delivered by said association. (Art. 238, Customs Code). This circulation booklet is valid for maximum period of one year. (Art. 239).

Nonresidents who wish to introduce their vehicles for a period not exceeding one month are exempted from having the special circulation booklet. (Letter No. 2611 of Nov. 12, 1964 of Supreme Council of Customs).

Actions Against Nonresident.

Nonresidents having a known residence or domicile are served with the process and proceedings by means of a registered letter return receipt requested. (Art. 362, C. C. P.).

If domicile of nonresidents is unknown the registered letter return receipt requested is sent to last known residence or domicile. If letter returns without notification, proceedings are served by advertisements in two local newspapers and posted on door of Court. (Art. 360).

Direct Actions.

There are no special provisions with respect to direct action against insurer. Actually, Lebanese Supreme Court is against direct action; Courts of Appeal and First Instance are divided on the subject.

22 TREATIES AND CONVENTIONS

22.01 TREATIES AND CONVENTIONS:

The treaties and conventions enumerated here are chiefly those bearing on legal and judicial relations.

Convention of Paris, Mar. 23, 1883, for Protection of Industrial Property, as revised at Brussels, Dec. 14, 1900, Washington, June 2, 1911, The Hague, Nov. 6, 1925, and London, June 2, 1934. Lebanon adhered July 19, 1939. (Decree 152 L. R.).

Convention of Berne for the protection of Literary and Artistic Property, as revised at Rome, June 2, 1928. Lebanon adhered June 28, 1934. (Decree 141 L. R.).

Convention with Western Germany for protection of Industrial Property. (Law of Aug. 10, 1955).

Charter of United Nations (International Court of Justice—Ratified by Lebanon, Sept. 25, 1945).

League of Arab States. Ratified by Law, Apr. 9, 1945. Treaty of Mutual Defence and Economic Co-operation between members of League of Arab States. (Law Dec. 5, 1952).

Treaty with Syria for Extradition of Criminals and Execution of Judgments. Feb. 25, 1951.

Treaty with Kingdom of Jordan for Extradition of Criminals and Execution of Judgments, Apr. 6, 1954.

Treaty with Yemen for Extradition of Criminals, Feb. 15, 1949.

Treaty with Iraq for Extradition of Criminals, 1929.

Convention for Rogatory Commissions with England, Feb. 7, 1922.

Treaty with Turkey for the Extradition of Criminals, 1932.

Treaty with Yugoslavia for Exchange of Penal Judgments, Feb. 24, 1953.

Treaty with Kuwait for Extradition of Criminals and Execution of Judgments. (Decrees No. 15743 and 15744 of Mar. 13, 1964).

Treaty with Belgium for Extradition of Criminals. (Law No. 33/64 of Nov. 17, 1964, supplemented by Decree No. 14805 of July 1, 1970).

Treaty with Tunis for Extradition of Criminals and Execution of Judgments. (Law No. 38/68 of Dec. 30, 1968).

Treaty with Italy for Execution of Judgments and Arbitral Awards and for Extradition of Criminals. (Decree No. 3257 of May 17, 1972).

Treaty with France on Double Taxation. (Decree No. 13673 of Aug. 23, 1963).

Point IV Convention with U.S.A., May 29, 1951.

Convention of Warsaw for Aviation as revised, Feb. 13, 1933 (through French High Commissioner), with complementary Convention of Guadalajara, Sept. 18, 1961 and The Hague Protocol of Sept. 29, 1955. (Decree No. 5194, Mar. 23, 1973).

Conventions on International Recognition of Right in Aircraft, signed in Geneva on June 19, 1948. (Law No. 11640, Jan. 9, 1969).

Convention of New York, June 4, 1954, on Customs Facilities. (Law No. 18, Dec. 26, 1970).

Convention of Vienna, 1961, on Diplomatic Relations. (Law No. 17, Dec. 26, 1970).

Convention of Chicago of 1944 on International Civil Aviation with New York Protocol of Mar. 12, 1971 and Montreal Protocols of May 27, 1947, June 14, 1954, Oct. 6, 1980.

Convention of Brussels of 1926 for the Unification of Certain Rules of Law Relating to Maritime Liens and Mortgages.

Convention of London of 1966 on Merchant Shipping.

Convention of London of 1954, as am'd in 1962, for the Prevention of Pollution of the Sea by Oil.

Convention on Repression of Unlawful Capture of Aircraft, signed in The Hague on Dec. 16, 1970.

Agreement of Chicago of Dec. 7, 1944 relating to transit of International Air Services.

Convention of Bruxelles of 1969 relating to Liability for Damages Caused by Oil Pollution.

Convention of Tokyo of 1963 relating to Offences and Certain Other Acts on Board Aircraft.

Air Transport Agreement between Government of Lebanon and Government of U.S.A. of Sept. 1, 1972.

International Convention Relating to Intervention on the High Seas in cases of Oil Pollution Casualties, signed in Brussels on Nov. 29, 1969. (Decree No. 9226, Nov. 12, 1974).

International Convention on the Liability of Operators of Nuclear Ships, signed in Brussels on May 25, 1962. (Decree No. 9228, Nov. 12, 1974).

International Convention on Repression of Unlawful Acts against Security of Aircraft, signed in Montreal on Sept. 23, 1971. (Decree No. 9227, Nov. 12, 1974).

Lebanese Government authorized by Law No. 13/75 of Apr. 5, 1975 to adhere to Brussels International Convention of 1924 for unification of certain rules of law relating to bills of lading, with amending Protocol of 1968.

Lebanese Government authorized by Law No. 14/75 of Apr. 5, 1975 to adhere to Brussels International Convention of 1952 for unification of certain rules concerning penal jurisdiction in matters of collision.

Lebanese Government authorized by Law No. 4/83 of Jan. 5, 1983 to adhere to United Nations Convention on the Carriage of Goods by Sea of 1978.

Lebanon is not party to Convention on Service Abroad of Judicial and Extrajudicial Documents in Civil and Commercial Matters. However, Lebanon adhered on Dec. 23, 1973 to Convention relating to Civil Procedure done at The Hague on Mar. 1, 1954, which includes number of provisions on service abroad of judicial and extrajudicial documents in civil and commercial matters.

Lebanon is not party to United Nations Convention on Recognition and Enforcement of Foreign Arbitral Awards.

Lebanon is not party to Convention on Taking of Evidence Abroad in Civil or Commercial Matters.

Lebanon is not party to the Convention Abolishing the Requirement of Legalisation for Foreign Public Documents.

Lebanese Government authorized by Law No. 294/94 of Mar. 10, 1994 to adhere to Brussels International Convention of Oct. 10, 1957 on Limitation of Shipowners' Liability.

Lebanese Government authorized by Law No. 387/94 of Nov. 10, 1994 to adhere to Basel International Convention of Mar. 22, 1989 on Control of Movement of Dangerous Waste Across Borders.

Agreement of Nuclear Safety signed in Vienna (Austria). (Law 482 of 8-12-1995).

Land International Transport Agreement between government of Lebanon and government of Romania. (Law 493 of 6-6-1996).

Maritime Transport Agreement between the government of Lebanon and the government of Romania.

Maritime Transport Agreement between the government of Lebanon and the China popular government. (Law 497 of 6-6-1996).

Commercial Agreement between the government of Lebanon and the government of Malaysia. (Law 573 of 24-7-1996).

Double Taxation avoids agreement between the government of Lebanon and the government of Romania. (Law 577 of 24-7-1996).

Double Taxation avoids agreement between the government of Lebanon and the government of Egypt. (Law 583 of 24-7-1996).

Agreement on crimes committed against persons having a diplomatic status set up in New York on 14-12-1973. (Law 620 of 28-12-1997).

Lebanese government authorized by Law 629 of 23-4-1997 to adhere to 1958 New York convention for recognition of arbitral execution decrees.

Lebanese government authorized by Law 658 of 24-7-1997 for double taxation avoids agreement between Lebanon and Syria.

Execution of the International Labor Treaty (20-1) by decision 493/1 of 13-9-1997.

Lebanese government authorized by Law 664 of 23-10-1997 to adhere to the International treaty against taking of hostages set up in New York 18-12-1979.

Lebanese government authorized by Law 29 of 23-2-1999 for double taxation avoids agreement between Lebanon and Russia.

Lebanese government authorized by Law 36 of 23-2-1999 for double taxation avoids agreement between Lebanon and Tunisia.

Lebanese government authorized by Law 38 of 23-2-1999 for double taxation avoids agreement between Lebanon and Armenia.

Lebanese government authorized by Law 42 of 23-2-1999 for double taxation avoids agreement between Lebanon and the United Arab Emirates.

Lebanese government authorized by Law 43 of 23-2-1999 for double taxation avoids agreement between Lebanon and the Islamic Republic of Iran.

Lebanese government authorized by Law 51 of 31-3-1999 to vise the amendments of the International Labor Constitution of 1997.

Lebanese government authorized by Law 67 of 31-3-1999 to adhere to the law use of International inland waters for maritime use.

Lebanese government authorized by Law 82 of 14-6-1999 for double taxation avoids agreement between Lebanon and Czech Republic.

Decree 1088 of 12-8-1999 to Minister of Justice to vise a judicial agreement between Lebanon and France.

Double Taxation avoids agreement between Lebanon and Bulgaria. (Law 111 of 25-10-1999).

Lebanese government authorized by Law 116 of 25-10-1999 to adhere to International Labor Treaties 136-139-142-159-172-176.

Double Taxation avoids agreement between Lebanon and Malta. (Law 120 of 25-10-1999).

Lebanese government authorized by Law 125 of 25-10-1999 to vise the five protocols relating to the amendment of the special statutes concerning the unification of some International Air Transport in Warsaw dated 12-10-1929.

Lebanese government authorized to adhere to the United Nations treaty for International Transport on 24-5-1980. (Law 257 of 30-12-2000).

Double Taxation avoids agreement between Lebanon and Italy. (Law 288 of 3-4-2001).

Lebanese government authorized by Law 367 of 14-12-2001 to adhere to United Nations treaty for International Transport contract of merchandises by (CMR) dated 19-5-1956 and the protocol of 5-7-1978.

Lebanese government authorized by Law 100 of 5-6-2002 to adhere to International Labor treaty 138 relating to the minimum of age 1973.

Extradition treaty between Lebanon and Bulgaria. (Law 468 of 12-12-2002).

Double Taxation avoids agreement between Lebanon and Ukraine. (Law 500 of 16-7-2003).

Double Taxation avoids agreement between Lebanon and Jordan. (Law 534 of 20-10-2003).

Double Taxation avoids agreement between Lebanon and the Senegal. (Law 538 of 20-10-2003).

Double taxation avoids agreement between the Republic of Lebanon and the Republic of Cyprus. Law 540 of 20-10-2003.

Double taxation avoids agreement between the Republic of Lebanon and the Kingdom of Bahrain. Law 569 of 11-2-2004.

Lebanese Government authorized by Law 569 of 20-11-2004 to adhere to the International Labor Treaty concerning great industrial injuries 1993.

Lebanese Government authorized by Law 614 of 20-11-2004 to ratify double taxation avoids between the Republic of Lebanon and the Republic of Sudan.

Lebanese Government authorized by Law 682 of 24-8-2005 to adhere to the Protocol concerning the prohibition of slave traffic especially women and children supplement to the International Treaty for non-national organized crime strife.

Lebanese Government authorized by Law 734 of 15-5-2006 to ratify the dual tax and income tax avoids Agreement between the Republic of Lebanon and the Republic of Turkey.

Lebanese Government authorized by Law 737 of 15-5-2006 to ratify the dual tax and income tax avoids Agreement between the Republic of Lebanon and the Islamic Republic of Pakistan.

Lebanese Government authorized by Law 755 of 11-11-2006 to ratify the United Nations Agreement concerning International sales contracts of merchandises.

Lebanese Government authorized by Law 762 of 11-11-2006 to ratify the dual tax and income tax avoids Agreement with the Government of Qatar.

Decree no 1214 of 24-4-2008 authorizing the Lebanese State represented by the Ministry of Finance to go to arbitration according to the rules of the International Chamber of Trade.

1

LIECHTENSTEIN LAW DIGEST

—Scope —

Revised for 2009 edition by

RITTER & WOHLWEND, of Vaduz.

See category 6 Courts and Legislature, topic 6.04 Statutes.

Note: This revision incorporates legislation through Sept. 1, 2008.

1 INTRODUCTION

1.01 CURRENCY:

Legal currency is Swiss franc (CHF). Swiss regulations regarding monetary, credit and currency policy within protection of Swiss coins and paper money are to be applied in Liechtenstein on basis of Currency Agreement entered on June 19, 1980.

1.02 GOVERNMENT AND LEGAL SYSTEM:

Liechtenstein is a monarchy with a democratic basis. State authority is divided between sovereign and subjects. Specialty of this monarchical constitution is legislation initiative and law-referendum by nation.

Prime minister and his substitute are appointed by sovereign for period of four years upon suggestion of parliament, which consists of 25 deputies and is chosen every four years according to principles of proporz (proportional system).

Cabinet council of four ministers, chosen by parliament for period of four years and ratified by sovereign, is associated with prime minister.

Liechtenstein embassies are established in Berne, Switzerland, Washington, D.C., Brussels, Berlin, Vienna and at Holy Seat, otherwise diplomatic representation is entrusted to Swiss foreign department.

Parliamentary sessions are held between Mar. and Dec. Date of opening of parliament is fixed each year.

Commercial Treaties.

There is postal agreement between Liechtenstein and Switzerland since 1922 and Customs Union Treaty since 1924, under which validity of commercial treaties entered into by Switzerland is extended also to Liechtenstein. Consular representation of Liechtenstein interests is in most cases taken care of by Swiss consulates.

See category 23 Treaties and Conventions, topic 23.01 Treaties and Conventions.

Information.

All laws and regulations may be found at: www.gesetze.li and www.recht.li.

1.03 HOLIDAYS:

Legal holidays are: Jan. 1; Jan. 6; Feb. 2; Mar. 19; Good Friday; Easter Monday; Ascension day; May 1; Mon. after Pentecost; Corpus Christi day; Aug. 15; Sept. 8; Nov. 1; Dec. 8; Dec. 25; Dec. 26.

1.04 OFFICE HOURS AND TIME ZONE:

Liechtenstein is in +01:00 GMT time zone. Office hours are generally from 9 a.m. to 5 p.m. (minimum) Mon. to Fri.

2 BUSINESS ORGANIZATIONS

2.01 ASSOCIATIONS:

See topic 2.06 Partnerships.

2.02 CORPORATIONS:

Shareholders and directors may be foreigners; there are no limitations as to their number. One member of board of directors, however, must have residence in citizenship of EEA member country or Switzerland and must comply with certain professional qualifications.

Minimum capital is SFr. 50,000 for companies limited by shares and SFr. 30,000 for all other companies. Owing to amendments to companies of law 1980, all companies running business according to commercial principles or companies whose statutory objects include such business must appoint auditing agency. Companies limited by shares always need auditing agency. Holding and other companies which do not have real economic activity in Liechtenstein need not have office there but must be represented by firm or citizen residing in Liechtenstein. Liechtenstein company is usually formed by Liechtenstein trustee for client. Forming of company only takes few days.

Company Limited by Shares.

(Aktiengesellschaft). Legal entity with capital determined in advance divided into shares. No personal liability of shareholder for obligations of entity. Only capital of corporation is responsible for liability. At least three shareholders at time of incorporation. Portions (shares) may be equal or dissimilar. Shares are issued to named person or to bearer. Company is obliged to issue share certificates unless otherwise stipulated. Formation of limited company may ensue when all founders declare in deed their intention to form limited company. At same time they declare paying of at least 20% for every share. Dividends result from net profit.

Limited Partnership with Shares.

(Kommanditaktiengesellschaft). Capital is divided into shares and one or more shareholders has joint unlimited personal liability like partners of general partnerships. Provisions of share corporation apply unless otherwise indicated.

Limited Liability Company.

(Gesellschaft mit beschränkter Haftung). One or more persons can form limited liability company with advanced fixed capital, whereby every person is liable for obligations of company up to certain fixed sum. This entity comes into being by incorporation in commercial register.

Cooperative Corporation.

(Genossenschaft). For purpose of economic or noneconomic interests, several legal entities or natural persons can form this corporation. Members are not liable for obligations of corporation unless articles provide for limited or unlimited liability.

2.03 FOUNDATIONS:

Establishment.

(Anstalt). Entity formed for purpose of economic or other interests, legally autonomous, which is incorporated in official register, but has no public-law characteristics. Has holdings of material and possibly personal resource. May be formed and operated by individual person, firm, community or by association of communes or legal entity not otherwise entered in Public Register. More than one founder is not required. In all cases, only establishment's assets shall be liable for establishment's debts.

Foundation.

(Stiftung). Dedication of assets for certain private or public purpose. Commercial enterprise only for purpose of dedication of assets. Family foundation for purpose of financing education, support of family members, or similar purposes. In mixed family foundation assets are so donated to serve ecclesiastical or other purposes outside family in addition or supplementally. Foundation comes into existence when incorporated in official register. Foundation deed must be deposited at registry office. When foundation has come into existence, founder or third party is required to transfer to foundation assets mentioned in deed of foundation.

. Only foundation's assets shall be liable for foundation's debts to creditors. New foundation law was passed by Parliament on June 26, 2008 and will (partly) enter into force on Apr. 1, 2009. Targets of new law are: (i) Creation of more detailed provisions, (ii) clarification of discrepancies between practice and jurisprudence, and (iii) creation of special authority supervising private (deposited) foundations while maintaining high level of privacy.

2.04 HOLDING COMPANIES:

See topic 2.06 Partnerships.

2.05 JOINT STOCK COMPANIES:

See topic 2.06 Partnerships.

2.06 PARTNERSHIPS:

Ordinary Partnership.

(Einfache Gesellschaft). Contractual association of two or more persons (legal or natural) for purpose of achieving common interests by joint efforts. Not incorporated in Commerce Register and has no possibility as such to gain rights or to stand in trial. Partners share profits, losses and liabilities.

General or Collective Partnership.

(Kollektivgesellschaft, Offene Gesellschaft). Comes into being when two or more persons (legal or natural) form and incorporate entity for economic or noneconomic purpose and are all unlimited liable for obligations of entity. No separate legal entity, but can acquire rights and has standing to sue.

Limited Partnership.

(Kommanditgesellschaft). Association of two or more persons for purpose of running business where some partners are responsible for obligations concerning partnership on unlimited basis whereas others are only liable up to certain limited amount.

2.07 TRUST:

Trustee is natural person, firm or legal entity, to whom another transfers property with obligation to administer or use such property in his own name for benefit of beneficiary. Trust is created by written agreement between settler and trustee. Trust has to be recorded to Public Register with information concerning name of trust and trustee and duration of trust. Trustee is under obligation to comply with provisions in trust agreement; he has to preserve and administer trust property with care and insure it from risk. Where trustee is in breach of provisions of trust instrument, he shall be personally liable to settler with his entire assets or, where settler is no longer present, to beneficiary.

Founder and directors may be foreigners; there are no limitations as to their number. One member, however, of board of directors must have residence in citizenship of EEA member country or Switzerland and must comply with certain professional qualifications. Minimum capital is SFr. 50,000 for companies limited by shares and SFr. 30,000 for all other companies.

Owing to amendments to companies of law 1980, all companies running business according to commercial principles or companies whose statutory objects include such business must appoint auditing agency. Companies limited by shares always need auditing agency.

Holding and other companies which do not have real economic activity in Liechtenstein need not have office there but must be represented by firm or citizen residing in Liechtenstein.

Liechtenstein company is usually formed by Liechtenstein trustee for client. This forming of company only takes few days.

See also category 12 Estates and Trusts.

3 BUSINESS REGULATION AND COMMERCE

3.01 BILLS AND NOTES:

Bills of Exchange (Wechselgesetz LGBl 1971/51).—

Requirements as to Content.

(1) Designation as bill within text of document as drawn; (2) unconditional order to pay determined sum of money; (3) name of drawee; (4) maturity; (5) place of payment; (6) name of person to whom or to whose order payment is to be made; (7) date and place of drawing; (8) signature of drawer.

Maturity.

Bill not mentioning maturity is payable at sight.

Payment.

If debtor delays payment, holder has option to demand payment either at rate of exchange in force on date of maturity or at rate prevailing on day payment is actually effected.

Recourse in Default of Acceptance or Payment.

Holder may exact payment from endorsers, drawer and others liable on bill, at maturity. This right also exists before maturity in case of nonacceptance, acceptor's insolvency or bankruptcy, or when execution on judgment against acceptor has been returned unsatisfied.

Any person paying bill has recourse against previous persons liable.

Checks (Scheckgesetz LGBl 1971/51/II).—Check must contain designation “check.” Checks payable in Liechtenstein may be drawn only on banks. (Art. 3). Checks cannot be accepted, it is payable on sight. Any provision to contrary is ineffective.

Other Negotiable Instruments.

Law defines negotiable instruments (Wertpapier, papiervaleur, titolo di credito or caravalore) to be document to which right is connected in such way that such right cannot be exercised against debtor nor transferred to third persons without document.

Transfer.

Full transfer may be effectuated only by delivery of instrument itself or means procuring power over instrument.

Defenses.

In any kind of negotiable instrument, debtor (obligor) has defenses: (1) Pertaining to validity and wording of instrument, (2) other defenses existing against immediate creditor.

3.02 COMMERCIAL REGISTER:

Anyone carrying on commercially trading, manufacturing or other business is obliged to register his firm in commercial register (Handelsregister). Legal entities such as company limited by shares, GmbH, Establishment, Trust and some foundations come into existence only if registered in commercial register.

3.03 CONTRACTS:

Applicable Law.

Contract Law is regulated in Civil Code (ABGB), which is adopted from Austrian Civil Code. When partners forming contract are from different countries, they can agree on which law should become applicable for contract concerned.

Formation of contract requires at least two persons, who are capable to contract, mutual agreement, which can be in writing or oral (expressly or implied), and cause. Capacity is gained at age of 18, if not mentally incapable.

Consideration is not required.

Concluding contract doesn't require special form unless otherwise provided. Some have to be in written form or require notarial acknowledgment.

Registration is required for acquisition and assignment of immovables.

Nullity and Voidability.

Contracts which are formed against rules of law or which are against good morals are void. If one of partners was in fear, was tricked or in error, he is able to avoid contract and reverse all transactions.

Standard Terms.

It is sufficient that partner refers to his terms and conditions in contract for them to become part of contract. However, if there are clauses which are unusual or unexpected, contract has to point them out specially. Terms, which place partner at gross disadvantage do not become part of contract.

3.04 DUE DILIGENCE:

Due Diligence Act of 26 Nov. 2004 serves to implement Directive 91/308/EEC of Council (EEA) in version of Directive 2001/97/EC of European Parliament and Council of 4 Dec. 2001 on prevention of use of financial system for money laundering. Serves to combat money laundering, organized crime, and financing of terrorism. Persons subject to due diligence are banks and finance companies, lawyers registered in List of Lawyers and legal agents. Act applies to every financial transaction concerning acceptance and safekeeping of assets of third parties and assistance thereof, or establishing legal entity on account of third party that does not operate commercially in domiciliary State.

Due Diligence Act requires that contracting parties are identified by means of documentation when entering into business relationship.

If during inquiries suspicion arises that connection with money laundering, organized crime or financing of terrorism exists, person subject to due diligence must immediately submit report in writing to Financial Intelligence Unit (FIU). Financial Market Authority (FMA) supervises execution of Act. If suspicion is not reported to FIU, Court of Justice shall punish with imprisonment of up to six months or with fine up to 360 daily rates.

3.05 INFORMATION TECHNOLOGY, INTERNET AND NEW MEDIA:

E-Commerce.

E-Commerce Act of 2003 provides legal frame for electronic business. Act emphasizes on special duty to inform about identification of offeror when entering into agreement. Consumer has to be aware of fact that he is able to save text document of contract and standard terms on computer.

Long Distance Sales.

Long Distance Sales Act of 2000 also emphasizes on identification of supplier and disclosure of object of business. Consumer has special revocation right within seven days without giving reason.

Telecommunication facilities are regulated by Telecommunication Law of 20.06.1996. (LGBl 1996/132). Law requires license for provision of certain performances in connection with telecommunication such as transmission circuits, telecommunication lines and like. Law's objective is to enable and strengthen competition in telecommunication market which historically was dominated by monopoly of Swiss mail.

3.06 INTEREST:

Legal rate is 5%.

3.07 LICENSES, BUSINESS AND PROFESSIONAL:

For establishing industrial or commercial enterprises state consent is required. (Law of Dec. 10, 1969, LGBl 1970/21).

4 CITIZENSHIP

4.01 ALIENS:

See category 16 Immigration, topic 16.01 Aliens.

4.02 CITIZENSHIP:

By law of Nov. 2, 1960 (LGBl 1960/23), and various further amendments, right of citizenship is acquired by birth, marriage (not automatically), legitimation or admission. Requirements for admission are faculty of acting, assurance of homeright by Liechtenstein municipality and five years' residence in Liechtenstein. Citizenship is lost by resignation, legitimation, invalidation of marriage or deprivation. Latter can take place within period of five years after admission if requirements were not fulfilled, or at any time if admission was sought by fraud.

4.03 IMMIGRATION:

See category 16 Immigration, topic 16.02 Immigration.

5 CIVIL ACTIONS AND PROCEDURE

5.01 ACTIONS:

It is permissible to agree upon application of foreign laws for interpretation of contracts between Liechtenstein citizens and aliens. If Liechtenstein court is to decide about interpretation of such a contract, it has to apply foreign law agreed upon, so far as its provisions are not against public policy.

See also topic 5.04 Limitation of Actions.

5.02 COSTS:

Costs of legal proceedings are calculated on number of court hearing hours, based on value in litigation according to Liechtenstein lawyer's Tariff Act.

Losing party has to refund costs to successful party.

5.03 JUDGMENTS:

Based on agreements between Switzerland and Liechtenstein (LGBl 1970/4) and between Austria and Liechtenstein (LGBl 1975/20), judgments in civil cases and judgments in arbitral cases are accepted in other country under certain circumstances and can be executed directly in other country. Liechtenstein is not party to multilateral enforcement treaties such as Lugano Convention.

5.04 LIMITATION OF ACTIONS:

In civil cases statutory period is, as a rule, 30 years.

Principal exceptions: Claims for payment of services and goods, salary, rent payments expire in five years. Contestation of will, claiming of compulsory portion, revocation of donation for ingratitude, avoidance of contract because of error or fear, raising of damage claims expires at end of three years. Damage claims against regulated financial services providers expire in ten years after damaging action took place.

Some rights are even more limited in time (e.g., actions for libel, unless assault is involved).

6 COURTS AND LEGISLATURE

6.01 COURTS:

In civil cases the princely county court decides in the first instance, the princely superior court in the second instance and the Princely Supreme Court in the last resort renders the final decision. All are located in Vaduz.

In criminal cases the princely county court decides violations, the jury offenses and the criminal court crimes. All are located in Vaduz.

In contentious administrative matters government decides in first instance, second (in some cases third) instance is Court of Administration (Verwaltungsgerichtshof) which renders final decision. All are located in Vaduz.

In constitutional matters Court of Constitution (Staatsgerichtshof) decides.

6.02 LAW REPORTS, CODES:

See topic 6.04 Statutes.

6.03 LEGISLATURE:

See category 1 Introduction, topic 1.02 Government and Legal System.

Legislative power is vested in Parliament.

Executive power consists of prime minister, and the four ministers of cabinet council.

6.04 STATUTES:

The Liechtenstein Laws are published in Liechtenstein Law Gazette which appears as case may be. Summary of leading cases and court decisions is published quarterly in Liechtenstein legal paper (Liechtensteinische Juristenzeitung).

7 DEBTOR AND CREDITOR

7.01 ASSIGNMENTS:

Assignment of personal property is effected by agreement about transfer of title of assignee.

Assignment of claims is, except where claims are transferred by virtue of law or by judicial act, effected by oral or written agreement between assignor and assignee. Notice to debtor is not required for validity of assignment but is advisable to prevent bona fide debtor from discharging his debt by payment to assignor.

For validity of assignments by way of payment between spouses and assignment by way of gift without handing over object, public document (öffentliche urkunde) is required.

7.02 ATTACHMENT:

Constitutes a provisional security measure provided for by Exekutionsordnung LGBI 1972/32 in order to protect creditor before effectuation of seizure or bankruptcy in execution proceedings.

Prerequisites allowable for all claims of private law including establishment of security by deposit money. Creditor may be a physical or juristic person. Attachable is any personal or real property of debtor situated in Liechtenstein and subject to seizure.

Grounds (Art. 274 of Exekutionsordnung) are: Debtor has no fixed domicile; debtor is suspected of avoiding his obligations by flight or removal of assets; debtor is in transit or at a fair or market but only for debts payable forthwith; debtor has no domicile in Liechtenstein; creditor has without success undertaken executions against debtor.

Indemnity.

Creditor is liable for damages resulting from unjustified attachment. Therefore, court may order security when granting attachment or later. Release of property from attachment will be granted by debtor against security.

Order of Attachment.

Creditor has to file petition with Liechtenstein court. Provided existence of claim and grant for attachment appeared to be credible, court will issue an “Order of Attachment.” Debtor may oppose order of attachment within 14 days after receiving it.

Prosecution.

Creditor, in case he has not previously instituted court action or execution for his claim has to institute court action or execution proceedings within a period of time after receipt of document of attachment.

Alleged rights of third persons to attached property must be notified to court. Within 14 days after knowledge of attachment, owner of attached property must claim his property before court.

7.03 BANKRUPTCY:

Bankruptcy Law (Konkursordnung) of 1973, LGBl 1973/45.

Bankruptcy proceedings (Konkurs) are ordered by court in case of insolvency upon petition made by debtor or by any creditor. Suspension of payments is prima facie evidence of insolvency. As regards companies and estates of deceased persons, a bankruptcy order can also be obtained if liabilities exceed assets.

When ordering bankruptcy, court appoints a receiver (Masseverwalter), in whom bankrupt's assets are vested. Receiver is supervised by court.

All rights of lien or mortgage obtained by way of judicial execution or based on contracts expire on day when bankruptcy proceedings are opened, unless they were established more than 60 days before opening of bankruptcy proceedings. Any other right of lien or mortgage remains unimpaired by debtor's bankruptcy, subject, however, to receiver's right to impugn it.

Distribution of assets by receiver does not effect bankrupt's discharge, but a discharge can be obtained by way of judicial composition. Bankruptcy order having been issued, bankrupt may still apply for forced composition (Zwangsausgleich).

Composition with Creditors.

At request of an insolvent debtor, judicial composition proceedings (Nachlassverfahren) may be instituted by court. Upon institution of such proceedings, rights of lien or mortgage expire to same extent as in case of bankruptcy.

Subject to court's confirmation, composition becomes valid (and binding all creditors) if agreed upon by a qualified majority of creditors.

Special regulations are in force with regard to composition proceedings of bankers and banks.

7.04 EXECUTIONS:

Execution is granted upon judgments, settlements, as well as on grounds of an executable document. Movable property must first be seized in order to be realized upon according to legal regulations. Immovable property can be realized upon by sequestration or public sale.

7.05 GARNISHMENT:

Attachment of outstanding debts of debtor is done by decree of court pursuant to which debt is assigned to creditor. This decree together with a garnishing order stating that debtor's debtor is forbidden to pay to his creditor, must be served upon debtor's debtor by court.

7.06 INSOLVENCY:

See topic 7.03 Bankruptcy.

7.07 PLEDGES:

(Sachenrecht Art. 365ff., LGBl 1923/4).

Personal property is pledged by being delivered into possession of pledgee. Cattle may be pledged by registration in a special register and notification of office of execution of debts. Such pledges may only secure credits of certain institutions licensed by authorities in charge.

Claims are pledged by written agreement and, if desired, by notifying debtor. If such claim is established under a written agreement, same must be delivered into possession of pledgee. Negotiable instruments to bearer may be pledged by being delivered into possession of pledgee. Negotiable instruments to an individual name require furthermore an endorsement or an assignment in favour of pledgee. If, besides an instrument giving title to merchandise, separate warrants have been issued in order to evidence an existing pledge on merchandise, same must be given into possession of pledgee and notice thereof must be made on any other instrument giving title to merchandise. If shares are pledged, pledgor appears as shareholder in general meeting of shareholders. (Art. 390).

More than one pledge can be given on same property. To this effect pledgor must notify pledgee in writing and instruct him to deliver, upon payment of his debt, property to second pledgee. (Art 368). Pledgee may himself pledge property, but needs consent of pledgor. (Art. 369).

Pledge is not effective as long as it remains in exclusive power of pledgor.

Pledge is terminated when pledgee has lost possession or right to recover possession over pledge. Upon reimbursement of debt, pledgor can ask pledgee to return pledge to person entitled. If debt is not paid in time, pledgee may start execution proceedings or sell it, if specifically so agreed. Same includes accessories and, when claims have been pledged, as a rule, income deriving therefrom. Pledges give security for capital, interest, costs of execution and interest of delay. (Art. 373).

8 DISPUTE RESOLUTION

8.01 ALTERNATIVE DISPUTE RESOLUTION:

Mandatory Dispute Resolution.

Does not exist in Liechtenstein.

Voluntary Dispute Resolution.

Arbitration.

According to Liechtenstein law (§§594-616 ZPO) every legal dispute which can be decided by regular court may also be decided by court of arbitration agreed upon by parties thereto. Every arbitration agreement has to be concluded in writing.

Number of arbiters is not limited. In case more than one arbiters are appointed, majority decides upon award to be rendered.

Action for annulment of award can be brought at competent regular court in specific cases itemized in law.

Mediation.

Civil Mediation Act, which was introduced in 2005 (LGBl 2005/31) regulates new form of dispute settlement. Where usually civil courts would have jurisdiction, parties can voluntarily agree to settle their dispute with mediator, person who supports communication of parties and leads them to their own solution. Mediator does not make any decisions but helps parties make their own.

Mediator is person of at least 28 years of age and has special training concerning communication and psychology. Mediators are registered on list.

9 DOCUMENTS AND RECORDS

9.01 ACKNOWLEDGMENTS:

The form of acknowledgment is ruled by the law of the country, where the acknowledgment is taken. Acknowledgments taken in foreign countries to be used in Liechtenstein should be legalized by Swiss consulate, unless multilateral or bilateral treaties provide otherwise.

9.02 NOTARIES PUBLIC:

Unknown in Liechtenstein. Legalizations, etc., are made by the princely county court. In special cases, arbitrator (Vermittler) can perform notarial functions.

10 EMPLOYMENT

10.01 LABOR RELATIONS:

Employers are not required to grant employees or their families any specific types of fringe benefits. Old age, disability insurance, family allowances and unemployment insurance are compulsory.

11 ENVIRONMENT

11.01 ENVIRONMENTAL REGULATION:

There is no express law on protection of environment but protectionist provisions do exist in various other statutes such as law concerning waste disposal, law in respect of water protection, air purity law, forestry law and laws governing hunting and fishing. There is also nature protection statute and ancillary regulations issued by government under which various nature reserves have been created.

Pursuant to customs union between Principality of Liechtenstein and Switzerland (LGBl 1923/24) certain provisions of Swiss statutes relating to environmental protection are directly applicable in Liechtenstein, for example several articles of Swiss law on protection of environment, ordinance regulating transportation of toxic waste, air purity ordinance, and noise prevention ordinance (LGBl 1987/74).

General Supervision.

Within government there exists department for “Environmental protection, agriculture and forestry” which is in portfolio of deputy head of government.

12 ESTATES AND TRUSTS

12.01 ADMINISTRATION:

See topic 12.05 Executors and Administrators.

12.02 DEATH:

If the death of a person is most probable because that person disappeared in grave mortal danger or has been absent for five years without some news, the court may be asked to declare that person as disappeared. If the disappeared person gives no notice within a year after official judicial invitation or if no news of him is received within this period, the court is authorized to declare such person as disappeared. Such declaration has the same legal effect as the death of such person would have.

12.03 DECEDENTS' ESTATES:

See topics 12.04 Descent and Distribution; 12.05 Executors and Administrators; 12.08 Wills.

12.04 DESCENT AND DISTRIBUTION:

Intestate distribution is as follows: (a) Spouse and descendants of deceased, if any; (b) parents and brothers and sisters; (c) grandparents and their issue; (d) great-grandparents only.

Surviving spouse takes one-third if there are children, otherwise two-thirds.

Divorce cancels the intestate right of the surviving spouse.

If there is no next of kin the estate escheats to the state.

12.05 EXECUTORS AND ADMINISTRATORS:

The compulsory institution of executors and administrators is not known in Liechtenstein. As a rule the administration of an estate is entrusted to the heir by the court until distribution. In exceptional cases the court may designate special trustees.

12.06 INTESTACY:

See topic 12.04 Descent and Distribution.

12.07 TRUSTS:

Legal concept of trusts under laws of Liechtenstein is based upon Anglo-American trusts law. Trust is managed by one or more trustees on basis of instrument of trust which also gives trust its own name. In accordance with Anglo-American trust law, Liechtenstein trust does not have legal personality.

Special statute governs so-called “Treuunternehmen”, trust enterprise, which is Liechtenstein adoption of so-called “business trust” or “Massachusetts Trust”. Trust enterprise may be formed with or without legal personality and may be described as business association in terms of laws of Liechtenstein and has its own organization and its own capital (trust fund). It can be formed for either economic or other purposes (in which case it deviates from original concept). In deviation from rule governing trusts in general all liabilities arising out of legal existence and activities of trust enterprise are limited to trust fund.

12.08 WILLS:

A last will naming heirs is called “Testament,” otherwise “Codicil.”

Wills must be either holographic or at least personally subscribed by the testator. In the latter case three subscribing witnesses to the will are required; at least two of them must be present at the execution.

The testator must respect the forced heirship provisions, which compel him to give a certain fraction of his property to his children, and spouse, or in absence of children and spouse, to his parents. “Pflichtteil” is equal to one-half of intestate share. However, disinheritance is permitted in one of following cases: not supporting testator in case of need; crime punished with 20 or more years in jail; or leading life against public morals.

13 FAMILY

13.01 ADOPTION:

New Adoption Law enacted 1976. (LGBl 1976/40; 1993/54).

Adoption becomes effective by agreement in writing between adopter and adoptive child and by court permission. If adoptive child is incompetent to act, he/she is represented by his/her legal guardian. Adoption by more than one person is only possible if adopters are spouses. With few exceptions, spouses may only adopt jointly. There must be reasonable cause for adoption.

Adoptive father must be at least 30 years of age and adoptive mother must be at least 28 years of age. Adoptive parents must be at least 16 years older than adoptive child.

Adopted child bears same relation to adopting parents and their kindred in all respects, including right of inheritance, as he/she would if he/she were natural child of such parents (subject to provisions on nationality). All rights and obligations as between adopted child and natural parents are extinguished by adoption.

13.02 COMMUNITY PROPERTY:

See topic 13.04 Husband and Wife.

13.03 DIVORCE:

As provided by law of Dec. 13, 1973 amended by law of Dec. 17, 1998 (LGB1 1999/28) Liechtenstein marriage act distinguishes between divorce by mutual consent, divorce after having lived separate and divorce on ground that continuation of marriage is intolerable: (a) If parties agree on divorce and conclude settlement concerning children, child and spouse support and division of property, they may apply for judicial permission of divorce; (b) if parties have lived separate for at least three years they may request divorce. If they do not agree on settlement (see clause a) court has to pass decision; (c) divorce may be granted before separation period of three years if continuation of marriage is intolerable for innocent party requesting divorce.

13.04 HUSBAND AND WIFE:

Matrimonial property rights during marriage: separation of property. In case of divorce: sharing alike of property acquired during marriage. (LGBl 1993/53 and 1999/28).

13.05 INFANTS:

Minority ends for both males and females on completion of 18 years of age.

Infants under age of 14 years are not subject to any prosecution under penal code. Minors on completion of 14 years and until age of 18 years are subject to special regulations of penal code.

Minor infants are represented by parent, if parents died or are deprived of parental power, by guardian appointed by court. Person under age of 18 years can transact business only with consent of his statutory guardian but may freely dispose of earnings acquired by himself.

13.06 MARRIAGE:

“Age of consent” is fixed at 18 for males and females. In order to contract marriage both parties must be capable of judgment.

Consent Required.

Minors or incapacitated persons wishing to marry must secure consent of their legal representative. In case of emergency consent may be secured by decision of court.

Prohibited Marriages.

Following impediments to marriage are provided by Liechtenstein marriage act: consanguinity, adoption and existing marital bond.

Ceremonial Marriage.

Civil ceremony is obligatory under Liechtenstein law.

Annulment.

Marriage may be annulled by court ex officio or upon application of injured party in following cases: where marriage was prohibited; where either party is physically or psychically impotent; where either party is not capable of judgment; where marriage was contracted without consent of legal representative; where either party was mistaken about identity of other; where consent of either party was obtained by fraud or by duress; where compulsory formality was omitted at time of marriage; where either party did not intend to establish community of life by marriage but to circumvent provisions on acquisition of Liechtenstein citizenship.

13.07 MARRIED WOMEN:

See topics 13.04 Husband and Wife; 13.06 Marriage.

14 FOREIGN TRADE AND COMMERCE

14.01 EXCHANGE CONTROL:

Foreign Exchange Control.

See category 1 Introduction, topic 1.01 Currency and Switzerland Law Digest, same category and topic. See topics 14.02 Foreign Investment, 14.03 Foreign Trade Regulations.

14.02 FOREIGN INVESTMENT:

With exception of real estate no restrictions.

14.03 FOREIGN TRADE REGULATIONS:

Imports and Exports.

See Switzerland Law Digest, same topic and subhead, with following addendum: Since May 1995 Liechtenstein is member of European Economic Area (EEA).

15 HEALTH

15.01 DRUGS:

Manufacturing, labeling, sale, import and export as well as advertising of drugs are regulated and controlled by government.

For drugs already admitted in EU country exists simple approval procedure.

Prescription drugs admitted in Liechtenstein have to be registered and may only be sold in pharmacies.

Manufacturing and sale of substances with potential for addiction (morphine, cocaine, hemp and others) are specially regulated.

15.02 FOOD:

Manufacture, distribution, storage, use of ingredients and sale of food is regulated by Swiss law and controlled by Liechtenstein government agency; specially regulated control of meat and dairy products.

15.03 HEALTH INSURANCE:

Basic health insurance coverage is mandatory. Half of costs of employee's mandatory health insurance is to be paid by employer.

15.04 PROFESSIONS:

Medical and other qualified professions in field of health need government licence.

16 IMMIGRATION

16.01 ALIENS:

Rights and duties of aliens are equal to that of Liechtenstein citizens except in those cases where Liechtenstein citizenship is prescribed.

See also topic Citizenship; category 20 Property, topic 20.03 Real Property.

Corporations Owned or Controlled by Aliens.

See category 2 Business Organizations, topic 2.06 Partnerships.

16.02 IMMIGRATION:

Residence and domicile permits are regulated by law of Apr. 12, 2000 (LGBl 2000/98) and various ordinances. Person who stays in Liechtenstein for more than three consecutive months needs residence permit. Permits are granted in connection with work permits (citizens from EU countries and Switzerland have priority over others); few permits are granted one time each year by drawing lots; residence permits for nonworking persons on basis of tax agreements with authorities, although possible in principle, are rarely ever granted.

Agreement between Liechtenstein and Switzerland concerning third country aliens from 1963 is based on strong collaboration of Swiss and Liechtenstein foreign police. Permit for stay is only valid in either of countries; foreigner is allowed to cross Liechtenstein/Swiss border without permit. Agreements between Switzerland and other countries are also applicable in Liechtenstein.

17 INTELLECTUAL PROPERTY

17.01 COPYRIGHT:

Copyright Law of 19 May 1999. (LGB1 1999/160). Limitation of copyright has been fixed at 70 years after death of author. Acquisition of right does not depend on registration in Public Register. It is acquired automatically by creation of work of art as described by law.

17.02 DATA PROTECTION:

Data Protection Act (LGBl 2002/55) seeks to protect use of personal data by private persons or public authority. Data has to be acquired lawfully. Data may only be used for purpose indicated in advance. Person, whose data is recorded, has to be informed about identification of holder of data compilation and purpose for data processing. Violation of data protection rights is penalized with up to one year imprisonment.

17.03 DESIGN PROTECTION:

Design Protection Act (LGBl 2002/134) has special provisions concerning protection of design. New design, which differs substantially from every other existing design and which has certain originality can be registered in Design-Register and is protected for five years.

Holder of legal protection has right to forbid others to use his registered design commercially; offence can also be penalized with up to one year imprisonment.

17.04 PATENTS:

Liechtenstein forms joint patent territory with Switzerland. (LGBl 1980 Nr. 31). Swiss patents are valid in Liechtenstein. Liechtenstein patent attorneys are admitted before Swiss and before European patent office. Liechtenstein is member of Munich patent treaty (European patent organization) and can be nominated by any applicant, although nomination of either Liechtenstein or Switzerland will be considered sufficient to cover whole territory. Same applies to patent cooperation treaty of which Liechtenstein is also member.

17.05 TRADEMARKS AND TRADENAMES:

Trademarks and tradenames which are recorded at patent office enjoy monopoly rights to be used only by owner in connection with product. Protection ends if owner of mark or name doesn't make use of it in continuous time of five years after its registration. It may be forbidden that known trademarks are used by person other than owner if usage endangers distinctiveness of mark or if it could endanger its reputation. (LGBl 1997/60).

17.06 UNFAIR COMPETITION:

Unfair methods concerning advertisement and sales, inducement to breach or termination of contract, disposal over service of third party, violation of business secret, use of abusive standard terms and use of detrimental terms of payment are understood to be unfair in accordance with Unfair Competition Act. (LGBl 1992/121). Anyone whose rights are violated by unfair action of another or who is threatened by latter has entitlement to claim. Act also provides for granting of preliminary measures.

18 LEGAL PROFESSION

18.01 ATTORNEYS AND COUNSELORS:

Jurisdiction over admission to bar is vested in Financial Market Authority (FMA).

Attorneys are governed by Law concerning lawyers dated Dec. 9, 1992, LGBl 1993/41 and by rules of conduct issued by lawyers' association.

Eligibility.

Requirements to qualify as attorney are Liechtenstein or EEA citizenship , good standing, bar examination, and registration into list of attorneys kept by FMA.

Educational Requirements.

Applicant for bar examination must be holder of degree from university (law faculty); two years clerkship, of these at least one year in law firm and six months at Liechtenstein Court; bar examination. Examinations are written and verbal on civil, criminal, constitutional and administration law.

Admission of Foreign Attorney.

Admission Pro Hac Vice.

Attorneys from EEA countries are entitled to temporarily appear in Liechtenstein court based on freedom to provide cross border services. They are obliged to name local attorney who accepts service. Attorneys from non -EEA countries may appear pro hac vice with special permit in case special circumstances prevail

Licenses and Authorized Practice.

Applicant who has passed examination and fulfils requirements (see subhead Eligibility, supra) is registered in list of attorneys kept by Liechtenstein Government.

Liabilities.

Attorneys are liable for neglect of duty.

Compensation.

Regulated by law; possibility of free agreement with client; no agreements as to de quota litis.

Discipline.

Liechtenstein Upper Court has jurisdiction over discipline of attorneys, possibility of appeal to Supreme Court.

Unauthorized Practice.

Prohibition of practice of law by individuals not admitted to bar (see subhead Admission of Foreign Attorney, supra).

Legal Professional Association.

Liechtensteinische Rechtsanwaltskammer (Law of Apr. 21, 1993; LGBl 1993/72). President is elected for three years. Contact address is of president, 2005-2008: Dr. Mario Frick, 9494 Schaan, Kirchstrasse 6. If foreign attorney seeks local counsel, association will send list of law firms but will not make recommendations.

19 MORTGAGES

19.01 CHATTEL MORTGAGES:

Known in Liechtenstein law only in very limited sense of pledging chattel by registration. See category 7 Debtor and Creditor, topic 7.07 Pledges.

19.02 MORTGAGES:

(Sachenrecht LGBl 1923/4).

Debts may be secured by real estate either as a mortgage (Grundpfandverschreibung, Art. 296ff.), or as a mortgage certificate (Schuldbrief, Art. 319ff.), or as a land charge certificate (Gült, Art. 325ff.). Mortgage secures a determined, or undetermined, existing, future, or contingent debt. Mortgage certificate is a collateral security of a determined and unconditional bond. Land charge certificate secures payments due by present owner of a piece of real estate without any accompanying personal obligation. Mortgage certificate and land charge certificate are negotiable instruments issued to name or to bearer. They may be transferred by endorsement to name of purchaser and transfer of instrument or, for bearer certificates, by actual transfer of instrument. Certain exceptions provided, debtor may pay interest to former creditor unless he was informed of assignment. Capital must be reimbursed to person qualifying as creditor.

Certain exceptions provided, mortgages, mortgage certificates and land charge certificates become effective upon their entry in Real Register. Maximum amount must be stated in Swiss currency. Entries, including amendments and cancellations, are made only upon execution of a publicly authenticated document. Priority is established according to rank designated in Real Register, not according to date of registration. Stipulations can be entered in Real Register to effect that upon cancellation of a mortgage, mortgage certificate, or land charge certificate prior in rank, subsequent mortgages, mortgage certificates or land charge certificates may succeed in such rank.

When real estate is sold and buyer acknowledges his personal liability for debts secured by a mortgage or a mortgage certificate on such property, liability of original debtor terminates unless creditor files written objections with original debtor within one year.

Debts secured by mortgages or mortgage certificates or land charge certificates are not subject to statute of limitations. If debt is not paid in time, creditor may sell property by execution. Same includes all accessories such as, unless expressly stipulated otherwise, plant, hotel furniture, etc., also rents accrued since beginning of execution proceedings. Property gives security for capital, expenses necessitated by execution, interest of delay, outstanding interest for three years preceding last due date and outstanding interest since such due date. If there is more than one creditor, proceeds of sale are distributed according to rank of mortgage, mortgage certificate or land charge certificates.

Mortgages, mortgage certificates and land charge certificates are cancelled upon cancellation of their entry in Real Register or upon total destruction of piece of real estate given as security. Cancellation or return of instrument of a mortgage certificate or a land charge certificate can be requested upon reimbursement of capital.

20 PROPERTY

20.01 ABSENTEES:

If for reasons of absence a person of age (see category 13 Family, topic 13.05 Infants) cannot act in an urgent matter nor designate a representative, furthermore if property is not taken care of because a person is continually absent with unknown abode or because of uncertainty as to heirs entitled to an inheritance, a curator (Beistand) is appointed by princely county court.

20.02 POWERS OF ATTORNEY:

Power of attorney contracts can be made either verbally or in writing. Power of attorney can be general or special. In order to carry out certain business transactions (purchase and sale of articles, loan agreements, carrying on a lawsuit, signing a settlement, etc.) a power of attorney is necessary, which is given expressly for these kinds of transactions. For certain other transactions (gifts, company contracts, etc.) a special power of attorney is needed which is given for each separate transaction.

Lawsuit power of attorney must be given in writing; if made out in a foreign country, court can demand a notarial attestation of principal's signature.

Speaking generally, power of attorney expires at death either of principal or of agent; but a lawsuit power of attorney is not withdrawn at death of principal, nor a power of attorney made out by a merchant in mercantile trade.

Power of attorney can be withdrawn at all times by either principal or agent. Principal is, however, responsible to agent for all damages accruing to him in consequence of a premature withdrawal, and agent is responsible to principal for all damages accruing to him by reason of agent's prematurely ending power of attorney which was given him for purpose of completing transaction entrusted to him.

Where agent enters into a legal transaction with a third person who is aware that he is acting under a power of attorney, all rights and duties thereunder belong to and are imposed on principal. Agent who exceeds limits of his power of attorney or one who falsely pretends to act in behalf of a principal (falsus procurator) is responsible to third persons dealing with him in good faith, for all damages sustained, and in commercial transactions he can be compelled by third person to perform all obligations which he, in virtue of his supposed power of attorney, has incurred in name of supposed principal.

20.03 REAL PROPERTY:

Liechtenstein law distinguishes between immovable things, immovables (Grundstücke), tangible movable things, tangible movables (bewegliche Sachen or Fahrnis), and intangibles (choses in action [Forderungen or Obligationen] and negotiable instruments, bills and notes). A separate category of property are the so-called immaterial or industrial property rights, e.g., rights on patents, trademarks.

Immovables are: (1) land, (2) independent and lasting rights entered in Land Register, e.g., specific building leases (right in rem), right to springs, (3) mines (Sachenrecht/SR Art. 34). Ownership of immovables comprehends all buildings, plants and springs. (SR Art. 47). Disposition of an immovable made without reservations extends also to tangible movables which, according to local usage or intention of owner of immovable, are permanently provided for as to management, use or preservation, and brought in many ways into relationship to immovable for its service. (SR Art. 23/24). Restricted rights in rem on immovables include: servitudes (SR Art. 198), usufruct (SR Art. 216-253), land charges (SR Art. 254-264), mortgages (see category 19 Mortgages, topic 19.02 Mortgages).

Effective in 1965 (LGBl 1965/25) new law allowing ownership of a particular story or floor of a building was introduced and, in connection therewith, provisions concerning co-ownership have been adopted.

Acquisition.

There is a distinction between underlying legal ground (causa) for acquisition of ownership or restricted rights in rem on immovables and acquisition itself. Underlying legal ground gives an obligatory right of entry of ownership or of restricted right in rem into Land Register; only such entry brings right in rem into existence (principle of entry [into the Land Register]). There are certain exceptions of ipso jure acquisition of ownership or restricted rights in rem on immovables, e.g., in case of heirship, judgment, execution. In such cases, entry takes place as a mere declaratory measure, which however is a condition precedent for a disposition of right. For mortgages, principle of entry is as a rule fully applicable.

Entry in Land Register pertaining to ownership or to a restricted right in rem is only valid, if underlying legal ground is valid (principle of legality or of causality; SR Art. 626.) However, acquisition of ownership or of a restricted right in rem on immovables by an acquirer relying bona fide on an entry in Land Register is protected (principle of public faith of Land Register; SR Art. 625).

A kind of effect of rights in rem can be given to certain obligatory rights pertaining to immovables by way of "annotation" in Land Register (SR Art. 556), e.g., to right of preemption, of purchase, of repurchase, of ordinary lease, of usufructuary lease. Co-owners of an immovable have, by virtue of law without entry in Land Register, a right of preemption against any third person who has acquired a share in immovable.

Agreements for conveyance or encumbrance of immovables require for validity the form of a written contract and to get real estate requires registration in Land Register, without exception. (SR Art. 38).

Acquisition by Nonresidents.

Based on law acquisition of real estate by resident and non-resident aliens or by legal entities in which such have majority interest are to be licensed by special commissions (Grundverkehrskommission). Permission for nonresident aliens or foreign legal entities is usually not given. (Grundverkehrsgesetz, LGBl 1993/49).

21 TAXATION

21.01 BUSINESS TAXES:

Holding and domiciliary companies only are subject to annual tax on capital of one per mille; based on company's own property, minimum SFr. 1,000 a year. No tax on profit, tax on earnings and tax on property have to be paid, except for companies whose capital is divided into shares; they pay 4% tax on dividends distributed and on liquidation surplus.

21.02 TREATIES AND AGREEMENTS:

Double Taxation.

Liechtenstein has agreements for avoidance of double taxation with Austria (LGBl 1970/37) and Switzerland (LGBl 1997/87).

21.03 VALUE ADDED TAX:

Since 1995 value added tax is imposed at rate of 7.6% on most goods and services. Export are zero-rated. (LGBl 1994/84).

22 TRANSPORTATION

22.01 MOTOR VEHICLES:

See Switzerland Law Digest.

23 TREATIES AND CONVENTIONS

23.01 TREATIES AND CONVENTIONS:

See categories 5 Civil Actions and Procedure, topic Judgments; and Introduction, topic Government and Legal System, subhead Commercial Treaties; Taxation, topic Taxes, subhead

Double Taxation.

Liechtenstein is party to Convention Abolishing Requirement of Legalisation for Foreign Public Documents.

Since May 1995 Liechtenstein is party to Agreement concerning the European Economic Area (EEA).

Principality of Liechtenstein is member of United Nations as well as of key UN special organizations such as Statute of the International Court of Justice, Universal Postal Union, International Telecommunications Union, International Atomic Energy Organization, World Intellectual Property Organization and also UNCTAD, UNIDO and ECE. Liechtenstein is also member of International Agreements on Refugees and Geneva Convention for the Protection of War Victims. 100 or so multilateral agreements to which Liechtenstein is signatory govern questions of law, traffic, public health, trademark protection, culture, copyright, telecommunications, etc.

In 1978, Liechtenstein was admitted to Council of Europe. In 1982 European Convention for the Protection of Human Rights and Basic Freedoms (ERMK) was ratified. Liechtenstein also made voluntary declarations to effect that it recognizes competence of European Commission for Human Rights to deal with individual complaints and accepts compulsory jurisdiction of European Court of Human Rights.

Liechtenstein has joined General Agreement on Tariffs and Trade (GATT) in 1994 and is also member of World Trade Organization (WTO).

Since 1995 Liechtenstein is member of Agreement concerning the European Economic Area (EEA) that EC and EFTA countries signed in 1992. Economic and social policy decisions that were previously made on purely domestic basis or else, under bilateral treaties, by Switzerland are henceforth tied into multilateral process in which Liechtenstein plays part with same rights and duties as other treaty partners. Recently Liechtenstein has joined Hague Trust Convention of July 1, 1985 which entered into force in Liechtenstein on Apr. 1, 2006.

1
REPUBLIC OF LITHUANIA LAW DIGEST

—Scope —

Revised for 2010 edition by

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(Abbreviations used are: **CK**, Civilinis kodeksas, Civil Code of Republic of Lithuania, adopted on July 18, 2000, effective from July 1, 2001. **CPK**, Civilinio proceso kodeksas, Code of Civil Procedure of Republic of Lithuania, adopted on Feb. 28, 2002, effective from Jan. 1, 2003.)

Republic of Lithuania is member of EU. See also European Union Law Digest.

Note: Except where noted otherwise, this revision is as of Feb. 18, 2010.

1 INTRODUCTION

1.01 CURRENCY:

National currency is Litas (Lt. or LTL), which equals to 100 cents. Central bank, Lietuvos Bankas (Bank of Lithuania), was established by Law on Bank of Lithuania (adopted on Dec. 1, 1994, am'd on Mar. 12, 1996; Apr. 8, 1997; July 2, 1997; Mar. 13, 2001; Mar. 4, 2003; Apr. 3, 2003; June 5, 2003; Feb. 5, 2004; Mar. 23, 2004; Apr. 15, 2004; Apr. 25, 2006; Mar. 19, 2009; Dec. 2, 2009; Dec. 10, 2009) and it has monopoly rights to issue national currency. In 1994 currency board system was adopted in accordance with Law on Reliability of Litas (adopted on Mar. 17, 1994, am'd on July 20, 1994; Apr. 5, 2001) and Litas was pegged to U.S. dollar, as anchor currency, at rate LTL 4 = $1. On Feb. 2, 2002, anchor currency was changed from U.S. dollar to EURO, i.e. Litas was re-pegged to EURO, at rate LTL 3.4528 = [Euro]1. Lithuania has entered ERM II on June 27, 2004 when EU communiqués were accepted. Central rate of EURO and compulsory intervention rate are as follows: top rate 3.97072; central rate 3.45280 and lowest rate 2.93488.

1.02 GOVERNMENT AND LEGAL SYSTEM:

Preliminary Note.

Republic of Lithuania, independent from 1918 until 1940, was annexed in 1940 by U.S.S.R. Supreme Council of Lithuania declared Republic's independence on Mar. 11, 1990 and adopted Provisional Basic Law, which was later replaced by Constitution of Republic of Lithuania (adopted on Oct. 25, 1992, am'd on June 20, 1996; Dec. 12, 1996; June 20, 2002; Jan. 23, 2003; Mar. 20, 2003; July 13, 2004; Apr. 25, 2006). In 1993 Lithuania became member of Council of Europe and in 1995 signed Association Treaty with European Communities (came into force on Feb. 2, 1998), whereby undertook to harmonize its legislation with that of European Communities. On Dec. 13, 2002, Lithuania finished European Union accession negotiations and joined European Union on May 1, 2004. On Mar. 26, 2003 Lithuania signed NATO accession protocols and became full member of NATO on Mar. 29, 2004.

As established in Constitution, Lithuania is independent democratic Republic. Sovereignty of Republic is vested in Lithuanian people. Powers of state are exercised by Seimas (Parliament), President and Government, and Judiciary. Lithuanian democratic institutions are now firmly established.

Fundamental rights and freedoms of citizens and other natural persons are codified in Constitution, c. 2. All persons are declared equal before law, court and other state institutions and officers. In 1995 Lithuania ratified European Convention for Protection of Human Rights and Fundamental Freedoms (1950).

Legislative Power.

Unicameral Seimas consists of 141 representatives of Lithuanian people. Seimas members are elected for four-year term on basis of universal, equal, direct and secret elections. Mixed election system was established by Law on Elections of Seimas of Republic of Lithuania(adopted on July 9, 1992, am'd on Aug. 4, 1992; Mar. 16, 1993; Nov. 8, 1994; Jan. 12, 1995; June 27, 1996; Oct. 9, 1997; Feb. 9, 1999; Sept. 23, 1999; July 18, 2000; Aug. 31, 2000; Sept. 19, 2000; Feb. 20, 2001; Apr. 19, 2001; June 20, 2002; Sept. 17, 2002; Apr. 3, 2003; Dec. 18, 2003; May 11, 2004; July 15, 2004; Aug. 20, 2004; Aug. 23, 2004; Nov. 17, 2005; Mar. 15, 2008; Apr. 16, 2009; Dec. 22, 2009). Citizens of Republic of Lithuania, who have reached 18 years of age, are entitled to vote and those, who have reached 25 years of age and permanently reside in Lithuania, may stand for election to Seimas. Seimas, among other powers, has power to pass laws, amend Constitution, ratify international treaties, announce elections of President of Republic of Lithuania, approve candidature of Prime Minister upon proposal by President, approve program of Government, state budget, appoint judges to Constitutional Court and Supreme Court. Statute of Seimas (adopted on Feb. 17, 1994, am'd on Dec. 20, 1994; Feb. 23, 1995; June 28, 1995; Dec. 19, 1995; Nov. 26, 1996; July 1, 1997; Nov. 11, 1997; Dec. 22, 1998; May 25, 1999; Nov. 11, 1999; Oct. 10, 2000; June 7, 2001; Sept. 13, 2001; Dec. 18, 2001; Sept. 5, 2002; Sept. 26, 2002; Jan. 14, 2003; Mar. 20, 2003; May 27, 2003; Nov. 11, 2003; July 13, 2004; Nov. 9, 2004; Dec. 2, 2004; Feb. 15, 2005; June 30, 2005; Dec. 13, 2005; Dec. 23, 2005; Jan. 11, 2006; Oct. 3, 2006; Nov. 14, 2006; June 26, 2007; Apr. 17, 2008; July 1, 2008; July 3, 2008; Nov. 13, 2008; Nov. 14, 2008; Dec. 4, 2008; Dec. 16, 2008; Apr. 23, 2009; June 23, 2009; Sept. 17, 2009; Nov. 5, 2009) establishes in detail legislative procedures and other working regulations of Seimas.

Seimas convenes yearly for two regular sessions; one running from Mar. 10 to June 30 and other from Sept. 10 to Dec. 23. Seimas may resolve to prolong session. Extraordinary sessions may be convened by Seimas Chairperson upon proposal of at least one-third of all Seimas members, and, in cases provided for in Constitution, by President of Republic of Lithuania.

Executive Power.

President of Republic of Lithuania, formal head of state, is elected for no more than two consecutive five-year terms on basis of universal, equal, direct and secret elections. President signs and promulgates laws adopted by Seimas. President has right of conditional veto, which may be overcome by majority of more than half of all Seimas members, except constitutional laws, for which majority of three-fifths of all Seimas members is required. President represents Republic of Lithuania in international relations, signs international treaties, submits them for ratification to Seimas, appoints and dismisses Prime Minister upon approval of Seimas, authorizes Prime Minister to form Government and approves its composition, appoints and dismisses state officers provided by law, appoints judges of Area, District and Administrative Courts and, upon Seimas' approval, judges of Court of Appeal, and has right of legislative initiative.

Principal executive body is Government of Republic of Lithuania, which consists of Prime Minister and 14 ministers. Prime Minister is appointed or dismissed by President with Seimas' approval, and ministers are appointed by President upon proposal of Prime Minister. New Government is empowered to act when Seimas approves its program by simple majority vote. Government is jointly accountable to Seimas for general activities of Government and must resign, among other cases, if majority of all Seimas members expresses lack of confidence in Government or Prime Minister. Competence and legal status of Government is regulated by Law on Government (adopted on May 19, 1994, am'd on Nov. 19, 1996; Dec. 3, 1996; Dec. 5, 1996; Dec. 12, 1996; Mar. 25, 1997; Apr. 28, 1998; June 30, 1998; Oct. 10, 2000; Oct. 17, 2000; May 17, 2001; July 12, 2001; Apr. 16, 2002; Sept. 5, 2002; Jan. 14, 2003; Oct. 14, 2003; June 15, 2004; Nov. 2, 2004; Nov. 11, 2004; May 12, 2005; Jan. 19, 2006; June 14, 2007; Mar. 20, 2008; Sept. 22, 2008; Nov. 6, 2008; Dec. 23, 2008; Jan. 12, 2009; Mar. 10, 2009; Apr. 16, 2009; July 7, 2009; Dec. 2, 2009).

Judicial Power.

Administration of justice in Republic of Lithuania is governed by the Constitution, c. 9 and Law on Courts (adopted on May 31, 1994, am'd on Oct. 20, 1994; Nov. 8, 1994; Dec. 8, 1994; Feb. 14, 1995; Mar. 21, 1995; June 18, 1996; July 4, 1996; Sept. 14, 1996; Sept. 24, 1996; Mar. 13, 1997; June 10, 1997; Apr. 8, 1998; Jan. 14, 1999; Feb. 9, 1999; Feb. 11, 1999; May 4, 1999; May 20, 1999; Nov. 4, 1999; Feb. 10, 2000; Nov. 28, 2000; July 10, 2001; Jan. 24, 2002; July 2, 2002; Jan. 21, 2003; Jan. 28, 2003; Apr. 3, 2003; Apr. 8, 2003; Apr. 17, 2003; May 18, 2004; Nov. 22, 2005; May 23, 2006; June 1, 2006; Apr. 19, 2007; July 3, 2008; Nov. 6, 2008; Mar. 28, 2009; Dec. 3, 2009; Dec. 21, 2009). Courts are divided into courts of general jurisdiction and administrative courts. Courts of general jurisdiction are: apylinkiu teismai (District Courts), apygardu teismai (Area Courts), apeliacinis teismas (Court of Appeal) and Aukscіausiasis Teismas (Supreme Court). Administrative court system was established by Law on Establishment of Administrative courts (adopted on Jan. 14, 1999, am'd on Apr. 13, 1999; Sept. 19, 2000; Mar. 12, 2002) and is comprised of apygardu administraciniai teismai (Area Administrative Courts) established in five major cities of Lithuania and Lietuvos vyriausiasis administracinis teismas (Supreme Administrative Court of Lithuania). Constitution provides for Constitutional Courtformation and competence which are also governed by Law on Constitutional Court (adopted on Feb. 3, 1993, am'd on Dec. 2, 1993; July 11, 1996; June 4, 1998; Feb. 20, 2001; Apr. 19, 2001; July 10, 2001; Oct. 28, 2003; Mar. 28, 2006; June 26, 2006; July 3, 2008; Nov. 6, 2008; Nov. 11, 2008).

Judges and courts are independent and obey only law. All citizens of the Republic of Lithuania are equally entitled to defend their rights in the court. Citizens of other states and stateless persons have rights to protection by court equally with Lithuanian citizens unless law provides otherwise. See also category 6 Courts and Legislature, topic 6.01 Courts.

Supreme Court publishes its rulings on Internet site at http://www.lat.lt, Court of Appeal publishes its rulings at http://www.apeliacinis.lt and Supreme Administrative Court of Lithuania at http://www.lvat.lt.

1.03 HOLIDAYS:

Pursuant to Art. 162 of Labor Code of Republic of Lithuania (adopted on June 4, 2002; effective from Jan. 1, 2003, am'd on June 26, 2003; June 22, 2004; Apr. 21. 2005; May 12, 2005; June 30, 2005; Dec. 20, 2005; June 15, 2006; July 13, 2006; Nov. 21, 2006; Dec. 4, 2007; May 13, 2008; June 17, 2008) following days are holidays in Republic of Lithuania: Jan. 1 (New Year's Day), Feb. 16 (Restoration of Lithuanian State), Mar. 11 (Re-establishment of Independence of Lithuania), Easter, Easter Monday, May 1 (International Labor Day), first Sun. of May (Mother's Day), first Sun. of June (Father's Day), June 24 (Rasos [Jonines]), July 6 (Crowning of Mindaugas, King of Lithuania), Aug. 15 (Assumption of Blessed Virgin), Nov. 1 (All Saints), Dec. 25, 26 (Christmas).

1.04 OFFICE HOURS AND TIME ZONE:

Since Oct. 31, 1999, Republic of Lithuania is in 2d (GMT +02:00) time zone. Office hours are generally from 8 a.m. to 5 p.m. and from 8 a.m. to 3:45 p.m. on Fri.

2 BUSINESS ORGANIZATIONS

2.01 AGENCY:

Pursuant to CK (see topic 2.03 Corporate Entities), Lithuanian and foreign enterprises may establish representative offices in Lithuania. Establishment of representative offices is regulated by Law on Companies (adopted on Dec. 11, 2003, am'd on June 23, 2005; June 22, 2006; July 11, 2006; Jan. 12, 2007; May 15, 2008; June 5, 2008; Nov. 11, 2008; July 17, 2009; Dec. 15, 2009; Dec. 22, 2009). Registration of representative offices is based on Government Resolution on Establishment of Register of Legal Entities and Approval of Regulations of Register of Legal Entities (adopted on Nov. 12, 2003, am'd on Apr. 14, 2006; Jan. 29, 2007; Oct. 2, 2007; July 9, 2008; Jan. 21, 2009; June 10, 2009; Nov. 4, 2009). Representative office is subdivision of enterprise having separate office location and having right to represent interests of enterprise and protect them, as well as to perform other actions on behalf of enterprise. It may not engage in any commercial-economic activities. Principal enterprise assumes all liability for activities of its representative office. Representative office has no capacity of legal entity. Representative office acts under representative office regulations approved by principal enterprise. Representative office regulations indicate purposes of activity of representative office, managing body and its competence, term of activity if term of activity is limited, information on principal enterprise, managing body of principal body, having right to appoint and recall managing bodies of representative office, adopt decisions on legal status of representative office. Representative offices do not have separate balance sheets. They are usually established for promotional and representational purposes. Representative office of foreign enterprise on behalf of principal enterprise can conclude transactions, perform export and import operations, however only between representative office of foreign enterprise and principal enterprise or any other authorized enterprise. Number of branches and representative offices of foreign state enterprise is not limited. Branch and representative office of foreign state enterprise must be guided by laws and other legal acts of Republic of Lithuania. They may commence economic-commercial activities only after their registration in Register of Legal Entities. Powers of manager of branch or representative office may not be contrary to laws of Republic of Lithuania.

Based on CK, Lithuanian and foreign enterprises may establish branches. Establishment of representative offices is regulated by Law on Companies (see supra). Registration of branches is regulated by Government Resolution on Establishment of Register of Legal Entities and Approval of Regulations of Register of Legal (see supra). Branch is structural subdivision of enterprise having separate office location and performing all or part of functions of that enterprise. It has no capacity of legal entity and acts on behalf of principal enterprise. Principal enterprise is liable for obligations of branch and branch is liable for obligations of principal enterprise. Branch acts under branch regulations approved by principal enterprise. Branch regulations indicate purposes of activity of branch, managing body and its competence, term of activity, information on principal enterprise, managing body of principal body, having right to appoint and recall managing bodies of branch, adopt decisions on legal status of branch.

Representative offices and branches are registered with Register of Legal Entities. After establishment of new Register of Legal Entities, which started its activity Jan. 1, 2004, all provisions of CK governing establishment, registration, activity and termination of legal persons, are applicable to representative offices and branches, except those inapplicable to branch and representative office due to nature of their regulation and legal status. See also category 19 Property, topic 19.02 Powers of Attorney.

2.02 ASSOCIATIONS:

Lithuanian laws distinguish non-profit organizations as kind of legal entity, purpose of which may not be profit making and which may not distribute profit to their members (founders). Non-profit organizations have capacity of legal entities upon their registration with competent institutions, and their liability is limited by their assets. Non-profit organizations may use their income only for purposes established in their by-laws. Following types of non-profit organizations exist in Lithuania: associations; charity and support funds; organizations of art creators; public institutions; and public organizations.

Associations are governed by Law on Associations (adopted on Jan. 22, 2004, am'd on Dec. 22, 2009). Three or more legal entities and/or natural persons may unite in association to achieve certain goals. Foreign legal entities and natural persons may also be members of associations.

Charity and support funds are governed by Law on Charity and Support Funds (adopted on Mar. 14, 1996, am'd on Apr. 30, 1997; Feb. 15, 2000; Apr. 17, 2001; June 5, 2001; Nov. 15, 2001); second version of Law on Charity and Support Funds (adopted on Dec. 22, 2003, am'd on Dec. 22, 2009). Charity and support funds are non-profit organizations having no members and founded with goal to provide charity and/or support to science, culture, art or other spheres. Charity and support funds may be founded by Lithuanian and foreign legal entities and natural persons. Funds may render support and charity in compliance with Law on Charity and Support (adopted on June 4, 1993, am'd on Dec. 20, 1995; June 26, 1997; Feb. 17, 1998; July 11, 2000; Dec. 21, 2001; Apr. 18, 2002; Apr. 22, 2003; Apr. 27, 2004; Dec. 20, 2005).

Organizations of art creators are governed by Law on Art Creators and Their Organizations (adopted on Aug. 15, 1996, am'd on Nov. 26, 1998; Sept. 28, 2004), on Mar. 14, 2005 title of Law was changed to Law on Art Creators and status of Art Creators Organizations. Establishment, organizational structure and liquidation of organizations of art creators are subject to Law on Associations or Law on Public Organizations (see subhead Public Organizations, infra), unless Law on Art Creators and status of Art Creators Organizations provides otherwise. Organization of art creators may be founded by at least 25 natural persons having status of art creators.

Public institutions are governed by Law on Public Institutions (adopted on July 3, 1996, am'd on June 17, 1997; May 18, 2000; Sept. 12, 2000; Dec. 21, 2001; Sept. 16, 2003; Jan. 27, 2004; Jan. 18, 2007; Apr. 30, 2009; Dec. 22, 2009). Public institution is a non-profit limited liability public organization established with objective to satisfy public needs.

Public organizations are governed by Law on Associations (see supra).

Special laws apply to professional unions, political parties and organizations, and religious communities.

2.03 CORPORATE ENTITIES:

CK provides that all enterprises, institutions and organizations have a capacity of legal entity. All enterprises, institutions and organizations are divided into two groups: legal entities with limited liability and unlimited liability. Only personal enterprises and partnerships are deemed to have unlimited liability.

Enterprise is defined as economic unit having its own name and established to carry out certain business activity. Following types of enterprises may be established in Lithuania: agricultural companies; cooperative companies; companies (corporations): public, private and investment companies; partnerships; personal enterprises; state and municipal enterprises. Law enables native and foreign state enterprises to set up branches and representative offices in Republic of Lithuania. Enterprise is deemed established upon its registration with Register of Legal Entities. See category 3 Business Regulation and Commerce, topic 3.05 Commercial Register.

Agricultural companies are governed by Law on Agricultural Companies (adopted on Apr. 16, 1991, am'd on Apr. 23, 1992; Feb. 3, 1993; Sept. 28, 1993; Nov. 9, 1993; Dec. 23, 1993; Dec. 15, 1994; June 13, 1995; Dec. 28, 1995; Jan. 18, 1996; Feb. 18, 1997; July 2, 1997; Dec. 9, 1997; May 20, 1999; May 17, 2001; Apr. 17, 2003; Nov. 4, 2004; Dec. 22, 2009). Agricultural company is enterprise which receives at least 50% of its total income from the sale of agricultural products and services in field of agriculture. Agricultural company may be formed by at least two natural persons or legal entities by joining their property into partial joint ownership for production and commercial activities in agriculture. Agricultural company is legal entity and its liability is limited by its assets. Agricultural company's assets are separated from property of its individual members and it is not liable for obligations of its members when such obligations are incurred by activities not related to company's activities.

Cooperative companies are governed by Law on Cooperative Companies (adopted on June 1, 1993, am'd on Mar. 21, 1995; July 2, 1997; Mar. 14, 2000; July 18, 2000; May 28, 2002; Apr. 27, 2004; May 24, 2007; June 5, 2008; Nov. 11, 2008; Dec. 22, 2009). Cooperative company is established by at least five natural persons, and/or legal entities, for purpose of satisfying its members' business, economic and social needs. Cooperative company is enterprise with changeable membership (minimum five members) and capital, and functions on initiative of its members and at their risk. Cooperative company's ownership capital is formed of members' entrance payments, members' investments (shares in capital), profit and other legal sources. Cooperative company may not issue shares. Cooperative company is legal entity and its liability is limited by its assets.

Corporations (Companies):

According to Law on Companies (see subhead Agency, supra), there are two kinds of companies: "private companies" (closed limited liability companies; Uzdaroji akcine bendrove) and "public companies" (open joint stock corporations; Akcine bendrove). Investment company (see subhead Investment Companies, infra) is specific type of public company. Private and public companies are enterprises with authorized capital divided into shares. They may be formed to carry out any business activity not prohibited by laws of Lithuania. Companies, private and public, have capacity of legal entities and are limited liability formations. Company is liable for its obligations only to extent of its assets and shareholders are liable only by amounts due to be paid for shares subscribed. Company acquires status of legal entity upon its registration with Register of Legal Entities. Company may be established by one or more legal entities or natural persons. Incorporation of companies or acquisition of shares of existing Lithuanian companies are most convenient and popular ways of foreign capital investment.

Main difference between private and public companies is that shares of public company may be sold publicly on stock exchange, whereas shares of private company may not be sold publicly. Issue of shares of public company must be registered with Lithuanian Securities Commission. Number of shareholders is limited to 249 in private company, whereas it is not limited in public company. Companies have right to acquire their own shares (up to 1/10 of authorized capital).

By-laws of company must state: company's name; type of company; purposes and types of company's business activities (it is enough to state only types of economic-commercial activities); amount of authorized capital; number of shares according to classes and kinds; par value of shares and rights of their holders; powers, procedure of convening and voting rules of general meeting of shareholders; procedure of election and resignation of supervisory board, board, head of company and their powers; manner of publishing of company's notices; procedure of submission of company's documents and other information to shareholders; procedure of making decisions on establishment of branches and representative offices, etc. By-laws may also include other provisions not contrary to laws. Amended and supplemented by-laws must be registered with Register of Legal Entities.

Minimum authorized (share) capital of private company is LTL 10,000 ([Euro]2,896) and LTL 150,000 ([Euro]43,443) of public company. Amount of authorized capital may be changed (increased or decreased) only by amending by-laws. Authorized capital may be increased by additional contributions of shareholders or other persons, or out of funds of company (not distributed profit, share premium or reserves). When deciding upon amount of authorized capital of company, authorized capital/ownership capital (shareholders' equity) ratio should be considered. Ownership capital may not be less than ½ of authorized capital. If shareholders' equity decreases below permitted limit and no other means are available to rectify situation, authorized capital must be reduced. Total amount of money lent by company may not exceed its ownership capital (shareholders' equity). Company has right to borrow money from its shareholders; however, interest may not be higher than average interest rate offered by commercial banks of locality of lender's place of residence or business, which was in effect on day of conclusion of loan agreement.

Shares are paid in cash or by non-pecuniary (property including intellectual property) contributions that are objects of civil circulation and may be evaluated economically (works or services may not be non-pecuniary [property] contributions). However, shares can only be paid in cash when there is decision made by general meeting to reduce authorized capital in order to cancel losses shown in balance sheet of company and at same time decision to increase authorized capital through additional contributions by issuing new shares is adopted. When establishing company, initial contribution in cash must be at least 1/4 of authorized capital. Remaining amount may be paid either in cash or in non-pecuniary contributions. Private company may issue material or non-material (evidenced by records in securities account) shares, whereas shares of public company may only be non-material. Shares of private company may be only registered shares and all shareholders of private company must be registered in shareholders' registration book. Shareholder of private company must inform head of company in writing about his intention to transfer shares. Shareholder may not transfer shares of private company if transfer would increase number of shareholders in private company that exceeds maximum permitted number of shareholders. If shareholder intends to sell his shares to person other than existing shareholder of company, other shareholders have pre-emption right to purchase such shares. According to granted rights, shares may be ordinary and preference shares. Par value of all preference shares may not exceed 1/3 of authorized capital. Dividends on preference shares may be cumulative or non-cumulative. Shareholder's rights incident to preference shares must be established in by-laws. Companies may issue company bonds, including bonds convertible into shares.

Net profit of company gained during business year must be distributed during general meeting of shareholders when annual financial accounting statements are approved. If aggregate amount of compulsory reserve, which is formed out of deductions from net profit and used to cover losses is less than 1/10 of authorized capital, deductions in amount of not less than 1/20 of net profit must be made to compulsory reserve. If share is not completely paid for and term for payment has not expired, dividend of shareholder is reduced in proportion to non-paid part of share price.

Bodies of company are general meeting of shareholders, supervisory board, board and head of company. Formation of supervisory board and board is not mandatory. If any type of bodies (except supervisory board) is not formed, its powers as established in by-laws must be transferred to other bodies. If supervisory board is not formed, its powers are not assigned to any other body. If board is not formed, its powers are assigned to head of company, except functions which are to be taken over by supervisory board or general meeting of shareholders.

Supreme body is general meeting of shareholders. Shareholders have voting rights only upon full payment of their shares, except first emission of shares when payment of initial contributions is sufficient. Number of votes given by different classes of shares is indicated in by-laws of company but it must be proportionate to par value of shares. By-laws may establish that shares of certain class do not give right to vote. Ordinary general meeting of shareholders must be convened by board annually within four months after end of company's previous financial year. Extraordinary meetings must be convened in certain cases required by law or by-laws of company, or upon request of supervisory board or shareholders having initiative right. Only general meeting, among other powers, has power to: amend by-laws; elect supervisory board (board, if supervisory board is not formed, or head of company, if neither supervisory board nor board is formed); approve annual financial statements; decide regarding distribution of profit; during period of two years after incorporation of public company, approve company's transactions on purchase of property from incorporators when total value of such transactions is not less than 1/10 of company's authorized capital, elect and recall members of supervisory board (or board, if supervisory board is not formed), elect and recall audit company, decide on reorganization or liquidation of company, etc. Quorum of at least ½ of total amount of votes is required for general meeting, and resolutions may be adopted by simple majority of votes. Majorities of 2/3 or ¾ of votes are required for resolutions on number of questions. By-laws may establish higher qualified majority vote in respect of such resolutions. Shareholders have right to vote in writing in advance. Notices about convening of general meeting of shareholders of private company in all cases must be delivered to shareholders by registered mail or hand delivered personally, or announced publicly in source, prescribed by by-laws.

Supervisory board consists of not less than three and not more than 15 members elected by the general meeting of shareholders for term of maximum four years. Supervisory board elects board members, controls activities of board and administration, inspects financial and other documents of company, submits proposals to general meeting of shareholders on activity strategy, annual financial statement, draft profit distribution, annual announcement of company, submits proposals to board and head of company to recall decisions and resolutions which are contrary to laws, articles of association and decisions of general meeting of shareholders.

Board consists of at least three members elected by supervisory board (if no supervisory board is formed, then by general meeting) for term of maximum four years. Board considers and approves: (a) Management structure of company and office duties; (b) positions for which persons are hired only on competitive basis; (c) salary of head of company; (d) regulations for branches of company; and (e) annual strategy and annual report of company. Board elects and removes head of company. Board analyses and assesses materials submitted by head of company on: (a) implementation of strategy of activities of company; (b) organization of activities of company; (c) financial status of company; (e) results of business activities, income and expenditure estimates, inventory data and other records of valuables; (f) company's financial statement and draft of distribution of profit as submitted along with annual report by head of company. Board must timely hold general meetings, draw up agendas of general meetings, present to shareholders company's annual financial statements, drafts of profit distribution, annual report, other information, necessary for considering items of agenda, etc.

Head of company (general director, general manager, president, etc.) must be appointed in every company. Head of company manages work of administration in compliance with by-laws, decisions of board, and usually has power to enter into transactions on behalf of company. By-laws may specify quantitative representation rule for certain issues where head of company may act on behalf of company only jointly with other representative of company.

Financial supervision of company's activities is performed by auditor, if audit of annual financial strategy is mandatory according to laws. Company's annual financial statements, annual report and audit report (if it is necessary according to laws) should be submitted to Register of Legal Persons throughout 30 days since ordinary general meeting.

Reorganization is transformation of company as legal entity without liquidation procedure. Successors to all rights and liabilities of reorganized companies must be companies newly incorporated in process of reorganization or companies continuing to operate after reorganization. Companies may be reorganized by: (a) Merger or consolidation of companies; (b) division of company by transfer of rights and obligations to existing companies; (c) division of company by transfer of rights and obligations to newly established companies; and (d) separation, which must be carried out by separating part of assets and organizing new company from existing company; latter also continues its activities. Simplified procedure applies to reorganization by merger of companies when one company has at least 90% of shares of another company.

Transformation of company may be carried out by changing type or status of company.

Liquidation of company may be carried out on following grounds: (a) upon expiration of time period of company's duration specified in by-laws; (b) court or creditors' meeting has passed resolution to liquidate bankrupt company; in this case company must be liquidated in accordance with procedure established by Law on Enterprise Bankruptcy (see category 7 Debtor and Creditor, topic 7.03 Bankruptcy); (c) court has passed decision to liquidate company for violations of law; (d) court has ruled company unlawfully incorporated; (e) general meeting has passed corresponding resolution (if no bankruptcy proceedings have been instituted); (f) court adopted decision to liquidate company upon initiative of administrator of Register of Legal Entities. If company is under liquidation procedure, powers of managing bodies of company, except for general meeting and supervisory board, are assigned to liquidator as of date of his/her appointment.

Partnerships are governed by Law on Partnerships (adopted on Nov. 6, 2003, am'd on Dec. 22, 2009). Partnership is legal person established on basis of partnership (joint venture) agreement entered into by several natural persons and/or legal entities. In accordance with partnership agreement participants of partnership (partners) invest their property under plan of partial joint ownership with aim of conducting joint business activity. Partnership is not liable for obligations of its partners which are not related to partnership's activity. Two types of partnerships exist: general partnerships and limited partnerships.

General partnership is partnership with unlimited liability. All partners are jointly and severally (in solido) liable with their property for obligations of general partnership, in proportion to their share in partnership. There should be at least two general partners, but no more than 20.

Limited partnership consists of at least two general partners and at least one limited partner, but there should not be more than 20 partners in all. Limited partnership differs from general partnership mainly in extent of liability of its members. General partners of limited partnership are jointly and severally (in solido) liable with their property for obligations of limited partnership, whereas limited partners are liable only to extent of their share in limited partnership.

Personal enterprises are governed by Law on Personal Enterprises (adopted on Nov. 6, 2003, am'd on July 15, 2009; Dec. 22, 2009). Personal enterprise belongs to one natural person by right of ownership or to several natural persons (spouses) by right of common joint ownership. Nonproduction organizations, having capacity of legal entities, may also own personal enterprises. Personal enterprise is unlimited liability legal entity and its assets are not separate from owner's property. Owner is liable for its obligations with all of his personal property, even after liquidation of personal enterprise.

State and municipal enterprises are governed by Law on State and Municipal Enterprises (adopted on Dec. 21, 1994, am'd on Apr. 27, 1995; June 25, 1996; July 2, 1997; Dec. 9, 1997; Mar. 3, 1998; June 24, 1999; Mar. 16, 2000; Apr. 11, 2000; May 2, 2000; Sept. 12, 2000; Dec. 16, 2003; Sept. 29, 2005; Dec. 22, 2009). State enterprise is enterprise fully owned by state of Republic of Lithuania, and municipal enterprise is owned by municipal unit. State and municipal enterprises have capacity of legal entities and their liability is limited by their assets. State (municipal unit) is not liable for obligations of state (municipal) enterprise and enterprise is not liable for obligations of state (municipal unit).

3 BUSINESS REGULATION AND COMMERCE

3.01 ANTITRUST LAWS:

See topic 3.10 Monopolies, Restraint of Trade and Competition.

3.02 BANKS AND BANKING:

Banks and banking activities are mainly governed by Law on Bank of Lithuania(see category 1 Introduction, supra) and Law on Banks(adopted on Mar. 30, 2004, am'd on Nov. 4, 2004; June 23, 2005; Jan. 18, 2007; July 3, 2008; Mar. 19, 2009; July 21, 2009; Dec. 10, 2009; Dec. 22, 2009). Banking activities are also regulated by number of legal acts of Bank of Lithuania which, as central bank of Lithuania, has power to license and supervise commercial banks and establish requirements for their activities. Commercial banks are established as private or public companies, thus they are also subject to Law on Companies(see category 2 Business Organizations, topic 2.03 Corporate Entities), with exceptions provided in Law on Banks.

Establishment of Banks.

Founders of commercial banks can be natural and legal persons. In order to establish bank, permission of Bank of Lithuania is needed. Permission is adopted upon bank's statute, incorporation agreement, outlines of activity, documents and data regarding founders of bank and proving legality of finances used to obtain part of core capital of bank, documents, confirming shares to be paid-up. Decision regarding this issue must be made within three months from day of application. Registration of banks is performed by Register of Legal Entities. License to perform financial operations is also needed. It can be issued by Bank of Lithuania upon registration of bank's statute, issue of shares and accumulation of core (main) capital, list of shareholders, outlines of activity for first three years, description of structure of organization and management, licenses obtained and other documents confirming reliability of bank. Bank of Lithuania must adopt decision regarding issue of license within three months from day of application.

Foreign banks in Lithuania may: with consent of Bank of Lithuania establish subsidiary (daughter) bank; acquire shares and controlling interest of functioning banks; establish bank affiliates (branches) and representative offices. Permission of Bank of Lithuania for latter action for EU member licensed banks is not needed. Additionally, EU member licensed banks can also perform financial facilities without establishing bank affiliates. Subsidiary banks and affiliates of foreign state banks are obliged to insure deposits in compliance with Lithuanian law or law of foreign country where bank is constituted, provided terms of compliance are equivalent to Lithuanian law requirements.

Shareholders (Stockholders).

Liability of shareholders is limited to amounts they must pay for subscribed shares. Foreign natural persons and legal entities may acquire shares of commercial banks issued after registration as well as shares sold in secondary market of securities. Permission of Bank of Lithuania is required for acquisition of qualifying holding as well as for increase of qualifying holding so that proportion of voting rights of capital held by acquirer would reach or exceed 20%, 30%, 50% or so that bank would become its subsidiary. Following entities may not be bank shareholders: legal persons financed from state or municipality budget; persons refusing to deliver information to Bank of Lithuania about their owners, activities, legitimacy of funds used to obtain shares of bank and financial situation; persons who object that Bank of Lithuania manages their personal information. In order to acquire or increase to qualifying holding of bank, entity must also comply with following criteria: have good reputation and financial soundness; to be able to comply and to ensure that bank would comply with requirements stipulated in Law on Banks; comply with anti-money laundering and anti-terrorism requirements. Latter information is verified by Bank of Lithuania before adopting permission to acquire or increase to qualified holding of bank.

Banking Activities.

Commercial banks are permitted to perform all financial facilities including financial facilities in foreign currency that are not restricted by legal acts. They are also allowed to perform other activities that are associated with provision of financial facilities. According to Law on Markets in Financial Instruments (adopted on Jan. 18, 2007, am'd on Mar. 19, 2009), credit institutions may render investment services on permanent basis and professionally to extent it is allowed by credit institution license.

Deposit insurance cover is provided for deposits in Litas and foreign currency—U.S. dollars, EUROs, and national currency of Member States of European Union and EEA (hereinafter "foreign currency"). Insurance cover for liabilities to investors must be obligations provided for liabilities to investors to repay securities irrespective of their denomination or money in Litas or foreign currency. Deposits and liabilities to investors must be insured at insurance undertaking by commercial banks, credit unions, undertakings as well as foreign banks and undertakings having branches in Lithuania at which deposits or liabilities to investors have no insurance coverage/are not subject to compensation or which are not covered by any other protection schemes under legislation of foreign state exercising jurisdiction over bank having branch or undertaking having subsidiary.

Implementation of directive 94/19/EC of European Parliament and of Council of 30 May 1994 on deposit guarantee schemes is gradual. Several intermediate periods are provided. Insured sum must be equal to depositor's deposit kept with commercial bank, branch or credit institution on day of insured peril, however it may not be in excess of: (1) LTL 50,000 ([Euro]14,481) —from 1 Jan. 2004; (2) LTL 60,000 ([Euro]17,377) —from 1 Jan. 2007 and (3) amount of LTL equivalent to [Euro]20,000 (LTL 69,056) —from 1 Jan. 2008, as determined in directive. Insured sum of liabilities to investor must be equal to liabilities of commercial bank or undertaking to investor on day of insured event; however, it may not be in excess of: (1) LTL 50,000 ([Euro]14,481) —from 1 Jan. 2004; (2) LTL 60,000 ([Euro]17,377) —from 1 Jan. 2007 and (3) amount of LTL equivalent to [Euro]20,000 (LTL 69,056) —from 1 Jan. 2008, as determined in directive.

Deposits.

Fixed term and no-term deposits, in national and foreign currency, are permitted. Deposits may be only denominative and belong to only one owner. Number of deposits is not limited. Deposits of natural and legal persons are mandatorily insured according to Law on Insurance of Deposits and Liabilities to Investors (adopted on June 20, 2002, am'd on Mar. 23, 2004; Jan. 20, 2005; Jan. 18, 2008; Sept. 14, 2008; July 21, 2009). This law sets forth procedure for insurance of deposits kept in banks, branches of foreign banks established in Lithuania, Central Credit Union and other credit unions. Banks, foreign banks or credit unions that have established branch(es) in Lithuania, credit unions or undertakings or foreign undertakings licensed to provide investment services and paying premiums to Deposits Insurance Fund or Fund of Insurance of Liabilities to Investors are assured. According to this law, funds of natural or legal persons keeping their deposits in banks, branches and credit unions must be insured. Object of insurance is deposits of depositors in LTL and foreign currency—$, [Euro] and national currencies of EU and EEA countries. Insurance event is initiation of bankruptcy proceedings against credit union or bank or adoption of decision regarding termination of banking or other credit activities when credit union or bank cannot settle accounts with creditors. Conditions of insurance of deposits may not be used for advertising. Upon adoption of new Law on Insurance of Deposits and Liabilities to Investors in June 2002, Lithuanian legislation fully complies with Directive 94/19/EC on Deposit Guarantee Schemes. Current edition of Law on Insurance of Deposits and Liabilities to Investors broadens insurance coverage stipulated in Directive 94/19/EC on Deposit Guarantee Schemes by covering full amount of deposit in LTL equivalent to [Euro]100,000 (LTL 345,280), all liabilities to investor in LTL amounting to [Euro]3,000 (LTL 10,358) and 90% of liabilities to investor in LTL amounting to [Euro]22,000 (LTL 75,962). Insurance coverage may not be provided to debt securities/deposit certificates issued by same insurer or liabilities arising out of own acceptances and promissory notes and to deposits of or liabilities to following persons: (1) Bank of Lithuania; (2) insurance undertakings; (3) credit institutions; (4) brokers undertakings; (5) insurance undertakings operating under Law on Insurance; (6) pension funds and management undertakings of pension funds; (7) investment companies of variable capital and management undertakings; and (8) undertakings engaged in leasing/financial lease; and (9) collective investment undertakings. Annual rates of insurance premium are: (1) for banks, branches—0.45%; (2) for credit unions—0.2%. Council of State Enterprise Deposit and Investment Insurance has a right to change amount of premium. Depositor acquires right to insurance benefit from date of insurance event. Deposits are inherited under general procedure. In case there are no inheritors of deceased person, deposit is transferred to state budget.

3.03 BILLS AND NOTES:

Governing laws in respect of bills of exchange and promissory notes (vekseliai) is Law on Bills of Exchange and Promissory Notes (adopted on Mar. 16, 1999, not am'd). Law distinguishes between bills of exchange (isakomasis vekselis) and promissory notes (paprastasis vekselis). Drawer of bill of exchange orders third party to pay certain sum to person named on bill of exchange, whereas drawer of promissory note is pledging to pay sum therein specified himself.

Bills of exchange must contain: words “bill of exchange” in language in which it is drawn; unconditional pledge to pay specified sum; name of drawee; date of payment; place of payment; instructions to whom or on whose order sum must be paid; place and date bill of exchange is drawn; and signature of drawer. Document lacking any of above requisites, with certain exceptions, is not enforceable as bill of exchange. Bill of exchange which does not specify date for payment is deemed payable at sight. Bill of exchange may be drawn on order of drawer and it may be drawn on drawer himself or on third person. In bills of exchange payable at sight or within certain period after sight drawer may prescribe interest payable on sum of debt stated therein (rate of interest must be specified). In other bills of exchange interest may not be prescribed. If sum is expressed in figures and words, words prevail in case of discrepancy.

Drawers of bills of exchange are liable for acceptance and payment thereof. They may disclaim their liability for acceptance of bill of exchange, however, they may not refuse liability for its payment. If bill has been issued without being filled in completely and later on has been filled in contrary to agreement made with drawer, non-observation of such agreement may not be invoked against holder unless he acquired bill in bad faith or with gross negligence. Every bill of exchange may be transferred by endorsement. If drawer of bill of exchange has written thereon words “not to order” or other analogous words, bill of exchange may be endorsed only in compliance with general rules of assignment. Bill of exchange may be endorsed for benefit of drawee as well as for benefit of drawer or any other person who is obligated on bill of exchange, and said persons may further endorse such bill of exchange. Endorsement may also be blank. Endorsement must be unconditional.

Payment of bill of exchange may be guaranteed by guaranteeing bill or part of its amount by third party or even signatory of bill of exchange. Guarantee is executed on bill of exchange or on paper affixed thereto, and is given by writing word “guaranteed” or other analogous words, and by signature of guarantor. Party for whose benefit guarantee is given must be specified when guaranteeing, otherwise guarantee is considered given for benefit of drawer. Guarantor and party for whose benefit he guarantees are jointly and severally (in solido) liable.

Owner or other holder of bill of exchange may present it for acceptance to drawee at his residence prior to expiration of term for payment of bill. By accepting bill drawee commits himself to pay bill upon its maturity. In certain cases drawer may interdict acceptance of bill of exchange or prescribe later date when acceptance is permitted. Bills of exchange payable within certain period from presentment must be presented for acceptance within one year from issue date. Drawer may establish shorter time limit or defer presentment for acceptance, and endorsers may fix shorter time limit. Acceptance is written on bill of exchange and is denoted by word “accepted” or other analogous words, and must be signed by drawee. Acceptance must be unconditional, although drawee may accept part of bill’s amount.

Refusal to accept or to pay bill of exchange must be confirmed by official deed—instrument of protest that is drawn up by notary public, unless this obligation is waived by drawer, endorser or guarantor by writing words “not to be protested” or other analogous words. In any case owner of bill must notify last endorser and drawer about non-acceptance or non-payment. Drawer, acceptor, endorser and guarantor of bill of exchange are jointly and severally (in solido) liable thereon to its owner. When bringing action, owner of bill of exchange may request payment of: amount of non-accepted or unpaid bill of exchange, including interest if it was prescribed; interest at rate of 6%, calculated from date when payment is due; expenses related to protest, filing of notices etc. If payment is requested prior to stated date, discount is deducted from amount of bill. All actions on bills of exchange may be brought against acceptor within three years from maturity date and within shorter terms against endorsers and drawer.

Promissory note must contain: words “promissory note” in language in which it is drawn; unconditional pledge to pay specified amount; date of payment; place of payment; instructions to whom or on whose order amount must be paid; place and date that promissory note is drawn; and signature of drawer. Same provisions as in respect of bills of exchange, with certain exceptions, apply in respect of promissory notes.

Cheques are governed by Law on Cheques (adopted on Mar. 16, 1999, not am’d). Cheque is defined as security-order to bank, executed according to certain legal form, to unconditionally pay certain sum of money. Cheque must contain: word “cheque” in language in which it is drawn; unconditional pledge to pay specified sum; name of drawee; place of payment; place and date that cheque is drawn; and signature of drawer. Document lacking any of above listed requisites, with certain exceptions, is not treated as cheque. Cheque may be drawn only to bank wherein drawer has deposit of funds, which he is entitled to manage by cheque under general procedure. Document not drawn to bank is not considered cheque. Cheques may not be accepted and may not prescribe payment of interest. Cheques may be drawn for payment to: certain person with or without phrase “pay to order of”; certain person with phrase “not to order of” or analogous phrase; or bearer. Cheque drawn in favour of certain person with inscription “or bearer” or another analogous inscription is enforceable as bearer check. Cheque wherein payee is not named is considered bearer cheque. Cheque drawn in favour of certain person with or without directive “to order of” may be transferred by endorsement, and those with phrase “not to order” or any analogous phrase may be endorsed only in compliance with general rules of assignment. Endorsement must be unconditional and for full amount of cheque.

Drawer is responsible for payment of cheque’s amount, and any inscription to contrary is considered invalid. Payment of check may be guaranteed by guaranteeing cheque or part of its amount. Guarantee is executed either by signature of third party or even signatories of cheque, with exception of drawee. Guarantee is written on cheque or on paper affixed thereto. It is given by writing word “guaranteed” or other analogous words, and by signature of guarantor. Party whose liability is guaranteed must be specified, otherwise it is considered that liability of drawer is guaranteed. Guarantor and party whose liability is guaranteed are jointly and severally (in solido) liable.

Cheques are payable on sight. Cheques drawn and payable in one and same country must be presented for payment within eight days and those payable in other country must be presented within 20 or 70 days, depending on location of states of drawing and payment. Amount of generally crossed check (check crossed with two diagonal parallel lines with word “bank” or without any words inscribed between them) may be paid by drawee only to bank or to customer of drawee, whereas amount of specially crossed cheque (cheque crossed with two diagonal parallel lines with name of particular bank inscribed between them) may be paid only to bank specified in cheque, or, if specified bank is drawee itself, only to its customer. However, such bank may collect cheque in another bank.

All persons obligated on cheque are jointly and severally (in solido) liable thereon to its holder. Cheque holder may have recourse against endorsers, drawer and other debtors if cheque was not paid when presented at proper time and refusal to pay was confirmed by protest (protest should be drawn up by notary public), or drawer’s note on cheque (which must be dated and indicate day of presentation), or statement of clearance chamber (dated and confirming that check was deposited for clearing at appropriate time, and was not redeemed). When bringing action, holder of cheque may request payment of: unpaid amount of cheque; interest at rate of 6%, calculated from date of presentment of cheque; expenses related to protest or analogous certification, filing of notices etc.

Claims of cheque holder in recourse against endorser, drawer and other debtors are subject to six months’ limitation period starting from day of payment. Claims in recourse that debtors obligated to pay cheque have against each other are subject to six months limitation period starting from day debtor redeemed bill, or he himself was sued on that basis.

Conflict of Laws.

Conflicts of laws related to cheques, bills of exchange and promissory notes are governed by 1931 Geneva Convention on Solution of Conflict of Laws Using Checks and 1930 Geneva Convention on Solution of Conflict of Laws Using Bills of Exchange and Promissory Notes that were ratified by Republic of Lithuania on Feb. 17, 2000.

Republic of Lithuania's earlier accession to 1930 Geneva Convention on Uniform Law on Bills of Exchange and Promissory Notes and to 1931 Geneva Convention on Uniform Law on Checks was reinstated on June 30, 1992.

3.04 COMMERCIAL LAW:

Note: There is no commercial code in Lithuania, only Civil Code of Republic of Lithuania (CK). Civil Code (CK), adopted on July 18, 2000, is effective as of July 1, 2001.

3.05 COMMERCIAL REGISTER:

Register of Legal Entities of Republic of Lithuania is administered in accordance with Law on Register of Legal Entities (adopted on June 12, 2001, am'd on May 21, 2009) and Government Resolution on Establishment of Register of Legal Entities and Approval of Regulations of Register of Legal Entities (adopted on Nov. 12, 2003, am'd on June 29, 2004; Feb. 17, 2005; Apr. 14, 2006; Jan. 29, 2007; Oct. 2, 2007; July 9, 2008; Jan. 12, 2009; June 10, 2009; Nov. 4, 2009). Register of Legal Entities started functioning from 1 Jan. 2004 and is considered main register of Lithuania.

Purpose of Register of Legal Entities is to register any kind of legal persons and collect, accumulate, process, systemize, save and render information and documents about them. Once legal person is registered, it is considered established and may commence activity. (CK 2.63).

Government of Republic of Lithuania is founder of Register of Legal Persons. State Enterprise "Centre of Registers" is chief manager of Register of Legal Persons. It accumulates and manages registration data of all registered legal persons, cooperates with other registers exchanging data disposed, renders information of legal persons. Objects of Register of Legal Persons are legal persons, their affiliates and representative offices, foreign legal persons and other organisations affiliates and representative offices.

Register of Legal Persons contains following information on registered legal persons: code; name; legal form; registered office (address); financial year; bodies of company: names and number of members of such bodies; list of shareholders; data about persons empowered to enter into transactions on behalf of company; rule based on which persons act on behalf of company; value of authorised capital except for that of investment companies with variable capital; data of company's affiliates and representative offices; restrictions of company's activities; licensed activities; facts on conclusion, modification and expiry of franchise or sub-franchise agreements; information on names of financial accountability documents and data of submission thereof with Register, etc.

Register of Legal Persons also makes available following information of foreign legal persons: name and code of branch or representative office; registered office (address) of representative office; activities of branch; data of members of managing bodies of branch or representative office, date of their appointment, data of members of founder's managing bodies, dates of their appointment (election) and data about persons entitled to conclude transactions on behalf of founder, date of their appointment; law of foreign state regulating founder's activities, except for EU Member States and other EEA countries; rule following which persons act on behalf of founder; restrictions of branch's activities; legal form of founder; authorised (subscribed for) capital of founder; foreign state register where founder's file is kept; registered office of founder; information on names of financial accountability documents and data of submission thereof with Register, etc.

Legal persons are obliged to notify Register on changes of registration data within legal acts settled terms. For purpose of registration of newly established legal person following documents must be presented to registrar: application to registrar; acts or agreements of incorporation of entity; licenses (if needed); and other documents depending on legal form of legal person.

Registration of new legal persons as well as changes of data of registered ones is publicly announced in homepage of State Enterprise "Centre of Registers" (http://www.registrucentras.lt). Announcement is kept for 15 days. Any legal or natural person has right to use Register documents and information for prescribed fee.

3.06 CONTRACTS:

General principles of Contract Law are contained in part II of Sixth Book of CK. Specific provisions relating to regulation of separate kinds of contracts are contained in part IV of Sixth Book of CK. CK distinguishes and regulates following types of contracts: sales and purchase, exchange, rent, donation, lease, rendering of services, agency, consignment (commission), loan, financial leasing, beneficial use, franchise, distribution, factoring, trust, insurance, cargo expedition, bank deposit, bank account, public tender, settlement agreement and transportation contracts.

Provisions of CK apply only to contracts concluded and rights and obligations arising after July 1, 2001. Contracts concluded before this date are governed by former Civil Code of Republic of Lithuania.

CK defines contract as agreement whereby two or more persons undertake to create, modify or terminate civil legal relationships, when one or more persons undertake to carry out certain activities in favour of other(s) (or to abstain from them), and latter acquires right of claim. Mutual consent of legally capable parties, in certain cases to be expressed under prescribed form of contract, is required for contract to be valid (CK, Art. 6.159). Contracts are classified into unilateral and bilateral; contracts for consideration and gratuitous contracts; consensual and real; consumer contracts and other (CK, Art. 6.160). Contracts are executed by presenting offer and accepting it or by any other actions of parties, sufficiently evidencing agreement of parties (CK, Art. 6.162). Contract is effective as of moment when parties agree on all essential conditions whereof, while agreement on secondary conditions can be postponed (CK, Art. 6.162). Essential conditions of contract are those designated as such by laws or indispensable to certain type of contract, as well as those designated by declaration of any of parties. Parties must behave fairly in pre-contractual relationships (CK, Art. 6.163). Preliminary contract is defined as agreement of parties whereby they undertake to execute principal contract in future. General principles of entering into contracts (offer and acceptance), as established by CK, are similar to those in legal systems of continental Europe and in UN Convention on Contracts for International Sales of Goods 1980. Contract is considered formed when offeror receives acceptance (CK, Art. 6.181). Contract is considered formed in place where offeror has its habitual residence or business place (CK, Art. 6.181). Legally executed and valid contract has power of law to parties thereto. If contract must be executed in certain form according to agreement between parties, contract is deemed to be entered into when it is executed in such required form (CK, Art. 6.192). In absence of such agreement, contract is deemed to be concluded when parties agree on all essential conditions of contract. (CK, Art. 6.162). Terms of contracts are classified into express or implied terms (CK, Art. 6.196).

Contract is void if according to laws it is not valid even without decision of court. Parties cannot approve or confirm a void contract. (CK, Art. 1.78). Contracts are voidable if court decision is necessary to recognize them as invalid. Contracts are deemed void only in cases expressly established by laws. (CK, Art. 1.78). Contracts are void or voidable in following cases: contract contradicts laws (CK, Art. 1.80); contract was entered into with purpose explicitly contradicting public order and interests (CK, Art. 1.81); contract was entered into by person without or lacking legal capacity (CK, Arts. 1.82-1.85, 1.88, 1.89); contract is ostensible (CK, Art. 1.86); contract is simulative and was entered into to cover other contract (CK, Art. 1.87); contract was entered into under influence of mistake of essential significance (CK, Art. 1.90); contract was entered into under influence of fraud, violence, menace (CK, Art. 1.91); compulsory form of contract was not observed (CK, Art. 1.93); contract was entered into by agent acting ultra vires (CK, Art. 1.92, etc.). Only persons stipulated by laws can file action for invalidation of contract. (CK, Art. 1.78). Any interested person may file action regarding legal consequences of void contract.

Form.

According to CK, contracts may be executed in the following forms: orally; implicitly (when person's will to enter into contract is clear from his/her actions); in writing; in writing certified by public notary. Silence may not be considered as acceptance of offer (CK, Art. 6.173). Following contracts must be executed in writing, inter alia: (1) Contracts between natural persons when sum of transaction exceeds LTL 5,000 ([Euro]1,448), except when contracts are performed at moment of their execution; (2) agreements on establishment of legal persons; (3) contracts on sale of goods by installment; (4) insurance contracts; (5) arbitration agreements; (6) agreement on lease of movable assets for period longer than one year; (7) preliminary contracts; (8) contracts of life annuity; (9) settlement agreements; and (10) other contracts, for which laws expressly require written form. Contracts are deemed to be executed in written form if they are executed in one document signed by all parties, as well as by exchanging notes, messages, telegrams, fax letters and any other information, capable of being transmitted via any other telecommunications means, if security of text is ensured and identification of signature is possible. (CK, Arts. 1.73, 6.192). Parties can agree on additional requirements related to written form (seal, special form, etc.). Certification by public notary and registration with competent institution is obligatory only in following cases: (1) contracts on transfer of rights in rem related to real estate or restrictions thereof; (2) wedding agreements (prenuptial, etc.); (3) in other cases provided by law. (CK, Art. 1.74). Contracts on sale of real estate must be notarized; otherwise, they are void. (CK, Art. 6.393). Contracts on sales of real estate can be invoked against third parties only upon registration with Real Estate Register. (CK, Art. 6.393). If contract must be registered, it is valid for parties even if it is not registered. (CK, Art. 1.75). However, parties to contract who failed to register it may not use contract vis-à-vis third persons. Non-observance of form required by law makes contract invalid only when such consequence is expressly provided by law. (CK, Art. 1.93). Non-observance of law requirement for notary certification in any case makes contract invalid. If requirement for written form is not complied with, parties, in event of dispute related to execution of contract or performance thereof, may not use testimonies of witnesses for proving existence of contract. (CK, Art. 1.93). Generally, non-observance of law requirement to register of contract does not invalidate contract. (CK, Art. 1.94).

Performance.

Each party of contract must perform its obligations properly and fairly; in cooperation with other party; in most economic way (CK, Art. 6.200). Parties must perform their obligations simultaneously if that performance can be rendered simultaneously and circumstances do not require otherwise (CK, Art. 6.201). In case of hardship disadvantage, party is entitled to request for renegotiations (CK, Art. 6.204).

Non-performance is party's failure to perform any of its obligations under contract, including improper or late performance. (CK, Art. 6.205). Party may not rely on non-performance of other party to the extent such non-performance was caused by first party's action or omission or by another event as to which first party bears risk. (CK, Art. 6.206). Where parties must perform their obligations simultaneously, either party may withhold performance until other party performs its obligations. Where parties must perform their obligations consecutively, party that must perform later may withhold its performance until first party performs its obligations. (CK, Art. 6.207). Nonperforming party may, at its own expense, cure non-performance, provided that: (a) Without undue delay, it gives notice indicating proposed manner and timing of cure; (b) cure is appropriate in circumstances; (c) aggrieved party has no legitimate interest in refusing cure; and (d) cure is effected promptly. Right to cure is not precluded by notice of termination. Upon effective notice of cure, rights of aggrieved party that are inconsistent with the nonperforming party's performance are suspended until time for cure has expired. Aggrieved party may withhold performance pending cure. Notwithstanding cure, aggrieved party retains right to claim damages for delay and any harm caused or not prevented by cure. (CK, Art. 6.208). In case of non-performance aggrieved party may set additional period of time for performance. (CK, Art. 6.209). Clause which limits or excludes one party's liability for non-performance or which permits one party to render performance substantially different from what other party reasonably expected may not be invoked if it would be grossly unfair to do so, having regard to purpose of contract. (CK, Art. 6.211). Party's non-performance may be excused if that party proves that non-performance was due to impediment beyond its control and that it could not reasonably be expected upon conclusion of contract and that it or its consequences could not be avoided or overcome (force majeure). (CK, Art. 6.212). Where party obliged to pay money fails to do so, other may require payment. (CK, Art. 6.213). Where party having obligation other than to pay money fails to perform it, other party may require performance, unless: (a) performance is impossible under law or in fact; (b) performance or, where relevant, enforcement is unreasonably burdensome or expensive; (c) party entitled to claim performance may reasonably obtain performance from another source; (d) performance is of exclusively personal character; or (e) party entitled to performance does not require performance within reasonable time after it has or ought to have become aware of non-performance. (CK, Art. 6.213). Right to performance includes a right to require repair, replacement, or other cure of defective performance (CK, Art. 6.214). Aggrieved party who has required performance of nonmonetary obligation and who has not received performance within fixed or reasonable period of time may invoke any other remedy (CK, Art. 6.216).

Termination.

Party may terminate contract when other party fails to perform it and this failure amounts to fundamental breach of contract. In determining whether failure to perform obligation amounts to fundamental breach regard must be had, in particular, to whether (a) nonperformance substantially deprives aggrieved party of what it was entitled to expect under contract; (b) strict compliance with obligation which has not been performed is of essence under contract; (c) nonperformance is intentional or reckless; (d) nonperformance gives aggrieved party reason to believe that it cannot rely on other party's future performance; (e) nonperforming party will suffer disproportionate loss as result of preparation or performance if contract is terminated. In case of delay aggrieved party may also terminate contract if other party fails to perform within additionally set time. (CK, Art. 6.217). Right to terminate contract can be exercised by notice to other party. (CK, Art. 6.218). Where prior to date for performance by one of parties it is clear that fundamental breach will occur, other party may terminate contract. (CK, Art. 6.219). Party who reasonably believes that there will be fundamental breach by other party may demand adequate assurance of due performance and meanwhile withhold its own performance. If this assurance is not provided within reasonable time party demanding it may terminate contract. (CK, Art. 6.220). Termination of contract releases both parties from their obligation to effect and to receive future performance. Termination does not preclude claim for damages for nonperformance. Termination does not affect any provision in contract for settlement of disputes or any other term of contract that is to operate even after termination. (CK, Art. 6.221). Upon termination of contract either party may claim restitution of whatever it has supplied, provided that such party concurrently makes restitution of whatever it has received. If restitution in kind is not possible, appropriate amount of money must be paid. (CK, Art. 6.222).

Applicable Law.

Parties' choice of governing law is enforceable to extent that such application does not contradict public interests of Republic of Lithuania and mandatory provisions of Lithuanian law. In case parties have not chosen law governing contract, generally, law of state which has closest connection to contract must be applicable. (CK, Art. 1.37). It is presumed that contract is most closely connected with state: (a) wherein party obliged to effect characteristic performance is habitually resident or has place of business; (b) wherein real estate is located, if subject-matter of contract is related to such real estate; (c) wherein carrier has its place of business upon execution of carriage contract. In absence of parties' agreement, insurance contracts are governed by law of state where insurer has habitual residence or place of business; arbitration agreements—by law applicable to principal contract; donation contracts—by law of state where donator has habitual residence or place of business (CK, Art. 1.41); consumers contracts—by law of state where consumer has habitual residence (CK, Art. 1.39); assignment contracts—by law applicable to principal agreement (CK, Art. 1.42); law of place of auction or competition, or location of exchange must be applied to contracts concluded at auction, exchange or by competition. Laws of state where contract is executed govern form of contract, except contracts regarding real estate located in Lithuania which must be executed under Lithuanian laws. Laws of state where consumer has habitual residence govern form of consumer contract. (CK, Art. 1.38).

3.07 FRAUDS, STATUTE OF:

There is no statute of frauds in Republic of Lithuania.

3.08 INFORMATION TECHNOLOGY, INTERNET AND NEW MEDIA:

Advertising is generally regulated by Law on Advertising (adopted on 18 July 2000, am'd on Dec. 3, 2002; Sept. 14, 2006; Jan. 11, 2008). For regulation purposes, advertising is understood as dissemination of information in any form or through any communication medium in connection with person's economic commercial, financial or professional activities in order to promote purchase of goods or services, including immovable property acquisition, assumption of property rights and obligations. Advertising must be proper, accurate and clearly recognisable. Advertising cannot violate public and moral principles; degrade human honor and dignity; incite national, racial, religious, gender-related or social hatred and discrimination, as well as defame or misinform; promote force and aggression, give rise to panic; promote behavior which presents threat to health, security and environment; abuse superstitions, people's trust and their lack of experience or information; mention name and surname of natural person, his/her opinion, information about his/her private or public life, property or contain his/her image without one's permission; be disseminated by special subliminal measures and technologies; infringe authors' rights in literature, art, science and (or) neighboring rights. Law prohibits misleading and surreptitious advertising, as well as sets forth requirements for comparative advertising. Competition Council may impose monetary fines of up to LTL 30,000 ([Euro]8,688), not exceeding 3% of entity's total income during previous year, for misleading and prohibited comparative advertising. As general rule, burden of proof in misleading or prohibited comparative advertising cases lies with supplier of advertising. Other Lithuanian laws provide for certain restrictions on advertising of tobacco, alcohol, gambling, pharmaceuticals, food products, legal services, etc.

Computer programs are subject to copyright protection under Law on Copyrights and Neighboring Rights (adopted on May 18, 1999, am'd on July 20, 2000; Mar. 5, 2003; Oct. 12, 2006; Mar. 13, 2008; Jan. 19, 2010). (See category 16 Intellectual Property, topic 16.01 Copyright.) Computer program is defined as set of instructions expressed in words, codes, schemes or any other form capable of causing computer to perform task or achieve particular result. Definition covers draft material of such instructions if their character enables them to determine set of instructions.

Author has right to inviolability of computer program, reproduction and distribution of computer program, which includes right to input, retrieve and store computer program.

Agreements for use of computer programs are attributed to license agreements. Person entitled to use computer program has right only to copy it if needed for preservation or use thereof for its intended purpose. Any other use or modification of computer program is subject to author's prior consent. Copy of computer program must be deleted upon termination of such license agreement. Reproduction of computer program for purposes of personal use is prohibited. Proprietary rights in computer program created by employee while performing employment duties are vested to employer if agreement does not state otherwise.

E-commerce is regulated by Law on Information Society Services (adopted on May 25, 2006, not am'd). This Law is based on EU Directive 2000/31/EC ("E-Commerce Directive"). Information society services are defined as services normally provided for remuneration, at distance, by electronic means and at individual request of recipient of services. Law sets forth main requirements for provision of information regarding such services, conclusion of contracts by electronic means and supervision of service provision by Information Society Development Committee to Government. Requirements do not apply to areas of taxes, personal data and privacy protection; agreements prohibited by competition law, notary services, representation of client in court, gambling and lotteries. Conclusion of contracts by electronic means is also regulated by Law on Electronic Signature, as well as general provisions of CK which enable conclusion of written contracts by technical means as long as security of text and identification of parties is ensured.

Electronic communications are regulated by Law on Electronic Communications (adopted on Apr. 15, 2004, am'd on Apr. 12, 2007, July 15, 2008, Nov. 6, 2008; Nov. 14, 2008). Activity of electronic communication is regulated by Communications Regulatory Authority ("CRA"). General authorisation regime applies with respect to electronic communications and no prior individual authorisation is required. Only providers of public fixed telecommunications network and services, public mobile telecommunications network and services, and leased lines must notify start of activities with CRA. Government establishes terms and conditions, as well as maximum price of universal services. Access and interconnection is generally subject to negotiations between commercial subjects. However, operator having significant market power ("SMP") in relevant market has obligation to meet all reasonable requests to interconnect electronic communication networks, except when interconnection is not technically feasible. Disputes of parties are resolved by CRA. Law sets forth four-month term for CRA to resolve such disputes.

In order to ensure effective competition, certain undertakings are designated to have SMP and imposed with ex-ante obligations. CRA proceeds in following stages: (i) defines relevant market; (ii) examines effectiveness of competition therein and identifies SMP undertakings; (iii) imposes ex-ante obligations on SMP undertakings. SMP definition has been realigned with principles of competition law: undertaking is considered to have SMP on relevant market if, either individually or jointly with others, it enjoys position equivalent to dominance, i.e. position of economic strength affording it power to behave to appreciable extent independently of competitors, customers and ultimately consumers. Ex-ante obligations, which may be imposed on SMP undertakings, include transparency, non-discrimination, accounting separation, access and interconnection, price controls and cost orientation, as well as certain obligations on retail level. Violations of electronic communications requirements may be sanctioned by fines up to 3% of annual income from telecommunications activities, or up to LTL 300,000 ([Euro]86,886) if it is difficult or impossible to determine extent of such activities.

Electronic signature is regulated by Law on Electronic Signature (adopted on July 11, 2000, am'd on June 6, 2002). Law regulates creation, verification, and validity of electronic signature, signature users' rights and obligations, certification services and requirements for their providers, as well as electronic signature supervision. Electronic signature is defined as data which are inserted, attached to or logically associated with other data for purpose of confirming authenticity of latter and (or) identification of signatory. Secure electronic signature, created by secure signature creation device and based on valid qualified certificate has same legal power as handwritten signature and is admissible as evidence in court. Following request by person, who has decided to use signature in his/her activities, certification service provider, using electronic signature device, creates for him/her signature creation and verification data. Signature verification data are public. Certification service provider enters them in certificate of signatory and provides them to all signature users. Law regulates in detail drawing up and managing of certificates, certification services, requirements for their providers, maintenance of electronic signature, etc.

Personal data protection is regulated by Law on Legal Protection of Personal Data (adopted on June 11, 1996, am'd on Mar. 12, 1998; July 17, 2000; Jan. 22, 2002; Feb. 6, 2002; June 20, 2002; Jan. 21, 2003; Apr. 13, 2004; Feb. 1, 2008) which is based on EU Directive 95/46/EC ("Personal Data Directive"). Data protection requirements apply only to information relating to natural persons, data subjects, who are identified or who can be identified directly or indirectly by reference to such data as personal identification number or one or more factors specific to their physical, physiological, mental, economic, cultural or social identity. Law applies to (1) data controllers which are established and operating in Lithuania or branches of data controllers of another EEA member state, established and operating in Lithuania; (2) data controllers which are established and operating in non-member state of EEA but which use processing equipment established in Lithuania, except where such equipment is used only for transit of data through EEA; or (3) data controllers which are bound by Lithuanian laws under international public law (diplomatic missions, consular posts, etc.).

Personal data must be collected for specified and legitimate purposes; processed accurately, fairly and lawfully; they must be accurate and up to date, identical, adequate, not excessive and kept in form which permits identification of data subjects for no longer than it is necessary for processing purposes. Personal data processing must be based on any of following grounds: (1) Subject's consent; (2) conclusion or performance of agreement; (3) legal obligation under laws; (4) protection of subject's vital interests; (5) exercise of official authority; or (6) legitimate interests which are not overridden by subject's interests. Data controllers must register with State Data Protection Inspectorate and implement appropriate organisational and technical data protection measures. Data may be transferred within EEA without any limitations. Data transfers outside EEA may take place only if authorised by State Data Protection Inspectorate provided that data controller or laws applicable to data recipient ensure sufficient data safeguards. Authorisation is unnecessary if data transfer (1) takes place with data subject's consent; (2) is necessary for performance or conclusion of agreement between controller and third party in interests of data subject; (3) is necessary for performance or conclusion between controller and data subject or implementation of respective pre-contractual measures; (4) is necessary for important public interests or legal proceedings; (5) is necessary for protection of data subject's vital interests; (6) is necessary for prevention or investigation of criminal offences; or (7) takes place from public data file. Violation of data protection requirements incurs administrative liability (minor monetary fines).

Television services are regulated by Law on Provision of Information to Public (adopted on July 2, 1996, am'd on Aug. 29, 2000; Nov. 21, 2000; Dec. 21, 2000; Oct. 18, 2001; June 13, 2002; June 20, 2002; Apr. 3, 2003; Nov. 25, 2003; Apr. 27, 2004; July 15, 2004; July 11, 2006; July 14, 2008; July 15, 2009) and certain provisions of Law on Electronic Communications. Activities of broadcasting and re-broadcasting in Lithuania (except for National Radio and Television) are licensed by Radio and Television Commission. Broadcaster using transmission services provided by third party must have license issued by Radio and Television Commission, while its conditions and terms must be coordinated with telecommunications operator providing transmission services. Broadcaster who has been awarded license by Radio and Television Commission for establishment and operation of its own telecommunication networks must obtain permit from Communications Regulatory Authority. Terms and conditions of these permits must comply with basic conditions for activities of telecommunication networks submitted by

Communications Regulatory Authority for tenders organized by Radio and Television Commission. Channels (radio frequencies) are under ownership of State and may not be privatized. Operators and broadcasters of wire radio must broadcast television and/or radio programs.

3.09 LICENSES, BUSINESS AND PROFESSIONAL:

According to Civil Code of Republic of Lithuania (CK, Art. 2.77) license is needed to engage in separate activities determined by laws. Government of Lithuania establishes regulations, unless they are contained in special laws, for licensing of separate licensed activities. Regulations provide for institutions in charge, documents to be filed, conditions for licensed activity etc. General rule is that decision must be provided by applicant within 30 days from filing of necessary documents.

Activities requiring license under Lithuanian laws include: manufacturing of guns, ammunition etc.; pharmaceutical activity; manufacturing, importing, exporting, trade in narcotic, psychotropic substances, or precursors; health care services; performing state land surveying or geodetic topographical works; providing passenger and cargo transportation services; manufacturing, wholesale or retail sale of tobacco and tobacco products; manufacturing, importing, wholesale and retail sale of alcohol products; organizing lotteries; certain use of electronic communication resources; manufacturing seals, stamps; establishment and operation of shooting-ranges, shooting galleries, hunting shooting-ranges; importing, exporting, wholesale and retail trade in bulk oil products; manufacture, export or import of electricity; retail trade in liquid gas for vehicles; insurance activities; tourist services; printing of securities and document forms; activities of non-state high schools; importing, transit and exporting of strategic products, etc.

Wide range of commercial activities may only be rendered in premises issued with permit-hygiene certificate. Activities include pharmaceutical, cosmetics, hotel and accommodation, education, health care sectors, etc. Permit-hygiene certificate confirms that premises where activities are rendered satisfy public health requirements.

Where commercial activities include use of natural resources or cause environment pollution, certain other permits must be applicable.

License issued by Bank of Lithuania is required for operation of bank in accordance with Law on Banks (see topic 3.02 Banks and Banking) and for credit unions in accordance with Law on Credit Unions (adopted on Feb. 21, 1995, am’d on Dec. 2, 1997; May 18, 2000; Feb. 27, 2001; June 20, 2002; June 17, 2008; July 21, 2009; Dec. 10, 2009; Dec. 22, 2009). Brokerage firms and financial consulting firms must have license issued by Securities Commission in accordance with Law on Financial Instruments Market. Permission of Securities Commission is necessary for establishment of stock exchange.

Citizens of Republic of Lithuania or other European Union Member State may be recognized advocates by Council of Advocates in accordance with Law on Advocacy (adopted on Mar. 18, 2004, am’d on July 7, 2005; June 13, 2006; Dec. 21, 2007; Apr. 15, 2008). License issued by Securities Commission is necessary for brokers, private persons, according to Law on Financial Instruments Market (supra). Qualification certificates are required for number of activities, e.g. valuation of assets, administration of enterprise under bankruptcy, audit etc.

3.10 MONOPOLIES, RESTRAINT OF TRADE AND COMPETITION:

Governing law in field of competition is Law on Competition, which is broadly in line with EC competition rules (adopted on Mar. 23, 1999, am’d on Sept. 19, 2000; July 4, 2003; Apr. 15, 2004; Oct. 25, 2007; Apr. 9, 2009; Sept. 24, 2009).

Competition Council is main state institution that ensures and supervises observation of Law on Competition and conducts investigations of alleged violations. Competition Council is also designated as competition authority responsible for application of Arts.101 and 102 of Treaty of Lisbon. Council is permanent collegiate body consisting of chairman and four members nominated by President of Republic of Lithuania upon proposal of Prime Minister.

Lithuanian competition rules are applicable to “economic entities” which are defined as enterprises, their formations (associations, corporations, consortiums, etc.), institutions or organizations or any legal or natural persons that perform or may perform economic activities in Republic of Lithuania or actions or intentions of which, if they were realized, could influence economic activities in Republic of Lithuania. Law on Competition is also applicable to activity of economic entities registered outside territory of Lithuania, provided this activity restricts competition in domestic market of Lithuania.

Competition Council is entitled to apply following sanctions: (1) to impose on economic entities obligation to stop illegal activity, to carry out actions restoring previous situation or removing consequences of violation, including obligation to cancel, amend or conclude contracts; (2) to oblige economic entities or controlling persons, which have performed concentration resulting in creation or strengthening of dominant position, or considerable reduction of competition in relevant market without giving notice to or obtaining permission from Competition Council, to carry out actions restoring previous situation or removing consequences of concentration, including obligations to sell enterprise, or assets of economic entity or shares, or portion thereof; to reorganize enterprise; to terminate or amend contracts; as well as to establish terms and conditions of meeting above obligations; (3) to impose fines on economic entities not exceeding 10% of total turnover in preceding business year.

Anticompetitive Agreements.

All agreements which restrict or may restrict competition are prohibited and are automatically void. Such agreements include: (1) agreements to fix, directly or indirectly, prices or other conditions of purchase and sale of certain goods or services; (2) agreements to share market of goods or services on territorial basis, according to groups of customers or suppliers, or in any other way; (3) agreements to fix volume of processing or sale of certain goods or services, as well as to restrict technical development or investment; (4) agreements to apply unequal (discriminatory) conditions to equivalent transactions with individual economic entities, thereby placing them in different competition conditions; (5) agreements to make conclusion of contracts subject to acceptance by other parties of supplementary obligations which, by their nature or commercial purpose, have no connection with subject of such contracts. Agreements enlisted in items (1) - (4) if made between competitors are always considered as restricting competition.

Anticompetitive agreements are not necessarily void, as they may be permitted because of their beneficial effects. Before May 1, 2004, Law on Competition established system of exemptions. These could be achieved in two ways: either by applying to Competition Council for individual exemption with respect to particular agreement, or by drafting agreement with terms satisfying one of block exemptions issued by Competition Council.

As of May 1, 2004, system of individual exemptions has been abolished and legal exception rule has been introduced in line with new EC Council Regulation 1/2003.

Under new system, agreement is in compliance with competition rules if it satisfies test, which requires that agreement: (1) stimulate investment or technical or economic development or improve distribution of goods and, as result: (2) consumers receive fair share of resulting benefits; and agreement: (3) does not impose restrictions on activities of contracting parties that are not indispensable to attaining of these objectives, nor (4) afford contracting parties possibility of eliminating competition with respect to substantial part of relevant market.

In contrast to prior administrative exemption system, legal exception system is based upon ex post control of anticompetitive agreements. Agreements satisfying above-listed four conditions are valid and enforceable ab initio with no prior administrative decision being required to that effect. Law on Competition does not establish monopoly of Competition Council over application of legal exception system, and aforementioned test can be performed by national courts.

Dominant position is defined as position of one or more economic entity(ies) in relevant market when it does not directly face competition or which enables it to make unilateral decisive influence in such relevant market thus effectively restricting competition. Unless proved to contrary, economic entity or group of associated economic entities with market share of not less than 40% are deemed to have dominant position in relevant market. Also each of two or three economic entities with largest shares of relevant market which together in aggregate hold 70% or more of this market are deemed to be in dominant position. Since 2009, Law on Competition has been amended introducing lower thresholds for dominance presumption for undertakings engaged in retail trade. Thus, currently single firm dominance of economic entities engaged in retail trade is presumed in case market share held by such economic entity is not less than 30%, while collective dominance is presumed in case two or three economic entities engaged in retail trade with largest shares of relevant market together in aggregate hold not less than 55% of market. Law on Competition prohibits abuse of dominant position by exercising any actions which restrict or may restrict competition including: direct or indirect imposition of unfair prices or other conditions of purchase or sale; restriction of trade, production or technical development resulting in detriment to consumers; application of unequal (discriminatory) conditions to equivalent transactions with individual economic entities, thereby placing them in different competition conditions; conclusion of contracts imposing acceptance by other parties of supplementary obligations which, by their nature or commercial purpose, have no connection with subject of such contracts.

Market Concentration.

Law on Competition establishes restraints on market concentration which is defined as: (1) Merger, when one or more economic entities which terminate their activity as independent persons are joined into economic entity which continues its activity, or when new economic entity is established of two or more economic entities which end their activity as independent economic entities; or (2) acquisition of control, when one and same natural person or same natural persons which exercise control over one or more economic entities, or economic entity or several economic entities acting on basis of agreement establish together new economic entity or gain control over another economic entity by acquiring enterprise or portion thereof, all or portion of assets of economic entity, shares or other securities, voting rights by concluding agreements or in any other way.

Competition Council must be notified of intended concentration and its prior permission is required where (i) combined aggregate income of economic entities participating in concentration in preceding financial year exceeds LTL 30 million ([Euro]8.69 million), and (ii) aggregate income of each of at least two of such entities in preceding financial year exceeds LTL 5 million ([Euro]1.45 million). Generally, notification about intended concentration is submitted jointly by all economic entities participating in concentration.

As of May 1, 2004 Competition Council has power to control concentrations falling below above-indicated turnover thresholds. Competition Council may request merging parties to file notification if it is likely that concentration falling below jurisdictional thresholds will create or strengthen dominant position, or result in significant impediment of competition in relevant market. This alternative means of exercising jurisdiction was designed to address competition concerns in so-called “small markets”, where turnover figures of firms with significant market power are below level that would allow competition authority to claim control over concentrations under thresholds mentioned above.

Law on Competition provides for two-phase procedure. Total of four months is assigned to Competition Council to complete its entire examination. Examination period may be extended for additional one month (both in first and second phase) if Competition Council intends to clear concentration subject to certain commitments from parties. Within one month after receipt of proper notification, Competition Council either permits concentration (with or without conditions and obligations imposed on undertakings concerned) or adopts decision for further examination of concentration. Such further examination may last up to three months. Within this time period Competition Council must either permit concentration (with or without conditions and obligations imposed on undertakings concerned) or issue prohibition. If Competition Council fails to act within prescribed time limits, concentration is considered to be cleared according to conditions indicated in notification.

Unfair Competition and Trade Practices.

Law on Competition contains list of acts which are considered as acts of unfair competition. Economic entities are prohibited from any actions contrary to fair practice and good customs of economic activity if such actions may damage competition interests of another economic entity. Such actions include (1) arbitrary use of any mark identical or similar to firm’s name, registered or not registered well-known trademark or other distinguishing reference of economic entity, if it causes or may cause confusion with that economic entity or its activity, or when it is attempted to unfairly use reputation of that economic entity (mark or reference), or when this may injure reputation (mark or reference) of that entity, or reduce distinguishing feature of mark or reference used by that entity; (2) misleading of economic entities by providing, in any way, incorrect or unsubstantiated information about quantity, quality, components, properties of usage, place and means of manufacturing of goods or services or suppression of risk related to consumption, processing or another possible usage; (3) use, transfer or announcement of information representing commercial secret of another economic entity, without its consent, also obtaining such information from persons, who have no right to transfer it, with aim to compete, to receive benefit for itself or to cause damage to that entity; (4) offering to employees of competing economic entity to cancel employment contract or not to carry out all or part of employment obligations, thus seeking to receive benefit or cause damage to such entity; (5) simulating another entity’s product or its packaging by another economic entity by copying external shape or package colour or other distinguishing feature of product, if this can mislead in identifying product or if it is intended to unfairly gain profit by using reputation of another economic entity; (6) provision of incorrect or baseless information about its or other entity’s managing persons, skills of employees, legal, financial or another status, if it may cause damage to another entity; (7) use of advertisement which according to Lithuanian laws is considered misleading. Actions meant to achieve certain functional characteristics of goods or of their packaging are not considered simulation of product’s external shape or package form, provided person who is responsible for such action has taken measures to prevent misleading of other economic entities or consumers as to identity of manufacturer or goods.

3.11 SALES:

General rules governing sales contracts are contained in c. XXIII of CK. General rules of contract law apply to sales contracts (see topic 3.06 Contracts). Republic of Lithuania signed 1980 UN Convention on Contracts for the International Sale of Goods (entered into force in respect of Republic of Lithuania on Feb. 1, 1996).

Transfer of Title.

By entering into sales contract seller undertakes to transfer object to buyer’s ownership, and buyer undertakes to accept object and to pay agreed sum of money. Any object existing in reality, ownership right with respect to which is transferable, can be transferred by sales contract. Unless laws or contract provides otherwise, ownership right (title) to movable property is not transferred by execution of contract itself but by delivery of sold property to buyer. Contracts on sale of real property must be registered with State Enterprise “Centre of Registers”. See category 19 Property, topic 19.04 Real Property.

Rights and Obligations of Parties.

When entering into sales contract, seller must notify buyer about all third parties’ rights (lessee’s rights, pledge, etc.) in respect of object sold. If seller fails to perform this obligation, buyer has right to claim reduction of price or cancellation of contract. (CK, Art. 6.321). If third party brings action against buyer and third party action is based on ground arising before buyer’s possession of object, buyer must invite seller to participate in proceedings. Otherwise seller will not be liable to buyer provided seller proves that, had he participated in proceedings, he could have prevented object from being taken from buyer. If object sold is taken from buyer according to court decision or arbitration award, seller must pay back received price and compensate damages, except in above case. Parties may by agreement limit such liability of seller, but agreement will be void provided seller does not notify buyer about known third parties’ rights in respect of object sold. (CK, Art. 6.323). Buyer bears risk of accidental loss of object sold from moment when seller fulfills his obligation to transfer goods. But seller is obliged to preserve object sold and prevent it from deterioration if ownership right is transferred prior to delivery. (CK, Art. 6.320). Then seller is liable for damages to object provided they have appeared as his fault. If seller, in breach of contract, does not deliver object sold to buyer, buyer may claim due delivery and compensation of damages or cancel contract and claim compensation of damages. Seller has analogous rights if buyer, in breach of contract, refuses to accept delivery of object or to pay set price.

Quality, Notices Required.

Quality of object sold must comply with relevant provisions of contract or, if such are not contained in contract, usually applicable requirements. (CK, Art. 6.333). In case of defects not previously disclosed by seller, including hidden defects, buyer has right to claim, at his choice: replacement with object of proper quality; reduction of price; elimination of defects; or cancellation of contract and compensation of damages. Unless warranty or fitness for purpose time period is established, buyer may claim defects (present notice on defects) not later than within two years from delivery of object. (CK, Art. 6.338). Action on defects may be instituted in court not later than six months from moment when claim was made or within term set for making claim. (CK, Art. 1.125). Regulations of Acceptance of Goods were established by Government Resolution on Approval of Regulations of Acceptance of Goods (adopted on May 12, 1995, am’d on July 17, 2000). Regulations apply to Lithuanian economic entities, unless other procedure for acceptance of goods is established in sales contracts or other regulatory acts. Regulations are applicable to acceptance of imported goods only if it is expressly provided in contract. According to Regulations, if goods are supplied in condition not complying with contractual or other applicable requirements, buyer must inform seller in writing not later than on next day. If seller fails to respond or to come to inspect goods, buyer must have goods examined by representative of State Inspection of Non-food Products or other institution performing examinations of goods. Terms for claims and actions as established in Civil Code equally apply where Regulations are applicable.

Warranties.

Warranty terms are subject to agreement between parties, unless such terms are prescribed by special regulations. If no warranty term is set two year’s term from delivery of goods apply to making claim and bringing action in respect of defects.

CK also provides place, terms of delivery of goods, price and covering of various expenses while executing agreement, etc.; it distinguishes sale and purchase agreements for consumer agreements, agreements of wholesale trade, public trade, trade in energy, in real estate, agreements for sale of enterprise, sale of rights, etc.

4 CITIZENSHIP

4.01 ALIENS:

See category 15 Immigration, topic 15.01 Aliens.

4.02 IMMIGRATION:

See category 15 Immigration, topic 15.02 Immigration.

5 CIVIL ACTIONS AND PROCEDURE

5.01 ACTIONS:

Any person or legal entity may sue or be sued in courts of Republic of Lithuania subject to applicable procedure rules. Rules regulating procedure in civil actions are contained in CPK. All actions are commenced by filling statement of claim with competent court. Appropriate venue generally is defendant's domicile or seat. Parties may agree, with certain exceptions, on choosing other appropriate venue. Actions regarding rights in rem to real estate (except for actions for division of property in cases of discontinuation of marriage), or on release of attachment, actions of creditors of deceased are subject to court of location of, respectively, real estate or inheritance. In certain cases plaintiff has alternative to sue in court other than defendant's domicile, like place of tort, place of performance, place of legal entity's branch or plaintiff's domicile, etc.

Court costs, which include stamp duty and costs related to court proceedings (fees to witnesses and experts, costs of examination of site, search of defendant, enforcement of court judgment, etc.), are regulated by CPK, c. 8. Under CPK, stamp duties in proprietary disputes are as follows: for claims up to LTL 100,000 ([Euro]28,962)—3% of claimed amount; for claims up to LTL 300,000 ([Euro]86,886) —LTL 3,000 ([Euro]869) plus 2% of claimed amount exceeding LTL 100,000 ([Euro]28,962); for claims over LTL 300,000 ([Euro]86,886) —LTL 7,000 ([Euro]2,027) plus 1% of claimed amount exceeding LTL 300,000 ([Euro]86,886). However, stamp duty must not be more than LTL 30,000 ([Euro]8,689). Amount of stamp duty for appeal or cassational complaint is same; however, it is calculated from sum under dispute. In number of cases, including, inter alia, recovery of alimony, compensation of losses caused by crimes, plaintiff is exempted from stamp duty. Court, taking into consideration financial situation of party, may partly exempt party from stamp duty. Payment of court costs by parties may be deferred or apportioned by court decision.

Representatives of parties must be advocates or assistants of advocates with few exceptions: labor unions may represent their members in labor disputes; person who has university degree of law—his or her nearest relatives or spouse; when few persons participate in dispute as one party, one of these persons may be appointed by others to represent them.

CPK provides for possibility for court, upon request of party to dispute, to appoint guardian for other party, if latter is incapable and does not have statutory representative, or its residence and place of work are not known, or it has no body to represent it (in case of legal persons). In certain cases court may adopt decision in absentia.

Losing party has to bear all costs, including stamp duty and costs related to court proceedings. Winning party may request judgment ordering other party to repay costs of legal services in amount not exceeding fees, which are recommended by Minister of Justice and Chairman of Bar. If party misuses court procedure, it may be obliged to compensate losses suffered by other party due to this as well as to pay fine of up to LTL 20,000 ([Euro]5,792).

Law on Legal Aid Guarantee by State (adopted on Mar. 28, 2000, am'd on Aug. 3, 2001; Apr. 3, 2003; Dec. 18, 2003; Jan. 20, 2005; Nov. 21, 2006; Apr. 15, 2008; Sept. 4, 2009), provides possibility to obtain legal aid in civil, administrative and criminal cases. All citizens of Republic of Lithuania, citizens of other Member States of EU as well as other natural persons residing lawfully in Republic of Lithuania and other Member States of EU and other persons specified in international treaties of Republic of Lithuania must be eligible for primary legal aid (i.e. legal consultations and preparation of documents not connected to litigation). Secondary legal aid (i.e. legal aid in connection to litigation) is eligible for persons who cannot duly defend their rights because of bad financial situation, persons maintained by State in stationary care institutions, persons eligible for social allowance, etc., if such possibility is provided for in international treaties. These persons must present to court application in established form and required documents confirming their financial situation and other circumstances. Depending on financial situation of person, state will cover from 50% to 100% of provided secondary legal aid expenses.

See also category 22 Treaties and Conventions, topic 22.01 Treaties, subhead International Co-operation in Legal Matters.

5.02 DEPOSITIONS AND DISCOVERY:

Code of Civil Procedure provides for witness testimony and taking of evidence in Lithuanian courts. If evidence is not available to party due to reasonable grounds it may be collected with assistance of court. Court may take measures to secure evidence, including before court procedures are initiated, provided there is reasonable danger that evidence will consequently be destroyed or become unavailable. Opponent party is provided with information on collected evidence. Generally, all available evidence must be submitted to court before hearing of case. However, evidence may also be submitted later if this does not delay procedure unduly. Parties may invite as witness any person aware of circumstances related to case. Due to valid reasons witness may give testimony elsewhere than in court.

Evidence may also be collected abroad with assistance of foreign courts in compliance with international agreements of Lithuania. Lithuania is party to European Agreement on Transmission of Applications for Legal Aid (1977), Convention on Taking of Evidence Abroad in Civil and Commercial Matters (1970) and number of bilateral agreements on legal aid, Council Regulation (EC) No. 1206/2001 of May 28, 2001 on cooperation between courts of Member States in taking of evidence in civil or commercial matters is also applicable. See category 22 Treaties and Conventions, topic 22.01 Treaties, subhead International Co-operation in Legal Matters.

5.03 JUDGMENTS:

Judgments adopted in first instance enter into force upon expiry of 30 days from adoption, if residence of appellant is in foreign state—upon expiry of 40 days from adoption, provided they are not appealed. Judgments adopted in second (appeal) and third (cassation) instance enter into force on adoption day.

Judgment may be enforced only when it has come into force, except urgently enforceable judgments. Judgment must be enforced urgently in certain cases provided by CPK or when court deems it necessary on reasonable grounds. Judgment is enforced only upon request of winning party after submission of enforcement writ. Limitation period for enforcement of judgments is ten years from entry into force. Judgments are enforced by bailiff offices at district courts. Orders of bailiffs are binding to every natural person or legal entity of Republic of Lithuania. Costs of enforcement are born by judgment debtor. Action or inaction of bailiff may be appealed to court.

With exception of Denmark, foreign judgments adopted in courts of EU Member States are enforced according to EU regulations. Judgments adopted in countries which have signed international agreements on legal aid with Lithuania are enforced on basis of international agreements. Other foreign judgments are enforced under procedure stipulated in CPK.

5.04 LIMITATIONS OF ACTIONS:

Limitation of actions is considered matter of substantial law in Lithuania. Civil Code provides that right to seek protection of right and rights supplementary to it (pledge, guarantee, etc.) cease to exist upon expiry of limitation period. However, court may not reject statement of claim on grounds of expired limitation period. Limitation of action is applied only upon request of party to dispute. Debtor may not demand restitution if he satisfied creditor's claim after expiry of limitation period.

Civil Code establishes general limitation period of ten years. It establishes shortened period of one month for claims arising from public tender results; three months—for claims to invalidate decisions of managing bodies of legal entities; six months—for claims for forfeit (default interest, fines) and for deficiencies of sold goods; one year—for claims related to insurance; three years—for claims for damage; and five years—for interest and other periodic payments. Different limitation periods may be established by special laws or international treaties. Limitation of action does not apply to claims arising from violation of personal non-property rights and claims of depositors to repay bank deposits.

6 COURTS AND LEGISLATURE

6.01 COURTS:

Following courts exist in Republic of Lithuania:

Konstitucinis Teismas (Constitutional Court) is specifically provided for in Constitution and its activities are regulated more in detail in Law on Constitutional Court (adopted on Feb. 3, 1993, am'd on Dec. 2, 1993; July 11, 1996; June 4, 1998; Feb. 20, 2001; Apr. 19, 2001; July 10, 2001; Oct. 28, 2003; Mar. 28, 2006; July 3, 2008; Nov. 6, 2008; Nov. 11, 2008). Constitutional Court is not part of general court system of Republic of Lithuania and only performs constitutional supervision.

Apylinkiu teismai (District Courts).

Based on Law on Courts (adopted on May 31, 1994, am'd on Oct. 20, 1994; Nov. 8, 1994; Dec. 8, 1994; Feb. 14, 1995; Mar. 21, 1995; June 18, 1996; July 4, 1996; Sept. 14, 1996; Sept. 24, 1996; Mar. 13, 1997; June 10, 1997; Apr. 8, 1998; Jan. 14, 1999; Feb. 9, 1999; Feb. 11, 1999; May 4, 1999; May 20, 1999; Nov. 4, 1999; Feb. 10, 2000; Oct. 10, 2000; Nov. 28, 2000; July 10, 2001; Jan. 24, 2002; July 2, 2002; Jan. 21, 2003; Jan. 28, 2003; Apr. 3, 2003; Apr. 8, 2003; Apr. 17, 2003; May 18, 2004; Nov. 22, 2005; May 23, 2006; June 1, 2006; Apr. 19, 2007; July 3, 2008; Nov. 6, 2008; Apr. 28, 2009; Dec. 3, 2009), courts of first instance in matters of civil, criminal and administrative law, except matters assigned by law to higher courts, are apylinkiu teismai (District Courts).

Five apygardu teismai (Area Courts) function as courts of first instance in matters ascribed to them by laws and as appeal instance for decisions, judgments and rulings of District Courts (see category 5 Civil Actions and Procedure, topic 5.03 Judgments). Area Courts are courts of first instance for, inter alia, following civil cases: where amount of action exceeds LTL 100,000 ([Euro]28,962); regarding intellectual property relations; involving foreign state as party; bankruptcy cases. Area Court of Vilnius (capital of Lithuania) has exceptional competence to hear as court of first instance, inter alia, civil cases regarding: patenting and use of inventions; registration and protection of trademarks as provided in Law "On Trademarks"; adoption matters involving citizens of foreign countries. (CPK, Art. 28).

Apeliacinis teismas (Court of Appeal), seated in Vilnius, functions as court of appeal instance for decisions, judgments and rulings of Area Courts adopted at first instance and hears other cases ascribed to it by laws.

Auksciausiasis Teismas (Supreme Court), seated in Vilnius, is only court of cassation instance for other courts' (of first and appeal instances) decisions, judgments and rulings, which have entered into force and were appealed in appeal instance.

See also category 1 Introduction, topic 1.02 Government and Legal System.

System of Administrative Courts was established by Law on Establishment of Administrative Courts (adopted on Jan. 14, 1999, am'd on Apr. 13, 1999; Sept. 19, 2000; Mar. 12, 2002) and Law on Administrative Legal Proceedings (adopted on Jan. 14, 1999, am'd on Apr. 13, 1999, June 22, 1999; Sept. 19, 2000; June 26, 2001; Mar. 12, 2002; Apr. 3, 2003; Apr. 8, 2003; Nov. 11, 2004; Dec. 18, 2007, June 11, 2009; Nov. 19, 2009). Administrative court system is comprised of five apygardu administraciniai teismai (Area Administrative Courts) and Lietuvos vyriausiasis administracinis teismas (Supreme Administrative Court of Lithuania), which is in Vilnius.

Administrative Courts decide, inter alia, on following issues: (1) legality of decisions taken by state or municipal administrative institutions or omission to act in proper way or procrastination; (2) compensation of moral and material damage caused by unlawful actions of state or municipal administrative institutions; (3) tax disputes; (4) claims of servants of state or municipal administrative institutions; (5) disputes among non-subordinated administrative bodies; (6) violations of election and referendum laws; (7) appeals against decisions in cases of violation of administrative laws; (8) decisions of public institutions and nongovernmental organizations in sphere of public administration; (9) legality of decisions taken by public organizations and political parties.

6.02 LAW REPORTS, CODES:

Essential part of law is statutory in the Republic of Lithuania. Some branches of law are codified in, inter alia, following codes: Code of Criminal Procedure (adopted on Mar. 14, 2002; effective from May 1, 2003); Criminal Code (adopted on Feb. 28, 2002; effective from Jan. 1, 2003); Civil Code (adopted on July 18, 2000; effective from July 1, 2001); Code of Civil Procedure (adopted on Feb. 28, 2002; effective from Jan. 1, 2003); Code of Execution of Punishments (adopted on June 27, 2002; effective from May 1, 2003); Code of Administrative Offences (adopted on Dec. 13, 1984); Code of Railroad Transport (adopted on Apr. 22, 2004); Code of Transport of Internal Waters (adopted on Sept. 24, 1996); Code of Road Transport (adopted on Nov. 19, 1996); and Code of Labor (adopted on June 4, 2002).

Doctrine of precedent is acknowledged in Lithuanian law by recent court practice. Moreover, Supreme Court, with purpose of unification of court practice, adopts recommendations and consultations for interpretation of law.

Official texts of laws and other legal acts, international treaties and conventions, etc. are published in Valstybes Zinios (Official Gazette) issued by state enterprise Seimas' Publishing House "Valstybes Zinios". English translations of number of regulatory acts may be found on Internet at http://www3.lrs.lt/dokpaieska/forma_e.htm.

6.03 LEGISLATURE:

Regulatory acts make hierarchic system in Republic of Lithuania, which is constituted of following categories of regulatory acts (in order of superiority): Constitution, constitutional laws, laws, Government resolutions and decrees of President, acts of governmental institutions and local municipal authorities. All regulatory acts, including laws, must be in compliance with

Constitution of Republic of Lithuania and other regulatory acts may not contradict laws. International treaties and conventions ratified by Seimas prevail over laws and other acts in Lithuania, except Constitution. International agreements signed by Government of Lithuania or other institutions but not subject to ratification are superseded by laws of Republic of Lithuania. Legal acts of EU are also part of Lithuanian legal system. EU Regulations are binding both at community level and at national level. Directives are not binding generally—they are binding on person to whom they are addressed.

Laws enter into force after they have been promulgated, i.e. signed by President or, in some cases, Chairman of Seimas, and published in "Valstybes Zinios" (Official Gazette). Publication and entry into force of laws and other regulatory acts are governed by Law "On Procedure for Publishing and Entry into Force of Laws and Other Regulatory Acts" (adopted on Apr. 6, 1993, am'd on July 4, 1996; Dec. 19, 1996; May 18, 1999; June 22, 1999; June 8, 2000; Sept. 11, 2001; Dec. 10, 2002; Oct. 28, 2003; July 7, 2005; Jan. 16, 2007). Laws enter into force on day of publication in "Valstybes Zinios", unless law itself provides for later date. In urgent cases laws may be published in special publication of Seimas and newspapers and come into force upon such publication. All other regulatory acts enter into force on next day after publication in "Valstybes Zinios", unless they provide for later date.

7 DEBTOR AND CREDITOR

7.01 ASSIGNMENTS:

Creditor may assign right of claim to third party, except laws or agreement provide otherwise, or if recovery is not possible thereof, or if such claim is related to creditor's personality (e.g. claims for compensation for material damage caused due to body injuries or manslaughter). It is forbidden for creditor to assign right of claim to third party, if person of creditor has great importance for debtor. Assignment agreement must be concluded in form, same as original obligation. Assignor must give assignee all related documents proving right of claim and other additional rights. Notice to debtor is advisable as, provided debtor has not been notified of assignment, discharge to assignor is deemed proper discharge of obligation. (CK, Arts. 6.101-6.110).

Third party under agreement with creditor can undertake rights and obligations of debtor. Debtor has right to transfer its debt to third party only if creditor gives consent. Transfer of debt agreement must be executed in writing, irrespective of whether original agreement was concluded in written form or not. (CK, Arts. 6.115-6.122).

7.02 ATTACHMENT:

At any time during court proceedings, persons participating in proceedings may request court to take measures to secure claim. Court may also take such measures at its own initiative. Court rules on measures to secure claim, provided otherwise execution of court judgment would become more difficult or impossible. (CPK, Art. 144). Court may, among other measures to secure claim: attach respondent's property, money or receivables; prohibit debtor from performing certain actions; prohibit other persons from making payments or discharging other obligations to debtor. (CPK, Art. 145).

7.03 BANKRUPTCY:

Bankruptcy is governed mainly by new Law on Bankruptcy of Enterprises (adopted on Mar. 20, 2001, am'd on Dec. 17, 2001; Nov. 19, 2002; Dec. 10, 2002; Jan. 28, 2003; Apr. 3, 2003; June 5, 2003; July 4, 2003; Apr. 15, 2004; Nov. 2, 2004; Nov. 4, 2004; Apr. 20, 2006; May 22, 2008; July 5, 2008) effective as of July 1, 2001. First version of Law on Bankruptcy of Enterprises (adopted on Sept. 15, 1992, am'd on Sept. 28, 1993; May 19, 1994; Dec. 22, 1994; Dec. 19, 1995; Dec. 20, 1995; May 2, 1996; Nov. 19, 1996; June 17, 1997) and second version of

Law on Bankruptcy of Enterprises (adopted on June 17, 1997, am'd on Nov. 26, 1998; Dec. 10, 1998; Mar. 30, 2000) are still in force and apply to bankruptcy procedures in enterprises where bankruptcy proceedings or extrajudicial bankruptcy procedures were commenced prior to, respectively, Oct. 1, 1997 or July 1, 2001. Provisions of new Law on Bankruptcy of Enterprises are discussed below. Law on Bankruptcy of Enterprises applies to all legal entities registered in the Republic of Lithuania, except budget enterprises, political parties, professional unions, and religious organizations. Peculiarities of bankruptcy procedures in banks, credit unions, insurance companies, agricultural enterprises, investment companies and some other enterprises may be established by special laws governing such enterprises.

Bankruptcy is defined as a state of insolvent enterprise, against which bankruptcy proceedings are commenced in court or implemented by creditors through extrajudicial bankruptcy procedure.

Extrajudicial bankruptcy procedure may be applied out of court, provided that no action has been brought in court in which claims have been filed against enterprise, also if no execution is directed against enterprise under writs of execution issued by courts or other institutions. Decision to carry out extrajudicial bankruptcy procedures may be adopted by creditors' meeting if decision is voted in favour by creditors whose claims in value account for at least 4/5 of enterprise's liabilities, including those which have not yet matured. In this case issues within competence of court must be considered and decided by creditors' meeting. If creditors' meeting rejects decision to carry out extrajudicial procedures, judicial procedure may be initiated.

Simplified bankruptcy process may be applied to enterprise by court ruling when administrator establishes in course of enterprise bankruptcy case that enterprise possesses no assets or that its assets are insufficient to cover legal and administration costs. Process may not last longer than one year from effective date of ruling to apply simplified bankruptcy process. Simplified bankruptcy process results in application of liquidation procedure. Issues relating to sale of assets, which in regular bankruptcy proceedings attributed to competence of creditors' meeting, are resolved by court.

Bankruptcy proceedings are instituted by area courts of locality, in which registered office of enterprise is situated, in manner set forth by CPK. It is possible to appeal any final decision of area court to Court of Appeals; most of decisions of Court of Appeals can be appealed to Supreme Court. Law provides for following comprehensive list of grounds for filing petition in bankruptcy in court: enterprise fails to pay wages and other employment-related amounts when due; enterprise fails to pay, when due, for goods received, work performed or services provided, defaults in repayment of credits or fails to fulfil other obligations assumed under contracts; enterprise fails to pay, when due, taxes, other compulsory contributions prescribed by laws and/or awarded amounts; enterprise has no assets or income from which debts could be collected and therefore bailiff has returned writs of execution to creditor. Following persons are eligible to file, each under specified procedure, petition in bankruptcy: creditor(s); owner(s), i.e. shareholders with more than 10% of votes; head of enterprise administration; enterprise liquidator. Creditor must notify head of enterprise administration in writing of his intention to file petition and enterprise must be given at least 30 days for discharge of obligation.

Upon issuing order to institute bankruptcy proceedings, court must appoint administrator of enterprise. Within 15 days from effective date of court order to institute bankruptcy, enterprise managing bodies must transfer assets of enterprise and all documents to administrator. As of this date, managing bodies of enterprise lose their powers. Court must inform Register of Legal Entities no later than next working day from effective date of court order. Within ten days from effective date of court order, court must inform: creditors, all persons renting, borrowing, securing or under other grounds managing or using assets of enterprise. On day of court ruling to institute bankruptcy procedure, court must seize all immovable property and other fixed tangible assets of enterprise. Said seizure is in force until effective date of court order to institute bankruptcy proceedings. Enterprise is entitled to engage in economic-commercial activities provided that they reduce creditors' losses incurred by reason of bankruptcy. Enterprise must also have right to use income received from above activities to cover expenses related to said activities. Administrator must review all contracts of enterprise under bankruptcy concluded within 36-month period prior to institution of bankruptcy proceedings. If court establishes fraudulent bankruptcy administrator must review all contracts concluded within five-year period prior to institution of bankruptcy proceedings. Administrator is obliged to bring actions before court investigating bankruptcy case for invalidation of contracts which are contrary to interests of enterprise and/or which could have contributed to its loss of ability to settle with creditors.

Creditors may file their claims within time limit set by court, which may be from 30 days to 45 days from effective date of court order. Creditors' claims filed upon expiry of such time limit may be accepted subject to certain conditions and only prior to court order to terminate bankruptcy proceedings or to liquidate enterprise due to bankruptcy. Creditors' claims are satisfied in two stages. During first stage, creditors' claims, except accrued interest and default interest, are satisfied; in second stage, remaining part of creditors' claims (interest, default interest) is covered.

Composition with creditors may be concluded at any stage of bankruptcy proceedings pending adjudication of bankruptcy and must be approved by court. Proposal to conclude composition agreement may be made by creditor, administrator or owner (including shareholders with more than 10% of votes) of enterprise. Composition agreement must be signed by all creditors (their authorized representatives) and administrator, provided that written consent is given by owner(s), management body of enterprise entitled to decide on liquidation or reorganization of enterprise.

Rehabilitation of enterprise is not possible during bankruptcy proceedings. Case of enterprise restructuring may be instituted in court, as alternative to bankruptcy proceedings, under newly enacted Law on Enterprise Restructuring (effective from July 1, 2001, am'd Nov. 19, 2002; Jan. 28, 2003; Apr. 3, 2004; July 4, 2003; Apr. 15, 2004; Nov. 2, 2004; Apr. 20, 2006; Oct. 12, 2006; Oct. 25, 2007; Dec. 10, 2009). This law aims to give possibility of avoiding bankruptcy procedures for enterprises having temporary financial problems. (See topic 7.08 Restructuring.)

Liquidation.

Court recognizes enterprise bankrupt and adopts ruling to liquidate it, if within three months from effective date of ruling to approve claims of creditors (this term may be prolonged only upon request of creditors' meeting); ruling regarding settlement (composition) agreement has not been adopted. If within 24 months from entry into force of court ruling to adjudge enterprise bankrupt, there remain assets, which have not been sold or transferred to creditors, liquidation procedures are deemed completed. Functions of enterprise liquidator are implemented by administrator in accordance with provisions of law.

Assets and rights of claim of enterprise bankruptcy or bankrupt enterprise are assessed and sold in accordance with provisions of Law on Bankruptcy of Enterprises. Real estate is sold at public auction according to procedure established by Government. Creditors' claims secured by pledge and/or mortgage are paid first from proceeds obtained from sale of pledged (mortgaged) assets of enterprise or by transferring pledged (mortgaged) assets. Where pledged (mortgaged) assets are sold at price higher than amount of claims secured by pledge, remaining balance of funds must be alloted for sequence claims of other creditors. First in sequence for satisfaction stand claims of workers arising from employment relationships; claims for compensation for damage caused by bodily injuries, occupational disease or death due to accident at work; claims of natural or legal persons for payment for agricultural produce purchased for processing. Second in sequence for satisfaction stand claims for payment of taxes and other payments into budget, compulsory state social insurance contributions and compulsory health insurance contributions; claims relating to loans obtained on behalf of State or guaranteed by State; third in line for satisfaction are all claims other than those specified above.

7.04 EXECUTIONS:

Executions are performed by bailiffs (antstolis) at District Courts on basis of documents of execution. In addition to writs of execution issued by courts, executable documents are, inter alia, following: composition agreements approved by court; rulings of mortgage (hypotheque) judges; decisions of commissions of labor disputes; arbitral awards in cases provided by laws; decisions of certain state institutions; etc. See also category 5 Civil Actions and Procedure, topic 5.03 Judgments.

7.05 GARNISHMENT:

Court, upon request of persons participating in proceedings or at its own initiative, may prohibit other persons from transferring property or discharging other obligations to respondent. (CPK, Art. 145). Respondent's assets held by third parties or receivables may also be attached. See also topic 7.02 Attachment.

7.06 INSOLVENCY:

After July 1, 2001, two types of insolvency procedures may be instituted: bankruptcy proceedings under Law on Bankruptcy of Enterprises (see topic 7.03 Bankruptcy); and restructuring proceedings under Law on Restructuring of Enterprises (see topic 7.08 Restructuring). Special procedures for rehabilitation and restructuring of capital of enterprises which were included in list of objects to be privatised and became insolvent prior to entrance into force of Law on Bankruptcy of Enterprises (Oct. 1, 1997) are set by Law on Rehabilitation and Restructuring of Capital of Enterprises (adopted on Oct. 20, 1998, am'd on July 18, 2000).

7.07 LIENS:

Based on CK, existing and future obligations may be secured, according to law or agreement, by contractual penalty, guarantee, security deposit, pledge (mortgage) and warranty. (CK, Art. 6.70). Agreements on security measures must be executed in written form.

Contractual Penalty.

If parties have agreed on contractual penalty (default interest or fine) or it is provided in law, party in default must pay penalty even if another party has not incurred losses. However, court may decrease amount of penalty on grounds that it is excessive if compared with creditor's losses. Amount of contractual penalty must necessarily be established in certain amount of money or percentage of secured obligation. (CK, Art. 6.71). Creditor has no right to demand from debtor both: to pay contractual penalty and to discharge obligation, with exception when debtor misses term of execution of obligation. When compensation of losses is claimed, contractual penalty is deemed included into such compensation. (CK, Art. 6.73).

Guarantee must be based on written agreement; if this requirement is not fulfilled, guarantee is deemed invalid. (CK, Art. 6.91). By giving guarantee, guarantor, within limits of amount referred to in guarantee, undertakes to fulfil secured obligation to creditor, if it is not properly fulfilled by debtor. Unlike warrantor who is primarily liable, liability of guarantor is secondary, i.e. creditor may claim fulfillment of guaranteed obligation from guarantor only after he has not received satisfaction of his claim from debtor. (CK, Arts. 6.90, 6.92). If guarantor satisfies creditor's claim, he has recourse against debtor.

Pledge is defined as device of granting security for discharge of obligations when ownership right and right to use proceeds from pledged property remains with owner of pledged property, if not agreed otherwise. Creditor (pledgee) has right to receive satisfaction of his claim against debtor from collateral and prior to other creditors of debtor, with exceptions provided by laws. (CK, Art. 4.198). Based on CPK, creditors have priority against other creditors of debtor in recovery from collateral.

Movable assets and real estate may be subject to pledge (mortgage). For mortgages see category 18 Mortgages, topic 18.02 Mortgages of Real Property.

Pledge of movable assets is governed by CK. Any movable object and property rights may be subject to pledge. Object, that is joint ownership, may be pledged only upon written consent of all owners. Collateral may be transferred to creditor (pledgee), to third party or left with debtor (pledgor). When collateral is transferred to creditor (pledgee), bilateral pledge agreement is concluded. If collateral is transferred to third party or remains within possession of debtor (pledgor), pledge is executed by unilateral pledge deed of owner, which must be notarized and registered with Mortgage Register. If debtor fails to discharge obligation or, in certain cases under Law, when creditor has right to demand that his claim be satisfied before expiration of maturity date, creditor must give debtor 20 days notice prior to enforcement. Upon delivery of enforcement notice, collateral must be placed in possession of creditor or, if debtor refuses, collateral is seized and transferred to creditor by mortgage judge. Collateral may be sold by creditor at auction, or by person authorized by creditor and debtor in manner as instructed by them. Proceeds from sale of collateral are transferred to deposit account of mortgage department and are distributed between creditors in accordance with procedure established by CPK.

Security deposit is paid by one party, from sum due under agreement, to another to evidence execution of agreement and to secure fulfillment thereof. Security deposit may not be paid to secure preliminary agreement or agreement that must be notarized according to laws. (CK, Art. 6.98). If agreement is not fulfilled because of fault of security depositor, security deposit remains with receiver of security deposit. If agreement is not fulfilled because of fault of receiver of deposit, he must refund same to depositor in double amount. In addition, party at fault must compensate other party for its losses.

Warranty (surety) may be based on warranty agreement, whereby warrantor undertakes to discharge secured obligation to creditor if it is not properly discharged by debtor. Warrantor and debtor are jointly and severally liable (in solido) against creditor. If creditor raises claim against warrantor, warrantor must call debtor to participate in proceedings. In response to creditor's claim warrantor may use all objections, which debtor might have against creditor. If warrantor satisfies creditor's claim, he has recourse against debtor. Warranty may not be provided for larger amount than secured debt. (CK, Art. 6.78).

7.08 RESTRUCTURING:

Law on Restructuring of Enterprises (adopted on Mar. 20, 2001, am'd on Nov. 19, 2002; Jan. 28, 2003; Apr. 3, 2003; July 4, 2003; Apr. 15, 2004; Nov. 2, 2004; Apr. 20, 2006; Oct. 12, 2006; Oct. 25, 2007; Dec. 12, 2009) regulates restructuring of enterprises and public institutions in temporary financial difficulties but seeking to avert bankruptcy.

Restructuring of enterprise may include change of type of economic activities, upgrading of production, rationalization of work, sale of enterprise's assets or part thereof, acquisition of assets of other enterprises through their merger or division, implementation of technical, economic and organizational measures intended to restore solvency of enterprise, as well as restructuring of enterprise's liabilities to creditors and deadline dates of their maturity.

Restructuring procedure may commence if following conditions are fulfilled: enterprise fails to settle with creditor for more than three months after payment becomes due; enterprise has not discontinued its economic-commercial activities; no bankruptcy proceedings have been initiated against enterprise and no extrajudicial bankruptcy process has been commenced. Head of administration of enterprise, upon receiving proposal from creditors, decision of managing body of enterprise, and approval of owners or partners of enterprise (founder of state-owned or municipal enterprise, or founders of public institution), must, within ten calendar days, convene meeting of principal creditors. Upon receiving written consents of creditors, or resolution by first meeting of creditors to enterprise, head of administration must, within five calendar days, file petition in court to initiate restructuring proceedings. Petition for restructuring of enterprise may be filed in court by creditors pursuant to resolution of first meeting of creditors even without decision of managing body of enterprise and consent of founders or owners. Court decides whether to institute restructure proceedings (restructuring case) or to deny. Court refuses to institute restructuring proceedings if: enterprise satisfies claims of creditor that filed petition in restructuring before court passes ruling to institute restructuring proceedings; not all necessary petition documents were presented; bankruptcy proceedings have been instituted against enterprise.

Restructuring plan is business plan of enterprise for restructuring period. Restructuring plan must be approved by required majority of creditors (generally by ¾ of total amount of claims) and filed in court within four months from date when court order to initiate restructuring proceedings became effective. If restructuring plan is not filed by prescribed date or if court does not confirm it, court must rule to discontinue enterprise restructuring proceedings. Restructuring plan is being implemented, all property owned or held in trust by enterprise is disposed of and economic activities of enterprise are directed by managing bodies of enterprise within limits of their competence pursuant to by-laws of enterprise and other documents regulating activities of enterprise, in compliance with restrictions established in restructuring plan or court rulings. During period of implementation of restructuring plan, activities of said bodies are supervised by chairman of committee of creditors and administrator of enterprise, if such has been appointed, within limits of their competence. During period of drafting restructuring plan, enterprise under restructuring, may not, without leave of court: sell enterprise or part thereof, or long-term assets or property rights; assign enterprise or part thereof, long-term assets or property rights, or transfer them for use without remuneration; grant guarantees, give sureties, pledge or secure discharge of obligations in any other way (subject to certain exceptions).

Creditors may file their claims within time limit set by court, which may be from 30 to 45 days from effective date of court order to institute restructuring proceedings. Creditors' claims are satisfied in two stages. During first stage, creditors' claims, excluding accrued interest and default interest, are satisfied. In second stage, remaining part of creditors' claims (interest, default interest) is covered. Creditors' claims secured by pledge and/or mortgage are paid first from proceeds obtained from sale of pledged or mortgaged assets of enterprise. If such proceeds are not enough, remaining part of creditors' claim is satisfied in second sequence. First in sequence for satisfaction stand claims of workers arising from employment relationships; claims for compensation for damage caused by bodily injuries, occupational disease or death due to accident at work; claims of natural or legal persons for payment for agricultural produce purchased for processing. Second in sequence for satisfaction stand claims for payment of taxes and other payments into budget, compulsory state social insurance contributions and compulsory health insurance contributions; claims relating to loans obtained on behalf of State or guaranteed by State; all other claims not specified above.

Termination of Restructuring Process.

After restructuring plan was implemented, head of administration and enterprise administrator (if appointed) must, within ten calendar days, draft statement about implementation of restructuring plan. Statement must be signed by head of enterprise administration, enterprise administrator (if appointed), owner(s), investor(s), and chairman of committee (meeting) of creditors. Statement must be confirmed by court.

8 DISPUTE RESOLUTION

8.01 ARBITRATION AND AWARD:

Commercial disputes in Lithuania are adjudicated by common practice courts (see category Civil Actions and Procedure).

Dispute resolution by means of arbitration is comparatively new but gains popularity among businessmen. Republic of Lithuania is party to New York Convention on Recognition and Enforcement of Foreign Arbitral Awards (1958). Arbitration is governed by Law on Commercial Arbitration (adopted on Apr. 2, 1996, am'd on Mar. 13, 2001; July 15, 2008), drafted on basis, with some modifications of UNCITRAL Model Law on International Commercial Arbitration. Law applies to both national and international arbitration. Unlike UNCITRAL Model Law, arbitral tribunal may not take any interim measure that it might consider necessary. Arbitral tribunal may, at request of any party, order other party to pay deposit to secure action. Arbitral tribunal, at request of any party, may address local court for taking other interim measures. Recourse against award of arbitral tribunal may be made to Lithuanian Court of Appeal. However this court will not decide on merits of case. Arbitral award takes effect from moment it is made and must be enforced by parties.

Currently, there is one major permanent arbitration institution in Lithuania. Two permanent arbitration institutions of Lithuania: Arbitration Court at Association International Chamber of Commerce—Lithuania (since 1997) and Vilnius International Commercial Arbitration (since 1996) were merged into one—Vilnius Court of Commercial Arbitration (since 2003).

9 DOCUMENTS AND RECORDS

9.01 ACKNOWLEDGMENTS:

Republic of Lithuania is party to Hague Convention Abolishing the Requirement of Legalisation for Foreign Public Documents (1961) and to Hague Convention on Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters (1965). Council regulation (EC) No. 1348/2000 of 29 May 2000 on service in Member States of judicial and extrajudicial documents in civil or commercial matters became effective in Lithuania as of May 1, 2004.

10 EMPLOYMENT

10.01 LABOR RELATIONS:

Labor Code (adopted on June 4, 2002, am'd on June 26, 2003; June 22, 2004; Apr. 21, 2005; May 12, 2005; June 30, 2005; Dec. 20, 2005; June 8, 2006; June 15, 2006; July 13, 2006; Nov. 21, 2006; Dec 4, 2007; July 15, 2008; Dec. 19, 2008; June 16, 2009; July 14, 2009, July 22, 2009, July 23, 2009; Dec. 21, 2009), designed to meet requirements of EU directives, came into force on Jan. 1, 2003.

Ministry of Social Security and Labor is main institution responsible for regulation of labor relations, implementation of state social support, social insurance and labor policies. Observance of labor laws is controlled by State Labor Inspection. State Labor Exchange functions with aims of ensuring employment guarantees and reduction of unemployment.

Normal work hours may not exceed 40 hours per week. Normal workday length may not exceed eight hours. Maximum length of workday, including overtime, may not exceed 48 hours per seven days. Standard five-day working week is established, but it may be extended to six-day working week. General rest day—Sunday, in case there are five working days—Sat. and Sun. Minimum wage is set by Government periodically. As of Jan. 1, 2008 minimum hourly rate is LTL 4.85 ([Euro]1.4) and minimum monthly wage is LTL 800 ([Euro]231.7). Wages must be paid at least twice a month in national currency— Litas. At least one and a half hourly wage rate (monthly salary) established for employees must be paid for overtime and night work. Special surcharges are provided for work under harmful and hazardous work conditions. Minimum annual paid vacation leave is 28 calendar days. Normally, employees are entitled to annual paid vacation leave after having worked continuously at enterprise for six months. Leaves of absence may be taken for following purposes: maternity leave; child care leave; study holidays; unpaid vacations.

Collective labor agreements may be entered into between employees' collective and employer or association of employers, and operates only in respective enterprise or institution. Collective bargaining agreement may be entered into between association of trade unions, and employers' association, and may be applicable to whole or certain territory of state or to branch of national economy. Terms of collective labor agreements may not be less favorable for employees than provisions of law. Strikes are prohibited during time of validity of collective labor agreements, provided employer observes them, except when not more than two months remain till expiration of collective labor agreement.

Employment contracts, under general rule, may not provide for terms less favorable to employees than those established by law. Parties to employment contract must necessarily agree on employee's place of work (company, subsidiary, etc.), employee's duties (position) and remuneration. If employee has actually commenced work upon oral agreement with employer, employment contract is considered entered into and must be executed. Employment contract must be executed in writing according to model form (as approved by law), additional terms may also be included therein. Term of employment contract may be for indefinite period, or for fixed period provided work is of temporary nature or in certain cases when work is of permanent nature but laws or collective agreements allow to execute employment contract for fixed period. Probation period not exceeding three months may be set in employment contracts, with certain exceptions.

Employer must register each employee with local department of State Social Security Fund Board on day of employment, pay social insurance contributions and withhold personal income tax. Employer is obliged to obtain employee's signature acknowledging acquaintance of internal standard acts of enterprise (work regulations, position profiles, etc.). Register of employment contracts must be kept by employer in which all employment contracts or amendments thereto must be registered. Registration of employment contract with register is not required when employer is private person employing three or less employees. Employee, prior to commencing his/her work, must be given employee identification document that should be carried by employer or held in place specified by employee (or internal rules and regulations). Employer is responsible for issuing employee identification document, setting forth rules for holding such document and presenting it for inspection to control institutions.

Illegal Work.

Work is deemed to be illegal if it corresponds to criteria provided for in law and is performed without having concluded employment contract or Social Authorities are not notified about commencement of work, as well as work performed by foreign nationals or stateless persons who failed to comply with procedure of employment.

Termination of Employment Contract.

Labor Code does not provide detailed list of grounds for termination of employment contract, but contains provision that upon employer's initiative, absent fault of employee, employment contract may be terminated only due to important reasons which can be circumstances related to employee's qualification, professional competence, or behavior at work. Employment contract may also be terminated for economic, technological reasons and structural changes of work place or similar important reasons. Code lists reasons which cannot serve as legal ground for termination of employment contract, including: (1) membership in trade union or participation in trade-union activity after business hours and, upon employers' consent, during business hours; (2) performance of functions of employees' representative at present or in past; (3) participation in proceedings against employer, accused for infringements of laws, other regulatory acts or collective agreement, as well as appeal to administrative bodies; (4) sex, sexual orientation, race, nationality, language, background, citizenship and social status, religion, marital or family status, beliefs or views, belonging to political parties and public organizations; (5) age; (6) absence from work, when employee performs, in cases provided by laws, military or other duties and obligations of citizen of Republic of Lithuania. Within term of notice on termination of employment contract, employer must give employee time, by releasing from performance of working duties, for search of new work, which may be not less than 10% of work time norm applied for employee during notice term. Labor Code provides list of employees who have priority right to retain work place when number of employees is reduced: (1) employees who have been injured or fallen ill with professional disease in work place; (2) who alone maintain children (foster children) under 16 years of age or other family members who are diagnosed with serious or middle level disability or working capacity level less than 55%, or family members who have reached pension age, to whom, under rules of laws, is established high or medium level of special needs; (3) who have not less than ten-year work record in that work place; (4) who have not more than three years left until old-age pension and for whom such right is established in collective agreement.

Employer, when dismissing employee upon employer's initiative without employee's fault, must give, under signature of employee, at least two-months written notice, to employees of certain categories—four-months written notice.

Employment contract with employees for whom not more than five years are left until right to receive whole old-age pension, with persons under 18 years of age, disabled persons, employees who have children under 14 years of age, may be terminated only in exclusive cases when retaining of such employee at work would substantially impair interests of employer.

Absent fault of employee, amount of severance pay depends on employee's work record in enterprise.

Labor Code separately regulates termination of employment contract without notice (which also includes termination of employment contract through employee's fault). Employment contract without notice must be terminated in following cases: (1) by court decision in effect, or upon court judgment in effect under which employee is punished by penalty disabling him/her to continue in work; (2) when employee is deprived of special rights to perform certain type of work; (3) upon request of bodies or officials authorized by laws; (4) when due to conclusion of medical commission or service of diagnosing disability and working capacity to Ministry of Social Protection and Labor, employee cannot occupy certain position or fulfill certain duties; (5) when, in case of employee from 14 to 16 years of age, one of parents or child's representative under law, or doctor who takes care of child's health, or school in which child studies, requires employee to terminate employment contract; (6) upon liquidation of employer, if according to laws another person has not been obliged to continue such employer's work obligations.

Employer is entitled to terminate employment contract without prior notice to employee in following cases: (1) When employee is negligently performing his/her working duties or has otherwise breached discipline, if previously at least once throughout last 12 months disciplinary penalties have been imposed on him/her; (2) when employee one time substantially breaches his/her working duties.

Change of owner of enterprise, establishment, organization, their subordination, founder or name, merger, splitting, share-out of enterprise, establishment or organization, or joining of such enterprise, establishment or organization to another enterprise, establishment or organization, transmission of establishment or organization, business or part of it, may not be deemed lawful reason to terminate labor relations.

Certain guarantees for unemployed people are provided in Law on Support for Employment (adopted June 15, 2006, am'd on May 10, 2007; July 14, 2009). Under provisions of

Law, aim of employment support system is to seek full employment of the population, to reduce their social exclusion and to strengthen social cohesion. General employment support services must cover: (1) Provision of information; (2) counseling; (3) employment intermediation; (4) planning of individual activities with view of supporting employment. Following groups of persons are additionally supported in labor market: (1) Persons who have completed vocational rehabilitation programmes; (2) persons taking up their first employment according to acquired speciality or occupation; (3) long-term unemployed; (4) persons over 50 years of age who are capable of work; (5) pregnant women, at choice of family, mother (adoptive mother) or father (adoptive father), guardian or custodian who actually raises child under eight years of age or disabled child under 18 years of age (before July 1, 2005—child recognised as invalid); (6) persons who have been released from places of imprisonment, where duration of imprisonment was longer than six months, etc.

Additional obligations are provided for employers discharging groups of employees by May 30, 2000 Social Security and Labor Minister's Order "On approval of regulations for discharging groups of employees and prevention of it". In order to dismiss group of employees, employer is obliged to notify 60 days before dismissal in writing territorial labor exchange, municipal institutions and trade union, acting at enterprise level.

Foreign personnel employment is governed by Law on Legal Status of Aliens (adopted on Apr. 29, 2004, am'd on Nov. 28, 2006; Feb. 1, 2008; July 22, 2009). Normally aliens, not permanent residents of Lithuania, may come for temporary work in Lithuania only if they have work permit issued. Work permit must be issued to alien taking into account needs of Lithuanian labor market, no specific quotas are established. Alien must obtain work permit before entering Republic of Lithuania, work permit must be issued to alien and revoked by Lithuanian Labor Exchange. Work permits are not needed for nationals of Member States of European Union and members of their family intending to work in Republic of Lithuania under employment contract; foreigners who have permits for permanent residence in Lithuania. Work permits also are not needed in other cases approved by Minister of Social Security and Labor.

Aug. 14, 2009 Social Security and Labor Minister's Order on approval of order and conditions for issuing work permits to aliens defines conditions for employment of aliens. Work permit is issued by Lithuanian Labor Exchange at Ministry of Social Security and Labor (consent of employer for future employment and personal insurance evidence are necessary), for maximum term of two years and can be prolonged in exceptional cases, providing that in any case validity term of work permit may not exceed two years. Enterprise, agency or organization where alien will be employed has to be specified in work permit. Alien who enters Republic of Lithuania to take up seasonal employment must be issued work permit for up to six-month period in year, calculated from date of entry into Republic of Lithuania.

Labor disputes may be settled by: direct negotiations between employer and employee; settlement of disputes in labor disputes commission; investigation of labor disputes in court. Labor disputes commission is mandatory pretrial institution to investigate labor disputes between employee and employer, except disputes that must be investigated directly in court.

Safety at work is regulated by Law on Employee's Health and Safety (adopted on July 1, 2003, am'd on Nov. 11, 2003; Feb. 5, 2004; Oct. 26, 2004; June 7, 2007). This law establishes: (1) general legal regulations and requirements designed to protect employees from professional risks or reduce above mentioned risks; (2) principles of evaluation of professional risks and reduction thereof, general provisions of procedure for investigation of accidents at work and professional diseases; (3) requirements of employees' safety and health applied to working young persons, pregnant women, also those who have recently given birth, breast-feeding women, and disabled persons; (4) public administration of employees' safety and health, competence of state and municipal institutions, rights and duties of employers, employers' representatives and employees, as well as their representatives, seeking to create safe and healthy working conditions; (5) general principles of responsibility for violations of requirements of legal acts regarding employees' safety and health.

Trade unions are governed by Law on Trade Unions (adopted on Nov. 21, 1991, am'd on May 24, 1994; Nov. 8, 1994; June 8, 1995; June 26, 1997; Mar. 27, 2001; Nov. 3, 2003; Dec. 22, 2009). Trade unions have capacity of legal entity. Trade unions may be established by at least 30 founders or when number of founders amounts to at least 1/5 of total number of employees in enterprise, but no less than three employees. Trade unions represent employees in negotiating and entering into collective labor agreements or other agreements, organize and manage strikes, participate in solution of collective and individual labor disputes. Employer may not terminate employment contract upon employer's initiative, with certain exceptions, or at employer's request (will) with employee, member of trade union functioning in that enterprise, without prior consent of elected body of such trade union. Refusal to give consent may be appealed to court.

Works councils are governed by Law on Works Councils (adopted on Oct. 26, 2004, am'd on Nov. 17, 2005; May 13, 2008). Works council is representative body of employees (alternative to trade union) and is also entitled to conclude collective agreements. Works council may be formed in cases where enterprise has no functioning trade union and if staff meeting has not transferred function of employee representation and protection to trade union of appropriate sector of economic activity. Works council may be formed only in enterprise in which number of employees is not less than 20. In enterprise with less than 20 employees functions of works council will be implemented by representative of employees to be elected at staff meeting. Number of members of works council depends on number of employees in enterprise and must be not less than three and not more than 15. All employees obtaining requirements established by laws may be elected as members of works council (age not less than 16 years, length of service in enterprise not less than six months). Employer and persons representing him/her under laws, powers of attorney or organization documents may not be members of works council. Works council will be formed for term of office of three years. Works council has all rights of entity of employees' collective representation in enterprise, except for functions recognized as prerogative of trade unions. One of major rights of works council is possibility to conclude collective agreement of enterprise with employer, as well as collective agreement of branch, representative office or structural division of enterprise.

11 ESTATES AND TRUSTS

11.01 DEATH:

Court of absent person's last domicile, upon request of persons concerned or curator, can declare absent person dead. Request may be made provided three years have elapsed since day on which information about absent person was last received at his domicile. Six months term applies if person disappeared in death threatening circumstances and two years from end of war for soldiers or persons who were absent due to war. Court gives public notice in local newspaper about initiation of proceedings. If court does not receive further information in three (in certain cases six) months, it declares absent person dead by judgment. (CK, Art. 2.31; CPK, Arts. 449, 453).

11.02 DESCENT AND DISTRIBUTION:

Decedent's estate consists of decedent's real and movable property, rights and obligations at time of decedent's death.

Right to intestate succession is based on blood relationship or adoption and does not extend to in-laws. Decedent's relatives inherit in sequence based on character and proximity of relationship. There are following six lines of heirs: all direct descendants, including adopted children, parents, including foster-parents and grandchildren of decedent; decedent's grandparents, great-grandchildren; brothers and sisters, great-grandparents of decedent; nieces, nephews, aunts and uncles; and cousins. Heirs of lower line do not inherit unless there are no heirs of higher line. (CK, Art. 5.11).

Rights of aliens to inherit land are subject to certain restrictions. See category 19 Property, topic 19.04 Real Property.

Surviving spouse inherits ¼ of decedent’s estate if there are up to four descendants of first line (including spouse); otherwise parts are equal. In case spouse inherits with second line, he/she is entitled to inherit half of bequest. If there are no descendants of first or second line, whole bequest is inherited by surviving spouse.

11.03 EXECUTORS AND ADMINISTRATORS:

Testament is realized by executor (testamento vykdytojas), heir or administrator appointed by local court. If testator has not nominated executor, or appointed executor or heir is not able to fulfil his/her duties, local court must appoint administrator as executor. Executor has rights and obligations as specified in testament. If testament contains no such specifications, executor’s obligation is to ensure that testator’s last will is realized. Executor does not acquire title to estate. After testament is executed, upon request of heirs, executor has to present report on execution. (CK, Arts. 5.37, 5.41).

Local court takes measures for estate’s protection if it is necessary to protect interests of state, heirs or creditors. (CK, Art. 5.42).

11.04 TRUSTS:

Trusts within meaning of law of equity are not known in Lithuanian law, since there is no distinct system of equity comparable to that known in Common Law. Similar aims can be reached by civil law constructs such as guardians, administrators and executors. Law of descent and distribution does not provide for division of title comparable to division between trustee and holder of equitable rights under Common Law.

11.05 WILLS:

Wills are governed by CK. Testament must be in writing, confirmed by notary public or by Lithuanian consul abroad and signed by testator. Heir is deemed to have accepted inheritance if he/she took inherited assets into possession or gave express statement to notary public.

Testator may dispose of all of his property by testament. However, his statutory compulsory heirs must receive their respective statutory shares of estate. Compulsory heirs are children, surviving spouse, parents who need maintenance. Compulsory statutory share equals one-half of such heir’s share under intestate succession.

According to CK, there are two kinds of testaments: official and private. In order to inherit, bequest must be accepted within three months. Acceptance may be expressed by taking inherited assets into possession, by giving statement to public notary or by applying to court for scheduling bequest description. Only when inheriting in latter manner is descendant not fully liable for debts of devisor—liability is limited only to extent of devisor’s assets.

12 FAMILY

12.01 ADOPTION:

Adoption of minor is permitted provided minor is at least three months old and adoption is in minor’s best interests and will result in true parent-child relationship. Adoption is permitted if adopted child is not less than 18 years younger than his/her parents. If child has reached ten years of age, his/her written consent is necessary for adoption. Upon adoption, adopted child and his/her descendants acquire same personal and property rights as children born in marriage, and adopted child's relationship with his/her natural parents terminates. However, adopted child retains any rights to pensions, support, and similar payments to which he/she is entitled at time of adoption. (CK, Arts. 3.209, 3.211, 3.215, 3.227).

Since Aug. 1, 1998, Lithuania is party of 1993 Hague Convention on Protection of Children and Co-operation in respect of Intercountry Adoption. As result, regulation of international adoption in CK was revised and restricted to comply with Act. Right to adopt is denied to stateless persons. Adoption of minor is permitted if minor is at least six months old and competent authorities determine, after having considered possibilities for placement of child within state of origin, that intercountry adoption is in child's best interests. Child (citizen of Lithuania) can be adopted solely in Contracting States, or other states if Lithuania and other states have adopted Treaties on Legal Aid concerning adoption matters. In any case, persons or families from Lithuania have priority over foreigners. Competent authority for adoption is Adoption Agency at Ministry of Social Security and Labor.

12.02 DIVORCE:

According to CK, marriage may be terminated when one of spouses dies or has been declared absent by court; or solely by court proceedings in following cases when certain conditions are satisfied: (1) spouses agree to divorce (if marriage lasted for more than one year; both spouses have agreed on results of marriage termination and both spouses are capable); (2) in case one of spouses applies to court (if spouses have lived separately for more than one year or spouse is recognized incapable or declared absent or is sentenced to not less than one year for unintentional crimes; (3) there is fault of other spouse.

Upon request of person concerned, marriage may be annulled on following grounds: lack of legal capacity; mental illness; consanguinity; bigamy; or fictitious marriage. (CK, Arts. 3.12-3.17, 3.37).

According to CK, marriage may be annulled on following additional grounds: same sex of spouses; involuntary marriage; age; failure to inform another partner about his/her HIV or testing positive for venereal disease before marriage.

CK also regulates issues of separation between spouses.

Above provisions apply regardless of spouses' citizenship if Lithuanian court or civil registry body is to grant divorce or annul marriage. Divorce or annulment by foreign court will be recognized in Lithuania, except for cases in which reasons for divorce or annulment do not correspond to Lithuanian law.

12.03 HUSBAND AND WIFE:

Assets acquired jointly or by one spouse with financial or other assistance of other spouse during marriage become marital property under common joint ownership right. Family, living place, movable property for family household (including furniture) and right to use family's living place are deemed family property irrespective of which spouse was owner of this property before or after marriage. CK also provides for nuptial agreement—agreement between spouses on property rights and obligations at time of marriage, divorce or separation. Nuptial agreement must be notarized and officially registered in register of nuptial agreements. Both spouses are responsible for fulfilling transaction entered into by one or both spouses and object of which was related to family household. When disposing of objects of marital property which are subject to compulsory registration, spouse must have written agreement from other spouse to dispose of it. Property acquired before marriage, received as gift, or inherited property does not become joint marital property. Every spouse has right to manage his/her own property.

Joint marital property regime ends upon death of one spouse or divorce. Joint marital property may also be divided, upon request of one spouse, by court decision without terminating divorce. Court divides joint marital ownership in equal portions to both spouses. Unequal portions may be determined by court considering interests of minor children, spouses' state of health, or other important interests of spouses. If spouses live separately, spouse is entitled to financial support from other spouse. (CK, Arts. 3.84, 3.88, 3.89, 3.92, 3.100, 3.101, 3.103, 3.118, 3.123).

12.04 INFANTS:

Minority lasts until person reaches 18 years of age. Minors under 14 years have no legal capacity. As contracts entered into by persons lacking legal capacity are void, minors must be represented by parents or guardians, except for petty everyday transactions. Minors between 15 and 18 years of age have limited legal capacity. They have right to dispose of their salary and other income, to realize their authorship rights in respect of intellectual property and enter into petty everyday transactions. But consent of parents or guardians is necessary to enter into other transactions.

Based on Law on Guardianship of Child (adopted Mar. 24, 1998, not am'd), temporary guardian is appointed by executive body (board or mayor) of local municipal authorities, upon proposal of local office for protection of children's rights. Permanent guardian is appointed by district court upon proposal of local office for protection of children's rights. After CK entered into force Law on Guardianship of Child became void as its provisions were incorporated in CK.

If minor is citizen of another country, he is adopted according to CK, unless international treaties state otherwise. (CK, Art. 3.226).

12.05 MARRIAGE:

In order to enter into marriage both parties must be at least 18 years of age. According to CK, court is entitled to reduce marital age to 15 years old; in case of pregnancy court may permit person less than 15 years old to enter into marriage. Person may not enter into marriage if he/she was declared legally incapable by court due to mental illness. Marriage is also prohibited between relatives related in direct line, between adopted parents and children, or where marriage would result in bigamy.

Provisions of CK also regulate such issues as property relationships between man and woman when their partnership (not marriage) is officially registered.

13 FOREIGN TRADE AND COMMERCE

13.01 CUSTOMS DUTIES:

See category 20 Taxation, topic 20.06 Customs Duty and Tax.

13.02 EXCHANGE CONTROL:

There is no foreign currency exchange control applicable to repatriation of profits from Lithuania.

13.03 FOREIGN EXCHANGE:

Litas may be freely exchanged into foreign currency by credit institutions (commercial banks and credit unions) holding license of Bank of Lithuania or such other supervisory institution of another EEA member state (when EEA bank establishes branch in Lithuania or passports its services on cross-border basis), covering foreign currency exchange services. Bank of Lithuania establishes maximum commission fee rates for foreign currency exchange operations with basic currency (EURO) for commercial banks subject to its supervision.

Financial brokerage firms, established in Lithuania or another EEA member state, as well as other subjects providing payment services, are also entitled to provide foreign currency exchange services in relation to, respectively, provided investment services or payment services.

13.04 FOREIGN INVESTMENT:

Based on Law on Investment (adopted on July 7, 1999, am'd on Feb. 17, 2000; May 2, 2000; July 11, 2001; June 24, 2003; July 1, 2003; July 15, 2004; Nov. 2, 2004; June 16, 2009). Domestic and foreign investors are guaranteed under this and other laws equal condition for operation, equal protection for investment, free access to all sectors of economy. Foreign investment is prohibited in sectors, relating to security and defence of State. Foreign investment is defined as investment in Republic of Lithuania by foreign states, international organisations and foreign natural and legal persons. Investors may invest in Republic of Lithuania according to established legal procedure by employing following methods: (1) Setting up economic entity, acquiring capital of economic entity registered in Republic of Lithuania or share therein; (2) acquiring securities of all types; (3) creating, acquiring fixed assets or increasing value thereof; (4) lending funds or other assets to economic entities in which investor owns share of capital, enabling investor to control economic entity or to exert considerable influence thereon; or (5) executing concession contracts and contracts of lease with option to purchase as well as government and private public partnership contracts. Certain spheres of economic activity may be engaged only upon receiving appropriate permission or license.

Law provides for promotion of investment: Investment project loans may be insured with public funds; tax incentives are applied for investors into free economic zones; state (municipality) guarantees are provided to creditors who have made investment project loans etc. Investment is promoted as far as it does not breach EU state aid rules.

Procedure and terms and conditions of investment by acquiring title to land by foreign legal and natural persons are established by Law on Amendment of Constitutional Law On the Subjects, Procedure, Terms and Conditions and Restrictions of the Requisition into Ownership of Land Plots Provided for in Art. 47, Paragraph 2 of Constitution of Republic of Lithuania. Certain limitations are also established by other laws, e.g. only state or municipal enterprises or special purpose companies have right to engage in printing of bank notes, postage stamps and minting of coins. Certain spheres of economic activity may be engaged only upon receiving appropriate permission or license.

Foreign investors have right, after having paid taxes, to transfer profit, income or dividends to foreign country without any restrictions. Dividends paid to Lithuanian and foreign corporate shareholders are subject to profit tax at 15% rate with certain exceptions. Dividends paid to Lithuanian and foreign shareholders natural persons are subject to income tax at 20% rate.

Network of free economic zones is under process of formation in accordance with Law on Fundamentals of Free Economic Zones (adopted on June 28, 1995, am'd on Apr. 2, 1996; June 26, 1997; Apr. 22, 1999; Nov. 9, 1999; Sept. 12, 2000; Apr. 19, 2001; Dec. 30, 2001; June 20, 2002; Feb. 12, 2004; Apr. 27, 2004; Nov. 4, 2004; Nov. 11, 2004). Lithuanian and foreign enterprises, corporations and associations are eligible to participate in free economic zones. Free economic zones offer considerable benefits for companies, which are registered and operate within their boundaries: no profit tax for enterprise in which investment exceeds [Euro] 1 million for six taxation periods; land lease at 50% discount for FEZ management company; equal legal guarantees for free economic zones companies and outside companies. There are currently two free economic zones in cities of Klaipeda and Kaunas.

Foreign investors have right, in event of disputes, to apply directly to International

Center of Settlement of Investment Disputes in compliance with Washington Convention on Settlement of Investment Disputes between States and Nationals of other States (1965).

Investment protection treaties are currently in force with, inter alia, following countries: Argentina, Armenia, Austria, Belarus, Belgium, Bulgaria, China, Czech Republic, Denmark, Estonia, Finland, France, Georgia, Germany, Greece, Great Britain, Hungary, Italy, Israel, Kazakhstan, Kuwait, Latvia, Luxembourg, Moldova, Netherlands, Norway, Portugal, Poland, Romania, Russian Federation, South Korea, Spain, Slovenia, Sweden, Switzerland, Turkey, United States of America, Ukraine, Uzbekistan, Venezuela, and Vietnam. Investment protection treaty with U.S.A. came into effect on Nov. 22, 2001.

13.05 FOREIGN TRADE REGULATIONS:

Since May 1, 2004 Lithuania became Member State of EU; legal order of EU in respect of trade regulation is applied. There are no restrictions for trade in internal market of EU, however, restrictions in trade with non-EU countries remain. Free movement of goods, services and capital must be fully implemented in Lithuania.

Import licenses are required for following kinds of goods: narcotics, highly effective poisonous, psychotropic substances; oil products; spirits, ethyl alcohol; tobacco and tobacco products; biological plant protection measures; foodstuffs of specific purpose; etc. Special permits or certificates issued by relevant institutions may also be necessary when importing some kinds of goods as specified by Government. Certain goods may not be imported into Lithuania (neither exported nor transported in transit) without special permits: dangerous, military (arms and ammunition) and secret cargoes etc.

14 HEALTH

14.01 FOOD, ALCOHOL, TOBACCO, DRUGS AND MEDICINES:

Food.

According to Law on Food (adopted on Apr. 4, 2000, am’d on June 6, 2002; Sept. 16, 2003; June 1, 2004; Nov. 17, 2005), food and substances coming into contact with food must conform to following basic requirements: (1) food must be of composition and quality which makes it fit for human consumption; it must not be contaminated with chemical, physical, microbial and other contaminants more than is permitted by legal acts; it must also be in conformity with mandatory safety and quality requirements; (2) only food additives and food substances conforming to established requirements for quantity, purity, etc. may be added; (3) competent authority may impose requirements compatible with international provisions to specific food group regarding its composition or quality for reasons of public health or nutrition; (4) only materials and products not hazardous to human health and prescribed by legal acts may be used for packaging of food or come into contact with it; (5) food and materials coming into contact with food must be marked accordingly. At all stages of its preparation and sale to consumer, handling of food is allowed only: if it meets food hygiene, public health, veterinary and environmental protection requirements and if there is appropriate equipment in conformity with hygiene and technology requirements; if hazard analysis and critical control points are present at food handling establishments and appropriate laboratory tests are carried out for ensuring self-control of food safety and handling; if persons handling food meet health requirements and undergo obligatory hygiene training. Consumers must be provided with true information about food. It is prohibited, inter alia, to: (1) confuse customer regarding description of food, its brand, identity, properties, composition, quantity, time of expiry, origin, handling, consumption and storage conditions; (2) indicate or make reference to nonexistent properties of food, curative or preventive features, unless registration certificate issued by competent institutions corroborating such information is provided; (3) indicate that some foodstuffs have specific features when these features can be actually found in all other similar products. It is prohibited to place on market food when it or its packaging contains things other than food, if such things could endanger health and life of consumers, except when it is necessary for food handling or consuming. It is prohibited to place on market products which, although not foodstuffs, possess form, odour, colour, appearance, labelling, packaging, size or in any other way are similar to food and consumers can confuse them with foodstuffs and their consumption could endanger their health or life.

Tobacco.

Law on Tobacco Control (adopted on Dec. 20, 1995, am'd on May 11, 1999; Dec. 21, 1999; Mar. 16, 2000; July 11, 2000; Dec. 21, 2000; June 11, 2002; Jan. 28, 2003; Nov. 20, 2003; Dec. 17, 2003; Dec. 15, 2005; May 11, 2006; June 15, 2006; June 26, 2008) regulates relations regarding tobacco growing, manufacture of tobacco products, domestic trade in tobacco products, their keeping, import, advertising and consumption of tobacco products, establish foundations of state tobacco control. Growing of tobacco, manufacture and wholesale of tobacco products is prohibited without licence issued by State Tobacco and Alcohol Control Authority. Retail sale of tobacco products is prohibited without licence issued by municipal institution. Sale of sniffing and chewing tobacco is prohibited in Lithuania. Under current hygiene norm adopted on Sept. 11, 2009, maximum allowed amounts of tar, nicotine and carbon monoxide are, respectively, 1 mg and 10 mg per one cigarette. Trade in tobacco products is prohibited in pharmacies, health care, educational and cultural institutions, internet cafes; retail trade enterprises where goods intended for children comprise 50% or more turnover; by vending machine; to individuals of up to 18 years; by communication means. Locations where tobacco products are sold must display signs, warning of harmful to health effect of smoking, information about prohibiting sale of tobacco products to individuals under 18 years, limitations of tobacco product sales. Law prohibits import of tobacco and tobacco products into Lithuania and sale thereof without prints and warning signs in Lithuanian language on package of tobacco products regarding harmful impact of tobacco on health. Advertising of tobacco products, including hidden advertising, is forbidden. Smoking is prohibited, inter alia, in: (1) all education and health care institutions, and their territories; (2) work places in enclosed areas, except specially-designated smoking areas; (3) common living areas and other common use areas where nonsmokers may be forced to breathe smoke-polluted air; (4) all types of public transport, except long-distance trains which must have separately designated cars for nonsmokers and smokers, as well as planes; and (5) restaurants, cafes, bars (other public nourishment places), clubs, discotheques, internet cafes, casinos, slot-machine and bingo salons, other leisure institutions, sports establishments, entertainment halls and other premises destined to provide various services, with exception of pipe and cigar clubs.

Alcohol.

Law on Alcohol Control (adopted Apr. 18, 1995, am'd on July 3, 1995; May 21, 1996; Apr. 8, 1997; July 2, 1997; Dec. 10, 1998; June 15, 1999; Mar. 16, 2000; July 18, 2000; Dec. 21, 2000; Apr. 5, 2001; Nov. 13, 2001; Jan. 17, 2002; June 20, 2002; Oct. 29, 2002; Mar. 9, 2004; Mar. 18, 2004;Nov. 4, 2004; Apr. 25, 2006; Nov. 9, 2006; June 21, 2007; Apr. 18, 2008, Oct. 14, 2008; Dec. 17, 2009) regulates relations regarding manufacture of alcohol and food products with alcohol additives, and other products containing ethyl alcohol, their internal trade, storage, transportation, import, export and use. Alcohol products are attributed to special products; manufacture, import, trade and use whereof is subject to special state regulatory regime. Alcohol products, manufactured by Lithuanian enterprises, imported and sold in Lithuania, must conform to legal acts of Lithuania. Requirements regarding quality of alcohol products are established in legal acts prepared by competent institutions. Hygienic indices of alcohol products are established by Ministry of Health. For every parcel of alcohol products manufactured in Lithuania, manufacturing enterprise must issue certificate attesting to quality of these products. State Food and Veterinary Authority controls whether alcohol products meet standard requirements. Laboratories accredited according to established procedure must test alcohol products. State Food and Veterinary Authority establishes principles of quality of alcoholic beverages and expert hygienic examination, procedure and pricing. Enterprises are prohibited from manufacturing, importing, wholesale of alcohol products without license issued by State Tobacco and Alcohol Control Authority. For retail sale of alcohol products license issued by municipal authorities is compulsory. Wholesale or retail trade in alcohol products is prohibited, inter alia, (1) without certificate issued by manufacturing enterprise attesting quality of alcohol products; (2) without special labels (except beer); (3) in respect of products which contain ethyl alcohol not manufactured from food raw materials; (4) in respect of products quality and/or hygiene indices whereof do not correspond to requirements established in Lithuania; (5) in respect of beer which contains more than 9.5% ethyl alcohol by volume; (6) in respect of non-denatured, denatured ethyl alcohol as well as technical ethyl alcohol if sold to population, except of non-denatured ethyl alcohol sold to population by pharmacies. Sale of alcoholic beverages is prohibited, inter alia: (1) in health care, educational, police and confession institutions; (2) in retail establishments, in which goods intended for children and teenagers comprise 50% or more turnover; (3) at mass events, exhibitions and fairs (with exception of alcoholic beverages less than 13% of ethyl alcohol by volume, and alcoholic beverages sold at exhibitions and fairs, held in permanent buildings); (4) from vending machines; (5) to persons who are under 18 years. Consumption of alcoholic beverages is prohibited, inter alia: (1) in all educational, health care, police and confinement institutions; (2) in public and government institutions, except at official receptions and events; (3) in all types of public transport, except international travel trains and ships which have separate places established for public catering, as well as planes; and (4) public places, except for licensed public catering companies. Law enumerates cases of prohibited advertising of alcohol products, including hidden advertising.

Medicines.

Law on Pharmacy (adopted on June 22, 2006, am'd on Sept. 29, 2008; Dec. 16, 2008; Dec. 22, 2009; Jan. 20, 2010) establishes basic principles for registration; manufacture and placing on market of medicines; procedure for quality control of medicines; characteristics of clinical trials of investigational medicine; procedure for evaluation of risk factors of medicines; conditions of use of veterinary medicines. Only medicines registered in Republic of Lithuania can be used for treatment of humans and animals, for diagnosis and prophylaxis of diseases or for affecting physiological functions. Registration of medicine means recording of product in national Medicines Register or Community register of Medicinal Products, or entered in List of Parallelly Imported Medicinal Products. Registration of medicines (except veterinary medicines), radioactive medicines, homeopathic preparations, preparations of traditional medicine, medicinal bio-products (toxins, serums, diagnostic allergens, diagnostic antigenes, diagnostic serums and vaccines), biotechnological products, blood preparations is performed by State Medicines Control Agency ("SMCA"). Medicated cosmetics and special purpose food supplements are registered by other authorities, State Public Health Agency and State Environmental Health Centre respectively. Law provides that following medicinal products not granted marketing authorisation may be supplied to market of Republic of Lithuania and used for health care: (1) Necessary medicinal products if they have been granted marketing authorisation in any EEA state; (2) bearer of prescription of medicinal products where doctor prescribes them for use of single patient assumes direct and personal responsibility. Legal person may engage in manufacture and/or import from third countries of medicinal product, investigational medicinal products only having received manufacturing licence issued by SMCA. Medicines manufactured in Republic of Lithuania can be marketed subject to registration, conformity with packaging text and labeling requirements set by SMCA. Manufacturer of medicine can change labeling and qualitative indicators of medicine only subject to authorization from SMCA. Manufacturer of medicine is responsible for quality of manufactured and marketed proprietary medicine. SMCA may request additional warnings and precautionary or identification marks about medicine on packaging, in instruction for use of medicine intended for health professionals or in information for user. Imported medicines are given marketing authorization provided medicines intended for medical purposes are registered, conform to requirements for packaging text and labeling approved by SMCA, have accompanying instruction on use of medicine intended for health professionals and/or information for user in Lithuanian. Quality control of medicines is exercised by SMCA.

Narcotics.

Law on Control of Narcotic and Psychotropic Substances (adopted on Jan. 8, 1998, am’d on May 11, 2000; July 4, 2000; Dec. 10, 2002; Nov. 16, 2006) establishes principles of classification of narcotic and psychotropic substances; lawful circulation of these substances when they are used for health care; veterinary and scientific purposes and circulation control. Narcotic and psychotropic substances are classified according to harmful effect on human health, when misused, and according to whether they can be used for health care purposes. Ministry of Health classifies and includes narcotic and psychotropic substances in lists according to control regime applied to them. Three lists of narcotic and psychotropic substances are compiled: (1) first list comprised plants, narcotic and psychotropic substances use whereof is prohibited in health care because they bring about harmful consequences to human health, when misused; (2) second list is comprised of plants, narcotic and psychotropic substances, used for health care purposes, which are very dangerous to human health due to harmful consequences arising when misused; (3) third list is comprised of plants and psychotropic substances used for health care purposes, which are dangerous to human health due to harmful consequences of misuse. Advertisement of narcotic and psychotropic substances is prohibited. Information regarding medicines that are narcotic and psychotropic substances must be provided to health care, pharmaceutical and veterinary specialists and consumers. It is prohibited to grow opium and corn poppies, cannabis and coca trees. It is prohibited to use for health care purposes, substances included in first list. It is prohibited to acquire, keep, transport within state territory, manufacture, process, import, export, use for scientific experimentation substances included in first list without issued license (permit). Activities involving substances included in second and third lists are subject to circulation requirements of other substances and preparations employed for health care and veterinary purposes. Substances included in second and third lists may only be manufactured, imported into, exported from, subject to wholesale or retail trade in Republic of Lithuania by legal persons or individual enterprises having license for that activity and only within buildings and premises for use of which special license is issued. Licenses for production of substances included in second and third lists are issued only upon presentation of all documents regarding production and technological extraction processes, projected amounts of production of intermediate substances and composition thereof. Manufacturer must ensure that production amounts indicated in license are not exceeded. Trade in substances included in second and third lists is to be effected only if packaging and labeling requirements are met. It is prohibited to store substances included in second and third lists in customs warehouses or temporarily keep them in import or export terminals. Customs procedures applied to temporary import, temporary import for processing and processing under customs supervision may not be applied. Persons transporting substances included in second and third lists within territory of Republic of Lithuania must have accompanying freight documents and ensure safety thereof. It is prohibited to send through post substances included in second and third lists. Substances included in second and third lists may be ordered for health care and veterinary science purposes only. Ministries of Internal Affairs and Health establish requirements for premises where substances included in second and third lists must be manufactured or traded in.

Law on Control of Precursors of Narcotic Drugs and Psychotropic Substances (adopted on June 1, 1999, am’d on Oct. 8, 2002; May 22, 2008) regulates activities related to precursors of narcotic drugs and psychotropic substances, and their control. It is aimed at prevention of use of precursors for illicit manufacture of narcotic drugs and psychotropic substances. It does not apply to products containing precursors which cannot be recovered and used for illicit manufacture of narcotic drugs and psychotropic substances.

Pharmaceutical Activities.

Law on Pharmacy (adopted on June 22, 2006, am’d on Sept. 29, 2008; Dec. 16, 2008; Dec. 22, 2009; Jan. 20, 2010) regulates pharmaceutical activities. Legal entities and natural persons may only engage in pharmaceutical activities if they have permit (license). Compounding of medicine according to individual written prescriptions is only permitted in pharmacies.

Medicines, medicinal substances and substances of natural origin used for pharmaceutical purposes may only be sold to residents and entities not having licenses to engage in pharmaceutical activity through pharmacies only. Advertisement of medicines is subject to control of State Medicine Control Agency. It is prohibited for persons engaged in veterinary pharmaceutical activities to sell medicines for purposes of treatment of human beings.

Medicine promotion is subject to Law on Pharmacy (adopted on June 22, 2006, am'd on Sept. 29, 2008; Dec. 16, 2008; Dec. 22, 2009; Jan. 20, 2010) and to Medicine Promotion Regulations approved by order of Minister of Health Care (adopted on Dec. 28, 2006, am'd on Jan. 21, 2009; June 10, 2009), which prescribe procedure for advertising of medicines and medical substances to general public and healthcare specialists. Advertising of medicines may be conducted or ordered only by advertisement providers, distributed by advertisement providers themselves or advertisement disseminators upon execution of agreements with advertisement providers. It is prohibited to use misleading, unlawful comparative or surreptitious advertisement. When advertising medicinal products to general public it is prohibited to advertise: prescription medicines; medicines containing substances entered on List of Narcotic and Psychotropic Substances approved by Minister of Health Care; reimbursable medicines. Following is prohibited when advertising medicinal products to general public: (1) To refer to recommendation by scientists, health professionals or persons who are neither of foregoing but who, because of their celebrity, could encourage consumption of medicinal product; (2) to present detailed description or representation of case history which could lead to erroneous self-diagnosis; (3) to refer, in improper, alarming or misleading terms to claims of recovery; (4) to use misleading terms or improper pictorial representation of changes in human or animal body caused by disease or injury, or of action of advertised medicinal product; (5) to present material directed exclusively or principally at children; (6) to give impression that medical consultation or surgical operation is unnecessary, in particular by offering diagnosis or by suggesting treatment by mail and by other information media; (7) to suggest that effects of taking medicine are guaranteed and are unaccompanied by adverse reactions; (8) to suggest that effects of advertised medicinal product are better than or equivalent to those of another medicinal product or treatment; (9) to suggest that health of subject can be enhanced by taking advertised medicinal product; (10) to suggest that health of subject could be affected by not taking medicinal product (this provision must not apply to carrying out vaccination campaigns); (11) to suggest that medicinal product is foodstuff, cosmetic or other consumer product; (12) to suggest that safety or efficacy of medicinal product is due to fact that is natural; (13) to influence residents through persistent offers of medicinal products, indicating alleged price reductions on price lists, price labels, pharmacy premises, other means or measures contrary to good morals and public order. It is prohibited to directly supply medicinal products to general public for free. Separate rules apply for advertisement of medicines for healthcare specialists as well as advertising of medicines on TV. Only medicines sold without prescriptions may be advertised in all radio and TV programs.

Products safety is regulated by Law on Products Safety (adopted on June 1, 1999, am'd by new version adopted on July 5, 2001; Jan. 29, 2004). Law establishes common requirements of product safety; grounds for state and public control; procedure on providing and transfer of information on unsafe products; duties of manufacturers, sellers and service suppliers; and liability for release of unsafe products into market of Republic of Lithuania and damage caused to consumers. Law is applied to legal and natural persons, which supply into market products for satisfaction of personal and household demands of consumers. State Non-Food Product Inspectorate coordinates implementation of legal acts regulating non-food product safety and is authorized to temporarily prohibit release of product into market, demand to eliminate such product from market or prohibit and cease advertising of such unsafe product, whereas State Food and Veterinary Agency pursues these functions with regard to food products. State Consumer Rights Protection Agency is entitled to impose fines amounting from 500 to 80,000 LTL ([Euro]145–23,170) for breach of these requirements.

14.02 HEALTH SYSTEM AND HEALTH INSURANCE:

Health insurance is regulated by Law on Health Insurance (adopted on May 21, 1996, am'd on June 19, 1997; Dec. 15, 1998; July 1, 1999; Oct. 12, 2000; Dec. 19, 2000; Feb. 20, 2001; Nov. 15, 2001; Dec. 3, 2002; Nov. 18, 2003; Dec. 16, 2003; Apr. 22, 2004; Apr. 28, 2005; May 12, 2005; July 5, 2005; Nov. 17, 2005; May 4, 2006; Nov. 16, 2006; June 26, 2007; July 4, 2007; Nov. 11, 2008; Nov. 14, 2008; Dec. 22, 2008; Feb. 19, 2009; July 22, 2009; Oct. 22, 2009). Health insurance is (1) compulsory and (2) supplementary (voluntary). Compulsory health insurance is state-established system of individual health care and economic measures, which guarantee provision of individual health care services to persons covered by compulsory health insurance and reimbursement of provided services costs. Supplementary (voluntary) health insurance means individual health care services specified in additional health insurance contracts, costs whereof are reimbursed under contracts upon happening of insured event covered by additional health insurance. Provision of individual health care services and reimbursement of costs of services provided to persons insured by other types of compulsory insurance is regulated by other laws and legal acts. Law specifies persons covered by compulsory health insurance; principles of compulsory health insurance fund formation; and compensation of individual health care service costs from compulsory health insurance fund resources institutions which transact compulsory health insurance; rights and duties of insured persons and health care institutions in compulsory health insurance; procedure of dispute settlement; principles of voluntary insurance.

Mental health care is regulated by Law on Mental Health Care (adopted on June 6, 1995, am'd on Dec. 2, 1999; July 5, 2001; Apr. 3, 2003; June 30, 2005; July 5, 2005), which establishes rights of persons who are provided with mental health care; procedure and supervision of mental health care; patients' rights to complaint against conducting of medical care; hospitalization of patients, etc.

National health system is governed by Law on Health System (adopted on July 19, 1994, am'd on Sept. 25, 1996; June 19, 1997; July 2, 1997; Dec. 1, 1998; Dec. 2, 1999; May 11, 2000; July 4, 2000; Sept. 19, 2000; Oct. 12, 2000; June 28, 2001; Oct. 1, 2002; Mar. 13, 2003; Apr. 3, 2003; Nov. 20, 2003; Dec. 18, 2003; Apr. 20, 2004; Apr. 22, 2004; Apr. 28, 2005; June 30, 2005; May 24, 2007; July 4, 2007; Apr.22, 2008). Law establishes national health system, its structure; scope of legal regulation of health protection; health strengthening and health recovery; basic principles of organization of individual and public health care; management of health care guaranteed by state or local authorities (free health care); health support; conclusion of contracts concerning health activities; subjects of health care; liability for infringement of health activities regulations; rights and duties of population and health activities bodies, etc. Right to engage in certain type of health care practice is granted to natural persons upon issuance of license and certificate. Right to engage in certain type of pharmaceutical practice is granted to natural persons who have been licensed or enlisted into Pharmacist's Assistants List. Enterprises and institutions have right to engage in health care activities only upon receiving licenses. Enterprises, institutions and organizations have right to engage in pharmaceutical activities only upon receiving licenses. Enterprises and institutions may be accredited for health care. Right to engage in other health activities is recognized only for institutions having on their staff physicians or other health care specialists. Natural persons who are not healthcare specialists or do not meet requirements prescribed by Ministry of Health have no right to engage in health activities. Enterprises, institutions, other legal and natural persons have right to form health funds resources for supporting municipal health programs, financing health protection or health strengthening program of enterprise, institution or organization, insuring enterprise's employees by voluntary health insurance, performing enterprise, institution or organization employees' labor hygiene assessment and morbidity investigation works. Services of health care guaranteed by state (free health care), financed from compulsory health insurance fund, state or municipal budgets, state or municipal health funds include, inter alia: (1) basic medical aid; (2) individual health care of soldiers of Republic of Lithuania; (3) individual health care of police and other internal affairs officers, additionally supported through programs; (4) individual health care of persons arrested by police, persons kept in places of pretrial detention, convicted persons, refugees, illegal migrants; (5) individual health care of persons insured by compulsory health insurance; (6) individual health care provided to persons ill with diseases entered on list compiled by Ministry of Health, prosthesis of limbs, joints and other organs; (7) individual health care provided to persons ill with tuberculosis, sexually transmitted diseases, AIDS, communicable, endocrine, mental, oncological diseases, alcohol dependence syndrome, drug addiction, toxic substance addiction, etc.; (8) compensation to persons covered by health insurance of cost of medicines entered on list compiled by Ministry of Health; (9) public health care on basis of compulsory public health measures and services nomenclature, certified by Ministry of Health; (10) blood donorship.

15 IMMIGRATION

15.01 ALIENS:

In Lithuanian legislation terms “aliens” or “foreigners” are attributed to non-citizens, i.e. foreign citizens and stateless persons.

Legal status of aliens is regulated by Law on Legal Status of Aliens (adopted on Apr. 29, 2004, am’d Nov. 28, 2006; Feb. 1, 2008; July 22, 2009, Law on Citizenship of Republic of Lithuania (adopted on July 15, 2008, am’d on Dec. 1, 2009), Government Resolution on Approval of General Description of Health Insurance in Respect of Aliens (adopted on Mar. 1, 2005, not am’d).

General rule is that aliens enjoy rights and freedoms secured by Constitution, laws and international treaties of Republic of Lithuania. Aliens in territory of Republic Lithuania must obey Lithuanian laws.

Aliens may own any property except land, internal waters and forests, which may only be owned by citizens and foreign subjects meeting criteria of European and Transatlantic integration (citizens of EU, USA, etc.) certain additional restrictions concerning agricultural and forestry land apply. Objects of exclusive ownership of Republic of Lithuania (nationally significant internal forests, parks, historical, cultural facilities, etc.) may not belong to aliens or citizens (see category 19 Property, topic 19.04 Real Property).

Aliens may not elect or be elected to elective state bodies. Aliens permanently residing in Lithuania are permitted to hold posts in state service, except for those which under laws may be held only by Lithuanian citizens. Aliens may elect or be elected to elective municipality bodies. Aliens are not subject to mandatory military service.

Aliens permanently residing in Lithuania enjoy same rights to social security and education as Lithuanian citizens.

15.02 IMMIGRATION:

Aliens may come to Lithuania provided they have visas except for citizens of states in respect of which visa regime has been abolished (Albania [for holders of diplomatic passports only], Andorra, Argentina, Armenia [for holders of diplomatic passports only], Australia, Austria, Belgium, Bosnia and Herzegovina [for holders of diplomatic passports only], Brunei Darussalam, Bulgaria, Canada, Chile, China [for holders of diplomatic passports only], Croatia, Cyprus, Czech Republic, Denmark, Estonia, Federation of Malaysia, Federative Republic of Brazil, Finland, France, Germany, Greece, Honduras, Hong Kong Special Administrative Region [only for Hong Kong Special Administrative Region passport holders], Hungary, Iceland, Ireland, Israel, Italy, Japan, Kingdom of Morocco [for holders of diplomatic passport only], Latvia, Liechtenstein, Luxembourg, Macau Special Administrative Region [only for Macau Special Administrative Region passport holders], Macedonia, Malta, Moldova [for holders of diplomatic passports only], Montenegro, Netherlands, New Zealand, Norway, Orient Republic of Uruguay, Poland, Portugal, Principality of Monaco, Republic of Costa Rica, Republic of Guatemala, Republic of Nicaragua, Republic of Singapore, Republic of Panama, Republic of Paraguay, Republic of San Marino, Romania, Russian Federation [for holders of diplomatic passports only], El Salvador, Serbia, Slovakia, Slovenia, South Korea, Spain, Sweden, Switzerland, Turkey [for holders of diplomatic, officials and special passports only], U.K., United Mexican States, U.S., Vatican, Venezuela, etc.). Alien to whom visa-free travel regime is applied must be entitled to enter Republic of Lithuania and stay in it without visa up to three months in each half year from first day of entry in Republic of Lithuania or any other Schengen state. Following kinds of visas exist: (1) Schengen visa. (2) national visa. Schengen visa may be: (i) Airport transit visa, (ii) transit visa, and (iii) short-stay visa. Group visa is transit visa or short-stay visa that may be issued to alien for maximum of 30 days issued to group of aliens formed prior to decision to travel to Republic of Lithuania to group of aliens between five and 50 people, provided that members of group enter territory, stay there and leave it as group. Group visa must be affixed to group passport. Schengen visas may be single-entry, double-entry, or multiple-entry. Visas are issued in diplomatic missions and consulates of Republic of Lithuania, and in institutions authorized by Ministry of Foreign Affairs. If international agreement exists, Ministry of Foreign Affairs can also authorize diplomatic missions and consulates of foreign states to issue visas. Right to issue visas within Lithuanian Republic belongs to Ministry of Foreign Affairs, Ministry of Interior and its authorized institution. Schengen Visa can be issued to alien possessing valid travel document, when its time of validity is not less than three months longer than term of validity of visa applied for. Provision may be not complied with due to humanitarian reasons, national interests or international obligations, if time of validity of alien's travel document is longer than period of visa validity and alien complies with conditions of issuing of visas established by Schengen acquis. Alien possessing short-stay visa may enter Republic of Lithuania and stay in its territory for period whose total duration does not exceed three months in any six-month period from first day of entry in Republic of Lithuania or any other Schengen state. National visa gives right to foreigner to enter Republic of Lithuania and stay in its territory for period not longer than three months. Employment permits are required for aliens except for nationals of Member States of EU coming to work (see category 10 Employment, topic 10.01 Labor Relations). Permits for permanent residence may be issued by Migration Department in accordance with Law on Legal Status of Aliens to persons under following conditions: they have retained right to citizenship of Republic of Lithuania; they are of Lithuanian ancestry; they came into Lithuania together with Lithuanian citizen as their family members; they lost Lithuanian citizenship but they reside in Republic of Lithuania; they are children until 18 years old born or living in Lithuania and their parents or one parent has/have permanent residence permit; they obtained status of refugees in Lithuania; they have lived in Lithuania without interruption for five preceding years and had temporary residence permits. Temporary permit to live in Republic of Lithuania may be issued to foreigners upon their request, if following conditions, inter alia, are met: they intend to work in Lithuania; they intend to engage into lawful activity in Lithuania; they intend to obtain education, to study in educational institutions, to work on probation, to increase qualification, to participate in professional training, etc.

Alien who is national of one of Member States of European Union or who is in possession of residence permit issued by another Schengen state can be entitled during period of validity of residence permit to enter Republic of Lithuania and stay in it without visa up to three months in each half year from first day of entry in Republic of Lithuania or any other Schengen state which did not issue said residence permit. National of Member State of EU has right to reside in Republic of Lithuania for more than three months in half a year if he: (1) Is employee or self-employed person, (2) is in possession of adequate means of subsistence for himself and for his family members to reside in Republic of Lithuania and is in possession of valid medical insurance document, 3) is student, pupil, trainee, attends retraining courses or vocational training courses, has adequate means of subsistence to stay in Republic of Lithuania for himself or his family members if they accompany or join him and is in possession of valid medical insurance document, 4) is family member of EU Member State national who accompanies him or joins him, 5) other cases. Family members of national of EU Member State who are not citizens of EU Member State, upon entering Republic of Lithuania for residence for longer than three months in six-month period accompanying national of EU Member State or joining him must be issued EU residence permit. EU residence permit can be executed for period of five years or for intended period of residence in Republic of Lithuania of EU Member State national, if period is shorter than five years.

16 INTELLECTUAL PROPERTY

16.01 COPYRIGHT:

Copyright are governed by Law on Copyright and Neighbouring Rights (adopted on May 18, 1999, am'd on July 20, 2000; Mar. 5, 2003; Oct. 12, 2006; Mar. 13, 2008; Feb. 2, 2010). It defines and regulates: rights of authors to works of literature, art or science; rights of performing artists ("performing artist" is defined as actor, musician, dancer or other person playing, singing, acting, reading, reciting or performing work of art in another way), record and video producers, and audiovisual communications companies; special provisions for protection of databases; implementation and protection of copyright and neighbouring rights. Works which are object of copyright: works of literature, articles, computer programs (in any language or form); speeches, lectures and other oral works, scientific works in oral or written form; dramas, musical works, pantomime and other works to be performed on stage; audiovisual works; sculptures, drawings; works of photography and analogous works, architectural graphics, plans, models; illustrations, maps, three-dimensional models, static and interactive websites, etc. Derivative works (translations, adaptations, revues, compilations etc.) are also objects of copyrights. Intellectual activity not protected by copyright is following: ideas, procedures, processes, systems, methods, conceptions, principles, inventions, separate data; legal and administrative acts, official translations thereof; officially registered draft legal acts; official state symbols (state emblem, flag, monetary signs); works of folklore; daily news and statements.

Copyright commences upon creation of work. No registration of work or any other formalities are necessary for commencement and enforcement of copyright. Copyright consists of personal nonproprietary rights and property rights. Personal nonproprietary rights are: right of authorship, right to inviolability of work. These rights are inalienable from author's personality. Basic property rights are: right of reproduction, dissemination, translation, modification, and publication of work, also right to display work etc. Proprietary rights may be transferred to other persons or entities by signing authorship or licence agreement. Copyright exists during author's lifetime and 70 years following his death. Neighbouring rights are protected for 50 years from first publication, performance or other way of presentation of work. Authorship and other nonproprietary rights are protected without time limitation.

Reproduction of works protected by copyright without permission of author is permissible solely for personal or educational use and only for natural persons. Reproduction of architectural works in form of buildings, reproduction of whole book or significant part of it, musical notes, computer programs and databases (with exceptions provided by law) is forbidden. Violations of copyright and neighbouring rights may include reproduction, performance, transmission, dissemination or use of work which is subject to copyright or neighbouring right without author's permission; import, export, distribution, transportation or storage of illegal reproduction of product with commercial purpose; evasion to pay royalty that is obligatory under law or agreement; removal of any technical means that are used by authors or owners of neighbouring rights to protect their copyrights, or importing, transporting or storing equipment used with commercial purpose for removal of above mentioned technical means; violation of author's nonproprietary rights. Depending on character and consequences of infringement, infringer may be subject to civil, administrative or criminal liability.

Lithuania is member of such international treaties related to copyright regulation: Berne Convention for the Protection of Literary and Artistic Works (joined on July 29, 1994); Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations (ratified on Dec. 22, 1998); Convention for Protection of Producers of Phonograms against Unauthorized Duplication of their Phonograms (ratified on Apr. 13, 1999); World Intellectual Property Organization Copyright Treaty (ratified on Mar. 13, 2001), etc.

16.02 INDUSTRIAL DESIGN:

Industrial design protection is governed by Law on Design (adopted on Nov. 7, 2002, am'd on Apr. 29, 2004; June 8, 2006; July 1, 2008). Industrial design must be new and must have individual character and not be contradictory to principles of public policy and morality. Industrial design is deemed new, if up to filing date of application or priority dates, it is not identical to another product which has been disclosed to public. Industrial design is deemed publicly accessible or known, if it had been published in Official Gazette of State Patent Bureau, exhibited at exhibition, submitted for marketing or demonstrated to public in another way. Novelty of industrial design is not disturbed by dissemination of information about it, provided this information did not become known to specialist of certain field in Republic of Lithuania, using design in usual way, or was disclosed to third persons under reasonable confidentiality terms, as well as in case this information has been disseminated within period of 12 months prior to filing date of application or priority date, and information has been disseminated by author himself or his successor in title, or by another person wishing to harm author or his successor. Industrial design is considered as possessing individual character provided informed user is able to differentiate one industrial design, on basis of its general appearance from another industrial design that became available to public before filing date of application or priority date.

Foreign persons (excluding permanent residents of Lithuania and European Community, legal persons having their agencies or registered offices in Lithuania or other EU country) may file applications with State Patent Bureau only through patent attorneys that are inserted into Lithuanian patent attorneys register. One application may include up to ten examples of design applied for. Industrial design protection is valid for five years from filing date of application. Term of validity of industrial design may in addition be extended four times, for five-year periods, for up to 25 years, counting from date of filing application.

16.03 PATENTS:

Patents are governed by Law on Patents (adopted on Jan. 18, 1994, am'd on Nov. 8, 1994; Dec. 9, 1997; Dec. 23, 1997; June 15, 2000; Dec. 21, 2000; Oct. 30, 2001; June 30, 2005; June 8, 2006; May 10, 2007). There are three ways of obtaining patent protection in Lithuania: filing application directly with State Patent Bureau, filing international application through Patent Cooperation Treaty (PCT), or extending European patents into Lithuania (Euro and Euro-PCT applications).

For purposes of patenting invention patent application must be filed with State Patent Bureau. Right to patent belongs to inventor or his successor in title or employer in case of service invention. Foreign applicants (natural and legal persons) which are not permanent residents or have no permanent registered office in Republic of Lithuania or in other state of Europe Economic Area or in state party to European Patent Convention may file their applications and perform any action related to patent grant only through patent attorney registered in Lithuania. Following are not regarded as inventions: discoveries, scientific theories and mathematical methods; design of products; schemes, rules and methods of games, intellectual and economic activities, as well as programs for computers; presentations of information; human body or element of human body being in natural environment, including gene succession or part of it in any period of its evolution and development except elements separated from human body or obtained otherwise in technological process and also except gene succession or part of it even if structure of it is identical to element being in natural environment. Patents are not granted for methods of treatment of people and animals, diagnostics and prevention of diseases, except equipment and materials utilized for such methods, varieties of plants and methods, except microbiological, of their protection, and for invention which are contrary to public interest, principles of humanity and morality. Where object of invention is method, patent protection is also granted with respect to product made by such method.

Patent application is published after 18 months from filing date. It may be published earlier but in no case earlier than after six months from filing date. Upon publication applicant must pay patent grant fee within three months. Then patent is entered into Patent Register and published in Official Gazette of State Patent Bureau. Patent validity term is 20 years from application filing date and is subject to payment of annual fees beginning with third year from filing date. Presenting system of patent grant is practiced in Lithuania, i.e. State Patent Bureau makes no examination as to novelty, inventive step or industrial applicability of invention.

If legal protection is granted for medicine active substances or means of plant protection active substances, owner of patent or its assignees, for not longer than five year period, may be issued additional protection certificate.

Lithuanian laws recognize concept of “prior user” which applies to natural persons and legal entities who, in good faith, have used invention or have made effective or serious preparations for such use before filing date or, where priority is claimed, priority date of patent application. Such persons have right to continue such use or to use invention as envisaged in such preparations, notwithstanding patent owner’s will.

16.04 TRADEMARKS:

Trademarks (service marks included) are governed by Law on Trademarks (adopted on Oct. 10, 2000, am’d on Oct. 22, 2002; Feb. 19, 2004; June 8, 2006). Protection is secured only after application to register mark is submitted or mark is already registered with Lithuanian State Patent Bureau, or mark is registered with international registrar that is valid in Lithuania. This law is also applied to marks which are recognized as widely known in Lithuania even if they are not registered with State Patent Bureau. Any sign which distinguishes goods or services of one person from those of another person and which can be represented graphically is considered capable of constituting mark. State Patent Bureau completes no research concerning trademark’s originality and it may be abolished only upon request of person concerned. There are no requirements of prior usage for mark to be registered. Sign is considered not capable of constituting mark on any of following grounds: it has no distinctive character; it has become generic name for goods; it exclusively designates, in trade, kind (type), quality, quantity, intended purpose, value, place of origin, time or means of production of goods or of rendering of services, or other characteristics of goods or services; it may mislead public; and it is contrary to morality or public order. Sign may not be registered if it is identical or confusingly similar to, among others, marks which are already registered or applied for same or similar goods or services with State Patent Bureau and enjoy prior rights; marks which are well known in Lithuania and which belong to other persons; firm names or style and signboards of firms belonging to other persons etc.

Foreign legal and natural persons (excluding permanent residents of Lithuania and European Community, legal persons having their agencies or registered offices in other European Union countries) may file applications with State Patent Bureau through Lithuanian patent attorney. Once registration is entered in Register of Trademarks, it is published in Official Gazette of State Patent Bureau. Any person concerned may, upon payment of fee, file opposition against registration, on basis that it contradicts provisions of Law “On Trademarks”, within three months from date of publication. Initial term of registration of mark is ten years from filing date of application. Registration may be renewed for additional terms no longer than ten years.

17 LEGAL PROFESSION

17.01 ATTORNEYS AND COUNSELORS:

Lithuanian laws do not distinguish between attorneys and counselors. Based on Law on Advocacy (adopted on Mar. 18, 2004, am’d on July 7, 2005; June 13, 2006; Dec. 21, 2006; Apr.

15, 2008), only persons included in List of Practicing Advocates of Republic of Lithuania may work as advocates and provide legal assistance services. Persons included in List of Advocates' Assistants of Republic of Lithuania may also provide legal assistance services. This provision does not apply to persons providing legal services to enterprises wherein they are employed and other persons permitted to act as representatives in civil proceedings under CPK.

Natural person may be acknowledged advocate if he/she: is citizen of Republic of Lithuania or European Union Member State; is law graduate of higher educational institution; has practiced law for not less than five years or has completed advocate assistant's internship of not less than two years; passed qualification examinations; is of irreproachable reputation; knows Lithuanian language and is not suffering from disease precluding to serve as advocate. Juris Doctor, Juris Doctor Habilitatis or one practicing as judge for not less than seven years could be admitted to Bar without need to pass qualification examinations. Lithuanian Bar acknowledges persons as advocates and enters them into List of Practicing Advocates. Procedure for execution of qualification examinations is established by Ministry of Justice. Advocates must hold insurance of civil liability for minimum amount of LTL 100,000 ([Euro]28,962).

Advocates are prohibited from direct or indirect advertisement of their professional practice. Clients may freely choose advocate, unless in certain cases provided by law advocate is assigned to client by court, prosecutor or investigator.

Disciplinary actions can be brought against advocates or advocate assistants before Honor Court of Advocates. Offences may be punished by following penalties: reproof; reprimand; reprimand with public announcement thereof; withdrawal from Lithuanian Bar.

Foreign advocates can engage in advocate practice in Lithuania only in compliance with international agreements of Lithuania on legal aid except for citizens of Member States of EU who have been accepted to practice law in Lithuania.

Since day of Lithuania's accession to EU lawyers who are granted professional title by competent authorities of Member States of EU are entitled, subject to some preconditions, restrictions and additional requirements, to practice as advocates in Lithuania. List of EU Lawyers Entitled to Advocate's Practice is administered by Lithuanian Bar. It is set forth that lawyer must be entitled to recognition as "advocate" and be listed as practicing advocate of Lithuania after three years of legal practice in Lithuania under his/her EU Member State home professional title.

18 MORTGAGES

18.01 CHATTEL MORTGAGES:

See category 7 Debtor and Creditor, topic 7.07 Liens, subhead Pledge.

18.02 MORTGAGES OF REAL PROPERTY:

Mortgage (hipoteka) is governed by CK.

Objects registered with public register, not withdrawn from civil circulation and eligible to be sold at public auctions may be subject to mortgage. Only insured objects, except for land plots, can be mortgaged. For mortgage of buildings, plot of land on which buildings are standing is to be mortgaged or mortgage must include right of lease (right of use) in respect of plot of land thereof. Title of ownership to mortgaged object is subject to transfer whereupon mortgage stays attached to said object. Only owner of property may be mortgagor. Mortgage is established by agreement between creditor and debtor, by unilateral statement or debtor's request to register compulsory mortgage and only upon due registration thereof with Mortgage Register. Mortgage of land extends to buildings as appurtenances, unless mortgage agreement provides otherwise. Mortgage of real estate does not include proceeds therefrom. Mortgage of following types may be established: compulsory and contractual. Latter is further divided into ordinary, joint, third party's assets, maximal, common and conditional. Law or decision of court provides for establishment of compulsory mortgage which is subject to preconditions set out in CK.

Mortgage is executed by filling in mortgage bond certified by public notary, in case of contractual mortgage, and registering it with mortgage departments at district courts. Data on mortgage are transferred to Central Mortgage Register by electronic data transfer. Claim secured by mortgage may be assigned, unless mortgage agreement provides otherwise, by endorsement in mortgage bond, assignment to be registered with Mortgage Register. Changes are subject to same order of registration as mortgage bond itself. Claim secured by mortgage may also be subject of pledge for securing repayment of loan, also to be registered with Mortgage Register.

If debtor fails to discharge obligation or, in certain cases provided by law, when creditor has right to demand that its claim be satisfied prior to expiration of maturity date, creditor must give mortgage judge enforcement request. Mortgage judge rules on seizure of collateral and gives debtor one month for discharge of obligation. If debt is not repaid within one month following day of service of warning to mortgagor and owner of mortgaged property, mortgagee has to repeatedly file his petition for foreclosure to mortgage office. Upon receiving petition, mortgage judge passes ruling for foreclosure sale or handing over mortgaged property to mortgagee for administration and sends it to bailiff for enforcement. However, if two months after day of service of warning to debtor creditor did not apply for recovery of debt or for granting of right to administer mortgaged property, mortgage judge must pass ruling to annul seizure of collateral. If collateral is not sold through second foreclosure sale or transferred to creditor's ownership, upon request of creditor it may be assigned to creditor for administration. This must not preclude mortgagee from filing repeated petition for foreclosure sale of collateral.

19 PROPERTY

19.01 ABSENTEES:

Person may be recognized as absent by court provided no data has been received of his/her whereabouts at his domicile for one year. Court appoints curator to protect and manage absentee's assets. Curator may also be appointed prior to expiry of one year term, upon request of persons concerned. (CK, Arts. 2.28-2.30).

19.02 POWERS OF ATTORNEY:

Power of attorney must be in written form. Save specific exceptions provided in law, following powers of attorney must be certified by public notary: power of attorney enabling agent to conclude transaction which by law must be certified by public notary (e.g. real estate sale and purchase agreements, registration of mortgage, etc.), power of attorney issued by natural person to perform action in relation to legal person on behalf of said natural person; power of attorney issued by natural person for administration, usage and disposal of his/her real estate. Legal person acting as agent is limited to transactions stipulated in establishment documents thereof. Power of attorney issued by legal entity must be signed by its manager (or representatives acting under joint representation rule) and stamped. (CK, Art. 2.140). Additional request as to power of attorney issued by legal entities may be established by corresponding laws (e.g. for procuracies). Power of attorney may be given for definite or indefinite term. If term is not specified, power of attorney is valid for one year. Principal is bound by agent's action only if agent has acted within limits as determined in power of attorney. Actions taken in excess of power of attorney are binding on principal only provided he later consents thereto. If principal does not consent, third parties may claim compensation for losses only from agent.

Power of attorney expires upon: expiration of time period specified therein; revocation of power of attorney by principal; repudiation by agent; abolishment of legal entity, which was principal or agent, or in case of start of bankruptcy proceedings of agent, death or loss of legal capacity of principal or agent.

Legal entities or entrepreneurs may issue procuracy enabling natural persons to perform all legal actions in principal's business activity, except for: transfer or encumbrances of principal's ownership rights to real estate; signing principal's balance sheet or tax declaration; announcement of principal's bankruptcy; issue of procuracy; affiliation to principal's partners. (CK, Arts. 2.176; 2.179). Procurator may not transfer procuration to other persons. Procuracy must be in written form and officially registered. Not registered procuracy cannot be invoked against third persons. Procuracy expires upon deregistration from official register, except for expiration upon procurator's death or upon principal's liquidation or reorganization. Grounds for deregistration: revocation of procuracy by principal; repudiation by procurator; start of principal's bankruptcy proceedings.

Rights and duties of principal and agent may be regulated in detail by commission agreement. Commission agreement is defined as agreement by which commissioner undertakes to perform certain legal acts with third persons on behalf of and at expense of principal. (CK, Arts. 6.756-6.759). Commission agreement may provide for execution of actions related to defence of principal, administration of part or whole of his/her property, performance of procedural actions on principal's behalf in court or other institutions as well as other actions. Commission agreement may be reimbursable or non-reimbursable. If commission agreement is entered into between natural persons, it is presumed that such agreement is non-reimbursable, unless agent is to perform his/her professional activities. If either commissioner or principal or both parties to commission agreement are businessmen, it is presumed to be reimbursable. Commissioner must deliver commission in good faith and exercise care so that his/her performance corresponds to principal's interests. Commissioner is also obliged to avoid conflict of interests. Among other duties principal has to co-operate with commissioner as latter carries out commission. Commissioner is entitled to transfer execution of commission to other person. Principal may at any time repeal and commissioner may at any time renounce commission. If commissioner renounces commission unreasonably or at inappropriate time, commissioner must compensate principal's losses. (CK, Art. 6.764).

19.03 PRIVATIZATION:

Privatization in Lithuania began in 1991 on basis of Law on Initial Privatization of State Property (adopted on Feb. 28, 1991). State property was being sold for investment vouchers and cash during initial round of privatization. In 1995 first privatization round was completed. Law on Privatization of State-Owned and Municipal Property was adopted on July 4, 1995, which still applies to objects of privatization programs that were approved prior to Dec. 1, 1997. New Law on Privatization of State-Owned and Municipal Property (adopted on Nov. 4, 1997, am'd on July 7, 1999; Oct. 14, 1999; Nov. 4, 1999; Nov. 25, 1999; Mar. 16, 2000; Apr. 11, 2000; July 20, 2000; Nov. 20, 2001; Dec. 17, 2001; Mar. 5, 2002; Nov. 2, 2004; Dec. 5, 2006, July 23, 2009) governs privatization at second stage. At second stage state-owned and municipal property is being sold exclusively for cash and at market prices, determined after valuation of objects. Both Lithuanian and foreign investors are eligible to participate in privatization on equal grounds, subject to general restrictions on foreign capital investment (see category 13 Foreign Trade and Commerce, topic 13.04 Foreign Investment) and ownership of real property by foreigners (see topic 19.04 Real Property).

Following methods of privatization are applied at second stage of privatization: public sale of shares; public auction; public tender; direct negotiations; transfer of controlling interest in state (municipality) controlled enterprises; and lease with right to purchase. It should be noted that combination of privatization methods apply for privatization of state controlled enterprises that are important infrastructure entities or entities holding dominant position in certain branches of economy.

Privatization Commission and State Property Fund are institutions in charge.

Privatization Commission is state institution, authorized to supervise privatization process and accountable to Seimas. State Property Fund acts as proprietor during privatization of state owned objects. Under separate arrangements with municipalities, Property Fund may also act as representative of individual municipality during privatization of municipal property. Responsibilities of Property Fund include drafting of list of privatization objects and submitting it to Government for approval. Both Privatization Commission and Property Fund are assisted by municipal property privatization commissions and municipal property funds.

List of privatization objects may include all state or municipality owned shares of enterprises, unless privatization of particular public or private limited company is limited by law, and other objects, which municipalities decide to privatize. Property held by exclusive ownership title by Republic of Lithuania, dwelling-houses held by ownership title by municipalities and property ownership title to which, in accordance with laws of Republic of Lithuania, is claimed by natural persons and religious communities.

19.04 REAL PROPERTY:

Natural persons and enterprises, irrespective of their nationality, are entitled to hold ownership, lease or usage rights in respect of buildings and other real estate in compliance with Lithuanian law. Ownership of land by all foreigners and enterprises, including those with invested foreign capital, previously was expressly forbidden by Constitution of Republic of Lithuania. On June 20, 1996 Constitution was supplemented with provision establishing that municipalities, other national subjects, including enterprises—legal entities, as well as foreign entities engaged in economic activities in Lithuania and complying with certain criteria, set by Constitutional Law, may be allowed to acquire ownership of nonagricultural land plots.

Law on Amending of Art. 47 of Constitution (adopted on Jan. 23, 2003) cancelled earlier constitutional provision. According to subsequent amendments of Constitutional Law (adopted on June 20, 1996, am’d on Mar. 20, 2003), legal entities registered in Lithuania, irrespective of origin of capital invested into them, foreign entities and natural persons that meet criteria of European and Transatlantic Integration could acquire ownership of land plots, internal waters and forests subject to same conditions and procedure as citizens and entities of Republic of Lithuania from date of Lithuania’s accession to EU. Transitional period which will expire on May 1, 2011 is established for acquisition of land for agricultural and forestry use by foreign persons with exception for foreign citizens that have been residing and engaged in agricultural activities in Lithuania for three years and foreign entities that have established subsidiaries or affiliates in Lithuania. Foreign persons that fail to comply with criterion of European and Transatlantic integration are not allowed to acquire land, inland waters and forests by title in Lithuania and may only use land on other basis established by laws, e.g. lease, right of development, etc.

Agreements for sales of real property must be certified by public notary and for such agreement to be invoked against third persons it must be registered with Real Estate Register.

Lease of land is governed by CK. Agreement on lease of real property term of which extends beyond one year must be in written form. It also has to be registered with Real Estate Register to be invoked against third persons. Lessee’s rights to use part of land plot under buildings (structures) where leasehold is located are automatically secured by agreement on lease of buildings (structures). Maximum term of lease agreements of state owned land is set at 99 years. Term of lease of private land may be freely agreed by parties. State owned land is leased through public auctions, except for land plots which have buildings (structures) held by ownership title by natural or legal persons located on them. State owned land plots, leased through public auctions, are leased to persons offering highest price, rent for other state owned land plots is established by laws, and rent for privately owned land plots is negotiated by parties to land plot lease agreements. Agreements on sublease of whole or part of land plot may be concluded upon receipt of permission from lessor.

Law On Real Estate Register (adopted on June 21, 2001, am'd on May 27, 2003, June 28, 2007) came into force on July 1, 2001. Law regulates registration of ownership and other rights to real property, except mortgages, and restrictions thereon. Law also establishes order of registration of said rights, legal facts and changes thereto. For specific information refer also to Real Estate Register's website http://www.registrucentras.lt/.

20 TAXATION

20.01 ADMINISTRATION:

Taxation in Lithuania is both national (levied by State) and local (levied by municipalities). Most taxes levied by State are administered according to Law on Tax Administration (adopted on Apr. 13, 2004, am'd on July 8, 2004; Nov. 9, 2004; June 7, 2005; June 16, 2005; Oct. 19, 2006; Apr. 12, 2007; July3, 2007; Oct. 18, 2007; Nov. 8, 2007; Nov. 6, 2008; Dec. 22, 2008, Dec. 10, 2009): value added tax, excise tax, personal income tax of inhabitants, corporate profit tax, real estate tax, land tax, state natural resources tax, oil and gas resources tax, pollution tax, consular duty, stamp duty, inheritance tax, compulsory health insurance contributions, contributions to Guarantee Fund, gambling games tax, tax on registration of industrial property, state levies, tax on extra quota of white sugar, tax on additional sugar production, sugar production tax, custom duties, compulsory state social insurance contributions, deductions from income under Law on Forests, tax for use of state property on trust. State Tax Inspectorate and its local divisions are main administrators of above listed taxes. Administration of custom duties as well as of taxes levied on imports (excise tax, value added tax) and exports are performed by Customs House. Administration of social insurance contributions is performed by State Social Insurance Fund Board in accordance with Law on State Social Insurance (adopted on May 21, 1991, am'd on Apr. 16, 1992; May 12, 1994; Nov. 3, 1994; Nov. 29, 1994; Apr. 27, 1995; July 5, 1995; Oct. 17, 1995; May 28, 1996; June 6, 1996; Sept. 25, 1996; July 1, 1997; July 2, 1997; Dec. 10, 1998; Dec. 21, 1998; Mar. 16, 1999; May 18, 1999; Oct. 14, 1999; Nov. 4, 1999; Mar. 16, 2000; May 23, 2000; July 4, 2000; Dec. 20, 2000; Dec. 21, 2000; Oct. 11, 2001; Nov. 20, 2001; May 21, 2002; July 4, 2002; Dec. 3, 2002; Dec. 10, 2002; Apr. 17, 2003; Sept. 11, 2003; Oct. 7, 2003; Nov. 18, 2003; Nov. 4, 2004; May 19, 2005; Nov. 17, 2005; Dec. 23, 2005; May 4, 2006; June 8, 2006; Apr. 3, 2007; Dec 19, 2007; Apr. 7, 2008; Nov. 15, 2008; Dec. 30, 2008; Mar. 5, 2009; June 30, 2009; Aug. 4, 2009; Nov. 28, 2009; Dec. 31, 2009). Rates (tariffs) of taxes (duties), procedures of computation and payment are governed by number of specific laws and Government resolutions regarding particular kinds of taxes. Administration of local fees is governed by Law on Fees and Charges (adopted on June 13, 2000, am'd on July 10, 2001; Apr. 18, 2002; Apr. 23, 2002; Sept. 17, 2002; Apr. 15, 2004; Sept. 29, 2005; Dec. 8, 2005; Nov. 28, 2006; May 24, 2007; Sept. 18, 2007; Oct. 18, 2007; Apr 15, 2008; Nov. 25, 2008). (See topic 20.11 Fees and Charges.)

20.02 ALCOHOL, BEVERAGES AND TOBACCO TAXES:

Alcohol, beverages and tobacco products are objects of excise duty.

Law on Excise Tax (adopted on Jan. 29, 2004; Nov. 17, 2005; Dec. 15, 2005; Jan. 20, 2006; Dec. 7, 2006; Dec. 6, 2007; Dec. 19, 2008; July 23, 2009; Dec. 9, 2009) establishes such rates of excise duty on alcohol and beverages: beer— LTL 8.5 ([Euro]2.5) /% vol/hectolitre; wine and other fermented beverages with concentration of alcohol not exceeding 8.5% vol.— LTL 53 ([Euro]15.4) /hectolitre; other fermented beverages with concentration of alcohol exceeding 8.5% vol.— LTL 216 ([Euro]62.6) /hectolitre; ethyl alcohol— LTL 4,416 ([Euro]1,279) /hectolitre. Rates on tobacco: combined excise rate (which consists of special element calculated for 1,000 items and valuable element calculated of maximum retail price) for cigarettes—special element LTL 132 ([Euro]38.2) and valuable element 25%; cigars and cigarillos— LTL 38 ([Euro]11) /kilogram; tobacco for smoking— LTL 111 ([Euro]32.2) /kilogram.

Certain types of tobacco are exempted from excise tax.

See also category 3 Business Regulation and Commerce, topic 3.09 Licenses, Business and Professional.

20.03 BUSINESS CERTIFICATES:

Under Law on Income Tax of Individuals (see topic 20.19 Personal Income Tax), natural persons having acquired, for set fee, business certificate for certain business activities are not subject to personal income tax on income derived from these activities. Procedure of issuance of business certificates is regulated by Government Resolution on Procedure of Issuance of Business Certificates for Individuals (adopted on Nov. 19, 2002, am'd on Apr. 29, 2003; June 30, 2003; Aug. 30, 2003; Feb. 17, 2004; May 31, 2004; Nov. 21, 2005; Sept. 11, 2006; Jan. 9, 2008; Apr. 29, 2008; Aug. 20, 2008; May 13, 2009; Jan. 12, 2010).

20.04 BUSINESS TAXES:

Legal entities engaged in business activity are subject to corporate profit tax.

Corporate Profit Tax.

Law on Profit Tax (adopted on Dec. 20, 2001, am'd on June 20, 2002; July 2, 2002; Dec. 5, 2002; July 1, 2003; July 4, 2003; Oct. 14, 2003; Jan. 22, 2004; Mar. 30, 2004; Apr. 8, 2004; Apr. 13, 2004; Apr. 29, 2004; June 1, 2004; Aug. 23, 2004; Oct. 12, 2004; June 7, 2005; June 21, 2005; June 30, 2005; July 5, 2005; Dec. 20, 2005; June 13, 2006; Oct. 19, 2006; Dec. 5, 2006; May 3, 2007; July 3, 2007; Oct. 25, 2007; Apr. 8, 2008; June 17, 2008; July 14, 2008; Dec. 18, 2008; Dec. 22, 2008; Feb. 19, 2009; July 22, 2009; Dec. 9, 2009). Payers of profit tax are: (1) Lithuanian taxable entities (legal persons who are registered under procedure established by legal acts of Lithuania) and (2) foreign taxable entities (foreign legal entities and organizations established or otherwise organized according to laws of foreign states and residing in foreign states except for European Economic Interest Grouping [EEIG]). Taxable base for Lithuanian taxable entities is all income received in Lithuania and abroad, for foreign taxable entities—(1) income of foreign entity received from activity carried out through permanent establishments in Lithuania and income received abroad, if income is related to activity of foreign entity carried out through permanent establishments in Lithuania; (2) income sourced in Lithuania and received by foreign entity otherwise than through permanent establishments in Lithuania. Tax rates: (i) 15% tax rate must be applied to taxable profit of Lithuanian entities and permanent establishments of foreign entities; (ii) 5% tax rate must be applied to taxable profit of entities where average recorded number of employees does not exceed ten people and income received during taxable period does not exceed LTL 500,000 ([Euro]144,810), except for certain cases; (iii) 10% tax rate must be applied to income (without any deductions) of foreign entities received as interest and royalties source of which is in Lithuania, received not through their permanent establishments in Lithuania. Starting from Jan. 1, 2010, interest paid by Lithuanian entity to foreign entities is not subject to withholding tax provided that such foreign entities are registered in country of European Economic Area or in country where double taxation treaty is signed with Lithuania; royalties paid to foreign entities that are factual receivers of payments and are registered in EU member state are tax exempt, provided that payer of royalties and factual receiver of royalties have been associated parties for not less than two years. Income received as interest on deposits and subordinated loans that will meet criteria established by legal acts of Lithuanian bank must not be subject to taxation. Interest on Government securities, issued in international financial markets, must be exempted from taxation as well; (iv) 15% tax rate must be applied to income (without any deductions) of foreign entities received from sale, transfer or lease of property that is immovable, and is located in territory of Lithuania. Foreign entity, having received income from sale, or transfer of property that is immovable, must have right to apply to local tax administrator for re-calculation of profit tax that has already been calculated and paid. In such case, profit tax is calculated on income received due to increase of value of property. Annual bonuses paid to foreign entities being members of board of Lithuanian entities are also subject to profit tax at rate of 15%; (v) dividends, received and paid by Lithuanian entities, as well as other income received as result of profit distribution, must be subject to taxation at 15% tax rate (prior to Jan. 1, 2002—29%). Dividends received by Lithuanian entity from Lithuanian or foreign entities wherein Lithuanian entity that receives dividends continuously (for at least 12 past months, including moment of distribution of dividends) owns more than 10% of voting shares (interest) is not subject to profit tax. Said provision must not be applied in case taxable profit of foreign entity that pays dividends is not subject to taxation at profit tax or dividends are received from foreign entity that is registered or otherwise organized in purposive territories (tax havens). Dividends received by Lithuanian entity from foreign entity registered in state of European Economic Area and which is payer of profit tax, are tax exempt. Dividends paid by Lithuanian entity to foreign entity wherein foreign entity that receives dividends continuously (for at least 12 past months, including moment of distribution of dividends) owns more than 10% of voting shares (interest), are not subject to taxation. Said provision must not be applied when foreign entity that receives dividends is registered or otherwise organized in purposive territories (tax havens). Withholding tax on income (sums) indicated in items (iii), (iv) and (v) above must be withheld and paid to budget by entity which has made payments to foreign entity, i.e. by Lithuanian entity, permanent establishment of foreign entity in Lithuania or permanent resident of Lithuania. Withholding tax on income of foreign entities (received not through their permanent establishments in Lithuania) received in consideration for information provided about industrial, commercial or scientific know-how is taxed by 10%. Profit tax is paid in advance, with exception of: newly registered companies for first taxable year; companies whose gross income during previous taxable period did not exceed LTL 1 million ([Euro]0.29 million). Amount of advance payment is calculated by taxpayer. Advance payment may be calculated in accordance with: (1) Results of previous year. Advance payment for first nine months of taxable period is based on amount of profit tax actually calculated for previous taxable period. Advance payment for 10 to 12 months of taxable period is based on profit tax calculated for previous taxable period. Profit tax advance payment of each quarter must be ¼ of profit tax amount actually calculated during said taxable periods; (2) supposed amount of profit tax for taxable period. Taxpayer may choose to make estimated quarterly tax payments on profit in amount of ¼ estimated profit tax sum. Amount of calculated advance profit tax may not be less than 80% of amount of actual annual profit tax. Tax advance payment must be made not later than by last day of every quarter of taxable period and not later than by 25th day of last month of last quarter of taxable period. Annual profit tax and annual fixed profit tax returns together with annual financial statement (if necessary) must be filed and profit tax must be paid by Oct. 1 of next taxable period. Advance profit tax return must be filed respectively by Jan. 31 and Oct. 31, if paid according to results of previous year and Jan. 31, if paid according to supposed amount of profit tax for taxable period. If there is difference between tax amount calculated in annual profit tax return and advance tax amount actually paid during taxable period, prepayment must be made or overpayment will be refunded.

Social Tax.

Temporary law on Social Tax (adopted on June 7, 2005). This law was applicable in calculating social tax for tax periods commencing in 2006 and 2007.

Profit Tax for Partnerships and Personal Enterprises.

Partnerships and personal enterprises are taxed as companies under Law on Profit Tax.

Road Tax.

For road tax see topic 20.18 Motor Vehicle Taxes.

20.05 CONSUMPTION TAXES:

There are no special consumption taxes in Lithuania other than VAT, environmental taxes, customs as well as excise duties.

20.06 CUSTOMS DUTY AND TAX:

Lithuania follows general customs set-up of EU, in accordance to which all customs duties on intra-EU exchange have been abolished. Movement of goods within EU is not subject to any customs. However, goods which are imported into EU from non-EU countries are subject to Common Customs Tariff, enforced by Member States on behalf of Community. Rates of customs duties imposed on imported goods differ depending on nature and value of goods and their origin. See category 13 Foreign Trade and Commerce.

When fixing rates of duties, goods are classified according to Combined Customs Tariffs and Foreign Trade Statistical Nomenclature, compiled in compliance with Brussels Convention on Harmonised Commodity Description and Coding System as of June 14, 1983 and Protocol of Amendment thereto of June 24, 1986, as well as with Combined Customs Tariffs and Statistical Nomenclature applied in EU.

Imported goods are also subject to excise tax and VAT. Excise tax is levied on custom value of imported goods and import duty. 21% of VAT is levied on customs value of goods, plus import duty and excise tax (if applicable).

20.07 EMPLOYMENT TAX:

Law on Income Tax of Individuals (adopted on July 2, 2002, am'd on Dec. 10, 2002; Jan. 28, 2003; Apr. 22, 2003; July 1, 2003; July 4, 2003; Oct. 16, 2003; Nov. 25, 2003; Dec. 18, 2003: Jan. 22, 2004; Mar. 16, 2004; Mar. 23, 2004; Apr. 8, 2004; Apr. 29, 2004; June 15, 2004; Aug. 23, 2004; Oct. 12, 2004; Nov. 2, 2004; June 7, 2005; June 9, 2005; Sept. 29, 2005; Dec. 15, 2005; Dec. 20, 2005; Dec. 22, 2005; Mar. 30, 2006; Apr. 25, 2006; Apr. 27, 2006; July 4, 2006; July 19, 2006; Oct. 3, 2006; Nov. 9, 2006; Dec. 7, 2006; Apr. 3, 2007; Jan. 18, 2008; Apr. 10, 2008; May 15, 2008; Dec. 23, 2008; Feb. 19, 2009; July 22, 2009; Dec. 9, 2009). Taxpayers are: (1) Residents of Lithuania who pay tax on all income source of which is in Lithuania and outside Lithuania, (2) nonresidents of Lithuania who pay tax on income received from individual activity carried out through permanent base in Lithuania and income received in foreign countries which is referred to permanent base in Lithuania when income is related to activity of nonresident through permanent base in Lithuania, also income received not through permanent base in Lithuania, however, source whereof is in Lithuania (e.g., income from labor relations etc.). Rate of personal income tax which is applicable for income of individuals received in relation to employment or activity in its essence corresponding to employment has been reduced to 24% as of Jan. 1, 2008 and it has been be reduced to 15% as of Jan. 1, 2009. Nontaxable amount of income (monthly amount is calculated according to formula: 470—0.2x monthly gross employment-related income—LTL 800 ([Euro]231.7)]); not applied if monthly gross employment-related income exceeds LTL 3,150 ([Euro] 912.3) and additional nontaxable amount of income as well as certain expenses incurred by resident of Lithuania (life insurance premiums, pension contributions, interest on certain loans obtained for construction or acquisition of housing, amounts paid for studies and lease payments for one personal computer and/or installation of Internet access equipment, acquired during period starting from 2004 to 2008) must be deducted from taxable income.

Social Insurance Tax.

Law on State Social Insurance (adopted on Nov. 4, 2004, am'd on May 4, 2006; June 8, 2006; Apr. 3, 2007; Dec. 20, 2007; Nov. 6, 2008; Nov. 11, 2008; Dec. 19, 2008; Feb. 17, 2009; June 18, 2009; June 22, 2009; Nov. 12, 2009; Dec. 22, 2009). Social security contributions are paid by both employers and employees. Employees pay 3% of gross salary as social security contributions, employers must pay 30.98% of total wages per month. Social security taxes are paid from amount of wage.

Health Insurance Tax.

Law on Health Insurance (adopted on Dec. 3, 2002, am'd on Nov, 18, 2003; Dec. 16, 2003; Apr. 22, 2004; Nov. 4, 2004; Nov. 23, 2004; Dec. 22, 2004; Apr. 28, 2005; May 12, 2005;

July 5, 2005; May 4, 2006; Nov. 16, 2006; June 26, 2007; July 4, 2007; Nov. 11, 2008; Dec. 22, 2008; Feb. 19, 2009; July 22, 2009; Oct. 22, 2009). Employment-related income is subject to 6% health insurance tax which is withheld by employer from gross wage of employee. Starting from Jan. 1, 2009, obligation to pay health insurance tax is also established for other categories of taxpayers (e.g. individuals engaged in individual business activities, individuals acting under authorship agreements, entrepreneurs, etc.). Tax rate is 9%. However, taxable base differs upon category of taxpayers. (See category 14 Health, topic 14.02 Health System and Health Insurance.)

Payments to Guarantee Fund.

According to Law on Guarantee Fund (adopted on Sept. 12, 2000, am'd on Feb. 27, 2001; Dec. 6, 2001; Oct. 8, 2002; July 1, 2003; Apr. 15, 2004; Sept. 29, 2004; Nov. 4, 2004; Mar. 23, 2006; June 26, 2007; June 26, 2008), deductions to Guarantee Fund at rate of 0.1% are imposed on wages paid by all enterprises to their employees. Capital of Guarantee Fund is used for payments to employees in case of bankrupt or insolvent enterprises, who terminated labor relations, or who are still operating but enterprise is indebted to them.

20.08 ENVIRONMENTAL TAXES:

State Natural Resources Tax.

Law on Taxes on State Natural Resources (adopted on Mar. 21, 1991, am'd on Apr. 30, 1996; Oct. 12, 2000; Sept. 19, 2002; June 10, 2003; May 25, 2006; July 1, 2008; July 23, 2009). Payers for state-owned natural resources tax are legal and natural persons having permit to take state-owned natural resources. Payers for hunted animal resources tax are legal and natural persons having permit to hunt animal resources in hunting area. Payers of tax are legal and natural persons using state-owned natural resources (state-owned land or continental shelf, fossil fuels, etc.) for commercial purposes. Tax rate, which depends on type of resources, is revaluated every year according to consolidated consumer price index. Index coefficient is definable by dividing consumer price index from 100. Index-linked tax rate comes into force from Jan. 1 after taxing period. For non-declared or declared less than gained amount of state-owned natural resources and/or without permission gained state-owned natural resources, higher tax rate is applied, which is computed by multiplying respective tax rate by coefficient of ten.

Pollution Tax.

Law on Pollution Tax (adopted on May 13, 1999, am'd on Oct. 12, 2000; Jan. 22, 2002; Dec. 10, 2002; Apr. 29, 2003; June 10, 2003; Jan. 22, 2004; Apr. 15, 2004; Mar. 31, 2005; Mar. 16, 2006; Jan. 29, 2008; May 12, 2009). According to this Law payers of tax are: (1) Natural and legal persons emitting pollutants from stationary sources of pollution which are required to obtain permissions to use natural resources; (2) natural and legal persons emitting pollutants from mobile sources of pollution used in economical-commercial activity (except for natural and legal persons emitting pollutants from motor vehicles) (i) with installed gas neutralisation system, (ii) used in agricultural activity, (iii) using biofuel matching certain standards, or (iv) used by natural persons engaged in activity for which patent is obtained); (3) manufacturers and importers of certain kinds of goods (e.g. tires, accumulators, batteries, hydraulic shock-absorbers, air and fuel filters, etc.) and/or packages. Tax rates are determined separately for each group of pollutants and established per one ton of pollutants or per one kilogram of taxable goods and packages. Persons implementing measures meant to decrease amount of emitted pollutants by not less than 5% are entitled to tax incentives. Manufacturers and importers of taxable goods and packages are released from duty to pay pollution tax for amount of goods and packages which were exported from Lithuania, and it can be proved by certain documents. Manufacturers and importers of taxable goods and packages are also exempted from pollution tax to extent they have been meeting goods or package waste reuse and/or recycling target set by Government, e.g. if taxpayer meets such goods or package waste reuse and/or recycling target by 50%, half of its taxable goods and/or taxable packages are exempted from tax. If amount of emitting pollutants is in excess of established norm, increased rate is applied. Tax is calculated and paid by taxpayer quarterly or once every six months. One-year taxable period is established for taxable persons emitting waste of production or packages.

20.09 ESTATE TAX:

None. See also topic 20.15 Inheritance Tax.

20.10 EXCISE TAXES:

Law on Excise Tax (adopted on Jan. 29, 2004, am'd June 16, 2005; Nov. 17, 2005; Dec. 15, 2005; Jan. 20, 2006; Dec. 7, 2006; Dec. 6, 2007; Dec. 19, 2008; July 23, 2009; Dec. 9, 2009). Payers of excise tax are importers of ethyl alcohol and alcoholic beverages, tobacco products, fuel, coal, coke and lignite, as well as owners of stores for taxable goods. Payers of excise tax are also manufacturers of taxable goods if they are produced outside special stores. Manufacturers of taxable goods need to establish special stores for manufactured goods. Starting from Jan. 1, 2010, payers of excise tax are independent or public electricity suppliers and/or electricity importers (other than suppliers) and/or other persons who acquire electricity from other EU Member States.

Law provides for concepts of registered tradesman and non-registered tradesman. Registered tradesmen as well as non-registered tradesmen are entitled to obtain for business purposes excise levied goods from any other EU Member State; however, non-registered tradesmen are subject to additional requirements in terms of ensuring payment of excise duties, i.e. before procuring excise levied goods from any other EU Member State such persons must provide prior security for payment of excise duties.

General principle of taxation of excise levied goods applies in state in which they are actually consumed. When transporting excise levied goods to another Member State, such goods will be transported with deferred payment of excise duties. Law provides specific tax rates for each kind of goods (see topics 20.02 Alcohol, Beverages and Tobacco Taxes and 20.13 Gasoline and Special Fuels Taxes). Declaration is filed and tax is paid before 15th day of following month, however, certain exceptions apply.

20.11 FEES AND CHARGES:

Law on Fees and Charges defines state fees and charges as compulsory monetary contribution for services (issue of documents having legal power or duplicates thereof, their re-registration and other services) provided by state and municipalities, institutions, establishments, services or organizations, except for courts. It also regulates local fees and charges—compulsory contributions established upon decision of municipalities, which are applicable within territory of that municipality. State fees and charges are collected for, inter alia: registration with registry offices, amendment of records in civil registrations and supplement thereof; issuance of citizenship papers, documents concerning going abroad and entry into Republic of Lithuania, residence of Republic of Lithuania, documents on employment of foreigners, etc.; issuance or de-registration of license (permit) to be engaged in licensed activities; other services provided by state institutions. Government establishes specific list of objects subject to state fees and charges. Institutions are not entitled to demand from legal entities or natural persons to compensate services provided, otherwise than to pay state or local fees or charges. Law provides for cases of exemption from state fees or charges and repayment thereof. Municipalities are entitled to establish local fees or charges within territory of municipality only for, inter alia: issuance of permit to perform excavation works in municipality public usage territory, to fence it off or part thereof or limit traffic therein; issuance of permit to engage in trade or provide services in public places; issuance of permit to establish external visual commercial advertisement on objects held by municipality; issue of permit to organize commercial events in territories held by municipality; issuance of permit to drive by mechanical transport means into state protected territories, protected reservations; usage of parking lots established by municipalities; registration of pets (dogs and cats) and keeping them in multi-flat houses; collection of utility waste from possessors of waste and maintenance of waste, issuance of permit to install temporary movable equipment within territory of municipality; issuance of permit to sell I, II and TO type of civil pyrotechnics; and usage of infrastructure of inhabited locality which has resort status.

20.12 FOREIGN INVESTMENT TAXES:

Law on Profit Tax, Law on Income Tax of Individuals, Law on Investment (adopted on July 7, 1999, am'd on Feb. 17, 2000; May 2, 2000; July 11, 2001; June 24, 2003; July 1, 2003; July 15, 2004; Nov. 2, 2004; June 16, 2009). Tax incentives for foreign investors (reduction of profit or income tax by 50%-100%) which were eliminated as of Apr. 1, 1997, continue to apply to foreign investments made prior to that date. In case if foreign investor within three years from Oct. 1, 1998 made investment amounting to LTL 200 million ([Euro]57.92 million) into entity registered in Lithuania, Government of Republic of Lithuania was obliged to enter into Investment Agreement with such investor(s), whereby investor(s) would be assured that tariffs of direct taxes established and applicable by time of investing would not be increased for that particular investor(s) during period of five years. At its own discretion, Government may prolong term of application of tax incentive up to ten years to investors that are considered strategic investors. These tax incentives expired at end of taxable period started in 2003. It should be noted that according to Lithuanian laws national investors and foreign investors must be treated equally (non-discrimination principle), so foreign investors enjoy same tax incentives as national ones. (See topic 20.23 Tax Incentives.)

Law on Fundamentals of Free Economic Zones (adopted on June 28, 1995, am'd on Apr. 2, 1996; June 26, 1997; Apr. 22, 1999; Nov. 9, 1999; Sept. 12, 2000; Apr. 19, 2001; Dec. 18, 2001; June 20, 2002; Feb. 12, 2004; Apr. 27, 2004; Nov. 4, 2004; Nov. 11, 2004). In case investments in FEZ enterprise have reached [Euro]1 million and not less than 75% of total revenue of such company is received from activity carried out in FEZ, such enterprise must be exempt from profit (income) tax for six years after investments into company had reached amount of [Euro]1 million and for subsequent ten years it must pay tax reduced by 50% rate.

20.13 GASOLINE AND SPECIAL FUELS TAXES:

No specific regulation. Gasoline and fuel are objects of excise tax. Tax rates per 1000 litres on motor petrol: which does not contain plumbum— LTL 1,500 ([Euro]434.4) motor petrol containing plumbum— LTL 2,000 ([Euro]579.2). Kerosene: LTL 1,140 ([Euro]330.2). Gasoline: LTL 947 ([Euro]274.3) (except for gasoline used for heating, which is taxed at LTL 73 [[Euro]21.1]/1000 litres rate). Liquid fuel (fuel oil): LTL 52 ([Euro]15.1) /1000 litres. Oil gas (except for natural gas): LTL 1,050 ([Euro]304.1)/1000 litres. Aviation fuel, ship fuel, mineral fuel and gasoline, as well as certain other power products, could be released from excise tax under certain conditions.

20.14 GIFT TAX:

Law on Income Tax of Inhabitants. Gifts from spouses, children (foster children), parents (foster parents), brothers/sisters and grandparents are treated as nontaxable income. Same rule applies to other persons, except for those residing in tax havens, if value of donations does not exceed LTL 8,000 ([Euro]2,317) per year. Personal gifts granted in accordance with procedure prescribed by laws of Republic of Lithuania and donations and gifts received during political campaign and used for that campaign in accordance with procedure prescribed by legal acts of Republic of Lithuania are also treated as non-taxable income. All other donations are taxed at 15% rate

20.15 INHERITANCE TAX:

Law on Tax on Inherited Property (adopted on Dec. 10, 2002, not am'd). Inheritance tax is applied at 5% rate when taxable value of property is less than LTL 0.5 million ([Euro]0.15 million), and at 10% in all other cases. Inheritance tax is not imposed on property inherited by close family members, sisters, brothers, foster-children, foster-parents, also on part of taxable value of property, which does not exceed LTL 10,000 ([Euro]2,896).

20.16 LOCAL GOVERNMENT TAXES:

Law on Fees and Charges. (See topic 20.11 Fees and Charges.)

20.17 MINES, MINERALS AND FISHERIES:

Oil and Gas Resources Tax.

Law on Tax on Oil and Gas Resources (adopted on May 20, 2003). Payers of tax are: Lithuanian and foreign taxable entities and natural persons extracting oil and gas in territory of Lithuania and its economic zone in Baltic Sea. Tax on oil and gas resources consists of base tariff and compensatory tariff. Base tariff is imposed on oil and gas extracted from all deposits. Compensatory tariff is imposed on oil and gas extracted from deposits for search and/or exploration whereof state funds have been used. Law establishes following tariffs of tax: (1) 20% base tariff is imposed on oil and gas from deposits in which extraction was started prior to July 1, 2003; (2) 2%-16% base tariff, depending on extent of extraction, is imposed on oil and gas from deposits in which extraction was started after July 1, 2003; (3) 9% compensatory tariff is established for oil and gas from deposits which have been found and explored using state funds.

20.18 MOTOR VEHICLE TAXES:

Law on Financing of Road Supervision and Development Programme (adopted on Oct. 12, 2000, am’d on Dec. 21, 2001; Apr. 9, 2002; May 29, 2003; July 4, 2003; Oct. 14, 2003; Apr. 15, 2004; Nov. 9, 2004; June 15, 2006; June 22, 2006; Nov. 9, 2006; June 7, 2007; July 4, 2007; Dec. 20, 2007; June 17, 2008; Dec. 23, 2008). Payers of contributions are owners or users of: (1) Cargo vehicles registered in Republic of Lithuania; (2) vehicles (registered in Republic of Lithuania and foreign states, including Member States of European Union) which are used on roads of highest category (trunk-roads); (3) vehicles (registered in Republic of Lithuania and Foreign States, including Member States of European Union) or combinations of vehicle dimensions whereof, when laden or non-laden, exceed authorised, and/or when maximum authorised axle(s) load and/or maximum authorised gross weight of vehicle (vehicle combination) are exceeded. Tax rates of first group (1) depend on category of vehicle and vary from LTL 300 ([Euro]87) to LTL 6,690 ([Euro]1,938). Contribution is paid prior to annual technical inspection of vehicle. The payers of second group (2) are divided into three categories: owners or users of (i) buses (annual rate depends on type, category, class and group of vehicles and varies from LTL 500 ([Euro]145) to LTL 2,600 ([Euro]753)), (ii) cargo vehicles (annual rate depends on type, category, class and group of vehicles and varies from LTL 600 [[Euro]174] to LTL 3,600 [[Euro]1,043]), and (iii) special vehicles (annual rate depends on type, category, class and group of vehicles and varies from LTL 300 [[Euro]87] to LTL 1,200 [[Euro]348]). Tax rates of third group (3) depend on gauge of exceeded parameters. If (i) maximum authorized axle(s) load or (ii) vehicle dimensions are exceeded, annual tax rate varies from LTL 168 ([Euro]49) to LTL 4,960 ([Euro]1,437). In case weight of vehicle is exceeded, tax rate is set on mileage, i.e. from LTL 3 ([Euro]0.9) to LTL 6 ([Euro]1.7) per ten km of drive.

20.19 PERSONAL INCOME TAX:

Law on Income Tax of Individuals. Taxpayers are: (1) Residents of Lithuania who receive income sourced in Lithuania and outside Lithuania, (2) nonresidents of Lithuania who receive income from individual activity carried out through permanent base in Lithuania and income received in foreign countries which is referred to permanent base in case income is related to activity of nonresident of Lithuania through permanent base in Lithuania, also income received not from permanent activity in Lithuania, however, source whereof is in Lithuania:

interests; income from distributed profit; income from management; income from lease of property located in Lithuania which is immovable in its nature; royalty; employment-related or similar income; income from performing activity in Lithuania incidental to employment relations or relations in their essence corresponding to employment relations; income from sports activity; income from activity of artists; income received from sale or other transfer with title of movable object if that object is subject to legal registration according to laws of Lithuania, as well as immovable property located in Lithuania; indemnities received for infringement upon copyrights or neighboring rights. Law provides for two tariff rates of personal income tax—15% and 20%. 20% tariff rate is applied to income from distributed profit (dividends). 15% tariff rate will be applied to all other taxable income of individuals, for example: (1) income received by unlimited civil liability participant from taxed profit of such entity, as well as interest; (2) income of sportsmen; (3) income of artists; (4) royalties; (5) income received in accordance with copyright agreement from creative activity; (6) income from sales or other transfer of ownership of personal property, securities; (7) income received from lease of real estate; (8) certain pension benefits and refundable contributions; (9) certain types of indemnities under life insurance agreement; (10) certain refundable life insurance premiums paid to inhabitant according to terminated life insurance agreement and some other income; (11) employment-related income, (12) income from individual business activity, etc. Pursuant to provisions of this Law, income of resident of Lithuania will also include positive income of controlled foreign unit, i.e. total income or part of income of controlled taxable unit registered or otherwise organized in determined states or zones, which is proportionate to number of shares (interests, stakes), votes or rights to profit of controlled taxable unit held by resident of Lithuania. Law provides for possibility for tax administrator to adjust prices specified by related persons in transaction or transactions where such prices fail to comply with fair market prices, taking into account peculiarities of economic operation underlying in such transactions, or to redefine income or payments.

When establishing taxable income, following must be deducted from income: (1) Non-taxable income (certain types of benefits; compensations; insurance indemnities; pensions and pension benefits; certain types of interest; received charity; income received as inheritance and gift [except for income received as gift from persons other than spouse, children (foster children), parents (foster parents), brothers/sisters and grandparents]; income from sales or other transfer into ownership of real estate and movable assets of compulsory registration not used in individual activity; income for sold or otherwise transferred into ownership securities; received indemnification of material and moral loss; received maintenance; scholarships; lottery winnings; paid life insurance premiums and pension contributions, and some other monetary amounts); (2) income received from activity specified in business certificate; (3) permitted deductions related to receipt of income from individual activity (except for expenses related to individual activity carried out under business certificate, sports activity and activity of artists); (4) acquisition price of assets of non-individual activity sold or otherwise transferred into ownership within taxable period, and expenses related to sales and other transfer into ownership of such assets; (5) non-taxable amount of income (monthly amount is calculated according to formula: LTL 470 [[Euro]136] — 0.2x [monthly gross employment-related income—LTL 800 ([Euro]232); not applied if monthly gross employment-related income exceeds LTL 3,150 [[Euro]912]) and additional non-taxable amount of income; (6) certain expenses incurred by resident of Lithuania (life insurance premiums, pension contributions, interest on certain loans taken, amounts paid for studies and lease payments for one personal computer and/or installation of Internet access equipment, acquired during period starting from 2004 to 2008).

Law provides for division of income into classes. Income of A class comprises income received from Lithuanian unit, from foreign unit through its permanent establishment in Lithuania and from nonresident of Lithuania through his/her permanent base in Lithuania, except for winnings from gambling games and lotteries, income received by participant of unlimited liability unit, and income from individual activity, as well as income of non-tax resident received from sales and other transfer into ownership of immovable and movable property in respect of which legal registration is required; income received from resident of Lithuania incidental to employment relations or relations in their essence corresponding to employment relations, income from sports activity, income from activity of artists, interest and royalties. Income of B class includes all income which is not attributed to A class. Law introduces obligatory declaration of income and income tax calculated on such income. Certain residents of Lithuania are discharged from obligation to submit declarations if they: (1) Do not intend to exercise right to deduct from income non-taxable amount of income and additional non-taxable amount of income and/or non-taxable income, and (2) within appropriate taxable period received only A class income. Income declarations are submitted until May 1 of calendar year following taxable period. It should be noted that income declaration must be accompanied by supplement in established form containing information about directly or indirectly possessed shares (interests, stakes) of controlled units or other rights to portion of distributed profit or exclusive rights to acquire them, as well as name and domicile of controlled unit, list of managers.

For certain types of activities obligatory acquisition of business certificates is established. Natural persons having acquired business certificate for certain business activities do not pay personal income tax on income derived from these activities. Such individuals are obliged to file their annual income declaration by May 1 of calendar year following taxable period. (See topic 20.03 Business Certificates.)

20.20 PROPERTY TAXES:

Law on Real Estate (adopted on June 7, 2005, am’d on Mar. 30, 2006; May 25, 2006; Oct. 24, 2006; Apr. 3, 2008, Feb. 19, 2009; Dec. 17, 2009). Object of taxation is: (1) Real estate (or part thereof) owned by natural persons located on territory of Republic of Lithuania, except for structures (premises) of residential, garden, garage, farm, greenhouse, household, auxiliary property, science, religion and recreational purpose, fishery structures and engineering structures, unless they are real property used for economic or individual activity or are transferred for use to legal persons for unlimited duration or for period longer than one month; (2) real estate located in Republic of Lithuania which is owned by legal persons. Annual tax rate is from 0.3% to 1% (municipal council must establish specific tax rate) of taxable value of real estate which is deemed to be average market value of real estate (using mass real property evaluation method) and value of certain property defined in this law calculated according to recoverable value method. Also taxable value of real property may be deemed value of real property calculated upon performance of individual evaluation of real property, in accordance with Law on Basics of Property and Business Valuation, where following conditions were met: (i) Individual valuation has been performed with help of certain methods of determination of value as indicated in this law; (ii) market value specified in this valuation report corresponds to average market price of similar property; (iii) report’s terms and conditions permit use of report for adjustment of taxable value; and (iv) date of valuation falls within time limit laid down for submission of applications defined in this law. Taxpayers may submit request to property valuer to consider as taxable value of real property determined by individual valuation of real property, where average market value of such as determined with help of mass valuation or value of real property specified in clauses No. 3 and 4 below as determined by recoverable value method is different from value of real property as determined by individual valuation by more than 10%. Tax is calculated by taxpayers on taxable value of property established by territorial branches of State Enterprise Centre of Registers. Evaluation is performed at least every five years based on status as of Jan. 1 of calendar year: (1) Real property of commercial use is evaluated employing methods of comparative value (sales price analogues) and usage income value (income capitalization or cash flow discount) applying mass real property evaluation; (2) real property of residential, garden and garage (except for industrial garages) purpose is evaluated employing comparative value (sales price analogues) method applying mass real property evaluation; (3) engineering structures are evaluated employing replacement value method (calculating physical depreciation percent); (4) other real property is evaluated employing replacement value method (calculating physical depreciation percent), applying location adjustment coefficient which measures influence of location of real property. Tax declarations for appropriate tax period are submitted until Feb. 1 of next calendar year.

Law on Land Tax (adopted on June 25, 1992, am’d on Apr. 6, 1995; June 13, 1995; July 3, 1995; Apr. 30, 1996; Sept. 29, 2005; Dec. 22, 2005; Apr. 5, 2007). Land ownership is taxed at annual rate of 1.5% of land value. Amount of tax is calculated by tax inspectorates.

20.21 STAMP DUTY:

Stamp duty is paid only under Code of Civil Procedure—upon filing of civil actions, claims, etc. Amount of stamp duty to be paid depends on kind of claim and its amount. Non-property claims are subject to stamp tax amounting to LTL 100 ([Euro]29). Stamp tax to be paid for property claims (which are evaluated by certain sum of money) must be calculated using such rules: amount of claim not exceeding LTL 100,000 ([Euro]28,962) must be taxed at 3% rate; amount of claim from LTL 100,000 ([Euro]28,962) to LTL 300,000 ([Euro]86,886) —taxed at 2% rate; amount of claim exceeding LTL 300,000 ([Euro]86,886) —taxed at 1% rate. Total stamp tax for property claims may not exceed 30,000 LTL ([Euro]8,689).

20.22 SUGAR TAX:

Law on Quoted Sugar Production Tax and Additional Sugar Production Tax (adopted on Oct. 14, 2003, am’d on Jan. 20, 2006; Apr. 12, 2007). Quoted sugar production tax and additional sugar production tax is levied on white sugar quota and isoglucose quota set for white sugar and isoglucose producers listed by Ministry of Agriculture of Republic of Lithuania. Payers of tax are those defined in Council Regulation (EC) No. 318/2006 on common organisation of markets in sugar sector (adopted on Feb. 20, 2006). Sugar production tax rate is established in Council Regulation (EC) No. 318/2006.

Law on White Sugar Overquota Tax (adopted on Jan. 24, 2002, am’d on Apr. 1, 2004; Apr. 12, 2007). Object of tax is set in Council Regulation (EC) No. 318/2006. Tax must be paid by manufacturers of sugar and isoglucose listed by Ministry of Agriculture of Republic of Lithuania which have sugar and/or isoglucose in excess of established quotas. Tax rate is set in Commission Regulation (EC) No. 967/2006 (adopted on June 29, 2006).

20.23 TAX INCENTIVES:

Law on Profit Tax provides for following tax incentives: (1) 5% rate of profit tax (instead of 15%) is applied to taxable entities whose gross income during taxable period does not exceed LTL 500,000 ([Euro]144,810) and average number of employees does not exceed ten. However, non-profit entities where gross income received from business activities during taxable period does not exceed LTL 1 million ([Euro]0.29 million) must apply 0% tax rate to part of taxable profit amounting to LTL 25,000 ([Euro]7,240.5) and 15% to remaining part of taxable profit; (2) agricultural entities are exempted from profit tax; (3) undertakings operating in Free Economic Zones with capital investment not less than [Euro]1 million must be exempted from profit tax for six years, counting from first taxable period, and for following ten years profit tax is reduced by 50%; in addition, no real estate tax, no road tax, no taxes on dividends paid to investors, 50% discount on land lease tax (however, total incentives received by enterprises operating in Free Economic Zones may not exceed 65% for small and medium enterprises and 50% for large enterprises); (4) 0% profit tax rate is applied if more than half of company’s labor force consists of handicapped employees; if handicapped make up to 20%-30% profit tax is reduced by 25%; if between 30%-40%—by 50%, if 40%-50%—by 75%.

20.24 TREATIES AND AGREEMENTS:

Agreements for avoidance of double taxation are in force, inter alia, with following countries: Armenia, Austria, Azerbaijan, Belarus, Belgium, Bulgaria, Canada, China, Croatia, Czech Republic, Denmark, Estonia, Finland, France, Georgia, Germany, Greece, Hungary, Iceland, Ireland, Israel, Italy, Kazakhstan, Korea, Latvia, Luxembourg, Macedonia, Malta, Moldova, Netherlands, Norway, Poland, Portugal, Romania, Russia, Serbia, Singapore, Slovakia, Slovenia, Spain, Sweden, Switzerland, Turkey, U.K., Ukraine, U.S.A., Uzbekistan.

20.25 VALUE ADDED TAX:

Law on Value Added Tax (adopted on Mar. 5, 2002, am'd on Sept. 6, 2002; Sept. 24, 2002; Nov. 28, 2002; Jan. 21, 2003; Mar. 13, 2003; Apr. 22, 2003; June 24, 2003; July 4, 2003; Oct. 14, 2003; Nov. 11, 2003; Dec. 18, 2003; Jan. 15, 2004; Dec. 9, 2004; May 26, 2005; June 21, 2005; Nov. 17, 2005; Jan. 12, 2006; July 19, 2006; Nov. 28, 2006; Apr. 12, 2007; July 3, 2007; Oct. 25, 2007; Nov. 13, 2007; Feb. 1, 2008; Dec. 18, 2008; Dec. 23, 2008; June 23, 2009; July 22, 2009; July 23, 2009; Dec. 3, 2009). VAT is paid by Lithuanian or foreign legal and natural persons engaged in any economic activity. Lithuanian persons whose annual receipt of sale of goods or rendering services exceeds LTL 100,000 ([Euro]28,962) or who are engaged in rendering of services to foreign taxable persons (place of supply is foreign country) or acquisition of services from foreign taxable persons (place of supply is Lithuania) must register as VAT payer. Foreign persons who supply goods or render services in territory of Republic of Lithuania should register as VAT payers irrespective of amount of receipt, with some exceptions. Goods and services which are not subject to VAT: (i) services of healthcare of individuals and society rendered by institutions of healthcare and natural persons who obtained right to render such services; (ii) social services rendered by institutions of wardship of children and youth, institutions of wardship (guardianship) of old-aged or disabled people and other nonprofit organizations and goods related thereto; (iii) educational and training services, if rendered by legal persons which obtained special licenses; (iv) cultural and sport services listed in Law rendered by nonprofit organization; (v) certain services rendered by nonprofit organizations; (vi) post services rendered by public legal persons; (vii) television and radio services; (viii) insurance services excluding insurance and financial services related to export of goods as defined in law and services related to insurance and reinsurance rendered by insurance and reinsurance agents; (ix) financial services (granting of loans, issuance of guarantees, securities, currency and financial derivatives transactions, etc.); (x) payments received from participants in betting or gambling and from sale of lottery tickets; (xi) lease, sale or other transfer of immovable property (with some exceptions); (xii) import of goods if sale thereof is not subject to VAT, etc.; (xiii) purchase of goods from Member State when import of analogical goods is not object of VAT. Tax rates: 0% tariff is imposed on: (1) Goods exported from EC; (2) supply, maintenance, repair and/or reconstruction (modernization), lease or charter of ships which carry passengers and/or goods on international routes, sea fishing ships, ships for rescue and search works; supply, maintenance, repair and/or reconstruction (modernization) and lease or charter of aircraft if aircraft is supplied or leased to liable for tax subjects gaining more than half income per year from passenger and/or goods on international routes, as well as maintenance and/or repair if these services are rendered to above-mentioned subjects; (3) transportation of exported from EC goods or goods transited through territory of EC, and all services related thereto; (4) insurance and financial services related to export of goods; (5) goods and services for embassies, consulates, and missions of international organizations, also for their personnel and members of their family; (6) supply of goods to another Member State (with certain exceptions); (7) goods and services supplied to recipients of sponsorship; (8) maintenance of movable property owned by client residing abroad; (9) agent's services in respect of transactions effected outside territory of Lithuania; (10) goods imported into customs warehouses, free economic zones and free warehouses, duty-free shops, temporarily imported goods or goods temporarily imported for processing, etc.; 5% tariff is imposed on medicines and medicinal aids when acquisition costs thereof are fully or partly compensated under Law on Health Insurance (applicable until Dec. 31, 2010); 9% rate is imposed on (1) heating of living houses which are paid from state/municipal budgets, state-granted loans or special state funds (applicable until Aug. 31, 2010); (2) books and non-periodical information publications (applicable until Dec. 31, 2010); 21% rate—for all other goods and services.

20.26 WEALTH TAX:

None.

21 TRANSPORTATION

21.01 AIRCRAFT:

Law on Aviation (adopted on Oct. 17, 2000, am’d on Nov. 5, 2002; Sept. 23, 2003; Apr. 29, 2004; July 15, 2004; Feb. 15, 2005; Nov. 15, 2005; May 10, 2007; May 15, 2008) has established comprehensive regulatory system for functioning of both military and civil aviation. Law sets forth principles of regulation, air space management rules, requirements for air communication and airport activities. It also covers aircraft registration, licensing of air carriers and personnel, air safety and search and rescue. Civil Aviation Authority (CAA) is vested with implementation of law in sphere of civil aviation. CAA was established in 2001 by separating regulatory functions of former Directorate of Civil Aviation. At same time, service provision was handed over to state enterprise “Air Navigation”.

Lithuania has signed and ratified Convention of Warsaw of 1929 (and amendments including Hague Protocol of 1955, Guadalajara Convention of 1961) on international carriage by air; Tokyo Convention of 1963 on offenses and crimes committed on board aircraft; Hague Convention of 1970 on suppression of unlawful seizure of aircraft; Montreal Convention of 1971 on suppression of unlawful acts against safety of civil aviation and Montreal Supplementary Protocol of 1988 on acts of violence at airports; Convention for Unification of Certain Rules for International Carriage by Air of 1999; Montreal Convention of 1991 on the Marking of Plastic Explosives for the Purpose of Detection; Chicago Convention of 1944 on International Civil Aviation (and additional protocols including Montreal Protocol of 1947 and two Montreal Protocols of 1954, Buenos Aires Protocol of 1968, Vienna Protocol of 1971, Montreal protocols of 1977, 1980, 1984, 1989, 1990 and two Montreal Protocols of 1995); Helsinki Treaty of 1992 on Open Skies; Brussels Eurocontrol International Convention of 1960 relating to Cooperation for the Safety of Air Navigation (and additional protocols of Brussels Protocol of 1970, Brussels Protocol of 1978, Brussels Protocol of 1981, Brussels Protocol of 1997, Brussels Protocol of 2002); Vilnius Agreement of 2005 on the Promotion, Provision and use of GALILEO and GPS Satellite-based Navigation Systems and related Applications.

21.02 MOTOR VEHICLES:

Road traffic is regulated by Regulations on Road Traffic (adopted by Government on Dec. 11, 2002, am’d on Dec. 24, 2004; Oct. 5, 2006; Mar. 20, 2008, July 16, 2008; Sept. 30, 2009). Based on Regulations, speed limits in different types of roads are as follows: in motor highways — 130 km/h from Apr. 1 till Oct. 31 and 110 km/h from Nov. 1 till Mar. 31; motorways — 110 km/h from Apr. 1 till Oct. 31 and 100 km/h from Nov. 1 till Mar. 31; roads covered with asphalt — 90 km/h throughout year; other roads — 70 km/h throughout year; settlements and towns—50 km/h throughout year.

Republic of Lithuania is party to Vienna Convention on Road Traffic (1968) and Vienna Convention on Road Signs and Signals (1968) and its Supplementing Agreement of 1971.

21.03 SHIPPING:

Shipping in Republic of Lithuania is regulated by following basic internal legal acts: Law on Merchant Shipping (adopted on Sept. 12, 1996, am’d on May 19, 1998; June 22, 1999; Aug. 29, 2000; Sept. 26, 2000; Nov. 13, 2001; Apr. 3, 2003; July 3, 2003; Feb. 15, 2005; June 17, 2008; June 19, 2008), Law on Safe Navigation (adopted on Aug. 29, 2000, am’d on Sept. 26, 2000; Feb. 15, 2005; Sept. 14, 2006; May 22, 2008), Law on Klaipeda State Seaport (adopted on May 16, 1996, am’d on Sept. 25, 1997; Mar. 26, 1998; Oct. 5, 1999; Feb. 15, 2000; Aug. 29, 2000; Sept. 26, 2000; Oct. 10, 2000; Dec. 5, 2002; Sept. 12, 2004; Dec. 6, 2005; Sept. 14, 2006; Dec. 5, 2006; June 3, 2008), Regulations on Registration of Republic of Lithuania Seagoing Vessels (approved by Minister of Communications on July 4, 2005, am’d Dec. 3, 2007; Aug. 31, 2009; Jan. 5, 2010). Under Lithuanian law distinction is made between seagoing vessels and inland navigation vessels. Company intending to carry passengers by ships within Lithuania or to carry passengers and goods by ships on international routes must obtain appropriate license from Ministry of Communications. Company intending to provide ship agency, towage, salvage and underwater services must be certified by Ministry of Communications.

Lithuania is party to majority of basic International Conventions related to shipping.

22 TREATIES AND CONVENTIONS

22.01 TREATIES:

Lithuania is party to, inter alia, following international treaties and conventions:

General.

Convention on International Civil Aviation (1944), and its Protocols; Convention on World Meteorological Organization (1947); Convention on International Maritime Organization (1948); Statute of Council of Europe (1949); European Council Principal Agreement on Privileges and Immunities (1949), and its Protocol; Convention Establishing Customs Co-operation Council (1950); Vienna Convention on Law of Treaties (1969); International Telecommunication Convention (1982); Energy Chart Agreement (1994), and its Protocol; Agreement with Western Europe Union on Security (1997); United Nations Convention on Law of Sea (1982); Civil Law Convention against Corruption (2002); North Atlantic Treaty (1949); Additional Protocol to Anti-Doping Convention (2002); European Convention for Protection of Pet Animals (1987); Convention on Elaboration of European Pharmacopeia (ETS No. 50), text amended according to provisions of Protocol to Convention on Elaboration of European Pharmacopeia (ETS No. 134) (1989); European Convention for Protection of Animals for Slaughter (1979); European Convention for Protection of Animals kept for Farming Purposes (1976); Convention on Cybercrime (2001); International Convention for Suppression of Terrorist Bombings (1997); International Convention for Suppression of Counterfeiting Currency and Protocol (1929); Tampere Convention on Provision of Telecommunication Resources for Disaster Mitigation and Relief Operations (1998); WHO Framework Convention on Tobacco Control (2003); Convention on Law Applicable to Traffic Accidents (1971); Convention concerning Customs Facilities for Touring (1966); UN Convention against Corruption (2005); Convention on Protection and Promotion of Diversity of Cultural Expressions (2005); International Convention against Doping in Sport (2005); Convention on International Exhibitions (1928); Agreement on Transfer of Corpses (1973).

Arbitration.

New York Convention on Recognition and Enforcement of Foreign Arbitral Awards (1958); OSCE Convention on Conciliation and Arbitration (1992).

Consular and Diplomatic Relations.

Vienna Convention on Diplomatic Relations (1961); Vienna Convention on Consular Relations (1963).

Consular Conventions are in force with China, Georgia, Poland, Russia, Turkey, Ukraine. Political Treaties are in force with Bulgaria, Byelorussia, Estonia, France, Georgia, Germany, Hungary, Kazakhstan, Latvia, Moldavia, Poland, Romania, Russia, Turkey, Ukraine, U.S.A. and Baltic States (Charter of Partnership), Uzbekistan.

Data Protection.

Agreements “On Bilateral Protection of Secret Information” are signed with Czech Republic, Estonia, Germany, Italy, Latvia, Poland, Romania, Slovakia, Sweden, U.S.A.;

Convention on Persons' Security Relating to Personal Data's Automatic Management (ETS No. 108) with Amendments Adopted by European Council Ministers' Committee; Additional Protocol to Convention for Protection of Individuals with regard to Automatic Processing of Personal Data, regarding supervisory authorities and transborder data flow (2001).

Environment.

Paris Convention for Establishment of European and Mediterranean Plant Protection Organization (1951); Geneva Convention on Territorial Sea and the Contiguous Zone (1958); International Convention for Prevention of Pollution from Ships—MARPOL (1973), and Protocol (1978); Gdansk Convention on Fishing and Conservation of Living Resources in Baltic Sea and Belts (1973); Helsinki Convention on Protection of Marine Environment of Baltic Sea Area (1974); Bern Convention on Conservation of European Wildlife and Natural Habitats (1979); Convention on Long-Range Trans-boundary Air Pollution (1979) and its Protocols (1984, 1998); Vienna Convention for Protection of Ozone Layer (1985), and Montreal Protocol (1987); Basel Convention on Control of Transboundary Movements of Hazardous Wastes (1989); UN Framework Convention on Climate Change (1992); Convention on Biological Diversity (1992); EU Agreement on Relationships in Field of Fishing (1996); Convention on International Effect of Industrial Accidents; Convention on Long-Distance Air Pollution Carry Through; Cartegena Protocol on Biosafety to Convention on Biological Diversity (2000); European Landscape Convention (2000); Kyoto Protocol to United Nations Frameworks Convention on Climate Change (1997); Joint Convention on Safety of Spent Fuel Management and on Safety of Radioactive Waste Management (1997); Convention for Safeguarding of Intangible Cultural Heritage (2003); International Convention for Regulation of Whaling (1946); Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (1998); International Tropical Timber Agreement (2006).

Human Rights.

Geneva Conventions for Relief of Wounded and Sick in Armies in Field and Regarding Treatment of Prisoners of War (1929); Geneva Convention for Amelioration of Wounded and Sick in Armed Forces in Field (1949); Geneva Convention for Amelioration of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (1949); Geneva Convention Regarding Treatment of Prisoners of War (1949); Geneva Convention Regarding Protection of Civil Civilian Persons in Time of War (1949); European Convention for Protection of Human Rights and Fundamental Freedoms (1950), and its Protocols Nos. 1, 4, 6, 7, 9, 11, 13 and 14; International Covenant on Civil and Political Rights (1966), and its Optional Protocol (1966); International Covenant on Economic, Social, and Cultural Rights (1966); London International Convention for Safety of Life at Sea—SOLAS (1974), and its Protocol (1978); Convention on Elimination of all Forms of Discrimination Against Women (1979) and its Protocol (1999); Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1987); UN Convention on Rights of Child (1989) and its Optional Protocol on Sale of Children, Child Prostitution and Child Pornography (2000); Hague Convention on Protection of Children and Co-operation in Field of International Adoption (1993); Convention on Human Rights and Biomedicine (1997), and its Protocol (1998); European Agreement relating to Persons Participating in Proceedings of the European Court of Human Rights (1996); Convention on Special Missions (1969).

International Co-operation in Legal Matters.

Brussels Convention for Immediate Exchange of Official Journals, Parliamentary Annals and Documents (1886); Brussels Convention for International Exchange of Official Documents, Scientific and Literary Publications (1886); European Convention on Mutual Assistance in Criminal Matters (1959) and its Protocols (1978, 2001); Hague Convention Abolishing Requirement of Legalization for Foreign Public Documents (1961); European Convention on Information on Foreign Law (1968) and its Protocol (1978); European Convention on International Validity of Criminal Judgements (1970); European Agreement on Transmission of Applications for Legal Aid (1977) and its Protocol (2001); Convention on Transfer of Sentenced Persons (1983);

Convention on Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters (1965); International Convention on Administrative Aid Preventing Violations of Custom Laws, Investigating Violations and Fighting with Them; International Convention on Fight Against Taking of Hostages; Convention on Law Applicable to Maintenance Obligations (1973); Hague Convention relating to Civil Procedure (1954); Rome Statute of the International Criminal Court (1998); Convention on Recognition and Enforcement of Decisions relating to Maintenance Obligations (1973); Convention relating to Civil Procedure, Hague (1954); Convention on Civil Aspects of International Child Abduction (1980); Agreement on Privileges and Immunities of International Criminal Court (2002); Convention on Limitation of Liability for Maritime Claims (1976); Convention for Pacific Settlement of International Disputes (1907); Convention on Issue of Multilingual Extracts from Civil Status Records (1976).

Treaties on Legal Aid are in force with Armenia, Azerbaijan, Byelorussia, China, Estonia, Kazakhstan, Latvia, Moldavia, Poland, Russia, Turkey, Ukraine, U.S.A., Uzbekistan.

Treaties on Readmission are in force with Armenia, Austria, Croatia, Estonia, Finland, France, Germany, Greece, Iceland, Italy, Latvia, Poland, Portugal, Russia, Slovenia, Spain, Sweden, Switzerland, Ukraine, and not yet in force with Benelux.

International Transportation and Trade.

Chicago Convention on International Civil Aviation (1944); Brussels Protocol Concerning European Conference of Ministers of Transport (1953); Protocol (1955) Amending Warsaw Convention on Unification of Some Rules Concerning International Aviation Transportation (1929), and its Supplementary Convention (1961); Convention on Contracts for International Carriage of Goods by Road—CMR (1956), and its Protocol (1978); European Agreement Concerning International Carriage of Dangerous Goods by Road—ADR (1957); International Convention on Load Line—LL (1966); International Convention on Tonnage Measurement of Ships—TONNAGE (1969); International Convention for Safe Containers—CSC (1972); London Convention on International Regulations for Preventing Collisions at Sea—OLREG (1972); European Agreement on Main International Traffic Arteries—AGR(1975); Customs Convention on International Transport of Goods under Cover of TIR Carnets—TIR (1975); International Convention on Standards of Training, Certification and Watchkeeping for Seafarers—STCW (1978); Agreement on International Railway Transport—COTIF (1980); Vienna Convention on Contracts for International Sale of Goods (1980); Geneva International Convention on the Harmonization of Frontier Control of Goods (1982); Trans-European North-South Motorway (TEM) Co-operation Trust Fund Agreement; International Convention on Harmonized Commodity Description and Coding System (1983); Convention on Temporary Import (1990); Agreement on Uniform Technical Indications for Wheeled Means of Transportation, Equipment and Parts, Adoption and Confirmation and Conditions for Bilateral Recognition (with amendments which came into effect on Oct. 16, 1995); European Convention for Protection of Animals during International Transport (1968); Rotterdam Convention on Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade (1998); Protocol (SDR Protocol) amending International Convention or Unification of Certain Rules of Law relating to Bills of Lading (1979); Convention on Control and Marking of Articles of Precious Metals (1972) and its Annexes (1998); Torremolinos Protocol of Torremolinos International Convention for Safety of Fishing Vessels (1993).

Jan. 19, 1993 Lithuania accessed to 1980 Vienna Convention “On International Sales of Goods” with reservation that eliminates oral form of contract, offer, acceptance or other indication of parties’ intention.

Treaties on Trade are in force with following countries: Canada, South Korea, Sweden. Treaties on Trade and Economic Cooperation are in force with Armenia, Austria, Byelorussia, Bulgaria, China, Croatia, Czech Republic, Denmark, Egypt, members of European Union, Estonia, Greece, Hungary, Iceland, India, Italy, Kazakhstan, Latvia, Moldavia, Pakistan, Poland, Romania, Russia, Slovakia, Sweden, Tatarstan, Turkey, U.S.A., Venezuela.

Investment Protection.

Washington Convention on Settlement of Investment Disputes Between States and Nationals of Other States (1965); Convention on Establishment of Multilateral Investment Guarantee Agency.

Treaties on investment protection are in force with following states: Argentina, Armenia, Australia, Austria, Belgium, Bosnia and Herzegovina, Byelorussia, China, Croatia, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Great Britain, Hungary, Italy, Israel, Kazakhstan, Korea Republic, Kuwait, Kyrgyz Republic, Latvia, Luxembourg, Moldova, Mongolia, Netherlands, Norway, Poland, Portugal, Romania, Russia, Slovenia, Spain, Sweden, Switzerland, Turkey, Ukraine, U.S.A., Uzbekistan, Venezuela, Vietnam.

Labor.

International Labor Conventions Nos. 11 (1921); 29 (1930); 47 (1935); 73, 79, 80 (1946); 81 (1947); 87, 88, 90 (1948); 98 (1949); 100 (1951); 105 (1957); 108, 111 (1958); 116 (1961); 122 (1964); 127 (1967); 131 (1970); 135 (1971); 138 (1973); 142 (1975); 144 (1976); 149 (1977) 154 (1981); 156 (1981); 159 (1983); 160 (1985); 171 (1990); 173 (1992); 182 (1999); 183 (2000) and Private Employment Agencies convention (1997).

Nuclear Energy.

Statute of International Atomic Energy Agency (1956); Vienna Convention on Civil Liability for Nuclear Damage (1963); Non-Proliferation of Nuclear Weapons Treaty (1968); Vienna Convention on Physical Protection of Nuclear Material (1979); Vienna Convention on Early Notification of Nuclear Accident (1986); Joint Protocol relating to Vienna Convention on Civil Liability for Nuclear Damage and Paris Convention on Third Party Liability in Field of Nuclear Power (1988); Vienna Convention on Nuclear Safety (1994); Convention on Aid in Case of Nuclear Accident or Nuclear Danger (1986). Treaties on Cooperation in Field of Nuclear Security are in force with Canada, Denmark, Poland and Norway. Agreement on International Atomic Energy Agency's Privileges and Immunity (1959); Co-operation Agreement between Government of Republic of Lithuania and European Organization for Nuclear Research concerning Further Development of Scientific and Technical Co-operation in High-Energy Physics (2004).

Protection of Intellectual Property.

Paris Convention for Protection of Industrial Property (1883); Bern Convention for Protection of Literary and Artistic Works (1886); Nice Agreement Concerning International Classification of Goods and Services (1957); Convention Establishing World Intellectual Property Organization (1967) (Lithuania is member of WIPO since 1992); Washington Patent Cooperation Treaty (1970); Geneva Trademark Law Treaty (1994); Madrid Protocol to Madrid Agreement Concerning Trademark Registration (1989); Agreement with European Patent Organization on Cooperation in Area of Patents (Republic of Lithuania is extension state for validation of European patents in Lithuania). Ratification of Budapest Treaty on International Recognition of Deposit of Microorganisms (1977), Rome Convention for Protection of Performers, Producers of Phonographs and Broadcasting Organizations (1961), Geneva Convention for Protection of Producers of Phonograms Against Unauthorized Duplication of Their Phonograms, World Intellectual Property Organization's Treaty on Copyright (Geneva, 1996), World Intellectual Property Organization's Treaty on Performances and Phonograms (Geneva, 1996); Convention on Grant of European Patents (1973), Geneva Act of the Hague Agreement Concerning the International Registration of Industrial Designs (1999); London Agreement on Application of Article 65 of European Patent Convention (2000).

Law of Succession.

Convention on Establishment of Scheme of Registration of Wills (1972); Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in respect of Parental Responsibility and Measures for Protection of Children (1996).

Taxation.

See category 20 Taxation, topic 20.24 Treaties and Agreements.

Treaties and Conventions with European Community.

Framework Agreement with European Economic Community (1991); Agreement with European Economic Community and European Atomic Energy Community on Trade and Commercial and Economic Cooperation (1992); Agreement with European Communities on Free Trade and Trade Related Matters (1994); Europe Agreement Establishing Association Between European Communities and their Member States and Republic of Lithuania (1995); Agreement with European Economic Community on Fisheries Relations (1996); EU Accession Agreement (2003); Agreement on Participation in EEA (2003); Agreement on Provisional Application between certain Member States of European Union of Convention drawn up on basis of Art. K.3 of Treaty of European Union on use of information technology for customs purposes (1995); Convention, drawn up on basis of Art. K.3 of Treaty of European Union, on Protection of European Communities' financial interests (1995) and its Protocol (1996); Convention based on Art. K.3 of Treaty on European Union, on Establishment of European Police Office (1995) and its Protocols (1996, 1997); Convention determining State responsible for examining applications for asylum lodged in one of Member States of European Communities (1990).

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LUXEMBOURG LAW DIGEST

—Scope —

Revised for 2010 edition by

BONN SCHMITT STEICHEN, of Luxembourg.

Note: This revision incorporates legislation through July 1, 2008.

1 INTRODUCTION

1.01 CURRENCY:

Luxembourg is member of European Economic and Monetary Union. EURO is the only legal currency since Dec. 31, 2001. Law of Aug. 1, 2001 provides for automatic conversion into EURO of all instruments, judicial acts and contracts from Jan. 1, 2002.

Luxembourg has created for first time in history own Central Bank under name of "Banque centrale du Luxembourg" (BCL), which is member of System of European Central Banks. Monetary powers are shared between BCL and European Central Bank in conformity with Treaties and other community legislation.

Following reorganisation in 1998, and starting Jan. 1, 1999, BCL and "Commission de Surveillance du Secteur Financier" (CSSF) are separate public authorities. From Jan. 2002, CSSF is financed by taxes on credit institutions, pension funds and other professionals of financial sector. Annual tax amount is fixed between [Euro]27,250 and [Euro]55,000 for credit institutions. CSSF is in charge of supervision of financial sector, i.e., supervision of credit establishments, other professionals of financial sector and investment funds. CSSF is also in charge of securities regulations and supervision of stock exchange, including enforcement of insider dealing and market abuse legislation.

Foreign exchange regulations are extremely liberal and there are no current restrictions on capital movements.

1.02 GOVERNMENT AND LEGAL SYSTEM:

Grand-Duchy of Luxembourg is constitutional monarchy. Its first constitution was established in 1841. Today's constitution dates back to Oct. 17, 1868 and has been amended several times since. Constitution includes section regarding basic rights, which was amended as recent as 2006 to reflect equality of men and women.

Every five years, people elect members of Parliament (Chambre des Députés), which is main law-making body. Participation in these elections is compulsory.

Grand-Duke, a hereditary sovereign, is head of State. However, he exercises his powers in accordance with Constitution. Amendment to art. 34 of constitution, Mar. 12, 2009, removed Grand-Duke's power to vote on parliamentary matters. He signs acts and bills of parliament but no longer enacts them.

Country is governed by prime minister and his government, at present a coalition, which are responsible to Parliament.

There are three major political parties: Christian Democratic Party, Liberal Party, and Luxembourg Socialist Workers' Party.

All these parties are moderate parties and share same basic economic views. This has given Luxembourg tradition of political and social stability, as well as economic prosperity, which are unrivalled.

Luxembourg Parliament ("Chambre des députés") is unicameral body consisting of 60 officials. Members are elected by popular vote to serve five year term. Luxembourg Parliament meets yearly in ordinary session. This session starts every second Tues. in Oct. at 3:00 p.m. In general, there is closed session prior to public ones. Grand-Duke may convene extraordinary session if one-third of Members of Parliament so request.

Judiciary.

According to art. 86 of Luxembourg Constitution, courts may only be created by law.

Law of Mar. 7, 1980 on judicial system, as amended, regulates ordinary courts, which are constituted by professional judges, whereas several subsequent laws regulate special courts. Judiciary is divided into two separate orders: judiciary order for all civil, commercial and criminal matters, and administrative order for administrative matters regulated by special legislation. Judicial entities include three Justices of the Peace, two District Courts, and one Supreme Court. Constitutional Court is separate entity in charge of constitutional control of laws and regulations, on prejudicial basis.

Judges are appointed for life by monarch.

1.03 OFFICE HOURS AND TIME ZONE:

Luxembourg is in the Central European time zone. Office hours are generally from 9 a.m. to 5 p.m.

2 BUSINESS ORGANIZATIONS

2.01 AGENCY:

General principles of agency law are set out by Civil Code (C.C. 1984 et seq.). Law of June 3, 1994 provides detailed statutory rules for independent commercial agency contracts.

In absence of specific statutory rules, it is recommended that parties determine their rights and duties contractually.

Extent of liability depends on nature of agent's relations with his principal. If agent is empowered to act in name and on behalf of principal, then latter is fully responsible for undertakings entered into by agent.

Law of July 1, 1988 amending Civil Code, provides that, unless otherwise agreed by parties, agency relationship terminates by discharge or resignation of agent, placing under guardianship of majors, bankruptcy or similar proceeding as well as death of principal or agent.

Under Law of June 3, 1994, commercial agent is defined as independent intermediary who negotiates sale or acquisition of goods, or negotiates and concludes transactions in name of and for account of another person. Agent is merchant person, subject to commercial law, and not employee. Agency contracts must be in writing and in two copies.

Agent must act loyally and in good faith in exclusive interest of principal. Law defines duties of agent and principal, and parties may not provide otherwise in contract. Law regulates agent's right to commissions and other remuneration.

At termination, agent is entitled to notice period and indemnity for termination. Noncompetition clauses with principal's business after termination must be in writing and limited as to geographic area, professional sectors and time (maximum 12 months). Law provides for cases of termination where such clauses cannot apply.

Representative under employment contract, subordinated to and supervised by his employer, is employee whose rights and duties are set forth by Labour Code.

2.02 ASSOCIATIONS:

Nonprofit organizations may be set up under law of Apr. 21, 1928, as modified in Feb. 22, 1984, Mar. 4, 1994, Aug. 1, 2001 and Dec. 19, 2002 (“Loi du 21 avril 1928 sur les associations et les fondations sans but lucratif, telle qu'elle a été modifiée”).

Associations (“associations sans but lucratif”) may be set up freely, and no governmental approval is required. Such governmental approval is, however, required for acceptance of gifts and donations, value of which exceeds certain threshold. Associations must be registered with Luxembourg Register of Commerce and Companies. See Section 3.03 below.

Foundations are associations which pursue exclusively philanthropic, religious, scientific, artistic, social, sporting or international purpose. Foundations may be set up by notarial deed or by will. They must be authorized by grand-ducal decree prior to obtaining their full legal existence. Foundations must also be registered with Luxembourg Register of Commerce and Companies.

Associations and foundations are normally subject to corporation tax. Exemptions are available for organisations pursuing exclusively religious, charitable or general interest purposes, to extent they do not have industrial or commercial activities. Even in that latter case, exemptions may be granted by Government if organisation's purpose serves particularly important public interest and if it does not seek to provide material gains to its members.

2.03 CORPORATIONS:

Types of Companies.

Luxembourg commercial companies are governed by law of Aug. 10, 1915, as amended.

All companies must have registered office ("siège social"), business name ("raison sociale" or "dénomination sociale") and specific business purpose ("objet social"). General and limited partnerships must have two or more partners. However, limited liability companies and joint stock companies may be incorporated with only one partner.

There are no restrictions as to nationality of partners or as to their residence.

Commercial companies are formed by act of incorporation. For joint stock companies ("société anonyme"), limited partnerships by shares ("société en commandite par actions") and limited liability companies ("société à responsabilité limitée"), notarial deed is compulsory.

Publication in full of charter in official journal ("Mémorial") is required for joint stock company, limited partnership by shares, limited liability company, and cooperative society. For general and limited partnership it is sufficient to publish excerpt of charter. Amendments to charter must be published in same way.

General and limited partnerships are not restricted by legislation as to their system of management. However, in limited partnership management is reserved to general partners, whose role is same as that of general partners in general partnership. Silent partners may not take part in management of limited partnership.

In general partnership, if there is no contrary stipulation in charter, every partner represents legal entity, but decisions require consent of all partners. Charter often appoints one or more managers.

Law of June 10, 1999 introduced in law of Aug. 10, 1915, distinction between general cooperative societies ("sociétés coopératives en général") and cooperative societies organized as joint stock company ("sociétés coopératives organisées comme des sociétés anonymes").

Management of cooperative societies, both general and organised as joint stock company, closely follows that of joint stock companies. However, in general cooperative societies' partners may freely regulate its management structure but, in absence of any stipulation, law provides that company must be represented by director.

In limited partnership, liability of partners who take active part in its management is unlimited, whereas inactive or silent partner's liability is limited to amount of capital he has contributed to partnership.

In general partnership, partners are fully and personally liable.

In cooperative society, partners have unlimited liability, unless charter provides otherwise (which it generally does).

At formation of companies (and for amendments to company charter or registered office), fixed fee of [Euro]75 will be payable since capital duty has been abolished as of Jan. 1, 2009.

For income tax purposes, tax laws consider company as either personal company or capital company. Personal company has no separate existence under tax laws, and tax is levied upon individual partners according to their respective income from company. Capital companies, i.e., joint stock companies, limited liability companies, and limited partnerships by shares, are considered as legal entities having separate existence and are subject to corporate tax on profits before distribution. Distributed dividends are then subject to income tax at full rate applicable to recipient, if shareholder is Luxembourg resident. If he is not, only withholding tax may be levied.

Dissolution of any company may be effected on expiration of term fixed by act of incorporation, it being however understood that term "fixed by act" can be extended by decision of shareholders. In any case, dissolution of any company may also be effected by disappearance or impossibility of purpose of company. In event of loss of half of corporate capital of joint stock company general meeting of shareholders must be convened at which shareholders resolve on possible dissolution of company. Same rule applies where loss equals at least three-quarters of corporate capital, though in this case only 25% of votes cast at meeting needed to approve dissolution. Dissolution may occur, too, if partners, according to formalities which differ from one company to other, agree to accelerate time of dissolution. Companies may have share capital in EURO or any other freely traded currency.

Joint Stock Companies ("**Société Anonyme").**—Form usually adopted by foreign investors. It requires minimum capital of EURO 30,986.69 divided into shares of equal value, which are freely transferable unless corporate charter provides for certain restrictions. Shares may be in bearer form or registered form. Latter form is mandatory as long as shares have not been fully paid up. Shares may be issued with or without nominal value, and no minimum nominal value per share exists. Capital must be subscribed entirely, but only 25% need to be paid up at time of incorporation. Capital may be increased by resolution of shareholders passed at shareholders' meeting, and shareholders may empower board of directors to increase capital. Contributions that are not in cash must be valued by external qualified auditor. It is possible for joint stock company to have sole shareholder. Liability of shareholders is limited to amount of their investment. Company is governed by board of directors, consisting of at least three members (one member if there is only one shareholder) who may be appointed for up to six years. They are eligible for reelection. Managing director, with day-to-day management powers, may be appointed by board. It is also possible to opt for two-tier management system consisting of supervisory board and board of directors. Statutory auditor must also be appointed. For companies meeting certain threshold figures, or engaged in certain types of activities (e.g., banking), annual accounts must be audited by qualified external auditors. Accounting standards are those imposed by EC rules. At least one general meeting must be held each year at day and time indicated in articles.

Limited Liability Companies ("Société à Responsabilité Limitée").—Number of partners is restricted to 40. Partners' liability is limited to amount of their investment. Limited liability companies are run by one or several managers ("gérant"), who need not be partners. Can pursue any activities save insurance, capitalization and savings activities.

If number of partners exceeds 25, law requires them to meet at least once a year in general assembly. Bylaws must mention date of this statutory general meeting. If there are fewer than 25 partners it is not legally necessary for them to meet at all; any resolution may be submitted to them for decision by mail and their vote may be expressed in writing. Resolution or proposed decision must be so clearly expressed as to make possible vote in negative or affirmative. If there are fewer than 25 partners, no statutory auditor is required. Minimum capital of this type of company must be EURO 12,394.68. There is no longer minimum nominal value for limited liability companies as well as for joint stock companies since law of Aug. 26, 2006. Shares must be subscribed and paid for in full. This type of company issues registered shares. This type of company can issue participation certificates ("certificats de participation à personne déterminée"). Shares are personal and their transfer is subject to strict regulations such as requirement of prior agreement of three-quarters of partners in general meeting for transfer of shares. Law of Aug. 5, 2005 relating to financial collateral arrangements removes requirement of such agreement in case of realization of pledge over all of shares of SARL granted to one or more pledges for purposes of said transaction.

Single Partner Limited Liability Companies.

Law dated Dec. 28, 1992 introduced limited liability company which is formed by one shareholder only. This law applies to small and medium sized enterprises.

Such company can either be formed at incorporation or by concentration of all shares in hands of one shareholder.

Holding Companies.—On July 19, 2006, European Commission announced its decision that Luxembourg 1929 Holding Companies regime ("H29 regime") violates EC state aid rules and therefore should be abolished. This decision was rapidly implemented in domestic law through adoption by Luxembourg Parliament of law of Dec. 22, 2006, repealing law of July 31, 1929 on Holding Companies with effect as from Jan. 1, 2007. During transitional period starting on Jan. 1, 2007 and ending on Dec. 31, 2010, 1929 Holding Companies incorporated before July 20, 2006, may, however, further benefit from H29 regime subject to certification requirements and some restrictions related to disposal of their shares.

In order to replace 1929 holding companies, Luxembourg Law dated May 11, 2007 has created "SPF" ("Société de gestion de Patrimoine Familial") with favorable tax regime for individuals' asset management. SPF may have legal form of Joint Stock Company, of Limited Liability Company, of Limited Partnership by shares, or legal form of Cooperative Society organized as joint stock company. SPF can issue bearer shares (if organized under legal form authorizing them) but not shares quoted on stock exchange. Main activities of SPF are acquisition, holding, management, and disposal of financial assets as:

(1) Shares, bonds in private or quoted companies;

(2) securitization funds, shares in SOPARFI, and in SICAR, shares in1929 holding companies (with limit stated by law dated July 19, 2006);

(3) term deposit bank account, SICAV, Luxembourg FCP or foreign FCP;

(4) hybrid instruments, hedge funds, precious metal, options, warrants, currency…;and

(5) granting non- interest bearing loan to its subsidiaries and guaranteeing engagements taken by its subsidiaries.

SPF is not authorized to carry out commercial activity, to directly hold real estate or intellectual property rights. SPF cannot manage other companies. It may, however, hold shareholdings in real estate companies (i.e. opaque entities) or in capital companies having commercial activity.

Taxation SPF is also extremely favorable.

During its lifetime only, tax which will be levied is annual subscription duty of 0.25% on current value of securities issued with minimum of [Euro]100 and maximum of [Euro]125,000.

In addition to SPF, there are also holding companies falling under general tax law i.e., financial participation companies (SOPARFIs), which, although they do not constitute special company form, are governed by law of Aug. 10, 1915, and most take form of joint stock company or limited liability company.

SICAV (SICAF).

SICAVs ("société d'investissement à capital variable") and SICAFs ("société d'investissement à capital fixe") are special purpose companies, whose exclusive business purpose are investment funds, i.e., entities which collect investments from public and pool them according to risk-spreading principle. Their legal status is governed by law of Dec. 20, 2002 on collective investment undertakings, as amended. 2002 law sets out special legal, regulatory and tax framework for these companies. However, it also provides that rules created by general corporate law of Aug. 10, 1915 apply in absence of specific provisions. Provisions that apply are primarily those relating to joint stock companies.

SICAVs are public limited companies with variable share capital. This means that their capital varies constantly depending on their redemptions and issuances of shares. SICAFs have fixed share capital and may be incorporated under any of forms of commercial companies provided for in law of Aug. 10, 1915. In both instances, minimum capital required is [Euro]1,250,000 or its equivalent in foreign currency. This minimum must be reached no later than six months following date of incorporation.

Fixed amount of [Euro]75 is payable by such investment companies,replacing former fixed capital duty of [Euro]1,250. In addition, on yearly basis, these companies pay 0.05% subscription duty, which is levied on net asset value of their portfolio. Special rates apply to money market funds and institutional funds. Certain institutional cash funds are tax-exempt. Taxes are payable quarterly in arrears. Pursuant to Law of June 21, 2005, which implemented EU Directive 2003/48/EC, withholding tax may be imposed on payments from certain SICAVs to individuals resident in EU (other than Luxembourg).

While there are no restrictions based on nationality regarding operation of these companies, it is however legal requirement that central management of entity is located in Luxembourg. Rationale behind this rule is to facilitate supervision by "Commission de Surveillance du Secteur Financier", or CSSF, depositary bank and external qualified auditor in monitoring fund's activities. Following activities consequently must be undertaken in Luxembourg: Fund accounting and bookkeeping; issuance and redemption of units; and calculation of fund's net asset value. It is furthermore mandatory that share registers be kept in Luxembourg. All documents regarding entity (i.e., prospectus, notices, and financial statements) must be prepared in cooperation with Luxembourg authorities and must be mailed from Luxembourg.

Before beginning operations, all investment funds must obtain approval of CSSF, which monitors all activities of Luxembourg-based investment funds.

During their existence, funds must provide periodic financial statements regarding their investment portfolio to CSSF and periodic accounts must be published for public information. It is also requirement that each shareholder be provided with latest prospectus, simplified prospectus where applicable and appendices at date of subscription. External qualified auditor, approved by CSSF, must furthermore be appointed to monitor activities of fund.

Besides forms of SICAV or SICAF, undertaking for collective investment may also choose form of "fonds commun de placement", i.e., unit trust or mutual fund (FCP).

FCPs are undivided coproprietorships of assets made up and managed according to principle of risk spreading on behalf of its unit holders who are liable only up to amount invested by them. Their rights and obligations, and investment rules, are all determined by FCP's management regulations. Such fund has no legal personality itself and therefore needs to rely on its management company to do business. Regulatory- and taxwise, same rules as for SICAVs or SICAFs apply.

Objective of law of May 9, 2006, regarding insider dealing and market abuse is to prevent market manipulation and insider dealing, both forms of market abuse. Law applies to all financial instruments, including units of investment funds (and not just investment companies) admitted to trading on regulated market or for which application for admission to trading has been made.

On Nov. 15, 2006, legislature passed law that requires information pertaining to payer that has to accompany transfer of funds. Professionals are responsible for complying with these know-your-customer requirements.

On July 13, 2007, law on markets in financial instruments, amending amongst others 2002 law, entered into force. As consequence, management companies set up under c. 13 of 2002 law who provide discretionary portfolio management are subject to provisions of MiFID Directives 2004/39/EC and 2006/73/EC and must, hence, comply with certain organizational requirements and rules of conduct in financial sector.

On Jan. 19, 2008, Luxembourg law regarding transparency requirements relating to information about issuers whose securities are admitted to trading on regulated market entered into force, imposing additional disclosure requirements by said issuers, for example, relating to financial reports and interim management statements; and notification requirements regarding changes in major holdings in said issuers.

Specialized Investment Fund Law (SIF).

Luxembourg legislature introduced on Feb. 13, 2007, new law regarding specialized investment funds. Law provides a more flexible regime for setting up institutional/high net worth investor types of funds. It introduces notion of “informed investors” to replace “institutional investors” of 1991 law on undertakings for collective investments, securities of which are not intended to be placed with public (prior law repealed). SIF law meets needs of investors and today's fund industry more effectively because SIFs enjoy more flexibility compared to other regulated funds in respect to rules applicable to, for example, investment restrictions, company law, valuation rules, reporting requirements, and approval process.

Art. 1(1) of SIF law defines SIFs as any undertaking for collective investment situated in Luxembourg, (1) exclusive object of which is collective investment of their funds in assets in order to spread investment risks and to ensure for investors benefit of results of management of their assets, (2) securities of which are reserved to one or several well-informed investors, and (3) constitutional documents or offering documents which provide that they are subject to provisions of SIF Law.

Concept of “well-informed investor” includes institutional and professional investors, and also any other investor who satisfies following conditions: (1) Confirmation in writing that they adhere to status of well-informed investor, and that (2) they invest minimum of [Euro]125,000 in SIF, or (3) if such minimum level of investment is not made, that they have obtained report made by professional of financial sector, who certifies his expertise, experience, and knowledge in adequately appraising investment made in SIFs. Those professionals permitted to give such certification are credit institutions and investment firms, and defined management companies.

FCP-SIFs: FCP-SIFs have 12 months as opposed to six months to reach minimum net asset threshold of [Euro]1,250,000 following authorization of common fund. Role and responsibility of depositary bank has been reduced to extent that depositary bank does not have to verify certain transactions. For example, depositary bank does not have to check that instructions of management company comply with law or management regulations. Unless management regulations state contrary, asset valuation is to be based on fair value of assets. Means of assessing such value is to be provided by management regulations, but it may be expected that management regulations will refer to those valuation methods set forth by well recognized professional associations such as, for instance, "International Private Equity and Venture Capital Guidelines" or "The Guidelines of the Royal Institute of Chartered Surveyors". Less legal publication is required in event of liquidation of SIF.

Words "SIF" or "Specialized Investment Fund" are to be inserted after abbreviation "FCP" of words common fund.

SICAV-SIF: SIFs must issue annual report to be made available to investors within six months following year-end, as opposed to four months required under previous legislation.

SIFs are to prepare annual report in accordance with annex attached to SIF Law. SIFs accounts do not have to be consolidated with those of companies in which they are invested, whatever holding percentage is. If investment holdings are carried out through subsidiaries, whose only purpose is to facilitate investments of SIF in target companies (as with "special purposes vehicles"), it is important to (1) apply "look-through" at level of these subsidiaries, so as to show investments held directly in accounts, and (2) specify that these subsidiaries are not obliged to consolidate underlying investments. CSSF circulars issued regarding minimum level of risk diversification and transmission of financial information to CSSF.

SEPCAV and ASSEP: Pension Fund Vehicles.

1999 law introduced new forms of investment funds specifically designed for international and pan-European pension funds. Law of Aug. 1, 2001 broadens scope of available choice of ASSEP or SEPCAV's managers, and completes also table of consequences in case of breach of minimum capital requirements. SEPCAV is comparable to SICAV, whereas ASSEP is comparable to FCP. Law ensures security of pensions to be paid, even in case of insolvency, and portability of pension benefits, especially in case of employees leaving employer before end of career. Pension funds (SEPCAV or ASSEP) are legal entities separated from employer's assets with, on asset side, accumulated and invested assets and, on liability side, commitments corresponding to pension promises. Assets are payments by employer and/or employee and are managed according to principles applicable to UCITS. SEPCAVs will pay capital at time of retirement, whereas ASSEPs may pay capital or life annuity. Assets are entrusted to depository located in Luxembourg, and may be managed by asset manager. ASSEPs are subject to specific liability supervision. CSSF will be in charge of supervision and prudential control. Special tax regime applicable to pension funds allows deduction of contribution and premium in country of exercise of work and gives possibility of taxation of benefits in country of residence. Pension funds themselves should be exempt from tax, but should benefit from treaty network. Law of July 13, 2005 which replaces 1999 law authorizes European pension funds to supply services to Luxembourg companies if authorized by competent authority of their own State. Non-European funds are also entitled to supply services to Luxembourg companies if authorized and supervised by competent authority of their own State which has to be coordinated to IGSS (Inspection Générale de la Sécurité Sociale). No agreement is required from any Luxembourg authorities.

SICARs.

SICARs ("Société d'Investissement en Capital Risque") are companies organized under provisions of law of June 15, 2004 which: (1) Have been incorporated in form of limited corporate partnership, corporate partnership limited by shares, co-operative society organized as joint stock company limited liability company, or joint stock company under Luxembourg law; (2) whose object is investment of its funds in securities representing venture capital with aim of rewarding investors with results of management of its assets, for risks they take; (3) whose securities are reserved for “experienced investors” as defined by law of June 15, 2004; and (4) whose articles of incorporation provide that it is subject to provisions of this law. Subscribed capital of SICAR cannot be less than [Euro]1 million. 5% of this should be paid up. Contributions to capital of SICAR are not subject to usual 1% duty and bear fixed capital contribution duty which shall not exceed [Euro]1,250. SICARs are subject to prior authorization and supervision of Commission for the Surveillance of the Financial Sector (“CSSF”). SICARs must appoint depositary bank to act as custodian of its assets, this depositary bank must have its registered office in Luxembourg or be established in Luxembourg if its registered office is in another Member State. SICARs must prepare prospectus containing all relevant information necessary for investor to make informed judgment on investment and risks attached thereto. Essential elements of prospectus must be up-to-date at time any new securities are issued. SICARs must produce annual report within six months of end of year to which it relates. Accounting information given in this report must be audited by independent auditor. SICARs must at least once every six months inform investors on request and free of charge of net asset value of their shares. SICARs are not required to create legal reserve. SICARs may issue new securities according to methods and forms set out in its articles of incorporation. CSSF issued circular 06/241 clarifying further notion of risk capital. Law of Oct. 24, 2008 amended law of June 15, 2004, and introduced legislative and regulatory improvements to SICAR regime including introduction of possibility of ring-fenced compartments, and change in requirement that management of SICAR no longer required to qualify as ``well-informed investors'' should they wish to invest in SICAR.

Securitisation Undertakings.

Securitisation undertakings are subject to provisions of law dated Mar. 22, 2004. Securitisation undertakings may be constituted under corporate form (as corporate partnership limited by shares, co-operative society organised as joint stock company, limited liability company, or joint stock company) or as fund managed by management company.

Securitisation companies must in order to benefit from provisions of law of Mar. 22, 2004 explicitly state themselves to be subject to provisions of this law in their articles. Securitisation undertakings which issue transferable securities on continuous basis to public must be authorised by CSSF. Authorised securitisation undertakings must deposit their liquid assets and their transferable securities with credit establishment established or having registered office in Luxembourg. Contributions to capital of securitisation undertaking are not subject to usual duty and no longer bear fixed capital contribution duty. Management regulations or articles of association may allow creation of one or several compartments in securitisation fund, each with distinct rules and characteristics. Accounts of securitisation company must be revised by independent auditor.

Economic Interest Grouping (EIG) and European Economic Interest Grouping (EEIG).

EIG and EEIG have been created by two laws dated Mar. 25, 1991.

Aim of these groupings is to facilitate or to develop economic activities of their members and to improve or increase results of those activities. Therefore purpose of EIG and EEIG must be related to economic activity of their members. Such link is essential and distinguishes these groupings from company, which has much broader object, i.e., realizing and sharing profits.

Both have legal personality and their members are fully and personally liable.

There are no essential differences between EIG and EEIG. Members of EEIG must however originate from at least two Member States of European Community.

European Company.

Law relating to European Company has been adopted by Luxembourg Parliament on July 2006. Aim of law is to allow provisions of European regulation of Oct. 8, 2001 on European Company to be exercisable in Luxembourg.

European Company is joint stock company attached to European Union Member State and is considered to have nationality of this Member State but its organization is harmonized at EU level.

There are four ways to incorporate European Company: (1) Merger of two joint stock companies of two different Member States; (2) incorporation by two joint stock companies or two limited liability companies having their statutory seats in two different Member States or by branch of joint holding company established in one of Member States for at least past two years; (3) incorporation of joint subsidiary of two joint stock companies or other legal entity governed by public law having their statutory seats in two different Member States or having joint subsidiary for at least past two years in another Member State; and (4) transformation of one joint stock company holding subsidiary in another Member State for at least past two years.

2.04 HOLDING COMPANIES:

See topic 2.03 Corporations.

2.05 INVESTMENT FUNDS:

See topic 2.03 Corporations.

2.06 PARTNERSHIPS:

Partnership is considered to be civil if its purpose is not commercial, if it is organized under art. 1832 of Civil Code and chooses one of forms outlined by that Code. (C.C. 1835 et seq.). Since buying of real estate for sale or lease and extraction of products from soil are not considered acts of trade, mining and real estate companies may be civil partnerships unless they adopt commercial form. Civil partnerships are separate judicial entities according to court decision of Mar. 11, 1875, and law of Sept. 18, 1933.

Partnerships are commercial if their intended purpose is to perform acts of trade. (Art. 1, Company Act of Aug. 10, 1915). Law recognizes six types of commercial partnerships, including those which are commercial by nature and partnerships whose subject matter is civil but that have adopted one of six forms of partnership. (Arts. 2 and 3, Company Act of Aug. 10, 1915).

In general partnership, if there is no contrary stipulation in charter, every partner represents legal entity, but decisions require consent of all partners.

The charter often appoints one or more managers.

In limited partnership, management is reserved to general partners, whose role is same as that of general partners in general partnership.

See also topic 2.03 Corporations.

3 BUSINESS REGULATION AND COMMERCE

3.01 BANKS AND BANKING:

The Finance Act (Luxembourg law of Apr. 5, 1993 relating to financial sector) constitutes Luxembourg's general legal framework for all banking and non-banking financial activities.

Finance Act implements provisions on EC banking passport and professional obligations of bankers and other financial intermediaries. Topics covered by statute are: conditions for access to financial sector; professional obligations in connection with banking and non-banking financial activities capital adequacy requirements and risk concentration at conglomerate level; supervision, monitoring and control of banking and non-banking financial activities; reorganization and liquidation of financial institutions; deposit-guarantee schemes in credit institutions and investor compensation schemes; penalties for infringing rules set by Finance Act. Annex lists activities to be considered investment services, financial instruments, and ancillary services.

Law has introduced common professional obligations for all professionals of financial sector, both banks and non-banks, in particular in relation to professional duties owed to clients. Laws of June 14, 2001 and Nov. 12, 2004 as amended, reinforce duties on banks, other professional actors in financial market, trust firms, and also lawyers and notaries, in order to prevent money laundering, and provides for aggravated sanctions. All of these professions are subject to certain provisions regarding acquisition and maintenance of data.

In 2006, Directive 2002/65/EC concerning distance marketing of consumer financial services and Directive 2002/87/EC on supplementary supervision of credit institutions, insurance undertakings, and investment firms in financial conglomerate were implemented into Luxembourg law by amending Finance Act. Law of July 13, 2007 implemented Directive 2004/39/EC (MiFID) and brought extensive amendments to Finance Act in particular regarding operating conditions in Luxembourg and abroad (under European Passport) relating to performance by investment firms of investment services, ancillary services and investment activities and organizational requirements for such investment firms. Law of July 25, 2008 implemented Directive 2007/44/EC, and amended provisions on supervisory assessment procedure of acquisition of qualifying holding in credit institution/professionals of financial sector. Also in 2008, provisions on banks issuing mortgage bonds were brought up-to-date by law of Oct. 24, 2008.

3.02 BILLS AND NOTES:

Luxembourg is party to two Geneva Conventions of June 7, 1930 (Luxembourg law of Dec. 15, 1962) dealing, respectively, with uniform law on bills of exchange and promissory notes and conflicts of laws rules applicable thereto. Luxembourg is also party to Mar. 19, 1931 Geneva Convention on checks (Luxembourg law of Mar. 14, 1968, as amended by law of Jan. 16, 1987) dealing, respectively with uniform law on checks, and conflicts of laws rules applicable thereto.

There are no stamp duties on creation, payment or use of bills, notes and checks.

Certain formal requirements must be respected when creating bill of exchange. It must include words “bill of exchange”. It must contain order to pay given amount, identity of drawer, maturity date, location where payment shall be made, identity of payee, and date and place of creation. It also must be signed by drawer.

Bills of exchange are transferable by endorsement. Endorsement is only valid if made without conditions. Endorsement can be to named endorsee or to bearer. Endorsers are liable for acceptance and payment of bill, but they may exclude subsequent endorsements, in which case they will only be liable towards their endorsee.

Holder of bill may request its acceptance by drawee until maturity. Acceptance results from drawee's signature on face side of bill or by word “accepted” or any equivalent word on bill. By accepting bill, drawee assumes personal commitment to pay at maturity.

Payment of bill may be guaranteed by third party or signatory acting as “aval”. Such “aval” may be given on bill or on separate document. Guarantor must indicate who guaranteed party is, since otherwise guarantee will be deemed to be for benefit of drawer. Guarantor will be liable in same way as person who is beneficiary of guarantee.

Refusal of acceptance or payment must be established by formal deed ("protêt faute d'acceptation ou faute de paiement"). Holder must inform drawer and his endorsee of such refusal. Each endorser will in turn have to notify his own endorser.

Drawer, drawee, endorser or guarantors are jointly and severally liable towards holder, who may sue each of them separately or jointly. All actions are subject to certain time limits. Against drawer who has accepted bill, action must be brought within three years following maturity. Actions by holder against endorsers and drawer must be brought within one year from date of formal protest or maturity date.

Actions of endorsers against each other and against drawer must be brought within six months after payment or action against endorser for payment.

Promissory notes are governed by same basic rules as bills of exchange.

Checks must contain term "check". They are payable on demand. They must contain unconditional order to pay certain amount of money, name of drawee, place of payment, date and place of issuance of check, and signature of drawer. Drawee must be bank. Check may be payable to given person or to bearer. Checks may be transferred by endorsement unless such endorsement was excluded by drawee. Endorser guarantees payment of check unless he has excluded such guarantee. Endorser may also prohibit all further endorsements. Checks must be presented for payment after no later than eight days if drawn and payable in Luxembourg, 20 days if drawn inside Europe including Mediterranean, and 70 days if drawn elsewhere.

Checks may also be barred. Payment for such checks may only be made to banker or to client of drawee.

Drawing check in bad faith, where no sufficient funds are available for payment, constitutes criminal offense. Same is true if funds are withdrawn while check may still be presented for payment, or, even after expiration of time period provided for by law for presentation of check, if drawer fraudulently or in bad faith stops payment or withdraws funds necessary for payment.

3.03 COMMERCIAL REGISTER:

Register of Commerce and Companies of Grand-Duchy of Luxembourg (RCS) keeps official register of all individuals and legal entities conducting commercial business. RCS is governed by law of Dec. 19, 2002, as amended (RCS Law), and executing Grand-Ducal regulation of Jan. 23, 2003, as amended. All natural persons and legal entities pursuing commercial business activities must register and file legally required documents. Failure to do so may, *inter alia*, be pleaded as defense by third parties in court actions and be subject to fine.

Amendment of RCS Law and regulation in 2009 allowed electronic filing of documents (as of Oct. 1, 2009) and simplified administrative procedures.

All documents can be requested online (http://www.rcsl.lu). Paper copies are available at RCS offices only for documents filed until May 29, 2009. Documents filed must be in French, German or Luxembourgish language. Translations in official EU language may be filed voluntarily at same time, but in case of divergences not enforceable towards third parties.

3.04 CONTRACTS:

Distinction between Civil and Commercial Contracts.

General law of contracts is found in Civil Code. There is no separate comprehensive set of rules which defines and governs what are commonly called commercial contracts, although there are some commercial contracts that are governed by detailed legal rules. Contract may be commercial by its nature or because of commercial qualification of its author (contracts made in course of trade).

Same contract may be commercial for one party and civil for other; in this case, it forms mixed contract, and civil law will apply to non-trader, and commercial law to trader. Jurisdiction of court is determined by status of defendant. If defendant is trader, it is commercial court; if defendant is non-trader, it is civil court. Also, New Code of Civil Procedure allows non-traders to sue traders before civil courts.

Contracts Requiring Written Form; Registration; Notarial Deed or Other Formalities.—Under Luxembourg law, nearly all contracts are formed by agreement of parties concerned, and without any formality. Written form becomes necessary, however, for evidentiary reasons.

If contractual value exceeds [Euro] 2,500, contract must be in writing. For commercial contracts this rule is modified, since special rules of evidence will apply.

Some contracts require notarial deed for their validity, including marriage settlements and mortgage contracts.

Some contracts require particular form to be valid as against third parties, most important of such contracts being contract for sale of real estate. This contract requires notarial deed and must be registered and transcribed at mortgage registry office. Joint stock company (``société anonyme''), limited partnership by shares (``société en commandite par actions''), and limited liability company (``société à responsabilité limitée'') must be incorporated by special notarial deed.

Special rules apply to distance contracts and e-commerce transactions.

Sales Contracts: Special Requirements or Conditions.

Sales contracts require no special form other than written form necessary for reasons of evidence. However, law of Aug. 9, 1993 on consumer credit, as amended, set up specific rules on consumer credits granted in connection with purchase of goods to protect consumers.

Sales contracts between traders and non-professional buyers have also been largely affected by Law of Aug. 25, 1983, on consumer protection, as amended. Law intends to abolish any contractual disequilibrium arising out of inexperience or lack of knowledge of ultimate consumer. Clauses written into contract that exclusively benefit vendor are null and void. Where meaning of clause is in doubt, interpretation most favourable to consumer will prevail.

Elements of Fraud in Contracts.

Under Civil Code, consent is not valid if it has been obtained by error or if it has been extorted by duress or secured by fraud. (C.C. 1109). Fraud is ground for annulling contract only if means employed by one of parties were such that, without these means, other party would not have contracted. (C.C. 1116). These rules also apply to commercial contracts.

If there is obvious disproportion between performance of both parties to contract and if such disequilibrium is result of abuse of dominant position of one party and inexperience of other party, contract may be annulled or injured party's performance reduced. Burden of proof rests with injured party and annulment or reduction must be claimed within one year of conclusion of contract. (C.C. 1118).

Conflicts of Laws.

In absence of choice of law expressed by parties in their contract, Luxembourg courts apply to international contracts rules laid down in Rome Convention on law applicable to contractual obligations of June 19, 1980 (Luxembourg law of Mar. 27, 1986).

Consent; Offer and Acceptance.

Agreement is validly formed when offer has been made and accepted. Acceptance may result from silence, and need not always be expressed. It is matter of circumstances.

Permissible Subject Matter.

Subject matter of contract may include anything over which person may freely dispose (C.C. 1128), but may not however, be contrary to public policy or good morals, nor infringe any mandatory rules.

Performance.

Contracts must be performed faithfully. They must be fulfilled not only according to express terms of contract, but also according to all consequences which equity or common usage or very nature of obligation impose.

If one party does not perform its obligations, other party may seek to enforce contract in court or apply for termination of contract. If specific performance is not available, damages may be obtained.

Breach of contract, or termination or insufficient performance, entitles injured party to damages. Damages may be sought in court when party who violated contract refuses to pay damages stated in contract for such case, or when contract does not include amount of damages and parties cannot reach agreement on amount.

3.05 FRAUDS, STATUTE OF:

In civil contracts, oral testimony is in principle not admissible for claims exceeding [Euro]2,500. (C.C. 1341). In commercial transactions such testimony is valid regardless of amount of claim. (C.Com. 109).

Unilateral undertakings to pay sum of money or to deliver specific thing must be signed by obligor who must as well write by hand sum or quantity. (C.C. 1326).

3.06 LICENSES, BUSINESS AND PROFESSIONAL:

Business licenses are required for all commercial activities carried on in Luxembourg. (Law of Dec. 12, 1988). They are issued by Ministry of the Middle Classes. Some activities, especially in financial sector, require special licenses granted by Minister in charge of financial sector, upon approval by “Commission de Surveillance du Secteur Financier” (CSSF). General criteria to be fulfilled in all cases are professional experience or education and good standing. Commercial companies may obtain authorisation to establish up to five branches.

3.07 MONOPOLIES, RESTRAINT OF TRADE AND COMPETITION:

Freedom of trade is protected by Luxembourg Constitution.

Monopolies, abuses of dominant position and restraints of trade are governed by EC competition law as well as by law of May 17, 2004 on competition, as amended.

Law of May 17, 2004 creates new administrative authorities (Competition Council and

Competition Inspectorate) who are in charge of enforcing national and EC legislation on competition and who handle cooperation with EC Commission in this respect.

Competition Council has power to impose fines (up to 10% of highest worldwide consolidated turnover), issue injunctions and take other coercive measures as appropriate for purposes of enforcing applicable laws. Immunity may be granted, or fines may be reduced, in favor of businesses that voluntarily reveal existence of violation of competition laws to Competition Inspectorate and fully cooperate with them. Decisions of Council may be appealed before administrative courts.

Competition Inspectorate has extensive investigative powers, including power to conduct searches and seizures upon court authorization.

3.08 SALES:

Sales agreements are governed by arts. 1582 et seq. of Civil Code. They may be made by notarial deed or by private agreement. Sales contract is binding on parties and ownership rights pass to buyer at moment there is agreement as to price and assets, even though no delivery has taken place, nor price paid. Case law has decided that parties can provide that title is reserved in seller until purchase price is paid in full.

Price of sale must be determined by parties. According to case law, price must be bona fide, i.e., reasonably related to value of assets.

3.09 WARRANTIES:

Seller must guarantee buyer against dispossession of property and latent defects. Buyer must bring defect to attention of seller as quickly as possible after discovery of defect. Courts determine time limit for bringing action in light of defect and personality, education and experience of buyer.

Liability for hidden defects arises even if seller was unaware of them. Courts have decided that professional sellers are deemed to know defects of goods sold by them and are liable for damages to buyers.

Applicable law is determined by Rome Convention of June 19, 1980 on law applicable to contracts. Rome Convention confirms principles that have been applied by case law prior to Convention, including that parties are free to choose law governing international contracts subject to observing public order provisions. In some sales contracts, entered into outside Luxembourg with Luxembourg residents, Luxembourg consumer protection laws apply, in accordance with Art. 5 of Rome Convention. In addition, UN Convention for the International Sale of Goods has been ratified in 1996 and replaces 1964 Hague Uniform Acts, starting Feb. 1, 1998. UN Convention for International Sale of Goods only applies to commercial sales.

4 CITIZENSHIP

4.01 ALIENS:

See category 15 Immigration, topic 15.01 Aliens.

4.02 IMMIGRATION:

See category 15 Immigration, topic 15.02 Immigration.

5 CIVIL ACTIONS AND PROCEDURE

5.01 ACTIONS:

District court (“tribunal d'arrondissement”) has full and common jurisdiction. District court consists of several specialized divisions.

In addition to district court, there are several specialized courts (mainly administrative, labor law and social security courts).

If subject matter of case is valued in excess of [Euro]10,000 case is heard by district court. Certain matters must be submitted to district court without taking into account amount involved. District court also hears appeals from decisions of Justices of Peace.

Jurisdiction of commercial courts (specialized division of district court) extends to (1) litigation relating to business transactions among traders, merchants and bankers; (2) litigation between shareholders or between members of board and shareholders of companies, if such litigation is related to business of their company; and (3) litigation involving any act of trade between any persons. (C. Com. 631). Commercial courts also deal with matters of bankruptcy. (C. Com. 635).

Litigation in civil courts is subject to important procedural reform starting Sept. 16, 1998 (introduction of “procédure de la mise en état”). Main goal of legislation, introduced in reformed Nouveau Code de Procédure Civile, is speeding up of procedure and excluding dilatory procedural moves.

Justice of Peace (“Justice de Paix”) has jurisdiction over matters valued at less than [Euro]10,000, regardless of commercial or civil nature of litigation. Justice of Peace also has special jurisdiction in certain matters irrespective of amount involved.

Litigation that arises from labor relations is within jurisdiction of labor courts and labor courts of appeal.

Social security courts deal with social security matters.

Law dated Nov. 7, 1996 has introduced administrative courts: “Tribunal administratif” and “Cour administrative d'appel”. Latter ensures availability of appeal in administrative matters.

Administrative jurisdictions hear actions against individual administrative acts by State, public authorities and agencies, as well as local authorities. Two legal actions are provided by law: Action for annulment and action for reformation, giving different powers to courts. Latter only exists if law specifically provides for that possibility. In certain cases prior complaint to competent administrative authority is required.

Actions against general regulatory acts are also brought before administrative courts, subject to certain restrictions, in particular in relation to standing of collective interest groups.

Tribunal and Court also hear complaints in cases involving direct taxes.

1997 law, in accordance with Art. 95 ter of Constitution introduced in 1996 created Constitutional Court, which controls conformity of laws with Constitution. Cases are brought before Constitutional Court in framework of litigation before other courts, where problem of conformity of law with Constitution appears.

Unsuccessful party is ordered in judgment to pay costs. Sharing of costs is ordered when both parties are unsuccessful to some degree. As rule, costs are not very high; they include court costs, filing fees and registration tax for judgment. Each party has to support its own attorney's fees.

However, if court considers it inequitable that party have to pay certain costs, e.g. lawyers' fees other than those already included in legal costs, judge may order other party to pay such sum. (N.C.P.C. 240). Additionally, party may seek damages in tort if it had to disburse lawyer's fees due to abusive and faulty behavior of other party.

See category 8 Dispute Resolution, topic 8.01 Alternative Dispute Resolution, subhead Arbitration.

5.02 DEPOSITIONS AND DISCOVERY:

When complex case is filed before district court, president of court designates instructing judge ("juge de la mise en état") whose role is to supervise pretrial proceedings and to report on case when it finally goes to trial. He may order discovery measures if necessary. Most of discovery process is done in written form: opposing lawyers file memoranda replying to each other and exposing their arguments, and testimonies can be submitted in writing. At trial stage, questioning of witnesses are directed by judge; there is no cross-examination strictly speaking. Witnesses must always testify unless they have legitimate excuse for not doing so. Professional secrecy (banks, lawyers…) is considered legitimate excuse, but it is not binding on witness: bank directors and employees may in fact freely choose to testify or not, though legal authors and certain courts have raised issue whether such testimony should be compelled in criminal matters.

5.03 JUDGMENTS:

Luxembourg has ratified Brussels Convention of Sept. 27, 1968 on jurisdiction and enforcement of foreign judgments concluded between Member States of European Union, and Lugano Convention of Sept. 18, 1988, concluded with States of European Economic Area. Convention provides for simplified proceedings for recognition and enforcement of judgments rendered by signatory States' courts. Matter is not reexamined (res judicata). Luxembourg is also bound by Council Regulation (EC) No. 44/2001 of 22 Dec. 2000 on jurisdiction and recognition and enforcement of judgments in civil and commercial matters within EU.

In absence of international treaty, procedure of enforcement must be carried out. It does not involve reexamination of case by court. (N.C.P.C. 681). Exequatur request must be lodged with President of "tribunal d'arrondissement" and will be granted only if: (1) judgment is enforceable in country where it was rendered; (2) judgment is not contrary to Luxembourg public policy; (3) foreign court had jurisdiction in conformity with local, international and Luxembourg rules; and (4) foreign court applied law designated by Luxembourg conflict of law rules, or, if different law has been applied, result does not differ from result that would have been achieved by law designated by Luxembourg conflict of law rules.

Arbitration Awards.—Foreign awards, like domestic ones, can only be executed upon enforcement order given by President of "tribunal d'arrondissement". (N.C.P.C. 1250). Proceedings and conditions are very similar to those requested for exequatur of foreign judgments.

Luxembourg is party to New York Convention on Recognition and Enforcement of Foreign Arbitral Awards.

5.04 LIMITATION OF ACTIONS:

General period of limitation for actions is 30 years. (C.C. 2262). Time limitation to become owner of real estate held in good faith is 10 or 20 years, depending on place of residence of actual owner. (C.C. 2265). There are numerous other limitation periods in civil matters.

General limitations period for rights and actions in commercial matters is ten years (C.Comm. 189), but statute of limitations may be shorter. Shorter limitation periods exist, for example, in labor matters, varying between six months and five years.

5.05 PRESCRIPTION:

See topic 5.04 Limitation of Actions.

6 COURTS AND LEGISLATURE

6.01 COURTS:

See category 5 Civil Actions and Procedure, topic 5.01 Actions.

6.02 LAW REPORTS, CODES:

Luxembourg law is organized in codified system with six main codes: Code Civil; Code du Commerce; Code Pénal; Code d'Instruction Criminelle; Nouveau Code de Procédure Civile; and Code du Travail.

Other compilations include Code Fiscal (tax code), Code d'Environnement, Code Administratif, Code d'Education Nationale, and Code de la Santé.

Other important laws are published in unofficial “Recueil des lois spéciales”. Acts of Parliament and executive decrees are published in official journal, “Mémorial”. Important court decisions are published in “Pasicrisie”, issued four times a year.

6.03 LEGISLATURE:

See category 1 Introduction, topic 1.02 Government and Legal System.

7 DEBTOR AND CREDITOR

7.01 ASSIGNMENTS:

Basic rules regarding assignment of claims not embodied in negotiable instrument are set out in Civil Code. (C.C. 1689-1691). To make such assignment effective vis-à-vis third parties, assignment must be notified to debtor or be accepted by latter. Notification and acceptance may be made by notarial deed or simple contract. Assignment is valid between parties at exchange of consent.

7.02 ATTACHMENT:

General prejudgment attachment (“saisie-conservatoire”) exists only in commercial matters and is only granted where debtor may become insolvent. (N.C.P.C. 550).

Any creditor may, if existence of his claim is sufficiently established, apply to court to obtain prejudgment attachment of debtor's assets held by third parties. (N.C.P.C. 694).

There are other special types of prejudgment attachments, such as “saisie-gagerie” (N.C.P.C. 956), for conservation of tenant's furniture, “saisie-revendication” (N.C.P.C. 964), by which dispossessed owner claims property held by third party, and “saisie-foraine” (N.C.P.C. 959), by which creditor attaches personal property of nonresident debtors located in jurisdiction.

When enforcing final judgment, all real or personal property of debtor may be seized. Certain assets, which are enumerated by law, cannot be attached, or can only be attached in part, because of certain humanitarian considerations.

7.03 BANKRUPTCY:

Only traders and commercial companies can be declared bankrupt. Trader is in state of bankruptcy if he ceases making due payments and has no more credit standing. (C.Com. 437). Bankrupt person must, within one month after having ceased payments, file declaration with register of commercial division of district court admitting insolvency. (C.Com. 440).

Bankruptcy will be declared upon such admittance. It may also be declared at request of bankrupt's creditors or on court's own motion. (C.Com. 442).

As from date of bankruptcy judgment, bankrupt may no longer administer his estate, and all transactions, as well as all payments made by him or to him, are null and void.

Same bankruptcy judgment also determines date of cessation of payments and following transactions, if carried out during such period or within ten days immediately preceding such period, will be null and void: all donations and all transactions where bankrupt receives grossly insufficient consideration; payments of unmatured debts; payments of matured debts not made in cash or negotiable instruments; all mortgages, pledges and other security rights for debts previously incurred. (C.Com. 445). However, law of Aug. 5, 2005 relating to financial collateral arrangements expressly recognizes validity and enforceability of such arrangements even if entered into during suspect period. Furthermore, all payments of matured debts, as well as all transactions with good consideration, which occurred during period of cessation of payments, may be voided, if other contracting party had actual knowledge of fact that bankrupt had ceased payments.

As result of bankruptcy judgment, all debts of bankrupt mature. (C.Com. 450). As of same date, interest will no longer accrue on unpreferred debts. (C.Com. 451).

Administration of bankrupt's estate is taken over by one or more court-appointed receivers. Actions of receivers are monitored by specially commissioned judge (“juge-commissaire”). (C.Com. 466).

Creditors are required to file declaration of their claims with registrar of commercial division of district court within maximum period of 20 days. This period of time may be extended for nonresident creditors. Declaration must contain full particulars of creditor and his claim. Receivers will examine claims filed which they may accept or dispute. If claim is disputed subsequent hearing will be held. If after such hearing claim remains still disputed, it will be submitted to court.

Creditors are informed of above proceedings by publications and advertisements, as well as by registered mail, once their identity is known.

After examination and discussion of claims, meeting of creditors is held, which will decide whether or not they will enter into settlement with debtor. If it is decided not to enter into settlement, receivers will liquidate estate by selling assets and paying off all bankruptcy expenses. Remaining assets will be divided equally among all unsecured creditors.

Special Procedures for Credit Institutions.

Law of Apr. 5, 1993 as amended by Law of Mar. 19, 2004 which implemented EU Directive 2001/24/EC sets out special procedures for reorganization (sursis de paiement) and winding up (liquidation) of financial sector institutions.

Credit institution itself or officials of Commission for Supervision of Financial Sector (“Commission de Surveillance du Secteur Financier” or “CSSF”) can apply for reorganization measures to district court if following conditions are met: (1) If creditworthiness of institution in question is impaired or if it is experiencing liquidity difficulties, whether or not it has ceased payments; (2) if there is danger that institution will not be able to fulfil its obligations completely;

and (3) if authorization of institution has been withdrawn but relevant decision is not yet final. Lodging of petition has, from time of completion of formalities until such time as final decision is taken on petition, of suspending all payments of institution concerned and prohibiting all actions other than safeguarding measures unless authorization of CSSF has been obtained, such acts otherwise being null and void. Court ruling must lay down, for period that may not exceed six months, terms and conditions governing suspension of payments. Court ruling must also appoint one or more supervisory auditors. CSSF must automatically perform function of supervisory auditor until court ruling. Written authorization of supervisory auditors must be required for all acts and decisions of institution, such acts and decisions otherwise being null and void. Court may limit scope of operations subject to authorization.

Credit institution which has ceased to fulfil its obligations and whose financial situation is wavering may be ordered to wind up its affairs by district court if public prosecutor or officials of CSSF request such measures to be taken. Credit institution may further be wound up if previously granted delay of payment did not lead to improvement of institution's financial situation. Court then will appoint judge-commissioner and one or more trustees. Court may apply normal rules of bankruptcy, and accordingly it may fix within six months preceding bankruptcy date from which credit institution ceased to make due payments. Effects of bankruptcy will start at moment of court decision or at moment counterparty to transaction has knowledge of bankruptcy, and not retroactively at 0.00 am of day of court decision as in general law. Court chooses form of liquidation. As soon as liquidation is terminated, trustee produces statement of institution's assets, and court closes liquidation after due examination of documents by auditors appointed by court. Notice of voluntary liquidation by credit institution must be made to CSSF one month prior to notice for extraordinary shareholders' meeting called to consider such liquidation.

Law of Jan. 12, 2001 provided that in event of insolvency proceedings against participant in Luxembourg payment or securities settlement system, transfer orders and nettings in such systems shall be legally enforceable and binding on third parties provided that transfer orders were entered into system before moment of opening of insolvency proceedings.

7.04 EXECUTIONS:

Under Luxembourg law, several methods of attachment are made available, depending on nature of property to be seized.

Rules Applicable to All Methods of Attachment.

Creditor must have evidence of indebtedness. Debt must be existing obligation; it may be future, but not contingent, liability. Certain property is not subject to attachment (N.C.P.C. 716-729), including: (1) Beds and clothing for debtor and his family, craftsmen's tools, or other property necessary for pursuit of trade; (2) alimony granted by court, by donation or will; (3) property given by will or donation under clause of immunity from attachment; and (4) portion of salaries, wages and pensions payable by state.

Money or Property Due to Debtor by Third Party (“Saisie-Arrêt”).—Money or property held by third party may be due to debtor or belong to him. Attachment may be requested for conservation or execution.

Proceedings.

(1) If creditor has document acknowledging debt which is beyond doubt, e.g. established by judge or notary, seizure can be made directly by bailiff. (2) If creditor has no or weak documentary evidence of debt, e.g. private document, he must present petition to court of domicile of debtor or garnishee. With authorization of judge bailiff may then proceed to seize property. In both cases, debtor whose property has been seized must be advised and summoned within eight days following attachment. Garnishee must in turn be advised of summons within eight days.

Debtor's Personal Property (“Saisie-Exécution”).—Debt must be liquid. One day at least before actual attachment proceedings, debtor must be served at his domicile with order to pay, together with notification of document acknowledging indebtedness.

Proceedings.

Seizure is executed by bailiff at domicile of debtor, with help of police if necessary. Debtor must be notified of attachment if it is made away from his domicile or not in his presence. Property may be seized in excess of alleged debt, but only property covering reimbursement of debt will be sold. Sale may only be made eight days or more after notification of attachment to debtor.

Debtor's Real Estate (“Saisie-Immobilière”).—Addressed to real property only, this method of attachment follows strict rules. As in “saisie-exécution” debt must be liquid, and debtor must be served with documented order to pay before starting actual attachment proceedings.

Proceedings.

(1) Seizure is realized by service of document by process server 15 to 180 days after order to pay. Attachment is notified to seized debtor. (2) Attachment is registered on cadastral survey within 15 days after its notification. (3) Case must be brought before court within 15 days after registration, which authorizes or rejects attachment no earlier than 30 days and no later than 40 days subsequent. Sale must be made by adjudication.

Miscellaneous.

Special execution methods are provided for attachment of: (1) Private pensions and annuities; (2) fruits and crops (“saisie-brandon”); (3) tenant's furniture (“saisie-gagerie”); (4) foreign debtor's property (“saisie-foraine”); and (5) property to be recovered (“saisie-revendication”).

7.05 GARNISHMENT:

See topic 7.04 Executions.

7.06 LIENS:

Liens may be created by contract (see topic 7.07 Pledges; category 17 Mortgages, topic 17.02 Mortgages) or exist by operation of law. In cash sales, seller has lien until price is paid. (C.C. 1612). With deposits, depository has right to keep deposited assets until full payment of all fees and costs related to deposit is made. (C.C. 1948).

7.07 PLEDGES:

To be valid, under civil law as well as commercial law, pledge must, besides consent to pledge, imply delivery of pledged object by debtor to pledgee or to specified third party holding in pledge for creditor. In commercial matters, delivery of carriage documents (bills of lading, way bills) is equivalent to delivery of object. Important example of pledge is pledge of business and its goodwill. Credit institutions wishing to accept such pledges generally must have permission of Government to deal with this branch of credit activity.

Law dated Dec. 21, 1994 provides that amount of secured debt no longer needs to be indicated in pledge deed. Moreover, law states now expressly that pledge can secure both present and future debts. Notification by bailiff of pledge to debtor of pledged claim is no longer required. Simple notification by mail is sufficient. As alternative, pledge may be accepted by debtor. Notification or acceptance may be done alternatively in authentic deed or in private deed.

Commercial pledges do not require notarial deed, and pledge may be established in conformity with procedure followed in sale of goods of similar nature.

Pledge is always accessory to contract. Termination of obligations under contract, for any reason, automatically releases pledge. Pledge may be released separately on waiver by creditor, merger of creditor's and debtor's rights, loss of pledged object or its delivery to debtor. Debtor's bankruptcy or death does not release pledge. Pledge of business and goodwill must be registered in mortgage registry. Registration must be renewed every ten years, and if not renewed it is barred by statutes of limitations. Non-renewal of registration is thus cause for release of pledge of business and goodwill.

When debt matures, creditor is not allowed to appropriate pledged object nor sell it at his option. Under civil law, creditor must obtain authorization from court to sell pledged object by auction or to take object in payment of amount determined by experts. Under commercial law, creditor must obtain authorization from president of commercial court either to sell pledged object by auction or by simple contract, unless place and manner of realization were previously agreed upon.

Pledge of Securities or of Sums of Money.

Law of Aug. 5, 2005 which implemented EU Directive 2002/47/EC sets out single legal instrument for all types of financial collateral arrangements (“FCA”) in order to protect validity and enforceability of FCA. Law applies to pledges over claims and financial instruments (such as securities, shares, bonds, debt securities, deposit certificates, notes, term financial instruments, money market instruments).

Under 2005 law, perfection of pledges continues to operate by transfer of possession of pledge assets from pledgor to pledgee or to designated third party. Date of perfection of pledges also determines their ranking, in case more than one pledge has been entered into over same asset. Law also provides possibility for parties to allocate voting rights and payments of income or even of capital from pledged assets as they see fit (by default, voting rights usually stay with pledgor whereas any payments on pledged assets go to pledgee).

It is now possible to enforce pledge of securities without prior notice at all, except for notification of default which shall remain. Creditor is also entitled to directly appropriate pledged shares without need to resort to court proceeding.

Transfer of Title on Property Intended to Serve as Security.

Law of Aug. 1, 2001 introduced in Luxembourg new kind of pledge by which ownership serves as security for debt. Law of Aug. 5, 2005 on financial collateral arrangements replaces 2001 law. 2005 law now applies to all types of parties, whether finance professionals or not, except for fiduciary assignments which still require that fiduciary must be finance professional.

8 DISPUTE RESOLUTION

8.01 ALTERNATIVE DISPUTE RESOLUTION:

Arbitration.

Any matter which may be contractually disposed of may be arbitrated.

Law excludes from arbitration questions relating to legal status and capacity of person, matrimonial relations, divorce and separation, as well as matters regarding incapacity and absence of persons. (N.C.P.C. 1224).

Parties are free to make contractual provisions for appointment of one or more arbitrators in arbitration agreement. In absence of such provision, arbitrators will be appointed according to rules of N.C.P.C. 1227.

Equally flexible approach has been adopted with regard to choice of rules of procedure to follow. In absence of agreement by parties on this question, procedural rules normally applied by court having jurisdiction will apply. (N.C.P.C. 1230).

Awards may be appealed unless parties have waived their right of appeal in arbitration agreement or amendment thereto. (N.C.P.C. 1231).

Luxembourg is party to many of international agreements that deal with international commercial arbitration. It has ratified Geneva Protocol of Sept. 24, 1923 (Luxembourg law of July 29, 1930) on arbitration clauses, but only for commercial matters.

More recently, it has approved European Convention on International Commercial Arbitration, done at Geneva on Apr. 21, 1961 (Luxembourg law of Nov. 26, 1981), as well as Paris Agreement of Dec. 17, 1962 (Luxembourg law of Nov. 26, 1981) relating to its application. These two agreements, which contain detailed provisions on arbitration of disputes arising from international trade, came into effect in June 1982.

As far as recognition and enforcement of foreign arbitral awards are concerned, application for enforcement has to be made to Presiding Judge of district court. (N.C.P.C. 1250 and 1251).

Luxembourg has also ratified New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of June 10, 1958 (Luxembourg law of May 20, 1983).

Luxembourg has introduced special rules for ADR (mediation) in petty criminal matters by 1999 law.

Luxembourg Chamber of Commerce has created Arbitration Centre.

Luxembourg Bar Association, together with Chamber of Commerce and Chamber of Professions, have created Luxembourg Bar Mediation Center.

At EU level, directive 2008/52/EC of European Parliament and of Council of 21 May 2008 on certain aspects of mediation in civil and commercial matters has been adopted. No implementation measures have been taken so far at local level with regard to this directive. Several EU networks for settling cross-border disputes out of court have already been created.

8.02 ARBITRATION AND AWARD:

See topic 8.01 Alternative Dispute Resolution.

9 DOCUMENTS AND RECORDS

9.01 ACKNOWLEDGMENTS:

If foreign official acts and deeds are to be used officially in Luxembourg, signatures appearing therein must be certified by relevant authorities in country of origin, and signature of latter will have to be certified by Luxembourg consular or diplomatic officer. Luxembourg is party to several international conventions which simplify foregoing procedure for documents from Contracting States (Hague Convention of Oct. 5, 1961 [Luxembourg law of Mar. 14, 1978]; European Convention of June 7, 1968 [Luxembourg law of Mar. 14, 1978]; Athens Convention of Sept. 15, 1977 [Luxembourg law of Apr. 2, 1981]).

9.02 AFFIDAVITS:

Under Luxembourg law there is no general document under oath analogous to affidavit. Under certain conditions, written declarations from third parties may be submitted in court proceeding. (N.C.P.C. 399). Such declarations must relate to facts in which author of declaration was involved or of which he has personal knowledge. (N.C.P.C. 402). Declarations must be handwritten or witnessed by notary public, and contain certain compulsory indications. (N.C.P.C. 402). Courts may hold declarations as true even though requirements of Art. 402 N.C.P.C. are not entirely met.

9.03 COMMISSIONS TO TAKE TESTIMONY:

See category 5 Civil Actions and Procedure, topic 5.02 Depositions and Discovery.

10 EMPLOYMENT

10.01 LABOUR RELATIONS:

Right to work is guaranteed by Constitution. In accordance with such provision, state is under duty to adopt rules that assure work to everyone to largest extent possible.

Trade Unions.—Luxembourg Constitution guarantees freedom to join trade unions. Luxembourg employees, as well as employers, are organized on voluntary basis into number of trade unions, respectively trade and professional federations, whose principal task is to negotiate collective bargaining agreements. Luxembourg's tradition of consensus politics integrates unions in periodic meetings together with employers and government. This has proved very successful in preventing labour disputes.

Work Permit.—Nationals of EU countries, nationals coming from other states party to agreement on European Economic Area and from Switzerland can freely work within territory of Luxembourg without work permit.

Prior to employment, all other foreigners must apply for single authorization combining work and residence permit at Ministry of Foreign Affairs, and undergo medical examination. Work and residence permit shall be delivered by Minister only if (i) there are no nationals or EU workers registered with Employment Administration for same job as one which shall be performed by third-country national; (ii) performance of such activity by third-country national shall serve Luxembourg economic interests; (iii) third-country national has professional skills for performing requested activity; and (iv) third-country national has employment contract for function which has been declared vacant by employer before hiring third-country national.

Labour Contract.—Regulated by Labour Code, as amended. Employment is normally of unlimited duration but may be for fixed-term in certain circumstances. Written contract is required regardless whether employment is for limited duration or for indefinite period of time. Copy must be provided to employee by time he starts work. In absence of written contract, burden of proof of existence and content of employment relationship shall be upon employer. In this case, contract is deemed to be for indefinite period of time, without possibility to prove contrary.

Labour contract for definite period of time is exceptional under Luxembourg law; it may only be entered into when all conditions laid down by law are met. Term or at least minimal duration must be disclosed in contract, which cannot be terminated before term except for gross negligence. Contract of limited duration can only be renewed twice, and has maximum duration of 24 months, including renewals.

Trial periods must be provided for in writing. Trial periods vary between two weeks and maximum of 12 months, depending on employee's qualifications and salary, with two exceptions: (1) Trial period for unskilled workers may not exceed three months; and (2) trial period for employees whose monthly salary exceeds certain amount to be determined by decree (currently ca. [Euro]3,672.48 at index 702.29) may be 12 months at most. Trial period is not renewable. Labour contract may be terminated by each party during trial period upon 15 days' to one month's notice. If contract is not terminated during trial period, it is deemed to be contract of unlimited duration as of first day of working relationship.

Employers' Obligations.

Within eight days of beginning of working relationship, employer must notify new hire to Joint Centre of Social Security Institutions(Centre Commun de la Sécurité Sociale). Sickness and pension insurance are paid on equally shared basis by employer and employee, although accident insurance and State family allowances are exclusively supported by employer.

Working Time.

Working time is limited to eight hours per day and 40 hours per week. Employees may be requested to work more than eight hours per day and 40 hours per week, on condition that average weekly working time, calculated over four-week period, does not exceed 40 hours a week. Every employer must draw up Organisation Plan with respect to working time of his employees over next four weeks. Absolute maximum time which may be spent at work ten hours a day and 48 hours a week.

Save where otherwise provided for by law, work done in excess of normal daily and weekly working hours (i.e., eight hours/day or 40 hours/week) is considered as overtime work. Except in event of danger, emergency or ``*force majeure*", overtime work is subject to prior authorization of Labour Minister. Overtime work is, in principle, restricted to following cases: (i) Where perishable materials would otherwise be lost or technical result of work compromised; (ii) for occasional tasks such as compiling inventories; and (iii) in circumstances involving public interest or national danger. In addition to above-mentioned exceptions, authorisation may also be granted in cases where reasons for having recourse to overtime work are duly explained and where there is no direct effect on labour market. Any employer wishing to have recourse to overtime work, must file request with Labour and Mines Inspectorate (``*Inspection du Travail et des Mines*"). Overtime work must be first compensated by time off, and only where either (i) time off could not be granted to employee for reasons relating to undertaking's organisation or (ii) employee has left company before having been entitled to time off, that overtime working hour should be paid at rate of 40% for all employees.

Sunday work is, in principle, prohibited. Where Sunday work is allowed, it must be paid with payment of 170% of normal rate and 200% for workers minors of age. If time off is taken in lieu of Sunday work, supplementary payment of 70% is due.

Night work is prohibited for minors (i.e., persons aged under 18) and expectant or breastfeeding mothers. Collective labour agreement must provide for salary increases of at least 15% for any night work.

Holiday.

Each employee is entitled to yearly leave of 25 days. Additional holiday of six days is granted to disabled workers and six days to employees whose work does not allow them to take uninterrupted weekly rest period of 44 hours. Collective labour agreements may also provide for additional holidays. Right to such holiday begins on completion of three uninterrupted months of service with same employer.

Extraordinary paid leaves are granted on certain occasions for: (1) death of employee's spouse or first degree relative (three days); (2) birth or wedding of child (two days); (3) wedding of employee (six days); (4) employee moving house (two days); and (5) enrolment for military service or death of second degree relative (e.g. grandparent) (one day); and (6) adoption of child under age of 16 unless special adoption leave has already been granted (two days).

Arts. L-234-43 to 234-49 of Labour Code allow each parent to take parental leave under certain conditions.

Compensation.

There is no legal requirement as to amount of salary to be paid. However, (1) salary must not be less than minimum wages periodically determined by Government (currently approximately [Euro]1.682,76 [index 702.29] for unqualified employees and approximately [Euro]2.019,31 [index702.29] for qualified employees), and (2) it must be periodically adapted to wage index. Salaries must be paid every month on last day of month at latest. However, employees may obtain pre-payment of salary corresponding to work performed in event of particular, justified, and urgent need. Detailed salary statement must be remitted to employee at end of each month.

Salaries must be paid in case of extraordinary leaves for family events (e.g. death of parent, birth of child). In case of sickness of employees, salary is paid by employer for first 77 days of sickness during 12-month reference period, as well as end of month during which 77th day occurs. Employer is reimbursed by new Employers' Mutual Insurance Fund at rate of 80% of wage declared to Joint Centre of Social Security Institutions (``*Centre Commun de la Sécurité Sociale*)''.

Expectant employees are entitled to maternity benefits for period starting eight weeks prior to birth of child and terminating eight weeks after birth. Upon return, employer is compelled to reintegrate woman to her former job or to equivalent position.

Dismissal.

Termination with notice is possible only in case of contract concluded for indefinite period of time. Notice of dismissal must be sent by registered mail by employer wishing to dismiss employee. In case of latter, following notice periods must be respected: (1) Two months if employee has worked with same employer for less than five years; (2) four months if employee has worked five to ten years with same employer; (3) six months if working relationship existed for more than ten years. If worker resigns notice period is half of this. Notice can only take effect on 1st and 15th of month. It is illegal for employer to dismiss woman whose pregnancy is medically proved, for period of pregnancy, and until up to 12 weeks following birth of child. Any dismissal violating these dispositions is void according to statute.

Special legislation (i) regulates prevention of acts of sexual harassment and victims legal rights regarding termination of their employment contract and (ii) reverses burden of proof in case of discrimination based on sexual considerations.

If notice periods are not respected, employer must provide dismissed employee with payment equal to employee's salary during period required for notice.

In addition, indemnifications for unfair dismissal must be paid to every dismissed employee (if not dismissed on grounds which are able to be supported by convincing evidence of facts connected with employee’s aptitude, employee’s conduct, or operating needs of business, establishment, or department) who has been working for employer. There is no pre-determined compensation for damage by statute and judges have widest powers to appreciate at their own discretion amount of indemnification.

Retirement.

Minimum age that entitles employee to pension is 65 for men and women. However, smaller pension (early retirement indemnities) may be paid out as of age of 57 or as of age of 60.

Early retirement schemes may be entered into upon special agreement with Ministry of Labour. Beneficiaries of this scheme must be at least 57 and may not execute any other paid or unpaid professional activity after early retirement. Pre-pension rights and duties cease when employee becomes entitled to normal pension.

11 ENVIRONMENT

11.01 ENVIRONMENTAL REGULATION:

Area Planning Law.

(a) Types of Development Plans.

Planning and development matters are governed by law of May 21, 1999 on national planning, as amended, and law of July 19, 2004 on town and country planning and development, as amended. Pursuant to law of May 21, 1999, Minister in charge of planning matters elaborates central guiding programme on national planning and helps establish regional and sectorial programmes at local level. On local level most municipalities have adopted land use plan and building regulations (réglement sur les bâtisses). According to law of Jan. 19, 2004, as amended, governing conservation of nature and natural resources, constructions to be erected for purpose of housing, trade, industry or sports are authorised if construction falls within ambit of national or local use plan.

Besides above mentioned construction, law distinguishes agricultural, gardening, market gardening, forestry, wine growing, piscicultural installations, or public utility undertakings. These buildings may be erected in natural environment outside of zoned areas. Authorisation is however required from Minister for environment.

Building regulations will determine character of construction and will provide for measures concerning conservation of sites and monuments from aesthetic point of view. All construction must meet with provisions of building regulations of relevant municipality.

Building regulations will also define monuments of artistic, historic or archeological value and places land-use plans designated as having special character from landscape point of view. In neighbourhood of these sites, new construction, extensions, billboards and other advertising facilities will be authorised only if they do not harm beauty of site. Besides these authorisations, it is understood that every construction needs separate building permit (``*permis de construire*") from mayor (``*bourgmestre*").

(b) Sanctions.

Law of Jan. 19, 2004 governing on conservation of nature provides for fine of up to [Euro]750,000 and imprisonment from eight days to six months. Law compels court to confiscate machinery and tools used by contravener as well as vehicles used to infringe law. Court must also order, at expense of contravener, restoration of site within one year.

In practice, court may order, besides fine, confiscation of building equipment and demolition of construction illegally erected.

Infringements of building regulations are punished by sanctions provided for by law of July 19, 2004, i.e., fine of up to [Euro]125,000 and/or imprisonment from eight days to two months. Court may also order demolition of executed works and restoration of site, at expense of contravener.

Municipalities or, in their stead, State, may claim damages for prejudice suffered as ``(*partie civile*)''. Although law governing land-use only gives courts mere possibility of ordering restoration of site, courts always order restoration, it being considered as only way to redress infringement.

Municipalities may also ask courts to order abolition of illegal works in penal proceedings; they also have the right to issue direct writ of summons (citation directe) against contravener.

Environmental Law.

Pursuant to art. 1 of law of June 10, 1999, as amended, industrial or commercial installations, whose establishment or operation may involve risk or have adverse effect on safety, health or well-being of general public, neighbourhood, employees or environment are subject to licensing requirements. Furthermore, every facility, activity or manufacturing process that may lead to similar risks is subject to licensing.

Determination of authorities responsible for granting license depends on classification of installation into one of four categories and two sub-categories specified by regulation according to degree of risk involved.

Installations falling under category 1, such as chemical factories, must be licensed by Minister of Environment and Minister of Labour and are subject to so-called "*enquête commodo et incommodo*" (see below).

Installations under category 2, such as bakery employing less than 15 people, are licensed by mayor (bourgmestre), whereas installations falling under category 3, such as e.g. hotel, must be licensed by above mentioned ministers, but without being subject to "*enquête commodo et incommodo*". Installations falling under category 4, such as stables for 20 to 200 animals, do not need to seek authorisation but must conform to certain conditions prescribed by law. Authorisation is nevertheless required for new installations, or installations that undergo substantial modifications.

Application submitted to competent authority must include, in addition to name, occupation and residence of applicant, nature and location of installation, purpose of its operation and details on extent of production or nature of materials to be stored there. Applicant must also provide estimation of number of employees and list potential risks for their safety and health.

Additionally, he must supply information on use of water, air, water and soil pollution, noise levels, vibrations, radiation, nature, amount, treatment and disposal of waste and other by-products engendered during production. He must also provide evaluation of all other harmful effects on environment. Application must contain approximate data on measures designed to prevent or reduce harmful effects as well as potential risks for employees, surrounding neighbourhood, public and environment.

Authorisation of Minister of Environment and Minister of Labour will specify requirements to ensure protection for safety, health and well-being of public, surrounding neighbourhood, employees and environment (air, water, soil, noise level and waste).

Authority issuing authorisation may require that installation be checked and approved on initial operation and in regular periods thereafter. Requirements of initial authorisation may be subject to continual review.

Subsequently imposed directives are possible.

Notification of project must be posted for two weeks in office of mayor at location of installation and in surrounding municipalities. In case of installations falling into categories 1 and 2, it must also be published in four daily newspapers.

Objections can be filed by every citizen. Public discussion (enquête de commodo et incommodo) is held in community of location of installation, during which all objections will be heard.

Within 40 days of notification of authorisation (or non-authorisation) decision, any affected party, i.e., any person living in immediate vicinity of installation who can thereby claim personal and direct interest in decision, may appeal against decision.

Associations for protection of environment recognised by law, have right to defend collective interests of affected individuals, provided association has got required approval by ministerial order, its articles have been validly published and it is active in environmental matters for at least three months.

Immediate neighbours and approved environmental associations also have right subsequently to ask competent authority to impose requirements on installations. They may even require deadline for fulfilling requirements already imposed.

Law of Nov. 25, 2005 provides for direct access by public to all information concerning environment held by public authorities.

Conservation Law of nature is governed by general law of Jan. 19, 2004, as amended, and other laws on air or water pollution, waste or noise.

Objectives of law of 2004 are conservation of environment's character, variety and integrity, protection and restoring of landscapes and natural spaces, conservation of flora and fauna and their biotopes, upholding and improvement of biological balances, protection of natural resources against any damages, and improvement of structures of environment.

Law also deals with waste disposal, protection of woods and their biotopes.

For new installations subject to licensing requirements, authorisation will only be granted if installation meets all requirements provided for by statutes governing waste disposal, pollution, etc.

12 ESTATES AND TRUSTS

12.01 DEATH:

See category 18 Property, topic 18.01 Absentees.

Death certificate is delivered by registrar (“officier de l'état civil”), upon production of medical doctor's certificate evidencing such death.

Actions for Death.

Actions for death resulting from wrongful or negligent conduct may be brought by surviving spouse (or partner), descendants and ascendants, and other heirs. Damages may cover pecuniary loss, as well as moral damages.

12.02 DECEDENT'S ESTATES:

See topics 12.03 Descent and Distribution, 12.04 Wills.

12.03 DESCENT AND DISTRIBUTION:

Real and personal property are governed by same rules of inheritance. There is no right of primogeniture and no distinction between sexes. (C.C. 745). Certain persons may, however, be excluded from succession, e.g. murderers and attempted murderers of deceased. (C.C. 727).

According to Luxembourg's conflicts of laws rules, real property located in Luxembourg is subject to Luxembourg inheritance rules, and personal property is subject to laws of inheritance of last domicile of deceased.

Legal heirs include descendants, surviving spouse, ascendants and brothers and sisters. (C.C. 731). If there are no such heirs, estate goes to Luxembourg state. (C.C. 768).

Children, legitimate and illegitimate, and their descendants exclude all other heirs except for surviving spouse. (C.C. 745).

Surviving spouse may opt between share in estate, which may not be less than one quarter of estate, and usufruct of house and furniture in which spouses lived. Usufruct may be converted into capital if spouse remarries. (C.C. 767-1). Surviving spouse will inherit entire estate if there are no children and descendants. (C.C. 767-2).

If there are no children and descendants, and no surviving spouse, estate goes to brothers and sisters and parents of deceased, each being entitled to half of estate. If there is only one parent left, this share will be reduced to one quarter. If no parent survives, brothers and sisters will inherit all of estate. (C.C. 748 to 751).

If deceased leaves no children and descendants, no surviving spouse and no brothers and sisters, all of estate goes to parents. If no parents are left, estate goes to ascendants. (C.C. 746).

12.04 WILLS:

Testamentary freedom is restricted by compulsory portion of estate due to children. Disposable portion of estate amounts to: 50% if there is one child; 33.33% if there are two children; 25% if there are three or more children. (C.C. 913). Luxembourg Civil Code recognizes three forms of wills: holographic, notarial and mystic will. (C.C. 969).

Holographic will is not subject to any special form, but must be entirely handwritten, dated and signed by testator. (C.C. 970). Notarial will is set out by notary recording intentions of testator. It must be signed by two notaries or by one notary and two witnesses. (C.C. 973). Mystic will is written by testator or third party and handed over in sealed envelope to two notaries or to one notary and two witnesses who write down testator's declaration that document deposited in hands of notary or notaries is his will.

Minors under age of 16 and persons who are not of sound mind lack capacity to draw up wills. (C.C. 902 and 903). Testators can revoke their wills, either expressly or by subsequent wills containing provisions conflicting with those of first will.

Luxembourg applies Hague Convention of Oct. 5, 1961 on conflicts of law regarding form of wills.

13 FAMILY

13.01 ALIMONY:

See topic 13.03 Divorce.

13.02 COMMUNITY PROPERTY:

Unless otherwise agreed upon by parties in marriage contract, community property includes all income of professional activity, interest and income of all assets, assets acquired during marriage. (C.C. 1401). Assets that husband/wife owned prior to marriage, or acquired during marriage by inheritance or gift, do not form part of community property. (C.C. 1404 and 1405).

Right of administration and disposal rests with spouse via whom asset has entered community, except real estate. (C.C. 1421). Spouse may not dispose of community property acquired or received by both spouses without consent of husband/wife. Action for annulment may be started by spouse who considers that other spouse has exceeded his powers in exercising right of disposal within two years after having knowledge of transaction.

13.03 DIVORCE:

Jurisdiction.

European Regulation CE No. 2201/2003 stipulates that jurisdiction is granted to tribunal either:

(1) Of spouses' usual domicile; or

(2) of their last usual domicile if one of spouses still lives there; or

(3) of defendant's usual domicile; or

(4) in case of joint application, of either of spouses usual domicile; or

(5) of applicant’s usual domicile if he resided there for at least one year before application was made; or

(6) of applicant’s usual domicile if he resided there for at least six months before application was made and if he is national of this state; or

(7) of nationality of both parties.

European Regulation CE No. 2201/2003 further stipulates that court of Member State where child is habitually resident at time court is seized has jurisdiction in matters of parental responsibility. Courts exercising jurisdiction on divorce may see their jurisdiction prorogated to connected matters of parental responsibility under certain conditions.

Aliens.

When both parties are aliens, divorce is governed by law of their common nationality; or if they are of different nationality, by law of their common permanent residence; or if there is no common residence, by law of court seized.

Types of Divorce.

Divorce may be by mutual consent or for specific cause:

Divorce by mutual consent (C.C. 275) must not be prohibited by one of parties' national law. Parties must have been married more than two years, and both must be over 23. After notarial inventory and valuation of their assets, spouses agree on common settlement of their pecuniary interest, on their residence pendente lite, on alimony and on custody of children during and after proceedings.

Proceedings: Parties appear two times before president of court at intervals of six months and repeat their mutual consent to divorce. With consent of State Prosecutor, court confirms that all legal requirements have been met, and grants divorce.

Divorce for Specific Cause.

Specific cause for which divorce is granted may be: (1) Abuse, cruelty or gross insult, when such acts constitute serious, and repeated violations of marital duties rendering marital state intolerable. (C.C. 229). Such acts include (i) adultery, (ii) violence, (iii) conviction for infamous crime, and (iv) desertion when not justified by serious grounds. Reprehensible conduct is examined by judge, having regard to social standing of parties. (2) Separation exceeding three years where spousal disunion cannot be remedied. (C.C. 230). (3) Separation in excess of five years due to mental insanity of spouse. (C.C. 231). Divorce may not be granted if it would result in excessive material or moral suffering. When divorce is requested on grounds of C.C. 230 or 231, cost of proceedings is always borne by petitioner.

Proceedings: Request, which must be signed by lawyer, must be lodged with “tribunal d'arrondissement”. Alleged wrongs must be outlined to court, and claims may be modified during proceedings if petitioner gains knowledge of additional wrongs that took place prior to request. Preliminary conciliation procedure no longer applies following a law of July 27, 1997. Plaintiff may, if necessary, prove his case by all means, including hearing of witnesses (except descendants and their spouses). Counter-petitions are accepted, and divorce may be pronounced against either or both parties and damages may be awarded. Court's judgment granting or refusing divorce is appealable before higher court within 40 days of its service. Case before appellate court will be granted expedited review.

Custody of Children.

Judge will make provision for temporary custody of children, according to parties' agreement, if any, or in best interests of children. When divorce is granted, parental authority and custody of children are awarded to either party or to third party, not necessarily member of family, in children's best interest.

Judge can take account of children's feelings by their appearance in Court.

Alimony.

President of court may make provision for temporary alimony according to parties' agreement. Court's decree granting divorce may award successful plaintiff alimony, which amount is determined having regard to defendant's revenue and plaintiff's resources. Alimony is always revisable and revocable. Alimony ceases to be due to ex-spouse if such person lives together with third person or remarries.

Separation.

May be granted on same grounds as divorce for specific cause. (C.C. 306). Private separation agreements are not accepted. Legal separation carries with it division of property. In case of reconciliation, after judgment granting separation, separation of property continues unless new matrimonial contract is signed. Reconciliation will be effective as against claims of third parties, only if special notary deed is signed and duly published.

Name.

Divorced woman cannot use her former husband's surname; use of husband's name during marriage being based only on custom and practice. In certain instances, she may be awarded by judgment authorization to continue using former husband's name (e.g. for commercial reasons).

Remarriage of Divorced Woman.

In case of divorce by mutual consent (C.C. 275) or on grounds of separation (C.C. 230, 231) woman may remarry after divorce is final. In other cases, same rule applies, provided 300 days elapsed since president of court's authorization to bring case before court, unless in meantime birth was given to child.

Draft law aiming to abolish 300 day—rule is currently discussed at Parliament.

Dower.

This institution does not exist in Luxembourg. Under community property rules, wife is entitled to half of assets acquired by spouses during marriage with their joint revenue. Spouses may insert in their will clause by which disposable portion of their assets is left to last surviving party.

See category 12 Estates and Trusts, topic 12.04 Wills.

13.04 INFANCY (CHILDREN):

In contracts and court actions, children must be represented by parent(s) exercising parental authority.

Age of majority for both sexes is 18. (C.C. 388 and 488). Child may be emancipated at 16 by court order. Emancipation is automatic upon marriage of child, which is only possible if authorized by parent(s) exercising parental authority. Emancipated minor enjoys full legal capacity, except that he cannot engage in commerce.

13.05 MARRIAGE:

Except in cases where Grand Duke grants special derogation for compelling reasons, men must be minimum of 18 years of age and women must be at least 16 years old to be allowed to marry. Consent of parents is required for people marrying under age of 18.

Draft law aiming to bring legal minimum age regarding marriage for women to 18 years is currently discussed at Parliament.

Marriage is civil contract. Civil marriage must take place before religious marriage. (Const. art. 21).

Marriage is celebrated before mayor (or his representative) of place of residence of one of persons to be married. Couple may elect to have their respective rights over their assets governed by rules of Civil Code regarding matrimonial regimes, or by separate marriage contract entered into before notary public.

14 FOREIGN TRADE AND COMMERCE

14.01 EXCHANGE CONTROL:

Since 1944, exchange control has been jointly organized with Belgium. In 1918 monetary association was created by Luxembourg and Belgium, leading to almost complete liberty of exchange between two countries. Since 1990, Luxembourg enjoys absolutely free movement of capital within EU as last exchange control barriers have been waived. Some documentation must be provided to administrative authorities in certain cases, but for statistical purposes only.

14.02 FOREIGN EXCHANGE:

See topic 14.01 Exchange Control.

14.03 FOREIGN INVESTMENT/FOREIGN TRADE:

International trade policy is within sole competence of EU authorities, although certain import regimes may be regulated directly by Member States.

Foreign investment is free in Luxembourg. Capital and income may be freely repatriated.

Luxembourg is Member State of Benelux Customs Union, European Union, and OECD.

15 IMMIGRATION

15.01 ALIENS:

Aliens have same rights and obligations as Luxembourg nationals, but exceptions to this rule may be created by law. (Const. 111). Status and capacity of aliens are governed by their national laws.

Residence.

EU citizens who wish to reside and to work in Luxembourg for period greater than three months must establish that they: (i) Are employed or exercise independent activity, (ii) have sufficient resources for themselves and their dependents (including health insurance), or (ii) are enrolled in educational or training program and also meet requirements set out in (ii) above. There is no requirement to hold residence permit; such persons must register with city administration where they intend to reside within three months of their entry into Luxembourg territory and prove that they meet relevant requirements. EU citizens who prove five years of uninterrupted residence in Luxembourg will have right to permanent residence. In certain circumstances, necessary period of uninterrupted residence can be two or three years.

Subject to certain exemptions, non-EU citizens who wish to take up residence in Luxembourg for up to three months within six month period must establish that they: (i) Hold valid passport and, if necessary, visa; (ii) are not subject of Art. 96 alert under Schengen Convention; (iii) are not subject of prohibition to enter territory; (iv) are not considered to be risk for public order, public health, or internal security reasons; and (v) have sufficient resources. Non-EU citizens who visit Luxembourg for family/personal reasons for period of less than three months only have to prove sufficiency of their resources. Such non-EU citizens do not have right to be employed or carry on independent activity without ministerial authorization. Non-EU citizens who wish to take up residence in Luxembourg for period greater than three months must, prior to their entry into territory, apply for temporary ministerial authorization to do so. Within three business days of his/her entry into territory, such non-EU national must register their arrival, present medical certificate along with any other appropriate and requested proofs (dependent on purpose of entry into Luxembourg) and pay fee (yet to be determined). If these conditions are met, ministerial authorization will issue. It is possible for non-EU citizens who have been resident in Luxembourg for five years to have renewable long term resident license issued to them by Minister.

Actions by Aliens.

Aliens suing in Luxembourg may be compelled, at request of Luxembourg-based defendant, to give sufficient surety to cover costs and damages to which plaintiff may be subject. (N.C.P.C. 257). Such condition is not applicable to actions before commercial court or in commercial matters. Luxembourg is party to many bilateral and multilateral treaties which have abolished this requirement (Hague Convention of July 17, 1905 [Luxembourg decree of July 11, 1909], Hague Convention of Mar. 1, 1954 [Luxembourg decree of Mar. 30, 1956]).

Actions against Aliens.

Aliens may be sued in Luxembourg if they are domiciled in or residents of Luxembourg. Luxembourg courts will also accept jurisdiction if Luxembourg is place of performance of contract, in real estate matters if real estate is located in Luxembourg, in tort actions if tortious acts occurred in Luxembourg, or in bankruptcy matters if bankruptcy is declared in Luxembourg. International treaties may modify these rules.

Aliens, even if not residing in Luxembourg, may be cited before Luxembourg courts for performance of obligations contracted by them in Luxembourg with Luxembourg national; they may be called before courts of Luxembourg for obligations contracted by them in foreign country towards Luxembourg nationals. (C.C. 14). Luxembourg courts will moreover accept jurisdiction in matters involving Luxembourg nationals even if underlying obligations have been assumed abroad with foreign national. (C.C. 15).

Corporations Owned or Controlled by Aliens.

There are no restrictions on basis of nationality of parties involved regarding ownership of Luxembourg corporation. Same is true as far as membership of board of directors and other corporate functions are concerned (except where special regulatory rules impose more stringent conditions, such as in financial sector).

15.02 IMMIGRATION:

See topic 15.01 Aliens.

16 INTELLECTUAL PROPERTY

16.01 COPYRIGHT:

Copyright is protected by Luxembourg law of Apr. 18, 2001 as amended by Law of Apr. 18, 2004 and Law of May 22, 2009. This law covers all literary and artistic creations including computer software. Law of Apr. 24, 2005 provides legal protection for all materials used in any computer conception. Copyright consists of exclusive right of author to publicly produce or reproduce his creation and to authorize production and reproduction thereof by third parties. Right of authorship gives author and heirs right to prevent any alteration of creation that is affecting honour or reputation. This moral right subsists even if patrimonial rights over creation have already been transferred to third party, for duration of 70 years after death of author. Criterion for protection to be granted under copyright law is originality. Law applies also to photographs, databases and software under certain conditions. Foreigners are treated in same way as

Luxembourg citizens. However, if originating country of work is not member of EU or WTO, period of protection ends on date fixed for expiration of protection in that country.

Luxembourg is signatory of most international conventions protecting copyright, including Berne Convention of Sept. 9, 1886, as amended (Luxembourg law of Nov. 19, 1974) and Universal Copyright Convention of Sept. 6, 1952 (Luxembourg law of June 13, 1955).

16.02 PATENTS:

Designs and Models.

New aspects of product having utilitarian function can be protected. Right is acquired by first deposit of claim in Benelux country. Benelux Convention on designs and models of Oct. 25, 1966 has been repealed by law of May 16, 2006 giving its approval to new Benelux Convention on designs and models signed in The Hague on Feb. 25, 2005.

Protection for designs is granted for maximum of 25 years (five years extendable for four other five year period) by Benelux Office for Intellectual Property.

Inventions.

Governed by law of July 20, 1992 as amended, by Law of Apr. 18, 2004, and Law of May 22, 2009 on patents. Temporary and exclusive rights are granted for each invention that is new, that is result of inventive activity and which has industrial application. Right to patent belongs to person who first registered his invention in accordance with law. Effect of patent is that, without authorisation of patent holder, invention cannot be applied, used or sold. Duration of patent is generally 20 years. Law of Apr. 18, 2004 amended 1992 law by eliminating necessity for agreed representatives in patent matters to have real domicile in Luxembourg.

Luxembourg is member of Strasbourg Convention of Nov. 27, 1963 on unification of certain elements of patents, and 1971 Strasbourg Agreement on international classification of patents and European Patent Convention of 1973.

Biotechnology Invention.

Law of Apr. 7, 2006 which implemented EU Directive 98/44/CE provides for legal protection of biotechnology inventions. Patents on biotechnology inventions are granted for each invention that is new, that is result of innovative activity and which has industrial application.

Trademarks.

Trademarks are protected under Benelux Convention on Intellectual Property adopted on Feb. 25, 2005 and implemented in Luxembourg by Law of May 16, 2006. Exclusive right to trade mark is acquired by first deposit in Benelux or by international registration with International Bureau for Intellectual Property. Trademark registrations are made for ten years and can be renewed by ten year period without any limit by Benelux Office for Intellectual Property.

Finally, Madrid Agreement (1891) and Madrid Protocol (1989) allow to register trademark in 80 countries.

Industrial Property.

Luxembourg is party to Paris Convention of Mar. 20, 1883 on protection of industrial property.

Special tax regime for intellectual property income.

Pursuant to Law of Dec. 21, 2007, fully taxable resident and non-taxable resident individuals carrying on business in Luxembourg, as well as resident corporate entities and local permanent establishments of non-resident companies can benefit from 80% income tax exemption on net income and capital gains deriving from software copyrights, patents, trademark designs, and models acquired or constituted after Dec. 31, 2007.

16.03 TRADEMARKS AND TRADENAMES:

See category 3 Business Regulation and Commerce, topic 3.06 Licenses, Business and Professional.

17 MORTGAGES

17.01 CHATTEL MORTGAGES:

There are no chattel mortgages in Luxembourg, unless specifically provided for by law. Aircraft and ships can be mortgaged however.

Under certain conditions “floating charge” over business as going concern can be created (“gage sur fonds de commerce”). Charge may cover all assets of business, such as goodwill, trademarks, patents, lease contracts, business equipment and up to 50% of inventory. Parties may contractually agree exactly what will be charged. Receivables must be included expressly. This charge must be registered to become fully effective, no later than 15 days after contract was made.

Such floating charges may only be granted to banks and breweries approved by Luxembourg government.

17.02 MORTGAGES:

Mortgage is right (droit réel) in immovable property which guarantees execution of obligation. Mortgage is, by its nature, indivisible and exists fully on all of real estate employed to that end and on each and every portion of such real property. Mortgage remains on real property even if such property changes hands. Mortgage will exist only under circumstances and in forms recognized by law, which are legal, judicial and conventional mortgages. (C.C. 2114). Legal mortgages result from law. Those provided for by civil law are not so relevant as those foreseen by fiscal law. Judicial mortgages result from judgments, but not from arbitration awards, unless latter have received judicial order of enforcement. Conventional mortgage is result of agreement and depends on form of contract. Notarial deed, properly registered, is required. Contracts made abroad cannot, in principle, create mortgage on real estate located in Luxembourg, except where special treaties might provide to contrary. Validity of conventional mortgage is subject to condition that notarial deed specify exactly nature and location of each element of real property owned by debtor which he agrees to mortgage. Each and all of debtor's actual property may be nominally subject to mortgage. Conventional mortgage further requires, in order to be valid, settlement of sum for which it has been given, this sum being certain and determined in deed. Between creditors, mortgages, be they legal, judicial or conventional, rank in order of their inscription at mortgage registry. Exception is made for certain fiscal debts which are secured by legal mortgage requiring no inscription. Mortgage is generally secured by its registration for period of ten years. Renewal is possible.

Law of July 14, 1966 provides for possibility to mortgage certain types of river boats. Such mortgages require notarial deed and must be registered with River Mortgage Registrar.

As for aircraft, Luxembourg has ratified Geneva Convention of June 19, 1948 on rights in aircraft. Law of Mar. 29, 1978 sets framework for aircraft mortgages, preferential claims and similar rights. It provides for registration with Registrar for aircraft mortgages.

18 PROPERTY

18.01 ABSENTEES:

When person has ceased to appear at place of his domicile or residence, and if his whereabouts are unknown, any interested party or public prosecutor (“ministère public”) may apply to court (“juge des tutelles”) to obtain judgment that such person is presumed to be absent. (C.C. 112). Court may appoint one or more relatives, or any other person, to represent absentee and to administer estate. Rights and duties of such representative are governed by same rules as those applying to guardianship of minors. (C.C. 113). If absentee reappears or if he provides information regarding his whereabouts, representative's mission ends and absentee takes over management of estate. (C.C. 118).

If more than ten years have passed since judgment of “presumption of absence”, court may, upon motion by any interested party or public prosecutor, declare actual absence. (C.C. 122).

Judgment of actual absence has same legal consequences as death of absentee. Procedure is set out in art. 998 and subsequent articles of N.C.P.C.

18.02 REAL PROPERTY:

Real estate or immovable property is legal term that encompasses land along with anything permanently affixed to land, such as buildings. Real estate (immovable property) is often considered synonymous with real property, in contrast with personal property. Real property, e.g. land and buildings, may be acquired by accession (increase of existing land by act of nature), contract, inheritance or prescription (adverse possession, which must be continuous, public, unequivocal and peaceful). Transfers of real property interest by contract must be by notarial act and recorded in Mortgage Registry.

No restrictions on ownership of real property for foreigners apply. See category 17 Mortgages, topic 17.02 Mortgages.

19 TAXATION

—Scope —

Luxembourg tax law is based on taxability of world-wide income and assets of residents and taxability of certain income from Luxembourg sources or derived from permanent establishment in Luxembourg of nonresidents, as well as certain of their assets located in Luxembourg.

Transactions executed and services rendered in territory of Grand Duchy are subject to Value Added Tax at rates varying between 3 and 15%.

19.01 INCOME TAX:

Personal Taxation.

Individual resident in Luxembourg is liable for income tax on his worldwide income, including certain capital gains. Individual is deemed to be resident if he stays continuously in Luxembourg for more than six months per year. Nonresident individual is liable for income tax only on Luxembourg source income. Income tax is levied on taxable income, after deductions, at progressive rates from 0 to 38%, plus 2.5% surcharge on payable tax amount as contribution to unemployment fund, amounting to total maximum rate of 38.95% (i.e. 38% + [38%*2.5%]). Interest paid by paying agent located in Luxembourg (except on certain UCI units) is now subject to final 10% withholding tax at source and is no longer computed in taxable base for regular income tax. Net wealth tax has been abolished for individuals as of 1 Jan. 2006.

Corporate Taxation.

Resident company is liable for corporate income tax on its worldwide profits, subject to provisions of any relevant tax treaty. Top corporate tax rate in Luxembourg is 22% as basic rate, plus municipal business tax, plus 4% surcharge on payable tax amount as contribution to unemployment fund, amounting to total maximum rate of 28.59% in city of Luxembourg.

Nonresident company is liable for corporate income tax only on specific types of income and capital gains arising in Luxembourg. Types of income that are taxable include business profits of branch or other permanent establishment of company in Luxembourg, interest from loans secured by Luxembourg real estate, and rental income from real estate situated in Luxembourg. Taxable capital gains include gains from disposal of Luxembourg branch assets and land and buildings in Luxembourg and gains from disposal of shareholdings in Luxembourg companies made within six months of acquisition where shareholding concerned exceeds 10%. Nonresident company is liable to withholding tax on dividends, interest from profit-sharing bonds, and royalties received from Luxembourg sources. This is usually final (definitive) tax but where such income arises through permanent establishment of company in Luxembourg it is subject to corporate income tax, credit being granted for withholding tax. Tax treaties frequently modify rules described in this paragraph, for example by reducing or eliminating withholding tax.

Nonresident company with branch in Luxembourg is liable for corporate income tax on all income earned through activities of branch or derived from assets held by branch as business property, regardless of its geographical source. Thus dividends, for example, received from third country on shares held by branch are subject to Luxembourg corporate income tax.

Income from capital normally forms part of recipient company's income for corporate income tax purposes.

Withholding tax (“WHT”) of 15% applies to dividends paid by Luxembourg company, but important participation exemption can apply. Dividend is exempt from WHT if it is paid to: (1) fully taxable Luxembourg limited company (SA, Sàrl, SCA), or (2) company resident in EU member state and listed under Art. 2 of EU Parent-Subsidiary Directive, or Luxembourg permanent establishment thereof, or (3) Luxembourg permanent establishment of company from double tax treaty country.

In all cases shareholder must also hold or undertake to hold at least 10% of share capital in Luxembourg paying company, or acquisition value of his share must remain above [Euro]1.2 million, during minimum period of 12 months.

As matter of principle, there is no withholding tax in Luxembourg on payments of all items of income from capital other than dividends. In particular, Luxembourg does not apply any WHT on interest paid by one of its residents to either resident or nonresident, except, from 1 July 2005 onwards, for interest on debt claims paid to natural persons resident of EU, which becomes subject to 20% withholding tax as consequence of entry into force of Directive on taxation of savings. Rate of such withholding tax is to increase to 35% as of 1 July 2011.

Any stock company resident in Luxembourg can also benefit from participation exemption (SOPARFI regime) in respect of dividends and capital gains received from qualifying equity stakes. Broadly, shareholding will qualify if: (1) it amounts to at least 10% of capital of subsidiary (or [Euro]1.2 million for dividends/[Euro]6 million for capital gains), and (2) it is held for minimum of 12 months, and (3) subsidiary is Luxembourg resident stock company, or EU resident company covered under Art. 2 of EU Parent-Subsidiary Directive of July 23, 1990, or nonresident company which is subject in its country of residence to income tax comparable to Luxembourg corporate income tax, this condition being fulfilled if such foreign income tax results in effective tax rate of at least 11%. All dividends received from any of these three types of companies further enjoy automatic 50% exemption if they are not covered by SOPARFI regime.

See also categories 2 Business Organizations, topic Corporations; Treaties and Conventions, topic Treaties.

19.02 INHERITANCE TAX:

If last residence of deceased was in Luxembourg, all his assets are subject to inheritance tax except for real estate located outside Luxembourg. If last residence of deceased was not in Luxembourg, tax assessable on death is transfer tax, not inheritance tax, which is charged only on deceased's real estate in Luxembourg. No inheritance tax is due on transfers of property to ascendants and descendants of deceased, such as from parents to children. This exemption does not apply in case of transfer tax.

Rates of inheritance tax and transfer tax are progressive and vary from nil to 15% (including surcharge), according to degree of relationship between beneficiary and deceased and value of property inherited.

20 TRANSPORTATION

20.01 MOTOR VEHICLES:

Liability insurance is required for all cars circulating in Luxembourg. Cars of residents must be registered with Ministry of Transportation. All rules to be observed by drivers circulating in Luxembourg have been compiled in Code de la Route.

20.02 SHIPPING LAW:

Registration.

According to Luxembourg Shipping Act of Nov. 9, 1990, as amended by law of June 17, 1994 and law of July 8, 2005, all ships that operate under Luxembourg flag have to register with Record Keeper of Maritime Mortgages.

Supervision of maritime flag by “Commissariat aux affaires maritimes”, which is department of Ministry of Transports.

Ships acquire Luxembourg nationality if they are registered under Luxembourg flag. Registration under Luxembourg flag supposes that ships are more than 50% owned by either natural persons who are citizens of EU Member State, or by companies whose principal place of business is located in EU Member State. In case of bare boat charter, significant part of management of ship must be carried out from Luxembourg.

Preferential Claims. Mortgages.

Registration of any agreement creating, transferring, declaring or terminating rights “in rem” with Mortgages Record Keeping Office is required by law for such rights to have any effect as against third parties. However, registration of such agreement is only possible if ship to which such conventions refer has itself been registered in Luxembourg.

Preferential creditors may either have preferential claims or mortgages. Preferential claims depend on nature of claims and always have priority over mortgages. Claims remain preferential even if ship is sold to another person or if it changes its nationality.

Maritime mortgages may only be granted on specified ships and for fixed sum. Mortgages may be registered at any time during their existence, save for case of death or bankruptcy of debtor, sale or loss of nationality of ship.

Registration preserves mortgages for renewable period of ten years. Preferential order of maritime mortgages is determined by their date of registration, and if they have same date, by their registration number.

Maritime mortgages are exempt from any duty, except registrar of mortgages' salary.

Tax.

Shipowning companies will be liable to common corporate tax rate applicable to any Luxembourg corporation. Corporate income tax rate of 21% on all income superior to [Euro]15,000. There is also municipal business tax in Luxembourg of 6.75% in Luxembourg City, which makes global tax rate of 28.59% if company has registered office in Luxembourg City. In addition, surcharge of 4% is payable to unemployment fund. Effective tax rate thus amounts to 22.88%. However, shipping companies are granted total exemption from municipal business tax as well as from net wealth tax. Per art. 43(i) of VAT Law, shipping companies are not subject to VAT if international carriage of goods is performed by river navigation.

Nonresident sailors on Luxembourg registered ships are subject to special 10% tax on their income. Resident sailors will be taxed in Luxembourg as any other taxpayer residing in Grand-Duchy of Luxembourg.

Labour Law.—Except for traineeships, sailors must be aged 18 or more to be eligible for work on Luxembourg registered ship. Medical certificate is required from any sailor certifying that his physical condition is satisfactory and that his embarkation does not harm his own health or that of his co-sailors.

With limited exceptions, contracts of employment for definite period of time may not be terminated before expiration of set period. Contracts for indefinite periods of time can be terminated by each party, subject to giving notice and observing some procedural rules.

Luxembourg labour courts are competent to decide whether dismissals are abusive. Abusive dismissals give right to payment of damages by employer.

Working time on boat shall not exceed eight hours per day and 40 hours per week. However, collective labour agreements may provide for different working hours during week or over another time span than a week. In absence of collective labour agreement, more flexible working schedule may also be approved by competent minister at request of shipowner.

Wages of all persons employed on Luxembourg ships must be at least identical to minimum wages required by law for any other employee in Luxembourg.

Social Security.

Luxembourg social security protection is available to sailors of Luxembourg nationality or of country with whom Grand-Duchy has bi- or multilateral agreement on social security. For sailors of other countries, shipowner is required to sign insurance policy with private insurance company. Social security protection by country of residence or by private insurer must at least cover sickness, unemployment, pension, working accidents, professional diseases and motherhood. However, subject to approval by Luxembourg government, such sailors may also be covered by social security system of their country of residence, if such country gives social security protection at least equal to protection granted by Law.

Safety Requirements.

First registration will not be available in Luxembourg to ships older than 15 years. For ships of more than 15 years of age that are already registered in Luxembourg, their registration is conditional upon continued existence of class of ship in accordance with criteria of international classification companies.

Every shipowner must have protection and indemnity insurance that covers all damages that ship may cause. Insurance may only be issued by insurance companies that have their registered office in EU and that can demonstrate professional experience. For ships carrying hydrocarbon oils, requirements are identical to those of 1969 Convention on Civil Liability for Oil Pollution Damage.

Maritime Companies.

Law of June 17, 1994, provides rules on creation under Luxembourg law of specific maritime companies, which must be approved by Government and whose corporate object is purchase, sale, charter or management of seagoing vessels, as well as financial or commercial operations thereto connected.

21 TREATIES AND CONVENTIONS

21.01 TREATIES:

Luxembourg is, among others, signatory of Treaty of Rome (European Economic Community) and subsequent EC treaties, BENELUX Treaty, Treaty establishing Belgian-Luxembourg Economic Union, and General Agreement on Tariffs and Trade. It is member of WTO, NATO, OSCE and United Nations and Council of Europe.

Tax Treaties.

In order to promote international economic and financial relations with third countries and to avoid imposition of double taxation, Luxembourg entered into bilateral treaties with third countries. Double tax treaties were agreed with South Africa (1998), Austria (1962), Azerbaijan (2006), Belgium (1970), Brazil (1978), Bulgaria (1992), Canada (1989), China (1994), Czech Republic (1991), Denmark (1980), Estonia (2006), Finland (1982), France (1958), Federal Republic of Germany (1958), Greece (1991), Hong Kong (2007), Hungary (1990), Iceland (1975), India (2008), Indonesia (1993), Ireland (1972), Israel (2004), Italy (1981), Japan (1992), Latvia (2004), Lithuania (2004), Malaysia (2002), Malta (1994), Mauritius (1995), Mexico (2001), Mongolia (1998), Morocco (1980), Netherlands (1968), Norway (1983), Poland (1995), Portugal (1999), Romania (1993), Russia (1993), San Marino (2006), Singapore (1993), Slovakia (1991), Slovenia (2001), South Africa (1998), South Korea (1984), Spain (1986), Sweden (1983), Switzerland (1993), Thailand (1996), Trinidad and Tobago (2001), Tunisia (1996), Turkey (2003), U.K. (1967), U.S.A. (1996), Uzbekistan (1997), and Vietnam (1996).

1
MACAO LAW DIGEST

—Scope —

Revised for 2008 edition by

LEHMAN, LEE & XU, of Beijing, Shanghai, Shenzhen, Hong Kong, Macao and

Mongolia.

(Abbreviations used are: CPC—Civil Procedure Code; GRL—General Rules for Lawyers; RMB—Renminbi.)

Note: This revision incorporates legislation through Oct. 8, 2007.

1 INTRODUCTION

—Scope —

Macao Special Administrative Region ("Macao SAR") is part of China's territory, located on southeast coast of China west of Pearl River Delta. Tourism is mainstay of Macao's economy, based heavily on gaming. Macao is only place in China where gaming is legal, with exception of horse racing in Hong Kong. In 1962, Sociedade de Turismo e Diversoes de Macau ("STDM") was granted casino concession, giving them monopoly in gaming industry and after numerous extensions, monopoly status ended with recent entry of Las Vegas Galaxy Casino, Sands, Wynn Resorts into Macao sharing huge casino pie with STDM's subsidiary Sociedade de Jogos de Macau. In first three quarters of 2005, gross gaming revenue in Macao was total of MOP$34.18 billion (US$4.27 billion), almost 70% of Las Vegas's gaming revenue of US$6.31 billion. Gaming generated MOP$13.07 billion (US$1.63 billion) in direct tax for Macao SAR.

1.01 CURRENCY:

Macao's currency is Pataca (MOP$), with each Pataca divided into 100 avos. Currency comes in denominations of MOP$1,000, 500, 100, 50, 20, 10 (banknotes), and 50, 20, 10 avos 5, 2, 1, 0.50, 0.20, 0.10 (coins). (Art. 108—Basic Law of Macao Special Administration Region "Basic Law of Macao"). Patacas are legal tender of Macao and are freely convertible. Value of Pataca is linked to that of Hong Kong dollar (HK$); Hong Kong dollars are also accepted as currency in Macao. Exchange rate is approximately MOP$103.20 = HK$100 within 10% range, and there are roughly eight Patacas to U.S. dollar. There are no restrictions on amount of currency that can be imported or exported. Monetary and exchange rate policies stipulate that neither foreign exchange nor capital control can be used. (Art. 109). Objective of Macao's monetary policy is to maintain stability of both currency and financial system.

Monetary institutions and arrangements in Macao have remained unchanged since its reversion to China. Macao Pataca banknotes are issued by two banks: Bank of China, and Banco Nacional Ultramarino, SA. These two banks must surrender any Hong Kong dollars they receive to Monetary Authority of Macao (AMCM), http://www.amcm.gov.mo/, and in exchange return Certificates of Indebtedness (CIs) legally required to back bank notes issued by each bank, at fixed rate of MOP$1.03 per Hong Kong dollar. Surrendered Hong Kong dollars are deposited in AMCM's official foreign exchange reserves. Although Macao Patacas are legal tender of Macao, Hong Kong dollars circulate widely alongside them.

Principal Mandates Conferred on AMCM.

(1) Advise Chief Executive in formulation, conduct of monetary, exchange-rate, financial, insurance policies in Macao; (2) ensure internal monetary stability, external insolvency of Macao's currency; (3) guide, coordinate, oversee money, foreign exchange, financial, insurance markets in line with relevant rules, regulations, laws; (4) monitor, ensure stability of financial system; (5) act as central monetary depository, manage territory's foreign exchange reserves, other foreign assets; (6) perform duty of lender of last resort; and (7) serve as intermediary in monetary and external financial relations.

1.02 EUROPEAN UNION:

Agreement for Trade and Co-Operation was signed between then European Economic Community and Macao in Luxemburg on 15 June 1992. Website: http://en.io.gov.mo/Legis/International/record/473.aspx.

1.03 GOVERNMENT AND LEGAL SYSTEM:

Macao SAR is under direct authority of Central Government of China, but enjoys significant degree of autonomy except in foreign affairs and national defense. Macao government is vested with executive, legislative, and judicial power, including that of final adjudication. (c. II, Arts. 12-23—Basic Law of Macao). Website: http://www.imprensa.macau.gov.mo/bo/i/1999/leibasica/index_uk.asp.

Chief Executive is appointed by Central People's Government on basis of elections and consultations held in Macao. (Art. 47). Chief Executive of Macao SAR nominates candidates for certain key governmental positions, those candidates must then be appointed by Central Government of China. (Art. 63). Public servants (including police) Chinese nationality and foreign nationalities employment may be appointed, employed to hold certain public posts in Macao SAR. (Arts. 97-100).

Religious organizations, believers in Macao SAR may carry out activities as before for religious purposes, within limits as prescribed by law, may maintain relations with religious organizations, believers outside Macao. Schools, hospitals, charitable institutions attached to religious organizations may continue to operate as before. Relationship between religious organizations in Macao SAR, those in other parts of China is based on principles of non-subordination, non-interference, mutual respect.

NPC adopted Macao Basic Law whereby constitutional value is given to take precedence over all other laws, no law enacted by Macao may contravene it.

Chinese laws are not to be applied in Macao except for those listed in Annex III of Macao's Basic Law. (Art. 18). In event that NPC decides to declare state of war, by reason of turmoil within Macao that endangers national security or unity, National People's Congress may issue order applying relevant national laws. (Art. 18). Furthermore, Macao may enjoy powers granted to it by National People's Congress or China's Central Government. (Art. 20).

Formal political parties do not exist, however, there are civic associations that, for purposes of legislative voting, join together to form political blocs. Several political groups and leaders influence government regulations, notable ones include Catholic Church (Domingo Lam, Bishop); Macao Society of Tourism, Entertainment (Stanley Ho, managing director); Civil Service Union (Jose Maria Pereira COUTINHO); Development Union (KWAN Tsui-hang); Macau Development Alliance (Angela LEONG On-kei); Macau United Citizens' Association (CHAN Meng-kam) and New Democratic Macau Association (Antonio NG Kuok-Cheong).

Legal Status of Macao.

Macao, including Macao Peninsula, Taipa Island, Coloane Island, has long been part of territory of China; it was gradually occupied by Portugal after mid 16th century. On 13 Apr. 1987, Chinese and Portuguese Governments signed Joint Declaration of Government of People's Republic of China and Government of Republic of Portugal on question of Macao, affirming China will resume exercise of sovereignty over Macao with effect from 20 Dec. 1999. China adopted “one country, two systems” formula to remain unchanged for 50 years, thus maintains Continental European law as foundation of its legal system, modeled upon Portuguese civil law system. Macao SAR established by provision of Arts. 31, 62(13) of 1982 Constitution of China by decision of National People's Congress (NPC) on 31 Mar. 1993.

Social Economic System.

Current social, economic systems in Macao is to remain unchanged. Laws currently in force remain unchanged. Rights, freedoms of inhabitants, other persons in Macao, including those of person, speech, press, assembly, association, travel, movement, strike, choice occupation, academic research, religion, belief, and ownership property will be ensured by law in Macao. (Art. 24).

Macao SAR will decide policies in these fields: culture, education, science, technology, and protection of cultural relics. Chinese and Portuguese languages are used in organs of government, legislature, courts in Macao.

Free Port.

Macao SAR will remain free port, separate customs territory in order to develop its economic activities. There will be free flow of capital.

Above-stated basic policies are elaborated in Annex I to Joint Declaration and will be stipulated in Basic Law of Macao SAR of China by National People's Congress of China, they will remain unchanged for 50 years (as set out in Preamble and Art. 5 of Basic Law of Macao).

Executive Legislation.

Executive power of Macao is vested in Government of Macao, composed of local inhabitants. Chief Executive of Macao SAR is appointed by Central Government on basis of results of elections, consultations to be held in Macao. Officials holding principal posts (equivalent to assistant-secretaries, procurator-general, principal officer of police service) are nominated by Chief Executive of Macao SAR for appointment by Central Government. Executive authorities abide by law, are accountable to legislature. (Annex I & II of Basic Law of Macao).

China's National People's Congress (NPC) authorized to create special administration regions, basic law provides degree of autonomy, separate political system, market economy under principle of “one country, two systems”.

Basic law provides Macao with degree of autonomy in exercising executive, legislative, independent judicial power including that of final adjudication, except for foreign affairs, defense. Notwithstanding non-sovereign status, Macao can conduct autonomously relevant external affairs in accordance with its provisions; it may maintain, develop relations, conclude international agreements with foreign states, international organization is respecting to wide-range of fields, including economic, trade, financial, monetary, shipping, communication, tourism, and sports.

Preliminary Note.

Basic law provides institutional balance between Legislative Assembly and Chief Executive. Although legislative power belongs exclusively to Legislative Assembly, laws relating to government policies require written consent of Chief Executive to be introduced. All laws passed by Legislative Assembly take effect only after being signed and promulgated by Chief Executive. Chief Executive has ultimate power to dissolve Legislative Assembly in case of continuing disagreement on budget issues or other important laws. This power of dissolution may only be exercised in each term of office, is balanced by resignation of Chief Executive office when new Legislative Assembly has again passed original law in dispute or still refuses to pass new budget or any other laws previously refused by Legislative Assembly. (Art. 52).

Chief Executive is appointed by China's central government after being selected by election committee, whose members are nominated by corporate bodies. Chief Executive designated head of government. (Art. 62). Specific method for selecting Chief Executive prescribed in Annex I: “Method for Selection of Chief Executive of Macao SAR.” (Art. 47). Term of office is five years; no individual may serve for more than two consecutive terms. (Art. 48). Qualifications for Chief Executive: (1) Chinese citizen of not less than 40 years; (2) permanent resident of Macao; and (3) ordinarily resident in Macao for continuous period of not less than 20 years. (Art. 46). During term of office, no right of abode in any foreign country, may not engage in activities for personal gain. (Art. 49). On assuming office, need to declare asset to President of Court of Final Appeal of Macao for record purposes. (Art. 49).

Powers, Function of Chief Executive is to lead government, implement laws, sign bills, to promulgate laws, submit reports to Central Government, decide on government policies, issue executive orders, formulate administrative regulations. (Art. 50). In addition, appoint or remove member of Executive Council, judges, nominate and pardon persons convicted of criminal offenses or commute penalties in accordance with law. (Art. 50). Under Chief Executive, five secretaries responsible for administration, justice, economy, finance, security, social affairs, culture, public works and transport. Commission against Corruption, Commission of Audit are independent bodies which are accountable to Chief Executive. Central Government of China has power to appoint, remove Chief Executive and principal officials of Macao Government.

Executive Council exclusive organ for assisting Chief Executive in policy making. (Art. 56). Composed of members appointed by Chief Executive among principal officials from executive authorities, Legislative Council, public figures. (Art. 57). Term of office for members may not extend beyond expiry term of Chief Executive who appoints them. (Art. 57). Composed of seven to 11 members (currently ten).

Chief Executive Election Law.

Law No. 3/2004 provides for elections of members of government; this law regulates election of Chief Executive of Macao SAR, other related subjects. (Art. 1) http://www.imprensa.macau.gov.mo/bo/i/2004/14/lei03_en.asp.

Election.

Electoral Affairs Committee for election of Chief Executive (EACCE), must be established; chairperson, members are approved of appointment by Chief Executive, upon proposal of Independent Committee for Recommendation of Judges: chairperson must be local judge with position not lower than judge of Court of Second Instance; other members must be in number of four, who with recognition of appropriate capability should be permanent residents of Macao SAR, except those principal officials, members of Executive Council and Legislative Assembly. (Art. 2.1).

EACCE shall: manage, promote electoral process for members of Election Committee, for Chief Executive, specifically acting as entity with functions of directing, presiding over polls at election of Chief Executive to be conducted by Election Committee; assess eligibility of candidates proposed for election of Chief Executive, as well as to monitor regularity, legality of nomination process and, confirm admitting candidates to office of Chief Executive. (Art. 3).

Members of EACCE are independent in exercise of functions, must not be removed from office. (Art. 6.1). Members of EACCE are not voters or candidates of election for members of Election Committee. (Art. 6.2).

Composition.

Election Committee is composed of 300 members drawn from four sectors. (Art. 8.1). Sectors, their respective allocation of seating capacity for Election Committee are listed in Annex I to present law, of which it is part. (Art. 8.2).

Annex I provides number of seats of Election Committee related to different sectors: number of members of 1st sector—industrial, commercial, financial is 100. Number of members of 2nd sector is 80 distributed as follows: 18 members of culture; 20 members of education; 30 members of specialty; 12 members of sports. Number of members of 3rd sector is 80 distributed as follows: 40 members of labor; 34 members of social services; members of religion: two representatives of Catholicism, two representatives of Buddhism, one representative of Christianity, one representative of Taoism. Number of members of 4th sector is 40 as follows: 16 members of Legislative Assembly; 12 deputies to National People's Congress; 12 members of National Committee of Chinese People's Political Consultative Conference. (Annex I).

Term of office of Election Committee is five years, commencing on date of first publication of all members of Election Committee in Official Gazette of MACAO SARMACAO SAR. (Art. 11).

Mode of Constitution.

Election Committee members related to 1st sector, 2d sector, labor, social welfare of 3rd sector listed in Annex I, must be elected by associations, organization eligible to vote in respective sector. (Art. 12). Representatives of members of Legislative Assembly, representatives of Macao members of National Committee of Chinese People's Political Consultative Conference in process of Election Committee, are elected by their peers of legislature or office, by internal vote. (Art. 14.1). Internal votes are conducted, concluded on same day of polls on election of Election Committee; list of elected candidates, their complete identification is presented to EACCE for record. (Art. 14.2).

Electoral Capacity, Eligibility, Mode of Election.

Those associations, organizations registered in accordance with Law No. 12/2000 have capability to vote at election of their respective sectors or sub-sectors. (Art. 16.1). Sectors, sub-sectors correspond to delimitation of social interests prescribed in Art. 29 of Law No. 12/2000: entrepreneurial interests correspond to industrial, commercial, financial sector; cultural interests correspond to culture; educational interests correspond to education; specialized, professional interests correspond to specialty; sports interests correspond to sports; worker, labor interests correspond to labor; charity interests correspond to social services. (Art. 16.2). Collective persons created by public entities, who depend on public entities for more than half of their financial income will not have eligibility to vote, except specialty public associations. (Art. 16.3). Following persons are disqualified from voting, being candidates during terms of office: Chief Executive; principal government officials; magistrates of both courts, Public Prosecution. (Art. 18). Each association or organization having capability to vote is entitled to maximum of 11 votes, cast by equal number of electors enrolled in electoral register. (Art. 19.1). Said electors are selected amongst current members having directive, administrative functions in their respective associations or organizations. (Art. 19.2).

Submission of Candidates.

Participants must submit candidature by obtaining, lodging appropriate form with SAFP. (Art. 21.1). Participants must lodge with SAFP, no later than 40 days before date of poll on election for Election Committee, completed form for submission of candidature with required documents. (Art. 21.3).

Term of Office and Election.

Term of office of Chief Executive is five years; office cannot be held by same person for more than two consecutive terms. (Art. 32.1). Term of office commences on date of taking charge of office specified by Central Government in official document of appointment. (Art. 32.2). In case of vacancy of office of Chief Executive, interim Chief Executive shall, within ten days after assuming office, order publication in Official Gazette of MACAO SARMACAO SAR of date office of Chief Executive being vacant. (Art. 33). Election of Chief Executive takes place in case of expiry of term or vacancy of office of Chief Executive. (Art. 34.1). Chief Executive must be elected by Election Committee, according to provisions of Basic Law, its Annex I, as well as according to terms of this law; Government of MACAO SARMACAO SAR communicates result of election to Central Government. (Art. 34.2).

Right to Nominate Candidates.

Only members of Election Committee enrolled in books of register have right to nominate candidates. (Art. 37.1). Each member may nominate only one candidate. (Art. 37.2). Members are not permitted to withdraw nomination presented by them. (Art. 37.3).

Exercise of right of vote subject to following conditions: in election of members of Election Committee, enrollment in appropriate book of register, verification of identity of elector by board of polling station; in election of Chief Executive, enrollment in book of register of members of Election Committee, verification of identity of voter by EACCE. (Art. 59.1). Exercise of right of vote must be in accordance with following rules: in each round of voting each elector, member of Election Committee only votes once; votes at poll are cast as anonymous ballots; right of vote is exercised personally by enrolled elector, member of Election Committee, except when provided by this law; in election of members of Election Committee electors may only vote, in their respective polling stations, for candidates of sector or sub-sector for which they are registered; in election of Chief Executive, members of Election Committee may only vote for one of finally admitted candidates in his/her individual capacity. (Art. 59.2). Elector or member of Election Committee must not, within polling station, within distance of 100 meters from building where it is functioning, reveal candidate he/she voted, is going to vote for; nobody shall, with any justification, oblige anybody else to reveal his/her vote. (Art. 59.3).

Ballots.

In election of members of Election Committee ballots are produced in correspondence with sector or sub-sectors described in paragraphs 1, 2 in item (1), (2) of paragraph 3 of Annex I. (Art. 70.1). Name of all candidates must be printed on each ballot. (Art. 70.2). Candidates appearing on ballots must be sorted by their Chinese surnames, names or, when they do not have it, translation of their name into such language, according to increasing number of strokes of traditional Chinese characters in order of least stroke appearing first; in case of candidates with identical surnames, names, their respective electoral registration number also appears below their names. (Art. 70.3). On same direction where each name is provided on ballot there will be blank square box, to be marked by elector with symbol to indicate his/her preference on candidate. (Art. 70.4). EACCE determines production, quantity of ballots. (Art. 70.5).

1.04 HOLIDAYS:

Public holidays in 2006: New Year's Day—Jan. 1; Spring Festival—Chinese Lunar Calendar New Year—Jan. 29-31; Ching Ming Festival—Apr. 5; Easter—Apr. 14-15; Labour Day—May 1; Feast of Buddha—May 5; Dragon Boat Festival (Tun Ng)—May 31; National Day of PRC—Oct. 1-2; Mid-Autumn Festival—Oct. 7; Festival of Ancestors (Chung Yeung)—Oct. 30; All Soul's Day—Nov. 2; Feast of Immaculate Conception—Dec. 8; Macao SAR Establishment Day—Dec. 20; Winter Solstice—Dec. 22; Christmas Holidays—Dec. 24-25. New regulations vary, extend holiday periods; includes extending Spring Festival holiday to one week.

1.05 OFFICIAL LANGUAGES:

In addition to Chinese language, Portuguese may also be used as official language by executive authorities, legislature and judiciary of Macao Special Administrative Region. (Art. 9 of Basic Law of Macao).

1.06 TIME ZONE:

Macao is in +08:00 GMT time zone.

2 BUSINESS ORGANIZATIONS

2.01 AGENCY:

Commission contract is mandate by which commercial entrepreneur undertakes to buy, sell goods in his own name, but for account of another person, against payment. (Art. 593 of Commercial Code) Website: http://www.imprensa.macau.gov.mo/bo/i/99/31/codcomen/. Before contract is concluded, principal can at any time revoke order for its conclusion; in such case commission agent is entitled to reimbursement of expenses incurred, to remuneration proportional to service rendered. (Art. 594). Commission agent is obliged to take adequate measures to protect interests of principal, to follow his instructions; to provide relevant information to principal, in particular to promptly communicate execution of commission; to render accounts to principal on transactions effected, to deliver to him results of operation. (Art. 595). Commission agent is not responsible for performance of obligations undertaken by persons with whom he contracts, except if at moment of conclusion of contract, he knew or should have known of their insolvency. (Art. 601).

Agency contract is contract by which one of parties undertakes to promote for account of other party conclusion of contracts, in autonomous and stable manner and against remuneration, possibly with designation of certain zone or certain circle of clients. (Art. 622). Any of parties has right, which cannot be renounced, to claim from other signed document indicating content of contract and any subsequent additions or amendments.

Agent can only conclude contracts in name of other party if latter has granted him, in writing, necessary powers. Claims and other declarations related to contracts agreed with intermediation of agent can be presented to him. Agent also has right to request urgent measures that may be indispensable to safeguard rights of other party. (Art. 623). Agent can only collect credits if other party has authorized him in writing to do so. Agent to whom powers of representation have been granted is presumed to be authorized to collect credits resulting from contracts concluded by him. (Art. 624).

Exclusive Agent.

Concession of exclusive right in favor of agent, according to which other party is prevented from using other agents for exercise of activities that are in competition with those of exclusive agent, is dependent upon agreement by parties. (Art. 625).

Sub-agency.

Unless there is agreement to contrary, use of sub-agents is permitted. Norms of this Title shall apply, with necessary adaptations, to sub-agency relation. (Art. 626).

2.02 ASSOCIATIONS:

Basic Law provides all residents with freedom of association. (Art. 27 of Basic Law of Macao).

Limited Partnerships.

Limited partnership can be created as simple limited partnership or, if participation of silent partners are represented by shares, as partnership limited by shares. (Art. 348 of Commercial Code). Distinctive elements of limited partnership are general partnership, which comprises general partners, silent partnership of funds. (Art. 349.1). Each silent partner is liable only for payment of his capital participation, cannot contribute with industry; general partners are liable for obligations of partnership in same manner as partners of general partnership. (Art. 349.2). Private companies, public companies can be general partners. (Art. 349.3).

2.03 CORPORATIONS:

Civil Liability of Commercial Entrepreneur.

Producer commercial entrepreneur is liable, regardless of fault, for damage caused to third parties by defects of products that he puts in circulation. (Art. 85.1). Producer is manufacturer of finished product, of component part, of raw material, also whoever presents himself as such through apposition of his name, trademark, other distinctive sign to product. (Art. 85.2). Following are also considered as producers: anyone who, in exercise of his enterprise, imports products for sale, lease or financial lease or another form of distribution; distributor of products whose Macao producer or importer is not identified, except if, after being notified in writing, he communicates to injured party identity of one or other, of some preceding distributor, also in writing. (Art. 85.3). Any movable good is considered to be product, even if incorporated in another movable or immovable good. (Art. 86.1). Product is defective if, at moment of its entry into circulation, it does not offer safety that legitimately is to be expected, taking into account all circumstances, its presentation, characteristics, use that reasonably can be made of it. (Art. 87.1).

Commercial entrepreneur is not liable if he proves that he did not put product into circulation; that at moment of product's entry into circulation, it can be reasonably assumed that defect did not exist or state of scientific and technological knowledge did not allow for its detection. (Art. 88). Damage resulting from death or personal injury can be compensated, damage to goods other than defective product, provided that these are normally destined to private use, consumption, that injured party has mainly given them such destination. (Art. 91). Right to compensation is barred three years after date when injured party gained or should have gained knowledge of damage and of defect, of identity of entrepreneur. (Art. 93).

Commercial Bookkeeping.

Commercial entrepreneur is obliged to have organized bookkeeping, adequate to his enterprise, in order to enable chronological knowledge of all his operations, periodic preparation of balance sheets, inventories. (Art. 38). Legalization of commercial entrepreneur's books must be done by any duly authorized member of management, administration, or by secretary, also by notary or competent register. (Art. 41.1). Entrepreneur's commercial bookkeeping is confidential, without prejudice to cases where law authorizes their showing “ex officio” (e.g. universal succession, bankruptcy, liquidation of company, etc.) and to other special provision. (Art. 52.1). Commercial entrepreneur is obliged to prepare annual, accounting period accounts of his enterprise, within three months from end of each accounting period, which comprise balance sheet, profit, loss account, annex. (Art. 54.1).

Relations between Shareholders, Company.

Nominal value of capital participations, paid in money or in kind, shall be multiple of 50 patacas. (Art. 201.1). If in money, its payment consists in delivery of amount in patacas at least equal to nominal value of participation; if in kind, in transfer to company of goods susceptible to judicial seizure, of value at least equal to nominal value of participation. (Art. 201.2). Goods with which capital participations in kind are to be paid must be identified, described, appraised by means of report to be prepared by auditor, firm of auditors, which must be attached to act of incorporation. (Art. 202.1). If any shareholder has serious grounds to suspect gross irregularities in activity of company he can request court to conduct examination of company to clarify matter, indicating facts on which suspicion is based and irregularities. (Art. 211.1). Dominant shareholder is individual, collective person who, by himself, together with other companies of which he is also dominant shareholder, with other shareholders to whom he is connected by agreements outside company, detains majority participation in company capital, has more than half of votes, has power to elect majority of members of administration. (Art. 212.1). Dominant shareholder is individual or collective person who retains majority participation in company capital or has more than half of votes, or has power to elect majority of members of management. Shareholders who, connected by agreements outside of company also achieve similar majority or powers, are also considered as dominant shareholder. (Art. 212).

Company Organs.

Organs of commercial companies are general assembly; management; company secretary; supervisory board or supervisor. (Art. 214.1). Existence of company secretary, of supervisory board or supervisor is compulsory in companies which have ten or more shareholders; issue bonds; have form of public company; have amount of company capital, balance sheet value, income volume in excess of limit stated by portaria of Governor. (Art. 214.2). Besides matters specially attributed by law, shareholders have competence to pass resolutions on following matters: election, removal of administration, of supervisory organ; balance sheet, profit, loss account, report of administration concerning accounting period; report, opinion of supervisory board or supervisor; apportioning of results of accounting period; amendment of articles of association; increase, reduction of company capital; division, merger, transformation of company; dissolution of company; all matters which, in accordance with legal provisions, with articles of association, do not fall within competence of other company organs. (Art. 216).

Management.

Any individual or collective person with full capacity can be manager. (Art. 234.1). If collective person is appointed manager, it will nominate individual to exercise position on its behalf; collective person is jointly and severally liable with appointed person for acts of latter. (Art. 234.2). Company secretary can be appointed, even if company is not obliged to do so in accordance with paragraph 2 of Art. 214. (Art. 237.1). Except for first secretary, who must be appointed by shareholders immediately in act of incorporation in accordance with subparagraph (f) of paragraph 3 of Art. 179, company secretary is appointed, dismissed by management, in minutes, among managers or any employees of company; function of secretary can also be exercised by lawyer hired by company for this purpose. (Art. 237.2). Supervision of company is responsibility of supervisory board composed of three members; articles of association can determine its replacement by supervisor. (Art. 239.1). In order to perform obligations of supervisory organ, members of supervisory board, jointly, or separately, or supervisor, can obtain from management or from company secretary, if there is one, presentation of books, records, documents of company, for examination and verification. (Art. 243.1[a]). Managers are liable to company for damage caused to it by acts or omissions practiced in breach of duties arising from law or from articles of association, except if they prove that they acted without fault. (Art. 245.1).

Merger of Companies.

Two or more companies, even if they are of different types, can merge into single one. (Art. 272.1). Merger can be done by global transfer of total assets of one or more companies to another one, attribution to shareholders of former of parts, shares in latter; by creation of new company, to which total assets of merged companies are globally transferred, shareholders of latter being given parts or shares in new company. (Art. 272.2). General rules apply, with some exceptions, to absorption by company of another of whose parts or shares former is only holder, directly, for its account but under separate name. (Art. 291.1). Company is allowed to separate part of its assets in order to create new company with it; dissolve itself, divide its assets, each of resulting parts being used to create new company. (Art. 293.1[a]-[b]).

Liquidation.

Company in liquidation continues to have legal personality; except if there is express provision to contrary, provisions that regulated it until dissolution still apply. (Art. 318.1). Company in liquidation keeps same firm, with addition of expression “in liquidation” (“em liquidação”). (Art. 318.2). Publication of company acts, required by law or by articles of association, shall be done in accordance with Art. 62. (Art. 326.1).

Limitation of Actions.

Rights of company against shareholders, managers, members of supervisory board, supervisor, company secretary, liquidators, their rights against company, are barred five years from start of delay, regarding obligation of payment of capital or supplementary payments; end of willful or negligent conduct, from its revelation if it has been hidden and from occurrence of damage, regardless of whether damage has fully occurred in relation to obligation to compensate company or expiration in relation to any other obligation. (Art. 330.1). In general partnership, each partner is jointly and severally liable in relation to partnership as well as with other partners for obligations of partnership that have been contracted prior to date when they joined. (Art. 331.1).

Private Companies.

Capital of private company is broken down into shares, shareholders are jointly and severally liable for payment of all shares in accordance with provisions of Art. 362. (Art. 356.1). Managers are appointed in act of incorporation, elected by resolution by shareholders. (Art. 384.1). If articles of association do not provide contrary, term of office of managers is for indefinite period of time. (Art. 384.2). If there is only one manager, company is bound by acts practiced by him in its name within limits of his powers. (Art. 386.1). If management is composed of two people, both have equal powers of management; company is bound by acts practiced by either of them in its name within limits of their powers or practiced jointly by both if articles of association so provide. (Art. 386.2).

Public Companies.

Creation of company through public subscription is initiated by one or more promoters, individuals or collective persons, who are jointly and severally liable for all procedures until registration of company. (Art. 396.1). Promoters themselves shall subscribe shares and pay in money, nominal value that must add up to at least 1,000,000 patacas or 20% of capital, depending on which is higher; such shares cannot be transferred or charged before approval of final results of third accounting period. (Art. 396.2). In companies created through public subscription there can only be ordinary shares of single category. (Art. 396.3). All promoters of company are personally, jointly and severally, without limit, liable for accuracy of factual elements mentioned in project. (Art. 398.1). For purpose of registration, act of incorporation consists of minutes of incorporation meeting and respective list of attendance. (Art. 405). Subscription is public even if it is indirectly done by credit institutions authorized by law to intervene in such operations. (Art. 406.1). In such cases, intervening institutions subscribe all capital reserved for public subscription, undertaking obligation to offer shares to public at price, conditions mentioned in project. (Art. 406.2).

Relations of Shareholders with Company.

Articles of association can authorize company to issue, up to half of company capital, preferred shares with no right to vote, which grant, in accordance with paragraph 1 of Art. 408, right to priority dividend of no less than 5% of its nominal value, to be defined upon their issuing as well as priority equal to amount of its nominal value upon liquidation. (Art. 420.1). From profits of accounting period, no less than 10% shall be retained by company as legal reserve, until it reaches amount equal to quarter of company capital. (Art. 432.1). Public companies can issue negotiable instruments designated as bonds, which, in single issue, grant equal credit rights for their nominal value. (Art. 433.1). Each bond issued is subject to registration, as is issue of each series of bonds. (Art. 436.1). Bondholders have right to interest from respective bonds up to moment of conversion, which, for this effect, is always accounted for at end of quarter in which conversion request is presented. (Art. 443.1). Shareholders who have such capacity at date of increase of capital by subscription of new shares payable in money, have pre-emption rights in subscription of new shares, proportional to number of shares that they hold. (Art. 469.1). Dominant shareholder who, by himself, by means of other companies of which he is also dominant shareholder, with other shareholders to whom he is connected by agreements outside of company, uses power of domination in way that he causes damage to company or to other shareholders in accordance with paragraph 3 of Art. 212, is punishable with fine of up to 120 days. (Art. 475.1).

3 BUSINESS REGULATION AND COMMERCE

3.01 BANKS AND BANKING:

See category 1 Introduction, topic 1.01 Currency.

Monetary Authority of Macao (Autoridade Monetaria de Macau, in Portuguese —"AMCM"), http://www.amcm.gov.mo/, acts as regulator of financial sector of Macao, which includes banking, insurance and other credit related activities. Main objective was to ensure sound growth of financial sector and to protect interests of those involved as allowed by law. AMCM issues currency, holds deposits of government departments, manages government's foreign-exchange reserves, supervises banking, insurance sectors, advises government on economic and monetary matters. Besides, AMCM is prepared for streamlining legal framework as well as adopting best international practices for development of Macao as financial services centre. It is also responsible for monitoring external solvency of local currency, pataca, and ensuring currency's full convertibility. In addition, Macao SAR Government assigned to AMCM additional responsibility of managing reserve fund of Macao SAR effective from Apr. 1, 2000. (Art. 5 of Rules of Autoridade Monetária de Macau Decree-Law No. 14/96/M of 11 Mar.—"Rules of AMCM"). Website: http://www.amcm.gov.mo/amcm_goal/content_14-96-m.htm.

Two institutions other than AMCM also issue currency. One is private bank, Banco Nacional Ultramarino (BNU), that is required to deposit foreign-exchange equivalent of its note issue with AMCM. In return, BNU is allowed to hold specified quantity of government deposit. In 1995, Bank of China began to issue banknotes alongside BNU.

New banking ordinance passed in July 1992 opened sector to foreign competition, allowed establishment of development banks. In addition, under Decree-Law No. 58/99/M of 18 Oct. 1999 of Offshore Service Regime, http://www.amcm.gov.mo/rules_and_guidelines/laws/bank/En_Lw_58_99.pdf, banking licenses will also be granted subject to prior authorization of Chief Executive of Macao SAR, on advice of AMCM. At present, there are 27 banks, out of which 12 are locally incorporated and 15 are branches of overseas banks. With exception of three offshore banks, all banks in Macao are retail banks with full banking license. In addition, there is finance company, with restrictive banking activities, which was authorized under Decree-Law No. 15/83/M of 26 Feb. Website: http://www.amcm.gov.mo/rules_and_guidelines/laws/bank/En_Lw_15_83.pdf.

Banking Law, Related Legislation.

Decree Law No. 35/82/M of 3 of Aug. 1993, Financial System Act ("FSA"), played successful role within context of developing open door policy, which Macao was experiencing at time. Nevertheless, impressive rate of change, innovation worldwide has made it imperative that traditional scope of banking activity, regulation of operations and of supervisory authorities be reappraised. Website: http://www.amcm.gov.mo/rules_and_guidelines/laws/bank/En_Lw_32_93.pdf.

General Provisions.

FAS defines legal framework to be applied to financial activity in Macao. Are from its provisions: (1) Financial activity conducted by Government of Macao including its own services and autonomous funds; (2) financial activity conducted within Territory of Macao by international organizations of which Macao is member or with which Macao is otherwise associated; (3) insurance business and management of pension funds; (4) activity conducted by pawnbrokers.

(Art. 2).

Disclosure of Information.

Financial institutions and companies must submit to AMCM all information pertaining to those financial institutions which are their subsidiaries, in whose capital they have holdings. (Art. 10 of FSA). Governor has power to oversee, coordinate, supervise monetary, financial and currency markets, as well as business conducted by respective authorized institutions. (Art. 4). All financial institutions authorized to operate in Macao are subject to annual supervision fee which must not exceed two hundred thousand patacas for head office or main office and twenty-five thousand patacas for each local branch. (Art. 11). Statutory books and records of institutions under AMCM's supervision, all applicants submitted by same to Governor must be written in official language of Macao. (Art. 12).

Advertisement.

Financial institutions are prohibited from including in their advertisements information data which is false, misleading or deceptive, which may affect normal competition between credit institutions, disturb credit system, disrupt normal conditions of monetary, financial or currency markets. (Art. 13).

Credit Institutions.

Scope.

Following shall be considered as credit institutions: (1) Banks; (2) Caixa Economica Postal (Post Office Savings Department); (3) financial leasing companies; (4) other companies which are legally classified. (Art. 15). Only those credit institutions, which have been duly authorized, may operate business involved in accepting deposits and other repayable funds from public. Banks may carry out following operations: (1) Accepting deposits and other repayable funds from public; (2) lending, guarantees and other commitments, financial leasing, factoring; (3) money transmission services; (4) issuing and managing means of payment such as credit cards, travelers' cheques, letters of credit; (5) trading on their own account or on behalf of customers in monetary, financial and currency markets instruments, financial futures, options, transactions involving foreign exchange, interest rates, transferable securities; (6) participating in issue and placement of securities and provision of other services related to such issue; (7) operating in interbank market; (8) portfolio safekeeping, and management of movable assets; (9) financial consultancy; (10) investment in external company's capital; (11) credit reference services; (12) safe custody services; (13) sale of insurance contract; and (14) other similar transactions not forbidden by law. (Art. 17).

Incorporation of Credit Institutions.

Prior special approval granted on case by case basis by Governor, on advice from AMCM, is required for following situations: (1) Incorporation of credit institutions; (2) opening of branches in Macao by credit institutions incorporated overseas; (3) setting up of subsidiaries, opening of branches, representative offices overseas by credit institutions incorporated in Macao. (Art. 19.1). On granting authorization, Governor may stipulate any requirements or specific conditions to be observed by respective credit institution, namely those relating to source and application of funds. (Art. 19.3). Credit institutions take form of public limited company and respective shares may be either nominal or registered to bearer. (Art. 20). Banks are not allowed to carry on business if share capital is less than one hundred million patacas. (Art. 21). At time of incorporation, share capital shall be fully subscribed and paid up in cash with at least half of respective amount deposited with AMCM to its account. (Art. 21). Incorporation of credit institution requires submission of application through AMCM accompanied by memorandum demonstrating economic, financial reason for wishing to incorporate institution, description of institution, articles of association, personal, professional identification of founding shareholders, in addition to any other information which AMCM deems necessary. (Art. 22).

Foreign Banks.

Branches of credit institutions incorporated overseas which are authorized to operate by AMCM, should be maintained at all times in Macao. Capital requirement amount equal to at least 50% of minimum required for constituting institutions of same type. (Art. 23.1). Half of amount to be deposited with AMCM, to its account prior to registrations. (Art. 23.2). Deposit amount may be withdrawn after said institutions commence business. (Art. 23.3). Application for authorization by overseas credit institutions needs following documents: (1) Explanation of economic, financial intentions; (2) document issued by supervisory authority in home country proving institution is legally constituted with indication of operations which it is entitled to carry out; (3) articles of association; (4) annual report and accounts for preceding three years; (5) resolution from general shareholders; and (6) identity of branch manager. (Art. 24).

Legal Liabilities.

Foreign credit institutions are liable for operations carried out by their branches authorized to operate in Macao. (Art. 25). Assets registered with local branches may be used to settle obligations undertaken by credit institutions abroad but only after settling all liabilities in Macao, including unrecorded liabilities confirmed by court decisions. (Art. 25.2). Members of management, or supervisory bodies are jointly liable for all acts in which they are actively involved unless expressed opposition or disagreement in writing. (Art. 52).

Establishment, Organization.

Credit institutions subject to special registration with AMCM. (Art. 36). Registration of credit institutions incorporated in Macao require following information: (a) Name of institution; (b) date of incorporation and commencement of business; (c) company objects; (d) address of head office; (e) address and date of commencement of business of all places of business; (f) share capital; (g) identity of qualified shareholders and their respective holdings in share capital; (h) any agreement among shareholders concerning exercise of voting rights; (i) identity of board of directors and supervisory body; (j) identity of external auditors; (k) notarized photocopy of memorandum and articles of association; and (l) amendments to information described above. (Art. 37). Applications for registration shall be submitted within period of 30 days, to be counted from date when incorporation of institution is authorized. (Art. 38).

Monopolies.

Macao established legislation to prevent credit institutions from entering into contracts, agreements with each other or use any other means which would put them in dominant position in money, financial, foreign exchange markets, adopt any other practices which may restrict, distort competition within markets. (Art. 112).

Offshore Regimes.

Decree-Law No. 55/99 (http://www.amcm.gov.mo/rules_and_guidelines/laws/bank/En_Lw_58_99.pdf) regulates other financial institutions, financial intermediaries other than credit institutions. This opens up possibility for economic agents to apply for incorporation in its territory to be engaged exclusively in Macao's offshore sector, allowing credit institutions incorporated in Macao to operate in same sector through subsidiaries. Institutional framework is also established for asset management in form of trusts broadly used in other jurisdictions.

Scope, Definitions.

Offshore activities mean any economic activity dedicated to foreign markets, to be pursued exclusively with nonresidents, by means of transactions in currencies other than pataca.

(Art. 2). Offshore institution refers to institution having legal personality, without independent legal status, engaging in offshore activity. (Art. 2). Offshore Financial Institution (OFI), authorized under disposition of law to carry out financial activities, including banking, insurance, reinsurance, captive insurance, those activities resulting in usual practice with view to profit from transactions. (Art. 2). Offshore institutions forbidden from: (1) Carrying out transactions with residents, namely purchasing, renting, leasing real estate in territory, granting credit to respective acquisition, renting, leasing, grant guaranties, collaterals, render any kind of services to residents; and (2) carrying out transactions denominated in patacas. (Art. 4).

Exemptions.

Offshore institutions authorized to operate in Macao benefit from: (1) Exemption from income tax (imposto complementar), when income is generated through engagement of offshore business; (2) exemption from industrial tax (contribuição industrial); (3) exemption from inheritance, donations tax on free transfer of movable, unmovable property exclusively affected to offshore business (imposto de sucessões e doações); (4) exemption from real estate transmission tax on properties affected (imposto de sisa); and (5) exemption from stamp duty (imposto de selo) on insurance policies concerning offshore risks, contracts established with entities not domiciled in Macao as result of engagement in offshore business, donations between living persons described in (2) above, bank transactions carried out within scope of offshore business, incorporation of offshore institutions, as well as supplements or increases in their share capital. (Art. 12).

Formation, Structure.

Offshore institutions must take form of: (1) Company incorporated according to law of Macao; or (2) branch of institution incorporated abroad. (Art. 5). Companies can be incorporated and subsist with any number of shareholders. (Art. 5). In addition, accounts must be kept, organized according to generally accepted accounting principles and, when applicable, in conformance with plan set for their respective business sector. (Art. 6). Board of directors, administrative bodies or management need minimum of three persons, all of recognized suitability, at least one of them resident of Macao. (Art. 21). Management of branches must be given broad powers to direct respective business, to handle or settle all matters concerning branch's activities, receive summons, also of confessing, withdrawing from, participating in any litigation. (Art. 8). Employees working for offshore institutions and their employers are subject to social security regime in accordance with Macao legislation. (Art. 11). In addition, opening fee and half-yearly operating fee shall be paid to Macao. (Art. 14.1). Value and/or limits of opening fee are established in schedule approved by Governor, published in Official Gazette. (Art. 14.2). Operating fee paid in Jan. or July, depending whether decision authorizing establishment was confirmed in first or second half of year. (Art. 14.5). Fees already levied not refundable, even if license lapses or is revoked. (Art. 14.8).

Legal Liabilities.

Institutions licensed to establish offshore branches are jointly responsible for transactions engaged in by latter. (Art. 7).

Requirements.

For institutions incorporated in Macao, government passed legislation regulating Offshore Financial Activity. Offshore Financial Activity (OFA) takes form of public limited companies, at least 51% of their respective shares must be nominal. (Art. 16). Specific requirements for incorporating, operating offshore subsidiaries are that: (1) They must hold share capital amounting to at least half share capital legally required for exactly same kind of institution licensed to operate with residents; (2) majority of shares must be held by financial institution authorized to do business with residents; and (3) AMCM must receive previous notification from supervisory authority in state or territory of origin identifying those responsible for subsidiary, kind of transactions it intends to carry out in Macao. (Art. 17). There are also specific requirements for branches that operate as offshore financial institution: (1) Institution must be incorporated outside of Macao, must have share of capital not lower than legally required for institutions authorized to do business with residents; and (2) AMCM must receive previous notification from supervisory authority in state or territory of origin identifying those responsible for offshore branch, and kind of transactions it intends to carry out in Macao. (Art. 18).

3.02 COMMERCIAL LAW:

Commercial Entrepreneurs, Commercial Enterprises, Acts of Commerce.

Commercial entrepreneurs are: (a) individuals and collective persons which, in their own name, by themselves or through third parties, exercise commercial enterprise; (b) commercial companies. (Art. 1 of Commercial Code of Macao). Commercial enterprise is any organization of productive factors for exercise of economic activity aimed at production for systematic, lucrative exchange, namely: industrial activity for production of goods or services; activity of intermediation in circulation of goods; transport activity; banking and insurance activity; activities auxiliary to these. (Art. 2.1). Organization of factors of production for exercise of economic activity which is not separable from person exercising it is not considered commercial enterprise. (Art. 2.2). Following are considered acts of commerce: acts especially regulated in law as result of special needs of commercial enterprises, those mentioned in Commercial Code, analogous acts; acts practiced in exercise of commercial enterprise. (Art. 3.1). Acts practiced by commercial entrepreneur are considered as being in exercise of respective enterprise, if from such acts or from circumstances surrounding their practice opposite does not emerge. (Art. 3.2).

Commercial Capacity.

Commercial entrepreneur can be any individual, resident or nonresident, or collective person, with or without registered office in territory, endowed with civil capacity, without prejudice to special provisions. (Art. 5). Commercial entrepreneurs cannot be collective persons which do not have material interests as their object; those who are legally forbidden from exercising a profession connected to exercise of commercial enterprise. (Art. 9).

Obligations of Commercial Entrepreneurs.

Commercial entrepreneur is especially obliged to adopt firm; have commercial bookkeeping, provide for entry in commercial register of acts subject to registration and render accounts. (Art. 12).

Economic interest grouping is dissolved in cases mentioned in law and also by resolution of its members, passed by unanimity, if contract does not provide otherwise; by expiry of its time limit; by accomplishment, extinction, supervening impossibility of its object; by occurrence of any cause of dissolution mentioned in contract; by unlawfulness by its object or by bankruptcy. (Art. 516.1[a]-[f]).

Firm.

Commercial entrepreneur is named, in exercise of his enterprise, under commercial name, which is his firm, he must sign documents related to enterprise with it. (Art. 14.1). Elements used in composition of firm must be truthful, not induce error regarding identity, nature, dimension or activities of its holder. (Art. 15.1). Firm must be distinct, not susceptible to be confused or mistaken with any other already registered. (Art. 16.1). Firm must be written in one or both official languages, if chosen language is Chinese, it can also have English version. (Art. 17.1). Firms cannot offend public morals, good mores (bons costumes). (Art. 18.1). Admissibility of firms registered outside territory is subject to evidence of such registration in their place of origin and to absence of susceptibility to confusion with firms already registered in Macao. (Art. 19). Right to exclusive use of firm is created only after its registration by respective holder in competent office. (Art. 20.1). Firm of general partnerships shall have addition of “Sociedade em Nome Colectivo” or, if written in Portuguese language, initials “S.N.C.” (Art. 24.1). Firm of private companies shall have addition of “Limitada” or, if written in Portuguese language, abbreviation “Lda.” (Art. 26). Firm of public companies shall have addition of “Sociedade Anónima” or, if written in Portuguese language, initials “S.A.” (Art. 28).

Commercial registration is intended to make public legal situation of entrepreneurs, commercial enterprises, its purpose being safety of legal commerce. (Art. 61).

Representation in Exercise of Enterprise.

Manager is person who, under any designation, depending on commercial usage, is engaged by commercial entrepreneur for exercise of enterprise. (Art. 64.1). Manager can practice all acts related to exercise of enterprise for which he is engaged, with exception of limitations contained in management engagement; however, manager cannot charge or transfer immovable goods used in exercise of enterprise if he is not expressly authorized to do so. (Art. 65.1). In relation to enterprise or part of it for which he is engaged, manager is obliged, jointly with entrepreneur, to comply with provisions relating to entry in commercial register of acts subject to it and to have commercial bookkeeping. (Art. 66). In documents relating to acts practiced in exercise of enterprise for which he is engaged, manager is obliged to use firm of principal, to write his signature with express mention of capacity in which he intervenes. (Art. 69).

3.03 CONTRACTS:

Advertising Contracts.

Note: Citations refer to “Commercial Code”.

Rights, Obligations of Advertising Entrepreneur.

Advertising entrepreneur is obliged to undertake all acts necessary for preparation and execution of advertising; follow instructions of client relating to preparation and execution of advertising; submit for prior approval of advertiser all acts mentioned in Art. 724(a); control diffusion of advertising in advertising media; not undertake advertising for products or services in direct competition with those which are object of contract concluded with client, except if there is agreement to contrary; render accounts as agreed or whenever justified. (Art. 724). Advertising creation contract is that by which one of parties undertakes to conceive and to prepare for other party project for advertising campaign or part of it or any other element of advertising, against remuneration. (Art. 741). Advertising creator conceives his work in conformity with what has been agreed, without defects that impair his ability to achieve goals mentioned in contract. (Art. 742).

Agency Contracts.

See category 2 Business Organizations, topic 2.01 Agency.

Termination of contract is agreement by which parties decide to put end to their contractual relation and must be made in writing. (Art. 645). Agency contract lapses especially by expiry of agreed time limit; if condition to which parties have subordinated it takes place or if it becomes certain that it cannot take place, depending on whether condition is resolutory or suspensive; by death of agent or, if it is collective person, by its extinction; by bankruptcy of agent or of principal. (Art. 646). If parties did not state time limit, contract is presumed to be agreed for undetermined period of time. (Art. 647.1). Contract that continues to be executed by parties after expiry of its time limit is deemed to have been renewed for undetermined period of time. (Art. 647.2).

Banking Contracts.

Bank deposit is contract by which person hands to bank certain amount of money or movable valuables, for latter to provide custody and return them when requested to do so. (Art. 840). Deposit of sums of money in bank can be made under one of following modalities: (a) Order deposit; (b) advance notice deposit; (c) time deposit; and (d) deposit created under special rules. (Art. 842).

Opening of bank credit is contract by which bank undertakes to keep certain sum of money at disposal of other party for certain period of time, latter having obligation to pay agreed commissions and, in accordance with actual use of credit, to reimburse bank and to pay respective interest. (Art. 850).

Factoring contract is contract by which one of parties, against payment, undertakes obligation to manage and collect credits, present or future, arising from exercise of enterprise by other party, and, additionally, to anticipate payments or to undertake risk, total or partial, of nonpayment by debtors. (Art. 869). Provisions of Civil Code on assignment of credits apply to factoring contract, to extent that they do not contradict law. (Art. 870). Factoring contract must always be agreed upon in writing and cover whole of relations between factor and supplier. (Art. 871.1). Without prejudice to provisions of code, assignment of credits under factoring contract must always be accompanied by corresponding invoices or equivalent supporting documents, in electronic form, or negotiable instruments. (Art. 871.2).

Leasing contract is that by which one of parties undertakes, against payment, to provide other with temporary enjoyment of good, acquired either from lessee himself, or from third party in accordance with his instructions, or built upon indication of same lessee; lessee can buy good, after agreed period of time, for price determined in contract, determinable by means of simple application of criteria stated in it. (Art. 889). Leasing can have as object any goods that can be rented. (Art. 890.1). If lessor builds, in accordance with surface right, on land owned by lessee, such right shall be deemed perpetual, without prejudice to possibility of acquisition by owner of ground, under general rules. (Art. 890.2).

Carriage Contract.

Contract of carriage is that by which person binds himself to conduct persons or goods from one place to another, against payment. (Art. 749). Carriage contract is regulated by legal rules directly applicable to it as result of means of transport used and by provisions of code compatible with them. (Art. 750). Carriage includes whole period during which passenger is in vehicle, as well as operations of embarking and disembarking at place of origin, at destination and at intermediate stops. (Art. 757.1). Shipper shall, upon request of carrier, issue bill of lading signed by him, containing information mentioned in Art. 761.1, and additional agreed conditions. (Art. 762.1). Carrier, upon request of shipper, must issue duplicate of bill of lading signed by him or, if no bill of lading was delivered to him, shipping receipt with same information. (Art. 762.2). Except if there is legal provision to contrary, duplicate of bill of lading and shipping receipt can be issued to order or to bearer. (Art. 762.3). If carrier has handed to shipper duplicate of bill of lading, or shipping receipt, to order, or to bearer, rights arising from carriage must be transferred by endorsement, or delivery of instrument. (Art. 768.1).

Commercial Concession Contract.

Commercial concession is contract by which one of parties, in his name and for his own account, undertakes to buy and resell goods produced or distributed by other party, in certain zone and in stable manner, subjecting himself to certain degree of control by other party. (Art. 657). Art. 680 applies to commercial concession contract, with necessary adaptations. Principal is obliged to act in accordance with good faith, in order to fully achieve contractual aim. (Art. 666).

Consortium contract is contract by which two, or more individuals, or collective persons, who exercise economic activity, bind among themselves to undertake certain activity, or to make certain contribution, in organized manner, with purpose of achieving any of following objects: performance of legal, or material acts in preparation of certain project or to continuous activity; execution of certain project; supply of goods similar or complementary among them, produced by each of members of consortium, to third parties; research into, or exploitation of natural resources; production of goods that can be shared, in kind, among members of consortium. (Art. 529).

Franchising contract is that by which one of parties, against direct or indirect payment, grants other, in certain zone and in stable manner, right to produce and or to sell certain goods or services under his entrepreneurial image, according to his know-how, with his technical assistance, subject to his control. (Art. 679). Franchiser is obliged to provide, in writing, with adequate advance, complete and truthful information to interested party, so that latter can form balanced and informed assessment of advantages and disadvantages of concluding contract, namely: identification of franchiser; franchiser's annual accounts of last two accounting periods; any judicial proceedings in which franchiser, holders of trademarks, patents and other industrial or intellectual property rights related to franchise are, or have been involved, their sub-franchisers, which may directly or indirectly come to affect or render impossible functioning of franchise; detailed description of franchise; profile of ideal franchisee regarding previous experience, level of education and other characteristics that compulsorily or preferably he must have. (Art. 680.1[a]-[e]). Franchiser must also provide interested party, with adequate advance, with model of standard contract and, if it is case, also that of pre-contract of franchise adopted, with complete text, including respective annexes. (Art. 680.2).

Guarantee Contracts.

For pledge to have commercial nature, it is necessary that debt secured arises from exercise of commercial enterprise. (Art. 911). Commercial pledge can be created with or without dispossession. (Art. 912.1). Creation of commercial pledge can only be done without dispossession if it falls upon good which is put to use of enterprise. (Art. 912.2). Creation of commercial pledge must always be without dispossession if it falls upon good essential to functioning of enterprise. (Art. 912.3). Only one commercial pledge can be created over all machinery, movable goods, tools installed, for use in exercise of enterprise. (Art. 913.1). For that purpose, boilers, furnaces that are not integral part of immovable, chemical installations and other fixed materials put to use of enterprise shall be considered as machinery. (Art. 913.2).

Fiduciary transfer in guarantee transfers to creditor rescindable ownership (propriedade resolúvel) and possession of movable good transferred, independently of effective delivery of good; debtor becomes detainer and depositary, with all responsibilities and duties that he has in accordance with law. Fiduciary transfer in guarantee can only be made in favor of commercial entrepreneur and for credits arising from exercise of respective enterprise. (Art. 917). Debtor who transfers or creates guarantees for benefit of third parties over good that he had already transferred in guarantee shall incur in liability of fiduciary depositaries. (Art. 925).

Floating charge is guarantee that covers all or part of goods that are or may be used in exercise of enterprise, with exception of immovables, and effects of which are suspended until moment when creditor, as consequence of occurrence of grounds mentioned in law or in contract, provokes crystallization of charge. (Art. 928). It must be expressly stipulated in act of creation. (Art. 928.2).

Independent guarantee is contract by which one of parties undertakes to pay to other determined or determinable amount of money, upon demand, accompanied or not by certain documents relating to obligation, in case of occurrence of certain risk or event. (Art. 942). Guarantor, beneficiary have rights and obligations arising from law and from contract of independent guarantee. (Art. 955).

Insurance contract is that by which insurer, against payment of premium, undertakes to compensate, within agreed limits, in case of occurrence of covered event, damage caused to insured, or to pay amount of money, or annuity, or to perform other obligations mentioned in such contract. (Art. 962). Various types of insurance contract are regulated by legal provisions that, according to their nature, are especially applicable to them, and by provisions of Commercial Code compatible with them. (Art. 963). Insurance contract is agreed between insurer and insurance holder. (Art. 965.1). Insured is individual, or collective person in whose interest contract is concluded or person whose life, health, or physical integrity is insured. (Art. 965.2). Beneficiary of insurance is addressee of insurer's performance. (Art. 965.3). Insurance contract produces effect from date of its conclusion. (Art. 966.1). However, parties can condition start of its effects to payment of premium, to subscription of policy, or to any other facts. (Art. 966.2).

Insurance contract against damage shall be void if, at moment of its conclusion, there is no interest of insured in compensation of damage. (Art. 995.1). Any direct or indirect economic interest that person may have in nonoccurrence of risk can be object of insurance. (Art. 995.2). If such interest is limited to part of good that is insured in its totality, or to right related to it, its insurance must be considered as made on account of all interested parties. (Art. 995.3).

Insurance of persons comprises all risks likely to affect life, physical integrity, or health of insured. (Art. 1028.1). Contract can be agreed with reference to risks relating to either one person or to group of persons. (Art. 1028.2). In life or personal accident insurance, insured capital is that which is stated in contract. (Art. 1029.1). Performance due by insurer in cases aforementioned is autonomous regarding any other arising from other insurance contracts. (Art. 1029.2).

Lodging contract is contract by which one of parties undertakes to provide lodging and other inherent services to other, with or without supply of meals, with adequate conditions of amenity and comfort, against payment. (Art. 798). Whoever runs hostelry is obliged to accept any and all lodging proposals presented by third parties, within availability existing at moment, except if there is just cause; but guest is obliged to respect indications of host, provided they are in accordance with law. (Art. 799.1). Host is obliged to accept lodging reservations presented to him, unless he has no available accommodation on proposed dates. (Art. 801.1). Acceptance or maintenance of reservation can be conditional on posting of bond of amount no higher than that due for stay. (Art. 801.2).

Negotiable Instruments in General.

Order instruments can be subscribed by more than one debtor. (Art. 1101.1). In absence of clause to contrary in instrument, various debtors are jointly and severally liable towards creditor, who can initiate proceedings against them individually or collectively, without obligation to observe order in which they became liable. (Art. 1101.2). Fact that creditor exercises his right against one of liable parties does not prevent him from exercising his right against others, even if subsequent to former. (Art. 1101.3). Creditor shall be indicated by his name or, if it provides sufficient identification, by reference to capacity. (Art. 1102.1). In case of indication of beneficiary by reference to capacity, his signature as endorser must be accompanied by indication of his capacity. (Art. 1102.2). Transfer of order instruments is done by means of endorsement and depends on delivery of instrument to endorsee; delivery must be made within terms prescribed for bearer instruments. (Art. 1103.1). Order instruments can also be transferred by ordinary assignment of credits, in which case they produce effects specific to such assignment. (Art. 1103.2). If he is not himself payee of instrument, bearer of order instrument has legitimacy to exercise right indicated in it, provided that he justifies his right by uninterrupted series of endorsements, even if last one is blank. (Art. 1110.1).

Negotiable Instruments in Special.

Bill of exchange contains: term “bill of exchange” inserted in text of instrument and expressed in language employed in drawing up instrument; unconditional order to pay exact sum of money; name of person who is to pay (drawee); indication of time of payment; indication of place where payment is to be made; name of person to whom or to whose order payment is to be made; indication of date on which and place where bill is issued; signature of person who issues bill (drawer). (Art. 1134). Bill of exchange can be drawn: payable to drawer's order; on drawer himself; by order and for account of third party. (Art. 1136). If bill of exchange is payable on sight or at fixed period after sight, drawer can stipulate that payable sum must bear interest. In any other type of bill of exchange this stipulation is implied. (Art. 1138.1). Every bill of exchange, even if not expressly drawn to order, can be transferred by means of endorsement. (Art. 1144.1). Until maturity, bill of exchange can be presented to drawee for acceptance at his domicile, by holder, even by mere detainer. (Art. 1154).

Maturity.

Bill of exchange can be drawn payable: (a) On sight; (b) at fixed period after sight; (c) at fixed period after date; or (d) on fixed date. (Art. 1166.1). Bills of exchange with different maturities or maturing by installments are void. (Art. 1166.2).

Check contains: term “Check” inserted in text of instrument, expressed in language employed in drawing up instrument; unconditional order to pay exact sum of money; name of person who is to pay (drawee); indication of place where payment is to be made; indication of date when and place where check is drawn; signature of person who draws check (drawer). (Art. 1212). Instrument in which any of aforementioned requirements is lacking does not produce effect as check, except in cases specified in Commercial Code. (Art. 1213.1). In absence of any special indication, place specified beside name of drawee shall be deemed to be place of payment. If several places are named beside name of drawee, check is payable at first place named. (Art. 1213.2). In absence of such indications or of any other indication, check is payable at place where drawee has his principal establishment. (Art. 1213.3). Check which does not specify place at which it was drawn is deemed to have been drawn in place specified beside name of drawer. (Art. 1213.4). Endorsement must be written on check or on slip attached to it (attachment). It must be signed by endorser. (Art. 1227.1).

Securities lending contract is contract by which lender transfers to borrower ownership of negotiable instruments of certain kind, for specified price and borrower undertakes obligation to transfer to lender, at end of agreed time limit, ownership of equal quantity of instruments of same type, against reimbursement of price, which can be increased or decreased by agreed amount. (Art. 831). Contract for lending of securities is concluded by delivery of instruments. (Art. 832).

Supply contract is that by which party binds himself to supply goods to another, continuously or periodically, against payment of price. (Art. 581). If quantity to be supplied is not determined, it is deemed to correspond to normal needs of client, taking into account moment of conclusion of contract. (Art. 582.1). If parties have established only maximum and minimum limits for entire supply or for each individual delivery, quantity due must be established, within those limits, by client. (Art. 582.2). If quantity of supply is to be determined in accordance with needs, if minimum quantity was stipulated, client is bound for quantity corresponding to his needs that exceeds said minimum limit. (Art. 582.3).

3.04 GAMING:

Gaming is most important part of Macao's economy; it is only location in China where organized gaming is legally permissible. Gaming Inspection and Coordination Bureau (DIRECÇÃO DE INSPECÇÃO E COORDENAÇÃO DE JOGOS—“DICJ”) provides guidance and assistance to Chief Executive of Macao SAR on definition and execution of economic policies for operations of casino games of chance or other ways of gaming, Pari-Mutuels and gaming activities offered to public.

Casino means premises permitted and appointed to conduct such type of business by Macao Government. Games of Chance are those games in which result depends mainly or purely on player's luck. Interactive games means games of chance by means of telecommunication tools such as telephone, facsimile, Internet, or other similar means of communications, using cash or other valuables as payment. Public gaming activities means gaming activities to be won exclusively by luck, such as lotteries, bingos and lucky drawings. Gaming agent means promoter of games of chance in casino, who provides various conveniences to player, namely transportation, lodging, food and entertainment, earning commissions or other remuneration from contractor. (Legal Regulations on Casino Lucky Gaming Business, Decree Law No. 16/2001 of 19 of Sept. 2001—Art. 2). Website: http://www.dicj.gov.mo/PT/Legis/FortunaAzar/lei_01_016.htm.

Illegal gaming is subject to criminal penalties pursuant to special laws. (Art. 1). Art. 3 has list of games of chance that are authorized to be played in casinos. Any form of interactive gaming is not allowed for contractor of casino line of business. Authorization to operate interactive gaming is independent to that of casino line of business. (Art. 4). Casino business is restricted to premises authorized by government. Chief executive office may approve, within specified period, handling of any form of games of chance on ships or aircraft registered in Macao when it is outside Macao and operating in touristic routes. (Art. 5).

Macao is regarded as continuous gaming zone, where casinos should run every day of year. Contractor may suspend operation of casino only in exceptional cases and needs to receive authorization from government. Contractor is exempted from this authorization in urgent situations such as serious accidents, natural disasters or any situation that poses significant threat to people's lives or safety. Contractor should notify government as soon as possible of suspension. (Art. 6). Right to exploitation of casino games of chance in Macao can only be given to approved joint-stock limited company established in Macao, while relevant approval shall be executed pursuant to law provisions. Approval shall be given to operation of three casino lucky gaming businesses to one company at most. (Art. 7). Open bidding process shall precede granting of any concession to operate casino. Open bidding may be restricted by preliminary evaluated qualification. (Art. 8).

Only joint-stock limited company established in Macao with scope of business restricted to operation of casino games of chance business will be permitted to attend to bidding. Government is entitled, prior to giving approval, to order amendment to Articles of Association of joint-stock limited company or shareholder's agreement. Those who do not amend provision of said Articles of Association of joint-stock limited company or agreement stated in agreement of quasi company within government specified period considered to have waived bid. Each bidder provides guaranteed bond if bid is accepted. Giving up bidding upon expiry of period specified in bidding acceptance form results in forfeiture of guaranteed bond. (Art. 10).

Term of casino games of chance grant is provided in approval contract for no more than 20 years. (Art. 13.1). In case of approved term being shorter than maximum term permitted by law, Government may approve one or several extensions no later than six months prior to expiry of said approved term, provided that such extension will not exceed longest term provided. (Art. 13.2). In case of approved term reaches maximum term, chief executive officer may approve one or several extensions not exceeding five years in total. (Art. 13.3). Approval of operation of casino games of chance will only be given to bidder examined by government to be qualified for obtaining approval. Fees to be paid by bidder for qualification examination by government deducted from guaranteed bond for bidding. Government considers experience, business reputation, financial ability of bidder and its associates. (Art. 14).

Contractor with corporate capital of less than Macao pataca 200 million will not be permitted to undertake business operation. Contractor must show evidence that said corporate capital is paid in full, in cash, provide relevant certification of deposit of relevant amount in credit organization in Macao. Such deposit shall not be removed by contractor prior to starting business operation. (Art. 17). Contractor's management authority must be given to one managing director, who must be permanent resident of Macao and in possession of at least 10% of corporate capital. (Art. 19).

Gaming agent activities must be conducted with license, under supervision of government. Gaming agent shall be registered at each contractor company where he is employed. (Art. 23). Contractor must pay special gaming tax according to net revenue of gaming business. Special gaming tax rate is 35%, to be paid within 12 months of each year. (Art. 27).

Contractor and its management company must, during approval term, by no later than Apr. 30 of each year, publish following information on Official Gazette of Macao SAR, one Chinese language newspaper and one Portuguese language newspaper that have most readership: balance sheet, income statement and appendixes; overall business report; opinions of supervisory council; general opinions by external auditor; name list of major shareholders of 5% or more of corporate capital in year, proportion of shares; and name of dominant person in company. (Art. 31).

Approval of operation of casino games of chance business can only be cancelled by reason of expiry of approved term; agreement between government and contractor; redemption; termination for default; termination for public benefit. (Art. 45). Redemption means withdrawal of approval of operation by government prior to expiry date of contract. Contractor is entitled to receive compensation for redemption of approval. (Art. 46). Government may unilaterally remove approval of operation of casino games of chance for contractor's noncompliance of laws, regulations, default in major obligations set forth in contract. (Art. 47).

4 COURTS AND LEGISLATURE

—Scope —

See category 1 Introduction, topic Governmental and Legal System.

4.01 CODES:

Legal system largely based on Portuguese civil law system with major Civil Code encompassing broad legal categories.

Bill of Rights, Duties.

Basic law (c. III Fundamental Rights and Duties of Residents Arts. 24-44—Basic Law of Macao), http://www.imprensa.macau.gov.mo/bo/i/1999/leibasica/index_uk.asp#c3, specifies certain rights and duties of Macao residents. Expression Macao residents includes permanent and non-permanent residents. (Art. 24). Deemed to be permanent residents: (1) Chinese citizens born in Macao before or after establishment of Macao SAR and their children of Chinese nationality born outside Macao; (2) Chinese citizens who have ordinarily resided in Macao for continuous period of no less than seven years before or after establishment of Macao SAR and their children of Chinese nationality born outside Macao after they have become permanent residents; (3) Portuguese who were born in Macao and have taken Macao as their place of permanent residence before or after establishment of Macao SAR; (4) Portuguese who have ordinarily resided in Macao for continuous period of no less than seven years and have taken Macao as their place of permanent residence before or after establishment of Macao SAR; (5) other persons who have ordinarily resided in Macao for continuous period of not less than seven years and have taken Macao as their place of permanent residence before or after establishment of Macao SAR; (6) persons under 18 years of age born in Macao of those residents listed in item (5) before or after establishment of Macao SAR. Above-mentioned residents shall have right of abode in Macao SAR and shall be qualified to obtain permanent identity cards. Non-permanent residents of Macao Special Administrative Region shall be persons who are qualified to obtain Macao identity cards in accordance with laws of region but have no right of abode. (Arts. 24.1-24.6). Resident's equality before law is fundamental right. (Art. 25). Permanent residents have right to vote, stand for election, regardless of race, sex, religion, language, political persuasion, ideological belief, educational level, economic or social status. (Art. 26). All Macao residents enjoy right to privacy of communication, movement, religious belief, speech, association, assembly and education. (Art. 27). No resident may be unlawfully searched or imprisoned. (Art. 28). Residents have right to speedy court trial, presumed innocent until proven guilty. (Art. 29). Human dignity of residents is held inviolable. (Art. 30). Humiliation, slander, false accusation against residents in any form are prohibited. (Art. 30). Privacy of persons, in their homes held inviolable, arbitrary, unlawful search of, intrusion into resident's home is prohibited. (Art. 31). Residents enjoy freedom and privacy of communication, except in those cases when relevant authorities inspect communication in accordance with legal provisions to meet needs of public security or of investigation into criminal offenses. (Art. 32). Unless restrained by law, residents enjoy freedom of movement within Macao. (Art. 33). Holders of valid travel documents are free to leave Macao without special authorization. (Art. 33). Macao residents shall have freedom of conscience and freedom of religion as well as freedom to preach and conduct religious activities in public. (Art. 34). Residents are free to choose occupation and work. (Art. 35). Residents have right to institute legal proceedings in courts against acts of executive authorities and their personnel. (Art. 36). Legitimate rights and interests of women shall be protected by law. Minors, elderly and disabled persons shall enjoy care and protection of Macao SAR. (Art. 38).

4.02 COURTS:

Macao has its own independent judicial system, with high court: Basic Law (c. IV Political Structure—§4: Judiciary Arts. 82 to 94—Basic Law of Macao), http://www.imprensa.macau.gov.mo/bo/i/1999/leibasica/index_uk.asp#c4, vests independent judicial power, including that of final adjudication. (Art. 84). Courts exercise judicial power independently, not subject to any interference. (Arts. 19, 83). Macao courts have jurisdiction over all cases in its region, with exception of matters of state such as defense and foreign affairs. (Art. 13). Primary court has general jurisdiction at first instance, including Criminal Instruction Court. (Arts. 10, 27 to 54). Administrative Court has jurisdiction at first instance in administrative disputes; Court of Second Instance, Court of Final Appeal are also established in Macao. Judges are selected by committee, appointed by Chief Executive. Committee recommended 24 judges who were appointed by first Chief Executive. Judges are appointed by Chief Executive on recommendation of independent commission composed of local judges, lawyers and eminent persons. Judges shall be chosen based on professional qualifications. Judges of foreign nationality may be employed if qualified. Judge may only be removed for inability to discharge job functions or for inappropriate behavior, by Chief Executive on recommendation of tribunal appointed by President of Court of Final Appeal consisting of no fewer than three local judges. Appointment, removal of judges in Court of Final Appeal must be reported to National People's Congress. (Art. 87). Judges exercise judicial power in accordance with law, except in cases relating to foreign affairs or defense. (Art. 89). Judges are not legally liable for acts practiced in exercise of their office. (Art. 89). Judge may not concurrently assume other public or private posts or any post in organizations of political nature. (Art. 89). Procuratorates exercise procuratorial functions vested by law, independently, free from any interference. (Art. 90). Procurator-General designated to Chinese citizen who permanently resides in Macao, nominated by Chief Executive, appointed by Central Government. (Art. 90). See http://www.court.gov.mo/ for more information.

4.03 LEGISLATURE:

Legislative Assembly is legislative organ of Macao. (c. IV Political Structure—§3: Legislature Arts. 67 to 81—Basic Law of Macao). Website: http://www.imprensa.macau.gov.mo/bo/i/1999/leibasica/index_uk.asp#c4. Macao SAR shall be vested with legislative power. Laws enacted by legislature of Macao SAR shall be reported to Standing Committee of National People's Congress for record. Reporting for record shall not affect entry into force of such laws. If Standing Committee of National People's Congress, after consulting Committee for Basic Law of Macao Special Administrative Region under it, considers that any law enacted by legislature of region is not in conformity with provisions of this law regarding affairs within responsibility of Central Authorities or regarding relationship between Central Authorities and region, Standing Committee may return law in question but shall not amend it. Any law returned by Standing Committee of National People's Congress shall immediately be invalidated. This invalidation shall not have retroactive effect, unless otherwise provided for in laws of region. (Art. 17). Laws in force in Macao SAR shall be Basic Law of Macao, laws previously in force in Macao as provided for in Art. 8 of Basic Law, and laws enacted by legislature of region. National laws shall not be applied in Macao SAR except for those listed in Annex III of Basic Law. Laws listed therein shall be applied locally by way of promulgation or legislation by region. Standing Committee of National People's Congress may add to or delete from list of laws in Annex III after consulting its Committee for Basic Law of Macao SAR and regional government. Laws listed in Annex III shall be confined to those relating to defense and foreign affairs as well as other matters outside autonomy limits of region as specified by Basic Law. In event of Standing Committee of National People's Congress deciding to declare state of war or, by reason of turmoil within Macao SAR which endangers national unity or security and is beyond control of regional government deciding that region is in state of emergency, Central People's Government may issue order applying relevant national laws in region. (Art. 18; Annex II of Basic Law: Method for Formation of Legislative Council of Macao Special Administrative Region). Website: http://www.imprensa.macau.gov.mo/bo/i/1999/leibasica/index_uk.asp#a2. Twenty-seven member body comprised of ten directly elected members, ten members representing functional constituencies, seven members appointed by Chief Executive. Legislative Assembly will increase in size to 29 members, when next election falls due. Legislative Assembly responsible for general law-making, including taxation, budget, socio-economic legislation. City of Macao and islands of Taipa and Coloane each have municipal council. Laws enacted by Macao must be reported to Standing Committee of NPC for record. If National People's Congress, after consulting Committee for Basic Law of Macao, considers that any law enacted by Legislative Assembly is not in conformity with its authorities, National People's Congress may return law in question but not amend it. See http://www.al.gov.mo/en/en.htm and http://www.gov.mo/egi/Portal/rkw/public/view/area.jsp?id=21 for more information.

5 DISPUTE RESOLUTION

5.01 ARBITRATION AND AWARD:

Adoption of Arbitration Law of China.

Disputes related to Macao arising from economic, trade transactions of contractual, non-contractual nature may be arbitrated in accordance with China International Economic and Trade Arbitration Commission (CIETAC) effective as from 1 Oct. 2000. (Art. 2).

Scope of Arbitration.

CIETAC Arbitration Rules, website: http://www.cietac.org.cn/english/rules/rules_3.htm. Contract and non-contractual disputes regarding economic and trade transactions arising from project financing, invitations to tender and bidding submissions, project construction or other activities conducted by Chinese legal person, physical person and/or other economic organizations which utilize capital, technology or services from foreign countries, international organizations or from Macao region may resort to arbitration. (Arts. 2.1-2.6). Disputes concerning marriage, adoption, guardianship, fosterage and inheritance and administrative disputes which should be handled by administrative agencies must not resort to arbitration. (Art. 2). Where parties intend to resort to arbitration, they must reach agreement and submit written application to Arbitration Commission for arbitration. (Art. 3). Where parties have reached arbitration agreement and other party requests court to make ruling, court will make such ruling. (Art. 4). Arbitration clause contained in contract should be regarded as existing independently and separately from rest of contract. (Art. 5). Validity of arbitration agreement shall not be affected by any modification, rescission, termination, expiry, invalidity, or nonexistence of contract. (Art. 5). If party objects to arbitration agreement and/or jurisdiction over arbitration case, that issue should be raised before first hearing conducted by arbitration tribunal. (Art. 6). If parties agree to submit dispute to Arbitration Commission, it will be taken that they have agreed to case being arbitrated under these rules. (Art. 7). However, if parties agreed otherwise, and subject to consent of Arbitration Commission, parties' agreement will prevail. (Art. 7).

Arbitration Commission.

Organization: has one honorary chairman and several advisors. (Art. 8). Panel of arbitrators is selected by Arbitration Commission from among Chinese and foreign persons with professional knowledge and practical experience in fields of law, economics and trade, science and technology, etc. (Art. 10). Based in Beijing, Arbitration Commission has Sub-Commission in Shenzhen Special Economic Zone and Shanghai. (Art. 11). Parties may agree to have dispute arbitrated in any Commission. (Art. 12).

Arbitration Proceedings.

Arbitration proceedings will commence when Notice of Arbitration is issued by Arbitration Commission or its Sub-Commissions. (Art. 13). Claimant submitting Application for Arbitration must do following: (1) Submit Application for Arbitration in writing, which should contain names, addresses of claimant, respondent, arbitration agreement, facts of case, main points of dispute, claimant's claim, facts on which claim is based; (2) attach relevant documentary evidence which supports facts; (3) pay arbitration fee according to fee schedule. (Art. 14). Upon receipt of Application for Arbitration and its attachments, Arbitration Commission should promptly send to respondent Notice of Arbitration, together with one copy each of claimant's Application for Arbitration and its attachments, as well as Arbitration Rules, Panel of Arbitrators and Arbitration Fee Schedule of Arbitration Commission. (Art. 15). Claimant and respondent have within 20 days as from date of receipt of Notice of Arbitration to appoint arbitrator from among panel of arbitrators. (Art. 16). Respondent has 45 days from date of receipt of Notice of Arbitration to submit written defense and relevant documentary evidence to Arbitration Commission. (Art. 17). Also, respondent shall, at latest within 60 days from date of receipt of Notice of Arbitration, file with Arbitration Commission his counterclaim in writing. Arbitration tribunal may extend time limit upon justifiable reasons. When filing his counterclaim, respondent must state specific claim, facts and reasons upon which claim is based and attach relevant documentary evidence. (Art. 18). Request to amend claim or counterclaim may be denied if arbitration tribunal considers request has been raised too late and might affect progress of proceedings. (Art. 19). When submitting Application for Arbitration, written defense, statement of counterclaim, documentary evidence and other documents, parties should submit them in quintuplicate. (Art. 20). If number of parties is more than two, additional copies should be provided accordingly. (Art. 20). Parties may authorize arbitration agents to deal with matters relating to arbitration; authorized arbitration agent must produce Power of Attorney to Arbitration Commission. (Art. 22). If party applies for property preservative measures, Arbitration Commission should submit party's application to court for ruling in place where domicile of party against whom property preservative measures are sought is located or in place where property of said party is located. (Art. 23).

Arbitration Tribunal.

Each party can appoint one arbitrator from among panel of arbitrators or entrust Chairman of Arbitration Commission to make such appointment. Third arbitrator shall be jointly appointed by parties or appointed by Chairman. In case two parties fail to jointly appoint third arbitrator and fail to entrust Chairman to appoint within 20 days from date on which respondent receives Notice of Arbitration, third arbitrator will be appointed by Chairman. Third arbitrator will act as presiding arbitrator. Presiding arbitrator and two appointed arbitrators will jointly form arbitration tribunal to hear case. (Art. 24). If parties so wish, they may jointly appoint or authorize

Chairman to appoint arbitrator to hear case alone. (Art. 25). Where two or more claimants and/or respondents are involved, claimants' side and/or respondents' side should appoint or entrust Chairman to appoint one arbitrator from among panel. (Art. 27). Any appointed arbitrator having personal interest in case should disclose such circumstances to Arbitration Commission and request withdrawal from office. (Art. 28). If party has justified reasons to suspect impartiality or independence of appointed arbitrator, request may be submitted in writing for arbitrator's withdrawal. Challenge against arbitrator must be in writing, put forth no later than first oral hearing. (Art. 29). Decision to remove arbitrator is made by Chairman of Arbitration Commission. (Art. 30).

Hearings.

Arbitration tribunal will hold oral hearings. At request of parties or with their consent, arbitration tribunal may decide not to hold oral hearings, and decide case on basis of documents only. (Art. 32). Date of first hearing is decided by arbitration tribunal in consultation with secretariat of Arbitration Commission. Secretariat should notify two parties of decision 30 days before date of hearing. Any party having justified reasons may request postponement of hearing, but written request must be submitted to Arbitration Commission 12 days before date of hearing. (Art. 33). Notice of date of hearing subsequent to first hearing is not subject to 30 day time limit. (Art. 34). Where parties have agreed on place of arbitration, shall be place where case is arbitrated. (Art. 35). Unless parties agree otherwise, cases accepted by Arbitration Commission will be heard in closed session. (Art. 36). For cases heard in closed session, parties, arbitration agents, witnesses, arbitrators, experts, appraisers appointed by arbitration tribunal should not disclose to outsiders substantive or procedural matters of case. (Art. 37). Arbitration tribunal may, on its own initiative, undertake investigation and collect evidence as it considers necessary. (Art. 38). Arbitration tribunal may consult expert or appoint appraiser for clarification of specific issues relating to case. It also has power to order parties to submit or produce any relevant materials, documents, properties or goods for check-up, inspection and/or appraisal. (Art. 39). Should one party fail to appear at hearing, arbitration tribunal may proceed with hearing or make award by default. (Art. 42). During hearing, arbitration tribunal may make record in writing and/or by tape-recording. (Art. 43). If parties make amicable settlement agreement by themselves, they may either request to conclude case by making award in accordance with contents of their amicable settlement agreement or request dismissal of case. (Art. 44). In case where parties reached amicable settlement outside arbitration tribunal in course of conciliation conducted by arbitration tribunal, such settlement should be taken as one which has been reached through arbitration tribunal's conciliation. (Art. 48). Parties should sign arbitration agreement in writing when amicable settlement is reached through conciliation conducted by arbitration tribunal, arbitration tribunal will close case by making award in accordance with contents of settlement agreement unless otherwise agreed by parties. (Art. 49).

Should conciliation fail, any statement, opinion, view, proposal which has been made, raised, put forth, acknowledged, accepted or rejected by either party or by arbitration tribunal in process of conciliation shall not be invoked as grounds for any claim, defense and/or counterclaim in subsequent arbitration proceedings. (Art. 50). Party who knows or should have known that any provision, requirement of these rules has not been complied with, yet proceeds with arbitration proceedings without explicitly raising in writing objection to noncompliance in timely matter should be taken to have waived right to object. (Art. 51).

Arbitration Award.

Arbitration tribunal shall render arbitral award within nine months as from date on which arbitration tribunal is formed. Secretary-General of Arbitration Commission may extend time limit at request of arbitration tribunal if necessary and reason for extension is justified. (Art. 52). In making its arbitral award, arbitration tribunal should consider facts, in accordance with law, terms of contracts, with reference to international practices and in compliance with principle of fairness, reasonableness. (Art. 53). Where case is heard by arbitration tribunal composed of three arbitrators, arbitral award shall be decided by majority of arbitrators, minority opinion may be recorded and placed on file. When arbitration tribunal cannot attain majority opinion, arbitral award shall be decided in accordance with presiding arbitrator's opinion. (Art. 54). Arbitration tribunal shall state in arbitral award claims, facts of dispute, reasons on which award is based, result of award, allocation of arbitration costs, date and place on which award is made. Facts of dispute and reasons on which arbitral award is based may not be stated in arbitral award if parties have agreed not to state them. (Art. 55). Unless arbitral award is made in accordance with opinion of presiding arbitrator or sole arbitrator, arbitral award shall be signed by majority of arbitrators. Arbitrator who has dissenting opinion may sign or not sign his name on arbitral award. Draft of arbitral award shall be submitted to Arbitration Commission before arbitrators sign award. Arbitration Commission's stamp should be fixed to arbitral award to give it legal effect. (Art. 56).

Interlocutory award may be made on any issue regarding case at any time in course of arbitration before final award is made if considered necessary by arbitration tribunal or if parties make such proposal and it is agreed to by arbitration tribunal. (Art. 57). Expenses and other fees to be paid by parties determined are determined by Arbitration Commission. (Art. 58). Furthermore, arbitration tribunal has power to decide in arbitral award that losing party should pay winning party as proportional compensation of expenses reasonably incurred by winning party. Amount of such compensation should not exceed 10% of total amount awarded to winning party. (Art. 59). Arbitral award is final and binds disputing parties. (Art. 60). If anything claimed or counterclaimed is found to have been omitted in arbitral award, either party may request in writing to arbitration tribunal for additional award within 30 days from date on which arbitral award is received. (Art. 62).

Execution of Awards.

Parties must automatically execute arbitral award within time limit specified therein. If no time limit is specified in arbitral award, parties should carry it out immediately. In case one party fails to execute arbitral award, other party may apply to Chinese or competent foreign court for enforcement of arbitral award in accordance with any treaties China might have subscribed to. (Art. 63).

Summary Procedure.

For any case in which dispute involves claims less than RMB500,000 yuan, summary procedure shall be applied, unless parties agree otherwise. In cases above RMB500,000 yuan, if one party so wishes, that party may apply for arbitration under summary procedure, provided other party agrees in writing. (Arts. 64-74).

Supplementary Provisions.

Chinese is official language of Arbitration Commission. If parties agreed otherwise, their agreements should prevail. At hearing, if parties or arbitration agents require language interpretation, Arbitration Commission may provide interpreter for them. Parties may also bring their own interpreter. (Art. 85). All arbitration documents, notices, materials may be sent to parties in person, by registered mail, express mail, telefax, telex, cable or any other means considered adequate by secretariat of Arbitration Commission. (Art. 86). Any written correspondence to parties and/or their arbitration agents should be taken to have been properly served if delivered to addressee, delivered at place of business or habitual residence mailing address. If after reasonable inquiries, none of aforesaid addresses can be found, written correspondence is sent to addressee's last known place of business, habitual residence, mailing address by registered letter or by any other means which provides record of attempt. (Art. 87).

5.02 LITIGATION:

Legal system in Macao vested in courts of Macao SAR. Power of final adjudication is exercised by court of final appeal. Courts exercise judicial power independently, free from interference, be subordinated only to law. Judges enjoy appropriate immunities. Judges of Macao are appointed by Chief Executive in accordance with recommendations of independent commission composed of judges, lawyers, noted public figures. Judges chosen by reference to their professional qualifications. Qualified judges of foreign nationalities may also be invited to serve as judges in Macao SAR. Judge may only be removed for inability to discharge functions of his office, for behavior incompatible with post he holds, by Chief Executive acting in accordance with recommendation of tribunal appointed by president of Court of Final Appeal, consisting of not fewer than three local judges. Removal of judges of Court of Final Appeal must be decided upon by Chief Executive in accordance with recommendation of review committee consisting of members of Macao SAR legislature. Appointment, removal of judges from court of final appeal must be reported to Standing Committee of National People's Congress for record. Prosecuting authority of Macao SAR exercise procuratorial functions as vested by law, independently, free from any interference. System previously in force in Macao for appointment and removal of supporting members of judiciary is maintained. Based on system previously operating in Macao, Macao SAR Government makes provision for local lawyers and lawyers from outside Macao to practice in Macao SAR. Central Government assists, authorizes Macao SAR Government to make appropriate arrangements for reciprocal juridical assistance with foreign states.

Litigation can be classified into ordinary litigation proceedings and enforcement proceedings. Ordinary litigation proceedings include application to obtain confirmation of right or findings of facts, application for mandatory injunctions, replevin or putting end in infringement; and application for formation changed and eliminated legal status. Enforcement proceedings is litigation where plaintiff requests enforcement of measures to ensure compensation or end infringement. (CPC, Art. 11).

Macao courts have jurisdiction over cases where facts underlying litigation arise in Macao; party who is Macao resident becomes defendant in Macao court; rights cannot be realized if litigation is not filed with Macao courts. (CPC, Art. 15). Preservation procedures or measures to adopt preliminary investigation evidence can be made to Macao court if main case can be argued in Macao court. (CPC, Art. 18).

Macao courts have exclusive jurisdiction and authority to proceed with litigation relevant to property rights in Macao, litigation regarding bankruptcy or insolvency of legal person in Macao. (CPC, Art. 20). Execution of decision by Macao court is under jurisdiction of trial court handling said case; execution of decision by arbitrator is under jurisdiction of basic-level court. (CPC, Art. 21). In case of litigation filed with higher level court, execution shall be brought forth into first level court. (CPC, Art. 22). Execution of higher level court's order to pay litigation fees, penalty, compensation for injury shall be undertaken in first instance court, pursuant to higher court's decision. (CPC, Art. 23).

Capacity to undertake litigation means ability to conduct litigation independently, which is based on and subject to capacity of person to act. (CPC, Art. 43). Persons without capacity for litigation can conduct litigation through proxy or guardian. Minor's parents shall represent them in litigation and respond to actions on their behalf, provided both father and mother achieve consensus on filing litigation. (CPC, Art. 44). Persons without capacity for litigation, who have no proxy, should apply to court of jurisdiction for appointing proxy, while in emergency judge handling case may immediately appoint special guardian. (CPC, Art. 45).

Compulsory joint litigation is litigation with more than one plaintiff or more than one defendant; general joint litigation means combination of many suits, in which parties concerned in each litigation are independent from one another parties (CPC, Art. 63). Attorney must be entrusted for cases subject to filing of common appeal; in appeals and in cases at courts of higher levels; execution procedures with values higher than limitation of appeal legally provided by intermediate court or basic court. (CPC, Art. 74). Entrustment for litigation may be done by official or private documents in accordance with applicable laws; by oral announcement of party, which needs to be noted in court file at any measure of litigation procedures. (CPC, Art. 77).

Useless litigation acts shall not be conducted in court. (CPC, Art. 87). Litigation acts shall be conducted in simplest, most effective way. (CPC, Art. 88). Official language must be used in any litigation act. (CPC, Art. 89). In case documents submitted are not in official language of Macao and require translation, judge must, ex officio or at request of party, order person submitting document to attach translated copy. (CPC, Art. 90). Litigation proceedings must be conducted in working days other than on court holidays. (CPC, Art. 93). Legal litigation periods can be extended for same time based on agreement by parties. (CPC, Art. 97).

If there are no specific provisions in law, plaintiff shall undertake to make its case within ten days of commencement of right to litigate, and defendant must respond within ten days, calculated from date of receipt of notice of act required for answer. (CPC, Art. 103). Civil litigation procedures are open to public, except restricted by law. (CPC, Art. 117). Speciation of courts on file will be restricted if disclosure of content of file may infringe personal esteem, privacy, good customs, or influence effect of decision. (CPC, Art. 118). Petition must be used for making request for participation in courts outside Macao, authorities to undertake litigation acts outside Macao; mandamus must be used in order to execute compulsory court order. (CPC, Art. 126). Improper statements of claim may lead to ineffectiveness of whole litigation procedures. Improper statement of claim may include uncertain, ambiguous request, cause of litigation; contradictory request and cause of litigation; incompatible request and cause of litigation. (CPC, Art. 139).

6 EDUCATION

6.01 EDUCATION SYSTEM:

Primary education starts at age six, lasts six years. Secondary education lasts up to five years. Free publicly provided education available for ten years. Main tertiary education institute is University of Macao (formerly University of East Asia), established in 1981 on Taipa Island, which offers courses in business, economics, sciences.

See http://www.dsej.gov.mo/~webdsej/www/dsejnews/index-e.htm for more information.

7 FOREIGN TRADE AND COMMERCE

7.01 CUSTOMS (DUTY):

Customs Valuation.

Macao accepted Customs Valuation Agreement; published in Official Gazette No. 9, 26 Feb. 1996. Since no customs duties, fees levied on imports, no general laws, regulations, administrative procedures for valuing goods for customs purposes. In 1996, authorities notified WTO that Law No. 7/86/M, which assessed value of imports subject to domestic taxes, was under review. This legislation superseded by Law No. 4/99/M, which stipulates that c.i.f. value will be used as basis for levying consumption tax on imported goods.

No tariffs are applied to imports into Macao. China implemented HS96 on 1 Jan. 1996. Imports of alcoholic beverages, tobacco, fuel, lubricant, automobiles, motorcycles are, with some exceptions, subject to consumption taxes, which are levied on basis of c.i.f. value.

Agreement for Trade, Co-Operation between European Economic Community, Macao.

Signed at Luxemburg on 15 June 1992: two parties undertake to strengthen their relations, resolve to promote co-operation between them, taking account of Macao's special situation, of its level of development. Co-operation between community, Macao, implementation of this agreement are based on respect for democratic principles, human rights which inspire policies of both community, Macao. (Art. 1).

Contracting parties reaffirm their reciprocal commitment under terms of General Agreement on Tariffs, Trade (GATT), accord each other most-favoured-nation treatment in all trade matters. (Art. 2). Contracting parties undertake to promote trade between them to greatest possible degree, taking into account their respective economic situations, granting each other widest possible opportunities. (Art. 3). Contracting parties agree to promote increase in mutually beneficial investment, within limits of their responsibilities, rules, policies. (Art. 7). Contracting parties establish under this Agreement Joint Committee consisting of representatives of community, on one hand, representatives of Macao, on other. (Art. 16).

7.02 FOREIGN INVESTMENT:

Measures Relating to Foreign Direct Investment.

Macao does not maintain any restrictions, controls on inward, outward foreign direct investment, use of foreign capital in existing, newly established companies; nor are there any restrictions on repatriation of profits, exchange controls. Moreover, same procedures applied to establishment of local, foreign company; each company doing business in Macao must have registered office there. See http://www.ipim.gov.mo/en/ for more information.

7.03 WORLD TRADE ORGANIZATION:

Macao remains separate customs territory; it may use name “Macao, China”, participate in international organizations, international trade agreements, such as WTO agreements.

Region may maintain, develop relations to conclude, implement agreements with foreign States, relevant international organizations in appropriate fields, including in economic, trade, financial, monetary, shipping. Basic Law that stipulates that Macao maintain status of free port, pursue policy of free trade, safeguard free movement of goods, intangible assets, capital. (Basic Law of Macao SAR—Chapter V Economy; Arts. 110, 111). Website: http://www.imprensa.macau.gov.mo/bo/i/1999/leibasica/index_uk.asp#c5. In addition, Macao may issue its own certificates of origin for products in accordance with prevailing rules of origin. (Art. 113).

Signed Marrakesh Declaration to become founding member of WTO, website: http://www.imprensa.macau.gov.mo/bo/i/94/52/desppr01.asp; it had been GATT contracting party in its own right since Jan. 1991. WTO Agreements published in Official Gazette on 27 Dec. 1994, entered into force on same date. At WTO Singapore Ministerial Conference in 1996, Macao became party to Ministerial Declaration on Trade Information Technology Products (Information Technology Agreement). Macao does not participate in any regional trade arrangements involving preferences. All trading partners are treated on MFN basis. Although Macao filed its application to join Asia Pacific Economic Cooperation (APEC) in 1993, it is not APEC member. No bilateral trade-related agreements, arrangements with any other parties; no bilateral negotiations, initiatives have taken place since its previous review.

As of Oct. 2000, principal notifications by Macao under WTO Agreements: Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS); Agreement on Agriculture; Agreement on Textiles, Clothing; Agreement on Implementation of Article IV of General Agreement on Tariffs, Trade 1994 (Agreement on Anti-Dumping Practices); Agreement on Customs Valuation; Agreement on Subsidies, Countervailing Measures; Agreement on Safeguards; Agreements on Import Licensing Procedures; Agreement on Technical Barriers to

Trade; Agreement on Application of Sanitary, Phytosanitary Measures; Understanding on Interpretation of Article XVII of GATT 1994.

8 INSURANCE

8.00 In General

Sole object of insurers is carrying on of activity referred to in Art. 2 paragraph A. It is not permissible to carry on life, non-life business concurrently. (Macao Insurance Companies Ordinance, Art. 4). Website: http://www.imprensa.macau.gov.mo/bo/i/97/26/declei27_en.asp.

Only Macao courts are competent to give judgments on actions arising from insurance contracts or operations entered into in Macao or related to persons or entities who, on date of such contracts or insurance operations, were resident or domiciled in Macao, assets located therein or of risks situated therein. (Art. 5).

Any liability arising from contracts, insurance operations mentioned above, when entered into with insurer not authorized to operate in Macao, shall not be enforceable, nor shall judgments of foreign courts on such contracts or insurance operations be enforceable in Macao. This does not apply to contracts or insurance operations which insurers authorized to carry on business in territory were unwilling or unable to accept; provided, however, aforesaid contracts or operations were entered into without objection from AMCM to whom notice of such contracts or operations shall be given by proponent at least 15 days in advance. In circumstances referred to in Art. 460 of Commercial Code, if insurer had not been authorized to carry on business in Macao, rules of collation, informality, rescission in respect of acts performed in prejudice of creditors apply as to sums insured, if they exceed amount received by such insurer.

8.01 CLASSES OF INSURANCE:

Classes of Life Insurance.

(A) Life and annuity: Effecting, carrying out contracts of insurance on human life or contracts to pay annuities on human life, but excluding (in each case) contracts within class C below. (B) Marriage and birth: Effecting, carrying out contracts of insurance to provide sum on marriage or on birth of child. Contracts of insurance of more than one year in length. (C) Linked long term: Effecting, carrying out contracts of insurance on human life or contracts to pay annuities on human life where benefits are wholly or partly to be determined by reference to value of, or income from, property of any description (whether or not specified in contracts) or by reference to fluctuations in, or in index of, value of property of any description (whether or not so specified). (D) Health long term: Effecting, carrying out contracts of insurance providing specified benefits against risks of persons becoming incapacitated in consequence of sustaining injury as result of accident or of accident of specified class or of sickness or infirmity, term of Art. in effect for five years or more, or until normal retirement age for persons concerned, or without limit of time; either are not expressed to be terminable by insurer, or are expressed to be so terminable only in special circumstances mentioned in contract; short term: effecting, carrying out contracts of insurance providing specified benefits against risk of loss attributable to accident, sickness or infirmity. (E) Tontines: Effecting, carrying out tontines. (F) Capital redemption: Effecting, carrying out capital redemption contracts. (G) Pension fund management: Type 1: effecting, carrying out contracts to manage investments of pension funds: under terms of which contributions are entrusted to management entity, such entity is required to apply, directly or indirectly, assets of fund, to execute corresponding retirement plans; which guarantee stipulated capital or return; Type 2: effecting, carrying out contracts to manage investments of pension funds: under terms of which contributions are entrusted to management entity, such entity is required to apply, directly or indirectly, assets of fund, to execute corresponding retirement plans; which do not guarantee stipulated capital or return. Type 3: effecting, carrying out contracts of insurance to manage investments of pension funds which guarantee, directly or indirectly, benefits in accordance with retirement plans (other than contracts specified in type 1 and type 2 above). (H) Operations of capitalization: effected, carried out by way of contracts under terms of which, upon payment of single lump sum or periodical installments, insurer provides to pay subscriber or legal holder of deed which forms basis of such contracts, determined capital on expiry of stipulated number of years also predetermined; capital may be determined on basis of "reference value" constituted by single "unit of account" or by combination of various "units of account".

Classes of Non-Life Insurance.

(1) Accident (personal, occupational): Effecting carrying out contracts of insurance providing fixed pecuniary benefits or benefits in nature of indemnity (or combination of both) against risks of persons insured: sustaining injury as result of accident; dying as result of accident; becoming incapacitated in consequence of disease; inclusive of contracts relating to occupational accidents, occupational diseases but exclusive of contracts falling within class 2 below classes of life insurance. (2) Sickness (Short term insurance): Effecting, carrying out contracts of insurance providing fixed pecuniary benefits or benefits in nature of indemnity (or combination of two) against risks of loss attributable to sickness or infirmity, but exclusive of contracts falling within class 1 above. (3) Land vehicles: Effecting, carrying out contracts of insurance against loss of or damage to vehicles used on land, including motor vehicles, but excluding railway rolling stock. (4) Railway rolling stock: Effecting, carrying out contracts of insurance against loss of or damage to railway rolling stock. (5) Aircraft: Effecting, carrying out contracts of insurance against loss of or damage to aircrafts, respective machinery, tackle, furniture or equipment. (6) Ship: Effecting, carrying out contracts of insurance against loss of or damage to vessels used on sea or on inland water, or to respective machinery, tackle, furniture or equipment of such vessels. (7) Goods in transit: Effecting, carrying out contracts of insurance against loss of, damage to merchandise, baggage, all other goods in transit, irrespective of form of transport. (8) Fire, natural forces: Effecting, carrying out contracts of insurance against loss of, damage to property (other than property to which classes 3 to 7 above relate) due to fire, explosion, storm, natural forces other than storm, nuclear energy, land subsidence. (9) Damage to property: Effecting, carrying out contracts of insurance against loss of, damage to property (other than property to which classes 3 to 7 above relate) due to hail, frost, to any event (such as theft) other than those mentioned in class 8 above. (10) Motor vehicle liability: Effecting, carrying out contracts of insurance against damage arising out of, in connection with use of motor vehicles on public roads, including risks in connection with transportation of cargo. (11) Aircraft liability: Effecting, carrying out contracts of insurance against damage arising out of, in connection with use of aircraft, including risks in connection with transportation of cargo. (12) Liability for ships: Effecting, carrying out contracts of insurance against damage arising out of, in connection with use of vessels on sea, on inland water, including risks in connection with transportation of cargo. (13) General liability: Effecting, carrying out contracts of insurance against risks of persons insured incurring liabilities to third parties, risks in question not being risks to which class 10, 11, 12 above relates. (14) Credit (commercial risks): Effecting, carrying out contracts of insurance against risks of nonpayment, including bankruptcy, insolvency. (15) Surety-ship: Effecting, carrying out: (a) Contracts of insurance against risks of loss arising from failure to perform contracts of guarantee; (b) contracts for fidelity bonds, performance bonds, administration bonds, bail bonds, customs bonds, similar contracts of guarantee. (16) Miscellaneous (financial loss): Effecting, carrying out contracts of insurance against any of following risks: (a) Risks of loss attributable to interruption, reduction of economic activity; (b) risks of loss attributable to unforeseen expenses; (c) risks which neither fall within paragraphs (a), (b) above nor can be considered under any other class. (17) Legal expenses: Effecting, carrying out contracts of insurance against risks of loss to persons insured attributable to their incurring legal expenses (including costs of litigation).

Infringements.

Penal Provisions.

Individuals who carry out acts or operations inherent to carrying on of insurance activity, whether in their own name, as representatives or as office bearers of corporate entity, even if constituted improperly or of association without legal personality, where in either case its object does not provide for carrying on of such activity, is subject to imprisonment of up to two years. When this crime is carried out by corporate entities, penalty is fine of up to 360 days. (Art. 119).

Setting up and operation of pension funds are subject to special legislation. (Art. 143).

Insurance Companies.

Formation.

Insurers with head office in Macao shall be constituted as commercial companies under form of joint-stock company with limited liability, respective shares be nominative, registered to bearer. (Art. 16).

Minimum share capital of insurer shall not be less than fifteen million patacas for carrying on of non-life business, thirty million patacas in case of life business. At time of formation, 50% of share capital has to be realized in cash and deposited in favor of AMCM with credit institution authorized to operate in Macao, with express declaration of amount subscribed by each shareholder, such deposit may only be withdrawn after commencement of insurance activity and authorization of AMCM. Remaining 50% of share capital has to be realized within maximum period of 180 days from date of deed of constitution. (Art. 17).

Insurers do not acquire their own shares or trade them. Issuing of debentures or other securities on part of insurers must be subject to prior authorization of Governor, who sets out respective conditions, after hearing opinion of AMCM. Insurers are prohibited from issuing debentures in order to cover their liabilities of technical nature. (Art. 18).

Authorization for formation of insurance company must be granted in accordance with criteria of opportunity and convenience, basically those concerning needs of local market or economic and financial benefit that would revert to territory as result of such formation. In appraisal of petition for authorization, insofar as it relates to opportunity and convenience of setting up insurer, following factors must be taken into account: possibility of applicant to improve variety or quality of services rendered to public; integrity of founder members which may, directly or indirectly, have significant influence on local insurance activity, management of insurer; integrity, qualification and professional experience of persons who effectively manage insurer; sufficiency of technical support, financial resources to back up activity in class(es) of insurance which applicant intends to transact; compatibility between development prospects of insurer and maintenance of healthy competition in insurance market. (Art. 19).

In appraising integrity of managers, it must be considered relevant, among others, fact that person: has been sentenced or indicated for crimes of robbery, theft, breach of trust, issuing checks without funds, fraud, forgery, embezzlement, bribery, extortion, usury, corruption, false declarations, unauthorized receipt of deposits, other repayable funds; has been declared, by sentence transited in rem judicata bankrupt, insolvent, judged as being responsible for bankruptcy of companies controlled by him, of which he had been director or manager; had been held responsible for committing infringements of legal, regulatory norms which govern activities of institutions subject to supervision of AMCM, when respective seriousness, repeated failure to comply is considered relevant. These provisions shall be applicable, with necessary adaptations, to members of supervisory board, of board of general assembly of insurer. (Art. 20).

For purposes of evaluating manager's qualification, person is considered to have adequate professional experience if he has previously performed, with competence, functions of responsibility in financial, technical fields, length of time during which such functions were performed also be considered relevant. (Art. 21).

Persons, individuals or corporate entities who intend to form insurer submit respective petition to AMCM, together with following documents: memorandum, duly substantiated, of economic, financial reasons justifying formation of company, which demonstrates respective viability and possibility of incorporating its activity in objectives of economic and financial policies of territory; indication of name of company, at least in official languages of territory, in such form, expression which unequivocally suggests that its sole object is carrying on of insurance activity; Draft of Memorandum and Articles of Association, drawn up in accordance with current legal, regulatory provisions; personal and professional identification of founder members indicating their respective share in capital and well-founded memorandum on suitability of shareholding structure for stability of insurer; no Criminal Record Certificate for each of founding members with qualified shareholding, issued less than 90 days before date of application; declaration, under oath, from founding members with qualified shareholding certifying that at no time neither they nor any companies, firms under their control, of which they were directors or managers, as case may be, were declared insolvent or bankrupt; details of material, technical and human resources to be utilized; indication of general conditions and respective technical basis of policies under class of insurance which applicant intends to transact. Where founder members are corporate entities with qualified shareholding, following information shall be submitted in relation to every such corporate entity: memorandum, Articles of Association; reports, accounts of last three financial years; identification of members of management bodies, together with biographical details; composition of share capital, list of shareholders with 10%, more of said capital; list of other companies in whose capital corporate entities hold qualified shareholding, structure of respective group. Petition for authorization also outline business plan which contain, at least, following information: reinsurance program, detailing business strategy to be adopted in respect of reinsurance inward, outward; estimation of organization, preliminary expenses, namely those relating to management and commercial aspects of business; estimation for each of first three years of activity in respect of following particulars: 1st—administrative expenses, namely commissions, general expenses, in respect of each class of insurance; 2nd—number of employees by place of recruitment, their respective salaries; 3rd—premiums, claims, technical reserves in respect of direct business, reinsurance; 4th—half yearly position of cash in hand, at bank; 5th—solvency margin position calculated in accordance with current legal provisions; 6th—financial resources sufficient to guarantee responsibility assumed. In addition to information referred to in preceding paragraphs, AMCM may request applicant to submit complementary information, documents considered necessary to complete application process. After verifying required technical and legal conditions for formation of insurance company, AMCM must submit respective application, together with its reports, to Governor for decision. (Art. 22).

Qualified Shareholding.

No person, individual or corporate body may acquire, directly or indirectly, qualified shareholding in insurer with head office in Macao, increase its shareholding in proportion equal to or higher than 5% of capital or of voting rights, in one, more acts, without obtaining prior authorization of AMCM, except if, by nature, this is not possible, in which case respective acquisition be communicated within maximum period of 30 days from date of such acquisition, increase. AMCM may oppose acquisition or increase of qualified shareholding if it considers that shareholder has failed to demonstrate that he meets conditions necessary to guarantee proper, prudent management of insurer. Opposition may be based, among other factors, on following: way person normally conducts his business or if nature of his professional activity demonstrates marked propensity for accepting excessive risks; inadequacy of economic, financial situation of person, verified on basis of amount of shareholding which he has proposed to hold; where AMCM has well-founded doubts on legality of source of funds destined for acquisition of shareholding or on real identity of owner of such funds; if structure and characteristics of business group wherein insurer will be integrated are not conducive for proper supervision; fact that person has failed to demonstrate his willingness to comply, give assurances that he will comply with conditions necessary to set right situation of this insurer, as laid down in advance by AMCM. Approval is deemed to have been given if AMCM does not comment within period of two months from date of petition. Where AMCM has not opposed, it may fix period for realization of proposed operation. (Art. 25).

Representation Overseas.

Setting up of branch offices or any other forms of representation overseas by insurers with head office in Macao is subject to prior authorization of Governor, which is granted by Executive Order after hearing opinion of AMCM. (Art. 30).

Application to be presented to AMCM shall contain following elements: notarized copy of minutes of general meeting, which relates to discussion on setting up representation overseas; indication of country or territory wherein representation will be established; type of establishment; well-founded report detailing reasons of economic and financial nature to justify decision taken, with indication of type of operations to be carried out; address of proposed establishment in receiving country; identification and professional resumé of person responsible for establishment, together with declaration stating that such person shall be vested with powers sufficient to bind insurer in relation to third parties, to represent such insurer in dealings with authorities and courts. Provision of Art. 22, paragraphs 3, 4 be applicable, with necessary adaptations, to petitions for authorization to establish overseas. Provision of Arts. 20, 21 be applicable, with necessary adaptations, to provisions of paragraph 1 (f). (Art. 31).

Reinsurance.

Reinsurers with Head Office in Macao.

Conditions of access to insurance activity set out in §I of c. III must be applicable, with necessary adaptations and particularities contained in article 97, to reinsurers with head office in Macao. With necessary adaptations, particularities relating to margin of solvency, regime set out in cc. V, VI, VIII also must be applicable to such reinsurers. (Art. 96).

Share capital of reinsurers with head office in Macao must not be less than one hundred million patacas for carrying on of non-life business, one hundred fifty million patacas in case of life business. (Art. 97).

Reinsurers with Head Office Overseas.

Regime set out in Subsection I of §II of c. III shall be applicable, with necessary adaptations and particularities stated in following paragraph, in following articles, to petitions for authorization to set up representative offices of reinsurers with head office overseas. Provision of Art. 35 paragraph 3, of Art. 37 must not be applicable to representative offices. (Art. 101).

Special Registration.

Insurers, reinsurers, branches of insurers with head office in Macao, representative offices, sub-offices not commence business without effecting special registration with AMCM. This provision does not prejudice any other registration obligations which insurers and reinsurers may be legally subject to. Summarized certificate of registration and amendments thereto must be issued to those whose request demonstrates legitimate interest. (Art. 47).

Register of insurers headquartered in Macao shall contain following particulars: name of insurer in different authorized versions; executive order which authorized its formation; class of insurance authorized and corresponding policies; date of incorporation; date of registration with Commercial Registry; income-tax registration number and number of corporate entity, as long as and when latter is made compulsory; share capital, authorized and paid-up; names of shareholders with qualified shareholding and respective value; address of head office; agreements between shareholders regarding exercise of voting rights; names of members of board of directors, supervisory board, main board at general meeting of shareholders, so too of any other attorneys with managerial powers; name of auditing firm; memorandum, Articles of Association, by depositing respective notarized copy; any subsequent changes to above particulars. Provision of preceding paragraphs must be applicable, with necessary adaptations to branches of insurers with head office in Macao, to reinsurers formed therein. (Art. 48).

In case of insurers with head office overseas, register contains following particulars: name of insurer in different authorized versions; executive order which authorized its establishment in Macao; class of insurance authorized and corresponding policies; date of registration with Commercial Registry; income-tax registration number and number of corporate entity, as long as and when latter is made compulsory; share capital, reserves and accumulated surplus; address of head office; establishment fund of branch in Macao; name of general representative in Macao; address of branch office; name of auditing firm; any subsequent changes to above particulars. (Art. 49).

Financial Guarantees.

In addition to other guarantees required under present law, insurance companies shall provide technical reserves and margin of solvency as financial guarantees, directly linked to their activity.

Technical Reserves.

Authorized insurers are required to set up claims reserve; mathematical reserve, where insurer carries on business of life insurance; unearned premium reserve, where insurer carries on business of non-life insurance; loss ratio variation reserve, where insurer carries on business of credit insurance (commercial risks). (Art. 56).

Claims reserve shall correspond to foreseeable amount of costs in respect of unadjusted claims and/or adjusted claims but still outstanding at end of year, including estimated liability for claims incurred but not reported. Without prejudice to provision in paragraph 4 of this article, claims reserve shall be calculated on case by case basis. Concerning adjusted claims which are still outstanding at end of year, amount of reserve corresponds to total of fixed indemnities. Under those classes of insurance where it is considered appropriate for technical reasons, insurers may calculate reserves for unadjusted claims based on average cost of such claims and respective system of calculation showing formulas utilized to update and ascertain current average cost of claims and method of application shall be submitted in advance to AMCM for approval. (Art. 57).

Mathematical reserve, calculated in accordance with technical basis as normally utilized, shall correspond to difference between actual values of reciprocal liabilities of insurer and persons who have entered into contracts of insurance with said insurer and such reserve shall be certified by actuary of insurer. In certain justified cases, AMCM may authorize“zillmerization” of mathematical reserve. (Art. 58).

Unearned premium reserve is amount set aside by insurer, in respect of every contract of insurance in force under non-life business, to guarantee risks borne by such insurer including expenses resulting therefrom after end of financial year, up to maturity date of respective contract. Without prejudice to provision of following paragraph, this reserve must be calculated contract by contract by applying “pro-rata temporis” method of calculation. Subject to prior communication to AMCM, insurer may, in respect of every non-life class of business so conducted, calculate unearned premium reserve on overall basis by applying percentage to total gross premium written during year under respective class, net of returns and cancellations. Percentage shall be laid down by AMCM, by way of Notices, to be published in month of Dec. of each year. (Art. 59).

Margin of Solvency.

Authorized insurers shall maintain margin of solvency sufficient to meet liabilities arising from its activities in Macao. This margin of solvency should be calculated based on state of affairs of insurer on last day of previous financial year and corresponds to: company's equity, in case of insurer formed in Macao; net assets of branch in Macao, in case of insurer with head office overseas. For these purposes company's equity and net assets must be free of any charge or liability and shall not include intangible items, as well as those specified by AMCM by way of Notice to be published in Jan. of each year. Assets representing margin of solvency must be situated in Macao, excluding, however, those assets which pertain to activity carried on overseas by insurer. Without prejudice to what has been established in preceding paragraph, AMCM may authorize, in duly justified cases and in accordance with conditions so laid down, utilization of assets located overseas or originating therefrom. (Art. 68).

Where state of affairs of insurer justifies reduction of its capital, Governor may, after hearing opinion of AMCM, direct or authorize such reduction and eventually exempt insurer from meeting some of requirements applicable to firms in general. This reduction is made by way of deduction, from respective share capital, of losses incurred in preceding years, so too of assets which are stated at value deemed unacceptable by AMCM. Any such reductions shall not bring capital below respective minimum established under Art. 17, paragraph 1. (Art. 95).

9 INTELLECTUAL PROPERTY

9.01 COPYRIGHT:

Decree-Law No. 43/99/M of Aug. 16, 1999, “Copyright Law”. Website: http://www.imprensa.macau.gov.mo/bo/i/99/33/declei43_en.asp.

Protected Works.

Intellectual creations in literary, scientific and artistic fields, whatever may be their type, form of expression, merit, form of communication or purpose, must be protected by copyright. (Art. 1.1). Ideas, processes, systems, operational methods, concepts, principles or discoveries, alone and as such, shall not be protected by copyright. (Art. 1.2). Prerequisite for copyright protection is outward manifestation of work, independently of its disclosure, publication, use, economic exploitation. (Art. 1.3). Work is original where it is result of author's own creative effort, not merely appropriation of another person's creation. (Art. 1.4). Following are protected works insofar as they are original: literary, journalistic, scientific and other writings, including computer programs; lectures, speeches, addresses and sermons; dramatic, dramatico-musical works and direction thereof; works of choreography or mime that are expressed in written or any other form; musical compositions, with or without words; cinematographic, television, video and other audiovisual works; works of drawing, tapestry, painting, sculpture, ceramics, glazing, engraving, lithography and architecture; photographic works and works produced by processes analogous to photography; works of applied art, industrial designs or models, designer works that constitute artistic creations; illustrations and maps; plans, sketches and three-dimensional works relating to architecture, geography or other sciences; slogans or mottoes, even if of advertising nature; parodies and other literary or musical compositions, even if inspired by theme or subject of another work; databases and other compilations original in arrangement of their subject matter or selection of their contents. (Art. 2.1). Successive editions of work, even if corrected, expanded, revised or given new title or format, do not constitute works distinct from original work, nor do reproductions of artistic works, even where their dimensions have been changed. (Art. 2.2). Protection granted to computer databases and other compilations of information do not include actual data or material compiled, without prejudice to any rights that may subsist in them. (Art. 2.3). Protection of disclosed, published work extend to title thereof, provided that it is distinctive, and cannot be confused with title of any other work of same genre by another author. (Art. 4.1).

Personal Rights, Economic Rights.

Author enjoys personal rights and economic rights in protected work. (Art. 7.1). Author's economic rights include exclusive right to use and economically exploit work, and to authorize its economic exploitation, in whole, or in part, by third party; to receive remuneration for use that third party makes of work, where author's permission for that use is dispensed by law. (Art. 7.2). Author's personal rights include power to keep work unpublished; to claim authorship of work and to be identified as author on original, on each copy and in any publicity; to withdraw his works from circulation as provided in Art. 48; to ensure authenticity and integrity of his work, object to any mutilation, distortion of it, in general to all, any acts that detract from it, might adversely affect his honor and reputation as author. (Art. 7.3).

Physical Embodiments of Works.

Copyright in work, being incorporeal, shall be independent of ownership rights in physical material used for its fixation, communication. (Art. 8.1).

Lapse of Copyright.

Where various parts, volumes or installments of work are not published simultaneously, copyright terms are calculated separately. (Art. 24.1). This also applies to issues or installments of collective work published periodically, such as newspapers and magazines. (Art. 24.2). Work falls into public domain on expiry of term of copyright. (Art. 25).

International Scope of Protection.

Law of Macao must be exclusively applicable when protection granted to work in Territory is determined. (Art. 49). Authors resident in Territory enjoy protection granted by law of Macao. (Art. 50.1). Authors who are not resident in territory enjoy protection accorded to residents subject to material reciprocity. (Art. 50.2). Where work originates in another legal system, and its author is not resident in territory, term of protection is specified in Decree-Law 43/99, provided that it does not exceed that specified by legal system in which work originated, as determined by following articles. (Art. 51). Legal system of published work is that of place of first publication. (Art. 52.1). Where work has been published simultaneously in different places subject to legal systems that specify different terms of copyright protection, legal system that grants shortest term protection shall be considered legal system of origin. (Art. 52.2). Work shall be considered published under several legal systems where, within period of 30 days from date of first publication, it is again published in another place subject to legal system different from that of place of first publication. (Art. 52.3).

Use of Protected Works.

Unless otherwise provided, author shall have exclusive right to use his work, in whole or in part, including notably right to disclose, publish and economically exploit it in any form, either directly or indirectly, within limits of law. (Art. 55.1). Guarantee of pecuniary benefits deriving from exploitation of work shall constitute basic objective, in economic terms, of legal protection. (Art. 55.2).

Freedom of Private Use.

Private use of protected works shall be free unless otherwise provided. (Art. 60.1). Following shall be considered private use: reproduction of work exclusively for private purposes of person who does it; performance of dramatic or dramatico-musical work, showing of cinematographic work, recitation of literary work, performance of musical work and any other form of communication of work already disclosed or published, when done without gainful intent, and in place open to public. (Art. 60.2).

Fair Use.

Following shall be lawful without consent of author: reproduction in media, for information purposes, of speeches, addresses and lectures given in public that do not fall into categories provided for in Art. 5(1), either as excerpts or in form of summaries; regular selection of articles from printed periodicals in form of press reviews; partial reproduction by educational establishments that is exclusively for teaching purposes in those establishments and without gainful intent; inclusion in one's own work of quotations or summaries from another's, whatever their nature, in support of one's own opinions or for purposes of criticism, discussion or teaching; reproduction of news articles, articles on economic, political or religious topics, provided that such reproduction has not been expressly reserved. (Art. 61).

Limits, Requirements.

Private and free use of protected work must not prevent its normal economic exploitation or unjustifiably prejudice legitimate interests of author. (Art. 62.1).

Lectures by Professors may only be published with consent of author concerned, even if lecture is presented in form of report on direct responsibility of person publishing it. (Art. 64.1).

Publishing contract is that by which author authorizes another to produce, distribute and sell specified number of copies of work or set of works on his own account. (Art. 67). Those contracts shall not be considered publishing contracts under which author entrusts another with: producing on his own account specified number of copies of work, ensuring that they are stocked, distributed and sold, parties having agreed to share between themselves results of corresponding economic exploitation; producing specified number of copies of work and ensuring that they are stocked, distributed and sold on author's account, at his risk in exchange for remuneration; ensuring that copies produced by author are stocked, distributed and sold in exchange for remuneration. (Art. 68.1). These contracts be subsidiarily regulated by legal provisions governing special partnerships in case of subparagraph (a), by those governing contracts for rendering of services in case of subparagraphs (b), (c), in addition by usage. (Art. 68.2). Publishing contracts may have as their subject matter one or more existing or future works, whether published or not. (Art. 69). Publishing contract shall be drawn up in writing. (Art. 70.1). Nullification for failure to draw up contract in writing may not be invoked by party who has been cause of it and shall be presumed attributable to publisher until opposite is proved. (Art. 70.2).

Effects of Contract.

Publishing contract shall not transfer any copyright to publisher or authorize him to translate work, to transform or adapt it to other genres or forms of use. (Art. 71.1). Subject to provisions of Art. 83 or any provisions to contrary, publishing contract shall prevent author from making or authorizing new edition of same work in same language inside or outside territory until previous edition is out of print or prescribed period has expired, unless circumstances arise that prejudice interest in edition and make revision or updating of work necessary. (Art. 71.3).

Content of Contract.

Publishing contract must mention number of editions concerned, number of copies in each edition and approximate unitary public selling price. (Art. 72.1). Where number of editions is not specified in contract, publisher may only produce one edition. (Art. 72.2).

Remuneration.

Publishing contract is presumed to be supported by consideration. (Art. 73.1). Author's remuneration may consist of lump sum payable for edition as whole, percentage of cover price of each copy, allocation of certain number of copies, or consideration based on some other criterion, according to nature of work and combination of those forms may be adopted. (Art. 73.2). In absence of any stipulation regarding author's remuneration, he must be entitled to 20% of cover price of each copy sold. (Art. 73.3). Where remuneration consists of percentage of sale price, its calculation shall take price rises and reductions into account, but publisher may not, except as provided in Art. 85, reduce that price without author's consent unless he pays author remuneration corresponding to original sale price. (Art. 73.5).

Obligations of Author.

Author shall provide publisher with means necessary for fulfillment of contract, in particular by handing over within agreed period original of work to be published in form that enables publisher to reproduce it. (Art. 74.1). Publisher is obliged to devote to production of edition such care as is necessary for reproduction of work in accordance with agreed conditions, to work assiduously and diligently on promotion and marketing of copies produced. (Art. 75.1).

Printing must not be done without author's consent, subject to paragraph (6) of Art 76. (Art. 77.1). Return of page proofs and draft cover design, unless accompanied by declaration to contrary, shall constitute authorization to print. (Art. 77.2). Works must not be brought on to market without author having inspected one copy thereof. (Art. 77.3).

Stage Performance, Recitation, Execution.

Stage performance is presentation before audience of dramatic, dramatico-musical, choreographic, mimed or other similar work by means of dramatic interpretation, singing, dancing or music, or by other appropriate means, either separately, together. (Art. 90).

Authorization.

Stage performance of protected work, whether on premises to which access is restricted, without gainful intent, must be subject to author's consent, without prejudice to provisions of Art. 60. (Art. 91.1). Right of performance must be deemed to be granted for consideration, unless it is granted to amateurs. (Art. 91.2).

Filming, Transmission, Reproduction.

Authorization by author must be necessary for all or part of stage performance of work to be broadcast by radio or television, reproduced on phonograms, videograms, filmed or shown, without prejudice to any other authorization that might be required. (Art. 92).

Copyright.

Unless otherwise stipulated, stage performance contract gives author right to make such changes in work as he deems necessary, independently of other party's consent, provided that they do not prejudice its general structure, detract from its dramatic or theatrical interest, prejudice programming of rehearsals or performances; to be consulted on casting; to attend rehearsals and give necessary guidance regarding interpretation and direction; to be consulted regarding choice of collaborators for artistic production of work. (Art. 95).

Obligations of Impresario.

Under contract, impresario shall undertake to have work performed in public within agreed period and in absence of any agreed period within one year from date of conclusion of contract, except in case of dramatico-musical works, where period shall be two years. (Art. 96.1).

Audiovisual works means cinematographic works and those expressed by methods analogous to cinematography, including televised and videographic works. (Art. 104).

Authorship.

Following are deemed to be authors of audiovisual work: director; authors of plot or music, where created specially for audiovisual production; authors of adaptation where work not specially created for audiovisual production is adapted for that kind of use. (Art. 105).

Lapse of Copyright.

Copyright in audiovisual work lapses 50 years after its disclosure. (Art. 106).

Public Performance.

Paragraph (4) of Art. 96 and, subject to necessary adaptation, regime for recitation and instrumental performance shall apply to public showing of audiovisual works. (Art. 107).

Cinematographic Works.

Use of protected works in cinematographic production shall be subject to authorization by authors concerned. (Art. 109).

Authorization granted by authors of cinematographic work for production concerned shall specify conditions governing production and also distribution and showing of film. (Art. 110.1). Producer shall derive from authorization of cinematographic production right to produce negatives, positives, copies and magnetic recordings necessary for showing of works. (Art. 110.2). Unless expressly agreed otherwise, this authorization shall also imply authorization to distribute and show film in cinemas open to public and to exploit it commercially by that means, without prejudice to payment of agreed remuneration. (Art. 110.3). Special authorization by authors of cinematographic works is required for their communication to public, in other forms by wire or wireless means, including radio or television broadcasting, cable distribution, satellite transmission, as well as for their reproduction, exploitation or presentation in form of videogram. (Art. 110.4). Broadcasting organizations have right, without author's consent, to communicate all or part of cinematographic works produced by them through their own transmission channels. (Art. 110.5).

Exclusive Rights.

Unless otherwise agreed, authorization given by author for cinematographic production of work, whether specially created for that form of expression or adapted, implies grant of exclusive rights. (Art. 111.1).

Economic Exploitation of Work.

Where authors have expressly or implicitly authorized showing of cinematographic work, producer has right to economic exploitation thereof, without prejudice to application of provision in paragraph (4) of Art. 110. (Art. 112.1).

Producer.

Impresario who organizes making of cinematographic work, providing necessary resources and assuming corresponding technical and financial responsibilities, is considered producer. (Art. 113.1). Producer is identified as such in film. (Art. 113.2). Throughout period of economic exploitation, unless owners of copyright have adopted other means of defending their rights in cinematographic work, producer deemed to be their representative for that purpose, and shall report to them on way in which he carries out his mandate. (Art. 113.3).

Time Limit for Fulfillment of Contract.

Where producer fails to complete production of cinematographic work within period of three years from date of delivery of literary and musical parts thereof and fails to have completed work shown within period of three years from its completion, author has right to terminate contract. (Art. 114.1).

Identification of Authors, of Adapted Work.

Names of authors of cinematographic work appear in film when it is shown, together with mention of contribution to work made by each. (Art. 115.1).

Fixation, Publication of Phonograms, Videograms.

Contract by which author allows others to fix sounds or images of protected work and to produce and sell copies of fixation is considered contract for phonographic or videographic fixation. (Art. 121.1). Fixation is separate or combined incorporation of sounds, images in sufficiently stable and durable material medium that allows them to be perceived, reproduced or communicated in any way for indefinite time. (Art. 121.2). Phonograms are recordings of sounds from any source fixed in material medium. (Art. 121.3).

Use of Phonograms, Videograms.

Acquisition of copies of phonograms and videograms must not confer on acquirer right to use them for any kind of public playing, transmission, reproduction or commercial rental. (Art. 123).

Identification of Work, Author.

Copies of phonograms and videograms must show title of work, identity of author, printed either on them or on labels as their nature dictates. (Art. 124).

Authorization for Broadcasting.

Broadcasting of protected works is subject to authorization by author. (Art. 129).

Broadcasting of Fixed Works.

Where work has already been fixed for commercial purposes with author's authorization and its broadcasting or communication is envisaged, it is not necessary to obtain special authorization for each broadcast, without prejudice to author's right to equitable remuneration. (Art. 130).

Identification of Author of Broadcast Work.

Broadcasts shall identify author and title of work broadcast, with exception of cases recognized by standard practice in which circumstances and requirements of transmission require omission of identifying elements. (Art. 134).

Photographic Works.

Only photograph that is protected by copyright is that which, by choice of its subject or manner of its execution, may be considered personal artistic creation of author. (Art. 149.1). Photographs that have mere documentary value, such as photographs of writings, documents, business papers, technical drawings or similar material, are not protected. (Art. 149.2). Stills from cinematographic films are considered photographs. (Art. 149.3).

Rights of Others.

Copyright in photographic work is without prejudice to provisions regarding exhibition, reproduction and marketing of portraits, to copyright in work photographed. (Art. 150).

Commissioned Photographs.

Unless otherwise agreed, commissioned photographs may be reproduced or its reproduction authorized by person portrayed or by his successors independently of authorization of photographer. (Art. 151.1). Remuneration shall be payable to author where reproduction of portrait, made by person photographed or his successors under foregoing paragraph, has commercial character. (Art. 151.2).

Photographs Published in Periodicals.

It shall be lawful, independently of authorization by author but without prejudice to right to remuneration, to reproduce photographs published in newspapers, magazines or other periodicals where they relate to persons, current events or are of general interest in any way, and reproduction is intended for inclusion in another similar periodical. (Art. 152).

Titles of Periodicals.

Title of newspaper or other periodical publication that meets conditions contained in Art. 4 is protected insofar as publication is issued regularly and is registered with Publication Information Department as required by corresponding legislation. (Art. 163.1). Use by another periodical of protected title shall not be permitted until one year has elapsed since termination of publication has been announced, in whatever manner, by person authorized to do so, or after three years have elapsed since publication actually ceased. (Art. 163.2).

Private Use, Fair Use.

Protection afforded by related rights does not cover: private use; use of excerpts from performance, phonogram, videogram, broadcast or show for purpose of information, criticism, any other among those permitted by quotations, summaries referred to in subparagraph (f) of Art. 61; use for exclusively scientific, educational purposes without gainful intent; ephemeral fixation by broadcasting organization; fixations or reproductions made by public bodies or providers of services for reasons of special documentary interest, or archives; other cases in which use of work is lawful without author's consent. (Art. 173).

9.02 INDUSTRIAL MODELS, DESIGNS:

Protection under title of industrial model or design shall be limited to creations whose appearance represents product as whole or in part by virtue of such characteristics as lines, contours, colors, forms, textures and/or materials used in product itself and/or in its ornamentation, which meet requirements set forth in Industrial Property Code. (Art. 150). For that purpose, product is considered any industrial or handcrafted article, including, inter alia, components for assembling complex product, packing, presentation elements, graphic symbols and typographic characters, but excluding computer programs. (Art. 151.1). Complex product is any article composed of multiple components that can be removed for purpose of disassembly and inserted into it for purpose of reassembly. (Art. 151.2). Industrial models and designs which are novel and are unique may be registered. (Art. 152.1). Innovative nature of industrial model or design shall not diminish if it involves novel combinations of known elements or different layout of already used elements, that endow respective subject matter with unique character. (Art. 152.2). Industrial model or design shall be considered novel if, prior to respective registration or priority application, no identical industrial model or design was published within or outside territory. (Art. 153.1). Industrial models or designs that differ only in insignificant details are considered identical. (Art. 153.2). Industrial model or design shall be considered unique in character if global impression that it gives to informed user differs from global impression that same user has of any industrial model or design published prior to date of registration application or claimed priority. (Art. 154.1). Industrial model or design applied to or incorporated into product that constitutes component of complex product shall be considered novel and unique in character if it can reasonably be considered that even after being incorporated into complex product, it will continue to be visible during normal use of said product; to extent that visible characteristics of that component itself meet requirements of novelty and uniqueness of character. (Art. 155.1). Registration does not protect visible characteristics of product resulting exclusively from its technical function; visible characteristics of product's appearance that must necessarily be reproduced in their exact form and dimensions in order for that product, into which industrial model or design is to be incorporated, or in which it is applied, be it mechanically connected to other product, or be it inserted within, around or against that other product, can both perform their function. (Art. 156.1). For purposes of Arts. 153 and 155, industrial model or design is considered to have been disclosed if it has been published, presented in exhibition, used in trade or made known in any other way, except if these facts could not reasonably have come to knowledge of persons operating in Macao and skilled in art in question in course of their normal activity, before date of filing of registration application or priority claim. (Art. 157.1). Industrial model or design shall, however, not be considered disclosed by simple fact of being made known to third party in explicit or implicit confidence. (Art. 157.2).

Right to register lies with creator or his successors in any capacity. (Art. 159.1). Notwithstanding provisions governing copyright, provisions of Arts. 70 to 76 apply to registration of industrial models or designs. (Art. 159.2).

Registration Procedure for Industrial Models, Designs.

Application to register industrial model or design must be filed in writing in official language of territory, indicating name, commercial style of applicant, his/its nationality, domicile or location, and must be accompanied by following items, in triplicate: title or short title designating industrial model or design meant to be registered, or its intended purpose, as appropriate; name and country or territory in which creator resides; photolithograph or any other medium that may be demanded by DES, bearing reproduction of object whose industrial model or design is meant to be registered; priority right claim, if applicable, pursuant to Art. 17(3). (Art. 160.1). Fantasy expressions used to designate industrial model or design do not constitute subject matter for protection. (Art. 160.2).

Effects of Registration.

Duration of registration shall be five years from date of application, renewable for similar periods up to 25 year limit. (Art. 176.1). These renewals should be requested during last six months of validity of registration. (Art. 176.2). Once valid, registration of industrial model or design confer to its holder exclusive rights to use model or design, and to prohibit its use by third parties without his consent. (Art. 177.1). This includes, especially, offering, placing on market, import, export or use of product into which that industrial model or design is incorporated or to which it is applied, as well as storage of that product for same ends. (Art. 177.2). Validity of registration shall not be presumed from act of granting respective certificate. (Art. 177.3).

Use of Drawings, Models.

During validity of registration, its holder may on products, use expression “design, model No.”, abbreviations “D M No.”, in Portuguese or else equivalent Chinese expression. (Art. 180). For as long as registration remains in effect, designs or models must be considered inalterable. (Art. 181.1). Enlargement or reduction of scale must not affect inalterability of designs or models. (Art. 181.2).

Prior Protection.

Application for prior protection may be filed regarding industrial models, or designs of textiles, or clothing, as well as those of any other industries specified by administrative ruling. (Art. 186). This application shall be preceded by deposit of respective samples or reproductions. (Art. 187.1). DES may conclude protocols with suitable entities for these purposes. (Art. 187.2). Prior protection application shall be filed with DES within 15 days of deposit, it being possible to extend this deadline, for equal period, for justified reason worthy of consideration. (Art. 187.3). Application for prior protection for industrial model or design shall be filed in writing in official language of territory, indicating name or commercial style of applicant, nationality and domicile or location, and shall be accompanied by following elements: number of samples or reproductions to be registered, up to maximum of 50; title or short title that synthesizes subject matter or matters for which protection is being claimed, or purpose of such subject matter; name and country or territory of residence of creator. (Art. 189.1).

9.03 INDUSTRIAL PROPERTY CODE:

Approved by Decree-Law No. 97/99/M, of 13 Dec. 1999. Website: http://www.imprensa.macau.gov.mo/bo/i/99/50/codrjpien/declei97.asp.

Industrial Property Code is adopted, published together with present statute, forms integral part thereof. (Art. 1). Governor appoints committee comprising legal experts, entrepreneurs, technical experts to supervise application of Code for first five years in force. (Art. 4.1).

General Provisions.

Industrial Property Code governs allocation of industrial property rights to inventions, other creations and distinctive signs therein referred to, and shall, in particular, serve to protect creativity, technological development, fair competition and consumers' interests. (Art. 1). Code applies to all individuals holding Macao Resident's Identity Card; all corporate bodies registered in Macao, constituted according to Law of Territory; all individuals, corporate bodies, nationals of countries and territories members of World Trade Organization (WTO), International Union for Protection of Industrial Property (Union), in accordance with terms of Paris Convention of 20 Mar. 1883, revisions thereof, regardless of place of domicile, establishment, save according to special provisions as to competence procedure. (Art. 2.1). Nationals of any country who reside or have industrial or commercial establishment, actual and not as matter of form, in any countries or territories members of WTO, or Union are treated as nationals of those countries for effects of Code. (Art. 2.2). Industrial property includes all sectors of economic activity, including agricultural, forestry, livestock, fishing activities, extraction and processing industries, trade and services, as well as all manufactured and natural products. (Art. 3). Industrial property rights confer on respective holder full and exclusive enjoyment, use and disposal of inventions, creations and distinctive signs, within limits, conditions and restrictions determined by Law. (Art. 5). Proof of industrial property rights, referred to in Code, is provided by means of corresponding certificates which contain elements necessary for perfect identification of right at issue. (Art. 6.1). Industrial property right certificates issued by international organizations whose effects extend to Macao are equivalent to aforementioned certificates. (Art. 6.2). Jurisdiction to grant industrial property rights lies with Director of Department of Economic Services, herein referred to as Director of DES. (Art. 8). Following constitute grounds for refusing to grant industrial property rights: object is not suitable to be protected; violation of rules of public order or good mores; recognition that applicant intends to practice unfair competition, or that this is possible regardless of his intentions. (Art. 9.1). Department of Economic Services, herein referred to as DES, ensure publication in Series II of Official Bulletin of following acts and decisions: notice of applications for various types of industrial property rights; notice of complaints, of opposition or filing of nullity or cancellation and other suits; notifications of rulings. (Art. 10.1). Save express legal limitation, industrial property rights may be assigned, total or partially, free of charge or for consideration. (Art. 11.1). Save stipulation to contrary, licensee shall, for all legal purposes, enjoy privileges conferred on title-holder to which exploitation license was issued, with some exceptions. (Art. 13.1).

Priority Right.

Except for cases foreseen in Code, industrial property rights shall be granted to first party to present application in due and proper form accompanied by all documents required for that purpose. (Art. 15.1). Anyone who has regularly filed application for granting of industrial property right envisaged in Code, or any similar right, and who has done same in any country or territory of WTO or Union, or with any intergovernmental organization with jurisdiction to grant rights effective in Macao, shall on filing application in Macao enjoy right of priority established in Paris Convention for Protection of Industrial Property. Those rights also extend to successor of any such person. (Art. 16.1). When application for granting of industrial property rights is submitted or sent by party not domiciled, registered or established in territory, DES notifies that party,

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instructing it to retain agent within period of one month, pursuant to terms of Art. 20, if it has not already done so. (Art. 21.1). Once process has reached publication stage, any interested party may request documents referring thereto, as well as photocopies, ordinary copies of drawings, photographs, plans and models filed with patent application or registration, provided that this does not prejudice third-party rights. (Art. 22.1). In any process, publication stage is deemed reached when application is published in Official Bulletin. (Art. 22.2).

Extinction of Industrial Property Rights.

Industrial property rights shall be total or partially annulled if they violate provisions that define to whom industrial property right belongs and, in general, if their granting infringes rights of third parties based on priority or other legal title. (Art. 48.1). Unless otherwise provided, annulment suits should be filed before General Court (Tribunal de Competência Genérica) within one year of appellant learning of facts on which suit is based. (Art. 48.3). Declaration of nullity or annulment can result only from court decision. (Art. 49.1).

Industrial Property Registration.

Industrial Property Register shall be supplemented by Register of Agents for purpose of ensuring that public knows of persons referred to in final part of Art. 20 (1[b]) and of any limitations on their respective powers, as well as of Macao industrial property agents authorized by DES and of official property agents of other countries accredited to function in territory under terms of applicable law. (Art. 55). Registers referred to in Arts. 54, 55 shall be public and anybody may, by name, request certificate of registrations effected, documents filed and of decisions published, as well as indication of date on which any of publications mentioned in Code were issued. (Art. 59).

9.04 PATENTS:

Inventions.

Only inventions meeting patentability requirements set forth in Code can be protected by granting of patent certificate. (Art. 60). Any inventions in any area of technology pertaining to products or processes for obtaining products, substances or compositions, even if they involve product composed of biological matter as process that permits production, processing or use of biological matter, shall be patentable provided that such inventions are novel; involve inventive step; are industrially applicable. (Art. 61). Following are not patentable: discoveries, as well as scientific theories and mathematical methods; materials or substances already existing naturally, and nuclear matter; aesthetic creations; schemes, rules and methods for performing mental acts, playing games or doing business, as well as computer programs; presentation of information (Art. 62.1); human cloning processes; human germinal genetic identity modification processes; processes for modification of genetic identity of animals that can cause them suffering without any substantial medical benefit to mankind or animal kind, as well as animals obtained by those processes (Art. 62.3). These provisions of previous article shall not exclude patentability of substance or composition included in prior art which is used in working one of methods mentioned in paragraph 2(b) of same article, provided that its use for any of methods mentioned therein is not included in prior art; any isolated element of human body or produced in any other way by technical process, including sequence or partial sequence of gene, even if structure of that element is identical to that of natural element; invention whose object is plant or animal matter if its technical feasibility is not limited to certain plant variety or animal species; biological substance isolated from its natural environment, produced on basis of technical process, even if it pre-exists in natural state; invention, object of which is microbiological or other technical process, or products obtained by such processes. (Art. 63.1). For purposes of sub-paragraph 1(b) above, industrial application of sequence or of partial sequence of gene must be concretely stipulated in patent application. (Art. 63.2). For purposes of Arts. 62 and 63, essentially biological process for obtaining plant, animal matter shall be understood as any process that consists entirely of natural phenomena such as crossing or selection; microbiological process must be understood as any process that uses microbiological matter, that involves manipulation of microbiological matter or that produces microbiological matter; biological matter shall be understood as any matter that contains genetic information and can reproduce itself, or be reproduced in biological system. (Art. 64). Invention is considered novel when it is not known in prior art. (Art. 65.1). Prior art comprises everything that, inside territory or outside it, has been made accessible to public before date of patent application, by description, use or any other means. (Art. 65.2). Invention is considered to involve inventive step if, for person skilled in art, result is not obvious from prior art. (Art. 66). Invention is considered industrially applicable if its subject matter can be manufactured or used in any type of industrial or commercial activity. (Art. 67). Following shall not prejudice novelty of invention: disclosures to scientific societies, professional technical associations, or for purpose of competitions, exhibitions and trade fairs in Macao or abroad which are official or officially recognized, if application for granting of respective patent is filed in territory within 12 months. (Art. 68).

Patent Entitlement.

Anyone discovering invention during fulfilment of employment contract must inform company of fact within following deadlines: two months from completion of invention; one month from filing of patent application with DES, if this was done within aforementioned period. (Art. 70.1). Inventions for which patent is filed within one year of date on which inventor leaves company shall be presumed to have been discovered during fulfilment of employment contract. (Art. 70.2). Entitlement to this invention lies with company if invention forms part of its area of activity and if it was discovered in process of: employment contract containing clause that explicitly provides for performance of inventive activity and that effectively corresponds to functions attributed to employee; studies or research that worker was explicitly requested to conduct. (Art. 71.1). Entitlement to invention also lies with company, even though invention does not fall within its area of activity, if employee has used knowledge, technical means and data supplied by company. (Art. 71.2).

Patent Procedure.

Patent request must be written in official language of territory indicating name or style of applicant, his/its nationality and domicile or place of residence, and shall be accompanied by following items in triplicate: title or short title briefly synthesizing subject matter of invention; description of subject matter of invention; claims of what is considered novel and what characterizes invention; mention of priority right, if appropriate, pursuant to Art. 17(3). (Art. 77.1). Elements referred in Art. 77 and, if appropriate, Art. 78, should be supplemented by following documents: summary of invention; drawings necessary for perfect understanding of description; name and country or territory of inventor's place of residence; proof of payment of request submission fee. (Art. 79.1). If appropriate, following shall also be submitted: documents proving claimed priority right; declaration by which inventor opposes disclosure of his identity; summary declaration on facts that justify title to patent, when applicant was not inventor, only inventor; any translations that may be necessary, specifically in light of regulations referred to in Art. 85(3). (Art. 79.2). Once request has been received, DES proceeds to its formal examination, within period of two months, to verify that it contains all of elements required in accordance with Arts. 77 to 79. (Art. 82.1). Once 18 months have elapsed from date of submission of request or, if priority right was claimed, from claimed date, DES has disclosure notice published in Official Bulletin and request proceedings shall be available to public from that date. (Art. 83.1). At risk of having patent request refused, applicant shall, within seven years of date of filing of main request or of several requests provide DES with: request that examination report be conducted by one of designated entities. (Art. 86.1). Starting from date of disclosure to public of patent application proceeding, anyone may request preparation of examination report referred to in previous article, if applicant has not done so within seven years from date of submission of patent application. (Art. 87.1). Access to deposited biological material must be ensured by provision of sample until first publication of patent application only to people who have access to proceedings; between first publication of application and granting of patent, to anybody who so requests or, at request of depositor, only to independent expert; after granting of patent, even if patent lapses because it becomes invalid or is forfeited, to anybody who so requests. (Art. 94.1).

Use of Patent.

Any patent can, on payment of compensation, be expropriated to be used for public good if need to disclose invention or to make it available for use by public entities is required. (Art. 108.2). By ruling of Governor, mandatory non-exclusive licenses can be granted for certain patent in any of following cases: failure to exploit or, inadequate exploitation of patented invention. (Art. 109). Mandatory licenses can be granted only when potential licensee has made efforts to obtain contractual license from patent-holder on acceptable commercial terms and such efforts have not been successful within reasonable period. (Art. 110.1).

Utility Models.

Under present statute, only inventions that change subject matter so as to give it configuration, structure, mechanism or disposition that increases its utility, improves advantage that can be derived therefrom can be protected as utility models. (Art. 120.1). Inventions whose protection is applied for as utility model meet patentability requirements foreseen in previous section, with exception of those which are not compatible with their nature as referred to in previous paragraph. (Art. 120.2). Duration of utility model shall be six years from date of submission of application and shall be renewable for two additional periods of two years each. (Art. 121.1). During term of patent, its holder may on products use expressions referred to in Art. 107, or else expressions, “Utility model No.”, “Utility Mod. No.”, in Portuguese or equivalent in Chinese. (Art. 122).

Complementary Certificate for Protection of Medicines, Phyto-Pharmaceutical Products.

Application for complementary protection certificate for medicines and for phyto-pharmaceutical products must be made in writing in official language of territory indicating name or corporate style of applicant, his/its nationality and domicile or location, and shall be accompanied by following items: patent number and title of invention protected by it; number and date of first authorization to place product on market in Macao. (Art. 125.1). Duration of complementary certificate may not exceed by more than seven year term of patent in respect of which it is granted. (Art. 127).

European Patents.

Applicant for European patent and holder of European patent, processed according to rules of European Patent Convention, signed in Munich on 5 Oct. 1963, may request extension of application or patent to Macao. (Art. 129.1). DES publishes extension applications in Official Bulletin as soon as received from European Patent Office, but not until 18 months have elapsed from date patent request was filed or, if priority right is invoked, from date of first relevant application. (Art. 129.2). Regularly formulated European patent application shall in territory have same legal effects as Macao patent application, including priority rights. (Art. 130.1). European patent shall be guaranteed temporary protection foreseen in Art. 7 from date DES makes accessible to public translation of respective claims in one of official languages of territory, accompanied by copy of drawings. (Art. 130.2). European patent extended to Macao shall have same legal effects as patent granted in Macao starting from date of granting by European Patent Office, provided that formalities foreseen in Law observed. (Art. 131.1). Within three months following publication of notice of granting of patent in European Patent Bulletin, patent holder shall provide DES with translation, in one of official languages of territory, of title or short title briefly describing subject matter of invention and claims and shall pay relative fee for publication in Official Bulletin. (Art. 131.2). If applicant or holder of European patent has neither domicile nor registered office in Macao, translations shall be done under responsibility of authorized or accredited official agent or agent registered with DES. (Art. 132.1). Macao patent subject matter of which is invention for which European patent has already been granted to same inventor, or with his consent, with same date of filing or priority, shall cease to have effect as from date on which time limit for filing oppositions against European patent expires, provided no opposition has been filed. (Art. 133.1).

Semiconductor Topography Products.

Under present statute only topographies of semiconductor products resulting from intellectual effort of creator and not known in semiconductor industry can be protected by granting of topography registration certificate. (Art. 136.1). Likewise, topographies that comprise elements known in semiconductor industry and combination of whose elements taken together meet conditions envisaged in previous sub-paragraph also enjoys legal protection. (Art. 136.2). Protection covers only configuration of electronic circuits, to exclusion of any idea, process, system, technique or codified information incorporated into topography. (Art. 136.3). For purposes of protection conferred by present statute, semiconductor product shall be understood as being final or intermediate form of any product that consists of material body that includes layer of semiconductor material; possesses one or more layers composed of conductive, insulating or semiconducting material, layers being disposed in accordance with predetermined three-dimensional model; is designed to carry out electronic function either alone or together with other functions. (Art. 137). Topography of semiconductor product is group of related images, either fixed or codified, represented by three-dimensional layout of layers of which product is composed, and in which each image has layout or part of layout of surface of same product, in any phase of its manufacture. (Art. 138). Right to register semiconductor product topography cannot be exercised if two years have already elapsed since first commercial exploitation of topography anywhere; 15 years have already elapsed since topography was fixed or codified for first time, if it was never exploited. (Art. 139).

9.05 TRADEMARKS:

Code can afford protection as trademark only to sign or group of signs which are capable of being represented graphically, namely words, including personal names, designs, letters, numerals, sounds, shape of product or its packaging, which are capable of distinguishing products or services of one company from those of other companies. (Art. 197). Wording contained in trademarks shall be written in Portuguese, Chinese or English, and may combine elements of these different languages. (Art. 198.1). Trademarks of products destined solely for export can be written in any language, but their use in Macao determines when they lapse. (Art. 198.2). Compulsory nature of use of Portuguese, Chinese and English does not apply to applications for registration of international marks under terms of respective regulation and to marks whose applicant is not domiciled, headquartered or established in territory. (Art. 198.3). Protection may not be afforded to signs that consist exclusively in shape resulting from nature of product itself, shape of product necessary for obtaining technical result, or shape that gives product its own substantial value; signs or indications that may be used commercially to designate kind, quality, quantity, purpose, value, geographical origin or time of production of product, or of rendering of service, or other characteristics thereof; signs or indications that have become customary in current language or in bona fide and established commercial practices; colours, except where they are combined together and used with graphics, wording or other elements in particular, distinctive manner. (Art. 199.1). Notwithstanding provisions of previous article, trademarks may be protected as collective trademark, according to conditions pertaining to association marks and certification marks. (Art. 200.1). Registration of collective trademark gives its holder right to control marketing of respective products, services, on terms stipulated by law, in statutes. (Art. 200.2). For purpose of present statute, following apply: Association Mark: specific sign belonging to association of individuals and/or corporate bodies whose members use or have intention of using sign for products or services; Certification Mark: specific sign belonging to corporate entity that controls products or services, or establishes regulations with which they must comply and that is to be used on products, services subjected to that control for which regulations were established. (Art. 200.3).

Right to Register Trademark.

Anyone using free or unregistered trademark for period not exceeding six months shall, for that period, enjoy priority right to have it registered and may lodge complaint against application filed by somebody else during said period. (Art. 202.1). Veracity of documents submitted to prove that priority right shall be freely appreciated, except if they are legally authenticated documents. (Art. 202.2). Right to register collective marks lies with corporate bodies which have been legally allocated or recognized as possessing certification mark and which can apply it to products or services having certain specific qualities; corporate bodies which protect, control or certify economic activities, for identifying products of those activities, or which originate from certain regions in accordance with their purposes and terms of their respective articles of association or statutes. (Art. 203.1).

Trademark Registration Procedure.

No more than one registration may be filed in same application and each trademark to be used on same products or services can be registered only once. (Art. 204). Trademark registration application must be filed in writing in official language of territory, indicating name or commercial style of applicant, his/its nationality and domicile or location, and identifying trademark whose registration is required, accompanied by following items in triplicate: products or services covered by trademark, grouped in accordance with classes of classification of products and services, and designated in precise terms, preferably terms appearing in aforementioned alphabetical classification; indication as to whether application concerns product, service, association or certification mark; indication as to whether application concerns three-dimensional or sound trademark; in latter case, graphic representation in musical notation of sounds that enter into composition of trademark; example of trademark appended in area reserved for that purpose on applicant's own printed paper. (Art. 206). Once DES has received application, it shall, within one month, proceed to its formal examination to ensure that it contains all elements required pursuant to Arts. 206, 207, classify products and services. (Art. 209.1). Once application has been shown to be complete, or after it has been duly rectified pursuant to previous article, DES shall have appropriate notice published in Official Bulletin, indicating elements necessary for complete identification of applicant and of subject matter, including as appropriate: typographic reproduction of trademark and indication of classes and products or services to cover, with express reference to colors if these are part of claim; graphic representation in musical notation of any sounds entering into composition of trademark. (Art. 210). Complaints shall be filed within two months of date of publication of application in Official Bulletin. (Art. 211.1). Registration of trademark shall be refused if any of general grounds for refusing to grant industrial property rights is found pursuant to Art. 9(1); essential part of trademark constitutes reproduction, imitation or translation of another that is well-known in Macao, if applied to identical or similar products or services and with which it can be confused, or if those products could establish connection with proprietor of well-known trademark; trademark, although meant for products or services with no connection, constitutes reproduction, imitation or translation of previous trademark that enjoys prestige in Macao, whenever use of subsequent trademark tries to derive improper advantage or prestige from distinctive character of trademark, or could harm them (Art. 214.1), signs that constitute breach of copyrights or industrial property rights. (Art. 214.2).

Effects of Registration of Trademark.

Registration of trademark implies mere legal presumption of innovation or of distinction from another previously registered. (Art. 217). Duration of registration shall be seven years counted from date of respective granting, indefinitely renewable for similar periods. (Art. 218.1). Renewal application shall be submitted within last six months of current validity period, accompanied by original registration certificate. (Art. 218.2). Registration of trademark confers upon holder right to prevent third party in his economic activity and without consent of holder, from using any sign identical to or likely to be confused with that trademark for products or services identical or similar to those for which that trademark was registered, or which, consequent upon identity or similarity of signs, products or services creates in mind of consumer risk of confusion that includes risk of association between sign and trademark. (Art. 219.1).

User of Trademark.

When affixed to product in any way, certification mark shall be complemented, if necessary, by indication that it does not apply to all phases of manufacturing process. (Art. 226). Assignment of establishment shall presuppose assignment of registration application or ownership of trademark, unless otherwise stipulated. (Art. 227.1).

Names, Emblems of Establishments.

Protection under present statute by means of title to name and emblem of establishment can be conferred only on distinctive signs of establishment wherein business is conducted in accordance with provisions of present section. (Art. 233). For purpose of present statute, establishment emblem shall be deemed to be any external sign composed of illustrations or drawings, alone or combined with name of establishment or with other words or mottos. (Art. 234.1). Respective registration shall not be hindered by fact that requested name or emblem contains any fancy or specific designations; historical names, with exception of those use of which would be detrimental, or offensive to esteem in which such names are generally held; name of property or premises of establishment, when this is admissible, or accompanied by distinctive element; name or distinctive elements of company name and pseudonym, or nicknames of proprietor; branch of activity of establishment, provided that it is accompanied by distinctive elements. (Art. 236). Following may not form part of name or emblem of establishment: names, designations, illustrations or drawings that are reproductions or imitations of names or emblems of establishments already registered by somebody else; words or phrases in foreign language other than simple geographical designations, unless establishment belongs to nationals of respective country. (Art. 237.1).

Right to Name, Emblem.

Anyone with legitimate interest, more specifically farmers, livestock-breeders, industrialists, merchants and other entrepreneurs domiciled or established in territory, shall be entitled to adopt name and emblem to designate their establishment and make it known pursuant to terms of following provisions. (Art. 238).

Registration of Name, Emblem of Establishment.

Application to register name or emblem of establishment must be submitted in writing in official language of territory indicating name or corporate style of applicant, nationality, domicile or place of establishment, and identifying name and/or emblem whose registration is requested. (Art. 239.1). Registration application further includes following elements: document proving that applicant owns establishment actually and not fictitiously and, more specifically, industrial or administrative license, or some identical type of document, or property registration certificate, or some other documentary proof in case of Art. 236(c), save if there is just reason preventing presentation of that document; declaration by applicant that for same establishment there does not exist any previous registration of name and emblem of establishment. (Art. 240.1).

Use of Name, Emblem.

During term of registration, proprietor of name or emblem must be entitled to add thereto designation “Nome registado” (Registered Name), “Insignia registada” (Registered Emblem), simply “NR”, “LR”, in Portuguese or else equivalent expression in Chinese. (Art. 248).

Designation of Origin, Geographical Indications.

Under present statute, only following can be protected by designation of origin: name of region, specific locality, country or territory that is used to designate or identify product originating from that region, specific locality, country or territory, whose quality or characteristics are essentially or exclusively due to geographical environment, including natural and human factors, and whose production, transformation and creation are conducted in demarcated geographical area; certain traditional designations, be they geographical or not, which designate product originating from region or specific locality that satisfy conditions foreseen in previous sub-paragraph. (Art. 254.1). Under present statute, only geographical indication, name of region, specific locality or, in exceptional cases, country or territory can be protected that is used to designate, to identify product originating from that region, specific locality or country, territory or, whose reputation, specific quality or other characteristic can be attributed to that geographical origin, and whose production and/or transformation and/or creation is conducted in demarcated geographical area. (Art. 254.2). Designations of origin and geographical indications, when registered, constitute common property of residents or persons who are actually and seriously established in region in question, and may be used indiscriminately by persons who, in that region, exploit any characteristic area of production when duly authorized by holder of registration to do so. (Art. 254.3). Exercise of this right does not depend on extent of exploitation nor on nature of products, and designation of origin or geographical indication consequently apply to any products characteristic of and originating from locality, region or territory, provided that demarcations and other traditional and usual or properly regulated conditions are observed. (Art. 254.4). Application for registration of designation of origin or geographical indication shall be filed, in writing, in official language of territory, indicating name of individuals or corporate bodies, public or private entitled to acquire registration and shall be accompanied by following information: name of product or products on which it is intended to use designation of origin or geographical indication; traditional or regulated conditions for use of designation of origin or geographical indication, and limits of respective locality or region. (Art. 255.1). Registration of designation of origin or of geographical indication shall confer right to prevent use by third party in designation or presentation of product of any means that indicate or suggest that product in question originates from geographical area different from true place of origin; any use that constitutes act of unfair competition within terms of Art. 10bis of Paris Convention in its Stockholm revision of 14 July 1967; use by anyone who is not authorized by holder of registration. (Art. 259.1).

10 LEGAL PROFESSION

10.01 LAWYERS, ATTORNEYS AND COUNSELORS:

Only attorneys effectively registered at Macao Bar Association and attorneys in practice may exercise their individual and professional acts within whole region on behalf of judicial organs, trial grade, government, public or private entity, especially taking position as litigation entrusted person, legal consultant within system of free occupation with pay. (GRL, Art. 11).

Conditions to be lawyer include: holding degree of Bachelor of Law from university in Macao or any other Bachelor of Law degree recognized by region; upon completion of internship for lawyer. Bachelor of Law from university outside Macao shall complete pre-courses for adapting to Macao's legal system pursuant to provisions of Macao Bar Association. Following people may be exempted from internship: law teacher with masters degree or above, once acting as teaching staff in university in Macao; former law officer in court, procuratorate, director of registration office; public notary who has taken such position for over two years and was given good rating in last evaluation. (GRL, Art. 19).

Following people are not allowed to register as lawyers: those not having morality for legal profession, those convicted of serious and dishonorable offense; those not having complete civil rights; those having been declared unable to manage their person and assets; those not permitted to hold incompatible posts or ceasing to engage in legal profession; those law officers and civil servants having been dismissed, forced retired or retired due to lack of morality; those not having qualifications to engage in legal profession in Macao. (GRL, Art. 23).

Those engaged in legal profession are not allowed to participate in or undertake following activities or positions that may impair such professionalism: director or member of administrative authority of Macao, its member consultant, civil servants, contract service personnel of such authority, except councilor of legislative council; incumbent, deputy law officer of court or procuratorate, civil servant, service personnel of any court; chairman, vice chairman, civil servant, service personnel of city hall; public notary, director of registration office; civil servant, service personnel of public institutions except teaching personnel; current member of armed forces, broker, auctioneer, other activities, positions considered colliding against certified lawyer position in special law. (Art. 2). Following prerequisites are required for registration with this association: holding Bachelor of Law degree of Macao and acknowledged in this area; receiving internship from certified lawyer pursuant to regulations, not influencing application of agreement reached in similar entity mutual benefiting agreement of other legal systems; applicant announcing in writing confirmation of nonexistence of incompatibility with engagement in said profession, to verify nonexistence of other limitations referred to in Art. 7. (Art. 4). Each registered lawyer and lawyer in practice will be given professional ID card as evidence of registration with this association. Professional ID card is issued by council and signed by any one of its members. Period of adaptive pre-course shall be subject to decision of this association for no less than 12 months, no more than 15 months, including six subjects: introduction to Macao law system, international private law, administrative law, civil law, commercial law, criminal law. (Art. 17). Internship is intended for practitioners to prepare for engaging in legal profession. (Art. 18). Internship shall be at least 18 continual months. (Art. 21, Regulations for Admission of Lawyers). Foreign lawyers are generally not permitted to practice in Macao.

11 PROPERTY

11.01 ABSENTEES:

Possession means power to manage manifested by person when exercising ownership or other property rights. (Civil Code, Art. 1175). When one finds lost animal or other movable and knows relevant owner, that person should return or notify said owner of lost property; if owner is not known, finder should make public notice in most appropriate way, or notify police, or follow practice to dispose of said property after considering value of lost property. If it is obvious that value of lost object exceeds 2,000 patacas, finder must notify police. If owner does not claim for lost property within one year after public notice or notice of finding of said lost property is given, lost property shall belong to finder. (Civil Code, Art. 1247).

11.02 ADVERSE POSSESSION:

Possession is classified as evidenced, non-evidenced, friendly, evil, peaceful, forcible, open or hidden possession. (Civil Code, Art. 1182). Possession continues during period when acts to exercise rights continues or may continue. One's possession once starting, is presumed to continue. (Civil Code, Art. 1181). Possession has to be exercised by possessor in opposition to all others. In case when some question exists, presumed person who actually exercises power to manage is possessor. (Civil Code, Art. 1176). Presumed current possessor, if also possessing previously, continued in possession. Previous possession cannot be determined from current possession, except those possessing evidence of current possession; such possession starts from date when said evidence exists. (Civil Code, Art. 1178).

11.03 CONVEYANCES:

In case possessor dies, possession will be continued by his heirs. (Civil Code, Art. 1179). When possessor conveys original right of possession to others, it is considered possession is conveyed to said person who has obtained right. (Civil Code, Art. 1188).

11.04 REAL PROPERTY:

Possession means power to manage manifested by person when exercising ownership or other property rights. (Civil Code, Art. 1175). Possession is classified as evidenced, non-evidenced, friendly, evil, peaceful, forced, open, hidden possession. (Civil Code, Art. 1182). Possession continues during period when acts to exercise rights continues or may continue. Possession once started is presumed to continue. (Civil Code, Art. 1181). Possession has to be exercised by possessor in opposition to others. In case when some question exists, presumed person who actually exercises power to manage is possessor. (Civil Code, Art. 1176).

Following persons will be regarded as possessors: those actually exercising power to manage; those who benefit via tolerance of right holder; agents or successors of possessor, those possessing in other's names. (Civil Code, Art. 1177). Presumed current possessor, if also possessing previously, continues in possession. Previous possession cannot be inferred from current possession, except if person possesses evidence of current possession; in that case possession starts from date supported and proved by evidence. (Civil Code, Art. 1178). In case possessor dies, possession will be continued by his heirs. (Civil Code, Art. 1179). One taking over other's possession by ways other than inheritance, shall combine it with his own possession. (Civil Code, Art. 1180).

Only objects which can be subjects of ownership, is provided in this Code. (Civil Code, Art. 1226). Owner of object has complete, exclusive right to use, benefit, dispose from his objects within scope of law, under limitation of laws, regulations. (Civil Code, Art. 1229). Commercial enterprise, copyright, industrial property rights are provided in special laws and regulations. Provisions of this Code may be additionally applicable to commercial enterprise, copyright and industrial property rights, if compliant with said laws and not against any special regulations therein. (Civil Code, Art. 1227). Except as provided by law, it is not permitted to limit ownership of property rights or other rights involved in property rights. All limitations not in line with above requirement arising from legal acts are creditor's rights in nature. (Civil Code, Art. 1230).

Ownership must be set with conditions. Ownership with term is set only under circumstances specially provided by law. (Civil Code, Art. 1231). All or part of anyone's ownership cannot be deprived, except provided by law. (Civil Code, Art. 1232). Private property can be expropriated only under circumstances provided by law. (Civil Code, Art. 1233).

Right to use means power of right holder and relatives to use, for own needs, specified objects, related to accrued interests. Right to use involving houses is called right to residence. (Civil Code, Art. 1411).

Right to benefit from use is right to enjoy full benefit without changing form, essence of object, or right of others. (Civil Code, Art. 1373). Right to benefit from use shall have time effectiveness by contract, or will be set by legal provisions. (Civil Code, Art. 1374). One or more persons may enjoy right to benefit from use, establishing said right at same time, provided all other persons already exist when first person obtains right. (Civil Code, Art. 1375). Right to benefit from use is set for many persons based on contract or will, combined with ownership only after death of all right holders, except as otherwise provided. (Civil Code, Art. 1376).

Right to benefit from use established for individuals or legal persons, shall not continue after death, elimination of right holder or legal person, except if expressly shown by contrary evidence that establish right, providing term for renewing right to benefit from use. Right to benefit from use must not exceed 30 years for legal person, no matter whether term for renew specified or not, nor for natural person. Compensated right to benefit from use involving real property must not set renewal period of less than two years, except provided temporarily for special purposes. (Civil Code, Art. 1377).

Setting or elimination of rights to use or right to residence, are same as right to benefit from use. Rights to use or right to residence shall not continue after death of beneficiary.

Rights to use or right to residence are subject to standards it is based upon. (Civil Code, Art. 1412).

Relatives of holder of right to use or right to residence, include spouse, children, other blood relatives supported by right holder. Persons with actual marital relationship with right holder, persons living together with right holder for serving right holder or persons specified in this provision, are equivalent to relatives of right holder. (Civil Code, Art. 1413). Holder of right to use or right to residence must not transfer, lend right to others, nor add any burden to right. (Civil Code, Art. 1414).

Holder of right to use, if receiving all accrued interest, whole building of real property, must be responsible for daily repair, undertake management expenses, taxes, annuity as holder of right to benefit from use; if receiving part of accrued interest or building, must bear above expenses according to his proportion of benefit. (Civil Code, Art. 1415). Provisions for right to benefit from use, if compliant in nature, are applicable to right to use or right to residence. (Civil Code, Art. 1416).

Surface rights mean rights to set up, maintain building on other person's land. (Civil Code, Art. 1417). Scope of surface right must include part of land occupied not for setting up building, provided said part of land is beneficial for use of said building. Subject of surface right must be setting up or maintaining building on surface or underground. (Civil Code, Art. 1418). Subject of surface right must be building under multi-story ownership system, setting up of buildings, complying with conditions for said ownership. Surface right must be permanent, not limited, as specified in Art. 1427(2). Upon completion of building, multi-story ownership system is applicable to relationship between owners in different floors, said owners and third party. Surface right system provided above is applicable to relationship between owners of multi-story building and land owners. Annuity for land owners must be paid by management body after collecting said amount from each owner of multi-story building according to proportion of separate unit. (Civil Code, Art. 1419).

Provisions herein are applicable to rights to set up building on another building. (Civil Code, Art. 1420).

Surface right must be set via contract, will, with time limit, arising from transfer of current building instead of land. (Civil Code, Art. 1421). Establishing of surface rights leads to setting of easement necessary for use, or benefit of building; location, conditions of easement not specified in relevant evidence for establishing surface right must be set by agreement; if there is no agreement, it will be set by court.

Easement of passageway may be set forcibly, on third party's real property, only in case subject of real property is surrounded when surface right is set. (Civil Code, Art. 1422).

When establishing surface right, owner and surface right holder must agree surface right holder make one-off payment or annuity to be paid forever or specified period for all parties involved, as compensation. Even if surface right is permanently established, annuity must be paid for specified period. Payment must be made in cash. (Civil Code, Art. 1423).

Before building, entire right to use, benefit from land, is vested in land owner, who must neither hinder progress of said building nor add burden to it. Even after completion of building, land owner has right to use, benefit from underground or surface, subject to purpose of surface right holder. Land owner has to undertake liability for damage to surface right holder for use of land, if damage caused by land owner. (Civil Code, Art. 1425). Surface right, land ownership must be transferred before death or by death. (Civil Code, Art. 1426).

Easements mean burden on real property for providing exclusive benefit to another real property, even if both belong to same owner; burdened real property is called servient tenement, benefited one is called dominant tenement. (Civil Code, Art. 1434).

All benefits for dominant tenement may be subjects of easement, even said interests existing in future, contingent, not adding value to dominant tenement. (Civil Code, Art. 1435).

Except as provided by law, easement must not be separated from involved dominant tenement of servient land. Benefits of easement given to other real property will lead to setting of new easement, elimination of old easement. (Civil Code, Art. 1436). Easement is non-separable: each part of separated servient tenement is vested with easement of said part before separation; in case of separation of dominant tenement, each right holder has right to exercise easement without any change. (Civil Code, Art. 1437). Easement can be established by contract, will, with time limit, specified by prior owner. Legal easement, not set voluntarily as provided in this Code shall be set by judicial judgment. (Civil Code, Art. 1438).

12 TAXATION

12.01 OVERVIEW:

Macao taxation system was introduced from Portugal, and its framework has remained same despite changes made in system. Yet there has been major change in Portuguese taxation system since 1970s. Taxation system currently in force in Macao is somewhat different from that in Portugal.

17 types of taxes are collected in Macao. In terms of sources of taxation, taxes are collected on earnings, property, wealth, assets and services, etc. Taxes in Macao are also classified into direct taxes and indirect taxes. Direct taxes include business tax, job tax, housing tax, additional income tax, gambling tax, franchise tax, inheritance and gift tax and real estate transfer tax, etc. Indirect taxes include stamp tax, tourist tax and consumption tax. In addition, charges are collected on issuing certificates, conducting legal and administrative affairs and inspections.

Macao taxation system small in types of taxes collected and low in tax rate. Collection of direct taxes is supplemented by indirect taxes.

Franchise tax is major source of government revenue in Macao. Franchise tax, taking form of contract, is special tax collected by Macao government on companies or institutions which, with special permission, operate particular type of business. It consists of franchise tax on gambling and franchise tax on other businesses. Since 1990s, franchise tax has made up 40% to 60% of total government revenue. Gambling tax accounts for lion share of franchise taxes. Gambling tax makes up over 30% of total government revenue.

Gambling tax generally is major source of revenue for Macao government.

12.02 BUSINESS TAXES:

Tax year in Macao starts on Jan. 1 and ends on Dec. 31. Taxes collected on businesses are calculated from date when businesses are started to end of year.

All natural person or legal person taking part in activity of industrial, commercial nature shall pay business taxes. All economic activities that are handled with own capital not under control of occupational taxes will be considered as industrial and commercial activities. Business taxes shall be collected according to fixed tax rate as provided by regulations. Additional tax to be added to imposition of business taxes is stamp tax. (Art. 4).

Following are exempted from business taxes: local government, its agencies, organizations, institutions, and legal persons; local autonomous institution, public welfare administrative organization, church institution; operators of places for water, electricity supply, distribution, mass transportation, marketplace, public supply, established, under supervision by municipal government; saving, deposit organizations, production, consumption, residential cooperative with member-only activities; nonprofit elementary school, secondary school, technical educational school; open show, balefire party, funfest, concert, permitted by relevant authorities, with all income contributed to cultural, educations, charity, almsgiving purposes; natural person, legal person, exempted from business taxes in compliance with special taxation system or special law; commercial, handicraft activities without shop premises, in outdoor temporary simple facility; newspaper, magazine publisher; owners of non-motorized passenger vehicles who must pay taxes set forth in city autonomous rules; small workshops, with business owner, spouse, son, daughter, at most four other relatives working therein. (Art. 6).

As to business taxes, accounting entry, method of collection, following procedures are included: declaration by taxpayers; preliminary evaluation; temporary settlement; payment, initiation of business; report of examiner; evaluation confirmation; confirmation of temporary settlement, cancellation, additional settlement. (Art. 7).

For engagement in industrial, commercial activities, at least 30 days prior to possible date after starting of business, application must be submitted by person involved, his authorized person to related public tax bureau in relevant imposing location. (Art. 8).

Evaluation refers to combination of business activities of each company with equivalent items on General Industrial Form. To implement evaluation work, following rules must be followed: evaluation will be based on main business handled by firm, engagement of any other business of independent nature at same time must also be registered on register. If business person handles his own business in another person's shop, separate registration is required. Engagement in both wholesale and retail business at same time must be registered according to items listed in General Industrial Form; under such circumstance, if firm registers as “import and export” business, it is not necessary to register for “wholesale” item; firms registered as in “consignment, agent of a variety of goods”, it is not necessary to register for “import and export” item. (Art. 10).

Preliminary evaluation will be done by related departments in Fiscal and Taxation Office within two workings after application is submitted by taxpayer. (Art. 11).

After preliminary evaluation is done, voucher is issued by Fiscal and Taxation Office for immediate taxation settlement, stamp duty settlement, at amount of one-twelfth of relevant business by end of year starting from business starting month. (Art. 12).

Tax payment, initiating of business is must for initiating profit-making business. (Art. 13).

Within 60 days after business requiring payment of business tax starts, inspecting department will determine if information stated in taxpayer's statement is true, collect important indexes for evaluation. (Art. 14).

Business taxes shall be paid by one-off payment in Feb. or Mar. in relevant year, as shown on tax receipt. (Art. 27).

12.03 INCOME TAX:

Macao complementary income tax levies are governed by Law No. 21/78/M, 9th Sept. 1978, “Regulations of Complementary Tax”. Regulations have been modified many times since promulgation in 1978. Complementary tax is equivalent to income tax or profit tax in other countries, regions. Macao complementary income tax is regarded as complement to levies of industrial tax, professional tax, urban property tax.

Individuals, corporations, irrespective of residence, location of head offices, who carrying on commercial, industrial activities in Macao, are subject to complementary tax on income arising in or derived from Macao. Taxpayers subject to complementary tax are classified into two groups, group A and group B. Group A taxpayers are those who have maintained appropriate accounting books and records, including anonymous companies with limited liability, companies limited by shares, etc., and companies with registered capital not less than MOP1,000,000 or with annual average taxable profits for preceding three years of more than MOP500,000. Individuals or companies with appropriate accounting books and records may elect to be assessed under group “A” category by filing applications to Macao Finance Department. Annual financial accounts prepared by group A taxpayers should be audited and counter-signed by accountants or auditors registered with Macao Finance Department. Group A taxpayers' tax liabilities are assessed by tax authority based on their financial accounts submitted, subject to tax adjustments determined by authority. Group B taxpayers are those individuals or corporations without appropriate accounting books and records. Tax liabilities of these taxpayers are determined by tax authority on deemed profit basis for Macao tax purposes. All taxpayers are required to submit complementary tax returns within prescribed periods set out in regulations. Group A taxpayers are obliged to file returns to Macao Finance Department in respect of preceding year between Apr., June each year, whereas tax filing period of group B taxpayers is between Feb. and Mar. each year.

Income means receipts from carrying on commercial or industrial activities such as sales and services rendered, financial income, and so on, whether of recurrent or occasional nature, principal or incidental, are all subject to complementary tax.

Outgoings, losses incurred in activities directed toward production of income are allowed as deductions from such income. For example, it encompasses operating costs and expenditures, personnel expenses, financial expenses, and allowable depreciation and loss provisions. (Art. 21). Deduction for depreciation is set out in Decree-Law No. 4/90/M “Regulations of Depreciation and Amortisation on Fixed Assets” which classifies fixed assets into ten general groups and defines prescribed depreciation rates for each category of fixed assets. Deduction for provisions includes allowable provisions for bad debts and stock losses. Provision for bad debts not exceeding amount equal to 2% of accounts receivable balance at end of financial year is deductible, while maximum deduction for stock loss provision is restricted to 3% of closing stock value. Certain expenditures may be disallowed by Macao Finance Department, such as proportion of entertainment and traveling expenses that tax authority considers excessive, complementary income tax payments and tax penalties, etc. Tax loss incurred by group A taxpayer in one financial year may be carried forward and deducted against taxpayer's taxable profits of succeeding three financial years. Taxpayers other than group A shall not be entitled to such deduction of losses carried forward. (Art. 25).

Taxable profits below MOP300,000 are taxed at progressive rates specified in annexed schedule. Taxpayers with taxable profits exceeding MOP300,000 are taxed at flat rate of 15%.

It is provided that some organizations are excluded from levy of complementary income tax, such as government departments, associated organizations, incorporated religious organizations. In accordance with provisions of tax incentive scheme by government for industrial sector, certain industrial organizations with new establishment or expansion may apply for 50% reduction of complementary income tax for prescribed period agreed by authorities. (Art. 9).

12.04 PENALTIES:

If tax is not paid within tax-paying month, 3% of delay interest, overdue taxes will be imposed within 60 days upon expiry of tax payment period, after 60 days forcible imposition of relevant overdue taxes will be imposed. (Art. 29).

Failure to submit application prior to starting business will be subject to fine between 200 to 100,000 patacas. Failure to pay taxes that have been settled prior to starting business, though having submitted application, will be subject to fine of between 200 to 100,000 patacas. Delay in submitting revised application, non-presentation of voucher to Fiscal and Taxation Office will be subject to fine between 200 to 100,000 patacas. (Art. 39).

False declaration, omission of taxes will be subject to fine between 200 to 100,000 patacas. (Art. 40). In case taxpayer fails to pay due taxes 60 days after tax payment period expires, fine of half of overdue taxes will be imposed. (Art. 41).

For recommitment, fines may be doubled. Recommitment refers to commitment of same illegal acts by taxpayer for which he has been fined within one year. (Art. 42).

Penalty will be deducted half once executed by self-confession of violator. (Art. 43). Penalty shall be paid within ten days upon delivery of penalty notice. Payment of fines will not be considered waive of taxes, stamp, interest payable by taxpayer. (Art. 45).

Dissent must be made in form of statement of claim to authority with acts to be amended, repealed by dissent announcer. Rejection must be made within eight days upon service, acknowledgement of said decision, action. (Art. 49).

Appeal of claim against decision of executing body shall be submitted to Governor General. Administrative appeal shall be submitted within eight days as of date of delivery of claim decision. (Art. 50).

It is protected that taxpayer may file, by reason of illegitimacy, judicial appeal against penalty imposed, decision of financial secretary on appeal against evaluation, re-evaluation, determinative and executive acts. (Art. 52).

Judicial appeal must be filed at Macao Administrative Court that makes initial decision. (Art. 53). Time limit for filing judicial appeal is 30 days, starting upon serving of relevant decision, or acknowledgement by related person of relevant decision in case service is not required by law. (Art. 55). Judicial appeal has no effect on ceasing execution of decision already made. (Art. 56).

In case of failure to pay overdue taxes, interest and penalties, and no guaranty of payment due to inability to obtain any property, debtor will be forbidden to conduct any activities that require payment of business taxes in region. (Art. 59).

13 TRANSPORTATION

13.01 MOTOR VEHICLES:

Driver should not drive when not possessing appropriate mental, physical conditions. It is forbidden to drive under influence of alcohol. Driver will be considered influenced by alcohol when each liter of his blood contains alcohol of 0.8 grams or above. (Road Transport Code, Art. 12).

Traffic should go on left side of roadway. (Art. 13). Outside town, if possible, vehicles should be parked outside roadway; in town, car park is only allowed: within roadway, parallel, close as much as possible to left roadside or sidewalk; outside roadway, on locations specially reserved for parking purpose. (Art. 33). Only those with driving qualification may drive motor vehicle on public road. Document certifying such qualification is called driving license. License for driving automobile, heavy motorcycle is called driving permit. Driver must carry relevant license, substitute documents, equivalent documents. (Art. 49).

Following documents may be given qualification to drive automobile, light and heavy motorcycle: international driving license issued by foreign country; license granted above license effectiveness by international conventions; other foreign license with preferential treatment as license issued in Macao; diplomat's driving license, special driving license. (Art. 50).

Minimum age required to obtain driving permit and driving license is 18 for light automobile and tractor, heavy motorcycle; 21 for heavy automobile and tractor; 16 for light motorcycle. Following are necessary conditions for obtaining driving license of automobiles, light, heavy motorcycles: essential mental, physical conditions; at least six months residence in Macao, passing relevant driving test, able to read, write Portuguese or Chinese. (Art. 51).

Driver of automobile, heavy motorcycle, who is not qualified for driving, will be fined Macao patacas 3,000 to 15,000. Those repeatedly committing above slight violation will be sentenced to six-month imprisonment, fined Macao patacas 5,000 to 25,000. Driver of light motorcycle on public road, who is not qualified for driving, will be fined Macao patacas 1,500 to 7,500. (Art. 67).

Driver with each liter of his blood containing alcohol of 1.5 grams or above will be fined Macao patacas 3,000 to 15,000; 1,500 to 7,500 patacas for over 0.8 grams, under 1.5 grams. (Art. 68).

Driving license will be terminated for one month to two years, depending on seriousness of law violation, in following cases: committing any crime during driving; evasive of liabilities in traffic accident; forging, removing, concealing vehicle identity information; forging driving license or substitute documents; robbery, theft of vehicles. (Art. 73).

14 TREATIES AND CONVENTIONS

14.01 INTERNATIONAL CONVENTIONS:

International Covenant on Civil, Political Rights; International Covenant on Economic, Social, Cultural Rights, international labor conventions remain in force, implemented through laws. (Art. 40).

Macao's legal system is based largely on Portuguese laws and regulations. It is developing close ties with EU and has entered into Agreement for Trade and Co-Operation between European Economic Community and Macao, at Luxemburg on 15 June 1992; Agreement between Macao and European Community on Readmission of Persons Residing without Authorization, at Luxemburg on 13 Oct. 2003.

In its quasi-independent status, Macao has entered into numerous other treaties: Agreement between Macao and Republic of Mali on Mutual Abolition of Visa Requirements, at Beijing on 15 July 2004; Air Services Agreement between Government of Macao and Government of Republic of Iceland, at Reykjavík on 13 July 2004; Agreement between Government of Macao and Government of Mongolia on Mutual Abolition of Visa Requirements, at Macao on 3 July 2004; Agreement between Government of Macao and Government of Latvia on Exemption of Visa Requirements; Agreement between Government of Macao and Government of UK of Great Britain and Northern Ireland Concerning Air Services, on 5 Feb. 2004; Agreement between Government of Macao and Government of Slovak Republic on Abolition of Visa Requirements, on 10 Dec. 2003; Agreement between Government of Macao and Government of Kingdom of Thailand on Exemption of Visa Requirements, on 10 Dec. 2002; Air Services Agreement Between Government of Macao and Government of Islamic Republic of Pakistan, on

15 Nov. 2000; Amendment to Air Services Agreement Between Government of Macao and Government of Republic of Singapore, on 5 Sept. 2002; Agreement between Government of Macao and Government of Republic of Lithuania On Mutual Abolition of Visa Requirements, on 6 Dec. 2001; Agreement between Government of Macao and Government of Republic of Hungary Concerning Mutual Abolition of Visa Requirement, on 28 Nov. 2001; Air Services Agreement between Government of Macao and Government of Czech Republic, on 23 Oct. 2001; Agreement between Government of Macao and Government of Kingdom of Cambodia Concerning Air Services, on 15 Jan. 2002; Agreement between Government of Macao and Government of Republic of Poland On Abolition of Visa Requirements, on 17 Sept. 2001; Agreement between Government of Macao and Government of Republic of Namibia On Mutual Exemption of Visa Requirements, on 26 Sept. 2001; Agreement between Government of Macao and Government of Republic of Estonia On Abolition of Visa Requirements, on 19 July 2001; Agreement, by exchange of notes, between Government of China and Government of India, relating to application on Hong Kong and Macao of Convention on Consular Relations between China and India, on 13 Dec. 1991; Agreement between Government of Macao and Government of Independent State of Samoa On Mutual Exemption of Visa Requirements, on 11 Aug. 2004.

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MALAYSIA LAW DIGEST

—Scope —

Revised for 2010 edition by

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Note: This revision incorporates legislation through Nov. 2, 2009.

1 INTRODUCTION

1.01 CURRENCY:

Local currency is Ringgit (RM).

See category 3 Business Regulation and Commerce, topic 3.01 Banks and Banking; category 13 Foreign Trade and Commerce, topic 13.02 Exchange Control.

1.02 GOVERNMENT AND LEGAL SYSTEM:

Malaysia is Federation consisting of: nine Sultanate States: Kedah, Perlis, Kelantan, Terengganu, Perak, Pahang, Selangor, Negeri Sembilan and Johor; Pulau Pinang and Melaka; Borneo states of Sabah and Sarawak; and Federal Territory of Kuala Lumpur; Federal Territory of Putrajaya and Federal Territory of Labuan. The nine Sultanate States, Pulau Pinang, Melaka, Federal Territory of Kuala Lumpur and Federal Territory of Putrajaya comprise West Malaysia; and Borneo States of Sabah and Sarawak, and Federal Territory of Labuan comprise East Malaysia. Malaysia has written constitution (Federal Constitution). Any law, whether State or Federal, inconsistent with Constitution is to that extent void. See also category 6 Courts and Legislature, topic 6.04 Statutes.

The Monarch.

Yang di-Pertuan Agong is constitutional Monarch. Monarch's position is both hereditary and elective. Only Sultans of nine Malay States are eligible for election under system of rotation done every five years whereby each Sultan has chance of being elected unless he declines. Executive authority of Federation is vested formally in Yang di-Pertuan Agong but he must act in accordance with advice of Cabinet. Cabinet comprises members of Parliament, and is headed by Prime Minister.

Parliament.

Legislative power of Federation is vested in Parliament. Parliament consists of Yang di-Pertuan Agong, Dewan Rakyat (House of Representatives) and Dewan Negara (Senate). Members of Dewan Rakyat are directly elected by citizens. Each Dewan Rakyat lasts for maximum of five years, after which general election must be called. Dewan Negara is filled partly by appointees of Yang di-Pertuan Agong, and partly by members elected from State Legislative Assemblies for term of three years (with one re-election). Parliament meets from Mon. to Thurs. when in session. Parliamentary year is broken up into three sessions and time between date of last sitting in one session and date appointed for first meeting in next session must not be more than six months. Dewan Rakyat and Dewan Negara can have different start and end dates for each session. Meetings can be convened by Yang di-Pertuan Agong; speaker of Dewan Rakyat or President of Dewan Negara; or by motion passed by simple majority in relevant house. Enactments are presented to Yang di-Pertuan Agong for assent. If enactment is not assented after 30 days of representation, it becomes law as if Yang di-Pertuan Agong had assented it. Dewan Negara only has powers to delay legislation, allowing Dewan Rakyat to reconsider its policies. Where “Money Bill” is passed by Dewan Rakyat and is not passed by Dewan Negara within 30 days (one month), Bill must be presented to Yang di-Pertuan Agong for his assent. Money Bills include bill or amendment making provision for imposing, increasing, abolishing or reducing tax.

State Legislative Assemblies.

Legislative power of each State is vested in State Legislative Assembly. Each State has unicameral assembly consisting of ruler or governor, and members directly elected by people of that State. Ruler or governor acts on advice of Executive Council of that State, which is headed by Menteri Besar or Chief Minister. Bills passed by Assembly become law only upon assent of ruler or governor. If bill is not assented to by ruler or governor within 30 days, bill will become law as if he had assented to it.

Judiciary.

Judiciary has four tiers comprising Federal Court, Court of Appeal, two High Courts (Malaya and Sabah and Sarawak), and Subordinate Courts. Judiciary is headed by Chief Justice of Federal Court, President of Court of Appeal and Chief Judges of High Courts of Malaya and Sabah and Sarawak. Judges of High Court and above are appointed until retirement at age 66, by Prime Minister in consultation with Chief Justice Malaysia.

See also category 6 Courts and Legislature, topic 6.01 Courts.

1.03 OFFICE HOURS AND TIME ZONE:

Malaysia is in the + 08:00 GMT time zone. Office hours are generally from 9 a.m. to 5 p.m. (Mon. to Fri. except for Kelantan, Terengganu and Kedah—Sun. to Thurs.) and from 9 a.m. to 1 p.m. (Sat.). Government offices, most banks and many private companies are closed on Sats.

2 BUSINESS ORGANIZATIONS

2.01 AGENCY:

Governed by Contracts Act (Act 136) and common law. Generally, principal is bound by his authorised agent. Agent may be authorised expressly, impliedly or by ratification, estoppel or necessity. Agent acting outside scope of authority may be liable for breach of warranty of authority. Agent acting for undisclosed principal also personally liable.

See also topic 2.05 Partnerships; category 20 Property, topic 20.01 Absentees.

2.02 ASSOCIATIONS:

See topic 2.05 Partnerships.

2.03 CORPORATIONS:

Governed by Companies Act (Act No. 125) and Companies Regulations 1966.

Formation.

Two or more persons (including body corporates) may incorporate company. Apart from issuance of two shares, no minimum amount of authorised or issued share capital.

Limited/Unlimited.

Companies may be limited (liability of shareholders limited by shares or guarantee, or both) or unlimited. Unlimited companies may be converted into limited companies but not vice versa.

Private company by its Memorandum and Articles of Association must restrict transfer of its shares, limit members to no more than 50, prohibit invitation to public to subscribe for shares and prohibit invitation to public to deposit money. Private limited companies must have words “Sendirian Berhad” or abbreviation “Sdn. Bhd.” as part of its name.

Public company do not have above restrictions and may invite public to subscribe for shares and debentures by issuance of prospectus. Limited liability companies must have word “Berhad” or abbreviation “Bhd.” as part of its name. Public companies may apply to be listed on Stock Exchange in accordance with listing requirements of Bursa Malaysia Securities Berhad.

Listed companies are principally regulated by Bursa Malaysia Securities Berhad and Securities Commission, to whom applications have to be made for certain transactions such as injection of assets into listed company, public offerings and takeovers.

Registrar of Companies administers Companies Act. All statutory documents including Memorandum and Articles of Association, and concerning details of registered office, directors, amount of share capital, charges created over assets of company, are to be lodged with Companies Commission of Malaysia who also approves intended names of companies. Company must also file with Companies Commission of Malaysia annual returns setting out specified information including audited accounts, names of members, details of directors and paid-up share capital. Some statutory documents may be filed electronically.

Administration of Company.

Essentially run by Board of Directors in accordance with Articles of Association. Certain matters are stipulated by Act as requiring approval of 75% of shareholders (for example, alteration in restriction of share transfer and alteration of Memorandum and Articles). Reduction in share capital requires Court order. Company can purchase its own shares under circumstances set out in Companies Act §67A.

Secretary and Directors.

Company secretary and at least two directors must be locally resident. Directors do not necessarily have to be shareholders. Directors of public companies or subsidiaries of public companies must not exceed 70 years of age. Directors must exercise their powers for proper purpose and in good faith in best interest of company. Apart from minimum standard of reasonable care, skill and diligence, directors must perform their duties according to their actual knowledge, skills and experience and that which may reasonably be expected of directors with same responsibilities. These duties of directors will be satisfied if directors make business judgments in good faith without personal interests, after reasonable investigation and in reasonable belief of acting for company's benefit.

Prohibited Acts.

Certain acts are prohibited by Act including provision of financial assistance by company for purchase of its own shares and making loans to persons (including companies) connected with directors. Prior approval at general meeting is required by company that can carry into effect any arrangement or transaction where director or substantial shareholder of company or its holding company or persons connected with such directors or substantial shareholders acquires from or disposes to company, shares or non-cash assets of “requisite value”.

Foreign Companies.

Part XI, Division 2 of Companies Act applies to foreign companies carrying on business in Malaysia and stipulates requirements including documents to be lodged with Companies Commission of Malaysia. Foreign companies must have registered office in Malaysia where all communications and notices may be served.

2.04 FOREIGN CORPORATIONS:

See topic 2.03 Corporations.

2.05 PARTNERSHIPS:

Partnership Act.

Partnership subsists between persons carrying on business in common with view of profit and is regulated by Partnership Act (Act 135) and Registration of Businesses Act (Act 197). Common ownership or sharing of profits does not of itself create partnership.

Act governs nature of partnership, relationship of persons dealing with partners, relations of partners to one another and dissolution of partnership and its consequences.

Formation of Partnership.

Partnership of more than 20 members is forbidden if purpose is for acquisition of gain. Exception is when partnership is formed for purpose of carrying on any profession or calling which is declared by Minister for Domestic Trade & Industry to be profession or calling not customarily carried on by association or partnership incorporated under Companies Act (Act 125) or formed in pursuance of some other written law or letters patent.

Partner is agent of firm and has power to bind firm. Partners of firm are bound by acts done on behalf of firm unless otherwise agreed upon between all partners. In such case, such acts will not be binding on firm with respect to persons having notice of agreement.

Liability of Partners.

Every partner is jointly liable with other partners of firm for all debts and obligations of firm incurred whilst he is partner; and after his death, his estate is also severally liable in due course of administration for such debts and obligations, so far as they remain unsatisfied but subject to prior payment of his separate debts. Limited liability partnership has been proposed but as of date, partnerships with limited liability are still not permitted, except for offshore limited partnerships in Labuan under Labuan Offshore Limited Partnerships Act (Act 565).

Taxation of Partners.

Partnership is not recognised in law as separate legal persona distinct from individuals who constitute it. Hence, for tax purposes, individual partners will be assessed on their respective shares of income.

Common Law Provisions.

Although Act contains provisions relating to creation and liability of partners, rules of equity and common law continue to apply save where inconsistent with Act.

3 BUSINESS REGULATION AND COMMERCE

3.01 BANKS AND BANKING:

Principal objects of Bank Negara Malaysia (Central Bank of Malaysia), are to: (a) Issue currency in Malaysia and keep reserves safeguarding value of currency; (b) act as banker and financial adviser to Government of Malaysia; (c) promote monetary stability and sound financial structure; (d) promote reliable, efficient and smooth operation of national payment and settlement systems and ensure national payment and settlement systems policy is directed to advantage of Malaysia; and (e) influence credit situation to advantage of Malaysia (Central Bank of Malaysia Act) (Act 519). It oversees licensing and regulation of all activities of banks and financial institutions in Malaysia, other than offshore banks operating in international offshore financial centre of Labuan which are regulated and licensed by Labuan Offshore Financial Services Authority.

All institutions carrying on banking, finance company, merchant banking, discount house and money-broking businesses are required to obtain licences from Bank Negara Malaysia under Banking and Financial Institutions Act (Act 372). Banks operating in Labuan are licensed and regulated under Offshore Banking Act (Act 443).

Islamic banking is governed by Islamic Banking Act (Act 276). Measures and incentives are given under initiative known as Malaysian International Islamic Financial Centre to promote growth of Islamic banking and finance. Banks licensed under Banking and Financial Institutions Act (Act 372) can also offer Islamic banking products and services via a dedicated division with a separate balance sheet and profit and loss account.

See also category 13 Foreign Trade and Commerce, topic 13.03 Foreign Investment; Acquisition of Assets, Mergers and Takeovers.

3.02 BILLS AND NOTES:

Bills of Exchange Act (Act 204) is substantially similar to English Bills of Exchange Act 1882 and Cheques Act 1957. Common law applies except where inconsistent with Act. Conflict rules are similar to those applicable in England.

3.03 BILLS OF SALE:

In general, chattel mortgages, other than mortgages and debentures registrable under Companies Act (Act 125), are governed by Bills of Sale Act (Act 268) which is applicable in West Malaysia only. Bill of sale as defined in Act is void unless for RM100 or more, made in prescribed form, truly sets forth consideration for which it was given and registered within seven clear days after execution thereof, or, if executed outside West Malaysia, registered within seven clear days after time at which it would, in ordinary course of post arrive in West Malaysia if posted immediately after execution thereof. Registration must be renewed at least once every 12 calendar months. Registered bills of sale are available for public inspection.

See also category 19 Mortgages, topic 19.01 Chattel Mortgages.

3.04 COMMERCIAL REGISTER:

Persons wishing to carry on business (i.e. every form of trade, commerce or other activity conducted for purpose of profit or gain) in Malaysia must seek registration either under Registration of Businesses Act (Act 197) or Companies Act (Act 125).

See also category 2 Business Organizations, topic 2.03 Corporations, topic 2.05 Partnerships; category 16 Intellectual Property, topic 16.02 Patents, topic 16.03 Trademarks; category 19 Mortgages, topic 19.01 Chattel Mortgages.

3.05 CONTRACTS:

Applicable Law.

Contracts Act (Act 136) is based on English law. Contracts must be made with free consent of parties competent to contract for lawful consideration with lawful object.

Excuses for Nonperformance.

Novation, rescission, alteration, dispensation, remittance, force majeure. Essentially same as English law.

Government Contracts.

Proceedings can be taken and enforced against Government. Such proceedings are governed by Government Proceedings Act (Act 359).

Penalty.

Damages may be stipulated in contract in event of breach but if stipulation is by way of penalty then aggrieved party is only entitled to such compensation as Court considers reasonable.

Assignments.

See category 7 Debtor and Creditor, topic 7.01 Assignments.

Privity.

Same as English law.

3.06 FRAUDS, STATUTE OF:

Fraud.

English Statute of Frauds Act inapplicable in West Malaysia. Parts of Act are probably applicable in East Malaysia though precise position uncertain because present statutes do not provide clear guidance on this issue. Case law on issue contributes to uncertainty.

3.07 INFORMATION TECHNOLOGY, INTERNET AND NEW MEDIA:

Computer Programs.

Copyright in computer programs protected as literary works under Copyright Act (Act

332). Computer programs defined as expression, in any language, code or notation, of set of instructions (whether with or without related information) intended to cause device having information processing capability to perform particular function either directly or after either conversion to another language, code or notation, or reproduction in different material form or both. Copyright vests initially in author but deemed to be transferred to person who commissioned work or author's employer, subject to any agreement between parties. Copyright is not infringed by making of reproduction of work or of computer program being adaptation of work if reproduction is made by or on behalf of owner of original copy or reproduction is made for purpose only of being used by or on behalf of owner of original copy in event that original copy is lost, destroyed or unusable.

Digital Signature Act (Act 562) and Digital Signature Regulations 1998.

Act provides that document signed with digital signature is legally binding as document signed with handwritten signature. Digital signature can be verified by reference to public key listed in valid certificate issued by licensed certification authority.

Electronic Commerce Act (Act 658).

Act applies to all commercial transactions conducted through electronic means including commercial transactions by Federal and State Governments. Related laws are Communications and Multimedia Act (Act 588); Malaysian Communications and Multimedia Commission Act (Act 589); Digital Signature Act (Act 562); Computer Crimes Act (Act 563); and Telemedicine Act (Act 564). Provision of network services or facilities or applications services must be licensed from Ministry of Energy, Water and Communications. Applications services includes any voice service, data service, content-based service or any service provided in connection with e-commerce or any other transaction or transmission service. Internet banking related services are governed by guidelines issued by Central Bank of Malaysia from time to time.

3.08 INTEREST:

General.

Interest is payable only when allowed by statute or in accordance with contract. No general prohibition on rate of interest that can be charged. However, interest rates charged by those carrying on business of moneylending in West Malaysia are capped under Moneylenders Act (Act 400) at 12% per annum for secured loans and 18% per annum for unsecured loans.

Prejudgment.

Interest may be awarded by Court in respect of late payment of damages or debts. Normally not more than 8% per annum unless otherwise ordered by Court.

Post-judgment interest is, subject to agreement of parties, at rate to be determined at discretion of Court.

3.09 LICENCES, BUSINESS AND PROFESSIONAL:

Licences are required for most businesses such as conducting remittance businesses, futures trading, stock exchange trading, carrying out finance business transactions, establishing restaurant and entertainment centres, massage parlours, conducting import and export trade, selling and distributing liquor, conducting certain manufacturing activities, acting as travel agents, driving motor vehicles and conducting businesses as moneylenders or pawnbrokers.

3.10 MONEY LAUNDERING:

Anti-Money Laundering Act (Act 613) which came into force on 15 Jan. 2002 puts

Malaysia's legislation against money laundering on par with international standards. Act has been amended to regulate terrorism financing offences and terrorist property and has been renamed as Anti-Money Laundering and Anti-Terrorism Financing Act 2001 with effect from 6 Mar. 2007. Act imposes obligations for reporting institutions such as financial institutions, solicitors, accountants and trust companies to verify identity, domicile, legal capacity, occupation or business purposes of its customers and to adopt, develop and implement sound internal policies, systems and control to detect any offence under Act. It also allows for seizing, freezing and forfeiture of properties that are proceeds of money-laundering activities.

3.11 NEGOTIABLE INSTRUMENTS:

See topic 3.02 Bills and Notes.

3.12 SALES:

Sales relating to goods are governed by Sale of Goods Act (Act 382) and other related statutes. Act is modelled on English Sale of Goods Act 1893.

Notices Required.

Generally, notices are not required under domestic sales law.

Applicable Law.

Generally, contract of sale is governed by law expressly or impliedly chosen by parties, unless choice is illegal, not bona fide, or against public policy. In absence of choice, contract is governed by law having closest and most real connection with transaction. Governing law applies to most contractual issues, including validity, interpretation and effect of terms.

Warranties.

Implied warranties are that: (a) Seller has right to sell goods free from undisclosed encumbrances; (b) goods sold are of merchantable quality, except if defect has been revealed to buyer or if buyer has examined goods and ought to have discovered it; (c) goods are fit for buyer's purpose, provided that seller sells goods in course of business, and buyer makes known to seller particular purpose, unless buyer did not rely, or it was not reasonable for him to rely, on seller; (d) in sale by description goods correspond to description; (e) in sale by sample, goods correspond to sample in quality, and that buyer will have reasonable opportunity to compare two; and (f) buyer shall have and enjoy quiet possession of goods.

Hire-Purchase Act (Act 212).

Act applies to hire-purchase of specified goods. Implied warranties are in respect of: (a) title; (b) merchantability; and (c) fitness for purpose. Latter two terms will not be implied if goods are secondhand, and hire-purchase agreement expressly excludes warranties.

Consumer Protection.

Consumer Protection Act (Act 599) affords protection to consumers in relation to consumer goods and services offered or supplied in course of any trade with exception of securities, futures contract, contract made before 15 Nov. 1999, land, services provided by professionals and healthcare provided by healthcare professionals or facilities. Act is supplemental in nature and is without prejudice to any other law regulating contractual relations. Limited protection is provided by Price Control Act (Act 121) and Control of Supplies Act (Act 122). Under Standard of Malaysia Act (Act 549), Standards and Industrial Research Institute of Malaysia may provide safety standards (either mandatory or as guidelines) for specific products. It is offence under Trade Descriptions Act (Act 87) to apply false trade description to goods or to sell goods with false trade description.

4 CITIZENSHIP

4.01 ALIENS:

See category 15 Immigration, topic 15.01 Aliens.

4.02 CITIZENSHIP:

National Service.

National Service Training Act (Act 628) compels all able-bodied citizens and permanent residents of Malaysia (male and female) between age 16 and 35 to undergo three-month national training service. Training program focuses on developing discipline and patriotism and boosting multi-racial living and is not form of military training.

4.03 IMMIGRATION:

See category 15 Immigration, topic 15.02 Immigration.

5 CIVIL ACTIONS AND PROCEDURE

5.01 ACTIONS:

Any person may sue or be sued as long as plaintiff is able to satisfy Malaysian courts that they have jurisdiction to hear matter. See category 6 Courts and Legislature, topic 6.01 Courts. If plaintiff resides outside Malaysia, he may be ordered by court to pay money into court as security for defendant's legal costs should plaintiff eventually fail to prove his claim.

Foreign Law.

Particulars of foreign law must be given if pleaded. Foreign law is to be proved as facts during trial. Experts can give oral evidence of foreign law. In absence of such evidence, Malaysian law will be applied. Exception is that Malaysian courts take judicial notice of all Public Acts passed by Parliament of U.K. and all local and personal Acts directed by it to be judicially noticed.

Pretrial Case Management.

Actions begun by writ, Court may give directions on further conduct of matter including furnishing of further particulars or ordering interrogatories.

5.02 DEPOSITIONS AND DISCOVERY:

Obtaining Evidence for Local Courts Before Trial.

Court may, in any cause or matter where it appears necessary for purposes of justice, make order for examination on oath before judge or registrar or some other person, at any place, of any person.

Deposition of person examined pursuant to order of court may be received in evidence at trial of cause or matter if: (a) party against whom evidence is offered consents; or (b) court is satisfied deponent is dead, or beyond jurisdiction of court or unable from sickness or other infirmity to attend trial. Reasonable period of notice of intention to use such deposition must be given to other party before trial.

Where person to be examined on oath is out of jurisdiction, assistance from judicial authorities of country in which that person is to be examined may be sought by applying to High Court to issue letter of request to judicial authorities for evidence of person to be examined.

Obtaining Evidence for Foreign Courts.

High Court may make orders for examination of witnesses and production of documents.

Discovery.

During summons for directions after pleadings have closed, Court will order service of list of documents providing for discovery of documents.

5.03 JUDGMENTS:

Foreign judgments obtained in superior court in any one of seven reciprocating Commonwealth countries may, with leave of Malaysian High Court, be registered in Malaysia and enforced in same manner as judgment given by Malaysian High Court under terms of Reciprocal Enforcement of Judgments Act (Act 99). Registration may be refused if judgment had been obtained by fraud, or if defendant had not been given sufficient opportunity to defend himself at foreign trial. For foreign judgments not falling within ambit of Act, fresh proceedings must be commenced against judgment debtor on judgment in which event procedural and substantive rules on establishing jurisdiction and service of documents must be satisfied.

5.04 LIMITATION OF ACTIONS:

Regulated by Limitation Act (Act 254) and Civil Law Act (Act 67).

One Year.

Action to recover any penalty or forfeiture recoverable by any written law.

Three Years.

Compensation to family of person for loss occasioned by his death.

Six Years.

Actions founded on contract or tort including claim for personal injuries; actions to enforce award; actions for account.

Twelve Years.

Actions to recover land; enforcement of any judgment.

Disability.

Limitation periods above are extended for varying periods in case of disability.

Fresh accrual of action to recover debt or other liquidated pecuniary claim on acknowledgment or part payment of claim.

Fraud or Mistake.

Where action is based upon fraud of defendant, or right of action is concealed by fraud of defendant or action is for relief from consequences of mistake, period of limitation does not begin to run until plaintiff has discovered fraud or mistake, or could with reasonable diligence have discovered it.

Arbitration.

Above applies to arbitration.

Maritime Actions.

Limitation periods are provided for in Merchant Shipping Ordinance (FM Ord. 70/1952).

See category 22 Transportation, topic 22.02 Shipping.

Sabah and Sarawak.

Limitation Ordinance Reprint (Cap. 72) of Sabah and Limitation Ordinance Reprint (Cap. 49) of Sarawak list specific limitation periods for different actions.

5.05 PROCESS:

Service of Process Within Jurisdiction.

Writ must be served personally on each defendant or sent by prepaid A.R. registered post addressed to his last known address, first service to be attempted no later than one month from writ. Writ is deemed to have been duly served if defendant's solicitor indorses on writ, statement that he accepts service of writ on behalf of defendant or where defendant enters unconditional appearance in action.

Writ commencing action in respect of contract may also be served in accordance with terms of contract if contract provides that court has jurisdiction to hear and determine action in respect of contract or apart from such term, court has jurisdiction to hear and determine such action; and contract provides that, in event of action in respect of contract being begun, process by which it is begun may be served on defendant, or on such person on his behalf as may be specified in contract.

Above rules generally apply with necessary modifications to originating summons, notice of originating motion and petition.

Where action is against corporation, writ may be served: (a) by leaving copy of it at registered office (if any) of corporation; (b) by sending copy of it by registered post addressed to corporation at office, or, if there be more offices than one at principal office of corporation, whether such office be situated within Malaysia or elsewhere; (c) by handing copy of it to secretary or to director or other principal officer of corporation; or (d) for foreign company registered under Part XI of Companies Act (Act 125) by handing copy of it to, or sending same by registered post to, person authorised to accept service of process on behalf of foreign company.

Document may be served on corporation by leaving it at or sending it by registered post to registered office of company.

If it appears to court that it is impracticable for any reason to serve document personally on person, court may make order for substituted service of that document.

Service of Process Out of Jurisdiction.

Service of notice of writ and other originating process out of jurisdiction is permissible with leave of court in many instances provided in Rules of Court, i.e. essentially where defendant or claim has some connection with forum.

Service of Foreign Process.

Service of process required in connection with foreign civil proceedings may be initiated by letter of request from foreign court or tribunal requesting service on person in Malaysia lodged in Registry of High Court and received by Minister of Foreign Affairs and which is sent by him to High Court with intimation that it is desirable that effect should be given to request.

If civil proceedings are pending before court or tribunal of foreign country, being country in which there subsists Civil Procedure Convention providing for service in Malaysia of process of tribunal of that country, letter of request may be from consular or other authority of that country requesting service on person in Malaysia of any such process received by Registrar. In both cases, letter of request must be accompanied by two copies in former case and one copy in latter case of English translation of process to be served.

6 COURTS AND LEGISLATURE

6.01 COURTS:

Superior Courts of Judicature.

Courts of Judicature Act (Act 91) establishes High Court, Court of Appeal and Federal Court.

High Court of Malaya and High Court in Sabah and Sarawak have jurisdiction to try all civil proceedings where cause of action arose, or defendant or one of several defendants resides or has his place of business, or facts on which proceedings are based exist or are alleged to have occurred, or any land, ownership of which is disputed, is situated within their respective local jurisdictions.

Tribunals such as Industrial Court and Special Commissioners of Income Tax provide specialized adjudication of disputes of technical character. Industrial Court constituted under Industrial Relations Act (Act 177) deals with trade disputes concerning employers, employees and trade unions.

Court of Appeal has appellate jurisdiction to hear and determine appeal against decision made by High Court in criminal matters, and in civil matters except where value of subject matter of claim is less than RM250,000 (unless with leave of Court of Appeal), where order is made by consent of parties; judgment or order relates to costs only, which by law are left to discretion of High Court (unless with leave of Court of Appeal) and where, by any written law judgment or order of High Court is expressly declared to be final.

Federal Court has jurisdiction to hear and determine appeals against decision made by Court of Appeal except for several non-appealable matters.

Subordinate Courts.

Subordinate Courts Act (Act 92) establishes Sessions Court, Magistrates' Courts and, in West Malaysia only, Penghulu's Courts. Sessions Courts and Magistrates' Courts have power to stay proceedings unless instituted in District in which cause of action arose, or defendant resides or has his place of business, or one of several defendants resides or has his place of business, or facts on which proceedings are based exist or are alleged to have occurred, or for other reasons desirable in interests of justice that proceedings should be had.

Judicial Appointments.

For better separation between Judicial, Executive and Legislative branches of Government and to ensure transparency at all levels of judicial appointments process, Judicial Appointments Commission Act 2009 (Act 695) was passed in 2009. Judicial Appointments Commission Act came into operation on 2 Feb. 2009 as act to provide for establishment of Judicial Appointments Commission in relation to appointment of judges of superior courts, to set out powers and functions of such Commission, to uphold continued independence of judiciary, and to provide for matters connected therewith or incidental thereto.

6.02 LAW REPORTS:

Law reports published in Malaysia include Malayan Law Journal, All Malaysia Reports and Current Law Journal.

6.03 LEGISLATURE:

See category 1 Introduction, topic 1.02 Government and Legal System.

6.04 STATUTES:

Statute law in Malaysia comprises Federal law and State law. “Federal law” means: (a) any existing law relating to matter with respect to which Parliament has power to make law, being law continued in operation under Constitution; and (b) any Act of Parliament. “State law” means: (a) any existing law relating to matter with respect to which State legislature has power to make law, being law continued in operation under Constitution; and (b) law made by State legislature.

Laws made by State legislature are called Enactments, including those made by Malay States (see category 1 Introduction, topic 1.02 Government and Legal System) before 1957 and Federal Territory of Kuala Lumpur. Laws in Sabah, Sarawak and Labuan are referred to as Ordinances. Generally, Laws of Sabah made prior to 16 Apr. 1994 would include references to Labuan. All revised laws enacted after 1 Jan. 1993 are designated by chapter (“Cap.”) numbers.

Laws that are enacted by Parliament are referred to as “Acts” but those made between 1946 and 1957 are called Ordinances. With effect from 1 Jan. 1969, continuing series of numbers omitting references to year is used, e.g. Promotion of Investments Act (Act 327). Amendment Acts carry letter “A” prefixed to number, e.g. Promotion of Investments (Amendment) Act (Act A715).

With coming into force of Constitution (Amendment)(No.2) Act (Act A206) on 1 Feb. 1974, Federal Territory of Kuala Lumpur ceased to be part of State of Selangor and all powers and jurisdiction in or in respect of Federal Territory vested in Federation. All written laws existing and in force in Federal Territory before 1 Feb. 1974 continue to be in force therein until repealed, amended or replaced by laws passed by Parliament.

Similarly, coming into force of Constitution (Amendment)(No.2) Act (Act A585) on 16 Apr. 1984, Federal Territory of Labuan ceased to be part of State of Sabah and all powers and jurisdiction in or in respect of Federal Territory vested in Federation. All written laws, other than Constitution of State of Sabah, existing and in force in Federal Territory before 16 Apr. 1984 continued to have effect therein until repealed, amended or replaced by laws passed by Parliament.

Constitution (Amendment) Act 2001 (Act A1095) which came into effect on 1 Feb. 2001, Federal Territory of Putrajaya ceased to be part of State of Selangor and all powers and jurisdiction in or in respect of Federal Territory vested in Federation. All written laws existing and in force in Federal Territory before 1 Feb. 2001 continue to be in force until repealed, amended or replaced by laws passed by Parliament.

Written laws of Selangor in force in Federal Territory of Kuala Lumpur before 1 Feb. 1974 and written laws of Sabah in force in Federal Territory of Labuan before 16 Apr. 1984, in their application to Federal Territories of Kuala Lumpur and Labuan, respectively, became federal laws.

7 DEBTOR AND CREDITOR

7.01 ASSIGNMENTS:

Assignment of Contractual Rights.

Law on legal and equitable assignment of contractual rights similar to English law. Many such rights have been made assignable by specific statutes, such as Bills of Exchange Act (Act 204—negotiable instruments), Copyright Act (Act 332—copyrights) and Companies Act (Act 125—shares in companies).

Apart from such specific statutory provisions, law on legal (i.e. statutory) assignments is contained in Civil Law Act (Act 67). Assignment of debt or other legal chose in action must be absolute, in writing, made under hand of assignor and must not purport to be by way of charge only. Express written notice of assignment must also be given to debtor, trustee or other person from whom assignor would have been entitled to receive or claim debt or chose in action. Assignment takes effect from date of notice. Such assignment is subject to all equities which would have been entitled to priority over right of assignee under law before 7 Apr. 1956 (for West Malaysia)/1 Apr. 1972 (for East Malaysia).

Failure to comply with formalities of Civil Law Act renders assignment void as legal assignment, but it may still be valid as equitable (that is, non-statutory) assignment. No particular form is required for valid equitable assignment. Transaction upon which assignee relies need not even purport to be assignment or use language of assignment. If intention of assignor clearly is that contractual right is to become property of assignee, then equity requires him to do all that is necessary to implement his intention.

Generally, assignee under legal assignment may sue upon assignment in his own name without joining assignor as party, whereas assignee under equitable assignment has to join assignor as co-plaintiff or co-defendant (except for absolute equitable assignment of equitable chose in action, where assignee can sue in his own name without joining assignor).

Rights that are incapable of assignment include rights under contracts which involve personal skill or confidence.

Assignment of Contractual Liabilities.

Similar to English law. Contractual liabilities cannot be assigned.

See also Contracts Act (Act 136) regarding person by whom promise is to be performed.

7.02 ATTACHMENT:

Attachment of property before judgment and after judgment made available under Debtors Act (Act 256). Seizure of property before judgment may be sought after issuance of writ of summons, and order for seizure may be made in West Malaysia, Sabah or Sarawak (“State”) if court is satisfied by evidence on oath that plaintiff has good cause of action against defendant and that: (a) defendant is absent from State and his place of abode cannot be discovered; (b) service of writ of summons cannot without great delay or difficulty be effected; or (c) defendant, with intent to obstruct or delay execution of judgment has, inter alia, removed, concealed, made away or about to remove, conceal or hand over to others his movable or immovable property.

7.03 BANKRUPTCY:

Law is contained in Bankruptcy Act (Act 360). Bankruptcy proceedings may be brought against individuals under various grounds, most common where creditor serves bankruptcy notice and debtor has not complied with notice within prescribed time or is unable to resist notice.

(Bankruptcy notice may be issued by creditor who has obtained final judgment or final order against debtor for any amount and execution thereon has not been stayed; notice must be in prescribed form.) “Debtor” includes any person who at time when act of bankruptcy was committed: (a) was personally present in Malaysia; (b) ordinarily resided or had place of residence in Malaysia; (c) was carrying on business in Malaysia either personally or by means of agent; or (d) was member of firm or partnership which carried on business in Malaysia.

Creditor cannot present bankruptcy petition against debtor unless: (a) debt owed by debtor to petitioning creditor or to two or more petitioning creditors aggregates at least RM30,000; (b) debt is liquidated sum payable either immediately or at some certain future time; (c) act of bankruptcy relied upon must have occurred within six months before presentation of petition; and (d) debtor has requisite connection with Malaysia.

On court's issuance of receiving order, Official Assignee is appointed receiver of debtor's property which becomes divisible among his creditors.

7.04 EXECUTIONS:

Writ of execution may be issued to enforce judgment. Most common form of execution proceedings is issuance of writ of seizure and sale of movable property of judgment debtor. Seizure and sale of immovable property are also available as form of execution of judgment. Seizure and sale of properties conducted by officers of Court.

Where judgment debtor is individual, judgment debt must be at least RM30,000 before bankruptcy proceedings may be brought against judgment debtor. Where judgment debtor is company, winding up proceedings may be brought against judgment debtor, if execution or other process issued on judgment is returned unsatisfied in whole or in part. See topic 7.03 Bankruptcy.

Debts due to be paid to judgment debtor may be garnished as form of execution proceedings. Debt must be due and owing at time of garnishment.

7.05 FRAUDULENT SALES AND CONVEYANCES:

Conveyance of real property, to person or body (other than purchaser in good faith and for valuable consideration or person or body claiming through or under such purchaser), is generally liable to be set aside in case of fraud or misrepresentation to which person or body, or agent of person or body, was party or privy.

Fraudulent conveyance constitutes act of bankruptcy and, if made within six months preceding presentation of bankruptcy petition, will be void against Official Assignee under doctrine of relation back, unless it is protected transaction under Bankruptcy Act (Act 360) (certain bona fide transactions with third parties without notice of act of bankruptcy are protected).

Voluntary settlements, although not fraudulent, may be void or voidable under certain circumstances.

7.06 GARNISHMENT:

See topic 7.04 Executions.

7.07 INSOLVENCY:

Corporate Insolvency.

Governed by Companies Act (Act 125). Companies incorporated in Malaysia may be wound up either voluntarily or compulsorily by order of court. Voluntary liquidation proceedings may be carried out by members in which event company must be solvent in that it will be able to pay its debts in full within 12 months from date of commencement of winding up company. Compulsory winding up proceedings usually brought by creditors against company on grounds that company unable to pay debts of RM500 or more.

Individual Insolvency.

See topic 7.03 Bankruptcy.

7.08 LIENS:

Generally, liens may arise from common law, equitable, contractual or statutory sources.

Common Law Lien.

Legal lien is unassignable personal right of security exercisable by person in possession of goods against owner of goods, but with no power of sale. General lien entitles person in possession to retain goods until all claims or accounts against owner are satisfied. These liens arise only by general usage or by express agreement. Particular lien is right to retain chattels until owner pays charges incurred in respect of those chattels.

Equitable lien is equitable right to charge real or personal property of another until certain specific claims are satisfied. It does not depend on possession and holder of lien has power of sale. Equitable liens arise in particular relationships, e.g., partners, vendor and purchasers, or from course of conduct or express agreement of parties. Equitable liens arising from contract are registrable under Bills of Sale Act (Act 268).

Contractual Lien.

It is matter of interpretation of contract what rights and obligations parties intended to arise from lien.

Statutory Lien.

It is question of statutory interpretation when such lien arises and what rights and obligations attach thereto.

Maritime Lien.

See category 22 Transportation, topic 22.02 Shipping.

7.09 PLEDGES:

Bailment of Pledges.

Under Contracts Act (Act 136), bailment of goods as security for payment of debt or performance of promise is called “pledge”. Bailor is called “pawnor”, and bailee is called “pawnee”. Pawnee may retain goods pledged, not only for payment of debt or performance of promise, but also for interest on debt, and all necessary expenses incurred by him in respect of possession or preservation of goods pledged.

Pawnee may not, in absence of contract to that effect, retain goods pledged for any debt or promise other than debt or promise for which they are pledged; but such contract, in absence of anything to contrary, is presumed in regard to subsequent advances made by pawnee.

Rights Relating to Pledge.

If pawnor makes default in payment of debt or performance, at stipulated time of promise in respect of which goods were pledged, pawnee may bring suit against pawnor upon debt or promise, and retain goods pledged as collateral security, or may sell goods pledged by giving pawnor reasonable notice of sale. If proceeds of sale are less than amount due in respect of debt or promise, pawnor is still liable to pay balance. If proceeds of sale exceed amount so due, pawnee is to pay over surplus to pawnor.

If time is stipulated for payment of debt, or performance of promise for which pledge is made, and pawnor defaults at stipulated time, he may redeem goods pledged at any subsequent time before they are sold, but he must also pay any expenses which have arisen from his default.

Where person pledges goods in which he has only limited interest, pledge is valid to extent of that interest.

Possession.

Person in possession of goods, bill of lading, dock-warrant, warehouse-keeper's certificate, wharfinger's certificate, or warrant or order for delivery, or any other document of title to goods, may make valid pledge of goods or documents subject to provisions of Act.

Suits by Bailee or Bailor against Wrongdoers.

If third person wrongfully deprives bailee of use or possession of goods bailed, or does them any injury, bailee is entitled to use such remedies as owner might have used in like case if no bailment had been made; and either bailor or bailee may bring suit against third person for such deprivation or injury.

Common Law and Equity.

Although Contracts Act (Act 136) contains certain provisions relating to pledges, rules of common law and equity continue to apply save where same is inconsistent with provisions of Act.

7.10 RECEIVERS:

See topics 7.03 Bankruptcy, 7.04 Executions.

8 DISPUTE RESOLUTION

8.01 ARBITRATION AND AWARD:

Arbitration Act (Act 646) which is based on UNCITRAL Model Law on International Commercial Arbitration regulates all domestic and international arbitration conducted in Malaysia from 15 Mar. 2006. However, Part III of Act contains seven provisions which apply only to domestic arbitrations unless parties to international arbitrations have “opted in” for provisions to apply to their arbitrations. One of key provisions in Part III of Act is §42 which provides for references to High Court on points of law arising during and after arbitration. Substantive law for international arbitrations will be decided based on common law principles for determining “proper law”.

Parties are free to determine number of arbitrators but in absence of determination, arbitration tribunal shall consist of three arbitrators in case of international arbitration. Where party fails to appoint or agree on arbitrator, or where there is no agreed procedure in arbitration agreement or where agreed procedure has failed, any party to arbitration may apply to Kuala Lumpur Regional Centre for Arbitration, an inter-governmental organization, established under auspices of Asian-African Legal Consultative Committee to act as appointing authority for arbitrator.

Party may, before taking steps in legal proceedings commenced by other party brought in respect of matter which is subject of arbitration, apply to court to stay proceedings and refer parties to arbitration. Court may not stay proceedings if it finds that: (a) Agreement is null and void, inoperative/incapable of being performed; or (b) there is in fact no dispute between parties with regards to matters to be referred. Subject to certain exceptions, award on arbitration agreement may, with leave of court, be enforced by entry as judgment in terms of award or by action.

8.02 MEDIATION:

Mediation has yet to be widely adopted by business community in Malaysia but Malaysian Mediation Centre and Mediation Committee under auspices of Bar Council of Malaysia are actively promoting mediation as alternative method of dispute resolution. Mediators do not generally refer to any legal authorities and play facilitating role in assisting conflicting parties to reach agreement. As mediator's decision is not binding, parties still have option of resorting to legal action in court.

9 DOCUMENTS AND RECORDS

9.01 AFFIDAVITS AND STATUTORY DECLARATIONS:

Affidavit may contain only such facts as deponent is able of his own knowledge to prove.

Affidavit sworn for purpose of being used in interlocutory proceedings may contain statements of information or belief with sources and grounds thereof. Any document referred to in affidavit must be exhibited by attaching copy of document to affidavit.

Affidavit purporting to have affixed or impressed thereon or subscribed thereto, seal or signature of court, judge, notary public or person having authority to administer oaths in Commonwealth country (and in case of any other country, seal or signature of consular officer of Commonwealth country in testimony of affidavit being taken before it or him) may be admitted in evidence without proof of it being seal or signature of that court, judge, notary public or person.

Statutory Declarations.

Any Session Court Judge, Magistrate, Commissioner for Oaths and Notary Public (subject to §4 of Notaries Public Act [Act 115]) may take or receive declaration of any person voluntarily making same in Malay or English in prescribed form. False declaration punishable under Penal Code (Act 574). Form of declaration is as follows:

I, ... do solemnly and sincerely declare that ... and I make this solemn declaration conscientiously believing the same to be true, and by virtue of the provisions of the Statutory Declarations Act, 1960.

Subscribed and solemnly declared)

by the abovenamed ... at ..... in)

the State of ... this ... day of...)

20...)

Before me,

....

(Signature of Sessions

Court Judge, Magistrate or Commissioner

for Oaths)

9.02 NOTARIES PUBLIC:

Governed by Notaries Public Act (Act 115).

Appointment.

Attorney-General is vested with power to appoint fit and proper persons to be notaries public to practise in West Malaysia or Sabah or Sarawak, or parts of these territories for such period as may be specified in appointment. Such persons must be practising advocates; or pleaders licensed before 1 Jan. 1956 under Pleaders and Petition Writers Enactment of State of Terengganu.

Attorney-General may appoint public officers as notaries public if no advocates are available for appointment in particular place.

If notary public is about to be absent from place of practice for more than one month, Attorney-General may appoint temporary notary public for up to 12 months. Temporary appointment lapses upon death or return to place of practice of notary public on account of whose departure temporary appointment was made.

Functions.

In general, notary public has and may exercise within place of practice all powers and functions ordinarily exercised by notaries public in England. But power of notary public to administer oaths or affirmations in connection with affidavits or statutory declarations, or to take or attest such affidavits or statutory declarations, is limited to certain situations as prescribed by Act.

9.03 SEALS:

Agreement under Seal.

For agreement under seal to be valid, there must either be consideration for execution of deed or agreement must come within §26 of Contracts Act (Act 136) which provides that agreement made without consideration is void, unless: (a) it is expressed in writing and registered under law (if any) applicable for time being in force for registration of such documents and is made on account of natural love and affection between parties standing in near relation to each other; (b) if agreement is promise to compensate for something done; or (c) if agreement is promise to pay debt barred by limitation law.

Practice Relating to Company Seals and Seal Books.

Company secretary usually has custody of company common seal. Directors usually pass resolution each time common seal is to be affixed to document; usually common seals are affixed and attested to by two directors or director and company secretary or director and another person authorised to attest such affixation. Name of company (whether or not it is carrying on business under business name) must appear on its seal.

Where seal is frequently used, particulars of documents sealed may be entered in Seal Book.

See also category 20 Property, topic 20.02 Deeds.

10 EMPLOYMENT

10.01 LABOUR RELATIONS:

Trade unions governed by Trade Unions Act (Act 262) and Trade Unions Regulations 1959. Act requires trade unions to be registered and confine membership to employees within particular establishment, trade, occupation or industry. No trade union can organise strike unless at least two-thirds of its total members consent by secret ballot. Relations between trade unions and employers governed by Industrial Relations Act (Act 177). Trade unions may claim recognition by employers and, upon being accorded recognition, may negotiate for collective agreements. Collective agreements cannot contain more favourable terms of employment than those specified under Employment Act (Act 265) unless approved by Minister of Human Resources. Trade disputes can be referred to Industrial Courts and once referred strikes and lockouts are prohibited.

Employment governed by Employment Act (Act 265) for West Malaysia and Federal Territory of Labuan, Labour Ordinance (Cap 67) for Sabah and Labour Ordinance (Cap 76) for Sarawak and common law principles.

Scope of Act.

Act affords protection for "employees" defined as persons who have entered into contracts of service with employers and: (a) their wages do not exceed RM1,500 per month, irrespective of their occupations; or (b) they are engaged in occupations as listed in Act (generally involving manual labour, including artisans, apprentices, drivers, seamen and domestic workers) irrespective of monthly wages earned.

In above cases, employees' rights would be governed by contract of service, collective agreement with relevant trade union (if applicable), and Act. Terms or conditions in contract which are less favourable than those prescribed in Act or related subsidiary legislation are regarded as void to that extent, and more favourable terms and conditions of Act or related subsidiary legislation will be substituted for terms and conditions struck out.

Where person is not protected by Act, he must look to contract of employment and collective agreement (if he is trade union member) for rights under terms of his employment.

Termination of Contracts.

Contract of service for unspecified period of time is deemed to run until terminated by either party by written notice in accordance with Act. Period of notice required to be given is prescribed and varies depending on length of service with employer. Either party may waive requirement on notice. If contract of service is terminated without notice or adequate notice, either party is entitled to wages in lieu of notice or unexpired term of notice, as case may be.

In event of wilful breach of contract of service by any party, other party may terminate contract without notice. Employer can dismiss employee without notice on grounds of misconduct only after due inquiry. Employer also has option of downgrading employee or imposing other lesser punishment as employer deems just and fit.

If employee is not covered by Act and contract of employment is silent, termination is usually by reasonable notice following common law.

Absence without Reasonable Excuse.

Employee is deemed to have broken contract of service if he continuously absents himself for more than two consecutive working days without employer's prior leave, unless he has reasonable excuse and has informed or attempted to inform employer beforehand or at earliest opportunity during his absence.

Payment of Wages.

Generally, wages must be paid within seven days after last day of wage period in question. Employer is deemed to have broken contract of service if he fails to pay wages in accordance with Act.

Hours of Work, Holidays and Other Conditions of Service.

(1) Hours of Work.

Subject to certain exceptions, employee has right not to work for more than: (a) five consecutive hours without period of leisure of at least 30 minutes; (b) eight hours a day; (c) spread over period of ten hours in a day; (d) 48 hours a week. Legal limit of working hours may be exceeded in emergencies. If overtime work is carried out, employee is entitled to overtime pay of at least 1.5 times his hourly rate of pay irrespective of basis on which his rate of pay is fixed.

(2) Holidays.

Employee is entitled to paid holiday at ordinary rate of pay on ten gazetted public holidays in any one calendar year.

(3) Rest Days.

Employee is entitled to one rest day per week. Before commencement of month in which rest days fall, employer must give roster informing employee of rest days in that month. Employer may require employee to work on rest day in emergencies. Employee working on rest day is entitled to be paid at various rates of pay as set out in Act.

(4) Annual Leave.

Entitlement to annual leave commensurates with length of service. Employee who does not complete 12 months of continuous service in any year is entitled to prorated annual leave.

(5) Sick Leave.

Upon examination by doctor (whether appointed by employer or not, as case may permit) or dental surgeon, employee is entitled to paid sick leave as stipulated in Act and which varies depending on duration of service with employer, if no hospitalisation is necessary. If hospitalisation is necessary, employee is generally entitled to 60 days paid sick leave in each year.

(6) Maternity Leave.

Every female employee is entitled to maternity leave for period of not less than 60 consecutive days.

(7) Termination, Lay-off and Retirement Benefits.

Employment (Termination and Lay-Off Benefits) Regulations 1980 enables employee to claim termination and lay-off benefits under certain conditions and prescribes method of calculating quantum of benefits. Minister may make regulations allowing for retirement benefits.

Employment of Non-Malaysian Citizens.

Under Employment (Restriction) Act (Act 353), non-Malaysian citizen must apply for and obtain valid employment permit before commencing employment, business, industry or undertaking in Malaysia.

Employees Provident Fund.

Employees Provident Fund Act (Act 452) requires all employers to contribute minimum of 12% of employees' monthly wages, and all employees (except foreign workers and those listed under First Schedule of Act), minimum of 11% of employee's monthly wages to Employees Provident Fund (EPF). Rate of contribution from employees has been temporarily reduced to 8% till 31 Dec. 2010 to boost economic growth in view of global financial crisis but employees can voluntarily contribute at 11% if they wish.

All employers must register their employees with EPF immediately upon employment except for those exempted under Act.

Workmen's Compensation for Injury.

In general, Workmen's Compensation Act (Act 273) enables compensation to be claimed if workman (as defined therein) suffers personal injury by accident arising out of and in course of employment; or contracts prescribed occupational disease or injury either during employment or within specified time frame after cessation of employment, and disablement or death of workman results from disease.

11 ESTATES AND TRUSTS

11.01 ADMINISTRATION:

See topic 11.04 Executors and Administrators.

11.02 DEATH:

Person is presumed dead if proved that he has not been heard from for seven years by persons who would have naturally heard from him if he had been alive.

Where two or more persons die in circumstances where uncertain who survived other, such deaths, subject to order of Court and for all purposes affecting right to title to property, are presumed to have occurred in order of seniority, so younger is deemed to have survived elder.

Married person may petition to Court to declare other party to marriage as presumed dead if petitioner has reasonable grounds for believing so. Party to marriage is presumed dead if continually absent for seven years and petitioner has no reason to believe that other person is living.

Executor or administrator of deceased may on behalf and for benefit of dependants commence action in name of executor or administrator within three years of death against person who by reason of his wrongful act, neglect or default caused death to deceased person. If no executor or administrator of deceased or no action is brought within six months after death by and in name of executor or administrator of deceased, action may be brought by and in name of all or any of persons for whose benefit executor or administrator could have brought it. This includes spouse, parent, grandparent, great- grandparent, child, grandchild or great-grandchild of deceased or person who is, or is issue of, brother, sister, uncle or aunt of deceased. Damages recoverable would include pecuniary loss to estate, bereavement and funeral expenses.

11.03 DESCENT AND DISTRIBUTION:

In testacy cases, distribution of deceased's estate governed by properly executed will.

In intestacy cases, distribution of movable property of deceased regulated by law of country in which he was domiciled at time of his death while that of his immovable property is regulated by Distribution Act (Act 300) (West Malaysia and Sarawak) and Intestates' Succession Ordinance (Ord. 1/1960) (Sabah). Sabah Ordinance is modelled on Intestates' Estates Act 1952 of England.

In effecting distribution in intestacy, if deceased is husband and leaves spouse but no issue, spouse gets half share of estate and balance half share will be distributed to parents if alive; if not, to brothers and sisters; if no brothers or sisters, then to grandparents. If there are no parents, brothers, sisters and grandparents, then spouse takes all. If deceased is wife and leaves spouse but no issue, spouse takes all.

If deceased is husband and leaves spouse and issue, wife gets one-third of estate and remaining share distributed equally between children. If deceased is wife and leaves spouse and issue, spouse takes all. If deceased leaves no surviving spouse, descendants or parents, estate will be distributed equally amongst deceased's brothers and sisters and in case any of them is dead, their descendants are entitled to share which he or she would have taken.

Grandparents will take whole estate in equal portions if no surviving spouse, descendants, parents, brothers and sisters or children of such brothers and sisters. Uncles and aunts take whole estate in equal portions if no surviving spouse, descendants, parents, brothers and sisters or children of such brothers and sisters or grandparents. If deceased leaves no spouse, issue, parents, grandparents, brothers and sisters, uncles or aunts, then granduncles and grandaunts take in equal shares.

Government is entitled to whole estate in default of distribution under foregoing rules.

Distribution provided under Act may be affected by Inheritance (Family Provision) Act (Act 39) which provides for maintenance of dependants in testacies and intestacies.

Law of Islamic Inheritance.

Rules of intestate succession set out above do not apply to Muslims and natives in East Malaysia. Distribution takes place only after legacies and debts, including funeral expenses, are paid out of property left behind by deceased. If deceased is husband, and leaves no issue and no parent, widow gets one-quarter. If deceased is wife and no issue and no parent, widower gets one-half. If deceased husband leaves issue and no parent, spouse is entitled to one-eighth of estate. On other hand, widower is entitled to one-half of deceased wife's estate. Remaining share is distributed amongst children of deceased. Female children's share is generally half of male children's share.

If deceased leaves surviving spouse and no issue but parents, widower entitled to one-half of estate, and father and mother get two-thirds and one-third of remaining estate respectively. As for widow, she will be entitled to one-quarter share of husband's estate, and father and mother get two-thirds and one-third of remaining estate respectively.

If deceased leaves parents but no surviving spouse and no children, mother will get one-third and father will get remaining two-thirds. If deceased leaves parents and children but no spouse, each parent takes one-sixth share while remaining share will be distributed among children.

11.04 EXECUTORS AND ADMINISTRATORS:

Upon death of person, whole of his real and personal property devolves to his personal representatives, who in case where he has left will are his executors and in case where he has died intestate are his administrators.

Appointment.

Executors are normally appointed by will. Such appointment may either be express or implied. Administrators are appointed by court in case of intestacy, and in case of testacy where executor is not named in will.

Authority of Administrator and Executor.

Administrator obtains authority solely from grant of letters of administration. Until grant is obtained, administrator has no authority. Executor's authority stems from will. He has authority to conduct affairs of deceased, moment deceased dies. It is purely to lend authority and vest proper title that letters of probate are obtained.

Grant of Probate on Testacy.

Executors appointed under will can apply for Grant of Probate.

Letters of Administration on Intestacy.

Number of administrators who may petition for letters of administration cannot exceed four. If there is minority or life interest, then minimum of two persons required as administrators. If no such interest, one administrator will suffice. If trust corporation applies for letters of administration, then requirement of additional person is dispensed with.

Letters of administration are usually granted to next-of-kin in accordance with priorities to entitlement of estate under Distribution Act (Act 300) (West Malaysia and Sarawak) and Intestate Succession Ordinance (Ord. 1/1960) (Sabah). Official Administrator may also administer estate if no application for letters of administration has been made, provided estate is worth less than RM50,000.

Renunciation.

Executor or administrator may renounce his right to apply for letters of representation.

Grant of Probate and Letters of Administration.

Grant of Probate and Letters of Administration are normally given as matter of course once petition is filed.

Domicile.

Before granting letters of representation, court requires proof of domicile. Deceased's domicile will determine validity of his will or right of his personal representatives to apply for letters of representation and question of priorities between persons contending for letters of representation.

General Powers and Duties.

In addition to powers conferred by deceased's will, personal representative is also conferred certain powers in his capacity as trustee under Trustee Acts (Act 208). Duties of personal representatives revolve around calling in estate's assets, determining beneficiaries and shares entitled to and thereafter distributing assets.

Assets and Liabilities.

Inventory of assets and liabilities of estate is first step to be taken by personal representatives to determine amount of estate duty payable and for purposes of distribution.

Creditors.

After calling in all assets of deceased and payment of funeral and testamentary expenses and estate duty, executor or administrator must ensure that debts of deceased are paid. Where estate is large, executor or administrator must place advertisement in Gazette or newspapers to give notice to all creditors that they ought to submit their claims within period stipulated, after which distribution will be made. If claim is not presented within time limited in advertisement, personal representative may distribute estate without being personally liable for debts which he had no knowledge of, but creditor may follow assets to beneficiaries.

Accounts.

Executor or administrator in winding up administration of estate must submit accounts for beneficiaries' perusal and approval before distribution.

Distribution.

It is duty of administrator in case of intestacy to distribute estate in accordance with laws on intestate succession, Distribution Act (Act 300) (West Malaysia and Sarawak) and Intestate Succession Ordinance (Ord. 1/1960) (Sabah). In case of testacy, duty of personal representative to carry out terms of will. No distribution of estate until debts of estate are disposed of.

Resealing of Letters of Representation.

Grant of probate or letters of administration by Commonwealth country may be resealed by High Court. Once such grant is resealed, it has same effect as grant of probate or letters of administration of High Court.

11.05 TRUSTS:

Number of Trustees.

Trustee Act (Act 208) limits number of trustees to four, except in case of property vested in trustees for charitable, religious or public purposes where there is no restriction on number of trustees.

Powers of Trustee.

These include powers expressly given by trust instrument and (generally, subject to any contrary intention expressed in trust instrument) powers conferred by Act, including following: (a) trustee for sale has power to sell or concur in selling all or any part of property; (b) trustees can give receipt which is good discharge. However, sole trustee other than trust corporation cannot give valid receipt for proceeds of sale or other capital money arising under trust for sale of land; (c) trustees can insure against loss or damage by fire any building or other insurable property to any amount, including amount of any insurance already on foot, up to full value of building or property, except where trust instrument forbids it or they are bound forthwith to convey building or property absolutely to any beneficiary upon being requested to do so.

Trusts under Torrens System.

Torrens System of registered conveyancing cannot be used to create trust over real property. This means that document creating trust cannot rely on registration to give effect to settlement. However, valid trust created outside register in conformity with trust principles may be protected by caveat or other means available under system.

11.06 WILLS:

Wills Act (Act 346) governs. Any person of sound mind and of age of majority may make will. Infant cannot make will, unless he is soldier in actual military service, or mariner or seaman at sea. See category 12 Family, topic 12.03 Infants.

Formalities of Execution.

Every will must be in writing, signed at foot or end thereof by testator, or by some other person in his presence and by his direction, and signature must be made or acknowledged by testator as signature to his will in presence of two or more witnesses present at same time, and those witnesses must subscribe will in presence of testator. Gift to attesting witness or his spouse is void.

Alterations, including obliteration and interlineation, made after execution must be executed by placing signature or initials of testator and witnesses on will.

Revocation.

Will or part thereof may be revoked by another will or codicil duly executed, or by declaring intention to revoke it and duly executed as will or by burning, tearing or otherwise destroying will by testator, or by some person in his presence and by his direction, with intention of revoking it. With certain exceptions, will is revoked by testator's marriage.

Foreign Wills.

Will is treated as properly executed if its execution conforms to manner required by Act or law in force in: (a) place where it was executed; or (b) place where testator was domiciled, either at time of execution or at death.

Allowance for Maintenance of Dependants.

Dependant of deceased may apply to Court for share of deceased's net estate for maintenance of that dependant under Inheritance (Family Provision) Act (Act 39). If Court is satisfied that disposition of deceased's estate effected by his will is not such as to make reasonable provision for maintenance of that dependant, Court may order such provision to be made out of deceased's net estate as it thinks fit. Act applies throughout Malaysia except estates of deceased Muslims or natives in East Malaysia.

Act is not restricted to provisions in wills: application may be made in cases of intestacies as well. However, if surviving spouse had been provided for with not less than two-thirds of income of net estate and where only other dependants are children, then no application can be made.

Persons for whom provision may be made are spouse, unmarried daughter, infant son or daughter or son who is, by reason of some mental or physical disability, incapable of maintaining herself or himself.

Court will on application made under Act have regard to any past, present or future capital or income from any source of dependant of deceased to whom application relates.

Application under Act must be made within six months from date on which representation in regard to deceased's estate is first taken out. However, Court will allow extension of time if Court feels that strict compliance with requirements of Act may prejudice interests of dependant.

Wills Made by Muslims.

In Islamic law, testator can bequeath only a third of his property with consent of his lawful beneficiaries. No one, however, can make bequest in respect of any legal Quranic heir. In other words, one cannot increase or decrease portions of those relatives whose portions are fixed in Quran nor can one deprive legal heir through bequest.

12 FAMILY

12.01 ADOPTION:

Governed by Adoption Act (Act 257) in West Malaysia and Adoption Ordinance (Ord. 23/1960) for Sabah and Adoption Ordinance (Cap 91) for Sarawak. Adoption of Muslim is governed by different provisions. Court or District Officer in case of Sarawak may, subject to provisions of Act or Ordinance, make order authorising applicant to adopt child. Child is defined as unmarried person under age of 21 (no definition of child in Adoption Ordinance (Cap 91) for Sarawak and in West Malaysia child includes female under that age who has been divorced).

In West Malaysia and Sabah, applicant must: (a) Have attained age of 25 and be at least 21 years older than child; (b) must have attained age of 21 and be relative of child; or (c) be father or mother of child and consent must be obtained from person who is parent/guardian of child or who is liable to contribute to support of child. Consent can be dispensed with by Court if: (a) In case of parent/guardian of child, he has abandoned, neglected or persistently ill-treated child; (b) in case of person liable to contribute to support of child, he has persistently neglected or refused to contribute; (c) in any case, person whose consent is required cannot be found, is incapable of giving consent or his consent is unreasonably withheld; or (d) in any case, in accordance with any written law relating to adoption of children for time being in force in any country any competent authority has given permission or granted licence authorising care and possession of child to be transferred to applicant (West Malaysia) or if court is of opinion that consent ought in all circumstances of case be dispensed with (Sabah).

In Sarawak, any person may adopt child. Consent of parent/guardian of child may be dispensed with if District Officer is satisfied that parent of child is not fit and proper to have care and custody of child.

Upon making of adoption order, all rights, duties, liabilities and obligations of parent or guardian of child are extinguished and vest in, and are exercisable by and enforceable against, applicant. Adopted child is treated in law as if child were child born in wedlock to adopting parents and has all rights and privileges of legitimate child in respect of rights of inheritance, right for provision under Inheritance (Family Provisions Act) (Act 39) (Act not applicable to East Malaysia or estates of deceased Muslims) and right to be considered “child of marriage” for purposes of Law Reform (Marriage and Divorce) Act (Act 164).

Malaysia has not ratified 1965 Hague Convention of Jurisdiction, Applicable Law and Recognition of Decrees and does not recognize inter-country adoption.

12.02 DIVORCE:

Governed by Law Reform (Marriage and Divorce) Act (Act 164). According to Act, court has jurisdiction to entertain proceedings for divorce, presumption of death and divorce, judicial separation or nullity of marriage if: (a) Marriage has been registered under Act; or (b) marriage is deemed to be registered under Act, or was solemnised under law which expressly or impliedly provides that marriage must be monogamous; or (c) either of parties to marriage is domiciled in Malaysia at commencement of proceedings.

Court has right to restrict petition of divorce within first two years of marriage with exception of hardship cases and conversion to Islam. Grounds for divorce are: (a) After three months from date of conversion to Islam, other party not so converted may petition for divorce; (b) after two years of marriage, both husband and wife freely consent to divorce and present joint petition; or (c) either party to marriage may petition for divorce on ground that marriage has irretrievably broken down. In its inquiry on breakdown of marriage court will have regard to one or more of following facts: (a) Respondent has committed adultery and petitioner finds it intolerable to live with respondent; (b) respondent has behaved in such way that petitioner cannot reasonably be expected to live with respondent; (c) respondent has deserted petitioner for continuous period of at least two years immediately preceding presentation of petition; or (d) parties to marriage have lived apart for continuous period of at least two years immediately preceding presentation of petition.

Married person who alleges that reasonable grounds exist for supposing that other party to marriage is dead may present petition to Court to have it presumed that other party is dead and to have marriage dissolved. See category 11 Estates and Trusts, topic 11.02 Death.

Decree nisi will be granted in first instance and will not be made absolute until expiration of three months unless court fixes shorter time.

When granting decree of divorce, Court has power to order division of assets acquired by them during marriage, payment of maintenance and custody of children of marriage.

Divorce in Islam.

Divorce in Islam, although permitted, is not encouraged. Divorce can be effected by Talak, Khu'lu or Fasakh. Divorce by Talak may be effected once husband utters words of divorce. Where husband does not agree to divorce wife but agrees to divorce by Khu'lu (redemption), Syariah Court may assess amount of payment to be made by wife according to her status and means. Husband will then have to pronounce divorce by redemption.

Either party may apply for and obtain decree of Fasakh (Divorce or Rescission by judicial decree) on any ground which is recognised as valid for dissolution of marriage by Fasakh in Islamic law which includes defects in either spouse such as insanity (whether intermittent or permanent), leprosy, vitiligo and dangerous contagious disease or apostasy of either spouse.

When registering divorce, President of Syariah Court has power to order: (a) division of harta sepencarian (assets acquired by them during marriage); (b) payment of maintenance during Iddah (period of continence) and payment of mutaah (consolatory gift) which wife is entitled to in event of divorce by Talak and Fasakh; and (c) custody of children of marriage.

12.03 INFANTS:

Age of Majority.

Age of majority is 18 years.

Actions By or Against Infant.

Subject to certain exceptions, can only be commenced by next friend and defended by guardian ad litem.

Contracts with Infants.

Following common law, contracts generally unenforceable as against infant and voidable at option of infant, except contracts for necessaries (necessary goods and services supplied to infant) and contracts of apprenticeship, education and service. Such voidable contracts may be of two types: (a) binding on infant unless repudiated during minority within reasonable time of infant attaining majority; or (b) not binding on infant unless and until ratified after attaining majority.

Child (below 14 years) or young person (14 years and above but below 16 years) is competent to enter into contract of service otherwise than as employer and may sue without next friend or defend action without guardian ad litem. However, damages and indemnity not recoverable from child or young person for breach of contract of service.

12.04 MARRIAGE:

All marriages contracted in Malaysia and of persons domiciled in Malaysia after Mar. 1, 1982 must be monogamous and must comply with formalities laid down in Law Reform (Marriage and Divorce) Act (Act 164). Act does not apply to Muslims or person married under Muslim law, any native of Sabah or Sarawak or any aborigines of West Malaysia whose marriage and divorce is governed by native customary law unless he elects to marry under Act.

Person cannot marry: His/her (a) grandparent, parent, child or grandchild, sister or brother, great-aunt or great-uncle, aunt or uncle, niece or nephew, great-niece or great-nephew as case may be; (b) grandparent or parent, child or grandchild of his/her spouse or former spouse; (c) former spouse of his/her grandparent or parent, child or grandchild; or (d) person whom he or she has adopted or by whom he or she has been adopted. However, Hindu can marry under Hindu law or custom his sister's daughter or her mother's brother. Relationships of half blood are equivalent to relationships of full blood.

Person under age of 21 years old must obtain written consent of: (a) His/her father; (b) if his/her father is dead or is illegitimate, his/her mother; (c) if adopted, his/her adopted father or if adopted father is dead, his/her adopted mother; or (c) if parents (natural/adopted) are dead person standing in loco parentis.

Each party intending to marry in Malaysia must notify Registrar of Marriages in district in which parties have been resident for period of seven days immediately preceding notice. Notice is to be posted by Registrar of Marriages until he grants his certificate or until three months have elapsed, whichever is earlier. Any person may lodge caveat against marriage. Registrar of Marriages only issues marriage certificate upon expiry of 21 days notice of intended marriage. If notice does not take place within six months after date of publication of notice, fresh notice will be required.

Chief Minister may, if he thinks fit, dispense with notice and grant special marriage licence authorising solemnisation of marriage between parties named in that licence. However he may only exercise his discretion if there is urgent need and good reason. Special licence is valid for one month from date of issue.

Solemnisation of marriage can take place any time during validity of marriage certificate. Solemnisation of marriage may be conducted only by Registrar and in presence of at least two credible witnesses.

Either party to marriage can petition for decree of nullity of marriage on ground that marriage is void in that: (a) either party was already lawfully married at date of marriage; (b) male under 18 years of age and female between ages of 16 and 18 years marries without special licence; (c) parties are within prohibited degrees as stated above; or (d) parties are not respectively male and female.

Marriage is voidable on following grounds: (a) non-consummation due to incapacity of either party; (b) non-consummation due to wilful refusal of respondent; (c) either party did not validly consent to marriage due to duress, mistake, unsoundness of mind or otherwise; (d) either party was suffering from mental disorder within meaning of Mental Disorders Ordinance (FM Ord. 31/1952) or of such kind or to such extent as to be unfit for marriage; (e) respondent was suffering from venereal disease in communicable form at time of marriage; or (f) respondent was pregnant by some person other than petitioner at time of marriage.

Marriage will not be avoided where it will result in injustice to respondent, or petitioner with knowledge that it was open to him to have marriage avoided, led respondent reasonably to believe that he would not seek to petition to do so.

Muslim Marriages.

For marriage to be valid in Islam, there must be offer of marriage by one party which offer must be accepted by other party. Words must indicate with reasonable certainty that marriage has been contracted. There must be two witnesses who are sane and adult male Muslims.

Marriage may be solemnised by “Wali”, “Kathi” or “Naib Kathi”. Where “Wali” refuses his consent to marriage, bride may apply to “Kathi” who, if satisfied after due inquiry that consent was unreasonably withheld, may solemnise marriage and act as bride's “Wali”.

13 FOREIGN TRADE AND COMMERCE

13.01 CUSTOMS:

Customs duty is levied on certain categories of goods, including tobacco, liquors, motorcars and certain electrical goods. Applicable rates of customs duty and types of dutiable goods are found in Customs Act (Act 235) and its regulations. See also topics 13.03 Foreign Investment; 13.04 Foreign Trade Regulations.

13.02 EXCHANGE CONTROL:

Legal basis for exchange control is Exchange Control Act (Act 17) and Exchange Control Notices (known as ECMs) issued from time to time by Bank Negara Malaysia (Central Bank of Malaysia). Exchange control regulations are applied uniformly to transactions with all countries except Israel, for which special restrictions apply.

Capital Controls.

Nonresidents can bring in any amount of foreign currency notes and/or traveller's cheques provided that any amounts in excess of equivalent of US$10,000 must be declared. Nonresidents would need to seek permission from Controller of Foreign Exchange (Controller) if amount of foreign currency notes to be carried out of Malaysia exceeds amount brought in and is more than equivalent of US$10,000. Both residents and nonresidents must obtain permission from Controller and declare Ringgit exceeding RM1,000 being brought in or out of Malaysia.

All payments, including repatriation of capital and remittance of profits, dividends, royalties, fees and commissions are freely permitted.

There is no restriction on payments to nonresidents for import for goods and services but such payments must be made in foreign currency (except for Israel, for which prior permission is required).

Licensed onshore banks may extend any amount of foreign currency credit facilities to non-residents for any purpose. In addition, a resident may extend any amount of Ringgit credit facilities to non-resident non-bank companies or individuals to finance activities in the real sector in Malaysia and to finance or refinance the purchase of residential and commercial properties in Malaysia (purchase of land only is not permitted). A non-resident non-bank company may lend any amount of foreign currency to its resident subsidiaries for any purpose and any amount of Ringgit to its resident subsidiaries to finance activities in the real sector in Malaysia. A non-resident non-bank company or individual may lend up to RM1 million in aggregate to a resident company or individual for use in Malaysia.

Entities incorporated under Offshore Companies Act (Act 441) are declared as nonresidents for exchange control purposes.

See also topic 13.03 Foreign Investment.

13.03 FOREIGN INVESTMENT:

Acquisition of Assets, Mergers and Takeovers.

Government of Malaysia established Foreign Investment Committee (``FIC'') in 1974 to enhance level of Bumiputra (indigenous Malaysian) participation in economy and FIC implemented policy guidelines that generally restrict foreign ownership to 30%. Over time as Malaysia liberalised its economy, restrictions under FIC guidelines have been progressively relaxed and were finally repealed on 30 June 2009. However, macro objective of 30% Bumiputra equity participation has not been abandoned completely as equity conditions for investments will continue to be imposed by relevant sector regulators. In particular, foreign equity restrictions will continue to be applied in ``strategic industries'' such as telecommunication, ports, energy and transport.

Real Property.

Prior approval of relevant State Authorities is required before noncitizen or foreign company may acquire land or interest in land, other than industrial land, by way of disposal or effecting dealings with respect to alienated land or interest in land. Where order for sale is made under National Land Code (Act 56/65), noncitizen of foreign company is not entitled to bid at sale where land is categorised “agriculture” or “building” or subject to condition that it be used for agriculture or building purpose without approval of State Authority.

Foreign interests are restricted from acquiring: (a) All properties under category of low and medium low cost determined by State Authority; (b) all properties built on Malay reserve land; (c) properties allocated to Bumiputera in any property development project determined by State Authority; (d) stall and service workshop; (e) agricultural land developed on basis of homestead concept, and (f) properties below RM500,000.

Approval from Economic Planning Unit, unit of Prime Minister's department is required for purchase of properties from Bumiputra or Government interests valued at RM20 million and above. Guidelines also impose conditions for foreign interests to be registered under local company with certain minimum paid up capital and Bumiputra equity if they acquire such properties that require approval.

Exchange Control.

Foreign exchange administration rules have been progressively liberalized to make Malaysia attractive and competitive investment destination. See also topic 13.02 Exchange Control.

Tax Incentives.

Foreign investment is encouraged. Various tax incentives are given for manufacturing, agriculture and tourism sectors. General incentives include granting of Pioneer Status and Investment Tax Allowance (ITA) to eligible companies. Eligibility is determined according to priorities termed as “promoted activities” or “promoted products” as determined by Minister of International Trade and Industry. Reinvestment Allowance is granted to manufacturing companies and agricultural projects which incur qualifying capital expenditure for expansion of production capacity, modernisation and upgrading of production facilities and diversification into related products. Specific incentives are also granted for high-technology industries, strategic industries, green technology, biotechnology, export, research and development, training, industrial adjustment, small-scale companies, storage, treatment and disposal of toxic and hazardous wastes and Operational Headquarters status. In agricultural sector, incentives include agricultural allowance and deduction for capital expenditure on approved agricultural projects. Generally, other incentives include incentives for forest plantation projects, Infrastructure Allowance for projects located in Sabah, Sarawak and ‘Eastern Corridor’ of Peninsular Malaysia, tariff protection, exemption from import duty and raw materials/components, drawback of excise duty on parts, ingredients or packaging materials, drawback on sales tax on materials used in manufacture and exemption from import duty and sales tax on machinery and equipment. Tax incentives are also given to companies carrying out "Qualifying Activities" for six targeted sectors, namely: creative industries, educational services, financial advisory and consulting, healthcare, logistic and tourism related services in designated zones within Iskandar Malaysia, special economic zone that has been created in Johor, south of Peninsular Malaysia to attract foreign investments.

13.04 FOREIGN TRADE REGULATIONS:

Customs duty is levied on some categories of goods, including tobacco, cigarettes, liquor and petroleum products imported into or exported from Malaysia. Applicable rates of customs duty and types of dutiable goods may be found in Customs Act (Act 235) and regulations made thereunder.

Areas specially designated for manufacturing establishments producing or assembling products essentially for export are known as Free Zones (FZ). Goods exported abroad from FZs are not liable to customs duty.

Labuan, Langkawi and Tioman are also designated free-trade zones. No export duty is payable upon goods exported from Labuan, Langkawi or Tioman and no import duty is payable upon goods imported into Labuan, Langkawi or Tioman other than petroleum and petroleum products and goods gazetted from time to time as dutiable by relevant Minister. However, customs duty is payable in respect of dutiable goods exported to Labuan, Langkawi or Tioman from principal customs areas and dutiable goods imported from Labuan, Langkawi or Tioman into principal customs areas in Malaysia, as if they were exports to or imports from abroad.

14 HEALTH

14.01 FOOD AND DRUGS:

Food and Drug Regulation and Control.

This empowers Ministry to search premises and seize products and to take action against persons liable for offences under various Acts.

Sale of Drugs Act (Act 368).

"Drugs" defined to include any substance, product or article intended to be used or capable or purported or claimed to be capable of being used on humans or any animal whether internally or externally for medicinal purposes. Offences under Act include person who sells adulterated drug, false or misleading statements on label of drug sold in package, drugs containing prohibitive substance, drugs containing greater proportion of any substance than permitted.

Dangerous Drugs Act (Act 234).

Act to make further and better provisions for regulating importation, exportation, manufacture, sale and use of opium and certain other dangerous drugs and substances; to make special provisions relating to jurisdiction of courts in respect of offences and their trial. Certain restrictions on importation, exportation and possession of raw opium, coca leaves, poppy straw and cannabis. Informants' evidence relating to drug cases as agent provocateur is admissible in court and protection of informants from disclosing names and addresses is given under Act.

Food Act (Act 281).

Act to protect public against health hazards and fraud in preparation, sale and use of food. Empowers Ministry officials/inspectors to examine, obtain, enter any premises for purposes of inspection for sanitary and hygienic conditions. It is offence for false labeling or description of food or preparing or selling adulterated food.

14.02 PUBLIC HEALTH:

Regulated and supervised by Ministry of Health. Ministry's functions are to improve health delivery system and develop and expand medical health; dental services in respect of public health; research and identify epidemiology of important diseases and its prevention; establish proper system for supply of pharmaceutical and other requirements for health programmes; ensure that importation, management and sales of pharmaceutical products including traditional medicine and cosmetics are properly handled and according to regulations; and to monitor registration of medical practitioners in Malaysia. Wide-ranging statutes govern different areas of health issues including Dental Act (Act 51), Food Act (Act 281), Human Tissues Act (Act 130), Dangerous Drugs Act (Act 234), Medical Act (Act 50), Private Hospitals Act (Act 43), Mental Disorders Ordinance (FM Ord. 31/1952), Nurses Act (Act 14), Prevention and Control of Infectious Diseases Act (Act 342), etc.

15 IMMIGRATION

15.01 ALIENS:

See topic 15.02 Immigration.

15.02 IMMIGRATION:

Governed by Immigration Act (Act 155).

General.

Non-Malaysian citizen can enter Malaysia only if he has valid Entry or Re-entry Permit or name endorsed on Entry or Re-entry Permit of accompanying husband/father or if he has valid Pass or if specially exempted by Minister's order. He must not be prohibited immigrant.

Passes.

Controller may issue following passes for purpose of entitling person to enter and remain temporarily in Malaysia:

Employment Pass or Work Pass.

Employment Pass is required if foreigner wishes to take up employment under contract of service with Federal or State government or City Council or Municipality, or to take up employment under contract with approved company or firm at monthly salary of at least RM5,000. Nonprofessionals are required to take up employment under contract for minimum period of two years.

Foreign spouses of Malaysian citizens (legally married under Malaysian law) may apply for employment pass with evidence of their marriage and letter of appointment for a permanent job regardless of salary.

Work Pass necessary for person intending to work in Sabah. Following conditions must be satisfied: (a) he must be qualified to work or undertake employment in that particular trade, business or calling; (b) there must not already be unemployment in Sabah of persons skilled in that particular class of trade, business or calling; and (c) his taking up of such work and employment will generally benefit Sabah.

Dependant's Pass.

Wife and dependant children of Employment Pass or Professional Visit Pass holder may apply for Dependant's Passes to enable them to remain with him in Malaysia. Holder of Dependant's Pass is not allowed to engage in any form of paid employment in Malaysia without Controller's written consent.

Visit Pass.

May be issued to person wishing to enter Malaysia on social, business or professional visit, for temporary employment or as tourist. Unless Minister has consented otherwise in writing, person holding Visit Pass as tourist or for purpose of social visit or as dependant child of Work Pass Holder cannot engage in any form of paid employment or in any business or professional occupation and cannot give political lectures, speeches, talks or engage in any political activity in Malaysia. Foreigners who fulfill certain criteria can apply under Malaysia My Second Home Programme to stay in Malaysia (together with their spouses, unmarried children below 21 years old and parents above 60 years old as dependants) on social visit pass with multiple entry visa for ten years, renewable indefinitely.

Student's Pass.

May be issued to person who has been accepted as student by recognised university or approved educational institution in Malaysia; or who possesses certificate issued by Minister charged with responsibility for education stating that it is desirable that he should be accepted as student at specified educational institution in Malaysia and that he has been so accepted.

Transit Pass.

May be issued to any person desiring to enter country for purpose of passing through country to destination outside it and that he is in possession of or in position to obtain such valid documents required to permit entry to his destination country. Entitles holder to enter and remain in country for such period not exceeding one month.

Special Pass.

May be issued to any person if Controller considers desirable to afford opportunity of making enquiry for purpose of determining whether such person is entitled to Entry Permit or whether such person is prohibited immigrant or for any other special reasons.

Landing Pass.

May be issued to any through passenger travelling in, or any member of crew of any vessel or aircraft on arrival; in any port or airport.

Permanent Residence.

Entry Permits may be issued to foreigners wishing to acquire permanent residence in Malaysia. Re-entry Permits may be granted to Malaysian Permanent Residents who intend to re-enter Malaysia. Permanent residence granted to applicants on case-by-case basis in accordance with immigration policies of Government.

Security Deposit.

Security by deposit or otherwise may have to be furnished as condition for issue of Pass, to ensure compliance with immigration provisions or conditions imposed in respect of Pass.

16 INTELLECTUAL PROPERTY

16.01 COPYRIGHT AND REGISTERED DESIGNS:

Copyright.

Statute.

Copyright Act (Act 332).

Treaties.

Malaysia is signatory to Berne Convention and Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS); hence, nationals and residents of member countries enjoy copyright protection in Malaysia.

Protection.

Works covered under Act comprise literary (which includes dramatic works and computer programmes), musical and artistic works, sound recordings, films, broadcasts, and typographical format of published editions of work. Derivative works derived from these subject matters are protected as "original works". No registration is required.

Copyright in literary, artistic and musical works ("works"), sound recordings and films extends to: (a) Making reproductions in material form; (b) communicating, performing, showing or playing to public; (c) broadcasting; and (d) distributing copies to public by sale, rental, lease or lending, of whole work or substantial part thereof, either in its original or derivative form.

For broadcasts, copyright extends to recording, reproduction and rebroadcasting of whole or substantial part of broadcasts, and performance in public of broadcasts before paying audience (for television broadcasts, includes right to take still photographs from such broadcast).

For published editions of works, copyright shall subsist in every published edition of which either first publication of edition took place in Malaysia or publisher of edition was qualified person at date of first publication.

Basic term of copyright is life of author plus 50 years after his death. For published editions, sound recordings, photographs, films (including video films) broadcasts and life performances, term of copyright is 50 years from beginning of calendar year following year in which work was first published, broadcast or performed.

Assignment.

Copyright may be assigned, but assignment must be in writing and signed by or on behalf of assignor.

Licence.

Copyright may be licensed either on exclusive or non-exclusive basis, and must be in writing.

Infringement of copyright takes place where, without permission of copyright owner, rights reserved exclusively to copyright owner is exercised by someone other than copyright owner. Person who imports article for purposes of selling, letting for hire or by way of trade offering or exposing for sale or hire, distributing article for purpose of trade or exhibiting article in public by way of trade or person who sells, lets for hire or by way of trade offers or exposes for sale or hire or exhibits article in public by way of trade and knows or reasonably ought to know that making of article was without consent of owner is liable for copyright infringement. Copyright infringement is criminal offence punishable with heavy penalties. Civil remedies include injunctions, damages or account of profits and delivery up of infringing articles and tools for making infringing copies.

Registered Design.

Statute.

Industrial Designs Act (Act 552) in effect from 1 Sept. 1999. Industrial Designs Regulations 1999.

Procedure.

From 1 Sept. 1999, applications for registration of designs can be filed locally. Designs registered in UK and in force immediately before 1 Sept. 1999 are deemed protected under Industrial Designs Act (Act 552). Applicant of design application filed in UK under Registered Designs Act 1949 but which was still pending on 1 Sept. 1999 faces deadline of 1 Sept. 2000 to apply for industrial design application in Malaysia. Application will be accorded UK priority date.

Registrability.

To be registrable, design must: (a) Be new; (b) appeal to eye; and (c) not contradict public order or morality.

Rights.

Registered proprietor of design has monopoly over its use. No need to prove copying (cf copyright). Registration gives proprietor exclusive right: (a) To make or import: (i) for sale or hire, or (ii) for use for purposes of trade or business; or (b) to sell, hire or offer or expose for sale or hire, article to which registered design is applied.

Duration.

Rights granted last for five years from date of registration but renewable for two subsequent periods of five years up to maximum of 15 years from date of registration.

Infringement.

Person who does any of aforesaid acts reserved exclusively for registered proprietor without consent of proprietor is liable for design infringement. Civil remedies include injunctions and damages.

Defence of innocence provided under Act i.e. registered proprietor of design is not entitled to recover damages or account of profits in respect of infringement of design from defendant who proves that at date of infringement he was not aware that design was registered and that he had taken all reasonable steps to ascertain whether design was registered. Innocence defence does not affect plaintiff's right to injunction.

16.02 PATENTS:

Statute.

Patents Act (Act 291) and Patents Regulations 1986.

Treaties.

Paris Convention, TRIPS and World Intellectual Property Organization Patent Cooperation Treaty.

Patentability.

Invention is patentable if: (a) It is new; (b) it involves inventive step; and (c) it is industrially applicable. Invention is not patentable if it consists of: (i) Discoveries, scientific theories or mathematical methods; or (ii) plant or animal varieties or essentially biological processes for production of plants or animals, other than man-made living micro-organisms, micro-biological processes and products of such processes; (iii) schemes, rules or methods for doing business, performing purely mental acts or playing games; or (iv) methods for treatment of human or animal body by surgery and diagnostic methods practised on human or animal body.

Procedure.

For domestic application, there are four stages: (a) Filing application in requisite form with prescribed fee. Application must contain: (i) request for grant of patent including statement justifying applicant's right to patent, (ii) specification containing description of invention, (iii) claim(s) defining matter for which applicant seeks patent protection and any supporting drawings, (iv) abstract which provides technical information concerning invention. If application is in order, filing date is given to application; (b) request for preliminary examination is filed within six months from date of filing of application; (c) applicant files request for substantive examination within 18 months from date of filing of application. Examiner will examine whether application complies with requirements of Act; (d) finally, patent granted if all is well. Patent Cooperation Treaty and its rules are applicable to processing of international application during international phase of application.

Duration of Protection.

Grant of patent confers on owner exclusive right to exploit invention for 20 years from date of filing of application.

Assignment/Licence.

Rights under patent or patent application may be assigned provided assignment is in writing and signed by or on behalf of parties to transaction. Licence may also be granted for working invention which is subject of patent.

Compulsory Licences.

Under certain circumstances, e.g. where there is abuse of patent monopoly rights, Act provides for grant of compulsory licences. Owner will then lose exclusivity of exploiting patent. Examples are non-production of patented product or non-application of patented process without any legitimate reason, or if pricing is unreasonably high.

Utility Innovations.

Act also provides protection for utility innovations. Utility innovation is valid for only five years from date of grant, extendable for two further periods of five years. Utility innovation means any innovation which creates new product or process or any new improvement of known product or process, which is capable of industrial application, and includes invention.

Infringement.

Patent is infringed if anyone without consent of proprietor makes, disposes of, offers to dispose of, uses or imports patented product or keeps it whether for disposal or otherwise. Same applies to patented process if unauthorised person uses it or does any of above acts in relation to product obtained by means of process. Remedies include injunctions, damages or account of profits, and delivery up.

16.03 TRADEMARKS:

Statutes.

Trade Marks Act (Act 175) and Trade Mark Regulations 1997 provide for, inter alia, registration of trademarks in respect of goods and services. These follow U.K. legislation closely.

Treaties.

Priority may be claimed for applications filed within six months from date of first application in “prescribed foreign countries” as approved by Minister of Domestic Trade and Consumer Affairs. Malaysia is also member of Paris Convention and TRIPS.

Definition.

Trademark is mark used or proposed to be used in relation to goods or services for purpose of indicating or so as to indicate, connection in course of trade between goods or services and person who has right, either as proprietor or as registered user, to use mark, whether with or without indication of identity of that person. Trademark may be device, brand, heading, label, ticket, name, signature, word, letter, numeral or any combination of these.

Registrability.

In order for trademark to be registrable, mark must have some intrinsic quality which makes it distinctive. Mark must also contain or consist of at least one of following: (a) Name of company, individual of firm represented in special or particular manner; (b) signature of applicant or predecessor of his business; (c) invented word or words; (d) mark which does not have direct reference to character or quality of goods or services and which is not in its ordinary meaning, geographical name or surname; and (e) any other distinctive mark.

Protection.

Upon registration of mark, it remains valid for initial term of ten years from date of filing of application, which term may be renewed indefinitely for subsequent terms of ten years each.

Assignment.

Mark may be assigned with or without goodwill of business. Under Act, all assignments must be registered with Trade Marks Registry. If one or more marks are associated, they must be assigned as whole and not separately.

Infringement.

Plaintiff has recourse to civil remedies in form of damages, injunction, seizure of goods and discovery.

Common Law Rights.

Act specifically preserves rights of action against person for tort of “passing off” and remedies in respect thereof. To succeed, plaintiff must show (a) goodwill or reputation in his mark or business; (b) misrepresentation made by defendant in course of trade which is calculated to injure plaintiff's goodwill or business; and (c) that damage has occurred or is likely to occur.

17 LEGAL PROFESSION

17.01 ATTORNEYS AND COUNSELORS:

Governed by Legal Profession Act (Act 166). Act applies throughout West Malaysia and is made applicable to Sabah and Sarawak with such modifications as Yang di-Pertuan Agong may, by gazetted order, make. Rulings are issued by Bar Council from time to time. Profession is fused, consisting of advocates and solicitors.

Admission.

To be admitted as advocate and solicitor of High Court of Malaya, person must be qualified person or articled clerk who has complied with conditions for admission stipulated in Act. “Qualified person” means person who: (a) has passed final examination leading to degree of Bachelor of Laws of University of Malaya or National University of Singapore (or its predecessors, University of Malaya in Singapore and University of Singapore); (b) is barrister-at-law of England; or (c) is in possession of such other qualification as may be declared by Legal Profession Qualifying Board, established under Act, and gazetted. In addition, he must be at least 18 years old, of good character, citizen or permanent resident of Malaysia and must have satisfactorily served in Malaysia prescribed period of pupillage for qualified persons, and has passed or is exempted from Malay language qualifying examination set by Legal Profession Qualifying Board.

Foreign Law Firms.

Foreign lawyers are only allowed to practise in Malaysia provided they obtain certificate from Attorney-General. Many foreign lawyers who work with Malaysian law firms work on variety of cross-border transactions and projects. Malaysia has made commitments to liberalise legal services under Uruguay Round General Agreement on Tariffs and Trade (GATT). Five foreign law firms are allowed to practice Islamic finance law in Malaysia. Malaysian Bar Council has drafted roadmap for liberalization of legal service for submission to Government.

18 MINERAL, WATER AND FISHING RIGHTS

18.01 MINES AND MINERALS:

Mines.

Petroleum Mining Act (Act 95) makes provisions with regard to mining for petroleum. These include restrictions on petroleum exploring and mining, and application for exploration licence. Act applies throughout Malaysia but in its application to Sabah and Sarawak only with respect to off-shore land.

Mining Enactments of various States regulate mining of minerals other than mineral oils in such states.

Mining leases must not infringe Malay Reservations Enactments of various States which restrict sale, lease and disposal of State land included within Malay Reservation in such states.

Minerals.

Mineral Ores Enactments of various States restrict purchase, treatment and storage of mineral ores (which do not include gold) in such states.

Gold Buyers Enactments of various States regulate purchase of raw gold in such states.

19 MORTGAGES

19.01 CHATTEL MORTGAGES:

Mortgages of chattel, except mortgages and debentures registrable under Companies Act (Act 125), are registrable under Bills of Sale Act (Act 268). Floating charges over chattels, charge over land or any interest therein and charge over ship or aircraft or share in ship or aircraft are registrable under Companies Act. This applies to property wheresoever situate for companies incorporated under Companies Act and to property in Malaysia for foreign companies registered under Companies Act. Such charges must be registered within 30 days after creation of charge (with extension of seven days for documents executed overseas). Otherwise charge is void against liquidator and creditors of company.

Mortgages of Malaysian-registered ships are also registrable under Merchant Shipping Ordinance (Ord. 70). No additional written provisions for registration of aircraft mortgages.

See also categories 2 Business Organizations, topic Corporations; Business Regulation and Commerce, topic Bills of Sale.

19.02 COLLATERAL SECURITY:

See category 7 Debtor and Creditor, topic 7.09 Pledges.

19.03 MORTGAGES:

In Malaysia, mortgages are created in form of charge.

Under National Land Code (Act 56/65) (West Malaysia), one may create legal/statutory charge in prescribed form over: (a) Whole, but not part only, of alienated land; (b) whole, but not part only, of undivided share in alienated land; or (c) lease of alienated land, as security for repayment of debt, or payment of any sum other than debt, or payment of annuity or other periodic sum. Legal/statutory charge takes effect upon registration at appropriate land Registry. Subject to certain vitiating factors like fraud or forgery, registration confers indefeasible interest on chargee. Priority of charge may in appropriate circumstances be affected by device of tacking and postponement.

Noncompliance with National Land Code (Act 56/65) does not affect contractual operation of transaction which may then take effect as equitable charge. Court in exercise of its equitable jurisdiction may grant creditor specific performance of contract by ordering debtor to execute valid and registrable document of charge.

For lands in Sabah and Sarawak, registration provisions are contained in Sabah Land Ordinance (Cap. 68) and Sarawak Land Code (Cap. 81) respectively.

20 PROPERTY

20.01 ABSENTEES:

Generally, in absence abroad, person may delegate authority to any person of full capacity, usually by way of power of attorney. As for company, as long as permitted by and in accordance with company's Memorandum and Articles of Association, its directors may empower any person as company's attorney to execute deeds on its behalf abroad. Power may be limited or unlimited as donor wishes.

Under Powers of Attorney Act (Act 424) (West Malaysia), in order for power of attorney to be valid, it must be authenticated in accordance with Act and copy of power of attorney duly certified as “true copy” by Senior Assistant Registrar of (West Malaysia) High Court, or where original power of attorney has been deposited in Registry of Supreme Court in Singapore, office copy of such power of attorney, must be deposited in office of Senior Assistant Registrar of (West Malaysia) High Court.

20.02 DEEDS:

Individuals.

Deed must be signed in presence of witness by party to be bound or by his attorney. Not necessary for deed to be sealed, so long as deed makes it clear on face of itself that it is intended to be deed.

Companies.

Common seal of company must be affixed in accordance with company's articles of association (usually in presence of two directors, or one director and one secretary). Individual authorised by company pursuant to power of attorney to execute documents under seal may execute them by signing for and on behalf of company and affixing his seal. See also category 9 Documents and Records, topic 9.03 Seals.

Attestation.

Generally, no attestation clause required unless deed contains power of attorney.

Consideration.

See category 9 Documents and Records, topic 9.03 Seals.

20.03 LANDLORD AND TENANT:

National Land Code (Act 56/65) (West Malaysia), makes distinction between lease and tenancy. Lease refers to letting of land for term exceeding three years and is registrable interest. Maximum term for which lease may be so granted is 99 years if it relates to whole of alienated land, and 30 years if it relates only to part thereof. Every lease has to be in prescribed form and registered with appropriate land Registry. Lease which is not registered is void as lease but nevertheless good and valid as agreement for lease and may be enforceable in equity by decree of specific performance.

Tenancy denotes letting of land for term not exceeding three years and is not registrable interest. It may, however, be protected by way of endorsement on register document of title. It can be granted orally or by way of written instrument in any form whatsoever.

For leases in Sabah and Sarawak, reference may be made to Sabah Land Ordinance (Cap. 68) and Sarawak Land Code (Cap. 81) respectively.

20.04 PERPETUITIES:

See category 11 Estates and Trusts, topic 11.05 Trusts.

20.05 REAL PROPERTY:

National Land Code (Act 56/65) is main piece of legislation governing land matters in West Malaysia. It lays down law relating to land and land tenure, registration of title to land and of dealings therewith and collection of revenue therefrom.

Dealings recognised and capable of being created may be divided into those which are capable of registration and those which are not. Former consists of transfers, charges, leases and easements. Latter covers tenancies exempt from registration and statutory liens which are protected by way of endorsement and entry of lien holder's caveat respectively on register document of title. Noncompliance with requirements of Code does not affect contractual operation of transaction relating to alienated land or any interest therein.

Persons or bodies who are co-owners but who are not trustees or personal representatives hold as tenants in common (no right of survivorship). Only trustees and personal representatives may hold land as joint tenants (with right of survivorship).

Registered proprietors may subdivide, partition or amalgamate their lands. They may also apply for subdivision of certain kinds of buildings on their land into parcels, each to be held under separate strata or subsidiary title.

Land Registration.

Conveyancing system is registered (Torrens System). Title to property is registered at appropriate land Registry. Subject to certain vitiating factors, register is conclusive evidence of title.

Legislation governing land matters in Sabah is Sabah Land Ordinance (Cap. 68) and in Sarawak is Sarawak Land Ordinance (Cap. 81).

21 TAXATION

21.01 ADMINISTRATION:

Care and management of income tax is responsibility of Inland Revenue Board. Director General of Inland Revenue is empowered to delegate specified powers to Deputy Director General, Assistant Director General, Senior Assistant Director and Assistant Director of Inland Revenue.

21.02 BUSINESS TAXES:

Business profits are computed on basis of normal accounting principles as modified by certain tax adjustments. §33 of Income Tax Act (Act 53) embodies deduction rule. In general all outgoings and expenses wholly and exclusively incurred during that period in production of gross income are allowable for income tax purposes. Deductions which are specifically disallowed include domestic or private expenses, preliminary or preoperating expenses, capital expenditure, depreciation and amortisation, interest expenses attributable to nonbusiness investments, lease rentals for passenger cars exceeding RM50,000 per car with certain restrictions, contributions to unapproved pension, provident or saving schemes, employer's contributions to approved schemes in excess of 19% of employer's remuneration, non-approved donations, entertainment expenses except in limited circumstances and employee's leave passages.

21.03 CONSUMPTION TAX:

This is value-added tax levied on supply of prescribed services and prescribed goods by prescribed establishments or professional establishments in Malaysia. Prescribed services include most services provided by service industries and various professional fields. Prescribed goods are food, drinks and tobacco provided by prescribed establishments. Provision of prescribed services to territories outside Malaysia is zero-rated. Service tax is levied under Service Tax Act (Act 151) at rate of 5% ad valorem.

21.04 CUSTOMS DUTY AND TAX:

Customs duty and tax levied under Customs Act (Act 235) on dutiable goods imported into or exported from Malaysia. Custom duties are generally levied on ad valorem basis but may also be imposed on specific basis or composite basis. Rates specified in Customs Duties Order 1996. Raw materials, machinery, essential foodstuffs and pharmaceutical products are generally non-dutiable or subject to lower rates. Import duty on raw material used directly for manufacture of goods for export is exempted if such materials are not produced locally or if local materials are not of acceptable quality and price. There are special provisions in Customs Act (Act 235) to cater for special status of Labuan, Langkawi, Tioman and joint development areas.

21.05 ESTATE TAX:

This is not payable on estate of deceased who dies on or after 1 Nov. 1991.

21.06 EXCISE TAXES:

Fixed excise duties are levied and paid on selected range of goods manufactured and sold in country. Rates of excise duty or valuation (if any) is payable on day goods are removed from their place of manufacture or any other place under excise control. Certain classes of goods may be exempted from payment of whole or part of excise duty. Remission of whole or part of duty payable are available for dutiable goods which are damaged, destroyed or, by unavoidable accident, lost at any time before removal from excise control. Legislation governing excise taxes are Excise Act (Act 176) and Excise Regulations 1977.

21.07 FOREIGN INVESTMENT TAXES:

Nonresident companies are subject to payment of tax on royalties, rental of movable properties, technical or management service fees, interest, dividends, business and other income. However, where recipient is resident in country which has double tax treaty with Malaysia, tax rates may be reduced. Interest paid to nonresident bank or finance company in Malaysia or on approved loans (which are loans granted to or guaranteed by Malaysian Government) is exempt from tax.

21.08 GASOLINE AND SPECIAL FUELS TAXES:

Petroleum (Income Tax) Act (Act 543) embodies legislation entirely devoted to taxation of petroleum companies. Petroleum income tax is chargeable at rate of 38%. Dividends paid out of petroleum income are not liable to any other income taxes.

21.09 INCOME TAX:

Income tax is governed by Income Tax Act (Act 53) and payable by persons, including individuals, companies, trustees and bodies of persons, on income arising in or derived from Malaysia in respect of trade, business, profession, vocation or employment and dividends, interest, discounts, pension, charge, annuity, rents, royalties, premiums, and gains or profits from other sources. Resident companies engaged in banking, insurance, sea or air transport are taxable on their worldwide income. Company resident in Malaysia if management and control exercised in Malaysia.

Unless exempted, payment of royalty and interest to nonresident person is subject to withholding tax of 10% and 15% respectively. However, no withholding tax is payable if royalty or interest is attributable to business carried on in Malaysia by such person. Payment to nonresident for technical services, advice, assistance or use of moveable property is subject to 10% withholding tax. However, payment to nonresidents for services performed outside Malaysia are not liable to withholding tax. Payment to nonresident contractor or professional under contract of service is subject to 13% withholding tax (10% for contract payment and 3% for tax payable by contractor's employees), and for nonresident public entertainer, 15%. These withholding tax rates are not absolute and some may be varied by double taxation agreements or under certain other circumstances. Dividends paid to nonresident are not subject to withholding tax.

Income tax rate for resident company is 25%. Small and medium sized companies with paid-up capital of RM2.5 million or less at beginning of basis period, tax is charged at 20% on first RM500,000 of chargeable income. Any subsequent chargeable income exceeding RM500,000 is subject to 25% tax.

Nonresident company is also taxed at same rate as resident company. There are no major differences in tax treatment for two except that resident company is generally able to qualify for tax reliefs afforded by double taxation conventions entered into by Malaysia with other countries whereas nonresident company is not. Tax rate of 25% also applies to income of trust and nonresident unincorporated body. Approved institutions of public or charitable character are exempted from income tax.

Individual income tax rate for resident individuals is based on graduated scale, with marginal rate from 0% to 26%. Various personal reliefs and rebates are available. For instance, tax reliefs are granted for the fees expended for certain course of study, purchase of books, journals, magazines, publications excluding newspapers, purchase of sports equipment and purchase of computer (once every three years). Donations to approved charitable and public institutions are tax-deductible.

Nonresident persons (other than companies) are taxed at flat rate of 26% with no personal reliefs given unless otherwise provided for in double taxation agreement. Resident and nonresident persons residing in Iskandar Malaysia and working in Qualifying Activities will be taxed at 15% if they apply and commence work before Dec. 31, 2015. Nonresident employees exercising employment in Malaysia for not more than 60 days are, however, exempted from tax. Remittances of foreign-sourced income into Malaysia by nonresidents are not subject to tax. See also topic 13.03 Foreign Investment.

Income tax relief in respect of certain categories of income can be found in Income Tax Act (Act 53), and tax incentives for selected types of investments can be found in Promotion of Investments Act (Act 327).

21.10 INHERITANCE TAX:

See topic 21.05 Estate Tax.

21.11 LOCAL GOVERNMENT TAXES:

These exist primarily in form of quit rent and assessment.

21.12 MOTOR VEHICLE TAXES:

Road tax is determined by engine power of car; in general car with higher engine power pays higher road tax.

21.13 PROPERTY TAXES:

Fixed rate of 5% will be imposed on gains from disposal of property with exemption for disposal of residential property once in lifetime and gift between husband and wife, parent and child and grandparent and grandchild with effect from Jan. 1, 2010.

21.14 SALES TAX:

Governed by Sales Tax Act (Act 64). Generally levied on selected types of goods manufactured in Malaysia or which are imported for home consumption. Wide range of goods are exempted from imposition of sales tax including primary commodities, certain essential foodstuffs, medical and educational equipment, books, sports equipment, photographic equipment, films and naturally occurring mineral substances. Tax is borne by manufacturers and importers at following rates depending on class of goods in question:

	Rate (%):
Fruits, certain foodstuff, timber and building materials	5,
Cigarettes and tobacco	5,
Liquor and alcoholic drinks	5.
All other goods not specifically exempted,	10.

`except petroleum`

21.15 STAMP TAX:

Stamp duty is chargeable on certain instruments or documents. Rate of duty varies according to nature of instruments or documents and transacted values under First Schedule, Stamp Act (Act 378).

For conveyance of land, duty is payable at progressive rate of 0.1% to 0.3% of value; on transfer of stocks and shares, duty is payable at RM3 per RM1,000 or part thereof; on principal security documents for payment or repayment of money, duty is payable at RM5 for every RM1,000 or part thereof (except in certain instances); on stockbroker's contract note, RM1 for every RM1,000 or part thereof. Relief from stamp duty are given for various specified transactions.

21.16 TAX INCENTIVES:

Companies and other bodies fulfilling certain conditions can apply for incentives under Promotion of Investments Act (Act 327). Major incentives are pioneer status, capital allowance for industrial buildings (includes hotel registered with the Ministry of Tourism, licensed private hospital and approved educational institutions), investment tax allowance, infrastructure allowance and investment allowance for approved service projects. Other tax incentives are provided for under Income Tax Act (Act 53), and Labuan Offshore Business Activity Act (Act 445) for offshore companies in or from Labuan.

21.17 TREATIES AND AGREEMENTS:

Malaysia has largely adopted Organisation for Economic Cooperation and Development (OECD) Model, in form and in intention, in concluding double taxation agreements with other countries. Malaysia has signed Double Taxation (Relief) Agreements with 70 countries as of Aug. 25, 2009.

22 TRANSPORTATION

22.01 MOTOR VEHICLES:

Governed by Road Transport Act (Act 333) and related subsidiary legislation.

Classification of Motor Vehicles.

Classification includes invalid carriages, motorcycles, tractors, motor cars and mobile machineries. Different requirements apply to various classes of motor vehicles. Third brake lights are compulsory for motor cars. Construction, (unladen) weight limits, equipment, use and age of motor vehicles regulated by Act.

Registration and Licensing of Motor Vehicles.

Any person possessing or using motor vehicle in Malaysia must register it subject to certain exceptions. Additionally, licence is required if motor vehicle is to be used in Malaysia. Valid third party insurance policy must, in absence of applicable exemptions, be in effect before licence can be issued. Grant of licence is also subject to condition that motor vehicle is roadworthy.

Tax is payable regularly in respect of motor vehicles in Malaysia.

Driving Licences.

Every driver of motor vehicle must possess valid driving licence. Before application for driving licence can be granted, applicant must satisfy one of following: (a) Applicant must have held probationary driving licence for period of two years and application must be made within one year after expiry of two-year period; (b) within three years before date of application, must have held driving licence issued by competent authority in Malaysia or Singapore; or (c) within three years before date of application, must have held driving licence issued by competent authority in any other country which has tests of competence to drive comparable to that prescribed under Act.

No driving licence will be granted to any applicant unless he satisfies Director-General that on date of application he has no outstanding matter with Road Transport Department or police relating to any contravention of Act.

Driving licence issued under corresponding laws of country which is party, along with Malaysia, to treaty that purports to recognise domestic driving licences of contracting parties, is deemed to be driving licence granted under Act so long as such licence remains in force in that country.

If driver's record, conduct or habits as driver establishes that it is not in interests of public safety for him to hold driving licence or that he is not competent to drive motor vehicle, then driving licence may be suspended for up to 12 months.

Person below 16 years is not allowed to drive motor vehicle on road and person below 17 years is not allowed to drive motor vehicle other than motorcycle or invalid carriage.

Use of Helmets and Safety Seat Belts.

Drivers and pillion riders of motorcycles are required to wear protective helmets. Use of safety seat belts by drivers and passengers is mandatory.

Driving under Influence of Intoxicating Liquor or Drugs.

Driving while under influence of intoxicating liquor or drugs is offence.

Third Party Insurance.

Subject to certain exceptions, it is compulsory to insure all motor vehicles in use with respect to third party risks in Malaysia. Person using, causing or permitting another to use motor vehicle without such insurance coverage commits offence. Third party victim although not privy to insurance contract, has direct claim against insurer after obtaining judgment against motorist, and after certificate of insurance has been delivered to insurer.

Commercial Vehicles.

Commercial Vehicles Licensing Board Act (Act 334) stipulates that licences have to be taken out for specified categories of commercial vehicles. Different conditions may be attached to various types of licences; in any event, all licences carry conditions that commercial vehicle must be maintained in fit and serviceable condition and must comply with provisions on speed limits, unladen and laden weight limits and loadings.

22.02 SHIPPING:

Merchant Shipping.

Merchant Shipping Ordinance (FM Ord. 70/1952) regulates registration, mortgages, control of shipping, safety of shipping, construction, equipment and survey, manning, certification, masters and seamen, wreck and salvage and limitation of actions. Relevant statutes for Sabah and Sarawak are Ordinance 11/1960 and Ordinance 2/1960 respectively.

Ship Registration.

Under Merchant Shipping Ordinance (FM Ord. 70/1952), Malaysia-registered ship must be owned by (a) Malaysian citizen; or (b) Malaysian company with majority Malaysian shareholding free of any trust or obligation in favour of non-Malaysian, and with principal office in Malaysia and management carried out mainly in Malaysia.

Malaysia-registered ship must be insured with Malaysian insurer under Insurance Act (Act 553).

Towage.

Private contract between parties.

Pilotage.

Regulated by Merchant Shipping Ordinance (FM Ord. 70/1952).

Collisions.

Merchant Shipping (Collision Regulations) Order 1984 (PU.[A]438) gives effect to International Regulations for Preventing Collisions at Sea 1972 as amended.

Liens.

Maritime liens governed by common law. Statutory liens for rent and expenses of wharfinger and warehouseman provided under Merchant Shipping Ordinance (FM Ord. 70/1952).

Pollution.

Regulated by Merchant Shipping (Oil Pollution) Act (Act 515), Environmental Quality Act (Act 127), Exclusive Economic Zone Act (Act 311) and Merchant Shipping Ordinance (FM Ord. 70/1952).

Carriage of Goods.

Carriage of Goods by Sea Act 1950 (Act 527) gives effect to Hague Rules.

Limitation and Exclusion of Liability.

Regulated by Merchant Shipping Ordinance (FM Ord. 70/1952).

Admiralty.

Courts of Judicature Act (Act 91) provides that Malaysia High Court has same admiralty jurisdiction as High Court of Justice in England under United Kingdom Supreme Court Act 1981.

23 TREATIES AND CONVENTIONS

23.01 TREATIES:

Member of, inter alia, Association of South East Asian Nations (ASEAN), World Trade Organisation (WTO) and Organisation of Islamic Countries (OIC). Malaysia has ratified International Centre for Settlement of Investment Disputes Convention (see Convention on Settlement of Investment Disputes Act [Act 392]). Malaysia has trade agreements and investment guarantee agreements with many countries. These agreements cover matters like protection against nationalisation and expropriation, and compensation in such events. There are also double taxation agreements with many countries (see category 21 Taxation, topic Taxes).

See also Part V of this volume for Selected Conventions to which U.S.A. and this country are parties.

1
MAURITIUS LAW DIGEST

—Scope —

Revised for 2010 edition by

Note: This revision incorporates legislation through Oct. 2009.

1 INTRODUCTION

—Scope —

Republic of Mauritius is parliamentary democracy modeled on British system. Separation of powers among three branches of Government, namely Legislative, Executive and Judiciary, is embedded in Constitution. Republic of Mauritius enjoys hybrid legal system consisting of British common law practices and French *Code Napoléon*, stemming from its former French and British colonial rules. Main sources of law are Constitution, Statutes, Criminal Code, Commercial Code, Code of Civil Procedure, and case law. Guarantees for safeguard of rule of law and fundamental rights of citizens have helped Mauritius to be longest standing uninterrupted democracy in Africa.

1.01 CURRENCY:

Rupee was established by law in 1876 as local currency of Mauritius and Mauritian rupee was introduced in 1877. Before establishment of Central Bank, currency issue was managed by Board of Commissioners of Currency first of its kind to be set up in World. Setting up of Bank of Mauritius marked beginning of new phase in monetary history of Mauritius, with monetary system moving forward from stage of ``Sterling Exchange Standard'', under which currency was issued in exchange for sterling at fixed rate of exchange, to that of ``managed currency'' in which discretionary role of monetary authority becomes important. Duties of Board were restricted to those of issuing authority.

See also topic 3.01 Banks and Banking.

1.02 GOVERNMENT AND LEGAL SYSTEM:

The Government.

Mauritius is parliamentary democracy and republic with president as head of state. Until 1992, Mauritius was constitutional monarchy with Queen Elizabeth II as head of state, but on Mar. 12 of that year, country became republic within Commonwealth. Under amended constitution, country's unicameral parliament, Legislative Assembly, was renamed National Assembly.

Mauritius is governed under Constitution of 1968 (as amended), which is supreme law of country. President is elected by National Assembly for five-year term on motion made by Prime

Minister and supported by votes of majority of all members of Assembly and is eligible for re-election.

Unicameral legislature is made up of 70 Members of whom 62 are directly elected in 21 constituencies. Government is headed by Prime Minister who is appointed by President.

The Judicature.

Supreme Court of Mauritius is highest court of land and possesses unlimited jurisdiction to hear and determine any civil or criminal proceedings under any law other than disciplinary law and such jurisdiction and powers as conferred upon it by Constitution or any other law. Supreme Court is held to have concurrent jurisdiction with all lower courts, except in matters where exclusive jurisdiction is not granted to them by Parliament.

Supreme Court has various divisions exercising jurisdiction as Bankruptcy Court, Court of first instance in civil and criminal matters, Court of Appeal (to hear and determine civil and criminal appeals from decisions of subordinate Courts), Court of Civil Appeal and Court of Criminal Appeal (to hear and determine appeals from decisions of Supreme Court sitting as Court of first instance).

Court of Rodrigues, District Courts, Intermediate Court and Industrial Court make up subordinate courts.

Final appeal from decisions of Court of Appeal of Mauritius to Judicial Committee of Privy Council in London as provided for under Constitution of Mauritius.

Law-Making.

As stated in Constitution, Parliament may make laws for peace, order and good government of Mauritius. Power of Parliament to make laws shall be exercisable by Bills passed by Assembly and assented to by President.

Prior to becoming law, Bill is presented by Minister for first and second reading in Assembly. All Bills, other than Private Bill or Private Member's Bill, must be presented by Minister. Bill may be presented as private Bill, provided it is not Money Bill, that is, Bill related to taxation, Consolidated Fund or any other public fund. Every Bill which is presented must be passed by National Assembly for it to become Act.

Until it has been submitted to and has received assent of President of Republic, Bill passed by National Assembly does not become law. When Bill has been assented to by President, it must then be published in Government Gazette for it to have force of law.

President cannot withhold assent to Bills specified in § 54 of Constitution. But President may withhold assent to any other bill, in which case he would return it to Assembly for reconsideration within 21 days, of it being submitted to him for assent. Upon bill being reconsidered and passed, with or without amendment, it is again submitted to President, who is bound to signify his assent.

Inherent in power to make laws is power to amend or repeal it or to suspend its operation or even to give it retrospective effect and to delegate law-making powers to executive.

Judicial Authority.

See category 4 Courts and Legislature, topic 4.01 Courts.

1.03 OFFICE HOURS AND TIME ZONE:

Time zone used by Mauritius is Mauritius Time or MUT which is four hours ahead of UTC (UTC+4). Office hours are generally from 9 a.m. to 5 p.m.

2 BUSINESS ORGANIZATIONS

2.01 CORPORATIONS:

General.

Mauritius' statute law on companies is contained in Companies Act 2001 (``Companies Act''), which was modeled after its counterpart from New Zealand. Companies Act 2001 was major revision of legislation since 1984. Until 2001, companies in Mauritius were formed under Companies Act 1984, which was modeled on English Companies Act 1948.

Types and Categories of Companies.

Companies Act provides for several types and categories of companies, namely (1) Companies limited by shares; (2) Companies limited by guarantee; (3) Companies limited by both shares and guarantee; or (4) Unlimited Companies.

Any of above types of company may be registered as limited life company.

Above mentioned companies can be domestic company or company holding Category 1 Global Business Licence or Category 2 Global Business Licence.

General Supervision.

Business and affairs of company are managed by its board of directors, and first directors are those persons named in application for registration or amalgamation proposal. All companies must have at least one director who is ordinarily resident in Mauritius, although this requirement may be waived in case of global business companies holding Category 2 Global Business Licence.

Board may, subject to Companies Act and its constitution, delegate any of its powers to committee of directors, director or employee of company, although board remains responsible for exercise of power by that delegate as if board had directly exercised power itself.

Duties of company's directors have been codified in Companies Act in such that every director, in exercising his powers and discharging his duties, must (1) exercise their powers in accordance with Companies Act and with limits and subject to conditions and restrictions established by company's constitution; (2) obtain authorisation of meeting of shareholders before doing any act or entering into any transaction for which authorisation or consent of meeting of shareholders is required by this Companies Act or by company's constitution; (3) exercise their powers honestly in good faith in best interests of company and for respective purposes for which such powers are explicitly or impliedly conferred; (3) exercise degree of care, diligence and skill required that reasonably prudent person would exercise in comparable circumstances; and (4) not make use of or disclose any confidential information received by them on behalf of company as directors.

Objects.

Under Companies Act, company is no longer required to state its objects, unless its constitution requires otherwise. However, if company wishes to state its objects, then its business purpose will be restricted to those specific objects. Subject to Companies Act, company's constitution and Global Business restrictions, company has full rights, powers, privileges and capacity to carry on or undertake any business or activity, do any act, or enter into any transaction from both within and outside Mauritius. Companies Act also provides that, notwithstanding any restrictions prescribed by company's constitution on business or activities in which company may engage in, capacity and powers of company will not be affected by those restrictions and no act of company will be invalid by reason only that it was done in contravention of those restrictions.

Constitution.

Any company may, but does not need to have constitution. Where company has constitution, rights, powers, duties, and obligations of company, Board, each director, and each shareholder of company shall be those set out in Companies Act except to extent that they are restricted, limited or modified by constitution of company in accordance with Companies Act. Constitution is rules governing company, and directors and shareholders in company, and their relationship with each other. Constitution may cover such matters as rights, duties, powers and obligations of company, directors and shareholders.

Stated Capital.

Companies Act no longer requires companies to maintain authorised share capital. Companies are now required to report their stated capital, which is total of nominal value of any par value shares and any premium paid in relation to those shares. If shares are issued with no par value, stated capital is total of any amount paid or due on issue of and subsequent calls on shares. Stated capital cannot be reduced unless special resolution is passed and solvency test has been satisfied, although global business companies are exempted from requirement to give public notice of any proposed reduction in stated capital.

Shares.

While Companies Act specifies basic rights attached to share, those rights may be varied by company's constitution and such variation may allow for issuance of different classes of shares including fractional shares, and attach thereto any special, preferential or deferred rights, privileges or conditions.

Companies Act also requires that share created or issued after commencement of Companies Act must have shares of no par value, with noted exceptions of: (1) Pre-existing companies; (2) global business companies; or (3) upon Registrar's approval that company is wholly owned subsidiary registered outside Mauritius and that for reporting purposes it is necessary to be formed with shares carrying par value. Global Business Companies may or may not have par value shares.

Board of company may authorise distribution by company at any time, and of any amount, and to any shareholders it sees fit, but must satisfy solvency test immediately after any such authorisation.

Dormant Companies.

Company shall be dormant for any period during which no significant accounting transaction has occurred. Dormant company is exempted from having accounts audited and paying certain fees, although accounts and returns have to be filed as required under Companies Act. Company may declare itself to be dormant by passing special resolution which it shall file with Registrar 14 days of date of resolution.

Foreign Companies.

Companies Act defines foreign company as body corporate incorporated outside Mauritius or partnership formed or incorporated or existing in Mauritius or elsewhere. All foreign companies which have place of business or that are carrying on business in Mauritius must be registered with Registrar, including foreign companies establishing or using share transfer office or share registration office in Mauritius or administering, managing, or dealing with property in Mauritius as agent, or personal representative, or trustee, and whether through its employees or agent or in any other manner.

2.02 Global Business Companies.

Now repealed Financial Services Development Act 2001 (``FSDA'') first introduced in Mauritius concept of: (1) ``Qualified global business'', defined as being any business or other activity carried out from Mauritius, by any entity, preferably corporate in nature, with persons ordinarily resident outside Mauritius and conducted in currency other than Mauritius Rupee; and (2) ``global business companies'', being companies holding either Category 1 (formerly Offshore Companies) or Category 2 (formerly International Companies) Global Business Licence (``GBL'') eligible to conduct qualified global business from Mauritius.

FSDA has now been repealed by FSA, which has revamped meaning of qualified global business, now referred to as ``Global Business''. Any body corporate formed or registered in Mauritius which proposes to conduct business outside Mauritius will be deemed to be conducting global business in Mauritius and may, accordingly, apply to Financial Services Commission (``Commission'') for Category 1 or Category 2 Global Business Licence.

Category 1 Global Business Licence.

Any entity holding Category 1 Global Business Licence (``GBL1'') is allowed to undertake from Mauritius any business activity which is not restricted by law. Further licence will need to be obtained by company if it is to carry on financial or investment services.

GBL1 licence-holders qualify for protection under various tax treaties to which Mauritius is party, however only if they come within definition of ``resident'' under taxation laws of Mauritius. In order to satisfy this requirement, Financial Services Act requires that GBL1 be managed and controlled from Mauritius. In order to be deemed resident in Mauritius under taxation laws, GBL1 entity should: (1) Have at least two directors, resident in Mauritius, of sufficient calibre to exercise independence of mind and judgment; (2) maintain at all times its principal bank account in Mauritius; (3) keep and maintain its accounting records at its registered office in Mauritius; and (4) prepare its statutory financial statements and/or cause to have such financial statements to be audited in Mauritius; (5) provide for meetings of directors to include at least two directors from Mauritius.

GBL1 may also be applied for upon registration in Mauritius of branch of foreign company (or even by way of continuation where allowed by law in country of origin).

Branch of foreign company may then have access to various tax treaties available through Mauritius, provided Commissioner of Tax is adequately satisfied that effective control and management of foreign company is in Mauritius. Opportunity for continuing company originally registered in foreign jurisdiction with GBL1 allows foreign company to benefit from relief on its existing holdings if that country has double taxation treaty with Mauritius.

Taxation.

As provided under Income Tax Act, GBL1 company is liable at uniform tax rate of 15%. However, GBL1 company is entitled to foreign tax credits and may opt to claim credit for actual tax suffered in another jurisdiction, resulting in effective tax rate of 3% or nil, in certain circumstances. In addition, GBL1 that is centrally controlled and managed and is tax resident in Mauritius may, upon written approval from Commissioner of Income Tax, benefit from tax relief from any one of 34 Double Taxation Agreements Mauritius has entered with other countries.00463.1

Category 2 Global Business Licence.

Any entity holding Category 2 Global Business Licence (``GBL2") is allowed to undertake from within Mauritius any activity other than following activities: (1) Banking; (2) Financial Services; (3) Carrying out business of holding or managing or otherwise dealing with collective investment fund or scheme as professional functionary; (4) Providing of registered office facilities, nominee services, directorship services, secretarial services or other services for corporations; (5) Providing trusteeship services by way of business.

Financial Services are listed in Second Schedule of Financial Services Act and include: (1) Financial Business Activities; (2) Asset Management; (3) Credit Finance; (4) Custodian services (non-CIS); (5) Distribution of financial products; (6) Factoring; (7) Leasing; (8) Occupational Pension Scheme; (9) Pension fund administrators; (10) Pension Scheme Management; (11) Retirement Benefits Scheme; (12) Superannuation Funds; (13) Registrar and Transfer Agent; (14) Treasury management; (15) Actuarial Services; (16) Credit Rating Agencies/Rating Agencies; (17) Payment Intermediary Services; (18) Representative office (for financial services provided by person established in foreign jurisdiction), and such other financial business activity as may be specified by Commission.

Significant difference between GBL1 and GBL2 is that GBL2 is exempted from provisions of Income Tax Act 1995 (``Income Tax Act") and is deemed to be ``non-resident" for tax purposes. Therefore, GBL2 therefore cannot claim double taxation relief under double-taxation treaties in force in Mauritius.

GBL2 provides for greater flexibility and it is suitable vehicle for holding and managing private assets. However, it is not allowed to raise capital from public or to conduct any financial services or to act as fiduciary.

Both Category 1 and Category 2 Global Business Licences allow company to freely repatriate profits, and there is no withholding tax in Mauritius on capital gains, dividends or interest, nor any stamp duty levied. Commission and Registrar of Companies currently have very low annual licence and registration fees.

GBL1 and GBL2 are companies incorporated under Companies Act 2001 and therefore, provisions in 2.01 above apply to both GBL1 and GBL2 except as specified. Both private and public company may apply to Commission for Category 1 Global Business Licence, however only private company may apply for Category 2 Global Business Licence.

Government Fees.

Annual fees payable to Financial Services Commission are as follows:

	GBL1	GBL2
Financial Services Commission		
Application Processing Fee	$500	100
Annual Licence Fee	$1,500	$235
Registrar of Companies		
Application Processing Fee	$75	$65
Annual Licence Fee	$220	$65

3 BUSINESS REGULATION AND COMMERCE

3.01 BANKS AND BANKING:

Bank of Mauritius (``Central Bank") was established in 1967 and modeled its internal practices and governance on Bank of England.

Central Bank is responsible for licensing, regulation and general supervision of banking sector and among its responsibilities is issuance of Mauritian Rupee.

Until end of 2004, banking system was split into two separate regimes, offshore banking and onshore banking. At that time there was only ten Offshore Banking Units (OBUs) admitted in Mauritius. Application process was fairly rigorous and required that applicants submit audited financial statements for at least five years prior to year they applied.

In Sept. 2004, Mauritius National Assembly passed Bank of Mauritius Act 2004 and Banking Act 2004 (together referred to as ``Act'') designed to give Central Bank more autonomy and to remove distinction between offshore and onshore banking.

Under new laws, Central Bank became responsible for licensing, regulation and general supervision of banking sector. More importantly, however, applicants could only apply for one type of licence. Additionally, those deemed dealers under Foreign Exchange Dealers Act were now regulated by Central Bank. Despite change, distinction between offshore and onshore banking still remains as Act requires that responsibility of financial sector is shared Central Bank and Financial Services Commission (``FSC'').

Act requires that 40% of bank's directors should be independent, i.e. director must have no relationship with, or interest in, whether past and present, financial institution or its affiliates, which could reasonably be perceived to materially affect exercise of his judgment in best interest of financial institution.

Act increased minimum capital requirement for bank from US$3m to US$6m and gives Central Bank power to appoint ``Conservator'' to protect assets of bank's depositors if financial institution has, or its directors have: (1) Engaged in practices detrimental to interests of its depositors; (2) knowingly and negligently permitted its chief executive officer, any of its managers, officers or employees to violate any provision of banking laws, any enactment relating to anti-money laundering or prevention of terrorism or guidelines and instructions issued by Central Bank.

Act enables Central Bank to establish deposit insurance scheme as protection ``against the loss of part of all of deposits in a bank that will contribute to the stability of the financial system in Mauritius and minimize the exposure to loss''.

Other provisions include strengthening of KYC rules, laying down that ``every financial institution shall only open accounts for deposits of money and securities, and rent out safe deposit boxes, where it is satisfied that it has established the true identity of the person in whose name the funds or securities are to be credited or deposited''.

Currently, two largest domestic banks are Mauritius Commercial Bank and State Bank of Mauritius, which is minority state-owned.

Government also wholly owns both Development Bank of Mauritius Ltd. and Mauritius Post and Cooperative Bank Ltd. and owns majority of First City Bank.

Banks are free to conduct business in all currencies. Three largest insurance firms account for approximately 75% of market. Capital markets are growing, and Stock Exchange of Mauritius has links to regional exchange networks in Africa and Asia.

In accordance with Act, any body corporate may apply to Central Bank for banking licence. If application is not complete, Central Bank shall notify applicant within 30 days of receipt of application of any outstanding documentation. Central Bank may also request supplementary information in connection with application if it deems such supplementary information to be necessary to determine application.

Once completed application is received, Central Bank has period of 60 working days to determine such application, and within seven days of such determination give notice in writing to applicant. Central Bank may grant banking licence or refuse to grant such licence.

If application is successful, banking licence will be granted pursuant to Act and it shall specify name of licensee, place(s) at which it may conduct business and any specific conditions Central Bank may impose.

Act specifies that each bank shall only carry on banking business from place of business specified in banking licence unless prior approval of Central Bank has been obtained. Prior approval of Central Bank must also be obtained for any change in bank's location. Each banking licence will specify business which licensee may conduct, and approval must be obtained before conducting any other business.

Act also confers on Central Bank power to amend, or vary banking licence, and to vary any conditions thereof. This power extends to imposing of further conditions. When Central Bank proposes any such amendment or variation, it must notify licensee in writing and licensee shall have seven days to submit written representations to Central Bank in connection therewith. Final decision, after consideration of any representations, will be delivered in writing within seven days.

Once banking licence has been issued, licensee has 12 months to commence business or risk having licence revoked by Central Bank. Act sets out number of circumstances in which Central Bank shall have power to revoke banking licence including, but not limited to, failure to comply with directions from Central Bank, failure to meet solvency requirements, and entering into any winding up proceedings. In each case, licensee will have opportunity to make representations to Central Bank before final decision is made.

In keeping with Mauritius' commitment to strict anti-money laundering regulations, any licensee convicted of offence related to money-laundering or financing of terrorism or other illegal activities, whether in Mauritius or in another jurisdiction, may have its banking licence revoked. Banking licence may also be revoked in Mauritius if affiliate or subsidiary of licensee has been convicted of such offence, whether in Mauritius or elsewhere.

In case of international banks with branches registered and licensed in Mauritius, if it no longer possesses valid banking licence in jurisdiction of head office, Central Bank may revoke banking licence for Mauritius Branch.

3.02 CONTRACTS:

Contractual obligation exists as one limb of general civil obligation, codified in Code Civil 1808 (``Civil Code''). Mauritian Civil Code has been inspired from French Civil Code.

Contract has been defined as agreement by which one or several persons bind themselves, towards one or several others, to transfer, to do or not to do something. Civil Code provides for following different types of contract: (1) Synallagmatic or bilateral; (2) unilateral; (3) commutative; (4) benevolence; (5) for value.

Contract is *synallagmatic* or *bilateral* where contracting parties bind themselves mutually towards each other. It is *unilateral* where one or more persons are bound towards one or several others, without there being any obligation on part of latter. Contract is *commutative* where each party binds himself to transfer or do thing which is considered as equivalent of what is transferred to him or of what is done for him. Where equivalent consists in chance of gain or of loss for each party, depending upon uncertain event, contract is *aleatory.* Contract of *benevolence* is one by which one of parties procures purely gratuitous advantage to other and contract *for value* is one which obliges each party to transfer or do something.

There are four requisites that are essential for validity of contract: (1) Consent of party who binds himself; (2) his capacity to contract; (3) definite object which forms subject-matter of undertaking; (4) lawful cause in obligation.

Agreements lawfully entered into take place of law for those who have made them. They may be revoked only by mutual consent, or for causes authorized by law and they must be performed in good faith. Agreements are binding not only as to what is therein expressed, but also as to all consequences which equity, usage or statute give to obligation according to its nature.

Privity.

Civil Code recognises adherence to principle of privity enunciated in Art. 1165 which provides that agreements produce effects only between contracting parties and bear no effects on third parties who benefit therefrom only where stipulation is made for third party's benefit, where it is condition of stipulation which one makes for oneself or of gift which one makes to another.

Annulment or Rescission.

Grounds giving rise to action for annulment or rescission of consent are: (1) Error; (2) Duress; (3) Deception; (4) Loss (exceptionally). Those are three elements recognised in Art. 1109 Civil Code to vitiate consent: ``There is no valid consent, where the consent was given only by error, or where it was extorted by duress or abused by deception.'' It is noteworthy that agreement entered into by error, duress or deception is not void by operation of law; it only gives rise to action for annulment or rescission.

In all cases where action for annulment or rescission of agreement is not limited to shorter time by special statute, that action lasts five years.

In case of duress, that time runs only from day when it has ceased; in case of error or deception, from day when they were discovered.

As regards transactions entered into by minor, time runs only from day of majority or emancipation; and as regards transactions entered into by protected adult, from day when he had knowledge of them, while being in situation to validly redo them. It runs against heirs of person under disability only from day of death, unless it has begun to run previously.

Error.

Error is ground for annulment of agreement only where it rests on very substance of thing which is object thereof. It is not ground for annulment where it only rests on person with whom one has intention of contracting, unless regard to/for that person was main *cause* of agreement.

Duress.

Duress exerted against person who has contracted obligation is ground for annulment even though it was exerted by third party different from one for whose benefit agreement was made. Duress is established where it is of nature to make impression upon reasonable person and where it can inspire him with fear of exposing his person or his wealth to considerable and present harm. Due consideration is given to age, sex and condition of persons.

Duress is ground for annulment of contract, where it is exerted not only against contracting party, but also against party's spouse, against his or her descendants or ascendants.

Contract may no longer be attacked on ground of duress where, since duress has ceased, that contract has been approved, either expressly, or by conduct, or in letting time fixed by law for restitution elapse.

Deception.

Deception is ground for annulment of contract where schemes used by one of parties are such that it is obvious that, without them, other party would not have entered into contract. Deception broadly refers to dishonest schemes employed to induce party to into entering contract. It may not be presumed, and must be proved.

Loss.

Loss refers to instances where contracting party finds himself or herself prejudiced by contractual performance of other party. Loss is ground for nullity only in special rare cases. No general requirement exists as to specific instances where loss is valid ground for rescission. Jurisprudence is known to look at matters on case by case basis.

Good Faith.

Doctrine of good faith permeates Mauritian law of contract as set out in Civil Code. Art. 1134 of Civil Code requires parties to enter into agreements in good faith.

Revocation.

Agreement may be revoked only by mutual consent or for causes authorised by law. Where party has stipulated for benefit of third party, he or she may not revoke stipulation if third party has declared that he or she wishes to take advantage of it.

See also Annulment/Rescission.

Minors.

Mere loss gives rise to rescission in favour of non-emancipated minor, with respect to all kinds of agreements. Minor is not entitled to rescission on ground of loss, where it results only from casual and unforeseen event.

Mere declaration of majority, made by minor, is not bar to rescission.

Minor who practises profession is not entitled to rescission against undertakings which he/she has taken upon himself/herself in practice thereof. Minor is, further, not entitled to rescission against terms contained in his/her ante-nuptial agreement where they were made with consent and assistance of those whose consent is required for validity of his/her marriage. Equally, minor may not rescind from obligations resulting from his intentional or unintentional wrongs.

Minor is no longer allowed to repudiate undertaking which he had entered into during his/her minority where he/she has ratified it when adult, whether that undertaking was void in its form, or only subject to rescission.

Where minors or adults in guardianship are entitled in those capacities to rescission against their undertakings, repayment of what may have been paid during minority or guardianship of adults in consequence of those undertakings, may not be demanded, unless it is proved that what has been paid has turned to their benefit.

Where formalities required with regard to minors or adults in guardianship either for conveyance of immovable, or for partition of succession, have been fulfilled, they shall be, in relation to those transactions, considered as though they had made them during majority or before guardianship of adults.

4 COURTS AND LEGISLATURE

4.01 COURTS:

Supreme Court.

Supreme Court is composed of Chief Justice, Senior Puisne Judge and 14 Puisne Judges. Judges are also Judges of Court of Criminal Appeal and Court of Civil Appeal. It is highest judicial authority in country and is vested with all powers and jurisdiction necessary to administer laws of Mauritius (§ 76[1] of Constitution). It is superior Court of Record (§ 15, Courts Act 1945) and has unlimited jurisdiction to hear and determine any civil and criminal proceedings and has same original jurisdiction as High Court in England. It is vested with all necessary powers and authority to exercise its equitable jurisdiction as Court of Equity. (§ 16, Courts Act 1945).

Supreme Court also exercises supervisory jurisdiction over subordinate Courts in order to ensure that justice is duly administered by any such Court. Supreme Court has original jurisdiction to determine whether any provision of Constitution has been contravened, including power to determine whether any law made by Parliament is void on ground that it contravenes any of provisions of Constitution. It is also empowered to secure enforcement of protective provisions entrenched in Constitution.

Supreme Court has full power and jurisdiction to hear and determine all appeals, whether civil or criminal, made to Court from decisions of: (1) Judge in chambers; (2) Bankruptcy Division of Supreme Court; (3) Master's Court; (4) Intermediate Court; (5) Industrial Court; (6) District Court; and (7) any other tribunal or body under any other enactment.

Family Division.

Since Jan. 2008, two courts are dealing exclusively with matrimonial matters.

Commercial Court.

Commercial Division of Supreme Court has jurisdiction to deal with all matters of bankruptcy, insolvency, matters arising out of Companies Act; banking, insurance, bills of exchange, offshore, industrial property, patents and dispute between traders in relation to dispute of commercial nature. There are two judges to hear Commercial Court cases.

Bankruptcy Division.

Bankruptcy Division is division of Supreme Court and it has jurisdiction relating to all matters of bankruptcy, insolvency or winding up of companies. Said jurisdiction is vested in and is exercised by Master and Registrar concurrently with Judges. (§ 62 of Courts Act). Constitution, procedure and powers of Bankruptcy Division are set out at Part VI of Bankruptcy Act. Any person may within 21 days of decision, appeal to Supreme Court, against judgment or order of Bankruptcy division. (§ 104 of Bankruptcy Act).

Court of Civil Appeal.

Court of Civil Appeal is division of Supreme Court and is composed of Judges of Supreme Court presided by Chief Justice or Senior Puisne Judge. (§ 80 of Constitution and § 2 of Court of Civil Appeal Act). Any party may appeal against judgment or order of Judge sitting alone in exercise of his original civil jurisdiction. Such appeals are governed by Court of Civil Appeal Act.

Court of Criminal Appeal.

Court of Criminal Appeal is division of Supreme Court and is duly constituted by three judges presided over by Chief Justice or Senior Puisne Judge. (§ 80 of Constitution). Person convicted before Supreme Court may appeal under Criminal Appeal Act against his conviction or sentence.

Intermediate Court.

Established by § 80 of Courts Act 1945, Intermediate Court is court of record which has civil and criminal jurisdiction in all districts in such cases and matters and to such extent as provided by Courts Act.

Industrial Court.

Established by § 3 of Industrial Court Act, Industrial Court has exclusive civil and criminal jurisdiction to try any matter arising out of any enactments set out of enactments set out in 1st schedule of Industrial Court Act or of any regulations made under those enactments (which relate to labour laws).

District Court.

Section 93 of Courts Act established court in every district known as District Court and it is court of record having limited jurisdiction in civil and criminal matters. It may sit in several divisions as directed by Chief Justice. District Court has jurisdiction in all civil cases where sum or matter in dispute does not exceed prescribed amount of Rs 50,000. (§ 104 of Courts Act). District Court has criminal jurisdiction to try all offences except those mentioned in § 116 of Courts Act. It shall not award against any person imprisonment with or without hard labour for more than two years and fine not exceeding Rs 2000. (§ 114 of Courts Act).

Privy Council.

When Mauritius became British colony in 1810, it was proclaimed that any litigant in court case could appeal to His Majesty's Council provided subject matter involved exceeded certain amount of money.

After independence in 1968 and on its becoming Republic in 1992, Mauritius deemed it fit to maintain Judicial Committee of Privy Council as its highest court of appeal. Appeals to Judicial Committee from decisions of Court of Appeal or Supreme Court may be as of right or with leave of Court, as set out in § 81 of Constitution and § 70A of Courts Act. Judicial Committee may also grant special leave to appeal from decision of any court in any civil or criminal matter.

5 ESTATES AND TRUSTS

5.01 TRUSTS:

Despite its French colonial and civil law heritage, trusts established in Mauritius subject to Mauritius law have benefited from strong influence of English common law and judicial decisions of English Courts. Trusts in Mauritius are governed by Trusts Act 2001.

Mauritius Trusts offer number of advantages ranging from: Confidentiality of trustees' deliberations, and of identities of settlor and beneficiaries; concept of managing and custodian trustees; possibility for migration of trust; possibility to establish letters and memorandum of wishes; possibility to appoint protector; possibility to accumulate income for any period during duration of trust; possibility of resident trusts to benefit from network of Double Tax Treaties; exemption of non-resident beneficiaries from income tax on income from trust; and exemption of charitable trusts from tax.

Settlors.

Any legal person, either resident or non-resident in Mauritius, may create trust. For non-resident settlors transferring or disposing of property on trust, under Act that transfer or disposition will not be set aside, avoided or otherwise declared invalid or ineffective by virtue of any rule or law relating to inheritance or succession in settlor's domicile or nationality, or by virtue of any rule of law of similar nature. Act also states that such transfer or disposition will not be set aside by virtue of any rule or law restricting right of person to dispose of his property during his lifetime so as to preserve such property for distribution at his death (i.e., forced heir-ship rules).

It should be noted that in Mauritius non-resident settlors can not include any movable or immovable property in Mauritius or any Mauritian rupee denominated accounts in domestic bank as part of trust fund.

Although Act allows for settlor to also be trustee and beneficiary of same trust (as well as protector or enforcer), it prohibits settlor from being sole beneficiary of that trust.

Trustees.

Corporate persons are as eligible as natural persons to become trustees. Total number of trustees is limited to maximum of four, with at least one being qualified trustee as defined by Act as management company or other such person resident in Mauritius and authorised by Financial Services Commission to provide trusteeship services. Trustees must disclose to their co-trustees any interest which they may have as trustee of another trust in those instances of any transactions that may be entered into by respective trusts.

Trustees are, under Act, expected to observe key duties, namely fiduciary duties, duty relating to trust property, duty to act together and duty to act impartially.

Trust deed is entitled to appoint firm, partnership or body corporate as custodian trustee to hold trust property and invest or dispose of trust funds under direction of managing trustee. Trust property will remained vested in custodian trustee while management of that trust property, as well as all powers and discretions exercisable by trustee, shall remain vested in managing trustee subject to terms of trust deed.

Protectors.

Act provides for appointment of Protector, who owes beneficial owners fiduciary duty to advise and supervise trustees. Subject to terms of trust deed, protector has power to: (1) Remove and appoint new or additional trustees; (2) determine which jurisdiction shall be proper law of trust; (3) change forum of administration of trust; and (4) conditionally or unconditionally withhold any prior consent required from trustees for specified actions.

Protector can be any adult individual of sound mind, including settlor, body corporate, firm, partnership or group of persons whether corporate or not. Protector may also be trustee or beneficiary of that trust.

Enforcers.

Terms of trust deed must also provide for appointment of enforcer who is responsible and capable of enforcing trust and for appointment of enforcer's successor. Both appointments must be approved by Commission in Mauritius. Enforcer cannot act as trustee at same time, and is prohibited from deriving any profit either directly or indirectly by reason of appointment, other than reasonable fee for his service.

Types of Trusts.

There are four types of trusts, namely: Discretionary Trusts, Purpose Trusts, Protective or Spendthrift Trusts and Charitable Trusts which individually accommodate different needs of settlor.

Discretionary Trusts.

Most common and flexible type of offshore trust is discretionary trust which typically allows trustees to appoint additional beneficiaries or to remove existing beneficiaries, and will usually also allow trustees to distribute income and capital of trust to beneficiaries in varying amounts and at various times. Discretionary trusts are commonly used when no decision is taken at time trust is established as to what portion of trust's income and capital should be reserved for each beneficiary. Settlor typically provides trustees with letter of wishes as guidance as to how trustees should administer trust and manage assets.

Purpose Trusts.

Objects of purpose trusts are for fulfillment of express purposes rather than benefit of specific beneficiaries or members of class. Purpose trusts must be: (1) Specific, reasonable and capable of fulfillment; and (2) not immoral, unlawful or contrary to public policy. Trust deeds must also provide for disposition of any surplus assets upon termination of trust (either by expiration on specified date, occurrence of specified event, or any other cause).

Protective or Spendthrift Trusts.

Act provides for protective or spendthrift trusts whereby terms of that trust may make interest of beneficiary subject to termination, restriction on alienation of or dealing in that interest or any part of that interest, or diminution, suspension or termination, in event of beneficiary becoming insolvent or any of his property becoming liable to seizure or sequestration for benefit of his creditors.

Charitable Trusts.

Trust shall be deemed to be charitable where trust has as its exclusive purpose or object one or more of following: (1) Relief of poverty; (2) advancement of education; (3) advancement of religion; (4) protection of environment; (5) advancement of human rights and fundamental freedoms; or (6) any other purpose beneficial to public in general. As result of their express charitable purposes, these forms of trust are exempt from tax in Mauritius.

Avoidance of Trusts.

Act provides degree of asset protection in sense that even if settlor is bankrupt, his property liquidated, or there are any actions or proceedings against settlor by creditors, trust shall not be void, voidable or invalidated.

Court may still declare trust void where it is established that trust was made with intent to defraud persons who were creditors of settlor at time when trust property was vested in trustee. Creditor must prove beyond reasonable doubt that settlor's intent was to defraud. However, no action may be brought against trust assets more than two years after settling assets into that trust.

6 FAMILY

6.01 MARRIAGE:

Marriages in Mauritius are governed by Code Napoleon and Part IV of Civil Status Act 1981. No one may contract marriage without having reached 18 years of age, however, minor having more than 16 years may contract marriage with consent of his mother and father; or by any one of his mother or father, who solely exercise parental authority; or by Judge in Chambers in absence of parents or parental authority.

There is no marriage where there is no consent and no one may contract second marriage before dissolution of first.

Marriages can be of four kinds – civil, religious, religious with civil effect and purely religious, governed jointly by §§ 18 – 36 of Civil Status Act and Code Napoleon, Arts. 144 – 228-10. Any marriage, whether civil or religious can only be celebrated if ``conditions de fond'' (substantial conditions) and ``conditions de forme'' (formalities) are complied with. Non-adherence to required conditions renders marriage null and void.

CIVIL MARRIAGE:

Civil marriages are governed by §§ 18- 24 of Civil Status Act and Arts. 144 – 154 of Code Napoleon. Marriages must obligatorily be officiated by Civil Status Officer or authorised person (e.g. priest). Non-authorised person celebrating marriage must be assisted by Civil Status Officer.

There are three different types of marital regimes which are recognized under Mauritian laws: (1) Community of property; (2) Regime of separate property; (3) Conventional Community.

Formalities (``conditions de formes'') of Civil Marriage.

Publication.

Before civil marriage may be celebrated, publication of intended marriage shall be made in office of district where marriage is to take place. Publication shall also be made in office of district in which each of parties has resided in Mauritius for seven days immediately preceding day of publication, however this does not apply to marriage of non-citizens.

Civil marriage shall not take place until after ten days from publication of marriage, however in cases of marriage of non-citizens of Mauritius and where they do not reside in Mauritius, they may celebrate their civil marriage on day immediately following day of publication. As regards to marriage within prison compound, marriage of person serving term of imprisonment may be celebrated within prison compound where he is detained not less than 28 days after publication of marriage as officer in charge of prison may approve. Where marriage does not take place within three months from publication, new publication shall be made before marriage is celebrated.

After publication of proposed civil marriage, any person has any ground to object to celebration of marriage or in opinion that any provision of Civil Status Act or any other enactment relating to marriage is likely to be infringed, he may lodge with Registrar of Civil Status notice of objection to proposed marriage.

Upon receipt of notice of objection, Registrar of Civil Status shall enquire into matter and, after hearing parties, make decision upholding or rejecting objection, and inform parties accordingly. Any party aggrieved by decision of registrar may within period not exceeding 30 days from date on which he is informed of decision apply to Judge in Chambers for order to quash decision. Upon hearing of such application, Judge in Chambers shall make order quashing or upholding decision, or such other order as he may deem fit. Order shall be transmitted to Registrar of Civil Status who shall cause it to be entered in appropriate register. Where proposed marriage may be celebrated in virtue of order transmitted to Registrar of Civil Status, Registrar of Civil Status shall cause marriage to be celebrated at such time as is convenient to parties and without parties having to make fresh publication of their proposed marriage.

Substantial Conditions (``conditions de fond'') of Civil Marriage.

Natural Aptitude Conditions (``Impératifs Naturels'').

As stated earlier no one may contract marriage without having reached 18 years of age, nevertheless minor having more than 16 years may contract marriage with consent of both parents (where both parents alive), otherwise, consent of person vested with parental authority, guardianship or curatorship. Where parties whose consent is required are absent, Judge in Chambers is competent to give consent.

General Prohibitions to Marriage.

Prohibitions to marriages are: (1) In direct lineage, marriage is prohibited between all ascendants and descendants, legitimate or illegitimate, and relatives by marriage in same lineage; (2) in collateral lineage, marriage is prohibited between legitimate or illegitimate brother and sister; (3) marriage is further prohibited between uncle and niece, aunt and nephew, whether relationship be legitimate or illegitimate.

Nevertheless, Judge in Chambers may for serious reasons remove prohibitions entered: (1) As regards to condition ``a'' as to marriages between relatives by marriage in direct lineage where person who created relationship is dead; (2) As regards to condition ``c'' as to marriages between uncle and niece, aunt and nephew.

Nullity of Marriage.

Non-adherence to any stipulated condition of marriage results in nullity of marriage. Nullity can be of two types: relative or absolute.

Relative nullity can be petitioned from whosoever holds himself/herself to have interest whereas absolute nullity can be petitioned from anyone.

Only ground for nullity of marriage is vitiated consent through (1) error; (2) duress; (3) deception.

Petitions for nullity of marriage, in respect of error and duress, is however time-barred. Where spouse has contracted marriage on grounds of error or duress, application for annulment may no longer be admissible whenever there has been continuous cohabitation for six months since spouse acquired his or her full freedom or mistake was discovered by him or her.

Marriage entered into regardless of stipulated conditions of legal marriageable age does not constitute ground for nullity. Nullity cannot be petitioned from those who have accepted and duly acknowledged marriage (in such cases, mostly parents, guardians or curators). Spouses will not be able to petition nullity if they have cohabited for six months or more following age of majority or if wife has become pregnant prior to stipulated six months' lapse.

Dissolution of Marriages.

Marriage is dissolved by: (1) Death of one of spouses; or (2) divorce lawfully pronounced.

RELIGIOUS MARRIAGE

Civil Status Act contains provisions for following types of religious marriages: (1) Religious marriage with civil effect; (2) Past religious marriage; (3) Purely religious marriage.

Religious Marriage with Civil Effect.

All formal and substantial requisites of civil marriage must be met.

Past Religious Marriage.

Religious marriages contracted before 1 Jan. 1982 can be registered at Civil Status Office on both parties appearing jointly to Civil Status Office and making their request or on one spouse producing affidavit of marriage to Civil Status Office (where one of parties objects or is absent). Registered past religious marriages produce limited effects and do not enjoy same status as civil marriages in law.

Purely Religious Marriage.

This is possibility opened to Muslims and is regulated mainly by Muslim Family Council.

6.02 ADOPTION:

Adoptions are regulated by Code Napoleon Arts. 343 - 370-5. National Adoption Council Adoption Act has set up National Adoption Council, whose objects are to inquire into all demands for adoption of citizens by non-citizens before any application is made to Judge in Chambers, to advise Minister on all matters relating to these demands and to coordinate with overseas official agencies engaged in adoption and welfare of children.

Adoption can be of three kinds: (1) Ordinary: ``adoption simple''; (2) plenary: ``adoption plénière''; (3) legitimisation by adoption: ``légitimation par adoption''.

ORDINARY ADOPTION:

This is covered by Arts. 343 – 363 of Code Napoleon. Adoption may also be petitioned by person over ``30 years of age'', however this condition is not required when adoption is petitioned by two spouses and there is no breakdown of community life. Adopters must be 15 years older than children whom they propose to adopt. Where latter are their spouse's children, required difference of age is only ten years. Judge in Chambers may, however, if there are good reasons, allow adoption where difference in age is smaller than that required. Ordinary adoption is allowed irrespective of age of adoptee, however if aged over 15, he must consent to the adoption.

Necessity of consent.

Where parentage of child is established with regard to his father and mother, latter must both consent to adoption. Where one of them is dead or unable to express his or her consent or has lost his or her rights of parental authority, consent of other suffices. Where parentage of child is established only as regard to one of his parents, only that one shall give consent to adoption. Where father and mother of child are dead, unable to express their intention or deprived of their rights of parental authority, consent shall be given by family council, after advice of person who actually takes care of child. Judge in Chambers issues his or her decision taking into account welfare of child. Where Judge in Chambers think necessary, before final decree, child may be placed on probationary adoption for not more than six months.

Where Judge in Chambers rejects adoption petition, reasons rejecting petition and relevant provisions in law must be specified. Where adoption is granted by Judge in Chambers, adoption is published in Registry of Supreme Court and other places where Judge decides. Registry officer to issue copy of same to Civil Status Office for registration of adoption.

Revocation.

Where serious reasons so justify, adoption may be revoked, on request of adopter or adoptee. Request for revocation made by adopter is admissible only where adoptee is over 15. Where adoptee is minor, father and mother by blood or, failing them, member of family of origin up to degree of cousin-german may also request revocation.

PLENARY ADOPTION:

This is covered by Arts. 364 – 369 of Code Napoleon. Plenary adoption may be petitioned by two spouses where there is no breakdown of community life.

Plenary adoption is irrevocable but can be pronounced null for wrong procedure.

LEGITIMISATION BY ADOPTION:

Where parentage of illegitimate child was established with regard to one of his father or mother, other spouse may adopt child. Legitimisation by adoption is irrevocable.

Adoption by Non-Mauritian Citizens.

Adoptions of minor citizens by non-citizens must be made by application to Judge in Chambers unless authorized in writing by National Adoption Council.

6.03 DIVORCE:

Jurisdiction.

General jurisdiction in divorce, judicial separation and nullity of marriage is granted to Supreme Court, Family Division. Judge in Chambers has jurisdiction for all provisional measures. All proceedings for grant of decree shall be entered by way of petition and any application incidental to or consequential upon petition for decree shall be made by way of motion.

Grounds for Divorce.

Following grounds for divorce exist under Civil Code: (1) ``Faute'' (Fault); and (2) ``Rupture de Vie Commune'' (Breakdown of communal life).

Divorce for Fault.

Divorce for fault may be petitioned for following reasons: (1) When there is serious or renewed violation of duties and obligations of marriage; (2) where one spouse has been sentenced for term of at least five years, divorce may then be petitioned by other spouse; (3) when there has been reconciliation, new petition may be filed by reason of facts occurred or discussed after reconciliation.

Divorce for Breakdown of Community Life.

Spouse may petition for divorce by reason of extended breakdown of community life, where spouses have lived apart in fact for five years.

Grant of Decree of Divorce.

Provisional Decree.

At trial of case, where Court is satisfied that petitioner has established his case, Court shall, in first instance, grant provisional decree.

Permanent Decree.

Any party may apply to Court for provisional decree to be made permanent. However, no decree shall be made permanent, except after expiry of three months from date on which provisional decree was made.

Restrictions on Permanent Decree.

Court shall not make permanent provisional decree unless Court is satisfied that there is no child in relation to whom financial arrangements ought to be made; or that financial arrangements have been made for every child in relation to whom such arrangements should be made and that arrangements made are satisfactory or best that can be devised in circumstances; or it is impracticable for party or parties appearing before Court to make such arrangements.

When Action May be Started.

Petition for divorce may be presented any time after marriage.

Annulment of Marriage.

See topic Marriage.

Recognition of Foreign Decree.

Overseas divorce or legal separation will be recognised by way of ``exequatur''.

7 INSURANCE

7.01 INSURANCE COMPANIES:

Governing Statutes.

Insurance Act 2005, which repealed Insurance Act 1987 improved soundness of insurance market in Mauritius. Act provides for application of International Association of Insurance Supervisors' (IAIS) standards and principles and focuses on specific regulatory issues relating to capital adequacy, solvency, corporate governance, early warning systems and protection of policyholders.

Act is administered by Financial Services Commission. In discharging its functions under Act, Financial Services Commission is required to strike appropriate balance between public policy aims of ensuring strong financial institutions and public protection on one hand and competitiveness, entrepreneurial spirit and efficiency on other.

Registration.

Any person carrying on insurance business in or from within Mauritius must be duly licensed by Financial Services Commission.

Conditions of Registration.

Insurer must maintain relevant solvency margin, liquidity and other ratios applicable.

Classes of Insurance Licence.

General and Long Term.

General and Long-Term Business.

Minimum paid-up capital required for: (1) General insurer is US$100,000; (2) long-term insurer is US$250,000; and combined company is $US350,000. Margin of solvency for general insurers must be higher of either surplus of assets over liabilities of US$100,000 or 15% of net premium income, while maintaining liquidity ratio of admitted assets equaling at least 75% of admitted liabilities. For long term insurers only difference is margin of solvency, where liabilities must not exceed value of fund. Limit of US$100,000 does not apply to Protected Cell Company (``PCC'').

Captive insurance companies are required to be reinsured in excess of reasonable and prudent retention levels unless Commission is satisfied that captive has access to sufficient security without need for reinsurance.

Regulation.

Captive insurers must appoint licensed captive management company in Mauritius who will act as principal representative and will be accountable to Commission for activities of captive and responsible for ensuring captive insurer is in compliance with guidelines at all times. Captive manager will also annually prepare and file (1) audited financial statements (2) certificate of margin of solvency (3) certificate of liquidity ratio (4) actuarial valuation of adequacy of premiums and loss reserves for long term business and (5) declaration of principal representative as to accuracy of accounts.

Premium Writings Restriction.

Maximum premium writings are restricted by operation of solvency margin. Insurer's capital and surplus must be maintained at level calculated by reference to its net premiums written. Basic rule is ratio 1:5.

Restriction on Assets.

Minimum liquidity ratio carriers is that value of its ``relevant assets'' be not less than 75% of amount of its relevant liabilities. Liquidity ratio does not apply to insurers carrying on long-term business.

Long-Term Business.

Separate accounts must be kept. All receipts must be credited to long-term business fund. No payment may be made directly or indirectly from this fund for any purpose other than in conduct of insurer's long-term business, except to extent that there is surplus certified by approved actuary to be available otherwise than to policyholders. Dividends may only be declared or paid to persons other than policyholders to extent that approved actuary certifies that value of assets in insurer's long-term business fund exceeds liabilities of its long-term business.

Incorporation Procedures.

Applications must be submitted to Commission through licenced management company, accompanied by certificate from law practitioner practicing in Mauritius to effect that application complies with laws of Mauritius, certified copies of memorandum and articles of association of company (if any) or other constitutive documents, name of principal representative (typically executive of appointed captive management company), and business plan. Captive insurers must also submit actuarial report for long term licences, which certifies that (1) financing of captive is sufficient to cover both technical reserves and required margin of solvency (2) Business Plan is actuarially sound as it relates to long term business and (3) name of appointed captive management company.

Taxation.

Insurers are nominally liable for Mauritius income tax at rate of 15%. However by being GBL1 company, insurer can claim credits for taxes incurred and paid in foreign jurisdictions against nominal tax payable (entitled to deemed tax credit equivalent to higher of actual foreign tax paid or 80% of Mauritian tax on its foreign source income). Effective tax rate is therefore 3%.

8 INTELLECTUAL PROPERTY

8.01 COPYRIGHT:

Copyright Act 1997 (``Copyright Act'') came into force in Mauritius on 20 Sept. 1977 pursuant to Proclamation No. 13 of 1997. It repealed Copyright Act 1986.

Copyright Act protects ``work'' that it defines as ``artistic, literary or scientific work, or a derivative work, which include (1) books, pamphlets or other writing (2) illustration or map, plan or sketch (3) lecture, sermon or any other address of similar nature (4) dramatic or dramatic-musical work (5) musical work (6) choreographic work or pantomime (7) sound recording (8) audiovisual work (9) photographic work (10) work of applied art, whether produced by handicraft or on industrial scale (11) computer program (12) judgment of court of law or tribunal''.

Copyright Act expressly excludes from scope of ``work'' following ``(1) any idea, procedure, system method of operation, concept, principle, discovery or mere data even if it is or they are expressed, described, explained, illustrated or embodied in work (2) official text of legislative, administrative or legal nature of official translation thereof''.

There are penalties specified for infringement of copyright. Infringement of copyright attracts both criminal and civil liability. Insofar as criminal liability is concerned, penalty in respect for first conviction is fine not exceeding MUR 300,000 (USD 11,111) and imprisonment for term not exceeding two years. In event of second conviction, quantum for fine is for maximum of MUR 500, 000 (USD 18, 519) and to imprisonment for maximum term of eight years. In relation to civil liability, Supreme Court has been given wide powers under Copyright Act as regards remedies that may be awarded. Thus it may (1) award damages (2) grant injunction (3) order forfeiture of any infringing copy and of any apparatus, article or thing used for making of infringing copy or otherwise and, (4) ``notwithstanding any other enactment …/… grant such remedies …/…as (it) thinks fit''.

8.02 PATENTS:

Patents are governed by Patents, Industrial Designs and Trademark Act 2002 (``PIDTA'') that repealed Patents Act. PIDTA came into operation on 6 Jan. 2003.

PIDTA defines patent as ``title granted to protect invention'', which is in turn defined as ``an idea of an inventor which provides the solution to a specific problem in the field of technology''. (§ 11[1]).

Any person or persons claiming to be inventor or joint inventors of invention may apply for registration of invention with Controller of Industrial Property Office (``Controller''), which, if granted, will be valid for period of 20 years after filing date of application of patent. Validity of registered patent during aforesaid period is conditional upon payment of annual fee failing which registered patent will be deemed to have lapsed.

When applying for registration of patent with Controller, applicant may claim priority as contemplated by Paris Convention for Protection of Industrial Property 1883.

8.03 REGISTERED INDUSTRIAL DESIGNS:

PIDTA defines Industrial Design as ``any composition of lines or colours or any three-dimensional form, or any material, whether or not associated with lines or colours... provided that such composition, form or material – (1) gives a special appearance to a product of industry or handicraft, (2) can serve as a pattern for a product of industry or handicraft; and (3) appeals to and judged by the eye''. (§ 27[1]).

Any person claiming to be creator of any ``new'' Industrial Design, as defined by PIDTA, must apply to Controller for registration of Industrial Design in order to acquire exclusive right to Industrial Design in Mauritius. Once registered Industrial Design is valid for initial period of five years from filing date of application. Thereafter, it may be renewed for maximum of three consecutive periods of five years. Continued registration of registered industrial design is conditional however upon (1) application for renewal being made six months before expiry of validity period (2) payment of renewal fees and, (3) compliance with any other conditions that may be prescribed under PIDTA.

There are penalties specified for where person has exploited registered Industrial Design in Mauritius without agreement of registered owner. This attracts both criminal and civil liability.

Action for unlawful exploitation of Industrial Design is styled as ``unfair practice''. Insofar as criminal liability is concerned, penalty is fine not exceeding MUR 250,000 (USD 9,259) and to term of imprisonment not exceeding five years. As regards civil liability, PIDTA has prescribed any parameters save for reciting that ``unfair practice may give rise to a claim in damages''.

8.04 MARKS (I.E. TRADEMARKS, SERVICE MARKS, COLLECTIVE MARKS & TRADE NAMES):

PIDTA repealed Trademark Act when it came into force on 6 Jan. 2003. Exclusive right to use of mark is achieved through registration with Controller, who has duty to examine whether mark applied for is capable of distinguishing goods or services of one enterprise from another. Furthermore, Controller has duty to ascertain whether requirements of PIDTA have been met. Amongst other factors, registration may be refused by Controller where (1) words ``patent'', ``patented'', ``registered'', ``registered design'', ``copyright'', or abbreviation thereof or (2) any representation of State, or any colourable imitation of these representations or (3) mark is likely to mislead (4) is contrary to public order or morality.

Registered mark is valid for period of ten years from filing date of application. At expiry of registered period, registered owner may apply for renewal of registration for consecutive periods of ten years provided (1) renewal fee is paid and (2) any conditions as may be prescribed by PIDTA are fulfilled.

Whilst PIDTA authorises licensing of marks, it has drawn exception in case of registered collective mark. Furthermore, PIDTA makes it mandatory that licence relating to registered mark, save for registered collective mark, shall ``provide for effective control by the licensor of the quality of the goods or services of the licence in connection with which the mark is used'', failing which licence will not be valid. (§ 45[1][2] of PIDTA).

PIDTA does not confer any powers of correction and rectification of Register maintained by Controller. Condition of precedent for causing Controller to rectify Register that he maintain for Patents, Industrial Designs and Marks is application before Industrial Property Tribunal for order of Invalidation or by way of appeal in terms laid down by PIDTA.

There are prescribed forms and procedures for applications, oppositions and other matters under PIDTA in relation to Patents, Industrial Designs and Marks.

9 REAL PROPERTY

9.01 TYPES OF SECURITY INTERESTS

Creation of security over real property is governed by Civil Code. Types of security that can be created over real property are Mortgages, Fixed and Floating Charges and Pledges.

Mortgages.

Mortgages give to mortgagee proprietary right in mortgaged property. Mortgagee has right to seize property in whatever hands it finds itself and have it sold to recoup sums due to him in preference to other creditors.

There are three types of mortgages namely mortgages by operation of law, judicial mortgages and mortgages by agreement.

Mortgages by operation of law are available in limited circumstances spelt out in Civil Code. They are available to spouses, minors, persons who are of age but are under guardianship, and State.

For purposes of taking security offshore are judicial mortgages and mortgages by agreement.

Judicial mortgages are created following judgment of court to that effect. Judicial mortgages can be created following judgments from local courts. They can also be created following judgments from foreign courts or following arbitral awards provided that such judgments or arbitral awards have been made enforceable by Supreme Court of Mauritius. In cases where creditor believes that sums due to him are in jeopardy due to acts and doings or due to dubious solvency of debtor, he may move local court for judicial mortgage on property of debtor.

Mortgages over real property can also be created by agreement. Civil Code provides for certain requirements of form. Such agreements have to be in form of authentic deeds, in other words, deeds drawn up by Notary Public in Mauritius. For such deeds to be valid and enforceable, they must specify nature and location of mortgaged properties. Deed drawn up in foreign country cannot give rise to mortgage over real property in Mauritius, unless there is derogation to that effect in bilateral, multilateral or other international treaty to which Mauritius and foreign country in question are parties.

Law provides that mortgages are preserved by having them inscribed at Office of Conservator of Mortgages. Inscription of mortgages has effect of preserving said mortgages for period of ten years beginning from date of inscription. Inscription has to be renewed after ten years.

Where different mortgages exist in relation to different properties, inscription dates determine priority of mortgages. Mortgage with earlier inscription date prevails. Where several mortgages are inscribed on same date, date of deed creating mortgage determines priority. Mortgage that has been created by virtue of deed with earliest date prevails.

Fixed and Floating Charges.

Only institutions that are authorised at law to burden property with fixed and floating charges are: Government of Mauritius, bank set up under Banking Act, insurance companies, Development Bank of Mauritius, co-operative banks, Mauritius Housing Company Limited, co-operative societies and any other local or foreign institution approved under Regulations made by Minister of Finance. As of date, current Regulations provide that offshore companies may burden property in Mauritius with fixed and floating charges.

Fixed or floating charge will be valid and enforceable only if it is inscribed at office of Conservator of Mortgages and must be inscribed within 20 days from date of deed creating it, failing which there may be penalty of 50% of duty leviable. Rank of fixed and floating charges is determined by date of its inscription and charge with earlier inscription date prevails.

Fixed charge only burdens such property as is mentioned in deed creating it and creates proprietary right in burdened property. Such property is burdened up to amount mentioned at time of inscription of deed.

Floating charge, on other hand, burdens whole of present and future property of debtor as and when acquired. Agreement may however provide that floating charge will only extend to present property of debtor. Property of debtor is burdened up to amount mentioned at time of inscription of deed.

Pledges.

General principle of pledge is that property is given by borrower (pledgor) to lender (pledgee) as security for debt. Property remains in ownership of pledgor although it is in possession of pledgee until debt is repaid. Instrument creating pledge must be in writing.

Pledge over real property gives pledgee/creditor right to occupy and receive rent on property and to credit it yearly, first to interests and then to principal sum owed by pledgor/debtor. Pledgee has duty to maintain pledged property in good condition at his own cost. Pledgee also has duty to pay all charges and rates on pledged property as they fall due, unless it has been agreed otherwise. Pledgor cannot request that he be given possession of pledged property before he has repaid all sums due to pledgee. Where pledgee wishes to be discharged of financial obligations relating to pledged property, he may compel pledgor to take possession of pledged property, unless otherwise agreed.

1

MALTA LAW DIGEST

—Scope —

Revised for 2009 edition by

Rutter Giappone & Associates, of Valletta

Malta is Member of EU.

Note: This revision incorporates legislation through Oct. 30, 2007.

1 INTRODUCTION

1.01 CURRENCY:

Unit of currency in Malta is Euro.

Central Bank of Malta has exclusive right to issue all Maltese money.

1.02 GOVERNMENT AND LEGAL SYSTEM:

Malta is sovereign independent Republic with democratic Parliamentary System based on British model. Parliament consists of House of Representatives to which members are elected by universal suffrage every five years.

Basic law of Malta is written constitution (The Constitution of Malta) which effectively creates Republic and enshrines fundamental principle of balance of powers, rule of law, independence of judiciary and human rights.

Executive is composed of Cabinet composed of Ministers and Parliamentary Secretaries nominated by Prime Minister. Prime Minister, who is appointed by President of the Republic, is usually leader of party commanding greatest measure of support in House. House of Representatives in Malta meets from Sept. to July.

Malta enjoys civil law jurisdiction, however, most modern legislations including company, tax and maritime laws are generally modelled on their Anglo-American counterparts.

Judiciary is independent of Executive and of Legislature. Judges are appointed by Government; but they cannot be removed before retirement age except for proved inability to exercise their functions properly, abuse, or proved misbehavior and following two thirds vote in House of Representatives.

Local Government.

Apart from national government by Local Councils Act, 1993, Malta has been divided into 68 localities each of which is administered as regards local affairs by Local Council consisting of from five to 13 counsellors (depending on population in each locality), one of whom is elected mayor. Elections of councillors will be held every three years. Councillors are elected by residents of each particular locality. Office of Mayor in any Local Council shall be occupied by such elected Councillor who at last local election shall have obtained highest number of votes in first count amongst candidates of political party which at such elections obtained absolute majority of Councillors in such Council.

Ombudsman.

Appointed by President of Republic upon resolution of House of Representatives supported by at least two-thirds of all members thereof. Term of office is of five years, with eligibility for reappointment for consecutive term. Cannot serve as: member of House of Representatives, local council, public officer nor take part in any professional, banking, commercial or trade union activity, or in any other activity for profit or reward while in office. Also cannot pursue any activity which might affect impartiality, independence or public confidence in his office.

Removed from office by President only upon proven inability to perform his functions and following demand by two-thirds majority of all members of House of Representatives.

Is responsible to investigate grievances involving: Government of Malta, including all Departments, Ministries and Authorities thereof as well as any Minister, Parliamentary Secretary, public officer and any member or servant of any other authority; any statutory body, partnership or other body in which Government or any of aforementioned bodies or combination thereof has controlling interest or effective control, including any director, member, manager or other officer of same; local councils or any committee thereof, mayors, councilors and members of staff; all actions of Malta Police Force (except any criminal investigation), of Public Service Commission and Armed Forces of Malta with some exceptions.

Cannot investigate: President, House of Representatives, Cabinet, Judiciary, certain commissions and bodies listed under Ombudsman Act, and in other limited cases specified under Ombudsman Act.

Right to complain to Ombudsman is remedy of last resort, is free of charge and must be made by person having personal interest in matter complained of. Ombudsman's findings are not enforceable.

1.03 OFFICE HOURS AND TIME ZONE:

Malta is in the +02:00 GMT Central European time zone. Office hours are generally from 9 a.m. to 5 p.m.

2 BUSINESS ORGANIZATIONS

2.01 AGENCY:

This is regulated by Civil Code (§§1856-1890).

Mandate is contract whereby person gives to another power to do something for him. Except where expressly stated, mandate may be granted by public deed, by private writing, by letter, verbally or even tacitly. Contract is not perfected until mandatory has accepted mandate but this acceptance may be tacit or implied. Blank mandatory is possible if mandate granted by private writing. Mandate is gratuitous unless otherwise stipulated. Mandate is either special or general in which case it refers to acts of administration only. Power to alienate property, except such alienation falling within limits of administration, or to hypothecate property or to perform other acts of ownership must be expressed. Generally mandatory is presumed to be authorised to perform all that he deems necessary for carrying out of his mandate.

Mandate is terminated: by its revocation; by death, interdiction or bankruptcy of either mandator or mandatory; by termination of powers of mandator; by expiration of time during which mandate was to continue; by renunciation on part of mandatory.

Commercial agency is regulated by Civil Code (cc. 16) which expressly states that except where otherwise provided by law, custom or agreement provisions relating to mandate in Civil Code (supra) apply to commercial agency.

All acts done by agent on behalf of principal, within scope of his authority, produce directly their effect whether in favour of or against principal. Agent is bound to furnish to third party all information regarding extent of authority conferred to him by principal, and any fake statement wilfully made by agent shall be considered commercial fraud.

Agent cannot transact with himself any business of his principal whether directly or indirectly without ratification of principal.

Where agency has been conferred in general terms, principal who withdraws agency may relieve himself from all liability towards third parties from any further acts done by agent by giving notice of such withdrawal by means of note filed in First Hall Civil Court and causing such note to be published in Government Gazzette and in other newspaper, and affixed in Exchange.

2.02 ASSOCIATIONS:

See topic 2.04 Partnerships.

2.03 CORPORATIONS:

See topic 2.04 Partnerships.

2.04 PARTNERSHIPS:

All forms of business partnerships are regulated under Companies Act, Act XXV of 1995.

Three forms of commercial partnerships exist: (a) partnerships “en nom collectif”; (b) partnerships “en commandite”; and (c) partnerships “anonyme” or limited liability companies.

With regard to first two types of partnerships, law is based on continental (mostly Italian) pattern; while in case of limited liability company, law is to very great extent modelled on U.K. Companies Act 1995, U.K. Insolvency Act 1986, and EU Harmonisation Directives.

All commercial partnerships have to be registered with Registrar of Partnerships and when so registered acquire legal personality distinct from that of their members or shareholders.

Under Maltese law partnership must have at least two members or shareholders and its objects must be limited to commercial activities, although limited liability company which is private exempt (private company in which no body corporate is shareholder, holds any interest in or is director of that company) can be registered with one shareholder, or become single member company during its existence.

(a) Partnership “en nom collectif”, originally known as “general partnerships” has been defined by law as partnership which operates under partnership name and has its obligations guaranteed by unlimited and joint and several liability of all parties, provided that no action shall lie against individual parties unless property of partnership has been discussed. (§6). Partnership name is limited to names of parties.

(b) Partnership “en commandite” is defined as partnership which operates under partnership name and has its obligations guaranteed by unlimited and joint and several liability of one or more parties, called unlimited parties, and by liability, limited to amount, if any, of any unpaid contribution, of one or more parties, called limited parties. (§50).

(c) Limited liability company, or corporation, is defined as partnership formed by means of capital divided into shares and having liability of its members limited to amount, if any, of unpaid shares respectively held by them. (§166).

Company may be public or private. Private company is one which restricts right to transfer its shares, limits number of its shareholders to 50, and prohibits invitation to public to subscribe for any shares or debentures.

Company is constituted by virtue of memorandum of association (Articles of Incorporation) which must contain following particulars: (i) whether company is public or private, (ii) name and residence of subscribers, (iii) name of company, (iv) registered office in Malta of company, (v) objects of company, (vi) details relating to share capital, (vii) number of, and names and addresses of first directors, manner of representation of company and name of first representative/s, (viii) name and residence of company secretary, (ix) period if any fixed for duration of company.

Subscribers may choose to regulate company by virtue of Articles of Association which is document signed by subscribers, registered together with memorandum. Alternatively, regulations contained in Companies Act 1995 may be made to constitute or supplement, as case may be, articles of company. These documents need not be incorporated in public deed.

Company may adopt any name that is not already in use but must end with words “Public Limited Company” or “PLC” in case of public company, or “Private Limited Company” or “Ltd.” in case of private company.

Term “capital” as used in law has various different meanings: (a) Authorised share capital, is total amount of capital which company is authorised to issue by memorandum. On this value stamp duty is payable upon registration of company; (b) issued capital is that part of authorised share capital actually taken up or subscribed by shareholders, which cannot be less than Lm20,000 in case of public company, or less than Lm500 in case of private company. In case of foreign controlled company, minimum issued share capital is Lm10,000; (c) paid up capital is that part of issued capital which has been actually paid up by shareholders and must be not less than 25% for public companies and not less than 20% for private companies.

Note: Last amendments of companies act saw introduction in Maltese system of recovery procedure for companies. This procedure is available only in case of companies that are not in position to honor their debts or are imminently likely to become unable to pay their debts.

Shares may be of different classes having different voting, dividends and other rights as regulated in Memorandum and Articles of Company. All shares must be registered. Bearer shares are not permissible under Maltese law except in case of public companies.

Transfer of shares can be effected freely or as regulated by Articles of Association of Company.

Debentures and debenture stock is allowed under Maltese law.

Ordinary administration of company is entrusted to Board of Directors which is composed of one or more directors appointed by subscribers in general meeting in accordance with regulations set out in Articles of Association. Directors are authorised to exercise all powers of company which are not, by law or by Memorandum or Articles of Association reserved for company in general meeting. Directors, unless specifically required by Memorandum, need not be shareholders of company.

Law specifically requires individual to act as company secretary. There is no requirement that any shareholder or officer of company need be resident in Malta.

Company is required to hold first meeting of its members within three months from date at which it is entitled to commence business—this is called “statutory meeting”. (§111[i]). Thereafter company is obliged to hold annual general meeting, and not more than 15 months should elapse between any two consecutive annual general meetings. “Extraordinary general meeting” can also be called at any time by directors upon requisition of such member or members holding not less than 10% of paid up share capital of company.

All shareholders are entitled to attend and vote at general meeting.

Procedures for calling of general meetings, for regulating procedure to be adhered to during these meetings, for regulating voting rights of shareholders are normally set out in Articles of Association of Company, and if not, regulations set out in Companies Act 1995 shall apply. As rule, unless otherwise regulated in Articles of Association, each share carries one vote and majority rule prevails.

In terms of law (§149), company is dissolved: (i) when company has resolved by extraordinary resolution that it be dissolved and consequently wound up by Court; (ii) when company has resolved by extraordinary resolution that it be dissolved and consequently wound up voluntarily.

Court will dissolve and wind up company where: (i) Company's business is suspended for 12 months uninterruptedly; (ii) company is unable to pay its debts.

Court will dissolve company where: (i) Number of its members is reduced below two and remains so for more than six months provided company is not single member company; (ii) number of directors is reduced below two in case of public companies, and below one in case of private companies, and remains so for more than six months; (iii) court is of opinion that grounds of sufficient gravity exist which warrant dissolution and consequent winding up of company; (iv) period of time for which company has been set up, if any, expires or event which under Memorandum and Articles sanctions winding up of company occurs and company before such expiry or occurrence or event, has not passed resolution to wind up voluntarily.

In case of voluntary winding-up, within 14 days from passing of resolution for dissolution and winding up of company, liquidator or officers thereof shall deliver notice of dissolution to Registrar for registration. Where company is dissolved by court, Registrar of

Superior Courts shall forward copy of winding up order to Registrar for registration.

Companies Act 1995, contemplates also possibility of “overseas companies”. Law allows that company which is registered or incorporated outside Malta to establish place of business in Malta by registering itself with Registrar of Companies by delivering to him: (i) authentic copy of deed of constitution of company; (ii) details of directors and secretary, if any; and (iii) names and addresses of one or more persons resident in Malta authorised to represent company in Malta.

Recent legislation in Malta (The Malta International Business Authority, 1989) has created new class of companies, namely offshore companies, which while retaining basic juridical characteristic features of Maltese company, differ in scope, application and attribution from Maltese company (see category 14 Foreign Trade and Commerce, topic Offshore Investment).

2.05 STOCK EXCHANGE:

By Malta Stock Exchange Act, 1990 was established Malta Stock Exchange, institution which provides facilities for trading, purchase and sale of securities of quoted companies, corporate bodies and others issued by Government of Malta. Law, which basically follows EC Directives and Regulations in this field, provides inter alia for admission of licenced stockbrokers to membership of Stock Exchange, for confidentiality of Exchange Information, prohibition of insider dealing and for tax incentives for companies quoted on Malta Stock Exchange.

3 BUSINESS REGULATION AND COMMERCE

3.01 BETTING OFFICE:

(1) Person granted permission to operate betting office shall ensure that there is in premises used as betting office approved control system and that all betting transactions are effected under system.

(2) Person granted permission to operate betting office shall not change approved control system without prior consent of Gaming Board.

(3) Person granted permission to operate betting office shall make submission in writing, prepared at his own cost and by or with approval of his auditors (hereinafter referred to as control system submission) to Board for approval of control system: (a) before effecting betting transactions; and (b) before effecting any change to existing approved control system.

(4) Control system submission shall describe and without prejudice to generality of foregoing, shall include information about: (a) following items to be used for conduct of betting office (i) accounting systems and procedures and chart of accounts, (ii) administrative systems and procedures, (iii) computer software, (iv) standard forms and terms; and (b) general procedures to be followed for effecting betting transactions; (c) procedures and standards for maintenance, security, storage and transportation of equipment to be used for effecting betting transactions; (d) procedures for recording bets and paying winnings won in betting transaction; and (e) procedures for using and maintaining security facilities.

(5) Board shall consider control system submission and either approve or refuse proposed control system or proposed change thereto.

(6) In considering control system submission, Board may require person granted permission to operate betting office: (a) to give Board further information about submission that is necessary and reasonable to assist Board to make decision about submission; and (b) to allow Board, acting through its inspectors or agents, to submit proposed control system, or approved control system as proposed to be changed, to tests.

(7) In considering whether to give approval Board shall have regard to: (a) whether system control submission satisfies requirements of this regulation; and (b) whether proposed control system, or approved control system as proposed to be changed, is capable of providing satisfactory and effective control over management and conduct of betting office.

(8) Board may refuse to give approval if person granted permission to operate betting office fails to comply with requirement above-mentioned.

(9) If Board decides to withhold its approval, notice in writing stating reasons for decision shall be served on person granted permission to operate betting office within 30 days and, if Board is of opinion that control system submission can easily be rectified to enable it to give approval, notice must also: (a) explain how submission may be changed; and (b) invite person granted permission to operate betting office to resubmit submission after making appropriate changes.

3.02 BILLS AND NOTES:

Law regulating bills of exchange, promissory notes and cheques is enunciated in Commercial Code. (§§260-272). Maltese courts rely heavily on English doctrine and case law for interpretation of relevant law.

Bill of exchange which fulfills all requirements brings parties within trading law, regardless of whether they are traders or nontraders, and whether or not bill was given in respect of purely civil transaction. Consequently, suits in respect thereof are brought before civil courts.

Requirements as to Content.

(1) Unconditional order to pay determined sum of money; (2) name of drawee; (3) maturity; (4) place of payment; (5) name of person to whom or to whose order payment is to be made; (6) date and place of drawing; (7) signature of drawer.

Maturity.

Bill not mentioning maturity is payable on sight. Bill not mentioning place of drawing is deemed to have been drawn at place indicated with name of drawer written on bill or on sheet attached to bill.

Transfer.

Delivery of bill with unconditional endorsement on bill or on sheet attached thereto, or with written assignment. If bill contains clause “not on order” or equivalent clause, transfer is effected only by delivery of bill with written assignment.

Presentment and Acceptance.

Bill may be presented for written acceptance by drawee at latter's place up to maturity unless prohibited in terms of bill; such prohibition is permissible only under certain conditions. Acceptance binds drawee for payment at maturity. Bill payable at sight must be presented within one year from date of drawing, unless otherwise stipulated. Bill has to be presented by holder on date of payment or on one of two following working days.

Payment.

If bill of exchange calls for payment in currency other than legal tender at place of payment, amount may be converted into local currency at rate of exchange prevailing on date of maturity. If debtor delays payment, holder has option to demand payment either at rate of exchange in force on date of maturity or at rate prevailing on day payment is actually effected.

Value of foreign currency is determined according to commercial custom at place of payment. Drawer may, however, in bill itself prescribe rate of exchange to be applied in converting foreign currency.

Protest.

Bills not accepted or not paid must be protested in usual manner, unless protest is waived.

Recourse in Default of Acceptance or Payment.

Holder may exact payment from endorsers, drawer and others liable on bill, at maturity. This right also exists before maturity in case of nonacceptance, acceptor's insolvency or bankruptcy or when execution or judgment against acceptor has been returned unsatisfied.

Limitation of Actions.

Actions are barred by lapse of five years.

Revenue Stamps.

Not due.

Promissory notes must be dated and must set forth sum to be paid, name of party to whose order it is payable and time and place of payment.

Promissory notes are subject to rules relating to bills of exchange insofar as these concern maturity, endorsements, joint and several liability, payment, protest, rights and duties of holder.

Cheques must be drawn only on bank and must be paid at sight. Date of drawing must be stated. It may be drawn in favour of specified person or to bearer or to self.

Anyone who negligently or wilfully draws cheques without provision after he has drawn cheque or who instructs bank not to pay can be prosecuted under criminal law. (Criminal Code, c. 9 of Laws of Malta).

3.03 BROADCASTING:

The Broadcasting Act, 1991 makes provision for regulation of all sound and television broadcasting services in Malta. Broadcasting Authority has also been set up and its functions include that of issuing licences in respect of nationwide and community radio services and television services in Malta.

3.04 COMMERCIAL REGISTER:

There are number of public registers created by special laws to make certain information matter of public record. Anyone carrying on any business enterprises is obliged to register firm in relative commercial register. Legal entities such as commercial partnerships, limited liability company, trusts, only come into existence after duly being registered in their relative commercial register.

3.05 CONTRACTS:

There are no essential differences between Maltese and Anglo-American law regarding validity of contracts. There is general power in all competent persons to freely enter into contractual agreements, limited only by public policy, illegal motives, and requirement that certain contracts be, (a) evidenced by writing, or (b) executed in presence of witnesses, or (c) acknowledged by notary public.

Applicable Law.

Obligations ex contractu are governed by law designated by parties, or failing such designation, by national law of parties if they belong to same country or by law of place where contract was entered into. Noncontractual obligations are governed by law of place where they arose.

Excuses for Nonperformance.

Nonperformance may be excused by supervening impossibility, by all cases of force majeure, and in event that, due to facts extraordinary and unexpected, performance has become exceedingly burdensome.

Government contracts are, as rule, awarded on basis of bids, except for system of direct negotiations in view of particularity of contract. Contracts are normally entered into on basis of general conditions and specifications and performance bond is usually required.

3.06 FRAUDS, STATUTE OF:

Unless law expressly prescribes otherwise, verbal agreements have full binding force. Generally following transactions require written form: (a) agreement implying promise to transfer or acquire under any title ownership of immovable property or rights thereon; (b) transfer or assignment of rights; (c) any promise of loan for consumption; (d) suretyship; (e) lease for period exceeding two years in case of urban leases, or 14 years in case of rural leases; (f) civil partnership; (g) agreement relating to Promise of Marriage Law.

Any agreement implying transfer, acquisition or in any way effecting rights over immovable property must be incorporated in public deed.

3.07 INFORMATION TECHNOLOGY, INTERNET AND NEW MEDIA:

Electronic Commerce.

Electronic Commerce Act (Act III of 2001) provides law in relation to electronic commerce and for matters connected therewith or ancillary thereto.

Electronic contract shall not be denied legal effect, validity or enforceability solely on grounds that it is wholly or partly in electronic form or has been entered into wholly or partly by way of electronic communications or otherwise.

For purposes of any law relating to contracts, offer, acceptance of offer and any related communication, including any subsequent amendment, cancellation or revocation of offer, acceptance of contract may, unless otherwise agreed by contracting parties, be communicated by means of electronic communications.

Unless otherwise agreed by parties who are not consumers, where addressee of electronic communication is required to give his consent through technological means: (a) in accepting originator's offer, electronic contract is concluded when addressee has received from originator, electronically, acknowledgment of receipt of addressee's consent; and (b) acknowledgment of receipt is deemed to have been received when addressee is able to access it.

Unless otherwise agreed by parties who are not consumers, originator shall provide addressee with effective and accessible means to identify and correct handling errors and accidental transactions prior to conclusion of contract.

Computer Misuse.

Person who without authorisation does any of following acts shall be guilty of offence against this article: (a) uses computer or any other device or equipment to access any data, software or supporting documentation held in that computer or on any other computer, or uses, copies or modifies any such data, software or supporting documentation; (b) outputs any data, software or supporting documentation from computer in which it is held, whether by having it displayed or in any other manner whatsoever; (c) copies any data, software or supporting documentation to any storage medium other than that in which it is held or to different location in storage medium in which it is held; (d) prevents or hinders access to any data, software or supporting documentation; (e) impairs operation of any system, software or integrity or reliability of any data; (f) takes possession of or makes use of any data, software or supporting documentation; (g) installs, moves, alters, erases, destroys, varies or adds to any data, software or supporting documentation; (h) discloses password or any other means of access, access code or other access information to any unauthorised person; (i) uses another person's access code, password, user name, electronic mail address or other means of access or identification information in computer; (j) discloses any data, software or supporting documentation unless this is required in course of his duties or by any other law.

Any person who without authorisation does any of following acts shall be guilty of offence against this article: (a) modifies computer equipment or supplies that are used or intended to be used in computer, computer system or computer network; (b) takes possession of, damages or destroys computer, computer system, computer network, or computer supplies used or intended to be used in computer, computer system or computer network or impairs operation of any of aforesaid.

If act is committed outside Malta which, had it been committed in Malta, would have constituted offence, it shall, if commission affects any computer software, data or supporting documentation which is situated in Malta or is in any way linked or connected to computer in Malta, be deemed to have been committed in Malta.

3.08 LICENSES, BUSINESS AND PROFESSIONAL:

For establishing any type of industrial or commercial enterprise state consent is required.

C. 370 of Laws of Malta on Investment Services regulates carrying on of investment business making provision for matters ancillary thereto or connected therewith. No person shall provide, or hold himself out as providing, investment service in or from within Malta unless he is in possession of valid investment services license.

3.09 MONOPOLIES, RESTRAINT OF TRADE AND COMPETITION:

Under Supplies and Services Act (c. 117) Government is entitled to restrict or limit any trading activity thus creating monopolies. Though Government intervention has been very limited, State was for some time prepared to grant monopolies to help set up new industries.

On its part State itself maintains virtual monopoly in certain fields, for example, trading of petroleum, water and electricity, etc.

Competition act (c. 379 of Laws of Malta) regulates competition and provides for fair-trading in Malta. This act provides for establishment of Office for Fair Competition, which is government department having following functions, to advise undertakings, associations of undertakings and public in relation to matters concerned with fair trading practices and procedures under this Act; to advise and make proposals and recommendations to Minister in relation to any matter concerning exercise of his functions under this Act; to investigate restrictive practices in competition and to institute action in terms of this Act to suppress same; and generally to exercise powers conferred upon it under this Act, and as may be assigned to it by Minister, within context of this Act. This Act also establishes commission of fair-trading whose functions are those of ensuring that there is no distortion of competition, or abuses of dominant position.

Of Limits of Competition.

(Arts. 32-37 of Maltese Commercial Code, c. 13 of Laws of Malta). Traders must not make use of any name, mark or distinctive device capable of creating confusion with any other name, mark or distinctive device lawfully used by others, even though such other name, mark or distinctive device is not registered in terms of Trademarks Act, nor may they make use of any firm name or fictitious name capable of misleading others as to real importance of firm.

Traders must not make use of any false indication of origin of goods: provided that designation which according to commercial usage is considered as common designation, shall not be deemed to be false indication.

Traders must not, for purpose of competition, spread news capable of prejudicing business or trade carried on by other persons. Moreover, they must not make use of honours, patents, medals, prizes or other distinctions to which they have no claim or which have been obtained for some other branch of business or trade.

Traders must not suborn persons employed in trade or business carried on by competitor for object of knowing or exploiting his customers.

Trader must not, in exercise of his trade or business, issue certificates of honesty or competency contrary to facts as known to him and capable of imposing upon good faith of others.

3.10 SALES:

Sale is perfected when parties have agreed on object and price, although neither has been delivered and from that moment thing itself remains at risk and for benefit of buyer. Sale of immovable property, however, must be made by public deed and such contracts are binding on third parties only if recorded in Public Registry.

Promise to sell thing for fixed price shall not be equivalent to sale but if accepted it shall create obligation on part of promisor to carry out sale, or, if sale can no longer be carried out, to make good damages to promise.

All expenses of or incidental to contract of sale are at charge of buyer. However, in absence of agreement brokerage fees shall be borne by seller and buyer one-half each.

Principal obligations of seller are to deliver goods and to give certain warranties. If seller fails to make delivery at time agreed upon, buyer may elect either to demand dissolution of contract or to demand that he be placed in possession of thing sold.

Warranties.—Warranty which seller owes to buyer is in respect of quiet possession of thing sold and of any latent defect therein.

In absence of any express agreement there is implied warranty on part of seller warranting buyer against any eviction. Seller warrants buyer against latent defects only, and not against apparent defects which buyer might have discovered for himself. In said two cases buyer may elect either to restore thing and have price repaid to him or retain thing and have part of price repaid to him. If defects of thing were known to seller, he is not only bound to repay price received by him but he is also liable in damages towards buyers. Claims based on disturbance of quiet possession and latent defects must be brought in respect of immovables within one year as from day of contract and in regard to movables within one month as from day of delivery of thing sold. Where, however, it was not possible for buyer to discover latent defect of thing, said periods of limitation of action shall run only from day on which it was possible for him to discover such defect.

4 CITIZENSHIP

4.01 ALIENS:

See category 16 Immigration, topic 16.01 Aliens.

4.02 IMMIGRATION:

See category 16 Immigration, topic 16.02 Immigration.

5 CIVIL ACTIONS AND PROCEDURE

5.01 ACTIONS:

Courts must decide all civil cases on basis of law; however, in certain cases, upon unanimous request of parties, case may be referred to arbitration and decided on basis of equity. Rules governing procedure of civil action are set forth in Code of Civil Organisation and Civil Procedure (c. 12 of Laws of Malta). Civil actions are commenced normally by service of application. All parties must be represented before courts by attorney except in case of Magistrates Courts (lower courts).

It is permissible to agree upon application of foreign laws for interpretation of contracts provided this is not against public policy of Malta.

5.02 DAMAGES:

Torts—Liquidation of Damages.

§1031 of our Civil Code (c. 16 of Laws of Malta) provides that “Every person, however, shall be liable for the damage which occurs through his fault.”

Our law defines standard of care that must be exercised in all cases. Hence, person shall be deemed to be in fault if in his own acts, he does not use prudence, diligence and attention of “bonus paterfamilias.”

No person shall, in absence of express provision of the law, be liable for any damage caused by want of prudence, diligence or attention in higher degree.

Moreover our Civil Code also caters to specific cases, which include liability of hotelkeeper and liability of owner of building.

Our jurisprudence furnishes method for compensation for damages. In determining amount of compensation, one must take into consideration two factors—“dannum emergens” and “lucrum cessans”. “Dannum emergens” is actual injury that has been suffered by victim, whilst “lucrum cessans” is loss of future earnings. There is no compensation for pain and suffering.

Our jurisprudence show that our courts have adopted particular formula for determination of loss of future income. Hence, wage of victim is multiplied by life expectancy of victim and result is in turn multiplied by percentage disability. It must be said that multiplier of life expectancy normally does not exceed 20, even though victim may still be young. There is also percentage reduction in case of lump sum payment.

If party injured has by his imprudence, negligence or want of attention contributed or given occasion to damage, court in assessing amount of damages payable to him, shall determine in its discretion, proportion in which he has so contributed or given occasion to damage which he has suffered, and amount of damages payable to him by such other persons as may have maliciously or involuntarily contributed to such damage, shall be reduced accordingly.

5.03 DEPOSITIONS AND DISCOVERY:

As rule witnesses are examined in open court during trial of action “viva voce”. Their deposition is taken by oath or solemn declaration. Evidence by “affidavit” is also permissible without prejudicing right of court to call deponent to appear in court for cross examination.

When depositions are to be taken abroad, Code of Organisation and Civil Procedure allows use of letters rogatory. These procedures are commenced in court and presented to Minister responsible for justice for execution. Basically party making demand is to produce interrogatories reduced into writing and translated into language in which witness is to be heard. Both party making request and other party have right to be represented by consul abroad during examination of witness.

5.04 JUDGMENTS:

Enforceability of Foreign Judgments.

Code of Organisation and Civil Procedure (§826) provides that any judgment delivered by competent foreign court may be enforced in Malta, in same manner as judgments delivered in Malta, upon request being made to Maltese court by means of application.

By virtue of British Judgments (Reciprocal Enforcement) Act (c. 52 of Laws of Malta), judgment obtained from Superior Courts of U.K. may be registered in Malta upon request made by judgment creditor before Court of Appeal in Malta. This would also apply to countries within British dominion if equivalent reciprocal enforcement agreement has been agreed between Malta and any of those other countries.

By virtue of Maintenance Orders (Facilities For Enforcement) (c. 48 of Laws of Malta) maintenance order made against any person by any court in England or Northern Ireland shall be registered and enforceable in Malta through Civil Court, First Hall, upon transmission by secretary of state to President of Malta of copy of such maintenance order.

Malta has acceded to Lugano Convention of 16 Sept. 1988. This Convention enables Malta to ratify international conventions on service abroad of judicial and extrajudicial documents, on taking of evidence abroad in civil or commercial matters, on international access to justice, and on enforcement of judgments in civil and commercial matters by means of Act IV of 2002, c. 443 of Laws of Malta.

Where regulations of EU provide, with regard to matters regulated under this title, in any manner different than in this title, said regulations shall prevail, and provisions of this title shall only apply where they are not inconsistent with provisions of such regulations or in matters not falling within ambit of such regulations.

5.05 PRESCRIPTION:

Generally all actions whether real, personal or mixed are barred by lapse of 30 years. (Civil Code [§2143]). In case of immovables held in good faith and under valid title prescriptive period is ten years. (Civil Code [§2140]).

Civil Code (§§2147-2160) provides various periods of limitation depending on object of action. Among more important are following: period of one year applies to actions of hoteliers or lodging houses for board and lodging and to actions of carriers by land or water for payment of their hire or wage; period of 18 months applies to actions of persons exercising any trade or mechanical art for price of their work or labour or materials supplied by them, to actions of creditors for price of merchandise, goods or other movable things sold by retail, actions of persons paid by year for payment of their salary, to actions of brokers for their brokerage fee, and to actions of any person for hire of movable things; period of two years applies to actions of builders of ships and other vessels and of contractors in respect of all works made of wood, stone or other material for works carried out by them or for materials supplied by them, to action of physicians, surgeons, advocates, notaries, architects, civil engineers and to other persons exercising their professions or liberal art for their fees and disbursements, to actions of attorneys or mandatories and to action of Government for payment of judicial fees, customs and other dues; period of five years to actions for payment of maintenance allowance or rent, for payment of interest or money lent, for restitution of money given on loan if loan not incorporated in public deed.

Actions for civil damages not arising from criminal offence are barred by lapse of two years, while if arising from criminal offence prescriptive period applicable to criminal offence applies to action for damages.

Actions for payment of any debt arising from commercial transaction or other cause, unless such action is otherwise regulated or results from public deed is barred by lapse of five years.

All executive titles are barred by lapse of three years from such time when they could have been executed.

Prescription is interrupted by judicial act filed in Court and served on party against whom it is sought to prevent running of prescription (§2128), by acknowledgment (§2133), and by payment on account (§2134).

6 COURTS AND LEGISLATURE

6.01 COURTS:

There are three principal jurisdictions: civil, criminal and voluntary. Courts are divided into Superior Courts presided over by judges and Lower Courts presided over by Magistrates, depending on seriousness or gravity of cause. There is one Court of Appeal for all jurisdictions.

Family Court deals with all matters relating to family.

Constitutional Court decides actions challenging validity of laws, alleging violations of human rights or generally involving Constitution.

Administrative cases are normally dealt with through normal courts, but there is growing network of administrative tribunals with appeal (usually only on question of law) to Court of Appeal.

6.02 LAW REPORTS, CODES:

There is official reporting of some of cases decided by various courts in Malta, but publication is not regular publication and has not been kept up to date.

6.03 LEGISLATURE:

See category 1 Introduction, topic 1.02 Government and Legal System.

6.04 REFERENDUM:

Law permits number of registered voters being not less than five and not more than ten to sign declaration proposing abrogative referendum. Proposal must be backed by at least 10% of total number of persons registered as voters for general elections in order that demand for referendum be accepted. Referendum may be held on all laws in Malta except Constitution of Malta and any provision thereof, European Conventions Act, and laws related to interpretation of statutes, general elections, fiscal matters, legislation giving effect to treaty obligations of Malta and bye-laws enacted by Local Councils.

Any person registered as voter or Attorney General on behalf of Government may file application in Constitutional Court requesting that referendum not be held on grounds that: number of persons having validly signed declaration was less than 10% of registered voters as required by law; provision relative to which referendum is demanded is one which cannot be subject of referendum; removal of provision to which referendum refers would render law incompatible with Constitution or European Convention Act; demand for referendum has been made before lapse of two years from date of previous unsuccessful referendum relative to same provision.

Referendum is valid only if 50%+1 of registered voters cast vote. Subsequent to successful referendum, President of Malta will issue Proclamation to effect that particular law to which referendum referred has been repealed.

6.05 STATUTES:

All legislation in Malta is presently being recodified and updated under revised edition of Laws of Malta.

Legislation in Malta is first published in Government Gazzette before becoming operative.

7 DEBTOR AND CREDITOR

7.01 ASSIGNMENTS:

Basic rules for assignment are set out in Civil Code.

Rights, credits, debits and causes in action may be assigned by written instrument. Formal requirements of such instruments are same as for normal transfer of rights, having regard to what rights are being transferred. Certain rights such as those relating to maintenance or support are not transferable.

Notice to debtor or his acceptance thereof are necessary for assignment of rights to become fully effective and operative in debtor's request, but latter's consent is not required.

Assignment of debts or contracts by debtor or one party to contract are of no effect on creditor or other party unless their consent thereto is previously obtained.

Assignor is answerable to assignee for existence of his title at time when assignment is effected, but normally he has no liability as regards debtor's solvency.

7.02 ATTACHMENT AND SEQUESTRATION:

The Code of Organisation and Civil Procedure provides for attachment of movable effects of one's debtor through warrants of sequestration granted by court either as precautionary measure at prejudgment stage or as means to effect execution of judgment already obtained.

In case of precautionary warrant, this may be authorised by court upon creditor's demand whenever creditor confirms on oath to have founded reasons for suspecting that guarantee of his credit may be prejudiced. This form of attachment may be granted by court hearing debtor, however, creditor must institute regular proceedings for confirmation of claim on which creditor justified attachment by filing application before competent court within 20 days from issue of warrant.

Executive warrant of sequestration is granted following definite judgment and precedes judicial sale of movable effects sequestrated.

No lien or preference in respect of other creditors is created by sequestration.

For attachment of immovable property see category 19 Mortgages, topic Mortgages (Hypothecs).

7.03 BANKRUPTCY:

Provisions regulating bankruptcy are set forth in Commercial Code (c. 13, Title III).

Only traders (persons or concerns ordinarily engaged in business) are subject to or can invoke bankruptcy law. One who is not able to discharge his obligations or pay his debts is in state of bankruptcy. Bankruptcy proceedings are instituted before Civil Court either directly by trader himself or by any creditor.

Court shall in and by judgment declaring bankruptcy appoint one or more curators in whom bankrupt's assets are vested. Curator acts under direction of Court and is specifically charged with assessment of assets and liabilities of bankrupt.

Curator shall receive all sums due to bankrupt and may sue for any payments due to bankrupt. Curator cannot effect compromise except with authority of judge.

When debts are ascertained and their nature and extent determined Court then issues decree admitting or rejecting claims of creditors. All creditors, or majority of them (i.e. concurrence of majority of simple creditors present and ¾ in value of proved debts) and bankrupt may reach settlement through reduction in creditors' claims or any other agreement not against law. Said settlement does not effect rights of privileged creditors who shall always be paid first.

If no settlement is reached property of bankrupt is sold. After sale of bankrupt's assets proceeds shall then be distributed to creditors according to their ranking: (1) Preferential claims are paid in full, (2) all ordinary claims are settled pro rata with remaining funds.

Chapter 459 of Laws of Malta “Set-Off and Netting on Insolvency Act” provides for enforceability of set-off and netting on bankruptcy or insolvency.

Special Procedures in Respect of Certain Unopposed Claims and Registration of Relative Executive Titles.

In actions for recovery of debt certain, liquidated and due not consisting in performance of act, and where amount of debt does not exceed five thousand liri, it must be lawful for creditor to proceed in accordance with following: provided that where debt is not liquidated creditor may proceed in accordance with this article if he limits his debt to amount not exceeding five thousand liri and expressly renounces right to any part of his claim that may upon liquidation exceed said sum of five thousand liri: provided further that creditor may only proceed according to this article if debtor is present in Malta and is not minor or person incapacitated according to law or if debt is not due by vacant inheritance, appointment of curators under Title XI of Book Third of this Code shall not apply to proceedings under this article: provided further that, without prejudice to provisions of Motor Vehicle Insurance (Third Party Risk) Ordinance, when debt to which this article applies is covered by insurance policy insured shall, without prejudice to that stipulated in insurance policy, within 15 days from service upon him of judicial letter made in accordance with this article, give to insurer notice in writing of said judicial letter and of any particulars of claim of which he is aware. In default, any executive title obtained in accordance with this article shall have no effect with regard to insurer.

Creditor must proceed by filing judicial letter which must be drawn up in form established by legal notice by Minister responsible for Justice and content of which shall be confirmed on oath by creditor, to be served upon debtor wherein shall be stated clearly, under pain of nullity, cause of claim, reasons why claim should be upheld, and statement of facts in support of claim: provided that notification procedure involving appointment of curator for absentee or posting up of written pleading or publication of relative extract shall not be availed of to effect service of aforesaid judicial letter.

Judicial letter shall also on pain of nullity contain intimation to debtor that if he does not reply within 30 days from service upon him of said judicial letter by presenting note in record of said judicial letter rebutting claim and which note may be signed and presented in court by debtor himself without signature of Advocate or of Legal Procurator being required, such official letter shall, constitute executive title: provided that: (a) Debtor may in such note admit claim in part only and oppose it in other parts, and where claim is opposed in part only it shall be deemed admitted to extent that it has not been so opposed; (b) where debtor shall have opposed claim or part of claim which is subsequently upheld, costs relative to claim or part thereof opposed and subsequently upheld shall be borne by him; (c) costs of any claim or part thereof that is opposed and not subsequently upheld shall always be borne by creditor; (d) where debtor has duly opposed claim, special procedure contained in this article may not be used again against debtor as regards same claim contained in judicial letter served on debtor; and (e) where claim arises under Motor Vehicle Insurance (Third Party Risk) Ordinance said judicial letter shall under pain of nullity be also notified to authorised insurance which shall have same rights under this article as though it were debtor as aforesaid.

Where debtor does not oppose claim, within 30 days from notification thereof to debtor, or where debtor only opposes claim in part within aforesaid term, judicial letter shall for purposes of any law in respect of claim so unopposed or part therein so unopposed, constitute executive title.

Any executive title obtained according to provisions of this article in absence of any opposition on part of debtor shall be rescinded and declared null and void if upon request by application in Court of Magistrates (Malta) or in Court of Magistrates (Gozo), as case may be, to be filed by debtor within 20 days from first service upon him of any executive warrant or other judicial act based on said title, court is satisfied that: (i) Debtor was unaware of said judicial letter because he was not duly notified; or (ii) judicial letter did not contain aforesaid requirements.

No opposition other than that specifically provided for above shall stay issue or execution of any executive act obtained thereunder or paying out of proceeds of any warrant or sale by auction carried out in pursuance thereof.

Judicial letter issued in manner provided above, must not constitute executive title unless it is registered according to provisions of this article which shall apply to registration of such judicial letters as executive titles. Applicant for registration of judicial letter which qualifies as executive title shall present to Registrar of Court legal copy of judicial letter, including evidence of service, and copy of any response received thereto, if any. Upon receipt of these documents, Registrar shall examine documents presented and shall verify whether debtor has filed note of reply within stipulated time and if he is satisfied that conditions for registration of judicial letter as executive title subsist he shall proceed to register documents presented in register to be known as Register of Judicial Letters as Executive Titles which shall be maintained by Registrar.

In actions within jurisdiction of superior courts or Courts of Magistrates (Gozo) in its superior jurisdiction, where demand is solely for recovery of debt, certain, liquidated and due, not consisting of performance of act; or for eviction of any person from any urban or rural tenement, with or without claim for ground rent, rent or any other consideration due or by way of damages for any compensation, up to date of surrender of tenement, it shall be lawful for plaintiff to pray in sworn application that court gives judgment allowing his demand, without proceeding to trial.

7.04 EXECUTIONS:

Following grant title of execution (Code of Organisation and Civil Procedure [§253]): (a) judgments and decrees of Maltese courts; (b) public deeds received before notary public of Malta; (c) taxed bills of judicial fees and disbursements, issued in favour of any advocate, legal procurator, notary public, architect and civil engineer, judicial referee or witness, unless such taxed bills are impugned according to law; (d) awards of arbitrators registered in accordance with Arbitration Act 1996; and (e) bills of exchange and promissory notes issued in terms of Commercial Code. Provided that court which is competent according to value of bill of exchange or promissory note may, by decree which shall not be subject to appeal, suspend execution of such bill of exchange or promissory note in whole or in part and with or without security, upon application of person opposing execution of such bill of exchange or promissory note on grounds that signature on said bill of exchange or promissory is not that of said person or of his mandatory or where such person brings forward grave and valid reasons to oppose said execution and in such case any person demanding payment of bill of exchange or promissory note shall file action according to provisions of Commercial Code.

Execution can affect both movable and immovable property of debtor.

7.05 FRAUDULENT SALES AND CONVEYANCES:

This is regulated by general provision of visa of consent under laws of contracts. See category 3 Business Regulation and Commerce, topic 3.05 Contracts.

7.06 GARNISHMENT:

Where creditor under judgment or any other executive title, in order to obtain payment of debt owing to him, desires to attach in hands of third party moneys or immovable property due or belonging to his debtor, he may do so by means of garnishee order.

This order states amount due as well as title under which creditor sues out execution and expressly enjoins garnishee not to pay or deliver to debtor, or any other person, such moneys or things as may be in his hands, under penalty of payment of damages and interest.

Garnishee order is executed by delivery of copy thereof to garnishee by Court Executing Officer or by such electronic means prescribed by Minister responsible for justice. Copy of order is also served on debtor.

Garnishee must lodge through Registrar any moneys or things belonging to debtor as attached by order at debtor's expense within 21 days from date of service of warrant. Garnishee who does not effect deposit is responsible for ensuing damages and interest in favour of creditor and court may, upon application made for that purpose by creditor, issue such orders as required, including garnishee's personal arrest for period not exceeding three months, in order to force him to lodge such property.

Property not subject to attachment by garnishee order is following: (i) Salaries or wages (including bonus, allowances, overtime and other emoluments). (ii) Allowance of any person pensioned by Government. (iii) Donations and charitable grants made by Government. (iv) Bequests made expressly for maintenance, if debtor has no other means of subsistence (except if debt itself is not due in respect of maintenance). (v) Sums due for maintenance awarded “officio judicis” (if debt itself is not due in respect of maintenance).

Notwithstanding above, if wife or minor or incapacitated child or ascendant of debtor sues husband, father or descendant (as case may be), for maintenance, court may either in judgment itself or in subsequent decree, order that specified portion of salary, allowance or bequest be paid directly to creditor. Service of such order on person who pays salary, allowance or bequest, is equivalent to garnishee order and such person shall pay creditor directly such part of salary, allowance or bequest specified in order. Court, however, cannot make such orders if debtor is officer or member of regular force of Malta, in which case creditor may only cause copy of order to be transmitted to authority concerned for their information.

In case of any salary, wage benefit, pension or allowance which exceed Lm300 per month, issue of garnishee order shall be applicable on that part in excess of amount aforestated unless debtor, upon application, shows to satisfaction of court that he needs such excess or part thereof for his maintenance or for maintenance of his family in which case court shall revoke garnishee order even with respect to such excess or part thereof. Court may also at any time, vary garnishee order given on demand by application of creditor or debtor, if there be any change in material circumstances of debtor. This article does not apply to pay of officer or of person in regular force of Malta.

Garnishee order may not be extended and remains in force up to such time as it is revoked by decree issued by court.

Precautionary Garnishee Orders.

Such garnishee orders are issued prior or concurrently to lawsuit. However, action in respect of claim stated in precautionary garnishee order shall be brought by applicant within 20 days from issue of warrant. In default, order shall cease. What has been stated vis-à-vis executive garnishee orders regarding their effects, contents of order, mode of execution, lodgement in court and property subject to such order applies to precautionary garnishee order.

The Precautionary Warrant of Prohibitory Injunction.

Warrant of prohibitory injunction is precautionary warrant. Its object is to restrain person from doing anything whatsoever which might be prejudicial to person suing out warrant.

Such warrant shall not be issued against government or authority established by constitution or any person holding public office in his official capacity unless authority or person against whom warrant is demanded confirms in open court that thing sought to be restrained is in fact intended to be done and court is satisfied, after hearing explanations given, that unless warrant is issued prejudice that would be caused would be disproportionate when compared with actual doing of thing sought to be restrained.

If on application, it is proved to satisfaction of court that subsequent to issue of this warrant, person restrained has acted in breach of court's order, court shall, without prejudice to any other action competent to it at law, at request of applicant, condemn person against whom warrant had been issued to remedy what was committed in breach of its order and to authorize in default applicant to carry out such remedial works as court may direct at expense of person restrained.

This warrant may also be demanded, by creditor to secure debt, or any other claim whatsoever, amounting to not less than Lm5,000. Object of such warrant is to restrain debtor from selling, alienating, transferring or disposing inter vivos by onerous or gratuitous title or in any manner creating burden or real and/or personal rights: provided that such warrant shall not apply to constitution of any right on, or alienation or transfer of, any property made pursuant to court order.

Court shall not issue any such warrant unless it is satisfied that such warrant is necessary in order to preserve any right of person suing out warrant, and that prima facie such person appears to possess such right.

If warrant prohibits sale, alienation, transfer or other disposal of immovable property, then application shall contain all particulars of person against whom it is issued so that upon its issue it is registered in Public Registry and in Land Registry. Where warrant prohibits sale or transfer of shares in commercial partnership, notice is also served on Registrar of Companies.

The Counter Warrant.

Without prejudice to any other right, person against whom any precautionary act has been issued, may make application to court issuing precautionary act, or if cause has been instituted, may make application to court hearing such cause, praying that precautionary act be revoked, either totally or partially.

Grounds of revocation are: precautionary act ceased to be in force; any one of conditions requested by law for issue of precautionary act does not in fact subsist; other adequate security is available; amount claimed is not prima facie justified or is excessive; security provided is deemed by court to be sufficient and finally if it is shown that in circumstances it would be unreasonable to maintain in force precautionary act in question since it is no longer necessary or justifiable.

Warrant of Impediment of Departure of Ships and Aircraft.

This warrant may only be issued to secure debt or claim, which could be frustrated by departure of ship or vessel or aircraft. This warrant may be demanded and obtained in security of debt or other claim whatsoever in excess of Lm5,000. Maltese law provides for minimum penalty to be charged on applicant who maliciously sues out warrant of impediment of departure. No warrant of impediment of departure may be issued against ship or vessel wholly chartered in services of Government of Malta or in any postal service by government. Nor can this warrant be sued out against warship.

7.07 LIENS:

See topic 7.08 Pledges; category 22 Transportation, topic 22.02 Shipping.

7.08 PLEDGES:

Pledge may only be created on movables including debts and rights over movable effects. Pledge of movable things is completed by delivery to creditor, or to third party selected by parties to contract, of thing pledged or of document conferring exclusive right to disposal of thing.

Although there is no need of any writing for constitution of pledge, in case where delivery cannot take physical form, pledge must result from public deed or private writing and (i) either notice of pledge is given by judicial act served on debtor of debt, or other right being pledged, or, (ii) such debtor has in writing acknowledged pledge.

Pledgee has right to retain thing pledged until debt is fully paid and if same debtor contracts another debt with same creditor subsequent to delivery of thing pledged, creditor, in absence of agreement to contrary, shall have, in respect of second debt, same rights on thing pledged as are competent to him in respect of prior debt.

Pledge confers to creditor right to obtain payment of thing pledged but law distinguishes between case when thing pledged is debt as distinct from case where pledged thing is any other movable thing. In former case pledgee is responsible for collection of such debt on maturity. He then has to place moneys or other things received either as agreed or failing such agreement, as court may determine. If debt secured by pledge is due pledgee may retain from any moneys received as aforesaid, amount sufficient to satisfy his rights and shall deliver remainder to pledgor.

If thing held on pledge is not money pledgee cannot dispose of such thing pledged in case of nonpayment but he may cause thing to be sold by auction under court's authority. However, if thing pledged has stock exchange or market price, court may, on creditor's application, order sale to be carried out by means of public broker, bank or other banking institution instead of by auction.

Apart from obligation to restore thing pledged when debt is extinguished, pledgee is also liable for loss or deterioration of thing pledged resulting from his negligence. Pledgor is bound on his part to refund to pledgee any expenses which latter may have incurred for preservation of pledge. Pledgee cannot either make use of thing pledged or sub-pledge without consent of pledgor. If pledgee abuses thing pledged, pledgor may demand that such thing be deposited with third party.

Pledge is deemed to be indivisible although debt may be divisible. If thing pledged bears interest or yields other profits, creditor shall appropriate such interest or profit to interest which may be due to him; if debt which is secured by pledge does not bear interest, then any interest of thing pledged shall be appropriated to capital.

Pledging of Securities.

The Companies Act 1995 also contemplates pledging of securities.

Unless otherwise provided in memorandum and articles of company, or under condition for issue of those securities, securities may be pledged by their holder in favour of any person as security for any obligation. Pledge of securities shall be constituted by means of instrument in writing entered into between pledgor and pledgee.

8 DISPUTE RESOLUTION

8.01 ALTERNATIVE DISPUTE RESOLUTION:

Mandatory Dispute Resolution.

All money claims not exceeding Lm1,500 are heard and determined by Small Claims Tribunal set up under Act bearing same name. Tribunal does not have jurisdiction to hear cases involving: questions of ownership of immovable property, or relating to easements, burdens or other rights annexed to such property, even though claim does not exceed Lm1,500; or causes of ejectment and eviction.

Tribunal is presided over by adjudicator who must be over 30 years of age, holds warrant of and has practiced as advocate for at least one year or as legal procurator for at least three years. He may not be member of House of Representatives, of Local Council, undischarged bankrupt, or have been sentenced to imprisonment for, or been found guilty of Crimes Against the Administration of Justice and other Public Administrations, Crimes affecting Public Trust, and Crimes affecting Public Trade.

Tribunal takes decisions principally in equity, although matters related to prescription decided upon according to law. Appeal lies from decision of Tribunal only: on any matter related to jurisdiction of Tribunal; on any question of prescription; where Tribunal has seriously infringed rules of impartiality and equity according to law and such shortcoming has prejudiced right of appellant; where Tribunal has not suspended proceedings where claim was sought to be avoided by way of defence, involving issue outside Tribunal's jurisdiction, or where it similarly failed to suspend proceedings where there was pending before competent court action outcome of which would have affected claim before Tribunal itself.

Voluntary Dispute Resolution.—Under Consumer Affairs Act 1994, consumer involved in dispute with trader regarding goods and services purchased or hired has recourse, if consumer so desires, to Consumer Claims Tribunal, which hears claims where value in dispute does not exceed Lm500. Tribunal can award up to Lm100 in moral damages caused by pain, distress, anxiety and inconvenience suffered.

Claim first made to Director of Consumer Affairs who will attempt to mediate between parties and help them reach agreement. If no agreement is reached, parties may present claim before Consumer Claims Tribunal against payment of small fee. Parties to case need not be represented by lawyer, although they may be so represented. This is intended to be quick and cheap way of obtaining redress.

See also topic 8.02 Arbitration.

8.02 ARBITRATION:

Malta Arbitration Centre is body corporate having distinct juridical personality set up under Arbitration Act 1996. Responsible for policy and general administration of affairs and business thereof is Board consisting of not less than five and not more than nine members appointed by President of the Republic acting on advice of Minister for Justice. Members of Board are persons having experience and capacity in international or domestic arbitration, conciliation and settlement of disputes, international trade, commerce, industry, investment and maritime affairs. Chairman and Deputy Chairman of Board must have practiced as advocates in Malta for period or periods amounting in aggregate to not less than 12 years. Attorney General is ex officio member of Board. Legal representation of Centre is on Registrar thereof, unless otherwise decided by Board.

Responsibilities of Centre are to: promote Malta as centre for international commercial arbitration; provide for conduct of international arbitration in Malta; encourage domestic arbitration as means of settling disputes; provide necessary facilities for conduct of arbitration; advise Government on above; perform any function supplementary or ancillary to above as well as any other function assigned to it under any law.

Centre together with Minister responsible for Justice has power through Board to make rules providing for: manner and requirements for registration of documents under Arbitration Act 1996; guidelines and optional models for drawing up arbitration clauses and agreements; any other matter in connection with which rules may be made under any provision.

International Commercial Arbitration is carried out according to UNCITRAL Model Law on International Commercial Arbitration.

Upon registration with Centre, foreign arbitration awards shall be enforced by Courts of Malta as though delivered in Malta.

9 DOCUMENTS AND RECORDS

9.01 ACKNOWLEDGMENTS:

Documents are acknowledged by advocates or notaries public.

9.02 AUTHENTICATION:

Authentication of acknowledgment of documents taken in Malta to be used abroad can be effected by Minister of Foreign Affairs. Authentication of acknowledgment of documents taken abroad to be used within Malta must be effected by local Maltese Consul or by local authority with Apostille of "Convention de La Hage du 5 Octobre 1961" when applicable.

Data Protection Act provides for protection of individuals against violation of their privacy by processing of personal data and for matters connected therewith or ancillary thereto.

This Act establishes post of Commissioner for Data Protection, who has following functions: (a) To create and maintain public register of all processing operations according to notifications submitted to him as specified in this Act; (b) to exercise control and, either of his own motion or at request of data subject, verify whether processing is carried on in accordance with provisions of this Act or regulations made thereunder; (c) to instruct processor and controller to take such measures as may be necessary to ensure that processing is in accordance with this Act or regulations made thereunder; (d) to receive reports and claims from data subjects or associations representing them on violations of this Act or regulations made thereunder, to take such remedial action as he deems necessary as as may be prescribed under this Act, and to inform such data subjects or associations of outcome; (e) to issue such directions as may be required of him for purposes of this Act; (f) to institute civil legal proceedings in cases where provisions of this Act have been or are about to be violated and to refer to competent public authority any criminal offence encountered in course of or by reason of his functions; (g) to encourage drawing up of suitable codes of conduct by various sectors affected by provisions of this Act and to ascertain that provisions of such codes are in accordance with provisions of this Act and for such purpose Commissioner may seek views of data subjects or their representatives; (h) to take such measures as may be necessary so as to bring to knowledge of general public provisions of this Act and for such purpose to give advice to any person where it is required; (i) to order blocking, erasure or destruction of data, to impose temporary or definitive ban on processing, or to warn or admonish controller; (j) to advise government on any legislative measures that are required to be taken to enable him carry out his functions appropriately; (k) to draw up annual reports of his activities at regular intervals, at least once per year, which reports shall be made public; (l) at request of data subject to verify that processing of personal data complies with provisions of Act or of any law referred to by Act in this respect; and (m) to collaborate with supervisory authorities of other countries to extent necessary for performance of his duties, in particular by exchanging all useful information, in accordance with any convention to which Malta is party or any other international obligation of Malta.

10 EMPLOYMENT

10.01 LABOUR RELATIONS:

Employer-employee relationships are still subject to provisions of Civil Code in normal way apart from being subject to pertinent laws or agreements relating to their employment.

Employment and Industrial Relations Act (c. 452 of Laws of Malta) provides for establishment of Employment Relations Board. Functions of Board are: (a) to make recommendations to Minister as to any national minimum standard conditions of employment, hereinafter referred to as national standard recommendation, for eventual inclusion in national standard order; (b) to make recommendations to Minister as to any sectoral conditions of employment, hereinafter referred to as sectoral regulation recommendation, for eventual inclusion in sectoral regulation order; (c) to advise Minister on any matter relating to conditions of employment, or on any matter referred to Board by Minister.

The aforementioned Act also provides for regulation and protection of wages (through establishment by government of guarantee fund), Protection Against Discrimination Related to Employment, Termination of Contracts of Services, Voluntary Settlement of Disputes and Enforcement of Employment Regulations.

C. 413 of Laws of Malta provides Promotion of Equal Job Opportunities for Persons with Some Form of Disability, prohibiting discrimination against another person on grounds of disability.

Under Social Security Act 1987, all persons in employment (including self-employed) must pay contributions to state for its social service system which includes benefits for: sickness and invalidity, unemployment, injury, maternity and death, as well as marriage grants, disablement gratuities and pensions and various other categories of pensions. Contributions, both those by employer and by employee, are paid together with and in same way as PAYE tax being deducted from wages and salaries.

Employees of offshore companies are exempt from paying any National Insurance Contributions (see category 14 Foreign Trade and Commerce, topic 14.03 Foreign Investment).

11 ENVIRONMENT

11.01 ENVIRONMENTAL REGULATION:

Environment Protection Act 2001 (c. 435 of Laws of Malta), was enacted empowering Government to: (a) take all those measures, both preventive and remedial, that may be necessary for protection of environment of Malta; (b) collaborate with other governments and entities for protection of world environment; (c) take into account need to protect environment when deciding on economic or social matters; (d) disseminate in Malta knowledge about environment when deciding on economic social matters; (e) disseminate in Malta knowledge about environment; about pollution or threats of pollution, and facilitate help of all persons in protection of environment; (f) endeavour to apply scientific and technical knowledge and resources when deciding upon matters that affect environment; (g) endeavour that food and drink, land, sea and air be free of contamination from any toxic substances or from use of any unnecessary energy or from noise; (h) safeguard biological diversity of all species; (i) safeguard common heritage of mankind. Civil action for damages as well as criminal punishments are provided for damages caused to natural, cultural and historical environment.

The Filfla Nature Reserve Act (c. 323 of Laws of Malta) provides for establishment of Filfla Natural Reserve. All surface area of Island of Filfla is to be protected nature reserve. Killing, capture, collection, trapping, maintaining in captivity, taxidermy, commercial exploitation, as well as picking and hunting of any species of flora and fauna in or from Filfla Nature Reserve is prohibited provided that Minister may remove such prohibition for purpose of scientific study in particular cases.

Access to Filfla Nature Reserve will be by permission to be granted by Minister for educational and scientific purposes. In granting permission Minister may impose such conditions as he may deem appropriate. Members of police and Armed Forces of Malta will have access to Filfla Nature Reserve for purposes of defence and security, rescue operations and control of smuggling and investigation of crimes.

The Marine Pollution (Prevention and Control) Act (c. 271 of Laws of Malta) was enacted to prevent and control pollution of sea and other waters and to give effect to provisions of international and regional conventions and protocols relating to protection of marine environment.

The Malta Resource Authority Act (c. 423 of Laws of Malta) provides for establishment of Malta Resources Authority. This Authority has as one of its functions establishment of measures for protection of environment by promoting use and development of alternative sources of energy.

L.N. 159 of 2002 provides for reduction of emission of sulphur dioxide resulting from combustion of certain types of liquid fuels and thereby limiting harmful effects of such emission on human beings and environment in general.

L.N. 161 of 2002 provides for collection and management of waste oils without causing any damages to environment.

ECO-Contribution Act provides for imposition of eco-contribution on products, which result in waste and to provide for matters ancillary or incidental thereto.

12 ESTATES AND TRUSTS

12.01 DESCENT AND DISTRIBUTION:

Successions.

Succession opens at time of death, or on day on which judgment declaring that person whose succession is concerned is, by reason of his long absence, to be presumed to have died has become res judicata. Inheritance may be accepted unconditionally or under benefit of inventory, acceptance may be express or implied however no person is bound to accept inheritance devolved upon him. Where testator has no descendants or spouse he may dispose of whole of his estate to persons capable of receiving by will. Where testator has descendants or spouse, disposable portion of his estate shall be that which remains after deducting such share as is due to said descendants or spouse. Testamentary dispositions exceeding disposable portion are liable to abatement.

Rules of succession to real property and personal property are same. There is no doctrine of primogeniture. Persons who are incapable or unworthy of receiving under will are also incapable or unworthy of succeeding “ab intestato”.

Children or other descendants succeed to their father and mother or other ascendants without distinction of sex, and whether they are born or conceived in marriage or otherwise and whether they are of same or different marriages. They succeed “per capita” when they are all in first degree; they succeed “per stirpes”, when all or some of them, take by representation.

However where person conceived and born out of wedlock succeeds ab intestato with adoptive children of deceased or other children who are not so conceived or born or descendants of such children, or with surviving spouse of deceased, person conceived or born out of wedlock shall receive only three quarters of share to which he would have been entitled to if all heirs of deceased, including such person had been conceived or born in wedlock, and remaining quarter of share to which he would have been so entitled shall devolve on other heirs of deceased to exclusion of any of such heirs who is conceived and born out of wedlock as if it were separate estate.

Where deceased has left children or their descendants and spouse, succession devolves as to one moiety upon children and other descendants and as to other moiety upon spouse.

If deceased left no children or other descendants, nor spouse, succession shall devolve to nearest ascendant or ascendants; if there be ascendant or ascendants and direct collaterals (brothers and sisters whether of full or half blood or adopted and descendants of predeceased brothers or sisters of full or half blood or adopted); one moiety to nearest ascendant or ascendants and other moiety to direct collaterals; if there are no ascendant or ascendants but there are direct collaterals: to direct collaterals and if there be neither ascendant or ascendants nor direct collaterals: to nearest collateral in whatever line such collateral may be.

Rights of Surviving Spouse.

Where deceased spouse is survived by children or other descendants, surviving spouse shall be entitled to one-fourth of value of estate on full ownership.

If there are no children or descendants, surviving spouse shall be entitled to one-third of value of estate in full ownership. Surviving spouse shall also be entitled to right of habitation over tenement occupied by such spouse as his/her principal residence at time of death of predeceased spouse, where such tenement is held in full ownership or emphyteusis by deceased spouse either alone or jointly with surviving spouse. Surviving spouse shall also have right of use over any of furniture in matrimonial home belonging to deceased spouse. Rights of habitation and of use over of any of furniture in matrimonial home of surviving spouse cease on remarriage of surviving spouse. Spouses may also, in pre-nuptial or post-nuptial agreement in accordance with Civil Code exclude or reduce these rights competent to surviving spouse according to law.

Surviving spouse cannot claim his/her rights in specific instances specifically provided for by law.

12.02 TRUSTS:

Trusts are regulated by Trust Act 1988, which is broadly based on Jersey Trust Law.

Definition.

In terms of Act, trust exists where person called trustee, holds or has vested in him property under obligation to deal with that property for benefit of beneficiaries, whether or not yet ascertained or in existence, or for purpose which is not for benefit of trustee, or for both such benefit and purpose as aforesaid.

Trust whether created in Malta or abroad may qualify as offshore trust, provided that settlor and beneficiary are not resident in Malta and provided trust property does not include immovable property situated in Malta. It should be noted however that foreigner residing in Malta under permanent residence permit is regarded as nonresident for purposes of Act.

Creation and Registration.

Trust must be created by means of written instrument, whether by will or by unilateral declaration, and is subsequently registered with Malta Financial Services Centre. Initial registration formalities are complied with by filing with Authority certified copy of trust instrument and declaration by trustee that trust satisfies conditions of Act. Subsequent changes in trust deed must also be notified to Authority.

Trustees.

Only nominee companies licensed by Malta International Business Authority, to act as trustees for offshore trusts may be sole trustees; where trustees are more than one, one of such trustees shall be nominee company. Registration of trust may only take place through agency of such licensed nominee companies.

Trustee's duties may be defined in trust instrument but these cannot be excluded to extent greater than law provides. Trustees shall in execution of their duties and exercise of their powers and discretions act with prudence, diligence and attention of bonus pater familias and observe utmost good faith.

Other Features Of Trust.

Freedom to choose proper law. Proper law of trust is that chosen expressly or impliedly by settlor. In default Maltese Law applies.

Broad liberty of settlor to determine terms of trust. Discretionary trusts are also possible and “letters of wishes” are complied with. Protector arrangements are also recognised by Act.

Trust may continue for 100 years unless sooner terminated. Trusts for charitable purposes are not similarly restricted.

Fiscal and Regulatory Incentives.

Fee payable for registration of trust is Lm200. Tax is payable at fixed rate of Lm200 per year (on income of trust and its beneficiaries). Therefore no other tax on any other income is due by trustee and by its beneficiaries.

Trusts are exempt death and donation duties, stamp duties, custom duties and exchange controls.

No obligation to file any tax returns. Nominee company acting as trustee must however file annual declaration confirming that statutory conditions have been complied with.

Guarantees.

Rights, exemptions and privileges granted to offshore trusts are guaranteed for ten year period. Such guarantee is also applicable against retrospective action whether by legislation or otherwise.

Foreign Trusts.

Recent legislation, “The Recognition of Trusts Act”, has codified various provisions from The Hague Convention on Trusts, so that foreign trusts are now recognized in Malta, and if registered with The Malta Financial Services Centre, foreign trust may appropriate all fiscal and other incentives applicable to Maltese Trust.

Foreign trust is trust whose proper law is other than Maltese law.

Proper law of trust is either chosen by settler or shall be deemed to be that law with which trust is most closely connected.

Fiduciary Obligations.

(Civil Code 1124A-1124B). Fiduciary obligations arise in virtue of law, contract, quasi-contract, trusts, assumption of office or specific behaviour whenever person (“fiduciary”): (a) Owes duty to protect interests of another person; or (b) holds and exercises control or powers of disposition over property for benefit of other persons (including when he is vested with ownership of such property for such purpose); or (c) receives information from another person subject to duty of confidentiality and such person is aware or ought, in circumstances, reasonably to have been aware, that use of such information is intended to be restricted.

Fiduciary must act honestly in all cases and is to carry out his obligations with utmost good faith. Fiduciary is also bound (subject to express provision of law or express terms of any instrument in writing excluding or modifying such duty, as case may be) to: (i) Exercise diligence of bonus pater familias in performance of his obligations; (ii) avoid any conflict of interest; (iii) not receive undisclosed or unauthorised profit from his position or functions; (iv) act impartially when fiduciary duties are owed to more than one person; (v) keep any property as may be acquired or held as fiduciary segregated from his personal property and that of other persons towards whom he may have similar obligations; (vi) maintain suitable records in writing of interest of person to whom fiduciary obligations are owed; (vii) render account in relation to property subject to fiduciary obligations; (viii) return on demand any property held under fiduciary obligations to person lawfully entitled thereto or as instructed by him or as otherwise required by applicable law.

When ownership of property is vested in person who holds it subject to fiduciary obligations, third parties may act in relation to such person as though he were absolute owner thereof. However, property held by person subject to fiduciary obligations is not subject to claims or rights of action of fiduciary's personal creditors, his spouse or heirs at law.

13 FAMILY

13.01 INFANTS:

Age of majority is 18 for both sexes. (Civil Code [§157]). Minor who has attained age of 16 and who has been authorised to trade by parent to whose authority he is subject by means of public deed registered in Commercial Court (Commercial Code [§9]) shall in regard to all matters relating to his trade be considered as being of age (Civil Code [§156]). Infant is also emancipated by marriage.

Parent having parental authority is administrator of property of his or her minor children. (Civil Code [§136]). Any minor whose parents have died or have forfeited paternal authority is subject to be placed under tutorship until he becomes of age or gets married. (Civil Code [§158]).

13.02 MARRIAGE:

Age of consent for both males and females is 16 years.

Marriage may be contracted either in civil form or in religious form, but always in accordance with provisions of Marriage Act. Recent amendment passed by Parliament on 31/1/95 provides that Catholic marriage celebrated in Malta shall as from moment of its celebration be recognized and have same effects as marriage celebrated in accordance with norms and formalities of Marriage Act.

Medical examinations and blood tests are not required. Marriage can be celebrated only after due publication of banns by Marriage Registrar.

Marriage is prohibited between certain categories of persons such as (1) ascendants and descendants in direct line, (2) brothers and sisters whether of full or half blood, (3) persons related by affinity in direct line, (4) adopter and person adopted or descendant or husband or wife of adopted person.

Marriage by proxy is permitted only if one of persons to be married is not present in Malta and in opinion of Marriage Registrar there exist grave reasons for permitting marriage to take place by proxy. Proxy shall cease to be operative 90 days after it is signed.

Any person who contracts marriage with sole purpose of obtaining Maltese citizenship; or freedom of movement in Malta; or work or residence permit in Malta; or right to enter Malta; or right to obtain medical care in Malta; shall be guilty of offence and shall on conviction be liable to imprisonment for term not exceeding two years.

Any right or benefit obtained by person convicted of above offence on basis of marriage referred to may be rescinded or annulled by public authority from which it was obtained.

Any person who contracts marriage with another person knowing that sole purpose of such other person in contacting marriage is one or more of purposes referred to above shall be guilty of offence and shall on conviction be liable for same punishment laid down above.

Annulment.

Marriage Act sets out grounds on which marriage is null and void “ab initio” namely (a) parties within prohibited degrees (supra); (b) either party under 16; (c) either party suffers from infirmity of mind at time of marriage; (d) existing prior marriage; (e) marriage lacks certain formalities but demand for annulment has to be made within two years of marriage; (f) if consent of either party (i) is extorted by violence or fear, or (ii) is excluded by error of identity of other party, or (iii) is extorted by fraud, or (iv) is vitiated by serious defect of discretion of judgment on matrimonial life or by serious psychological anomaly which makes it impossible for that party to fulfil essential obligations of marriage, or (v) is vitiated by positive exclusion of marriage itself on its essential elements or of right to conjugal act; (g) relative or absolute impotence of either party which must exist at time of marriage; (h) if either party subjects his or her consent to condition referring to future; (i) if either party did not have sufficient powers of intellect or volition to elicit matrimonial consent. Recent amendment now provides that “valid” marriage may be annulled on grounds that either party refused to consummate same. Furthermore exclusive competence has now been given to Ecclesiastical Tribunal when either party files petition for annulment of Catholic marriage before said tribunal.

When marriage is annulled children of that marriage are considered born during marriage and spouse who was responsible for nullity of marriage is bound to pay maintenance to other spouse in good faith for period of five years unless latter gets married.

Divorce cannot be obtained in Malta. However, foreign divorce will be recognised if granted in country where either spouse is domiciled or of which he or she is citizen.

Separations.

Court can grant separation on following grounds: (1) Adultery on part of other spouse (Civil Code [§38]), or (2) excesses, cruelty, threats or grievous injury against other spouse or against his or her children, or (3) marriage has irretrievably broken down (Civil Code [§40]).

Demand for separation based on last ground may not be made before expiration of four years from date of marriage. Separation may also be based on mutual consent to be expressed before court and ratified by same.

Separations may also be demanded if for two years or more one of spouses has deserted other without good grounds. (Civil Code [§41]). Subsequent cohabitation between parties to separation shall restore obligations of cohabitation and of maintenance. Any other effect of separation shall not cease except in virtue of public deed. (Civil Code [§64]).

Effects of Separation.

Spouse against whom separation is pronounced shall not as result of such separation be relieved from obligation of supplying maintenance to other spouse where such maintenance is due. (Civil Code [§54]). On separation being pronounced court shall on demand of either spouse direct cessation and liquidation of community of acquests even though it may have been established by contract.

When deciding in whose custody children shall be placed Court shall always be directed by better welfare of children. Other spouse who is not granted custody of children may be given right of access to them. (Civil Code [§57]).

14 FOREIGN TRADE AND COMMERCE

14.01 EXCHANGE CONTROL:

Law permits free repatriation of capital and earnings therefrom provided that capital was originally brought into Malta from outside sources. Earnings from legitimate business activities can also be freely repatriated. Exchange control permission or advice is however always necessary for such movement of funds.

In case of all offshore activities according to Malta International Business Authority, 1988 (see topic 14.03 Foreign Investment), there are no restrictions on transfer of funds into or out of Malta.

14.02 FOREIGN EXCHANGE:

See topics 14.01 Exchange Control, Foreign Investment; category 1 Introduction, topic 1.01 Currency.

14.03 FOREIGN INVESTMENT:

Foreign investor seeking to do business in Malta may benefit from number of investment incentive laws regulating various sections of activity.

Foreign Trade Regulations.

See category 23 Treaties and Conventions, topic 23.01 Treaties.

15 HEALTH

15.01 FOOD AND DRUGS:

Dangerous Drugs Ordinance (c. 101 of Laws of Malta) provides for importation, exportation, manufacture, sale and use of opium and other dangerous drugs.

Food, Drugs and Drinking Water Act (c. 231 of Laws of Malta) provides for hygienic and other control of food, drugs and drinking water.

C. 424 of Laws of Malta provides for establishment of Occupational Health and Safety Authority, and Occupational Health and Safety Appeals Board. Major functions of O.H.S.U., which forms part of Department of Industrial and Employment Relations, are related to: Promotion of health and safety at places of work and tendering of advice to interested parties and voluntary bodies on issues related to this field, enforcement of Act for Promotion of Occupational Health and Safety (Act VII of 1994) and subsidiary legislation, investigation of occupational accidents, injuries and diseases, health evaluation of workers involved in high risk occupations and vetting for applications for importation of chemical substances, collation of certificates relating to lifts, hoists, cranes and boilers used at work place, Unit also acts as National Focal Point for European Agency for Health and Safety at work.

15.02 HEALTH REGULATIONS:

Department of Health (Constitution) Ordinance (c. 94 of Laws of Malta) provides for reorganization of certain departments and for establishment of Department of Health in Malta. This Ordinance caters for Council of Health, Medical Council, Advisory and Executive Board, Pharmacy Board, Nursing and Midwifery Board, Board for the Professions supplementary to Medicine, Hospital Management Committees and the General Services Board.

Chief Government Medical Officer is chief advisor to Government on any matter relating to or in connection with Health Services. Principal Medical Officer assists Chief Government Medical Officer and Minister responsible for Department of Health for planning, direction, development and administration of health services. Senior Medical Officers are executive officers in administration of health services.

Chapter 468 of Laws of Malta “Social Work Profession Act” provides for regulation of social work profession and to provide for matters connected therewith or ancillary thereto.

Chapter 471 of Laws of Malta “Psychology Profession Act” provides for regulation of psychology profession and to provide for matters connected therewith or ancillary thereto.

16 IMMIGRATION

16.01 ALIENS:

Rights and duties of aliens are basically equal to those of Maltese citizens except in case where Maltese citizenship is precluded and except in case of law relating to international offshore business.

See also categories 2 Business Organizations, topic Partnerships; Foreign Trade and Commerce, topic Offshore Investment; Property, topic Real Property.

16.02 IMMIGRATION:

Citizenship is exclusively regulated by Constitution of Malta.

Acquisition, possession, renunciation and loss of Maltese citizenship shall be regulated by law.

Dual or multiple citizenship is now permitted if in accordance with law. Any person may be citizen of Malta and at same time citizen of another country. Citizen of Malta who acquires citizenship in another country on or after 10th Feb. 2000 may hold such other citizenship together with his Maltese citizenship. Minor citizen of Malta who also possesses foreign citizenship, as well as person who is in possession of two citizenships and who on 10th Feb. 2000 was over 18 years of age but had not yet attained 19th birthday, may now hold both citizenships indefinitely.

Person (born in Malta or abroad) who was citizen of Malta by birth or by descent and who resided outside Malta for aggregate period of at least six years and who acquired or retained citizenship of another country shall be deemed not to have ever ceased to be citizen of Malta.

Person who (before 10th Feb. 2000) had ceased to be citizen of Malta by acquiring foreign citizenship or because he failed to renounce foreign citizenship within time prescribed by law, shall be entitled to reacquire Maltese citizenship by registration. Those former citizens of Malta, who had acquired Maltese citizenship on 21st Sept. 1964 or at birth but who have not resided abroad for at least six years and those persons who were citizens of Malta by registration or naturalization are now entitled to be registered as citizens of Malta. These persons, without having to satisfy any residence conditions and irrespective of where they are now residing (whether in Malta or abroad), may submit application to be registered as citizens of Malta. In case of former citizens of Malta who had acquired Maltese citizenship by registration or naturalization, however, Maltese citizenship shall be granted only if Minister responsible for citizenship matters is satisfied that such grant is not contrary to public interest.

Foreign spouses of citizens of Malta can apply to be registered as citizens of Malta only after five years of marriage and as long as they are still living with their spouse. Upon acquisition of Maltese citizenship, they may retain also their citizenship of origin. Persons who are separated may also apply for Maltese citizenship as long as they had lived with their spouse five years after marriage. Foreign widows/widowers may also apply for Maltese citizenship as long as five years would have elapsed from celebration of marriage.

Children born of Maltese mother on or after 21st Sept. 1964 and before 1st Aug. 1989 (date when it became possible to acquire Maltese citizenship automatically if mother is citizen of Malta), can be registered as citizens of Malta. Those persons, who are now 18 years of age or over, irrespective of whether they reside in Malta or abroad may now apply to be registered as citizens of Malta and retain Maltese citizenship together with their foreign citizenship. In case of minor children, application can be submitted in their behalf by their mother to be naturalized as citizens of Malta.

Domicile is not defined in law, it denotes combination of facts. Maltese courts follow English principles in establishing concept of domicile.

Residence.

Law distinguishes between various types of residence status: (a) Nonresidents: when visitor's stay does not exceed three months. He is entitled to purchase immovable property in Malta provided this is valued at over Lm15,000; (b) Temporary Residents: when Principal Immigration Officer grants permit to foreigner to reside temporarily in Malta. This is granted upon foreigner showing evidence that his income will enable him to live in country without becoming financial burden on Government; (c) Permanent Residence: when foreigner can show that he owns capital net worth of Lm150,000 worldwide or earns annual income of Lm10,000 and is prepared to purchase property in Malta worth minimum of Lm30,000 or rent premises at not less than Lm1,200 per annum.

Apart from above, temporary residence permit is automatically granted to expatriate employees working in Malta under valid working permit. This residence permit is normally made to coincide with foreigner's working permit.

17 INTELLECTUAL PROPERTY

17.01 COPYRIGHT:

Protection of copyright is regulated by Copyright Act. (c. 415 of Laws of Malta).

Nature of Copyright.

Copyright consists in exclusive right to do, or authorise others to do, acts in relation to original work in question which are set out in Act namely literary, musical and artistic works, cinematographic films, databases, audiovisual works, sound recordings and broadcasts.

These rights include reproduction in any material form, communication to public, broadcasting or later rebroadcasting of whole work or substantial part thereof, either in its original form or in any form recognisably derived from original.

Copyright may be transmitted by assignment, by testamentary disposition and by operation of law, as movable property.

Copyright in respect of literary, musical or artistic works, other than photographs, lasts for 25 years after death of author, in respect of cinematographic films and photographs for 25 years after work was first made accessible to public by owner of copyright, in respect of sound recordings for 25 years after recording was made and in respect of broadcasts for 25 years after broadcast took place. For joint authorship copyright runs from death of survivor irrespective of whether survivor is qualified person under copyright act.

Date of Expiration of Copyright.

(i) Literary, musical or artistic works and database—70 years after end of year in which author dies, irrespective of date when work is lawfully made available to public; (ii) audiovisual works—70 years after end of year in which last of following person dies: principal director, author of screenplay, author of dialogue and composer of music specifically created for use in audiovisual work.

Infringement.

Where any person infringes copyright, neighbouring rights or sui generis rights in respect of work, he shall be liable, at suit of copyright owner or right holder to be condemned by Civil Court, First Hall to payment of damages or to payment of fine to be determined in accordance with scale of fines to be prescribed by Minister, as said court, having regard to circumstances of case, may deem proper and to restitution of all profit derived from infringement of copyright, neighbouring rights or sui generic rights.

17.02 PATENTS AND DESIGN:

The Patents Act c. 417 of Laws of Malta provides for registration and regulation of patents. Administration of this Act is entrusted to Comptroller of Industrial Property, hereinafter referred to as "Comptroller". Minister shall appoint Comptroller.

Invention shall be patentable if it is novel, involves inventive step and is industrially applicable.

Following, in particular, shall not be regarded as inventions: discoveries, scientific theories and mathematical methods; aesthetic creations; schemes, rules and methods for performing mental acts, playing games or doing business and programs for computers; presentations of information. Method for treatment of human or animal body by surgery or therapy and diagnostic method practiced on human or animal body shall not be regarded as invention capable of industrial application for purposes of aforementioned; provided: that this shall not apply to products, in particular substances or compositions, for use in any of these methods.

Patent shall not be granted in respect of: invention exploitation of which would be contrary to public order or morality: provided that exploitation shall not be deemed to be so contrary merely because it is prohibited by law or regulation; human body, at various stages of its formation and development from moment of conception, and simple discovery of one of its elements; processes for cloning human body, processes for modifying germ line genetic identity of human body and uses of human embryo for industrial or commercial purposes; processes and products for modifying genetic identity of animals which are likely to cause them suffering without any substantial medical benefits to man or animal; and animal variety, or essentially biological process for production of plants or animals other than microbiological process or products thereof, where essential biological process consists entirely of natural phenomena such as crossing or selection, and microbiological process means any process involving, or performed upon, or resulting in, microbiological material. Minister responsible for protection of industrial property may make regulations to modify any of aforementioned for purpose of maintaining them in conformity with developments in science and technology.

Application for patent is to be made in duplicate in prescribed form and shall be filed at Office of the Comptroller and shall contain: request for grant of patent, description of invention, one or more claims, any drawings referred to in description or claims, abstract of invention.

Application will designate inventor or, where there are several inventors, all of them. If applicant is not inventor, or is not sole inventor, applicant shall indicate legal grounds for his entitlement to file application.

Application will be subject to payment of filing fee as may be prescribed.

Application is to be drafted in prescribed language and shall satisfy any conditions that may be prescribed.

Filing date of application shall be date of receipt by Office of the Comptroller of documents that contain: express or implicit indication that granting of patent is sought; indications allowing identity of applicant to be established; description of invention for which patent is applied for.

If Comptroller finds that, at time of receipt of application, requirements have not been fulfilled, he shall invite applicant to comply with any requirement that has not been satisfied within such time as may be prescribed.

If applicant complies with invitation referred to above, filing date of application shall be date of receipt of all missing requirements. If applicant fails to comply with such invitation, application shall be treated as if it had not been filed. Where description refers to drawings, which are not included in application, Comptroller shall invite applicant to furnish missing drawings within such period as may be prescribed. If applicant complies with said invitation, filing date of application shall be date of receipt of missing drawings. If applicant fails to comply with invitation, filing date shall be date of receipt of application and any reference to drawings shall be deemed as not having been made. Indications referred to in above must be submitted in such language or languages as may be prescribed. If any description referred to in above or any text contained in any drawings is in language other than official languages of Office, translation thereof in one of official languages of Office shall be deposited at Industrial Property Office within such time limit as may be prescribed.

Examination and Grant or Refusal.

Where application for patent has been filed and is not withdrawn, Comptroller shall refer application to officer in his department hereinafter referred to as “examiner” to determine whether application complies with requirements laid out in Patents Act and of any regulations made thereunder and which are designated by any regulations as may be prescribed as formal requirements. Examiner shall make report thereon to Comptroller.

If examiner reports to Comptroller that not all formal requirements are complied with, applicant shall be given opportunity to make observations on report and to amend application within such period as may be prescribed so as to comply with those requirements, and if applicant fails to make such amendments Comptroller may refuse application.

If examiner reports to Comptroller that application, whether as originally filed or as amended complies with all formal requirements at any time before end of such prescribed period as is referred to in previous paragraph, Comptroller shall notify applicant accordingly.

Where applicant has been notified that his application complies with all formal requirements, Comptroller shall on payment of prescribed fee, grant patent on application.

As soon as possible after decision to grant patent, Comptroller shall publish notification that patent has been granted and shall publish patent in prescribed manner.

Comptroller shall, within time limit provided for in subarticle (2) and in prescribed manner, publish all applications filed with it.

However no application shall be published if it is withdrawn or is rejected before expiration of 17 months from filing date or, where priority is claimed, from priority date of application.

If by time application is published, patent has been granted pursuant to that application, Comptroller shall not publish application but shall publish patent in prescribed manner.

Comptroller shall publish each application filed with it promptly after expiration of 18 months from filing date or, where priority is claimed, from priority date of application. However, where, before expiration of said period of 18 months, applicant presents written request to Office of the Comptroller that his application be published, Office of the Comptroller shall publish application promptly after receipt of request.

17.03 TRADEMARKS:

Trademarks.

Chapter 416 of Laws of Malta regulates Trademarks. “Trademark” means any sign capable of being represented graphically which is capable of distinguishing goods or services of one undertaking from those of other undertakings. Trademark may, in particular, consist of words (including personal names), figurative element, letters, numerals or shape of goods or their packaging: provided that for purpose of this Act “any sign capable of being represented graphically” includes any sign capable of being put down in words. Registered trademark is property right obtained by registration of trademark under this Act. Proprietor of registered trademark has rights and remedies provided by this Act.

Grounds for Refusal of Registration.

Following shall not be registered as trademarks: (a) Signs which do not fall within definition of trademarks; (b) trademarks which are devoid of any distinctive character; (c) trademarks which consist exclusively of signs or indications which may serve, in trade, to designate kind, quality, intended purpose, value, geographical origin, time of production of goods or of rendering of services, or other characteristics of goods or services; (d) trademarks which consist exclusively of signs or indications which have become customary in current language or in bona fide and established practices of trade: provided that trademark shall not be refused registration by virtue of paragraph (b), (c) or (d) above if, before date of application for registration, it has in fact acquired distinctive character as result of use made of it in Malta; (1) Sign shall not be registered as trademark if it consists exclusively of: (a) shape which results from nature of goods themselves, (b) shape of goods which is necessary to obtain technical result, or (c) shape which gives substantial value to goods; (2) trademark shall not be registered if it is: (a) contrary to public policy or to accepted principles of morality, or (b) of such nature as to deceive public or likely to deceive public as to nature, quality or geographical origin of goods or service or in any other manner; (3) trademark shall not be registered if or to extent that its use is prohibited in Malta by any enactment or rule of law; (4) trademark shall not be registered in cases specified, or referred to, in art. 5; (5) trademark shall not be registered if, or to extent that, application is made in bad faith.

Specially Protected Emblems.

Trademark which consists of or contains: (a) Arms, or any of principal armorial bearings of arms appertaining to President or Roman Catholic Archbishop of Malta, or any insignia or device so nearly resembling such arms or any such armorial bearing as to be likely to be mistaken for them or it; (b) representation of Presidential or Episcopal flags; (c) representation of President or Archbishop, or any colourable imitation thereof, or (d) words, letters or devices likely to lead persons to think that applicant either has or recently has had Presidential or Episcopal patronage or authorization, shall not be registered unless it appears to Comptroller that consent has been given by or on behalf of President or Archbishop.

Trademark which consists of representation of national flag of Malta shall not be registered. Trademark which contains representation of national flag of Malta shall not be registered if it appears to Comptroller that use of trademark would be misleading or grossly offensive. Trademark shall not be registered in cases specified in certain exceptional cases: provided that Minister may by regulation extend applicability of provisions of this subarticle to apply mutatis mutandis in respect of religions other than Roman Catholic Apostolic Religion.

Relative Grounds for Refusal of Registration.

(1) Trademark shall not be registered if it is identical with earlier trademark and goods or services for which trademark is applied for are identical with goods or services for which earlier trademark is protected; (2) trademark shall not be registered if because it is either identical with earlier trademark and is to be registered for goods or services similar to those for which earlier trademark is protected, or it is similar to earlier trademark and is to be registered for goods or services identical with or similar to those for which earlier trademark is protected, there exists likelihood of confusion on part of public, including likelihood of association by public with earlier trademark: provided that mere association without likelihood of confusion shall not prevent mark from being registered; (3) trademark which: (a) is identical with or similar to earlier trademark, and (b) is to be registered for goods or services which are not similar to those for which earlier trademark is protected, shall not be registered if, or to extent that, earlier trademark has reputation in Malta and use of later mark without due cause would take unfair advantage of, or be detrimental to, distinctive character or repute of earlier trademark; (4) trademark shall not be registered if, or to extent that, its use in Malta is liable to be prevented: (a) by virtue of any rule of law protecting unregistered trademark or other sign used in course of trade, or (b) by virtue of earlier right other than those referred to in paragraph (a) hereof or in subarticles (1) to (3) in particular by virtue of law of copyright, or registered designs. Person thus entitled to prevent use of trademark is referred to in this Act as “the proprietor of an earlier right” in relation to trademark; (5) nothing in this article prevents registration of trademark where proprietor of earlier trademark or proprietor of earlier right consents to registration for which earlier trademark is protected, there exists likelihood of confusion on part of public, including likelihood of association by public with earlier trademark: provided that mere association without likelihood of confusion shall not prevent mark from being registered.

Limits on Effect of Registered Trademark.

(1) Registered trademark is not infringed by use of another registered trademark in relation to goods or services for which latter is registered; (2) registered trademark is not infringed by: (a) use by person of his own name or address, (b) use of indications concerning kind, quality, quantity, intended purpose, value, geographical origin, time of production of goods or of rendering of services, or other characteristics of goods or services, or (c) use of trademark where it is necessary to indicate intended purpose of product or service, in particular as accessories or spare parts: provided use is in accordance with honest practices in industrial or commercial matters; (3) (a) registered trademark is not infringed by use in course of trade in Malta of earlier right; (b) for purposes of this subarticle “earlier right” means unregistered trademark or other sign continuously used in relation to goods or services by person or his predecessor in title from date prior to whichever is earlier of: (i) use of first-mentioned trademark in relation to those goods or services by proprietor or his predecessor in title, or (ii) registration of first-mentioned trademark in respect of those goods or services in name of proprietor or his predecessor in title, and (iii) earlier right shall be regarded as applying if, or to extent that, its use is protected by virtue of any rule of law.

Application for Registered Trademark.

Application for registration of trademark shall be made to Comptroller in such manner as may be prescribed.

Registration Procedure.

Examination of application: (1) Comptroller shall examine whether application for registration of trademark satisfies requirements of this Act and for that purpose he shall carry out search, to such extent as he considers necessary, of earlier trademarks; (2) if it appears to Comptroller that requirements for registration are not met, he shall inform applicant and give him opportunity to make representations or to amend application within such period as Comptroller may specify; (3) if applicant fails to satisfy Comptroller that those requirements are met, or to amend application so as to meet them, or fails to respond before end of specified period, Comptroller shall refuse application; (4) if it appears to Comptroller that requirements for registration are met, he shall accept application as eligible for registration.

Withdrawal, Restriction or Amendment of Application.

(1) Applicant may at any time withdraw his application or restrict goods or services covered by application; (2) save as provided in subarticle (1), application may be amended, at request of applicant, only by correcting: (a) name or address of applicant, (b) errors of wording or of copying, or (c) obvious mistakes, and then only where correction does not substantially affect identity of trademark or extend goods or services covered by application.

Registration.

(1) Where application has been accepted as eligible for registration, Comptroller shall register trademark, unless it appears to him having regard to matters coming to his notice after he accepted application that it was accepted in error; (2) trademark shall not be registered and application shall be deemed to be withdrawn unless any fee prescribed in respect of any action taken before registration is paid within prescribed period; (3) trademark when registered shall be registered as of date of filing of application for registration, and that date shall be deemed to be date of registration; (4) on registration of trademark Comptroller shall publish registration in prescribed manner and issue to applicant certificate of registration.

Duration, Renewal and Alteration of Registered Trademark.

Duration of registration: (1) Trademark shall be registered for period of ten years from date of registration; (2) registration may be renewed in accordance with art. 39 for further periods of ten years.

Renewal of Registration.

(1) Registration of trademark may be renewed at request of proprietor, subject to payment of prescribed renewal fee not more that six months before date of expiry; (2) Minister may by regulation make rules providing that Comptroller informs proprietor of registered trademark, before expiry of registration, of date of expiry and manner in which registration may be renewed; (3) without prejudice to subarticle (1) request for renewal must be made, before expiry of registration: provided that, request may be made and fee paid within such further period as may be prescribed, in which case prescribed additional renewal fee must also be paid within that period; (4) renewal shall take effect from expiry of previous registration; (5) if registration is not renewed in accordance with above provisions, Comptroller shall remove trademark from register; (6) provision may be made by rules for restoration of registration of trademark which has been removed from register, subject to such conditions (if any) as may be prescribed; and (7) renewal or restoration of registration of trademark shall be published in prescribed manner.

Alteration of Registered Trademark.

(1) Registered trademark shall not be altered in register, during period of registration or on renewal; (2) nevertheless, Comptroller may, at request of proprietor, allow alteration of registered trademark where mark includes proprietor's name or address and alteration is limited to alteration of that name or address and does not substantially affect identity of mark; and (3) provision shall be made by rules for publication of any such alteration and making of objections by any person claiming to be affected by it.

18 LEGAL PROFESSION

18.01 ATTORNEYS:

Attorneys in Malta are called Advocates. No person may exercise profession of advocate in Malta without authority of President of Malta provided by warrant under Public Seal of Malta.

No person shall be authorized to obtain warrant unless: (a) he is of good conduct and of good morals; (b) he is citizen of Malta; (c) he has obtained academic degree of Doctor of Laws (LL.D.); (d) he has attended at office of practising lawyer for period of one year after completion of his academic course; (e) he possesses full knowledge of Maltese language; (f) he has been examined by two judges certifying that he is competent to act as advocate.

19 MORTGAGES

19.01 CHATTEL MORTGAGES:

See category 7 Debtor and Creditor, topic 7.08 Pledges.

19.02 MORTGAGES (HYPOTHECS):

Mortgages (hypothecs) are of three classes: (i) Legal, that is, created by law in favour of specified persons in certain circumstances such as that belonging by law to wife on property of her husband for her dowry; (ii) judicial, arising from judgment against debtor; and (iii) contractual, that is, established by contract.

Hypothec can either be general or special one. General hypothec affects all property present and future of debtor, special hypothec affects only one or more of particular immovables of following kind: (a) things which are immovable by nature and products of such immovables so long as they are not separated therefrom; (b) right of usufruct over said immovables, during continuance of such right; (c) “dominium directum” over said immovables given on emphyteusis, and “dominium utile” over such immovables.

Whereas general hypothec attaches to property affected thereby only so long as such property does not pass into hands of third party, special hypothec has “droit de suite” and thus it continues to attach to any immovable charged therewith into whosoever's possession such immovable may pass.

All hypothecs must be registered in Public Registry and they rank according to their date of registration. Registration may be reduced or totally cancelled either with consent of creditor given in public deed, or in virtue of judgment. Registration of privilege or hypothec in Public Registry shall cease to have effect after 30 years from date thereof unless such registration is renewed before expiration of said time.

Privileges.—Privilege is another right of preference which however always ranks prior to hypothec even if latter is registered at earlier date. Privileges may be either general, that is, extending over all property movable or immovable of debtor, or special, that is, affecting certain property movable or immovable. Whereas special privileges over movables and general privileges cease to exist if property so secured passes to hands of third parties, special privileges over immovables continue to have effect even when these are transferred to third parties.

Privileged debts over all property in general are: judicial costs, funeral expenses, death bed expenses, wages of servants and supplies of provisions which are indispensable for support of debtor and his family. Privileged debts over particular movables include amongst others: debt due to pledgee over thing which he holds as pledge, debt due to hotel keeper over affects of his guest, debt due for carriage of goods over goods carried. Amongst privileged creditors over immovables most important are: architects, contractors over immovable constructed for debts due to them in respect of expenses and price of their work.

Antichresis is devise in Maltese law which can only be created by virtue of writing whereby creditor acquires right to collect fruits of immovables belonging to his debtor, subject to his obligation of deducting annually such fruits from interest if any be due to him, and then from principal of debt. Creditor must also provide for maintenance and necessary repairs of immovable and pay ground rent, if any. Creditor does not become owner of immovable by mere default of payment at time agreed upon; however, in default of payment he may sue for sale of immovable by judicial auction. If creditor who holds immovable by way of antichresis, enjoys other rights of privilege or hypothec created on such immovable, he may exercise such rights as any other creditor.

20 PROPERTY

20.01 ABSENTEES:

Person absent abroad may generally delegate authority to any person of full capacity, usually by giving Power of Attorney. This is normally in written form and may be general or limited to particular scope.

In judicial matters if absent person of age cannot be summoned or in case of uncertainty as to heirs entitled to inheritance, judicial curator is appointed by Civil Courts.

20.02 REAL PROPERTY:

Maltese Civil Code divides all properties into immovables (real property) and movables (personal property).

Real property consists of (i) property movable by nature such as land and buildings and springs of water; (ii) any movables annexed to tenement permanently to remain incorporated therewith; (iii) “dominium directum”, usufruct, servitude, actions in respect of immovables and rights thereon and actions in respect of inheritance.

Real property may be acquired by accession, succession, prescription or contract.

Accession is right whereby owner of property acquires ownership of all that it produces or that becomes united to or incorporated with it, whether naturally or artificially. (Civil Code [§566]).

Succession.

See category 12 Estates and Trusts, topic Wills.

Prescription is acquisition of ownership by any person who in good faith and under title capable of transferring ownership possesses immovable for period of ten years. (Civil Code [§2140]). Ownership may be acquired also even when there is absence of title or good faith after lapse of 30 years provided possession is continuous, public, unequivocal and peaceful. (Civil Code [§2143]).

Contract.

Acquisition of real property by contract is null if not made by public deed and registered at Public Registry by notary public. (Civil Code [§1363]).

Usufruct is real right to enjoy things of which another has ownership subject to obligation of preserving this substance with regard both to matter and to form. (Civil Code [§328]). Usufruct may be constituted either by law or by operation of man. In latter case it has to be constituted by public deed. Usufruct may be for life or for specified period and may also be conditional. (Civil Code [§331]).

Servitudes may be created by law for public or private utility; by contract or by prescription during period of 30 years under same conditions applicable to acquisitive prescription.

Acquisition of real property of foreigners is regulated by Immovable Property (Acquisition by Non-Residents) Act 1974.

Nonresident is defined as (a) any individual who is not citizen of Malta or of another Member State; or (b) citizen of Malta or of another Member State, even in either case, if in possession of valid residence permit, who has not been resident in Malta for minimum continuous period of five years at any time preceding date of acquisition; or (c) any body or other association of persons, and any authority, institution, organisation, fund, firm and any other entity whatsoever, whether corporate or not, if: (i) it is constituted, formed, established, incorporated or registered in, or under laws of, state other than Malta or another Member State, or (ii) it has its registered address, principal place of residence or of business in state other than Malta or another Member State, or (iii) 25% or more of its share or other capital is owned by nonresident person or is registered in name of trustee for benefit of nonresident person, or (iv) it is in any manner and whether directly or indirectly controlled by one or more nonresident persons; (d) any trustee in terms of trust who is: (i) nonresident person unless all beneficiaries of trust are determined and are residents of Malta and in case of discretionary trust where power of appointment or any discretion may be exercised in favor of residents of Malta, (ii) resident of Malta where any of beneficiaries are nonresident persons and in case of discretionary trust, where power of appointment or any discretion may be exercised in favour of any nonresident person.

Nonresidents may acquire immoveable property in Malta provided that immoveable property is grave or site for grave, lies in specially designated area whose value must not be less than Lm30,000 in case of apartment and Lm50,000 in case of any other kind of property, acquisition of any further divided or undivided share in immoveable property when such nonresident had previously lawfully acquired share in such immoveable property.

Minister responsible for finance may grant permit to nonresident person to acquire immoveable property in particular cases where in his opinion it is in public interest or appropriate to do so. Minister shall not withhold such permit if immoveable property is required for touristic project approved by government or if value of building is more than Lm8,000, is intended to be used by nonresident person as residence for himself and his family and if such nonresident person does not own any other immoveable property in Malta.

21 TAXATION

—Scope —

Principal taxes under Maltese Law are following: Income tax (including tax on companies and tax on capital gains), death and donation duty, customs and excise duties, value added tax, stamp duties (tax on documents and transfers), national insurance contribution, expenditure levy and number of other minor taxes, e.g., road tax on vehicles, etc. Malta has no property tax or wealth tax or municipal or local taxes.

21.01 ADMINISTRATION:

Sole taxing authority is Government of Malta and main taxes are assessed and administered by Commissioner of Inland Revenue.

21.02 CUSTOMS DUTY AND TAX:

Customs and Excise Duties.

Large variety of imported goods are subject to customs duties. Excise duties on other hand are levied on locally produced products, such as cigarettes, beer, soft drinks, etc.

21.03 EMPLOYMENT TAXES:

National Insurance Contributions.

The Social Security Act 1987 regulates collection and distribution of national insurance contributions. These are payable by employers and employees according to scale based on earnings.

21.04 INCOME TAX:

The Income Tax Act (c. 123) imposes tax upon income (including also capital gains) of any person (individuals or corporations), on following basis: (i) Income (and capital gains) arising in Malta is always subject to tax. (ii) Income (and capital gains) arising outside Malta is subject to tax if recipient is both domiciled and ordinarily resident in Malta, irrespective of whether such income is received in Malta or not. If recipient is either not ordinarily resident in Malta or not domiciled in Malta (or both) only income received in Malta is charged to tax.

Although Maltese system of tax is not schedular, following sources of income are specifically contemplated: Trade, business, profession or vocation, employment and offices, dividends, interest and discounts, pensions, charges, annuities or any other annual payments, rents and any other profits arising from immovable or real property, royalties, profit sharing in lieu of rentals in agriculture, sums realized under insurance against loss of profits, balancing charges (in respect of excess allowances for wear and tear), any distribution made on winding up of approved pension scheme, gains or profits of income nature not falling under any of above classifications. Fiscal year coincides with calendar year and assessment is on previous year basis. However permission in writing can be obtained by companies and other bodies to close accounts on day other than 31st Dec.

Foreign Source Income.

When income is derived from foreign source, relief from double taxation is extended so that company can practically ensure tax credit of 25% of tax due in Malta. Furthermore nonresident shareholders receiving dividends deriving from income originating from foreign source shall enjoy tax refund equivalent to 100% of tax paid by company in case of “participating holding company” and to 66.67% in case of all other companies.

Companies Mainly Involved in International Trading.

Company registered in Malta engaged in carrying on any business activity from Malta with persons not resident in Malta and has its persons not resident in Malta and has its objects expressly limited to such activities and to such other acts as are necessary for its operations in Malta. Though company is liable for normal 35% company tax, nonresident shareholder will receive refund of about 30.83% of tax paid by company.

Individual Liability.

The Income Tax Act sets out number of rules for quantification of personal income from each source that is brought to tax. There are number of personal allowances which are granted to taxpayer by means of tax credit for tax due. Tax credit allowances vary according as to whether taxpayer is single or married and as to whether he is domiciled and ordinarily resident or not. Tax rates for computation of personal tax liability are on graduated scale reaching maximum of 35% where taxable income exceeds Lm6,750 (single person) or Lm10,000 (married person).

Since 1988 foreigners in possession of permit for permanent residence issued under Immigration Act 1970 are liable to income tax at flat rate of 15% on their chargeable income. Minimum liability after taking into account any double taxation relief to which such individual may be entitled is Lm1,800. Nonresidents whose stay does not exceed three months at any one time are not liable to tax. Temporary residents in possession of requisite permit are regarded as nonresidents for tax purposes.

Corporate Liability.

Taxable base of companies is same as that of individuals. Worldwide basis of taxation is thus applied to Maltese domiciled and ordinarily resident companies whether taxable income arises in Malta or elsewhere. Companies not ordinarily resident in Malta or not domiciled in Malta are liable for tax only on income received in Malta.

Companies pay income tax as fixed rate of 35% on net income. Net income is equivalent to aggregate income from all sources specified by law remaining after making allowance for exemptions and deductions admitted for expenditure employed wholly and exclusively in production of income.

Five deductions allowed by law are as follows: (i) Business expenses: these must be of noncapital nature but are not limited territorially. In case of no income, expense may be carried forward. (ii) Depreciation: allowance is made, initially and subsequently on wear and tear basis. (iii) Allowance is granted for debts that become bad during accounting period in question. (iv) Deduction is granted for legal and accountancy fees if paid in normal course of work and if necessary for running of business. (v) Rents paid for premises employed in generation of income also qualify as deduction.

Income Tax Act also provides for system of integration between tax paid by company on distributed profits and shareholders liability thereon. Upon distribution of dividend, Maltese registered or resident company is entitled to deduct tax from such dividend at rate paid by it (35%) on income out of which dividend is distributed. When dividend is taxed in shareholders hand, tax deducted by company is set off against shareholders' liability. Tax withheld by company is thus in effect payment on account of shareholders' liability.

All taxpayers be they individual or corporate are to file annual return of income containing such particulars, accounts and documentation as may be necessary to readily ascertain such persons' income. Return of capital assets owned on first of year of assessment is also required.

21.05 STAMP TAX:

Stamp Duty.

Some categories of commercial documents and legal documents as well as sales and other transfers (including transfers causa mortis) are subject to stamp duty levied under Duty on Documents and Transfers Act 1993. Ad valorem rates vary depending on class of documents/transfers involved.

21.06 TAX INCENTIVES:

Exemptions from taxes are granted in terms of various investment incentive laws including, Business Promotion Act, Malta International Business Activities Act 1988 (see category 14 Foreign Trade and Commerce, topic Foreign Investment), Malta Offshore Trusts Act 1988 (see category 12 Estates and Trusts, topic 12.02 Trusts), Merchant Shipping Act (c. 234) (see category 22 Transportation, topic 22.02 Shipping), Malta Freeports Act 1989, etc.

21.07 TREATIES AND AGREEMENTS:

Double Taxation.

Malta has signed Double Taxation Agreements with Albania, Australia, Austria, Barbados, Belgium, Bulgaria, Canada, China, Croatia, Cyprus, Czech Republic, Denmark, Egypt, Estonia, Finland, France, Germany, Hungary, Iceland, India, Ireland, Italy, Jordan, Korea, Kuwait, Latvia, Lebanon, Libya, Lithuania, Luxembourg, Malaysia, Morocco, Netherlands, Norway, Pakistan, Poland, Portugal, Romania, Russia, San Marino, Singapore, Slovak Republic, Slovenia, South Africa, Spain, Sweden, Syria, Thailand, Tunisia, Turkey, Ukraine, United Arab Emirates, U.K., USA and Switzerland on ships and aircrafts.

21.08 VALUE ADDED TAX:

There are three rates of VAT. There is standard rate of 18%, reduced rate of 5% and 0% on essential things.

22 TRANSPORTATION

22.01 MOTOR VEHICLES:

Motor vehicle licence is required. Every vehicle must have number plates displayed front and rear.

Driver's license is required, which must be produced to police on demand. Person under 18 years of age may not operate motor vehicle. In Malta traffic must keep to left hand side of road. In case of any accident causing damage or injury to any person or vehicle or animal driver must stop and report accident to police and produce certificate of insurance to police within 48 hours.

It is not lawful for any person to use or permit another person to use motor vehicle on road unless there is in force in relation to user of vehicle such policy of insurance in respect of third-party risks as complies with Motor Vehicles Insurance (Third-party Risks) Ordinance (c. 165).

Visitor must hold international driving licence.

All cars rented in Malta are covered by fully comprehensive insurance.

In case of accident involving death or bodily injury and judgment is obtained against insured, then, notwithstanding that insurer may be entitled to avoid and cancel insurance policy, insurer has to pay sum adjudged by Court provided that insurer has notice of institution of proceedings by means of judicial act within seven days after conclusion of evidence of plaintiff in proceedings.

22.02 SHIPPING:

Legal Regime.

Main body of statutory maritime law is incorporated in Commercial Code and in Merchant

Shipping Act (c. 234) (MSA) which later enactment is modelled on British Merchant Shipping Act. Number of international Maritime Conventions have been ratified by Malta including SOLAS 1974 and 1978 Protocol, International Load Line Convention 1966, International Tonnage Measurement Convention 1969, International Regulations for Preventing Collisions At Sea 1972, Convention for the Unification of Certain Rules relating to Assistance and Salvage at Sea 1910.

Regulatory Incentives.

MSA offers generous incentives to nonresident ship owners wishing to utilize Malta Flag. Shipping companies may be set up with minimum capital of Lm500, 20% paid up. Shareholders must be declared but there is no limitation on use of foreign trusts or corporations or shareholders. There are no restrictions on appointment of directors.

MSA accords exemption from income tax, death and donation duties and stamp duties if vessel exceeds 1,000 NRT. Specific exemption is necessary for smaller vessels. Shipping companies are exempt from exchange control if they are at least 80% foreign owned.

Crew Requirements.

Maltese registered vessels may be manned by officers and crew of any nationality. Local tax and social security contribution requirements are not applicable. Certificates of competence are to be provided within six months of registration.

Safety certification from internationally recognised classification society is necessary for registration. Vessels must comply with major safety conventions to which Malta is party (vide above) and with MSA provisions relating to safety.

Carriage of Goods.

Main body of law is incorporated in the Commercial Code, MSA and Carriage of Goods by Sea Act 1954, as subsequently amended. Latter gives Hague Rules (appended as Schedule to Act) force of law.

Limitation of Liability.

MSA applies principles of Brussels International Convention relating to Limitation of Liability of Owners of Seagoing Ships.

Mortgages.

Provisionally or permanently registered vessels may constitute security through registration of mortgage on same. Mortgagee is treated very favourably by law. Mortgage constitutes execution title at law and in event of mortgagor's default, mortgagee is entitled to take possession of and sell ship or any share therein without necessity of lengthy court procedures. For purpose of security of actions and claims to which vessel is subject, ships are deemed to constitute separate and distinct assets within owner's estate. Mortgages rank high in list of debts accorded priority in event of distribution of proceeds of forced sale.

23 TREATIES AND CONVENTIONS

23.01 TREATIES:

Malta became member of European Union in May 2004.

U.S. and Canada classify Malta as developing country thereby granting preferential treatment to goods bearing Maltese certificate of origin. Malta is party to increasing number of Bilateral Agreements with countries such as Bulgaria, Turkey, Poland, Libya, Germany, Russia, Iraq, Czech Republic.

Malta has also signed Bilateral Investment Treaties with various countries such as Belgium, Germany, France, Italy, Netherlands, Libya, Switzerland and United Kingdom. Malta is also party to extensive array of Double Taxation Agreements (see category 21 Taxation, topic Taxes).

1
MEXICO LAW DIGEST

—Scope —

Revised for 2009 edition by

NORIEGA Y ESCOBEDO, A.C. of Mexico City.

(Abbreviations used are: C. C., Civil Code of Federal District; Com. C., Commercial Code; C. C. P., Code of Civil Procedure of Federal District. References are to articles of these Codes. See also category 6 Courts and Legislature, topic 6.03 Statutes.)

Note: This revision incorporates legislation through Dec. 31, 2008.

1 INTRODUCTION

1.01 CURRENCY:

(Monetary Law of July 25, 1931, as am'd). Monetary unit is peso divided into 100 centavos. Only Banco de Mexico may issue bank notes with unrestricted legal tender value. Foreign currency obligations to be paid in Mexico may be discharged by delivery of national currency at rate of exchange published by Banco de México on date when payment is made.

1.02 GOVERNMENT AND LEGAL SYSTEM:

(Constitution of Feb. 5, 1917 as am'd).

Mexico is federal, democratic, representative Republic composed of 31 States and one Federal District, which are free in all that concerns their internal government, but united in Federation according to constitutional principles. States have their own Constitution based upon Federal Constitution.

Legislative power of Republic is exercised by Congress formed by Chamber of Deputies and Chamber of Senators. Chamber of Deputies is composed of 500 members, elected every three years. Chamber of Senators is composed of 128 members, four members of each State and four of Federal District. Congress shall assemble each year in two ordinary sessions, one running from Sept. 10 until latest Dec. 15 and another running from Feb. 10 until Apr. 30. Congress or one of its two Chambers may also hold special sessions if called by Permanent Commission. Executive Power is exercised by President elected by direct popular vote for six years and cannot be reelected. Judicial Power of Federal Government is vested in Supreme Court of Justice, Council of Federal Judicature, Electoral Court, Circuit Tribunals, Appeal Courts and in District Courts. States and Federal District have their own judiciary system.

1.03 HOLIDAYS:

Jan. 1 (New Year's); first Mon. of Feb. (Constitution Day); third Mon. of Mar. (Juarez's

Birthday); May 1 (Labor Day); Sept. 16 (Independence Day); third Mon. of Nov. (Revolution Day); Dec. 25 (Christmas).

*Many offices do not open at all during Holy Week, mainly Maundry Thursday and Good Friday; also Nov. 2 (All Souls); Nov. 20; Dec. 12 (Our Lady of Guadalupe's Day), although they are not holidays.

1.04 OFFICE HOURS AND TIME ZONE:

Mexico has three time zones: first time zone, subtract one hour from Eastern Standard Time (E.S.T.), includes all country, except second and third zones; second time zone, subtract two hours from E.S.T., includes States of Baja California Sur, Chihuahua, Nayarit, Sinaloa and Sonora; and third time zone, subtract three hours from E.S.T., includes State of Baja California.

From Apr. to Oct., first zone is G.M.T.-5, second zone is G.M.T.-6 and third zone is G.M.T.-7; from Oct. to Apr., subtract extra hour to G.M.T. time for each time zone to reflect Daylight Savings Time (D.S.T.). For 2003, D.S.T. time changes occur on Apr. 6th and on Oct. 26th. Office hours are generally from 9 a.m. to 6 p.m.

2 BUSINESS ORGANIZATIONS

2.01 AGENCY:

(C. C. 2546-2604, C. Com. arts. 273-308).

An agency (representation) may be oral or it may appear in private document with signature of two witnesses and in some cases it needs to be in public instrument, or in private instrument before two witnesses with all signatures acknowledged before notary or other authority. All of above depend on amount involved and limits to powers. Powers of attorney for appearing and representation in court must be given by public instrument.

For unlimited powers of attorney it is necessary to mention in text of power that it is given with general authority and with such special authority as must be specifically granted according to law; general powers of attorney for administration acts need to mention that they are given for general administrative purposes, and general powers for acts of ownership (domain) may also be granted in general terms; in these three cases if faculties and authority of agent is to be limited, limitations must be expressed in text of power. Document containing power of attorney must include transcription of entire text of C. C. Art. 2554. Agent cannot institute action to enforce obligations contracted in name of principal, unless authority for this purpose is expressly included in power of attorney. Agents need express authority to subscribe bills of exchange, promissory notes, and other exchangeable documents and credit instruments as well as to initiate amparo trials before courts and to delegate powers to third persons.

The contract of agency is perfected by express or tacit acceptance from agent. If power of attorney is given to professional man for acts of his professional expertise, it is considered as accepted if not refused in three days. Agency is gratuitous only when expressly so agreed. Agent may delegate his powers if expressly authorized to do so. Principal must advance to agent funds required for exercise of agency.

An agency is terminated: (a) By revocation; (b) by resignation by agent; (c) by death of principal or agent; (d) when either is declared incompetent; (e) by expiration of its term or conclusion of business for which it was given; (f) in certain cases when principal has disappeared. Principal may freely revoke agency, unless same was stipulated as condition in bilateral contract or as means to comply with obligation contracted; in these cases agent also cannot resign from agency. Appointment of new agent for same matter implies revocation as to former agent from day he is notified of new appointment. Although, if agency is terminated because of death of principal, agent must continue his administration until legal heirs can look after business for which powers were granted, if otherwise damage can result. If agent resigns from agency he must continue acting until principal can appoint another agent if damage might otherwise be caused.

2.02 ASSOCIATIONS:

See topic 2.08 Partnerships.

2.03 COOPERATIVE SOCIETIES:

See topic Corporations (Sociedades Anonimas).

2.04 CORPORATIONS (SOCIEDADES ANONIMAS):

Caveat: As to corporations which have foreign participation, certain special requirements must be met. (See category 14 Foreign Trade and Commerce, topic 14.05 Foreign Investment.)

Provisions relating to corporations are found largely in General Law of Mercantile Companies, of July 28, 1934 as am'd.

Special permit from Ministry of Foreign Affairs is required to organize any corporation. (of Foreign Investment Law of Dec. 23, 1993).

Name of Mexican corporation may be freely chosen, but words “Sociedad Anónima” or abbreviation “S.A.” must appear at end of corporate name and prior authorization from Ministry of Foreign Affairs for use of name is also required.

Organization.

Corporations are formed either by public subscription or by articles of incorporation executed by at least two persons and each should subscribe at least one share. Minimum capital of $50,000 Mexican pesos wholly subscribed is required. When shares are to be paid in cash, 20% of value must be paid in, and if payment is to be made in property other than cash total value of shares must be paid in.

Public Subscription.

In case of formation by public subscription following rules prevail:

(a) Promoters must file in Public Registry of Commerce a prospectus signed by them, setting forth proposed by-laws and stating: (1) Object, (2) name and duration of corporation; (3) capital; (4) whether or not capital shall be variable, indicating minimum authorized in case it be variable; (5) domicile of company; (6) manner in which administration is to be carried on and powers of directors; (7) manner of electing directors and designation of those entitled to sign on behalf of company; (8) manner of distribution of profits and losses among members; (9) reserve fund; (10) cases in which company must be dissolved before expiration of its term; (11) manner of liquidation; (12) what part of capital paid in; (13) number, par value and nature of shares into which capital is divided, but shares may be without par value; (14) manner and time in which balance of subscribed capital must be paid; (15) participation in profits allowed to promoters; (16) powers of stockholders' meetings and other provisions regarding voting rights.

(b) Subscriptions to capital stock must be taken on two copies of prospectus, duplicate copy being left with subscriber. In taking subscriptions, following must be stated: (1) Name, nationality and domicile of subscriber; (2) number, nature and value of shares subscribed and manner of payment; (3) what property, if any, other than money, is given in payment for shares; (4) date of subscription and statement by subscriber that he is acquainted with and accepts proposed by-laws.

(c) All shares must be subscribed within one year from date of prospectus unless shorter period is fixed therein.

(d) If at expiration of subscription period, whole capital stock is not subscribed, or for any other reason constitution of company is not concluded, subscribers are released and entitled to recover amounts paid in.

(e) Cash payments are made by deposits in credit institution(s) designated in prospectus; and are delivered to company when constitution is perfected. Property given in payment for subscription must be deeded to company on its constitution.

(f) A stockholders' meeting is held after capital is subscribed and at least 20% of same is paid. At this meeting first payment of 20% of capital must be acknowledged, value assigned to various properties, other than cash, contributed in payment of stock is also approved, but persons contributing such properties may not vote on their value, profits reserved for promoters of company are discussed, first directors and statutory auditors (comisarios) are appointed, and those empowered to sign for company are designated.

(g) Minutes of the stockholders' meeting and by-laws are notarized and registered.

Articles of Incorporation.

When public subscription is not resorted to, it is sufficient that articles of incorporation be executed as a public document by incorporators. Such articles must state: (1) Names, nationality and residences of incorporators; (2) object, name and duration of company; (3) capital of company, contributions in cash or in other property, specifying value of latter and manner in which determined, together with statement as to whether or not capital shall be variable, if variable minimum authorized capital should be indicated; (4) domicile of company; (5) manner in which administration will be carried on and powers of directors; (6) manner of electing directors and designation of those entitled to sign on behalf of company; (7) manner of distribution of profits and losses among members; (8) reserve fund; (9) cases in which company must be dissolved before expiration of its term; (10) manner of liquidation; (11) what part of capital paid in; (12) number, par value and nature of shares into which capital is divided, but shares may be without par value; (13) manner and time in which balance of subscribed capital must be paid; (14) participation in profits allowed to promoters; (15) powers of stockholders' meetings and other provisions regarding voting rights. Foregoing provisions and others which may be added constitute both articles of incorporation and by-laws. Articles of incorporation and amendments must be recorded in Commercial Registry on judicial order; petition must be filed before competent judge and summary proceeding follows.

Effect of Incorporation.

Corporation cannot be declared void once registered, except when object or purpose is illegal or when carrying on illegal business; in this case, any person may apply for immediate liquidation of corporation, then debts of company must be paid and remainder of assets applied to indemnify injured parties and to public charity. In such cases persons in control of company, whether or not owning a majority of its shares, are secondarily and without limitation liable for illicit acts of company.

Shares of stock are generally of equal value and confer equal rights; but articles of incorporation may provide for different classes of shares with special rights for each class. Each share has one vote; but it may be agreed that some of the shares can be voted only at special meetings called for extraordinary purposes stated in law, such as increase or reduction of capital, changes of object, bond issues, etc.

Shares with limited voting power must be reimbursed in preference to common shares in case of liquidation of company, and their holders have right to oppose resolutions of stockholders' meetings and to examine balance sheets and books of company.

No shares may be offered for sale to public without an authorization from Federal Government, unless shares are listed in a stock exchange.

Shares cannot be issued for less than their face value and can be non-assessable only when fully paid. Subscribers and acquirers of shares not fully paid are responsible for unpaid balance; this liability expires in five years from date of transfer, and no action can be taken against transferor before action is taken against transferee. On due date of amounts owing for subscriptions of shares company may either bring action or have shares sold through broker; if in either case, and within one month after due date, no action is taken or sale of shares cannot be made, such shares are cancelled and capital reduced accordingly. Shares must be issued within one year from date of articles of incorporation or any amendment increasing capital.

Shares must be issued in form provided by law, and must bear dividend coupons which must be nominatives. Company must keep stock register for registered shares, and to all effects persons appearing in such register are considered as owners of such shares. Articles of incorporation may provide that transfer of registered shares can be effected only with authorization of board of directors, which may deny said authorization and designate buyer at market price. Transfers of registered shares otherwise than by endorsement must be noted on stock certificate. No issuance of shares can be made until previous issuances have been wholly paid. Corporations (except publicly traded companies) cannot acquire their own shares unless by judicial proceedings and in payment of corporate credits, in which case company must sell shares within three months after acquisition; if resale is not made within that period shares are cancelled and capital reduced accordingly. Shares acquired by company cannot be voted at meetings of shareholders. In case of reduction of capital through reimbursement to shareholders of price of their shares, shares to be cancelled must be drawn before notary public or broker.

Treasury stock may be issued for convertible bond or debenture issues only.

Corporations are allowed, when articles of incorporation authorize to do so, to issue “workers' shares” (acciones de trabajo) and “participating shares” (acciones de goce). Former may be issued to employees of company under special conditions and restrictions. Latter share in net profits after dividends have been paid on common shares.

Corporations cannot grant loans or advances on their own shares. Shares issued for property other than cash must be deposited with company during two years; if value of property then appears to be 25% less than its estimated value, shareholder is liable for difference and company has a preferred lien on deposited shares.

Management may be in hands of sole administrator or of board of directors elected by stockholders but who can or cannot be stockholders. There may also be managers appointed by stockholders or board of directors or sole administrator and removable by them at any time. When directors are three or more, articles of incorporation must determine rights of minority stockholders in their election, but in any event minority representing 25% of capital (or 10% in case of listed shares) is entitled to at least one director whose appointment can only be revoked jointly with that of all other directors. Administrators, directors and managers must furnish bond as determined in by-laws or by stockholders; administrators and directors are liable as agents and in manner provided by law and in by-laws; they are also responsible to company for faithful performance of their duties.

Supervision of affairs of company is in hands of one or more statutory auditors called “comisarios,” who may, but need not, be shareholders and who are appointed by shareholders.

Comisarios shall demand from board or managers financial monthly reports.

Shareholders' meetings are regular or special and are known as general assembly. They must be held at corporate domicile. Regular meetings are held at least once a year within four months after close of fiscal year. Special meetings may be held at any time to decide on matters specially enumerated by law, such as modification of articles of incorporation, bond issues, etc. Meetings are called by administrator, board of directors, or statutory auditors, and in some cases by holders of at least 33% of capital stock. Notice must be published at least 15 days before date of meeting, unless different period is provided in by-laws, in official newspaper of state where company is domiciled or in newspaper of large circulation in said domicile; notice must contain agenda or statement of matters to be submitted; but these requisites may be omitted if all shares are found represented at time of voting. At least half capital must be represented, and resolutions adopted by meeting are valid when taken by majority of shares represented. At special meetings at least three-fourths of capital stock must be represented and resolutions must be approved by shareholders representing at least half capital stock. Shareholders may appear by proxy in form described by by-laws; when by-laws do not provide, proxies must be in writing. They may not vote on matters in which they have interest contrary to that of company. Directors, administrators and inspectors may not hold proxies or vote on approval of accounts or on matters affecting their personal responsibility.

Dividends may not be paid on common shares unless a dividend of 5% has been paid on shares having limited voting power. Articles of incorporation may provide that dividend on shares having limited voting power be larger than that on common shares. When shares are not fully paid, dividends may be paid only in proportion to part paid in. By-laws may provide for payment, during a period not exceeding three years from date of respective issue, of interest not exceeding 9% per annum on shares; this interest is charged to general expenses.

Reserve Funds.

At least 5% of net earnings must be set aside each year as a legal reserve fund until such fund amounts to one-fifth of capital of company. Reserve fund must be built up in same manner if depleted.

The annual balance must be completed within three months after close of fiscal year and submitted to inspectors at least one month before date of stockholders meeting in which it is to be discussed. Annual balance with inspector's annual report must be at stockholders' disposition at least 15 days before meeting. Annual balance must show amount of capital, amount paid in and to be paid in, cash assets and accounts constituting assets and liabilities of company. It must be published in official newspaper of state in which company is domiciled, and certified copy must be deposited in Public Registry of Commerce.

Fiscal Obligations.

(Law of Dec. 30, 1981 as am'd). Accounting must be performed in accordance with Federal Fiscal Code and related laws. Business reflected in foreign currency must be registered and converted into Mexican pesos according to official foreign exchange rate on that business day.

Dissolution may be effected: (1) On expiration of legal term; (2) by impossibility of carrying on principal object of company or when such object has been consummated; (3) by resolution of stockholders, taken in accordance with articles of incorporation and law; (4) when number of shareholders is reduced to less than two or when all shares are owned by one person; (5) on loss of two-thirds of capital stock. On dissolution of company, it must be liquidated by one or more liquidators.

Investment Companies.

Law of Investment Companies of Dec. 21, 1984, as am'd covers creation and operation of investment companies, requiring minimum capital fully paid to be determined from time to time by Ministry of Finance. Authorization to organize must first be obtained from National Banking and Securities Commission. Approval of charter is required. Such companies are subject to regulation and control of National Banking and Securities Commission. Special rules are provided for taxation.

Law forbids foreign governments or foreign official agencies, either directly or through nominees, to own stock in this class of companies. Penalty for violation of foregoing is either forfeiture of capital stock to Mexican Government, or revocation of operating franchise.

Securities Market Law of Dec. 30, 2005 as am'd, allows formation of Investment Promotion Corporations (Sociedades Anonimas Promotoras de Inversion).

Name may be freely chosen, but words ``Sociedad Anónima Promotora de Inversion'' or its abbreviation ``S.A.P.I.''

No special registry is required except if their shares are listed in which case it has to be registered in National Banking and Securities Commission. This type of company may acquire its own stock, in which case, such stock is not voted and is kept in treasury.

Company must be administrated by board of directors. Audit committee maybe established instead of appointment of ``comisario''.

All provisions regarding ``Sociedad Anonima'' are applicable to ``Sociedad Anonima Promotora de Inversion''. However, this Law grants more flexibility with respect to some corporate and economic issues than General Law of Mercantile Companies, including minority rights that are reduced from 25% in case of Sociedad Anonima to 10%, possibility to agree on different restrictions to transmission of Company's shares, causes of separation, retirement or amortization of shares, no compete clauses, share options and form of vote in stockholders meetings and freedom to implement mechanisms to resolve controversies between shareholders.

Cooperative societies

Cooperative societies (sociedades cooperativas) may be for purposes of consumption, production, or both. At least five members are necessary for incorporation and operation, but their number as well as duration and capital of society may be unlimited. Liability of members may be limited or unlimited. Capital is represented by certificates, which cannot be to bearer. From yearly earnings 10% to 20% must be set aside as a reserve fund which may be limited but not less than 25% of capital of a producers' cooperative or 10% of capital of a consumers' cooperative. Percentage of gross income must be set aside as a social insurance fund. Incorporation is effected by document executed before municipal authority, or before a civil judge, notary public or broker; whereupon Ministry of Industry and Commerce grants authorization to do business. This ministry has inspection of cooperatives and may withdraw its authorization and order their liquidation. Management is vested in general meeting of members, a board of directors with at least three members or one member if company has less than ten members, and a supervisory board, with an odd number of members not exceeding five.

Dissolution.

Cooperative society is dissolved: (a) By resolution approved by two-thirds of members; (b) when number of members is reduced to less than five; (c) when its financial condition does not permit further operations; (d) when object of cooperative has terminated; (e) by withdrawal of governmental authorization. (Law of July 29, 1994).

Civil Companies.

Under Federal Civil Code or those of various states, civil companies may be organized with a profit motive although for purposes not strictly mercantile. Firm name must be followed by words “Sociedad Civil” (Civil Company). Their administration may be entrusted to one or more members, who will be secondarily liable, jointly and severally, for obligations of company; other members are liable only to extent of their capital contribution, unless otherwise provided in instrument of organization or company contract. New members may be admitted and a member may assign his rights only with prior consent of other members, unless otherwise provided in company contract. (C. C. 2688-2735).

Organization and Registration Fees.

Tax is payable on execution of corporate papers of domestic civil (noncommercial) corporation or upon protocolization of those of foreign corporation. (Law of Federal Fees of Dec. 28, 1982 as am'd).

See also topic 2.08 Partnerships.

2.05 FOREIGN CORPORATIONS:

Foreign corporations legally constituted are juridical persons and may appear in court or before other authorities without previous registration, but in order to do business, they must register in Public Registry of Commerce. Registration can be obtained only on authorization from Ministry of Economy.

Foreign corporations may not acquire ownership of land, waters or their accessions, nor obtain concessions to exploit waters unless they agree before Ministry of Foreign Relations to be considered as nationals with respect to such properties and not to invoke with regard to them protection of their governments. In no case may they directly own land or waters within 100 kilometers of frontiers and 50 kilometers of seashore. (Const., art. 27, par. I; Law of Dec. 31, 1925).

See also categories 4 Citizenship, topic Aliens; Foreign Trade and Commerce, topic Foreign Investment.

2.06 LIMITED LIABILITY COMPANIES:

See topic 2.08 Partnerships.

2.07 LIMITED PARTNERSHIP:

Limited liability companies (sociedades de responsabilidad limitada) are formed by members who are liable only for amount subscribed by them. They have some characteristics of corporation and some of partnership. Participations may not be represented by negotiable certificates, either to order or to bearer, and are transferable only in cases and in manner prescribed by law. Firm name may include name of one or more members, and must conclude with words ``Sociedad de Responsabilidad Limitada'' or abbreviation ``S. de R. L.''. Failure to add said expressions to firm name makes members responsible without limitation. This type of company may not have more than 50 members. Capital may not be less than three thousand pesos and must be divided into parts which may be of different class and value but such value must be one thousand pesos or multiple of said amount.

These companies cannot be constituted or increase capital by public subscription, nor without total subscription of capital, nor without payment of at least 50% of each participation. Members cannot assign their interest and no new members may be admitted without consent of majority of members, unless company agreement provides for consent of higher percentage of members. No member may own more than one participation. When member makes further contribution or acquires all or part of interest of another associate, his participation is increased, unless participations are entitled to different rights, in which case they are held separately. Participations may not be divided unless in manner and cases provided by law.

Management is in hands of one or more managers who need not be members, who may act temporarily or for indefinite period, and whose appointment may be revoked any time. Resolutions of managers are adopted by majority, unless it is stipulated that they must act jointly, in which case vote must be unanimous. Members act through general meetings at which resolutions are approved by vote of majority representing at least half capital, unless company contract or instrument of organization agreement requires larger proportion. General meetings have power to: (a) Discuss, approve, modify or reject balance sheet for preceding fiscal year; (b) declare dividends; (c) appoint and remove managers; (d) appoint council of inspectors, if any; (e) decide on division or amortization of participations; (f) modify company agreement; (g) consent to assignments of participations and admission of new members; (h) decide on increases or reductions of capital; (i) dissolve company; (j) exercise other powers which may be provided for by law or by company contract. Meetings are held at least once a year at company domicile. Modification of company agreement must be approved by at least three quarters of capital; except any change of object of company or increase of obligations of members requires unanimous vote of all members.

Company agreement may provide that members shall have right to receive interest not exceeding 9% per annum on contributions; this right is limited to period long enough to allow company to perform acts and works necessary to carrying on of business, and may not exceed three years. This interest is charged to general expenses.

2.08 PARTNERSHIPS:

Governed by General Law of Mercantile Companies of July 28, 1934 as am'd (General Law of Mercantile Companies) which applies to whole nation.

All partnership agreements must be in form of public documents (see category 9 Documents and Records, topic 9.04 Public Instruments) which must be recorded in Public Registry of Commerce. All partnerships are regarded as legal entities.

General partnership (sociedad en nombre colectivo) is a partnership in which all partners have unlimited and joint liability towards third persons with respect to company's obligations. As between partners liability of one or more may be limited to a certain amount. Only name of partners may appear in firm name; when names of all are not used, firm name may consist of name of one or more with addition of words “y compañía” or other similar expression. Any person whose name appears in firm name, is liable as if he were a partner. In case firm name has been used by another partnership whose rights and obligations have been transferred to partnership, word “sucesores” must be added to firm name; likewise when name of a former partner is used in firm name.

Management of partnership may be entrusted to one or more administrators, who may or may not be partners; when administrators are not designated, all of partners have a voice in management. Administrators are appointed and removed by vote of majority of partners; any partner has right to separate from partnership when in spite of his opposing vote a non-partner is appointed administrator. A partner who has been appointed administrator can be removed only by judicial order if partnership agreement forbids his removal.

Partnership agreement can be modified only by unanimous consent of all partners, unless it authorizes modification by a majority; in this case minority has right to withdraw. Partners may not assign partnership rights, nor may new partners be admitted without consent of all other partners, unless partnership agreement allows such assignment and admittance by majority vote.

Administrators may not sell or mortgage real property of partnership without consent of a majority of partners, unless such sale or encumbrance constitutes principal object of partnership or a natural consequence thereof. Administrators may grant powers of attorney for carrying on specified partnership business, but in order to delegate duties vote of a majority of partners is required; in this case dissenting minority has right to withdraw from partnership if delegate is a non-partner. Firm name may be used by all administrators unless partnership agreement limits said use to one or more. Resolutions of administrators must be adopted by a majority and in case of a tie, partners decide. Resolutions of partners are also adopted by majority but partnership agreement may provide that such majority be computed by interest; if any one of partners holds a majority interest, vote of another partner is necessary. Partners not in administration may appoint an inspector and have right to examine books and accounts of partnership. Capital may not be distributed prior to dissolution and liquidation of partnership, unless otherwise agreed.

Partnership agreement may be rescinded in respect of any of partners for: (a) Use of firm name or capital for own business; (b) violation of partnership agreement; (c) violation of legal provisions governing partnership; (d) fraudulent and deceitful acts; (e) bankruptcy, interdiction or incapacity to carry on commercial business.

Simple limited partnership (sociedad en comandita simple) is one in which one or more of partners are subject to unlimited and joint liability for partnership obligations, and one or more of partners are responsible for debts and losses only to amount of capital which they have subscribed. Name of partnership must include name of one or more of general partners. Any person whose name appears in firm name, is responsible in same manner as general partners. Special partners are also liable to same extent as general partners when expression S. en C. or words it represents are omitted. Special partners have no voice in management of company; if they intervene in any respect they are responsible to third persons together with general partners. However, in case of death or inability of administrator a special partner takes his place if partnership agreement does not provide manner of substitution, but in this case special partner can act only during one month from date of said death or inability and merely to perform urgent acts or take care of mere administration. Interests of special partners may be represented by shares in which case partnership is a “sociedad en comandita por acciones” (limited partnership with shares). Many of provisions regarding general partnerships are applicable to limited partnerships.

Sociedad en Comandita por Acciones (Limited Partnership with Shares).—This is legal entity which has aspects of both joint-stock company and partnership and is able to transact business, acquire real and personal property, and sue and be sued in its own name. It is composed of one or more general partners who have subsidiary, though unlimited, liability with company, and one or more limited partners responsible only to extent of their contributions (shares). All provisions regarding ``Sociedad Anonima'' are applicable to ``Sociedad en Comandita por Acciones'' except (i) Capital is divided into shares of stock; shares of general partners have to be registered and may not be transferred without consent of all of general partners and two-thirds of limited partners; (ii) Name of firm may be composed of names of one or more of general partners, followed by words “y Compañía” (and Company). If not all general partners are included, name must also be followed by the words “Sociedad en Comandita por Acciones”, abbreviated to “S. en C. por A.”

Limited partners may not participate in administration of company. Organization, management and liquidation are governed by company rules, with some exceptions.

Many of provisions regarding general partnerships are applicable to limited partnerships with shares.

Capital of all types of partnerships may be variable; in this case expression ``de capital variable" must be added to firm name. Capital may not be reduced below minimum fixed capital established for each type of partnership.

Asociación en Participación.

This is contractual arrangement between two or more individuals or enterprises for realization of one or more business transactions. There is no legal entity, nor may association operate under name. Managing associate receives capital from contributing associates and underlying agreement provides how profits will be distributed. Managing associate operates in his own name and is liable for debts of business, whereas contributing associates are liable only up to amount of their respective contributions. Association is to be based on written contract, which may modify some of basic rules expressed above.

Sole Proprietorship.

Individual person, including foreign individual with proper immigration permit, can do business in his name as sole proprietor and is personally responsible for losses of enterprise. Business has no legal personality.

Business Associations.

In Mexico, business enterprises are not only permitted, but are legally required to organize themselves into associations. Twenty firms in any particular industry may create national industrial association or chamber; for commercial chamber minimum is 50.

Foreign Partnerships.

Requisites before qualifying to do business are same as those provided for foreign corporations. See topic Foreign Corporations.

3 BUSINESS REGULATION AND COMMERCE

3.01 BILLS AND NOTES:

“General Law on Negotiable Instruments and Credit Operations” of Aug. 26, 1932 (Ley General de Títulos y Operaciones de Crédito as am'd).

Bills of exchange must contain: (1) Statement that instrument is a bill of exchange; (2) place where and date when executed; (3) unconditional order to drawee to pay a certain sum of money; (4) name of drawee; (5) place and date of payment; (6) name of payee; (7) signature of drawer or of person executing instrument at his request or on his behalf. Bill may be drawn payable: (1) At sight; (2) at a certain period after sight; (3) at a certain period after date; (4) on a certain date. If drawn payable at other times, at several times, or when time of payment is not expressed, bill is payable at sight. If bill is drawn payable one or several months after date or sight, payment must be made on corresponding day of month of maturity; if there is no such day, on last day of such month. If time of payment is stated to be “at the beginning,” “at the middle” or “at the end” of any month, payment must be made respectively on first, fifteenth and last day of month. Expressions: “Eight days” or “one week,” “fifteen days” or “two weeks,” “a fortnight” or “half a month” are understood to mean not one or two whole weeks but periods of eight or fifteen days, respectively. If due date is a holiday, bill must be paid preceding day. Intermediate holidays are included in count of periods. Bill may be drawn to order of drawer; if drawn against drawer it must be payable at a different place. Bill may not be drawn to bearer. Bill, note or check drawn payable to a designated person is considered drawn to his order, unless instrument or an endorsement contains the words “not to order” or “not negotiable.” Bills of exchange may not cause ordinary interest. Penalty interest in case of default is payable at rate of 6% per annum.

Bill of exchange is transferable by endorsement, which may be made: (1) To transfer ownership of bill; (2) for collection or (3) as security. Regular endorsement must contain: (1) Name of endorsee; (2) signature of endorser; (3) nature of endorsement; (4) place and date. Endorsement may be in blank and if made to bearer it is understood to be in blank. Endorsement must be unconditional. Partial endorsement is ineffective. Endorsement must be written on bill or on a paper attached thereto. Endorsement transferring ownership of bill makes all endorsers of this kind jointly liable, but any endorser may avoid liability by inserting phrase “without recourse” or some equivalent. Drawer may not waive liability; he is responsible for acceptance and payment of bill.

Bill must be presented for acceptance at place and address stated thereon. Lacking such statement presentation for acceptance must be made at domicile of drawee. If various places are designated for acceptance, holder may present bill at any of them. Bill drawn at a certain time from sight must be presented for acceptance within six months after date; but any obligee may reduce, or drawer may extend, said period by so stating on bill. If a bill is not presented for acceptance within proper time, holder loses his rights against endorsers and drawer. Acceptance is done in writing “I accept” or its equivalent but mere signature of acceptor is sufficient evidence of acceptance. Bill may not be accepted conditionally but may be accepted for part of amount.

“Aval” is several guaranty by one of parties to bill or by one who is not party to bill. It may be made on bill or on separate paper attached thereto.

Bill must be presented for payment at place and time stated. If drawn at sight it must be presented within six months after date but any obligee may reduce, or drawer may extend, period by so stating on bill. Payment may be made in part; but holder must protest for unpaid balance and retain bill until complete payment is effected. Holder may refuse to accept payment before due date. There are no days of grace.

Bill of exchange should be protested for partial or total nonacceptance or nonpayment. Protest is made before a notary public or broker if there be any in place, and if not, before highest political authority. Protest for nonacceptance must be made within two days after presentation, but always before due date, protest for nonpayment must be made within two days after due date; bill payable at sight should be protested on presentation or within two days following. Bill protested for nonacceptance need not be presented for payment or protested for nonpayment. Record of protest should contain: (1) Literal copy of bill, including acceptance, endorsements, etc.; (2) fact of presentation and whether or not person who should have accepted or paid was present; (3) reasons for refusal to accept or pay; (4) signature of person against whom protest is made or statement of impossibility or refusal to sign if such be case; (5) place, date and hour of protest; (6) signature of person before whom protest is made.

Acceptor, drawer, endorsers and guarantors are jointly liable to holder for amount of bill, interest, costs of protest and all other legitimate expenses. Holder of a bill duly protested may exercise his right of action against all of persons signing, or against some or any of them. Any endorser who pays has same right against previous endorsers and drawer.

Last holder of a bill duly protested, as well as any endorser who pays same, may reimburse himself by: (1) Charging to, or asking credit in account from other obligees for amount of bill, penalty interest and other costs; or (2) drawing at sight against said obligees for amount of bill, penalty interest and other costs. In both cases respective notice or bill of exchange should be accompanied by original bill, a copy of protest and an account of costs, including those of new bill. (Law of Aug. 26, 1932, arts. 25-41, 76-169).

Bills grant executive action to holder. Statute of limitations of executive action is three years and six months from maturity. Statute of limitations of ordinary action is ten years from maturity.

Promissory notes must contain: (1) Statement that instrument is a promissory note (pagaré); (2) unconditional promise to pay a certain amount; (3) name of payee; (4) time and place of payment; (5) date and place of issue; (6) signature of maker or of person signing on his behalf. If no time of payment is stated, promissory note is payable at sight. If payable at a certain time after sight, promissory note must be presented within six months after date. Most of provisions with regard to bills of exchange concerning endorsement, payment, protest, etc., are applicable to promissory notes; ordinary interest may be established in promissory notes. (Law of Aug. 26, 1932, arts. 170-174).

Checks may be drawn only against banks or other credit institutions and must contain: (1) Statement that instrument is a check; (2) place and date of issue; (3) unconditional order to pay a certain sum; (4) name of drawee; (5) place of payment; (6) signature of drawer. Checks may be issued to bearer up to certain limit which is adjusted first day of each Jan., however, Bank of Mexico and each bank may establish minor limit amounts of checks to bearer. Checks are always payable at sight and may be payable to a designated person or to bearer. Check must be presented for payment: (1) Within 15 days after date, if payable at place of issue; (2) within one month, if payable at different place within national territory; (3) within three months if drawn abroad for payment in Mexico; (4) within three months if drawn in Mexico for payment abroad, provided foreign law does not state different period. Drawer may not stop payment on check during above periods. Bank, if it has funds of drawer, must pay check. Drawer shall be liable for damages, which may not be less than 20% of amount of check if check is not paid by bank due to lack of funds of drawer. Bank may refuse payment if it has notice that drawer is in state of bankruptcy or suspension of payments. Check presented at clearing house is considered as presented to drawee. Check presented in time and not paid must be protested within two days after presentation, in manner of bill of exchange payable at sight. For failure to present or protest, holder loses his right of action against endorsers, drawer and their guarantors; but in case of drawer and his guarantors they must prove that they had made provision of funds for payment and that such funds were available at time when presentation or protest should have been made.

There are special provisions regarding “crossed checks,” “checks to be credited on account of holder,” “certified checks,” “cashier's checks” and “traveler's checks”; and most of provisions with regard to bills of exchange concerning endorsement, payment, protest, etc., are applicable to checks. (Law of Aug. 26, 1932, arts. 175-207).

Bonds and Debentures (Obligaciones) may be issued by corporations payable to designated person, or to bearer when registered at National Securities Registry. They may be in denominations of 100 pesos (US$7 approx.) or multiples thereof. Holders of bonds and debentures of same series must have equal rights. Bonds and debentures must contain: (1) Name, nationality and domicile of holder when required; (2) paid-in capital of issuer, and statement of corporation's assets and liabilities are shown by balance sheet specially prepared for issue; (3) amount of issue, number of bonds or debentures and par value of same, (4) rate of interest; (5) time of payment of interest and principal, and periods, conditions and manner of amortization; (6) place of payment; (7) list of special guaranties, if any, with registration data relating thereto; (8) place and date of issue and date and number of registration entry in Registry of Commerce; (9) signatures of authorized officers of corporation; (10) signature of authorized representative of holders of obligations. No clause may be inserted providing for amortization by drawings at price above par or with premiums, unless interest payable to all obligation-holders is in excess of 4% per year and periodical sum set aside for amortization and payment of interest is same during entire amortization period. No issue may be made for amount greater than net assets of corporation as shown in balance sheet specially prepared for that purpose, unless issue is intended to provide value or price of property for whose acquisition or construction corporation has contracted.

Law permits corporations to issue convertible bonds or debentures and then they may issue treasury stock to cover issue. This stock is not subject to preemptive rights.

In connection with issue corporation must execute instrument before notary public, which must be recorded at registry office of place where property mortgaged, if any, is located, and also at registry office of domicile of corporation.

Representative of bond-holders may not be holder himself, and may be individual or corporation; holders may remove him at any time; his duties and powers are enumerated by law, but they may be expressly increased by instrument of issue.

Majority of outstanding bonds constitutes quorum at ordinary meetings of bond-holders; decisions must be approved by majority vote of obligations represented. Three-quarters of outstanding obligations must be represented and vote of majority thereof is required to (a) designate or remove representative of bond-holders or (b) to grant extensions to corporation or amend instrument of issue.

Bond-holders themselves may sue corporation for payment of coupons, bond due or drawn, or amortizations or reimbursements due or ordered, provided that no action by common representative is pending to same effect. Actions for payment of coupons and obligations prescribe in three and five years respectively. (Law of Aug. 26, 1932, arts. 208-228 as am'd).

3.02 COMMERCIAL REGISTER:

See category 9 Documents and Records, topic 9.05 Records.

3.03 CONDITIONAL SALES:

See topic Sales (Realty and Personalty).

3.04 CONTRACTS:

In area of contracts as in other branches of civil law distinction between commercial and civil transactions must be continually borne in mind. Contracts executed by at least one merchant or contract which object is commercial matter, shall be considered as commercial contract. Commercial Code contains special rules governing commercial contracts, principal purpose of which is to simplify procedure. Commercial Code provides that in mercantile transactions parties are bound in manner and terms upon which they appear to have obligated themselves and that validity of commercial transactions does not depend upon observance of definite formalities and requisites except: (1) In cases where code or other commercial laws require agreement to be in form of public document (for example articles of association of corporation or partnership) or where special formality or solemnity is required to render it effective (as for example bills of exchange); and (2) that in case of agreements executed in foreign countries they must comply with formalities required in country of execution regardless of whether or not such formalities are required in Mexico. (Com. C. 78, 79). Commercial contracts evidenced by correspondence, telegrams or any other means such as electronic, optical or technological devices, shall be considered executed upon date acceptance of offer is received. (Com. C. 80). Commercial contracts that need to be formalized before commercial notary (corredor) shall be perfected, until relevant public deed is signed by parties. (Com. C. 82).

Electronic contracts (e-mail, facsimile or other technological devices) shall be considered executed in following events: (1) When acceptance of offer reaches electronic system designated by addressee; (2) when acceptance is obtained by addressee, in case acceptance reaches different electronic system from one designated by addressee or no electronic system is designated; or (3) when acknowledgment of reception of acceptance is received, if it is required by law or agreed by issuer. (Com. C. 91, 92).

With modifications and restrictions established by Com. C., provisions of civil law governing civil contracts as they relate to capacity of parties, exceptions and causes which rescind or invalidate contracts, are applicable to commercial contracts. (Com. C. 81).

If contract consists of offer and acceptance made at different places, and time within which acceptance must take place is not stated in offer, offer is considered as remaining open and offerer bound for three days in addition to time necessary for regular passage of mail between two places or time deemed sufficient in case there are no public mails taking into account distances and facility or difficulty of communication, unless there is a mistake relating to fundamental motive of one of parties. If an acceptance is not absolute it is considered as a new offer. Contracts are void for mistake of law. Mistake of arithmetic is only subject to correction. (C. C. 1803-1823). In electronic contracts where offer does not contain time within which acceptance must take place, acceptance must be delivered immediately upon receipt.

Certain contracts must be in writing, such as contracts agreeing to make a future contract, sales of real estate, leases, pledges, mortgages, etc. Writing must be in form of public instrument depending on value of real property sold or value of pledged good calculated according to formula set forth in C.C. Also public instrument is required in lease of rural property when lease exceeds value set forth in C.C. (C. C. 1832, 2317-2320, 2406, 2407, 2860, 2917. See category 9 Documents and Records, topic 9.04 Public Instruments). Reference is made to Civil Code of various jurisdictions for provisions of law with regard to interpretation of contracts, classes of obligations, performance, extinction of obligations, rescission, etc., and special classes of contracts such as suretyship, pledge, bailments, loans, insurance, sales, leases, etc.

See topic Sales (Realty and Personalty).

3.05 ELECTRICITY:

Background.

In 1960 Federal Government nationalized electric industry. Accordingly, Mexican Constitution was amended in order to establish basic rule that remains in force up until today and sets forth Nation's exclusive right to generate, conduct, transform, distribute and supply electric power which is to be used for public service. Activities regarding electricity public service are carried out by the two government entities: Comisión Federal de Electricidad ("CFE") and Luz y Fuerza del Centro (LFC). CFE is in charge of public service in all country, except Mexico City and part of states of Mexico, Morelos, Hidalgo and Puebla, which are served by LFC.

Legal Framework.

1975 Law on the Public Service of Electric Energy was amended in 1992 and its regulations were enacted in 1993 and amended in 2001, in order to attract private investment. Amendments basically defined activities that were not considered as public service, therefore, can be performed by private entities. 1998 Public Electric Service Ruling Law on Contributions regulates cases and conditions where applicants for electric power public service shall make contributions for execution of specific works, expansion or modification of existing works, as well as those where they can agree with supplier that they may receive electric power in return of contributions made, in accordance with official model agreements approved by CRE.

Opened Activities.

Economic activities that currently are not considered as public service and that may be performed by private entities, either Mexican or foreign are: (i) power generation through any of following schemes (a) self-supply, (b) cogeneration either for self-consumption or to export power, (c) small production for self-consumption, to sell power to CFE or to export it, (d) independent power producer, either to sell power to CFE or to export it, (e) generation for interruptions in service or smaller than.05 MW; and (ii) importation of power for self-consumption.

Permitting.

To carry out activities referred to in subhead Opened Activities, supra (except for activity referred to in clause [e]), permit by Energy Regulatory Commission (“CRE”) must be obtained.

Self-Supply.

Under this scheme (i) consumers may be co-owners of power facility or they may organize corporation that will own and operate power facility; (ii) electric power generated by self-supply power facility may only be consumed by its co-owners or by shareholders of corporation, as case may be; (iii) surpluses of electric power may be sold only to CFE, if CFE requires such surpluses; (iv) other entities such as EPC or O&M contractors may be shareholders of corporation even though they do not consume power generated by facility; (v) CRE has authorized self-supply projects that will also produce thermal energy in form of steam; (vi) changes in identity of shareholders/power consumers may be authorized through “fast track” if same were contemplated in corresponding “expansion plan”; if such changes were not contemplated new permit will have to be obtained.

Cogeneration.

(i) Cogeneration is defined as (a) production of electric power together with steam or other form of secondary thermal energy, or both, (b) direct or indirect production of electric power from thermal energy not used in industrial processes that originate cogeneration, and (c) direct or indirect production of electric power using fuels produced in industrial processes that originate cogeneration; (ii) electric power generated by cogeneration facility shall be destined to satisfy needs of individuals or corporations that use or produce, steam, thermal energy or fuels that originate cogeneration processes; or are co-owners of facilities or shareholders of corporation that owns cogeneration facility; (iii) surpluses of electric power may be sold only to CFE, if CFE requires such surpluses; (iv) other entities such as EPC or O&M contractors may be shareholders of corporation even though they do not consume power generated by cogeneration facility.

Independent Power Producer (IPP).

(i) Sales of capacity and electricity may be made to CFE through long term agreements. Generally, sales to CFE are derived from public bids except in emergencies that may jeopardize supply of power to entire Mexican Republic or to particular region; (ii) IPP is producer that owns facility with capacity greater than 30 MW, and which production is exclusively destined to CFE or to exportation; (iii) regarding public bids, price of capacity and electricity is established in bidding documents.

Small Producer.

(i) As small producer permit holder, sales of capacity and electricity may be made to CFE; as with IPP's, sales to CFE are derived from public bids except in emergencies that may jeopardize supply of power to entire Mexican Republic or to particular region; (ii) small producer of power is producer that owns facility with capacity no greater than 30 MW, and which production is exclusively destined to CFE or to exportation.

Surplus Power.

CFE may enter into agreements with self-supply and cogeneration permit holders with whom, subject to dispatch rules and to pricing methodologies to be issued, capacity payments as well as energy payments shall be agreed upon, in accordance with following: (i) up to 20 MW regarding self-supply permit holders, as long as same have installed capacity of up to 40 MW; (ii) regarding self-supply permit holders, up to 50% of their total capacity as long as such permit holders have total installed capacity greater than 40 MW, provided however that such percentage may be amended considering requirements of public service and level National Electric System energy reserves; (iii) regarding cogeneration permit holders, up to their total surplus production.

Transmission Lines, Wheeling, Interconnection and Backup Power.

Private entities may use CFE's lines or they may build their own. Wheeling, interconnection and backup power are services granted by CFE or LFC in accordance with official model agreements and tariffs approved by CRE.

3.06 FRAUDS, STATUTE OF:

See topic 3.04 Contracts.

3.07 INFORMATION TECHNOLOGY, INTERNET AND NEW MEDIA:

Computer Software and Databases.

Under Copyright Law of 5 Dec. 1996, moral and property rights are granted to software and databases; software is protected under same terms as literary works, and such protection is extended to operative and application software (both source and object code). Law does not protect software made to damage other software. Software's property rights made by employees as part of their job and by instructions of employer are considered owned by employer.

Holder of copyrights on software program or database keeps, even after sale of copies, right to authorize or prohibit leasing of copies (see category 16 Intellectual Property, topic 16.01 Copyright).

Owner of software can make copies as license granted by author authorizes him/her; notwithstanding it is authorized to make one copy if it is necessary for execution of software or is going to be utilized as backup when first cannot be utilized. Backup copy must be destroyed when rights of user to utilize software expire.

On other hand, there are provisions on prohibition to importing, manufacturing, distributing and using devices, or providing services designed to eliminate technical protection of software programs, broadcasts through electromagnetic spectrum, and telecommunication networks and programs with electronic elements.

There is no specific regulation in Mexico regarding Internet matters; however, there are several legal dispositions that help to determine who is liable, as well as scope of such liability, regarding Internet content. Relevant legal dispositions in this regard are: (i) Federal Telecommunications Law, (ii) Copyright Law (iii) Federal Criminal Code, and (iv) Federal Consumers Protection Law.

E-Commerce.

There are no specific Acts or regulations regarding communication networks and E-Commerce. However, some provisions related to these topics are included in other laws and codes pursuant to Decrees published in Federal Official Gazette on May 29, 2000 and Aug. 29, 2003 which are based on Model Acts on Electronic Commerce and on Electronic Signatures adopted by UN Commission on Trade Law. These decrees amend: (1) Federal Civil Code which states that electronic, optical or other types of media (hereinafter media) may be used to expressly consent, as well as to submit and accept offerings; if written form of agreement is required, this formality could be satisfied through media provided however that (i) information generated or communicated is attributable to obliged persons, and (ii) it may be accessed for further consultation. (2) Federal Code of Civil Procedures, due to amendments made thereto, allows as evidence information generated or communicated that is recorded in media provided such information has been kept same and not changed from moment it was generated to its final form. These provisions seek to eliminate legal hindrances to use of electronic messages, and intend to adapt laws to technical breakthroughs in communications. (3) Commerce Code includes provisions regarding agreements and contracts executed through media, which are perfected as from receipt of acceptance of proposal or amendments thereto, and authorize use of media in trading activities. This Code defines “data messages” as information that is generated, sent, received, filed or communicated through media, and “information system” as any technological means used to operate data messages. Message is deemed to be sent from address of issuer, and received at address of consignee. According to Model Law on Electronic Signatures, Commerce Code rules electronic signatures as well as providers of certificates of authenticity of electronic firms, which could be public institutions or companies or public notaries or agents with prior governmental authorization. Other rules regulate place where message comes, time of receipt of information, among other issues. Finally, law admits media as evidence in court.

Federal Consumer Protection Law includes provisions regarding protection of consumers in transactions made through media, and deals with information confidentiality, access to information on offered products, quality and amount of products, as well as guidelines for sales strategies, and fines for violation of these provisions.

3.08 INTEREST:

Legal interest is 9% per annum in civil matters. Parties may agree upon any other rate, but when rate is unconscionable, judge may, in special circumstances, reduce interest to legal rate. If rate higher than legal rate has been agreed upon, debtor may, after six months from date of contract, and whatever be stipulated maturity, cancel debt on two months' notice by paying principal and matured interest. Agreements in advance to compound interest in civil matters are forbidden under penalty of nullity. (C. C. 2393-2397).

Art. 362 of Commercial Code provides that debtors who do not pay their debts must satisfy from day following maturity the interest agreed upon, or in its stead legal interest at 6% annually. Art. 1414 bis 19 of Commercial Code provides in specific case set forth therein higher variable interest rate. For interest payable abroad, see category 21 Taxation, topic Taxes. Most commercial agreements allow compound interest.

3.09 MONOPOLIES, RESTRAINT OF TRADE AND COMPETITION:

(Const. 1917, art. 28; Federal Law of Economic Competition of Dec. 22, 1992 as am'd [FLEC] and its regulations of Oct. 12, 2007; Federal Law on Consumer Protection of Dec. 22, 1992 as am'd; Foreign Trade Law of July 27, 1993 and its regulations of Dec. 23, 1993 and Regulations on unfair foreign trade practices of Nov. 24, 1986 all of them as am'd).

Constitutional basis for restriction of monopolistic practices is contained in art. 28, which categorically states that monopolies, monopolistic practices, State monopolies and tax exemptions are prohibited as well as restrictions or prohibitions under excuse of protection to industry with exception of activities carried out by Federal Government in areas such as mail, telegraph and radiotelegraphy services; petroleum and other hydrocarbons, basic petrochemicals; radioactive minerals and production of nuclear energy and electricity. Constitutional provisions prohibit concentrations in hands of one or several persons of goods for purpose of obtaining increase in prices; every act that prevents or tends to prevent free competition in production, industry, or commerce, or services to public; every agreement or combination of producers, manufacturers, merchants, common carriers, or those engaged in any other service intended to prevent competition among themselves and to require consumers to pay excessive prices; and in general whatever constitutes exclusive and undue advantage in favor of one or more specified persons or causes damages to public generally or to any social class.

Federal Law of Economic Competition regulates Art. 28 of Constitution with regard to monopolies and economic competition. It is applicable to all areas of economy. All economic agents, including individuals or juridical persons, public, federal, state or municipal administrative agencies or entities, associations, professional groups, trusts or any other form of participation in economic activities are subject to provisions of Law. Its purpose is to protect competition and free market access by preventing and eliminating monopolies, monopolistic practices and other restrictions upon efficient functioning of markets for goods and services. Law prohibits monopolies and state monopolies, as well as practices that, pursuant to Law, diminish, damage or impede competition and market freedom in production, processing, distribution, and commercialization of goods and services. Law does not define monopoly; it lists acts or activities which are considered to be monopolies or monopolistic practices. Monopolistic practices per se are those contracts, agreements, arrangements or combinations of economic agents competing among themselves, whose purpose or effect is to: fix, raise, coordinate or manipulate prices, or exchange information with same purpose or effect; restrict supply of or prevent supply of goods and services; provided for allocation of markets, allocate customers or suppliers; establish or coordinate public bids or abstention from public bids. These practices are considered null and void and subject to administrative sanctions. Anyone may file claim. Subject to proof, Law also considers as monopolistic practices those acts, contracts, agreements, arrangements or combinations whose purpose or effect is or may be to displace wrongfully other market agents, substantially impede their access to markets, or establish exclusive advantages in favor of one or various persons, when they involve: establishing exclusive distribution of goods or services, resale price maintenance or other resale conditions, tying or reciprocity, conditioning transactions upon agreement not to deal with third parties, unilaterally refusing to sell or supply to particular persons goods or services that are usually available and offered to third parties, group boycotts systematic sales beyond total medium cost or occasional sales beyond variable medium cost, discounts tied to exclusivities or restrictions, cross subsidies, imposition of different prices to economic agents under similar circumstances and any other act that wrongfully harms or obstructs competition and market freedom in production, processing, distribution and commercialization of goods and services. Such activities are violations only if: alleged responsible person has substantial leverage over relevant market and activities are conducted with regard to goods and services that correspond to market in question. Relevant market is determined basically by availability of substitute goods or services, and possibility of securing supply from other areas. Above referred to practices will be sanctioned if economic agent is able to fix prices unilaterally or substantially restrict supply without competing agents being able to counteract such leverage; if there are barriers to entry; if there are competitors and their leverage; economic agent's and competitor's access to sources of supply; economic agent's recent course of conduct; and any other criteria established by regulations.

Concentrations are defined as mergers, acquisitions of control or any transaction through which companies, associations, shares, partnership interests, trusts or assets are concentrated, or transactions in general that are carried out among competitors, suppliers, customers or any other economic agents. Law and its Rulings also regulate and sanction legal acts or contracts executed or carried out abroad, when effect is materialized in Mexico. Sanctions are imposed upon those concentrations whose purpose or effect is to diminish, damage or impede competition and market freedom with respect to equal, similar, or substantially related goods or services. Concentrations exceeding certain thresholds require prior notice to Federal Competition Commission which is decentralized administrative agency of Ministry of Economy. Federal Competition Commission is in charge of preventing, investigating and opposing monopolies, monopolistic practices and concentrations pursuant to terms of Law. Concentrations that obtain favorable resolution from Commission, may never be challenged on basis of Law. Concentrations not requiring prior notification may not be challenged a year after their creation. Federal Competition Commission has autonomy to issue its rulings and it is empowered to impose sanctions consisting in fines and orders of suspension, correction or termination of activity or concentration in question. Law grants faculties to Commission to quantify loss of profits or damages incurred as result of monopolistic activity or unlawful concentration. Affected party must file judicial action in order to validate valuation made by Commission and recover incurred damages. Administrative sanctions may reach amount equal to 20% of assets or sales of economic agent involved. Criminal actions are also provided for those infringing Law. Federal

Competition Commission issues on bi-annual basis report which contains summary of cases submitted to it.

Thresholds are linked to: (i) Price of transaction, (ii) volume of sales and/or assets of economic agent to be acquiring (more than 70%), and (iii) volume of sales and/or assets of participants in transaction if accumulation of assets of capital is materialized in Mexico.

Foreign Trade Law and Regulations on Unfair Foreign Trade Practices.

Law regulates and promotes foreign trade. Ministry of Economy is in charge of enforcement of law. Law protects local production from unfair practices of international trade imposing countervailing duties on import of foreign goods. Dumping and subvention are considered unfair practices when injure or have tendency to destroy or diminish national production. Dumping is defined as import of foreign goods at lower price than normal price in place of origin, and subvention as direct or indirect incentives, subsidies, premiums or assistance of any kind granted by foreign governments to producers, manufacturers, or exporters of goods in order to make them more competitive at international market, with exception of those trade practices internationally accepted.

Federal Consumer Protection Law.

Law is of public interest and deals with: relations between manufacturers or services providers and final consumers who use or enjoy goods or services contracted and not with intention to use or enjoy them in manufacturing process. Some exceptions are provided by Law to include in definition small and medium size entities. Consumers right to be informed; promotions and sales; real estate operations; form contracts; general representations and warranties; credit operations; lack of performance; services, domicile sales and general regulations on subject. Provisions of Law are drafted as exceptions to general commercial terms to acquire goods or services. Federal Consumer Protection Agency (Procuraduria Federal del Consumidor) is federal agency to protect consumers' rights and to research marketing of products.

See also category 14 Foreign Trade and Commerce, topic 14.05 Foreign Investment.

3.10 NEGOTIABLE INSTRUMENTS:

See topic 3.01 Bills and Notes.

3.11 SALES (REALTY AND PERSONALTY):

(C. C. 2248-2326; Federal Law on Consumer Protection of Dec. 22, 1992 as am'd).

In general a sale is perfected between the parties when they have agreed as to the object of the sale and the price, although neither has been delivered. Sales made out of premises of seller are perfected five days after later of delivery of product sold or signing of agreement. Sales reserving right to repurchase are prohibited; but it may be stipulated that seller shall have preferential right to purchase at same price offered by third person, when buyer wishes to sell object; such right must be exercised within three days after notice of third person's offer in case of personal property, and within ten days after such notice in case of real property.

It is legal to make installment sales with condition that sale shall be deemed rescinded if any installment is not paid. Such condition is effective against third persons who may have acquired object sold providing such object is real property or is some kind of personal property which can clearly be identified, and provided condition is recorded in public registry; but it may not be effective against third persons acting in good faith, when property is not susceptible of clear identification. In case of such rescission buyer and seller must restore to each other objects and amounts they have received, but seller may demand rental for object and indemnity for its deterioration, both such rental and indemnity to be determined by experts, and buyer may demand interest on money paid to seller.

It may also be stipulated that the seller retains title until price is paid and such stipulation is effective as to third persons if it is recorded at Registry and objects can be clearly identified. In such case seller cannot sell property until expiration of period for paying price and buyer is meanwhile regarded as lessee. If property is retaken by seller, rules hereinbefore stated for retaking property sold on installments will apply.

International Sale of Goods.

United Nations Convention on Contracts for the International Sale of Goods, in force on Jan. 1, 1988. See Part V, Selected International Conventions.

3.12 STATUTE OF FRAUDS:

See topic 3.04 Contracts.

3.13 TELECOMMUNICATIONS:

Fact that communications sector has shown dramatic expansion worldwide in recent times is unquestioned. Mexico has participated in this trend by various means, to acquire and have telecommunications infrastructure required to foster integration of different population groups, while simultaneously allowing country to expand both its domestic and international communications, thus enabling Mexico to become active, competitive and efficient participant of international community. Large program of government owned enterprises have been privatised. Best example is Telmex. On Dec. 23, 1947, Telmex was created as result of merger of Compãnía Telefónica Mexicana and Ericsson. This new company operated as private enterprise with majority foreign interest, but in 1958 company was acquired by Mexican investors, and in 1972 Federal Government became company's major stockholder. In 1976, company became state-owned enterprise, and maintained this legal status until Dec. 1990, when Mexican government undertook its divestiture, by allowing both Mexican and foreign corporate groups to participate as minority-interest partners. Moreover, major innovations took place, and in addition to basic telephone service, other fast growing areas of telecommunications were developed, among these, mobile communications, telemessaging, private line networks and information and data transmission. As result, new Federal Telecommunications Law (FTL) was enacted and published in 1995, and it allowed for granting of concessions for exploitation of orbital positions assigned to Mexico, for launching, installation and operation of satellites, as well as concessions to exploit, within Mexico, satellite signals from foreign satellites when reciprocity treaties have been entered by Mexico and other countries. Other regulatory innovations followed, with Decree providing for creation of Federal Telecommunications Commission (FTC, Spanish acronym COFETEL) in 1996, for purpose of regulating and promoting efficient development of telecommunications.

Besides, in Apr. 1996, Mexican and American governments entered Treaty and Protocol on signal transmission and reception from and to Mexican and American satellites. In Nov. of that year, Protocol for direct TV satellite services was signed.

On Jan. 8, 2009, it *was* published in Official Federal Gazette new Internal Regulation of Ministry of Communications and *Transport*, *by means of which*, Minister of such Federal Entity is duly empowered to grant, modify and extend Concessions which belongs to aforementioned Ministry. Pursuant to this new internal regulation, COFETEL has lost *authority* to grant Telecommunication *Concessions*.

As new strategy in public security, it was recently published in Official Federal Gazette amendment to Federal Telecommunications Law, by means of which Concessionaires of telecommunications public nets must create Registry of each of their clients. Such Registry shall be composed by name, personal details, and telephone numbers of each client, as well as every call which has been made through those numbers. This modification to Federal

Telecommunications Law aims to control and prevent commitment of felonies through public telecommunications nets. This Users Registry will be shared with both (Federal & Local) Public Security Agencies in order to carry out all kind of investigations in connection with those criminals who are involved with use of telecommunication public nets to commit crimes.

Main Legal Sources of Regulations and Enforcement Agencies, Adherence to International Instruments.

Main law governing telecommunications is following: Constitution and Federal Telecommunications Law (June 7, 1995), amended in Apr. 2006. FTL provides that in absence of express provision in Law itself, its regulations or in international treaties, it will apply in supplementary manner: (i) Law of General Ways and Means of Communication; (ii) Federal Law on Civil Procedure; (iii) Com. Code; (iv) C. C.; (v) Federal Code of Civil Procedure; (vi) General Law on Public Property; and (vii) Federal Radio and Television Broadcasting Law. In addition, there are various other laws and regulations regarding telecommunications, as listed in detail in Addendum number 1.

Federal Telecommunications Law provides that government has at all times dominion over electromagnetic spectrum and orbital positions assigned to country, and characterizes electromagnetic spectrum, telecommunications networks and satellite communication systems as general means of communication. It also regulates use and commercial exploitation of electromagnetic spectrum, of public telecommunication networks and all related services, as well as satellite communications. On other hand, operation of companies marketing communications services, known as resellers, require permit granted by Secretariat of Communications and Transportations (SCT). These companies engage in activities complementing services offered by telecommunications carriers and provide consumers with wider range of service options. Only requirement for aggregate-value service providers to be able to operate is to be registered with SCT.

In addition, this Law establishes that concessions and permits will be granted only to Mexican individuals or juridical persons, and foreign investment participation will be ruled by Foreign Investment Law, but under no circumstance can foreign participation exceed 49%. Prior authorization of SCT foreign investment can exceed 49% in cellular phones' services.

Enforcement Agencies.

Main enforcement agencies regarding telecommunications are SCT and FTC. FTC is composed of Plenary of Commissioners, Chairman, General Bureau and Coordination Departments.

Concessions are required to: (i) Make, use, profit and/or exploit frequency band in national territory, (ii) install, operate or exploit public nets of communications, (iii) take orbital positions assigned to country and exploit its frequency bands, and (iv) exploit emission and reception signals associated with foreign satellite systems covering national territory or being able to offer different services on them.

Concessions are granted exclusively to Mexican nationals or corporations having Mexican stockholders. Foreign participation must never exceed 49%, except for case of mobile phone services in which authorization of National Commission of Foreign Investment is required for foreigners to participate with more than 49%.

Forms of Concessions.

FTL divides form of concessions as follows:

(a) Concessions for Electromagnetic Spectrum.

Law provides for five different categories, as follows: (1) Free-use spectrum: frequency bands which public generally use, without need of concession; (2) spectrum for specific uses: frequency bands for which concession is required, to be used to provide services set forth in title of concession, and which SCT has authorized; (3) official-use spectrum: frequency bands allocated for exclusive use of federal public administration, and state and municipal governments, their use is permitted by direct allocation; (4) experimental-use spectrum: frequency bands to be used, by means of direct and nontransferable concession, to test technical and financial viability of technologies being developed both in country or abroad, for scientific purposes or for transitory equipment testing; (5) restricted-use spectrum: frequency bands not subject to concession or allocation by SCT.

Law also provides that concessions are granted for: use of electromagnetic spectrum, public telecommunications networks and for satellite communications. FTL specifies cases in which concession granted by SCT is required. These are: "I. For use and commercial exploitation of frequency band in Mexico. Frequency bands of free and official use are exempt from this requirement; "II. Install, operate or exploit public telecommunications networks; "III. Occupy geostationary orbital positions and satellite orbits assigned to the country, and exploit the corresponding frequency bands; "IV. Exploit the right to transmit and receive signals on frequency bands associated with foreign satellite systems with coverage over and which able to provide services in the Mexican Territory."

When commercial exploitation of services to be provided under concession obtained for use and exploitation of frequency band of electromagnetic spectrum, implies obtaining public telecommunications transport network concession. Concessions for frequency bands for specific uses are granted by public bid, and Federal Government is entitled to receive pecuniary compensation for granting concession.

SCT may change or reclaim frequency or frequency band in following instances: (i) When required by public interest; (ii) for national security's reasons; (iii) for introduction of new technologies; (iv) to solve problems of harmful interference; (v) to comply with international treaties to which Mexico is party.

In regard to title to concession, it must include at least following items: (i) Name and address of concessionaire, (ii) frequency bands subject to concession, intended use and geographic area, (iii) relevant investment programs, (iv) services concessionaire is allowed to provide, (v) technical specifications of project, (vi) its effective term, (vii) payment for concession, and (viii) other rights and obligations of concessionaire. Once concession has been granted, extract of title will be published in Official Gazette, and cost will be borne by interested party.

(b) Public Telecommunications Network Concessions.

Telecommunications network is defined by FTL as: "system made up of any means of transmission such as channels or circuits using frequencies of the electromagnetic spectrum, satellite links, cables, electrical transmission network or any other means of transmission, as well as exchanges, switching or central devices or any other necessary equipment".

Parties interested in obtaining concession to install, operate or commercially exploit public telecommunications network must submit application containing following information: name and address of applicant, services intended to be provided, technical specifications of project, commitments for scheduled investments, coverage and service quality standards, business plan, documentary proof of their financial soundness and technical, or administrative capacity. SCT has 120 natural days to review information and may request further information.

(c) Concessions for Satellite Communication.

Concessions assigned to country to occupy and exploit geostationary positions and satellite orbits (with their frequency bands and rights for transmission and reception of signals) will be granted by public bid and Federal Government is entitled to compensation for granting them.

SCT may grant concessions on rights for transmission and reception of signals and frequency bands associated with foreign satellite systems having coverage over, and which are capable of providing services within Mexico, according to treaties on matter have been entered with country where signal originates and providing reciprocity for Mexican satellites. These concessions will only be granted to Mexican companies. Moreover, international satellites may operate in Mexico if this is provided by multilateral treaties. Concessions are obtained by meeting same requirements set forth in FTL for concessions over spectrum frequency bands.

It was not until 1987 when Mexico launched its first satellite, Morelos I, to be followed shortly after by Morelos II, Solidaridad I and II and by Satmex 5 in Dec. 1998. In Aug. 1997, bid to sell up to 75% of stock of SATMEX (Satélites Mexicanos) was published. SATMEX was at time state-owned company with three orbital positions and frequency bands, and facilities located in Mexico City and Hermosillo, Sonora. Government had also assigned to SATMEX title over Morelos II, Solidaridad I and II, as well as title over new satellite which was to replace Morelos II. On Dec. 17, 1997, concession was awarded to consortium of foreign and Mexican shareholders.

Permits.

Permit from SCT must be obtained to establish and operate or exploit commercially from telecommunications services which are not public telecommunications network, and to install, operate or exploit transmissions to earth stations.

Application, complying with information requirements set forth in FTL for public network concessions, must be submitted to SCT and latest has 90 calendar days to review information and may request additional information.

Providers require register before SCT, for rendering aggregate value services.

Rates.

FTL provides that concession and permit holders will be free to set rates for telecommunications services, but must ensure that services are provided under satisfactory conditions as regards their quality, competitiveness, safety and permanence. Rates must be registered before SCT, before they become effective. Discriminatory practices are forbidden.

Infringements.

When infringements occur, law provides for pecuniary penalties which range from 2,000 to 100,000 minimum-wage days. Penalties are imposed, among others, for: providing telecommunications services without concession or permit; failure to comply with provisions regarding interconnection access; keeping separate accounting records; disruption of services without justified cause or without authorization, failure in complying with terms and conditions set forth in titles of concessions and permits.

FTL provides for forfeiture in favor of Government of all property, facilities and equipment of non-concessioned persons who provide unauthorized telecommunications services or trespasses on, invade or obstruct general ways and means of communication.

Radio and television broadcasting is ruled by Federal Radio and Television Broadcasting Law (FRTBL), which has been recently amended (Apr. 2006), and all matters related to radio and television broadcasting are of federal jurisdiction.

Radio and television broadcasting is activity of public interest and its protection belongs to State. It is activity which must contribute to strength of national integration and to improvement of human relations.

Broadcasting Services.

Pursuant to FRTBL, broadcasting services are those over-the-air radio communication services meant to be received directly by public, while activities relating to radio and television involve use and exploitation of electromagnetic spectrum by means of installation and operation of modulation, amplitude or frequencies of radio systems, television stations, facsimile services or other technical procedures.

According to FRTBL, nation has direct dominion of its territorial space and, in consequence, means by which electromagnetic waves are spread. Accordingly, authorization in form of concession or permission, granted by specific public authorities, is required to have right of offering broadcasting services, using electromagnetic waves, etc.

Concessions.

With respect to concessions or permits for radio and television broadcasting, Ministry of Communications and Transportation (SCT) has faculty to determine nature and purpose of radio and television stations, which may be stations for commercial, official, cultural, experimental, training or other uses. Only commercial stations are subject to concession. Title of concession for commercial radio and television broadcasting must set forth, at least: channel(s) allocated, location of transmitting equipment, authorized power, broadcasting system and specific technology used, hours of operation, name, call sign and term.

Concessions are granted by public bid and Federal Government is entitled to receive economic return in exchange.

Government must provide schedule in order to determine location of radio stations and other characteristics related to frequencies that are going to be subject of public bid. Concessions and permits can be granted for maximum period of 20 years, which may be renewed.

Concessions are granted exclusively to Mexican nationals or corporations having Mexican stockholders, whose articles of incorporation include provision excluding foreigners.

It is expressly prohibited to totally or partially alienate or transfer concession or permit, or rights conferred by them to foreign government or person, as well as it is prohibited to accept them as stockholders or associates of corporation holding concession or permit.

Transmission of concession may be authorized exclusively when: (i) Person, entity or corporation receiving transmission is capable under Law to obtain concession or permission, (ii) concession to be transmitted has been in force for minimum period of three years, and (iii) beneficiary of transmission obtains favorable opinion of Federal Antitrust Commission.

Concessionary who desires to offer another telecommunication service besides radio broadcasting services, using same bands of frequencies already granted to him, shall apply before SCT to obtain authorization. In same act in which SCT authorizes offering of this other service by concessionary, it will grant, in place of previous one, wider concession to use, and exploit band of frequencies in national territory, as well as to install, operate or exploit public nets of telecommunications.

In Feb. 2000 Television and Audio Restrictive Services Rulings (TARSR) were enacted, to regulate these services and procedures to obtain concessions and permits for restrictive services.

TARSR establishes that when concessionaries finish with network installations, before they initiate operations, they should notify SCT, to provide television and audio restrictive services in continuous and efficient manner for end users.

In Oct. 2002 Ruling of the Federal Law of Radio and Television Broadcasting related to Concessions, Permits and Contents of Transmissions (Ruling) was enacted with purpose of establishing all specific regulations and procedures to obtain concessions and permits.

Ruling also establishes registry in which all concessionaries and permissionaries must be registered, and all information about concession and permission obtained must be noted.

Concessionaries and permissionaries shall invoice services, identifying separately audio, television or another kind of telecommunications service, keeping separate accounting records.

Fine between five thousand and fifty thousand pesos will be imposed on concessionary that infringes Law or proceeds against recommendations made by government.

If person operates or exploits radio broadcasting station, aside from imposition of penalty mentioned before, he or she will lose to benefit of nation all properties and goods used or dedicated to operate or exploit radio broadcasting station.

Equipment.

Telecommunications products must meet official requirements. Manufacturers, sellers or users of terminal equipment must obtain, for commercial exploitation, certification from SCT.

Trade Competition Law in Telecommunications.

Addendum 1.

Regulations for Telecommunications Experts (Dec. 20, 1972), Television and Audio Restrictive Services Rulings (Feb. 29, 2000), Rate Advisory Commission Regulations (Jan. 2, 1986), Decree creating the Mexican Postal Service (Aug. 2, 1986), Rulings for the Mexican Post Service's Operation (Oct. 31, 1988), Telecommunications Regulations (Oct. 29, 1990), Determination regarding the interconnection plan with long distance public networks (July 1, 1994), Determination on reporting obligations of telecommunications carriers regarding interconnection agreements (Oct. 31, 1995), Administrative determination by the SCT on rate regulation for the interconnection of long distance public telecommunications networks (Apr. 26, 1996), Basic Technical Numbering Plan (June 21, 1996), Basic Technical Signaling Plan (June 21, 1996), Long Distance Service Rules (June 21, 1996, as am'd by resolutions of May 7, Aug. 28 and Dec. 29, 1997, and Apr. 22 and Nov. 25, 1998), ID Code Allocation List of Long Distance Carriers authorized before June 21, 1996 (July 12, 1996), Decree creating the Federal Telecommunications Commission (Aug. 9, 1996), Determination establishing the telecommunications services rate filing procedure, as provided by FTC (Nov. 18, 1996, as am'd June 16, 1997), Internal Rulings of SCT (Oct. 29, 1996 as am'd on Feb. 23, 2001), Internal Rulings of the Federal Communications Commission (as am'd on Dec. 9, 1996, July 21, 1999, Feb. 22, 2002, May 14, 2002, Oct. 8, 2002 and May 8, 2003), Rules to be applied by international long distance carriers (Dec. 11, 1996, as am'd by resolutions of Nov. 26, 2003 and May 27, 2004), Public Telephone Service Regulations (Dec. 16, 1996), General Bases to allow Private Investment in the Mexican Satellite System (June 16, 1997), Satellite Communication Regulations (Aug. 1, 1997), Rules for Local Service (Oct. 23, 1997), FTC Determination regarding Long Distance Carrier Dialing Selection (Mar. 31, 1998), Determination regarding free electromagnetic spectrum frequency bands (Aug. 21, 1998), Determination regarding technical and operational issues for access to 800 numbers from public phones (Aug. 26, 1998), Organizational Manual of the SCT (Oct. 12, 1998), Determination regarding local dialing (Nov. 13, 1998, as am'd by resolution of Sept. 17, 2000, Technical Plan regarding mobile services network standards. (Aug. 5, 2003).

4 CITIZENSHIP

4.01 ALIENS:

See category 15 Immigration, topic 15.01 Aliens.

4.02 EMPLOYMENT:

Employment of Aliens.

(Labor Law, May 1, 1970 as am'd). Law establishes that main objective is to obtain equilibrium and social justice in labor-management relations; to work is both a right and social obligation. These concepts are to be considered in interpreting law, and in case of doubt, interpretation most favorable to workers takes preference. In every enterprise or business at least 90% of workers must, in principle, be Mexican. Technical and professional employments requiring special skills that are not available in country may be filled temporarily by foreign workers, but these may not be more than 10% of total number of workers engaged in each specialization area. Employer and foreign workers must be jointly responsible for training Mexican workers. Doctors on duty in factories or enterprises must be Mexicans. Provisions regarding restrictions to aliens shall not be applicable to directors, administrators and/or general managers. Employment of aliens for maritime industries and management positions in unions is prohibited.

Principle of equality between nationals and foreigners is subject to restrictions and limitations governed by Constitution and regulatory laws.

4.03 IMMIGRATION:

See category 15 Immigration, topic 15.02 Immigration.

4.04 NATURALIZATION:

Naturalization is governed by Nationality Law of Jan. 23, 1998 as amended. Naturalization may be obtained after five-year residency in Mexico, or when living in Mexico for at least two years if: (i) Direct ascendant of applicant is Mexican, (ii) one child of applicant was born in Mexico, (iii) applicant is from Latin America or Spain, (iv) applicant is married to Mexican citizen, or (v) applicant rendered exceptional services for country. Aliens adopted by Mexican citizens may also obtain naturalization after one year of residency in Mexico.

Naturalization is granted by Secretariat of Foreign Affairs at its sole discretion. Naturalized individuals must formally renounce their former citizenship before any Mexican authority.

Naturalization authorization may be revoked if: (i) Other citizenship is acquired on voluntary basis, (ii) appearing as foreigner on public instruments deriving from utilization of foreign passport, (iii) accepting and/or using nobility titles implying submission to foreign country.

5 CIVIL ACTIONS AND PROCEDURE

5.01 ACTIONS:

Actions in General.

Civil procedures are subject to jurisdiction of local courts and are governed by Code of Civil Procedure of each State and Federal District. (This document has been drafted following principles established by Code of Civil Procedure of Federal District which is very similar to those of States, but some differences may apply.)

Commercial procedures are subject to jurisdiction of local or federal courts at choice of plaintiff, and are governed by Federal Commercial Code and Federal Code of Civil Procedure that applies to whole country.

Actions for Death.

See category 12 Estates and Trusts, topic 12.03 Death, subhead Actions for Death.

Limitation of.

See topic 5.05 Prescription.

5.02 DEPOSITIONS AND DISCOVERY:

To make judicial procedures more time efficient, very significant portion of discovery capabilities by parties has been sacrificed. Therefore it is advisable to gather all of evidence to be presented during trial before filing lawsuit because, for almost all procedures, announcement and presentation of all evidence must be done in same document that contains complaint. In some cases, announcement and presentation must be done very shortly thereafter.

All foreign documents coming into Mexico for official purposes (especially judgments) must be legalized. Mexico is member of “Convention de La Haye du 5 Octobre 1961” since 1995. If document is coming into Mexico from another member country of Convention “apostille” will provide validity to it; if document comes from nonmember country it must be legalized at Mexican consulate.

Mexico is member of several international treaties regarding judicial cooperation.

5.03 FOREIGN JUDGMENTS:

Foreign civil and commercial judgments are enforceable in Mexico, as long as they comply with following basic principles: (i) that judgment does not arise from action “in rem” or imposes obligation contrary to Mexican public principles, (ii) that judge issuing judgment had subject matter jurisdiction, (iii) that party subject to execution was duly notified of procedure and had full opportunity to defend itself, (iv) that judgment represents final and executable resolution in country of origin, (v) that same case is not simultaneously being tried by Mexican court and (vi) that document containing judgment has been dully authenticated and legalized. (See topic 5.02 Depositions and Discovery.)

5.04 JUDGMENTS:

Courts must rule according to letter of law so there are no judgments based on equity.

Judgment is usually challenged by filing appeal before Superior Tribunal, and judgment in appeal is usually challenged by Amparo Trial. (See category 6 Courts and Legislature, topic 6.01 Courts.)

Average time to try civil or commercial case in Mexico (including all challenges) is two years. There are no official court fees to be paid to try case in Mexico. Therefore, time and cost involved in trying case may vary depending on: (i) Nature of evidence to be presented, (ii) difficulty of enforcing judgment, and (iii) profile of law firm representing case. Losing party's duty to pay costs in civil or commercial trial will be determined by judge in each case, and is usually fixed by percentage of principal amount claimed in lawsuit. Specific percentage may vary from one jurisdiction to another.

In some states filing fraudulent cases with or without substance may be sanctioned and lawyers may become joint and several obligors.

5.05 PRESCRIPTION:

Acquisition of property or rights by virtue of possession (adverse possession) or extinction of obligations by failure of performance (statute of limitations) are both encompassed under Mexican Law under term “prescription”. For purposes of this chapter we will use word “prescription” under its second meaning.

As general rule, limitation to file civil or commercial ordinary action is ten years after cause of action arises. Same rule applies for execution of judgments. However, there are many exceptions to general rule both in civil and commercial matters (actions related to divorce matters; letters of credit, checks and promissory notes; hidden defects, etc.). Periods of prescription in commercial transactions are provided in Commercial Codes and other commercial laws (such as General Law of Mercantile Companies, General Law on Negotiable Instruments and Credit Operations, Mercantile Insolvency Law, Stock Market Law, Credit Institutions Law, Industrial Property Law, etc.).

Periods of prescription for civil actions are prescribed by Civil Codes and Codes of Civil Procedure of each State.

Therefore, it is necessary to refer to both substantive body of law governing specific legal institution involved, as well as to procedural regulation related to such institution in order to ascertain specific statute of limitations for each cause of action.

6 COURTS AND LEGISLATURE

6.01 COURTS:

Jurisdiction is divided between federal and state courts much as under U.S. law. Federal system is composed of a Supreme Court of Justice, Electoral Court, Circuit Tribunals, Appeal Courts, District Courts, States and Federal District Courts have their own judiciary system as indicated by Constitution. Federal courts have jurisdiction over: (1) All matters involving federal laws, and treaties; when private interests are involved, such cases may be tried at option of plaintiff in state courts with final appeal to Circuit Tribunals; (2) matters involving maritime law; (3) cases in which Mexico is a party; (4) actions between states or state and Mexico City, and disputes between federal and state courts; (5) actions between state and resident of another state; and (6) cases concerning members of diplomatic and consular service except (4) in which only Supreme Court has jurisdiction. Federal courts mainly attend constitutional matters usually involved with violation of individual constitutional rights by governmental entity. This procedure is known as Amparo Trial.

In very broad terms, Amparo Trial may be triggered by: (i) formal complaint following act of government entity, outside of judicial or administrative procedure, in violation of constitutional rights of individual (Indirect Amparo Trial filed before Federal District Court and in case revision recourse is filed, before Circuit Tribunals) or (ii) form of judicial appeal for violation of constitutional rights in final judgment in judicial, labor or administrative procedure (Direct Amparo Trial filed before Federal Circuit Court).

However, Federal District Court system may serve as regular trial court for commercial matters. Commercial Law is subject to what is known as “concurrent jurisdiction” so controversy arising out of commercial transaction may be tried by Federal Civil District Judge or by State Civil Court. Bankruptcy cases must be tried before Federal District Courts.

6.02 LEGISLATURE:

See category 1 Introduction, topic 1.02 Government and Legal System.

6.03 STATUTES:

Mexico is Federation composed of 31 States and one Federal District which is seat of Executive, Legislative and Judicial Federal Powers.

States have autonomy to enact their respective Civil Codes and their Codes of Civil Procedure, while Federation has authority to legislate in commercial matters.

Mexican Commercial Code contains only general principles that govern commercial law, framework to interpret few commercial contracts in general, and rules for commercial judicial procedures.

Specific commercial laws contain framework of each activity said legislation regulates.

Subjects that have been stripped from Commercial Code have been regulated through separate federal codes and laws for each of them, such as General Law of Mercantile Companies, General Law on Negotiable Instruments and Credit Operations, Mercantile Bankruptcy Law, Stock Market Law, Credit Institutions Law, Industrial Property Law, etc. Accordingly, commercial transaction, litigation or establishment of new business enterprise in Mexico will most likely be subject to more than one piece of commercial legislation.

7 DEBTOR AND CREDITOR

7.01 ATTACHMENT:

Seizures may be granted either before commencing action or during course of same, in following cases: (1) when there is reason to fear defendant will abscond or conceal himself; (2) in action in rem when it is feared that defendant will conceal or injure property; (3) in action in personam when defendant has no property other than that which is to be seized and it is feared that he will conceal or alienate it.

The plaintiff must prove his right to and the necessity for the seizure.

If seizure is granted before action is commenced, plaintiff must give bond and action must begin within three days if action is brought in same place as seizure is placed, plus additional day for every 200 kilometers if performed in another place. (Com. C. 1168-1193).

Certain documents entitle the holder to seek what is called executive action, in which case plaintiff is entitled, as matter of right, to seize defendant's property. He may also be entitled to this right as precautionary measure, as noted above. Following entitle holder to file executive action and consequently to seize defendant's assets: (1) Executive judgment or nonappealable award; (2) public instruments (see category 9 Documents and Records, topic 9.04 Public Instruments); (3) judicial confession of debtor; (4) bills of exchange, promissory notes, checks, and other credit documents provided by law; (5) policies of insurance; (6) awards of experts designated in insurance matters if given before notary, if not so given, judicial declaration of experts, acknowledging their signatures and genuineness of award, must first be had; (7) invoices, current accounts and any other commercial contract signed and judicially recognized by debtor. (Com. C. 1391; Code of Civil Procedure Art. 443).

7.02 BANKRUPTCY:

See topic 7.05 Mercantile Insolvency Proceeding.

7.03 FORECLOSURE:

See category 19 Mortgages, topic 19.02 Mortgages.

7.04 INSOLVENCY:

Mexican Law provides that insolvency occurs whenever sum of all goods and credits of debtor, estimated at fair price, is not equal or superior to total amount of its debts.

Under Mexican Law (art. 17 of Constitution) no person shall be imprisoned as result of civil debts.

In general there are two types of insolvencies which are: (1) Non-fraudulent insolvency (see topic 7.02 Bankruptcy); (2) fraudulent insolvency. This type of insolvency occurs when debtor alienates its assets falling into insolvency to prevent creditor from collecting amount owed by such debtor. In such case creditor can file legal action requesting nullity of all acts that caused insolvency of debtor, if such acts caused insolvency of debtor, and such credit is previous to those acts. If aforementioned acts were onerous (both parties involved in alienating act have burdens and profits) nullity of same can only take place if both debtor and third acquiring party proceeded in bad faith. If such acts were gratuitous (one of parties involved in alienating act has all profits and other has all burdens) nullity of such acts shall take place, regardless if both debtor and third acquiring party proceeded in good or bad faith.

Creditor can file such action even against second acquirer provided that such acquirer proceeded in bad faith.

This action can also be filed to nullify any payment of debts before its term is through; as well as to nullify acts under which debtor waives any right or credit, provided that such credit is not considered as personal credit by C. C. (C. C. 2163-2179).

See topic 7.02 Bankruptcy.

7.05 MERCANTILE INSOLVENCY PROCEEDING:

Persons engaged in mercantile pursuits and mercantile corporations and partnerships which incur in general default of payment of obligation may be declared insolvent. General default of payment is presumed when (i) merchant files for its own insolvency, and one of following hypothesis (a or b) occurs: (ii) when creditor or District Attorney files action initiating mercantile insolvency proceedings, and following hypothesis (a and b) occurs. General default of payment consists in defaulting payment to two or more different creditors, provided that following occurs: (a) that obligations referred to hereinabove, were due 30 days before filing insolvency proceedings, and such debts represent at least 35% of all obligations of such merchant; (b) that merchant does not have assets (cash or collecting rights or documents payable on term not exceeding 90 days), to pay at least 80% of obligations due at time insolvency proceeding is filed. Suspension of activities or payment is presumed to exist: (1) When execution has been levied by creditor and sufficient property to satisfy his claim has not been found; (2) when merchant defaults payment of two different creditors; (3) when merchant conceals or absents itself or closes its establishment without leaving person in charge to cover its debts; (4) in case of assignment for benefit of creditors; (5) when merchant employs ruinous, fraudulent or fictitious means to discharge or avoid discharging its obligations; (6) when merchant does not comply with obligations contracted with its creditors in settlement reached within conciliatory stage of insolvency proceeding.

Merchant's estate may be subject to insolvency proceeding when any of following occurs: (a) That merchant's business is still operating at time insolvency proceeding is filed, and (b) after its business has ceased, its creditors actions to claim actions are not barred by statute of limitation. In such case merchant obligations are paid by estate, represented by executor.

Partnership subject to insolvency proceeding provokes legal presumption that unlimited partners are subject to insolvency proceeding. In such cases insolvency proceedings may commence at same time for partnership and partners. Filing of insolvency proceeding of partner does not provoke presumption of partnership being subject to insolvency proceeding.

Insolvency proceeding may be commenced by merchant willing to be declared insolvent, or by creditor. Merchant requesting declaration of its insolvency must file motion which must meet with following requirements: full name or commercial firm name, domicile to receive notifications, corporation's domicile and its branch offices' domiciles, including factories, warehouses, and its main office domicile. If merchant is natural person its home domicile. With his petition he must file: (a) accounting books and balance sheets for last three years; (b) statement containing causes and reasons that led to default its obligations; (c) list of names and addresses of all its creditors and debtors, showing term of maturity for each debt and credit, particular characteristics of each credit, as well as any collateral guarantee granted to guarantee any personal debt or of third party; (d) inventory of all its real estate, personal property, credit instruments, or any other good or right. Motion must meet with requirement provided by law for lawsuits to be filed requesting declaration of insolvency.

Lawsuit requesting declaration of insolvency of merchant may be filed by any creditor or by District Attorney. Such lawsuit must be duly signed by person filing such lawsuit, and must contain following: (i) Name of court to which lawsuit is addressed; (ii) full name and address of plaintiff; (iii) merchant's full name or commercial firm name, and domicile of defendant merchant, including corporation's domicile, and its branch offices' domiciles, including factories, warehouses, and its main office domicile; (iv) facts that support lawsuit; (v) applicable law; and (vi) requisition to declare defendant as insolvent.

Lawsuit must be filed attaching following documents: (i) documentation proving plaintiff as creditor; (ii) document proving that proper guarantee has been given to cover judicial accountant's (judicial accountant for procedure) fees; and (iii) documents that plaintiff has and may serve as evidence in trial.

After foregoing is filed, judge serves summons on merchant defendant, with nine day term to answer lawsuit. Defendant must answer lawsuit in writing within term granted, and must offer evidence. Once defendant answers lawsuit, judge grants plaintiff three day term to file further arguments regarding answer to lawsuit; plaintiff may offer further proofs. Judge may grant 30 day term to produce evidence. Should lawsuit not be answered within term granted to that effect, judge will presume as true facts narrated by plaintiff, and shall pronounce judgment declaring mercantile insolvency within five days.

After lawsuit is admitted, Judge shall send copy of same to Federal Institute of Mercantile Insolvency Proceedings, ordering such institution to designate judicial accountant. Such judicial accountant must perform review of defendant's account and documents in order to determine if such meets with provisions to be pronounced in insolvency proceeding. Merchant must allow judicial accountant to review all documentation such person requests, otherwise defendant may be declared in mercantile insolvency proceeding. Judicial accountant must file report within 15 days of date inspection commenced. After report is filed, judge grants ten day period to parties to file closing arguments. Once ten day period expires, judge proceeds to pronounce judgment, which must be pronounced within following five days. That judgment may be appealed by any of litigating parties.

Judgment in insolvency proceeding must contain: (a) merchant's full name or commercial firm name, and its domicile, and if merchant is partnership, name and addresses of partners; (b) date in which judgment is rendered; (c) legal status on which judgment stands, and list of creditors that judicial accountant found in merchant's accounting, establishing amount of each debt; (d) order requesting Institution for Insolvency Proceedings to appoint conciliator, as well as declaration that merchant, and merchant's directors and managers will have obligations of depositary until conciliator is appointed; (e) declaration of initiation of conciliatory stage, unless merchant requested its own declaration of bankruptcy; (f) resolution ordering merchant to immediately put to at consiliator's disposition all accounting books, and all other records of corporation, as well as necessary amount to cover expenses regarding all newspaper publications that must be done in accordance to law; (g) resolution ordering merchant to allow judicial accountant and conciliator to carry out all activities provided by law; (h) prohibition of any further payments of debts contracted before declaration of insolvency proceeding judgment, except for those debts indispensable to carry on business; Judge must be informed of such payments within 24 hours of being made; (i) order to suspend any seizure order during conciliatory stage, or any foreclosure against merchant's property or rights; (j) date as of which declaration of insolvency proceeding is retroactively made effective; (k) order to publish two consecutive times part of judgment in official government's newspaper, and in important newspaper; (l) order to conciliator to record judgment in Commerce Public Registry of domicile of insolvent merchant; (m) order to conciliator to commence creditor recognition proceedings; (n) statement announcing to creditors possibility to file credit recognition; and (o) order providing issuance of certified copy of judgment declaring insolvency of merchant to whoever requires and pays such.

Summary of judgment declaring insolvency of merchant must be published in official government's newspaper, and in important newspaper two consecutive times.

Creditors are represented by inspectors. Any creditor or group of creditors that represent 10% of debt owed may appoint inspector whose fees are paid by such creditors.

After declaration of insolvency, and during conciliatory stage merchant retains administration, unless conciliator considers it necessary to restrain merchant from administration in order to protect assets, in which case conciliator administers corporation.

Debts of insolvent merchant do not fall due as result of filing insolvency proceeding, and any agreement on such terms is void. However, all debts of merchant declared insolvent by final judgment fall due at once and cease earning interest; financial debts as well as their accessories of credits in pesos are converted into investment units “UDIS” (financial monetary equivalent which increases based on inflation index). All debts in foreign currency are converted into pesos at exchange rate determined by Banco de Mexico at time judgment is rendered, and afterwards such debt is converted into investment units. Mortgage and pledge credits, nevertheless, earn interest up to extent of respective guarantee. Property in hands of insolvent merchant which has not been transferred to it by legal and irrevocable title must be returned to its rightful owner.

Creditor may file petition to be officially recognised as such: (i) within 20 days following latest publication of judgment in newspaper; (ii) within term to file objections to provisional list of creditors; (iii) within term to file appeal against judgment that declares recognition of creditors, as well as their order of preference for payment. Within following 30 days of latest publication of judgment in newspaper conciliator must issue provisional list of creditors which includes: (a) Full name and address of creditor; (b) amount of credit that conciliator estimates is to be recognised, and converted into investment units; (c) guarantees, conditions, terms and other characteristics of credit, such as type of document that proves credit.

After provisional list is filed by conciliator, judge grants creditors and insolvent merchant ten day term to file objections against provisional list, as well as relevant documents. Once objections are filed judge grants ten day term to conciliator to file definitive list of creditors. Within following five days judge renders judgment that declares recognition of creditors, as well as their order of preference for payment. Such judgment may be appealed within following nine days of its notification.

Conciliatory stage has duration of 185 days commencing as of day latest publication in newspaper of merchant's insolvency declaration judgment appears. If conciliator and two-thirds of creditors believe settlement is about to be reached, they may request judge to extend conciliatory term up to 90 days. This last term may also be extended for 90 days more, if that is requested of judge by merchant and 90% of creditors. However, in no case may conciliation period and its extensions exceed 365 days commencing as of day of latest publication in newspaper of merchant's insolvency declaration judgment.

Conciliator may request judge to forestall conclusion of conciliatory stage if merchant or creditors are not cooperating to reach settlement.

Conciliator with agreement of merchant and most of recognised creditors, will put settlement to creditors considerations for ten day term, in order to receive opinions, and if such is case, to have settlement subscribed. Within following seven days of final day of aforementioned term, and if settlement is entered by majority of creditors, conciliator shall file settlement before judge. Judge receives settlement, and grants five day term to creditors to file objections or to exercise veto. After five day term expires, judge must review settlement to determine that it meets all requirements provided by law, and that it is not contrary to public policy principles, in which case judge renders judgment consenting to settlement. That judgment ends insolvency proceeding. Insolvent merchant shall be declared in bankruptcy whenever: (a) merchant requests it; (b) if conciliatory stage, and its extension elapses, and no settlement that meets with law requirement is submitted to judge for its approval; and (c) conciliator requests it and judge grants it as result of lack of disposition of creditors or merchant in reaching settlement.

Judgment declaring bankruptcy must contain: (a) general declaration that legal capacity of merchant over assets of bankruptcy; (b) order to merchant, its managers, to turn over to receiver possession and administration of all assets and rights of bankruptcy, being deprived of administration and disposition thereof; (c) order to all persons in possession of goods of merchant to turn them over; (c) prohibition to make payments or to turn over property to bankrupt, without prior authorisation of receiver; (d) order to Institution of mercantile insolvency proceedings to designate conciliator as receiver, or to appoint receiver; whoever is administrating corporation is to be considered as depositary. Such judgment must also contain items “a”, “b” and “o” of judgment declaring insolvency of merchant described herein before. Such judgment may be appealed.

Summary of judgment declaring bankruptcy of merchant must be published in official government's newspaper, and in important newspaper two consecutive times.

Receiver's rights and obligations are those required in general for proper preservation and administration of property entrusted to his care. Within 60 days receiver must render: (a) statement regarding merchant's accounting status; (b) inventory of merchant, and (c) balance to date when receiver initiates administration.

Creditors are paid in specified order of preference and are divided into four classes: (1) singularly privileged creditors; among these are creditors for funeral expenses and for expenses in connection with last illness leading to death of bankrupt, if bankruptcy is declared after death, and workers and employees for salaries during two years preceding bankruptcy; (2) mortgage and pledge creditors; (3) special creditors to whom Code of Commerce or special law grants special privilege; and (4) common commercial creditors whose credits are derived from mercantile operations. Last type is paid pro rata.

Insolvency proceeding may end: (a) When settlement is reached; (b) by whole payment to all creditors; (c) if payment has been made in accordance with insolvency proceeding quotas, and there are no more assets to sell; (d) by lack of assets sufficient for payment of necessary expenses in connection with labour obligations and bankruptcy proceedings; (e) at any stage at which creditors and merchant file such request.

7.06 PLEDGES:

Pledges may be given of personal property and of crops to be garnered at a specified time. In the latter case pledge must be recorded in public registry. As general rule object pledged must be delivered to creditor physically or constructively. Constructive delivery is understood to exist when there is agreement to leave object with third person or when it is left with debtor either by agreement with creditor or because of express authorization by law. Parties may agree that debtor retains possession of pledged property, in such case agreement must be ratified before public notary and must be recorded at Commerce Public Registry, and pledged property must be determined. When pledge is left with debtor, contract has no effect as to third persons unless recorded in public registry. Recording must be carried out in all cases. Pledge contract must appear in writing if private writing. Contract is not effective as to third persons unless date can be proved by registry, by public document or in some other conclusive manner. If object pledged is lost or deteriorates without fault of creditor, latter may demand another pledge or payment even before maturity. If debtor does not pay at maturity creditor may apply to judge for sale of pledge at auction in accordance with rules provided in Commerce Code, but parties may agree that sale be made extrajudicially. Sale may not take place until debtor has been heard in trial.

There are special rules regarding commercial pledges. In commercial pledges, if value of pledged articles or securities depreciates to less than amount of debt plus 20%, creditor may request to judge for sale of pledge. (C. C. 2856-2892; Law Aug. 26, 1932, General Law on Negotiable Instruments and Credit Operations Arts. 334-345).

8 DISPUTE RESOLUTION

8.01 ARBITRATION:

Mexico is party to New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 1958, ratified in 1971, and Inter-American Convention on International Commercial Arbitration, Panama Jan. 1975, ratified in 1978. Provisions contained in Mexican law on arbitration matters (Title IV, fifth book, C. of C.) are almost identical to those contained in model law of UNCITRAL except for specific legal issues, such as those related to: (i) term to request judge incompetence to review and decide case, (ii) number of arbitrators in case agreement between parties does not include it, (iii) procedural mechanism to request annulment of arbitral award. Corresponding chapter of Code of Commerce regulates domestic and international arbitration, including recognition and enforcement of foreign and domestic arbitral awards. Disputes arising from previously determined legal relationship may be subject to arbitration, except if according to Mexican legislation controversy cannot be subject to such alternate dispute resolution mechanism. Arbitration agreement must be in writing, whether in form of arbitral clause, in contract or in separate agreement. Invalidity of contract does not affect validity of arbitration clause. Arbitration agreement may be evidenced by any kind of document or by other means of communication which constitute record of agreement or even by reference to another contract. Arbitrators may be empowered by parties to decide according to rules of law (en derecho) or ex aequo et bono (arbitraje de equidad). Arbitration procedures are held either on ad-hoc basis or before institutionalized bodies such as American Arbitration Association, Centro de Arbitraje de México or International Chamber of Commerce. Procedure may be agreed by parties but essential procedural rights must be observed.

Arbitrators have authority to make restricted provisional orders including interim measures of protection at request of either party, and to require any party to provide appropriate security in connection with such measures.

8.02 MEDIATION:

Mediation clauses in contracts are valid. Institute for mediation has been recently created and is called Instituto Mexicano de la Mediación, A.C.

Some states already regulate mediation procedures mainly in civil cases. Some other states do not regulate mediation, however centers for mediation sent by court were established in effort to reduce number of cases that need to be brought to such courts.

9 DOCUMENTS AND RECORDS

9.01 ACKNOWLEDGMENTS:

Certificates of acknowledgment are unknown in Mexican law, since all documents which in the United States would ordinarily require a certificate of acknowledgment are executed before a notary public who certifies in the instrument itself to the facts which, in the United States, are usually expressed in a certificate of acknowledgment.

Documents executed in United States should be acknowledged in usual manner if they are to be used in Mexico. Certificate of county clerk or other competent official as to power of notary to take acknowledgment should be attached and apostille should then be obtained. When Minister of Foreign Relations of Mexico has attached certificate regarding qualifications of consular or diplomatic officer document may be recorded in protocol of Mexican notary by order of competent court and is then duly recognized.

9.02 COMMISSIONS TO TAKE TESTIMONY:

See category 5 Civil Actions and Procedure, topic 5.02 Depositions and Discovery.

9.03 NOTARIES PUBLIC:

(Notarial Law of Mar. 28, 2000).

Mexican notary is a public official, who must be lawyer, whose duties are much more important than those of notaries under U.S. system of law. Contracts and conveyances between private individuals, powers of attorney and wills which are required to be in form of public document (see topic 9.04 Public Instruments) when entered into in Mexico, should be prepared by and executed before notary public. Notaries are required to pass examinations before they are commissioned, and must furnish bond. They are required to keep protocol, which comprises originals of all documents which are executed before them. General archives are kept to which protocols of notaries pass after certain length of time. Instruments executed before notaries must be prepared with certain formalities and drawn in Spanish language. If parties do not know Spanish they must appoint interpreter, who takes oath before notary that he will faithfully perform his duties. If parties are not known to notary, their identity must be certified to by two witnesses known to notary, who must also certify as to their legal capacity.

Contracts, powers of attorney and other documents executed in foreign countries should be duly authenticated (see topic 9.01 Acknowledgments) and translated and notarized in office of notary by order of competent court in order to receive full recognition in Mexico.

Notary has no fixed term of office and may be removed from office only for cause.

Authentic copies of documents executed or notarized before notary may be presented as evidence in any court. (See topic 9.04 Public Instruments). Notaries shall issue to each party first copy of notarial document and may issue second or further copies, provided third parties are not prejudiced, but such second or additional copies are not admissible in executive proceedings, unless issued by order of court after notice given to interested parties.

9.04 PUBLIC INSTRUMENTS:

Documents executed before a notary and the notarial copies of such documents are considered public instruments. The law further designates numerous other documents as public instruments, among them documents issued by public officers in the discharge of their functions, documents, registers, etc., in the public archives and certifications thereof, certificates issued by officials of the civil registry, court records, etc. (C. C. P. 129-142). In commercial matters public instruments also include mercantile contracts executed before mercantile brokers ("corredores") and certified by them. (Com. C. 1237). Most contracts of the more important kind are required to appear in a public instrument. (See category 3 Business Regulation and Commerce, topic 3.04 Contracts.) Public instruments constitute full proof against parties and authorize institution of summary proceedings. (C. C. P. 407-419).

9.05 RECORDS:

Public Register of Property.

All contracts transferring or modifying ownership, possession or enjoyment of real property or rights in rem must be registered in order to affect third parties. (C. C. 3000 et seq.). See also category 20 Property, topic 20.05 Deeds and Registration.

Commercial Register.

Corporate charter and its amendments, issuance of certain class of stock, and dissolution of commercial corporations must be registered. General and certain special powers of attorney must be registered. Certain credit contracts and pledge contracts must be registered. Individual merchants must register documents relating to their capacity to do business and family documents relating to their estate. Ship ownership must also be recorded in this register. (Com. C. 18, et seq.). See subheads Organization, Foreign Corporations, and Organization and Registration Fees, under category Business Organizations, topic Corporations.

Civil Register.

Birth and death, marriage and divorce, adoption and guardianship must be recorded in this register. (C. C. 35, et seq.).

Other Registers.

There are other registers such as Importers and Exporters Register, Taxpayers Register, Foreign Investment Register and Treasury Register.

10 EMPLOYMENT

10.01 HOUSING FUND:

National Workers Housing Fund Institute Law, Apr. 24, 1972 as amended. National Workers Housing Fund Institute (INFONAVIT) mainly focuses on: (i) Managing resources of INFONAVIT, and (ii) establishing and operating of financing system allowing workers obtainment of cheap credit for acquiring, constructing, repairing and maintaining of real estate. Employers must contribute 5% of payroll to INFONAVIT. Base salary for contributions has cap of 25 times minimum daily wage in Mexico City.

Housing contribution and social security payments into pension and retirement funds are part of Retirement Savings Plan. Employees may use funds to purchase, repair, or remodel their homes based on preference policy followed by INFONAVIT. Net fund balance, if any, will be paid to employees in case of total disability, retirement or death.

10.02 LABOR RELATIONS:

Federal Constitution, Title VI provides for labor and social security. Therefore, Congress must formulate labor laws which apply to workers, daily laborers, domestic servants, artisans, and in general all labor contractors: maximum duration of work for day must be eight hours, in case of night work it shall be seven hours Certain types of works are prohibited such as unhealthful or dangerous works, and industrial night works and any other night job after 10 pm for minors less than 16 years of age. Hiring of minors less than 14 years of age is prohibited. However, persons over 14 and less than 16 years of age shall have maximum work day of six hours. In any case, for every six days of work, there must be at least one day of rest.

During pregnancy women are not allowed to perform any physical labor that requires excessive effort. They have six weeks before and six weeks after birth of maternity leave, and must receive full salary and retain employment and rights acquired under their particular labor contract, on suckling period, two extraordinary rest day periods of half hour each must be granted for child feeding.

In general minimum salary must be sufficient to satisfy normal material, social and cultural needs of head of family and to provide for education of children. Equal salary shall be paid for equal work, regardless of sex or nationality. In general minimum salary is exempt from attachments and deductions. Workers are entitled to participation in profits of enterprises; but such profit-sharing does not imply possibility to intervene in management or direction activities. Salary must be paid in legal currency; they cannot be paid in goods, drafts, promissory notes, or in any other object intended to substitute for such legal currency.

Employers are responsible for labor accidents and for occupational illnesses of workers, contracted due to or in performance of work. Employers must pay indemnification when death or permanent or temporary incapacity results as consequence of such accident or illness. Employers and workers have right to organize unions, professional unions, professional associations, etc. for defense of their rights and interests.

As to social security following basis are applicable: In general it must cover work accidents, occupational illnesses, maternity, retirement, disability, old age and death. Provisions of Federal Constitution have been object of extensive legislation. Social Security Law of Dec. 21, 1995 has retirement savings system in addition to social security system.

Federal Labor Law effective on May 1, 1970 as am'd. Law tends to increase benefits for workers, to guarantee working conditions and to improve relations with employers as well. In case of doubts arising from interpretation of provisions of Law, most favorable interpretation and treatment to worker shall always take preference. Working day is defined in law as period of time during which worker is available to render services to employer. In case of full-time working day employer is required to grant minimum rest period of half an hour. In case of overtime, compensation must be calculated according to following procedure: (1) First nine hours of overtime per week must be paid at twice normal salary, and (2) overtime in excess of such nine hours must be paid at three times normal salary. If for any reason employee is requested to work on Sun., he will be entitled to additional compensation equal to 25% of normal salary. This rule is applicable even though employee enjoys day off during week. Furthermore, if employee is requested to work during mandatory holidays, he is entitled to receive three times normal salary. Overtime cannot last more than three hours per day, nor more than three times a week.

There are special provisions for minors, if fewer than 16 or 18 years of age, as case may be. They are not allowed to perform certain types of work, such as to sell liquor, to work in underground or submarine tasks, and in nonindustrial establishments after 10 P.M., and in any kind of industrial work during night.

Law allows six days vacation after first year of service, eight days for second year, ten days for third year, 12 days for fourth year, and 14 days for fifth through nine years, 16 days for ten through 14 years, 18 days for 15 through 19 years; 20 days for 20 through 24 years; 22 days for 25 through 29 years, etc. Vacation bonus equal to 25% of each daily wage must be paid during vacations.

Salary is defined to be remuneration that employers must pay to employees in exchange for their work. In general, employers are required to pay benefits, e.g., bonuses, severance compensation, vacations, etc. which are based mainly on salary; therefore, if salary is increased benefits are also increased. In general terms, salary is reviewed yearly.

Law establishes a compulsory Christmas annual bonus equal to at least 15 days salary, which must be paid before Dec. 20 of each year. If worker has worked for shorter term, bonus must be computed proportionately to number of days effectively worked during that year.

One of employers' obligations is to provide training courses for workers. Law also sets forth in detail further provisions regarding additional compensation for special cases, contemplating number of years, preferences and type of services rendered. As to statute of limitations, workers in case of unjustified termination of employment have two month period within which to sue employer. However, in certain other situations statute of limitations runs from one month up to two years as case may be. Law also regulates matters such as workers' investigations and inventions, independent agents, work performed at home, domestic workers, and rights and duties of crews of ships and airplanes as well. Procedures for strikes and indemnification in case of accidents, among other requirements are also comprehended in Law.

10.03 SOCIAL SECURITY:

Social Security Law of Dec. 21, 1995 (in force as of July 1, 1997). All employers must register themselves and their employees before Government Social Security Agency (IMSS). Social Security dues are paid by both employer and employees (via withholding) every month, taking as basis of daily salary received by employees. This contribution basis generally is capped at 25 times minimum wage. Social Security must cover job-related risks; general illnesses and maternity; disability and life; retirement, old age and unemployment at advanced age; children's nurseries and social benefits.

IMSS maintains medical clinics and hospital facilities throughout Mexico, and provides services free of charge to eligible employees and their families. IMSS subsidizes 100% of employee's salary in event of temporary disability due to job-related accident or illness, and 60% of salary in case of general accidents or illnesses. Employee's family may receive pension in event of death of employee. Any employee may obtain pension benefits upon retirement at age 60. There is no legal mandatory retirement age.

New Law in effect on July 1, 1997 introduced important modifications to Social Security System; most relevant of which involves replacement of administrative system for employee retirement funds that had been controlled by IMSS since 1943. As of July 1997, such funds are administered by private, specialized financial entities known as Afores.

To this effect complex network of organizations, rules and related procedures has been created to extend Retirement Savings System known in Mexico as SAR. Main emphasis of this system is in individualization of retirement accounts for employees. Funds in individual accounts are invested by specialized subsidiary companies of Afores.

Because Social Security contributions are tax in nature, law uses concepts from Federal Tax Code to regulate sanctions.

Employer penalties for noncompliance with contribution payment requirements, along with updating and delayed payment surcharges, include fines from 70% to 100% of omitted payments.

11 ENVIRONMENT

11.01 ENVIRONMENTAL REGULATION:

(General Law on Ecological Equilibrium and Environmental Protection published on Jan. 28, 1988 and its regulations on Protected Natural Areas of Nov. 30, 2000, Environmental Auditorship of Nov. 29, 2000, Evaluation on Environmental Repercussions of May 30, 2000, Environmental Ordinance of Aug. 8, 2003, Prevention and control of atmosphere pollution dated Nov. 15, 1988, and on Registry of Emissions and transference of pollutant elements of June 3, 2004.)

Purpose of this Law is preservation, restoration and conservation of environmental equilibrium, as well as protection to environment, in national territory, and over zones where Mexico exercise its sovereign and jurisdiction.

General Law on Ecological Equilibrium and Environmental Protection's Regulations govern prevention and control of contamination generated by automotive vehicles, general atmospheric contamination, environmental impact, and hazardous waste. Law governs environmental regulatory process which includes environmental protection, natural resource conservation, environmental impact statements and risk assessments, ecological zoning, and sanctions. Within environmental protection are air, water and hazardous waste pollution, pesticides, and toxic substances. Federal government has exclusive jurisdiction over activities that have environmental impact on two or more states, operations that involve hazardous waste, and procedures for prevention and control of activities that could pose environmental risk or emergency of serious magnitude. Environmental regulatory agency is Secretariat of Environment and Natural Resources and Fishing industry whose main functions are environmental policy formulation and enforcement, urban planning, developing regulations and technical environmental standards or “normas”; granting permits, licences and authorizations; ruling on environmental impact statements; and studying state environmental programs www.semarnat.gob.mx. Office of Federal Attorney General of Environmental Protection is in charge of enforcing environmental laws, regulations and standards; conducting audits and evaluations; imposing sanctions, and educating public on environmental issues www.profepa.gob.mx.

Hazardous Waste.

Waste is considered hazardous when it is explosive, ignitable, corrosive, reactive, toxic or biologically infectious. List of hazardous materials and waste is published in official gazette. Authorization and registration must be obtained before generating or handling hazardous waste. Generator is responsible for its elimination, including final treatment. They are requirements for areas and containers for storing hazardous waste. Authorization for importation of hazardous waste for reuse or recycling may be granted.

Air.

Law requires achievement of emission of air quality standards for specific pollutants. Stationary sources of emissions of pollutant elements must control emissions to maintain them within maximum permissible levels. Facilities with stationary source of emission must obtain operating license, which is valid indefinitely and contains mandatory conditions.

Water quality standards are established. Law restricts wastewater discharges through issuance of concessions or permits. Handling, treatment and disposal of wastewater is regulated. Special permit and registration is required to discharge pollutants to any body of water, other than to municipal sewer system. Mandatory conditions include discharge limits, sampling, analysis and reporting.

Environmental impact statements as well as corresponding authorizations are required for construction of new facilities. Technical standards or “normas” which implement law and regulations and set forth requirements, procedures, conditions and limits must be complied with. {rpaga} Administrative or criminal penalties are imposed for violations of law. Criminal sanctions include fines and imprisonment, depending on whether hazardous material or waste, air pollution, or water pollution is involved. Administrative sanctions include fines, temporary or permanent closure of facility, arrest of company officials and revocation of permits, depending on gravity of offense, economic situation of party involved and prior violations.

12 ESTATES AND TRUSTS

12.01 ADMINISTRATION:

See topic 12.06 Executors and Administrators.

12.02 CLAIMS:

See topic 12.06 Executors and Administrators.

12.03 DEATH:

Under Mexican Law, death of person is attested by means of certificate issued by physician authorized to do so. Burial or cremation shall not take place within 24 hours of time of death, except in those cases which appropriate authorities direct otherwise. If person dies in place other than his residence, copy of death certificate shall be forwarded to judge of civil registry of place where individual resided for entry in appropriate record book.

All judicial authorities that decree absence or presumption of death shall transmit certified copy of respective decree within eight days of its issuance to appropriate judge of civil registry. In event missing person or one presumed dead reappears, notice shall be given to judge of civil registry by interested party and by corresponding authorities in order that inscription referred to be canceled.

Absentees. If person disappears or his whereabouts are unknown and there is no known attorney-in-fact to act on his behalf leaving no one to represent him, judge, upon petition of any interested party, or on his own motion, shall appoint receiver of his assets, and appointment shall be published in official notices of principal newspapers of last place of residence of person, and notices shall further summon him to appear before judge within period of not less than three nor more than six months, and court orders shall be issued to safeguard and protect assets of absent person. In general, two years after legal representative was named, representative may take legal action to ask for declaration of absence; and six years thereafter, upon request of interested party, absentee be declared presumptively dead. However, if person disappears in war, shipwreck, flood or similar disaster, he may be declared presumptively dead after two years from date of disappearance, without being previously declared absentee. Should disappearance occur as result of fire, earthquake, railroad or air accident, and there is sufficient evidence that person who disappeared was at that same place, presumption of death may be declared six months thereafter. Anyone who takes temporary possession of assets of absent person shall have same powers, obligations and be subject to same restrictions as guardian. When declaration of absence is entered, any person in possession of formal last will and testament or of holographic will shall deposit it before judge within 15 days after date of last publication referred to above. Judge shall, on his own motion or upon petition by anyone who believes he has interest in holographic will, open in presence of receiver for absent person, after having notified all parties who promoted declaration of absence; and he shall do so in accordance with formalities prescribed for this type of testament. If absent person appears or proof is provided that he is alive before declaration of presumption of his death, he shall retrieve his assets. Those who held temporary possessions of his assets are entitled to all industrial profits which were produced by their efforts and to 1/2 of all other profits. (C. C. 648-722).

All deaths must be recorded in Office of Civil Registry of municipality or district where death occurs. Death forms may be obtained by applying to Official of Civil Register having jurisdiction.

Actions for Death.

Each State has its own Civil Code. Under Federal Civil Code anyone acting illegally or against good customs is liable for damages caused to another unless he or she proves that damage was caused by victim's fault or inexcusable negligence. Person will also be liable for damages caused as result of operation or management of hazardous substances or mechanisms. If death, permanent disability or temporary disability results from wrongdoing amount of indemnity shall be fixed by multiplying by four quotas established by Federal Labor Law according to circumstances of victim and compensation or wages by him received, with certain limitations and imputing minimum salary if none was being earned. In addition court may grant family of decedent special compensation for moral damages which shall be determined freely by court in consideration of injured rights, responsibility degree, economic situation of person in charge and one of victim, as well as other circumstances of case. (C. C. Arts. 1910; 1915 and 1928).

12.04 DECEDENTS' ESTATES:

See topics 12.05 Descent and Distribution, 12.06 Executors and Administrators, 12.09 Wills.

12.05 DESCENT AND DISTRIBUTION:

(C. C. 1281-1294, 1599-1791).

Inheritance is succession of all property of deceased along with all rights and obligations which are not extinguished by death. Estate of deceased may pass to heirs either by will or by provision of law. Former is called testamentary inheritance and latter legal inheritance. When decedent has: (i) Not left valid will, (ii) when having left will, it is nullified, (iii) when testator does not dispose all of his property, (iv) when condition imposed upon heir in order to acquire is not fulfilled, and (v) when person entitled to residuary estate dies before testator, renounces inheritance or is incapacitated to acquire by inheritance, these will be governed by provisions related to legal succession. Following have right to inherit by legal succession: (i) Descendants, spouse, ascendants, collateral relatives within fourth degree and in certain cases concubine; (ii) in default of foregoing, public charity.

Order of inheritance is as follows: (1) If at death of parents only children remain, inheritance shall be divided among them in equal shares, (2) if there are descendants together with surviving spouse, latter shall be entitled to share equal to portion of child if surviving spouse has no property or if such property is not equal to share pertaining to each child, (3) if children and descendants in further degree remain, former shall inherit per capita and latter per stirpes, (4) if there are children and ascendants, latter shall only be entitled to food, clothing, shelter and assistance in case of sickness (economic support) up to value of portion of one child, (5) and adopted person inherits as child but there is no right of succession between adopted person and relatives of adopter, (6) in default of descendants and spouse, father and mother shall succeed in equal shares, (7) if there are no descendants, ascendants receive one-half and surviving spouse one-half, (8) there being only one surviving parent, latter receives entire estate, (9) in absence of descendants and ascendants, surviving spouse receives two-thirds, and brothers and sisters one-third, (10) in absence of descendants, ascendants and brothers or sisters, spouse receives all, (11) if there are only brothers and sisters, they inherit all in equal portions; if there are nephews and nieces, they inherit, portion of deceased brothers and sisters being taken up by their children per stirpes; half brothers and half sisters inherit half portion corresponding to brother/sister, (12) in absence of all foregoing, nearest relatives inherit up to fourth degree, (13) concubines shall inherit as spouse provided that such union lasted at least two years or child was conceived in such union, both are free of marriage and there is no other person claiming to have lived as spouse with deceased, (14) in absence of any other heir, estate goes to public charity.

If administrator has been appointed, heirs must enforce their rights through administrator, but if none has been appointed heirs may make their claims directly. Statute of limitation to claim inheritances is ten years and is transmissible to heirs.

Acceptance of inheritance may be made expressly or by implication. Repudiation must be expressed in writing before judge or by public instrument before notary public if heir is not in place where proceedings take place. Neither acceptance nor repudiation may be partial, submitted to term or conditional. Right to inherit from person who is alive may not be transferred nor repudiated. Acceptance and repudiation once made are irrevocable, unless there exists will unknown at time of acceptance or repudiation, which alters character or amount of inheritance. Every acceptance is understood to be made with benefit of inventory, that is on condition that inventory must be made of estate and that heir is not liable for debts beyond amount of inheritance.

12.06 EXECUTORS AND ADMINISTRATORS:

(C. C. 1679-1791).

In Mexican law word “albacea” includes both executors and administrators, and same general rules apply to both.

Testator may name one or more executors in his will to administrate all at same time or one after other. In default of appointment by testator heirs may appoint executor by majority vote, majority being determined according to interests of heirs and not by numbers. If there is no such majority, court makes appointment of one of persons proposed by heirs. Same rules apply to intestate proceedings. When entire estate is to go to legatees and no executor is named in will, they must appoint administrator. Testator cannot relieve executor from giving bond, but heirs may do so. Executor shall not be obliged to give bond when it is also heir.

Executor must complete his work within one year from date of his acceptance or from termination of lawsuits filed regarding validity or nullity of will are terminated, but extension of another year may be granted by heirs representing two-thirds of estate. Accounts of administration must be approved by all heirs; dissenting heirs may bring action in accordance with Code of Civil Procedure. Testator may designate compensation for executor; in absence of such designation executor is entitled to 2% of liquid value of estate and 5% of profits produced by industry, and he also may choose between these percentages and amount designated by testator. Heirs who did not agree with appointment of executor may appoint inspector to supervise his work, and in certain cases, as when there are absent heirs or legacies to public establishments, inspector must be appointed.

Liquidation of Estate. Within period determined by Code of Civil Procedure, executor shall take steps for preparation of Inventory. After conclusion and judicial approval of inventory, executor shall proceed with liquidation of estate. General debts may not be paid until after inventory has been prepared, and approved except for mortuary debts which include funeral expenses and expenses of last illness of author of inheritance. In second place, expenses strictly necessary for conservation and administration of estate shall be paid, as well as credits for food, clothing, shelter and assistance in case of sickness (economic support) which may also be paid before termination and acceptance of inventory. If cash funds are insufficient in order to pay debts or other urgent expenses, executor may, with approval of heirs or of judge, sell personal or real property, all such sales to be made at public auction unless majority of interested parties determine otherwise. Unless insolvency proceeding is pending, creditors are paid in order in which claims are filed, but if there are preferred creditors who have not filed their claims, those who are paid must give security. Executor cannot pay legacies until he has set aside enough property to pay debts. Creditors who file their claims after payment of legacies may bring action against legatees only if there is not enough inherited property to pay their claims.

Partition is effected by executor after inventory has been approved, administration accounts have been also approved and all claims have been paid including legacies. Partition may be suspended by agreement of interested parties. It must appear in public instrument if inherited property should be alienated by that formality. Annuities are provided for, by setting aside sums which capitalize them at 9%.

12.07 INTESTACY:

See topic 12.05 Descent and Distribution.

12.08 TRUSTS:

In recent years Mexico has adopted, with substantial modifications and restrictions, some of the principles of the Anglo-American law of trusts. “Fideicomisos” trusts are transactions whereby trustor transfers certain assets or title to rights to trust institution (trustee), to be allocated by trustee for particular lawful purpose for benefit of one or more beneficiaries. Trusts may be created with respect to all types of property and rights, except for those which in accordance to law are strictly personal to holder; such assets or rights will be applied to object of trust and only actions and rights may be executed with regard to said object. Trust is valid even though it was formed without designating beneficiary, provided its purpose is lawful and determined, and trustee has accepted trust. Trusts may be created designating simultaneous beneficiaries or successive beneficiaries, except from ones in which persons must be successively substituted because of death of former beneficiary, unless substitution takes place in favor of person alive or in being at trustor's death. Persons capable of receiving profits of trust may be designated as beneficiaries. Only capable persons with right to transfer property or legal title of assets or rights that are object of trust, can appear as trustor, as well as competent judicial or administrative authorities for that purpose. Only trust institutions authorized by law may appear as trustee. Incorporation of trust must be in writing. Secret trusts, as well as ones in which persons must be successively substituted because of death of former beneficiary, unless substitution takes place in favor of person alive or in being at trustor's death, and in general, trusts with duration for more than 50 years, where beneficiary is juridical person are prohibited unless they are charitable or of public order in nature, as well as cultural and scientific museums. Only banking institutions, guaranty companies, insurance companies, securities firms, special-purpose financial institution and public bonded warehouses may act as trustees. (General Law of Negotiable Instruments and Credit Operations of Aug. 26, 1932 as am'd). Trust extinguishes for following reasons: (i) Accomplishment of purpose of trust; (ii) if purpose of trust becomes impossible; (iii) if fulfillment of condition precedent to which accomplishment of purpose of trust becomes impossible, or it could not be accomplished in time set in trust incorporation; (iv) as result of occurrence of condition subsequent to which trust was subjected; (v) for execution of agreement entered into and between trustor, trustee and beneficiary; (vi) if trustor revokes trust, only if he/she expressly reserved that right in trust agreement; (vii) if trust was created in order to defraud third parties. When trust is terminated, if there is no specific settlement in trust agreement, trust institution will transfer assets and rights appointed to trust, to trustor or beneficiary as it corresponds.

Warranty trust's main purpose is to guarantee obligations of trustor before third parties. Possession of goods that are guarantee can be administered by trustor without need of transferring said goods to trust institution. Trust may be constituted to secure simultaneous or successive different obligations of trustor, with same or with different creditors. Assets may be in possession of third parties or trustor. Risk for loss or damage of assets appointed to trust is for party who possesses them. Parties may settle procedure that trust institution should follow in order to alienate assets appointed to trust. This figure has facilitated business transactions since it allows trustor to continue with his business operations and guarantee their obligations with goods that are kept under his administration.

12.09 WILLS:

(C. C. 1295-1598).

Will is absolutely personal, free and revocable act by which person with legal capacity disposes of his property and rights, and declares or complies with duties taking effect after his death. All persons are capable of making wills except: (a) Minors below 16 years; and (b) persons who permanently or temporarily are not of sound mind. All persons whatever age they may be may inherit and may in no way be deprived thereof; however regarding certain persons and specific property, they may lose such capacity for any of following reasons: (a) Lack of legal personality such as those not conceived at time of death of testator; (b) persons who were guilty of certain crimes or dishonorable acts towards testator or testator's descendants, ascendants, spouse, brothers or sisters; (c) persons who filed criminal complaint against testator, or testator's descendants, parents, spouse, brothers or sisters; (d) guardians with respect to their wards, unless will was made before their appointment or after minor came of age and guardianship accounts were approved; (e) physician who attended testator during his last illness or was attending testator when he or she granted his or her will and near relatives of physician, namely, spouse, ascendants, descendants and brothers and sisters, unless such persons are also legal heirs; (f) notary and witnesses who signed will and their near relatives; (g) ministers of religion with respect to other ministers and other persons to whom they are not related within fourth degree; (h) likewise near relatives of such ministers with respect to persons whom ministers attended during last illness or as spiritual advisers; (i) aliens and corporations in so far as they are included in disabilities established by Mexican Constitution; (j) lack of international reciprocity, aliens whose national laws do not allow Mexicans to inherit; (k) public utility, and (l) persons whom testator appoints as executors or guardians and who decline office without good cause or are removed for bad conduct. Such incapacities must be declared by court in action brought within three years after incapacitated person has entered into possession of property, except that incapacities established on ground of public utility may be enforced at any time.

Conditional legacies are allowed, but a condition not to give or not to do is regarded as nonexistent, as also a condition not to attack the will under penalty of losing the legacy.

The testator may freely dispose of his estate, but must leave alimony to following persons if they have insufficient property of their own: (a) Descendants under 18 years to whom testor has legal obligation to provide economic support at time of his death; (b) descendants of any age who are unable to work; (c) surviving spouse provided that such person is unable to work and has insufficient property. Unless otherwise expressed by testator, this right shall last only so long as spouse shall remain unmarried and lives honorably; (d) ascendants; (e) in certain cases person with whom testator lived as man or wife for two years or had child with provided they both remained unmarried during concubinage; (f) collaterals within fourth degree if under 18 or incapacitated.

A testator may appoint heir to inherit in case first named heir dies before testator or refuses inheritance. Trust substitutions are forbidden; but title to property may be left to one person and usufruct for life to another, and father may leave his property to son with remainder to children of son born before death of testator.

Wills are either: (1) Ordinary; or (2) special. Ordinary wills are: (a) Public open; (b) public closed; (c) public simplified or (d) holographic. Special wills may be: (a) Private; (b) military; (c) maritime or (d) granted in foreign country.

The following cannot be witnesses to a will: (a) Clerks of the officiating notary; (b) minors under 16 years; (c) persons not in sound mind; (d) blind, deaf or dumb persons; (e) persons who do not understand the testator's language; (f) heirs and legatees, and their descendants, ascendants, spouse or brothers or sisters, but the presence of a witness of this kind invalidates only the provision benefiting such person or such relatives and not whole will; (g) persons convicted of forgery.

Public open wills are those executed before notary. Testator declares his will before notary; notary draws up will in accordance with testator's wishes as regular notarial instrument and reads it aloud, with statement of place, date and hour of signing. Notary issues certified copy (see category 9 Documents and Records, topic 9.03 Notaries Public; also topic 9.04 Public Instruments) which serves as original in all estate proceedings. If testator does not know Spanish, he may write his will and it must be translated by interpreter, original remaining in notary's file. If testator is deaf, blind or does not know how to sign, two witnesses are required.

Public closed wills are written by testator or by another person at his request. Testator must put his rubric on every page and undersign will; he must then have it sealed or enclosed in sealed envelope, and exhibit to notary in presence of three witnesses, declaring that it contains his last will. Notary shall certify execution of will expressing formalities on envelope that said will is signed by testator, witnesses and notary. If testator cannot sign, another person may sign will for him and testator must so declare in presenting it to notary. Likewise someone may sign statement on envelope for him, and if witness cannot write, another person may sign for witness. When will has been closed and covering statement signed, notary makes note of matter in his records. Testator may keep will himself, leave it in custody of another or entrust it to judicial archive.

Public open simplified wills are granted before notary with regard to single real property destined to housing which value does not exceed amount equal to 25 times annual minimal wage, is granted at same public instrument corresponding to acquisition of such real property and testator may only name several legatees with rights to inherit such property.

Holographic wills are those written by the testator in his own handwriting. Holographic wills shall have no effect if they are not deposited in General Archives of Notarial Offices. Such a will can be made only by persons who are of age (18 years). Aliens can make holographic wills in their own language. Testator must himself write and sign will in duplicate in longhand, stating date in which it is executed, and must place his fingerprint on every page. Original in sealed envelope is deposited in General Archives of Notarial Offices; duplicate, also in sealed envelope, is returned to testator; each of envelopes being provided with statement signed by registry official and testator. When General Archives of Notarial Offices' clerk does not know testator, two witnesses are required to recognize testator's identity.

Private wills are emergency wills which can be made in certain cases where testator is seriously ill and there is no time to call notary, or where no notary is available. It is necessary that testator be unable to make holographic will. Private will must be declared before five witnesses or in cases of great urgency before three witnesses, and need not be in writing when witnesses cannot write or when there is great urgency. Will is valid only if testator dies of illness or in danger in which it was made or within one month after cessation of circumstances which authorized it.

Foreign Wills.

(C.C. 1593 - 1598) Will made abroad is considered valid if made in accordance with the laws of the country where it was executed. Mexicans can make wills before Mexican secretaries of legation, consulates and vice consulates which will act as notaries or receivers in execution of wills of Mexican nationals abroad. Said officials shall send certified copy of wills executed before them to Ministry of Foreign Affairs.

13 FAMILY

13.01 ADOPTION:

Federal Civil Code.

(**Note:** Every State in Mexican Republic has its own legislation. It is not common to apply Federal Civil Code for family affairs.)

Civil Code for Federal District. Any person over 25 years of age, single or married and in full exercise of his civil rights may adopt one or more minors or incapacitated minor or adult. In any case adopter must be 17 years older than adopted.

Adopter must prove: (I) To have sufficient means to support adopted, educate him, and provide proper care of adopted as son or daughter, according to special circumstances of adopted; (II) that adoption is beneficial to adopted; (III) that he is capable of adopting.

Spouses or concubines may adopt only when each of spouses or concubines agree to consider adopted as their own child; only one of them must be over 25 years of age, one of adopter, at least, must be 17 years older than adopted. They must fulfill aforementioned requirements.

Nobody can be adopted twice by different person, except in case of marriage or concubines.

Adopted persons have rights and obligations of descendant.

Adopted persons must use name of adopting party.

For adoption to take place, following must consent: (I) Individual exercising paternal authority; (II) tutor of adopted; (III) person who took care of adopted for six months, and treated him same as its own child, when no individual exercised paternal authority; (IV) District Attorney of adopted's domicile, when such does not have parents or tutor; (V) public or private institutions who take care of adopted.

When adopted party is at least 12 years of age, must give his or her consent for adoption.

Full Adoption.

Adopted has same legal rights as consanguineous son. Adoption extinguishes relationship between adopted and his progenitors, except for marriage impediments.

For full adoption to take place, mother or father of adopted, shall give his/her consent.

International adoption takes place when citizen from one country decides to adopt person from another country. It is regulated pursuant to international treaties and “full adoption” scheme.

13.02 DIVORCE:

(Note: In Mexico, each state has its own legislation on family matters. It is not common to enforce Federal Law for such issues.)

Civil Code for Federal District.

Divorce dissolves marriage and allows spouses to marry again.

Divorce can be petitioned by one or both spouses whenever any of them solicits it before judicial authority, stating his/her will to dissolve marriage. It is not necessary to establish reason why divorce is being petitioned, provided that, at least, year has elapsed as of date marriage took place.

To proceed with divorce, spouse requesting it unilaterally, must attach to his/her request, agreement in which he/she proposes: (i) Designation of spouse who will have custody of minor children or legally incompetent; (ii) form in which parent, who does not have custody of children, will exercise his/her visitation rights; (iii) form in which to fulfill needs of children and, in its case, needs of spouse to whom maintenance must be provided; (iv) designation of spouse who will use matrimonial domicile; and (v) form in which assets of marriage partnership will be distributed.

In event spouses entered into marriage under separation of marital property regime, spouse who during marriage cared for home and/or children, and who has not acquired his/her own assets, or if those acquired were notoriously lesser in value than those owned by his/her counterpart, judge will grant compensation in his/her favor, which may not exceed 50% of value of assets acquired during marriage.

It is also possible to request administrative divorce, when having elapsed year or more of marriage, both spouses agree to divorce, are of full legal age, have liquidated marital property, when married under this regime, spouse is not pregnant, they do not have children in common, or if they do, these are of full legal age and these children or any of spouses do not require maintenance. This procedure will be carried out before judge of local civil registry.

In Federal District, in event spouses do not want divorce, he/she may request suspension of obligation to cohabit with his/her spouse, arguing any of following: (i) Incurable or hereditary disease; (ii) irreversible sexual impotence, provided it is derived from advance age; and (iii) incurable mental disorder.

As of date of filing of divorce application and at anytime during trial, preventive measures may be requested in order to guarantee maintenance of children or spouse in need of maintenance, as well as for protection of assets and safeguard and integrity of children.

Children under age 12 will remain under mother's care.

13.03 HUSBAND AND WIFE:

(**Note:** Every State in Mexican Republic has its own legislation. It is not common to apply Federal Civil Code for family affairs.)

Provisions in Federal Civil Code may be summarized as follows:

Married couples must contribute to purposes of marriage and assist each other. Spouses must live together at marital domicile, which is place selected by both. But if one of them takes up residence abroad or in objectionable locality, courts may relieve him/her of this duty.

Both spouses shall contribute to support expenses, alimony and education for children; they may distribute this burden in any proportion according to their conditions. However spouse that is indigent or unable to work may devolve expenses on other spouse. Rights and burdens are equal for both spouses, so that amount that they provide in order to support home does not give better right to such person.

Husband and wife have equal authority at home and must, by mutual agreement, provide education for their children, and for administration of their children's property. In case of disagreement, court shall decide controversy.

Both spouses may exercise any employment, profession or business.

Husband and wife who are of age may each appear in court, contract or dispose of their separate property, also exercise any appeal which is available or oppose exceptions, without consent of other, except in case of mutual property's administration or disposition acts.

Sales between spouses are allowed only if marriage is under system of separate property. Husband and wife may exercise rights or actions against one another, but prescription will not run while they remain married.

When contracting marriage, parties must state whether they marry under system of conjugal partnership or under separation of property, this shall be drafted in instrument called articles of marriage. Before or after marriage, articles of marriage shall be settled, considering not only their present property but also property that they will acquire later.

Conjugal partnership shall be ruled by articles of marriage, and in default of such regulation, general rules relating to conjugal partnership will be applied.

Articles of marriage shall be drawn up in form of public instrument recorded in Property Registry, to regulate manner in which spouse's property is to be held.

Community property may be terminated before divorce takes effect, if spouses agree to do so or if one spouse claims it, provided one of following courses occurs: (a) Negligence or bad administration by spouse, (b) when administrator spouse without other spouse's consent assigns property in favor of creditor, (c) if administrator spouse is declared in bankruptcy, (d) if court declares so.

Separation of Property.

If system of separation of property is adopted, each spouse has full administration of his or her own property and income. Articles of marriage may state system of separation of property adopted before or after marriage, by voluntary act of spouses or by judgment of court. It may be total or partial and may relate both to property owned at time of marriage and property received afterwards.

Prenuptial gifts are those that one party gives other prior to marriage and those which third person gives to one or both parties in consideration of marriage. Such gifts between parties may not amount to more than one-sixth of donor's property.

State Laws.

Law prevailing in most of other regions of Mexico is found in Civil Codes of various states, provisions which are similar to those of Civil Code in force in Federal District. More important provisions of that code may be summarized as follows: Spouse is required to support his/her counterpart if latter does not work or have economic resources. Spouse who has property of his/her own is required to support other when he/she lacks means and is unable to work. Both spouses are required to live together at matrimonial domicile. Court may excuse either of spouses from this obligation if other takes up residence abroad or in objectionable locality. Husband and wife who are of age may each appear in court, contract or dispose of their separate property. If both are minors, judicial authorization is necessary for alienation or encumbrance of real property, and guardian is required in judicial matters. Property and affairs of married persons may be managed either on system of conjugal partnership or under separation of property. Conjugal partnership may be voluntary or legal.

Voluntary conjugal partnership is governed in accordance with agreement of parties made either before or during marriage. This agreement must be in form of public document. (See category 9 Documents and Records, topic 9.04 Public Instruments.) Insofar as not specifically agreed upon, rules for legal partnership govern. Any agreement by which one of parties is to receive all earnings or by which one of parties is to be responsible for losses and common debts to greater proportion than his (her) share of capital or earnings is void. In some states if there is no express agreement between parties marriage is understood to be legal partnership or conjugal partnership. In such case each spouse is owner of property owned prior to marriage and property which he/she possessed and acquired title to by prescription during marriage, and also of property acquired by chance, gift, inheritance or legacy during marriage. Property acquired by either of partners during marriage as result of profession or business or manual labor and proceeds thereof, etc., is joint property. Ownership and possession of their joint property resides in both husband and wife. Spouse may alienate or encumber personal property without other's consent, but real property owned in common may not be encumbered or alienated without consent of other. Each of parties may dispose of part of common property to which they are entitled by will.

Separation of Property.

There may be separation of property either by public document entered into before or during marriage or by judicial decree in certain cases. In such case each may administer his/her own property subject to certain limitations. Property acquired in common during marriage is treated as in case of legal partnership until divided, unless share of each has been designated; debts contracted before marriage are paid out of property of debtor; debts contracted jointly during marriage are paid jointly; if contracted separately they are paid by debtor.

Concubine.

When two persons who are allowed to be married, according to Mexican law, live together for period equal or longer than two years or they conceive child, they will be considered as concubines with several rights and obligations as ones granted to husband and wife.

13.04 INFANCY:

Federal Civil Code.

Majority begins at 18 years of age, and major has full disposition of himself/herself as well as of his/her property. Only marriage of minor produces emancipation. Once obtained it will not be lost; even if marriage is terminated, minor will not return to paternal authority. Emancipated minor requires: Judicial authorization to alienate, mortgage or encumber real property; guardian ad litem for judicial matters.

Parental authority is exercised over person and property of minors; those who exercise it are legal representative of minor, and have full administration of his/her property. Paternal authority shall be exercised by parents; if one of them, under any circumstances loses paternal authority, other will exercise it. If both parents lose it, grandparents will do so and judge will decide in which order they will exercise paternal authority.

Property of minor is divided into: (a) Property acquired by his work; (b) property acquired in any other way. Ownership, administration and usufruct of property related to goods described in section (a) belongs to child. Ownership and one-half of usufruct of property of goods mentioned in section (b) belongs to child; administration and other part of usufruct belongs to person exercising paternal authority. Person that is exercising paternal authority has obligation to render accounts to minor.

13.05 MARRIAGE:

(**Note:** Every State in Mexican Republic has its own legislation. It is not common to apply Federal Civil Code for family affairs.)

Civil Code for Federal District. In order to get married, both parties should be of age of majority. Minors below age of 18 require consent of person exercising paternal authority, or tutor; if such person does not consent, Family Judge may consent. Foreigners require consent of Mexican immigration authorities to be able to get married in Mexico.

Impediments to marriage are: (1) Lack of age required by Law; (2) if under age of majority lack of consent from person exercising paternal authority, or tutor, or Family Judge; (3) relationship by consanguinity in direct descending or ascending line, between brothers and sisters of whole or half blood, and between uncles and nieces, aunts and nephews in third degree, but in last mentioned cases dispensation may be obtained; (4) relationship by affinity in direct line; (5) adultery between parties if proved in court; (6) attempts against life of spouse in order to marry other; (7) physical or moral violence against one party to get married; (8) incurable impotence; (9) chronic and incurable diseases which are also contagious or hereditary; (10) mental disability which makes party unable to express his/her will by any means; (11) existing marriage; and (12) civil relationship extended up to descendents of adopted.

Adopter cannot marry adopted or his/her descendants. Guardian may not marry person who has been under his guard, unless he has obtained dispensation. Marriage is free union between man and woman in order to endeavour respect, equality and help to each other, with possibility of conceiving children in free, responsible and informed manner.

Marriage ceremonies shall be performed by official of civil registry.

Marriages may be annulled: (a) For error as to person married; (b) in case of existence of any of aforementioned impediments; (c) if formalities required for marriage ceremony were not observed. In certain cases there is no limit to time in which annulment may be demanded, as in case of marriage within prohibited degrees. In other cases there are time limits; thus in case of error as to person, annulment must be demanded as soon as error becomes known. In case of lack of consent by parents or guardians, annulment action must be filed within 30 days after such acknowledgment of marriage; in case of duress, action must be filed within 60 days after duress ceased. While marriage lasts it produces civil effects with respect to party who acted in good faith. Law on this subject prevailing elsewhere in Mexico is generally to be found in Civil Codes of various states and is in general very similar to law in Federal Civil Code.

13.06 MARRIED WOMEN:

See topics 13.03 Husband and Wife; 13.05 Marriage.

14 FOREIGN TRADE AND COMMERCE

14.01 CUSTOMS:

Customs procedures, import and export of merchandise into or from Mexico and its transportation are regulated by Customs Law of Dec. 15, 1995, (Dec. 30, 1996, Dec. 31, 1998, Jan. 4, 1999, Dec. 31, 2000, Jan. 1, 2001, Jan. 1, 2002, June 25, 2002, Dec. 30, 2002, Jan. 23, 2006, Feb. 2, 2006 as am'd) and its Regulations of June 6, 1996 (Oct. 18, 1999, Oct. 28, 2003 as am'd). Customs Law along with Import/Export Tax Law and other applicable dispositions regulates import and export activities of goods into Mexican Territory as well as its transportation. Federal Tax Code is suppletory to Customs Law dispositions.

Every person or company who performs import or export activities must observe Custom Law dispositions whether such persons or companies act as owners, possessors, addressees or consignees, remittent, agents, custom brokers or any other person that intervene in import, export, custody, transportation, storage and handling of merchandise.

Customs Law dispositions will be applied without prejudice to any international treaty subscribed by Mexican Government.

Every individual arriving into or departing from country carrying cash and/or checks and/or payment orders, or any other collectible document in excess of equivalent of US$10,000, must declare such amount to customs authority. When utilizing services from international securities transportation companies, customer must declare to such company when amounts involved are in excess of equivalent of US$10,000.

14.02 CUSTOMS DUTIES:

See category 21 Taxation, topic Custom Duty and Taxes.

14.03 EXCHANGE CONTROL:

There are no exchange control regulations. Banco de México publishes daily official selling rate of foreign exchange for payment of foreign currency obligations which may be paid locally by delivery of national currency at this rate of exchange. Computation of official selling rate of exchange is based on daily prevailing selling rates for U.S. dollar calculated according to provisions. (Provisions of Nov. 9, 1991).

14.04 FOREIGN EXCHANGE:

See topic 14.03 Exchange Control.

14.05 FOREIGN INVESTMENT:

Foreign Investment Law.

Foreign investments are regulated by Foreign Investment Law of Dec. 23, 1993 as amended ("FIL") and by its regulations of Aug. 27, 1998 published on Sept. 8, 1998. Foreign investors may, as general rule, freely purchase capital of Mexican companies, acquire assets, engage in new lines of business or manufacture new products and open, expand, relocate and operate establishments; however there are restrictive provisions with respect to certain activities.

Foreign investment is defined as (i) Participation by foreign investors, in any percentage, in capital stock of Mexican corporations; (ii) investments by Mexican corporations in which foreign capital has majority interest; and (iii) participation by foreign investors in activities and acts contemplated by FIL. Investments by foreigners with resident status of "inmigrado" will not be considered as foreign investment (excepting investments on real estate, hydraulic and mining exploitation, restricted and specific regulated activities as defined by FIL), provided that certain activities or geographic area are not exclusively reserved to Mexicans or Mexican companies with clause excluding foreigners.

Economic Activities.

In order to identify activities in which foreign investment has restrictions, FIL contains list of activities which in any manner have restrictions on foreign investors.

Restricted Activities.

Following activities are exclusively reserved to State: (i) petroleum and other hydrocarbons; (ii) basic petrochemicals; (iii) electricity (public service); (iv) radioactive minerals; (v) telegraph; (vi) radiotelegraphy; (vii) postal service; (viii) bank note issuing; (ix) control, supervision and surveillance of ports, airports and heliports; (x) and all others set forth expressly by applicable legal provisions.

Following activities are exclusively reserved to Mexican citizens or Mexican companies with clause excluding foreign participation: (i) Domestic land transportation for passengers, tourism and freight, excluding messenger or courier services; (ii) gasoline retail sales and distribution of LP gas; (iii) radio broadcasting services and other radio and television services, other than cable television; (iv) development banking institutions, under terms of law governing matter; and (v) rendering of professional and technical services set forth expressly by applicable legal provisions.

Foreign investment shall not directly participate in activities and companies mentioned above, nor through any kind of trusts, agreements, and shareholders agreements, pyramidal schemes or any other mechanism that provides control or participation. Neutral investment is excepted as provided by FIL.

Activities with Specific Regulation.

In following activities foreign investment may participate up to following percentages: (a) Up to 10% in cooperative companies for production; (b) up to 25% in (i) domestic air transportation, (ii) air taxi transportation, and (iii) specialized air transportation; (c) up to 49% in (i) insurance institutions, (ii) bonding institutions, (iii) currency exchange houses, (iv) general deposit warehouses, (v) companies to which Art. 12 bis of Securities Market Law refers, (vi) retirement funds' management companies, (vii) manufacture and commercialization of explosives, firearms, cartridges, munitions and fireworks, excluding acquisition and use of explosives for industrial and extraction activities or preparation of explosive mixtures for use in said activities, (viii) printing and publication of newspaper for circulation solely throughout Mexico, (ix) “series T” shares in companies that own agricultural, ranching, and forestry lands, (x) fresh water, coastal, and exclusive economic zone fishing excluding aquaculture, (xi) integral port administration, (xii) piloting port services for vessels to carry out operations of inland navigation operations in terms of subject law, (xiii) shipping companies engaged in commercial exploitation of ships for inland and coastal navigation, excluding tourism cruisers and exploitation of marine dredging and implements for port construction, conservation and operation, (xiv) supply of fuel and lubricants for ships, airplanes, and railway equipment, and (xv) concessionaire companies in terms of Arts. 11 and 12 of Federal Telecommunications Law. Limits in foreign participation established above may not be directly exceeded, nor through any kind of trusts, agreements, and shareholders agreements, pyramidal schemes or any other mechanism that provides major control or participation than established by FIL.

In following activities favorable resolution of National Commission of Foreign Investments (“CNIE”) is required for foreign investment to participate in percentage greater than 49%: (i) Port services for ships to effect their inland navigation operation, such as towing, mooring and lighterage; (ii) shipping companies engaged in exploitation of ships solely for high seas traffic; (iii) concessionaire or permissionaire companies of airdromes for public service; (iv) private education services at preschool, primary, secondary, upper middle, upper, and combined levels; (v) legal services; (vi) credit information companies; (vii) securities classification institutions; (viii) insurance agents; (ix) cellular telephone; (x) construction of pipeline for transportation of petroleum and products derived thereof; (xi) perforation of petroleum and gas wells; and (xii) construction, operation and exploitation of railroads considered as General Communications Ways, and rendering of public services of railway transportation.

In activities of international passenger land transportation, tourism and freight between destinations in Mexican Territory and administration services for bus central stations for passengers and auxiliary services may participate as follows: (i) as of Jan. 1, 2001, up to 51% of capital stock of Mexican corporations; and (ii) as of Jan. 1, 2004, up to 100% of capital stock of Mexican corporations without need to obtain favorable resolution from CNIE.

Further, favorable resolution from CNIE shall be required for Mexican corporations where foreign investment intends to participate, directly or indirectly, in percentage higher than 49% of its capital stock, only when aggregate value of assets of corporations in question, at filing date of request for acquisition, exceeds amount determined annually by CNIE (according to General Resolution No. 9 of June 8, 2008, current asset amount is $2,549,872,000 pesos). In activities other than ones mentioned above, foreign investment may freely participate.

Mexican law prohibits foreigners from owning direct interest in real estate located in strip of Mexican territory of 100 kilometers wide along borders, and 50 kilometers wide along seacoast ("Restricted Area"), however, foreigners may have interest in Restricted Area through trust or through Mexican subsidiary depending on type of real estate (previous execution of treaty referred on Art. 27 of Mexican Constitution "Clausula Calvo"). Title on real estate destined for residential purposes located within Restricted Area requires use of trust and corresponding acquisition has to be authorized by Ministry of Foreign Affairs. Mexican companies with foreign investors as shareholders may directly own real estate destined for purposes other than residential within Restricted Area; under this scenario notification to Ministry of Foreign Affairs is required. To acquire real estate located outside Restricted Area or to obtain concessions for exploration and exploitation of mines and water, foreign investor must obtain authorization from Ministry of Foreign Affairs.

Foreign entities that intend to habitually undertake business activities in Mexican Republic shall previously be authorized by Secretariat of Economy.

Neutral investment is investment in Mexican corporations or in trusts and shall not be computed to determine percentage of foreign investment in capital stock of Mexican corporations. Neutral investment may be used for activities that are exclusively reserved to Mexican citizens or Mexican companies with clause excluding foreign participation or to those activities that have specific regulation. Secretariat of Economy may authorize (i) fiduciary institutions to issue neutral investment instruments that shall solely grant, with respect to companies, pecuniary rights to their holders, and, as applicable, limited corporate rights, but without granting their holders voting rights in shareholders meetings, (ii) investment in shares without voting rights or with limited corporate rights, provided that authorization from National Banking and Securities Commission is obtained when applicable.

Registration.

National Registry of Foreign Investments ("RNIE") is divided into three sections in which following individuals, entities and trusts must be recorded: (i) First Section (foreign individuals or corporations who habitually undertake commercial activities in Mexico, and branches of foreign investors established in Mexico); (ii) Second Section (Mexican companies in which foreign investors participate, including those in which they participate through trusts and neutral investment; and (iii) Third Section (trusts on shares or corporate equity interest, on real estate, and on neutral investment by which rights are derived for foreign investment. In order to obtain registration in RNIE and to maintain updated information provided to RNIE, individuals and entities above described shall provide certain information from time to time.

Foreign individuals and entities must submit recordation format to "RNIE" within following 40 working days from date which they start carrying out commercial operations.

Submitted information to "RNIE" must be updated, for such purpose foreign individuals and entities as well as Mexican companies with foreign investment must also submit to "RNIE" following reports:

Yearly Renewal Economic Report.

Presentation report to “RNIE” depends on initial letter naming foreign individual or company. Individuals or companies whose names or initials are from A to D (Apr. of each year), from E to J (May of each year), from K to P (June of each year) and from Q to Z (July of each year).

Quarterly Economic Report.

Must be submitted to “RNIE” within following 20 working days from closing of each quarter of year, having as first quarter Jan. to Mar., as second quarter Apr. to June, as third quarter July to Sept. and as fourth quarter Oct. to Dec.

Corporate Information Report.

In case of changes in corporate information (established in Art. 38 FIL Regulations) previously submitted to “RNIE”, such changes must be notified to “RNIE” within following 40 working days as from date such change(s) occurs.

14.06 FOREIGN TRADE REGULATIONS:

Foreign Trade Law of July 27, 1993 as amended and its Regulations of Dec. 30, 1993 as amended.

Foreign Trade Law establishes specific “foreign trade instruments” used to efficiently perform foreign trade in Mexico. Such “foreign trade instruments” among others might be non-customs regulations and restrictions measures applicable to import or export activities, which consist of obtaining previous permits, maximum quotas, country of origin and certificates. There are other kinds of “foreign trade instruments” that derive from international treaties signed by Mexico such as Exportation Origin Certificates that are not considered as non-customs regulations.

Non-customs regulation measures applicable to import activities are established for example in order to correct unbalance of payment balance, or to regulate entry of used products into Mexico, or to avoid import of merchandise in unfair foreign trade practice conditions.

Certificate of Origin considered as “foreign trade instrument” has been frequently used since signature by Mexican Government of international treaties and agreements. Certificate of Origin is document by which origin of merchandise is demonstrated with object of applying preferential duties under frame of foreign trade international treaties and other international treaties signed by Mexico. It is also applicable for non-preferential cases such as to credit letter releases or to comply with certain regulations that destiny countries impose on Mexican merchandise.

In Mexico there is important range of “foreign trade instruments” used to efficiently perform foreign trade in Mexico, so it is important that foreign trade broker know about specific characteristics of applicable instrument.

Also see category 3 Business Regulation and Commerce, topic 3.09 Monopolies, Restraint of Trade and Competition.

15 IMMIGRATION

15.01 ALIENS:

Pursuant to Constitution aliens have same rights and obligations as Mexican nationals.

Aliens may not participate in politics, and President may order alien to leave country without trial if deemed undesirable. Marriage and divorce of aliens to Mexicans must be authorized by Secretariat of Interior (Secretaría de Gobernación). Entry of aliens is controlled by General Population Law of Jan. 7, 1974, as am'd and its Regulations of Apr. 14, 2000.

15.02 IMMIGRATION:

Migration to Mexico or entry for any purpose is regulated by statutes, administrative regulations, and internal policy of Secretariat of Interior, General Population Bureau (Consejo Nacional de Población), and National Immigration Institute (Instituto Nacional de Migración).

Immigration Categories.

Pursuant to General Population Law, foreigners are divided into three broad categories for immigration purpose. These are: (A) Nonimmigrant ("no-inmigrante"), (B) immigrant ("inmigrante"), (C) resident ("inmigrado"). Each of these categories is further divided into sub-categories.

(A) Nonimmigrant visa ("No-Inmigrante") is granted to aliens who enter Mexico on temporary basis, with no aim of residing in Mexico. There are 11 sub-categories included under this general heading:

1. Tourist ("Turista") visa is granted to persons who come for recreation, health, scientific, artistic or sports reasons. Tourist visa has 180-day maximum validity.

2. Transit visa ("Transmigrante") is granted to individuals simply passing through Mexico for up to 30 days.

3. Visitor ("Visitante") is granted for temporary stay in Mexico, to carry out licit and honest activities for which he may be remunerated from Mexican or foreign source. This visa is granted generally for up to one year.

4. Minister of Religious Affairs or Religious Associate ("Ministro de Culto o Asociado Religioso") status is granted to members of registered religious associations. This visa is granted for up to one year and may be renewed four times for up to one year each.

5. Alien Seeking Political Asylum ("Asilado Político") status is granted to individuals seeking protection of life or liberty from political prosecution. Secretariat of Interior will decide duration of this visa.

6. Student ("Estudiante") status is granted to study in government or private institutions. Validity of this visa depends on program of studies.

7. Refugee ("Refugiado") status is granted to alien seeking protection of his life, security or freedom because of violence, foreign aggression, internal conflicts or violation of human rights in his country. Secretariat of Interior will decide duration of this visa.

8. Distinguished Visitor ("Visitante Distinguido") status is exceptionally granted as matter of courtesy to prominent individuals, or to those who are internationally recognized for their work in science, human studies or to journalists. This visa is granted for up to six months and Secretariat of Interior may extend validity when advisable.

9. Local Visitor ("Visitante Local") status is granted to aliens visiting seaport or frontier cities for up to three days.

10. Provisional Visitor ("Visitante Provisional").—This visa is exceptionally granted to

individuals arriving at seaports or airports who wish to stay in Mexico, when they do not fulfill legal requirements. This visa is granted for up to 30 days.

11. Newspaper Correspondent ("Corresponsal") visa is granted to individuals for special event or temporary assignment. This visa is granted for up to one year, and it is renewable.

(B) Immigrant Status ("Inmigrante") is given to aliens to stay permanently in Mexico, while they become residents ("Inmigrados"). This status is granted for up to five years. There are nine sub-categories:

1. Individual Alien Sustained by Unearned Income ("Rentista") status is granted to individuals intending to live permanently relying upon foreign resources. Secretariat of Interior may authorize "Inmigrante Rentista" to render personal services as professor, scientist, or researcher where activities prove to be beneficial to country.

2. Investor ("Inversionista") status is granted to individuals intending to live permanently in Mexico bringing with them capital for investment.

3. Professional ("Profesional") visa is given to individuals who render professional services. When exercise of profession requires diploma, individual must first be registered at Bureau of Professions of Secretariat of Public Education.

4. Confidential Personnel ("Cargos de Confianza") status is granted to managers or directors in companies established in Mexico.

5. Scientist ("Cientifico") status is granted to individuals who will direct or conduct scientific research, transmit their scientific knowledge to others, prepare research, subject to criteria of Secretariat of Interior.

6. Technician ("Técnico") status is granted to individuals who carry out applied research in field of production or who will assume technical or specialized position.

7. Family Members ("Familiares") status is granted to spouse and children of "inmigrante" or "inmigrado" or Mexican citizen. Children and brothers of "inmigrante" or "inmigrado" or Mexican citizen may also be admitted in this sub-category as long as they are minors, students or they are physically handicapped.

8. Artists and athletes ("Artistas y deportistas") status is granted subject to Secretariat's criteria.

9. Assimilated ("Asimilados") status is granted to persons whose purpose is to carry out licit and honest activities, being spouse, father or mother of Mexican citizen, when they cannot apply for any other status.

In case "Inmigrante" is physically absent from Mexico for more than 18 months, consecutively or not, during five-year period, he will not be able to request "inmigrado" status. If he stays out of Mexico for more than two years during same period, he may forfeit his migratory status.

(C) Inmigrado status is given to aliens whose purpose is to settle in country, after five years stay and wish to permanently reside in Mexico. Application is subject to review by Secretariat. "Inmigrado" is permitted to engage in any activity and is obliged to inform Secretariat whenever he modifies his professional activity, his marital status or his domicile.

Absence of “Inmigrado” from Mexico for more than 36 consecutive months and accumulated absences in excess of five years over ten-year period causes forfeiture of visa.

Administration of Immigration Laws.—Granting of any immigration status and issue of relevant documentation are in fact and by law within discretion of Secretariat of Interior. Pursuant to Law, entry into Mexico or change of immigration status may be denied, when: (1) No migratory reciprocity exists between Mexico and country of origin of applicant; (2) domestic demographic equilibrium does not allow it; (3) quotas based on vocational activities or domicile as established by Secretariat of Interior have been filled; (4) deemed not to be in economical interest; (5) applicant has violated Mexican or foreign laws and regulations; and (6) sanitary authorities find foreigner not in good physical or mental condition.

See also category 14 Foreign Trade and Commerce, topic 14.05 Foreign Investment.

See topic 15.01 Aliens.

16 INTELLECTUAL PROPERTY

16.01 COPYRIGHT:

(Law of Dec. 5, 1996 as am'd and its regulations of May 15, 1998).

Law grants moral and property rights to author, regarding literary and artistic works. Moral rights include recognition of capacity of author as such and right to exploit and modify work. Such rights are perpetual, inalienable, non-prescribable, may not be surrendered or attached. Proprietary rights include exclusive right to exploit work personally or by authorized third party. Proprietary rights remain in force for author's life plus 100 years, and 100 years after publication in case of posthumous works. Proprietary rights are assignable for period no longer than 15 years except when nature of work or size of required investment justify otherwise and, except for publication rights of computer programs and books. Plastic arts and photographs re-sold in auctions, through commercial establishments or in transactions where businesspersons or brokers participate are subject to Droit de suite or ReSale Right.

Works Protected.

Protection is granted in respect to literary, dramatic, dance, sculpture, comics, graphic design, musical, pictorial, architectural, photographic, and cinematographic works; computation programs; works for broadcasting and television, and any other works which, by analogy, can be regarded as artistic or literary productions; computer and database programs, compendium of works such as encyclopedia, anthologies and others such as databases to extent they have originality of their own. These works remain protected, even without registration. Law protects adaptations, arrangements, translations, compendium, paraphrases, collections and transformations of literary and artistic works, which have originality of their own to extent of such originality, but can be exploited only with authorization from original owner of work. Performers, book editors, phonograph and video producers are protected for 75 years.

Notice.

Every copy of protected works must display phrase, “Derechos Reservados,” or abbreviation “D.R.”, followed by symbol “©”, name and address of owner, and year of first publication. Phonographs must display symbol (P) in circle with year of first publication. Absence of these requirements does not destroy copyright, but publisher may be liable.

Limitations of Author's Rights.

Publication or translation of literary or artistic works necessary or helpful to advancement of public education or national culture is considered matter of public interest. Ministry of

Education may authorize publication or translation, subject to prior payment of compensation when consent of holder of proprietary rights cannot be obtained.

Registration.

Agreements creating, modifying, transferring or extinguishing proprietary rights must be in writing and recorded in Public Registry of Copyrights.

Reserved rights are granted for one year, renewable, for periodical publications, and five years for characters, persons or groups who engage in artistic activities and advertisement promotion. Reserved rights include: rights to use and exploit in exclusive manner.

Foreigners enjoy same rights of national authors according to law and international conventions.

Violations of law are sanctioned by administrative fines and copyright crimes are punished by penalties established in Criminal Code.

Arbitration is regulated by law and may be used for resolution of dispute arising out of rights protected by law.

Intellectual Property Commission (Comisión Intersecretarial para la Protección, Vigilancia y Salvaguardia de los Derechos de Propiedad Intelectual) is in charge of overseeing proper application, compliance with and enforcement of intellectual property law. Commission is empowered to impose “exemplary sanctions”.

Treaties.

Mexico signed inter-American Convention on Copyright and Literary Property in Washington, June 22, 1946, which was promulgated by Presidential Decree of Oct. 3, 1947, and also ratified Universal Copyright Convention and became bound by it on May 12, 1957, and by Decree of Aug. 11, 1975, ratified revision of July 24, 1971 of this Convention made in Paris. By Decree of Sept. 20, 1974, Mexico ratified Law of Paris of Berne Convention for protection of literary and artistic works of July 24, 1971; Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations of Oct. 26, 1961, in force in Mexico May 27, 1964; Convention for the Protection of Producers of Phonograms Against Unauthorized Duplication of their Phonograms of Oct. 29, 1971, in force in Mexico Feb. 8, 1974; Brussels Convention Relating to the Distribution of Programme-Carrying Signals Transmitted by Satellite adopted May 21, 1974.

16.02 PATENTS:

(Law on Industrial Property of June 27, 1991 as am'd and regulations of Nov. 23, 1994).

Instituto Mexicano de la Propiedad Industrial is government agency in charge of industrial property matters.

New inventions susceptible of industrial application, including processes and products, are patentable. Following, among others, are not patentable: (i) uncovering of anything which already existed in nature; (ii) computation programs; (iii) surgical treatment methods; (iv) artistic works; and (v) variations of known products. Owner of patent may sue for damages any person who exploits patented process or product without owner's approval.

Patents are granted for period of 20 years, counting from application date.

Application may be filed by inventor, by his causahabiente (beneficiary) or by representatives of either. Priority rights of foreign applications are recognized provided that application is filed within 12 months following filing date in foreign country or pursuant to terms set forth in applicable international treaties.

Law establishes general rules for granting of licenses and transfer of rights conferred by patents. Transfer of rights to be effective vis-à-vis third parties, must be registered. When patented invention is not exploited for industrial or commercial purposes by owner of patent during three years counting from granting date or four years from application date, whichever is later, third parties may request Patent Office granting of "compulsory license" (licencia obligatoria) to exploit patented invention, which will be granted if patentee or registered licensee do not exploit invention within one year from request of compulsory license. When patented products are imported, such importation is regarded as effective exploitation of respective patent. In situations of emergency or national security, including serious diseases requiring attention on priority basis according to General Health Board, Patent Office may determine that exploitation of certain patents may be carried out through public benefit licenses. Ministry of Health shall set conditions relative to production, quality and field of application of license.

Patents expire, and therefore fall within public domain: (i) at end of term stated in Law; (ii) when annual fees are not paid; or (iii) for lack of exploitation.

Utility Models are defined as objects, implements, apparatus or tools which, as result of modification in their disposition, structure, or configuration, have different function with regard to integral parts thereof or render different advantage as far as their utilization is concerned. Utility models may be registered for term of ten years counting from application date.

Industrial designs include both drawings and industrial models. Drawings must be related to industrial product. Industrial models must serve as basis for manufacturing of industrial products. Industrial designs are registrable for term of 15 years, commencing on application date.

Trade secret is defined as confidential information of industrial or commercial application that provides competitive or economic advantage to owner. Information considered trade secret must be expressed in documents, laser discs, microfilm films, by electronic or magnetic means or similar instruments.

Layout-designs of integrated circuits (topographies), protected as from Dec. 26, 1997. Exclusive rights for ten years counted as from filing date are obtained through registration at Mexican Institute of Industrial Property. Conditions for registration are originality and novelty. Originality should be construed as layout-design that is result of intellectual efforts of creator, which is not common among creators and manufacturers of topographies. Right to obtain registration shall be barred when layout-design has been exploited in Mexico or abroad more than two years prior to filing date in Mexico. Prosecution consists basically in performance of formal examination only since examination as to substance is not contemplated in statute.

Conventions.

Convention for the Protection of Industrial Property, Paris, Mar. 21, 1883, Stockholm Revision of July 14, 1967; Patent Cooperation Treaty with Regulations, Washington, June 19, 1970; Agreement on Trade-Related Aspects of Intellectual Property Rights, Marrakesh, Apr. 15, 1994; International Convention for the Protection of New Varieties of Plants (UPOV), Dec. 2, 1961; Strasbourg Agreement Concerning the International Patent Classification, Mar. 24, 1971; Locarno Agreement Establishing an International Classification for Industrial Designs, Oct. 8, 1968; Budapest Treaty on the International Recognition of the Deposit of Microorganisms for the Purposes of Patent Procedure, Apr. 28, 1977.

Vegetal Species.

(Federal Law of Vegetal Species of Oct. 3, 1996).

Vegetal species are protected when they are novel, distinguishable, stable and homogeneous. When registered, certificate of holder is issued for 15 and 18 years, depending on type of vegetal variety. Rights are assignable and may be encumbered. Certificate grants holder exclusive right of exploitation, but compulsory license may be granted in case of declared emergency or for no exploitation during last three years from date of certificate.

16.03 TRADEMARKS AND TRADENAMES:

(Law on Industrial Property of June 25, 1991 as am'd; and regulations of Nov. 23, 1994).

Law protects trademarks and commercial slogans and names. Translations into other languages of words which are not registrable may not be registered. Among others, following are not registrable: technical names; isolated letters; numbers or colors; geographical denominations; and titles of literary works. Trademark may not be extended to additional products or services other than registration.

Instituto Mexicano de la Propiedad Industrial is government agency in charge of industrial property matters.

Registered trademarks enjoy protection for term of ten years. Such term may be renewed for terms of ten years. If mark registration is requested by two or more persons, rules governing use, license, transfer of rights, voluntary cancellation and voluntary limitation of goods or services covered by trademark registration must be attached to application. Priority rights of foreign application are recognized as provided by international treaties. If there are no international treaties, such date is recognized if application is made within six months from application date in country of origin. Resolutions on registration of trademarks, as well as renewals, licenses, change of name and assignments thereof, are published in Official Gazette of Industrial Property.

Applications for extension of registration of trademark must be made by owner within six months prior to expiration date plus six-month grace period. If trademark is registered in order to protect two or more classes of products or services, renewal of registration in any one of such products or services shall be effective to cover all other products or services if fees are paid for other classes.

Owner of trademark or pending application may grant license to use trademark, which license must be registered to be effective vis-á-vis third parties. Products sold or services rendered by licensee must meet same quality standards as products manufactured or services rendered by licensor. When license is registered licensee has right to institute legal proceedings to enjoin falsification, imitation or illegal use of trademark unless there is contrary agreement. Franchise (franquicia) exists under Law when technical knowledge and assistance is transferred along with license for use of trademark. Franchisor must provide franchisees ample information about business prior to execution of franchise agreement.

Rights deriving from mark application and trademark registration may be mortgaged or transferred pursuant to general principles contained in Civil and Commercial Codes. To be effective vis-á-vis third parties, transfer must be registered. For purposes of transfers of rights, Law regards registration of trademarks as “associated or linked” (marcas ligadas) when such trademarks belonging to same person are identical and cover similar products or services or when such trademarks are confusingly similar and apply to same products or services or to similar products or services. In such instances, owner of trademark must transfer all of associated trademarks except when Institute considers that dissolution of association of marks will not cause confusion or deceit to consumers upon explanation and request of owner to that effect.

Registration of trademark is null and void when (i) registration was obtained against provisions of Law on Industrial Property; (ii) registration was granted based on false declarations in application; (iii) same or confusingly similar trademark had been used in Mexico or abroad in order to cover same or similar products or services by third party prior to filing date or date of first use declared in application of registered trademark; (iv) registration was granted in error notwithstanding existence of previous registration for same or confusingly similar trademark; and, (v) distributor, licensee, representative or agent of owner of foreign registration applied for and obtained registration of same or confusingly similar mark in its own name, in which case registration shall be deemed as obtained in bad faith. Certain statutes of limitations apply.

Commercial slogans are defined as “phrases or sentences purpose of which is to advertise to public commercial or industrial establishments or businesses, as well as establishments and businesses which provide services, to distinguish them from others of same kind.” Registration of commercial slogan is granted for term of ten years counting from date of filing application. Such registration may be renewed for terms of ten years.

Commercial name of industrial or commercial business or establishment or of business or establishment for rendering of services is protected, without requirement of registration in those geographical areas where business or establishment has customers or in entire country if there is constant and significant advertising and promotion at national level. Anybody using commercial name may request publication thereof in Official Gazette of Industrial Property. Such publication establishes good faith in use of name. Effect of publication of commercial name lasts ten years counting from application date and can be renewed for terms of ten years.

Mexican State is owner of denomination of origin and such denomination of origin may only be used by means of authorization. Denomination of origin is defined as name of geographical area of country which identifies product as originally of such geographical area, when quality and characteristics of such product are due exclusively to geographical region including natural and human elements. Companies or individuals engaged in extraction, production or manufacturing of products linked with geographical areas may request authorization to use denomination of origin.

Authorization to use denomination of origin lasts ten years counting from application date, renewable for periods of ten years. Right to use denomination of origin may be transferred by licensee, but such transfer shall be effective vis-á-vis third parties as from moment of registration.

Federal Courts enjoy jurisdiction to determine criminal sanctions and fines established in Law, as well as to resolve disputes of mercantile or civil nature arising from application of Law. Fraudulent use of trademark on commercial scale and revealing and unauthorized use of trade secrets are crimes. Sanctions provided by Law are imprisonment and fines.

Conventions.

Convention for the Protection of Industrial Property, Paris, Mar. 21, 1883, Stockholm Revision of July 14, 1967; Agreement on Protection of Denominations of Origin and its international registry, Lisbon, Oct. 31, 1958; Agreement on Trade-Related Aspects of Intellectual Property Rights, Marrakesh, Apr. 15, 1994; Nairobi Treaty on the Protection of the Olympic Symbol of Sept. 26, 1981, in force in Mexico May 16, 1985; Vienna Agreement Establishing an International Classification of the Figurative Elements of Marks of June 12, 1973, in force in Mexico Jan. 26, 2001; Nice Agreement Concerning the International Classification of Goods and Services for the Purposes of the Registration of Marks of June 15, 1957, in force in Mexico Mar. 21, 2001.

17 LEGAL PROFESSION

17.01 ATTORNEYS AND COUNSELORS:

(Law of Dec. 30, 1945 as am'd and its regulations of Oct. 14, 1975).

To practice law, attorney must hold law degree from Mexican university, and be authorized to practice by Head Office of Professions (Secretariat of Education).

Foreigners may practice law in Mexico, subject to compliance with legal requirements.

NAFTA establishes possibility for U.S. and Canada lawyers to practice as consultants in Mexico, but not give opinions on Mexican Law. See Joint Recommendations of the Relevant Bodies of the Legal Professions of Canada, United States and Mexico, 19 June 1998.

18 MINERAL, WATER AND FISHING RIGHTS

18.01 MINES AND MINERALS:

(Mexican Constitution Art. 27, Mining Law of June 6, 1992 as amended and its Rulings of Feb. 15, 1999 and Dec. 16, 2008).

Under art. 27 of Mexican Constitution all minerals and substances existing in veins, strata, masses or beds, and which constitute deposits of nature different from land are property of Nation, including certain salt deposits.

Exploration, exploitation and processing of all mineral or substance deposits are governed by Mining Law (“Law”), including gas deposits related to mineral carbon, with exception of petroleum, hydrocarbons, radioactive minerals, certain salt deposits, substances contained in underground waters as long as they do not come from mineral deposits different from land components, and products from decomposition of rocks.

Above mentioned activities may be carried out by Mexican private individuals and Mexican corporations through concessions granted by Federal Government. Exploration activities may be also carried out by Mexican Geological Service through mining assignments granted as well as by Federal Government. These assignments and concessions are granted by executive branch of Federal Government through Secretariat of Economy (Secretaría de Economía) and in certain cases Secretariat of Energy is also involved (gas deposits related to mineral carbon) and refer only to minerals and substances located in free lands as opposed to those already granted, assigned or national mining reserves. Certain concessions may be granted as result of previous public bid. Foreign investment may participate in mining activities through Mexican corporations. Today there is no longer limit to participation of foreign investment in capital of mining companies although favorable resolution from National Commission of Foreign Investments must be obtained when foreign investment exceeds certain thresholds. Concessionaries are obligated to demonstrate ``works'' through investment.

Term of mining exploration concession is six years not renewable (it also applies to assignments) and 50 years for exploitation concessions as from registration date, renewable. Application for renewal must be submitted five years prior to expiration of concession. Concessionaires are entitled to certain benefits as right to request expropriation of land for installation, storage plants and other facilities, easement of access, power and water lines, use of subsoil waters, and others. Mining concessions are subject to cancellation by: (i) End of term; (ii) duly formulated abandonment by holder; (iii) substitution of concessions; (iv) judicial resolution; (v) exploitation of minerals or substances not considered by concession; (vi) failure to carry out exploration and exploitation works in terms and conditions of concession; (vii) lack of payment of mineral rights; (viii) lack of payment of discovery premium; (ix) not carrying out carbon exploration and exploitation in accordance with technical rules issued by Ministry; (x) carrying out works or activities without correspondent authorizations, particularly activities related to gas; (xi) grouping concessions on mining land not adjacent to each other for verification purposes that do not constitute mining unit from technical and administrative point of view; (xii) losing capacity to be concession holder; and (xiii) lack of rendering information related to gas not associated with mineral carbon.

In Public Registry of Mines all acts concerning organization, modification and dissolution of corporations organized for exploration, extraction or processing of mineral substances must be recorded. All acts concerning transfers and termination of concessions, contracts for exploitation of minerals and other contracts related to mining industry and to constitutions of easements and expropriations to be made in relationship with same must be registered, as well as any resolutions related to national mineral reserve. Recording of above mentioned acts in Public Registry of Mining produces effects against third parties as from date of registration. Public Mining Registry may be examined by any person, certified copies may be obtained of entries and existing documents. Infractions to Law are subject to fines and cancellation of concessions or assignments.

18.02 NATURAL GAS:

Activities.

There are three different main economic activities related to natural gas that law allows to be performed: distribution, transportation and storage of natural gas.

Permitting.

Performing such activities requires previous permit by Energy Regulatory Commission (CRE), subject to procedures and requirements provided by Natural Gas Regulatory Law. Permits will be granted by CRE to companies or individuals to carry out said activities in determined geographic zones to be established by CRE, and will be in force for maximum period of 30 years as of date of issuance; however, permits could be renewed pursuant to requirements and conditions established in Natural Gas Regulatory Law. Permits could be obtained through direct request from company or individual to CRE or through public bid procedure, depending on specific situation of relevant geographic zone, which will be determined by CRE, although, Law establishes that first permit for distribution of natural gas in certain geographic zone will be granted through public bid process and shall confer to permit holder exclusivity for first 12 years. Therefore, direct request scheme for obtaining distribution permit in specific geographic zone will be applicable only when exclusivity period for distribution is over.

There are some other specific requirements and conditions provided by Law related to (i) maximum prices that could be charged to final user of natural gas; (ii) “First Hand Sales” that can only be made by PEMEX (first hand sales of Mexican gas carried out by PEMEX or its subsidiaries to third parties for supply in Mexican Republic, such sales must be carried out in accordance with Directive No. DIR-GAS-004-2000 of 23 Feb. 2000, approved by CRE.); (iii), specific economic activity to be carried out and (iv) requirements that company must comply with in order to be entitled to be permit holder. There are also specific regulations regarding procedures for establishing prices to be charged for services rendered, accountant procedures that must be followed by permit holders, etc.

Notwithstanding fact that permits can only be granted to Mexican companies, foreign investment is not restricted.

18.03 PETROLEUM:

Legal framework for oil industry and related activities is Regulatory Law of Art. 27 of Mexican Constitution in Area of Oil, enacted on Nov. 29, 1958, and its Ruling of Aug. 25, 1959. In accordance with Law, Nation has direct non-transferable domain and not subject to statute of limitation over all hydrocarbons found in national jurisdiction in any of its forms, and only Nation, through Petróleos Mexicanos (PEMEX) may carry out exploitation of hydrocarbons that comprise oil industry as well as of basic petrochemicals. Oil industry includes exploration, exploitation, refinement, elaboration, storage, distribution and first hand sale of petroleum refinement products.

Decree of Nov. 28, 2008 sets forth Law of PEMEX, as decentralized entity of Federal Government located in Mexico City, whose main purpose is to oversee and carry out strategic management of oil industry through its subsidiaries: PEMEX Exploración y Producción engages in exploration and exploitation of oil and natural gas; PEMEX Refinación engages in industrial refining processes; PEMEX-Gas y Petroquímica Básica engages in processing of natural gas, natural gas liquids and artificial gas; and PEMEX Petroquímica engages in industrial petrochemical processes not included in basic petrochemical industry. PEMEX is managed by Board of Directors and General Manager. Board of Directors is composed of 15 members, six of which represent State and are appointed by President; five represent PEMEX workers union (must be active member of such union as well as regular worker of PEMEX) and four professional advisors appointed by President (must be ratified by absolute majority at Senate). This law grants broad powers of organization, management and exploitation of its assets so that it can perform all types of transactions directly or indirectly relating to oil and petrochemical industry. Further provisions of law regulate meetings, special meetings, quorum and kinds of majorities required for resolutions taken by Board of Directors as well as rights and duties of General Manager and other officers.

PEMEX may obtain economic resources by means of public debt or citizen bonds, which in no case will confer corporate, property, control rights over PEMEX nor state oil industry. Citizen bonds can be obtained only by Mexican individuals or following Mexican Corporations: (i) Investment Corporations specialized on retirement funds; (ii) Pension funds; (iii) Investment corporations for individuals; or (iv) other financial intermediaries considered as market developers.

19 MORTGAGES

19.01 CHATTEL MORTGAGES:

Chattel mortgages may be given in shape of pledges in which pledged objects may remain in possession of debtor. In such case pledge must be recorded in public registry (C. C. 2859) and rules relating to pledges (q. v.) apply.

19.02 MORTGAGES:

(C. C. 2893-2943).

Mortgages must specifically designate the property they affect. A mortgage of real property covers all articles comprised under that term. (See category 20 Property, topic 20.08 Real Property.) Although not so expressed, a mortgage includes: (a) The natural accessions of the mortgaged property; (b) improvements made thereon by the owner; (c) movable objects permanently incorporated with the mortgaged property by the owner and which cannot be removed without damage to such objects or the property; (d) new buildings constructed by the owner on the mortgaged land. Unless otherwise stipulated the mortgage does not comprise: (a) Industrial fruits of the property, produced before the creditor demands the amount due; (b) rents matured when payment of the debt is demanded. The following cannot be mortgaged: (a) Pending fruits and rents apart from the land producing them; (b) movable objects permanently placed in buildings for adornment, convenience or the service of some industry, unless mortgaged together with the building; (c) servitudes, unless mortgaged with the dominant tenement; (d) the right of ascendants to receive fruits from property of their descendants; (e) use and the right of habitation; (f) property in litigation, unless the bill of complaint has been provisionally recorded in the registry or the creditor acknowledges in the mortgage instrument that he is aware of the litigation.

Only a person able to alienate may make a mortgage and only property subject to alienation may be mortgaged. If the mortgaged property becomes insufficient to secure the debt, the creditor may demand that additional property be included in the mortgage, otherwise the mortgage may be considered matured. When several parcels are mortgaged to secure a debt it is necessary to specify what part of the debt is secured by each, and any parcel may be redeemed by paying the amount corresponding to it. When mortgaged property susceptible of division is subdivided the mortgage lien must be distributed among the parcels. Without the consent of the creditor the owner of the mortgaged property cannot lease it or agree to an advance payment of rentals for a period extending beyond the term of the mortgage.

If the debt exceeds amount calculated according to formula set forth in C.C. mortgage must appear in public instrument (q. v.); if it is smaller sum there may be private instrument before two witnesses; but in any case mortgage has no effect as against third persons unless recorded. As against third persons mortgage does not secure interest on mortgage debt for more than three years, unless longer time, not beyond time specified in law relating to prescription, was expressly stipulated and stipulation is on record in registry.

Voluntary mortgages are those entered into by agreement of the parties or constituted by the owner of the property. The mortgage credit may be assigned, provided the assignment be communicated to the debtor and recorded in the registry. If the mortgage is constituted to secure an instrument to order, it may be assigned by mere endorsement of the instrument; if it secures an instrument to bearer, it may be assigned by mere delivery. The mortgage exists for the period stipulated; if no time is designated it cannot last longer than ten years.

Necessary mortgages are mortgages which the law requires certain persons to give in order to secure their administration of property or the rights of certain creditors. Thus guardians may be required to give mortgages to secure their administration of the property of their wards and state or municipal administrators and collectors to secure the revenues collected by them.

Foreclosure (C.C.P. arts. 468-488; 564-598), is effected by a summary action. A formal announcement of the institution of the mortgage action is published by the court and recorded in the registry and the debtor is given nine days to answer lawsuit. In lawsuit and answer to lawsuit, both parties must announce evidence, and enclose all related documents. After lawsuit or counterclaim is answered, judge schedules evidentiary hearing within following 30 days. Once hearing has concluded judge pronounces judgment. Judgment may be appealed. There is expert valuation of property and order of sale by public bidding, which is advertised. Lowest bid allowable is two-thirds of valuation of property. Bidders must first make deposit of 10% of this amount. If there is no bidder creditor may ask that property be adjudicated to him for two-thirds of valuation or that another sale be held in which valuation is reduced by 20%. If there is still no bidder he may ask that property be adjudged to him for two-thirds of new valuation or be delivered to him in administration to pay himself with income or that there be third sale at which any bid will be received. At this third sale if best bid is less than two-thirds of valuation in second sale, debtor is given opportunity for 20 days to pay debt or to present higher bid. At any time up to termination of sale or adjudication of property debtor may redeem property by paying debt and costs; later there is no equity of redemption.

The right to the summary foreclosure action prescribes in ten years, counting from the time it might have been instituted. The parties may agree that the property is to be adjudicated to the creditor at a price determined when payment of the debt is demanded, but not when the mortgage is signed.

20 PROPERTY

20.01 ABSENTEES:

See category 12 Estates and Trusts, topic 12.03 Death.

20.02 ADVERSE POSSESSION:

See category 5 Civil Actions and Procedure, topic 5.05 Prescription.

20.03 CONVEYANCES:

See topic 20.05 Deeds and Registration.

20.04 CURTESY:

Not recognized in Mexico.

20.05 DEEDS AND REGISTRATION:

No specific form or requirement is necessary for purchase and sales contract unless it is for real estate. Sales of real property may be made by private documents signed by parties before two witnesses and their signatures must be ratified afterwards by notary public. If value of real property exceeds value set forth in Civil Code sale must be in form of public document. (See categories 3 Business Regulation and Commerce, topic Contracts and Documents and Records, topic Public Instruments.) All contracts transferring or modifying ownership, possession or enjoyment of real property or rights in rem which value exceeds value set forth in Civil Code, must be recorded in Public Registry of Property. Otherwise they are not effective against third parties. On execution of deed involving such registered contract, notary advises registration, who makes annotation, and if such deed is filed for record within one month after execution, registration is effective from date of such annotation, otherwise it takes effect from date of filing deed. Since registration fees are based on amount involved, actual and not nominal consideration must be stated in contract. (C. C. 2316-2320, 3002, 3003, 3018).

Deeds executed in foreign countries may be recorded if they are authenticated by Mexican Consul and Ministry of Foreign Affairs of Republic and notarized. See category 9 Documents and Records, topic 9.01 Acknowledgments.

20.06 DOWER:

Not recognized in Mexico.

20.07 ESCHEAT:

See category 12 Estates and Trusts, topic 12.05 Descent and Distribution.

20.08 REAL PROPERTY:

The following are considered real property: (1) Land and the constructions thereon; (2) plants and trees unseparated from the soil and the fruits thereon which have not been separated by harvesting or regular cutting; (3) objects attached to a building in such manner that they cannot be separated without deterioration to the building or to the real estate; (4) statues, paintings and other ornamental objects placed on real property in such manner as to reveal the owner's intention to attach them permanently; (5) dove-cotes, beehives, fishponds and analogous breeding places when the owner preserves them as a permanent part of the property; (6) machines, instruments and implements devoted by the owner of the real property directly and exclusively for the industry conducted thereon; (7) fertilizers and seeds required for cultivation of the property; (8) electric apparatus and accessories attached to the land or buildings, unless otherwise agreed; (9) springs, pools, cisterns and water courses, aqueducts and pipelines for liquids or gases necessary to conduct such liquids or gases to property or extract them from it; (10) animals for breeding purposes on rural property devoted totally or partially to cattle raising, and working animals indispensable for cultivation of property while devoted to that object; (11) dikes and other constructions which, although floating, are intended to remain at fixed point of river, lake or coast; (12) rights in rem on real property; (13) rolling stock of railroads, telephone and telegraph lines and radio stations. (C. C. art. 750).

The owner of real property owns the surface and whatever exists thereunder, subject to servitude, police regulations, the mining laws (see category 18 Mineral, Water and Fishing Rights, topic 18.01 Mines and Minerals) and article 27 of the Constitution.

21 TAXATION

21.01 INTRODUCTION:

Caveat.

Mexico modifies its tax legislation usually during last days of year. Consequently, some rates and provisions herein contained might not be accurate for year this edition is distributed, although correct as to previous one.

Federal Fiscal Code of Dec. 30, 1981, as am'd and its Regulations of Feb. 28, 1984 as am'd comprises provisions for surcharges on delinquent payments, penalties, collection procedures, appeals, statute of limitations, and other regulations applicable to various taxes. Code includes number of provisions taken from other specific laws which are considered of general application for all taxes, such as those referring to geographic and economic zones considered as part of national territory, rules for sales of assets, fiscal year, obligations to keep accounting records, procedures for guaranteeing payment of pending taxes in case of liquidation, basic conceptual definitions of sales transactions, and issuance of proper documentation and authority of the Ministry of Finance and Public Credit to estimate income.

21.02 BUSINESS TAXES:

Single Rate Businnes Tax.

(Law of Sept. 28, 2007). Single Rate Business Tax (Impuesto Empresarial a Tasa Unica —IETU-) is effective on Jan. 1, 2008. IETU replaces Mexico's Asset Tax. IETU is minimum tax and will be paid when it exceeds Income Tax. Individuals or legal entities with tax residence in Mexico and foreign enterprises with permanent establishment will be subject to IETU for following activities: (i) Sale of goods, (ii) rendering of independent services, or (iii) lease of goods. Rate for fiscal year of 2009 is 17%. Base rate is gross income less authorized deductions.

21.03 CUSTOMS DUTY AND TAX:

Customs Law.

Law of Dec. 13, 1995 as am'd, and its Regulations of June 3, 1996, establishes that base for ad valorem duties is “normal” or free market value of imported merchandise, which must appear on customs declaration as described in arts. 64 and 66 of said Law. Law sets prices from which to determine normal value of merchandise which must reflect usual price of competition defined as that prevailing between independent buyer and seller in free market conditions. For purpose of speeding up foreign trade operations, Law provides for having taxpayer himself prepare tax returns and determine amount of tax liability payable, subject to review by customs authorities. Maquiladoras and companies with export programs authorized by Secretariat of Economy may import merchandise temporarily for return abroad after undergoing processing, manufacture or repair, and may also import merchandise to be returned abroad in same condition, in terms of said authorized programs, when companies pay tax in accordance with Title II, applicable to entities, of Income Tax Law and comply with requirements of control established by Secretariat of Finance and Public Credit in general rules.

Temporary importation of fuel, lubricants, materials to be consumed in process of production of merchandise for export; raw materials, parts or components destined to become part of merchandise of export; packages and packaging will be subject to pay Import General Tax and applicable compensatory quotes when such merchandise has been introduced into Mexico under differing or devolution program of import duties in terms of Art. 63-A of said Law.

21.04 INCOME TAX:

(Law of Jan. 1, 2002 and its Regulations of Feb. 28, 1984 as am'd and as applicable.) —Subject to tax are: Individuals or juridical persons who: (1) Are residing in Mexico, on all incomes, regardless of source; (2) are residing outside country, with permanent establishment in Mexico, on income ascribed to latter; (3) are residing outside Mexico, on income from Mexican sources different than above. Whenever taxable income has its source abroad, income tax applied by country of origin will constitute tax credit, within certain limitations. Juridical persons residing in Mexico owning at least 10% of capital of foreign company may credit not only taxes paid on dividends but also taxes assessed and paid on its profits in said foreign country. Taxpayer who is not in position to take full credit for taxes paid to foreign country given ten-year carry over of such excess foreign taxes, provided certain requirements are met. Tax brackets and amounts in pesos in income tax law are indexed in Jan. and July of each year.

Main taxes established by Law are: (a) Tax on legal entities; (b) tax on nonprofit organizations; (c) tax on individuals; (d) tax on Mexican source income of nonresidents.

(A) Tax on Legal Entities.

Applicable to juridical persons which carry out business activities related to commerce, industry, agriculture, livestock, fishing, and forestry activities, as defined in Law. These rules apply also to decentralized agencies doing business activities as well as to permanent establishments in country of foreign taxpayers residing abroad and to credit institutions.

Rates.

Tax liability is figured: Rate applicable to tax result in fiscal year is 28%. Tax result shall be determined by obtaining taxable income, which represents difference between gross income of such year and authorized deductions, minus, if result obtained is positive, profit sharing pain to employees and fiscal losses from other fiscal years. Taxpayers dedicated exclusively to agriculture, livestock, forestry or fishing activities can reduce 32.14% of corresponding income tax related with such activities.

Deductions permitted, among others: Cost of sale; expenses; investments; difference between final and initial inventories of fiscal year, when initial inventory is larger, in case of taxpayers engaged in livestock business; casualty losses due to Acts of God or force majeure; uncollectible credits; contributions to funds for research and technology development when complying with rules established in Law; creation or increase of reserves for pension or retirement plans complementary to ones established by Social Security Law; interest. With certain restrictions, payments to board members and other officer are also tax deductible.

Law permits depreciation and amortization of tangible fixed assets and of intangible assets, deferred charges and expenses. Law allows straight-line depreciation of buildings, machinery and equipment and straight-line amortization of intangible assets, deferred charges and expenses. Since fiscal year of 2002, Secretariat of Finance and Public Credit allows accelerated depreciation of assets.

No deduction is allowed for: Income taxes paid on behalf of taxpayer or third parties; indemnification, seniority and similar reserves for employees except as provided by law; goodwill; losses derived from merger, capital reduction or liquidation of entities in which taxpayer had interest or stock; interest on amount of taxpayer's debts that is more than three times greater than shareholder's equity and that comes from debts incurred with foreign resident related parties (thin capital rules); entertainment expenses; interests paid to individuals and to nonprofit organizations; losses derived from sale of assets which investment is not deductible in accordance with Law; gifts or courtesies offered to clients except when directly related to rendering of services; per diem or travel expenses except for meals, lodging, transportation and kilometer allowance outside 50 kilometers around company's premises; value added tax; tax on assets, etc. Deducibility of charitable contributions shall not exceed 7% of taxable income.

Losses of operation may be carried over for period of ten subsequent years. Note, however, this deduction is personal to taxpayer who suffered loss, not being usable by another juridical person even as consequence of merger. Nevertheless, in case of mergers surviving company may amortize its losses incurred up to moment of merger against taxable profits deriving from same types of business from which loss was incurred.

In certain cases, Secretariat of Finance and Public Credit may estimate gross income and determine tax profit by applying certain coefficients established for each kind of activity.

Payments for Single Rate Business Tax (IETU) or Tax on Cash Deposits (IDE) shall be credited against income tax payable.

Consolidated Income Tax Returns.

Main advantage in these provisions is possibility of deducting currently, at consolidated level, tax losses incurred by controlled companies, in proportion to holding companies' ownership of total capital of such controlled companies. For this purpose, holding company for tax purposes is that company which: (a) Is resident of Mexico, (b) directly or indirectly holds at least 50% of shares with voting rights of controlled companies, and (c) in no case 50% or more of its shares with voting rights are owned by another corporation unless said company resides in country that has executed agreement of interchange of information with Mexico. 28% tax rate is applied to consolidated tax. For this purpose, amount so included will be total tax result of all controlled companies and holding company itself, in accordance with certain rules contained in law.

In order to consolidate, Secretariat of Finance and Public Credit has to grant specific authorization. Holding and controlled companies must meet following requirements: (a) holding company must have written consent of each of controlling companies and (b) be obliged to prepare financial statements under provisions set forth in Fiscal Code of Federation. Following entities do not qualify for filing consolidated returns: Companies that are not taxpayers referred to in Title III of Law, companies which are residents of foreign countries regardless of their possessing permanent establishment or fixed base in national territory, credit institutions, insurance companies, auxiliary credit organizations, and brokerage and exchange houses. Additionally, civil societies and associations, and cooperative societies or companies undergoing liquidation are not entitled to consolidating provisions.

(B) Tax on Nonprofit Organizations and Fixed Income and Common Investment Companies.

These rules apply to juridical persons who are not among those contemplated under Tit. II of Law (corporations and other organizations). Taxpayers will be those who own organization concerned. Said taxpayers are taxed on their corresponding individual income.

(C) Individuals are Subject to.

(a) Tax on Labor Income.

This tax applies to salaries of any kind and compensations pursuant to rescission or termination of employment agreements. Following are included: Fees of administrators, corporate inspectors, directors, general managers, remunerations to officers and employees of Government.

Fees are treated as salaries when services are carried out on premises of person paying fees.

(b) Tax on Business or Professional Income.

Applicable to individuals who obtain revenues from conducting business activities (commerce, industry, agriculture, livestock, fishing and forestry) or rendering of professional services. (Fees of professionals, artists, agents of credit institutions, insurance companies or custom houses when not rendering subordinate personal services). Individuals obtaining income from these kinds of activities may deduct necessary expenses and investments. Nonresident individuals with fixed base of operation in Mexico are subject to tax.

(c) Rental income

Derived from lease or sublease contracts and earnings from non-amortizable participation certificates. Individuals may deduct yearly land tax, maintenance expenses, interest on loans used to buy, construct or renovate real estate or they may take allowed standard deduction which is 35% of rental income and yearly land tax paid.

(d) Transfer of Goods.

Taxpayer with income derived from any transfer of goods except by cause of death, donation, merger of corporations or from alienation of bonds, securities or other negotiable instruments; must effectuate provisional payment on each operation, in accordance with procedure established in Art. 154 of Law.

(e) Acquisition of Assets.

Provisional withholding of tax assessed on income herefrom shall be made at rate of 20% on income received from donations, treasuries, acquisition by prescription etc., without any deduction.

(f) Dividends and profits

Dividends and profits distributed by juridical persons resident in Mexico are taxable according to special rules of Tit. IV. Tax payment at rate of 28% is absorbed by distributing entity.

Taxpayers may credit against tax assessed on individuals residing in Mexico, Mexican income tax paid by juridical persons decreasing dividend or profit in accordance with Art. 165 of Law. In this case income obtained must be added to other income of taxpayer in preparing his annual return.

(g) Interest

Interest from bonds, debentures, certificates of credit institutions, mortgage certificates, negotiable instruments, loans or other credits of credit institutions and auxiliary organizations, amortizable participation certificates in real property and ordinary participation certificates and proceeds deriving from hedging operations, paid to individual residents of Mexico or received by them are subject to withholding tax of 0.85% (for 2009) of paid interest when such securities are classified as traded among general investing public; otherwise, such interest income would be considered normal gross interest income, subject to regular individual tax rates.

(h) Prizes

Income from prizes obtained by individuals residing in Mexico from lotteries, raffles, gambling and competitions of all kinds is taxed at final rate of 21% or 1% when local tax is 6%. These tax rates apply to gross income without deduction.

(i) Other Income

Other income of individuals includes among others: Fees for guaranties; income from dividends received from residents outside Mexico; income from royalties for use or exploitation of author's rights by third parties; amounts received from special personal savings accounts with exceptions indicated by law; amount of debts forgiven by creditor or paid by another person; moratory interests and indemnification for damages.

Interest paid to Federal Government, States, Municipalities, decentralized agencies when their activities are not preponderantly business, political parties or associations acknowledged by law or entities authorized to receive deductible donations are not subject to withholding.

Among exempt incomes appear: Payments other than salaries received by employees of general minimum wage when not exceeding legal minimum wages established by labor law; limitation is imposed on exemption from tax of social welfare benefits granted in form of disability subsidies, educational scholarships, day-care centers, cultural activities, sports, and other activities of similar nature, whenever sum of both salaries and social welfare benefits exceed amount of seven times minimum wage of economic area of taxpayer, all such social welfare benefits in excess of one annual minimum wage of economic area of taxpayer are taxable; Social Security benefit pensions for retirement, disability, dismissal or by reason of employee's death; compensation for professional risks or sickness; bonuses to employees at end of year; fees of foreign diplomatic and consular representatives, employees of foreign embassies, with citizenship of said represented country, members of scientific delegations etc.; interests paid by credit institutions, when interest results from checking accounts, for deposits of wages and salaries, pensions, retirement funds or savings deposits, when average daily invested balance does not exceed amount equivalent to five times annual minimum wage salary of Federal District; income from inheritance income; income from sale of shares from publicly held investment companies; interest paid by banking institutions on savings accounts; from donations among spouses or between direct ascendants or descendants with certain limitations; income derived from royalties for use or exploitation of author's rights by third parties, when not exceeding amount equivalent to 20 times annual minimum wage salary of geographical area, except in case of individuals who, in addition to receiving royalties, receive from same pay or either fees or salaries, when person who received royalties is partner of more than 10% of capital stock of juridical person or when royalties derived from ideas, publicity phrases, logotypes, emblems, distinctive stamps, industrial models, operative manuals or pieces of art, this exemption will not apply when income is derived from utilization of written or musical works created by taxpayer in entrepreneurial activities other than selling his work to or rendering his services for public.

General deductions for individuals residing in Mexico are: Medical and dental fees as well as hospital expenses incurred by taxpayer and his/her spouse, children or person living with him in concubinage and his direct ascendants or descendants when said persons did not receive more than minimum wage salary yearly; funeral expenses; donations to public services or charity institutions. Contributions to educational institutions are expressly authorized except in case of donations made to cover tuition or fees for services. Premiums on medical insurance, real interest paid on mortgages, etc. Additional cross-references are made to sections of law covering corporations. Thus, requirements for deductibility will be consistent for both individuals and corporate entities.

Rates.

Individuals residing in Mexico are subject to rates ranging from 1.9% to 28% on taxable income.

(D) Tax on Mexican Source Income of Foreign Country Residents.

Foreign residents who obtain any income are required to pay income tax when said income arises from sources of wealth located in Mexican territory.

Payments made for account of foreign country residents are subject to tax. Salaries, commissions and fees for intermediation services rendered outside Mexico are not subject to tax.

Income tax is calculated on basis of specified rates applied to gross income received. Deductions are allowed on expenses and other disbursements made abroad when directly connected with business activity subject to Mexican taxation. Foreign country resident may elect to be taxed on income net of expenses provided it has qualified representative in Mexico, who meets following requirements: (a) He is resident of Mexico or foreign resident with permanent establishment in national territory; (b) he retains for five years supporting evidence of tax paid by him on behalf of foreign country resident. Representative is jointly liable with those he represents for payment of tax due.

Law sets forth specific rules for determining when certain categories of income will be considered Mexican source income subject to income tax. For instance: Salaries and other payments made by employer for personal services rendered within Mexico are subject to tax with some exceptions. Tax rates are 15% and 30% of gross income received and must be withheld by party making payment.

Professional fees are subject to tax at rate of 25%; same tax rate will be applicable for payments made to Members of Board of Directors, Statutory Examiner, General Manager, etc.

Salaries, professional fees and other payments are not subject to tax when paid to foreign country resident by individual or juridical entity without permanent place of business in Mexico or if such permanent place of business exists, if particular services are unrelated to such establishment. This exemption applies only when service is for less than 183 days in 12 month period.

Income from lease of immovable located in Mexico is subject to tax at rate of 25% on gross income.

Rental income from movable goods used within country for commercial, industrial, agricultural, cattle growing and fishing activities is subject to tax at rate of 25% on gross income. In case of containers and also of aircraft or vessels with concession of Federal Government or permit for exploitation applicable tax rate will be 5%.

Income from distribution of dividends or profits by companies resident in Mexico is subject to pay tax at rate of 28% and it is obligation for Mexican companies that pay such dividend in terms of Art. 10 of law.

Income from interest earned on capital deposited or invested in Mexico is subject to tax at following tax rates: (a) 10%, on interest payable to foreign governmental financial institutions and foreign banks, duly registered with Ministry of Finance and Public Credit; (b) 21%, on interest paid by credit institutions to nonresidents not included above; interest paid to foreign resident suppliers for sale of machinery and equipment that are part of purchaser's fixed assets; interest paid to finance acquisition of assets (machinery and equipment) and in general for working capital loans or for trading, provided legal entities are registered at Ministry of Finance And Public Credit; (c) 15% on interest paid to reinsurance companies; (d) 4.9% on interest paid to foreign financial entities when Federal Government participates in their capital stock; (e) 28% on other types of interest. Law considers interest income to be Mexican-source if party paying interest is resident in Mexico, or, if not resident in Mexico, such party has permanent place of business in Mexico or when capital is placed or invested in Mexico and interest is paid to foreign residents from bonds, securities, and other credit instruments (different from shares of stock), which are classified as traded among general investing public.

During 2008 and 2009, withholding tax rate applicable to interest paid to foreign banks registered before Ministry of Finance and Public Credit, so long as effective beneficiary resides in country with which Mexico has income tax treaty for avoidance of double taxation, is 4.9%.

Concept of interest includes yields on credits of any kind; premiums paid on securities lending; discounts for placement of securities, bonds, or debentures, fees or payments made as result of opening or guaranteeing credits; payments to third party as result of acceptance of aval, granting of guarantee or responsibility of any kind; gains from selling instruments issued among general investing public, etc.

Income from financial leasing of assets used in Mexico is subject to tax at rate of 15%, on amount covenanted as interest. Taxable interest income of nonresidents includes compensation for guarantee of loans; applicable rate of tax depends on who renders guarantee service, and nature of loan.

Gains on sale of bonds, securities, and other credit instruments (different from shares of stock), which are classified as traded among general investing public are also taxable as interest income; tax shall be computed by applying rate due in accordance with effective beneficiary of operation, as provided in Art. 195 of Law. Gains on sale of securities through authorized securities exchange or on broad-based securities market pursuant to rules issued for such purpose, are exempted from tax.

Income from royalties paid for temporary use of railroad cars is subject to tax at rate of 5% and royalties other than mentioned before and for technical assistance applicable tax rate will be 25%. In case of royalties for temporary use or enjoyment of patents or certificates of invention or improvement, trademarks, and trade names, as well as for advertising, rate applicable 28%.

Income from services related to construction, installation maintenance of immovable goods performed in Mexico is subject to withholding tax at rate of 25% on gross income. Election is available for payment of tax at rate of 28% on net income provided foreign country resident has qualified representative in Mexico.

Income from sale of immovable assets located in Mexico is subject to tax at rate of 25% on gross income. Election is available for payment of tax at rate of 28% on net gain provided sale is made in form of public deed to purchaser. When he is not resident of Mexico and has no qualified representative in Mexico, Mexican resident payor of goods or services of nonresident assumes tax responsibility arising from transaction. When real property is acquired by resident of foreign country for more than 10% below its appraisal value, difference is taxable income of nonresident. Amount of tax on income so obtained will be 25% of profit on acquisition, payable within 15 days after authorities advise nonresident of their assessment.

Income from sale of shares or negotiable instruments issued by companies organized under Mexican law, whether or not sale takes place in Mexico, is subject to tax at rate of 25% of gross proceeds. Election available for payment of tax at rate of 28% of net gain.

21.05 LOCAL GOVERNMENT TAXES:

Local Income and Other Taxes.

Federal District and the several states have their own revenue laws, taxing several activities, including property tax, real estate acquisition tax, and payroll tax. Rates in States are similar. In addition there are excise taxes on products or activities.

21.06 MOTOR VEHICLE TAXES:

Tax on Ownership and Use of Vehicles.

Regulated by Law on subject of Dec. 19, 1980 as am'd. Amount of tax is determined according to specific kind of vehicle. Electric and hybrid vehicles, tax rate is 0%.

Tax on New Automobiles.

Regulated by Law on subject of Dec. 18, 1996 as am'd. Amount of tax is determined according to specific kind of vehicle. During 2009, new electric, hybrid and hydrogen vehicles are exempt.

21.07 TAX INCENTIVES AND EXEMPTIONS:

Special Tax Incentives.

Assembly Plants.

Customs Law, Regulations of June 3, 1996 and Decree of Oct. 31, 2006 on promotion and operation of assembly plants as am'd. Assembly plants are authorized to sell in domestic market percentage of value of annual production. Temporary importation of goods for assembly and finishing of: (1) Raw and auxiliary materials; (2) machinery, apparatus, instruments and equipment; (3) spare parts; (4) tools and accessories for production and security, as well as manuals and blueprints; (5) containers, packaging material, labels and booklets; (6) computer, telecommunications and administrative equipment.

Persons who carry out temporary importation of merchandise mentioned above are obligated to pay import general tax, when merchandise is: exported or returned after authorized period to U.S. or Canada; used as material in production of other merchandise, after authorized period exported or returned to U.S. or Canada, or will be substituted by identical or similar merchandise used as material in production of other merchandise, after authorized period exported or returned to U.S. or Canada.

Free Zones and Perimeters.

(Arts. 136-142 of Customs Law of Dec. 13, 1996 and its Regulations and Decree of Dec. 22, 2008). Some industries located in border areas herein may import goods duty-free except alcoholic beverages, beer, cigarettes, cigars and race horses,. For tax purposes free zones and perimeters deemed separate from rest of Mexico; goods brought from abroad into such areas not deemed import into Mexico; goods sent from areas to rest of Mexico, deemed import; goods sent from rest of Mexico to areas, return to regimen on borders areas.

21.08 VALUE ADDED TAX:

Added Value Tax (Law of Dec. 22, 1978 as am'd; Regulations Feb. 28, 1984 as am'd).—Applies to sales, use and temporary possession of goods, independent services rendered and to importation of goods and services.

Any person, corporation or economic entity engaged in above mentioned business activities, is subject to tax. Added value tax applies to production and marketing of goods but not to their exportation.

Rates.

General rate is 15%.

Credit against Tax.

Tax paid for importation of services and goods which are strictly necessary may be credited against value added tax due in proportion that tax paid on imported goods is creditable.

Exemptions.

Among others: gold; gratuitous services; public transportation not requiring federal permit or concession; life insurance; books; medical fees.

21.09 TAX ON CASH DEPOSITS:

(Law of Sept. 28, 2007). Cash Deposits Tax (Impuesto a los Depósitos en Efefctivo—IDE-) is effective on July 1, 2008. Any person, individual or legal entity will be subject to IDE for all deposits in cash, in national or foreign currency, in any account they have in entities forming part to Mexican financial system, for up to accumulated amount of $25,000 pesos per month. This tax will be paid on sum which exceeds such amount. Following persons are exempt from IDE: (i) Government entities, (ii) legal entities with no lucrative purposes; (iii) institutions of financial system for deposits in cash, derived from its financial intermediation; and (iv) individuals for deposits in cash which are exempt for Income Tax purposes. Tax rate is 2%, which will be withheld by financial institutions. IDE paid in year will be creditable against Income Tax.

21.10 SPECIAL TAX ON PRODUCTION AND SERVICES:

(Law of Dec. 19, 1980 as am'd; Regulations Nov. 30, 2006 as am'd).—Individuals and legal entities must pay this tax for sale and importation of alcoholic beverages and beer, alcohol, denatured alcohol, and uncrystallizable honey, tobacco, gasoline, and diesel. This tax shall also be paid for rendering of following services: (a) Commission, mediation, agency, representation, brokerage, consignment and distribution, regarding sale of alcohols, beers and tobaccos; (b) In cases when gambling and raffles are carried out in agreement with Federal Law of Gambling and Raffles, those carried out by decentralized organizations or institutions, as well as games and contests where prize is obtained by participant's dexterity in use of machines, where electronic visual images (numbers, symbols, shapes, etc.) are utilized and are made in country. Is indirect tax since taxpayer does not pay it directly, it is transferred to his/her clients (except for importation of goods).

Rates.

Rate for beer and alcoholic beverages from 25% to 50%; for alcohol, semi-processed alcohol and uncrystallized, 50%; for cigarettes and cigars, from 30.4% to 160%; for gasoline and diesel, published on monthly basis; and for carrying on gambling activities and raffles, 20%.

22 TRANSPORTATION

Highway Transportation Sector is regulated by Roads, Bridges and Highway Transportation Law published on Dec. 22, 1993.

Purpose of this law, specifically about land transportation, is to regulate highway transportation services, other services related to it and transit on federal roads, highways or bridges.

In Mexico, highway transportation, its related services and transit operated on federal roads, highways or bridges are under jurisdiction of federal authorities.

Permit given by Ministry of Communication and Transportation is required in order to be able to render highway transportation services or any service related to it, such as operation and exploitation of load, passage and tourism services, small goods, delivery or stage coach services.

Law considers as federal highway transportation services: (i) Passenger services, (ii) tourism services, and (iii) load services. It also classifies as related services to federal highway transportation services following: (i) Passenger terminals, (ii) inside load terminals, (iii) dragging, saving and deposit of vehicles, (iv) verification units, and (v) small goods, delivery or stage coach services.

No assignments, liens or encumbrances of any kind may be created in favour of any foreign government or state. Ministry of Communications and Transportation is entrusted with authority to impose penalties for infringements of Law.

Only Mexican nationals and Mexican corporations are entitled to obtain permit to retal these kind of services.

22.01 MEXICAN PORT LAW:

Mexico's Port sector is regulated by Port Law published in July 19, 1993 and regulations deriving from Law dated Nov. 21, 1994.

Purpose of this Law is to regulate ports, terminals, marinas and port installations, their construction, use, exploitation, operation and administration, as well as port services, excluding those dedicated to military purposes, which are governed by applicable legislation.

Law of Ports is considered to be matter of public policy and federal in nature; and therefore all matters relating to activities mentioned in paragraph above are subject to jurisdiction of federal authorities. Ministries of Social Development and of Communications and Transportation are governmental agencies entrusted to jointly defining and determining which federal public property will become port harbor enclosures, terminals and marinas. Permit or concession, as case may be, is required for use, exploitation and beneficial use, of public domain property at ports, terminals and marinas, as well as for any related construction works and rendering of port services; concessions are granted by public bid; titles to concessions granted to integral port administrators may provide that operation of terminals, marinas and facilities and rendering of port services must be carried out by third parties.

Concession duration is determined on discretionary basis by Ministry of Communications and Transportation. Nevertheless, Law establishes that Concession may be granted for term up to 50 years and it can be extended for equal term at discretion of Ministry.

No assignments, liens or encumbrances of any kind may be created in favour of any foreign government or state. Ministry of Communications and Transportation is entrusted with authority to impose penalties for infringements of Law.

General concepts which are basic to Mexican Port Law include:

(1) Port.

Site on coast or riverbank designated as such by Federal Executive to receive arrivals, give shelter and render services to vessels. It is composed by port grounds and, in its case, development zone, access and common areas for internal navigation related to its operation; with services, terminals and installations, public and private, for transfer of goods and change of passengers between in-land water transportation that connects.

(2) Terminal.

"Terminal" is in-port or out-of-port unit comprising works, facilities and areas, including marine zone, permitting entire undertaking of port operation for which it is meant.

(3) Port Facility.

Legal definition of port facility is infrastructure works, buildings and superstructures, built at ports or elsewhere destined to serve vessels, render port services or for shipbuilding and repair.

(4) Port Services are those rendered at ports, terminals, marinas and port facilities to serve vessels, as well as those rendered during transfer of people and goods between ships, to land, or to other means of transportation.

(5) Marina is set of port facilities and adjacent water and land areas, as well as organization specialized in rendering services to sports or recreational vessels.

(6) Harbor enclosure is area composed of private abutting property or of private domain of federation, federal entities' or municipality's property, for establishment of industrial facilities and of services or of any other facilities related to port function and, in its case, expansion of port.

Integral port administration ("IPA") arises "… when the planning, programming, development and other actions relating to the property and services of a port are entrusted wholly to a corporation, by means of a concession for the use, beneficial utilization and exploitation of the respective property and services."

This particular kind of administration is absolutely autonomous in its operative and financial management; it has its own politics and internal procedures with no limitations other than provided by applicable Mexican legislation.

Concession.

Art. 20 of Law of Ports provides that only requirement to use, exploit, and make beneficial utilization of public property at ports, terminals and marinas, as well as to undertake construction of works thereat and to render port services, is to have concession or permit granted by Ministry of Communications and Transportation.

Port concessions are granted by public bid called for by Ministry of Communications and Transportation acting on its own, or called at request of any interested party intending to become IPA holding title to integral concession, or operator of terminal, port facility or marina (not found within scope of action of IPA) who would hold title to specific concession. Rights and obligations deriving from concession may be assigned to third parties, provided that five years of its effective term have elapsed, that assignor has complied with all its obligations and that assignee meets same requirements taken into consideration when original concession was granted.

Terminals, Marinas, and Port Facilities.

Operation of terminals, port facilities and marinas, as well as supply of port services must, in principle, be carried out or rendered by third parties other than IPAs, except in cases when their titles to their concessions expressly authorize them to do so. Under Law, they are classified in two categories: (i) Public: when there is obligation to have them available to any solicitor, and (ii) Private: when title holder destines terminal, marina or port facility for its own interests or interests of third party by means of previous contract.

Foreign Investment.

Only Mexican nationals and Mexican corporations are entitled to own property of land, waters and accessions, or to obtain concessions for exploitation of mines or waters. Foreigners are, in principle, not allowed direct ownership of land or waters. (Art. 27 of Constitution). Nevertheless, foreigners may become beneficiaries of trusts created to acquire rights over immovable property located within restricted zone.

Port Operation.

Beneficial use of port goods and render of port services jointly constitute so-called “Port Operation” under Law. Port services are classified in three categories, which are: (i) Those rendered to vessels for inshore navigation, such as pilotage, towing, mooring and tendering; (ii) general vessel services such as victualling, drinking water supply, refueling, communications, electric power supply, garbage or waste collection and waste water disposal; and (iii) services for handling of goods and merchandise, such as loading and unloading, tendering, storage, stowage and in-port transportation are called cargo port services. Title to concession of integral port administration may provide that port operation and port services be carried out by third parties, in which event, integral port administrator must execute agreements for partial assignment of rights subject to concession with winners in bidding procedures.

22.02 SHIPPING:

(Navigation and Maritime Commerce Law of July 1, 2006).

Legal acts related to national ships while in foreign waters are subject to Mexican law in whatever is compatible with the application of its own laws by the foreign state, and foreign vessels in territorial water are subject to Mexican laws.

Purpose of Navigation Law and Maritime Commerce (“Law”) is to regulate all general channels of communication by water, navigation and services rendered in those channels, as well as all acts, facts, and goods related to maritime trade. Such Law does not regulate vessels and naval artifacts property of Ministry of Marine.

In Mexico, navigation and shipping are governed by federal authorities.

Navigation and shipping are under jurisdiction of federal authorities. Mexican vessels must be registered in National Public Maritime Registry. Mexican corporations and individuals may own Mexican vessels. National Maritime Public Registry shall also record acquisition, transfer or lease of any vessel; concessions to establish maritime and port installations or shipyards, drydocks and repair docks and other maritime and port services; incorporations and bylaws of maritime corporations, sale or encumbrances of same, as well as any contract which said corporations execute as public document; mortgages or other encumbrances on ships. There are provisions governing vessels and their crews and maritime contracts including leases, charter contracts, sales, insurance and averages.

23 TREATIES AND CONVENTIONS

23.01 TREATIES:

International law aspects of treaty law are governed by Vienna Convention on the Law of Treaties, in force since 27 Jan. 1980. Mexico ratified Convention on 25 Sept. 1974. Other legal aspects on treaties are governed by Law on Treaties of 2 Jan. 1992. Constitutional authority to enter into treaties is vested in President. Senate, by majority, must approve treaties signed by Executive. If ratified by President treaty becomes Supreme Law of the Land. Treaties are published in Official Gazette of Federation.

Mexico has entered into large number of bilateral and multilateral treaties and agreements of commercial and fiscal nature.

Regarding Conventions for avoidance of double taxation and prevention of fiscal evasion, Mexico is party to following agreements: Argentina (limited to vessels and aircrafts), published on 19 Jan. 1998 and on transportation 19 Mar. 2004; Australia, published on 13 Feb. 2004; Austria, published on 8 Dec. 2004; Barbados, published on 15 Jan. 2009; Belgium, published on 6 Jan. 1997; Brazil, published on 1 Jan. 2007; Canada, published on 20 June 2007; Chile, published on 12 May 2000; China, published on 28 Feb. 2006; Czech Republic, published on 28 Jan. 2003; Denmark, published on 27 May 1998; Ecuador, published on 4 Apr. 2001; Finland, published on 11 Aug. 1999; France, published on 16 Mar. 1993; Germany, published on 16 Mar. 1994; Greece, published on 31 Dec. 2005; Iceland, published on 31 Dec. 2008; Ireland, published on 9 Aug. 2000; Indonesia, published on 8 Dec. 2004; Israel, published on 11 Aug. 2000; Italy, published on 29 Mar. 1995; Japan, published on 6 Jan. 1997; Korea, published on 16 Mar. 1995; Luxembourg, published on 6 Feb. 2002; Netherlands, published on 31 Dec. 1994; New Zealand, published on 15 June 2007; Norway, published on 26 Aug. 1996; Poland, published on 18 Oct. 2002; Portugal, published on 3 Apr. 2001; Romania, published on 28 Nov. 2000; Russia, published on 20 May 2008; Singapore, published on 23 Aug. 1996; Slovakia, published on 28 Sept. 2007; Spain, published on 31 Dec. 1994; Sweden, published on 10 Feb. 1993; Switzerland, published on 24 Oct. 1994; U.K., published on 15 Mar. 1995; U.S., published on 3 Feb. 1994, 25 Jan. 1996 and 22 July 2003.

Mexico is presently negotiating conventions for avoidance of double taxation with Hungary, India, Malaysia, Nicaragua, Russia, and Venezuela.

Mexico is party to bilateral trade and commercial agreements with several States: Argentina, published on 1 Dec. 1986; Belgium, published on 29 Jan. 1954 and 28 Jan. 1986; Bulgaria, published on 9 Mar. 1978 and 26 Feb. 1979; Colombia, published on 11 July 1989; Costa Rica, published on 18 Oct. 1950; Cuba, published on 27 July 1976 and 22 Apr. 1988; Chile, published on 30 Nov. 1991; China, published on 4 July 1975; Czech Republic, published on 8 Jan. 2001; Denmark, published on 6 May 1981; Egypt, published on 17 Aug. 1966; Finland, published on 28 July 1976; France, published on 11 May 1982 and 18 Mar. 1994; Germany, published on 8 Apr. 1997; Greece, published on 30 Dec. 1964; Hungary, published on 26 July 1976; India, published on 19 Dec. 1983; Italy, published on 26 Mar. 1953 and 29 July 1994; Jamaica, published on 28 July 1976; Kuwait, published on 7 Mar. 1977; Poland, published on 22 Feb. 1977; Portugal, published on 11 Aug. 1981; Republic of Korea, published on 17 Mar. 1969 and 21 Aug. 1990; Romania, published on 7 Aug. 2000; Russia, published on 20 Jan. 1975 and 21 Jan. 1978; Slovakia, published on 17 Jan. 2003; Spain, published on 5 Jan. 1978 and 29 Nov. 2000; Switzerland, published on 31 Aug. 1951.

Regarding Free Trade Agreements Mexico is party to bilateral treaties with Bolivia, published on 11 Jan. 1995; Costa Rica, published on 10 Jan. 1995; Chile, published on 23 Dec. 1991; Nicaragua, published on 1 July 1998; and Chile, published on 28 July 1999. Of paramount importance is North American Free Trade Agreement entered with Canada and U.S., published on 20 Dec. 1993; also, Mexico is party to Multilateral Agreement of Commercial Free Trade with Costa Rica, El Salvador, Guatemala, Honduras and Nicaragua dated 20 Aug. 1992 and Free Trade Agreement with Columbia and Venezuela published on 26 Dec. 1996. Mexico has signed significant Treaty on Economic Partnership, Political Coordination and Cooperation Agreement with European Union, published 26 June 2000, in force as of 1 July 2000 as well as Free Trade Agreement with Israel, published on 28 June 2000, Free Trade Agreement with Guatemala; Honduras and El Salvador, published on 14 Mar. 2001; with Uruguay 26 May 2004; and Japan published on 31 Mar. 2005.

Concerning international agreements for promotion and protection of foreign investments, Mexico is party to agreements with Spain, published on 19 Mar. 1997 and 19 May 2008; Switzerland, published on 22 Aug. 1998; Argentina, published on 28 Aug. 1998; Netherlands, published on 10 July 2000; Denmark, published on 30 Nov. 2000; Finland, published on 30 Nov. 2000; France, published on 30 Nov. 2000; Portugal, published on 8 Jan. 2001; Germany, published on 20 Mar. 2001; Austria, published on 23 Mar. 2001; Sweden, published on 27 July 2001; Uruguay, published on 1 Mar. 2002; Cuba, published on 3 May 2002; Korea, published on 9 Aug. 2002; Greece, published on 11 Oct. 2002; Italy, published on 17 Jan. 2003; Luxembourg, published on 19 Mar. 2003; Czech Republic, published on 25 Mar. 2004; Iceland, published on 6 June 2006; Panama, published on 19 Dec. 2006; Australia, published on 12 June 2007; Trinidad and Tobago, published on 12 Sept. 2007; United Kingdom, Published on 25 July 2007; India, published on 5 Mar. 2008. OPIC Treaty with United States of America was published 14 June 2004. Mexico joined MIGA, published on 5 Aug. 2008.

Mexico is original member of U.N. (1945) and to all international organizations of U.N. system. Mexico is also party to Organization of American States, and its related international organizations. It is also a member of World Trade Organization and Organization for Economic Cooperation and Development (OECD).

In relation to international disputes Mexico is party to Statute of the International Court of Justice, New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards dated 10 June 1958 and Inter-American Convention on International Commercial Arbitration of 30 Jan. 1975.

In relation to International Contracts, Mexico is party to United Nations Convention on Contracts for International Sale of Goods (11 Apr. 1980).

Regarding Conflict Rule Conventions Mexico is party to Inter-American Convention on Uniformity on Powers of Attorney Regime, published on 17 Feb. 1940; The Hague Convention Abolishing the Requirement of Legalization for Foreign Public Documents (5 Oct. 1961); The Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters (18 Mar. 1970); Inter-American Convention on Letter of Credit, Promissory Notes and Invoices (30 Jan. 1975); Inter-American Convention on Legal Regime of Powers of Attorney to be Used Abroad (30 Jan. 1975); Inter-American Convention Rogatory Letters (30 Jan. 1975 and 9 May 1979); Inter-American Convention on Evidence of Foreign Law (8 May 1979); Inter-American Convention on Conflict of Laws concerning Corporations (8 May 1979); Inter-American Convention on General Rules of Private International Law (8 May 1979); Convention on the Statute of Limitations on Contracts for International Sale of Goods (11 Apr. 1980); and Inter-American Convention concerning Applicable Law on International Contracts (17 Mar. 1994). See category 16 Intellectual Property, topic 16.01 Copyright, subhead Treaties.

1
MONGOLIA LAW DIGEST

—Scope —

Revised for 2008 edition by

LEHMAN, LEE & XU, of China, Mongolia and Macao.

Abbreviations used are: Account.L. for Accounting Law; Altanbulag.F.T.Z.L. for Altanbulag Free Trade Zone Law; Anti-Corrupt. Law for Anti-Corruption Law; Arbit.L. for Arbitration Law; Bank.L. for Banking Law; Bankruptcy.L. for Bankruptcy Law; Civil.L. for Civil Law; Civil.Proc.L. for Civil Procedure Law; Comp.L. for Company Law; Cons.L. for Constitution Law; Consumer.P.L. for Consumer Protection Law; Coop.L. for Cooperation Law; Cur.Settle.L. for Currency Settlements Law; Cus.L. for Customs Law; Cus.Tariff.L. for Custom Tariff Law; Energy.L. for Energy Law; Entity.Income.Tax.L. for Economic Entity and Organization Income Tax Law; Fam.L.

for Family Law; Foreign.Inves.L. for Foreign Investment Law; Free.Z.L. for Free Zone Law; Gen.Tax.L. for General Taxation Law; Health.L. for Health Law; Hunt.L. for Hunting Law; Immovable.Prop.Tax.L. for State Tax of Immovable Property Law; Ind.Income.Tax.L. for Individual Income Tax Law; Insur.L. for Insurance Law; Lab.L. for Labor Law; Land.Fee.L. for Land Fee Law; Land.L. for Land Law; Legal.St.Foreigners.L. for Legal Status of Foreigners Law; Mine.L. for Minerals Law; Part.L. for Partnership Law; Pat.L. for Patent Law; Petrol.L. for Petroleum Law; Reg.Entity.L. for Registration of Legal Entities Law; Rights.Own.Reg.Prop.L. for State Registration of Right to Ownership of Property and Other Rights Related to Property of Law; Securities.Mar.L. for Securities Market Law; Special.D.Tax.L for Special Duty Tax Law; T.M. and Geo.Indications.L. for Trademark and Geographic Indications Law; Tech.T.L. for Technology Transfer Law; Travel.T.L. for Travel and Tourism Law; Unfair.C.L. for Unfair Competition Law; VAT.L. for Value Added Tax Law; Wat.L. for Water Law.

Note: This revision incorporates legislation through Nov. 16, 2007.

1 INTRODUCTION

1.01 PRELIMINARY NOTE:

Formerly a tightly controlled Soviet satellite, Mongolia embarked in 1990 on radical economic and political reform program intended to transform it from communist one party state to free-market multiparty democracy. Encouraged by changes in Soviet Union, citizens staged pro-democracy demonstrations in winter of 1990 which led to Mongolia's first free elections in June of that year. Victorious democratic coalition, led by Prime Minister Byambasuren, pushed through radical reformist agenda of more than 25 new laws, as well as numerous amendments to existing legislation. Government goals included rapid privatization of more than 80% of economy, liberalization of foreign investment and trade policy, tax overhaul, banking reform, and enactment of new constitution protecting political freedom and human rights.

Fourth Presidential election in Mongolia was successfully conducted on May 22, 2005. N. Enkhbayar, from MPRP, was confirmed by Parliament on June 3 as officially having right to take office as President, Mr. N. Enkhbayar received 53.4% of vote and his main opponent was M. Enkhsaikhan, who is from Democratic Party, got 20.05% of vote. B. Jargalsaikhan from Republican Party was next in running, with 13.83%, followed by candidate from Motherland Party B. Erdenebat, who took 11.33% of vote. J. Yadamsuren, Chairman of the General Election Committee, said that there were no breaches of conflict serious enough to influence result. He also mentioned that 101 foreign observers and 34 media reporters were involved in reporting election. According to Official figure of General Election Committee, 74% of 1,237,000 voters voted across country. Compared to last Presidential election, in which over 81% of all voters voted, percentage of voters decreased. But attendance of all percentage of voters was sufficient enough for election.

Economic growth and foreign investment is on increase. Mongolia appears to be both politically and economically stable, though unemployment remains high.

Since 1995, private sector value-added has grown by 48.2% measured in constant prices, private sector's share of GDP has risen to 77.8% while private sector's share of industrial value-added has risen to 70.3%. GDP has grown by 5.6% over 2003; per capita GDP is US$1,840, main contribution to GDP is made by mining and cashmere processing sectors.

As of June, 2005, over 4,250 joint ventures and foreign owned companies from over 70 countries have been registered with FIFTA (Foreign Investment and Foreign Trade Agency of Mongolia). Total foreign investment capital amounts to over US$1,300 million. Major investing countries include China, Russia, South Korea, USA, Japan and Germany.

Process of developing more sophisticated legal system has progressed with promulgation of extensive legislation and amendment to prior acts including Special Duty Tax law, Patent law, Economic Entity and Organization Income Tax law, Travel and Tourism law, Value Added Tax law, Government law, Social law, Registration of Legal Entity law, Telecommunication law, Licensing law.

1.02 CURRENCY:

See category 3 Business Regulation and Commerce, topic 3.01 Banks and Banking.

Rate of Tugrik to USD is US$1 = 1,165-1,183 MNT as of Nov., 2007.

Exchange Controls.

Circulation of currency consists of activities such as selling, buying, holding, lending, settling transactions with, and transferring currencies within and out of Mongolia. Banks shall deal with foreign currency at same time and same manner as national currency. (Cur.Settle.L. Art. 9). With permission from Bank of Mongolia, commercial banks may carry out following activities related to currency circulation: (1) Non-cash transactions with respect to foreign currency; (2) buying and selling foreign currencies in form of cash; (3) opening and operating accounts using foreign currency for permanent and provisional residents; and (4) all kinds of operations involving foreign currency, such as providing credit in foreign currencies and giving guarantees. Commercial banks involved in currency circulation have following duties: (1) Report and prepare accounts on currency circulation in accordance with established regulations; (2) carry out operations which affect rate of tugrik only with permission of Bank of Mongolia; (3) secure and keep foreign currency bank accounts of customers confidential; and (4) carry out transactions involving foreign currency of customers on demand of customer and pay interest on foreign currencies held in accounts. (Cur.Settle.L. Art. 10).

Permanent and provisional residents shall only lend, transfer, buy and sell foreign currency through Bank of Mongolia and commercial banks authorized by Bank of Mongolia. Permanent residents dealing in foreign currency, in form of cash, shall sell or hold it in commercial bank except for amounts needed for daily reserves in accordance with procedure approved by Bank of Mongolia. Citizens of Mongolia and permanent resident must be registered with Ministry of Finance to provide credit, assistance, or to set up capital in foreign country. Permanent and provisional residents shall provide written guarantees and enter contracts for sale, loan, purchase, or borrowing of foreign currency from commercial banks. (Cur.Settle.L. Art. 12).

Banks, non-bank financial institutions, insurance companies, and other such commercial entities dealing with transactions worth 20 million Tugriks or more (or foreign currency equivalent to such amount) are obliged to inform Financial information office of these transactions. However, individuals and other entities are not obliged to do so, but may do so under same circumstances. (Law on fight against money laundering and against financing terrorism Art. 7).

Citizens of Mongolia, foreign citizens, and stateless persons are permitted to bring foreign currency declared at customs office through state borders of Mongolia. Permanent, provisional residents, and stateless persons are permitted to take foreign currency beyond state borders of Mongolia in following circumstances: (1) By providing document verifying that freely convertible foreign currencies have been purchased from commercial banks; (2) by providing declaration from customs office establishing that such foreign currency entered from outside Mongolia; (3) by providing certificate from State Notary Office certifying that such foreign currencies constitute gift or inheritance; and (4) by any other means provided by Law of Mongolia.

Citizen of Mongolia may take freely convertible currencies outside Mongolia in such quantities as declared to customs office unless otherwise prohibited by law. (Cur.Settle.L. Art. 13).

1.03 GOVERNMENT AND LEGAL SYSTEM:

Following popular democratic reform demonstrations in winter of 1989, existing Soviet-style constitution of 1960 was amended in May of 1990 to provide for multiparty elections. After victory of democratic coalition in election of July 29, 1990, reformist Prime Minister Byambasuren appointed draft commission to prepare entirely new constitution based upon principles of democracy, human rights and rule of law. Draft committee worked closely with American and European advisors and proposed constitution based on European parliamentary model. Draft constitution was submitted to State Great Khural June 1, 1991, and was adopted with some modification on Jan. 13, 1992.

On 15 July 2000 several amendments to Constitution became effective namely: (1) Speaker and deputy of parliament shall be elected by open ballot; (2) parliamentary terms shall be for at least 50 working days; (3) Parliament and standing committee have quorum when 50% of Parliament members are present; (4) Parliament members can also serve as government cabinet members; (5) Parliament shall be dissolved on its own or by President if unable to appoint Prime Minister within 50 days. In case of changeover, President must name new Prime Minister, and open debate on candidate within five days; Prime Minister shall consult with President about structure of government within seven days, and if not, Prime Minister should present issue to Parliament.

Highest organ of Mongolian State pursuant to new constitution is State Great Khural, unicameral parliament of 76 members. (Cons.L. Arts. 20, 21.1). Members are directly elected for term of four years. (Cons.L. Art. 21.2). Exact electoral procedure is specified by Election Law. (Cons.L. Art. 21.4). State Great Khural normally meets for two 75 day sessions per year (Cons.L. Art. 27.2), but under certain circumstances, extraordinary sessions may be called (Cons.L. Arts. 27.3, 27.4, 27.5). State Great Khural has power to enact and amend laws, set dates of Presidential and Khural elections, establish standing committees dealing with specific issues, and to appoint or remove Prime Minister. (Cons.L. Arts. 25.1, 25.6). State Great Khural also approves budget, decides whether to ratify international agreements, holds referenda, decides questions of war and peace, and declares national emergencies. (Cons.L. Arts. 25.7, 25.18).

Government, highest executive body of State (Cons.L. Art. 38), is comprised of Prime Minister and his/her cabinet members (Cons.L. Art. 39.1), who normally sit for four-year term (Cons.L. Art. 40.1). Candidates for Prime Minister are nominated by Great Khural. (Cons.L. Art. 33.1). Nominee who is elected by State Great Khural proposes cabinet which must be approved by both President and State Great Khural. (Cons.L. Art. 39). Government may be dissolved prematurely if Prime Minister or half of members of Government resign (Cons.L. Art. 43.2), or if Government receives vote of no confidence from State Great Khural.

Constitution holds Government accountable to State Great Khural (Cons.L. Art. 41.2), but it nevertheless has wide-ranging powers. Pursuant to constitution, government proposes social and economic development plan for nation, and outlines scientific and technological policy. (Cons.L. Arts. 38.2, 38.3). It is also responsible for proposing state budget (Cons.L. Art. 38.2), protecting environment (Cons.L. Art. 38.2), ensuring national security (Cons.L. Art. 38.6), and protecting human rights while enforcing public order (Cons.L. Art. 38.7).

President is head of state, and is elected for four year term through two-stage election process. (Cons.L. Arts. 30, 31.1). Parties with seats in State Great Khural nominate candidates, who then appear on ballot for national direct elections. (Cons.L. Arts. 31.2, 31.3). Candidate receiving majority of votes wins (Cons.L. Art. 31.4), otherwise two candidates with largest share of votes face each other in run-off election (Cons.L. Art. 31.5). Powers of President are limited in line with constitution's parliamentary model. President may veto legislation in part or whole, but veto may be overruled in State Great Khural by 2/3 majority. (Cons.L. Art. 33.1.1). President also has power to make law by presidential decree, but such decrees are only valid insofar as they are compatible with existing law. (Cons.L. Art. 34). Additional powers of President include status as Commander in Chief of armed forces (Cons.L. Art. 33.2) and power to conclude international treaties (Cons.L. Art. 33.1.4).

Judicial System.

Constitution provides that judicial power is vested only in courts (Cons.L. Art. 47), and that Judiciary be strictly independent and guided by law (Cons.L. Art. 49). General Council of Courts, overseeing board whose structure and membership are left unspecified, acts to maintain judicial impartiality as well as to nominate judges to courts. (Cons.L. Art. 49.4).

Supreme Court is highest judicial organ, and court of last resort for all criminal, civil and administrative matters. (Cons.L. Art. 38). Supreme Court, however, may not make rulings which involve constitution. (Cons.L. Art. 50.4). Constitution provides for Chief Justice (Cons.L. Art. 51.1), but number of judges is not specified. Judges are nominated by President from pool of candidates put forward by General Council of Courts. (Cons.L. Art. 51.2).

Procurator General and deputies are nominated by President and are appointed with consent of State Great Khural. (Cons.L. Art. 56.2). Procurator supervises registration and investigation of cases, and represents State in court proceedings. (Cons.L. Art. 56.1).

Constitutional Court supervises implementation of constitution and makes judgment on violations of its provisions. (Cons.L. Art. 66). There are total of nine judges, each serving six year terms. (Cons.L. Art. 65.1). Three each are appointed by State Great Khural, President and Supreme Court. (Cons.L. Art. 65.1). Chairman is elected from among members for three year term by majority of votes. (Cons.L. Art. 65.3). Constitutional Court may decide to take case on its own initiative, or on basis of petition from citizen, State Great Khural, President, Prime Minister, Supreme Court or Procurator General. (Cons.L. Art. 66.1). If court finds that laws, Presidential decrees, referenda, official actions or international treaties violate constitution, it submits its decision to State Great Khural. (Cons.L. Art. 66.2). Judgments are final if matter relates to violation of constitution by Government officials, or grounds for removing Government official from office; in all other matters, Constitutional Court grants final review only if its decision is rejected by State Great Khural. (Cons.L. Art. 66.3). Laws, decrees, referenda, official actions and international treaties found unconstitutional by Court are invalid. (Cons.L. Art. 66.4).

Courts and Legislature Courts.

In accordance with law, Special Administrative Courts commenced operations throughout territory of Mongolia on June 1, 2004. Before establishment of Special Administrative Courts, Aimag, and Capital City Courts, Soum, Inter-Soum, and District Courts resolved all disputes related to administrative cases. Person with administrative complaint must first submit his complaint to administrative organization that breached his rights and interests within 30 days after breach has been committed or within 30 days after he gains knowledge of breach. If no administrative organization can be identified, person may submit his complaint to Special Administrative Courts.

Legal Profession: Assignee Contract.

Under assignee contract attorney undertakes to perform on behalf of and at expense of principal certain actions, and principal undertakes to pay for service. Attorney shall perform assigned task personally unless otherwise specified. Principal has right to cancel assignment and attorney has right to refuse task at any time. Contract restricting this right shall not be considered valid. (Civil.L. Art. 399).

Attorney shall execute assignment in accordance with instructions of principal. Attorney shall have right, in interest of principal, to recede from instructions in case of necessity and it is impossible to inform principal in advance. (Civil.L. Art. 400). Principal shall accept result of assignment and provide attorney with items necessary for execution, reimburse expenses paid by attorney. (Civil.L. Art. 401). If principal alters or cancels assignment before complete execution, principal shall be liable to reimburse expenses paid in course of assignment execution and compensate for damage incurred. If there was agreement to pay fee, portion of fee due for executed tasks shall be paid. (Civil.L. Art. 402).

If personal implementation is impossible, or implementation by another would be in best interests of principal, or stipulated in contract, or principal has delegated right, attorney may transfer assignment to another person. Attorney must promptly inform principal and provide necessary information about replacing person. (Civil.L. Art. 404).

Anti-Corruption Office.

New Law on Anti-Corruption was adopted on July 6, 2006 by Parliament. Law was designed to determine legal grounds of fight against corruption, and establishment of anti-corruption organization and to govern relations arising thereof. (Anti-Corrupt. Law Art. 1).

Anti-corruption office is independent specialized state organization that promotes anti-corruption public awareness, takes preventative measures against corruption, conducts investigation and inquiry into corruption crimes and monitors income statements of subjects mentioned in law. (Anti-Corrupt. Law Art. 15). Its director is appointed by Parliament for term of six years. (Anti-Corrupt. Law Art. 21).

Human rights and personal freedoms are strongly protected by new constitution, reflecting influence of both American Bill of Rights and European constitutions. Discrimination on basis of ethnicity, language, race, age, sex, social origin, property, occupation, title, religion, conviction and education are all forbidden. (Cons.L. Art. 14). Enumerated rights include: right to life (except where State proscribes capital punishment) (Cons.L. Art. 16.1); clean environment (Cons.L. Art. 16.2); possession of private property (expropriation prohibited) (Cons.L. Art. 16.3); choice of work (Cons.L. Art. 16.4); assistance in old age (Cons.L. Art. 16.5) and free medical care (Cons.L. Art. 16.6). State guarantees right to free general education (Cons.L. Art. 16.7); right to protect intellectual property (through copyrights and patents) (Cons.L. Art. 16.8); and right to vote upon reaching age 18 (Cons.L. Art. 16.9). Freedom of association (Cons.L. Art. 16.10), religion (Cons.L. Art. 16.15), speech (Cons.L. Art. 16.16) and freedom from unreasonable search and seizure (Cons.L. Art 16.13) are similarly protected. Citizens have right to approach court to protect their rights. (Cons.L. Art. 16.14). Once in court, they may not be compelled to testify against themselves, and they are innocent until proven guilty. (Cons.L. Art. 16.14). Citizens have duty to respect and abide by laws, pay taxes and to serve in army. (Cons.L. Art. 17.1).

Human rights of foreigners in Mongolia are governed by Mongolian law and treaties concluded with relevant foreign states. (Cons.L. Art. 18.2). State has power to limit those rights of foreigners not specifically protected by international treaty, provided such limitation is necessary to ensure national security. (Cons.L. Art 18.5). Foreigners fleeing political persecution will be granted asylum provided their request is reasonable. (Cons.L. Art 18.4).

In 2001 National Human Rights Commission of Mongolia was established. Law on National Human Rights Commission regulates activity of such institute. This is same organization as OMBUDSMAN to protect human rights in Mongolia.

Local government in Mongolia is divided into 21 aimags (provinces), and its capital city, Ulaanbaatar. Aimags are further subdivided into soums; soums into bugs. Capital city is divided into districts and horoos. Each aimag, soum and district, as well as capital city, is governed by local Khurals, or parliaments. (Cons.L. Art. 59). Local social and economic policy is made within these administrative units (Cons.L. Art. 62.1), so long as their decisions are made in conformity with constitution and State Law (Cons.L. Art. 62.2).

State authority in provinces is administered by governors at each administrative level who are nominated by relevant local Khural and appointed by State Government Office. (Cons.L. Art. 60). Governor ensures observance of national laws (Cons.L. Art. 61.1) and has right to veto legislation proposed by local Khurals (Cons.L. Art. 61.2). Veto, however, may be rejected by majority vote from local Khural. (Cons.L. Art. 61.3).

1.04 OFFICE HOURS AND TIME ZONE:

Mongolia is in the +08:00 GMT time zone. Office hours are generally from 9 a.m. to 6 p.m. Mon. - Fri.

2 BUSINESS ORGANIZATIONS

—Scope —

Note: Law on Registration of Legal Entities on 23 May 2003, which entered in force from 1 Oct. 2003. This law regulates procedure of registration of all legal entities like NGO, company, representative office. (Reg.Entity.L. Art. 1).

2.01 AGENCY:

Proxy (Civil Code).

Transactions may be concluded via representatives/or proxies; if law prohibits concluding transaction with proxies, or due to nature of transaction, parties should conclude in person, such transaction shall not be concluded by proxy. Power of attorney mandate shall be created based on law or warrant. Entrusted agent shall be liable to carry out authorised activity in person. If power of attorney envisages that activity can be carried out by others, or if required in interests of principal, power of attorney may be transferred. Term of transferred power shall not be longer than principal one. Entrusted agent shall be liable to inform represented person/principal about transferring warrant and person receiving it. If agent fails to do so, agent shall bear responsibility for consequences of conduct of person receiving authority. (Civil.L. Art. 62).

Citizen or legal person with full, or partial, or limited civil legal capability can be represented by proxy. Within mandate delegated by principal, proxy shall conclude transactions with third parties on behalf of principal. Rights and obligations created by transaction shall belong solely to principal. Proxy shall be liable to exercise mandate fairly, adjusting it to principal's rights and legitimate interests. Proxy shall be liable to eliminate harm done to principal due to failure to fulfill obligations as provided by Art. 63.3 of this Law. Person represented by citizen with partial or limited civil legal capability, without consent of its legal representative, shall bear personal responsibility for any harm done, due to such representation. (Civil.L. Art. 63).

Principal may delegate mandate to proxy by oral or written means and inform third party to transactions about representation and proxy mandate. Written power of attorney shall meet following requirements: be signed by principal; legal person's warrant shall be signed by executive, carry seal on it; warrant entitling to receive, or transfer, or administer legal person's assets shall be signed by accountant and corporate executive; issued date shall be indicated; if provided by law, it should be certified by notary; if power of attorney was issued for certain period of time, duration should be indicated.

Power of attorney is issued for certain period of time and shall be valid for no more than three years, warrants without specified time shall be valid for year from date of issuance. Unless otherwise stipulated by law, requirements of format of transaction to be concluded by proxy are irrelevant to expression of will of person being represented. (Civil.L. Art. 64).

In case of concluding transaction by proxy in compliance with mandate issued and instructions received, principal shall not be entitled to insist on considering transaction void on grounds that proxy was not aware of conditions principal knew or had to know. (Civil.L. Art. 66.2).

If power of attorney mandate changed or became invalid, third party shall be notified in form in which original warrant was issued. In case this requirement is not met, alteration shall not be valid other than when third party knew or had to know at time of concluding transaction. Representation shall terminate on following grounds: declining mandate by holder of power of attorney; mandate cancelled by represented person; unless otherwise stipulated in law, either proxy or represented person dies or loses full legal capability; termination of activity of legal person who issued warrant; fulfillment of mandate; termination of mandate is terms and if grounds for representation defined by law terminate, as provided by law. (Civil.L. Art. 67).

Proxy shall be prohibited to conclude transaction with her/himself on behalf of principal, or on behalf of latter with third party. (Civil.L. Art. 70).

2.02 COMPANY LAW:

Company law was adopted on 22 July 1999. Purpose of this law is to regulate establishment, registration, and reorganization of companies, as well as their administrative, supervisory and auditing structure, rights and duties of shareholders and dissolution of company.

There are two different forms of company: (a) joint stock company, (b) limited liability company.

Law also provides that subsidiary or affiliated company is independent legal entity. (Comp.L. Art. 6). Letters “XK” must follow name of joint stock company, and letters “XXK” must follow name of limited liability company. (Comp.L. Art. 10).

Company's Establishment.

Company may be established directly or by reorganization of another legal person through merger, consolidation, separation, division, or transformation.

In case of company created as result of privatization, State shall be deemed to be founder. Requirements with respect to subscriptions for shares of such company and sale or transfer of such shares, shall be governed by State and Local Property Law.

Founder of company may be person or Mongolian legal entity, and where specified by law, foreigner, foreign legal entity or stateless person may form company. Company may be established by one or more persons or legal entities but in case of limited liability company, number of founders must be no more than 50.

Legal Entity should be registered in Tax office according to territorial belongings of its main administrative office location.

Company established by public offering shall include information relating to type of production or service activity; duration of activity; proposed amount of charter fund; par value, number and total value of shares to be issued; estimated amount of profit; and starting and closing dates for subscription. (Comp.L. Art. 13).

Subscription for shares is governed by regulations laid down by Financial Regulatory Commission. Shares are subscribed by way of application. Such application must bear name and surname of subscriber; name of organization receiving application; and par value, number and total value of shares being subscribed for. Signing of application by subscriber, or his/her proxy shall constitute subscription for shares. Subscriber must pay 30% of total of subscribed shares' price within 30 days of closing date of subscription. (Comp.L. Art. 13.2-5).

If company was established by more than one founder, then all founders shall sign contract on joint actions. Such contract shall include rules about joint actions; obligations of each founder; par value, number and classification of shares that each founder shall buy, etc. Company is deemed established when required minimum capital fund is paid. (Comp.L. Art. 13.6).

Founders of company shall call constituent meetings. Constituent meetings will consider and decide following issues: (a) approval of resolution establishing company; (b) approval of articles of association; (c) determination of number of shares, and original price; (d) appointment of auditing board and determination of its remuneration and allowances; (e) payment expenses incurred by promoters in connection with establishment of company; (f) determination of final date for payment for subscribed shares. (Comp.L. Art. 14.3).

There is quorum of shareholders' meeting if it is attended by simple majority of shareholders and resolutions are valid if passed by simple majority of votes cast. Where shareholder intends to pay for shares by noncontribution, then value of contribution shall be determined by expert.

Following documents shall be submitted for company's registration within ten days of adoption of articles of association: (1) application signed by authorized person, and bearing name and address of company; (2) resolution establishing company; (3) articles of association; (4) receipt for payment of registration fee.

It is prohibited to require any other documents other than those specified in this law.

Registration office shall register company and issue license, or refuse to register company, within three days of receiving aforementioned documents. If applicant does not agree with decision of registration office he/she may appeal it to court.

Foreign entity, its representative office or branch, intending to operate in Mongolia shall be registered. (Comp.L. Art. 15.1-9). Branch and representative office are not legal persons.

Company must formulate articles of association which specify following: (1) full and short name and mark of company; (2) location of company; (3) number of shares; (4) number of subscribed preference shares, if any; (5) number of members of Board of Directors, if any; (6) authority to conduct shareholders, board of directors and auditing board meetings; (7) business scope of company; (8) any other matters stated in this law. (Comp.L. Art. 16.1-4).

Capital, Shares, and Securities of Company.

Minimum size of charter fund of joint stock company is 10,000,000 Tugriks and minimum size of charter fund of limited liability company is 1,000,000 Tugriks. Where annual balance sheet shows that balance has fallen below charter fund level for two years or more, then Board of Directors or executive director shall wind up company following meeting of shareholders. Holder of 10% of company's debts may ask court to wind up that company. (Comp.L. Art. 32).

Company may issue two types of shares: ordinary shares or preference shares. (Comp.L. Art. 33.2).

Company is obliged to issue shares. Each ordinary share has voting right. Number of ordinary and preference shares shall be determined by articles of association. (Hereinafter referred to as subscribed shares Comp.L. Art. 33.)

New company law stipulates rights of shareholders. (Comp.L. Arts. 35, 36).

General Meeting of Shareholders.

Company's supreme authority is exercised by general meeting of shareholders. Shareholders' meeting may exercise following powers: (1) revision of existing articles of association; or adoption of new articles of association; (2) approval of company's reorganization; (3) transfer of company's debts into shares/bonds; (4) alteration of company's form of incorporation; (5) appointment of winding up commission; (6) division or combination of shares; (7) election of members of Board of Directors; (8) election of members of auditing board, and termination of their powers; (9) setting issues regarding purchase of shares; (10) approval of reports of Board of Directors and auditing board; (11) approval of agreements with significant amounts of money; (12) approval of agreements where there is conflict of interest; (13) issuing of permits to buy company shares; (14) establishment of wages and benefits for members of Board of Directors; (15) discussion of any other matters raised by Board of Directors; (16) discussion of any other matters specified in this law or in company's articles of association. (Comp.L. Art. 63.1-16).

If limited liability company does not have Board of Directors then shareholders' meeting may exercise following powers: (1) acquisition of company shares; (2) determination of power of company's administration; (3) appointment of executive director and members of collective executive administration, and determination and termination of their powers; (4) determination of remuneration, and benefits of members of administration; (5) examination and approval of any reports on company's activities or any financial report; (6) appointment of company's auditor; (7) determination of dividends, and approval of regulations on their payment; (8) approval of internal administration; (9) establishment of company's branches and subsidiaries; (10) determination of market price of company's assets; (11) any other matters provided for by this law or in company's articles of association; (12) any other matters raised by administration or by shareholders. (Comp.L. Art. 63.2.1-12).

General meeting has quorum if members holding more than 50% of all voting rights attend. (Comp.L. Art. 70). Resolutions shall be adopted by simple majority of members attending with voting rights. (Comp.L. Art. 64).

General meeting includes regular and irregular meetings. Regular meeting shall be convened by decision of Board of Directors or executive administration. Irregular meeting shall be convened either following decision of Board of Directors or executive administration or may be called by members holding 10% or more of voting rights. (Comp.L. Art. 62). Any member may authorize, in writing, another person to attend general meeting as proxy. (Comp.L. Art. 69).

Board of Directors.

In period between general meetings, powers of general meeting shall be exercised by Board of Directors. Joint stock company shall have Board of Directors. Limited liability company may carry out its activities without Board of Directors, unless otherwise specified in articles of association. Members of Board of Directors shall be determined by company's articles of association. Board of Directors of joint stock company must be composed of nine members or more. Member of Board of Directors may be person who is not company shareholder. (Comp.L. Art. 74). Chairman of Board of Directors is to be appointed from among members by majority vote of members, unless articles of association state otherwise. Chairman of Board of Directors shall be responsible for organizing activities of Board of Directors, including calling its meetings, and shall have authority to enter into agreements on behalf of company. (Comp.L. Art. 77).

Board of Directors may exercise following powers: (1) devising company's business plan; (2) convening meetings of shareholders; (3) presenting matters for discussion to general meeting of shareholders; (4) issuing shares; (5) issuing securities; (6) determining market price of company's assets; (7) purchasing company's shares and securities; (8) appointing or removing executive administration and determining their powers; (9) entering into agreement with executive administration and determining salary pool, benefits, and responsibilities; (10) appointing company's auditor, and determining conditions of service of auditor (this doesn't apply for companies for financial statements and performance audit of entities with 51 or more percentage of ownership by state or local property); (11) compiling reports on company's annual business activities, and financial report of company; (12) determining dividends unless articles of association state otherwise; (13) approving rules relating to activities of Board of Directors and executive administration; (14) establishing company's branches or subsidiaries; (15) drafting decisions of shareholders' meetings with respect to company reorganization, and implementing adopted decisions; (16) granting permission to enter into agreements involving significant amounts of money; (17) any other matters specified by this law or articles of association. (Comp.L. Art. 76).

Meetings of Board of Directors shall be convened once a month unless articles of association state otherwise. There is quorum of such meeting if members holding absolute majority of votes are present. If vote of members are split equally, then chairman of Board of Directors shall have deciding vote. (Comp.L. Art. 79). Minutes of meeting should be signed by head of meeting.

Executive Administration.

Company is governed by executive administration or by executive director. Executive administration or executive director shall be employed pursuant to employment contract entered into with Board of Directors or authorized by meeting of shareholders. Executive administration or executive director may represent company and carry out transactions relating to company's activities within scope of authority granted by Board of Directors. (Comp.L. Art. 80).

Auditing.

Company may appoint auditor for purpose of supervising company's financial report and for full or partial examination of financial and economic activities of company. Examination of financial and economic activities shall include regular and irregular examinations of company documents. Any authorized officer of company is obliged to present necessary documents to auditor.

Following persons are prohibited from serving as auditor: (1) person who has interests in company or any officer of company; (2) person who owns property or jointly owns property with person, where company has related interest; (3) any person who has entered into agreement with company. (Comp.L. Art. 91).

Joint stock company shall have auditing board. Limited liability company may have auditing board. Number of members of auditing board, terms of their appointment, and term of their powers and duties shall be determined by articles of association. Auditors will have following duties: supervision of articles of association; execution of decisions of shareholders' meeting; preparation of their conclusions on company's activities and their financial reports, supervision of company's business and financial activities pursuant to any suggestions or complaints of shareholders. (Comp.L. Art. 92).

Finance, Accounts and Reports.

Company shall produce and present annual financial report in accordance with procedures provided by law. Financial report must consist of following: (1) balance sheet; (2) account of profits; (3) cash-flow statement; (4) account of accumulated profits; (5) list of agreements with conflicting interests; (6) any additional notes; (7) any other matters.

Limited liability company's articles of association may state other requirements.

Board of Directors shall prepare annual report on company's activities. (Comp.L. Art. 94).

Company must keep following books and records: (1) company license; (2) decisions of founders' meeting, and company's documents approved by meeting of shareholders, Board of Directors, executive administration or auditing board; (3) articles of association of any branch or subsidiary; (4) any documents relating to property rights; (5) records of shareholders' meetings or, Board of Directors or executive administration meetings, as well as orders and decisions of any person, who solely administers company; (6) records of auditing boards' meetings and auditor's conclusions; (7) financial and activities reports; (8) any regulations relating to issue of shares or securities; (9) accounting documents; (10) list of persons with conflict of interests; (11) any other documents specified in this law or by articles of association.

Company is obliged to keep company's articles of association and its amendments for five years. Board of Directors, secretary and other officers must keep all books and records. (Comp.L. Art. 95).

Reorganization.

Company may be reorganized by merger, division, separation and reformation in accordance with decision of Board of Directors. (Art. 18). Company may be divided or separated by court's decision. Such reorganized company shall inform its shareholders within 15 days after decision in writing and notice shall include following information: (1) nature of reorganization; (2) name and address of new company; (3) date of decision stipulating reorganization; (4) divided balance sheet where company is divided or separated. (Comp.L. Art. 18.5.1-4).

2.03 COOPERATIVES:

See topic 2.04 Partnerships.

Cooperative Law was adopted on 8 Jan. 1998 to establish legal basis for activities of cooperatives, to regulate relationships arising from establishment of cooperative and to regulate subsequent termination of its activities. Law covers cooperative's organizational structure, rights and duties of members and its financial and business activities. Pursuant to Mongolian law, cooperative is business structure that may be established by not less than nine members or two cooperatives (referred to as joint cooperative). Cooperative shall have its own Articles of Association, its foundation document. (Coop.L. Art. 8).

Establishment and Registration.

Articles of Association shall include cooperative's name, address, terms, addresses of persons authorized to represent cooperative, size, estimation of share value of capital contributed by every member, methods of dissolution and reorganization, principles of distributing leases and names of members. (Coop.L. Art. 9).

Members shall file application for registration within 30 days of charter approval. Cooperative shall be deemed founded within two weeks of date it announces its decision to register at State Registry Office. (Coop.L. Art. 11).

Scope of Activities.

Main types of cooperatives shall be industrial, service and purchasing. Cooperative's types may also include but are not limited to agriculture and cattle breeding, processing, development of natural resources, crop cultivation, lending, insurance, housing, transport, construction, culture, education, hospital and health services or any combination of such activities. (Coop.L. Art. 3).

Management.

Members meeting shall be cooperative's supreme authority. Meeting shall be held at least once a year and decide matters by majority vote. (Coop.L. Art. 23). In case of dissolution, cooperative shall give notice to Registry within seven days that such decision is adopted. (Coop.L. Art. 24). Court declares dissolution and gives notice to Notary at State Registry Office. (Coop.L. Art. 31).

2.04 PARTNERSHIPS:

Law on Partnership adopted on May 11, 1995, regulates establishment and registration, administration, supervisory and auditing structure, reorganisation and dissolution.

Partnership may be established in two forms: (a) partnership with full liability of all members or (b) partnership with full liability of some members. (Part.L. Art. 3.1).

Partnership with full liability of all members is defined as organisation whose partners are jointly liable for partnership obligations with property they contributed to partnership and with their own personal property. Abbreviation “BB” shall follow name of partnership with full liability of all members. (Part.L. Art. 19).

Establishment and Registration. Partnership is established on basis of foundation contract. Contract shall contain name, address of partnership; time period for conducting activity; names and addresses of persons authorised to manage and represent partnership; size and estimation of share of capital contributed by every member, method of estimation; principles for distributing incomes and losses; date of signature of contract; names, citizenship, addresses of members and any other provisions deemed necessary. Members shall file application for registration at Registry within seven days of contract approval. Contract shall be notarised. (Part.L. Art. 20). Partnership shall be deemed to be founded as of date of its registration. Registry receives and examines application and, if it complies with requirements partnership is registered within seven days. (Part.L. Art. 11).

Management. Every member has right to manage and represent partnership. Contract may designate one or several members who are authorised to manage and represent partnership. Management shall decide matters by majority of votes, bear responsibility for decisions jointly and regularly inform other members about their activity. Activities of members who are entitled to manage and represent are supervised by other members. Managers are relieved of their duties if other members consider them to be exercising their duty to manage improperly.

Rights and Duties. Members participate personally in activities of partnership and may not be member of another partnership or company. Apart from number of shares contributed to partnership every member has one vote. Amendments to contract and changing basis of activity is decided unanimously by members. Other issues are decided by simple majority of votes, unless stated otherwise in contract. (Part.L. Art. 22).

New members may enter partnership and they shall enjoy same rights and duties as other members. Reasons for withdrawing from partnership may be expiration of term of contract or other conditions set out in contract. Reasons for excluding members from partnership may be proven incapability to exercise their duties under contract, or to contribute their share of capital, or serious breach of their duties under contract. Excluded member has right to appeal exclusion in court within 30 days of decision. Share capital which was contributed by member who is excluded or who has withdrawn is returned to him within three months unless provided otherwise in contract. (Part.L. Art. 23).

Partnership profits or losses for each member shall be proportional to share of capital contributed to partnership. (Part.L. Art. 24). Members have right to share capital they contributed after dissolution of partnership. Share capital distributed only after debts of partnership are fully settled. If property of partnership is insufficient to settle fully its debts, then personal property of members shall be used, in proportion to their contributions to cover debts. (Part.L. Art. 25). When member withdraws, is excluded or becomes insolvent, or when heir of member, declared dead or missing, does not join partnership, partnership shall be dissolved. However, if such partnership is to continue with its activities, contract must be amended and those amendments registered at Registry. (Part.L. Art. 26).

Partnership with full liability of some members is organisation in which at least one of members is wholly liable with both his contribution and own personal property for partnership obligations, while liability of other members is limited to amount of their contribution. Abbreviation "ZB" shall follow name of partnership with full liability of some members. (Part.L. Art. 27).

Peculiarities of Partnership with Full Liability of Some Members.

Foundation contract shall specify individual liability of each member. Only members with full liability have right to manage and represent partnership or company. Members who bear liability according to size of their contribution may not themselves participate in activities of partnership. Changing number of these members shall not be reason for dissolution of partnership. However, if all members withdraw then partnership will be dissolved. Remaining members may decide to continue activities as partnership with full liability of all members. They shall revise foundation contract and reregister partnership.

3 BUSINESS REGULATION AND COMMERCE

3.01 BANKS AND BANKING:

New Banking Law, which entered into force Oct. 1, 1996, regulates licensing of banks and banking activities, revocation of licenses, establishes general principles for banking activities, management and organization, supervision, and power of enforcement. (Bank.L. Art. 1). Banks may be divided into state and, privately or jointly owned banks according to ownership of their capital, and share company or company with limited liabilities according to types of banking activities involved. (Bank.L. Art. 4). With consent of Bank of Mongolia, banking activities can be related to deposit of money, credit and accounts; providing guarantees on payment to third parties; purchasing, selling, safeguarding foreign currency, dealing in financial leasing transactions and the like. (Bank.L. Art. 6). Prohibitions exist on banks engaged in industry, commerce or services other than banking, for not disclosing privileged information; for entering into transactions or engaging in practices of any kind that would provide them, alone or together with others, position of undue influence on currency, financial or foreign exchange markets; from engaging in manipulative devices or practices; for engaging in land market operations; and for providing financial subsidies to any political party or political coalition. (Bank.L. Art. 7). Restrictions on banking activities include that total amount of credits and guarantees extended to one person or related persons shall not exceed 20% of capital of bank. Total amount of equity securities purchased or held by bank in lieu of repayment of credit cannot exceed 20% of capital of bank and 5% of total amount of outstanding shares of one company. (Bank.L. Art. 16). Banking capital shall consist of paid-in capital and other funds. Paid-in capital shall consist of shareholders' cash contributions. Minimum amount shall be one billion Tugriks. (Bank.L. Art. 27.2). With consent of Bank of Mongolia, banking activities can be related to following: deposit of money, credit and accounts, providing bail and guarantees to third parties, purchasing, selling, safeguarding foreign currency, dealing in financial transactions and like. (Bank.L. Art. 6). For banks with one owner, supreme authority of general meeting of shareholders goes to owner. For state owned banks supreme authority of general meeting of shareholders goes to government or its authorized entity. (Bank.L. Art. 25.1). Banks shall maintain minimum amount of required capital specified in law and by central bank. (Bank.L. Art. 24.2). General meeting of shareholders shall be supreme authority of bank. Executive director shall manage bank's day-to-day operations in accordance with law, charter of bank and terms of his/her contract. Relationships in connection with procedure of general meetings of shareholders and Board of Directors shall be determined pursuant to Articles of Partnership and Company Law of Mongolia. (Bank.L. Art. 25). Bank of Mongolia (Central Bank) has authority to take enforcement measures against banks. Bank of Mongolia must consider and decide on application within 30 days of receiving application and other relevant documents. Bank of Mongolia may deny application if restructuring or liquidation of bank would be inconsistent with other legislation or would not be in best interest of bank's clients. (Bank.L. Art. 30).

New Banking System of Mongolia clearly attempts to follow International Banking Standards, by regulation of Mongol Bank, pursuant to Basel Accord capital adequacy standards.

3.02 CONSUMER PROTECTION:

Consumer Protection Law.

New Consumer Protection law was entered into force in Dec. 2003, to protect rights of consumers. (Consumer.P.L. Art. 1). Consumer Protection shall be administered by State Central Administrative, District, Aimag, Soum's Citizen's Deputy Khural and their Governors. (Consumer.P.L., c. 4). If product, service and safety do not comply with standards, seller shall pay consumer for damage to life, health or environment pursuant to Civ.L. Arts. 18 and 52. (Consumer.P.L. Art. 5.4). Non-State organizations are authorized to act on behalf of consumers for their protection. (Consumer.P.L. Art. 5.5). Products, supplied by manufacturers, sellers and contractors, shall be non-hazardous to human life, health and environment. (Consumer.P.L. Art. 12.2).

Consumer shall have rights to protect financial interest and to receive compensation for losses suffered by fault of manufacturers, contractors or sellers. Consumer may demand compensation for loss suffered due to purchase of products which are defective, damaged, incomplete or which do not meet quality requirements. (Consumer.P.L. Art. 6.2).

Consumer shall be entitled to receive true and complete information about products. (Consumer.P.L. Art. 7.1). Manufacturers, sellers shall provide consumers with following information: names and addresses of manufacturer, or seller trademarks of goods and barcode; designation and nature of use; instructions on storage and use; brand of product, its price or tariff; dimensions, units into which product is measured and its quality; warranty and usage periods of product and safety warnings. (Consumer.P.L. Art. 7.2).

Relevant State inspection agency shall consider legislation on consumer protection. Consumer Protection law is breached and if case is non-criminal, responsible person may receive penalty by State Controller. (Consumer.P.L. Art. 21.1).

3.03 CONTRACTS:

Transaction can be made through representatives except those which law requires to be concluded in person. Authority of representative shall be based on law or authorization. (Civil.L. Art. 64). Contracts shall be made in form as required by law, otherwise if not stipulated by law, parties can make it in oral or written form. (Civil.L. Art. 42). Representative can be citizen, who has full legal capacity, or has limited legal authority or legal person. (Civil.L. Art. 63). Contracts are made orally when: (1) parties have agreed on principal conditions of their transaction, (2) there is exchange of things used traditionally as performance and receipt, or (3) in case of one party's offer to perform, term fixed for response or ordinary term has expired. (Civil.L. Art. 43). Contracts in writing are completed when: (1) parties provide documents expressing their intent and execute said documents, (2) one party has received letter, cable, official paper (e.g. telex), or other document expressing intent of another who has accepted offer, or (3) contract is registered and certified by notary in accordance with law. (Civil.L. Art. 43).

If content of contract is unclear, it will be considered invalid. (Civil.L. Art. 43). Contracts under conditions that fail will be considered invalid when it is unknown whether circumstances for abatement of rights and obligations will be created or not. (Civil.L. Art. 55). If one person intentionally hinders creation of fixed conditions, these conditions will be regarded as created; if one person intentionally accelerates creation of fixed conditions, these conditions will not be regarded as created. (Civil.L. Art. 44).

Court may consider following contracts null and void, based on claim of interested person: (1) made as result of impulse; (2) made by means of fraud; (3) made by means of violence and under duress. (Civil.L. Arts. 57-60).

Authorization shall be made orally or in writing. Written authorization requires: (1) signed, if authorized by legal person; by signature of directors and seal of organization; (2) authorization to deal with receipt, transfer and disposal of property shall be signed by accountant; (3) date; (4) must be notarized, if required by law; (5) terms of authorization.

Authorization shall be for period not more than three years, if duration is not indicated. (Civil.L. Art. 64).

Conclusion of Contract.

If proposal is addressed to indefinite persons and does not contain any other description, it must be considered to be invitation to make proposal. (Civil.L. Art. 196). If draft contract is sent with fixed term of response and other party responds in time, contract will be regarded as concluded. (Civil.L. Art. 196). Contract is considered concluded when it becomes clear from late response of draft contract by other party that response was made in fixed time, although other party received draft contract beyond expiration date of its offer and did not inform another party about its rejection. (Civil.L. Art. 196). In cases where offering party informed other party about late reception of response, reply must be considered potential offer for new draft contract. (Civil.L. Art. 196). If other party proposes in its reply to conclude contract in terms different from terms in draft contract, reply must be considered new draft. (Civil.L. Art. 196). Disputes arising during conclusion of contract must be settled by litigation or arbitration as specified in law or contract. (Civil.L. Art. 196). Unilateral contract must be executed in written form. If one party of unilateral contract renounces contract, other party has right to bring lawsuit. Party which evaded without any reason its responsibility under contract must redress losses caused to other party as result of its acts.

Interpretation of Contract.

When interpreting contract, court must consider direct meaning of words in contract. (Civil.L. Art. 198). If meaning of one of terms is not clear, court must construe term by comparing it with other terms and general content of contract. (Civil.L. Art. 198).

Standard condition is condition, standard in trade or industry offered by one party to another party; which is not determined by specific legislation or used many times; or determined in advance by parties to contract. If one party, receiving offer, is businessman, then is deemed to know standard conditions in industry, which shall be inseparable part of contract. If another party to contract did not know in advance of standard condition, due to unusual differences in standard condition's form, then standard conditions shall not be inseparable part of contract. If parts relevant to standard conditions are invalid or not condition of contract, contract shall still be valid. Conditions, which are determined by parties in detail, shall not be considered standard conditions. (Civil.L. Art. 198).

Types of Contract.

In contract for benefit of third person, parties must come to agreement concerning execution of obligations for benefit of third party. (Civil.L. Art. 203). Civil Code contains provisions on contracts for grants (Civil.L. Art. 276), loans (Civil.L. Art. 281), leases (Civil.L. Art. 287), leasing (Civil.L. Art. 312), franchising (Civil.L. Art. 333), work (Civil.L. Art. 343), tourism (Civil.L. Art. 370), transportation (Civil.L. Art. 380), agency (Civil.L. Art. 410), storage (Civil.L. Art. 422), insurance (Civil.L. Art. 431), guarantee (Civil.L. Art. 458), and custody (Civil.L. Art. 483).

Mongolia is member of Convention on Contracts for the International Sale of Goods (1980) (CISG).

3.04 ENERGY:

Mongolian Law on Energy was adopted Feb. 1, 2001 and came into force on Apr. 15, 2001. Law regulates production, use, transfer, and distribution of energy, along with construction of new sources of energy. (Energy.L. Art. 1.1). State Great Khural shall define state policy on energy and determine whether to build nuclear energy resources. (Energy.L. Art. 4.1). Legal entity shall only engage in activity related to energy through special license. (Energy.L. Art. 12.1).

Interested organizations and private individuals, either foreign or local, have to apply to Energy Regulation Agency to participate and to have interest in this field. (Energy.L. Art. 21).

Policy for power in Mongolia is presently major priority and is fully under State control. (c. 2, Energy.L. Art. 4). Foreign investment, however, is welcomed. Mongolian state policy on energy is to attract direct foreign investment into field.

Mongolian Law on Renewable Energy was adopted on Jan. 11, 2007. Law regulates activities of legal entities that produce and supply energy and heat using renewable sources. (Renewable.Energy.L. Art. 3.1). Legal entity to construct new source of renewable energy shall obtain special permit as defined in Art. 20 of Energy Law. (Renewable.Energy.L. Art. 6.1). Range of prices and tariffs for buying wind, water, and solar energy is defined by law. (Renewable.Energy.L. Art. 11).

3.05 MONOPOLIES, RESTRAINT OF TRADE AND COMPETITION:

Unfair Competition.

Law on Unfair Competition was adopted on 12 May 2000. Law is designed to create conditions for fair competition in market. (Unfair.C.L. Art. 1).

Dominance exists when single business entity acting alone, or group of business entities acting together, account consistently for over 1/3% of sales of relevant goods on market. (Unfair.C.L. Art. 5.1). Monopoly exists when business entity illegally uses its position of market dominance by creating obstacles for competitors in marketplace and blocking competition or customers. (Unfair.C.L. Art. 5.2). Natural monopoly exists when monopolistic business entity is able to supply particular market with particular goods at lowest cost and in most efficient way for customers. (Unfair.C.L. Art. 5.3).

Dominant business entity is prohibited from following activities: halting or restricting production or sale of goods in order to create artificial shortage or to raise prices; selling their own goods at lower than cost in order to prevent other business entities from entering particular market or to drive them from market; unreasonably refusing to establish business relationships with other business entities in order to drive them out of market; making purchase of unwanted or incomplete goods condition of purchase by buyer of different and separate goods which buyer is willing to purchase, etc. (Unfair.C.L. Art. 6).

Business entities that collectively hold dominant market position are prohibited from making agreements on competition: fixing or altering prices, or holding or limiting scales of production or sales; dividing markets by location, size of production or sale, products, consumers or sellers; preventing competitors from becoming members of collective or from organizing in order to facilitate efficient business transactions; by unreasonably refusing to enter into business relationships with other business entities in order to drive them out of market; or by selling or purchasing goods on noncompetitive basis. (Unfair.C.L. Art. 7).

Individuals from management of dominant business entity are prohibited from concurrently serving in management of competing business entities. (Unfair.C.L. Art. 8).

Dominant business entity is prohibited from creating new entity or buying competitor's stocks in order to carry out monopolistic activities in market. (Unfair.C.L. Art. 9.1).

Business entities are prohibited from carrying out following activities deemed inconsistent with fair competition: disseminating false, inaccurate, or misleading information that results in loss to competitors or diminishes their reputation; misinforming or disseminating false or inaccurate information about their own or competitors' enterprises, their location, their methods of manufacture, their principal features or quality of goods, etc. (Unfair.C.L. Art. 10).

Unless otherwise permitted by law, government and local administrative bodies must not make decisions which prohibit or restrict business entities from: engaging in particular types of activity, production or sales of goods, selling goods in particular markets; giving priority or preferential treatment to any business entity, or discriminating against any business entity; prohibiting or restricting entry of new business entities into market in any area of business, etc. (Unfair.C.L. Art. 14).

Supervision service is state agency that shall have following duties: to submit proposals for supervising enforcement of law prohibiting unfair competition, to prohibit, restrict and control unfair competition by demanding dissolution of monopoly or dominant entity which illegally takes advantage of its position. (Unfair.C.L. Art. 12.1).

Supervision committee shall be comprised of council consisting of chairman and four members. Chairman of Supervision committee shall be Council Chairman. Supervision service shall be comprised of local, state, senior and general inspectors. (Unfair.C.L. Art. 12.2).

Supervision committee shall exercise following powers: supervise business entities for dominance, monopoly, natural monopoly positions, and for conditions of unfair competition between business entities; develop policy to promote fair competition. (Unfair.C.L. Art. 14). Merger between dominant business entity and competitors is prohibited. (Unfair.C.L. Art. 15).

Person or legal entity that disagrees with decision of Supervision committee shall submit complaint to court. (Unfair.C.L. Art. 17).

Person or entity whose breach of law of unfair competition causes pecuniary damages to another person or entity must compensate aggrieved party for such damages in accordance with law. (Unfair.C.L. Art. 18.1).

3.06 SALE AND PURCHASE:

In contract for sale and purchase, seller is obliged to transfer property to buyer, who must receive items contracted for and pay specified price. (Civil.L. Art. 243). Contract for sale and purchase of real estate must be registered at Real Estate Registration Agency. (Civil.L. Art. 203). Parties may establish prices by mutual agreement; prices must be paid immediately after transfer of items. (Civil.L. Art. 204). If seller does not transfer property to buyer or transferred property does not meet contract terms, buyer has right to claim transfer of property specified in contract or to claim compensation for losses caused by delay of execution of contract, and may claim compensation for losses caused by contract termination. (Civil.L. Art. 205). If ownership right is transferred before transfer of property, seller is obliged to store that property until it is transferred to buyer. (Civil.L. Art. 207). If it is stipulated in contract, buyer must pay all expenses borne by seller for storing property. (Civil.L. Art. 206).

If seller does not inform buyer beforehand about defects in property, buyer has right to complain and make following claims to seller: (1) exchange defective property for property of proper quality, (2) remove defect free of charge, (3) reimburse any expenses incurred for removal of defects or encumbrances in property, and (4) reduce costs by proper amount or refuse to make payments in partial amount for certain period. (Civil.L. Art. 210). Instead of claims, buyer has right to suspend contract, return defective property to seller, and demand return of money paid for property. (Civil.L. Art. 210). If previous two methods are not sufficient to compensate damages, buyer has right to claim complete damages. (Civil.L. Art. 210). If seller can prove that defects in property were caused by buyer's violation of rules concerning transportation and use of property or by force majeure, seller may refuse to meet claims of buyer. (Civil.L. Art. 210). If defects of purchased property are disclosed by buyer after expiration of period specified in paragraph 4 of this article but within time products may be used, and if buyer can prove that defects were caused before purchase of property, buyer may enjoy right to claim as stated in this article. (Civil.L. Art. 210).

Seller is obliged to supply all property together with its components and spare parts in accordance with standards, specifications, and price list. (Civil.L. Art. 213). If seller does not completely deliver property in fixed term, buyer has right to refuse receipt of property and to demand compensation for losses. (Civil.L. Art. 213). If seller does not meet claim of buyer, buyer has right to bring suit against defects in property within six months from date of raising claim. (Civil.L. Art. 214). If it is impossible to fix date of raising claim or of receiving its reply, or reply was not given, period of limitations will start running from date when period of raising claim expires. (Civil.L. Art. 214).

If third person brings suit against buyer about recovery of property for reasons existing before sale, buyer is obliged to involve seller in settling case. (Civil.L. Art. 216). If claim of third party about recovery of property is satisfied, seller is obliged to compensate losses of buyer. (Civil.L. Art. 216). However, if buyer did not involve seller in settling case, of if seller was involved and seller could prove that he was able to convince buyer to maintain property, then seller will be free of this obligation. (Civil.L. Art. 216).

3.07 SECURITIES:

State Great Khural adopted new Law on Securities Market on Dec. 12, 2002. Law regulates issuing, registering, keeping, trading, selling, and transferring rights of securities. Law also regulates delivery of information to investors, protects rights and interests of investors, and supervises activities of issuers and organizations that participate in security markets. According to law, “security” means bonds issued by Government or other authorized organizations and other instruments determined by Securities Committee to be in conformity with law. (Securities.Mar.L. Art. 3.1.1).

Government may issue securities with permission of State Great Khural. Governors of capital city and aimags may also issue securities with permission of Khurals of Representatives of Citizens. Securities issued by Government, governors of capital city, and aimags shall obtain registration with Securities Committee and Mongolian Stock Exchange. (Securities.Mar.L. Art. 4.2).

Issuer may sell securities through public offering or private offering. (Securities.Mar.L. Art. 5.1). In case of public offering, issuer shall obtain registration with Securities Committee. This requirement shall not apply to private offerings. (Securities.Mar.L. Art. 7.1). Issuer shall include application, introduction, decision to issue securities, documents establishing legal person status, and any other documents deemed necessary by Securities Committee in order to obtain permission to issue securities. (Securities.Mar.L. Art. 7.3). Securities Committee shall determine whether to approve registration statement within 30 days after receipt of registration statement. (Securities.Mar.L. Art. 7.8).

Securities registered with Securities Committee shall only be sold in securities market. Issuer may sell securities directly to primary market or through underwriting organization. (Securities.Mar.L. Art. 9.1.2). Issuer must report to Securities Committee within 30 days after sale of securities. (Securities.Mar.L. Art. 9.6).

Person that purchases 5% or more of publicly offered security must report purchase to Securities Committee within ten days of purchase. (Securities.Mar.L. Art. 12.1). Person that makes tender offer to purchase controlling stake of common shares must report tender offer to Securities Committee. (Securities.Mar.L. Art. 11.2).

Securities market includes primary markets as well as secondary markets. Securities are initially either sold directly by issuer or through underwriting organization in primary markets. Securities are then traded in secondary markets.

All participants in securities markets (issuers, underwriters, brokers, dealers, clearing and settlement organizations, depository organizations, etc.) shall be granted licenses to operate in securities market. (Securities.Mar.L. Art. 19.1).

Securities Committee regulates and supervises participants of securities market and protects rights and interests of investors. (Securities.Mar.L. Art. 31.1). Securities Committee shall be composed of five members. Chairman is appointed by Prime Minister (Head of State Great Khural), one member appointed by Minister of Finance, another appointed by President of Bank of Mongolia (Central Bank), and remaining two members that represent interests of companies operating in security market are appointed by Economic Standing Committee of State Great Khural. (Securities.Mar.L. Art. 32.1). Securities Committee reports to State Great Khural on its activity every year. (Securities.Mar.L. Art. 31.6). Stock Exchange is company that manages sale of securities and other activities not prohibited by law. (Securities.Mar.L. Art. 22.1). Members shall participate in Stock Exchange. Nonmembers shall participate through members.

Members of Securities Committee shall have right/duty of state supervisor of securities activity. Securities Committee may appoint officials as state supervisor of securities activity. (Securities.Mar.L. Art. 37).

Administrative sanctions may be imposed upon violators of securities legislation if there is no case for criminal charges. (Securities.Mar.L. Art. 38).

3.08 TRAVEL AND TOURISM:

Law on Travel and Tourism was adopted on 5 May 2000.

Purpose of law is to govern relations among state, citizens, economic entities and agencies with regard to supporting travel and tourism in territory of Mongolia, day to day affairs of travel and tourist businesses, and tourist related services.

Travel and tourist agencies carry out following duties: plan, provide, advertise, arrange and engage in wholesale and retail trade of travel and tourism products and services, and arrange tours; provide documents related to travel, including papers for obtaining visas; book tickets for travel by plane, train and other means of transportation, as well as sell and purchase tickets; arrange hotel reservations, reservations for tourist camps, sightseeing tours, cultural performances, etc.; arrange meetings and departure services for tourists. (Travel.T.L. Art. 4.1).

Travel and tourist agencies shall be classified into tour operators and tour agents. Tour operators shall carry out duties provided in sections below. Tour agents shall carry out all or part of duties provided below as well as serve as mediator for selling and purchasing products and services for tour operators. (Travel.T.L. Art. 4.2).

Legal person that has obtained special permission to run travel and tourism business shall carry out duties of tour operators and tour agents. (Travel.T.L. Art. 5.1). Permission shall be issued by state administrative body in charge of travel and tourism in accordance with this law. (Travel.T.L. Art. 5.2). Legal person requesting permission to run travel and tourism business shall include with written request following materials: contract for establishing economic entity; rules for economic entity; recommendations on management, personnel, equipment, working places of particular economic entity; copy of insurance agreement with insurance agency for protection from various risks in accordance with Insurance Law. (Travel.T.L. Art. 5.4).

Legal person meeting following requirements and providing following materials shall be issued permission to run travel and tourism business: providing location for running of business, equipment necessary for running travel and tourism business; providing appropriate level of administrative personnel with proficiency in travel and tourism, or over three years working experience in administrative position in travel and tourist agency, and holding certificate of training in travel and tourist profession. (Travel.T.L. Art. 6.1). Term of validity for such permission shall be two years. (Travel.T.L. Art. 7.1). Travel and tourist agencies shall enjoy following rights and exercise following responsibilities: promote activities according to classification provided by §4.2 supra; advertise, trade and purchase travel and tourist products in its own name; provide state administrative body in charge of travel and tourism with information about tourists receiving services of agency during particular year in accordance with regulations; provide tourists with realistic and accurate information about socioeconomic and state structure of Mongolia, its history, culture, traditions and customs; to take appropriate measures aimed at preservation and protection of nature, rare historical and cultural sights and items, to inform relevant authorities about violations in this regard; to provide travel and tourist service staff with professional training and training courses; to set up tariffs on travel and tourist products; to establish contracts with travel and tourist entities. (Travel.T.L. Art. 8.1).

Travel and tourist agency shall promote form of travel and tourism which contributes to socioeconomic development of Mongolia, does not have negative effects on environment, public health, customs and traditions of people. (Travel.T.L. Art. 8.2). Tour operators or tour agents shall establish agreements on trade and purchase of travel and tourist production. (Travel.T.L. Art. 9.1). Travel and tourist agreements shall be established according to §163 of Civil Code and are required to include following: official name, address, permission reference numbers and state registration certificate, bank account numbers of parties of agreement; information concerning composition of tourist groups, travel itineraries, other related information; quality of travel and tourism production, tariffs, payment regulations; term of tours, rules for meeting and seeing off tourists, rights and responsibilities of parties; regulations on consideration and solution of service complaints and disputes from tourists. (Travel.T.L. Art. 9.2).

Travel and tourist agencies, services provided by hotels to foreign tourists shall enjoy same support and privileges state provides to export industry. (Travel.T.L. Art. 11.1). Tax discount issues for citizens and legal persons investing in travel and tourism shall be regulated according to relevant tax laws and regulations. (Travel.T.L. Art. 11.2).

Legal person awarded for best projects arranged with purpose to develop travel and tourist regions as provided by §14.1.1. of this law can obtain certain funds from state to implement project. (Travel.T.L. Art. 11.3). Person with following qualifications shall work as escort-guide: must be citizen of Mongolia; have knowledge of one or more foreign languages, acquire certificate of completion of escort-guide training course; able to meet health requirements to work as escort-guide. (Travel.T.L. Art. 12.1). State administrative body in charge of travel and tourism shall issue permission to work as escort-guide to individual who meets requirements provided in §12.1. supra. (Travel.T.L. Art. 12.2). Permission to work as escort-guide shall be valid for two years. (Travel.T.L. Art. 12.4).

Escort-guide shall have following rights and responsibilities: provide services to tourists according to itinerary approved by particular travel and tourism agency; prevent tourists from danger and provide for their security; carry badge of escort-guide identifying name of travel and tourism agency and personal name for use while working with tourists; provide tourists with realistic and accurate information about socioeconomic and state structure of Mongolia, its environment, history, culture, traditions and customs of Mongolian people; not reveal to others classified information concerning state, individuals and agencies; cover losses caused to tourist and travel and tourism agency due to negligence while working as escort-guide. (Travel.T.L. Art. 13.1).

It is prohibited for escort-guide to ask for tips from tourists, to run travel and tourism business, to represent foreign travel and tourist agency. (Travel.T.L. Art. 13.2).

Government shall exercise following rights regarding travel and tourism: determine location of travel and tourism development regions in Mongolia considering country's policies of socioeconomic development; promote unified state policy on travel and tourism and provide implementation of relevant laws and regulations; approve national program on development of travel and tourism; approve regulations for accumulating revenues for travel and tourism fund, its expenditures and oversight in conformity with relevant laws and regulations as provided by §19 of this law, and to appoint person to represent and administer fund; support foreign and domestic investment for travel and tourism; set up state administrative body in charge of travel and tourism, and to approve its rules; oversee implementation of travel and tourism laws and regulations, approve rules for state supervision of travel and tourism. (Travel.T.L. Art. 14).

Structure of state administrative body in charge of travel and tourism shall consist of central state administrative agency in charge of travel and tourism, Council on Travel and Tourism under Prime Minister, and unit (staff) in charge of issues relating to local travel and tourism. (Travel.T.L. Art. 15.1). Council on Travel and Tourism (hereinafter "Council") shall advise Prime Minister on issues of elaboration and implementation for unified state policy on travel and tourism, as well as make suggestions and evaluations. (Travel.T.L. Art. 15.2). Council shall consist of chair, one member nominated from each central state administrative agency in charge of budget, finance, infrastructure, environmental issues, and three members of travel and tourist agencies nominated by travel and tourism NGO. (Travel.T.L. Art. 15.3). Prime Minister shall appoint chair and members of Council. (Travel.T.L. Art. 15.4). Chair of Council shall head state administrative agency in charge of travel and tourism. (Travel.T.L. Art. 15.5). Government shall approve rules of Council. (Travel.T.L. Art. 15.6). Governors of all levels may create unit (staff) in charge of travel and tourism issues in ways that facilitate development of travel and tourism. (Travel.T.L. Art. 15.7).

Central state administrative agency in charge of travel and tourism shall exercise following rights: elaborate state unified policy on travel and tourism, coordinate with professional management; oversee implementation of laws and regulations on travel and tourism; elaborate plan on development of travel and tourism, and provide its implementation; coordinate internal and international work of travel and tourist agencies; plan development of human resources in area of travel and tourism, and partner with relevant agencies to approve structure and program of training; approve rules for determining grades of travel and tourist agencies, hotels, tourist camps, and for issuing permission; to determine number and location of tourist camps, hotels, recreational facilities, etc., in order to effect business in travel and tourism regions. (Travel.T.L. Art. 16).

State administrative body in charge of travel and tourism shall exercise following with respect to travel and tourism: endorse Mongolia abroad and internally; issue permission to agency to run travel and tourism business and permission to work as escort-guide; collect and analyze travel and tourist data; create united information network on travel and tourism, and set up information database; determine number of tourists to be received in travel and tourist regions; determine roads and appropriate routes for travel and tourism; ban activities which have negative impact on development of travel and tourism. (Travel.T.L. Art. 17).

Hurals of Citizens' Representatives for Aimags, Capital City, and Soums districts shall exercise following rights regarding travel and tourism: oversee implementation of state policy, laws and regulations regarding travel and tourism in their territory, and to consider Governor's report on issue if necessary; provide implementation of national program on travel and tourism; submit proposal to central state administrative agency in charge of travel and tourism for inclusion of particular parts of territory into travel and tourist reserve areas; approve program for development of travel and tourism in their own territory. (Travel.T.L. Art. 18.1).

Governors of Aimags, Capital City, and Soums districts shall exercise following rights regarding travel and tourism: promote in their territory unified state policy on travel and tourism, provide implementation of laws and regulations on travel and tourism; issue permission and make agreements with tourist service entities to lease land within their power and according to relevant laws and regulations in accordance with number and location determined by central state administrative agency in charge of travel and tourism; work out program and project regarding policy of regional development for travel and tourism in their own territory, to submit materials to Hural of Citizens' Representatives at relevant level, and to elaborate and implement development plan for travel and tourism according to approved program. Such Governors shall not collect taxes, fees or payments from tourists traveling or touring their territory other than those taxes, fees, and like which are provided by law. (Travel.T.L. Art. 18.2).

Implementation of law and regulations on travel and tourism shall be monitored by state and professional levels. State oversight of implementation of laws and regulations on travel and tourism shall be carried out by virtue of central state administrative agencies, state administrative body in charge of travel and tourism, Governors of all levels vested with relevant powers. Professional oversight of implementation of laws and regulations for travel and tourism shall be carried out by State Infrastructure audit agencies. Appointing and releasing state senior inspector, and state inspector of travel and tourism shall be conducted as stipulated in §21 of Law on State Audit. (Travel.T.L. Art. 22).

State inspector of travel and tourism shall have following rights and responsibilities: oversee implementation of laws and regulations on travel and tourism by travel and tourist agencies, tourist service entities, and escort-guides; obtain documents and information necessary for supervision from relevant citizens, official, agencies, etc., free of charge; submit to state administrative body in charge of travel and tourism justified proposal on termination of permission provided in §§5.2. and 12.2. of this law; have access to relevant agencies for supervision; check documents of persons in violation of laws and regulations on travel and tourism, and remove them temporarily if necessary; impose administrative sanctions on persons in violation of laws and regulations on travel and tourism provided by this law; and submit to state administrative body in charge of travel and tourism proposals to downgrade hotels that fail to meet requirements of particular grade. (Travel.T.L. Art. 23.1).

State inspector of travel and tourism shall have following responsibilities: strictly observe all laws and regulations, as well as rules issued in accordance with such laws and regulations, and oversee implementation of laws and regulations on travel and tourism; respect rights and legitimate interests of agency and individuals, and to keep confidential all infringements, taking measures to end infringing actions; to oversee and solve complaints and claims of tourists regarding violations of laws and regulations on travel and tourism; oversee travel and tourist agencies, and escort-guides, and determine whether they provide tourists with realistic and accurate information about socioeconomic and state structure of Mongolia, its history, culture, traditions and customs of Mongolian people. (Travel.T.L. Art. 23.2).

For noncriminal violations of laws and regulations on travel and tourism, judge or state inspector of travel and tourism shall administer fines in following amounts, taking into consideration nature of violation and damages. Violations of §10.3. of this law shall result in confiscation of illegal profit, and official responsible for violation shall be fined up to Tg 60,000, and responsible agency up to Tg 250,000. Escort-guide shall be fined Tg 15,000-50,000 if he/she is in violation of provisions of §13.2. of this law. Official who does not comply with instructions issued by competent organization shall be fined up to Tg 50,000, agency up to Tg 100,000. Official who fails to provide timely information to competent authority shall be fined up to Tg 10,000, and agency up to Tg 50,000. Any fees and payments collected from tourists passing through particular territory in violation of this law shall be confiscated by state, and person responsible for violation shall be fined up to Tg 50,000. (Travel.T.L. Art. 24).

4 CITIZENSHIP

4.01 ALIENS:

See category 15 Immigration, topic 15.01 Aliens.

5 CIVIL ACTIONS AND PROCEDURE

5.01 APPEALS:

Complaints Against Court Rulings and Orders.

After ruling and order pursuant to Arts. 20.1, 65.1.4, 65.1.5, 69.1, 80, 92.4, 97.1, 100.2, 117, 124 issued by court, written complaints may be filed within ten days of date of enforcement of first instance court's decision to this court. (Civil.Proc.L. Art. 170).

Court may make following judgments: (a) dismiss complaint; (b) return case for reconsideration decide case; judgment shall be final. (Civil.Proc.L. Art. 171).

Appeals may be filed by parties, representative or advocates of parties, affiliated third parties, or prosecutor that participated in case within 14 days of receiving decision of Court of First Instance. (Civil.Proc.L. Arts. 161.1, 120.2).

Appeal should include following: (a) Court having jurisdiction over appeal or protest; (b) appellant's or protester's name, address, and occupation; (c) court of first instance and description of its decision; (d) grounds of appeal or protest; (e) person's request on appeal or protest. Appeal must be in writing and signed. (Civil.Proc.L. Art. 162).

Court shall consider appeal within 30 days of receipt of appeal. Appeal hearing shall be conducted by three judges and shall be handled by single judge appointed by Judges Counsel. In considering appeal, court shall consider all matters related to case, not limited to grounds of appeal. Court hearing shall proceed in following order: (a) judge introduces case; (b) appellant and respondents may then ask relevant questions; (c) matter will be further discussed by all parties; (d) relevant documents are examined; (e) judges convene to make judgment. (Civil.Proc.L. Art. 166).

Appeal court may issue following judgments: (a) uphold decision at court of first instance; (b) amend decision of court of first instance or any part thereof; (c) send case to court of first instance for rehearing.

Judgment shall include part of decision of court of first instance that is upheld, content of appeal, court's decision and grounds. Judgment is legally effective upon announcement. Court of appeal may send case to court of first instance for reconsideration. (Civil.Proc.L. Art. 167).

Extraordinary Legal Remedies.

Supervising complaint on decision of court of first instance and appeal court judgment may be filed by parties, their representatives, advocates, and third parties to court issued that made decision. Grounds of supervising complaint: (a) court misapplied law, applied other law, and wrong interpretation of law; (b) violated proceedings provided by law. (Civil.Proc.L. Arts. 171, 173).

If parties choose to participate in review hearing, court shall notify them as to hearing venue. (Civil.Proc.L. Art. 175). Five Judges of Supreme Court shall conduct supervising hearing and pass resolution. Person who filed complaint after receiving resolution can make complaint to Supreme Court within 30 days based on infringement of law.

If Chief Justice of Supreme Court considers that complaint has legal grounds, it shall be considered at Supreme Court hearing.

In Supreme Court hearing all Judges of Supreme Court shall participate.

Resolution of Supreme Court hearing shall be final and made by quorum of judges.

Supervising Court may issue following resolution: (1) Uphold decision of court; (2) amend decision of court; (3) reject decision of court; (4) send case to court for second hearing. (Civil.Proc.L. Art. 178).

Stamp Duty.

Amendments regarding stamp duty, which is payable upon making of claim, came into force on 1 June 1999. Defendant shall pay stamp duty in cash or via bank and attach receipt to his claim. Stamp duty rates as follows:

The amount of claim	**The stamp duty**
0-3,000 Tugriks	50 Tugriks
3,001-10,000 Tugriks	2% of amount sum of claim
10,001-50,000 Tugriks	200 Tugriks plus 3.5% of amount exceeding10,000 Tugriks
50,001-500,000 Tugriks	1,500 Tugriks plus 4% of amount exceeding50,000 Tugriks
500,001-1,000,000 Tugriks	19,500 Tugriks plus 2.1% of amount exceeding500,000 Tugriks
1,000,001-10,000,000 Tugriks	30,000 Tugriks plus 1.4% of amountexceeding 1,000,000 Tugriks
10,000,001 or more Tugriks	156,000 Tugriks plus 0.5% of amountexceeding 10,000,000 Tugriks

5.02 CIVIL CODE:

Civil Code consists of six parts: General Provisions, Law of Property, General Grounds for Liability, Contract Liability, Liability Not Arising under the Contract, and Right of Succession. It establishes legal capacity for various categories of persons and defines legal person with rights and obligations. Statute of limitations on most civil actions runs for three years. (Civil.L. Art. 69). Provisions on agency, contracts, insurance, labor, real property, sale and purchase, securities, succession, and trespass to be found under respective categories and topics in this Digest.

Civil Procedure Code was adopted on Jan. 10, 2002, effective from Sept. 1, 2002 consists of 20 sections regarding grounds, evidence, fees, instituting action, composition of court, participants, general procedure of hearing, standing orders to trial court, judgments, appeal, procedure for execution of court decisions and provisions regarding Private International Law. Purpose of law is to regulate procedures for hearings of civil cases arising between litigants.

Litigants.

Term “litigants” in case means litigants, third parties, their representative or advocates and other persons who take part in proceedings to protect others' rights, freedoms, and interests. Term “parties” means plaintiff, defendant, and persons who have equal rights with plaintiff and defendant as provided in law and take part in proceedings. Plaintiff has right to change claim or grounds of claim to increase or decrease sum in dispute or to discontinue said claim. Defendant has right to accept or reject plaintiff's claim and to file counter-claim. Proceedings may be discontinued if parties reach settlement. (Civil.Proc.L. Art. 20). Plaintiff and defendant have right to settle litigation. (Civil.Proc.L. Arts. 22 and 26).

Litigants have following rights in proceedings: (1) be acquainted with claims, arguments, refute evidence of other party; (2) be acquainted with record of case, make notes after order is made by court; (3) take part in judicial proceedings; (4) request to testify as witness, to appoint expert to perform actions specified in clause 48, if it is considered that evidence is false or tendered illegally; object or apply to reject evidence; request adjournment of case on grounds provided by law; (5) challenge composition of court, judge, prosecutor, citizen's representative, secretary of court, expert, translator or interpreter; (6) put questions to other participants; (7) appeal against court decisions; (8) and other rights provided by law. (Civil.Proc.L. Arts. 23, 24, 25).

Litigants to proceedings shall have following duties: (1) prove their claim, make submissions, objections, and gather their evidence; (2) appear in court when called by court; (3) implement court orders; (4) comply with court rules; and (5) implement final decision of court. (Civil.Proc.L. Art. 25).

Third Parties.

Third party may take part in proceedings before final court decision is made if he has independent interest in proceedings. Third party with separate interest shall have rights and duties of party to action. If court decision may have deleterious effect on rights and duties of person who is not party to proceedings, that person at his initiative, or at request of party to proceedings, or at initiative of court, shall have right to take part in proceedings as third party. Third party with independent interest shall have all rights and duties of party, except rights to: alter claim or grounds of claim, increase or decrease sum in dispute or discontinue claim. (Civil.Proc.L. Art. 29).

If law provides that citizen or legal person has option to protect rights, freedoms or interests of citizen, then that citizen or legal person may bring action on other citizen's behalf. Citizen or legal person specified shall have rights and duties specified in Art. 24. If citizen or legal person fails to perform obligations required of party to proceedings, it shall not be grounds to discontinue proceedings. (Civil.Proc.L. Art. 26.2). If prosecutor considers that interests of state have been violated, he/she shall have right to participate in proceedings on behalf of state, as requested by state organization. (Civil.Proc.L. Art. 31).

Advocate is responsible to protect rights, freedoms and interests of citizen or legal person by agreement and to provide legal assistance and to take all measures, specified by law, and to help to ascertain true facts of case. (Civil.Proc.L. Art. 32). Advocate who participated in proceedings shall have rights and duties specified in Law on Advocacy. (Civil.Proc.L. Art. 34).

Evidence shall mean information received through procedures provided in law to determine facts important for resolution of claims and refutation of other evidence. Evidence of case shall be determined by submissions by parties, their representatives or advocate, submissions of third parties, testimony of witnesses and written and physical evidence, opinions of experts, motion pictures and photographs, illustrations, pictures, sound recordings, imprints (footprints, fingerprints etc.), records of court proceedings, identifications, results of experiments and inspections. (Civil.Proc.L. Art. 37).

Written evidence shall mean documents in written form which have important meaning to proceedings in case. Written evidence shall be in original form. If it is impossible to obtain original of written evidence, notarized copy shall be provided; otherwise evidence is not sufficient. If necessary, Court shall have right to demand production of original written evidence. If written evidence is difficult to obtain, court may examine and inspect written evidence at place where written evidence is kept. Person who provides original written evidence to court may request return of written evidence once final decision is made by Court. Notarized copy of written evidence shall be retained by Court in these circumstances. (Civil.Proc.L. Art. 44).

Physical evidence shall mean physical objects which are capable of establishing facts and have important meaning for proceedings in case. Physical evidence shall be maintained separately in file of case or special box or premises and comprehensive and detailed record of all such evidence shall be compiled. If impossible to keep physical evidence in court, inspection of physical evidence shall be conducted in place where evidence is located and record of inspection shall be completed. If necessary, picture, photograph, illustration, drawing or sound recording of physical evidence may be attached to file of case and order may be made freezing physical evidence. Inspection of foods or perishable items shall be conducted as soon as possible and notice shall be given to holders of evidence. Unless otherwise provided by law, physical evidence shall be returned to holder of evidence after inspection. If necessary, physical evidence may be kept by its owner or person to whom it has been entrusted or by officers of local police or administrative department. Person holding such physical evidence shall keep such evidence in good condition. Unless otherwise provided by law, physical evidence shall be returned to owner after final decision of Court. Motion picture, photographs, illustrations, drawings, sound recordings of physical evidence shall be kept in file of case in these circumstances. (Civil.Proc.L. Art. 45).

General Procedure.

Complaints shall contain following provisions: (1) court to which suit was made; (2) name, address of plaintiff; (3) name, address of defendant; (4) contents of suit; (5) amount in dispute; (6) competent evidence; and (7) list of documents in addendum. (Civil.Proc.L. Art. 62). Claim must be in written form and signed by plaintiff or his representatives. (Civil.Proc.L. Art. 61). If law did not fix special date, case shall be decided within 60 days from date of instigation of proceedings and, in case of appeals shall be decided within 30 days from date of receiving appeal. Before hearing of case, defendant enjoys right to make counter-claim for consideration of it, together with basic claim. (Civil.Proc.L. Art. 73). Evidence shall be considered documents, explanations, video and audio records, and depositions. (Civil.Proc.L. Art. 37).

Judge shall dismiss action in following cases: (1) if jurisdiction over persons (as distinct from [2]) was not established; (2) if proper court jurisdiction was not established; (3) if plaintiff defied procedure specified in law on nonjudicial provisional adjudication; (4) if inability to show cause of action by plaintiff is established; (5) if action was brought by person without right of representation of plaintiff; (6) if there is court decision that has come into force about facts alleged in action and regarding fault of parties, or decree of court that has come into force, or judge's decree about dismissal of action as well as dismissal of case; (7) if court is considering another case about matter in dispute; (8) if this matter is subject of criminal investigation; (9) if defendant's address is unknown; (10) if claim at issue or liability at issue was transferred to successor in case when person representing one party has died or legal entity was dissolved; or (11) if claim specified in Art. 60 of this law not met. (Civil.Proc.L. Art. 65).

Plaintiff may combine several claims connected with each other. If judge considers it necessary to separate one or several claims from combined action, then claims may be separated by decree of judge. If it is necessary to try one or several claims separately then they may be separated by decree of judge. When court considers case with participation of parties which have been involved in several cases of same kind, or judge considers it useful and expedient to try to combined procedure, several cases with one action made by one plaintiff against several defendants or with several actions made by different plaintiff against one defendant may be combined by decree of judge. (Civil.Proc.L. Art. 68). After instigation of proceedings, if judge deems it necessary, judge may decree following measures for affirmation of court decision on basis of plaintiff's request: (1) to seize assets of defendant in amount of claim; (2) to prohibit any concrete operations of defendant in amount of claim; (3) to seize current accounts of defendant in amount of claim; and (4) to transfer money in amount of claim to Court. (Civil.Proc.L. Art. 69).

Grievance Procedure of Court.

Court shall consider following cases by grievance procedure: (1) complaints made pursuant to law regarding public administration court, prosecutor's office conducting inquiry, investigating authority and other organizations, economic entities as well as their officials' decisions and activities; and (2) other complaints, specified in law, to be settled by court. Cases shall be considered pursuant to general procedure fixed by law unless stipulated otherwise in this Chapter. (Civil.Proc.L. Art. 156). Unless law requires another jurisdiction, complaint shall be made to court in venue where organization, economic entity and their officials who adopted decisions or carried out activity are located. Complaint shall specify what kind of organization or economic entity, their officials' decision and activity as described in complaint, what kind of legislative acts contradict these decisions and activities, and grounds and evidence to be considered in decision. If it is stipulated in law that complaint shall be settled preliminary in nonjudicial manner, then after remedy of grievance is awarded, that claim shall be accepted by court. (Civil.Proc.L. Art. 157).

While considering case presented by complaint, court shall include claimant and representative of related organization or economic entity. If applicant did not attend hearing without reasonable excuse, judge shall order return of complaint. Absence of representatives of organization and economic entity shall not delay consideration of case. Applicant shall file complaint and declare its legal grounds as well as evidence; representatives or organization and economic entity shall respond as to whether they agree with complaint or not. If they do not agree, they shall provide legal grounds for stating so. Court shall establish whether decision and activity of organization, economic entity and their officials are legal, whether decision was adopted by competent person or not and whether or not complaint is grounded in law. (Civil.Proc.L. Art. 163). After considering complaint, court shall adopt following decisions: (1) If it is stipulated in law, to annul decision and activity of organization, economic entity and their officials, or to oblige it to carry out activity, to compensate damage caused by their decision and activity to complainant; and (2) to dismiss complaint. (Civil.Proc.L. Art. 164).

5.03 DAMAGES:

If person trespasses against life, health, honor, prestige, reputation, or property of others, he must bear unlimited liability for that damage; and eliminate such trespass, unless such act was without fault, was trespass de jure, or did not exceed limits of necessary defense. (Civil.L. Art. 497). Court must determine quantum of liability. Liability for trespass caused by workers in scope of their employment must be borne by legal person for whom workers are working. (Civil.L. Art. 498). If trespass resulted from wrong decision or misconduct of State Organ of Administration and its officials, liability for trespass must be borne by State agency or related legal entity. (Civil.L. Art. 498).

Damages caused by person aged 7-14 or person without legal capacity must be compensated for their legal representatives- parents or guardian; and if damage caused by juvenile under direct control of special school reformatory, and health organizations, these organizations must be answerable for damages. (Civil.L. Art. 503).

If person without legal capacity caused damage due to mental disorder, damage must be compensated by guardian or organization exercising regular control over him or her. (Civil.L. Art. 503). Underage people themselves are liable for damages caused to others; if earnings and property of underage people are insufficient for payment of damages, their parents and guardians must make up deficiency. (Civil.L. Art. 503). Citizen is not answerable for causing damage to others if he was unable to realize consequences of action or exercise reasonable control over his action. (Civil.L. Art. 504). Person who lost capacity as result of taking alcoholic drinks and narcotic drugs will not be free of civil liability. (Civil.L. Art. 504). If life, health of person, or property of other persons is damaged during transport, owner of transport shall compensate such damages; however if damage caused by accident or force majeure in transport, except air, owner is not liable for such damages. (Civil.L. Art. 499). If damage caused by building or construction's collapse, owner or possessor will be liable; only if building was maintained improperly. (Civil.L. Art. 500). If life, health of person damaged by animal's attack, owner of animal must compensate such damages. (Civil.L. Art. 501). If damage of life, health or property of persons resulted from change of structure of building or construction, electric wires installed in, flammable or poisoned essence, legal person caring on this activity, or owner of dangerous items obliged to compensate damage. (Civil.L. Art. 502).

Person who caused damage jointly must bear joint and several liability. (Civil.L. Art. 497). Person who caused damage to health of others is obliged to compensate for loss of income, wages, and other similar profits (not taken completely result of disablement and all expenses connected with damage to health such as care of victim, additional meals, artificial limbs, hospital expenses, etc.). (Civil.L. Art. 505). If victim does not have definite earned income, wages, and profits during disability, victim has right to demand compensation in accordance with lowest wages fixed by law for disabled. (Civil.L. Art. 505). If health of person up to 16 years old and without earned income, wages and profits was damaged, responsible person must compensate expenses connected with damage. (Civil.L. Art. 506). If health condition of victim is not improved after reaching age of 16, parents or guardians have right to demand compensation at lowest wages fixed by law for disabled. (Civil.L. Art. 506). If person up to 16 years old had regular earned income, wages, and profits before time when damage was done, compensation must be made in amount of income, wages, or profits lost. (Civil.L. Art. 506). If health condition of victim, who lost part of labor capacity, worsened or decreased amount of compensation, he or she shall have right to require increasing compensation; however if salary, revenue or compensation increased due to better health condition, obliged person shall have right to decrease compensation by application. (Civil.L. Art. 507).

If victim died, parents or relatives, as well as children, have right to demand compensation for consequential expenses connected with burial and damages. (Civil.L. Art. 508). Compensation must be established by size of average monthly earnings of victim, not including portion which should be paid to those able-bodied people who were under guardianship of dead victim or those who have no right to compensation. (Civil.L. Art. 508). Pension for loss of benefactor not to be included in compensation for victim. (Civil.L. Art. 508). If action of juridical person who is obliged to make compensation for damage will be terminated and there is no heir to his right and duty, his property may be seized and transferred to state social insurance agency in order to grant compensation for victim as specified in Art. 31. Judge can change amount of compensation on request of victim. (Civil.L. Art. 509). Person who caused damage to property of other persons must compensate such damage or return condition before such damage by giving property with same name, type, and quality or fixing damaged property. (Civil.L. Art. 510).

If person spreads information defaming dignity, prestige, or business reputation of other person, that person is obliged to eliminate non-property damage with monetary or other forms of compensation, whether or not there was property damage. (Civil.L. Art. 511). Court must determine amount of compensation for non-property damage at request of complainant by considering methods for distribution of defamatory information, scope of distributed information, and physical consequences, and must oblige disseminator to discredit defamatory information by same means used for spread of defamatory information. Producer of low quality or defective products, must compensate such damages no matter whether contract relation was or was not between producer and victim; however in following situations producer will be free of obligations: (1) did not produce products for sale; (2) formally informed that product will not cause damage when produced; (3) when produced, product defects met norms and standards; (4) it was impossible to know about product defects due to science and technology level; and (5) salesman or producer proved that damage was caused by wrong storage, usage. (Civil.L. Art. 512). Social fund or social insurance or legal person shall have right to compensate for payments, or fund paid due to other's life, health damages, from obliged legal person or citizen; and obliged citizen or legal person must compensate under relative requirements. (Civil.L. Art. 513).

If gross negligent act or omission of victim has affected trespass or increased amount of damage, amount of compensation may be reduced by taking into consideration circumstances. (Civil.L. Art. 514). Court may reduce amount of compensation by taking into consideration property of perpetrator, except damage resulting from intentional criminal act. (Civil.L. Art. 514). Person who was injured during rescue of other's property from possible danger has right to demand compensation from owner of that property or from person who enjoys right of ownership, use, and disposal of that property.

Person who voluntarily purchased other's property is obliged to return said property to its owner or to person who has right of ownership, use, and disposal of that property, if initial purchase subsequently becomes invalid. (Civil.L. Art. 492). Person who purchased other's property by fraud must return income earned or income to be earned, as well as its benefits to its legal owner from time when property was purchased. (Civil.L. Art. 492). Person who purchased property in honest way is obliged to return that property to its legal owner from time he knew or should have known lack of legal basis of his purchase. (Civil.L. Art. 492). If bailee transfers to another party property as bailment due to ignorance of expiration of bailment, no one may make claim for property purchased by third party. (Civil.L. Art. 493).

5.04 INTERNATIONAL PRIVATE LAW:

Mongolia shall conclude international treaties on basis of general principles of Civil Law of Mongolia. However, if international treaty to which Mongolia is party contains provisions other than those of Civil Law, provisions of international treaty shall prevail. (Civil.L. Art. 539).

Foreign laws or internationally recognised practices not contrary to Mongolian law or international treaties to which Mongolia is party may apply to civil law relations. (Civil.L. Art. 540).

In applying foreign law, courts and arbitration panels shall ascertain content of rules in accordance with their official interpretation and practice. Courts and arbitration panels may approach Central Administrative Body issuing justice (Ministry of Justice and Home Affairs of Mongolia) or other competent authorities in Mongolia or abroad for legal assistance and interpretations and invite experts in order to ascertain contents of rules of foreign law. Parties may provide documents certifying contents of appropriate rules of foreign law. If rules of foreign law are not ascertained, as result of appropriate measures taken under this article, Mongolian law shall apply. (Civil.L. Art. 541). If application of foreign law conflicts with Mongolian law or international treaties to which Mongolia is party, foreign law shall not apply. (Civil.L. Art. 541).

Limitation periods shall be determined in accordance with Mongolian law or international treaties to which Mongolia is party, which apply to regulation of relations in question. Mongolian law may provide for exceptions to limitation period. (Civil.L. Art. 542).

Civil law capacity of foreign citizens and stateless persons shall be equal to that of citizens of Mongolia. Mongolian law may restrict their civil status. Legal capacity of foreign citizens shall be determined by law of State of which those citizens are nationals. Legal capacity of stateless persons shall be determined by law of State where they have permanent residence. Legal capacity of foreign citizens in respect of their contractual obligations and torts occurring in territory of Mongolia shall be determined by Mongolian law. Deprivation of legal capacity or limitation of legal capacity of any persons in territory of Mongolia shall be determined by Mongolian law. Declaration of person who has died or has been determined missing in territory of Mongolia shall be made in accordance with Mongolian law. (Civil.L. Art. 543).

Determination of legal capacity of foreign legal entities under law of State of which such entities are nationals shall be recognised by Mongolia. Foreign legal entity entering into transactions may not rely on restrictions not provided for by Mongolian law. (Civil.L. Art. 544). If there is any special restriction by foreign State of civil law capacity of citizens and legal entities of Mongolia, Government of Mongolia may establish reciprocal restriction in respect of civil law capacity of citizens and legal entities of that State. (Civil.L. Art. 544).

In protecting non-property and personal rights, law of State where event or other circumstances justifying claim occurs or where plaintiff has its place of residence or business shall apply in accordance with plaintiff's choice.

Rights of ownership of property shall be determined as follows: (1) right of ownership of property—by law of State where that property is situated; (2) right of ownership of property required to be registered—by law of State where that property is registered; (3) creation and termination of right of ownership of property—by law of State where property in question is situated at moment of occurrence of events or other circumstances justifying that creation or termination of right of ownership unless otherwise provided by Mongolian law; (4) acquisition and termination of right of ownership of property which is subject of transactions—by law governing that transaction unless otherwise agreed by parties; (5) right of ownership of property in transit under foreign trade transactions—by law of State from which property is dispatched unless otherwise agreed by parties; (6) right of owner who has filed claim for protection of right of ownership—by law of State where that property is situated or law of State where it is registered or law of State in whose court action may be brought, in accordance with choice of owner of any of them. (Civil.L. Art. 547).

Form for transaction shall be determined by law of State where that transaction is made. Transactions, which are made abroad and meet requirements of Mongolian law may not be considered void as result of contravention of any requirements as to form. Form of transactions relating to immovable property situated in territory of Mongolia shall be determined by Mongolian law. Determination of place of making transaction shall be regulated by Mongolian law. Form of and valid term of authorisation shall be determined by law of State where that authorisation is given. If authorisation meets requirements of Mongolian law, then it may not be considered void as result of contravention of any requirements as to form. (Civil.L. Art. 548).

Rights and obligations of parties to foreign trade transactions shall be determined by law of any State designated in those transactions or any future agreements made by parties. If parties do not designate governing law as provided in paragraph 1 of this article, then law shall be law of State where following parties have their place of residence or carry out their main business activities in respect of: (1) contract for sale —by law of seller; (2) contract for lease—by law of lessor; (3) contract for deposit—by law of depository; (4) contract for commission—by law of commission agent; (5) contract of agency—by law of agent; (6) contract for carriage—by law of carrier; (7) insurance contract—by law of insured; (8) contract for loan—by law of lender; (9) contract for gift—by law of donor; (10) contract of suretyship—by law of surety; (11) contract for pledge—by law of pledgor.

Contracts for joint action, specialisation, cooperation, civil engineering, construction and other works shall be governed by law of State where those activities are carried out or where results of those contracts occur unless otherwise agreed by parties. Joint venture agreement involving foreign legal entities and citizens shall be governed by law of State where joint venture enterprise has its place of business. Contract concluded as result of security transactions or auction sales shall be governed by law of State where those security transactions were made or where auction sales were conducted. Rights and obligations of parties to contracts not provided for in paragraphs 1, 2, 3 and 4 of this article shall be determined by law of State where party performing principal obligations under those contracts has its place of residence or carries out its main business activities. Unless otherwise agreed by parties, in respect of accepting performance, reference shall be made to law of State where such acceptance is made. (Civil.L. Art. 549).

Rights and obligations of parties arising out of torts shall be determined by law of State where events and other circumstances justifying claims for recovery of losses occur. If parties to obligations for torts that occur abroad are citizens or legal entities of Mongolia, then their rights and obligations shall be determined by Mongolian law. (Civil.L. Art. 551).

Inheritance shall be regulated by law of State where testator had his or her last permanent place of residence. Legal capacity of testator, form of testament, and making of testament and its amendments shall be determined by law of State where testator had his or her place of permanent residence at moment of making or amending testament. However, if making or amending of testament complies with requirements of law where it is made and those of Mongolian law, except for requirements as to form, then that testament and its amendments shall be considered valid. Inheritance of immovable property situated in Mongolia is subject only to Mongolian law. In inheritance of immovable property situated in Mongolia, making of testament and its form and amendment shall be governed by Mongolian law. (Civil.L. Art. 552).

5.05 TRESPASS:

See topic 5.03 Damages.

6 COURTS AND LEGISLATURE

6.01 COURTS:

Structure and procedure of Mongolian courts will radically change with passage of new court structure and Procedure Law soon to be passed by State Great Khural. New constitution of 1992 provides only general guidelines for structure and practice of courts, but clearly, old system based on Soviet model will be entirely discarded. Constitution provides that judicial system shall consist of Supreme Court, aimag and capital city courts, soum, inter-soum and district courts. (Cons.L. Art. 48). Special courts such as criminal, civil, and administrative courts may be formed, but all fall under supervision of Supreme Court. (Cons.L. Art. 48). Proceedings are to be held publicly if possible. (Cons.L. Art. 54). Separate Constitutional Court is empowered to make judgments on violations of, or disputes involving, constitution. (Cons.L. Art. 64).

See also category 1 Introduction, topic 1.03 Government and Legal System.

7 DEBTOR AND CREDITOR

7.01 BANKRUPTCY:

New Bankruptcy Law, which entered into force Nov. 20, 1997, provides procedures to declare firm's bankruptcy, to instigate proceedings for bankruptcy, to adjudge reorganization proposal, to set reorganization protocol, to dissolve economic entities and to protect economic interests of creditors.

Bankruptcy proceedings can begin either upon creditor's claim that debtor firm is insolvent or upon debtor's own report of insolvency directed to local court. (Bankruptcy.L. Art.

5.1). Within 30 days of entering bankruptcy proceedings, court determines debtor's assets and capacity to pay debt. (Bankruptcy.L. Art. 5.3). Once court determines debtor's situation, court must within seven days give official public notice of bankruptcy proceedings. In this notice court will declare date and place of creditor's meeting, rules and terms of creditor's claims, and outcome of unsatisfied claims. (Bankruptcy.L. Art. 5.5).

Creditor's meeting is organized by court to reorganize bankrupt entity or to dissolve bankrupt entity and liquidate and distribute debtor's assets. Upon court selection of trustee, court discusses and approves trustee's suggestions on distribution of debtor's assets and supervises trustee's activities. (Art. 11). Executor must be lawyer; financial expert; economist; consultant; financier or economist without private interest to debtor. (Art. 11.2). Trustee prepares detailed financial investigation of bankrupt debtor, secures remaining assets, and gives opinion on distribution of property to Creditor's Council. (Art. 12). If Creditor's Council is satisfied with trustee's opinion, it approves opinion and trustee is discharged. (Art. 12.3). Disputes are resolved by court. (Art. 6).

Property is distributed to creditors according to trustee's approved opinion. Creditors failing to submit claim before judgment of bankruptcy cannot be involved in distribution of property unless court decides otherwise. (Art. 35.1).

Property in entity's possession upon judgment of bankruptcy, bankruptcy insurance payments and property returned to entity are all considered distributable. (Art. 17).

If assets of debtor are not sufficient to pay off all creditor's claims, employee wages, allowances and other compensations are paid first with remainder distributed in proportion to claim among creditors.

7.02 EXECUTIONS:

Following decisions shall be enforced pursuant to executionary process: (1) Court judgment on civil case; (2) court judgment on criminal case; (3) arbitration award; (4) notary; (5) writ of execution based on administrative punishment. (Art. 4).

Jurisdiction of Court Judgment and Execution.

Officer of justice of location where person whose property is to be executed resides, works or where property is located, shall serve executionary process. If he has moved, and address is known, then executionary process documents shall be transferred to executive authority of that place and notice shall be served. (Art. 192).

Executionary Documents.

Means for executing judgment specified in Art. 4 of this law is execution document. Writ of execution shall include following: (1) Name of court granting writ of execution; (2) date of adoption of judgment and its number; (3) grounds on which writ of execution was granted; (4) surname, name, office and home address of payer and, if applicable, following: name of economic entity and organization, address of where its activity is being carried out; (5) sum and type of payment; and (6) term of effective judgment.

Enforcement of Judgment.

If payee does not voluntarily fulfill judgment, bailiff shall take following measures to enforce judgment: (1) Make property inspection, as well as personal search, and seize mortgage, confiscate or sell property; (2) make deductions from salary and/or income; (3) make payment from property possessed by others; (4) seize certain items named in judgment and to transfer to party owed, or to take concrete action; and (5) other measures specified in law. (Art. 34).

Seizure.

After making inspection of property and establishing extent of his property, bailiff shall fix time for covering payment by seizing or mortgaging property of such amount to cover payment. If payment was not made on time, seized and mortgaged property shall be confiscated. If payment is made in time, or court order was adopted for releasing seized or mortgaged property, that property shall be returned. (Arts. 36.4, 5, 6).

Exemptions.

(Art. 54.1). Payer shall not be compelled to give following items: (1) Needed food and tools for kitchen; (2) one set of clothes for every season; (3) firewood (fuel) for winter; (4) tools and required materials of those that engage in business of livestock or agriculture; and (5) tools and required materials of those that engage in professional work. (Art. 55.1).

Valuation and Sale.

(67.1; Art. 38). Bailiff shall execute sale of confiscated property within two months of confiscation. Food and fragile items shall be sold immediately. Movable property shall be sold by auction, and immovable property shall be sold by compulsory auction. (Art. 39).

In case of dispute on valuation of compulsory auction legal entity shall have right to claim within seven days from day of auction held. (Art. 51.1).

Payment from Salary.

If established that he does not possess any property or his property is not enough to cover payment, then payment shall be taken from salary, remuneration, and other income. Payment shall be taken from payer if payment does not exceed 50% of average monthly salary. Court shall not make deductions which will exceed 50% of monthly salary, remuneration, or income. Following income shall not be seized: (1) overtime wage, one time…; (2) relief for interim disablement, maternity and post natal benefit granted in accordance with law of relief; (3) compensation given for donations of blood and maternal milk; (4) additional expenses for food, recreation, and rest given for artificial organs and nursing; (5) pension for invalid; (6) child ailment. (Art. 56).

Stay.

Judge shall stay executionary process in following circumstances: (1) When payer has instituted bankruptcy proceedings and made claim to release seized property to court; (2) when third party, with right of reclamation for confiscated property, has made complaint to court; (3) when appeal has been made to supervising court; (4) when payer files complaint to remove item from list of items to be seized. (Art. 15.1). When reason for delay has been removed, judge shall make order for restoring executionary process at request of payee or bailiff. (Art. 15.6).

Dismissal.

Bailiff shall dismiss executionary process in following circumstances: (1) By request of payee, if payee refuses payment; (2) if payer has paid payment in full; (3) if payer and payee compromise; (4) when rights of payer and payee were not transferred after death of payer and/or payee; and (5) when dissolution has finished for payer in compliance with liquidation process and there is insufficient property to cover payment; (6) when executionary documents are annulled. (Art. 16.1).

International Law.

If another procedure prescribed in international treaty of Mongolia, is different from procedure fixed in legislation of Mongolia for proceedings of case, then procedure in international treaty shall prevail. (Art. 235). Citizens of foreign entities residing in Mongolia enjoying diplomatic immunity privileges shall not be subject to court proceedings of Mongolia. (Art. 236). Parties may change, by mutual agreement, local court and court jurisdiction of dispute that has arisen out of transaction between Mongolian citizen and foreign legal person. (Art. 238). If it is not contradictory to Constitution of Mongolia, courts may refer to customary international law for considering dispute in accordance with Art. 237 of this law. (Art. 239). Executionary procedure of Mongolia's courts and court of foreign country shall be defined by legislation of Mongolia and applicable international treaty concluded with foreign country and ratified by Mongolia.

Pledge.

Movable and immovable property and rights that may be transferred to others may be items of pledge. Property may be pledged to several persons and demand shall be satisfied according to sequence of contracts concluded. (Civil Code, Art. 154). If pledged to several persons, person who first accepted pledge shall have rights to demand to sell pledge. If he refuses to exercise right, next pledger shall exercise right to demand sale. (Art. 158). If debtor fails to fulfill obligation secured by pledge, then creditor shall be entitled to have his needs satisfied, first from value of pledged property before other creditors. (Art. 153). Contract for pledge shall be in writing. Contract to pledge immovable property must be certified by notary and registered with Real Estate Register Agency, and must meet detailed requirements. (Art. 156). Pledge shall be sold at auction, according to procedures set forth in this Law. Owner of pledge may take part in sales operation of pledge and make offer to purchase pledge. (Art. 159). Creditor may transfer rights to pledge to others, by transfer of demand secured by pledge. (Art. 161).

Hypothec.

Creditor's mortgage of immovable property in order to have his demand satisfied first before all other creditors shall be hypothec. (Art. 165). Hypothec is created with its registration with State Register. Parties involved must make document certifying amount of demand secured, interest, and period of performance. (Art. 166).

On July 6, 2005, Parliament passed “Law on Procedures of non-judicial sale of hypothec items” which sets grounds for non-judicial foreclosure of pledged immovables for banks and non-bank institutions. Law provides for creditor to apply for and obtain title to pledged immovable property upon several defaults by debtor. However on June 15, 2006, Constitutional Court of Mongolia, upon request by Supreme Court, ruled that articles inserted into Civil Law providing non-judicial foreclosure for hypothecs of banks and non-bank institutions were unconstitutional. As provisions deemed unconstitutional are deemed invalid, it is at present, problematic as to how Law on Procedures of non-judicial sale of hypothecs is to be enforced. At present, Law is technically still standing.

8 DISPUTE RESOLUTION

8.01 ARBITRATION:

Arbitration Tribunal of Mongolia, operating under aegis of Mongolian Chamber of Commerce and Industry, was originally established in 1961 to resolve trade disputes between Mongolian state enterprises and those of other COMECON countries. In 1991, Arbitration Court expanded to consider all commercial disputes involving foreign trade, regardless of nationality of disputants.

New Law on Arbitration, entered into force 1 May 2003. Purpose of law is to regulate arbitration in disputes related to material and nonmaterial property arising between legal bodies. (Arbit.L. Art. 1).

Structure and Activities of Arbitration Tribunal.

Arbitration shall be institutional or ad hoc arbitration. Chamber of Commerce & Industry, and other nongovernmental organizations and associations protecting rights and interests of producers, and customers may set up institutional arbitration center as its organization. Governmental agency, administration bodies and profit making legal persons are prohibited from establishing arbitration centers. Permanent arbitration center shall be deemed as established when organization permitted by this law shall make decision to set up institutional arbitration center, and adopt its rules and arbitrators' list. Organization and management of institutional arbitration center shall be regulated by its statute. Institutional arbitration center can conduct arbitration procedure of any disputes mentioned in Arbitration Law, in particular disputes such as intellectual property, and foreign trade arbitration. Mongolia is signatory to NY Convention (1958) and other International Treaties. Ad hoc arbitration shall be set up by parties in written format. Institutional and ad hoc arbitration have same rights. (Arbit.L. Art. 5).

Arbitration settles disputes that parties agreed to resolve by arbitration in accordance with Civil Procedure Code. (Civil.Proc.L. Art. 13.2). Non-arbitrable disputes are disputes under jurisdiction of court, other organizations or officials in accordance with Civil Procedure Code (Civil.Proc.L. Art. 13.3) and other laws (Arbit.L. Art. 7).

Definition and Form of Arbitration Agreement.

Arbitration agreement shall be in writing, and may be made before or after dispute arises. If parties have standard contract clause, arbitration agreement can be made after dispute arises. (Arbit.L. Art. 11).

Selection of Arbitrators.

Arbitral tribunal may consist of sole arbitrator or panel of arbitrators. Parties are free to determine number of arbitrators. Failing such determination, number of arbitrators shall be three. (Arbit.L. Art. 14). Competent body is free to appoint any person as arbitrator unless prohibited by law. Persons like judge, prosecutor, and detective are prohibited to work as arbitrators. Court of Appeal, in appointing arbitrator, shall have due regard to following factors: ability to act as arbitrator; independent and impartial arbitrator; qualifications required of arbitrator by agreement of parties. (Arbit.L. Art. 15).

Challenge of Arbitrators.

When person is approached in connection with possible appointment as arbitrator, he shall disclose any circumstances likely to give rise to justifiable doubts as to impartiality or independence. Arbitrator from time of appointment, throughout arbitral proceedings shall, without delay, disclose such circumstances to parties. Arbitrator may be challenged if circumstances exist that give rise to justifiable doubts as to impartiality or independence. Party may challenge arbitrator appointed by him, or in whose appointment he participated, reasons for which he becomes aware of after appointment. (Arbit.L. Art. 16).

Commencement of Arbitral Proceeding.

Parties shall be treated with equality; each party shall be given full opportunity of presenting case. (Arbit.L. Art. 22). Parties are free to agree on place of arbitration. (Arbit.L. Art. 24). Unless otherwise agreed to by parties, arbitral proceedings of particular dispute commence on date on which request for dispute referred to arbitration is received by respondent. (Arbit.L. Art. 25). Mongolian language shall be used in arbitral proceedings, unless another language is agreed otherwise by parties. (Arbit.L. Art. 26). Claims application shall be in writing. Claimant or representative shall sign claim application. Respondent can agree to perform claim requirements, settle, or refuse to agree and submit counter-claim. Claimant shall state facts supporting claim, points at issue, relief or remedy sought and respondent shall state defense in respect of particulars. Parties may submit all documents they consider relevant or may add reference to documents or other evidence. Unless otherwise agreed, either party may amend or supplement claim or defense during course of arbitral proceedings, unless arbitral tribunal considers it inappropriate having regard to delay. (Arbit.L. Art. 27). Subject to contrary agreement by parties, arbitral tribunal shall decide whether to hold oral hearings for presentation of evidence or oral argument, or proceed on basis of documents. All statements, documents or information supplied to arbitral tribunal by party shall be communicated to other party. Any expert report or evidentiary document which arbitral tribunal may rely on in its decision shall be communicated to parties. (Arbit.L. Art. 28). Unless otherwise agreed to by parties, arbitral tribunal may appoint experts to report to it on specific issues. (Arbit.L. Art. 30). If one of parties does not know language of arbitration, or is unable to communicate (deaf, etc.) and if parties need professional assistance, they may obtain assistance (translator, interpreter, lawyer, representative). (Arbit.L. Art. 31). Tribunal and parties shall maintain confidentiality of government, organization and persons disclosed during proceedings. (Arbit.L. Art. 32). Arbitral tribunal or party with approval of arbitral tribunal may request from Court of Appeal, assistance in taking evidence. Court may execute request. (Arbit.L. Art. 33).

Arbitration Costs.

Arbitral tribunal shall allocate costs of arbitration regarding dispute and time of arbitral proceedings. Arbitral tribunal shall determine actual cost of arbitration by arbitral award. Arbitration cost includes: arbitrators' fee, expenses occurred to arbitrator during arbitral proceedings, unpaid costs, under Arbit.L. Art. 31.2 of this law, costs related to witnesses, other costs of arbitral tribunal during arbitration; for institutional arbitration administration fee as stated in statute. Unless parties agree otherwise, basic arbitration costs shall be borne by respondent if claimant's claim is fully upheld, and by claimant if claimant's claim is dismissed. If only part of claim is satisfied, costs shall be apportioned between claimant and respondent upon adjustment of amount satisfied or dismissed claim. If actual cost is lower than anticipated cost because settlement is reached between parties, or claimant withdraws claim, or respondent fully satisfies claim, and there is sole arbitrator, difference will be returned to parties. Arbitral tribunal may take advance payment from parties. Arbitral tribunal shall determine advance costs of arbitral proceedings and if parties fail to pay within agreed time, arbitral tribunal may postpone or terminate arbitral proceedings. (Arbit.L. Art. 41).

Arbitral Award.

Arbitral tribunal shall decide dispute in accordance with rules of law chosen by parties as applicable to substance of dispute. (Arbit.L. Art. 34). For arbitral proceedings with more than one arbitrator, decision of arbitral tribunal shall be made, unless otherwise agreed, by majority of all its members. Award shall be in writing and signed by arbitrator or arbitrators. (Arbit.L. Art. 37). Award shall provide names of arbitral tribunal, place of arbitration, date, legal reasons for arbitral award, and unless otherwise agreed to or settled by parties and arbitration costs. (Arbit.L. Art. 37).

Within 30 days of receipt of award, unless otherwise agreed, Party, with notice, may request arbitral tribunal to correct award errors in computation, and clerical or typographical errors. (Arbit.L. Art. 39). Parties are bound to execute arbitral award. If party fails to execute award, other party may submit request to Court of Appeal to enforce award. (Arbit.L. Art. 42). Procedure of recognizing and enforcing foreign arbitral award regulated in accordance with 1958 New York Convention on Recognition and Enforcement of Foreign Arbitral Awards and c. 8 of this law. Procedure of recognizing and enforcing Mongolian arbitral award abroad shall be regulated in accordance with international conventions and treaties to which Mongolia is party. (Arbit.L. Art. 3).

Setting aside of arbitral award may be set aside by court as specified in Arbit.L. Art. 6 only if: party is under some incapacity, or arbitration agreement is legally invalid; or improper notice was given to party regarding arbitration, or was otherwise unable to present his case; or dispute or decision does not fall within scope of arbitration agreement; or arbitral tribunal or arbitral procedure was not in accordance with arbitration agreement of parties; or subject of dispute is not capable of settlement by arbitration under law; or award is against public policy. (Arbit.L. Art. 40). Application for setting aside must be made within three months after arbitral award has been granted or three months after decision on Arbit.L. Art. 39 request. If requested by party, Court of Appeal may suspend setting aside proceedings to give arbitral tribunal opportunity to take action that would eliminate grounds for setting aside. If arbitral committee fails to eliminate grounds for setting aside, Court of Appeal shall withdraw its suspension and decide upon request to set aside. (Arbit.L. Art. 40).

If Court of Appeal fails to issue writ of execution for illegal or unclear reasons it will not be sufficient reason to not enforce measure. In such case, court enforcement organization may execute arbitral award on its own initiative. (Arbit.L. Art. 42). Court of Appeal has right to refuse to recognize and enforce arbitral award under following grounds: if there is circumstance stated in Arbit.L. Art. 40.2 of this law; or arbitral award is not valid, or challenged, or withdrawn by court of place of arbitration. (Arbit.L. Art. 43).

9 EMPLOYMENT

9.01 LABOR LAW:

Note: Some minor amendments to Labor Law, and its definitions have been made on 22 May 2003.

New Labor Law came into force on July 1, 1999 and governs rights and duties of employees and employers on basis of employment contract. Law also determines essential provisions of collective agreement, methods of solving collective and private labor disputes, labor conditions, management and supervision regulations, as well as liability for violation of this law.

Collective agreement may be concluded between employer and employee's representative. Collective agreement will provide for basic labor wage, term of payment, supplement, any supplemental or additional wage, bonus, award, additional pension, or vocational training, as well as improvement in labor safety, or protection of employee's rights and legal interests where there is privatization or reorganization of enterprise/organization. (Lab.L. Art. 18.1.1-10).

Employment agreement may be concluded by mutual consent with or without fixed term. Standard terms of employment agreement are following: job title and work place; job description and list of related duties; basic wage; and labor conditions. (Lab.L. Art. 21.1). Employer cannot require employee to carry out duties that are beyond terms of employment agreement. (Lab.L. Art. 31).

Employee's position shall be kept open for employee during time that employee is seconded for governmental body for up to three months, or during regular annual leave, or short-term medical leave, or in circumstances pre- and post-confinement leave, participation in lawful strike, drafting of collective agreement/treaty and in any other circumstances set forth in collective agreement/treaty or bylaws.

New labor law also defines special contract. Special contract may be concluded between owner of property or his/her authorized representative and employee, or employee may conclude special contract with person having special skills or qualifications. (Lab.L. Art. 22).

Special contract shall be concluded in writing and term of such contract shall be up to five years. Worker may be temporarily transferred from his/her post to another post by employer. (Lab.L. Art. 32).

Employment agreement may be terminated by mutual consent; upon initiative of either party; upon expiration of employment agreement; upon death of employer or employee; upon employee's departure for military service; upon criminal indictment of employee; or upon request of competent authorities. Termination by employer is allowed to: reduce number of personnel, wind up enterprise, organization, its subsidiary, or branch; or when: there is inadequate job performance by employee; employee has reached age of 60 and is entitled to pension benefits; there is sustained violation by employee of rules relating to labor discipline; employee commits serious offence leading to immediate termination of work relations; or employee moves to another job or post by appointment or election. (Lab.L. Art. 40.1.1-7).

Change in ownership of organization/enterprise or in its form of incorporation shall not constitute basis for termination of employment agreement. Termination requires one-month notice where enterprise/organization is winding up or employee has failed to meet job requirements due to lack of qualification or skills, or health reasons. In circumstances of dissolution of business entity/organization, where there is necessity to reduce number of employees, employer shall inform employee's representative at least 45 days prior to taking such actions. (Lab.L. Art. 40.5).

Special contract may be terminated by employer in following circumstances: employee has not met requirements set forth in special contract; employee has entered into employment agreement with another employer; employer transfers rights of ownership in property to another person; or employee wastes property entrusted to him.

Employer is obligated to inform employee at least two months prior to termination of special contract and shall pay him dismissal benefits equivalent to three-months salary. (Lab.L. Art. 41).

Employee may terminate employment agreement at will. Employee shall have right to leave his job or post 30 days after submitting proper notice to his/her employer. Notice is considered termination of employment agreement. (Lab.L. Art. 39.1).

When employer terminates employment agreement by dismissing employee, employer shall determine date on which that employee is to finish his work and shall fix that date in notice given to employee. (Lab.L. Art. 43).

Both employer and employee are obligated to pay social and health insurance premiums each month at rate provided for by law. (Lab.L. Art. 46).

Hours of Work and Rest Periods.

Work hours shall be 40 hours per week (eight hours per day), except for persons aged 14 or 15 years where work hours will be 30 hours a week, and 36 hours a week for persons aged 16 or 17 years. (Lab.L. Arts. 70.1-2; 71.1).

Employer must investigate and remove any work hazards. Night time working hours are from 22:00 to 6:00. (Lab.L. Art. 72). Overtime work is allowed in cases of national emergency, or where it is required to eliminate disruption to electrical supply or damage to telecommunication facilities. It shall be prohibited to force employee to work two consecutive shifts. (Lab.L. Art. 74).

Employee is permitted both rest and lunch breaks. Sats., Suns. and national holidays are official nonworking days. (Lab.L. Arts. 75, 77).

Employee is permitted annual leave of 15 working days, plus additional leave days depending on his/her overall term of service. (Lab.L. Art. 79). Employee is also permitted short-term leave. (Lab.L. Art. 80).

Remuneration of Labor, Guaranteed Payment and Compensation.

Basic wage is fixed by law. Employee shall receive double wages for work carried out on holidays and one and half times usual rate for overtime work or any work during weekly day of rest. (Lab.L. Arts. 52, 53). Wages are to be paid at least twice a month. Changes in payment dates require ten-day notice. (Lab.L. Art. 62). Deductions from wages can only be made under limited circumstances. Where employee is unable to attend work because of natural disaster or other wide-spread calamity, or for another valid reason, he shall be paid compensation equivalent to half of his/her normal tariff wages. (Lab.L. Art. 66). Employee shall receive average wage during: reduced working hours; period of temporary transfer to another post; his/her absence due to health problems; or where there has been wrongful dismissal or transfer. (Lab.L. Art. 69).

Labor Discipline and Material Liability.

Employer shall adopt labor relations, sanctions and liability in accordance with current legislation. Liability of employee may be limited or full. Employee who is liable for damages must compensate relevant organization. (Lab.L. Art. 136).

Labor Protection.

New law determines requirements for particular post; any special work clothing or individual protective equipment; warnings of harmful chemical or biological materials or explosives; as well as fire safety, and unfavorable weather conditions. Employer shall inform competent authorities about any industrial accident, occupational disease or poisoning in accordance with established procedure. Concealment of aforementioned cases is prohibited. (Lab.L. Art. 95.8-9).

Employer must provide medical examination for his/her employees at employer's own expense. (Lab.L. Art. 92). Employer shall compensate employee for damages that occurred due to fault of employer. (Lab.L. Art. 97).

Employment of Women.

Employer shall not dismiss pregnant women, or single fathers with children under three years of age. (Lab.L. Art. 100.1). Pregnant women, mothers with children under eight years of age, and single mothers with children under 16 years of age shall only be required to perform night or overtime work, or make assigned work trips, where they agree to perform such work. (Lab.L. Art. 102). Mothers are permitted additional breaks for nursing infants. (Lab.L. Art. 103).

Employment of Young Persons, Midgets and Elder Persons.

Persons who have reached 16 years of age have capacity to enter into basic employment agreement. (Lab.L. Art. 109).

Business entity or organization with 50 or more employees must reserve 3% of its total work positions for disabled people or midgets in accordance with their abilities. (Lab.L. Art. 111.1).

Labor Disputes.

Labor Arbitration Commission will consist of three arbitrators appointed after consultation with participants to dispute and local district administration. Labor Arbitration Commission is empowered to settle disputes involving collective labor agreements. Decision must be made within five days of arbitrators' appointment. If parties to dispute do not accept decision of arbitrators, they may appeal decision to court.

Individual labor disputes shall be settled by Labor Dispute Settlement Commission. If decision of Commission is not accepted, employer or employee has right to appeal to relevant District Court within ten days from decision of Commission.

While most individual labor disputes are settled by Labor Dispute Settlement Commission, some disputes are subject to jurisdiction of District Court. Court shall settle following labor disputes: (a) appeals from decisions of Labor Arbitration Commission; (b) employee's complaint about unfair dismissal or unfair transfer to another job upon employer's initiative; (c) employer's claim for compensatory damages caused by employee's actions; (d) employee's claim for compensation for losses or damages due to injury caused during performance of work; (e) labor related disputes.

Parties to labor contract have right to bring complaint within three months of date of violation of their rights. (Lab.L. Arts. 125-129).

Supervision of Implementation of Labor Legislation.

Law empowers government and governors of all instances and organizations to supervise implementation of labor legislation.

10 ENVIRONMENT

10.01 ENVIRONMENTAL REGULATION:

State Great Khural (Parliament) enacted between 1994-1995 package of 16 laws on environmental protection. Although they establish a basic environmental legal framework, they do not establish by themselves complete procedures or standards and therefore, are to be completed by resolutions enacted by Government or Parliament. Main Agency in charge of environmental protection is Ministry for Nature and Environment was created in 1988. After Parliamentary elections in 1996, newly formed government assigned Ministry with travel and tourism policy developments. Package of laws relevant to environmental protection include following:

Law on Land, Law on Underground Resources, Law on Mineral Resources, Law on Protection of Livestock Genetic Fund and Health, Law on Air, Law on Hunting, Law on Protection from Toxic Chemicals, Law on Forests, Law on Natural Plants, Law on Water, Law on Natural Plant Use Fees, Law on Fees for Harvest of Timber and Fuelwood, Law on Hunting Reserve Use Payments and Trapping Authorization Fees, Law on Special Protected Areas. There are three other laws in drafting stage which include Law on Private Ownership of Land, Law on Land Fees and Law on Mineral Resource Fees.

Law on Environmental Protection is umbrella law for all environmental and natural resource laws in Mongolia. It established overall institutional structure and general rights and responsibilities to be implemented by various line ministries and local governments.

Land Law.

Purpose is regulation of possession and use of land by citizens, economic entities, organisations of Mongolia. It establishes seven categories of land, rights of each level of government, rights and responsibilities of land users, procedures for land assessment, land use contracts and land conservation.

Law on Special Protected Area was adopted in 1994 and became effective on Apr. 1, 1995. It is divided into eight chapters covering General Provisions, Strictly Protected Areas, National Conservation Parks, Nature Reserves, Monuments, Governmental Rights and Responsibilities, Land Use and Research, and Administrative Penalties. Purpose of Law is to regulate “use and procurement of land” for state protection, to preserve and conserve “original condition”, to protect specific traits, unique formations, rare and endangered plants and animals, historic and cultural monuments, natural beauty, and to foster scientific research.

Law on Hunting.

State Great Khural adopted Law on Hunting May 5, 2000. Law consists of 17 clauses. Law regulates hunting and trapping of animals. (Hun.L. Art. 1.1). Hunting animal fund consists of mammals, birds, and fishes that are native to Mongolia. Citizen that has studied hunting, possesses certificate for guns used in hunting, and has obtained permission from authorized organizations has right to hunt and trap animals. Hunt and trap for following reasons: (1) Industrial; (2) use; and (3) special. (Hun.L. Art. 6.1, 2). Administrative sanctions may be imposed upon violaters of hunting legislation if there is no case for criminal charges. (Hun.L. Art. 16).

Law on Forests was adopted on May 17, 2007. Purpose is to manage protection, proper use and regeneration of Mongolia's forests. Forest resources are property of state which has power to grant possession of them to local governments. Local governments may then grant citizens, economic entities and organizations rights to use forests and forest resources pursuant to contract or license. Citizens may also own timber and forest resources on land which they lease provided they pay relevant fees. Any trees planted by them on land they lease shall be their property.

Law of Water was adopted by Great State Khural Apr. 22, 2004 and will come into force June 1, 2004. Law contains six chapters. Law regulates use, protection, and restoration of water. (Wat.L. Art. 1.1). Person shall use water based on contract. (Wat.L. Art. 21.1).

Law on Toxic and Hazardous Chemicals was adopted on May 25, 2006. Purpose is to regulate production, export, import, storage, trade, transport use and disposal of toxic and hazardous chemicals. Toxic and hazardous chemicals are classified into three categories—chemicals that are toxic and hazardous for: (1) health of human; (2) nature and environment; and (3) animals and creatures—depending their chemical properties and effectiveness. Law contains one chapter related to protection requirements.

Law on Natural Plants was adopted in its present form in Apr. 1995 and became effective in June of same year. It contains four chapters covering general provisions, plant protection and restoration, plant use, and fines for violation of law. Plants are classified according to their abundance and restorative capacity as very rare, rare or abundant. Law also establishes certain plant protection zones to limit impacts of commercial activities.

Law on Air was adopted in Mar. of 1995 and became effective in June of same year. It contains four chapters governing general purposes, administration, and information related to air quality, various measures for protection, and fines and penalties for violations.

11 ESTATES AND TRUSTS

11.01 DESCENT AND DISTRIBUTION:

Property and rights of testator may be inherited; succession must be executed by law or testament; succession can be changed only by will of testator; legal inheritors or inheritors by testament must be only citizens who are alive during death of testator or his children born after his death; and property must be transferred to State ownership as escheated property if there is no legal heir to property. (Civil.L. Art. 515). Right to inherit intellectual property must be related only to right to property which may be obtained by law or testament; rights to intellectual property may be kept for 50 years; and rights not specified in this article must be transferred to State. (Civil.L. Art. 516).

If court decides that testator, legal inheritor, or inheritor by will was murdered intentionally, or other intentional criminal acts became cause of death, guilty person must forfeit right to inherit by law or will. (Civil.L. Art. 517). Property must not be inherited by person who is under investigation for crime specified in this article until judicial decisions are effective. (Civil.L.

Art. 517). Permanent residence of deceased testator will be place for hearing matters of succession, and if last permanent residence of deceased is not known, place where one can find all or most property will be considered place for commencing succession claim. (Civil.L. Art. 519).

Heirs-at-law include: (1) husband, wife, children, adopted children, children born after death, and parents or foster parents without capacity for work; (2) parents or foster parents with capacity for work, grandparents, brothers, and sisters if no one under (1) exists or they refuse succession; (3) grandchildren and great-grandchildren if their parents who had right to inherit were not alive when succession commenced; and (4) citizen who has no ability to work and was living with deceased before his death for over one year under guardianship of deceased. (Civil.L. Arts. 520-522). If testator left all his property to another person, not less than two-thirds of property to be inherited must devolve compulsorily on testator's underage children, children without ability to work and under guardianship of deceased, parents, foster parents, and other legal heirs. (Civil.L. Arts. 520-522). If beneficiary named in will dies before will was probated or he refuses inheritance, testator may appoint another beneficiary. (Civil.L. Art. 524.3).

Will must be made in writing and certified by Baga and Soum Administration head or notary. (Civil.L. Art. 523). Place and date of execution must also be specified in will, which must be certified by notary office. (Civil.L. Art. 523). Will will be considered certified in following cases: (1) testament of serviceman certified by commander of that military unit and (2) testament of people detained in prison or employed in prison certified by chief of prison. (Civil.L. Art. 523). Administration of will must be executed by inheritor appointed by will, but testator may appoint another person in charge of administration of will. (Civil.L. Art. 526).

If heir who lived together with testator until his death did not inform within three months notary or Baga and Soum Administration head of his refusal to accept legacy, it will be considered as accepted. (Civil.L. Art. 528). If heir died and did not accept legacy, right to accept his part would be transferred to his heir. (Civil.L. Art. 529). Although heir may accept property to be inherited, not waiting for arrival of other heirs, he has no right to sell, give, mortgage, or leave within one year from date when legacy was commenced or until acceptance of certificate for right to withdrawal, but may incur following expenses from inherited property: (1) expenses for taking care of testator and for his funeral, (2) expenses for guardianship of person who was under guardianship of testator or who has right to get pensions from testator, (3) salary and expenses necessary for providing other payments, and (4) expenses for protecting inherited property. (Civil.L. Art. 530).

Heir may hand in his application for granting of certificate of right to legacy to notary office where legacy was opened or Baga and Soum Administration head in absence of such office. (Civil.L. Art. 531). Certificate of right to legacy must be granted to heir one year after application was filed. (Civil.L. Art. 531). If there is reliable document evidencing that there are no other heirs, then certificate may be granted beyond one year since legacy was filed. (Civil.L. Art. 531).

11.02 SUCCESSION:

See topic 11.01 Descent and Distribution.

11.03 WILLS:

See topic 11.01 Descent and Distribution.

12 FAMILY

12.01 FAMILY LAW:

On June 11, 1999 Ikh Khural passed Family Law that came into force on Aug. 1, 1999.

This Law replaced Family Code adopted in 1973.

Purpose of Family Law is to regulate marriage, dissolution of marriage, criteria for invalidation of marriage, corporeal and incorporeal rights of family members, adoption, mutual maintenance, trusteeship, and upbringing and guardianship of children. (Fam.L. Art. 1).

Principles of marriage and family are as follows: (1) marriage is based on equal rights and voluntary mutual consent; (2) there are no restrictions on marriage based on nationality, origin, language, race or religion; (3) family is basic social unit; (4) state protects interests of family, maternity and children; (5) family is required to protect interests of children and provide for their healthy upbringing and development. (Fam.L. Art. 4). Family rights are protected by court, state administrative bodies, and social care organizations. (Fam.L. Art. 5). Marriage is valid only where following criteria are satisfied: both parties are at least 18 years of age at time of marriage regardless whether they are Mongolian citizens or foreigners; both parties are married on voluntary and mutual consent; man can have only one wife, and woman can have only one husband.

This law is also applicable to marriage between Mongolians and foreigners. Where Mongolians have married foreigners according to law of foreign country, then such marriage is valid, and rights of family members are defined by law of that foreign country. Where Mongolian citizens have married foreigners outside Mongolia, parties can choose applicable law, either law of Mongolia or law of foreign country where marriage took place. (Fam.L. Art. 6).

Applications must be made to Family Registration Office to register proposed marriages. (Fam.L. Art. 7). For marriage registration, applicants must submit medical reports disclosing any AIDS, venereal or tubercular diseases, and mental diseases. (Fam.L. Art. 8).

Marriage will not be permitted when: prior marriage of applicant remains valid; one or both applicants are under 18 years of age; application is for marriage between relatives, or between guardian and ward, or between adopter and adoptee; one or both of applicants suffers from mental disease that has tendency to be inherited by their children. (Fam.L. Art. 9).

Marriage may be dissolved by court or administrative body. Dissolution of marriage is not permitted when wife is pregnant or when children of family are under one year of age, or where respondent is ill.

Marriage may be dissolved by administrative body under following conditions: where there is mutual consent of parties; where there are no children under 18 years of age; where there are no property disputes between parties. In such circumstances administrative agency will dissolve marriage within 30 days of receiving application for dissolution from parties. (Fam.L. Art. 13).

In all other cases dissolution of marriage shall be decided by court.

Court may take some measures in order to attempt reconciliation between parties. Court may suspend hearings for period of up to three months in this regard. Where there is real threat to any child's health, health of other party, or life or health of other family members, then court shall not postpone hearings and must proceed to dissolve marriage.

Where parties cannot agree on matters relating to children, property division, alimony, and/or support of disabled family members, then court shall decide all of these matters. (Fam.L. Art. 14).

Marriage is invalid where it has been concluded in breach of provisions of Art. 9 of this law. (Fam.L. Art. 20).

All property disputes shall be decided in accordance with provisions of Civil Code.

Parents are responsible for care of their children, to ensure their healthy development, to educate them in accordance with national traditions, to provide essential elementary education, and to teach them basic labor skills. Parents must defend rights of their children and help their children to bear their responsibilities.

It is prohibited for parents to damage their children's health or education, or to abuse their rights as parents, or cruelly treat their children.

In event of dissolution of marriage both parents will keep same rights in respect of their children. (Fam.L. Art. 26).

Where there has been abuse or breach of parents' rights, parents may forfeit those rights or such rights may be limited by court. (Fam.L. Art. 27).

After dissolution of marriage mutual rights and obligations of former spouses with respect to material support for each other remain valid. Parties may make separation agreement relating to children's support, support of disabled family members, etc. (Fam.L. Art. 37).

Alimony may be paid in cash or in form of material things. Alimony may be paid monthly, quarterly, twice a year, annually, or in form of one off payment. (Fam.L. Art. 41).

Purpose of adoption is to protect interests of children. Foreigners are permitted to adopt. (Fam.L. Art. 54).

Following general conditions are necessary for adoption: (1) Permission from natural parents for adoption of their child, as well as application of person seeking to adopt child shall be notarized; (2) where one of spouses wishes to adopt child then he/she must obtain permission from other spouse; (3) where child is orphan, or his/her parents were deprived of their rights by court, permission for adoption of that child must be obtained from social care organization responsible for that child; if child is seven years of age or older, his/her opinion regarding adoption shall be considered; (4) child may be adopted after six months have elapsed from date when court's decision to deprive parents of their rights has entered into force; (5) application for adoption must be submitted to district or soum governor of place of child's residence; (6) governor shall make decision regarding adoption within 20 days of date of application; (7) marriage registration office shall register adoption.

Applicant must submit with application, notarized official translation of medical certificates relating to AIDS, tubercular or mental diseases; copy of marriage certificate; criminal statement that verifies good character from country of his/her permanent residence; financial statement from competent governmental body of country of his/her permanent residence; and statement from immigration and naturalization service of country of his/her permanent residence. (Fam.L. Art. 58).

Adopter has same rights and duties with respect to adopted child as natural parent. If adopter has submitted forged documents for adoption or he/she abuses parent's rights, then adopted child upon reaching 14 years of age has right to seek dissolution of adoption before court. (Fam.L. Art. 61).

New family law has also included provisions relating to trusteeship and guardianship.

13 FOREIGN TRADE AND COMMERCE

13.01 CUSTOMS:

Customs system is supervised by Customs General Administration, which controls frontier points, employs customs officials and collects fines and duties. All goods and vehicles must enter Mongolia through frontier points and pass through customs. Ulaanbaatar International Airport, Zamiin-Uud (Sino-Mongolian Border) and Altanbulag-Sukhbaatar (Russo-Mongolian Border) are presently only frontier points which handle wider international traffic. Customs Administration officials have authority to confiscate or to impose fines on illegally imported goods, as well as power to present certain violations to criminal courts for prosecution.

Customs Law purpose is to regulate customs matters in conjunction with Customs Tariff Law of Mongolia. (Cus.L. Art. 1). Customs Law regulates organizational structure and legal basis of customs, defines customs procedure, and establishes enforcement measures. (Cus.L. Art. 1). Unless there is written permission from Customs Central Body to do otherwise, all goods and means of transport coming into Mongolia must come through point where there is Customs establishment. (Cus.L. Art. 4). Goods or means of transport crossing Customs frontier shall be subject to Customs control for various periods depending on purpose of goods. Goods shall not be held at Customs for longer than three days pursuant to rules of Customs office. Carrier of goods possesses variety of duties relating to Customs. (Cus.L. Art. 8). Customs entrusted carriers carry goods from one Customs office to another. (Cus.L. Art. 9). Principal document for Customs clearance of goods is Goods Declaration Form. Other documents may need to be produced upon demand by Customs office. (Cus.L. Art. 10). Customs brokers at Customs office may represent owners of goods. All presented documents must be in Mongolian. (Cus.L. Art. 11). Customs Central Body fixes Customs clearance charges. (Cus.L. Art. 12). Customs Central Body may, only once, extend deadline for return of goods or means of transport introduced into Customs territory by up to six months. (Cus.L. Art. 14). Goods or means of transport may move in same province from one Customs office to another by Customs route, within specific time, without paying Customs duties and other taxes. (Cus.L. Art. 17). Mongolian Customs office also has specific provisions and procedures for outright exportation, temporary exportation, outward processing and reexportation. (Cus.L. Arts. 19-22). All Customs offices have designated warehouses for temporary placement of goods. Placement can be for no more than three months by Customs office rules. Customs offices will also have bonded warehouses, bonded manufacturing areas, bonded exhibition sites, bonded construction sites and special zones. (Cus.L. Arts. 24-28). Upon authorization by government, Customs Central Body is entitled to issue, prolong or cancel licenses for operation of Customs bonded zones or duty free shops. (Cus.L. Art. 31). Goods or means of transport crossing Customs frontier shall be subject to Customs examination. (Cus.L. Art. 34). All Customs documents presented to Customs officials are deemed confidential. (Cus.L. Art. 41). All goods or means of transport shall be subject to Customs affixments. (Cus.L. Art. 44). Customs Central Body shall tally all statistics relating to foreign trade according to Harmonized Commodity Description and Coding System. (Cus.L. Art. 46). Customs consists of Customs Central Body and affiliated Customhouses and Customs offices. Customhouses may have units and/or branches. (Cus.L. Art. 48). Customs shall administer and enforce Customs legislation; assess and collect Customs duties and taxes; compile Customs statistical data and combat Customs offences. (Cus.L. Art. 50). State Customs Inspector shall carry out Customs control and examination. (Cus.L. Art. 56). State Customs Inspectors are assisted by Customs Entrusted Agents. (Cus.L. Art. 70). Penalty for noncriminal smuggling offenses is confiscation or fines. Fines range from 5,000 to 150,000 Tugriks. (Cus.L. Arts. 71, 72). Other offenses include smuggling of prohibited goods, use of means of transport for concealment, noncompliance with declaration rules, moving goods without permission of Customs Control, failure of carrier to comply with obligations, alteration of customs affixments, violation of customs clearance procedures, noncompliance with lawful requirements of State Customs inspector, forgery, Customs duty evasion. These violations are punishable by confiscation and/or fines of up to 250,000 Tugriks. (Cus.L. Arts. 72-84). Any confiscated goods not related to offense shall be returned or their net worth shall be reimbursed to owner. (Cus.L. Art. 87). Appeal of Decision of State Customs Inspector must be filed with court within ten days of State Custom Inspector's decision.

Customs Tariff Law of Mongolia.

Purpose of law is to regulate Mongolian tariff system. (Cus.Tariff.L. Art. 1). Customs duties are assessed on basis of customs value and most-favored rates. (Cus.Tariff.L. Art. 4). Customs Tariff Council shall propose tariff policy for government of Mongolia, which may in turn, alter tariff rates in variety of ways. (Cus.Tariff.L. Arts. 5, 6). Customs duty rates may be ad valorem, specific, special, antidumping, countervailing or combinations thereof. (Cus.Tariff.L. Arts. 7, 8). Customs value of imported goods shall be their value at Mongolian border as made by declarant and verified by Customs Office. (Cus.Tariff.L. Arts. 10-12). Methods for determining value of imported goods are Transaction Value Method, Computed Method, Fall-Back Method and Deductive Method. (Cus.Tariff.L. Arts. 13-18). Customs duties may be paid in Tugriks or convertible foreign currencies. (Cus.Tariff.L. Art. 19). Customs office may, upon decision of government of Mongolia, suspend payment of customs duties for up to two months. (Cus.Tariff.L. Art. 20). Certain goods are exempt from Customs duties. (Cus.Tariff.L. Art. 21). Declarants must fill out certification of origin for their goods or pay general rates of Customs duty. (Cus.Tariff.L. Art. 23). Customs Office may, in certain cases, grant remission, abatement, refunds or drawbacks of customs duties. (Cus.Tariff.L. Arts. 24-27).

13.02 FOREIGN INVESTMENT:

See also category 20 Taxation, topic Taxes.

Mongolia became member of WTO in 1999; membership should influence Foreign and Commerce laws.

New Foreign Investment Law entered into force July 1, 1993 as part of legislative reform package which included overhaul of Tax Law. While similar in many respects to old Foreign Investment Law of 1990, new Law was drafted from beginning as part of integrated tax/investment package. It also gives more detailed regulations on use of and by foreigners and more specific regulations on labor regulation for foreign employers.

Pursuant to new Law, foreigners are permitted to invest in any branch of economy unless laws or regulations stipulate otherwise. (Foreign.Inves.L. Art. 4.1). Most notable such prohibition is provided by Constitution of 1992, which forbids foreign ownership of land. (Foreign.Inves.L. Art. 6.3). Foreign investment may take four forms: (1) establishment of wholly owned subsidiary or Mongolian branch of foreign entity; (2) direct investment by purchase securities of Mongolian business entity; (3) acquiring rights by law, concession, and contract to exploit and process natural resources; (4) investment through lease and franchise. (Foreign.Inves.L. Art. 6). (5) establishment of joint venture with Mongolian partner and (6) purchase of licence or other rights for exploitation of mineral or petroleum resources in Mongolia. (Foreign.Inves.L. Arts. 5, 6).

Governmental approval of foreign investments must be obtained from Ministry of Trade and Industry. To obtain approval prospective investors must submit special application package which should identify investors, describe subject matter and amount of investment proposed, describe form of investment and duration. In addition to application investors should include evidence of their own financial solvency, legal identity, any articles of incorporation for proposed business entity, any marketing, management, technical or other plans and any necessary authorizations from other Mongolian state organs which might be required. (Art. 12.3). Upon receipt of application Ministry of Trade and Industry shall in 60 days decide whether to issue certificate of approval. (Art. 12.4). Approval may be withheld if Ministry finds that proposed activities would be inconsistent with existing legislation, environmental protection, public health or Mongolian technological standards. (Art. 12.8).

Protection of Foreign Investments.

According to foreign investment law, state may expropriate foreign investment only where such action is in accordance with due process of law and is performed on nondiscriminatory basis. (Art. 8.3). Foreigners are guaranteed full and prompt compensation for expropriated investments. (Art. 8.3). Value of such compensation is determined according to value of expropriated investments as measured from date of expropriation. (Art. 8.4). Foreign investors are guaranteed equal treatment under law for losses caused by force majeure. (Art. 8.5). Foreign investors also have following additional rights: (1) to possess use and dispose of property invested, including right to repatriate investments made for formation of registered capital; (2) to participate in management of entity in which it has invested; (3) to promptly remit abroad its share of profits, dividends and proceeds from sale of assets; (4) to transfer rights and obligations to other persons in accordance with law. (Art. 10.1).

Operation of Foreign Invested Business Entity.

Obligations—Labor Policy.

While foreign invested businesses are required to recruit employees primarily from Mongolian citizens, Ministry of Labor may permit employ of foreign experts. (Art. 24.1). Mongolian social and labor regulations apply to all Mongolian citizens employed. (Art. 24.2). Foreign employers have right to transfer their salaries abroad after paying required income tax. (Art. 24.3).

Obligations—Land Use.

In conformance with Constitutional prohibition on direct foreign ownership of land, Foreign Investment Law provides that all entities with foreign investment gain use of real property through lease. (Art. 21.1). Relevant local hural and its presidium must approve such leases. (Art. 21.3). Leases must contain terms, duration, any necessary measures for environmental protection, other liabilities of lessor and lessee, as well as annual rent. (Art. 21.2). Responsibilities for lease in case of joint venture are borne by investors in proportion to their capital contributions. (Art. 21.4). Initial lease terms may not exceed 60 years, but lessee may extend lease once for up to 40 years, provided this is stated in initial terms of lease. (Art. 21.5). State has right to substitute or take leaseholds for specific State purposes, but foreign investors have right of prompt and adequate compensation. (Art. 21.7). If State determines that use of land harms public health, environment or national security, it may cancel lease.

Winding Up and Dissolution of Foreign Invested Business Entities.

Business entities must notify State Central Administrative body in charge of foreign investment (Foreign Investment and Foreign Trade Agency of Mongolia) and to General Department of National Taxation within 14 days of decision to terminate operations. (Art. 17.1).

Investment agreement shall be removed from registration and certificate of approval shall be revoked when duration of investment agreement expires and/or investor annuls agreement or violates laws of Mongolia. (Art. 17.2).

Upon receiving notice, General Department of National Taxation shall remove business entity from State Register and publish that fact. (Art. 17.4). Should operation of business be terminated before dissolution, foreign investors are entitled to transfer abroad their share of profits after final settlement of all business debts. (Art. 17.5).

Taxation of foreign invested business entities is governed by both Foreign Investment Law and Economic Entity Income Tax Law of 1993. Foreign investors may take advantage of tax preferences offered by both laws.

Customs Duty and Sales Tax Preferences.

Foreign Investment Law provides that registered initial capital of foreign invested business entity is free from both customs duty and sales tax. (Art. 19.1). For all enterprises except for caterers or traders, customs duties are suspended for five years on raw materials imported to support production. (Art. 19.2).

Other Preferences.

Foreign investments which are entirely new (i.e. not established by purchasing shares of existing business) are eligible for following three preferences: (1) investments in priority infrastructure projects such as power or thermal plants, highways, air cargo, railways, basic telecommunications and civil engineering receive ten year tax holiday plus five year 50% tax reduction thereafter (Art. 20.1.1); (2) investments in mining and mineral processing (except precious metals), oil and coal, metallurgy, chemicals, machinery, and electronics receive five year tax holiday plus five year 50% tax reduction thereafter (Art. 20.1.2); (3) foreign invested business entities not referred to in the two cases above which export more than 50% of their production receive three year tax holiday (Art. 20.2). In all cases regardless of method of formation of foreign invested business entity, reinvested income is deductible. (Art. 20.4).

See also category 20 Taxation, topic Taxes.

Foreign Investment Law.

Minister of Ministry of Trade and Industry has confirmed following with Resolution no. 271 dated July 2, 1993 and its annex “The order of the organization, registration and liquidation of the economic entity with foreign investment.” Enterprises with foreign investment are those which: (1) are comprised of 100% foreign investment; (2) are comprised of joint venture with Mongolian and foreign investment. Economic entity with foreign investment may make direct investment by way of purchasing with free currency dividends, shares and other securities of economic entities operating on territory of Mongolia, including dividends, shares and other securities sold by voucher of investment in line with privatization law of Mongolia, or may buy them with tugriks obtained from investment activity.

Economic entities and joint-venture enterprises shall be permitted to deposit and to make other transactions at Mongol Bank. Only state enterprises appear to be required to sell portion of their foreign currency to Mongol Bank. Fact that state entity invests state property in joint venture does not make joint venture corporation state enterprise.

Importation of Funds.

Evidence of importation of funds and evidence of importation of foreign currency and investment shall be granted by Ministry of Trade and Industry on basis of projects and documents of foreign investment, evidence shall be granted on basis of note from Customs Board. If cash and foreign currencies are imported evidence shall be granted by certificate of bank. Evidence of investment through bank is sufficient to satisfy MT and obtain FIL benefits.

Concluding a Stability Agreement.

Foreign Investment Law of Mongolia, adopted on 1 July 1993; amended on 3 Jan. 2002. (Art. 20).

In event of request by investor intending to undertake investment project of not less than US$2 million or equivalent amount of Tugriks in Mongolia, Cabinet Member responsible for taxation policy as permitted by Government of Mongolia, may sign agreement with investor on stability. Sample of stability agreement will be approved by Government of Mongolia.

Agreement sample shall contain provisions to ensure stable tax conditions during certain period, state objectives, and amount of investment, its implementation period, and rationale to revoke agreement. If start-up investment amount of project by foreign investor is

US$2.0-10.0 million, stability agreement can be signed for ten years; if amount over US$10.0 million for 15 years. In event of termination of activities by sole initiative of investor before period stated in stability agreement when business entity with foreign investment and/or branch of foreign legal entity was not bankrupt in accordance with laws of Mongolia, or their activities were not stopped by respective authorities, or parties did not terminate contract upon mutual agreement, amount of tax discounts and/or exemptions awarded to investor shall be refunded by investor. (Art. 19).

Investor willing to conclude Stability Agreement shall submit application and draft Stability Agreement to State central administrative body in charge of taxation policy issues. Government member in charge of taxation policy issues shall examine application and draft agreement within 14 business days following receipt and conclusion of Stability Agreement with applicant, if no clarifications required. If clarifications required, applicant shall be notified within seven business days. Three relevant organizations shall be notified of such Stability Agreement. (Art. 20).

13.03 FREE TRADE ZONES:

Mongolia now has two free trade zones, Northern border “Altanbulag”, and in Southern border of Mongolia “Zamiin Uud”. Law on Altanbulag free trade zone and Law on Zamiin Uud free trade zone regulate legal status and activity of free trade zones. Laws offer many advantages including tax exemption to persons and legal entities. Law approving casinos in free trade zones is major progress in this area.

When accounting for business entity or organization, following principals must be adhered to: (1) Financial statements shall be in conformity with international accounting standards; (2) financial statements shall be based on correct and fair documents, figures and information; (3) descriptions in report and statements shall be simple, clear, and easy to understand; (4) per methodology, accounting and reports shall be organized to compare future and past information; (5) best choice should be applied in administrative and cost accounting; and (6) accounting activities should be continued permanently. (Account.L. Art. 4). Business entity or organization should maintain accounting on accrual basis. Business entity or organization may maintain accounting on cash basis if it receives permission from State Central Administrative Body on Finance and Accounting. Business entity or organization that maintains accounting on cash basis shall convert its year ended financial statement to accrual basis. (Account.L. Art. 5). Unit of accounting shall be denominated in Tugrik and Mungu—currency of Mongolia. (Account.L. Art. 6).

Business entities and organization engaged in business within Mongolia shall maintain accounting records and prepare financial statements. Accounting records must be maintained in double entry form. Accounting information shall be implemented in following stages: (1) Compilation of primary accounting documents; (2) journal entries; (3) maintenance of detailed and general accounts; (4) preparation of transactions' information; and (5) preparation of statements. (Account.L. Art. 8).

Primary accounting document shall be basis to maintain accounting record and prepare financial statements fairly and properly. State Central Administrative Body on Finance and Accounting and National Statistic Department shall jointly approve methodology on primary accounting document. Management and accountants of business entity shall be responsible for compiling and recording changes of assets and liabilities in primary accounting document which occurred in course of their business. Primary accounting document is valid document upon signature and seal affixed by person that prepared, permitted, and inspected document. Those who prepared, permitted, inspected, and received document shall be responsible for compilation and faithfulness of primary accounting document. Any transaction without primary document shall be forbidden to record in accounting records and financial statements. (Account.L. Art. 7).

Business entity or organization shall prepare financial statements in accordance with international accounting standards. Financial statements shall be composed of: (1) Balance sheet; (2) income statement; (3) statement of changes in equity; (4) statement of cash flow; and (5) other additional disclosures of financial statements. Business entity or organization shall prepare financial statements on quarterly basis cumulatively from beginning of year. Director, head of financial department, chief accountant, or contracted accountant must sign and stamp financial statements. (Account.L. Art. 10).

Financial year begins on Jan. 1 and ends on Dec. 31. Business entity or organization must prepare and submit quarterly financial statements by 20th of first month following each quarter. Annual financial statements must be prepared and submitted by Feb. 10 of following year. Business entity or organization that prepares consolidated financial statements must submit quarterly financial statements by 25th of first month following each quarter and annual financial statements by Feb. 25 of following year. (Account.L. Art. 13).

Free Trade Zones.

In accordance with Law on Free Zones, “Free Zone” means part of Mongolian territory that is established under special conditions for business activity and investment; and should be considered separately in terms of customs and taxation policies. (Free.Z.L. Art. 3.1). There are five main forms of free zones: (1) Free Trade Zone. Activities aimed at improving packaging, storage, and protection of goods without loss of quality, value, and sale shall be carried out in free trade zone. (Free.Z.L. Art. 3.3); (2) Free Industrial Zone. Activities aimed at developing advanced, export oriented technology and production of products with great competition shall be carried out in free industrial zone; (3) Free Agricultural Zone. Activities aimed at developing intensive agriculture and husbandry, production and sale of foodstuffs shall be carried out in free agriculture zone. (Free.Z.L. Art. 3.5); (4) Free Tourism Activity Zone. Various services shall be offered in tourism free zone where adequate facilities and infrastructure up to international standards will be established. (Free.Z.L. Art. 3.6); (5) Free Economic Zone. Combined or merged types of tourism-activity and trade shall be carried out in free economic zone. (Free.Z.L. Art. 3.7).

Mongolia is currently developing three free trade zones, on Northern border of Mongolia “Altanbulag”, on Southern border “Zamiin Uud”, and on Western border “Tsagaannuur”. Law on Altanbulag free trade zone, Law on Zamiin Uud free economic zone, and Law on Tsagaannuur free trade zone regulate legal status and activity of free zones. Free zone laws offer many advantages including tax exemption, easier registration procedures, and simplified entry/exit procedures. Law approving casinos in free trade zones constitutes major progress in this area.

Law on Altanbulag Free Trade Zone.

Amount of company's investment into infrastructure of Altanbulag zone such as electricity, heating, water supply, telecommunications, roads, and railroads shall be deducted from revenue subject to income tax. Companies that invest in construction of storage facilities, cargo terminals, and hotels in Altanbulag zone shall be exempt from income tax for five years since commencement of operations, and granted 50% income tax abatement for three additional years. Companies engaged in storage and protection of goods, improvement of packaging that have signed contract with Governor of zone to operate for more than ten years shall be exempt from income tax for one year since commencement of operations and granted 50% income tax abatement for three additional years. Foreign companies, organizations, and individuals registered with Governor's Office and residing permanently in Altanbulag zone shall be exempt from real estate tax, and they shall be exempt from income tax if real estate in their ownership is sold to Mongolian company, organization, or citizen. (Altanbulag.F.T.Z.L. Art. 4).

Abatement of land use fee shall be granted in following cases: (1) Companies engaged in trade and services shall be exempt from paying land use fee for three years since commencement of operations and granted 50% abatement for three additional years; and (2) companies engaged in construction of main infrastructure of Altanbulag zone shall be exempt from land use fee for five years since commencement of operations and granted 30% abatement for two additional years. (Altanbulag.F.T.Z.L. Art. 5).

14 HEALTH

14.01 HEALTH REGULATIONS:

Law on Health, effective July 1, 1998 consists of seven sections regarding grounds, management and structure of health organizations, rights and duties of specialist in health, health services, rights and duties of citizens regarding health, supervision, participation and duties of legal entities, organizations and society in supporting and protection of health.

General Grounds.

Main purpose of this law is to manifest state policy principles on health, rules regarding legal entities, organizations; citizens on implementation of rights, to protection of health and medical care, to specify legal grounds of health organizations and their employee's activities.

State policy on health includes: general health of population is exclusive obligation of State; to render health aid to citizens without discrimination; to render some health aid free of charge; to provide treatment through health organizations irrespective of organizational form.

Structure of health management includes State Ih Hural, Government, state administrative body responsible for health; governments of administrative and territorial units are all responsible for management of health organization.

License to provide qualified service shall be issued by state administrative body if service concerns State or foreign investment health organization and shall be issued by government of aimag and Capital City. Following shall be submitted for license: decision of founders, articles of association, structure of specialists, guarantee of diagnostic and medical equipment, financial sources, guarantee.

License shall be terminated if activity not in accord with law and regulations were carried out on more than one occasion or by other reasons specified in law.

Financial source of health funds for state and territorial budgets are from health insurance, donations from legal entities, organizations and persons; chargeable services for health organizations and other related income; foreign donations, loans and other sources not prohibited by law.

Law defines rights and duties of health specialists, structure of medical education, protection and struggle against infectious diseases, guarantees to protect mother and child's health, abortion clinics, medicine expertise, pathological anatomy, rights and duties of citizens on health.

15 IMMIGRATION

15.01 ALIENS:

Law on legal status of foreigners in Mongolia of Nov. 1993 became effective on Feb. 1, 1994.

Amendments to Law on Legal Status of Foreigners was entered into force on Nov. 28, 2002. Government of Mongolia shall adopt rules of registering immigrants that are residing temporarily and long term in Mongolia. (Legal.St.Foreigner.L. Art. 26.10).

Amendments to law on legal status of foreigners entered into force on 1 Jan. 2001.

Visas are required to enter, exit and transit in Mongolia except when they are covered by agreements between states for mutual exemption from visas.

Constitution of Mongolia provides that rights and duties of foreign nationals shall be based on principles of reciprocity.

Foreigners must be holders of valid foreign passport and must obtain permission from competent Mongolian organizations prior to visiting or residing in Mongolia. (Legal.St.Foreigner.L. Art. 21). New amendments determine rights and duties of organizations issuing visa. (Legal.St.Foreigner.L. Art. 6/14).

Law classifies foreigners into four categories depending on duration of their visit or residence in Mongolia: (a) foreigners travelling to Mongolia for up to 30 days are considered visitors; (b) foreigners visiting Mongolia for up to 183 days are considered temporary residents; (c) foreigners living in Mongolia for up to five years are considered long term residents; (d) foreigners living in Mongolia for private reasons are considered immigrants. Aliens who are criminal defendants or suspects considered to represent threat to national security or public order may be denied exit from Mongolia. (Legal.St.Foreigner.L. Art. 22).

There are quantitative restrictions on number of immigrants residing in Mongolia. Total of immigrants in Mongolia should not exceed 1% of total population of country and immigrants from any one country should not exceed 0.33%. (Legal.St.Foreigner.L. Art. 24).

Council on Foreign Nationals under Ministry of Justice is in charge of immigrant status. (Legal.St.Foreigner.L. Art. 25).

Pursuant to amendments, Police Department is in charge of supervising movement of foreigners. (Legal.St.Foreigner.L. Art. 26).

Foreigners arriving in Mongolia, except those who arrived at invitation of Governmental organizations or local administrations, must register with Police within ten days of their arrival. Registration request must be made through host organization or private person. Foreign immigrants must inform Police of changes in residence, family status or employment within seven days of change. (Legal.St.Foreigner.L. Art. 26).

15.02 TRAVEL ABROAD AND MIGRATION:

Art. 16 of Constitution proclaims right of citizens to travel and reside abroad and to return to home country. Law on travel abroad and migration was adopted on Dec. 24, 1993 and became effective as of Feb. 1, 1994. Under this law citizens of Mongolia have right to travel freely abroad except those who are defendants in criminal cases or criminal suspects, or who are involved in unresolved civil cases. Citizens who were involved in State security sensitive work may be suspended exit from Mongolia for three years from date of their separation. Citizens wishing to travel abroad must apply to Police to obtain passport for travel abroad. Passports should be issued within ten days from date of submission of application. Citizens residing abroad for more than six months must register with Mongolian diplomatic mission in that country.

16 INSURANCE

16.01 INSURANCE REGULATIONS:

New Insurance Law adopted by State Great Khural, Apr. 30, 2004, will come into effect Jan. 1, 2005. Law consists of 17 chapters. Law regulates insurance activity, grants special licenses, and protects rights and interests of insured through state organizations.

Foreign citizens and entities have same right as Mongolian citizens and legal entities to insure property and nonmaterial property.

Two classifications of insurance: long term insurance and normal insurance. (Insur.L. Art. 6.1). Two types of insurance: obligatory insurance and voluntary insurance. (Insur.L. Art. 6.2). Each type of insurance shall be according to form. Laws regulate form of obligatory insurance. (Insur.L. Art. 6.3). Accounting regulating committee regulates form of voluntary insurance. (Insur.L. Art. 6.5).

Mongolian and foreign companies have right to submit application to Accounting Regulating Committee for special licenses to engage in insurance activities.

Accounting Regulating Committee shall decide whether to grant special license within 45 days after receipt of application. (Insur.L. Arts. 19, 20). Accounting Regulating Committee shall grant special licenses without term until Insur.L. Arts. 69 and 70 of insurance law have been suspended and abated.

Authorized capital of insurance company must consist of equity and be at least five hundred million Tugrugs. Authorized capital cannot be established through loan. (Insur.L. Art. 22.1).

Insurer shall have insurance supply fund to provide for execution of obligations in process of contract. (Insur.L. Art. 25.1).

17 INTELLECTUAL PROPERTY

17.01 COPYRIGHT:

See topics 17.02 Intellectual Property Rights, 17.03 Patents.

17.02 INTELLECTUAL PROPERTY RIGHTS:

See topic 17.03 Patents.

Art. 84 of Civil Code defines property; specifically Art. 84.5 provides rights, claims and intellectual values that bring profit to their owner, belong to non-material assets. Art. 122.1 provides ownership of intellectual property arises from moment of its creation.

New Law on Copyright and Related Rights was adopted on Jan. 19, 2006 by Parliament, replacing “Law on Copyright” of 1993. Law is designed to govern relations arising from possession, exploitation, regulation and protection of works protected by copyright and other related rights.

Intellectual property includes scientific discoveries, inventions, copyrights, product patents, new production methods, and trademarks. Scientific discovery is form of intellectual property which explains laws and phenomena of natural world. Invention is creation of method or machine relating to production or operation or product that has not been registered before and invented for first time relying on natural laws and revealing its principles. Design patent is new and specific solution relating to form or design of product which may be made by manufacturing method. New production method is concrete solution relating to new production method or process and organization of production process. Trademark is distinctive mark used by legal persons or citizens carrying on business for purpose of distinguishing their own goods and services from others. Common mark is trademark used by members of cooperative of legal persons under control of that cooperative.

Works protected by copyright include: (1) All types of oral or written scientific and literary works, computer programs and software; (2) all works with and without lyrics relating to music; (3) all works of fine art; (4) decoration and complementary works, stage decoration works; (5) architectural works, sculpture, architectural constructions; (6) all works of dance choreography, contortion works, pantomimes; (7) plays, musicals and other works of performing arts; (8) photographs and other works relating to photography; (9) video works with audio; (10) works originating from previously created works; (11) other works expressing authors' intellectual and creative activity; and (12) works originating from previous works and based on traditional arts. (Law on Copyright and Related Rights Art. 7).

In accordance with New Civil Code, any person may acquire assets that are material or nonmaterial wealth, and intellectual values and rights. (Civil.L. Art. 83.1). Person that has acquired right or obligation to possess intellectual value and rights for certain period of time, according to own rights and legitimate interests based on law or transaction, shall be direct possessor. (Civil.L. Art. 89.3). If two or more persons jointly possess intellectual value and rights they shall be joint possessors. (Civil.L. Art. 89.4). Mongolia is member of World Intellectual Property Organization treaties since 1979.

17.03 PATENTS:

See category 5 Civil Actions and Procedure, topic 5.02 Civil Code.

Mongolia ratified Paris Convention for Protection of Industrial Property in 1985 and became member of World Intellectual Property Organization in 1979. New Patent Law of Mongolia was adopted by Parliament on Jan. 19, 2006.

Law is designed to govern relations arising from protection of rights of authors of inventions, industrial designs or innovations and of patent owners and ensuring rights of ownership of patent and certificate holders. (Pat.L. Art. 1). Inventions and industrial designs may be patented, while authors of innovations can be issued certificates. (Pat.L. Arts. 4, 6). Invention is defined as absolutely new solution relating to product or process; industrial design means absolutely new, original solution relating to appearance or form of article of manufacture that can be produced by industrial means; and innovation means solution which is new for given organisation, and relates to product, process or organisation of manufacturing process. (Pat.L. Art. 3).

Unpatentable subject matters include: (1) Scientific discoveries, theories and mathematical methods; (2) computer programs and algorithms; (3) schemes, rules or methods for doing business, performing mental acts or playing games; (4) solutions contrary to public order, morality, environment or human health; (5) methods of treatment and diagnosis for humans and animals; (6) animals and plants except microorganisms and biological methods of producing them. (Pat.L. Art. 4). Law established Patent Office with authority to examine applications and issue patents and innovation certificates. Application must be in Mongolian. If it is filed in another language, translation must be provided by applicant within two months. (Pat.L. Art. 7). Application must contain request, description of invention, claim(s), abstract and where necessary drawings, and references. (Pat.L. Art. 7). Law makes distinction between inventions and innovations with regard to procedures to follow in order to issue patents and innovation certificates.

Patent Office reviews application based on examination report, and within nine months from filing date, makes decision whether patent is to be granted. When required, Patent Office may extend this period of time up to 12 months. If patent is granted it shall be published in Patent Gazette. (Pat.L. Art. 11). Patents for inventions and industrial designs are valid for term of 20 and ten years respectively, and innovation certificates are valid for term of seven years starting from filing date of respective applications. (Pat.L. Art. 15).

Patented invention or industrial design may be exploited only with consent of patent owner. Right to patent for invention or industrial design which has been created in course of employee's official duties or contractual obligations shall belong to employer unless otherwise provided in contract. (Pat.L. Art. 16).

Exploitation of patented inventions or industrial designs are subject to license contracts which should be registered with Patent Office. (Pat.L. Art. 19). License contract must be confidential. Fees are payable to Patent Office for maintenance of patent and for registration of license contract. (Pat.L. Art. 23).

Appeal filed against results of examination of patent applications for inventions or industrial designs shall be examined and considered by Patent Office. Appeals and disputes on all other matters shall be considered and settled by court. (Pat.L. Art. 28).

Invention means new useful solution that can be used in manufacturing and relates to product, manufacturing process or means, or principal parts or organization thereof. (Pat.L. Art. 3.1).

Unpatentable matters include: (5) method of treatment and diagnosis of human and animal diseases; (6) biological method for obtaining plant varieties and animal breeds other than microorganisms. These do not include nonbiological and microbiological activities.

Patents for inventions shall be valid for term of 20 years. Patents for industrial design shall be valid for term of ten years. Innovation certificates shall be valid for term of seven years. Each term shall run from date on which patent or certificate is granted. (Pat.L. Art. 15).

Right to patent invention or industrial design created jointly shall belong to all authors. (Pat.L. Art. 16).

License contract shall be registered with Intellectual Property Office. (Pat.L. Art. 19.3). Fees shall be paid for filing application for invention, industrial, industrial design, or innovation, to maintain validity of patent, and to register license contract. Intellectual Office shall collect fees. (Pat.L. Art. 23).

17.04 TECHNOLOGY TRANSFER:

Law on Technology Transfer was adopted by parliament and became effective 15 June 1998. This law determines requirements for technology transfer, technology level involved, use of technology transferred, and regulates any relationships related to technology transfer. (Tech.T.L. Art. 1).

Main requirements for technology transfer are following: conformance with technological and scientific policies of state; compliance with state's regulations regarding use and principles of free competition; transfer must be ecologically sound and not harmful to health of people or animals, and utilization of current techniques and technologies. (Tech.T.L. Art. 4).

Scientific Research Institution shall officially determine which technology is harmful to environment or health of people or animals. In this respect, Scientific Research Institution shall consider following matters both with respect to technology in question and similar types of technology: any information relevant to ability to reduce any negative consequences or harmful effects to surrounding environment or health of people or animals caused by utilization of technology for production purposes; economic value of such technology utilization; any information regarding product's quality or safety standards; availability of professional staff for technology utilization; any other relevant matters. (Tech.T.L. Art. 7). Following are permitted to be transferred: technological regime conditions for production, service and background information on technology stages as well as its regime and composition; techniques and equipment necessary for technology transfer; results of any scientific or technological studies or research; patents, licenses and product design; know-how. (Tech.T.L. Art. 8).

Technology to be transferred shall have following standard features: energy, material and raw material efficiency leading to reduced product cost and expenditure; absence of waste usable materials; both production process and product shall be ecologically friendly and not harmful to health of people or animals, financing sources for each stage of technology transfer shall be clear; property rights with respect to technology and employees and development of any aspect of technology shall be clear. (Tech.T.L. Art. 9).

Any technology that may be harmful to environment and people is strictly prohibited from being transferred. (Tech.T.L. Art. 10).

All parties to technology transfer shall enjoy following rights: to be engaged in all types of technology transfer work, except those prohibited by law; to obtain all necessary information with respect to technology transfer, except that prohibited by law; to deal or mediate within activity of technology transfer; to cooperate with relevant foreign countries and international organizations or persons, and to organize joint seminars, meetings and conferences for purpose of gaining further knowledge of technology. (Tech.T.L. Art. 11).

Technology transfer shall be performed pursuant to license agreement. Following provisions shall be contained within such agreement for technology transfer: (a) know-how related to process for production and materials, raw materials, scales and form of services to be supplied; (b) terms of patents and industrial design utility; (c) technology utilization, and provision for updating same; (d) training of necessary professional staff as well as provisions for their retraining; (e) terms for technology supply, equipment installation, transfer and servicing; (f) guarantee of technology licensor, providing for duration and capability of technology and equipment; terms of supply with respect to technology transfer; liabilities of parties to agreement and terms for compensation for losses; (g) confidentiality terms; (h) terms for variation; (i) price for technology and terms of payment; place of servicing and sale of product produced with technology transferred; (j) terms relating to validity and other provisions. (Tech.T.L. Art. 12).

All agreements on technology transfer shall be registered at Intellectual Property Office. (Tech.T.L. Art. 14).

17.05 TRADE NAMES AND TRADEMARKS:

Intellectual Property-Trademark and Geographical Indications.

New Law on Trade Marks and Geographical Indications adopted by Great Khural effective 2 May 2003. Purpose of law to ensure legal guarantees for registered trademarks, service marks and geographical indications, to protect rights and legitimate interests of owners, users; to govern relations arising in connection with ownership, use, disposal of trademarks and use of geographical indications. (T.M. and Geo.Indications.L. Art. 1).

Law gave definitions to term used: “Trademark” means distinctive expression used by person, engaged in manufacturing goods or provision of services, to distinguish goods or services from others; “collective marks” means trademark used by manufacturers and service providers under associated control; “geographical indication” means geographical name of country, region or locality which identifies goods as originating therein, where given quality, reputation or characteristic of goods are essentially attributable to geographical origin. (T.M. and Geo.Indications.L. Art. 3).

Trademark application shall be filed in Mongolia with Intellectual Property Office by individual or legal person wishing to register trademark. (T.M. and Geo.Indications.L. Art. 6). Trademark registration shall be valid for ten years following filing date, and may be renewed for ten year periods. (T.M. and Geo.Indications.L. Art. 10).

Following items shall not be considered trademarks: words or figurative shapes representing things and phenomena; common names; formulae; figurative shapes; common geometrical shapes; numerical expressions or indecipherable letters or marks; words or figurative shapes explaining origin, quantity, weight, quality and numerical expressions or indecipherable letters or marks; words or figurative shapes explaining origin, quantity, weight, quality, purpose or price of goods; name of manufacturers or methods or date of manufacture; anything in any way misleading; place names or abbreviations of them; maps or signs showing locations; human names expressed in undistinctive manner or common expressions of common undistinctive places.

Following marks shall not be registered: trademarks identical or similar to national emblems, flags, whole or abbreviated names of mass or international organizations, or official badges of Mongolia or other countries; whole or abbreviated names, portraits, pictures or signatures of famous people used without permission; words or figurative shapes protected by copyright or industrial design patents of Mongolia, used without permission; and trademarks similar to trademarks used for other goods and services which are registered in Mongolia or have been submitted for registration.

Name of locality that identifies good as originating therein shall be registered as geographical indication. (T.M. and Geo.Indications.L. Art. 15).

Application for registration of geographical indication shall be filed in Mongolia with Intellectual Property Office by individual or legal person who manufactures goods in indicated locality where characteristic of goods is associated with locality. (T.M. and Geo.Indications.L. Art. 16).

Registration of geographical indication shall be valid beginning from filing date and shall be unlimited in time. (T.M. and Geo.Indications.L. Art. 18).

International registration of trademark designating Mongolia shall have same effect as if directly applied for, examined and registered in Mongolia. (T.M. and Geo.Indications.L. Art. 26). Intellectual Property Office shall handle or settle following matters: disputes, grievances with respect to trademarks and trade names; examination of applications for trademarks and trade names; recording of filing priority dates; rights of authorship.

Where dispute arises, if disputing parties disagree with decision of Intellectual Property Office, parties may apply to court within 30 days from receiving decision. Court shall settle all disputes and grievances except those falling within sole jurisdiction of Intellectual Property Office by Law. (T.M. and Geo.Indications.L. Art. 20).

Where violation of legislation on trademarks and geographical indication is held not to constitute criminal offence, state inspector can impose fine of up to 50,000-250,000 Tugriks. (T.M. and Geo.Indications.L. Art. 30).

18 MINERAL, WATER AND FISHING RIGHTS

18.01 MINERAL LAW:

New Mineral Law entered into force Aug. 27, 2006. It gives specific regulations on procedures to obtain exploration licenses, to pay official fees, to reach binding agreements and to contract pertinent government agencies. Pursuant to new law, only legal entities registered in

Mongolia as taxpayers are permitted to implement exploration and mining works, where foreign invested companies are allowed to invest in mineral works projects. If foreign owned company exceeds investing US$50 million in first five years of its operation, then it is entitled to investment agreement with government, for protection of investments and tax stability. In 1997 law, this agreement used to be called Stability agreement.

Deposits and minerals belong to State. (Mine.L. Art. 5.1). State implements its power through Mineral Resources and Petroleum Authority. Government approval of exploration and mining must be obtained from this agency in form of license, which is valid for three years and 30 years respectively. (Mine.L. Art. 19, Art. 26).

Fees (Mine.L. Art. 32).

Exploration work:

Years	1 hectare USD
1	0.1
2	0.2
3	0.3
4-6	1.0
7-9	1.5

Mining work:

Type of minerals	1 hectare USD
Coal and common minerals	5.0
Other	15.0

18.02 PETROLEUM:

Development and exploitation of petroleum resources in Mongolia is governed by Petroleum Law of Feb. 13, 1991 and Petroleum Regulations which implemented law. State petroleum administration, Mongol Gazryn Tos (MGT), enters into contracts related to petroleum operations and supervises their implementation. According to Petroleum Law, all petroleum in Mongolia is exclusively property of State. (Petrol.L. Art. 3). Foreigners may exploit petroleum resources on basis of production-sharing contracts. All such contracts must meet certain basic requirements, including: (1) technology used must extract minimum of 20% of field resources; (2) steps must be taken to develop domestic petroleum processing industry; (3) training for domestic labor must be provided; (4) environmental damage must be minimized; (5) petroleum data and information must be provided to MGT; and (6) safety measures must be taken to protect health of personnel, prevent accidents and avoid damage to property or land. (Petrol.L. Art. 6). Once contract is approved by MGT and government, prospective foreign contractor must receive land tenure permit from local authorities and mine tenure permit from government. (Petrol.L. Art. 7).

Permitted term of petroleum operations differs according to type of activity pursued. For petroleum exploration, MGT may grant exploration term of up to five years with possibility of two extensions of two years each. (Petrol.L. Arts. 8.1, 8.2). Term for oil field development is set at 20 years, but if contractor installs additional industrial infrastructure such as processing facilities and pipelines, MGT may grant two extensions of up to five years each. (Petrol.L. Arts. 8.3, 8.4).

Royalty, Taxation and Production Sharing.

Contractors shall pay State royalty set by government (Petrol.L. Art. 9.1), and are subject to normal rates of taxation set by Mongolian Law (Petrol.L. Art. 9.2). Cost recovery oil is set at

40%. (Petrol.L. Art. 11). Contractor shall share with State negotiated percentage of remaining part of total production after deduction of cost recovery and royalty. (Petrol.L. Art. 10.1). Contractor has right to export its share of petroleum (Petrol.L. Art. 10.2), but under certain circumstances, MGT may request delivery for domestic consumption (Petrol.L. Art. 10.3).

Contractors are exempt from customs duties on: (1) import of equipment and materials necessary for petroleum operations; (2) reexport of equipment temporarily imported; and (3) export of its share of petroleum out of Mongolia. (Petrol.L. Art. 12).

Disputes over property arising out of petroleum operations are settled by court unless otherwise provided by contract. (Petrol.L. Art. 13.1). Disputes related to petroleum contract may be settled by request of parties in accordance with UNCITRAL arbitration rules. (Petrol.L. Art. 13.2). See category 8 Dispute Resolution, topic 8.01 Arbitration.

Liabilities.

State shall confiscate equipment, other property and petroleum produced in event that unauthorized person conducts petroleum operations. (Petrol.L. Art. 14.1). Serious violations of criminal nature are subject to jurisdiction of court. (Petrol.L. Art. 14.1.1). Contractors undertaking operations contrary to Petroleum Law or any other law of Mongolia are liable for damage caused. (Petrol.L. Art. 14.2). Damage resulting from any infringement of contractual obligations shall be compensated for by guilty party. (Petrol.L. Art. 14.3).

19 PROPERTY

19.01 IMMOVABLE PROPERTY REGISTRATION:

Immovable Property Registration.

Law on State Registration of Right to Ownership of Property and Other Rights Related to Property was adopted by State Great Khural on June 19, 2003. Law regulates registration of property, guarantees rights to own property, and other rights related to property and state registration.

Ownership rights of land, buildings, construction, and airplanes that cannot be used if separated from land, within territory of Mongolia shall be registered. In addition following rights shall be registered with state: (1) Mortgage; (2) lease; (3) servitude; (4) usufruct; (5) right to build and construct on other's land; and (6) right of ownership and use of land. (Rights.Own.Reg.Prop.L. Arts. 3.1 and 2). Law does not require registration of immovable property of state and its right to assure use to state organization. (Rights.Own.Reg.Prop.L. Art. 3.3).

When owner registers and obtains certificate of ownership right of immovable property, owner's rights shall be guaranteed. (Rights.Own.Reg.Prop.L. Art. 4.1).

Functions of Registration Office include: (1) Receiving, considering, and deciding upon applications of registration; (2) registering and guaranteeing certificates; (3) operating private affairs of state registration of rights; (4) providing information to citizens and legal entities in accordance with law; (5) consisting, operating, and keeping information regarding state registration of right; (6) operating activity of archives; (7) keeping land maps, its measure, and other required indicators related to immovable property; (8) providing information to courts and other authorized organizations in accordance with regulations; (9) making amendments and changes to registration pursuant to judgment of courts and other authorized organizations. (Rights.Own.Reg.Prop.L. Art. 11.1).

Citizens and legal persons shall submit application and other required registration statements concerning immovable property to State Registration Office. Within 14 days of receipt of registration statements, State Registration Office shall decide whether to register rights. (Rights.Own.Reg.Prop.L. Art. 15.1). After registration, state registration office shall grant state registration certificate of ownership right of immovable property. (Rights.Own.Reg.Prop.L. Art. 18.1).

Law on State Tax of Immovable Property became effective on 1 Jan. 2001. Payors of immovable property taxes are as follows: company, partnership, foreign invested company, its branches, non-governmental and religious organizations, State and local state entity, citizen of Mongolia and nonresident of Mongolia. Tax on immovable property is 0.6% of property value.

Immovable property of legal entity financed by state budget; apartments and common place construction are free from taxes.

Payor of immovable property taxes shall submit tax reports by 10 Jan. of year following.

19.02 LAND FEES:

Land Fee Law was adopted on Apr. 24, 1997 and regulates relations with respect to payment for land use.

Fee amounts are determined by value and size of properties and any developments on property if land is located within cities and by its resources if land is located outside designated city areas. (Land.Fee.L. Art. 5). Basic fee for use of land in city region is equal to 0.1-1% of total value of land. (Land.Fee.L. Art. 7.3). Land fees for land outside city regions varies and is based on resources on land.

Land-user whose land does not exceed 0.07 hectares shall enjoy 90% discount in land use fees. Further, if land is utilized for kindergarten, secondary school, or children's summer camp then no land fee applies. (Land.Fee.L. Art. 8).

Land-user's contract for use of land shall provide that land-user pays all fees before 25th day of first month of each quarter. (Land.Fee.L. Art. 9).

Land fee paid by landowner goes to budget of administrative region on which land is located. (Land.Fee.L. Art. 10).

19.03 REAL PROPERTY:

Land Ownership.

According to Law on Privatization of Land to Mongolian Citizen which was adopted on 1 May 2003, Mongolian family (citizen) has right to own free 0.7 hectare of land.

Land Use.

State Great Khural adopted Land Law of Mongolia on June 7, 2002. Law became effective on Jan. 1, 2003. Law regulates use of land by citizens, legal entities, and organizations. (Land.Fee.L. Art. 1). Foreign countries, international organizations, foreign legal entities, foreign invested entities, foreign citizens, and stateless persons may use land under conditions provided by law. (Land.Fee.L. Art. 6.3). Land shall be given for possession for purpose, and according to terms and conditions stipulated by Law, land may be given for possession only by license. (Land.Fee.L. Art. 27.1). Land possession license shall only give citizen or legal entity of Mongolia, possession for 15 to 60 years. Land possession license may not be extended for greater than 40 years upon expiration. (Land.Fee.L. Arts. 27.2, 30). Land given to citizens for possession, for fenced areas with private residential lots for purpose of households, shall not exceed 0.07 hectares. (Land. Fee.L. Art. 29.1). In addition, possession of land not exceeding 0.1 hectares may be given to citizens for cultivation of vegetables, berries, and fodder plants. (Land.Fee.L. Art. 29.2).

Licenses may be transferred or put up as collateral, in accordance with law, by license holder. Such transfers and pledges may only be undertaken between Mongolian citizens, companies, and organizations. (Land.Fee.L. Art. 38.1).

Governors of soum and districts shall decide on whether or not to give land to foreign citizens and stateless persons permanently residing in Mongolia through land auctions and for household need only; land not exceeding 0.05 hectares, for use as residential lot, and land not exceeding 0.1 hectares for cultivating vegetables, fruits, and berries.

Land may be given for use for up to five years through contract. Land use contract may be extended by up to five years upon expiration. (Land.Fee.L. Arts. 44.4, 6).

Common Ownership.

Two or more persons may jointly or individually own property and possess rights to protect their property. (Civil.L. Art. 108). Common property under partial ownership must be owned, used, and disposed of by owners according to their mutual agreement; disputes connected with this agreement must be settled by court. (Civil.L. Art. 108). Each partial owner of common property has right to transfer his part to others or to dispose of it in other ways. (Civil.L. Art. 108). If one of owners of common property partially sells or leases his own part, he should inform other owners and other owners will have first option to lease that parcel. (Civil.L. Art. 108). If other owners do not respond to party's notice of intent to sell or lease parcel within one month from date of his notice, selling party has right to sell or lease own parcel to another party. (Civil.L. Art. 108). If one of owners of common property owned partially sells or leases own parcel by failing to notify other owners, other owners may bring lawsuit against him within six months to demand damages. (Civil.L. Art. 108).

Partial owner of common property has right to demand separation of his own parcel from common property. (Civil.L. Art. 108). If partial owner of common property does not agree with other owners concerning severance of his parcel and quality of property, property will not be altered by agreement between parties as to severance of parcel, then partial owner may request court to sever his parcel from common property. (Civil.L. Art. 108). Common property includes all profits, fruits, and animals obtained as result of use of property, and if other owners do not agree, profits, fruits, and animals will be allocated according to each owner's parcel. (Civil.L. Art. 108). Family property is one form of property that is under common ownership (Civil.L. Art. 108), and special provisions apply to family property (Civil.L. Art. 108).

Leased Property.

Landlord is obliged to transfer property to tenant for temporary use, and tenant is obliged to pay for use of leased property. (Civil.L. Art. 287). Property leasing contracts must be concluded with or without fixed terms. (Civil.L. Art. 293).

Lease of Apartment House.

Lessor is obliged to transfer ownership or right to own, use and dispose of ownership and use by lessee and his family members in apartment, hostel, flat, room, or tent suitable for living conditions, and lessee is obliged to use that dwelling house in accordance with purpose of lease to provide dwelling and also to make lease payments in timely manner. (Civil.L. Art. 302). Landlord is obliged to transfer dwelling house in time to ownership and use of lessee and to make necessary repair work if it is stipulated in law or contract. (Civil.L. Art. 287.1 and 288). Lessee has following obligations: (1) pay rent at time fixed by contract, (2) use apartment and grounds for common use in line with its purpose, (3) make necessary repair work at proper time if it is stipulated in law or by contract, and (4) follow other rules for use of apartment. (Civil.L. Art. 287.1). Contract of lease of apartment may be concluded with or without fixed term. (Civil.L. Art. 287). Citizen may own and use apartment house for life, and this right is heritable. (Civil.L. Art. 287). Contract of lease of apartment house must be terminated by its destruction in accordance with decision of competent organization. (Civil.L. Art. 309).

Lease of Property.

Lessor is obliged to transfer real estate or movable estate and right to own, use, and dispose of such property to lessee for maintaining business activity and for implementation of purpose specified in lease with proper conditions, date and payment for ownership and use. (Civil.L. Art. 318). Lessee is obliged to use property in line with law or contract and to pay rents for leased property. (Civil.L. Art. 318). Property lease contract must be made in writing; real estate lease contract must be registered at Real Estate Registration Agency; otherwise, contract is null and void. (Civil.L. Art. 318). Parties must fix term for property lease contract by mutual accord, taking into consideration property conditions and purpose of lease. (Civil.L. Art. 320). When it becomes impossible to discharge obligation specified in contract by reasonable excuse, one party has right to demand reconsideration and abatement of contract. (Civil.L. Art. 321). Lessor is obliged to transfer to lessee property fitting conditions specified in contract, and unless it is stipulated in law or contract, to repair that property. (Civil.L. Art. 326). Lessor must be answerable for quality deficiencies of property not known during conclusion of contract which delays use of property. (Civil.L. Art. 326). Lessee is obliged to use leased property in accordance with contract terms; not to damage fertility of land, soil, productivity of cattle, and quality of property; rehabilitate property and make payments in fixed term unless it is stipulated otherwise and agreed in contract; repair property, unless otherwise stipulated in law or contract; and return property to lessor by calculating usual wear and tear of property. (Civil.L. Art. 326).

Land Use Fees.

Resolution no. 136 (Apr. 26, 1991) of Government of Mongolia establishes schedule of basic fees for land in Ulaanbaatar City and for land use prices. Price for one hectare of urban land is 4.5 million Tugriks and this applies to Mongolian citizens, economic entities, or organizations. Price for one hectare of urban land is US$633,800 for foreign companies, etc., who must pay in foreign currency. Annual land fee is 10% of this basic fee. These prices are subject to some negotiation.

Basic time period for land lease under draft land law to foreign entity or joint venture with foreign investor is 60 years, but it may be extended one time for another 40 years.

Initial lease period may be for 99 years depending on complexity of project, whether it is built in special economic zone once established, and length of time before investor will earn back initial investment. (Art. 44, 11.21).

Foreign enterprise, organization, or citizen who invests in technology which promotes production and service areas necessary for development of country, or which promotes protection and conservation of nature by using technology not harmful to nature, may enjoy reduced land payment rates and, in some cases, may be able to use land free.

20 TAXATION

20.01 ADMINISTRATION:

General Laws of Taxation, enacted Jan. 1, 1993, outlines tax system, including general principles of taxation and rights and obligations of taxpayers. It also establishes legislative grounds for administrative apparatus of taxation. State Great Hural (Parliament) is authorized to introduce, amend, or suspend taxes, as well as to set rates in all but a few cases. (Gen.Tax.L. Art. 18). State Tax Administration, (Central Taxation Office), division of Ministry of Finance, collects revenue and controls implementation and administration of tax laws.

20.02 CUSTOMS DUTY AND TAX:

Special Duty Tax Law was entirely revamped by new Law on Special Duty Tax adopted on June 29, 2006. Goods, vehicles, alcohol, beer, petrol and tobacco are taxed when they cross border. All legal entities and citizens (both Mongolians and foreigners) who are importing and producing above-mentioned goods within Mongolia are considered taxpayers. (Special.D.Tax.L. Art. 3). Alcohol and cigarettes within certain limits are exempt from tax if they are for private use. (Special.D.Tax.L. Art. 7.1.4).

20.03 INCOME TAX:

Individual income tax was entirely revamped by new Law on Individual Income Tax, adopted on June 16, 2006 and enforced from Jan. 1, 2007. Citizens or residents (defined as foreigners staying in Mongolia for 183 days or more) are taxed on income from both inside and outside Mongolia. (Ind.Income.Tax.L. Art. 6.1). Nonresidents present in Mongolia pay tax only on income from within country. (Ind.Income.Tax.L. Art. 9.1). Taxable income includes wages, salaries, bonuses, most allowances, capital gains, rents, dividends, interest, pensions, prizes, and winnings. Rates range from 2% in lowest bracket to over 40% in highest. Self-employed persons whose income derives from processing grains and cereals in Mongolia receive credit of 50%. (Ind.Income.Tax.L. Art. 24).

Economic Entity Income Tax.

Companies, cooperatives, joint ventures with foreign participation, commercial banks, credit and insurance agencies, non-government organizations, foreign representative offices, religious organizations, and state-owned legal entities are all considered taxpayers under new Economic Entity Income Tax Law enacted June 19, 2006. (Entity.Income.Tax.L. Art. 3). Branch office of foreign entity is taxpayer. (Entity.Income.Tax.L. Art. 5.4).

Taxable income is defined differently according to type of activity giving rise to income. Income derived from most commercial activity, including manufacturing, trade in goods, commercial banking, insurance, financial services, dividends, sales, interest, income and exchange of currency are taxable. Direct expenses which include salaries, material expenses, social insurance, capital depreciation, interest on loans, real deficit from difference of foreign currency value, payment of works completed by others, lease payment, interest of financial lease payment, orders of professional publications, vehicle tax, routine repair expenses, payments for use of natural resources are deductible. (Entity.Income.Tax.L. Art. 12). Income earned as interest on government bonds is similarly exempt. (Entity.Income.Tax.L. Art. 18). Income of foreign companies conducting activities in Mongolia in field of oil production or sharing products with Government are exempt. (Entity.Income.Tax.L. Art. 18). 50% tax credit is granted for all income derived from processing grains and cereals. (Entity.Income.Tax.L. Art. 19). Tax rates vary according to type of activity giving rise to income. Most commercial activity is taxed progressively. Rates range from 10% of income up to 3 billion. Tugriks to around 25% for income over 3 billion Tugriks per year. (Entity.Income.Tax.L. Art. 17). Dividend income is taxed at 10%. (Entity.Income.Tax.L. Art. 17.2). Income from sale of immovable property is taxed at 2%. (Entity.Income.Tax.L. Art. 17.2). Income from bank interest is taxed at 10%. Income from most activities of nonresidents in Mongolia is taxed at 20%. (Entity.Income.Tax.L. Art. 17.2). Lottery winnings and income from rental of videos is taxed at 40%. (Entity.Income.Tax.L. Art. 17.2).

20.04 VALUE ADDED TAX:

New Value Added Tax Law was adopted by Parliament on June 29, 2006 and became effective Jan. 1, 2007. Law regulates imposition of value added tax, payment of value added tax to budget, and its recompensation from budget to taxpayer. (VAT.L. Art. 1).

Taxpayer shall submit application for registration to concerned tax authority within three business days of being considered value added taxpayer, in accordance with this law. (VAT.L. Art. 6.1).

Permanent and temporary employees with labor contracts are not subject to VAT. (VAT.L. Art. 5).

Following goods, work and services are liable for VAT: sealed goods in Mongolia; exported goods for using outside of Mongolia; executed work and rendered services in Mongolia; and all goods imported to Mongolia for sale, use and application in Mongolia. (VAT.L. Art. 7.1).

VAT rate is 10%. (VAT.L. Art. 11).

VAT rate on exported products, goods and services is 0%. (VAT.L. Art. 12.1). This rate applies to goods exported for sale, transport services, and all services rendered outside of Mongolia. (VAT.L. Art. 12.1.1).

Finance services; currency exchange; money order services; accounting services; value vessel banking services; insurance services; reinsurance services; property registration services; securities related services; loan services; interest on social insurance; banking interest; dividend fees on loan guarantees; fees for insurance; finance listings; education services; health services; culture, art and sport services; religious organization services; government services; public transportation services; funeral services; services provided by organizations engaged in tour operating activities to foreign tourists; and experimental products of research and studies are exempted from VAT. (VAT.L. Art. 13).

21 TREATIES AND CONVENTIONS

21.01 TREATIES:

See also Part V of this volume, for selected conventions to which the U.S. and Mongolia are parties.

Washington Convention on Selling and Exchanging Rare Animals and Plants. Joined 1995; Hague Convention on Trademark Protection. Joined 1995; Agreement of Military Exchanges and Visits Between the Government of U.S. & Government of Mongolia. June 26, 1996. (Provides for joint exercises, etc.); Investment Incentive Agreement. Sept. 29, 1990. (Insures certain investments); Encouragement and Reciprocal Protection of Investments. Joined Oct. 6, 1994; Convention between the Mongolian Peoples Republic and the United States of America with Respect to Taxes on Income and Property. (Treaty to avoid double taxation); Agreement for Access To and From Sea, and Transit by Government of Mongolia thru Chinese Territory. Aug. 26, 1991; Trade Relation Agreement. Jan. 23, 1991. (Agreement to establish trade relations and MFN status); Agreement Between the Government of Mongolia and Government of U.S. Regarding Cooperation and Mutual Assistance in Customs Matters. June 19, 1996. 1993 Hague Convention on Protection of Children and International Adoption of Infants. Joined Jan. 1998; 1989 Barrel Convention on Controlling the Transportation of Dangerous Disposable Items. Joined Dec. 1996.

Note: As of July 9, 1997, Mongolia is member of the UN Convention on Contracts for International Sale of Goods. See Part V of this volume.

1
THE NETHERLANDS LAW DIGEST

—Scope —

Revised for 2010 edition by

MOLENGRAAFF INSTITUTE FOR PRIVATE AND EUROPEAN LAW, University of Utrecht, Faculty of Law, Utrecht, The Netherlands.

(Abbreviations used are: B.W., Burgerlijk Wetboek, Civil Code; N.B.W., Nieuw Burgerlijk Wetboek, New Civil Code; WvK, Wetboek van Koophandel, Commercial Code; Rv, Wetboek van Burgerlijke Rechtsvordering, Code of Civil Procedure; PbEG, Publikatieblad van de Europese Gemeenschappen, Official Journal of the European Commission.)

The Netherlands is member of EU. See also EU Law Digest.

Offical government website: http://www.overheid.nl.

Note: This revision incorporates legislation through Oct. 30, 2009.

1 INTRODUCTION

1.01 CONSULS:

In countries mentioned in royal decree (``Consulair Besluit'') The Netherlands consuls are competent to register births, marriages and deaths, to draw up instruments for which The Netherlands law requires notarial assistance, and to perform some judicial activities. Competence is limited to services for The Netherlands citizens. Some States of U.S., U.K., Canada, Australia and South Africa belong to areas of above consular competence. Furthermore The Netherlands consuls may issue visa for The Netherlands to foreigners.

1.02 CURRENCY:

Unit is EURO ([Euro]). EURO coins issued by EU Member States and banknotes issued by European Central Bank constitute legal tender.

1.03 GOVERNMENT AND LEGAL SYSTEM:

The Netherlands is democratic constitutional monarchy. Present constitution dates from 1814 and has often been amended, lastly in 1995 on which occasion constitution was totally revised. Montesquieu's theory of separation of powers prevails.

Both houses of Parliament are in session all year, but with several interval periods in which only urgent matters are dealt with. Parliamentary year starts on third Tues. in Sept. (“Prinsjesdag”).

Territorial/Administrative Subdivisions.

Major ones are: Provinces (12), Municipalities (“gemeenten”) and drainage districts (“waterschappen”). They all have popularly elected councils. Political debate on election of majors, principal magistrate of municipality.

Executive Power.

Sovereign (now Queen) and Council of Ministers (together called Crown) constitute executive branch. Sovereign is head of Kingdom (The Netherlands, The Netherlands Antilles and Aruba, and has limited power and no political responsibility, Ministers being responsible for acts of Sovereign. Ministers, assisted by sub-Ministers (“Staatssecretarissen”), appointed by Royal

Decree, head various ministries (since 2007: 15) and are individually responsible to Parliament but are not members of Parliament. Crown may initiate legislation in Parliament and may promulgate under certain conditions certain legislation as “Royal Decree” without consultation of Parliament (see subhead Legislative Power, infra). Chairman of Council of Ministers is Prime Minister, appointed by Royal Decree. Prime Minister coordinates work of Council of Ministers, which generally is based on coalition of two or more political parties. Prime Minister is not necessarily party leader.

Council of State.

Council of State (“Raad van State”) consists of 30 members and several extraordinary members, all appointed by Crown. Sovereign is official chairperson of Council of State, but day-to-day management is in hands of vice-president. Advice of Council of State (plenary) is compulsory for practically all new acts, AMvB (see subhead Legislative Power, infra) and ratification of treaties. Council of State advises Crown in disputes between governmental bodies and in cases of spontaneous annulment of governmental decisions contrary to law. Council of State acts through its Judicial Dept. on Administrative Disputes (“Afdeling bestuursrechtspraak”) as administrative judge in appeal in disputes between Administration and citizens and between administrative bodies. In environmental matters of administrative nature it is judge in first and only instance. See category 6 Courts and Legislature, topic 6.02 Courts.

Legislative Power.

Main legislative body is Parliament (“Staten-Generaal”), consisting of First Chamber (75 members chosen by popularly elected provincial councils) and Second Chamber (150 members chosen by universal suffrage), acting jointly with Government. First and Second Chamber can be dissolved by Royal Decree, ordering at same time new elections. Legislation by Parliament and Crown is called Act (“Wet”) having formal statutory force. Second Chamber of Parliament and Crown have right of initiative, but in practice, most bills initiated by Crown. Bill passes plenary session of Council of State for advice and is thereafter submitted to Parliament. After adoption by Second Chamber (debate in special committees; public debate in full session, attended by responsible Ministers), same discussion and consideration take place in First Chamber on basis of bill as adopted by Second Chamber. Until adoption by Second Chamber amendments may be introduced by this Chamber and by Crown. Both Chambers decide by simple majority with exception of special bills (mainly relating to Constitution: 2/3 majority). Bill becomes Act after adoption by Parliament and confirmation by Queen.

Legislation issuing from Crown alone is called “Algemene Maatregel van Bestuur” (AMvB), having statutory force, provided penal sanctions and taxes must be based on Act. AMvB passes Council of Ministers, and Council of State in same way as bill. AMvB is issued by Crown in form of “Royal Decree” without consultation of Parliament. Ministers may exercise (delegated) legislative power through Decree (“Ministeriëleregeling”). Local authorities and other territorial or functional bodies, as well as statutory boards for trade and industry and some professions (“bedrijfschappen”, “produktschappen”) have regulatory powers (“verordeningen”). Legislation by local authorities must pass local representative bodies (“provinciale staten”, “gemeenteraad”, etc.).

Judicial Power.

Constitution provides for judicial power for adjudication of civil law disputes and of penal offences. Judiciary is independent of government and appointed by Crown to serve for life (maximum age 70). Judiciary does not pass on constitutionality of acts. There is political debate on Constitutional Review. Members of Supreme Court (``Hoge Raad'') are appointed by Crown after nomination by Second Chamber. Public prosecutors are formally appointed until revocation but in practice also until retirement age (65). See also category 6 Courts and Legislature, topic 6.02 Courts.

Civil Rights.

Except as noted hereinafter (see category 15 Immigration, topic 15.01 Aliens), all have equal rights in Dutch territory. Human rights (prohibition of discrimination, freedom of religion, press, association, assembly and demonstration, protection of privacy, physical freedom and privacy of communication) are guaranteed by constitution and can only be restricted by special laws. Self-executing provisions of human rights treaties, to which The Netherlands is party (e.g., European Convention for the Protection of Human Rights and Fundamental Freedoms) are directly applicable and prevail over national laws.

Law.

Statutory law prevails. Judicial decisions (notably by Supreme Court) carry weight as interpretation of statutory law. Stare decisis rule does not formally exist. Dutch Civil Code is based on Napoleonic Code, but has since developed under strong influence of German Civil Code ("Bürgerliches Gesetzbuch") and Swiss Civil Code and Obligations Code ("Zivilgesetzbuch" and "Obligationenrecht"). New Civil Code entered into force Jan. 1, 1970 (Book 1—Family Law), July 26, 1976 (Book 2—Law on Legal Entities), Apr. 1, 1991 (Book 8—Sea and Traffic Law), Jan. 1, 1992 (Books 3 and 5—Property Law, Book 6—Law on Contracts in general, Book 7—Law on special Contracts) and Jan. 1, 2003 (Book 4—Succession Law). As of Jan. 1, 2002 Civil Procedure Code has been subject to far-reaching changes. See category 6 Courts and Legislature, topic 6.03 Law Reports, Codes. EU Law has large influence.

Prosecution of criminal offences set forth in Penal Code and various other laws (e.g. administrative or social-economic laws) is conducted by public prosecutors, who are hierarchically under Minister of Justice. So-called administrative sanctions (e.g. closing of enterprise, removal of illegal buildings) carried out by police at direction of administrative body charged with execution of law.

General Act on Administrative Law ("Algemene wet bestuursrecht"), provides for general rules for Administration in respect of citizens, such as codification of general principles of proper administration, preparation of, participation in and publication of governmental decisions and procedural provisions regarding complaint and appeal.

The Netherlands Antilles and Aruba.

The Netherlands Antilles (abbreviated "Antilles"), consisting of Caribbean islands Bonaire, Curaçao, Saba, St. Eustatius and St. Maarten, and Aruba belong to Dutch Kingdom. The Netherlands Antilles and Aruba are equal partners in Kingdom. Dutch Sovereign is head of Kingdom, represented in Antilles and in Aruba by Governor. Under "het Statuut voor het Koninkrijk der Nederlanden" Antilles and Aruba enjoy autonomy except in matters of common concern with The Netherlands (including defence, foreign relations and Dutch nationality). Antilles and Aruba have their own legislative assemblies ("Staten") elected by residents of Antilles and Aruba. Civil and commercial laws of Antilles and Aruba follow in general those of The Netherlands, although The Netherlands and both Antilles and Aruban corporate laws are growing apart to some extent because of adaptation of The Netherlands corporate law to EEC directives, not incorporated by Antilles or Aruba in their legal systems. (See also category 2 Business Organizations, topic 2.03 Corporations, subhead The Netherlands Antilles' and Aruban Corporations.) Some acts and treaties contain special clause that they apply equally to The Netherlands and to Antilles and Aruba (Act is then called "Rijkswet"). Judgments of highest court in Antilles and Aruba ("Gemeenschappelijk Hof van Justitie van de Nederlandse Antillen en Aruba") in civil, commercial and criminal cases are, with minor exceptions, subject to appeal to Supreme Court of The Netherlands in The Hague. (Act of July 20, 1961, as am'd by Acts of Dec. 18, 1963 and Dec. 12, 1985).

See also category 6 Courts and Legislature, topic 6.02 Courts.

1.04 HOLIDAYS:

The legal holidays are Sundays, Good Friday, New Year's Day, Christmas Days Dec. 25 and 26, Easter Monday, Pentecost Monday, Ascension Day, Liberation Day (May 5) and official Queen's birthday (Apr. 30). Banks and other offices are usually closed Sat. Process may not be served on legal holiday with exception of Good Friday. Time periods expire on next working day not being Sat. or holiday if last day of period falls on Sat. or holiday.

1.05 THE NETHERLANDS ANTILLES:

See topic Government and Legal System; category 2 Business Organizations, topic 2.03 Corporations.

1.06 OFFICE HOURS AND TIME ZONE:

The Netherlands is in the +01:00 GMT time zone. Office hours are generally from 9 a.m. to 5 p.m.

2 BUSINESS ORGANIZATIONS

2.01 AGENCY:

General.

Terms principal and agent relate to agency being legal situation in which person (agent) performs legal acts on behalf and in name of other person (principal). Agency occurs in many fields of law. Civil Code provides for set of rules on representation by proxy (volmacht art. 3:60 BW), part of which also applies to other types of agency (art. 78 BW). Civil Code also contains rules on specific types of agency, such as representation of company by directors and representation of partnership by partners, mandate (lastgeving art. 7:414 BW), intermediation (bemiddeling art. 7:425 BW), and commercial agency (agentuur art. 7:428 BW).

Proxy can be oral or in writing, express or implicit as part of function/job (art. 3:61 BW) and can be general for all matters or for specific matter (art. 3:62 BW). Businesses have to register certain proxies at local Trade Register. (art. 21 Trade Register Act 2007). Principal is represented by agent generally only if agent expresses to third party that he acts in name of principal and acts within limits of proxy. (art. 3:66 BW). If agent acts without proxy or exceeding his (registered) proxy principal is only bound if principal consents (art. 3:69 BW), or, exceptionally, if principal's conduct or other circumstances attributable to principal caused other party to believe that agent had adequate power to represent principal (art. 3:61 BW). Businesses are bound by agent acting within his registered proxy even if registration is incomplete or incorrect unless other party is aware of incompleteness or incorrectness. (Art. 25 Trade Register Act 2007).

Agent acting without or exceeding his proxy is liable for damages. (art. 3:70 BW).

Agent acting in name of principal still to be nominated has to inform third party of principal's identity within reasonable time failing which he is deemed to have acted on his own behalf, unless contract provides otherwise. (art. 3:67 BW). Agent may act as counterpart of principal only if proxy has been specified in such detail that conflict of interest cannot arise. (art. 3:68 BW).

Granting proxy does not deprive principal of capacity to perform by himself acts covered by proxy.

Main grounds of expiration of proxy are: termination of employment or duties of agent; lapse of time or fulfilment of condition; revocation; death, bankruptcy or guardianship of agent or principal. (art. 3:72 BW). Proxy for benefit of agent or third party can be irrevocable or continuing after death or guardianship of principal. (art. 3:74 BW).

Commercial Agency.—Commercial agents are defined as independent contractors who agree to act as intermediary in conclusion of contracts for principal or to enter into contracts on behalf of and for account of principal during specified period or for indefinite period of time and for commission. (art. 7:428 BW). Civil Code is in line with EC-Directive 86/653 of Dec. 31, 1986 on self-employed commercial agents. Civil Code contains some provisions designed to protect commercial agent, including obligation for principal to pay agent upon termination compensation of up to one year's commission (based on average of last five years) in case agent has developed business and has thereby substantially increased value of principal's business, provided compensation is reasonable considering circumstances, in particular loss of commission. (art. 7:442 BW).

2.02 ASSOCIATIONS:

Legal Entity.

Ordinary association (“Vereniging”) is nonprofit organization; however, profit making is allowed as long as it is not distributed among members. (§2:26 BW). Associations are created by multilateral acts which may be embodied in notarial deed. Associations which are not established by notarial deed are restricted legal entities (``verenigingen met beperkte rechtsbevoegdheid''): those making third party commitments on behalf of association remain liable under certain circumstances even after their discharge along with association and association may not obtain title to registered goods or be appointed heir. Such restrictions do not apply if association either has full legal entity status by being created in first place by notarial deed or obtains such status by having articles of association incorporated in notarial deed. Limited concept of ultra vires applies: commitments to third parties by board are binding even if exceed association's purpose unless board can show third party knew or should have known that board exceeded purpose.

Other kinds of legal entities, provided for in BW, Book 2, are:

Cooperative (``Coöperatie'') is association whose object it is to satisfy specific material needs of its members by means of entering into agreements with them in conduct of business which it operates to this end on behalf of its members. Business with third parties, if allowed by its articles, must be secondary to business with members. (§2:53-4).

Mutual insurance company (``Onderlinge Waarborg Maatschappij'') is association (in fact a cooperative) whose object it is to enter into insurance contracts with its members in conduct of insurance business which it operates to this end on behalf of its members. Insurance business with third parties, if allowed by its articles, must be secondary to business with its members. (§2:53-4).

Limited Liability Companies (NV and BV) treated under topic Corporations.

Foundation (``Stichting'') dealt with under topic Foundations.

Besides legal entities mentioned above, there are three kinds of legal entities based on European law:

European Economic Interest Grouping (EESV), introduced by EC Council Regulation 2137/85 and implemented in The Netherlands by Act of June 28, 1989. EESV can be defined as legal vehicle for cooperation of two or more enterprises, situated in at least two different EC Member States, in order to facilitate or develop economic activities of its members and to improve or increase results of those activities. Direct participation of natural persons having their activities outside EC or of legal persons from outside EC is not allowed. Members of EESV shall have joint and several liability for its debts and other liabilities, but only after creditors have requested EESV itself to pay and payment has not been made within appropriate period.

European Company (SE), based on EC Council Regulation 2157/2001 establishing company law rules and EC Directive 2001/86 on involvement of employees. Implemented in The Netherlands by Acts of 17 Mar. 2005. By setting up an SE (which is optional), companies established in more than one EC Member State will be able to merge and operate throughout EC on basis of single set of rules and unified management and reporting system. However, while national company rules concerning public limited liability companies (in The Netherlands: N.V.) have gap filing function, there are in fact as many different SE's as there are Member States.

European Cooperative Society, based on EC Council Regulation 1435/2003 and EC Directive 2003/72, both entering into force on Aug. 18, 2006. Acts of implementation forthcoming.

See topics 2.03 Corporations, Partnerships; categories 6 Courts and Legislature, topic Law Reports, Codes, subhead Recodification of Civil and Commercial Codes; Documents and Records, topic Records; Business Regulation and Commerce, topic Trade Register; Estates and Trusts, topic Trusts, subheads Foundations, Fiduciaries.

2.03 CORPORATIONS:

N.V. and B.V.

Dutch law (§§1, 4, 5, 7, 8, 9 Book 2 BW) recognizes two main types of corporations: N.V. (“naamloze vennootschap” or “public company”) and B.V. (“besloten vennootschap met beperkte aansprakelijkheid” or “private company with limited liability”). Both types are very similar, but there are a few important differences: (1) Shares of B.V. must be made out in name of holder, while N.V. may issue shares and certificates to bearer; (2) transfer of B.V. shares must be restricted by articles of association in either of two ways (or combination thereof): preemptive rights for other shareholders or transfer subject to approval of some corporate body, e.g. shareholders meeting or board of management; transfer of N.V. shares may or may not be restricted dependent on articles of association; (3) minimum capital upon incorporation for N.V. [Euro]45,000 and for B.V. [Euro]18,000.

In practice, B.V. form is more common form for family business and subsidiary companies, while public companies always have N.V. form. B.V.'s vastly outnumber N.V.'s. B.V. regime is being criticized for not being competitive enough in European context. Cabinet is working on proposal for more flexible B.V. which might lead to abolition of minimum capital requirement.

Incorporation of N.V.'s and B.V.'s.

N.V. and B.V. companies are incorporated by execution of deed of incorporation (“akte van oprichting”) by one or more persons in presence of notary. In this deed of incorporation, act of formation (``oprichtingshandeling'') is drawn up. Deed of incorporation includes articles of association. Incorporation is subject to declaration of no-objection ``preventive supervision'' from Minister of Justice, which has to be obtained prior to execution of deed of incorporation. Such declaration may only be refused on grounds that, in view of intentions or past record of those who will determine or help determine company's policy, danger exists that company will be used for unlawful purposes, or that its activities will be carried on to detriment of creditors. For these purposes, Ministry examines credentials of incorporators and initial managing directors (“bestuurders”). If declaration of no-objection is refused, person who asked for no-objection has right of appeal. Cabinet is working on proposal for new system of supervision of corporations under which declaration of no-objection is no longer required and is replaced by continuous supervision.

Deed of incorporation must be in Dutch language and must be signed by incorporators or their proxies and notary.

Execution of deed of incorporation brings company into existence and company thereupon has legal personality. Managing directors however, remain jointly and severally liable to third parties for all acts binding company and performed during their term of office until: (i) Registration of company in Trade Register, (ii) payment of at least 25% of total par value of shares issued upon incorporation, and (iii) payment of at least [Euro]45,000 ([Euro]18,000 in case of B.V. as long as minimum capital requirement is upheld) on shares issued upon incorporation.

It should appear from deed of incorporation how many shares and of what kind are issued to each incorporator. Each incorporator must take at least one share and together with others they must take so many shares that at least one-fifth of authorized capital is issued at time of incorporation. In deed of incorporation initial managing director(s) must be appointed.

Company must register with Trade Register immediately following incorporation. (See subhead Registration, infra.)

There is no organization tax but capital tax amounting to 0.55% of paid-up capital.

Amendment of Articles of Association.

With absolute majority of votes cast, unless articles require quorum and/or qualified majority, general meeting can resolve to amend articles. If existing articles forbid any amendment, general meeting can nevertheless amend by unanimous vote in meeting where entire issued capital is represented. If articles grant any right to anyone else than shareholders, amendment cannot deprive him of his vested rights, unless stipulated in grant. Convening notice must announce proposed amendment and complete text of amendment must be deposited at company's office for inspection by shareholders, from date of convening notice until meeting is closed.

Amended articles must be embodied in notarial deed and amendments have no legal force until Ministry of Justice has issued declaration of no-objection, which may be obtained either prior to or after execution of deed of amendment. Declaration of no-objection may only be refused on ground that amendment would facilitate use of company contrary to public order or that danger exists that company will be used for unlawful purposes.

Trade Register Act requires registration and deposit of complete text as amended by managing director.

Issuance of Stock.

Issue of N.V. shares requires resolution of general meeting or resolution of other corporate body (e.g. board of supervisory directors) which has received authority to issue shares either by means of provision in articles of association or through resolution of general meeting; grant of authority in N.V. may be given for maximum of five years (renewable). Issue of B.V. shares requires resolution of general meeting, unless articles of association designate other corporate body. General meeting can pass on its authority to issue shares to other corporate body. In case of B.V. there is no limitation as to certain period. Issuance of shares requires notarial deed.

Existing shareholders generally have preemptive rights in case of new issue, but there are important exceptions and restrictions to this rule. Most important is that preemptive right can be excluded by resolution of general meeting of shareholders or other designated organ (in N.V. resolution of general meeting of shareholders requires qualified majority of two-thirds of casted votes in case less than half of subscribed share capital is represented at meeting).

If company is N.V., shares to bearer may be issued if fully paid up. If company is B.V., all shares must be made out in name of holder.

Concerning shares issued at incorporation against payment in Dutch legal tender or foreign currency bank statement must be produced in order to ensure that money is actually paid. Proposal for new Act on B.V. provides for abolition of bank statement.

In case shares are paid up in kind upon incorporation or thereafter, description of assets and liabilities involved and valuation report by auditor is required. Analogous rules apply if, within two years after company was registered in Trade Register, company acquires assets belonging to incorporator (or—if B.V. is concerned—incorporator or shareholder) or having belonged to such person as recently as one year before incorporation. Proposal for new Act on B.V. provides for abolition of report by auditor.

Different Kinds of Shares.

It is possible to create several classes of shares as well as preference and priority shares; holders of priority shares may have special ``voice'' rights, e.g. right to make nomination proposal for election of members of board of management or board of supervisory directors; holders of preference shares have preferred dividend rights to be defined by articles of association.

Transfer of Stock.

Transfer of shares of N.V. is free unless limited by articles of association by means of share transfer restriction. Transfer of shares of B.V., however, is free only if transferee is husband or wife or next of kin of transferor or if transferee is another shareholder or B.V. itself, but articles may restrict these transfers as well. In other cases, articles must restrict transfer of shares (see subhead N.V. and B.V., supra). Proposal for more flexible B.V. abolishes compulsory share transfer restrictions. Under proposal shareholders can determine scope of restrictions.

Shares made out to bearer can be transferred by actual delivery of share certificate or by giro transfer if shares are deposited in giro system. If delivery is effected for valuable consideration and transferee is in good faith, ownership passes to transferee even if transferor was not owner. If shares of listed N.V. are made out in name of holder, title to them can be transferred by instrument of transfer followed either by written acknowledgment by N.V. after instrument has been submitted to N.V. or by service of instrument upon N.V.

All shares in B.V. must be made out in name of holder and no certificates of shares are permitted to be issued. Title to B.V. shares and to shares in non-listed N.V. is transferred by notarial deed. Transferee cannot exercise his shareholder's rights before company has been notified of transfer or has acknowledged transfer of its own accord.

Accordingly, transfer is not effected by entry in register of shareholders.

N.V. is required only to keep register of holders of shares made out in name of holder. B.V. is required to keep register of holders of all shares.

Rights of Shareholders and of Holders of Depositary Receipts Issued with Cooperation of Company.

(i) Right to attend general meeting of shareholders and to take part in discussions in person or by proxy applies equally to shareholders and to holders of depositary receipts, provided company co-operated in issuance of those depositary receipts. Such receipts are issued in exchange for shares by separate legal entity which undertakes to administer such shares in behalf of holders of depositary receipts (``administratiekantoor''). Separate legal entity exercises voting rights appertaining to shares in respect of which depositary receipts have been issued. Trust company frequently has legal form of “Stichting” (Foundation). (See category 12 Estates and Trusts, topic 12.07 Trusts, subhead Foundations.) Depositary receipts are called “certificaten” and are not to be confused with share certificates (“aandeelbewijzen”). Proposal for more flexible B.V. introduces shares without having right to vote. (ii) Right to vote applies to shareholders only. Every shareholder has at least one vote. If capital is divided into shares of equal nominal values, any shareholder has as many votes as he has shares. If nominal amounts differ, smallest amount is unit, and number of units which can be comprised by sum total of amounts any given shareholder is holding determines how many votes he may cast. However, number of votes per shareholder may be limited by articles of association, provided that holders of equal amounts of shares must have equal number of votes, and provided that limitation may not be more favorable for holders of larger amounts of shares than for holders of smaller amounts. Further deviation from normal “one share one vote” system is allowed provided that in such case no single shareholder shall have more than six votes (or if capital is divided in less than 100 shares, three votes). Cumulative voting is not allowed. With due observance of statutory restrictions and restrictions in articles of association, right to vote may be granted to pledgees (“pandhouders”) and usufructuaries (“vruchtgebruikers”) of shares. (iii) Every shareholder is entitled to share in profits. Separate legal entity which has issued depositary receipts collects dividends and other distributions as holder of shares in N.V. or B.V. and will pass dividends and other distributions on to holders of depositary receipts in accordance with its administration agreement with such holders. (iv) Any interested party can, on ground of violation of law, of articles, or of good faith, obtain from court annulment of resolution of general meeting of shareholders or of any other corporate body. (v) Right to place items on agenda of general meeting for both shareholders and holders of depositary receipts when shareholder has one percent of issued capital. Legislative proposal to raise to three percent. (vi) Holders of depositary receipts for shares of listed companies have right to receive proxy from issuer of receipts, allowing to vote on underlying shares. Proxy may be refused, e.g. in case of hostile takeover bid. Cabinet made proposal for restricting possibilities to refuse proxy.

Shareholders' Liabilities.

Personal liability of any shareholder is generally limited to paying up in full nominal amount of shares, which liability does not cease by transfer unless exemption is granted by company.

Buy out Minority Shareholders.

Single shareholder or two or more group companies holding—on his/their own account—at least 95% of issued capital can institute proceedings to buy out minority shareholder(s). Enterprise Section of Amsterdam Court of Appeals will only refuse judgment for plaintiff on very limited grounds. Regarding public bid, Dutch company law contains separate regulations to buy out shareholders. Moreover, Dutch law offers possibility to buy out shareholder (or to be bought out) if presence of shareholder, in good faith, is no longer to be tolerated. However, this avenue is only open to shareholders in N.V. only issuing registered shares which are not freely transferable. See further category Dispute Resolution.

Management.

All executive authority and representation of corporation is vested in “Bestuur” (board of management) consisting of one or more managing directors (“Bestuurders”) generally with equal individual authority to represent company vis-á-vis third parties unless articles of association provide that managing directors are only jointly authorized to do so. Articles of association may vest representing authority in persons other than managing directors. Articles of association may grant board of supervisory directors (see subhead Supervision, infra) right to approve certain actions of board of management but absence of approval does not affect validity of transactions entered into by company. In all matters where one or more members of board of management have interest conflicting with company's interest, supervisory directors must represent company unless articles provide otherwise or general meeting designates one or more different persons. Legislative proposal provides new regulation regarding conflicting interest of managing directors. Basic principle will be that director with conflicting interest refrains from decision making concerned.

Board of management member is appointed by incorporators and, once corporation has been incorporated, by general meeting of shareholders, which also has authority to suspend and dismiss. If articles bind general meeting to nomination list, such list must contain at least two candidates for any vacancy (same applies to appointment of supervisory directors at nonstructured corporation) and nomination list loses its binding character if general meeting so decides by resolution passed with majority of at least two-thirds of votes cast representing more than half of subscribed share capital. However, at structured corporation, board of supervisory directors is entitled to appoint, suspend and dismiss members of board of management (see subhead Structured N.V. or B.V., infra).

Civil Code provides detailed rules concerning liability of managing and supervisory directors in case of bankruptcy of company. If there has been mismanagement within three years before bankruptcy, members of boards may be held liable for entire deficit.

In case legal entity acts as managing director, its managing directors are jointly and severally liable for any obligation such legal entity has as managing director.

Supervision.

Supervisory board is required by law only for N.V.s that fit description of so-called “large company” or structured corporations (see subhead Structured N.V. or B.V., infra). In other cases it is optional. In either case, law provides that its function must be to oversee conduct of affairs by board of management and general course of developments in N.V. or B.V. and enterprise(s) it operates and to assist board of management by giving advice. In exercise of this function, its members must be guided by interest of company and of enterprise(s) operated by it. Supervisory board is entitled to get in time from board of management all information which is required for proper exercise of its function. Articles may provide for additional tasks and powers.

When company is incorporated, first members of supervisory board must be appointed by deed of incorporation. Unless articles of nonstructured corporation with supervisory board provide otherwise, members are appointed for indefinite period of time and any subsequent members are elected by general meeting. Articles may bind general meeting to nomination list (see subhead Management, supra).

Articles of corporation may furthermore provide that one or more supervisory directors (not exceeding one-third of total number) may be appointed by other persons than general meeting. Power to appoint any supervisory director also entails power to suspend or dismiss. General meeting can terminate suspension at any time.

Legislative proposal provides opportunity to choose between two-tier system (with board of management and supervisory board) and one-tier system (with board of management containing ``executives'' and ``non-executives''). Non-executives are directors and have wider tasks than supervisory boards. Articles of association have to provide for one-tier board.

General meeting of shareholders exercises all authority not granted by law or under articles of association to others: right to appoint and dismiss members of board of management and supervisory board, to amend articles of association, to adopt annual accounts, to declare dividends, to file bankruptcy requests, to appoint company's auditor, to dissolve company, to approve resolutions of management concerning significant change in identity or character of company or business, to influence remuneration of members of management board. (See subhead Structured N.V. or B.V., infra.) At least one general meeting of shareholders per annum must be held.

Meetings are convened by board of managing directors or by board of supervisory directors, but articles can grant this authority to others. Any group of shareholders and holders of depositary receipts issued with cooperation of company representing 10% of outstanding capital can require that general meeting of shareholders be convened by board of managing directors or by board of supervisory directors and in case of delay of meeting of more than six weeks apply to president of competent district court for authorization to proceed to convene meeting.

Voting.

See subhead Rights of Shareholders and of Holders of Depositary Receipts Issued with Cooperation of Company, supra.

Works Council.

Any enterprise employing 50 employees or more in The Netherlands has to establish Works Council (``Ondernemingsraad'') under “Wet op de Ondernemingsraden”. Ondernemingsraad (“OR”) is elected for period of two, three or four years by secret ballot by all employees of enterprise and consists—absent contrary decision of OR—of three to 25 members according to number of employees it represents. Management and OR have to meet jointly regularly to discuss any matter which either management or OR deems to be important, as well as such items that under law have to be discussed, including at least twice a year general trend of business of enterprise, which latter meetings have to be attended by board of supervisory directors or delegation thereof.

OR has to be consulted with regard to number of important decisions proposed by entrepreneur. These decisions include, among others, transfer of control over enterprise, closing down of enterprise, joint ventures with other enterprise, etc. In case advice of OR is in conflict with final decision taken, OR has right of appeal to Enterprise Section of Court of Appeals in Amsterdam which may prohibit implementation of decision, but only if it determines that entrepreneur, in consideration of interests involved, could not reasonably have taken decision.

Without approval of OR, number of decisions concerning, among others, wages, pensions, shifts, hiring of personnel, seniority, complaints and education are null and void, if timely invoked by OR. In case approval is refused, entrepreneur has right of appeal.

Law provides in detail which information concerning business, structure and financial situation of enterprise has to be provided to OR. Furthermore, annual accounts have to be communicated to OR.

OR must be consulted in case of appointment or dismissal of manager of enterprise, but it has no right of appeal if its advice is neglected.

Finally, OR has rights with regard to appointment of members of board of supervisory directors of Structured Corporation (see subhead Structured N.V. or B.V., infra).

Less demanding rules concerning meetings with and consultation of employees apply to enterprises employing less than 50 employees.

Structured N.V. or B.V.

Apart from distinction between N.V. and B.V. type of company, yet another demarcation line between different types of companies may be drawn. This division makes distinction between “normal” and “large” companies and is equally applicable to B.V.'s and N.V.'s. Large companies can be subdivided into “exempt” companies, “structure” companies and “mitigated structure” companies depending on whether special management structure provisions do not apply or apply wholly or partly to them.

Civil Code contains number of general provisions relating to “large” companies. Cumulative criteria for such company are: (1) It has issued capital and reserves totalling at least [Euro]16,000,000; (2) it has (or dependent company has), pursuant to legal obligation to do so, formed works council; and (3) it and any dependent company together employ at least 100 persons in The Netherlands. Dependent company is defined as: (1) Legal entity in which company or one or more dependent companies, by itself or together, furnishes at least 50% of issued capital; or (2) partnership, owning business registered in Trade Register, of which company or dependent company is fully liable partner.

If company meets these conditions, it is under obligation to file statement with Trade Register, indicating that company meets size requirements unless it is “exempt” company, as defined below. After company has filed above-mentioned statement during three consecutive years, it has to comply with special corporate governance regime under so-called “structure provisions” which are incorporated in Civil Code.

Structure provisions basically provide for compulsory two-tier management system. Supervisory board (“Raad van Commissarissen”) of at least three individuals must be established, to supervise activities of board of management. Supervisory board (instead of general meeting of shareholders) nominates and appoints managing directors. Legislative proposal regarding one-tier boards is also applicable to structured N.V. or B.V. (See Supervision.) Under proposal instead of Supervisory board, there will be executive and non-executive directors.

See below for method of appointment of members of supervisory board of “large” company and powers of such supervisory board.

Two major exceptions to mandatory implementation of structure provisions:

In first place following “large” companies need not be registered as such and are therefore completely exempted (“exempt companies”): (1) Dependent company of another “structure” or “mitigated structure” company; (2) “pure” holding and financing company, provided that majority of employees of companies in its group are employed outside The Netherlands; (3) company rendering administrative and financial services to companies referred to under (2) above and to affiliated companies; (4) company owned to extent of at least 50% under joint venture agreement by two or more structure or mitigated structure companies.

Second exemption (“mitigated structure companies”) is only partial insofar as it permits articles of association to provide that, instead of supervisory board, general meeting of shareholders appoints and dismisses managing directors. This only applies in case of those “large” companies which are owned to extent of at least 50%: (1) By legal entity employing majority of its employees outside The Netherlands or dependent company thereof; or (2) under joint venture agreement, by two or more legal entities or companies of kinds referred to under (1); or (3) under joint venture agreement, by one or more legal entities or companies of kind referred to under (1) and one or more “structure” or “mitigated structure” companies.

Partial exemption is not applicable if majority of combined number of employees of company in question and legal entity or entities referred to in previous paragraph (employees of companies belonging to same group as such legal entity or entities being taken into account as their own employees) is employed within The Netherlands. In other words, only those companies which are part of international group which has its “centre of gravity” outside The Netherlands may opt for partial or “mitigated” structure regime.

Furthermore, partially exempt regime also applies to company if entire issued capital is provided, alone or under joint venture agreement, for own account, by natural person, foundation, association or public legal entity.

Structured companies differ from normal types of N.V.'s or B.V.'s in various respects. Regime includes: (a) Managing directors will be appointed by supervisory board; (b) members of supervisory board will be appointed by general meeting of shareholders, but only upon nomination by supervisory board itself, that first must draw up profile. Appointment for four years; reappointment allowed. Rejection of nominated candidate by absolute majority representing at least one third of issued capital. managing directors have to make new nomination; (c) general meeting of shareholders and works council may recommend persons to supervisory board for nomination. Shareholders can transfer this possibility to recommend to shareholders' commission. For one third of seats in supervisory board works council has enhanced right, meaning that supervisory board may only veto recommendation of works council on limited ground that candidate is not suitable or that composition of board after election of vetoed candidate is improper. If no agreement can be reached, Enterprise Section of Court of Appeals in Amsterdam will decide; (d) general meeting may pass motion of no confidence in supervisory board as whole, resulting in dismissal of all members. Notification to works council at least 30 days before meeting. Motion requires absolute majority of votes representing at least one third of issued capital. Deviation rules in articles of association regarding appointment managing directors are permitted except for establishing managing directors, profile drawn up by Supervisory boards and rejection of nominated candidate by absolute majority representing at least one third of issued capital; (e) decisions taken by board of management in respect of following matters are subject to previous approval by board of supervisory directors: issue and acquisition of stock or bonds of company or of bonds issued by partnership of which company is fully liable partner; cooperation when depositary receipts are issued for shares; filing application for listing or withdrawal of listing of bonds or shares or depositary receipts at stock exchange; entering into or terminating lasting cooperation of company or dependent company with other corporation or as fully liable partner of partnership if such cooperation or termination is of vital importance; participation in another corporation by company or dependent company if investment represents 25% or more of value of capital and reserves, or substantial alteration in size of such participation; other investments of that order; amendments of articles of association; declaration of bankruptcy or application for moratorium of payments; dissolution of corporation; termination of employment of important number of employees of corporation or of dependent company; substantial changes in labor conditions of important number of such employees; reduction of issued share capital; (f) members of board of supervisory directors of structured corporation cannot be: (1) Employees of corporation; (2) employees of dependent companies; (3) representatives of unions involved in negotiating employment conditions for employees of corporation or of dependent companies.

Mergers/Take-overs.

Dutch law recognizes three types: (1) Take-over of assets, (2) take-over of shares, and (3) legal merger. First two types are not specifically dealt with in statutory law, so that general contracts law and law of property applies. Third type was introduced in 1984 in Civil Code as result of EEC Directive. Simplest form of legal merger involves one acquiring and one acquired corporation and leads to following result: (a) Assets and liabilities of acquired corporation are passing as whole by operation of law unto (existing or newly established) acquiring corporation, (b) all shareholders of acquired corporation (including those minority shareholders opposing merger) become shareholders of acquiring corporation or even, if so decided, of group-company holding directly or indirectly all shares of acquiring corporation, and (c) acquired corporation ceases to exist. Statute sets out detailed procedure to be followed and guarantees interests of parties involved (shareholders, creditors). Procedure starts with elaborate merger proposal by boards of management of both companies and must be approved by specified majority of shareholders. Legal merger is possible between Dutch legal entities of same kind (whereby N.V. and B.V. are considered to belong to same kind), and in certain circumstances between B.V. or N.V. and association or foundation. EC Court of Justice Dec. 13, 2005 (Case C-411/03) (Sevic) stated that international legal merger is allowed under freedom of establishment. After this decision, EC Directive 2005/56 on international legal merger went into force on Dec. 18, 2005 and is implemented in Dutch corporate law in separate part, containing special provisions regarding international legal merger. N.V., B.V. or Societas Corporation Europaia (SCE) can merge with joint stock company or SCE under EU- or EEA-law. EC Directive 2004/25 aims at approximation of Member States' legislation governing takeover bids and is implemented in Financial Supervision Act.

Division.

In 1998 legal division of corporations was introduced as result of EC Directive. (§§2:334a-334 ii B.W.). Legal division can be seen as pendant of legal merger. Two types are distinguished under Dutch law: (1) pure division (only type dealt with in EC Directive) and (2) split off. Pure division means acquisition ipso jure by two or more corporations of assets and liabilities as whole of other corporation ("corporation being divided") which ceases to exist. Acquiring corporations may be existing corporations or may be incorporated with division. Split off means acquisition ipso jure of assets and liabilities as whole or part of assets and liabilities of corporation ("splitting corporation") which continues to exist by one or more corporations, of which at least one allocates shares in its capital to splitting corporation or is incorporated with split off by splitting corporation. If all assets and liabilities of splitting corporation pass to acquiring corporation(s), splitting corporation ceases to exist unless at least one acquiring corporation is incorporated with split off and splitting corporation acquires all shares in that corporation.

As result of division shareholders of corporation being divided generally become shareholders of all acquiring corporations (statute contains exceptions). Statute sets out detailed procedure to be followed (similar to procedure to be followed for legal merger) and guarantees interests of parties involved (especially creditors of corporation being divided or splitting corporation). Division is effected by notarial deed. Parties to division must belong to same kind (whereby N.V. and B.V. are considered to belong to same kind) with exception that N.V.(-s) or B.V.(-s) may be incorporated as acquiring corporation(s) even if legal entity being divided is association, cooperative society, mutual insurance company or foundation, provided that legal entity being divided acquires all shares of acquiring N.V.(-s) and/or B.V.(-s). Consequences of Sevic decision (see: Mergers/Takeovers) are likely to apply also to international legal division.

Reports-Audit-Deposit-Disclosure.

Acts on Implementation of 4th and 7th EC Directives with respect to annual accounts and annual reports of certain types of companies ("Acts") apply, inter alia, to N.V. and to B.V. They provide specific rules in Civil Code about subsidiaries, consolidated accounts. EC regulation forces publicly traded companies governed by law of EC Member State to prepare their accounts as from Jan. 2005 in conformity with International Accounting Standards (IAS) and International Financial Reporting Standards (IFRS). EC Directives 4a and 4b refer to annual accounts regarding banks and insurance companies respectively.

Scope.

Principles of law applicable before Acts are preserved as far as possible. Provisions of Acts, however, are more detailed with respect to financial information to be set forth in balance sheet, profit and loss account and explanatory notes, as well as to valuation principles which should be used. By general administrative order, models of balance sheets and profit and loss accounts are prescribed. Acts also provide for rules in respect of consolidation, annual report and additional data.

Currency.

Items in annual accounts and consolidated accounts may be expressed in foreign currency if international structure of group of companies concerned justifies it to do so.

Language.

Items in annual accounts must be written in Dutch language, unless general meeting of shareholders has decided on use of another language.

Publication.

As general rule, all companies must publish their annual accounts within eight days after adoption, or, in case of structured corporation, after approval thereof. Publication takes place through filing with Trade Register. Annual report and additional information must be published simultaneously with accounts. Since Sept. 2002 amount of compensation of each individual manager and supervisor is part of information to be published. As from 2005, publicly traded companies shall publish whether or not they adopt Dutch Corporate Governance Code (``comply or explain'') (see also subhead Other Provisions Affecting Application of Company Law, infra).

Limitations.

Apart from power of Ministry of Economic Affairs to exempt companies for important reasons from obligation to draw up, present, adopt and publish annual accounts, Act provides for limitations of these obligations on basis of size of company's business provided company is not publicly traded. Small companies are allowed to draw up, present and adopt limited annual accounts. Annual report and additional data must be complete. Only limited balance sheet and limited explanatory notes must be published. Business of company is small, when at least two of three following conditions are fulfilled during at least two successive financial years (i) Value of total assets is not more than [Euro]4,400,000; (ii) turnover does not exceed [Euro]8,800,000; (iii) average number of employees is less than 50.

Medium sized companies are allowed to draw up, present and adopt profit and loss account according to rules applicable to small companies. Other financial documentation should be complete. Apart from balance sheet, on which some information may be left out and some items may be condensed, other financial documentation must be published according to way it should be drawn up. Business of company is medium sized when at least two of three following conditions are fulfilled during at least two successive financial years (i) Value of total assets is not more than [Euro]17,500,000; (ii) turnover does not exceed [Euro]35,000,000; (iii) average number of employees is less than 250. Other companies must draw up, present, adopt and publish complete financial documentation.

Auditing.

As general rule, annual accounts of medium sized and large companies must be audited by licensed auditor. Small companies are exempted from this obligation. In reaction to recent scandals, EC Commission proposed new Directive on statutory audit, clarifying duties of statutory auditors, their independence, ethics and public oversight. (COM 2004/177). Proposal was approved by European Parliament.

Registration.

In addition to financial information referred to in previous paragraphs, following papers must be deposited for public inspection with Trade Register: (1) Deed of incorporation including complete text of articles; (2) full text of following agreements made prior to formation: (a) concerning subscriptions imposing special obligations on company, (b) that ensure profit to incorporator or any person involved in formation of company, (c) concerning payment for shares by means other than in cash; (3) bank statement concerning shares issued at incorporation against payment in Dutch legal tender or foreign currency; (4) valuation by auditor (and description of assets involved) in case shares are paid up in kind upon incorporation or thereafter; (5) bank statement concerning shares issued after incorporation against payment in foreign currency; (6) revised full text of articles after every amendment; (7) in case of dissolution of company: plan of distribution and account of liquidators.

Following information must be filed with Trade Register: (i) Official name and seat according to articles, business name, office address, phone and fax number, e-mail address, starting date of business, business description, number of employees, authorized, issued and paid-up capital of company; (ii) name, address, date of entrance in position, powers, nationality, place and date of birth and signature of managing and supervisory directors and of others with representative authority; (iii) name, address, nationality, place and date of birth, of holders of shares which are not fully paid-up as well as amount of shares owned and amount paid-up; (iv) if all shares are owned by one person or marital community, name, address, nationality (if applicable), place and date of birth (if applicable) of shareholder; (v) if company meets criteria for structured company statement to that effect. Any change in relevant information must be reported to Trade Register within one week after change occurred.

Companies incorporated under foreign jurisdiction outside EC but exercising business exclusively or almost exclusively in The Netherlands and lacking real ties with state of that jurisdiction must deposit with Trade Register statement to that effect as well as deed of incorporation and text of articles, statement of auditor that company complies with Dutch rules on minimum issued and paid-up capital and minimum equity capital and following information: (i) register where company is registered, registration number and date of first registration; (ii) if all shares are held by one person or marital community, name, address, place and date of birth (if applicable) of shareholder.

Resolution of general meeting to dissolve company must be recorded in Trade Register together with particulars about liquidators.

Trade Register will arrange for publication of information on file and any changes therein in official government gazette (“Staatscourant”).

With respect to any fact which is subject to requirement of deposit or registration, claim of third party, that he in good faith was unaware of it, is barred if fact had been published in official gazette unless third party proves that he acted within 15 days after publication and that when he acted he could not possibly have taken cognizance of publication.

On all instruments issued by company or to which company is party and on all outgoing letters, orders, order confirmations, invoices and other writings and all outgoing printed papers and all announcements made by company, except in form of telegrams, or cables or containing advertising matters, must be stated complete name according to articles, seat according to articles and, if capital is stated, always both amounts of issued and of paid up capital. In addition, Trade Register registration number of company shall be stated in all letters, orders, invoices and offers. Noncompliance may be prosecuted by virtue of Act on Economic Offences. Amendment of Commercial Registers Act (2008) obliges registered companies to publish trade register registration number on websites and emails.

Companies incorporated under foreign jurisdiction outside EC but exercising business exclusively or almost exclusively in The Netherlands and lacking real ties with state of that jurisdiction must state on all instruments, outgoing letters etc., apart from information mentioned above, statement to that effect, legal form of company, place of business and if applicable register where company is registered under foreign jurisdiction, registration number and date of first registration.

Disputes.

Civil Code contains rules to solve disputes within B.V. and closely held N.V. by providing for mechanisms by which (1) one or more shareholders holding at least one third of subscribed share capital can apply to competent court to force shareholder who is damaging interests of corporation to dispose of his shares and by which (2) shareholder who is damaged in his rights or interests by one or more of his co-shareholders to such extent that continuation of his shareholding cannot be reasonably expected, can apply to competent court to force such co-shareholder to acquire his shares.

Investigation into Company Affairs (``EnquÊterecht'').

If there are grounds to suspect that acts of mismanagement have been or are being done, order for inquiry can be applied for with Enterprise Section of Court of Appeals of Amsterdam, but application will be dismissed if it does not appear that applicant's objections have been communicated in writing to board of management and to supervisory board, and they have been given reasonable time to investigate matters and take sufficient steps. If trade union takes initiative, it must first ask written opinion of works council of enterprise of N.V. or B.V. Application can be made by: (a) One or more holders of shares or depositary receipts holding in aggregate not less than 10% of issued capital or par value [Euro]225,000 whichever is lower; (b) trade union subject to certain conditions; (c) any natural or legal person to whom by articles or by contract such power has been given; (d) advocate-general of Court of Appeals.

Committee of inquiry has far-reaching powers to make thorough investigation. Court determines which persons and/or entities will be allowed to inspect report of committee and may order deposit for public inspection in which case deposit will be advertised in official gazette. Court may take preliminary measures. If mismanagement is established, court may take any of following measures: (a) Suspension or annulment of any resolution; (b) suspension or dismissal of any board member; (c) temporary replacement of any board member; (d) temporary deviation from designated provisions of articles; (e) temporary administration of shares by third party; (f) dissolution of N.V. or B.V. unless dissolution would harm interests of shareholders or employees or public interest.

Court can also postpone its final decision for such period as it determines if respective N.V. or B.V. undertakes to take necessary steps to terminate mismanagement and to undo or reduce its damaging effects as much as possible.

Draft bill approximation ``EnquÊterecht'' concerns modifying i.e. access to ``EnquÊterecht'', weighing up of interest in position measures and principle of hearing both sides of argument with regard to investigation.

Dissolution.

N.V. or B.V. will be dissolved: (a) In cases provided for in its articles; (b) by special resolution of general meeting; (c) if after its adjudgment in bankruptcy, its insolvency is established or bankruptcy is lifted on ground of lack of assets; (d) by court in cases provided for in statutory law; (e) by decision of chamber of commerce if fails to fulfill certain administrative obligations.

Board of management acts as committee of liquidators unless other liquidators are appointed. Liquidators announce dissolution in official gazette and in national newspaper and have it registered in Trade Register. Words “in liquidation” must be added to name of company. For purpose of liquidation of its affairs, dissolved N.V. or B.V. subsists until liquidation is completed. Account of liquidators must be deposited for public inspection.

Other Provisions Affecting Application of Company Law.

“SER-Besluit Fusiegedragsregels 2000”, containing code of conduct to be observed in events of mergers, take-overs, and tender offers in order to protect employees.

“Fondsenreglement” (Stock Exchange Manual) which is compilation of conditions made by Euronext Amsterdam with which companies must comply in order to issue shares to public or

obtain listing of their shares with Amsterdam Euronext Stock Exchange.

"Wet Financieel Toezicht" (Act on Supervision of Financial Markets) integrates nine different Acts, it consists of seven parts. First part is general and gives definitions and general rules. Second part regulates entree to financial markets. Third part calls for prudential demands for financials. Fourth part provides rules of conduct for financials, while fifth part contains rules regarding trade and brokerage in securities. This part is also basis for code of conduct to be observed in event of mergers, takeovers and tender offers in order to protect shareholders. Sixth part has not entered into force but will contain rules regarding supervision of infrastructure of financial markets. Part seven contains final provisions.

"Corporate Governance Code" dated Dec. 9, 2003, by Dutch Corporate Governance Committee contains both principles and best practices. Introduced indirectly in Civil Code by Order in Council of Dec. 23, 2004. Applies to all Dutch publicly traded companies. Not binding, but adopts "comply or explain" principle. (See Publication.) In 2008, Corporate Governance Code has been modified.

Corporations Owned and/or Managed by Foreigners.

Establishment of companies in The Netherlands of which all shareholders and all members of managing and supervisory boards are aliens and nonresidents is permitted. There are no local burdens or disqualifications, which do not apply equally to domestic companies and foreign companies.

Domestic subsidiaries may be wholly owned by foreign parent, and all board members may be nonresident aliens. However, supervisory board members of foreign owned structural company cannot all be parent employees. See also category 14 Foreign Trade and Commerce, topic 14.04 Foreign Investment.

Certain nationality and residence requirements apply to companies engaged in banking, shipping or air transport.

Corporations incorporated under foreign jurisdiction but exercising business exclusively or almost exclusively in The Netherlands and lacking real ties with state of jurisdiction are subject to certain rules of Dutch corporation law (Act on Formally Foreign Corporations), such as rules with regard to minimum issued and paid-up capital and minimum equity capital, bookkeeping, annual accounts and annual reports, report of information with Trade Register (see subhead Registration, supra), statement of certain information on outgoing printed papers etc. (see subhead Registration, supra), liability of managing and supervisory directors in certain cases. However, since EC Court of Justice stated in Sept. 2003 (Case C-167/01) that application of Dutch corporation law on foreign corporations incorporated under jurisdiction of EC Member State is not in accordance with freedom of establishment of corporations and therefore not allowed, this only applies to corporations incorporated under foreign jurisdiction outside EC. Act on Formally Foreign Corporations has been amended in line with court decision.

The Netherlands Antilles and Aruban Corporations.

Foreign entities and individuals frequently use The Netherlands Antilles as jurisdiction to organize finance, (investment) holding, patent holding, and real estate companies, activities of which companies are carried on exclusively outside Antilles. These "offshore-companies" may profit from certain tax advantages. General characteristics of both N.V. and B.V. rules are that they are much less strict compared to Dutch and EU-rules. As from Mar. 1, 2004, Antillean corporations are dealt with in new Book 2 of Antillean Civil Code. On Antilles one form of corporate entity is N.V. ("Naamloze Vennootschap"), capital of which is divided into shares that may be in registered or in bearer form. Another form of corporate entity is B.V. ("Besloten Vennootschap"), with one or more registered shares. In B.V., bearer shares cannot be issued but can be traded on stock exchange. All shares in capital of N.V. and B.V. can be held by one shareholder. Non- and limited voting shares may be issued. N.V. and B.V. are basically designed for distinct types of businesses. Both N.V. and B.V. are incorporated by one or more individuals or legal entities acting as incorporators, who execute deed of incorporation before notary, including, inter alia, articles of association. Equity capital may not be negative upon incorporation. For banks and insurance companies capital requirements are more strict. Both two-tier and one-tier board system are possible. Code contains provisions with respect to financial information to be set forth in balance sheet, profit and loss account and explanatory notes, as well as to valuation principles which should be used. Only in "large" N.V.s, (employment of at least 20 persons, value of total assets more than NAF 5 million, turnover more than NAF 10 million) auditing by licensed auditor is mandatory, as well as publication of annual account. When conditions are fulfilled, N.V. and B.V. can be converted into a foreign corporation and vice versa. Legal merger and legal division is also possible.

For off-shore activities and open to nonresidents only, Aruba has apart from N.V. (dealt with in Aruban Code of Commerce) so-called Aruba Exempt Company (``Aruba Vrijgestelde Vennootschap''), which owes yearly fixed amount to government, irrespective of amount of profit or loss. However, revised tax regime as from Jan. 1, 2006. In 2009, introduction of limited liability company (``VBA - Vennootschap met Beperkte Aansprakelijkheid''), which can be seen as counterpart to Dutch and Antillian private limited company. In contrast to Dutch B.V., VBA—shares are free and transferable.

2.04 FOUNDATIONS:

Foundation ("stichting") is legal entity created by notarial deed (either inter vivos or by will); it has no members and is governed by board. Foundations may be used for social, cultural, scientific or charitable purposes; foundations may also be used for commercial purposes but their objectives may not include distributions to founders or directors or other persons except for social or charitable purposes. Foundations are not subject to corporate income taxes except for their entrepreneurial activities and commercially competitive activities. See also category 12 Estates and Trusts, topic 12.07 Trusts.

The Netherlands Antilles National Ordinance regarding Foundations provides regulation regarding creation of Foundations, similar to The Netherlands Foundations ("stichting") and Private Foundations ("stichting particuliere fonds"). Private Foundations can make distributions, which do not serve ideal or social purpose, to founders, to those who constitute its bodies and to other beneficiaries. Private Foundations may not make profit by operating business or enterprise, which does not include operating as investment or holding entity. Distributions to those residing outside of The Netherlands Antilles and profits of Private Foundations may be exempted from The Netherlands Antilles taxes.

2.05 JOINT STOCK COMPANIES:

No parallel. See topic 2.02 Associations.

2.06 PARTNERSHIPS:

"Maatschap" is form of co-operation between two or more persons created by their agreement to make contributions (money, property or use of certain corporeal or incorporeal effects, labor or skill) as means for exercise of profession with purpose of profit-sharing.

Rights and liabilities ensuing out of activities or business transactions within scope of partnership can be subject to any kind of provision between partners, but provision that one partner is entitled to all profits is void. In principle all partners are entitled to manage partnership, unless contract between partners provides for managing partner(s) with special authority.

Liabilities of partnership (joint partners) bind individual partners for equal parts, as far as claims of creditors of partnership are concerned, unless contract has specified liability of individual partners. No liability of partnership exists if engaged in by partner outside scope of his authority.

``Vennootschap onder firma", abbreviated “v.o.f.” is “maatschap” created for joint conduct of business under common style. Each partner to v.o.f. is jointly and severally liable towards third parties and each partner individually binds co-partner(s) within scope of its object and of limitations of powers registered. Its formation must be embodied in written instrument, not necessarily executed before notary. Absence of instrument cannot be held out against third party. V.o.f. must be registered in Trade Register and limitations of powers of acting partner cannot be invoked by other partner(s) against third party if they are not evident from registration. According to case law creditors of partnership have priority over creditors of individual partners with respect to recourse against common assets.

Commanditaire Vennootschap, abbreviated “C.V.” is “maatschap” created for conduct of business under common style if one or more partners abstain from activities in conduct of business. Such silent partner's liability is limited to amount of his contribution but any activity on his part may make him jointly and severally liable with active partner(s). If there is more than one active partner, relationship between these partners is governed by provisions related to v.o.f.

New Act on partnerships forthcoming, including possibility for partnership to opt to be legal entity. However status of legal entity of partnership does not lead to non-liability of partners.

See also topics 2.02 Associations, Corporations; categories 3 Business Regulation and Commerce, topic Trade Register; Estates and Trusts, topic Trusts.

3 BUSINESS REGULATION AND COMMERCE

3.01 BILLS AND NOTES:

The Netherlands law was amended to comply with “Geneva Conventions” concerning bills of exchange and promissory notes (1930), and cheques (1931).

Bills of exchange must contain: (1) Term “wisselbrief” (i.e., bill of exchange) in language of document, (2) unconditional order to pay certain sum of money, (3) name of drawee, (4) date of maturity, (5) place of payment, (6) name of person to whom or to whose order payment must be made, (7) place and date of issue, (8) signature of drawer.

If any of above elements is lacking, document will not be bill of exchange, except as provided otherwise.

Maturity may be as follows: At sight; at certain date after sight; at certain date after date of issue; at certain date.

If bill of exchange does not contain provision on maturity, it will mature at sight. Bill maturing at sight or at certain date after sight may carry interest.

Drawer warrants that bill of exchange will be accepted and paid. Drawer must provide that drawee shall have funds for payment at maturity.

Transfer.

Every bill of exchange is transferable, by endorsement and delivery, except that bill of exchange “not to order” is transferable by assignment. Holder of bill will be considered to be lawful holder, if his rights are evidenced by uninterrupted series of endorsements, even if last endorsement is in blank, except if holder has acquired bill in bad faith.

Unless provided to contrary, endorser warrants acceptance and payment of bill of exchange.

Presentation for Acceptance.

Generally, holder can present bill of exchange to drawee for acceptance, prior to maturity. Word “accepted” should be noted on bill and acceptor should sign it. By acceptance, drawee makes commitment to pay bill at maturity.

Guarantee for Payment.

Third party can guarantee payment of bill of exchange, by writing “for aval” on bill and adding his signature.

Presentation for Payment.

Holder of bill of exchange must present it for payment within two working days of maturity.

Protest for Nonacceptance or Nonpayment.

Must be evidenced by means of authentic deed in due time.

Liability.

Drawer, acceptor, endorser and guarantor are jointly and severally liable to holder for payment.

Exchange Rate.

Bill of exchange payable in currency other than currency of place of payment, can be paid in currency of country of such place, at rate of exchange prevailing at maturity, except if provision for payment in certain currency has been made.

Forfeiture, Prescription.

Various terms must be observed, on penalty of forfeiture or prescription.

Promissory notes must contain: (1) Term “to order” or “promissory note” in language of document, (2) unconditional promise to pay certain sum of money, (3) date of maturity, (4) place of payment, (5) name of person to whom or to whose order payment must be made, (6) place and date of issue, (7) signature of issuer.

If any of above elements is lacking, document will not be treated as promissory note, except as provided otherwise.

Many provisions with respect to bills of exchange correspondingly apply to promissory notes.

Cheques must contain: (1) Term “cheque” in language of document, (2) unconditional order to pay certain sum of money, (3) name of drawee, (4) place of payment, (5) place and date of issue, (6) signature of drawer.

If any of above elements is lacking, document will not be treated as cheque, except as provided otherwise.

Cheque matures at sight.

Cheque must be drawn on bank holding funds at order of drawer. However, writing of uncovered cheque does not, by itself, constitute criminal offense. Cheque may be made payable to particular person with or without clause “to order”, or to bearer.

Cheque is not subject to acceptance.

Transfer.

Cheque is transferable by endorsement and delivery, except that cheque “not to order” is transferable by assignment.

Presentation for Payment.

Cheque payable in country of issue must be presented for payment within eight days of date of issue. If cheque evidences that it is intended to circulate in another country, its term will be extended to 20 or 70 days respectively, if it will circulate in continent of issue or in another continent.

Other Means of Payment.

Most noncash payments in The Netherlands are made through intermediary of bank- or giro-systems. Guaranteed bank cheques (“eurocheques”) and credit cards have become popular as means of payment. All these instruments are subject to various legal provisions.

3.02 COMMERCIAL REGISTER:

See topic 3.12 Trade Register.

3.03 CONTRACTS:

As Distinguished from Other Sources of Obligations.

Contracts may result in legally enforceable obligations of one or more parties to give, to do or to refrain from doing something. B.W. Book 6 contains general principles of such obligations. B.W. Book 6, Title 5, gives general provisions for contracts and obligations resulting from contracts.

In general no special formalities are required for contract to be binding upon parties. There are, however, exceptions to this general principle, such as requirement of written contract, e.g. in case of hire-purchase (§7:201 B.W.), various stipulations in labor contract (not labor contract as such), requirement of notarial deed, e.g., in case of gift (§7A:1719), matrimonial contracts (§1:115 B.W.). Bill implementing European Directive on electronic commerce PbEG 2000 L 178/1 contains new art. 6:227a B.W., which provides that requirements of form that contract be entered into in writing, can be fulfilled if certain conditions are met.

B.W. Book 7 contains provisions in respect of sale and exchange (“koop en ruil”), order (“opdracht”), agency (“lastgeving”), commercial agency (“agentuur”), safe custody (“bewaarneming”), donation (“schenking”), employment (“arbeidsovereenkomst”), medical treatment (“medische behandelings-overeenkomst”), surityship (“borgtocht”), lease (“huur en verhuur”), contract work (“aanneming van werk”), and insurance law (``verzekeringsrecht''). B.W. Book 7A contains provisions in respect of sale on deferred terms (``koop of afbetaling'') and hire purchase (``huurkoop'') of moveable goods, loan for use (“bruikleen”), loan for consumption (“verbruikleen”), life annuity (“gevestigde of altijddurende renten”), aleatory contracts (“kans-overeenkomst”) and insurance law (“verzekeringsrecht”) and nontrading partnership (``maatschap'').

B.W. Book 8 contains general conditions in respect of transport and specific conditions in respect of transport of goods (“goederenvervoer”), transport of natural persons (“personenvervoer”), maritime law (“zeerecht”), inland navigation (“binnenvaartrecht”) and road-transport (“wegvervoersrecht”), air law (``luchtrecht) and railway transport.

§§15-951g WvK contains provisions relating to contracts of business partnerships, contracts with brokers (merchandise and real estate), sales representatives, insurance brokers, stockbrokers, signatories and holders of negotiable instruments and some provisions in respect of maritime law and inland navigation. Contracts with intermediates are mostly subjected to “Act on Supervision of Financial Markets” (“Wet op de Financiële Dienstverlening”). See topic 3.10 Securities.

Statutory provisions on special contracts may also be contained in special acts like those on copyright, on patents, on trademarks or in international conventions like those on transport by road, by railroad or by air and those on international sales of moveable property.

Offer and Acceptance.

One is bound, irrespective of one's subjective intent, by such manifestation of intent as would reasonably justify understanding of other party that one assents to terms of agreement. Courts rule that offer is accepted at moment that offeror could reasonably be expected to take note of acceptance, which is later moment than deposit of acceptance in postbox.

Registration (voluntary) of contract at local tax authorities provides conclusive evidence of date of contract.

Pre-Contract Negotiating Obligations.

As negotiations near culmination, standards of reasonableness and fairness may under certain circumstances give rise to certain limitations to liberty of parties to withdraw from negotiations and may make withdrawing party liable for costs or even for profits forgone by other party.

Competence of Parties.

See category 13 Family, topics 13.05 Husband and Wife; 13.06 Infants.

Consideration.

Mutuality of consideration is not required. Person may undertake to give something, to act as agent for someone else, to take goods in custody, etc., without getting anything in return.

Offer is revocable except when offer includes specific term for acceptance or irrevocability otherwise follows from offer. If creditor and debtor agree that existing debt be discharged by paying less than amount due, payment of balance cannot be enforced. Contract whereby X promises to pay something to Y and Y, in return, undertakes to give something to Z, is generally valid and may be enforced by Z as third party beneficiary after his acceptance. In all these cases, deed or formal contract is not required.

Interpretation.

Courts not required under all circumstances to follow wording of contract when determining its meaning. What meaning parties could reasonably have attributed to clause and what parties may reasonably have understood from one another is decisive. Circumstances (e.g., course of dealing etc.) under which contract was concluded may also be considered. No formal parol evidence rule but similar principles followed in practice.

Annulment (Action for).

Possible where will of one of parties to enter into agreement was defective (i.e. entering into contract under threat, error, fraud, abuse of circumstances or in case one of parties is incompetent to contract because of age or mental state).

Legality of Subject Matter.

If intended effect of agreement, i.e. obligations created for either party, would be contrary to law, good morals or public policy, agreement is in most cases null and void.

Underlying motives for making of contract, generally, do not count.

Nonperformance.

Code distinguishes between delay in performance, defective performance and nonperformance. Sometimes, final request of creditor for good performance within fixed period of time and debtor's subsequent default are required before aggrieved party can obtain remedy of damages (§§6:81-83 B.W.) or rescission of contract (§6:265 B.W.).

Remedies.

In case of default by one party, other party in general has choice of following remedies: (1) Specific performance, (2) specific performance with demand for supplemental damages, (3) demand for damages instead of performance, (4) demand for damages (expectation), (5) rescission of contract, (6) rescission of contract with demand of supplemental damages, (7) suspension of own obligations. Applicability of certain remedy depends on circumstances of particular case.

Liquidated damages and penalties must be agreed beforehand. Restitution for breaching party permitted. Immediate suit on anticipatory breach allowed. Obligation for injured party to limit damages.

Excuses for Nonperformance.

“Force majeure” or “cas fortuit” (§§6:74-78 B.W.). Defaulting party will be liable for claimed damages unless he proves that failure to perform contractual obligations results from impossibility caused by facts or circumstances for which he cannot be held liable. (§6:74 B.W.). In other words, party is excused if nonperformance does not result from his fault and if he cannot be held liable for it by law, juridical act or common opinion (“verkeersopvattingen”). Defence is banned if “force majeure” occurred when debtor was already in default (by delay or defective performance) unless in absence of such default damage would have occurred just as well. (§6:84 B.W.).

§§6:74-75 B.W. provide for excuse against claims for performance, damages and suspension in general, but not against claim for rescission.

If debtor who cannot be held liable for nonperformance derives benefit in connection with that nonperformance, creditor is entitled to damages by application of rules relating to unjustified enrichment. (§6:78 B.W.).

If contract comprises under term “force majeure” or “overmacht of toeval” any facts or circumstances which by law are not included, excuse of nonperformance is not based on §§6:74-78 B.W., but on contractual exclusion or limitation of liability. Whether and to what extent such excuse is admitted depends on court's construction of intention of parties and court's attitude towards standard contracts and also on restrictions imposed by public order; good morals and principles of reasonableness and fairness (§§6:2 and 6:248 B.W.) or on statutory restrictions applying to special contracts.

If contract provides for reciprocal obligations of each party, failure of party to perform entitles other party to demand rescission of contract by court or to rescind contract by written statement out of court.

Other party's nonperformance may be invoked as excuse for nonperformance. (§§6:262-264 B.W., “exceptio non adimpleti contractus”). When, however, claimant cures his own nonperformance, defendant's excuse is barred.

Fundamental change of circumstances beyond control and original contemplation of parties give each of parties right to request that court shall alter results of contract or, entirely or partly, dissolve it. (§§6:258 B.W.).

Consumer Protection.

Specific provisions can be found in §§6:235-236 B.W. and throughout B.W. Book 7, such as implementation of Directives 97/7/EG (Pb EG L 144) and 2002/65/EG (Pb EG L 271) regarding distance contracts. (Art. 7:46a B.W. r.f.). According to Art. 7:2 B.W., consumer enjoys special protection in case of purchase of real estate. Buyer (consumer) can annul purchase within three days. This period starts when buyer is given copy of purchase contract.

§§6:231-247 B.W. contain specific provision for general conditions. §§6:193a-193j B.W. contain specific provisions for unfair trade practices (implementation of Directive 2005/29/EG. (Pb EG L 144).

Government Contracts.

Except for public or administrative activities or employment contracts, government contracts under The Netherlands law are contracts governed by private law of contracts and subject to jurisdiction of normal courts of justice. The Netherlands government buys in accordance with Algemene Rijksinkoopvoorwaarden or A.R.I.V., and lets out works in accordance with Uniforme Administratieve Voorwaarden voor de uitvoering van werken or U.A.V.

Applicable Law.

On Sept. 1, 1992, Convention on the Law Applicable to Contractual Obligations (Rome, June 19, 1980) came into force for The Netherlands. It was converted into EU Instrument, Rome I Regulation, which entered into force on July 24, 2008. According to Rome I, both parties are in general entitled (see §3) to make choice of law (principle of party autonomy). If parties did not make choice of law, §4 introduces eight categories of contract, stating for each category determinative connecting factor to designate applicable law. Contracts falling outside these categories are governed by law of country where party required to effect characteristic performance of contract has its habitual residence.

Where applicable law cannot be determined pursuant to two main rules mentioned above, contract shall be governed by law of country with which it is most closely connected.

Special rules are applicable for consumer contracts, insurance contracts and employment contracts.

According to Rome I, consumer contract is governed by law of country in which consumer has his habitual residence provided that this is also country where professional carries out its activities or to which its activities are directed. Employment contract is governed by law of country in which employee habitually carries out his work in performance of contract, or, if this cannot be determined, applicable law will be that of country where place of business is located, unless contract is more closely related to another country.

Insurance contracts, in absence of choice, are governed by law of country of residence of insurer, unless contract is more closely related to another country.

From application of Rome I are excluded: status of legal capacity of natural persons, matrimonial and family relationships, negotiable instruments, arbitration and choice of court agreements, bodies corporate, agency, trusts, dealings that occur before contractor is concluded, insurance and reinsurance, except those defined in Art. 2 of Directive 2002/83/EC concerning life assurance.

Distributorships and Dealerships.

Dutch law contains no specific provisions in respect to dealer and distribution agreements. General civil law is applicable. Distribution agreement is contract whereby manufacturer or supplier of goods or services enables independent contractor to resell these goods or services for his own risk and account. Examples of distribution agreements are exclusive distribution and exclusive purchasing agreements. Franchising can be qualified as form of exclusive distribution. Termination of distribution agreement will trigger obligation on part of principal to compensate for duly made investments.

When distributor agrees to act as intermediary in conclusion of contracts for principal or to enter into contracts on behalf of and/or for account of principal, distribution agreement can be qualified as commercial agency. Specific provisions of Civil Code are applicable (see category 2 Business Organizations, topic 2.01 Agency).

Franchising.

There are no Dutch laws which focus directly on franchising. Most franchising organisations in The Netherlands are members of Dutch Franchising Association. In essence, franchise is contract whereby one party, franchiser, provides one or more other parties, franchisee(s), with licensed right to use trademark name, secret commercial know-how or other distinguishing features, in sale of products or services.

EEC Regulations.

Distribution and franchise agreements can be prohibited by §85.1 EEC treaty. Commission of EEC has enacted several block exemptions i.e. regulations whereby certain categories of agreements are exempted as group. Because §85.1 EEC treaty can be applicable to franchise or distribution agreement, it is of great importance to check whether agreement is in accordance with provisions of regulations. Relevant regulations are, for example: 1983/83 of 22-06-1983 on application of §85(3) of treaty to categories of exclusive distribution agreements; 1984/83 of 22-06-1983 on application of §85(3) of treaty to categories of exclusive purchasing agreements, .4087/88 of 30-11-1988 on application of §85(3) of treaty to categories of franchise agreements. (See also topic 3.07 Monopolies, 3.09 Restraint of Trade and Competition.)

3.04 FRAUDS, STATUTE OF:

The Netherlands has no Statute of Frauds. As rule, contracts are concluded by mutual consent (§6:217 B.W.) evidenced by offer and acceptance. Generally, there are no specific formalities required. However, certain contracts do require specific form. Contracts relating to loan of goods (“bruikleen and verbruikleen”) for no consideration are only complete on delivery of goods (so-called “reële contracten”); other contracts require compliance with specific formalities. For instance: notarial deed is required with respect to transfer of shares in Dutch corporation, transfer of real estate, prenuptial contracts (“huwelijkse voorwaarden”); and contracts relating to hire purchase (“huurkoop”) and noncompetition clause in employment agreement, must be in writing and duly signed by parties. According to §3:39 B.W. contracts concluded without observance of required formalities are partially null, unless otherwise provided by law. If contractual provision is (partially) null, it will be converted into valid provision, as close as possible to nullified one, unless result would be unreasonably harmful to interested person (see also topic 3.03 Contracts, subhead As Distinguished from Other Sources of Obligations; category 20 Property, topic 20.04 Deeds).

3.05 INFORMATION TECHNOLOGY, INTERNET AND NEW MEDIA:

General.

Electronic trade and electronic transfer of funds, so-called E-Commerce, is to some extent regulated by EU Directives. One of those Directives is Directive 1999/93/EC of European Parliament and Council, Dec. 13, 1999 regarding common framework for electronic signatures. Another EU Directive 2000/31/EC of European Parliament and Council, June 8, 2000 regarding certain legal aspects of information society services, in particular electronic commerce, in Internal Markets, is implemented in Dutch private law and changes several Arts (3:15 d-f, 6:227 a-c, 6:196 b, 6:196c). This regulates legitimacy of online closed contracts, liability of Internet providers and commercial communication via Internet.

Database Protection.

Databases are subject to protection under Databases (Legal Protection) Act 1999 which implements EU Directive 1996/9, Mar. 27, 1996-96/9/EC, on protection of databases. Databases (Legal Protection) Act provides special (sui generis) protection for nonoriginal content of databases.

Digital Signature.

Directive 1999/93/EC of European Parliament and Council, Dec. 13, 1999 regarding common framework for electronic signatures. This directive is implemented in 3:15 a-b and allows parties to use electronic signatures.

Directive 1999/93, under Art. 1, first paragraph, first sentence, has as its objective to simplify use of electronic signatures and to contribute to legal recognition thereof, although Art. 1, second paragraph, does not relate to aspects concerning conclusion or validity of contracts or other legal obligations for which national or Community law prescribes formal requirements and it leaves intact rules and limitations prescribed by national or Community law for use of documents.

Computer programs are copyright protected as literary works under Dutch Copyright Act (Auteurswet) of 1912 (as amended), which implements Directive 1991/250, May 17, 1991, on protection of computer programs. Copyright Act offers computer programs copyright protection in that reproduction is in principle not allowed, unless it concerns reproduction within framework of intended usage.

Telecommunication facilities (telecommunication lines, access to networks, connections and other telecommunication facilities) are regulated by Dutch Telecommunications Act (Telecommunicatiewet) of 1998, which implements European directives on telecommunication services and networks.

Teleservices.

Principal regulation determining relationship between companies and consumers is Distance Selling Act which implements EU Distance Selling Directive 1997/7/EC, introduced into Title 1, art. 7:46 a-j, Book 7 BW, whereby, amongst other things, consumer is given right to withdraw from contract concluded for up to seven working days.

3.06 INTEREST:

Applicable interest rate is either legal interest or interest stipulated by agreement. Rate of legal interest is determined from time to time by European Central Bank. Interest rate stipulated by agreement may exceed legal interest provided this is not prohibited by law. Interest rate stipulated by agreement must be stated in writing.

In general in case of obligations to pay certain amount of money, damages caused by delay in payment consist only of legal interest as determined from time to time; in this case creditor does not have to prove any real damages.

Generally, legal interest is calculated as from date of summons to court, unless payment of debt due has been formally demanded in writing with explicit demand for legal interest from certain date. However, in certain cases legal interest is due, without any further notice being required, as of date of default ("verzuim"). Legal interest is accounted cumulatively per year.

Interest on borrowed monies extinguishes after five years so that interest must be demanded at each expiration date.

Compensation for, including interest on, consumers' credit may not exceed levels determined by ministerial decree by virtue of Act on Consumers' Credit.

3.07 MONOPOLIES, RESTRAINT OF TRADE AND COMPETITION:

EU competition rules applicable to enterprises may prohibit agreements, decisions and concerted practices (§81[1]) or abuse of dominant position (§82). In agriculture, application of these rules is somewhat limited. (EEC Regulation 26/62). Special rules apply to transport sector. In case 66/86, SAEED, concerning air transport, European Court of Justice held that national judges can directly apply §82 if all conditions of this article are satisfied (see infra). ECSC Treaty, which contained specific rules for certain coal and steel products expired on July 23, 2002. Specific sector legislation applies to following sectors: Agriculture, Regulation 26/62; Insurance, Block Exemption Regulation 358/2003 (expiry date Mar. 2010, consultation of draft regulation will close Nov. 30, 2009); Postal Services, Notice from Commission on application of competition rules to postal sector and on assessment of certain State measures relating to postal services Feb. 1998; Transport sector, subdivided into Air, Maritime, Rail, road and inland waterways and Infrastructure; Telecommunications, Electronic Communications Framework Directive 2002/21/EC and number of notices and guidelines.

In deciding whether any particular transaction falls within §81(1) it is necessary to consider three aspects: (i) Whether there exists agreement, decision or concerted practice made between or observed by undertakings or by association(s) of undertakings, (ii) whether competition within Common Market may be prevented, restricted or distorted, and (iii) whether trade between Member States may be affected thereby. §81(1) subparagraphs (a) to (e) illustrate certain particular agreements which commonly have as their object or effect restriction of competition within Common Market. These illustrations, however, are not exhaustive. Agreement may affect trade between Member States if it appears, after consideration of its objective legal or factual elements, that agreement may reasonably be expected to exercise direct or indirect, actual or potential effect upon flow of trade between Member States which may hinder creation of Common Market among those states and obstruct economic interpenetration aimed at by Treaty. In considering whether particular agreement falls within above definition, it is necessary to assess agreement within whole surrounding economic and legal context. Commission has issued guidelines on concept of effect on trade (Apr. 27, 2004) which provides quantification of concept. Broadly speaking, agreements between parent and subsidiary or between subsidiary companies in same group, or subject to common control, fall outside §81(1), if subsidiary does not enjoy any real autonomy in determination of its course of action.

Both European Commission and European Court of Justice specified on various occasions that §81(1) is only applicable to those agreements, decisions or concerted practices, which have appreciable effect on both competition and trade between Member States. European Commission issued notice concerning agreements of minor importance indicating that there is no appreciable effect on competition if certain thresholds are met: joint market share for products or services concerned on relevant market less than 10% in “horizontal” agreements (direct competitors) or 15% in “vertical” agreements (e.g. supplier and distributor). Notice does not apply to agreements containing “hard-core restrictions” specified for horizontal and vertical agreements (i.e. price fixing, market allocation). Notice applies to parallel networks of agreements having similar effect on market when individual market share does not exceed 5%. Agreements between small and medium-sized companies are in general of minor importance. European Commission has adopted so-called effect doctrine when it comes to applying §81(1) to certain agreements and practices being operated outside territory of Common Market. Prohibition may apply if such agreements or practices produce effect within EU. This doctrine has been endorsed by European Court of Justice.

If agreement falls within §81(1), two quite separate consequences follow. First, validity of agreement will be affected under civil law. §81(2) provides that any agreements prohibited pursuant to §81(1) are “automatically null and void”. Under Dutch civil law infringement of §81(1) (and §82) constitutes tort and, hence, can give rise to liability for damages. Secondly, parties may be exposed to risk of European Commission as well as national competition authorities and courts taking proceedings under EC-Regulation 1/2003 to enforce prohibition contained in §81(1) (and §82). Under §23 of that regulation, Commission may impose fines upon enterprises if they intentionally or negligently infringe Treaty. Under §7 thereof Commission may also require enterprises to bring to end infringements of Treaty. Under §24 thereof such requirement may be enforced by imposition of penalty payments in respect of each day that infringement continues. Commission may also take provisional measures pending final decision. §20-21 of Regulation gives Commission right to hold investigation in enterprises.

Since May 1, 2004, §81(3) has direct effect and can be applied by national courts and national competition authorities as well as European Commission. Commission has exercised its powers to exempt “en bloc” under §81(3) vertical agreements concluded between two or more firms, each operating, for purpose of agreement, at different stages of economic process, and relating to conditions under which parties may purchase, sell or resell certain goods or services, including exclusive distribution agreements, exclusive purchasing agreements, franchising agreements and selective distribution agreements, and combinations thereof. (Regulation 2790/1999). If market share of parties to agreement exceeds threshold of 30%, exemption Regulation is no longer applicable. This exemption Regulation entered into force on June 1, 2000. This regulation expires in May 2010. Consultation on Draft Commission Regulation on application of Article 81(3) of Treaty to categories of vertical agreements and concerted practices and Draft Commission Notice—Guidelines on Vertical Restraints closed in Sept. 2009. Commission has also adopted exemption Regulations for specialization agreements (2658/2000) and research and development agreements (2659/2000). These two Regulations entered into force on Jan. 1, 2001. Regulations 2658/2000 and 2659/2000 replaced exemption Regulations 417/85 and 418/85. Agreements exempted under latter Regulations remained exempted until June 30, 2002. These regulations expire in Dec. 2010. In order to prepare regime to be applied after expiry of current rules, Commission invited stakeholders to share their experiences in practice in applying two block exemption Regulations and accompanying guidelines. This consultation was open until Jan. 30, 2009. Commission has furthermore adopted exemption Regulations for motor vehicle distribution and servicing agreements (Regulation 1400/2002, which replaced Regulation 1475/95 and entered into force on Oct. 1, 2002), and technology transfer agreements (772/2004, which replaced Regulation 240/96 and entered into force May 1, 2004). Exemption regulation on technology transfer agreements is accompanied by Commission Notice—Guidelines on application of Art. 81 of EC Treaty to technology transfer agreements Apr. 27, 2004. Regulation 1400/2002 expires in May 2010. Commission has adopted Communication setting out key elements of competition regime which will apply to motor vehicle sector after expiry of Regulation 1400/2002; COM (2009) 388 final, accompanied by Impact Assessment Report. Consultation on this subject closed in Sept. 2009.

Commission issues decisions which are binding and notices which provide guidance for undertakings and indicate Commission's view on various matters relating to §81 (and §82). At present are to be mentioned: Guidelines on vertical restraints (Oct. 13, 2000); guidelines on horizontal co-operation agreements (Jan. 6, 2001); notice concerning agreements of minor importance (Dec. 22, 2001) and notice concerning subcontracting agreements (Dec. 18, 1978), and notice on application of EC competition rules to crossborder credit transfers (Sept. 27, 1995) notice on co-operation within European network of competition authorities (Apr. 27, 2004); notice on co-operation between Commission and national courts (Apr. 27, 2004); notice on handling of complaints by Commission (Apr. 27, 2004); notice on informal guidance regarding novel questions concerning §81 and §82 (Apr. 27, 2004); Guidelines on application of §81(3) (Apr. 27, 2004); Guidelines on effect on trade (Apr. 27, 2004). Notice on definition of relevant market (Dec. 9, 1997).

It is possible for member of cartel to apply for leniency. Commission has adopted Leniency Notice (Feb. 19, 2002) which has been amended in 2006 (Dec. 8, 2006). Notice has two sections, one concerning immunity from fines and other concerning reductions in fines. This notice sets out framework for rewarding cooperation in Commission investigation by undertakings which are or have been party to cartels. Collaborations by undertaking which leads to opening of investigation may, providing additional requirements are fulfilled, result in immunity from fines. If immunity is no longer possible, co-operation by undertakings involved in cartel under investigation by Commission may result in reduction in fines. Such reductions are limited to undertakings that provide evidence that adds significant value to information which is already in possession of Commission.

Conduct of kind prohibited by §82 requires presence of three factors: Existence of dominant position, abuse of that position and possibility that trade between Member States may be affected by it. Commission has emphasized “over-all independence of behavior” as principal test of dominant position, which can only be satisfied by examining relative strengths of enterprises which compete in supply or acquisition of goods or services within particular market.

“Abuse” is thought to be objective criterion, which means that it may be brought about unintentionally. Abuse may be established irrespective of object of actions. It is economic effect that counts. Economic effect of abuse may consist of, basically: (a) market behaviour to disadvantage of third parties; or (b) action by which competitive structure of market is altered to disadvantage of third parties. Subparagraphs (a) to (d) of §82 illustrate kind of abuse which is prohibited. Illustrations are not exhaustive. From case law which has been developed by both European Commission and European Court of Justice it has become clear that §82 is applied on basis of its economic meaning rather than on its exact wording. Both “monopolizing” and “unfair trade practice” known in U.S. antitrust law seem to fall under scope of §82. Commission has issued Guidance on its enforcement priorities in applying Art. 82, Dec. 3, 2008. This Guidance was adopted on Feb. 9, 2009. It should assist undertakings in determining whether certain type of behavior could lead to intervention by Commission.

On May 1, 2004, merger control regulation (139/2004) entered into force (replacing earlier version of regulation which entered into force in 1990). Applies to mergers with community dimension. Latter criteria is decided on turnover of enterprises concerned. Below community dimension appraisal left to national authorities. Considered to be merger if enterprise(s) lose legal or economical independence. Merger must be notified to Commission prior to their implementation and following conclusion of agreement. Notification may also be made on basis of good faith intention to conclude agreement. Notification of merger to commission leads to Phase I proceedings which entails initial investigation. If proposed merger raises serious doubts Phase II of procedure is entered into. This entails detailed appraisal of proposed merger. Result may be either unconditional approval of merger because it is not incompatible with common market, or attachment of certain conditions and obligations to Commission's approval, or prohibition in case of incompatibility of merger with common market.

On July 10, 2007, Consolidated Jurisdictional Notice under Regulation 139/2004 was adopted, consolidating four Commission notices: notice of Commission on concept of full function joint ventures (Mar. 2, 1998), notice on concept of concentration (Mar. 2, 1998), notice on concept of undertakings concerned (Mar. 2, 1998), notice on calculation of turnover (Mar. 2, 1998); Commission Consolidated Jurisdictional Notice under Council Regulation 139/2004 on control of concentrations between undertakings (Apr. 16, 2008).

Guidelines on assessment of horizontal mergers under merger control regulation (Feb. 5, 2004); notice on restrictions directly related and necessary to concentrations (Mar. 5, 2005); notice on case referral in respect of concentrations (Mar. 5, 2005); notice on simplified procedure for treatment of certain concentrations (Mar. 5, 2005); guidelines on assessment of non-horizontal mergers under merger control regulation (Oct. 18, 2008); notice on remedies acceptable under merger control regulation (Oct. 22, 2008).

Commission has published compilation of currently applicable legislation and guidance documents regarding Merger Control (situation as of July 14, 2009), available on website of European Commission.

New Dutch Competition Act (“Mededingingswet”) entered into force on Jan. 1, 1998. New Act replaces Economic Competition Act of 1956. This new Act is virtually identical to EC Competition Law. It contains provisions that comprise same rules as §§81, 82(2) and 86 of EC Treaty.

Dutch competition authority (DCA: Nederlandse Mededingingsautoriteit) is entrusted with enforcement of Act. DCA has exclusive competence to grant licences for concentrations and individual exemptions from prohibition on anticompetitive agreements and to impose fines for infringement of Competition Act.

Art. 6 of Act, like §81 of Treaty, prohibits agreements or concerted practices between undertakings and decisions of associations of undertakings which have intention to or will result in hindrance, impediment or distortion of competition on Dutch market or on part thereof. Agreements which fall under prohibition are automatically void unless they qualify for exemption or fall under one of special exceptions provided in Act (infra). Any interested party who has suffered damages from unlawful act may seek recovery of those damages before civil court of law. In matters of great urgency, interim injunction proceedings may be instituted before civil court. DCA also has power to take interim measures.

Prohibition of Art. 6 is subject to number of exceptions which are set out in Competition Act.

First, Act contains de minimis exemption: Art. 7 provides that Art. 6 does not apply to agreements concluded between fewer than eight undertakings whose joint turnover does not exceed [Euro]5,500,000 where their primary activity is distribution of goods; if their primary activity is not distribution of goods (e.g. services) combined turnover threshold of [Euro]1,100,000 applies.

Second, Art. 6 does not apply to agreements which are exempted under EC law. Agreements which fulfill conditions under one of these regulations do not fall under Art. 6 and agreements which have obtained clearance from European Commission in form of individual decision granting exemption also enjoy immunity from Art. 6.

Third, agreements may be exempted pursuant to one of Dutch block-exemptions adopted by general administrative order. Exemptions govern: maximum prices during short-term joint-advertising campaigns within retailing chains, purchasing obligations within retailing chains and trade branch protection arrangements for new shopping centers. Block-exemption for formation of public procurement consortia expired on Jan. 1, 2009. As replacement, Policy guidelines on application of Art. 6 to public procurement consortia have been published by Minister of Economic Affairs, The Netherlands Government Gazette 2009, no. 14082, Sept. 22, 2009.

Fourth, prohibition does not apply to undertakings entrusted with performance of special tasks (e.g. undertakings which provide public utilities) to extent that application of that provision would obstruct performance of that special task. Agreements which are subject to approval or are mandatory pursuant to other legislation will fall outside scope of prohibition for period of five years after entry into force of Act.

Finally, agreement may fall within scope of §6(3). In order to do so, agreement must contribute to improvement of production or distribution, or to technical and economic progress. Fair share of these benefits must be passed down to consumer. Restriction(s) of competition must be indispensable for this redeeming purpose. Furthermore, sufficient level of competition must remain on market. If all above mentioned conditions have been fulfilled §6(1) prohibition does not apply. Since Aug. 1, 2004, §6(3) has direct effect. In The Netherlands, it is possible for member of cartel to apply to DCA for leniency. DCA has published Leniency policy, Leniency policy of DCA, Bulletin of Acts and Decrees no. 122, Oct. 10, 2007.

Art. 24, like §82 EC Treaty, prohibits abuse of dominant position. Prohibition is subject to only one exception: undertakings entrusted with performance of special tasks may apply for exemption where application of Art. 24 would obstruct their performance of that special task. (Art. 25).

Concentrations (mergers, total or partial takeovers and certain joint ventures) must be notified to director general of DCA where aggregate annual (world-wide) turnover of undertakings concerned is in excess of [Euro]113,450,000 and at least two of undertakings concerned have annual turnover in excess of [Euro]30,000,000 in The Netherlands.

Concentrations which have community dimension do not fall within scope of Act and must be notified in Brussels.

Mergers may not be effected within first four weeks following notification ("standstill" period). During this period DCA will examine whether merger creates or strengthens dominant position on relevant market in The Netherlands. If examination leads to conclusion that this is indeed case, DCA will decide within four weeks after notification that license must be requested. Application for licence must be supported by additional information supplementing initial notification.

After application for license, DCA will investigate whether merger will actually create or strengthen dominant position which will significantly restrict competition. If affirmative, license will be refused. DCA has competence to impose conditions when granting license (e.g. divestiture of certain activities). Under Competition Act Minister of Economic Affairs may, acting upon request of undertakings concerned and in presence of sufficiently serious grounds of general interest, overrule refusal of DCA to grant license.

DCA has power to impose fines for infringement of Arts. 6 and 24 of Competition Act of either [Euro]450,000 or in case of undertaking or association of undertakings, and its result is more than [Euro]450,000, up to 10% of annual turnover of undertaking(s) concerned. DCA may also impose periodic penalty payments. In field of merger control, DCA may impose fines of up to [Euro]450,000 or in case of undertaking or association of undertakings, and its result is more than

[Euro]450,000, up to 10% of annual turnover of undertaking(s) concerned. As it is possible for anti-trust infringements, periodic penalty payments may be imposed. For infringements of provisions regarding investigation, enforcement in field of anti-trust and procedural matters in field of merger control, DCA may impose fines of up to [Euro]450,000 or in case of undertaking or association of undertakings and its result is more than [Euro]450,000, up to 1% of annual turnover of undertaking(s) concerned. Periodic penalty payments may be imposed either as single penalty or in combination with fine.

Moreover, infringements of cartel provision of Act. (§6) will render agreement automatically null and void. Third parties who have suffered damages may seek compensation on grounds of tort liability.

DCA also publishes guidelines and notices on various subjects. Information is only available in Dutch, except for text of Dutch Competition Act and number of guidelines: Procedure in relation to Inspection and Copying of Digital Data and Documents 2007, Dec. 12, 2007, NMA Fining Code 2007 AMEW, Oct. 10, 2007, Guidelines on Cooperation between Undertakings, Apr. 2008, Amicus Curiae Guidelines, Sept. 23, 2004 and Leniency Guidelines, Oct. 10, 2007.

3.08 NEGOTIABLE INSTRUMENTS:

See topic 3.01 Bills and Notes.

3.09 RESTRAINT OF TRADE:

See topic 3.07 Monopolies, 3.09 Restraint of Trade and Competition.

3.10 SECURITIES:

Act on Supervision of Financial Markets (“Wet Financieel Toezicht” or “Wft”) integrates nine different Acts regarding financial supervision. Act on Supervision of Financial Markets consists of six parts. First part is general and gives definitions and general rules. Second part regulates entrée to financial markets. Third part calls for prudential demands for financials. Fourth part provides rules of conduct for financials, while fifth part contains rules regarding trade and brokerage in securities. This part is also basis for code of conduct to be observed in event of mergers, take-overs and tender offers in order to protect shareholders. Sixth part has not entered into force but will contain rules regarding supervision of infrastructure of financial markets. All relative EU directives are and will be implemented into Act on Supervision of Financial Markets. In Nov. 2009, various changes have been made and are being prepared for FSA. FSA has been amended by Recovery of technical defects in FSA and certain other laws (``Reparatiewet'' FSA) (Bulletin of Acts and Decrees 545, Dec. 18, 2008) (Staatsblad 2008, 545). This act restores technical errors, incorrect references and technical omissions in FSA and some other laws that have been detected by Authority for Financial Markets (``Autoriteit Financiële Markten'', or ``AFM''), Dutch Central Bank (``De Nederlandsche Bank'', or ``DNB''), legal practitioners and other users. Transparency Directive (Directive 2004/109/EG) has been implemented in FSA (Bulletin of Acts and Decrees 476, Nov. 20, 2008) and entered into force on Jan. 1, 2009. Latest amendment adjusts level of fines which can be imposed for certain breaches of FSA (Wet wijziging boetestelstel financiële wetgeving, Bulletin of Acts and Decrees 327, July 31, 2009) (Staatsblad 2009, 327). Pending legislation entails Wetswijziging FSA (Parliamentary document submitted to Parliament: Kamerstukken 2008-2009, 32306, no. 2). This amendment of FSA entails more substantial legal recovery based on pressure points brought up by AFM, DNB and market parties. Another proposed amendment is addition of rules regarding settlement services and supervision of such settlement services (Parliamentary document submitted to Parliament: Kamerstukken II 2008-2009, 32025, no. 2).

(1) Offering of Securities.

Offering “Prospectus Directive securities” in The Netherlands is prohibited unless prospectus is made available that was approved by Dutch Authority for the Financial Markets or supervisory authority in another Member State or if relevant securities consist of participations in open-end investment institution. Several exemptions are available. In practice most relevant exemptions are offering securities to professional investors only, offering securities to less than 100 persons per Member State, offering securities in minimum aggregate purchase amount of [Euro]50,000 per investor offering securities with minimum denomination of [Euro]50,000. Authority for Financial Markets (“Autoriteit Financiële Markten”, or “AFM”) may also grant individual dispensation upon request.

(2) Acting as Securities Intermediary or Portfolio Manager (collectively ``Investment Firms'').

Offering or performing of services as securities intermediary or portfolio manager in or from The Netherlands is prohibited without license from AFM.

This does not apply to performance of services as securities intermediary or portfolio manager by, inter alia, certain insurance companies, investment institutions, credit institutions and securities institutions authorized in their home country and making use of “European passport”. Prohibition also does not apply to entities licensed as bank under Wft (see below).

(3) Financial Undertakings (``Financiële Ondernemingen'').

FSA defines several types of financial undertakings: Management company, collective investment scheme, investment firm, depositary, cleaning institution, financial service provider, financial institution, credit institution and insurer. Each of these is also defined in FSA definitions.

FSA differentiates between investment firm and collective investment scheme. Collective investment scheme is either investment company or common fund. Investment company is legal person requesting or acquiring funds or other goods for collective investment in order to have unit-holders share in proceeds of investments. Common fund is capital not kept by investment company including funds or other goods requested or acquired for collective investment in order to have unit-holders share in proceeds of investments. Fund does not have legal personality. Collective investments schemes are also subject to variety of rules in FSA. Investment is party providing investment service.

For application of FSA rules, regulated market is market as meant in Art. 1 under 13 of Investment Services Directive or similar market in raw materials derivatives. FSA defines holder of regulated market as natural person or legal entity that manages or operates regulated market.

Holder of regulated market and investment firm are subject to different FSA rules. Investment firm may operate Multilateral Trading Facility, but not regulated market. However, holder of regulated market needs separate license to operate Multilateral Trading Facility.

(4) Interests in Securities Institutions.

It is prohibited to acquire, maintain or increase qualified interest (i.e. direct or indirect interest of 10% or more of shares or voting rights) in certain types of investment firms (i.e. banks with statutory seat in The Netherlands, management company of undertaking for collective investment in transferable securities established in The Netherlands, investment firm established in The Netherlands, insurer established in The Netherlands) without certificate of no objection issued by DNB. With regard to holder of regulated market and five biggest banks and insurers with statutory seat in The Netherlands in situations as specified in FSA, certificate of no objection needs to be issued by Minister of Finance.

Minister of Finance has given mandate to AFM for issuance of certificate of no objection in case of qualified interest in holder of regulated market (``Mandaatbesluit verklaringen van geen bezwaar gereglementeerde markten van 30 Jan. 2008'', Netherlands Government

Gazette Feb. 7, 2008, no. 27). When exercising its mandate AFM has to apply Guidelines that were drawn up in combination with mandate (``Beleidslijn verklaringen van geen bezwaar gereglementeerde markten'', Netherlands Government Gazette Feb. 7, 2008, no. 27).

Additionally, holder of such license must notify AFM of any change in interest when passing 20, 33, 50, 95% or reaching 100%, or any change in interest that causes financial undertaking to become subsidiary, or any change that causes financial undertaking to cease being subsidiary.

(5) Organization of Market in Financial Instruments.

Under FSA, market in financial instruments is market subject to rules and meant to bring together supply and demand of financial instruments. FSA definition of financial instrument includes (amongst others) securities, unit in collective investment scheme (not being security), instrument usually negotiated on money market, right to transfer goods in time, or equivalent instrument focused on settlement in money, interest installment contract, interest swap, currency swap or share swap or option to acquire or alienate aforementioned instrument, including equivalent instrument focused on settlement in money.

It is prohibited to operate market in financial instruments in The Netherlands without certificate of no objection issued by Minister of Finance. Market in financial instruments is regulated market if a) it is market as meant in Art. 1 under 13 of Investment Services Directive or similar market in raw materials derivatives and b) it is listed as such on list of regulated markets of Member State where it is situated. Two Dutch regulated markets are Euronext Amsterdam and Euronext Amsterdam Derivatives Market.

(1) Securities: FSA defines securities as: (a) Negotiable share or other negotiable securities or rights to equivalent to negotiable shares, not apartment right; (b) negotiable debenture or other forms of negotiable debt instrument; or (c) any other negotiable securities issued by legal person, company or institution by which securities meant under a or b may be acquired by performance of rights pertaining thereto or by conversation or that is settled in money.

For purpose of offering securities to public, FSA differentiates between equity securities and non-equity securities. Shares are equity securities and debentures and other debt instruments are non-equity securities. Difference is of importance with regard to question: which authority needs to give its approval to prospectus? FSA prohibits offering securities to public in The Netherlands or having securities admitted to trading on regulated market situated or operating in The Netherlands unless prospectus relating to offer or admission is available to public which is approved by The Netherlands Authority for Financial Markets or by Supervisory Authority of another Member State.

With regard to equity securities, AFM is authorized supervisor, when securities are issued by issuer with its statutory seat in The Netherlands and offered to public or admitted to trading on regulated market in The Netherlands or another EU Member State. AFM is also authorized supervisor, when securities are issued by issuer with its statutory seat in non-EU Member State and offered to public or admitted to trading on regulated market: In The Netherlands and issuer opts for AFM; in The Netherlands or another EU Member State and for previous issuance or admission issuer opted for AFM; in The Netherlands or another EU Member State and for previous issuance or admission issuer opted for supervisory authority of another EU Member State, but now opts for AFM.

With regard to non-equity securities situation is more complex. There are three types of non-equity securities and distinction needs to be made between those with nominal value or less than [Euro]100 and those with nominal value of at least [Euro]100.

Shares in capital of company are equity security. Natural or legal person who acquires or transfers shares or voting rights in capital of The Netherlands company listed on EU or EEA exchange and who knows—or ought to understand—that he has thereby reached or crossed threshold of 5, 10, 15, 20 25, 30, 40, 50, 60, 75, 95% of issued share capital or voting rights pertaining to issued share capital of that company is obligated to notify AFM thereof forthwith. AFM shall publish notification in each EU or EEA country where company is listed. In addition, board members of company must disclose to AFM every change in shareholding in that company and/or voting rights pertaining to shares they hold.

Proposal to lower first threshold from 5% to 3% (amongst other issues relating to corporate governance) has been submitted to Parliament on July 30, 2009 (Parliamentary document submitted to Parliament: Kamerstukken 2008-2009, 32014, no. 2).

FSA also provides extensive provisions to prevent market abuse; this includes e.g. insider information and market manipulation.

(2) Participation in collective investment scheme: FSA prohibits soliciting or obtaining in or from The Netherlands, money or other goods, in exchange for units of collective investment scheme or to offer units of such collective investment scheme without authorization from AFM. Act prohibits soliciting or obtaining money or other goods as participation in collective investment scheme that has not been licensed, or to offer participations in such collective investment scheme, in or from within The Netherlands. Depending on form of collective investment schema: (i) Investment company, (ii) investment fund, (iii) institution for collective investment in securities (referred to in EC Directive 85/611) based in The Netherlands, (iv) institution for collective investment in securities (referred to in EC Directive 85/611) based in other EU member states, or in state which is party to Agreement on European Economic Area (``EEA''), rules applicable to collective investment schemes vary. License requirement does not apply if participation rights are offered to professional investors only, including banks, brokers, asset management companies, etc.

Obligation to publish prospectus, which has been approved by AFM, depends on type of collective investment scheme and type of participation right that is offered to public. Participation rights in open-end collective investment scheme are exempt from prospectus rules that apply to offering securities on regulated market as described above at ``(1) Securities''.

Participation rights in closed-end collective investment scheme are subject to prospectus rules that apply to offering of securities on regulated market, if they are marketable and are not redeemable or to be repurchased directly or indirectly, at expense of assets, on request of holder of such participation right. Participation rights in closed-end collective investment schemes, which do not fit this description and participation rights in open-end collective investment schemes are subject to separate set of prospectus rules in FSA.

(3) Debentures and debt instruments: redeemable funds are funds that must be redeemed at some point, for whatever reason, and regarding which it is clear beforehand which nominal sum should be redeemed.

It is prohibited for anyone to address public for purpose of raising money (redeemable funds) in ordinary course of business, except for licensed banks and certain other institutions. Several general exemptions are available from this prohibition, including raising capital by issuing debentures in accordance with FSA. For example, issuer that has complied with obligation to publish prospectus according to rules of FSA, may issue debentures. Minister of Finance can also grant dispensation upon request.

See category 2 Business Organizations, topic 2.03 Corporations, subhead Issuance of Stock.

3.11 STATUTE OF FRAUDS:

See topic 3.04 Frauds, Statute of.

3.12 TRADE REGISTER:

(Trade Register Act of Mar. 22, 2007, entered into force Jan. 1, 2008.)

Trade Register is held by chambers of commerce. Enterprises whether Dutch or foreign which are established or have branch or agent authorized to contract in The Netherlands or which are owned by legal entity established or with statutory seat in The Netherlands must be registered with trade register held by chamber of commerce of district where enterprise, branch or agent is established.

Any limited company (N.V.), private company with limited liability (B.V.), association with full legal capacity, cooperative society, mutual insurance company, foundation, European Economic Interest grouping, European Company and European Cooperative Society with statutory seat in The Netherlands must be registered whether or not they have enterprise, branch or agent in The Netherlands. Moreover, lawyers, notaries and medical practitioners, Association of Owners, churches, and public legal persons are obliged to register in trade register as well.

Particulars of and documents relating to enterprises, or legal entity must be filed on application to trade register, such as tradename used by enterprise, legal form of owner, directors if owner is legal entity, holders of proxy, agents, names of supervisory directors. All subsequent changes and additions should be registered within one week after changes or additions have occurred. Registrations may have retroactive effect.

Third parties may rely in good faith on information and documents filed with trade register. Enterprise or legal entity may not prove inaccuracy or incompleteness of any such information or documents against third party who is ignorant of inaccuracy or incompleteness.

Responsible for supplying data for registration are owners or all co-owners of enterprise or if owner is legal person, any member of its managing board. If enterprise in The Netherlands (e.g., branch establishment) is owned by nonresident natural or legal person, resident person in charge of daily management of Dutch enterprise is responsible as well. If foreign enterprise has no office or other establishment in The Netherlands but is represented by agent in The Netherlands having authority to bind owner by his act or signature, agent is also responsible for supplying data for registrations.

Supply of incorrect or incomplete data is penal offence with sanction of imprisonment or fine.

See categories 2 Business Organizations, topics Associations, Corporations, Partnerships; Courts and Legislature, topic Law Reports, Codes; Documents and Records, topic Records.

4 CITIZENSHIP

4.01 ALIENS:

See category 15 Immigration, topic 15.01 Aliens.

4.02 IMMIGRATION:

See category 15 Immigration, topic 15.01 Aliens.

5 CIVIL ACTIONS AND PROCEDURE

5.01 ACTIONS:

No distinction is made between actions at law and suits in equity. Generally, litigation is initiated by summons to be served on other party by process server. Summons must contain all essential facts (particulars) upon which demand for relief or injunction is based. Classification by plaintiff of his demand as specific action is irrelevant and may be disregarded by court which may grant relief or injunction on other legal grounds provided that sufficient facts have been stated. In his complaint to court, plaintiff repeats or refers to statements in summons. Defendant, in his answer, has to give reasons for his defenses; he must compile his defenses of procedural nature and his substantive defense.

However, plea that court has no jurisdiction must, and few other pleas may, be filed before answer. After his answer defendant can no longer plead new defence of procedural nature. Usually, oral hearing follows. Court decides on new motions or oral pleadings. To lawsuit initiated by summons, strict rules of procedure and proof apply. Suit is completed by judgment ("vonnis"). (See topic 5.04 Judgments.) No jury. No summary judgment practice.

Specific suits, particularly relating to family law, are initiated by petition filed with court, copy of which is sent by court's clerk by registered mail to other party. To those suits less strict rules apply and they are completed by order ("beschikking"). For other special proceedings see categories 7 Debtor and Creditor, topic Bankruptcy (Moratorium); Employment, topic Labor Relations; Family, topic Divorce.

In case of urgency, provisional injunction or other provisional measure may be obtained from provisional judge of district court by highly accelerated form of procedure ("kort geding") similar to French reféré, without prejudice to rights in main action. Parties may do so unless law provides for other means of obtaining provisional measures (see infra). See category 6 Courts and Legislature, topic 6.02 Courts.

Distinction between civil and commercial actions has been abolished. Disputes about labor contracts are treated as civil actions.

If one of parties is government or government agency and acts as private party and action is based on contract or tort, action is treated as civil action and civil courts have jurisdiction.

Complaints about decisions by central or local government or government agency are to be submitted to either (administrative section of) district court or specific administrative courts and kind of procedure is regulated substantially by general act on administrative procedure. (See also category 6 Courts and Legislature, topic 6.02 Courts.) Determination of damages by expropriation is, however, subject to normal courts. In most administrative proceedings provisional measures may be obtained from Chairman of specific administrative court. Otherwise, Parties can still obtain provisional measures by way of "kort geding" as outlined above.

If parties agreed to submit their disputes to arbitrators according to procedure provided for in §§1020-1076 Rv, only order from provisional judge of district court is required to make award enforceable as judgment of Dutch court. In all other cases award (classified as "binding advice") is treated as agreement of parties to abide by decision of person(s) to whom they submitted their dispute resulting in contractual obligation which, if not complied with, shall be submitted by legal action to normal courts.

Special Parties.

Suit is to be brought by and against guardian of infant, committee of judicially declared incompetent, trustee in bankruptcy (only financial matters). As to deceased's estate, suit under circumstances is to be brought by "executeur-testamentair", if any. In all other cases, estate is represented by joint heirs; process may be served on “executeur testamentair” or on last address of deceased if spouse is living there; or, within one year of decease, upon any one of heirs. See category 12 Estates and Trusts, topic 12.05 Executors and Administrators.

Joinder.

If suit is brought against several defendants separately, each party may file motion for joinder if subject matters of suits are sufficiently connected. Besides, if between two parties several suits on same subject are pending each of them may move for joinder.

Intervention by interested third party who has interest at stake is permissible.

Third Party Practice.

Before service of any responsive pleading or any motion other than motion for lack of jurisdiction, defendant may move for leave to serve summons and complaint upon third party who is or may be liable to him or to plaintiff for all or part of plaintiff's claim against him.

Interpleader.

Analogous practice does not exist.

Stay.

Court fixes terms within which pleadings and motions have to be filed and extensions requested by any of parties.

Proof of Foreign Claims.

Foreign marriage, birth and death certificates and other official documents or records are permissible as documentary evidence; if state of origin is not party to Convention of The Hague of Oct. 5, 1961, legalization of documents by The Netherlands consulate may be required. Documents of some states require verification.

Proof of Foreign Law.

Judge himself will have to determine meaning of foreign law, if applicable, but may ask information in this respect from parties; usually he therefore instructs (one of) parties to prove meaning of foreign law. This does not relieve him, however, from obligation to investigate foreign law on his own. In determining meaning of foreign law, judge strictly conforms to relevant rules. EEC law: under §234 EEC Treaty court of one of Member States can ask Court of Justice for preliminary ruling regarding matters set out in §234 if court in question is of opinion that such is necessary to be able to decide case. If decision of court in question will not be subject to appeal court is obliged to ask Court of Justice for preliminary ruling whenever question regarding matters set out in §234 is raised unless case is so clear that court can consider it as beyond discussion what preliminary ruling would be. European Convention concerning supply of information on foreign law concluded between members of Council of Europe in 1968 was ratified by The Netherlands effective 1977.

Limitation of.

See topic 5.05 Limitation of Actions.

Actions for Death.

See category 12 Estates and Trusts, topic 12.02 Death, subhead Actions for Death.

See also topic 5.03 Evidence; categories 15 Immigration, topic Aliens, subhead Procedural Rules; Courts and Legislature, topic Courts; Introduction, topic Government and Legal

System.

5.02 DEPOSITIONS AND DISCOVERY:

Dutch law does not provide for depositions; for evidence by witness see topic 5.03 Evidence. However, foreign depositions may be accepted in evidence; their probative value is at discretion of courts which may prefer to have evidence taken by means of letters rogatory or by consular officer.

The Netherlands is party to Hague Convention on taking of Evidence Abroad in Civil or Commercial Matters of Mar. 18, 1970. (Statute of Dec. 11, 1980, §652). Proper Dutch Central Authority is “Officier van Justitie” at district court of Hague.

No other way to hear witness outside The Netherlands is provided for other than by letters rogatory, transmitted to foreign court through diplomatic channels or to The Netherlands consul in foreign country. Council Regulation in taking of evidence in civil or commercial matters of May 28, 2001, EG 1206/2001, came into force on Jan. 1, 2004. Makes available request to take evidence through direct transmission between courts or direct from requesting court through expert of requesting court.

5.03 EVIDENCE:

Although evidence must be provided by parties, judge plays active role by allocating burden of proof and deciding on admissibility of evidence (except for documentary evidence which may be introduced without judicial permission). Generally, judge free in evaluation of evidence. Rule that illegally obtained evidence is excluded has not as yet been developed.

Evidence by Witness.

In principle, chamber of court before which suit is pending determines by interim judgment for which issues testimony of witnesses is required and who has burden of proof. Taking of testimony is usually delegated by chamber to single judge of court (“Rechter-Commissaris” or R.C.) unless parties jointly ask for testimony in chamber. Witnesses can be divided into two categories: litigants and others; differences between those e.g. with regard to conclusive force of testimony. Examination in chief, cross-examination and reexamination by attorneys of parties not permitted. Both R.C. and attorneys of parties may interrogate witness. It is however, at R.C.'s discretion, whether or not (and in what manner) to put questions.

Questions and answers are not recorded verbally; R.C. summarizes in terms R.C. considers relevant and dictates to secretary. Summary is read out to witness and submitted to witness for signature. R.C.'s report including summary is referred back to chamber.

Judge is free in evaluation of testimony by witnesses. Hearsay (testimonium de auditu) is admissible. See also topic 5.02 Depositions and Discovery; category 9 Documents and Records, topic 9.02 Affidavits.

Other Means of Evidence.

Apart from witnesses, most important are documentary evidence, evidence by experts and disclosure of books. But all means are possible.

Documentary evidence: distinction made between “authentieke akten” (public instruments made by or in presence of public official, usually notary) and “onderhandse akten” (private writings).

Judge may appoint one or three experts, following choice of parties if they agree thereupon. Experts' report may be oral, but is usually written.

Judge may either at request of one of parties or on own initiative order party to disclose corporate records. Other party is allowed to comment on documents. If party does not obey court's order, judge can interpret such refusal to party's disadvantage.

Pretrial Evidence.

At request of one of parties, court may allow examination of witnesses or report by experts or inspection of premises without action pending. Party requesting such examination should have sufficient grounds to do so, usually to perpetuate testimony: for instance, if party intends to sue but fears that proof will be lost because of fading memory, illness, old age or imminent emigration of witness, or perishability of goods to be examined by experts. Also lawful to request examination merely to evaluate potential success in possible suit.

See also topic 5.01 Actions, subheads Proof of Foreign Claims; Proof of Foreign Law.

5.04 JUDGMENTS:

Interim Judgments.

Before pronouncing final judgment, judge may render so-called interim judgment, which may have varying contents: (a) Ordering personal appearance of parties, e.g. to try and reach settlement; (b) ordering plaintiff or defendant to prove certain facts, by hearing witnesses; (c) ordering examination by experts; (d) providing day and hour for local inspection, etc.

Interim judgment ends part of dispute insofar as judge expressly sustains or denies part of claim.

Default judgment may be rendered against defendant who fails to appear, but proceedings may be reopened at his instance on payment of extra costs as long as judgment is not rendered. Term for reopening of default proceedings is four weeks and runs from: (a) Moment default judgment has been served upon defendant personally, (b) moment defendant performs act from which necessarily may be inferred that judgment or commenced term of four weeks has become known to him.

Foreign judgments, generally, are not enforceable but facts recited therein may, at discretion of court in The Netherlands, be used as evidence. However, bilateral treaties with Austria, Belgium, Federal Republic of Germany, Great Britain, Italy and Suriname provide for reciprocal recognition and enforcement. Same holds for European Convention of Sept. 27, 1968, between Belgium, France, Luxembourg, Federal Republic of Germany, Italy and The Netherlands (with accession treaties of Oct. 9, 1978 for Denmark, Ireland and U.K., of Oct. 25, 1982 for Greece, of May 26, 1989 for Spain and Portugal and of Nov. 29, 1996 for Finland, Austria and Sweden). In respect of judgments pronounced and deeds executed on or after Feb. 1, 1973, provisions of said European Convention replace provisions of bilateral treaties insofar as some subject matters are dealt with: not covered by European Convention are listed subject matters like rights relating to birth, marriage, death, marital property rights, wills, decedent's estates, bankruptcy, social insurance, arbitration. Equal to European Convention is Lugano Convention of Sept. 16, 1988. In addition to The Netherlands, relevant parties to Lugano Convention for The Netherlands are Switzerland, Norway and Iceland. Council Brussel I-Regulation of Dec. 22, 2000 EG 44/2001, on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, came into force Mar. 1, 2002 and replaces European Convention of 1968. From May 1, 2004 ten new Member States joined Regulation: Cyprus, Estonia, Hungary, Latvia, Lithuania, Malta, Poland, Slovenia, Slovakia and Czech Republic. From Jan. 1, 2007, Bulgaria and Romania followed. Denmark joined Reg. Brussels I from July 1, 2007. See also categories 7 Debtor and Creditor, topic Execution; Family, topics Divorce and Marriage. Covered by European regulation of Mar. 1, 2001 which was replaced by Reg. of Nov. 27, 2003 No. 2201/2003.

See also category 8 Dispute Resolution, topic 8.02 Arbitration.

5.05 LIMITATION OF ACTIONS:

Adverse Possession/Acquisition of Title by Prescription.

Rights in movables which are not registered property (with exception of some movables forming part of National Heritage), and in claims payable to bearer or order are acquired by possessor by possession in good faith for three years without interruption. Rights in other property are acquired by such possession for ten years (acquisition by prescription). Good faith is assumed; contesting party has to show bad faith of possessor. If property has been in possession during statutory period, other rights to that property expire as result of statutory limitation of right of action (infra) and person in possession of property at moment of expiry acquires rights in this property even if possession was not in good faith. Interruption or extension of limitation of right of action to terminate possession (infra) interrupts or extends period for acquisition by prescription accordingly. Nonvoluntary loss of possession does not interrupt course of prescription provided possession is restored within one year or action installed within one year to that effect is successful.

Limitation of Actions.

Rights of actions are subject to limitation (also called extinctive prescription). In case of rights in personam right itself does not terminate by lapse of limitation period; nonenforceable right remains. In case of limited rights in rem prescription of right of action of holder of limited right against principal holder of property leads to revival of full title of latter to property involved.

Unless provided for by law otherwise rights of action expire by lapse of 20 years as from day following day claim matures. Some special periods of extinctive prescription are:

Six months: annulment of termination of labour contract by giving notice of termination without prior consent of “regionaal directeur voor arbeidsvoorziening”; prescription period starts on date of notification of termination.

One year: annulment of resolution of meeting of shareholders by shareholder or third party interested; prescription period runs as from date of publishing resolution. Revindication of movables qualifying as part of National Heritage; prescription period starts on day following day place of movables and identity of possessor becomes known, and will in no case be more than 30/75 years.

Two years: in case of purchase contract rights of actions and defences related to nonconformity of property sold and delivered; prescription period runs as from date on which notice of nonconformity has been given to seller; seller is to be notified on short term after nonconformity is discovered or reasonably should have been discovered.

Three years: annulment of legal act for reason of error/misrepresentation, fraud, threat, abuse of circumstances, prejudice to creditor's right of recovery or legal incapacity; prescription period starts on different dates; right of action for damages against producer of product as meant in EU product liability regulation of July 25, 1985; prescription period runs as from day after day victim knows or should have known of damage, defect and identity of producer; however, claim for damages becomes barred anyhow ten years after date on which product which has caused damage has been put into market; (see also subhead Extinction of Rights and Actions by Mere Operation of Law, infra).

Five years and more: right of action for performance of contractual obligation to hand over property or to do something; starting point of prescription period is date on which claim has matured. Right of action for payment of interest on sum of money, life rent, dividend, lease rent and all other amounts to be paid annually or even more frequently is subject to prescription five years after day following day on which amount involved has fallen due. Right of action for indemnification or contractual fine; prescription period runs as from day following day on which victim is aware of both damage or claimability of fine and identity of debtor; claim for indemnification or contractual fine will be barred anyhow 20 years—30 years in case of damage resulting from pollution of air, water or soil or in case special risk of dangerous substances materializes—after event which has caused damage or has caused contractual fine to become due; in case of sexual offence against minors claim for indemnification will not be barred before right of (criminal) prosecution has lapsed. Right of action for dissolution of contract for reason of breach of contract; prescription period starts as from day after day creditor has become familiar with breach of contract; claim for dissolution will be barred anyhow 20 years after breach of contract. Right to revendicate certain movables forming part of National Heritage; prescription period starts from day following day place of goods and identity of possessor have become known and will in no case be longer than 30 years.

Pleading of Limitation.

Limitation of actions must be pleaded. This may be done at any stage of proceedings before final judgment, appeal included. This right to plead limitation of actions can be renounced, expressly or implicitly, but only after full prescription period has lapsed. Contractual shortening of statutory prescription period is allowed.

Interruption and Extension of Statutory Period of Limitation.

Limitation period is extended in certain cases because of special relationship between parties involved, e.g. between spouses, legal representative and incapable person represented by former, legal entities and their directors and between creditor and debtor who deliberately hides existence of debt or its claimability. Prescription will be completed not earlier than six months after expiration of ground of extension if right of action would become barred during existence of ground for extension or within six months thereafter.

Limitation of action is interrupted by institution of legal action or by any other act of judicial recourse instituted in required form by person entitled to right of action. Prescription of rights of action to claim performance of obligation, including claims for damages arising either from breach of contract of from tort, is also interrupted by written request for performance or by written communication in which creditor unequivocally reserves right to performance. Limitation of other rights of action is interrupted by written warning followed by act of judicial recourse (supra) within six months.

Limitation of right of action is interrupted if debtor by his words (explicitly) or by his act (implicitly) acknowledges existence of right whose protection is served by right of action.

Extinction of Rights and Actions by Mere Operation of Law.

After interruption of prescription period new prescription period will start to run. In number of cases right/claim expires because of lapse of time without appeal to it required; court by its own motion applies relevant rules. Not only right of action but also right/claim itself expires. Lapse of time cannot be interrupted or extended even by contract.

Some examples are:

Twenty years: right of civil action.

Ten years: claim for damage based on product liability as provided for in EU product liability regulation of July 25, 1985, however only insofar as claim extinguishes by lapse of ten years after defective product has been put in circulation.

Five years: claim for alimony against alleged father of illegitimate child.

Three years: revindication of stolen property; action for rescission of partition of estate of deceased or of other type of joint property.

One year: some claims relating to international transport by ship.

Six months: some claims arising from labour and agency contracts; right of either party to render dissolution of marriage effective by registration of decree; denial of father that child born in wedlock is his child.

Sixty days-six weeks: right of (unpaid) seller to recover possession of goods sold for cash (provided that they are still in same condition and have not been delivered for due consideration to third party acting in good faith), expires when simultaneously, six weeks have passed since right to payment of purchase price has become claimable and 60 days since day on which good concerned has been put into possession of buyer or someone else acting on his behalf.

Limitation of Action in Civil Litigation.

Regular remedies are against Court decisions, “opposition” (against judgment in default of defense), “appeal” (to higher court) and “cassation” (to Supreme Court).

Judicial remedies can be instituted against “judgments” and “decisions or orders upon petition.”

Judgments:

Opposition.

In general opposition against condemning judgment must be instituted within four weeks after service is made on defaulter personally by process-server or defaulter has carried out activities which show that he knows of judgment or its execution.

Appeal.

In general appeal is to be lodged within three months after day judgment has been passed. In case of judgment after summary proceedings term is four weeks.

Cassation.

In general cassation is possible only in case of judgment in appeal or final and conclusive judgment of first instance.

In general cassation must be entered within three months from day judgment has been passed. In case of summary proceedings, term is eight weeks.

Decisions or Orders Upon Petition.

Especially in personal status and family matters decisions or orders are issued upon petition.

Opposition.

In general opposition against decision not possible.

Appeal.

In general appeal is to be lodged by party who appeared in first instance within three months after date of decision; by other interested party within three months after service of final decision on him or moment he has gained knowledge of that decision otherwise.

Appeal against decision authorizing execution of foreign judgment must be entered one month after date of decision.

Decisions on provisional measures in divorce case are not open for appeal.

Cassation.

Only party who appeared in lower court can apply for cassation with Supreme Court within three months after date of final decision.

In case of decision authorizing execution of foreign judgment term is one month after date of decision in appeal.

Note: Above only main terms for judicial remedies are given; there are exceptions.

5.06 PRESCRIPTION:

See topic 5.05 Limitation of Actions.

5.07 REPLEVIN:

See category 7 Debtor and Creditor, topic 7.03 Attachment.

6 COURTS AND LEGISLATURE

6.01 ADMIRALTY:

See category 22 Transportation, topic 22.03 Shipping.

6.02 COURTS:

National Courts.

Imposition of punishment provided for in statutory law and decision of all claims based on property rights, rights in rem, contracts, general tort law and other private rights provided for in civil and commercial codes and special Acts, and, more generally, decision in all cases, which have not been specifically submitted to other specialized judiciary bodies, are under exclusive jurisdiction of general judiciary which consists of body of courts (two instances) stated below. Claims for damages or restitution based on contracts with or alleged torts of government or other public agencies are within jurisdiction of general judiciary. General judiciary is composed exclusively of lawyers with university degree. They are appointed for life (maximum age 70) and cannot be removed for political reasons. No cases are ever tried with jury. There are no commercial courts. From 2002 there is “Council for the Administration of Justice” (Raad voor de Rechtspraak) with authorities in field of technical and organisational administration in respect of all courts.

Proceedings in first instance are distributed among: 19 district courts (“Arrondissementsrechtbank”) with branches of Courts.

District courts have canton sections (single judge) which deals with: (a) Punishment of trespassers, (b) variety of measures required by family law, (c) claims if amount claimed does not exceed [Euro]5,000 and collection of rents of any amount, (d) claims based on hire-purchase contracts, (e) demands for repair of buildings and for claims in connection with leases, (f) claims based on contracts of employment or on collective employment agreements or on principal and agent relation, (g) claims with respect to annulment of certain decisions by management by virtue of Works Council Act.

District courts (single judge) have jurisdiction in first instance in all cases not specifically submitted to other courts. In district courts sometimes depending on nature of case it can be decided by three judges.

If prompt action is needed injunction can be obtained at very short notice from provisional judge of district court ("kort geding") during and even before or without institution of law suit about rights of parties. Judgment of provisional judge cannot prejudice any rights in later lawsuit. After "kort geding" parties often refrain from law suit about rights of parties.

Second instance consists of appeal on points of fact and law and is generally allowed, unless excluded by statutory law (e.g. because of smallness of claim). Appeals in cases which in first instance were decided by district court are instituted with one of five courts of appeal ("Gerechtshof"). In exceptional cases, Netherlands Supreme Court acts as second instance.

Generally, courts of appeal decide appeals with three judges. Judgment of Court of Appeals on appeal from judgment of provisional judge of district court ("kort geding") does not prejudice rights of parties in litigation about main issue before court of first instance or appellate court.

Third instance consists of review only on points of law and on compliance with essential formalities by Supreme Court of The Netherlands which adopts lower court findings of fact. Subject to such review are judgments in second instance and, if no second instance was admitted, judgments in first instance unless excluded by statutory law. If lower court based its judgment on "formal law" (Act made by Parliament and Crown), assertion that such act violates any provision of constitutional law is not admissible as ground for reversal of judgment. If, however, such act has been applied which in any respect violates provision of international treaty or convention, judgment can be reversed. Generally, grounds for reversal are: (1) Noncompliance with essential formalities and (2) violation of law of The Netherlands or of Antilles, including (mostly unwritten) conflict of law rules. Violation of any applicable law of foreign country does not constitute ground for reversal by Supreme Court.

Special Courts and Proceedings.

Numerous acts (e.g. dealing with government control and administrative law regarding environment, town and country planning, education, public health etc.) provide for administrative procedures. Since Jan. 1, 1994 General Act on Administrative Law ("Algemene wet bestuursrecht") has come into force. Pursuant to this act, administrative disputes should be brought before administrative chambers of district court. Prior to this, however, complaint-procedure should be passed through in most cases. Appeals from decision of administrative chamber of district court are handled by "Judicial Dept. on Administrative Disputes" (Afdeling bestuursrechtspraak") of Council of State ("Raad van State"); see category 1 Introduction, topic 1.03 Government and Legal System. General decisions of (local) governments (e.g. so-called town or country plans) and decisions regarding environmental acts, are subject to direct appeal in first and only instance to Judicial Dept. on Administrative Disputes of Council of State.

Most rules of procedures of Dept. of Council of State are set forth in Act of Council of State and General Act on Administrative Law.

Pending complaint procedure, appeal for administrative chamber of district court and Dept. of Council of State, provisional judge of district court and chairman of dept. may be requested to take provisional measures or suspend appealed decree.

Enactment of General Act on Administrative Law has introduced more coherent system of administrative judicial protection in which Judicial Dept. of Council of State ultimately decides upon most administrative disputes. However, special courts of appeal still exist for (i) matters regarding social security and staff-cases (Central Council of Appeal; "Centrale Raad van Beroep") and (ii) disputes on certain regulations for industry and business (Regulatory Industrial Organisation Appeal Court, "College van Beroep voor het bedrijfsleven").

Objections against assessment of tax are in first instance lodged with inspector of taxes from whose decisions appeal can be made in case of income and property taxes ("direct taxes"), tax on added value and some kinds of anti-pollution taxes. Second appeal to district Court of Appeals and third instance to Supreme Court. Appeal against decisions by inspector about import duties must be instituted with Tariff Committee, instead of Court of Appeals. No appeal to Supreme Court from Tariff Committee decision. Declaration that contractual clause is unreasonably onerous. (Court of Appeals of The Hague, art. 6: 241 B.W.).

In respect of violations of Act on Annual Accounts of Enterprises, some violations of Works Council Act and in respect of actions based on Act Revising Right of Investigation specialized Chamber of Court of Appeals of Amsterdam ("Ondernemingskamer") has exclusive jurisdiction subject to appeal to Supreme Court on matters of law. See category 2 Business Organizations, topic 2.03 Corporations, subheads Reports-Audit-Deposit-Disclosure; Investigation into Company Affairs. (§§2:344-359 B.W.).

Disputes about leases of land which in first instance are decided by mixed committee constituted of cantonal judge and of two specialists who may not be lawyers and who are not members of judiciary, are in second instance decided by mixed committee constituted of three members of Court of Appeals of Arnhem and two specialists who are not members of judiciary (so-called "Pachtkamer"). This is one of the very exceptional cases in which laymen are involved in Dutch judiciary.

Benelux Court.

Concerning specific fields or rules of law, Belgium, The Netherlands and Luxembourg, by virtue of Benelux Economic Union Treaty of 1958 commit themselves by special treaties to introduce into their national laws uniform provisions or uniform systems of statutory law and uniform regulations based thereon. Uniform interpretation of respective uniform laws and regulations is secured by provision in respective treaty granting exclusive jurisdiction for that matter to special Benelux Court provided for by Treaty of Mar. 31, 1965, which became operative on Jan. 1, 1974. Court is composed of nine judges (three from each state) and its sessions are held at Brussels. Questions of interpretation are submitted to Benelux Court by national court before which suit is pending. National court may do so upon initiative of party to suit or at its own initiative.

As of Jan. 1, 1975, Benelux Court has jurisdiction with regard to: (1) Benelux Uniform Trademark Act; (2) Benelux Uniform Act re Designs and Models; (3) fines imposed by national court on account of civil contempt, on party for indemnity of other party at whose complaint president of court had granted preliminary injunction or court had granted interlocutory or final injunction (Treaty of Nov. 26, 1973); (4) Benelux Uniform Act re mandatory insurance against liability caused by motor vehicles (Treaty of May 24, 1966). Pending are treaties and attached uniform acts re: (5) Agreements between principals and commercial agents (Treaty of Nov. 26, 1973); (6) penal clauses in private agreements (Treaty of Nov. 26, 1973).

Court of Justice of European Union.

Uniform interpretation of EU Treaty and EU regulations, etc. is similarly secured by exclusive jurisdiction of EU Court to which questions are referred by national courts relevant to issue of cases pending before latter courts. See EU Law Digest.

Jurisdiction over Foreign States.

Courts only have jurisdiction over foreign states in matters concerning acts jure gestionis (acts in legal transactions of private law).

European Convention on State Immunity of May 16, 1972 is effective in The Netherlands.

See category 5 Civil Actions and Procedure, topic 5.01 Actions.

6.03 LAW REPORTS, CODES:

Codes.

Most essential parts of private and commercial law and civil procedure have been codified in Civil Code (Burgerlijk Wetboek; B.W.). Commercial Code (Wetboek van Koophandel; WvK) and Code of Civil Procedure (Wetboek van Burgerlijke Rechtsvordering; Rv) which were, in 1838, for greater part copied from or adaptations of French Codes.

They have been frequently amended and supplemented by Legislature. By 1938, 100 years later, 345 of original 2,030 sections of Civil Code had been amended or deleted and 209 sections had been added and body of private law outside Civil Code had become larger than Civil Code itself. Besides, gap between social and economic life in 1838 and modern times was bridged in practice by standard regulations and clauses replacing many non-compulsory statutory provisions and in litigation by unorthodox rulings of court.

Most essential parts of criminal law and criminal procedure have been codified in Criminal Code and Code of Criminal Procedure. These codes, in their present form, date from 1881-1886 and 1921-1929 respectively and have been frequently amended as well. Code of Civil Procedure of 1838 has been substantially altered since Jan. 1, 2002.

Recodification of Civil and Commercial Codes.

Project of recodification was started in 1947. Plans to replace B.W. and WvK in stages by one Civil Code consisting of eight books (Draft New Civil Code: N.B.W.) were completed for largest part by Jan. 1, 1992.

Books 1 (natural persons and family law) and 2 (legal persons, company law) have been enacted and are in effect since 1970 and 1976 respectively.

Book 8 (transport) is in effect since Apr. 1, 1991.

Book 3 (general provisions as to property, rights in rem and obligations), Book 5, (rights in rem), Book 6 (obligations) and certain parts of Book 7 (nominate contracts) are in effect since Jan. 1 1992, together with related amendments of Code of Civil Procedure. Parts of Book 7 have been introduced on several dates after Jan. 1, 1992. Detailed transitional provisions apply. Book 4 (inheritance) is in effect since Jan. 1, 2001. Rest of project is still under discussion.

Official Publications of Statutory Law and of Regulations.

All statutes and all regulations by Crown (i.e., Central Government) and some regulations by Ministers of Central Government are published in “Staatsblad” (abbreviated “Stb.” or “S.” with year and number; from 2009 only in electronic form). Other regulations are published in Official Gazette (“Staatscourant”, abbr. “Stct.”) or in official publications of lower governmental bodies. International conventions and treaties in “Tractatenblad”, abbr. “Trb.”. Above three publications are issued by Publishing Office "Sdu", Christoffel Plantijnstraat 2, 2515 TZ The Hague. Dutch text of European Communities regulations etc. is published in "Publicatieblad van de Europese Unie" (Dutch-language edition of Official Journal of E.C., abbr. PbEU).

Law Reports.

There is no official reporting of The Netherlands law cases, but there are number of unofficial reports.

Literal text of judgments (often abbreviated) is published in "Rechtspraak van de Week" (mainly civil cases Supreme Court; abbr. "R.v.d.W."); in "Nederlandse Jurisprudentie Feitenrechtspraak" (judgments in summary proceedings, abbr. "NJF"); in "Nederlandse Jurisprudentie", split in two series: N.J. (civil law [including arbitral awards] and criminal law) and A.B. (administrative law); in "Schip en Schade" (abbr. "S & S", shipping, transportation and fire insurance law); in "Verkeersrecht (traffic law, abbr. "V.R.") and in "Beslissingen in Belastingzaken" (taxation, abbr. "BNB"). Weekly publication on http://zoeken.rechtspraak.nl/weekoverzicht of law cases of Hoge Raad (Supreme Court), courts of appeal, and district courts.

In addition summaries or extracts in various forms of judgments and decisions relevant for their field of interest are published by numerous law reviews, such as "Nederlands Juristenblad" (general law review, official publications of The Netherlands Lawyers Association, abbr. "N.J.B."), Weekblad voor Privaatrecht, Notariaat en Registratie (official publication of the Royal Civil Law Notaries' Association, abbr. Nederlands "WPNR", Nederlands Tijdschrift voor Burgerlijk Recht (general law review on civil law, abbr. "NTBR"), "Ars Aequi" (for university students, abbr. "A.A." or "A.Ae."), "Sociaal Economische Wetgeving (social economic legislation, abbr. "SEW"), "Sociaal Maandblad Arbeid" (labor law, abbr. "S.M.A."), "Sociaal Recht" (Labour Law, abbr. "SR"), Arbeids Recht, "de Praktijkgids" (inter alia, rental and labor law), "T.V.V.S." (law concerning companies and societies), "De Naamlooze Vennootschap" (company law, abbr. "De N.V."), "Weekblad voor Fiscaal Recht" (taxation, abbr. "WFR"), "Bijblad bij de Industriële Eigendom (industrial property law, abbr. "B.I.E."), "Tijdschrift voor Arbitrage" (arbitration, abbr. "TvA"), Tijdschrift voor Mediation (Mediation abbr. "TMD"), "Bouwrecht" (building and construction law), "De Gemeentestem" and "De Nederlandse Gemeente" (for municipalities), "Delikt en Delinkwent" (criminal law, abbr. "D.D."), "Tijdschrift voor Familie- en Jeugdrecht" (family and juvenile law, abbr. "F.J.R."). Nederlands Tijdschrift voor Europees recht (European Law abbr. "NTER"). Tijdschrift voor Nederlands Internationaal Privaatrecht (Dutch Private International Law Journal, abbr. NIPR). Tijdschrift voor civiele rechtspleging (Journal on Civil Procedure, abbr. TCR). Judgments of Court of Justice of European Communities are officially reported in "Jurisprudentie van het Hof van Justitie" (Dutch language edition of European Court Reports).

Compilations and Treatises.

Increasing number of compilations is in loose-leaf form, with comments and references and purport to be regularly kept up-to-date by teams of authors. Sources of legal thought may be found in treatises, articles in periodicals and in notes under published court rulings. They have often considerable influence on courts and on legislature. Subjects like torts, good faith, reasonableness and fairness are largely judge-made law, compiled, classified and put in legal framework by authors who frequently make comparisons with laws of Belgium, Germany, France and occasionally Great Britain and U.S.A. Increasingly, legal periodicals and texts, are published on-line or on CD Rom.

6.04 LEGISLATURE:

See category 1 Introduction, topic 1.03 Government and Legal System.

6.05 REPORTS:

See topic 6.03 Law Reports, Codes.

6.06 STATUTES:

See topic 6.03 Law Reports, Codes.

7 DEBTOR AND CREDITOR

7.01 ASSIGNMENTS:

Assignability.

Personal rights and claims (i.e. rights and claims not on bearer or order) are assignable except for strictly personal ones and as far as not provided for otherwise by statute (e.g. claims for wages are assignable only to certain extent) or contract. Rights payable to bearer or order are always assignable, except when made non-assignable between original creditor and debtor. (§3:83[2] BW).

Form.

Assignment of personal rights and claims is effected by notarial or informal deed of transfer followed by notice of transfer to debtor. If on date of drafting this deed, debtor exists but cannot be identified, assignment is deemed to have taken place on said date provided that notice of transfer is given expeditiously once debtor has been ascertained. Assignment of rights payable to bearer is effected by delivery of document embodying right to be assigned if alienator has possession and control of that document. Same applies to assignment of rights payable to order when document is under control and in possession of alienator, provided that document is also endorsed. When document embodying right is not under control and in possession of alienator, assignment is effected by deed of transfer followed by notice of transfer to debtor.

7.02 ASSIGNMENTS FOR BENEFIT OF CREDITORS:

Not known under Dutch law. See topic Bankruptcy (Moratorium).

7.03 ATTACHMENT:

Main Types.

Two main types of attachment have to be distinguished: (a) “Executoriaal beslag” and (b) “Conservatoir beslag”.

Common feature, however, of both types of attachment is that after attachment attached property can no longer be disposed of to prejudice of attaching creditor.

“Executoriaal Beslag” (Attachment under Execution).

Act of seizing property, property rights or, in case of garnishment, goods/money detained by third party or debt due by third party to debtor, for satisfaction of claim of attaching creditor against debtor by virtue of judgment or notarial instrument, by which claim has been established.

See further topic Execution.

“Conservatoir Beslag” (Conservatory Attachment).

Act of taking and holding into custody of law of property and/or money in possession of debtor or of third party who is owing this property or money to debtor (garnishment), for securing attaching creditor's right to seek recourse against this property and/or money.

Special Types.

Special types of “conservatoir beslag” are ``beslag onder derden'', for instance on bank account, “beslag tot afgifte van zaken en aflevering van goederen” (revindicatory seizure), which serves to secure right to possess or repossess goods or to prevent ship from sailing, “beslag op goederen van de gemeenschap” (seizure of marital property) which serves to secure rights of spouses on marital community property while in divorce proceedings and “vreemdelingenbeslag” (foreign attachment), which serves to secure attaching creditor's right to seek recourse against property and/or money located in The Netherlands of debtor without known residence within The Netherlands. Seizure of evidence in intellectual property cases, due to implementation Dir. 2004/48 (EC) on enforcement of IP rights.

Prior Permission.

In principle, conservatory attachment cannot be effected without prior permission of provisional judge of district court. To obtain permission attaching creditor has to supply summary proof of his claim and, in most cases, that debtor is about to frustrate attaching creditor's right of recourse or possession, e.g. by disposing of his property.

Period within which to Summon Defendant.

In all cases in which permission for conservatory attachment is asked and in which no principal claim is yet filed, provisional judge of district court shall only give permission under condition that attaching creditor shall institute legal proceedings against debtor to demand his principal claim within period to be fixed by president of district court; attachment becomes null and void ipso jure, if period is not observed.

In case principal claim is dismissed, attachment comes to end. In case principal claim is awarded, all conservatory attachments become attachment under execution.

See further topic Execution.

Creation of Jurisdiction.

In general, conservatory attachment does not create jurisdiction. However, in case of attachment of property in The Netherlands of nonresident (foreign attachment) court will acquire jurisdiction also over principal claim. However, exclusive jurisdiction clause appointing foreign court should still be observed. For instance in EEC-Convention of Sept. 27, 1968 and Brussel I-Regulation of Dec. 22, 2000.

Goods Detained by Third Party (Garnishment).

In case of conservatory attachment of goods detained by third party or of debt due by third party to debtor attachment is made by serving writ of attachment on third party. This writ must, on pain of nullity, also inform third party where principal claim has been filed or within what period and where principal claim will be filed. Bailiff's notification of conservatory attachment has to be served on debtor within eight days after date of garnishment. If period of eight days is expired, debtor is entitled to request president of district court to release attachment. When principal claim is filed after garnishment, writ of summons of principal claim has to be served on third party within eight days after date of introduction of principal claim. If this period is expired, attachment becomes null. As soon as four weeks have passed since garnishment, third party is obliged to inform bailiff who served writ of attachment or attaching creditor's attorney by extrajudicial statement what debts he owes defendant or which of defendant's goods are in his possession. If third party fails to meet this obligation, attaching creditor can in event of attachment under execution institute legal proceedings against third party to demand payment of his principal claim. Subsequently, judgment obtained against debtor in respect of claim is to be served upon third party and latter is summoned to disclose any money due by him to debtor or any property of debtor in his custody and he is ordered either to make money or property available for execution or to surrender amount to which debtor was condemned.

Release.

Defendant may in proceedings before district court or (quicker) before provisional judge of district court in summary proceedings obtain release of attachment on filing bond or on summary proof that principal claim is not valid or attachment was not necessary.

See also topics 7.05 Execution, 7.06 Exemptions.

7.04 BANKRUPTCY (MORATORIUM):

Bankruptcy ("*faillissement*").—Any debtor (being natural person or private legal entity) can be declared bankrupt by district court provided it resides, or has (had) its place of business in The Netherlands and either applies for bankruptcy itself, or is subject of proper application for bankruptcy filed by creditor or for reasons of public interest-by public prosecutor. Bankruptcy Act provides for special provisions in case of insolvency of natural person ("schuldsanering natuurlijke personen"). These specific provisions allow him to reschedule his debts in three or five year period. Objective of these provisions is to grant overdebted person fresh start and complete discharge.

Note: In cross-border insolvency proceedings, Council Regulation no. 1346/2000 of May 29, 2000 on insolvency proceedings, in force from May 31, 2002, will be relevant.

Competent Court.

District Court of debtor's domicile, residence or place of business has jurisdiction over petition for bankruptcy.

District Court will only declare debtor in state of bankruptcy if facts and circumstances briefly prove that debtor has ceased to pay. This is considered to be the case if there are at least two creditors, one of whom has claim which is due and payable and which debtor cannot pay, refuses to pay, or simply does not pay. In case bankruptcy is declared, and debtor has not been heard, debtor has right to ask for review by same court within 14 days after judgment of bankruptcy of debtor was given. Creditors of debtor (with exception of creditor-petitioner) and all other interested parties have same right to ask for review, but they have to exercise their right within period of eight days after judgment of bankruptcy of debtor was given. Appeals must be lodged ultimately within eight days after judgment (which is subject to appeal) was given. Both review and subsequent appeals have no suspensory effect.

Scope of Bankruptcy.

Assets belonging to debtor's estate include all assets of debtor as of time bankruptcy was declared (i.e. as from 0.00 hours of that day, with exception for certain financial institutions), as well as all assets acquired during course of bankruptcy; see also topic 7.06 Exemptions.

As result of bankruptcy, debtor loses—as from 0.00 hours of day bankruptcy was declared—its right to administer and dispose of its assets and by law there is automatic attachment of all assets of debtor. Any attachments on assets of debtor made before bankruptcy cease to exist. Unless treaties or Council Regulation EG no. 1346/2000 on insolvency proceedings have been concluded, foreign bankruptcy has no effect in The Netherlands.

Administration.

In bankruptcy court appoints trustee in bankruptcy ("curator") who has to administer and liquidate business of debtor and court also appoints member of court as supervisory judge in bankruptcy ("rechter-commissaris") who has to supervise activities of trustee.

Trustee will (try) to sell off assets of debtor for highest price possible. With prior authorisation of supervising judge trustee may—inter alia—continue business of debtor, appear in court or with arbitrators, sue and be sued, and settle disputes out of court.

Validation of Claims.

Creditors (both preferential and non-preferential) can no longer take recourse against debtor's assets on their own, but they have to present their claims for verification to trustee, thereby stating their (possible) right of priority. Secured creditors ("separatisten") holding either valid mortgage ("recht van hypotheek") or valid pledge ("pandrecht") on assets of debtor can ignore existence of bankruptcy and foreclose on their collateral. Estate creditors ("boedelcrediteuren") have immediate claim against bankrupt estate, and they are also not obliged to present their claims for verification with trustee. Claims of estate creditors that have arisen after bankruptcy was declared have to be paid out of proceeds of bankrupt estate first.

Termination.

Bankruptcy can terminate by liquidation without meeting of creditors ("opheffing"), liquidation with meeting of creditors ("vereffening"), or by composition ("akkoord") to be offered by debtor. In both cases of liquidation debtor (being a company) will dissolve. Only in case of composition debtor is discharged of all its debts and debtor (being a company) survives as legal entity.

In case proceeds allow for partial payment of (non-)preferential creditors, meeting of creditors ("verificatievergadering") will be held, having as purpose to list, verify and classify all claims of creditors. If claim is challenged and creditor concerned does not agree with challenge, supervisory judge will order that legal proceedings must be initiated to determine whether or not claim can be admitted ("Renvooi-procedure"). After list of admitted claims is finalized, plan of distribution ("uitdelingslijst") is prepared by trustee, and, after approval by supervisory judge, filed with competent district court. If no creditors oppose plan, bankruptcy terminates ten days after plan is filed.

See topic 7.07 Fraudulent Sales and Conveyances.

Suspension of Payment or Moratorium ("Surséance van Betaling").

Moratorium can be requested if debtor foresees it will not be able to pay all its creditors having due and payable claims. Debtors can be private legal entities or natural persons conducting business. Only debtor itself can file petition for suspension of payment and court will immediately grant provisional suspension of payment, appoint administrator ("bewindvoerder"), in principle appoint also member of court as supervisory judge in moratorium ("rechter-commissaris"), and set date for meeting of creditors. If there are prospects that debtor will be able —in due course—to pay its creditors, and creditors of debtor holding ¼ of total amount of claims represented at hearing, or more than 1/3 in number of creditors holding such claims, do not oppose, court may grant final suspension of payment to debtor for period up to 1 and ½ years (which period can be extended one or more times for 1 and ½ years).

Scope.

Moratorium takes only effect to non-preferential creditors, having no secured claim by either mortgage or pledge, or any other privileged right. Those creditors may not from day of (provisional) moratorium take recourse against debtor on their own. All measures of recourse already taken by creditors are—by virtue of law—suspended as of day (provisional) suspension of payment takes effect.

Administration.

After (provisional) moratorium is declared administrator and debtor are only entitled to continue business of debtor, and to administer and to dispose of assets of debtor, with consent of each other.

Termination.

Moratorium will terminate by court order when there no longer are prospects that debtor will be able in due course to pay its creditors. In that case court will declare debtor—at same time—bankrupt. Two other ways of terminations are (a) payment of all debts, and (b) acceptance of settlement, ratified by court.

7.05 EXECUTION:

Execution or Enforcement of Judgment or Arbitral Award.

Measures of execution may also be taken by virtue of correctly drawn notarial deed.

Foreign judgment can be executed in The Netherlands only upon leave ("exequatur") from district court where debtor is domiciled or execution has to be effected. However, exequatur can only be granted if execution of foreign judgment has been provided for in treaty or other international agreement. EEC Convention of Enforcement and Recognition of Judgments of Sept. 27, 1968 and Treaty of Lugano of Sept. 16, 1988 played important part in this field, as far as judgments in countries belonging to EC were concerned. Mar. 1, 2002, Convention was replaced by EC Council Regulation no. 44/2000 of Dec. 22, 2000 "Brussel I-Regulation", Denmark joined Brussels I-Reg July 1, 2007. For family matters, see EC Council Regulation EG no. 2201/2003, "Brussel II bis-Regulation". EC Council Regulation no. 805/2004 on European Enforcement Order (EEO) in force Jan. 21, 2005. EEO abolishes exequatur procedure in EU for uncontested claims under certain conditions. European order for payment procedure, for uncontested moneyclaims, in cross-border cases = EC regulation no. 1896/2006 in force Jan. 2, 2007; European procedure for small claims, in cross-border cases up to [Euro]2000, EC Regulation no. 861/2007, in force Aug. 1, 2007.

Dutch arbitral awards can be executed upon order of provisional judge of district court where award has been filed. Foreign arbitral awards can be executed upon leave of provisional judge of district court where debtor is domiciled or execution has to be effected, irrespective of whether execution has been provided for in treaty.

Service of Judgment.

First step of execution is service of judgment on debtor by bailiff ("deurwaarder").

Means of execution may be divided into two categories: (a) Means which serve as incentive for debtor to give performance to judgment. Civil imprisonment and penal sum to be forfeited in case of noncompliance with judgment belong to this category; (b) means by which creditor himself brings about (legal) situation in which he would be if debtor would have complied with judgment. Examples of such means include: Seizure of debtor's property, subsequent public sale and distribution of proceeds by either bailiff (goods) or notary public (immovable property or ship). Other creditors showing valid claim may share in proceeds of sale. If proceeds do not allow full payment to all creditors distribution will take place either according to division, arranged between creditors, or, in case no agreement is reached, according to division determined by Supervisory Judge (Rechter-Commissaris); seizure by bailiff and bringing into creditor's possession of specified goods to which creditor has specific title, recovery of possession of such goods by bailiff and, if required with help of police; registration in proper public records of judgment condemning debtor to deliver ship or immovable property (instead of instrument that normally is entered into said record on delivery of ship or immovable property and that debtor refuses to sign or to file for registration) serves as alternative means of conveyance by way of execution of judgment to deliver.

7.06 EXEMPTIONS:

Objects of attachment which cannot be seized or only to limited extent: state owned property used for public service, tools of craftsman, means of education and study, wages, pensions, and social security payments like illness, invalidism, unemployment, welfare and old age payments, nontransferred copyright and strict personal rights like right of habitation. Most of these exemptions, however, do not apply to claims for alimony.

7.07 FRAUDULENT SALES AND CONVEYANCES:

Creditors whose recourses have been adversely affected by any juridical act like sale and conveyance by debtor, while debtor in performance of this act, to which he was not obligated, knew or ought to have known that one or more creditors were adversely affected in their recourses as consequence of act, may annul this act by debtor irrespective of whether the creditor's claim has arisen before or after act “Actio Pauliana”. Annulment of juridical acts, either multilateral or unilateral and directed at one or more specifically determined persons other than by gratuitous title can only be invoked by creditor if those persons with whom debtor performed juridical act knew or ought to have known that prejudice to one or more creditors of debtor would result from it. This knowledge is, under certain circumstances, presumed in advance.

In Bankruptcy Act similar rules apply for annulment by trustee in bankruptcy (“curator”) of juridical acts by debtor with extension that payment by debtor, to which he was obliged, can also be annulled by trustee in bankruptcy if person whom debtor paid knew that at time of payment petition of bankruptcy had already been filed with court, or payment was result of arrangement (“samenspannen”) between debtor and creditor, with object of debtor and creditor to give this creditor undue preferences over other creditors.

Creditor who challenges act on ground of preferred transaction annuls this act only for his own benefit and not to larger extent than is needed to make good prejudice he suffered (“relatieve werking”).

7.08 GARNISHMENT:

See topic 7.03 Attachment.

7.09 HOMESTEADS:

No provision for homesteads.

7.10 INSOLVENCY:

See topic Bankruptcy (Moratorium).

7.11 LIENS:

In general, rule of “paritas creditorum” does apply. However, statutory law grants preference to certain groups of creditors in certain order. Some preferences are granted on specific goods only (for example preferences related to mortgage, pledge and costs of preservation of good), some on all goods of debtor (most tax claims, social security payments, claims of employees or former employees for wages and some pension payments).

7.12 MORATORIUM:

See topic Bankruptcy (Moratorium).

7.13 PLEDGES:

Pledge (“pandrecht”) is, like mortgage, right of property for purpose of securing priority payment in event that debtor fails to perform obligations. Pledge may be vested to secure present and future obligations of pledgor or third party.

Susceptible of pledging are movable properties, both tangible and intangible.

Pledge on tangible property and bearer documents is created by pledgor giving up possession to pledgee or third party ("vuistpand").

Pledge on tangible property and bearer documents may also be created by notarial deed, or by private deed date of which is certified by its registration, without property being given in possession to pledgee or third party ("bezitloos pand"); in such case pledgee may request possession of assets as yet in case of default or imminent danger of default by pledgor (See category 19 Mortgages, topic 19.01 Chattel Mortgages.)

Pledge on intangible assets (e.g. receivables and shares) is effected in same way as transfer of such assets; this normally includes execution of notarial or private deed and acknowledgment by or service upon third party against whom such property right may be exercised. However, property right to be exercised against third party (e.g. receivables) may be pledged without such acknowledgment or service, provided pledge is created by notarial deed or by private deed date of which is certified by its registration (so called undisclosed pledge). Pledge on registered shares in capital of non-listed company is effected (like transfer of registered shares) by notarial deed. Pledge on registered shares in capital of listed company is affected by notarial or private deed followed by notice of pledge to company.

Obviously, pledge with possession of pledged assets for pledgee, respectively pledge with acknowledgment by or service upon person against whom property right is to be exercised provides better security, but often it is necessary to keep pledgor in possession of pledged assets (e.g. when he needs such assets, like stock or inventory, for his business purposes), or it is not desirable to disclose pledge to third parties against whom incorporeal asset (e.g. receivables) is to be exercised.

Pledgee of receivable is authorized to cash such receivable when due and payable.

Foreclosure.

In case of default pledgee is entitled to sell pledged property without court proceedings by public auction; securities listed on stock exchange or assets negotiable on market (e.g. commodities) may be sold by authorised broker without public auction. Upon request of either pledgor or pledgee president of district court may order that foreclosure is effected in another way; president may also rule at request of pledgee that pledged assets will remain with pledgee for amount to be determined by president of district court.

Proceeds of sale of pledged property shall go in payment of debt secured by pledge and any balance is to be refunded to pledgor. With respect to certain movable goods, tax authorities have special priority right (for certain tax claims only).

Bankruptcy of pledgor or debtor does not affect pledgees right to foreclose.

See also category 19 Mortgages, topic 19.02 Mortgages.

8 DISPUTE RESOLUTION

8.01 ALTERNATIVE DISPUTE RESOLUTION:

In recent years alternative dispute resolution has become topical issue in The Netherlands. In recent years various initiatives have been taken aimed at introducing alternative methods for speedy resolution of conflicts. In June 1995 The Netherlands Mediation Institute

(NMI, P.O. Box 30137, NL-3001 DC Rotterdam, email: info@nmi-mediation.nl; Internet: http://209.238.35.252/en/index.htm) was founded. It has published model mediation clauses, set of Rules for Mediation and Ethical Code for Mediators, and it keeps register of trained mediators. As per Sept. 1, 1995 The Netherlands Arbitration Institute (NAI, P.O. Box 21075, NL, 3001 AB Rotterdam, email: secretariaat@nai-nl.org; Internet: http://www.nai-nl.org/english) has published model ministerial clause and set of Ministerial Rules, version 2 dated Jan. 1, 2001 and Appendix 2 to those Ministerial Rules. In 1998 ACB Conflict Management for Commerce and Industry (ACB, P.O. Box 93002, NL-2509 AA The Hague, email: ACB@vno-ncw.nl; Internet: http://www.mediation-bedrijfsleven.nl/english.shtml) became operational.

Alternative dispute resolution in The Netherlands is solely on voluntary basis so far. There are no statutes or court rules requiring litigation to be transferred to alternate dispute systems. Experiments have been initiated in some courts for referral of litigation to ADR on voluntary basis. Mediation in European cases, Mediation directive EC no. 2008/52, in force June 14, 2008.

See topic 8.02 Arbitration.

8.02 ARBITRATION:

Arbitration as means of solving disputes is used regularly in The Netherlands. Hence numerous standing arbitration committees in certain trades and standard rules of procedure and standard arbitration clauses for both national and international transactions, most importantly those of The Netherlands Arbitration Institute (NAI) and Council for Arbitration in construction matters.

Civil and commercial matters may be submitted to arbitration with exception of matters not at parties' free disposition (e.g., matters relating to divorce, separation, care and control of minors, etc.) and matters under exclusive court jurisdiction.

Arbitration law is incorporated in Code of Civil Procedure. From Dec. 1, 1986, completely new set of regulations for arbitration applies.

Arbitral agreement may be agreement relating to existing dispute or arbitral clause intended for possible future disputes. Arbitrators must be in uneven numbers. Foreign arbitrators allowed under Dutch law. Arbitrators' acceptance of mission creates contract between arbitrators and parties.

Arbitrators can take interim measures, but attachment is national court's domain. “Amiable composition” (arbitrators bound only by general rules of public policy) must be specifically agreed to. Arbitral award must be in writing and reasoned and deposited at district court registry.

Arbitral award is only enforceable on application and granting of exequatur by provisional judge of district court. Award can only be annulled on limited grounds by courts, who may not rule on merits of case.

The Netherlands are signatory to Protocol of Geneva of 1923 concerning arbitral clauses, Geneva Convention of 1927 on enforcement of foreign arbitral awards, New York Convention of 1958 on recognition and enforcement of foreign arbitral awards and Washington Convention of 1966 on the Settlement of Investment Disputes between States and Nationals of other States.

9 DOCUMENTS AND RECORDS

9.01 ACKNOWLEDGMENTS:

Dutch law does not require acknowledgment of signatures on private instruments.

In notarial instruments signatories thereto acknowledge before notary to have knowledge of contents of instrument, whereas signature of notary constitutes certification of signatures of signatories who must identify themselves to notary.

Signatures on private instruments may be certified by notary, and, if required, signature of notary can be certified by foreign consular officers.

So called “apostille” is issued by clerk of court to certify signature of notaries and certain other officials on documents to be used in countries party to The Hague Convention of Oct. 5, 1961; those countries include most EU countries and USA. For documents to be used in countries party to Convention only apostille and no certification by consular officers is available.

See also topic 9.04 Notaries; category 1 Introduction, topic 1.01 Consuls.

9.02 AFFIDAVITS:

Dutch law does not provide for affidavits. However, foreign affidavits may be accepted in evidence by courts; their probative value is in discretion of courts which may prefer to have evidence taken by means of letters rogatory or by consular officer.

Notaries are authorised by law to administer oaths, and foreign courts generally accept affidavits sworn before Dutch notary.

There are conventions between The Netherlands and various other countries for mutual assistance in conduct of legal proceedings.

See also topics 9.01 Acknowledgments, Notaries; category 1 Introduction, topic 1.01 Consuls.

9.03 COMMISSIONS TO TAKE TESTIMONY:

See category 5 Civil Actions and Procedure, topic 5.02 Depositions and Discovery.

9.04 NOTARIES:

Notary (notaris) is lawyer appointed by Crown to serve as public official within specified district. There are approximately 1,400 notaries in The Netherlands. Duties of Dutch notary are strongly different from those of notary public in Anglo-American jurisdictions: (a) For many legal transactions obligatory assistance of notary is required in form of notarial instrument. Such transactions include: incorporation and amendments to articles of association of legal entities, issuance, transfer and encumbering of registered shares (NV/BV), transfer and mortgage of real property and mortgage of registered aircraft and vessels, wills, marriage settlements, liquidation of estates if e.g., minors are involved; (b) notarial instruments may also be drawn up for other legal transactions if clients so desire. Notary may, like common law notaries, notarize signatures; such notarisations receive full credit (see also topics 9.01 Acknowledgments, 9.02 Affidavits); (c) like general legal practitioners notaries may act as legal counsel to their clients on their request, but notaries do not engage in any litigation; (d) notaries may (be under obligation to) look after interest of parties with conflicting interests.

Notarial instrument is document signed by parties thereto or their representatives, as case may be, notary and, if required, two witnesses. Notarial instrument includes: (1) Appearance of parties, or their legal or duly appointed representatives, before notary, (2) date and place of execution of instrument, (3) full personal data of parties and their representatives, if any, (4) exact wordings of statements by signatories, (5) notary's statement that contents of instrument have been explained to signatories, (6) notary's statement that he knows signatories and nature and numbers of ID's produced by signatories, (7) notary's statement that he has convinced himself of powers of attorney, if any, granted by parties to signatories, (8) signatures of parties, or their representatives as case may be, notary and witnesses, if any.

Subject to few exceptions law requires original of instrument to be kept in custody of notary and only certified copies may be given to party. Notarial instrument provides conclusive evidence of its date and of statements by notary and, between parties involved, of contents of their statements. Notarial instrument reciting claim may be enforced like judgment of court without any court procedure. On request of parties notarial instrument may be made out in foreign language provided that notary understands language; for certain instruments (e.g. incorporation and amendments to articles of association of legal entities and real property transactions) Dutch language is required.

See also category 1 Introduction, topic 1.01 Consuls.

9.05 RECORDS:

For protection of privacy Wet bescherming Persoonsgegevens (Act on protection of personal data of Sept. 1, 2001) contains restrictions in respect of automated privately held records of personal data; Act also covers records held by public authorities other than those required by law. Law provides inter alia for following records: Registers of births, marriages and deaths are maintained in each municipality by registrars of civil status appointed by central government. (1:16-29 B.W.). Personal data of residents are kept in records of each municipality by local authorities. (Wet basisadministratie persoonsgegevens of June 9, 1994). Marital property registers are kept by each district court. (1:116 BW). The Hague district court keeps register containing facts relating to guardianship over adults ("curatele"; 1:391 B.W.). Registers containing facts pertaining to parental authority, legal representation and guardianship over minors ("gezag"; 1:244 B.W.) are kept by each district court. Estate register is held by clerk of each district court. (4:186 seq. BW). Central registry of wills is kept by Ministry of Justice (Act of June 12, 1977); register only contains fact that will has been made, but not its contents. Registers of bankruptcies are held by each district court. (Art. 19, Bankruptcy Act).

Under Trade Register Act 1996 each of 21 Chambers of Commerce keep Trade Registers in respect of (a) all business establishments in its district, including branches irrespective of legal form of owner or operator, (b) all N.V.'s, B.V.'s, cooperative societies, mutual insurance companies, fully and formally qualifying associations, foundations and European Economic Interest Groupings domiciled in its district (unless they are on file in another Trade Register by virtue of [a]).

Not fully qualifying associations may also register in order to limit personal liabilities of their board members.

See categories 2 Business Organizations, topics Associations, Corporations; Business Regulation and Commerce, topic Trade Register; Courts and Legislature, topic Law Reports, Codes, subhead Recodification of Civil and Commercial Codes; Transportation, topic Motor Vehicles.

Title and Mortgage Register kept by 15 local registrars of real estate and mortgages contains rather complete record of ownership and rights in rem of real estate. (3:16-31, 84, 89, 98, 260-267, 274, 275 BW). Description of parcels of land and maps ("Kadaster") are kept by same registrar. Separate registers are maintained of sea going vessels (8:193B.W.), river-vessels (8:783 B.W.) and aircraft (8:1013 B.W.) and rights in rem on them, including mortgages; ship and aircraft registers are kept by Land, Ship and Aircraft Registers in Central Registry in Rotterdam.

For patents, trade marks, designs and models see category 17 Intellectual Property.

There is no register of copyrights.

9.06 SEALS:

Notaries must use their official seal on all their issued notarial documents.

Dutch law does not provide for use of private seals.

10 EMPLOYMENT

10.01 LABOR RELATIONS:

General.

Dutch law with regard to labour relations is laid down in complex body of statutory regulations and in extensive case law. Following only gives bird's eye view of subject matter.

A. Employment Contracts.

Dutch Civil Code contains general rules on employment contracts. In practice, it may be difficult to distinguish between employment contracts on one hand and comparable contracts for (personal) services on other hand. Dutch Civil Code creates legal presumption of employment contract in case work has been performed every week or at least 20 hours monthly over consecutive period of three months. Distinction, nevertheless, is important, because many of statutory provisions for employment contracts are binding on parties, deviations therefrom being void. Second legal presumption is that if employment contract has lasted for at least three months, stipulated activities are presumed to have scope equal to average scope of monthly activities in the three preceding months.

Employment contract need not be in writing. Some obligations, however, are valid only if accepted in writing. Important example is so-called noncompetition clause, which is allowed, but which may be annulled or moderated by competent court, if equity so demands. Furthermore, trial period is only valid if concluded in writing. Moreover, employer is obliged to furnish employee with document stating conditions of employment.

Other subjects dealt with in relevant title of Civil Code are: Forms and ways of payment of wages (special penalty in case of late payment), paid vacation (at least 20 days per year for full-time employee), consequences of illness of employee, testimonials, etc.

Full-time employees must be at least 16 years old. Employment with some exceptions forbidden for those under 15.

Wages.

Specific statute provides for minimum wages. For employees above 22 years of age minimum monthly gross salary presently is about [Euro]1,356. If employee only works part-time pro rata reduction may be applied. For those under 23, minimum wage is lower, precise amount thereof depending on age of person concerned (e.g., minimum wage for 17 year old is 40% of minimum wage for 23 year old). Statute in question also provides for minimum vacation pay, to be paid at least once a year and amounting to no less than 8% of income over past year.

Pensions.

There is no generally applicable law imposing obligation to grant pension rights; however, in some branches of industry participation in industry-wide pension plans is obligatory. If pension is provided, special, rather severe, rules for funding thereof apply to secure distribution under all circumstances. State social security is always available for every citizen after 65 (will be changed to 67 and made dependant on years of work).

Hours of Labour.

Average Dutch employee's full-time working week is 38 hours. Trends to further reduction have been curtailed thereof. This is below statutory maxima (45 hours and 54 hours in overtime-situations). Specific rules concern minors.

Equal Pay.

Equal remuneration for man and woman for comparable jobs is imposed by statutory provisions.

Trial period can only be concluded in writing and must be equal for employee and employer. Maximum length of trial period is two months for contracts concluded for indefinite period of time and for contracts concluded for definite period of two years or longer. Maximum length of trial period is one month for contracts concluded for unspecified period of time or for contracts concluded for definite period of time less than two years.

Risk of No Work.

Pursuant to Civil Code employer retains salary if there is impediment to work which can be ascribed to employer. Derogation at expense of employee is only allowed during first six months of employment contract by written agreement. After expiration of this period, derogation is only allowed by collective labour agreement or by regulation of administrative authority.

Minimum Salary for “On-call” Employees.

If scope of stipulated activities is less than 15 hours a week and time in which work should be done has not been agreed upon or if scope of activities has not been clearly agreed upon, employees have minimum claim for salary for three hours work per call.

Termination. 1. Permit to Terminate.

In absence of mutual agreement or cause, employer may not terminate employment contract without permit from Regional Director of Labour Office (“RLO”). Director has to balance interests of employer and employee. If permit is refused, contract cannot be terminated in valid way, and employer must continue to pay to employee his salary, etc. Especially in complicated cases, it may take quite some time (varying from some months to half year or even longer) for Director to render his decision. Although there are some applicable guidelines, it is often difficult to predict whether permit will be granted or not.

Termination. 2. Dissolution by District Court, Section Canton (Cantonal Court).

Employer or employee may petition cantonal court in order to obtain court decision, which dissolves employment contract. Advantages over obtaining dismissal permit are swiftness of procedure and marked inclination of cantonal court to dissolve employment contract because of frustrated employment relationship. However, cantonal court may award compensation to employee when employer is to be blamed, or in situation of no culpability on either side. Size of compensation payment is calculated according to employment years, age, gross monthly salary and other relevant facts as culpability.

Termination. 3. Illness.

If employee is ill at moment that he receives notice termination is void (unless employee has been ill for two consecutive years).

Termination. 4. Period of Notice.

Dutch Civil Code provides fixed periods of notice to be observed by employers. Contracts for less than five years: period of notice is one month. Contracts for five years or more: period of notice is two months. Contracts for ten years or more: period of notice is three months. Contracts for 15 years or more: period of notice is four months. Employee has to observe period of notice of one month. Under certain conditions it is possible to shorten or lengthen period of notice.

Termination. 5. Immediate Cancellation.

Above rules do not apply, if there is sufficient cause to warrant immediate cancellation of employment contract. Very serious misconduct should be present before such termination will be allowed; moreover, certain formal rules must be observed, e.g., cause must be stated explicitly and termination should be effected as soon as possible after misconduct has occurred. If these rules are not observed, cancellation is not valid, even if breach of contract in itself would have constituted sufficient cause.

Termination. 6. Compensation Payments.

Notwithstanding fact that employer has terminated contract of employee in accordance with above rules, compensation may be due, if dismissal is found to be “clearly unreasonable”. Termination is clearly unreasonable if reason for termination is false or insufficient; it may also be case if financial effects of termination would otherwise be too hard on employee. Especially with regard to older employees, employees with long tenure and employees with high income, compensation payments are quite customary in The Netherlands.

Termination. 7. Further Remarks.

If contract is entered into for definite period of time it may expire automatically at end of term. Rules with regard to dismissal permit, notice period and compensation payment do not apply unless observation of notice period is explicitly agreed upon between parties. If up to three contracts are concluded for total period of less than three years, second and third contract will terminate automatically without requirement of giving notice. After third contract or after three years, contract will automatically convert into contract for indefinite period of time; if contract is concluded for definite period of 36 months or more and contract is prolonged immediately after extension for period of maximum three months, giving notice is not required. Above rules do not apply either if court is requested to rescind contract “for important reasons”; however, in such case, compensation may be imposed by court. Rules with regard to permits to terminate do not apply to statutory managing directors of N.V. or B.V. For dismissal of members of Works Council special rules apply. Their employment can only be terminated in situation of dismissal on spot or by dissolution procedure before cantonal court. In these instances it must be proved that reason for termination or dissolution is not connected to membership of Works Council. In case of mass dismissals, special rules apply, providing for period of one month of suspension before request for permits to terminate will even be considered. Mass dismissal is present if employer wants to terminate 20 or more employees working in one region in period of less than three months.

Termination. 8. Contemporary Discussion.

Over last decades many proposals have been made to reform complicated regulation regarding termination of employment contracts. None of these have seen fruition. At present there is discussion concerning abolishing of permit to terminate.

B. Collective Labor Law.

Above is description of law relating to individual employment contracts. Picture would not be complete, however, without description of rules relating to labor-management relations.

Works Council.

Every enterprise employing 50 or more employees is obliged to have Works Council.

Measures with regard to certain specific subjects cannot be taken without formal approval of Council. On most major subjects, such as all measures seriously affecting number of personnel employed in undertaking, Council has to be heard and be given chance to advise; if employer does not follow advice, appeal may be lodged with Business Chamber of Amsterdam Court of Appeals and decision will be annulled if employer is found to have acted unreasonably. As appears from its case law, Business Chamber is not likely to annul decision on material grounds but has annulled quite a number of decisions on grounds concerning procedure to be followed in obtaining Council's advice, especially concerning supply of relevant information to Council. See also category 2 Business Organizations, topic 2.03 Corporations, subhead Works Council.

Collective Bargaining Agreements.

Various Dutch unions hold quite strong position in The Netherlands. Although there are no specific rules relating to duty to bargain with unions, approximately 80% of Dutch working force is covered by collective bargaining agreements. Only 40% of employees, however, belong to one union or another, but employment conditions in collective agreements also have to be applied by unionized employers to nonmembers.

Number of unions are combined in federation called FNV which accounts for more than 50% of unionized employees. Collective bargaining agreement can be declared binding on nonorganized employees also, if certain conditions are fulfilled.

Strikes.

There are no Dutch statutory regulations on strikes. However, according to case law strikes are legal in principle. Injunction against strike can be obtained, if strike is being called although negotiations have not yet reached impasse or, if strike is in violation of collective bargaining agreement. Strikes do not occur often.

C. Social Security.

Dutch system of social security is one of most comprehensive (and most expensive) in world. Costs of system are borne by employees and employers alike. Minor part of needed funds is provided by government. Premiums and benefits are only computed over statutorily determined amount not exceeding [Euro]46,000 on annual basis. This amount is called statutory maximum amount per day. *Note:* Social security system is currently under review.

Unemployment Benefits.

Employee who, because of no fault of his own, is or remains unemployed is entitled to benefits which are 70% of his most recent salary for period of three months up to 38 months, depending on age and tenure with maximum of about [Euro]27,000 per annum. For next two years employee is entitled to benefits which are 70% of statutory minimum wages. If employee is 57½ years or older when he becomes unemployed, latter benefits are continued for another one and one-half years. Duty to search for employment is strictly enforced.

Compensation for Illness or Disability.

Employers need to pay 70% of recent salary for two years or until temporary labour contract ends (Illness Act 2005). Increased stimuli to search for “reintegration” of disabled. After this period possibly further compensation (Disability Act) on basis of “disability percentage” (35% threshold).

Further Social Security.

Dutch healthcare is changed since Jan. 1, 2006. Insurance companies provide basic package of medical and related services to all citizens. Duty to be insured, mandatory acceptance (for basic package). Employees (as well as other heads of family) are entitled to certain children allowances. For all residents of The Netherlands, old age pensions (about [Euro]12,000 gross for individual and about [Euro]16,000 gross for couple) are provided. Moreover, there are general schemes for widower's and orphan's benefits. There is also generally applicable statute covering costs of very long-lasting illness (treatment in mental hospitals for senility, etc.).

11 ENVIRONMENT

11.01 ENVIRONMENTAL REGULATION:

Legislation to preserve environment from pollution of soil, water and air has been enacted generally thought to be in line with requirements of EC-law, specifically recent Directive on Integrated Pollution Prevention and Control.

Several acts require companies to obtain licenses for all kinds of activities which may cause nuisance, damage or danger to environment or to neighbouring residential or business areas.

Generally licenses are subject to conditions, containing safety provisions, restrictions on kind or quantity of disposed substances, on method of disposal, etc.

Activities without obligatory license or in violation of conditions to license are considered criminal acts, punishable by fines and/or (when deliberately committed) by imprisonment of person responsible. Maximum fine in respect of environmental offenses [Euro]67,000. Third parties suffering damages by activities without or, in violation of, license can claim compensation in civil court procedure and/or compulsory closure of establishment.

Procedural rules for issue, withdrawal, alterations, appeal against such decisions and environmental impact statements are set forth by Environmental Control Act (Wet milieubeheer) and General Act on Administrative Law (Algemene wet bestuursrecht). Former act is comprehensive act on environmental issues and requires most businesses to either abide by conditions in Environmental Royal Decrees or to obtain license for construction and use of plants, machinery or installations, which may cause nuisance, danger or damage to third parties and environment. This act also empowers central authorities to impose levy on production or import of fuel. Furthermore, this act provides for compensation of damages as result of refusal of licenses, or conditions attached to licenses. Based on EC directive Environmental Impact Assessment (MER) is required before licenses be granted for projects with significant effects on environment. Additional procedural provisions in respect of MER of activities with trans-boundary consequences. Act also regulates licenses for disposal of waste, not only in respect of prevention, recycling, incineration and dumping but also in respect of international transport. Finally it regulates enactment of plan and policies regarding environment by public authorities. Allowances to emit greenhouse gasses may be transferred within EC, subject to EC directive.

Further legislation in: surface water pollution act (Wet verontreiniging oppervlakte wateren). Act empowers central or local Government to impose levies on disposal of waste water; soil protection act (Wet bodembescherming) relating to bringing in or on soil substances possibly damaging or polluting soil and to execution of works which might cause damage to soil. Act grants provincial authorities legislative powers for soil protected areas. Act empowers provinces and four largest cities to order polluter or owner of polluted soil or groundwater to clean up; it provides for recovery of cleaning costs from companies or persons responsible for pollution; nuclear energy act (Kernenergiewet), regulating by way of licenses any application of nuclear energy; pollution of sea by ships act (Wet voorkoming verontreiniging door schepen), referring to international treaty for prevention of pollution of sea by ships, London 1973; act on substances endangering environment: (Wet milieugevaarlijke stoffen), regulating import, packaging and labelling of substances, possibly dangerous to men and/or environment; subsoilwater act (Grondwaterwet), regulating retrieval and injecting of subsoil water; pesticide act

(Bestrijdingsmiddelenwet), regulating trade in and use of pesticides; dangerous substances act (Wet gevaarlijke stoffen), regulating transport and disposal of dangerous substances. Legislation on mining (land and seabed) contains specific environmental regulations.

Strict liability for owner (possessor) of dangerous substances, whether in transport or not, and operator of dumping ground or drilling platforms has been enacted in Civil Code on 1 Feb. 1995.

General Supervision.—Decisions regarding environmental acts, e.g. decisions to grant or withdraw licenses or to impose administrative sanctions, are subject to direct appeal in first and only instance to Judicial Dept. of Council of State. See also category 6 Courts and Legislature, topic 6.02 Courts, subhead Special Courts and Proceedings.

12 ESTATES AND TRUSTS

12.01 ADMINISTRATION:

See topic 12.05 Executors and Administrators.

12.02 DEATH:

If someone's death cannot be proven by death certificate, but his existence has become uncertain, interested parties can request court order to call upon missing person that he show that he is alive, and if such showing is not made, to declare that there is legal presumption that missing person has died. Time period, from departure of missing person or from latest news of his existence, has to be applied, i.e.: (a) of five years or (b) one year if missing person remains missing within this period and circumstances render his death probable.

In following cases someone's death can be established differently: if body of missing person cannot be found but, taking into account all circumstances, his death can be considered certain, court of The Hague can state, upon demand of public prosecutor or upon request of each interested party, that missing person has died: (a) if person has become missing in The Netherlands; (b) if person has become missing while travelling on Dutch vessel or airplane; (c) if missing person was Netherlands national; (d) if missing person had his residence or domicile in The Netherlands.

If person has died outside The Netherlands and no death certificate has been made or can be submitted, court of The Hague, upon demand of public prosecutor or upon request of each interested party, can state that person has died: (a) if death has occurred while travelling on Dutch vessel or airplane; (b) if decedent was Netherlands national; (c) if decedent had residence or abode in The Netherlands.

Actions for Death.

Action for indemnification may be brought against defendant liable for death toward decedent (a) for reimbursement of funeral expenses and (b) for damages for loss of support; in principle no other compensation is granted. Damages for loss of support can only be claimed by: decedent's spouse or children; other relatives who were supported by decedent; persons who lived with decedent as family and were supported by him to extent that situation would have continued, and need support; persons who lived with decedent as family and was supported by decedent's taking care of common household to extent that person must make other arrangements to take care of household. Extent of damages for loss of support depends on need of support and other circumstances. Action must be started within five years after plaintiff became aware of both damage and identity of defendant and in any case within 20 years after death. If person was killed by motor vehicle while not riding in motorized vehicle, that person benefits from strict liability regime. Law does not make exceptions with regard to foreigners. Transportation law contains special rules with regard to actions for death. As for European Community airlines, EC Regulation 2027/97 provides for strict liability up to maximum of 100,000 SDR (Standard Denomination Rate) per passenger and unlimited fault liability. Carriage by non-EU airlines may be subject to Warsaw Convention (fault liability up to maximum of 8,300 SDR p.p.), as amended by Hague Protocol (fault liability up to maximum of 16,600 SDR p.p.), though airline company's conditions may provide for strict liability and/or higher maximum amount. Montreal Convention of 1999 (not yet in force) incorporates two-tier system of EC regulation. In maritime law maximum amount of damages recoverable from carrier is limited to [Euro]137,000 per passenger. (Dutch Civil Code, book 8, art. 518). As to liability of shipowners and salvors, Convention on limitation of liability for maritime claims (London, 1976) applies, implemented in Dutch Civil Code, book 8, arts. 750-759.

12.03 DECEDENTS' ESTATES:

See topics 12.04 Descent and Distribution, 12.05 Executors and Administrators, 12.08 Wills.

12.04 DESCENT AND DISTRIBUTION:

Intestate Succession.

As from Jan. 1, 2003 intestate succession is regulated by next rules. See Martindale-Hubbell International Law Digest 2002, Netherlands Law Digest for regulations valid until Dec. 31, 2002.

In absence of will (see topic 12.08 Wills) there is one uniform rule of succession, applicable to realty and personality alike. One has to exist to be heir. Foetus is considered to be born when this is in its interest.

Each of following classes of which one or more members is living takes to exclusion of subsequent classes: (1) surviving spouse, not separated a thoro et mensa (legal separation), and children of deceased in equal parts; (2) parents, brothers and sisters of deceased in equal parts; (3) grandparents of deceased in equal parts; (4) great-grandparents of deceased in equal parts.

If part of parent is less than quarter, it is augmented until quarter; parts of other heirs are diminished subsequently.

Share of half-sister or half-brother is half share of full-sister or full-brother or parent.

Representation occurs with regard to persons who at moment of opening estate do not exist, are unworthy, have been disinherited, repudiate estate or whose right to inherit has lapsed. Those who are heirs by representation are called per stirpes to share of person that they represent. Persons further than sixth degree family members of deceased are not heirs. If there are no persons capable of inheriting estate, then estate escheats to State after paying debts by administrator.

Legal Distribution.

As from Jan. 1, 2003 in case of surviving spouse, not separated a thoro et mensa (legal separation), and descendents as heirs, estate—unless testator provided otherwise in last will—is distributed by law as follows. Surviving spouse acquires by operation of law all property forming part of estate. Payment of debts of estate is chargeable to surviving spouse. Goods of children are not chargeable for those debts. Every child receives as heir by operation of law monetary claim payable by surviving spouse corresponding to worth of child's share in estate. Monetary claim is immediately due and payable (1) if surviving spouse has been declared bankrupt or is subject to legal debt rescheduling arrangement, or (2) if surviving spouse has died. Monetary claim is also immediately due and payable in cases mentioned by testator in last will. Monetary claim is, unless testator or surviving spouse and children have together stipulated otherwise, to be increased with percentage equal to annual legal interest, as far as this is more than 6%.

Surviving spouse can within three months after death of deceased undo legal distribution by declaration in notarial deed (“verklaring van ongedaanmaking”) recorded in successions register (“boedelregister”) at District Court. Declaration has retrospective force until moment of death of deceased. Rights of third parties (including other heirs) are nevertheless recognized.

If child has obtained monetary claim against surviving spouse as mentioned above, and surviving spouse has registered marriage, surviving spouse is obliged on request of child to hand over to child one or more goods of estate of predeceased spouse up to value of monetary claim (plus interest) of child. Handover takes place—unless surviving spouse waives such right—under retention of right of usufruct on those goods.

If child has obtained monetary claim against surviving spouse as mentioned above, and surviving spouse dies after remarrying, stepparent is obliged on request of child to hand over to child one or more goods of estate of predeceased spouse up to value of monetary claim (plus interest) of child. If child has obtained monetary claim against stepparent on behalf of estate of his predeceased parent, stepparent is then obliged on request of child to hand over to child one or more goods of estate of predeceased parent up to value of monetary claim (plus interest) of child. Handover takes place—unless stepparent waives such right—under retention of right of usufruct on those goods. If child has obtained monetary claim against stepparent on behalf of estate of his predeceased parent, and stepparent has also died, heirs of stepparent are obliged on request of child to hand over to child one or more goods of estate of predeceased parent up to value of monetary claim (plus interest) of child.

Other Legal Rights.

As from Jan. 1, 2003 when marital home inhabited by surviving spouse belongs to estate or matrimonial property of deceased spouse or deceased spouse had right of habitation, otherwise than in accordance with rental agreement, surviving spouse has right to continue to reside in dwelling for six months. Same rights apply to household effects belonging to estate or matrimonial property of deceased spouse.

Persons who run joint household with deceased on long-term basis have same rights to home and household effects.

If surviving spouse according to last will of deceased spouse is not entitled or is not only person entitled to home and household effects belonging to estate, being home and household effects of matrimonial home at time of death, or home of surviving spouse, heirs are then obliged on request of surviving spouse to cooperate in creating right of usufruct in respect of these goods.

Posthumous Children.

Excluded from heirship. One has to exist to be heir. Foetus is considered to be born when this is in its interest and will share as if it were alive at time of death of deceased.

Adopted children are treated as children in blood of adoptors.

Illegitimate Children.

Dutch law does not acknowledge illegitimate children. However, there is possibility of recognizing (``erkenning'') child by its father or after death of its father by court (``gerechtelijke vaststelling''). Child will then share equal parts in estate of its father when there is no will. If there is will and he is not mentioned in will, he has possibility of so called ``legitieme portie'' (see 12.08).

Distribution of Assets.

If there is no legal distribution then distribution is regulated as follows. Debts need not be discharged before distribution is made. Heirs succeed deceased immediately in title to assets belonging to estate ("saisine") and are co-owners of such assets; they may distribute assets immediately among themselves. Creditors of estate, however, and legatees may oppose distribution until they are satisfied.

Heirs are at liberty to keep estate or any part thereof undistributed for any length of time. Any heir, however, may demand distribution unless there is agreement to have estate undistributed, which agreement cannot be made for more than five years. Prolongation of five years is permitted. Formal distribution by notarial deed is required only if one or more heirs are minors or otherwise do not have free disposal of their property. If real property or registered shares of unlisted N.V.'s or B.V.'s form part of estate, distribution must take place by notarial deed.

Determination of Heirship.

Probate proceedings are unknown. Heirship is generally determined by notary, who delivers certificate of inheritance (verklaring van erfrecht). Such certificate is generally accepted as sufficient proof of heirship. If heirship is contested parties may ask court for declaratory judgment.

Succession presumed accepted. Right to reject lost upon explicit or implicit indication of willingness to accept. Succession may be accepted either plain or under beneficium inventarii. Estate, including its debts, devolves on heirs directly; upon plain acceptance heir becomes liable pro rata parte for all liabilities of estate; acceptance under beneficium inventarii prevents heirs from becoming liable to extent liabilities of estate exceed its assets. Minors and other persons not having free disposal of their property cannot accept other than under beneficium inventarii. Liquidation of estate which has been accepted under beneficium inventarii is subject to various formalities which are not required in case of plain acceptance.

Succession Convention.

Hague Succession Convention of 1989 has only been ratified by The Netherlands, but is not yet in force. However, provisions of Convention are incorporated by reference in Dutch law and are effective.

12.05 EXECUTORS AND ADMINISTRATORS:

Executors may only be appointed in last will (see topic 12.08 Wills). Their powers are comprehensive under new legislation. Executor has possession of estate. If forced heirs are entitled to estate or part thereof their position does not prejudice powers of executors.

Estate does not, however, devolve to executors, but directly to heirs. Executor's legal task is to administer estate and to pay debts and legacies. He is allowed to convert parts of estate into cash if it is necessary to pay debts of estate.

Executor must make inventory and assist heirs in settling case. He can appoint notary (boedelnotaris) to divide estate.

Executors may sue on behalf of estate. Claims may be brought immediately against estate.

On request of interested party, or public prosecution, court can nominate administrator if there are no heirs.

12.06 INTESTACY:

See topic 12.04 Descent and Distribution.

12.07 TRUSTS:

Dutch law does not provide for trusts. However, for number of purposes for which Anglo-American trusts are being used analogous or similar devices are available, e.g.:

Fidei-Commis.

There are three exceptions to rule that heir must exist at moment of deceased's death: (1) It is valid if deceased provides in last will that what he leaves to descendant of parent of deceased, by death of favored person or earlier, shall go to descendents of favored person per stirpes, although these descendents did not yet exist at moment of deceased's death. (2) It is valid if deceased provides in last will that what he leaves to person, by death of favored person or earlier, shall go to descendents of parent of deceased and also that if descendants do not survive at that moment, his descendants living at that moment shall substitute him per stirpes. (3) It is valid if deceased provides in last will that whatever favored person at moment of his death or earlier will leave shall go to blood relative in hereditary degree of deceased (fidei-commis de residuo). All fidei commissary heirs have conditional right.

Administration (“bewind”).

Testator may provide that his estate or part thereof will be administered by administrator (“bewindvoerder”) for specific period of time or during lifetime of heir.

Foundations (“stichting”) are created by notarial deed (inter vivos or testamentary). They may be used for social, cultural, scientific or charitable purposes. Foundations are also used to acquire capital stock of corporations against issue of depository receipts representing such stock to former stockholders who remain beneficiaries of such stock and continue to be entitled to dividends. Voting powers, however, will be exercised by foundation board. See also category 2 Business Organizations, topics 2.03 Corporations, subhead Rights of Shareholders and of Holders of Depositary Receipts Issued with Cooperation of Company; 2.04 Foundations.

Trust by Agreement.

Exercise of certain rights under agreement may be conferred by parties to third party (“trustee”); e.g.: exercise of rights attached to bonds by trustee on behalf of all bondholders.

Fiduciaries.

Assets may be transferred to fiduciary acquiring legal title thereto and becoming legal owner. Fiduciary holds assets for beneficiaries as designated by fiduciary agreement and will distribute (net) revenues or transfer assets itself to beneficiary under conditions set forth in fiduciary agreement. It is not possible for fiduciary to designate beneficiaries at its own discretion (exception: foundation, but only for social and charitable purposes; see subhead Foundations, supra).

Foreign Trusts.

The Netherlands have signed and ratified The Hague Convention of 1986 on Trust, which has entered into force for The Netherlands on Feb. 1, 1996. If trust has been created which fulfils criteria of Convention, it shall be recognized by Dutch courts in accordance with terms of Convention.

See topics 12.04 Descent and Distribution, Wills; category 20 Property, topic 20.07 Perpetuities.

12.08 WILLS:

Testamentary Capacity.

Wills made by minors under 16 and by persons of unsound mind are invalid, however, persons of unsound mind can make last will with acceptance of court. If spouses are married in community of property each spouse may dispose of undivided one-half of community property (see category 13 Family, topic 13.05 Husband and Wife).

Capacity to Benefit.

Any person benefiting from will must be living at time of testator's death. Foetus is considered to be born when this is in its interest. For exception, see topic 12.07 Trusts. Technically, Dutch law does not know forced heirship and it is possible to exclude children from estate. However, so called “legitieme portie” or entitlement can be asked for by descendants of deceased (``legitimarissen'').

**``Legitieme portie''** is part of value of estate, to which ``legitimarissen'' has claim, except for gifts or dispositions by deceased. ``Legitimarissen'' are descendants of deceased who are heirs to estate in case of intestacy, be it in their own right, be it by substitution of persons who do not exist at moment of death of deceased or who are unworthy. Heir who renounces (his part of) estate loses his right of ``legitieme portie'', unless he declares that his ``legitieme portie'' shall be maintained.

''Legitime portie'' is one-half of intestate portion of ``legitieme massa''. ``Legitieme massa'' is estate plus certain gifts minus certain debts. Descendants of predeceased children inherit per stirpes.

Dispositions by will or even by gifts made in contravention of ``legitieme portie'' rules are valid, without prejudice to right of ``legitimarissen''.

Surviving spouse is never ``legitimarissen'' and may be excluded from estate in will either by express provision or by implication, without prejudice to “other rights”.

Forms of Wills.

Will can be made by notarial or private instrument.

Notarial Wills.

Practically all wills are made in this form: testator describes his intention which is put in writing by notary and signed by testator in presence of notary, acknowledging signatures, execution, date and contents of will.

Private Wills.

Private will must be signed by testator. If will is made by person other than testator or by electronic means, and is more than one page in length, every page must be numbered and be certified by signature of testator. Private will must be handed over to notary. Testator has to declare that handed over document is his will and that statutory requirements have been fulfilled. If document handed over is sealed, testator can declare that only if certain conditions are fulfilled on day of his death will his last will be opened. Notary draws up instrument of deposit and declarations of testator, signed by testator and notary.

Codicil.

Few dispositions may be made by so-called “codicil” without intervention of notary. Unlike what “codicil” suggests, it need not necessarily be supplementary to another will made earlier. Dispositions which may be made by codicil include: (a) 1° legacies of personal clothing, personal belongings, and specified jewelry; 2° certain furniture and certain books; (b) condition that goods mentioned under (a) shall not belong to matrimonial property community of recipient; (c) nomination of person as mentioned in art. 25, §§2 and 4, Copyright Act 1912 and art. 5, §2, Neighbouring Rights Act.

Other assets like cash, real property, securities, claims etc. may not be bequeathed by codicil, neither may such instrument appoint heirs nor appoint executor (as was possible under old law; see topic 12.05 Executors and Administrators). Codicil must be totally handwritten, dated and signed.

Nuncupative wills are not valid.

Mutual wills, or wills executed in one instrument by two or more persons are also invalid.

Foreign Wills.

The Netherlands is party to Hague Convention of 1961 on conflicts of laws relating to form of testamentary dispositions.

Revocation.

Will is by its definition revocable and any contracts which restrict freedom to amend or revoke will are null and void. Revocation must be made personally and in form of subsequent will. Subsequent will which does not contain provisions other than revocation results in intestacy (see topic 12.04 Descent and Distribution). Subsequent will which does not contain express revocation clause only cancels those prior provisions that are incompatible with those contained in subsequent will. Will made by unmarried individual is not automatically annulled or revoked by subsequent marriage. Will made by married person is not automatically annulled or revoked by subsequent divorce or separation.

If testator destroys codicil, it is revoked. If codicil is destroyed it is presupposed that this has been done by testator.

Annulment.

Upon death of testator will may be annulled by court upon application of any interested party on grounds that it is defective in form or that testator was incapable or that it was made through coercion or fraud. Will cannot be annulled by court on ground that it is created on abuse of circumstances. Proceedings for annulment of will must be taken within one year after death of testator, and existing will and grounds for annulment must be known by interested party or his predecessor. However, possibility will expire when at least three years have passed since death of testator and his/her will has been made known.

Central Registry of Wills.

Notary is under legal obligation to give notice of any will drawn up by or deposited with him to Central Register of Wills. This notice does not specify contents of will, but merely states fact that will was made and by whom. Upon death of testator, Registar will inform (usually through notary as intermediary) interested parties on their request of existence of will and of name of notary in whose custody original of will is kept.

Probate.

See topic 12.04 Descent and Distribution, subhead Determination of Heirship.

See also category 1 Introduction, topic 1.01 Consuls.

13 FAMILY

13.01 ADOPTION:

Adoption is effected by judgment of district court, at petition of adopters (married or unmarried) or of single adopter. Adoption by two persons of same sex is permitted on condition that child or children are Dutch nationals.

Adoption will be granted on condition that adopters have cohabitated for at least three years and have cared for child as guardians for at least one year. Difference in age between each adopter and child may not be less than 18 years and child must be of minor age. One may not adopt one's grandchild.

On date of petition mother of child, if she is not married or has been married, must have attained age of 16. Persons who legally are deemed to be child's parents must not have filed objections, at first petition of adopters. Under certain circumstances mentioned by law, objection of parents may be disregarded.

Partner of parent may adopt child out of wedlock, or child from earlier marriage, if other parent has not filed objections.

Adoption granted only if severance from legal parent(s) and ties with adopters are in child's best interest.

Court of domicile of child has jurisdiction, or if child has no domicile in The Netherlands, court of child's actual residence in The Netherlands or if child neither domiciled nor residing in The Netherlands, court at The Hague.

Child younger than 12 can be heard by court. Child aged 12 or more must be heard by court before judgment. Child aged 12 or more must not have indicated objections.

By affirmative decision, legal familial ties exist between adopted child, adopting parent and his or her blood relatives or adoptive parents and their blood relatives and ties of family law with original parents and their family relations are severed (with exception of case of adoption by spouse, registered partner or life companion of parent), as from date when appeal against judgment can no longer be instituted, even if it would turn out afterwards that court was wrong when it deemed all conditions to have been fulfilled. In case of adoption by two persons they can choose name of one of them for child.

However, child may demand revocation by petition made not earlier than two and not later than five years upon attaining age of majority. Revocation will be granted only if court is convinced of child's interest and of reasonableness of request, and by revocation all legal ties with adopters and their relatives are severed and those with original parents and their relatives renewed.

13.02 ALIMONY:

See topics 13.04 Divorce, Husband and Wife; category 7 Debtor and Creditor, topic 7.06 Exemptions.

13.03 COMMUNITY PROPERTY:

See topic 13.05 Husband and Wife.

13.04 DIVORCE:

This subject is governed by Civil Code.

Ground.

Lasting breakdown of marriage only and exclusive ground for divorce and for legal separation. Guilt criterion abandoned. Defence that no lasting breakdown exists very unlikely to succeed: in case law, living apart for some longer period, or plaintiff consistently maintaining that in his/her personal view lasting breakdown exists, often considered signs of breakdown. If, in case of joint request, both parties assert lasting breakdown or if, in case of unilateral request, respondent does not deny breakdown, court will not investigate whether breakdown exists.

Legal Separation.

Granted for same ground as divorce. Institution retained for those whose religion prohibits divorce or who otherwise prefer legal separation. Separation proceedings mainly similar to divorce proceedings; see subhead Proceedings, infra. After three years of legal separation either party may request dissolution of marriage. This term may be shortened to at least one year in case of serious misconduct of other spouse. No term applies in case of joint request for dissolution of marriage.

Like divorce, legal separation leads to partition of community property. Legal separation has same consequences as divorce with regard to children born from marriage; see subhead Children, infra.

Legal separation only effective against third parties if separation has been registered in register of marital property.

Legal separation terminates in case of reconciliation of spouses. All effects of marriage revive. If judgment of separation had been publicized or registered, results of reconciliation cannot operate against third parties unless reconciliation has been publicized or registered likewise.

Action.

Divorce and legal separation are granted: (a) upon request by either spouse to the court; (b) upon joint request to court of both spouses stating as their common opinion that lasting breakdown of their marriage has occurred. Pending suit at joint request either spouse may withdraw request.

Alimony detached from guilt criterion and based on either party's need and financial means. At request of party who does not have and is not able to acquire sufficient income for living expenses, court may allow such party alimony, to be paid by other party, if latter has sufficient resources. Need for alimony of party may depend on circumstances such as length of duration of marriage, actual period of living together and standard of living during marriage.

Spouses may state in agreement with view to divorce or separation (divorce covenant) on whether, and if so to what amount, one party will have to pay alimony to other party.

Alimony imposed by court or agreed upon by spouses may be altered by court in case of changed circumstances; such alteration may be excluded in divorce covenant of parties, but even then alteration is possible in event of essential change of circumstances causing considerable unfairness.

Since 1994 alimony may be imposed by court for certain (finite) period of time and on certain conditions, but not for longer than 12 years after date of registration of judgment for divorce or dissolution in public record of marriages, births and deaths (see also subhead Proceedings, infra). Under same Act, all alimonies for infinite period of time, established by court or agreed upon from July 1, 1994 onwards, end automatically after period of 12 years after date of registration of judgment. If marriage has lasted no longer than five years and no children have been born from marriage, this period is reduced to duration of marriage. Within three months after expiration of period, party entitled to alimony may request that court grant new period of alimony on grounds of fairness. Under same Act, party paying alimony as established by court or agreed upon before July 1, 1994, may request court to end obligation to pay after it has lasted 15 years.

Obligation to pay alimony ends at remarriage or at entry into registered partnership, or at cohabitation comparable to marriage of party entitled to alimony.

Children.

With regard to parental authority interest of child decisive. After divorce, joint custody continues. However, court may, in exceptional cases, grant sole custody to one of parents if in interest of child.

Child has right of access to his/her parents and to any person with whom he/she has close personal relationship. Parents who exercise joint parental responsibility and who have instigated divorce proceedings are obliged to submit preceding parenting plan which sets out their agreements concerning way in which caring and upbringing tasks with regard to their minor child(ren) are divided (including child's or children's residence with each parent), way in which parents duly inform and advise each other concerning important matters with regard to their child(ren), as well as costs involved in caring for and raising their child(ren). Mandatory norms with which parents must comply are respectively: duty and right of parents to care for and to raise his/her child and parent's duty to stimulate development of his/her child's connections with other parent. Alongside this, parenting plan should ensure child's right, after dissolution of marriage, to be jointly cared for and raised by both parents and parents can only diverge from this norm if practical impediments arise in connection with dissolution of marriage and only for as long as these impediments remain.

Parent who exercises parental authority after divorce has right and obligation to have access to his/her child(ren).

In case of parents who exercise joint parental responsibility, courts can make regulation if parents are not in agreement concerning exercise of their parental responsibility. In case of sole parental responsibility, courts can make, at request of parent or another person who has close personal relationship with child, arrangement concerning contact.

Child of 12 years or older has right to be heard by court.

Separation of Community Property.

If no marriage contract has been made, spouses are co-owners of all property which upon divorce must be partitioned into two equal parts. However, parties may expressly agree to partition in unequal parts; see also topic 13.05 Husband and Wife.

Settlement of Pension Claims.

Since 1994 unless otherwise agreed in marriage articles or divorce covenant, spouse, who has built up pension claims during marriage, is obliged to settle these pension claims with other spouse. As result of this settlement, other spouse obtains separate right towards pension fund to payment of part of pension.

Divorce Covenant.

Spouses who intend to divorce may settle consequences of divorce in written agreement (divorce covenant). Matters to be settled in covenant e.g.: maintenance obligations in respect of former spouse and in respect of children, partition of community property, settlement arising from marriage articles, parental authority, visitation and information rights, pension rights, etc. Upon joint request of spouses, court may insert divorce covenant in divorce judgment in order to make it enforceable.

Remarriage.

Immediately after divorce has taken effect (i.e. after judgment is registered in public record of marriages, births and deaths, see also subhead Proceedings, infra), either spouse may get married to third party. Former spouses may remarry each other. See also topic 13.07 Marriage, subhead Requirements.

Jurisdiction.

In divorce and separation proceedings, Dutch courts have jurisdiction if, at moment when unilateral or joint request is filed, (a) both parties are Dutch citizens; or (b) either party has had permanent residence in The Netherlands for 12 months, or Dutch party for six months. Upon joint request case is heard by court of either spouse's permanent residence. At request of one of spouses, case is heard by court of requestor's permanent residence, or if requestor lives outside The Netherlands, court of respondent's permanent residence. If both parties live outside The Netherlands, Court of The Hague has jurisdiction.

Proceedings are in writing, but in case of request of one party, parties have to appear in court once. In case of joint request and divorce covenant, oral proceedings often not required. Until judgment (divorce and separation) has taken effect, each party may file request for provisional measures for duration of proceedings: provisional allocation of house to one of spouses, provisional assignment of minor children to one of spouses, provisional visitation rights, provisional alimony for children and/or other spouse. If provisional measures are requested, parties will have to appear in court.

Note: Judgment granting divorce or dissolution takes effect only as from date of registration in public record of marriages, births and deaths. Registration is made upon request of either party to competent record. If judgment is not registered within six months after it has become final, it is rescinded by law.

Foreign Divorce Judgment.

Regardless of nationality of parties, foreign divorce or separation is recognized in The Netherlands if granted after proper process by court or other authority having jurisdiction or if other party has acquiesced. If wife acquiesced, under certain conditions, dissolution of marriage effected by unilateral declaration of husband is recognized. Recognition of foreign divorce or separation effected prior to date of coming into force of Act (Apr. 10, 1981) in accordance with case law or applicable international convention.

Foreign Parties in Divorce Proceedings in The Netherlands.

Unless foreigners choose Dutch law to be applicable, they are, in principle, treated according to their common national law. In case common nationality of spouses has lost practical meaning (i.e. for one of spouses or for both of them real social connection with country of nationality is manifestly absent) or in case of different nationality, law of their common residence applied. If no common residence, Dutch law applied.

Annulment.

Each of spouses, ascendants of one of spouses, and public prosecutor may request annulment of marriage on several grounds. Person married to one of spouses may request annulment of (later) marriage of that spouse. Few other possibilities for annulment exist, “bijvoorbeeld geestelijke stoornis t.t.v. huwelijkssluiting”.

13.05 HUSBAND AND WIFE:

Different Same-Sex.

Same-sex marriage was introduced on Apr. 1, 2001 and since that date following applies to all spouses, regardless of their sex (see topic 13.07 Marriage, subhead Same-Sex Marriage). Same-sex marriage is not possible in Dutch Antilles and Aruba.

General Obligations.

Each of spouses has obligation towards other to be faithful, render all necessary assistance and maintenance, to care for and educate children; there is no obligation to form common household.

Marriage Property System.

From day of marriage community of property, consisting of all existing and future assets and liabilities of both spouses, is imposed by operation of law. Outside community of property remain only: (a) Gifts and bequests to spouse if so provided by giver or legator, (b) assets and liabilities especially attached to one of spouses, and (c) pension claims.

Spouses may deviate from this system by matrimonial property contract (see subhead Matrimonial Property Contract, infra).

Right of Disposal.

Unless otherwise provided by matrimonial property contract, each spouse generally has exclusive right of disposal of property which is part of community property from his/her side. If any asset of which one of spouses has exclusive right of disposal has been applied with his/her consent to other's business or profession, latter has exclusive right to use it within scope of business or profession but consent of both is required for disposition outside that scope.

If third party is not aware which spouse has right of disposal of any unregistered movable (including negotiable instruments made out to bearer), he may assume that holder of movable has that right.

Performance of obligations from acts concerning property by spouse who is not in possession of right of disposal of such property can be restrained by other spouse, which may result in obligation to repair damages by first spouse. Such liability, however, is part of community of property.

At request of one of spouses district court may in certain cases: (a) withdraw and entrust to requesting spouse right of disposal of all or part of community property; (b) cancel community of property of spouses.

Consent of both spouses required for: (a) Purchase of goods on instalment payment plan (unless goods mainly or only regarding business or profession by one of spouses); (b) transaction related to house in which they jointly or other spouse separately lives or to fittings and furnishings of such house; (c) gifts other than usual, not excessive gifts; (d) agreements by which liability under guarantee or other form of surety are incurred by spouse on behalf of third party, unless within scope of business or profession. If spouse acts without consent of other, provisions apply which enable other spouse to invoke invalidity of act by declaration to other party, unless other party acted in good faith or act concerned was gift. If spouse cannot declare his/her will or refuses consent, other spouse able to ask cantonal judge to decide. Both spouses are jointly and separately liable for debts made in scope of normal housekeeping, including employment contract. Spouses are separately liable for other, separately contracted obligations. Creditors to such obligations have recourse against separate assets of contracting spouse as well as community property. Other spouse may prevent recourse against community property by indicating recoverable assets of contracting spouse to creditor.

Duties Between Spouses Relating to Household Expenses.

Spouses must provide each other with essentials. For payment of cost of household including care for and education of children, spouses have mutual obligation to apply income and property in following order: (1) Joint income (in sense of law of matrimonial property), (2) contributions from separate income in proportion of each spouse's income, (3) community property (in sense of law of matrimonial property), (4) contributions from separate property in proportion.

Court may determine otherwise at request by one or both spouses. Each of spouses has towards other during their marriage obligation to realize said contribution by furnishing monies and/or goods out of those assets of which he/she has exclusive right of disposal unless exempted by matrimonial property contract or unless special circumstances would make such contribution unreasonable. On ground of changed circumstances court may at any time, at request of one or both parties, interfere. Separation of households, caused by unreasonable behaviour of one spouse, ends obligation of other spouse to provide first with necessary payment of costs of living. Both spouses remain responsible for costs of care and education of children. Dissolution of any form of community is effected by: (a) Dissolution of marriage, death of one of spouses, disappearance of one of spouses followed by new marriage of other spouse, divorce; (b) separation from bed and board; (c) court's order; (d) respective agreement of spouses made during marriage in form of matrimonial property contract. Dissolution results in division into two equal parts, unless otherwise agreed in writing in advance.

After dissolution of community each of former spouses is 100% liable for those community debts for which he or she was previously liable and 50% liable for other community debts but after payment to creditor of more than his share he has recourse against other one.

Dissolution ends all legal, judicial and contractual administrative provisions. After dissolution spouses can only act jointly with regard to estate. However, provided he/she abandons his/her right from community of property, each of spouses has privilege to exonerate himself from liability in respect of such community debts for which, prior to dissolution, he was not liable. In respect of those debts for which he was liable, he is not exonerated. Heirs and residuary legatees of predeceased spouse have same privilege to be exercised within three months from date when informed of death, which term in special circumstances may be extended by court. Privilege lapses as soon as possible claimant of privilege has taken possession of or made away with any asset of community. If both spouses invoke privilege these provisions are replaced by obligation to liquidate community of goods. At request of one of spouses, court may order dissolution of community property on ground that other one is squandering community assets or by acts infringes upon applicant's right of disposal or without valid reasons refuses to inform applicant about community assets and liabilities and his administration thereof. Application is to be entered in public register and may be accompanied by seizure of assets.

Matrimonial Property Contract.

Such contract can be made prior to marriage or, subject to consent of court, during marriage. Contract must be executed before notary (see category 9 Documents and Records, topic 9.04 Notaries). Otherwise, it is invalid. Contract cannot be invoked against third parties unless registered in public register of marital property held by court. Parties are free in determining their matrimonial property regime provided contract provisions: (a) Are not contrary to rules of law; (b) do not attribute bigger share of liabilities to spouse than his/her share of assets; (c) do not involve parental rights of spouses or rights accorded by law to surviving spouses.

Provisions governing legal community of property regime apply, insofar as contract does not deviate. Several possible matrimonial property systems (all containing some form of limited community of property), are provided explicitly in Civil Code but are relatively rarely used in practice. Complete separation of all community of property is most widely used, however in most cases with stipulation that periodically (e.g. once a year) partners compute their gains and losses and transfer to each other what they deem necessary and/or that in case of divorce or death of one of spouses assets will be divided as if there had been full community of property.

13.06 INFANTS:

Persons under 18 are minors except if they are or have been married or registered partner; (see also topic 13.07 Marriage, subhead Minors and Wards). Minor mother may be declared of age and granted parental authority by court judgment when having reached age of 16.

Legal Acts.

Minor has no capacity to perform legal acts (inclusive of Court actions) on his own unless law provides otherwise. With consent of legal representative given (verbally or in writing) for particular act or (in writing) for specific purpose, minor who can be supposed to understand what he is doing is deemed to have capacity for performing that act, provided that legal representative had authority or was authorized to perform those legal acts for minor. Consent of legal representative presupposed for acts generally accepted in social and economic life to be performed by minors independently. Minor has capacity to enter into employment with verbal or written authorization of legal representative which after four weeks' employment without objection on latter's part is deemed to have been given. In lawsuit based on employment contract minor can be party only with assistance of legal representative. Payment of wages or salary to minor discharges employer unless legal representative stipulated otherwise when consenting or has objected. Minor has capacity to act as agent for legal representative in latter's name and for latter's account without binding himself. If or insofar as incapacity has not been removed legal acts performed by minor can be annulled by legal representative or by minor himself after having attained majority. Party with whom minor has dealt cannot invoke minority to obtain annulment of legal act.

Tort.

Minor under 14 cannot be held liable but his parents with parental authority or guardian are liable. In respect of tortious behaviour of minor's of 14 or 15 years old, parents or guardian are liable next to minor unless parents or guardian prove that they cannot be blamed for not having prevented minor's behaviour.

Emancipation.

If minor has attained age of 16, subdistrict court may at his request grant him certain powers of adult, e.g. to collect and dispose of income, to lease personal and real property, to participate in company or partnership or to exercise profession or run a business, and if such grant (“handlichting”) has been given, minor can sue and be sued independently with regard to these matters. Minor cannot be authorized to dispose of registered goods (including real estate), securities, and claims secured by mortgages. If grant and scope of powers have not been published, it cannot be invoked against third party ignorant of it. Grant may be withdrawn by district court in case of abuse by minor.

Descent (Affiliation).

Mother of child is woman who gave birth to or adopted child. Father of child is man who was married to mother on day of birth, however this presumption can be rebutted by the man and/or the mother within a year after birth of child. Child can deny fatherhood during three years after it discovered that presumed father was not actual father. If there is no marriage father can recognize child, with permission of mother, at Civil Registry (Burgerlijke stand). Court can give permission to father if mother refuses to do so. Married man can recognize child of mother with whom he is not married. If biological father refuses to recognize child mother (within five years after birth) and child of any age can bring paternity suit, even (by way of DNA test) when biological father is already dead. Children born outside marriage have same rights as children born within. Child can be acknowledged by biological father, and also by any other man.

Custody.

If parent has sole custody over period of three years and new partner (married or unmarried) has close personal relationship with child, parent and new partner can have joint custody. Until age of 18 children are subject to custody. When parents are married there is joint custody. After divorce joint custody continues, but court may grant sole custody to one of parents in exceptional cases when in interest of child. Registered partners (man and woman, or two women) obtain joint custody of their children born during their registered partnership, if there is no other parent. Joint custody is possible, upon request, for parents outside marriage or registered partnership.

After death of parent who had joint custody with other person (not being parent), other person has ipso jure sole custody. Court can however, if requested, decide that surviving parent will have (sole) custody over child.

After death of parent who has sole custody, judge will have to decide who will have custody. Judge decides, if requested, that other parent will have (sole) custody, unless there is reasonable fear that interests of child will be neglected.

See also topic 13.04 Divorce.

13.07 MARRIAGE:

Requirements.

Dutch law only acknowledges civil marriages, performed before registrar of marriages. Boys and girls under age 18 are not allowed to marry without dispensation of Minister of Justice unless both at least age 16 and girl being pregnant or having given childbirth. Marriage cannot be concluded if one party is so mentally disturbed that he/she does not understand meaning of statement.

Minors and Wards.

Minor may not marry without consent of those persons who by law are regarded as their parents. If minor is under guardianship, consent of guardian is required as well. If such consent is not obtained it may be replaced by consent of court. Person who is under guardianship on ground of prodigality or abuse of alcohol may not marry without consent of guardian and supervising guardian which, if not obtained, may be replaced by consent of court. Person who is under guardianship because of mental disturbance, may not marry without consent of court.

Marriages prohibited between persons who either by natural ties or by adoption or are legitimately or illegitimately regarded as each other's ascendant and descendant or brother and sister. For weighty reasons, Minister of Justice may grant dispensation to those being brother and sister by adoption.

Formalities.

Notification of marriage is to be made by two parties in person at municipal registrar at residence of one of parties. If both parties have residence outside The Netherlands and want to be married in The Netherlands, registrar in The Hague may be notified, provided one party is Dutch national. Several documents have to be submitted, including certificate of birth of both parties, statement of names and addresses of witnesses (see infra), act of notification. In case one of parties is minor or ward: deed of consent (see subhead Minors and Wards, supra). If one of parties is foreigner: statement of police stating that foreigner has (made request for) residence permit (unless both parties have residence abroad). Sufficient documentary evidence of intention may replace personal appearance. Marriage may not be concluded within 14 days after date of act of notification, except for permission of public prosecutor for important reasons. If marriage is not concluded within one year after date of notification, new notification has to be made. Breach of promise to marry is no cause of action but in case act of notification of marriage has been made, relief can be granted for damaged proprietary interests within 18 months.

Marriage can be stayed by certain relatives, guardians and supervisory guardians if parties do not meet requirements or is spouse-to-be. Public prosecutor also can or, in certain circumstances, has to stay marriage. Marriage may not be concluded before stay has been cancelled, either by person invoking stay or by court. Marriage is concluded publicly by statement of two parties in person before registrar of marriages in city hall, in presence of at least two and at most four witnesses of age. Marriage certificate is supplied by and marriage is registered in local municipal register. Under special circumstances and subject to special requirements place other than city hall and marriage by proxy are possible. Marriage in church is permitted only after marriage before registrar of marriages and has no legal consequences.

Aliens may be married, provided one of them has permanent residence in The Netherlands. This person must be registered in Gemeentelijke Basisadministratie, i.e. Local Administration. Both parties need a Declaration of conformation with Aliens Act. Apart from that normal statutory rules apply. However, documents required such as those evidencing identity, nationality, and single status may differ according to alien's nationality. Numerous bilateral treaties set forth general rules on marriage between aliens and Dutch nationals.

Registered Partnership.

As of Jan. 1, 1998, it is possible that two persons (of different or same sex) have partnership registered. Consequences of registered partnership are similar to those of marriage—same rights and obligations—with two main exceptions. First exception is that registered partnership does not concern relationships with children. Second exception is that registered partnership can be terminated by administrative procedure in case of mutual agreement concerning consequences of separation but only in cases in which registered partners/parents are not required to make parenting plan. If partners do not agree upon one of consequences (e.g., alimony, dwelling, pension, etc.), judicial procedure is necessary.

See also topics 13.04 Divorce, Husband and Wife; category 15 Immigration, topic 15.01 Aliens.

Same-Sex Marriage.

As of Jan. 1, 2001, two women or two men can enter into marriage. The Netherlands is first country to make institution of civil marriage available to same-sex couples. Other countries have followed, e.g. Belgium. Conditions for marriage and consequences of this marriage are same as for marriage between man and woman. Only if it concerns recognition outside The Netherlands and relationship with children are there significant differences. Non-Dutch partners who both live abroad cannot marry in The Netherlands.

Registered partnership was introduced in 1998. Since then, same-sex couples have already been able to regulate their relationship legally in way that is in most respects equivalent to marriage. And yet it was decided to make institution of marriage available to two women or two men. Basic tenet of equal treatment was decisive in this. For many, marriage simply has special value and carries certain symbolism. People may wish to confirm relationship in precisely this manner. And there is no reason to exclude same-sex couples from this.

Conditions that apply to marriage are same as for marriage between man and woman. For instance, partners must in principle be of age of majority and may not be related. For divorce and consequences of divorce, there are no differences between same-sex and different-sex couples.

Non-Dutch partners who both live abroad cannot marry in The Netherlands. If at least one of them lives in The Netherlands or has Dutch nationality, then marriage is possible. This restriction in event of international marriages applies to both marriages between same-sex and different-sex couples. Fact that marriage in which foreigner is involved can be concluded in The Netherlands does not mean that this marriage will be recognized in other countries. Two men or two women who are married have same rights and obligations as do man and wife within institution of marriage. Examples are obligation to support one another, matrimonial property regime (community of property or prenuptial agreement) and inheritance law.

In relation to children, however, there is important difference. If child is born in marriage between man and woman, then according to law, spouses are parents of child. If two men or two women are married, marriage has no consequences for the affiliation of child. In same-sex marriage between women partners obtain joint custody of children born during marriage if there is no legal father. Parent is sole person to exercise parental responsibility. In such situation, non-parent only has obligation to support child. Other rights and obligations exclusively exist after partners obtain joint custody. Only through adoption do lawful family ties arise with child and same-sex spouse/partner.

Marriage and Registered Partnership.

Registered partnership can be converted into marriage. Registrar of births, deaths and marriages must draw up deed of conversion for this purpose. In principle, conversion has no consequences for existing situation. For instance, conversion changes nothing as regards responsibility for child.

Recognition Abroad.

As mentioned, The Netherlands is one of few countries that has made institution of marriage available to same-sex couples. There are, however, countries that offer registered partnership. This means that same-sex couples must take into account fact that their marriage is not accepted everywhere. In particular in event of longer stay or in event of emigration, legal problems may occur in important areas, such as law of inheritance. It is important to obtain expert legal advice on this in good time, either in The Netherlands or in country of destination.

14 FOREIGN TRADE AND COMMERCE

14.01 CUSTOMS:

Applicable import duties are annually established by EU by means of regulation. The Netherlands is party to Schengen Convention.

As consequence only few implementing measures of mainly procedural character have remained in force on Dutch national level such as laid down in “Douanewet” (Customs Act) and “AWR” (General Act on State Taxes). Few items like instruction to customs relating to sampling have remained national Dutch law.

Exemption from import duty can be obtained when imported goods after having been processed in The Netherlands are reexported or when imported goods or materials are used in The Netherlands for manufacturing products which are exported to non-EU Member States. See also category 21 Taxation, topic Taxes, subhead Turnover Tax. Payment of import duties on importation of goods from outside EU can be postponed, and avoided in case of reexportation out of EU, by storing goods under (administratively controlled) bonded warehouse-system.

Excise duty is levied on among others beer, wine, spirits, tobacco and mineral oils.

See topic 14.05 Foreign Trade Regulations.

14.02 EXCHANGE CONTROL:

Note: As of Jan. 1, 2002, The Netherlands national currency is EURO. The Netherlands guilder was converted on ratio of 2.20371 (i.e. [Euro]1 = NLG 2.20371). Contracts and private documents referring to former currency do not require separate action. No restrictions in effect. However, there are certain reporting requirements. See category 3 Business Regulation and Commerce, topic 3.10 Securities.

14.03 FOREIGN EXCHANGE:

See topic 14.02 Exchange Control.

14.04 FOREIGN INVESTMENT:

Generally, foreign nationals and enterprises are given same treatment as The Netherlands subjects in respect of engaging in commercial, industrial or financial activities including establishment of branches, formation of companies and acquisition of majority and even 100% interest in existing companies. All members of managing board may be nonresidents. Status of branch or subsidiary of foreign investor is equal to that of purely The Netherlands investor.

Treaty of Friendship, Commerce and Navigation with U.S.A. (1956) contains general rules concerning admission and legal position of citizens of each country, possibility of carrying on trade, and how expropriation and social insurance are dealt with. In addition, U.S.A. and The Netherlands have entered into mutually favourable treaty for preventing double taxation of, inter alia, corporate profits, dividend and personal income. See category 21 Taxation.

Investments in The Netherlands by nonresidents are no longer subject to foreign exchange control.

Machines, apparatus and spare parts which non-EU company supplies to its subsidiary in The Netherlands or contributes as investment are not exempt from import duty, even if they were manufactured by foreign company. See topic 14.01 Customs.

Investment deduction is granted for investments in classified business assets if total amount of investments exceeds [Euro]2,100 but not [Euro]232,000 per annum. Investments less than [Euro]450 (i.e. not qualifying as a means of business) are excluded. Deduction decreases if total amount of investment in one calendar increases. Sliding scale starts at 25% for small investments and decreases to 1% for large investments. Investments in business assets in interest of energy efficiency may be deducted by 44%.

Apart from this investment deduction, cash grants may be allowed if new businesses are established or existing businesses are expanded in certain designated area.

See also topic 14.02 Exchange Control; category 15 Immigration, topic 15.01 Aliens.

Special government agency facilitates: Netherlands Foreign Investment Agency (http://www.nfia.com).

14.05 FOREIGN TRADE REGULATIONS:

The Netherlands is member state of EU, EC, Euratom Treaties and party to WTO.

By virtue of EC Treaty, Member States form customs union covering all trade and comprising prohibition, as between these states, of customs duties on importation and exportation and all charges having equivalent effect. Member States have adopted common customs tariff for their relations with third countries. Quantitative restrictions on imports or exports and all measures having equivalent effect are prohibited between Member States. This also applies to products in free circulation in member state and originating from third country, as European Court of Justice held in case 41/76 (Donckerwolcke) (1976) ECR 1921.

In principle (foreign) trade with third countries is subject exclusively to rules of EU commercial policy, which, apart from customs duties and antidumping duties, provide for completely free imports and exports. Only certain imports and exports are subject to special EU-rules. For instance: agricultural goods may be subject to import quota and are always subject to veterinarian or phytosanitary requirement for prevention and combat of plant diseases.

Furthermore special EU restrictions apply in field of rare animal and plant species, cultural goods, strategic goods, waste and dangerous substances.

The Netherlands have made use of their residual powers to adopt rules on export of military goods and cultural goods (both to other Member-States of EU, as well as to third countries). These restrictions cover both disposal for benefit of non-Dutch nationals as well as transportation abroad.

Furthermore, from time to time specific measures are adopted in The Netherlands to comply with international legal requirements in relation to export of goods to countries such as North Korea or to prohibit foreign exchange with these countries. These rules as well as rules adopted to implement EU-legislation, are based on “In- en Uitvoerwet” (Act on Imports and Exports) and “Sanctiewet” (Sanction Act).

See also topics 14.02 Exchange Control and 14.04 Foreign Investment.

Anti-bribery Legislation.

Pursuant to OECD Corruption Treaty, provisions of Dutch Penal Code dealing with bribery, have been amended as of Feb. 1, 2001, such that it applies to all Dutch persons and legal entities who bribe (foreign) public servants abroad.

15 IMMIGRATION

15.01 ALIENS:

Visas are needed for entry. But agreements with many countries (including U.S., Canada, Japan) allow visitors to enter without visa to stay for period of three months. Employed labour not allowed during this period. Residence permit required for stay longer than three months. Citizens of many countries (U.S., Canada, Japan and number of others not among them) need apply for prior approval (“machtiging tot voorlopig verblijf or MVV”) at Dutch diplomatic mission in home country before entering The Netherlands to apply for residence permit.

Aliens Act 2000 regulates admission and expulsion of and control over aliens. Furthermore it sets conditions for granting and withdrawal of permits to stay for longer than three months, permits to establish residence and granting and withdrawal of status of refugees. From decisions taken by authorities aliens have general right to request revision according to c. 7 of Aliens Act 2000 and rules in General Administrative Law Act with some exceptions and changes as mentioned in c. 7 of Aliens Act 2000. Non-EU citizen intending to work in The Netherlands is granted stay permit only if Dutch employer has obtained work permit (see below) for employing alien. In other cases non-EU citizen must prove that his stay in The Netherlands is in interest of Dutch society, or that his stay should be granted for urgent humanitarian reasons ("Klemmende redenen van humanitaire aard"). Generally, aliens must prove to be financially independent. Proposed revision of Aliens Act is mainly aimed at curtailing procedures regarding refugees.

Labour (by) Foreign Employees Act (Dec. 21, 1994) requires employer to obtain work-permit for employment of foreign employees. Employment without permit is misdemeanor and employer may be prosecuted. Certain categories, like nationals of EU-countries are exempted. Permit is applied for at district labor office by employer with Central Board of Employment Office formally deciding. Grounds for refusal are refusal of alien's request for stay permit or existence of labor supply enjoying priority meaning nationals of all EU-countries as well as Norway and Iceland. Labour office must have been notified of vacancy at least five weeks before filing of request for work permit. More lenient policies for issuing work-permits apply with respect to international key or specialist personnel as well as to their spouses. Applicants can ask for revision of refusal to Central Board. Judicial appeal is possible to district court which may also give temporary injunction.

EU nationals are exempt from most restrictions based on Aliens Act.

Extradition Act (1967) contains ratification of European Convention on Extradition (Paris, Dec. 1957) and Benelux Convention on Extradition (Brussels, June 1962).

Convention stipulates that extradition is possible for committed offences, punishable with one year or more imprisonment, in both extraditing country and country claiming extradition.

The Netherlands reserves right to refuse extradition on humanitarian grounds. No extradition is granted where serious reason to believe that person, whose extradition is sought, will be persecuted for his religious or political views, his nationality or race.

Procedural Rules.

Generally private and commercial laws of civil and criminal procedure are same for aliens and Dutch citizens. For most aliens treaties provide that, as plaintiff, they are not required to post bond for costs of litigation and that, whether plaintiff or defendant, they enjoy benefit of legal aid system in same way as Dutch citizens. As of Jan. 1, 2002, arts. 2-14 of new rules in Civil Procedure Code (CPC) give Dutch courts undiminished jurisdiction according to treaties and EU Regulations.

In general in case commenced by writ of summons (dagvaarding), Dutch court has jurisdiction if defendant has his domicile (in Dutch sense of that notion; see arts. 1:10-1:14 Civil Code) or his habitual residence in The Netherlands. If case is commenced by petition (verzoekschrift) Dutch courts have jurisdiction if (i) plaintiff or interested party has his domicile (in Dutch sense of that notion; see arts. 1:10-1:14 Civil Code) or his habitual residence in The Netherlands, (ii) petition relates to case in which Dutch court has jurisdiction and that case has been or must be commenced by writ of summons, or (iii) case otherwise has sufficient connection with Dutch jurisdiction. Special jurisdiction is provided in arts. 4-8 CPC. If Dutch courts do not have jurisdiction according to arts. 2-8 CPC, they nevertheless have jurisdiction if (i) it concerns legal relationship that can be freely regulated by parties and defendant or interested party has not appeared in court exclusively with purpose of denying jurisdiction of Dutch court, unless Dutch courts have no reasonable interest in having jurisdiction, (ii) legal proceedings abroad appear to be impossible, or (iii) case which must be commenced by writ of summons has sufficient connection with Dutch jurisdiction and it is not reasonable to expect plaintiff to bring case abroad. In cases commenced by writ of summons, plea that Dutch court has no jurisdiction must be entered before all other defenses. If case is pending in court abroad and in that case decision delivered by foreign court can, under certain circumstances, be recognized in The Netherlands, or can be executed there, Dutch court that hears case between same parties concerning same issue, can stay “Dutch” case until decision is delivered by foreign court. If foreign decision has been delivered and can be recognized in The Netherlands, or can be executed there, Dutch court will declare itself to be incompetent in “Dutch” case. Jurisdiction of Dutch courts to take interim or provisional measures cannot be disputed by raising sole ground that Dutch courts do not have jurisdiction to hear case on merits. For application of regulations concerning jurisdiction of Dutch courts, Dutch part of continental shelf is on same footing as territory of The Netherlands.

Conflict of law rules are based mainly on domicile. EC Regulation no.44/2000 provides different jurisdiction rules for suits among residents of EEC countries.

Corporations Owned or Controlled by Aliens.

No general disqualifications apply. Some provisions of Codes or of separate Acts or Royal Decrees have different rules for residents and nonresidents respectively instead of distinction citizen/alien. Others use both distinctions as factor. According to Dutch-American Friendship Treaty U.S. citizens are entitled to stay permit to develop enterprise in The Netherlands in which they have invested minimum of about [Euro]4,538—or have share capital interest of at least 25%. See also category 2 Business Organizations, topic 2.03 Corporations, subhead Corporations Owned and/or Managed by Foreigners.

Under Nationality Act of 1984 (as am'd by Act of Dec. 20, 2000, Stb. 2002, 618 and Act of Apr. 18, 2002, Stb. 2002, 222, in force since Apr. 1, 2003) Dutch citizenship is acquired by birth if one of parents is Dutch citizen and by adoption if one of parents is Dutch citizen. Foreigners can apply for Dutch citizenship by naturalization or by option. In case of naturalization continual period of legal residence of five years in Netherlands is in general required.

Whoever acquires Dutch citizenship by naturalization has as rule to reject his citizenship of origin. In some cases such obligation does not exist, i.e. spouse of Dutch citizen. Acquiring Dutch citizenship by option is possible for e.g. stateless children, migrants of “second generation” and immigrants who remain in The Netherlands for long period of time. They have no obligation to reject their citizenship of origin.

Whoever wishes to qualify for Dutch citizenship by naturalization has to fulfill naturalization test (knowledge of Dutch language, Dutch political science and Dutch society, to be evidenced by written and oral examinations).

Children legitimated by Dutch men acquire nationality if man is biological father or right of option is used before child is seven years old. In other cases, children must be maintained and educated by that father for period of three years before they can obtain Dutch citizenship.

In general Dutch citizenship will lapse if Dutch citizen voluntarily acquires different citizenship.

Obtaining Dutch citizenship by fraudulent means can lead to withdrawal of Dutch citizenship, even if consequence thereof means that person in question becomes stateless.

Aliens who have married Dutch citizen can apply for citizenship after three years of marriage.

See categories 2 Business Organizations, topic Corporations; Business Regulation and Commerce, topics Contracts, subhead Applicable Law, Trade Register; Debtor and Creditor, topic

Bankruptcy (Moratorium); Employment, topic Labor Relations; Family, topic Divorce; Foreign Trade and Commerce, topic Foreign Investment; Property, topic Real Property; Taxation, topic Taxes.

16 INSURANCE

16.01 INSURANCE LAW:

Insurance Companies.

"De Nederlandse Bank (DNB)" is supervisory authority for insurance companies. Address of DNB is P.O. Box 98 1000 AB Amsterdam; tel. +31(0)205249111.

Insurance company (life or non-life) with its head office in The Netherlands is not allowed to exercise insurance business in Netherlands without license provided by DNB. Insurance company needs license for each class of risks in which it is active.

Starting insurance company with its head office in The Netherlands must possess adequate resources which are at least equal to amount of so-called minimum guarantee fund. Minimum guarantee fund for life insurance companies is [Euro]800,000. Minimum guarantee fund for non-life insurance companies depends on classes in which insurer is active. It varies between [Euro]200,000 for e.g. legal assistance insurers and [Euro]1,400,000 for credit insurers.

Over and above technical reserves insurance undertaking must possess supplementary reserve, known as solvency margin, represented by free assets and, with agreement of supervisory authority, by other implicit assets, in order to guarantee against business fluctuations. In subsequent course of business solvency margin is not allowed to fall below minimum guarantee fund.

Authorisation granted by supervisory authority of EC Member State in which insurance company has its head office is also valid to carry on business in The Netherlands, either by way (of right) of establishment or by way of freedom to provide services, provided that insurance company has notified its own supervisory authority.

After this notification insurance company is allowed to establish branch (affiliate) in Netherlands or to provide its services in The Netherlands from his head office or from branch (affiliate) in another member state of EC (plus Norway, Liechtenstein and Iceland), together forming so-called European Economic Space.

Insurance company with its head office outside European Economic Space needs to have license provided by DNB to establish branch in The Netherlands. Moreover, insurance company with its head office outside European Economic Space is also allowed to provide its services in The Netherlands from its head office.

Financial Supervision Act also lays down rules concerning transfer of rights and obligations under insurance contracts, as well as rules concerning mergers; it also contains special emergency regime and regime which is applicable in case of bankruptcy.

Decisions made by DNB under Insurance Supervision Act can be challenged before court of Rotterdam. Any infringement of Act is punishable under Economic Offences Act (Wet op de economisch delicten).

Insurance Brokers and (Underwriting) Agents.

Insurance intermediary business is governed by Financial Services Act (Wet op het

Financieel toezicht).

Insurance intermediaries (brokers and agents) are allowed to do business with license issued by supervisory authority (Authoriteit Financiële Markten). Underwriting agent (de gevolmachtigde agent) who has been provided with license to undertake insurance business on behalf of insurer has to fulfil same requirements of professional skill. Underwriting agent has mandatory power to represent insurer in Court in disputes concerning insurance contracts which it has entered into on behalf of insurer. Authority keeps register of insurance intermediaries and underwriting agents.

Tax.

Dutch insurance companies are subject to corporate income tax which is established under Corporate Income Tax Act. Current corporate income tax rate is 25.5% for taxable income exceeding [Euro]60,000 and 23.5% for taxable income between [Euro]25,000 and [Euro]60,000 and 20% for first taxable income.

Value Added Tax.

Liability for Dutch Value Added Tax is established under Turnover Tax Act 1968. VAT is levied on supply of goods and services within The Netherlands by undertakings conducting their business enterprise. Services of insurance companies and insurance intermediaries are free from VAT.

Insurance tax is levied on indemnity insurance premiums if policyholder is resident in The Netherlands or if insured object is located in The Netherlands. Rate is 7%. Exemptions are available for life insurance, sickness, casualty, disability and unemployment insurances.

General Principles of Insurance Contract Law.

Title 17, Book 7 of Dutch Civil Code contains rules on insurance contracts.

Two types of insurance contracts can be distinguished; indemnity insurance (insurer binds itself to compensate insured for damages that insured may suffer) and non-indemnity insurance (insurer binds himself to pay certain sum of money to insured regardless of damage insured may have suffered). Non-indemnity insurance is only allowed for some risks, among which are life or health of persons.

Insurance is informal contract, but contract must be laid down in deed, signed by insurer and delivered by insured as soon as possible. (Art. 7:932).

Prior to conclusion of contract insured has to disclose all facts of which he has or should have knowledge and as far as he understands or should understand would mean that insurer, had these facts been known to it, would have agreed to cover insured or only to cover subject to conditions which are less favourable to insured. In principle entitlement to indemnification is only forfeited if there is fraud or there is clear link between damage insured and undisclosed relevant information. (Arts. 7:928-930).

In most cases of indemnity insurance it is damage caused by specific event (fire, burglary, accident, etc.) to particular object (house, business, car) that one insures oneself against, peril being specified in policy. Peril must be “uncertain”. Uncertainty on part of both parties upon conclusion of contract is essential. If one of parties knows event to be certain, there is no valid insurance contract. (Art. 7:925).

Insured object does not have to be insured's property. One may insure against damage to interest one has in another's property. This is not to be confused with case where one takes out insurance against damage to interest of another person (insured), who in that event is entitled to compensation. This construction, however, should be stated explicitly in policy, otherwise insurance is considered to cover interests of insured (policyholder). (Art. 7:946).

Law recognizes “principle of indemnity” (on indemnity insurance); insurance shall not be source of profit for insured; he shall obtain no compensation which would evidently be advantageous to him. (Art. 7:960).

Insurer is not obliged to pay compensation for damage caused by nature of object insured or defect therein (inherent vice; proper vice). (Art. 7:960). Compensation need not to be paid if damage is caused by insured himself either on purpose or by recklessness. (Art. 7:952).

If insurer compensates insured, then claim of insured against third party will pass to insurer, but only to extent of amount of compensation paid. Insurer is, in other words, subrogated in claim against third party. (Art. 7:962).

Arts. 7:951, 7:952 and 7:962 do not apply in case of non-indemnity insurance.

17 INTELLECTUAL PROPERTY

17.01 COPYRIGHT:

Dutch copyright Act is based, in principle, on Berne Convention, and follows provisions of Convention fairly accurately. The Netherlands is also party to Universal Copyright Convention and, as of Jan. 7, 1995, to Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPs), so that, for all practical purposes, works made or published in most countries of world will be protected under Dutch Copyright Law.

Copyright Act requires no notice, registration, deposit or any other formality for award or continuation of copyright. Copyright subsists in all manner of creative works. Act defines considerable numbers and categories of works, but protection is not necessarily limited to these. There is actual debate on definition of “work”, for moment concluded by Dutch Supreme Court in Endstra tapes case (HR May 30, 2008, LJN BC2153, Endstra/Nieuw Amsterdam), stating that “work” consists of two pillars: (1) Unique original character and (2) personal imprint from work’s creator. Work does not have to be deliberately created. In recent case (ECJ 16-07-2009, C5-8, *Infopaq*), ECJ explained for first time what has to be understood under ``work'' in Infosoc Directive: Work should have ``unique original character'', which is case when it consists of unique personal intellectual creation of author. Even parts of larger work can be independent works, if they have originality of complete work in them. Dutch courts will have to follow this definition in their jurisprudence. Right continues for 70 years after death of maker of work, or, in some cases, after its publication.

Protection against all unauthorized publication or reproduction is provided, including for example renting, reissuance of works broadcast via another broadcasting entity. Moral rights are recognized to certain extent. Computer programs have been awarded copyright protection. (Mask works are protected by separate act. See topic 17.04 Patents, subhead Chips.) Act provides that one is entitled to oppose publication of one's portrait (including photographs) if one has “reasonable interest”. Fact that one is celebrity who can command payment for use of one's portrait's is held to be “reasonable interest”. In its decision of June 16, 2006, NJ 2006, 585 (Kecofa vs Lancôme) Dutch Supreme Court, for first time ever, granted copyright protection to mere flavour. This judgment stands alone in EU copyright jurisprudence.

Exceptions.

Limited incursions on copyright are accepted under Act, among which are, for purposes of compilation; quotation; private use and education. Lending is not considered incursion on copyright, provided equitable remuneration is paid. European Community and European

Economic Area exhaustion rule applies to works (products) put on market by or with permission of author (this rule does not apply to renting and lending).

Remuneration for Photocopying Documents.

As of Mar. 28, 2002, Copyright Act has been amended in matters relating to remuneration for photocopying documents. Provisions are now effectively applicable to corporate sector. Small amounts and private use of photocopies are exempt. Rates remain unaltered.

Performing Artists; Producers of Phonograms; Broadcasting Organisations.

See subhead Neighbouring Rights, infra.

Assignment must be in writing and may be by will. Licenses may be in any form, including oral or even tacit. Moral rights cannot be assigned.

Intermediary in exploitation of copyright in musical works is, by monopoly right created by Copyright Act, conferred upon two specific bodies set up for that purpose, BUMA and STEMRA, comparable to German GEMA.

See also topic 17.02 Designs.

Neighbouring Rights.

Neighbouring Rights Act (NRA) came into force in 1993. From that date The Netherlands has been party to Rome and Geneva Conventions (before 1993 protection was based on general principles of tort).

NRA grants exclusive rights to: (1) performing artists, (2) producers of phonograms and (3) broadcasting organizations.

Protection against unauthorized use (e.g. registration, reproduction, distribution, transmission by cable or satellite, renting etc.) of performances, phonograms and broadcasts is provided. As regards secondary use of commercial records (e.g. broadcasting thereof), performers and producers are entitled to equitable remuneration. Neighbouring rights remain applicable for period of 50 years after date of performance, production of phonogram or broadcast.

Exceptions.

NRA contains exceptions similar to Copyright Act.

Assignment and Licenses.

Must be in writing except where inherited. Moral rights cannot be assigned.

Intermediary.

New Collecting agency SENA collects remuneration for secondary use of commercial records.

Database Rights.

Database Act entered into force on July 21, 1999. It serves to implement EU Directive on databases. Unlike EU Directive, Act leaves room for pseudo-copyright protection of databases which have not been obtained or maintained through any substantial investment. If database is only derived from business’ core activity, it is not likely to be protected under Database Act (Hof Arnhem, July 4, 2006, IER 2006/87, p. 114, NVM-makelaars/Zoekallehuizen.nl). Not considered breach of database rights is (repeated) collecting of database records as long as this collecting does not result in substantial draining of database (District Court Utrecht, Nov. 21, 2007, Autotrack.nl/Gaspedaal.nl).

Future Legislation.

"Directive on Electronic Commerce" (Directive 2000/31/EC on certain legal aspects of information society services, in particular electronic commerce, in Internal Market) has been implemented. Directive 2001/29/EC on harmonisation of certain aspects of copyright and related rights in information society was implemented on July 6, 2004. Directive 2001/84/EC on resale right for benefit of author of original work of art was implemented on Feb. 9, 2006. See topic Enforcement for implementation of Directive 2004/48/EC on enforcement of intellectual property rights.

17.02 DESIGNS:

Uniform Benelux Act on Designs and Models ("Act").

On Jan. 1, 1975, Act entered into force, creating uniform system of design protection for Belgium, Luxembourg, and The Netherlands. Designs protected before Jan. 1, 1975 under existing national laws of these countries continue to enjoy pre-existing protection.

National Courts are competent in cases involving Act, but may refer questions concerning interpretation of Act to Benelux Court.

Benelux Treaty concerning Intellectual Property.

On Sept. 1, 2006, BTIP replaced Uniform Benelux Act on Designs and Models. Early in 2007, BTIP was adapted to conform with Directive 2004/84/EC, Court 2005, 96; Sib. 2006, 262 and Court 2005, 96; Sib. 2006, 604. National courts are competent in matters involving BTIP, but courts may refer to Benelux Court and/or European Court of Justice concerning questions of interpretation of BTIP.

Design.

New appearance of utility product may be protected as design. Originality is no requirement, novelty and distinct character suffice. Excluded from protection are aspects of appearance of product which are indispensable for achieving technical effect.

Right to design is acquired by first application for registration at Benelux Bureau for Designs and Models unless design is not new or application does not sufficiently disclose characteristics of design. Design is not new if either: (i) At any time during 50 years preceding application date such design, or design differing only in minor aspects, has been known in relevant industrial or commercial circles in Benelux, or (ii) identical or confusingly similar design has been registered previously.

Maximum period of protection of registered design is 25 years. (See subhead Future Legislation, infra.) Protection by concurring copyright may continue thereafter.

Cancellation and Infringement.

Nullity of registration may be invoked on grounds enumerated in Act. Most important are: (i) Design is not design as defined by Act, (ii) design is not new, or (iii) application insufficiently discloses characteristics. Owner of registered design may forbid manufacture, sale, etc. of identical designs or of designs which differ only in minor aspects, and claim damages. European Community and European Economic Area exhaustion rule applies to designs and models (products) put on market by or with permission of right holder. Unregistered designs are not protected and no unfair competition action against imitation can be instituted if registration of design has been omitted.

Copyright.

Design can be concurrently protected under copyright law, if sufficiently original. If design is registered, copyright protection after termination of design registration's effect continues only if notice to that effect is filed in Benelux Design Register. Recent case law by Supreme Court indicates no such formal notice may be required. Copyright for designs is very broad, also due to limitation mentioned above.

Assignment and License.

Assignment of design must be in writing; for license of design no written statement is required. To have effect against third parties, assignment and license must be recorded in design register.

European Community Designs.

On Dec. 12, 2001 EU's Council of Ministers adopted Regulation on Community Designs. Regulation sets up simple and inexpensive procedure for registering new designs with individual character with EU's Office for Harmonisation in the Internal Market in Alicante. Maximum period of protection for registered designs is 25 years. As from Mar. 6, 2002 unregistered designs will also be protected for three years.

Future Legislation.

Directive 98/71/EC on legal protection of designs was implemented on Mar. 24, 2004, changing the maximum period of protection from 15 to 25 years (Art. 12 Uniform Benelux Act on Designs and Models). Pursuant to Art. 3 clause 2 of Directive, Art. 1 clause 1 of Uniform Benelux Act on Designs and Models now requires designs to have distinct character, in addition to novelty, to be eligible for protection. European Community exhaustion rule is provided as well, thereby changing formerly limited Benelux exhaustion rule of Art. 14 clause 6 of Uniform Benelux Act on Designs and Models, and in line with case law of European Court of Justice. See topics Enforcement for implementation of Directive 2004/48/EC on enforcement of intellectual property rights; also see Trademarks, subhead Future Legislation for Benelux Treaty on Intellectual Property (designs, models and trademarks only), to take effect on Aug. 1, 2006.

17.03 ENFORCEMENT:

Directive 2004/48/EC on enforcement of intellectual property rights issued on Apr. 29, 2004 should harmonize enforcement measures for intellectual property holders in European Community. Position of intellectual property holder strengthened, and procedures made more clear and uniform. Many measures in Directive already provided in contemporary Dutch Code of Civil Procedure and/or intellectual property statutes and/or case law. Insofar as required, Code and these statutes will be complemented. Intellectual property statutes that need amendment include Copyright Act, Neighbouring Rights Act, Database Act, Benelux Treaty concerning Intellectual Property and Patent Act. Patent Act amended separately, since it is statute with special legislative stature. Amendments concern among other things and mostly complementing existing rights and measures: correct information about origin and distribution channels infringing goods or services; recalls, removals, and destruction of infringing goods at cost of infringer; publication of court ruling at cost of infringer (apart from rectification); measures for safeguarding evidence if danger of destruction is proved, including description or seizure of infringing goods, and abstaining order (ex parte); damages, seizures, rule infringing party is to bear costs of procedures, and extension certain claims to intermediates in infringement. Neighbouring Rights Act will be amended also as to assumption of right holder (comp. Art. 4 Copyright Act). Amendments to Patent Act effective on July 1, 2006. Legislative proposal for other amendments pending.

17.04 PATENTS:

For accurate understanding, it is necessary to establish fact that The Netherlands is Member State of EU, contracting state of European Patent Convention and Strasbourg Convention on Unification of Certain Points of Substantive Law on Patents for Invention. As result, Dutch Patent Law is strongly influenced by and based on European Legislation. Larger number of articles of Dutch Patent Act is one-on-one copy of articles of treaties aforementioned. In The Netherlands one can apply for Dutch patent. Number of Dutch patents is quite low. On other hand, number of European patents granted for The Netherlands is reasonably bigger (see infra subhead “European Patents and Legislation”).

Obtaining of Patents.

Patents valid for The Netherlands may be obtained through national filing of application (see for specific rules C. 2 of the Dutch Patent Act (hereafter: DPA), or through filing of application under European Patent Convention (see for specific rules Third part, C. 1 of The European Patent Convention (hereafter: EPC). In latter case, filing may also be made pursuant to Patent Co-operation Treaty.

Subjects for Which and Persons to Whom Patents are Granted.

Patent must be granted for any inventions, in all fields of technology, provided that they are new, involve inventive step and are susceptible of industrial application. (See arts. 2, 4-6 DPA and 52 EPC). Last paragraphs of art. 52 EPC provide list with examples of objects which are not applicable for granting of patents. For example, patent must not be granted for: (a) Discoveries, scientific theories and mathematical methods; (b) aesthetic creations; (c) schemes, rules and methods for performing mental acts, playing games or doing business, and programs for computers; and (d) presentations of information. See for complete list art. 52 of EPC. Compare arts. 3, 8 clause j, art. 15 clause 5, and 16 clause 5 of Biodiversity Conventions. Furthermore, see arts. 3 DPA, 53 EPC).

Novelty and inventiveness.

Art. 54 of EPC reads as follows: “An invention shall be considered to be new if it does not form part of the state of the art”. Second paragraph states that “The state of the art shall be held to comprise everything made available to the public by means of a written or oral description, by use, or in any other way, before the date of filing of the European patent application”. (See art. 54 EPC.) Invention shall be considered as involving inventive step if, regarding state of art, it is not obvious to person skilled in art. If state of art also includes documents within meaning of art. 54, paragraph 3 EPC, these documents shall not be considered in deciding whether there has been inventive step. (See arts. 4-6 DPA and 54, 56, and 57 EPC.)

European patent application shall designate inventor. If applicant is not inventor or is not sole inventor, designation shall contain statement indicating origin of right to European patent (art. 8 DPA and 81 EPC). For particular rules concerning who has right to patent object, see arts. 8, 11-13 DPA and Part II C. II of the EPC.

Obtaining National Patent and Legislation.

As of Apr. 1, 1995, system of national patent filing has been substantially changed.

Application must be filed in Dutch.

Applicant may indicate, within 13 months, whether novelty search is required. If applicant foregoes novelty search, patent can be registered immediately. Registration leads to automatic grant of patent. Patent thus granted have limited period of validity of six years after date of application.

If novelty search is duly requested and performed, patent is also granted upon registration. Registration takes place after 18 months, unless applicant requests registration to be effected sooner. Granting of patent takes place after both registration and novelty search have been made. Patent obtained in this manner has maximum validity of 20 years after application date.

New national patent system does not necessarily provide for substantive material examination of application. If novelty search is carried out, outcome will be articulated in written opinion, which also discusses inventiveness. In granting patent, Patent Centre ("Octrooicentrum", former Bureau for Industrial Property) therefore gives no ruling on patentability of subject matter of application. Third parties are free to dispute patentability of that subject matter in Court.

In The Netherlands, Dutch Patent Act was evaluated from 1995 until 2006 (Evaluatie 2006 Rijksoctrooiweg 1995). See explanatory memorandum (Kamerstukken II 2006/07, 30 975, no. 3), proposal of Bill (Kamerstukken II 2006/07, 30 975, no. 2) and alternated proposal of Bill (Kamerstukken II 2006/07, 30 975, no. A). Last modification of DPA was in June 2008. Important modification can be found in fact that patent with validity of six years has been cancelled. Dutch Supreme Court ruled that "essence" of invention is decisive for granting of patent (HR 20 June 1930, NJ 1930, 1217 Philips vs. Tasseron, compare HR Jan. 27, 1989, NJ 1989, 506 (Meijn vs. Stork).

See also Protocol on Interpretation of §69 of European Patent Convention.

European Patents and Legislation.

European patent is patent granted in respect of European Patent Convention. The Netherlands may be designated by applicant as one of countries in which this European patent is legally binding. The Dutch Patent Act is generally applicable to "European" patents also, when The Netherlands is designated, and same rights devolve to "European" patent as to "Dutch" patent, provided that translation into Dutch of the European patent has been filed with Patent Center within three months after publication of granting of European patent. One branch of Munich European Patent Office is established in The Hague (Rijswijk). Patentee cannot hold national patent and European patent for same subject matter. In that instance, national patent with identical filing date becomes ineffective as soon as corresponding European patent is granted.

On European level, on Dec. 13, 3007, EPC 2000 entered into force.

Patent Rights, and Obligations of Patentee.

National patents may only be valid for period of 20 years (due to last change of DPA) from application date. Term of European patent shall be 20 years as from date of filing of application.

Assignment of patent or patent application must be in written form. For effect against third parties, assignment must be registered at Patent Centre.

Patentee has exclusive right (according to art. 64 EPC jo. 53 of DPA): (a) to make, use, put on market or resell, hire out or deliver patented product, or otherwise deal in it in or for his business, or to offer, import or stock it for any of those purposes; (b) to use patented process in or for his business or to use, put on market, or resell, hire out or deliver product obtained directly as result of use of patented process, or otherwise deal in it or for his business, or to offer, import or stock it for any of those purposes, with exception of any product excluded from grant of patent pursuant to Art. 3 of the DPA (compare art. 54-60 of DPA and 64 EPC).

Under certain circumstances, patentee may also oppose sale or supply of non-infringing goods, if intended for infringing use. The European Community and European Economic Area exhaustion rule applies to products put on market by, on behalf of or with permission of patentee. Excluded from exclusive right of patentee, and therefore permitted, are: (i) use for purposes of study or experimentation only, (ii) use aboard foreign ships or in other means of transportation, and (iii) prior user right, for persons who already applied invention in Dutch Kingdom (national patents) or The Netherlands (European patents) before patent application was filed. Scope of patent is determined by contents of its claims, description and drawings serving to explain such claims.

Licensing.

Patentee can grant license orally or in writing. Written license registered with Patent Center has third party effect. Compulsory license may be granted by Minister of Economic Affairs when required by public interest, or by courts if: (i) insufficient exploitation of patent, or (ii) license is needed for use of younger patent. On May 17, 2006, EC Regulation 816/2006 issued for uniform interpretation of WTO Decision on implementation of §6 Doha Declaration on TRIPS and Public Health (in force June 29, 2006). Procedure was established for granting compulsory licenses for patents and supplementary protection certificates and concerning manufacture and sale of pharmaceuticals for export to certain countries or for public health reasons.

Damages can only be claimed in case if infringer knew that he infringed patent. Writ served upon infringer serves as constructive knowledge. Instead of damages, court may award profits derived from infringement and destruction of infringing goods. (See topic Enforcement for implementation of Directive 2004/48/EC on enforcement of intellectual property rights).

For patented products put into circulation in Dutch Kingdom before effective date of patent (i.e. publication of grant or decision to grant, depending on which procedure is applicable), patentee may claim reasonable compensation (but no more) if certain conditions are fulfilled.

Patent can be declared invalid only on grounds specifically mentioned in Dutch Patent Act and EPC. Most important grounds are lack of novelty, lack of inventive step, and insufficient disclosure of invention.

Cross-Border competence.

In 2006, cross-border competence of Dutch courts in infringement cases was highly restricted by rulings of European Court of Justice in Roche vs. Primus (ECJ Case C-450/07) and Gat vs. Luk (ECJ Case C-4/03).

As can be found in art. 22 (4) Council Regulation No. 44/2001 of Dec. 22, 2000 on jurisdiction and recognition and enforcement of judgments in civil and commercial matters, Dutch judge has competence in cases concerning registration/validity of patents, but only if patents are registered in The Netherlands. Because of this, these disputes will be decided by courts with which they have closest (practical and legal) connection. Limitation of competence does not prevent cross-border injunction in summary proceedings. President of the District Court in H3/Bettacare—case with nullity defense against patent—decided that he has jurisdiction to grant provisional measures about practicability of such defense in this case. (See Vzr. Rb's-Gravenhage Sept. 21, 2006, BIE 2006, 91.) Rationale behind this is fact that these provisional measures do not have permanent character on international level. As result, cross-border infringement-injunction as provisional measure is still possible. (See Vzr. RB.'s-Gravenhage Oct. 19, 2007, BIE 2007, 104 [Van Kempen vs. Kuipers]).

Alternation of conclusion after granting.

In 2007, Spiro/Flamco-doctrine (HR 9 Feb. 1996, BIE 1996, 94, p. 334.) was further enforced. Maintaining patent partly is possible when limitation of person skilled in art are clearly determined in patent claims of art.

Because of implementation of art. 138 paragraph 3 EPC 2000, European patentee is always allowed to reduce scope of its patent in nullity procedure, by changing claims. This article will therefore influence doctrine of Dutch Supreme Court that changing claim in case of partial nullity of patent is only allowed in case change was predictable by person skilled in art.

On European level, art. 105a became part of EPC, providing central claim for limitation of European patent in Munich, with “limitation procedure”.

Level of protection.

The Dutch Supreme Court re-stated its findings in Ciba-Geigy in case Lely vs. Delaval HR Sept. 7, 2007, no. C06/054HR, B9 4655 (Sept. 12, 2007). It ruled that Court of Appeals—in respect of Ciba Geigy-case—used right standards by choosing “inventive idea” behind words of claims as decisive measure in contrast to verbatim text of claims. This resulted in level of protection which is smaller than, compared to level of protection which stems from exact words of claims. The Dutch Supreme Court explicitly refers to art. 69 paragraph 1 of EPC and Protocol. It is questionable that this means Dutch Supreme Court corresponds to art. 69 paragraph 1 EPC and Protocol in more scrupulous way. Future will show.

London Agreement.

In 2007, London Agreement was ratified and came into force on 1 May 2008. Translations of patents are no longer necessary. European patent is granted in either English, French, or German. Claims have to be translated into all three languages. For claiming in another country, claim should be translated into that particular national language as well. Concerning Germany, France, and UK, description does not have to be translated if European patent was granted in another official language than their “own” language. Claims still need to be translated in all three official languages. For other countries, such as The Netherlands, translation of description is no longer necessary if European patent was granted in English. Translation of claims into Dutch is sufficient. This does not apply for to granting patents in French or German. In such cases, description needs to be translated.

Chips.

As of Nov. 7, 1987, Dutch law provides specific protection for semi-conductor topographies. Protection is obtained by depositing topography with Bureau for Industrial Property. Deposit must be made within two years after topography has first been put to use. Period of protection is ten years, or 15 years for topographies which have never been put to use or deposited.

Mask Works.

See subhead Chips, supra.

Treaties.

The Netherlands have ratified, inter alia, following treaties: (a) Stockholm text Paris Convention for Protection of Industrial Property; (b) European Patent Convention; (c) Patent Cooperation Treaty; (d) TRIPS-Agreement (included in WTO-Agreement).

Future Legislation.

European Directive on patentability of computer-implemented inventions was proposed on Feb. 20, 2002, and with modifications, adopted by European parliament on Sept. 23, 2003. EC legislative process in progress. European Directive 98/44 of July 1998 on legal protection of biotechnological inventions entirely implemented in Dutch Patent Act in Nov. 2004. Apart from changes to exceptions and patentable subject-matter mentioned above, also scope and reach of patents consisting of or containing biological material amended accordingly. See topic Enforcement for implementation of Directive 2004/48, EC on enforcement of intellectual property rights.

The London Agreement came into force on May 1, 2008.

17.05 TRADEMARKS:

Benelux Trademark Act (BTA).

On Jan. 1, 1971, BTA entered into force. From this date onwards, trademark laws of The Netherlands, Belgium and Luxembourg unified and one territory, as far as trademarks are concerned, now created. The BTA has been revised to conform with EC directive on harmonization of trademark law. As of Jan. 1, 1996, new BTA entered into force. On Sept. 1, 2006, Benelux Treaty concerning Intellectual Property (BTIP) came into force. In meanwhile, art. I a had been added to BTIP which decrees that every plan for decision by Committee of Ministers, immediately after it has been conceived, must be presented before both Chambers of Dutch Parliament for their approval. Finally, early in 2007, BTIP was adapted to Directive 2004/84/EC, Court 2005,96; Sib. 2006,262 and Court 2005,96; Sib. 2006,604.

National courts are competent in matters involving BTA, but courts may refer to Benelux Court and/or European Court of Justice with questions of interpretation concerning BTA.

Trademarks.

Any symbol distinguishing goods or (since Jan. 1, 1987) services of enterprise can be trademark, except for shapes, if such shapes are determined by very nature of goods, produce technical result or influence their essential value.

The right to trademark is acquired by registration and is valid for those goods or services for which trademark as filed is registered. Unregistered trademarks are not protected and no infringement action based on unregistered trademark can be instituted. Registration of attachment or pledge of trademark is possible. The date of filing and not date of registration of trademark is decisive for moment when right to trademark is acquired. Benelux Trademarks Office (branches in The Hague, Brussels, Luxembourg) may refuse to register sign if it does not meet legal definition of trademark (especially if there is lack of any distinctive character). Objection can be lodged against preliminary refusal. Appeal against final refusal may only be filed with Court of Appeals with access to Supreme Court thereafter.

Correspondence address in Benelux is required. Trademark right remains valid for ten year periods, renewable indefinitely against payment of filing and renewal fees.

Cancellation and Loss of Right.

Nullity of trademark registration (ex tune) can be invoked on grounds enumerated in BTA, such as (i) complete lack of distinctiveness, (ii) misleading character, (iii) conflict with prior registration, (iv) filing made in bad faith. Right to trademark ceases to exist (ex nunc) inter alia (i) in case of non-use during uninterrupted period of five years (but in general, such non-use may be rectified if use has been resumed before relevant legal action has been brought); (ii) if trademark has become generic through fault of proprietor (including acquiescence); (iii) voluntary withdrawal or non-renewal of registration.

Infringement.

Proprietor of trademark may oppose following kinds of use in economic intercourse: (i) any use of trademark for goods/services for which it has been registered; (ii) any use of trademark or similar sign for registered goods/services or similar goods/services, if this entails possibility of confusion between marks; (iii) any use, without valid reason, of trademark known within Benelux, or of similar sign, for goods/services not similar to those for which trademark has been registered, if such use may entail unjustified benefit or other effect detrimental to trademark; (iv) any use of trademark or similar sign without valid reason, made not to distinguish goods/services, if such use entails unjustified benefit or other effect detrimental to trademark.

If proprietor of trademark accepts use of younger infringing trademark during at least five years, he loses his right of action (acquiescence), unless younger trademark was filed in bad faith.

Assignment and License.

The assignment of trademark must be in writing; for licensing trademark no written statement is required. To have effect against third parties, assignment and license must be recorded in trademark register. Assignment does not need to be in conjunction with business in which trademark was used. The licensee has right to intervene in certain proceedings, instituted by proprietor, in order to claim compensation for damages directly sustained by him.

A collective trademark is symbol designated as such when filed, and distinguishing common features of goods/services from enterprises which use trademark with consent and under control of proprietor. Together with trademark, regulation must be filed, setting out conditions for use, stating common features of goods/services which trademark guarantees, and specifying measures of control to be applied. In general, collective trademarks are subject to same rules as stated above.

Counterfeit Goods.

Infringing goods and also materials used in production of infringing goods may be seized and claimed as property by trademark proprietor, or alternatively, proprietor may sue for destruction. Infringer may be compelled to provide information concerning infringement.

Parallel Imports.

The exhaustion of rights is limited to European Community; parallel imports from outside can be halted.

Treaties.

The Netherlands has ratified, inter alia, Paris Convention and Madrid Agreement.

Future Legislation.

Benelux Treaty on Intellectual Property (BTIP, see above) now in force. Directive 2004/48 now in force (see topic Enforcement for implementation of Directive 2004, `48, `EC on enforcement of intellectual property rights). Parliamentary procedures finalized in Benelux countries, ratification should take place shortly. By Benelux Treaty on Intellectual Property, Benelux Trademark Act and Uniform Benelux Act on Designs and Models will be integrated as well as administrative offices applying them, i.e. Benelux Trademark Office and Benelux Bureau for Designs and Models, combined in Benelux Bureau for Intellectual Property, situated in The Hague. Treaty will not substantially change contemporary substantive law, referenced as Acts.

European.

ECJ concluded in Adam Opel vs. Autec that “Where a trade mark is registered, inter alia, in respect of motor vehicles, the affixing by a third party, without the authorization of the proprietor of the trade mark, of a sign identical to that mark to scale models of that make of vehicle, in order faithfully to reproduce those vehicles, and the marketing of those scale models, do not constitute use of an indication concerning a characteristic of those scale models, within the meaning of Art. 6 (1)(b) of Directive 89/104." (ECJ Jan. 25, 2007, case C 48/05).

It is unclear whether Court used determination of confusion as requirement for establishing infringement (despite text of Directive), in cases where people use sign which is identical to trade mark for goods identical to goods for which mark has been registered. Judgment could also be read as affirmation of fact that trade mark holder can act also by means of paragraph (a), when use of disputed sign does not affect origin function of its mark; i.e. in case remaining functions of mark are questioned.

National.

The Benelux Court of Justice has determined that showing integration does not extend so far, that even translations in languages other than official languages of Benelux must be naturalized. This might create interesting consequences for level of protection of mark in other languages of Benelux. (See Benelux Court of Justice June 28, 2008, case A 2005/1/16.)

European.

In "Brainbridge judgment of ECJ, it has been ruled that 'no consumer can be expected, in the absence of use of a sufficient number of trade marks capable of constituting a family or a series, to detect a common element in such a family or series and/or to associate with that family or series another trademark containing the same common element. Accordingly, in order for there to be a likelihood that the public may be mistaken as to whether the trade mark applied for belongs to a 'family' or 'series', the earlier trade marks which are part of that 'family' or 'series' must be present on the market'". (European Court of Justice in Case C-234/06 P, Il Ponte Finanziaria SpA v OHIM, FMG Textiles Srl).

Therefore, not required is proof of use of older marks as such, but purely use of sufficient number that can form serial of marks, and therefore proof of existence of that serial for appraisal of danger of confusion. Registered mark can be assessed as being "used", also when proof is provided of use of it in form which slightly deviates from form in which it has been registered. It is however not possible to extend level of protection belonging to registered trademark—by proving use of this registered mark—to another registered mark, for which proof of using was not provided, because of fact that this last mark is only light version of first mark.

17.06 TRADENAMES:

(Tradename Act entered into force Oct. 14, 1922, as am'd).

The use of name identical or similar to name or trademark which is already used by another enterprise is prohibited, if such use would confuse public. Assignment of tradename apart from enterprise is not allowed. The right to trade name is acquired by public use thereof, which need not be use in The Netherlands. Foreign trade names therefore protected in The Netherlands if name acquires reputation in this country and confusion would thus not arise. Registration of trade name in Commercial Register is not prerequisite for protection. Trade name law does not provide opportunity to prohibit use of trade name when it is used in fair way. ECJ Sept. 11, 2007, IER 2007/102, p. 393, m.nt. ChG (Céline).

Future Legislation.

See topic Enforcement for implementation of Directive 2004/48/EC on enforcement of intellectual property rights.

18 MINERAL, WATER AND FISHING RIGHTS

18.01 MINES AND MINERALS:

On-shore as well as off-shore exploration and exploitation of coal, oil, natural gas and many other minerals are subject to concession awarded by Crown decree under Mining Act (2002). Extensive, detailed provisions governing on-shore and off-shore exploration are laid down in various Crown Decrees and regulations of Ministry of Economic Affairs; pursuant to Upstream Licensing Directive (94/22/EEC) new competitive and nondiscriminatory procedure for issuing oil and natural gas licenses was introduced on June 5, 1996. In case of gas and oil production, state participation is regular feature by means of state-controlled company (Energie Beheer Nederland) which by Act holds 40% or 50% of gas interest. As per 1990 Dutch fiscal jurisdiction is extended to Dutch sector of continental shelf. Labour law concerning off-shore employees is governed by North Sea Mining Industry Employment Act (1992).

On June 22, 1998 Council of European Communities adopted directive (98/30/EEC), concerning common rules for internal market for natural gas. Pursuant to this directive gas market is liberalised (Gas Act 2000), Regulation of energy market similarly liberalized (Electricity Act 1998). Continuing process of legislative action.

19 MORTGAGES

19.01 CHATTEL MORTGAGES:

Chattel mortgage does not exist under Dutch law. Chattels may be pledged. Transfer of possession is not required. Sale and lease-back transactions are allowed.

See category 7 Debtor and Creditor, topic 7.13 Pledges.

19.02 MORTGAGES:

Mortgage is right over property for exclusive and express purpose of securing priority payment upon public auction in event that debtor fails to perform obligations. Mortgage may be vested to secure present obligations of mortgagor or third party, and future obligations as well.

Mortgageable Property.

Susceptible of mortgage are: (1) immovable property; (2) registered ships and other vessels; (3) aircraft; (4) limited rights in respect of mortgageable property like usufruct and long lease (“erfpacht”).

Mortgage deed must be in form of notarial instrument executed before Dutch notary. It must describe property, mention nature and amount of debt, or facts on basis of which debt may be determined, indicate parties, and may contain specific stipulations made by mortgagee such as restriction of mortgagor's power to let mortgaged property, obligation to keep property insured, right of mortgagee to take over management of property in case of default of mortgagor, etc.

Power of attorney for creation of mortgage on behalf of mortgagee requires notarial instrument.

Recording.

Any mortgage to be valid must be recorded in Title and Mortgage Registry for district where property is situated or where ship or aircraft is registered. See category 9 Documents and Records, topic 9.05 Records.

Priorities.

Creditors having claims secured by mortgage have priority on foreclosure proceeds before other creditors and before taxes (except for real property taxes).

Among other mortgages rank of mortgage is determined by date of entry on record; mortgages entered on same date have same ranking.

Foreclosure is effected in case of default of debtor by public auction of property before notary in district where property is situated.

If proceeds of sale are insufficient to satisfy secured obligations, mortgagee may proceed against other assets pari passu with all other unsecured creditors.

Bankruptcy of mortgagor or debtor does not affect mortgagee's right to foreclose.

Upon request of either mortgagor or mortgagee president of court may order that foreclosure is effected by private sale according to agreement to be approved by him.

Cancellation of mortgage is effected by notarial instrument upon satisfaction of creditor or otherwise at his discretion. If upon satisfaction creditor fails to cancel mortgage mortgagee may request court to order cancellation.

Upon foreclosure of property cancellation of mortgage will be ordered by court at request of purchaser provided that foreclosure took place with due observance of all legal requirements, and provided purchase price was paid in hands of notary.

Purchase price is distributed by notary to mortgagees according to priority.

Mortgages on Ships and Other Vessels.

Some special provisions apply. Mortgage on ship may be vested only if ship is registered in ships register. By change of nationality of ship obligations for which ship is mortgaged mature. Mortgagee is entitled to sell ship in any country where it is berthed.

Mortgage on Aircraft.

Similar provisions as for mortgage of ships apply. The Netherlands have not yet ratified 2001 Cape Town Convention on International Interest in Mobile Equipment.

20 PROPERTY

20.01 ABSENTEES:

Absentee, defined as person who has left his residence without provision for proper management of his affairs, cannot be contacted or whose existence is uncertain, retains all rights and liabilities. If, however, necessary to provide for administration of absentee's property, or if necessary to have absentee represented in suit, district court of absentee's last place of residence (if in The Netherlands or, otherwise, court of The Hague) may appoint administrator ("bewindvoerder") at request of interested party or upon demand of public prosecutor. (1:409 B.W.). Administrator may not, however, represent absentee in matter of family law unless expressly authorized by district court. Fee of administrator may amount to 5% of net proceeds of administered property unless cantonal court decides otherwise. Administration ends by joint decision of former absentee and administrator, by notice of termination from former absentee to administrator or when death of absentee has been ascertained.

If absentee declared "presumably dead" by district court (see category 12 Estates and Trusts, topic 12.02 Death), heirs may exercise their legal rights but must return property if absentee returns.

20.02 ADVERSE POSSESSION:

See category 5 Civil Actions and Procedure, topic 5.05 Limitation of Actions.

20.03 CURTESY:

There is no provision for curtesy in Dutch law.

20.04 DEEDS:

See topic 20.08 Real Property; categories 2 Business Organizations, topic Corporations; Documents and Records, topic Notaries; Estates and Trusts, topic Wills; Mortgages, topic Mortgages.

20.05 DOWER:

There is no provision for dower in Dutch Law.

20.06 LANDLORD AND TENANT:

Law as to relations between landlord and tenant differs considerably as to: (a) Housing premises; (b) retail business premises; (c) “other” business premises; (d) agricultural sites; and (e) other real estate.

(a) Housing Premises.

Lease for residential premises can be entered into for fixed or indefinite period. Even if agreement is entered into for fixed period, agreement does not terminate upon expiry of this period but must be terminated by notice. Freedom to negotiate terms and conditions of contract severely limited in at least two respects: termination of contract and rental prices. For termination of contract, strict formalities apply (most important points being: notice to be given by registered letter or bailiff's writ and, if given by lessor, to contain reasons for notice). Notice by lessor does not terminate rental agreement if lessee wishes to remain in possession. Lessor must then file proceedings to terminate lease. Court is held to consider, as grounds for allowing action, only reasons advanced in lessor's notice to lessee. Court can order eviction, but only on one or more of limited number of grounds. Generally, these grounds are: (1) Unreasonable or improper conduct of lessee; (2) lessor urgently requires premises for his proper use, or for purpose of implementing zoning plan; (3) premises have been temporarily let during lessor's absence, and lessor wishes to return. Law contains number of special provisions, protecting spouse, other members of household, and sub-lessees, from eviction when main rental agreement is discontinued.

(b) Retail Business Premises.

This is group of premises mainly consisting of shops, artisan's workshops, hotel, café and restaurant premises. Rental agreements must either be for less than two years, or for at least five years. For agreements of less than two years duration no further mandatory rules apply. For agreements of longer duration, lessee has option to prolong agreement to at least ten years. These agreements do not terminate upon lapse of their duration, but must be terminated by notice. Notice is subject to strict formalities: at least one year's notice by registered letter or bailiff's writ, and, if given by lessor: to specify grounds for notice. If notice is given by lessor, and lessee does not comply therewith, lessor must apply to court for termination order, much in same manner as described under subhead Housing Premises, supra. Notice by lessor after five-year term, is only legally possible in case of misconduct of lessee or urgent need, on part of lessor, to use premises himself for retail business purposes. In case of notice by lessor after ten-year term (or thereafter), court must balance parties' interests, but must allow action for termination if one or more of limited number of grounds is present.

Law provides that lessee who transfers his business to another, may ask court to substitute that other in his place as lessee.

(c) Other Business Premises.

For instance: offices, factories (but also all other buildings not covered under specific rules described under subheads Housing Premises, Retail Business Premises, or Agricultural Sites). Parties are free to agree on terms of contract. For termination of tenancy, by lessor, it is necessary that he summon lessee who has remained in possession to vacate premises, using registered letter with receipt, or bailiff's writ. Thereafter, lessee has limited time to submit request for prolongation of tenancy to court. Court can grant prolongation for maximum of three one-year periods.

(d) Agricultural Sites.

Agreements must be in writing, and must be approved by Board appointed for that purpose. Mandatory duration of agreement is at least six or at least 12 years, depending on whether premises include farm-building or not. Agreement is prolonged automatically for further six-year periods unless notice of termination is given by registered letter or bailiff's writ. Lessee may, when notice is given, submit request to court for prolongation of tenancy. Court must balance circumstances equitably in deciding whether to allow prolongation. In case of sale of agricultural sites, lessee has first refusal right to buy. Limited possibility for substitution of lessee by his successor in business.

(e) Other Real Estate.

Very limited category, including mainly nonagricultural sites without buildings. Examples: sportsfields, storage areas, parking lots. No mandatory provisions apply, parties are free to contract.

Rental Prices.

Though principal rule is that parties are free to negotiate rental prices as they see fit, in considerable number of cases price is subject to court, or other supervision. Most important instances are: For housing premises, rules vary, depending on value of premises. For more valuable premises, rental price may be freely established. For less valuable premises, lessee may request Rental Board (“Huurcommissie”) to rule on fairness of agreed rental rate by reference to detailed valuation system concerning size, fittings, age, neighbourhood, etc. of premises and leading to fairly low valuations. Freedom to increase prices periodically is limited, and similarly supervised by rental board (Huurcommissie). Rents of publicly-funded housing have long been set by Ministry of Public Housing using similar valuation. Although this system has now been discontinued, large numbers of rental agreements are still based on conditions prescribed by Ministry. This situation will continue for some years to come. For retail business premises: either party may, if fixed period agreed upon (if any) has elapsed, or, if no fixed rental period continues to be applicable, each time contract has run for five years or series of five year periods, commence action to establish new contract price by reference to local rental conditions. For agricultural premises: parties may request revision of price at three year intervals. Initial approval of contract may be withheld if price is inappropriate. For all other nonagricultural business premises court that grants request for prolongation, may set price to be paid thereafter.

Note: For all kinds of rental agreements, law provides that sale of premises by lessor does not entail termination of rental agreement or of tenancy. In very limited number of cases this rule may be set aside in contract.

General.

Civil Code contains a number of provisions generally applicable to rental agreements, of which most important are: Lessor is responsible for damage resulting from visible or hidden defects in property; lessee may not sublet, unless otherwise provided or unless lessee wishes to sublet part of house he himself resides in; major maintenance and repairs are for account of lessor, minor repairs and day-to-day maintenance for account of lessee.

Civil Code rules just mentioned may be (and frequently are) set aside in contract forms.

See also topic 20.08 Real Property.

20.07 PERPETUITIES:

Dutch law does not contain specific rule against perpetuities as such. However, property and limited rights over property always are transferable, unless this is specifically precluded by law or by nature of right. Fidei-commis is only allowed under specific and restricted circumstances (see category 12 Estates and Trusts, topic 12.07 Trusts).

20.08 REAL PROPERTY:

Land, everything that grows on or has been built on land and everything permanently affixed to, or destined for permanent service of, real property is deemed real property. Other property is movable.

Buyer may have contract of sale registered in Title and Mortgage Register, provided sale is by notarial deed. Thereby buyer is protected against later sales or seller's insolvency. Property should be conveyed within six months of registration of sale, on penalty of losing retroactively this protection.

Conveyance of ownership of real property takes place by notarial deed, executed by parties and notary, and subsequent entry of authentic notarial copy thereof in Title and Mortgage Register for district where property is situated. Buyer usually pays notarial fees. Joint ownership is possible. Special rules apply to ownership of apartments. Other (less encompassing) rights in rem on real property than ownership, e.g. “erfdienstbaarheid” (easements and servitudes), “erfpacht” (long lease), “opstal” (right to own buildings etc. on other person's land), “vruchtgebruik” (usufruct, right to use and to enjoy fruits of other person's property), are established and transferred by entry of notarial deed in Title and Mortgage Register. Hiring out of real property is subject to strict statutory provisions, tending to protect position of tenant. Different rules exist for hiring out of agricultural property, housing, shops and small enterprises, other buildings. Owners, persons entitled to other rights in rem, and tenants have action based in tort against factual infractions of their rights by third parties (e.g. squatters).

Free disposition of real property is restricted in certain rural areas. Municipalities have preemptive rights in certain town areas. Strict legislation on land and country planning forbids establishment of buildings without permit and limits other use of land. Permit should be in accordance with municipal zoning and building regulations (on location of buildings and use thereof as well as technical requirements). Several environmental laws restrict use of real property.

Dutch law does not contain restrictions on ownership of real property by foreigners. Expropriation of real property against full compensation by central or local government is possible under Expropriation Act. Decision to expropriate is made by separate Act or requires approval by Crown. Compensation is determined by ordinary courts.

See category 5 Civil Actions and Procedure, topic 5.01 Actions. See also topic 20.06 Landlord and Tenant; categories 3 Business Regulation and Commerce, topics Licenses, Business and Professional, Sales; Civil Actions and Procedure, topic Limitation of Actions; Documents and Records, topic Records; Mortgages, topic Mortgages; Taxation, topic Taxes.

21 TAXATION

21.01 ADMINISTRATION:

General administration of taxation is carried out by Ministry of Finance. Assessments are issued by inspectors of taxes residing in tax districts throughout country and these assessments are collected by collectors of taxes (Ontvangers der Rijksbelastingen) also residing in tax districts throughout country. Authority to grant most types of advanced rulings for (international) enterprises (e.g. arm's length conditions) has been undertaken by “Dept. for Large Enterprises” of Tax Inspectorate in Rotterdam. This Inspectorate is also only address for potential foreign investors to obtain advance binding arrangements.

Tax returns (aangiftebiljet) must be filed with competent Tax Inspector of district in which individual is resident or company is situated, or if company is situated in several districts, district in which head office is located. In some cases, electronic application is obligatory.

Tax returns must be filed by date set by law or by Tax Inspector. Inspector may, on application, extend (originally fixed) filing date. Extensions of filing dates are usually granted, without condition, to professional advisers preparing corporate income tax or individual income tax returns. Information regarding return to be filed includes also copies of all documents which may be relevant in arriving at tax assessment. For corporate income tax returns, main documents necessary are balance sheet and profit and loss account prepared for tax purposes.

In process of determining amount of tax due and preparing assessment, inspector reviews return filed. He may request additional data or inspect any additional accounting records which may be relevant in arriving at tax assessment. Inspector is not obligated to follow statements in tax return filed, but he must inform taxpayer of any adjustments which he makes. Collector of taxes prepares notice of assessment which is sent to taxpayer, after amount of tax due is assessed by Tax Inspector.

If exact tax liability can only be ascertained after close of taxable period, one or more provisional assessments can be made during period in which income to be taxed is earned, limited to total foreseeable sum of taxes due (amount of provisional assessment corporate income tax is e.g. based on average profits of last two years).

Final assessments must be made within three years from time tax is due or from end of accounting year in which tax liability arose. However, these periods are extended for duration of period of extension of filing tax return to which tax authorities have agreed. Additional assessments are allowed within five years after close of financial year for which final assessment has been issued. Five year period is extended to 12 years for foreign income. This additional assessment, however, may in principle only be issued on condition that new data has become available to inspector (e.g. through state audit). With some exceptions, administrative mistakes cannot lead to additional assessment.

Taxpayer may file with inspector of taxes notice of objection (bezwaarschrift) to final assessment within six weeks of date of assessment.

Objections are also allowed against provisional assessments.

Decision (uitspraak) on objection must be rendered generally within one year, sometimes 13 weeks, after date notice of objection is filed. Taxpayer has right to request that he will be heard before decision is taken. If inspector rejects taxpayer's objection, he must, explicitly state grounds for rejection. If inspector does not react within one year period, it is assumed objection has been rejected.

If taxpayer is not satisfied with inspector's decision, he can file notice of appeal (beroepschrift) with tax court (``rechtbank'') within six weeks after date of inspector's decision. For urgent situations temporary provision may be requested.

Either taxpayer or tax administration may ask for revision (cassatie) of court's decision by appealing first to Court of Appeals (``gerechtshof'') and after that to Supreme Court (Hoge Raad) within six weeks after judgment is sent to taxpayer.

Entire procedure before inspector is free of charge. Fee is charged for appeal.

If nonresident begins proceedings, he must specify address in The Netherlands at which he will accept service.

Notice of assessment is prepared by collector of taxes and is sent to taxpayer. Taxes such as corporate or personal income tax must be paid after receipt of assessment. Some taxes, however, such as VAT, withholding tax on dividends, capital tax and wage tax must be paid on tax return base.

Fines and (criminal) penalties may be due if filing requirements are not fulfilled correctly.

If company is insolvent and therefore not able to pay wage tax, VAT or excise duties, its directors are required to inform tax collector thereof within two weeks from date on which taxes were due, to avoid that each of company's directors is personally liable for unpaid tax claims which have arisen prior to insolvency.

Tax audit of all companies and unincorporated businesses is made periodically by state audit dept. of local tax office. Although these state audits are planned to occur every few years, longer intervals have resulted because of shortage of state auditors.

In respect of tax collection statute of limitations is five years from date that tax is payable. Any action on part of tax collector to collect tax due will cause this five-year period to start again.

Also, any extension of payment granted extends five-year period.

Main taxes—all taxes on income, in particular—are levied in The Netherlands on national level.

There are taxes though which are levied by municipalities or other regional entities. Real estate tax is most important of these local taxes. Hereunder follows survey of national taxes which are of primary importance.

21.02 ALCOHOL, BEVERAGES AND TOBACCO TAXES:

Excise duties are levied on ultimate use or consumption of only few types of goods such as beer, wine, spirits, certain soft drinks, cigarettes and other tobacco products. (See topic 21.11 Excise Taxes, subhead Excise Duties.)

21.03 BUSINESS TAXES:

Insurance premium tax (assurantiebelasting) is imposed with respect to insurances whereby risk insured is situated in The Netherlands. For individuals this is case if they reside in The Netherlands. For legal persons this is case if main establishment or other permanent presence of entity to which insurance applies is located in The Netherlands. Risk insured is also situated in The Netherlands with respect to immovable property located in The Netherlands and for motor vehicles, ships and aircraft duly registered in The Netherlands.

As of Mar. 1, 2008, tax rate is 7.5% of net insurance premium excluding tax itself.

Premiums for life, accident, disablement, sickness, health unemployment, transportation and export credit insurances are exempt. Also exempt are premiums for reinsurance and insurances for seagoing vessels and aircraft used in international traffic.

21.04 CAPITAL GAINS:

Capital gains realized as part of business profit are taxed accordingly as part of income under income tax (individuals) or corporation tax (legal entities). Other capital gains realized by individuals are only taxed in specific circumstance, e.g., in case of substantial participation in company. There is no specific capital gains tax.

21.05 CONSUMPTION TAXES:

There are no special consumption taxes in The Netherlands other than VAT, certain national environmental taxes and custom and excise duties.

21.06 CUSTOMS DUTIES:

According to Rome Treaty of 1957 establishing EU and time schedule agreed upon by state members, customs duties on trade between Common Market countries is presently completely abolished. As from Jan. 7, 1996 Turkey forms custom union with EU under certain conditions. Customs duties are levied on most imports from non-EU Member States. Customs rates applied by various Member States on imports from countries outside EU are unified. No customs duties are levied on exportation and on importation from EU Member States. In principle The Netherlands has not disposed of system of autonomous customs law. On Oct. 12, 1992 EU introduced Common Customs Code by means of Regulation (EC) No. 2913/92, and adopted implementing measures (Regulation [EEC] No. 2954/93).

Applicable EU import duties are annually established by EU by means of regulation.

As consequence only few implementing measures of mainly procedural character have remained in force at Dutch national level such as laid down in “Douanewet” (Customs Code) and “AWR” (General Act on Governmental Taxes). Moreover, few items like instruction to customs relating to sampling have remained national Dutch law.

Exemption from import duty can be obtained when imported goods after having been processed in The Netherlands are reexported or when imported goods or materials are used in The Netherlands for manufacturing products which are exported. However, this exemption does not apply in case of export to other EU countries. Payment of import duties on importation of goods from outside EU can be postponed, and avoided in case of reexportation out of EU, by storing goods under (administratively controlled) bonded warehouse system.

21.07 CUSTOMS DUTY AND TAX:

See topic 21.06 Customs Duties.

21.08 EMPLOYMENT TAXES:

Wage Taxes.

Employer is obligated to withhold wage tax (loonbelasting) on wage paid to his employees. Wage tax is levied on basis of Wage Tax Act of 1964. Wage tax is in principle preliminary levy of personal income tax due by employee but for great majority of employees with no income from other sources, wage tax in practice is final levy. Employees assigned from abroad working in The Netherlands can receive tax free 30% allowance included in agreed salary package during first ten years of their employment in Netherlands.

21.09 ENVIRONMENTAL TAXES:

Several environmental taxes (“milieubelastingen”) are levied by national government on basis of “Wet belastingen op milieugrondslag”. This law includes taxes on ground water, tap water, waste products, fuels and “regulating” energy tax on certain types of mineral oil, electricity and natural gas. Furthermore, taxes are levied on pollution of inland waters, air pollution and pollution of soil and under specific circumstances on sound pollution by civil aviation. All these taxes are deductible for corporate income tax purposes.

21.10 ESTATE TAX:

See topic Inheritance (and Gift) Tax.

21.11 EXCISE TAXES:

Excise duties are levied on ultimate use or consumption of only few types of goods, e.g. beer, wine, spirits, certain soft drinks, cigarettes and other tobacco products, sugar and gasoline. These duties are not creditable or refundable, except in case of reexportation. Excise duties paid are incorporated in price of goods and deductible for e.g. corporate income tax purposes.

21.12 FOREIGN INVESTMENT TAXES:

There are no foreign investment taxes in Netherlands.

21.13 GASOLINE AND SPECIAL FUELS TAXES:

Fuel tax is levied on mineral oils, coal, natural gas, blast furnace gas, cokes oven gas, coal gas and refinery gas. “Regulating” energy tax is levied (inter alia) on certain types of mineral oil (gasoline, liquid petroleum gas).

Fuel tax and “regulating” energy tax on mineral oils are levied as if they were excise duties.

Fuel tax on other fuels than mineral oil is due by person who extracts, produces or imports fuel and subsequently uses them as fuels or supplies them to others for use as fuel.

21.14 GIFT TAX:

See topic Inheritance (and Gift) Tax.

21.15 INCOME TAX:

Income tax can be distinguished in personal income tax (inkomstenbelasting), based on Personal Income Tax Act 2001, which is levied from individuals and Corporate Income Tax (vennootschapsbelasting) based on Corporation Tax Act 1969.

Personal Income Tax.

As from Jan. 1, 2001 Dutch Individual Income Tax Act is based on analytical system called ``box system''.

Former synthetic tax system in which taxation was based on individuals aggregated income, has been replaced by analytic system which introduces “box system”. New Income Tax Act 2001 recognises three separate income classifications named “boxes”. In each tax payable is calculated using different set of rules and different rate. Total amount of tax due is arrived at by adding together these taxes and subtracting certain amount based on personal circumstances of taxpayer. Main outlines of box system are as follows:

Box 1 contains income from business, labour and activities, income and deductions related to principal residence and income in form of certain periodic benefits (alimony) and allowances. Tax in Box 1 is levied on progressive scale up to 52% which percentage applies with respect to taxable amount exceeding [Euro]54,776.

Income from activities includes income from labour in employer-employee relationship, income from labour not in employer-employee relationship, income from loans to business belonging to close relative, and income from capital or goods placed at disposal of company in which owner of capital/goods or his spouse or partner holds substantial participation. Income from activities is computed almost in same way as income from business, which means that capital gains are taxable as well as regular income.

Box 1 contains number of tax incentives aimed at business income.

In Box 1, only limited number of deductions is allowed. Interest paid on loan granted for purchase, maintenance or renovation of main residence remains deductible, under certain restraints.

Box 2.

Dividend income and capital gains from substantial participations are taxed at flat rate of 25%. Only exception being year 2007 in which rate was 22% for income not exceeding [Euro]250,000 and 25% for remainder. However, income from capital (other than shares in company in which substantial participation is held) or goods placed at disposal of company in which owner of capital/goods or his spouse or partner has substantial participation, is assigned to Box 1 (see catchline Box 1, supra). Substantial participation exists, in general, if individual, together with his spouse or partner, holds at least 5% in share capital of company or option rights to such 5%. In principle any deductions or losses are only deductible in Box 2. Under specific circumstances, loss in box 2 entitles taxpayer to tax credit against tax payable in box 1.

Box 3.

Income from savings and investments by individuals is taxed at flat rate of 30%. Taxation is not based on real income, but on deemed annual yield on net assets of 4%. Therefore, system amounts to 1.2% taxation per year on average net assets, that is after deduction of debts. Tax free basic allowance is [Euro]20,661. This amount is increased in case of partners and elderly people.

Taxable assets include second homes (personal dwelling houses are taxed in box 1) and personal property if used for investment. Investments in business and substantial participation are not taxed in box 3 but in boxes 1 and 2 respectively. Number of assets are tax exempt, including “objects d'arts” unless mainly used for investment. Also certain capital insurances are tax exempt. Certain social investments like “green” investments and loans to new entrepreneurs, are tax exempt up to maximum of [Euro]55,145. Income in box 3 cannot be negative.

Deductions.

In principle, deductible amounts like interest are assigned to same box as income to which they are related. Exception exists for certain personal allowances, which are deductible in Box 1, Box 3 or Box 2 (in this order) if income from preceding box is not sufficient for deduction. These allowances are: alimony, losses on loans granted to starting entrepreneurs, childcare expenses, medical expenses, maintenance costs for historic monuments and gifts.

Resident/Nonresidents.

Residents are taxed on their world-wide income. Nonresidents are only taxed on basis of certain income earned in The Netherlands. Nonresident individuals may opt for treatment as Dutch individuals, provided they are resident of EU member state or of country designated by Ministry of Finance. Opting may be especially favourable for employees working in The Netherlands as interest paid for main residence in state of actual residence will be deductible from Dutch earnings.

Corporate Income Tax.

Dutch resident companies are in principle liable for Dutch corporate income tax (vennootschapsbelasting) on their worldwide income. Companies and certain other entities not established/resident in The Netherlands are taxed on account of certain income from Dutch sources, in particular, Dutch permanent establishment or permanent representative and real estate in The Netherlands and substantial shareholding in resident companies.

In 2007, large number of reforms have been made to corporate income tax.

In last few years, rates have been substantially reduced. Corporate income is taxed at progressive rate up to 25.5% for corporate income.

Income (dividends and capital gains) derived from another company (whether or not established in The Netherlands), is in principle exempt from corporate income tax by virtue of participation exemption (deelnemingsvrijstelling). Most important conditions for application of participation exemption are following. In principle, recipient should hold at least 5% of nominal paid-in share capital in qualifying subsidiary. Foreign subsidiaries should be subject to income tax. These requirements are assessed to be met in case of qualifying participation of at least 25% of nominal paid-in share capital (or of votes) in company residing in member state of EU. Foreign non-EC resident company should not be “passive finance company”.

Tax reporting in foreign currency is available to taxpayers, subject to approval of tax authorities. In principle all parts of group are taxed separately. Under certain conditions whole group is taxed as one entity (fiscale eenheid). These conditions include number of anti-avoidance measures. Under certain circumstances, several taxpayers can be taxed as one taxpayer (fiscal unity).

Withholding Taxes.

Company when distributing dividends has to withhold dividend tax (dividendbelasting). This dividend withholding tax is preliminary levy of personal or corporate income tax. Normal rate is 25%. In certain (domestic) situations exemption is granted. Rate is lowered to percentages between 25% and nil by number of tax treaties or according to EU parent-subsidiary directive.

There are no withholding taxes on other types of income like interest or royalties (except for interest on profit sharing bonds).

21.16 INHERITANCE (AND GIFT) TAX:

Inheritance (and gift) tax (successierecht, schenkingsrecht and recht van overgang) is levied based on Act of 1956. Currently, bill is prepared to modernize this tax. Tax is levied from heirs and other beneficiaries wherever they reside, of estate which belonged to person who was resident of The Netherlands at time of his death. Dutch national is deemed to have had residence in The Netherlands at time of his death if he had such residence within period of ten years prior to his death. Rates progress up to 68% depending on degree of consanguinity and on amount inherited. There are exempted amounts based, also, on degree of consanguinity. Same rules apply to gift tax. Transfer of Dutch real estate and Dutch business by gift or death of nonresident is also subject to tax at regular rates. For purpose of gift tax, foreigner is deemed to have had residence in The Netherlands at time of gift if he had such residence within one year of gift. Also gift tax will be due if individual dies within 180 days after date of gift, while being resident or deemed to be resident in The Netherlands.

21.17 INHERITANCE TAX:

See topic Inheritance (and Gift) Tax.

21.18 LOCAL GOVERNMENT TAXES:

As mentioned under topic Administration, most important taxes—all taxes on income, in particular—are levied in The Netherlands on national level. There are taxes though which are levied by municipalities or other non national entities. Real estate tax is most important of these local taxes. Owners of real estate are generally assessed on value of real estate owned or used.

Increasing number of municipalities levy taxes on parked cars. Ownership of dogs is also frequently taxed.

21.19 MOTOR VEHICLE TAXES:

Tax on passenger cars and motorcycles is levied on registration of passenger cars and motorcycles in The Netherlands, as well as on vehicles registered abroad but available for use in The Netherlands.

Tax must be paid by person who applies for license number, in most cases importer. He must file tax return and pay tax on behalf of and in name of consumer ultimately liable for tax. For persons residing in The Netherlands and using vehicle in The Netherlands with foreign license, tax will be levied upon vehicle's entry into The Netherlands. Such persons, both individuals and companies, have to file tax return and pay tax before using vehicle in The Netherlands.

Taxable base is list price, excluding VAT included in list price and BPM itself (net list price). Amount of tax to be paid, depends on weight of car, type of fuel used (benzine or diesel) and type of vehicle (passenger car, truck or pickup truck).

These taxes might in future be replaced by tax levied on kilometers actually driven.

21.20 PROPERTY TAXES:

See topic 21.26 Wealth Tax.

Transfer tax (overdrachtsbelasting) is levied on transfer of Dutch real estate. Rate is 6% of market value of real estate transferred. Capital tax (kapitaalsbelasting) on capital contributions to Dutch company has been abolished. For transfer tax, exemptions may apply in event of internal reorganisation or merger.

21.21 SALES TAX:

There are no sales taxes in The Netherlands.

21.22 STAMP TAX:

There are no stamp taxes in The Netherlands.

21.23 TAX INCENTIVES AND EXEMPTIONS:

Special deduction regime is granted for investments in classified business assets if total amount of investments exceeds [Euro]2,200 but not [Euro]240,000 per annum for small investments (kleinschaligheidsinvesteringsaftrek), energy investments and approved environmental investment. Small investment allowance is granted. Allowance expressed as percentage of amount invested decreases if total amount of investments in one calendar year increases. Sliding scale starts at 25% for small investments and decreases to 0% for large investments. For special environmental investments, which have to be approved, special investment deduction (accelerated deduction) may apply ranging from 44% to 0%. Under income tax 10.5% of business profit is tax exempt if certain requirements are met (MKB-winstvrijstelling).

These amounts are deducted from business profit.

21.24 TREATIES AND AGREEMENTS:

In order to prevent, to certain extent, international double taxation, there is unilateral Decree for avoidance of double taxation (Besluit voorkoming dubbele belasting). This Decree is only valid if treaty between country involved does not exist. To avoid double taxation within Kingdom of the The Netherlands, tax regulation for Kingdom of The Netherlands exists (Belastingregeling voor het Koninkrijk).

Furthermore, The Netherlands are party to treaties for avoidance of double taxation concluded with many countries (among which USA) and to EU Tax Directives. Domestic tax law may be overruled by treaties. These treaties are mostly based on OECD-model convention. The large number of treaties signed by The Netherlands makes The Netherlands attractive place to conduct international business. Sometimes The Netherlands are referred to as tax haven for corporations. The Netherlands Ministry of Finance strongly opposes this qualification.

National tax laws (especially income tax and corporate income tax) are under constant influence of European Law. In past number of specific measures have been abolished or altered to remove European Discrimination. It is expected that more measures will be put forward to European Court in future.

21.25 VALUE ADDED TAX:

Value Added Tax (omzetbelasting) is levied under Value Added Tax Act of 1968. Act follows tax on value added system, as obligatory in EU under Sixth VAT Directive. Therefore interpretation and workings of VAT lies under heavy influence of case law of European Court of Justice. Ordinary turnover tax rate is 19%. There is reduced rate of 6% for food, medicine etc. Nil rate applies to exportation and deliveries by VAT-registered companies to VAT-registered companies in other EU-countries. Tax is due on importation of goods from outside EU, on acquisition by VAT-registered companies and legal entities of goods from other EU-countries, and on sale of goods and rendering of services in The Netherlands. Tax is levied from importer, acquirer, seller or person or company rendering service (except in certain cases where such person is nonresident while purchaser/client is resident). In turn, such persons may invoice tax to purchasers/clients.

Purchasers/clients at their turn may deduct on their turnover tax returns amounts so invoiced to them (or claim restitution thereof), if goods were delivered to them or services were rendered to them in connection with their business (unless they perform so-called exempted services, including financial services). Foreign companies can appoint fiscal representative to fulfil their Dutch VAT obligations. Regarding mail order firms specific provision applies. Final consumers cannot ask for deduction or restitution, except in certain cases of exportation.

21.26 WEALTH TAX:

Wealth Tax in The Netherlands was abolished in Jan. 2001. Personal property is taxed as part of income tax (see topic 21.15 Income Tax, subhead Personal Income Tax, catchline Box 3 supra).

22 TRANSPORTATION

22.01 AIRCRAFT:

International Conventions.

The Netherlands have signed and ratified Convention of Warsaw of 1929 (and amendments including The Hague Protocol of 1955, Guadelajara Convention of 1961, Guatemala Protocol of 1971 [not yet in force], Protocols of Montreal of 1975 [protocol 3 not yet in force]) on international carriage by air, and Montreal Convention of 1999; Convention of Rome 1933 on precautionary arrest on aircraft; Convention of Chicago 1944 (and amendments including arts. 3 bis and 83 bis) on nationality of aircraft, etc.; International Air Services Transit Agreement and International Air Transport Agreement of 1944; Convention of Geneva of 1948 on international recognition of rights in aircraft; Tokyo Convention of 1963 on offenses and crimes committed on board aircraft; The Hague Convention of 1970 on the suppression of unlawful seizure of aircraft; Montreal Convention of 1971 on suppression of unlawful acts against safety of civil aviation and Montreal Supplementary Protocol of 1988 on acts of violence at airports.

Netherlands have not yet ratified Convention of Rome of 1952 concerning damage caused by foreign aircraft to third parties on surface. According to explanatory memorandum pertaining to Law on Enactment of Book 8, Civil Code, second part ("Invoeringswet Boek 8 Burgerlijk Wetboek, tweede gedeelte") parties concerned and insurers have to settle disputes themselves in compliance with The Netherlands tort law.

The Netherlands have not yet accepted Convention on International Interests Mobile Equipment and Protocol Matters Specific Aircraft to Equipment of 2001. In this respect it awaits further action by EU.

European Conventions.

Paris Agreement of 1956 on Commercial Rights of nonscheduled Air Services (does not apply to overseas territories); Paris Agreement of 1960 on Certificates of air worthiness for imported aircraft; Brussels Convention of 1960 on cooperation for safety of air navigation (Eurocontrol) (including Brussels Protocols of 1970, 1978, 1981); Paris Multilateral Agreement of 1967 on establishment of tariffs for scheduled air services (does not apply to overseas territories); Geneva Multilateral Agreement of 1979 on civil aircraft trading; Brussels Multilateral Agreement of 1981 on "En Route" charges. The Netherlands are, as EU Member State, bound by EU regulations. Some of most important Regulations and Directive are 2407/92 (July 23, 1992) on licensing of air carriers, R. 2408/92 (July 23, 1992) on access for air carriers to intra-Community air routes, R. 2409/92 (July 23, 1992) on tariffs for air services, D. 3976/87 (Dec. 14, 1987) regarding application of rules on competition for undertakings in air transport sector, R. 95/93 (Jan. 18, 1993) on "slot" allocation on Community airports, D. 94/56 (Nov. 21, 1994) on aviation accident and incident investigations, D. 96/67 EC (Oct. 15, 1996) on Access to the Groundhandling Market at /Community Airports, R. 889/2002 (Oct. 9, 1997) on Air Carrier Liability in the Event of Accidents and R. 261/2004 on compensation and assistance to passengers in event of denied boarding and of cancellation or long delay of flights. Regulation (EC) no. 549/2004 of European parliament and of council of Mar. 10, 2004 laying down framework for creation of single European sky. Regulation (EC) no. 550/2004 of the European parliament and of council of Mar. 10, 2004 on provision of air navigation services in single European sky. Regulation (EC) no. 551/2004 of the European parliament and of council of Mar. 10, 2004 on organization and use of airspace in single European sky. Regulation (EC) no. 552/2004 of the European parliament and of council of Mar. 10, 2004 on interoperability of European air traffic management network. Noteworthy is also European Commission Regulation 1617/93 (June 25, 1993) which, under certain restrictions, allows Member States to jointly plan, coordinate and operate air services within Community, to negotiate tariffs for scheduled services within Community and to allocate "slots" on Community airports. Regulation (EC) No 1107/2006 of the Parliament and of the Council of July 5, 2006 concerning rights of disabled persons and persons with reduced mobility when travelling by air (Official Journal L 204 of July 26, 2006). Regulation

(EC) No 2111/2005 of the European Parliament and of the Council of Dec. 14, 2005 on establishment of Community list of air carriers subject to operating ban within Community and on informing air transport passengers of identity of operating air carrier, and repealing Art. 9 of Directive 2004/36/EC. Important bilateral agreement is Open Skies Agreement between EU and U.S.A. (Mar. 30, 2008). The EU's objective is to create airspace without borders: air services single market between EU and USA, within which investments can move freely and where European and American airline carriers can provide air services free of restrictions in both EU and US internal markets.

National Regulations.

Provisions concerning creation and registration of secured interests and other real rights in aircraft are laid down in Title 15 of Book 8, Dutch Civil Code (Jan. 26, 1995, “Staatsblad” No. 71 and Amendments) and “Kadasterwet” (Land Registry Act) May 3, 1989, “Staatsblad” No. 186 and Amendments. Title 15 of Book 8 Civil Code is based on contents and purpose of Convention of Geneva of 1948 on international recognition of rights in aircraft (see subhead International Conventions, supra). Geneva Convention requires that four specific types of proprietary rights in aircraft that have been created validly under law of one Signatory State will be recognized in all other Signatory States. (Art. I[a-d] Geneva Convention). All these interests, however, are consensual in nature. This convention does not govern recognition of interests which are created by operation of law. For that reason, it does not cover topical issue of separate financing of aircraft engines. Consequently, convention does not stipulate that title to engine, which is owned by third party, is transferred to owner of aircraft frame as soon as it is attached to this frame. Considering misunderstandings that exist in legal practice, it is important to note Art. 8:3a of Civil Code is copy of Art. XVI of Geneva Convention. This article gives definition of “aircraft” and its “parts”, particularly its expensive engines. In The Netherlands substantive property law governing aircraft and engines is regarded as “lex specialis”. These objects occupy exceptional position in Dutch property law, both in dogmatic and conceptual terms. It follows from Explanatory Memorandum to Title 15 of Book 8 Dutch Civil Code that general rules of property law concerning movables in Books 3 and 5 Civil Code are not applicable to aircraft and engines. Under current Dutch special rules of air law, engines are generally not considered as (integral) “parts” of airframe. Reason for this is that most engines are not intended for use on “the” airframe. On contrary, most frequently engines are temporarily or coincidentally used, leased or exchanged based on engine pooling arrangements and engine interchange agreements. In these cases owner of airframe and owner of engines are not same person. Consequently, these engines are not intended for use on specific airframe. Besides, currently engines can easily be attached to or detached from airframe, without damaging airframe or engines. For these reasons, in The Netherlands most engines are not considered to be parts of aircraft. This view was confirmed by Court of Appeals in The Netherlands which decided that general Dutch property law doctrine of ‘Accession’ (Natrekking) does not apply to aircraft engines that are attached to large aircraft frames which are registered in national registry. Therefore, engines can be objects of separate security interests. (See AAR Aircraft & Engine Group/Aerowings, Gerechtshof, Den Bosch, The Netherlands, Aug. 15, 2002.) Dutch law, however, makes sharp distinction between financing of registrable and non registrable aircraft. Dutch Civil Code contains special property regime for large aircraft which are registered in national registry. This regime, however, does not cover small non registrable aircraft. Small aircraft are governed by general property regime of Book 3 and 5 Civil Code that applies to movable property. The Court of First Instance of Aruba, which is autonomous part of Kingdom of The Netherlands and has its own but identical air law, ruled in same direction as Dutch Court of Appeals. This case, however, concerned financing of aircraft engines that are attached to small aircraft that are not registered in Aruba's national registry. (See Volvo Aero Leasing/AVIA Air, Kort Geding, Gerecht in Eerste Aanleg van Aruba, June 25, 2003, No. 121.) Both these important rulings have been influenced by, and they are entirely in line with, Convention of International Interests in Mobile Equipment (Convention of Cape Town and the Aircraft Equipment Protocol [2001]). Under these instruments engines are regarded as distinct aircraft objects which can be financed and registered separately (Art. 1[2][c]). As stated above, however, The Netherlands has not yet ratified Convention and Protocol.

Besides, Title 15 of Book 8 Civil Code concerns closed system of real rights. (Art. 8:1305 DCC). No real rights other than ownership can be vested in registered aircraft, mortgages and full real rights (secured interests) of Dutch airline company to acquire (8:1308 DCC) or possess registered aircraft under lease agreement concluded for at least six months (8:1309 DCC). Similar full real rights cannot be awarded to holders of other kinds of movable property. These secured interests of airlines can be basis if international security interests under Convention of Cape Town (Art. 2[2][a]). If lessor is situated in Contracting State to this Convention and Aircraft Equipment Protocol, regime of these instruments is applicable. Reason for this is that "debtor" is situated in Contracting State (Arts. 3 juncto 2 [1][a] Convention). Fact that "creditor" is situated in non-Contracting State does not affect applicability of Convention (Art. 3[2]). In this case Dutch lessee (airline) is creditor. Tit. 16 Civil Code regulates liability according to Montreal treaty for both cargo and personal transport.

Public law provisions are: "Wet Luchtvaart" (June 18, 1992, "Staatsblad" 368), formerly known as "Wet Luchtverkeer", which gradually integrates "Luchtvaartwet" (Jan. 15, 1958, "Staatsblad" 47 and Amendments), covering, inter alia, issuance of air transport licenses and air traffic; "Wet Raad Transportveiligheid" (July 1, 1998, "Staatsblad" 466) regarding, inter alia, aircraft accident and incident investigations; "Regeling Toezicht Luchtvaart" (Jan. 22, 1959, "Staatsblad" 67 and Amendments), containing rules as to registration of aircraft, certification, licenses, airworthiness and safety requirements; "Luchtverkeersreglement" (Dec. 18, 1992, "Staatsblad" 697), concerning air traffic control. Provisions regarding enforcement of rights in aircraft and precautionary arrest on aircraft are included in §§584a-584r Rv and §§729-729e Rv respectively.

22.02 MOTOR VEHICLES:

Drivers of motor vehicles living in The Netherlands are required to have The Netherlands driver's license. Foreigners starting to live in The Netherlands should apply to municipal authorities for The Netherlands driver's license as soon as possible after their actual establishment.

Minimum age for driver's license is 18. License has validity of ten years. Validity can be extended every ten years until driver has reached age of 60. After age of 60 validity period will be shortened. Extension after age of 65 is only possible with medical certificate of capability. Foreign license of non-EU citizens valid for 185 days. After this period it can be exchanged for Dutch license, provided that alien resides legally in The Netherlands and existing license is still valid. EU citizen need not exchange driver's license for Dutch license.

Drivers licenses of American tourists issued in their home country are only recognized in The Netherlands together with "International Driving Permit", to be obtained in their home country at American Automobile Association.

Motor vehicle with foreign registration plate to be used permanently in The Netherlands is to be registered. For import of motor vehicle from EU-country V.A.T. and special tax on sale of passenger cars are charged; for import of motor vehicle from most non-EU-countries also import duty. Yearly registrations fee and quarterly or yearly use tax ("Motorrijtuigenbelasting") are dependent on vehicle weight and type.

Temporary use of foreign motor vehicle in The Netherlands is, generally with maximum of one year, tax exempt.

Registration is subject to inspection of vehicle by inspectors of National Traffic Service ("Rijksdienst voor het Wegverkeer").

At transfer of motor vehicle, part II of document of registration ("kentekenbewijs") must be made out in name of acquirer. Acquirer must give to transferor signed indemnity release form, issued by post office. Transfer is registered via post office at National Traffic Service. No taxes due on transfer of motor vehicle by private persons. Purpose of Part III of document of registration is proof of property.

Insurance against third-party risks is compulsory ("WA-verzekering") Principle of strict liability towards pedestrians and cyclists; action directly against insurer possible.

Motor vehicles (except motorcycles with weight of less than 400 kg) of more than three years old are subject to compulsory yearly inspection ("APK-keuring").

22.03 SHIPPING:

Under The Netherlands law distinction is made between seagoing vessels and inland navigation vessels. Title 3 through Title 7 of Book 8, Dutch Civil Code ("DCC") provides for legislation on seagoing vessels concerning, amongst others, rights vested in vessels, exploitation of vessels, transportation of goods and civil transportation, general average and limitation of liability. Corresponding legislation for inland navigation vessels is found in Title 8 through Title 12 of Book 8, DCC. Legislation is supplemented by decrees and regulations. Maritime law is not administered by special courts except in prize cases in which instance Supreme Court is competent.

Certain claims arising out of labour contracts, maintenance costs incurred after attachment as well as rescue charges and average charges (a) have priority over right of mortgage, (b) have droite de suite, and (c) attach to vessel even though owner of vessel may not be debtor of preferential debt. (DCC 8:211, 215§1 and 216). See 8:217 DCC for further provisions concerning ranking of claims. Carrier of goods may deny discharge of goods to third parties other than party to contract of carriage of goods. (DCC 8:489§1). Exception to this rule applies in respect of attachment. (DCC 8:489§3). Carrier of goods may also exercise right of retention under certain circumstances. (DCC 8:489§2).

International Conventions to which The Netherlands are party: International convention on collision between vessels Brussels 1910, International convention on assistance and salvage Brussels 1910, International convention on bills of lading Brussels 1924 (Hague Rules), International convention on immunity of State owned ships Brussels 1934, International convention on arrest of sea going vessels Brussels 1952, International convention on limitation of liability of owners of seagoing vessels Brussels 1957, International convention on collision inland navigation Geneva 1960, Amended International convention on bills of lading Brussels 1968 (Hague-Visby Rules), Convention on civil liability for oil pollution Brussels 1969, Convention on establishment of international fund for compensation oil pollution damage Brussels 1971.

23 TREATIES AND CONVENTIONS

23.01 TREATIES:

Treaties become effective after explicit or tacit approval by parliament.

Self-executing provisions of treaties prevail over national acts and regulations.

Number of treaties to which The Netherlands is party is too large to list. Some are mentioned where subject-matter is dealt with in this Digest. See categories 3 Business Regulation and Commerce, topics Bills and Notes, Monopolies, Restraint of Trade and Competition, Sales, Trade Register; Courts and Legislature, topic Courts; Documents and Records, topic Affidavits; Family, topic Marriage; Foreign Trade and Commerce, topic Customs; Intellectual Property, topics Designs, Patents, Trademarks; Taxation, topic Treaties and Agreements; Transportation, topics Aircraft, Shipping. Important are treaties in which The

Netherlands have become member of EU: EC-Treaty (http://www.europa.eu), as well as European Convention on Human Rights (http://www.ECHR.COE.int).

Treaties for reciprocal recognition and enforcement of foreign judgments are stated in category Civil Actions and Procedure, topic Judgments under subhead Foreign Judgments.

Other examples are: United Nations Convention on Recognition and Enforcement of Foreign Arbitral Awards, signed at New York on June 10, 1958, Trb. 1959–5B ratified by Act of Oct. 14, 1963 Stb. 417, operative as from July 23, 1964; Convention on Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters signed at The Hague on Nov. 15, 1965. Trb. 1966-91, ratified by Act of Jan. 8, 1975, Stb. 4, operative as from Jan. 2, 1976, Stb. 1976 by virtue of Royal Administrative Decree of Dec. 17, 1975, Stb. 693; Convention on Taking of Evidence Abroad in Civil or Commercial Matters signed at The Hague on Mar. 18, 1970; Trb. 1979–38, ratified by Act of Dec. 11, 1980, Stb. 652, operative as from June 7, 1981; Treaty of The Hague of Oct. 5, 1961 (Convention Abolishing the Requirement of Legalisation for Foreign Public Documents, “Apostille”). Trb. 1963, 28, ratified by Act of Mar. 10, 1965, Stb. 10.4, operative as from Oct. 8, 1965.

International Sale of Goods.

United Nations Convention of Contracts for the International Sale of Goods, in force on Jan. 1, 1992. See category 3 Business Regulation and Commerce, topic Sales and Part V, Selected International Conventions.

1
NEW ZEALAND LAW DIGEST

—Scope —

Revised for 2010 edition by

Faculty of Law, University of Auckland, New Zealand

Note: This revision incorporates legislation through June 30, 2009.

1 INTRODUCTION

1.01 CURRENCY:

See category 3 Business Regulation and Commerce, topic 3.01 Banking and Currency.

1.02 GOVERNMENT AND LEGAL SYSTEM:

New Zealand is constitutional monarchy acknowledging Her Majesty the Queen as its Sovereign. It is member of British Commonwealth of Nations.

Its territory includes Cook Islands, Niue, Tokelau Islands, Kermadec Islands and a number of other islands. Cook Islands and Niue are now self-governing states in free association with New Zealand which remains responsible for their external affairs and defence. By Imperial Order-in-Council of 1923, Governor-General was appointed Governor of Ross Dependency and is empowered to make regulations for its government.

The Crown.

Governor-General represents Queen in New Zealand and holds in essential respects the same position in relation to administration of public affairs as is held by Her Majesty in United Kingdom. Governor-General is appointed for five years by Her Majesty acting on advice of New Zealand Government. United Kingdom Government is represented in New Zealand by High Commissioner.

The Legislature.

By Constitution Act 1986, legislative power and authority reside in Parliament (General Assembly abolished by Constitution Act 1986) which consists of Sovereign in right of New Zealand and House of Representatives. Members of House of Representatives, known as Members of Parliament, are elected every three years. Elections are held once every three years and franchise is general. 1993 referendum resulted in change from first-past-the-post (FPP) system to mixed-member-proportional (MMP) system set up under Electoral Act 1993. MMP is proportional voting system under which there is minimum of 120 Members of Parliament.

House of Representatives sits Tues. to Thurs. for two or more weeks of each month starting mid-Feb. and ending mid-Dec., except Apr. (one week).

Each bill usually must be read three times in House before it is placed before Governor-General for assent.

Assent of Governor-General as representative of Sovereign in right of New Zealand is necessary before bill becomes law.

The Imperial Laws Application Act 1988 specifies extent to which Acts of U.K. Parliament, subordinate legislation made pursuant to those Acts, and common law of England, are part of law of New Zealand.

The Statute of Westminster, 1931, an Act of U.K. Parliament which abolished right of that Parliament to legislate for Dominions of British Commonwealth of Nations without request and consent and which was adopted in New Zealand by Statute of Westminster Adoption Act 1947, ceased to have effect as part of law of New Zealand from Jan. 1, 1986. Constitution Act 1986 provides that no Act of U.K. Parliament passed after Jan. 1, 1986 shall extend to New Zealand as part of its law.

New Zealand Bill of Rights Act 1990 specifies basic human rights and fundamental freedoms in New Zealand. Act not entrenched and may be repealed by simple majority. Act requires courts to adopt rights-consistent meanings of enactments where possible.

The Executive.

In accordance with British constitutional practice, government policy is determined by Cabinet chosen by Prime Minister or Government caucus. Under MMP, coalition governments may result. Cabinet ministers must be members of Parliament. Where legislative or executive powers are formally conferred on Governor-General, he or she is advised by Executive Council which comprises members of Cabinet and, on occasions, other members of Parliament. Its functions correspond broadly to those of Privy Council in England.

The Judiciary.

High Court of New Zealand is superior court of first instance, possessing general jurisdiction. Both civil and criminal matters are within its purview, and it also combines functions exercised in England by Probate, Divorce and Admiralty Divisions of High Court of Justice. From High Court appeal lies to Court of Appeal and thence to Supreme Court of New Zealand (established by Supreme Court Act 2003). Appeals to Supreme Court are by leave. Former right of appeal from Court of Appeal to Judicial Committee of Privy Council in London abolished for all cases decided after Jan. 1, 2004. Supreme Court comprises Chief Justice and four judges.

Court of Appeal comprises President and minimum of five or maximum of eight other judges.

Court of Appeal normally sits in two divisions of three judges each. Majority of division may refer proceeding to Full Court of Appeal.

High Court holds sittings throughout country. Court of Appeal has power to do likewise, but usually sits in Wellington, although division occasionally sits in Auckland.

Judiciary is free from control of executive. Appointments to judiciary are made by Governor-General on advice of Attorney-General, and appointees cannot be removed from office except where address from House has been presented to Governor-General.

Minor criminal jurisdiction and civil jurisdiction limited to claims not exceeding $200,000 are exercised by District Court. Jurisdiction can be extended by agreement. District Court has wider original jurisdiction (including increased equitable jurisdiction and power to grant injunctions). Family Court, division of District Court, has jurisdiction over guardianship, matrimonial property, adoption proceedings and dissolution of marriage. Disputes Tribunal established under Disputes Tribunal Act 1988 has jurisdiction to hear claims in contract and tort that do not exceed $15,000 (from Aug. 1, 2009) or $20,000 (from Aug. 1, 2009) if both parties to dispute agree.

There are other specialised courts such as Youth Court, Employment Court and Environment Court. There are also large number of administrative tribunals affecting many activities. There is no general legislation governing such tribunals. Where, however, power or right exercised by such tribunals falls within definition of “statutory power of decision” as widely defined in Judicature Amendment Act 1972 High Court has power to review exercise of, or refusal to exercise, that power. High Court also has powers of judicial review under common law in respect of decisions of bodies performing public functions.

1.03 OFFICE HOURS AND TIME ZONE:

New Zealand is in +12 GMT time zone. Office hours are generally from 8:30 a.m. to 5:00 p.m. Mon. to Fri.

2 BUSINESS ORGANIZATIONS

2.01 AGENCY:

While basically common law there is Mercantile Law Act 1908 (virtually identical with English Factors Act).

An agent having in customary course of his business as such agent authority to sell, consign for sale, buy, or raise money on security of, goods, is known as “mercantile agent.” Where such an agent is, with consent of owner, in possession of goods or their documents of title, any sale, pledge, or other disposition by him when acting in ordinary course of his business is as valid as if he was expressly authorized by owner to effect sale, pledge or other disposition, provided purchaser takes bona fide, for value and without notice of agent's lack of authority. If goods are subject to perfected security interest, purchaser deemed to have notice that agent has no authority to make disposition. However, if goods are sold in ordinary course of business, Personal Property Securities Act 1999 provides purchaser will take goods free of any security interest granted by seller. See category 20 Mortgages, topic 20.01 Chattel Mortgages, subhead Personal Property Securities Act 1999. Powers so conferred on mercantile agent are in amplification and not in derogation of powers exercisable by him at common law.

There is also Secret Commissions Act 1910 and Real Estate Agents Act 2008, replacing 1976 Act, which came into force on Nov. 17, 2009. Secret Commissions Act provides penalties for agent who commits his principal to contract in which agent has pecuniary interest, or for which agent receives consideration from other party to contract. Latter Act provides for licensing of land agents, audit of their trust accounts, fidelity guarantee fund, complaints procedure, and for Real Estate's Agents Disciplinary Tribunal. No land agent may recover commission unless he has acknowledgment of authority in writing made before or after contract.

For companies, rules of agency law are modified to give outsiders greater protection than provided by common law.

2.02 CORPORATIONS:

The Companies Act 1993 (“1993 Act”) governs companies registered in New Zealand. It is based on North American and, particularly, Canadian models.

Companies do not have memorandum and articles of association, but may adopt constitution. 1993 Act contains rules concerning operation of companies, but companies may adopt constitution to alter (where permitted) or add to those rules to suit individual requirements. Solvency test governs distribution to shareholders. For example, company may not pay dividend to shareholders unless solvency test can be met. Companies able to repurchase own shares (if permitted to do so by constitution) or provide financial assistance for purchase of own shares provided solvency test is met. Shares do not have par value. Instead directors determine consideration for which shares are to be issued. Consideration must be fair both to company and existing shareholders. Companies only require one shareholder. True “one person” companies possible in which sole director is also sole shareholder. No distinction between public and private companies although companies listed on New Zealand Stock Exchange are also governed by Listing Rules, and some regulatory legislation applies only to public issuers or widely-held companies, see Securities Markets Act 1988 and Takeovers Act 1993, infra.

Acquisition and Redemption of Shares.

1993 Act allows company to purchase or otherwise acquire its own shares if its constitution expressly permits. Repurchase offer must be made pro rata to all shareholders although shares may be repurchased on selective basis where all shareholders consent or where constitution permits and procedure laid down for special offers is followed. Shares may also be purchased by publicly listed companies through New Zealand Stock Exchange.

Company may issue redeemable shares if permitted by its constitution. Constitution or terms of issue of shares must provide for redemption of shares by company either at option of company, at option of holder of shares or on date specified in constitution or terms of issue of shares. Constitution or terms of issue of shares must also specify consideration, refer to formula by which consideration can be calculated or require consideration to be fixed by suitably qualified person who is not associated with or interested in company.

Amalgamations.

Two or more companies may amalgamate and continue as one company which may be one of amalgamating companies or new company. Court approval for amalgamation is no longer required. There are two types of amalgamation under 1993 Act, namely: (1) “Long form amalgamation” primarily where companies proposing to amalgamate are not part of same corporate group; and (2) “short form amalgamation” where company wishes to amalgamate with direct or indirect wholly owned subsidiaries or where amalgamating companies are directly or indirectly wholly owned by same company.

Capacity.

Company has full legal capacity, though may be restricted in constitution. Third parties are protected against acts done by company without capacity, but shareholders and entitled persons may restrain company from performing such acts. Generally, company or guarantor of obligation of company may not assert against person dealing with company that 1993 Act or company's constitution is not being complied with or that person held out as having authority to bind company does not have that authority.

Capital.

Raising of equity by companies registered in New Zealand by issue of shares to “overseas persons” restricted by Overseas Investment Act 2005. Act provides for Minister of Finance or other authorised Minister to grant or refuse consent to specified transactions. Consent not required if: (a) Issue of shares does not result in overseas person having 25% beneficial interest in total shares of issuer, control of 25% of voting power of issuer or control of appointment of 25% or more of directors of issuer; or (b) neither value of shares to be issued or assets of issuer (and its subsidiaries if any) exceed NZ$100,000,000 and New Zealand company does not own or have any estate or interest in specified classes of land. There are no restrictions on New Zealand companies borrowing overseas. Overseas Investment Commission has been disestablished.

See category 15 Foreign Trade and Commerce, topic 15.04 Foreign Investment.

Constitutions.

Companies are not required to have constitutions although one will almost always be desirable (except in case of wholly-owned subsidiaries). Constitution cannot affect mandatory requirements of 1993 Act (for example, directors' duties) but it can affect presumptive and optional provisions in 1993 Act. Presumptive provisions are provisions in 1993 Act which apply to company unless company's constitution says otherwise (for example, all shares are of same class unless constitution provides otherwise). Optional provisions are provisions in 1993 Act which apply to company only if its constitution says so (for example, company may purchase its own shares only if expressly permitted to do so by its constitution). Any provisions of constitution that are contradictory to 1993 Act are ineffective. Company cannot provide indemnity or effect insurance for directors or employees unless expressly authorised by its constitution. Extent of indemnification limited by 1993 Act.

Co-operative companies may register under Co-operative Companies Act 1996. Co-operative company is company, principal activity of which is stated in its constitution as being co-operative activity and in which at least 60% of voting rights are held by shareholders involved in transactions with company. “Cooperative activity” is supplying shareholders with goods or services, processing or marketing goods or services provided by shareholders or entering into other commercial transactions with shareholders. Registered co-operative company has simplified procedures for changing shareholders.

Directors.

Definition of “director” includes any person occupying position of director (by whatever name called). Person may be director for some purposes but not others. In general, following may be deemed to be directors: (a) any person in accordance with whose instructions director of company, or board, is required or accustomed to act; (b) any person entitled to exercise powers under constitution of company which would otherwise be exercised by board; (c) any person to whom power or duty of board has been directly delegated; and (d) shareholders given power by constitution to exercise power usually exercised by board, if shareholders in fact exercise that power or take part in deciding whether to exercise it.

Director' duties under 1993 Act are: (a) to act in good faith and in best interests of company; (b) to exercise powers for proper purpose; (c) to act in accordance with 1993 Act and company's constitution; (d) not to conduct business in way likely to create substantial risk of loss to company's creditors; (e) not to agree to company incurring obligation unless there are reasonable grounds for believing that company will perform; (f) to exercise reasonable care; and (g) to disclose interest in transactions.

1993 Act also imposes restrictions on directors' share dealing and use of confidential information.

Distributions.

Companies required to meet solvency test in 1993 Act before making distribution to shareholders. Solvency test requires company: (a) to be able to pay its debts as they become due in normal course of business; and (b) to have assets greater in value than value of its liabilities including contingent liabilities. Company must meet test where it pays dividends, purchases shareholders' property, guarantees shareholders' obligations, purchases its shares, redeems shares, gives financial assistance for purchase of its shares, makes compulsory purchase of minority shareholder's shares, amalgamates with another company or enters into shareholder discount schemes. Directors who vote in favour of “distribution” must sign certificate stating, in their opinion, company will be able to satisfy test immediately after distribution made. Directors must identify basis for opinion and can be personally liable on certification if test not satisfied. Company may be able to recover distributions from shareholders or directors if solvency test was not met immediately after distribution made.

Execution of Documents.

Obligations required to be by deed may be entered into on behalf of company in writing signed under name of company by: (a) two or more directors; (b) where there is only one director, that director whose signature must be witnessed; (c) where constitution of company so provides, director or other person or class of persons whose signatures must be witnessed; and (d) one or more attorneys appointed by company pursuant to 1993 Act. Obligations required to be in writing can be entered into on behalf of company in writing by person acting under company's express or implied authority. Obligations not required to be in writing can be entered into orally or in writing on behalf of company by person acting under company's express or implied authority. There are now complementary provisions in Property Law Act 2007, applicable both to 1993 Act companies and to other corporations.

See category 10 Documents and Records, topic 10.06 Seals.

Liquidations and Voluntary Administration.

Company is put into liquidation by appointment of liquidator. Liquidator may be appointed by: (a) special resolution of shareholders; (b) board of company on happening of event specified in constitution; and (c) court on application of company, director, shareholder, entitled person or creditor. Court may appoint liquidator where it is satisfied that: (a) company is unable to pay its debts; (b) company or board has persistently or seriously failed to comply with 1993 Act; (c) company does not have one of essential requirements for company which are listed in 1993 Act; or (d) it is just and equitable that company be put into liquidation. Failure of company to comply with statutory demand issued by creditor under 1993 Act creates presumption that company is unable to pay its debts.

Companies Amendment Act 2006, in force from Nov. 1, 2007, introduced, inter alia, concept of Voluntary Administration (adapting Australian regime), places controls on “phoenix companies” (adapting United Kingdom regime, regulating situation where there has been liquidation of company and formation of new company with same management and using same or similar name to former company), and revises provisions on voidable preferences. Voluntary administration forms Part 15A of 1993 Act.

See subhead Statutory Management and Receivership, infra.

Major Transactions.

Special resolution of shareholders required under 1993 Act before company enters into any major transaction. “Major Transaction” is: (a) acquisition of assets value of which is more than half value of company's assets before acquisition; (b) disposition of assets of company value of which is more than half value of company's assets before disposition; or (c) transaction that has or is likely to have effect of company acquiring rights or interests or incurring obligations or liabilities value of which is more than half value of company's assets before transaction.

Management.

Under 1993 Act, day-to-day management of company rests with board of directors unless constitution provides otherwise. Certain management rights are reserved to shareholders. Following actions must be approved by special resolution of shareholders: (a) adoption, alteration or revocation of company's constitution; (b) entering into major transaction; (c) amalgamating company; and (d) putting company into liquidation. Unless constitution provides for higher majority, special resolution is resolution approved by majority of 75% of votes of those shareholders entitled to vote and voting on question.

Minority Buy-outs.

Where shareholder of company is entitled to vote on special resolution approving alteration to company's constitution (where alteration imposes or removes restriction on company's activities), approving major transaction or approving amalgamation of company, and shareholder exercises all his or her votes against special resolution but special resolution is passed, shareholder is entitled subject to certain qualifications, to require company to purchase his or her shares under 1993 Act. Company must either rescind action that shareholder voted against, agree to purchase shares itself, arrange for other person to agree to purchase shares, or apply to court for exemption. Procedures for implementing buy-outs, including process for valuing shares, were revised by Companies (Minority Buy-out Rights) Amendment Act 2008, in force from Sept. 17, 2008.

Foreign Corporations.

Companies incorporated outside New Zealand are “overseas persons” within definition in Overseas Investment Act 2005 and as such require consent of Overseas Investment Commission to carry on business in New Zealand.

“Overseas persons” that wish to carry on business in New Zealand for period of less than three months in any year need not obtain consent. There is general exemption for businesses whose total expenditure expected to be incurred prior to establishment of business is less than NZ$100,000,000.

All overseas companies that commence “carrying on business” in New Zealand must apply for registration under 1993 Act within ten working days of commencing that business. Term “carrying on business” is broadly defined, and there is no longer requirement that company have physical office in New Zealand. 1993 Act now applies to all overseas companies that administer, manage or deal with property in New Zealand, whether directly or through employees or agents.

Under 1993 Act, overseas companies carrying on business in New Zealand must now file annual return with Registrar of Companies. Registrar will nominate month during which return must be filed each year, and fee will be payable. In addition, notice of any alteration to registration details must be filed with Registrar within 20 working days of alteration. Failure to comply with these requirements may result in fine of up to $10,000.

Provided documentation required to be filed with Registrar is filed, overseas companies may, subject to Overseas Investment Act 2005, hold land as if company was registered in New Zealand. Consent of Minister of Finance or other authorised Minister (before Aug. 2006, Minister of Conservation) and Minister of Land Information are required for acquisition by overseas persons of specified classes of land, whether direct or indirect by way of share transfer, including land exceeding five hectares in area, land forming part of island (excluding North and South Islands), and land including or adjoining "sensitive land", such as foreshores, lakes and other specified areas.

Filing of Accounts.

Obligation of company to file accounts governed by Financial Reporting Act 1993, as amended. Financial statements complying with financial reporting standards have to be filed by following persons: (a) Issuers of securities to public (and "conduit issuers" as defined); and (b) companies to which two or more of following criteria apply: i) total assets in excess of NZ$1,000,000; ii) turnover in excess of NZ$2,000,000; or iii) more than five fulltime employees. Act also requires overseas company to file financial statements, with auditor's report, with Registrar within 20 working days after signing of those accounts in accordance with laws prevailing in company's country of incorporation. Overseas company obliged to file accounts in relation to New Zealand operations, as, in general, do New Zealand subsidiaries of overseas companies. Filing of statements is also required by New Zealand companies 25% or more of shares of which are owned by overseas persons where two or more of following criteria apply: i) Company's assets exceed NZ$10,000,000; ii) turnover exceeds NZ$20,000,000; or iii) company has 50 or more employees.

Overseas Takeovers.

Consent under Overseas Investment Act 2005 is required for specified acquisitions of shares in New Zealand incorporated company by "overseas persons" (as defined) prior to such acquisitions taking place.

Consent to such acquisitions may also require consent of Commerce Commission under Commerce Act (see subheads Capital, Major Transactions, and Foreign Corporations, supra; and Commerce Act 1986, infra).

Statutory Management and Receivership.

Corporations (Investigation and Management) Act 1989 provides for statutory receivership and management. Act allows statutory manager to take over management of company where company is operating fraudulently or recklessly, or where necessary to preserve interest of company's members or creditors, or for any other reason in public interest. Act also provides for moratorium against enforcement of rights against company in statutory management.

Receiverships Act 1993 relates to company receivers.

Takeovers.

Takeovers Act 1993 enacted to establish Takeovers Panel to recommend takeovers code to apply to takeovers of companies which are either parties to listing agreement with registered exchange, or have 50 or more shareholders. Takeovers Panel has recommended code which is in effect. Entities to which Code applies cannot contract out of its provisions. Code generally ensures that all holders of securities are treated equally in respect of takeover. Increases in percentage of voting rights held in company above 20% can only occur in certain permitted ways. These are by making full offer for all outstanding shares, by making partial offer (to all shareholders) for specified percentage of shares, by approval of disinterested shareholders, by creeping 5% per annum between 50% and 90% or by compulsory acquisition to 100% once 90% is held. Code also prohibits defensive tactics once takeover offer is pending. 2006 Amendment conferred increased powers on Takeovers Panel, and provided increased range of remedies for breaches of Act and Code.

Commerce Act 1986.

This Act contains provisions regulating anti-competitive conduct in relation to restrictive trade practices, monopolies, business acquisitions (or mergers and takeovers).

Some trade practices are absolutely prohibited, for example, price fixing between competitors, resale price maintenance, collective boycotts and misuse of market power. Other practices may also be prohibited if they have purpose, effect or likely effect of substantially lessening competition in market, for example, exclusive dealing, market sharing or output agreements.

Authorisations may be obtained from Commerce Commission for most restrictive trade practices on grounds of public benefit outweighing lessening of competition.

This Act also deals with competition issues of mergers and acquisitions. Voluntary premerger notification system has replaced mandatory pre-merger notification provisions. Clearance or authorisation from Commerce Commission is required for any acquisition having effect of substantially lessening competition in market. Cease and desist orders available where there is situation of urgency (see category 3 Business Regulation and Commerce, topic 3.10 Monopolies, 3.12 Restraint of Trade and Competition).

Securities Act 1978.

This Act contains extensive provisions relating to raising of investment and other monies from issue of securities to public and imposes obligations as to information required to be given in such circumstances, particularly with reference to prospectuses. Securities Act requires issuers of securities to public (not confined to corporate issuers) to register prospectus and to provide prospective investors with “investment statement”. Investment statement provides key information likely to assist prudent but nonexpert person to decide whether or not to invest. Superannuation schemes, unit trusts and life insurance policies are also within ambit of Act. Part 5 extends territorial scope and recognises and applies securities laws of designated countries (In 2008, Australia became first country to be so designated). Extensive range of class and ad hoc exemption notices have been issued under §5 of Act. Securities (Disclosure) Amendment Act 2009, in force Oct. 1, 2009, has introduced reduced regime of compliance for issuers listed on New Zealand Exchange, and has otherwise amended provisions governing reach of 1978 Act. New regulations made under 1978 Act, replacing those of 1983, governing content of prospectuses and investment statements and other matters, were introduced by Securities Regulations 2009, in force from Oct. 1, 2009.

Securities Markets Act 1988.

This Act creates substantial penalties for insider trading, and for holding out as futures exchange without required authorisation. Directors and officers of public issuers required to disclose “relevant interests” and substantial security holders required to disclose interests in public issuer. Register of these interests to be kept by issuer. Continuous disclosure of “material information” is required to be made by public issuers. Securities Markets Amendment Act 2006, in force from Feb. 29, 2008, makes major changes to base Act, including substituting new insider trading and market manipulation regime, additions to substantial security holder disclosure regime, and replacement of regime governing investment advisers and brokers (formerly found in Investment Advisers [Disclosure] Act 1996).

2.03 FOREIGN CORPORATIONS:

See topic 2.02 Corporations; category 15 Foreign Trade and Commerce, topic 15.02

Exchange Control.

2.04 INCORPORATED SOCIETIES:

Any group of 15 or more persons associated for any lawful purpose (other than pecuniary gain) may be incorporated under Incorporated Societies Act 1908. All incorporated societies must register in Incorporated Societies Register. Incorporated societies may only carry out activities permitted by their objects which are contained in their rules. Members have no personal liability for debts, contracts, or other obligations of society unless incurred from operations involving pecuniary gain or as result of unlawful activities. On dissolution, surplus assets are disposed of in accordance with society's rules.

See also topic 2.06 Partnerships.

2.05 MORTGAGES OF SHARES:

For more details concerning mortgaging shares, see category 20 Mortgages, topic 20.01 Chattel Mortgages.

2.06 PARTNERSHIPS:

The rules of common law and equity continue to apply except in so far as they are inconsistent with the Partnership Act 1908 (based on earlier UK Act), which is, in main, declaratory of those rules.

In past, number of partners permitted in partnership carrying on business for gain was restricted to 25 (with some exceptions). This restriction has been removed.

Limited Partnerships Act 2008, in force May 2, 2008, repealed special partnership provisions of 1908 Act, and created new concept of limited partnership. Limited partnership upon registration as such, has separate legal personality from its members, although general partners will remain personally liable for any shortfall in meeting partnership debts. Limited partners who make passive investment of equity in partnership will have limited liability for partnership debts.

3 BUSINESS REGULATION AND COMMERCE

3.01 BANKING AND CURRENCY:

Reserve Bank is constituted under Reserve Bank of New Zealand Act 1989 and acts as central bank of New Zealand.

Reserve Bank's primary function is to formulate and implement monetary policy directed to economic objective of achieving and maintaining stability in general level of prices. 1989 Act continues to recognise Government's right to determine economic policy. Duty of Governor of Reserve Bank is to ensure that actions of Bank in implementing monetary policy are consistent with Government policy targets which are fixed from time to time.

Reserve Bank acts as lender of last resort for financial system if considered necessary to do so for purpose of maintaining soundness of financial system. Reserve Bank provides settlement accounts, advises Minister of Finance on matters relating to financial system and on foreign exchange, undertakes banking business of Government and provides to any person security registry services relating to financial securities. Reserve Bank has sole right to issue bank notes and coin in New Zealand.

Reserve Bank continues to have authority to register banks and to prudentially supervise them. Since 2008, Reserve Bank has responsibility for prudential supervision of ``deposit takers'' in New Zealand, which are defined as non-bank financial institutions (including building societies and credit unions) that (a) offer debt securities to public in New Zealand; and (b) carry on business of borrowing and lending money, or providing financial services, or both. ``Deposit takers'' must have current credit rating from approved rating agency, must comply with certain governance requirements, must adopt ``risk management program'', and may be subjected to minimum capital, capital ratio, and liquidity requirements. There are also restrictions on exposures of ``deposit takers'' to related parties.

Only registered banks, representative offices and certain private savings banks can use word “bank” or derivatives in name. Reserve Bank shall not register any person as registered bank unless satisfied that business carried on, or proposed to be carried on, by applicant, consists of, or to substantial extent consists of, borrowing and lending of money, or provision of other financial services, or both. Reserve Bank must be satisfied with standing of applicant in financial market and its ability to carry on business in prudent manner.

Powers given to Reserve Bank (Governor General and Minister of Finance) for prudential supervision purposes are to be exercised for purposes of: (a) Promoting maintenance of sound and efficient financial system; or (b) avoiding significant damage to financial system that could result from failure of registered bank. When performing functions or duties or exercising powers, Reserve Bank must support prescribed Australian financial authorities in meeting their statutory responsibilities relating to prudential regulation and financial system stability in Australia. To extent reasonably practicable, Reserve Bank should avoid any action that is likely to have detrimental effect on financial system stability in Australia. In addition, Reserve Bank must have regard to any directions given by Minister of Finance with respect to government policy objectives. Officers and employees of Reserve Bank have immunity from suit for performance in good faith of their functions.

Under 1989 Act, Reserve Bank has power to deal in foreign currency and may, on direction of Minister of Finance, influence exchange rates by dealing in foreign exchange within guidelines set by Minister. Minister may fix exchange rates for foreign exchange dealing by Reserve Bank.

Foreign Reserves.

Minister of Finance shall, in consultation with Reserve Bank, determine levels at which foreign reserves shall be maintained to enable Reserve Bank to exercise its powers.

Exchange.

On Mar. 2, 1985, New Zealand changed its existing exchange rates by floating New Zealand dollar. Exchange rates are now determined by market forces and reflect demand for and supply of New Zealand dollars in foreign exchange markets. Minister of Finance has power to direct Reserve Bank to deal with foreign exchange for purpose of influencing exchange rate or exchange rate trends.

Foreign Exchange Arrangements.

Foreign exchange facilities are provided by dealers in foreign exchange and enable any person or corporation to take out contracts for purchase or sale of specified amount of foreign exchange, at spot or at future dates. New Zealand Futures and Options Exchange enables US$ and NZ$ futures contracts and NZ$ options to be purchased and provides any person or corporation with alternative hedging facilities.

Financial Transactions Reporting Act 1996.

Financial institutions are responsible for prevention and detection of money laundering and must verify customers, report suspicious transactions and keep records of financial transactions. Verification obligations arise when person requests to become facility holder, including becoming member of Kiwisaver scheme, or seeks to conduct occasional transaction which exceeds prescribed amount. Exceptions apply if another financial institution has verification obligation. Financial institution required to report transactions when financial institution has reasonable grounds for suspecting that transaction may be relevant to investigation or prosecution of money laundering offence or enforcement of Criminal Proceeds (Recovery) Act 2009 (in force Dec. 2009), which provides for forfeiture of property derived directly or indirectly from significant criminal activity or property representing value of person's unlawfully derived income.

Financial institutions must keep transaction records (including amount, currency, date, parties and contact with other institutions) to enable reconstruction of transaction by police. Verification records kept for at least five years either in written form in English language, or readily accessible and convertible into written form.

In order to comply with recommendations issued by Financial Action Task Force, Anti-Money Laundering and Countering Financing of Terrorism Act 2009 imposes on financial institutions parallel regime of customer due diligence, record keeping and reporting of transactions which financial institution has reasonable grounds to suspect is relevant to investigation or prosecution of money laundering offence or to enforcement of Misuse of Drugs Act 1975, Terrorism Suppression Act 2002, Criminal Proceeds (Recovery) Act 2009 or serious offence under Crimes Act 1961.

Currency.

Since July 10, 1967, monetary unit has been dollar with 100¢ equalling $1.

See also category 15 Foreign Trade and Commerce, topic 15.02 Exchange Control.

3.02 BILLS AND NOTES:

Bills of Exchange Act 1908 substantially reproduces English Bills of Exchange Act 1882. As in England, rules of common law, including law merchant, save in so far as they are inconsistent with express provisions of Act, continue to apply to bills of exchange, promissory notes, and cheques. Conflict of laws rules are substantially same as English rules. Cheques payable into account of payee do not require endorsement. Cheques Act 1960 contains rules relating to nontransferable cheques. Cheque that is crossed and bears words “not transferable” or “nontransferable” or “account payee” or “a/c payee” is valid only as between parties to it and is not transferable.

3.03 COMMERCIAL REGISTER:

No general requirement to register other than specific provisions relating to companies under Companies Act 1993, (including overseas companies carrying on business in New Zealand), limited partnerships within Limited Partnerships Act 2008 (in force 2 May 2008),incorporated societies within Incorporated Societies Act 1908, “motor vehicle traders” under Motor Vehicle Sales Act 2003, “licensed immigration advisers” under Immigration Advisers Licensing Act 2007, licensed real estate agents under Real Estate Agents Act 2008, ``financial advisers'' under Financial Advisers Act 2008 in relation to certain types of financial advice and investment product, and ``financial service provider'' under Financial Service Providers (Registration and Dispute Resolution) Act 2008. No business register of names under which trading names able to be protected. Internet Society of New Zealand has set up register of New Zealand domain names which can be found at www.domainz.net.nz.

See category 2 Business Organizations, topics Associations, 2.02 Corporations and 2.06 Partnerships.

3.04 CONDITIONAL SALES:

See category 20 Mortgages, topic 20.01 Chattel Mortgages.

3.05 CONTRACTS:

Much of New Zealand law of contract is similar to that of England and in many respects common law applies. There are number of statutes in force each relating to particular areas of law of contract. Principal features of contract statutes are their simplicity and broad discretion conferred on courts, tribunals or arbitral tribunals to grant relief.

Excuses for Nonperformance.

Common law generally does not relieve party from performing contract due to unforeseen circumstances arising unless truly exceptional circumstances (rendering contract impossible to perform) arise when Frustrated Contracts Act 1944 can come into operation. Court, tribunal or arbitral tribunal has power to grant relief to party to illegal contract governed by NZ law by virtue of Illegal Contracts Act 1970.

Applicable Law.

Parties may specify law to govern contract, if not specified then law of jurisdiction that has closest or most real connection with parties or contract will govern.

Amendments to contract legislation in 2002 specifically state legislation does not apply to contracts governed by foreign law.

Government Contracts.

No special requirements. Enforcement against Crown governed by Crown Proceedings Act 1950. Crown power to borrow, issue securities and enter into derivative transactions restricted by Public Finance Act 1989 (as am'd by Public Finance Amendment Act 2004).

Contractual Mistakes Act 1977.

Act confers upon Courts and arbitrators power to mitigate arbitrary effects of mistakes, of certain kinds, which influenced one or more of parties to enter into contract and which resulted at time of contract in substantially unequal exchange of values or in conferment of benefit or imposition of obligation substantially disproportionate to consideration therefor.

Insurance Law Reform Act 1977.

Act contains important provisions preventing insurer relying on misstatement in proposal unless statement was substantially incorrect and was material. Special provision is made for misstatements as to insured's age in life insurance policy. Provisions in insurance contracts requiring disputes to be referred to arbitration do not bind insured. Salesmen, etc., are deemed to be agents of insurer which is deemed to have notice of all material matters known to salesman.

Contractual Remedies Act 1979.

Act sets out code of rules relating to remedies for misrepresentation and breach of contract which apply unless parties to contract have made other provision. Remedies in Act not applicable to sales of goods except in case of misrepresentation.

Consumer Guarantees Act 1993.

Act provides that certain statutory guarantees are implied where goods and services are supplied to consumers and establishes processes for enforcement of those guarantees.

See topic 3.13 Sales.

Corporations (Investigation and Management) Act 1989.

Act limits enforcement of contractual rights against corporation subject to statutory management. Statutory manager may suspend discharge of obligations under any contract without breaching or repudiating it. Statutory manager may exercise any power, privilege or right corporation has under any contract, and may terminate contracts of service or agency between corporation and its servants or agents.

Credit Contracts and Consumer Finance Act 2003.

Act (in force Apr. 2005) applies to consumer credit contracts and consumer leases and contains important provisions relating to disclosure of terms of arrangements whereby credit is granted, places restrictions on credit advertisements, and controls credit and default fees.

Court may also reopen any credit contract (and not just consumer credit contracts) which it considers “oppressive”. “Oppressive” is defined to mean oppressive, harsh, unjustly burdensome, unconscionable or in contravention of reasonable standards of commercial practice. Court has considerable remedial powers to provide relief to debtors under credit contracts which are oppressive or are operated oppressively, or are induced by oppressive means. Act also permits courts to change terms of consumer credit contract on grounds of “unforeseen hardship”, including but not limited to debtor's illness, injury, loss of employment, and end of personal relationship. Commerce Commission, as well as involved debtors, have power to enforce duties under Act.

Contracts (Privity) Act 1982.

Act makes provision for enforcement by third party of promise made in its favour under deed or contract to which it is not party unless promise has been discharged or varied in accordance with contract or discretion of court or promise not intended to create obligation enforceable by third party.

Minors Contracts Act 1969.

Act permits courts to enforce contract against or declare that contract is binding upon minor if contract is fair and reasonable in circumstances. Minors’ Contracts Act 1969 was substantially amended by Minors’ Contracts Amendment Act 2005 (in force 26 Apr. 2005).

See topic 3.13 Sales.

Distributions, Dealerships and Franchises.

No statute law in New Zealand specifically applicable to these arrangements. Consideration must be taken of trade practices requirements of Commerce Act 1986 (amended by Commerce Amendment Act 2008). In particular, prohibition against actions whose purpose or likely effect is lessening of competition in market may have potential application to, inter alia, resale price maintenance provisions, exclusive dealing provisions and territorial restrictions provided for in contractual arrangements.

Protection of arrangements of this type is afforded by combination of registration of product and service trademarks under Trade Marks Act 2002 (amended by Trade Marks Amendment Act 2005), and prohibitions against misleading and deceptive conduct provided for by Fair Trading Act 1986 (expressly protecting both registered and unregistered trademarks) and in tort of passing-off (see category 2 Business Organizations, topic 2.02 Corporations, subhead Commerce Act 1986).

Credit (Repossession) Act 1997.

Act provides for repossession of goods by creditor under “security agreement” to which Act applies.

See topic 3.13 Sales.

3.06 FACTORS:

See category 2 Business Organizations, topic 2.01 Agency.

3.07 FRAUDS, STATUTE OF:

As from 1 Jan. 2008, Contracts Enforcement Act 1956 has been entirely repealed and replaced by Property Law Act 2007, which provides that contracts of guarantee or any contract under which person agrees to answer to another person for debt, default, or liability of third person must be in writing and signed by guarantor. 2007 Act also provides that contracts for disposition of land is not enforceable by action, unless in writing or recorded in writing and contract or written record is signed by person against whom contract is to be enforced. For these purposes, contract for disposition of land means any sale, mortgage, transfer, grant, partition, exchange, lease, assignment, surrender, disclaimer, appointment, settlement, or other assurance of any estate or interest in real property. It also includes creation of easement, profit à prendre or other interest in real property, but does not include short-term lease, sale of land by order of court through Registrar of High Court, or to any alienation of Maori land by Maori being alienation that is required by Te Ture Whenua Maori Act 1993 (Maori Land Act), to be confirmed by Maori Land Court or to any sale of Maori land by order of that Court. Provisions in Property Law Act 2007 also require actual disposition of legal and equitable interests in land to be in writing and signed by person making disposition. 2007 Act also requires declaration of trust over land to be in writing that is signed by settlor.

See topic 3.13 Sales.

3.08 INFORMATION TECHNOLOGY, INTERNET AND NEWS MEDIA:

General Commercial.

In general, New Zealand's core business law has not been technology specific and applies equally to business on Internet and other types of business. Such legislation includes:

Fair Trading Act 1986.

Act prohibits misleading and deceptive conduct in trade in New Zealand in relation to representations made about products or services. Act purports to apply to persons outside New Zealand where such persons are resident or carrying on business in New Zealand and to extent that their conduct relates to supply of goods or services within New Zealand. Question whether representations made on Internet or via other means of electronic communication constitutes “carrying on business in New Zealand” remains untested in courts. Potentially, Fair Trading Act will apply to representations made by overseas entity over Internet, although there are difficulties with court action against businesses that have no physical presence in New Zealand. Such action would be similar to that used against overseas business that placed newspaper advertisements in New Zealand. Commerce Commission uses warnings, settlements and court action to enforce Act. Courts can impose fines of up to $200,000 against corporations and up to $60,000 against individuals and wide range of injunctions and orders (pyramid selling carries higher fines).

Films, Videos and Publications Classification Act 1993.

Certain material that is published over Internet may infringe Act if it is considered by Act as “objectionable”. For purposes of Act, publication is objectionable if it describes, depicts, expresses, or otherwise deals with matters such as sex, horror, crime, cruelty, or violence in such manner that availability of publication likely to be injurious to public good. Publications falling within certain defined categories are deemed “objectionable”.

Copyright Act 1994.

Protection for works of originality (see category Intellectual Property) is afforded to works on Internet (such as literary, musical and artistic works) under Act, as well as ``communication works'' by Copyright (New Technologies) Amendment Act 2008. 2008 Act made number of changes to reflect digital and Internet developments, including expansion of provision relating to technological protection measures, and new provision relating to copyright management information. There are also new provisions concerned with Internet Service Provider (ISP) liability, but one providing that ISP must have policy that could require termination of account of ``repeat infringer'' has not been put into force, pending further consideration by Government. Computer programs are also protected as literary works under Act.

Electronic Transactions.

Electronic Transactions Act 2002.

Electronic Transactions Act removes uncertainty surrounding legal status of electronic communications. Act was passed Oct. 17, 2002, and came into force on Nov. 21, 2003. Act is overarching legislation, meaning that provisions of Act apply to and modify certain requirements of all Acts already on statute book, unless expressly excluded by Electronic Transactions Act. Act provides that no transaction will be denied legal effect merely because it occurs electronically. Most statutory requirements of writing, signatures and retention of records will be able to be met by electronic equivalents. Act does not cover such arrangements as wills, cheques, affidavits and other court documents, documents relating to land and some provisions in consumer legislation relating to notice.

Offer and Acceptance.

Electronic Transactions Act contains list of default rules for determining when and where electronic messages are received (although these rules can be overridden by contrary agreement between parties to electronic transaction). Time of receipt will be when message enters intended recipient's information system. If message does not enter particular information system designated by intended recipient, receipt occurs only when message is retrieved.

Evidence.

Discovery Process.

Recent decision indicates discovery of electronically stored information is becoming commonplace tool. Decision indicates lenient attitude on part of courts towards discovery of electronic information. (Geddes v. New Zealand Dairy Board [2002] 1 NZECC [digest] 70-022); (Fujitsu General New Zealand Ltd. v. Black Diamond Holdings Ltd. [HC Wellington, 31 May 2004, Associate Judge Gendall]).

Evidential Admissibility.

Documents containing downloaded information are admissible by virtue of Evidence Act 2006 (in force 1 Aug. 2007) which renders admissible documents produced wholly or partly by machine, device or technical process. Act is without prejudice to Interpretation Act 1999 (which is also overarching legislation) recognises that electronic documents may be admissible as evidence, by providing that electronically generated words, figures or symbols will comply with requirement that document be in “writing”, unless Act specifies that certain documents are required to be in writing. Evidence Act 2006 also provides for giving of evidence and making of submissions by video-link.

Domain Names.

Registration.

New Zealand's system for allocation and registration of domain names has recently been modified. Main change was shift to Shared Registry System (SRS) which allows authorised registrars to register and manage.nz domain names directly with registry. Internet Society of New Zealand Inc. (trading as InternetNZ) still has overall responsibility for register of domain names. Responsibility for .nz name space was assigned to InternetNZ by ICANN. Office of Domain Name Commissioner (Commissioner) is operational office of InternetNZ. Commissioner is responsible for day to day oversight of .nz domain name registration and management system. Commissioner is also responsible for authorising registrars, empowering them to register domain names and modify information relating to those names. Approximately 68 registrars are authorised by Commissioner. Commissioner also handles any disputes and complaints regarding registration of domain names, and dispute resolution service was implemented on 1 June 2006. Domainz (which is owned by InternetNZ) controls registry, allocates domain names and acts as stabilising registrar. One of its main functions has been to manage transition from old register to new SRS. .nz Registry Services (NZRS) was established by InternetNZ to act as registry, and exclusively operates and manages .nz register and domain name server on behalf of InternetNZ. Registrant of domain name must be identifiable individual over 18 years of age or legally constituted organisation. It is possible to register country specific domain name without being resident in country.

Fair Trading Act 1986.

Fair Trading Act provides for plaintiff's claim of misleading or deceptive conduct in trade. Legitimate and continuous use of domain name will assist in establishing goodwill and/or reputation which are critical elements to successful claim under Act.

Cybersquatting.

New Zealand courts have developed principles for determining who has better right to use particular domain name where registered trademark is involved. Possession of registered trademark similar to disputed domain name may strengthen party's claim for ownership of domain name.

Cybercrime.

Crimes Act 1961.

Computer hacking or electronic fraud and interception of any private communication by means of interception device (subject to exceptions in favor of Police) can be prosecuted under Crimes Act 1961. Computer program and computer disk on which program may be stored is covered by definition of “document” in Crimes Act in terms of taking or dealing with certain documents with intent to obtain any property, service, pecuniary advantage, or valuable consideration. Technology specific amendments to Crimes Act came into force on Oct. 1, 2003 creating criminal offences in relation to accessing any computer system for dishonest purposes, damaging or interfering with computer system, dealing in software designed for committing crime, and having unauthorised access to computer or computer system (hacking or electronic trespass).

Interception of Telecommunications.

Telecommunications (Interception Capability) Act 2004.

Came into force on Apr. 6, 2004. Act is to ensure that law enforcement and national security capabilities are not eroded by changes in technology, by obliging telecommunications network operators to upgrade their voice and data network systems to ensure that, if required, they are able to intercept telecommunications (including emails and Internet activity). Act also creates duty on network operators to provide assistance to warranted police and surveillance agencies if required. Act does not change or broaden existing powers of police and surveillance agencies to intercept telecommunications. (See topic 3.08 Information Technology, Internet and News Media, subhead Cybercrime.)

"Interception" includes ability to hear, listen to, record, monitor, acquire or receive telecommunication. Network operators must ensure that their systems are able to obtain call associated data (duration of calls and other "metadata") and content of telecommunications in form able to be used by surveillance agencies. Network operators are also required to decrypt encrypted messages, if they provided that encryption.

Digital Broadcasting.

There is no legislation specific to digital broadcasting in New Zealand. Broadcasting is regulated by Broadcasting Act 1989 (as amended), Radiocommunications Act 1989 (as amended) and Commerce Act 1986.

Choice of Law.

Governing law of transaction, where parties are from different countries, will usually be law of country chosen by parties or with which contract has most real and substantial connection. However, when contract formed online, presumption (proposed by New Zealand Law Commission, but as yet untested in New Zealand) is that governing law is that of country where contract is to be performed (goods delivered or service performed). This issue is further confused if parties are communicating via ISP in third country. In such case, if ISP is deemed agent of customer, acceptance may occur when delivered to ISP. Laws of ISP's country would then govern contract.

Encryption.

New Zealand is party to number of international conventions and protocols which relate to export of encryption technology. To meet its obligations under such conventions (for example Wassenaar Arrangement) New Zealand regulates export of encryption technology through Customs and Excise Act 1996 and Customs Export Prohibition Order 1996. Products containing encryption technology cannot be exported without Ministry of Foreign Affairs and Trade's consent.

3.09 LICENCES, BUSINESS AND PROFESSIONAL:

Many business activities can only be carried on pursuant to licences or permits issued under statutes or regulations. Often the issue, control and cancellation of licences are carried out by tribunals appointed under statute with or without rights of appeal to appeal tribunal or High Court. Many businesses or professions, and persons engaged therein, must by statute be registered, and disciplinary power is often conferred upon controlling body.

3.10 MONOPOLIES, RESTRAINT OF TRADE AND COMPETITION:

Commerce Act 1986 is designed to promote competition in markets by prohibiting restrictive trade practices which substantially lessen competition. Price fixing and resale price maintenance are unlawful. Use of substantial degree of market power which reduces competitive activity in market is also prohibited. Mergers and takeovers are prohibited if they are likely to have effect of substantially lessening competition in market.

Authorisations may be obtained from Commerce Commission for restrictive trade practices on grounds of public benefit. Authorisations may be obtained for business acquisitions if countervailing public interest outweighs any detriment from lessening of competition. Clearances may be obtained where no substantial lessening of competition. Commerce Commission Practice Notes outline both authorisation and clearance processes. Right of appeal to High Court of New Zealand and, in limited circumstances, to Court of Appeal, and Supreme Court (see category 2 Business Organizations, topic 2.02 Corporations, subhead Commerce Act 1986).

Territorial Sea, Contiguous Zone and Exclusive Economic Zone Act 1977.

Act claims for New Zealand territorial sea and contiguous zone of 12 nautical miles and exclusive economic zone of 188 nautical miles beyond that. Pursuant to Fisheries Act 1996 (as am'd), no foreign fishing craft is to be used for fishing within exclusive economic zone except in accordance with licence issued by Minister of Fisheries. Substantial penalties are provided for breach of Act. See also category 23 Transportation, topic 23.05 Shipping.

3.11 NEGOTIABLE INSTRUMENTS:

See topic 3.02 Bills and Notes.

3.12 RESTRAINT OF TRADE:

See topic 3.10 Monopolies, 3.12 Restraint of Trade and Competition.

3.13 SALES:

Sale of Goods Act 1908 substantially reproduces English Act of 1893, except that law relating to market overt is expressly excluded. Statute is practically codification of law and deals specifically with formalities of contract, price, conditions and warranties, sales by sample, rights of unpaid sellers, and actions for breach of contract.

Contract of sale may be made in writing (either with or without seal) or by word of mouth, or partly in writing and partly by word of mouth, or may be implied from conduct of parties.

Where goods are of perishable nature or where unpaid seller gives notice to buyer of intention to resell and buyer does not pay price within reasonable time, unpaid seller may resell goods and may recover damages from original buyer.

If sale of goods is binding according to law governing contract of sale and to law of place where goods are situate at time of sale, sale will be upheld by New Zealand court. Law governing contract is determined by reference to intention of parties or significance of factors connecting contract to particular legal system such as place where contract was to be made or to be performed.

Layby Sales Act 1971 is deemed part of Sale of Goods Act 1908. Act excluded if sale is of motor vehicle and seller is dealer licensed under Motor Vehicle Sales Act 2003 or price of goods exceeds $7,500. Act entitles purchaser to statement of balance owing, to cancel contract and governs rights on cancellation and time when risk passes.

As to hire-purchase agreements, see category 20 Mortgages, topic 20.01 Chattel Mortgages.

Ability to terminate sale contract and reject goods for breach is recognised by Sale of Goods Act 1908. Damages for breach of contract are governed partly by Act and partly by common law principles. Plaintiff retains ability to rescind sale contract for misrepresentation and ability to claim damages in this case is now governed by Contractual Remedies Act 1979 rather than common law.

Warranties on sale of goods are either expressed or implied under Sale of Goods Act

1908. Under this Act three conditions are implied after certain prerequisites are satisfied: (a) Correspondence with description; (b) fitness for purpose; (c) merchantable quality. In case of a sale by sample there is an implied condition that bulk shall correspond with sample in quality; that buyer shall have a reasonable opportunity of comparing bulk with sample; and that goods are not unmerchantable. Open to parties to exclude above conditions in their contract, except layby sales where Act does not allow contracting out unless conditions more favourable to buyer. An implied warranty or condition as to quality or fitness for particular purpose may be annexed by trade or usage. Certain obligations as to title are also implied in contracts of sale, namely: (a) implied condition on part of seller that seller has right to sell goods; (b) implied warranty that buyer shall have and enjoy quiet possession of goods and; (c) implied warranty that goods are free from any charge or encumbrance in favour of any third party. There are currently no guarantees of quality imposed by law or usage.

Consumer Guarantees Act 1993 replaces implied conditions and warranties as to title, quality, fitness and correspondence with description and sample contained in Sale of Goods Act 1908 in case of supply of goods to consumers (customers purchasing for domestic use and not for business use or resale) and introduces additional guarantees, one of which is that goods are of acceptable quality. Goods will only be considered to be of acceptable quality if fit for all purposes for which goods of type in question are commonly supplied, have acceptable appearance and finish, be free from minor defects, be safe and durable and be what reasonable consumer fully acquainted with state and condition of goods would regard as acceptable having regard to such matters as nature and price of goods and representations made on packaging and by suppliers. Act also provides for guarantees to consumers in relation to services, including guarantees as to reasonable care and skill, fitness, time of completion and price. Procedures for enforcing statutory guarantees are created. Act cannot be contracted out of in relation to consumers.

Door to Door Sales Act 1967.

Act makes certain credit sale agreements, hire purchase agreements and hiring agreements in respect of sale of goods or provision of services entered into at premises other than vendor's premises unenforceable unless agreement is in writing, signed by purchaser and by or on behalf of vendor, contains a statutory statement dealing with purchaser's right of cancellation, contains statement of cost and details of credit received by purchaser, copy of agreement and form for use on cancellation is handed to purchaser at time agreement is made. Agreements that are subject to Act may be cancelled in all cases by purchaser within seven days entitling purchaser to return of all moneys paid, any trade-in and, in certain cases, compensation.

Unsolicited Goods and Services Act 1975.

Act provides if recipient does not agree to acquire or return goods and sender does not repossess them within stated time goods deemed gift. Contracts for supply of prescribed services made unenforceable unless recipient signs note complying with Act. Threats or demands for payment, and sending invoices, for unordered goods or services made offences.

Motor Vehicle Sales Act 2003.

Act requires car dealers to be registered and salesmen to be registered or approved. Act imposes obligations on dealers in respect of sale of second-hand motor vehicles (see topic 3.13 Sales, supra). Act creates series of regulatory offences and gives powers to ban people from acting as dealers and salespeople.

Fair Trading Act 1986.

Act dictates standards of consumer and product safety. Misleading and deceptive conduct, in relation to trade, is prohibited. Damages and other civil remedies available. False representations relating to wide range of descriptive aspects of those goods or services are also prohibited—i.e. quality, quantity, grade, previous history or usage, price, origin, approval, endorsement, etc. Certain unfair practices are also prohibited—bait advertising, referral selling, pyramid selling schemes, etc. Penalties for infringement both civil and criminal—fines up to maximum of $200,000 for corporate liability and up to $60,000 for personal liability. Injunctive relief available to all litigants—remedy of corrective advertising available only to Commerce Commission, body given task of policing compliance with Act. Limited defences available to news media. Other persons are restricted to defences of reasonable mistake etc. As of 1 Oct. 2008, international reach of Act will be extended to goods exported to China.

Minister can declare services and product safety standards.

3.14 STATUTE OF FRAUDS:

See topics 3.07 Frauds, Statute of, 3.13 Sales.

4 CITIZENSHIP

4.01 ALIENS:

See category 17 Immigration.

4.02 IMMIGRATION:

See category 17 Immigration, topic 17.01 Aliens.

4.03 NATIONALITY:

Citizenship Act 1977 consolidates and amends law relating to citizenship as originally set out in British Nationality and New Zealand Citizenship Act 1948; status of persons who are New Zealand citizens under latter Act is not affected. Every person born in New Zealand (except for children of certain aliens holding diplomatic status and neither parent being New Zealand citizen, or who are enemy aliens and birth occurred in place occupied by enemy) on or after Jan. 1, 1949 and before Jan. 1, 2006 or, if born in New Zealand on or after Jan. 1, 2006 (provided that at least one parent was New Zealand citizen or entitled indefinitely to reside in New Zealand, Cook Islands, Nuie, or Tokelau) is citizen by birth. Despite this, every person born in New Zealand on or after Jan. 1, 1978 is citizen by birth if he would otherwise be rendered stateless. Also, person is citizen by birth if he was born recently and found abandoned in New Zealand and identity of neither parent could be established. Every person born outside New Zealand on or after Jan. 1, 1978 shall be New Zealand citizen by descent if at time of his birth his father or mother is New Zealand citizen otherwise than by descent. Person shall be deemed to be child of New Zealand citizen if adopted by that citizen pursuant to Adoption Act 1955. Any person who has attained 16 years of age and is of full capacity may obtain citizenship by grant if he satisfies Minister of Internal Affairs that: (a) He is entitled to be in New Zealand indefinitely under Immigration Act; (b) he was present in New Zealand for minimum or 1,350 days during (and at least 240 days in each of) five years preceding his application; (c) he is of good character; (d) he has sufficient knowledge of responsibilities and privileges of New Zealand citizenship; (e) he has sufficient knowledge of English language; and (f) he intends to continue to reside in New Zealand or work for Crown under New Zealand Government, or under international organization of which New Zealand Government is member, or for person, company, society or other body or persons resident or established in New Zealand.

Citizenship may also be granted by Minister, subject to certain conditions, to any person: (a) Who is younger than 16; (b) whose father or mother was at time of person's birth New Zealand citizen by descent; (c) if it is in public interest because of exceptional circumstances of humanitarian or other nature; or (d) if he would otherwise be stateless.

Act also provides for renunciation or loss of citizenship in case of taking up other citizenship or citizenship if fraudulently obtained and for registration of aliens.

There are special provisions relating to persons of Western Samoan descent in Citizenship (Western Samoa) Act 1982.

See also category 17 Immigration, topic 17.01 Aliens.

4.04 NATURALIZATION:

See topic 4.03 Nationality; category 17 Immigration, topic 17.01 Aliens.

5 CIVIL ACTIONS AND PROCEDURE

5.01 ACTIONS:

With some exceptions (e.g. defamation), on death of any person all causes of action subsisting against or vested in that person survive against or, as case may be, for benefit of estate. Exemplary damages not recoverable after death of plaintiff.

Limitation of.

See topic 5.04 Limitation of Actions.

Service of Foreign Process.

There are currently no special provisions for service of process of Commonwealth countries, and service may be effected under usual New Zealand rules. Other foreign process is served by appropriate High Court by request transmitted through Chief Executive of Ministry of Justice, unless convention is in force between New Zealand and country concerned, in which case application can be made, in standard form, to Registrar of High Court at Wellington. (High Court Rules 213-218).

In 2008, New Zealand and Australia signed Trans-Tasman Court Proceedings and Regulatory Enforcement Agreement allowing civil process issued by court in either jurisdiction to be served in other. This regime will come into effect when appropriate domestic legislation is enacted.

Proof of Foreign Law.

If it is considered by New Zealand court that foreign law is applicable to particular dispute, that foreign law must be proved as question of fact. Evidence Act 2006, §141 (in force 1 Aug. 2007) allows receipt in New Zealand courts of official volumes of foreign statute law and judicial decisions as prima facie proof of that law. Expert evidence is usually required.

5.02 DEPOSITIONS AND DISCOVERY:

For purposes of proceedings in New Zealand court, evidence may be taken abroad by means of commissions, special examinations, or requests to foreign courts in lieu of commissions. (Judicature Act 1908, §§47-49). Conventions regarding evidence exist between New Zealand and some countries, for example Germany. Conversely, evidence may be taken on commission in New Zealand or by means of special affidavits or declarations made in New Zealand for use in proceedings before foreign tribunals. Evidence Act 2006, §184 (in force Aug. 1, 2007) allows taking of evidence in New Zealand on examination at request of any court or tribunal exercising jurisdiction in country or territory outside New Zealand.

When enacted, Commerce Commission (International Co-operation and Fees) Bill will allow sharing of information and evidence between competition authorities in New Zealand and

Australia.

5.03 JUDGMENTS:

Pursuant to orders-in-council made under Reciprocal Enforcement of Judgments Act 1934, judgments of superior courts of stipulated countries may be enforced in New Zealand. On assurance being given of substantial reciprocity of treatment in enforcement of New Zealand judgments, provisions of Reciprocal Enforcement of Judgments Act may be extended to judgments of any part of Her Majesty's Dominions, or judgments of any foreign country by order-in-council (§3 Reciprocal Enforcement of Judgments Act 1934). By virtue of Maritime Transport Act 1994, Reciprocal Enforcement of Judgments Act 1934 applies to any judgment given by court in any country: (a) In respect of which International Convention on Civil Liability for Oil Pollution Damage 1969 is in force, to allow enforcement of claim in respect of liability of ship owners for pollution damage incurred under Maritime Transport Act (§369); or (b) against International Oil Pollution Fund in any country in respect of which Fund Convention is in force (§382).

Foreign judgments in personam constitute good cause of action in New Zealand, as setting up simple contract debt between parties. Foreign judgment must be registered before it can be proceeded upon to recover any sum in any court in New Zealand. However, unregistered judgment may be recognised in proceedings based on same cause of action, and may be relied on for defence or counterclaim. Foreign judgment will not be registered if it has been wholly satisfied, or would be unenforceable in country it was given in. No foreign judgment whether from country to which Reciprocal Enforcement of Judgments Act applies or otherwise will be enforced unless court is satisfied that judgment is final and conclusive and that sum of money is payable thereunder. It will be deemed final and conclusive notwithstanding that appeal may be pending. There are various grounds upon which registration may, or shall, be set aside, such as lack of jurisdiction of original court. Under Judicature Act 1908 memorials of judgments of courts of any part of Her Majesty's Dominions, which are not enforceable under Reciprocal Enforcement of Judgments Act 1934, may be registered.

Care of Children Act 2004 enacted provisions relating to enforcement in New Zealand of overseas parenting orders and as to enforcement overseas of such orders made by New Zealand Courts.

5.04 LIMITATION OF ACTIONS:

Common law action for damages barred in respect of personal injury by accidents occurring on or after Apr. 1, 1974 by Accident Compensation Act 1972; Act replaced in 1992 and again by Accident Insurance Act 1998 on 1 July 1999. 1998 Act introduced competitive private provision for workplace accident insurance. Accident Insurance (Transitional Provisions) Act 2000 substantially amends 1998 Act and renationalises scheme, but prohibition on personal injury damages remains. This Act now replaced by Injury Prevention, Rehabilitation, and Compensation Act 2001, although further changes may be introduced by Injury Prevention, Rehabilitation, and Compensation Amendment Bill. However, exemplary damages under common law remain available. Limitation time for making claims to Accident Compensation Commission is generally 12 months from date of accident causing injury or death. Actions for recovery of land, except those brought by Crown in which case 60 years (§7, Limitation Act 1950), money charged on land and actions on deed or upon judgment must be brought within 12 years. Actions on simple contracts, merchants' accounts, tort (except personal injuries), to recover rent or to recover any sum recoverable by virtue of any enactment must be brought within six years. (§4 Limitation Act 1950). Action for defamation must be brought within two years, or six years with Courts leave. (§4[6A], 4[6B] Limitation Act 1950). Actions under Fair Trading Act 1986 amended in 2002 have three year limitation period from date on which loss or damages, or likelihood of loss or damage was discovered or ought reasonably to have been discovered. Limitation periods extended in cases of disability, fraud and mistake and no limitation to actions for recovery of land tax or income tax. Law applicable to limitation is likely to undergo significant changes if Limitation Bill, before Parliament, is enacted.

5.05 PRESCRIPTION:

See topic 5.04 Limitation of Actions.

6 COURTS AND LEGISLATURE

6.01 COURTS:

See category 1 Introduction, topic 1.02 Government and Legal System, subhead The Judiciary.

6.02 LAW REPORTS, CODES:

See topics 6.04 Reports, 6.05 Statutes.

6.03 LEGISLATURE:

See category 1 Introduction, topic 1.02 Government and Legal System.

6.04 REPORTS:

Law reports include New Zealand Law Reports—(NZLR), Resource Management Appeals—(NZRMA), Family Law Reports—(NZFLR), New Zealand Administrative Reports—(NZAR), District Court Reports—(DCR) all published by Lexis Nexis Butterworths; Trade and Competition Law Reports—(TCLR), Criminal Reports of New Zealand—(CRNZ), Family Reports of New Zealand—(FRNZ), Procedure Reports of New Zealand—(PRNZ), and Employment Reports of New Zealand—(ERNZ) all published by Brooker's; Environmental Law Reports of New Zealand—(ELRNZ) published by DSL; New Zealand Company Law Cases—(NZCLC), New Zealand Business Law Cases—(NZBLC), New Zealand Employment Law Cases—(NZELC), New Zealand Tax Cases—(NZTC), New Zealand Conveyancing Cases—(NZ Conv. C), Australian and New Zealand Insurance Cases—(ANZ Insurance Cases) all published by CCH New Zealand.

6.05 STATUTES:

Legislation Direct publishes Statutes of New Zealand and Regulations made under authority of statutes. It also publishes New Zealand Gazette which contains proclamations, notices and orders in council.

Free and amended legislation is available from (http://www.legislation.govt.nz).

Brooker's (http://www.brokers.co.nz), Knowledge Basket (http://www.knowledge-basket.co.nz) and Lexis-Nexis Butterworths (http://www.lexisnexis.com) have legislation available at their websites on subscription.

7 CRIMINAL LAW

7.01 ARREST:

Absconding debtors and persons guilty of contempt of Court may be arrested and/or imprisoned in some circumstances. Writ of sequestration is available by which property of contemnor may be seized. Imprisonment for debt has been abolished, except in specified circumstances where debtor may be imprisoned for period of up to one year under Imprisonment for Debt Limitation Act 1908 as amended by Imprisonment for Debt Limitation Amendment Act 1989.

7.02 CRIMINAL LAW:

Apart from certain common law defences, criminal law is entirely statutory and has been so since enactment of Criminal Code Act 1893, an Act based on English Criminal Code Bill of 1880. Present law is contained in Crimes Act 1961. In addition to such jurisdiction as they possess in respect of indictable offences, District Court judges (and in certain cases justices of peace) have jurisdiction in respect of summary offences created by Justices of the Peace Act 1957, Summary Offences Act 1981 and Summary Proceedings Act 1957 (substantial amendments made in 2008).

8 DEBTOR AND CREDITOR

8.01 ASSIGNMENTS:

Under Property Law Act 2007 (in force 1 Jan. 2008), any absolute assignment (not purporting to be conditional by way of charge only) of any debt or other legal or equitable thing in action to be statutory assignment must be in writing signed by assignor, and regardless of whether assignment has been given for valuable consideration. Notice to debtor is no longer pre-condition of valid statutory assignment, but may be important in identifying debtor who is entitled to pay and determining any rights of set-off or other equities that exist between debtor and assignee. Assignee takes subject to all equities existing between debtor and assignor until such time as debtor has actual notice of assignment. There can be statutory assignment of part of thing in action and of amount payable in future under right already possessed by assignor. Property Law Act 2007 also gives effect to equitable assignment of legal or equitable thing in action whether oral and in writing, provided assignment is for valuable consideration and complete. Equitable assignment will be complete when assignor has done everything that needs to be done by assignor to transfer rights to thing in action. Assignee may enforce thing in action without joining assignor, unless assignment relates to only part of thing in action or constitutes equitable assignment. Assignees can be liable for damages for nonperformance by assignor up to value of contract to assignee under Contractual Remedies Act 1979, and under Consumer Guarantees Act 1993.

Book debts are personal property under Personal Property Securities Act 1999. Assignments of book debts whether absolute or by way of security are deemed security interests and therefore need to be registered in Personal Property Securities Register in order to preserve priority. See category 20 Mortgages, topic 20.01 Chattel Mortgages.

8.02 ASSIGNMENTS FOR BENEFIT OF CREDITORS:

See topic 8.03 Bankruptcy.

8.03 BANKRUPTCY:

Law is contained in Insolvency Act 2006 (in force Dec. 3, 2007). Debtor commits act of bankruptcy if: (a) Debtor makes disposition to trustee of all or substantially all of his property for benefit of all or any creditors; (b) debtor makes certain fraudulent dispositions; (c) debtor departs, attempts to depart or prepares to depart from New Zealand with intention to delay or defeat creditors, or if already outside New Zealand, remains there with such intent; (d) debtor fails to comply with bankruptcy notice served by creditor within ten days, or satisfied court within that time that there is cross claim against creditor; (e) debtor gives notice to any creditor that he has suspended or is about to suspend payment of debts; (f) at creditor's meeting (1) majority of creditors present at meeting requires filing of application for adjudication, or (2) debtor consents to file application for adjudication and does not do so within two working days after meeting; (g) possession taken under execution issued against debtor or property and judgment is not satisfied within five working days after possession, but interpleader proceedings will delay time from running until determined; (h) writ of sale of his land has been directed and advertised and judgment remains unsatisfied for five working days after writ of sale has been delivered to sheriff and advertised; (i) return is made that sufficient goods and chattels of debtor could not be found on which to levy debt; (j) debtor conceals or removes property with intent to prejudice creditors or prefer creditors; (k) debtor fails to account for trust monies held as trustee if court has made order to account which remains unsatisfied for five working days; (l) keeps away from his home or remains at home with intent to defeat or delay his creditors.

Proceedings may be instituted by debtor's application for adjudication to official assignee or creditor's application for adjudication to court. Debtor may file application if he has debts of $1,000 or more. Debt certain that is payable either immediately or at certain future date and is for not less than $1,000 together with available act of bankruptcy within previous three months is necessary to support creditor's application for adjudication. Two or more creditors may join to raise debt to $1,000.

Bankruptcy commences on date when court makes order of adjudication (on creditor’s application) or when debtor is adjudicated bankrupt (on debtor’s application). On adjudication, property of bankrupt vests in official assignee. Property passing to official assignee comprises: (a) All property belonging to or vested in bankrupt at commencement of bankruptcy or acquired by or devolving on him before discharge; (b) powers that bankrupt could have exercised in, over, or in respect of such property for own benefit.

Property held by bankrupt in trust does not vest in official assignee and bankrupt is entitled to retain necessary tools of trade up to maximum value fixed in official assignee’s discretion, necessary household furniture and effects including clothing for bankrupt and dependants up to maximum value fixed in official assignee’s discretion, and motor vehicle up to value of $5,000. Detailed provisions render certain transactions voidable where entered into by bankrupt within certain specified periods prior to adjudication. Where bankrupt is purchaser of consumer goods under hire purchase agreement, official assignee may in certain circumstances exercise debtor’s rights under Credit (Repossession) Act 1997 to introduce buyer or settle bankrupt's obligations.

Undischarged bankrupt may not enter into or carry on business alone or in partnership and may not be involved with business conducted by or on behalf of bankrupt or relative. Undischarged bankrupt may not directly or indirectly take part in management of any company.

Discharge of bankrupt will be automatic upon expiration of three years from date of filing statement of affairs. Bankrupt can apply to court at any time for discharge. Assignee or any creditor (with leave of court) may object to discharge (automatic or otherwise) of bankrupt. If objection has been made, assignee must call on bankrupt to be examined by Court.

Person who is insolvent but not yet adjudicated bankrupt may make proposal to court to satisfy creditors. Provisional trustee is named to administer proposal and upon its acceptance by creditors trustee obtains court's approval to it. Court's approval precludes any creditor named in proposal from filing application for debtor’s adjudication or taking out proceedings to enforce debt without court's consent while proposal is in force.

Where debtor's total unsecured debts does not exceed $40,000 (excluding any student loan balance), debtor or creditor may apply to official assignee for summary installment order whereby debtor undertakes to satisfy those debts. Supervisor is appointed to oversee debtor’s compliance with terms of order.

Debtor may apply to official assignee for entry to no asset procedure where he has no realizable assets, has not previously been adjudicated bankrupt, has not previously been admitted to no asset procedure, has debts between $1,000 and $40,000 (excluding any student loan balance) and does not have means to pay debts in question. Certain debtors may be precluded from using this procedure. On being admitted to no asset procedure, creditors must be informed and debtor may not obtain further credit in excess of $100. Creditors may not enforce debts of debtors subject to this procedure. Criteria for entry to no asset procedure may alter under Insolvency Amendment Bill.

Insolvency Act 2006 also governs administration of insolvent deceased estates.

Official assignee is permanent official appointed by government and powers and duties are defined by statute.

8.04 EXECUTIONS:

Judgments may be enforced in High Court by writs of sale, possession, sequestration, or by way of charging order. Judgment debtors may be examined in Court as to financial means, (see High Court Rules, Second Schedule to Judicature Act 1908). District Court enforcement is similar but District Court has additional power to attach judgment debtor's salary or wages, (see District Courts Act 1947). Creditors may also use bankruptcy or liquidation proceedings. In certain circumstances, Court may order arrest of defendant about to leave New Zealand with aim of frustrating plaintiff's action and obtaining of judgment (see High Court Rules, Judicature Act 1908). See category 7 Criminal Law, topic 7.01 Arrest.

8.05 EXEMPTIONS:

Right of landlord to distrain on tenant’s possessions for unpaid rent has been abolished by Property Law Act 2007 (in force Jan. 1, 2008). This remains case even if lease contains express provision conferring right of distraint. Exceptions to distraint recognized in Distress and Replevin Act 1908 are of no effect from that date. 2007 Act does not affect ability of landlord to enforce judgment debt against tenant’s possessions, or ability of tenant to create interest over personal property to secure payment of rent or other charge.

8.06 FRAUDULENT SALES AND CONVEYANCES:

See topic 8.03 Bankruptcy.

8.07 GARNISHMENT:

Any party to an action may at any time before judgment and by leave of court, on proof that other party is making away with his property or is absent from or about to quit New Zealand with intent to defeat his creditors or any party to action, or at any time after judgment without such leave as against other party against whom judgment has been obtained, issue out of court order charging: (a) Any estate or interest in land held by other party in his own name; (b) any debts due to him; (c) any right or interest of his in any partnership; (d) any shares held by him in any New Zealand company or overseas company having office in New Zealand in which transfers of shares may be registered; (e) any estate or interest in any land, moneys, shares, or other chattels, under any express or implied trust. (See High Court Rules, Second Schedule Judicature Act 1908; for District Court garnishee orders see District Courts Act 1947.)

New Zealand courts have jurisdiction to grant “Mareva” injunction restraining defendant from removing assets from jurisdiction or disposing of assets within jurisdiction.

8.08 INSOLVENCY:

See topic 8.03 Bankruptcy and category 2 Business Organizations, topic 2.02 Corporations, subhead Liquidations.

8.09 LIENS:

Common law, equitable, and statutory liens are recognized. Common law liens may be general arising by operation of law or by contract or they may be particular. Examples of particular liens are those to which innkeepers and common carriers are entitled. Equitable liens arise from particular relationship between certain parties, such as between members of partnership. Statutory liens include those under Mercantile Law Act 1908 which confers liens on unpaid vendors, warehousers and shipowners, and those under Sale of Goods Act 1908, which confers lien on certain unpaid vendors. Wages Protection and Contractors' Liens Act Repeal Act 1987 provides for enforcement of liens over chattels. Contractual liens are also recognised by courts, but are likely to be affected by Personal Property Securities Act 1999.

8.10 PLEDGES:

The common law of pledges has largely been superseded by Personal Property Securities Act 1999. See category 20 Mortgages, topic 20.01 Chattel Mortgages. Licensing and conduct of business of pawnbrokers are dealt with by Pawnbrokers Act 1908.

8.11 SUBCONTRACTORS' CLAIMS UNDER CONSTRUCTION CONTRACTS:

Construction Contracts Act 2002 confers certain protections on creditors under building construction contracts. It renders unenforceable “pay-only-when-paid” clauses between head contractors and subcontractors, creates default provisions for making of progress claims by contractors, and gives right to unpaid contractor to suspend performance. Act also sets up special adjudication system for disputes between contracting parties.

9 DISPUTE RESOLUTION

9.01 ALTERNATIVE DISPUTE RESOLUTION:

Mandatory Dispute Resolution.

New Zealand's employment legislation, Employment Relations Act 2000, provides that mediation is primary problem solving mechanism for employment problems. Legislation requires all problems (with some limited exceptions) to be referred to mediation as first step, and as prerequisite to referral to formal body established to investigate employment problems, Employment Relation Authority. Legislation also established specific body, Mediation Service, to provide mediation services for purposes of Act. With this exception, New Zealand has no mandatory alternative dispute resolution regime which requires disputes to be subject of alternative resolution process prior to or during litigation.

There is legislation that encourages alternative dispute resolution, primarily mediation. That legislation includes:

Resource Management Act 1991 which deals with sustainable management of natural and physical resources. By consent mediation, conciliation and other procedures can be used to resolve disputes in specialist Environment Court.

Disputes Tribunals Act 1988 which established Tribunal for resolution of claims less than $15,000 or up to $20,000 if agreed by parties. Tribunal will attempt agreed resolution prior to adjudication which, if successful, becomes order of Tribunal and enforceable in District Court.

Family Proceedings Act 1980 which provides for counselling and mediation for resolution of disputes arising out of marriage and child custody/access issues.

Residential Tenancies Act 1986 which provides for resolution of disputes between residential landlords and tenants by mediation if parties consent.

Weathertight Homes Resolution Services Act 2006 which provides for mediation between owners of “leaky” dwelling houses and other parties.

High Court Rules under which settlement conferences can be convened by judge at any time before trial.

Voluntary Alternative Dispute Resolution.

Increasing use of alternative dispute resolution processes, primarily mediation, in commercial disputes.

Main organisations promoting use of alternative dispute resolution are Arbitrators' & Mediators' Institute of New Zealand and LEADR (Lawyers Engaged in Alternative Dispute Resolution). Both maintain panels of mediators and provide facilitation services to legal and commercial communities and general public.

Usual voluntary mediation process in New Zealand is: (a) Parties agree to attempt mediation and approach agreed mediator who arranges for them to execute mediation agreement that provides for procedure, confidentiality, mediator's indemnity and remuneration; (b) pre-mediation meeting (often between lawyers only) to take care of timing, venue, documents to be exchanged or given to mediator, identification of issues and other miscellaneous matters; (c) typical commercial mediation takes one day. Mediator will explain process and each party makes opening address. Mediator normally conducts series of joint and private sessions depending on progress towards resolution however no set procedure and importance given to flexible approach to allow parties to conduct mediation; (d) if resolution is agreed, parties (often by way of lawyers) draw up and sign binding agreement recording resolution prior to leaving mediation conference.

Other alternative dispute resolution processes such as minitrial and early neutral evaluation not unknown but do not enjoy same popularity as mediation which is now mainstream dispute resolution tool.

9.02 ARBITRATION AND AWARD:

Arbitration Act 1996 based on UNCITRAL model law which brings New Zealand into line with other Pacific Rim countries in effort to harmonise international trading laws. Act emphasises party autonomy and reduces judicial scrutiny at same time as increasing powers of arbitral tribunal.

See topic 9.01 Alternative Dispute Resolution.

10 DOCUMENTS AND RECORDS

10.01 ACKNOWLEDGMENTS:

Execution of Instruments in New Zealand for Use Overseas.

Instrument executed in New Zealand for use overseas may be executed in presence of Notary Public or verified in Notary's presence by person who witnessed execution of document (whether executed by individual or body corporate). In some cases (depending upon requirements of country in which instrument is to be used) execution or verification of signature and seal of Notary is authenticated by Internal Affairs Department with certificate to Ministry of Foreign Affairs and Trade which latter then certifies to diplomatic or consular representative of that country in New Zealand.

This degree of formality is not usually required in case of contracts and deeds executed in accordance with laws of New Zealand or with legal formalities of country in which document is to be used.

10.02 AFFIDAVITS:

Affidavits of New Zealand court may be sworn outside New Zealand before Commissioner of High Court of New Zealand in that country, person lawfully authorised by laws of that country to administer oaths in that country, or person who is authorized by judge to administer oath required for affidavit. (Former rules providing for different rules for Commonwealth and other countries replaced from Nov. 1, 2004.) High Court Rule 9.88 provides for alternative to affidavit of authenticated deposition where local law provides for imprisonment or fine for making false statements, and document is authenticated by judicial officer or other authorized official.

Court may require verification of authority. (High Court Rule 9.86, Second Schedule to Judicature Act 1908).

There are no statutes allowing alternative to formal swearing although deponent may affirm rather than take oath.

See also topic 10.03 Commissioners to Administer Oaths.

10.03 COMMISSIONERS TO ADMINISTER OATHS:

§47 of Judicature Act 1908 makes provision for appointment of Commissioners of High Court, who may be appointed to act in any country beyond jurisdiction for administering and taking any oath, affidavit, or affirmation in any proceeding pending in any superior or inferior court in New Zealand or in any proceeding within jurisdiction of any such court. Every oath, affidavit, or affirmation so taken is of same validity as if administered within New Zealand.

Commonwealth diplomatic representatives exercising their functions in any place outside New Zealand are given same powers by Oaths and Declarations Act 1957.

See also topic 10.02 Affidavits.

10.04 COMMISSIONS TO TAKE TESTIMONY:

See category 5 Civil Actions and Procedure, topic 5.02 Depositions and Discovery.

10.05 NOTARIES PUBLIC:

Notaries exercise their functions in New Zealand. There is no statute law in New Zealand relating to notaries; English law applies. See topics 10.02 Affidavits; 10.03 Commissioners To Administer Oaths.

10.06 SEALS:

In case of individuals, sealing is not necessary for validity of any deed, but seals are sometimes used by individuals where document is intended for use overseas. Notaries Public continue to use seals.

Use of common seals by companies not required under Companies Act 1993. Seals are permitted under 1993 Act as long as statutory requirements also met.

See category 2 Business Organizations, topic 2.02 Corporations, subhead Execution of Documents.

11 EMPLOYMENT

11.01 LABOUR RELATIONS:

Department of Labour provides employment service and administers employment initiatives. Department of Labour enforces safety and health regulations, maintains register of shops, offices and factories, collects and publishes information relating to employment, unemployment, wages, strikes. Department's inspectors have powers to inspect workplaces to ensure compliance with legislative requirements relating to wages, etc. In particular, Department of Labour provides inspectors who operate under Health and Safety in Employment Act 1992. Act repeals all preexisting major statutory provisions relating to health and safety of employees and has three major facets, imposing duties on employers, identifying roles of inspectors and establishing penalties for breach. Amendment to legislation in force in May 2003 confirmed stress and fatigue as workplace hazards covered by health and safety law, introduced private prosecutions for offences under Act and increased maximum penalties for breach to two years' imprisonment and/or $500,000 fine.

Employment Relations Act 2000 replaced contractual regime of individual and collective employment contracts and introduced focus on recognition of employment relationships through promotion of good faith behaviour.

Union membership voluntary, but only unions may bargain for collective agreements (and only union members may be covered by those agreements). Non-union employees must, if entering work environment covered by collective agreement, have terms of that agreement apply for first 30 days of employment (following which individual arrangement may be confirmed if mutually desired).

Work which is not covered by one or more collective agreements may be regulated by way of individual employment agreements. Employers may not pass on to individual employees terms and conditions agreed to in collective bargaining with union, unless bargaining fee clause agreed.

Legislation confers jurisdiction to deal with disputes about employment contracts on Employment Relations Authority and Employment Court. Legislation requires all employment problems (with some limited exceptions) to be referred to mediation as first step. Employee/employer relations cannot be conducted outside Act's provisions. Personal grievance procedures apply to all contracts of employment. Special remedies provided for employees in cases of unjustified dismissal or disadvantage in employment, discrimination, sexual harassment including, if appropriate, reimbursement of lost wages, compensation for injury to feelings, and reinstatement. Prohibited grounds of discrimination are identical to those set out in Human Rights Act 1993. Majority of enforcement action must be taken by employee(s) affected.

Holidays Act 2003 contains law relating to public holidays, sick leave, bereavement leave, and annual holidays with pay for workers.

Parental Leave and Employment Protection Act 1987 makes provision for maternity, paternity and extended leave. Employee, including from 2006 eligible self-employed persons, has entitlement to be paid up to NZ$325 per week for first 14 weeks of parental leave (with such payments to be made out of public funds).

Social Security Act 1964 provides social welfare system for widows, orphans, family, invalids, and miners, which involves sickness, unemployment, emergency, medical and hospital and other related benefits.

Wages Protection Act 1983 and Minimum Wage Act 1983 define concept of wages and prescribe minimum rates. Minimum adult wage for person over 18 years is NZ$500 per 40 hour week or NZ$12.50 per hour. All wages earned by worker must be paid in cash (except if paid by Crown or local authority, where wages may be paid by cheque), or as otherwise agreed, and without deduction except for taxation which is deducted from wages paid under PAYE system. Unpaid back wages enjoy priority in case of employer insolvency.

See also category 22 Taxation, topic Taxes.

Accident Compensation.

Right of employees to sue for personal injury largely replaced by regime of compensatory payments provided by state-owned corporation under Injury Prevention, Rehabilitation, and Compensation Act 2001. In certain circumstances, employees may still claim exemplary damages. Accident Insurance (Transitional Provisions) Act 2000 removed competitive private provision of workplace accident insurance that was introduced by Accident Insurance Act 1998. See also category 16 Health, topic 16.02 Other Related Health Legislation.

Privacy of Information.

Privacy Act 1993 affects almost every organisation in private and public sector that collects or holds or uses information about individual persons. To comply with Act, most businesses need to implement procedures that regulate how they collect personal information, manner in which it is stored, how it is used and circumstances in which it may be disclosed to third parties. Provisions of legislation also impact on manner in which employers collect, store and disclose information in relation to current and former employees.

Discrimination.

Human Rights Act 1993 prohibits discrimination in employment on grounds of sex, marital status, religious belief, ethical belief, colour, race, ethnic or national origins, disability, age, political opinion, employment status, family status or sexual orientation. Person may either make complaint to Human Rights Commission in respect of alleged breach of this legislation or may raise employment problem under Employment Relations Act 2000, but not both.

12 ENVIRONMENT

12.01 ENVIRONMENTAL REGULATION:

Resource Management Act 1991 (as amended) provides statutory controls over use of land, air, and water, with overriding purpose to promote sustainable management of New Zealand's natural and physical resources. Focus is on effects of activities on environment, rather than using traditional zoning methods which focus on activities. To achieve this, hierarchy of documents sets out environmental policy, including: National Environmental Standards, National Policy Statements, New Zealand Coastal Policy Statement, Regional Policy Statements, Regional Coastal Policy Statements, Regional Plans, and District Plans. In addition, Act provides for system of resource consents, offences, enforcement mechanisms and penalties. Among significant amendments made in Resource Management Amendment Act 2009 (in force Oct. 1, 2009) is creation of Environmental Protection Agency, functions of which are to receive, process, and make decisions on land development proposals of national significance.

Crown Minerals Act 1991 provides for managed prospecting, exploration and mining of Crown-owned minerals. It vests ownership of certain minerals in Crown, and provides for Minerals Programmes, prospecting, exploration and mining permits, and access to land.

Hazardous Substances and New Organisms Act 1996 relates to management and prevention of harmful effects on people and environment of hazardous substances and new organisms. Management is aimed at ensuring maximum net national benefit. Act prohibits importation, manufacture, development, field testing or any release of hazardous substance or new organism unless in accordance with Act's procedures. Act sets up Environmental Risk Management Authority (ERMA), which administers Act, advises, monitors, assesses and reviews hazardous substances and new organisms and creates registers. To date no approval has been granted to allow use of GMO products in field. See also category 16 Health, topic 16.02 Other

Related Health Legislation.

Environment Act 1986 establishes office of Parliamentary Commissioner for Environment. Office has investigative and advisory role in relation to: systems and procedures used to manage allocation, use and preservation of natural and physical resources, any cause of adverse environmental effects, encouraging, collecting and disseminating information relating to environment, encouraging prevention and remediation to protect environment, and reporting its findings to New Zealand Parliament. Act establishes Ministry for Environment, which formulates policy on natural resource and ecosystem management, environmental planning and impact assessment, monitoring and pollution control. Primary goal of Act is ensuring that intrinsic values of ecosystems, value of environmental quality, Treaty of Waitangi, sustainability and intergenerational equity are taken into account in management of New Zealand's natural and physical resources.

Management of Crown owned natural resources governed by number of statutes, including Wildlife Act 1953 (as amended), Wild Animal Control Act 1977 (as amended), Reserves Act 1977, National Parks Act 1980, NZ Walkways Act 1990 and Conservation Act 1987 (as amended). Conservation Act established Department of Conservation, which administers Crown owned natural resources.

Fisheries Act 1983 provides for fisheries. Fisheries Act 1996 (as amended) provides for use of fisheries resources while ensuring sustainability through measures including quota management system.

Biosecurity Act 1993 (as amended) relates to eradication and effective management of pests and unwanted organisms.

Other specific environmental protection has been provided in, for example, Energy Efficiency and Conservation Act 2000, Climate Change Response Act 2002, Health Act 1956, Historic Places Act 1993, Hauraki Gulf Marine Park Act 2000, Land Transport Management Act 2003, Ozone Layer Protection Act 1996, Marine Mammals Protection Act 1978, Marine Reserves Act 1971, Maritime Transport Act 1994, Antarctica Act 1960, Antarctic (Environmental Protection) Act 1994, Antarctic Marine Living Resources Act 1981, and Native Plants Protection Act 1934.

Marine pollution see also category 23 Transportation, topic 23.05 Shipping.

13 ESTATES AND TRUSTS

13.01 ADMINISTRATION:

See topic 13.05 Executors and Administrators.

13.02 DEATH:

There is no general statute relating to presumption of death. On application for probate, death certificate should be annexed to affidavit or there should be definite statement on oath that deceased died on or about specified date. If such evidence cannot be given applicant should place before Court evidence he has and obtain leave to swear to death. Where two or more persons have died at same time or in circumstances which give rise to reasonable doubt as to which of them survived other or others, property of each person so dying shall devolve, unless contrary intention is expressed in duly executed will, as if he had survived other person or persons so dying and had died immediately afterwards. (Simultaneous Deaths Act, 1958). There is presumption of death after seven years continuous absence. Under certain circumstances this is defence to charge of bigamy. Dissolution of marriage is necessary, however, to remove all rights and obligations of marriage.

Official death certificates may be obtained by application to Registrar-General of Births, Deaths and Marriages, 191 High Street, PO Box 31-115, Lower Hutt and payment of applicable fee.

Actions for Death.

With minor exceptions, compensation rights are determined by Injury Prevention, Rehabilitation, and Compensation Act 2001. Where that Act does not apply, claim for compensation for loss of support to dependants is possible under Deaths by Accident Compensation Act 1952 if accident due to negligence of person other than deceased. Action under Deaths by Accident Compensation Act must be brought within two years unless leave of court obtained.

13.03 DECEDENTS' ESTATES:

See topics 13.04 Descent and Distribution, 13.05 Executors and Administrators, 13.08 Wills.

13.04 DESCENT AND DISTRIBUTION:

Real estate of any person who dies intestate as to such real estate is held by administrator upon trust for person who, if it was personal estate, would be entitled. Real and personal estate can therefore be treated together.

Administration Act 1969 generally reenacts earlier legislation so far as canons of descent and distribution upon intestacy are concerned and provides briefly as follows:

(1) Intestate survived by a spouse, civil union partner, or de facto partner:

(a) If intestate also survived by issue of any degree who become indefeasibly entitled under statutory trust: Surviving spouse, civil union partner, or de facto partner takes (i) personal chattels absolutely, (ii) $121,500 (with interest at 7.5% per annum from date of death) charged on residue, and (iii) one-third of residue absolutely. Issue take two-thirds of residue on statutory trusts.

(b) If intestate also survived by parent (or parents) but no issue who become indefeasibly entitled under statutory trusts: Surviving spouse, civil union partner or de facto partner takes (i) personal chattels absolutely, (ii) $121,500 (with interest at 7.5% per annum from date of death) charged on residue, and (iii) two-thirds of residue absolutely. Both parents surviving take one-third of residue in equal shares absolutely. One parent surviving takes one-third of residue absolutely.

(c) If intestate not survived by a parent, and no issue becomes indefeasibly entitled under the statutory trusts: Surviving spouse or de facto partner takes whole of estate (after payment of debts, etc.) absolutely.

(2) Intestate survived by spouse or civil union partner and one or more de facto partners, or by two or more de facto partners:

Real or personal estate that surviving spouse, civil union partner or de facto partner would otherwise take is distributed equally amongst them.

(3) Intestate not survived by spouse, civil union partner, or de facto partner:

(a) If intestate is survived by issue of any degree: Issue take upon the statutory trusts, but if no issue becomes indefeasibly entitled thereunder the distribution is the same as if no issue survived the intestate.

(b) If intestate is survived by parent (or parents) but not by any issue, or if none of surviving issue becomes indefeasibly entitled under statutory trusts: Both parents surviving take whole residuary estate in equal shares absolutely. One parent surviving takes whole residuary estate absolutely.

(4) Intestate not survived by a spouse, civil union partner, de facto partner or parent, and either not survived by any issue, or none of issue surviving becomes indefeasibly entitled under statutory trusts:

(a) If intestate survived by brother (or brothers), sister (or sisters), or issue of any degree of deceased brother or sister: brothers and sisters (of full or of half blood) and their issue taking by substitution take whole residuary estate on statutory trusts.

(b) If intestate is not survived by any of persons mentioned in (a) above or if though so survived none of them become indefeasibly entitled under statutory trusts, estate divided into two halves; one half on trust for maternal grandparents or grandparent, and if none such then for maternal uncles and aunts (of full or half blood); other half on corresponding trusts for paternal grandparent(s) or paternal uncles and aunts; issue of any degree of any deceased uncle or aunt takes share of that uncle or aunt by substitution; if no person takes absolutely vested interest in one half of estate, that half is held on trusts applying to other half of estate. Above rules of descent and distribution upon intestacy under Administration Act 1969 do not apply to de facto partner (in relationship of short duration) unless: (a) there is child of de facto relationship, or (b) surviving de facto partner made substantial contribution to relationship.

Bona Vacantia.

If no person mentioned in (1), (2) or (3) above becomes entitled to an absolute interest, the estate, in lieu of any right to escheat, vests in the Crown. The Crown may, however, make provision out of the estate for the dependants of intestate and other persons for whom intestate might reasonably have been expected to make provision.

Statutory trusts apply as regards three classes or primary stocks of relatives of the intestate, namely: (a) Issue, (b) brothers and sisters, and (c) uncles and aunts.

No person takes under statutory trusts unless he or she attains age of 20 years or sooner marries. Rules of succession are provided in cases where statutory trusts fail.

Family Protection Act 1955 and Law Reform (Testamentary Promises) Act 1949 dealing with claims which certain classes of people may in certain circumstances make against estates of deceased persons apply to intestate estates. De facto partner in relationship of short duration (as defined in Property [Relationships] Act 1976) cannot make claim under Family Protection Act 1955 unless: (a) there is child of de facto relationship, or (b) de facto partner has made substantial contribution to relationship.

13.05 EXECUTORS AND ADMINISTRATORS:

On granting of probate or administration of estate of deceased person all his property, whether real or personal, and whether held by him beneficially or in trust, vests by force of Administration Act 1969, in his executor or administrator. Grant relates back to death of deceased. All real and personal property, with some limited exceptions, constitute assets for payment of debts.

Right to Administer.

In cases of intestacy the person most nearly related to the deceased is generally entitled to administration, but the Public Trustee is always entitled to be heard. The court will not make the grant to the Public Trustee where the person applying would, if the Public Trustee had not applied, have had a clear right to the administration.

Where an executor neglects to prove his testator's will or renounces probate within three months of his death, administration may be granted on application to any person interested in the estate or to the Public Trustee.

Estates of Nonresidents.

The New Zealand estate of a person dying abroad does not vest unless administration is granted in New Zealand. Probate or letters of administration (or an exemplification thereof) granted abroad require resealing in New Zealand, and the effect is to put the executor or administrator in the same position as if such probate or letters of administration had been originally granted in New Zealand. Nonresident executors or administrators are empowered to delegate their functions. Grant of administration to New Zealand resident ancillary to principal grant may be obtained in certain circumstances.

Commission of such amount as is just and reasonable in circumstances may be allowed by court to executor, administrator, or trustee on passing his accounts.

The rules of English law governing the rights and duties of executors and administrators generally apply. See England Law Digest.

13.06 INTESTACY:

See topic 13.04 Descent and Distribution.

13.07 TRUSTS:

Trustee Act 1956 follows substantially Trustee Act 1925 of the United Kingdom but with considerable modifications and extensions. See England Law Digest. Trustees may invest in any property, but are subject to new statutory duties from which they may contract out. Rules of common law governing rights and duties of trustees otherwise generally apply.

Only companies specially authorized by law can act as personal representatives of a deceased person. Trusts are not registrable under Land Transfer Act 1952, which affects legal interests only.

Public Trustee is authorized by statute to act as trustee under any will or settlement, and may accept appointment in conjunction with any other person. There is reciprocity of administration with Public Trustees of England and of other Commonwealth countries.

13.08 WILLS:

Wills now governed by Wills Act 2007, in force Nov. 1, 2007 but generally, only in relation to wills executed from that date. Older wills still governed by Wills Act 1837 (UK), as amended in New Zealand. Language of 1837 Act is modernized by 2007 Act, but substance of two Acts is similar. Will may be created by any natural person 18 years old and above. For people younger than 18, see §14.04 below. Will must be in writing and signed by will-maker (or signed by person directed by will-maker in will-maker’s presence), and be witnessed by two persons who are both together with will-maker when latter signs, and who must themselves sign document. Executor may witness will, but no witness, or spouse, civil union partner or de facto partner of witness can take any interest under will, unless there are at least two other witnesses not so related to will-maker (subject to limited exceptions). High Court can declare valid will that does not comply with foregoing requirements so long as satisfied that document expresses deceased’s intentions. Court also has power to correct will. Act provides mechanisms for change, revocation, and revival of wills. It also provides for effect of will-maker entering into marriage or civil union, or ceasing to be married or in civil union. Act has provisions dealing with gifts to unincorporated association that is not charity, and in respect of mutual wills.

Status of Children Act 1969 abolishes illegitimacy in subsequently executed wills, but there are provisions to enable effect of Act to be negated.

See also category 14 Family, topic 14.04 Infancy.

Family Protection Act 1955.

Act restricts freedom to dispose of property by will. That Act provides that if person dies leaving will without making therein adequate provision for proper maintenance and support of his or her wife, husband, civil union partner, children, de facto partner if relationship is not of short duration and, in certain circumstances, stepchildren, parents and grandchildren, court may on application order that such provision be made out of estate as it thinks fit. In general, application must be made within 12 months of grant of administration. “Children” includes illegitimate children and adopted children. Court has absolute discretion as to making of order. Provision made depends on size of estate and circumstances of applicant. Court will take into account material given it by administrators of estate who have duty to give to court information in their possession. Courts are beginning to show some reluctance to make orders under this Act.

Property (Relationships) Act 1976.

(Previously named Matrimonial Property Act 1976.) This allows spouse, civil union partner or de facto (including same sex) partner to take either share he or she will receive by will of deceased spouse or de facto partner, or claim under rules governing relationship property. See also category 14 Family, topic 14.03 Husband and Wife, subhead Marriage and De Facto Relationships.

Foreign Wills.

As regards realty, must be made (whether within or outside New Zealand) as required by law of New Zealand.

As regards movable property, held to be well executed if made outside New Zealand if made as required by: (a) Law of place where person was domiciled at time of death; or (b) law of place where same was made; or (c) law of place where person was domiciled when same was made; or (d) law in force when same was made in place where person had his domicile of origin; and if made within New Zealand if made as required by: (a) Law of place where person was domiciled at time of death; or (b) law of New Zealand; or (c) law of place where person was domiciled when same was made; and probate is granted or refused accordingly.

Law Reform (Testamentary Promises) Act 1949.

Act provides that claims may be made against estates of deceased persons founded on services rendered deceased during lifetime, where there was express or implied promise to reward claimant by testamentary provision. Claim is limited to extent to which deceased, by will or otherwise has failed to remunerate claimant.

As to probate, see topic 13.05 Executors and Administrators.

14 FAMILY

14.01 ADOPTION:

Governed by Adoption Act 1955. Consent of all parents and guardians of child necessary, except that of natural father who was not married to, in civil union or de facto relationship with child's mother any time between conception or birth. Court may require consent of such father if it deems expedient but is unlikely to do so unless father has been involved with child. No provision for formal consent of person to be adopted. Family Court can dispense with consent of parent or guardian if he or she is unfit physically or mentally, has abandoned child, neglected child, persistently ill-treated child, continually failed to maintain child or consistently failed to exercise other duties and cares of parenthood. Parents or guardians can give consent subject to conditions such as placing child in specific religious denomination, subject to conditions with respect to religious denomination and practice of adopters.

Act gives Family Court scope to make adoption order where identities of natural parents and adopters are known to other party and to permit adoption by relatives. De facto couples in heterosexual relationships in certain circumstances, entitled to adopt children. Couples in same sex relationships unable to adopt. Social Worker from Child, Youth and Family, or in case of application by Maori to adopt child who is Maori, Maori Social Worker, reports to Family Court on fitness of applicants and whether granting application in best interests of child.

Effect of adoption is that child becomes applicants' as if born to them. New birth certificate issued for child and any existing guardianship, maintenance or affiliation order ceases to have effect. However, where child is adopted by their mother alone or with her spouse any maintenance order or agreement continues in effect and mother may apply for maintenance and affiliation orders. Adoption does not affect child's race or nationality. Where New Zealand court makes adoption order, child is deemed to be New Zealand citizen. (§2[2][a] Citizenship Act 1977). Child under 14 years who is adopted outside New Zealand by New Zealand citizen is deemed to be New Zealand citizen if adoption is recognised under §17 Adoption Act 1955. (§2[2][b] Citizenship Act 1977). Natural parentage recognised for purpose of any prior will or intestacy that gives child specific right.

Act makes it offence to receive or give payment or reward as consideration for adoption without consent of Court. Offence to publish advertisement indicating child is available for adoption or person desires to adopt or can make arrangements for adoption.

Family Court preserves natural family relationships where possible and looks at alternative arrangements (e.g. guardianship or parenting orders) rather than adoption.

Inter-Country Adoption Act 1997 implemented Convention on Protection of Children and Co-operation in Respect of Inter-Country Adoption. Adoption out of New Zealand, if legally valid according to laws of country where it was made, deemed in New Zealand to have same effect as adoption under New Zealand's Adoption Act. Child and Family Protection Bill 2009 provides for new offence of improperly inducing consent for adoption of child. This provision is to enable New Zealand to ratify option protocol to UNCRC on sale of children, child prostitution and child pornography.

Adult Adoption Information Act 1985 restricts access to adoption records and gives adopted person and his or her birth parents limited rights of access, after referral to counselling. Adopted person or birth parents may place endorsement on file preventing access to identifying information.

In 2000, Law Commission produced Report 65: “Adoption and its alternatives: a different approach and a new framework”. Report includes recommendations that de facto couples should be permitted to apply to adopt and that there be no prohibition against applications by same-sex couples. Paramount issue is what is in child's best interests. In 2001 Government Administration Select Committee released interim report: “Inquiry into New Zealand's Adoption Laws”. Government currently considering integrated framework for care of children.

14.02 DIVORCE:

§§37-43 Family Proceedings Act 1980 apply to application to Family Court fordissolution of marriage or civil union. Such application may be made by either spouse or civil union partner or jointly by both spouses or civil union partners where, at time of filing of application, at least one party is domiciled in New Zealand. Sole ground for dissolution will be that marriage or civil union has broken down irreconcilably, which ground shall be established only where court is satisfied that parties to marriage or civil union are living apart and have been living apart for period of two years immediately preceding filing of application.

Common law concepts of collusion and condonation etc., are no longer applicable.

§44 Family Proceedings Act 1980 provides for recognition of overseas decrees of divorce or nullity where: (a) One or both of parties were domiciled in that country at time of order; or (b) that foreign court has exercised its jurisdiction on basis of: (1) residence for continuous period of not less than two years of one or both parties, or (2) nationality or citizenship, or (3) domicile of husband immediately prior to his desertion or deportation, or (4) domicile of husband as at date of agreement or order, or (5) in case of nullity of marriage, on basis of celebration of marriage in that country; or (c) decree or order is recognised as valid in courts of country in which at least one of parties to marriage is domiciled.

Family Court will not make order dissolving marriage or civil union unless satisfied arrangements made for day-to-day care, maintenance and welfare of every child of marriage or civil union under 16 years. There are limited exceptions to this. (§45 Family Proceedings Act 1980). There may be ongoing liability for one spouse, civil union or de facto partner to maintain other after dissolution. This is to end after expiration of reasonable period. (§64, 64A Family Proceedings Act 1980).

14.03 HUSBAND AND WIFE:

Marriage, De Facto Relationships and Civil Unions.

Property (Relationships) Act 1976 (previously named Matrimonial Property Act 1976) sets out law relating to division of property upon dissolution of marriage, civil union or de facto relationship or upon death of one party within marriage, civil union or de facto relationship. Part 4 of Act creates general rules, subject to specified exceptions, for equal division of relationship property. Rules requiring equal division of property apply equally to marriages, civil unions and de facto relationships of more than three years. One exception to principle of equal sharing is, where court considers extraordinary circumstances would render repugnant to justice equal sharing of family home, family chattels and any other relationship property, share of each partner shall be determined in each case in accordance with contribution of each to relationship. (Contribution need not be monetary. Care of children, management of household, performance of work or services, are considered contributions determining share of property.) Misconduct will not be taken into account unless gross and palpable and significantly affected extent or value of relationship property. Relationship of less than three years treated differently. Equal division rules do not apply to any family home or family chattel which has been acquired from outside relationship. Instead shares are in accordance with contributions to relationship. Other relationship property is shared equally unless contribution of one partner to relationship has been clearly greater than that of other in which case sharing is in accordance with contributions to relationship.

In 2002, Act was extended to de facto and civil union relationships of more than three years. De facto relationships are heterosexual or homosexual relationships between people who are not married, are over 18 years of age, and live together as couple. De facto relationship of less than three years not subject to any order under Act unless there is child of relationship, or applicant has made substantial contribution to relationship property and failure to make any order would result in injustice. Civil unions are governed by Civil Union Act 2004. Rights and responsibilities of civil union partners (single sex or heterosexual) mirror those of legal spouses.

Act provides for either partner to have separate property which, upon separation, remains that partner's alone. Separate property can become relationship property if mixed with relationship property.

Under Part 6 of Act, parties to actual or proposed relationship may, subject to important formalities, make written agreements with respect to status, ownership or division of their (including future) property. Such agreements are void if necessary formalities are not complied with or court is satisfied it would result in serious injustice to give effect to agreement.

Act has recently been extended to de facto and civil union relationships of more than three years. De facto relationships are heterosexual or homosexual relationships between people who are not married, are over 18 years of age, and live together as couple. De facto relationship of less than three years not subject to any order under Act unless there is child of relationship, or applicant has made substantial contribution to relationship property and failure to make any order would result in injustice. Civil unions are governed by Civil Union Act 2004. Rights and responsibilities of civil union partners (single sex or heterosexual) mirror those of legal spouses.

Maintenance and Separation Orders.

Only married couples and civil union partners can apply for separation orders under Part 3 of Family Proceedings Act 1980 in Family Court division of District Court. Separation order can be made by Family Court if it is satisfied there is disharmony and it is unreasonable to require parties to live together. Reconciliation and mediation will be promoted before separation order granted. Part 2 of Act provides procedures for mediation conferences to resolve issues.

Either spouse, civil union or de facto partner (including same-sex partners) can apply for maintenance orders under Part 6 of Family Proceedings Act 1980 upon separation or, in case of de facto partner, after ceasing to live with his/her partner. Each partner is responsible for maintaining other party if other party cannot practicably meet their reasonable needs. Maintenance orders will be determined in accordance with existing family arrangements or responsibilities where appropriate. Family Court can order payment of periodic or lump sums. Provision made for enforcement of such maintenance orders. Procedures are established for enforcement of maintenance orders made in certain designated countries. Spouses, civil union or de facto partners must take responsibility for their own needs within reasonable time.

Domestic Violence Act 1995.

Act aims to reduce and prevent violence in domestic relationships. Domestic relationships include de facto relationships and same sex relationships. Act gives Family Court powers to make protection, occupation, tenancy and furniture orders and Court can include conditions as it sees fit. Violent person is required to attend stopping program. Protected person and any child covered by protection order are entitled to attend program aimed at assisting them to keep themselves safe.

14.04 INFANCY:

Infant reaches majority at 20. (§4 Age of Majority Act 1970). Minors Contracts Act 1969 renders contracts entered into by minor who has attained age of 18 years, life insurance contracts whereby minor over 16 years insures his own life, and contracts of service by minors, generally enforceable against minor unless court is satisfied that (a) Consideration for minor's promise or act was so inadequate as to be unconscionable; (b) any provision of contract was harsh or oppressive.

Other contracts entered into by minors under 18 are generally unenforceable against them but court has power to enforce them if fair and reasonable at time entered into.

All married minors have full contractual capacity regardless of age.

Under Wills Act 2007, persons under 18 have full capacity to make, change, revoke or revive will who are or have been married, in civil union or de facto relationship. Will (or change etc.) made in contemplation of entry into qualifying relationship is also valid. Person under 18 may otherwise make will with approval of Family Court. In addition, capacity to make will is vested in persons under 18 years who are members of armed forces or seafarers. Also, under §66C Life Insurance Act 1908, infant of 16 years or more, with approval of Public Trustee, may dispose of life insurance policy or any interest therein by will.

Care of Children Act 2004 covers all questions related to parenting orders, custody, guardianship, wardship, and up-bringing of children. Family Court has primary jurisdiction under Act with some subsidiary jurisdiction in High Court and District Court. Overriding principle under Act that welfare and best interests of child paramount. Usual practice to appoint independent counsel representing child. Care of Children Act 2004, Part 2, subpart 3 has provisions relating to enforcement in New Zealand of overseas court orders as to custody and access and as to enforcement overseas of such orders made by New Zealand Courts.

Care of Children Act 2004, Part 2, subpart 4 has provisions relating to international child abduction and orders as to return of and access to child.

Father and mother are each a guardian of child. Unmarried mother is sole guardian in certain circumstances but father has right to apply. Family Court must appoint father guardian unless appointment would be contrary to child's welfare and best interests. (§19[4] Care of Children Act 2004). Both mother and father have right to apply to court on any matter affecting child. Child means person under 18. Either parent has right to appoint testamentary guardian to act either alone or with surviving parent. Children, Young Persons and Their Families Act 1989 provides for children (under 14) and young persons (14 to 17) who are in need of care or protection or who offend against law and establishes Youth Courts and Commissioner for children.

Infant under ten years old cannot be convicted of any criminal offence. To obtain conviction between age of ten and 14, it is necessary to show that infant knew act or omission was wrong or contrary to law.

Status of Children Act 1969 provides that for all purposes of law of New Zealand, relationship between every person and his father and mother shall be determined irrespective of whether father and mother are or have been married to each other and all other relationships shall be determined accordingly. In general, instruments and intestacies executed or arising before commencement of Act hold as though Act had not been passed.

Status of Children Amendment Act 2004, Part 2, deems parentage for children conceived by specified Assisted Human Reproductive procedures using donated material. Woman who gives birth will be mother. Where woman conceives by AHR with consent of her partner (male or female) partner will be other parent of child. Donor of genetic material to partnered woman not parent of child for any purposes. Donor of genetic material to non-partnered woman will be child's other parent if they become mother's partner.

See also topic Marriage.

14.05 MARRIAGE AND CIVIL UNIONS:

Governed by Marriage Act 1955. See Part VII of Births, Deaths, Marriages and Relationships Registration Act 1995 (as amended in 2008) as to registration of marriages. All persons are entitled to marry person of their choice, provided that person not under 16 years and marriage is not within certain prescribed degrees of relationship as prohibited in Second Schedule to Marriage Act 1955. If under 18, person cannot marry without consent of both parents, guardians or Court. Court has discretion to consent to marriages within Second Schedule of Marriage Act, provided that relationship is due to marriage, not blood.

Notice of every intended marriage must be given by one of parties to Registrar of district within which one of parties has lived for not less than three days. Notice must contain full particulars of parties and of intended marriage. Declaration of truth of particulars must then be made. Party giving notice must appear personally before Registrar and declare there is no impediment or hindrance to marriage. After Registrar has issued certificate, marriage may be celebrated either before duly authorised marriage celebrant or before Registrar. Any person may lodge with Registrar caveat against marriage of any person on grounds that marriage is one for which licence should not be issued.

Civil Unions governed by Civil Union Act 2004. Civil Union Act reflects all provisions of Marriage Act 1955 and applies to heterosexual and single sex couples.

In any case of marriage intended to be celebrated outside New Zealand under Foreign Marriage Act 1892 (U.K.) or any new Act, or in any case of marriage between British subjects intended to be celebrated or contracted in U.K., one of parties who has had his or her usual place of abode in marriage district in New Zealand for no less than seven days beforehand may give notice of intended marriage to Registrar of that district. Registrar can then issue certificate of marriage to those parties provided no lawful hindrance to that certificate being given. Same provisions as to consent to infants' marriages apply as in case of marriages celebrated in New Zealand. Certain marriages abroad may be expressly declared valid in New Zealand as if solemnised in New Zealand in accordance with Act.

14.06 MARRIED WOMEN:

See category 4 Citizenship, topic 4.03 Nationality.

15 FOREIGN TRADE AND COMMERCE

15.01 CUSTOMS (DUTY):

Customs and Excise Act 1996 governs lawful and unlawful import and export of goods to and from New Zealand including provisions for collection and recovery of duties.

Tariff Act 1988 imposes tariff duties.

Duty has been historically high on wide range of imported goods (especially manufactured), but since July 1, 1988 tariffs have been reduced or removed on manufactured goods. Government retains extensive powers under Tariff Act 1988 and Dumping and Countervailing Duties Act 1988. See topic 15.05 Foreign Trade Regulations, infra; category 24 Treaties and Conventions, topic 24.01 Treaties.

15.02 EXCHANGE CONTROL:

Remittances and receipts of foreign exchange are free from exchange control. In practice most foreign exchange dealing is undertaken through registered banks, although there is no legal impediment preventing any person or corporation dealing in foreign exchange.

New Zealand is member of International Monetary Fund and International Finance Corporation (part of World Bank).

See also category 3 Business Regulation and Commerce, topic 3.01 Banking and

Currency.

15.03 FOREIGN EXCHANGE:

See topics 15.02 Exchange Control, Foreign Trade Regulations; category 3 Business Regulation and Commerce, topic 3.01 Banking and Currency.

15.04 FOREIGN INVESTMENT:

Foreign investment, especially if introducing new technology or expertise or making other contributions to New Zealand's well-being is encouraged. New Zealand capital markets are open to any person or body corporate. Prior consent of Minister of Finance or other authorised Minister and Minister of Lands is required for all acquisitions (whether direct or indirect by way of shares) of specified land defined in Overseas Investment Act 2005. Apart from these exceptions, only large investments (whether in land or other assets) generally involving investment of more than NZ$100,000,000 require consent.

See also topic 15.02 Exchange Control; categories 2 Business Organizations, topic Corporations, subheads Capital and Overseas Takeovers; and Business Regulation and Commerce, topic Licenses, Business and Professional; Citizenship, topic Aliens.

15.05 FOREIGN TRADE REGULATIONS:

Customs and Excise Act 1996 and Import Control Act 1988 allow Governor-General, by Order in Council, to prohibit or limit importation of any specified goods or class of goods. Government now subjects all industry assistance policies to close scrutiny to encourage competition and economic efficiency. Customs and Excise Act 1996 gives Governor-General similar powers in regard to exports.

New Zealand is member of World Trade Organisation.

See category 24 Treaties and Conventions, topic 24.01 Treaties.

16 HEALTH

16.01 NEW ZEALAND HEALTH SYSTEM:

New Zealand Public Health and Disability Act 2000.

New Zealand Public Health and Disability Act (NZPHDA) provides for public funding and provision of health and disability services. Act establishes health and disability sector based on 21 district health boards (DHBs). DHBs funded by Government, and have dual “funder” and “provider” role, which involves funding health and disability services in their regions provided by range of health providers, including general practitioners, nurses, community and hospital laboratories and pharmacies; and providing public hospital services through their self-owned hospitals. Ministry of Health provides policy advice to Government, including advice on general performance of DHBs.

NZPHDA also established number of Crown-owned health agencies, including New Zealand Blood Service (NZBS) and Pharmaceutical Management Agency (PHARMAC). NZBS manages all aspects of blood supply, including donation, collection and processing. PHARMAC is government’s pharmaceutical purchasing agent, responsible for purchasing both hospital pharmaceuticals, as well as those used in community. It manages Pharmaceutical Schedule, updated monthly, of prescription drugs and related products subsidised by Government. It makes final decision on subsidy levels and prescribing guidelines and conditions, by balancing evidence of effectiveness with cost within fixed pharmaceutical budget. Receives independent expert medical input from Pharmacology and Therapeutics Advisory Committee. PHARMAC enters into contracts with pharmaceutical suppliers wanting their pharmaceuticals listed on Pharmaceutical Schedule and subsidised by Government. Precondition to listing is market approval from Medsafe, unit within Ministry of Health responsible for ensuring pharmaceuticals meet acceptable levels of safety, quality and efficacy.

NZPHDA contains provisions about governance and operation of DHBs and other Crown-owned health agencies, including their objectives, functions, roles, partnership with Maori, and DHBs' accountability mechanisms and reporting obligations under Public Finance Act 1989. It also specifies responsibilities of Minister of Health, including developing various health and disability strategies that set out Government's overall framework for sector; entering into Crown funding agreements with DHBs and other health providers under which Crown agrees to provide funding in return for DHBs and other providers providing or arranging provision of specified health services. NZPHDA also establishes number of advisory committees in sector.

Provisions in Health Act 1956 (HA) govern public health issues, and powers and duties of local territorial authorities relating to provision of sanitary works and regulation of buildings. HA defines and provides for prosecution and abatement of “nuisances.” It provides for designation of Medical Officers of Health, to whom special powers granted to prevent outbreak or spread of infectious diseases, including requiring persons to submit to medical examination, and quarantining people and selected environments. HA requires physicians to notify Medical Officers of Health of specified notifiable infectious and other diseases, prohibits trading of one's own blood, and regulates collection and supply of human blood. HA also contains provisions authorizing disclosure of personal health information in certain circumstances, including disclosure to specified state agencies, such as Police, for specified purposes.

Epidemic Preparedness Act 2006 passed in response to concerns about potential avian flu epidemic. Principal purpose to ensure adequate statutory power for Government agencies: (a) To try to prevent outbreak of epidemics in New Zealand; (b) to respond to epidemics in New Zealand; and (c) to respond to certain possible consequences of epidemics (whether occurring in New Zealand or overseas). With agreement of Minister of Health, Prime Minister may issue Epidemic Notice, declaring he or she is satisfied that effects of outbreak of stated quarantinable disease are likely to disrupt, or continue to disrupt essential governmental and business activity in New Zealand significantly, whether outbreak is occurring within New Zealand or overseas. While Epidemic Notice is in force, Prime Minister may, with agreement of Minister responsible for administration of enactment concerned, issue Epidemic Management Notice, enabling use of special powers in other enactments, such as Health Act 1956, and activating measures while Epidemic Notice is in force. While Epidemic Notice is in force, Governor-General can, by Order in Council on recommendation of Minister of Health, immediately modify any statutory requirement or restriction to facilitate management of quarantinable disease or its effects, or to enable compliance during epidemic. Parliament is required to scrutinize immediate modifications. While Epidemic Notice is in force, Judges may modify rules of court during epidemic to take account of effects of quarantinable disease stated in notice; certain common law doctrines, such as rule of impossibility or necessity, not affected by any thing done under Act or other specified enactments; and statutory requirements that person must be told of rights to be read as requirement that he or she must be told of rights as modified by Order.

Health Amendment Act 2006 was also passed in response to avian flu epidemic. It updated HA to enact changes affecting emergency and quarantine provisions of HA to ensure effective response to possibility of communicable disease-related emergencies. Act increased special powers of Medical Officers of Health for purpose of preventing outbreak or spread of infectious diseases, or on outbreak of infectious disease, or if state of emergency has been declared, or while Epidemic Notice is in force. Police empowered to do anything reasonably necessary, including use of force, to assist Medical Officers of Health. New offences relating to obstructing Medical Officer of Health or people assisting him/her specified. Medical practitioners required to give notice to Medical Officer of Health of cases of notifiable disease. In case of notifiable infectious diseases, medical practitioners required to inform occupier of premises and every person nursing or in immediate attendance on patient of infectious nature of disease and precautions to be taken, and to notify Medical Officer of Health, and local authority of district. Medical laboratories also to be required to give notice of cases of notifiable diseases from Dec. 2007. Director-General of Health given new power to devise policies determining priorities for medicines under control of Crown to be dispensed during outbreaks of quarantinable diseases. Medical Officer of Health may, by notice, redirect aircraft that has landed in New Zealand while Epidemic Management Notice in force.

2006 amendments to HA to be carried forward in new Public Health Bill introduced in 2008. New public health legislation would substantially replace outdated HA, Tuberculosis Act 1948, and associated regulations. Objective to improve, promote and protect public health by providing for risk management approach to detection, assessment, and management of significant or emerging risks to public health. Bill contains new measures concerning non-communicable diseases, including principles and provisions enabling Director-General to make non-binding codes and guidelines to address non-communicable disease risk factors. Latter powers controversial because of potential for compulsion, as well as concerns about forced disclosure of personal health information. Bill has been stalled, its passage not priority of current National Government.

Patients' Rights.

Health and Disability Services Consumers' Code of Rights (Code of Rights), passed into law in regulations made pursuant to Health and Disability Commissioner Act 1994 (HDCA), encourages patient focus in health care in New Zealand. All health and disability services providers, including non-registered health providers, are bound by Code of Rights. Code of Rights accords ten rights to “consumers” and correlative duties to which providers subject. More extensive than common law, they include right to be treated with respect; right to have services provided with reasonable care and skill and in compliance with legal, professional, ethical and other relevant standards; right to effective communication in form that enables understanding of information; right to information that reasonable consumer, in that consumer's circumstances, would expect to receive; and right to make informed choice, including to refuse services, and give informed consent. Rights subject to defence that provider is not in breach of Code if he/she has taken “reasonable actions in the circumstances” to give effect to rights and comply with duties in Code. Code enforced by complaints regime under jurisdiction of Health and Disability Commissioner, who has power to require complaints alleging breach(es) of Code of Rights to be referred for attempted settlement by advocacy or mediation, or investigated by Commissioner's Office in order for Commissioner to reach opinion on whether provider's action in breach of Code. After amendment in force since Sept. 18, 2004, Commissioner's jurisdiction expanded to include actions of registered health practitioners before July 1, 1996 (when Code of Rights came into force). Pre-July 1, 1996 complaints determined in accordance with disciplinary standards in relevant registration enactment in force at time. On forming opinion of breach of Code or that provider's actions were grounds for disciplinary action, Commissioner has various powers, including making recommendations and/or (for actions after July 1, 1996) to refer complaint to Director of Proceedings to decide whether to institute disciplinary proceedings against registered health practitioner before Health Practitioners Disciplinary Tribunal or to initiate civil proceedings against provider(s) before Human Rights Review Tribunal (HRRT). HRRT has power to award damages up to NZ$200,000, but cannot do so in respect of personal injury covered by accident compensation legislation. Where Commissioner has not referred breach opinion to Director of Proceedings or Director decides not to take proceedings, aggrieved person in respect of whom practitioner guilty of breach of Code may bring civil proceedings before HRRT.

Privacy and disclosure issues in relation to health information about identifiable individual regulated by Health Information Privacy Code 1994 (HIPC), code of practice issued by

Privacy Commissioner under Privacy Act 1993 (PA). HIPC applies rules to health agencies in health sector concerning collection, storage and security, accuracy, retention, use and disclosure of health information relating to identifiable individuals. Also provides entitlement of access to and correction of personal health information. HIPC enforced by Privacy Commissioner, who has authority to investigate complaints of interference with privacy. PA emphasizes securing settlement of complaints and obtaining assurances against repetition, although Privacy Commissioner may refer complaint to Proceedings Commissioner to decide whether to institute proceedings before HRRT in respect of any action alleged to be interference with privacy. HRRT has power to award damages up to NZ$200,000. Where Privacy Commissioner or Proceedings Commissioner considers complaint lacks substance or that matter ought not to be proceeded with, aggrieved individual may bring civil proceedings before HRRT.

Health and Disability Services (Safety) Act 2001 (HDSSA) replaced former licensing arrangements for hospitals, rest homes, and residences for people with disabilities. HDSSA requires providers of these services to meet relevant service standards developed after consultation with organizations representing affected consumers and providers and approved by Minister of Health. Designated audit agencies are charged with responsibility of auditing services against relevant service standards. HDSSA authorizes inspection of places providing health care services and for cessation and closing orders if relevant standards are not met.

§19 of New Zealand Bill of Rights Act 1990 (NZBORA) affirms right to freedom from discrimination on grounds of discrimination in Human Rights Act 1993 (HRA). Most relevantly in relation to health services, prohibited grounds include “age” and “disability.” Under HRA unlawful for provider of services to refuse or fail on demand to provide goods, facilities, or services to public or any section of it, or to treat any person “less favorably” in connection with provision of services than would otherwise be case, by reason of prohibited grounds of discrimination. HRA is subject to limited exceptions, which include where HRRT declares there to be “genuine justification” for otherwise unlawful actions. After amendment of HRA in 2001, NZBORA, rather than HRA, applies to complaints of discrimination on prohibited grounds by person or body to whom NZBORA applies—all three branches of government or person or body performing public function pursuant to law. This means that potentially discriminatory actions on prohibited grounds in public sector, such as in public hospitals or in respect of publicly funded health care, are to be assessed against more flexible NZBORA standard. NZBORA contains §5, which permits reasonable limits on anti-discrimination right so long as “prescribed by law” and “demonstrably justified in a free and democratic society.” HRA applies to privately funded health services in private institutions.

16.02 OTHER RELATED HEALTH LEGISLATION:

Medicines.

Medicines Act 1981 (MA) regulates manufacture, sale and supply of medicines, medical devices and related products. “Medicine” is any substance manufactured, imported, sold, or supplied for therapeutic purpose. MA prohibits non-licensed persons from manufacturing, selling, packing or labeling any medicine.

Medicines must be registered, i.e. approved, in New Zealand before they can be sold, distributed, or advertised as available in New Zealand, even if registered overseas. Applications must address safety, efficacy, and risks of use of medicine, although consent is deemed no warranty. Minister of Health's consent to distribution notified in Gazette. Medicine is approved with particular set of indications, dosage instructions and routes of administration on data sheet, changes to which also have to be applied for.

MA also governs prescribing, dispensing, proper packaging and labelling of prescription medicines, as well as medicine storage.

MA also restricts advertising of medicines without appropriate descriptions or warnings as prescribed in Medicines Regulations. Advertisements must not be misleading, claim that medicine will cure certain specified diseases or conditions, that medicine is panacea or infallible, or recommended by relevant health practitioner(s). Advertising of prescription medicines to public never explicitly prohibited. New Zealand and U.S. only industrialised countries that currently allow direct-to-consumer advertising of prescription medicines.

In 2003 New Zealand and Australian governments agreed to establishment of joint New Zealand/Australia regime to regulate therapeutic products in both countries. Under scheme joint agency would be established to regulate therapeutic products, to include medicines, medical devices, and complementary healthcare products. Regime would address problems with New Zealand's current outdated therapeutic products regulatory framework, which does not adequately manage public health and safety risks for some medical devices and complementary healthcare products. Treaty signed by both countries, but passage of implementing legislation in both countries required for regime to come into force.In 2007, Government announced it would not be proceeding with legislation to enable establishment of joint agency for regulation of therapeutic products because of insufficient support to ensure passage of legislation at that time. Negotiations between two countries to establish joint agency postponed, but Agreement between Australia and New Zealand for establishment of joint scheme for regulation of therapeutic products remains in place.

Rehabilitation and Compensation for Persons Suffering Personal Injury.

Since 1974 accident compensation scheme has provided comprehensive, no-fault scheme to rehabilitate and compensate persons suffering personal injury through accident. Scheme funded partly through levies paid by employers, self-employed, earners, tariff on petrol and component of motor vehicle registration fee, and partly through general taxation. Coverage and entitlement to compensation does not depend on proof of fault, but that claimant has suffered personal injury for which he/she covered by legislation. Current statute Injury Prevention, Rehabilitation, and Compensation Act 2001 (IPRCA). Topics of coverage include personal injury caused by accident and work-related gradual process, disease, or infection. Amendment in force from July 1, 2005 replaced restrictive cover for medical misadventure with more expanded cover for personal injury caused by treatment given by or at direction of registered health professional. Under current scheme compensation includes income-replacement to certain level, survivors' benefits, contribution to medical costs, and limited lump sum compensation for permanent physical impairment. Current scheme under government review because of cost blowout. Levels of cover and compensation likely to be reduced by new legislation, and competition from private insurers permitted in employers' account and possibly motor vehicle account. Provision in IPRCA bars bringing civil proceedings for compensatory damages for personal injury covered by IPRCA and former Acts, but does not prevent claim for punitive damages. Threshold for awards of punitive damages is high. Test is that conduct in question satisfies criterion of outrageousness. Levels of awards extremely modest by U.S. standards. Second area where civil suits for compensatory damages open is for purely mental injury unaccompanied by physical injury, for which no coverage under current scheme (except where suffered by victims of various sex crimes).

Registration and Discipline of Health Professionals.

Health Practitioners Competence Assurance Act 2003 (HPCAA) entered into force on Sept. 18, 2004. Repealed separate regulatory statutes for registered health professions, replacing them with one generic piece of legislation applicable to all. HPCAA applies only to registered health practitioners, not to unregistered providers of health care and disability services, such as homeopaths and naturopaths. There are no registration requirements for them, and they cannot face disciplinary proceedings for conduct found by Health and Disability Commissioner in breach of Code of Rights.

HPCAA appointed registration authorities responsible for registration and oversight of their health profession's registered practitioners. Authorities responsible for prescribing scopes of practice for their health professions and necessary qualifications and experience for each scope of practice. Health practitioners must not practise outside authorised scope of practice, and must comply with conditions imposed by authority. Practitioner can only claim to practise health profession regulated by HPCAA if registered and holding current practising certificate. Unregulated health professions can apply to Minister of Health for designation of their health services as “health profession” regulated under Act. HPCAA authorizes Minister of Health to declare certain activities “restricted”, if satisfied this is necessary to protect public from risk of serious or permanent harm. Only health practitioner permitted by his/her scope or practice may perform “restricted” activity.

HPCAA contains protections for health practitioners to take part in protected quality assurance activities. Purpose to encourage open and constructive examination of practice to occur in protected and confidential environment, hopefully resulting in quality improvement. Application for protection is to Minister of Health, who may declare activity protected if in public interest. Where activity protected, information that becomes known solely as result of and documents created solely for purposes of activity are “confidential” i.e. no person can be required to disclose information or produce documents in judicial proceeding or investigation.

HPCAA places various reporting obligations on employers and public agencies, including authorities and Health and Disability Commissioner, to notify each other of competence concerns about practitioners believed to pose risk to public. HPCAA does not require health practitioners to notify authorities of such concerns about colleagues and other health practitioners, but provides they may do so. Provision reinforces ethical duties to report, and provides person reporting with immunity from civil or disciplinary proceedings, unless they have acted in bad faith.

HPCAA extended competence review provisions formerly applicable only to physicians to all registered health professions. Intention to identify practitioners practising below standard considered appropriate by their authority, and to raise competence levels to acceptable levels through attaching conditions and setting programmes. Authority may carry out competence review of practitioner's practice, and on concluding that practitioner has failed to meet required standard of competence, can make various orders, including attaching conditions to scope of practice, or that practitioner complete competence or recertification programme.

HPCAA also established consistent complaints and disciplinary regime across registered health professions, coordinated with Health and Disability Commissioner's regime. Established single disciplinary tribunal, Health Practitioners Disciplinary Tribunal, for all registered practitioners. Disciplinary hearings generally held in public, unless Tribunal orders otherwise. There are seven disciplinary grounds, principal ones being: professional misconduct, because of conduct amounting to “negligence or malpractice” in relation to practitioner's scope of practice; and professional misconduct, because of conduct that “has brought or was likely to bring discredit to the profession.” On finding of guilt, most serious potential penalties are cancellation and suspension of registration which, given drastic consequences for practitioner, likely to be confined to most serious cases where considered necessary for public protective purposes. Remaining penalties are: practice subject to conditions; fine; censure; and orders for payment of costs.

Human Assisted Reproductive Technologies.

Human Assisted Reproductive Technologies Act 2004 (HARTA) came into force on Aug. 21, 2005. Prohibited certain assisted reproductive procedures, including: human reproductive cloning; implanting animal or genetically modified gamete, or animal, hybrid or genetically modified embryo into human; implanting human gamete or human or hybrid embryo into animal; or implanting gametes or embryo derived from fetus into human. HARTA prohibits: commercial

supply of human embryos or gametes; collection or use of gamete from minors (under 16 years) unless for use of person from whom collected; and sex selection of human embryos except to prevent or treat genetic disorder or disease. In vitro human or hybrid embryos not to be developed beyond 14 days, and there is storage limit of ten years for gametes and embryos without ethics committee approval. Surrogacy arrangements not illegal, but unenforceable. Act prohibited commercial surrogacy and advertising for such arrangements. Assisted reproductive procedures and human reproductive research only permitted to proceed with ongoing ethics committee approval, unless procedure declared by Order in Council to be "established procedure." HARTA establishes framework for regulating and guiding performance of assisted reproductive procedures and human reproductive research. Act established Advisory Committee on Assisted Reproductive Procedures and Human Reproductive Research (ACART). Functions include issuing guidelines to ethics committee on assisted human reproduction matters, providing advice to Minister of Health and monitoring developments in assisted reproductive procedures and human reproductive research. Designated ethics committee considers applications to perform such procedures or research in accordance with guidelines and advice issued by ACART and keeps previously given approvals under review. Set of guiding principles specified by Act to guide persons exercising powers, performing functions and making decisions under HARTA. First is that health and well-being of children born as result of assisted reproductive procedures is important consideration in all decisions about procedures. Act also establishes comprehensive information-keeping regime to ensure that people born from donated embryos or cells can find out about genetic origins.

Food.

Key statute is Food Act 1981 (FA), amended in 2002 (FAA), as well as Food Regulations 1984. Many food standards join Australian/New Zealand standards developed by Food Standards Australia and New Zealand (FSANZ), bi-national independent statutory authority that develops food standards for composition, labelling and contaminants that apply to all foods produced or imported for sale in Australia and New Zealand. Standards developed by FSANZ comprise joint Australia New Zealand Food Standards Code. Standards then adopted in New Zealand as standards under FA, and implemented and enforced by New Zealand Food Safety Authority (NZFSA), set up from July 1, 2002 by FAA. There are also general provisions in FA on labelling and packaging, and restrictions on advertising, and regulations on general safety issues.

Workplace Health and Safety and Smoke-Free Environments.

Under Health and Safety in Employment Act 1992 (HSEA), employers required to take all practicable steps to ensure safety of employees while at work, and to identify and eliminate, isolate or minimize significant hazards. Employers required to provide reasonable opportunities for employees to participate in processes to improve health and safety at work. Although primary duty rests on employer, HSEA also places duty on employees to take all practicable steps to ensure own safety and that of others. HSEA also places duties on person in control of places of work in relation to hazards to others, such as contractors and invitees. Employers required to report certain accidents and serious harms. Failure to comply with duties in HSEA constitutes criminal offence, with liability to substantial fines. Health and Safety in Employment Amendment Act 2002 made HSEA more comprehensive in coverage, including making HSEA applicable to volunteers, and including work-related stress as "harm" for purposes of HSEA.

Purpose of Smoke Free Environments Act 1990 (SFEA) to prevent, so far as practicable, detrimental effects of smoking on health of anyone who does not smoke or wish to smoke inside any workplace, or in certain public enclosed areas.

Smoking prohibited on aircraft, at schools and early childhood centers. Restricted in other public places, such as bars, restaurants, and casinos, in which nonsmoking room or designated area in which specified percentage of seating or floor area required to be set aside for nonsmokers. Employers required to prepare written policy on smoking in workplace, and required to designate areas where smoking is and is not permitted, after appropriate consultation with employees.

To reduce social approval of tobacco use, particularly by young people, SFEA also imposes controls on marketing, advertising or promotion of tobacco products and their association through sponsorship with other products and events. Regulations specify health messages and other warnings to be displayed on cigarette packs. SFEA also established Health Sponsorship Council to promote health and healthy lifestyles and make alternative sponsorship available to persons or organizations to that provided by tobacco companies.

Hazardous Substances and New Organisms.

Purpose of Hazardous Substances and New Organisms Act 1996 (HSNO) to protect environment, and health and safety of people and communities, by preventing or managing adverse effects of hazardous substances and new organisms. “Hazardous substance” is any substance that may be: explosive, flammable, able to oxidise, toxic or eco-toxic. New organism is any species not present in New Zealand immediately before HSNO came into effect on July 29, 1998, and includes genetically modified organism (GMO). Act has full schedule of banned animals and plants.

HSNO establishes Environmental Risk Management Authority (ERMA) to assess and determine applications for approval to introduce hazardous substances and new organisms, including (since Oct. 30, 2003) GMOs, or to do so in containment. Act provides for public process, to weigh up risks, costs and benefits in each case. Act puts emphasis on assessing risks, to decide if it is safe to bring something new into NZ and if so, under what conditions. On applications to develop or filed-test GMOs in containment, ERMA must consider additional matters. These are any adverse effects on human health and safety and environment, any alternative method with fewer adverse effects, and any effects resulting from transfer of genetic elements to other organisms around site. It must follow detailed criteria set down in formal Methodology developed in accordance with Act.Actalso provides for approvals for certain developments and all contained field-testing of GMOs to include controls. Monitoring requirements may be applied to conditional release approvals, requiring users of approval to monitor for evidence of specific events occurring. ERMA also monitors and co-ordinates compliance with HSNO and promotes public awareness of risks of hazardous substances and new organisms. ERMA acts as adviser to Minister for Environment on effectiveness of HSNO and other matters and inquires into accidents and emergencies. Act also established Bioethics Council but incoming Government abolished it as part of efficiency drive in 2009.

See also category 12 Environment, topic 12.01 Environmental Regulation.

17 IMMIGRATION

17.01 ALIENS:

Restrictions on Ownership by Foreigners.

Subject to provisions of Overseas Investment Act 2005, Overseas Investment Regulations 2005, Fisheries Act 1983 and Fisheries Act 1996, aliens or overseas persons may acquire, hold, and dispose of all real and personal property in New Zealand. Overseas person may be individual who is not New Zealand citizen or resident or comprises corporate body with 25% or more securities held overseas.

Under overseas investment legislation, subject to certain exemptions, contracts for sale, leases for three years or more, and options for sale or lease, of non-urban land in New Zealand require prior consent by Minister of Finance or other authorised Minister (until Aug. 2006, Minister of Conservation) and Minister of Land Information, where: (a) Purchaser, lessee or grantee not New Zealand citizen and not ordinarily resident in New Zealand, or is overseas company or body corporate, or is New Zealand company that is subsidiary of overseas company, or is New Zealand company controlled by overseas interests (each "overseas person"); and (b) where land, together with any associated land, is defined as sensitive land. Details are found in Schedule 1 to 2005 Act, but importantly include non-urban land over five hectares; land over 0.4 hectares and is part of certain islands, or contains or is next to reserves, historic or heritage areas exceeding 0.4 hectares, or contains foreshore, seabed, lakebed, or is next to these areas and exceeds 0.2 hectares in area; or any land on certain islands.

Consent is also required where overseas person acquires securities in any entity that owns or controls any such land or interest in any estate in such land (regardless of dollar value), that results in (a) land owning entity being owned or controlled by overseas persons or (b) overseas person acquiring 25% or more of ownership or control of land owning entity or increasing its ownership or control of land owning entity or increasing its ownership or control if overseas person already has 25% or more ownership or control.

Consent is required for purchase of shares of company where purchase will result in overseas person acquiring 25% or more of ownership or control in company and value of consideration paid for shares exceeds $100 million or value of assets of company exceeds $100 million. Certain exceptions apply.

Fisheries Acts provide that no fishing quota be allocated to individual who is not ordinarily resident in New Zealand or to body corporate that is wholly or significantly controlled from outside New Zealand.

See categories 2 Business Organizations, topic Corporations; Foreign Trade and Commerce, topic Foreign Investment.

Aliens are not qualified to enjoy parliamentary franchise or to own ships registered in New Zealand; but, provided they are not alien enemies, they may vote at local government elections except where specifically disqualified by statute. Aliens may not be elected as members of central or local government.

Rights of alien enemies are considerably restricted during the existence of a state of war.

See also category 4 Citizenship, topic 4.03 Nationality.

Immigration.

New Zealand citizens have right to be in New Zealand at any time and do not require permit under Immigration Act 1987 to be or work in New Zealand. Persons other than New Zealand citizens may be in New Zealand only if such persons hold residence or temporary permit or are exempt under Act from requirement to hold permit. Persons other than New Zealand citizens may undertake employment in New Zealand if such persons hold residence permit, work permit or are holders of temporary permit giving authority to undertake employment or are exempt under Act from requirement to hold permit. No permit shall be granted to persons who: (a) Have been convicted at any time of any offence and sentenced to imprisonment for term of five years or more; (b) have been convicted within preceding ten years of any offence and sentenced to imprisonment for term of 12 months or more; (c) are subject to removal order in force; (d) have been previously deported from New Zealand or any other country; (e) are believed to have engaged in terrorism in New Zealand or are members of internal terrorist organisation; (f) are believed to have engaged in terrorism outside New Zealand or are members of international terrorist organisation; (g) are believed to be likely to engage in terrorism or commit offence against Crimes Act 1961 or Misuse of Drugs Act 1975; (h) are believed in light of international circumstances to be likely to constitute danger to security or public; (i) are believed to be members of any group or organisation which has criminal objectives or which has engaged in criminal activities and whose presence in NZ would constitute threat to public interest or public order.

Following persons are exempt from requirement to hold permit: (1) Persons on whom immunity is conferred by virtue of diplomatic status; (2) members of armed forces of any country, civilian components of that force and crew of any craft used for transporting members of armed forces of any country to New Zealand, while: (i) members of that force are in New Zealand at request or with consent of Government of New Zealand, and (ii) members' presence in New Zealand is in ordinary course of members' duty or employment; (3) crew or passengers on any seagoing craft carrying passengers or cargo in ordinary course of business and plying between any foreign place and New Zealand; (4) crew or passengers on any licensed foreign fishing craft; (5) crew on any commercial aircraft flying between any foreign place and New Zealand; (6) members or associates of any scientific programme or expedition of any contracting party to Antarctic Treaty within meaning of Antarctic Act 1960, or persons to whom §5 of that Act applies, while those members or persons are in Ross Dependency; (7) persons exempted by Minister of Immigration by special direction; (8) classes of persons exempted under regulations made under Act; (9) crew or passengers on any ship in respect of which Minister of Transport has authorised carrying of cargo or passengers, for 28 days, beginning with day ship arrives in New Zealand. (Express time limits apply for circumstances set out in clauses (3), (4) and (5).)

Range of new provisions dealing with “security concerns” were added to 1987 Act in 2004. Provision is made for deportation of persons threatening national security, suspected terrorists and certain non-New Zealand citizens if certain criminal convictions are entered against them. Persons falling within last category have right of appeal to special tribunal, while those ordered to be deported because of suspected terrorist activities have right of appeal to High Court.

In relation to persons suspected of being in New Zealand unlawfully, Act provides immigration officers with powers to require production of certain information or surrender of documents, make removal order or apply to District Court for removal warrant. Persons suspected of being in New Zealand unlawfully may be taken into custody by police and under removal order removed from New Zealand in certain specified circumstances. Persons named in removal order may appeal to Removal Review Authority.

Person applying for permanent entry permit may do so under general, business, family reunification, Pacific quota, refugee or humanitarian categories. General category is assessed according to points system which allocates points to such factors as academic or trade qualifications, skills, relevant work experience, job offer, and age. Content of these broad categories depends on policy of Government of day and is subject to change. Full details of requirements under each category, and application forms, may be obtained either from Department of Labour or Immigration New Zealand (http://www.immigration.govt.nz) or by contacting nearest office of Immigration New Zealand or nearest New Zealand diplomatic post.

All persons entering New Zealand are required to produce on demand travel document (Passport or Certificate of Identity recognized by New Zealand Government).

See also topic Nationality; category 2 Business Organizations, topic 2.02 Corporations, subhead Foreign Corporations.

Corporations Owned or Controlled by Aliens.

Except as elsewhere indicated in this topic, there are no special provisions relating to corporations owned or controlled by aliens, as to issuing or raising of capital and as to filing of accounts. See category 2 Business Organizations, topic 2.02 Corporations. See also category 3 Business Regulation and Commerce, topic 3.10 Monopolies, 3.12 Restraint of Trade and Competition.

18 INTELLECTUAL PROPERTY

18.01 COPYRIGHT:

Copyright in New Zealand governed and regulated by Copyright Act 1994 based on Copyright Designs and Patents Act 1988 (U.K.). Protection is given for traditional works, such as literary works (including computer programs), as well as “signal” works such as sound recordings, films, and “communication works” (to embrace Internet transmissions and like) following coming into force of Copyright (New Technologies) Amendment Act 2008. Other protections are for moral rights and performers’ rights. Remedies extend to measures for border protection. 1998 amendment removed previous copyright prohibition on parallel importation, but other intellectual property measures remain unaffected. Subject to any agreement to contrary, first owner of copyright in works produced by employees is employer, and commissioner is first owner of certain works including software, designs and photographs. Copyright owner has rights to prevent “restricted acts”, such as copying, as well as to take action against those who commit “secondary infringement”, such as dealing in infringing copies. There are wide range of exceptions for particular purposes, such as fair dealing for research. Registration is not necessary for copyright protection.

New Zealand extends protection to countries of Berne Convention and pursuant to TRIPS agreement.

Copyright protection exists for nationals of foreign countries on basis of reciprocity of benefits.

Copyright (New Technologies) Amendment Act 2008 has updated Act in context of digital technology, including Internet covering issues such as digital reproduction rights, Internet, communication to public, ISP liability, technological protection measures, electronic rights management information, and permitted acts and exceptions. Derived from WIPO Internet Treaty.

18.02 DESIGNS:

Governed by Designs Act 1953 and Regulations 1954, protection upon registration. Overlapping protection provided by Copyright Act 1994. Protection given to shape, configuration pattern or ornament of industrially applied article. Term maximum of 15 years. Novelty required. Design registration may be licensed or assigned. Infringement assessed objectively. Opposition and revocation procedure.

Layout Designs Act 1994.

Act provides for copyright style protection (without need for registration) in original layout designs or integrated circuits which are now expressly excluded from definition of “artistic work” in Copyright Act 1994.

18.03 PATENTS:

Governed and regulated by Patents Act 1953 (as am'd 1994), and Patents Regulations 1954, but note new Bill below. Patents are granted for inventions. Term is now for 20 years. Inventor or his assignee may apply. Three copies of specifications, claims and drawings are required but in nonconvention cases provisional specifications may be filed first if formal documents lodged within 12 months.

Application may claim priority from date of first filing in convention country if made within 12 months.

Novelty is essential. There can be no prior publication or use in N.Z. Obviousness is not ground of refusal but is ground of opposition or revocation. Documents are examined and application must be in order for acceptance within 15 months from date of filing complete specification. Swiss form claims for second medical use are accepted. Computer software applications may be patentable as are novel business methods (including method of doing business on Internet) provided, in each case, meet tests of novelty and inventiveness.

After acceptance, acceptance is advertised in Intellectual Property Journal and opposition may be lodged within three months. Oppositions are decided by Commissioner subject to appeal to High Court.

There is no restriction on manufacture, sale or use of overseas patented article if no N.Z. patent. Otherwise patentee has exclusive entitlement. Patents may be assigned or licensed. In event of nonuse, compulsory licences may be granted. Note also Crown use provisions. Marking of articles with N.Z. patent number is not essential but failure may enable infringer to avoid damages.

New Patents Bill 2008 makes considerable changes to law and procedure, though generally similar to current Australian and UK Patents Act (and provides for absolute novelty, and for obviousness as ground for refusal). Date of enactment likely in 2009 or 2010.

18.04 PLANT VARIETIES:

Governed by Plant Variety Rights Act 1987.

Act grants proprietary rights in respect of plant varieties. Granting such rights, upon appropriate application to Commissioner of Plant Variety Rights, includes exclusive right to sell reproductive material of variety concerned. Proprietary rights subject to certain exceptions, including that any person may propagate, grow, or use protected variety for noncommercial purposes. *Note:* Amendment Bill released for discussion in 2005 will, if enacted, introduce number of changes including provision for concept of “essentially derived varieties”, held up pending resolution of Maori claim under Treaty of Waitangi legislation.

18.05 TRADE MARKS:

Governed by Trade Marks Act 2002 (as am’d in 2003 and 2005) and Regulations 2003 which substantially follows UK law. (See England Law Digest, topic Trademarks and Tradenames.) “Trade mark” means any sign capable of being represented graphically and capable of distinguishing goods and services of one person from those of another. “Sign” is defined and may include shape of goods, shape of packaging and smells, sounds and taste (if capable of being “represented graphically”). Marks for goods and services are registrable.

Domain names and web addresses may be registrable as trade mark if meet registrability criteria. Commissioner must accept application if satisfied that absolute grounds (e.g., deceptive mark, nondistinctive mark, bad faith) or relative grounds (e.g., identical or similar trade mark or “well known” mark) do not exist to prevent registration. Once accepted, trade mark is advertised in Intellectual Property Journal and opposition may be lodged within three months. Oppositions are decided by Commissioner subject to appeal to High Court. Registration is not essential to use of mark but no Trade Mark Act action lies for infringement of unregistered mark. Common law tort of “passing off” is not affected by Trade Marks Act and §9. Fair Trading Act 1986 resembles “passing off” in that it prohibits misleading and deceptive conduct in trade (see category 3 Business Regulation and Commerce, topic 3.13 Sales).

To all intents, generally similar restrictions as in UK apply to registrable marks. Infringement may also arise by use of identical or similar mark in relation to dissimilar goods or services, if registered mark “well known”. Certification and Collective (but not defensive) trade marks registrable. Convention applications must be made within six months of first application. Registration is for period of ten years followed by successive periods of ten years on payment of renewal fees. Trade marks are assignable with or without goodwill of business. Present system of voluntary registration for licensees is to be repealed, likely in 2009. “Use” of trade mark includes use by person other than owner if use is authorized by, and subject to, control of owner (whether or not that other person is registered as licensee). Registered marks may be removed on grounds including three years' continuous “non-use”. As in UK border protection provisions of Trade Mark Act allow owner to request Customs Department to detain goods with infringing marks. Criminal proceedings may be brought for counterfeiting and other dishonest uses of registered trade marks.

Geographical Indications Act.

Legislation establishes registration system for protection of geographical indications for wines and spirits.

Geographical Indications (Wine and Spirits) Registration Act 2006 passed, not yet in force pending regulations. New law will allow for registration of foreign geographical indications if protected in country of origin and for New Zealand geographical indications if such identify wine or spirit as originating in New Zealand. New law will clarify relationship between trade marks and geographical indications implementing “first-in-time, first-in-right” principle in determining which right has priority.

See also topic 18.03 Patents.

19 LEGAL PROFESSION

19.01 ATTORNEYS:

Person may act as barrister or solicitor in New Zealand provided he or she has passed prescribed examinations, is enrolled as barrister and/or solicitor of High Court, and holds current practicing certificate. New Zealand Law Society is governing body of profession, but membership of law society is voluntary under Lawyers and Conveyancers Act 2006. Society's address is PO Box 5041, Wellington, New Zealand, telephone (64)(4) 472 7837, fax: (64)(4) 473 7909.

2006 Act regulates legal profession. New rules cover such matters as discipline, complaints, fidelity fund, admission, law firm incorporation, and sale of real estate. Barrister and/or solicitor holding current practicing certificate has exclusivity in certain “reserved areas of work” (such as in relation to legal proceedings), but others may provide legal services not in reserved areas, or otherwise restricted.

19.02 BARRISTERS AND SOLICITORS:

See topic 19.01 Attorneys.

20 MORTGAGES

20.01 CHATTEL MORTGAGES:

Personal Property Securities Act 1999 enacted in 1999 came into effect on May 1, 2002 and reforms law relating to security interests in personal property. Based closely on

Saskatchewan legislation, in turn derived from Art. 9 of U.S. Uniform Commercial Code.

Act applies to all “personal property” including shares, motor vehicles (defined in §57) and ships (within meaning of Ship Registration Act 1992) that do not exceed 24 metres in length. Personal property also includes chattel papers, documents of title, goods, intangibles, investment securities, money, and negotiable instruments.

Security interest is defined as interest in personal property created or provided for by transaction that in substance secures payment or performance of obligation, without regard to form of transaction and identity of person who has title to collateral.

Act uses concepts of “attachment” and “perfection” of security interests. Security interest attaches to collateral when value has been given by secured party, debtor has rights in collateral and security interest is enforceable against third parties. Security interest is enforceable against third parties if secured party is in possession of collateral or debtor has signed or assented to security agreement.

Generally, security interest is “perfected” when security interest has attached and financing statement has been registered in respect of security interest or secured party or person on their behalf has possession of collateral.

Act contains rules governing priority between competing security interests in same collateral. In general, perfected security interest will take priority over unperfected security interest and, as between perfected security interests, security interest registered first in time will have priority. There are important exceptions to this. Example; purchase money security interest (PMSI). PMSI is security interest covering funding of purchase of collateral. Properly registered PMSI will have priority over earlier perfected security interest.

Assignments of security interests should be registered under Act to perfect security interest of assignee and give assignee's interest priority over third parties, subject to priority rules of Act.

Failure to register security interest under Act does not make security interest invalid against liquidator or Official Assignee.

Act has specific provisions relating to when buyers or lessors of motor vehicles will take vehicles free of security interests. Competing security interests in same motor vehicle are dealt with under Act's rules of priority.

Registrar of Personal Property Securities is responsible for providing and maintaining Personal Property Securities Register. Register contains details of security interests in personal property.

Credit (Repossession) Act 1997.

Act applies to repossession of consumer goods under security agreements. “Consumer goods” are goods used or acquired primarily for personal, domestic or household purposes. “Security agreement” means agreement that creates or provides for security interest. Creditor has duty to give notice and time to remedy default, use all reasonable efforts to obtain best price following repossession.

Ship Registration Act 1992.

Act governs registration of ships and procedure for mortgaging ship or share in ship. Priority of mortgages is generally in order of registration. Ships not more than 24 metres in length can be concurrently subject of security interests under both PPSA and Ship Registration Act

1992. This is likely to create uncertainty.

20.02 COLLATERAL SECURITY:

See category 8 Debtor and Creditor, topic 8.10 Pledges.

20.03 MORTGAGES OF REAL PROPERTY:

Virtually all private land is registered under Land Transfer Act 1952. Main provisions of mortgages are covered by part VI Land Transfer Act 1952 and part 3 of Property Law Act 2007. Mortgage in order to be legal and not equitable must be in prescribed form, executed in prescribed manner and registered under Land Transfer Act. Mortgage under Land Transfer Act has effect as security in form of statutory charge, but will not operate as transfer of estate or interest charged. Registration is notice. Order of registration determines priorities but priority may be varied by memorandum of priority in prescribed form and registered under Land Transfer Act. Mortgages may secure further advances. Covenants in Second Schedule of Property Law Act implied into mortgage except as varied in mortgage or by deed. Equitable mortgages may be created by written agreement. Priority may be protected and notice given by caveat against title. Mortgage executed after unregistered equitable mortgage will only take priority if second mortgagee has given value, acted in good faith, has no prior notice of equitable mortgage, and registration occurs. Mortgage can be discharged by mortgage discharge instrument executed by mortgagee and registered.

Powers of sale and entry into possession can only be exercised after giving four weeks notice. Mortgagee in possession must comply with provisions of Part 3 Property Law Act. Restrictions on mortgagee's rights in Part 3 cannot be contracted out of. Mortgagee may buy in if sells through High Court.

See category 20 Mortgages, topic 20.01 Chattel Mortgages.

See also category 21 Property, topic Real Property and category 3 Business Regulation and Commerce, topic 3.05 Contracts, subhead Credit Contracts Act and Consumer Finance Act 2003.

21 PROPERTY

21.01 ABSENTEES:

In absence abroad person may generally delegate authority to any person of full capacity or corporation by way of power of attorney. Power revoked upon donor becoming mentally incapable but power created under Protection of Personal and Property Rights Act 1988 will (if desired) endure after donor becomes mentally incapable. Power may be subject to conditions donor desires.

See also category 22 Taxation, topic Taxes.

21.02 CONVEYANCES:

See topic 21.03 Deeds.

21.03 DEEDS:

Much of law of deeds is now found in Property Law Act 2007, Part 2. In case of individuals, every deed must be signed by party to be bound thereby or by his attorney and attested by at least one witness who, if deed is executed in New Zealand, must add to his signature his address and occupation or description. No particular words of attestation are necessary. Formal delivery, sealing, and indenting are unnecessary (as provided in Property Law

Act 1952, now repealed, but without revival of common law). Enforceability turns on delivery and intention to be bound, and where conditions to enforceability are attached, when conditions are fulfilled.

In case of companies, execution of deeds is determined by Companies Act 1993 and by 2007 Act, which is in identical terms. In case of all companies common seal no longer required and deed may be entered into on behalf of company in writing and signed under name of company by persons specified in 1993 and 2007 Acts. Other corporations may need to use seal.

See also category 2 Business Organizations, topic 2.02 Corporations.

If attorney (either of individual or of company) signs certificate of non-revocation of power of attorney prescribed by Schedule 1 of 2007 Act immediately before or at any time after act is done, that is conclusive proof of non-revocation for persons dealing with donee of power in good faith for valuable consideration without notice of death of donor or other revocation. Certificate signed by officer of company duly authorised has similar effect.

See also category 10 Documents and Records, topic 10.06 Seals.

21.04 LANDLORD AND TENANT:

Leases are governed by principles of contract, and by principles relating to grants of estates in land. Residential Tenancies Act 1986 applies to residential tenancies and offers protection to residential tenants. Leases may be registered under Land Transfer Act 1952 but great proportion of leases are by unregistered deed. Leases for 20 years or more may constitute subdivisions and require local authority consent under Resource Management Act 1991. Since Aug. 1, 2003 definition of subdivision includes leases of 35 years or more only (see §69 Resource Management Amendment Act 2003). Termination of leases is usually by expiry, forfeiture, determining event, surrender or merger. Property Law Act 2007 contains restrictions on, and provision for relief against, forfeiture. See also topic 21.06 Real Property.

See categories 8 Debtor and Creditor, topic Exemptions; Employment, topic Labour Relations (re discrimination).

21.05 PERPETUITIES:

Basically common law applies but Perpetuities Act 1964 introduced many improvements, e.g., (1) Woman who has attained age of 55 years or child under 12 years of age are now presumed for purposes of rule to be incapable of having a child; (2) unborn widow or widower possibility is abolished; (3) rule of remorseless construction is abolished; (4) High Court has power to reform disposition in certain circumstances; (5) wait and see rule is applied; (6) terminable fee becomes fee simple if it is not terminated within perpetuity period.

In general, perpetuity period is still life in being plus 21 years but Act enables settlor or testator to adopt period not exceeding 80 years by specifying to that effect in instrument by which disposition is made.

21.06 REAL PROPERTY:

In general, apart from matters incidental to compulsory registration of land under Land Transfer Act 1952, law of real property is similar to England. Property Law Act 2007 consolidates law as to real property in New Zealand and embodies many of changes enacted by Law of Property Act 1925 (England).

The Land Transfer or Torrens System of title to land has now virtually superseded the old conveyancing system. Under the Land Transfer system, title of owner is certificate of title constituted by page in volume held in Land Registration Districts, or computer register. Under

Land Transfer (Computer Registers and Electronic Lodgement) Amendment Act 2002 registration may be electronic. Duplicate certificates of title are no longer required, or of any legal effect. Duplicates of title will no longer be issued. Computer register now created for dealings, and dealings are now subject to 2002 Amendment Act and Land Transfer Act 1952. All dealings (except private trusts and equitable dealings) are recorded in register which is, except in case of fraud, conclusive evidence of such dealings. Registration constitutes notice to all persons dealing with such land, and common law doctrine of constructive notice has no application. Title may be gained by prescription of not less than 20 years occupation in limited circumstances.

Foreign individual and corporation may become registered as proprietor of land in certain circumstances. See category 4 Citizenship, topic 4.01 Aliens.

Joint Family Homes Act 1964.

Act is designed to protect family home from creditors and grant it exemption from gift duty and, formerly, stamp duty. Main benefit to protect from creditors. Either or both spouses may settle their home upon themselves jointly under Act in certain circumstances. Neither can separately alienate his or her interest. Each spouse has equal rights to possession, use and enjoyment of settled property. On death of either spouse home becomes property of survivor. Matrimonial Property Act 1976, renamed Property (Relationships) Act 1976: Property (Relationships) Amendment Act 2001, gives some equivalent protection and exemptions. See category 14 Family, topic Marriage and De Facto Relationships. Property (Relationships) Act 1976 has been amended to provide similar protections and exemptions for same sex or different sex couples who are not married.

Estate Duty Abolition Act 1993.

Act abolished estate duty in respect of estates of persons who die after Dec. 17, 1992.

Stamp Duty Abolition Act 1999.

Act abolished stamp duty with effect from May 20, 1999.

Protection of Personal and Property Rights Act 1988.

Act gives Family Court jurisdiction to appoint manager to manage affairs of incompetent people.

Treaty of Waitangi Act 1975.

Act enables Maori inhabitants of New Zealand to claim compensation from Crown for injustices to Maori by Crown. Act established Waitangi Tribunal to hear grievances and make recommendations to Crown. Grievances may be negotiated and settled between Crown and Maori directly: e.g., see Ngai Tahu Claims Settlement Act 1998 and Waikato Raupatu Claims Settlement Act 1995. Where land has been purchased from Crown-owned Enterprise, that land may be liable to be taken by Crown for return to Maori: State-Owned Enterprises Act 1986, Education Act 1989 and Treaty of Waitangi Act 1975. Compensation is payable in respect of land taken. Liability is identified by memorial on title to relevant land. Claimants may apply under Act to Maori Land Court. Te Ture Whenua Maori/Maori Land Act 1993 applies to dealings with all Maori land.

The government of any foreign state is deemed by Land Transfer Act 1952 to be and to have always been capable of being registered as proprietor of any estate or interest in land in same manner as if it were corporation, and any transfer or other instrument purporting to affect its land may be executed on behalf of government of any foreign state by senior representative in New Zealand of that state.

See also categories 14 Family, topic Husband and Wife; Taxation, topic Property

Taxes, subhead Tax on Property.

22 TAXATION

22.01 ADMINISTRATION:

Income tax and goods and services tax are collected and administered by Commissioner of Inland Revenue and Inland Revenue Department under Tax Administration Act 1994. Customs and excise duties are collected and administered by Comptroller of Customs and New Zealand Customs Service under Customs and Excise Act 1996.

Annual budget is introduced about May and changes in tax rates usually take place from commencement of financial year which is Apr. 1. Income tax rates are set out in Schedule 1 to Income Tax Act 2007 and are fixed annually by annual taxing Act. Rates for 2008/2009 tax year are found in Taxation (Personal Tax Cuts, Annual Rates, and Remedial Matters) Act 2008.

Foreign Officials.

The Minister may exempt from any public or local tax diplomatic representatives of foreign states, high commissioners, foreign consuls, trade commissioners and their staffs resident in New Zealand solely for performance of official duties.

See also category 24 Treaties and Conventions, topic 24.01 Treaties.

Absentees for tax purposes are individuals who do not have permanent place of abode in New Zealand and who are not present in New Zealand for 183 days or more in 12 month period. Tax liability of absentee generally depends upon: (1) Derivation from New Zealand of any income, (2) whether there is relevant double taxation agreement. 1981 Income Tax Amendment Act extends definition of New Zealand for purposes of Income Tax Act to include air and sea space above continental shelf where exploration or exploitation of natural resource involves activity on or in that water or air space.

22.02 ALCOHOL, BEVERAGES AND TOBACCO TAXES:

Excise duties are imposed under Customs and Excise Act 1996 on manufacture or importation of alcoholic beverages and tobacco products at rates which vary depending upon nature and strength of alcoholic beverage or tobacco product.

22.03 BUSINESS TAXES:

See topic 22.12 Income Tax.

22.04 CONSUMPTION TAXES:

See topics 22.02 Alcohol, Beverages and Tobacco Taxes, 22.05 Customs Duty and Tax, 22.10 Gasoline and Special Fuels Taxes, 22.15 Motor Vehicle Taxes and 22.21 Value Added Tax.

22.05 CUSTOMS DUTY AND TAX:

Duty is collected under Customs and Excise Act 1996 on importation of certain types of goods. Extent to which tariff duty applies (if at all) to any importation is determined under Tariff Act 1988. Certain duties may also be imposed under Dumping and Countervailing Duties Act 1988. See also topics 22.21 Value Added Tax, 22.02 Alcohol, Beverages and Tobacco Taxes and 22.10 Gasoline and Special Fuels Taxes.

22.06 EMPLOYMENT TAXES:

New Zealand does not currently have any form of employment tax as such. Employers are responsible under Income Tax Act 2007 for collection of income tax deducted at source from employees' earnings and must also pay fringe benefit tax and superannuation contribution withholding tax as surrogate for income tax on noncash fringe benefits and superannuation contributions benefiting employees. Employers must also pay levies to fund national accident compensation scheme administered by Accident Compensation Corporation, and separate health and safety levy to meet costs of administering Health and Safety in Employment Act 1992.

22.07 ESTATE TAX:

Estate duty was abolished with effect from Dec. 17, 1992.

22.08 EXCISE TAXES:

See topics 22.02 Alcohol, Beverages and Tobacco Taxes and 22.10 Gasoline and Special Fuels Taxes.

22.09 FOREIGN INVESTMENT TAXES:

New Zealand has no foreign investment taxes as such but income tax is imposed (often by way of withholding tax at source) on income of nonresidents which has source in New Zealand (subject to overriding provisions of treaties). See topic 22.12 Income Tax.

22.10 GASOLINE AND SPECIAL FUELS TAXES:

Excise duty is imposed under Customs and Excise Act 1996 on manufacture or importation of certain fuels, including in particular motor spirit, methanol, diesel, natural gas and liquified petroleum gas.

22.11 GIFT TAX:

Gift duty is imposed by Estate and Gift Duties Act 1968 on value of gifts made by person within any period of 12 months. No duty is payable where such gifts do not exceed value of $27,000 per annum in aggregate. Duty for gifts exceeding $27,000 in aggregate is as follows: (a) Exceeding $27,000 but not exceeding $36,000: 5% on excess over $27,000; (b) exceeding $36,000 but not exceeding $54,000: $450 plus 10% of excess over $36,000; (c) exceeding $54,000 but not exceeding $72,000: $2,250 plus 20% of excess over $54,000; (d) exceeding $72,000: $5,850 plus 25% of excess over $72,000. From July 1, 2008, gifts to charitable entities will remain exempt only if entity is registered as charity under Charities Act 2005.

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22.12 INCOME TAX:

Pay-as-you-earn system of collection has been adopted and applies to all salary and wage income of individuals. Various other withholding taxes apply—see subheads Nonresident Withholding Tax, “Withholding Payments”, Resident Withholding Tax, infra. Other income is subject to system of provisional tax payments made in three instalments during financial year. From Apr. 1, 2008, payment of provisional tax aligned with dates for paying goods and services tax. This change will enable GST refunds to be offset against provisional tax liabilities. Option for calculating provisional tax based on percentage of taxpayer's taxable supply also introduced. Taxation Review Authority or High Court deals with challenges to assessments or determinations made by Commissioner.

Rate for individuals is on sliding scale. Tax rates for three income years commencing 1 Apr. 2009, repeal low income rebate and replace it with new low rate of 12.5% on annual income up to $14,000. Maximum rate is 37% on annual income over $70,001.

From 1 Apr. 2008, company tax rate is 30%. Company dividends are taxable in hands of shareholders (except New Zealand companies in certain circumstances) and become part of shareholder's assessable income. Generally all distributions or other transfers of value by company (except certain share repurchase but including bonus issues in lieu of dividends) to shareholder or to associate of shareholder are counted as dividends. Scheme of full imputation for corporate distributions has applied from Apr. 1, 1988.

Accrual tax accounting rules relating to timing of deductions and recognition of income apply to all financial arrangements, that is, debt instruments or arrangements whereby money is obtained in return for generally payment. Definition contains exclusions. Yield to maturity method of calculation must be used by holders of financial arrangements when ascertaining income to give discounted cash flow analysis to calculate yield on instrument. Yield is then applied in each compounding period to value of instrument at start of that period, in order to calculate interest which may be deducted or assessed in that period. When yield to maturity method is not appropriate, taxpayers will be required to use another appropriate and approved method. Certain de minimis concessions apply.

Legislation has been enacted to deny deductions for payments to nonresidents if not enough information about payment is given to Inland Revenue Department. Also, partial deduction only is available for certain entertainment expenditure.

Government has enacted comprehensive legislation (CFC Rules) to subject to income tax New Zealand residents having 10% or greater interest in foreign companies controlled from New Zealand, on their share of accruing income of those foreign companies (except in case of eight specific countries). Legislation also subjects to tax New Zealand residents on any growth in value of interests (of whatever size) in foreign companies, unit trusts, life insurance policies and superannuation funds (subject to certain exemptions). From Apr. 1, 2007, New Zealand residents owning less than 10% of foreign company are taxed under scheme up to 5% of market value of their share portfolio held at commencement of each tax year. Where New Zealand resident has settled property on trust, all worldwide income of that trust is subject to New Zealand income tax and New Zealand resident is liable to meet such tax as agent for trustee unless trustee is resident in New Zealand at all times.

Nonresident withholding tax is payable on nonresident passive income to nonresidents, of dividends, royalties (including know-how payments), and interest (including redemption payments on commercial bills). Persons making such payments are obliged to deduct withholding tax at source. On dividends, “cultural royalties” and interest if interest is not paid to “associated person”, withholding tax is 30% for dividends and 15% for “cultural royalties” and interest, and no further New Zealand tax is payable by recipient. For other types of income subject to nonresident withholding tax, tax is minimum tax and is deductible from final assessment at rate calculated by reference to total income (including income not subject to nonresident withholding tax) of nonresident individual or company. Nonresident withholding tax on dividends is subject to relief (up to 15%) under Foreign Investor Tax Credit (FITC) regime where income tax has been paid by company paying dividends. Nonresident withholding tax on interest paid to non-associated persons can in various common circumstances be replaced by voluntary 2% “approved issuer levy” payable by borrower. New Zealand's double tax treaties generally limit NRWT to 10% on royalties, 10% on interest and 15% on dividends. See topic 22.20 Treaties and Agreements.

“Withholding payments”, are defined as payments where no employer-employee relationship exists. They include payments to nonresident contractors for services performed in New Zealand, for supply for use in New Zealand of personal property or services, are subject to withholding of 15% of gross amount pending final determination of tax liability in New Zealand. Exemption may be sought on basis of satisfactory taxpaying history, application of reciprocal agreement on tax with nonresident's home state, etc.

Resident withholding tax applies to domestic resident passive income in form of interest or dividends (but not royalties; compare with NRWT) to New Zealand residents. In case of interest, only persons carrying on business are to be required to deduct withholding tax and many persons may receive interest income free of deduction. Rate of withholding is 19.5% for interest (unless recipient elects higher rate) and 33% for dividends (with credit given for imputation credits). Employer contributions to superannuation funds are subject to final withholding tax of 33% but may be subject to 5% withdrawal tax on withdrawal.

Fringe benefit tax is payable by employers on value of certain benefits (goods and services, low interest loans, vehicles for private use, and some subsidised transport) provided by employers to employees. No tax is imposed on employee who receives benefits on which employer pays fringe benefit tax. Rate of FBT is 61% from 1 Apr. 2009 (or can be lower rate if employee is on lower marginal tax rate than 39%) but tax is deductible to employer.

22.13 INHERITANCE TAX:

See topic 22.07 Estate Tax.

22.14 LOCAL GOVERNMENT TAXES:

Local governments impose rates under Local Government (Rating) Act 2002 based upon land values.

22.15 MOTOR VEHICLE TAXES:

Motor vehicle registration fees are payable annually under Transport (Vehicle and Driver Registration and Licensing) Act 1986. Operators of heavy vehicles pay road user charges under Road User Charges Act 1977.

22.16 PROPERTY TAXES:

New Zealand has no property taxes as such, although see topic 22.14 Local Government Taxes. Income tax applies to rents and certain gains derived from land transactions.

Tax on Property.

Gains derived by individuals or companies dealing in sale or disposition of real or personal property or who bought such property for purpose or intention of disposition are deemed to be assessable income. Gains derived by persons associated with persons dealing in land may also be deemed to be assessable income. Taxable profits can also arise from certain land betterment factors. There are exemptions for certain bona fide dispositions of properties occupied by individuals or companies.

22.17 SALES TAX:

New Zealand has no sales taxes as such but see topic 22.21 Value Added Tax.

22.18 STAMP TAX:

Stamp duty was abolished with effect from May 20, 1999.

22.19 TAX INCENTIVES:

New Zealand has, since 1984, steadily eliminated or reduced most tax-based incentives for types of economic activity.

22.20 TREATIES AND AGREEMENTS:

Reciprocity with Other States.

New Zealand Government has entered into reciprocal agreements with Australia, Austria, Belgium, Canada, Chile, China, Denmark, Fiji, Finland, France, Germany, India, Indonesia, Ireland, Italy, Japan, Korea, Malaysia, Mexico, Netherlands, Norway, Philippines, Poland, Russian Federation, Singapore, South Africa, Spain, Sweden, Switzerland, Taiwan, Thailand, United Arab Emirates, UK and U.S.A. New agreement was entered into with Czech Republic in Sept. 2008 to take effect from 1 Jan. 2009. Tax information treaty made with Netherlands Antilles, effective from 1 Jan. 2009.

Agreements are based on “credit” system although some use “exemption” system in part. There are differences in each Double Tax Agreement.

Canadian agreement closely resembles agreement with U.S. Under Canadian agreement residents of New Zealand and Canada are exempt from taxation in other's territory if they are present within such territory for period not exceeding in aggregate 183 days in any year, in respect of personal services performed for persons resident in their own territory, provided remuneration is not borne by employer's fixed base in other territory. Tax payable in other territory on income derived from sources within such territory is allowed as credit to residents of Canada or New Zealand against tax payable in their own territory.

Industrial or commercial profits of New Zealand enterprise are not subject to taxation in Canada unless enterprise has permanent establishment situated there to which such profits are attributable, and corresponding provisions are in force with respect to Canadian enterprises in New Zealand.

In New Zealand, credit allowed is lesser of (1) Tax imposed by country which has primary right to tax income, or (2) New Zealand tax on that income.

22.21 VALUE ADDED TAX:

Goods and services tax is imposed by Goods and Services Tax Act 1985. It is similar to European value added tax. It applies to supply of nearly all goods and services and is levied at rate of 12.5% on value of goods or services supplied or imputed; see §§8 and 12.

Tax is payable on supply of nearly all goods and services. Two exceptions are for zero-rated goods and services and exempt goods and services. Zero-rating applies mainly to exported goods and services, and to supplies of “going concerns”. There is no zero-rating of classes of goods. Exempt goods and services are mainly financial services and residential rents.

22.22 WEALTH TAX:

New Zealand has no wealth tax.

23 TRANSPORTATION

23.01 AIRCRAFT:

See topic 23.03 Carriage by Air.

23.02 AUTOMOBILES:

See topic 23.04 Motor Vehicles.

23.03 CARRIAGE BY AIR:

International.

Civil Aviation Act 1990, Part 9A, gives force of law in New Zealand to Warsaw Convention, Hague Protocol (1955), Montreal Additional Protocols nos. 1 and 2 and Protocol no. 4 (1975), Guadalajara Convention (1961) and Montreal Convention (1999).

Internal.

Civil Aviation Act 1990, Part 9B, applies broad scheme of Warsaw Convention, Hague Protocol and Guadalajara Convention to carriage by air of passengers within New Zealand which is not international carriage. There are some significant variations from Convention. Carrier liable for death of or personal injury to passengers where caused by accident on board aircraft or when embarking or disembarking, except where passenger has cover for personal injury under Part 2 Injury Prevention, Rehabilitation, and Compensation Act 2001. Liability for death or personal injury cannot be limited. Liability for delay limited to lesser of actual loss or ten times amount paid for carriage. Carriage of Goods Act 1979 covers any liability claimed for damage to baggage or cargo and gives carrier lien over unclaimed baggage and cargo. Liability limited to NZ$1,500 per unit of goods lost or damaged. Act excludes carriage of goods by NZ Defence Force or Ministry of Defence, as paid public service, and carriage of letters by “postal operator” (defined in Postal Services Act 1998). Civil Aviation Act 1990 varies time allowed for making claims.

23.04 MOTOR VEHICLES:

Every motor vehicle must be registered, licensed annually and bear registration plate in front and rear. Vehicle must possess vehicle certificate of inspection, and owner must renew certificate every six months. Every driver must have licence to drive. Extensive powers for making of regulations are conferred upon Executive Council by Transport (Vehicle and Driver Registration and Licensing) Act 1986 upon Executive Council.

Compensation for injuries received in motor accidents may be provided under Injury Prevention, Rehabilitation, and Compensation Act 2001. Owners of motor vehicles contribute to cost of scheme created by that Act. Motor Vehicle Sales Act 2003 prohibits any person from carrying on business of buying, selling, exchanging or leasing motor vehicles without first obtaining motor vehicle traders licence. All “car consultants”, car auctioneers, car market operators, car importers and wholesalers are defined as motor vehicle traders and must also be registered.

For information concerning law on security interests in motor vehicles see category 20 Mortgages, topic 20.01 Chattel Mortgages.

New Zealand is party to Geneva Convention on Road Traffic.

See also category 3 Business Regulation and Commerce, topic 3.13 Sales.

23.05 SHIPPING:

Chief statute dealing with shipping and maritime transport in general is Maritime Transport Act 1994 (see also Maritime Rules). Act contains ship safety provisions which came into force on Feb. 1, 1995. Maritime New Zealand (formerly Maritime Safety Authority of New Zealand) is organisation responsible for maintenance of and adherence to maritime safety standards.

Act also contains significant marine environment protection provisions, including measures relating to protection from oil spills and marine pollution.

Owners of ships (and any other person for whose acts or omissions owner is responsible), salvors (and persons for whom they are responsible) and insurers of such persons are entitled to limit liability in respect of certain claims on basis of provisions broadly modeled on London Convention on Limitation of Liability for Maritime Claims (1976), unless loss, injury or damage arising from such person's personal act or omission was committed or omitted with intent to cause such loss or injury or recklessly and with knowledge that such loss or injury would probably result. Limitation of liability can be claimed in respect of: (a) Loss of life or personal injury or loss of or damage to property occurring on board ship or directly connected with its operation or salvage; (b) loss or damage arising from delay in sea carriage of cargo; (c) loss or damage resulting from infringement of rights other than contractual rights directly connected with operation of ship or salvage; (d) claims in respect of raising, removal etc. of ships which have sunk or been wrecked; (e) claims in respect of removal, destruction or rendering harmless of cargo of ship; and (f) claims of person (other than person liable) in respect of measures taken to avert or minimize any loss, injury or damage for which person liable is entitled to limit liability.

Claims for salvage or contribution in general average, for oil pollution damage subject to Maritime Transport Act 1994 and claims in respect of nuclear damage are excluded.

New Zealand has given International Convention on Salvage 1989 force of law in New Zealand. Text of Convention included in sixth schedule of Act. Convention came into force in New Zealand on Oct. 16, 2003. Maritime Transport Act also provides for compensation for life salvage.

Calculation of limits of liability for maritime claims is by reference based on tonnage of ship multiplied by “units of account” (being $NZ equivalent of International Monetary Fund Special Drawing Rights). Scale applicable is different for claims relating to loss of life or personal injury as opposed to other types of claim.

New Zealand has ratified Hague-Visby Rules (1995 20/3) and extends application of Hague-Visby Rules to carriage of goods by sea evidenced by non-negotiable document (other than bill of lading or document of title) that contains express provision that Hague-Visby Rules are to govern carriage as if document were bill of lading. (§209[2]).

Admiralty Act 1973 prescribes jurisdiction in admiralty and in prize of New Zealand courts. High Court Amendment Rules 1997 prescribe procedure for litigation under Admiralty Act 1973. In general, however, New Zealand's admiralty jurisdiction similar to English legislation that partially incorporates Brussels Arrest Convention. See England Law Digest, category Transportation, topic Shipping. See also topic 23.03 Carriage by Air.

Carriage of Goods Act 1979 prescribes further limitations on liabilities. “Carrier of goods” liability is limited in amount to sum of $1,500 for each unit of goods lost or damaged or in case of contract “at declared value risk” for amount specified in contract. Carrier of goods will not be liable for any loss or damage to goods which results directly and without fault on its part from: (a) Inherent vice, (b) any breach of implied term that goods are fit to be carried and stored in accordance with contract or that goods are packed in manner in which they are tendered for carriage, (c) seizure under legal process, or (d) saving or attempting to save life or property in peril.

Territorial Sea, Contiguous Zone, and Exclusive Economic Zone Act 1977.

Act creates exclusive economic zone of New Zealand being, broadly, balance of seas from 12 mile territorial limit out to 200 miles from shore. Under provisions of Fisheries Act 1996,Minister of Fisheries determines total allowable catch of fish within zone and what proportion thereof New Zealand fishing craft have capacity to harvest. Balance constitutes allowable catch for foreign craft. No foreign craft may fish within zone unless Minister has issued licence in respect of that craft. Fees for licences may be imposed. See also category 3 Business Regulation and Commerce, topic 3.10 Monopolies, 3.12 Restraint of Trade and Competition.

Antarctic Marine Living Resources Act 1981.

Act gives effect to 1980 Canberra Convention on Conservation of Antarctic Marine Living Resources by prohibiting taking of marine organisms (living or dead) from Convention area without ministerial permission.

Driftnet Prohibition Act 1991.

Act provides penalties in respect of driftnet fishing activities and implements 1989 Wellington Convention for the Prohibition of Fishing with Long Driftnets in the South Pacific.

Marine Mammals Protection Act 1978.

Act provides penalties for importation, exportation, taking or possession of marine mammals (NZ$250,000), use of purse seining nets, structures, traps or chemicals where marine mammals are likely to be injured or harmed (NZ$30,000), harassing marine mammals with vessel or aircraft (NZ$30,000) and catching, disturbing or injuring marine mammals (NZ$10,000). Act amended by Fisheries Act 1996 to provide population management plans.

Shipping Act 1987.

Act provides for regulation of unfair practices as between shippers and carriers. Act is intended to promote fair competition in international shipping and provides procedures whereby Minister of Transport can investigate and regulate unfair practices. Act excludes parts of Commerce Act 1986 (which deals with competition, price control and trade practices) from application to carriage of goods by sea from place inside New Zealand to place outside New Zealand.

Ship Registration Act 1992.

Act governs registration of New Zealand ships and procedure for mortgaging New Zealand ship or share in New Zealand ship.

Mercantile Law Act 1908.

As amended by Mercantile Law Amendment Act 1994, Act provides for transfer of rights of suit and liability under shipping documents: bills of lading, sea waybills and ship's delivery orders. Based on English Carriage of Goods By Sea Act 1992.

24 TREATIES AND CONVENTIONS

24.01 TREATIES:

New Zealand is currently party to approximately 1,500 international treaties. Under Australia New Zealand Closer Economic Relations Trade Agreement all tariffs have been eliminated for trans-Tasman trade. Trade in services is also virtually free, except in few inscribed areas. New Zealand is also party to series of free trade agreements involving China, Singapore, Thailand, Chile, and Brunei, with several more under negotiation including Hong Kong, Malaysia, ASEAN (Association of South East Asian Nations), and Gulf Cooperation Council. New Zealand also has Trade and Investment Framework Agreement with U.S.

Agreements to avoid double taxation and fiscal evasion are in force as well as bilateral Investment Promotion and Protection Agreements. See category 22 Taxation.

New Zealand is member of World Trade Organisation.

New Zealand is member of World Customs Organisation and party to associated customs conventions, including International Convention on the Simplification and Harmonization of Customs Procedures and its Kyoto Protocol.

New Zealand is also party to Asian Development Bank Agreement, Convention on the Organisation for Economic Co-operation and Development (OECD), and Pacific Agreement on Closer Economic Relations. It is member of U.N. (and related U.N. organisations), Commonwealth and European Bank for Reconstruction and Development, as well as being member of various regionally based organisations, including Asia-Pacific Economic Co-operation (APEC) and Pacific Islands Forum (formerly South Pacific Forum).

New Zealand is party to Vienna Convention on Law of Treaties.

New Zealand is party to International Covenant on Civil and Political Rights, International Covenant on Economic, Social and Cultural Rights and Convention on the Rights of the Child, Convention on Elimination of Discrimination Against Women, International Convention on the Elimination of All Forms of Racial Discrimination and Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment. New Zealand is also party to both Optional Protocols to International Covenant on Civil and Political Rights,Optional Protocol to Convention on Elimination of All Forms of Discrimination Against Women, Optional Protocol to the Torture Convention, and Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict. It is signatory to Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography.It is party to number of other human rights instruments including Convention Relating to the Status of Refugees, Convention on the Prevention and Punishment of the Crime of Genocide, and Convention on Rights of Persons with Disabilities but not its Optional Protocol.

New Zealand is party to Convention for Protection of Resources and Environment of the South Pacific Region, Convention to Ban the Importation into Forum Island Countries of Hazardous and Radioactive Wastes and to Control the Transboundary Movement and Management of Hazardous Wastes within the South Pacific Region (Waigani Convention), Nuie Treaty on Co-operation in Fisheries Surveillance and Law Enforcement in the South Pacific Region, and United Nations Framework Convention on Climate Change and its Kyoto Protocol, Convention on Control of Transboundary Movements of Hazardous Wastes and their Disposal (Basel), London Convention on the Prevention of Marine Pollution by Dumping Wastes and Other Matter, Vienna Convention for the Protection of the Ozone Layer and Montreal Protocol on Substances that Deplete the Ozone Layer, UN Convention to Combat Desertification, International Convention on International Trade in Endangered Species of Wild Fauna and Flora, Convention on Biological Diversity and Convention on Conservation of Migratory Species of Wild Animals, and International Tropical Timber Agreement. New Zealand is also party to Antarctic Treaty and Protocol on Environmental Protection to the Antarctic Treaty, Convention on the Conservation of Antarctic Marine Living Resources, United Nations Convention on the Law of the Sea (UNCLOS), Agreement relating to implementation of Part XI of UNCLOS and Agreement for the Implementation of the Provisions of UNCLOS relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks and number of regional fisheries arrangements including Convention for the Conservation of Southern Bluefin Tuna. New Zealand has signed South Indian Ocean Fisheries Agreement.

New Zealand is member of Hague Conference on Private International Law. It is party to Convention Abolishing the Requirement of Legislation for Foreign Public Documents, Hague Convention on the Civil Aspects of International Child Abduction and Convention on Protection of Children and Co-operation in respect of Inter-country Adoption. It is not party to Convention on Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters. New Zealand is also party to series of bilateral agreements providing for mutual legal assistance in respect of civil and commercial matters. New Zealand is party to United Nations Convention on Recognition and Enforcement of Foreign Arbitral Awards, Convention on Settlement of Investment Disputes between States and Nationals of Other States, Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, and Convention for

Unification of Certain Rules Relating to International Carriage by Air. New Zealand is member of Multilateral Investment Guarantee Agency, and has signed Singapore Treaty on Law of Trademarks.

New Zealand has bilateral extradition and mutual assistance in criminal matters treaties or arrangements in force with number of countries and is party to United Nations Single Convention on Narcotic Drugs, Convention on Psychotropic Substances, Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, Rome Statute of International Criminal Court, four Geneva Conventions 1949and two 1977 Additional Protocols, Convention for Protection of Cultural Property in Armed Conflict and has signed its two Protocols. It is party to UN Convention Against Transnational Organised Crime and two of its three Protocols (Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children and Protocol Against the Smuggling of Migrants by Land, Sea and Air), and Agreement on the Privileges and Immunities of the International Criminal Court. New Zealand has signed Third Additional Protocol to 1949 Geneva Conventions.

New Zealand is party to Berne Convention for the Protection of Literary and Artistic Works, UNESCO Conventions on Means of Prohibiting and Preventing Illicit Import, Export and Transfer of Ownership of Cultural Property and on Protection and Promotion of Diversity of Cultural Expressions. New Zealand is party to Chicago Convention on International Civil Aviation.

New Zealand is party to Treaty on the Non-Proliferation of Nuclear Weapons and South Pacific Nuclear Free Zone Treaty, Convention on Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and their Destruction, Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxic Weapons and on their Destruction, Convention on Prohibition of Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction, and Convention on Certain Conventional Weapons (including Protocols I to V inclusive). New Zealand has ratified Comprehensive Nuclear-Test-Ban Treaty, and has signed Cluster Munitions Convention.

New Zealand is party to number of bilateral agreements for air services and antiterrorist Conventions including Tokyo Convention on Offences and Certain Other Acts Committed on Board Aircraft, Hague Convention on Unlawful Seizure of Aircraft, Montreal Convention on Suppression of Unlawful Acts Against Safety of Civil Aviation and Protocol, Convention on Prevention and Punishment of Crimes Against Internationally Protected Persons, Convention Against Taking of Hostages and Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation, 1988, International Convention for the Suppression of Terrorist Bombings, International Convention for the Suppression of the Financing of Terrorism, and Convention against the Recruitment, Use, Financing and Training of Mercenaries. New Zealand is also party to Convention on Safety of United Nations and Associated Personnel, and has signed Optional Protocol. New Zealand has signed two Protocols to Convention for Suppression of Unlawful Acts Against Safety of Maritime Navigation, and Convention for Suppression of Acts of Nuclear Terrorism.

1
NICARAGUA LAW DIGEST

—Scope —

Revised for 2008 edition by

CURTIS, MALLET-PREVOST, COLT & MOSLE LLP of New York.

(Abbreviations used are: C. C.—Civil Code; C. Com.—Code of Commerce; C. C. P.

—Code of Civil Procedure. Numbers refer to articles in these codes.)

Note: This revision incorporates legislation through Dec. 6, 2007.

1 INTRODUCTION

1.01 CURRENCY:

(Monetary Law, Decree-Law 1-92 of Jan. 6, 1992 and Central Bank Law, Law 317 of Oct. 11, 1999 as am'd). Monetary unit is córdoba divided into 100 cents which is only currency in which promises of payment in Nicaragua may be agreed upon. However, promises in foreign money made abroad to be paid in Nicaragua or vice versa are legal, in many cases detailed in Law. Banco Central may issue bank notes which are legal tender.

1.02 GOVERNMENT AND LEGAL SYSTEM:

Constitution of Jan. 9, 1987 as am'd enacts principles of human rights, freedom and equality for Nicaragua. Government is democratic, republican, participatory and representative and is composed of: Legislative, Executive, Judicial and Electoral power. Legislative power is vested in national assembly whose members are elected for six year period. President and Vice-President are elected by direct vote for five year period. Judicial Power is vested in Supreme Court of Justice whose judges are designated by Legislative Power.

1.03 HOLIDAYS:

Jan. 1; Holy Thursday and Good Friday*; May 1; July 19; Sept. 14 and 15; Dec. 8 and 25. (Labor Code Art. 66).

* These are movable holidays.

1.04 OFFICE HOURS AND TIME ZONE:

Nicaragua's time zone is one hour later than Eastern Standard Time in the United States. That is-01:00 GMT. Office hours are generally from 9 a.m. to 5 p.m.

2 BUSINESS ORGANIZATIONS

2.01 AGENCY:

(C. C. 3293-3389; C. Com. 398-459).

An agency may be conferred in writing or orally, but in court it can be proved by witnesses only in accordance with the general rules of evidence, and a private document will not be accepted when a public instrument is required. A power of attorney which is all-embracing (generalísimo) or general, must be granted by a public instrument. The former includes authority to alienate and encumber real property of all kinds, the latter merely grants authority to administer, and additional powers must be specifically expressed. A power of attorney for litigation confers general authority to carry on lawsuits, but specific authority is required for various special acts, such as to compromise, receive moneys, renew contracts, challenge, record in the registry of property, and delegate the power of attorney. A power of attorney for litigation otherwise than with respect to small amounts must be given in a public instrument.

An agent appointing a substitute is liable for the acts of the latter if he was not empowered to appoint a substitute or if the substitute is notoriously incompetent. An agency terminates by: (a) Termination of business or expiration of time for which given; (b) revocation by principal; (c) resignation of agent; (d) death, bankruptcy or declaration of incapacity of principal or agent; (e) cessation of principal in capacity in which he conferred agency.

If a mercantile agent wishes to refuse the agency given him, he must advise the principal as soon as possible and nevertheless take the necessary steps to protect the merchandise remitted to him. Factors must act in the name of their principals; if they do not they are personally liable and the person contracting with them may proceed either against the principal or the factor. The death of the principal does not terminate the factor's agency.

2.02 ASSOCIATIONS:

(Law 147 of Apr. 6, 1992).

Law regulates nonprofit organizations that can be organized by natural or juridical persons and at least five members are required. Associations legally established acquire juridical personality by legislative decree. Recording of their articles of association and decree of authorization is required. Articles of associations must contain name, domicile, purpose, term and name of its officers. Cancellation of authorization of associations is by legislative decree according to causes indicated by law and prior consultation with Ministerio de Gobernación.

2.03 CORPORATIONS:

(C. Com. 118-132, 201-286, 337-340).

Corporations may be formed by notarial instrument executed by two or more persons. The articles of incorporation must show: (1) Name and domicile of founders; (2) name and domicile of company; (3) object; (4) manner of electing directors, their term of office and manner of filling vacancies; (5) manner of electing supervisor or supervisors; (6) manner of calling and holding shareholders' meetings; (7) capital, stating value of contributions not in money, or manner of ascertaining same; (8) number, kind and value of the shares and whether registered or to bearer; (9) time and manner of collecting capital subscriptions; (10) advantages reserved to founders; (11) rules for drawing balances and calculating and distributing profits; (12) reserve fund; (13) duration, which cannot be indefinite nor exceed 99 years; (14) manner of forming majority; (15) persons representing company until election of directors. The by-laws must be approved by the shareholders and must state: (a) Powers of board of directors, board of supervisors, and shareholders; (b) supervision of acts of managers; (c) rights of shareholders to know how corporate funds are employed; (d) number of shareholders and amount of capital required at meetings to determine increase or decrease of capital or dissolution or modification of the company.

The corporation comes into being when the articles of incorporation and by-laws are registered in the mercantile registry, and these documents must also be published in the official newspaper. The corporation will not be registered: (1) If the founders are not honorable persons; (2) if the articles of incorporation do not contain the legal requisites; (3) if they contain provisions contrary to law, morals or public order; (4) if the by-laws are not approved as provided in the articles of incorporation or are not in accord with said articles; (5) if they do not offer the shareholders guarantees of good administration or opportunities to supervise the action of the managers, and the right to know how the corporate funds are employed. No corporation may begin operations until at least half the capital is subscribed and at least 10% of the cash capital is paid in. Companies holding a special privilege require approval of the President.

Corporations may also be formed by public subscription, for which purpose the founders publish a program and the corporation is constituted after all of the capital is subscribed.

Public sale of shares of stock or securities issued by corporations organized in country through advertisements, mail campaigns or public distributions of pamphlets or other means of propaganda must be registered with Superintendent of Banks.

Banking financing investment and insurance companies are subject to special laws.

Shares are registered and are transferred by endorsement and registration. Unless otherwise provided in the by-laws, a registered share not fully paid cannot be alienated without consent of the company, except by judicial sale, and in this case the company has the preferential right to buy. There may also be remunerative non-voting shares as compensation to the founders, but they cannot exceed 10% of the entire capital. Companies may purchase their own shares only in certain cases, and the shares purchased are considered amortized.

Dividends may be paid only from realized profits, but it may be agreed that during the period required for the enterprise to get under way, and designated in the by-laws, interest shall be paid at a specified rate.

Management.

Directors are elected by the shareholders or as provided in the articles of incorporation. They cannot do business with the corporation nor carry on the same business as the corporation unless authorized by the shareholders. Balances must be published yearly in the Government paper, but if the company was formed by public subscription, every six months. At least one-twentieth of the net profits must be set aside as a reserve until the same amounts to one-tenth of the capital. The shareholders elect one or more supervisors to watch over the administration of the company. If the corporation has a Government concession, the Government has the right of supervision.

Regular meetings of shareholders must be held at least once a year. No shareholder may represent over one-tenth of all the shares issued nor over two-tenths of the shares represented at the meeting. Unless otherwise provided in the by-laws, the presence of shareholders representing three-quarters of the capital and the vote of shareholders representing half the capital is required for extending or shortening the duration of the corporation, increasing or decreasing the capital, or otherwise modifying the articles of incorporation. Said changes must be approved by the judge and recorded in the registry of commerce. A corporation must be liquidated if it loses over two-thirds of its capital or becomes bankrupt, or if for over six months it has less than three shareholders and dissolution is requested by an interested party, or if it loses half its capital and the unguaranteed creditors request dissolution.

Foreign corporations must record their articles of incorporation and by-laws and the appointment of their agents. They must have a representative in Nicaragua with full power and annually publish in the official newspaper their balance and the names of the persons charged with their management. If their principal business is in Nicaragua and most of their capital is derived from there or their shareholders' meetings are held there, they are considered national companies.

2.04 FOREIGN CORPORATIONS:

See topic 2.03 Corporations.

2.05 LIMITED PARTNERSHIP:

See topic 2.06 Partnerships.

2.06 PARTNERSHIPS:

(C. Com. 118-200, 287-336; C. C. 3175-3292).

Commercial partnerships as well as civil partnerships are considered legal entities.

General partnership is one in which the partners are jointly liable without limit, for the debts of the partnership. It is formed by notarial instrument stating: (1) Names and domiciles of partners; (2) character of business; (3) firm name and designation of administrating partners; (4) capital contributed by each partner; (5) domicile of firm; (6) duration of firm. The firm name comprises the names of all the partners or the names of one or more of them adding the words "y Compañía." Unless the administration of the firm has been confided to specific partners, all have the power of management in person or by delegate. A partner may not on his own account engage in the same business as the partnership.

Limited general partnership is a partnership of the nature of a general partnership except that the liability of one or more partners is limited by the partnership articles. The firm name must be followed by the word "Limitada."

Limited partnership is the usual kind of a limited partnership in which one or more of the partners are special partners liable only for the amount of their contribution. The firm name must be followed by the words "en comandita." Ordinarily a special partner who allows his name in the firm name or engages in the management of the firm's business is jointly liable with the general partners. The participation of the special partners may be represented by shares.

Civil company is a company formed for purposes which the law does not consider commercial, such as agriculture, and is governed by special rules of the Civil Code. Unless expressly agreed otherwise, the partners are liable for the partnership debts only in proportion to their interest in the partnership.

3 BUSINESS REGULATION AND COMMERCE

3.01 BILLS AND NOTES:

(Negotiable Instruments Law approved by Legislative-Decree 1824 of June 11, 1971 as am'd by Law 620 of Mar. 18, 1977; and Law 24 of June 11, 1987).

Bills of exchange must show: (1) Name of bill of exchange within its text; (2) unconditional order to pay specific sum of money; (3) drawee; (4) due date; (5) place of payment; (6) payee; (7) if date and place of payment is not stated, bill is payable at sight. Bill may be payable: (a) At sight; (b) at certain time after sight; (c) at certain time after date; (d) at a fixed date; or (e) on several successive installment dates, with or without acceleration on default of one payment.

Endorsements may be made with or without recourse, but otherwise be unconditional, in full, to specific person or in blank or to bearer, in ownership or for collection or in guarantee or pledge.

Guarantee may be given to secure a bill through an "aval" which renders guarantor jointly and severally liable with party for whom given and subsequent endorsers. An "aval" is given on same bill or on a continuation sheet. Simple signature of a third party on front constitutes an "aval." Guarantee for "aval" is binding even if bill is not valid for incapacity of maker or other reason, except defects of form.

Presentment and Protest.

Bill payable at a certain time after sight must be presented for acceptance within one year after date unless drawer extended or shortened that period. Endorser may only reduce it. Drawee may demand a second presentation on day following first. Bill payable at sight must be presented for payment in one year after date, but period may also be extended or shortened by drawer and shortened by endorsers and drawer may stipulate that bill not be presented before a certain date which will then be starting point. Other bills must be presented for payment on due date or on two following working days. Bills must be presented for acceptance or payment, as case may be, at one of places indicated for payment. Presentment to a clearing house amounts to presentation for payment if not at sight. Presentment for acceptance or payment may be made to payee through a bank. Partial payment must be received after maturity date.

Failure to accept or pay must be established by a protest before a Notary Public. If for lack of acceptance or, if at sight, for lack of payment, protest must be made within period of presentment. In other cases, on any of two working days following due date. However, if presented through a bank, a notation on bill by bank, showing that it was not accepted or paid, substitutes for protest. If force majeure prevents presentment or protest periods therefor are extended but notice must be given, as stated below for event of dishonor, and a signed and dated notation thereof made on bill or additional sheet. Presentation and protest, if necessary, must then be made up on termination of obstacle but if this lasts more than 30 days, holder may exercise his rights without presentation and protest. Protest may be waived, but not presentation. Notice of dishonor must be given to drawer and immediate endorser within four working days. Each endorser must, in turn, give notice to his predecessor within two days.

Failure to present or to protest, when necessary, prejudices bill, except against acceptor or, if not accepted, against maker. Failure to give notice of dishonor does not, but it renders negligent party liable for damages suffered by his predecessors for up to value of bill.

Remedies.

Payee or holder in due course has an action on bill against drawer, guarantor for “aval,” acceptor and endorsers who are jointly and severally liable therefor, plus interest, which may be agreed only in bills at sight or at period after sight, interest for period of default at agreed or legal rate and expenses.

Action on underlying obligation, origin of bills, may be brought, provided that bills are returned or deposited with a bond or filed with action and that they were timely presented and protested, when necessary, and that they operated no novation. If this action is not available, action may lie against drawer, acceptor or endorsers, as case may be, for undue enrichment, within one year after right of action on bills has been lost or extinguished.

Promissory note to order must show: (1) Name of document within its text; (2) unconditional promise to pay a certain sum of money; (3) maturity, being otherwise payable at sight; (4) place of payment, being otherwise payable at place of issue; (5) name of person to whom or to whose order it is payable; (6) date and place of issue; (7) signature of maker. Most of rules related to bills of exchange are applicable to notes, maker taking place of acceptor. Note payable at a time after sight must be presented to maker who must endorse date of presentation. Upon refusal, protest is necessary to fix date.

Checks may only be drawn on banks with which drawer has an agreement and funds at his disposal and must be written in numbered forms supplied by drawee bank against a receipt or in other forms expressly authorized by same. Check must bear: (a) Name of drawee; (b) date and place of issue; (c) payee, stating or not that it is to his order or with clause “not to his order,” or made “to bearer” or with no indication of payee, when it is deemed payable to bearer; (d) unconditional order to pay a specific sum of money written in letters and numbers or with stamping machine; and (e) signature of drawer or representative written by hand or, when authorized by bank, by special machine. Checks, even if postdated, are payable at sight and must be presented to drawee or a clearing house except within eight days, if payable at same place of issue; one month if at different place, within country of issue; and three months if issued abroad and payable in Nicaragua. Stop-payment orders are not valid, except when given after said periods and, in absence thereof, drawee may pay even if period has elapsed. Refusal to pay must be established by a protest or by a statement signed by drawee or clearing house that check was presented on time, and reason for denial of payment. Most provisions on bills of exchange apply to checks.

Law contains special provisions on crossed checks (payable to banks or a specified bank only); check to be credited on account, not payable in cash; nonnegotiable checks; certified checks; cashier's checks; circular checks (issued by authorized banks payable by any branch of drawer); traveler's checks; checks with stub for receipt (to be signed by holder upon collection); and checks issued by Treasury. Checks with “valor garantizado” (guaranteed checks) are specially regulated.

Conflict of Laws.

Capacity to issue, guarantee or endorse bills, notes or checks is governed by national law of obligor, but “renvoi” to other law is accepted; but if incompetent obligor is competent under law of place of execution, this law applies. Law of place of execution governs form of acts, but invalidity does not affect validity of later transactions related thereto, if said transactions are validly executed. Effects of obligations resulting from bills, notes, or checks are governed by laws of place where act creating obligation was executed. Form and periods for acceptance, payment, protest and other acts related thereto are governed by place where acts must be performed or executed.

3.02 CONTRACTS:

See category 2 Business Organizations, topic 2.01 Agency, subhead Agents, Representatives or Distributors of Foreign Firms.

3.03 FRAUDS, STATUTE OF:

See category 9 Documents and Records, topic 9.03 Public Instruments.

3.04 INTEREST:

Legal rate is 9%. (C. C. Art. 3402). Parties freely agree on interest rate of loan from banking institution. (Art. 50, Law 561 of Oct. 29, 2005).

Law establishes that usury is when interest rate is higher than average interest rate plus percentage for national financial system published by Central Bank.

Usury is punished by imprisonment and fine of ten times excess interest and obligations are void. (Penal Code 302-304, Law 176 of June 3, 1994).

3.05 MONOPOLIES, RESTRAINT OF TRADE AND COMPETITION:

(Law 601 of Oct. 19, 2006 regulated by Decree 79-2006 of Dec. 21, 2006).

Law prohibits acts or conduct that may harm general economic interest, expressed in any form, related to production, distribution, supply or commercialization of goods and services, which purpose is or may result in distortion or restriction of competition or access to market. Following are practices which are considered restrictive practices, among others: price arrangement between competitors, market division, fixing or limiting production, combined bids, underselling, dumping, imposition of resale prices on distributors or retailers, retaining of products or consumer goods, excessive increase in price or abusive profits, refusal to sell. Law is applicable to individuals and public or private entities, associations of individuals or entities, with or without legal representation which operate in country and to companies operating abroad whose acts or activities may produce effects in local market. Law also considers those acts or conduct against honest commercial practices as unfair competition, among others, comparison and imitation of products, disclosure of false negative information, false advertisement. Law is enforced by Instituto Nacional de Promoción de la Competencia (PROCOMPETENCIA) that can collect evidence, may order end of restrictive practice and also impose fines that may be duplicated in case of second offense. Acts and agreements between enterprises that may be considered as economic concentration must be reported to Procompetencia and are subject to approval. Failure to report economic concentration is subject to fines.

Central American Regulations on Unfair Trade Practices of Dec. 12, 1995 implement principles established by Agreements of World Trade Organization. Central American governments may issue restrictive covenants to temporarily protect their local production from massive import of same or similar products that may cause pecuniary loss to local producers.

Consumer Protection Law.

(Law 182 of Nov. 1, 1994 regulated by Decree 2187 of June 14, 1999).

Rights granted to consumers under law are non-waivable and prevail over any other law, commercial practice or stipulation which opposes it. Law regulates relationship between supplier and consumer in any kind of goods and public or private services, including energy and water supply, sewer, telecommunications and postal services, ports, transportation and the like.

It also regulates advertisement, adhesion contracts, credit and door to door sales, and civil responsibility of suppliers.

3.06 SALES (REALTY AND PERSONALTY):

(C. C. 2530-2731; C. Com. 341-368).

Between parties a sale is perfected when an agreement is reached as to the thing sold and the price, though neither has been delivered. If goods are sold by weight, count or measure, the sale is not perfected until they are weighed, counted or measured. In sales of real estate with designation of area and specification of a unit price, an adjustment must be made if a different area is found, but the purchaser may rescind the sale if the difference exceeds one-twentieth; in case an upset price was specified, no adjustment is required unless the difference exceeds one-twentieth, and the purchaser may rescind if an increase in the price would result.

The seller is not obliged to deliver a thing sold until the price is paid, unless a term was granted for payment, nor even in that event if the buyer becomes insolvent. Unless otherwise stipulated, the seller guarantees the title and warrants against hidden defects which render the thing sold useless or diminish its value to such an extent that the buyer would not have bought it. Personalty cannot be sold with reservation of the right to repurchase, and in case of real property, the right to repurchase cannot be reserved for over three years.

In mercantile transactions if no period is stipulated for delivery, the seller must have the merchandise at the disposal of the buyer in 24 hours. The buyer must make claim in writing within five days after delivery to him for differences of quantity or quality, and within 30 days for hidden defects. For the purpose of bringing suits on these grounds he must make a protest before a notary public, with two witnesses. The existence and amount of the differences must be determined by the judgment of experts.

Government Contracts.

Law 323 of Dec. 17, 1999 as amended and its regulations Decree 21-2000 of Mar. 2, 2000 as amended regulates legal requirements, bidding process, registration, violations and sanctions, among other matters.

4 CITIZENSHIP

4.01 ALIENS:

See category 16 Immigration, topic 16.01 Aliens.

4.02 IMMIGRATION:

See category 16 Immigration, topic 16.02 Immigration.

5 CIVIL ACTIONS AND PROCEDURE

5.01 ACTIONS:

Actions for Death.

See category 12 Estates and Trusts, topic 12.02 Death, subhead Actions for Death.

Limitation of.

See topic 5.04 Prescription, subhead Actions.

5.02 JUDGMENTS:

(C. C. P. 509 to 552).

Judgments constitute liens only upon property on which execution has been levied and after registration in public registry.

Foreign judgments have the effect provided by treaties; if there is no treaty, they have the same effect as is given to Nicaraguan judgments in the foreign country; if the foreign country does not execute Nicaraguan judgments, the foreign judgment cannot be executed in Nicaragua. If none of these rules apply, the foreign judgment will be executed in Nicaragua provided: (1) It was rendered in a personal action; (2) the obligation on which it is based is legal in Nicaragua; (3) the certified copy contains the requisites necessary in the foreign country so that it may be considered authentic, and those required in Nicaragua for its authenticity; (4) it was not obtained by default unless defendant was duly summoned; (5) it is not contrary to public order; (6) it is a definitive judgment in the foreign country.

5.03 LIMITATION OF ACTIONS:

See topic 5.04 Prescription.

5.04 PRESCRIPTION:

(C. C. 868-931; C. Com. 669, 670, 1150-1152).

The acquisition of property or rights by virtue of possession and the extinction of obligations by failure to require performance are called prescription. Prescription may be waived as far as it has run, but cannot be waived in advance. Real property belonging to the State may not be acquired by prescription.

Prescription is interrupted: (a) If the possessor is deprived of possession or enjoyment for over one year; (b) by express or implied recognition; (c) by lawsuit unless the same is withdrawn or dismissed. Except in case of the extraordinary thirty year period mentioned below, prescription does not run: (1) Against minors or incompetents while they have no legal representative; (2) between parents and children under parental authority; (3) between guardians and wards; (4) against decedents' estates before the office of executor or administrator has been accepted; (5) against servants and laborers for their wages while they continue in the debtor's employ; (6) in favor of a debtor who has illegally impeded the action of his creditor.

Ownership is acquired by positive prescription, and requires possession based on a legal acquisition, and continued in good faith, quietly, uninterruptedly and publicly. Personal property is acquired by prescription in two years, but if the property was lost by the owner or taken from him by crime, possession for five years by a third person in good faith is required to establish ownership. Real property and rights therein are acquired by possession for ten years with good faith and under a legal acquisition, but ownership may be acquired by possession of 30 years without these conditions.

Actions.

Rights are lost by negative prescription and the prescriptive period varies according to the nature of the action. The action to enforce a right is extinguished by the prescription of the right. Some of the more important periods of prescription of actions are:

Ten years, actions to recover debts in general and civil actions not otherwise limited.

Five years, actions against administrators for rendition of accounts.

Three years, actions to recover interest, rents or pensions payable in periods of six months or more, actions against the acceptor of a bill of exchange, and mercantile actions for which no specific period is designated.

Two years, actions of judicial agents for salaries and fees, actions of principals against judicial agents for rendition of accounts, actions of teachers and physicians for fees, actions to recover salaries and wages, actions of contractors and artisans to recover price of work, actions of merchants for amounts due on sales not made for resale, actions of innkeepers to recover value of lodgings and food.

One year, actions for slander, actions to enforce rights in personal property, actions of holders of bills of exchange against drawer and endorsers, actions to recover interest, rents or pensions payable in periods of less than six months.

Six months, actions of endorsers among themselves or against the drawer.

6 COURTS AND LEGISLATURE

6.01 COURTS:

Justice is administered by: (1) A Supreme Court which hears appeals from the courts of appeals and has various other functions in judicial matters; (2) courts of appeals which hear appeals from district judges and have other functions; (3) district judges having original jurisdiction in most civil and criminal matters; (4) local judges for minor civil cases and misdemeanors and who act as committing magistrates. (Law 260 of July 23, 1998 as am'd regulated by Decree 63-99 of May 14, 1999 as am'd. See also Constitution of Jan. 9, 1987 as am'd).

6.02 LEGISLATURE:

National Assembly meets from Jan. 10 to Dec. 15 in ordinary meetings. (Law 122 of Dec. 19, 1990).

6.03 STATUTES:

The principal codifications are the Civil Code, Code of Civil Procedure, Code of Commerce, Penal Code, Code of Criminal Procedure, Mining Code, Labor Code and Notarial Law. The current laws appear in an official newspaper called “La Gaceta.”

7 DEBTOR AND CREDITOR

7.01 ASSIGNMENTS:

The assignment of a right or action is effected by delivery of the document evidencing the same, if any, or by a written instrument. Except when the document is subject to transfer by mere endorsement or payable to bearer, the assignment has no effect as to the debtor or third persons unless the debtor is notified thereof or accepts it. Notification may be made through a notary or judicial officer. The assignor of a credit document not subject to endorsement warrants the existence of the credit, but not the solvency of the debtor unless otherwise stipulated. (C. C. 2716-2747; C. Com. 230-232, 365-368).

7.02 ASSIGNMENTS FOR BENEFIT OF CREDITORS:

An assignment for the benefit of creditors is the voluntary abandonment by the debtor of all his assets, except those not subject to attachment, when in consequence of unavoidable accidents he cannot pay his debts. The creditors must accept the assignment unless the debtor is guilty of fraud or has dissipated his property, or has received deductions or extensions from the creditors. The assignment does not transfer the title to the property but only the right to dispose thereof. The debtor may be left in charge of the administration. The debts are extinguished only up to the amount obtained from the property assigned. (C. C. 2080-2091; C. C. P. 1809-1813, 1843-1858). See also topic 7.04 Bankruptcy and 7.09 Insolvency.

7.03 ATTACHMENT:

On giving bond, precautionary attachments may be obtained with respect to the revenues, fruits or real property of the debtor, if the latter intends to take them away or alienate them, or if he is an alien, or if there is danger that they may deteriorate. The debtor may raise the attachment by giving bond. Likewise the claimant of a mine or of landed properties may demand judicial intervention in their management unless the defendant gives bond. An attachment may be issued without bond in summary actions based on certain documents designated in the law, such as documents executed before a notary, private documents judicially acknowledged, bills of exchange duly protested, judgments, etc. (C. C. P. 886-920, 1684-1842).

7.04 BANKRUPTCY AND INSOLVENCY:

(C. Com. 1047-1149; C. C. 2239-2334; C. C. P. 1843-1956).

Suspension of payments may be declared by the court on the petition of merchants who though possessing sufficient assets are unable to pay by reason of unforeseen circumstances. Extensions of time and other facilities will be granted to the extent approved by two-thirds of the creditors representing three-quarters of the debts, or three-quarters of the creditors representing two-thirds of the debts, and the same proportion of creditors may demand rejection of the suspension of payments. If there are no majorities in these proportions the judge may grant up to one year's extension. Certain debts are excepted, such as those guaranteed by mortgage or pledge, rentals, wages, etc.

Bankruptcy of merchants exists when they cease to make payments and do not enjoy the benefits of a suspension of payments. It may be declared on petition of the debtor or a creditor. The debtor thereupon becomes incompetent to manage his affairs and his debts mature, and, with certain exceptions, cease to bear interest. Bankruptcies are of three kinds: fortuitous, culpable and fraudulent; in the latter two cases the debtor is liable to prosecution under the Penal Code. The judge appoints a provisional receiver and calls a meeting of creditors at which a definitive receiver is appointed. The debtor may at any time make offers of settlement which take effect if accepted by the same proportion of creditors above designated in connection with suspension of payments, and approved by the court. Unless an agreement is reached the estate is liquidated. Nicaraguan property of a person declared bankrupt abroad must be applied in the first place to satisfy Nicaraguan creditors.

Insolvency relates to non-merchants and may be declared on the petition of a creditor on showing that the debtor's property is insufficient to pay his debts. Insolvency is presumed if the debtor cannot designate, or the registry of property does not show, sufficient property belonging to him on which an attachment can be levied. The rules relating to insolvency proceedings are similar to those relating to bankruptcy.

Fraudulent Transfers.

See topic 7.08 Fraudulent Sales and Conveyances.

Privileged Credits.

See topic 7.10 Liens.

7.05 EXECUTIONS:

When an attachment has been levied and an order of execution is issued, perishable property is sold in the manner considered most advisable by the judge, mercantile effects are sold by a broker or a merchant appointed by the judge, and other personalty is sold at auction. Real property must be appraised, and a day is set for the auction, at which, unless the parties agree otherwise, no bid of less than two-thirds of the appraisal is accepted. If there are no bidders at this price, the creditor may demand that the property be adjudicated to him for two-thirds of the appraisal or that the judge reduce the appraisal by not exceeding one-third. In the latter case a new auction is held at which the lowest acceptable bid is two-thirds of the new appraisal. If there are still no bidders, the creditor may demand that the property be adjudicated to him for two-thirds of the new appraisal price, or delivered to him for administration, or be offered for sale a third time at any upset price designated by the judge. If the creditor does not demand such second or third sales the debtor is granted an extension of three years for payment of his debt, without interest. If the creditor requests administration of the property the debtor may demand a public sale without any upset price. After the property is sold, there is no equity of redemption. (C. C. P. 509-541, 1684-1796).

7.06 EXEMPTIONS:

Exempt from attachment among others are: two-thirds of salaries and compensation up to certain amount and one-half salary above that sum, pensions; homestead, household furniture, family clothing and food; child support, alimony; professional books, teaching instruments and artisans and farmers tools; personal rights; real property given or devised as not subject to attachment up to value in appraisement judicially approved; savings accounts up to certain amount; life insurance policies; payments to public works contractors except for salaries and materials furnished; property specifically exempted, such as property of municipalities and charity boards. (C. C. P. 1703; C. C. 2084).

7.07 FORECLOSURE:

See category 20 Mortgages, topic 20.03 Mortgages.

7.08 FRAUDULENT SALES AND CONVEYANCES:

Fraudulent acts of an insolvent debtor may be annulled on the petition of creditors, if the debtor contracted without a valuable consideration or if the person contracting with him was aware of his insolvency or was otherwise in collusion with him. Such annulment may be requested with respect to contracts executed within two years before the insolvency if the other party was closely related to the debtor by blood or marriage. In case of bankruptcy the following acts executed after the cessation of payments are void: (1) Acts without a valuable consideration;

(2) payments of unmatured debts. The following acts executed after the cessation of payments are presumed fraudulent and may be annulled: (1) Alienations for a valuable consideration when the other party knew of the cessation of payments; (2) contracts where the consideration received was clearly inadequate; (3) payments of matured debts otherwise than in cash or commercial effects; (4) mortgages and pledges to secure previous debts. (C. C. 2020-2238, 2253-2263; C. Com. 1082-1086).

7.09 INSOLVENCY:

See topic 7.04 Bankruptcy and 7.09 Insolvency.

7.10 LIENS:

In insolvencies in general there are two classes of privileged credits: (1) Those affecting all properties of the debtor, such as judicial costs in the interest of the creditors, current taxes, funeral expenses, medical assistance for one month, minor wages for three months; (2) those affecting specific property, such as liens of (a) mortgagees and pledgees on articles mortgaged or pledged, (b) carriers on articles carried, for costs of transportation, (c) makers of personal property, on such property in their possession, for the price thereof, (d) landlords, on the fruits of the property, for the amount of the rental, (e) the Government and municipalities, for one year's back taxes. In bankruptcy the pledge and mortgage liens are first satisfied and thereupon the credits rank as follows: (1) Amounts due to Government; (2) judicial expenses; (3) funeral expenses; (4) expenses of last illness; (5) wages for six months; (6) rentals; (7) credits for support of debtor and family; (8) special privileged credits allowed by the Code; (9) general mercantile credits; (10) other credits. (C. C. 2335-2355; C. Com. 1109-1119).

7.11 PLEDGES:

Article pledged must be delivered to pledgee or to some other person agreed on between parties. As between parties contract is effective from time of such delivery; as to third persons it must appear in document executed before notary or judge. In case of default pledge may be sold in summary judicial proceeding, or, if parties have so agreed, by third person at public sale. Any agreement allowing creditor to appropriate pledge is void. (C. C. 3728-3770; C. Com. 506-518). Pledges without delivery may be given to banks and national agencies for development on livestock and to others on farm and industry machinery and products or crops (Law of Aug. 6, 1937 as am'd).

7.12 REDEMPTION:

See topic 7.05 Executions; category 20 Mortgages, topic 20.03 Mortgages.

7.13 USURY:

See category 3 Business Regulation and Commerce, topic 3.04 Interest.

8 DISPUTE RESOLUTION

—Scope —

(Law 540 of May 25, 2005, Art. 94 of Law 260 of July 23, 1998 and its regulations Decree 63-99 of May 14, 1999).

8.01 ARBITRATION:

Law applies to any dispute concerning matters which may be legally and freely disposed of by parties and to any other dispute which may be settled by arbitration under other laws, as long as arbitration agreement is valid under this law.

There are two types of arbitration: de jure arbitration (arbitraje de derecho) and ex aequo et bono arbitration or amiable composition (arbitraje de equidad). In ex aequo et bono arbitration, arbitrators are not bound to decide on basis of rules of law; they may do so according to their best understanding and knowledge. Arbitration agreement may be in form of arbitration clause in contract or in separate agreement. Arbitration agreement shall be in writing, in document signed by parties or in exchange of electronic messages, letters, telexes, faxes, telegrams, or other means of telecommunication which provide record of agreement, or in exchange of statements of claim and defense in which existence of agreement is alleged by one party and not denied by other. Arbitration agreement compels parties to respect and observe prior stipulations and prevents judges and courts from entertaining action based on disputes submitted to arbitration. Number of arbitrators should be three, unless parties agree on another number.

Law is applicable to both domestic and international arbitration. Arbitration is international: (i) When parties to arbitration agreement are domiciled in different States at time of conclusion of that agreement; (ii) when place of arbitration, place where substantial part of obligations of commercial relationship is to be performed, or place with which subject matter of dispute is most closely connected is located outside of State in which parties have their domicile; or (iii) parties have expressly agreed that subject matter of arbitration agreement relates to more than one State.

Parties are free to establish place and language of arbitration. Arbitrators have authority to grant provisional remedies. Award must be rendered within six months from installation of arbitral tribunal, unless parties agree on another period. Arbitrators have right to demand estimated advance payment to cover their fees and expenses of arbitration.

Conventions.

Inter American Conventions on Extraterritorial Validity of Foreign Judgments and Arbitral Awards, Montevideo, 1979; Convention on the Recognition and Enforcement of Foreign Arbitral Awards, New York, 1958.

8.02 MEDIATION:

Parties may agree to submit their controversies arising, out of patrimonial and non-patrimonial matters with some exception indicated by law, to extrajudicial dispute resolution by mediation with help of neutral and impartial third party. Institutions established for such purpose may administer intervention of third party in mediation process. Parties are free to appoint one or more mediators. Mediation proceedings are confidential. Mediation agreement shall be in writing and shall have legal effect of settlement. Extrajudicial mediation agreements homologated by judge are res judicata.

Law regulates judicial dispute resolution by mediation prior to submitting dispute to litigation, except among others, in provisional remedies, executions, nullity of marriage, declaration of incompetence and rehabilitation proceedings, bankruptcy, restraint orders, when government and its entities are party. Judge proposes conciliation and he acts as conciliator. Agreements are res judicata.

9 DOCUMENTS AND RECORDS

9.01 ACKNOWLEDGMENTS:

Acknowledgments as customary in the United States are not used in Nicaragua, and documents requiring notarial authentication are executed as public instruments before notaries who retain the original in their file and issue certified copies. See topics 9.02 Notaries Public, 9.03

Public Instruments.

Documents executed abroad are accepted if executed in accordance with the laws of the respective country and authenticated by a diplomatic or consular officer of Nicaragua or, if none, of a friendly nation, but in cases where the Nicaraguan laws require a public instrument, no private writing will be accepted. (C. C. VI, XV; C. C. P. 1129-1131).

9.02 NOTARIES PUBLIC:

(Notarial Law, of Aug. 11, 1915 as am'd, Decree 658 of Feb. 24, 1981, Law 105 of July 14, 1990, Law 139 of Dec. 12, 1991 and C. C. 2364-2374).

Notaries require the authorization of the Supreme Court. A notary must have a proper diploma from a school authorized to grant it, must prove his reputation for honesty and good conduct, and must give bond. The following cannot be notaries: Those who are deaf or dumb or blind, or deprived of civil rights, or under indictment, or sentenced for any serious offense, or are bankrupts not discharged. Notaries may act anywhere in the Republic or even abroad if the parties are Nicaraguans or contract is to be performed in Nicaragua. In certain cases, district and local judges may act as notaries.

Instruments executed before a notary must be prepared with certain formalities. They must be in Spanish. Notary retains original document in protocol and furnishes parties with certified copies which have effect of originals in court. Documents certified by notary are invalid if they relate to matter in which notary, his wife, or his relatives within fourth degree of consanguinity or second of affinity, have interest, unless it be interest in corporation or unless all parties are relatives of notary and he had no direct interest.

9.03 PUBLIC INSTRUMENTS:

A public instrument is a document executed before a notary public or other competent public official. It is proof of the purpose of its execution and of its date, and the declarations made therein are proof against the parties and their successors. The law requires numerous contracts to be executed as public instruments, e.g., deeds of real property, mortgages, general powers of attorney, articles of incorporation and partnership, etc. Other documents are private documents. With respect to a third person a private document is effective only from the death of one of its signers, or the date on which it was recorded in a public registry, delivered to a public official or presented to a notary for authentication. A writing is required to prove an obligation of over eight córdobas. (C. C. 2364-2430).

9.04 RECORDS:

There is a public registry of real property for recording real property rights and conveyances; a registry of mortgages for recording documents relating to mortgage rights; and a registry of persons for recording judgments relating to the capacity of persons, divorce, bankruptcy, etc., and marriage articles and similar documents. There is also a mercantile registry for registering merchants, articles of partnership and incorporation, mercantile powers of attorney, trademarks, conveyances of ships, etc. Furthermore there is a civil registry for recording births, marriages, deaths, guardianships, etc. (C. C. 499-595, 3935-3980; C. Com. 13-27; and Law 80 of Mar. 12, 1990).

There is also a Central Registry of Civil Status, which issues identity cards. All Nicaraguans must have this ID card. Foreigners must request document equivalent to above from immigration authorities. (Decree Law 154 of Apr. 30, 1993).

9.05 SEALS:

Seals are not used in private contracts. Public instruments have most of effects of sealed instruments in United States.

10 EMPLOYMENT

10.01 LABOR RELATIONS:

(Const. art. 80-88, Labor Code; Law 539 of May 12, 2005). National Constitution provides for right to work of individuals and guarantees workers limited working day, minimum wages, paid days for rest and vacations, social security, equal pay for equal work, double pay for overtime, Christmas bonus, right of labor to organize trade unions, right to strike, severance payment and right to reinstatement for “unjust” dismissal.

Labor relations are regulated by Labor Code. Labor contracts may be oral or written; written contracts must be according to Code. Labor contracts can be for indefinite period, for certain period for specific service or work. In any company or establishment at least 90% of workers must be Nicaraguans. Eight hour working day is in effect with maximum of 48 hours per week with resting period of at least one day per week. Certain exceptions are allowed. Overtime is limited by law. Workers are allowed vacation of 15 days for each six months worked. Working legal age is 14 years. Workers' compensation is payable in case of labor accidents and occupational diseases as indicated by law.

Contract for indefinite period of time is subject to termination by employee, as long as prior written notice is given to employer. When employer exercises right of termination, employer must pay severance. Labor Code indicates causes of dismissal without any responsibility to employer. If employer cannot prove legal cause for dismissal, employer must pay severance.

Labor Code contains special regulations for minors under 14 years and for women. Pregnant women cannot be dismissed during pregnancy; after delivery without previous authorization of Ministry of Labor.

Law on Social Security provides protection to employees in case of sickness, maternity, incapacity, retirement, death and accidents in work place. Pension fund system is created through individual savings and government and employer contribution, as stipulated by law.

11 ENVIRONMENT

11.01 ENVIRONMENTAL REGULATION:

(Law 217 of May 2, 1996 as am'd regulated by Decree 9-96 of July 25, 1996 as am'd; Law 559 of Nov. 11, 2005, Decree 76-2006 of Dec. 19, 2006, Decree 01-2007 of Jan. 8, 2007 as am'd).

Law establishes general rules for conservation, protection, improvement and restoration of environment and natural resources. Legislation related to protection and conservation of environment and natural resources is of public interest. Law considers environment and natural resources as national patrimony, conservation and protection of which are of social interest.

Importation of hazardous waste is prohibited. Liability is imposed on those who knowingly or negligently cause environmental damage. Liability includes payment for clean-up of environmental damage and indemnification in accordance with general principles of Civil Code. Ministry of Environment and Natural Resources is in charge of formulating environmental policy and enforcement of law.

Environmental impact statements are mandatory for projects having environmental impact, such as, mining, oil, gas pipelines, energy generating plants, ports, airports, railroads, roads, manufacturing plants, disposal of toxic waste and dams, among others. Failure to comply with obligation to prevent damage to environment, clean-up plans and with legal provisions are sanctioned with temporary or permanent closure of facilities.

Special Law on Crimes against Environment and Natural Resources defines crimes and establishes its sanctions and preventive, punitive and corrective measures to repair damages caused by soil, air, water, waste and noise pollution and irrational exploitation of natural resources.

12 ESTATES AND TRUSTS

12.01 ADMINISTRATION:

See topic 12.05 Executors and Administrators.

12.02 DEATH:

If a person disappears a guardian or custodian may be appointed for his property. Four years after the absentee's disappearance, or six years if he left an attorney in fact, his presumptive heirs or legatees may petition for possession of his property, giving bond. Such petition may likewise be made after three years if the absentee disappeared in a battle, shipwreck, earthquake or similar calamity. Any security given is released and the possession of the property becomes final upon the expiration of 16 years, or 70 years after his birth. (C. C. 48-75).

Records of death are entered in the Civil Register. Death certificates are issued by the Official of the Civil Registry upon payment of a small fee fixed by local regulation.

Actions for Death.

There is no specific statute recognizing wrongful death action but this could be supported by the general provisions of Civil Code (arts. 2509 et seq.) on torts. Civil Aviation Code has some rules on death on occasion of air travel accidents. Civil actions out of tort are not usual and civil liability compensation out of crimes is usually sought in the criminal proceedings.

12.03 DECEDENTS' ESTATES:

See topics 12.04 Descent and Distribution, 12.05 Executors and Administrators, 12.07 Wills.

12.04 DESCENT AND DISTRIBUTION:

In case of intestacy the estate passes to the following in the order given: (1) Legitimate children, with one-quarter share to natural children and grandchildren, if any, but in no case can the part of a legitimate child be less than that of a natural child; (2) legitimate ascendants with equal shares to spouse and natural children and grandchildren; (3) legitimate brothers and sisters with large shares to spouse and natural children and grandchildren; (4) natural children and grandchildren with half of estate to spouse; (5) natural parents and grandparents with half of estate to spouse; (6) spouse and natural brothers and sisters; (7) other legitimate collaterals to the sixth degree; (8) the municipality. A Nicaraguan heir of an alien has the same rights in the alien's estate as he would have according to the Nicaraguan law in the estate of a citizen of Nicaragua. (C. C. 998-1024).

See also category 13 Family, topic 13.05 Husband and Wife.

12.05 EXECUTORS AND ADMINISTRATORS:

(C. C. 1224-1433).

The testator may appoint as executor any person capacitated to obligate himself except the notary before whom the will is made. The will may empower the executor to sell real or personal property, but the executor cannot make use of this power except when indispensable for carrying out the will and with the approval of the heirs or the judge. The executor must give public notice to claimants against the estate. He continues in office for the time designated in the will; if no time is designated he continues for one year, but these terms may be extended by the judge. If there is no executor, the heirs are charged with carrying out the testator's wishes.

The estate vests in the heirs immediately upon decedent's death. The executor and the heirs have the duty of demanding the preparation of an inventory. Heirs must accept or refuse the inheritance without imposing conditions. Acceptance may be express or implied, but refusal must be express. Every acceptance is considered to be with benefit of inventory, that is, the heir is liable for the debts of the testator and other charges against the estate only up to the value of his share in the estate.

12.06 TRUSTS:

Trusts as they exist in the common law are unknown in Nicaragua, but the freedom of contract often makes it possible to create relationships similar to trusts.

12.07 WILLS:

(C. C. 932-997, 1025-1223).

Wills may be made by all except (a) males below 15 and females below 14, (b) persons not in possession of their faculties or declared mentally incapacitated and (c) persons unable to express their will orally or in writing. The following cannot be witnesses: (a) Minors below 18; (b) those mentally incapacitated; (c) persons who are blind, deaf or dumb; (d) persons convicted of crime carrying loss of civil rights, or convicted of forgery or perjury; (e) nonresidents; (f) persons who cannot understand the language of the testator; (g) the writer of the will and the wife, employees, servants or relatives within the fourth degree of consanguinity and second of affinity of the officiating notary; (h) in the case of open wills, the heirs and legatees and their spouses and relatives within the fourth degree of consanguinity and second of affinity, unless the legacy be of a specific chattel or of an unimportant amount. Wills are common or special. Common wills comprise the open and the closed will.

Open wills are made before a notary public and three witnesses who see, hear and understand the testator and of whom at least two know how to read and write. The will is drawn up by the notary in his protocol, stating the place, date and hour of execution; it must be read aloud by the notary to the testator in the presence of the witnesses; and all sign, or if the testator or a witness is unable to sign another signs for him and the notary so certifies. If the testator is in immediate danger of death and there is no notary in the locality he may declare his will before five witnesses, and in case of an epidemic a will may be made before three witnesses over 16; in such cases the will may be oral or in writing, but it becomes void two months after the danger or epidemic ceases or three months after the death of the testator, unless the will be proved before a competent judge.

Closed wills may be written by the testator or another person, expressing the place and date; they must be signed by the testator; and every page must be signed by him if written by another, or bear his scroll if he wrote the will himself. The will is enclosed in an envelope which is sealed; and the testator declares before a notary and five witnesses that the envelope contains his will. The notary writes a statement of such declaration on the envelope and all sign.

Special wills are military wills made by soldiers and naval wills made on Nicaraguan vessels at sea. They may be made before certain officers and require only two witnesses.

Foreign wills are accepted as valid if made in the form required by the respective foreign country and if the authenticity of the instrument is duly proved. A Nicaraguan or an alien domiciled in Nicaragua may likewise make a will before a Nicaraguan consul or diplomatic officer.

Testamentary Dispositions.

The testator may freely dispose of his estate, the only obligatory provisions he must make being (a) provisions for the support of his needy descendants and ascendants and (b) the marital fourth pertaining to the surviving spouses. Legacies to religious institutions are void in so far as they exceed one-tenth of the estate, nor can more than one-tenth be left for masses. Certain persons cannot receive legacies, such as: (1) The guardian in certain cases; (2) the teacher who was in charge of a minor testator; (3) the physician or priest who attended the testator in his last illness; (4) the accomplice of an adulterous spouse; (5) the notary before whom the will was made or the person who wrote it; (6) the descendants, ascendants, spouses, brothers and sisters and brothers-in-law and sisters-in-law of such persons; but remunerative legacies are permitted in cases (2) and (3), also legacies to the spouse or legal heirs of the testator. By reason of indignity the right to be an heir is denied to those who: (1) Killed or attempted to kill the author of the inheritance; (2) obliged the testator to make a will or modify it; (3) prevented him from making or revoking a will or destroyed, concealed or altered a later will.

13 FAMILY

13.01 ADOPTION:

(Decree 862 of Oct. 12, 1981 as am'd).

Adoption gives adopted person identical status with that of natural child, creating lines of kinship between adopted person and adoptive parent's family. Consent is required from spouse of adopting party, from adopted party who is over seven years old, from parents if adopted party is under their “patria potestas” or where parents are curators. Minors less than 15 years of age may be adopted under conditions indicated by law, by local or foreign spouses, economically, physically, mentally, psychologically and morally fit; over 24 years and under 55 years of age. Adopted party may be over 15 years old and under 21 years old as stipulated by law. Adopting parties must be 15 years older than adopted party, except when one party is son or daughter of other adopting party. Widows, widowers and single persons may adopt in certain cases. There are special requirements for foreign adopting parties. Consejo Nacional de Adopción is government agency in charge of administration of adoption. Adoption is irrevocable and extinguishes legal bonds between adopted party and natural family, must be approved by judge. Adoption may be declared invalid by court decision during first five years.

13.02 ALIMONY:

See topic 13.04 Divorce.

13.03 COMMUNITY PROPERTY:

See topic 13.05 Husband and Wife.

13.04 DIVORCE:

(C. C. 174-193; C. C. P. 1617-1622 and Law 38 of Apr. 28, 1988 as am'd).

Marriage bond is dissolved by: (1) Death of one spouse; (2) divorce by mutual consent; (3) unilateral divorce; (4) court decision declaring marriage void.

The court of the conjugal domicile has jurisdiction in cases of divorce. The Code contains no requirement of residence for any specific period.

For divorce by mutual consent spouses must apply in writing and personally to judge, who attempts to reconcile them at hearing where both must necessarily appear in person or proceeding is discontinued, and, if they insist, orders them to prepare agreement as to custody of children and division of property. Judge thereupon declares dissolution of marriage and his judgment is sent to court of appeals for confirmation.

For dissolution by unilateral divorce, spouse must apply in writing and personally appear before judge and present documents indicated by law. Judge shall grant some term to other spouse to oppose or accept arguments, except in connection with express desire to dissolve marriage. If there are no minor children, handicapped offspring and assets to be distributed, judge shall declare marriage dissolved as indicated by law. If there are minor children or handicapped offspring with right to alimony, judge shall resolve matter if parties agree; in case of no agreement, judge attempts to reconcile parties at hearing. If no reconciliation, judge decides after complying with requirements of law.

Separation without dissolution of marriage may be decreed: (a) For same reasons which are grounds for divorce; (b) for refusal of either spouse to support other who is in need or to support children.

Law 143 of Jan. 22, 1992 as amended regulates right to receive alimony and duty to pay it, bases of calculation and summary action to claim it, and causes for extinction of payment duty.

13.05 HUSBAND AND WIFE:

(C. C. 105, 151-159, 1201-1209).

Husband and wife owe each other fidelity and mutual assistance. The husband must live with his wife and she with her husband and follow him wherever he fixes his residence, but these obligations are suspended if harm would result to either spouse. The spouses may either before or after marriage make agreements regarding their property, which agreements must be executed before a notary and recorded. Such agreements may be changed after marriage. In the absence of such an agreement each spouse may freely dispose of the property owned by such spouse at the time of marriage and that acquired thereafter in any manner.

Husband and wife may contract with each other and the wife does not require authorization by her husband or the court in order to contract or appear in court. The spouses are liable for the support and education of the children in proportion to their respective property.

The surviving spouse is entitled to a marriage portion of one-quarter of the estate of the deceased spouse, unless the surviving spouse is the owner of property, in which event the marriage portion is the difference between the value of such property and one-quarter the value of the estate. Everything received by the surviving spouse from the decedent's estate is credited to the marriage portion.

Community property system is optional in marriages in Nicaragua; persons married abroad under the rules of community property are still subject to such rules if they take up their domicile in Nicaragua unless they make new stipulations according to Nicaraguan legislation.

13.06 INFANCY:

(C. C. arts. 6-10, 244-282, 298-498, 2201-2219, 2472, Decree 1065 of June 24, 1982).

Minority ends at 21 except when the courts grant majority to a minor prior to that age. Contracts by males under 15 and females under 14 are void and, if over those ages, voidable.

Minors are subject to parental authority of legitimate father and mother or natural mother or, upon her death or absence of natural father who has recognized paternity. Parental authority includes custody, legal representation and administration of real and personal property of minor. In absence of parents guardian is appointed. Parents and guardians may receive fee of 5% to 20% of net income and have restricted powers of disposition.

Code of Minors and Adolescents (Código de la Niñez y de la Adolecencia) recognizes special rights to minors and adolescents; it also imposes duties and responsibilities. Consejo Nacional de Atención y Protección Integral a la Niñez y la Adolecencia (national council for the care and protection of children and adolescents) is governmental agency in charge of protecting minors and adolescents. There is criminal judicial system specialized in minors and adolescent matters. (Law 287 of Mar. 24, 1998).

13.07 MARRIAGE:

(C. C. 92-150).

The marriage ceremony is performed by the district judge or local judge or by notary public who has been register at Supreme Court more than ten years. Marriages by proxy are allowed. No religious marriage may be performed unless there has been previous civil ceremony.

The following marriages are void: (a) Those of persons already married; (b) between ascendants and descendants by consanguinity or affinity, legitimate or illegitimate; (c) between brothers and sisters; (d) between the author of the death of one spouse or his accomplice, and the surviving spouse; (e) between a person convicted of adultery and the other party to the adultery. The following are causes for voiding the marriage: (a) Error or duress; (b) mental incapacity; (c) if the male is below 15 years or the female below 14; (d) impotence. However, these marriages are valid: (1) In case of error, duress or mental incapacity, if the parties continue living together one month after the defect is discovered; (2) if persons below the age of puberty live together one day after puberty is attained or if the female conceives; (3) in the case of impotence if no claim is made within one year. The following marriages, though valid, are prohibited and the parties are liable to punishment: (a) That of a male below 21 or a female below 18, without the consent of parents, grandparents or guardians; (b) that of a woman before the expiration of 300 days after the dissolution of a previous marriage; (c) between a guardian and ward before the guardianship accounts are approved; (d) marriages without due publication of edicts or exemption from such publication.

A marriage declared void, if contracted in good faith, produces civil effects with respect to the parties and children. If only one party acted in good faith it produces civil effects only with respect to that party and the children.

A marriage validly contracted abroad is valid in Nicaragua; if one of the parties was a Nicaraguan it is necessary that there was no violation of Nicaraguan laws relating to capacity for contracting marriage.

14 FOREIGN TRADE AND COMMERCE

14.01 CUSTOMS:

Decree 942 of Feb. 1, 1982 regulates violations of customs laws. Central American Agreement on Tariff and Customs Regime and its Protocol establishes common regime that includes: Import tariff based on Brussels Nomenclature and ad valorem duties, law on customs value of merchandise and its regulations, uniform customs code and its regulations, regulations on tax exemptions.

14.02 EXCHANGE CONTROL:

(Law 317 of Oct. 11, 1999 as am'd). There are no exchange controls. Foreign exchange accounts are permitted. Official exchange rate is published monthly by Central Bank.

14.03 FOREIGN EXCHANGE:

See topic 14.02 Exchange Control; also category 1 Introduction, topic 1.01 Currency.

14.04 FOREIGN INVESTMENTS:

(Law 344 of May 22, 2000 regulated by Decree 74-2000 of Aug. 22, 2000).

Law establishes foreign investor's rights and duties, and benefits and guaranties for foreign investment. Foreign investment may be freely convertible foreign currency, tangible assets, any form of technology, or capitalization of loan. Direct foreign investment is authorized in all economic activities, except: national defense and public health. Law provides equal treatment to national and foreign capital. Disputes related to their investment can be subject to international arbitration. Existing tax regime is applied but exemption may be negotiated. Right to repatriate capital and dividends and to get foreign exchange and compensation in case of expropriation is guaranteed. Foreign investment subject to former law may apply new regime.

14.05 FOREIGN TRADE REGULATIONS:

See topic 14.02 Exchange Control.

15 HEALTH

15.01 HEALTH AND MEDICINE:

(General Health Law 423 of May 7, 2002 regulated by Decree 001-2003 of Jan. 9, 2003 as am'd). Ministry of Health is in charge of regulating, enforcing, supervising, controlling and evaluating compliance with Law. Law regulates, among other things, rights and duties related to public health services, control and prevention of diseases and accidents, health plans, sanitary control of products and services, sanitation and safety of work place; medical equipment; health institutions; disease control; control of alcoholic beverages; organ implant and sanctions for infringement of Law.

Pharmacies and registration, labeling, advertising and control of medicines are regulated by Law 292 of Apr. 16, 1998 regulated by Decree 6-99 of Jan. 25, 1999 as amended. Veterinary health and vegetables sanitation is regulated by Law 291 of Apr. 16, 1998 regulated by Decree 2 of D. 2-99 of Jan. 21, 1999 as amended. Pest control and toxic substances are regulated by Law 274 of Nov. 5, 1998 as amended regulated by Decree 49-98 of June 26, 1998. Controlled substances are regulated by Law 177 of May 27, 1994 as amended regulated by Decree 74-99 of June 16, 1999.

16 IMMIGRATION

16.01 ALIENS:

Aliens in general have the same civil rights as citizens, and they can invest in any economic activity. (Const. art. 27, Immigration Law 153 of Apr. 22, 1993 and Aliens Law 154 of Apr. 30, 1993).

See also topic 16.02 Immigration; categories 9 Documents and Records, topic

Records; Estates and Trusts, topic Descent and Distribution; Mineral, Water and Fishing Rights, topic Mines and Minerals; Property, topic Real Property.

16.02 IMMIGRATION:

(Immigration Law 153 of Apr. 22, 1993, Aliens Law 154 of Apr. 30, 1993).

Foreigners entering country must apply for a visa with Consul. Foreigners, after legal admission, with exception of tourists must get special identification document issue by local authorities.

For departure, foreigners must appear before Immigration Authority with their passport in order to obtain exit visas.

Aliens Law 154 establishes two special categories of residents: “Retired Residents” and “Investors Residents”.

17 INTELLECTUAL PROPERTY

17.01 COPYRIGHT:

(C.C. arts. 725 and 726, Law 312 of Aug. 26, 1999 as am'd and its regulations Decree 22-2000 of Mar. 3, 2000 as am'd).

Scientific, literary and artistic works, and folklore expressions as defined by law are protected. Law also protects performers, phonograph producers and broadcasting companies. Law grants moral and patrimonial rights to author, his successors or assignees. Moral rights include recognition of capacity as such, non-publication of works, and modification of work. Such rights are inalienable and non-waivable. Patrimonial rights include exclusive right to exploit work personally or by authorized third party. Patrimonial rights remain in force for 70 years from Jan. 1st of year subsequent to author's death; however for audiovisual works and photographs, 70 years from publication date. Protection of rights of performers, phonograph producers and broadcasting companies is for 70 years as provided by law. Producer of motion picture is protected for 70 years from first projection. Assignment of patrimonial rights, in absence of express provision, is deemed to be five years. Author has non-waivable and nontransferable right to receive at least 5% of difference between original sale price of work and its resale price. Law also protects as “independent copyright works”, translations, adaptations, musical arrangements and other transformations on private intellectual works. To protect these copyright works written authorization from original owner of work is necessary. Literary and artistic works, performances and other productions are protected by law without requiring registration. Sanctions for infringement of rights are imprisonment up to three years, fines, compensation for damages, withdrawal from commercial channels, seizure and destruction of goods, among others. Statute of limitations for criminal actions is six years from last crime.

Conventions: Universal Copyright Convention, Geneva, Sept. 6, 1952 and Paris revision of July 24, 1971; International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations, Rome, Oct. 26, 1961; Convention for Protection against Unauthorized Reproduction of Phonograms, Oct. 29, 1971; Agreement on Trade-Related Aspects of Intellectual Property Rights, Marrakech, Apr. 15, 1994.

Law 324 of Jan. 17, 2000 regulated by Decree 38-2001 of Apr. 4, 2001 protects integrated circuit's designs when considered original as indicated by law. Application for registration must be filed within two years from its commercial exploitation. Registration is granted for ten years from filing date. Rights are assignable and inheritable, and may be encumbered. Annuity must be paid to keep rights in force.

Protection of Satellite Signals.

Law 322 of Dec. 14, 1999 as amended regulated by Decree 44-2000 of May 26, 2000 protects, with some limitations, for 50 years, rights of those emitting signals by any process or medium, independently of rights of owner of program contained in signal. Purpose is to prevent unauthorized use of signals, regardless of nationality, residence, or country of origin of transmitter. Legal entities and individuals emitting, carrying or distributing signals must register with Intellectual Property Registry. Rights may be assigned or licensed. Law contains sanctions for infringement of rights.

17.02 PATENTS:

(Law 354 of Sept. 19, 2000 as am'd regulated by Decree 88-2001 of Sept. 12, 2001 as am'd).

Invention.

Technical solution to any specific problem; it could be product of proceeding, or applicable to them. Product: any substance, composition, material, including biological, apparatus, machines or any other object or part of them. Proceeding: any method, operation or group of operations or application or use of product. Simple discoveries, material or energies naturally found, scientific theories and mathematical methods, literary and artistic works, economic plans, principles and methods used in business, games and mental exercises, computer program considered separately are not considered inventions. Animals, surgical, therapeutic or diagnostic treatment methods for human beings and animals, among others, are not patentable. Invention is considered novel if it is not within state of art and is susceptible of industrial application. Applications may be divided, maintaining original application date. Patents are granted for 20 years from filing date. Within 60 days from granting date, applicant may request extension of term based on unjustified delay in patent prosecution due to Register's fault, as indicated by law. Patent gives exclusive right of exploitation but compulsory license may be granted in case of declared emergency or national security reasons or unfair competition practices. Patent rights are transferable. Law contains sanctions for infringement of rights. Statute of limitations is two years or five years, according to law.

Utility Models and Industrial Designs.

Utility models are registrable if they are novel and susceptible to industrial application. Registration term is ten years from filing date. Any new design or new model, which may be applied to industrial object, may be registered as author's ownership. Industrial designs are new if no publicity thereof has been made in any form. Protection is granted for three years from date first divulged by designer or his successors, without registration. Provisions regarding patents are applicable to industrial designs and utility models.

Unfair Competition and Trade Secrets.

Law regulates unfair competition related to industrial property. Law protects trade secrets and considers them as any confidential information with commercial value.

Vegetal Species.

(Law 318 of Oct. 20, 1999 regulated by Decree 37-2000 of May 2, 2000). Vegetal species are protected when they are novel, distinguishable, homogeneous and stable. When registered, certificate of holder is issued for 20 years. Rights are assignable and inheritable. Law gives holder exclusive right of exploitation, but non-exclusive compulsory license must be granted up to four years to supply local market. Annual fee must be paid to keep in force registration.

Conventions.

Convention for the Protection of Industrial Property, Paris, Mar. 21, 1883, Stockholm Revision of July 14, 1967 as amended on Sept. 28, 1979; Patent Cooperation Treaty (PCT), Washington, June 19, 1970 as amended; Budapest Treaty on the International Recognition of the Deposit of Microorganisms for the Purposes of Patent Procedure, Budapest, Apr. 28, 1977, as amended; Agreement on Trade-Related Aspects of Intellectual Property Rights, Marrakech, Apr. 15, 1994.

17.03 TRADEMARKS AND TRADENAMES:

(Law 380 of Mar. 26, 2001 as am'd regulated by Decree 83-2001 of Sept. 11, 2001).

Trademarks.

Mark is any sign apt to distinguish goods and services. Words or combinations of words, phrases, letters, numbers, figures, monograms, pictures, labels, lines, combinations of colors, sounds, and other perceptible signs, such as scents, may be registered as marks. Use and registration of marks for commercialization of goods and services is optional. No registration may be granted to marks, denominations, signs and emblems of State or its agencies, or international organizations; to usual or necessary shapes of products or denomination and color thereof; common words or their equivalent in common languages or descriptive denominations; marks which may be confused with others registered or pending registration; geographical names if their use may suggest origin; or names of historical personalities; title of literary, artistic or scientific works protected by copyright; marks contrary to law, those against public policy, denomination of protected vegetal varieties, those identical or similar to registered slogans and commercial names provided under circumstances where public may be confused; those that are reproduction, imitation, translation or total or partial transcription of distinctive signs, locally or internationally, well-known, without taking into consideration classification of goods or services concerned; or because of similarity to well-known trademarks causes confusion to public. When well-known trademarks are registered as domain name or as part of electronic address cancellation may be declared at request of owner of mark within period of five years from registration date or from date of first use, whichever is longer. In case where bad faith is proved Law considers acts of unfair competition related to industrial property, among others, use of any sign which is not permitted to register as mark; use or advertisement of false statements related to products, services, businesses or companies belonging to others; copy or reproduction of products. Registration is granted for ten years subject to renewal for indefinite ten-year periods. Law contains sanctions for infringement of rights and prohibits unfair competition and penalizes violators. Statute of limitations for violation of rights is two years or five years, according to law. Statute of limitations for criminal actions is six years from last crime.

Collective Marks, Certification Marks and Origin Denominations.

Any sign that distinguishes origin, or any other common characteristic, of products or services of different enterprise that uses and controls mark. Provisions regarding trademarks are applicable to collective names. Private or public enterprises, governmental bodies or international organizations may register certification marks. Registration is granted for ten years, but granted to governmental body registration is for indefinite period of time. It cannot be encumbered or subject to attachment. Origin denominations may be registered for indefinite period of time.

Slogans are expressions or commercial publicity signs. Any person or corporation may apply for registration of slogans employed or to be employed in relation with economic activities. They must be distinctive. Slogans are registered for indefinite term as long as trademark used in conjunction therewith remains valid.

Commercial Names.

Those signs used to identify individuals or juridical persons regarding their economic activity are protected by law without requiring registration. Exclusive right to use of commercial name ends with closing of establishment or termination of industry covered by name. Registration is granted for indefinite period. Provisions regarding trademarks are applicable to commercial names.

Conventions.

Convention for the Protection of Industrial Property, Paris, Mar. 21, 1883, Stockholm Revision of July 14, 1967 as amended on Sept. 28, 1979; Nice Agreement Concerning the International Classification of Goods and Services for the Purposes of the Registration of Marks, 1957 as reviewed and amended; Lisbon Agreement for the Protection of Appellations of Origin and their International Registration, Lisbon Agreement, 1958, revised at Stockholm, 1967, and amended in 1979; Vienna Agreement Establishing an International Classification of the Figurative Elements of Marks, 1973 as amended; Agreement on Trade-Related Aspects of Intellectual Property Rights, Marrakech, Apr. 15, 1994.

18 LEGAL PROFESSION

18.01 ATTORNEYS AND COUNSELORS:

(Law of July 19, 1894, Law 260 of July 23, 1998 and Decree 63-99 of May 14, 1999).

Supreme Court of Justice grants attorney degree if applicant: has law degree from local university, is more than 18 years old and can fully exercise his civil and political rights. Persons holding law degree from foreign country may get attorney degree by complying with special requirements depending on whether foreign legal system is based on civil or common law.

19 MINERAL, WATER AND FISHING RIGHTS

19.01 MINES AND MINERALS:

Mining.

(Decree 316 of Apr. 17, 1958, Law 387 of July 27, 2001 as am'd regulated by Decree 119-2001 of Dec. 18, 2001 as am'd).

Mining in General.

State is owner of all mineral resources within its territory, above and under ground. State guarantees same rights and duties to national and foreign investors. Mineral resources are classified as: substances where main commercial or industrial element is metallic, substances where main commercial or industrial element is non-metallic, and mineral substances and rocks used in construction and salt deposits. State grants mining concessions for exploitation and exploitation activities. Holders of mining concession have exclusive right to explore, exploit, process and commercialize minerals. Mining concession constitutes jus ad rem, distinct from surface, although both may be possessed by same owner. They may be alienated or encumbered, rented and in general negotiated in any contract, except to be part of homestead with previous authorization of Ministry of Promotion, Industry and Commerce. There is Central Registry of Concession where all mining concessions and contracts related thereto are registered. Infringement of law is punished by imposition of fines or cancellation of concession.

Taxation.

Holders of mining concession are subject to semiannual surface royalty per square hectare at rates between US$0.25 to US$12 and to extracting royalty at rate of 3% calculated on market value of extracted mineral, excluding transportation. They are also subject to income tax but duty-free importation of capital goods and raw materials necessary for exploration, exploitation, manufacture, refining, transportation, or any other related activity are granted.

Petroleum.

(Law 286 of June 11, 1998 and its regulations Decree 43-98 of June 17, 1998). State is owner of all hydrocarbon deposits within its territory, including continental shell. Hydrocarbon industry, including production, transportation, storage and commercialization, is regarded as public interest. Property may be expropriated for development of industry. State may execute contracts for exploration and exploitation of hydrocarbons with private developers under various stipulated arrangements by bid or individual evaluation. National and foreign companies must be duly established in country and have signed agreement renouncing all diplomatic recourse. Contractors performing exploration and exploitation activities are subject to local law and jurisdiction, but they may agree in contract to submit disputes arising out of their performance to national or international arbitration. Contracting parties must post undertaking to guarantee performance of contract. Law establishes causes for termination of contracts. At termination of contracts for any reason, all buildings, permanent installations, machinery, equipment and any other property connected with operations shall be transferred in full ownership to State free of any cost. Failure to perform may result in fines from 10,000 to 500,000 U.S. dollars. Amendment and assignment of contracts requires prior authorization. All contractors must file environmental impact study. Contracts are executed only with private parties possessing sufficient technical and financial capacity and proven experience. Minimum amount of investment shall be established in each contract. Term of exploitation contract is up to six years, renewable for additional one year, and exploitation contract for 30 years renewable for additional five year period. Contractors may import duty free all necessary equipment required for operation provided that they are not locally available. Contractors pay income tax at rate of 30%. State guarantees legal stability related to tax regime, free availability of foreign currency regime.

20 MORTGAGES

20.01 CHATTEL MORTGAGES:

Personal property may be given in guarantee of unpaid part of purchase price or to secure payment of loan incurred to buy it. Chattel mortgage may be imposed on personal property belonging to another person if owner expressly consents to it. Personal property given in guarantee remains in custody of debtor. Contract must be in public deed or in private document acknowledged before notary public. Chattel mortgage may be canceled at any time by payment. Foreclosure action is summary. Statute of limitation for action arising from this contract is three years. (Law 146 of Mar. 20, 1992). As to ships and aircraft see topic 20.03 Mortgages.

20.02 COLLATERAL SECURITY:

See category 7 Debtor and Creditor, topic 7.11 Pledges.

20.03 MORTGAGES:

(C. C. 3771-3898; C. Com. 1024-1035; C. C. P. 1684-1796; Law 595 of Sept. 29, 2006).

Mortgages must be executed in the form of notarial instruments and recorded in the public registry. Mortgages made abroad are valid if properly authenticated. Mortgages may be made on (a) real estate, its fruits, and rights in rem thereon and (b) ships and aircraft. The mortgage covers only three years back interest, unless the creditor causes other unpaid annuities to be expressly recorded, in which event third persons are affected only from the date of such record. Whenever the debtor makes a partial payment, he may demand a proportionate reduction of the mortgage.

When property encumbered by mortgage is sold at a public sale under execution, it is sold free of the encumbrance if the mortgage creditor was duly summoned; in such case the proceeds of the sale are devoted to the payment of liens in their order of preference. It is forbidden to stipulate that in case of nonpayment the creditor may take possession of the property, but the parties may waive the usual mortgage procedure and agree that the property be sold by judicial sale with an upset price designated in the mortgage instrument or assessed by experts. Mortgage foreclosures follow the general rules of summary actions and execution of judgments. After the sale there is no right of redemption.

Real property may be charged with a mortgage, divided in cedulas of 100 córdobas or multiples of that amount, signed by the property owner and the Registrar of Real Property. The liability for capital and accessories constitutes a charge of the property, the owner of which shall have no personal liability. (C. C. Art. 3888).

21 PROPERTY

21.01 ABSENTEES:

See category 12 Estates and Trusts, topic 12.02 Death.

21.02 ADVERSE POSSESSION:

See category 5 Civil Actions and Procedure, topic 5.04 Prescription.

21.03 CONVEYANCES:

See topic 21.05 Deeds; category 9 Documents and Records, topics 9.02 Notaries Public, 9.03 Public Instruments.

21.04 CURTESY:

No estate by curtesy. See categories 12 Estates and Trusts, topic Descent and Distribution; Family, topic Husband and Wife.

21.05 DEEDS:

Deeds must be executed as public instruments before notary public. They are subject to taxes depending on value of the property. (C. C. 2534, 3935-3949, Decree 40-91 of Sept. 27, 1991). See also category 9 Documents and Records, topics 9.02 Notaries Public, 9.03 Public Instruments.

21.06 DOWER:

No dower right. See categories 12 Estates and Trusts, topic Descent and Distribution; Family, topic Husband and Wife.

21.07 REAL PROPERTY:

Civil Code governs real property in Nicaragua.

Contracts regarding real property must be by public instrument and registered in Registry of Property.

Only Nicaraguans and corporations in which more than 51% of capital belongs to Nicaraguans may own property in an area within 20 km. from borders.

Decree 782 of July 19, 1981 as amended and its regulations regulate agrarian reform.

22 TAXATION

Tax Code.

(Law 562 of Nov. 22, 2005 as am'd). Code establishes general principles, proceedings and norms that regulate tax system and are applicable to taxes, fees and special contributions. It comprises provisions for rights and duties of taxpayers, tax exonerations, surcharges on delinquent payments, penalties, collection procedures, appeals, statute of limitations, fiscal domicile, tax identification and other regulations.

22.01 FREE ZONES:

(Decree 46-91 of Nov. 13, 1991 regulated by Decree 50-2005 of Aug. 8, 2005). Free zones can be publicly owned and administered by "Corporación de Zonas Francas" or privately owned and administered by corporation created for that purpose called "Empresa Operadora de Zonas Francas". Such corporation must be authorized by "Comisión Nacional de Zonas Francas". Free zones must be created for production and exportation of goods and services. They are exempted from all taxes, including municipal tax.

22.02 INCOME TAX:

(Law 453 of May 15, 2003 regulated by Decree 46-2003 of June 2, 2003 as am'd). All income derived from assets located, services rendered and business done in Nicaragua or having effect therein is subject to tax, regardless of where income is received. Presumed income is based on taxpayer's net worth or net receipt applies when regular reported net income is less than presumptive amount established by law.

Among incomes exempted are workers' compensation, certain insurance proceeds, lottery prizes from Popular Lottery of less than 50,000 córdobas; certain interests, all social security payments.

Gross income includes income derived from work, services, sales, business, gains for transfer of personal or real property, gifts, inheritance, lottery and similar items. Tax is paid on net income. Net income is gross income less deductions allowed by law. Losses may be carried forward for four years. Some payments are subject to withholding tax at source, among them, salaries over 50,000 córdobas, purchases of goods, construction works, lease and services.

Individuals are taxed at rates ranging from 10% to 30% and juridical persons at flat rate of 30%.

22.03 PROPERTY TAXES:

Tax on Real Property.

(a) (Decree 3-95 of Jan. 31, 1995). Tax is levied on real property owned by individuals and juridical persons with net value over certain amount at rate of 1% of market value. Tax is paid to municipalities where properties are located. (b) (Decree 36-91 of Aug. 19, 1991 as am'd). All acts involving real property originally acquired from Government or its institutions or municipalities with construction over 100 square meters are subject to 100% tax on its recorded value. Tax is paid in advance, once per property, and notaries public must indicate payment of tax in all notarial deeds related to any of abovementioned properties.

22.04 SALES TAX:

Selective Tax on Consumption.

(Law 453 of May 15, 2003 regulated by Decree 46-2003 of June 2, 2003 as am'd).

Tax is applied to importation and transfer of specific and detailed list of items running from occasional 4% to 100%, payable on price of sale, if national product, and on CIF price, if imported. In certain cases, tax applies under special rules.

22.05 STAMP TAX:

(Law 453 of May 15, 2003 regulated by Decree 46-2003 of June 2, 2003 as am'd). Tax is imposed on contracts, public documents, promissory notes and other documents and instruments specified by law, executed or issued within country and executed or issued abroad to take effect in Nicaragua. Tax rates vary for different transactions.

22.06 TAX INCENTIVES AND EXEMPTIONS:

Export Promotion, Decree 37-91 of Aug. 21, 1991 as amended regulated by Decree 23-92 of Mar. 20, 1992, grants special benefits to export of traditional and nontraditional products outside Central American area. Imports of raw materials and capital goods are exempted from duties and taxes, under temporary importation system. Exporting companies of nontraditional products may enter into export contract with Government and receive income tax exemption up to six years, and “certificado de beneficio tributario” (tax payment certificates) equivalent to percentage of value of exported goods, for period up to six years. Certificates are negotiable bearer instruments.

Drawback.

(Law 382 of Mar. 19, 2001 as am'd regulated by Decree 80-2001 of Aug. 15, 2001). Law regulates temporary importation, exempted from duties and taxes, of raw materials, semi-processed products, containers and packing materials to be used for manufacture of products to be exported. Companies operating under free zones regime are not allowed to enjoy benefits under this Law.

22.07 VALUE ADDED TAX:

Value Added Tax.

(Law 453 of May 15, 2003 regulated by Decree 46-2003 of June 2, 2003 as am'd). Importation of goods into country, transfer of goods, rendering of services within country are subject to this tax. Tax shall be levied on net price obtained by deducting from amount of invoice discounts or other reductions made according to commercial usage. General rate is 15%.

23 TRANSPORTATION

23.01 SHIPPING:

(Law 399 of Aug. 28, 2001, C. Com. 735-1046).

Admiralty matters are governed by Aquatic Transportation Law. Provisions of Code of Commerce are applicable when not opposed to law and to free competition. Law is applicable to national vessels wherever they go, and to foreign vessels in Nicaraguan waters. Vessels are registered in Public Registry of National Navigation. Registry is granted to native or foreign vessels provided they belong to national individuals or companies domiciled in country or to foreign company with open branch in country; acts related to ownership and encumbrance of registered vessels must be recorded at Registry. Nicaraguan individuals or juridical persons dedicated to construction and repair of vessel must be registered. General Department of Aquatic Transportation of Ministry of Transport and Infrastructure is in charge of enforcing Law.

24 TREATIES AND CONVENTIONS

24.01 TREATIES:

Nicaragua is among others, a party to following: Convention on Private International Law (Bustamante Code), Havana, 1928; Multilateral Trade Negotiations, The Uruguay Round, Final Act, Marrakech, Apr. 15, 1994 and Agreement Establishing the World Trade Organization, Marrakech, Apr. 15, 1994.

Bilateral.

Treaty of friendship, commerce and navigation, and protocol. Signed on Jan. 21, 1956 with U.S. One significant clause is that in commercial matters citizens of both countries receive same treatment as nationals, in each country; Agreement relating to investment guaranties under §413(b)(4) of Mutual Security Act of 1954, as am'd, with U.S.

Multilateral.

General Treaty on Central American Economic Integration and its Protocol; Agreement establishing Central American Bank for Economic Integration; United States of America-Dominican Republic-Central America Free Trade Agreement. Signed Aug. 5, 2004, Washington, D.C.

Also see category 17 Intellectual Property, topic 17.01 Copyright.

1
NIGERIA LAW DIGEST

—Scope —

Prepared for 2010 edition by

ÁELEX of Lagos, Port Harcourt, Abuja and Accra.

(Abbreviations used: “LFN” indicates “Laws of the Federation of Nigeria, 2004”; “c.” indicates “Chapter”.)

Note: This revision incorporates legislation through October 2009.

1 INTRODUCTION

1.01 CURRENCY:

Local currency is the Naira (N) which is divided into 100 kobo.

1.02 OFFICE HOURS AND TIME ZONE:

Nigeria is in GMT +01:00 time zone. Office hours for public sector are 8:00 a.m. to 4:00 p.m., Mon. - Fri. For private sector, they are 8:00 a.m. to 5:00 p.m.

1.03 GOVERNMENT AND LEGAL SYSTEM:

Government.

Country presently operates under federal constitution which came into force on 29th May 1999. Country is divided into 36 states. Capital of country is Abuja.

Federal Government is headed by elected President who has executive powers. He is also commander-in-chief of Armed Forces. Executive powers of president may be exercised by him either directly or through vice-president or ministers of Government or other public officers of Federation. Each state is headed by elected Governor who has executive powers.

Federal legislative power is vested in National Assembly which consists of Senate and House of Representatives. Senate consists of 109 senators, i.e. three from each of the 36 states and one from Federal Capital Territory, Abuja. House of Representatives consists of 360 members elected from each of Federal constituencies in country. Both houses meet yearly in two ordinary sessions; first session starts from Jan. to June and other from Sept. to Dec. Houses may also hold special sessions at request of Senate President. State Legislative power is vested in state Houses of Assembly.

National Assembly has exclusive powers to make laws in respect of matters on Exclusive Legislative List contained in Part 1 of Second Schedule to the Constitution.

National Assembly and Houses of Assembly of each of the 36 states exercise concurrent powers with respect to matters contained on Concurrent Legislative List contained in Part 2 of Second Schedule to Constitution. In event of conflict between laws passed by National Assembly and any state House of Assembly that of National Assembly prevails.

Houses of Assembly of states exercise exclusive powers to make laws in respect of matters not contained in either list.

Legal System.

Common law legal system with roots in English common law.

Treaties.

Treaty shall have no legal effect in Nigeria except to extent enacted into law by legislature. (§12 Constitution of the Federal Republic of Nigeria 1999). Treaties (Making Procedure, Etc.) Act No. 16 of 1993 designates Federal Ministry of Justice as depository of all treaties entered into between Nigeria and another country. Act provides that: (a) treaties which have effect of altering or modifying existing laws or affecting legislative powers (Federal) and treaties that impose financial, political or social obligations or are of scientific or technological import must be ratified by legislature in order to have effect (§3[1]); (b) agreements which deal with mutual exchange of cultural and educational facilities need not be ratified (§3[2]).

§5(1) of Act requires Federal Ministry of Justice to maintain Register of Treaties which should be open at all reasonable times for inspection by members of public.

Territorial waters of Nigeria include every part of open sea within 12 nautical miles of coast of Nigeria (measured from low water mark) or of seaward limits of inland waters. (§1[1] Territorial Waters Act, c. T5 LFN).

Exclusive Economic Zone of Nigeria extends to 200 nautical miles except as otherwise stated in treaty or other written agreement. (§1[1] Exclusive Economic Zone Act, c. E17 LFN).

1.04 PREFATORY NOTE:

Nigeria is member of Economic Community of West African States.

2 BUSINESS ORGANIZATIONS

2.01 COOPERATIVE SOCIETIES:

(These are also known as industrial or provident or friendly societies.) Both Federal and state governments can make laws on subject. Federal legislation is Nigerian Co-operative Societies Act N98. Various state laws exist including Co-operative Societies Law, c. 15 Laws of Lagos State of Nigeria 2003. Director of Co-operatives undertakes registration and regulation of cooperative societies. Federal as well as state governments appoint directors.

Societies Which May Be Registered.

Society may be registered by Director of Co-operatives as cooperative society if it has as its objects promotion of socio-economic interests of its members in accordance with co-operative principles and is established for purpose of facilitating operation of those principles. (§2[1] Nigerian Co-operative Societies Act N98). Society may be registered as industrial society; primary society; or secondary society. (§2[2]).

Condition for Registration.

Primary society must have at least ten individuals as members in order to be registrable. (§3[1]). Industrial society must have at least six individuals as members and be economically viable to be registrable. (§3[2]). Secondary society must have at least five registered societies as members. (§3[3]). Word “Co-operative” shall form part of name of every society. (§3[4]). Word “limited” shall be last word in name of every society in which liability of members is limited. (§3[5]). Words “bank” or “banking” shall not form part of name of registered society unless it is central financing society. (§3[6]).

Effect of Registration.

Registration of society makes it body corporate with perpetual succession and vests it with power to hold property (including real property); enter into contracts; institute and defend legal proceedings; and do all things necessary for purpose of its constitution. (§6[1]). Affairs of registered society shall be administered and managed by committee appointed by members. (§6[2]).

Money Lending.

Registered society may lend money to its members where its objects include lending of money to members. Bye-laws of society must, in such case, make provisions dealing with conditions on which loans may be granted, including: rate of interest; maximum amount which may be lent to member; maximum period which can be granted for repayment of loan; extension of term for repayment of loans; purpose for which loan can be granted; and consequences of default in payment or repayment of any sum due on account of shares or loans and consequences of failure to use loan for purpose for which it is granted. (§11[3]). Provisions of Money Lender's Law of state shall not apply to registered society. (§55[1]).

Lending to Non-members is prohibited. (§30).

Contracts with Members.

Registered society whose objects include disposal of any article produced or obtained by work or industry of its members whether it is product of agriculture, animal husbandry, forestry, fisheries, handicraft or otherwise may by its bye-laws or by contract with its members require: that every member who produces article shall dispose of whole or any specified amount or quantity to or through society; and that member who is proved or adjudged in such manner as may be prescribed by regulations to have committed breach of bye-laws or contract shall pay to society as liquidated damages sum ascertained or assessed in such manner as may be prescribed by regulations. (§14[1]). No contract entered into under this provision shall be contested in any court on ground only that it constitutes contract in restraint of trade. (§14[2]).

Charge and Set Off in Respect of Shares of Members.

Registered society shall have charge: upon shares or interests in capital and on deposits of member; and upon any dividend, bonus or profits payable to member, in respect of any debt due to society from member and may set off any sum credited or payable to member in or towards payment of any debt. (§16).

Shares or Interest Not Liable to Attachment.

But for few exceptions, share or interest of member in capital of registered society shall not be liable to attachment or sale under any decree or order of court in respect of any debt or liability incurred by that member, and his assignee in insolvency or receiver duly appointed shall have claim on such share or interest. (§17).

Exemption from Certain Duties, Fees and Tax.

All instruments executed by or on behalf of registered society or by any officer or member of registered society, relating to business of society shall be exempted from stamp duties chargeable under Stamp Duties Act and from registration fees payable under any law, relating registration of instruments, for time being in force throughout Federation. (§20[1]). Registered society is exempted from payment of tax on profits of cooperative activities carried out with its members. (§20[2]); also §19 of Companies Income Tax Act, c. C21 LFN).

Exemption from Registration of Instruments.

Nothing in any law, for time being in force relating to registration of instruments shall apply to: any instrument relating to shares in registered society, notwithstanding that assets of society consist in whole or in part of immovable property; or debenture issued by registered society and not creating, declaring, assigning, limiting or extinguishing any right, title or interest to or in immovable property, except insofar as it entitles holder to security afforded by registered instrument whereby society has mortgaged, conveyed or otherwise transferred whole or part of its immovable property or any interest therein to trustees upon trust for benefit of holders of debenture; or any endorsement upon or transfer of debenture issued by society; or charge created in favour of registered society by member of that society in respect of produce of his agriculture or his land. (§21).

Restriction of Membership.

Except with prior consent of registered society concerned, no person shall be member of more than one registered society whose primary objective is to grant loans to its members. (§24).

Restriction on Interest of Members.

No member, other than another registered society, shall hold more than 20% of share capital of society. (§27).

Disposal of Profit.

Distribution of dividends and bonuses must be approved by Committee of the Society (§34[1]) and, in case of society with unlimited liability, must also be approved by Minister or Commissioner (§34[5]).

Settlement of Disputes.

If dispute touching business of registered society arises: among members; or between member and society, its committee or any officer, agent or servant of society; or between society and any other committee and any officer, agent or servant of society; or between society and any other registered society, dispute shall be referred to Director for settlement. (§49[1]). Director shall settle dispute, or refer it to arbitrator for disposal. (§49[3]). Appeals lie to Minister or

Commissioner, as case may be, within 30 days from date of decision and subsequent decision of Minister or Commissioner, shall be final and conclusive. (§49[6]).

Restrictions on Application of Certain Enactments.

Provisions of Money Lender's Law of state shall not apply to registered society. (§55[1]). Provisions of Arbitration Act shall not apply on any matter referred to arbitrator under provisions of this Act. (§55[2]). Provisions of Pawnbrokers Law of state shall not apply to agriculture produce or to products of handicraft man pledged, pawned or otherwise delivered to registered society by member. (§55[3]). Provisions of Companies and Allied Matters Act and Trade Unions Act shall not apply to registered society. (§55[4]).

2.02 CORPORATIONS:

Law governing corporations is Companies and Allied Matters Act c. C20 LFN. General supervision of companies is carried out by Corporate Affairs Commission pursuant to Act. Headquarters of Commission is situated at Federal Capital Territory, Abuja. (§1).

There are three types of incorporated companies: (1) company limited by shares, which is company having liability of its shareholders limited to amount, if any, unpaid on shares held by them; (2) company limited by guarantee, which is company having liability of its shareholders limited to amount that they have undertaken to contribute (or guaranteed) in event of company being wound up; (3) unlimited company, which is company not having any limit on liability of its shareholders.

Any of these may be private company or public company. (§21).

Private company is one which is stated in its memorandum of association to be private company. It must by its articles of association restrict transfer of its shares and it must not have more than 50 shareholders (excluding employees). (§22). Any company that is not private company is public company. (§24).

Company limited by guarantee may not have share capital, and may not distribute profits to its members. (§26).

Term of corporate existence is perpetual. Any two or more persons (including corporations) may form and incorporate company whether private or public. (§18).

Name of private company limited by shares must end with words “Limited”. Name of public company limited by shares must end with words “Public Limited Company”. Name of company limited by guarantee must end with words “(Limited by Guarantee)” in parenthesis. Name of unlimited company must end with words “unlimited”. Company may use abbreviations “Ltd”, “Plc”, “(Ltd/Gte)” and “Ultd” for words “Limited”, “Public Limited Company”, “(Limited by Guarantee)” and “Unlimited”, respectively. (§29).

Restriction on Use of Certain Names.

No company is to be registered by name which: (a) is identical with that by which company in existence is already registered; or (b) so nearly resembles that of company in existence as to be calculated to deceive, except where company in existence signifies its consent; or (c) contains words “Chamber of Commerce” unless it is company limited by guarantee; or (d) is capable of misleading as to nature or extent of its activities or is undesirable, offensive or otherwise contrary to public policy; or (e) would violate any existing trademark or business name registered in Nigeria unless consent of owner of trademark or business name has been obtained. (§30).

Except with consent of Commission, no company is to be registered by name which: (a) includes word “Federal”, “National”, “Regional”, “State”, “Government” or any other word which suggests or is calculated to suggest that it enjoys patronage of Government of federation or Government of state in Nigeria, as case may be, or any Ministry or Department of Government; or (b) contains word “municipal” or “chartered” or suggests or is calculated to suggest connection with any municipality or other local authority; or (c) contains word “co-operative” or words “building society”, or (d) contains word “group” or “holding”. (§30 and §579).

Company which breaches these provisions will be directed to change its name. (§31).

Reservation of Name.

Commission may on written application and on payment of prescribed fee reserve name pending registration of company or change of name by company. Such reservation is for such period as Commission thinks fit not exceeding 60 days and during period of reservation no other company is to be registered under reserved name or under any other name which in opinion of Commission bears too close, resemblance to such reserved name. (§32).

Memorandum and Articles of Association.

Every company must have memorandum of association and articles of association.

Memorandum of association should state the following: (a) name of company; (b) that registered office of company will be situated in Nigeria; (c) nature of businesses which company is authorised to conduct or if it is not formed to carry on business, nature of its objects; (d) any restriction on company's powers; (e) that company is private or public company, as case may be; (f) that liability of its members is limited by shares or by guarantee or is unlimited as case may be; (g) amount of authorised share capital, if company has share capital, and division thereof into shares of fixed amount.

In case of company limited by guarantee, memorandum will also state: (1) that company's income and property must be applied solely towards promotion of its objects and none will be paid or transferred directly or indirectly to members of company; (2) sum that each member undertakes to contribute to assets of company in event of its being wound up.

Memorandum is required to be signed by each subscriber in presence of at least one witness who will attest to signature. Memorandum must also be stamped as deed. (§27).

Articles of association prescribe regulations for company, are required to be signed by subscribers to memorandum of association and filed together with memorandum of association. (§33).

Articles of association must be signed by each subscriber in presence of at least one witness, who will attest to signature. Articles must also be stamped as deed. (§34).

Documents of Incorporation.

For company to be incorporated following documents must be delivered to Commission: (a) memorandum of association and articles of association; (b) notice of address of company's registered office and head office, if different from registered office (note that postal box address or private bag address is unacceptable); (c) statement in prescribed form containing list and particulars of persons who have consented to be company's first directors, together with their letters of consent; (d) statement of authorised capital signed by at least one director; (e) any other document required by Commission to satisfy requirements of any law relating to formation of company; (f) statutory declaration in prescribed form by legal practitioner that requirements of Act for registration of company have been complied with. (§35).

Incorporation Tax.

Stamp duty of .75% of nominal share capital is to be paid to Federal Inland Revenue Service.

Filing fees of 1% of nominal share capital is to be paid to Corporate Affairs Commission.

Share Capital Requirements.

Minimum authorised share capital is N10,000 in case of private company and N500,000 in case of public company; at least 25% of shares must be issued to shareholders at time of incorporation. (§27). This is continuing obligation and on any increase in company's share capital, company must ensure that, within six months, at least 25% of company's shares including increase has been issued to shareholders. (§103). Issued shares need not be paid up.

Amendment of Articles.

Company may by special resolution alter or add to its articles. Any alteration or addition so made is valid as if originally contained in articles. (§48).

However, save to extent to which member of company agrees in writing at any time to be bound, such member will not be bound by any alteration made in memorandum or articles of company requiring him on or after date of alteration to: (a) take or subscribe for more shares than he held at date on which he became member; (b) or increase his liability to contribute to share capital of company; (c) or pay money by any other means to company. (§49).

Increase or Decrease of Authorised Capital.

Company having share capital may in general meeting and not otherwise increase its share capital by new shares of such amount as it thinks necessary. Notice of increase must be given to Commission within 15 days after passing of resolution authorising increase. (§102).

Increase may be by ordinary resolution, unless articles provide otherwise. (§233[6]).

Company may reduce its share capital by special resolution, if it is authorised by its articles and such reduction will be subject to confirmation by court. Such reduction can be done in any of following ways: (a) by extinguishing or reducing liability on shares in respect of share capital not paid up; (b) or cancellation of any paid up share capital which is lost or unrepresented by available assets; (c) or paying off any paid up share capital which is in excess of wants of company. (§106).

Where company has passed resolution for reduction of capital, it may apply to court for order confirming reduction. (§107).

Shares or other interests in company constitute property transferable in manner provided in articles of association. (§115). Every share must carry right to attend any general meeting of company and vote at such meeting. (§114). With exception of preference shares, every share must carry right to one vote at all general meetings and shares may not be issued which carry more than one vote or which do not carry any right to vote. (§116). In following circumstances only, articles of company may provide that preference share is to carry right to more than one vote: (a) Upon any resolution during such period as any portion of preferential dividend is in arrears; or (b) upon any resolution which varies rights attached to preference shares; or (c) upon any resolution to remove auditor or to appoint another auditor; or (d) upon any resolution for winding up or during winding up of company. (§143).

Company may, issue classes of shares which have preferred, deferred or other special rights or which have restrictions on dividend, return of capital or restrictions on such other benefits as accrue to other shares. (§119).

Company limited by shares may, if its articles so authorise, issue redeemable preference shares. (§122).

Share certificate should have company's common seal and identify shares to which it relates and amount paid up on them. (§146[3]). Certificate, under common seal of company, is prima facie evidence of title to shares. (§147[1]).

Allotment of Shares.

Power to allot shares is vested in shareholders at general meeting but they may delegate it to directors. (§124).

Whenever company limited by shares makes any allotment of its shares, company shall within one month thereafter deliver to Commission for registration return of allotments stating number and nominal amount of shares comprised in allotment, names, addresses and description of allottees, and amount, if any, paid or due and payable on each share. (§129).

Payment for shares on allotment may be in cash or, if articles permit, other valuable consideration or partly in cash and partly in consideration other than cash. (§135). Where consideration other than cash, independent valuer should be appointed to determine true value of consideration. (§137). Company must not give financial assistance for purchase of its shares (§159[2]) except: (a) where company lends money in ordinary course of its business and lending of money is part of business of company; (b) where company provides money in accordance with scheme to purchase shares for benefit of employees of company; (c) where company makes loans to bona fide employees (except directors) to enable them to purchase shares (§159[3]).

At Premium.

Shares of company may be issued at premium. (§120[1]). Where company issues shares at premium, sum equal to premium must be transferred to “share premium account”. Rules relating to reduction of share capital of company, apply (with few exceptions) as if share premium account were paid up share capital of company. (§120[2]). Exceptions are: share premium account may be applied by company (i) in paying up issued shares of company to be issued to members of company as fully paid bonus shares, (ii) in writing off preliminary expenses of company, or expenses of, or commission paid or discount allowed on, any issue of shares of company, or (iii) in providing for premium payable on redemption of any redeemable shares of company. (§120[3]).

At Discount.

Company may issue shares at discount on condition that (a) issue of shares a discount is authorised by resolution passed in general meeting of company, and thereafter is sanctioned by court; (b) resolution specifies maximum rate of discount at which shares are to be issued; and (c) shares to be issued at discount are issued within one month after date on which issue is sanctioned by court or within such extended time as court may allow. (§121[1]).

Transfer of shares must be by instrument of transfer and, except as expressly provided in articles, transfer of shares shall be without restrictions. (§151[1]). Instrument of transfer must be executed by or on behalf of transferor and transferee; transferor remains holder of shares until name of transferee is entered in register of members. (§§151[3] & 152[3]).

Company may not register transfer of shares, unless proper instrument of transfer has been delivered to company. (§151[2]). Company may refuse to register transfer of share (not being fully paid share) to person of whom company does not approve, and may also refuse to register transfer of share on which company has lien. (§152[3]). If company refuses to register transfer of shares it must within two months send notice of refusal to transferee. (§153).

Share Transfer Tax.

None.

Share Repurchase.

Provision of financial assistance by company for acquisition of its shares is permitted only in following cases: (a) lending of money by company in ordinary course of its business, where lending of money is part of ordinary business of company; (b) provision by company, in accordance with any scheme for time being in force, of money for purchase of, or subscription for, fully-paid shares in company or its holding company, to be held by or for benefit of employees of company, including any director holding salaried employment or office in company; (c) making by company of loans to persons, other than directors, bona fide in employment of company with view to enabling those persons to purchase or subscribe for fully-paid shares in company or its holding company, to be held by such persons beneficially. (§159).

Company may not purchase or otherwise acquire shares issued by it except for purpose of: (a) settling or compromising debt or claim asserted by or against company; (b) eliminating fractional shares; (c) fulfilling terms of non-assignable agreement under which company has option or is obliged to purchase shares owned by officer or employee of company; (d) satisfying claim of dissenting shareholder; (e) complying with court order. (§160).

For company to purchase its own shares, it must comply with following conditions: (a) shares may only be purchased out of profits of company which would otherwise be available for dividend or proceeds of fresh issue of shares made for purpose of purchase; (b) redeemable shares may not be purchased at price greater than lowest price at which they are redeemable; and (c) no purchase may be made whereby total number of company's shares, or of its shares of any one class, held by persons other than company or its nominees become less than 85% of total number of shares, or of shares of that class which have been issued. (§§161 & 162).

Redeemable Shares.

Company may redeem its redeemable preference shares only out of (a) profits which would otherwise have been available for dividend; or (b) proceeds of fresh issue of shares made for purpose of redemption. (§158[1] & [2]). Redemption of preference shares shall not be taken as reducing authorised share capital. (§158[6]).

Where shares in company are redeemed, purchased, acquired or forfeited, such shares shall unless company by alteration of its articles of association cancels shares be available for reissue by company. (§164).

Shareholders' Liabilities.

Prior to winding up of company, liability of member is limited to amount, if any, unpaid on shares. If company is being wound up, present or past members may be required to contribute to payments of company's debts and liabilities and for costs, charges and expenses of winding up; liability is limited to amount, if any, unpaid on shares. (§92).

Shareholders' Meetings.

In addition to any other meetings, company must each year hold general meeting as its annual general meeting. (§213).

Every member is entitled to attend any general meeting of company and to speak and vote on any resolution before meeting. (§81).

All statutory and annual general meetings must be held in Nigeria. (§216).

Notice required for all types of general meetings is 21 days from date of dispatch of notice. Members may agree to shorter notice. (§217).

Notice of meeting to specify place, date, time of meeting and nature of agenda. (§218). Every member entitled to receive notice of general meeting. (§219). Where notice is sent by post, service is deemed to have been effected seven days after posting. (§220[2]).

Board of directors may convene extraordinary general meeting whenever it deems fit, and if at any time there are not sufficient directors within Nigeria capable of acting to form quorum, any director may convene extraordinary general meeting. (§215[1]). Extraordinary general meeting may also be requisitioned by shareholders holding not less than one-tenth of paid up capital, or in case of company not having share capital, members of company representing not less than one-tenth of total voting rights. (§215[2]).

Proxies.

Any member of company entitled to attend and vote at meeting of company is entitled to appoint another person (whether member or not) as his proxy to attend and vote instead of member. Such proxies shall have same right as member to speak at meeting. (§230).

Resolutions.

Resolution shall be ordinary resolution when it has been passed by simple majority of votes cast by such members of company as, being entitled to do so, vote in person or by proxy at general meeting. (§233[1]).

Resolution shall be special resolution when it has been passed by not less than three-fourths of votes cast by such members of company as, being entitled to do so, vote in person or by proxy at general meeting of which 21 days' notice, specifying intention to propose resolution as special resolution, has been duly given.

Provided that, if it is so agreed by majority in number of members having right to attend and vote at any such meeting, being majority together holding not less than 95% in nominal value of shares giving that right or, in case of company not having share capital, together representing not less than 95% of total voting rights at that meeting of all members, resolution may be proposed and passed as special resolution at meeting of which less than 21 days' notice has been given. (§233[2]).

At any meeting at which special resolution is submitted to be passed, declaration of chairman that resolution is carried shall, unless poll is demanded, be conclusive evidence of fact without proof of number or proportion of votes recorded in favour of or against resolution. (§233[3]).

In computing majority of poll demanded on question that special resolution be passed, reference shall be had to number of votes cast for and against resolution.

For purposes of this section, notice of meeting shall be deemed to be duly given and meeting to be duly held when notice is given and meeting held in manner provided by Act or articles. (§233[5]).

Company may, by its articles provide that any matter not required by articles or by Act to be passed by special resolution shall be passed by ordinary resolution.

All resolutions shall be passed at general meetings and shall not be effective unless so passed: Provided that in case of private company written resolution signed by all members entitled to attend and vote shall be as valid and effective as if passed in general meeting. (§234).

Matters Requiring Special Resolution: (1) Alteration of memorandum or articles of association (§§46[1] and 48[1]); (2) changing name of company (§31[3]); (3) reduction of authorised share capital (§106[1]); (4) making liability of directors unlimited (§289); (5) winding up of company (§§408[a] and 457[b]); (6) authorising liquidator, on sale of undertaking of company, to receive shares, policies or similar interests as consideration for distribution among members (§538); (7) reregistration of unlimited company as company limited by shares (§52[1]); (8) reregistration of private company as public company (§50); (9) reregistration of public company as private company (§53[1]); (10) reregistration of company limited by shares as unlimited company (§§51 and 46[1]).

Minutes of Meeting.

Every company shall: record minutes of all proceedings of general meetings, all proceedings at meetings of its directors, and where there are managers, all proceedings at meetings of its managers in books kept for that purpose. (§241[1]).

Any such minute if purporting to be signed by chairman of meeting at which proceedings were held, or by chairman of next succeeding meeting, shall be prima facie evidence of proceedings. (§241[2]).

Where minutes have been made, in accordance with provisions of this section, of proceedings at any general meeting of company or meeting of directors or managers, then, until contrary is proved, meeting shall be deemed to have been duly held and convened, and all proceedings had at meeting to have been duly had, and all appointments of directors, managers or liquidators shall be deemed to be valid. (§241[3]).

If company fails to keep minutes of meetings as required by Act, company and every officer of company who is in default shall be guilty of offence and liable to fine of N500. (§241[4]).

Books containing minutes of proceedings of any general meeting of company are to be kept at registered office of company and must during business hours be open to inspection by members without charge. On request, any member is entitled to be furnished with certified copy of such minutes at prescribed charge. (§242).

Directors.

Every company must have at least two directors. (§246).

Board of directors may appoint new directors to fill any casual vacancy arising out of death, resignation, retirement or removal of director. Where such vacancy is filled, appointment must be approved at next annual general meeting. Directors may also appoint additional directors so long as total number of directors does not exceed maximum allowed by articles but general meeting has power to increase or reduce number of directors generally. (§249).

Appointment or removal of director, or any other change among directors must be reported to Commission. (§292[4], [5]).

Board Meetings.

Directors may meet for conduct of business of company and may regulate their meetings as they think fit. First meeting of directors to be held not later than six months after incorporation of company. (§263[1]). Director may, and secretary on requisition of director shall, at any time summon meeting of directors. (§263[3]).

Directors may elect chairman of their meetings or choose chairman from meeting to meeting. (§263[4]). Directors may delegate any of their powers to managing director. (§263[5]).

Resolution in writing, signed by all directors for time being entitled to receive notice of meeting of directors, shall be as valid and effective as if it had been passed at meeting of directors duly convened and held. (§263[8]).

In all director's meetings, each director shall be entitled to one vote. (§263[9]). Any question arising at any meeting shall be decided by majority of votes, and in case of equality of votes, chairman shall have second or casting vote. (§263[2]).

Quorum.

Unless articles of company otherwise provide, quorum necessary for transaction of business of directors is two where there are not more than six directors, but where there are more than six directors, quorum is to be one-third of number of directors and where number of directors is not multiple of three, then quorum shall be one-third to nearest number. (§264).

Where board is unable to act because quorum cannot be formed, general meeting may act in place of board. (§265).

Notice of Board Meetings.

Unless articles provide otherwise, it shall not be necessary to give notice of meeting of directors to any director for time being absent from Nigeria unless he has provided address in Nigeria for service of such notice. Every other director is entitled to receive notice of directors' meetings, unless he is disqualified by any reason under Act from continuing with office of director. Unless otherwise provided in articles, 14 days' notice in writing is required to be given to all directors to attend directors' meetings. Failure to give notice invalidates meeting. (§266).

Powers and Duties of Directors.

Company acts through its members in general meeting or its board of directors. Respective powers of members in general meeting and board of directors is determined by company's articles.

Except as otherwise provided in articles, business of company is to be managed by board of directors who may exercise all such power of company not required by Act or articles to be exercised by members in general meeting. (§63).

Unless otherwise provided in Act or articles, directors may exercise their powers through committees or managing director. (§64).

Director of company stands in fiduciary relationship towards company and is to observe utmost good faith towards company in any transaction with it or on its behalf. (§279[1]).

Director is to act at all times in what he believes to be best interests of company as whole so as to preserve its assets, further its business and promote purposes for which it is formed.

Director must exercise his powers for purpose for which it is conferred and must not do so for collateral purpose. If power is exercised for right purpose it does not constitute breach of duty even if incidentally it affects member adversely. (§279[5]).

Directors are under duty not to fetter their discretion to vote in particular way. (§279[6]).

Director is not to allow his personal interest to conflict with any of his duties as director under Act.

Director must not in management of affairs of company or in utilisation of company's property make any secret profit or achieve other unnecessary benefits, otherwise he will be accountable to company for such secret profit or benefit derived. (§280).

Where person holds multiple directorships, he is still under fiduciary duty to each company including duty not to use property, opportunity or information obtained in course of management of one company for benefit of another company. (§281).

Every director of company must exercise his powers and discharge his duties honestly, in good faith and in best interest of company and must exercise that degree of care, diligence and skill which reasonably prudent director would exercise in comparable circumstances. (§282).

Director are trustees of company's moneys, properties and their powers and as such must account for all moneys over which they exercise control and must refund any moneys improperly paid away, and must exercise their powers honestly in interest of company and of all shareholders, and not in their own or sectional interests. (§283).

Director must not accept bribes, gifts or commissions either in cash or kind from any person or share in profit of that person in respect of any transaction involving his company in order to introduce his company to deal with such person. (§287).

Liabilities of Directors.

In limited company, liability of directors may, if so provided by memorandum, be unlimited. (§288). Limited company, if so authorised by its articles, may by special resolution alter its memorandum so as to render unlimited liability of its directors. (§289).

Where company receives money by way of loan for specific purpose or receives money or other property by way of advance payment for execution of contract or project and with intent to defraud, fails to apply money or property for specified purpose, every director or officer of company who is in default will be personally liable to party from whom money or property was received for refund of money or property. (§290).

Officers.

Company Secretary.

Every company must have secretary. (§293[1]). Upon appointment of secretary, notice of appointment, name and particulars of secretary must be filed with Commission. (§292[4] & [5]).

Duties of company secretary, include: (a) attending meetings of shareholders and meeting of board of directors and its committees; rendering all necessary secretarial services in respect of meeting and advising on compliance by meetings with applicable rules and regulations; (b) maintaining registers and other records required to be maintained by company; (c) rendering proper returns and giving other necessary notification to Commission; and (d) carrying out such other administrative and other secretarial duties as directed by directors, or company. (§298[1]).

Auditors.

Every company must appoint auditors to audit financial statements. (§357[1]). First auditors of company may be appointed by directors at any time before company is entitled to commence business and auditors so appointed may hold office until conclusion of next annual general meeting. (§357[5]).

In preparing audit report auditors must carry out such investigations as may enable them to determine whether proper accounting records have been kept by company; whether proper returns adequate for audit have been received from company's branches not visited by auditors; and whether company's balance sheet and profit and loss account are in agreement with accounting records and returns. (§360[1]). If auditors are not satisfied, this fact is to be stated in their report. (§360[2]).

Auditor has right of access at all times to company's books, accounts and vouchers, and is entitled to require from company such information and explanations as he thinks necessary for performance of auditor's duties. (§360[3]).

It is auditor's duty to confirm whether directors' report is consistent with audited accounts; and if auditor is of opinion that it is not so, he should state that fact in audit report. (§360[5]).

Auditor is entitled to attend any general meeting of company and to receive all notices of and other communications relating to any general meeting that shareholder of company is entitled to receive and to be heard at any general meeting on any part of business of meeting that concerns auditors. (§363).

Powers of Company.

Unless company's memorandum otherwise provides, every company in furtherance of its authorised business or objects has all powers of natural person of full capacity (§38[1]); however, company is prohibited from making donation or gift of any of its property or funds to political party or political association or for any political purpose; in case of breach, officers in default and any member who voted for breach are jointly and severally liable to refund to company sum or value of donation or gift and in addition, company and every such officer or member is guilty of offence and liable to fine equivalent to amount or value of donation or gift (§38[2]).

Ultra Vires Acts.

Company is not allowed to carry on any business not authorised by its memorandum. (§39[1]). Nevertheless, no act of company and no conveyance or transfer of property to or by company may be invalidated on ground that such act, conveyance or transfer was not done or made for furtherance of any of authorised business of company or that company was otherwise exceeding its objects or powers. (§39[3]).

On application of any shareholder, or holder of any debenture secured by floating charge over company's property, court may prohibit by injunction doing of any act or conveyance or transfer of any property not authorised by company's memorandum. (§39[4]).

Any provision in memorandum of company restricting powers and capacity of company to carry on its authorised business or object may be relied on and have effect only for purpose of: (a) proceedings against company by director or shareholder or by holder of debentures secured by floating charge; (b) proceedings by company or shareholder against present of former officers of company for failure to observe any such restriction; (c) proceedings by Commission or shareholder to wind up company; (d) proceedings for purpose of restraining company or other person from acting in breach of memorandum or directing company or such person to comply with memorandum. (§40[1]).

Liability of Company for Acts of Its Agents.

Any act of shareholders in general meeting, board of directors or managing director, while carrying on in usual way business of company is deemed act of company and company is liable therefor, unless person dealing with company had actual or implicit knowledge that general meeting, board of directors or managing director did not have power to act or acted in irregular manner. (§65). But acts of other officers or agents of company are not deemed to be acts of company unless: (a) company acting through members in general meeting, board of directors, or managing director have expressly or impliedly authorised such officer or agent to act; or (b) company has represented officer or agent as having its authority to act. (§66[1]). Authority may be conferred after fact by ratification or acquiescence. (§66[2]). Notwithstanding absence of express authority, company remains vicariously liable for acts of its servants while acting within scope of their employment. (§66[3]).

Any provision, whether contained in articles of company or in contract with company or contained anywhere else, that exempts any officer of company or company's auditor from liability, or indemnifies him against any liability which ought to attach to him, in respect of any negligence, default or breach of trust of which he may be guilty in relation to company is void. (§67).

Person is not deemed to have knowledge of contents of memorandum and articles of company or of any other particulars, documents or contents of documents merely because such particulars or documents are registered by Commission or referred to in any particulars or documents so registered or are available for inspection at company's office. (§68). This provision has effect of abolishing common law doctrine of constructive notice of registered documents.

Any person dealing with company or with someone deriving title under company entitled to make following assumptions and company and those deriving title under it are estopped from denying their truth: (a) company's memorandum and articles have been duly complied with; (b) every person described in particulars filed with commission as director, managing director or secretary or represented by company as officer or agent of company has been duly appointed and has authority to exercise powers and perform duties customarily exercised or performed by director, managing director, secretary, officer or agent of type concerned; (c) secretary and every officer or agent of company having authority to issue documents or certified copies of documents on behalf of company has authority to warrant genuineness of documents or accuracy of copies so issued; (d) document has been duly sealed by company if it bears what purports to be seal of company attested by what purports to be signatures of two persons who in accordance with paragraph (b) above can be assumed to be director and secretary of company. Person not entitled to make such assumptions if he has actual knowledge to contrary or if having regard to his position with or relationship to company he ought to have known contrary. (§69).

Where company would be liable to third party for acts of any officer or agent, company shall, except where there is collusion between officer or agent and third party, be liable notwithstanding that officer or agent acted fraudulently or forged document purporting to be sealed by or signed on behalf of company. (§70).

Dividends.

Company may in general meeting declare dividends in respect of any year or other period only on recommendation of board of directors. Company may from time to time pay to members such interim dividends as appear to directors to be justified by profits of company. General meeting has power to decrease amount of dividend recommended by directors but has no power to increase recommended amount. Dividends to be payable only out of distributable profits of company. (§379). However, company may not declare or pay dividend if there are reasonable grounds for believing that company is or would be, after payment, unable to pay its liabilities as they become due. (§381).

Where dividend is unclaimed, company may invest such dividend to its benefit. Company is not obliged to account for any interest or other gain arising from such investment. (§382).

Books and Records.

Every company must keep register of its members and enter in it following particulars: (a) names and addresses of members, and in case of company having share capital statement of shares and class of shares, if any held by each member; (b) date on which each person was registered as member; (c) and date on which any person ceased to be member. (§83).

Register of members is to be kept at registered office of company, except where work of making it up is done at another office of company, it may be kept at that other office.

Every company must send notice to Commission of place where register is kept and of any change of that place. (§84).

Every company having more than 50 members, must keep index of names of members of company, unless register of members is in such form as to constitute in itself index. Index must, at all times be kept at same place as register of members. (§85).

Except when register of members is closed under provisions of Act, register and index of members' names must be open during business hours to inspection of any member of company without charge, and with permission of company to any other person on payment of N1 or any less sum as company may prescribe for each inspection. Any member or any other person with permission of company, may require copy of register, or of any part thereof on payment of fee. (§87).

Public company is to keep register in which it must enter its substantial shareholders which will contain in alphabetical order names and addresses of shareholders and full particulars of shares held by them. This is known as register of interests in shares. Register is to be kept at place where register of members is required to be kept under §84 of Act and subject to same right of inspection as register of members. (§97).

Every company is to cause copy of every instrument creating any charge requiring registration under Act to be kept at registered office of company. (§190).

Every limited company must keep at registered office of company, register of charges and enter therein all charges specifically affecting property of company and all floating charges on undertaking or any property of company. (§191).

Copies of instruments creating any charge requiring registration with Commission under Act and register of charges kept pursuant to §191 of Act, must be open during business hours to inspection by any creditor or member of company without fee. (§192).

Company which issues or has issued debentures must maintain register of holders. Register to show names and addresses of debenture holders; principal of debentures held by each of them; amount or highest amount of any premium payable on redemption of debentures; issue price of debenture and amount paid up on issue price etc. (§193).

Every register of holders of debentures of company must, except when duly closed, be open to inspection of registered holder of any such debentures or any holder of shares in company without fee. Any such registered holder of debentures or any other person may require copy of register of holders of debentures of company or any part thereof on payment of fee. (§194).

Every company must keep register showing as regards each director of company, number, description and amount of any shares in or debentures of company, which are held by or in trust for director. (§275).

Every company must keep at its registered office, register of its directors and secretaries. With respect to each director, register will contain following particulars: his present forename and surname, any former forename, his usual residential address, his nationality, his business occupation, if any, particulars of any other directorships held by him and date of his birth.

With respect to secretary, if individual, register will contain following particulars: his present forename and surname, any former forenames and surnames and his usual residential address; and in case of corporate secretary, its registered name and registered or head office. Register must during business hours be open to inspection by any member of company without charge and by any other person on payment of prescribed fee. (§292).

Every company must cause accounting records to be kept. Accounting records must disclose with reasonable accuracy, at any time, financial position of company. (§331).

Accounting records of company must be kept at its registered office or such other place in Nigeria as directors think fit and must at all times be open to inspection by officers of company. Records will be preserved by company for period of six years from date of making. (§332).

Annual Returns.

By virtue of §§370 and 374 of Act, all registered companies are required to complete annual return within 42 days after annual general meeting for year, and forward this to Corporate Affairs Commission. Annual returns are to include: (a) In case of company having share capital: (i) name of company, (ii) address of registered office of company, (iii) situation of registers of members and debenture holders, (iv) summary of share capital and debentures, (v) particulars of indebtedness of company, (vi) list of past and present members of company, (vii) particulars of directors and secretary; (b) in case of company limited by guarantee: (i) address of company, (ii) situation of registers of members and debenture holders, (iii) particulars of indebtedness of company, (iv) particulars of directors and secretary.

Annual return shall be accompanied by following documents: (a) written copy, certified both by director and by secretary of company to be true copy, of every balance sheet and profit and loss account laid before company in general meeting held in year to which return relates; (b) copy certified as aforesaid, of report of auditors on, and of report of directors accompanying, each such balance sheet; (c) private company shall send with annual return certificate signed by both director and by secretary of company that company has not since date of last return, or, in case of first return, since incorporation of company, issued any invitation to public for any shares or debentures of company, and, where annual return discloses fact that number of members of company exceeds 50, also certificate so signed that excess consists wholly of persons who are not included in reckoning number of 50. (§376). Unlimited company is exempted from requirements imposed by this Act as to documents to be annexed to annual return unless it is subsidiary of or holding company of limited company. (§377[1]).

Other Returns.

(1) Under §553 of Act, insurance companies, banks, deposit, provident or benefit societies are required to make returns to Corporate Affairs Commission in prescribed form before commencing business and also on first Mon. in Feb. and first Tues. in Aug. each year. Returns are to include: (a) Authorised nominal share capital; (b) number of shares issued; (c) number of shares paid up; (d) assets and liabilities of company.

(2) All insurance companies in Nigeria are required to submit in writing to National Insurance Commission (NAICOM) not later than 30th Sept. of each year statement containing following: (a) Balance sheet, duly audited, showing financial position of insurance business of company at close of that year, together with copy of relevant profit and loss account which insurer is to present to its shareholders at its annual general meeting; (b) revenue account applicable to

each class of insurance business for which insurer is required to keep separate account of receipts and payments; and (c) statement of investments representing insurance funds. (§26[1] Insurance Act c. I17 LFN).

In addition to foregoing, life insurance companies are required to submit to Commission, following every three years: (a) abstract of report of actuary and valuation report of insurance business; (b) summary and valuation of life policies; and (c) table showing premiums, policy reserve values and guarantee surrender values, together with relationship between premiums paid and such guaranteed surrender values; (d) certificate of solvency signed by actuary stating that value of assets representing funds maintained by insurer in respect of their insurance business exceeds value of liabilities. (§27[1] Insurance Act).

Life insurance companies shall at expiration of each year: (a) prepare with reference to that year, in prescribed form, statement and exhibit of life policies; and (b) submit statement and exhibit together with such other documents and information relating to relevant accounts and balance sheet (including copies of reports on affairs of insurer for year as submitted to policyholders of insurer) as Commission may, from time to time, require. (§27[3] Insurance Act).

Insurance company shall each year, after receipt of approval mentioned above, publish its general annual balance sheet together with its profit and loss accounts in at least one newspaper having wide circulation in Nigeria. (§27[6] Insurance Act).

Corporate Bonds or Mortgages.

Where company creates: (a) charge for purpose of securing any issue of debentures; (b) charge on uncalled share capital of company; (c) charge created or evidenced by instrument which if executed by individual would require registration as bill of sale; (d) charge on land, wherever situated or any interest therein, but not including charge for rent or other periodical sum issuing out of land; (e) charge on book debts of company; (f) floating charge on undertaking or property of company; (g) charge on unpaid calls; (h) charge on ship or aircraft or any share in ship; or (i) charge on goodwill, on patent or licence under patent, on trademark or on copyright or licence under copyright; charge shall so far as any security on company's property or undertaking is conferred be void against liquidator and any creditor of company, unless particulars of charge together with instrument, if any, by which charge is created or evidenced, are filed with Commission within 90 days. (§197).

Charge Securing Fluctuating Amount.

Where charge is expressed to secure all sums due or to become due or some other uncertain fluctuating amount, maximum sum deemed to be secured by charge must be filed with Commission; any excess over stated maximum will not be secured by such charge. (§202).

Merger and Consolidation.

Majority of shareholders representing not less than three quarters in value of shares must approve. (§539[2]). See also category 3 Business Regulation and Commerce, topic 3.03 Monopolies, Restraint of Trade and Competition.

Dissolution.

Winding up of company may be effected by court, voluntarily or subject to supervision of court. (§401).

Company may be wound up by court if (a) company has by special resolution resolved that company be wound up by court; (b) default is made in delivering statutory report to commission or in holding statutory meeting; (c) number of members is reduced below two; (d) company is unable to pay its debts; (e) court is of opinion that it is just and equitable that company should be wound up. (§408).

Company may be wound up voluntarily (a) when period, if any, fixed for duration of company by articles expires, event occurs which articles provide will cause company to be dissolved, or company in general meeting has passed resolution requiring company to be wound up voluntarily; (b) if company resolves by special resolution that company be wound up voluntarily (§457); or (c) by its creditors (§§471-478).

Not-for-profit Corporations.

There are two types of not-for-profit corporations.

(i) Company Limited by Guarantee.

Where company is to be formed for promoting commerce, art, science, religion, sports, culture, education, research, charity or other similar objects, and income and property of company are to be applied solely towards promotion of its objects and no portion thereof is to be paid or transferred directly or indirectly to members of company except as permitted by this Act, company shall not be registered as company limited by shares, but may be registered as company limited by guarantee. (§26[1]; Companies and Allied Matters Act c. C20 LFN).

As from commencement of this Act, company limited by guarantee shall not be registered with share capital; and every existing company limited by guarantee and having share capital shall, not later than appointed day alter its memorandum so that it becomes company limited by guarantee not having share capital. (§26[2]).

In case of company limited by guarantee, every provision in memorandum or articles or in any resolution of company purporting to give any person right to participate in divisible profits of company or purporting to divide company's undertaking into shares or interests shall be void. (§26[3]).

Company limited by guarantee shall not be incorporated with object of carrying on business for purpose of making profits for distribution to members. (§26[4]).

Company limited by guarantee shall not be registered without authority of Attorney-General of Federation. (§26[5]).

If any company limited by guarantee carries on business for purpose of distributing profits, all officers and members thereof who are cognisant of fact that it is so carrying on business shall be jointly and severally liable for payment and discharge of all debts and liabilities of company incurred in carrying on such business, and company and every such officer and member shall be liable to fine not exceeding N100 for every day during which it carries on such business. (§26[6]).

If, upon winding up company limited by guarantee, there remains after discharge of all its debts and liabilities any property of company, same shall not be distributed among members but shall be transferred to some other company limited by guarantee having objects similar to objects of company or applied to some charitable object and such other company or charity shall be determined by members prior to dissolution of company. (§26[10]).

(ii) Incorporated Trustees.

Where community or body or association of persons established for any religious, educational, literary, scientific, social, development, cultural, sporting or charitable purpose, such body or association may appoint one or more trustees and such trustees may apply to Corporate Affairs Commission for registration as corporate body. Upon being so registered, trustee or trustees shall become corporate body (§590), have power to sue and be sued in its corporate name and such trustee or trustees shall subject to §602 of Act, have power to hold and acquire and transfer, assign or otherwise dispose of any property or interests therein belonging to, or held for benefit of such association in such manner and subject to such transfer, assign or otherwise dispose of same for purposes of such community, body or association of persons (§596[1]).

Name of incorporated body or association must contain words "Incorporated Trustees of . . . . ". (§591[1][a]).

Certificate of incorporation vests in incorporated association all property and interests of whatever nature or tenure belonging to or held by any person in trust for such community, body or association of persons. (§596[2]).

Association may appoint council or governing body which must include trustees and may, assign to it such administrative and management functions that association deems expedient. (§601).

Powers vested in trustees shall be exercised subject to directions of association, or of council or governing body as case may be. (§602).

Income and property of body or association whose trustee or trustees are incorporated must be applied solely towards promotion of objects of body as set out in this constitution and no portion may be paid or transferred directly or indirectly, by way of dividend, bonus, or otherwise by way of profit to any of members of association. (§603[1]). However, payment, in good faith, of reasonable and proper remuneration to officer of servant of body in return for any service actually rendered to body or association is permitted. (§603[2]).

Trustees of association must submit to Commission annual return showing, among other things, name of incorporated association, names, addresses and occupations of trustees, and members of its council or governing body, particulars of any land held by body or association during year, and any changes which have taken place in constitution of association and this is to be submitted not earlier than 30th June or later than 31st day of Dec. each year (other than year of incorporation). (§607[1]).

If trustees fail to comply with this provision, they will be liable to fine. (§607[2]).

Incorporated body or association may be dissolved by court on petition brought for that purpose by: governing body or council of association; or any one or more trustees; or members of association constituting not less than 50% of total membership; or Commission. (§608[1]).

Grounds upon which body or association may be dissolved are: That aims and objects for which it was established have been fully realised and no useful purpose would be served by keeping corporation alive; that body or association is formed to exist for specified period and that period has expired and it is not necessary for it to continue to exist; that all aims and objects of association have become illegal or otherwise contrary to public policy; and that it is just and equitable in all circumstances that body or association be dissolved. (§608[2]).

If in event of winding up or dissolution of body or association there remains after satisfaction of all its debt and liabilities, any property whatsoever, such property is to be given or transferred to some other institution having objects similar to objects of body or association. Recipient of such institution is to be determined by members of body or association at or before time of dissolution. If effect cannot be given to this provision, property is to be transferred to any charitable object. (§608[4] & [5]).

Act Prevails over Other Instruments.

Provisions of Act override memorandum or articles of association of company, or any agreement entered into or any resolution passed by company. (§542).

2.03 FOREIGN CORPORATIONS:

Foreign company wishing to set up business in Nigeria must incorporate separate entity in Nigeria. Until so incorporated, such company may not carry on business in Nigeria or exercise any of powers of registered company unless it has obtained exemption from local incorporation. (§54).

Exemption from local incorporation is available only to following categories of foreign companies, upon application: (a) Foreign companies invited to Nigeria by or with approval of Federal Government of Nigeria to execute any specified individual project; (b) foreign companies which are in Nigeria for execution of specific individual loan project on behalf of donor country or international organisation; (c) foreign government-owned companies engaged solely in export promotion activities; and (d) engineering consultants and technical experts engaged in any individual specialist project under contract with any of governments in Federation or any of their agencies or with any other body or person, where such contract has been approved by Federal Government. (§56[1]).

Application for exemption should be addressed to Secretary to Federal Government and should contain following information: (a) name and place of business of foreign company outside Nigeria; (b) name and place of business or proposed name and place of business of foreign company in Nigeria; (c) name and address of each director, partner or other principal officer of foreign company; (d) certified copy of charter, statutes or Memorandum and Articles of Association of company, or other instrument constituting or defining constitution of company; (e) names and addresses of some one or more persons resident in Nigeria authorised to accept on behalf of foreign company services of process and notices required to be served on company; (f) business or proposed business in Nigeria of foreign company and duration of such business; (g) particulars of any project previously carried out by company as exempted foreign company; and (h) such other particulars as may be required by Secretary to Federal Government. (§56[2]).

Under category Foreign Trade and Commerce, see topic Foreign Investment.

See category 17 Taxation, topics 17.08 Income Tax, subhead Income Tax on Companies; 17.15 Tax Incentives and Exemptions, subhead Pioneer Industry Status.

2.04 LIMITED LIABILITY COMPANIES:

See topic 2.02 Corporations.

2.05 PARTNERSHIPS:

In states of Nigeria which have no partnership laws, law of partnership is governed by Partnership Act 1890 of U.K. Some states (e.g. Lagos State) have own partnership laws which are variants of 1890 Act. Lagos State Partnership Law c. P1 Laws of Lagos State 2003 as amended by Partnership (Amendment) Law 2009, provides for limited partnerships and limited liability partnerships which must be registered at Registry of Limited Partnerships in Lagos.

Formation.

Except in case of lawyers and accountants, partnership consisting of more than 20 persons must be incorporated. (§19 Companies and Allied Matters Act c. C20 LFN). Partner may be corporate body. Partnership agreement may be oral or made in writing, by deed, or even by conduct. In practice it is desirable for agreement to be set out in writing, so that terms may be clearly known; such agreement is necessary for purpose of income tax.

Name.

See category 14 Intellectual Property, topic 14.04 Trademarks and Tradenames. In Lagos State, all registered limited partnerships and limited liability partnerships must use abbreviations ``LP'' and ``LLP'' respectively after partnership name. (§64 Partnership [Amendment] Law 2009).

Rights and Liabilities of Partners Inter Se.

Partnership agreement regulates relations of partners to one another. If there is no agreement or if it does not cover all aspects of their rights and duties, these will be implied from Partnership Act or from course of conduct of partners. Mutual rights and duties of partners whether arising from agreement or implied under Act may be varied by unanimous consent of partners, which may be either express or inferred from course of dealing. (§19).

Partnership property must be held and applied by partners exclusively for purpose of partnership and in accordance with partnership agreement (§20): (a) All partners are entitled to share equally in capital and profits of business and must contribute equally towards losses whether of capital or otherwise sustained by firm; (b) firm must indemnify every partner in respect of payments made and personal liabilities incurred by him in ordinary and proper conduct of business of firm; or in or about anything necessarily done for preservation of business or property of firm; (c) partner making, for purpose of partnership, any actual payment or advance beyond amount of capital that he has agreed to subscribe, is entitled to interest at rate of 5% per annum from date of payment or advance. Such advance is regarded as loan to firm and rightly attracts payment of interest; (d) partner is not entitled, before ascertainment of profits to interest on capital subscribed by him; (e) every partner may take part in management of partnership business. Partners may however entrust on one partner only duty to manage firm; (f) no partner is entitled to be paid remuneration for managing partnership business; (g) no partner may be introduced as partner without consent of all existing partners; (h) any difference arising as to ordinary matters connected with partnership business may be decided by majority of partners, but no change may be made in nature of partnership business without consent of all existing partners; (i) partnership books are to be kept at place of business of partnership (or in principal place if there is more than one) and every partner may when he thinks fit, have access to and inspect and copy any of them (§24).

Partners are bound to render true accounts and full information of all things affecting partnership to any partner or his legal representatives. (§28). Every partner is also liable to account to firm for any benefit derived by him without consent of other partners from any transaction concerning partnership or from any use by him of partnership property, name or business connection. (§29). If partner without consent of other partners, carries on any business of same nature as and competing with that of firm, he must account for and pay over to firm all profits made by him in that business. (§30).

No majority of partners can expel any partner unless power to do so has been conferred by express agreement between partners. (§25).

By §26, if no fixed term has been agreed upon for duration of partnership, any partner may terminate partnership at any time by giving notice of his intention to do so to all partners. If partnership was originally constituted by deed, notice in writing signed by partner giving it is required, otherwise oral notice is sufficient.

Rights and Liabilities of Partners as to Third Persons.

Normal rules of agency apply to relations between partners and persons dealing with them. Every partner has authority to bind firm and other partners in respect of matters within usual business of firm. Relationship is that of principal and agent. However, where partner so acting has in fact no authority to act for firm in particular matter, and person with whom he is dealing either knows that he has no authority or does not know or believe him to be partner, such partner will not be deemed agent of firm. (§5).

Every partner is liable jointly with other partners for all debts and obligations of firm incurred while he is partner and, after his death, his estate is also severally liable for such debts and obligations so far as they remain unsatisfied, but subject to prior payment of his separate debts. (§9).

Firm may also be liable for wrong (tort) done to third party either because it has authorised it or because it was done in ordinary course of firm's business. (§10).

Firm's debts and liabilities are personal debts and liabilities of each partner. Each is fully liable even to extent of his private fortune. Judgment obtained against firm may be executed against any partner. Person who is admitted as partner into existing firm does not thereby become liable to creditors of firm for anything done before he became partner. (§17[1]).

Partner who retires from firm does not cease to be liable for partnership debts or obligations incurred before his retirement. (§17[2]).

Partner may however be discharged from any existing liabilities, by agreement to that effect between himself and members of firm as newly constituted and creditors, and this agreement may be either express or inferred as fact from course of dealing between creditors and firm as newly constituted. (§17[3]).

Dissolution.

Court may, on application of partner, order dissolution of partnership in following cases: When partner becomes insane; when partner, other than partner suing, becomes in any other way permanently incapable of performing his part of partnership contract; when partner, other than partner suing, wilfully or persistently commits breach of partnership agreement or otherwise so acts that it is not reasonably practicable for other partners to carry on business in partnership with him; when business of partnership can only be carried on at loss; whenever in any case, circumstances have arisen which in opinion of court render it just and equitable that partnership be dissolved. (§35).

Partnership may be dissolved without court order in following cases: if entered into for fixed term, by expiration of that term; if entered into for single venture or undertaking by termination of that venture or undertaking; if entered into for undefined time, by any partner giving notice to other or others of his intention to dissolve partnership. In this case, partnership is dissolved as from date mentioned in notice as date of dissolution, or, if no date is so mentioned as from date of communication of notice. (§32).

Also §33 provides for dissolution: upon bankruptcy of partner; upon death of partner; if partner suffers his share of partnership property to be charged for his separate debt, other partners have option to dissolve partnership.

Partnership will also be dissolved by happening of event which makes it unlawful for business of firm to be carried on or for members to carry it on in partnership. (§34).

Under §41, partnership contract may be rescinded for fraud or misrepresentation of one of parties thereto and partnership dissolved.

Application of Partnership Property on Dissolution.

On dissolution of partnership, every partner is entitled, as against other partners and all persons claiming through them, to have property of partnership applied in payment of debts and liabilities of firm, and to have surplus assets after such payment applied in payment of what may be due to partners respectively after deducting what may be due from them as partners to firm. For this purpose, any partner or his representatives may, on termination of partnership, apply to court to wind up business and affairs of firm. (§39).

3 BUSINESS REGULATION AND COMMERCE

3.01 BANKS AND BANKING:

Banking industry in Nigeria is regulated by following statutes: Banks and other Financial Institutions Act c. B3 LFN; Central Bank of Nigeria Act No. 7 of 2007; Community Banks Act c. C18 LFN; Failed Banks (Recovery of Debts) and Financial Malpractices in Banks Act c. F2 LFN; Foreign Exchange (Monitoring and Miscellaneous Provisions) Act c. F34 LFN; Government Promissory Notes Act c. F34 LFN; Loans (Internal Borrowing) Act c. 210 LFN 1990; Loans (State Development) Act c. L16 LFN; Loans Act c. L15 LFN; Local Loans (Register Stock & Securities) Act c. L17 LFN; Money Laundering Prohibition Act c. M18 LFN; Mortgage Institutions Act c. M19 LFN; Nigeria Deposit Insurance Corporation Act c. N102 LFN; Nigerian Industrial Development (Guarantee) Act c. N111 LFN; Savings Bonds & Certificates Act c. S1 LFN.

It is also regulated by guidelines, circulars and directives issued by Central Bank of Nigeria from time to time.

Security for Loans.

Nigerian banks may grant naira denominated loans on security of foreign guarantees only where: (a) foreign guarantee has bank guarantees and/or foreign currency deposits in foreign banks or domiciliary account with bank in Nigeria; (b) it involves projects agriculture, manufacturing, building/construction (equipment and real estate development), solid minerals, telecommunications (excluding merchandising), information technology (software development, assembling of computer hardware and orbital satellite system installation), oil, gas and energy, tourism development sectors and any other sector that CBN may from time to time approve; (c) in case of bank guarantee, foreign guarantor is first-class banks or other banks acceptable to CBN; and (d) in case of foreign currency deposits, banks in which funds will be held is to CBN. (Memorandum 12, Foreign Exchange Manual, 2006).

See also category 2 Business Organizations, topic 2.02 Corporations, subhead Corporate Bonds or Mortgages.

Financial Crimes.

Economic and Financial Crimes Commission (Establishment) Act c. E1 LFN establishes Commission to investigate financial crimes and enforce related laws.

3.02 IMPORTS:

Pre-shipment inspection abolished in 2006 and replaced with destination inspection. Import Guidelines published by Foreign Exchange and Trade Relations Division, Home Finance Department, Federal Ministry of Finance in Apr. 2006 sets out new procedure under destination inspection: Upon shipment, local bank (Authorized Dealer) engaged in processing of mandatory Form M, forwards set of original shipping documents to Inspection Agents for issuance of Risk Assessment Report (RAR). RAR states duty payable on shipment. Based on RAR, importer calculates amount of duty payable taking into consideration other import taxes such as Customs administrative charge (CISS), charged at 1% of FOB value of import. Authorized Dealer issues bank draft in respect of duty payable which is then paid to any Customs designated bank.

3.03 MONOPOLIES, RESTRAINT OF TRADE AND COMPETITION:

Every merger, acquisition or business combination between or among companies is subject to prior review and approval of Securities and Exchange Commission. (§118[2] Investments and Securities Act, 2007). In considering merger, Commission will determine whether or not it is likely to substantially prevent or lessen competition. If it appears that merger is likely to prevent or lessen competition, Commission will determine whether or not merger is likely to result in technological efficiency or other pro-competitive gain greater than effects of any prevention or lessening of competition that may result from merger; and whether merger can be justified on substantial public interest grounds. (§121[1]).

Where Commission determines that company's business practice prevents or substantially lessens competition, Commission may in public interest, order break-up of such company into separate entities in way that its operations do not cause substantial restraint of competition in its line of business or market. (§121[1]).

See also category Business Organisations, topic Corporations, subhead Merger and Consolidation.

3.04 SECURITIES:

Regulatory Authority.

By virtue of Investments and Securities Act 2007 Securities and Exchange Commission is empowered to regulate securities market. It is required to register any securities to be offered for subscription or sale to public; to levy fees or other charges on any person for carrying out investment and securities business in Nigeria. (§13).

Securities to Which Act Applicable.

Securities include: (a) debentures, stocks, shares, bonds, or notes whether issued or proposed to be issued by government or private company; (b) any right or option in respect of any such debentures, stocks, shares, bonds or notes; (c) commodities futures, contracts, options and other securities; (d) bills of exchange; and (e) promissory notes or certificates of deposit issued by bank which have tenure of not less than nine months. (§264). Act also applies to collective investment schemes and unit trusts. (§§160, 161, 192–196).

Prerequisites to Sale or Offerings.

All securities of public company and all securities or investments of collective investment scheme must be registered with Commission (§54).

Registration fees range between 0.15–0.30% of market value of securities on offer.

Registration Documents.

Documents required for registration are: (a) Certified copy of resolution of general meeting authorising offer; (b) certified copy of Memorandum and Articles of Association of offer or company signed by subscribers; (c) certified copy of Certificate of Incorporation; (d) copy of audited accounts for last five years (or number of years in operation if less than five years) including detailed profit and loss accounts for latest year; (e) draft prospectus and abridged prospectus; (f) two copies of draft trust deed (where applicable); (g) draft underwriting and vending agreements; (h) letters of consent by parties to issue.

Registration of Dealers.

No person shall operate in Nigerian capital market as expert or professional; or carry on investments and securities business unless person is registered by Commission. (§38).

Advertisements.

No person may make any invitation to public: (a) to acquire or dispose of any securities of body corporate; or (b) to deposit money with any body corporate for fixed period or payable at call, whether bearing or not bearing interest; unless body corporate concerned is public company or bank or sale has been ordered by court. (§67[1]).

Take-over Bids.

No person may make take-over bid on public company unless authority to proceed with take-over bid has been granted by Commission.

Commission may require person applying for such authority to furnish it with such information as it reasonably considers necessary to enable it to make decision on application. Commission must keep confidential contents of any such information and also contents of application and any document or report accompanying application.

For purpose of deciding whether or not to grant authority to proceed with take-over bid, Commission shall have regard only to likely effect of take-over bid (a) on economy of Nigeria; or (b) on any policy of Federal Government with respect to manpower and development, and if Commission is satisfied that none of these matters would be adversely affected, it will grant authority to proceed with proposed take-over bid.

Authority to proceed with take-over bid will remain in force: (a) for period of three months following date of authority; or (b) for such longer period as Commission may allow, on application made to it before expiration of period. (§134).

Take-over bid is deemed to be made where control is sought of 30% or more of shares of public company. (§104).

Returns by Stock Broking Companies.

Every stock broking firm must file monthly returns with Federal Inland Revenue Service. (§57 [1] Companies Income Tax Act (c. C21).). Returns should contain details of transactions carried out including details of withholding tax and value added tax payable. (§57[1] c. C21).

3.05 TECHNOLOGY TRANSFER:

National Office of Technology Acquisition and Promotion (“NOTAP”) formerly referred to as National Office of Industrial Property is responsible for monitoring, on continuous basis, transfer of foreign technology to Nigeria. National Office was established by National Office of Technology Acquisition and Promotion Act, c. N62 LFN and is charged with following functions: (a) encouragement of more efficient process for identification and selection of foreign technology; (b) development of negotiating skills of Nigerians with view to ensuring best contractual terms and conditions by Nigerian parties entering into any contract or agreement for transfer of foreign technology; (c) provision of more efficient process for adaptation of imported technology; (d) registration of all contracts or agreements having effect in Nigeria on date of coming into force of this Act, and of all contracts and agreements hereinafter entered into, for transfer of foreign technology to Nigerian parties. (§4).

Principal concern of NOTAP is to register contracts or agreements which deal with transfer and acquisition of foreign technology. Such contracts or agreements are registrable if their purpose or intent is, in opinion of NOTAP, wholly or partially for or in connection with any of following: (i) use of trademarks, (ii) right to use patented inventions, (iii) supply of technical expertise in form of preparation of plans, diagrams, operating manuals or any other form of technical assistance of any description whatsoever, (iv) supply of basic or detailed engineering, (v) supply of machinery and plant; and (vi) provision of operational staff or managerial assistance and training of personnel. (§4[d]).

NOTAP will refuse registration of contract or agreement if it is satisfied that: (a) purpose of it is transfer of technology freely available in Nigeria; (b) price or other valuable consideration therefor is not commensurate with technology acquired or to be acquired; (c) provisions are included therein which permit supplier to regulate or intervene directly or indirectly in administration of any undertaking belonging to transferee of technology and are, in its opinion, unnecessary for due implementation or execution of such contract or agreement; (d) there is onerous or gratuitous obligation on transferee of technology to assign to transferor or any other person designated by transferor, patents, trademarks, technical information, innovation or improvements obtained by such transferee with no assistance from transferor or such person; (e) limitations are imposed on technological research or development by transferee; (f) there is obligation therein to acquire equipment, tools, parts or raw materials exclusively from transferor or any other person or given source; (g) it is provided that exportation of transferee's products or services is prohibited or unreasonably restricted or where there is obligation on such transferee to sell products manufactured by it exclusively to supplier of technology concerned or any other person or source designated by transferor; (h) use by transferee of complementary technologies is prohibited; (i) transferee is required to use permanently or for any unreasonable period personnel designated by supplier of technology; (j) transferee is required to appoint supplier of technology as exclusive sales agent or representative in Nigeria or elsewhere; (k) contract or agreement is expressed to exceed period of ten years or other unreasonable term where this is less than ten years; (l) consent of transferor is required before any modification to products, process or plant can be effected by transferee; (m) obligation is imposed on transferee to introduce unnecessary design changes; (n) transferor, by means of quality controls or prescription of standards, seeks to impose unnecessary and onerous obligations on transferee; (o) there is provision for payment in full by transferee for transferred technology which remains unexploited by him; (p) there is requirement for acceptance by transferee of additional technology or other matter, such as consultancy services, international subcontracting, turnkey projects and similar package arrangements, not required by transferee for or in connection with principal purpose for which technology is to be or has been acquired by him; (q) transferee is obliged to submit to foreign jurisdiction in any controversy arising for decision concerning interpretation or enforcement in Nigeria of any such contract or agreement or any provisions thereof. (§6).

This refusal can be reviewed where it would be in national interest that registration be granted. (§6[3]).

Time Limit for Registration.

Contract or agreement must be registered with NOTAP in prescribed manner not later than 60 days from its execution or conclusion. (§5[2]).

Fees and Fines.

Presentation fee of N25,000 is required to be presented with contracts or agreements before registration. Failure to present contract or agreement for registration with NOTAP within 30 days from effective date of contract results in penalty of N50,000 (NOTAP Supplementary Information for Registration of Technology Agreements). Registration fee is to be paid after approval of agreements or contracts. Registration fee for contracts involving total payment under N5 million for duration of agreement is N50,000 while registration fees for contracts involving total payment above N5 million for duration of agreement ranges from N100,000 to maximum of N2.5 million.

Effect of Non-registration.

No payment will be effected by any bank to credit of any person outside Nigeria in respect of any payments due under contract or agreement for transfer of foreign technology to Nigerian parties unless certificate of registration issued by National Office is presented by party or parties concerned together with copy of contract or agreement certified by National Office. (§7).

3.06 TELECOMMUNICATIONS:

Nigeria Communications Commission (NCC) is body responsible for regulating telecommunications industry by virtue of Nigerian Communications. Principal legislation is Nigerian Communications Act c. N97 LFN.

No person may operate communications facility or provide communications service in Nigeria unless person is licensed under Act or is exempted. (§31[1]). Penalty for operating without licence includes: (a) Fine not less than initial fee for licence; (b) fine not exceeding ten times initial fee for licence; (c) imprisonment for term not exceeding one year; or (d) both fine and imprisonment. Additional penalty is forfeiture to NCC of property, facilities, installations and equipment used during operation of unlicensed service. (§31[2]).

Transfer of Licence.

Licence may not be operated by, assigned, sub-licensed or transferred to another party unless prior written approval of Commission has been granted. (§38).

Dispute Resolution.

Commission is empowered to resolve disputes between licensees regarding any matter under Act or its subsidiary legislation. (§73).

Competition Regulation.

Commission has exclusive competence to enforce compliance with competition laws and regulations relating to Nigerian communications market. (§90).

Obligation to Interconnect, and Give Access.

Network services or facilities provider is obliged to interconnect on request any other licensee pursuant to terms and conditions negotiated between parties in good faith. (§96).

Licensee must provide other licensee with non-discriminatory access to any post, network facilities or right-of-way owned or controlled by him. (137).

Tariff Rate Regulation.

Nigerian

Tariffs rates and charges for services are to be approved by Commission. (§108).

Technical Codes.

Commission is to specify and publish technical codes and specifications in respect of communications equipment and facilities that may be used in Nigeria. (§130).

Other laws and regulations applicable to telecommunications include Wireless Telegraphy Act c. W5 LFN; Telecommunications Networks Interconnection Regulations (S.I. 33 of 2007); Universal Access and Universal Services Regulations (S.I. 31 of 2007); Consumer Code of Practice Regulations (S.I. 31 of 2007); Competition Practices Regulations (2007); Frequency Spectrum Pricing and Fees; and Enforcement Regulations (2004); Frequency Spectrum (Fees and Pricing, etc.) (Amendment) Regulations (2009); Type Approval Regulations (2007); Numbering Regulations (2007); Quality of Service Regulations (2009).

§3.07 POWER:

POWER.

Nigerian Electricity Regulatory Commission is responsible for regulating electricity generation, transmission, distribution and trading. Principal legislation is Electric Power Sector Reform Act, 2005 c. E7 LFN.

Licences.

Licence issued by Commission is required to construct, own or operate undertaking or engage in electricity generation, transmission, system operation, distribution or trading in electricity.(§62[1]). Penalty for non-compliance is N500,000 or two years imprisonment or both fine and imprisonment. (§62[5]). Licence not required for captive generation (§62[1][a]); constructing, owning or operating undertaking for generating electricity not exceeding one megawatt in aggregate at site; or undertaking for distributing electricity with capacity not exceeding 100 kilowatts in aggregate at site or such other capacity as Commission may from time to time determine. (§62[2]). Commission may issue interim licence for period not exceeding 18 months if it determines it necessary in public interest to do so. (§62[3]).

Enforcement.

Where Commission is satisfied that licensee is contravening, has contravened or is likely to contravene conditions of licence, Commission may serve licensee with order requiring licensee to do or refrain from doing such things as are specified in order and stipulating period of compliance. (§75[1]). Order may specify penalty for each day licensee is in default of compliance. (§75[4]). Prior to serving order, Commission must serve notice upon licensee specifying grounds upon which order is to be issued and what it considers necessary for purpose of rectifying or avoiding any contravention or threatened contravention; stipulating maximum period for implementation of any requirement it proposes to order; allowing licensee to make representation to Commission within such period specified in notice. (§75[2]).

Cancellation of Licences.

Commission may inquire into conduct or functioning of licensee's obligation upon receipt of complaint from eligible customer, consumer association or other licensee. (§74[1]). After inquiry including giving opportunity to licensee to show cause why licence should not be cancelled, Commission may cancel licence if in its opinion: (a) licence was issued through fraud, misrepresentation or non-disclosure of material fact; (b) licensee has willfully, or unreasonably contravened any provision of this Act that is applicable to licensee; (c) licensee has not complied with licence condition breach of which is expressly declared by such licence to render it liable to revocation; (d) financial position of licensee is such that he is unable to fully and efficiently discharge licence obligations. (§74[2]). Prior to cancellation, Commission must notify licensee in writing of intention to cancel licence and reasons for doing so and must allow licensee opportunity to demonstrate within 60 days following delivery of notice that circumstances have changed such that cancellation may no longer be warranted. (§74[3]). Commission will cancel licence where it is satisfied after inquiry and hearing from licensee if it is in public interest that licence concerned should be cancelled. (§74[4]).

Tariffs.

Tariff for generation, trading, transmission, distribution and system operation are regulated by Commission. (§76). Commission has issued Multi Year Tariff Order to regulate tariffs.

4 CITIZENSHIP

4.01 ALIENS:

See category 12 Immigration, topic 12.01 Aliens.

4.02 IMMIGRATION:

See category 12 Immigration, topic 12.02 Immigration.

5 CIVIL ACTIONS AND PROCEDURE

5.01 ACTIONS:

Generally, any person or legal entity may sue or be sued in Nigerian courts subject to various rules of procedure applicable in the different courts. Rules governing procedure in civil actions in high court of most states of Nigeria are modelled after Uniform Civil Procedure Rules, 1987. Federal High Court (Civil Procedure) Rules, 2009 is applicable in Federal High Court. High Court (Civil Procedure) Rules Abuja 2004 regulate proceedings in High Court of the Federal Capital Territory, Abuja. Apart from aforementioned civil procedure rules, there are other rules which regulate civil proceedings in specific areas such as Admiralty Jurisdiction Procedure Rules, 1993, Bankruptcy Rules, 1990, Companies Proceedings Rules, 1992, Companies Winding-Up Rules 2001, Matrimonial Causes Rules, 1983, Tax Appeal Rules, 1992, VAT Tribunal Rules 2003, Fundamental Human Rights Enforcement Rules, 1979. As regards appeals to Court of Appeal, Court of Appeal Rules, 2007 are applicable while appeals to Supreme Court are governed by Supreme Court Rules,1999. Various State High Court Laws provide that where there is lacuna in rules, recourse should be had to practice and procedure for time being of High Court of Justice in England. By Order 56, rule 8 of Federal High Court (Civil Procedure) Rules, 2009 and §2 of High Court of the Federal Capital Territory (Civil Procedure) Rules Act, 1991, where there is any lacuna in rules, court will adopt any procedure that ensures substantial justice between parties. For purpose of this Digest Federal High Court (Civil Procedure) Rules, 2009 which is similar in many respects to High Court Rules applicable throughout country will be used as guide.

Equity.

In civil matters, law and equity are to be administered by court concurrently. (§10, Federal High Court Act, c. F12 LFN). There are similar provisions in various High Court laws applicable throughout country.

Conditions Precedent.

Certain statutes provide for service of pre-action notices by intending litigant before commencement of action. For examples of such statutes see topic 5.10 Limitations of Actions, subhead Pre-action Notice and Limitation Periods.

Commencement.

See topic 5.12 Process.

Parties to action must have legal capacity to institute or defend action. Where it is shown that person or entity lacks legal capacity to institute or defend action, action is unmaintainable in law. (Order 9 of Federal High Court Rules).

Partners may sue or be sued in firm's name. (Order 9, rule 9 of Federal High Court Rules). Infants may sue by their next friend and may defend by guardians appointed for that purpose. Lunatics and persons of unsound mind may sue or defend any action by their committees or next friend. Trustees, executors and administrators may sue or be sued on behalf of or as representing property or estate of which they are trustees or representatives. Where determination of action between parties to suit would directly affect third party's legal right or pecuniary interest, court may order that third party be made party to action. Court may at any stage of proceedings either upon or without application of party to action and upon such terms as may seem just order that name of any party improperly joined whether as plaintiff or as defendant be struck out.

Class Actions.

Also known as representative actions. Where numerous persons have same interest in action one or more of them may with approval of court be authorised by other persons interested to institute or defend action on their behalf. (Order 9, rule 12 of Federal High Court Rules). Every person whose interest is represented in action will be bound by any judgment or order that may be made. High Court of Lagos (Civil Procedure) Rules further empowers judge to allow class action in specific matters; even when class or some members of class are unascertainable.

Intervention.

At any stage of proceedings, any person interested in subject matter of action and who is not already party may apply to be joined either as plaintiff or as defendant. (Order 9, rule 15 of Federal High Court Rules).

Interpleader.

Where two or more persons claim money, goods or chattels in custody or possession of third party, or in possession of sheriff pursuant to execution of judgment, third party or sheriff may protect himself from legal proceedings by applying to court for relief by way of interpleader. (Order 33, rule 1 of Federal High Court Rules).

Third Party Notice.

Provided for in following instances where in action: (a) defendant claims against any person not already party to action that defendant is entitled to contribution or indemnity; (b) defendant claims he is entitled to relief or remedy relating to original subject matter of action which is substantially same as relief claimed by plaintiff; or (c) any issue relating to subject matter is same as issue arising between plaintiff and defendant and should be determined not only as between plaintiff and defendant but between plaintiff and defendant and third party or between any or either of them. (Order 9, rule 17 of Federal High Court Rules).

Joinder of Causes of Action.

Plaintiff may unite several causes of action but court may order separate trials of any such causes of action as cannot be conveniently tried together. (Order 10, rule 1 of Federal High Court Rules).

Stay of Proceedings.

Where court orders costs to be paid or security be given for costs, it may order stay of proceedings pending compliance with said order. (Order 25, rule 9 of Federal High Court Rules). Court can also order stay of proceedings where party to arbitration agreement commences litigation in defiance of said agreement. (§§4 and 5 of Arbitration and Conciliation Act, c. A18 LFN).

Severance of Actions.

Where joinder of several causes of action in proceeding may unduly complicate or delay trial or is inconvenient, court may order separate trials. (Order 10, rule 4[1] of Federal High Court Rules).

Limitation of.

See topic Limitation of Actions.

Termination of Actions.

Plaintiff(s) in action by serving notice of discontinuance may without leave of court discontinue action or withdraw any particular claim as against defendants at any time not later than 14 days after service of defence on him or, if there are two or more defendants, after defence last served. Defendant by serving notice to that effect may also without leave of court withdraw his defence or any part of it at any time. Defendant may also discontinue counterclaim or withdraw any particular claim made by him therein, as against any or all of parties against whom it is made at any time not later than 14 days after service of defence to counterclaim or if there are two or more defendants to counterclaim, of defence to counterclaim last served. (Order 50, rule 2 of Federal High Court Rules).

Proof of Foreign Law.

Courts, in establishing foreign law, may rely on: opinions of experts who in their profession are acquainted with such law; works of authority upon foreign law in question. (§58[1] Evidence Act, c. E14 LFN).

5.02 APPEAL AND ERROR:

Appeals shall lie to Court of Appeal from decisions of Federal High Court, High Court of the Federal Capital Territory, Abuja, High Court of a State, Sharia Court of Appeal of the Federal Capital Territory, Sharia Court of Appeal of a State, Customary Court of Appeal of the Federal Capital Territory, Abuja, Customary Court of Appeal of a State and from decisions of court martial or other tribunals as may be prescribed by act of National Assembly. (§240 of 1999 Constitution).

Appeals shall also lie from decisions of Court of Appeal to Supreme Court. (§233 of 1999 Constitution). Appeals to Court of Appeal are governed by Court of Appeal Rules, 2007 while appeals to Supreme Court are governed by Supreme Court Rules, 1985.

Appeal How Taken.

All appeals shall be by way of rehearing and must be brought by notice of appeal to be filed in court which gave judgment sought to be appealed against. Notice of appeal should set out grounds of appeal, stating whether complaint relates to part or whole of judgment and stating also exact nature of relief sought and names and addresses of parties directly affected by appeal. (Order 6, rule 2 [1] of Court of Appeal Rules). Where grounds of appeal allege misdirection or error in law, particulars and nature of misdirection or error should be clearly stated. (Order 6, rule 2 [2] of Court of Appeal Rules).

Parties to appeal are required to appear before Registrar of court below to agree: (1) documents to be included in record of appeal; (2) amount to be deposited by appellant to cover estimated cost of compiling and forwarding record of appeal; (3) amount to be deposited as appeal bond for due prosecution of appeal. (Order 8, rule 11 [a] of Court of Appeal Rules).

Within 45 days of receipt of record of appeal appellant is to file written brief, being succinct statement of his arguments on appeal. (Order 17, rule 2 of Court of Appeal Rules). Respondent shall also within 30 days of service of appellant's brief on him file respondent's brief. (Order 17, rule 4 [1] of Court of Appeal Rules, 2007). Oral arguments will be allowed at hearing of appeal to emphasize and clarify written arguments appearing in briefs. (Order 17, rule 9 [1] of Court of Appeal Rules).

Time Allowed for Taking Appeals.

Appeal against interlocutory decision of court below must be made within 14 days of date of decision complained of, while appeal against final decision must be made within 90 days of date of decision complained of. (§24 of Court of Appeal Act, c. C36 LFN). Court of Appeal may extend these periods where applicant can show by affidavit good and substantial reasons for failing to appeal within prescribed period; and that grounds of appeal prima facie show good cause why appeal should be heard. (Order 7, rule 10 [2] of Court of Appeal Rules). Supreme Court Act, c. S15 LFN contain similar provisions regarding appeals to Supreme Court.

Practice.

Appeals to Court of Appeal are governed by Court of Appeal Act, c. C36 LFN and Court of Appeal Rules, 2007 while appeals to Supreme Court are governed by Supreme Court Act, c. S15 LFN and Supreme Court Rules, 1985.

Appeal Bond.

Registrar of court below is entitled to fix amount to be deposited by appellant or secured by bond for due prosecution of appeal and payment of any costs. (Order 8, rule 11 [a] of Court of Appeal Rules).

Stay of Proceedings.

Courts have inherent jurisdiction to order stay of proceedings pending appeal. Where application for stay pending appeal is refused by High Court, same application may be made to Court of Appeal within 15 days of refusal. (Order 7, rule 3 of Court of Appeal Rules, 2007).

5.03 CERTIORARI:

Order of certiorari is employed to quash decisions, judgments, orders, convictions or other proceedings of inferior courts or bodies in civil or criminal actions made without, or in excess of jurisdiction.

Jurisdiction.

Application for order of certiorari may be made to Federal High Court. (Order 34, rule 1 of Federal High Court Rules). Certiorari is also available in various State High Courts.

Grounds.

Order of certiorari is issued where decision of inferior court or tribunal is unreasonable or where court or tribunal has exceeded its jurisdiction or acted contrary to natural justice. Order may also be made where it appears on face of record that decision of inferior court of tribunal is erroneous on point of law.

Proceedings.

Applicant for order of certiorari must obtain ex parte leave of court. Application for leave must be supported by affidavit verifying facts relied on and statement setting out name and description of applicant, relief sought and grounds on which it is sought. Where leave is granted, application on notice may be made by motion or by originating summons. Notice of motion or summons must be served on all persons directly affected. Application on notice shall be supported by affidavit and statement. (Order 34, rules 3, 5 of Federal High Court Rules).

5.04 COSTS:

Court has discretion of determining which of parties to action shall bear costs of whole suit, particular proceeding therein and cost of every proceeding in court. General rule is that costs follow event (i.e. successful party is entitled to his costs). However, court may order successful party to pay costs of any particular proceeding. (Order 25 of Federal High Court Rules).

Security for Costs.

Court at any stage of proceedings on application of plaintiff or defendant may order that plaintiff or defendant give security for costs where it appears that: (a) one of parties is ordinarily resident out of jurisdiction; (b) plaintiff is nominal plaintiff suing for benefit of some other person and there is reason to believe that he will be unable to bear costs of defendants if ordered to do so; (c) plaintiff's address is not stated in writ or originating process or is incorrectly stated therein; (d) one of parties has changed his address during course of proceedings with view to evading consequences of litigation. (Order 25, rule 1 of Federal High Court Rules).

5.05 DEPOSITIONS AND DISCOVERY:

Compelling Attendance of Witnesses.

Court on application of either party to action may issue subpoena ad testificandum or duces tecum requiring witness to give oral evidence or to give oral evidence and tender documents at trial.

Examination of Witnesses.

Witness is first examined in chief (i.e. by party calling him) then, cross-examined by adverse party, then re-examined by party calling him. Examination and cross-examination must relate to relevant facts but cross-examination need not be confined to evidence which witness testified to in chief. Re-examination must be limited to explanation of matters referred to in cross-examination. If any new matter is by permission of court introduced in re-examination, adverse party may further cross-examine upon matter. (§188 of Evidence Act, c. E14 LFN).

Discovery.

Party may apply to court for order directing any other party to make discovery on oath of documents which are or have been in his possession or power, relating to any matter in issue. (Order 43, rule 8 [1] of Federal High Court Rules).

Court may at any time during pendency of action order any party to produce upon oath such documents in his possession relating to any matter in question in action. (Order 43, rule 17 of Federal High Curt Rules).

Every party to action shall be entitled at any time to give notice in writing to any other party in whose pleadings or affidavit reference is made to any document to produce said document for inspection and to permit copies to be taken. (Order 43, rule 18 of Federal High Court Rules).

Demand for Admission of Facts.

Any party may by leave of court call upon any other party to admit any document or fact. (Order 15, rule 2 [1] of Federal High Court Rules).

Interrogatories.

Any party within seven days after close of pleadings (i.e. formal allegations in writing by parties of their respective claims and defences) deliver interrogatories in writing for examination of any other party. (Order 43, rule 1 of Federal High Court Rules).

5.06 EQUITY:

See topic 5.01 Actions.

5.07 EVIDENCE:

Every person is competent witness unless court considers that he is prevented by reason of tender years, extreme old age, disease infirmity whether of body or mind from understanding questions put to him or giving rational answers to those questions. Mute witness may give evidence in any other manner for example by writing or by sign and such writing or sign must be made in open court. (§§155 & 156 of Evidence Act).

Privileged Communications.

Legal practitioner will not be allowed without express consent of his client to disclose any communication or contents of any documents passing between them in professional confidence. However, legal practitioner is allowed to disclose any communication made in furtherance of any illegal purpose and any fact observed by legal practitioner in course of his employment showing that crime or fraud has been committed since commencement of his employment. (§170 of Evidence Act, c. E14 LFN). Person will not be compelled to disclose to court any confidential communication that has taken place between him and his legal practitioner unless he offers himself as witness. (§173 of Evidence Act, c. E14 LFN).

Husband and Wife.

Person may not be compelled to disclose any communication made by spouse during marriage without consent of person who made statement. However, husband or wife may be compelled to give such evidence in actions between them or proceedings in which one married person is prosecuted for certain offences. (§164 of Evidence Act).

Compelling Attendance.

See topic 5.05 Depositions and Discovery.

5.08 INJUNCTIONS:

Court has jurisdiction to grant injunction on application by party to action in cases where it appears to be just or convenient and in interest of justice. Injunction may be granted for detention or preservation of any property subject matter of action either before or after trial whether or not claim for injunction is included in action. (Order 28, rule 1 of Federal High Court Rules). Where case is one of urgency application may be made ex parte on affidavit. In other cases, application must be made on notice. (Order 28, rule 2 of Federal High Court Rules).

Prerequisites.

Applicant must show that there is serious issue to be tried and that balance of convenience is in favour of granting injunction. (Order 28 of Federal High Court Rules).

Interim (Temporary) Injunction.

Interim injunction may be granted to last until named or definite date or until further order or pending hearing of motion on notice for interlocutory injunction. Interim order is usually granted in cases of extreme urgency to preserve res or rights of parties.

5.09 JUDGMENTS:

Every court is required to deliver its decision not later than 90 days after conclusion of evidence and final addresses is required to furnish all parties to matter with duly authenticated copies of decision within seven days of delivery thereof. Each Justice of Supreme Court or of Court of Appeal is required to deliver his opinion in writing or state in writing that he adopts opinion of any other Justice who delivers written opinion. It is not necessary for all Justices who heard matter to be present when judgment is to be delivered. Decision of court consisting of more than one judge is to be determined by opinion of majority of members. (§294 of 1999 Constitution).

Decision in cause is to be delivered in open court. (Order 23, rule 1 of Federal High Court Rules). Judgment or order may be final or interlocutory. Appeals against final judgments must be brought within 90 days of decision complained of and such appeals are as of right while appeals against interlocutory orders are made with leave of court and must be brought within 14 days of decision complained of. Any judgment or order which does not finally dispose of rights of parties is interlocutory while final judgment or order finally disposes of rights of parties. In determining whether judgment or order is final or interlocutory, test is whether rights of parties have been finally determined.

Judgments by Consent.

By consent of parties to suit, court may enter judgment on terms and conditions agreed to by parties. Court may set aside consent judgment where it is shown that it was obtained by fraud or collusion. Appeal Court may also set aside consent judgment on appeal if judgment was obtained by fraud, collusion or without knowledge of appellant. Consent judgment shall not operate as estoppel against party who had no knowledge of proceedings leading to consent judgment. Party requires leave of Court to appeal against consent judgment. (§241[2][c] of 1999 Constitution).

Judgment on Pleadings.

Where party makes admissions either by his pleadings or otherwise, court may enter judgment in favour of other party in action without waiting for determination of any other question between parties. (Order 15, rule 4 of Federal High Court Rules).

Summary Judgments.

Court may enter summary judgment against defendant in any of following instances: (a) where defendant fails to file appearance to within time limited in writ or other originating process (Order 8 of Federal High Court Rules); (b) where defendant fails to file defence within time stipulated in rules (Order 14 of Federal High Court Rules); (c) under undefended list procedure where it is shown by affidavit evidence that defendant has no defence to action (Order 12 of Federal High Court Rules).

Under High Court Rules applicable in various States, High Court may in addition to instances listed above enter summary judgment where: (a) defendant has filed appearance to writ of summons specially endorsed with or accompanied by statement of claim and plaintiff has by summons supported by affidavit applied for judgment on grounds that defendant has no defence to action. In cases of liquidated claims, court may enter judgment without more; (b) where in action for specific performance of contract in writing for sale or purchase of property with or without alternative claim, plaintiff applies for judgment by summons on grounds that there is no defence to action.

Vacation or Modification.

Once judgment has been delivered by competent court it remains valid until set aside by higher court. Court however has inherent power to set aside its own judgment entered in default of appearance and default of defence. (Orders 8 and 14 of Federal High Court Rules). Court also has power to set aside its own judgment where judgment is complete nullity or obtained by fraud practiced on court by one of parties. Court may correct clerical mistakes in judgments or errors arising therein from any accident, slip or omission.

Enforcement of Foreign Judgments.

This is governed by Foreign Judgment (Reciprocal Enforcements) Act, c. F35 LFN. Enforcement of foreign judgments in Nigeria is based on reciprocity of treatment. “Judgment” is defined to include judgment or order given or made by court in any civil proceedings as well as award in proceedings on arbitration if award has in pursuance of law in force in place where it was made, become enforceable in same manner as judgment given by court in that place, or judgment or order given or made by court in any criminal proceedings for payment of sum of money in respect of compensation or damages to injured party. (§2[1]).

Application to enforce foreign judgment in Nigeria must be made within six years after date of judgment (in case of appeal, date of last judgment given on appeal). (§4).

Judgment will not be registered if at date of application: (a) it has been wholly satisfied; or (b) it could not be enforced by execution in country of original court. (§4).

Registered judgment will be of same force and effect with judgment of registering court; and proceedings may be taken on registered judgment; and sum for which judgment is registered shall carry interest; and registering court shall have same control over execution of registered judgment, as if judgment had been judgment originally given in registering court and entered on date of registration. (§4[2]).

Registered judgment may be set aside if: judgment is not judgment to which Act applies or was registered in contravention of Act; or courts of country of original court had no jurisdiction in circumstances of case; or judgment debtor, being defendant in proceedings in original court, did not (notwithstanding that process may have been duly served on him in accordance with law of country of original court) receive notice of those proceedings in sufficient time to enable him to defend proceedings and did not appear; or judgment was obtained by fraud; or enforcement of judgment would be contrary to public policy in Nigeria; or rights under judgment are not vested in person by whom application for registration was made; or if registering court is satisfied that matter in dispute in proceedings in original court had previously to date of judgment in original court been subject of final and conclusive judgment by court having jurisdiction in matter. (§6).

Enforcement of Award of International Centre for Settlement of Investment Disputes.

International Centre for Settlement of Investment Disputes (Enforcement of Awards) Act, c. I20 LFN provides that where for any reason it is necessary or expedient to enforce in Nigeria award made by International Centre of Investment Disputes, copy of award duly certified by Secretary-General of the Centre, if filed in Supreme Court by party seeking its recognition in Nigeria, shall for all purposes have effect as if it were award contained in final judgment of Supreme Court, and award shall be enforceable accordingly. (§1[1]).

5.10 LIMITATIONS OF ACTIONS:

Each state of Federation has enacted its own limitation law. Actions must be brought within following periods.

Twelve Years.

Actions to recover principal sum of money secured by mortgage or charge on land.

Six Years.

Actions founded in simple or quasi contracts, torts, arrears of interest, action to enforce recognizance, actions to enforce arbitral award where arbitration agreement is not under seal or where arbitration is under any enactment other than Arbitration Law, actions against trustees.

Three Years.

Actions for damages for slander, maritime claims or claim on maritime lien or other charge provided that contract between parties contains no limitation period provided or limitation period is not fixed by some other statute such as one year time limitation applicable under Carriage of Goods by Sea Act, c. C2 LFN or two year limitation period fixed by §274 of Merchant Shipping Act, c. M11 LFN for salvage claims.

Two Years.

Actions based on Convention for the Unification of Certain Rules Relating to International Carriage by Air, 1929.

One Year.

Actions for enforcement of fundamental human rights of individual, actions for judicial review such as writs of certiorari and mandamus, actions for loss or damage in respect of goods under Carriage of Goods by Sea Act, c. C2 LFN.

Pre-action Notice and Limitation Periods.

Abuja Environmental Protection Board Act No. 10 1997:

Type of Action or Defendant: Abuja Environmental Protection Board. Pre-action Notice Period: One month. (§40[3]). Limitation Period: Three months for singular incident. Six months in the case of continuing damage or injury. (§40[2]).

Admiralty Jurisdiction Act c. A5 LFN:

Type of Action or Defendant: Maritime claims. Pre-action Notice Period: None. Limitation Period: Three years, except otherwise prescribed by another law. (§18[1]).

Agricultural and Rural Management Training Institute Act c. A10 LFN:

Type of Action or Defendant: Agricultural and Rural Management Training Institute Pre-action Notice Period: One month. (§12). Limitation Period: None.

Board of Customs and Excise (Amendment) Act No. 77 1993:

Type of Action or Defendant: Board of Customs and Excise. Pre-action Notice Period: One month. (§5A[2]). Limitation Period: Three Months. (§5A[1]).

Carriage by Air (Colonies, Protectorates and Trust Territories) Order, 1953. [Warsaw Convention]:

Type of Action or Defendant: Claims in respect of loss of or damage to goods, death or injury to person. Pre-action Notice Period: None. Limitation Period: Two years. (Art. 29[1]).

Carriage of Goods by Sea Act c. C2 LFN:

Type of Action or Defendant: Claims for loss of or damage to goods. Pre-action Notice Period: None. Limitation Period: One year. (§2; Art. III paragraph 6 of schedule).

Customs and Excise Management Act c. C45 LFN:

Type of Action or Defendant: Proceedings for offences. Pre-action Notice Period: None. Limitation Period: Seven years. (§176[3]).

Electoral Act c. E6 LFN:

Type of Action or Defendant: Election Petitions. Pre-action Notice Period: None. Limitation Period: 30 days. (§132).

Federal Airport Authority of Nigeria Act c. F5 LFN:

Type of Action or Defendant: Federal Airport Authority. Pre-action Notice Period: Three months. (§20[2]). Limitation Period: Twelve months. (§20[1]).

Federal Environmental Protection Agency Act c. F10 LFN:

Type of Action or Defendant: Federal Environmental Protection Agency. Pre-action Notice Period: One month. (§30[2]). Limitation Period: Twelve months. (§30[1]).

Federal Radio Corporation of Nigeria Act c. F18 LFN:

Type of Action or Defendant: Federal Radio Corporation of Nigeria. Pre-action Notice Period: One month. (§25[2]). Limitation Period: Twelve months. (§25[1]).

Federal Road Safety Commission Act c. F19 LFN:

Type of Action or Defendant: Federal Road Safety Commission. Pre-action Notice Period: None. Limitation Period: Immunity from suit enjoyed by employees of Commission. (§17[1]).

Geneva Conventions Act c. G3 LFN:

Type of Action or Defendant: Criminal proceeding against protected internee or prisoner of war. Pre-action Notice Period: Three weeks. (§5[1] & [2]). Limitation Period: None.

Industrial Training Fund Act c. I9 LFN:

Type of Action or Defendant: Proceedings for recovery of monies due to fund. Pre-action Notice Period: None. Limitation Period: Six years. (§11[1]).

Investments and Securities Act c. I24 LFN:

Type of Action or Defendant: Claim for loss arising from contravention of Act by securities trader. Pre-action Notice Period: No notice required, but action may not be commenced until two years after completion of transaction. (§98[1]). Limitation Period: None.

Merchandise Marks Act c. M10 LFN:

Type of Action or Defendant: Proceedings for offences. Pre-action Notice Period: None. Limitation Period: Three years after commission; one year after first discovery. (§13).

Merchant Shipping Act c. M11 LFN:

Type of Action or Defendant: Proceedings against ship owner or ship. Pre-action Notice Period: None. Limitation Period: Two years. (§374[1]).

National Agency for Food and Drug Administration and Control Act c. N1 LFN:

Type of Action or Defendant: National Agency for Food and Drug Administration and Control. Pre-action Notice Period: One month. (§27[1]). Limitation Period: None.

National Agency for Science and Engineering Infrastructure Act c. N3 LFN:

Type of Action or Defendant: National Agency for Science and Engineering Infrastructure. Pre-action Notice Period: One month. Limitation Period: None.

National Health Insurance Scheme Act c. N42 LFN:

Type of Action or Defendant: National Health Insurance Scheme. Pre-action Notice Period: One month. (§34[3]). Limitation Period: Three months for singular incident. Six months in case of continuing damage or injury. (§34[2]).

National Inland Waterways Authority Act c. N47 LFN:

Type of Action or Defendant: National Inland Waterways Authority. Pre-action Notice Period: None. Limitation Period: Three months. (§26[1]).

National Insurance Corporation of Nigeria Act c. N54 LFN:

Type of Action or Defendant: National Insurance Corporation of Nigeria. Pre-action Notice Period: One month. (§26[2]). Limitation Period: Twelve months. (§26[1]).

National Library Act c. N56 LFN:

Type of Action or Defendant: National Library. Pre-action Notice Period: One month. (§10[2]). Limitation Period: Twelve months. (§10[1]).

National Metallurgical Development Centre Act c. N60 LFN:

Type of Action or Defendant: National Metallurgical Development Centre. Pre-action Notice Period: One month. (§17[3]). Limitation Period: Six months. (§17[2]).

National Steel Raw Materials Exploration Agency Act c. N77 LFN:

Type of Action or Defendant: National Steel Raw Materials Agency. Pre-action Notice Period: One month. (§18[3]). Limitation Period: Six months. (§18[2]).

National Water Resources Institute Act c. N83 LFN:

Type of Action or Defendant: National Water Resources Institute. Pre-action Notice Period: One month. (§11). Limitation Period: None.

Nigerian Agricultural Insurance Corporation Act c. N89 LFN:

Type of Action or Defendant: Nigerian Agricultural Insurance Corporation. Pre-action Notice Period: One month. (§26[2]). Limitation Period: Twelve months. (§26[1]).

Nigerian Airspace Management Agency (Establishment) Act c. N90 LFN:

Type of Action or Defendant: Nigerian Airspace Management Agency. Pre-action Notice Period: One month. (§25[3]). Limitation Period: Three months for singular incident. Six months in case of continuing damage or injury. (§25[2]).

Nigerian Civil Aviation Authority (Establishment, etc.) Act c. N94 LFN:

Type of Action or Defendant: Nigerian Civil Aviation Authority. Pre-action Notice Period: One month. (§25[3]). Limitation Period: Three months for singular incident. Six months in case of continuing damage or injury. (§25[2]).

Nigerian Institute of Advanced Legal Studies Act c. N112 LFN:

Type of Action or Defendant: Nigerian Institute of Advanced Legal Studies. Pre-action Notice Period: One month. (§16[2]). Limitation Period: Twelve months. (§16[1]).

Nigerian National Petroleum Corporation Act c. N123 LFN:

Type of Action or Defendant: Nigerian National Petroleum Corporation. Pre-action Notice Period: One month. (§12[2]). Limitation Period; Twelve months. (§12[1]).

Nigerian Ports Authority Act c. N126 LFN:

Type of Action or Defendant: Nigerian Ports Authority. Pre-action Notice Period: One month. (§92[1]). Limitation Period: None.

Nigerian Railway Corporation Act c. N129 LFN:

Type of Action or Defendant: Nigerian Railway Corporation. Pre-action Notice Period: Three months. (§83[2]). Limitation Period: Twelve months. (§83[1]).

Nigerian Social Insurance Trust Fund Act c. N88 LFN:

Type of Action or Defendant: Proceedings for recovery of monies due to fund. Pre-action Notice Period: None. Limitation Period: Twelve months. (§25[1]).

Nigerian Television Authority Act c. N136 LFN:

Type of Action or Defendant: Nigerian Television Authority. Pre-action Notice Period: One month. (§26[2]). Limitation Period: Twelve months. (§26[1]).

Petroleum Equalisation Fund (Management Board etc.) Act c. P11 LFN:

Type of Action or Defendant: Petroleum Equalisation Fund Management Board. Pre-action Notice Period: None. Limitation Period: Six years. (§8[1]).

Public Enterprises (Privatization and Commercialization) Act c. P38 LFN:

Type of Action or Defendant: Council on Privatisation. Pre-action Notice Period: One month. None. Limitation Period: Three months for singular incident. Six months in case of continuing damage or injury. (§23[2]).

Public Officers Protection Act c. P41 LFN:

Type of Action or Defendant: Public Officers. Pre-action Notice Period: None. Limitation Period: Three months. (§2[a]).

Tafawa Balewa Square Management Act c. T1 LFN:

Type of Action or Defendant: Tafawa Balewa Square Management Board. Pre-action Notice Period: One month. (§13[1]). Limitation Period: None.

Tobacco Smoking (Control) Act c. T6 LFN:

Type of Action or Defendant: Officer/employee of Federal Ministry of Health. Pre-action Notice Period: None. Limitation Period: Immunity from suit enjoyed by officers and employees of Ministry. None.

Voice of Nigeria Corporation Act c. V5 LFN:

Type of Action or Defendant: Voice of Nigeria Corporation. Pre-action Notice Period: One month. (§22[2]). Limitation Period: Twelve months. (§22[1]).

Workmen's Compensation Act c. W6 LFN:

Type of Action or Defendant: Proceedings for compensation for death/injury of employee. Pre-action Notice Period: None. Limitation Period: Six months. (§13[1]).

Fraud.

Where action is based on fraud of defendant or his agent or any person through whom he claims or his agent or where right of action is concealed by fraud of any such person, time will not begin to run until plaintiff has discovered fraud or could with reasonable diligence have discovered it.

Disabilities of Plaintiff.

Limitation period of six years does not begin to run until disability ceases or person dies.

Revival of Barred Claims.

In actions for recovery of debt, time within which action may be brought begins to run anew from acknowledgment of debt in writing. In action by mortgagee of land to recover mortgage debt, time begins to run anew when person in possession acknowledges mortgagee's title to land.

Pleading.

Statutory limitations must be specifically pleaded. (Order 13, rule 6 of Federal High Court Rules).

5.11 PLEADINGS:

Pleadings governed by Order 13 of Federal High Court Rules. Pleadings must be brief, must contain only material facts but not evidence by which they are to be proved. Pleadings must also be precise, concise and clear. Dates, sums and numbers must be expressed in figures but may also be expressed in words. Pleadings must be signed by legal practitioner or by party if he sues or defends in person. Facts relating to fraud, limitation or any fact showing illegality must be specifically pleaded. In all cases where party pleading relies on any misrepresentation, fraud, breach of trust, willful default, party must give particulars of same in pleadings.

Statement of Claim.

Plaintiff must serve statement of claim together with copies of documentary evidence mentioned therein on defendant unless statement of claim has been endorsed on writ or court has given leave to contrary. (Order 13, rule 1 of Federal High Court Rules). Statement of claim must be accompanied by: list of witnesses; written statements on oath of witnesses; copies of documents intended to be relied on at trial. (Order 3, rule 1 of Federal High Court Rules). Similar rule applies in Lagos, Ogun and Rivers State. However, it is not compulsory under High Court Rules of most states that copies of documentary evidence must be attached to statement of claim.

Statement of Defence.

Defendant who enters appearance must, unless court gives leave to contrary, serve defence on plaintiff which must include any preliminary objection which he wishes to raise together with copies of documentary evidence mentioned therein. (Order 13, rule 2 of Federal High Court Rules). It is not compulsory under High Court Rules of various states that documentary evidence must be attached to statement of claim.

Reply.

Plaintiff on whom defence is served by defendant shall if needed, serve on that defendant reply within 14 days of service of defence on him. (Order 13, rule 3[1] of Federal High Court Rules).

Counterclaim.

Plaintiff on whom counterclaim is served shall, if he intends to defend it, serve on that defendant defence to counterclaim within 14 days. (Order 13, rule 3[2] of Federal High Court Rules).

Demurrer not allowed. However following proceedings are allowed in lieu of demurrer: (a) party is entitled to raise point of law in his pleading and such point must be disposed of at beginning of or after trial; (b) pleadings may also be struck out on ground that they disclose no reasonable cause of action or court may also order any action to be stayed or dismissed, or judgment entered accordingly if pleadings are shown to be frivolous and vexatious. (Order 25 of Federal High Court Rules).

Amended or Supplemental Pleadings.

Under High Court of Lagos State Rules only two amendments are allowed after pre-trial conference; under other rules court may at any time amend any defect or error in any proceedings for purpose of determining real question or issue raised by proceedings. Court may also at any stage allow party to alter or amend his endorsement or pleadings on terms as may be just. Application to amend may be made by either party to court at trial of action. Whenever amendment is made court may order that copy of process so amended be filed and served on all parties. Date of order to amend must be endorsed on amended process. (Order 17 of Federal High Court Rules).

5.12 PROCESS:

There are four modes of commencing action. These are by writ of summons, originating summons, originating motions and by petition. Unless otherwise provided, mode for commencing actions in High Court is by writ of summons which is endorsed with statement of nature of claim or relief sought. Proceedings are commenced by writ of summons if facts are likely to be contentious.

Originating summons is utilised where there is no dispute between parties as regards facts of matter. For example, where issue for determination is construction of written document or instrument or deed, will, contract or other document or some other question of law, appropriate mode is by originating summons.

Petitions and originating motions are utilised where statutes provide for their use. Examples are winding up petitions under §410 of Companies and Allied Matters Act, c. C20 LFN divorce petitions under §54 of Matrimonial Causes Act, c. M7 LFN.

Who May Serve.

Writs of summons, notices, petitions, pleadings, orders, summonses, warrants and all other proceedings, documents or written communications shall be served by: (a) sheriff or deputy sheriff, bailiff, officer of court; or (b) person appointed thereafter (either especially or generally) by court, unless another mode of service is prescribed by rules; or (c) solicitor filing document who must give written undertaking at time of filing document to registrar that he will serve document on other party or his lawyer and that he would provide proof of such service signed by other party or his solicitors; or (d) court by such other method of service as court may otherwise direct. (Order 6 of Federal High Court Rules).

Under High Court Rules applicable in various States, legal practitioner is not allowed to serve originating processes but is allowed to serve any other process for which personal service is not required, for example, pleadings, petitions, summonses, warrants. (Order 7, rule 1 of High Court of Lagos State [Civil Procedure] Rules 2004).

Court may also in civil cases appoint any process to be served by special bailiff who for time being shall have privileges and liabilities of officer of court. (Order 13, rule 4 of Federal High Court Rules).

Service on Individual.

Originating processes shall be served personally by delivery to person to be served copy of original process duly certified by court as being true copy of original process filed. (Order 6, rule 2 of Federal High Court Rules).

Service on Infant.

Where infant is party to action, service on his father or guardian or if none, upon person with whom infant resides or under whose care he is, shall unless otherwise ordered by court be deemed good personal service on infant. (Order 6, rule 11 of Federal High Court Rules).

Service on Incompetent Person.

Where person on whom service is to be effected is prisoner or lunatic in any asylum, it shall be sufficient to deliver writ or other process to superintendent or person appearing to be head officer in charge of prison or asylum. (Order 6, rule 10 of Federal High Court Rules).

Service on Partnership.

Writ or other document shall be served upon any one or more of partners, or at principal place within judicial division of business of partnership, or upon any person in that place having at time of service control or management of business. (Order 6, rule 7 of Federal High Court Rules).

Service on Domestic Corporation.

Subject to enactment establishing corporation or company or under which company is registered, writ or other document may be served on corporation or company authorised to sue and be sued in its name or in name of officer or trustee, by giving said process to any director, secretary or other principal officer or by leaving it at office of corporation or company. (Order 6, rule 8 of Federal High Court Rules).

Service Outside State.

Writ of summons issued by High Court of state may be served on defendant in another state in Nigeria or in Federal Capital Territory, Abuja. (§96 of Sheriff and Civil Process Act, c. S6 LFN). In some states, leave is required to issue writ of summons to be served in another state or Federal Capital Territory, Abuja, while in other states there is no requirement for leave to issue. Such writ of summons for service must be endorsed with following statement: “This summons is to be served out of the . . . . . state and in the . . . . . . state”.

Court may also grant leave to serve writ of summons or notice of writ of summons outside Nigeria whenever it is shown that: (a) subject matter of action is land situated within jurisdiction; (b) any act, deed, will, contract, obligation, or liability affecting land or hereditament situated within jurisdiction is sought to be construed, rectified, set aside or enforced in action; (c) any relief is sought against any person domiciled or resident within jurisdiction; (d) action against defendant is to enforce, rescind, dissolve, annul or otherwise effect contract to recover damages in respect of breach of contract: (i) made within jurisdiction, (ii) made by or through agent trading or resident within jurisdiction on behalf of principal trading or residing out of jurisdiction, or (iii) by its term to be governed by law in force in jurisdiction or is brought against defendant in respect of breach committed within jurisdiction of contract wherever made; (e) action is founded on tort or other civil wrong committed within jurisdiction; (f) any injunction is sought as to anything to be done within jurisdiction, or to prevent or remove any nuisance within jurisdiction; (g) any person out of jurisdiction is necessary or proper party to action properly brought by person within jurisdiction; (h) action is by mortgagee or mortgagor in relation to mortgage of property situated within jurisdiction and seeks following relief: sale, foreclosure, delivery of possession by mortgagor, redemption, reconveyance, delivery of possession by mortgagee; (i) action is one brought under Civil Aviation Act or any regulation made in pursuance of Act or any law relating to carriage by air. (Order 6, rule 13 of Federal High Court Rules).

Application for leave to serve outside Nigeria must be supported by affidavit disclosing that plaintiff has good cause of action and showing place or country where defendant may be found and grounds for application. Various High Court Rules contain similar rules concerning service outside Nigeria.

Substituted Service.

Where it appears to court that for any reason personal service cannot be conveniently effected, court may order that service be effected either by delivery of document to some adult resident at usual or last known place of abode or business of person to be served or by delivery thereof to some person being agent of person to be served, or to some other person on its being proved that there is reasonable probability that document would in ordinary cause, through that agent or other person come to knowledge of person to be served; or by advertisement in state gazette or in some newspaper circulating within jurisdiction; or by notice put up at principal court-house or some other place of public resort in judicial division where proceeding is instituted or at usual or last known place of abode or of business of person to be served. (Order 6, rule 5 of Federal High Court Rules).

5.13 SERVICE:

See topic 5.12 Process.

6 COURTS AND LEGISLATURE

6.01 COURTS:

Constitution of Federal Republic of Nigeria 1999 provides for following superior courts of record: (a) Supreme Court (§230); (b) Court of Appeal (§237); (c) Federal High Court (§249); (d) High Court of the Federal Capital Territory, Abuja (§255); (e) Sharia Court of Appeal of the Federal Capital Territory, Abuja (§260); (f) Customary Court of Appeal of the Federal Capital Territory, Abuja (§265); (g) High Court of a State (§270); (h) Sharia Court of Appeal of a State (§275); (i) Customary Court of Appeal of a State (§280).

Supreme Court.

Court has original jurisdiction to determine disputes between federal and state government and disputes between two or more states. (§232). Court has jurisdiction to determine appeals from Court of Appeal. (§233). Appeals to Supreme Court from decisions of Court of Appeal may be as of right or may require leave of court. (§233).

On question of law; interpretation or application of Constitution; contravention or likelihood of contravention of fundamental human rights; death sentence imposed or affirmed by Court of Appeal; whether person has been validly elected to office or President or Vice President; whether term of office of President or Vice President is vacant; other matters prescribed by act of National Assembly, appeal lies as of right. (§233).

All other appeals must be with leave of Court of Appeal or Supreme Court. Court is duly constituted by five justices. However, when court is exercising its original jurisdiction or considering appeal relating to interpretation or application of Constitution or contravention or likelihood of contravention of fundamental human rights, court is duly constituted by seven justices. (§234).

Decisions of court are final, save for exercise by President or State governor of power of prerogative of mercy. (§235).

Court of Appeal.

Court has original jurisdiction to determine any question as to whether person has been validly elected as President or Vice President; or whether term of office of President or Vice President has ceased; or whether office of President or Vice President has become vacant. (§239).

Court has jurisdiction to determine appeals from Federal High Court, High Court of the Federal Capital Territory, Abuja, High Court of a State, Sharia Court of Appeal of the Federal Capital Territory, Abuja, Sharia Court of Appeal of a State, Customary Court of Appeal of the Federal Capital Territory, Abuja, Customary Court of Appeal of a State, Court Martial and Tribunals prescribed by Act of the National Assembly. (§240). Appeals to Court of Appeal may be as of right or may require leave of court.

On question of law; decisions in civil or criminal proceedings where Federal of State High Court sat as court of first instance; interpretation or application of Constitution; contravention or likelihood of contravention of fundamental human rights; decisions in criminal proceedings where Federal or State High Court has imposed death sentence; decisions in respect of liberty of person or custody of infant; grant or refusal of injunction or appointment of receiver; determination of case of creditor or liberty of contributory or other officer under any enactment relating to companies in respect of misfeasance or otherwise; decree nisi in matrimonial cause or decision determining liability in admiralty action; and any other causes as may be prescribed by any law in force, appeal lies as of right. (§§241, 244, and 245).

On decision of Code of Conduct Tribunal, National, State Assembly and Governorship Election Tribunals, appeal lies as of right. (§246). All other appeals must be with leave of High Court or Court of Appeal.

Decision of court on election petitions brought before it by way of appeal is final. Court is duly constituted by three justices. When considering appeals from Sharia Court of Appeal or Customary Court of Appeal, court is duly constituted by three justices learned in Islamic personal law or customary law respectively. Court presently has divisions in Benin, Lagos, Abuja, Enugu, Kaduna, Port Harcourt, Jos, Ilorin, Calabar and Ibadan.

Federal High Court.

Court has exclusive jurisdiction in civil matters concerning: (a) revenue of Federal Government; (b) taxation of companies and other bodies established or carrying on business in Nigeria and all persons liable to pay tax under any federal tax enactment; (c) customs and exercise duties including claim by or against Nigeria Customs Service or any member or officer thereof, arising from performance of duty imposed under any regulation relating to customs and exercise duties and export duties; (d) banking, banks and other financial institutions, including action between two banks, any action by or against Central Bank of Nigeria arising from banking, foreign exchange, coinage, legal tender, bills of exchange, letters of credit, promissory notes and other fiscal measures. Court has no jurisdiction in disputes between individual customer and bank in respect of transactions between both parties; (e) operation of Companies and Allied Matters Act or any enactment replacing same or regarding operation of companies incorporated under said Act; (f) federal enactments relating to copyright, patent, designs, trademarks and passing off, industrial designs and merchandise marks, business names, commercial and industrial monopolies, combines and trusts, standards of goods and commodities and industrial standards; (g) admiralty jurisdiction including shipping and navigation on River Niger, River Benue and their affluents and on such inland waterway as may be designated to be international waterway by any enactment, all federal ports (including constitution and powers of ports authorities for federal ports) and carriage by sea; (h) diplomatic, consular and trade representation; (i) citizenship naturalization and aliens, deportation of persons who are not citizens of Nigeria, extradition, immigration into and emigration from Nigeria, passports and visas; (j) bankruptcy and insolvency; (k) aviation safety of aircraft and carriage of passengers and goods by air and meteorology; (l) arms, ammunition and explosives; (m) drugs and poisons; (n) mines and minerals (including oil fields, oil mining, geological surveys and natural gas); (o) weights and measures; (p) administration or management and control of Federal Government and any of its agencies; (q) operation and interpretation of Constitution as it affects federal government and its agencies; (r) action for declaration or injunction affecting validity of any executive or administrative action or decision by Federal Government and its agencies; (s) such other civil or criminal jurisdiction whether exclusive or not as may be conferred by Act of the National Assembly court jurisdiction in respect of criminal matters relating to matters listed above.

Court is duly constituted by one judge. Court presently has divisions in Lagos, Benin, Calabar, Abuja, Ibadan, Enugu, Kaduna, Jos, Port Harcourt, Ilorin, Maiduguri, Kano, Sokoto.

High Court of a State.

Court has jurisdiction to determine civil proceedings where existence or extent of legal right, power, duty liability, privilege, interest, obligation or claim is in issue. Court also has jurisdiction to determine criminal proceedings involving penalty, forfeiture, punishment or other liability in respect of offence committed by person. (§272). Court is duly constituted by one judge. (§273).

High Court of Federal Capital Territory, Abuja.

Court has same jurisdiction and constitution as High Court of State. (§§257 and 258).

Sharia Court of Appeal of a State.

Each state may create Sharia Court of Appeal if it so desires. Court has appellate and supervisory jurisdiction in civil proceedings involving Islamic personal law. (§277). Court is duly constituted by three kadis. (§278).

Sharia Court of Appeal of the Federal Capital Territory, Abuja.

Court has same jurisdiction and constitution as Sharia Court of Appeal of a State. (§§262 and 263).

Customary Court of Appeal of a State.

Each state may create Customary Court of Appeal if it so desires. (§280). Court has appellate and supervisory jurisdiction in civil proceedings involving customary law. (§282). Court is duly constituted by three judges. (§283).

Customary Court of Appeal of the Federal Capital Territory, Abuja.

Court has same jurisdiction and constitution as Customary Court of Appeal of a State. (§§267 and 268).

6.02 STATUTES:

Laws of the Federation of Nigeria 2004 contain compilation of all federal laws up to 31st Dec. 2002. Subsequent federal laws are published as they are enacted and are identified by year of enactment and serial number. Various states have also published compilations of their respective laws.

7 DISPUTE RESOLUTION

7.01 ALTERNATIVE DISPUTE RESOLUTION:

Conciliation.

Parties to any agreement may seek amicable settlement of any dispute in relation to agreement by conciliation under provisions of Arbitration and Conciliation Act, c. A18 LFN. (§37). Party may initiate conciliation proceedings by sending written request setting out subject matter of dispute to other party. (§38).

Where request is accepted, dispute shall be referred to conciliation body consisting of one or more conciliators to be appointed as follows: (a) in case of one conciliator, jointly by parties; (b) in case of three conciliators, one by each party and third jointly by parties. (§§39 and 40).

Parties are entitled to appear before conciliation body in person or may have legal representation. (§41). After conciliator has examined case and heard parties, he shall submit terms of settlement to parties. (§42). If parties agree to terms of settlement, conciliator shall draw up settlement and sign record of settlement. However if parties do not agree to terms of settlement they may submit dispute to arbitration in accordance with any arbitration agreement or where no arbitration agreement they may take any action in court as they deem fit. (§42).

7.02 ARBITRATION AND AWARD:

Principal legislation governing arbitration in Nigeria is Arbitration and Conciliation Act, c. A18 LFN. Parties may voluntarily submit to arbitration.

Act is modelled after UNCITRAL Model Law 1985.

Arbitration under Act covers only disputes arising from relationships of commercial nature. (§57).

Arbitration proceedings shall be in accordance with procedure contained in Act or in such manner as arbitral tribunal considers appropriate so as to ensure fair hearing. (§15).

International commercial agreements are to be referred to arbitration in accordance with arbitration rules contained in Act or UNCITRAL Arbitration Rules or any other international arbitration rules acceptable to parties. (§53). In event of deadlock in appointment of arbitrator in international commercial arbitration, Secretary-General of Permanent Court of Arbitration at The Hague shall be appointing authority. (§44).

Arbitral award shall be recognised as binding, and subject to parties' right to request court to refuse recognition or enforcement shall be enforced by court in same manner as judgment or order to same effect.

Nigeria is party to, and adopts Convention on the Recognition and Enforcement of Arbitral Awards, 1958 (New York Convention).

Form and Requisite of Submission.

Agreement to submit dispute to arbitration must be in writing. (§1).

Contracts to Arbitrate Future Disputes.

Parties to arbitration agreement may agree to submit future disputes to arbitration. (§1).

Rescission.

Arbitration agreement is irrevocable except by agreement of parties or by leave of court. (§2).

Powers of Arbitrators.

Powers may be conferred on arbitrator directly through arbitration agreement or further agreement between parties. These powers must be within limits permitted by law, for example, parties to arbitration agreement cannot confer power on arbitrator to enforce award in violation of §§31 and 51 of Act which vests such power in courts. Powers may also be conferred indirectly when parties agree that international or institutional rules of arbitration should apply to arbitration.

Act also confers certain powers on arbitrator, for example, power of tribunal to rule on its jurisdiction (§12[1]), power to extend time limited by Act for doing anything (§36), power to make preservative orders in respect of subject matter of arbitration (§13), power to administer oaths and take affirmations (§20[5]), power to appoint experts (§22) and power to determine language of arbitral proceedings (§18).

Mandatory Arbitration.

Certain statutes provide for reference of certain disputes to arbitration irrespective of will of parties. Examples of statutes requiring mandatory reference to arbitration are: (1) Trade Disputes Act, c. T8 LFN which requires that trade disputes be referred to Industrial Arbitration Panel (§7); (2) Nigerian Investment Promotion Act c. N117 LFN requires that disputes between investors and federal government be referred to arbitration (§26).

Regional Centre for Commercial Arbitration, Lagos.

Regional Centre for International Commercial Arbitration Act (c. R5 LFN) establishes Regional Centre for Commercial Arbitration to promote resolution of disputes arising from international transactions and commerce as well as foreign investments by offering institutional arbitration and other alternative dispute resolution techniques. Centre has its own rules which were adopted from UNCITRAL Arbitration Rules. It also administers arbitration under other rules. Centre's rules make provisions for fixing arbitrators' fees in accordance with schedule of fees, ensuring compliance with rules and time limits, provision of facilities and assistance for conduct of proceedings; secretarial assistance and facilities for interpretation.

In order to initiate arbitration proceedings under rules of Centre, parties must take following steps: (1) notify director of Centre in writing that parties have entered into agreement in which they have agreed to refer their disputes to arbitration under rules of Centre; (2) claimant must file with director of Centre copy of notice of arbitration served respondent; (3) parties must also file with director copy of any other notice including notification, communication or proposal concerning proceedings; (4) if parties have agreed on appointing authority, other than Centre, they must furnish director name of that authority.

8 EMPLOYMENT

8.01 FACTORIES:

General.

Every person who occupies or intends to occupy factory is to apply to Director of Factories for registration of factory. (§§2[1], 3[1] Factories Act c. F1 LFN).

Director shall, on receipt of application, cause factory to be registered and issue certificate of registration if satisfied that factory is suitable. (§§2[2], 3[2]).

Act contains provisions dealing with employer's obligation for health, safety and welfare of employees. (§§7-50).

Notification of Accidents.

Where accident in factory causes loss of life or disability of employee, written notice of accident must be given to inspector of factories. (§51).

Notification of Industrial Diseases.

Where employer believes, or suspects that occupational disease has occurred in factory employer must give written notice to inspector of factories. (§53).

General Registers.

There shall be kept in every factory register called general register, to which there shall be attached certificate of registration, prescribed particulars as to washing, painting, etc. of factory, prescribed particulars of every accident and all other reports and particulars required by Act. (§58).

Posting of Abstract of Act.

There shall be kept posted in prominent position in every factory prescribed abstract of Act, any regulations and notices required by Act. (§60).

Prohibition of Deduction from Wages.

Occupier of factory shall not, in respect of anything to be done or provided by him in pursuance of Act make any deduction from sum contracted to be paid by him to any employee, or receive, or allow any person in his employment to receive any payment from any such person. (§62).

Penalty for Death or Injury.

If any person dies or suffers any bodily injury, as result of occupier or owner of factory having contravened Act, occupier or owner will be liable to fine or to imprisonment, or to both such fine and imprisonment. Fine may be applied for benefit of injured person or his family as court may order. (§71).

8.02 MINIMUM WAGE:

Exemptions.

National Minimum Wage Act c. N61 LFN, establishes national minimum wage.

Establishments employing less than 50 workers, part-time workers, workers paid on commission or piece-rate basis, workers on seasonal employment or employed in vessel or aircraft to which laws regulating merchant shipping or civil aviation apply exempted. Minister may grant other exemptions. (§2).

See also category 17 Taxation, topic 17.05 Employment Taxes.

9 ENVIRONMENT

9.01 ENVIRONMENTAL REGULATIONS:

Governed principally by National Environmental Standards and Regulations Enforcement Agency (Establishment) Act 2007 No. 25 of 2007 (NESREA Act), Environmental Impact Assessment Act c. E12 LFN, Nuclear Safety and Radiation Protection Act c. N142 LFN, and Harmful Waste (Special Criminal Provisions, etc.) Act c. H1 LFN. NESREA Act repealed Federal Environmental Protection Agency Act c. F10 LFN. Regulations made pursuant to c. F10 which survived repeal are National Environmental Protection (Effluent Limitation) Regulations S.I. 8 of 1991, National Environmental Protection (Pollution Abatement in Industries and Facilities Generating Wastes) Regulations S.I. 9 of 1991, National Environmental Protection (Management of Solid and Hazardous Wastes) Regulations S.I. 15 of 1991 and National Environmental Health Practices Regulations S.I. 21 of 2007.

Public or private sector of economy not to undertake or authorise projects or activities without prior consideration, at early stages of their environmental effects. Where extent, nature or location of proposed project or activity is such that is likely to significantly affect environment, its environmental impact assessment must be undertaken. (§2 Environmental Impact Assessment Act c. E12 LFN).

No Federal, State or Local Government or any authority under them can exercise any power or perform any duty or functions that would permit certain projects to be carried out in whole or in part until National Environmental Standards and Regulations Enforcement Agency has given order that project could be carried out with or without conditions. Such projects are: (a) oil and gas fields development; (b) construction of off-shore pipelines in excess of 50 kilometres in length; (c) construction of oil and gas separation, processing, handling, and storage facilities; (d) construction of oil refineries; (e) construction of product depots for storage of petrol, gas or diesel (excluding service stations) which are located within three kilometres of any commercial, industrial or residential areas and which have combined storage capacity of 60,000 barrels or more. (Schedule 12 Environmental Impact Assessment Act c. E12 LFN).

Operator embarking on above activities must submit to both National Environmental Standards and Regulations Enforcement Agency and Department of Petroleum Resources environmental impact assessment report for approval.

Nuclear Radiation.

Nuclear Safety and Radiation Protection Act c. N142 LFN establishes Nigerian Nuclear Regulatory Authority whose functions include control and regulation of use, storage and sale of radioactive substances or of material and equipment, emitting and generating ionizing radiation. Legislation also prohibits disposal of radioactive waste without permission and sets out penalty for offenders. Authority is empowered to grant licences for exploration, excavation, mining and milling of ores containing radioactive materials.

Following regulations have been made: Nigeria Basic Ionizing Radiation Regulations S.I. 15 of 2003; Food Irradiation Regulations S.I. 50 of 2006; Nigerian Radiation Safety in Industrial Radiography Regulations S.I. 57 of 2006; Nigerian Safety and Security of Radioactive Sources Regulations S.I. 58 of 2006; Nigerian Transportation of Radioactive Sources Regulations S.I. 59 of 2006; Nigerian Radiation Safety in Nuclear Medicine Regulations S.I. 61 of 2006; Nigerian Radioactive Waste Management Regulations S.I. 60 of 2006; Nigerian Radiation Safety in Radiology Regulations S.I. 62 of 2006; and Nigerian Radiation Safety in Diagnostic and

Interventional Radiology Regulations S.I. 63 of 2006.

10 FOREIGN TRADE AND COMMERCE

10.01 CUSTOMS DUTIES:

See category 17 Taxation, topic 17.04 Customs Duties and Tax.

10.02 EXCHANGE CONTROL:

Principal legislation is Foreign Exchange (Monitoring and Miscellaneous Provisions) Act c. F34 LFN. This Act establishes Autonomous Foreign Exchange Market for transactions in foreign exchange. All such transactions must be conducted in accordance with Act. (§1[1]). Central Bank of Nigeria, issues guidelines periodically to regulate procedures for transactions in Market and for other matters related to operation of Market. (§1[2]). Transactions in Market may be conducted in any convertible foreign currency, or with other money market instruments like foreign bank notes, foreign coins, travellers' cheques, bank drafts, mail or telegraphic transfers. (§2).

Foreign currencies provided by individuals (Nigerians and foreigners resident in Nigeria), foreign missions, Central Bank of Nigeria and other organisations including proceeds from export of crude oil may be sold in Market. (§4). Central Bank may appoint any bank or other corporate organisation as Authorised Dealer or Authorised Buyer of foreign currency. (§5).

Transactions in Market are to be executed at any exchange rate mutually agreed by parties concerned. (§9).

All transactions must be supported by adequate documentation. (§10). Act does not permit general dealing in foreign currencies or dealings which are not supported by documentation. (§11). Every importation or exportation of foreign currencies in excess of U.S. $5,000 is to be declared but solely for statistical purposes. (§12[2]). Any foreign currency purchased from Market may be repatriated from Nigeria without need for further approval. (§13). Importation and exportation of Nigerian currency is prohibited except as permitted by Central Bank. (§14).

Foreigner who brings investment capital into Nigeria must obtain “Certificate of Capital Importation” from Authorised Dealer in order to be entitled to transfer out of Nigeria: dividends or profits attributable to investment; payments in respect of loan servicing where foreign loan has been obtained; and proceeds, in event of sale or liquidation of investment. (§15).

Any person may open, maintain and operate domiciliary account(s) designated in any internationally convertible currency. (§17). No money imported in accordance with Act shall be liable to seizure or forfeiture or suffer any form of expropriation by Nigerian Government. (§17[5]). Any person who imports cash in excess of U.S.$10,000 or its equivalent and deposits cash in domiciliary account may only make cash withdrawals from account. (§21[1]).

For purposes of determining and monitoring flow of foreign currencies into Nigeria Authorised Dealers are required to notify Central Bank of any transfer to or from any country of sum greater than U.S.$10,000 or its equivalent. (§25).

10.03 FOREIGN INVESTMENT:

Nigerian Investment Promotion Commission Act c. N117 LFN contains provisions dealing with foreign investment in Nigeria.

Foreigners may own up to 100% of any Nigerian business (§17), but not in business involved in production of military or paramilitary attire and equipment; or production of narcotic drugs and psychotropic substances (§18). After incorporation in Nigeria foreign owned business must obtain registration with Nigerian Investment Promotion Commission. Commission must give reply within 14 days to application for registration. (§20).

Foreign investors are guaranteed unconditional transferability of their dividends, profits, loan repayments, and capital (upon disinvestment). (§24).

There is express protection against nationalisation and expropriation of business interests with exception where this is carried out in national interest or for public purpose. In such case fair and adequate compensation is to be paid. (§25).

Disputes with Federal Government are to be resolved in accordance with rules of International Centre for Settlement of Investment Disputes or within such other framework as parties may agree such as bilateral investment protection agreements. (§26[1a,b,c] & §26[3]).

See category 5 Civil Actions and Procedure, topic 5.09 Judgments, subhead Enforcement of Award of International Centre for Settlement of Investment Disputes.

11 HEALTH

11.01 FOOD AND DRUG REGULATION AND CONTROL:

National Agency for Food and Drug Administration and Control (NAFDAC) is charged with regulating and controlling importation, exportation, manufacture, advertisement, distribution, storage, sale and use of foods, drugs, cosmetics, medical devices, detergents, bottled water and chemicals. (NAFDAC c. N1 LFN). This agency has published following regulations dealing with food and drugs: Bottled Water (Advertisement) Regulations (1995 LN 17), Bottled Water (Labelling) Regulations (1996 LN 8), Bottled Water Registration Regulations (1996 LN 18), Cosmetic and Medical Devices (Advertisement) Regulations (1996 LN 17), Drug Products Advertisement Regulations (1995 LN 15), Cosmetics (Prohibition of Bleaching Agents) Regulations (2005 LN 31); Fats and Oils Regulations (2005, LN 32); Food Fortification Regulations (2005 LN 33); Non-Nutritive Sweeteners in Food Products Regulations (2005 LN 34); Food Products (Advertisement) Regulations (2005 LN35); Food Grade (Table or Cooking) Salt Regulations (2005 LN 36); Herbal Medicines and Related Products (Advertisement) Regulations (2005 LN 37); Non-Nutritive Sweetener in Drug Products (Prohibition) Regulations (2005 LN 38); Pesticide Registration Regulations (2005 LN 39); Spirit Drinks Registrations (2005 LN 40);Pre-packages Food (Labeling) Regulations (2005 LN 41); Cocoa Products Regulations (2005 LN 42); Drug Labeling Regulations (2005 LN 43); Cosmetics Products (Labelling) Regulations (2005 LN 44); Herbal Medicines and Related Products (Labelling) Regulations (2005 LN 45); Soft Drinks Regulations (2005 LN46); Food Fortification with Vitamin A Regulations (2005 LN 47); Processed Food Registration Regulations (2005 LN 48); Wine Regulations (2005, LN 49); Food Irradiation Regulations, (2005 LN 50); Fruit Juice and Nectar Regulations (2005 LN 51); Food Additives Regulations (2005 LN 52); Herbal Medicines and Related Products (Registration) Regulations (2005 LN 53); and Milk and Dairy Products Regulations (2005 LN 54).

Thrust of these regulations is to protect members of public by providing, inter alia, that: food products and drug products must be registered with NAFDAC before they can be sold or advertised in Nigeria; food and drugs must meet prescribed standards; labelling of any product must indicate name of product and constituents of or ingredients in product as well as manufacturer of product; expiry date of any product must be indicated on its packaging; trademark, labelling or advertising of any product must not misrepresent nature, qualities or origin of product or be otherwise misleading; information regarding ionization or other special treatment of pre-packaged food must be provided; for food products, details of any nutritional claim must be stated on labelling; advertisements for drug products must have prior clearance and approval of

NAFDAC; labelling or advertising statements claiming or implying superlative function may not be used unless statements can be substantiated; directions for use must be provided with packaging; for drug products, indications for use as well as contra-indications must also be provided; prescription drugs may not be advertised to public; no advertisement may claim that drug is for treatment, prevention or cure of any of list of 66 diseases, disorders or abnormal physical states. Diseases are Acquired Immune Deficiency Syndrome, Alcoholism, Appendicitis, Arteriosclerosis, Asthma, Blood disorders, Cancer, Cataract, Cholera, Diabetes, Diphtheria, Disorders of menstrual flow, Disorders of prostrate gland, Dysentery, Encephalitis, Enteric Fever, Epilepsy, Erysipelas, Filariasis, Gallstones, kidney stones and bladder stones, Gangrene, any genital or urinary diseases not mentioned elsewhere in this Schedule, Glaucoma, Goitre, Hay Fever, Heart disease, Hernia, High blood pressure, Infective hepatitis, Influenza and flu, Jaundice, Kidney Disease, Leprosy, Locomotor ataxis, Loss of youth, Measles, Meningitis, Mental conditions, Mumps, Nervousness, Nutritional disorders, Obesity, Onchocerciasis, Paralysis, Plague, Pleurisy, Pneumonia, Poliomyelitis, Rabies, Rheumatic fever, Schistosomiasis, Sexual impotence, loss of virility or sterility, Sleeping sickness, Snake bite, Syphilis, Tetanus, Trachoma, Tuberculosis, Tumours, Typhoid fever, Undulant fever, Ulcers of the gastro-intestinal tract, Venereal diseases, Yaws, Yellow fever. (Drug Products Advertisement Regulations 1995).

Marketing (Breast-Milk Substitutes) Act c. M5 LFN prohibits, amongst other things, sale, advertisement, distribution or offer as sample or gift to members of public, of breast-milk substitutes or infant formula unless such products have been registered with Food and Drugs Administration of Federal Ministry of Health. Hospitals and other health care delivery medical establishments are prohibited from being used as avenues for promotion of breast-milk substitutes or infant formulas notwithstanding that product has been registered. (§§2 and 7).

Registration Fees.

These are contained in National Agency for Food and Drug Administration and Control Charges Regulations 2001.

Consequences of Non-registration.

Central Bank of Nigeria has directed banks in Nigeria not to effect remittances in respect of importation of food and drug products which do not have NAFDAC registration.

Offences and Penalties.

Counterfeit and Fake Drugs and Unwholesome Processed Foods (Miscellaneous Provisions) Act c. C34 LFN prohibits any dealing in counterfeit, adulterated, banned or fake, substandard or expired drugs or unwholesome processed foods. (§1). It also prohibits sale or display of drugs or poisons in certain premises or places. (§2). Penalties for breach include fines up to N500,000 and imprisonment for up to 15 years. (§3).

Dangerous Drugs.

The Dangerous Drugs Act c. D1 LFN provides for regulation and control of importation, exportation, manufacture, sale and use of number of dangerous drugs, including opium, coca leaves, Indian hemp, cocaine, ecgonine, morphine, diacetylmorphine, thebaine and their derivates or any preparations containing foregoing.

National Drug Formulary and Essential Drugs List Act c. N29 LFN prescribes National Drug Formulary and Essential Drugs List and prohibits importation and manufacture in Nigeria of any drug not on list.

Food and Drugs.

Food and Drugs Act c. F32 LFN provides for regulation of manufacture, sale and advertisement of food, drugs, cosmetics and devices and repeals existing State laws on above matters.

Food, Drugs and Related Products (Registration, Etc.) Act c. F33 LFN prohibits manufacture, importation, exportation, advertisement, sale or distribution of drugs and other drug related products without registration. Also provides for forfeiture of assets or property obtained by person who breaches Act. (§8).

Tobacco Smoking (Control) Act c. T6 LFN prohibits tobacco smoking in following places: (a) cinema, theatre or stadium; (b) offices; (c) public transportation; (d) lifts; (e) medical establishment; (f) schools; and (g) nursery institutions. Also, advertisements for tobacco products through any of following media: (a) newspapers; (b) magazines; (c) radio; (d) television; (e) cinema; (f) billboards; and (g) handbills, must contain warning that tobacco smoking is dangerous to health. (§§1 & 2).

12 IMMIGRATION

12.01 ALIENS:

Corporations Owned or Controlled by Aliens.

See category Business Organisations, topics Corporations; Foreign Corporations. Also, category Foreign Trade and Commerce, topic Foreign Investment.

12.02 IMMIGRATION:

Regulated by Immigration Act, c. I1 LFN and by regulations promulgated thereunder. Minister of Internal Affairs has power to prescribe conditions of entry into Nigeria and fees payable in respect of any travel document, visa or permit. (§33). In practice this power is delegated to Comptroller-General of Immigration who is also charged with administration of immigration in Nigeria. (§5).

Visas/Entry Permits.

Term “entry permit” is used when immigrant is from Commonwealth country while term “visa” is used when immigrant is not from Commonwealth country. However, same provisions apply to both terms. Application for visa or permit is made to appropriate Nigerian diplomatic mission. (§9[1]). Visa granted depends on purpose of journey intended. Any variation regarding purpose will render visa inappropriate for entry.

Entering Nigeria for Purpose Other than Employment.

Following types of visa are available: (a) Transit visa, (b) visitor's visa, tourist visa, business visa, (c) diplomatic visa, (d) gratis and courtesy visa.

Transit visa is issued to applicants who wish to pass through Nigeria en route to further destination. It is issued for initial period not exceeding seven days unless Comptroller-General of Immigration extends period. Transit visa is only issued to person who has onward passage to destination outside Nigeria and to which he has entry facilities or to person who has sufficient funds to pay for any means of transportation appropriate to reach that destination. In special cases, transit visa may be issued at port of arrival.

Visitor's visa, tourist visa, business visa may be issued to visitors, or to tourists, or to persons who wish to visit Nigeria for business meetings or for purpose of exploring business or investment opportunities in Nigeria. Visa is usually issued for initial period of three months although period may be extended on application. It may allow only single journey to Nigeria or specified number of journeys or any number of journeys within period granted.

Diplomatic visa is issued on basis of reciprocity to diplomats duly accredited to Nigeria. No fee is charged for diplomatic visa.

Gratis and Courtesy visa is normally issued to persons who do not qualify for diplomatic visa, but who are foreign government officials travelling on official business. It may be granted in cases where it is considered undesirable to accede to application for diplomatic visa, but where it is desirable on grounds of international courtesy to facilitate journey.

Entering Nigeria for Employment.

No person, other than citizen of Nigeria can accept employment (not being employed with Federal Government or State Government) without consent in writing of Comptroller-General of Immigration. (§8). Person who wishes to remain in Nigeria for purpose of long term employment will require residence permit that contains permission to take up employment. Such permit is only issued by Comptroller-General of Immigration in Nigeria, therefore person will, on application to Nigerian diplomatic mission, be issued with visa that contains provisional permission to reside and work in Nigeria. Such visa is also called “Subject-To-Regularization” or “STR” visa. With this STR visa, person can enter Nigeria but upon entry will have to apply to Comptroller-General of Immigration for proper residence permit. STR visa is usually issued for three months.

Spouse or dependant of such person will also require residence permit. However, in this case, permit will usually prohibit employment. Spouse or dependant will similarly be issued with STR visa with which to enter Nigeria and upon entry will have to apply to Comptroller-General of Immigration for proper residence permit.

Person who wishes to remain in Nigeria for purpose of short term employment may apply for visa that contains permission to take up employment. Such visa is also called “Temporary Work Permit”. It can be applied for at Nigerian diplomatic mission, but cannot be granted without reference to and approval from Comptroller-General of Immigration. This visa is usually granted for period not exceeding three months that may be extended upon application to Comptroller-General of Immigration.

Return or re-entry visa is issued to person holding residence permit, in order to enable him to return to Nigeria after trip out of Nigeria.

Expatriate Quota.

Company seeking to employ foreigners must obtain permission to do so. Permission will specify maximum number (or quota) of expatriates that may be employed, positions in which they are to be employed and duration of such employment. Usually expatriate quota would require renewal after two years; it is possible, however, to obtain one that is permanent until it is reviewed. Application for expatriate quota is made to Minister of Internal Affairs or to Nigerian Investment Promotion Commission. (Nigerian Investment Promotion Commission Act c. N117 LFN).

Residence Permit.

Any person who is not citizen of Nigeria and who is desirous of remaining in Nigeria for purpose of residence may be issued residence permit. (§10[2]). Residence permit may be issued by endorsement on any travel document. (§10[3]). Comptroller-General may endorse on residence permit such conditions as he thinks fit such as prohibition on taking up of employment. (§10[4]).

Business Permit.

No person other than citizen of Nigeria can of his own account or in partnership with any other person, practice profession or establish or take over any trade or business whatsoever without consent in writing of Minister of Internal Affairs. (§8). Such consent takes form of business permit. Application for business permit is made to Minister of Internal Affairs or to Nigerian Investment Promotion Commission. (Nigerian Investment Promotion Commission Act c. N117 LFN).

Registration of Aliens.

Any person aged 16 years or over, who is not citizen of British Commonwealth or who is not otherwise exempted from compliance with Aliens Regulations and who intends to reside in Nigeria for more than 56 days must register with officer in charge of aliens in State in which he resides within 21 days of arrival in Nigeria. Such officer is to transmit particulars of such person to Comptroller-General of Immigration. (§8; Immigration [Control of Aliens] Regulations). Persons under age of 16 years, persons entitled to diplomatic immunity and accredited to Government of Nigeria, visiting Head of State (including his family and entourage), seaman (unless he leaves his ship and remains ashore for more than 28 days) and person holding visitor's visa during validity of such visa, are not required to register as aliens. (§23).

13 INSURANCE

13.01 INSURANCE COMPANIES:

Regulation.

Insurance in Nigeria is regulated by National Insurance Commission Act c. N53 LFN, Insurance Act c. I17 LFN and Insurance Regulations of 1998, Statutory Instrument No. 11 of 1998. Insurance industry in Nigeria is supervised by National Insurance Commission (NAICOM). See §§6, 7 and 10 of NAICOM Act No. 1 of 1997. Insurance Act does not apply to mutual assurance society or to foreign reinsurer. (§1 Insurance Act).

Registration.

No insurer may commence or carry on insurance business in Nigeria unless insurer has been registered by Commission.

Application for registration as insurer shall be made to Commission in prescribed form and be accompanied by business plan and such other documents or information as Commission may, from time to time, direct or require.

Life insurance business and general insurance business shall be subject to separate application and registration.

Commission will, if satisfied, register applicant as insurer and issue to applicant certificate of registration which will be valid for period of three years. See §§4–6 of Insurance Act c. I17 LFN.

Minimum Capitalisation.

By virtue of §9 of Insurance Act no insurer shall carry on business in Nigeria unless insurer has and maintains, while carrying on that business, paid up share capital of following amounts as case may require, that is: (a) In case of life insurance business; not less than N150,000,000; (b) in case of general insurance business, not less than N200,000,000; (c) in case of composite insurance business, not less than N350,000,000; (d) in case of reinsurance business, not less than N350,000,000.

However, following NAICOM recapitalisation directive, insurance companies shall have following minimum paid-up capital: (a) In case of life insurance business, not less than N2,000,000,000; (b) in case of general insurance business, not less than N3,000,000,000; (c) in case of reinsurance business, N10,000,000,000.

Rates of Premium.

Commission approves rates of insurance premium to be paid in respect of all classes of insurance business. See §7(b) and (c) of NAICOM Act c. N53.

In respect of all classes of motor insurance, insurance companies are prohibited from increasing rates of premium without approval of National Insurance Commission. See §51 of Insurance Act.

Returns.

See category 2 Business Organizations, topic 2.02 Corporations, subheads Annual Returns, Other Returns.

Dividends.

No insurance company shall distribute any dividends until Commission has approved financial statement of insurer. (§26[5] Insurance Act).

Agents and Brokers.

Insurance agents, brokers and loss adjusters must be registered by Commission. (§§34, 36 & 45 Insurance Act). Nigerian Council of Registered Insurance Brokers Act c. N148 LFN also provides for registration by Council of persons and corporate bodies carrying on business as insurance brokers. (§§5, 6 & 7).

Insurance of Imports to Nigeria.

Insurance in respect of goods to be imported into Nigeria shall be made with insurer in Nigeria. Consequently, every letter of credit or such similar document issued by any bank or other financial institution in Nigeria in respect of such goods shall be on carriage and freight basis only. In exceptional cases however, Commission may in writing permit insurance broker to effect such insurance outside Nigeria, upon satisfying Commission that it is impracticable to effect insurance with insurer registered in Nigeria. See §72 (1-4) of Insurance Act.

Health Insurance.

This is regulated by National Health Insurance Scheme Act c. N42 LFN.

14 INTELLECTUAL PROPERTY

14.01 COPYRIGHT:

Copyright in Nigeria is regulated by Copyright Act, c. C28 LFN and is administered by Nigerian Copyright Commission (hereinafter referred to as “Commission”). (§34). Copyright protection does not require registration.

Nature.

Following are eligible for copyright: literary works, musical works, artistic works, cinematograph films, sound recordings and broadcasts. (§1[1]).

Literary, musical or artistic work is not eligible for copyright unless sufficient effort has been expended on making work to give it original character and unless work has been fixed in definite medium of expression now known or later to be developed from which it can be perceived, reproduced or otherwise communicated either directly or with aid of any machine or device. (§1[2]).

Artistic work is not eligible for copyright if, at time when work is made, it is intended by author to be used as model or pattern to be multiplied by any industrial process. (§1[3]).

Work may be eligible for copyright even though making of work or doing of any act in relation to work involved infringement of copyright in some other work. (§1[4]).

§3 confers copyright on every work other than broadcast, which is eligible for copyright and which being literary, musical or artistic work or cinematograph film, is first published in Nigeria, or in case of sound recording is made in Nigeria and which has not been subject of copyright conferred on qualified person.

Copyright is conferred on every work eligible for copyright of which author, or, in case of work of joint authorship, any of authors, is at time when work is made Nigerian citizen, or is domiciled in Nigeria, or is body corporate incorporated in Nigeria (§2[1]); and on work eligible for copyright which is made by or under directive or control of government, state authority or prescribed international body (§4[1]).

Copyright is also conferred where any of authors is citizen of or is domiciled in or is body corporate incorporated in country that is party to treaty to which Nigeria is also party. Copyright is also conferred where work is first published in country which is party to obligation in treaty or other international agreement to which Nigeria is party or by United Nations and its specialised agencies or Organisation of African Unity or Economic Community of West African States. (§5[1]).

Where any country is party to treaty or other international agreement to which Nigeria is also party and Minister is satisfied that country in question provides for protection of copyright in Nigerian works, Minister may by order in Federal Gazette extend application of this Act: (a) To individuals who are citizens of or domiciled in that country; (b) to bodies corporate established by or under law of that country; (c) to works, other than sound recordings and broadcasts, first published in that country; and (d) to broadcast and sound recordings made in that country. (§45).

Term.

In case of literary, musical or artistic works other than photographs, 70 years after end of year in which author dies; in case of government or body corporate, 70 years after end of year in which work was first published.

In case of cinematograph films and photographs, 50 years after end of year in which work was first published.

In case of sound recordings, 50 years after end of year in which recording was first made.

In case of broadcasts, 50 years after end of year in which broadcast first took place. (First Schedule to Act).

Where work of joint authorship, time runs from death of author who dies last. (§2[4]).

In case of anonymous or pseudonymous literary, musical or artistic works copyright shall subsist until end of expiration of 70 years from end of year in which works were first published provided that when author becomes known, term of copyright shall be calculated in accordance with paragraph 1 of first schedule to Act. (§2[3]).

Regardless of citizenship or domicile of author, copyright will be conferred on every work, other than broadcast, which is made in or first published or made in Nigeria and which is not otherwise subject to copyright. (§3[1]).

Copyright is exclusive right to control doing in Nigeria of activities specified in §§6, 7 and 8 of Act.

Exceptions to this exclusivity are specified in Second and Third schedules to Act. Exceptions include fair dealing for purposes of research, private use, criticism, review or reporting of current events, parody, pastiche, or caricature, amongst others.

First Ownership of Copyright.

Copyright shall vest initially in author. (§10[1]). Author in case of cinematograph film means person by whom arrangements for making of film were undertaken unless parties to making of film provide otherwise by contract. Author in case of sound recording means person by whom arrangements for making of sound recording were made, except that in case of sound recording of musical work, author means artist in whose name recording was made, unless in either case parties to making of sound recording provide otherwise by contract. Author in case of broadcast transmitted from within any country means person by whom arrangements for making or transmission from within that country were undertaken. (§51).

Where work is commissioned by person who is not author's employer or, not having been commissioned, is made in course of author's employment, copyright shall belong to author unless otherwise stipulated in written contract. (§10[2]).

Where literary, artistic or musical work is made in course of employment by newspaper, magazine or similar periodical for purpose of publication in such periodical employer shall, in absence of contrary agreement, be first owner of copyright in work relating to publication of work in such periodical or reproduction of work for purpose of such publication. In all other respects employee shall be first owner. (§10[3]).

Where work is made by or under direction or control of government, state authority or prescribed international body, copyright shall vest initially in such entity and not in author. (§10[5]).

Assignment and Licence.

Copyright is transmissible by assignment, testamentary disposition or operation of law. (§11[1]).

Assignment and exclusive licence must be in writing. (§11[3]). Non-exclusive licence may be oral, written or inferred from conduct. (§11[4]).

Assignment or licence granted by one copyright owner will have effect as if granted by all co-owners. (§11[5]).

Assignment, licence or testamentary disposition may be effectively granted or made in respect of future work or any existing work in which copyright does not yet subsist; and prospective copyright in any such work shall be transmissible by operation of law as movable property. (§11[7]).

Rights.

Author of work in which copyright subsists has right to claim authorship of his work and to object and to seek relief in connection with any distortion, mutilation or modification of, and any other derogatory action in relation to his work, where such action would be or is prejudicial to his honour or reputation. These rights are perpetual, inalienable and imprescriptible. (§12[1] & [2]).

Notwithstanding assignment or sale of original work, authors of graphic works, three dimensional works and manuscripts have inalienable right to share in proceeds of any sale of such original work by public auction or through dealer. (§13[1]).

Duty to Keep Register.

Publishers, printers, producers or manufacturers of works in which copyright subsists must keep register of all works produced by them showing: name of author; title; year of production; and quantity of work produced. (§14).

Infringement.

Copyright is infringed by any person who without licence or authorisation of owner of copyright: (a) Does, or causes any other person to do act which is controlled by copyright; (b) imports or causes to be imported into Nigeria any copy of work which if it has been made in Nigeria would be infringing copy; (c) exhibits in public any article in respect of which copyright is infringed under §15(1)(a); (d) distributes by way of trade, offers for sale, hire or otherwise or for any purpose prejudicial to owner of copyright, any article in respect of which copyright is infringed under §15(1)(a); (e) makes or has in his possession plates, master tapes, machines, equipment or contrivances used for purpose of making infringed copies of work; (f) permits place of public entertainment or of business to be used for performance in public of work where performance constitutes infringement of copyright of work, unless person permitting place to be so used was not aware, and had no reasonable ground for suspecting that performance would be infringement of copyright; (g) performs or causes to be performed for purposes of trade or business or as supporting facility to trade or business, any work in which copyright subsists. (§15[1]).

Infringement of copyright is actionable at suit of owner, assignee or exclusive licensee of copyright, as case may be, in Federal High Court. (§16). No collecting society shall commence or maintain any action for infringement of copyright or any right under Act unless it is approved by Commission or is otherwise issued with certificate of exemption. (§17). Also infringement of rights conferred by §§10 and 12 of Act is actionable as breach of statutory duty owed to person entitled to right. (§19).

Infringement may result in criminal liability. (§20). It is permissible for both criminal and civil actions to be taken simultaneously in respect of same infringement under Act. (§24).

Reliefs.

In any action for infringement, plaintiff may claim such relief by way of damages, injunction, accounts or otherwise as is available in any corresponding proceedings in respect of infringement of other proprietary rights. (§16[1]). All infringing copies of work in which copyright subsists and all plates, master tapes, machines, equipment or contrivances used or intended to be used for production of such infringing copies are deemed to be property of owner, assignee or exclusive licensee, as case may be, of copyright, who accordingly may take proceedings for recovery of possession or in respect of conversion. (§18). Where ex-parte application is made to court supported by affidavit that there is reasonable cause for suspecting that there is in any house or premises any infringing copy or any plate, film or contrivance used or intended to be used for making infringing copies or capable of being used for purpose of making copies or any article book or document by means of or in relation to which any infringement has been committed, court may grant order authorizing applicant to enter such house or premises in company of police officer not below rank of Assistant Superintendent of Police and seize, detain and preserve such infringing copy or contrivance or inspect documents in custody or under control of defendant. (§25).

Anti-Piracy Measures.

Commission has power to prescribe any design, label, mark, impression or any other anti-piracy device for use on, in or in connection with any work in which copyright subsists. Any person who sells, rents, hires or offers for rent or hire any work in contravention of such prescription commits offence and is liable to fine or term of imprisonment or to both fine and imprisonment. Any person who without permission of commission imports into Nigeria or has in his possession any prescribed anti-piracy device or any machine, instrument or other contrivance intended for use in production of anti-piracy device, or any person who without permission of commission is in possession of, reproduces or counterfeits any prescribed anti-piracy device is guilty of offence and liable to fine or term of imprisonment or both fine and imprisonment. (§21).

Neighbouring Rights.

Performer has exclusive right to control, in relation to his performance following acts: (a) performing; (b) recording; (c) broadcasting live; (d) reproducing in any material form; and (e) adaptation of performance. (§26[1]).

Performer's right shall subsist in relation to performance until end of period 50 years from end of year in which performance first took place. (§27).

Performer's right is infringed by person who, without performer's consent or authorisation in writing, does any of following: (a) Makes recording of whole or substantial part of live performance: provided that where consent sought is to make recording of work for research, private or domestic use, such consent shall not be unreasonably refused; (b) broadcast live, or includes live in cable programme, whole or substantial part of live performance; (c) performs in public whole or substantial part of performance; (d) shows or plays in public whole or substantial part of performance for commercial purposes; (e) broadcasts, or includes in cable programme, substantial part of performance by means of recording which is, and which that person knows or has reason to believe was made without performer's consent; (f) imports into country otherwise than for his private or domestic use or displays performer's work which is infringing recording; or (g) in course of trade or business, sells or lets for hire, offers, distributes or displays for sale or hire recording of performer's work which is infringing recording. (§28).

Infringement of performer's right is actionable by person entitled to right as breach of statutory duty and performer is entitled to damages, injunction, account for profit or conversion and person having performer's right or recording rights to performance is entitled to order of court that unauthorized recording be forfeited and delivered to him. (§29). Infringement may also result in criminal liability in respect of infringement of performer's right. (§30).

Protection of Expressions of Folklore.

Expressions of folklore are protected against reproduction; communication to public by performance, broadcasting, distribution by cable or other means; adaptations, translations and other transformations, when such expressions are made either for commercial purposes or outside their traditional or customary context. (§31). Any person who, without consent of Commission, uses expression of folklore in manner not permitted by Act will be in breach of statutory duty and liable to Commission in damages, injunction and any other remedies as court deems fit to award in circumstances. (§32). Infringement may also result in criminal liability. (§33).

Compulsory Licences.

There are provisions that permit Nigerian citizen, individual domiciled in Nigeria or body corporate incorporated in Nigeria to obtain from Commission licence to produce and publish translation of literary or dramatic work for purposes of teaching scholarship or research. (§37).

No licence will be granted for this purpose until one year from date of first publication for translations into a Nigerian language; or until three years from first publication for translations into English. (Paragraph 2[6], Fourth schedule).

Where after specified period from first publication of edition of literary or artistic work no copies of edition available in Nigeria; or copies have not been put on sale for six months licence may be obtained from Commission to reproduce and publish such work in printed or analogous form. (Paragraph 3[1], Fourth schedule).

Specified periods are seven years from date of first publication for works of fiction, poetry, drama, music or art; or three years for works relating to natural science, physical science, mathematics or technology. (Paragraph 3[8], Fourth schedule).

Copyright Inspectors.

Commission has power to appoint copyright inspectors. Copyright inspector shall for purposes of Act have power to: (a) enter, inspect and examine at any reasonable time any building or premises which he reasonably suspects is being used for any activity which is infringement of copyright under this Act; (b) arrest any person who he reasonably believes to have committed offence under this Act; (c) make such examination and inquiry as may be necessary to ascertain whether provisions of this Act are complied with; (d) require production of register kept by publishers, printers, producers or manufacturers and to inspect, examine or copy it; (e) require any person who, he finds in such building or premises to give such information as it is in his power to give in relation to any purpose specified in this Act; and (f) carry out such examination, test or analysis within or outside premises as is required to give effect to any provision of this Act and to take instant photographs where such examination, test, analysis or photograph is carried out within premises and such examination, test, analysis or photograph shall be required to be endorsed by occupier of premises or his agent but refusal by occupier to endorse any document containing result of examination, test, analysis or photograph shall not invalidate result or finding of examination, test, analysis or photograph, and (g) exercise such other powers as commission may delegate to give effect to provisions of Act. (§38[1, 2]).

Any person who obstructs copyright inspector in performance of his duties is guilty of offence and liable on conviction to fine not exceeding N500 or to imprisonment for term not exceeding three months or to both such fine and imprisonment. (§38[4]).

With regard to prosecution or defence of civil or criminal matter under Act, copyright inspector shall have all powers, rights and privileges of police officer. (§38[5]).

Collecting Societies.

Commission has power to approve establishing and operating of collecting societies in respect of any one or more rights of copyright owners for benefit of such owners. (§39[1]).

Copyright (Video Rental) Regulations 1999 made pursuant to §45(4) of Copyright Act c. C28 LFN. Regulations provide for accreditation of outlets, compliance with relevant laws, certificate of accreditation, keeping of books and returns and fees to be charged by Commission.

Copyright (Security Devices) Regulations 1999 made pursuant to §21 of Copyright Act c. C28 LFN. Regulations provide for prescription of holograms, affixation of holograms, accreditation of producers, accreditation of importers, keeping of books and returns and fees to be charged by Commission.

14.02 DESIGNS:

Designs are regulated by Patents and Designs Act, c. P2 LFN.

Industrial design is registrable if it is new, and is not contrary to public order or morality

(§13). Industrial design is defined as "any combination of lines or colours or both, and any three dimensional form, whether or not associated with colours" which is intended by creator to be used as model or pattern to be multiplied by industrial process and is not intended solely to obtain technical result. (§12).

Excluded from registration, however, are designs to be applied to certain sculptures; wall plaques and medals; and certain printed matter, primarily of literary or artistic character e.g. book jackets, calendars, certificates, coupons, dressmaking patterns, greeting cards, leaflets, plans, maps, postcards, stamps, trade advertisements, trade forms and cards transfers. (Reg. 22, Designs Rules).

Registration.

Application for registration of industrial design is made to Registrar of Patents and Designs on prescribed forms and should contain together with prescribed fee: (a) applicant's full name and address; (b) specimen or representation of design; (c) indication of kind or class of product for which design will be used; (d) where application is made by agent, signed power of attorney in prescribed form; and (e) such other matter as may be prescribed from time to time. (§15[1]).

Single application may relate to any number of industrial designs not exceeding 50 as long as products to which designs relate are of same kind or class. (§15[2]).

Right to registration is vested in person who, whether or not he is true creator of design, is first to file application, or first to validly claim foreign priority for application, for registration of design. However, whether true creator is applicant or not, he is entitled to be named as such in Register and this right cannot be modified by contract.

On receipt of application for registration of design Registrar will examine it and if examination shows that application satisfies requirements of law Registrar must register design and issue applicant with registration certificate. (§16[2]). Registrar will shortly after this publish in official gazette notification of registration indicating details of design. (§17[3]).

Where applicant seeks to avail himself of foreign priority in respect of earlier application made in foreign country application should also include written declaration giving details of name of person who made earlier application, its date and number, and country in which it was made. Within specified period after filing application applicant must also furnish Registrar with certified copy of earlier application. (§15[3]).

Applicant may ask for design to be kept secret for period not exceeding 12 months from date of application. In such case Registrar will keep application and particulars in sealed package to be opened after specified period. (§18[1]).

Protection Afforded.

Industrial design confers upon registered owner right to preclude any other person from doing any of following acts: (a) reproducing design in manufacture of product; (b) importing, selling or utilising for commercial purposes product reproducing design; and (c) holding such product for purpose of selling it or utilising it for commercial purposes. (§19[1]).

Duration.

Registration of industrial design is initially for five years from date of application. This may, however, be extended for two further periods of five years each. (§20[1]).

14.03 PATENTS:

Definition.

Patents are regulated by Patents and Designs Act, c. P2 LFN.

Invention is patentable in Nigeria if: (a) it is new, results from inventive activity and is capable of industrial application; or (b) it constitutes improvement upon patented invention and also is new, results from inventive activity and is capable of industrial application.

Invention is new if it does not form part of state of the art, that is, if it does not form part of field of knowledge already made available to public anywhere and at any time (except at official or officially recognised international exhibition within period of six months preceding filing of application).

Invention results from inventive activity if it does not obviously follow from state of the art either: (i) as to method, (ii) application, (iii) combination of methods, (iv) product which it concerns, or (v) as to individual industrial result it produces. (§1).

In other words, there is inventive step if invention is not obvious to person skilled in the art.

Invention is capable of industrial application if that invention can be manufactured or used in any kind of industry, including agriculture.

Patents cannot however be obtained in respect of (i) plant or animal varieties or essentially biological processes for production of plants or animals (except microbiological processes and their products); (ii) inventions publication or exploitation of which would be contrary to public order or morality; or (iii) principles and discoveries of scientific nature. (§1[4]).

Right to patent in respect of invention is vested in person who, whether or not he is true inventor, is first to file application, or first to validly claim foreign priority for application, in respect of invention. (§2[1]). However, whether true inventor is applicant or not, he is entitled to be named as such in patent and this right cannot be modified by contract. (§2[2]).

Where invention is made in course of employment or in execution of contract for performance of specified work, right to patent in invention is vested in employer or person who commissioned work. (§2[4]).

Procedure for Registration.

Application for patent is made to Registrar of Patents and Designs on prescribed forms and should contain together with prescribed fee: (a) applicant's full name and address; (b) description of relevant invention with any appropriate plans and drawings; (c) claim or claims indicating limits of monopoly being sought for invention; (d) where application is made by agent, signed power of attorney (in prescribed form); (e) address for service in Nigeria if applicant's address is outside Nigeria; and (f) such other matter as may be prescribed from time to time. (§3).

Application must relate to only one invention but may cover claims from any number of products or processes. (§3[3]).

Where applicant seeks to avail himself of foreign priority in respect of earlier application made in foreign country application should also include written declaration giving details of name of person who made earlier application, its date and number, and country in which it was made. Within period of three months after filing application applicant must also furnish Registrar with certified copy of earlier application. (§3[4]).

On receipt of application for patent Registrar will examine it and if examination shows that application satisfies requirements of law he will grant patent as applied for. (§4[2]). Registrar will shortly after this publish in official gazette notification of grant indicating details of grant. (§5[2]).

Examination—Only as to Form.

Examination of patent applications is only as to form. Registrar of Patents will not, in considering any application for patent, enquire whether subject of application is patentable, whether description and claims satisfy requirements of law or whether there has been prior application for, or prior grant of, patent in respect of same or similar invention as that under consideration. (§4[2]). Patents are therefore granted at risk of patentee and without guarantee of their validity. (§4[4]).

Publication.

After patent has been granted notification of grant should be published by Registrar. In practice publication has not been done for some time. (§5[3]).

Rights Conferred by Patent.

Patent confers upon patentee right to preclude others from: (a) in respect of product—making, importing, selling, using or stocking for purpose of sale or use; or (b) in respect of process—applying process or doing in respect of product obtained directly from process any of acts mentioned above. (§6[1]).

However, rights are subject to two limitations, viz.: (a) They extend only to acts done for industrial or commercial purposes and do not extend to acts done in respect of patented product after it has been lawfully sold in Nigeria. (§6[3]). Thus, rights do not cover private and domestic use of product. (b) They do not touch "concurrent user". If at date of filing patent application in respect of product or process or at date of foreign priority validly claimed in respect of application, person other than applicant was in good faith manufacturing product or applying process or had made serious preparations with view to doing so, then that person has right to continue manufacture or application of process or to continue and complete preparations and thereafter undertake manufacture of product or application of process. Such "concurrent user" has same rights in respect of product as patentee. (§6[4]).

Also patentee can transfer his rights in patent by assignment. Patentee who is not precluded from granting further licences may grant licence, on such terms as he determines, to any person who applies. Such grant must be registered and once registered will give grantee same rights as patentee has with respect to patent.

Duration.

Patent expires at end of 20th year from date of filing of relevant patent application. (§7[1]). During life of patent, patentee must pay prescribed annual fee in order to maintain patent and if this fee is not paid within six months of anniversary date patent will lapse (§7[2]) and lapsed patent cannot be restored.

Nullity of Patent.

Since patents are granted at risk of patentee and without guarantee of their validity, they are liable to be attacked and set aside for invalidity at any time on application of any person including public officer acting in exercise of his functions. Patent may be declared null and void on any of following grounds: (a) that subject-matter is not patentable; or (b) that description (specification) of claim does not conform with statutory requirements; or (c) that patent has been granted already in respect of same invention. (§9).

Infringement of Rights.

Patent is infringed if person does or causes to be done any acts which are reserved to owner under law without let or licence of patentee. (§25[1]). Infringement is actionable at suit of patentee or his assignee. Licensee cannot sue in first instance but must first of all by registered letter require licensor to sue to remedy signified infringement. However, if licensor (that is patentee) unreasonably refuses or neglects to institute proceedings, licensee may do so in his own name without prejudice to right of licensor to intervene in proceedings. (§25[4]).

In action for infringement, all such relief by way of damages, injunction, accounts or otherwise shall be available to plaintiff as is available in any corresponding proceedings for infringement of other proprietary rights. Jurisdiction over legal proceedings arising under Patents and Designs Act is vested in Federal High Court. (§26).

Convention Applications.

Unlike case of trademarks, necessary ministerial declaration has been made and countries that are to be recognised as Convention countries have been listed. This declaration and list were made in 1971 and included Paris Union members of the time. No subsequent declaration or list has been made. It is therefore not clear whether subsequent signatories to Paris Convention qualify as Convention countries in Nigeria. In practice the Registrar of Patents accepts Convention applications from these later countries. Legality of this practice has, however, not been tested in court.

Licences of Right.

If patentee (not being precluded by terms of any previously registered licence from granting further licence) applies in writing to Registrar for words “licences of right” to be registered in respect of his patent, Registrar shall enter words accordingly in register and notify entry. (§10[1]).

Where such entry is made, any person shall have right to obtain licence to exploit patent on such terms as failing agreement between that person and patentee, shall be fixed by court on application of that person; and amount of annual fees payable in respect of patent shall be reduced by half, reduction first taking effect in relation to annual fees first payable after date of entry. (§10[2]).

Patentee may at any time apply to Registrar for entry to be cancelled; and if no licences have been granted under this section or all grantees agree, Registrar shall thereupon cancel entry and notify patentee of cancellation, but only after payment of all annual or other fees which would have been payable if entry had never been made. (§10[3]).

Grantee of licence is not entitled to assign licence or grant further licences under it. (§10[4]).

Compulsory Licences.

Four years after filing of patent application or three years after grant of patent any person may apply to court for grant of compulsory licence on following grounds: (a) that patented invention, being capable of being worked in Nigeria, has not been so worked; (b) that existing degree of working of patented invention in Nigeria does not meet on reasonable terms demand for product; (c) that working of patented invention in Nigeria is being hindered or prevented by importation of patented article; and (d) that, by reason of refusal of patentee to grant licences on reasonable terms, establishment or development of industrial or commercial activities in Nigeria is unfairly and substantially prejudiced. (§1 & Schedule 1).

Compulsory licence: does not permit licensee to import; does not entitle licensee to grant further licences; and shall be non-exclusive. (paragraph 6, Schedule 1).

Compulsory licence may be transferred only with industrial undertaking in which invention is used and with consent of court. (paragraph 7, Schedule 1).

For patented products and processes declared by government to be of vital importance for defence or economy of Nigeria or for public health, compulsory licences may be granted before periods mentioned above have expired. Importation may also be permitted. (paragraph 13, Schedule 1).

14.04 TRADEMARKS AND TRADENAMES:

Definition.

Trademark means mark used or proposed to be used in relation to goods for purpose of indicating or so as to indicate connection in course of trade between goods and some person having right either as proprietor or as registered user to use mark whether with or without any indication of identity of that person. (§67 Trademarks Act, c. T13 LFN).

"Mark" includes device, brand, heading, label, ticket, name, signature, word, letter, numeral, or any combination thereof. (§67).

Registration.

Nigerian law provides that trademark can be registered only for goods or classes of goods in respect of which owner of mark has acquired or intends to acquire reputation for dealing in within Nigeria. Where therefore goods are dealt in only outside Nigeria trademark in respect of such goods cannot be registered in Nigeria unless owner of mark intends to deal in those goods within Nigeria. In practice Trademarks Registry does not require applicants to produce evidence of such intention. However, §31 of Act provides that mark may be de-registered if it is not used. See subhead Removal on Ground of Non-use, infra.

Nigeria adopts international classification of goods into 34 classes each consisting of number of goods or types of goods. Separate application must be made for registration in each of these classes. Register is divided into two parts, Part A and Part B.

For mark to be registrable in Part A of register, it must contain or consist of at least one of following essential particulars: (a) name of company, individual, firm represented in special or particular manner; (b) signature of applicant for registration or some predecessor in his business; (c) invented word or invented words; (d) word or words having no direct reference to character or quality of goods, and not being according to its ordinary signification geographical name or surname; (e) any other distinctive mark.

For any of particulars above to be registrable there must be evidence of its distinctiveness. (§9).

On other hand, for trademark to be registrable in Part B it is sufficient that it is capable of distinguishing goods in respect of which it is registered from goods that have no connection with proprietor of mark. Trademark may be registered in Part B, notwithstanding any registration in Part A. (§10). In practice registration in Part B is no longer common.

Procedure for registration is fairly simple. First step is submission to Registrar of Trademarks of formal application. This application should give details of mark for which registration is sought. Also, it should indicate nature of goods for which registration is sought and class of Register in respect of which registration is sought. Application must be made on prescribed forms on which is pasted specimen of mark and be accompanied by stipulated registration fee. On receipt of application Registrar searches Register to ascertain whether there is on record in respect of same goods or description of goods any mark which is identical with applicant's mark or so nearly resembles it as to render applicant's mark likely to deceive or cause confusion. Registrar also considers whether mark meets criteria for registration. To be eligible for registration trademark (and this includes symbol or device) must be distinctive; and if it is word it should be adapted so as to distinguish it from ordinary words.

Notwithstanding that it is distinctive, trademark is not registrable if: (a) it is deceptive, scandalous or resembles or is identical to trademark that is already registered (§§11, 13); (b) it is common name of any simple chemical element or single chemical compound but not brand name of such element or compound (§12); (c) it contains representation of Coat of Arms of Nigeria or of a State or National flag or in any other way suggests official connection between proprietor and government of Nigeria (Reg. 18, Trademark Regulations); or (d) it contains words such as “Patent”, “Patented”, “Copyright”, or similar words; or “Red Cross” or “Geneva Cross” or marks relating to them.

Application for registration of trademark may be made by proprietor or by agent. In case of foreign proprietor however local agent must be used. Specimen form for authorisation of agent is shown at end of this Digest.

After Registrar has satisfied himself of eligibility of mark he accepts application and then advertises it in official gazette, namely “Trade Marks Journal”. Publication includes invitation to persons wishing to object to trademark application to do so within two months of publication. If this time elapses and no objection has been made or, if made, has been unsuccessful mark is then registered and certificate of registration is issued.

Rights Conferred by Registration.

Registration of trademark confers registered owner with exclusive right to use of trademark in relation to goods mentioned in Register. (§§5 and 6). Also, registration confers on proprietor right of assignment and transmission of trademark to any person (§29), and right of action in case of infringement.

Duration and Renewal.

Trademarks are registered for initial period of seven years from date of application for registration. After this they can be renewed for subsequent periods of 14 years in perpetuity. (§23).

Infringement.

If person, not being proprietor or registered user, uses mark identical with or so nearly resembling mark as to be likely to deceive or cause confusion in course of trade in relation to any goods in respect of which mark was registered, this use will amount to infringement. (§5). Registered owner of trademark thereby becomes entitled to apply to Federal High Court for reliefs, which include injunction, delivery up of marked articles and damages for loss of profit.

Defensive Trademarks.

Where registered trademark consisting of invented word or words has become so well known that its use by other persons in relation to other goods “would be likely to be taken as indicating a connection in the course of trade” between those other goods and owner of well-known mark, mark may be registered by owner in respect of those other goods as defensive trademark, notwithstanding that owner does not use or propose to use mark in relation to those other goods. (§32).

Certification trademarks are also registrable in same manner and upon same criteria as ordinary trademarks. (§43).

Service Marks.

Nigerian law does not presently provide for registration of service marks as registrable marks are defined only in relation to use on goods. However, Minister for Commerce has issued regulation to extend classification of goods under Fourth Schedule of Trademarks Regulations to include service marks in classes 35 to 45, ``according to the manner and structure'' of 9th Edition of Nice Agreement Concerning International Classification of Goods and Services for Purposes of Registration of Marks. Extension is intended to make marks used or proposed to be used in respect of services contained in classes 35 to 45 registrable as trademarks under Act.

Registered User.

Although trademark which has been registered in name of one person may not be registered again in name of another person registered owner or proprietor of trademark may permit another person to use trademark and such other person may be registered as user. Application for such registration is made by both proprietor and proposed user giving among other things particulars of relationship between them including degree of control to be exercised by proprietor over permitted use. (§33).

Convention Applications.

Nigerian law makes provision for filing of “Paris Convention” trademark applications. (§44[1]). However, necessary executive order that would specify countries to be recognised in Nigeria as Convention countries has not been made. See §44[5]-[6].

Well-known Trademarks.

See subhead Defensive Trademarks, supra.

Removal from Register on Ground of Non-use.

Registered trademark may be taken off register if it is shown that trademark was registered without bona fide intention on part of owner to use it and there has in fact been no bona fide use of trademark; or if it is shown that for continuous period of five years there has been no bona fide use of trademark. Any person may apply to have trademark taken off register. (§31).

Offences and Penalties.

Merchandise Marks Act (c. M10 LFN) sets out penalties for use or participation in use of fraudulent marks.

Under Act, application of false trade description to goods extends to application to goods of any such figures, words or marks, or arrangement or combination thereof, whether including trademark or not, as is reasonably calculated to lead persons to believe that goods are manufacture or merchandise of some person other than person whose manufacture or merchandise they really are. (§2[2]).

It also extends to application to goods of any false name or initials of person applied in like manner as if such name or initials were trade description for those purposes. “False name or initial” means any name or initials of person which: (a) are not trademark or part of trademark; (b) are identical with or colourable imitation of name or initials of person carrying on business in connection with goods of same description, and not having authorised use of such name or initials; or (c) are either of fictitious person or of some person not bona fide carrying on business in connection with such goods. (§2[3]).

Every person who forges any trademark; or falsely applies to goods any trademark or any marks so nearly resembling trademark as to be calculated to deceive; or makes, disposes of, or has in his possession any die, block, machine or other instrument for purpose of forging, or of being used for forging trademark; or applies any false trade description to goods; or causes any of things above mentioned shall, unless he proves that he acted without intent to defraud, be guilty of offence. (§3).

Trademark is deemed to be forged when person without assent of proprietor of trademark, makes that trademark or mark so nearly resembling that trademark as to be calculated to deceive; or falsifies any genuine trademark, whether by alteration, addition, effacement, or otherwise. (§4).

Trademarks shall be deemed to have been applied to goods if they are applied to goods themselves; or to any covering, label, reel, or other thing in or with which goods are sold or exposed or had in possession for any purpose of sale, trade, or manufacture; or places, encloses, or annexes any goods which are sold or exposed or had in possession for any purpose of sale, trade, or manufacture, in, with, or to any covering, label, reel, or other thing to which trademark or trade description has been applied; or uses trademark or mark or trade description in any manner calculated to lead to belief that goods in connection with which it is used are designated or described by that trademark. (§5).

Every person who, being within Nigeria, procures, counsels, aids, abets, or is accessory to commission outside Nigeria of any act, which if committed in Nigeria would be offence under Act, is guilty of that offence as principal, and be liable to be proceeded against, tried and convicted in Nigeria as if offence had been there committed. (§10).

It is unlawful to import into Nigeria any goods which, if sold, would be liable to forfeiture under Act. (§14).

Every person who is guilty of offence against Act is liable (a) on conviction before High Court to imprisonment for two years, or to fine, or to both; (b) on summary conviction before magistrate to imprisonment for six months or to fine of 100 naira; (c) in any case, to forfeit every chattel, article, instrument or thing by means of or in relation to which offence has been committed. (§3[3]).

Every person who sells or has in his possession for sale goods to which false or forged trademarks or descriptions have been applied, is guilty of offence under Act unless he proves that he had taken all reasonable precautions to avoid committing offence, had no reason to suspect genuineness of trademark or description, he has given all information in his power with respect to persons from whom he obtained such goods or things; or that otherwise he had acted innocently. (§3[2]).

Act has particular provision dealing with watches. (§7). Section specifically provides for situations where watch case has words or marks which are by common repute considered as constituting description of country in which watch was made though watch itself bears no such description. In such cases such words or marks are prima facie deemed to be description of that country for purposes of Act.

Limitation of Prosecution.

No prosecution for offence against Merchandise Marks Act is to be commenced three years after commission of offence, or one year after first discovery thereof by prosecutor, whichever expiration first happens. (§13).

Tradenames.

Every individual, firm or corporation having place of business in Nigeria and carrying on business under business name must be registered if: (a) in case of firm, name does not consist of true surname of all partners without any addition other than true forenames of individual partners or initials of such forenames; (b) in case of individual, name does not consist of his true surname without any addition other than his true forenames or his initials; (c) in case of corporation, name does not consist of its corporate name without any addition. Where addition in names merely indicates that business is carried on in succession to former owner of business, such addition does not render registration necessary. Similarly where two or more individual partners have same surname, addition of "s" at end of that surname does not render registration necessary. Where business is carried on by court appointed receiver or manager, registration is unnecessary. (§573, Companies and Allied Matters Act, c. C20 LFN).

Procedure for Registration.

Every firm, individual or corporation required to be registered under Act, must within 28 days after commencement of business furnish to Registrar signed statement in writing in prescribed form, containing following general particulars: (a) business name or, if business is carried on under two or more business names, each of those business names; (b) general nature of business; (c) full postal address of principal place of business; (d) full postal address of every other place of business.

Where registration to be effected is that of firm, following information to be also supplied: Present forenames and surname, any former forenames or surname, nationality, age, sex, usual residence and any other business occupation of each of individuals who are partners; and corporate name and registered office of such corporation which is partner.

Where registration to be effected is that of individual, following information to be also supplied: Present forenames and surname, any former forenames or surnames, nationality, age, sex, usual residence and any other business occupation of individual.

Where registration to be effected is that of company, following information to be also supplied: Name and registered office of company, date of commencement of business. For registration of individual or firm consisting only of individuals, copies of certified passport photographs of individuals must also be submitted to Registrar.

Where registration to be effected is that of firm or individual carrying on business on behalf of another individual, firm or corporation whether as nominee or trustee, statement furnished to Registrar to contain this additional information: Present forenames and surname, any former forenames or surname, nationality and usual residence of each individual on whose behalf business is carried on; name of each firm or corporation on whose behalf business is carried on.

Where registration to be effected is that of firm or individual carrying on business as general agent for any concern carrying on business outside Nigeria without business place in Nigeria, statement to include information regarding name and full postal address of each such concerns; but for firm or individual carrying on business as general agent for three or more such concerns, it is sufficient to state fact that business is so carried on and countries in which concerns carry on business.

Statement containing information furnished by individual must be signed by him. In case of statement furnished by firm, it must be signed by each individual who is partner and by director or secretary of each corporation which is partner. In case of statement by company, it must be signed by director or secretary. Statement furnished by individual who is minor must be appropriately notarised. (§574[1-5] c. C20 LFN).

On receipt by Registrar of above statement of particulars furnished under §574 of Act, he will enter in register business name of individual, company or firm and file statement. Registrar will add to business name in register identification letters of state which will be in brackets at end of business name, and these will form part of business name. (§575).

On registration of any firm, company or individual under Act, Registrar will issue certificate in prescribed form containing business name together with distinguishing state identification letters in brackets at end of name. On registration of any change in particulars registered in respect of any firm, company or individual Registrar may either amend certificate previously issued or issue fresh certificate. Certificate issued to firm, company or individual is to be exhibited in conspicuous position at principal place of business so registered. Where firm, company or individual has several places of business, original certificate is to be exhibited at principal place of business while copy of certificate certified by Registrar to be exhibited in conspicuous position in each of other places of business. (§576).

Whenever change is made or occurs in statement of particulars previously furnished under §675 of Act, apart from changes in age of individual, firm or individual must within 28 days after such change occurred notify change to Registrar at register office at which firm, company or individual is registered. (§577).

If any registered firm, company or individual ceases to carry on business, it is duty of firm's partner or individual (if dead his personal representative) within three months after cessation of business to notify Registrar that firm or individual has ceased to carry on business. On receipt of such notice Registrar may remove firm, company or individual from register. Where Registrar has reasonable cause to believe that any firm, company or individual registered under Act is not carrying on business, he may after due notice remove business name from register, if he receives answer that firm, company or individual is not carrying on business or if he does not receive answer within two months from date of notice. (§578[4]).

Restriction on Use of Certain Names.

No business name is to be registered by name which: (a) contains word “national”, “Government”, “Municipal”, “State”, “Federal”, or any other word which imports or suggests that business enjoys patronage of federal, State or Local Government; or (b) contains words “co-operative” or its equivalent in any other language or any abbreviation thereof; or (c) contains words “Chambers of Commerce”, “Building Society”, “Guarantee”, “Trustee”, “Investment”, “Bank”, “Insurance” or any word or similar connotation; or (d) is identical with or similar to any other registered business name or name of any registered company; or (e) is similar to any trademark registered in Nigeria. (§579).

Every individual or firm registered under Act to publish true names of individual or partners of firm and registration number of business name in legible characters in all trade catalogues, trade circulars, show cards and business letters issued or sent by individual or firm to any person. (§582).

Annual Returns.

Every firm, company or individual carrying on business under registered business name must deliver to Commission not later than June 30 in each year except year in which business name is registered return in prescribed form showing particulars of firm, company or individuals, nature of business carried on and state of financial affairs of business carried on by firm, company or individual in business name during preceding period of Jan. 1st to Dec. 31st.

In case of individual or firm consisting only of individuals, return is to be signed by individuals but in case of company or partner who is company, return to be signed by director and secretary. (§587).

15 MINERAL, WATER AND FISHING RIGHTS

15.01 MINES AND MINERALS:

Mining of solid minerals is governed by Minerals and Mining Act, 2007.

Ownership of Resources.

Entire property in and control of all minerals in, under, or upon any land in Nigeria (including its territorial waters and Exclusive Economic Zone) is vested in Federal Government of Nigeria. Property in minerals will pass from Federal Government to person who lawfully wins them in accordance with Act. (§1).

Lands Excluded from Exploration and Mining.

Mining operations will not be permitted on land (a) set apart or used for or appropriated or dedicated to military purpose except with prior approval of President, (b) within 50 m. of oil pipeline licence area granted under Oil Pipelines Act, (c) occupied by town, village, market, burial ground, cemetery, sacred or archaeological site, appropriated for or situated within 50 m. of railway or government or public building, reservoir, dam or road, (d) subject to provisions of National Commission for Museum and Monuments Act c. N19 LFN and National Parks Service Act c. N65 LFN. (§3[1]).

No mineral title will be granted over area designated as closed to mining operations. (§3[2]).

Titles and Rights.

Following categories of mining titles are available: Reconnaissance Permit, authorises holder to carry out reconnaissance activities on any land; exploration licence, authorises holder to carry out exploration activities on exclusive basis within title area; mining lease and small-scale mining lease, authorises holder to carry out mining operations on large and small scale respectively; and water-use permit, authorises holder to use water in connection with mining activities.

Titles are granted by Mining Cadastre Office. Criteria of first come, first served, as evidence by registration in Priority register established by Act must be strictly applied by Mining Cadastre Office in case of conflicting applications in same area. (§8[2]).

Reconnaissance Permit.

Holder has right to obtain access into, enter on or fly over any land within Nigeria to search for mineral resources on non-exclusive basis and to obtain and remove surface samples in small quantities. (§58). Holder must not engage in drilling, excavation or other subsurface technique. (§56[1][b]).

Reconnaissance Permit is valid for one year and is renewable annually provided requirements of Act has been met. (§57).

Exploration Licence.

Holder has sole right to conduct exploration on land within title area and for that purpose may (i) enter upon land with agents and workmen, (ii) employ persons upon land for exploration purposes, (iii) erect and maintain machinery and plant, and construct such ways as may be necessary for or in connection with his exploration operations, (iv) carry out operations and work necessary for exclusive exploration of all mineral resources, (v) take, remove and export specimens and samples for purpose of analysis, (vi) conduct bulk sampling and trial processing of mineral resources to determine mineral potential, (vii) sell specimens and samples, (viii) use timber and water, and sink or drill shafts or wells and dig holes and trenches.

Holder who has fulfilled all conditions attached to exploration licence, will be entitled to grant of mining lease for any mineral for which he was authorised to explore. (§60). Maximum area of grant is of 200 sq. km. (§59[3]). Exploration licence is valid for three years renewable for two further periods of two years each provided holder complies with minimum work obligations and other requirements of Act. (§62).

Mineral obtained in course of exploration may be sold, subject to payment of royalty as if obtained under mining lease. (§63).

Obligations.

Holder of exploration licence must (a) conduct exploration activities in safe, environmentally and socially responsible manner in accordance with regulations, (b) if intending to explore on land occupied subject to right of occupancy, give notice to Chairman of affected Local Government Area and to owner, user or occupier of land before commencing operation, (c) maintain and restore land to safe state including filling up shafts, wells, holes, and trenches, (d) compensate users or occupiers for damage to land caused by exploration activities, (e) not use water except in compliance with water use permit, (f) not explore in forest reserve except with approval of Minister or other relevant authority, (g) pay all fees, annual rental and water usage charges. (§61[1]).

Mining Lease.

Mining lease confers on holder right to (a) obtain access into mining lease area; (b) exclusively use, occupy and carry out mineral exploitation within mining lease area; (c) exclusively carry out exploration within mining lease area; (d) utilize water and wood and other construction materials as necessary for mineral exploitation; (e) use such portions as may be required for purposes of growing such plants and vegetables, or keeping such animals, poultry and fish as may be reasonable for use by employees of mine; (f) store, remove and process mineral resources and dispose of any waste; (g) market, sell, export, or otherwise dispose of mineral resources. (§68).

Mining Cadastre Office will not grant mining lease to company, unless it is satisfied that company has in employment, person who possesses adequate professional qualifications and experience in mining operations. Mining lease will only be in force while such person remains in employ of company. Where person is not available to supervise mining operation, company must cease operations until suitably qualified person is available. (§73).

Mines Inspectorate Department must be notified of discovery during course of mining of any radioactive mineral or any mineral which may reasonably be expected to be radioactive. Provisions of Nuclear Safety and Radiation Act 1995 apply to any radioactive mineral discovered. Minister may authorise removal of radioactive minerals from land from which they have been obtained to any place approved by him for safe custody. (§44).

Mining lease may be granted for term not exceeding 25 years and is renewable every 24 years provided holder has complied with its minimum work obligation commitments and all other requirements of Act. (§66). Maximum area of grant is 50 sq. km. (§67).

Obligations.

Holder of mining lease must (a) commence mine development within 18 months from date all requirements of Act are met where mining lease is for mineral resources or within 12 months where mining lease is for mineral water; (b) commence production no later than 36 or 24 months where mining lease is for mineral resources or mineral water respectively, effective from date that requirements of Act have been met, unless circumstances justify extension; (c) carry out mining operations in skillful and efficient manner; (d) maintain lease area and mining operations in safe manner in compliance with applicable health and safety regulations; (e) not divert water from any water course in manner contrary to provisions of Act; (f) comply with social obligations prescribed in regulations; (g) comply with requirements for environmental impact assessment studies and protection plans required under Act; (h) allow access to adjoining land and construction of utilities, waterways, pipes, drains and roads, insofar as such access does nor interfere with mining operations; (i) compensate owner or occupier of land for revocation of right to use land; and (j) pay annual rental, royalty and water use charges. (§71[1]).

Pre-Conditions for Commencement of Development.

Holder of mining lease must not commence development work or extraction of mineral resources until after: (a) all environmental impact assessment studies and mitigation plans required by law are approved by Mines Environmental Compliance Department; (b) details of work program are approved by Mines Inspectorate Department; (c) community development agreement between holder and host community is concluded; and (d) holder has notified, compensated, or offered compensation to all users of land or in event of dispute, after matter has been resolved by arbitration. Matters specified under (a) and (b) must be concluded within three years where mining lease is for mineral resources or two years where mining lease is for mineral water respectively. (§71).

Lawful occupier of any land within area of mining lease will retain right to graze livestock upon or to cultivate surface of land, insofar as grazing or cultivation does not interfere with mining operations in area. (§72).

Possession and Purchase of Minerals.

All persons, other than officer authorised in that behalf by Minister and acting in execution of his duty are prohibited from possessing any mineral unless: (a) mineral is won from mineral title area which entitles holder to explore and exploit minerals; or (b) person holds licence to possess or purchase that mineral; or (c) person is, in respect of that mineral, duly authorised agent or employee of person permitted to possess that mineral. (§93).

Licence required to purchase minerals. (§94).

Minerals obtained under small scale mining lease must be sold to Mineral Buying Centres and valid receipts must be obtained. (§95).

Mineral Buying Centres must keep records of all purchases and sales of minerals with details of mines where minerals were won and obtained. (§96[2]).

Use of Water.

Every person who uses water in connection with mining operations, whether for generation of power; removal of mineral substance; concentration, milling, or otherwise, must ensure that water so used does not contain injurious substances in quantities likely to prove detrimental to animal or vegetable life when water leaves mining area in which it had been so used. (§124).

Any alteration in water supply of any land that would prejudicially affect water supply enjoyed by any other person or land without permission of Minister is prohibited, Whenever any such alteration is made, lessee benefiting from alteration must, in absence of proof to contrary, be presumed to have made it. (§127).

Accidents.

Holder of mining lease or licence must report any accident that occurs in mine or in connection with mining operations conducted under its lease, temporary title, or licence which involves loss of life or serious injury to person to nearest police station or office of Mines Inspectorate Department in State in which accident occurred. (§82[1]).

Every accident occurring in connection with quarrying operation and involving loss of life or serious injury to any person, must be reported to Inspector or quarry officer immediately by quickest available means of communication. (§82[2]).

Place where accident occurred must be left undisturbed until place or anything at place, has been visited or examined by Inspector or quarry officer. (§84).

If accident occurs in mine, Minister will set up panel of enquiry of not less than four members. (§85).

Panel will decide cause of accident including (a) whether holder or agent is guilty of negligence, (b) whether any person was killed or injured as result of accident, and (c) how future accidents might be prevented. (§86).

"Serious injury" means: (a) fractured skull, pelvis, arm, thigh, spine, forearm or leg; (b) dislocated shoulder; (c) amputation of arm, hand, one finger or more to same hand, leg or foot; (d) loss of sight of eye; (e) any other serious bodily injury, including internal hemorrhage or burns or asphyxia, if injury is likely to endanger life, cause permanent incapacity or impair efficiency subsequently. (§89).

Transfer of Title.

Subject to approval of prescribed authority, rights arising from transferable mineral title may be wholly or partially assigned, subleased, pledged, mortgaged, charged, hypothecated or subject to any security interest. (§147). Reconnaissance permit is non-transferable. (§56[4]).

Compensation.

Under §107, holder of mining title is required to: (a) pay reasonable compensation for any disturbance of surface rights of owner or occupier for any damage done to surface of land on which prospecting or mining is being, or has been carried on and, (b) in addition, pay to owner of any crop, economically valuable tree, building or work damaged, removed or destroyed by holder for mining title or by any of its agents or servants, compensation for damage removal or destruction of crop, economically valuable tree, building or work.

Where mining lease is granted in respect of area, Governor of state where land is located is required to revoke any existing right of occupancy in respect of such land in accordance with Land Use Act c. L5 LFN. Mining lease holder must pay compensation to owners/occupiers of land whose right of occupancy has been revoked. (§70[1][j])

Fiscal Incentives.

(a) Capital allowance of 95% of qualifying capital expenditure incurred in year in which investment incurred, includes certified exploration, development and processing expenditure and infrastructure costs regardless of ownership (§24[1]); (b) carrying over losses indefinitely (§24[2]) ((c) exemption from payment of duty on plant, machinery, equipment and accessories imported specifically for mining operations; (d) residence permit in respect of approved personnel; (e) personal remittance quota for expatriate personnel, free from any tax imposed by any enactment for transfer of external currency out of Nigeria (§25); (f) retention of portion of earned foreign exchange in external account for use in acquiring spare parts and other inputs required for mining operations if such equipment would not be readily available without use of such earnings (§26); (g) free transferability through Central Bank in convertible currency of payments in respect of servicing foreign loans, remittance of foreign capital on sale or liquidation of mining operations or interest therein attributable to foreign investment (§27); (h) tax relief for three years commencing from date of operation and extendable for further two years (§28); (i) deduction from taxable profits of environmental protection, mine rehabilitation, reclamation and mine closure costs (§30); (j) deduction from taxable profits of pension contributions made in respect of employees (§31); (k) annual indexation of unclaimed balance of capital cost by 5% (applicable only to mines starting production within five years from date of enactment of Act) (§32).

Royalties.

Royalty is payable on every mineral obtained in process of exploration and mining. Minister may reduce or waive royalty to be paid where satisfied that such mineral(s) is being (a) exported solely for purpose of analysis or experiment or as scientific specimen and, (b) quantity is not larger than is, in his opinion, necessary for that purpose. Minister may defer payment of royalty for specific period on approval of Federal Executive Council. (§33).

Revocation of Titles.

Mineral title may be revoked if (a) holder is convicted of offence under Act, (b) holder breaches provisions of Act or regulations or terms and conditions of title, or fails to show cause within time specified in any notice or order why mineral title should not be revoked, (c) holder surrenders title before expiration of term of title, (d) holder is declared insolvent or bankrupt by court of competent jurisdiction, (e) no progress is made in mining operations in case of all titles but Reconnaissance Permit by end of period specified in title, (f) holder wholly discontinues operations for under small scale mining lease or mining lease for continuous period of six months. (§151[1]).

Holder of title revoked will remain liable for performance of any obligations arising out of mineral title incurred prior to date of revocation. (§155).

Person aggrieved by revocation may appeal in accordance with provisions of Act. (§156).

Quarrying Operations.

Every operation for purpose of extracting any quarriable mineral from quarry for industrial use (“quarrying operation”) must be conducted under lease or license granted by Minister. (§76).

Quarry lease will not be granted in respect of any area of land exceeding 5 sq. km. Maximum duration for lease is five years and is renewable upon expiration. (§77).

Holder of quarry lease has right to: (a) enter on land within area of lease; (b) carry out quarrying operation; and (c) remove and dispose of any quarriable material specified in lease. (§78[1[).

Holder of lease who has complied with provisions of Act and regulations (relating in particular to compensation and payment of surface rents) will, for purposes of quarrying operation, have, right to: (a) make all necessary excavation; (b) erect, construct and maintain such houses and buildings as, in opinion of Mines Inspectorate Department, are necessary for his use and for use of his agents and servants; (c) erect, construct, maintain such engines, machinery, buildings and workshops and other structures as may be necessary or convenient; (d) stack or dump products from quarry; (e) lay water pipes and make water courses and ponds, dams and reservoirs; and (f) construct and maintain all such electrical transmission lines, tramways, railways, roads, landing grounds, communications and conveniences as may be necessary. (§78[2]).

Use of Explosives.

§1 of Explosives Act c. E18 LFN provides for regulations to be made with respect to: (a) importation of explosives into Nigeria; (b) manufacture, storage, transport or use of explosives; (c) ownership or possession of explosives (including changes of ownership or possession); (d) fees in respect of licences or other instruments issued in pursuance of regulations; (e) penalties for offences against regulations, not exceeding in case of any particular offence imprisonment for term of two years or fine of N1,000 or both; (f) seizure of explosives in respect of which offence is alleged to have been or has been committed and forfeiture of explosives in respect of which such offence has been committed; amongst other matters.

Pursuant to this provision Explosives Regulations (S.I. 38 of 1967) have been made.

15.02 OIL AND GAS:

Ownership and control of all petroleum in, under and upon any lands are vested in Federal Republic of Nigeria, see Constitution of Federal Republic of Nigeria, and §1(1) of Petroleum Act, c. P10 LFN. Petroleum is defined as mineral oil (or any related hydrocarbon) or natural gas as it exists in its natural state in strata and does not include coal or bituminous shale or other stratified deposits from which oil can be extracted by destructive distillation.

Statutes.

Listed below are statutes regulating petroleum industry in Nigeria: (1) Associated Gas Re-injection Act, c. A25 LFN; (2) Deep Offshore and Inland Basin Production Sharing Contracts Act 1999 (No. 9); (3) Environmental Impact Assessment Act, c. E12 LFN; (4) Exclusive Economic Zone Act, c. E17 LFN; (5) Hydrocarbon Oil Refineries Act, c. H5 LFN; (6) National Environmental Standards and Regulations Enforcement Agency (Establishment) Act No. 25 of 2007 (7) Nigeria LNG (Fiscal Incentives, Guarantees and Assurances) Act, c. N87 LFN; (8) Nigerian National Petroleum Corporation Act, c. N123 LFN; (9) Nigerian National Petroleum Corporation Projects Act, c. N124 LFN; (10) Offshore Oil Revenues (Registration of Grants) Act, c. O4 LFN; (11) Oil and Gas Export Free Zone Act, c. O5 LFN; (12) Oil in Navigable Waters Act, c. O6 LFN; (13) Niger Delta Development Commission Act c. N86 LFN; (14) Oil Pipelines Act, c. O7 LFN; (15) Oil Terminal Dues Act, c. O8 LFN; (16) Oso Condensate Project Act, c. O11 2004; (17) Petroleum (Amendment) Act 1996 (No. 23); (18) Petroleum (Special) Trust Fund Act, c. P14 LFN; (19) Petroleum Act, c. P10 LFN; (20) Petroleum Equalisation Fund (Management Board Etc.) Act, c. P11 LFN; (21) Petroleum Production and Distribution (Anti-Sabotage) Act, c. P12 LFN; (22) Petroleum Products Pricing, Etc. Act No. 8 of 2003; (23) Petroleum Profits Tax Act, c. P13 LFN; (24) Petroleum Technology Development Fund Act, c. P15 LFN; (25) Petroleum Training Institute Act, c. P16 LFN; (26) Pre-Shipment Inspection of Exports Act, c. P25 LFN; (27) Special Tribunal (Miscellaneous Offences) Act, c. 410 LFN.

Subsidiary Legislation.

Following are regulations which have been made pursuant to foregoing statutes: (1) Association Gas Re-Injection (Continued Flaring of Gas) Regulations 1984; (2) Crude Oil (Transportation and Shipment) Regulations 1984; (3) Deep Water Block Allocation to Companies (Back-In Rights) Regulations 2003; (4) Hydrocarbon Oil Refineries Regulations 1965; (5) Mineral Oils (Safety) Regulations 1995; (6) Oil and Gas Pipelines Regulations 1995; (7) Oil in Navigable Waters Regulations 1968; (8) Oil Terminals (Terminal Dues) Regulations 1971; (9) Petroleum Refining (Amendment) Regulations 1996; (10) Petroleum (Amendment) Regulations 1996; (11) Petroleum (Drilling and Production) (Amendment) Regulations 1990; (12) Petroleum (Drilling and Production) (Amendment) Regulations 1995; (13) Petroleum (Drilling and Production) (Amendment) Regulations 1996; (14) Petroleum (Drilling and Production) (Amendment) Regulations 2001; (15) Petroleum (Drilling and Production) (Amendment) Regulations 2003; (16) Petroleum (Drilling and Production) Regulations 1969; (17) Petroleum Refining Regulations 1974; (18) Petroleum Regulations 1967; (19) Marginal Fields Fiscal Policy Regulations 2005; (20) Petroleum (Drilling and Production) (Amendment) Regulations 2006; (21) National Gas Supply and Pricing Policy 2008; (22) Petroleum Act-National Data Depository Regulations 2007.

Exploration, Prospecting and Mining Rights.

Rights available in Nigeria over petroleum are: Oil exploration licences for exploration of petroleum; Oil prospecting licences for prospecting of petroleum; and oil mining leases to search for, mine, work, carry away and dispose of petroleum. These are granted by Minister for Petroleum Resources. (c.P10, §2[1]).

Applications are made to Ministry of Petroleum Resources through its Department of Petroleum Resources.

Oil Exploration and Oil Prospecting Licence Applications.

Applicant for prospecting licence must either be: (i) Citizen of Nigeria or (ii) company incorporated in Nigeria. (c. P10, §2[2]). In addition to this, application must be accompanied by: (i) Evidence of financial status and technical competence of applicant; (ii) details of work programme to be undertaken by applicant being no less than minimum work programme prescribed by Department of Petroleum Resources for licence applied for; and (iii) details of specific scheme for recruitment and training of Nigerians.

Duration of Licence.

Maximum duration of exploration licence is one year ending on 31st day of Dec. following date of grant, with option to renew for one year provided all requirements of Department of Petroleum Resources are satisfied. Duration of prospecting licence is at discretion of Minister of Petroleum Resources, although it cannot exceed period of five years including renewals for onshore areas and ten years including renewals for offshore areas. Prospecting licence can be converted to mining lease upon discovery of at least 10,000 barrels of oil.

Oil Mining Lease.

Applicant for oil mining lease must, amongst other things: (i) hold prospecting licence; (ii) have discovered oil in commercial quantities under prospecting licence; and (iii) be company incorporated in Nigeria.

Applications for mining lease should include: evidence of financial status and technical competence of applicant; details of work which applicant is prepared to undertake or programme for carrying out any minimum working obligations imposed; details of annual expenditure which applicant is prepared to make on each area applied for; details of specific scheme for recruitment and training of Nigerians; evidence of applicant's ability to market any petroleum produced.

Duration.

Maximum term of oil mining lease is 20 years.

Assignments.

Application for assignment of licence or lease must be made to Minister. In order to obtain Minister's consent, proposed assignee must, amongst other things: (a) Be of good reputation or subsidiary of company of good reputation; (b) have sufficient technical skills, experience and financial resources for efficient petroleum operations available to it; and (c) be politically acceptable to Government in other respects. (c. P10, §16 Second Schedule).

Revocation.

Minister may revoke licence or lease on any of following grounds: (a) Where licensee or lessee becomes directly or indirectly controlled by country other than its own country of origin and such country is one whose laws do not permit Nigerian citizens to acquire or hold petroleum rights under similar terms or rights that are granted to its citizens; (b) where licensee or lessee fails to comply with any of regulations which are incorporated into licence or lease; (c) where licensee or lessee is not conducting operations continuously in rigorous and businesslike manner and in accordance with good oilfield practice; (d) where licensee or lessee fails to pay his rents and royalties when due; and (e) where licensee or lessee fails to furnish Head of the Department of Petroleum Resources with reports of his operations. (c. P10, §§24, 25 Second Schedule).

Surrender.

Three months notice in writing to Minister is required before licensee or lessee can surrender his licence or lease.

Pre-emption Rights.

Minister has right to require licensee or lessee in event of national emergency or war to: (a) Produce petroleum products (complying with specifications given by said Minister) for Federal Government, provided that refinery is located in Nigeria; (b) deliver to holder of licence to operate refinery, such quantity and quality of crude oil as may be specified by said Minister, provided that licence or lessee has that quantity and quality of crude oil. (c. P10, §7[2] Second Schedule).

Price to be paid for petroleum products or crude oil delivered shall be: (a) reasonable value at port of delivery less discounts to be agreed upon by parties; (b) where no such agreements are reached before exercise of right of pre-emption, fair price at port of delivery to be settled by Minister and licensee or lessee or, in default of agreement, by arbitration.

Area Relinquishment.

After ten years, one half of area of oil mining lease must be relinquished. (Paragraph 12 of First Schedule of Petroleum Act).

Farm Out of Marginal Fields.

Oil mining lessee may with consent of President of Nigeria and on such terms and conditions as may be approved by President farm out any marginal oil field which lies within leased area.

President may cause farm out of marginal field if it has been left unattended for not less than ten years from date of first discovery of marginal field.

President may give his consent or cause farm out of marginal field if he is satisfied: (a) that it is in public interest and in case of nonproducing marginal field, it has been unreasonably left unattended for at least ten years; and (b) that parties to farm out are in all respects politically acceptable to Government.

Farm out means agreement between lessee and third party to explore, prospect, win, work and carry away any petroleum encountered in specified area during validity of lease. (First Schedule paragraph 17[3] Petroleum Act).

Environmental Matters.

Ministry of Environment and Department of Petroleum Resources are agencies of Federal Government which bear responsibility for environmental matters in petroleum industry and they ensure that operators do not degrade quality of environment in course of their petroleum operations.

Before operator can embark upon any of these activities, namely: (a) Oil and gas field development, (b) construction of offshore pipelines in excess of 50 km. in length, (c) construction of oil and gas separation, (d) processing, (e) handling and storage facilities, (f) construction of refineries, (g) construction of storage depots for petrol, gas, diesel and other service stations, he must submit to both Ministry of Environment and Department of Petroleum Resources environmental impact assessment report for their approval.

Maintenance of Equipment.

Petroleum (Drilling and Production) Regulations require licensee or lessee to maintain in good repair and condition, all his equipment as well as all bore holes and wells capable of producing petroleum.

Under Regulation 37, he must take steps to: (a) control flow and prevent escape or avoidable waste of petroleum discovered or obtained; (b) prevent damage to adjoining petroleum bearing strata; (c) prevent entrance of water through bore holes and wells to petroleum strata, except in case of secondary discovery authorised by Department of Petroleum Resources; (d) prevent escape of petroleum into any water, well, spring, stream, river, lake, reservoir, estuary or harbour; and (e) cause as little damage as possible to surface area and to trees, crops, building, structures and other property thereon.

Also, regulations lay down specific parameters, guidelines and reporting requirements that licence or lessee has to comply with in drilling, redrilling, plugging and maintenance of well, appraisal, development and production operations.

Labour Policies.

Paragraph 38 to First Schedule of Petroleum Act requires holder of mining lease within ten years of grant of lease, to do following: (a) Ensure that number of Nigerian citizens in his employment in connection with lease in managerial, professional and supervisory grades must be minimum of 75% of total number of persons employed in those grades; (b) number of Nigerian citizens in any one grade shall not be less than 60% of total; (c) this provision also requires that all skilled, semiskilled and unskilled workers must be Nigerian citizens.

Oil and Gas Pipelines.

Oil pipeline is defined as pipeline for conveyance of mineral oils, natural gas and any of their derivatives or components, and also any substance (including steam and water) used or intended to be used in production or refining or conveying of mineral oil, natural gas and any of their derivatives or components. (§11[2] Oil Pipelines Act).

Person may apply to Minister of Petroleum Resources for permit to survey route for oil pipeline for transportation of mineral oil, natural gas, or any product of such oil or such gas to any point of destination required for any purpose connected with petroleum trade or operations. Every application for permit to survey to specify approximate route or alternative routes proposed. (§4 Oil Pipelines Act).

Oil pipeline licence not to be granted or renewed unless route of pipeline has been surveyed or in case of renewal, has been resurveyed. Application for permit to survey to be accompanied with ten copies of topographical map of proposed route of pipeline. (paragraph 1 Oil and Gas Pipelines Regulations 1995).

Application for licence to construct pipeline to be accompanied with statement indicating services to be rendered by pipeline; specification of pipeline; characteristics of fluids to be conveyed through pipelines and total estimated cost of construction of pipeline. (paragraph 2 Oil and Gas Pipelines Regulations 1995).

Design of pipeline to be suitable for transportation of liquid petroleum, including crude oil, refined products, natural gas liquid condensate and liquefied petroleum gas. (paragraph 3 Oil and Gas Pipelines Regulations 1995).

Licensee not to operate pipeline unless he has obtained approval of Department of Petroleum Resources. (paragraph 9 Oil and Gas Pipelines Regulations 1995).

No corrosive material to be transported in pipeline unless appropriate measures taken to mitigate corrosive effect of material on internal coating of pipeline. (paragraph 14 Oil and Gas Pipelines Regulations 1995).

Guidelines for design, fabrication, installation, inspection, testing, operation and maintenance of gas transmission and distribution pipeline to follow required specifications. (paragraph 16 Oil and Gas Pipelines Regulations 1995).

Refineries.

No refinery can be constructed or operated in Nigeria without licence granted by Minister. (§3 Petroleum Act).

Pollution.

Discharge of crude oil, fuel oil, lubricating oil, heavy diesel oil and other related oil from Nigerian ship into specified sea area is prohibited; otherwise owner or master of ship is guilty of offence. (§1 Oil in Navigable Waters Act).

Discharge of any oil or mixture containing oil from any vessel or any place on land or any apparatus for transferring oil into Nigerian territorial waters or inland waters attracts offence against owner or master of vessel, or occupier of land or person in charge of apparatus, as case may be. (§3 Oil in Navigable Waters Act).

No oil to be transferred between sunset and sunrise to or from vessel in any harbour in Nigeria unless requisite notice given, except for transfer of oil for fire brigade purposes. (§9 Oil in Navigable Waters Act).

Minister of Transport may appoint inspector to report to him whether prohibitions, restrictions and obligations imposed by this Act have been complied with and measures taken to prevent escape of oil and mixtures containing oil. (§11 Oil in Navigable Waters Act).

Every Nigerian ship (except tanker) of 80 tons gross tonnage or over, which uses bunker fuel tanks for carriage of ballast water to be filled with oily-water separator of such design, construction and capacity as would be adequate for purpose of separating oil from mixture of oil and ballast water from bunker fuel tanks of ship. (paragraph 2 Oil in Navigable Waters Regulations).

All vessels to take certain prescribed precautions in loading, discharging or bunkering oil to avoid pollution. (paragraph 5 Oil in Navigable Waters Regulations).

Oil Terminal Dues.

Terminal dues may be levied on any ship evacuating oil at any oil terminal regarding services or facilities provided. Persons liable to pay such terminal dues are master or owner of ship; every consignor or agent. (§1 Oil Terminal Dues Act).

Oil terminal not to be installed by any person, except by or under authority of licence or lease granted under Mineral Act and express written approval of Minister for Petroleum Resources. (§7 Oil Terminal Dues Act).

Permit.

Ministry of Petroleum Resources is body responsible for supervision of following activities: oil drilling, exploration, prospecting, production, construction and operation of processing plants, oil service activities and all activities in oil and gas industry. Anybody involved in these activities must obtain annual permit from Department of Petroleum Resources (DPR) of

Ministry.

Taxation.

See category 17 Taxation, topic 17.11 Mines, Minerals and Fisheries Tax.

Fiscal Incentives.

See category 17 Taxation, topic 17.15 Tax Incentives and Exemptions, subhead Fiscal Incentives for Oil and Gas Industry.

Use of Explosives.

See topic 15.01 Mines and Minerals, subhead Use of Explosives.

15.03 WATER:

Water Rights.

Right to use and control of all surface and groundwater and of all water in any water course affecting more than one state together with bed and banks thereof is vested in Federal Government of Nigeria for following purposes only: (a) promoting optimum planning, development and use of Nigeria's water resources; (b) ensuring co-ordination of such activities as are likely to influence quality, quantity, distribution, use and management of water; (c) ensuring application of appropriate standards and techniques for investigation, use, control, protection, management and administration of water resources; and (d) facilitating technical assistance and rehabilitation for water supplies. (§1, Water Resources Act c. W2 LFN).

Any person (i) may take water without charge for his domestic purpose or for watering his livestock from any water course to which public has free access; (ii) may use water for purpose of fishing or for navigation to extent that such use is not inconsistent with any other law for time being in force; or (iii) who has statutory or customary right of occupancy to any land, may take and use water from underground water source or if abutting on bank of any water course, from that water course, without charge for domestic purposes, for watering livestock and for personal irrigation schemes. (§2).

However, Minister shall have power to: (a) define places from which or manner in which and times at which such water may be taken or used; (b) fix, in times of actual or anticipated shortage of water, amount which may be taken by any person for such purposes; (c) prohibit temporarily or permanently, taking or use of water from any source for such purposes, when in his opinion, taking or use of such water would be hazardous to health; (d) revoke right to use or take water when such right is likely to override public interest; (e) require to be examined or licensed, any person undertaking work of drilling for water; (f) regulate place, depth, manner of construction or mode of operation of any borehole or well; and (g) define times at which water may be taken from such borehole or well. (§4). In discharge of his duties, Minister is to consider need to make provision for: (a) adequate supplies of suitable water for watering of animals, irrigation, agricultural purposes, domestic and nondomestic use, generation of hydroelectric energy, for navigation, fisheries and recreation; (b) supply of water for drainage, safe disposal of sewage, effluent and water-borne wastes and control and prevention of pollution; (c) control and prevention of flooding, soil erosion and of damage to watershed areas; (d) reclamation of land; (e) protection of inland and estuarine fisheries, flora and fauna; (f) ensuring that possible consequences of particular development proposals on environment are properly investigated and considered before each proposal is approved; (g) procedures to facilitate and ensure co-ordination of all detailed planning for investigation, use, control, protection, management and administration of water resources, direct co-ordinated execution of approved plans and projects by public authorities; and (h) procedures for technical assistance and rehabilitation and improvement support to public authorities having responsibility for public water supply. (§5).

Diversion, storage, pumping or use on commercial scale of any water or construction, maintenance, operation, repair of any borehole or any hydraulic works may be carried out only with licence issued pursuant to Act. (§9[1]). Application for licence shall be made to Minister and shall contain such information as may be prescribed by Minister from time to time. (§10).

16 PROPERTY

16.01 REAL PROPERTY:

All land comprised in territory of each state is vested in Governor of that state (§1), except land vested in Federal Government or its agencies (§49, Land Use Act, c. 202 LFN).

Land in areas designated by state Governor as urban areas is under control and management of Governor, while all other land is under control and management of Local Government. (§2). Land may be held only under right of occupancy which may be customary or statutory. Statutory right of occupancy is granted by Governor in respect of any land, whether or not in urban area while customary right of occupancy is granted by local government in case of land not in urban area. (§§5, 6).

No right of occupancy or any part of it may be alienated (whether by assignment, mortgage, transfer of possession, sublease or otherwise) without prior consent of Governor, in case of statutory right of occupancy; or approval of Local Government, in case of customary right of occupancy (§§21, 22); or consent of Federal Government, in case of land vested in it (§51[2]).

Governor has power to revoke right of occupancy for overriding public interest. (§28). Compensation is payable to holder of right of occupancy or occupier of land, except where holder or occupier has been in breach of terms under which right of occupancy is held. (§29).

17 TAXATION

17.01 ADMINISTRATION:

Federal Government (through Federal Inland Revenue Service) collects following taxes: petroleum profits tax, companies income tax, value added tax, withholding tax on companies and non-resident individuals, education tax, capital gains tax on companies and non-resident individuals, stamp duty on instruments to which company is party.

State governments (through Boards of Internal Revenue) collect following taxes: personal income tax, capital gains tax on individuals, withholding tax on individuals, stamp duty on instruments executed by individuals; pools betting and lotteries, gaming and casino taxes, road taxes, business premises registration fees.

Local governments (through Local Government Revenue Committees) collect following taxes: tax rates on shops and kiosks; tenement rates; on and off liquor licence fees; marriage, birth and death registrations.

See Taxes and Levies (Approved List for Collection) Act No. 21 of 1998.

Capital Allowance.

(See §36[1] and Schedule 5, Personal Income Tax Act; §31 and Schedule 2, Companies Income Tax Act; §20 and Schedule 2, Petroleum Profits Tax Act.) Book depreciation is not allowed in computing profit for income tax purposes but capital allowances are available at specified rates and are deductible from assessable profits.

These allowances consist of initial allowance based on capital expenditure and several annual allowances. Annual allowances are claimable, from first year, on residue of qualifying expenditure, after deduction of initial allowances, on straight line basis at specified rates. Amount of N10 is retained in books for tax purposes until asset is disposed of. Total allowances may not exceed amount of qualifying expenditure. At time of disposal of asset, excess, if any, of written-down value over amount realised is deductible from taxable income. Any excess of amount realised over written-down value is added to taxable income to extent of previous allowances made.

Expenditure that would not normally qualify for capital allowances includes expenditure on acquisition of land, goodwill, trademarks, patents and other intangible assets.

17.02 ANTI-AVOIDANCE:

Where Federal Inland Revenue Service is of opinion that transaction which reduces or would reduce amount of tax payable is artificial or fictitious it may disregard such transaction and direct that such adjustments be made regarding tax liability as it considers appropriate so as to counteract reduction of liability to tax effected or reduction which would otherwise be effected by transaction. Any person concerned with such transaction shall be assessable to tax accordingly. Aggrieved taxpayer entitled to appeal against such direction as if it were assessment to tax. Transaction between connected persons shall be deemed to be artificial or fictitious if Federal Inland Revenue Service considers that it has not been made on terms that might fairly have been expected by independent persons engaged in similar activities dealing with one another at arm's length. (§17 Personal Income Tax Act, §22 Companies Income Tax Act, §15 Petroleum Profits Tax Act, §20 Capital Gains Tax Act).

17.03 CAPITAL GAINS TAX:

Capital Gains Tax.

Capital Gains Tax Act, (c. C1 LFN) provides for taxation of gains accruing on disposal of assets, including assets situated outside Nigeria. (§3). Rate of tax is 10%. (§2[1]).

Exemption from capital gains tax is granted to any ecclesiastical, charitable or educational institution of public character; any statutory or registered friendly society; any cooperative society registered under cooperative societies law of any state; or any registered trade union. (§§26, 27).

Also exempted from capital gains tax are gains accruing on disposal of Nigerian government securities (§30), gains made upon replacement of business assets (§31), gains made upon disposal of securities by unit trust schemes (§33), gains made upon disposal of, or of interest in, rights under any policy of assurance or contract for deferred annuity on life of any person (§34), sums paid by way of compensation or damages for any wrong or injury suffered by individual (§36), gains made upon disposal of main dwelling house (§37), gains made upon disposal of stocks and shares (§30), and gains arising from acquisitions of shares in company either taken over, absorbed or merged in another company as result of which acquired company loses identity as limited liability company (provided that no cash payment is made) (§32).

17.04 CUSTOMS DUTIES AND TAX:

These are regulated by Customs, Excise, Tariff, etc. (Consolidation) Act, c. C49 LFN. Tariffs are amended from time to time.

17.05 EMPLOYMENT TAXES:

Industrial Training Fund was established by Industrial Training Fund Act, c. I9 LFN to promote and encourage acquisition of skills in industry or commerce with view to generating pool of indigenous trained manpower sufficient to meet needs of economy.

Every employer having 25 or more employees must contribute 1% of annual payroll to Fund. Employees include all persons, whether or not they are Nigerians, whether employed on full-time or part-time basis, including temporary workers who work for periods of not less than three months in any year. (§6). If any contribution is not paid punctually penalty of 5% of amount unpaid is levied for each month. (§9).

Fund reimburses employers for cost of approved training schemes subject to maximum of 60% of employer's contribution. (§7). Employers must provide adequate training for indigenous staff with view to improving job-related skills; and must forward to Fund evidence of such training; and must accept students for industrial attachment. (§8[1]).

Pension Reform Act, 2004 requires most employers and employees in public and private sectors to make monthly contributions to employees' Contributory Pension Scheme. Contributions are in respect of contingencies of retirement, death or missing employees. (§§4-6).

Act provides for cumulative contribution of at least 15% with contributions of 7.5% by employee and employer respectively. Employer may bear full burden of scheme provided employer's contribution shall not be less than 15% of monthly emoluments of employee. (§9).

Exempted Employees.

Persons exempted from Act include judicial officers and employees who are entitled to retirement benefits under any pre-existing Pension Schemes and who are three years or less away from retirement. (§8).

Mandatory amounts payable as retirement benefits under Act are not taxable. Voluntary contributions by employee in addition to contributions made by him and his employer are subject to tax where withdrawal is made before end of five years from date of voluntary contribution. (§7). Contributions made shall form part of tax deductible expenses in computation of income tax of employee or employer. (§10).

See topic 17.08 Income Tax, subheads Income Tax on Individuals, Income Tax on Companies.

17.06 FREE ZONES:

Nigerian Export Processing Zones Act, c. N107 LFN provides for establishment of export processing zones; while Oil and Gas Export Free Zone Act, c. O5 LFN provides for establishment of oil and gas export free zone.

See also Free Zones (Monitoring and Regulation, Etc.) Order 2002, Statutory Instrument No. 3; Free Zones (Tariffs and Other Charges) Order 2002, Statutory Instrument No. 4.

17.07 GIFT TAX:

None.

17.08 INCOME TAX:

Income Tax on Individuals.

Under Personal Income Tax Act, c. P8 LFN; tax is imposed on income of every individual including non-resident individuals who derive income or profit from Nigeria. (§2).

Income Taxable.

Tax is payable on all income (less allowed reliefs) whether income is from source inside or outside Nigeria. Income for these purposes includes gains or profits from any trade, business, profession or vocation carried on by individual; any salary and any benefits received in kind by employee; any dividend, interest, discount, pension, charge or annuity. (§3[1]).

Where individual outside Nigeria carries on trade or business of which only part of operations are carried out in Nigeria, gains or profits of trade or business to be taxed in Nigeria shall be those gains or profits as are not attributable to that part of operations carried on outside Nigeria but only in following cases: (a) where individual does not have fixed base in Nigeria; (b) where individual does not operate through agent in Nigeria; (c) where business in Nigeria involves single contract for surveys, deliveries, installations or construction; (d) where trade or business is between persons who in opinion of relevant tax authority deal with each other on arm's length basis. (§6).

Where resident derives income from source outside Nigeria and income is brought into Nigeria through Government approved channels, he shall be allowed tax credit against tax payable by him but tax credit shall not exceed proportion of his total tax for year of assessment which that income derived from outside and brought into Nigeria bears to his aggregate income chargeable to tax in Nigeria. (§11).

Income Exempt from Taxation.

All income specified in Third Schedule of Act is exempt from tax. (§19[1]). Third Schedule includes following categories of income: (1) income of diplomats; (2) income of local government or government institution; (3) income of any ecclesiastical, charitable or educational institution of public character insofar as such income is not derived from trade or business carried on by such institution; (4) income of trade union registered under Trade Unions Act, insofar as income is not derived from trade or business carried on by that trade union; (5) gratuities payable to public officers; (6) up to N100,000 of any gratuities payable to employee in private sector provided period of service exceeds ten years; (7) income of statutory or registered friendly society insofar as such income is not derived from trade or business carried on by such society; (8) sum received by way of death gratuities or as consolidated compensation for death or injuries; (9) sum withdrawn or received by employee from approved pension, provident or other retirement benefits fund, society or scheme; (10) any compensation for loss of employment; (11) income of foreigner employed under technical assistance arrangement involving Federal or state government; (12) interest accruing to person on foreign currency domiciliary accounts; (13) income earned from outside Nigeria by temporary guest, lecturer, teacher, nurse, doctor and other professional and brought into Nigeria shall be exempt from tax provided that such income is deposited in domiciliary account in authorised bank in Nigeria; (14) income from dividend, interest, rent, royalties, fee, commission earned from abroad and brought into Nigeria by Nigerian resident is exempt from tax, provided that such income is brought in convertible currency and paid into domiciliary account in bank approved by Government; (15) income earned from abroad by author, sportsman, playwright, musician, artist and brought into Nigeria is exempt from tax provided that such income is brought in foreign currencies and paid into domiciliary account in authorised bank in Nigeria.

Personal Relief.

In arriving at taxable income every individual is allowed to deduct, as personal relief, sum equal to 20% of income plus N5,000, and to pay tax only on balance (less other reliefs, if any). (§33[1]).

Tax on Turnover.

Where true income of business cannot be readily ascertained, individual may be charged tax on turnover of business. (§7[1]).

Employment.

Where employer is in Nigeria, income of employee will be deemed to be derived from Nigeria, unless duties of employment are wholly performed, and remuneration paid, outside Nigeria. Where employer is not in Nigeria, income of employee will not be deemed to be derived from Nigeria unless employee is in Nigeria for period of 183 days or more in 12 month period or employee's income is not liable to tax in employer's country. (§10[1]).

Pay As You Earn (PAYE).

Employer is required to deduct from employee's emoluments personal income tax due from employee in respect of such emoluments. (§80). Employer is to account to relevant tax authority for deductions so made. (§80[1] of Act, also Operation of Pay As You Earn [PAYE] Regulations 2002 [Statutory Instrument No. 18]).

Rates of Tax are as Follows.

Taxable Income	**Rate of Tax**
For every Naira of the first N20,000	5%
For every Naira of the next N20,000	10%
For every Naira of the next N40,000	15%
For every Naira of the next N40,000	20%
For all income above N120,000	25%

Tax Returns.

For each year of assessment, taxable person is required, without notice or demand, to file return of income in prescribed form, containing prescribed information, with tax authority of State in which taxable person is deemed to be resident. (§41).

However, if taxable person's only source of income is employment from which he earns N30,000 or less, no tax return is expected to be filed. (§43).

Tax returns are to be filed within 90 days from commencement of every year of assessment. (§41[3]).

Basis.

Generally, tax is charged on income earned in preceding calendar year. Income from employment or pension is taxed on current year basis. (§§23, 26).

Objections and Appeals.

Taxpayer objecting to assessment may give to relevant tax authority notice of objection in writing within 30 days from receipt of assessment. (§58[1]). Where Federal Inland Revenue Service refuses to amend assessment it shall give to taxpayer notice of refusal. (§58[3]). Taxpayer may appeal against refusal to Tax Appeal Tribunal within 30 days of receipt of notice of refusal to amend. (§61). Where there is no Tax Appeal Tribunal to hear appeals taxpayer may appeal against assessment directly to High Court of state on giving notice in writing to relevant tax authority. (§65[2]). Taxpayer or tax authority may appeal against decision of Tax Appeal Tribunal to High Court of state within 30 days of decision. All appeals to be heard in camera unless judge on application of taxpayer, otherwise directs. (§65[6]).

Income Tax On Companies.

Companies Income Tax Act, c. C21 LFN, governs taxation of companies other than companies engaged in exploration and production of petroleum and chargeable oil. See also topic 17.11 Mines, Minerals and Fisheries Tax.

Taxable Income.

Companies pay income tax on all profits accruing in, derived from, brought into, or received in, Nigeria at rate of 30%. (§9[1]). For company incorporated in Nigeria, all its profits, wherever they have arisen and whether or not they have been brought into or received in Nigeria, are taxable in Nigeria. For foreign company, following profit will be deemed to be derived from Nigeria: (a) where company has fixed base of business in Nigeria, profit that is attributable to that fixed base; (b) where it does not have such fixed base in Nigeria but operates through agent in Nigeria, profit that is attributable to business carried on by such agent; (c) where its business in Nigeria involves single contract for surveys, deliveries, installation or construction, profit from that contract; and (d) where activities are between company and another person controlled by it or which has controlling interest in it and Board is of opinion that business has not been conducted on arm's length basis, profit as adjusted by Board to reflect arm's length basis.

"Fixed base" does not include: facilities used solely for storage or display of goods or merchandise; or facilities used solely for collection of information. (§13). Tax is to be paid to Federal Inland Revenue Service.

Tax on Turnover.

Where true profits of company cannot be readily ascertained, company may be charged tax on its turnover. (§30[1]). In practice 20% of company's turnover will be deemed to be its profits.

Tax Returns.

For each year of assessment, taxable company is required, without notice or demand, to file return of income in prescribed form, containing prescribed information, with Federal Inland Revenue Service. (§53[a]). Return is to be filed within six months from end of accounting period.

Company is to compute tax payable and to pay such tax when forwarding return. (§53).

Best of Judgment Assessment.

Where company has not delivered return and Federal Inland Revenue Service is of opinion that such company is liable to pay tax, Federal Inland Revenue Service may, according to best of its judgment, determine amount of total profits of such company and make assessment for tax accordingly. (§65).

Person Answerable.

Company is chargeable to tax not only in its own name but also in name of any principal officer, agent or representative of company in Nigeria and such principal officer, agent or representative can be required to pay any tax liability of company out of any money belonging to company which is in possession of such principal officer, agent or representative. (§§47–49).

Basis.

Tax is charged on profits earned in accounting period ending in preceding calendar year. (§29).

Objections and Appeals.

Taxpayer company wishing to object to assessment may give Federal Inland Revenue Service notice of objection. (§69[1]). Where Federal Inland Revenue Service refuses request for amendment it must give notice of refusal to aggrieved company. (§69[5]). Aggrieved company may appeal against assessment to Tax Appeal Tribunal within 30 days after receipt of notice of refusal. (§13[1], Schedule 5, Federal Inland Revenue Service [Establishment] Act No. 13, 2007). All appeals before Tax Appeal Tribunal shall be held in public. (§15[5], Schedule 5, Federal Inland Revenue Service [Establishment] Act No. 13, 2007).

Tax Appeal Tribunal has power to (1) summon and enforce attendance of persons and examine under oath; (2) require discovery and production of documents; (3) receive affidavits into evidence; (4) call for examination of witnesses and documents; (5) review its decisions; (6) dismiss application for default or decide matters ex-parte; (7) set aside any such dismissal or ex-parte order passed by it. (§20[2], Schedule 5, Federal Inland Revenue Service [Establishment] Act No. 13, 2007).

At hearing of appeal, if Federal Inland Revenue Service proves that: (a) appellant has failed to prepare and deliver to Federal Inland Revenue Service returns and provisional accounts; (b) appeal is frivolous or vexatious or is abuse of appeal process; or (c) it is expedient that appellant should pay amount as security for prosecuting appeal, Tax Appeal Tribunal or court may order appellant to deposit with Federal Inland Revenue Service, on account of tax charged by assessment under appeal, amount equal to tax charged upon appellant for preceding year of assessment or one half of tax charged by assessment under appeal (whichever is less) plus 10%, and if appellant fails to comply with order, assessment against which it has appealed shall be confirmed and appellant shall have no further right of appeal whatsoever with respect to that assessment. (§15[7], Schedule 5, Federal Inland Revenue Service [Establishment] Act No. 13, 2007).

Decision of Tax Appeal Tribunal may be appealed only on point of law, to Federal High Court, within 30 days of decision. (§17[1], Schedule 5, Federal Inland Revenue Service [Establishment] Act No. 13, 2007). Chief Judge of Federal High Court may make rules of procedure governing appeals from Tax Appeal Tribunal. (§17[5], Schedule 5, Federal Inland Revenue Service [Establishment] Act No. 13, 2007). Appeal against decision of Federal High Court shall lie to Court of Appeal. (§75).

Tax-Exempt (Companies) Income.

Profits of companies engaged in certain activities are exempted from taxation under Companies Income Tax Act (CITA). Companies, which fall within this category, include: (1) statutory or registered friendly societies; (2) cooperative societies registered under any enactment or law relating to cooperative societies; (3) ecclesiastical, charitable or educational establishments of public character; (4) trade unions registered under Trade Unions Act; (5) companies formed for purpose of promoting sporting activities where such profits are wholly expendable for such purposes; (6) companies engaged in petroleum operations, insofar as profits are derived from operations liable to tax under Petroleum Profits Act; (7) any body corporate established by or under any local government law or edict in force in any state in Nigeria; (8) any body corporate being purchasing authority established by or under any local government law or edict in force in any state in Nigeria; (9) any body corporate being purchasing authority established by enactment and empowered to acquire any commodity for export from Nigeria from purchase and sale of that commodity (§23 CITA); (10) dividend distributed by unit trust (§23[1][f]); (11) dividend received from small companies in manufacturing sector, in first five years of their operation (§23[1][o]); (12) dividend received from investments in wholly export oriented businesses (§23[1][p]); (13) profits of any Nigerian company in respect of goods exported from Nigeria provided that proceeds from such export are repatriated to Nigeria and are used exclusively for purchase of raw materials, plants, equipment and spare parts (§23[1][q]); (14) profits of company whose supplies are exclusively inputs to manufacturing of products for export (§23[1][r]); and (15) profits of company established within export processing zone or free trade zone, to extent that such profits are from export. (§23[1][s]). Usually, profits derived from trade or business carried out by above mentioned companies are not entitled to such exemptions.

Federal Executive Council may exempt by order, any company or class of companies from all or any of provisions of Act; or specifically from payment of tax, on any grounds to which it appears sufficient.

Allowable Expenses.

These consist of expenses wholly, exclusively, necessarily and reasonably incurred in production of profits, including: (1) interest on money borrowed; (2) benefits or allowances provided for senior staff and executives up to prescribed limits; (3) rent on business premises; (4) rent on residential accommodation up to employees' basic salary; (5) repair and renewal costs relating to premises, plant, fixtures etc., used in business; (6) contributions to approved pension, provident or other retirement, benefits funds, society or scheme. (§24 CITA).

Deductible Donations.

Company is allowed to deduct as expense donations made to public funds; statutory bodies and institutions; and ecclesiastical, charitable, benevolent, educational and scientific institutions specified in Fifth Schedule. (§25[1] CITA). With exception of donation to university or other tertiary or research institution, deductions to be allowed for donations are not to be of capital nature and are limited to 10% of company's profits. (§25[3]). Donations to university or other tertiary or research institution limited to 15% of total profits or 25% of tax payable in year of donation, whichever is higher.

Disallowed Expenditure.

Following expenses are specifically disallowed under CITA: (1) capital repaid or withdrawn or any expenditure of capital nature; (2) any sum recoverable under insurance or contract of indemnity; (3) taxes on income or profits levied in Nigeria or elsewhere. Where tax is levied on profits chargeable to tax in Nigeria and there is no double taxation relief for such tax, tax would be allowed as deduction; (4) payments to unapproved pensions, provident, savings, widows and orphan society, funds or schemes; (5) depreciations; (6) appropriation of profits; (7) management fees incurred without approval of Minister; and (8) any expenses incurred within or outside Nigeria for purpose of earning management fees unless prior approval of agreement giving rise to such management fee has been obtained from Minister of Finance. (§27).

Depreciation.

See topic 17.01 Administration, subhead Capital Allowance.

Amount of capital allowance that can be set-off against assessable profits of company in any one year is restricted to 662/3% of assessable profits for companies other than those involved in agriculture and manufacturing.

Capital allowances not fully absorbed may be carried forward indefinitely and set-off against subsequent profits of trade or business to which they relate.

Expenditure qualifying for allowances and capital allowance rates from 1 Jan. 1999 are:

Qualifying Expenditure	**InitialAllowance %**	**AnnualAllowance %**
Building (Industrial and non-industrial)	15	10
Plant and Machinery		
—Agricultural Production	95	Nil
—Others	50	25
Motor Vehicles:		
—Public Transportation	95	Nil
—Others	50	25

Housing Estate	50	25
Ranching and Plantations	30	50
Mining	95	Nil
Plantation Equipments	95	Nil
Furniture & Fittings	25	20
Research and Development	95	Nil

Other Allowances.

Where company has incurred expenditure on plant and equipment it will be entitled to investment allowance of 10% of expenditure. (§32[1], [2]).

Where company has incurred qualifying expenditure for purchase of plant and machinery for replacement of old ones, there shall be allowed such company once-and-for-all 95% capital allowance in first year, with 5% retention as book value until final disposal of asset. However aggregate capital allowances granted in respect of any asset under this schedule and under §30 may not exceed 95% of total cost of asset. (Second schedule, paragraph 6[3]).

Companies and other organizations engaged in research and development activities for commercialization shall be allowed 20% investment tax credit. (§26[3]).

Carry Forward of Losses.

Trading losses may be carried forward against future trading profits of same trade or business indefinitely.

Taxation of Income in Special Cases.

Foreign Companies Engaged in Shipping or Air Transport.

Where ship or aircraft owned or chartered by foreign company calls at any port or airport in Nigeria, its profits or loss derived as result shall be full profits or loss arising from carriage of passengers, mail, livestock or goods shipped or loaded onto ship or aircraft in Nigeria. This does not, however, apply to passengers, mail, livestock or goods that are brought to Nigeria solely for transshipment or transfer from one aircraft to another or in either direction between aircraft and ship. (§14[1] Companies Income Tax Act, c. C21 LFN). Where Federal Inland Revenue Service is satisfied that taxation authority of foreign country computes and assesses profits of such company on basis not materially different from that prescribed by Act and that authority certifies: (a) ratio of profits or loss, before any allowance by way of depreciation, to worldwide income in respect of carriage of passengers, mail, livestock or goods; and (b) ratio of allowances, by way of depreciation, to that same total, then profits or loss in Nigeria shall be obtained by applying first-mentioned ratio to income receivable for carriage of passengers, mail, livestock or goods shipped or loaded in Nigeria, and in place of allowances in second schedule allowances shall be amount produced by applying second-mentioned ratio to such Nigerian income. (§14[2][a] and [b]). Where at time of assessment above provisions cannot be satisfactorily applied profits derived from Nigeria may be computed on fair percentage on income receivable for carriage of passengers, mail, livestock and goods shipped or loaded in Nigeria. Company assessed by reference to such percentage, is entitled to claim at any time within six years that its liability be recomputed on basis provided by §14(2), and where claim is made and certificate is produced to satisfaction of Federal Inland Revenue Service, repayment of tax shall be made where necessary to give effect to this provision. However, if company disagrees with Federal Inland Revenue Service as to amount of tax recomputed and repaid, Federal Inland Revenue Service will give notice of its refusal to company and provisions of Act with respect to objections and appeals shall apply accordingly. (§14[3]). Notwithstanding foregoing provisions, tax payable shall not be less than 2% of income receivable for carriage of passengers, mail, livestock or goods shipped or loaded in Nigeria. (§14[4]).

Foreign Communications Companies.

Foreign company carrying on business of transmission of messages by cable or by any form of wireless apparatus is assessable to tax as though it operates ships or aircraft and provisions of §14 of Act apply mutatis mutandis to computation of its profits deemed to be derived from Nigeria as though transmission of messages to places outside Nigeria were equivalent to shipping or loading of passengers, mail, livestock or goods in Nigeria. (§15).

Insurance Companies.

For foreign non-life insurance company or Nigerian insurance company whose profit accrued in part outside Nigeria, taxable profits are determined by taking gross premium interest and other income receivable in Nigeria less reinsurance and deducting from balance reserve for unexpired risks at percentage consistently adopted by company in relation to such risk. For foreign life insurance, which carries on business through permanent establishment in Nigeria, taxable profits consist of investment income, less management expenses inclusive of commissions. Where such company's profits accrue in part outside Nigeria, taxable profits shall be proportion of total investment income of company as premium earned, whether received or receivable less agency expenses in Nigeria and fair proportion of expenses of head office of company. If such insurance company has its head office outside Nigeria, Board may substitute some other basis for ascertaining required proportion of total investment income. However, any amount distributed in any form as dividend from actuarial revaluation of unexpired risks or from any other revaluation shall be deemed to be part of total profits of company. (§15[1][b]). In case of Nigerian insurance company, profits on which tax may be imposed shall be ascertained as though whole investment and premium income of company were received in Nigeria, and all expenses and other outgoings of company were incurred in Nigeria. (§15[1][c]). Where insurance company carries on life insurance business in conjunction with insurance business of any other class, life insurance business shall be treated as separate business from non-life insurance business carried on by company. (§15[5]).

Approved Unit Trust Schemes.

Income of unit trust scheme established for participation of public shall be treated (a) as if trust were company whose business consists mainly in making of investments and principal part of whose income is derived therefrom; (b) as if rights of unit holders were shares in such company; and (c) as if so much of income accruing to trust as is available for payment to unit holders were dividends on such shares.

Taxable profits of approved unit trust scheme, shall be income accruing to trust from all sources less management expenses. Where unit trust receives payment on which it suffers tax by deduction (not being franked investment income), such tax shall be set-off against income tax assessable on trust. So much of profit accruing to unit trust as is available for payment to unit holders or for investment shall be deemed to be dividends paid or payable to unit holders in proportion to their rights. (§17[1-5]).

Tax Where Dividend Exceeds Profits.

Where company pays dividend that exceeds profits, company will be charged tax as if dividend is total profit of company. (§18).

Closed Companies.

Where it appears to Federal Inland Revenue Service that company controlled by not more than five persons, with view to reducing tax chargeable on company and on those persons, does not distribute as dividend, all profits that could be distributed without detriment to company's business, it may direct that any such undistributed profits be treated as distributed. (§21[1]).

Education tax is charged on profit of every company incorporated in Nigeria at rate of 2%. (§1, Education Tax Act, c. E4 LFN). It is assessed by and payable to Federal Inland Revenue Service.

17.09 INHERITANCE TAX:

None.

17.10 LOCAL GOVERNMENT TAXES:

See topics 17.01 Administration; 17.12 Property Taxes.

17.11 MINES, MINERALS AND FISHERIES TAX:

Taxation of Petroleum Exploration.

Companies engaged in petroleum operations are charged tax on their profits in accordance with Petroleum Profits Tax Act. (c. P13 LFN, §8). Such companies are not taxed under Companies Income Tax Act. See also topic 17.15 Tax Incentives and Exemptions, subhead Fiscal Incentives for Oil and Gas Industry.

Petroleum operations in this context refers to winning or obtaining and transportation of petroleum or chargeable oil in Nigeria by or on behalf of company for its own account by any drilling, mining, extracting or other like operations or process, not including refining at refinery, in course of business carried on by company engaged in such operations and all operations incidental thereto and any sale of or any disposal of chargeable oil by or on behalf of company. (§2).

Where company engaged in petroleum operations is also engaged in business of transportation of chargeable oil by ocean going oil tankers operated on behalf of company to another country or engaged in some other business, then any profit or loss attributable to such transportation or other business will be excluded from profits taxable under Act but will be taxable under Companies Income Tax Act. (§14).

Basis.

Tax is levied on chargeable profits earned in “accounting period”. (§8). For company engaged in petroleum operations, “accounting period” is one year commencing on 1st Jan. and ending on 31st Dec. of same year. (§2).

Payment of Tax.

Not later than two months after commencement of accounting period taxpayer must submit to Federal Inland Revenue Service estimate of its chargeable tax for such accounting period. (§33[1]). Estimated tax is payable in equal monthly installments commencing no later than third month of accounting period. (§45[2]).

Chargeable Profits.

§9 provides that profits chargeable to tax are arrived at after deduction of capital allowances (§16); deduction of carried forward losses (§20); exclusion of profits arising from any international ocean going oil transportation business (§14); deduction of any expenses that are wholly, exclusively and necessarily incurred for purpose of company's petroleum operations, including stamp duties and education tax (§10).

Chargeable Tax.

Tax to be charged, assessed and paid under Act is assessable tax less following deductions: royalties, nonproductive rents, investment tax credit, custom or excise duty. (§22).

Assessable tax is 85% of chargeable profits except during period before pre-production capitalized expenditure has been fully amortised when rate is 65.75%. (§21). However, where petroleum operations are carried on under production sharing contract in deep offshore or inland basin tax rate is 50% for duration of production sharing contract. (§3, Deep Offshore and Inland Basin Production Sharing Contracts Act, c. D3 LFN).

Disallowed Expenditure.

Following expenses are not deductible in ascertaining profit under Act: (a) any disbursements or expenses not being money wholly and exclusively laid out or expended, or any liability not being liability wholly or exclusively incurred, for purpose of those operations; (b) any capital withdrawn or any sum employed or intended to be employed as capital; (c) any capital employed in improvements as distinct from repairs; (d) any sum recoverable under insurance or contract of indemnity; (e) rent of or cost of repairs to any premises or part of premises not incurred for purpose of those operations; (f) any amounts incurred in respect of any income tax, profits tax or other similar tax whether charged within Nigeria or elsewhere; (g) depreciation of any premises, buildings, structures, works of permanent nature, plant, machinery or fixtures; (h) any payment to any provident, savings, widows and orphans' or other society, scheme or fund, except such payments as are allowed under subsection (1) (f) of §10 of this Act; (i) any royalty or other sums deductible in ascertaining tax under provisions of §22 of this Act; (j) any expenditure for purchase of information relating to existence and extent of petroleum deposits. (§13).

Depreciation.

See topic 17.01 Administration, subhead Capital Allowance.

Amount of capital allowance that can be set-off against assessable profits of company in any one year is restricted to 85% of assessable profits. (§20[4]).

Capital allowances not fully absorbed may be carried forward indefinitely and set-off against subsequent profits of trade or business to which they relate.

Carry-Forward of Losses.

Losses may be carried forward indefinitely. (§16).

Taxation of Mining.

Companies engaged in mining are charged tax on their profits in accordance with Companies Income Tax Act. See also category 15 Mineral, Water and Fishing Rights, topic 15.01 Mines and Minerals, subhead Fiscal Incentives.

17.12 PROPERTY TAXES:

Real Property Tax.

Tenement rates are imposed on all real property occupied (with few exceptions). Tenement rate payable is assessed by state government where property is situated but collected by local government. In Lagos State, land use charge has consolidated and replaced following taxes: tenement rate, neighbourhood improvement charge and land rate. (Land Use Charge Law c. L61, of Lagos State).

Real Estate Conveyance Tax.

Land in every state is vested in State Governor. Consent of Governor is required for transfer of any interest in land situated in urban area. (§22 of Land Use Act). Fee charged for grant of such consent varies but can be as high as 20% of market value of land or interest being conveyed.

See also category 16 Property, topic 16.01 Real Property.

Real Estate Registration Tax.

Title registration fee is payable in most states. Fee can be as high as 6% of value of real estate.

17.13 SALES TAX:

Sales tax of 5% is levied by Lagos State Government. See also topic 17.18 Value Added Tax.

17.14 STAMP TAX:

Stamp duty is payable on written agreements and other documents. Where at least one of parties executing agreement is company, stamp duty on it will be payable to Federal Government. Where all parties executing agreement are individuals, stamp duty on it will be payable to State Government. (§4 Stamp Duty Act, c. S8 LFN).

Below are rates of duty applicable where duty is payable to State Governments:

A. Flat Rate

	Type of Instrument	Rate
1.	Affidavit-Affirmation, Statutory declaration, Declaration of age,Declaration of loss of item; Declaration of Ownership of property	N100
2.	Ordinary Tenancy Agreement (not involving corporate bodies,Government or Agencies)	N500
3.	Ordinary receipts	N20
4.	Certificate of Occupancy	N1,000
5.	Agreement (Under seal)	N500
6.	Agreement (Memo of any agreement)	N500
7.	Oath and other affiliate bodies relating to above	N500
8.	Bond (ordinary)	N1,000
9.	Gift	N1,000
10.	Collateral Security	N500
11.	Certificate	N500
12.	Legacy (Movable Property)	N1,000
13.	Proxy forms or cards	N200
14.	Partnership	N1,000
15.	Bank Guarantee	N1,000
16.	Appointment of Trustee of Attorney	N500
17.	Appointment of Commissioner for Affidavit	N500
18.	Warrants of Attorney of any kind	N500
19.	Notaries Act	N500
20.	Will	N500

B. Ad Valorem (based on value of underlying transaction)

	Type of Instrument	Rate
1.	Contract Agreement	1%
2.	Land Agreement	2%
3.	Lease Agreement, Sublease Agreement	3%
4.	Lease Hold Agreement or Rent Agreement	6%
5.	Deed of Assignment, Deed of Ratification, Deed of Confirmation	3%
6.	Deed of Release, Hire Purchase or Surrender	0.75%
7.	Legacy (Immovable)	1.5%
8.	Promissory Notes/IOU	1%

Below are rates of duty applicable where duty is payable to Federal Government:

A. Flat Rate

	Type of Instrument	Rate
1.	Bond forms; Guarantor's forms; Power of Attorney; Scholarship bond; Loan agreement; Sealed agreement; Partnership agreement; Guarantee of Bank Facilities; Trust Deeds; Memorandum; Article of Association; Admission form in French; Articles Clerkship; Trustee; Fidelity Bond; Sealed Declaration; Protest on Bill of Exchange; Maturity claim forms for Insurance Company;	
	Memorandum of Deposit; Deed of Appointment; Ordinary receipts; Protest of Will; Dividend Warrants; Proxy cards.	N500
2.	Ordinary or Open Agreement under hand	N500
3.	Legacy (Movable Property)	N500
4.	Appointment of Commissioner for Affidavit	N500
5.	Affidavit-Affirmation; Statutory Declaration; Agreement (Memo of hand written) (ordinary)	N100
6.	Agreement (under seal)	N500
7.	Appointment of Trustee or of Attorney	N500
8.	Warrants of goods; Bonds (under seal); Collateral Security; Guarantor form of understanding	N500
9.	Oath and other affiliate bodies relating to above	N500
10.	Certificate of Occupancy; Partnership	N1,000
11.	Gift (Land); Will; Warrants of Attorney of any kind	N1,000
12.	Notaries Act	N500
13.	Bank cheques (per leaflet)	N1

B. Ad Valorem (based on value of underlying transaction)

	Type of Instrument	Rate
1.	Insurance policy/policies	1.5%
2.	Share capital and share capital increase	1.5%
3.	Mortgage of Insurance and or Debentures; Indenture and their upstamping; equitable Mortgage (e.g. Deposit)	1.5%
4.	Bill of Sale	1%
5.	Assignment from Bank (Amount written on top corner); Discharge (from Insurance Company); Indemnity or lease of Mortgage	1%
6.	Contract relating to shares; Loan agreement from Insurance Company	1%
7.	Surrender; Bills of Exchange	1%
8.	Promissory notes	1%
9.	Lease agreement on Plant and Machinery	1.5%
10.	Goodwill; Debenture; Settlement	2%
11.	Premium	1.5%
12.	Contract agreement	1%
13.	Land Agreement	2%
14.	Deed of assignment; confirmation; Ratification	3%
15.	Deed of conveyance or transfer on sale of property	1%
16.	Lease agreement; sub-lease agreement	3%
17.	Tenancy agreement or form	3%
18.	Lease hold agreement or rent agreement	6%
19.	Deed of release	0.75%
20.	Hire purchase; lending (money)	0.5%
21.	Legacy (immovable property)	1.5%
22.	Policy Insurance certificate	3%
23.	Promissory notes/I.O.U.	1%

Non-Chargeable Instruments

	Type of Instrument	Rate
1.	Share transfer agreement/form	0% (Free)
2.	Shipping agreements	0% (Free)
3.	Documents/agreements involving ministries and parastatals	0% (Free)
4.	Documents executed by co-operative society	0% (Free)

17.15 TAX INCENTIVES AND EXEMPTIONS:

Pioneer Industry Status.

Under Industrial Development (Income Tax Relief) Act, c. I7 LFN, industry or product may be declared pioneer industry or product if: (i) industry is not carried on in Nigeria on scale suitable to economic development of Nigeria; or (ii) there are favourable prospects of further development of such industry in Nigeria; or (iii) it is expedient, in public interest, to encourage development or establishment of such industry in Nigeria. (§1[1]).

Following industries and products currently enjoy pioneer status: (1) Cultivation and processing of food crops, vegetables and fruits; (2) manufacture of cocoa products; (3) processing of oilseeds; (4) integrated dairy production; (5) cattle and other livestock ranching; (6) bone crushing; (7) (a) deep sea trawling and processing, (b) coastal fishing and shrimping, (c) inland lake fishing and processing; (8) manufacture of salt; (9) mining of lead zinc ores by underground mining methods; (10) manufacture of iron and steel from iron ore; (11) smelting and refining of nonferrous base metals and manufacture of their alloys; (12) mining and processing of barytes and associated minerals; (13) manufacture of oil well drilling materials containing predominant proportion of Nigerian raw materials; (14) manufacture of cement; (15) manufacture of glass and glassware; (16) manufacture of lime from local limestone; (17) quarrying and processing marbles; (18) manufacture of ceramic products; (19) manufacture of basic and intermediate industrial chemicals from predominantly Nigerian raw materials; (20) manufacture of pharmaceuticals; (21) manufacture of surgical dressings; (22) manufacture of starch from plantation crop; (23) manufacture of yeast, alcohol and related products; (24) manufacture of animal foodstuff; (25) manufacture of paper-pulp, paper and paperboard; (26) manufacture of articles of paper-pulp, paper and paperboard; (27) manufacture of leather; (28) manufacture of textile fabrics and man-made fibres; (29) manufacture of products made wholly or mainly of metal; (30) manufacture of machinery involving local manufacture of substantial proportion of components thereof; (31) manufacture of goods made wholly or partly of rubber; (32) manufacture of spare parts including automotive spare parts and components; (33) manufacture of telecommunication equipment, cables, etc.; (34) manufacture of educational and science equipment; (35) manufacture of medical and dental equipment; (36) manufacture of office and school stationery; (37) manufacture of building and home furnishings materials.

Application may be made by company incorporated in Nigeria or by group of persons on behalf of company yet to be incorporated for issue of pioneer certificate in respect of any industry declared pioneer industry provided that qualifying capital expenditure to be incurred on or before production day is in excess of: N50,000 in case of Nigerian controlled company; or N150,000 in case of other company. In practice investment of at least N10,000,000 is currently required.

Applications for pioneer status must: (a) state whether company is, or proposed company will be indigenously controlled; (b) give particulars, source, and estimated cost of assets on which qualifying capital expenditure will be incurred before production day and in three years following; (c) specify product and by product (where this is not pioneer product) to be produced, estimated quantities, and value of product and by-product during first year from production day; (d) specify place in which assets, in respect of which qualifying expenditure will be incurred by company or proposed company, will be situated; (e) give particulars of loan and share capital of company including dates of issue and sources of capital; (f) in case of proposed company, give names, addresses and nationalities of promoters; (g) contain declaration signed by applicants that all particulars contained therein are true; (h) be accompanied by appropriate fee. (§2).

Where application on behalf of proposed company is approved, that company must be incorporated within four months of approval, and pioneer certificate will not be issued until company has been incorporated. (§3[3]).

Not later than one month after production in marketable quantities, pioneer company must apply in writing to Director, Industrial Inspectorate Division, Ministry of Industries, to certify date as its production day. (§6).

Company may voluntarily apply that pioneer certificate be cancelled. Effective date of cancellation will be pioneer date (production day) or last anniversary thereof, whichever is later. (§7).

Tax Relief Period.

Pioneer companies enjoy tax relief period of three years which can be extended to maximum of five years. (§10). During its pioneer period, company must not carry on any business other than its pioneer enterprise, and if it does profit from such other business will not enjoy tax relief. (§12).

Profits Exempted from Tax.

Profit of pioneer company for any accounting year as certified by Federal Inland Revenue Service is exempt from companies' income tax. (§16).

Pioneer profits certified by Revenue must be credited to account and any dividends or distributions in form of bonus shares are to be debited to that account and such dividends are exempted from tax in hands of recipients. (§17). Pioneer company must not, during its tax relief period make any distribution in excess of balance standing in account and it may not grant loans without permission of Minister. (§18).

Fiscal Incentives for Oil and Gas Industry.

Incentives for Deep Offshore Exploration.

Deep Offshore and Inland Basin Production Sharing Contracts Act, c. D3 LFN provides, amongst other things, for amendment of certain legislation in order to give effect to fiscal incentives granted to various petroleum exploration and production companies who operate in deep offshore and inland basin areas under production sharing contracts with Nigerian holders of oil prospecting licences.

Specifically, Act does following: (1) It amends Petroleum Profits Tax Act so far as petroleum operations within production sharing contract area is concerned. For such operations petroleum profits tax rate is to be 50% instead of usual 85% of chargeable profits. (2) It provides that in respect to production sharing contracts entered into prior to 1st July 1998 parties shall be entitled to Investment Tax Credit equal to 50% of qualifying expenditure for accounting period in which asset was first used. This Investment Tax Credit is to be set off against assessable tax. For production sharing contracts entered into after 1st July 1998 parties shall be entitled to Investment Tax Allowance equal to 50% of qualifying expenditure for accounting period in which asset was first used. This Investment Tax Allowance is to be set off against profits rather than taxes. (3) It amends Petroleum (Drilling and Production) Regulations to provide that royalty payable in respect to oil produced within deep offshore production sharing contract areas is to run from 0% for areas in excess of 1,000 metres water depth to 12% for areas between 201 and 500 metres water depth. (4) Incentives are to be subject to review to ensure that if price of crude oil should exceed $20 per barrel share of Federal Government in additional revenue shall be adjusted “to such extent that the Production Sharing Contracts shall be economically beneficial to the Government”. In any case, incentives are to be reviewed in 2008 and every five years thereafter.

Incentives for Utilization of Associated Gas.

Following incentives apply to upstream company that utilises associated gas: (a) Investment required to separate crude oil and gas from reservoir into usable products shall be considered as part of oil field development; (b) capital investment on facilities and equipment to deliver associated gas in usable form at utilization or designated custody transfer points shall be treated for tax purposes as part of capital investment for oil development; (c) capital allowances, operating expenses and basis of tax assessment shall be subject to provisions of Petroleum Profits Tax Act and tax incentives under revised Memorandum of Understanding. (§11[1], Petroleum Profits Tax Act).

These incentives are subject to following conditions: (a) condensates extracted and reinjected into crude oil stream shall be treated under existing tax arrangement; (b) company shall pay minimum amount charged by minister of petroleum resources for any gas flared by company; (c) company shall, where practicable, keep expenses incurred in utilization of associated gas separate from those incurred on crude oil operation and only expenses not able to be separated shall be allowable against crude oil income of company; (d) expenses identified as incurred exclusively in utilization of associated gas shall be regarded as gas expenses and be allowable against gas income and profit to be taxed under Companies Income Tax Act; (e) only companies which invest in natural gas liquid extraction facilities to supply gas in usable form to downstream projects, including aluminium smelter and Methanol, Methyl Tertiary Butyl Ether and other associated gas utilization projects shall benefit from incentives; (f) all capital investments relating to gas-to-liquids facilities shall be treated as chargeable capital allowance and recovered against crude oil income; (g) gas transferred from natural gas liquid facility to gas-to-liquids facilities shall be at 0% tax and 0% royalty. (§11[2], Petroleum Profits Tax Act). All incentives granted in respect of investment in utilization of associated gas apply to upstream investments in nonassociated gas. (§12, Petroleum Profits Tax Act).

Incentives to Gas Industry (Downstream).

Special fiscal incentives have been provided for companies engaged in marketing and distribution of natural gas for commercial purposes; companies that use gas for power plants and fertilizer plants; companies that set up liquefied natural gas or gas to liquid plants; and companies that own gas transmission and distribution pipelines. Incentives are: (a) initial tax free period of three years which may, subject to satisfactory performance of business be renewed for additional period of two years; (aa) as alternative to initial tax free period, additional investment allowance of 35% which shall not reduce value of asset, so that company which claims this incentive shall not also claim incentive provided under clause (b); (b) accelerated capital allowances after tax free period: (i) annual allowance of 90% with 10% retention, for investment in plant and machinery, (ii) additional investment allowance of 15% which shall not reduce value of asset; (c) tax free dividends during tax free period, where: (i) investment for business was in foreign currency, or (ii) introduction of imported plant and machinery during period was not less than 30% of equity share capital of company; (d) interest payable on any loan obtained with prior approval of Minister for gas project, shall be tax deductible. (§32[1], Companies Income Tax Act).

Tax free period of company shall start on day company commences production as certified by Ministry of Petroleum Resources. (§32[3], Companies Income Tax Act).

Other Fiscal Incentives for Oil and Gas Industry.

By special arrangements between Federal Government and oil and gas companies various incentives have been granted in order to encourage exploration and production as well as gas utilisation activities. These arrangements are contained in Memorandum of Understanding with each oil company, as well as in Associated Gas Framework Agreement and Production Sharing Contract. Although not all of these arrangements have been backed by legislation they are in practice recognised by Federal Board of Inland Revenue.

Project Specific Incentives.

Some project specific incentives are contained in Oso Condensate Project Act, c. O11 LFN, and Nigeria LNG (Fiscal Incentives, etc.) Act, c. N87 LFN.

17.16 TREATIES AND AGREEMENTS:

Double Taxation Arrangements.

Double taxation agreements with governments of Czech Republic (1987), Great Britain (1988), Pakistan (1990), Belgium (1990), France (1991), Canada (1993), Romania (1993), Netherlands (1994), Italy (1994), South Africa (2009) and China (2010).

Each of agreements covers following Nigerian taxes: (a) personal income tax; (b) companies income tax; (c) petroleum profits tax; and (d) capital gains tax.

Also, each agreement deals with issues such as meanings of terms “Fiscal Residence” and “Permanent Establishment”; as well as indicating in which of two contracting states following may be taxed: Income from immovable property, business profits, shipping and air transport, associated enterprises, dividends, interest, royalties, capital gains, dependent and independent personal services, director's fees, and pensions and annuities.

Thrust of each agreement is essentially to provide that contracting state give credit for taxes paid in other contracting state. Provision is also made for exchange of information between taxation authorities of contracting states.

17.17 USE TAX:

None.

17.18 VALUE ADDED TAX:

Value Added Tax Act, c. V1 LFN provides for tax to be charged and payable on supply of all goods and services other than those listed in Act. These goods and services are referred to as taxable goods and services. (§2).

VAT is chargeable at flat rate of 5%. Certain goods and services classified taxed at zero rate including (1) non-oil exports; (2) goods and services purchased by diplomats; (3) goods purchased for use in humanitarian donor funded projects (Part III, Schedule 2, Value Added Tax [Amendment] Act No. 12 2007) (§4). Exempted goods include: all medical and pharmaceutical products, basic food items, books and educational materials, baby products, commercial vehicles and commercial vehicle spare parts, plant, machinery and goods imported for use in export processing zone or free trade zone, agricultural equipment and chemicals, plant and machinery purchased for gas utilisation in downstream sector of petroleum industry. Exempted services include: all exported services, medical services, services rendered by community banks, Peoples Bank and mortgage institutions, and plays and performances conducted by educational institutions as part of learning.

Exported goods also exempted and any tax previously paid on such goods at any point along distribution chain is refundable. However, unless they are already under exemptions mentioned above, imported goods are subject to VAT. Importer is expected to pay VAT before clearing goods, hence, Nigerian Customs Service is required to demand VAT compliance certificate issued by Federal Inland Revenue Service on those goods before releasing them to importer. (§15).

VAT is collected by Federal Inland Revenue Service. (§7).

All businesses and persons that deal in goods and services which are subject to VAT are required to register at VAT office nearest to them within six months of commencement of business. (§8). Non-resident company must register for VAT using address of person with whom it has contract as its address for service of notices. (§10[1]).

Return in respect of all taxable goods and services purchased or supplied or imported during preceding month must be made on or before 21st day of month following. Failure to file this return will attract fine of N5,000 for every month. Business is required to remit to Federal Inland Revenue Service difference between VAT received by it on its sales and VAT paid by it on its purchases. (§13). However, VAT paid on overhead, service and general administration expenses may not be deducted. (§17).

Where goods and services are supplied to ministry, statutory body or other agency of government, such agency is to deduct VAT from payments it is making to supplier and to remit this to VAT Office of Federal Inland Revenue Service. (§13[1]). Where goods and services are supplied by non-resident company to resident person, person to whom goods and services are supplied is to deduct VAT from payments it is making to supplier and remit this in currency of transaction. (§10[2]).

Where taxable person fails to render returns or renders incomplete or inaccurate return, Federal Inland Revenue Service can make best of judgment assessment of amount of tax due. (§18).

Disputes.

Federal Inland Revenue Service may recover unpaid tax through proceedings in Federal High Court (Stabilini Visinoni Ltd. v. Federal Board of Inland Revenue [Unreported] Suit No. CA/I/125/05). Taxpayer may take objections to Federal Inland Revenue Service. Appeals against decision of Federal Inland Revenue Service go to Tax Appeal Tribunal. Appeals from decision of Tax Appeal Tribunal go to Federal High Court. (§20 as amended by Value Added Tax [Amendment] Act No. 12 2007).

17.19 WITHHOLDING TAX:

Withholding Tax.

Where payment is due to company or individual in respect of goods or services supplied by such recipient, or payment is of dividend, interest on loan, royalty or rent, person making payment is required to deduct portion of such payment (by way of withholding tax) and to remit tax so withheld to appropriate tax authority. Tax remitted will be held by tax authority to credit of recipient concerned and be available for set-off against income tax due from such recipient. Person making deduction or withholding must issue to recipient receipt for amount withheld and statement showing name and address of recipient; nature of activity or service in respect of which payment was made; gross amount of payment due to recipient; tax deducted; and period to which payment relates.

Where recipient is company withholding tax is to be remitted to Federal Inland Revenue Service, and where recipient is individual withholding tax is to be remitted to Board of Internal Revenue of state in which individual is resident.

Person who fails to deduct withholding tax, or to remit tax withheld, is punishable upon conviction with penalty of 200% of tax involved, plus interest at prevailing commercial rate.

Rates of withholding tax are as follows:

Payments in respect of	**Rate at which tax is to be deducted on payment to company.**	**Rate at which tax is to be deducted on payment to individual**
1. All aspects of building, construction and related activities	5%	5%
2. All types of contracts and agency arrangements, other than sales in the ordinary course of business	5%	5%
3. Consultancy and professional services	10%	5%
4. Management services	10%	5%
5. Technical services	10%	5%
6. Commissions	10%	5%
7. Royalty	10%	5%
8. Dividends	10%	10%
9. Interest	10%	10%
10. Rent and rentals	10%	10%
11. Directors' Fees	—	10%

Tax when paid over to relevant tax authority will be final tax due where recipient is foreign company or non-resident individual. Where payment is of dividend, tax withheld is final tax due from resident individual or Nigerian company; and where payment is of royalty or interest, tax withheld is final tax due from resident individual.

See §§69-74 Personal Income Tax Act 1993 and Personal Income Tax (Rates, etc., of Tax Deducted at Source [Withholding Tax]) Regulations 1997 S. I. 9; §§78-82 Companies Income Tax Act and Companies Income Tax (Rates, etc., of Tax Deducted at Source [Withholding Tax]) Regulations 1997 S. I. 10; also, §56 Petroleum Profits Tax Act.

18 TRANSPORTATION

18.01 AVIATION:

Courts.

Jurisdiction to hear and determine matters relating to aviation, safety of aircraft and carriage of passengers and goods by air in first instance is vested exclusively in Federal High Court. (§251[k] Constitution of the Federal Republic of Nigeria, 1999; §7[1][1] Federal High Court Amendment Act, c. F12, 2004).

Regulation.

Civil Aviation Act, c. C13 LFN, 2004, confers powers on Minister to regulate aviation in Nigeria in conformity with 1944 Convention on International Civil Aviation.

Act establishes Nigerian Civil Aviation Authority with overall responsibility for safety and regulation of aviation and powers to make regulations. (§30).

Convention for the Unification of Certain Rules Relating to International Carriage by Air, 1999; Convention (and protocol) on International Interests in Mobile Equipment 2001; Convention on International Recognition of Rights in Aircrafts 1948, §73(1) is applicable in Nigeria by virtue of Act. (c. C13, §48[1], §73[2], §73[1]).

Airports.

Federal Airports Authority of Nigeria Act, c. F5 LFN establishes Federal Airports Authority of Nigeria to manage and control airports in Nigeria.

Action.

No action can be commenced against Nigerian Civil Aviation Authority, member of Authority's board, director-general employee for any act done in pursuance of any law or any public duty, or authority or in respect of any alleged neglect or default in securing such law, duty or authority after 12 months after said act, neglect or default complained of and in case of continuance of damage or injury within 12 months next after ceasing thereof. 12 months pre-action notice required to commence action. (c. C13, §24).

No action can be commenced against Federal Airport Authority of Nigeria without three month pre-action notice. (c. F12, §20).

Nigerian Airspace.

Nigerian Airspace Management Agency (Establishment, etc.) Act, c. N90 LFN establishes Nigerian Airspace Management Agency. (§1). Agency has duty to inter-alia (a) provide air traffic services in Nigeria, including air traffic control, visual and non-visual aids, aeronautical telecommunications services and electricity supplies relating thereto, to enable public transport, private, business and military aircraft to fly, as far as practicable and as safely as possible; (b) provide navigation services necessary for operation of aircraft taking-off and landing and integrate them into overall flow of air traffic within Nigerian airspace; (c) generally secure safety, efficiency and regularity of air navigation.

18.02 SHIPPING:

Court.

Jurisdiction to hear and determine admiralty cases in first instance is vested exclusively in Federal High Court. (§251[1][g] Constitution of the Federal Republic of Nigeria, 1999). Extent of court's jurisdiction is spelt out in §§1 and 3 of Admiralty Jurisdiction Act. (c. A5 LFN, 2004).

Admiralty jurisdiction of court in respect of carriage and delivery of goods extends from time goods are placed on board ship for purpose of shipping to time goods are delivered to consignee or whoever is to receive them whether goods were transported on land during process or not. (c. A5, §1[2]).

Also, any agreement or purported agreement, monetary or otherwise, connected with or relating to carriage of goods by sea whether contract of carriage is executed or not will be within admiralty jurisdiction of court.

Admiralty jurisdiction of Court applies to: (a) all ships, irrespective of places of residence or domicile of their owners; and (b) all maritime claims, wherever arising. (c. A5, §3).

Ships.

No ship may be registered in Nigeria unless she is wholly owned by: (a) Nigerian citizens; (b) bodies corporate and partnerships established under and subject to Nigerian laws, having their principal place of business in Nigeria; (c) such other persons as Minister may, by Regulations prescribe. (§18[1] Merchant Shipping Act c. M11 LFN, 2004).

Mortgages.

Ship registered in Nigeria or share therein may be made security for loan or other valuable consideration by means of instrument creating security called ``mortgage''. On production of mortgage to Registrar at ship's port of registry, Registrar shall record it in register book. Mortgages must be recorded in order in which they are produced to Registrar who must endorse and sign memorandum on each mortgage, stating date and time of that record which must govern priority of mortgages. (c. M11, §54[3]).

§57(1) and (2) of c. M11 also provide thus: (1) Except as may be necessary for making mortgaged ship or share available as security for mortgage debt, mortgagee will not, by reason of mortgage, be deemed owner of ship or share, nor will mortgagor be deemed to have ceased to be owner thereof; (2) every registered mortgagee will have power absolutely to dispose of ship or share in respect of which he is registered, and to give effectual receipts for purchase money; but, where there are more persons than one registered as mortgagees of same ship or share, subsequent mortgagee must not, except under order of court of competent jurisdiction, sell ship or share without concurrence of every prior mortgagee. Registered mortgage of ship registered in Nigeria or share in ship are transferable. (c. M11, §58).

Crew.

Provisions are contained in c. M11 for manning of ships, certification, liability and welfare of masters, officers and crew.

Merchant Shipping (Crew Accommodation) Regulations made pursuant to §§177 and 435 Merchant Shipping Act, set out comprehensive provisions regarding accommodation of crew which includes seamen and apprentices.

Safety.

Nigerian Maritime Administration and Safety Agency Act (2007, No. 17), charges Agency with duty of maritime safety promotion (§1[1]). There are also various regulations made pursuant to Merchant Shipping Act with respect to prevention of collision at sea and other matters. Nigeria has also accepted International Regulations for Preventing Collisions at Sea, 1948. §391 of Merchant Shipping Act also makes it mandatory for master or any person in charge of ship, so long as there is no serious danger to his own ship, crew and passenger, to render assistance to every person in danger of being lost at sea in danger of being lost. Failure to render such assistance is offence.

Carriage of Goods by Sea.

This may be governed by charterparty, bill of lading or Carriage of Goods by Sea Act, c. C2 LFN. Merchant Shipping Act also contains provisions governing carriage of certain types of cargo.

In respect of carriage of outbound cargo, Nigeria is party to International Convention for the Unification of Certain Rules Relating to Bills of Lading otherwise known as “Hague Rules” which have been enacted as schedule to Carriage of Goods by Sea Act, c. C2 LFN.

Carriage of Passengers.

Main provisions are contained in Merchant Shipping (Carriage of Passengers) Regulations made under c. M11, §435.

Pilotage and Towage.

Towage is governed by private contract between parties.

Liens.

Maritime liens have been recognised under Nigerian Law by §5(3) of Admiralty Jurisdiction Act 1991 which describes maritime lien as lien for: (a) Salvage; or (b) damage done by ship; or (c) wages of master or member of crew of ship; or (d) master's disbursements on account of ship.

Statutory liens arise in connection with claims which are not maritime liens. Statutory rights in rem include claims relating to following: (a) title or ownership of ship, (b) mortgage of ship, (c) port, harbour, canal or light toll charges or dues, (d) damage received by vessel, (e) carriage of goods or person by ship, use or hire of ship, (f) insurance premium for ship, goods or cargoes carried by ship.

National Carrier Status.

By 2007, No. 17 §37(1), national carriers will have right to participate in carriage of bulk cargo. In carriage of bulk cargoes to and from Nigeria, national carrier will have carriage rights to not less than 50% of such cargoes.

Ships owned or hired by Nigerian national carriers must carry at least 50% of cargoes generated through technical assistance or international aid. (§37[5]).

Nigerian Maritime Administration and Safety Agency must determine ways and means of involving national carriers in carriage of crude petroleum in Nigerian vessels. (§37[6]).

National carrier status may be granted to shipping company by Minister (of Transport) on recommendation of Agency if: (a) Nigerian individuals or enterprises fully owned by Nigerian individuals have at least 60% of its equity shares and company is registered in Nigeria; (b) vessels owned by company operate on deep sea and not on Nigerian coastal or inland waterways; (c) head office of company is located in Nigeria and its management and control is directed from its Nigerian head office; (d) company owns at least one oceangoing vessel of not less than 5,000 net registered tonnage; (e) terms and conditions of employment of seafarers engaged by company are in conformity with Nigerian laws and accepted international rules and standards; (f) vessels of company are registered in Nigerian Register of Ships and vessels satisfy all conditions stipulated in Merchant Shipping Act; and (g) 100% of crew and at least 75% of shipboard officers, including captain and chief officer and wherever possible chief engineers, are Nigerians. (§35).

§36(1) provides that national carriers will have exclusive right to carriage of export and import cargo belonging to Federal, State and Local Governments including Federal and State owned companies except where such freight is exempted by Minister (of Transport).

§38, however, provides that Minister (of Transport) on recommendation of Agency may suspend, or revoke national carrier status of company if company fails to meet any of conditions (including training of Nigerian seafarers).

§3 of Coastal and Inland Shipping (Cabotage) Act 2003 provides that only vessels wholly owned, manned, built by Nigerian citizens and registered in Nigeria shall engage in domestic coastal carriage of cargo and passengers within Coastal, Territorial, Inland Waters, Island or any point within waters of Exclusive Economic Zone of Nigeria. This is subject to Ministerial Waivers that may be granted under §§9-11 which would allow foreign vessel to engage in cabotage trade where there are no wholly owned, manned and built Nigerian vessels suitable for proposed activity. Separate registration is required for vessels engaged in cabotage trade. (§22, Cabotage Act). Any vessel engaged in cabotage trade must pay surcharge of 2% on its contract sums into Cabotage Vessel Financing Fund (CVFF). CVFF is for purpose of developing indigenous ship acquisition capacity.

Ports and Jetties.

Nigerian Ports Authority (NPA) licences ports and jetties in declared port. (c. N126, §§30 and 33). National Inland Waterways Authority (NIWA) licences piers, jetties and dockyards in all internal waters and navigable waterways and consents to erection of permanent structures that may obstruct or interfere with declared waterway. (c. N47, §§9 and 11). Such license grants user right to construct and operate ports, jetties and dockyards. Construction on land within State jurisdiction requires certificate of occupancy or lease from holder of such certificate.

1
NORTHERN IRELAND LAW DIGEST

—Scope —

Revised for 2008 edition by

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(Statutes are cited by reference to their Short Title [if any] and by the regal year and chapter number, except Statutes of Northern Ireland Parliament passed after Dec. 31, 1942 which are cited by calendar year and chapter. Statutes of Parliament of United Kingdom, Parliament of Ireland passed prior to 1801, and Parliament of Northern Ireland from 1921 to 1942 are distinguished by having “[U.K.],” “[Ir.]” and “[N.I.]” inserted after their respective citations. Measures of Northern Ireland Assembly are cited in same manner as Statutes passed by Northern Ireland Parliament after Dec. 31, 1942. S.R. & O. refers to United Kingdom Statutory Rules and Orders. S.R. & O. [N.I.] and S.R. refer to Northern Ireland Statutory Rules and Orders passed up to Dec. 31, 1973 and from Jan. 1, 1974, respectively. All subordinate legislation cited by calendar year and number. Orders in Council [Statutory Instruments passed between Apr. 1, 1972 and Dec. 31, 1973; and after July 17, 1974] are cited by calendar year and number [e.g. “1982, S.I. No. 1534 (N.I. 17)”]. [See category 1 Introduction, topic 1.02 Government and Legal System.] O. and r. refer to Orders and Rules of Supreme Court (Northern Ireland) (Revision) 1980 (1980, S.R. No. 346). A.C.—Scottish and Divorce Appeal Law Report; A.E.A. —Administration of Estates Act 1955; Anne—Queen Anne; C.P.—Common Pleas Law Report; Eliz.—Queen Elizabeth; Edw.—King Edward; Geo.—King George; L.R. —Law Reports; OFT—Office of Fair Trade; Reg.—Regulation; Sch.—Schedule; Vict.—Queen Victoria.

Northern Ireland, as part of United Kingdom, is member of EU. See also European Union Law Digest.

Note: This revision incorporates legislation through October 1, 2007.

1 INTRODUCTION

1.01 CURRENCY:

Power to legislate with respect to coinage, legal tender or negotiable instruments (including banknotes) excluded from competence of Northern Ireland Assembly (except as far as negotiable instruments may be affected by exercise of powers of taxation) by Northern Ireland Constitution Act 1973. (1973, c. 36 [U.K.] Sch. 1-5 repealed by Northern Ireland Act 1998 §100[2] Sch. 15). See topic Government and Legal System.

Unit of currency is Pound Sterling which is divided into 100 pence. Bank of England banknotes (£5, £10, £20, £50) are legal tender in Northern Ireland. In addition, banknotes issued by various provincial banks (i.e. Bank of Scotland, Northern Bank, Ulster Bank) are widely circulated and accepted. Coins minted by Royal Mint (1p, 2p, 5p, 10p, 20p, 50p, £1, and special commemorative £2 and 25p “crowns”) are legal tender. Banknotes and coins of Republic of Ireland are not legal tender in Northern Ireland.

1.02 GOVERNMENT AND LEGAL SYSTEM:

Northern Ireland forms part of the United Kingdom of Great Britain and Northern Ireland.

In 1920 the Parliament of the United Kingdom (which included Irish members) passed the Government of Ireland Act, which provided for the division of Ireland into Northern and Southern Ireland. Northern Ireland was to consist of the Counties of Antrim, Armagh, Down, Fermanagh, Londonderry and Tyrone and the Boroughs of Belfast and Londonderry; and Southern Ireland was to comprise the remainder of the island. The Act provided for separate Parliaments in North and South, and for a Council of Ireland to deal with matters in which both parts had a common interest.

The legislative powers of both Irish Parliaments were limited, certain powers and services being reserved for the Council of Ireland and others for the Parliament of the United Kingdom, which was to continue to include Members representative of both North and South. Laws in force in Ireland at the commencement of the Act were to continue in force, subject to the Act and to alteration or repeal by the new Parliaments in so far as their powers would extend.

The Government of Ireland Act 1920 (10-1 Geo. 5, c. 67 [U.K.]), took effect only in Northern Ireland. First Northern Ireland Parliament was opened on 22nd June, 1921. United Kingdom Parliament by Irish Free State (Agreement) Act, 1922 and Irish Free State (Consequential Provisions) Act, 1922 ratified an agreement with Southern Irish Political leaders whereby whole of Ireland was to be self-governing dominion under name of Irish Free State. Northern Ireland was to have an option of retaining its status in Government of Ireland Act, which option was in due course exercised.

In 1949 as result of Irish Free State resolving to become a Republic and secede from Commonwealth, United Kingdom Parliament passed Ireland Act 1949 (12, 13-14, Geo. 6, c. 4 [U.K.]). §1(2) of that Act provided “It is hereby declared that Northern Ireland remains part of His Majesty's dominions and of the United Kingdom and it is hereby affirmed that in no event will Northern Ireland or any part thereof cease to be part of His Majesty's dominions and of the United Kingdom without the consent of the Parliament of Northern Ireland.”

This principle is embodied in The Northern Ireland Constitution Act 1973. (1973, c. 36 [U.K.]). §1 provides that Northern Ireland should not cease to be part of U.K. without consent of majority of people ascertained by a poll. Northern Ireland parliament in form provided for by Government of Ireland Act 1920 (10-1 Geo. 5, c. 67 [U.K.]) was prorogued in 1972. There followed under Northern Ireland (Temporary Provisions) Act 1972 (1972, c. 22 [U.K.]) a period of direct rule by British Parliament at Westminster. Executive powers were exercised by Secretary of State and laws made by Order in Council.

The Northern Ireland Constitution Act 1973 (1973, c. 36 [U.K.]) replaced Government of Ireland Act 1920 (10-1 Geo. 5, c. 67 [U.K.]) and established a new constitution.

Act stated that Northern Ireland Parliament should cease to exist and should be replaced by Assembly. (1973, c. 36 [U.K.] §31; §§1-33 & 36-40 in 1973 Act have been subsequently repealed by Northern Ireland Act 1998 §100 as am'd by Justice [N.I.] Act 2002). Northern Ireland Assembly Act 1973 (1973, c. 17 [U.K.]) provides for Assembly consisting of 78 elected members. Offices of Governor of Northern Ireland and of Attorney General for Northern Ireland were abolished. Attorney General for England and Wales is by virtue of that office Attorney General for Northern Ireland. (1973, c. 36 [U.K.] §10). Attorney General appoints Crown Solicitor for Northern Ireland whose service is available to any Minister or Department of Government of N.I. or U.K. (1973, c. 36 [U.K.] §35).

Unpopularity of some actions of elected Assembly Executive caused such political unrest that Executive was forced to resign and Assembly was prorogued by Order in Council in

May 1974 and later dissolved. Secretary of State appointed two Ministers of State and three Parliamentary Under-Secretaries to be political heads of various Government Departments and Offices formerly headed by members of Northern Ireland Executive.

Northern Ireland Act 1974 (1974, c. 28 [U.K.]) provides for dissolution of Northern Ireland Assembly and provides for elections and holding of Constitutional Convention in Northern Ireland for purpose of considering what provision for Government of Northern Ireland is likely to command most widespread acceptance. Convention elected and dissolved after final report rejected by Westminster. Period specified in N.I. Act 1974 (1974, c. 28 [U.K.] §1) for which temporary provisions for government of Northern Ireland contained in 1974, c. 28 (U.K.) Sch. 1 should continue, extended until July, 1995. This Act has subsequently been repealed by Northern Ireland Act 1998 §100(2).

Meanwhile laws are made by Order in Council and Secretary of State acts as Executive. These arrangements are temporary and Northern Ireland Constitution Act 1973 (1973, c. 36 [U.K.]) and Northern Ireland Assembly Act 1973 (1973, c. 17 [U.K.]) remain on Statute Book.

Present Position.

New Northern Ireland Assembly was established as part of Belfast Agreement reached at multiparty negotiations on Fri. 10 Apr. 1998. Under Agreement, Assembly has full legislative and executive authority in respect of those matters previously within remit of six Northern Ireland government departments. New Northern Ireland Assembly was constituted under Northern Ireland (Elections) Act 1998. (1998, c. 72 [U.K.]). 108 members were elected to Assembly by Proportional Representation (Single Transferable Vote) from existing 18 Westminster Constituencies. Powers were devolved to Northern Ireland Assembly on 2 Dec. 1999, by passing of Northern Ireland Act 1998. (1998, c. 47 [U.K.]). Direct Rule was reintroduced in 2002 following suspension of Assembly.

During such period, Assembly's powers reverted to Northern Ireland Office. Following period of over four and half years of Direct Rule, Northern Ireland Assembly was restored on 8 May 2007. Northern Ireland (St. Andrews Agreement) Act 2006 (2006, c. 53 [U.K.]) provided for Transitional Assembly to take part in preparations for restoration of devolved government in Northern Ireland in accordance with St. Andrews Agreement. Transitional Assembly continued to meet until Northern Ireland Assembly was restored. Restoration took place on 8 May 2007 restoring full power to devolved institutions.

Representation at Westminster.

Northern Ireland is divided into 18 parliamentary constituencies, each returning one Member to U.K. House of Commons.

Representation in European Assembly.

European Assembly Elections Act 1978 (1978, c. 10 [U.K.]) provides for election of three members (§2) by single transferable vote system of proportional representation (§3) to represent Northern Ireland in European Assembly. (First elections held in 1979.) Franchise as for U.K. parliamentary elections. See European Union Law Digest, category Introduction, topic Government and Legal System.

Legislation.

Laws may be made by Measures of Assembly enacted by being passed by Assembly and approved by Her Majesty in Council. Measures shall have same force and effect as Acts of U.K. Parliament. (1973, c. 36 [U.K.] §4). Any matter may be subject of legislation except those listed in schedule 2 of The Northern Ireland Constitution Act 1973 (1973, c. 36 [U.K.]) as being solely within competence of U.K. Parliament, or those listed in schedule 3 which are indefinitely reserved by U.K. Parliament. Consent of Secretary of State is required before measures are submitted to Her Majesty in Council.

Excepted Matters.

Crown; U.K. Parliament; international relations; armed forces; nationality; taxes; appointment of judges; elections; coinage and bank notes. (1973, c. 36 [U.K.] Sched. 2).

Reserved Matters.

Matters relating to courts and legal profession; matters relating to maintenance of public order; criminal law; powers of arrest and detention; police; Assembly and its powers; trade with any place outside Northern Ireland except Republic of Ireland; navigation; civil aviation; postal services. (1973, c. 36 [U.K.] Sched. 3).

Where a measure purports to deal with an excepted or reserved matter, consent of Secretary of State is required before submission to Her Majesty in Council, which consent shall not be given unless measure is ancillary to other provisions dealing with excepted or reserved matters, i.e., if it is necessary or expedient for making those other provisions effective. (1973, c. 36 [U.K.] §5). Measures to which Secretary of State has consented must then be laid before both Houses of U.K. Parliament before being submitted to Her Majesty in Council. (1973, c. 36 [U.K.] §6).

Any measure, any Act of Parliament of Northern Ireland, any relevant subordinate instrument shall to extent if it discriminates against any person, or class of persons, on ground of religious belief, or political opinion be void. (1973, c. 36 [U.K.] §17). No Act shall be treated as discriminating if made for purpose of safeguarding national security. (1973, c. 36 [U.K.] §23). Standing Advisory Commission on Human Rights advises Secretary of State on adequacy of law for preventing discrimination on grounds of religious or political belief, and in providing redress for persons aggrieved. (1973, c. 36 [U.K.] §20).

E.E.C. European Communities Act 1972 (1972, c. 68 [U.K.]) provides that all such rights, powers, liabilities, obligations and restrictions created or arising by or under treaties forming E.E.C., and all remedies and procedures provided for by treaties must be recognized and available in law, and be enforced, allowed and followed accordingly. Provision is made for Her Majesty by Order in Council to make regulations in order to implement any obligations arising out of membership of E.E.C., and this power may be delegated to designated Ministers, including Ministers of Northern Ireland Government. Such regulations must be treated as Acts of Parliament. (1972, c. 68 [U.K.] §2). See European Union Law Digest, category Introduction, topic Government and Legal System.

Relations with Republic of Ireland.

Northern Ireland executive authority may: (a) Consult on any matter with any authority of Republic of Ireland, and (b) enter into agreement with such authority in respect of any transferred matter. (1973, c. 36 [U.K.] §12). In addition, 1998 Act (1998, c. 47 [U.K.]) established North South Ministerial Council and British Irish Council §53 permits Assembly to give effect by way of Act to any agreement or arrangement entered into by Minister or Junior Minister particularly within either Council. 1998 Act also established British Irish Intergovernmental Conference which discusses excepted or reserved matters relating to Northern Ireland.

Northern Ireland Parliamentary Franchise.

Under provisions of Electoral Law Act (Northern Ireland) 1962 (1962, c. 14) a person is entitled to be registered as a parliamentary elector for any constituency returning a member to Parliament of Northern Ireland if he or she is a British subject, 18 or more years of age, not subject to any legal incapacity, and was born in Northern Ireland (or, alternatively, has resided continuously in U.K. for a period of seven years ending on qualifying date) and either (a) was residing in constituency on qualifying date and had resided in constituency or elsewhere in Northern Ireland for a period of three months ending on qualifying date; or (b) was on qualifying date occupying business premises in constituency and occupied those or other premises in constituency—or one or more than one other constituency in Northern Ireland—throughout three months immediately prior to qualifying date; or (c) is wife or husband of a person entitled to be registered in respect of above business premises qualification; or (d) was on qualifying date a member of Forces or a person employed in service of Crown in a post outside U.K., or a merchant seaman, and made a declaration that but for such service he or she would have been residing at an address in constituency; or is wife of such a person and is residing outside U.K. to be with her husband.

United Kingdom Parliamentary Franchise.

Under the provisions of the Representation of the People Act, 1949 (11-2 Geo. 6, c. 65 [U.K.]), a person is entitled to be registered as a parliamentary elector for any Northern Ireland constituency returning a member to the Parliament at Westminster if that person is a British subject or citizen of the Irish Republic of 18 or more years of age and not subject to any legal incapacity to vote, is resident at an address in that constituency on the qualifying date, and has resided at that address (or at any other address or addresses in Northern Ireland) for a period of three months ending on the qualifying date.

There are also included in the register the names of persons qualified as above but whose 18th birthday is after Sept. 16 and on or before the following May 1. Such persons are entitled to vote at any election, for which the register is used, held after Oct. 1 in that year.

In addition, a person who would ordinarily have been resident at a specified address in a constituency in Northern Ireland may be registered in respect of a service qualification if: (a) he or she is a member of the Forces; or (b) he or she is a person employed in the service of the Crown in a post outside the United Kingdom; or (c) she is the wife of a person having a Service qualification and is residing outside the United Kingdom to be with her husband.

Elections.

Persons entitled to vote on poll for election of members of Assembly are those who would be entitled to vote on polls held at general election to Parliament of Northern Ireland. Each vote is single transferable vote, that is a vote capable of being given so as to indicate voter's order of preference for candidates for election as members for constituency, and capable of being transferred to next choice when vote is not required to give a prior choice necessary quota of votes or when that choice is eliminated owing to a deficiency in number of votes given for a prior choice. (1973, c. 17 [U.K.]). Secretary of State has power by Order to make any provision concerning election and in particular provision concerning holding of any election, frequency, method of voting, counting and transferring votes. Same system applied to Convention elections.

Civil Service.

The Civil Service of Northern Ireland is in general organised on the lines of the Imperial Civil Service. It was staffed at its inception by the transfer of civil servants employed in Imperial Departments and this nucleus was supplemented by ex-service candidates recruited locally.

General Control.

Regulation of Service falls within common law executive power of Crown and, as such is exercisable by Secretary of State for Northern Ireland, (§8). Power was exercised in certain important respects by Orders made by Governor dated Feb. 28, 1923 and July 11, 1923, nominating three Civil Service Commissioners to perform, in relation to Civil Service of Northern

Ireland, functions similar to those performed by Imperial Civil Service Commission in relation of Civil Service of U.K. Latter order also provided that Department of Finance should make Regulations for controlling conduct of Civil Service, and prescribing classification, remuneration and other conditions of service of all persons employed therein whether permanently or temporarily.

1.03 HOLIDAYS:

Jan. 1, Mar. 17 (St. Patrick's Day), Good Friday, Easter Monday, 1st Mon. in May, Spring Holiday, last Mon. in May, July 12 and 13, last Mon. in Aug., Christmas Day, Boxing Day (Dec. 26) and Dec. 27 are bank holidays on which all banks and Stock Exchange are closed.

1.04 OFFICE HOURS AND TIME ZONE:

Northern Ireland is in the Greenwich Mean time zone. Office hours are generally from 9 a.m. to 5 p.m.

2 BUSINESS ORGANIZATIONS

2.01 AGENCY:

Common law rules apply generally; the principal is responsible for the acts of his agents. An agent acting for an undisclosed principal is personally liable. In order to make the principal liable, however, it must be shown that the agent was acting within the scope of his employment. If agent acts outside scope of his authority principal is liable if he is shown to have ratified and adopted action of agent, in which case ratification relates back to time at which agent acted, provided that at time of acting agent professed to be an agent; and that at that time principal was competent to act as such.

2.02 ASSOCIATIONS:

See topic 2.05 Partnerships.

2.03 CORPORATIONS:

Companies (Northern Ireland) Order 1986 (1986 S.I. No. 1032 [N.I. 6] as am'd by 1989 S.I. No. 2404 [N.I. 18]; 1989 S.I. No. 2405 [N.I. 19]; 1990 S.I. No. 593 [N.I. 5] and 1990 S.I. No. 1504 [N.I. 10]) governs incorporation, formation, operation, and winding up of companies limited by shares and by guarantee and unlimited companies. Unless otherwise indicated citations refer to Companies (Northern Ireland) Order 1986 and Articles thereof. Companies may be public companies or private companies. (Art. 12) (S.3-8).

Companies Act 2006 (2006, c. 46 [U.K.]) is due to be fully implemented by Oct. 2008, which will provide for single company law regime applying to entire U.K. rather than Great Britain and Northern Ireland separately. In effect, it will repeal above provisions almost in their entirety but new provisions largely correspond to old provisions. However, company law is transferred matter meaning that Northern Ireland Assembly could amend or repeal Companies Act 2006 if desired. Where Companies (Northern Ireland) Order 1986 is cited, reference will be made to corresponding sections of Companies Act 2006 (“2006 Act”).

General Supervision.

Department of Enterprise, Trade & Investment, Netherleigh, Massey Avenue, Belfast BT4 2JS and Companies Office, 1st Floor, Waterfront Plaza, 8 Laganbank Road, Belfast BT1 3BS.

Purposes.

Companies may be formed for purposes of profit or charity. Purposes must not be contrary to criminal law. Objects of company are set out in memorandum which is company's charter. Acts not within scope of “objects clauses” in memorandum are ultra vires.

Name.

Name of public company must end with words “Public Limited Company” or “PLC”, (Art. 35).

Name of private company must end with “Limited” or “Ltd” (Art. 35) (S.59) except for certain companies exempt from requirement (Art. 40) (S.60).

Fee of £40 to register change of name.

Business Names (Northern Ireland) Order (1986 S.I. No. 1033 [*N.I.*] *7)* applies to name of company carrying on business in name other than its corporate name. 2006 Act will repeal Business Names (Northern Ireland) Order 1986 and replace it with Part 5 of 2006 Act. See category 3 Business Regulation and Commerce, topic 3.02 Commercial Register, subhead Who Must Comply.

Term of Corporate Existence.

Perpetual.

Incorporators.

Any two or more persons associated for lawful purpose may by subscribing their names to memorandum of association and otherwise complying with requirements of Order in respect of registration, form incorporated company with or without limited liability. (Art. 12) (S.7). No restriction as to citizenship or residence.

Memorandum and Articles of Incorporation.

Memorandum of association stating name of company, objects and registered office (Art. 13[1]) (S.9[2]) must be signed by each subscriber in presence of at least one witness (Art. 13[5]) (S.8) and delivered to registrar of companies (Art. 21) (S.9[6]). Under 2006 Act, objects clause is not required and one person acting alone can form company. Memorandum of company limited by shares or guarantee must also state liability of members is limited. (Art. 13[2]) (S.9[2]). Memorandum of company limited by guarantee must state amount members guarantee. (Art. 13[3]) (S.9[2]). Memorandum of company with share capital must state amount of share capital and state against name of each subscriber number of shares be taken. (Art. 13[4]) (S.9[4]).

Articles of association (rules governing internal regulation of company) may be filed by company limited by shares and must be filed by company limited by guarantee or unlimited and must be signed by subscriber to memorandum each in presence of one witness (Art. 18); if articles not filed Table A of Order (as prescribed by regulations made by Department of Enterprise, Trade & Investment) applies. (Art. 19).

Filing of Memorandum or Articles.

Only one copy of memorandum and articles must be delivered to registrar of companies. (Art. 21) (S.9).

Incorporation Tax or Fee.

Fixed registration fee of £35.

Filing Fees.

Fee of £20 on filing annual return.

Licence to do Business.

Certificate of incorporation issued by registrar of companies. (Art. 24) (S.15).

Organization.

Company must (1) in each calendar year hold annual general meeting, (2) hold its first annual general meeting within 18 months of incorporation and (3) not more than 15 months must elapse between one such meeting and next. (Art. 374). Other organization is set out in articles. 2006 Act will repeal these requirements as regards private companies and amend them as regards public companies. (S.336).

Paid in Capital Requirements.

No requirement for private companies. Authorised minimum capital for public company is £50,000. (Art. 128) (S.763).

Amendment of Articles or Memorandum.

Objects clause in memorandum may be altered by special resolution. (Art. 15). (For special resolution, see Art. 386.) (S.283). No objects clause required under 2006 Act.

Articles may be altered by special resolution. (Art. 20 as am'd 1990 S.I. No. 1504 [N.I. 10] Art. 46[2]) (S.21).

Increase or Decrease of Authorised Capital Stock.

Companies having capital may increase or decrease capital by resolution at general meeting. (Art. 131) (S.617). Public companies may not decrease capital below authorised minimum. (Art. 127) (S.763).

By-Laws.

See subhead Memorandum and Articles of Incorporation, catchline Articles of Association, supra.

Stock.

No restriction as to classes, preferences, etc. Share is personal estate. Shares must be numbered unless all shares of particular class are fully paid up and rank pari passu. (Art. 192) (S.540-544).

Stock Certificates.

Within two months of allotment, or of date when transfer of stock is lodged with company, company must complete and have ready certificates for shares issued or transferred. (Art. 195) (S.769). Certification by company is prima facie evidence of title to shares in transferor named in certificate. (Art. 194) (S.768).

Transfer of Stock.

Most transfers in practice fall within ambit of Stock Transfer Act (Northern Ireland) 1963 (1963 [N.I.], c. 24) which allows single form of transfer for fully paid shares in any company within ambit of Act except unlimited companies and companies limited by guarantee. It need only be signed by transferor. For transferors outside ambit of Act must consult articles of company in which stock is being transferred.

Issuance of Stock.

Issue of stock to public by private company prohibited. (Art. 91). No allotment of stock by public company unless minimum amount stated in prospectus is subscribed. (Art. 93). Minimum amount must be received within 40 days of first issue of prospectus. See further Arts. 90-98 of Order. Company issuing prospectus must comply with Arts. 66 to 73 and must comply with Stock Exchange requirements. Copy of every prospectus issued by or on behalf of company or in relation to intended company, signed by all directors and intending directors or their agent authorized in writing must be delivered to registrar of companies on or before publication (Art. 74) and comply with Art. 75. (S.549-551).

Stock Transfer Tax.

None.

Stockholders.

General rule is any person can become stockholder. Persons may become members (1) by subscribing to memorandum or (2) by agreeing to become member either by applying for allotment of shares or by taking transfer from member. Person may cease to be member by (1) transfer, (2) forfeiture, (3) surrender, (4) sale by company under its lien, (5) death, (6) winding up of company and (7) expulsion. Existing shareholders have pre-emption rights on new allotments. (Art. 99) (S.561).

Stockholders' Action.

Three types of action exist: (1) Personal action by shareholder; (2) representative action on behalf of group of shareholders; (3) derivative action brought on behalf of company.

Member may petition courts (1) when subjected to unfairly prejudicial conduct (Art. 452), (2) for company to be wound up on just and equitable ground. Rules governing availability of derivative action are complex (see Foss v. Harbottle [1843], 2 Hare 461).

Stockholders' Liabilities.

In company limited by shares liability is limited to amount unpaid on members' shares. Past member is only liable for one year after membership ceases. (Art. 63 of Insolvency [N.I.] Order 1989 [1989, S.I. No. 2405 (N.I. 19)]). In other companies liability is unlimited except for company limited by guarantee where amount of guarantee is limit of liability.

Stockholders' Meetings.

Subject to Art. 374A there must be one annual general meeting (Art. 374) but for private company under 2006 Act, there is no such requirement. Members may requisition extraordinary general meetings. (Art. 376). Requisition must (1) state reason for meeting, (2) be signed by owners of one tenth of share capital or one tenth voting right (if not limited by shares), (3) be deposited at company's registered office. Notice requirements vary depending on type of meeting called. (Art. 377) (S.307). Proxies may be appointed if company has share capital. (Art. 380) (S.324).

Voting Trusts.

Can be created but uncommon in Northern Ireland.

Directors.

All public companies must have at least two directors and private companies at least one. (Art. 290) (S.154). Directors' appointments in public companies must be approved at general meeting. (Art. 300). Directors of public company must be under age 70 except with approval of general meeting after special notice of resolution. (Art. 301). 2006 Act requires that no person under age can be director. (S.157). No restriction as to citizenship or residence. Directors need not be shareholders unless articles so provide. Director's service contract for over five years in public company cannot be created without resolution of approval at general meeting. (Art. 327) (S.188).

Directors' Meetings.

Directors must act at meetings unless articles give them power to act otherwise. Due notice of meeting must be given to every director. Meetings may be held anywhere. Quorum of directors is usually fixed in articles.

Powers and Duties of Directors.

Director owes fiduciary duty to company to act bona fide in interest of company, not to act for collateral purpose and duty of care and skill.

Directors are generally given wide ranging powers of management under articles.

Statutory duties of directors of public company include duty (1) to convene extraordinary general meeting when net corporate assets are half or less of called-up share capital (Art. 152), (2) to disclose details of compensation to director on take-over (Art. 322), (3) to disclose directors' interest in corporate contracts (Art. 325) and in shareholdings in own company (Art. 332) (S.171-177).

Liabilities of Directors.

Civil liability to company to account for any company property misappropriated or profit diverted (Art. 584 and Common Law) or to creditors if fraudulent trading (Arts. 451 [S.993], 583 and 177 [1989, S.I. No. 2405 (N.I. 19)]) or wrongful trading proved (Art. 178, 1989, S.I. No. 2405 [N.I.19]) in course of winding up.

Criminal liability includes liability for untrue statements in prospectus (Art. 80), liability for concealing name of creditor on capital reduction (Art. 151). Wide range of criminal offences directors may be liable for in Companies Order and also 2006 Act.

Officers.

Include directors, managers, secretary and may include solicitor if appointed at salary or auditors if formally appointed by articles or under Art. 392 as am'd (1990, S.I. No. 1504 [N.I. 10] Arts. 53-58). Secretary must be appointed in accordance with Art. 291. Under 2006 Act, there is no requirement for private company to have secretary. (S.270).

Liability of Officers.

No provision in articles or contract may exempt officers for liability in respect of negligence, breach of duty or trust to company. (Art. 318). In winding-up officer may be liable in damages for misfeasance. (Art. 170 [1989, S.I. No. 2405 (N.I. 19)]). Various criminal offences in Order, e.g., Art. 585 (1986, S.I. No. 1032 [N.I. 6]) and Schedule 7 (1989, S.I. 2405 [N.I. 19]). Various offences included in 2006 Act.

Registered Office.

Must be stated in memorandum and located in Northern Ireland. (Art. 13 and Art. 295 as am'd [1990 S.I. No. 1504 (N.I. 10) Art. 71]) (S.9 and S.86).

General Powers of Corporation.

Express powers are set forth in objects clause of memorandum. Anything reasonably incidental to attainment or pursuit of any express objects of company will, unless expressly prohibited, be within implied powers of company. Where company's memorandum states that company's object is to carry on business as general commercial company, object of company is to carry on any trade or business whatsoever and company is empowered to do all such things as are incidental or conducive to carrying on of any trade or business. (Art. 14A). Subject to Art. 45 as am'd (1990 S.I. No. 1504 [N.I. 10] Art. 44) contract which is ultra vires company and beyond its powers is absolutely void. Ultra vires rule does not affect transaction decided on by directors dealing with person acting in good faith (Art. 45 and Art. 45A as am'd [1990 S.I. No. 1504 (N.I. 10) Art. 44]) nor categories of wrong, e.g., crime or tort, for which company can be vicariously liable. 2006 Act provides that companies have same legal capacity as natural person, so objects clause no longer required.

Dividends.

Must only be declared out of profits available for purpose. (Art. 271) (S.830). (See also Arts. 272, 273, S.829 and S.831.)

Sale or Transfer of Corporate Assets.

Directors must disclose any interests in contracts with company. (Art. 325) (S.177 and S.175). No director to buy substantial cash asset of company without resolution of company in general meeting. (Art. 328) (S.190-S.192).

Books and Records.

Company must (1) keep minutes of general and directors' meetings (Art. 390) (S.248); (2) full accounting records (Art. 229) (S.386) at registered office; (3) account books open to inspection by company's officers (Art. 230) (S.386); (4) make annual return to registrar of companies (Art. 371) (S.854); (5) keep register of members (Art. 366) (S.113) at registered office open to members free and others on payment (Art. 364) (S.116).

Reports.

Subject to Art. 260 (S.475-S.476 and S.495) company auditors must report to members on accounts and on balance sheet and profit and loss account. Directors must prepare profit and loss account or if company is not trading for profit income and expenditure account (Art. 235), report stating matters and particulars required by Art. 243 and must (except on certain unlimited companies) in respect of each of company's financial years deliver to registrar company's accounts (Art. 246) which comprise balance sheet, profit and loss account, group accounts of holding company (if any), auditors report and directors' report (Art. 247) (S.415). Every member and holder of company's debentures must receive copy of company's accounts.

Registration of Mortgages.

Every mortgage or charge created by company and being:

(1) *Mortgage or charge* (a) for purpose of securing any issue of debentures, (b) on uncalled capital of company, (c) created or evidenced by instrument which, if created by individual would require registration as bill of sale, (d) on any land, wherever situate, or any interests therein, (e) on any book debt of company;

(2) *Floating charge* on undertaking or property of company;

(3) *Charge,* (a) on calls made but not paid, (b) on ship or any share in shop, or (c) on goodwill, on patent or licence under patent or trademark or on copyright or licence under copyright is void against liquidator and any creditor of company unless received by registrar of companies for registration within 21 days after date of charges creation (Arts. 402-403) (S.869-S.870) except in case of charge created out of U.K. comprising property outside U.K. which must

be received by registrar of companies within 21 days of date instrument or copy could in due course of post if dispatched with due diligence have been received in Northern Ireland (Art. 405) (S.870). Copies of all mortgages or charges must be kept at company's office and open to inspection of members and creditors of company. (Art. 414) (S.876).

Mergers, Takeovers.

Miscellaneous provisions contained in Arts. 421, 422 and 423 as amended by Part III of Companies (Northern Ireland) Order 1989 (1989 S.I. No. 2404 [N.I. 18] [Part 27 of 2006 Act]). Also City Code on Takeovers and Mergers implemented by City Panel available from: Secretary Panel on Takeovers and Mergers, Stock Exchange Building, London.

Insider Dealing.

Restrictions contained in Company Securities (Insider Dealing) (Northern Ireland) Order 1986 (S.I. 1986 No. 1034 [N.I. 8]) as amended (Part III [1989 S.I. No. 2404][N.I. 18] [2006 Act]).

Corporate Insolvency.

See category 7 Debtor and Creditor, topic 7.04 Bankruptcy and 7.09 Insolvency, subhead Corporate Insolvency.

Foreign Corporation.

Company carrying on business in Northern Ireland but incorporated outside it is required under penalty to file: (1) Certified copy of its charter, statute, or other instrument constituting or defining its constitution; (2) list of its directors; and (3) name and address of person resident in Northern Ireland authorised to accept service of process or any notices required to be served on company. Every such foreign company must also file such statement of its affairs as is required to be filed by public companies incorporated in Northern Ireland. (Art. 641). They must also comply with Arts. 642 to 648. (S.1044-S.1053).

Insurance Corporation.

Companies Order provides considerable restriction on insurance business in conjunction with Insurance Companies Act 1982. (1982, c. 50).

Inspection.

Order contains provisions for inspection of corporation affairs by Department of Economic Development inspectors on application of minimum number of members. (Art. 424) (S.1035-S.1039). Further extensive powers allow Department to conduct “informal” investigation of books and papers of company. No formal reason for such investigation need be given.

Company Accounts.

Companies (1986 Order) (Audit Exemption) (Amendment) Regulations (N.I.) 2001 S.R. & O. No. 153 have amended provisions in Part VIII of Companies (N.I.) Order 1986 concerning exemption of certain small companies from requirement of having their annual accounts audited and conditions company must satisfy in order to qualify as dormant. (S.381-S.384 of 2006 Act).

Taxation.

See category 19 Taxation. See also European Union Digest, category Business Organizations, topic Corporations.

2.04 JOINT STOCK COMPANIES:

(See topic 2.03 Corporations.)

The principal class of unincorporated company is that formed under the Chartered Companies Acts 1837, Section 2 of which empowers the Crown by letters patent under the Great Seal to grant to any company or body of persons associated together for any trading or other purposes although not incorporated by such letters patent, any privileges which according to the rules of the common law it would be competent for the Crown to grant to any such company or body of persons by any charter of incorporation. The individual liability of members of such a company may be restricted by the letters patent. See also S.1043 of 2006 Act.

2.05 PARTNERSHIPS:

With certain excepted corporations and associations (53-4 Vict. c. 39, §1[2]) partnership is relation which subsists between persons carrying on business in common with view to profit (Partnership Act 1890, 53-4 Vict. c. 39 [U.K.], §1[1]). It may be general (1890, 53-4 Vict. c. 39), limited (Limited Partnership Act 1907, 7 Ed.7 c. 24 [U.K.]) or limited liability (Limited Liability Partnerships Act [N.I.] 2002 [2002, c. 12]). Generally, law of partnership is law of contract.

General Partnership.

Formation.

Contract of partnership requires no particular form. In determining whether partnership does or does not exist regard must be had to following rules: (1) Joint tenancy, tenancy in common, joint property, common property, or part ownership does not of itself create partnership as to anything so held or owned, whether tenants or owners do or do not share any profits made by use thereof; (2) sharing of gross returns does not of itself create a partnership whether persons sharing such returns have or have not a joint or common right or interest in any property from which or from use of which returns are derived; (3) receipt by a person of share of profits of business is prima facie evidence that he is partner in business, but receipt of such a share or of a payment contingent on or varying with profits of business does not of itself make him a partner in business and in particular (a) receipt by person of debt or other liquidated amount by instalments or otherwise out of profits of business does not of itself make him partner or liable as such; (b) contract for remuneration of servant or agent of person engaged in business does not make servant or agent a partner or liable as such; (c) receipt by widow or child of deceased partner of portion of profits by way of annuity does not of itself render that person a partner or liable as such; (d) advance of money by way of loan to person engaged or about to engage in business on a contract with that person that lender shall receive a rate of interest varying with profits, or shall receive share of profits does not of itself make lender a partner or liable as such with person carrying on business provided that contract is in writing and signed by or on behalf of all parties thereto; (e) person receiving by way of annuity or otherwise a portion of profits of business in consideration of sale by him of goodwill of business is not by reason only of such receipt partner in business or liable as such. (53-4 Vict. c. 39, §2).

Name.

Persons who have entered into partnership with one another are called collectively a firm, and name under which their business is carried on is called the firm name. (53-4 Vict. c. 39, §4[1]). See category 3 Business Regulation and Commerce, topic 3.02 Commercial Register.

Rights and Liabilities of Partners Inter Se.

Mutual rights and duties of partners, whether ascertained by agreement or defined by statute, may be varied by consent, express or inferred, of all partners. (53-4 Vict. c. 39, §19). All property, rights, and interests in property originally brought into partnership stock or acquired on account of firm are called partnership property and must be held and applied by partners exclusively for purposes of partnership in accordance with partnership agreement. (§20[1]).

Unless contrary intention appears property bought with money belonging to firm is deemed to have been bought on account of firm. (§21). Land or heritable interest therein is treated as personal or moveable estate as between partners or representatives or heirs of deceased partner. (§22). Partnership property cannot be taken in execution for a separate judgment against one partner but court can make order where one partner is judgment debtor charging his share. (§23). All partners are entitled to share equally in capital and profit of business and must contribute equally towards losses of capital or otherwise sustained by firm. (§24[1]). Firm must indemnify every partner in respect of payments made and personal liabilities incurred by him in ordinary conduct of business of firm or in preservation of business or firm property. (§24[2]). Payments and advances beyond agreed subscribed capital made by partner entitled to interest at 5% per annum. (§24[3]). Partner not entitled to interest on subscribed capital before ascertainment of profits. (§24[4]). Every partner must take part in management of partnership business. (§24[5]). No partner entitled to remuneration for acting in partnership business. (§24[6]). No person can be introduced as a partner without consent of all existing partners. (§24[7]). Save changes in nature of partnership all differences connected with partnership business may be decided by a majority of partners. (§24[8]). Partnership books must be kept at place of business of partnership and every partner may inspect and copy them. (§24[9]). Expulsion of one partner not possible by majority unless agreement to that effect. (§25). Where partnership of no agreed fixed term, any partner may determine partnership on giving notice of his intention to all partners at any time. (§26). After expiration of fixed term and in absence of new agreement, continuance of partnership is presumed to be on old terms. (§27). Partners bound to render true accounts and full information to other partners of all matters affecting partnership and must account to firm for private profits made from transactions concerning partnership or its property. (§28-9). If partner competes with firm without consent of other partners, he must pay over all profits so made. (§30). An assignment by partner of his share does not entitle assignee to interfere in management of partnership or to inspect books and assignee merely entitled to assignor's share of profits. (§31).

Rights and Liabilities of Partners as to Third Persons.

Every partner is agent of firm and other partners for purpose of partnership business and acts of partner in doing usual business of firm bind firm and partners. (53-4 Vict. c. 39, §5). Not so if partner no authority to act and fact known to third party. Instrument relating to business of firm executed in firm name or in manner showing intention to bind firm by partner or other authorized person not being a partner, binds firm and all partners. (§6). If any person, not being a partner, suffers loss or injury through wrongful act or omission of partner acting in ordinary course of business, firm is liable to same extent as partner who has acted or omitted to act. (§10). New partner is not liable to creditors of firm for debts incurred prior to his becoming a partner but retiring partner continues to be liable for debts incurred before retirement, although he may be discharged from such liability by agreement. If a person, not being a partner, holds himself out to have authority as a partner, he is liable as a partner to anyone who has given credit to firm on strength of representation. (§14). Admissions or representations made by partner in ordinary course of business is evidence against firm. High Court can now make Disqualification Order against person if it is satisfied that person has been officer of partnership which has become insolvent and if person's conduct as officer makes that person unfit to be concerned with management of company.

Dissolution.

Subject to agreement, partnership is dissolved (a) On expiration of fixed term; (b) on completion of undertaking for which partnership entered; (c) on notice from one partner; (d) on death of partner; (e) on bankruptcy of partner; (f) where partner suffers his share to be charged for separate debt; or (g) when event occurs rendering continuance unlawful. May also be dissolved by court on application of one partner where another partner (a) Becomes of unsound mind; (b) is incapable of performing partnership contract; (c) is guilty of conduct prejudicially affecting business; (d) wilfully or persistently commits breach of partnership agreement. (53-4

Vict. c. 39, §32-5). Can also be dissolved when partnership can only be continued at loss or when court considers dissolution just and equitable. Notice of dissolution may be advertised in Belfast Gazette and thereafter all persons dealing with firm are deemed to have notice of change of partnership constitution. Authority of partners continues after dissolution for purposes of winding up. (§38). Every partner entitled to have partnership property applied in payment of debts and liabilities of firm and to have surplus assets applied in payment of what may be due to partners after deducting what may be due from partners to firm. (§39). Where remaining partners carry on business of firm with its capital and assets without final settlement of accounts between firm and outgoing partner then, subject to partnership agreement, outgoing partner is entitled to such share of profits made since dissolution as court may find attributable to use of his share of partnership assets, or interest at 5% per annum on his share. (§42). If option to purchase share of outgoing partner is given by agreement to and exercised by remaining partner, outgoing partner not entitled to further share of profits. In settling accounts on dissolution, losses including deficiencies of capital must be paid out of profits, capital and then by individual partners in proportion in which they were entitled to share profits. Assets must be applied (a) In paying debts; (b) in paying partners what is due from firm for advances; (c) in paying partners what is due from firm for capital. Residue is divided in proportion in which profits are divisible.

Limited Partnership.

Limited Partnership Act 1907 (7 Ed.7 c. 24) authorizes formation of partnerships in which liability of partner to creditors of firm is limited to fixed amount representing capital invested by him. Limited partnerships rare in Northern Ireland. On becoming limited partner stated amount contributed to firm and partner not liable for firm's debts beyond that amount. Privilege of limited liability may be lost. (§4[3], §6). Must be one or more general partners liable for all debts and obligations of firm and one or more limited partners. Must be registered or becomes general partnership. Registration effected by delivering to Registrar of Companies, Department of Enterprise, Trade & Investment, form of application to have partnership registered as limited partnership setting out particulars of firm, partners, business and term, if any, partnership entered into, accompanied by statement of contributions made by partners and requisite fees. To give effect to any change in partnership, change must be advertised in Belfast Gazette otherwise change of no effect. Limited partner must not take part in management of partnership business, and can not bind firm. If he does, he is treated as general partner (7 Ed.7 c. 24, §6).

Limited Liability Partnerships Act (N.I.) 2002 (S.I. 2002 c. 12) are relatively new type of legal entity which provide some of advantages of limited companies such as incorporation and limits on personal liability while retaining other characteristics of traditional partnerships. It should be noted that implications for limiting personal liability have yet to be tested in courts. For limited liability partnership to be incorporated, two or more persons associated for carrying on lawful business with view to profit must have subscribed their names to incorporation document (S.I. 2002 c. 12 Art. 2) and deliver said document to Companies Registrar for registration (S.I. 2002 c. 12 Art. 3). Any other person may become member of limited liability partnership by and in accordance with agreement with existing members. (S.I. 2002 c. 12 Art. 4). Limited liability partnership must ensure that where person becomes or ceases to be member or designated member, notice is delivered to Companies Registrar within 14 days. (S.I. 2002 c. 12 Art. 9). Where member of limited liability partnership is liable to any other person (other than another member of limited liability partnership) as result of wrongful act or omission of his in course of business or with its authority, limited liability partnership is liable to same extent as member. (S.I. 2002 c. 12 Art. 6). Insolvency and winding up of limited liability partnerships shall be governed by Part II to V, VII and VIII of Insolvency (N.I.) Order 1989. (1989, S.I. No. 2405 [N.I. 19]). Companies Act 2006 may repeal Limited Liability Partnership Act (Northern Ireland) 2002.

3 BUSINESS REGULATION AND COMMERCE

3.01 BILLS AND NOTES:

Power to legislate with respect to negotiable instruments, except insofar as they may be affected by powers of taxation, is excluded from competence of Northern Ireland Assembly by Northern Ireland Act 1998. (1998, c. 47 [U.K.] Sch. 2 as am'd by Regulation of Investigatory Powers Act 2000 [c. 23] Sch. 4 para. 9; Political Parties, Elections & Referendums 2000 [c. 41] Sch. 21 para. 14; Tax Credits 2002 [c. 21] §64[2]; Justice [N.I.] 2002 [c. 26] §9[13]; Child Trust Funds 2004 [c. 6] §25). (See category 1 Introduction, topic 1.02 Government and Legal System.) Law of Northern Ireland is same as law of England. See England Law Digest, category Business Regulation and Commerce, topic Bills and Notes.

3.02 COMMERCIAL REGISTER:

Regulations governing use of business names by firms and individuals are contained in Business Names (Northern Ireland) Order (1986 S.I. No. 1033 [N.I. 7]). Citations unless otherwise indicated refer to that Order and Articles thereof. References to sections will be to corresponding sections of Companies Act 2006 that is due to come into force in October.

“Notes for Guidance on Business Names and Disclosure of Business Ownership” available from Companies Office.

Who Must Comply.

Order applies to any person who has place of business in Northern Ireland and carries on business in Northern Ireland under name which: (a) in case of partnership does not consist of surnames of all partners who are individuals and corporate names of all partners who are bodies corporate; (b) in case of individual does not consist of his surname; (c) in case of company, being company capable of being wound up under Companies (N.I.) Order 1986, does not consist of its corporate name (see subhead Registration of Company Names, infra and category Business Organizations, topic Corporations). (Art. 3[1]).

Permitted Additions.

Legislation does not apply to persons (either partners or individuals) to whose names are added forenames or initials or recognized abbreviations of forenames; or in case of any addition merely indicating that business is carried on in succession to former owner. (Art. 3[2]).

Prohibitions.

Persons to whom legislation applies must not, without written approval from Department of Enterprise, Trade & Investment (“Department”), carry on business in Northern Ireland under name which would be likely to give impression that business is connected with H.M. Government or any district council; or which includes certain prohibited words or expressions, including (but not limited to) references to Crown or royalty, or any foreign or Commonwealth government; or is misleading; or contains expression “British” (unless business is of substantial size and importance). Certain terms, including “co-operative” and “building society” are prohibited. Names including “bank”, “banking”, “investment” or “trust” are permitted only where circumstances are justified. (Art. 4) (S.54-56).

Disclosure of Names.

All business letters; written orders for goods or services; invoices; receipts; and written demands for payment of business debts sent out by businesses to which Order applies must bear, in legible characters: (a) In case of partnership, name of each partner; (b) in case of individual, his name; (c) in case of company, its corporate name; and (d) in relation to each person so named, address within Northern Ireland for service of any documents relating to business. (Art. 6[1]). Notice containing aforementioned information must be prominently displayed in any premises where business is carried out and to which customers or suppliers of goods have access. (Art. 6[2]).

In case of partnership of more than 20 partners it is sufficient to maintain list of names and addresses, to be made available on request, at principal place of business, provided all documents bear address and note to effect that list of names and addresses is available at principal place of business for inspection. (Art. 6[3]).

Penalties Arising from Default.

Any person contravening requirements as to disclosure of names and addresses, without reasonable excuse, is guilty of offence and liable to fine on summary conviction not exceeding £400 and further fine for continued default. (Art. 9).

Any legal proceedings arising from contract made in course of business and brought by any person, firm or company who has failed to comply with requirement to disclose names and addresses must be dismissed if defendant shows: (a) That he has claim against plaintiff arising out of same contract which he has been unable to pursue by reason of plaintiff's default; or (b) that he has suffered some financial loss in connection with contract by reason of plaintiff's default; provided that courts can permit proceedings to continue if satisfied that it is just and equitable so to do. (Art. 7).

Registration of Company Names.

Generally, see category 2 Business Organizations, topic 2.03 Corporations.

Registrar of companies maintains index of names of: (a) All companies within meaning of Companies (N.I.) Order 1986; (b) certain unincorporated bodies to which Art. 667 (S.1043) Companies (N.I.) Order 1986 applies; (c) limited partnerships registered under Limited Partnerships Act, 1907 (1907, c. 24 [U.K.]); (d) companies within meaning of Companies Act, 1985 (1985, c. 6); (e) societies registered under Industrial and Provident Societies Act (N.I.) 1969 (1969, c. 24) or Industrial and Provident Societies Act, 1965 (1965, c. 12 [U.K.]) as am'd by Industrial and Provident Societies Act 2002; (f) limited liability partnerships incorporated under Limited Liability Partnerships Act (N.I.) 2002; (g) companies incorporated outside Northern Ireland which have complied with Art. 64 (S.98) of Companies (N.I.) Order 1986 which do not appear to have place of business in Northern Ireland; (h) companies incorporated outside Great Britain which have complied with §691 of Companies Act 1985 (1985, c. 6 [S.98]) which do not appear to have place of business in Great Britain.

Registration of Certain Names Prohibited.

Approval of Department is required for use of any name likely to give impression that company is connected with H.M. Government or any district council. (S.54).

3.03 CONTRACTS:

Common law rules govern generally but certain subjects have been codified e.g. Bills of Exchange Act 1882, (45 & 46 Vict., c. 61 [U.K.]), see topic Bills and Notes: Sale of Goods Act, 1979 (1979, c. 54 [U.K.]), as amended by Sale of Goods (Amendment) Act 1994 (1994, c. 32 [U.K.]), Supply of Goods (Implied Terms) Act 1973 (1973, c. 13 [U.K.]), Sale and Supply of Goods Act 1994 (1994, c. 35 [U.K.]), see topic 3.08 Sales; Marine Insurance Act 1906 (6 Edw. 7, c. 41 [U.K.]). A collection of statutes regulates gaming and wagering contracts. Common law relating to carriage of goods by land has been considerably modified by Carriers Act 1830 (11 Geo. 4 and 1 Wm. 4, c. 38 [U.K.]), and carriage of goods by rail, sea and air is regulated by statutes. Certain statutes such as Infant Relief Act 1874 (37 & 38 Vict., c. 62 [U.K.]) and Married Women's Property Acts 1882 to 1907 (47 & 48 Vict., c. 14 am'd 7 Edw. 7, c. 18 [U.K.]) affect capacity of parties to contract. See category 12 Family, topic 12.05 Infants, subhead Ratification of Contracts.

Restrictions on freedom of contract are contained in Moneylenders Acts (N.I.) 1900 to

1933 (1933, c. 22); Rent and Mortgage Interest Restriction Acts (N.I.) 1920 to 1956 (1956, c. 10, §63 [iii]); Air Corporations Acts 1949 and 1953 (2 & 3 El.2, c. 7, §4 [iii] [U.K.]); Transport Acts (N.I.) 1948 to 1960 (1960, c. 11, §2 [ii]); Borrowing (Control Guarantee) Act 1946. (10-1 Geo. 6, c. 14 [U.K.]; Import of Goods (Control) Order 1940, S.R. & O. 1940 No. 873 as am'd made under 2 & 3 Geo. 6, c. 69 (U.K.); Wages Council Act (N.I.) 1945 (c. 21).

Form of Contract.

As general rule simple contract need not be reduced to writing.

Written evidence of contract is required to prove (1) promise by debtor to pay debt barred by statute of limitations (Statutes of Frauds Amendment Act 1828, 9 Geo. 4, c. 14, §1 [U.K.]); (2) bills of exchange, promissory notes and other negotiable instruments which must be reduced to writing and signed by parties thereto (Bills of Exchange Act 1882, 45 & 46 Vict., c. 61, §3 [U.K.]); (3) contents of marine insurance (Stamp Act 1891, 45 & 46 Vict., c. 39 [U.K.]); Marine Insurance Act 1906, 6 Edw. 7, c. 41 [U.K.]); (4) sale or transfer of registered ships or shares therein (Merchant Act 1894, 57 & 58 Vict., c. 46 [U.K.] §5 [ii]); (5) contract of sale of land and memorandum thereof must be signed by party to be charged or his lawfully authorised agent (Statute of Frauds [Ireland] 1695, 7 Wm. 3, c. 2, §2 [Ir.]); (6) any promise to answer for debt default or miscarriage of another (7 Wm. 3, c. 12, §2 [Ir.]).

Excuses for Nonperformance.

(a) Impossibility and frustration: common law rules of frustration have been am'd by Frustrated Contracts (N.I.) Act 1947 (c. 2); (b) exception clauses: common law rules governing exclusion of liability am'd by Unfair Contract Terms Act 1977 (1977, c. 50 [U.K.]); (c) mistake; (d) breach by other party; (e) renunciation; (f) prevention of performance by promisee; (g) where innocent misrepresentation has become term of contract (Misrepresentation Act [Northern Ireland] 1967 [1967, c. 14]).

Applicable Law.

Essential validity (as distinguished from formal validity), interpretation and effect of contract and rights and applications of parties to it are governed with certain exceptions by proper law of the contract i.e. law which parties have agreed or intended to govern or which they may be presumed to have intended. Prima facie proper law of contract is presumed to be lex loci contractus.

Legality of contracts.

Contract illegal by its proper law or by law of country where it is to be performed, lex fori, will not be enforced in Northern Ireland. Contracts which have their proper law are illegal in Northern Ireland if contrary to Northern Ireland ideas of public morality or even if any part of them is so contrary.

Discharge of contracts.

A contract which has been discharged, (otherwise than by performance) in accordance with or by means of operation of its proper law is discharged also in Northern Ireland so that no further action will lie upon it, but a contract which is still binding and subsisting by its proper law may nevertheless not be actionable in Northern Ireland because the plaintiff's remedy is barred by statute of limitations and this being a matter of procedure is for the lex fori.

Government Contracts.

No special provisions apply.

Distributorships, Dealerships and Franchises.

No special provisions apply.

3.04 FRAUDS, STATUTE OF:

No action shall be brought: (1) to charge a person on any special promise to answer for the debt, default or miscarriage of another; or (2) to charge any person upon any contract for the sale of lands or any interest in same, or for any lease thereof for more than three years; unless in these cases the agreement or some note or memorandum thereof be in writing and signed by the party to be charged or someone by him lawfully authorized. (Statute of Frauds [Ireland] 7 Will. 3, c. 12, §2).

See also topic 3.08 Sales.

3.05 INTEREST:

Judgments for money carry interest at 12% from their date (Judgments Enforcement [N.I.] Order, 1981 [1981, S.I. No. 226 (N.I. 6)]), but 15% as from 19 May, 1985 (1985, S.R. No. 102. County Court (Amendment) Rules (Northern Ireland) 1993 made under S.I. 1980 No. 397 reduces rate of interest to 8% on decrees.

Extortionate rates of interest, whether in relation to money-lending or any other form of credit agreement other than those made with body corporate or with partnership of bodies corporate, are not permitted by Consumer Credit Act 1974. (1974, c. 39 [U.K.] §§137-140). There is no longer maximum permissible rate of 48% interest per annum. If debtor alleges credit bargain is extortionate, it is for creditor to prove contrary. “Extortionate” is defined as “grossly exorbitant” payments where ordinary principles of fair dealing are grossly contravened. (§138[1]).

3.06 LICENSES, BUSINESS AND PROFESSIONAL:

Licenses are required by the following: Bookmakers and bookmaking offices (1953, c. 24, §§9-14; 1957, c. 19, §§2-4, 6-14; 1959, c. 26, §1); moneylenders (1953, c. 24, §38); pawnbrokers (1954, c. 30, §5); general dealers (3 Edw. 7, c. 44 [U.K.], §§1, 2[i], 12; 1954, c. 4, §1); and for horsebreeding (16-7 Geo. 5, c. 30 [N.I.], §§2, 3, 12) theatres and music halls (17-8 Geo. 5, c. 2 [N.I.] §12[i] sch. 2), cinematograph exhibitions (1959, c. 20, §§3, 6, 8 and sch.), dog racing (1946, c. 22, §§2, 5), fishing vessels (14 & 15 Geo. 6, c. 30 [U.K.] §8), air transport (8-9 Eliz. 2, c. 38 [U.K.] §§1-3), and to deal in game (18 & 19 Geo. 5, c. 25 [N.I.] §4[i]), sell eggs (1957, c. 27, §§1, 2, 5), produce and sell milk and milk products (1958, c. 31, §1), manufacture ice cream (1958, c. 27, §20), produce and keep petroleum or natural gas (18 & 19 Geo. 5, c. 52 [U.K.] §§1, 5; 8 & 9 Geo. 5, c. 52 [U.K.] §2; 20 Geo. 5, c. 13 [N.I.] §§1, 23), produce dangerous drugs (14-5 Geo. 6, c. 48 [U.K.] §2), manufacture new explosives (38 & 39 Vict., c. 17 [U.K.], §6), operate flax scutch mills (1954, c. 14, §§12, 14), sale of intoxicating liquor (Licensing [N.I.] Order 1996 and S.I. 1987/1277 [N.I. 13]).

Excise licences are required by Customs and Excise Act 1952 (15 & 16 Geo. 5 and 1 Eliz. 2, c. 44 [U.K.]) for brewing of beer (§125, sch. 2), to manufacture sugar, glucose, saccharine, invert sugar (§§210-11), matches (§220), mechanical lighters (§221; 1 & 2 Eliz. 2, c. 34 [U.K.] §§3[iv], 35[vii] sch. 3, pt. 1; 8 & 9 Eliz. 2, c. 44 [U.K.] §§7, 79, sch. 8, pt. 3); to manufacture or deal in tobacco and snuff (§175, sch. 5), to grow or cure tobacco in U.K. (§178) and by makers of vinegar (§225), dealers in manufacture of and retailers of sweets (§139), and by persons keeping or using stills or retorts (§226), makers, mixers of and retailers of methylated spirits (§116-7), dealers in beer, wine and spirits (§146; 4 & 5 Eliz. 2, c. 54 [U.K.] §2[iii]; 17 & 18 Geo. 5, c. 21 [N.I.] §5; 18 & 19 Geo. 5, c. 9 [N.I.] §1; 1957, c. 9, §12[ii]), and by distillers, rectifiers and compounders of spirits (§93-9).

3.07 MONOPOLIES, RESTRAINT OF TRADE AND COMPETITION:

Law on this subject is practically same as in rest of U.K. Common-law rules apply subject to statutory provisions contained in Acts of U.K. Parliament which extend to Northern Ireland. (See England Law Digest, category Business Regulation and Commerce, topic Monopolies, Restraint of Trade and Competition. See also European Union Law Digest, category Business Regulation and Commerce, topic Monopolies, Restraint of Trade and Competition.)

The common-law rule is that all interference with individual liberty of action in trading and all restraints in themselves, if there is nothing more, are contrary to public policy and therefore void, unless justified by the special circumstances of a particular case. It is sufficient justification if the restraint is reasonable in the interests of the parties concerned and in the interest of the public. ([1894] A.C. 535, 565).

At Common Law (1) a combination of two or more persons wilfully to injure a man in his trade is unlawful and if it results in damage to him is actionable; (2) if the sole purpose of the combination is not to injure another but to forward or defend the trade and those who enter into it then no wrong is committed and no action will lie although damage to another ensues. ([1925] A.C. 700, 711, 712; [1942] A.C. 435). However, the purposes of any trade union are not by reason merely that they are in restraint of trade unlawful so as to render void or voidable any agreement or trust and a court cannot entertain any legal proceedings instituted with the object of directly enforcing or recovering damages for the breach of any agreement between members of a trade union as such, concerning the conditions on which any members for the time being of such trade unions shall or shall not sell their goods, transact business, employ or be employed or any agreement made between one trade union and another (Trade Union Act 1871, 34 & 35 Vict., c. 31 §§3, 4[1], [4]).

Competition Law has been reformed twice over last five years by Competition Act 1998 (1998, c. 41 [U.K.]) and Enterprise Act 2002 (2002, c. 40 [U.K.]).

Competition Act 1998 (1998, c. 41 [U.K.]) prohibits any agreements, business practices and conduct which have damaging effect on competition in U.K. More specifically Act prohibits those agreements between undertakings, decisions by associations of undertakings (such as trade associations), and concerted practices which prevent, restrict or distort competition, are intended to do so, and which may effect trade within U.K. Also prohibited is abuse by one or more undertakings of dominant position in market which may effect trade within U.K.

Enterprise Act 2002 reforms powers of Office of Fair Trade (“OFT”) and changes U.K. merger regime as previously set out in Fair Trading Act 1973. (1973, c. 41 [U.K.]). Role of Secretary of State is restricted.

Regulatory Authorities have powers to investigate undertakings believed to be involved in anticompetitive activities and to impose financial penalties where appropriate. Third parties may be able to claim for damages in courts.

Enterprise Act 2002 (2002, c. 40 [U.K.]) grants consumer groups right to put forward “super complaints” to OFT or bring representative actions for damages before Competition Appeal Tribunal.

Competition Act 1998 is modelled on European Competition Law, set out in Arts. 81 and 82 of EC Treaty, under which European Commission examines agreements, business practices and conduct which may effect trade between member states of EU. Main responsibility for administering Competition Act 1998 (1998, c. 41 [U.K.]) and Enterprise Act 2002 (2002, c. 40 [U.K.]) lies with OFT although regulators for electricity, gas, water, telecommunications and railways have responsibility for cases in sectors they regulate. Competition Commission was established by Competition Act 1998 (1998, c. 41 [U.K.]) and is reconstitution of former Monopolies and Mergers Commission. If notification or complaint under Act leads to full investigation and OFT considers that agreement or conduct in question infringes one of prohibitions, undertakings concerned can appeal to Competition Appeal Tribunal against OFT's Decision and against level of any penalty imposed. (2002, c. 40, §12 & Sch. 2).

Competition Act 1998 (1998, c. 41 [U.K.]) replaced former Restrictive Trade Practices Act 1976 and 1977 (1976, c. 34 [U.K.] and 1997, c. 19 [U.K.]) together with Restrictive Practices Court Act 1976 (1976, c. 33 [U.K.]).

Act applies to agreements (whenever made between two or more persons carrying on business within U.K. in production or supply of goods, or in application to goods of any process of manufacture, whether with or without other parties) being agreements under which restrictions are accepted by two or more parties in respect of any of following matters: (a) Prices to be charged, quoted or paid for goods supplied, offered or acquired, or for application of any process of manufacture to goods; (b) prices to be recommended or suggested as prices to be charged or quoted in respect of resale of goods supplied; (c) terms or conditions on, or subject to which, goods are to be supplied or acquired; (d) quantities or descriptions of goods to be produced, supplied or acquired; (e) processes of manufacture to be applied to any goods, or quantities or descriptions of goods to which any such process is to be applied; or (f) persons or classes of persons to, for, or from whom, or areas or places in or from which goods are to be supplied or acquired, or any such process applied. (§6). All such agreements must be registered with Director. (§1). Restrictions relating to following matters are disregarded: (1) Certain restrictions or information provisions relating to coal or steel (§9[1]); (2) any terms relating exclusively to goods supplied or processed under agreement for supply of goods or for processing (§9[3]); (3) terms by which parties agree to comply with standards approved by British Standards Institution, or standards prescribed or adopted by any trade association or other body approved by Secretary of State (§9[5]); (4) licences or assignments of patents or registered designs provided that only restrictions excepted relate to invention or articles made by use of it or articles to which design is applied (Sch. 3, Para. 5); (5) certain agreements between two persons for exchange of “knowhow” (Sch. 3, Para. 3); (6) certain agreements relating to trademarks (Sch. 3, Para. 4); (7) agreements under which all restrictions (as described in §6[1]) relate exclusively to export of goods and to certain other transactions in relation to goods taking place outside U.K. (Sch. 3, Para. 6).

Trade Associations are defined as a body of persons (whether incorporate or not) which is formed for purpose of furthering trade interests of its members or of persons represented by its members. (§43[1]). Where agreement is by trade association it is treated as though it were made between all persons who were members or represented by members and all these persons are under duty to register agreement. (§8[1]).

The Restrictive Practices Court consists of five judges and up to ten members appointed by the Lord Chancellor by virtue of knowledge of and experience in Industry, commerce and public affairs. (1976, c. 33 [U.K.] §§1-3). Court can sit in divisions anywhere in U.K. and has jurisdiction to declare whether or not any restrictions registered (with limited exception in favour of restrictions relating to transactions outside U.K.) are contrary to public interest. Jurisdiction is exercisable on application of Director whose duty it is to proceed in respect of all registered agreements. Court is currently being wound down by Competition Act 1998.

There is a presumption that a restriction accepted in pursuance of a registered agreement is contrary to public interest but it is open to any party to satisfy the court that a particular restriction is not contrary to public interest by proving one or more of the following circumstances: (a) that the restriction is reasonably necessary, having regard to the character of the goods to which it applies, to protect the public against injury (whether to persons or to premises) in connection with the consumption, installation or use of those goods; (b) that the removal of the restriction would deny to the public as purchasers, consumers or users of any goods other specific and substantial benefits or advantages enjoyed or likely to be enjoyed by them as such, whether by virtue of the restriction itself or of any arrangements or operations resulting therefrom; (c) that the restriction is reasonably necessary to counteract measures taken by any one person not party to the agreement with a view to preventing or restricting competition in or in relation to the trade or business in which the persons party thereto are engaged; (d) that the restriction is reasonably necessary to enable the persons party to the agreement to negotiate fair terms for the supply of goods to, or the acquisition of goods from, any one person not party thereto who controls a preponderant part of the trade or business of acquiring or supplying such goods, or for the supply of goods to any person not party to the agreement and not carrying on such a trade or business who, either alone or in combination with any such other person, controls a preponderant part of the market for such goods; (e) that, having regard to the conditions actually obtaining or reasonably foreseen at the time of the application, the removal of the restriction would be likely to have a serious and persistent adverse effect on the general level of unemployment in an area, or in areas taken together, in which a substantial proportion of the trade or industry to which the agreement relates is situated; (f) that, having regard to the conditions actually obtaining or reasonably foreseen at the time of the application, the removal of the restriction would be likely to cause a reduction in the volume or earnings of the export business which is substantial either in relation to the whole export business of the United Kingdom or in relation to the whole business (including export business) of the said trade or industry; (g) that restriction is reasonably required for purposes connected with maintenance of any other restriction accepted by parties, whether under same agreement or under any other agreement between them, being restriction which is found by court not to be contrary to public interest upon grounds other than those specified in this paragraph, or has been so found in previous proceedings before court; or (h) that restriction or information provision does not directly or indirectly restrict or discourage competition to any material degree in any relevant trade or industry and is not likely to do so; and that restriction is not unreasonable having regard to balance between those circumstances and any detriment to public or to persons not parties to agreement (being purchasers, consumers or users of goods produced or sold by such parties or persons engaged or seeking to become engaged in trade or business of selling such goods or of producing or selling similar goods) resulting or likely to result from operation of restriction. (§10).

Where any restrictions are found by court to be contrary to public interest agreements are void in respect of those restrictions and court upon application of OFT may make order restraining any person or party to agreement who carry on business in U.K. from giving effect to or enforcing agreement in respect of those restrictions or from making any other agreement to like effect. (§2). Court may also restrain trade association from making any recommendations.

Competition Act 1980—see England Law Digest, category Business Regulation and Commerce, topic Monopolies, Restraint of Trade and Competition, subhead Competition Act 1980.

Resale Price Agreements.

It is unlawful for two or more persons carrying on business in the United Kingdom as suppliers of goods to make or carry out an agreement for the enforcement of conditions as to resale prices whereby withholding supplies refusing trade terms or imposing penalties or setting up trade courts and dealers in goods cannot make or carry out any agreement or arrangement by which they impose sanctions on suppliers who do not impose or enforce resale price maintenance conditions. This applies to associations and recommendations by suppliers of or dealers in goods and are treated on the same basis as agreements. Contracts for the sale of goods between two parties containing undertakings by the purchaser in relation to the goods sold and by the vendor in relation to other goods of the same description are exempted (1956, c. 68 [UK] §24) and no criminal proceedings lie in respect of any contravention of section but civil proceedings are available to Crown for injunction or other appropriate relief and also to individuals.

Nothing in the act interferes with the right of an individual supplier to enforce any contractual term as to resale prices against a party to a contract and the right of action of such a supplier is available against any person (though not a party to the sale) who acquires the goods with notice as if he had been a party to the contract. (1956, c. 68 [UK] §25). Condition as to amount of discount which may be allowed on resale of any goods or as to price which may be paid on resale of any goods for other goods taken by way of exchange is treated as condition as to price at which goods may be re-sold. (1956, c. 68 [UK] §26).

3.08 SALES:

Regulated by Sale of Goods Act, 1979 (1979, c. 54 [U.K.]) am'd by Sale of Goods (Amendment) Act 1994 (1994, c. 32 [U.K.]) which repeals and reenacts Sale of Goods Act 1893 (56-7 Vict., c. 71 [U.K.]) and those sections of Supply of Goods (Implied Terms) Act 1973 (1973, c. 13 [U.K.]) which amended 1893 Act. Except where contrary is indicated, reference to statutory provision is reference to 1979 Act.

Contract of sale may be either absolute or conditional. Where the property in the goods is at once transferred from the seller to the buyer the sale is absolute; but if the transfer of the property in the goods is to take place at a future time or subject to some condition (to be fulfilled thereafter) the contract is merely an agreement for sale or conditional sale.

The seller may reserve the right of disposal of the goods until certain conditions are fulfilled. Until fulfillment (notwithstanding delivery to a carrier or shipper for the purpose of transmission to the buyer) the property in the goods does not pass to the buyer until the conditions are fulfilled.

When goods are shipped and by the bill of lading the goods are deliverable to the order of the seller or his agent, the seller is prima facie deemed to reserve the right of disposal. Where the seller of goods draws on the buyer for the price and transmits the bill of exchange and bill of lading to the buyer (together) to secure acceptance or payment of the bill of exchange, the buyer is bound to return the bill of lading if he does not honour the bill of exchange and if he does not honour the bill of exchange and wrongfully retains the bill of lading the property in the goods does not pass to him.

Unless otherwise agreed the goods remain at the seller's risk until the property therein is transferred to the buyer, but when the property is so transferred the goods are at the buyer's risk whether delivery has been made or not. This rule is subject to the proviso that if delivery has been delayed through the fault of either buyer or seller the goods are at the risk of the party in fault as regards any loss which might not have occurred but for such fault.

Where the seller is authorised to send the goods to the buyer, delivery of the goods to a carrier or shipper for transmission to the buyer is prima facie deemed to be a delivery of goods to the buyer. But goods are liable to be stopped in transit and the buyer is only deemed to have accepted the goods when he intimates to the seller that he has accepted them, or when the goods have been delivered to him, and he does any act in relation to them which is inconsistent with the ownership of the seller or when after a lapse of a reasonable time he retains the goods without intimating to the seller that he has rejected them. Goods may, by arrangement, be accepted conditionally and the acceptance may in such case be withdrawn on failure of condition. A resale by the buyer is strong evidence of acceptance. Where goods which he has not previously examined are delivered to the buyer, he is not deemed to have accepted them unless and until he has had a reasonable opportunity of examining them, and (unless otherwise agreed) when the seller tenders delivery to the buyer the seller is bound, on request, to afford the buyer a reasonable opportunity of examining the goods.

Where the seller is bound to send goods to the buyer but no time for sending them is fixed, the seller must send them within a reasonable time, which is always a question of fact.

Delivery of goods and payment of price (unless otherwise agreed) are concurrent conditions.

Terms are collateral to main purpose of contract and breach gives right to damages but not repudiation of contract. Breach of condition may entitle buyer to treat contract as repudiated unless he elects to treat such breach as breach of warranty. (§11[2]). Whether stipulation is condition or warranty depends in each case on construction of contract and stipulation may be condition, though called warranty in contract. (§11[3]). In absence of contrary intention appearing, stipulations as to time are not deemed to be essence of contract.

Unless contrary intention is shown in contract there is (a) implied term that seller has right to sell goods or in case of agreement to sell that he will have right to sell at time property is to pass (§12[1]), (b) implied term that buyer will have and enjoy quiet possession of goods (§12[2]), (c) implied term that goods are free from any charge or encumbrance in favour of any third party not declared or known to buyer when contract made. (§12[2]).

In case of sale by description there is an implied condition that goods correspond with description. (§13).

Sale of goods shall not be prevented from being sale by description by reason only that, being exposed for sale or hire, they are selected by buyer. (§13[3]).

Sale and Supply of Goods (Amendment) Act 1994 (1994, c. 35 [U.K.]) inserted implied terms as to quality and fitness for all purposes for which goods in question are commonly supplied. Where seller sells goods in course of business there is implied term that goods supplied under contract are of satisfactory quality except: (a) defects specifically drawn to buyer's attention before contract, or (b) if buyer examines goods before contract, defects which that examination ought to reveal; goods deemed to be of satisfactory quality if they meet standard that reasonable person would regard as satisfactory taking into account any description applied to them, price and all other relevant circumstances. (§14). Where seller sells goods in course of business and buyer makes known any particular purpose for which goods are being bought, there is implied term that goods are fit for such purpose except where circumstances show that buyer does not rely on seller's skill and judgment. Implied term may be annexed to sale by usage. (§14).

Where any right, duty or liability arises by law under contract for sale it may (subject to Unfair Contract Terms Act, 1977 - see subhead Unfair Contract Terms Act 1977, infra) be negatived by express agreement between parties or by course of dealing or usage but any attempt to exclude §§12-15 of 1979 Act are void in case of consumer sale, and in any other case are not enforceable to extent that it is shown that it would not be fair or reasonable to allow reliance on such agreement.

Notices Required.

Unless otherwise agreed where goods are delivered to buyer and he refuses to accept them having right to do so, he is not bound to return them to seller but it is sufficient if he intimates to seller that he refused to accept them. (§36). No particular form is essential. It is sufficient if he does any unequivocal act showing he rejects. ([1875] L.R. 10, C.P. 391).

Consumer Credit Act (U.K.) 1974 protects consumers in respect of transactions involving hire or sale by credit in respect of: (a) Control of credit grantors, information to which consumer is entitled before selecting which form of credit he will avail himself of, (b) his rights during course of agreement, (c) his rights in default of or termination of agreement. Act applies where debtor is individual and where amount of credit does not exceed £25,000. (Consumer Credit [Increase of Monetary Limits] Amendment Order 1998; [S.I. 1998/966]). See England Law Digest for further details.

Unfair Contract Terms Act 1977.

This Act (1977, c. 50 [U.K.]) imposes further limitations on extent to which civil liability for breach of contract, or for negligence or other breach of duty, can be avoided by means of contract terms. Basically applies only to business liability (arising from breach of obligations or duties arising in course of business). Act prevents exclusion or restriction of liability for death or personal injury resulting from negligence. (§21). Where party to contract deals as consumer or other party uses written standard form of contract, liability for breach of contract cannot be excluded or restricted except insofar as contract term satisfies statutory requirement of “reasonableness”. (§3). Act provides guidelines for determining reasonableness (§11 and Sch. 2) and includes relative strength of parties' bargaining positions. Act also outlaws unreasonable indemnity clauses in contracts where one party is consumer (§4); restates existing protection for sale of goods and consumer credit (§6); and brings service contracts within its ambit. (§7). Part III contains provisions relating to international contracts.

Unfair Terms in Consumer Contracts Regulations 1994.

Relates to contracts between consumer and seller/supplier (Reg.2) and applies to nonindividually negotiated terms (Reg.3). Regulations provide definition of unfair term (Reg.4) and gives additional duties to Director General of Fair Trading (Reg.8).

Supply of Goods and Services Act, 1982.

This Act (1982, c. 29 [U.K.]) sets out terms to be implied in contracts for transfer of property in goods; contracts for hire of goods; and contracts for supply of services. Contracts for transfer of property in goods does not include contract for sale of goods. Contract for hire of goods does not include hire purchase agreement. Implied terms in both of foregoing include: (i) Transferor has right to transfer; (ii) transferee will enjoy quiet possession of goods; (iii) goods will correspond with description; (iv) goods to be of satisfactory quality; (v) goods to be reasonably fit for purpose made known to transferor by transferee; (vi) quality of bulk supply must correspond with quality of sample. Implied terms in contracts for supply of service are: (i) Supplier will carry out service with reasonable care and skill; (ii) supplier will carry out service within reasonable time; (iii) supplier will be paid reasonable amount. Where right, duty or liability arises in any of above contracts, it may be negatived or varied by express agreement subject to provisions of 1977, c. 50 (U.K.). Implied terms listed in 1982 Act cannot be excluded or restricted by parties to contracts. (§11).

Consumer Protection (Northern Ireland) Order 1987 (S.I. 1987/2049 [N.I. 20]).

Part II of Order introduces general safety requirement for all consumer goods. Also empowers Secretary of State to make specific safety regulations. All goods must be reasonably safe; what is reasonable is to be determined by court. Parts I and III of Order govern respectively product liability and misleading price indications.

Sale and Supply of Goods to Consumers Regulations 2002 (2002, S.I. No. 3045).

These Regulations implement provisions of EU Directive 1999/44/EC and provide additional consumer remedies in respect of inherent faults in goods.

Applicable Law.

The cardinal principle is that law applicable to contract is that by which parties intended it to be governed. In absence of any other indication of intention of parties law of contract is lex loci contractus but this is not conclusive as tenor of contract may show that parties to contract intended it to be governed by lex loci solution is.

Stipulations and terms of contract must be construed according to the lex loci contractus. Questions of evidence belong to lex fori.

4 CITIZENSHIP

4.01 ALIENS:

See category 14 Immigration, topic 14.01 Aliens.

4.02 IMMIGRATION:

See category 14 Immigration, topic 14.02 Immigration.

5 CIVIL ACTIONS AND PROCEDURE

5.01 ACTIONS:

Action means litigation in a civil court for recovery of individual right or redress of individual wrong, inclusive in its proper legal sense of suits by Crown.

For purposes of Judicature (N.I.) Act, 1978 (1978, c. 23 [U.K.]), §120, “Action” means civil proceedings commenced by writ or in such other manner as is prescribed by Rules of Court and does not include criminal proceeding by or in name of Crown. Subject to any statutory provisions and to R.S.C. 1980 (1980, S.R. No. 346) civil actions in High Court may be commenced by writ of summons, originating summons, originating motion, or petition (O.5, r.1).

Equity.

Legal and equitable remedies are enforced by same court but nature of legal as opposed to equitable rights is unchanged. Rules of equity prevail subject to express provisions of any other Act and generally in all matters not particularly mentioned.

Forms of Action.

Forms of writs are prescribed by O.6, r.1. Forms of originating summonses and originating motions are prescribed respectively by O.7, r.2; and O.8, r.3. Petitions must conform to requirements in O.9, r.2.

Condition Precedent.

Due performance of all conditions precedent need not be alleged. If defendant contends that a condition precedent has not been duly performed he must state specifically what that condition was and plead its nonperformance. But allegation which is of essence of cause of action is not condition precedent and must still be pleaded in the statement of claim. e.g. in action for dishonoured cheque notice of dishonour must be averred.

Parties.

Government Departments and state officials may sue and be sued in manner prescribed by statutes relating to them but right to sue and liability to be sued is limited.

Ambassadors cannot be sued here (7 Anne c. 12. [U.K.]). Immunity extends to other members of embassy and to servants of ambassador and to members of official staff. Exemption from local jurisdiction can be waived with consent of sovereign or official superior.

Business Name.

See category 3 Business Regulation and Commerce, topic 3.02 Commercial Register.

Corporations must sue and be sued in their corporate title or registered name as case may be.

Foreign sovereigns and states recognised by Her Majesty's Government are admitted to sue here in name by which recognised. Court will not entertain action by foreign state for enforcement of revenue law against its own subjects; similarly as to political or penal laws. A person contracting as agent for foreign government cannot be sued in absence of his principal.

Joinder of Parties.

Two or more persons may be joined together in one action as plaintiffs or defendants with leave of court, or where: (a) If separate actions were brought, some common question of law or fact would arise in all actions; and (b) all rights to relief claimed in action arise from same transaction or series of transactions. (O.15, r.4).

Intervention.

Persons interested may by consent and on submitting to jurisdiction, attend on summons in action to which they are not parties and they will be bound thereby, but can generally only be insisted upon (1) In a representative action where intervener is one of class whom plaintiff claims to represent, (2) where proprietary rights of intervener are directly affected by proceedings, or (3) in actions claiming specific performance of contracts where third persons have an interest in manner in which contract should be performed. If foreigner seeks to intervene he may have to give security for costs.

Interpleader.

Relief by way of interpleader may be granted where person seeking relief (applicant) is under liability for any debt, money, goods or chattels for, or in respect of which he is, or expects to be, sued by two or more parties (claimants), making adverse claims thereto. (O.17).

Joinder of Causes of Action.

Plaintiff may in one action claim relief against same defendant in respect of more than one cause of action: (a) If plaintiff claims, and defendant is alleged to be liable, in same capacity in respect of all causes of action; or (b) if plaintiff claims or defendant is alleged to be liable in capacity of executor or administrator of estate in respect of one or more of causes of action and in his personal capacity but with reference to same mistake in respect of all others; or (c) with leave of court. (O.15, r.4).

Splitting Causes of Action.

Defendant may at any time apply to court or judge for order confining action to such causes of action as may be conveniently disposed of together. (O.15, r.5).

Consolidation.

Where two or more actions are pending in same court division, court may consolidate actions on appropriate terms if (a) some common question of law or fact arises in both or all of them; or (b) rights to relief claimed therein are in respect of or arise out of same transaction or series of transactions; or (c) there is some other good reason. (O.4, r.5).

Stay of Proceedings.

Court retains inherent power to prevent vexatious oppressive or unreasonable proceedings or those in which there is clearly no cause of action or equity. This jurisdiction is discretionary to be exercised by court if it thinks fit and its general jurisdiction to stay proceedings in proper cases is not limited by Rules of Supreme Court.

Application to stay must be made in court in which action is pending.

Lis Alibi Pendens.

Where one action is a foreign action court may act in one of three ways: (1) Put party suing to his election, (2) stay suit in this country, or (3) restrain plaintiff from proceeding in foreign country or institution of proceedings in foreign country. Balance of inconvenience is not sufficient grounds for stay; defendant must show that continuance of action would work an injustice because it would be oppressive or vexatious or an abuse of power of court and that stay will not cause injustice to plaintiff.

Abatement and Revival.

Where party to action dies or becomes bankrupt but cause of action survives, action shall not abate by reason of death or bankruptcy. (O.15, r.7). Where at any stage of proceedings, interest or liability of any party is assigned or transmitted to or devolves upon some other person, court may, on ex parte application, make that other person party to action. (O.15, r.7). If after death of party, no new party is substituted, court may, on application of other party, order that action will be struck out unless it is proceeded with. (O.15, r.9). If death terminates cause of action or interest of party, action (save where otherwise provided by law) is at end.

Foreign Judgment.

Judgment by any court of competent jurisdiction may be sued on in High Court of Northern Ireland. (O.71). Foreign judgment that is contrary to public policy or that is founded on cause of action which is not recognisable in Northern Ireland law will not be enforced, general principle being that only judgments that rest upon principles of universal acceptance will be enforced. Judgment must be final and conclusive binding rights and liabilities of parties. Foreign court must be competent to entertain sort of case which it did deal with and to require defendant to appear before it; and proceedings must not offend against Northern Ireland views of substantial justice though there may be difference in procedure.

Foreign Judgment (Reciprocal Enforcement) Act 1933 23.Geo. 5, c. 13 (U.K.). Queen may direct that provisions of the Act which relate to registration of foreign judgments may extend to any foreign country which is prepared to give reciprocity of treatment to judgments given in the superior court of U.K. A judgment of superior court of foreign country may be registered provided it is final and conclusive and there is payable thereunder a sum of money not being in respect of taxes, fines or penalties. (§1). Extended to France (S.R. & O. 1936 No. 609); Belgium (S.R. & O. 1936, No. 1169).

Application to register may be made within six years of date of judgment, but not if it has been wholly satisfied or if it could not be enforced by execution in country of original court. (§4, O.4[b]). Broadly speaking foreign judgment when registered can be treated as if it were judgment of a Northern Ireland Court (§2 [1]). If expressed in currency of foreign country it is treated on basis of rate of exchange prevailing on date when it was given in original court. (§2 [iii]). Interest and reasonable costs of registration may be added to judgment when registered. (§2 [vi]). Cases in which registration of judgment may be set aside are specified in §4 of Act as are circumstances in which country of origin is deemed to have and not to have had jurisdiction. §8 of Act defines circumstances in which foreign judgment is to be recognised.

Proof of Foreign Law.

Foreign Law Ascertainment Act 1861 (24 & 25 Vict., c. 11 [U.K.]) provides for ascertaining law of foreign country or state and applies only to countries with which conventions under Act have been made. British Law Ascertainment Act 1859 (22 & 23 Vict., c. 63 [U.K.]) provides for ascertaining of law as administered in any part of Her Majesty's Dominions.

Limitation of.

See topic 5.04 Limitation of Actions.

Small Claims.

See category 6 Courts and Legislature, topic 6.01 Courts, subheads Inferior Courts of Northern Ireland, County Courts and Courts of Summary Jurisdiction.

Prohibited Actions.

Court has power to prevent vexatious, oppressive or unreasonable proceedings or those in which there is clearly no cause of action or equity. This jurisdiction is discretionary and exercised by court "if it shall think fit" (see §27[5] Supreme Court of Judicature Ireland Act 1877, 40 & 41 Vict., c. 57 [U.K.]).

Administration.

See category 11 Estates and Trusts, topic 11.04 Executors and Administrators.

Direct Action Against Insurers.

See category 20 Transportation, topic 20.01 Motor Vehicles, subhead Direct Actions.

5.02 DEPOSITIONS AND DISCOVERY:

The court or a judge may where it appears necessary for the purposes of justice make any order for examination on oath before judge or any officer of court, or any other person, and at any place, of any witness or person and may empower any party to any such cause or matter to give such deposition in evidence therein on such terms as court or judge may direct. (O.39, r.1).

Obtaining Evidence Out of the Jurisdiction.

Court has discretion in every case and before it will grant an application for leave to examine a witness out of the jurisdiction, it must generally be satisfied that (1) the application is made bona fide, (2) the issue in respect of which the evidence is required is one which the court ought to try, (3) the witnesses to be examined can give evidence material to the issue, (4) there is some good reason why they cannot be examined here, (5) examination abroad will be effectual.

Evidence out of the jurisdiction may be obtained: (a) By appointment of a special examiner (O.39, r.2) or in case of country with which convention has been made, by examination of witnesses before British consular authority in that country (O.39, r.2); (b) by letters of request (O.39, r.3), which method is available for all countries, but not employed in U.S., which prefers method (a).

The examination takes place in the presence of the parties, their counsel and their solicitors or agents, and the witnesses are subject to cross-examination and re-examination. (O.39, r.8).

Depositions taken before an officer of the court, or before any other person appointed to take the examination, are taken down in writing by or in the presence of the examiner, not ordinarily by question and answer, but so as to represent as nearly as may be the statement of the witness, and when completed must be read over to the witness and signed by him in the presence of the parties, or such of them as may think fit to attend. If the witness refuses to sign the depositions, the examiner must do so. (O.39, r.11).

When the examination of any witnesses is concluded the original depositions, authenticated by the signature of the examiner, must be transmitted by him to the Central Office of the Supreme Court and there filed. (O.39, r.11).

The person taking the examination under these rules may make special report to court touching such examination and conduct or absence of any witness or other person thereon, and court or judge may direct such proceedings and make such order as, on report, they or he may think just. (O.39, r.13).

Except where otherwise provided or directed by the court or a judge, no deposition may be given in evidence at the hearing or trial without consent of the party against whom it is offered, unless the court or judge is satisfied that deponent is dead, beyond the jurisdiction of the court, or unable from sickness or other infirmity to attend the hearing or trial, in any of which cases the deposition certified as above is admissible in evidence, saving all just exceptions, without proof of the signature to such certificate.

Obtaining Evidence For Foreign and Dominion Tribunals in Civil and Commercial Matters.

Laws of this country do not prohibit foreign, colonial or dominion courts or tribunals from obtaining, without request to or intervention of, the authorities or courts of Northern Ireland. A foreign court may make an order appointing a consular officer or some other suitable person as examiner to take evidence and special examiner may be appointed by a Dominion or colonial court but attendance of a witness before any person so appointed as examiner is entirely voluntary, examiner has no compulsory powers, and if witness refuses to attend aid of Northern Ireland courts must be invoked.

Courts or Tribunals in Foreign Countries.

Court or judge may, upon ex parte application of any person shown to be duly authorized to make the application, make an order appointing an examiner and ordering attendance of a witness within the jurisdiction before such examiner to take his testimony in relation to civil or commercial matter pending before foreign tribunal. (§4 of Evidence [Proceedings in Other Jurisdiction] Act 1975 [c. 34]).

The Northern Ireland court must be satisfied that: (i) Court of origin is a court of competent jurisdiction (certificate by ambassador or other diplomatic representative of foreign country that court is a court of competent jurisdiction according to laws of that country to hear and determine subject matter of the proceedings will normally be considered sufficient evidence by Northern Ireland and of the matter so certified); (ii) application relates to a civil or commercial proceeding pending in that court; and (iii) such court is desirous of obtaining, with the assistance of Northern Ireland court, evidence of a witness in this country. A certificate under hand of ambassador, minister, or other diplomatic agent of any foreign power received as such by Her Majesty or in case there is no such diplomatic agent, then of consul general, or consul of any such foreign power at London, that any matter to which an application is made under Act is a civil or commercial matter pending before court or tribunal in country of which he is diplomatic agent or consul having jurisdiction in the matter so pending, that such country is desirous of obtaining testimony of the witness or witnesses to whom application relates, is evidence of matters so certified, but where no such evidence is produced other evidence to that effect is admissible. (Evidence [Proceedings in Other Jurisdiction] Act 1975 [c. 34] §§1-2). In practice desire of foreign tribunal to obtain evidence frequently takes form of issue by tribunal of commission rogatoire or of letters of request addressed to courts of this country.

Application to Northern Ireland court to take evidence for use in foreign court is made either (i) by agent in Northern Ireland of one of parties to proceedings in foreign country; or (ii) by Crown Solicitor without intervention of agents.

(i) *Application by Agent of One of Parties.*—Commission rogatoire, letters of request, or certificate of diplomatic representative that the evidence is required, is either sent direct to agent or through diplomatic channel and Foreign Office to Master of Supreme Court. Agents are rarely appointed in respect of convention countries. Evidence is usually taken in accordance with convention procedure and application is made to court by Crown Solicitor without intervention of agents for parties. If documents are received by Master, notification to this effect is sent to solicitor whose name appears thereon as appointed agent. Examination may be ordered to be taken before any fit or proper person nominated by person applying or before one of officers of court or such other qualified person as to court or judge may seem fit. In absence of any special directions in order for examination, procedure in High Court applies, i.e., in accordance with O.39.

Unless otherwise provided in order for examination, examiner before whom examination is taken must, on its completion, forward it to Master (Queen's Bench and Appeals) and on receipt thereof Master must certify it for use out of jurisdiction and forward depositions so certified, and commission rogatoire or letter of request, if any, to Her Majesty's Secretary of State for Foreign Affairs for transmission to foreign court or tribunal requiring same.

(ii) *Application by Crown Solicitor.*—Where commission rogatoire or letter of request is transmitted to Supreme Court by Her Majesty's Secretary of State for Foreign Affairs, with intimation that it is desirable that effect should be given to same without requiring application to be made to court by agents in Northern Ireland of any of parties to action or matter in foreign country, Master must transmit same to Crown Solicitor, who may thereupon, with consent of Her Majesty's Treasury, make such applications and take such steps as may be necessary to give effect to such commission rogatoire or letter of request. (O.70, r.3). Similarly, if letter of request is received by Master from consul general in London of foreign country with which civil procedure convention has been concluded it is also transmitted by Master to Crown Solicitor to be dealt with under provisions of convention and Rules of Court without intervention of agents to parties if none have been appointed.

When depositions are forwarded repayment is claimed of expenses incurred in respect of allowances to witnesses and examiners' fees. No court fees are charged nor is repayment claimed in respect of services of Crown Solicitor.

Courts or Tribunals in Her Majesty's Dominions.

Where upon an application court or judge is satisfied that any court or tribunal of competent jurisdiction in H. M. Dominions has duly authorized by commission, order or other process, the obtaining of testimony in, or in relation to any action, suit or proceeding pending in or before such court or tribunal, the court or judge may order the examination before person or persons, and in manner and form directed by such commission, order or other process, of such witness or witnesses accordingly; and court or judge by same order or any subsequent order may command attendance of any person to be named in such order for purpose of being examined or producing documents. (Evidence [Proceedings in Other Jurisdiction] Act 1975 [c. 34]).

It is essential that party desiring evidence instruct a solicitor in this country to take steps for execution of the letter of request from court out of the jurisdiction but within Her Majesty's Dominions and if letter of request is received through official channels name and address of solicitor who has been appointed as agent should be supplied.

Procedure on application is similar to that set out in case of letters of request from foreign tribunals. (O.70). Application is made ex parte to Queen's Bench Division on affidavit to which letter of request is exhibited. Depositions, when completed and received by Master, are certified as provided and are forwarded to Dominion or Colonial Office as case may be for transmission to court of origin. Any sum in respect of payment of fees, disbursements and expenses should be sent by party desiring evidence direct to solicitor appointed as agent and not through medium of Northern Ireland Court.

Where a Dominion or colonial court has appointed an examiner in Northern Ireland to take evidence, it is not necessary to apply here for appointment of an examiner but only to apply to High Court for an order to enforce attendance of witness; and an order if so made, takes the place of subpoena and disobedience thereto is deemed contempt of court. In such cases, depositions are returned by examiner to court requiring them as directed in order appointing him.

De Bene Esse.

Court has jurisdiction where it is necessary for the purpose of justice to make an order for examination de bene esse of witnesses upon an ex parte application, the order being taken by applicant at his peril, and subject to risk of being discharged on sufficient grounds. (26 Ch. D.1).

Perpetuating Testimony.

Any person who would under the circumstances alleged by him to exist become entitled upon the happening of any future event, to any honour, title, dignity or office, or to any estate or interest in any property, real or personal, the right or claim to which cannot by him be brought to trial before the happening of such event, may commence an action to perpetuate any testimony which may be material for establishing such right or claim.

Witnesses may not be examined to perpetuate testimony unless an action has been commenced for purpose. (O.39, r.15).

5.03 JUDGMENTS:

Where a judgment or order directs a person to pay any money or deliver up or transfer any property, real or personal, to another, he is bound to obey such judgment or order upon being duly served with same, without demand.

Enforcement.

Money judgment may be enforced through Judgments Enforcement (N.I.) Order, 1981 (see category 7 Debtor and Creditor, topic 7.05 Executions), or registered as mortgage against lands under Judgment Mortgage Act 1850, or if amount of judgment, including debt and costs, is £750 or over, bankruptcy proceedings may be instituted. Judgment for recovery or delivery of possession of land may be enforced by writ of possession. Mandatory order or injunction may be enforced by writ or sequestration or order for attachment for contempt of court.

Foreign Judgments.

Foreign judgments for fixed amounts can be enforced by action in the courts of Northern Ireland and cannot normally be re-opened provided the defendant was present in the jurisdiction of the foreign court when the proceedings were begun or submitted to it, e.g., by defending the foreign proceedings.

There are reciprocal arrangements for enforcing judgments of EU member states. See European Union Law Digest, category Civil Actions and Procedure, topic Judgments.

Under the Administration of Justice Act 1920, judgments obtained in many parts of the British Commonwealth can be registered in the High Court if the court thinks it just and convenient and provided application is made within 12 months. Under the Foreign Judgments (Reciprocal Enforcement) Act 1933, a judgment for a fixed amount obtained in India, Burma, Belgium or France can be registered in the High Court as of right within six years. On registration a foreign judgment may be enforced in the same manner as judgments of the High Court of Northern Ireland. Certain formalities regarding application for registration and notice to the debtor must be observed and power is given to the court to cancel registration on certain grounds.

There are reciprocal arrangements for enforcing judgments of EU member states. See European Union Digest, category Civil Actions and Procedure, topic Judgments.

5.04 LIMITATION OF ACTIONS:

Governed by Limitation (N.I.) Order 1989 (1989 No. 1339 [N.I. 11]) which consolidates Limitation Acts (N.I.) 1958-1987 and provides that any proceedings, except proceedings by Crown (1) for recovery of any tax or duty or interest thereon or any fine or penalty due in connection with any tax or duty, or (2) for forfeiture under any statutory provision, or (3) in respect of forfeiture of any ship or interest in ships; must be brought within following periods after accrual of cause of action: This list contains more common types of proceedings only: there are others to which special time limits apply.

Sixty Years.

Action by Crown to recover foreshore.

Thirty Years.

Actions brought by Crown to recover any land or claiming sale of lands which is subject to mortgage or charge.

Twelve Years.

(a) Action upon instrument under seal other than to recover (1) arrears of rent charged or convention rent, or (2) any principal sum of money secured mortgage or other charge, or (3) arrears of interest in respect of any sum or mortgage secured by mortgage or other charge, or (4) arrears of annuity charged on personal property; (b) action to enforce award where arbitration agreement is under seal; (c) action to recover debt created by Art. 25(2) or Art. 474 of Companies (N.I.) Order 1986; (d) action (other than by Crown) to recover any land; (e) action to recover future interest in land by person entitled to preceding estate or interest; (f) action to redeem land by mortgagee of which he has been in possession for 12 years; (g) action to recover any principal sum of money secured by mortgage or charge on land or personal property (other than ship); (h) action in respect of right in nature of lien for money's worth in or over land for limited period not exceeding life; (i) action in respect of any claim to personal estate of deceased person or to any share or interest in such estate whether brought under will or intestacy.

Six Years.

(a) Action founded on simple contract; (b) action founded on quasi-contract; (c) action to enforce award where arbitration agreement is not under seal; (d) action to recover any sum recoverable by virtue of any statutory provision, other than (1) debt created by Art. 25(2) or Art. 474 of Companies (N.I.) Order 1986, or (2) amount recoverable under §1 of Civil Liability (Contribution) Act 1978; (e) action founded on tort other than (1) action claiming damages for libel or slander, (2) action claiming damages for negligence, nuisance or breach of duty where damages consist of or include damages in respect of personal injuries; (f) action upon judgement; (g) action in respect of further conversion of chattel after expiration of six years from accrual of action in respect of original conversion; (h) action brought or distress made to recover arrears of rent charge or damages in respect thereof; (i) action to recover arrears of annuity charged on personal property or damages in respect thereof; (j) action to recover arrears of conventional rent or damages in respect thereof; (k) action to recover arrears of interest payable in respect of any principal sum of money secured by mortgage or charge on land or personal property or to recover damages in respect of such arrears; (l) action against trustee to recover money or other property or in respect of any breach of trust but no period of limitation shall apply to action against trustees where (l) claim is founded on any fraud or fraudulent breach of trust to which trustee was party or privy or (2) claim is to recover trust property or proceeds thereof still retained by trustee or previously received by trustee and converted to his own use.

Normal limitation period for contract of loan is six years, but where contract of loan is made which provides no fixing date for repayment and loan is not expressly made repayable on demand, limitation period will only start to run when written demand for payment is made to borrower by or on behalf of creditor.

Three Years.

All actions for damages for negligence, nuisance or breach of duty where such damages consist of or include damages for personal injuries. Such actions cannot be brought after expiration of three years from: (a) Date on which cause of action accrued; or (b) date of knowledge (if later) of person injured of following facts: (1) that injury in question is significant; (2) that injury is attributable to act or omission giving rise to cause of action; (3) identity of defendant and (4) if it is alleged that act or omission was that of person other than defendant, identity of that person and additional facts supporting bringing of action against defendant. If injured person dies before expiration of three year period, cause of action survives for benefit of estate of deceased under Law Reform (Miscellaneous Provisions) Act (N.I.) 1937 (1937, c. 9 [N.I.]) for three years from: (a) date of death; or (b) date of personal representative's knowledge of facts listed above.

Actions under Fatal Accidents (N.I.) Order 1977 (1977 [N.I.] 18) cannot be brought after expiration of three years from: (a) Date of death; or (b) date of knowledge of person for whose benefit action is brought.

Actions for damages in respect of defective products by virtue of any provisions of Part II of Consumer Protection (N.I.) Order 1987 (1987 [N.I.] 20) may not be brought after expiration of ten years from relevant time, other than action in which damages claimed consist of or include damages in respect of personal injuries to plaintiff or any other person or loss of or damage to any property, which may not be brought after expiration of three years from whichever is later, namely (a) date on which cause of action accrued; or (b) date of knowledge of injured person, or in case of loss or damage to property, date of knowledge of plaintiff or (if earlier) any person in whom cause of action was previously vested.

Judicial Discretion.

Where in cases involving actions for damages for negligence, nuisance or breach of duty in respect of personal injuries to any person or in cases involving action under Fatal Accidents (N.I.) Order 1977 or Consumer Protection (N.I.) Order 1987, it appears to Court that it would be equitable to allow action to proceed having regard to effect on both parties, Court may direct that above provisions are not to apply. (Art. 50).

Two Years.

Action to recover contribution by virtue of §1 of Civil Liability (Contribution) Act 1978 (1978 c. 47 [U.K.]) may be brought within period of two years from date of original settlement or Court judgment in respect of which contribution or indemnity is sought. (Art. 13).

Persons under Disability.

(I.e.: infant or person of unsound mind) where right of action accrues to person under disability, action may be brought at any time before expiration of six years from date when person ceased to be under disability or died, whichever event first occurred, except for (a) actions for personal injuries; or (b) action for libel or slander, where relevant period is three years.

Interruption of Statutory Period.

On acknowledgment in writing signed by the person making the acknowledgment there is a fresh accrual of the right of action in the case of actions (a) by any person (other than a mortgagee) to recover land; (b) by mortgagee to recover land; (c) by incumbrancer claiming sale of land; (d) in respect of personal right in or over land such as a right of support; (e) to recover debt; (f) claiming personal estate of deceased person.

An acknowledgment of title to any land by any person in possession thereof binds all other persons in possession during the ensuing period of limitation. On part payment there is a fresh accrual of right of action in the case of an action (a) by mortgagee to recover land; (b) by incumbrancer claiming sale of land; (c) to recover debt; (d) claiming personal estate of deceased person.

Fraud and Mistake.

Where (a) an action is based on the fraud of the defendant or his agent or any person through whom he claims or his agent; or (b) the right of action is concealed by the fraud of any person the period of limitation does not begin to run until the plaintiff has discovered the fraud or could with reasonable diligence have discovered it except that no action can be brought to recover or enforce any charge against or set aside any transaction affecting any property which has been purchased for valuable consideration by a person who is not a party to the fraud and did not at the time of the purchase know or have reason to believe that any fraud had been committed.

Where an action is for relief from the consequence of mistake the period of limitation does not begin to run until the plaintiff has discovered the mistake or could, with reasonable diligence, have discovered it.

Pleadings.

The statute of limitations must be pleaded in order to take advantage thereof.

5.05 PRESCRIPTION:

See topic 5.04 Limitation of Actions.

5.06 REPLEVIN:

Common Law rules govern.

5.07 SEQUESTRATION:

Mode of execution available against one who has disobeyed order of court. It empowers sequestrators to enter on lands of defendant and receive rents and profits and to take possession of his personal property until he complies with order. With court's leave they may sell personal property and pay proceeds into court.

6 COURTS AND LEGISLATURE

6.01 COURTS:

Constitution, jurisdiction and administration of Northern Ireland courts substantially altered and amended by Judicature (Northern Ireland) Act, 1978. (1978, c. 23 [U.K.]). Any reference in this topic to section of statute without reference to statute by name or chapter number shall be reference to Judicature (Northern Ireland) Act, 1978. See also European Union Law Digest, category Courts and Legislature, topic Courts.

House of Lords.

Judicial functions of the House are largely governed by constitutional practice. It has a certain original, as well as appellate, jurisdiction. Appointment and position of the Law Lords and constitution of the appellate tribunal are dealt with by Appellate Jurisdiction Acts, 1876-1949 (39 & 49 Vict., c. 59 [U.K.], 50 & 51 Vict., c. 70 [U.K.], 3 & 4 Geo. 5, c. 21 [U.K.], 19 Geo. 5, c. 8 [U.K.], 10-1 Geo. 6, c. 11 [U.K.]).

In noncriminal matters, appeals lie from Court of Appeal in Northern Ireland to House of Lords only with leave of House of Lords (39 & 40 Vict., c. 59 [U.K.], §§3, 4, 11-2, 40 & 41 Vict., c. 57 [U.K.], §§65 & 68, 13 Geo. 5, Sess. 2, c. 2 [U.K.], §1, sch. 1, 20 & 21 Geo. 5, c. 45 [U.K.], §18, 8 & 9 El. 2, c. 65 [U.K.], §§1[c], 18[2]).

In criminal matters, defendant or prosecutor may appeal with leave to court below or to House of Lords either from Court of Appeal in Northern Ireland or from any decision of divisional Court of Queen's Bench Division. Leave to appeal is not granted unless it is certified by court below that point of law of public importance is involved and it appears to court that point ought to be considered by House. (20 & 21 Geo. 5, c. 45 [U.K.], §§6 & 20 am'd 8 & 9 El. 2, c. 65 [U.K.], §§1, 18 sch. 2).

Supreme Court of Judicature of Northern Ireland consists of Her Majesty's High Court of Justice in Northern Ireland ("the High Court"); Her Majesty's Court of Appeal in Northern Ireland ("the Court of Appeal"); and Her Majesty's Crown Court in Northern Ireland ("the Crown Court"). (1978, c. 23 [U.K.] §1).

The High Court consists of Lord Chief Justice of Northern Ireland, as President, and 11 judges. (§2). High Court has three divisions, namely: (a) Chancery Division; (b) Queen's Bench Division; (c) Family Division. (§5). All High Court judges may sit in any division. (§6). Principle matters over which High Court has jurisdiction include:

Chancery.

Administration of trusts, charitable or private; administration of estates of deceased persons; enforcement of mortgages and charges; construction of wills and other documents; questions of title to land; dissolution of partnerships; administration and winding up of joint-stock companies; taking of accounts; rectification, setting aside, or cancellation of deeds and other documents; specific performance of contracts; registration of title to land.

Queen's Bench.

Hearing of bail applications in criminal matters; applications for writ of habeas corpus; applications for judicial review of administrative decisions, seeking such forms of relief as order of mandamus, order of certiorari, declaratory judgment; exclusive jurisdiction in admiralty matters. (§30). Hears civil appeals from county courts and common law proceedings, such as claims for damages for breach of contract; damages for injuries to person or property; damages for nuisance, libel, slander.

Family.

All matters concerning dissolution of marriage; annulment of marriage; judicial separation; jactitation of marriage; adoption; wardship; custody of children and matrimonial property proceedings; applications under §17 of Married Women's Property Act, 1882 (for declaration as to rights of applicant spouse to matrimonial property).

Court of Appeal consists of Lord Chief Justice, as President, and three Lords Justices of Appeal. (§3). Every judge of High Court deemed judge of Appeal Court in exercise of its criminal jurisdiction (§6[2]), with proviso that no judge may hear appeal against his own judgment in lower court. Every matter before Court of Appeal is heard by three judges together, unless Lord Chief Justice directs that two judges hear appeal. (§36). Court of Appeal by Judicature (N.I.) Act, 1978 (1978, c. 23 [U.K.] §34) incorporates jurisdiction previously exercised by Court of Appeal and Court of Criminal Appeal, together with additional jurisdiction conferred by Act.

Civil Jurisdiction.

Court of Appeal has power to review decisions of High Court on points of law. May also hear appeals from county courts and petty sessions courts on points of law. Further appeal lies from judgment of Court of Appeal in civil matters to House of Lords, where statutes permit. Such appeal must be on point of law of general public importance.

Criminal Jurisdiction.

Persons convicted on indictment may appeal to Court of Appeal: (a) Without leave, on point of law; (b) with leave of Court, or on certificate of trial judge on question of fact, or on some other sufficient ground; (c) only by leave of Court against sentence (if not fixed by law); (d) automatically, if convicted by judge sitting without jury under Northern Ireland (Emergency Provisions) Act, 1978. (1978, c. 5 [U.K.]).

Court of Appeal sits in Belfast unless, by special direction of Lord Chief Justice, session is held at some other place in Northern Ireland.

Crown Court is superior court of record (in common with High Court and Court of Appeal) and was created by Judicature (N.I.) Act, 1978. (1978, c. 23 [U.K.] §4). Jurisdiction exercisable by Lord Chief Justice, as President, any judge of High Court or Court of Appeal, or any county court judge. (§4[1]).

All proceedings on indictment are tried by single judge with jury in Crown Court, except terrorist offences (see subhead Emergency Provisions, infra). Crown Court business may be conducted at any place in Northern Ireland. Act creates two-tier system by which certain cases, or classes of cases, are allocated to judges of High Court or Court of Appeal, and other cases or classes of cases to county court judges. (§47). Lord Chancellor has directed that serious offences such as treason and murder must be heard by judges of High Court or Court of Appeal.

Inferior Courts of Northern Ireland.

These are county courts and courts of summary jurisdiction (magistrates' courts). These courts are intended to provide localized judicial system of speedy operation to deal with minor criminal and civil matters. County courts are presided over by county court judges and (in more minor cases within courts' jurisdiction) District Judges. Minor criminal, quasi-criminal and civil matters, and initial stages of more serious criminal cases, are dealt with by Resident Magistrates in courts of summary jurisdiction.

County Courts.

Controlling legislation is County Courts (Northern Ireland) Order, 1980. (1980, S.I. No. 397 [N.I. 3]).

By County Courts Divisions Order (N.I.) 1983 (1983, S.R. No. 96), Northern Ireland is divided into seven county court divisions, each with several venues at which court sits on regular basis at least four times per year (more frequently in Belfast).

There must be at least one county court judge for each division. Currently 13 in Northern Ireland. Judges appointed by Crown on recommendation of Lord Chancellor. Judges for Divisions of Belfast and Londonderry are known as Recorders.

County courts have jurisdiction in cases of libel and slander where damages claimed do not exceed £3,000, and in all other cases of disputes between party and party where sum, damages or penalty claimed does not exceed £15,000. Their jurisdiction also embraces all cases —irrespective of amount of damages or penalty—which have been remitted from High Court.

The court can also deal with ejectments, subject to a limitation of the annual value or rent of the lands and can decide equity matters, the jurisdiction being restricted as a rule in cases where land is involved by the annual value, which may not exceed £500, and in other cases by sum involved, which must not exceed £15,000. Equity jurisdiction of County Court includes such matters as applications under Trustee Act, (Northern Ireland) 1958; proceedings for maintenance and advancement of infants under Guardianship of Infants Act, 1866; making of adoption orders under Adoption Act (Northern Ireland), 1967; partition suits; and proceedings under Married Women's Property Acts. Its probate jurisdiction is limited to suits where assets do not exceed £500 in annual value (if land) and pure personalty does not exceed £15,000. To this court are also assigned criminal injury cases, and certain cases arising under Increase of Rent Acts and Settled Land Acts.

By Art. 30 of 1980, S.I. No. 397 (N.I. 3), as am'd by County Courts (Financial Limits) Order (N.I.) 2001 (2001, S.I. No. 67), actions in which amount claimed or value of specific chattels claimed does not exceed £5,000 are heard before District Judge, whose decisions have same force and validity as those of county court judges. Claims of up to £2,000 are dealt with by District Judges by way of informal arbitration but jurisdiction of these “Small Claims” courts excludes certain matters, i.e., ownership of land, defamation, claims in respect of personal injuries, claims arising from road traffic accidents.

Appeal from decisions of county court judges or District Judges on facts of cases lies to High Court. (1980, S.I. No. 397 [N.I. 3]; Art. 60). Alternative right of appeal on points of law by way of “case stated” to Court of Appeal. (1980, S.I. No. 397 [N.I. 3]; Art. 61).

By Art. 48 of Matrimonial Causes (N.I.) Order, 1978 (1978, S.I. No. 1045 [N.I. 15]), County Courts have jurisdiction to hear undefended divorces, regardless of amount of money or value of property involved.

Courts of Summary Jurisdiction.

Petty sessions courts have jurisdiction to hear and determine summarily minor criminal and quasi-criminal cases and certain minor civil disputes. Courts are held weekly in each of 26 petty sessions districts (which correspond to local government districts) but daily in Belfast. Jurisdiction derived mainly from statute. Main statute is Magistrates' Courts (N.I.) Order, 1981. (1981, S.I. No. 1675 [N.I. 26]). On civil side, powers include ejectments (if property let at rent not exceeding £110 per year), recovery of small debts not exceeding £100, and trespass; but they have no powers to deal with disputes over title to land. By 1978, c. 23 (U.K.); §97(2), Crown may, by Order in Council, abolish civil jurisdiction of petty sessions courts and confer it on county court District Judges.

Petty sessions courts have jurisdiction to decide whether prima facie case exists against persons charged with indictable offences; and powers under Domestic Proceedings (N.I.) Order, 1980 (1980, S.I. No. 563 [N.I. 5]) to grant separation orders, maintenance payments and custody of children in matrimonial disputes (see category 12 Family, topic 12.03 Divorce, subhead Judicial Separation).

Emergency Provisions.

Northern Ireland (Emergency Provisions) Act, 1973 (1973, c. 53 [U.K.] as am'd by Northern Ireland (Emergency Provisions) (Amendment) Act, 1975 (1975, c. 62 [U.K.]), consolidated by Northern Ireland (Emergency Provisions) Act, 1978 (1978, c. 5 [U.K.]) and subsequently amended by Northern Ireland (Emergency Provisions) Act, 1987 (1987, c. 30 [U.K.]) 1991, 1996 and 1998 (1998, c. 9 [U.K.]) and now consolidated within Terrorism Act 2000 (2000, c. 11 [U.K.]) provides for trial of certain terrorist offences at Belfast Crown Court (2000, c. 11 [U.K.]). Offences in question are either created by statutes themselves or are existing common law or statutory offences listed in schedules to emergency legislation and known as “scheduled offences.” (2000, c. 11 [U.K.]; §65 and Sch. 9). Offences are tried before single judge with no jury (2000, c. 11 [U.K.]; §75) but in certain cases where scheduled offences do not involve terrorist element (i.e., domestic murder) offence can be “descheduled” by certificate of Attorney-General and tried before judge and jury (2000, c. 11 [U.K.]; §67).

Cases under emergency legislation may be tried by any judge of Supreme Court. County court judges can, at request of Lord Chief Justice, hear such cases with all jurisdiction, powers and privileges of Supreme Court judges (2000, c. 11 [U.K.]; §75) except general power to grant bail. Bail may be granted by judge of Supreme Court or by county court judge trying particular case only if he must adjourn that particular case. (2000, c. 11 [U.K.]; §67).

Court of Justice of European Communities.

Where question concerning validity and interpretation of Treaty of Rome establishing E.E.C. or of any acts of institutions of Community is raised before domestic court of Tribunal it may refer matter to Court of Justice to give ruling. Where that court is highest domestic jurisdiction in sense that there is no remedy or appeal against its decision that court must bring matters before Court of Justice of European Communities as provided by Article 177, Treaty of Rome as ratified by European Communities Act 1972. (1972, c. 68 [U.K.]). See European Union Law Digest, category Courts and Legislature, topic Courts.

6.02 LAW REPORTS, CODES:

See topics 6.04 Reports, 6.05 Statutes.

6.03 LEGISLATURE:

See category 1 Introduction, topic 1.02 Government and Legal System.

6.04 REPORTS:

The Northern Ireland Law Reports are published under the superintendence and control of the Incorporated Council of Law Reporting for Northern Ireland which is composed of representatives of the bar and the solicitors' profession. In practice the English reported cases are consulted and followed.

6.05 STATUTES:

Statute Law Revision (N.I.) Acts are passed by U.K. Parliament at regular intervals to amend and repeal obsolete legislative provisions affecting Northern Ireland. Latest Acts passed in 1973 (1973, c. 55 [U.K.]) 1976 (1976, c. 12 [U.K.]) 1980 (1980, c. 59 [U.K.]) and 1986 (1986, c. 12 [U.K.]).

The Statutes Revised (Northern Ireland) contain in 16 volumes public and general statutes of Ireland, England, Great Britain, U.K. and Northern Ireland up to 1950 (am'd to 1954) which affect Northern Ireland. Chronological table of Statutes affecting Northern Ireland covering legislation to Dec. 31, 1989, published by Her Majesty's Stationery Office in 1990. Index to Statutes in Force in Northern Ireland covering legislation to Dec. 31, 1990, published in 1993 also by H.M.S.O. Latest edition (18th) of Index to Northern Ireland Statutory Rules and Orders in force on Dec. 31, 1988 (showing statutory powers under which they were made) published by H.M.S.O. in 1991.

7 DEBTOR AND CREDITOR

7.01 ASSIGNMENTS:

Assignments of legal choses in action are governed by §87 of Judicature (Northern Ireland) Act, 1978 (1978, c. 23 [U.K.]). Any absolute assignment by writing under hand of the assignor (not purporting to be by way of charge only) of any debt or other legal chose in action of which express notice in writing has been given to the debtor, trustee or other person from whom assignor would have been entitled to claim such debt or chose in action, is effectual in law (subject to equities having priority over right of assignee) to pass and transfer from date of such notice: (a) The legal right to such debt or thing in action; (b) all legal and other remedies for the same and (c) power to give a good discharge for the same without concurrence of assignor. Provided that if debtor, trustee or other person liable in respect of such debt or thing in action has notice (a) that assignment is disputed by assignor or any person claiming under him, or (b) of any other opposing or conflicting claims to such debt, or thing in action, he may either call on persons making claim thereto to interplead concerning the same or pay the debt or other thing in action into court.

This section enables legal assignments of legal things in action to be made so that assignee can sue in his own name without joining assignor as a party. Assignments of this kind need not be for valuable consideration but must be of the whole debt and not of a part thereof and written notice to debtor or trustee of the fund is essential.

Assignments of life assurance must be by deed in accordance with the Policies of Assurance Act, 1867 30-1 Vict., c. 144 (U.K.).

Equitable assignments both of legal and equitable things in action are recognized as valid; in such assignments the formalities of the statute need not be complied with, but must be complete so that the assignee can demand payment from the debtor. The equitable assignee cannot sue in his own name and must join assignor to proceedings. Notice in writing to debtor should be given, as priority of assignee's rights depends on date of such notice and he is entitled to be paid out of fund in order in which he gives notice to debtor or other person by whom fund is distributable.

7.02 ASSIGNMENTS FOR BENEFIT OF CREDITORS:

By Insolvency (N.I.) Order 1989 (S.I. 1989/2405 [N.I. 19]) any instrument whether under seal or not made by, for, or in respect of affairs of debtor for benefit of his creditors generally or made by, for, or in respect of affairs of debtor who was insolvent at date of execution of instrument for benefit of any three or more of his creditors, otherwise than in pursuance of law relating to bankruptcy, is deemed to be deed of arrangement to which Part VIII, c. I, S.I. 1989/2405 (N.I. 19) applies.

The following classes of instruments in particular are included: (a) Assignments of property; (b) deeds of and agreements for a composition; and in cases where the creditors obtain control over the debtor's property or business; (c) a deed of inspectorship entered into for the purpose of carrying on or winding up the business; (d) a letter or license authorizing the debtor or any other person to manage, carry on, release, or dispose of the business with a view to paying all debts and (e) any agreement entered into for the purpose of carrying on or winding up the debtor's business or authorizing the debtor or any other person to manage or carry on release or dispose of the debtor's business with a view to the payment of his debts.

Deed of arrangement is void unless it bears ad valorem duty stamp and is registered within seven clear days after its execution, if executed in Northern Ireland, or if executed abroad, within seven days after time at which it would, in ordinary course of post arrive in Northern Ireland, if posted within one week after execution thereof.

Deed for benefit of creditors generally is void unless before expiration of 21 days of registration it receives assent in writing of majority in number and value of creditors. No creditor is bound to join in such deed unless he thinks proper. Trustee must file statutory declaration that requisite majority of creditors have assented at time of registration or if deed is assented to after registration within 28 days thereof.

See also topic 7.04 Bankruptcy and 7.09 Insolvency.

7.03 ATTACHMENT:

Relevant legislation is Judgments Enforcement (N.I.) Order, 1981 (1981, S.I. No. 226 [N.I. 6]) as amended by The Judgments Enforcement (Attachment of Debts) (Northern Ireland) Order 1983 (1983 S.I. No. 1904 [N.I. 22]) and The Judgments Enforcement [Amendment] [Northern Ireland] Order 1986 (1986 S.I. No. 1166 [N.I. 11]). All references to statutory provisions are to provisions contained in 1981 Order. (1981 S.I. No. 226 [N.I. 6]).

Attachment of Earnings.

Where debtor is in receipt of income, Office may, on application of creditor, make attachment of earnings order requiring person to whom order is directed (employer) to make out of debtor's earnings such payments as may be specified on weekly, monthly or other basis, taking into consideration debtor's resources and needs. (Art. 73). Before making such order, Office has power to require debtor to furnish, within specified period: (i) Name and address of any person by whom earnings are paid to debtor; (ii) specified particulars of his earnings, anticipated future earnings, resources and needs; (iii) particulars for purpose of identifying debtor to his employer. Office may also require employer to furnish particulars of debtor's earnings.

See topics 7.05 Executions, Garnishment; category 5 Civil Actions and Procedure, topic 5.03 Judgments.

7.04 BANKRUPTCY AND INSOLVENCY:

Regulated by Insolvency (N.I.) Order 1989 (S.I. 1989/2405 [N.I. 19]), Insolvency (N.I.) Order 2002 (2002, S.I. 3152 [N.I. 6]) and Insolvency Rules (N.I.) 1991 (S.R. 1991/No. 364). Unless otherwise stated citations refer to Insolvency (N.I.) Order 1989 and Insolvency (N.I.) Order 2005.

Corporate Insolvency.

Company Voluntary Arrangements.

Company may conclude effective arrangement with its creditors and shareholders. Arrangement may be proposed even after company has gone into liquidation or administration. If not in liquidation or administration directors propose arrangement. If authorised insolvency practitioner acting as directors' nominee is of opinion that there is some prospect of arrangement being approved, he will state that meeting of creditors and shareholders should be convened to consider proposal. For arrangement to be approved by creditors there has to be 75% majority in value in favour of it. Shareholders' approval is given by simple majority. Approved arrangement binds every person who was given notice of meeting to consider proposal. Nominee under obligation to report outcome of meeting to court, creditors and shareholders. Person whose function is to carry out arrangement is supervisor. Supervisor may apply to court for directions. (Part II).

Moratorium.

By Insolvency (N.I.) Order 2002 (S.I. 2002/3152 [N.I. 6]) small sized company as defined by Art. 25 of Companies (N.I.) Order 1986 attempting to set up voluntary arrangement with company's creditors has option of filing for short moratorium during which company will be protected from threat of legal proceedings or enforcement action by its creditors. Company will be under restrictions regarding disposing of property and payment of debts during moratorium. (S.I. 2002/3152 [N.I. 6] Sch. 1A, Paras. 26-33). Company directors are still liable for their actions during moratorium period. Nominee will decide with creditors whether to approve proposed voluntary arrangement. Moratorium period can be extended. Where petition for winding up of company was presented before beginning of moratorium High Court shall dismiss petition. (S.I. 2002/3152 [N.I. 6] Sch. 1A, Para. 47[4]).

Administration Orders.

Court can make Administration Order to place management of insolvent company in hands of Administrator. Court will do so if satisfied, inter alia, that order would ensure survival of company in whole or in part as going concern or more advantageous realisation of company's assets than in winding up. Application is by petition to court either by company, all its directors, creditors or supervisor and must be supported by affidavit. Effect of application for Administration Order is that no steps can be taken in legal actions, executions against company or its property or to enforce any security over company's property without leave of court. Once administrator appointed, directors must submit statement of company's affairs verified by affidavit to him. Administrator has full management powers of administration, including authority to call meetings of creditors. (Schedule I). Administrator must supply such information, including purpose statement and statement of affairs, to enable creditors to decide whether to approve proposal. Administrator must report outcome of meeting to court and if proposals approved, administrator must account for all his receipts and payments at regular intervals to Registrar of Companies, court and creditors. (Part III as am'd by Art. 3[1] Insolvency [N.I.] Order 2005).

Administrative receiver is receiver or manager of company's property appointed under charge. Appointment not valid until receiver accepts. Receiver must notify company and advertise notice of appointment, and within 28 days send similar notice to all creditors. Powers conferred on receiver include power to carry on business. (Schedule I). Receiver must report to creditors within three months after appointment and send to Registrar of Companies and to all creditors report on events leading up to appointment, details of property being disposed of, amount owed to debenture holders and preferential creditors and amount (if any) likely to be available for unsecured creditors. Copy of report must also be laid before meeting of company's unsecured creditors within three months. (Part IV as am'd by Art. 5 Insolvency [N.I.] Order 2005).

Winding up of company may be voluntary or by High Court. (Part V).

Members Voluntary Winding Up.

Shareholders of company resolve to put company into liquidation in circumstances other than its insolvency.

Creditors Voluntary Winding Up.

At meetings convened by directors of company, shareholders and creditors resolve to wind up company by reason of its insolvency, appoint liquidator and liquidation committee. At least seven days notice of meeting must be given to creditors. Notice must also be advertised. Creditors' meeting must be held not more than 14 days after shareholders' meeting. At creditors' meeting shareholders nominate qualified insolvency practitioner (infra) to act as liquidator. If more than one nominated, creditors decide on vote. Creditor is only entitled to vote if, as unsecured creditor, he is present or represented by proxy, his claim is not unliquidated and he has lodged claim. Voting is by reference to value of creditors' claims. Liquidator must advertise his appointment and notify Registrar of Companies. Liquidator must given all creditors within 28 days of meeting copy of Statement of Affairs and report on meeting. Liquidator must also call annual meetings of shareholders and creditors to keep them informed and must call final meeting of shareholders and creditors to approve his account before company can be dissolved.

Winding up by High Court.

Petition may be presented if company has by special resolution resolved that company should be wound up by Court; or company is unable to pay debts; or it is just and equitable that company be wound up. Company is deemed to be unable to pay its debts if it fails to comply with statutory demand (infra) or if its liabilities (including contingent and prospective liabilities) exceed its assets. Procedure to hearing of petition same as for bankruptcy; individual insolvency (infra) with following exceptions: (i) petition and demand must be served personally on director or authorised person at debtor company's registered office, (ii) petition must be advertised in Belfast Gazette not less than seven business days before hearing and not less than seven business days after service and (iii) petitioner or solicitor must lodge at court at least five business days before hearing prescribed certificate showing compliance with Rules together with copy of advertisement. Any creditor who has given notice to petitioner can appear on hearing of petition. On hearing of petition, Court may make winding up order and its discretion is unfettered. It is usual, if majority of creditors in value support petition, that order will be made. Court usually orders costs of petitioner be paid by company out of its assets in priority to all other claims including preferential and secured. Official Receiver serves sealed copy of order upon company and advertises it.

Antecedent Transactions.

If company goes into liquidation, any disposition of its property after date of presentation of petition is void.

Provisional Liquidator.

If necessary to protect company's assets prior to hearing of petition, court can on application of company, petitioner or creditor, appoint Official Receiver or authorised insolvency practitioner (infra) as provisional liquidator.

Statement of Affairs.

Directors or other officers are obliged to submit Statement of Affairs verified by Affidavit to Official Receiver within 21 days of order or appointment of provisional liquidator. Statement is in prescribed form.

Examination.

Official Receiver or liquidator may make application to Court for public or private examination of former officers of company. Application must be accompanied by report. Court may also order private examination of any person thought to have information relating to property of company.

Appointment of Liquidator.

Unless or until someone else is appointed liquidator, Official Receiver is liquidator. Only authorised insolvency practitioner can act as liquidator. Official Receiver must decide within 12 weeks after date of winding up order whether or not to summon meeting of creditors and contributories to choose alternative liquidator, of which 21 days notice given. Notice must also be advertised. Resolutions are passed on majority in value of creditors and contributories presented personally or by proxy. Creditors can only vote if debts liquidated and not secured. Contributories vote in accordance with articles of association. Creditors can also resolve to establish liquidation committee, but committee cannot be established when Official Receiver is liquidator. Any creditor (other than secured creditor) who has lodged satisfactory proof of debt is eligible for election. Committee's role is primarily supervisory, but it also must sanction certain acts of liquidator. Quorum for committee meeting is two.

Bankruptcy—Individual Insolvency.

Bankruptcy Proceedings.

High Court alone has jurisdiction in bankruptcy proceedings.

Creditor's Petition.

To found petition for bankruptcy of debtor, creditor must show that (i) debt owed above bankruptcy level, currently £750, (ii) debt is for liquidated sum, (iii) debtor appears unable to pay debt or appears to have no reasonable prospect of being able to pay debt and (iv) debtor domiciled or personally resident or carries on business in Northern Ireland on day petition presented or at any time in previous three years. Failure to comply with statutory demand in prescribed form (Forms 6.01 to 6.03, S.R. 1991 No. 364) served personally upon debtor within 21 days of service or to apply within 18 days to have demand set aside is sufficient proof that debtor unable to pay debt or appears to have no reasonable prospect of being able to pay it. Petition in prescribed form (Forms 6.07 to 6.11, S.R. 1991 No. 364) must be verified by affidavit in prescribed form (Form 6.15, S.R. 1991 No. 364) and be accompanied by affidavit of service of demand and Official Receiver's receipt. Sealed copy of petition must be served personally on debtor at least 14 days before hearing of petition. Substituted service by post can be ordered by court. Affidavit of service of petition must be filed in court immediately after service. On hearing of petition, creditor must satisfy court that debt still owing. Court may order that bankruptcy order be made if satisfied debt not paid (nor secured or compounded for) or if debt due in future, and debtor has no reasonable prospect of being able to pay it when due. Bankruptcy order will not be made if court satisfied debtor able to pay all his debts or if debtor made offer to secure or compound for debt which has been unreasonably refused. If made, sealed copy of order sent to debtor and adjudication advertised in local newspapers and Belfast Gazette. Debtor can oppose petition by giving notice to petitioner and court specifying grounds of objection. Petitioner can withdraw petition or apply to have petition dismissed by filing supporting affidavit in court. (Parts VIII to X and Part 6 S.R. 1991 No. 364).

Debtor's Petition.

Debtor may present own bankruptcy petition on ground unable to pay debts. Petition must be accompanied by statement of affairs in prescribed form. Court may make bankruptcy order on hearing. If liabilities less than small bankruptcy level currently £20,000 and assets exceed minimum level, currently £2,000 then bankruptcy order must not be made. Instead court may appoint insolvency practitioner (infra) to prepare report on whether voluntary arrangement possible. (Part IX, c. I).

Voluntary Arrangement.

Individuals can make voluntary arrangement with creditors whereby creditors agree to accept dividend on their debts or allow debtor time to pay. It is essentially private arrangement. Insolvency practitioner acting as debtor's nominee applies to court for moratorium during which nominee considers debtor's proposals. Court considers proposals and nominee's report and directs whether creditors meeting should be held. Debtor's proposals either accepted, modified or rejected at creditors meeting. Court makes order approving voluntary arrangement and proposals implemented by supervisor (can be nominee). (Part VIII, c. II as am'd by Art. 21 Insolvency [N.I.] Order 2005).

Restrictions in Bankruptcy.

Any disposition by bankrupt of his property after date of presentation of petition is void. Once order made, creditor has no remedy against person or property of bankrupt and may not commence legal action against him without leave of court. (Part IX, c. II).

Statement of Affairs.

Bankrupt obliged to submit statement of affairs in prescribed form verified by affidavit to Official Receiver within 21 days of order. If fails without reasonable excuse, guilty of contempt of court. (Part IX, c. II).

Public Examination.

Official Receiver must apply to court if he wishes bankrupt to be publicly examined on oath. Official Receiver, trustee and any creditor who has tendered proof in debt can ask questions at examination. (Part IX, c. II).

Creditors' Meeting and Appointment of Trustee.

Official Receiver must decide within 12 weeks after making of bankruptcy order to call creditors' meeting to appoint trustee. If no meeting called, Official Receiver is trustee and must give notice to court and creditors. No person can be appointed as trustee unless he is authorised insolvency practitioner (infra). (Part IX, c. III).

Proofs of Debt.

Every creditor must submit claim in prescribed form to Official Receiver or trustee to prove debt as soon as possible after adjudication. Official Receiver cannot declare dividend until he has examined every proof of debt. Creditor dissatisfied with Official Receiver's decision, can apply to High Court. (Part IX, c. IV).

Discharge.

If person not previously bankrupt within last 15 years or has not been made criminally bankrupt, automatic discharge at expiry of three years from bankruptcy order is granted. If certificate of summary administration in force (liabilities less than £20,000) period is two years. Right to automatic discharge can be suspended on application of Official Receiver to court. After five years, bankrupt can apply to court to be discharged. (Part IX, c. I.).

Certificate of Discharge.

Court must, at request of bankrupt, issue certificate of discharge. Bankrupt is released from all obligations in respect of pre-bankruptcy liabilities with exception of fraud, fines and damages for negligence in respect of personal injury.

Annulment.

Court can annul order if it appears at any time that order ought not to have been made or that debts and expenses of bankruptcy have all been paid or secured to satisfaction of court since order.

Insolvency practitioners are licenced on authorisation by recognised professional body or competent authority appointed by Department of Enterprise, Trade & Investment. (Parts XII and XIII).

Debtors may also carry an arrangement in bankruptcy in which the proceedings are the same as in a bankruptcy, save that sittings are held in private, only the creditors and their solicitors attending, and the name of the arranging debtor is not, as a general rule, published in the daily newspapers nor is publication made in the official Gazette. Proceedings in court are reported anonymously.

Failure of the debtor to carry out an arrangement constitutes an Act of Bankruptcy.

Insolvency Practitioners must now ensure that Insolvency Proceedings comply with EC Regulation No. 1346/2000 which came into force on May 31, 2002 and governs cross-border Insolvency Proceedings. Regulation makes provisions for liquidator appointed in another EC Member State to bring application to open winding up proceedings, etc. (Art. 18). Regulation also provides that Member State liquidator can participate in proceedings on same basis as creditor i.e. liquidator is entitled to vote on administration to winding up bankruptcy. (Art. 32[3]). Insolvent Partnership (Amendment Order [N.I.] 2003) provides that liquidator appointed by virtue of EC Regulation is included in those entitled to present petition to court.

Preferred Debts.

Parts V and XI of Insolvency (Northern Ireland) Order 1989 (1989 S.I. No. 2405 [N.I. 19] as am'd by Art. 6 of Insolvency [N.I.] Order 2005) provide in distribution of property of bankrupt there must be paid in priority to other debts: (a) Any sum owed by debtor to which Sch. 3 to Pension Schemes (N.I.) Act 1993 applies (contributions to occupational pension schemes and state scheme premiums); (b) any amount owed by debtor to person who is or has been employee of debtor payable by way of remuneration for period of four months next before relevant date and does not exceed maximum amount as specified by Department of Economic Development (at present £800); (c) amount owed by way of accrued holiday remuneration in respect of any period of employment before relevant date irrespective of whether employment was terminated before or after relevant date; (d) any amount which is ordered (even after relevant date) to be paid by debtor under Reserve Forces (Safeguard of Employment) Act 1985 (1985 c. 17) and is so ordered in respect of default by debtor before that date in discharge of his obligations under that Act as does not exceed such amount as may be specified in order by Department; (e) any sums due at relevant date from debtor in respect of levies on coal and steel production under European Community legislation.

Where floating charge relates to property of company which has gone into liquidation is in administration of which there is provisional liquidator or receiver liquidator administrator or receiver shall make prescribed part of Company's net property available for satisfaction of unsecured debts and shall not distribute that part to proprietor of floating charge except insofar as it exceeds amount required for satisfaction of unsecured debt. (Art. 150 Insolvency [N.I.] Order as am'd by Art. 7 of Insolvency [N.I.] Order 2005).

Foregoing debts rank equally among themselves and must be paid in full unless property of bankrupt is insufficient to meet them, in which case they abate in equal proportions.

See also topic 7.07 Fraudulent Sales and Conveyances.

7.05 EXECUTIONS:

Jurisdiction relating to enforcement of judgments is vested in Enforcement of Judgments Office (which is part of Northern Ireland Court Service under control of Lord Chancellor) and is exercised by designated officers in accordance with Judgments Enforcement (Northern Ireland) Order, 1981 (1981, S.I. No. 226 [N.I. 6]) as amended by The Judgments Enforcement (Attachment of Debts) (Northern Ireland) Order 1983 (1983 S.I. No. 1904 [N.I. 22]) and The Judgments Enforcement [Amendment] [Northern Ireland] Order 1986 (1986 S.I. No. 1166 [N.I.]1). All references to statutory provisions are to provisions contained in 1981 Order. (1981 S.I. No. 226 [N.I. 6]). Any reference to Art. number in this topic is reference to 1981 Order unless contrary is indicated.

Order applies to judgments for recovery of money in civil proceedings (including those given outside Northern Ireland, but enforceable in Northern Ireland under any statutory provision); possession of land (including warrant for possession after conviction of squatter); delivery of goods and payment of lump sums under Domestic Proceedings (Northern Ireland) Order, 1980 (1980, S.I. No. 563 [N.I. 5]; Art. 4).

Applications for enforcement must be made within 12 years from judgment, and after six years leave of Office is required. (Art. 17).

Powers of Office.

For purposes of enforcement, Office may: (a) Make enforcement orders (Art. 13[a]); (b) issue custody warrants (Art. 13[b]); (c) issue summonses for attendance and examination of debtors as to their means, and other persons who may be able to give evidence as to debtors' means (Art. 13[c]); (d) conduct examinations as to means of debtors (Art. 13[d]); (e) receive monies in respect of payments of whole or part of amounts payable under judgments lodged for enforcement (Art. 13[e]); (f) stay enforcement of proceedings in Office (Art. 13[f]); (g) set aside, discharge or vary its own orders (Art. 13[g]); (h) issue notices and certificates of unenforceability (Art. 13[h]); (i) dismiss applications for enforcement (Art. 13[i]); and (j) make administration orders (Art. 13[j]).

Orders.

Where application has been accepted, Office may, at its discretion, make any of following orders which have force and effect of High Court orders: (a) Instalment order where it appears debtor will have means to satisfy judgment by instalments (Art. 30); (b) order of seizure by which certain property of debtor may be seized but not including, inter alia, such furniture, bedding, household equipment as appears essential for domestic purposes of debtor, spouse and dependants; and tools and implements of debtor's trade to value of £200 (1983, S.R. No. 150); (c) order charging land, which confers power of sale on application to court for possession (Arts. 46-52); (d) charging order on funds, stocks or shares, having effect so as to require that all dividends or interests accruing be paid to owner of charge (Art. 58); (e) debenture order, requiring debtor who has beneficial interest in debenture to make payment to creditor of principal or interest or both (Art. 61); (f) stop order in respect of funds, shares or stock held in debtor's name in court (Art. 62); (g) restraining order, where debtor has share in private company, restraining company from paying dividend to debtor or dealing with shares in any other way (Art. 66); (h) partnership order requiring partner's interest in property to be transferred to Office (1890, c. 39); (i) order appointing receiver by way of equitable execution against debtor (Art. 67); (j) attachment of debts order attaching all debts due to debtor for purpose of satisfying judgment debt (Art. 69) and Art. 72 as am'd); (k) order for payment by garnishee to creditor (Art. 70); (l) attachment of earnings order (requiring employer to make available such payments out of debtor's earnings as Office directs, in order to pay off judgment (Art. 73).

Certificate of Unenforceability.

Where it appears after examination of debtor that judgment cannot be enforced within reasonable time, Office may issue notice of unenforceability and, after giving debtor and creditor opportunity of being heard, may grant certificate of unenforceability. Where granted, no further application for enforcement is accepted unless certificate is set aside on application of any creditor who can establish that debtor has, or is about to have, assets which can be made amenable to enforcement. Grant of certificate constitutes act of bankruptcy. (Arts. 19-21). (See topic 7.04 Bankruptcy and 7.09 Insolvency.)

Appeal.

Any person aggrieved by order or decision of Office may appeal to High Court or, in certain cases, to Court of Appeal. (Art. 140).

7.06 EXEMPTIONS:

Special Cases.

No execution can be issued against a foreign sovereign or a person subject to diplomatic immunity unless privilege is waived. No person is individually liable under any order for payment by Crown or any government department or any officer of Crown as such for money or costs. (Crown Proceedings Act 1947, 10 & 11 §6, c. 44 [U.K.]).

Rolling stock or plant of railway company exempt from execution. (Railway Companies Act 1867, 30 & 31 Vict. c. 137 [U.K.] §4).

Exemptions from Execution.

Wearing apparel and bedding of judgment debtor or his family and tools and implements of his trade not exceeding in whole value of £200 are exempt from liability to seizure under any execution. Judgment or order against member of Her Majesty's military (Army Act 1955, 3 & 4 Eliz. 2, c. 18 [U.K.] §185) or airforce (Airforce Act 1955, 3 & 4 Eliz. 2, c. 19 [U.K.] §185) cannot be enforced by levying execution against his arms, ammunition, equipment, instruments or clothing used for military or airforce purposes, or in respect of debt due for maintenance of wife or child of person subject to Naval Discipline Act against any person, pay, arms, ammunition, equipment, instruments or clothing.

Substitution.

Debtor who does not possess articles specifically exempted may not hold money or other property in lieu thereof.

7.07 FRAUDULENT SALES AND CONVEYANCES:

Transaction made by any company or person (whether or not bankrupt or insolvent) at undervalue for purpose of putting assets beyond reach of person making or who may make, claim against such company or person, or of otherwise prejudicing interests of such company or person in relation to claim, may be set aside on application of Official Receiver or trustee or victim of transaction to High Court. (Insolvency [N.I.] Order 1989, [S.I. 1989 No. 2405] [N.I. 19] Art. 367-369). Court may make such order as it thinks fit to restore position and to protect interests of victims of transaction. Interests of bona fide third parties are however protected.

Where bankrupt has within six months of presentation of bankruptcy petition (or five years in case of transaction at undervalue or two years if given to associate of bankrupt) given preference to any person, Court may, on application of trustee make such order as it thinks fit to restore position. Person preferred must have been creditor or surety or guarantor for debts or liabilities of bankrupt. If preference constituted transaction at undervalue given within two years of presentation of petition or is given to associate, insolvency of bankrupt is presumed at time of preference. Otherwise, trustee must prove insolvency. Interests of bona fide third parties are protected. (Art. 313, S.I. 1989/2405 [N.I. 19]).

Any conveyance, mortgage, delivery of goods, payment, execution or other act relating to property made or done by or against company within six months before commencement of its winding up which, had it been made or done by or against individual within six months before he became bankrupt, would be deemed in his bankruptcy fraudulent preference, is in event of company being wound up deemed fraudulent preference of its creditors and invalid accordingly. Any conveyance or assignment by company of all its property to trustees for benefit of all its creditors is void. (The Companies [N.I.] Order 1986 [S.I. 1986 No. 1032][N.I. 6] Art. 571).

7.08 GARNISHMENT:

Creditor who has obtained judgment for sum of money may apply to Enforcement of Judgments Office for garnishee order attaching all debts due to judgment debtor from any person (garnishee) within jurisdiction for purpose of satisfying amount recoverable on foot of judgment or part thereof. (Judgments Enforcement [Northern Ireland] Order 1981 [1981 S.I. No. 266 (N.I. 6) Art. 69]). If garnishee upon service on him of order does not within specified period either pay required amount to Enforcement of Judgments Office or show cause why order should not be enforced creditor may proceed to enforce order as if it were judgment. If liability disputed office may determine issues or may direct any issue or question to High Court. (1981 S.I. No. 226 [N.I. 6] Art. 70). Order may be made attaching money in bank or other deposit taking institutions standing to credit of debtor. (1981 S.I. No. 226 [N.I. 6] Art. 72 and 1983 S.I. No. 1904 [N.I. 22] Art. 3[1]). Clerical and administrative costs of institutional garnishees in complying with attachment of debts order are deducted from debt which is subject of order. (1981 S.I. No. 226 [N.I. 6] Art. 72 and 1983 S.I. No. 1904 [N.I. 22] Art. 4 and 1986 S.I. No. 1166 [N.I. 11] Art. 3).

7.09 INSOLVENCY:

See topic 7.04 Bankruptcy and 7.09 Insolvency.

7.10 LIENS:

Common law rules apply.

7.11 PLEDGES:

A pledge consists of delivery of goods or chattels by one party (the bailor) or another party (the bailee) as security for the payment of a debt and upon the understanding that the article or articles delivered are to be returned on payment of the debt within the time fixed therefor, if any. The rights and duties of the bailor and bailee are governed by the common law. The bailee may sell the pledge in default of repayment. If more than one article is pledged all must be redeemed at the same time.

8 DISPUTE RESOLUTION

8.01 ARBITRATION:

All references to Arbitration Act 1996 (c. 23) unless otherwise stated. Under Act arbitration not mandatory. Act governs arbitration pursuant to Arbitration Agreement between parties. §§5 and 6(1) define Arbitration Agreement as written agreement to refer present or future disputes, whether they are contractual or not, to arbitration.

Parties are free to agree on most facets of arbitration process. They can agree on composition of tribunal, powers of tribunal etc. There are default procedures in Act if agreement is not reached. Certain provisions of Act are, however, mandatory.

If party commences court proceedings in respect of matter agreed to be referred to arbitration, any party to proceedings may after taking appropriate procedural step (if any) to acknowledge proceedings but before he has taken any step in those proceedings to answer substantive claim apply to court to stay proceedings. (§9).

With leave of court arbitration award can be entered as judgment and have same effect as Court Order. (§66).

Award can be challenged on basis of substantive jurisdiction or serious irregularity; Court can vary or set aside. (§§67 & 68).

Limitation.

Limitation (N.I.) Order 1989 (S.I. 1989/1339 N.I.[11]) together with any other limitation provision apply to arbitration as they apply to action.

Foreign Arbitration Awards.

Except for New York Convention awards recognition and enforcement governed by Part II Arbitration Act 1950. (14 Geo. 6 c. 27 U.K. [U.K. Legislation: See England Law Digest]). Presumption of recognition or enforcement of New York Convention award except in specified circumstances. (§103).

Consumer Arbitration Agreements.

May be unenforceable by party acting in course of business against consumer not acting in course of business. (§89).

9 DOCUMENTS AND RECORDS

9.01 ACKNOWLEDGMENTS:

Acknowledgement within Northern Ireland.

Acknowledgement of any instrument may be made in Northern Ireland before Commissioner for Oaths (§1 Commissioner for Oaths Act 1889, 52 & 53 Vict., c. 10 [U.K.]); officers of court performing duties in relation to court and authorized by judge may administer oaths required for any purpose connected with their duties (52 & 53 Vict., c. 10, §2). Every solicitor holding valid practising certificate has all powers of Commissioner for Oaths, but may not exercise such powers in proceedings in which he is acting or interested. (Solicitors [Northern Ireland] Order 1976 [S.I. No. 582 (N.I. 12) Art. 78]). Commissioner for Oaths is entitled to fee of £5 per signature to be sworn on affidavit, declaration or instrument in writing and fee of £1 per signature on each additional exhibit. (Commissioners for Oaths [Fees] Order 1993, [1993 S.R. No. 418]).

Acknowledgement without Northern Ireland.

Acknowledgement of any instrument may be made outside Northern Ireland for purpose of any cause or matter in Northern Ireland or for purpose of registration of any instrument in any part of U.K. may be taken or made in any place out of Northern Ireland before any person having authority to administer oath in that place, but in case of person having such authority otherwise than by law of foreign country, judicial and official notice shall be taken of his seal or signature affixed, impressed, or subscribed to or on any such oath or affidavit. (52 & 53 Vict., c. 10, §3). Every British ambassador, envoy and minister, charge d'affaires, and secretary of embassy or legation exercising his function in any foreign country, and every British consul, general, vice-consul, acting-consul, pro-consul and consular agent exercising his function in any foreign place may in that country or place administer any oath and take any affidavit and also do any notarial act which any notary public can do within Northern Ireland and every oath, affidavit and notarial act administered sworn or done by or before any such person shall be as effectual as if duly administered, sworn, or done by or before any lawful authority in any part of Northern Ireland. Any document purporting to have affixed, impressed, or subscribed thereon or thereto seal or signature of any person authorized by this section to administer an oath in testimony of any oath, affidavit or act being administered taken or done by or before him shall be admitted in evidence without proof of seal or signature being seal or signature of that person or of official character of that person. (52 & 53 Vict., c. 10, §6).

The Statutory Declarations Act 1835 (5 & 6 Will 4, c. 62 [U.K.]) enables any non-litigious act or thing to be proved or evidenced by a declaration.

Voluntary declarations may be taken for purpose of confirming written instruments or allegations or proving execution of Deeds or other matters (§18).

The declaration must be in form prescribed in the Schedule to the Act (§20) as altered in title by §68, Conveyancing and Law of Property Act 1881 (44 & 45 Vict., c. 41 [U.K.]). Within United Kingdom declarations may be made before any justice of the peace, notary public or other officer authorized to administer oaths. Justice of the peace must take the declaration without any fee. Commissioner in Northern Ireland entitled to fee as above. (1988 S.R. No. 249). Outside U.K. every British Ambassador, Envoy, Minister Charge D'Affaires and Secretary of Embassy or Legation exercising his function in any foreign country and every British Consul-general pro-consul and consular agent acting consular general, acting vice-consul and acting consular agent exercising his powers in any foreign place may in that country or place administer any oath or take any affidavit and also do any notarial act which any Notary Public can do within U.K. (Commissioner of Oaths Act 1889, 52 & 53 Vict. c. 10 [U.K.], §6[1] am'd. Commissioner for Oaths Act 1891, 54 & 55 Vict. c. 50 [U.K.], §2).

General Requirements as to Taking.

Officer taking acknowledgement must know and have satisfactory evidence that person making acknowledgement is person described in and who executed instrument and must satisfy himself that person who is going to swear the oath thoroughly understands what he is going to swear to. A commissioner for oaths who is a party to any proceedings or interested therein or is solicitor, agent or correspondent of any party thereto or is clerk to a partner of any solicitor or persons concerned or interested cannot act as a commissioner in any such proceedings. (52 & 53 Vict., c. 10, §1[3]).

General Requirements of Certificate.

(1) If acknowledgement is taken within Northern Ireland or out of Northern Ireland by Northern Ireland Officer, no authentication is necessary and any document purporting to have fixed, impressed or subscribed thereon or thereto, seal and signature of any person authorized to administer an oath in testimony of any oath, affidavit or act being administered, taken or done by, or before him, is admitted in evidence without proof of the seal or signature being seal or signature of that person or of official character of that person. (52 & 53 Vict., c. 10, §6[2]).

(2) If acknowledgement is taken out of Northern Ireland, signature of foreign official authorized by law of his country to take oaths requires verification by High Court of his country. Certificate of president and clerk of county court in U.S. verified by its seal has been accepted. Certificate of British Vice-Consul as to authority of person before whom oath is taken is accepted without affidavit.

Married Woman.

No special requirements in case of.

Corporations.

No special requirements except those contained in articles and memorandum of association.

Effect of Acknowledgement.

Every oath, affidavit and notarial act administered, sworn or done by or before any person authorized to administer oaths in a foreign country is as effectual as if duly administered sworn or done by or before any lawful authority in any part of U.K. (52 & 53 Vict., c. 10, §6[1]).

Proof by Subscribing Witnesses.

Any attesting witness to the execution of any will or codicil, deed or instrument in writing or any other competent person can verify and prove the signing, sealing or delivery of any such will, codicil, deed or instrument by a solemn declaration in writing. (Statutory Declarations Act 1835, 5 & 6 Will. 4, c. 62, §16).

Forms.

The following is the form of statutory declaration prescribed by statute.

Form

I (name of declarant) of etc. do solemnly and sincerely declare that (here set out statement of facts to be proved in numbered paragraphs) . And I make this solemn declaration conscientiously believing the same to be true and by virtue of the provisions of the Statutory Declarations Act. 1835.

Declared at . . . .

This day of }

Signature of Declarant

Before me . . . .

(Signature of Commissioner or Magistrate)

A Commissioner for Oaths (or Justice of the Peace for . . . .)

Stamp.

A declaration requires no stamp.

9.02 AFFIDAVITS:

Affidavit for use in Northern Ireland may be sworn in the United Kingdom, Colonies or Commonwealth, before any judge, notary public, or any person authorized to administer oaths there. In foreign countries it should be sworn before the British Consul and if sworn before a notary public, or person authorized by law to administer oaths there, the authority of such person must be verified, i.e., a certificate must be annexed that the person before whom affidavit is sworn is authorized to administer oaths in the country in which it is sworn. This certificate must be signed by a British Consul or Vice-consul or verified by seal of foreign court. No such verification is required when the person before whom the affidavit is sworn derives authority to administer oaths in such country from a British source. Affidavits for use in the High Court in Northern Ireland must be written, typewritten or printed in black ink, on foolscap paper, bookwise, with a margin on the left side.

Affidavits sworn for the purposes of any provisions of the Registration of Deeds Acts, or for the purposes of the registration of any document or transaction in the registry of deeds may be sworn as mentioned above as well as before one of the following persons: (a) If sworn in Northern Ireland before Registrar of Deeds, or Assistant Registrar, or before notary public, commissioner for oaths or justice of the peace having authority or jurisdiction in the place where the oath is administered; (b) if sworn in any other part of the British Isles, before notary public or commissioner for oaths having jurisdiction in that part or before any court or judge lawfully authorised to administer oaths in such part; (c) if sworn in any part of the Commonwealth outside the British Islands, before a judge of any court of record, the mayor of any incorporated city or incorporated town under common seal of such city or town, or notary public under his official seal; (d) if sworn in any other place, before a judge of a court of record or court of comparable status under seal of such court, mayor of any city or incorporated town under common seal of such city or town or a consular officer, or notary public under his official seal. (§2(1) Registration of Deeds (Amendment) Act 1957 [1957, c. 20]).

Form

An affidavit is commenced with title of action, e.g.: In the High Court of Justice in Northern Ireland 19. . No. . . (in Court Index), Queen's Bench Division (or Chancery Division). (In Chancery Division add, “In the matter of the Estate of . . . . Deceased (or as the case may be), Between A. B. Plaintiff, and C. D. Defendant.” The full name, place of abode and description of the deponent must then be stated, e.g., “I, (Full Names) . . . . of . . . . (Address) . . . . County in the State of . . . . United States of America, (description) . . . . make oath and say as follows:” Then the facts to be deposed to should be set out in the first person in paragraphs numbered consecutively.

An affidavit must be confined to facts within the deponent's own knowledge and must contain an averment that such facts are within his own knowledge except on interlocutory motions where statements as to his beliefs with the grounds thereof may be admitted. Affidavits containing alterations or erasures cannot be filed or read without leave of the court, unless such alterations and erasures are initialled by the officer before whom the affidavit is sworn.

Jurat.

The jurat must follow close at the end of the affidavit to preserve its continuity and must state date when and place where it was sworn. The deponent must sign his usual signature, or make his mark, at left of jurat, not beneath it, and signature and full official character and description of person before whom affidavit is sworn, his official seal of office attached should follow immediately after jurat in form as follows:

(Signature of

Deponent)

{ Sworn by the deponent . . . . (Name) at . . . . (Place) . . . . on the . . . . day of . . . . 20. .)

Before me,

(Signature of Officer)

(Seal)

(Title of Officer)

If the deponent appears to officer taking the affidavit to be illiterate or blind, officer must certify in jurat that affidavit was read in his presence to deponent, that deponent seemed perfectly able to understand it, and that deponent made his signature in presence of the officer. The jurat is sworn as follows:—

Form

Sworn by the deponent . . . . . . (Name) . . . . . . at (place and date as above) . . . . I having first truly distinctly and audibly read over the contents of the above affidavit to the said deponent who seemed to perfectly understand the same and made his mark thereto in my presence.

Before me (etc. as above).

The mark of

X

(Deponent's

name)

Exhibits.

A document may be referred to in an affidavit either as an exhibit, thus: “the said letter is now produced and shown to me and marked with the letter ‘A,’ ” or if not as an exhibit, thus: “hereunto annexed.” In the former case the officer before whom affidavit is sworn must enquire whether the deponent has seen the document and is aware of contents thereof: in the latter case document should be annexed to affidavit at time it is sworn and is filed with it.

Every exhibit referred to in an affidavit must be marked with a short title of the cause or matter, and must be distinguished by some mark placed upon it, and must be signed and identified by the officer before whom affidavit is sworn, or certified by him to be the document referred to as follows:—

Form

(Title of Action)

This is the Exhibit marked “A.B.” (or “A.B.1.”) referred to in the Affidavit of X.Y. sworn in this action (if Chancery, “Matter” not “Action”) this . . . . day of . . . . 20. ..

Before me,

(Name and Title of Officer.)

9.03 NOTARIES PUBLIC:

Their appointment extends during the pleasure of the Crown by whom appointments are made and not for any fixed term. When any document for use in the United States is executed before a notary public the notary's signature should be verified by the American Consul in Belfast.

9.04 RECORDS:

Dealings in freehold and leasehold registered land (i.e. leases for term greater than 21 years) must be registered under Land Registry Act (N.I.) 1970. (1970, c. 18 as am'd by Registration [Land and Deeds] [N.I.] Order [1992, S.I. No. 811]).

All deeds transferring interest in land not subject to 1970 Act may be registered in Registry of Deeds. Purchasers are deemed to have notice of all previous registered dealings with land.

See also category 11 Estates and Trusts, topic 11.06 Wills.

9.05 SEALS:

Deed must be signed and sealed. It must have seal fixed or impressed upon or attached to it. Not necessary that particular kind of seal be used. Not every document under seal is deed, e.g., award, certificate of admission to learned society, letters of ordination.

10 EMPLOYMENT

10.01 LABOUR RELATIONS:

Department of Regional Development and Department for Employment and Learning administers services in connection with trade disputes, trade boards, labour exchange, factories and workshop, national health and unemployment insurance and matters relating to labour and employment generally.

Hours of Labour.

Number of hours which can be worked during each day and each week is governed by Working Time Regulations 1998.

Employment Rights (N.I.) Order 1996 (1996 S.I. No. 1919 [N.I. 16]) requires minimum period to terminate employment and requires employers to give written particulars of terms of employment. It also provides for making of redundancy payments by employers, to full-time employees with at least two years continuous employment with employer or associated employer after age of 18.

Wages.

Deductions from wages are restricted by Employment Rights (N.I.) Order 1996. (Arts. 45-54). Preferential payment of wages is provided for in bankruptcy and in winding up of companies. (Insolvency [N.I.] Order 1989, S.I. No. 2405 [N.I. 19]). Employees can also make application to Department of Regional Development for payment of debt of insolvent employee. (1996 No. 1919 [N.I. 16] Arts. 227-235).

Child Labour.

Person not over compulsory school age is deemed to be child. (Children [N.I.] Order 1995, S.I. 1995, 1755 [N.I. 2] Art. 133).

Department of Health and Social Services with approval of Department of Education has power to restrict or prohibit employment of children. (1995 S.I. 1755 [N.I. 2] Art. 136). Restrictions are imposed on times children may be employed (1995 S.I. 455 [N.I. 2] Art. 135[1]) on nature of employment (Art. 135[2]) and children are prohibited from employment in any occupation likely to be injurious to his life, limb, health or education and in street trading.

Female Labour.

Woman must not be employed within two weeks after childbirth.

Maternity Rights are contained in Part IX of Employment Rights (N.I.) Order 1996, as amended by Part I of Sch. 4 of Employment Relations (N.I.) Order 1999 (1999, S.I. No. 2790 [N.I. 9]), Employment (N.I.) Order 2002, (2002 No. 2836 [N.I. 2]) and Work and Families (N.I.) Order 2006 (2006 S.I. 1947) which increased ordinary maternity leave to 26 weeks and provides for additional 26 weeks maternity leave. In addition, 2002 Order introduced new rights to paid Paternity Leave (Arts. 3, 4, 5 and 15, 2002 No. 2836) as well as right to request flexible working and adoption leave. Employment Relations (N.I.) Order 1999 (1999, S.I. No. 2790 Art. 9) provides for Parental Leave of up to 13 weeks for employees with one year's continuous employment.

Labour Unions.

Trade union is temporary or permanent organisation which consists mainly of workers and whose principal purposes include regulation of relations between such workers and employers or employers' associations or which consists mainly of affiliated constituent group of such organisations or their representations. (Industrial Relations [N.I.] Order 1992, S.I. No. 807 [N.I. 5] Art. 3[1]).

Trade unions are not bodies corporate but are capable of making contracts and of suing and being sued in their own name. (1992 S.I. No. 807 [N.I. 5] Art. 3[2]). All property belonging to trade union shall be vested in trustees in trust for union. (1992 S.I. No. 807 [N.I. 5] Art. 3[2][e]).

Trade unions must keep proper accounting records with regard to its transactions and its assets and liabilities (1992 S.I. No. 807 [N.I. 5] Art. 10[2]) and must send annual returns to Certification Officer for Northern Ireland including audited accounts (Art. 11).

Trade unions' liability in tort is limited to fixed amount depending on size of union. (1992 S.I. No. 807 [N.I. 5] Art. 22). Trade unions are also immune from certain tort actions and to prove certain tortious acts were carried out by union it must be proved that act was authorised or endorsed by responsible person (defined in Art. 21[2]).

It is lawful for person in contemplation or furtherance of trade dispute to attend at or near his own place of work or for trade union official to attend at or near place of work of member of union whom he is accompanying and whom he represents for purpose only of peacefully obtaining or communicating information or peacefully persuading any person to work or abstain from working. (Trade Union and Labour Relations [N.I.] Order 1995, S.I. No. 1980 [N.I. 12] Art. 98[1]). Act done by trade union to induce person to take part or continue to take part in industrial action is not protected from liability in tort unless industrial action has support of ballot. (1995 S.I. No. 1980 [N.I. 12] Art. 104[1]). Trade union must send notice to employer containing date of opening day of ballot and describing employees of employer who will be entitled to vote in ballot at least seven days before opening date of ballot. (1995 S.I. No. 1980 [N.I. 12] Art. 105). Independent scrutineer must be appointed by union to report on ballot (1995 S.I. No. 1980 [N.I. 12] Art. 106) and employers are to be informed of result of ballot as soon as is reasonably practicable (1995 S.I. No. 1980 [N.I. 12] Art. 113). 1995 Order was updated and amended by Employment Relations (N.I.) Order 2004 (2004 S.I. 3078) in relation to areas of Trade Union recognition, industrial action and rights of trade union members, workers and employees.

Unemployment Compensation.

Unemployment benefit is payable under Social Security (N.I.) Act 1975 (1975, c. 15 as am'd). National insurance benefits system makes provision for unemployment, sickness or disability, widowhood, retirement and industrial injury. Most of these benefits depend on claimant satisfying contribution conditions.

There are four classes of contributions: Class 1—paid by all employees earning over Lower Earnings Limit which gives access to all contributory benefits; Class 2—paid by self-employed persons which gives access to all contributory benefits except unemployment benefit; Class 3—may be paid voluntarily by persons not otherwise liable wishing to secure widows' and retirement pensions; Class 4—additional contributions paid by all self-employed persons where profit and gains exceed specified limit as amended by §§3, 4 Social Security (Contributions) Act 1994.

Unemployment benefit payable to insured persons under pensionable age, 65 for men, 65 for women, and subject to special conditions to those in that class who have reached but are not more than five years over pensionable age and have not retired from work. (1975, c. 15, §14 am'd Social Security [N.I.] Order 1989, S.I. No. 1324 [N.I. 13] Sch. 1). Claimants must satisfy contribution conditions, be capable of work and be deemed available for employment (1975, c. 15, §§14 and 17) and must be actively seeking employment (1989 S.I. No. 1342 [N.I. 13] Art. 12 and Social Security [Unemployment Sickness and Invalidity Benefit] [Amendment No. 2] Regulations [N.I.] 1989, S.R. No. 364 Reg. 12[b]). Benefit is not payable for first three days and lasts for one year. To requalify person must be in employment for 13 weeks out of 26 weeks preceding claim. (Art. 13 1989, S.I. 1342 [N.I. 13]).

Person who has lost employment may be disqualified from receiving employment benefit (a) for as long as stoppage continues, if employment lost through stoppage of work due to trade dispute at his place of employment unless he proves he is not participating in or financing or directly interested in trade dispute (1975, c. 15, §19[i]), or, (b) for period up to 26 weeks if employment lost as result of misconduct or he left it without good cause, or (c) employment or training refused without good cause when offered (1975, c. 15, §20 am'd 1989, S.I. 1342 [N.I. 13] Art. 14 and 1989, S.R. No. 364 Reg. 7[b]), or (d) person failed to take reasonable steps to get suitable job when told about one (1975, c. 15, §20).

Fair Employment and Treatment (Northern Ireland) Order 1998 ([N.I. 21] as am'd by Fair Employment and Treatment Order [Amendment] Regulations [N.I.] 2003 S.R. 2003/520) makes discrimination or harassment on grounds of religion or politics unlawful in field of employment, training and conferment of qualifications. Positive duty is conferred on employers to provide equality of opportunity. Equality Commission for Northern Ireland was established by Northern Ireland Act 1998. Purpose is to assist public authorities in their requirement to have due regard to need to promote equality of opportunity between persons of different religious belief, political opinion, racial group, age, marital status, sexual orientation, between persons with disability and persons without; and between persons with dependants and persons without. Duty to identify and keep under review patterns and trends of employment in Northern Ireland. Power to carry out investigations and make directions to employers and require undertakings which may be appealed to Fair Employment Tribunal. Decision of Fair Employment Tribunal may be referred to Court of Appeal. Employer employing more than 11 employees required to register with Equality Commission and complete monitoring return containing such information about employees of employer as may be prescribed by Equality Commission.

Sex Discrimination (N.I.) Order 1976 (1976, S.I. No. 1042 [N.I. 15] am'd Sex Discrimination [N.I.] Order 1988, S.I. No. 1303 [N.I. 13]) makes discrimination in employment on grounds of sex or marriage unlawful. Equality Commission's function is to work towards elimination of discrimination and promotion of equality of opportunity between men and women.

Race Relations (N.I.) Order 1997 (1997, S.I. No. 1101 [N.I. 6] as am'd by Race Relations [Amendment] Regulations [N.I.] 2003 [S.R. 2003/341]) makes discrimination in employment on grounds of race unlawful.

Employment Equality (Sexual Orientation) Regulations (N.I.) 2003 makes discrimination on grounds of sexual orientation unlawful.

Health and Safety at Work (N.I.) Order, 1978 (1978, S.I. No. 1039 [N.I. 9]) as amended by Health and Safety at Work (Amendment) (N.I.) Order 1998 (N.I. 18) provides legislative framework to promote, stimulate and encourage high standards of health and safety in places of employment. General purposes of Order are to: (1) Secure health, safety and welfare of persons at work; (2) protect persons other than persons at work against risks to health or safety arising out of or in connection with activities of persons at work; (3) control keeping and use of explosive, highly flammable or otherwise dangerous substances. Order includes duty on employee to take care for health and safety of himself and other persons at work (Art. 8) and duty on all persons not to interfere, intentionally or recklessly, with anything provided in interests of health and safety (Art. 9).

Dispute Resolution in Employment.

Employment (Northern Ireland) Order 2003 (Dispute Resolution) Regulations (Northern Ireland) 2004 S.R. 2004/521 has introduced new three step plan to encourage employers and employees to resolve disputes before they go before tribunal: (1) Put it in writing; (2) meet and discuss; (3) appeal i.e. employers fail to implement this process and dispute goes before tribunal financial penalties can be imposed and to formalise disciplinary procedures.

Employment Equality (Age) Regulations (Northern Ireland) 2006 2006/261 makes discrimination in employment on grounds of age unlawful as from 1 Oct. 2006.

Disability Discrimination Act 1995 (1995 c. 50) as amended makes it unlawful to discriminate against disabled persons in connection with employment, provision of goods, facilities and services or disposal or management of premises.

11 ESTATES AND TRUSTS

11.01 ADMINISTRATION:

See topic 11.04 Executors and Administrators.

11.02 DEATH:

The common law rules apply, viz.: Where a person has been absent and not heard of for upwards of seven years from the time that he was last known to be living, by a person who would have heard had he been living, then he is presumed to be dead; but there is no legal presumption that he died at any given time within the seven years.

Survivorship.

Where several persons perish in same disaster, there is, in absence of evidence on the point, no presumption as to order in which they died or that they died at the same time. Onus probandi lies on party who asserts survival, or concurrent decease, or predecease.

Actions for Death.

Fatal Accidents (N.I.) Order 1977 as am'd by Sch. 6 of Administration of Justice Act, 1982 (1982, c. 53 [U.K.]) and Damages for Bereavement (Variation of Sum) (Northern Ireland) Order 1990 (1990, No. 2576 and Civil Partnership Act 2004 [2004, No. 33]) provides that whenever death of person is caused by wrongful act, neglect or default, and act, neglect and default is such as would (if death had not ensued) have entitled party injured to maintain action and recover damages in respect thereof, person who would have been liable if death had not ensued, is liable to action for damages notwithstanding death of person injured. Such action is for benefit of: (i) Wife or husband; (ii) former wife or husband; (iii) any person living in same household for two years as husband or wife; (iv) any parent or other ascendant; (v) any person treated by deceased as his parent; (vi) any child or other descendant; (vii) any person treated by deceased as child of deceased's marriage; (viii) any brother, sister, uncle or aunt of deceased (or issue thereof); (ix) civil partner; (x) former civil partner (Art. 2[2]) and is brought by and in name of executor or administrator of deceased (Art. 4[1]). If no executor or administrator, or no action brought within six months of death by and in name of executor or administrator, action may be brought by and in name of all or any persons for whose benefit executor or administrator could have brought it. (Art. 4[2]). In assessing damages under Fatal Accidents Order (as am'd) benefits which have accrued or will or may accrue to any person from his estate or otherwise as result of his death must be disregarded (Art. 6[1]), and no account taken of widow's remarriage prospects (Art. 5[3]). Contributory negligence reduces damages recoverable to same extent as for any claim under §2(1) of Law Reform (Miscellaneous Provisions) Act (N.I.) 1948 (1948, c. 23). (Art. 7).

The Law Reform (Miscellaneous Provisions) Act (Northern Ireland) 1937 as am'd by Sch. 6 of Administration of Justice Act, 1982 (1982, c. 53 [U.K.]) provides that on death of any person all causes of action subsisting against or vested in him shall survive against or, as case may be, for benefit of his estate excluding causes of action for defamation. Where cause of action survives for benefit of estate of deceased person damages recoverable for benefit of estate of that person: (a) Do not include any exemplary damages; (b) do not include any damages for loss of income in respect of any period after person's death; and (c) where death of that person has been caused by act or omission which gives rise to cause of action, are calculated without reference to any loss of gain to his estate consequent on his death except that sum in respect of funeral expenses may be included. No proceedings are maintainable in respect of cause of action in tort which by virtue of Act has survived against estate of deceased person unless: (a) Proceedings against him in respect of that cause of action were pending at date of his death; or (b) proceedings were taken in respect thereof not later than six months after his personal representative took out representation. Where damage has been suffered by reason of any act or omission in respect of which cause of action would have subsisted against any person if that person had not died before or at same time as damage was suffered there is deemed to have been subsisting against him before his death such cause of action in respect of act or omission as would have subsisted if he had died after damage was suffered. Rights conferred for benefit of estates of deceased persons are in addition to and not in derogation of any rights conferred on dependents of deceased persons by Fatal Accident Acts.

Criminal Injuries Compensation (N.I.) Order 2002 provides for payment of compensation by Secretary of State through Compensation Agency to victims of violent offences in N.I. and to dependants of deceased victims that occurred on or after 1st May 2002. Where person dies as result of criminal injury arising out of violent crime in N.I. and incident is reported to police as soon as possible after incident occurred application for compensation may be made within two years from date of injury. N.I. Criminal Injuries Compensation Scheme 2002 provides for Tariff Scheme for payment of compensation depending on level of injury or loss. (Art. 4[3]). Dependants of deceased's victims are entitled to bereavement support payment and compensation for other pecuniary losses resulting from death. (Art. 4). Compensation Agency may refuse to pay or reduce award if victim had criminal record. No compensation is payable to anyone who is or ever was member of illegal organisation or who is or has ever engaged in terrorism. Appeal against review decisions made by Compensation Agency can be made to independent Appeals Panel within 90 days (para. 61-82 of Scheme) called Criminal Injuries Compensation Appeals Panel for N.I. (CICAPNI). Their decision is final.

Death certificates of persons dying on or after Jan. 1, 1922, may be obtained from Registrar-General, Oxford House, Chichester Street, Belfast; fee £5.50.

11.03 DESCENT AND DISTRIBUTION:

By Administration of Estates Act (N.I.) 1955 (1955, c. 24) as amended by Civil Partnership Act 2004 (2004, No. 33), where deceased died intestate on or after Jan. 1, 1956, same rules of succession apply to real and personal property. All estate to which such deceased person was entitled for estate or interest not ceasing on his death and as to which he dies intestate, after payment of all debts, duties, testamentary and funeral expenses, is distributed as follows (figures of £125,000 and £200,000 below having been inserted by Administration of Estates [Rights of Surviving Spouse] Order [N.I.] 1993 [1993, S.R. No. 426] and applying to estates of persons dying after Dec. 1, 1987):

Surviving Spouse.

Must survive 28 days in order to take on intestacy if death after Feb. 20th 1997. (Art. 6A A.E.A. [N.I.] 1955 inserted by Succession [N.I.] Order 1996 S.I. 1996/3163 [N.I. 26]). (A) Takes personal chattels; (B) if intestate leaves neither issue, nor parents, nor brothers, nor sisters, nor issue of deceased brothers or sisters takes whole of estate; (C) if intestate leaves issue, takes, in addition to personal chattels, (a) where net value of remaining estate does not exceed £125,000 whole of remaining estate, (b) where net value of remaining estate exceeds £125,000 sum of £125,000 free of all duties, charges, and costs, with charge upon remaining estate for that sum with interest thereon at 6% per annum from date of death until date of payment together with: (i) where only one child of intestate also survives, one-half of any residue left of remaining estate, after providing for that sum and interest thereon; (ii) where more than one child of intestate also survives, one-third of any residue left of remaining estate, after providing for that sum and interest thereon. (D) If intestate dies leaving no issue, but leaves parents or brothers or sisters, or issue of deceased brothers or sisters takes, in addition to personal chattels, (a) where net value of remaining estate does not exceed £200,000 whole of remaining estate, (b) where net value of remaining estate exceeds £200,000 sum of £200,000 free of all duties, charges and costs, and charge upon remaining estate for that sum with interest thereon at 6% per annum from date of death until date of payment together with one-half of any residue left of remaining estate after providing for that sum with interest thereon. In relation to estate of person dying after Mar. 2, 1970 but before Aug. 2, 1973, for “£125,000” mentioned above, read “£2,250”; for “£200,000” read “£7,500”. (Family Provision Act [N.I.] 1969 [1969, c. 38, §1] and 1970, S.R. & O. [N.I.] No. 29). In relation to estate of person dying after Aug. 1, 1973, but before Jan. 1, 1978, for “£125,000” read “£7,500” and for “£200,000” read “£20,000”. (1973, S.R. & O. [N.I.] No. 199). In relation to estate of person dying after Dec. 31, 1977, but before June 1, 1981, for “£125,000” read “£25,000” and for “£200,000” read “£55,000”. (1977, S.R. No. 283). In relation to estate of person dying after May 31, 1981, but before Dec. 1, 1987, for “£125,000” read “£40,000” and for

"£200,000" read "£85,000". (1981, S.R. No. 124). In relation to estate of person dying after Dec. 1, 1987, but before Jan. 1, 1994, for "£125,000" read "£75,000" and for "£200,000" read "£125,000". (1987, S.R. No. 378).

Issue.

If an intestate dies leaving issue, his estate is, subject to rights of surviving spouse or civil partner (if any), distributed, per stirpes, among such issue. (§8 A. E. A. [N.I.] 1955).

Parent.

If an intestate dies leaving no issue, his estate is, subject to the rights of the surviving spouse or civil partner (if any), distributed between his parents in equal shares, if both survive the intestate, but if only one parent survives the intestate, such surviving parent, subject as aforesaid, takes the whole estate. (§9 A. E. A. [N.I.] 1955).

Brothers and Sisters.

(1) If an intestate dies leaving neither issue nor parent, his estate shall, subject to the right of the surviving spouse or civil partner (if any), be distributed between his brothers and sisters in equal shares, and if any brother or sister predeceases the intestate, the surviving issue of the deceased brother or sister take, per stirpes, the share that brother or sister would have taken if he or she had survived the intestate. (2) If the intestate dies leaving neither issue nor parent, nor brother, nor sister, his estate is, subject to the rights of the surviving spouse or civil partner (if any), be distributed, per stirpes, among the issue of his brothers and sisters. (§10 A. E. A. [N.I.] 1955).

Next-of-kin.

If an intestate dies leaving neither spouse, nor issue, nor parent, nor brother, nor sister, nor issue of any deceased brother or sister, his estate is distributed in equal shares among his next-of-kin. Where any uncle or aunt of an intestate (being brother or sister of a parent of the intestate), who would have been included among such next-of-kin, if he or she had survived the intestate, has predeceased the intestate, leaving issue who survive the intestate, such issue represent that uncle or aunt, and by such representation take, per stirpes, the share that uncle or aunt would have taken as next-of-kin if he or she had survived the intestate. Representation of the next-of-kin is not admitted amongst collaterals except in the case of issue of brothers and sisters of the intestate and issue of uncles and aunts of the intestate. Subject to the rights of representation mentioned above, the person or persons who at the date of the death of the intestate stand nearest in blood relationship to him, are taken to be his next-of-kin. (§§11, 12 A. E. A. [N.I.] 1955).

Relatives of half-blood are treated as and inherit equally with relatives of whole-blood in the same degree. In default of any person taking the estate of an intestate under the foregoing provisions, the estate passes to the Crown as bona vacantia. (§§14, 16 A. E. A. [N.I.] 1955).

N.B. "Personal chattels" means carriages, horses, stable furniture and effects, motor cars and accessories, garden effects, domestic animals, plate, plated articles, linen, china, glass, books, pictures, prints, furniture, jewellery, articles of household or personal use or ornament, musical and scientific instruments and apparatus, wines, liquors and consumable stores, but does not include any chattels used at the death of the intestate for business or professional purposes nor money or security for money. (§45 A. E. A. [N.I.] 1955).

Inheritance (Provision for Family and Dependants) (Northern Ireland) Order, 1979 (1979, S.I. No. 924 [N.I. 8] as am'd by Civil Partnership Act 2004 and Succession [N.I.] Order 1996).

Following death of any person domiciled in Northern Ireland, certain dependants, if not satisfied that reasonable provision has been made for them in deceased's will, or by intestacy provisions relating to deceased's estate, may apply to court for variation of relevant provisions. Following persons may apply: (a) Spouse of deceased; (b) former spouse who has not remarried; (c) any child of deceased; (d) any person who was treated as child of deceased's family; (e) any other person wholly or partly maintained by deceased immediately prior to deceased's death (Art. 3); (f) co-habitee of two years standing living with deceased immediately before date of death (Art. 3[1A] inserted by Succession [N.I.] Order 1996); (g) civil partner of deceased.

If court is satisfied that reasonable financial provision has not been made for applicant, court can make any of following orders: (i) Order for periodical payments to applicant; (ii) order for lump sum payment; (iii) order for transfer of property; (iv) order for settlement of property for benefit of applicant; (v) order for acquisition of part of property by applicant; (vi) order for variation of ante-nuptial or post-nuptial settlement affecting applicant. (Art. 4).

In coming to its decision, court must have regard, inter alia, to financial resources of applicant; any physical or mental disabilities of applicant; and relationship between deceased and applicant.

Provision is made for granting of interim orders in case of great hardship (Art. 7) and for variation and discharge of orders (Art. 8). Except by leave of court, no application can be made after expiration of six months from grant of probate or letters of administration. (Art. 6).

11.04 EXECUTORS AND ADMINISTRATORS:

Executor or administrator must collect all assets of decedent, and discharge all his liabilities. One year is allowed for this purpose, and a legatee cannot without the leave of the court sue for payment of his legacy until after one year from decedent's death.

Real and personal estate to which a deceased person who died on or after Jan. 1, 1956, was entitled to an estate or interest not ceasing on his death, notwithstanding any testamentary disposition, devolves upon and vests in his personal representatives for distribution.

Personal representatives are not bound to publish for creditors, but, as a general rule, this is done in order to safeguard the personal representative against any personal liability for debts of decedent of which he has no notice.

Executor or administrator may be required by High Court as precondition to issue of grant to provide surety. (Art. 17 Administration of Estates [N.I.] Order 1979 No. 1575 [N.I. 14]).

Once a grant of probate or letters of administration has been obtained the remainder of the administration is usually carried out without the supervision of the court; but if unusual difficulty arises, a personal representative, a creditor or a legatee may apply to the court for an order for administration, and when such order is made the entire administration is carried out in the Chancery Division.

An executor may retain a debt due by the decedent to himself, out of the assets; even where the estate is insolvent an executor may retain his debt in full (out of the assets actually passing through his hands) as against a creditor in equal degree.

Personal representatives are not allowed any statutory fees, nor may they charge for their services unless authorized by the will to make professional charges.

As to inheritance tax, see England Law Digest, category Taxation, topic Taxes.

11.05 TRUSTS:

Law regulating trusts and trustees is contained in Trustee Act (N.I.) 1958 (1958, c. 23); Trustee Act (N.I.) 2000 (2000, c. 29) (2001, c. 14); Trustee Investments (Additional Powers) (N.I.) Order 1983 (1983, S.I. No. 772); and large body of decided case law.

A trust may arise from an infinite variety of circumstances, in fact, on any occasion in which one person is placed in a fiduciary relationship to another. It may be called a confidence reposed in a person with respect to property of which he has possession or over which he can exercise a power to the intent that he may hold the property or exercise the power for the benefit of some person or object.

Trusts are either: (1) Express, i.e., created by the actual terms of some instrument or declaration; or (2) constructive or implied which arise when property to which no express trust is for the time being attached is acquired or held by a person under circumstances which render him bound in equity to hold it in trust for the benefit of some person or object.

Express trusts may be either executed or executory. An executed trust is where the terms of the trust are designated by the instrument or declaration creating it. An executory trust is where the instrument or declaration by which it is created directs the subsequent execution of an instrument defining the trust.

A precatory trust is one created by expressions of confidence, request or desire that property will or shall be applied for the benefit of a definite person or object.

A secret trust is where property is in law given to a person either absolutely or upon an indefinite trust but there has been an undertaking by him or an understanding between him and the donor that it shall be applied for the benefit of some person or object.

Apart from the above, trusts may arise when one person receives money from or on behalf of another without apparent reason. In this case a resulting trust arises in favour of the donor or in favour of the person on whose behalf the money was paid. If, however, the donee stands in special relationship to the donor a presumption of complete gift may arise, e.g., husband paying a sum of money to wife or a person paying money to or for the benefit of another to whom he stands in loco parentis.

There are certain restrictions governing trusts in favour of charities and corporations.

Trustees have whatever discretion is given in the instrument creating the trust; otherwise they are bound to act with the utmost care and diligence and will under certain circumstances be held personally liable for any loss resulting from their own carelessness.

Trustee Act (N.I.) 2001 §3(1) provided for general power of investment but this is subject to any restriction or exclusion imposed by trust instrument or by any statutory provision. (§6[B]).

A trustee may be called upon to account through the court at any time by a fellow trustee or a beneficiary.

11.06 WILLS:

Citations, unless otherwise indicated, refer to Wills and Administration Proceedings (N.I.) Order 1994 (S.I. 1994/1899 N.I. 13). This Order governs execution of wills, made on or after Jan. 1, 1995. Person under age of 18 cannot make valid will unless, either they are or have been married (Art. 4[1]) or such will is privileged will of person in actual military service (S.I. Wills [Soldiers and Sailors] Act 1918 [7 & 8 Geo. 5 c. 58]). §3(1) amended by Family Law Reform Act 1969. (§3[1][b]).

Testamentary Disposition.

Person may dispose of all estate by will (Art. 3), executed in accordance with The 1994 Order. (See subhead Execution, infra.) Restrictions in mortmain abolished. (Repeals Mortmain Act [N.I.] 1960 [1960, c. 20]) and see category 18 Property, topic 18.05 Perpetuities. If court considers operative dispositions of deceased's estate, whether by will or rules or intestacy, do not make reasonable provision for specified dependants, it may make order for maintenance out of estate on application, within six months of grant of administration, of those dependants. (Inheritance [Provision for Family and Dependants] [Northern Ireland] Order, 1979 [1979, S.I. No. 924 (N.I. 8)]). But person may enter contract by which part or whole of estate will be bound and beneficiaries under will become trustees.

Execution.

Art. 5 requires that for will to be validly executed, it must meet certain requirements, (a) it is signed by testator, or by some other person in his presence and by his direction; and (b) it appears from will or is shown that testator intended by his signature to give effect to will; and (c) signature is made or acknowledged by testator in presence of two or more witnesses present at same time; and (d) each witness, in presence of testator (but not necessarily in presence of any other witness), either (i) attests testator's signature or testator's acknowledgment of his signature and signs will, or (ii) acknowledges his signature.

Attestation.

No form of attestation necessary. (Art. 5[2]).

Revocation.

Even if will is expressed to be irrevocable such expression is of no effect and will may be revoked.

Marriage.

Will is revoked by testator's lawful marriage or civil partnership, unless will made in exercise of a power of appointment when property appointed would not in default of appointment pass to testator's personal representatives. (Art. 12, Art. 13A and Art. 13B as inserted by Civil Partnership Act 2004 [2004, c. 33]). Where it appears from will that at time it was made testator expecting to be married or entered into civil partnership to particular person and testator intended will should not be revoked by marriage, or civil partnership, will not revoked by marriage to that person. (Art. 12[3] and Art. 13A). Where, after testator has made will, marriage dissolved or annulled, civil partnership dissolved or annulled, gift to former spouse or former civil partner takes effect as if former spouse or former civil partner had died on date marriage or civil partnership dissolved or annulled. (Art 13[1]). Art. 13(1) will not take effect if any contrary intention appears from will. (per Art. 13[3]). No will revoked by presumption of intention on ground of alteration in circumstances. (Art. 14[2] [See Art. 13A-13B re Civil Partners]).

Voluntary Revocation.

Will revoked by subsequent will, properly executed; by some writing, declaring intention to revoke will, executed in accordance with Art. 5 or by testator, or some person in his presence and by his direction, burning, tearing or otherwise destroying will with intention of revoking. (Art. 14[1]).

Revival.

Will may be revived by re-execution or by properly executed codicil showing intention to revive it. (Art. 15).

Witnesses.

Gift by will to person who witnesses will, or spouse or civil partner of any such person, void (Art. 8), but only if witness signs will (Art. 8[3]). Executor may be witness (Art. 10) and will not void because witness incompetent to be admitted witness to prove execution (Art. 7).

Foreign Executed Wills.

Will is valid in Northern Ireland if execution thereof conforms to internal law in force in country where it was executed, or in territory in which testator domiciled at his death, or in state of which testator was a national. (Wills Act 1963 [U.K.] [1963, c. 44]). To procure probate of will of person domiciled in U.S., or abroad, it is necessary to appoint corporation or person in Northern Ireland as attorney to extract grant. Court will follow foreign grant and exemplified copy of will properly legalised should be forwarded to attorney in Northern Ireland.

Copies of wills proved after year 1955 can be obtained from Principal Probate Registry, Belfast. Copies of wills proved prior to that date can be obtained from Public Record Office, Belfast.

See also topic 11.03 Descent and Distribution.

12 FAMILY

12.01 ADOPTION:

Legal adoption in N.I. is regulated by Adoption (N.I.) Order 1987. (1987, S.I. No. 2203 [N.I. 22]). Overseas adoption is regulated by Adoption (Intercountry Aspects) Act (N.I.) 2001 which gave effect to Convention of Protection of Children and Co-operation in respect of Intercountry Adoption and which extended Adoption (N.I.) Order 1987 insofar as it deals with overseas adoption.

Consent Required.

Adoption order not made in any case except with consent of every person who is parent or guardian of infant, and on application of one of two spouses, except with consent of other spouse. Child's stepparent acquiring responsibility under Family Law Act (N.I.) 2001 as result of court order does not have right to give or refuse consent to making of application under Adoption (N.I.) Order 1987. (§1[3] Family Law Act [N.I.] 2001). Consent of mother is of no effect if given within six weeks of birth of infant. If parent or guardian does not attend in proceedings on application for purpose of giving consent document signifying consent is admissible as evidence of that consent without further proof of signature. Court has power to dispense with consent where it is satisfied that person whose consent is to be dispensed with has abandoned, neglected or persistently ill-treated infant, is incapable of giving consent, cannot be found, has persistently failed to discharge obligations of parent, or unreasonably withholds consent, or in such other cases as court thinks fit. (§16[2] Adoption [N.I.] Order 1987).

Conditions Precedent.

No adoption order will be made unless infant is at least 19 weeks old and has been continuously in care and possession of applicant in Northern Ireland for at least thirteen weeks immediately preceding date of order, where applicant is relative or infant is placed with applicants by adoption agency or in pursuance of High Court Order. In case of intercountry adoption where adoption will be effected by Convention or child is habitually resident outside Northern Ireland and will be effected by adoption order rather than Convention adoption order, 13 week requirement will be extended to six months. Otherwise Order will not be made unless child is at least 12 months old and during preceding 12 months has lived with applicant. Before making order court must be satisfied that all necessary consents have been obtained and that person consenting understands nature of consent.

Restrictions on Sending Infants Abroad.

Without authority of court order no person may take or send an infant who is a British subject out of Northern Ireland to any place outside British Islands with view to adoption of infant (whether in law or fact) by any person not being parent or guardian or relative of infant.

Registration of Adoption Orders.

Every adoption order contains a direction to Registrar General to make an entry in Adopted Children Register which contains particulars of name, sex, date and country of birth of infant and particulars of adopter and adoption order. Index may be searched and certified copies of entries therein obtained. In relation to overseas adoptions Registrar General has power to decide whether he has necessary information relating to adopted child under registrable foreign adoption to enable entry to be made in Adopted Children Register.

Effect of Revocation of Certain Orders.

Where person adopted in pursuance of order has subsequently become a legitimated person and order is then revoked, such revocation does not affect operation of law in relation to an intestacy which occurred or disposition made before revocation. High Court may order under 2001 Order that overseas adoption shall cease to be valid in Northern Ireland on ground that adoption is contrary to public policy or that authority which purported to authorise adoption was not competent to do so. However no application to Northern Irish Court will be allowed unless immediately before application person adopted or adopter resided in Northern Ireland.

Extended Powers of Court.

Convention relating to adoption of children was concluded at Hague in 1965 and as result provisions of Adoption (Hague Convention) Act (Northern Ireland) 1969 (1969, c. 22) were enacted giving court power to make adoption order on application of person resident in Northern Ireland, being U.K. national or national of Convention country, or person resident in Convention country being U.K. national, in respect of unmarried infant under 18 years of age who is U.K. national or national of Convention country and resides in Northern Ireland or Convention country. (1969, c. 22, §1 of 1969 Act was am'd by 1987 N.I. 22). Provision also made therein for recognition of foreign adoptions and adoption proceedings. (§4 am'd by 1995 N.I. 2; §5 am'd by 1987 N.I. 22 & 1995 N.I. 2; §7 am'd by 1995 N.I. 2 [Children (N.I.) Order 1995]).

Restrictions on Bringing Children into N.I. for Adoption.

Resident of Northern Ireland who brings child into Northern Ireland for purpose of adopting that child shall be guilty of offence under 2001 Order unless certain requirements have been satisfied. This does not apply where child has been brought into Northern Ireland for purpose of adoption by parent, guardian or relative - same as English Law.

12.02 CIVIL PARTNERSHIPS:

Civil Partnership Act 2004 (2004, c. 33) introduced concept of Civil Partnerships to Northern Ireland. This allows two people of same sex to form relationship similar to that of marriage with similar rights on separation and on death. Any references to sections in this part are references to Civil Partnership Act 2004, unless indicated otherwise.

Formation.

Two people are regarded as having registered as civil partners of each other once each of them has signed civil partnership schedule in presence of (a) each other, (b) two witnesses, both of whom professes to be over 16, and (c) registrar. (§137[1]). After civil partnership schedule has been signed under §137, it must also be signed, in presence of civil partners and each other, by (a) each of two witnesses, and (b) registrar. (§137[3]). After witnesses and registrar have signed civil partnership schedule, registrar must cause registration of civil partnership to be recorded as soon as possible. (§137[5]).

Eligibility.

Two people not eligible to register as civil partners of each other if (a) they are not of same sex, (b) either of them is already civil partner or lawfully married, (c) either of them is under 16, (d) they are within prohibited degrees of relationship (Sch. 12), or (e) either of them is incapable of understanding nature of civil partnership. (§138).

12.03 DIVORCE:

Law regulating divorce, previously based on principle of “matrimonial fault” and governed by Matrimonial Causes Act (N.I.) 1939 (2 & 3 Geo. 6, c. 13 [N.I.]) has been replaced by system more closely akin to law of England, based on irretrievable breakdown of marriage. Governed by Matrimonial Causes (N.I.) Order, 1978 (1978, S.I. No. 1045 [N.I. 15]) and Family Law (N.I.) Order 1993 (1993 No. 1576 [N.I. 6]) and regulated by Matrimonial Causes Rules (N.I.) 1981 (1981, S.R. No. 184). Where any Art. or Rule is referred to without reference to Order or particular Statutory Rules, such Art. or Rule will be Art. of Matrimonial Causes (N.I.) Order, 1978, or Matrimonial Causes Rules (N.I.) 1981 as am'd by Matrimonial and Family Proceedings (N.I.) Order 1989 (1989 S.I. No. 677 [N.I. 4]).

Jurisdiction in matrimonial matters is exercised by Family Division of High Court or, where order made by Lord Chancellor is in force designating County Court sitting for any division as divorce County Court, County Court sitting for that division. (Art. 48). All County Courts have now been designated as Divorce County Courts, with jurisdiction to hear undefended divorces.

Domicile Requirements.

To give Northern Ireland courts jurisdiction to entertain proceedings for divorce or judicial separation: (a) Either spouse must be domiciled in Northern Ireland on date when proceedings commence, or (b) have been habitually resident throughout period of one year ending with that date provided proceedings in respect of same marriage are not pending elsewhere. (Art. 49 as am'd by S.I. 2001/660).

Sole ground for divorce at suit of either party to marriage is that marriage has broken down irretrievably. (Art. 3[1]). Court hearing divorce petition cannot grant divorce unless petitioner satisfies court of one or more of following “specified facts”, namely: (a) Adultery by respondent; (b) behaviour by respondent of such kind that petitioner cannot reasonably be expected to live with respondent; (c) desertion of petitioner by respondent for continuous period of two years immediately preceding presentation of petition; (d) both parties having lived apart for continuous period of at least two years immediately preceding presentation of petition, and respondent consenting to divorce; (e) both parties having lived apart for continuous period of at least five years immediately preceding presentation of petition. (Art. 3[2]).

Limitation.

No divorce petition may be presented within two years of marriage. (1989 S.I. No. 677 [N.I. 4] Art. 3).

Parties.

Where in petition for divorce (or judicial separation) one party alleges other has committed adultery, he or she must make that person party to proceedings unless excused by court on special grounds from doing so. (Art. 53[1]). If court considers there is insufficient evidence against third party, it may dismiss third party from proceedings. (Art. 53).

Decree for divorce is at first "decree nisi" which is not made absolute, unless court fixes shorter period, until expiration of six weeks, during which time any person may show cause why decree should not be made absolute, and Crown Solicitor may intervene. (Art. 11).

Refusal of Divorce.

Court will refuse decree in following circumstances: (a) Where petitioner fails to satisfy court of one or more "specified facts" as in Art. 3(2); (b) where one or more specified fact proved, but court satisfied marriage has not broken down irretrievably; (c) where adultery is relied upon by petitioner, but petitioner having found out about adultery, both parties lived together for period exceeding, or periods together exceeding, six months (Art. 4[1]); (d) where five years separation alleged, if court satisfied respondent would suffer grave financial or other hardship, and it would in all circumstances be wrong to dissolve marriage (Art. 7).

Court may, at its discretion, refuse to dissolve marriage in following circumstances: (a) Where adultery is alleged, and respondent proves adultery committed with connivance of petitioner (Art. 4[2]); (b) where respondent consents to decree nisi after two years' separation only because he or she has been misled by petitioner (innocently or deliberately) into doing so, court may rescind decree nisi (Art. 12[1]); (c) where decree nisi is granted on either two or five years' separation, decree absolute may be refused where court not satisfied financial provisions made by petitioner for respondent are reasonable and fair, or best in circumstances (Art. 12); (d) where court not satisfied about arrangement for welfare of minor children of marriage, may refuse decree absolute (Art. 44 as am'd by 1995 [N.I. 5]).

Reconciliation.

If at any stage of divorce proceedings court considers there is reasonable possibility of reconciliation, court may adjourn proceedings for as long as it thinks fit to enable attempts to be made to effect such reconciliation, but if parties resume cohabitation during such adjournment, no account shall be taken of that fact for purposes of proceedings. (Art. 8).

Financial and Property Considerations.

Matrimonial Causes (N.I.) Order, 1978, as amended by Family Law (N.I.) Order 1993, contains wide range of detailed provisions for division of matrimonial property, including money, between parties to dissolved marriage, and for future maintenance of less financially secure party (whether wife or husband).

Maintenance Pending Suit.

On petition for divorce, nullity, or judicial separation, court can make order requiring either party to marriage to make to other such periodical payments for maintenance, beginning with date of presentation of divorce petition and ending on determination of proceedings, as court sees fit. (Art. 24).

Financial Provision Orders.

On granting decree of divorce, nullity or judicial separation, court can make any one or more of following orders: (a) Order for periodical payments; (b) order for secured periodical payments; (c) order for lump sum payment or payments; (d) order for periodical payments to person named in order for benefit of child of family, or directly to said child; (e) order for secured periodical payments to person named in order for benefit of child of family, or directly to said child; (f) order for lump sum payment or payments to person named in order for benefit of child of family, or directly to said child. (Art. 25). (Art. 25[7] am'd by [1989 N.I. 4] Matrimonial & Family Proceedings [N.I.] 1989). Clauses (d), (e) and (f) do not apply to children of family who have attained age of 18 years unless undergoing full-time education. (Art. 31). (Art. 31[2] am'd by SR 1993/98 & 31[2][a] 1989 [N.I. 4]; Art. 31[4] am'd by SR 1993/98 & 2000 c. 4 [N.I.]).

Property Adjustment Orders.

On granting decree of divorce, nullity, or judicial separation, court can make any one or more of following orders: (a) Order that party to marriage transfers to other party, to any child of family, or to such person as specified in order for benefit of child of family, any property specified; (b) order that settlement of specified property be made for benefit of other party to marriage and of children of family; (c) order varying any ante-nuptial or post-nuptial settlement (including one made by will or codicil); (d) order extinguishing or reducing interest of either of parties to marriage under any such settlement. (Art. 26). Clause (a) does not apply to children of marriage who have attained age of 18 years, unless undergoing full-time education. (Art. 31).

Considerations to Which Court is to have Regard.

Court has duty, in deciding whether to exercise its powers under Arts. 25 (Art. 25[7] am'd by 1989 [N.I. 4]) or 26 (Art. 26 am'd by 1999 [N.I. 11] Welfare Reform & Pensions [N.I.] Order 1998) to have regard to all circumstances of case, including following matters: (a) Income, earning capacity, property and other financial resources of each party; (b) financial needs, obligations and responsibilities of each party; (c) standard of living enjoyed by family before breakdown of marriage; (d) age of each party and duration of marriage; (e) any physical or mental disability of either party; (f) contributions made by each of parties to welfare of family, including contributions made by looking after home or caring for family; (g) value to either party of any benefit (for example, pension) which dissolution or annulment of marriage would adversely affect.

Court's duty is to exercise its powers under Arts. 25 and 26 so as to place parties, as far as is practicable, and, having regard to their conduct, just to do so, in financial position in which they would have been if marriage had not broken down and each had properly discharged his or her financial obligations and responsibilities towards other. (Art. 27[1]).

In deciding whether to exercise its powers under Arts. 25 or 26 in relation to child of family, court has duty to consider all circumstances of case including following: (a) Financial needs of child; (b) income, earning capacity (if any), property and other financial resources of child; (c) any physical or mental disability of child; (d) standard of living enjoyed by family before breakdown of marriage; (e) manner in which child was being educated or trained.

Court's duty is to exercise its powers so as to place child, so far as is practicable, in financial position in which child would have been if marriage had not broken down and each party had properly discharged his or her financial obligations and responsibilities towards him. (Art. 27[2] as am'd by 1999 [N.I. 11]).

Commencement of Proceedings for Relief.

Where petitioner seeks such financial or property relief as is mentioned in Arts. 24, 25 and 26, such application shall be included in petition. Applications by respondent shall be included in answer to petition. Applications by either party if not so made require leave of court. (Art. 28).

Duration of Financial Provision Orders.

No order for periodical payments or secured periodical payments can extend beyond death or remarriage of benefiting party. After dissolution or annulment of marriage, no party can apply for financial provision order or property adjustment order after remarrying. (Art. 30 as am'd by 1989 [N.I. 4]).

Court will not make absolute decree of divorce or nullity or grant decree of judicial separation, unless court, by order, declares itself satisfied: (a) That there are no children to whom this legislation applies; or (b) that satisfactory arrangements have been made for children; or (c) it is impracticable for party or parties to make such arrangements; or (d) that circumstances make it desirable for decree to be granted or made absolute without delay, despite fact that no satisfactory arrangements have yet been made. (Art. 44 am'd by 1995 [N.I. 2]).

Remarriage.

Either party may remarry after decree has become absolute, unless appeal is pending.

Judicial Separation.

Petition for judicial separation may be presented to court by either party on ground that any of five “specified facts” as outlined above (see Art. 3[2], subhead Sole Ground, supra) exist. Court is not concerned whether marriage has broken down irretrievably. If court satisfied of existence of one or more specified fact, it must grant decree of judicial separation.

Petty Sessions Courts have jurisdiction under Domestic Proceedings (N.I.) Order 1980 (1980, S.I. No. 563 [N.I. 5]) as amended by Family Law (N.I.) Order 1993 to grant either party to marriage order for financial provision on ground that other party to marriage: (a) Has failed to provide reasonable maintenance for applicant; or (b) has failed to provide, or to make proper contribution towards, reasonable maintenance for any child of family; or (c) has, since date of marriage, committed adultery; or (d) has behaved in such way that applicant cannot reasonably be expected to live with respondent; or (e) has deserted applicant.

Petty Sessions Court may make any one or more of following orders for financial provision: (a) Order that respondent shall make to applicant such periodical payments, and for such term, as may be specified in order; (b) order that respondent shall make to applicant such lump sum as may be so specified; (c) order that respondent shall make to applicant for benefit of child of family to whom application relates, or to such child, such periodical payments, and for such term, as may be so specified; (d) order that respondent shall pay to applicant for benefit of child of family to whom application relates, or to such child, such lump sum as may be so specified.

If there is child of family under age of 18, Petty Sessions Court has power to make order regarding: (a) Legal custody of such child and (b) access to any such child by either party to marriage or any other person who is parent of that child. Court shall not dismiss application or make final order for financial provision until it has decided whether to exercise its power regarding legal custody and access.

Nullity of Marriage.

Effect of decree of nullity is that there was no marriage at all, whether it was void or voidable. Marriage can be declared void ab initio on following grounds only: (a) Parties are within prohibited degrees of relationship; (b) either party is under 16 years; (c) by reason of noncompliance with any statutory provision or rule of law governing formation of marriage; (d) at time of marriage either party was already lawfully married; (e) parties not respectively male and female; (f) in case of polygamous marriage entered into outside Northern Ireland, that either party was at time of marriage domiciled in Northern Ireland. (Art. 13). (Art 13[2] am'd by 1995 [N.I. 20] Polygarnals Marriages [N.I.] Order 1995).

Marriage is voidable on following grounds only: (a) Marriage not consummated owing to incapacity of either party; (b) non-consummation owing to wilful refusal of respondent; (c) lack of valid consent to marriage by either party (i.e., through duress, mistake or unsoundness of mind); (d) where either party, though capable of valid consent, was suffering (continuously or intermittently) from mental disorder within meaning of Mental Health Act (N.I.) 1961 (1961, c. 15) of such kind or to such extent as to be unfitted for marriage; (e) at time of marriage, respondent suffering from venereal disease in communicable form; (f) at time of marriage respondent pregnant by another party (Art. 14). (Art. 14[d] am'd by 1986 [N.I. 4] Mental Health [N.I.] Order 1986).

Court cannot grant decree of nullity unless satisfied petitioner was at time of marriage ignorant of facts alleged, and that proceedings were instituted within three years of marriage. (Art. 16 am'd by 1989 [N.I. 4]; Art. 16[2] of [4-5]).

Presumption of Death.

Any married person who alleges reasonable grounds exist for presuming other party dead may present petition to High Court for dissolution of marriage. Fact that for seven years or more other party to marriage has been continually absent from petitioner and petitioner has no reason to believe other party has been living within that time shall be evidence that other party is dead. High Court can then grant decree of presumption of death and dissolution of marriage. (Art. 21).

Publication of any particulars, in any newspaper or periodical, other than (1) Names, addresses and occupations of parties and witnesses, (2) concise statements of charge and defence, (3) submissions on any point of law, (4) judgment of court and court's observations in giving judgment; in relation to any judicial proceedings for dissolution or nullity of marriage is prohibited by Matrimonial Causes (Reports) Act (Northern Ireland) 1966. (1966, c. 29).

12.04 HUSBAND AND WIFE:

A married woman is free to contract and is subject to the bankruptcy laws as if she were a feme sole. She can hold property free from any liability for her husband's debts and may dispose of same as she wishes. He is liable on foot of his wife's contracts for necessaries, e.g., food, clothes, medical fees, and articles for the home. The wife has implied authority to pledge his credit for such necessaries; but if a husband gives a wife a housekeeping allowance such authority may be cancelled.

Prior to 1938, property could be left or given to a married woman subject to the proviso that she be restrained from anticipating or alienating it during coverture. Such a provision in a deed or will made before 1938 is still operative but in any instrument executed since that date is void.

Actions.

In actions by or against married woman joinder of husband is unnecessary. Wife can sue husband in contract and tort.

Desertion and Nonsupport.

Any married woman whose husband has deserted her or has been guilty of wilful neglect to provide reasonable maintenance for her or for any of her children under age of 16 years (or under age of 18 years if receiving full-time training or education) whom he is legally liable to maintain may apply to court of summary jurisdiction for order that husband shall pay to wife personally or for her use to any officer of court or any third person on her behalf weekly sum and in any case where there are children under age of 16 years weekly sum in respect of each child.

If in the opinion of court of summary jurisdiction matters in question between parties would be more conveniently dealt with by High Court, court of summary jurisdiction may refuse to make order under Domestic Proceedings (N.I.) Order, 1980. (1980, S.I. No. 563 [N.I. 5]).

12.05 INFANTS:

Age of Majority.

From Jan. 1, 1970, person, either sex, attains majority at 18, whether 18 reached before or after that date (Age of Majority Act [Northern Ireland] 1969 [1969 c. 28]).

Emancipation.

No special statutory provisions.

Disabilities.

In general an infant has no power to contract except for necessaries.

Ratification of Contracts.

Infants may ratify all contracts after majority. No writing needed. By Minors' Contracts (Northern Ireland) Order, 1988 (1988, S.I. No. 930 [N.I. 9]) minors can ratify otherwise unenforceable contracts on attaining majority. Order also provides for guarantees of contractual obligations entered into by minors to be enforceable against guarantors.

Actions.

Infant may sue by guardian if any or next friend. No court appointment needed. Guardian ad litem or next friend may upon request be appointed by the court to protect the interest of any minor or person unborn, unascertained or under disability in any suit relating to property in which such person may be or may become interested.

Torts.

Infant is liable for torts. Negligence of parent or custodian not imputed to infant.

12.06 MARRIAGE:

The word “marriage” as understood by Northern Ireland courts means voluntary union for life of one man and one woman to the exclusion of all others, as understood in Christian countries.

Polygamous Marriages.

Apart from divorce jurisdiction, Northern Ireland courts will usually treat polygamous marriages, valid according to law of the domicile, as binding in matters of property, legitimacy and succession.

Evidence of Ceremony.

Where usual evidence of a valid marriage is not forthcoming or is not readily available, in civil suits, if there is evidence of a ceremony of marriage having been gone through followed by cohabitation of parties, everything necessary for validity of marriage will be presumed in the absence of decisive evidence to the contrary, even though it may be necessary to presume grant of a special license.

Requisites for Valid Marriage.

(1) Age: Each party must have attained age of 16 years. (2) Mental Capacity: Each party must have mental capacity to marry. Lunatics cannot marry, nor can persons of unsound mind (not so found by inquisition or certified as a lunatic) unless he understands nature of contract or marries during a lucid interval. (3) Prohibited Degrees: Each party should be outside prohibited degrees of affinity and consanguinity which are those annexed to Book of Common Prayer subject only to exceptions contained in Family Law (Miscellaneous Provisions) (N.I.) Order 1984 as amended by Family Law (N.I.) Order 1993 (1993 No. 1576 [N.I. 6]). (4) Subsisting Marriage: Neither of the parties may be married to someone else if valid marriage is still subsisting (see also topic 12.03 Divorce). (5) Free Consent and Understanding: Each party should consent to

intermarry with a proper understanding of the contract. (6) Each party must be competent to perform marital intercourse (see also topic 12.03 Divorce). (7) Ceremonies of marriage must be performed in due form: Marriages must be celebrated either (a) according to rites of Roman Catholic Church, (b) according to usages of Presbyterians, (c) according to usages of Quakers and Jews, (d) under Registrar's Certificate or licence, (e) special licence.

British Marriages Abroad.

Marriages abroad by British subjects may be validly contracted in three ways (1) under common law i.e., solemnised before a Priest either of the Church of England or the Church of Rome, (2) by lex loci contractus, (3) under Foreign Marriage Act 1892 §1, which provides that all marriages between parties of whom at least one is a British Subject, solemnised in manner provided in Act, in any foreign country by or before a marriage officer who include a British Ambassador, or Minister accredited to country in question, or a prescribed officer to solemnise marriages in embassy or legation, British Consuls, a governor, high commissioner, resident or other consular officers.

Marriages solemnised by a Chaplain serving with any part of H.M. Forces in any foreign territory are, subject to certain provisos, valid.

There are no restrictions on marriage with foreigners.

Annulment.

See topic 12.03 Divorce.

13 FOREIGN TRADE AND COMMERCE

13.01 CUSTOMS:

Power to legislate with respect to customs (reserved matter) excluded from competence of Northern Ireland Assembly by Northern Ireland Act 1998. (1998, c. 47 [U.K.] Sch. 3). Northern Ireland is integral part of U.K. of Great Britain and Northern Ireland with no internal customs between Britain and Northern Ireland. (See category 1 Introduction, topic 1.02 Government and Legal System.) Customs duty payable on certain goods crossing border between Northern Ireland and Republic of Ireland, which is U.K.'s only land frontier.

All Acts of U.K. Parliament on this topic apply to Northern Ireland unless their application is expressly or by implication excluded. See England Law Digest, category Foreign Trade and Commerce, topic Customs. See also European Union Law Digest, category Foreign Trade and Commerce, topic Customs Duties.

13.02 EXCHANGE CONTROL:

Power to legislate with respect to coinage, legal tender or negotiable instruments (including banknotes) excluded from competence of Northern Ireland Assembly, except insofar as negotiable instruments may be affected by exercise of powers of taxation. (Northern Ireland Act 1998 [1998, c. 47 (U.K.) Sch. 2]). See category 1 Introduction, topic 1.02 Government and Legal System.

13.03 FOREIGN EXCHANGE:

See topic 13.02 Exchange Control.

13.04 FOREIGN INVESTMENT:

Industrial Development Board for Northern Ireland, I.D.B. House, 64, Chichester Street, Belfast, is responsible for all matters relating to establishment of new, or expansion of existing, industrial undertakings in Northern Ireland. Since 1998 Industrial Development Board was revamped as Invest Northern Ireland. Information about facilities for industrial development in Northern Ireland may also be obtained from: Invest Northern Ireland, Ulster Office, 11, Berkeley Street, London, W1X 6BU; or from Invest Northern Ireland, British Consulate General, 150 East 58th Street, New York, NY 10155. Invest Northern Ireland offers special assistance and generous grants to encourage industrial development under Industrial Development (N.I.) Order, 1982.

Invest Northern Ireland was established by 1982 Order. Functions of Board are to advise Head of Department of Enterprise, Trade and Investment generally on formulation and implementation of its industrial development policy. Department, through Board, has wide powers (subject to approval of Department of Finance and Personnel) to carry on, establish, develop, promote, assist and maintain any industrial undertaking for purposes of development or assistance of economy; promotion of industrial efficiency; and provision, maintenance or safeguarding of employment in Northern Ireland. Department may provide financial assistance, by arrangement with Department of Finance and Personnel, where such assistance is likely to provide, maintain or safeguard employment in any part of Northern Ireland. Department may also give financial assistance for research and development and for marketing of products.

Department may provide premises for industrial occupation, do anything required to develop land for industrial use, including erection of buildings and construction of access roads, and provision of fixtures and fittings. Department may give financial grants toward new machinery or plant. Grants are available in respect of industrial machinery; computers for business use; hire of machinery, plant or computers; renting of buildings needed for certain industrial processes; and mining activities subject to revision from time to time.

13.05 FOREIGN TRADE REGULATIONS:

Northern Ireland Assembly cannot legislate on trade with any place outside Northern Ireland, except so far as trade may be affected by exercise of its powers of taxation, or by regulations made for sole purpose of preventing contagious disease, or for protection of traders from fraud. (Northern Ireland Act 1998; 1998, c. 47 [U.K.] Sch. 3). See category 1 Introduction, topic 1.02 Government and Legal System.

All acts of the United Kingdom Parliament apply to Northern Ireland unless their application is expressly or by implication excluded. See England Law Digest, category Foreign Trade and Commerce, topic Foreign Trade Regulations. See also European Union Law Digest, category Foreign Trade and Commerce, topic Foreign Trade Regulations.

14 IMMIGRATION

14.01 ALIENS:

Power to legislate with respect to aliens, nationality or immigration excluded from competence of Northern Ireland Assembly by Northern Ireland Act 1998. (1998, c. 36 [U.K.] Sch. 2). See topic 14.02 Immigration; category 1 Introduction, topic 1.02 Government and Legal System; see also England Law Digest.

Corporations Owned or Controlled by Aliens.

There are no disqualifications applying to corporations owned or controlled by aliens, but catalogues, trade circulars, show cards and business letters of companies must state, inter alia, nationality of directors and managers, if not British. (1960, c. 22, §192). Corporation's register of directors and secretaries, as well as documents required to be lodged with Registrar of Companies and Friendly Societies with respect to directors and secretaries on incorporation and thereafter, must state, inter alia, nationality of directors and usual residential address of directors and secretaries. (Arts. 21, 297 and 298 The Companies [N.I.] Order 1986 [1986 S.I. 1032] [N.I. 6]).

See also category 2 Business Organizations, topic 2.03 Corporations, subhead Foreign Corporation.

14.02 IMMIGRATION:

Power to legislate with respect to nationality, immigration and aliens as such is excluded from competence of Northern Ireland Assembly by Northern Ireland Act 1998. (1998, c. 36 [U.K.] Sch. 2). (See category 1 Introduction, topic 1.02 Government and Legal System.) Law relating to immigration governed by Immigration Act 1971 (1971, c. 77 [U.K.]) as am'd by British Nationality Act, 1981 (1981, c. 61 [U.K.]); and, with respect to citizens of Member States of European Economic Community, by Treaty and Regulations of E.E.C. See European Union Law Digest, category Foreign Trade and Commerce, topic Internal Market, subheads Free Movement of Goods; and Free Movement of Workers and Freedom to Provide Services.

European Economic Community.

Until Jan. 1, 1978, Safeguarding of Employment Act (N.I.) 1947 (1947, c. 24) generally restricted employment under contract of service in Northern Ireland to Northern Ireland workers except under permit issued by Department of Manpower Services. Act no longer applies, and is superseded by provisions of E.E.C. Treaty. Treaty provides for free movement of workers within member states and states that “any discrimination based on nationality between workers of the Member States as regards employment, remuneration and other labour conditions” must be abolished. (Art. 48[2]). Subject to limitations justified on grounds of public policy, public security and public health, workers have right: (a) To accept offers of employment in another member state which have actually been made; (b) to move freely within territory of member states for this purpose; (c) to stay in member state for purpose of employment in accordance with provisions governing employment of nationals of that state laid down by law, regulation or administrative action; and (d) to remain in territory of member state after having been employed in that state, together with relatives living with them. These provisions do not extend to professions, employment in public service, banking, insurance (except reinsurance) and transport.

Channel Islands, Isle of Man, Republic of Ireland.

Arrivals from these places are excluded from control under Immigration Act 1971 for most purposes. Entry into U.K. via these places may be restricted. (1971, c. 77, §9 and Sch. 4).

Overseas Arrivals.

§2 of Immigration Act, 1971 (1971, c. 77 [U.K.]) as am'd by §39(2) of British Nationality Act, 1981 (1981, c. 61 [U.K.]) confers right of abode in U.K. on: (a) British citizens; (b) Commonwealth citizens having right of abode under 1971 Act (i.e. by birth, adoption, naturalization or marriage).

British citizens defined in Part 1 of 1981 Act as including: (i) Those born in U.K. to parent who is British citizen or settled in U.K.; (ii) foundlings; (iii) persons born in U.K., one of whose parents subsequently becomes settled in U.K. or becomes British citizen or has lived in U.K. for ten years from birth; (iv) children adopted by order of U.K. court; (v) children born overseas, if at least one parent is British citizen (otherwise than by descent) or British citizen in Crown service. Persons may also be registered as British citizens in certain circumstances. (§§3-10). British Nationality (Hong Kong) Act 1990 (1990, c. 34 [U.K.]) provides for acquisition of British citizenship by selected Hong Kong residents, their spouses and minor children.

§3 provides that persons who do not have right of abode require leave to enter U.K., which may be given for limited or indefinite period and which may be subject to conditions restricting employment or occupation in U.K. or requiring registration with police, or both. Section provides for system of immigration rules to administer Act and defines circumstances in which such persons may be deported (i.e., breach of conditions attached to entry; or if Secretary of State considers deportation to be conductive to public good).

15 INTELLECTUAL PROPERTY

15.01 COPYRIGHT:

Power to legislate with respect to copyright excluded from competence of Northern Ireland Assembly by Northern Ireland Act 1998. (1998, c. 47 [U.K.] Sch. 3). See category 1 Introduction, topic 1.02 Government and Legal System.

Statutes of U.K. Parliament therefore apply. See England Law Digest, category Intellectual Property, topic Copyright.

15.02 PATENTS:

Power to legislate with respect to patents or designs is excluded from competence of Northern Ireland Assembly by Northern Ireland Act 1998. (1998, c. 47 [U.K.]).

Law of patents has been considerably changed by Patents Act, 1977. It establishes new system of domestic law, gives effect to EEC Patents Convention and sets up new Patents Court. Minor amendments to 1977 Act by Copyright, Designs and Patents Act 1988. (1988, c. 48 [U.K.]) and Patents Act 2004 (2004, c. 16 [U.K.]). Except where contrary is indicated, reference to statutory provision is reference to 1977 Act. (1977, c. 37 [U.K.]).

Transitional Provisions.

Patents granted and applications for patents made before June 1, 1978 remain governed by Patents Act, 1949 but subject to certain amendments of which most important relate to duration. Patents granted before June 1, 1967 still run for 16 years with limited right to extension. Patents granted between June 1, 1967 and June 1, 1978 will run now for 20 years but without right to extension. Unless contrary appears all further references under this topic are to law established by Patents Act, 1977.

Patentability is now elaborately defined. Invention is not patentable unless it is new, involves inventive step and is capable of industrial application. (§1[1]). Number of inventions are never patentable, particularly scientific theories, aesthetic creations, computer programmes and biological processes except for those involving microbiology. (§1[3]).

Application for patent may be made by any person whether British citizen or not. Patents are granted primarily to inventor or joint inventors but may also be granted to any person entitled to legal interest in invention in U.K. at time of invention. They may also be granted to successors in title of either class of persons. (§7).

Mode of Application.

System of provisional protection under 1949 Act has been replaced for new applications by system of priority dates. Generally, priority date is date of filing of application at Patent Office. Priority may be gained if documents filed contain indication that patent is being applied for, applicant is identified, invention is described and filing fee paid (§15), even though documents do not fully comply with Act and Patent Rules, 1978. But such application will be treated as withdrawn unless within overall period of (generally) three and one-half years, requirements as to claims and abstracts are complied with and preliminary examination and search and substantive examination are both requested. Thus, although priority may sometimes be gained without full compliance with Act and Rules, it will almost always be necessary to file prescribed proper documents later. Formal application must be in prescribed form containing request for grant of patent, specification describing invention, abstract giving technical information and claim or claims. Claim or claims serve to delimit precise nature and extent of invention being patented. If patent is granted in respect of any claim or claims, it is their wording which forms basis of subsequent infringement proceedings. Consequently, they must be carefully and precisely drafted. (§14). Official searches made on application are now divided into two stages of preliminary examination and search and substantive examination, (§18). Two fees are payable.

Objections and Grant.

In contrast to 1949 Act objections are not receivable except by third parties as to whether they are entitled to patent invention in question. However, any person may lodge written observations as to whether invention is patentable at all. (§21). If Patent Office decides that application complies with Act and Rules, patent is granted upon payment of fee. It takes effect from date of publication in Official Journal and runs 20 years from date of filing of application. (§25). Renewal fees must be paid at end of fourth year from filing and every year thereafter within three month period ending with anniversary of filing date or else patent ceases. (§25).

Revocation.

Third party may apply to court or comptroller of Patent Office to revoke patent on any of following grounds, but no other: (A) Invention was not patentable; (B) patent was not granted to person entitled to make application. Ground (B) can only be invoked by person who has obtained prior finding of court or comptroller that he was person truly entitled to patent invention. Further, except in cases of fraud, ground (B) cannot be invoked unless proceedings which produced that finding were commenced within two years of grant of patent; (C) specification of patent does not disclose invention clearly and completely enough for skilled person to perform it; (D) matter disclosed in specification of patent extends beyond that disclosed in application for patent as filed; (E) protection conferred by patent has been extended by amendment which should not have been allowed. (§72 as am'd by Patents Act 2004).

Infringement.

Right to sue for infringement does not arise until patent is published and only in respect of acts after publication. Broadly, infringement may be defined as commercial use of or dealing with patented product or process without consent of proprietor of patent. In case of process there is no infringement unless user or dealer knew or ought to have known that his acts constituted infringement. (§60). Defendant to infringement action can rely on any ground of defence common to all actions but he may only attack validity of patent on grounds available upon application to revoke. Usual relief granted to successful plaintiff is injunction coupled with damages or account of profits. (§61). Damages or account will not be ordered against defendant honestly and reasonably ignorant of patent provided proceedings are brought in good faith. (§62 as am'd by Patents Act 2004). Failure to register transaction passing property in patent, license or sub-license within six months or if six months was too short as soon as practicable, also bars right of transferee to damages or account. (§68), Although secret prior user is no longer ground for revocation, bona fide prior use may be continued without constituting infringement.

Registration.

System of registration has been extended by 1977 Act. Grants, assignments, mortgages, vesting assents and court orders in relation to patent licenses and sub-licenses are all registrables. Priority of claims in respect of such property depends upon order of registration unless earlier unregistered transaction was known to person claiming under later register transaction. (§33).

Licenses.

To use or deal with patent can of course be negotiated with proprietor in ordinary way.

There is also system of compulsory and semi-compulsory licensing. Under latter, proprietor who is perfectly willing to grant licenses on such terms as comptroller may decide are reasonable can at any time apply to have entry in register to effect that licenses under patent are available as of right. If applicant for license as of right cannot agree on terms with proprietor they will be settled by comptroller. If declaration filed by patent owner, licence of right under transitional provisions in Schedule 1 cannot be had for medicinal use of patented product and such other uses as Secretary of State may specify by Order. (1988, c. 48, §29). Applications for settlement of terms for licences of right available under transitional provisions in Schedule 1 made more than one year before relevant patent becomes subject to licence of right provisions not permitted. (1988, c. 48 §294). Under former, any person may at any time after three years from grant apply to comptroller for compulsory license upon such terms as are reasonable. Possible grounds for application are that: (A) Invention can be worked commercially in U.K. but it is not being worked at all or to fullest practical extent; (B) U.K. demand for patented product is not being met on reasonable terms or is being met to substantial extent by imports; (C) commercial working of patent in U.K. is being prevented or hindered by imports of patented production of products produced by patented process; (D) injury to commerce and trade of U.K. by reason of refusal of licenses on reasonable terms; (E) injury to commerce and trade of U.K. by reason of imposition of conditions by proprietor. Finally Crown has certain right to patented inventions compulsorily upon such terms as may be agreed or as may be ordered by court. (§48).

Invalidity of Certain Contracts.

Under both 1977 and 1949 Acts certain restrictive convenants in connection with patented material are rendered void. More important are new provisions protecting rights of employees to their inventions as against their employers. These apply to persons mainly employed in U.K. and to persons attached to place of business in U.K. who are not mainly employed anywhere or whose place of employment cannot be determined. (§43 as am'd by Patents Act 2004). Employee's invention is his own unless made in course of usual or special duties in circumstances where he might reasonably be expected to make invention or unless invention was made in course of his duties and these duties and his responsibilities were such that he had special obligation to further his employer's interests. In those cases invention is his employer's but he is entitled to compensation to be assessed by court or comptroller. (§40 as am'd by Patents Act 2004). Any contract diminishing those various rights is to that extent unenforceable.

International Element.

One of major purposes of 1977 Act was to bring U.K. law into line with EC Patent Convention. Broadly, any EC patent is to be treated as patent under 1977 Act. (§72 as am'd by Patents Act 2004). Patent Cooperation Treaty is older system applying to many countries, including U.S. Applications to patents offices of countries adhering to treaty establish earlier date for U.K. purposes provided that application to U.K. Patent Office is filed within 12 months of filing of foreign application and declaration is made specifying earlier application.

Court.

1977 Act abolished Patents Appeal Tribunal and replaces it by Patents Court which is part of Chancery Division of High Court of Justice. (§96).

Patent Agents.

Applications to and proceedings before Patent Office are generally made and conducted by patent agents. (S.292, Copyright, Designs and Patents Act 1988). They are not lawyers in strict sense but are highly skilled in relevant law and practice. They are governed by Chartered Institute of Patent Agents, Staple Inn Buildings, London WC1.

15.03 TRADEMARKS AND TRADENAMES:

See Trade Marks Act 1994. (1994, C26[UK]).

Tradenames.

See category 3 Business Regulation and Commerce, topic 3.02 Commercial Register.

16 MINERAL, WATER AND FISHING RIGHTS

16.01 MINES AND MINERALS:

Property in all minerals existing in natural condition and in all mines for working of such minerals is vested in Department of Economic Development (Mineral Development Act [N.I.] 1969 [1969 c. 35], §1). Mines or minerals already vested in that Department (§3), Crown (§4), or which are property of any religious denomination or educational institution (§5) or which were being lawfully worked or developed by any person on Dec. 18, 1969 are excepted (§7). Owner of estate in possession in mines and minerals excepted by §7 must apply to Department for registration of that estate. (§8). Compensation is paid, subject to conditions, by Department for mines and minerals so vested under §1.

N.I. services in connection with coal and metalliferous mines and quarries are administered by Department of Economic Development, which has power to hold inquiries which it thinks necessary to ensure compliance with statutory obligations (Mining Industry Act, 1920 [10-11 Geo. 5, c. 50]). Mines of coal, stratified ironstone, shale and fireclay are governed by Mines Act (N.I.) 1969 (1969, c. 6); Coal Mines Regulation (Amendment) Act, 1917 (7 & 8 Geo. 5, c. 8); Coal Mines Act, 1919 (9 & 10 Geo. 5, c. 48); Mining Industry Act, 1920 (10 & 11 Geo. 5, c. 50); Coal Mines Act, 1931 (21 & 22 Geo. 5, c. 27); Under Mines (Working Facilities, etc.) Act (Northern Ireland) 1926 (16-17 Geo. 5, c. 9) [N.I.]).

Operation of Mines.

Every mine must be under management of one manager who is responsible for control and direction of that mine, and every owner or agent of any mine must appoint such manager to exercise personal daily supervision. Without approval of Department no person may act as manager for more than one mine. Every manager must be 26 years of age and holder of first class Certificate of Competency as awarded by Board for Mining Examinations. There must be in every mine at least two shafts or outlets with which every seam which is being worked shall have communication. Where two or more parts of mine are worked separately, owner or manager may give notice in writing to inspector of division (see subhead Inspection of Mines, infra) and thereupon each part will be treated as separate mine. Notice of any new shaft or seam must be given to Department of Economic Development in writing two weeks before shaft or seam is opened. (1969, c. 6, §§2-10).

Safeguarding Employees.

Provisions as to safety regarding ventilation; safety lamps; fencing and securing shafts and outlets; travelling and haulage roads and refuge holds; securing and propping of roofs and sides; signalling and telephones; fencing of dangerous machinery and boilers; electricity; explosives and dust are contained in §§22-97 of Mines Act (N.I.) 1969 (1969, c. 6) (see also Statutory Rules 1998/375). Provision of suitable sanitary conveniences, washing accommodation, and sprays when silicious rock is being drilled is also required. On application of Attorney General, High Court may by injunction prohibit working of any mine in which there is breach of safety provisions of any of relevant Acts.

Inspection of Mines.

Inspection is governed by Mines Act (N.I.) 1969 (1969, c. 6) and inspectors are appointed by Department of Economic Development. They have power to make any inspection, examination or inquiry as may be necessary to ensure that regulating Acts are complied with, and they are obliged to make periodic reports to Department of Economic Development as to condition of mines. Owners of mines, their servants or agents are under duty to furnish means required by inspector for entry, inspection, examination and exercise of any of his powers. Plan of mine and its ventilation must be kept and produced for inspector if required. Notice must be given to appropriate inspector of any accident in mine which results in loss of life. Workmen employed in mine may, at their own cost, appoint two of their number, or any two persons who have had more than five years mining experience, to inspect mine.

Prospecting Licence.

Where mines and minerals are vested in Department, that Department may, subject to any rights conferred upon any other person by any lease or licence granted by Department, either enter on land and do whatever is reasonably necessary for purposes of searching for those mines or grant to any person licence to do what Department is authorized to do. (1969, c. 35, §11). Before doing so Department must advertise in Belfast Gazette and in at least one newspaper circulating in locality where land is situated. (§11).

Abandoned Mines.

Notice of any abandoned shaft or seam must be given to Department of Commerce, and owner of any abandoned mine must ensure that top or entrance of every shaft or outlet is surrounded by structure of permanent character which will prevent accidents. Any unfenced abandoned shaft may be deemed nuisance under Public Health Acts.

Taxes.

Income from mines is taxed under Schedule D Case 1. Reliefs for certain capital expenditure, treatment of demolition costs, etc., see Finance Acts (15-16 Geo. 6 & 1 Eliz. 2, c. 10, §305; 2-3 Eliz. 2, c. 44, §21).

17 MORTGAGES

17.01 CHATTEL MORTGAGES:

Mortgages of chattels except those executed by limited companies, which require registration under the Companies Order (soon to be Companies Act 2006) (see category 2 Business Organizations, topic 2.03 Corporations) or by credit unions, which require registration under Credit Unions (Northern Ireland) Order, 1985 (1985, S.I. No. 1205 [N.I. 12]) must be in form prescribed by Bills of Sale (Ireland) Act (1879); Amendment Act 1883 (46-7 Vict., c. 7 [U.K.]). There are two classes of bills of sale. First comprises absolute bills of sale, to which Bills of Sale (Ireland) Act (1879) (42-3 Vict., c. 50 [U.K.]) applies, and second comprises bills of sale given to secure payment of money and principal Act and amending Act are construed together.

An agreement, whether intended or not to be followed by the execution of any other instrument, by which a right in equity to any personal chattels, or to any charge or security thereon, is conferred, is a bill of sale. A bill of sale by way of security made or given in consideration of any sum under £30 is void. Every bill of sale must set forth consideration for which it was given.

What May be Mortgaged.

The Bills of Sale Acts relate only to personal chattels which come under one or other of four classes of things: (1) Goods, furniture and other articles capable of complete transfer by delivery; (2) growing crops when assigned or charged separately from the land; (3) fixtures when assigned or charged separately from the land; and (4) trade machinery, which for the purposes of the Acts is to be deemed personal chattels.

The subject matter of bills of sale by way of security is restricted by certain provisions of the amending Act which require in order that a bill of sale by way of security should have effect against persons other than grantor, that the personal chattels to which it relates should be specifically described in the schedule annexed to the bill of sale, and that grantor should be the true owner of such personal chattels at time of its execution. These provisions are subject to certain exceptions in the case of growing crops, fixtures, plant and trade machinery.

Although an instrument purporting to assign by way of security property other than personal chattels is void as a bill of sale, it may nevertheless be valid as regards property not deemed to be personal chattels within the meaning of the principal Act.

After Acquired Property.

A bill of sale by way of security is void except as against grantor in respect of any personal chattels specifically described in the schedule thereto of which the grantor was not the true owner at time of execution of the bill of sale. But the rules imposed by the amending Act with regard to the true ownership at the time of the execution of the bill of sale, and to the specific description of chattels in the schedule are subject to exceptions (1) in the case of growing crops separately assigned or charged, where such crops are actually growing at time when bill of sale was executed and (2) in case of fixtures separately assigned or charged, plant, or trade machinery, when they are in substitution for like fixtures, plant, or trade machinery which are specifically described in the schedule. And bills of sale, if in the statutory form, of such growing crops, and bills of sale with a schedule contemplating the substitution of fixtures, plant, or trade machinery for those assigned, will be valid against third parties as well as against grantor, although grantor was not the true owner of such growing crops or substituted articles, and although they are not specifically described in the schedule.

Requisites of Instrument.

A bill of sale must truly set forth the consideration for which it was given and a bill of sale made or given by way of security for payment of money by a grantor thereof is void unless in accordance with the form in the Schedule to the amending Act annexed. A bill of sale must be complete in itself and if it has to be read with some collateral agreement it is not in accordance with the statutory form.

The names of the respective parties must be filled up with addresses and descriptions. Some consideration must be inserted. The form requires that a fixed sum shall be secured, and a bill of sale cannot be given by way of indemnity, the amount ultimately payable being uncertain nor can future advances be included. It must contain an agreement to repay the principal sum at a certain stipulated time or times. Every bill of sale given by way of security must have annexed thereto or written thereon a schedule containing an inventory of the personal chattels comprised in it. The name, address and description of the attesting witness or witnesses must be stated. Where registration is made void by failure to comply with the statutory requirements a bill of sale given by way of security is void in respect of the personal chattels comprised therein.

Execution of instrument by the grantor of a bill of sale by way of security must be duly attested by one or more creditable witnesses, not being parties thereto.

Filing.

Bills of sale given by way of security must be registered within seven clear days after the execution thereof or if executed in any place out of Northern Ireland then within seven clear days after the time at which it would, in the ordinary course of post, arrive in Northern Ireland if posted immediately after execution thereof. The bill of sale with every schedule or inventory thereto annexed or therein referred to and a true copy of such bill and of such schedule or inventory and of every attestation of such execution of such bill of sale together with an affidavit containing certain required particulars must be presented to the Registrar and the copy bill of sale and affidavit must be filed with him. The affidavit presented to and filed with the Registrar must prove the following facts: (1) The due execution and attestation of the bill of sale; (2) the residence and occupation of the grantor and of every attesting witness; and (3) the true date of execution of the bill of sale. The affidavit may be sworn before a master of the High Court or a Commissioner of Oaths.

Re-Filing or Extension.

The registration of a bill of sale must be renewed once at least every five years and if a period of five years elapses from registration or renewed registration of a bill of sale without a renewal or further renewal, as the case may be, the registration becomes void. The renewal by a registration is effected by filing with the Registrar an affidavit stating date of the bill of sale and of the last registration thereof and the names, residences and occupations of the parties thereto as stated therein and that the bill of sale is still a subsisting security.

Seizure.

Grantee cannot seize or take possession of the goods except for the causes specified in the amending Act. Possession may be taken for any one or more of those causes even though no express power of seizure is conferred by the bill of sale. Personal chattels assigned under a bill of sale given by way of security, are not liable to be seized or taken possession of by the grantee for any other than the following statutory causes: (1) If grantor makes default in payment of the sum or sums secured by the bill of sale at the time therein provided for payment; (2) if the grantor makes default in performance or any covenant or agreement contained in the bill of sale or necessary for maintaining the security; (3) if grantor becomes bankrupt; (4) if grantor suffers the goods assigned by the bill of sale or any of them to be distrained for rent, rates or taxes; (5) if grantor fraudulently either removes or suffers the goods or any of them, comprised in the bill of sale, to be removed from the premises; (6) if grantor does not, without reasonable excuse, upon demand in writing by grantee produce to him his last receipts for rent, rates and taxes; and (7) if execution is levied against the goods of grantor under any judgment at law. No power of seizure can be given for breach of agreements differing from the causes of seizure within the Act and to make seizure lawful the conditions of the Act must be observed.

Satisfaction or Discharge.

Where a debt secured following a bill of sale has been satisfied or discharged the Registrar may order a memorandum of satisfaction to be written upon any registered copy of the bill. Leave to enter up satisfaction may be obtained ex parte on a consent signed by the person entitled to the benefit of the bill of sale, attested by witnesses and verified by an affidavit being produced to the Registrar and filed in the Central Office. Where consent cannot be obtained an order to enter up satisfaction may be obtained on summons in chambers.

Form

This Indenture made the . . . . day of . . . ., between A. B. of . . . . of the one part, and C. D. of . . . . of the other part, witnesseth that in consideration of the sum of £. . . now paid to A. B. by C. D., the receipt of which the said A. B. hereby acknowledges (or whatever else the consideration may be), he the said A.B. doth hereby assign unto C. D., his executors, administrators, and assigns, all and singular the several chattels and things specifically described in the schedule hereto annexed by way of security for the payment of the sum of £ . . ., and interest thereon at the rate of . . . per cent, per annum (or whatever else may be the rate). And the said A. B. doth agree and declare that he will duly pay to the said C. D. the principal sum aforesaid, together with the interest then due, by equal . . . . payments of £. . . on the . . . . day of . . . . (or whatever else may be the stipulated times or time of payment). And the said A. B. doth also agree with the said C. D. that he will (here insert terms as to insurance, payment of rent, or otherwise, which the parties may agree to for the maintenance or defeasance of the security).

Provided always, that the chattels hereby assigned shall not be liable to seizure or to be taken possession of by the said C. D. for any cause other than those specified in section seven of the Bills of Sale (Ireland) Act (1879) Amendment Act, 1883.

In witness, &c. . . . .

Signed and sealed by the said A. B. in the presence of me, E. F. (add witness' name, address, and description).

Sale by Mortgagee.

Chattels seized under a bill of sale given by way of security must before removal or sale remain on the premises where seized until after the expiration of five clear days from the day they were seized, within which time of five days from the seizure the grantor may apply for relief.

17.02 MORTGAGES OF PERSONAL PROPERTY:

See topic 17.01 Chattel Mortgages.

17.03 MORTGAGES OF REAL PROPERTY:

A mortgage can be either legal or equitable.

Legal mortgage is one duly executed by deed or memorandum in writing, the legal interest in the lands or chattel passing to the mortgagee or lender.

Equitable mortgage can be effected by merely depositing the title deeds or other evidence of ownership with the mortgagee, no formal transfer document being executed. In this case the legal interest remains with the mortgagor while the equitable interest passes to the mortgagee.

Registration.

Mortgages of land should be registered in the registry of deeds. See category 9 Documents and Records, topic 9.04 Records. Mortgages executed by limited companies should be registered in Registry of Companies and Friendly Societies, Belfast—see category 2 Business Organizations, topic 2.03 Corporations.

Remedies of the mortgagee are:

(a) Foreclosure and sale, i.e., calling in the security. In this event the subject of the Mortgage must be sold and if a greater amount than the mortgage debt is recovered the mortgagee becomes trustee for the balance to the mortgagor.

(b) The mortgagee may enter into possession of mortgaged lands and take the rents and profits thereof. The accounting required is so strict that it is generally considered best to avoid this remedy where possible.

(c) Appointment of a receiver. The safest method is to apply to the Chancery Division of the Supreme Court or to the County Court if the matter is within the County Court jurisdiction (see category 6 Courts and Legislature, topic 6.01 Courts) to have receiver appointed. Receiver will enter into possession, receive rents and profits and account for them to Court.

Assignment.

Mortgages may be assigned in any of the ways in which they may be created.

Redemption.

The usual method of recording redemption is to endorse a short memorandum of satisfaction on the mortgage instrument. This, of course, should be registered in the registry of deeds if the mortgage was so registered.

18 PROPERTY

18.01 ABSENTEES:

There are no special provisions relating to rights or liabilities of persons residing out of Northern Ireland or who have departed therefrom or relating to the care of property, process agents or escheat.

Process Agent.

No duty to appoint agent for service of process. When defendant by his solicitor undertakes in writing to accept service and enters an appearance all obligation as to service of writ of summons is waived or dispensed with, and such an undertaking remains in force for six years. (0.9.r.1). Once undertaking is given, defendant is bound by authority he has given to his solicitor. Parties may agree that service of writ shall be good if made in a particular way unless such agreement involves asking court to do something which by rules it is forbidden to do. Person without jurisdiction can contract to have domicile for purpose of being sued within jurisdiction and service on agent named in contract to accept service is good, but agreement between parties cannot give court jurisdiction to do that which is forbidden by rules. (British Wagon Company v. Gray, [1896] 1 Q.B. 35).

Escheat.

County court has jurisdiction to hear and determine any action for recovery of land (irrespective of amount of annual value) where (a) At least six months rent of land remains unpaid and (b) tenant has deserted or otherwise abandoned land leaving any premises thereon unoccupied or land not farmed in accordance with rules of good husbandry. (Art. 12[3] County Courts [N.I.] Order, 1980 [1980, S.I. No. 397 (N.I. 3)]). Landlord of premises to which Business Tenancies (N.I.) Order 1996 (1996 No. 725 [N.I.5]) applies must satisfy Lands Tribunal that: (a) He has taken all reasonable steps to communicate with person last known to him to be tenant, and has failed to do so; (b) during period of six months ending with date of application neither tenant nor any person claiming under him has been in occupation of premises comprised in tenancy or any part thereof; and (c) during said period no rent has been payable by tenant, or if rent payable has not been paid. Lands Tribunal may order tenancy to determine from date of order. (1996 N.I.5 Art. 37).

18.02 CURTESY:

Abolished by Administration of Estates Act (Northern Ireland) 1955. (1955, c. 24).

18.03 DEEDS:

Deeds must be signed, sealed and delivered and should be executed in the presence of two respectable witnesses who, in addition to signing their names, should subscribe their full addresses and descriptions, businesses or occupations. Seals of Bodies Corporate to be affixed in presence of at least two witnesses who sign their names.

Document signed by director and secretary or two directors of company and expressed to be executed by company has same effect as if executed under company's common seal. Document executed by which on face of it is clearly deed has effect, upon delivery, as deed and is presumed to be delivered upon being executed. (Art. 46A, 1990 S.I. 1504 [N.I. 10]).

Recording.

With exception of leases not exceeding 21 years where actual possession goes with the lease a memorial of all deeds, whether voluntary or for valuable consideration and whether creating a legal or equitable interest can be registered in Registry of Deeds. (Registration of Deeds Act [Northern Ireland] 1970 [1970, c. 25]).

Conveyances Compulsorily Subject to Registration are: (1) Conveyances of any estate for charitable uses which are void unless registered within three months after their execution (7 & 8 Vict., c. 97 [U.K.], §16); (2) certificate of appointment of bankrupts assignees must be registered within two months (20 & 21 Vict., c. 60, [U.K.], §269); (3) instrument executed by tradesmen or shopkeepers in Northern Ireland charging their goods after their death for their widow and children must be registered within four months after execution to bar creditors (5 Geo., c. 4 [Ir.]); (4) charging order for and advances under Land and Property Improvement Acts and other statutes (10 & 11 Vict. c. 32 [U.K.], §§ 21, 52, 21 & 22 Vict., c. 72, §51, 28 & 29 Vict., c. 88, §§6 & 7).

The Memorial must comply with provisions of Schedule 1 of 1970 Act (1970, c. 25) and must contain date when instrument perfected; names, addresses and occupations or descriptions of all parties and witnesses to instrument; and must specify land affected by instrument with name of street and county borough if land situated in a county borough; or county, barony and townland if land situated elsewhere, together with name of village and town where applicable.

Memorial need not be signed, sealed or attested, in case of any document lodged for registration. (§5 Registration of Deeds [Amendment] Act [Northern Ireland] 1967 [1967, c. 30]).

In case of wills registration is no longer possible. (§2 Registration of Deeds [Amendment] Act [Northern Ireland] 1967 [1967, c. 30]).

It is sufficient proof of execution of document if execution by grantor under document is attested by two witnesses who subscribe their names, address, and occupations or descriptions to document, and so execution of document need not be proved by affidavit.

Stamp Tax on Deeds.

See category 19 Taxation.

18.04 DOWER:

Abolished by Administration of Estates Act (Northern Ireland) 1955.

18.05 PERPETUITIES:

Common law rule applies to all instruments taking effect prior to Mar. 26, 1966.

Perpetuities Act (N.I.) 1966 (1966, c. 2) alters rule against perpetuities in relation to instruments taking effect after Mar. 26, 1966. Disposition (§16) is not void for remoteness until such time (if any) that interest disposed of cannot vest within perpetuity period; until then it is treated as if it were not subject to rule against perpetuities (§3[2]). Period not exceeding 80 years instead of any other period may now be chosen as perpetuity period applicable to a disposition under rule against perpetuities (§1[1]) except a disposition consisting of conferring of an option to acquire for valuable consideration any interest or land where period is 21 years (§10). Where disposition is made in exercise of special power of appointment any period of years specified in instrument creating power will apply for purpose of any disposition made under it. (§1[2]).

In considering validity of any limitation it is now presumed that a male can only have a child at age of 14 years or over and that a female can have a child between ages of 12 and 55 years, but in case of living person evidence may be given to show that he or she will or will not be able to have child at time in question. (§2).

Where disposition is limited by reference to attainment by any person or persons of a specified age exceeding 21 years and it is apparent at time disposition is made or it becomes apparent at a subsequent time (a) that disposition would (otherwise) be void for remoteness, but (b) that it would not be void if specified age had been 21 years, disposition is vested for all purposes as if, instead of being limited to age in fact specified it had been limited by reference to age nearest that age which would, if specified instead have prevented disposition from being void. (§4[1]).

Where it is apparent at time disposition is made or becomes apparent at subsequent time that inclusion of any persons being potential members of a class or unborn persons who at birth would become members or potential members of class, could cause disposition to be treated as void for remoteness they are deemed for all purposes of disposition to be excluded from class unless their exclusion would extinct class. (§4[4]).

No disposition is treated as void for remoteness by reason only that interest disposed of is ulterior to and dependent upon an interest under a disposition which is void. (§6).

Rule against perpetuities does not invalidate a power conferred on trustees or other persons to sell, lease, exchange or otherwise dispose of any property for full consideration, or do any other act in administration (as opposed to distribution) of any property. (§8).

18.06 REAL PROPERTY:

There are four different classes of freehold estates: (1) Estate in fee simple; (2) estate in fee tail; (3) estate for life; and (4) estate pur autre vie.

Leasehold interests are classified by common law as being less than freehold, and are generally referred to as a term of years. They are not real property and shall be diminished in number in residential sphere by Ground Rents Act (N.I.) 2001 which enables owners of residential property to buy out ground rent on their homes. Equitable estates are recognised.

A joint tenancy arises whenever land is conveyed or devised to two or more persons without any words to show that they are to take distinctive and separate shares. But if the grant contains words of severance the result is the creation of a tenancy in common. A tenancy in common will be presumed (a) where money is advanced on a mortgage by two or more persons; (b) where joint purchasers of land provide the purchase money in unequal shares; and (c) where land is bought by partners.

Rule in Shelley's case is recognised.

There are no restrictions on ownership of real property by aliens. (British Nationality Act 1948, 11 & 12 Geo. 6, c. 56 [U.K.]) and Status of Aliens Act 1914, 4 & 5 Geo. 5, c. 17. [U.K.], §17).

See categories 5 Civil Actions and Procedure, topic Limitation of Actions; Estates and Trusts, topics Descent and Distribution, Executors and Administrators, Wills.

19 TAXATION

19.01 ADMINISTRATION:

Government of Ireland Act, 1920 (1920, 10 & 11 Geo. 5, c. 67) established Exchequer and Consolidated Fund for Northern Ireland and vested wide powers of taxation in Parliament of

Northern Ireland, while reserving to United Kingdom Parliament most important fields of taxation, including income tax, corporation tax, capital gains tax and customs duties. Parliament of Northern Ireland legislated in respect of estate duty, stamp duty, general betting duty, pool betting duty, duty on gaming machine licenses and duty on licenses for mechanically-propelled vehicles.

Northern Ireland Constitution Act, 1973 (1973, c. 36 [U.K.]) provides for continuation of Consolidated Fund but not Exchequer. Northern Ireland Assembly has considerably fewer powers of taxation than Parliament of Northern Ireland. By Schedule 2, Para. 8 of 1973 Act, taxes levied under any law applying to U.K. as a whole; taxes previously levied by Parliament of Northern Ireland; and taxes "substantially of the same character" as those taxes are "excepted matters" and therefore excluded from competence of Northern Ireland Assembly. However, by §14 of 1973 Act (and Schedule 1 of Northern Ireland Act, 1974) certain powers remain with Secretary of State to impose taxes in areas not deemed to be "excepted matters".

§15 of 1973 Act provides for payment to Consolidated Fund of Northern Ireland of proportionate share of tax revenue of U.K.

§16 of 1973 Act permits additional sums to be paid by United Kingdom Parliament into Consolidated Fund of Northern Ireland and permits Secretary of State to pay out such sums as are authorised by United Kingdom Treasury.

See category 1 Introduction, topic 1.02 Government and Legal System.

For details of taxes applicable to Northern Ireland as part of U.K., see England Law Digest, category Taxation.

20 TRANSPORTATION

20.01 MOTOR VEHICLES:

Law relating to motor vehicles and road traffic governed generally by Road Traffic (Northern Ireland) Order, 1981 (1981, S.I. No. 154 [N.I. 1]), Road Traffic Amendment (N.I.) Order 1991, Road Traffic (N.I.) Order 1995, S.I. No. 2994 (N.I. 18), Road Traffic Regulation (N.I.) Order 1997 (No. 276 [N.I. 2]) subordinate legislation passed thereunder; and by Finance Act 1991.

Department of Environment is empowered to make regulations as to use, construction, equipment and speed of vehicles and to authorise use on roads of special vehicles, etc. Department can by Order prohibit and restrict driving of vehicles or classes of vehicles on specified highways and impose restrictions as to driving over bridges and erection of notices. Road authority has power to make bylaws prohibiting or restricting waiting of vehicles in public roads.

Vehicle Licence.

Vehicles must be licensed annually for use on public roads except, inter alia, fire engines, ambulances, invalid carriages. Licence duties levied by Department of Environment. Licence must be exhibited on vehicle. Law in Northern Ireland same as law in England.

Identification Marks.

Every new vehicle must be registered with Department of Environment and index mark and registration number of vehicle must be exhibited on flat rectangular plate or flat rectangular surface forming part of vehicle, on front of and on back of vehicle in vertical position. Identification marks must not be obscured. Law in Northern Ireland same as law in England.

Operator's Licence.

Any reference to Art. Number under this heading is reference to 1987 Order. Driving licences are issued only after applicant has passed test of competence. (Art. 3). No person under 17 years may drive motor vehicle on public roads (exceptions: motorcycles, invalid carriages, certain other vehicles). (Art. 17). Provisional licence may be issued to any person over age of 17 years to enable him to undergo test of competence for full licence. (Art. 13). Provisional licence holders restricted to 45 miles per hour maximum (Art. 19) and must not drive on motorways. Provisional licence continues for six months unless revoked or surrendered. (Art. 15). Driving licences granted in Great Britain are valid in Northern Ireland.

Title.

Registration Book containing particulars of the vehicle in respect of which a licence has been issued, is issued to every owner.

Sales.

On a sale or change of ownership of vehicle owner must deliver Registration Book to transferee or other new owner and forthwith notify change of ownership to registration authority and deliver it to registration authority where Secretary of State will insert name and address of new owner. On change of address owner must notify Secretary of State of particulars of new address and unless Registration Book has been lost, stolen or destroyed, deliver it to him for change to be recorded and for revised book to be issued to him.

Liens.

There are no special provisions with respect to liens on motor vehicles.

Operation Prohibited.

Driving without licence (Art. 3) or while disqualified from holding licence (Art. 167) is prohibited. Person cannot obtain licence who is suffering from following diseases and disabilities: epilepsy, certain forms of mental disorders or mental defects, liability to sudden attacks of disability, giddiness or faintness, inability to read at distance of 25 yards in good daylight six figures of white or grey on black background of same size and arrangement as those prescribed for identification mark of motor car.

Size and Weight Limits.

Regulated by Motor Vehicles (Construction and Use) Regulations (N.I.) 1989 (1989, S.R. & O. [N.I.] No. 299) as amended by 1999, S.R. & O. (N.I.) No. 9 and as amended by 2001 S.R. & O. (N.I.) Nos. 28, 173 and 241 and as amended by 2004 S.R. & O. (N.I.) Nos. 44, 48 & 67.

Equipment Required.

Regulated by Motor Vehicles (Construction and Use) Regulations (N.I.) 1989 (1989, S.R. & O. [N.I.] No. 299) as amended by 1999 S.R. & O. (N.I.) No. 9 and as amended by 2001 S.R. & O. (N.I.) Nos. 28, 173 and 241.

Lights Required.

Regulated by Road Vehicles Lighting Regulations (N.I.) 2000 (S.R. & O. [N.I.] No. 169) as amended by 2001 S.R. & O. (N.I.) No. 171.

Inspection.

Goods vehicles and public service vehicles are subject to inspection. (Arts. 57 and 64).

Traffic Regulations.

Operators must comply with traffic signs in Road Traffic (Traffic Signs) Regulations (N.I.) 1966 (1966, S.R. & O. [N.I.] No. 23) as am'd by 1970, S.R. & O. (N.I.) No. 276.

Accidents.

Driver involved in accident must: (a) Stop; (b) give his name and address and name and address of vehicle owner if different, and its identification marks to police on demand, or to any person who on reasonable grounds requires him to do so; and (c) if for any reason he does not give these particulars, or if anyone is injured, report accident to police station or to policeman as soon as possible, giving information listed in (b) and producing certificate of insurance. (Art. 175).

Liability of Owner.

Driver is presumed to be servant or agent of owner. (Art. 207). Common law rules of liability of master for torts of his servants or agents apply.

Guests.

There is no limitation of liability of owner or operator for injury to guests.

Insurance.

Users of motor vehicles must be insured against third party risks or give security. (Art. 90, as am'd by Motor Vehicles [Third Party Risks] Regulations [N.I.] 1994 [No. 46] made under S1 1981 No. 154 [N.I.]). Insurers shall be liable for accidents that occur on roads as well as all “other public places” (by virtue of Motor Vehicles [Compulsory Insurance] Regulations [N.I.] 2000 S.R. & O. No. 331).

Foreign Vehicles and Nonresidents Operators.

Motor Vehicles (International Circulation) Act 1952 (15 & 16 Geo. 6 & 1 Eliz. 2, c. 39. [U.K.]) enables Her Majesty's Government to give effect to U. N. Convention on road traffic signed in Geneva on Sept. 19, 1957, to Art. 4 of Agreement regarding status of forces of parties to North Atlantic Treaty signed in London, June 19, 1951 and to further international agreement on road traffic. Attorney General may make provisions in relation to Northern Ireland for any purpose for which provision may be made in relation to Great Britain. (15 & 16 Geo. 6. & 1 Eliz. 2, c. 39 [U.K.] §2). Following Orders still in force: Motor Car (International Circulation) Order 1930 (1930, S.R. & O. No. 968) as am'd by Motor Vehicles (International Circulation) Order 1957 (1957, S.R. & O. No. 1074); Motor Vehicles (International Circulation) Regulations 1957 (1957, S.R. & O. No. 1246).

Actions against Nonresidents.

No special provisions exist with regard to service of process and proceedings on nonresidents but leave of court is required to issue and serve a writ of summons out of the jurisdiction.

Direct Actions.

Third parties are given direct rights against insurers in cases of insolvency of insured (Art. 100), and where insurance policy is voidable through fraud (Art. 98).

20.02 SHIPPING:

See England Law Digest.

21 TREATIES AND CONVENTIONS

21.01 TREATIES:

By Northern Ireland Act 1998 (Schedule 2) as amended by Regulation of Investigatory Powers Act 2000 (c. 23); Political Parties, Elections & Referendums 2000 (c. 41); Tax Credits 2002 (c. 21); Justice (N.I.) 2002 (c. 26); Child Trust Funds 2004 (c. 6). International relations, including treaties, making of peace or war, neutrality, and connected matters are “excepted matters” outside competence of Northern Ireland Assembly. There are three exceptions: (a) Agreements relating to surrender of fugitive offenders between Northern Ireland and Republic of Ireland; (b) exercise of legislative powers so far as required for giving effect to any agreement entered into by Minister or Junior Minister participating (under §52) in meeting of North-South Ministerial Council or British-Irish Council or in relation to activities of any body concerned with implementing policies agreed in North-South Ministerial Council; and (c) observing and implementing international obligations, obligations under Human Rights Convention and obligations under Community law. See category 1 Introduction, topic 1.02 Government and Legal System.

International Conventions.

As integral part of U.K., Northern Ireland adheres to international conventions and treaties to which U.K. as whole is party. Particularly significant is The Human Rights Act 1998 (1998, c. 42[U.K.]) which came into operation in Nov. 2000 and which implements European Convention on Human Rights into U.K. domestic law. See Selected International Conventions section.

1

NORWAY LAW DIGEST

—Scope —

Revised for 2010 edition by

Advokatfirmaet NORDIA DA, Oslo.

See category 6 Courts and Legislature, topics 6.03 Law Reports and 6.06 Statutes.

Note: This revision incorporates legislation through Jan. 10, 2010.

1 INTRODUCTION

1.01 CURRENCY:

Monetary unit is Norwegian Krone (Crown). Currency exchange is controlled by Act dated July 14, 1950. See category 14 Foreign Trade and Commerce, topic 14.03 Foreign Exchange.

1.02 EUROPEAN UNION:

Norway is party to EFTA (European Free Trade Association) and party to EEA (Agreement on the European Economic Area). EEA establishes free movement of goods, services, labor and capital within EU and EFTA states.

1.03 GOVERNMENT AND LEGAL SYSTEM:

Norway is a hereditary democratic Kingdom. The Norwegian Constitution was promulgated May 17, 1814, and is based on Montesquieu's principle of partition of power. It has been subject to a number of alterations, one of most important innovations being the introduction of “Parliamentarism” in 1884 (Parliament's right to discharge ministry). However, Constitution does not expressly state system of Parliamentarism.

The Government can be sued before the ordinary courts.

Executive power is vested with King in Council. Both men and women have accession to throne of realm. Council p.t. consists of 18 (including prime minister) ministers. Minister must be Norwegian citizen.

Legislature.

Parliament ("Stortinget") consists of two sections: "Lagtinget," consisting of one-fourth, and "Odelstinget," of three-fourths of members of Parliament. Parliament has 169 members. Any member of Parliament must be 18 years of age, and must have been domiciled for at least ten years in Norway. Parliament shall assemble each year, during four-year period, in regular sessions from Oct. 1 until Sept. 30.

Any proposed law must pass "Odelsting" as well as "Lagting." If both of them have treated it twice without having reached any agreement, it is submitted to the whole Parliament in plenum.

Judiciary.

Judges are appointed by King in Council. They are independent of administration and Parliament. See category 6 Courts and Legislature, topic 6.01 Courts.

It is within the province of the courts to decide whether a law passed by Parliament is in conflict with the Constitution.

1.04 HOLIDAYS:

Public holidays in Norway are New Year's Day, Maundy Thursday, Good Friday, Easter Monday, Ascension Day, Whit Monday, Dec. 25 and 26, May 1 and National Day, May 17.

Certain terms expiring on holiday may be extended to following weekday. This provision applies to terms for presenting cheques and all processual terms. Holidays are not included in lay-days, and they do not start running on holiday.

Employees are entitled to 25 workdays paid holiday per annum. Employees above 60 years of age are entitled to 31 workdays paid holiday. (Act of Apr. 29, 1988).

1.05 INTERNATIONAL LAW:

Norwegian law on conflicts of laws applies domicile as the test of personal rights, i.e., when the legitimacy, sanity, capacity, marriage or divorce of a person is the subject of inquiry. The succession to the movables, as well as the immovables of an intestate, is as a rule governed by the law of his domicile.

The Norwegian concept of domicile does not coincide with the English. According to Norwegian law it is easier to acquire a domicile of choice.

The validity of a contract is governed by the proper law of the contract.

Norwegian courts have jurisdiction in all cases where defendant is domiciled in Norway, also in respect of an immovable situated outside Norway. In a divorce case Norwegian courts have jurisdiction even if only plaintiff resides in Norway, provided the spouses had their last joint domicile in this country. There is emergency jurisdiction to help Norwegian plaintiffs if divorce in country where defendant resides is unobtainable or connected with extreme difficulties.

1.06 OFFICE HOURS AND TIME ZONE:

Norway is in the +01:00 GMT time zone. Office hours are generally from 8:00 a.m. to 16:00 p.m. (CET) in summer DST.

2 BUSINESS ORGANIZATIONS

2.01 AGENCY:

For principal and agents in general, provisions are given in the Act of May 31, 1918. Special provision concerning commission, commercial agents and commercial travelers (commercial clerks) are given in Acts of June 30, 1916 and June 19, 1992.

Contract made by agent in name of principal and within limits of agent's power binds principal. If third party knew or should have known that agent acted outside his power, contract does not bind principal. Agent is responsible for his power being in order. There are special provisions with regard to revocation of agent's power, death of principal or agent, bankruptcy of one of the parties, etc.

2.02 ASSOCIATIONS:

See topic 2.03 Corporations.

2.03 CORPORATIONS:

Most types of private and public corporations for purposes of business and trade may be formed. Companies with limited liability are governed by Private Limited Liability Companies Act and Public Limited Liability Companies Act, both of June 13, 1997. Limited liability companies may be incorporated by drawing up memorandum of association and registering in Register of Business Enterprises. Public limited liability companies use abbreviation ASA while private limited liability companies use AS.

Only public limited liability companies may offer shares for public subscription and be listed on Oslo Stock Exchange.

Private limited liability companies must have minimum share capital of NOK 100,000. Public limited liability companies must have minimum share capital of NOK 1,000,000. Both types of limited liability companies must have equity which is soundly based on risk and extent of company's activities. Board of Directors must take action and convene General Meeting if equity becomes unsound. Same applies if equity is reduced to less than half of share capital.

Each share must be issued to specific shareholder. No limitations on share ownership by foreigners. Shareholding and share transfer must be entered in company's shareholder register or shareholders register in Norwegian Securities Depository. Transfer of shares in private limited liability companies generally requires approval from Board of Directors, and existing shareholders have right of preemption unless otherwise determined in by-laws.

Board of Directors must consist of three or more members of which one half must be domiciled in EEA-countries. If share capital of private limited liability companies is less than NOK 3,000,000 number of board members may be reduced to one, but at least one deputy member is then required. In companies with more than 30 employees, majority of employees may demand board representation.

Private limited liability companies with share capital exceeding NOK 3,000,000 and public limited liability companies must have chief executive officer domiciled in EEA-country.

Resolutions by General Meeting generally passed by simple majority. Changes of by-laws and other significant resolutions generally require two-thirds of votes cast and two-thirds of represented capital. Voting rights may be limited in by-laws.

Minority rights are generally granted shareholders or groups of shareholders representing 10% of total share capital. Statutory provisions prohibit decisions by General Meeting and Board of Directors which may be unreasonably beneficial to particular shareholders or others. Alterations in registered particulars must be registered in Register of Business Enterprises.

Companies must have registered or authorized auditor. Companies must submit annual accounts including reports from Board of Directors and auditor to Central Register of Accounts.

Limited and unlimited partnerships are regulated by Companies Act of June 21, 1985.

2.04 FOREIGN CORPORATIONS:

See topic 2.03 Corporations.

2.05 JOINT STOCK COMPANIES:

See topic 2.03 Corporations.

2.06 PARTNERSHIPS:

See topic 2.03 Corporations.

3 BUSINESS REGULATION AND COMMERCE

3.01 BILLS AND NOTES:

Norway is a party to the Geneva Conventions of June 6, 1930 and Mar. 19, 1931, concerning uniform law on the subject of bills of exchange and cheques. Two acts of May 27, 1932, establish conformity with the conventions. These acts have also incorporated the international rules as to conflicts of law on this subject, agreed on by the parties to the said conventions.

Bill of exchange (Act of May 27, 1932) must contain express indication that it is a bill of exchange and must show: Amount for which drawn; names of payee, drawer and drawee; time when and place where issued and to be paid. Time for payment must be on certain day after sight or after issue.

Bill may be transferred by indorsement which must be written thereon. Every indorser is responsible to all subsequent holders for acceptance or payment of bill unless he excludes personal liability by adding the words “ikke til ordre” (not to order) or the like.

Any holder of bill may present it for acceptance and if it is not accepted may have bill protested. Holder may also have bill protested for nonpayment, which must be done during two weekdays after day for payment.

No revenue stamps are to be affixed.

Cheque (Act of May 27, 1932) must be drawn on a bank only, must contain express indication that it is a cheque and must show: Sum to be paid; to whom and by whom payment is made; place of payment; day of issue; and signature of issuer. Cheque may be issued to bearer or to a specified person. Endorser of cheque is subject to same liability as endorser of bill of exchange.

A cheque can be revoked by the drawer before payment but when unduly revoking he is liable to penalty. Overdraft also subjects drawer to penalty. No stamps or taxes are payable on cheques.

Other instruments are divided into two groups: negotiable instruments and simple instruments, the former negotiable in same way as bills of exchange. (Act of Feb. 17, 1939).

A bill is negotiable when issued to bearer or to a person mentioned by name with the affix "or order"; when it specifically states that it is negotiable or when it gives mortgage in real property, registered vessels and aircrafts.

3.02 COMMERCIAL REGISTER:

Commercial companies have to be entered in Register of Business Enterprises (Foretaksregisteret Act of June 21, 1985). Registration and change of registered information require use of particular form. It is advisable to contact Norwegian lawyer when entries in register are necessary.

3.03 CONTRACTS:

Contracts are binding upon parties unless performance is contrary to public order. Normally no specific form is required and oral agreements are in principle valid. Reasons for invalidity are fraud, lack of intention by one of parties noticeable to other party, mental deficiency, minority or if contract is unreasonable. Stringent terms must be met if contract is to be considered invalid due to unreasonableness.

Excuses for nonperformance of otherwise valid contract are de facto and financial force majeure. Further nonperformance may in some cases be excused in accordance with doctrine of rebus sic stantibus.

Applicable Law.

Normally Lex Loci Contractus, unless otherwise stipulated by mandatory law; e.g. Act on Financial Agreements and Transactions Orders.

Government Contracts.

Ministries or directories in accordance with instructions from Government are normally entitled to bind Government. Contracts of minor importance entered into by subordinate official authorities are also normally binding on Government provided authority in question acts in accordance with ministry instructions.

Larger contracts for goods and services must in general only be entered into after tender procedure in accordance with EU Directives.

Distributorships, Dealerships and Franchises.

(Act on Competition of Mar. 5, 2004, No. 12). Appropriate authority is Competition Authority. Cooperation related to price fixing, marketsharing and response to invitation to tender is normally prohibited. Exceptions exist.

3.04 INFORMATION TECHNOLOGY, INTERNET AND NEW MEDIA:

Computer programs are copyright protected as literary works under Norwegian Copyright Act §1, which implements EU Directive on protection of computer programs 91/250 EEC. In order to be copyrightable computer program must be result of independent, original and intellectual creation of creator. There are no quality or quantity requirements. Valid copyright does not depend upon any public registration or inclusion of copyright notice. Copyright in computer programs includes source code, object code and draft materials. Copyright owner has exclusive right to reproduce, distribute, and exploit work, including right to copy, grant licenses, hire out and sell programs. Legitimate user or owner of copy of computer program may only make back-up copies of program if necessary for intended use of program. Copyright Act allows user to perform certain degree of reverse engineering, right to change and modify program within scope of purpose of program and to correct errors and defaults in program. Copyright in computer programs that are created by employees within scope of his or her employment, devolves upon employer unless otherwise agreed.

Databases are protected under Norwegian Copyright Act §43, which implements EU Database Directive 96/9 EEC. Databases are protected as literary works or sui-generis, depending on nature of work. Database may partly be protected as literary work if selection includes original intellectual work. Sui-generis protection may be obtained for any systematic compilation of information or similar work, which are result of substantial investments. Rights holder will have exclusive right to reproduce, distribute, and exploit databases. For sui-generis protected databases protection period is 15 years from publication or production of database.

E-Commerce.

In general there is no requirement for public license or permission to conduct e-commerce and prevailing contract law will be applicable to most aspects of e-commerce. Existing restrictions with regard to certain types of businesses and services will apply, e.g. banking and securities, lotteries and broadcasting as well as sale and distribution of alcohol, tobacco, and pharmaceuticals. Recently there have been some extensive legal developments, and new regulation covering different consumer issues e-commerce has been enacted.

New E-Commerce Act came into force July 1, 2003. Act implements parts of E-Commerce Directive 2000/31 EU with respect to country of origin principle (E-Business subject to legislation in home country and not any other state in which it advertises or operates). Furthermore, Act specifies which information must be provided to consumers, to allow them to enter into and conclude on-line transactions.

Long distance sales are regulated in Distance Sales and Cancellation Act. Act implements parts of Long Distance Selling Directive 97/7 EU, imposes strict information requirements upon long distance sellers. It is required that sellers provide information before conclusion of agreements, and give consumers 14 days to revoke their acceptance of such agreements, without giving any reason for doing so.

The Marketing Control Act was recently amended in order to implement parts of Long Distance Selling Directive 97/7 EEC. Most important change relating to e-commerce is general prohibition against unsolicited direct marketing by using methods of telecommunication that permit individual communication, such as electronic mail, text messaging services to mobile telephones, facsimile or automatic calling machine, without prior consent of recipient.

Electronic Signatures.

New Electronic Signatures Act came into force July 1, 2001. Purpose of act is to provide legal framework for use of electronic signatures and to give legal effect to electronic signatures, where it is feasible within current legislation. Act implements EU Directive 1999/93/EEC on Community Framework for Electronic Signatures.

Domain Names.

Norwegian domain name regulatory agency is NORID, which is registry for domains under DNS top-level domain.no. Domain names are limited to legal entities that are registered in Norwegian Business Registry, and have physical presence and address in Norway. Individuals cannot register.no domain name, but only second-level domains under priv.no. Domain names do not have to be similar to entity's name or trademark, but applicant must ascertain that domain name does not infringe upon any rights of third party. Each entity may at any time have up to 15 domain names directly under.no. In addition, entity may have up to five domain names under each geographic domain where it is located, and five domain names under each generic domain to which it belongs. Complaint commission has been established and been in effect from Oct. 7, 2003.

Data Protection.

The Personal Data Act with regulations implements European Data Protection Directive (95/46/EC). Purpose of Act is to protect persons from violation of their right to privacy through processing of personal data. Personal data is defined as any information and assessments that may be linked to natural person. Personal data may only be processed if data subject has consented thereto, or there is statutory grounds for such processing, or processing is necessary, e.g. in order to fulfil contractual obligation. Consent must be freely given, specific and informed declaration by data subject to effect that he or she agrees to processing of personal data relating to him or her. Consent must clearly state that (i) data subject gives his or her consent, (ii) what kind of processing consent includes, and (iii) to which processor consent is granted. Data subject may give his or her consent orally or in writing, electronically or on paper. Minors under age of 18 normally need parental or guardian's consent. Sensitive personal data, information regarding ethnic origin, political opinions, religious beliefs, criminal and health records etc. may only be processed if certain conditions are fulfilled. Personal data may only be transferred to countries, which ensure adequate level of protection of data, e.g. countries that have implemented Directive 95/46/EEC. Personal data may also be transferred to other countries if controller provides adequate safeguards with respect to protection of rights of data subject. Act applies to controllers who are established in Norway and to controllers who are established in states outside territory of EU/EEA if controller makes use of equipment in Norway. Latter does not apply if such equipment is used only to transfer personal data through Norway. If server's location is outside Norway, main rule is that law does not apply even though information on webserver is in Norwegian and targets Norwegian residents. If law is applicable, controller must have representative who is established in Norway. Provisions that apply to controller shall also apply to representative. Controller is defined as person who determines purpose of processing of personal data and which means are to be used, as opposed to processor, which is defined as person who processes personal data on behalf of controller.

3.05 INTEREST:

(Act of Dec. 17, 1976).

Claims which are not paid on maturity carry 8.75% (as of Jan. 1, 2010) per annum interest from date of maturity. Where no such date has been established creditor may claim payment in writing in which case interest accrues from one month after request for payment has been sent.

3.06 LICENCES, BUSINESS AND PROFESSIONAL:

Licences are required for a number of activities such as land transportation, banking, life and non-life insurance, establishment and management of mutual securities funds, mining, conveyance of real property and stockbroking. Licences are often only issued to EEA subjects.

Industrial manufacturing normally requires no licence. See however subhead Real Property, infra.

Real Property.

Acquirement of real property by aliens generally requires Government licence. According to statutory law passed by Parliament in Nov. 28, 2003, licence will to large extent also be required for EEA citizens. See categories 19 Mineral, Water and Fishing Rights, topic Continental Shelf; Property, topic Real Property.

3.07 MONOPOLIES, RESTRAINT OF TRADE AND COMPETITION:

Due to range of political and social reasons there exists state monopolies, state ownership and rules of expropriation. For example, retail sale of wine and liquor is forbidden for anyone but State Wine Monopoly, and railway is run by state-owned company. On other hand, telephone and telecommunications market was opened for competition Jan. 1, 1998.

In principle all private enterprises may be subject to expropriation by passing adequate laws. Owners are, however, according to constitution entitled to full compensation. Such compensation is normally fixed by court assessment. Profit arising out of expropriation is taxed to extent of about 28% unless reinvested in other enterprise.

Norway is member of EFTA and party to EEA Agreement.

3.08 SALES:

Property in chattels may be transferred without any formality; and payment of purchase is not essential for transfer of ownership.

The Purchase Act of May 13, 1988, applies unless stipulations to contrary have been agreed upon or is consequent on commercial customs. Some of stipulations in Act may not be altered to detriment of buyer when seller is professional and articles sold are consumer goods bought for personal use. This applies inter alia to delay on behalf of seller and to faults attached to object sold. In absence of agreement as to price, buyer must pay prevailing price (price normally paid for similar goods), unless same is unreasonable.

If goods sold are not delivered in due time, and delay is not due to buyer's conduct or to accident for which he bears the risk, buyer may choose whether he will demand delivery or, if delay is of considerable importance to buyer, cancel contract. If delivery is delayed, vendor may be liable for damages. If buyer fails to pay purchase price at maturity, vendor is free to choose whether he will uphold or cancel contract, but if delay is of no considerable importance contract may not be cancelled. If bargain is cancelled by vendor he may claim damages from buyer. In absence of proof of additional loss having been suffered, damages will be fixed at amount, by which purchase money exceeds price of goods of nature and quality similar to that of goods sold at time when delay began. If buyer omits in due time to send for or to receive goods sold, seller may be bound to take care of goods, and if necessary to sell them on account of buyer. Seller may claim compensation for his expenses, for which he has a lien on the goods.

If specific article purchased proves defective, buyer may cancel contract and claim damages. Contract may only be canceled if defect is of considerable importance to buyer. If purchase regards articles of special description and goods delivered are defective, buyer may cancel contract or demand proper delivery or proportional reduction of purchase price. Under special circumstances vendor may be liable for damages, even though he is not to blame.

If, after conclusion of bargain, buyer goes into bankruptcy or negotiations have been opened as to a composition, seller has a right of stoppage in transit even though goods were sold on credit.

When seller is professional and articles sold are consumer goods for personal use, The Consumer Purchase Act of June 21, 2002 applies. The Consumer Purchase Act entered into force July 1, 2002, and will apply for agreements made after this date. Under The Consumer Purchase Act, consumer is given stronger position towards seller compared to Purchase Act. The

Consumer Purchase Act grants consumer more severe remedies for seller's breach of contract and seller's right to exercise remedies for consumer's breach of contract is more limited.

Conditional Sales.

Movables may be transferred with an agreement that the buyer's disposal of movables must be restricted until the full purchase price is paid. As regards agreements with consumers, restrictions apply as to content of agreement such as information regarding credit costs, etc. Sales on installment plan are governed and restricted by Purchase on Credit Act of June 21, 1985.

Notices Required.

Notice of nonconforming delivery is required to protect right against seller. Notices required to reserve rights for parties need not be in writing but written notices are preferable as containing proof of notice. In transactions between traders and industrialists notices reserving rights must be given without delay, otherwise without undue delay.

Warranties.

Whether or not a sold article is defective is dependent upon stipulations in contract and according to common law upon circumstances in each specific case such as purchase price, nature of purchased article, usual specification of same, property of sample presented prior to bargain, etc. Numerous leading judgments by Supreme Court give further guidance.

Applicable Law.

Normally Lex Loci Contractus.

International Sale of Goods.

United Nations Convention on Contracts for the International Sale of Goods, except part II and sales between Nordic countries, in force on Aug. 1, 1989. See category 24 Treaties and Conventions, topic 24.01 Treaties and Part V, Selected International Conventions.

4 CITIZENSHIP

4.01 ALIENS:

See category 16 Immigration, topic 16.01 Aliens.

4.02 IMMIGRATION:

See category 16 Immigration, topic 16.02 Immigration.

5 CIVIL ACTIONS AND PROCEDURE

5.01 ACTIONS:

Foreigners have same right as Norwegians to bring action in Norwegian courts. Any legally protected interest can be subject of action. Plaintiff must have “legal interest” in obtaining judgment, e.g. existence of right that is disputed.

Submission of evidence is free, but illegally acquired evidence may be excluded.

See categories 6 Courts and Legislature, topic Courts; Estates and Trusts, topic Death (Presumption of and Actions for), subhead Actions for Death.

Limitation of.

See topic 5.05 Limitation of Actions.

5.02 CONFLICTS OF LAW:

See category 1 Introduction, topic 1.05 International Law.

5.03 DEPOSITIONS AND DISCOVERY:

The proper Norwegian Court will examine witnesses upon request of a foreign court if such request is made through diplomatic channels to the Norwegian Ministry of Justice. Qualified Norwegian lawyer can also examine witnesses upon such request. Outside Norway for use in Norwegian Courts depositions are normally taken at request of Norwegian court in question by nearest Norwegian consular officer. See topic 5.01 Actions.

5.04 JUDGMENTS:

Judgments must state a time limit within which execution may not be levied, in ordinary cases two weeks and in some special cases three days from the service of the judgment. A judgment given by the Supreme Court of Appeal may be enforced at once.

Judgment for the plaintiff may be given both in the board of conciliation and in the courts of first instance, if the defendant does not appear.

Courts are entitled to order loser of court case to pay all reasonable court costs incurred by winning party.

Foreign Judgments.

The effect of foreign judgments depends upon treaty with the country where the judgment was rendered. Such treaties exist between Norway and other countries parties to EEA (Lugano convention). Norway is signatory to The Hague Treaty of 1954, exempting citizens of signatory countries from deposit of costs and making foreign judgments for costs enforceable. As to civil claims foreign judgments based on agreed venue may also be binding.

5.05 LIMITATION OF ACTIONS:

One year: Claim related to transportation by road and sea.

Two years: Claims against air carriers for injuries to passengers and damage to goods; see category 23 Transportation, topic 23.01 Aviation, subhead Time Bar.

By act of May 18, 1979 actions are limited as follows:

Three years: All claims unless otherwise stated.

Ten years: Claims for which written acknowledgment of debt has been issued, pension, alimony and some other claims.

Twenty years: Bank deposits.

It should be noted that many claims under Admiralty Law are barred earlier than stated above, time bar in some cases being as short as six months.

Time within which action must be brought is reckoned from first day creditor may demand payment.

Acknowledgment of liability by debtor keeps debt alive, and destroys effect of statutory limitation.

Contractual Limitation.

Agreements which have effect of excluding statutory limitations are not valid. After claim has arisen debtor may accept prolongation of time limits for three years at a time, but not for longer period than ten years altogether.

5.06 PRESCRIPTION:

See topic 5.05 Limitation of Actions.

5.07 SEQUESTRATION:

See category 7 Debtor and Creditor, topic 7.05 Executions.

6 COURTS AND LEGISLATURE

—Scope —

Boards of Conciliation are established in every town and parish, and are formally not courts, but have limited competence to pass judgments. With some exceptions, it is obligatory that case has been handled by Board of Conciliation before one can initiate legal action in Court of First Instance. No lawyer may represent parties before Board of Conciliation unless other party has been given prior notification.

6.01 COURTS:

Courts of First Instance are called “tingrett”.

In every jurisdiction there are special divisions for probate, bankruptcy and enforcement. Duties of such divisions are performed in country districts or small towns by ordinary judge, in larger towns by special judge.

Courts of First Instance also deal with appeals against judgments of Board of Conciliation.

Courts of Appeal “**Lagmannsretten ”.**—There are six, one each for East, South, Southeast, West, Mid and North-Norway. Court of appeal is for individual case set with three judges. Two or four assessors are called when demanded by one of parties or when court deems fit. Appeal from Courts of First Instance are dealt with where amount or value involved is at least NOK 125,000.

Supreme Court “**Høyesterett”.**—This court has its seat in Oslo and is headed by Chief Justice of Norway. For individual case Supreme Court is normally set with five judges. Supreme Court has committee consisting of three judges that decides what cases must be handled by Supreme Court. Supreme Court deals with appeals from Courts of Appeal and in special circumstances directly from Courts of First Instance and only cases which have consequence beyond individual case or cases of special importance.

Criminal justice is administered by the same courts that handle civil lawsuits, viz. courts of first instance, Courts of Appeal, and the Supreme Court. In criminal case proceedings number of judges may differ from those of civil case proceedings.

6.02 JURISDICTION:

See category 1 Introduction, topic 1.05 International Law.

6.03 LAW REPORTS:

Statutory laws are reported in the Norwegian Law Gazette (Norsk Lovtidende) as soon as they are passed.

Every year University of Oslo publishes a near complete set of all statutory laws in force in Norway. Latest issue covers Acts passed 1687-2008; next issue, 1687-2009 will be published Mar. 2010.

Judgments by Supreme Court are reported in “Norsk Retstidende.” Judgments of principal interest passed by inferior courts are reported in “Rettens Gang.” Both these publications are published by Norwegian Bar Association. Judgments in maritime cases passed by courts in Scandinavia are reported in “Nordiske Domme i Sjöfartsanliggender” published by Nordisk Skibsrederforening, Oslo.

Laws and other regulations can also be found at www.lovdata.no on Internet, free of charge.

See also topic 6.06 Statutes.

6.04 LEGISLATURE:

See category 1 Introduction, topic 1.03 Government and Legal System, subhead Legislature.

6.05 REPORTS:

See topic 6.03 Law Reports.

6.06 STATUTES:

The Civil Procedure, the Criminal Procedure and the Penal Act are codified. Regarding civil law there are number of special statutes but no general codification, although special parts are codified, e.g., Inheritance Act, Marriage Act and Taxation Act.

See also topic 6.03 Law Reports.

7 DEBTOR AND CREDITOR

7.01 ASSIGNMENTS:

Claims may be transferred by agreement. Notice must be given to debtor to prevent him from making payment to transferor and to safeguard assignment against transferor's creditors. Transferror is responsible for existence of claim and his ownership thereof, but not for solvency of debtor.

7.02 ATTACHMENT:

Goods may be seized by court order if debtor's behavior indicates that execution will otherwise be unavailing. It is not necessary that the claim should be matured, but seizure may be made subject to security and on the condition that action must be brought within a term fixed by the court. Provisional seizure must be registered and then gives protection against debtor's transactions, but does not give any preference against other creditors or any protection against subsequent execution or bankruptcy proceedings.

See also topic 7.05 Executions.

7.03 BANKRUPTCY:

(Bankruptcy Act of June 8, 1984). Debtor who is unable to meet his liabilities is obliged to file petition for bankruptcy, and under certain circumstances creditor may present bankruptcy petition against debtor, in which case proofs may be required before bankruptcy court.

Trustee in bankruptcy is appointed, assets are registered and claims are called within three to six weeks. Notice for claim has to be given before trustee in bankruptcy. Creditors must prove claim before bankruptcy court if necessary.

Claims are paid in following order: (1) Fees and costs; (2) certain wages; (3) certain taxes and duties; (4) ordinary claims. Where claim is secured by mortgage, property has to be sold and proceeds are first applied to mortgage debt.

See also topic 7.07 Fraudulent Sales and Conveyances.

Composition.

Debtor may obtain composition with creditors before going into bankruptcy. If he offers to pay at least 50% of unsecured debts, acceptance by at least 3/5 of creditors representing 3/5 of liabilities is sufficient; but if he offers less than 50%, there must be acceptance by at least ¾ of creditors representing ¾ of liabilities. Composition must be approved by court. Approval will not be given for offer less than 25%.

7.04 DEBT COLLECTIONS:

Debt collections are arranged at fees varying from approximately NOK 350,- to approximately NOK 17,000,-, or under certain conditions actual cost if higher. Collection fees are paid by debtor provided previous notice. In case creditor is foreigner, however, additional fees may be charged to creditor. If collection does not result, creditor will be responsible to collector for fee. As general rule, it is to be observed that Norwegian lawyers are not allowed, according to rules and ethics of Norwegian Bar Association, to undertake case on percentage of proceeds. Lawyers are also strongly recommended by Norwegian Bar Association not to undertake case on “no cure no pay” basis. Fee will be computed on basis of work spent on case and also with regard to value of interests at issue. Contingent agreements may however be entered into in special cases.

7.05 EXECUTIONS:

Execution is levied pursuant to: A judgment, an order given by the board of conciliation settlement in court or in board of conciliation, legal arbitral decision; written and certified acknowledgments of debt; and some other cases specified in Executions Act of June 26, 1992. Debtor's goods of any kind, less certain exemptions, may be taken in execution according to such judgment after specified period of time. Through execution, creditors get mortgage on real property or in chattels. Any execution must be registered (or other legal remedy specified in Execution Act) in order to be valid against competing creditors. Goods must either be sold at public auction or by assistant appointed by court. When real property is sold at such public auction, all encumbrances that are privileged before claim must be covered, and rest of sales sum is paid out to creditors according to rank of priority. Bonds and claims may be taken in execution. Documents are handed over to bailiff and debtor is prohibited to pay his debt to original creditor. Execution is performed in towns by special officers of execution, otherwise by sheriff.

After judgment is given and before execution may be obtained, or in case the losing party has made an appeal to the court of appeal, the claim of a creditor may be protected through a temporary seizure called “arrest” (attachment). Special conditions exist.

7.06 EXEMPTIONS:

Under Act of June 8, 1984 every debtor has right to exemption of certain articles and assets such as personal belongings, unpaid salary, cash and bank deposits necessary for support of debtor and his family.

7.07 FRAUDULENT SALES AND CONVEYANCES:

Every transaction which is fraudulent against the creditors may be declared void under the principle of invalidation adopted by most Western European countries in accordance with the principles of Roman law (Actio Pauliana).

7.08 GARNISHMENT:

See topic 7.05 Executions.

7.09 HOMESTEADS:

No homestead exemption.

7.10 INSOLVENCY:

See topic 7.03 Bankruptcy.

7.11 LIENS:

Factors, warehousemen, hotel-keepers, and carriers have lien upon goods for their charges. Persons making improvements, repairs, etc., upon personal property in their possession have a lien thereon for work done and material furnished. Solicitors have a lien upon documents in their possession for their charges. Certain third parties have liens upon ship and cargo for number of claims against shipowner. There is lien for taxes and number of rates and duties.

Mechanics' lien on real property does not exist in Norway.

7.12 PLEDGES:

See category 20 Mortgages, topic 20.01 Chattel Mortgages.

8 DISPUTE RESOLUTION

8.01 ALTERNATIVE DISPUTE RESOLUTION:

Mandatory Dispute Resolution.

Conciliation before Board of Conciliation is mandatory in most civil cases. If proceedings fail board may at request of party pass judgment.

During court proceedings, judges may attempt conciliation. Court can also initiate conciliation during preparation of case.

Specific conciliation requirements apply to certain family and labour relations cases.

At request of party certain cases may be decided by certain panels. This applies e.g. to consumer, banking, insurance and patient liability matters.

Voluntary Dispute Resolution.

Parties may agree to minitrials in front of ordinary courts. Claims arising out of criminal offences may be made subject to conciliation by Conflict Board.

Arbitration may take place on ad hoc basis or before established panels, e.g. Oslo Chamber of Commerce and Permanent Technical Panels. Ad hoc mediation and conciliation solutions are becoming more common.

See also topic 8.02 Arbitration; category 6 Courts and Legislature, topic 6.01 Courts, subhead Boards of Conciliation.

8.02 ARBITRATION:

All disputes relating to matters over which parties may legally dispose freely, can be settled by arbitration. Arbitration agreement must be made in writing. Consumer cannot agree on arbitration before dispute has arisen. Parties are free to agree upon procedure and arbitrators. Award is binding on parties and may be enforced without further recourse to courts. Arbitration clauses are very common in Norwegian shipping documents but are also used in other contract relations.

9 DOCUMENTS AND RECORDS

9.01 ACKNOWLEDGMENTS:

In most cases signature to documents needs no attesting by witnesses, but deed of conveyancing, mortgages and other documents to be recorded with real estate registry or ships registry need attesting by witnesses. Also other documents for purpose of execution need special attesting by two witnesses, lawyer or sheriff. They can also be signed before notary public. When documents have to be signed abroad for use in Norway, signature will usually have to be signed before notary public whose signature will need legalization by Norwegian consul. Some countries may demand that documents signed before Norwegian Notary Public are legalized by way of Apostille by County Governor.

9.02 AFFIDAVITS:

If foreign lawyers require service of affidavits in Norway procedure laid down in convention with relevant country should be adhered to.

9.03 NOTARIES PUBLIC:

There are special notaries public in Norway. Ordinary judges of courts of first instance and sheriffs also perform duties of notary public.

9.04 RECORDS:

There are a number of public records. Land titles and all encumbrances on land, as mortgages, etc., are recorded in National land registry. Anybody who has interest in registrations may inspect records relating to particular parcel of land.

Other registers are The Register of Business Enterprises for commercial partnerships, limited partnerships and corporations, accounting register, ship registers, boat register, population register, register for aeroplanes and motor vehicles, and marriage contract register for their respective purposes.

Central Coordinating Register for Legal Entities coordinates company information from various official registers.

9.05 SEALS:

No special rules regarding seals.

The use of a seal on a private document or a contract has no legal effect to its validity.

10 EMPLOYMENT

10.01 LABOR RELATIONS:

There is no national minimum wage. Pay and other conditions are to large extent settled by agreement between Employers Association and Unions.

Probationary period of maximum length of six months is common.

Employee may not be discharged unless facts objectively justify termination of his employment. Details of termination must be in writing and comply with specific statutory requirements in Labour Act. (§§14-5 and 14-6). If employee disputes termination, he may remain in employment during period when court proceedings take place. If court finds decision of termination unfair, dismissal is not effective. Infringements entitle employee to reasonable compensation decided by court under consideration of economical loss suffered, conduct of employee and employer, and circumstances in general. Minimum notice period to be given by employer in probationary period is 14 days. Notice period varies from one to six months dependent upon length of employment and age of employee.

State old age pension is payable after retirement at age of 67. Additional old age pension paid by employer is usual, but not compulsory.

There is required occupational pension paid by enterprise. (Act of Dec. 21, 2005). Pension contribution must be at least 2% of salary between 1 G and 12 G that employee received from enterprise (1 G equals NOK 72,881). See topic 12.03.

11 ENVIRONMENT

11.01 ENVIRONMENTAL REGULATION:

Among most important enactments in Norwegian environmental legislation is Pollution Control Act which states that all pollution is forbidden unless permission is given specifically or in law or regulation. Other important enactments are Product Control Act, Planning and Building Act, Nature Conservation Act, Outdoor Recreation Act and Cultural Heritage Act. Extensive regulations pursuant to law.

General Supervision.

Ministry of Environment.

Highest authority in environmental matters lies with Ministry of Environment which is divided into six following departments: Department for Nature Management, Department for Pollution Control, Department for Cultural Heritage Management, Department for International Cooperation, Department for Regional Planning, and Department for Organizational and Economic Affairs. Address: Myntgaten 2, P.O. Box 8013 Dep., N-0030 Oslo, telephone: +47 22 24 90 90, telefax: +47 22 24 95 60, email: postmottak@md.dep.no, Internet: www.md.dep.no.

State Pollution Authority.

Has executive responsibility with regard to instructions and control relating to measures to combat industrial pollution, acute pollution, chemicals substances and products and monitoring pollution in air and water. It monitors pollution control act and product control act. Address: Strømsveien 96, P.O. Box 8100 Dep., N-0032 Oslo, telephone: +47 22 57 34 00, telefax: +47 22 67 67 06, email: postmottak@sft.no, Internet: www.sft.no.

Directorate for Nature Management.

It is responsible for implementing nature management policy in Norway. Its authority derives from various acts and regulations e.g. Nature Conservation Act, Outdoor Recreation Act. Address: Tungasletta 2, N-7005 Trondheim, telephone: +47 73 58 05 00, telefax: +47 73 58 06 01, email: postmottak@dirnat.no, Internet: http://www.dirnat.no.

Norwegian Polar Research Institute.

It is central government institution for mapping and scientific investigation of polar regions. Follow-up and implementation of Norwegian environmental legislation in Antarctic. Address: Polarmiljøsenteret, 9296 Tromsø, telephone: +47 77 75 05 00, telefax: +47 77 75 05 01, email: postmottak@npolar.no, Internet: www.npolar.no.

Directorate for Cultural Heritage.

It is responsible for management of architectural and archeological monuments and sights and cultural environments. Its responsibilities are set out in Cultural Heritage Act. Address: Dronningens gate 13, P.O. Box 8196 Dep., N-0034 Oslo, telephone: +47 22 94 04 00, telefax: +47 22 94 04 04, email: postmottak@ra.no, Internet: www.ra.no.

County governors and county councils are key players in implementing environmental policy and legislation. Municipalities are central authority with regard to Planning and Building Act.

12 ESTATES AND TRUSTS

12.01 DEATH (PRESUMPTION OF AND ACTIONS FOR):

(Act of March 23, 1961). If a person has disappeared under such conditions that it is not reasonable to doubt he is dead, the judge of the Probate Court may decide that the person shall be considered dead. Otherwise presumption of death has to be established by court proceedings. Judgment that missing person be deemed dead may be obtained in case of unexplained absence for period of ten years. Person missing in connection with specific fatal event which created serious danger to his life, may be deemed dead after one year's absence. When it thus has been established that person is to be considered or deemed dead, his estate is normally wound up by Probate Court.

Actions for Death.

Civil action lies in favor of person's inheritors, spouse and any other person with legal interest in judgment. Amount recoverable is not normally limited. Courts will estimate and allow damages according to circumstances in each separate case. See also category 5 Civil Actions and Procedure, topic 5.05 Limitation of Actions.

12.02 DECEDENTS' ESTATES:

See topics 12.03 Descent and Distribution, 12.06 Wills.

12.03 DESCENT AND DISTRIBUTION:

The Law of Succession (of Mar. 3, 1972) has following classes of inheritors: (1) Children and other issue; (2) parents and their issue; (3) grandparents and their issue, but not remoter than their children and grandchildren. A nearer class of inheritors excludes more remote classes, and any person entitled to inherit will, with certain modifications, exclude his issue.

Surviving spouse takes one-fourth if there are issue of deceased, one-half if there are no issue but father or mother or brother or sister or their issue, otherwise entire estate. If there was community of property (see category 13 Family, topic 13.04 Husband and Wife), only half common estate is inherited, other half falling to surviving spouse by virtue of his or her ownership. Surviving spouse has right to receive minimum of 4 G (annually revised bases for entire social benefit system) if there are issue of deceased and 6 G in all other cases. This means that all smaller estates with values of respectively 8 G or less or 12 G or less will be taken over in whole by surviving spouse. (1 G [basic amount for social security] equals NOK 72, 881 - as of 01.05.09.) See also category 13 Family, topic 13.04 Husband and Wife.

Subject to certain conditions, surviving spouse may choose to postpone settlement and thus keep entire estate undivided until his/her death.

If there are neither heirs nor surviving consort nor a will, State takes entire estate.

Illegitimate children inherit from their mother on equal terms with her children born in wedlock. They also inherit from their father if they were born after Jan. 1, 1917. Paternity is established after legal proceedings in court. If alleged father admits paternity, however, County Governor will merely issue decree to that effect.

12.04 EXECUTORS AND ADMINISTRATORS:

(Act of Feb. 21, 1930).

If at least one heir of age takes over full responsibility for debts, no administrator or executor is required by law to have estate settled.

Absent heirs, whose address is known, must, as a rule, have particular information of the succession. If the residence of such heirs is unknown, they are most frequently called through an advertisement to appear, but nonappearance does not deprive them of their right as heirs.

By leaving the winding up of the estate to the court the heirs avoid responsibility for the debts. If the probate court does not interfere the heirs may divide the estate between themselves if they undertake responsibility for the debts. Creditor of the deceased is entitled, within six months, to claim the winding up of the estate by the court if he can establish that his chance of being paid would be reduced by the succession.

Within six weeks of receipt of legal notice, creditors may be called to prove their claims.

Appointment.

An executor can be appointed by will of deceased. Appointment must be approved by Probate Court.

12.05 TRUSTS:

Trusts within the meaning of equity are not known in Norway.

12.06 WILLS:

(Act of Mar. 3, 1972).

Any person who leaves issue may dispose by will only one-third of his estate, remaining two-thirds, up to NOK 1,000,000 per share for children and NOK 200,000 per share for grandchildren, devolving upon issue as their portio legitima. Person can reduce inheritance of surviving spouse through will if spouse is informed of its content before death of testator. Surviving spouse has, however, right to minimum inheritance of 4G if person leaves issue, and 6G if person leaves no issue, see topic Decent and Distribution.

Age of majority is not required by law for making will, but will made by person under 18 years old is not valid unless confirmed by King. Ordinarily will must be made in writing in presence of two witnesses, subject to certain formalities prescribed in law.

A will may be altered or repealed, but such alteration or repeal must be done in the form of a will.

A will made abroad according to the rules of a foreign country is valid in Norway even though said rules do not conform to Norwegian law.

13 FAMILY

13.01 ALIMONY:

See topic 13.02 Divorce.

13.02 DIVORCE:

(Act of July 4, 1991).

Grounds for Absolute Divorce.

Divorce may be granted without prior separation in certain cases, e.g. severe threats, physical abuse.

Grounds for Legal Separation.

Either party who refuses to continue cohabitation may demand decree of separation. When decree of separation is given, either party may demand divorce after one year. Divorce may be demanded by either party when cohabitation has been discontinued for two years regardless of whether decree of separation has been given.

Jurisdiction.

Usual courts have jurisdiction. Parties can agree to submit certain matters to County Governor for decision without court proceedings.

Conciliation before public arbitrator is compulsory in some cases, e.g. when parties have children together, age under 16.

See category 1 Introduction, topic 1.05 International Law.

Alimony.

If spouse's ability and possibility to maintain suitable upkeep has been impaired as result of caring for common children or distribution of joint tasks during cohabitation, other party may be directed to pay alimony.

In other cases, alimony may be imposed if special reasons recommend it.

Custody of children is based on what is considered to be in best interest of child. If parents agree they may decide to share custody. Neither courts, nor County Governor is authorised to impose such decision. Other parent has visitation rights and must pay child support.

13.03 GUARDIAN AND WARD:

(Act of Nov. 28, 1898). Adults who are physically or mentally strongly handicapped may by court decree be declared incapable of managing his (her) own affairs, in which case a guardian is appointed. See also topic 13.05 Infants.

13.04 HUSBAND AND WIFE:

(Act of July 4, 1991).

Community Property.

There may be community of property or separate property under marriage settlement. In absence of any agreement to contrary community of property is rule. Marriage contracts require special form, called “ektepakt.” See subhead Separate Property, infra.

The property of both spouses at time of marriage and property they may acquire after marriage is community of property. Each spouse has right to dispose of goods which he or she has brought into community. By divorce, separation, or by death of one of spouses, community acquired during marriage, is divided equally between spouses or between surviving spouse and heirs of deceased one. However, by divorce or separation each of spouses may claim separate property of goods he or she has brought into marriage or later has brought into community through gifts or inheritance.

Conveyance or Encumbrance of Property.

Without consent of other spouse, real property may not be alienated or mortgaged if it serves as common residence of spouses. Movables may not be alienated or pledged without consent of other spouse if said movables belong to common furniture or are objects necessary for children.

If one of the spouses essentially diminishes community of property through mismanagement or neglect, compensation may be awarded other spouse for loss when community is divided.

Separate Property.

By “ektepakt” (marriage settlement or contract) made prior to or after marriage, estate may be declared wholly or in part as separate property of one of spouses.

A donation from a third person may be on condition that the articles bestowed be the separate property of the receiver. In his will a testator may leave part or all of his estate to be the separate property of the heir in question, which also applies to hereditary shares, falling to issue under the law. Goods superseding separate property are separate property. Profits of separate property are separate property.

Contracts.

Marriage contract must be written, certified by two witnesses present together and signed by parties. In order to acquire legal effect in relation to third party such marriage contracts must be registered in Register of Marriage Settlements. For certain assets, registration must also be made in special Public Register.

Donations between spouses must, in order to be valid, be through Marriage Contract. This does not apply to ordinary gifts considering donor's financial situation.

Surviving spouse has right to continue possession of community property. For separate property special provision to same effect may be made in marriage contract. If deceased spouse leaves issue of previous marriage right is subject to their consent. (Act of Mar. 3, 1972).

13.05 INFANTS:

Minors below age of 15 may not be punished for criminal offences or—normally—held liable for damages. Parents may be held liable for damages caused by minors below 18 years.

Age of majority is 18. Agreements entered into by minor are invalid. Parents or, in their absence, appointed person act as guardian. Guardian has limited command of minor's property and income. (Act of Apr. 22, 1927).

13.06 MARRIAGE:

(Act of July 4, 1991). Both two persons of opposite sex and two persons of same sex may enter into marriage (from Jan. 1, 2009).

Consent Required.

No person, under age of 18, may enter into marriage without consent of his parents and permission from County Governor. One who is declared incapable of managing his/her own affairs may not enter into marriage without guardian's consent. One who is suffering from contagious venereal disease may not enter into marriage unless other person is informed and doctor has informed them of risks of disease.

Prohibited Marriages.

No marriage may be entered into by: Persons related in direct ascent or descent; brother and sister.

There are no restrictions on marriage with a foreigner.

Ceremonial Marriage.

Marriage is solemnized by church wedding or contracted before the magistrate. Two witnesses must be present. Marriage is solemnized in church only when persons are of opposite sex.

14 FOREIGN TRADE AND COMMERCE

14.01 CUSTOMS DUTIES:

For import originating from EEA countries (EU states and EFTA-countries) customs are abolished except for certain agricultural products. Import originating from non-EEA countries is subject to custom duties in accordance with list of charges revised every year. Rates are mainly based upon value and vary considerably.

25% value added tax is levied on all import.

14.02 EXCHANGE CONTROL:

See topic 14.03 Foreign Exchange; categories 3 Business Regulation and Commerce, topic Licences, Business and Professional; Introduction, topic Currency.

14.03 FOREIGN EXCHANGE:

Exchange control is governed by Exchange Control Act of 14 July 1950. It is administered by Ministry of Finance, but day-to-day management is carried out by Central Bank of Norway and other licenced banks.

Exchange control applies to both residents and nonresidents in respect of all currency transfers to and from Norway. Any person having permanent residence or habitual abode in Norway and any legal entity having base there, is regarded as resident for exchange control purposes. This definition does not accord with that in use for tax and social security purposes.

After many years with extensive regulation, which were based on principle that all transactions are forbidden unless they are allowed, new principle was introduced in new regulations which took effect July 1, 1990. According to new rules all transactions are now allowed, unless they are explicitly forbidden.

Norwegian companies and individuals may make direct foreign investments, borrow in foreign currency, enter into forward exchange contracts, open accounts in foreign banks, purchase and sell life insurance and shares in companies. Transfer of means of payment is subject to report to CBN depending upon amount transferred and means of transfer.

See also categories 3 Business Regulation and Commerce, topic Licences, Business and Professional; Introduction, topic Currency.

14.04 FOREIGN INVESTMENTS:

See category 3 Business Regulation and Commerce, topic 3.07 Licences, Business and Professional.

14.05 FOREIGN TRADE REGULATIONS:

Government may levy restrictions on import and export of goods. (Act of June 6, 1997). Treaties with foreign states and international organisations limit scope and extent of Act. Currently, export restrictions are levied on whale products. Import restrictions are levied on grain feed for animal husbandry and certain other goods. Import and export restrictions are also levied under special provisions.

15 HEALTH

15.01 HEALTH REGULATIONS:

Social Security Act.

(Feb. 28, 1997 No. 19). All persons residing in Norway and selected group living abroad are members of National Insurance. Members are eligible for retirement pension by age of 67, however pension is reduced between ages of 67 and 70 depending on members' income. Members are also eligible for other benefits in situation of unemployment, sickness, injuries, and childbirth.

Mental Health Care Act.

(July 2, 1999 No. 62). Mental Health Care is compulsory treatment following either court order or decision of board of institution where patient is committed. Voluntary treatment is offered based on patient's consent. Mental Health Care Act establishes several minimum rights for patient undergoing treatment, including right to contest decisions of board in court.

Patient Privileges Act.

(July 2, 1999 No. 63). All persons in need of medical assistance are entitled to receive immediate health care, as far as necessary. Patient is given right to receive information about his illness to reasonable extent, and may demand access to his medical file.

15.02 SMOKING:

Smoking Regulation.

(Act on Prevention of the Harmful Effects of Tobacco dated Mar. 9, 1973 No. 14). All forms of advertising of tobacco products are prohibited. It is unlawful for any person to distribute samples of tobacco products, or coupons redeemable for cigarette or tobacco products. All tobacco products must be marked with text pointing out health risk involved in use of tobacco. Act contains restrictions on nicotine and tar yield of cigarettes. Tobacco products may only be sold to consumers of 18 years of age or more.

In premises and means of transport to which public have access air shall be smoke free. Same applies in meeting room, work premises and institutions where two or more persons are gathered. If within certain area, several premises are used for same purpose, smoking may be permitted in half of these premises. There is total ban on smoking inside restaurants and other establishments where food and beverages are served. Infringements of Act are punishable by fines.

16 IMMIGRATION

16.01 ALIENS:

The legal position of aliens is in general the same as that of Norwegian citizens.

Aliens must have passport to enter Norway, except citizens arriving from countries which are parties of Schengen Agreement, i.e. Norway, Iceland, and all EU member states with exception of UK, Ireland, Cyprus, Bulgaria, and Romania.

Aliens from non-EEA countries need prior permit to take up permanent residence or to seek employment in Norway. EEA-citizens must register with local police after arriving in Norway. This does not apply to citizens of Nordic countries. New Norwegian legislation will come into force by Jan. 1, 2010.

Alien ownership of property, see categories 21 Property, topic Real Property; Transportation, topics Aviation, Shipping.

See also topic 16.02 Immigration; categories 3 Business Regulation and Commerce, topic Licences, Business and Professional; Property, topic Real Property; Mineral, Water and Fishing Rights, topic Continental Shelf.

16.02 IMMIGRATION:

Aliens from visa-free countries may remain in Norway without specific permission up to three months and EEA nationals up to six months if they are actively seeking paid employment. EEA nationals may apply for extended permission to remain in Norway within expiry of this period. Non-EEA nationals must apply for such extended permission before entering Norway.

Non-EEA nationals seeking paid employment in Norway must have permission from police. Permissions may be granted in special cases (wife and children of aliens already living and working in Norway, refugees, scientists, artists, technical experts, etc.). Applications to be sent prior to travelling to Norway to local Norwegian Embassy or Consulate. Exemption for foreigners with at least one Norwegian parent.

These rules also apply to temporary entry of technical and industrial personnel, etc.

Norwegian immigrants have right or duty to join introduction program to Norwegian language and society.

After three years in Norway aliens may apply for general and unlimited permission to remain in country and to take paid employment.

After seven years uninterrupted residence in Norway aliens may apply for Norwegian citizenship.

17 INTELLECTUAL PROPERTY

17.01 COPYRIGHT:

(Act of May 12, 1961). Author has exclusive right of using his work in any way and for any sort of publishing. This applies as rule to all kinds of intellectual productions, literature, lectures, cinema, music, painting and designs, sculpture, handicrafts, as well as computer software. Act is result of cooperation between Nordic countries, and legislation within Scandinavia is, with few exceptions, identical. Upon author's death, ordinary rules of inheritance apply to such rights. No translation may be published without consent of person who has copyright. Translator has exclusive rights to translation as such. Author may convey his right of publishing totally or partly. Period of author-rights ends with expiration of 70th year after author's death. This applies to productions by Norwegian citizens, and to works by foreign citizens if either work is first made public in Norway, or according to reciprocal agreement between Norway and country in question. Norwegian copyright is enjoyed by persons domiciled in Norway as well as by foreigners, provided their intellectual work is published in Norway within 30 days after having first been published abroad. Further, copyright may be extended to foreign citizens to same degree as enjoyed by persons domiciled in Norway by international agreement and on condition of reciprocity. Such agreement exists with U.S.A. and numerous other countries, among them those who, like Norway, are parties to Berne Convention.

No registration is required to obtain copyright. There are no formal requirements for giving assignments or licences.

See category 3 Business Regulation and Commerce, topic 3.05 Information Technology, Internet and New Media.

17.02 PATENTS:

In accordance with Patents Act of Dec. 15, 1967, patents may be granted for new inventions which can be industrially utilized. Applications for patents are filed at “Styret for det Industrielle Rettsvern” (Patent Office) in Oslo, accompanied by enclosures required. Applications on file are made accessible to public no later than 18 months after application/priority date. Applications are subject to formality and novelty examination. Novelty requirement is absolute. From granting there is nine months opposition period. Only inventor or his legal successors are entitled to patent. Patent term is 20 years from date of filing of application, against payment of annuities, accrued annuities being payable only after grant of patent. Applicant not resident in Norway must be represented by agent residing in realm. Law suits concerning validity of patent shall be brought before City Court of Oslo.

Patents Act is harmonized with corresponding Acts in Denmark, Finland and Sweden. Envisaged system of Nordic patent application is not enforced.

Norway is party to Paris Convention EEA Agreement, in which principle of EEA consumption of rights applies.

17.03 TRADEMARKS AND TRADENAMES:

(Act of Mar. 3, 1961).

Trademarks and tradenames may be protected either by use or by registration. Trademarks are legally defined as comprising also service marks (such as a shipowner's house flag), specific types of packages and slogans. A foreigner enjoys same legal protection as a native, but he may only register trademarks which are registered by himself in his own country. This rule does not apply to parties to Paris Convention of 1883 as revised in Stockholm 1967. Further, he must be represented by an agent residing in Norway, who can be summoned and appear in court on his behalf. A registered trademark is protected for ten years and registration may be renewed for ten years at a time. Question of whether regional EEA consumption or global consumption of rights applies is currently unresolved in Norwegian Law. Lawsuits concerning validity of trademarks and names are heard and decided by city court of Oslo. Norway being a party to Nice Convention of 1957, has introduced International Classification of Goods for Trade Marks including services. Trade Marks Act is in harmonization with corresponding Acts in Denmark, Finland and Sweden.

18 LEGAL PROFESSION

18.01 ATTORNEYS AND COUNSELORS:

To obtain licence to practice one must: be 20 years old, hold law degree, have two years relevant practice, complete 44 hour course given by Bar Association and litigate three cases before courts. Attorneys must be covered by NOK 5,000,000 liability insurance.

Attorney with at least one year practice may, after satisfactory performance in two cases before Supreme Court, be licensed to litigate before Supreme Court.

Norwegian Bar Association (Den Norske Advokatforening); Kristian Augustsgate 9, 0164 Oslo, telephone (47) 2203 5050, fax (47) 2211 53 25, email: DNApost@jus.no, Internet: http://www.jus.no or http://www.advokatforeningen.no.

Foreign attorneys may obtain permit to advise clients in foreign and international law. Courts may on individual basis allow foreign attorneys to litigate before courts.

Attorneys from EEA-countries may represent clients in Norway. If knowledge of Norwegian language is satisfactory, attorney may litigate before courts. With lack of language skills EEA attorney must perform with aid of Norwegian attorney. To obtain ordinary Norwegian licence EEA attorney must pass test on knowledge of Norwegian law.

Foreign attorneys must be covered by NOK 5,000,000,- liability insurance before obtaining permanent license.

19 MINERAL, WATER AND FISHING RIGHTS

19.01 CONTINENTAL SHELF:

(Petroleum Act of Nov. 29, 1996). Right to submarine petroleum resources is vested in Norwegian state. King in Council may, on conditions to be further stipulated, grant production licences. Production licence may be granted to body corporate established in conformity with Norwegian legislation and registered in Norwegian register of business enterprises or to company from European Economic Area (EEA). Such production licence entails exclusive right to exploration, exploration drilling and production of petroleum within delimited areas. Licensee becomes owner of petroleum which is produced. Municipal and government tax is levied at rate of 28% and special tax at rate of 50%. Rules on oil production do in addition have regulations about production fee, area fee and CO2 tax. Production licence is initially granted for ten years and may be prolonged for up to 30 years upon relinquishment of half licence area. Further prolongation up to 50 years may be granted when justified by special reason. Licence to explore and exploit for submarine natural resources other than petroleum may be granted by government.

Delimitation of continental shelf between Norway and U. K. is settled by agreement of Mar. 10, 1965 between the two countries. Basis of agreement is principle of median line. Similar agreements with Denmark and Sweden were entered on Dec. 8, 1965 and July 24, 1968.

Act introducing 200 nautical miles economical zone round coast was passed by Parliament on Dec. 17, 1976. Act does not influence shipping or aviation over zone nor does it influence right to place submarine cables or petroleum pipelines or any other rights granted to licensee according to Petroleum Act of 1996. It does however restrict fishing in these waters to Norwegian citizens or citizens of countries listed in decree of Dec. 17, 1976 by Ministry of Fishing.

Norwegian territorial water is increased from four to 12 nautical miles by Jan. 1, 2004, according to Act of June 27, 2003.

19.02 FISHING:

(Law dated 17 June 1966). Law in principle restricts other than Norwegian citizens or Norwegian ships/companies to fish in Norwegian waters. Same restriction applies for production, transhipment, packing, etc. This restriction will not apply for angling for private consumption.

(Law dated 14 Dec. 1951). Law gives rules regarding sale and production of fish. All initial sales of fish in Norway shall be made through special organization approved by Government. Regulation will also govern such sale of fish caught outside Norwegian waters.

19.03 MINERALS ON-SHORE:

(Law dated 30 June 1972). Law governs prospecting and mining for minerals. In principle all Norwegians and citizens of EEA country are allowed to prospect for defined minerals. Other citizens may, on certain conditions, apply for Governmental approval for such prospecting. Legislation gives procedures regarding application for official approvals, cooperation with landowners, remuneration to landowners, fees to be paid to Government and general control of activities. The Government will propose change to legislation whereby law will adopt EEA-regulations related to mutual approval of vocational qualification for personnel working within prospecting and mining industry.

20 MORTGAGES

20.01 CHATTEL MORTGAGES:

See topic 20.02 Mortgages.

20.02 MORTGAGES:

(Act of Feb. 8, 1980).

Property and Movable Property.

As main rule Mortgages Act allows titleholder creation of mortgage of property. Furthermore Act allows for liens on movable property that can be entered in real property register, i.e. ships, aircraft and motor vehicles. Legal protection is acquired by registration in land register or in appropriate register (Ship's Register, Aircraft Register, Movable Property Register).

Chattel.

If not done by business enterprise chattel may only be mortgaged by handing over to mortgage.

Securities, Non-Negotiable Money Claims Etc.

Act also allows contractual lien on securities, nonnegotiable money claims etc. Legal protection is acquired by notification to debtor.

In connection with sales of movable objects pledge, as security for purchase price or connected loans, may be agreed upon. Legal protection is acquired by agreement.

Factoring.

In addition business enterprise can enter into factoring agreements connected to their nonnegotiable money claim derived from business. Furthermore, business enterprises are allowed to pledge their operating accessories and their stocks of goods used in business. Legal protection is acquired by registration in movable property register.

21 PROPERTY

21.01 ABSENTEES:

See category 12 Estates and Trusts, topic Death (Presumption of and Actions for).

21.02 CONVEYANCES:

See topic 21.04 Deeds.

21.03 CURTESY:

No right corresponding to “Curtesy” exists in Norway. As to the right of the surviving husband or wife to hold the joint estate for lifetime, see category 13 Family, topic 13.04 Husband and Wife.

21.04 DEEDS:

Transfer of real property must be entered in land register (see topic 21.07 Real Property; category 9 Documents and Records, topic 9.04 Records) to be effective against third parties or creditors of vendor, and such purchase deed must bear certificate from either a notary public, a lawyer or two witnesses confirming that vendor is of age and has signed in their presence. Close relatives and employees of purchaser cannot confirm vendor's signature on deed. As to stamp duty, see topic 21.07 Real Property.

Similar rules apply to ships and aircraft. No stamps payable.

21.05 DOWER:

No rules apply. If given, donor may decide that dower shall be married person's separate estate. See also category 13 Family, topic 13.04 Husband and Wife.

Dower is subject to inheritance tax. See category 22 Taxation, topic Taxes.

21.06 REAL ESTATE CONTRACTS:

Legislation and Standards.

As main rule agreements for work to be performed on real property are not regulated by law, however, Act of June 6, 1989 (håndverkertjenesteloven) and Act of June 13, 1997 (bustadoppføringslova) covering issues where consumer has arranged for work to be performed on his real property. Both laws are as main rule mandatory and in favour of consumer.

There are number of standard contracts for real estate, and consultant and architect services. Included are standards for competitive bidding, construction contracts, design and construction contracts and turnkey contracts. Standards for "professionals" are recognised by strictly formalised routines for giving notice and ordering. Consequences for not adhering to these routines are loss of right to protest or time-bar.

Relationship to Public Authorities.

Prior to construction municipal construction permit must be obtained. As main rule building and construction work shall be performed by publicly authorised contractors under supervision of municipality. County is responsible for approval. However, approval is based on central authorisation which county must adhere to in each individual case. Technical workmanship must be in accordance with requirements stated in laws and regulations.

21.07 REAL PROPERTY:

Establishment and Registration.

In Norway, all properties are registered in register of land and land charges. Agreements concerning land may be recorded in this register.

Property is established with map and partitive transaction, resulting in new land no. and title no. Act regarding property borders opens up for classification of properties in horizontal and vertical level.

Property Rights.

Besides ordinary property rights, Norwegian law also allows co-ownership, leasing and different forms of rental and usage rights. Owner-occupied Unit Act regulates situation where individual co-owners get exclusive right to use their own share of property. After World War II, so called housing cooperatives were established in Norway, where property is owned by housing cooperative, while individual member has exclusive right to use his unit.

Transfers and Agreements Relating to Real Property.

As main rule transfer of properties, mortgages and other property rights have to be registered in register of land and land charges in order to obtain legal remedy in relation to third parties. However, this does not include prescriptive rights or certain claims which automatically get first mortgage.

Concession must be obtained on most property sales according to Concession Act of Nov. 28, 2003.

In respect to forestry and agricultural holdings special regulations give certain relatives right of first refusal to property based on estimated value. In order to purchase larger properties permission from authorities is usually required.

There is legislation for both sale of property and letting out of property (Alienation Act of July 3, 1992 and Landlord and Tenant Act of Mar. 26, 1999). These laws are partly mandatory in consumer relations.

Compulsory acquisition of property needs authority in law. However, it may be carried out in order to secure vital public or private purposes.

Governing-issues.

Development of real property and business which are to be conducted on property normally require permission from local authorities. Municipal authorities are in charge of planning within county boundaries.

22 TAXATION

22.01 ADMINISTRATION:

Payment of Taxes.

Personal taxpayers: Ordinary income tax, personal income tax and social security tax is estimated by tax authorities as income is earned. Final assessment is taking place in subsequent year on basis of tax return filed by taxpayer. Capital tax is assessed on basis of taxpayer's financial position Jan. 1 in year in which taxes are assessed. Limited companies: Company tax is estimated by tax authorities and paid in three steps in year following income year—1/3 on Feb. 15, 1/3 on Apr. 15 and 1/3 on June 15. Balance to be paid or returned after final assessment. Payment of taxes may be enforced by execution or sequestration.

22.02 EMPLOYMENT TAXES:

Social Security Tax is payable at three different rates—3% (pensions), 7.8% (salaries) and 11% (self-employed). See also subhead Payroll Tax, infra.

Highest overall income tax for employees is 47.8% and 51% for self-employed.

Payroll/employer's tax is payable by employer. Rate on gross wages and salaries varies from 0% up to 14.1% depending on where in Norway employee lives; 14.1% is most commonly used rate. Payroll tax is deductible to employer. Exemption from liability to pay payroll tax and social security tax may be granted for employer as well as employee if latter is covered by similar foreign government pension and health service schemes.

22.03 INCOME TAX:

There are two categories of taxable income—ordinary income and personal income.

Ordinary income tax is levied on net income which includes income derived from employment (salaries) and business, capital gains, interest and other capital proceeds. Deduction for interest expenses, capital costs and capital losses are only available for ordinary income tax purposes. Ordinary income tax rate is 28%.

Personal income tax is levied on individual's gross income in excess of NOK 456,400 derived from employment or self-employment and pensions. Personal income tax rate is 9%, but if income exceeds NOK 741,700 tax rate is 12%.

Capital tax is assessed at progressive rates varying from 0.9% to 1.1%.

Corporation tax is levied at flat rate of 28% on net income (ordinary income tax rate). Norwegian corporations do not pay wealth tax. Shareholding companies are not taxable for dividends received from shareholding companies within EEA area. Same applies for dividends received from shareholding companies outside EEA provided Norwegian company holds at least 10% of shares and company distributing dividends is not located in tax heaven. Gain on sale of shares is exempted from taxation on same conditions. Private persons are taxable for dividends and gain of sale of shares at 28%.

22.04 INHERITANCE TAX:

Inheritance tax ranges from 0 to 15% depending upon remoteness of heir and amount of heir's inheritance share.

22.05 LOCAL GOVERNMENT TAXES:

Other Taxes.

In addition to taxes mentioned above there are number of special taxes collected by state or municipality such as property tax and luxury tax on different types of goods.

22.06 MINES, MINERALS AND FISHERIES TAXES:

Petroleum Tax.

Offshore oil production is subject to special state tax in accordance with decision to be made by Parliament each year. (Petroleum Tax Act of June 13, 1975, No. 35). For 2009, tax rate is 50% (which comes in addition to 28% ordinary income tax). Marginal tax rate is thus 78%. See also category 19 Mineral, Water and Fishing Rights, topic 19.01 Continental Shelf.

22.07 TREATIES AND AGREEMENTS:

Withholding tax on dividend from shares in Norwegian corporations is payable by shareholders domiciled outside EEA area. Tax rate of 25% is levied unless otherwise is stipulated in tax treaty between Norway and country in question (see category 24 Treaties and Conventions, topic 24.01 Treaties). Withholding tax to be withheld by Norwegian corporation.

22.08 VALUE ADDED TAX:

Value Added Tax (VAT) is payable at rate of 8%, 14% or 25% depending on goods or services rendered; 25% is most commonly used rate. VAT is deductible until final consumer. VAT is not charged on export sales.

23 TRANSPORTATION

23.01 AVIATION:

Legal aspects of aviation are codified in Act of Parliament, dated June 11, 1993. Act legalizes, inter alia, Warsaw Convention of 1929 with amendments in accordance with Hague Agreement of Sept. 28, 1955, and Montreal Convention of May 28, 1999.

Registration of aircraft requires Norwegian ownership. To qualify company must be registered in Norway and two thirds of share capital must be owned and voted by Norwegian citizens. All members of board of directors must be Norwegian.

Norwegian aircrafts may not be owned by aliens. Aircraft owned by company is considered Norwegian owned when two thirds of share capital is owned and voted by Norwegian citizens or entities with similar status.

Liability.

Carrier is responsible for injuries to passengers, limited to 100,000 SDR. Owner is responsible for injuries to third parties. No need to prove negligence.

Time Bar.

According to §10-29 of above Act claims are barred by elapse of two years after aircraft's arrival at destination or after scheduled time of arrival when voyage was interrupted. Legislation requires substantial set of rules of specific and detailed character. Act draws mainlines while details are included in form of decrees, e.g. compilations provisions for civil aviation (BSL). Legislation has been adopted to EU regulations.

23.02 MOTOR VEHICLES:

There is special act for carriage of goods by road (vegfraktloven), Act of Dec. 12, 1974—based on CMR Convention. Claims for loss or damage to goods are barred by elapse of one year, usually from date goods were delivered.

There is a special Motor Vehicle Act of June 18, 1965, containing provisions for the size and fittings of motor vehicles, the entry, examination and registration of such vehicles, drivers and driving and duties payable on such vehicles.

Special provisions are issued for motor vehicles belonging to foreigners. Foreign travellers wanting to bring their cars with them to Norway should obtain a green card from their insurance company which covers liability in Norway. Vehicles registered in EEA (EOS) member states are exempted. If such card is not available in homeland, compulsory liability policy must be subscribed, via customhouse at place of entry. See subhead Liability, infra.

Liability is regulated by an act dated Feb. 3, 1961 which instead of personal liability for owner or driver institutes compulsory third party insurance for all vehicles. Third parties are entitled to compensation (unlimited for bodily injuries) even if neither owner of vehicle nor driver has been inadvertent.

23.03 SHIPPING:

Maritime Act of Norway is dated June 24, 1994. Norway is party to various international Conventions entered into in Brussels on such subjects as Bills of Lading (the Hague-Visby Rules), Salvage, Limitation of Shipowners' Liability (of 1957), Collisions, Stowaways and Maritime Liens (of 1967).

Norwegian ships, to be entitled to carry national flag, must be exclusively owned by Norwegian citizens or by corporation domiciled in Norway, whose board mainly, including chairman, consists of Norwegian citizens domiciled in Norway, and of whose capital six-tenths must be held by Norwegian subjects. Exemptions may be granted. Nationality requirements have been modified according to EEA (EOS) agreement.

Master has legal competence to bind owner in matters concerning upkeep and running of vessel.

Owner's liability is limited in cases of accidents.

The law contains detailed provisions with regard to the owner's liability in connection with bills of lading and damage to goods. The effect of non-responsibility clauses in bills of lading is regulated by the Hague-Visby Rules.

There are a number of liens on ship and cargo peculiar to maritime law, particular liens being enumerated in maritime code (e. g., claims for wages of master and crew, salvage money, average, etc.).

By act of June 12, 1987, alternative ship register, Norwegian International Ship Register, has been established. This makes it possible to employ foreign seamen at salaries corresponding to salaries in seamens' homeland.

Time Bar.

Claims for loss of or damage to goods are barred by elapse of one year from date goods were or were supposed to be delivered. Collision claims are barred by elapse of two years from date vessel was damaged.

24 TREATIES AND CONVENTIONS

24.01 TREATIES:

Treaties aiming at avoiding double taxation have been entered into between Norway and a number of foreign countries such as Australia, Austria, Belgium, Canada, France, Great Britain, Holland, Ireland, Italy, Japan, Scandinavian countries, U.S.A. and Germany. See category 14 Foreign Trade and Commerce, topic 14.05 Foreign Trade Regulations.

Norway is party to agreement on European Economic Area (EEA), Convention on Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters, Convention on Taking of Evidence Abroad in Civil or Commercial Matters, and United Nations Convention on Recognition and Enforcement of Foreign Arbitral Awards, Convention Abolishing the Requirement of Legalisation for Foreign Public Documents, Convention on the Civil Aspects of International Child Abduction, Convention on jurisdiction and enforcement of Awards in Civil and Commercial Matters (Lugano convention). Norway is member of OECD and WTO. As member of WTO, Norway is chiefly party to organisations agreements.

International Sale of Goods.

United Nations Convention on Contracts for the International Sale of Goods, except part II and sales between Nordic countries, in force on August 1, 1989. See category 3 Business Regulation and Commerce, topic 3.09 Sales and Part V, Selected International Conventions.

1
PAKISTAN LAW DIGEST

—Scope —

Revised for 2009 edition by

SURRIDGE & BEECHENO, Advocates and Solicitors, Karachi.

See category 6 Courts and Legislature, topics 6.04 Reports, 6.05 Statutes.

Note: This revision incorporates legislation through Dec. 31, 2008.

1 INTRODUCTION

1.01 CURRENCY:

Under § 24 of State Bank of Pakistan Ordinance 1955 the Bank has the sole right to issue bank notes for periods fixed by Federal Government.

Rupees and paisas are legal tender in Pakistan; 100 paisas are equivalent to one rupee. Notes used are of value of Rs. 5/—, Rs. 10/—, Rs. 20/—, Rs. 50/—, Rs. 100—, Rs. 500/—, Rs. 1,000/—and Rs. 5,000/—.

Rate of exchange is linked to basket of currencies and rate is fixed on daily basis against U.S. dollar by State Bank of Pakistan and vary according to transaction.

1.02 GOVERNMENT AND LEGAL SYSTEM:

Official name of country is Islamic Republic of Pakistan presently under rule of President General Pervez Musharraf. President maintains Pakistan is moderate Islamic state positioned to progress from its current status as "developing country". Brief history follows.

First Constitution was promulgated in 1956 whereby Pakistan became a Republic within Commonwealth of Nations, whereas originally it had been a Dominion with Governor-General as its chief executive. This Constitution was abrogated in Oct. 1958 but country was governed as nearly as possible in accordance with abrogated Constitution. A new Constitution was promulgated in 1962. This Constitution was abrogated in 1969 but country was governed as nearly as possible in accordance with 1962 Constitution. On 10th Apr. 1973 National Assembly passed present Constitution, effective 14 Aug. 1973.

On 5th July 1977 General Zia-ul-Haq Chief of Army Staff proclaimed Martial Law and assumed Office of Chief Martial Law Administrator. Superior Courts continued to function as before. Certain parts of Constitution relating to fundamental rights were suspended, but otherwise Pakistan was governed as nearly as may be in accordance with Constitution of 1973.

By Provisional Constitution Order 1981 all laws made by authorities since inception of martial law were declared valid and President and CMLA were always to have had power to amend Constitution.

By Establishment of the Office of Wafaqi Mohtasib (Ombudsman) Order 1983 office of Ombudsman has been created to investigate complaints of maladministration against government functionaries, upon complaints by aggrieved persons and other specified institutions. Ombudsman has wide ranging remedial powers but if his orders are not complied with he may only refer matter to President who, in his discretion, may direct that they be duly implemented. Ombudsman has powers of civil court in many specified matters and no court has jurisdiction to stay or grant injunction against any order of Ombudsman or to question validity of any order or action taken by Ombudsman. Person aggrieved by order of Ombudsman may make representation to President.

By Revival of Constitution of 1973 Order, 1985, provisions of constitution as amended by order to stand revived on such dates as President may appoint. Amended Constitution still provides that President is Head of State and holds office for term of five years from day he enters upon his office; however General Mohammad Zia-ul-Haq appointed President for five years from Mar. 23, 1985.

By Constitution (Eight Amendment) Act, 1985 all President's orders, ordinances, and martial law orders and regulations, including Referendum Order 1984 (pursuant to which referendum was held, and General Mohammad Zia-ul-Haq became President), Revival of Constitution Order 1985, Constitution second and third amendment Orders 1985 and all other laws made between July 5, 1977 and Dec. 30, 1985 were validated by Parliament; and all orders made, proceedings taken, and acts done by any authority, or person between July 5, 1977 and Dec. 30, 1985, in exercise of powers derived from above-mentioned enactments were ratified, and could not be called in question in any court on any ground whatsoever. On Dec. 30, 1985 General Zia-ul-Haq issued last Martial Law (Pending Proceedings) Order, 1985. Pursuant to which all Martial Law Orders and Regulations made on or after July 5, 1977, except for 32 Order and Regulations specified in Schedule to said Order, were cancelled.

By Proclamation (withdrawal of Martial Law) 1985 General Mohammad Zia-ul-Haq revoked Proclamation of July 5, 1977 and repealed laws (Continuance in force) Order 1977, and

Provisional Constitution Order 1981. Offices of Chief Martial Law Authority, and martial law authorities of various zones, and Military Courts were abolished. Fundamental rights under Constitution revived, and Constitution of 1973 as amended by Constitution (Eight Amendment) Act 1985, and jurisdiction of courts stand fully restored.

Amended Constitution also provides for Parliament (called “Majlis-e-Shoora”) consisting of two houses known as National Assembly and Senate, with National Assembly consisting of 207 Muslim members with ten additional seats for representatives of religious minorities and Senate consisting of 87 members, of whom 14 are to be from each of the four provinces, eight from Federally Administered Tribal Area, three from Federal Capital, and five from “Ulema” (religious scholars, technocrats and other professionals). Term of National Assembly is five years and that of members of Senate six years, approximately half of them retiring every three years.

Rules on sessions of two houses of Parliament (Senate and National Assembly) are contained in Arts. 52, 54 and 61 of Constitution of Pakistan. Under Art. 52, term of National Assembly is five years from day of its first meeting, after which term Assembly stands dissolved.

Art. 54(2) stipulates that there must be at least three sessions of National Assembly every year, and not more than 120 days should intervene between last sitting of Assembly in one session and date appointed for its first sitting in next session. National Assembly must meet for at least 130 working days in each year.

Under Art. 54 of Constitution, President can summon, from time to time, either House or both Houses in joint sitting to meet at such time and place as he thinks fit and also prorogue same. Further, under Art. 54(3), on requisition signed by no less than one-fourth of total membership of National Assembly, Speaker can summon National Assembly to meet, at such time and place as he thinks fit, within 14 days of receipt of requisition; and when Speaker has summoned Assembly only he may prorogue it.

Lastly, Art. 61 applies above provisions to Senate (Upper House) as they apply to National Assembly, except that Senate is required to meet for at least 90 days in each year.

Upon death of General Mohammad Zia-ul-Haq in a plane crash, Mr. Ghulam Ishaq Khan, Chairman of Senate, became President under Constitution. General Elections were held when Ms. Benazir Bhutto became Prime Minister for first time. Her Government however lasted for little over 20 months when President dissolved National Assembly and dismissed Benazir's Government, inter alia, on charges of corruption and misrule. President purported to act under Art. 58(2)(b) of Constitution and fixed date for fresh General Elections.

General Elections were held in Oct. 1990 when electoral alliance of nine political parties by majority was able to form Federal Government. Mr. Mohammad Nawaz Sharif, President of alliance, was elected Prime Minister on 6th Nov. 1990.

Serious differences arose between elected Prime Minister Mohammad Nawaz Sharif and Mr. Ghulam Ishaq Khan, President of Pakistan. On 18-4-93 President of Pakistan announced that under Art. 58(2)(b) of Constitution (i.e. 8th Amendment of Constitution) he had dissolved National Assembly, dismissed Prime Minister and his cabinet and had called for general elections in country and appointed caretaker cabinet, sworn that very evening, which was comprised of 62 ministers.

A week later dismissed Prime Minister Mohammad Nawaz Sharif moved Superme Court of Pakistan under its Original Constitutional Jurisdiction of Art. 184(3) of Constitution praying that order of dissolution of National Assembly and dismissal of his government by President of Pakistan was malafide, without lawful authority, null and void and of no legal effect.

Full Court consisting of 11 judges of Supreme Court heard matter day to day and vide unprecedented and historical decision announced on 26-5-93 by majority (10 to 1) held inter alia that order passed by President dismissing National Assembly, Prime Minister and his Government was not within ambit of constitutional powers conferred upon President and in consequence, restored National Assembly and Government of Prime Minister. Decision of Supreme Court (reported in PLD 1993 S.C.-473) was unique in recorded history of legal jurisprudence in that discretionary order of highest in power in hierarchy of State - the President - was declared nullity and overturned and overthrown Government and dissolved Parliament were restored to life and legitimacy by sheer majesty of law enshrined in judiciary.

Shortly after being restored to power, under political settlement Mohammad Nawaz Sharif resigned as Prime Minister and Mr. Ghulam Ishaq Khan retired as President. Chairman of Senate Mr. Wasin Sajjad became Acting President. General Elections were held on 6-10-1993 and Ms. Benazir Bhutto, former Prime Minister and leader of PPP, was elected as Prime Minister for second time.

Mr. Farooq Ahmad Khan Leghari, close associate of Ms. Benazir Bhutto, was elected by National Assembly and Senate as President of Pakistan.

Second term of Ms. Benazir Bhutto commenced on 19-10-93 and lasted till 5th Nov. 1996 when President Laghari dismissed her Government on charges of massive corruption and misrule and simultaneously announced date for new General Elections.

Ms. Benazir Bhutto challenged dismissal of her Government and dissolution of National Assembly in Supreme Court. Full Court of seven judges of Supreme Court by majority (of 6 to 1) rejected Ms. Benazir's Application and upheld dismissal of her Government and of National Assembly.

Fresh General Elections as earlier scheduled were held on 3-2-97 and Mr. Mohammad Nawaz Sharif, former Prime Minister, returned to power with massively overwhelming majority in National Assembly.

In dramatic and lightning move, Parliament by Constitution (Thirteenth Amendment) Act No. I of 1997 unanimously amended Constitution. Amendment repealed Art. 58(2)(b) of Constitution under which by exercising discretionary powers pursuant to Eighth Amendment, Presidents had dismissed as many as four elected Governments within span of less than ten years. Thirteenth Amendment also made certain other changes which related to abolishment or curtailment of certain discretionary powers of President.

Cumulative effect of Thirteenth Amendment in Constitution was that President's powers under Constitution to dismiss elected Parliaments and elected Prime Ministers were taken away unanimously by Senate and National Assembly and President's discretionary authority in appointment of Armed Forces Chiefs was also withdrawn. It may thus be said that Thirteenth Amendment in Constitution was major step towards restoration of Parliamentary form of Government in country.

In July 1997, Government of Pakistan again amended Constitution by passing Fourteenth Amendment thus introducing Art. 63A in Constitution. Purport of this Article was to prevent instability in relation to formation of functioning of Government by disqualifying member of political party on grounds of defection. Member of a House shall be deemed to defect from political party if he having been elected as such candidate or nominee of political party commits breach of party discipline which means violation of party constitution, code of conduct and declared policies, or votes contrary to any direction issued by Parliamentary Party to which he belongs, or abstains from voting in House against party policy in relation to any Bill.

In May 1998, Pakistan responded to nuclear experiments conducted by India through conducting six similar experiments of her own. This resulted in most of developed countries penalising Pakistan by stopping their much-needed aid to country. Severe economic turmoil followed these sanctions in Pakistan, forcing Government to impose emergency throughout country as well as restrictions on transactions in foreign exchange. Imposition of emergency was declared unjustified by Supreme Court and, consequently, revoked by Government. Most restrictions on foreign exchange transactions have now been relaxed. Economic condition of country is improving now, and it is hoped that all restrictions on foreign exchange dealings will soon be lifted.

On 12 Oct., 1999 Army once again took over reins of country when Chief of Army Staff, General Pervaiz Musharaf, removed Mr. Nawaz Sharif from post of Prime Minister and proclaimed himself Chief Executive of country. General also dismissed Mr. Sharif's entire cabinet and suspended Parliament and constitution of country. The Proclamation of Emergency of 14th Oct., 1999 was made to give necessary legal cover to Army's action.

While Martial Law was not imposed, Chief Executive held absolute control over way country was to be governed. Under Provisional Constitution Order No. 1 of 1999, country was to be run as nearly as possible in accordance with suspended constitution, including provisions for safeguarding fundamental human rights. Further, courts of land were not to have any powers to make any order against Chief Executive or any person exercising jurisdiction under his authority, nor could they call or permit to be called in question Proclamation of Emergency. However, Army's act was challenged before Superior Courts, and Supreme Court. In deciding one such matter, Supreme Court gave Government three years to complete its agenda of reform and economic reconstruction. Upon completion of this period, Government was to hold General Elections and give way to properly elected democratic Government. Government showed its acceptance of Supreme Court decision and as first step towards restoration of democracy held local elections in country. President Tarar continued in office under Provisional Constitutional Order 1 of 1999 until June 20, 2001, when Chief Executive General Pervaiz Musharraf issued Chief Executive Order No. 2 of 2001, providing for immediate cessation of holding of office of president by Mr. Tarar. Order also provided for immediate dissolution of national and provincial assemblies, which were hitherto suspended. Speakers and Deputy Speakers of said assemblies were declared to have ceased to hold their offices with immediate effect. On same day, Chief Executive passed Chief Executive's Order No. 3 of 2001 allowing him to take over the office of president of Pakistan. Coup de grace for Mr. Musharraf came through referendum held on Apr. 30, 2002 under Chief Executive's Order No. 12 of 2002, allowing him to claim “people's mandate” by securing more than 99% majority of total votes cast.

Chief Executive's Orders Nos. 2 and 3 of 2001 and Chief Executive's Order No. 12 of 2002 were challenged in Supreme Court under Constitutional Petitions Nos. 15 and 22 of 2002. Supreme Court declared first two Orders validly issued by Chief Executive in exercise of his powers under Proclamation of Emergency Order and Provisional Constitutional Order of 1999. However, as regards Chief Executive's Order No. 12 of 2002, Court declared that issue of any harmful consequences flowing from holding of referendum under this Order were purely academic, hypothetical and presumptive in nature and not capable of being determined at that time. Court, therefore, while allowing referendum to proceed, left issue to be determined at “proper forum at some appropriate time”. Overwhelming victory in referendum entitles Mr. Musharraf, under terms of Chief Executive's Order No. 12 of 2002, to hold office of president of Pakistan for period of five years. This has been further fortified by passing of President to Hold Another Office Act 2004 which allows Musharraf to hold both offices of President and Chief of Army Staff simultaneously.

True to declaration made under Order 12 of 2002 General Elections were held in country on 10 Oct. 2002 as scheduled and Pakistan Muslim League (Q) emerged as leading party and Mr. Zafarullah Khan Jamali was elected as Prime Minister. Provincial governments have also been formed with duly elected representatives of people. Mr. Jamali resigned office on 26 June 2004 citing “greater interests of democracy” and nominated finance minister Shoukat Aziz as his successor. Chouhdary Shujat acted as interim Prime Minister while Mr. Aziz, who was then senator, contested election for National Assembly and became member whereupon he was elected as Prime Minister of country by Parliament.

Upon completion of its five year term by Parliament, fresh elections were held on 18 Feb. 2009 when ruling Muslim League-Q was routed and Pakistan People's Party emerged as leading force. Asif Ali Zardari, widower of Benazir Bhutto, who had earlier been assassinated on her return from exile to Pakistan, led Pakistan People's Party to election victory and Yousuf Raza Gillani became Prime Minister of Pakistan. Musharraf stepped down as President of Pakistan when faced with real prospect of impeachment and Mr. Zardari was elected by Parliament as President of Pakistan.

Musharraf's tenure was marked by various important developments on constitutional front. National Security Council comprising Prime Minister, Chairman Senate, Speaker of National Assembly. Leader of Opposition in National Assembly, Chief Ministers of Provinces, Chairman of Joint Chief of Staff Committee and Services Chiefs has been set up through amendments to constitution with purpose to aid and advise President in exercise of his functions as President.

Effects of 13th Amendment to constitution introduced by Mr. Shareef's Government have been reversed through amendments to constitution and President's power under Art. 58(2)(b) to dissolve Parliament has been restored. Amendments also do away with automatic disqualification of members of Parliament due to defection as introduced by 14th Amendment to Constitution by Mr. Shareef's Government by leaving final decision on disqualification in such cases to Election Commission.

Newly elected Government has continued with several of previous Government's schemes and seems to be equally committed to restoring confidence of foreign investors in country's economy and all possible steps are being taken towards reducing budget deficit, increasing exports, retiring foreign loans and giving country much needed economic uplift.

Supreme Court's Decision on Interest.

Supreme Court of Pakistan in its judgment of Dec. 23, 1999 declared interest charges to be illegal and instructed Government to adopt Islamic modes of financing instead. Decision also gave time frame to guide Government to achieve results. Under guidelines, Government was required to introduce new legislation by June 2001—date set by Supreme Court in its decision for all existing laws that are in conflict with Islamic principles to become void. Just days before expiration of that period, local bank filed review application before Shariat (religious) Appellate Bench of Supreme Court for reconsideration of Court's earlier decision. Attorney General, acting for Government, also lent his voice to bank's contention and argued that deadline for new legislation should be extended till Dec. 31, 2005 to enable Government to overcome several practical hindrances in abolishing interest-based laws. Appellate Bench, while refusing to grant extension sought by Government, agreed to extend deadline till June 30, 2002, by which date all laws in contradiction of Islamic principles would stand abolished. Court hinted that provided Government sincerely took steps to totally eliminate interest-based laws it may be willing to grant further extension in revised deadline. However, court has subsequently reviewed its decision and has held that issue is not free of complications and needs further analysis of position of interest in Islam. Earlier decision has been suspended and case remanded back to Shariat Court for reconsideration.

See also subhead Islamic Laws, infra; category Courts and Legislature, topics Courts, Legislature.

Economic Policy.

Last few governments had initiated policies of economic liberation, denationalization and privatization of commercial and industrial units and other economic concessions and introduced substantial deregulation of industrial controls, exchange and payment controls and partial de-registration of capital issues particularly as regards foreign investment in industrial undertakings and issue and transfer of securities pertaining thereto. Present Government is also committed to like policies and is encouraging infrastructure development on BOT (build, operate and transfer) principles with generally unrestricted foreign participation in power generation, highways, airports and telecommunications. Other significant factor is taxation of agricultural income for first time. For details see category 22 Taxation. Economic Reforms Ordinance gives protection to these reforms.

Under latest Investment Policy, integrated strategy for creating even more investor friendly environment has been formulated with focus on further opening up of economy and marketing potential of all economic sectors for direct private investment. Essence of policy is to keep Pakistan attractive in International Investment Market by improving Policy Regime, offering fiscal and tariff relief and providing additional procedural and social facilitation. Previously only manufacturing sector was open to foreign investment. It has been decided to liberalize Policy Regime, open up other economic sectors for foreign investment and mobilize domestic financial resources towards long-term investment. Foreign investment on repatriable basis is now allowed in Agriculture, Service/Infrastructure and Social sectors.

See also categories 2 Business Organizations, topic Corporations (Companies); Foreign Trade and Commerce, topic Exchange Control.

Islamic Laws.

On Feb. 10, 1979 two Ordinances came into force for purposes of providing punishments under Islamic Laws against offences of theft and adultery. Two more Ordinances dealing with manner in which punishment of whipping was to be carried out and amending second Schedule attached to Code of Criminal Procedure 1898, for purpose of facilitating enforcement of punishment of whipping and powers of authority to arrest in certain cases, also came into force on this date.

Under Ordinance VI of 1979, courts have now been empowered to award persons found guilty of offences of theft for first time punishment of “amputation of the right hand from the joint of the wrist” and for second time punishment of amputation of his left foot up to ankle and for third time and all subsequent occasions punishment of life imprisonment. Under Ordinance VII of 1979 courts have now been empowered to award persons found guilty of offence of “adultery” punishment of “stoning to death.” Under Prohibition (Enforcement of Hadd) (Amendment) President's Order No. 12 of 1983, person found guilty of manufacturing and trafficking in opium, heroin, cocaine and other dangerous drugs “shall be punishable with imprisonment which is not less than two years and with whipping not exceeding 30 stripes and shall be liable to fine”.

It may be noted however that punishments under both above Ordinances, i.e., VI & VII, are not ordinarily awarded but are subject to strict proof, e.g. in case of theft evidence of only those two witnesses is to be taken who are regarded fit by court in this behalf, meaning thereby that to qualify witnesses should have exemplary character themselves, both religion-wise and according to norms of society. In case of “adultery” requirement of witnesses as regards both their character and numbers is even stronger. Here four such witnesses are required to depose before court.

Besides above safeguards certain exceptions have also been provided in both Ordinances and provisions relating to lesser punishments have been incorporated in addition to stricter punishments. These lesser punishments are contained in Penal Code and now punishment of whipping has supplemented same.

Provisions regarding presence and examination by medical officers both before and at time of punishment are part and parcel of two Ordinances.

Government of Pakistan under Islamic Laws has also imposed complete "prohibition" in country. Prohibition under Central Laws has been supplemented by Provincial Ordinances which inter alia provide following: (a) That no member belonging to Muslim Community, be he citizen of Pakistan or any other country, would be allowed either to consume alcoholic beverages or sell, deal, keep or manufacture same; (b) all other persons whose religions allow consumption of alcohol, would henceforth be allowed to consume same only within four walls of their homes and not publicly; (c) strict punishments have been provided for violators of these regulations which include punishment of whipping.

Except in cases where punishment of whipping is provided for in hadd, sentence of whipping under other laws stands abolished in Pakistan by Abolition of the Punishment of Whipping Act, 1996.

In order to provide mechanism for prevention of terrorism, sectarian violence and for speedy trial of heinous offences, Anti-terrorism Act, 1997 was passed. Act was aimed to combat terrorism in country and to provide sense of security to general public. In Act, sentence of two years was also provided for delinquent officers for carrying out defective investigations.

By Constitution Amendment Order 1980 Federal Shariat Court replacing Shariat Benches of High Courts has been constituted. It consists of five members including Chairman who has rank of Supreme Court Judge while remainder have rank of High Court Judges. All five are appointed by President of Pakistan. Federal Shariat Court ("FSC") exercises noncontentious jurisdiction and may be petitioned by any citizen of Pakistan, Federal or Provincial Governments to examine any law except Constitution, Muslim personal law, law of procedure of any court or tribunal and, until May 1990, any fiscal law, or law relating to levy and collection of taxes and fees or banking or insurance practice and procedure. Court must decide whether it conforms to injunctions of Islam as contained in Holy Quran and Sunnah. If law is held to be repugnant to these injunctions it ceases to be effective from date specified and must be amended. FSC (Nov. 1991) struck down provisions relating to payment of interest in 22 laws and required amendment by 30 June 1992. However, court has subsequently reviewed its decision and has held that issue is not free of complications and needs further analysis of position of interest in Islam. Earlier decision has been suspended and case remanded back to Shariat Court for reconsideration.

By Banking Companies (Third Amendment) Ordinance 1980 banks can now accept deposits on basis of participation in profit and loss of bank. Money so deposited will be invested by banks in business or transactions returns of which do not accrue to bank by way of interest. Person depositing money on this basis shall be entitled, subject to such general directions as State Bank may give from time to time in interest of monetary stability, to receive periodically share of profit of banking company arising out of such business or transactions and in event of loss, shall be liable to bear proportionate loss. In addition to above, banks can also accept deposits free of interest or return in any form and, until such time as government may determine, deposits can also be accepted on interest accounts. In order to promote Islamic banking State Bank issued detailed criteria on Dec. 1, 2001 for setting up of scheduled Islamic commercial banks in private sector. Existing scheduled commercial banks have also been allowed to open subsidiaries for Islamic banking operations.

By Circular dated June 20, 1984, of State Bank of Pakistan, issued under Banking Companies Ordinance, 1962, interest directed to be eliminated from banking system with effect from Jan. 1, 1985, in respect of finances provided by bank to Federal Government, Provincial Governments, public sector corporations and public or private joint stock companies, and with effect from Apr. 1, 1985, in respect of finances provided by bank to all other entities including individuals. As from July 1, 1984, all banks permitted to adopt alternative modes of financing listed in Annexure I to Circular, including profit and loss sharing, purchase of goods by banks and their sale to clients at appropriate mark-up in price on deferred payment basis, leasing, hire purchase, equity participation, purchase of participation term certificates, etc. Maximum and minimum rates of return or profit to be derived by banks from these transactions is to be determined by State Bank from time to time. As from July 1, 1985, no banking company to accept interest bearing deposits and all deposits to be on basis of participation in profit and loss of bank. These instructions have been implemented by Banking and Financial Services (Amendment of Laws) Ordinance, 1984, and Banking Tribunals Ordinance, 1984, has been enacted to provide for speedy recovery of finance provided by banks under these alternative systems. However these instructions are not to apply to on-lending of foreign loans or to foreign currency deposits.

By Zakat and Ushr Ordinance 1980, provision has been made for collection of Zakat and Ushr from Muslim citizens of Pakistan, or from companies, majority of whose shares are held by such citizens. Zakat is tax of 2½% on all assets, but compulsory deduction at source is only made from specified list of assets, including bank accounts, savings and investment certificates etc. On all other assets, Zakat is payable on self-assessment basis. Ushr is tax of 5% of produce from land. Zakat funds have been established at central, provincial and local level, and moneys in Zakat fund are to be utilised for specified purposes: For helping needy, orphans, widows, handicapped, and on public hospitals, educational institutions etc. Zakat councils, at central, provincial and lower levels have been created for administration and organisation of Zakat and Ushr collection and disbursement etc. Certain tax concessions are available on assets on which Zakat and Ushr has been paid.

By Zakat and Ushr (Amendment) Ordinance 1980, no compulsory deduction at source will be made from assets of person who files declaration in prescribed form.

By Zakat & Ushr (Amendment) Ordinance, 1984, no Zakat to be charged on compulsory basis on assets which have been acquired against payment in foreign currency, or which are maintained in foreign currency and return on which and value on encashment, redemption or withdrawal which is payable in foreign currency.

The Modaraba Companies and Modaraba (Floatation and Control) Ordinance 1980 provides for setting up of Modaraba companies and carrying on of Modaraba business, which is defined to mean business in which person(s) participates with his money and another with his efforts and/or skill. Company can apply to Registrar (appointed under Ordinance) for registration as Modaraba company. Modaraba Company can then apply to Registrar for permission to float Modaraba business. Public participates by buying Modaraba certificates, Modaraba company shall subscribe in each Modaraba business floated by it to not less than 10% of total amount of Modaraba certificates offered for subscription, but remuneration of Modaraba company shall not exceed 10% of net annual profits. Registrar has powers of holding inquiries into running of Modaraba or of appointing administrator. Special tribunal may be constituted, with civil and criminal jurisdiction to hear claims and try offences, under Ordinance.

Evidence Act, 1872 repealed and replaced by Qanun-e-Shahadat Order, 1984. Majority of sections in new statute same as those of old Act. Certain changes have been made with view to bring law of evidence in conformity with injunctions of Islam. Under new statute all courts of law required to determine competence of witness in accordance with qualifications prescribed by injunctions of Islam, but where such witness is not forthcoming, court may take evidence of available witness. All accused persons, including accomplice made liable to cross-examination. Instruments pertaining to financial or future obligations must be attested by two men or one man and two women.

1.03 HOLIDAYS:

Governed by Weekly Holidays Act 1942 which provides for persons employed in shops, restaurants and theatres. It declares that a shop will be entirely closed one day in every week and employees except anyone in a confidential or managerial position are entitled by law to one complete day's holiday, which will be day shop is closed unless employee's total period of employment is less than six days altogether or he has been allowed some other day completely free. Penalties under Act for Employer are Rs. 25 for a first offence and as much as Rs. 250 for a second offence. Weekly holiday is Sun. with effect from 15th Mar. 1997.

Public Holidays.

Number of public holidays has been reduced from 21 to 11. Now public holidays include two main Muslim festivals of Id-ul-Fitr and Id-ul-Zuha fixed with reference to lunar calendar, Ashura in lunar month of Muharram and Id-e-Milad-un-Nabi, Dec. 25 (which is both Christmas and birthday of Quaid-e-Azam Mohammad Ali Jinnah), Independence Day and Pakistan Day, on Aug. 14 and Mar. 23 and Iqbal Day on Nov. 9. Government holidays are compulsory but there are various other religious holidays which may or may not be given by individual employers, e.g., during the month of Ramzan all government offices and most other offices work Ramzan hours which are from 8 A.M. to 2 P.M. These hours are also the official summer hours for government offices and the courts.

1.04 OFFICE HOURS AND TIME ZONE:

Pakistan is in the +05:00 GMT in summer, +04:00 GMT in winter time zone. Office hours are generally from 9 a.m. to 5 p.m.

2 BUSINESS ORGANIZATIONS

2.01 AGENCY:

An “agent” is a person employed to do any act for, or represent, another in dealing with third persons. The person for whom such an act is done, or who is so represented is called the “principal.”

Any person who is major and sane can employ a person as agent. No requirements as to sanity or majority are necessary in an agent for purposes of binding the principal to third parties but in such cases principal will not be able to enforce his rights against the agent. No consideration is needed between the parties and the authority can either be express or implied. Authority to do an act means implied authority to do every lawful thing supplementary to this act. If the authority is to conduct a business on behalf of the principal, the agent may do all things incidental to this. Special powers lie with an agent in cases of an emergency to protect the interests of the principal.

Sub-Agents.

Any work personally to be done by the agent cannot be delegated by him, but otherwise he may, unless expressly forbidden to, delegate work to other persons who are then known as sub-agents. A sub-agent is responsible to the agent who is in turn answerable to the principal but third parties are bound directly to the principal. Where a sub-agent is appointed without authority he is in relation to the agent as an agent and the agent is, in relation to him, a principal.

Ratification.

Where a person acts for another the other can either expressly or impliedly confirm the actions provided he has knowledge of them and has free choice. Partial ratification is not possible nor is ratification possible of originally unauthorised action that injures third party.

Termination of agency can be by revocation, by renouncement or by death, insanity, or insolvency of principal. Where agent has interest in property forming subject matter of agency, agency cannot be terminated to detriment of such interest. Revocation is not possible by principal with regard to acts already performed on his behalf. Where agency was for period of time and is revoked earlier, compensation becomes payable to agent or where agent is person who terminates relationship, to principal. Reasonable notice should be given, and any acts done while there was no knowledge of revocation will equally bind principal. Where principal dies, or becomes insane, agent is bound to take all adequate steps to safeguard principal's interest.

Rights and Duties.

An agent is required to show skill and diligence in conducting his principal's business, to communicate his actions to him and present accounts. Where agent deals on his own account in the business of agency without principal's consent, principal has a right to the benefits gained by agent. Agent has a right to be indemnified against the consequences of his lawful acts and acts done in good faith. He is entitled to be compensated for any injury caused by the principal's neglect. No agent is liable to carry out other than lawful orders of principal. Agent's duty is to pay sums received on principal's behalf though he may retain a portion out of these sums as retainer. An agent has a lien on principal's property for remuneration which becomes due when act to be performed is completed.

Third Party Rights and Duties.

Principal is bound to third parties by his agent's lawful and authorized acts. Where agent exceeds authority given to him and this is not ratified, principal is only bound to extent of authority he gave where the further transaction outside the agent's authority is separable from the authorized transaction. Otherwise he is not bound at all. Notice given to agent is notice to principal. Agent cannot, however, enforce a contract on his principal's behalf nor is he personally bound to third parties except where a contract exists to this effect or where the contract made by agent is for the sale or purchase of goods for a merchant resident abroad, or where agent does not disclose his principal's name, or where principal cannot be sued. Third parties have same rights and duties towards undisclosed principals as they would have had against the agents as principals but if the third parties can show that they would not have contracted with the principal had he been disclosed or that nature of contract would be changed by intervention of principal, they can refuse to fulfill contract. Undisclosed principal cannot have greater rights against third parties than his agent would have had. Where agent is personally liable, person dealing with him may hold either him, or his principal, or both of them liable. Where third party induces agent or principal to act on belief that other only will be liable he is estopped by this representation and cannot sue person so induced to act. Person falsely representing himself as agent if his authority is not ratified is bound to make compensation for any loss or damage he has caused to third parties. Persons falsely contracting as agents where they are principals are not entitled to performance. Where principal induces belief that agent's unauthorized actions were authorized principal will be bound by his misrepresentation. Misrepresentation or fraud by agent acting in course of his business will have same effect in agreements as if such misrepresentations were made, or frauds committed, by agent in matters which do not fall within his authority and do not affect his principal.

2.02 ASSOCIATIONS:

Associations, clubs and societies are usually unincorporated and without shares; they have no legal entity and cannot sue or be sued on contracts made in their own name or on their behalf. Liability generally falls on office bearers.

Societies for scientific, charitable, educational and similar purposes may be incorporated under the Societies Registration Act 1860.

Formation.

Any seven or more persons may form society by subscribing to and filing memorandum of association with Registrar of Joint Stock Companies.

Rights and Powers.

All those necessary to attain objects.

Property of such societies if not vested in trustees, vested in governing body and in all proceedings property described as that of trustees or governing body.

Actions.

May sue or be sued in name of president or other officials as determined by rules and regulations of society. Judgments enforced against property of society and not against that of officials.

Dissolution.

By vote of three-fifths of members and all necessary steps must be taken for disposal and settlement of property according to the rules. If no rules, then as governing body finds expedient. In event of dispute adjustment of affairs may be referred to court. Where any provincial government is member of society, no dissolution without its consent.

Professional Associations.

No statutory authorization necessary but Pakistan Bar Council constituted by Legal Practitioners and Bar Councils Act 1973 which came into force in Feb. 1973.

Co-operative and religious societies formed under Co-operative Societies Act 1925 and Religious Societies Act 1880 respectively.

See topic 2.06 Partnerships.

2.03 COMPANIES:

See topic Corporations (Companies).

2.04 CORPORATIONS (COMPANIES):

Law relating to corporations (or “companies” as they are called in Pakistan) is chiefly contained in Companies Ordinance, 1984 as amended.

General Supervision.

Duties of registration of companies and enforcing Ordinance are vested in Registrars, Additional Registrars, Joint Registrars, Deputy Registrars or Assistant Registrars of Joint Stock Companies who maintain offices in Karachi, Lahore, Peshawar, Quetta, Multan and Hyderabad. Securities and Exchange Commission (“SEC”) enjoys wide powers of investigation of affairs of companies. SEC may in pursuance of findings of such investigation either itself take action or apply to court of law for any number of specified sanctions against company, including dismissal of any officer of company or direction to directors to carry out requisite changes in management or accounting policies. In addition, courts have jurisdiction in certain matters relating to Ordinance.

Code of Corporate Governance has been issued by SEC for all listed and insurance companies to follow. Code encourages such companies to appoint independent nonexecutive directors, including chairman of company, and afford reasonable representation to minority interests. No person directly or indirectly engaged in business of stock brokerage or part of particular company's external auditors may be appointed director of that company. Board of Directors of every listed company must prepare “Statement of Ethics and Business Practices”, adopt “Mission Statement” and overall corporate strategy and generally establish sound system of internal control. Code also contains detailed criteria for persons appointed as Chief Financial Officers. All listed companies would be obliged to appoint independent share registrar of company possessing such qualifications and performing such functions as may be specified by commission. All listed companies must also establish internal Audit Committees, comprised of at least three members, that shall consult with external auditors at least once a year. Companies shall also be required to change their external auditors after every five years. § 234A of Companies Ordinance 1984 has been inserted with objective to enable commission to order special audit of company and hence appoint auditor to carry out such audit by detailed scrutiny of affairs of company. Powers and duties of auditor to be appointed to undertake special audit are to be governed by § 255 of Companies Ordinance 1984. § 234A empowers commission to pass such interim orders and directions during course of special audit as it may deem appropriate and also issue such directions for immediate compliance to company and its management as may be deemed appropriate.

Formation.

Incorporated company, with or without limited liability, is formed in case of private company by one or more persons, in case of unlisted public company by three or more persons, and public listed company by ten members (as quorum for general meetings of public listed companies has been set at ten) subscribing their names to Memorandum of Association thereby agreeing to take at least one share each in company, and by otherwise complying with requirements of Ordinance as regards registration. Memorandum must state name of company with “Limited” as last word in its name in case of public limited company and parentheses and words “(Private) Limited” as last words in its name in case of private limited company; province in which registered office will be situated; objects of company; (in case of company limited by shares) that liability of members is limited; and amount of authorized share capital and its division into shares of fixed amount. Company may be limited by guarantee.

Name.

Name of company must not be identical to, or closely resemble, that of existing company or (without SEC's consent) contain any words denoting patronage of or in connection with any past or present, Pakistani or foreign, Head of State or Government or any international organisation. Name which is inappropriate or deceptive or designed to exploit or offend religious susceptibilities is also prohibited. Ordinance lays down procedure whereby company can change its name.

Registration of Articles.

A company limited by shares (to which the succeeding paragraphs exclusively relate) may also register articles of association signed by subscribers to memorandum setting out the company regulations. A company may adopt the specimen articles contained in Table A in First Schedule to Ordinance, which will in any case be deemed to be regulations of company in so far as its registered articles do not exclude or modify them.

Stamp Duty and Registration Fees.

Memorandum and articles of a company (which must be printed) are required to be stamped in accordance with Stamp Act 1899 in federal capital Islamabad. No stamp duty is payable in this respect in other parts of country. Fee based on amount of the authorized capital is, however, payable to Registrar. There is no capital duty as such.

Certificate of Incorporation.

On registration of memorandum and articles together with certain prescribed returns. Registrar will issue certificate of incorporation, upon which subscribers (with such other persons as may become members of the company) become a body corporate with perpetual succession and common seal.

Public and Private Companies.

Private company is company which by its articles restricts right to transfer its shares, limits number of its members to 50 and prohibits any invitation to the public to subscribe for shares. Law also allows single member private companies which are treated differently than ordinary private companies. All other companies are public companies. Many provisions of Ordinance do not apply to private companies, and certain provisions do not apply to private companies unless they are subsidiaries of public companies.

Commencement of Business.

Except in case of private company, a company cannot commence any business or exercise any borrowing powers unless shares have been allotted to an amount not less than the minimum subscription; every director has paid full amount on shares taken or contracted to be taken by him; no money is or may become liable to be paid to applicants for shares owing to failure to obtain permission for shares to be dealt in on stock exchange; declaration that above conditions have been complied with has been filed with Registrar and Registrar has issued certificate to commence business; and either prospectus inviting public to subscribe for shares has been filed with Registrar or, if no prospectus is issued, statement in lieu of prospectus.

Alteration of Memorandum and Articles.

A company may alter its memorandum to change its name or place of its registered office to another province or to alter or restructure its share capital, or (to limited extent) with respect to its objects, and may alter or add to its articles, by special resolution, but any such alteration of memorandum must be confirmed by Registrar of Companies in each province.

Share Capital.

Shares of no par value are not permitted. All shares issued by company must be fully paid up. Companies are now allowed to have any type of share capital. Shares in company are moveable property transferable as provided in company's articles. Certificate under common seal of company is prima facie evidence of title of member to shares specified therein. Company is required to keep register of members and, if it has more than 50 members, index of members. No notice of any trust can be entered on register of members. Application for registration of transfer of shares can be made by transferor or transferee by delivering to company stamped and executed instrument of transfer along with scrip. Transfer of share of deceased member can be made by his legal representative. Member may confer on his spouse, parents, siblings or children right to acquire his shares in event of his death and such person(s) shall be entitled to such shares to exclusion of all others. Listed companies are allowed to repurchase their own shares subject to certain requirements. No company (except private company not subsidiary of public company) can give any financial assistance in connection with purchase of any of its shares. However, Finance Act 1999 has now allowed companies to have Employees Stock Option Schemes. Where share capital of company is divided into several classes of shares, and rights attached to any class of shares are varied, holders of not less than 10% of shares of that class may apply to court to have variation cancelled. Company, if so authorized by its articles, may alter conditions of its memorandum so as to increase its share capital by issue of new shares; consolidate and divide its share capital into shares of larger amount; convert its shares into stock and vice versa; subdivide its shares into shares of smaller amount than fixed in memorandum; or cancel shares not taken or agreed to be taken by any person. Company may not, however, reduce its share capital unless approved by court. And management in company cannot disinvest its shares unless minority shareholders are offered same price and prior approval of SEC is obtained.

Finance Bill 2007 seeks to relax existing provisions, where company was prohibited from purchasing its own shares and shares of its holding company. Amendment enables subsidiary to act as trustee of holding company provided holding company is not beneficially interested in trust.

Subsidiary may also deal in shares of holding company listed at stock exchange in ordinary course of bona fide business of brokerage of shares. However, such subsidiary shall not be entitled to exercise voting rights to such shares.

Central Depositories Act, 1997.

Act brings capital market in Pakistan at par with its counterparts in advanced countries in terms of credibility and transparency. Central Depository Company acts as custodian of shares in same sense as bank is custodian of money. Its most significant function is to facilitate prompt transfer of shares to buyers.

General Meetings.

A public company must hold statutory meeting of its members, called "the statutory meeting" not less than three months nor more than six months from date on which it became entitled to commence business, at which members may discuss formation of company and statutory report. This report, certified by directors and auditors of company, must be circulated to members and filed with Registrar prior to meeting. Company must hold annual general meeting within 18 months from date of its incorporation and thereafter at least once calendar year, within three months from close of financial year, not more than 15 months intervening between meetings. All other general meetings are extraordinary general meetings, but directors shall be bound to convene such meeting on meeting of requisition of holders of not less than 1/10th of issued share capital upon which all calls and other sums then due have been paid.

Both public listed and unlisted companies have to file their financial statements with registrar of companies within 30 days from date of Annual General Meeting. Private limited companies were exempted from this requirement. By virtue of proposed amendment in Finance Bill 2007, this exemption available to private limited companies is restricted only to such private limited companies which have paid-up capital of less than 7.5 million rupees.

Quorum, Voting and Proxies.

Unless articles of company provide for larger number, one member in case of single member private company, two members in case of ordinary private company, ten members in case of listed company, and three members in case of unlisted public company, personally present at meeting, and representing not less than 25% of total voting power of company either of their own account or as proxies, constitute quorum; each member has, except in case of appointment of director, votes proportionate to paid up value of shares carrying voting rights held by him according to entitlement of class of such shares; on poll votes may be given personally or by proxy; proxy must be member of company unless articles of company provide otherwise. Minutes of all general meetings (and directors meetings) must be kept.

Finance Bill 2007 proposes to insert new section to entitle acquirer of 12.5% or more of voting shares in listed company in his name to have board of directors reconstituted.

Resolutions.

An ordinary resolution is passed by a simple majority. Special resolution is passed by three-quarter majority of such members entitled to vote as are present in person or by proxy at meeting for which 21 days notice must be given to members of intention to propose resolution as special resolution, provided that, if all members entitled to attend and vote so agree special resolution may be passed at shorter notice. Copy of every special resolution must be filed with Registrar and annexed to articles. Distinctions between special and extraordinary resolutions is removed.

Directors.

Single member private company must have at least one director, other private companies must have minimum of two directors, unlisted public company must have three directors and listed public company must have seven directors to be elected by members of company in general meeting on basis of cumulative voting system. Only natural persons may be directors. Company may also have nominated (contractual) directors with certain restrictions. Member may cast as many votes as is equal to product of shares held by him and number of directors to be elected and may cast all his votes in favour of any one or more candidates. Every director must hold at least one share in company, unless nominated as directors. In addition articles of company may provide for holding of qualification shares by director. Normally, SEC imposes such condition for permitting company to issue shares. All directors of company can hold office for maximum period of three years only unless nominated as directors. Director cannot assign his office unless such assignment approved by special resolution of company. Director with approval of board, may appoint alternate director to act for him during his absence for period of not less than three months from Pakistan. No company except private company may make, guarantee or provide any security in connection with loan to director or partner, spouse or minor child of director. Director cannot hold any office of profit under company without consent of company in general meeting and he cannot enter into contracts of sale or purchase with company without consent of board. Ordinance lays down certain grounds upon which office of director shall be vacated and company may at any time, by resolution in general meeting, remove any director provided that resolution shall not be deemed to have been passed if number of votes in favour of it is less than: (i) Minimum number of votes cast for election of director at immediately preceding election of directors, in case of removal of elected director, or (ii) total number of votes computed in manner in which votes are computed for election of directors divided by number of directors for time being, in case of removal of persons appointed as first directors of company or to fill casual vacancy on board. Director must disclose nature of any interest he may have in contracts entered into by him with company and cannot vote on any contract in which he is interested.

Managing Agents.

Appointment of managing agents prohibited except in certain limited cases. No Pakistani company, or company conducting major portion of business in Pakistan may appoint sole purchase, sale or distribution agent without approval of SEC. Penalty for contravention of these provisions is imprisonment of up to two years and/or fine of Rs. 100,000.

Mortgages and Charges.

Every mortgage or charge by company affecting its assets is void against any creditor of company unless registered in prescribed manner with Registrar.

Execution of Documents.

Instruments not executed by a company under its common seal may be executed under the hand of an attorney of the company duly authorized by writing under its common seal.

Books and Returns.

Ordinance contains detailed provisions as to maintenance by companies of books of accounts, registers and other documents, and as to filing returns with Registrar giving notice of changes in board, shift of registered office, allotment of shares etc.

Winding-up.

Company may be wound up by court if: (a) It resolves to do so by special resolution; (b) it fails to file the statutory report or hold statutory meeting or any two consecutive annual general meetings; (c) it fails to commence business within one year from date of its incorporation or suspends its business for one year; (d) number of its members is reduced below statutory minimum; (e) it is unable to pay its debts; (f) it is carrying on unlawful or fraudulent activities or business not authorised by its memorandum or which is oppressive to any of its members or is run by persons who fail to maintain proper accounts or commit fraud in relation to company or who refuse to act according to its constitution or Ordinance; (g) being listed with stock exchange, it ceases to be so listed; or, (h) in court's opinion it is just and equitable that company should be wound up. Company may be wound up voluntarily: (a) When period (if any) fixed by articles for duration of company expires or event, if any, occurs on occurrence of which articles provide that it is to be dissolved and company in general meeting passes resolution to be wound up voluntarily; or (b) if it resolves to do so by special resolution. When company has resolved to wind-up voluntarily, court may order that winding-up will continue subject to court's supervision.

Foreign Companies.

Before company incorporated abroad can open branch in Pakistan it is necessary for permission of Board of Investment to be obtained. Further, issue of shares to nonresidents requires permission of SEC State Bank of Pakistan. Protection of minority shareholders is normally achieved by suitable provisions in Articles which under Companies Ordinance, 1984 can only be altered by special resolution requiring ¾ majority. Special resolution is also required for reduction of issued share capital along with confirmation of reduction by court.

Every company incorporated outside Pakistan must, within one month of establishing a place of business in Pakistan, file with Registrar a certified copy of its charter or memorandum, address of its principal or registered office, list of its directors, chief executive and secretaries, name and address of principal officer of company in Pakistan, names and addresses of one or more persons authorized to accept service of process and notices on behalf of company, and address of its principal place of business in Pakistan. Any change in any of matters aforesaid must be reported to Registrar, and company must file with Registrar each year its annual balance sheet and profit and loss account.

Capital Issues (Continuance of Control) Act 1947 has been repealed but this does not affect consent given by Federal Government or licences issued under § 3 of Act.

Foreign Exchange Regulation Act 1947.

No shares or debentures in a company registered in Pakistan may be issued or transferred to a person who is not a resident of Pakistan (which expression is defined to include a foreign national who is for the time being resident in Pakistan and a company registered in Pakistan which is controlled directly or indirectly, by a person resident outside Pakistan) without permission of State Bank of Pakistan. However, State Bank has given general permission for certain categories of transactions for which no prior permission is required. Issues or transfer of shares of industrial companies (other than specified industries) quoted on Stock Exchange now allowed if price paid is not less than stock exchange price on date of sale. Disinvestment likewise permitted and disinvesting foreign investor permitted to repatriate proceeds provided not in excess of quoted price on date of transaction. Likewise issue or transfer of shares in private or public unquoted companies permitted if consideration paid is not less than “break-up” value as certified by chartered accountant. Likewise upon disinvestment in favour of resident repatriation of proceeds not exceeding break-up value certified by chartered accountant permitted. All issues required to be supported by evidence of remittance to issuing company in Pakistan. All transactions to be reported to State Bank and tax on capital gain, if any, required to be deducted.

Owned or Controlled by Aliens.

A company in which 50% or more of the shares are subscribed by a foreign national would be regarded as a company controlled by a person resident outside Pakistan. Foreign-controlled companies engaged in manufacturing are entitled to borrow working capital without limit; semi-manufacturing and non-manufacturing concerns are allowed to borrow 75% and 50% respectively of their paid up capital including reserves. Such companies engaged in manufacturing also permitted to raise rupee capital requirements from local banks or financial institutions. Except for restriction above, corporations controlled by aliens are treated on same basis as Pakistani controlled companies.

Companies (Appointment of Legal Advisers) Act 1974.

Under § 3 every company with paid up capital of more than Rs. 500,000 shall appoint at least one legal adviser on retainership to advise such company in performance of its functions and discharge of its duties in accordance with law.

Retainer in respect of a legal adviser appointed by a company shall not be less than Rs.1,200 per mensem.

An advocate may represent three companies as legal adviser and a registered firm may represent product of three and total number of partners of firm.

An advocate means an advocate entered in any roll under provisions of Legal Practitioners and Bar Councils Act 1973.

See also categories 3 Business Regulation and Commerce, topic Price Control; Foreign Trade and Commerce, topics Exchange Control, Foreign Trade Regulations, Industrial and Investment Regulations; and Introduction, topic Government and Legal System, subhead Islamic Laws.

Listed Companies (Substantial Acquisition of Voting Shares and Takeovers) Ordinance 2002 prohibits any person from directly or indirectly acquiring voting shares, which (taken together with voting shares, if any, held by such person) would entitle such person to more than 25% voting shares in listed company or control of listed company unless such person makes public announcement of offer to acquire voting shares or control of such company. Acquisition of shares must be preceded by public announcement required to be published in one Urdu and one English daily newspaper having circulation in province in which concerned stock exchange is situated. Copy of announcement also needs to be submitted to SECP, concerned stock exchange and target company at least two working days prior to publication. In addition, acquirer is required to make disclosure of aggregate of his shareholding in target company to company itself as well as to concerned stock exchange. Acquirer is also required to send letter containing formal offer to target company, all shareholders (including convertible security holders, if any) of target company and concerned stock exchange within two working days of publication. List of relevant shareholders is required to be supplied to acquirer by board of directors of target company.

Prior to making public announcement, acquirer must appoint bank, or financial institution or member of stock exchange as manager to offer. Manager shall ensure that acquirer is able to implement public offer and, generally, that provisions of Ordinance have been duly complied with. Where shares offered for sale in pursuance to public announcement are more than voting shares offered to be acquired by acquirer, acquirer will be required to accept shares actually offered on proportional basis. Upon transfer of securities, acquirer shall be entitled to proportionate representation on board of directors of target company.

2.05 JOINT STOCK COMPANIES:

See topic Corporations (Companies).

2.06 PARTNERSHIPS:

Partnership is a status arising from contract between persons who have agreed to share the profits of a business carried on by all or any of them acting for all. A Partnership may be at will, for any duration specified, or for the prosecution of some particular and defined business.

Liability of the partners of a firm is joint and several. The firm is liable for individual acts of misfeasance and misapplication of money or goods by one of its partners.

Capacity.

No minor can be a partner but he may with consent of all partners be admitted to the benefits of the partnership. The minor's right of action against the partners will only arise when and if he desires to sever the connection between himself and them and his share will then be determined after valuation.

Registration is not compulsory but if done should include particulars of the firm's name, address of principal place of business and any other places of business, date of formation of the firm and date of joining of each partner and his address. This document should be signed and verified by all partners. Any alterations should be recorded. A firm which is not registered is not competent to sue for enforcement of any right from contract except as regards suit or claim of set-off not exceeding Rs. 100.

Rights and Liabilities of Partners Inter Se.

Duties of a partner are to carry on business to the greatest common advantage of all and to indemnify the other partners for any loss caused by his own fraud. Other rights and duties may be created by contract and can be varied or restricted. By contract it may be provided that a partner be reimbursed for his part in the conduct of the business. A partner is entitled to be reimbursed for expenses incurred by him in the ordinary and proper conduct of the business or in an emergency but not where the emergency arose out of his own wilful neglect. Unless otherwise agreed by contract, each partner is entitled to an equal share in the profit of the firm. Consent of all the partners is required to any changes.

Change in the Constitution of the firm does not vary the rights and duties of the remaining partners. If after expiry of a fixed term of years for the existence of the firm the partners continue their business, the rights and liabilities inter se remain as before and where other enterprises are undertaken as additional ventures to the original undertaking, the same rights and duties that attended the original undertaking will continue to apply to the additional undertaking.

Rights and Liabilities of Partners as to Third Persons.

A partner is agent for the firm and his actions bind the firm but he cannot without express authority (i) submit a dispute to arbitration, (ii) open a bank account for the firm in his own name, (iii) compromise a claim without authority on behalf of the firm, (iv) institute a suit, (v) withdraw a suit, (vi) admit liability, (vii) acquire immoveable property or transfer the firm's immoveable property, (viii) enter into a partnership on behalf of the firm. However, by implied authority he may do all these things in an emergency to protect the firm from loss. Admissions by a partner are admissions by the firm and notice to one partner is notice to all except where it relates to a fraud committed by or with the consent of that partner.

Retirement from firm can be by consent; or by express agreement. Where a partner becomes insolvent, even if the partnership is not dissolved, he ceases to be a partner. Partner can also be discharged provided that power to expel has been conferred by express agreement between partners and said power has been exercised in good faith. Retiring partner can open new business and carry on same business as firm from which he retired but he cannot use firm name, represent former firm or solicit orders from its customers. Reasonable agreements in restraint of operating such new firm may be made and will be enforced.

Dissolution of the whole firm can take place by consent; adjudication of a partner, or the firm, as insolvent or, dissolution by notice of partnership-at-will; or happening of some event that makes pursuit of its purpose illegal. Firm will also be held to have been dissolved on expiry of express term of its duration or completion of its purpose. Liability of firm and each individual partner after dissolution continues until notice has been given to public of such dissolution.

3 BUSINESS REGULATION AND COMMERCE

3.01 BANKS AND BANKING:

Nationalised Pakistani banks being denationalised by sale of shares and transfer of management to private sector bidders and/or employees. Government also allowing applications, in accordance with certain criteria, to set up new commercial banks including with foreign participation. Investment banks also allowed to be set up with foreign participation.

In banking sector, one of most important developments was completion of process of legislation for its structural reform. State Bank of Pakistan Act, Banks Nationalization Act, and Banking Companies Act, were amended further and new recovery law under name of Financial Institutions (Recover of Finances) Ordinance 2001 was legislated.

Changes in State Bank Act gave full and exclusive authority to State Bank to regulate banking sector, to conduct independent monetary policy and to set limit on government borrowings from State Bank of Pakistan. In significant development, State Bank of Pakistan (SBP) has recently been bifurcated. Under SBP Banking Services Corporation Ordinance 2002, SBP Banking Services Corporation has been set up to perform all non-core functions of SBP. SBP transfers to new corporation all such agreements and contracts, deeds and bonds, powers of attorney, letters of credit, guarantees and legal representations that have been established in its favour or to which it has been party. Bifurcation allows SBP to perform core job of central bank, such as formulating following monetary policy, regulating and supervising banks, managing debt and foreign exchange reserves etc., more efficiently.

Microfinance Institutions Ordinance 2001 has been enacted to provide organizational, financial, and infrastructural support to poor people especially women; to relieve poverty; and to promote social welfare and economic justice through establishment of company that would accept deposits from public for purpose of providing above services. By Companies (Second Amendment) Ordinance 2002 non-banking finance companies may be established, which may carry out investment finance services, leasing, housing finance services, venture capital investment, discounting services and asset management services, etc.

Amendments in Banks Nationalization Act abolished Pakistan Banking Council and institutionalized process of appointment of Chief Executives and Boards of nationalized commercial banks and development finance institutions with State Bank having role in their appointment and removal. Amendments also increased autonomy and accountability of Chief Executives and Boards of Directors of banks and development finance institutions.

New recovery law is designed to ensure expeditious recovery of stuck up loans and to speed up court proceedings for loan recovery decrees and their implementation. Full and effective implementation of these laws would improve health and viability of banking sector, which is critically needed for efficient financial intermediation in context of increasing integration of economy of Pakistan with world money and capital markets. However, in recent decision, full bench of Lahore High Court has struck down § 15 of Financial Institutions (Recovery of Finances) Ordinance 2001, declaring it repugnant to fundamental rights enshrined in Arts. 2-A, 3, 4, 9, 23, 24, and 25 of Constitution. Consequently, financial institutions stand barred from disposing of mortgaged properties of defaulters without obtaining court order.

See category 1 Introduction, topic 1.02 Government and Legal System, subhead Islamic Laws.

3.02 BILLS AND NOTES:

Bills of exchange (including cheques) and promissory notes are regulated by Negotiable Instruments Act, 1881.

Inland Instrument and Foreign Instrument.

An inland instrument is a promissory note, bill of exchange or cheque drawn or made in Pakistan payable in or drawn upon any person resident in Pakistan. Any other instrument is a foreign instrument.

Maturity.

Maturity of a promissory note or bill of exchange is date at which it falls due. Every promissory note or bill of exchange which is not expressed to be payable on demand, at sight or on presentment is at maturity on third day after day on which it is expressed to be payable. When day on which a promissory note or bill of exchange is at maturity is a public holiday, instrument is deemed to be due on next preceding business day. Expression “public holiday” includes Sundays and days declared by Federal Government by notification in Official Gazette to be public holidays.

Holder in due course is a person who for consideration becomes possessor of a promissory note, bill of exchange or cheque if payable to bearer, or payee or indorsee thereof, if payable to order, before it became overdue, without notice that title of person from whom he derived his own title was defective and holds bill free of defects of title or prior parties and may enforce payment against all parties liable on bill. A holder who derives his title through a holder in due course, and who is not himself a party to any fraud or illegality affecting the negotiable instrument, has all the rights therein of that holder in due course as regards acceptor and all parties to instrument prior to that holder. Every party to a bill is deemed to have become a party thereto for value and each holder is prima facie deemed to be a holder in due course.

Presentment for acceptance is necessary when a bill is payable a certain number of days after acceptance, or after sight. Presentment for acceptance is absolutely necessary in case of such bills to fix date of payment. Also, where a bill expressly stipulates that it shall be presented for acceptance, it must be presented for acceptance before it can be presented for payment. A bill of exchange is said to be dishonoured by nonacceptance when the drawee, or one of several drawees not being partners, makes default in acceptance upon being duly required to accept the bill, or where presentment is excused and the bill is not accepted, where drawee is incompetent to contract, or acceptance is qualified, the bill may be treated as dishonoured.

Where there are several persons, not being partners, liable on the negotiable instrument as makers, acceptors or drawees, as case may be, and no place of payment is specified, presentment must be made to them only.

Presentment for Payment.

Promissory notes, bills of exchange and cheques must be presented for payment to maker, acceptor or drawee thereof respectively, by or on behalf of holder in manner provided in law. In default of such presentment, other parties thereto are not liable thereon to such holder.

Where authorised by agreement or usage, a presentment through the post office by means of a registered letter is sufficient.

Exception.

Where a promissory note is payable on demand and is not payable at a specified place, no presentment is necessary in order to charge maker thereof nor is presentment necessary to charge acceptor of a bill of exchange.

Notice of dishonour must be given in case of dishonour by nonacceptance or nonpayment by the holder thereof or some party thereto who remains liable thereon to all other parties whom holder seeks to make severally liable thereon, and to some one of several parties whom he seeks to make jointly liable thereon.

When a bill of exchange is dishonoured by nonacceptance drawer or any indorser to whom such notice is not given is discharged, but rights of holder in due course subsequent to omission to give notice are not prejudiced by that omission.

When a bill of exchange is dishonoured by nonacceptance and notice of dishonour is given, it is not necessary to give notice of a subsequent dishonour by nonpayment, unless the bill is, in the mean time, accepted.

Stamp Duty.

Under § 35 of Stamp Act 1899, no instrument chargeable with stamp duty shall be admitted in evidence, acted upon, registered or authenticated unless such instrument is duly stamped. This defect cannot be rectified in case of bills of exchange, and promissory notes, but in case of other such instruments this defect can be rectified by payment of proper duty and specified penalty.

Foreign unstamped notes and bills if invalid in the foreign country are invalid in Pakistan, and are never admissible in evidence in Pakistan.

Conflict of Laws.

If a negotiable instrument is made, drawn, accepted or indorsed outside Pakistan but in accordance with law of Pakistan, the circumstance that any agreement evidenced by such instrument is invalid according to law of country wherein it was entered into does not invalidate any subsequent acceptance or indorsement made thereon within Pakistan.

Where there is no provision to contrary in the contract, legality and validity of the instrument or of its acceptance or negotiation is governed by law of the place where instrument was made, drawn, accepted or negotiated. Law of place where instrument is payable determines liability of the parties, duties of holder with respect to presentment for acceptance or payment, date of maturity of instrument, what constitutes dishonour, all questions relating to payment and satisfaction including the currency and rate of exchange at which instrument is to be paid.

Law of any foreign country regarding promissory notes, bills of exchange and cheques is presumed to be same as that of Pakistan unless and until contrary is proved.

3.03 COMMERCIAL REGISTER:

Registration not compulsory except for joint stock companies.

See category 2 Business Organizations, topic 2.06 Partnerships.

3.04 CONTRACTS:

The law relating to contracts which is to a great extent based on the Common Law of England is to be found in codified form in the Contract Act 1872. Previously this Act had contained sections on the sale of goods and on the Law of Partnership. Subsequently in 1930 and 1932 respectively these sections were repealed and separate Acts covering these subjects passed. Amongst the main differences between the Act and the Common Law are the provisions of the Act to the effect that a third party's actions may constitute sufficient consideration for the performance of promise and that past consideration is good consideration. (§ 2). Promisee may also dispense with, or remit wholly or in part, performance of promise made to him or may extend time for such performance or may accept instead of it any satisfaction which he thinks fit. There is however nothing corresponding to enforceable document under seal without consideration. See, however, § 25 of Contract Act (Act IX of 1972).

Contract with a minor is void. For purposes of contract persons under 18 are minors.

Agreement to contracts obtained by force, fraud or undue influence are voidable at option of person coerced, defrauded or influenced. The consideration must be permissible by law. Illegal contracts, wagering contracts and contracts against public policy cannot be enforced. Contracts in restraint of trade are void to extent of the restraint except where made on the sale of goodwill of business, when a reasonable restraint upon the Vendor will be enforced. Principle of negotiorum gestor is also recognized and person benefitting must make some sort of payment to the other.

Excuses for Nonperformance.

When a contract consists of reciprocal promises to be simultaneously performed, no promisor need perform his promise unless promisee is ready and willing to perform his reciprocal promise.

When a contract contains reciprocal promises and one party to contract prevents other from performing his promise, contract becomes voidable at option of the party so prevented, and he is entitled to compensation from the other party for any loss which he may sustain in consequence of nonperformance of the contract.

When a contract consists of reciprocal promises such that one of them cannot be performed or that its performance cannot be claimed till other has been performed, and promisor of the promise last mentioned fails to perform it, such promisor cannot claim the performance of the reciprocal promise, and must make compensation to the other party to the contract for any loss which such other party may sustain by the nonperformance of the contract. An agreement to do an act impossible in itself is void. Contract to do an act which after contract is made becomes impossible, or by reason of some event which the promiser could not prevent, unlawful, becomes void when the act becomes impossible or unlawful.

If parties to a contract agree to substitute a new contract for it, or rescind or alter it, original contract need not be performed. Where a person at whose option a contract is voidable rescinds it, the other party thereto need not perform any promise therein contained in which he is a promisor.

If any promisee neglects or refuses to afford the promisor reasonable facilities for performance of his promise, the promisor is excused by such neglect or refusal as to any nonperformance caused thereby.

Measure of Damages.

On breach of a contract proper measure of damages is loss sustained by injured party naturally following as consequence of breach.

Contract without Consideration.

In four instances a contract even without consideration is valid. Firstly, where agreement is in writing and is based on natural love and affection, secondly, where agreement is to compensate person who has performed some act voluntarily for promisor or done something which promisor would have been legally obliged to do, thirdly, where it is promise in writing to pay time-barred debt, and, lastly, where there is contract of agency.

Applicable Law.

In absence of an express intention to contrary the proper law of a contract is presumed to be law of country where contract is made, and, where contract is made in one country and is to be performed wholly or partly in another country, the law of the country where performance is to take place. Parties to a contract are free to choose its proper law subject to the qualification that contract should have a substantial connection with the country the law of which is chosen and that there should be no reason for avoiding the choice on grounds of public policy.

Where parties have not expressed any intention the proper law is inferred from terms and nature of contract and from general circumstances of the case. Proper law governs the material or other essential validity of the contract as well as its interpretation, effect and discharge. Formation of the contract is governed by the law which would be the proper law if the contract were validly concluded. Capacity to contract is governed by law of country with which the contract is most closely connected. Formal validity is governed by law of country where contract is made or by the proper law.

Government Contracts.

There are no special requirements to be observed when contracting with Government. General law of contracts applies.

Distributorships, Dealerships and Franchises.

These are governed by general law of contracts and agency.

3.05 FRAUDS, STATUTE OF:

There is no statute of frauds in Pakistan, and under § 11 of Contract Act 1872 all agreements are contracts if they are made by free consent of parties competent to contract, for a lawful consideration and with a lawful object and are not in the section expressly declared to be void. Provisions of the section do not affect any law in force in Pakistan by virtue of which a contract is required to be made in writing or in presence of witnesses or any law relating to registration of documents. Examples of such laws are Companies Ordinance, 1984 §§ 19 and 27 of which require memorandum and articles of association respectively of company to be in writing; Transfer of Property Act, under provisions of which sales, mortgages, leases, exchanges and gifts of immovable property and transfers of actionable claims must be in writing. Writing is also required for creation of trust by Trusts Act, in case of acknowledgment of barred debts by Limitation Act, in case of submission to arbitration by Arbitration Act.

Where a contract is not required to be in writing it is immaterial whether a clause is written, printed or typewritten. When written and printed clauses are inconsistent greater importance is to be attached to written clause.

3.06 INFORMATION TECHNOLOGY, INTERNET AND NEW MEDIA:

Computer software and Information Technology has been declared industry via government notification. Government has offered various incentives for facilitation and growth in this area such as 0% customs duty on import of IT related machinery and equipment. Software companies are allowed to retain 35% of their export earning in Foreign Exchange to meet expenditure on purchase of hardware/software and hiring of consultants, etc. Provinces of Balochistan and Sindh have enacted Balochistan Information Technology Board Ordinance 2001 and Sindh Information Technology Board Ordinance 2002 with sole aim of taking all necessary measures for promotion, development and use of information technology. Special Information Technology Board Fund has also been set up to allow Board to perform its functions effectively.

In order to develop broadcast media and to regulate establishment and operation of all broadcast and CTV stations, Pakistan Electronic Media Regulatory Authority has been formed.

Legal recognition and facilitation of documents, records, information, communications and transactions in electronic form and accreditation of certification service providers is provided for in Electronic Transactions Ordinance 2002. No record, document or transaction will be denied legal recognition on ground that it is in electronic form. Detailed rules determine origin of electronic transmission and time when such transmission is made or received, etc. It is hoped that these rules will help parties determine their liabilities or other legal consequences of electronic transmissions, especially in cases of electronic contracts. Time for receipt of transmission, in particular, is time when electronic record enters addressee's computer source. However, if recipient had designated particular computer source and transmission is to different source, receipt is deemed to have been made when record is actually retrieved by addressee. Place of dispatch of electronic record under IT Ordinance is (principal) place of originator's business/residence and of receipt is (principal) place of addressee's business/residence.

Ordinance also provides for establishment of Certification Council. Council shall grant and renew accreditation to service providers and monitor their compliance with provisions of Ordinance. Council may also recognize certificates issued by foreign certifying authorities. Certification Council may also act as repository of certificates issued and has wide powers to investigate any contravention of licenses and Ordinance. Council may also with permission of government make regulations pertaining to safety and management of keys, and passwords, inspection of operations, privacy and protection of data subscribers, suspension and revocation of certificates and accreditation.

Offences Under Electronic Ordinance 2002 include provision of false information to certification service provider by subscriber, intentionally issuing false certificate by director or officer of certification provider (in both cases, wrongdoer liable to pay fine up to 10 million rupees or imprisonment not exceeding seven years). Other offences include accessing computer system without permission of owner, intentionally tampering with computer source documents (up to seven years imprisonment and one million rupees fine). In absence of intent to facilitate, network service provider shall not be subject to any liability in connection with contravention of Ordinance by person not subject to direction or control of network service provider.

Protection of Software.

IT Policy also contains draft “Protection of Software Ordinance 2000” (“Software Ordinance”). This Ordinance provides for establishment of “Registry of Software Intellectual Property” consisting of registrar and sub-registrars. Registry shall be entrusted with task of issuing certificates of registration to appropriate applicants and of protecting owners of software as well as consumers of software against anticompetitive conduct of owners, and of adjudicating disputes between owners, owners and consumers and owners and third parties.

Applications for registration of software must be in prescribed form and accompanied by description of relevant particulars of software and registration fee. Registration is to be valid for 15 years and may subsequently be renewed by concerned party. Registration may be transferred into name of any other person, if registered owner so wishes. Infringement of registration rights will be offence punishable by imprisonment and/or fine.

3.07 LICENSES, BUSINESS AND PROFESSIONAL:

See category 14 Foreign Trade and Commerce, topics 14.05 Foreign Trade Regulations, 14.06 Industrial and Investment Regulations.

3.08 MONOPOLIES, RESTRAINT OF TRADE AND COMPETITION:

Abuse of dominant position, entering into agreement in respect of production, supply, distribution, acquisition or control of goods, or provision of services which have object or effect of preventing, restricting, or reducing competition within relevant market, entering into deceptive marketing practices, and entering into merger which substantially lessens competition by creating or strengthening dominant position in relevant market area are acts that are prohibited under Competition Ordinance 2007. Abuse of dominant position must be deemed to have been brought about, maintained, or continued if it consists of practices which prevent restrict, reduce, or distort competition in relevant market.

Expression ``practices'' include: (a) Limiting production, sales and unreasonable increases in price or other unfair trading conditions; (b) price discrimination by charging different prices for same goods or services from different customers in absence of objective justifications that may justify different prices; (c) tie-ins, where sale of goods or service is made conditional on purchase of other goods or services; (d) making conclusion of contracts subject to acceptance by other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with subject of contracts; (e) applying dissimilar conditions to equivalent transactions on other parties, placing them at competitive disadvantage; (f) predatory pricing driving competitors out of market, prevent new entry, and monopolize market; (g) boycotting or excluding any other undertaking from production, distribution or sale of any goods, or provision of any service; and (h) refusing to deal.

Deceptive marketing practices must be deemed to have been resorted to or continued if undertaking resorts to: (a) Distribution of false or misleading information that is capable of harming business interests of another undertaking; (b) distribution of false or misleading information to consumers, including distribution of information lacking reasonable basis, related to price, character, method or place of production, properties, suitability for use, or quality of goods; (c) false or misleading comparison of goods in process of advertising; and (d) fraudulent use of another's trademark, firm name, or product labeling or packaging.

Ordinance creates new regulatory body by name of Competition Commission of Pakistan. This body has power to conduct enquiries and issue orders and grant individual and block exemptions. Noncompliance with provisions of Ordinance entail fine not exceeding Rs. 50 million or amount not exceeding 15% of annual turnover of defaulting undertaking. Any person aggrieved by order of Competition Commission can appeal against it to Appellate Bench of the Commission within 30 days from decision of which appeal lies to Supreme Court of Pakistan.

Government Control.

Essential Commodities Distribution Order 1953 and Essential Supplies Act 1957, Essential Commodities Control Order 1965 and Price Control and Prevention of Profiteering and Hoarding Act, 1977 are enactments which enable Federal Government to control distribution and price of commodities therein specified. Number of these specified commodities is steadily decreasing as it is policy of Government to allow free play of market forces and to do away with price control.

3.09 PRICE CONTROL:

Price control is regulated by government under Price Control and Prevention of Profiteering & Hoarding Act, 1977. Items affected thereby have been progressively reduced and at present direct control is exercised only in respect of few items. Full powers to regulate price, however, still lie with government and would be used if government felt prices were being inflated. Control also exists in relation to supply of essential commodities.

3.10 SALES:

A contract for sale of goods is governed by Sale of Goods Act 1930 and is a contract whereby seller transfers or agrees to transfer property in goods to buyer for a price. Such a contract may be conditional or absolute and may be effective immediately or in the future. A contract for future sale is an agreement to sell.

Formalities.

There must be an offer and acceptance of existing or future goods. The sale may be in writing or oral. If the goods have already perished, unknown to the seller, at the time of contracting then the contract to sell is void. If the goods perish before reaching the buyer the contract may be voidable.

Conditions and Warranties.

A condition is a stipulation that is essential to the contract while a warranty is a stipulation collateral to the main agreement. A condition may, and in certain cases, must be waived and treated as a warranty. This waiver becomes mandatory where goods have been partly accepted and are not severable. Implied undertaking or condition exists that seller has or will have the right to sell the goods. There is an implied warranty that buyer will have quiet enjoyment of the property and that the goods are free from encumbrances. It is a condition that where sale is by description or sample, the goods should correspond to the description or sample. There is no implied condition or warranty as to the fitness of goods sold for any particular purpose except where buyer makes known to seller such particular purpose and places reliance on seller's skill and judgment. If goods are generally sold by seller there is also an implied condition that they are fit for the purpose sold except where they are sold under their patent or trade name. Where sale is by description there is an implied condition that the goods will be of merchantable quality except where buyer examined the goods before purchase and the defects were not latent defects.

Transfer of Title.

Property passes in the goods when it is intended that it should pass. No better title can be passed than that of the seller unless the owner is precluded from denying seller's authority. A mercantile agent in possession, with consent, of goods can pass a good title to a bona fide purchaser as if expressly authorised so to do with the owner's consent. Similarly one of several joint-owners, in possession of the goods with the consent of all, can pass a good title to a bona fide purchaser. Where a seller has acquired goods under a voidable contract but which has not at the time he contracts been rescinded, a bona fide purchaser takes good title. Where a seller after sale retains possession of the goods and subsequently resells them to a third party, who is in good faith, that third party takes a good title. A buyer in possession after sale can also sell and a third party will take without notice of the original seller's lien, if any.

Delivery.

Unless otherwise agreed, payment and delivery are concurrent conditions though seller is not bound to deliver until buyer applies for delivery. Delivery should be made within a reasonable time at seller's expense. Where buyer rejects the goods he is not bound to return them physically to seller. Delivery is deemed to take place at time of the handing over of the goods to the carrier but seller must stipulate this.

Notices Required.

Unless otherwise agreed, where goods are delivered to buyer and he refuses to accept them, having the right so to do, he is not bound to return them to seller but it is sufficient if he intimates to seller that he refuses to accept them. Buyer is deemed to accept the goods when he intimates to seller that he has accepted them or when goods are delivered to him and he does any act in relation to them which is inconsistent with the ownership of seller, or when, after lapse of a reasonable time, he retains the goods without intimating to seller that he has rejected them.

Stoppage in Transit.

It is possible for an unpaid seller to take this action when buyer becomes insolvent. The duration of transit is calculated to last until buyer takes delivery from the carrier, even if after arrival of the goods at the appointed destination the carrier acknowledges to agent of buyer, or to buyer that he holds the goods on his behalf. It is a question of fact when goods are shipped as to whether the master is a carrier, or an agent of the buyer. The remainder of goods partly delivered can be stopped in transit.

Remedies of Seller.

Seller can sue for the price of goods even where delivery is not made, if the price was by contract payable on a certain date irrespective of delivery. He can also claim damages for nonacceptance of goods by buyer.

Remedies of Buyer.

Buyer can sue for damages for nondelivery. He can also sue for damages for breach of warranty, or for breach of a condition being treated as a warranty, or set up this breach in reduction of the price. Both these remedies can lie on the same breach where additional damage is incurred by buyer. Where either party repudiates the contract before date of delivery the other can sue immediately or wait until the contractual date comes around. Special damages and interest are also recoverable in certain cases.

Warranties.

See subhead Conditions and Warranties, supra.

4 CITIZENSHIP

4.01 ALIENS:

See category 16 Immigration, topic 16.01 Aliens.

4.02 IMMIGRATION:

See category 16 Immigration, topic 16.02 Immigration.

5 CIVIL ACTIONS AND PROCEDURE

5.01 ACTIONS:

Proof of Foreign Claims.

A foreign claim may be proved in same manner as a local claim. Where a claim is to be proved by evidence of a foreign witness, such evidence can be taken on commission if Pakistani Court concerned issues a commission or letter of request to the foreign court.

Proof of Foreign Law.

Foreign law may be proved either by evidence of a person specially skilled in it or by direct reference to books printed or published under authority of the foreign Government. A man will not be accepted as competent to prove foreign law unless he is a practising lawyer, or has held some official position which presumes a knowledge of that law or has special knowledge of that law acquired from practical experience.

§ 94 of Qanun-e-Shahadat Order, 1984 dispenses with proof of genuineness of every book purporting to be printed or published under authority of government of any country and to contain any of laws of that country, and of every book purporting to contain reports or decisions of courts of such country.

Limitation of.

See topic 5.04 Limitation of Actions.

5.02 DEPOSITIONS AND DISCOVERY:

These may be taken in criminal cases by Magistrates and Sessions Judges and in civil matters by the civil judges. Provisions for this are to be found in Civil Procedure Code Order XVIII and Criminal Procedure Code, § 353-§ 363. The maxim omnia praesumuntur rite acta esse applies to depositions and it will generally be assumed that, if signed by the judge or magistrate concerned, the contents thereof have been read over to the witness and checked. Where depositions are given in English the accused if he does not understand English, is entitled to a written interpretation of the contents which then forms part of the court record.

Depositions are either taken down by the magistrate or judge in his own hand or else a memorandum of the substance of the evidence is recorded by him, or failure to do this accounted for. The deposition should be read over to the witness, and if necessary, corrected.

De Bene Esse.

Under O. XVIII Civil Procedure in a case where it is feared that a witness is about to leave the jurisdiction, or other sufficient cause is shown to the court, a witness' evidence may be recorded immediately.

Dying declarations are admissible under § 164 Criminal Procedure Code before a magistrate or judge.

Compelling Attendance of Witness.

Expenses of witnesses are paid into court by the applicant for summons, and summons to attend will subsequently be issued to witness named. Summons must specify time and place of attendance. Where expenses have been underestimated the court may direct the applicant to make up the sum. Where any witness fails to accept service, or having accepted service fails to appear and it seems to the court that such nonacceptance or nonattendance is deliberate, he may be arrested or his property attached.

Depositions outside the country may only be taken on commission or a letter of request.

A commission may only be issued to a competent foreign court in whose jurisdiction the witness resides.

Notice must be given to the other side and the other side must have an opportunity to cross-examine in person, by representation, or cross-interrogatories, when a commission outside the jurisdiction is executed.

Restriction on Local Use.

Depositions taken abroad are placed on same footing as depositions taken in Pakistan.

5.03 JUDGMENTS:

Judgment on Admissions.

Any party may, at any stage of a suit, where admissions of fact have been made, either on the pleadings, or otherwise, apply to the court for such judgment or order as upon such admissions he may be entitled to, without waiting for the determination of any other question between the parties, and court may upon such application make such order or give such judgment, as court may think just.

Judgment by Consent.

If it is proved to satisfaction of court that a suit has been adjusted wholly or in part by any lawful agreement or compromise, or where defendant has satisfied plaintiff in respect of whole or any part of subject matter of suit, court orders such agreement, compromise or satisfaction to be recorded, and passes a decree in accordance therewith so far as it relates to the suit.

Declaratory Judgments.

Any person entitled to any legal character, or to any right as to any property can institute a suit against any person who denies or is interested in denying his title to such character or right. Court may in its discretion make a declaration that he is so entitled, and plaintiff need not in such suit ask for any further relief. Court will, however, make no such declaration where plaintiff, being able to seek further relief than a mere declaration of title, omits to do so.

Judgment by Default.

If defendant does not appear when suit is called on for hearing, and it is proved that summons was duly served, court may proceed ex parte and pass an ex parte order.

Where defendant appears and plaintiff does not appear when suit is called on for hearing, court shall make an order that suit be dismissed, unless defendant admits the claim, or part thereof, in which case court shall pass a decree against defendant upon such admission, and where part only of claim has been admitted, shall dismiss the suit so far as it relates to remainder.

Revival.

First application for execution for a decree, to be within time, must be made within three years of decree. Subsequent applications must be made within three years from date of final order made on last application.

Foreign Judgments.

A foreign judgment is conclusive as to any matter directly adjudicated upon between the same parties or between parties under whom they or any of them claim litigating under the same title except: (a) Where it has not been pronounced by a court of competent jurisdiction; (b) where it has not been given on merits of the case; (c) where it appears on face of proceedings to be founded on an incorrect view of international law or a refusal to recognize the law of Pakistan in cases in which such law is applicable; (d) where proceedings in which judgment was obtained are opposed to natural justice; (e) where it has been obtained by fraud; (f) where it sustains a claim founded on a breach of any law in force in Pakistan.

Foreign judgment may be enforced by proceedings in execution mainly under § 44A of Code of Civil Procedure 1908, but in other cases foreign judgment can only be enforced by a suit upon judgment.

§ 44A states: (1) Where certified copy of decree of any of superior courts of U.K. or any reciprocating territory has been filed in District Court, decree may be executed in Pakistan as if it had been passed by District Court. (2) Together with certified copy of decree shall be filed certificate from such superior court stating extent, if any, to which decree has been satisfied or adjusted and such certificate shall, for purpose of proceedings under this section, be conclusive proof of extent of such satisfaction or adjustment. (3) Provision of § 47 shall as from filing of certified copy of decree apply to proceedings of District Court executing a decree under this section, and District Court shall refuse execution of any such decree, if it is shown to satisfaction of court that decree falls within any of exceptions specified in Clauses (a) to (f) of § 13 which define cases in which a foreign judgment is not conclusive and are quoted first above. Also § 14 states that court shall presume, upon production of any document purporting to be a certified copy of foreign judgment, that such judgment was pronounced by court of competent jurisdiction, unless contrary appears on record; but such presumption may be displaced by proving want of jurisdiction.

§ 47 defines the questions to be determined by court executing decree: (1) All questions arising between parties to suit in which decree was passed, or their representatives, and relating to execution, discharge or satisfaction of decree, shall be determined by court executing decree and not by separate suit. (2) Court may, subject to any objection as to limitation or jurisdiction, treat proceeding under this section as suit or suit as proceeding and may, if necessary, order payment of any additional court fees. (3) Where question arises as to whether any person is or is not representative of party, such question shall, for purposes of this section, be determined by court.

Award given in foreign state by arbitrators selected by parties cannot be equated to judgment given by foreign court and its validity is not open to attack on grounds mentioned in § 13. Award pronounced in foreign state is not judgment within this section and no suit will in consequence lie on it even if it was filed in foreign court unless it was made a rule of court. However suit may be filed on award itself under Arbitration (Protocol & Convention) Act, 1937.

Where a foreign judgment is sought to be enforced in execution under § 44A it will be open to the judgment-debtor to raise all objections which would have been open to him under § 13 if suit had been filed on judgment.

Suit on foreign judgment in court governed by Code of Civil Procedure 1908 must satisfy conditions of § 20 which states that suits should be instituted where defendant resides, or carries on business or personally works for gain or where cause of action wholly or in part arises.

Period of limitation for suit on foreign judgment in six years from date of judgment. (Limitation Act 1908, Schedule 1, Article 117). Pendency of appeal in foreign country will not bar a suit on foreign judgment, but if appeal results in decree dismissing appeal, appellate decree affords fresh starting point for limitation.

See also category 7 Debtor and Creditor, topic 7.04 Executions.

5.04 LIMITATION OF ACTIONS:

Limitation is governed by the Limitation Act 1908. Actions must be commenced within the following periods:

Sixty Years.

Any suit by or on behalf of the central government, suits by a mortgagee for foreclosure and sale, against a mortgagee for redemption or to recover possession of immoveable property.

Thirty Years.

Against a depositary or pawnee to recover moveable property deposited, by a mortgagee to recover possession of the immoveable property from the mortgagor.

Twelve Years.

Inter alia, to recover a legacy or share in an intestacy, to establish a periodically recurring right, to enforce a charge upon immoveable property, to recover immoveable property mortgaged or bequeathed in trust which has been transferred for a valuable consideration, by a landlord to recover possession from a tenant, by a remainderman or reversioner for possession of immoveable property, generally for the possession of immoveable property or any rights therein not specially provided for.

Six Years.

For compensation for breach of a contract in writing registered, upon a foreign judgment, to obtain a declaration that an alleged adoption is invalid or valid, any suit for which no limitation is provided elsewhere in the Act.

Three Years.

Most actions arising in contract are within three years limitation including any breach of contract not specially provided for.

Two Years.

Suits against executors or administrators, for compensation for any malfeasance, misfeasance or nonfeasance independent of contract and not specially provided for.

One Year.

For wages, for price of food or drink supplied, for price of lodgings, to enforce a right of prescription, to set aside, inter alia, sale in execution of a decree, against the government to recover land acquired, money paid, challenged orders, for compensation for false imprisonment, by executors and administrators, for compensation for injuries under Fatal Accidents Act, or other injury, for compensation for malicious prosecution, libel and slander.

Six Months.

Under the Specific Relief Act.

Ninety Days.

For compensation for doing or omitting to do an act alleged to be in pursuance of any enactment for the time being in force.

Thirty Days.

To contest an award of the Board of Revenue.

Limitation need not be specifically pleaded as the courts must take cognizance of this.

Exclusion of Time.

Where at time of commencement of the period of limitation the person in whom right of action lies is under a disability e.g., where he is insane, a minor, or an idiot, time will not commence to run against him until disability ceases. Where a second disability commences before the first disability is over, time will run after second disability is over. Once time begins to run, however, subsequent disability will have no effect. Where the person dies still under a disability, his right of action passes to his legal representatives and time will commence to run from that date.

Public holidays and court holidays are excluded from the period of limitation.

In an appeal the time for obtaining a copy of the decree and judgment will also be excluded.

Where a plaintiff bona fide prosecutes his claim in a wrong court, the time of such prosecution will be excluded.

Extension of Time.

Where a defendant acknowledges a debt in writing during the period of limitation or makes a part payment of rent a fresh period of limitation will be computed from that date. (Limitation Act 1908, § 19).

5.05 PRESCRIPTION:

See topic 5.04 Limitation of Actions.

5.06 SOVEREIGN IMMUNITY:

By State Immunity Ordinance 1981, foreign state is immune from jurisdiction of courts of Pakistan, except as specified. Exceptions include submission to jurisdiction by state and suits relating to commercial transactions, contracts of employment (where contract was made or work is to be wholly or partly performed in Pakistan), ownership, possession or use of property, patents and trademarks, memberships of corporate bodies (by state) arbitration (agreed upon by state), ships belonging to state, levy of customs duties, value added tax etc. Procedural requirements are also laid down. Government of Pakistan and Provinces are not immune from suit or other legal proceedings in courts in Pakistan.

6 COURTS AND LEGISLATURE

6.01 COURTS:

Highest Court in country is Supreme Court of Pakistan which sits at Rawalpindi and hears both civil and criminal appeals from various High Courts. By virtue of Supreme Court (Number of Judges) Act, 1997, number of judges of Supreme Court shall be 16. There is one High Court for each Province and federal capital Islamabad. Supreme Court of Pakistan and Peshawar High Court have in relation to Provincially Administered Tribal Areas of Chitral, Dir, Kalam, Swat and Malakand Protected Area, same jurisdiction as in relation to other areas of North West Frontier Province. High Courts are superior Courts of Record. High Court of Sind hears original civil cases originating from Karachi District and being of value of more than Rs. 3,000,000, and appeals from civil and criminal courts of province. Other High Courts do not have original civil jurisdiction.

The subordinate courts can be divided into two broad divisions, the District Courts for civil matters and the Sessions and Magistrates Courts which deal with criminal matters. The District Courts consist of the Court of the District Judge, which hears civil cases and also a certain amount of appellate matters, both civil and criminal, and the lower courts of Additional District Judges and Subordinate Judges. The pecuniary limit of such courts in Karachi is Rs. 3,000,000, while at other places district judge or senior civil judge has unlimited pecuniary jurisdiction. There is also Small Causes Court where simple money suits within pecuniary limit which varies from place to place are heard. Pecuniary limit in Karachi is Rs. 5,000. On criminal side are Sessions Courts and Magistrates Courts, latter being subdivided into three classes, first, second and third. Small Claims & Minor Offences Courts may now be established by Government, which will have exclusive jurisdiction to try suits subject matter of which does not exceed Rs. 100,000. By Code of Civil Procedure (Amendment) Ordinance 2002, courts may with consent of parties adopt alternate dispute resolution method for expeditious disposal of cases.

See also categories 14 Foreign Trade and Commerce, topic Foreign Trade Regulations; Introduction, topic Government and Legal System.

6.02 LAW REPORTS, CODES:

See topics 6.04 Reports, 6.05 Statutes.

6.03 LEGISLATURE:

Under Proclamation of Emergency Order of 14 Oct. 1999 Constitution of 1973 and Parliament were suspended. However, Constitution was revived with certain significant amendments by Legal Framework Order 2002 ("LFO"). Under 1973 Constitution as amended by LFO there shall be Parliament called Majlis Shoora consisting of two houses, to be known as National Assembly and Senate. National Assembly shall consist of 342 members, of which 272 are elected on general seats, 60 on seats reserved for women, and ten on seats reserved for non-Muslims. Senate shall consist of 100 members of whom 14 shall be elected by each of four provincial assemblies, eight from Federally Administered Tribal Areas, four shall be chosen from Federal Capital, four women and four technocrats to be elected by each of four provincial assemblies. National Assembly shall be elected for five years. Senate shall not be subject to dissolution but its members shall hold office for six years approximately half of them retiring every three years. If Bill is rejected or not passed within 90 days of receipt, or passed with amendments by either house, it shall, at request of House in which Bill originated be referred to Mediation Committee for consideration and resolution therein. Mediation Committee shall within 90 days formulate agreed bill which is likely to be passed by both houses of Parliament and place bill separately before each house. Bill passed by Parliament can become law either on being assented to by President within 30 days or if after President sends it to reconsider by both Houses in joint session, it is again passed, with or without amendment, by majority of total membership of both Houses under Art. 70 after which President must give consent. When National Assembly is not in session, President has power to make Ordinance which will be placed before National Assembly as soon as practicable and shall stand repealed at expiration of four months from its promulgation or earlier disapproval by Assembly. There are four provincial legislatures headed by governors, one each for provinces of Baluchistan, North West Frontier Province, Punjab and Sind consisting of 65, 124, 371 and 168 members respectively elected by direct and free vote. Relationship between governors and provincial legislature is similar to that between President and National Assembly.

Note: Some useful information on important laws can be found at: http://www.pak.gov.pk/public/government.html.

See also category 1 Introduction, topic 1.02 Government and Legal System.

6.04 REPORTS:

These are published here in a series of volumes by Law Department of Ministry of Law & Parliamentary Affairs. These publications cover post-partition period, i.e., from 1947 and also contain latest acts, ordinances and notifications. Revenue decisions are also published. There is also a more exhaustive private publication "The All Pakistan Legal Decisions" which contains reports of Supreme Court and High Court cases and from 1954 onwards have also contained latest acts, ordinances and notifications. There is also a private publication "Pakistan Tax Decisions" of revenue cases.

Authorities binding on the courts in Pakistan are judgments of the Supreme Court of Pakistan and Privy Council decisions pre-1950 and all Indian decisions before that date of courts of equivalent or superior status; persuasive authorities are decisions of the House of Lords, the Privy Council, the Indian Supreme Court, decisions of Indian High Courts, and decisions of Supreme Court of United States. National Judicial (policy making) Committee has been set up to publish annual or periodic reports of Supreme Court, Federal Shariat Court, High Courts, subordinate courts and administrative courts and tribunals.

6.05 STATUTES:

Law in force in Pakistan is based on English common law and except for the law of torts and personal law it is to be found in the various Federal and Provincial statutes and ordinances, and rules, regulations and orders framed thereunder from time to time. Recent enforcement of Islamic laws is also enacted by statute. (See category 1 Introduction, topic 1.02

Government and Legal System, subhead Islamic Laws.)

All unrepealed Federal statutes and ordinances from 1836 to 1965 have been assembled and published by Ministry of Law & Parliamentary Affairs of Government of Pakistan in a set of 15 volumes under title “The Pakistan Code.” These volumes have been amended up to May 1966. Federal as well as Provincial Acts, Ordinances, Rules, Orders and Regulations are first published in official Gazettes of Pakistan, and from 1954 have also been published in All Pakistan Legal Decisions, a private publication.

7 DEBTOR AND CREDITOR

7.01 ASSIGNMENTS:

All rights in moveable or immoveable property are assignable by way of gift, hire, lease or sale by § 30 of Trustees and Mortgagees Powers Act 1866 a person may transfer to himself and another person or persons or corporation any moveable property that is by law assignable, as if he were transferring the property to another. Any actionable claim (chose in action) other than debt secured by mortgage of immoveable property or hypothecation or pledge of moveable property or beneficial interest in property not in possession of claimant, which actionable claim would be recognized in court of law as entitling relief to creditor, may be transferred. Such transfer must be in writing and signed by transferor or his duly authorized agent and can be with or without consideration.

Sale of tangible immovable property over value of Rs. 100 or of reversion can only be effected by registered assignment. Where value of such tangible immovable property is under Rs. 100 it can be effected by mere delivery.

A gift (transfer without consideration) must be made within lifetime of donor. A donor may also dispose of, in expectation of death, any moveable property that he could have disposed of by gift. A gift by a Muslim, which is called Hiba can be either of immoveable or moveable property without consideration and by word of mouth but in the case of immoveable property the donee must take possession of the property.

Insurance policies are assignable unless the Policies themselves provide otherwise. In the case of Life Policies this can only be done by a deed of transfer or an endorsement on policy which must be attested by a witness. A Marine Policy can be assigned either before or after the loss occurs.

Effect of assignment is to create an interest for assignee, in the assigned object. No greater rights can be created than those which existed in the transferor.

Mere right to sue cannot be transferred nor can the salary of a public officer either before or after it has become payable.

7.02 ATTACHMENT:

Rules regarding attachments governed by Code of Civil Procedure 1908.

Actions in Which Allowed.

Attachment orders made both in execution of decree and before judgment. Orders for attachment before judgment may be made in all except following actions: For recovery of immovable property; for foreclosure, sale or redemption in case of mortgage of or charge on immovable property; for determination of any other right or interest in immovable property; and for attachment of any agricultural produce in possession of agriculturist, or attachment or production of such produce. Order only made before judgment if defendant has failed to show cause to contrary or to furnish security. Provided however, attachment before judgment is not to affect rights existing prior to attachment, of persons not parties to suit nor bar any person holding decree against defendant from applying for sale of property under attachment in execution of such decree.

Property once attached before judgment, may not be reattached in execution of decree.

Where holder of decree for possession of immovable property or purchaser of any such property sold in execution of decree is resisted or obstructed by any person in possession of property he may make application to court and court shall investigate matter. All questions as to right, title or interest in or possession of immovable property shall be adjudicated upon and determined by court and no separate suit shall lie for determination of any such matter.

Courts Which May Issue Order.

All courts including industrial and tax tribunals, except Small Causes Court.

In Whose Favour Given.

In favour of plaintiff when made before judgment and in favour of decree holder to enforce execution. In both cases may be given in favour of nonresident or foreign corporations.

Grounds.

Order for attachment may be made before judgment if court satisfied that defendant with intent to obstruct or delay execution of decree that may be passed against him is about to dispose of whole or part of his property or is about to remove whole or part of his property from local limits of jurisdiction of court. Order for attachment after judgment made only to enforce decree.

Proceedings to Obtain.

Application of plaintiff or decree holder is necessary, together with affidavit and schedule specifying property to be attached.

Attachment Bond.

Judgment debtor may be required to furnish attachment bond to effect that he will not dispose of property in question and will endeavour to satisfy decree.

Levy.

Both moveable and immovable properties are subject to attachment. However, certain things necessary for judgment debtor's survival may not be attached.

Lien.

Decree holder has lien over property attached.

Release of Property.

Attachment withdrawn on dismissal of suit; where decree is satisfied or where other security furnished to satisfaction of court.

Sale.

Court can order sale only after judgment but pending execution of decree. Property attached may be sold only after public notice and proclamation of sale issued. Moveable property may be sold after 15 days of proclamation, and immoveable property after 30 days. Where immoveable property sold in execution of decree, person owning it or having an interest in it, may within 30 days of sale apply to have sale set aside on depositing in court (1) 5% of purchase money for payment to purchaser, and (2) decretal amount specified in proclamation of sale for payment to decree holder. Where immoveable property sold in execution of decree, decree holder or other person entitled to a rateable distribution of assets, or where their interests are affected by such sale, may within 30 days of sale apply to court to set aside sale on grounds of material irregularities or fraud in publicizing or conducting sale.

Claims of Third Persons.

Where property attached any person with interest in property may prefer a claim or make objection to attachment which must be investigated by court. Where claim or objection is rejected, person may institute suit to establish such claim. Limitation period is one year from date of attachment order.

See topic 7.04 Executions.

7.03 BANKRUPTCY:

See topic 7.06 Insolvency.

7.04 EXECUTIONS:

Rules regarding execution governed by Civil Procedure Code 1908.

Decree may be executed by court which passed it or by court to which it is sent for execution. Court which passed decree may send it to another court for execution if judgment debtor: (1) Resides or carries on business within local limits of jurisdiction of other court; (2) has no property within jurisdiction of court passing decree and has property within jurisdiction of other court; (3) has immoveable property within jurisdiction of other court and order is regarding sale of such property; (4) for any other reason recorded by court. All questions arising out of execution determined by court executing decree.

Decree against firm can be executed against: (1) Property of firm; (2) partners sued in their own names; (3) any person who has been individually served with a summons as a partner and has failed to appear; (4) in other cases against any other persons except aforestated with leave of court.

Where judgment debtor dies without satisfying decree, decree holder may apply to court for execution against legal representatives who are only liable to extent of deceased's property which is in their hands and is not already disposed of. Notice to representatives necessary.

Foreign decrees, including arbitration awards, may be executed in Pakistan if decree is from court of country with which Pakistan has reciprocal arrangements, or from any superior court of U.K.

Kinds of Executions.

Court has wide powers to enforce execution by attachment and sale of moveable and immoveable property, including shares, securities, salary, negotiable instruments and debts, arrest and detention of judgment debtor.

Time for Issuance.

Execution application may be made immediately after decree passed and warrant of execution may be served on judgment debtor without calling upon him to file objections except in case where decree is to be executed by detention and arrest of judgment debtor in which case notice is necessary. If notice issued more than one year after decree passed judgment debtor has right to file objections. Limitation period for execution 12 years from date of decree; may be extended in cases of fraud or force.

Stay granted at court's discretion if judgment debtor shows sufficient cause. Appellate court may grant stay where judgment debtor has filed appeal against judgment of trial court.

Lien.

Decree holder has lien on property attached.

Priorities.

Where immoveable property sold in execution of decree proceeds of sale applied as follows: (1) Defraying expenses of sale; (2) discharging amount due under decree; (3) discharging principal and interest due on subsequent incumbrances, if any; (4) rateably among holders of decrees for payment of money who have, prior to sale of property, applied to court which passed decree ordering sale for execution of decrees and have not yet obtained satisfaction.

Satisfaction.

Where money payable under a decree is paid out of court or is otherwise adjusted in whole or part decree holder must certify payment or adjustment to court for record. Judgment debtor may apply to court notifying payment and/or adjustment and court after notice to decree holder must record such payment or adjustment if decree holder fails to show cause. Payment or adjustment not certified or adjusted is not recognised.

Sale.

Both moveable and immoveable property may be sold under court supervision upon decree holder showing sufficient cause. Sale usually effected by public auction. See topic 7.02 Attachment.

Redemption.

Judgment debtor may offset sale by offering other security.

Supplementary Proceedings.

Judgment debtor may apply for appointment of receiver to collect sale proceeds when property attached is to be sold.

Body Execution. (Capias ad satisfaciendum).—Writ for arrest of judgment debtor may be issued if judgment debt not satisfied.

See topic 7.02 Attachment.

7.05 GARNISHMENT:

Any person who has obtained a decree for any sum of money may apply to court that judgment has been obtained but decree is unsatisfied in respect of specified sum and that a third person (garnishee) owes money to judgment debtor.

Property Which May Be Reached.

All moveable and immoveable property.

Jurisdiction.

Garnishee must reside or property to be attached must be within local limits of jurisdiction of court issuing order.

Proceedings to Obtain.

On application supported by affidavit.

Practice.

Court may order garnishee to appear before court to show cause why he should not deposit money in court. Deposit by garnishee is valid discharge to garnishee.

7.06 INSOLVENCY:

Law of personal insolvency is governed in Karachi by Insolvency Act 1909; Provincial Insolvency Act 1920 applies elsewhere. Under Provincial Insolvency Act a debtor is held to commit an act of insolvency when: (i) he transfers all or substantially all his property to a third person for the benefit of his creditors; or, (ii) he transfers all his property with the object of defeating or delaying his creditors; or, (iii) where it is feared that he is about to abscond from the jurisdiction, or abandons his house or place of business or otherwise secludes himself so that he cannot be approached; or, (iv) where any of his property is sold in execution; or, (v) if he petitions to be adjudged an insolvent; or, (vi) makes an announcement that he has or is about to suspend payment of his debts; or, (vii) if he is imprisoned in execution of any decree against him.

Insolvency is deemed to commence from date of presentation of the petition.

For a creditor to bring a Petition against the debtor, the debt must be Rs. 500 or more and have become due. The act of insolvency complained of must have occurred not more than three months prior to presentation of petition. A debtor may not present a petition to the court unless the debts amount to more than Rs. 500 or he is under arrest, or an order for attachment has been made and is subsisting against his property.

A debtor can be imprisoned in civil prison if he does not give security for his appearance. An interim order for the attachment of his property can be passed. An order for an arrest warrant to issue against him can also be made if it is shown that the debtor is committing various acts of bad faith.

After hearing of the petition for insolvency, the court may either dismiss it, or pass an adjudication order. Such an order brings the whole of the debtor's property into the receivership of the court and his debts are settled in the following order of priority: (1) State and municipal debts; (2) salary or wages of any clerk or salary in respect of work rendered to the insolvent not more than four months before the petition nor above Rs. 20; (3) secured creditors against their security; (4) expenses of administration; (5) unsecured creditors pro rata.

After an adjudication order the insolvent may apply for court protection against arrest. When a reasonable time has elapsed and the assets have been dealt with the insolvent may apply to court for discharge, but no absolute discharge will be given to him in the following circumstances: (a) The insolvent's assets are not of a value equal to 50 paisas on the rupee relating to the amount of his unsecured liabilities unless he satisfies the court that these circumstances are not his responsibility; (b) that he has omitted to keep proper account books in the business carried on by him within three years of his insolvency; (c) that he has continued to trade after knowing himself to be insolvent; (d) that he contracted any debt provable under Act without reasonable or probable grounds of being able to repay it; (e) that insolvent has failed to account satisfactorily for any loss on deficiency of assets; (f) that insolvent brought on insolvency by rash and hazardous speculations or by unjustifiable extravagance, or by gambling or by culpable neglect of his business affairs; (g) that insolvent has on any previous occasion been adjudged an insolvent or made composition or arrangement with his creditors; (h) that insolvent within three months prior to presentation of the petition gave undue preference to any of his creditors; (i) that insolvent has concealed or removed his property or any part thereof or has been guilty of any other fraud or fraudulent breach of trust.

An order for discharge does not release insolvent from: (a) Any debt due to the Crown; (b) any debt or liability incurred by means of any fraud or fraudulent breach of trust to which he was party; (c) any debt or liability in respect of which he has obtained forbearance by any fraud; (d) any liability under an order for maintenance of wife and children made under § 488 Code of Criminal Procedure.

The debtor may be liable for any acts of fraud, making of false entries, wilful failure to perform duties imposed upon him, destruction of records, keeping or causing to be kept false books, to a year's imprisonment and this liability continues notwithstanding his discharge or the approval of any composition or scheme of arrangement.

Appeals can be preferred against any order of the court from a court subordinate to a District Court to the District Court whose order is final, provided that the High Court may call for the case to satisfy itself that the order in appeal was made according to law and may make such orders with respect thereto as it may think fit.

A person may also appeal from an original order of the District Court, to the High Court. Appeal must be taken to District Court and to High Court within 30 and 60 days respectively.

7.07 LIENS:

Lien is a right in one person to retain in his possession such property moveable or immoveable belonging to another until such time as claims of person in possession are satisfied. Lien, unless there is express provision to contrary, is not transferable and confers no right of sale on creditor without court intervention. Lien may be general, i.e., for a general balance owing to the creditor, or particular, i.e., a right over goods until certain demands are satisfied.

Carriers, unpaid sellers, hotel keepers, agents and all persons who are entitled to be paid for services rendered or for expending money for purposes of debtor have a right of lien on property in their possession belonging to debtor. Banker may have a lien over securities deposited with him for money due and in such cases bankers generally retain right to sell without recourse to debtor. Trustee has lien over trust property in respect of expenses lawfully incurred in connection with such property. Company may in its articles of association create lien over its own shares.

Right of lien is lost upon payment of debt, by tender of debt and by taking alternative security for debt.

7.08 PLEDGES:

See category 20 Mortgages, topic 20.01 Chattel Mortgages.

8 DISPUTE RESOLUTION

8.01 ARBITRATION:

Arbitration Act 1940 governs arbitration proceedings in Pakistan. Rules follow ordinary law of contract to major extent. “Arbitration Agreement” has been defined in Act as “a written agreement to submit present or future differences to arbitration, whether an arbitrator is named therein or not”. Arbitrator's Award, in order for it to be valid, must be final and certain, and must contain decision only on matter referred.

Law implies certain conditions in arbitration agreements, which may be excluded by express statements to contrary. These include following conditions: reference to arbitration will be deemed to be sole arbitrator; where even number of arbitrators are appointed by parties, umpire must be appointed by those arbitrators within month of their own appointment; Award by arbitrators will be made within four months of reference whereas umpire must announce his Award within two months of entering on reference; Award shall be final and binding on all parties; and, awarding cost of reference shall be within discretion of arbitrators.

§ 13 of Act defines powers of arbitrators, but makes them subject to any agreement to contrary between parties. These include, inter alia: to administer oath to parties and witnesses; to make Award conditional; and to administer such interrogatories to any party to arbitration as may be necessary. Civil Procedure Code of Pakistan does not apply to these proceedings, but arbitrators are under duty to observe common principles of equity and justice. Authority of arbitrator may be revoked if power is given by arbitration agreement itself, on such grounds as are specified therein, or it may be revoked with leave of court. Court will grant leave where arbitrator has personal interest in matter, or he is indebted to one of parties, or has conducted proceedings with undue and inordinate delay, or has committed some misconduct, or lacks jurisdiction, or there is some other bias in mind of arbitrator which may unfairly prejudice interest of any of parties, § 5 of Act.

Arbitration Award may be modified or corrected by court where it is necessary to do so for removing any ambiguity, confusion or obvious mistake etc. as long as such modification or correction does not change Award materially. Court may not, however, change Award merely because it takes different view as to what is fair and what is not. It cannot, therefore, go into merits of case or try to incorporate its own decision into Award. Further, § 26A of Act, inserted by Arbitration (Amendment) Act 1981, allows parties to be notified of any irrelevant or extraneous considerations or erroneous view of law or material facts and evidence etc. taken by arbitrators, so that they may, if aggrieved by Award, challenge same in court.

Arbitration Award may be set aside by court on any of following grounds: that arbitrator or umpire has committed some misconduct (which includes not following common rules of justice); that Award has been made after issue of order by court superseding arbitration or after arbitration proceedings have become invalid; or that Award has been improperly procured or is otherwise invalid.

New York Convention was ratified through Recognition and Enforcement (Arbitration Agreements and Foreign Arbitral Award Ordinance, 2005). This Ordinance lapsed after four months as per terms of Constitution of Pakistan but has been subsequently re-enacted several times. It is anticipated that Act of Parliament will be enacted to place New York Convention on more permanent statutory footings.

Jurisdiction to arbitrate is often agreed to be conferred on International Court of Arbitration, International Chamber of Commerce and London Court of International Arbitration by parties. Alternative methods of dispute resolution, such as Mediation, Conciliation, Fact Finding, Med-Arb, Early Neutral Evaluation and Multi-door Courthouses are still at early inceptive stages in Pakistan.

8.02 MEDIATION:

Karachi Centre for Dispute Resolution (KCDR) is successfully resolving commercial disputes which are increasing along with business activity, according to Pakistan former Chief Justice who is on KCDR board.

Established in 2005 with help from the World Bank, International Finance Corporation (IFC), KCDR is now non-governmental organization guided by both active and retired judges and business leaders.

By reducing expenses and delays and freeing assets tied up in court, it is observed that KCDR encourages market based activity as also intended by IFC and serves as example for rest of Pakistan.

9 DOCUMENTS AND RECORDS

9.01 ACKNOWLEDGMENTS:

A certificate of an officer attesting an instrument that the person executing it acknowledged it to be his voluntary act is not a legal requirement in Pakistan. As to authentication of documents, see topic 9.02 Affidavits, subhead Affidavits Sworn Abroad.

9.02 AFFIDAVITS:

An affidavit is written statement on oath made before person competent to receive it and for production in Court. Affidavits sworn within Pakistan must embody title of the suit, or other proceeding, and complete identification of deponent as to name, religion, age and residential address as e.g., the following.

Form

I,. . . . . . son of. . . . . .,. . . . . . (state religion) adult aged. . years, residing at. . . . make oath and state:

Affidavit must be on facts within deponent's knowledge.

Deponent must be identified to commissioner of oaths by an advocate or registered court clerk. An affidavit is sworn before commissioner of oaths or first class magistrate in district court or commissioner for taking affidavits or deputy registrar in High Court.

Stamp.

Affidavits for immediate use in court and also affidavits in support of applications need not be stamped. Other affidavits must carry Rs. 20/—stamp.

Affidavits sworn abroad must be sworn before notary public and must then be legalized by Pakistan Embassy or Consulate as case may be.

9.03 NOTARIES PUBLIC:

There are at present two sorts of notaries public. Those who are appointed by the faculty in the United Kingdom who are empowered to do all things that it is usual for notaries public to do, such as enter protests from ships' masters, legalize documents, etc.; and those that are appointed under the Negotiable Instruments Act 1881 whose powers are limited to the powers delegated to them under that Act.

A new ordinance, namely, Notaries Ordinance 1961, was promulgated in June 1961 and has been enforced throughout Pakistan except Tribal Areas. This Ordinance, inter alia, appoints notaries public in supersession of first of above-mentioned categories.

9.04 RECORDS:

Power to make rules for the disposal of such records as are not in their opinion worth preserving lies with High Court over documents appertaining to High Court and to subordinate courts and with Chief Controlling Revenue Officer for the revenue courts. Of documents in the possession or custody of any other public officer, if these documents relate to the provinces then the provincial government or any other officer specifically appointed may deal with the disposal or retention of these. In any other case the central government or an officer especially appointed for this purpose may make such rules as to them may seem fit for the disposal of other documents. Where such rules are formulated, they must, where relating to a provincial government be subject to approval of such government and where relating to the central government be subject to its approval.

Employment records are governed by the Employment (Record of Services) Act 1951. This act applies to all persons concerned as employers or employees in such classes of employment and in such areas as the appropriate government may specify. An employee must keep a service book containing identification of the employee, name and other particulars of his or her employers, the period of employment, occupation rate of wages, leave taken and records of conduct and efficiency, and if the employee is male, a photograph. If such a book is kept prospective employers may ask for it to be produced. Employers may keep copies of such “service books” of their employees.

See also categories 2 Business Organizations, topic Corporations (Companies); Employment, topic Labour Laws, subhead Workmen's Compensation Act, 1923; Family, topic Marriage; Mortgages, topics Chattel Mortgages, subhead Registration, Mortgages, subhead Registration.

10 EMPLOYMENT

10.01 LABOUR LAWS:

Major Central Acts and Ordinances which affect labour management relations in Pakistan are: (1) The Factories Act, 1934; (2) Payment of Wages Act, 1936; (3) Workmen's Compensation Act, 1923; (4) Minimum Wages Ordinance 1961; (5) Income Tax Ordinance, 1979; (6) Companies Profits (Workers Participation) Act, 1968; and (7) Industrial Relations Ordinance, 2002; (8) The West Pakistan Industrial and Commercial Employment (Standing Orders) Ordinance, 1968; (9) West Pakistan Shops and Establishments Ordinance, 1969; (10) The West Pakistan Employees Social Security Ordinance, 1965; (11) Workers' Children (Education) Ordinance, 1972.

Acts and Ordinances relating to mining industry in Pakistan are not included in the above list.

All these statutes are subject to frequent amendment.

Industrial Disputes.

Industrial Relations Ordinance was first introduced in 1969 and thereafter amended in 1970, 1973 and 1975. In 2002 new Industrial Relations Ordinance was promulgated which repealed Industrial Relations Ordinance of 1969. Repealed 1969 Ordinance has, however, recently been revived. Industrial Relations Act 2008, passed by National Assembly in Nov. 2008, is stated to be interim law and is proposed to be replaced by more comprehensive legislation in 2010. Ordinance applies to all persons employed in any establishment or industry and deals with formation of trade unions, regulations of relations between workmen and employer and avoidance and settlement of differences or disputes arising between them. Ordinance does not apply to employees in Police, Government administration, Government printing press, installations and services exclusively connected with armed forces, non-commercial institutions maintained for mentally unfit, sick or infirm and members of security staff of establishments engaged in production or distribution of petroleum products, seaport or airport. Some substantial changes were introduced by amendments made in 1975 for betterment of workmen some of which have been abolished by new Ordinance which tilts more in favour of employers. National Industrial Relations Commission introduced in 1975 shall now consist of not more than eight members including chairman to be appointed by Federal Government. Main functions of Commission are to promote formation of trade unions of workers within same industry, federations of such trade unions and federations at national level and also to adjudicate and determine industrial dispute to which an industry-wide trade union or federation of trade unions is party and any other industrial dispute which, in opinion of Federal Government, is of national importance and is referred to it by Government. Functions of National Industrial Commission also include registration of industry-wide trade unions, federation of such trade unions and federations at National level, to determine collective bargaining agent amongst said unions and federations, to try offences punishable under Industrial Relations Ordinance 2002, and to deal with cases of unfair labour practices and to take such measures as are necessary to prevent an employer or workman from committing an unfair labour practice. However, power of Commission to grant interim relief in cases related to dismissal or transfer has been made subject to pendency of industrial dispute.

Amending Ordinance of 1975 introduced shop steward system to act as link between labour and management in every establishment where 50 or more workmen are employed. Shop stewards are to be elected by CBA, or if no CBA exists then workmen at secret ballot in shop, section or department. Main function of shop steward is to act as link between workers and employer, assist in improvement of arrangements for physical working conditions and production work in workshop, section or department and also to help workers in settlement of their problems either connected with work or with any individual grievance of workman. Provision in repealed 1969 Ordinance giving power to workers to participate in management of factory to extent of 50% has now been abolished. Instead, now every establishment which employs 50 persons or more shall set up Joint Works Council consisting of not more than ten members in which workers' participation shall be to extent of 40%. Convener of council shall be from management and employers representatives shall be from amongst Directors or their nominees or senior executives whereas workers' representatives shall be from Collective Bargaining Agent (“CBA”) office bearers. Council shall deal with matters, namely: (a) Improvement in production, productivity and efficiency; (b) provision of minimum facilities to such workers not covered by laws relating to welfare of workers; (c) promoting settlement of differences through bilateral negotiations; (d) promoting conditions of safety and health for workers; (e) encouraging vocational training and (f) provision of educational facilities for workmen's children.

Under Industrial Relations Ordinance 2002 workers and employers have been granted rights to establish and join associations of their own choice to draw up their constitutions, to elect their representatives in full freedom to organise their programmes, to establish and join any federations or confederations. Every CBA has to affiliate with any federation at national level registered with National Industrial Relations Commission within two months after its determination as CBA. § 3 of Ordinance is intended to conform to requirements of ILO Conventions Nos. 87 and 98 which Pakistan has ratified.

Ordinance also prohibit unfair labour practice on part of employers and workmen. Even threat to dismiss, discharge, remove from employment or injure workman is unfair labour practice. Intimidation, coercion, etc., of any officer of collective bargaining agent is also unfair labour practice. Workmen or unions are prohibited from canvassing for trade union membership or otherwise during working hours. Intimidation or coercion on employer to sign memorandum of settlement and to interfere in ballot or carry arms within premises of employer without legal authority are also unfair labour practices on part of workmen or their unions. Maximum penalty for employer for contravening provisions may be Rs. 30,000 and for workers Rs. 20,000.

By Ordinance of 2002 tripartite Board of Conciliators can be formed by Federal or Provincial Government to conciliate in industrial dispute involving more than one establishment in province or in industry on national level or in industrial dispute of national importance. Appeals from Labour Court now have to be made to High Court instead of Labour Appellate Tribunal which has been abolished by new Ordinance.

Other important provisions: Limits application of conspiracy laws under Pakistan Penal Code and confers immunity on registered trade unions from certain civil suits; defines collective bargaining agent whose officers may represent workmen in any proceedings under Ordinance; provides for appointment of conciliator, arbitration, establishment of joint work councils to promote measures for securing and preserving good relations between employers and workmen; provides for establishment of Labour Courts for adjudication of industrial disputes and other matters relating thereto; legalizes strikes and lock-outs as permitted under law except in public utility service like electricity, gas, oil, water, hospitals, post, telephone, telegraph, railways and airways etc., provides penalty of Rs. 20,000 fine for breach of settlement, award or decision and similar penalties for other offences under Ordinance.

Factories Act 1934 regulates conditions of labour employed in a “factory” as defined in Act. This has been amended by Factories (Amendment) Act, 1973. One of amendments, makes all offences against Act, Rules and Order made thereunder as cognizable and bailable.

Act ensures that health and safety of labour are not ignored by factory owners. Chapter III of the Act requires employer to keep a minimum standard of cleanliness, ventilation, artificial humidification, lighting etc., and keep the building and machinery used by the factory in proper condition lest harm may be caused to labour. Vaccination and inoculation of each factory worker against such diseases and at such intervals as may be prescribed is made compulsory. Appointment of welfare officers by occupier or manager of every factory where not less than 500 workers are ordinarily employed is made compulsory.

In order to further ensure due observance of the conditions laid down in said Chapter III of Act, it provides for the appointment of inspectors who have been empowered to require the factory owners to fulfil the requirements of Act.

Every district magistrate is the inspector for the district in his jurisdiction. An appeal from the decisions of an inspector lies to the government concerned.

Besides making special provision regarding child and female labour, Act seeks to regulate daily and weekly working hours, weekly holidays, compensatory holidays, intervals of rest, overtime and shift working etc.

Chapter IV deals with working conditions of adults, Chapter V with conditions of work of children and adolescents. Children below 14 are prohibited to be employed.

Separate chapters have been devoted to “holidays with pay”, “small factories”, and “penalties and procedure”.

Shops and Establishments Laws.

West Pakistan Shops & Establishments Ordinance 1969 regulates hours and other conditions of work and employment of persons employed in shops and commercial and industrial establishments. Ordinance has repealed Sind Shops & Establishments Act 1940, North West Frontier Trade Employees Act 1947, Punjab Trade Employees Act 1940, and Weekly Holiday Act 1942 in its application to provinces of Pakistan except tribal areas.

Ordinance primarily regulates daily and weekly hours of work, holidays, wages for overtime and leaves with pay in shops, commercial, industrial and other establishments. Children below 14 are prohibited to be employed.

Provisions for appointment of shops inspectors have been made in Ordinance. Inspectors are empowered to challenge any shop, establishment, etc., found guilty of breach of any mandatory provision of law.

Industrial and Commercial Employment.

This is governed by West Pakistan Industrial and Commercial Employment (Standing Orders) Ordinance 1968 as am'd by West Pakistan Industrial and Commercial Employment (Standing Orders) (Amendment) Act 1973.

Standing Orders lay down minimum terms and conditions of service which must be allowed to “workmen” by every employer of an industrial or commercial establishment as defined in enactments, provided such industrial or commercial establishment employs, or did employ on any day during preceding 12 months, 20 or more workmen.

Minimum terms and conditions of service given in schedule to Ordinance, in form of Standing Orders, cannot be changed except by way of improvement from workmen's point of view, for which it is made compulsory for employer to enter into a collective agreement with a trade union or a representative body of his workmen.

Standing Orders contained in Schedule are to be displayed to workmen in English and Urdu so that minimum terms of employment should be made known to them.

Non-observance of Standing Orders or any other provision of Ordinance by any “commercial establishment” or “industrial establishment” has been made punishable with fines or imprisonment or both.

Payment of Wages Act 1936 regulates payment of wages. Its applicability has been extended to all employees working in any industrial or commercial establishment regardless of their wages.

Act casts responsibility of payment of wages to workmen upon employer or manager of establishment and regulates wage period and time for payment of wages.

Cuts imposed on wages on account of fines and various kinds of deductions and the circumstances under which these can be imposed have also been laid down in the act.

Special provisions have been made for: (1) deductions for absence from duty; (2) deductions for damage or loss to employer's property; (3) deductions on account of services rendered by employer; (4) deductions for recovery of advances; and, (5) deductions from wages for payment to cooperative societies and insurance schemes.

A single workman or a group of workmen, if aggrieved on account of non-payment or delay in payment of wages by employer or on account of a deduction made by him contrary to provisions of Act, can make an application within three years of time when deduction was made or payment was delayed or refused, to Commissioner appointed under Act. Appeal lies to District Court from a decision of Commissioner within 30 days of the directions given by Commissioner.

Inspectors appointed under Act have been empowered to check relevant books containing salary accounts to be maintained by employer.

For breach of certain provisions of Act, fines up to Rs. 500 may be imposed as punishment.

The Federal and provincial governments have made their own rules for proper functioning of Act in their respective jurisdictions.

Workmen's Compensation Act, 1923.

This has been amended by Labour Laws (Amendment) Act 1972 and by Act of 1986 which has introduced some important changes. Schedules I and IV have been substituted and list of injuries and amounts of compensation have been revised and increased to provide substantial benefits to workmen.

There has been further amendment by Labour Laws (Amendment) Ordinance 1994, and now workmen are covered by Act. Schedule II to Act gives definition of “workmen” as being same under Industrial Relations Ordinance, 2002. Act provides for payment of compensation by employer to his workmen injured during course of employment.

Compensation allowed by Act ranges between lump sum amount of Rs. 100 and Rs. 200,000 according to nature of injury and wages drawn by workmen concerned at time of receiving injury. Half-monthly payments at specified rates are payable in cases of temporary disablement for maximum period of five years.

The Act also lays down circumstances when employer will not be liable to compensate an injured workman.

Injuries have been defined under the Act to be mainly of the following kinds: (1) Injuries resulting in death of a workman; (2) permanent total disablement; (3) temporary total disablement; (4) permanent partial disablement; (5) temporary partial disablement.

Schedule I to Act gives list of injuries, a combination of two or more of which may constitute total disablement within meaning of Act. Loss of a limb or member of the body, is to be compensated according to the percentage loss of earning capacity as indicated in Schedule I.

List of diseases is given in Act which are recognized as occupational diseases.

Besides laying down provisions as to method of calculating compensation, Act provides details for payment of compensation to survivors in case of death of a workman resulting from injury received during employment.

Commissioners have been appointed under Chapter III of Act to entertain claims for compensation against employer from injured workmen. Commissioners' powers, procedure to be observed before them and provisions for appeals against decisions made by them are also laid down in this Chapter.

Under Chapter II of Act an injured workman is required to serve notice of his claim for compensation in the prescribed manner on employer and claim before Commissioner must be made within one year of time of receiving injury or date of death as case may be.

Special provisions have been made for keeping of an up-to-date record of fatal accidents by Commissioners and duty has been cast upon employers to furnish details regarding same to Commissioners. Employer is required to send periodic returns of compensation paid to injured workmen, to appropriate authority appointed by the government concerned.

Exhaustive rules have been framed by the central government under § 32 of Act for smooth and efficient working of Act. Provincial governments observe separate rules.

Separate rules have been made by the central government for workmen's compensation returns and transfers of money due as compensation under Act.

Law of Trade Unions.

See subhead Industrial Disputes, supra.

Income Tax Ordinance 2001.

Part I of Sixth Schedule relates to certain classes of provident funds which employer may establish for benefit of his employees.

Provident funds recognized by Commissioner of Income Tax have following advantages:

(1) To employer: (a) Employer obtains income tax relief on its contributions to fund; (b) employer is not liable for any fixed rate of interest (return to the member is governed by the actual return obtained on funds by trustees).

(2) To member employee: (a) Fund is in the hands of trustees; (b) members obtain income tax relief on their contributions to the fund; (c) when a member withdraws from fund he obtains entire balance free of tax; (d) circumstances in which a member can borrow against his contributions to the fund are clearly set out.

Minimum Wages Ordinance 1961.

Minimum Wages Ordinance which came into force on Sept. 29, 1961, provides for regulation of minimum rates of wages for workers employed in “industrial undertakings”, as defined in Ordinance.

Ordinance provides for establishment of Minimum Wages Council by central government for advising central government and provincial governments on all matters relating to carrying out of provisions of Ordinance and other matters relating thereto. Ordinance also provides for establishment of Minimum Wages Board of provincial governments. According to scheme of Ordinance, Minimum Wages Board will, upon a reference being made by provincial government, recommend to such government after such enquiry as Board thinks fit, minimum rates of wages for workers employed in industrial undertakings in province. Upon receipt of recommendation of Board provincial government may declare minimum rate of wages for such workers and no employer may pay any worker wages at rate lower than rate declared under Ordinance. Any employer who contravenes provisions of Ordinance is punishable with imprisonment for term which may extend to six months or with fine which may extend to 500 rupees or with both. Board and Council may, for purpose of an enquiry under Ordinance, direct any employer to furnish such records, documents, information or do such other acts as Board, Council or Chairman may require. Rate of minimum monthly wage has been enhanced to Rs. 6,000/—.

Fringe benefits in Pakistan are not the subjects of legislation. These benefits are provided by collective bargaining agreement between unions and management as well as by judicial precedents which are based on practice prevailing in the region-cum-industry.

Fringe benefits which are generally provided to workmen in Pakistan include house, conveyance, medical, officiating and compensatory allowances, gratuity, pension, retirement scheme and provident fund.

Quantum of the benefit varies from industry to industry.

Special legislation in form of maternity benefits has been enacted for welfare of women employed in factories.

Bonuses in Pakistan in actual practice are no longer regarded as ex gratia payments. The industrial courts in the country allow claims for bonuses if there is an available surplus, and the workers have contributed substantially towards profits. For commercial and industrial concerns employing more than 20 “workmen” (as defined) compulsory bonus, related to profits, but compulsory maximum of one months salary, has to be paid, if profits are sufficient.

West Pakistan Employees Social Security Ordinance 1965, Ordinance No. 10 of 1965.

This extends to whole of Pakistan except tribal areas. This has been amended by West Pakistan Employees Social Security (Amendment) Act 1973. Contingencies covered by social security benefits are sickness benefits, maternity benefits, death grant, medical care during sickness and maternity, injury benefits, medical care in case of employment injury. All employees employed in or in connection with affairs of industry or establishment whose wages are up to Rs. 5,000 per mensem are covered irrespective of their designation, status or nature of work.

All above benefits are available in case of any injury or accident or occupational disease arising out of and in course of employment. Subsection 3 of § 1 provides that it shall come into force at once but shall apply only to such areas, classes of persons, industries or establishments, from such date or dates and with regard to provisions of such benefits as Government may by notification specify in this behalf. Government has from time to time notified areas, classes of persons, industries and establishments etc. Ordinance deals with benefits in respect of sickness, maternity, death grant, medical care during sickness and maternity injury benefits, disablement pensions, disablement gratuity etc. This Ordinance has repealed Employee's Social Security Ordinance, 1962.

Control of Employment Ordinance 1965.

Ordinance is intended to control and check termination of service of essential personnel in industrial undertaking. Under Ordinance, three bodies have been constituted, namely: Manpower Board, Manpower Council and Manpower Tribunal. Manpower Board is most important.

Manpower Board is vested with wide powers. Section 5 defines functions and powers of Manpower Board. Board can control or regulate employment in any industrial undertaking, prohibit persons from accepting employment, lay down terms and conditions of service of persons employed or to be employed, etc.

Notified industries have to report to Board all situations which are vacant or likely to be vacant and employ such essential personnel and on such terms as may be directed by Board. No employer of notified industrial undertaking can fill any vacancy in which essential personnel are employed except with previous permission of Board.

Rules.

Rule 10 of Rules framed under this Ordinance is of general importance. Under this rule, no owner or manager of industrial undertaking is permitted to discharge or dismiss any person without previous permission in writing of Board.

Employers who have to comply with this Rule appear to be those who have received prior notice from Board requiring them to put up, before specified date, notices making known to employees provisions of this Rule and intimating place to which applications to Board may be addressed.

It is, however, not necessary for employer to obtain prior permission to discharge or dismiss his employee in cases of probationary period, employment for specific period, completion of piece of work for which employee was engaged, medical grounds or where employee has been guilty of gross insubordination, habitual absence from work or any other serious misconduct, etc. In all such cases employer has to give notice in writing to Board with reasons of discharge or dismissal within 24 hours of such discharge or dismissal.

It may further be mentioned that in cases where employer has to apply to Board for permission to discharge or dismiss, Board is required to communicate its order within 15 days of date of despatch of employer's application, failing which, Board's permission is deemed to have been given.

Phrases “industrial undertaking,” “personnel” and “persons” have not been used with sufficient clarity in Ordinance and its Rules. These phrases in all probability refer only to “Notified Industrial Undertaking” and “Essential Personnel” respectively.

Breach of any of provisions of Ordinance or of Rules has been made a penal offence.

Companies Profits (Workers Participation) Act, 1968 came into force on 4th July, 1968 and extends to whole of Pakistan. This has been amended by Companies Profits (Workers Participation) Ordinance 1972 and 2002. Substantial change made by Act is payment by employer of 5% of profits of company every year to fund created for workers, including contract workers (even hired through contractors).

Under § 3 of this Act every company to which scheme is applicable shall establish a workers participation fund in accordance with scheme given in schedule and company shall pay 5% of its annual profits to this fund. This scheme applies to all industrial undertakings where number of workers is 50 or more or if its paid-up capital is two million rupees or more or if value of its fixed assets is four million rupees or more.

Workers' Children (Education) Ordinance 1972 as amended by Workers' Children (Education) Act.

An Employer is obliged under Act in respect of a person employed in his establishment who is not earning more than Rs. 3,000 per month to pay to Provincial Government an education cess at rate of Rs. 100 per worker per annum in respect of establishments in which number of workers employed at any time during year is 20 or more. Provincial Government shall provide education free of cost up to matriculation examination to one child of every worker employed in an establishment referred to in § 3.

Employees Cost of Living (Relief) Act, 1973.

This Act was promulgated for payment of Cost of Living Allowance to employees periodically, though not at regular intervals. Under this Act sum of Rs. 300/- was payable to employees whose salary did not exceed Rs. 4065/- p.m. Now this wage limit has been deleted so that all those who are employees under Act are entitled to Rs. 300/- p.m. as Cost of Living Allowance.

Employees Old-Age Benefits Act 1976.

Applies to every industry or establishment wherein ten or more persons are employed directly or through any other person whether on behalf of himself or any other person, or were so employed on any day during preceding 12 months. Though under Labour Law (Amendment) Ordinance 2001 industry or establishment with less than ten workers may also apply for voluntary registration.

§ 9(1). Contributions payable every month by employer to Employees' Old-Age Benefits Institution in respect of every person in his insurable employment, at rate of 5% of his wages.

§ 22. Old Age Pension: Insured person entitled to old age allowance at rates specified in schedule provided that: (a) He is over 60 years of age or in case of woman, 55 years, (b) contributions in respect of him were paid.

§ 23. Invalidity Pension: Insured who sustained invalidism (i.e., condition other than that caused by employment injury as result of which insured person is permanently incapacitated to such extent as to be unable to earn from his usual or other occupation more than 1/3 of normal rates of earning in his usual occupation) shall be entitled to invalidism allowance at rate specified in schedule subject to conditions in § 23.

§ 26. Right to invalidism and old age allowance is extinguished if claim is not made within 12 months from date it becomes payable, but Institution may condone delay if it was caused for reasons beyond control of insured person or survivor. Through amendments made by 2002 Ordinance employer may opt to register under self-assessment scheme instead of normal pension scheme whereby he shall be liable to pay fixed amount of Rs. 150 in respect of every person in his insurable employment irrespective of his wages. Effective July 1, 2001, employees (insured persons) have been made liable to pay through employer Rs. 20 per month as contribution to Institution fund.

10.02 LABOUR RELATIONS:

See topic 10.01 Labour Laws; category 9 Documents and Records, topic 9.04 Records.

10.03 WORKERS' COMPENSATION LAW:

See topic 10.01 Labour Laws, subhead Workmen's Compensation Act, 1923.

11 ENVIRONMENT

11.01 ENVIRONMENTAL REGULATION:

In Dec. 1997, Pakistan Environmental Protection Act, 1997 (Act) was passed so as to repeal Pakistan Environmental Protection Ordinance, 1983. Act extended existing coverage and provided systematic judicial mechanism taking cognizance of offences relating to environments. Pollution Charge for Industry (Calculation and Collection) Rules 2001 were published on Oct. 5, 2001 stipulating levy of “pollution charge” payable by any industrial unit breaching environmental laws. Charge shall be calculated by multiplying pollution level, as determined by specially constituted inspection team, with actual production during period in which charges are to be paid, and with applicable rate per pollution unit for year in accordance with rates and escalation table shown in Schedule III.

Under new Act, like previous Ordinance, offices of Pakistan Environmental Protection Council were retained to administer and implement provisions of this Act. Offices are headed by Prime Minister or other person nominated by Prime Minister and consist of federal and provincial ministers in charge of environment and Pakistan Environmental Protection Agency (PEPA) headed by Director General both at Federal and Provincial levels.

Other important feature of Act was establishment of Environmental Tribunals to handle all cases relating to contraventions under Act. Tribunal also possesses appellate powers. However appeal against order of Tribunal shall lie to High Court. Provincial Sustainable Development Funds is also established to provide financial assistance to projects designed for protection and improvement of environment.

Land Improvement Loans Act 1883 provides for loans for improvement of land such as storage, supply or distribution of water, drainage, reclamation from rivers or other waters etc.

In addition there are various other federal and provincial statutes which regulate water and air quality, noise, toxic and hazardous substances, solid wastes and effluents, marine and fisheries, forest conservation, parks, wildlife and mineral development.

12 ESTATES AND TRUSTS

12.01 DEATH:

Presumption of.

Under Art. 124 of Qanun-e-Shahadat Order, 1984 where missing man is dead or alive, and it is proved that he has not been heard of for seven years by those who would naturally have heard of him if he had been alive, burden of proving that he is alive is shifted to person who affirms it.

In case of commorientes or persons dying in a common disaster or calamity, the old English rule governs which recognizes no presumption either of survivorship or of contemporaneous death, and treats matter as one of fact to be decided on the evidence. Therefore, party on whom onus lies of proving survivorship of one individual after another will fail if he has no evidence beyond the presumption that from age or sex that individual must have struggled longer against death than his companion.

Action for.

Where death of a person is caused by a wrongful act, neglect or default even amounting in law to a crime, and act, neglect or default is such as would, (if death had not ensued) have entitled injured party to maintain an action and recover damages in respect thereof, under Fatal Accidents Act 1855 such an action or suit may be brought by and in name of a successor, administrator or representative of the deceased person for benefit of wife, husband, parents and children, including grandparents, grandchildren and stepchildren.

In every such action court may award such damages as it thinks fit proportionately to loss suffered by the respective parties for whom and for whose benefit such action is brought, resulting from said death. Provided that not more than one action or suit is brought for and in respect of same subject matter, a claim for recovery of any pecuniary loss occasioned to deceased's estate by such wrongful act, neglect or default may be inserted in the action or suit.

Under Art. 21 of Limitation Act 1908 such action or suit if not brought within one year from date of death is barred.

12.02 DESCENT AND DISTRIBUTION:

This is governed either by the personal religious law of the deceased or else by the Succession Act XXXIX of 1925. Hindus, Muhammadans, Buddhists, Sikhs and Jains are excluded under this Act and Parsis have a special chapter relating to them.

Where intestate has left a widow if he has also left lineal descendants, one-third of his property belongs to his widow and two-thirds to descendants, distribution amongst them inter se following certain prescribed rules.

If intestate left a widow and no lineal descendants but has left persons who are kindred to him and if his estate exceeds Rs. 5,000 the widow takes Rs. 5,000 outright. Of the residue, further one-half of this will go to his widow and one-half to the kindred again following certain prescribed rules for distribution amongst them. If the estate does not exceed Rs. 5,000 widow takes all.

If there are no lineal descendants or kindred, the widow inherits all. If intestate has left no widow, the property goes to lineal descendants or to kindred and if there is none, to state.

Rules for distribution where there are lineal descendants are that where there are surviving only children or a child or grandchildren or grandchild the property passes to them equally or him entirely. Where intestate leaves lineal descendents not all in same degree of kindred to him and those through whom the more remote are descended are dead the property is equally divided into shares corresponding to the number of lineal descendants who stood in the nearest degree of kinship to the intestate at his decease or who having been of like degree of kindred to him, died before him, leaving lineal descendants who survived him. One such share is allowed to each of the lineal descendants who stood in the nearest degree of kinship to the intestate at his decease, and one of such shares allotted in respect of each such deceased lineal descendant belongs to his surviving child or children or more remote lineal descendant as the case may be.

If there are no lineal descendants father of the deceased will inherit the property. If there is no father but mother and also brothers or sisters of the deceased and no child of any deceased brother or sister, the mother and each living brother or sister succeeds to the property in equal shares. Where there are children of any deceased brother or sister these children inherit per stirpes the share of their deceased parent. Where there are only the mother and a nephew or niece these take in equal shares or where there are more than one the nephews and the nieces take in equal shares the shares their respective parent would have taken if living at the intestate's death.

Where mother is the sole survivor she inherits the whole property.

Where intestate has left no lineal descendants nor any parents but brothers or sisters, estate will be distributed between them and the children of any deceased brother or sister will take per stirpes.

Where intestate has left neither lineal descendant nor parent, nor brother or sister, his property is divided equally between those of his relatives who are in the nearest degree of kindred to him.

Special rules exist for Parsi intestates as above stated.

Rules of intestate succession according to personal laws are very detailed. Not more than third of his property can be bequeathed by Muslim. Rules of succession further vary in Sunni and Shiah Schools of law, which are two main Schools of Muhammadan law.

12.03 EXECUTORS AND ADMINISTRATORS:

No right as an Executor can be established in any court of justice unless a court of competent jurisdiction in the provinces or capital of the Federation has granted probate of the will under which the right is claimed or has granted letters of administration with the will or with a copy of an authenticated copy of the will annexed. These rules apply only to wills made by Hindus, Buddhists, Sikhs or Jains and they are of classes specified in § 57, clauses (a) & (b) of Succession Act 1925, and not at all to the wills of Muslims. (See topic 12.05 Wills.) Where deceased was intestate and was Hindu, Muslim, Buddhist, Sikh or Jain or exempted person letters of administration may be granted to any person who, according to rules of distribution of estate applicable in case of such deceased, would be entitled to whole or part of such deceased's estate, in discretion of court as to which of these persons, if there be more than one, they will grant these letters. Failing such persons administration may be granted to creditor of deceased. Where deceased was not one of categories above-mentioned following are entitled to letters of administration in order of their entitlement: (1) Widow unless court sees fit reason to exclude her; (2) widow along with others entitled in absence of widow, in discretion of court; (3) if there is no widow, or she is excluded, than to those persons who would be beneficially entitled to estate according to rules of distribution of intestate's estate but where mother is one of these persons she alone is entitled to administration; (4) widower has rights of widow; (5) those who stand in equal degree of kindred to deceased are equally entitled to administration.

Probate may be granted to an executor appointed by the will and such appointment may be expressed or implied.

Capacity.

Probate or letters of administration cannot be granted to persons of unsound mind or minors nor to any association of individuals unless it is a company which satisfies the conditions made by the government. Grant of probate can be made to several executors simultaneously or at different times.

Special Kinds of Administration.

Administration with a copy annexed of authenticated copy of will proved abroad may be granted. In event of failure to accept or renouncing an executorship within the time limited for acceptance or refusal thereof, will may be proved and letters of administration with a copy of the will annexed may be granted to the person who would be entitled to administration in case of intestacy.

Universal legatees may be appointed where: (a) There is a will but no executor has been appointed; or (b) appointed executor refuses to act or is incapable of acting; or (c) executor dies after having proved will but before administrating estate of the deceased.

Rights of executorship and that of universal legatee may pass by succession.

Grant of letters of administration with the will annexed will not be made to any legatee other than an universal or residuary legatee before citation has been issued and published calling on next-of-kin to accept or refuse letters of administration. Where a person appointed executor has not renounced the executorship, provided that when one or more of several executors have proved a will, the court may, on death of the survivor of those who have proved, grant letters of administration without citing those who have not proved. When executor is absent, under S. 241, from the provinces in which application is made and there is no executor within the province willing to act, letters of administration, with the will annexed, may be granted to the attorney or agent of the executor limited until he obtains probate or letters of administration granted to himself.

In case of the minority of a sole executor or sole residuary legatee, letters of administration may be granted to minor's legal guardian for the period of minority. Similarly where a sole executor or a sole universal or residuary legatee or a person who would be solely entitled to the estate of the intestate is a minor or a lunatic letters of administration may be granted to the person to whom in the case such minor's or lunatic's estate has been committed by competent authority or if there be no such person to such other person as the court may deem fit.

Grants may be limited for purpose specified in the will or granted with an exception or for a remainder of the deceased's estate.

Grants may be altered, rectified or revoked by courts of competent jurisdiction.

12.04 TRUSTS:

Law relating to trusts (apart from *waqf* which is governed by Muslim Law, the relations between members of an undivided family which are governed by customary or personal law, and public or private religious or charitable endowments) is contained in Trusts Act 1882.

A trust under the Act may be created for any lawful purpose by a person competent to contract (“author of the trust”) for the benefit of a person capable of holding property (“beneficiary”) in respect of property transferable to the beneficiary which is not merely a beneficial interest under a subsisting trust. A trustee must also be a person capable of holding property and, if the trust involves the exercise of discretion, a person competent to contract. A trustee may accept or disclaim a trust.

Creation.

A trust of immoveable property must be declared by an instrument in writing signed by author of the trust or the trustee and, unless the instrument is a will, registered. No trust of moveable property is valid unless declared as aforesaid or unless ownership of the property is transferred to the trustee. In either case author of the trust must indicate with reasonable clarity: (a) an intention to create a trust, (b) purpose of the trust, (c) the beneficiary, and (d) the trust-property, and (unless the trust is declared by will or author of the trust is himself to be the trustee) transfer the trust-property to the trustee.

Duties and Liabilities of Trustees.

A trustee is bound to fulfil the purpose of the trust and, except as modified by consent of the beneficiaries, obey the directions of the author of the trust given at time of its creation; to acquaint himself with, and (where necessary) secure the transfer to himself of, the trust-property; to take steps for its preservation and deal with it as carefully as man of common prudence; to convert perishable trust-property into permanent and profitable property and to prevent waste; to keep accounts of the trust-property, and to observe impartiality as between several beneficiaries.

Rights and Powers of Trustees.

A trustee is entitled to possession of the instrument of trust and title deeds relating to the trust-property; to reimbursement of expenses and to recoup overpayments made to a beneficiary; to apply to the court for its advice or direction as to management of the trust-property; if empowered to sell the trust-property, to sell the same either together or in lots, by public auction or by private contract, and subject to such special conditions as he thinks fit; to vary investments; to apply property held in trust for a minor for the minor's maintenance, education and advancement; to give receipts for money and moveable property; to compound debts relating to the trust; and generally to do all acts for the realization, protection or benefit of the trust-property and for the protection and benefit of a beneficiary not competent to contract.

Disabilities of Trustees.

A trustee having accepted the trust cannot renounce it, unless so empowered by the instrument of trust, except with the court's permission or the consent of the beneficiary if competent to contract. The act contains restrictions on a trustee's right to delegate his office and prohibits a trustee from charging for his services unless so authorized in the instrument of trust, from using the trust-property for his own profit and from buying trust property.

Vacating Office of Trustee.

Office of trustee can be vacated only by the trustee's death or his discharge by the extinction of the trust, completion of his duties, by any means prescribed in the instrument of trust, by the appointment of a new trustee under the act, by consent of the beneficiaries if competent to contract, or by the court.

Appointment of New Trustees.

New trustee may be appointed by the person nominated in the instrument of trust or, if none, by author of the trust or the surviving or continuing trustees or the legal representative of the last surviving or continuing trustee or (with consent of the court) the retiring trustees or the last retiring trustee. Such appointment must be in writing under the hand of the person making it.

Extinction of Trusts.

A trust is extinguished when its purpose is fulfilled or becomes unlawful, when fulfilment becomes impossible or, being revocable, it is revoked. Except in case of a trust created by will, a trust can be revoked only when all the beneficiaries are competent to contract, with their consent; in exercise of an express power reserved to author of the trust; or, when the trust is for payment of debts of author of trust and has not been communicated to his creditors, at pleasure of author of the trust.

Investment.

Section 20 of Act lists the types of securities in which trust money must be invested (briefly, government stocks and first mortgages of immoveable property) unless the instrument of trust authorizes investment in other securities.

By virtue of Finance Act, 1998 new clause (g) is proposed to be added to § 20 of Trusts Act, 1882, whereby investment of trust money would henceforth be permitted in units issued by schemes established under Asset Management Companies Rules, 1995.

See also category 21 Property, topic 21.03 Perpetuities.

12.05 WILLS:

Making of a will is governed by the Succession Act 1925 and is based on the law in England. This does not, however, apply to Muslims and the law applicable to them is stated infra under subhead Muslims.

Capacity.

No one who is not a major or of sound mind can dispose of his or her property by will. Women, whether married or single may dispose of any property which they could have alienated or transferred during their lifetime. Physical handicaps do not bar a person from becoming a testator provided such handicaps do not prevent him from understanding the import of his actions. Insane persons may make a will during a lucid period. No person can make a valid will when he is in such a state that it may be presumed that he was incapable of knowing what he was doing. Aliens are not barred except as above by minority or insanity, from making wills. Domicile is the deciding factor under this law for the validity of a will.

Muslims.

The majority of the population being Muslim does not come within the purview of the above act. Such persons are governed by their personal law. Muslims are divided into two main communities, Sunnis and Shiahs, and the large majority of the Muslims in Pakistan are Sunnis of the Hanafi School. The remarks hereinafter made are therefore applicable only to them. The Shiahs are in a minority and are in themselves split up into several smaller sects, of which the Ismailis, with the Aga Khan as their religious head, are one. Every Muslim can dispose of his property by will if he is a major and not insane. The will can be either in writing or verbal. Not more than one-third of the estate can be disposed of by will in any case and no bequests may be made to persons who are heirs under the laws of intestate succession except with consent of all other heirs. Nor can more than one-third of the property be bequeathed without a similar consent. A Muslim will does not have to be proved and the taking out of a succession certificate is sufficient.

Limitation on Charitable and Religious Gifts.

No Person with any near relation can validly dispose of any property to religious or charitable uses except where the will was executed 12 months prior to his death and deposited within six months of execution in office of Sub-Registrar of Assurances.

Execution.

Ordinarily will must be in writing and signed by testator or some person on his behalf and in his presence. The signature must indicate that contents of the will were being approved. Signature must further be attested and the attesting witnesses must have seen the testator, or his attorney, sign in their presence or received an acknowledgment by testator of the signing of the will. Witnesses must each sign in presence of testator but need not sign in each other's presence.

Revocation.

A will may be revoked at any time during the testator's lifetime or amended by the addition of codicils. Marriage will usually revoke a will. Deliberate destruction of will with intent of revocation also serves to revoke will.

Privileged Wills.

Any soldier, sailor or airman, if he is over 18 and employed in expedition, or at sea, can make will and such will is privileged one. It can be either oral or in writing provided, if oral, it is declared before two witnesses. One month after testator of privileged will ceases to be in service, will becomes void. Written wills do not require signature or attestation unless written in some one other than testator's hand in which case they require signature. Privileged will may be revoked by subsequent unprivileged will if that will is properly executed and clearly revokes previous will.

Testamentary Gifts to Subscribing Witnesses.

No witness who is a beneficiary may take, but the will remains valid.

Foreign wills are governed by the law of domicile of testator except insofar as they relate to immoveable property in Pakistan. Foreign probate of such a will is proof of its due execution as far as the courts here are concerned, provided a properly authenticated copy of the will and probate are produced, notarial certification being sufficient. In other cases the court must satisfy itself of due execution of the foreign will. Probate cannot be granted of a foreign will executed within Pakistan relating only to property outside Pakistan.

Grant of foreign probate though evidence of due execution of the will is not sufficient for the grant of letters of administration here and application must be made to the courts. Law of testators domicile in this respect is not binding.

See also topics 12.03 Executors and Administrators, Trusts; category 21 Property, topic 21.03 Perpetuities.

13 FAMILY

13.01 DIVORCE:

Law relating to dissolution of marriage is governed partly by personal law and partly by statute law which apply to different religious communities. If one of parties is Christian question of divorce would be governed by Divorce Act 1869, as am'd by The Divorce (Amendment) Act 1975. Under Divorce Act 1869 both parties must be domiciled in Pakistan at time petition is presented and petitioner must be resident here. Jurisdiction to entertain petitions for divorce lies with High Court and also in District Court and decrees for dissolution under Act will be given as far as possible in conformity with principles and rules on which court for divorce and matrimonial causes in England acts. By powers given under Family Courts (Amendment) Act 2002, family courts have jurisdiction to try offences where one of spouses is victim of offence by another notwithstanding provisions of Code of Criminal Procedure.

Grounds for Divorce.—

Christian husband can ask for dissolution of marriage only on ground of wife's adultery, wife may seek dissolution on any of the following grounds: (a) Husband has changed his Christian religion; (b) he has gone through a form of marriage with another woman; (c) he has been guilty of incestuous adultery; (d) he has been guilty of marriage with another woman and committed adultery; (e) he has been guilty of rape, sodomy or bestiality; (f) he has been guilty of adultery with such cruelty as would have entitled his wife to divorce mensa et thoro; (g) he has been guilty of adultery coupled with desertion for two years.

Collusion or petitioner's own adultery will vitiate a petition but where such petition is dismissed on these grounds by District Court a similar petition may be presented to High Court. Adultery will be deemed to have been condoned where conjugal habitation has been resumed or continued. Relief can be granted to respondent on his or her application where respondent opposes petition and court will not be bound to pronounce any decree of dissolution where it finds that petitioner has been guilty of adultery, or unreasonable delay in presenting petition or cruelty to, or desertion or separation from, respondent. Every decree of divorce granted by District Court will have to be confirmed by High Court and such confirmation decreed by two or more Judges. The court may also hear additional evidence. Every decree for dissolution of marriage made by High Court not being a confirmation as above will be a decree nisi not to be made absolute less than six months from pronouncement thereof.

Where the parties are Muslim the contract of marriage under the Mohammedan Law may be dissolved in any one of following ways: (1) By husband at his will (2) by mutual consent of husband and wife, without intervention of a court; (3) by a judicial decree at suit of husband or wife; (4) by wife through delegated right of divorce.

Formerly any Mohammedan male of sound mind, who obtained puberty, could divorce his wife whenever he desired without assigning any cause by the pronouncement of talaq effected either orally or in writing.

Muslim Family Laws Ordinance 1961 has made some changes. By § 7 subsection (1) of this Act, any man who wishes to divorce his wife must, as soon as may be after the pronouncement of talaq in any form whatsoever, give the Chairman notice in writing of his having done so, and must supply a copy thereof to the wife, a talaq unless revoked earlier, expressly or otherwise is not effective until expiration of 90 days from day on which notice under subsection (1) is delivered to the Chairman. Within 20 days of receipt of notice under subsection (1), Chairman must constitute an Arbitration Council for purpose of bringing about a reconciliation between parties, and Arbitration Council takes all steps necessary to bring about such reconciliation.

Woman married under Muslim Law is entitled to obtain decree for dissolution of marriage under Dissolution of Muslim Marriage Act 1939 on ground simply that she does not want to live with husband anymore.

By Family Courts (Amendment) Act, 2002, period for disposal of suit for dissolution of marriage was fixed as four months and appeal against such order shall also be decided within four months. Under recent amendment, plaint for dissolution for marriage may contain all claims relating to dowry, maintenance, dower, personal property and belongings of wife, custody of children and visitation rights.

Renunciation by a married Muslim woman of Islam or her apostacy does not by itself operate to dissolve her marriage nor are her rights under Act affected.

Divorce by mutual consent is also possible between two Muslims.

See also topic 13.04 Marriage, subhead Nullity.

Parsis are governed by Parsi Marriage and Divorce Act 1936 which lists several varied grounds.

By Amendment Act, 1975 (Act IV of 1976) jurisdiction has now been conferred solely on Court of Civil Judge, within local limits of whose jurisdiction husband and wife reside or last resided.

13.02 HUSBAND AND WIFE:

Husband and wife are reckoned as separate persons and may freely contract either between themselves or individually as if they were unmarried. Suits in tort are maintainable between spouses.

§ 20 of the Succession Act 1925 further lays down that marriage neither entails accession to nor loss of property by married women. This section does not include in its operation Hindus, Muslims, Buddhists, Sikhs or Jains. Muslim women, however, by their personal law are equally protected.

Married Women's Property Act 1874 also excludes from its operation Hindus, Muslims, Sikhs, Buddhists and Jains, except when included specifically. Under it the wages, earnings or any separate property acquired by wife are protected and remain in her entire ownership.

Actions.

A married woman can sue in her own name to recover any wages or property belonging to her, as if she were unmarried and her husband need not be joined in the suit as plaintiff. Nor is he necessarily liable to be joined as defendant in any suit against her.

Debts.

A husband is not liable for his wife's pre-nuptial debts except where he undertakes to make payment of them. Nor is he liable for any debts she may contract after marriage except where these debts are contracted through his wife's agency, such as the supplying of necessaries to his house.

Maintenance.

A husband is responsible for maintenance of his wife and children and a court order may be obtained to force him to make an adequate allowance to his wife. Default in this respect renders him liable to a fine and also to simple imprisonment for a month or to both. No maintenance arrears can be claimed for a period over a year from the institution of the suit.

Insurance.

A wife may take out insurance for her husband's benefit. Insurance for her benefit will be deemed to be a trust in her favour and this section has been made applicable equally to Hindus, Muslims, Sikhs and Jains.

Additional Non-Liability of Husband.

A husband is not liable for his wife's breach of trust or where she is executrix for devastation, unless he has meddled with the Estate she is administrating.

13.03 INFANTS:

By the Majority Act 1875 the age of minority ceases for both sexes at 18 unless the minor has been made a ward of the court when it continues to age 21. Majority Act does not, however, effect minor's rights, under his personal law, during minority, of marriage, dower, divorce, and adoption.

Under Child Marriage Restraint Act 1929, however, minimum ages for marriage are for male 18 years and were for female 14 years. Family Laws Ordinance 1961 has now raised limit to

16 for females. Marriages contracted under these ages render parents or guardians of the minor, the major contracting party (if either of the parties is major, i.e., over 18) and the solemnizers of the marriage to penalties but marriage is not void.

Under Christian Marriage Act 1872 a minor is defined as a person who has not attained his or her 21st birthday.

For purpose of guardianship under Divorce Act 1869, children of Pakistani descent remain minors until their 16th and 13th birthdays respectively for males and females but for children of other descent minority continues till their 18th birthdays.

Actions.

Bringing or defending of suits by a minor is governed by Order XXXII of Civil Procedure Code. Every suit by a minor must be instituted in his name by a person called “next friend” of the minor, and a suit instituted directly by the minor may be struck off the file.

Where defendant is a minor, the court on being satisfied of the fact of his minority must appoint a proper person to be guardian ad litem for the suit for such minor. No person can be appointed guardian for a minor who has an interest adverse to that of the minor. Guardians ad litem must also be appointed for minors in petitions for letters of administration, and in any other matter in which the minor is directly or indirectly involved.

Contracts.

Minors cannot enter into valid contracts except in relation to marriage, divorce or dower.

13.04 MARRIAGE:

Marriage, like divorce, is governed by different statutes and by personal customs for different communities. Under the Child Marriage Restraint Act minimum ages for male and female were respectively 18 and 14, but by Family Laws Ordinance 1961 minimum age for a female has now been raised to 16 years. No medical examination is required before marriage.

By Marriages (Prohibition of Wasteful Expenses) Act, 1997, no person celebrating his marriage or marriage of any other shall decorate any house or building with lights and illumination and serve meals or other edibles to persons participating in marriage except hot and cold soft drinks. Whoever contravenes provision shall be punishable with fine not less than Rs. 100,000 and not more than 300,000.

Christian marriages are governed by the Christian Marriage Act 1872. It applies where either one or both parties are Christians. Such marriages can be solemnized by any person who has received Episcopal ordination and according to the rites of that church, by a clergyman of the Church of Scotland, and by any minister of religion, marriage registrar or other licensed person. Marriage must, unless a special license is obtained, be celebrated between the hours of 6 a.m. and 7 p.m., and should normally be at a church unless special license is obtained or there is no church within five miles of the parties' residences. Notice must be given to the minister who is to solemnize the wedding, stating full names, status, profession, residential address and length of residence, if under a month, of the parties, and intended place of solemnization. Where one of parties is a minor consent in writing is also required of such person's parent or guardian and a copy of the notice and consent must also issue to Marriage Registrar unless the parents or guardians are not resident in Pakistan in which case no consent is required. This notice must be published both by the minister and by Marriage Registrar where it is sent to him and on the request of either party a certificate of notice given and a declaration made can be obtained from Registrar or minister, where no lawful impediment exists and the giving of such a certificate is not forbidden. Any person whose consent is necessary can forbid the marriage but the minister must examine the notice forbidding the marriage and satisfy himself that it is authorized. Where the marriage is to be solemnized by Marriage Registrar and consent is withheld, the parties may appeal on petition to District Judge. Marriages solemnized by Marriage Registrar are also governed by virtually similar rules.

Marriages must be solemnized within two months of issuance of a certificate of notice, otherwise, unless a certificate is reissued, the marriage will be void.

The marriage must be witnessed by two witnesses. Marriages must be registered and a register kept according to the rules under part IV of Act.

Special Marriage Act 1872 governs the marriages of persons who are not professing Buddhists, Christians, Hindus, Muslims, Parsis, Sikhs or Jains and also those persons who profess the Hindu, Buddhist, Sikh or Jain religion where such persons wish to marry out of their community into one of the remaining three communities. The minimum age under the Act is 18 for males and 14 for females and consent of the guardian or parents is required for the party who is under 21. No persons can marry who would have been unable to marry according to the laws of consanguinity or affinity under their personal law. No law of consanguinity operates however unless a relationship can be traced between the parties through some common ancestor who stands to each of them in a nearer relation than that of a great-great-grandfather or a great-great-grandmother or unless one of the parties is a lineal ancestor or brother or sister of some lineal ancestor of the other.

Marriages are solemnized before Registrars appointed for this purpose. Notice of marriage must be given and in absence of any objections can be solemnized after 14 days. Objections must be filed in court and if the court is in vacation Registrar must wait 14 days after opening of court so that objections can be lodged. A certificate of the filing of suit must be lodged with Registrar if he is to take cognizance that such objections have been made. Where such objections are frivolous, the person making them may be fined. The marriage must be solemnized before three witnesses and parties must sign a declaration in their presence and that of Registrar, stating that they are not professing Buddhists, Christians, etc., as above, or that being Hindu, Buddhist, etc., they will be marrying some person outside that community. Where either party is under 21, this declaration must also be signed by the father or guardian except where the party under 21 is a widow. The declaration must be countersigned by Registrar.

Marriages contracted under this Act are monogamous and dissolution of such marriages is governed by the Divorce Act 1869. See topic 13.01 Divorce.

Issue of such marriage will be subject to the laws of consanguinity that governed the parties.

Rights of Hindus, Jains, Buddhists and Sikhs continue except rights to inherit any kind of religious position or status in their community.

Succession to property is governed by the Succession Act 1925.

A party's right of adoption ceases on marriage but the party's father may have the right to adopt where the party to such a marriage was an only son.

Other marriages are contracted under the parties' personal laws. Muslim marriages have been modified by the Family Laws Ordinance 1961 which provides that during the existence of one marriage no further marriage may be contracted by the husband without prior permission of an arbitral commission or any other person so appointed having authority to grant or withhold such permission. No such second marriage is void, however, but the husband may be liable to a fine, or a year's imprisonment, or both. Muslim women can only marry Muslim men, but Muslim men can also contract marriages with Christian or Jewish women.

Nullity.

A marriage contracted under Christian Marriage Act and Special Marriage Act can be annulled for impotence at time of marriage continuing to date of presentation of the petition, as also in case of incapacity at the time of marriage, marriages between persons within prohibited degrees of consanguinity, and bigamy with respect to the second marriage. The children of a marriage contracted in good faith during the existence of a previous subsisting marriage are legitimate.

Marriage with a Foreigner.

There are no restrictions on marriage with a foreigner except on Government servants.

14 FOREIGN TRADE AND COMMERCE

14.01 CUSTOMS:

The Customs Act 1969, as am'd by The Prevention of Smuggling Ordinance 1977 Ch. VI (Amendment of Customs Act 1969), consolidates and amends law relating to levy and collection of customs duties and also provides for other allied matters. This Act repeals (a) The Sea Customs Act 1878, (b) Inland Bonded Warehouse Act 1896 and (c) Land Customs Act 1924.

Central Board of Revenue which is Chief Customs authority may appoint officers of Customs or may entrust, either conditionally or unconditionally any functions of any officer of Customs under this Act to any officer of Federal or Provincial Government.

Under Act, Federal Government has power from time to time by notification to prohibit or restrict bringing or taking by air, sea or land goods of any specified description into or out of Pakistan. Contravention of this section would make goods liable to detention and confiscation by Customs authorities.

Act provides for levying of customs duties at rates prescribed under Finance Act, passed annually or under any law for time being in force on: (a) Goods imported into or exported from Pakistan; (b) goods brought from any foreign country to any Customs Station and without payment of duty there transshipped or transported for, or hence carried to and imported at, any other Customs Stations; and (c) goods brought in bond from one Customs Station to another.

Federal Government has general power to exempt from customs duties any goods imported into or exported from Pakistan.

Central Board of Revenue has power to declare certain places as Customs Ports or Customs airports or Land Customs Stations.

Federal Government may by special order in each case recording such circumstances exempt any goods from payment of whole or any part of customs duties chargeable thereon. Under S.R.O. 1972 Federal Government exempted samples of no commercial value from whole of customs duty leviable thereon on export from Pakistan.

Where goods are imported only temporarily with a view to subsequent re-exportation, Chief Customs authority has power to exempt them from duty subject to such limitations and conditions as it sees fit to impose on such goods either by generally prescribed rules or in any particular case by special order.

Where prescribed goods of such class or description which are intended to be used in production, manufacture, repair or refitting are imported into Pakistan, Chief Customs authority with previous sanction of Federal Government and subject to such terms and conditions as it sees fit to impose, may either exempt goods from duty or authorise repayment in full or in part of duty already paid.

Where goods capable of being easily identified are imported into Pakistan and upon which customs duties have been paid on importation are exported to any place outside Pakistan seven-eighths of such duties shall be repaid as drawback, subject to following conditions: (a) Goods are identified to satisfaction of an officer of Customs not below rank of Assistant Collector of Customs at same Customs Station, through which goods had been imported; and (b) goods are entered for export within two years of date of their importation as shown by records of Customs House or if such time is extended by Central Board of Revenue or Collector of Customs for sufficient cause within such extended time. Provided that Collector of Customs shall not extend time beyond three years of importation of such goods.

Federal Government has powers to make rules according to which repayment of duty as drawback will be allowed on such goods as are taken into use between importation and re-exportation.

Any conveyance entering Pakistan from any place outside Pakistan must call or land in first place at a Customs Station and deliver within 24 hours import manifest to appropriate Customs Officer.

Penalties for offences in above act range in specified cases to a maximum fine of Rs. 10,000, confiscation of conveyance and/or goods, a penalty not exceeding ten times the value of goods and/or imprisonment not exceeding six years on conviction before a Magistrate. New provisions on Alternate Dispute Resolution have been incorporated into law to provide for efficient and quick mode of determination of disputes.

Countervailing Duties Ordinance 2001 gives effect to provisions of Arts. VI and XVI of General Agreement on Tariffs and Trade 1994 and to Agreement on Subsidies & Countervailing Measures. Ordinance amends law relating to imposition of countervailing duties to offset such subsidies to provide framework for investigation and determination of such subsidies and injury in respect of goods imported into Pakistan and ancillary matters thereto. Anti-dumping Ordinance 2000 amends and consolidates laws relating to imposition of anti-dumping duties. National Tariff Commission can impose anti-dumping measures on products imported into Pakistan if investigated product is dumped within meaning of Ordinance or injury is being caused to domestic industry.

By Import of Goods (Development Surcharge) Ordinance, 1984, development surcharge of three rupees and 50 paisa per ton is to be levied and collected on all goods other than food grains, fertilizers and petroleum products, imported through Karachi customs port.

14.02 EXCHANGE CONTROL:

In May 1998 Government of Pakistan after nuclear tests declared emergency throughout country thus freezing all foreign currency accounts and suspending all kinds of foreign currency transactions. Main purpose of this declaration was to plug outlets used for foreign currency transfer. However foreign currency accounts maintained by diplomatic missions accredited to Pakistan, their nonresident employees, all international organizations were not affected. Furthermore restrictions did not apply to special foreign currency accounts allowed to be opened by firms/companies in Pakistan for receiving foreign equity and foreign currency loans for purpose of import of plant and machinery, and to foreign currency accounts opened by independent power projects. *Note:* All these restrictions have been removed. State Bank of Pakistan ("SBP"), through its Circular No. FE/8, has adopted market-based Unified Exchange Rate System, under which SBP fixes exchange rate for foreign currencies on daily basis, and all scheduled banks are then allowed to convert currencies on those rates. Supreme Court, in its judgment in Civil Appeal No. 319 of 99, has ordered Government to make arrangements to lift restrictions imposed on foreign exchange transactions under Foreign Exchange (Temporary Restrictions) Act, 1998, as same are unjustified and without authority. In view of this decision, and fact that country's economic condition has improved reasonably since imposition of emergency, it is hoped that total restrictions will soon be lifted. In this regard, Foreign Currency Accounts (Protection) Ordinance 2001 was promulgated on Sept. 28, 2001. This provides complete protection of foreign currency accounts and stipulates that no person holding foreign currency account shall be deprived of his right to hold or operate such account or in any manner be restricted from, temporarily or permanently, lawfully selling, remitting, transferring, using as security or taking foreign currency from within or outside Pakistan. Protection provided under this Ordinance is in addition to, and not in derogation of, protection provided under Protection of Economic Reforms Act 1992.

Exchange Control is regulated by the Foreign Exchange Regulation Act of 1947 as am'd by F.E.R. (Amend.) Act 1973 and 2002. It covers payments and dealings in foreign exchange and securities and import and export of currency and bullion. No person except authorized dealer and exchange companies may deal in foreign exchange without previous general or special permission of State Bank. This includes buying, borrowing, selling, lending or exchanging any foreign exchange with any person who is not authorized dealer. State Bank may on application made to it authorize any company registered under Companies Ordinance 1984 to deal in foreign exchange. Authorized dealers, money changers and exchange companies are now free to determine exchange rates for conversion of Rupees into any foreign currency and vice versa. Effective Aug. 1991, under general permission of State Bank all individuals, companies including investment banks and registered firms may have and freely operate foreign currency bank accounts in Pakistan without restriction save that exports proceeds and earnings on account of services, commissions etc. may not be credited to such accounts. Foreign currency may now be held, exported and imported without restriction and such bank accounts are free from all other exchange control regulations. If foreign exchange is acquired from authorised dealer under general or special permission of State Bank for special purpose it must be used for that purpose and that purpose only or else sold to authorized dealer. Foreign national resident in Pakistan is deemed to be nonresident for purpose of Act. Federal Government has right to acquire foreign exchange by way of sale or assignment but not at price less than market rate of foreign exchange which is still exercised in respect of export proceeds and earnings of residents on account of services, commissions and the like. No acquisition can be made of any foreign exchange owned by authorized dealer and retained by him with permission of State Bank. Restrictions exist on import and export of gold or silver jewellery or precious stones. As regards transfer of securities to person resident outside Pakistan which, for this purpose, includes foreign national for time being resident in Pakistan and company registered in Pakistan which is controlled, directly or indirectly, by person resident outside Pakistan and control of Pakistani companies by such person, see topic Corporations (Companies), subhead Foreign Exchange Regulation Act 1947. Federal Government may acquire foreign securities in same manner as it may foreign exchange. No person resident in Pakistan may, except with State Bank permission, settle any property otherwise than by will, upon any trusts under which person who at time of settlement is resident outside Pakistan elsewhere than in territories indicated by State Bank will have interest in property, or may exercise power under said trust, and any such settlement or exercise of power is void to that extent.

Nonresidents are allowed to trade freely in Federal Investment Bonds (FIB's) and Treasury Bills (TB's) in secondary market through Special Convertible Rupee Accounts. Nonresident shareholders have choice of receiving dividends in US Dollars or in currency of country in which they reside if designated Authorised Dealer is maintaining account in that currency. Investment by nonresident (including overseas Pakistanis) are allowed on repatriable basis in corporate debt instruments viz Participation Term Certificates (PTC's) and Term Finance Certificates (TFC's) etc.

Federal Government or State Bank may at any time by notification in Official Gazette direct owners of foreign exchange to make returns thereof to State Bank and supply particulars thereof. Federal Government may, by notification in official Gazette, direct citizens of Pakistan resident in Pakistan, or any class of such citizens, to make within such time, and giving such particulars as may be specified in notification, a return of any immoveable property or any industrial or commercial undertaking or company outside Pakistan, held, owned, established or controlled by them or in which they have any right, title or interest. Rights of entry and seizure exist in cases of suspected contravention of Act but action may be taken only on representation in writing supported by a statement on oath from informer, or subject to authorization in writing by Federal Government or State Bank a person may, for purpose of making an inquiry which he considers necessary for purposes of this Act, enter any place and call for and inspect any accounts, books or other documents kept in such place.

Contracts to avoid this act are invalid but not such contracts as make it a condition that State Bank permission be obtained and it will be an implied term of all such contracts that where anything is to be done that requires State Bank or Federal Government permission it need not be done unless such permission is granted. Legal proceeding to recover any amounts due are not however barred under the above provisions but no steps will be taken to enforce any judgement or order for payment except for the amount which the Federal Government or State Bank may permit.

Contravention of the Act can be punishable with two years imprisonment or fine or both, as well as confiscation of the property in respect of which the offence has been committed. Forum of such trial is either before a magistrate or an adjudication officer having the powers of a first class magistrate or a tribunal constituted by the Federal Government having these powers and appeal lies to the central government from an order of the adjudication officer or to High Court on appeal from the tribunal. Burden of proof rests with accused to show that he had permission to enter into the dealings or transactions, or to do the acts done.

See also topics 14.05 Foreign Trade Regulations, Industrial and Investment Regulations; categories 2 Business Organizations, topic Corporations (Companies); Business Regulation and Commerce, topic Price Control.

Restriction on Repatriation of Foreign Funds Invested Locally.

See topic 14.04 Foreign Investment.

14.03 FOREIGN EXCHANGE:

See topic 14.02 Exchange Control.

14.04 FOREIGN INVESTMENT:

Government attaches great importance to inflow of direct foreign investment, particularly in areas where it brings advanced technology, managerial and technical skills and marketing expertise. Foreign investment is welcomed virtually without restriction in equity in manufacturing industry but has also been permitted in investment banking and other financial sector activities with Government approval and is being encouraged in power generation and other infrastructure development.

Foreign capital invested in accordance with laws is guaranteed repatriation facilities, and current profits thereon are remittable after payment of all taxes.

Under latest Investment Policy 2007, foreign investment on repatriable basis is allowed in manufacturing/industrial, services/infrastructure, social and agriculture sectors. There are no regulatory requirements for investment in manufacturing/industrial sector. Foreign companies wishing to invest in other sectors must fulfill requirements of registration with Board of Investment and under Companies Ordinance 1984. Minimum required investment in Services sector is

US$0.15 million whereas in Social, Infrastructure and Agriculture sector this amount is US$0.3 million. For agricultural sector, minimum of 40% equity must be held by Pakistani investors within five years of registration of foreign company with Board of Investment and repatriation of profits is restricted to maximum of 60%. Facility to contract private foreign loans not involving any guarantee by Government of Pakistan is available to all foreign investors making investments in sectors open to foreign investment for financing cost of imported plant and machinery required for setting up project. Such loan agreement has to be registered with State Bank.

Pakistan has signed bilateral agreements on promotion and protection of investment with 43 countries: Australia, Azerbaijan, Bangladesh, Belarus, Belgium, China, Egypt, France, Germany, Indonesia, Iran, Italy, Japan, Kuwait, Kyrgyz Republic, Malaysia, Mauritius, Netherlands, Oman, Philippines, Portugal, Qatar, Romania, Singapore, South Korea, Spain, Sri Lanka, Sweden, Switzerland, Syria, Tajikistan, Thailand, Tunisia, Turkey, Turkmenistan, United Arab Emirates, U.K. and Uzbekistan.

Foreign Private Investment (Promotion and Protection) Act, 1976.

Applies to all industrial undertakings in Pakistan having foreign private investment established with approval of Federal Government after Sept. 1, 1954.

“Foreign private investment” means investment in foreign capital by person who is not citizen of Pakistan or by company incorporated outside Pakistan, but does not include investment by foreign government or agency of foreign government.

§ 3: Federal Government may, consistent with national interest, for promotion of foreign private investment, authorise such investment in any industrial undertaking: (a) Which does not exist in Pakistan and establishment whereof, in opinion of Federal Government, is desirable; or (b) which is not being carried on in Pakistan on scale adequate to economic and social needs of country; or (c) which will contribute to: (i) development of capital, technical and managerial resources of Pakistan; (ii) discovery, mobilisation or better utilization of national resources; (iii) strengthening of balance of payments of Pakistan; (iv) increasing employment opportunities in Pakistan; or (v) economic development of country in any other manner.

§ 4: Where Federal Government sanctions an industrial undertaking having foreign private investment, it may do so subject to such conditions as it may specify in this behalf. When foreign private investment is by person who, being citizen of Pakistan, is also citizen of any other country, he shall deposit entire amount of repatriable foreign investment in foreign exchange account in Pakistan for its subsequent use for purchase of machinery and other fixed assets of undertaking.

§ 5: (1) Where Federal Government considers it necessary in public interest to take over management of an industrial undertaking having foreign private investment or to acquire ownership of shares of citizens of Pakistan in capital of such industrial undertaking, any agreement approved by Federal Government relating to such undertakings entered into between foreign investor or creditor and any person in Pakistan shall not be affected by such taking over or acquisition. (2) Foreign capital or foreign private investment in an industrial undertaking shall not be acquired except under due process of law which provides for adequate compensation therefor to be settled in currency of country of origin of capital or investment and specifies principles on and manner in which compensation is to be determined and given.

§ 6: Subject to provisions of Foreign Exchange Regulation Act, 1947 (VII of 1947): (a) Foreign investor in an industrial undertaking established after Sept. 1, 1954, and approved by Federal Government, may at any time repatriate in currency of country from which investment originated: (i) foreign private investment to extent of original investment; (ii) profits earned on such investment; and (iii) any additional amount resulting from re-invested profits or appreciation of capital investment; and (b) creditor of an industrial undertaking referred to in clause (a) may repatriate foreign currency loans approved by Federal Government and interest thereon in accordance with terms and conditions of said loan; Provided that nothing in this section shall affect terms of permission to make such investment granted to foreign investor before commencement of this Ordinance.

§ 7: Foreign nationals employed with approval of Federal Government in any industrial undertaking having foreign private investment may make remittances for maintenance of their dependants in accordance with rules, regulations or orders issued by Federal Government or State Bank of Pakistan.

§ 8: (1) Federal Government may allow such concessions to industrial undertakings having foreign private investment as may be admissible under any law for time being in force. (2) Foreign private investment shall not be subject to other or more burdensome taxes on income than those applicable to investment made in similar circumstances by citizens of Pakistan. (3) Foreign private investment shall be allowed all tax concessions which may be admissible on basis of any agreement for avoidance of double taxation which Government of Pakistan may have entered into with government of country of origin of such investment.

§ 9: Industrial undertakings having foreign private investment shall be accorded same treatment as is accorded to similar industrial undertakings having no such investment in application of laws, rules and regulations relating to importation and exportation of goods.

By § 8 of Protection of Economic Reforms Act, 1992 no industrial or commercial enterprise established or owned in any form by foreign or Pakistani investor for private gain in accordance with law and no investment in share or equity of any company, firm or enterprise, and no commercial bank or financial institution established or owned by any foreign or Pakistani investor shall be compulsorily acquired or taken over by Government.

To facilitate foreign investment in country, standard guidelines for payment of fees for technical know-how, royalties, have been prescribed. Ceilings on payments of royalties and technical fees have been abolished. Agreements falling within these prescribed limits do not need formal Government permission but have merely to be registered with State Bank of Pakistan. Entrepreneurs are free to contract foreign private loans/credits for financing foreign currency cost of industrial projects covered by Government's industrial policy on best possible terms and no approval is required for rate of interest, front end fees/ charges for cash loans and repayment period from State Bank. Loan agreements have to be registered with State Bank through bank and registration constitutes exchange control authority to that bank to make necessary remittances to lender on due date. Government is also open-minded on issue of quantum of foreign equity, which is decided on case by case basis where Government approval is still required.

See also topic 14.06 Industrial and Investment Regulations.

14.05 FOREIGN TRADE REGULATIONS:

Imports and exports are chiefly controlled by annual Import Policy Order and Export Policy Order (made under Import and Exports (Control) Act 1950) which, in case of imports, sets out specific restrictions applicable to import of goods inter alia in form of “negative list”. Items not on negative list or otherwise subject to any restriction may be freely imported, and except in certain specific cases, import licences have been abolished. However, 6% fee for privilege to import still required. SRO 490(I)/2002 issued by Federal Government rescinds Registration (Importers & Exporters) Order 1993 with immediate effect, which required registration of importers and exporters with Export Promotion Bureau and Ministry of Commerce. Nominal registration fee is payable.

By Imports and Export (Control) (Amendment) Ordinance,1980 Federal Government have set up Commercial Courts with exclusive jurisdiction to deal with contravention by exporters of orders under § 3 of Imports and Exports (Control) Act, 1950, relating to restrictions and control of exports. Commercial Courts can compel exporter guilty of contravention to deposit with court amount equivalent in court's opinion to damage suffered by foreign buyer as result of such contravention. These courts can also direct immediate compensation of such foreign buyer from revolving fund set up by Federal Government.

Amendment in Merchandise Marks Act 1889 requires that goods imported into or produced in Pakistan shall bear indication of country they were made in or name of manufacturer (with address). This only applies to classes of goods that government may by notification require to be so marked.

Under Inspection, Valuation and Assessment of Imported Goods Rules, 1994 certain classes of imported goods required pre-shipment inspection by PSI Companies, Clean Report of Findings (CRF) and Discrepancy Reports. But SRO 185(1)97, issued by Central Board of Revenue, withdrew requirement of inspection of goods by PSI Companies w.e.f. 12th Mar. 1997 and of issuance of CRF and Discrepancy Report by PSI Companies w.e.f. 1st Apr. 1997. After 1st Apr. 1997 importers are liable to pay duties and taxes and other charges on value fixed under § 25B of Customs Act, 1969, on normal value ascertained under § 25 thereof whichever is applicable.

See also topics 14.02 Exchange Control, Industrial and Investment Regulations; categories 2 Business Organizations, topic Corporations (Companies); Business Regulation and Commerce, topic Price Control.

14.06 INDUSTRIAL AND INVESTMENT REGULATIONS:

The Development of Industries (Federal Control) Act 1949 authorizes the Federal government to plan and regulate establishment of any new enterprise or development of any new or existing undertaking in any of industries specified in Schedule to Act and to otherwise make rules with regard to development of scheduled industries.

The rules governing these industries are set out in the Development of Industries Rules 1950.

Investment Regulations.

Projects for investment in manufacturing industry in Pakistan no longer are subject to sanction of any governmental authority except in case of certain specified industries in certain limited cases (see infra). List of specified industries now includes only: (a) Arms and ammunitions; (b) security printing; currency and mint; (c) high explosives; (d) radioactive substances; (e) alcoholic beverages.

Questions relating to income-tax reliefs and concessions, and remittance of dividends are dealt with respectively by Central Board of Revenue and State Bank of Pakistan.

Board of Investment, Prime Minister's Secretariat, assists would-be investors with information.

By Export Processing Zones Authority Ordinance, 1980, Federal Government is empowered to create Export Processing Zones in which industries will be set up and operated by sanction of Export Processing Zones Authority. Zones will be bonded customs areas and Federal Government may exempt them from any law in force in rest of Pakistan. Movement of goods from zones to remainder of country will only be in manner and extent specified by Authority. Authority is statutory corporation and will make master plan and phased master programme for development of zones. Industries will function according to conditions contained in letter of sanction issued by Authority.

See also topics 14.02 Exchange Control, Foreign Trade Regulations; categories 2 Business Organizations, topic Corporations (Companies); Business Regulation and Commerce, topic Price Control.

15 HEALTH

15.01 DRUGS:

Regulation of Drugs.

Manufacture, import and sale of drugs in Pakistan is regulated by Drugs Act 1976 ("Drugs Act") that makes it illegal for anyone to carry out these activities unless appropriate license from Central Licensing Board has been acquired. Further, all drugs manufactured or imported into Pakistan are required to be registered with Registration Board; manufacture, import or sale of drugs in Pakistan without license is offence. By drugs (Amendment) Ordinance 2002, subject to directions given by Federal Government, only drugs that are on sale in any western European country, USA, Japan, Australia or other prescribed countries can be imported.

Applications for license or registration are made under Drugs (Licensing, Registering and Advertising) Rules 1976 on prescribed forms. Separate applications are needed for manufacturing drug on different premises. Duration of license is two years, but may be renewed for further periods of two years. Licensing Board considers following factors when deciding to grant application: suitable premises for manufacturing of drugs, adequacy of plant/equipment, competence of technical staff, quality control mechanism, standards of hygiene on premises and so on. Toll manufacturing (agreement whereby licensee agrees with non-licensee to manufacture on behalf of non-licensee is toll manufacturing agreement) is allowed but in exceptional cases only and with approval of Licensing Board.

Under § 23 of Drugs Act, it is offence to export, import or manufacture any spurious, counterfeit, misbranded, adulterated, substandard or unregistered drugs. Special Drug Courts try cases involving breach of Drugs Act or Rules made thereunder, with accused given direct right of appeal to Division Bench of respective High Court. Apart from penalties meted out by Drug Courts, Central Licensing Board and Registration Board may also, if considered appropriate, cancel/suspend license of any individual or registration of drug. By sales Tax (Amendment) Ordinance 2002, further tax of 1½% has been abolished on supply of substances registered under Drugs Act 1976 by registered person.

Advertising of drugs is regulated directly by Federal Government under Drugs Act 1976 and Drugs (Licensing, Registering and Advertising) Rules 1976. Any interested person intending to advertise drug is generally required to make application to Government in this regard. However, promotion of drugs to medical representatives, medical staff, pharmaceutical companies etc. or through medical journals and publications meant exclusively for medical related personnel may be made without prior approval of Government. However, copy of such publication must be filed with Government.

There are strict conditions for advertising of drugs through public media. Drugs must not be advertised in manner that would encourage self-medication or promote drug in question as "best-available" or "most efficacious" medicine. Further, advertisement must contain information on risks and precautions associated with drug as necessary for protection of public health as well as its maximum retail price.

Drug (Labelling and Packing).

Following particulars are required under Drugs (Labelling and Packing) Rules 1986 to appear in conspicuous manner on label of innermost container of drugs (except in cases of capsule/tablet strips etc.) and also on cover of package (though not outer transparent wrapper): registered and generic name of drug, active ingredients with their weights/measure, name and principal place of business of manufacturer, license number, registration number, date of expiry, Urdu (national language of Pakistan) version of registered name of drug, dosage and instruction for use, and distinctive batch number, date of manufacture and maximum retail price. Packing of drugs/substances meant for "external use" such as creams, lotions, liquid, liniment and antiseptic etc. must further contain words for external use only.

Import and Export of Drugs.

Under Drugs (Import and Export) Rules 1976, finished drugs may be imported into Pakistan by any person possessing valid license to sell said drug and having adequate facilities for proper storage to preserve its properties. Unfinished drugs, on other hand, may not be imported into or exported out of Pakistan in commercial quantities without appropriate license from Licensing Authority. Such license will be issued for period of two years and may subsequently be renewed. Usual conditions for issuance of such licenses include: conditions of license must be complied with by importer/exporter, drugs being imported/exported conform to provisions of drug laws of country, licensee will allow licensing authority to inspect premises and plant/appliances to manufacture finished drug at all times. Complete record of utilization is to be maintained by importer/exporter etc.

Miscellaneous Drug Rules.

Apart from above, Government regulates manufacture, sale and import/export of drugs under The Drugs (Research) Rules 1978, Drugs (Specifications) Rules 1978, The Drugs (Generic Names) Act 1972 and Rules of 1973, The Destructive Insects and Pests Act 1914, Central Manufactured Drug Rules 1934, Pharmacy Act 1960, Control of Narcotic Substance Act 1997 etc.

Registration of Drugs.

Drugs must be registered with Registration Board. Registration is valid for period of five years, upon expiry of which registration may be renewed for further five-year periods. Before registering drugs, Registration Board customarily inspects process of manufacture intended to be employed by applicant, premises, plant/appliances and means to be employed for complying with mandatory standards. Applicant must undertake that drug would be produced in sufficient quantities to ensure adequate supply in market and that manufacture of drug would not be discontinued without prior approval of Registration Board unless such discontinuance is beyond control of applicant.

15.02 MEDICAL AND DENTAL PRACTICE:

Registration of medical and dental practitioners is effected by Medical and Dental Council of Pakistan ("Council") established under Medical and Dental Council Ordinance 1962 ("Ordinance"). Council is entrusted with task of overseeing granting of degrees by medical institutes in country and recognizing degrees conferred by foreign institutes. Registers of medical and dental practitioners possessing recognized qualifications are maintained by Council; registers are public document. Council is also authorized under Ordinance to make necessary rules and regulations to regulate these professions.

16 IMMIGRATION

16.01 ALIENS:

Aliens are defined in Pakistan Citizenship Act 1951, § 2 (as Amendment Act 1952) to mean persons who are neither citizens of Pakistan nor Commonwealth citizens who have status of Commonwealth citizen under British Nationality Act, 1948 and British Protected person under same Act.

Alien visitors must register with the police within 24 hours of arrival and also, if they move about from area to area, in each area to which they go.

Acquisition of Citizenship.

Every person is deemed to be a citizen of Pakistan (1) whose parents or grand parents were born in territories now included in Pakistan and who after August 14, 1947 has not been permanently resident outside Pakistan, or (2) who had any parent or grandparents born in territories included in India on March 31, 1937 and who has been domiciled at commencement of Pakistan Citizenship Act 1951 in Pakistan or in territories now included in Pakistan, or (3) who is a person naturalized as a British subject in Pakistan and has before the date of commencement of the Pakistan Citizenship Act 1951 renounced citizenship of the United Kingdom and of any foreign state; or (4) who before commencement of said Act migrated to territories now included in Pakistan from any territory in the Indo-Pakistan subcontinent and who migrated with intention of settling there permanently.

Furthermore, every person born in Pakistan after commencement of said Act is citizen of Pakistan by birth unless (1) such person's father possesses at time of his birth such immunity from suit and legal process as is accorded to an envoy of an external sovereign accredited in Pakistan and is not a citizen of Pakistan or (2) his father is an enemy alien and the birth occurs in a place then under enemy occupation. A person may also acquire citizenship by naturalization or by incorporation of new territory.

Under the § 2 Pakistan Citizenship (Amendment) Ordinance 1972, dual nationality is permissible where a person who being a citizen of Pakistan, is also citizen of U.K. and Colonies or of such other country as Federal Government may, by notification in official gazette specify in this behalf.

Under Pakistan Citizenship (Amendment) Act, 1973, § 8(2) a subject of State of Jammu and Kashmir who, being under protection of a Pakistan passport, is resident in U.K. or such other country as Federal Government may, by notification in official gazette, specify in this behalf, shall, without prejudice to his rights and status as a subject of that State, be deemed to be, and always to have been, a citizen of Pakistan.

Under latest Investment Policy, any person of country recognized by Pakistan may get Pakistani citizenship by investing minimum of US$0.75 million in tangible assets and US$0.25 million in cash, both on non-repatriable basis and subject to fulfillment of conditions of Pakistan Citizenship Act.

Married women do not in most cases acquire the status of Pakistani Citizens when their husbands do.

Any alien woman married to a citizen of Pakistan or to a person who but for his death could have acquired such citizenship as above (see subhead Acquisition of Citizenship, supra) is entitled to make application to Federal Government, and, by taking oath of allegiance and obtaining certificate of domicile, she may be registered as citizen of Pakistan whether or not she is 21.

Registration.

A person who has ceased to be a citizen of Pakistan under Pakistan Citizenship Act 1951, § 1, or has not renounced his dual nationality, where such renunciation is required by law, or has been deprived of his citizenship, is not entitled to be registered as citizen except with previous consent of Federal Government. Minors may be registered as citizens of Pakistan by their guardians and become citizens from date of their registration.

Under National Registration Act, 1973, every citizen of Pakistan, whether in or out of Pakistan, who has attained age of 18 years shall get himself, and a parent or guardian of every citizen who has not attained that age shall get such citizen, registered in accordance with provision of Act. (§ 4). Under § 5 Registrar-General shall cause to be issued to every citizen, who has attained age of 18 years and registered himself under § 4, an identity card. Identity card is subject to be called for inspection by Registration Officer or any gazetted officer under control of, and authorized by, Registrar-General. Identity card shall be surrendered on death of holder or within 60 days of holder ceasing to be a citizen. No citizen who has attained age of 18 years but does not possess or produce an identity card shall be granted a passport, permit or other travel document for going out of Pakistan and he will further not be allowed to vote.

Penalties for offences under Act are a fine not exceeding Rs. 50, or in default of payment of fine, simple imprisonment for a period not exceeding 15 days.

Under § 10 any person who (a) being a person employed for purposes of this Act, publishes or communicates to any person, otherwise than in ordinary course of such employment, any information acquired by him in course of employment, or (b) having possession of any information which to his knowledge has been disclosed in contravention of Act, publishes or communicates that information to any other person, shall be punishable with imprisonment with term which may extend to six months, or with fine which may extend to Rs. 1,000, or with both, provided that nothing in this section shall apply to any publication or communication of information made: (i) for purpose of any criminal proceedings, or (ii) to any gazetted officer authorized by Federal Government or Registrar-General.

Deprivation.

If any certificate of domicile or naturalization was obtained by fraud, false representations or concealment of any material fact deprivation of citizenship will be by order of Federal Government. Furthermore, a certificate of naturalization may be revoked for acts of disloyalty, trading with enemy in wartime, imprisonment for 12 months or over within five years of naturalization or continuous absence for seven years unless the absence was in service for the Government or an international organization of which Pakistan at any time during that period was a member, or where the person has registered annually at the Pakistan Consulate or Mission as prescribed.

Other Rights.

Suits may be brought by alien enemies residing in Pakistan with permission of central government and other aliens may sue, without permission. (Civil Procedure Code, § 83). However, it has been held by High Court in cases arising during and after Indo-Pakistan war of Sept. 1965 that an alien enemy is neither competent to institute a suit nor can he continue suit. He is not competent during continuance of hostilities to file an appeal or to continue appeal or execute a decree obtained by him. However, if a suit is filed against an enemy defendant he is not only entitled to defend suit but he is also entitled to file an appeal if a decision is given against him during continuance of hostilities. He is, however, debarred from executing any benefit derived by him in such litigation.

Corporations Owned or Controlled by Aliens.

See categories 2 Business Organizations, topic Corporations (Companies), subheads Foreign Companies, and Owned or Controlled by Aliens; and Foreign Trade and Commerce, topic Foreign Investment.

16.02 IMMIGRATION:

Entry into Pakistan—Passport Rule 1955.

To enter into Pakistan visa is generally required except in case of country which has reciprocal arrangements with Pakistan.

All foreigners entering the country (not being Commonwealth citizens) must register with police within 24 hours. If they wish to stay in Pakistan after expiry of their visa, they must obtain permission of Police Department.

Technicians, experts and industrial personnel may enter country under the general rules of entry, but their contracts of service in Pakistan must be approved by Investment Promotion Bureau of Ministry of Industries.

A foreign employee whose contract of service has been approved by Investment Promotion Bureau is entitled to remit 50% of his monthly salary up to ceiling of US$750 per month, which may in special cases be raised.

Emigration Ordinance 1979 regulates emigration of Pakistanis for employment abroad. Bureau of Emigration and Overseas Employment headed by Director General controls emigration and is responsible for welfare of emigrants. Protector of Emigrants fulfils same function in relation to particular district. Overseas Employment Corporation recruits Pakistanis for employment abroad. All other persons or agencies may only perform such recruitment, or advertise for such recruitment, if they possess licence from Federal Government.

Pakistani may emigrate if he can furnish proof of permission to work abroad such as employment visa issued by foreign employer or foreign government. Emigrant must appear before Protector of Emigrants and furnish him with any information required before emigrating.

Offences against this Ordinance are treated as criminal offences and tried by Special Courts created by Federal Government. Penalties include fine and imprisonment which may extend to five years.

Acquisition of Citizenship.

See topic 16.01 Aliens.

17 INTELLECTUAL PROPERTY

—Scope —

Pakistan Intellectual Property Rights Organization has been created under Pakistan Intellectual Property Rights Organization Ordinance 2005 to provide for protection of intellectual property in Pakistan. Ordinance also provides for creation of Policy Board with functions to promote modern system for protection of intellectual property rights in Pakistan and to formulate procedures and necessary framework for utilization of funds generated or acquired through services, donations or grants, etc. More importantly, Ordinance effects integration of Trade Marks Registry, Copyright Office and Patent Office and makes them part of Organization.

17.01 COPYRIGHT:

This is governed by Copyright Ordinance 1962 which came into force in Feb. 1967 as am'd. by Copyright (Amendment) Act 1992 and 2000.

Nature and Term of Copyright.

Copyright is property and is exclusive right to do or authorise others do such acts in relation to original work in question as are set out in § 3 of Ordinance.

Literary, Dramatic or Musical Work including Computer Software.

Copyright in these works extends to acts of reproducing work in any material form; publishing or performing it in public; producing, reproducing, performing or publishing any translation; authorizing rentals of computer programs or cinematographic works; making adaptation of work; using work in cinematographic work or making record of it; communicating work by radio or loudspeaker. To protect IT industry in Pakistan, recent amendments now define computer programs as literary works. Term of copyright is 50 years from beginning of calendar year next following year of author's death if his true name is published or 50 years after publication of work if true name not published, provided that where identity of author is published before expiry of this 50 year period copyright will subsist until 50 years after his death. For joint authorship, copyright runs from death of survivor.

Artistic Work.

Copyright in artistic work extends to acts of reproducing work in any material form; publishing it; using it in cinematographic work; televising it or adapting it. Term of copyright is as above.

Cinematographic Work including Video Films.

Copyright here extends to acts of copying it; broadcasting it or causing it to be seen or heard in public. Term of copyright is 50 years from beginning of calendar year next following year in which work is published.

Record.

Copyright here extends to making any other record embodying same recording; using record in sound track of a film; causing record to be heard in public and broadcasting it on radio. Term of copyright is 50 years from beginning of calendar year next following year in which work is published.

Rights of Broadcasting Companies.

Broadcasting companies can authorise rebroadcasting of their broadcasts; fixation of their broadcasts and copying of such fixations. These rights exist until 25 years from beginning of calendar year next following year of first broadcast.

Rights in Published Editions of Works.

Publisher enjoys rights of making or authorising making by photographic or other process of copies intended for sale in commerce of typographical arrangement of edition. Such rights subsist for 25 years from beginning of calendar year next following year in which edition first published.

Owner.

Author of a literary, dramatic, musical or artistic work is entitled to copyright except where work is commissioned or done during course of employment or done for Government or for an international organisation, when person who commissioned or employer or Government or international organisation is owner.

Term of copyright of Government or international organisation extends to 50 years from beginning of calendar year next following year of publication.

Term of Copyright of Posthumous or Unpublished Work.

In case of posthumous work 50 years from beginning of calendar year next following year of publication. If work whose author's identity is known is not published within 50 years after death of author, such work shall fall into public domain after 50 years from beginning of calendar year next following year in which author dies. Where author's identity unknown, and work not published within 50 years of creation, work falls into public domain after 50 years from beginning of calendar year next following year of creation.

Copyright (*Amendment*) *Act 1973.*—Because of effect of § 10(2A) of Copyright (Amendment) Act 1973, copyright shall not subsist in original literary, dramatic, musical and artistic works, cinematographic works and records as respects its reprint, translation, adaptation or publication, by or under authority of Federal Government, as textbook for purposes of teaching, study or research in educational institutions.

Assignment.

Owner or prospective owner of future copyright can assign either wholly or partially, generally or subject to limitations and either for whole or part of term of copyright. Assignments must be made in writing and signed by owner or duly authorised agent. Assignment can also be made by testamentary disposition and where unpublished work is disposed of by will, it is inferred that copyright also passes unless contrary intention is expressed in will.

Copyright assigned in respect of unpublished work for specific purpose of publication reverts to owner if such work remains unpublished for period of three years from date of assignment.

Relinquishment.

Owner can relinquish all or any rights comprised in copyright by giving notice in prescribed form to Registrar of Copyrights who must publish this notice. Relinquishment will not affect any rights existing prior to date of notice.

Registration of Copyright.

Author, publisher or owner of any copyright may make an application to Registrar in prescribed form and upon payment of prescribed fee for registration in Copyright Office. Assignments and licences can also be registered. Register of Copyrights is prima facie evidence of particulars entered therein and documents or extracts certified by Registrar and sealed with seal of Copyright Office are admissible in evidence. Certificate of registration is prima facie evidence of subsistence of a copyright and that person named in certificate is owner thereof.

Performing rights societies must, within prescribed time and in prescribed manner, prepare, publish and file with Registrar statements of all fees, charges or royalties which it proposes to collect for grant of licences or for public performance of works in respect of which it has power to grant licence. Failure so to do results in society being unable to commence any action or proceeding to enforce any remedy for infringement except with consent of Registrar. Objections to any such fees, charges, royalties, etc., can be lodged at Copyright Office and must be referred to Copyright Board for decision.

Copyright Board has jurisdiction to determine disputes between licensing bodies and persons claiming licences and hear objections to any fees, charges, royalties or licensing schemes. When determining such disputes and hearing such objections, Board has all powers of a civil court under Code of Civil Procedure in respect of summoning, enforcing attendance of and examining any person on oath, receiving evidence on affidavits, issuing commissions for examination of witnesses or documents, requisitioning any public record or copy thereof from any court or office.

Infringement.

Owner or exclusive licensee of a copyright may sue on an infringement and is entitled to all such remedies by way of injunction, damages, accounts and otherwise as are or may be conferred by law for infringement of a right. Custom officers have now been empowered to detain consignments suspected to contain infringing copies of any work. Both civil and criminal actions are provided for infringement of copyright. If defendant proves that at date of infringement he was not aware of copyright or had reasonable grounds for believing copyright did not subsist, plaintiff is not entitled to any other remedy except injunction and decree for profits made by defendant by sale of infringing copies as court may deem reasonable. In any action, author or publisher named is, until contrary is proved, presumed to be author or publisher. Copyright owner is deemed to be owner of any infringing copy and may sue for recovery of possession thereof or in respect of conversion thereof. All offences under Ordinance are cognizable and non-bailable. If person having interest in copyright is unable to institute regular legal proceedings for lack of sufficient cause, applications may be made to court for immediate provisional orders to prevent infringement of copyrights.

There is no infringement in use of any literary, dramatic, musical or artistic work for purpose of research, private study, criticism or review or reporting of current events. Use in judicial proceedings, reporting in newspapers of an address of a political nature unless such report is prohibited, reading or recitation of an extract in public, publication, reproduction or adaptation for use in educational institutions, or quoting of extracts for purpose of examination questions is not infringement. Amateur performances before a nonpaying audience or for benefit of religious, charitable or educational institution of any literary, musical or dramatic works is not infringement. There is no infringement of an artistic work if it is used for private or critical purposes or as a background to a film or television broadcast or if a photograph, painting, drawing or engraving of an architectural work is published.

Registrar may, upon application by owner or his agent and upon payment of prescribed fee and after making necessary enquiries, order that copies made out of Pakistan or work which would be an infringement if made in Pakistan shall not be imported. Copies in respect of which order made deemed to be goods of which import has been prohibited or restricted by Sea Customs Act and provisions of that Act will apply accordingly.

International Copyright.

Federal Government may by notification direct that all or any of provisions of this Ordinance may apply to foreign works provided that reciprocal arrangements exist in foreign country for protection of works entitled to protection under Ordinance.

17.02 PATENTS:

Under Patents Ordinance 2000, Controller shall refer to examiner every application in respect of which complete satisfaction has been filed, for making report to Controller after detailed scrutiny of application, specification, claims and drawing, if any, to determine whether invention is new and involves inventive step, and to also determine whether other requirements under Ordinance have been met. Examiner is required to make this report within 18 months of filing of application. To give effect to International Convention on Trade related Intellectual Property Rights 1994, Patents (Amendment) Ordinance 2002 has been promulgated. Now, application for registration of invention relating to genetically modified organisms require clearance.

On and from date of advertisement of acceptance of complete specification and until date of sealing of patent, applicant shall have all privileges and rights of registered proprietor. Under § 22, applicant may institute proceedings for infringement of patent after its sealing, and court may grant relief sought if it is convinced that applicant is true proprietor of invention, shall suffer irreparable loss if infringement of its patent is not stopped, and applicant, in due course, shall be properly registered as patentee.

§ 12 of Ordinance provides that right to patent for invention made by employee during course of his employment in area of activity of employer shall in absence of contractual obligation to contrary belong to inventor unless employer proves that invention could not have been made without use of employer's facilities and equipment, etc.

Ordinance allows for “Convention applications” to be made in cases where applicant has made application in member country of World Trade Organization. Such applications must be made within 12 months of making of application in Convention country that would afford claimant single or multiple priorities from such application, as case may be.

Applications for patents can be made by a person of any nationality according to the prescribed form. However, resident Pakistani may not generally make application outside Pakistan without written authority of Controller unless he files application for invention in Pakistan not less than six weeks before making application outside of Pakistan. Applicant must be first and true inventor of invention or else assignee of such person. Application should be accompanied by provisional or complete specification plus documents supporting applicant's title where he is assign. If provisional specification is filed in first instance, complete specification must be filed within at most 12 months. Patent is granted for 20 years from date of filing of application.

Protection.

All inventions can be used in the interim period without prejudice to the patent and such protection is known as provisional protection.

Opposition.

After application is accepted by the Controller (which if not done within 18 months will mean that application is rejected) it will be advertised as accepted. Opposition can then be filed within four months only on one of the following grounds: (i) That opposer is the true inventor or assign thereof; (ii) that the invention described in the specification is the same as another invention filed elsewhere in the country which if granted will be prior in date to the grant of this patent; (iii) that the specifications are not clear; (iv) that the invention has been publicly used or been made publicly known in any part of Pakistan; (v) that the completed specification does not agree with the provisional specification and the invention described in the completed specification is one that is the subject of another application which if granted would be dated between the date of the second application and the filing of the completed specification. Controller will give notice to applicant of these objections before deciding case.

Licenses.

After grant of a patent, application may be made for compulsory grant of license or revocation. If this application is refused by the central government appeal lies to High Court. Revocation cannot be ordered before four years have elapsed from date of making of application or three years from grant of patent, nor, in any case, if patentee gives satisfactory reasons to government against such revocation. Grant can also be revoked on following grounds: (i) Because patent in respect of that invention already exists; (ii) that grant was obtained by perpetrating fraud; (iii) that applicant was not true inventor nor his assign; (iv) that no new improvement or invention step is involved; (v) that patent was obtained on false suggestion or representation; (vi) that primary uses of invention are against law; (vii) that scope of invention is not clearly ascertainable. Similarly, patent may be revoked by High Court on petition filed by any interested person or Federal Government on any ground upon which grant of patent may be refused. Federal Government may also revoke patent under § 48 if of view that it is generally prejudicial to public.

Act also covers copyright of designs, and, subject to notification in official gazette, provides for reciprocal arrangements between Pakistan and foreign States for mutual protection of inventions and designs of applicants in those States.

See also category 3 Business Regulation and Commerce, topic 3.06 Information Technology, Internet and New Media, subhead Protection of Software.

17.03 TRADEMARKS AND PASSING OFF:

Trade Marks Ordinance 2001 effective April 12, 2004, along with Trade Marks Rules 2003 repealed Trade Marks Act 1940 and provides statutory recognition to provisions of Paris Convention for the Protection of Industrial Property of 20th Mar. 1883. It introduces for first time comprehensive regime of registration of goods as well as services and affords protection to “well-known” trademarks, as defined in Paris Convention, and to “collective marks”, “certification marks” and “domain names”. In addition, Act confers substantial powers on various government authorities, such as customs officials, to confiscate infringing goods. Act also declares unlawful unfair competition as well as misleading and, subject to certain defences, competitive advertising.

Trademarks may be acquired by any person claiming to be proprietor of a trade mark used or proposed to be used by him who is desirous of registering it. Nothing scandalous or likely to deceive, or hurtful to the religious susceptibilities of others, or contrary to law or morality can be registered. Use of chemical names is not permitted nor registration of identical or similar trade marks, but in the latter cases where there is honest concurrent user such registration may be permitted. Where proprietor claims to be entitled to exclusive use of any part of a mark, he may register the whole and the parts of the whole as separate trade marks. Each separate trade mark must however satisfy all conditions applying to it and all incidentals of an independent trade mark.

Registration.

Application is made to Registrar who may in first instance reject application in which case applicant can appeal to court. If application is accepted it is numbered and advertised so that opposition, if there is going to be any can be made. Unless opposition succeeds trade mark can be registered, with any such disclaimers as Registrar may think fit, and registration runs from date of application. A sealed certificate of registration will be issued to proprietor. Registration is for seven years and can be renewed. Where renewal fees are not paid mark can be removed but will be held to continue for purposes of barring other applications for registration of a similar trade mark for one year unless applicant can show that original trade mark had not been used for two years before removal and that no deception would result from his application.

Applications for registration are to be made to Registrar of Trade Marks, CD 3, Behind KDA Civic Centre, Gulshan-e-Iqbal, Karachi.

Government filing fees for single application for registration of a trademark is Rs. 1,000; additional amount of Rs. 3,000 is to be paid once application is accepted.

Effect of registration is to make infringers of trademark liable to action being taken against them. It gives proprietor exclusive right to the trademark. Registration is prima facie evidence of validity and after ten years it becomes conclusive evidence of this.

Licence.

After trademark has been registered application may be made for registration of licence, if any.

Assignment is possible for registered trademark but not where multiple rights would be created nor where exclusive rights would be created in different parts of country in which case Registrar's approval is required. In case of unregistered trademarks they can be assigned only under shadow of registered trademarks at same time and to same person.

Resale price agreement is not protected under Trade Marks Act.

Infringement occurs when a person not a registered proprietor thereof uses a trade mark or a mark deceptively similar to it in relation to same class of goods. Such action is punishable under Penal Code and also is actionable under provisions of Trade Marks Act. Unregistered trade marks are not protected by Act but have same rights under Penal Code. They are also protected under the common-law remedy against passing off. Passing off is actionable as a common-law tort.

Drugs.

Drugs Act 1976 regulates registration, import and export, manufacture and sale of drugs. Pakistan National formulary contains name of all drugs allowed to be imported, manufactured or sold. By Act, government has power to fix maximum prices of drugs and also to inspect, seize, analyse and punish importers and manufacturers of faulty drugs.

18 LEGAL PROFESSION

18.01 ATTORNEYS AND ADVOCATES:

The four provinces of Pakistan have High Courts at Karachi, Lahore, Peshawer and Quetta. High Court of Sindh exercises original civil jurisdiction for district of Karachi for suits valued over Rs. 3,000,000/—. All district courts elsewhere in Pakistan exercise unlimited original civil jurisdiction.

Advocates.

The Legal Practitioners and Bar Council Act, 1973 governs all matters regarding advocates in the four provinces of Pakistan.

General.

Act envisages single class of practitioners, namely advocates, abolishing all previous distinctions between advocates, solicitors, pleaders, etc. Under this Act Pakistan Bar Council and Provincial Bar Councils for each province were constituted with tenure of five years.

Function of Pakistan Bar Council and Provincial Bar Council: (1) to prepare and maintain common roll of advocates whereby advocates registered on roll of Bar Council of one province are entitled to practise in every province of Pakistan; (2) to admit persons as advocates entitled to practise before High Court/Supreme Court; (3) to entertain and determine cases of misconduct against advocates of High Court/Supreme Court; to award punishment; (4) promote and suggest legal reforms and provide legal aid etc.

Qualifications for Membership of Pakistan Bar Council.

Person is qualified if: he has been on roll of advocates of Supreme Court maintained by Provincial Bar Council, has been advocate for not less than ten years on day of filing of nomination papers and cleared all dues payable to Pakistan Bar Council. (§ 11.A).

Persons Who May Be Admitted as Advocates.

Barristers who have been called to Bar in England or persons who were enrolled as advocates of High Court in any area which before 14 Aug. 1947 was comprised within India may be enrolled as advocates of any Provincial Bar Council on payment of necessary dues.

To qualify as advocate in Pakistan today, candidates must obtain law degree of Pakistani University or from University outside Pakistan recognized by Pakistan Bar Council. In addition, candidate must pass written exam and interview conducted by Bar Council.

Citizenship and Other Requirements.

It is not necessary to be citizen of Pakistan to be enrolled as advocate, provided that person has resided in Pakistan for period of not less than one year immediately preceding day on which person applies for admission and belongs to country wherein citizens of Pakistan duly qualified are permitted to practice law. Advocates must also have completed age of 21 years. (§ 26).

To Qualify as Advocates Of High Court.

Primary conditions for admission as advocates of High Court are: practice for period of not less than two years as advocate, vakil or pleader before subordinate courts in Pakistan or practice outside Pakistan as advocate before any High Court specified in this behalf by Pakistan Bar Council and payment of enrollment fee and fulfillment of such conditions as may be prescribed by latter. (§ 27).

Advocates of Supreme Court.

Such persons must make application for enrollment as advocate of Supreme Court addressed to Chairman of Pakistan Bar Council. (§ 106). Admission is governed by Rules made by Supreme Court. Person is qualified for enrollment as advocate of Supreme Court if: he has been enrolled as advocate in High Court for not less than ten years; has been certified by Chief Justice of Pakistan and Judge of High Court and is fit and proper person to appear and plead as advocate before Supreme Court.

Advocate on Record.

Advocate of five years standing in Supreme Court shall be qualified to be registered as Advocate on Record on making application in this behalf. Provisions relating to enrollment of advocates contained in Supreme Court Rules shall mutatis mutandis apply to registration of Advocates on Record. No advocate other than Advocate on Record shall be entitled to act for party in any proceedings in Court regarding procedural matters. It is Advocates of Supreme Court and not Advocates on Record that appear and plead on behalf of party.

19 MINERAL, WATER AND FISHING RIGHTS

19.01 MINES, OIL FIELDS AND MINERAL DEVELOPMENT:

Regulation of Mines and Oil Fields and Mineral Development (Federal Control) Act 1948.

In exercise of powers conferred by § 2 of 1948 Act, Pakistan Mining Concessions Rules 1949 and Pakistan Petroleum (Production) Rules 1949 were made. Former apply to all minerals other than petroleum and natural gas whereas latter apply only to petroleum and natural gas. Pakistan Petroleum (Production) Rules, 1949 were repealed on Sept. 14, 1986 and replaced by Pakistan Petroleum (Exploration & Production) Rules, 1986.

1948 Act was amended by Regulation of Mines and Oil Fields and Mineral Development (Federal Control) (Amendment) Act 1976. By 1976 Act, following additional concessions have been granted: (1) Any provisions of rules made under § 2, or of any amendment in Income Tax Act, 1922 (XI of 1922), hereinafter referred to as Act, made after effective date of agreement for grant of licence or lease to explore, prospect or mine petroleum, which are inconsistent with terms of agreement, shall not apply to extent of such inconsistency to company which is party to agreement. (2) Royalty shall be charged at fixed rate of 12% of wellhead value and shall form part of sum of payments to Federal Government and taxes on income which shall neither be more than 55% nor less than 50% of profits or gains before deduction of “payments to the Government” referred to in sub-rule (2) of rule 4 of Second Schedule to Act, hereinafter referred to as said Schedule. (3) Before commencement of commercial production of petroleum, any expenditure on searching for, or on discovering and testing, petroleum deposit, or on winning access thereto allocable to surrendered area and to drilling of dry hole, shall be deemed to be lost at time of surrender of area or completion of dry hole, as case may be, for purpose of Second Schedule to Act. Such lost expenditure shall be allowed in one of two ways mentioned in sub-rule (1) of rule 2 of said Schedule. (4) In addition to net profits, amount charged in annual financial accounts on account of additional allowance admissible under rule 3 of Second Schedule to Act, and depreciation at such rate as may be agreed upon between President and licensee or lessee, which is company incorporated outside Pakistan, including its assignee, shall be allowed to be remitted and retained abroad, provided that aggregate amount of such additional allowance and depreciation does not exceed agreed percentage of investment in assets on which depreciation is charged. (5) Value of crude oil for purposes of royalty and income tax to be calculated on basis of price realised in transactions with purchasers other than subsidiaries or affiliates of licensee or lessee, including its assignee, and in case of transactions with subsidiary or affiliate, value shall be calculated on such basis as may be agreed upon between Federal Government and licensee or lessee. (6) Income derived by licensee or lessee from use of any surplus capacity of its pipeline by any other licensee or lessee shall be assessed on same basis as its income from petroleum produced by it from its concessions area. (7) Licensee or lessee which is company incorporated outside Pakistan including its assignee, shall be allowed to export its share of petroleum after meeting such portion of internal requirement of Pakistan as may be agreed upon. (8) Sale proceeds of share of petroleum exported by licensee or lessee which is company incorporated outside Pakistan, including its assignee, shall be allowed to be retained abroad and to be used freely by it, subject to condition that it shall bring back such portion of these proceeds as is required to meet its obligations under lease. (9) No customs duty or sales tax shall be levied on import of machinery and equipment specified in agreement for purposes of exploration and drilling prior to commercial discovery. (10) Concessionary consolidated rate of 5¼% customs duty ad valorem, including sales tax and any surcharge related thereto, shall be charged on import of machinery and equipment required for development of each commercial discovery until 24 months from effective date of mining lease granted with respect to each such discovery, and thereafter normal rate of customs duty, sales tax and any other duty shall be applicable. (11) Foreign nationals employed by licensee or lessee or its contractor shall be allowed to import commissary goods free of customs duty and sales tax to extent of U.S. $550 per annum, subject to condition that same shall not be sold or otherwise disposed of in Pakistan. (12) Foreign nationals employed by licensee or lessee or its contractor shall be allowed to import used and bona fide personal and household effects, excluding motor vehicles, free of customs duty and sales tax subject to condition that same shall not be sold or otherwise disposed of in Pakistan. (13) Foreign nationals employed by licensee or lessee or its contractor shall not be charged income tax for period of three years from date of their arrival in Pakistan in accordance with, and subject to provision of, clauses (xii) and (xiiia) of subsection (3) of § 4 of Act as in force on effective date of agreement with licensee or lessee. (14) Data in respect of areas surrendered by previous licensee or lessee shall be made available for inspection to prospective licensee free of charge. (15) Initial participation by Federal Government in exploration shall be to such extent as may be agreed upon between Federal Government and licensee. However, by Privatisation Commission (Amendment) Ordinance 2002, Privatisation Commission may withhold specified amount out of privatisation proceeds of Government of Pakistan's shares in oil and gas fields located in specified areas.

In order to improve efficiency and availability of natural gas transportation and distribution services through increased private ownership and improved regulation, Natural Gas Regulatory Authority Ordinance, 2002 has been promulgated. Main feature of new Ordinance is establishment of Natural Gas Regulatory Authority responsible for matter connected to distribution and transportation of natural gas. Authority has exclusive power to grant, renew or terminate licence in respect of any regulated activity. Ordinance does not apply to upstream petroleum activities except where holder of petroleum rights claims transportation or transmission tariffs for pipeline connecting petroleum field to point of delivery. Marketing of Petroleum Products (Federal Control) Act was repealed in 2002, effective date of repeal being transfer of all government shares in Pakistan State Oil to private sector investors.

Hydrocarbon Development Institute of Pakistan Act, 2006 sets up Institute by this name with Federal Minister of Petroleum and Natural Resources as its chair. Functions of Institute include assisting Government in formulation of national policies for development of hydrocarbon industry, carrying out basic studies, research and development explorations of hydrocarbons, carrying out quality control and standardization of hydrocarbons to develop, and promoting use of clear, economic and alternative fuels, etc.

20 MORTGAGES

20.01 CHATTEL MORTGAGES:

Charges over moveable property can be created by way of hypothecation or by way of pledge. In the latter transaction possession of the goods is transferred whereas in a hypothecation possession of the goods is not transferred.

After-acquired Property.

Deed of Hypothecation can also be drawn up to include after-acquired property but this has to be done specifically.

Stock in Trade.

Hypothecation may cover floating stock and other stock in cases where, for instance money is advanced to a trading company and provisions to cover this stock are incorporated in hypothecation.

Future Advances.

Can be covered by a hypothecation. It is also possible to provide that while any part of the debt is unpaid the whole security will continue as a security and not be diminished proportionately.

Formalities.

Instrument must be signed by both parties to it and where one of parties is a Company, in accordance with the articles of association, but if a hypothecation is witnessed it requires mortgage stamp duty. (See topic 20.03 Mortgages, subhead Stamp Duty.)

Registration.

Is optional under § 18 of Registration Act, 1908 Act XVI, but in case of company, unless particulars are filed under § 121 of Companies Ordinance, 1984 such chattel mortgage shall be void against liquidator and any creditor of company.

20.02 HYPOTHECATION:

See topic 20.01 Chattel Mortgages.

20.03 MORTGAGES:

The law relating to mortgages has developed against the background of the anxiety of the government to protect farmers against unscrupulous moneylenders. This means that the remedies of a mortgagee are sometimes slower and less effective than would be desirable in a primarily commercial community and therefore full and careful drafting is absolutely essential to safeguard the mortgagee.

A mortgage is a transfer of an interest in specific immoveable property for the purpose of securing the payment of money advanced or to be advanced by way of loan, an existing or future debt or the performance of an engagement which may give rise to a pecuniary liability.

Kinds of Mortgages.

A simple mortgage is created where without delivering possession of the mortgaged property, the mortgagor binds himself personally to pay the mortgage money and agrees, expressly or impliedly, that failure to do so will give mortgagee a right to have mortgaged property sold, and to apply sale proceeds towards his debt.

A mortgage by conditional sale exists where mortgagor ostensibly sells the mortgaged property on condition either that if payment is not made by a certain date the sale will become absolute or else on condition that if payment is made buyer will transfer the property to the seller or that sale would be void on payment. These conditions have to be expressly written into contract for sale.

A usufructuary mortgage exists where the mortgagor delivers, or undertakes to deliver, possession of the mortgaged property to the seller and authorizes him to retain possession until payment of the mortgage money and to receive the rents and profits in lieu of interest or partly in lieu of interest and partly in lieu of mortgage money.

Where the mortgagor binds himself to repay the mortgagee on a certain day and transfers the mortgaged property absolutely to mortgagee subject to proviso that mortgagee will retransfer it to mortgagor upon payment of the mortgage money as agreed, the transaction is called an English mortgage. This transfer may be with or without possession.

Where a debtor delivers to his creditor, or his agent documents of title to immoveable property, with intent to create security thereon transaction is called mortgage by deposit of title deeds.

Any other mortgage is called an anomolous mortgage.

Registration is required where the property is valued at over Rs. 100 and all mortgages except by deposit of title deeds can only be effected by a registered instrument attested by two witnesses. Where the property is less than Rs. 100 in value and where the mortgage to be created is not a simple mortgagee the mortgage can be effected by delivery of the property.

Stamp Duty is worked out ad valorem. Stamp duty varies from province to province but is maximum of 5% of amount secured if possession is given and 4.5% of amount secured where possession is not given (in Sind) but only 1% for loans in Islamic mode of financing.

Priorities.

In general the first in time is first in rights but where a second mortgagee is induced to accept by the fraud, misrepresentation or gross neglect of first mortgagee, the prior mortgage will not take effect until after second mortgage.

If a mortgage made to secure future advances or the performance of an engagement or balance of a running account expresses the maximum to be secured thereby, a subsequent mortgage of the same property, if made with notice of the prior mortgage, will be postponed to the prior mortgage in respect of all advances or debts not exceeding the maximum though made or allowed with notice of the subsequent mortgage.

A first mortgagee buying the mortgaged land acquires rights of the mortgagor as against a second mortgagee.

Rights and Liabilities.

A mortgagor has the right after payment to redeem the mortgaged property, but where his interest is only a share in the property he is not entitled to redeem his share only, on payment of a proportionate part of the amount, except where the mortgagee or mortgagees has or have acquired the share of a mortgagor in the property. If mortgagor requires it mortgagee must transfer the property on redemption to a third person. Mortgagor has right to inspect documents, lease the property or commit waste unless the act is destructive or permanently injurious thereto or renders the security insufficient, i.e., reduces its value to less than one-third or where the property is buildings, one-half in excess of the amount due. Mortgagor is also entitled to any improvements without payment unless these improvements were necessary to prevent deterioration or under municipal direction. Mortgagor must defend mortgagee's title and possession; pay all public charges where the mortgagee is not in possession; where the mortgaged property is a lease, have paid all rents due and performed all covenants undertaken; and where the mortgage is a second mortgage, mortgagor will pay the interest, as and when it becomes due on each prior incumbrance and at the proper time discharge the principal.

After the mortgage money has become due, mortgagee has a right to foreclosure and sale but this right must be exercised before a decree has been made for redemption and the money deposited in court. The exercise of the power of sale without reference to the court is limited in most cases. Where mortgagee holds two or more mortgages executed by the same mortgagor if he brings a suit on one he must sue on all the others, too. His right to sue for the mortgage money arises when the mortgagor binds himself to repay same, where the mortgaged property is destroyed either wholly or partly or security is rendered insufficient, where the mortgagee is deprived of the whole or part of his security in consequence of the wrongful act or default of the mortgagor, or where the mortgagee in possession is not given quiet enjoyment of the property. A mortgagee must generally manage the property as man of ordinary prudence would manage it if it were his own.

Redemption.

Any person who has an interest in or charge upon the property mortgaged, the surety for the payment of the mortgage debt, a creditor of the mortgager who has in a suit for the administration of his estate obtained a decree for sale of the mortgaged property all have similar rights of redemption.

Deposit in Court.

Any time after payment becomes due mortgagor may deposit the amount owed in court and the court must issue notice to mortgagee of this payment. Mortgagee must then express willingness to accept the money deposited and himself deposit in court all documents in his possession of power relating to the property and will receive the money instead, while the documents will be handed over to mortgagor and all mortgagee's interest in the mortgaged property will be held to have ceased.

Corporate Mortgages.

See also category 2 Business Organizations, topic Corporations (Companies), subhead Mortgages and Charges.

21 PROPERTY

21.01 ABSENTEES:

Persons resident outside Pakistan can institute suits against persons resident within, or apply for Letters of Administration to estates here or, under section 13 of Civil Procedure Code seek to have judgments obtained outside Pakistan enforced in Pakistan. Likewise suits may be brought against persons resident outside Pakistan and judgments obtained enforced against the judgment debtor's property within Pakistan.

Care of Property.

There are no special provisions but absentees may appoint an attorney under Powers of Attorney Act 1882 to deal with their property.

21.02 ADVERSE POSSESSION:

§ 28 of Limitation Act, 1908 was held unIslamic by Shariat Appellate Bench of Supreme Court as right of person shall not extinguish merely on account of another holding same adversely for more than 12 years. It is offence under Illegal Dispossession Act, 2005 to enter into or upon any property to dispossess, grab, control or occupy it without having any lawful authority to do so with intention to dispossess, grab, control, or occupy property from owner or occupier of such property. Offence is punishable by imprisonment of up to ten years and fine/compensation.

21.03 PERPETUITIES:

No transfer of property can operate to create an interest which is to take effect after the life-time of one or more persons living at the date of such transfer and the minority of some person who shall be in existence at the expiration of that period, and to whom, if he attains that age, the interest created is to belong.

21.04 REAL PROPERTY:

Technically speaking there is no such classification of property in Pakistan. The contrast is not between real property and personal property but between moveable and immoveable property. There are no restrictions on ownership of immovable property in Pakistan by foreign controlled Pakistani incorporated companies; however foreign individual persons require prior approval of Home Department of relevant Provincial government or Federal Ministry of Interior in case of Islamabad Capital Territory.

See also topic 21.03 Perpetuities.

22 TAXATION

22.01 ESTATE TAX:

Estate duty abolished.

22.02 GIFT TAX:

By Gift Tax Act (Repeal) Order 1985 Gift Tax Act 1963 has been repealed, and as of July 1, 1985 no gift tax is leviable.

22.03 INCOME TAX:

Effective from July 1, 2002, Income Tax Ordinance 2001 came into force. However, provisions of 1979 Ordinance shall remain effective for any income year ending on or before June 30, 2002. All pending proceedings shall also be carried out in accordance with provisions of 1979 Ordinance.

Ordinance 2001 does away with concepts of "income year" and "assessment year" and replaces them with single concept of "tax year" ending normally on June 30, though "special tax year" may be chosen by assessee with prior permission of Commissioner Income Tax.

Under Ordinance 2001, if shares of listed company are not traded during year, it will not be regarded as public company. Any benefits under share option schemes provided by employer shall now be taxed as "salary". However, mere grant of option will not impose any tax, which would only become due when option is exercised, with market value of shares on that date, as reduced by amount paid by employee for option, being treated as "salary".

Capital Gains have been exempted from charge of income tax until 2005. Through amendment made by Finance Ordinance 2003, concept of "Advance Tax Ruling" from Central Board of Revenue has been introduced in case of nonresident for transaction proposed or entered into by taxpayer. Further residence status of individual would now be determined on basis of his stay in country in current year only. Company shall not be considered to be resident for tax purposes unless control and management of its affairs is situated "almost wholly" within Pakistan.

Income Tax ("Tax") is chargeable by reference to income of taxpayer ("Assessee") in previous year ("income year") which is either year ending June 30th or calendar year or such other year ending as may be permitted by Central Board of Revenue. Tax year runs from July 1st to June 30th. By Finance Act, 1991, extensive withholding tax provision enacted also turnover tax payable by companies and registered firms. CBR also enabled to prescribe scheme for payment of fixed tax by person maintaining small establishment to carry on business or profession.

Through Finance Supplementary (Amendment) Act, 1997 person who owns immovable property with land area of 250 sq. yards or more, or owns motor vehicle, or subscribes to telephone, or has undertaken foreign travel except for Haj during income year must file income tax return irrespective of amount of total income unless they are covered by exceptions.

For purposes of charge of tax and computation of total income all income is classified under following heads: (a) Salaries, (b) interest on securities, (c) income from house property, (d) income from business or profession, (e) capital gains, and (f) income from other sources.

In line with tax regime of certain developed jurisdiction, one of persistent demands of corporate sector is proposed to be met in context of taxation of group of companies as one fiscal unit. Proposed provision would tend to promote culture of corporate consolidation and is consistent with emerging needs of country's current status of economic development and demand of globalization.

Companies opting for group taxation should consider that losses of any company of group prior to it joining group will not be taken into account and no relief will be available to same for purposes of group taxation.

Proposed provision seeks to allow, under certain circumstances, subsidiary of company to surrender its evaluated loss, not including capital losses for that tax year, either to its holding company or to another subsidiary of same holding company. Loss submitted to holding company or any part of holding company will be set off against income from business in tax year in which it surrendered and following two tax years.

Salaries.

This head covers all income received by way of salary, annuity, pension or gratuity, fees, commissions and perquisites or profits in lieu of or in addition to salary or wages.

Interest on Securities.

Income from interest receivable by person from any security of federal or provincial government or any debenture or other security issued by or on behalf of local authority or company is classified under this head. Standard withholding rate of 30% is applicable to such income except in case of interest on debentures issued by local authority or company for which recipient gets credit at time of his own assessment. Interest on Government Securities is exempt from tax provided that this is condition of issue of such securities.

Income from House Property.

Tax under this head is leviable in respect of annual rental value of property.

Income from Business or Profession.

This head applies to all income derived from commercial and industrial activities as well as from exercise of profession or vocation such as law, medicine, engineering, accountancy, etc. Income under this head is computed according to normal principles of accountancy after allowing deduction of business expenses. Losses are allowed to be set off against current income from all sources and where these are not completely absorbed in this manner can be carried forward for six years to be set off against further profits from same business profession or vocation. Six year time limit does not apply to unabsorbed depreciation allowance which can be carried forward indefinitely until it is completely set off against future profit. Special rules for computation of profits apply to undertakings engaged in exploration, production and extraction of oil, gas and mineral deposits as well as insurance business.

Capital gains derived from disposed of capital assets other than, inter alia, any stock-in-trade (not being stocks and shares), personal effects and land from which income derived by assessee is agricultural income, is charged under this head. *Note:* Exemption from capital gains tax on locally listed securities has been extended again.

Income from Other Sources.

Under this head all residual income from any source other than those listed above is included. This includes dividends, interest, royalties and fees for technical services. Dividend income received by assessee (not being company) from company is taxed at 10% as separate slice of income; likewise income from prize bonds (at 10%); interest/profit from banks, finance society or company profit on specified security issued by any of foregoing (at 10%) deductible at source. Tax on income of nonresidents from fees for technical services and on invoice for royalty fees is charged at 15%, unless lower rate is prescribed under tax treaty.

Personal Tax.

All individuals, unregistered firms, association of persons and every artificial juridical person other than company are liable to tax on their taxable income at rates set out in First Schedule to the Ordinance with minimum of 0.5% (of total income) where total income is more than Rs. 100,000 but less than Rs. 110, 000 (no tax is payable by female citizen unless her total income exceeds Rs. 250, 000).

Tax on Companies.

Tax rate for companies remains unchanged at 35% (20% for small companies) for fiscal year 2007-2008.

Tax on dividend received by public or insurance company is payable at rate of 5%, 10% in all other cases. Bonus shares no longer taxable in hands of shareholders; nor is S company required to withhold tax on bonus shares. Nonresident air and shipping enterprises are taxed at flat rate of 3% and 8% respectively on their gross earnings.

Primary principle for taxation of banking companies is that all profit and gains for purposes of taxation will mainly be pre-tax profits from all sources as computed in yearly financial statements submitted to State Bank of Pakistan.

In order to rationalize taxation of banking companies in Pakistan and to diminish undue litigation of certain claims unusual for banking companies, significant changes were proposed in Finance Bill 2007. Seventh schedule was introduced under § 100A of Ordinance under which all income profits and gains of banking companies will be processed in line with proposed schedule.

Foreign banks will be allowed deduction on account of head office expenses in ratio of Pakistani turnover to world turnover. Substantial change is also proposed whereby capital gains of banking company would be subject to tax at 10% of gross amount.

Tax on Registered Firms.

Registered firms (partnership) are liable to pay super tax only at rates specified in First Schedule to the Ordinance. Share of income of each partner of registered firm is added to his other income if any and tax is levied on his aggregate income after deducting super tax.

New provisions on Alternate Dispute Resolution have been incorporated into law to provide for efficient and quick mode of determination of disputes.

22.04 PROPERTY TAXES:

Capital Gains Tax.

Capital Value Tax payable in certain transactions relating to transfers of immovable property if transferee not taxpayer.

22.05 SALES TAX:

Finance Bill 2007 seeks to introduce Federal Board of Revenue (FBR Act) with view to substitute existing Central Board of Revenue Act, 1924. Single point sales tax at the general rate of 15%, as well as retail tax and turnover tax, is levied on all goods imported into Pakistan or manufactured or produced in Pakistan. Certain articles are exempt from tax. Sales tax has also been imposed at 15% on certain services provided in province of Sindh. Further, Finance Act 1999 has increased additional tax rate for supply to non-registered persons to 3%, thereby raising effective rate for such supplies to 18%. Finance Ordinance 2002 declares all persons liable to be enrolled as deemed to be enrolled. However, 3% further tax has been retained for such unregistered persons except in specified cases. Capital Value Tax payable in certain transactions relating to transfers of motor vehicles if transferee not taxpayer. New provisions on Alternate Dispute Resolution have been incorporated into law to provide for efficient and quick mode of determination of disputes. Presently, requirement to retain records and documents is three years. It is proposed to increase this requirement up to five years.

22.06 STAMP TAX:

Stamp Duty.

Stamp Duty is leviable under Stamp Act, 1899 by provinces at rates which vary from province to province; Punjab rates adopted in Islamabad Capital Territory. All instruments chargeable with duty must be stamped before or at time of execution, and instruments executed abroad within three months of receipt in Pakistan. Certificate of Stamp Officer that full duty is paid or no duty is payable is conclusive.

No instrument chargeable with duty may be admitted in evidence unless it is properly stamped. A penalty may be imposed on all instruments which are not properly stamped to the extent of ten times the duty payable.

Rates of duty are fixed by provincial governments. Highest rate presently payable on any instrument is 9% ad valorem in Sindh, which is payable on conveyance of immoveable property.

See also categories 2 Business Organizations, topic Corporations (Companies), subhead Stamp Duty and Registration Fees; Documents and Records, topic Affidavits, subhead Stamp; Mortgages, topics Chattel Mortgages, subhead Formalities, Mortgages, subhead Stamp Duty.

22.07 TREATIES AND AGREEMENTS:

Double Taxation Agreements.

Government of Pakistan has signed agreements to avoid double taxation with 51 countries including almost all developed countries of world. These Agreements set ceilings on tax rates applicable to different types of income arising in Pakistan. They also set some basic principles of taxation which cannot be modified unilaterally. List of countries with which Pakistan has concluded tax treaties are: Austria, Bangladesh, Belarus, Belgium, Canada, China, Denmark, Egypt, Finland, France, Germany, Greece, Hungary, India, Indonesia, Iran, Ireland, Italy, Japan, Jordan, Kazakstan, South Korea, Kuwait, Lebanon, Libya, Malaysia, Malta, Mauritius, the Netherlands, Nigeria, Norway, Oman, Philippines, Poland, Qatar, Romania, Saudi Arabia, Singapore, South Africa, Sri Lanka, Sweden, Switzerland, Syria, Thailand, Tunisia, Turkey, Turkmenistan, United Arab Emirates, U.K., U.S.A., and Uzbekistan.

22.08 WEALTH TAX:

Wealth tax has been abolished effective assessment year 2000-2001.

See category 1 Introduction, topic 1.02 Government and Legal System, subhead Islamic Laws.

23 TRANSPORTATION

23.01 MOTOR VEHICLES:

Vehicle registration is required. Number plates must be displayed front and rear and must be of requisite size. Operations licence is required. Any person eligible to do so may apply to the licensing authority having jurisdiction in the area in which he ordinarily resides or carries on business for issue to him of a licence.

Operation Prohibited.

(1) No person under age of 18 is allowed to drive a motor vehicle in any public place. (2) No person under age of 21 is allowed to drive transport vehicle i.e., public service vehicle, locomotive or tractor unless latter two vehicles are used for agricultural purposes.

Licensing authority may revoke a licence when there are reasonable grounds for believing that holder of the license is by virtue of any disease or disability unfit to drive a motor vehicle.

Licensing authority has power to disqualify a person for a specified period from holding or obtaining a licence in certain cases viz: if person is habitual criminal or habitual drunkard, or the person has by his previous conduct as driver of a motor vehicle shown that his driving is likely to be attended with danger to public.

Transfers.

A certificate of registration containing a detailed description of the motor vehicle is issued by the registering authority. Within 30 days of transfer of ownership of any motor vehicle transferee must report transfer to registering authority within whose jurisdiction he resides and must forward certificate of registration to that registering authority together with prescribed fee in order that particulars of the transfer of ownership may be entered therein.

Insurance.

Any person using or permitting another to use a motor vehicle in a public place must be insured against third party risks. Certificate of insurance must be produced if demanded by police officer in uniform authorised to make demand by provincial government.

Visitors to Pakistan having Carnet Registration may on reporting to the authorities obtain a free tax token for one month. On expiry of month visitors pay taxes normally imposed. Unless renewed by issuing authority for a further period, on expiry of Carnet Registration (usually valid for a year) visitor must pay relevant import duty on the vehicle and obtain fresh registration.

Visitors may not sell their motor vehicles in Pakistan until after two years from date of issue of the import permit by office of Controller of Imports and Exports. Then too vehicles may only be sold to non-Pakistani nationals and payment must be made in foreign exchange only. Customs duties must be paid prior to sale.

Nationals of Member States of International Convention holding international driving licences are permitted to use these licences until date of expiry when they may on application to licensing authority obtain a Pakistan driving licence.

Visitors from U.S. and nationals of states who are not members of International Convention may on basis of reciprocity obtain a Pakistan licence for duration of their stay in Pakistan on production of their respective driving licences.

23.02 SHIPPING:

Principal acts applying to shipping include the British Merchant Shipping Act of 1894 (with regard to registration, mortgages, and various other matters) and the Maritime Conventions Act 1911 which incorporates “International Convention For The Unification of Certain Rules of Law With Respect To Collisions Between Vessels”, 1910.

Carriage of Goods by Sea Act 1925 incorporates the Hague Rules into the law of Pakistan for outward bills of lading. An express statement should be contained in every outward bill of lading or document of title as to the applicability of these rules. Carrier is bound to exercise due diligence to make ship seaworthy, properly to equip the ship and make the holds, etc., fit for the carriage of goods. Goods loaded must be clearly marked and a bill of lading giving all particulars should be handed to shipper. Neither carrier nor shipper will be liable for any loss caused by the unseaworthiness of the ship unless this was caused by want of due diligence on part of carrier. Defaults of others, fire, perils of the sea, act of God, war, latent defects, omissions of shipper, are listed, amongst other causes of damage, as causes for which carrier is not responsible. Carrier may surrender or increase all or any of his rights provided that such surrender or increase is embodied in bill of lading. Special conditions in respect of special goods may be imposed and scope of above rules can be limited by contract, provided that bill of lading is made nonnegotiable.

Merchant Shipping Ordinance 2001.

Law relating to limitation of liability of shipowners in Pakistan has undergone significant change on Promulgation of the Merchant Shipping Ordinance 2001 with effect from Oct. 3, 2001.

Ordinance gives effect to limits of liability for maritime claims under 1996 (London) Protocol to the 1976 Limitation Convention. Pakistan has also adopted limit of liability in respect of carriage of passengers in ship as prescribed under 1974 Athens Convention. By § 541 of Ordinance following limits have been prescribed: For loss of life or personal injury 333,000 units of account for ship with tonnage not exceeding 500 tons, thereafter there is sliding scale providing for each additional ton 500 units up to 3,000 tons; 333 units per ton up to 30,000 tons, 250 units per ton up to 70,000 tons, and 167 units for each ton in excess of 70,000 tons. In respect of any other claims: 167,000 units of account up to 500 tons and thereafter for each additional ton 167 unites up to 30,000 tons and 125 units for each additional ton up to 70,000 tons and 83 units per ton in excess of 70,000 tons.

Units of account are units of Special Drawing Rights "SDR" of International Monetary Fund, which will be converted into Pakistan currency at rate determined by State Bank of Pakistan on date of payment or on date when security is given. Equivalent in local currency of value of SDR unit on Feb. 12, 2002 was Rs. 75.0813.

§ 542 of Ordinance, which came into force on Oct. 3, 2001, prescribes that maximum limit of liability of shipowners in respect of passengers shall be in sum of 46,666 units of account multiplied by number of passengers which ship is authorized to carry but not exceeding 25 million units of account. Above limit of liability is for loss of life and personal injury. But no limit is prescribed for loss of luggage, which will be governed by conditions of carriage on ticket. By Merchant Shipping (Amendment) Ordinance 2002 licenses to shipping companies, shipping agents and non-vessel operating carriers shall be issued only after grant of no-objection certificate from Shipping Rates Advisory Board.

Admiralty Jurisdiction of High Courts Ordinance 1980, gives High Court extensive jurisdiction to hear admiralty cases relating to large number of specified questions or claims. In most cases, action in rem against ship will also lie.

See category 1 Introduction, topic 1.02 Government and Legal System.

24 TREATIES AND CONVENTIONS

24.01 TREATIES:

Pakistan is a signatory to several multilateral and bilateral treaties, conventions and agreements concerning commerce, trade and foreign investment.

See category 22 Taxation, topic Taxes, subhead Double Taxation Agreements.

1

PANAMA LAW DIGEST

—Scope —

Revised for 2010 edition by

ICAZA, GONZALEZ-RUIZ & ALEMAN, of Panama.

(C. C. indicates Civil Code; C. C. P. indicates Code of Civil Procedure [or Judicial Code]; C. Com. indicates Code of Commerce; C. F. indicates Fiscal Code; C. T. indicates Labor Code; F.C. indicates Family Code; and see category 6 Courts and Legislature, topic 6.05 Statutes. All codes are cited by articles.)

Note: This revision incorporates legislation through Oct. 31, 2009.

1 INTRODUCTION

1.01 CURRENCY:

National currency unit is “Balboa” at par with U.S. dollar, also legal currency. Panama has not issued paper currency. See also category 13 Foreign Trade and Commerce, topic 13.03 Foreign Exchange and Foreign Trade.

1.02 GOVERNMENT AND LEGAL SYSTEM:

Panama is independent country. Its government is unitary, republican, democratic and representative, divided into three branches: Legislative, Executive and Judiciary, with separate powers.

Legislative body is called National Assembly, whose members are elected for period of five years, by popular vote, one for each 30,000 inhabitants within electoral circuit, and another for residue of 10,000 inhabitants. At present there are 41 electoral circuits and 78 elected members of National Assembly.

National Assembly shall hold meetings by its own right, without prior notice, in Capital of the Republic in sessions that will last eight months in one year, divided in two ordinary legislatures of four months each. Said legislatures shall last from July 1st to Oct. 31st, and from Jan. 2d to Apr. 30th. National Assembly may meet at another place in country, provided majority of its members so decide it.

Also, National Assembly shall hold extraordinary meetings, whenever it is so convened by Executive Branch and during time latter designates, to exclusively have knowledge of issues that said Branch submits for its consideration.

President is head of Executive Branch, elected by direct popular vote for term of five years.

Judicial Branch consists of Supreme Court and Tribunals and Courts as are established by law. Members of Supreme Court are appointed by Executive Branch, with approval of Legislative Branch, for period of ten years.

1.03 HOLIDAYS:

National holidays, in addition to Sundays, are: Jan. 1, Jan. 9, Shrove Tuesday, Good Friday, May 1, Nov. 3, Nov. 5, Nov. 10, Nov. 28, Dec. 8, Dec. 25, and day elected president takes office. (C. T. 46).

See also category 9 Employment, topic 9.01 Labor Relations.

1.04 OFFICE HOURS AND TIME ZONE:

Panama is in the Eastern (GMT -05:00) time zone. Office hours are generally from 8 a.m. to 5 p.m.

1.05 THE PANAMA CANAL AUTHORITY:

USA built Panama Canal, and Republic of Panama has been exercising exclusive jurisdiction thereon as of Dec. 31, 1999, pursuant to treaty entered into by both countries on Sept. 7, 1977; and for such purpose The Panama Canal Authority, autonomous juridical public institution, was created following Arts. 316 to 323 of Constitution of Republic of Panama, and corresponding provisions thereof implemented by Law No. 19 of June 11, 1997.

Said law sets forth nature of authority, defines terms used, contains provisions on its administrative organization, establishes Board of Directors of 11 members, provides for appointment of Administrator, Assistant Administrator, General Supervisor, determines what constitutes its patrimony, finances, and its supervising powers, provides for appointment of Board of Inspectors, establishes rules for administration of personnel and labor relations, adopts other provisions for operation and maintenance of canal; protection, maintenance and preservation of natural resources of hydrographic basin of canal and establishes rules governing canal tolls, fees for services, transit, inspection and control of vessels, adjustment and payment of compensation for damages to vessels, their cargo, crew and passengers.

2 BUSINESS ORGANIZATIONS

2.01 AGENCY:

(C. C. 1400-30; and C. Com. 580-634). An agent is required to adhere to the instructions of the principal and, if there are none, to proceed in the most prudent manner. He must account for everything he receives for the principal. He may delegate his powers, if not expressly prohibited from doing so, but is liable for the acts of substitution if there was no authority of delegation, or if his appointee is notoriously incompetent. In the absence of stipulation otherwise the principal must pay the agent a commission for all business done through him. In case of sale the commission will be on the amount of the sale. The agent cannot collect money or extend time of payment if not authorized to do so. When the commission is not stipulated it will be considered the usual commission paid in the place where the transaction took place. The agent is not entitled to reimbursement for expenses for his transportation unless there is an agreement to that effect. The principal must indemnify the agent for any damages caused from his negligence. The agent has the right to demand from his principal a copy of extract of the books regarding the transactions done through him.

The agency is generally conferred by power of attorney, which can be general or special. Power of attorney is drawn according to certain formalities of the law. Power of attorney made according to the formalities of the laws of a foreign country is valid in Panama, if authenticated by the Panama diplomatic or consular representatives or by means of Apostille of the 1961 The Hague Convention.

Persons presuming to act for others without authority are personally liable to the person to whom they misrepresent. If the person presumed represented ratifies or takes advantage of what has been done, the relation of principal and agent is established.

Power of attorney is terminated: (1) By revocation; (2) by resignation of agent; (3) by death, loss of civil rights, insolvency or bankruptcy of principal or agent.

According to legal opinion, a power of attorney coupled with an interest may not be revoked by principal and probably would not be revoked by his death. In commercial matters, death of principal does not terminate agency if failure of agent to act would jeopardize interests of principal; nor is the power automatically revoked by death of principal in case of a manager of a commercial or industrial establishment.

Power of attorney in civil matters, unless stipulated to contrary, is gratis; in commercial matters, remuneration to the agent is presumed.

2.02 ASSOCIATIONS:

Right of association is granted in art. 39 of Constitution of 1972. Associations must be authorized by special laws or have approval of Executive. They are governed by Civil Code 64-75 and Decree 26 of 1988. Decree No. 26 of 1988 was repealed.

2.03 CORPORATIONS:

Corporations are regulated by Law 32 of 1927, effective Apr. 1, 1927, and Law 9 of 1946.

Incorporation.

Two or more natural or juridical persons may constitute company of any kind; or one or more of them may be shareholders, directors, officers, managers, attorneys-in-fact or liquidators thereof.

The persons desiring to form a corporation must sign an agreement of incorporation (pacto social) setting forth:

(1) The name and domicile of each subscriber.

(2) The name of the corporation, which may be expressed in any language, but must not be the same as, nor so similar to, the name of any other preexisting corporation as to lend itself to confusion, and must include a word, phrase, or abbreviation, indicating that it is a corporation and distinguishing it from a natural person or other form of association.

(3) Name can be reserved in Public Registry Office for period of no more than 30 days. After said period, reservation shall expire.

(4) The general object or objects of the corporation.

(5) The amount of the capital stock and the number and par value of the shares into which it is divided, both of which may be expressed in the currency of Panama, or in legal gold currency of any country, or in both, and if the corporation is to issue shares without par value the statements hereinafter referred to as to such stock (see infra subhead Shares and Capital).

(6) If there are to be shares of various classes, the number of each class and the designations, preferences and voting powers, and the restrictions, or requisites of each class, or a stipulation that such designations, preferences, etc., may be determined by a resolution of a majority of the interested stockholders or of a majority of the directors.

(7) The number of shares which each subscriber to the agreement of incorporation agrees to take.

(8) Domicile of corporation and name and domicile of its agent in Panama, who must be attorney-at-law or firm of attorneys admitted to practice in Republic of Panama. (Decree 147 of May 4, 1966). Resident agent is under duty to know client and keep enough information to identify client before competent authorities. This information shall be disclosed only upon petition filed by Public Prosecutor or member of Judicial Organ competent to take cognizance of narcotics' traffic, crimes or of money laundering arising therefrom, as result of proceedings already initiated in Republic of Panama, or under treaties for Mutual Legal Assistance.

(9) The duration of the corporation.

(10) The number of directors, which may not be less than three, and their names and addresses.

(11) Any other lawful provisions which the subscribers have agreed to.

The agreement of incorporation may be made in any place, in or outside Panama, and in any language. It may be in form of public deed or in other form, provided it is attested by notary public or by another official who is authorized to make attestations in place of execution.

If the agreement is not set forth in a public deed it must be protocolized in the office of a notary of Panama. If it has been executed outside of Panama it must, in order to be protocolized, be previously authenticated by a consul of Panama, or if there is no such consul, by the consul of a friendly state. If the agreement is executed in any language except Spanish there must be protocolized with it a translation thereof in the Spanish language, certified by an official or public interpreter of Panama.

Public deed or protocolized document setting forth agreement of incorporation must be filed for registration in Mercantile Registry, and incorporation is not effective with respect to third persons until agreement of incorporation has been registered. Law 6 of Feb. 2, 2005 established amount of US$300 as annual franchise tax on all domestic and foreign corporations recorded in Public Registry of Panama applicable to both existing and new corporations and starting in year 2006. However, first year of annual franchise tax when corporation is organized will remain at US$250. Subsequent years will be US$300. Surcharge for late payment is US$50 and after two years of nonpayment, there will be additional restoration fee of US$300. Nonpayment of annual franchise tax for ten consecutive years will automatically dissolve corporation. No other incorporation tax is levied upon corporations save registration fees which are charged at following rates: (a) First US$10,000 (Ten Thousand Balboas): US$50 (Fifty Balboas); (b) from US$10,000.01 (Ten Thousand Balboas With One Cent) to US$100,000 (One Hundred Thousand Balboas): US$50 (Fifty Balboas) for first US$10,000 (Ten Thousand Balboas) and US$0.90 (Ninety Cents of Balboa) for every additional US$1,000 (One Thousand Balboas) or fraction thereof, up to US$100,000 (One Hundred Thousand Balboas); (c) from US$100,000.01 (One Hundred Thousand Balboas With One Cent) to US$1,000,000 (One Million Balboas): US$131 (One Hundred Thirty-one Balboas) for first US$100,000 (One Hundred Thousand Balboas) and US$0.60 (Sixty Cents of Balboa) for every additional US$1,000 (One Thousand Balboas) or fraction of US$1,000 (One Thousand Balboas) over US$100,000 (One Hundred Thousand Balboas), up to US$1,000,000 (One Million Balboas); (d) more than US$1,000,000 (One Million Balboas): US$671 (Six Hundred Seventy-one Balboas) for first Million Balboas (US$1,000,000) and US$0.12 (Twelve Cents of Balboa) for every additional US$1,000 (One Thousand Balboas) or fraction of US$1,000 (One Thousand Balboas) up to One Million Balboas (US$1,000,000); (e) value of US$20 (Twenty Balboas) shall be assigned to shares of stock without nominal value, as basis to calculate registration fee; (f) if only part of shares of stock were without nominal value, fee shall be calculated over aggregate resulting from shares of stock with nominal value and shares of stock without nominal value.

In cases of (e) and (f) registration fee shall be determined subject to fact that registration fee that corresponds to shares of stock without nominal value shall not exceed limit of US$1,200 (One Thousand Two Hundred Balboas).

Same fee set forth above in (a), (b), (c) and (d), shall apply when there is increase in capital stock. In this case, fees shall only be paid on basis of increase. Whenever shares of stock without nominal value are exchanged for shares of stock with nominal value, or vice versa, shares of stock without nominal value shall be deemed as having value of US$20 (Twenty Balboas) each, in order to determine if there has been increase in capital stock.

Amendment of Agreement of Incorporation.

A corporation formed under the Law of 1927 may amend its agreement of incorporation provided the amendments are in accordance with the provisions of the Law. Consequently, the corporation may change the number of its shares of stock or of any class of its stock outstanding at the time of such amendment; change the par value of the outstanding or subscribed shares of any class; change the outstanding or subscribed shares of a class having par value for the same or different numbers of shares of the same or a different class without par value; change the outstanding or subscribed shares of a class without par value into the same or different number of shares of the same or a different class having par value; increase the amount or the number of shares of its authorized stock; divide its authorized stock into classes; increase the number of classes of its authorized stock; change the designations of the shares, the rights, privileges, preferences, voting powers, and the restrictions or requisites.

An amendment of the agreement of incorporation must be made in the manner provided by the Law with respect to the execution of the agreement of incorporation.

Amendments made before shares have been issued must be signed by all persons who have signed the agreement of incorporation and by all who have agreed to take shares.

If shares have been issued the amendments must be signed: (a) By the holders, or their agents, of all the outstanding or subscribed shares entitled to vote, and have annexed thereto a certificate issued by the secretary, or an assistant secretary, of the corporation to the effect that the persons who have signed the amendment, in person or by agent, constitute all the holders of the outstanding or subscribed shares entitled to vote; or (b) by the president, or one of the vice-presidents, and the secretary, or one of the assistant secretaries, of the corporation, who must sign and annex to the instrument of amendment a certificate stating that they have been authorized to execute such amendment by resolution adopted by the owners, or their agents, of a majority of such shares and that such resolution was adopted at a stockholders' meeting held on the date fixed in such notice or waiver of notice thereof.

If the amendment alters the preferences of outstanding or subscribed shares of any class or authorizes the issuance of shares having preferences which are in any respect more advantageous than those of outstanding or subscribed shares of any class, the certificate referred to in (b) above must state that the officers of the corporation who signed the same were authorized to execute the instrument of amendment by resolution adopted by the owners, or their agents, of a majority of the shares of each class entitled to vote and that such resolution was adopted at a stockholders' meeting held on the date fixed in such notice or waiver of notice thereof.

If the agreement of incorporation provides that more than a majority of the outstanding or subscribed shares of any class is required in order to amend the same, the certificate referred to in (b) above must state that the amendment has been authorized in such manner.

Unless the agreement of incorporation, or the amendments thereof provide otherwise, each stockholder has a preferential right to subscribe for stock issued by virtue of an increase of stock in proportion to the number of shares owned by him.

The corporation may reduce its authorized capital stock by amendment of its agreement of incorporation, but no distribution of its assets may be made by virtue of such reduction, if it reduces the actual value of assets to less than the total amount of its liabilities, considering the amount of its reduced capital stock as part of such liabilities. In case of such reduction there must be annexed to the instrument of amendment a certificate under oath of the president or vice-president and the treasurer or an assistant treasurer stating that such reduction has not been effected by the distribution. Except in case of fraud the judgment of the board of directors as to the value of assets and liabilities is considered correct.

On increase of capital stock, recording tax is payable on the increase at the same rates as for original incorporation. See supra, subhead Incorporation.

Acquisition by Corporation of its own Stock.

Unless the agreement of incorporation provides otherwise, a corporation may acquire shares of its own stock. If such acquisition is made with funds or property which are not part of the surplus of assets over liabilities or of the net profits, the shares acquired must be cancelled by the reduction of the issued capital stock, but such shares may be resold if the authorized capital stock is not reduced upon cancellation thereof. The shares of its own stock acquired by a corporation with funds arising from its surplus or net profits may be held by the corporation or sold by it for its corporate purposes, and may be cancelled or reissued by resolution of the board of directors.

The shares of a corporation acquired by it, may not, directly or indirectly, be represented at a stockholders' meeting.

A corporation may not acquire its own stock with funds which do not arise from its surplus or net profits if by reason of such acquisition the actual value of its assets is reduced to an amount which represents less than the total amount of its liabilities, considering the reduced capital stock as part of such liabilities, but except in case of fraud, the judgment of the board of directors as to the value of assets and liabilities is considered correct.

General Powers.

Every corporation organized under the Law of 1927 has, in addition to any other powers specified in the Law, the following powers:

(1) To sue and be sued.

(2) To adopt and use a corporate seal and alter the same.

(3) To acquire, purchase, hold, use and transfer movable and immovable property of all kinds and to create and accept pledges, mortgages, leases, liens, and encumbrances of all kinds.

(4) To appoint officers and agents.

(5) To make contracts of all kinds.

(6) To make by-laws for the management and regulation of its affairs and property, for transfer of its shares and for calling of meetings of its stockholders and directors, and for all other lawful matters, provided such by-laws do not violate any existing laws or its agreement of incorporation.

(7) To carry on its business and exercise its powers in foreign countries.

(8) To dissolve in accordance with law, whether voluntarily or for other cause.

(9) To borrow money and contract debts in connection with its business or for any lawful purpose; to issue bonds, notes, bills or exchange, and other instruments of obligation (which may or may not be convertible into shares of the corporation) payable at a specified date, or payable upon the happening of a specified event, whether secured by mortgage or pledge or unsecured, for money borrowed or in payment for property acquired or for any other lawful object.

(10) To guarantee, acquire, purchase, hold, sell, assign, transfer, mortgage, pledge or otherwise dispose of or deal in shares, bonds, or other obligations issued by other corporations or by any municipality, province, state or government.

(11) To do whatever necessary in the accomplishment of the objects enumerated in its agreement of incorporation or in amendments thereof, or necessary or convenient for the protection and benefit of the corporation, and in general, to carry on any lawful business even if not similar to any of the objects specified in its agreement of incorporation or amendments

thereof.

Shares and Capital.

A corporation created under the Law of 1927 has power to create and issue one or more classes of shares, with such designations, preferences, privileges, voting powers, restrictions or requisites and other rights as its agreement of incorporation may provide, and subject to such rights of redemption as it may have reserved to itself in the agreement of incorporation.

The agreement of incorporation may provide that shares of any class are convertible into the shares of one or more other classes.

Shares of stock may have a nominal or par value. Such shares may be issued as fully paid and non-assessable, as partly paid, or without any payment having been made thereon. Unless the agreement of incorporation provides otherwise, fully paid and non-assessable shares having a par value, or bonds or shares convertible into such shares, may not be issued, in exchange for services or property which, in the judgment of the board of directors, are of a value less than the par value of such shares or of the shares into which such bonds or shares are convertible. It may not be stated in certificates for partly paid shares that there has been paid on account thereof an amount greater, in the judgment of the board of directors, than the value of what has actually been paid thereon. The payment may be in money, labor, services or property of any kind.

Except in case of fraud, the judgment of the board of directors as to values is considered correct.

Corporations may create and issue shares of stock without par value, provided there be set forth in the agreement of incorporation:

(1) The total number of shares that the corporation may issue;

(2) The number of shares, if any, with par value, and the value of each;

(3) The number of shares without par value;

(4) One or the other of the following statements: (a) That the capital of the incorporation shall be at least equal to the total sum represented by the shares with par value plus a determined amount with respect to every share without par value which is issued, and such amounts as from time to time, pursuant to a resolution or resolutions of the board of directors, are incorporated into the corporate capital; or (b) that the capital of the corporation shall be at least equal to the total sum represented by the shares with par value, plus the value which the corporation receives for the issue of shares without par value, and such amounts as from time to time pursuant to resolution or resolutions of the board of directors are incorporated into the corporate capital.

There may also be set forth in the agreement of incorporation an additional statement to the effect that the corporate capital shall not be less than the sum which is named therein.

Subject to the designations, preferences, privileges, voting powers, restrictions or requisites granted or imposed with respect to any class of shares, all shares of one class, whether with or without par value, are equal to the other shares of the same class.

A corporation may issue and sell the shares without par value, which it is authorized to issue for the amount which is prescribed in its agreement of incorporation; for such price as is considered fair in the judgment of the board of directors; for such price as from time to time the board of directors determines, if the agreement of incorporation so authorizes; or for such price as is determined by the holders of a majority of the shares entitled to vote.

All the shares without par value are deemed fully paid and non-assessable. The holders of such shares are not responsible, on account of such shares, to the corporation or to its creditors.

The price of the shares must be paid at such times and in such manner as the board of directors may determine. In case of default, the board of directors may elect to proceed against the defaulting stockholder to enforce payment of the part which he has failed to pay and to collect the damages which the corporation may have suffered, or to rescind the contract with respect to such stockholder, with the right in the latter case to retain for the corporation the amounts of the corporate assets which correspond to such stockholder.

In case it elects to rescind the contract with respect to the defaulting stockholder, and to retain for the corporation the amounts which correspond to him, the board of directors must give notice thereof to such stockholder at least 60 days in advance.

The shares which the corporation may acquire by virtue of the provisions of this article may be reissued and reoffered for subscription.

The certificate for shares must state:

(1) The recordation of the corporation in the Mercantile Registry.

(2) The corporate capital.

(3) The number of shares corresponding to the stockholders.

(4) The class of share, when there are various classes, as well as the special conditions, designations, preferences, privileges, premiums, advantages and restrictions or requisites which any of the classes of shares may have as against others.

(5) If the shares which the certificate represents are fully paid and non-assessable, this fact must be stated in such certificate; otherwise the amount which has been paid must be stated in the certificate.

(6) If the share be issued in the name of the holder, his name must be stated therein.

Shares may not be issued to bearer except when they are fully paid and non-assessable.

Shares represented by certificates issued in the name of the owner are transferable on the books of the corporation in accordance with what may be provided in that respect in the agreement of incorporation or in the by-laws. In no case does a transfer bind the corporation, until registration thereof in the Register of Stock.

If holder of certificate owes any amount to corporation, it may oppose transfer until amount owed is paid to it. In every case transferor and transferee remain solidarily liable for amounts which may be owed to corporation on account of shares transferred.

Bearer shares are transferable by mere delivery of the certificate.

If so provided in the agreement of incorporation, the holder of a stock certificate issued to bearer may cause such certificate to be exchanged for another certificate in his name for a like number of shares; and the holder of shares issued in the name of the owner may cause his certificate to be exchanged for another certificate to bearer for a like number of shares.

The agreement of incorporation may provide that the corporation or any of the stockholders shall have a preferential right to purchase the shares in the corporation which another stockholder desires to transfer. Other restrictions may be imposed upon the transfer of the shares, but a restriction which absolutely prohibits the transfer of the shares is void.

The corporation may issue new certificates of stock to replace those which may have been destroyed, lost or stolen. In such case the board of directors may require that the owner of the destroyed, lost or stolen certificate execute a guaranty to answer to the corporation for any claim or damage.

The agreement of incorporation may provide that the holders of any specified class of shares shall not be entitled to vote, or may limit or define such right with respect to the several classes of shares. Such provisions govern in all voting which may take place and in all cases in which the Law requires the vote or written consent of the holders of all of the shares or of a part of the shares.

The agreement of incorporation may also provide that the vote of the holders of more than a majority of any class of stock shall be required for specified purposes.

Voting Trusts.

One or more stockholders may agree in writing to transfer their stock to one or more trustees for the purpose of conferring upon them the right to vote in the name and stead of the owner, for a period fixed and upon the conditions stated in the agreement. Other stockholders may transfer their stock to the same trustee or trustees, thereby making themselves parties to such agreement. The certificates of stock so transferred must be delivered to the corporation and cancelled by it and new certificates issued in favor of the trustee or trustees, in which it must appear that they are issued pursuant to such agreement, and such facts must be noted in the register of stock of the corporation. In order that the foregoing provisions shall apply, an authenticated copy of the agreement must be furnished to the corporation.

Stock Register.

The corporation must keep at its office in Panama, or at such other place as the agreement of incorporation or the by-laws specify, a book to be known as the Stock Register (Registro de Acciones), in which must be noted (except in the case of shares issued to bearer) the names in alphabetical order of all stockholders, showing the place of residence, the number of shares held by each of them, the date of acquisition, and the amount paid thereon or that the shares are fully paid and non-assessable.

In the case of shares issued to bearer the stock register must state the number of shares issued, the date of issue and that such shares are fully paid and non-assessable.

Accounting Records.

Compulsory accounting records which must be kept by every merchant are: journal and ledger. Commercial companies shall also keep Minutes Registry Book and Share and Shareholders Registry Book, or Registry of the Quotas or Contributions of Assets or Social Participation.

Juridical persons which do not perform operations which are completed, consummated or become effective in Republic of Panama, are not bound to keep in Republic of Panama its compulsory accounting records to which this article refers, unless they have their domicile and operate in Republic of Panama.

Accounting Records.

Internal Revenue Director of Ministry of Economy and Finance issued Resolution no. 201-4306 dated Dec. 28, 2001, published in Official Gazette no. 24,469 dated Jan. 14, 2002. In first article of this Resolution, it is established that all corporations are under obligation to be registered in Taxpayer's Registry (RUC), according to art. 694 of Fiscal Code, although its income not be considered of Panamanian source. In second article of Resolution, it is established that registration of these corporations must be performed by its Resident Agent before Dec. 31, 2002, by filing registration form, accompanied by evidence of recording of corporation from Public Registry and proof of domicile for fiscal purposes, which in these cases shall be that of Resident Agent. In third article of Resolution it is clarified that recording does not produce obligation to file income tax return when its activities as well as provisions of Fiscal Code exempt them from said obligation.

Stockholders' Liability.

The holders of fully paid stock are not liable for the debts of the corporation. Other stockholders are liable to creditors of the corporation up to the amount unpaid on their stock, but no action may be brought against a stockholder for a debt of the corporation until judgment therefore has been obtained against corporation and full amount thereof remains uncollected after execution against corporate property.

Dividends may be paid from net profits or surplus, but not otherwise, and may be declared and paid upon the basis of the amount actually paid upon partly paid shares. Dividends may be paid in stock when the directors so determine, provided such stock has been duly authorized and, if it has not theretofore been issued, there be transferred from surplus to capital an amount at least equal to that corresponding to the shares so issued.

Stockholders' meetings must be held in Panama, unless it is otherwise provided in the agreement of incorporation or by-laws.

Whenever under the provisions of the law the approval or authority of the stockholders is necessary notice of the meeting of stockholders must be given in writing and in the name of the president, vice-president, secretary or assistant secretary or of any person or persons authorized for the purpose by the agreement of incorporation or the by-laws.

The notice must state the purpose or purposes for which the meeting is called and the place and hour at which it is to be held.

The notice must be given at such time in advance and in such manner as the agreement of incorporation or the by-laws may provide; but if they do not otherwise provide, the notice must be given by delivery of the notice personally or by mail to each registered stockholder entitled to vote, not less than ten nor more than 60 days before date of meeting.

If the corporation has issued shares to bearer, the notice must be published in such manner as the agreement of incorporation or the by-laws provide.

Special meetings of stockholders may be called by the Board of Directors and must be called by the Board or the competent Circuit Judge upon demand of one or more stockholders whose shares represent at least 1/20 of the capital stock. (Law 9 of 1946, reenacting C. Com. 420).

Acts or contracts entered into by telephone or fax, or by electronic communication means, however, shall be understood as entered between those present if parties or their representatives or attorney-in-fact have been in direct communication.

It shall, likewise, be understood that meetings of Board of Directors or of Assembly of Shareholders or Partners, or of liquidators of any kind of company, in which participants have been in direct communication through any of means set forth in preceding paragraph, have been held between persons present. In such case, minutes of meeting must be issued stating that meeting was held, what agreements were adopted, and manner in which participants had been in communication.

Agreements of any kind of directors, partners, shareholders, managers or liquidators of companies shall be valid, even though they have signed document at different places and dates.

The stockholders or their legal representatives may waive in writing notice of any meeting either before or after the meeting.

Resolutions adopted at any meeting at which all the stockholders are present, in person or by proxy, are valid; and resolutions adopted at a meeting at which there is a quorum and notice of which has been waived by all absent stockholders, are valid for all purposes stated in such waiver, although the notice was not given in proper form.

If the agreement of incorporation does not otherwise provide, every stockholder is entitled to one vote for each share registered in his name, of whatever class and whether with or without par value. Unless the agreement of incorporation otherwise provides, board of directors may fix period, not exceeding 40 days, before date of each meeting of stockholders, during which no transfer of stock will be registered on books of corporation, or may fix date, not to be more than 40 days prior to date of meeting, as date on which stockholders (except holders of bearer shares) entitled to notice of and to vote at such meeting shall be determined. In such case, only stockholders of record on such date are entitled to notice of calling of meeting and to vote at such meeting.

In the case of shares issued to bearer, the bearer is entitled at stockholders' meeting to one vote for each share of stock entitled to vote, if he presents the corresponding certificate or certificates or proof of his right in the form prescribed by the agreement of incorporation or the by-laws.

At all meetings of the stockholders any stockholder may be represented by proxy, who need not be a stockholder, and who may be appointed by an instrument, public or private, with or without power of substitution.

Suits to invalidate resolutions adopted at stockholders' meetings must be instituted within 30 days. (Law 9 of 1946, reenacting C. Com. 418).

The agreement of incorporation may provide for cumulative voting at elections of directors.

Directors.

The affairs of the corporation are managed by a board of directors, who must be natural or juridical persons or any combination of them, and need not be stockholders unless agreement of incorporation so requires.

Subject to the provisions of the Law and of the agreement of incorporation, the number of directors is fixed by the by-laws, but there must not be less than three directors.

The directors are elected, and vacancies in the board are filled, in the manner provided in the agreement of incorporation or the by-laws, but, subject to such provisions, vacancies in the board, whether resulting from an increase in the number of directors or from any other cause, are filled by the vote of a majority of the members of the board. If directors are not elected at the time designated for that purpose, the directors in office continue to hold office until their successors are elected.

Subject to the provisions of the Law and of the agreement of incorporation, the board of directors has absolute control and full direction of the affairs of the corporation and may exercise all the powers of the corporation except those which the Law or the agreement of incorporation or by-laws expressly confer upon or reserve to the stockholders.

A majority of the members of the board is ordinarily necessary to constitute a quorum, but the agreement of incorporation may provide that a specified number, either more or less than a majority, shall constitute a quorum. The resolutions of a majority present at a meeting at which a quorum is present are the resolutions of the board.

The directors may adopt, alter, amend and repeal the by-laws of the corporation, unless otherwise provided by the agreement of incorporation or by the by-laws adopted by the stockholders.

If the agreement of incorporation or the by-laws do not otherwise provide, the board of directors may appoint two or more of their number to constitute a committee or committees, having all the powers of the board of directors in the direction of the affairs of the corporation, subject to the restrictions expressed in the agreement of incorporation, the by-laws, or the resolutions by which they were appointed.

If the agreement of incorporation expressly so authorizes, the directors may be represented and voted at meetings of the board of directors by proxies, who need not be directors and who must be appointed by an instrument, public or private, with or without power of substitution.

The directors may be removed at any time by the votes of the holders of a majority of the outstanding or subscribed shares entitled to vote in elections of directors. The officers, agents and employees may be replaced at any time by resolution adopted by a majority of the directors, or in any other manner prescribed by the agreement of incorporation or the by-laws. Also director or officer may resign as such and said resignation must be protocolized and registered in Public Registry Office. (Decree 204 of July 16, 1992).

If any dividend or distribution of assets be declared or paid which reduces the value of the property of the corporation to less than the amount of its liabilities, including the capital stock; or the amount of the capital stock be reduced; or if any statement or report be made which is false in any material point, the directors who have given their consent to such acts, with knowledge of the facts are jointly and severally liable to the creditors of the corporation for damage arising therefrom.

Officers.

A corporation must have a president, a secretary and a treasurer, elected by the board of directors, and may have such other officers, agents and representatives as the board of directors, the by-laws or the agreement of incorporation may determine, who must be chosen in the manner provided thereby.

The same person may hold two or more offices, if the agreement of incorporation or the by-laws so provide.

No person need be a director of the corporation in order to be able to be an officer thereof, unless the agreement of incorporation or the by-laws so provide.

Registration of the names of the directors, officers and anyone else holding general authority to represent the company is required; changes must likewise be recorded. To effect registration the necessary documents must be first protocolized with a notary public. Such documents may consist of the entire minutes of the directors or stockholders meeting, as the case may be, or an extract thereof containing the following data: (a) date of the meeting; (b) name of the chairman and of the secretary thereof, and if not the president and secretary of the company respectively, a statement of the reasons for others acting in their place; (c) in case of stockholders meeting, the number of shares represented and the relation thereof to the total outstanding shares, or a statement that all the shares have been represented; (d) in the case of a meeting of the board of directors, the names of all directors present or represented; (e) how notice was given or, if no notice has been given, the reasons therefor, whether by waiver or by presence at the meeting. The copy of the minutes of the meeting or the extract thereof must be certified by the secretary of the meeting or the chairman thereof. They must be protocolized preferably by the secretary of the company or in his absence by the president with a statement to that effect; in the absence of both, the registered agent or any other officer so authorized by the board of directors. (Decree No. 130 of June 3, 1948).

General or special power of attorney granted by public deed, or by private document with date certain, shall have effect regarding third parties from date it was granted and may be registered in Public Registry at election of interested party. However, revocation of power of attorney which had been previously recorded, must be registered in public registry, unless it is otherwise provided in same document, or if power of attorney is for fixed time, or for compliance with given act or event.

Sale of Assets and Rights.

Every corporation may, by virtue of resolution of its board of directors, sell, lease, exchange or otherwise dispose of all or part of its property, including its goodwill and its privileges, franchises and rights, upon such terms and conditions as its board of directors may deem expedient, if authorized by resolution of the holders of a majority of the shares entitled to vote thereon, adopted at a meeting duly called for that purpose, or by the written consent of such stockholders. The agreement of incorporation may, however, provide that consent of any class of stockholders is necessary in order to grant such authority.

If the agreement of incorporation does not provide otherwise, the vote or consent of stockholders is not necessary for the transfer of property in trust, or to encumber it by pledge or mortgage, as security for debts of the corporation.

Consolidation.

Subject to the provisions of the agreement of incorporation, two or more corporations organized under the Law of 1927 may consolidate so as to constitute a single corporation. The directors, or a majority of them, of each of such corporations desiring to consolidate may enter into an agreement to that effect, which they must sign, and in which they must set forth the terms and conditions of the consolidation, the mode of effecting it and any other facts and circumstances which may be necessary in accordance with the agreement of incorporation or with the provisions of the Law, as well as the manner of converting the shares of each of the constituent corporations into shares of the new corporation, and also any other details and lawful provisions which may be deemed desirable.

The agreement may provide for the distribution of cash, notes or bonds, in whole or in part, in lieu of the distribution of stock, provided that after such distribution the obligations of the new corporation, including those derived by it from the constituent corporations and the amount of capital to be issued by the new corporation, do not exceed the assets of the new corporation.

The agreement of consolidation must be submitted to the stockholders of each constituent corporation at a meeting thereof duly called especially for the purpose, at which the agreement must be considered and a vote taken as to whether it shall be adopted or rejected.

Without prejudice to the provisions of the respective agreements of incorporation, if the votes of holders of a majority of the shares entitled to vote in each corporation, are given in favor of the consolidation agreement, that fact must be set forth in a certificate of the secretary or assistant secretary of each corporation, and the consolidation agreement so approved and certified must be signed by the president or a vice-president and the secretary or an assistant secretary of each constituent corporation in the manner provided with respect to the execution of the agreement of incorporation.

The consolidation agreement so made must be presented at the Mercantile Registry for recording, as required in the case of agreements of incorporation and when recorded is the act of consolidation of said corporations.

When such agreement of consolidation has been made and recorded in the Mercantile Registry, each of the constituent corporations ceases to exist, and the consolidated corporation, so constituted, succeeds the extinguished corporations in all their rights, privileges, powers and franchises as owner and possessor thereof, subject to the restrictions, obligations and duties which corresponded to the constituent corporations respectively. The rights of creditors of the respective constituent corporations and liens upon their property are not prejudiced by the consolidation, but such liens affect only the property affected thereby at the date of making the agreement of consolidation. The debts and obligations of the extinguished constituent corporations bind the new consolidated corporation.

The agreement of incorporation of any corporation may prescribe additional conditions which must be fulfilled in order to consolidate the corporation with any other.

In the judicial or administrative proceedings to which the extinguished corporations or any of them have been parties, the new consolidated corporation continues as a party.

The liability of the corporations and their stockholders, directors or officers, as well as the legal rights and remedies of their creditors or of persons doing business with the corporations which are being consolidated, are not in any way to be impaired by the consolidation thereof.

Merger.

One or more Panama corporations may merge with one or more foreign corporations provided: (a) that foreign corporations be registered in Mercantile Registry (see subhead Foreign Corporations, infra); (b) that if foreign is surviving corporation same must remain registered in Mercantile Registry for five years after time of merger. During this period attorney-in-fact must be maintained in Panama duly authorized to receive service of process on behalf of corporation. Otherwise, service of process may be made to resident agent. (Law No. 32 of June 30, 1978).

Dissolution.

If the board of directors of any corporation subject to the Law of 1927 deem it advisable that the corporation should be dissolved, the board must propose, by vote of a majority of its members, an agreement of dissolution and within ten days thereafter must duly call or cause to be duly called a meeting of the stockholders having voting power, to decide upon the resolution.

If at the meeting so-called the holders of a majority of the shares entitled to vote upon the matter adopt a resolution approving the resolution for the dissolution of the corporation, a copy of such resolution of the stockholders, accompanied by a list of the names and residences of the directors and officers of the corporation, must be certified by the president or a vice-president, and the secretary or assistant secretary, and the treasurer or an assistant treasurer, and such certified copy must be protocolized and presented at the Mercantile Registry. When the copy has been presented, it must be published at least once in a newspaper in the place where is situated the office of the corporation in Panama, or if there be no newspaper in such place, in the Official Gazette of the Republic.

If all the stockholders having voting power thereon consent in writing to the dissolution, neither a meeting of the board of directors nor a meeting of the stockholders is necessary. In such case the document showing the consent of the stockholders must be protocolized, recorded in the Mercantile Registry and published as above stated. When these formalities are complied with, the corporation is deemed to be dissolved.

Every corporation whose existence expires by expiration of period of duration fixed in its agreement of incorporation or by dissolution, nevertheless continues for three years thereafter, for purposes of prosecuting judicial proceedings which may be deemed convenient, defending its interests as defendant, arranging its affairs, transferring and disposing of its property and dividing its capital; but in no case may it continue business for which it was constituted.

When the existence of a corporation expires by expiration of period of its duration, or by dissolution, directors act as trustees of corporation with powers to settle its affairs, collect its credits, sell and convey its property of all kinds, divide its property among stockholders, after payment of debts of corporation, and they have power to initiate judicial proceedings in name of corporation, with respect to its credits and property, and to represent it in proceedings which may be brought against it. In such case, directors are jointly or severally responsible for debts of corporation, up to amount of moneys and property of corporation of which they may have acquired possession and management.

Such directors are authorized to apply funds and property of the corporation to the payment of a reasonable compensation for their services and may fill any vacancy in their number.

The directors, when acting as such trustees, make their decisions by majority vote.

Dissolution of a corporation may be ordered by a court for unlawful practices and for just cause upon demand of any stockholder; and the court may for good cause appoint liquidators. (Law 9 of 1946, reenacting C. Com. 524, 531).

Continuation.

Company validly constituted under foreign law, may elect to be governed by laws of Republic of Panama and to continue its existence under protection thereof as Panamanian company, notwithstanding provisions in its original legislation, by filing following documents in Public Registry for their recordal: (1) Evidence that it is constituted, and in good standing, under laws of its corresponding country or jurisdiction, issued by competent authority of said country or jurisdiction or, in absence thereof, by means of notarial certificate; (2) certification or certified copy of agreement or resolution by competent organ evidencing authorization to continue existence of company pursuant to laws of Republic of Panama; (3) Deed of Organization or charter subscribed in accordance with requirements prescribed by corresponding laws of Republic of Panama, with statement that it substitutes organization or constitution document of foreign company.

Documentation issued in foreign countries or jurisdictions must be apostilled or authenticated by Consul of Republic of Panama or, in absence thereof, by one from friendly nation in country or jurisdiction in which documentation is issued.

Upon recording of corresponding documents in Public Registry, continuation of company under laws of Republic of Panama shall be effective between parties and as to third parties, from date of original constitution of company in its country or jurisdiction of origin.

Company shall continue with all of its properties, rights, privileges, powers and franchises, as owner and possessor thereof, subject to restrictions, obligations and duties which corresponded to company in its country or jurisdiction of origin, it being understood that rights of creditors of company and encumbrances on its properties shall not be affected by its continuation under laws of Republic of Panama.

Company validly constituted and in good standing under foreign law may, conditionally, register in Public Registry its continuation in Republic of Panama in accordance with foregoing provisions under condition that said continuation become effective upon registration of statement to that effect issued by its duly authorized representative or attorney-in-fact.

Upon compliance with such formality, provisions of preceding article shall be applied.

Company constituted in accordance with Panamanian law may continue as set forth in constitution deed or amendments thereof, under protection of laws of land of another country or jurisdiction; provided, however, that it be so allowed by laws of that country or jurisdiction, and that company be up to date with its fiscal obligations to Republic of Panama.

Company must file, for such purpose, certification or certified copy of corresponding decision or agreement, as well as certification that it has been duly registered in jurisdiction to which it was transferred, through public deed which must be recorded by lawyer in Public Registry of Republic of Panama.

After recording is made, company shall keep all of its properties, rights, privileges, powers and franchises as owner and possessor thereof, subject to restrictions, obligations and duties which corresponded to company, it being understood that creditors of company and encumbrances on its properties shall not be affected by its continuation under laws of foreign country.

Duly proven absence of registration of company in other country, does not impair effects of its registration in jurisdiction of origin.

Foreign Corporations.

A foreign corporation may have offices or agencies and carry on business in Panama after having presented at the Mercantile Registry for recording, the following documents:

(1) Deed of protocolization of its agreement of incorporation.

(2) Copy of its last balance sheet accompanied by a declaration of the amount of its capital utilized or intended to be utilized in business in Panama.

(3) A certificate that it is incorporated and authorized under the laws of the corresponding country, issued and authenticated by the consul of Panama in said country, or if there is no such consul, by the consul of a friendly nation.

(4) An excerpt of the minutes of the meeting wherein the then directors and officers were elected, executed by the secretary of the corporation.

(5) Appointment of business agent.

Foreign corporations acting within Panama and which have not complied with the above requirements may not initiate judicial or other proceedings before the courts or authorities of Panama, but may be sued in any proceeding before the judicial and administrative authorities, and are liable to a penalty of up to 5,000 balboas.

Foreign corporations recorded in the Mercantile Registry must present for record in the Mercantile Registry any amendments of their agreement of incorporation, or instruments of consolidation or dissolution which affects them.

Change of Domicile (siege social).—A foreign corporation may change its domicile (siege social) to Panama, if the country of incorporation permits such change, by filing with the Registry Office in Panama substantially the same documents as for qualifying. (Decree-Law 16 of Aug. 23, 1958).

Pre-existing Corporations.

Domestic or foreign corporations which, when the Law of 1927 came into effect, were established in Panama or had agencies or branches therein are governed by their deeds of incorporation, their by-laws and the laws in force at the time of their incorporation or establishment in Panama. But domestic corporations created before the Law of 1927 took effect may at any time subject themselves to its provisions, by resolution adopted by the stockholders and recorded in the Public Registry.

Stockholders of domestic corporations actually dissolved but not liquidated may, for the purposes of liquidation, avail themselves of the provisions of the Law of 1927, if so resolved by a number of stockholders not less than that which their by-laws require for determination upon dissolution of the corporation prior to expiration of the term fixed for its existence.

Distributors and Sales Agents.

Representation, agency and distribution of goods or services of foreign and national manufacturers or concerns in Republic of Panama are currently regulated by general provisions of Commercial Contracts contained in Title VII of Book I of Code of Commerce of Republic of Panama and by Law No. 29 of Feb. 1, 1996.

Under above cited legal frame, parties involved are free to agree to pertinent terms and conditions of said commercial relationships. Any controversy arising between manufacturer and representative, agent and/or distributor must be resolved before special civil circuit courts and Superior Court created by Law No. 29 of Feb. 1, 1996, and before Supreme Court, pursuant to special rules of proceeding created for first two instances by said law or through arbitration.

Mutual Fund Companies.

("Sociedades de Inversión") Decree Law No. 1 (of July 8, 1999), regulates operation of so called mutual funds companies.

These Mutual Fund Companies can be open-end or close-end funds. Decree Law No. 1 regulates different categories, such as those investment companies organized according to redemption options, and according to risk.

Following types of investment companies can register with Commission: investment companies with only one class of shares and only one investment portfolio (simple investment companies), investment companies with multiple classes of shares where each one of said classes represents interest in one distinct investment portfolio (umbrella investment companies), investment companies with multiple classes of shares, each class having different arrangements in terms of payment of commissions and marketing costs, redemption and administrative services (multiple class investment companies), investment companies which in turn invest exclusively in another investment company (main fund fed by other funds) or in other investment companies (fund of funds), and any other structure which Commission has not prohibited.

Commission has authority to make different rules for each category of investment company according to characteristics of each one.

In order to operate in Republic of Panama, formal request must be presented to National Securities Commission in order to engage in business of administration of mutual funds.

See category 3 Business Regulation and Commerce, topic 3.16 Securities.

Taxation.

See category 21 Taxation, topic Taxes.

See also topic 2.09 Partnerships; category 11 Estates and Trusts, topic 11.08 Trusts.

2.04 FINANCE COMPANIES:

Effective as of 25th day of Oct., 2001, Law No. 42 of 23rd of July, 2001, new law, which is applicable to financial companies came into effect. Some new elements in connection with former law worth mentioning are: (1) Law assigns competency to Authority for Consumer Protection and Competition Defense to carry out conciliations with respect to complaints filed by consumer or users. (2) As requirement for obtaining respective authorization to initiate business operations, law requires submission of criminal and police record of applicant (for natural person) or of its directors, officers, legal representative or General Attorney (for corporation) which submission shall state that they have not been convicted for felonies against legal authorities, public administration or for money laundering. (3) Period to notify changes or modifications on data submitted in order to obtain authorization is reduced from 30 to 15 business days. (4) Fee for issuance of authorization is increased to US$1,000 and annual fee for inspection services is created in amount of US$750. (5) Minimum paid capital for this type of company is increased from US$15,000 to US$500,000. Period of seven years is granted so that existing companies in operation may adjust to new ruling. (6) Law limits use of word “financial” in any language, in any firm name, letterhead paper or advertising, for those persons (natural or juridical) duly authorized to operate as financial companies. (7) Law requires applied effective interest rate, commissions and expenses collected for itself and for third parties to be included in every financial contract. (8) Signature on blank documents (letters authorizing direct discount from salary) is allowed, provided that such documents make express reference to main contract to which they have agreed upon. (9) “Statement of account”, which caused so many problems under force and effect of present law, is clarified. Said statement of account must include, in chronological order, payments and outstanding balance. (10) Calculation method that may be agreed upon for collection of interest is regulated, based on financing terms. For financing term of up to 26 months, method of advanced discount, aggregated method or method over outstanding balance, may be agreed upon. For financing term that exceeds 26 months, aggregated method or method over outstanding balance must be agreed upon. (11) Formula for calculation of effective applied interest rate is established, taking into account nominal rate of interest, plus any sum of money withheld for itself. (12) Moratorium interest rate allowed to be collected is modified. From 1.5% monthly, it is increased to 2% monthly, not compoundable. (13) Conduct by financial companies classified as prohibited includes, among others: utilization of interest calculation method other than those permitted, incorrect calculation of applied effective interest rate, misrepresentation of expenses and commissions collected for itself and/or third parties, signing contracts with blank spaces. (14) Amount of fines that may be levied upon financial companies is increased, ranging from US$500 up to US$10,000.

2.05 FOREIGN CORPORATIONS:

See topic 2.03 Corporations.

2.06 FOUNDATIONS OF PRIVATE INTEREST:

Foundations of private interest are governed by Law 25 of June 12, 1995, Executive

Decree 417 of Aug. 8, 1995, and its amendments which regulates matters concerning its registration before Public Register and Fiscal Code regulates its tax liabilities.

Incorporation.

One or more natural or juridical persons may constitute Private Interest Foundation, personally or through third parties, in accordance with formalities set forth in Law 25. For such purpose it is required to constitute endowment devoted exclusively to purposes expressly contemplated in Foundation Charter. Initial endowment may be increased from time to time by founder of Foundation who shall be known as founder, or by any other person.

Foundation of Private Interest shall be governed by Foundation Charter and its regulations, as well as by provisions of Law 25 and by other legal provisions or regulations applicable thereto.

Foundations of Private Interest cannot pursue goals for profit. Nevertheless, Foundations may engage in mercantile activities in non-customary manner or may exercise rights accrued from titles representative of capital of mercantile companies which are part of assets of Foundation; provided, however, that results or economic proceeds from said activities be devoted exclusively to purposes of Foundation.

Private Interest Foundation may be constituted to become effective from time of constitution or after death of founder, in any of following manners: (a) By private document subscribed by founder whose signature must be authenticated by Notary Public of place of its constitution. (b) Directly before Notary Public of place of its constitution.

Irrespective of manner used to constitute Foundation, formalities established in Law 25 for constitution of Foundations must be complied with.

In event that Foundation be constituted either by public or private instrument to become effective after death of founder, it shall not be required to comply with formalities prescribed in order to make will.

Foundation Charter.

Act whereby Foundation is constituted must embody following: (1) Name of Foundation set forth in any language of Latin alphabet, which shall not be identical or similar to name of another Foundation already in existence in Republic of Panama, in order that it may not lead to confusion. Name must include word Foundation to distinguish same from other natural or juridical persons of different nature; (2) initial assets of Foundation expressed in any currency of legal tender, which shall in no case be less than sum equivalent to US$10,000; (3) complete and clear designation of member or members of Foundation Council, which might include founder, setting forth their addresses; (4) domicile of Foundation; (5) name and domicile of resident agent of Foundation in Republic of Panama, which must be attorney-at-law or law firm, who must countersign Foundation Charter before it is filed for registration; (6) purposes of Foundation; (7) manner in which beneficiaries of Foundation are appointed, among which founder may be included; (8) reservation of right to amend Foundation Charter, whenever it is deemed advisable; (9) duration of Foundation; (10) use to be made of assets of Foundation, and manner in which same may be liquidated in event of dissolution; (11) any other lawful provisions which founder may deem convenient.

Amendments.

Foundation Charter, and also any amendment thereto, must be written in any language in letters of Latin alphabet and comply with formalities for registration of acts and titles in Public Register, to which end it must be first protocolized before Notary of Republic. If Foundation Charter, or amendments thereto, are not written in Spanish Language, they must be protocolized with translation made by authorized Public Interpreter of Republic of Panama.

Amendments to Foundation Charter, whenever allowed, must be effected and signed in accordance with provisions of Foundation Charter. Corresponding agreement, resolution or amendment thereof must set forth date on which it is issued, clearly identifiable name of person or persons subscribing same, and their signatures which must also be authenticated by Notary of place at which document is signed.

Registration Fees.

Every Foundation of Private Interest must pay initial annual franchise tax of US$250 at time of organization. Thereafter, annual franchise tax will be US$300 as established by Law 6 of Feb. 2, 2005. Surcharge for late payment is US$50 and after two years of nonpayment, there will be additional restoration fee of US$300. Nonpayment of annual franchise tax for ten consecutive periods will automatically dissolve foundation.

Procedure and manner of payment, surcharge for arrears, consequences for lack of payment and all other provisions supplementary to legal principles aforementioned, shall be applicable to Foundations of Private Interest.

Juridical Personality.

Registration of Foundation Charter in Public Register will confer juridical personality to Foundation without necessity of any other legal or administrative authorization.

Registration in Public Register also constitutes notice to third parties. Consequently, Foundation may acquire and possess properties of all kinds, undertake obligations and be party in every type of administrative and judicial proceeding in accordance with provisions applicable thereto.

Upon Foundation acquiring juridical personality, founder or third parties who have undertaken obligation to contribute assets to Foundation, personally or at request of any other person with interest in Foundation, must comply with formalities to transfer to Foundation assets undertaken to be transferred.

When Foundation is constituted to become effective after demise of founder, same shall be deemed to have been in existence before demise of founder regarding donations that he or third parties have made to Foundation.

Assets of Foundation shall constitute assets separate from personal assets of founder, for all legal purposes. Therefore, they may not be attached, executed on nor be object of any action or security measure, except for obligations incurred or damages caused as result of fulfillment of purposes or objectives of Foundation, or for lawful rights of beneficiaries of Foundation. In no case shall Foundation be liable for personal obligations of founder or of beneficiaries.

Other “assets protection” features are discussed under category Business Regulation and Commerce, topic Banks and Banking.

Irrevocability.

Foundations will be irrevocable, except in following cases: (1) When Foundation Charter has not been recorded in Public Register; (2) when contrary is expressly set forth in Foundation Charter; (3) for any of grounds for revocation of donations.

In addition to provisions of foregoing, transfers which are made to Foundations shall be irrevocable by person who made transfer, except if contrary is expressly provided in transfer thereof. When Foundation has been constituted to take effect after demise of founder, he shall have exclusive and unlimited right to revoke same.

Heirs of founder shall have no right to revoke Foundation, or transfers thereto, even in event that same had not been recorded in Public Register before demise of founder.

Existence of legal provisions in domicile of founder, or of beneficiaries, concerning hereditary matters shall not affect Foundation or its validity or prevent accomplishment of its purposes in manner provided in Foundation Charter or its regulations.

Creditors of founder or third parties have right to challenge contributions or transfers to Foundation when contribution or transfer amounts to fraudulent act against creditors. Rights of and actions by said creditors will be barred after three years from date of contribution or transfer of properties to Foundation.

Assets of Foundation may be derived from any lawful business, and may be constituted by present or future assets of any nature, sums of money or other properties which founder or third parties may also periodically incorporate into its assets. Transfer of properties to assets of Foundation may be effected by public or private document. However, if properties are real estate, such transfer must comply with provisions for transfer of real estate.

Foundation Council.

Foundation must have Foundation Council, powers and obligations of which shall be set forth in Foundation Charter or in its regulations.

Except in case where Council is juridical person, number of its members shall be not less than three.

Obligations of Foundation Council.

Foundation Council will be entrusted with fulfillment of purposes of Foundation. Except as might be otherwise provided in Foundation Charter, or in its regulations, Foundation Council shall have following general rights and duties: (1) To manage assets of Foundation, in accordance with Foundation Charter and its regulations; (2) to perform any acts, contracts and lawful business which might be convenient or necessary in order to fulfill purposes of Foundation; and to include in said contracts, agreements, or other instruments or obligation all of provisions and conditions which are necessary and convenient, which are compatible with purposes of Foundation, and which would not be contrary to law, morals, to good customs, or public order; (3) to inform beneficiaries of Foundation about status of its assets, as might be provided by Foundation Charter or its regulations; (4) to deliver to beneficiaries of Foundation assets or proceeds established in their favor by Foundation Charter or its regulations; (5) to perform all acts or contracts permitted to Foundation, by Law 25 and other legal or regulatory provisions applicable thereto.

Foundation Charter or its regulations may provide that members of Foundation Council may exercise their powers only with prior authorization of protector, committee or of any other supervisory body appointed by founder or majority of founders. Members of Foundation Council shall not be liable for loss of or impairment to assets of Foundation, nor for damages or injuries caused when aforesaid authorization has been duly procured.

Except as otherwise provided in Foundation Charter or in its regulations, Foundation Council must render accounts for its management to beneficiaries; and, in its turn, to supervisory body. If neither Foundation Charter nor its regulations provide otherwise, account must be rendered annually. If no objection is made to account rendered within time required by Foundation Charter or its regulations, or within 90 days from date on which account is rendered, if nothing is provided therein, accounts would be deemed approved, and such time shall be stated in report of accounts rendered. After expiration of such time or upon approval of account, members of Foundation Council shall be released from liability for its management, unless they had not acted as ordinary prudent person. Such approval shall not release them from liability to beneficiaries or third parties interested in Foundation for damages caused by grave fault or fraud in management of Foundation.

Renewal Member of Foundation Council.

Founder may reserve right in Foundation Charter, for himself or for other persons, to remove members of Foundation Council, and also to appoint or add new members.

When nothing is provided in Foundation Charter or its regulations concerning right and/or causes for removal of members of Foundation Council, they may be removed by court in summary proceedings, for following causes: (1) When their interests are not compatible with interests of beneficiaries or of founder; (2) if they do not manage assets of Foundation with due care of ordinary prudent person ("Good Pater Family"); (3) should they be convicted for crime against property or public faith. In latter case indicted member may be suspended temporarily while criminal proceeding is pending; (4) due to incapacity or impossibility to perform purposes of Foundation, from time that such causes arise; (5) due to insolvency, bankruptcy or calling meeting of creditors.

Removal by court of members of Foundation Council may be requested by founder, and beneficiary or beneficiaries. If beneficiaries are incapacitated or under age, they may be represented by person having their custody or guardianship, as it may be the case. Order of court which decrees removal must appoint new members to replace former ones, who must be persons sufficiently capable, qualified, and of known good moral character to manage assets of Foundation in accordance with purposes established by founder.

Supervisory Bodies.

Foundation Charter or its regulations, may provide establishment of supervisory bodies, which might be constituted by natural or juridical persons, such as auditors, protectors of Foundation or other similar persons.

Powers of supervisory bodies shall be set forth in Foundation Charter or its regulations; and may include following, among others: (1) To supervise compliance by Foundation Council with purposes of Foundation, and with rights and interests of beneficiaries; (2) require Foundation Council to render accounts; (3) change purposes and goals of Foundation when it is impossible to achieve same or when their achievement would be highly costly; (4) to appoint new members of Foundation Council due to temporary or permanent absence or to expiration of term for which they were appointed; (5) to appoint new members of Foundation Council to replace original appointees in case of temporary or accidental absence; (6) to increase number of members of Foundation Council; (7) to ratify steps taken by Foundation Council set forth in Foundation Charter or its regulations; (8) to safeguard assets of Foundation and supervise compliance with their application to uses or objectives set forth in Foundation Charter; and (9) to exclude beneficiaries of Foundation and add others in accordance with what is provided in Foundation Charter or its regulations.

Dissolution of Foundation.

Foundation will be dissolved: (1) Upon arrival of day fixed for expiration of Foundation in accordance with Foundation Charter; (2) upon compliance with purposes for which Foundation was constituted or upon compliance thereof becoming impossible; (3) upon becoming insolvent, stopping of payments or upon calling of meeting of creditors by court; (4) due to loss or total extinction of assets of Foundation; (5) by its revocation; and (6) for any other cause set forth in Foundation Charter or in Law 25.

Every beneficiary of Foundation may challenge actions of Foundation which impair rights thereby conferred to them, denouncing such circumstance to protector or other supervisory bodies, if any; or if none, filing directly corresponding judicial claim before competent court in domicile of Foundation.

Exemption of Taxes.

Steps to constitute, amend or terminate Foundation as well as assignment, transfer or encumbrance of assets of Foundation and income from those assets or any other steps concerning same, are exempt from any tax, contribution, tariff tax, encumbrance or assessment of any type or denomination, provided that assets of Foundation consist of: (1) Assets located abroad; (2) money deposited by natural or juridical persons, whose income is not from Panamanian sources or is not taxable in Panama for any reason; (3) shares or securities of any kind, issued by companies whose income is not from Panamanian sources or is for any reason not taxable in Panama, even if such shares or securities are deposited in Republic of Panama.

Continuation of Foreign Foundation in Panama.

Foundations constituted in accordance with foreign law may agree to be governed by provisions of Law 25.

Foundations referred to in preceding section which agree to be governed by provisions of Law 25, must file continuation certificate issued by body which would be competent in accordance with its own provisions, and it shall set forth: (1) Name of Foundation and date of its constitution; (2) data of its registration or deposit in its country of origin; (3) express statement of its desire to continue its legal existence as Panamanian Foundation; (4) requirements provided by Art. 5 of Law 25 for constitution of Foundation of Private Interest.

Following documents must be accompanied to certificate containing continuation resolution and other requirements mentioned in preceding section: (1) Copy of original Foundation Charter expressing desire to continue in Panama, with any subsequent amendments thereto; (2) Power of attorney in favor of Panamanian lawyer in order that he take necessary steps to effect continuation of Foundation in Panama. Certificate of Continuation, and also accompanying documents to which Law 25 refers, must be duly protocolized and recorded in Public Register so that Foundation will continue its legal existence as Foundation of Private Interest in Republic of Panama.

In cases set forth in Art. 26 of Law 25, responsibilities, obligations and rights acquired by Foundation prior to change of domicile or legislation shall continue in force, as well as proceedings filed against it or ones filed by Foundation, without those rights and obligations being affected by change authorized by referred legal provisions.

Transfer of Panama Foundation to Jurisdiction of Another Country.

Foundations constituted in accordance with Law 25 and also properties which are part of its assets, may be transferred or be subjected to laws and jurisdiction of another country, as might be provided by Foundation Charter or its regulations.

Registration in Public Register.

Registrations concerning Foundations of Private Interest must be recorded in special section of Public Register known as “Section of Foundations of Private Interest”.

To avoid undue use of Foundations of Private Interest, all of legal provisions in force to combat laundering of money from narco traffic, shall be applicable to its operations.

Secrecy and Confidentiality.

Members of Foundation Council and of supervisory bodies, if any, and also public or private employees who have knowledge of activities, transactions or operations of Foundations, must maintain secrecy and confidentiality at all times concerning same. Violations to such obligation shall be punished with imprisonment for six months and fine of US$50,000, without prejudice to corresponding civil liability.

Provisions of this article shall be applied without prejudice to information which must be revealed to official authorities, and to inspections which they must conduct in manner established by Law.

Any controversy not subject to special proceeding established by Law 25 shall be resolved by summary proceedings.

Arbitration.

Foundation Charter or its regulations may provide that any controversy which may arise with Foundation shall be resolved by arbiters or arbitrators, and also procedure by which it must be governed. In event that such procedure has not been established, corresponding provisions of judicial code shall be applied.

2.07 JOINT STOCK COMPANIES:

Such companies, as understood in the United States, do not exist in Panama.

2.08 LIMITED LIABILITY COMPANIES:

See topic 2.09 Partnerships.

2.09 PARTNERSHIPS:

(C. Com. 249-358). Partnerships are considered as legal entities. Before doing business partnership agreement must be drawn up in public instrument, executed before a notary public, and recorded in Mercantile Registry. Fee for recording partnership articles is same as for recording articles of incorporation. (See topic 2.03 Corporations, subhead Incorporation).

Unlimited partnerships (sociedades colectivas) are straight partnerships in which all partners have unlimited and joint liability. Such a firm must act under a firm name which must include the names of all the partners or of one or more, followed by the words “y Compañía,” commonly abbreviated “& Cía.” The name of a person not a partner cannot be used.

The partnership agreement must express the following: (1) Name and domicile of the partners; (2) partnership name; (3) object, duration of the company and the manner to compute the period of same; (4) amount of capital, explaining the share brought in by each partner, and if partially or totally paid, and the manner in which any unpaid balance is to be paid; (5) names of the partners who will manage the firm and use of the firm name; (6) statement of the contributions to the firm, whether in work, money, credits, or any other value with the valuation given to same; (7) percentage left for the reserve fund; (8) dates for inventories and distribution of profits; (9) the causes for the dissolution of the firm; (10) basis for the liquidation of firm and the manner for the selection of liquidators; (11) the form in which the publications of the firm will be made; (12) any other lawful agreement.

Limited Partnership.

The parties may provide in the articles of partnership that their liability is limited to amount of their contribution. (C. Com. 327).

Special Partnership.

"Sociedades en comandita" are partnerships in which one or more of the partners are subject to an unlimited and joint liability for the partnership obligations and one or more of the partners are not responsible for debts and losses of partnership except up to amount of capital they have subscribed.

Name of firm must contain name of at least one of members of firm who is unlimited and jointly liable, and immediately thereafter indication that it is limited partnership, expressions commonly used being "S. en C.". Names of special partners must not appear in firm name, but only names of partners of unlimited liability.

The appointment of a manager is made by the majority vote of all the partners.

Foreign partnerships may do business within Panama if they record articles of co-partnership in Mercantile Registry.

Limited Liability Company (Sociedad de Responsabilidad Limitada).—(Law 4 of Jan. 9, 2009). This company has some of characteristics of a corporation and some of a partnership. Name of company must be followed by words ``Sociedad de Responsabilidad Limitada'' (Limited Liability Company) or initials ``S. de R. L.''. Company may engage in any kind of legal activities, being civil or commercial in nature. Articles of constitution must be recorded at Public Registry and must indicate: (i) Name and domicile of partners; (ii) domicile of company; (iii) term of company which may be perpetual; (iv) objectives of company; (v) amount of authorized capital, that may be in any currency, may comprise money, assets and/or services, and amount and face value of its participation quotas; (vi) name of administrator(s) and representative(s) of company; (vii) officers or attorneys; (viii) resident agent of company who must be licensed lawyer or law firm; (ix) any other clause. Every partner shall be entitled to receive participation certificate and will have voting rights in proportion to his respective participation in social capital. Participation certificates may be assigned through any kind of private document but is subject to approval by other partners and to registration before Public Registry. Responsibility of partners shall be limited to amounts they have contributed to company. Partners are forbidden to execute similar businesses to those executed by company, unless all partners so agree. Partners may be expelled from company if majority of partners so decide in any of following cases: (i) Engage, without authorization of other partners, in businesses similar to those executed by company; (ii) not paying his contribution on time; (iii) be declared bankrupt; (iv) stop or obstruct developing of objectives of company; (v) commit serious fault to his loyalty duties to company. It shall correspond to assembly of partners: (i) Execute amendments to constitutional document; (ii) approve or disapprove balance, administration report, gains and losses report and gains distributions; (ii) approve any legal actions against administrator(s) and partners; (iii) remove administrator(s) and appoint his substitutes; (iv) decide dissolution, merger, transformation or redomiciliation of company. Administrator(s) shall be empowered to execute on behalf of company, any activities within normal course of businesses. Company may be dissolved: (i) In cases contemplated in constitutional documents and amendments; (ii) by agreement of partners; (iii) due to accomplishment of objectives of company; (iv) when term is over; (v) because of merger; (vi) by judicial resolution; (viii) because of reduction of its capital to less than 50% due to losses; (ix) reduction of company's partners to less than two. Company may transform into another kind of company or merge with Panamanian or foreign company or may redomicile.

3 BUSINESS REGULATION AND COMMERCE

3.01 ANTI-MONEY LAUNDERING AND TERRORISM:

Law 23 of 1986 defines concept of money laundering connected with illicit drug trafficking, developing postulates established in 1988 U.N. (Vienna) Convention. Panama ratified this Convention in 1993. Legal structure against money laundering has been consistently modernized by Panamanian regulations over years in order to adjust it to international standards.

Cabinet Decree No. 41 of 1990 established “due diligence” requirements to prevent banking operations from being carried out with funds obtained from drug-related illegal activities. It also requires banks to properly identify their clients and to keep record of cash deposits or withdrawals, change of bills, checks, money orders, etc., for amounts over US$10,000.

Cabinet Decree No. 10 of 1994 requires all persons entering into territory of Panama to report cash and value convertibles for US$10,000 or more.

Executive Decree 468 of 1994 subjects attorneys acting as Resident Agents of Panamanian corporations to “know your client” requirements.

Executive Decree No. 136 of June 9, 1995 created what is now named Financial Analysis Unit for the Prevention of the Crimes of Capital Laundering and Financing of Terrorism (“FAU”). It functions as administrative unit within Council of Public Security and National Defense that must report directly to Attorney General of Nation. FAU obtains from public institutions all financial information furnished by governmental and private entities related to commercial transactions which might be linked to money laundering.

Following organizations must submit statements to FAU, in particular manner established for cash transactions and other transactions referred to as applicable, and on any other cash transactions or other securities that are convertible into cash, for amount over US$10,000: Money-exchange offices, natural or juridical persons who engage part or most of their time to money-exchange activities, financial institutions, insurance and reinsurance companies, companies established in The Colon Free Zone, The National Casinos, The National Lottery and other entities, organizations, and natural or juridical persons, as determined by Executive Branch.

Law No. 14 of May 18, 2007, amended by Law No. 26 of May 21, 2008 (hereinafter referred to as ``Penal Code''), specifically, renders “capital laundering” as separate and independent punishable criminal act per se. Penal Code broadens connection of capital laundering to other crimes, not only illicit drug trafficking, to comprehend whoever receives, deposits, trades, converts or transfers monies, titles, securities, goods or other financial resources knowing that source of activities is related to drug trafficking, qualified embezzlement, traffic of illegal weapons, human traffic, kidnapping, extortion, embezzling public money, corruption of public servants, terrorism, robbery or international vehicle contraband, with purpose of hiding or covering their illicit origin.

Sanctions apply to whoever knowingly hides, or covers real nature, origin, location, destination, ownership or assists to facilitate benefit of monies, titles, securities, goods or other financial resources, whenever these are derived directly or indirectly from any of said illicit activities. Carrying out of transactions directly or through third parties, natural or juridical, in banking, financial, commercial institutions or institutions of any nature, with monies, titles, securities, goods or other financial resources derived from any of said illicit activities and providing to banking, financial, commercial institutions, or institutions of any nature, false information for opening of accounts or engaging in illegal monetary transactions with titles, securities, goods or other financial resources are also penalized.

Executive Decrees No. 163 (of Oct. 3, 2000) and No. 78 (of June 5, 2003) extended operational capacity of FAU, among others, power to exchange information with homologous entities of other countries.

While past legislation applied “know your customer” rules to banks and other limited institutions, Law No. 42 (of Oct. 2, 2000) expanded application of such rules to other institutions, such as trust companies, houses of exchange, currency exchanges, financing companies, saving and loans cooperatives, stock exchanges, investment administrators and other similar institutions which are now under obligation to use in their operations diligence and care necessary to prevent capital laundering.

By Resolution No. 4-2001 (of Feb. 19, 2001), as amended by Resolution No. 08-02 (of Nov. 5, 2001), Panama Securities Commission developed Law No. 42 in order to regulate in detail obligations of securities intermediaries to comply with “know your customer” and “due diligence” policies imposed by said Law and, also, to implement process of reporting suspicious transactions to Financial Analysis Unit. These resolutions were actualized by Panama Securities Commission's Resolutions No. 1-2004 (of Feb. 9, 2004), No. 1-2005 (of Feb. 3, 2005) and Agreement No. 5-2006 (of June 9, 2006), in harmony with current international standards applicable to intermediaries in securities.

Trust companies are subject to comply with “know your customer” and “due diligence” policies imposed by Law No. 42 (of Oct. 2, 2000) and, also, to follow process of reporting suspicious transactions to Financial Analysis Unit.

Banks cannot reveal to their clients nor to third parties that information has been provided to Financial Analysis Unit. They should take appropriate actions to give to their employees instructions on these requirements and maintain corresponding documents for at least five years.

Information provided in good faith by banks, its officers, officials, employees or representatives shall not constitute violation of professional confidentiality or of any restriction on disclosure of information, imposed by contracts or by any other legal or regulatory provisions, and shall not imply any type of liability whatsoever for banks, their officers, officials, employees or representatives.

Persons who receive information shall maintain this information in strict confidentiality, in event that it is not relevant to investigation of criminal offense; otherwise, they may only disclose it to competent authorities, in accordance with law.

Panama has entered into Mutual Legal Assistance Treaties with nine countries. In 1991, with U.S., for investigation, trial and suppression of crimes, such as illicit narcotraffic activities, drug traffic, theft, bank robbery, terrorism, extortion, fraud and violation of law of one of contracting states related to cash or other financial transactions that may contribute to commission of crimes and, in 1994, with U.K., for legal assistance in matter of drug traffic. In 1995, similar treaties with Colombia, Costa Rica, El Salvador, Guatemala, Honduras, Mexico, Nicaragua, U.S.A. and U.K. were entered into by Panama.

By Law No. 51 (of July 15, 1998), Panama ratified July 11, 1997 Central American Convention for prevention and repression of money laundering and of laundering of other assets related to illicit drugs traffic and connected crimes.

In 2003, Panama and Mexico entered into Mutual Cooperation Convention to interchange financial information for prevention and repression of money laundering practices.

By Law No. 75 (of Dec. 3, 2003) Panama ratified Interamerican Convention against Terrorism adopted in Barbados on June 3, 2002. By Resolution No. 002-2005 (of Jan. 26, 2005), Superintendence of Banks clarified AML's regulations applicable to banking transfers, adjusting them to FATF recommendations.

You may consult official website of Superintendence of Banks at www.superbancos.gob.pa, and National Securities Commission at www.conaval.gob.pa.

See also categories 2 Business Organizations, topic Finance Companies; Estates and Trusts, topic Trusts.

3.02 BANKS AND BANKING:

Decree Law No. 9 of 1998, as amended, Decree Law No. 2 of Feb. 22 of 2008 and reinstated by Executive Decree No. 52 of Apr. 30, 2008 (hereinafter referred to as ``Banking Law'') created The Banking Superintendence. National and qualified foreign bank companies (see category 2 Business Organizations, topic 2.03 Corporations, subhead Foreign Corporations) must have minimum paid-in capital, comply with capital reserve and liquidity requirements and operate under one of following three types of banking licenses: General License to engage in banking business within or outside, Panama (US$10,000,000, minimum paid-in capital); International License to exclusively conduct foreign transactions from Panama (US$3,000,000, minimum paid-in capital); Representation License fee for foreign banks to establish local representative offices. Requirements vary on type of license. Numbered accounts similar to Swiss system are allowed. General License Banks must pay annual Banking Regulation Fee of US$30,000 plus US$35 for each million or fraction thereof of total assets up to US$100,000. International License banks must pay annual tax of US$15,000 and banks having Office of Representation US$5,000. In addition to income tax and regulation fees, banks must pay special annual tax assessed on bank's total assets, according to scale from US$50,000 (assets up to US$100 million) to US$325,000 (assets up to US$750 million) and US$350,000 (assets for more than US$1 billion). In order for local banks to receive cash deposits in amounts over US$10,000, or in subsequent transactions amounting to less than US$10,000, but that will add up to US$10,000 or more during week, sworn declaration form must be completed and filed with bank.

Pursuant to art. 222 of Banking Law, foreign assets transferred to, or deposited in bank, as bank deposit, as mandate, trust, or other similar arrangement (such as Foundation) shall be totally subject to principle of freedom to contract and to regime of free disposition of assets, even if inheritance laws or marital system of country of nationality or of domicile of title holder, or settlor, or founder, or beneficiary, provide otherwise. To this effect, foreign assets are those which belong to person who is not Panamanian or resident of Panama. (See topic Anti-money Laundering.)

In 2003, Banking Superintendence regulated, among other matters electronic banking, micro financing, bank credit cards, business and merger & acquisitions.

Intermediaries in security, under supervisor of National Securities Commission, is also subject to anti-money laundering regulations similar to those applicable to banks.

You may also consult official website of Superintendence of Banks at www.superbancos.gob.pa.

3.03 BILLS AND NOTES:

The Uniform Negotiable Instruments Act, translated into Spanish, was adopted by Law 52 of 1917.

Letter of credit must state the name of the payee, the limit of amount and the term for which issued, and must be signed by the issuing party and the payee. (C. Com. 944-956).

Lost instruments may be replaced by order of a competent court on due application and notice. Bond may be required. (C. Com. 957-974).

3.04 COMMERCIAL OR MERCANTILE REGISTER:

See category 8 Documents and Records, topic 8.03 Records.

3.05 CONDITIONAL SALES:

See topic 3.15 Sales.

3.06 CONTRACTS:

Contracts are governed as to nature, form, objects by general principles of Civil Code, but there are certain type of contracts which are deemed mercantile or commercial in nature, concerning which basic principles of contracts of Civil Code are applicable but are supplemented by provision of Commercial Code; and, in absence thereof, by commercial usage of each market place.

For validity of every contract there must be consent by persons having legal capacity to consent, object certain or object which is ascertainable, and consideration not contrary to law, public morals, or public order. Certain contracts must be in writing or executed by means of notarial document.

Franchise, Distributorship, Representation.

Are governed by general provisions of Commercial Contracts contained in Title VII of Book I of Code of Commerce of Republic of Panama and by Law No. 29 of Feb. 1, 1996, amended by Law 35 of May 10, 1996 and Law 23 of July 15, 1997 and, supplemented by Law 15 of Feb. 7, 2001. Specific provisions of Code of Commerce are: Brokers (arts. 107 to 127); commercial agents (arts. 100 to 106); commission agents (arts. 635 to 662); factors (arts. 603 to 617); transportation agents (arts. 728 to 739); mercantile power of attorney (arts. 580 to 602).

Note: Cabinet Decree No. 344 of Oct. 31, 1969, on contracts of agency, representation and distribution was declared unconstitutional by ruling of Supreme Court of Aug. 2, 1989.

Excuses for Nonperformance.

Where contract involves particular object, loss thereof discharges obligation provided loss occurs without fault of person required to deliver and before time for such delivery. (C. C. 1068).

In contracts in general, nonperformance or delay thereof is excused when performance is prevented by “unforeseen events” or events “impossible to avoid.” (C. C. 990; 34-d). By “unforeseen events” is meant acts of God (force of nature) and by “impossible to avoid” acts of man, including Governmental actions or acts of enemies which prevent or delay performance.

Applicable Law.

As to external formalities, law of place of execution governs, but parties may follow pertinent law of Panama; however, when law of Panama requires a public instrument (notarial document), private documents have no force in Panama, even though valid where executed. (C. C. 7). By “private documents” is meant those in which notary or other authorized public official takes no part in execution.

Government Contracts.

They are governed by special provisions of Law No. 22 of June 27, 2006, and certain provisions of Fiscal, Civil, Administrative, and Penal Codes. Said Law 22, sets forth principles governing government contracts, determines circumstances under which public auction, or direct contracting are in order, and requirements to be complied with in each case.

3.07 FRAUDS, STATUTE OF:

Any agreement involving more than US$5,000 must be in writing, except for technologically stored documents, according to law. (Law 11 of Jan. 22, 1998 amending art. 1103 of C.C.).

Written documents are classified as public and private documents. Public document is one made by public official in exercise of his duties. When it is made before notary public and forms part of notary's protocol it is called public deed. (C. C. P. 834 and C. C. 1728). Private document is one made between parties without any official record thereof.

Agreements regarding personal property may be made by private document.

The following acts or agreements must be made by public instruments: (1) an act or contract dealing with any interest in real property, except the sale of crops in being or future; (2) leases for six or more years; (3) a marriage settlement; (4) an assignment or repudiation of an inheritance or of community property rights; (5) a power of attorney to contract marriage as proxy, a general power of attorney for litigation to administer property or to represent in an act which must be executed by public instrument or affects third parties; (6) an assignment of shares or right derived from an act executed by a public instrument (C. C. 1131); (7) leasing agreements in which value of goods is more than US$15,000. (Law 7 of July 10, 1990, regulated by Executive Decree 76 of July 10, 1996).

3.08 INFORMATION TECHNOLOGY, INTERNET AND NEW MEDIA:

E-Commerce.

Computer programs are considered result of intellectual creation. Thus, they are copyright protected. (Law 15 of 1994, Art. 7). Person indicated as originator in computer program shall be presumed to be its originator. (Law 15 of 1994, Art. 17).

Unless otherwise agreed, contract between originator and authors of computer program implies exclusive transmission of copyright protection in favor of originator. (See category 17 Intellectual Property.)

Providing e-commerce services as rule does not require obtaining public license or approval other than regular commercial license that shall be obtained by persons or entities carrying out commercial operations. (See topic 3.11 Licenses, Business and Professional.)

Law No. 51 of July 22, 2008 published in Official Gazette No. 26,090, defines and regulates documents and electronic signatures as well as interchange of electronic documents and electronic certification entities; regulates filing of documentation by electronic means and certain aspects of e-commerce. Said law defines electronic document as “any electronic representation which gives evidence of a fact, image or idea”.

In spite of fact that it is classified as law that regulates electronic commerce, as pointed out in introductory recitals which were part of project that was delivered to National Assembly. Law No. 51 does not limit its application to electronic commerce. Consequently, Law No. 51 is applicable to acts and contracts granted or celebrated by means of electronic documents and/or utilizing electronic signatures, whether of commercial nature or any other type. Through said law, it is sought to give validity and juridical effectiveness to these acts and contracts, provided certain requirements are complied with.

Several articles of Commercial Code were modified by this law, in order to confirm validity of documentation generated or filed utilizing electronic means.

Law No. 51, among other things, determines characteristics that electronic signature must have in order to consider it legally equivalent to holographic signature, regulates certificates that guaranty or give faith to authenticity of electronic signatures, sets forth requirements which entities must comply with in order to engage in issuance of these certificates and establishes degree of responsibility applicable to these entities and to those who require or employ these certificates. Moreover it establishes possibility that notary may certify or authenticate signature through electronic means.

Previous laws and regulations regarding electronic filing of documentation only took into consideration filing of paper documents through electronic means. Important addition to Panama legislation that has been accomplished by Law No. 51 is that filing through electronic means of electronically generated documents is also regulated.

Furthermore, Law No. 51 has several articles covering issues that arise from provision of services through Internet, including anti ``spam'' provision of ``op-out'' type and several provisions concerning limitation of liability of applicable to e-commerce players.

Law No. 51 gives lot of regulatory powers to General Directorate of Electronic Commerce of the Ministry of Commerce and Industries, including imposition of fines on persons or entities that breach new law. Also, said Directorate has power to suspend provision of services through electronic means violating Law No. 51, at request of third parties, other authorities, or on its own motion.

3.09 INTEREST:

Contractual interest cannot exceed monthly rate of 2%.

3.10 INVESTMENTS:

Law No. 54 of July 22, 1998, regulated by Executive Decree No. 9, of Feb. 22, 1999 guarantees stability in connection with national indirect taxes, municipal taxes, customs taxes and labor matters to any natural or juridical person that will make investment of over US$2,000,000 in any of following: tourism, industrial, agriculture for exportation, agroforest, mining, processing zones for exportation, oil and commercial free zones; telecommunications, constructions, port and railroad developments, electric energy production, irrigation projects and efficient use of water resources, pursuant to approved and registered investment plan.

See also categories 21 Taxation, topic Investments; Foreign Trade and Commerce, topic Foreign Investments; Employment, topic Labor Relations.

3.11 LICENSES, BUSINESS AND PROFESSIONAL:

Law No. 5 of Jan. 11, 2007, regulated by Executive Decree No. 26, July 12, 2007 has primary function of regulating issuance of licenses and registration (hereinafter referred to as ``Notice of Operation'') thereof in Republic of Panama.

Notice of Operation is required to carry on any industry and most trades. Retail trade can only be carried on by citizens of Panama and in limited cases by foreigners. (Const. art. 293). Sale of agricultural products, including cattle by breeder, does not require license.

There is no general requirement of special license for imports. However, license is required to import fire arms, explosives and drugs containing opium or cocaine. Then there is flat prohibition on other goods as instruments of war, counterfeit money, opium, pornographic literature and pictures. Plants and seeds may only be imported when specifically permitted.

See category 21 Taxation, topic Taxes, subhead License Tax.

3.12 MONOPOLIES, RESTRAINT OF TRADE AND COMPETITION:

Panamanian Constitution, Laws and Implementing Regulations.

Arts. 159, 265, 295, 297 and 298 of Panamanian Constitution are most important legal provisions related to monopolies, restraints of trade and competition. Constitutional provisions were regulated in more detail by Law No. 45 of Oct. 31, 2007, on Defense of Competition (hereinafter referred to as Competition Law) and said Competition Law was supplemented by Executive Decree No. 31 of Sept. 3, 1998, Executive Decree No. 8-A of Jan. 22, 2009, and by Concentration Guidelines approved July 16, 2009, by Autoridad de Protección al Consumidor y Defensa de la Competencia, hereinafter referred to as "Competition Agency".

Private Monopolies.

Under general principles established by Panamanian Constitution, private monopolies are forbidden as well as those practices that would produce monopoly effect. According to Art. 298 of Constitution, State shall watch free competence and free concurrence in markets. Art. 295 clearly prohibits every combination, contract or action in trade or industry that tends to restrict or render impossible free trade and competition and that has effect of monopoly against public interest. This article contemplates public action to impugn those acts, contracts or combinations considered as monopolistic practices, before competent courts.

These Constitutional articles have been regulated in more detail by Competition Law which also created autonomous public legal entity, called Autoridad de Protección al Consumidor y Defensa de la Competencia, and foresee creation of three special lower courts and seven special circuit courts, to be located all over country, and one superior court, all of them to attend to, among others, competition matters.

Purpose of Competition Law is to protect and secure free competition process by prohibiting large number of practices considered anticompetitive, same as certain economic concentrations and eliminating all restrictions to efficient functioning of markets in goods and services, thus preserving consumers' best interests.

Competition Law is applicable to all individuals, legal entities (corporations) and to State Entities (either National or Local), who actively participate in economic activities within national market (all of them generally called by Competition Law, "economic agents"). However, Competition Law does not apply to State Monopolies, collective bargaining agreements to owners of intellectual property, patent and copyrights, or agreements promoted by State with Economic Agents to preserve public interest as declared by Executive Cabinet.

Competition Law distinguishes between absolute and relative monopolistic practices, both prohibited.

Absolute practices, which are prohibited per se, are exhaustively listed in law and include collusive practices such as price fixing, market sharing, limitation of production and bid rigging.

Relative practices are subject to rule of reason and are listed by Competition Law in non-exhaustive list (list is merely illustrative) and include several horizontal, vertical and unilateral restrictions, such as exclusive agreements, tying agreements, refusal to supply, predatory pricing and price discrimination. Rule of reason requires that economic agent having substantial power in relevant market (defined according to hypothetical monopoly test) exercises practice considered as relative monopolistic one, causing undue restriction (not generating increases in economic efficiency, as defined by Law Decree No. 31, and Art. 4-A of Law No. 29) to free competition.

As mentioned before, Competition Law created Competition Agency and some special courts, in order to enforce law. At present, owing to budget reasons, there are only one lower court, three circuit courts and superior court operating. Competition Agency is headed by general manager for period of seven years by Executive Branch, subject to approval by majority of Legislative Branch members. Competition Agency has power to prosecute monopolistic practices, to sue any person (individuals, corporations and/or State Entities) committing such practices, before competent courts and to impose fine up to US$1 Million in cases of absolute monopolistic practices and up to US$250,000 in relative monopolistic practices' cases. Fine could only be imposed after court judgment, establishing violation of law, has been rendered. In addition court may order violating party to compensate victim in sum that could be as high as three times damages suffered (triple damage rule).

Affected parties could go directly to competent court in defense of their rights.

Competition Agency and special courts do not limit their duties to enforce competition policy and consumer protection laws. Courts also attend intellectual property suits.

Under Law-Decree No. 6 of Feb. 15, 2006, Ministry of Commerce and Industry has competence to investigate, collect evidence and make recommendations to Executive Cabinet on matters related to Unfair Competition Practices in International Trade and Safeguards.

Economic Concentrations.

Competition Law also prohibits economic concentrations which unreasonably restrict process of free competition affecting most efficient functioning of market of goods and services. According to Competition Law, economic concentration is not only merger or acquisition, but also any other act by which corporations, associations, shares, participations, trusts or assets, that are competitors among themselves, become joined.

There is no premerger notification requirement in law. However any interested party may submit economic concentration to prior opinion of Competition Agency, with opinion rendered binding on Competition Agency but not binding on any competent court.

Competition Agency has statutory power to approve, prohibit or condition any economic concentration, same as to investigate and challenge concentration before court, within three year period after concentration has taken place.

On July 16, 2009, Competition Agency approved new Merger Guideline which contributed to give more transparency to procedures before Agency. Guideline has four main parts, first, which analyzes scope of legal provisions from territorial and time point of views; second, which analyzes concept of control and economic concentrations; third part, which establishes methodology for economic analysis and fourth part, which covers economic efficiency issues. Guidelines detailed procedure to determine relevant market, substantial power of economic agent in that market, and gives heavy weight to concept of economic efficiency as to determining when economic concentration is illegal.

Competition Agency has authority to condition concentration and to order deconcentration.

Superior Court is competent court to attend this matter and Competition Law contemplates public action to challenge any economic concentration.

State Monopolies.

Arts. 159, 265 and 297 of Constitution regulate State Monopolies. Panamanian government has constitutional right to have official monopolies regarding importation of goods, goods not produced within country, public services, games of chance (as it is for lotteries) and those activities that produce wager. Any official monopoly must be established by law.

At present water supply is still official monopoly and there are some other temporary and partial monopolies on public services, such as electricity transmission, to be due to privatization process. National Authority of the Public Services was created to regulate supply of public services such as water, electricity and telecommunications.

Some telecommunication services (such as basic local and international telecommunication services) were given as temporary exclusive concession (five years ended on Jan. 1, 2003) to mixed corporation (partly private owned and partly State owned). Same happened to electricity services, in which production and distribution were given in concessions to mixed and private corporations. At present electricity transmission is managed by State.

Private concessions of public services are subject to competition laws.

3.13 NEGOTIABLE INSTRUMENTS:

See topic 3.03 Bills and Notes.

3.14 RESTRAINT OF TRADE:

See topic 3.12 Monopolies, 3.14 Restraint of Trade and Competition.

3.15 SALES:

A sale of real or personal property is perfected and binding when the vendor and vendee have agreed upon the thing sold and the price thereof, though neither thing has been delivered; except that a sale of real property and rights and of an inheritance is not perfected until a public instrument is executed, but this exception does not apply to a sale of trees or pending fruits. In general the legal rules and principle of the Uniform Sales Act of the United States apply to law of sales in Panama. (C. C. 1215-88).

The expenses of the sale, unless otherwise agreed, are divided equally between vendor and purchaser. Sales of real property must be recorded immediately. In the sale of real property full description of same is required. See category 20 Property, topic 20.04 Deeds.

Conditional sales of personal property are permitted, provided the property can be clearly identified and the contract is recorded in the Public Registry Office. (Decree-Law 2 of 1955).

Notices Required.

There is no general provision in sale of goods with respect to notices, except that when goods have been delivered in container, purchaser may have three days within which to refuse acceptance because of damage or quality inferior to contract. Purchaser, on receipt, must assert condition that he is entitled to examination.

Warranties.

Vendor guarantees to vendee legal and peaceful possession of thing sold and that it has no hidden defects that will make it improper for its destined use, but vendor will not be responsible for obvious or visible defects if vendee could have easily noticed them by reason of his occupation or profession.

Applicable Law.

In accordance with Art. 6 of Civil and Commercial Codes, local courts will apply law of Panama if contract, although made in foreign country, contemplates delivery in Panama.

3.16 SECURITIES:

Decree Law No. 1 of 8th July 1999 created National Securities Commission as autonomous agency of Government and regulates stock exchange businesses, their installation and functioning, investment brokers, investment managers, financial advisors, public sale of shares, securities, bonds or other evidences of indebtedness by corporations or by mutual funds or evidence of ownership in such funds and securities market in general. Aforementioned activities require registration with and/or license issued by Commission. See also categories 2 Business Organizations, topic Corporations, subhead Mutual Fund Companies; Debtor and Creditor, topic Assignments. Several issues of this Decree-Law have been regulated by means of agreements. National Securities Commission maintains in its web page www.conaval.gob.pa all this information.

3.17 STATUTE OF FRAUDS:

See topic 3.07 Frauds, Statute of.

3.18 TELECOMMUNICATIONS:

General Provisions.

On Feb. 8, 1996, Law No. 31 was enacted whereby Telecommunication System within Republic of Panama is regulated. Said Law was regulated by Executive Decree No. 73 of Apr. 10, 1997.

Purpose of said Law is to promote private investment, expand access of people and improve quality of existing services.

Telegraphic services, radio broadcasting, and distribution of noninteractive television signals and radio amateur signals, were excluded from scope of application of law.

This law establishes three kinds of rights for concessionaries which must be stated in contract, and which are as follows: (1) Price for right of concession; (2) annual rate of concession and (3) regulation fee as established by National Authority of the Public Services. Such Authority is government institution that shall inspect administration of public services.

Law provides that communications are inviolable and cannot be intercepted or interfered with, nor content of communications can be released.

Telecommunication services shall be classified as follows: (1) Type A: Refers to those services that due to technical reasons are granted to limited number of concessionaires, under temporary exclusivity basis, with exception of mobile phone services, all other telecommunication services are type B services. (2) Type B: Rest of services which shall be granted under free competition basis. Once Type A service has been reclassified as Type B, it will remain as such.

Aforementioned Authority shall grant and supervise concessionaires regarding use of frequencies assigned to telecommunications. Ministry of Government and Justice shall protect rights of concessionaries and shall not assign any frequencies that may interfere with those already granted.

Call Center Services are subject to telecommunications laws and regulations. If services are rendered to persons or entities abroad, they may be subject to special labor, tax and immigration regime similar to one applicable to Export Processing Zones as long as all required registrations and permits are obtained.

Concession for Rendering Telecommunications Services.

Rendering telecommunication services shall help, in some cases, as established by contract, telecommunication network construction by concessionaire and use of radio electric frequency.

Major private and foreign participation in capital stock of companies engaged in telecommunication services exploitation is authorized. Under any circumstance, any foreign government or any company or consortium which have ownership, control or major participation in foreign government, may exploit, whether under its own basis or through intermediary, any of telecommunication services; or be shareholder or senior partner of such company.

Concessions shall have term of 20 years and extensions thereof cannot exceed equal term. Type A concessions shall be granted by Cabinet Council through public bid. Companies desirous to obtain concession, must prequalify pursuant to established procedure. To participate in bid stage, any company must be previously prequalified, however, companies that have not qualified but meet several conditions set forth by law, may associate with any other companies which have been prequalified.

Once Cabinet Council approves documents related for prequalified companies, National Authority of the Public Services shall call for public bid which shall be governed by procedure established by rules of practice.

Type B concessions shall be granted, without any public bid, to any person who meets requirements established on this matter.

Rates and Prices.

Prices for telecommunication services offered on competition basis shall be fixed by concessionaires.

National Authority of the Public Services may determine prices and rates provided that there is only one concessionaire rendering specific service, or when one or more services are subsidized; or whenever there are practices restricting competition.

Termination of Concession Contract and General Provisions.

State may terminate any contract by Administrative Resolution, provided that grounds exist for termination as established by law to rescind Type A concession. Such grounds are listed in Art. 47 of law, for example, non-authorized modification of object of concession, bankruptcy of concessionaire, and others.

C. V of law refers to all possible infringements, sanctions and procedures sanctioned by law.

Companies rendering telecommunication services shall proceed to obtain ``operation notice'' (former Commercial License) to services.

3.19 TOURISM:

Tourism subject is governed by Law No. 8 of June 14, 1994, amended, and Decree Law No. 4 of Feb. 27, 2008, among others, with purpose of adopting comprehensive development of all tourist activities within Republic of Panama. Decree Law No. 4 creates Panamanian Tourism Authority and shall have among its duties, planning and design of national tourism policy, drawing up and implementation of master plans and procedures to facilitate registration of companies, and supervise tourist activities. Tourist activities will be classified in accordance with code established in Uniform International Classification of Tourism Activities (CIUAT).

Wholesale international tourism promoters operating in countries with existing or potential markets for Republic of Panama, such as United States of America, Canada and countries of European Union, may establish offices in Panama to coordinate and assist their clients.

For rendering of tourist services, there will be no request for requirements not established in Decree Law No. 4. Therefore, neither Tourism Authority nor any other national or municipal authority may collect any money whatsoever or request requirements that are not established in laws of Republic of Panama.

Law No. 8 of June 14, 1994 and Law No. 58 of Dec. 28, 2006 grant fiscal incentives and benefits to persons engaged in all of these activities which cover wide field such as establishment of hotels, motels, Apart Hotels (hotels with small apartments), restaurants, convention centers, etc.

In addition, zones of special interest for tourist development may be adopted and are granted even greater tax incentives.

4 CITIZENSHIP

4.01 ALIENS:

See category 15 Immigration.

4.02 IMMIGRATION:

See category 15 Immigration.

5 CIVIL ACTIONS AND PROCEDURE

5.01 ACTIONS:

Limitation of.

See topic 5.05 Limitation of Actions.

5.02 DEPOSITIONS AND DISCOVERY:

In civil cases part of evidence is obtained by: (1) pretrial inspection of documents, things, property or land; (2) pretrial depositions; (3) recognition of private documents; (4) request of reports; (5) oral and written confessions; (6) depositions; (7) inspection of documents, things, property or land; and (8) expert witness opinion and/or testimony.

Letters rogatory, with copies of questions to be asked, may be issued to another judge if examination is to take place elsewhere. Letters rogatory without Republic of Panama are transmitted through diplomatic and consular channels, or as provided by treaties.

Maritime jurisdiction established special rules for depositions and discovery in general patterned after U.S. Federal Rules of Civil Procedure. (Arts. 227-289 of Law No. 8 of 1982 as am'd).

In addition, there are special discovery and evidence rules that apply to antitrust, consumer protection, unfair competition and intellectual property cases. (Law No. 29 of 1996).

5.03 EVIDENCE:

See topic 5.02 Depositions and Discovery.

5.04 JUDGMENTS:

Judgments do not constitute a lien on property of judgment debtor as against third persons, except as to real property, when they have been recorded in Public Registry.

Foreign judgments have the force provided by treaty, or, in the absence of treaty provisions, the force that is given to Panama court judgments in the foreign country. If the courts of a foreign country refuse to carry on a Panama judgment, the judgments of that country have no force in Panama. If the foregoing rules cannot be applied, the foreign judgment will be enforced in Panama, if: (1) It was rendered on personal action, except as the law provides with respect to descent and distribution (see category 11 Estates and Trusts, topic 11.04 Descent and Distribution); (2) defendant was personally served in place where action was filed; (3) it was rendered on an obligation valid in Panama; and (4) it has been properly authenticated. (C. C. P. 1409-1411).

Law No. 8 of Mar. 30, 1982 which created maritime jurisdiction establishes that final judgments, arbitration awards, interlocutory judgments and orders decreeing protective measures rendered in foreign countries shall have in Panama force granted by international treaties and in absence thereof, they shall have same force granted therein to rulings rendered in Republic of Panama. If ruling has been rendered in country wherein by its jurisprudence Panamanian rulings cannot be enforced, it shall have no force in Panama.

5.05 LIMITATION OF ACTIONS:

Periods after which some of more important rights of action are barred by running of Statute of Limitations are following: Actions relating to real property, 15 years; actions relating to personal property, six years; actions for alimony or rent, five years (Law 17 of 1961); tort actions, one year. Period with respect to commercial actions is generally five years, but some such actions are barred in three years. (C. C. 1668-1713; C. Com. 1649-53).

5.06 PRESCRIPTION:

See topic 5.05 Limitation of Actions.

5.07 REPLEVIN:

Replevin (revindicacion) is an action by the owner of a single thing, of which he is not in possession, against the actual possessor to surrender it to him. This action cannot be maintained against a third possessor who has recorded his property. Almost all real and personal property can be repossessed by replevin. The action must be brought by the owner, and against any possessor, with certain exceptions. (C. C. 582-96; C. C. P. 1574).

5.08 SEQUESTRATION:

This is a proceeding used before commencing or during any state of the suit against property of the defendant to ensure that such property of the defendant may not be put out of the reach of the plaintiff and that the plaintiff may be able to have something to secure satisfaction of a judgment in his favor. To obtain a decree of sequestration it is necessary that a bond be filed to answer for damages in case that the suit may not be successful. Any property, real or personal, owned by the defendant, whether in his possession or in the possession of someone else, can be sequestrated. The sequestration is almost like attachment and garnishment. (C. C. 375-98).

See also category 6 Courts and Legislature, topic 6.01 Courts, subhead Maritime Courts.

6 COURTS AND LEGISLATURE

6.01 COURTS:

There are six Superior District Courts, one Superior Family Court and one Superior Minors' Court. In civil, family and minors' cases, justice is administered by following tribunals:

Municipal courts, sitting in the districts or municipalities and having general jurisdiction in certain matters and with certain limits as to the amount in controversy.

Circuit Courts.

Sectional Family Courts having jurisdiction in domestic relations, marriage, separation, divorce and maintenance. Sectional Minors' Courts having jurisdiction in matters relating to paternity, maternity, adoption, guardianship and offenses committed by minors, sitting in capital of each province, having general jurisdiction: (a) in matters exceeding jurisdiction of municipal courts; (b) cases relating to adjudication of insanity, and appeals from municipal courts. Special Civil Courts having jurisdiction in consumer protection, free competition, copyright and industrial property matters.

Superior district courts generally have jurisdiction in appeals from circuit courts. First District court hears civil cases, the Second District court, criminal and Third District court (created by Law No. 29 of Feb. 1, 1996) hears appeals from special circuit courts created by same law having jurisdiction on industrial property, copyright, consumer protection, free competition and monopolies cases. They all sit in First District in City of Panama; another District court sits in Penonomé; other in David, and other in Las Tablas. With exception of First, Second and Third District courts, others hear both civil and criminal cases.

Superior Family Court having jurisdiction in appeals for Sectional Family Courts.

Superior Minors' Court having jurisdiction in appeals from Sectional Family Courts.

Supreme Court, in the capital of the Republic, sitting in bank has jurisdiction (a) in constitutional questions; (b) in matters involving the interpretation of administrative acts; (c) in prize cases and (d) as trial court in certain criminal cases involving high officials.

First division has jurisdiction in recourse of cassation and bills of review, invalidation of judgments and appeals from the Superior courts.

Second division has jurisdiction in recourse of cassation and bills of review in criminal cases and in criminal appeals from the Superior courts; it also has original jurisdiction in certain criminal cases.

Third division has jurisdiction to determine legality of acts of the Executive branch of the Government and in controversies between the Government and private persons.

Fourth division has jurisdiction in miscellaneous matters, including the enforcement of foreign judgments. (Law 47 of 1956).

Probate Courts.

Probate jurisdiction is exercised by the circuit courts or the municipal courts according to the amount involved.

Labor Courts.

Sectional Courts sit in cities of several provinces and have general jurisdiction in labor cases. Two superior courts or tribunals sit as follows: one in capital of Republic, other in City of Santiago de Veraguas; both have jurisdiction in appeals from sectional labor courts.

Labor cases with certain limitations may be appealed to Supreme Court, which acts on behalf of Court of Labor Cassation which, although created by law, is not yet operational.

Boards of Conciliation and Decision created by Law No. 7 of 1975 have jurisdiction throughout Republic of Panama and have competence over dismissals; suits claiming labor benefits under US$1,500 and household employees' disputes. Decisions of Boards of Conciliation and Decision may be appealed before Superior Labor Tribunals in proceedings exceeding amount of US$2,000, or when sum of benefits and indemnifications that must be paid in lieu of reinstatement of employee including back wages, exceeds said amount. Decisions of Superior Labor Tribunals in these cases are not appealable. Actions concerning seamen enrolled in vessels in Panama registry may be filed before labor courts or maritime courts at option of seamen.

Maritime Courts.

Law No. 8 of Mar. 30, 1982 as modified and supplemented by Law No. 11 of May 23, 1986 and Law No. 12 of June 2009 created Maritime Courts, sitting in City of Panama. Jurisdiction of Maritime Court shall extend to all causes arising from maritime commerce and maritime traffic within territory of Republic of Panama, its territorial sea, navigable waters of rivers, lakes and in waters of Panama Canal. Also to those arising elsewhere from maritime commerce and traffic, in following cases: (1) When actions are filed against vessel or its owner and vessel is attached within jurisdiction of Republic of Panama; (2) when Maritime Court has attached other property of defendant, even if he is not domiciled within territory of Republic of Panama; (3) when defendant is found within jurisdiction of Republic of Panama, and has been personally served with complaint of actions filed in Maritime Courts; (4) when one of two vessels involved is of Panama Registry or substantive law of Panama would be applicable by virtue of contract, or because so provided by Panama Law, or where parties had submitted, expressly or impliedly to jurisdiction of Maritime Court of Republic of Panama.

Law provides for attachment of vessels and other maritime property for following purposes: (1) To provide security and prevent that defendant secrete, sell, encumber or otherwise cause that property lose value or be wasted; (2) as means of acquiring jurisdiction; (3) to satisfy maritime liens on property attached.

See also categories 1 Introduction, topic Government and Legal System; Civil Actions and Procedure, topic Depositions and Discovery; Debtor and Creditor, topic Executions.

6.02 LAW REPORTS, CODES:

See topics 6.04 Reports and 6.05 Statutes.

6.03 LEGISLATURE:

See category 1 Introduction, topic 1.02 Government and Legal System.

6.04 REPORTS:

The only court report officially published is the “Registro Judicial,” which relates all the business done in the Supreme Court of Panama and the Superior Tribunals. The reports began in 1904.

Unofficial mimeograph copies of judgments and orders of Supreme Court were published monthly, until Apr. 1969. (Repertorio Jurídico).

6.05 STATUTES:

Most of the legal provisions are codified. The important codes are Civil Code, Code of

Commerce, Code of Procedure (or Judicial Code), Penal Code, Administrative Code, Mining Code, Fiscal Code, Sanitary or Health Code, Agrarian Reform Code, Aviation Code, Labor Code, Family Code, and Electoral Code. Family Code, which entered into force on Aug. 1, 1994 was enacted by Law No. 3 of May 17, 1994, amended by Law No. 12 of July 25, 1994, superseded all prior legal provisions relating to family and minors, created Family and Minor's Lower and Appellate Courts, and prescribed rules of procedure by which they will be governed.

Governs the rights and obligations of spouses, equal rights of children, and protection of minors. Family ties arise by consanguinity, affinity or adoption.

7 DEBTOR AND CREDITOR

7.01 ASSIGNMENTS:

Assignments of credit rights or actions are only effective, as regard third parties, as of time its date may be fixed according to law. If transfer affects real property, from date of its filing for registration in Public Registry. Any debtor who pays his creditor, before having knowledge of assignment, is released from obligation. Principle of bona fide governs all relationships between assignor and assignee. Sale or transfer of a credit includes that of all accessory rights. Transfers of inheritance rights and credits in litigation are permitted.

Securities market law (Decree Law No. 1 of July 8, 1999) regulates assignments of future credits and other incorporeal rights for purpose of securitization arrangement. Such credits and rights may be assigned even before they come into effect provided they are identified or determinable from pertinent assignment agreement. Assignment agreement of future credits and rights must be in writing; and to affect third parties must be notarized.

7.02 ASSIGNMENTS FOR BENEFIT OF CREDITORS:

A debtor may assign all his property by either a public or private deed or instrument for the payment of his debts and the assignment must be accepted by his creditors, except in certain cases of fraud or where the creditors have previously made him allowances. This assignment in the absence of agreement to the contrary, only releases the debtor to the extent of the net value of the property assigned. The agreements between debtor and creditors must conform with the legal dispositions regarding preference of credits. (C. C. 1062, 1500-4, 1653-67; C. C. P. 1788). See also topic 7.04 Bankruptcy.

7.03 ATTACHMENT:

Attachment is accomplished by the judicial deposit of personal property or retention of money or items of value; by sequestration of real property. (C. C. P. 533, 1801).

These measures can be used either before or after complaint has been filed, but in either case party applying for attachment must furnish bond or security for costs and damages, and attachment obtained before action is commenced will be vacated if plaintiff does not file complaint within six days after attachment has been granted or if defendant has not been served complaint within three months of its filing and plaintiff has not requested service by publication, or if within 30 days of having received edicts for publication, he has not caused them to be published. (C. C. P. 531). Attachment will also be vacated on defendant giving bond or security, except in cases of real actions involving specific immovable or movable property and attachment has been directed against said property or when currency, credits or specific securities have been attached. (C. C. P. 546).

In executory proceedings, attachment is called “embargo.”

See also category 5 Civil Actions and Procedure, topic 5.08 Sequestration.

See also category 6 Courts and Legislature, topic 6.01 Courts, subhead Maritime Courts.

7.04 BANKRUPTCY:

This subject is regulated by C. C. 1659-62 and Code of Commerce, Book 3rd, Law 43, 1919.

Kinds of Bankruptcy.

The bankruptcy may be: (1) Fortuitous; (2) culpable; (3) or fraudulent. In the latter two cases the bankrupt is liable to be prosecuted under the Penal Law.

Bankruptcy proceedings may be commenced by a merchant, by one or more of his creditors, or by the Public Prosecutor (Ministerio Publico) when the debtor has fled or is in hiding and has not left a representative to manage his affairs and fulfill his obligations.

A registered merchant who is unable to meet his obligations must call a meeting of creditors within two days after ceasing to make payments. This is done by presenting a petition to the court to be adjudged bankrupt. The debtor must state the reasons for his failure and make a statement of his financial condition and present a list of his creditors indicating the nature of their claims. He also must state the date in which he failed to make payments and present his account books.

When a creditor petitions for bankruptcy proceedings against a merchant the petition must state that he is a legal creditor, that his credit originates from acts of commerce, and that such credit is liquidated and demandable. When the debtor has fled without leaving a representative to manage his business and to attend the payment of his obligations, the creditor may demand the adjudication of bankruptcy even though the credit may not be due, but the creditor must prove to the satisfaction of the judge, that the debtor has failed in payment of his obligations or has maliciously disposed of all or great part of his property or has created incumbrances on it or tried to hide the same.

Effect of Declaration of Bankruptcy.

Upon the declaration of bankruptcy by the court, the debtor loses the administration and control of all his property except that which is not subject to attachment, but he retains a limited ownership. For the administration of the property of the bankrupt a receiver is appointed by the court, who assumes, for the benefit of the bankrupt estate, all the assets and liabilities and exercises all the privileges and rights of the bankrupt and holds all commercial agencies or representations which the bankrupt may have.

Bankrupt is not permitted to leave jurisdiction without permission from court. He is not a party in proceedings with regard to his property, but may appear in any matter concerning his person. He is precluded from exercise of civil rights granted by Constitution of Panama.

Upon the declaration of bankruptcy no interest is chargeable against the bankrupt estate, with the exception of secured credits.

Creditors outside of Panama in foreign countries cannot present their claims after two months from the date of the publication of the order of the court.

Composition.

The bankrupt may make a composition with his creditors at any stage of the proceedings, after examination and recognition of credits has been made, but not before. The agreement is made in a meeting of creditors. The court will approve the agreement if it is supported by majority of creditors. In order that an agreement between the creditors and the bankrupt be valid it must receive the majority of personal votes attending the meeting and that such majority shall represent three-fourths of the liabilities. None of the creditors can have more than one personal vote although he may represent several credits, and joint creditors will have only one personal vote. A creditor who assigns one or more of his claims to obtain more than one vote in the meeting will lose entirely the right to vote.

Property of Third Persons.

The property in the hands of the bankrupt which has not been transferred to him by a legal and irrevocable title is returned to its rightful owners.

Priorities.

Credits are classified as follows: (1) Credits with respect to personal property; (2) credits with respect to real property and real rights; (3) credits with respect to the balance of personal and real property. The rules of preferences are the following: (1) Credits with respect to personal property enjoy preference as follows: (a) Construction, reparation, conservation or price of the personal property in possession of the debtor up to the value of same; (b) credits guaranteed by pledge; (c) those guaranteed by bond or securities; (d) credits for carriage upon the price of goods, expenses and right of carrying, and keeping up to delivery; (e) credits for the price of the lodging upon the personal property of the debtor; (f) credits for seeds and expenses in cultivation, upon the crop for which those seeds were used; (g) credits for hiring and rents of one year upon the property and products of same. (2) Credits with respect to real property and rights enjoy preference as follows: (a) Credits in favor of the government upon the property of the contributors for taxes; (b) credits of insurance companies upon the property insured for the payment of two years' premium; (c) credits guaranteed by mortgage properly inscribed in the public register upon the mortgaged property; (d) credits properly noted in the public register by order of the court for embargoes, sequestration or execution of sentence upon the property so annotated, but only upon credits after the annotation. (3) Credits with respect to other personal and real property, enjoy preference as follows: (a) Credits in favor of municipality for taxes; (b) credits for expenses for administration of bulk of bankrupt estate; (c) credits for funeral of debtor, his wife and children under age if he lacks property of his own; (d) credits for medical attendance; (e) salaries and wages of employees for one year; (f) credits for advances made to debtor for him and his family for necessary articles, for period of one year; (g) credits for boarding during proceedings; (h) credits without special privileges found in public deeds or executed judgment if such judgment is based upon real litigation.

With respect to personal property, the proceeds are distributed pro rata among the creditors entitled to the same preferences, except as follows: Credits guaranteed by pledge have priority as to the pledged property; in case of bonds given to two or more creditors, such bonds take priority according to their dates; and with respect to crops credits for seeds, cultivation expenses and harvesting have preference over credits for hiring and rents.

Discharge.

The bankrupt may be discharged by the court without any petition if his bankrupt estate has been sufficient to pay all his debts except fraudulent ones. Culpable bankrupts are discharged upon proof of having suffered the penalty imposed upon them.

Foreign Declaration of Bankruptcy.

Except as otherwise provided in treaties, bankruptcy declared in a foreign country has no effect in Panama, until the judgment has been held enforceable by a local court. Even though the above requirement is not fulfilled preventive measures may be ordered against the property in Panama of the bankrupt if such measures are asked by means of rogatory commissions. In spite of the exequatur, the foreign declaration of bankruptcy will not affect the resident creditors of the bankrupt or their rights in his property within the Republic or abrogate contracts made with the bankrupt.

Banks.

Banking Law includes special provisions for intervention in and reorganization and liquidation of banks. It is not necessary to request declaration in bankruptcy under ordinary legislation encompassed in Civil Code, Code of Commerce and Judicial Code; however, latter are subsidiarily applicable insofar as they are not incompatible with provisions of Banking Law.

Banks are subject to intervention by Superintendency of Banks on grounds established by Banking Law and interventor with broad powers is appointed. Superintendency may then proceed with reorganization or compulsory liquidation of bank or to return management and control to its Board of Directors.

If Superintendency deems it necessary to decree compulsory liquidation of bank, it will appoint one or more liquidators with very broad powers to direct liquidation process. Payment of interests and statutes of limitations against any of bank's rights or causes of actions are suspended.

Superintendency resolutions may be challenged before Administrative Chamber of the Supreme Court.

Other Special Legislations.—Insurance, reinsurance and securities businesses are subject to administrative intervention, reorganization and compulsory liquidation processes different from provisions of ordinary legislation on bankruptcy, under control of respective regulatory authority; processes which are similar to those applicable to banks.

7.05 EXECUTIONS:

Judgments for money are carried into effect by attaching property of the debtor. After judgment the judge must proceed upon petition as follows: (1) To notify the judgment; (2) to demand payment; (3) in case payment is not made, to obtain statement under oath from the debtor as to the property he has; (4) to attach his property declared by him or discovered by his creditor.

Attachment of property is made in following order: (1) Money; (2) jewelry; (3) credits in favor of debtor; (4) real property and its income; (5) salaries or pensions; (6) personal property in general; (7) any other things belonging to debtor not exempted from attachment. This order may be altered according to will and desire of creditor.

The valuation of the property is made by the judge with assistance of referees appointed by him.

After attachment the next step is the sale of the property that cannot be turned over to the creditor. The sale is held by the clerk after the necessary advertisement of sale and property. Bidders must file a bond in amount of 10% of total amount of property to be sold. Sale can take place for two-thirds of valuation. When nobody bids two-thirds another date will be set and bids for one-half will be accepted. If no bid for one-half is made, new sale takes place and property will be sold to highest bidder although his bid is for less than one-half of valuation.

The right to replevy is recognized but cannot be exercised by the person against whom the execution has taken place. Third parties may intervene to allege preferential rights but the sale will not be stayed unless the intervenor claims ownership based on a title of earlier date than the execution. (C. C. P. 1615-1733).

7.06 EXEMPTIONS:

The following, among others, are exempted from attachment and execution: (1a) Minimum wage under law, alimony and child support obligations; (1b) 85% of salary in excess of minimum wage (according to law); (2) beds and clothing of debtor, wife and children, and their furniture; (3) professional books to amount of US$5,000 at selection of debtor; (4) machineries or instruments used in teaching of science or art to amount of US$5,000 at selection of debtor; (5) agricultural or mechanical utensils belonging to debtor; (6) food and fire to amount necessary for maintenance of family; (7) personal rights of use, and lodging and maintenance of debtor. (C. C. P. 1650). All pensions from official sources are also exempt. (Labor Code 162).

7.07 FRAUDULENT SALES AND CONVEYANCES:

In general all acts of commerce done with the intention to defraud creditors, when a person is bankrupt or insolvent, can be set aside on petition of the creditor, provided action is commenced within ten years.

An assignment for the benefit of creditors is regarded as a fraudulent conveyance unless made in accordance with the Civil Code.

A sale of property by a husband to his wife does not affect third person unless recorded in the Public Registry.

7.08 GARNISHMENT:

Property of debtor in hands of third person may be reached by order of sequestration or attachment describing it, subject to exceptions provided by law. See topics 7.06 Exemptions, Attachment; and category 5 Civil Actions and Procedure, topic 5.08 Sequestration.

7.09 HOMESTEADS:

Rural Homestead.

Under provisions of Agrarian Code rural homestead is constituted by no more than ten hectares of land for agricultural and husbandry activities, and dwelling house wherever built, as property of rural family. Possession and enjoyment thereof is protected under said provisions against claims of creditors by withdrawing property thereof from execution and forced sale.

7.10 INSOLVENCY:

When a person, not a merchant, is unable to pay his obligations and his liabilities are greater than his assets, he may appear to the judicial tribunal to be declared insolvent. For further discussion see topic 7.04 Bankruptcy.

7.11 LIENS:

Mechanics' liens do not exist in Panama. Maritime liens or privileged credits affecting maritime property are established by C. Com. 1502-1511.

7.12 MECHANICS' LIENS:

See topic 7.11 Liens.

7.13 PLEDGES:

Requirements for valid pledge contract are: (1) That pledge is given to secure obligation; (2) that thing pledged is movable (personal) property and belongs to person pledging it; (3) that person pledging is capable of disposing of his property; (4) that pledged object be delivered to creditor or to depository, but when pledge is of cattle, or of agricultural implements, owner of same may keep it subject to conditions of contract. In order to give notice to third persons such contract must be recorded in Mercantile Registry. All movable property can be pledged. Document of pledge must be acknowledged before Notary Public to be effective against third parties. When obligation is not canceled, unless otherwise provided in document of pledge, pledgee shall have right to proceed with private sale of pledged things, after notifying pledgor 30 days before sale. All baggage and articles brought into hotels by guests are considered as pledges of security for charges of innkeeper.

When livestock is pledged, pledgor may retain possession, but document must be recorded in Public Registry.

Corporation may grant general pledge (floating charge) of all its assets located outside territory of Republic of Panama. Document containing floating charge shall be recorded in Public Registry and will grant preferential rights to creditor. Requirement 4 above does not apply to floating charge.

7.14 STAY OF EXECUTION:

See topic 7.05 Executions.

8 DOCUMENTS AND RECORDS

8.01 ACKNOWLEDGMENTS:

In Panama, certificates of acknowledgment in the form used in the United States and England are unknown.

The legal effect which in United States is secured by seals and acknowledgments is obtained in Panama by executing the document before a notary public in the form known as a public document or instrument. See topic 8.02 Notaries Public.

Contracts, deeds, and other documents which require authentication by a notary public are executed with two witnesses before a notary, and made part of his protocol; that is to say, the original documents are kept in an official registry in the notary's office, and the interested party receives certified copies. The notary public testifies the execution of public and private documents; public documents become a part of the protocol while of private documents no record is left in the notary's office.

Foreign Acknowledgments.

Documents executed abroad, in conformity with law of country where executed, are entitled to recognition by Panama courts and administrative officials, with same force as in country where executed, if duly authenticated by diplomatic or consular representative of Panama or through “apostille”.

Powers of attorney executed abroad must comply with 1975 Interamerican Convention on the Legal Regime of Powers of Attorney to be Used Abroad, and be authenticated by Panamanian diplomatic or Consular representative of Panama or through “Apostille”.

8.02 NOTARIES PUBLIC:

(C. C. 1714-52). Notaries are public officials whose duties are much more important than those of notaries under the American laws. They must be attorneys. (Law 53 of 1961). They are appointed by the President for determined circuits.

Instruments executed before a notary public must be prepared with certain formalities and drawn in the Spanish language. The notary must set forth the Christian name and the surname, legal age, civil status, profession or occupation, and domicile of each party. He must certify that he knows the parties and witnesses and that they have legal capacity. It must appear that he has read the instrument to the parties and explained its legal force and effect. If the parties do not know Spanish they must appoint an interpreter ad-hoc to translate and sign with them. All public instruments executed before a notary public must have at least two witnesses. Parties to a notarial instrument receive formal certified copies which have the effect of originals and may be presented in court.

Consuls abroad are notaries and must keep a protocol as well as notaries in Panama.

8.03 RECORDS:

Law No. 3 of Jan. 6, 1999, established autonomous entity named Public Registry Office of Panama, with legal personality, its own patrimony and autonomy in its internal regime, both administratively and functionally, as well as budgetarily and financially. Public Registry Office was formerly department of Ministry of Government and Justice.

The law regarding the recording of property and certain acts is contained in articles C. C. 1753-1801, and recording and office for such purpose is regulated by following laws and decrees: Decrees No. 9 of 1920 and No. 117 of 1925; Decree-Law 41 of 1966; Executive Decree No. 47 of 1966; Decree No. 93 of 1976; Law No. 3 of 1979; Decrees 28 and 29 of 1979; Decree No. 8 of 1980; Law 14 of 1980; Decree 62 of 1980; Decree 203 of 1982; Decree 102 of 1983; Decree No. 120 of 1998; Decrees No. 202 and No. 230 of 1998. Public Registry is subdivided into: (1) Registry of Property; (2) Registry of Mortgages; (3) Registry of Persons; (4) Microfilm Section (Mercantile) Registry; (5) special section for recording contracts regarding sale of pending fruits and personal property; (6) Interoceanic Region Authority Section (regarding properties from Canal Zone transferred back to Panama). Property Registry is for inscription of real property and any modification upon it. Mortgage Registry is for recording of mortgages on real property. Registry of Persons is subdivided into Civil and Mercantile; Civil Division is to record powers of attorney and sentences of courts, and Mercantile, articles of incorporation of companies, partnership deeds, etc. Mercantile Registry is to inscribe all acts of commerce that, according to law, must be recorded. All transactions that require inscription must be recorded to give notice to third persons and perfect title.

C. Com. 57 and 58 indicate documents or acts of commerce that must be inscribed.

8.04 SEALS:

Seals are used by the government departments but not by private persons. Public instruments executed before notaries, take the place of sealed instruments. Juridical persons (corporations, churches, etc.) are using the seal, but it has not the effect that it has in the United States. Nevertheless, it is acquiring effect of raising presumption of being executed by party stamping seal.

8.05 VITAL STATISTICS:

Besides Public Registry, there exists Civil Registry for inscription of marriages, births, deaths, etc.

9 EMPLOYMENT

9.01 LABOR RELATIONS:

Relations of employers and employees are regulated by a Labor Code adopted by Cabinet Decree 252 of 1971, which became effective Apr. 2, 1972. Code is divided in two parts: First contains substantive law—very detailed set of rules; and second sets up separate system of labor courts and procedure law.

When a national holiday falls on Sunday, the following Monday will be observed as a holiday with pay. If on Sat., there is no effect.

See category 6 Courts and Legislature, topic 6.01 Courts, subhead Labor Courts.

Minimum wage is provided by law. Amount varies according to nature of services and locality where performed. It is fixed periodically by Executive Decree (see last Executive Decree No. 46 of Dec. 11, 2007.) Special salary regime for seafarers and crew members to Panamanian Cruise Ships has been adopted by Executive Decree No. 4 of Feb. 25, 1994.

Social Security.

Caja de Seguro Social (Social Security Fund) is an autonomous Government Agency which provides sickness, maternity, disability, workmen's compensation, old age benefits, widow's and orphan's pensions and funeral assistance. Social Security coverage is obligatory in certain districts and categories of workers: voluntary insurance with agency is also possible. Employer contributes 12.25% and employee, 8.00% levied on his wages. Cost of workmen's compensation is separate and borne entirely by employer.

Social security quotas must be remitted to Social Security Institute within first 15 days of following month. From Jan. 1, 2010, forward employee social security quota will be equal to 8% of employee's salary, and employer social security quota will be equal to 11.75% of employee's salary.

Labor contracts may be executed for indefinite period, specified period and for specific piece of work.

Probation period of up to three months may be included in labor contracts provided that service demands certain skills or special dexterity.

Work Shifts.

Maximum day shift of work permitted is eight hours and up to 48 hours a week. Maximum night shift is seven hours and for corresponding week up to 42 hours. Surcharges will apply for working overtime. When work shift exceeds above limit, following surcharges will apply:

Overtime during daytime work period: with 25% surcharge upon wage if overtime occurs during daytime work period.

Overtime during nighttime work period: with 50% surcharge upon wages if overtime occurs during nighttime work period; and

Overtime during certain mixed work period: with 75% surcharge upon wages if overtime constitutes prolongation of mixed began during nighttime work period.

Total extra hours permitted per day is three hours and per week nine hours. 75% additional surcharge will apply for work performed after such limits.

Export Processing Zones have special labor regime where fixed surcharge of 25% is applied for overtime regardless of type of shift. Such special regime applies to call centers. This special labor regime also applies to call centers.

Termination of Labor Relationship.

Labor relations may be ended unilaterally by employer within first two years of service by paying indemnification according to scale provided by art. 225 of Labor Code. After two years of service working relationship may only be terminated by invoking dismissal for cause provided by law. If employer does not have cause for dismissal and wishes to terminate labor relationship, employer may offer employee as settlement, payment of indemnification provided for in art. 225 and surcharge of 25% or 50% over said indemnification as per art. 219 of Labor Code, in exchange for his resignation. Another possibility is to sign mutual consent agreement terminating labor relationship by paying above referred indemnification.

Indemnification.

Scale is 3.4 weeks worth of salary for every year of service.

Legal Bonuses.

Thirteen Month Bonus.

Bonus of one month worth of salary must be paid to every employee every year payable in three installments.

Seniority Bonus.

Bonus of one week of salary for every year of service must be paid to every employee at time of termination of working relationship.

Cessation Fund.

For indefinite period contracts, employers must establish trust fund in order to pay employees seniority bonus and indemnification in case of unjustified dismissal or justified resignation. (See art. 37 of Law 44 of Aug. 12, 1995.)

See category 21 Taxation, topic Taxes, subhead Education Tax.

10 ENVIRONMENT

10.01 ENVIRONMENTAL REGULATION:

Law 41 of July 1, 1998 creates environmental authority and establishes basic principles for protection, conservation and restoration of environment. Violating or infringing provisions of Law 41 may be subject to fines up to US$10,000,000 in addition to payment of damages to persons and entities affected by pollution and environmental damage. Civil actions regarding right to healthy environment will be subject to summary proceedings. Executive Decrees No. 57 and 58 of year 2000, establish regulation for several chapters of Law No. 41 concerning Environmental Advising Committees, environmental quality norms and permissible maximum limits. Executive Decree No. 123 of Aug. 14, 2009 contain regulations that apply to environmental impact audits. Articles 22 and 71 of Law No. 41 are regulated by Executive Decree No. 283 of Nov. 21, 2006, and Executive Decree No. 257 of Oct. 17, 2006. Article 16 of Law No. 41 is regulated by Executive Decree No. 314 of Dec. 19, 2006.

Rational environmental strategy to period 2008-2012 was approved by Cabinet Resolution No. 2 of Jan. 23, 2009. Regulations regarding environmental standards for soil are contained in Executive Decree No. 2 of Jan. 14, 2009. Regulations regarding environmental standards against air pollution from fixed emissions are contained in Executive Decree No. 5 of Feb. 4, 2009. Regulations regarding environmental standards against air pollution from motor vehicles are included in Executive Decree No. 38 of June 3, 2009.

In Panama, use of atmospheric and underground waters, as well as use of water from waterways/bodies (rivers, creeks, lakes, oceans, etc.), requires concession or permit from ANAM (National Environmental Authority). Decree Law No. 35 of 1966 establishes general legal provision for use of waters, said Decree Law is regulated by Executive Decree No. 70 of July 27, 1973, which contains provisions related to obtainment of concessions and permits for use of water. There are technical regulations concerning discharge of liquids and mud into water bodies, systems for recollection of liquids; and reutilization of treated water.

Law No. 21 of July 9, 1980 prohibits discharge of any contaminating substances in country's navigable waters and territorial sea. This prohibition extends to all vessels registered in Panama's Ship Registry. Law No. 1 of Feb. 3, 1994 regulates protection, conservation, improvement, investigation and use of country's forests. This law declares of national interest all forest resources in country. Law 24 of 1992 provides for fiscal incentives to reforestation projects. In May 1995 Law No. 24 of same year was adopted to protect wildlife, imposing fines and imprisonment to infringers.

Environmental criminal offenses are included in Law No. 1 of Feb. 3, 1994 and arts. 391–416 of Penal Code, as adopted by Law No. 14 of May 18, 2007. Import of toxic waste is prohibited. (Law No. 8 of June 7, 1991). Law No. 36 of May 17, 1996, regulated by Executive Decree No. 158 of Sept. 18, 1998, establishes that after Dec. 31, 2001, only unleaded gasoline may be sold in Republic of Panama, unless used for aviation purposes.

Following conventions, among others, have been adopted: Agreement for the Conservation of Biodiversity and the Protection of Wildlife Areas in Central America, signed in Managua, Nicaragua in 1992; United Nations Agreement on Climatic Changes, made in New York in 1992; Regional Agreement on Climatic Changes, signed in Guatemala in 1993; Regional Agreement on Transborder Movement of Dangerous Wastes, signed in Panama in 1992; Regional Agreement for the Management and Conservation of Natural Forest Ecosystems and the Development of Forest Plantations, signed in Guatemala in 1993; The International Convention of Tropical Wood, signed in Geneva in 2006. (Law No. 58, Dec. 21, 2007). International Convention about civil responsibility due to contamination by hydrocarbons for vessel fuel. (Law No. 7, Jan. 14, 2009).

See also category 23 Treaties and Conventions, topic 23.01 Treaties.

11 ESTATES AND TRUSTS

11.01 ADMINISTRATION:

See topic 11.05 Executors and Administrators.

11.02 DEATH:

A person may be declared missing after two years have elapsed without his having been heard from, or if the same period has elapsed since the last news concerning him was received, or after five years, if the missing person shall have left some person in charge of his property. Presumption of death may be judicially declared after five years of the disappearance of the missing person or since he was last heard from, or 60 years from his birth. Upon final judgment, estate is probated as testate or intestate, as case may be. Should missing person reappear, or without such reappearance it is proved that he is still alive, he may recover his property in condition in which it may then be, but not products or income. (C. C. 50-60).

Application for death certificate should be made to Director-General del Registro Civil, Panama, Republic of Panama. Fee, including stamp paper, US$4.20. Remittance should be made in Panama funds. See category 8 Documents and Records, topic 8.03 Records, subhead Vital Statistics.

Actions For Death.

There is no separate action for death. If death occurs as result of voluntary homicide, civil action lies against person responsible therefor (Code of Civil Procedure, 1969), and if because of negligence only, then person responsible is liable under general negligence rule (C. C. 1644). Action may be brought only by decedent's spouse or relatives within fourth degree of consanguinity or second degree of affinity. Further, it is not clear if mental suffering can be computed as part of damages.

Brain Death.

As defined in Law 52 of 1995, brain death is "a biological condition that occurs when in an irreversible manner, the functions of the brain stem of a person cease."

11.03 DECEDENTS' ESTATES:

See topics 11.04 Descent and Distribution, 11.05 Executors and Administrators, 11.09 Wills.

See also category 12 Family, topic 12.05 Husband and Wife.

11.04 DESCENT AND DISTRIBUTION:

Law of descent and distribution is contained in C. C. 628-693f, as superseded in part by Constitution adopted in 1972. (Const., arts. 59, 60).

In default of testamentary disposition, the bulk of the estate passes to the following in the order named: (1) descendants in equal parts; (2) ascendants (parents) excluding collaterals, in equal parts, or surviving parent takes entire estate; (3) collaterals in the order prescribed by C. C. 678-684.

Parents have the same obligations to their children, whether born in or out of wedlock, all children are equal in law, and have the same rights of inheritance. Proof of paternity (in case of children born out of wedlock) is regulated by The Family Code.

Adopted children have the same right of inheritance as other children.

Surviving spouse takes an equal portion with descendants and ascendants (parents). In the absence of descendants or parents the estate is divided into three parts; one for the surviving spouse; one for the paternal ascendants; and one for the maternal ascendants.

Escheat.

In the absence of heirs entitled to take, the municipality of the decedent's last domicile takes the entire estate.

Disability to Inherit.

The law enumerates various acts which render the guilty parties incapable of inheriting, such as killing of person from whom the guilty party would inherit, abandonment by children of their duties to their parents, etc.

Acceptance of Inheritance.

In order to be entitled to the inheritance the heir must accept the same. Acceptance may be expressed or implied, and may be unconditional or subject to certain conditions. Those who have not the free management of their property cannot accept or repudiate an inheritance.

In case of unconditional acceptance, the heir is liable for all the debts of the decedent, out of his own property as well as out of the estate which he accepts.

What Law Governs.

The estates of nationals or foreigners located in Panama pass according to the law of Panama even though the decedent is domiciled in a foreign country at the time of death. The right of inheritance is determined by the law of Panama, but a judgment or a decree of a foreign country according to the laws of such country will have legal force in Panama provided it is not in conflict with rights based upon Panama laws.

11.05 EXECUTORS AND ADMINISTRATORS:

The term used in Panama for executor is “albacea” and the law regarding “albaceas” is contained in C. C. 854-873.

A testator may appoint one or more executors. Persons who cannot contract obligations cannot be executors. Executors may be universal or particular. The office is voluntary, but an executor who resigns or declines without reasonable cause loses the legacy or bequest, made in his favor, provided he is not entitled to maintenance.

The office of executor cannot be delegated without express authorization from the testator.

Duties.

The testator may define the duties of the executor, but if he has not done so, then the executor must: (1) Pay the funeral expenses; (2) recognize the legacies; (3) look after the fulfillment of everything ordered by will and defend the will within or without the court; (4) take all steps in benefit of the conservation and custody of the property, with the intervention of the heirs. The executor must conclude his labor within one year from the date of his acceptance or from the date of litigations relating to the will. If the testator wants to extend the time he must so indicate, but in the absence of this indication it is deemed extended for six months more. The heirs and legatees may extend the time for any period, but if the decision is only by a majority, then the extension will be for six months.

Fees of the executor are fixed by the testator, but in the absence of this the court will fix them according to the bulk of the estate and the work involved.

The heirs act as administrators of the estate of a person dying intestate. (C. C. P. 1676).

11.06 FIDUCIARIES:

See topics 11.05 Executors and Administrators, 11.08 Trusts.

11.07 INTESTACY:

See topic 11.04 Descent and Distribution.

11.08 TRUSTS:

Original law of trusts enacted in 1941 has been modified to make it more flexible. Law of trusts is now embodied in Law 1 of Jan. 5, 1984, regulated by Executive Decrees 16 of Oct. 3, 1984 and 213 of Oct. 3, 2000, largely based upon laws of trusts as exist in Anglo-Saxon countries.

Trust may be created upon property of any kind, present or future. Cestui que trust may be settlor himself. Trust must be expressly declared in writing. Verbal, constructive or implied trusts are not valid.

Trust deed must contain, among other things specified in law, following: Complete and clear designation of settlor, trustee and beneficiary; sufficient designation of substitute trustees or beneficiaries, if any; description of property or of estate or portion thereof on which it is created; powers and duties of trustee. Trust deed might further contain such clauses which are not contrary to morals, laws or public order.

Trust inter vivos may be created by public or private deed. Trust mortis causa, by will. It may also be created by private deed, without formalities of will, in event that trustee is person authorized to engage in trust business. Trust is irrevocable unless otherwise expressly provided in trust deed. To affect rights of third parties, deed requires authentication by Public Notary. However, trust on real property situated in Panama must be created by public deed and recorded in Public Register.

Assets of trust shall constitute separate estate from personal assets of trustee for all legal purposes, and cannot be attached or embargoed, except for obligations incurred into or damages caused by performance of trust, or by third parties when property has been transferred or withheld fraudulently and in detriment of their rights.

Designation of one or more nonexistent beneficiaries, or of class of beneficiaries, which are ascertainable, shall be effective provided one or more thereof shall come into existence or be ascertained during life of trust.

In case of revocable trusts, beneficiary and trustee may be replaced. Trustee may resign his office if it is expressly so authorized by trust deed; in absence of express authorization he may resign with judicial approval.

Trust deed may establish limitations to liability of trustee; but such limitations shall not release trustee from losses or damages caused by gross negligence or fraud.

Trustee might be removed by court through summary proceedings in presence of causes defined in law.

Trust is tax exempted when it involves: (1) Property situated abroad; (2) money deposited by natural or juridical persons whose income is not from Panamanian sources or taxable in Panama; or (3) shares of stock or securities of any kind, issued by corporations income whereof is not from Panamanian sources, although such monies, shares of stock or securities are deposited in Republic of Panama.

Executive Decree No. 16 of Oct. 3, 1984 as modified by Executive Decree No. 53 of Dec. 30, 1985, regulates engaging in trust business as regards requirements, granting of license, guarantees, penalties and any other conditions to which trust companies, insurance companies, banks, attorneys and other natural or juridical persons engaged professionally and habitually in this business are subject to.

Regulatory power as to trust business resides in Banking Superintendence. In addition to professional qualifications and experience in trust business, trust companies that engage in trust business in or from Panama must maintain available to Superintendence guarantee of US$250,000, consisting of unencumbered assets kept at all times in Republic of Panama.

Trust companies not exclusively engaged in trust business (such as banks or investments concerns) must maintain separate, over-all functional accounting between trust department and other departments.

No Panamanian company, unless licensed to do trust business, may utilize word “trust” or derivatives thereof in any language, or any other expression, either in their corporate name, corporate purposes, description, business denomination, invoices, letterheads, advertisements, notices or publications, implying that they are engaged in trust business.

Violation of secrecy in connection with trusts is penalized with internment or imprisonment of up to six months and fine of up to US$50,000.

Trust deed may establish governing law as either Panamanian or foreign.

Trust companies are required to comply with “know your customer” and “due diligence” policies imposed by Law No. 42 (of Oct. 2, 2000) and, also, to follow process of reporting suspicious transactions to Financial Analysis Unit. (See category 3 Business Regulation and Commerce, topic Anti-money Laundering.)

11.09 WILLS:

The law regarding wills is contained in C. C. 694-853.

Any competent person may dispose of all of his or her estate freely by will, provided enough is left for the support and maintenance of children legally entitled to it until they attain majority or for life if they are crippled, and for the support and maintenance of legitimate parents, illegitimate mother and surviving spouse while they are in need of it.

Wills may be made by all persons, except those under the age of puberty, mentally incapacitated, civilly dead or unable to express their wills clearly. Wills are opened and published by the court of the last domicile of the testator.

Forms.

Wills, with respect to form, may be either common or special. The common may be holographic, open or sealed. Special wills may be maritime, military and foreign wills. The open will must be made before a notary public with all the formalities of the law. The sealed will may be made by any person ordered by the testator.

Witnesses.

The following cannot be witnesses to wills: (1) Minors; (2) persons not domiciled in the place making the will; (3) blind, deaf or dumb persons; (4) persons who do not understand the language of the testator; (5) persons mentally incapacitated; (6) persons convicted of forgery or perjury, and those deprived of civil rights; (7) clerks, employees or relatives of the notary; (8) in open wills the legatees or heirs. Three witnesses are needed.

Holographic wills can only be made by persons of legal age and to be valid must be written and signed in the testator's own handwriting, with the expression of year, month and day.

Open wills must be executed before a notary public with three witnesses. The will must be read aloud once, and in case of a blind testator twice, to the testator and the witnesses.

Closed or sealed wills are privately prepared by the testator and enclosed in a sealed envelope which the testator must, in the presence of a notary and three witnesses, declare to contain his will. On the envelope the notary makes a minute of such declaration and the same must be signed by all the parties. Blind persons are incapable of making closed wills.

Maritime wills are those made on board vessels. Maritime wills may be open or closed. If the vessel is a war vessel the will must be made before the commander and two witnesses. If executed on a merchant vessel the will must be made before the captain and two witnesses. Upon arrival in port, a copy of the will must be delivered to the diplomatic or consular representatives.

Military wills are those made by soldiers or police or any officer of either force while engaged in war or in commission. During battle a verbal will may be made in the presence of two witnesses.

Revocation.

Wills properly executed and rendered invalid by revocation by the testator. The revocation may be total or partial but no revocation can have effect unless made with the formalities required to make a will. A subsequent will revokes the prior one, if the testator does not express his will that the latter may remain in force in whole or in part.

Foreign Wills.

Citizens of Panama may make wills in a foreign country if they act according to the formalities of local law; and may in any case execute a holographic will. Foreign wills are valid in Panama if executed according to the law of the country where made.

12 FAMILY

12.01 ADOPTION:

Law No. 61 of Aug. 12, 2008, on Adoptions Generally, establishes that any person of legal age (18 years) may adopt another provided that there is difference between them of at least 18 years, but no more than 45 years. Minors under 18 years of age may be adopted, regardless of nationality of person or persons adopting. In case of joint adoptions, persons adopting must prove uninterrupted functional living together for minimum two year period. Existence of descendants of person adopting does not preclude adoption.

Legal family tie arising from adoption is final, indivisible, not renounceable and irrevocable.

Adoption: (1) gives adopted rights of legitimate child; (2) dissolves authority of natural parents; (3) makes adopted heir of adopter; and (4) entitles adopted to use adopter's surname.

12.02 COMMUNITY PROPERTY:

See topic 12.05 Husband and Wife.

12.03 DESERTION:

See topic 12.04 Divorce.

12.04 DIVORCE:

The law of divorce is contained in Family Code 212-223.

Grounds.

Divorce may be granted for following causes: (1) attempt against life of spouse, their children or their stepchildren; (2) cruel treatment, psychic or physical, if it makes domestic peace and tranquility impossible; (3) out-of-wedlock sexual relationship; (4) attempt of one spouse to prostitute other; (5) attempt of husband or wife to corrupt or prostitute their children, or their stepchildren, or connivance for their corruption or prostitution; (6) absolute abandonment of duties of spouse and parent; (7) habitual or unjustified use of drugs or sedative substances; (8) habitual drunkenness; (9) actual separation for more than two years; (10) mutual consent, in following cases: (a) when complaint is filed more than two years from date of marriage, (c) when parties ratify their petition six months after date of presentation or filing in court thereof.

Domicile.

To obtain a divorce it is necessary to be domiciled in Panama. To acquire domicile, foreigners must comply with immigration laws and obtain necessary authorization from Ministry of Government and Justice.

Time to Sue.

An action for divorce on the grounds of: (a) causes (1), (2), (3), (4), (5), (7) and (8) must be brought within one year from happening of act furnishing ground for divorce; (b) cause (6) must be brought within two years from happening of act furnishing ground for divorce.

Remarriage.

Husband may remarry immediately after recording the decree of divorce in the Civil Registry. Wife may remarry immediately after recording of decree of divorce in Civil Registry, prior to scientific test certifying that she is not pregnant. Otherwise, wife may not remarry until 300 days after date of separation as determined by court, provided that divorce has by then been recorded in Civil Registry.

Decree of separation does not dissolve the marriage bond, but otherwise it has the same effect as a divorce except that the parties cannot remarry. See topic 12.05 Husband and Wife.

12.05 HUSBAND AND WIFE:

The law relating to husband and wife is in Family Code 77-197.

The husband and wife are obliged to live together, be faithful and protect and respect each other. Maintenance must be furnished by husband and wife in proportion to means of each one. Spouses must decide which will be their domicile but in absence of agreement marital domicile will be that of husband or of wife according to circumstances in each particular case.

Married woman may engage in commerce without permit from her husband.

The wife needs no authority from the husband to appear in court. Marriage settlement may be altered any time during the marital relations.

Unless otherwise provided in prenuptial agreement, relationship between husband and wife on economic matters is regulated by Family Code for couples married on or after Jan. 3, 1995 when Family Code came into force. Such relationship between husband and wife married before date on which Family Code became effective is governed by pertinent laws and regulations that were in force on Jan. 2, 1995.

Separate Property.

Unless otherwise provided in a prenuptial agreement, each spouse holds his or her own property and can dispose of same in the manner he or she wishes. The following property belongs to each spouse upon the dissolution of the marriage: (1) Property brought into the marriage; (2) the property bought with their own separate funds set aside in the marriage settlement; (3) should there be no marriage settlement, property bought for value by one of the spouses, presuming that the acquisition has been made from the private funds of said spouse; (4) property inherited; (5) property acquired before the marriage; (6) the real property which has replaced other property belonging to a spouse according to marriage settlement.

Community Property.

All other property is considered as community property and is distributed equally on dissolution of the marriage. The marriage may also be considered as a partnership if it is so stipulated in the marriage settlement. The following is partnership or community property: (1) Property acquired with community funds; (2) property acquired by industry, labor, wages or salary of either spouse; (3) income, rents or interest received from separate or community property; (4) all property not identified as belonging to one of spouses; (5) businesses founded with community funds. (F.C. 136-150).

Following obligations are charged to partnership property: (1) maintenance of family and education of children of marriage, and of children of either party, if living in same home; (2) acquisition, tenancy and enjoyment of community properties; (3) normal administration of community properties; (4) normal exploitation of business, occupation or profession of their party.

Unless provided in prenuptial agreement, husband and wife, acting jointly, are administrators of community property.

12.06 INFANCY:

Age of majority is 18; minors may be emancipated, but only by marriage. (Law 107 of 1973). Contracts by males under 14 and females under 12 are void and over those ages, if not emancipated, voidable. Voidable contracts may be expressly or tacitly ratified by minors within four years after age of majority. In absence of parents, guardian is appointed having legal representation of minor.

See also topic 12.01 Adoption.

See topic 12.05 Husband and Wife.

12.07 MARRIAGE:

The law relating to marriage is in Family Code Arts. 25-207 and 835.

Our Family Law grants civil effects to all common law marriages, when couple is legally capable to marry, are single and stable for five consecutive years.

A license is required for the performance of a religious marriage.

Prohibited Marriages.

The following conditions are a bar to marriage: (1) fact that male is under 16 or female is under 14 years of age, but marriage will be validated if they live together day after date of attaining majority, without filing complaint for annulment or if female conceives; (2) existing previous marriage. Marriages cannot take place between following: (i) Persons of same sex; (ii) relatives by consanguinity or adoption in direct descending or ascending line, and in collateral line up to second degree; (iii) relatives by affinity in direct descending or ascending line; (iv) person convicted as author or accomplice of murder or attempted murder against one of spouses, with surviving spouse. While proceedings are pending, marriage cannot take place. Marriage is prohibited to: (1) Minors, unless proper consent is given by parent or guardian; (2) women whose marriages have been dissolved, during period of 300 days after date of dissolution as determined by court, except if woman proves, with scientific test, that she is not pregnant; (iv) father or mother having children under paternal dominion without making judicial inventory of property of said children; (v) guardians and their descendants, with their wards, until accounts of guardianship are approved.

Annulment.

Marriages made in violation of any of the above-mentioned conditions and prohibitions can be annulled.

Foreign Marriages.

A marriage in a foreign country, which is valid according to the laws of such country or of Panama is valid in Panama.

13 FOREIGN TRADE AND COMMERCE

13.01 EXCHANGE CONTROL:

See topic 13.03 Foreign Exchange and Foreign Trade.

13.02 EXPORT PROCESSING ZONES:

Law No. 25 of Nov. 30, 1992 adopted series of incentives for creation of industrial export zones.

Some of tax incentives for companies, operating industrial export zone, are following: (a) Exemption from import tax and from tax on transfer of chattels applicable to introduction of machinery, equipment, spare parts and other material necessary for construction and maintenance of export zone. (b) Exemption from real estate tax applicable to land and buildings of export zone. (c) Exemption from income tax applicable to operation of zone during first ten years of operation. Among labor law incentives for companies operating industrial export zone are following: (a) Company may agree to work contract for definitive period of time of up to three years. (b) Company is under no obligation to have collective bargaining agreement during its first four years of operation. (c) Any fluctuation in export market which results in considerable loss of clients on markets will be deemed just cause of economic nature which will allow company to terminate labor relationship, provided prior approval is obtained from Labor Ministry. Executive Decree No. 1-D of Jan. 28, 1994 regulates various aspects of Law 25, 1992. Law-Decree No. 3 of Jan. 7, 1997 establishes Special Integral and Simplified Regime for creation and operation of Export Processing Zones.

13.03 FOREIGN EXCHANGE AND FOREIGN TRADE:

There is no control of foreign exchange. However, as preventive measure to control drug related money-laundering, in fashion similar to U.S. equivalent regulations, banks are required to report each transaction of more than US$10,000, and travellers into Panama are under obligation to report if they carry more than US$10,000 in cash or documents convertible “in cash”.

See category 3 Business Regulation and Commerce, topic Anti-Money Laundering.

13.04 FOREIGN INVESTMENTS:

See category 21 Taxation, topic Investments.

13.05 FOREIGN TRADE ZONE:

Government has established a foreign trade zone (free zone) in City of Colon, where foreign goods may be imported, repacked, finished, or otherwise handled and then re-exported. Space will be rented at standard rates.

Operations within foreign trade zone are free of import and export taxes and all other national or provincial taxes with exception of taxable income derived from export operations, at fixed rate of 15%; but three equal advanced payments are to be made according to combined progressive tariff beginning at US$8,500 and up to US$500,000 for income in excess of US$120,000,000. Advanced payment is not to be made during first year of operations by enterprises to be established in Republic of Panama.

Agents handling merchandise within Free Zones shall pay US$8,500 as advanced tax for income earnings from reexportation of such merchandise, but tax shall be paid at fixed rate of 15% at end of fiscal period.

New Touristic and Multimodal Free Zone was created in District of Barú, Province of Chiriquí, by virtue of Law No. 19 of May 4, 2001.

13.06 INTERNATIONAL TECHNOPARK:

Decree-Law No. 6 of Feb. 10, 1998 created special trade and commercial zone open to new entrepreneurial initiatives engaged in development and application of advanced technologies, promoting innovation and technological development within City of Knowledge.

Special tax incentives and exemptions were established by above-referred Decree-Law.

13.07 OIL FREE ZONES:

See category 21 Taxation, topic 21.13 Tax Incentives.

13.08 PANAMA-PACIFIC SPECIAL ECONOMIC AREA:

Law 41 of July 20, 2004 created Panama-Pacific Special Economic Area.

Legal, fiscal, customs, labor, migration and business system for establishment and operation of Special Economic Zone in former Howard Air Base, located in Pacific Coast of Republic of Panama, named “Panama-Pacific—Special Economic Area” is established, addressed to induce and assure flow and free movement of assets and capitals, for wide variety of activities, in order to attract and promote investments and generation of employments, and to make Republic of Panama more competitive and productive within global economy. Law creates, also, autonomous entity of State named “Agency of the Panama-Pacific—Special Economic Area” with due powers for efficient administration of “Panama-Pacific—Special Economic Area”.

14 HEALTH

14.01 DRUGS AND COSMETICS REGULATION AND CONTROL:

Law No. 1 of Jan. 10, 2001 and Executive Decree No. 178 of July 12, 2001, regulates manufacture, importation, acquisition, distribution, commercialization, information, advertising, registration and quality control of medicines, pharmaceutical specialties, medicinal drugs, controlled substance biological products, vitamins, odontologic, surgical and radiological equipment and products; cosmetics, household pesticides and disinfectants and any other product related to human health within territory of Republic of Panama. Exception is made to tax free zones, when products are to be exported.

Health Authority in charge with execution of Law is National Directorate of Pharmacy and Drugs, within Ministry of Health.

Quality control takes place before and after issuance of sanitary registration. Health Registrations of medicines, medical equipment and drugs are valid for five years. In case of cosmetic and other products, registration has validity of ten years.

Pharmacist is responsible for operation of pharmacy, together with owner thereof.

Pharmacist and physician must offer consumer alternative, therapeutically equivalent medicine. Prescription must include generic name of product, and must be written legibly.

Only products authorized to be sold without prescription (OTC's) may be advertised to general public. Advertising material must be previously authorized by Advertising Committee of the Ministry of Health.

15 IMMIGRATION

15.01 ALIENS:

Under our Constitution, aliens enjoy same civil and commercial rights as citizens of Panama. Their life, honor and property are protected thereby, but may not own land located within 10 kms. from national borders (Const. art. 291) and their right to engage in some commercial activities is limited (Const. arts. 293, 294).

See also categories 13 Foreign Trade and Commerce, topic Foreign Investments; Business Organizations, topic Corporations, subheads Foreign Corporations and Distributors and Sales Agents.

15.02 IMMIGRATION:

Immigration is regulated by Decree Law No. 3 of Feb. 22, 2008, Executive Decree No. 320 of Aug.8, 2008, and Executive Decree No. 26 of Mar. 2, 2009. Among other regulations, and Arts. 10, 17, 20, 24, 67, and 73 of our National Constitution. Decree Law No. 3 creates National Immigration Service and grants series of immigration functions to Panamanian Consulates accredited around world and creates new tariff for diverse immigration formalities.

Decree Law No. 3 creates four categories dealing with purpose of entry of foreigner:

1. Non-resident—is foreigner who occasionally enters country, who has no intention of establishing his residence in it nor to abandon his residence of origin while he remains in Panama, and must rely on his own and adequate economic resources to live, while his permanence lasts and leaves country when authorized period expires;

2. Temporary resident—is foreigner or his dependents who enter country for work, special policies, education, cultural, religious, humanitarian, and family regrouping purposes, and other subcategories, for period of up to six years, except in those cases in which special laws and agreements establish different periods;

3. Permanent resident—is foreigner who enters country for economic and investment reasons, special policies, and demographic, and other subcategories, with intention of establishing in country, according to special policies adopted by State; and

4. Foreigners under Panama's Protection—are refugees, inmates, stateless persons, and persons under provisional humanitarian protection bylaws, whom have entered country on large scale or individually, in search of temporary asylum while they wait to return to their country of origin or their resettlement in third State.

In order to obtain any resident visa that relates to employment within Panamanian territory, foreign employee must obtain work permit from Ministry of Labor. All types of work permits are regulated under Executive Decree No. 17 of May 11, 1999. Under Art. 17 of Labor Code, only 10% of employees—15% in case of technicians or specialized employees—of company or business, may be foreigners.

Section 2a of Executive Decree No. 320 of Aug. 8, 2008, allows retired foreign workers or foreigners receiving monthly pension from government and/or private company, exceeding or equal to US$1,000—plus additional US$250 for each dependent—to apply for Permanent Resident visa.

Next, they may apply for Panamanian citizenship: Foreigners residing in Panama for five consecutive years after obtaining their permanent resident status; foreigners residing in Panama for three consecutive years after obtaining their permanent resident status, if they are married to Panamanian citizen or have children born in Panama, as long as other parent of child is Panamanian; foreigners that are citizens (by birth) of Spain or any other Latin American country, as long as they meet all requirements that Panamanian must overcome in order to become citizen of their countries.

16 INSURANCE

16.01 INSURANCE COMPANIES:

Insurance/Reinsurance/Captives.

Insurance activities were regulated in Republic of Panama solely by provisions of Commercial Code (1917) until 1984 when special regulations entered into effect. More recently, in 1996, newer legislation on insurance, reinsurance and captive companies was enacted, enabling Panama to benefit from modern evolution of industry and, mainly, to adapt it to world-wide liberalization trends.

Most important features of Law No. 59 of July 29, 1996 (Law of Insurance), are: (1) Law applies to insurance companies, insurance companies' administrators, insurance brokers and insurance claim adjusters, each with its own set of requirements. None of them may operate in Panama without previous authorization and license from Superintendence of Insurance and Re-Insurance (SIR); (2) law strengthens regulatory and administrative powers of industry's regulator, which is SIR, seeking to emphasize preventive control and supervision of financial solvency of licensees. SIR, which was created in 1984, is now conceived of as independent government entity outside of ordinary ministerial structure of Executive Branch; it is managed by superintendent and deputy manager. SIR has Insurance Technical Council, which defines policies to be followed by SIR and is composed of ten persons: Commerce Ministry, superintendent, actuary from SIR, director from National Securities Commission, Commerce Ministry legal advisor, two managers of insurance companies, two representatives from insurance brokers; (3) all licenses to operate as insurance company, insurance company administrator, insurance broker or insurance claim adjuster, are granted by SIR; (4) minimum paid-in social capital required to insurance companies is of US$2 million, in cash, maintained in Panama, free of encumbrances; (5) each license must define kind of insurance activities in which licensee may engage in (i.e. life, fire, civil responsibility, theft, bails, etc.); (6) all insurance policies must be approved by SIR before commercial distribution among insured people; (7) tariffs are subject to some equity and technical principles; (8) only licensed persons may sell insurances within Panamanian territory; (9) there are some requirements on reserves, according to kind of insurance engaged in, and on investments in which those reserves may be placed; (10) law imposes some taxes according to premiums charged; (11) law requires presentation of different reports (i.e. financial statements) to SIR, and gives to SIR broad authority to conduct inspections; (12) there are some special provisions on voluntary liquidation and intervention, reorganization, compulsory liquidation of insurance company by SIR; (13) foreign risks premiums are 100%

exempted.

Reinsurance activities are regulated by Law No. 63 of Sept. 19, 1996, and also submitted to control and supervision of SIR and Reinsurance National Commission (RNC).

Insurance company may also accept reinsurance if authorized by RNC.

Law No. 63 establishes various classes of licences, to wit: general licence, to engage in both local and foreign reinsurance; International Licence to exclusively reinsure foreign risks; licence to manage and represent reinsurance businesses carried out by other reinsurance companies, local or foreign; and licence to engage in reinsurance brokerage.

Minimum paid-in capital of US$1 million is required for general licence reinsurance companies, in cash, maintained in Panama, free of encumbrances. Reserve requirements are set forth in detail.

Reinsurance managers must have minimum paid-in capital of US$500,000.

Captives.

Under Law No. 60 of July 29, 1996 licence is granted to captives engaged in insurance and reinsurance of foreign risks as specifically authorized by SIR. Minimum paid-in capital of US$150,000 (or US$250,000, depending on kind of risks licence refers to) is required. Reserves and solvency ratio is also required. 35% of reserves must be invested in Panama. Premiums paid for foreign risks are 100% tax-exempted; income is also exempted. Each licencee must pay to Government annual licence fee in amount of US$2,000. Physical presence in Panama is necessary. However, captives may be managed by independent administrator residing in Panama, if duly licenced by SIR. Administrator must pay US$500 annual licence fee and post US$100,000 bond.

See also category 7 Debtor and Creditor, topic 7.04 Bankruptcy, subhead Other Special Legislations.

17 INTELLECTUAL PROPERTY

17.01 COPYRIGHT:

Copyrights are governed by Law No. 15 of Aug. 8, 1994 and by Decree No. 261 of Oct. 3, 1995. They are granted for life of author and 50 years thereafter. Anonymous or pseudonymous works, as well as software and audiovisual works, are protected for 50 years as of date of publishing. Right to exploitation of copyrights is transferable and transfer must be made in writing. Copyrights may be registered in National Directorate of Copyrights (Ministry of Education). This Directorate may apply administrative sanctions including fines ranging from US$1,000 to US$20,000, and suspension for one year of permit to operate, to copyright infringers. Civil and criminal actions before circuit courts may also be instituted against infringers, who may be punished with up to four years imprisonment plus fines of up to US$20,000. As of May 22, 2008, infringers may be punished with up to six years imprisonment.

Panama has ratified Convention on Literary and Artistic Copyright, 1910; Convention for the Protection of Producers of Phonograms Against Unauthorized Duplication of their Phonograms, 1971; Interamerican Convention on Rights of Author in Literary, Scientific and Artistic Works; Convention Establishing World Intellectual Property Organization; Universal Copyright Convention as Revised in Paris, 1971; Convention Relating to the Distribution of Programme Carrying Signals Transmitted by Satellite, 1974; International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations; 1886 Berne Convention for the Protection of Literary and Artistic Works, as revised in Paris on July 24, 1971 and amended on Sept. 28, 1979.

See also topics 17.02 Patents, Trademarks, Tradenames and Slogans; and category 23 Treaties and Conventions, topic 23.01 Treaties.

17.02 PATENTS:

Law No. 35 of May 10, 1996 and Executive Decree No. 7 of Feb. 17, 1998 provide as follows:

In order to be patentable, invention must be new, result of creative activity and susceptible of industrial use. Utility models must meet only novelty requirement and be susceptible to industrial use. Industrial designs need only to be new. Patents of products and processes are recognized, as well as patents for special use of product or of not evident use thereof. Following, among others, are not deemed inventions: theoretical or scientific principles; discoveries, designs, projects, sketches, economic or business principles or methods; games; software programs per se; data presentation formats, and methods for surgical, therapeutical or diagnostic treatment. Following, among others, are excepted from patentability: vegetable species and animal species and breeds; biological material as it is found in nature; living matter of human body; vegetable varieties and essentially biological cases for obtainment or reproduction of plants, animals or varieties thereof, if they offend morality, integrity or dignity of human beings. Patents of invention shall have duration of 20 years from date application is filed. Registration of utility models shall have duration of ten years, not renewable, running from date application is filed. Registration of industrial designs shall have duration of ten years, running from date of deposit, renewable for five additional years. Industrial designs enjoy automatic protection for two years from first disclosure in Panama, without necessity of registration.

Documents required in order that number and date of deposit be assigned to patent application are: (a) Application setting forth name and address of petitioner, name of inventor and title of invention; (b) description of invention; (c) claims; (d) drawings (if applicable); (e) summary and (f) payment of tax and filing fees. Power of Attorney and certificate of existence of corporation may be filed at later date. Priority may be claimed, based on Paris Convention. Certified copy of previous application must be filed within six months following filing of application in Panama. Fourteen months after deposit, petitioner must request Industrial Property Office to render report on state-of-art, for which purpose it may submit reports prepared by national or international organisms. Eighteen months after deposit, and of examination as to form, patent application shall be published in Official Bulletin. After report of state of art is rendered, patent application is published, and any person may file objections, within period of two months. Industrial Property Office shall grant patent applied for. Nevertheless, Industrial Property Office may deny patent if subject matter thereof lacks novelty. Law does not contemplate for figure of compulsory licenses. Licenses are voluntary, and must be recorded, in order to be effective against third parties.

Law No. 41 of July 13, 1995 approved Paris Convention for the Protection of Industrial Property.

Vegetables Varieties.

Law No. 23 of July 15, 1997 recognises protection of vegetables varieties in Panama. This law is based on rules of International Union for the Protection of Vegetables Securing (UPOV).

Obtainer's right is granted if variety is new, different, homogeneous and stable. It extends to all botanical species and types and applies in general to whole plant, including flowers, fruits, seeds and any other part that could be used as reproduction or propagation material.

Duration of obtainer's right is 20 years from date of concession of title of protection.

Protection for vines, forest trees, fruit bearing trees and ornamental trees is of 25 years.

By Law No. 12 of May 3, 1999 Republic of Panama has adhered to International Agreement for the Protection for the Vegetable Securing (CIPOV) of Dec. 2, 1961, revised in Geneva on Nov. 10, 1972 and on Oct. 23, 1978.

See topics 17.01 Copyright; 17.03 Trademarks, Tradenames and Slogans.

17.03 TRADEMARKS, TRADENAMES AND SLOGANS:

Product, service, collective and guaranty marks, indications and denominations of origin, business or commercial names and slogans are governed by Law No. 35 of May 10, 1996 and Executive Decree No. 7 of Feb. 17, 1998. Applicant may be national or foreign. Period of registration is ten years and registration may be renewed indefinitely for equal periods at expiration of term. Famous and notorious marks are also protected.

Applications for registration of marks do not need to be based on foreign registrations or pending applications, and must be accompanied by following documents: (1) Legalized power-of-attorney with notarial acknowledgment as to existence and legal representation of applicant corporation, or with certificate of existence and good standing issued by competent authority of applicant's country; (2) affidavit of use of trademark, tradename or slogan; (3) six samples of trademark or drawing thereof; (4) receipt showing payment of government registration and publication fees; (5) priority claim, if any (Panama has approved Paris Convention). If priority claim based on Paris Convention is made, certified and legalized copy of prior application must be filed within six months of filing of Panamanian application. Same documents are required for applications for registration of slogans. Applications for collective and guaranty marks must also be accompanied by their regulations of use. Law contemplates 19 prohibitions for registration of mark. Application may be filed without power-of-attorney by posting refundable US$100 bond, but power-of-attorney must be filed within next two months after date of filing of application official. Fee for registration or for renewal is US$100, plus 20% surcharge fee. It is necessary to file as many applications as classes to be protected with mark. Applications are published on Industrial Property Bulletin and oppositions may be instituted against them within following two months.

In case of civil action, infringement of Industrial Property Rights is punished with fines ranging from US$10,000 to US$200,000, together with suspension for three months of commercial or industrial license if infringer operates in Panama (or operating permit for companies established in Colon Free Zone or other free trade or export processing zones), seizure of infringing goods and of machinery used for infringement and with payment of compensation for damages caused. If infringer operates in Colon Free Zone or in any other free trade or export processing zones, fine will be equivalent to 25% of monthly commercial movement of company, but will never be less than US$75,000.

Criminal action may also be instituted and, if found guilty, infringer may be punished with up to six years imprisonment.

Any person that receives deposits, trades, exchanges or transfers money, securities, goods or any financial instruments knowing that they originated from Intellectual Property Crimes, may be punished with up to 12 years imprisonment.

Executive Decree No. 123 of Nov. 26, 1996 and Executive Decree No. 79 of Aug. 1, 1997, allow Customs and Free Trade Zones authorities to retain and seize counterfeit and infringing goods in transit. They also allow for registration of product and service marks and copyrights in both Customs Office and Free Trade Zones offices.

Opposition, Cancellation, Nullity and Infringement Proceedings will be prosecuted before Circuit Courts, Superior Courts and Supreme Court, in accordance with rules of procedure established by Law No. 35 of May 10, 1996 and by Judicial Code.

Panama is member of General Interamerican Convention for Trademark and Commercial Protection (Law No. 64 of Dec. 28, 1934); of Convention establishing the World Intellectual Property Organization (Law No. 3 of Nov. 9, 1982); of Paris Convention (Law No. 41 of July 13, 1995) and of World Trade Organization (Law No. 23 of July 15, 1997).

Law No. 20 of June 26, 2000 has created special intellectual property system on collective rights of Indian people, for protection and defense of their cultural identity and their traditional knowledge. This law protects rights over traditional Indian dresses, musical instruments, music, dances, oral and written expressions, working instruments and traditional art and crafts, rights that may be registered before Department Collective Rights and Folklore Expressions of the General Directorate of Industrial Property, only by traditional Indian authorities. Provisions on collective and guaranty marks included in Law No. 35 of 1996, will be applicable to this special system.

Each Indian group may adopt its rules on use and marketing of their art and other cultural expressions and these rules must be registered before General Directorate of Industrial Property or before National Directorate of Copyrights.

This law prohibits importation of imitations of Indian dresses, musical instruments and artistic works. In cases not contemplated by customs and industrial property laws, infringement of Law No. 20 carries fines between US$1,000 and US$5,000, in addition to seizure and destruction of infringing goods. As of May 22, 2008, infringers of collective rights of Indian people may be punished with up to six years imprisonment.

See topics 17.01 Copyright and 17.02 Patents.

18 MINERAL, WATER AND FISHING RIGHTS

18.01 MINES AND MINERALS:

(Decree Law 23 of 1963 as am'd by Cabinet Decree of Dec. 29, 1970, Laws 70 and 89 of 1973, Law 9 of 1974, Law 33 of 1984, Law 3 of 1988 and Law No. 32 of 1996).

Mines and mineral concessions are governed by Mining Code. (Decree Law 23 of 1963). State is considered owner of all mines, but private persons may obtain right to work them. Precious stones and metals on surface in open lands belong to first possessor. All persons except foreign states, certain governmental officials and incapacitated persons, may obtain mining concessions. Mines can be encumbered and transmitted like other real property, subject to provisions of Mining Code. Mining concessions expire by termination of period thereof, abandonment or failure to pay taxes, but right of person is not terminated until it be so declared by competent authority.

Law 109 of 1973, amended by Law 32 of 1996, establishes provisions applicable to concessions for exploration and exploitation of nonmetallic minerals.

Taxes, Royalties and Rentals.

The Mining Code provides for the payment of a surface tax, surface rentals and royalties. Surface tax and surface rentals are paid annually and in advance according to a tariff based on the class of minerals and the number of years of the concessions. The royalties are paid quarterly on a percentage basis according to the class of minerals.

19 MORTGAGES

19.01 CHATTEL MORTGAGES:

According to art. 1567 of Civil Code, chattel mortgages are permitted only on chattels that can be individualized and clearly identified and described.

Chattel mortgages are governed in more detail by Decree Law No. 2 of May 24, 1955, which additionally requires that chattels have not been incorporated into any real property and have not been previously encumbered. Contracts whose principal obligation is for amount of US$4,000 or more, must be set forth in public document. Contracts whose principal obligation is for amount less than above, may be executed in private document but signature of parties must be witnessed before notary public who must certify document. In any case, for document to be effective against third parties must be registered in Public Registry.

Decree-Law No. 2 also provides some regulations on civil procedure.

19.02 COLLATERAL SECURITY:

See category 7 Debtor and Creditor, topic 7.13 Pledges.

19.03 MORTGAGES OF PERSONAL PROPERTY:

See topic 19.01 Chattel Mortgages.

19.04 MORTGAGES OF REAL PROPERTY:

Mortgages must be executed before a notary public in form of public instrument and recorded in Public Registry. Their date and effect are counted only from date of recording same. Mortgages made in a foreign country on property in Panama are valid if recorded in Public Registry. Each party to mortgage must appear in person before notary public. Instrument must describe property in detail.

The unrestricted right to mortgage property extends only to real property and real property rights. The following property, with restrictions may be mortgaged: (1) A building on the soil of another, if done without prejudice to the owner of the land; (2) the right to receive usufruct if the mortgage is cancelled when the thing, cause of the usufruct, terminates without will of the owner, but upon an involuntary event; (3) property already mortgaged if the mortgage is subject to prior mortgagors' rights; (4) railroads, tramways, channels, electric plants or any public utility if they are attached to land; (5) property belonging to wards if done according to the law; (6) property in litigation if the complaint has been previously recorded. The following property cannot be mortgaged: (1) Future rents and crops, if separated from the land producing the same; (2) personal property placed in buildings if not mortgaged with the building; (3) national and municipal obligations or obligations or shares of banks or companies of any nature; (4) real rights, to be acquired in the future, if they are not properly inscribed; (5) servitudes or easements if not mortgaged with dominant property; (6) use of dwelling; (7) mines without final title of concession, in spite of the fact that they are in own land. (C. C. 1566-1621).

Mortgage of vessels is governed by Code of Commerce, arts. 1512-1526.

20 PROPERTY

20.01 ABSENTEES:

See category 11 Estates and Trusts, topic 11.02 Death.

20.02 CONVEYANCES:

See topic 20.04 Deeds.

20.03 CURTESY:

The estate by curtesy does not exist in Panama. For rights of surviving husband see category 11 Estates and Trusts, topic 11.04 Descent and Distribution.

20.04 DEEDS:

A transfer of title to or any interest in real property must be by deed, called public instrument, which must contain a true statement of the consideration (not nominal), a true description of the property by bounds and nature of same, and if a building is conveyed the material of which constructed, the flights and the area in metric measurements. Both the grantor and the grantee must sign at the same time, with two witnesses and before a notary public. If one party is absent he must be represented by an attorney in fact. The signing of the deed takes place after the notary has read it to the parties in the presence of the witnesses. The original becomes part of the notary's protocol, and the parties receive certified copies, which must be accepted in place of the original by any court or authority. Real property duly recorded may be described by reference only to volume, folio and number of the Real Property Record.

In order that third persons may be bound to take notice of the transfer of real property rights, the deed must be recorded in the Public Registry.

The transfer of certain personal property rights is also made by deed with the same formalities.

20.05 DOWER:

There is no dower right in Panama. For rights of surviving wife see category 11 Estates and Trusts, topic 11.04 Descent and Distribution. See also category 12 Family, topic 12.05 Husband and Wife.

20.06 ESCHEAT:

See category 11 Estates and Trusts, topic 11.04 Descent and Distribution. See also category 12 Family, topic 12.05 Husband and Wife.

20.07 PERPETUITIES:

See category 11 Estates and Trusts, topic 11.08 Trusts.

20.08 REAL PROPERTY:

(C. C. 324-44). Practically the same distinction exists between real and personal property as in the United States. The things considered as real property are the following: (1) Land, buildings, roads and all sorts of constructions attached to the soil; (2) plants, trees and pending fruits while attached to the land; (3) everything permanently attached to the real property so that it cannot be separated without breaking or deterioration; (4) statues, paintings or other objects of use or ornament placed in such manner as to reveal the intention to make them a permanent part of the realty; (5) machinery, containers, instruments and tools required by the owner of the property for the industry or manufacture carried on therein; (6) beehives, dovecotes, fishponds and similar objects if attached to the property in a permanent manner; (7) fertilizer on land where it is to be used; (8) mines and quarries while the materials remain attached to the deposit; (9) dikes and floating constructions destined by reason of their object to remain at a fixed point of a body of water; (10) administrative concessions for public works, easements and other real rights on immovable property.

The owner of real property owns the surface and subsoil and whatever exists thereunder subject to easements and to the provisions of the mining laws, the law of waters and the police regulations.

Condominiums are permitted by Law No. 13 of Apr. 28, 1993, amended by Law 39 of May 8, 2002, which superseded all prior provisions on Horizontal Property.

21 TAXATION

21.01 ADMINISTRATION:

The tax laws are found in the Fiscal Code of 1956 and amendments thereof.

21.02 ALCOHOL, BEVERAGES AND TOBACCO TAXES:

Carbonated Drinks Tax.

Tax established on sale of carbonated drinks and on syrups and concentrates utilized in production of carbonated drinks.

Cigarette Tax.

Tax is levied on sales of cigarettes based on percentage of sales price to consumer.

Beer Tax.

Tax per liter is levied on sales of beer.

Liquor Tax.

Taxes are levied on sales of any potable liquids containing alcohol, amount being based on alcoholic content of beverages.

21.03 BUSINESS TAXES:

Notice of Operation tax is imposed on net worth at flat rate of 2%; maximum tax is US$40,000. See category 3 Business Regulation and Commerce, topic 3.11 Licenses, Business and Professional.

21.04 CORPORATE TAXES:

All Panama corporations must pay US$300 annual franchise tax.

Corporations organized during first semester of each calendar year (Jan. through June) must pay franchise tax no later than July 15 every year. Corporations organized during second semester of each calendar year (July through Dec.) must pay franchise tax no later than Jan. 15 every year.

21.05 EMPLOYMENT TAXES:

Income Tax.

In accordance with Art. 734 of Fiscal Code, employer is obliged to withhold from its employees' salaries income tax deriving from payment of such salaries. Amounts deducted must be remitted to Internal Revenue Service within first 15 days of following month.

Social Security Quota.

Employer is also obliged to withhold from its employees' salaries, employee social security quota which is equal to 8% of employee's salary. Employer must pay employer social security quota which is equal to 12.25% of employee's salary.

Social security quotas must be remitted to Social Security Institute within first 15 days of following month.

Education Tax.

Employer is also obliged to withhold from its employees' salaries, employee quota of education tax which is equal to 1.25% of employee's salary. Employer must pay employer quota of education tax which is equal to 1.50% of employee's salary. Education tax quotas must be remitted to Internal Revenue Service within first 15 days of following month.

Professional Risk Insurance.

Employer must also pay professional risk insurance payed on amount of its employees' salaries, according to table approved by Social Security Institute. For construction activity, said amount is between 4.34% and 7% of employees' salaries.

21.06 ESTATE TAX:

Law No. 22 of Dec. 30, 1985 eliminated estate tax.

21.07 GASOLINE AND SPECIAL FUELS TAXES:

Gasoline Tax.

There is an excise tax on refining and use of all motor fuel.

21.08 GIFT TAX:

Law No. 61 of Dec. 26, 2002 eliminated gift tax.

21.09 INCOME TAX:

Income tax is imposed on income from any source within Republic of Panama. Income tax is paid on progressive percentage scale up to maximum of 27% on any income of natural persons in excess of US$30,000. No tax is paid on annual income of natural person which does not exceed US$9,500. In case of natural person whose only source of income is salary by reason of labor relation, no tax is paid on annual income that does not exceed US$10,400. General deduction of US$800 is allowed to each person; and of US$1,600 on joint tax return of husband and wife. There is additional deduction of US$250 for each person that is economically dependent of taxpayer.

There is flat income tax rate for corporations of 30% of highest amount between: (a) Net taxable income obtained by subtracting from taxable income costs and deductible expenses; or (b) net taxable income obtained by subtracting from taxable income amount equal to 95.33% of said income.

Dividends distributed by corporations deriving income from activities within Republic of Panama pay 10% tax which is withheld at source. Branches of foreign juridical persons must withhold 10% on their local taxable income, after deducting therefrom income tax payable in Panama. When shares are issued to bearer, then 20% tax is applied and also withheld from source.

Following incomes are not considered as from sources in Panama and, hence, not subject to the tax: (a) income derived by a Panama office from invoicing at a higher price merchandise moving exclusively between foreign ports; (b) income of the Panama office from managing foreign operations; (c) dividends paid out of income not produced within the territory of

Panama.

Exemptions.

Certain kinds of income are not subject to tax, more important being interest on Government bonds, on savings accounts and time deposits with banks operating within and outside Republic.

Capital Gain Tax.

There is no Capital Gain Tax as such; but profits obtained in sale of bonds, stocks, or other securities are subject to income tax, unless securities are registered in National Exchange Commission and sale is effected through stock exchange. Gains in sale of real estate are considered income, but computed on separate basis.

21.10 PROPERTY TAXES:

Real Estate.

Scale (tariff) of taxes on real property is as follows: (a) 0.70% on any amount exceeding US$30,000 on assessed value of property to be taxed and up to US$50,000; (b) 0.90% on assessed value in excess of US$50,000 up to US$75,000; (c) 1% on assessed value over and above US$75,000. (Art. 766-A of Fiscal Code).

For purpose of taxation, rural real estate is valued at minimum of US$30 per hectare. (Law 63 of 1961).

21.11 SALES AND SERVICE TAX:

5% sales tax on transfer of ownership, lease and use of corporal movable property, including importation of such goods. Among items exempted are transfers of goods mortis causa, donations; transfers in marriage settlement, contributions of partition of community property; transfer of negotiable instruments and stock certificates; sales made by farmers, poultrymen, cattle raisers of their respective products, or of similar products made in their natural state; export and re-export of goods; transfer of movable property within Panama free zones; operations affecting corporeal movable property within customs and storage deposits ownership of which is transferred by endorsement of documents; transfer of soft drinks already taxed; import and transfer of fuel and oil.

5% service tax on provision of services by merchants, industrialists, professionals, lessors of goods and providers of service in general, with exception of services provided by reason of labor relation.

21.12 STAMP TAX:

Stamp taxes are imposed on drafts, checks, receipts, accounts and acknowledgments of indebtedness. Legal business in administrative branch of government must be conducted on legal stamped paper. (Fiscal Code Art. 946, et seq.).

Among such taxes are the following:

US10¢ for each US$100 or fraction thereof of amount involved on action, contract, document or obligation for more than US$10 not specially taxed and which relates to any matter of business subject to jurisdiction of the Republic. Same rate on receipts covering demandable obligations and not covered by any other provision of the law.

US50¢ on each set of copies of bills of lading, consular invoices and declarations executed in the Republic covering merchandise for foreign ports.

Declarations for imports must bear a US$1 stamp if value of merchandise imported is US$10 or more. (Law 66 of 1961).

US$10 on concession for exploitation of any kind of national or municipal properties, unless a certain value is specified, in which case tax is computed according to value.

US$10 on proposal submitted to public powers for construction or repair of railways, ports, canals or other means of communications.

US$10 on certificate or passport issued to foreigner for departure from the country.

US$5 on certificate issued by Panamanian consular employee or diplomatic agent abroad.

US$2 on each sheet of freight manifests, ships' crews and mess lists, customs declarations, requests for permission to discharge, pratiques and other documents which must be furnished in ports of the Republic for ships engaged in foreign commerce.

US$2 on first authentication of signature of national official, and US$5 in case of a foreign official on any document.

US$2 on any document which does not or cannot, on account of its nature, state a specific amount, unless otherwise taxed. On tickets for travelling abroad by air US$1 per coupon; by sea US$4.

US20¢ on clearance for ships or airplanes to depart.

US1¢ for each US$100 or fraction thereof of amount of draft drawn and payable outside the Republic and negotiated in the Republic.

US50¢ plus 1% of total value on check, order for payment, draft or other document for US$50 or more issued by a resident within the jurisdiction of the Republic against an institution in the Republic but not within its jurisdiction.

US10¢ on all checks.

Stamp taxes are also imposed on foreign made perfumes, soaps, etc.

Law 1 of 1985 provides for stamp paper, US$4 per folio. In addition, most documents and petitions must bear US5¢ stamp.

Decree Law No. 1 (of July 8, 1999) exonerates stamp tax of all documents and securities transactions regulated by said Decree Law.

21.13 TAX INCENTIVES:

Important incentives are also granted for investments in agricultural sector, including cattle, most farming investments and for agricultural exports. (Law No. 2 of Mar. 20, 1986).

Special regime has been established for creation and operation of Export Processing Zones. (Law 25 of 1992).

Important incentives are also granted to reforestation activity. (Law No. 24 of Nov. 23, 1992). *Note:* These incentives will be in force until Dec. 31, 2006. Exception is made for natural or juridical persons that on Dec. 27, 2002 were registered in Forestry Register of the National Environmental Authority. These persons can continue to enjoy benefits of tax incentives for up to 25 years from date of respective registration in registry.

Special regime has been created for operation of Oil Free Zones. (Decree No. 29 of July 19, 1992). In connection with this activity following regulations have been adopted: Cabinet Decree No. 38, 1992; Cabinet Decree No. 4, 1993; Cabinet Decree No. 14, 1993 and Decree No. 26, 1993.

Special incentives have been created by Law No. 8 of June 14, 1994 whereby tourism activities are promoted in Republic of Panama. This law has been regulated by Executive Decree No. 73 of Apr. 8, 1995.

Special tax regime was established for International Technopark. See category 13 Foreign Trade and Commerce, topic 13.06 International Technopark.

Important incentives have been granted to companies engaged in operation of centers for commercial calls ("call centers"). (Law No. 54 of 2001).

21.14 TRANSPORTATION:

Taxes on Vessels Enrolled under the Panama Flag.

See category 22 Transportation, topic 22.04 Shipping.

22 TRANSPORTATION

22.01 AIRCRAFT:

National aircraft must be registered and owner must be citizen of Panama; if owner is juridic person and aircraft is to be used within Panama for cargo and passenger transport 60% of capital must be owned by, and management must be controlled by citizens of Panama. In cases of aircraft in international airline services under flag of Panama, 51% of capital must be owned by citizens of Panama. (Decree-Law 19 of Aug. 8, 1963).

Panama has ratified Convention of Chicago of 1944 (Law 52 of 1959) and Amendment Protocols of New York of 1971 (Cabinet Decree 121 of 1971) and of Vienna of 1971 (Cabinet Decree 28 of 1972) and of Montreal of 1980 (Law 16 of 1981) and has ratified Conventions (Air Piracy) of The Hague of 1970 (Cabinet Decree 13 of 1972) and of Montreal of 1971 (Cabinet Decree 59 of 1972) and has bilateral agreements with Belgium, Bolivia, Colombia, Cuba, Mexico, Switzerland, U.K., U.S.A. and Venezuela. Aircraft flying through air space of Panama must hold proper certificates and documents of home country.

Civil aviation matters are entirely regulated by Law No. 21 of Jan. 29, 2003 and same subrogates Decree Law No. 19 of 1963.

By Law No. 22 of Jan. 29, 2003, Civil Aviation Authority of the Republic of Panama was created. Law No. 23 of Jan. 29, 2003 establishes framework for regulation and management of national airports or aerodromes. This Law was regulated by Executive Decree No. 38 of May 19, 2003. In addition, by Resolution No. 001-JD of Nov. 17, 2003, were established procedures and other mechanisms for Public Contracts relating aeronautic airport services and nonaeronautic services.

Civil Aviation Regulations were adopted by Resolution No. 111-JD of Nov. 16, 1996 in accordance with International Agreements subscribed by Federal Aviation Administration (FAA) and Organización de Aviación Civil International (OACI). Resolution No. 111-JD was updated by means of Resolution 033-JD of Feb. 28, 1997 and added by Resolution 215-JD of Sept. 24, 2000, which regulates aviation schools. In addition, by Resolution No. 079-JD of June 18, 2002, air navigation manuals were approved, and afterwards modified by Resolution 095-JD of June 27, 2002 and Resolution 002-JD of Feb. 2, 2004.

Panama adopted Protocol Complementary to the Montreal Convention on Air Piracy by Law No. 6 of 1996, and approved Montreal Convention of 1991 Marking Explosive Plastics for Detection Purposes. National Airport Security Program (AVSEC) was adopted by Resolution No. 060-JD issued on Apr. 9, 1996 by Civil Aeronautic Department. Regulations for construction and operation of airports within Republic of Panama are contained in Resolution No. 020-S.A.-96 dated Apr. 15, 1996. Technical and legal information required is listed in Resolution No. 019-JD of Feb. 28, 1997.

22.02 AUTOMOBILES:

See topic 22.03 Motor Vehicles.

22.03 MOTOR VEHICLES:

There is a national license tax collected by the municipalities. Rules and regulations for the operation of vehicles are issued by the President through the Ministry of Government.

Tourist automobiles are exempted from license requirements for a period not exceeding 90 days from date of arrival but vehicle must be registered with customs office.

Land public transportation is governed by Law No. 14 of May 26, 1993, as amended by Law No. 34 of 1999 (by which there is created Authority of the Traffic and Terrestrial Transport). Traffic of Motor Vehicles is regulated by Executive Decree No. 160 of June 7, 1993, as amended by Executive Decree No. 116 of June 3, 1997 and by Executive Decree No. 17 of Jan. 23, 1998, and regulated by Resolution No. AL-36 of Mar. 23, 2004. Violations of traffic rules and responsibility for traffic accidents, will be prosecuted before special courts.

22.04 SHIPPING:

Principal features of maritime law and commerce are covered by Law No. 55 of Aug. 6, 2008, which entirely repealed Book II of the Code of Commerce of Panama on Maritime Commerce. Law No. 55 of 2008, in force since Aug. 7, 2008 (Official Gazette No. 26,100) covers all matters relating to ownership and transfer of vessels, priority of liens thereon, rights and obligations of officers and crew, maritime contracts, bills of lading, marine insurance, average collision and shipwrecks. Limitation of liability of shipowners is governed by Law No. 8 of Mar. 30, 1982, as amended by Law No. 11 of 1986 and Law No. 12 of 2009, Arts. 576-616, patterned after London Convention, 1976, on Limitation of Liabilities of Maritime Claims. Rights and obligations of officers and crew are also established in Decree Law No. 7 of 1998. Law No. 57 of Aug. 6, 2008 entirely regulates procedure for registration of vessels under Panama Flag.

Maritime laws of Panama are framed on old European laws, but are very favorable to steamship companies. No fixed schedule of wages or food is provided; Lloyd's and other ship surveyor certificate, including official annual inspection certificate, is accepted by Government. Annual tax is 10¢ per net registered ton. In addition there are following annual payments that must be made and which vary depending on size and type of vessel: Consular fees; inspection fees; fees to determine liability arising out of maritime chose in action and for participation of Government in international conferences and treaties. Vessels of foreign registry, chartered for period no longer than two years (renewable), may acquire Panamanian Registry without waiving such foreign registry provided country of registry allows it. International Safety Management Code (ISM CODE) has been implemented since July 1, 1998 in respect to vessels registered under Panamanian flag.

Administrative Procedure for Maritime Casualties investigation on Panama flag vessels is required by Resolution No. 106-06-DGMM of Jan. 30, 2008.

Likewise, vessels of Panamanian Registry chartered for period no longer than two years (renewable), may be registered in a foreign country without waiving Panamanian Registry, provided that such foreign country has a procedure similar to above.

Ship's mortgages are recognized as liens on the vessels. Registration fee is 10¢ per net registered ton of vessel with maximum limit of US$500. Law 55 of 2008, provides for preliminary registration of ships' mortgages in Mercantile Registry. Decree No. 203 of 1982 provides for 24 hour service for preliminary filing of title deeds and mortgages to Panamanian registered vessels.

Decree Law No. 8 of Jan. 26, 1998, entirely regulates work at sea and navigable waters.

By means of Resolution No. 614-22-ALCN of Feb. 21, 1981, issued by Directorate General of Consular and Maritime Affairs, which came into effect on July 15, 1981, Republic of Panama adopted rules establishing requirements and procedures for issuance of certificates of competency to be granted to following officers serving Panamanian flag vessels: Master, chief engineer and deck and engine watchstanding officers and radio operator.

Under Resolution No. 614-308-ALCN of Dec. 31, 1982, issued by Directorate General of Consular and Maritime Affairs, which came into effect on June 1, 1983, there were adopted minimum manning requirements for Panamanian vessels.

Every Foreign Service vessel, at time of registering into Panamanian Merchant Marine must pay enrollment fee according to following rate: Vessels up to 2,000 GRT, US$500. Vessels from 2,000 up to 5,000 GRT, US$2,000. Vessels of 5,000 up to 15,000 GRT and more, US$3,000 plus US$0.10 for each Gross Registered Ton or fraction thereof in excess of 15,000 GRT up to maximum of US$6,500 in total.

Title deeds to vessels must be recorded in Mercantile Registry. Notarial translation and incidental expenses amount to approximately US$150.

Law No. 57 of 2008 provides the following: (a) establishes two types of navigation patents, one provisional good for six months and regulation patent valid for two years in case of private recreation, sports or pleasure yachts and for four years in case of merchant vessels; (b) private recreation, sports or pleasure yachts in order to become registered, shall pay sole tax of US$1,500 every two years; (c) regulates requirements and procedures for deletion of vessels from Panamanian Registry; (d) US$1,000 if ownership is held by Panamanian Corporation or National.

Special fleet rebate tariff is established by Law No. 57 of 2008, and corresponding rules in frequent application are established by Resolution No. 106-48-DGMM of Dec. 30, 2008.

Decree Law No. 7 of Jan. 26, 1998 creates Panama Maritime Authority and various maritime competencies of public administration are unified. Bodies for administrative services and program execution of The Panama Maritime Authority are: The Directorate General of Merchant Marine, The Directorate General of Ports and Maritime Ancillary Industries, and The Directorate General of Seafarers.

Regarding measurements and tonnage Panama has ratified International Convention on Tonnage Measurement of Ships, 1969.

Law No. 44 of Nov. 23, 2006 creates Authority of Aquatic Resources, replacing Directorate General of Marine and Coastal Resources, originally under Panama Maritime Authority.

Law No. 56 of Aug. 6, 2008, On Ports Generally, creates legal frame for establishing port services and related activities within territory of Republic of Panama.

The Panama Maritime Authority by Resolution ADM. No. 140 of May 15, 2003 approved new regulations for implementation of ISPS Code, which was adopted as amendment of SOLAS Convention 74/78.

By means of Law No. 44 of July 15, 2008, Republic of Panama ratified 1965 Convention (as am'd) to facilitate International Maritime Traffic.

23 TREATIES AND CONVENTIONS

23.01 TREATIES:

Panama has no tax treaties except with Costa Rica, Honduras, Nicaragua, Guatemala, and El Salvador excepting from custom duties certain products imported from or exported to said countries.

Panama has ratified following 1976 Interamerican Conventions: On Conflict of Laws concerning Bills of Exchange, Promissory Notes and Invoices; Conflict of Laws concerning Checks; International Commercial Arbitration; Letters Rogatory; The Taking of Evidence Abroad; and The Legal Regime of Powers of Attorney to be Used Abroad. It has also ratified 1981 Interamerican Extradition Convention; 1985 Interamerican Convention to Prevent and Punish Torture; 1991 Protocol to Interamerican Convention on Human Rights, relative to Abolition of the Death Penalty.

Panama has an agreement with U.S.A. whereby investments in Panama of U.S.A. nationals may be guaranteed by their government against war, expropriation and convertibility of currency risks. Panama is not party to: (1) Convention on Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters; (2) Convention on Taking of Evidence Abroad in Civil or Commercial Matters; (3) United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards.

Panama has ratified Treaty on Non-Proliferation of Nuclear Weapons and following Conventions: International Convention for the Safety of Life at Sea, 1948, 1960, 1966, 1974 and Protocol of 1978; International Convention for the Prevention of Pollution of Sea by Oil, 1954, Amendments of 1962 and 1969 and Protocol of 1978; International Convention on Load Lines, 1966, Amendments of 1971 and 1975; International Convention of Tonnage Measurement of Ships, 1969; American Convention on Human Rights “Pact of San Jose Costa Rica, 1969”; Convention on International Trade in endangered species of wild fauna and flora; Inter-American Convention on Rights of Author in Literary, Scientific, and Artistic Works; International Convention for Protection of Performers, Producers of Phonograms and Broadcasting Organizations; Convention relating to Distribution of Programme-Carrying Signals Transmitted by Satellite; Convention establishing World Intellectual Property Organization; International Convention for the Prevention of Pollution from Ships, 1973; Convention Abolishing the Requirement of Legalisation for Foreign Public Documents (Apostille), 1961; Agreement on Professional Readaption and Employment of Invalid Persons (General conference of the International Labor Organization, June 20, 1983—Law No. 18, Nov. 8, 1993); Convention of the United Nations Against Illicit Traffic of Drugs and Sicotropic Substances (Vienna, Dec. 20, 1988—Law No. 20, Dec. 7, 1993); Agreement on Civil Aspects of International Abduction of Minors (The Hague, Oct. 25, 1980—

Law No. 22, Dec. 10, 1993); Agreement for the Constitution of the Interamerican Institute for the Research on the Global Change (Montevideo, May 13, 1992, Law No. 23, Dec. 10, 1993); Agreement of Air Transportation Between the Government of the Republic of Panama and the Government of the Russian Federation (Panama, Feb. 3, 1993—Law No. 25, Dec. 10, 1993—Ratification Instrument deposited Feb. 10th, 1994); Amendment of the Montreal Protocol Regarding Substances which Exhaust the Ozone Layer (June 29, 1990—Law No. 25, Dec. 10th, 1993—Ratification Instrument deposited Feb. 10, 1994); Charter of the International Union for the Preservation of Nature and the Natural Resources (Fontainebleau, France, Oct. 5, 1984—Law No. 26, Dec. 10, 1993—Deposit Instrument of Adhesion); Agreement for the Constitution of the Fund for the Development of Indian Communities of Latin America and the Caribbean (Madrid, Spain July 24, 1992—Law No. 27, Dec. 13, 1993—Ratification Instrument deposited Feb. 10, 1994); Law No. 2, May 16, 1994—Treaty Constituting the Central American Parliament (Guatemala, Oct. 2, 1987); Law No. 11, July 11, 1994—Convention of Mutual Legal Assistance relating to Traffic of Drugs between Great Britain, Northern Ireland and Republic of Panama (Mar. 3, 1993); Law No. 2, Jan. 12, 1995—Convention on Biological Diversity (Rio de Janeiro, June 15, 1995); Law No. 12, Apr. 20, 1995—Interamerican Convention concerning Violence against Women (Belem Do Para, Brasil, June 9, 1994); Law No. 13 Apr. 21, 1995—Regional Agreement concerning Border Transportation of Dangerous Waste (Panama, Dec. 11, 1992); Law 14, Apr. 21, 1995—Regional Convention to Maintain Natural Forest Ecosystems and develop Forest Plantations (Guatemala, Oct. 29, 1993); Law No. 18, May 5, 1995—"Washington Protocol" amending the Charter of the Organization of American States (Washington, Dec. 14, 1992); Law No. 19, May 5, 1995—"Guatemala Protocol" amending the Charter of the Organization of American States at the XIX Term of the Extraordinary Meetings of the General Assembly (Managua, June 10, 1993); Law No. 2, May 31, 1995—Approving the Additional Protocols 1 and 2 of the Geneva Convention of Aug. 12, 1949 on Confirmation and Development of Humanitarian International Rights Applicable to Armed Conflicts; Law No. 54, Dec. 18, 1995—Cooperation Agreement Between the Republic of Panama and the United States of Mexico to Repress Narcotraffic and Pharmaco Dependency. Panama, Mar. 8, 1995; Law No. 55, Dec. 22, 1995—Agreement for Mutual Assistance Between Panama and Colombia Concerning the Illegal Traffic of Drugs and Sicotropic Substances. Panama, Nov. 19, 1993; Law No. 15, Jan. 3, 1996—Air Transportation Agreement Between the Republic of Panama and China. Panama, Aug. 30, 1994; Law No. 22, June 8, 1995—Approving the Convention Whereby the Coordination Center was Created for the Prevention of Natural Disasters in Central America (CEPREDENAC). Guatemala, Oct. 29, 1993; Law No. 23, June 8, 1995—Interamerican Convention to Expedite Assistance in Case of Disaster adopted in Santiago of Chile, June 7, 1991 at the 21st Period of Ordinary Meetings of the General Assembly of the Organization of American States; Law No. 30, June 28, 1995—Convention of the Central American Commission to Eradicate Products, Traffic, Consumption and Use of Illicit Drugs and Sicotropic Substances. Guatemala, Oct. 29, 1993; Law No. 32, Interamerican Convention on Forced Disappearance of Persons. Belem Do Para, Brasil, June 9, 1994, at 24th period of meetings; Law No. 37, July 11, 1995—Convention for the Integration of Central American Production of Movies. Caracas, Nov. 11/89; Law No. 38, July 11, 1995—The Latin America Convention for the Joint Production of Movies; Law No. 39, July 13, 1995—Mutual Assistance Treaty on Criminal Matters Between Costa Rica, El Salvador, Guatemala, Honduras, Nicaragua and Panama, Guatemala, Oct. 29, 1993; Law No. 40, July 13, 1995—Agreement Between the Republic of Panama and Colombia on Measures to Prevent Deviations of Chemicals and Essential Substances. Panama, Nov. 19, 1983; Law No. 41, July 13, 1995—Agreement for the Protection of Industrial Property of Mar. 20, 1993. Revised: Brussels, Dec. 14, 1900; Washington, June 2, 1911; La Hague, Nov. 6, 1928; London, June 21, 1934; Lisbon, Oct. 31, 1958; Stockholm, July 14, 1967; Law No. 42, July 14, 1995—Agreement for Legal Assistance and Mutual Judicial Cooperation Between the Republic of Panama and Colombia. Panama, Nov. 19, 1993; Law No. 11, Jan. 3, 1996—Treaty on Social Integration of Central America. El Salvador, Mar. 30, 1995; Law No. 13, Jan. 3, 1996—Agreement for Settlement of Differences Concerning Investments Among States and Nationals of Other States. Washington, Mar. 18, 1965; Law No. 14, Jan. 3, 1996—Agreement on Security of the Personnel of the United Nations and Associated Personnel, Approved at the General National Assembly of the United Nations. Dec. 9, 1994; Law No. 16, Jan. 3, 1996—Agreement Constituting the South Center. Geneva, Sept. 1, 1994; Law No. 17, Jan. 3, 1996—Agreement for the Amendment of the Air Traffic Convention Between the Republic of Panama and the United States of America of 1949, Entered Into by Exchange of notes of the 12th and 13th of Jan. 1994; Law No. 18, Jan. 3, 1996—Commercial Agreement Between the Republic of Panama and the Republic of Poland. Panama, Nov. 14, 1994; Law No. 19, Jan. 8, 1996—Agreement Constituting the Multi-lateral Organization to Guarantee Investments. Seoul, Oct. 11, 1985; Law No. 20, Jan. 8, 1996—Agreement Constituting the Association of Caribbean States. Cartagena of Indies, Colombian Republic. July 24, 1994; Law No. 21, Jan. 8, 1996—Agreement Constituting the Organization of the Andres Bello Agreement of Integral Scientific, Technological, and Cultural Education. Madrid, Spain, Nov. 27, 1990; Law No. 22, Jan. 8, 1996—International Agreement on Tropical Woods. Geneva, Jan. 26, 1994; Law No. 38, Jan. 4, 1995—United Nations Convention on the Rights of the Sea. Montego Bay, Dec. 11, 1982; Law No. 42, July 5, 1996—Approval of The Protocol on Areas and Forest and Wild Life Specially protected by Convention for the Protection and Development of Marine Zone in the Great Caribbean Region, signed at Kingston, Jamaica, Jan. 18, 1990; Law No. 43, July 5, 1996—Approval of The Basic Convention on Technical and Scientific Cooperation Between The Republic of Panama and The Government of Ecuador, signed at Quito, Ecuador, Sept. 5, 1995; Law No. 44, July 5, 1996—Approval of The Convention for the Unification of Certain Rules Concerning International Air Transportation, signed at The Hague, Sept. 28, 1955; Law No. 45, July 5, 1996—Approval of the Additional Protocols to the Constitution of the Universal Postal Union, signed at Hamburg, July 27, 1984, Washington, Dec. 14, 1984, and Seoul, Sept. 14, 1994; Law No. 46, July 5, 1996—Approval of the Amendment to The Montreal Protocol concerning Substances Depleting the Ozone Layer, adopted at Fourth Meeting of party States held at Copenhagen, Nov. 25, 1992; Law No. 49, July 12, 1996—Approval of the Agreement Between the Republic of Panama and the Republic of Cuba on Cooperation to Combat Narcotraffic and the Illicit demand for Drugs and Psychotropic Substances and consequences thereof; Law No. 50, July 12, 1996—Approval of The Basic Convention for the Technical and Scientific Cooperation Between The Republic of Panama and The Government of the United States of Mexico, signed at Panama, Feb. 14, 1996; Law No. 51, July 12, 1996—Approval of The Convention on Air Transportation Between the Republic of Panama and The United States of Mexico signed at Panama, Feb. 14, 1996; Law No. 52, July 12, 1996—Approval of The Convention Establishing The American Commission on Environment and Development signed at San Jose, C.R., Dec. 12, 1987 and its protocol signed at San Salvador, July 16, 1991; Law No. 53, July 17, 1996—Approval of The Convention to Combat the Undue Use, the Production and the Illicit Traffic of Drugs, Between the Republic of Panama, and the Republic of Peru, signed at Panama, Mar. 6, 1996; Law No. 54, July 17, 1996—Approval of The Convention on Touristic Cooperation Between the Government of the Republic of Panama and the Republic of Peru, signed at Panama, Mar. 6, 1996; Law No. 66, Dec. 30, 1996—Approval of The Convention Concerning Prohibitions and Restrictions on the Use of Certain Conventional Fire Arms Which Might be Deemed Greatly Harmful or of Indiscriminate Effect, adopted at Geneva, Oct. 10, 1980 and its protocol; Law No. 67, Dec. 30, 1996—Approval of Convention for Cooperation Within the Framework of the Iberoamerican Conference signed at the V Iberoamerican Conference held at the City of San Carlos De Bariloche, Argentine, Oct. 25, 1995; Law No. 68, Dec. 30, 1996—Approval of the Amendment to the International Telecommunications Organization by Intelsat Satellite to Apply Arrangements of Multiple Signatories, approved at Copenhagen, Denmark, Aug. 31, 1995; Law No. 69, Dec. 30, 1996—Approval of the Cooperation Agreement on Tourism Between the Government of the Republic of Panama and the Government of the Republic of Argentine, signed at Panama, May 10, 1996; Law No. 70, Dec. 30, 1996—Approval of the Convention on Prevention of the Undue Use and the Repression of the Illicit Traffic with Stupefacients and Psychotropic Substances Between the Government of the Republic of Panama and the Government of the Republic of Argentine, signed at Panama, May 10, 1996; Law No. 71, Dec. 30, 1996—Approval of the Traffic Between the Republic of Panama and the Kingdom of Spain for the Transfer of Convicted Persons, signed at Madrid, Mar. 20, 1996; Law No. 72, Dec. 30, 1996—Approval of The Convention Between the Government of the Republic of Panama and the Government of the Hellenic Republic on

Cooperation in the Fields of Education and Culture, signed at Athens, Greece, Apr. 18, 1996; Law No. 73, Dec. 30, 1996—Approval of the Agreement Between the Republic of Panama and the Kingdom of Netherlands on Air Services Between and Beyond Their Respective Territories, signed at The Hague, July 5, 1996; Law No. 2, Jan. 13, 1997—Approval of The Convention Between the Republic of Panama and the Republic of Argentine for the Reciprocal Promotion and Protection of Investments, signed at Panama, May 10, 1996; Law No. 3, Jan. 13, 1997—Approval of The Agreement for the Cooperation and Coordination on Sanitation and Vegetable Quarantine Between the Republic of Panama and the Republic of Argentine, signed at Panama, May 10, 1996; Law No. 4, Jan. 13, 1997—Approval of the Unidroit Convention of Financial International Leasing, signed at Ottawa, May 28, 1996.

Marrakech Agreement Constituting the World Commercial Organization and the Adhesion Protocol with its Annexes and List of Undertaking. (Law 23 of July 15, 1997).

Central American Treaty on Recuperation and Devolution of Stolen, Illicit or Undue Appropriation or Retention of Vehicles. Subscribed at Copan, Republic of Honduras on Dec. 14, 1995. (Law No. 34 of Nov. 14, 1997).

Basic Technical and Scientific Cooperation Agreement between the Republic of Panama, and the Republic of Peru. Signed at Lima, Peru, on Nov. 6, 1996. (Law No. 35 of Nov. 14, 1997).

Touristic Cooperation Agreement between the Government of the Oriental Republic of Uruguay and the Republic of Panama, subscribed at Montevideo, Uruguay on Nov. 9, 1996. (Law No. 36 of Nov. 14, 1997).

Agreement of Cultural and Educational Integration between the Government of the Republic of Peru and the Government of the Republic of Panama. Signed at Lima, Peru on Nov. 6, 1996. (Law No. 37 of Nov. 14, 1997).

Agreement between the Government of the Republic of Panama and the Government of the Oriental Republic of Uruguay, for the Prevention, Undue Use and Repression of the Illicit Traffic of Drugs and Psychotropic Substances and its Essential Basic Elements and Chemical Products. Signed at Montevideo, Uruguay, Nov. 9, 1996. (Law No. 38 of Nov. 14, 1997).

Agreement between the Government of the Republic of Panama and the Government of Canada for the Promotion and Protection of Investments. Signed at Guatemala on Sept. 12, 1996. (Law No. 39 of Nov. 14, 1997).

Amendment to the Basel Treaty on Control on the Border Movement of Dangerous Residues and their Disposal adopted at the Third Meeting of the Conference of the Parties on Sept. 22, 1995. (Approved by Law No. 32 of May 28, 1998).

Treaty Relative to the Child Protection and the Cooperation on the Subject of International Adoption subscribed at La Hague, on May 29, 1993. (Approved by Law No. 33 of May 28, 1998).

Protocol Relative to the Amendment of Article 56 of the International Civil Aviation Treaty subscribed at Montreal on Oct. 6, 1989; Protocol Relative to an Amendment of Article 56A of the International Civil Aviation Treaty subscribed at Montreal on Oct. 20, 1980, and Protocol Relative to the Annexed Five Language Text of the International Civil Aviation Treaty, subscribed at Montreal on Sept. 29, 1995. (Approved by Law No. 34 of May 28, 1998).

Treaty Creating the Iberoamerican Sport Council subscribed at Montevideo on Aug. 4, 1994. (Approved by Law No. 35 of May 28, 1998).

Approving the Interamerican Convention on International Traffic of Minors. Subscribed at City of Mexico, D.F. on Mar. 18, 1994. (Law No. 37 of June 25, 1998).

Approving the Interamerican Convention on Alimentary Obligations. Subscribed at Montevideo on July 15, 1989. (Law No. 38 of June 25, 1998).

Agreement of Scientific and Technical Cooperation between the Government of the Republic of Panama and the Government of the Republic of the Philippines, subscribed at Panama on May 14, 1997. (Approved by Law No. 39 of June 30, 1998).

Treaty on Mutual Legal Assistance Regarding Criminal Matters between the Government of the Republic of Panama and the Government of the United States of Mexico, subscribed at the City of Mexico, D.F. on July 29, 1997. (Approved by Law No. 40 of June 30, 1998).

Interamerican Convention against Corruption, subscribed at Caracas on Mar. 29, 1996. (Approved by Law No. 42 of July 1, 1998).

Agreement for the Reciprocal Promotion and Protection of Investment between the Republic of Panama and the Kingdom of Spain, subscribed at Panama, on Nov. 10, 1997. (Approved by Law No. 43 of July 1, 1998).

Agreement of Education and Cultural Cooperation between the Government of the Republic of Panama and the Government of the United States of Mexico, subscribed at the City of Mexico D.F., on July 29, 1997. (Approved by Law No. 44 of July 1, 1998).

International Organization for Migrations adopted at Geneva on Oct. 18, 1983 and Amendment thereof on May 20, 1997. (Approved by Law 46 of July 14, 1998).

Treaty on Extradition—Between the Republic of Panama and Spain, signed at Panama, Republic of Panama, on Nov. 7, 1997. (Approved by Law 47 of July 15, 1998).

Convention on Prohibition of the Development, Production, Storage and Use of Chemical Weapons, and on Their Destruction—Opened for signature at Paris, France on Jan. 13, 1933. (Approved by Law 48 of July 15, 1998).

Convention on Prohibition of the Use, Storage, Production and Transfer of Anti-personal Mines, and on their Destruction. Adopted at Oslo, Norway on Sept. 18, 1997, and opened for signature at Ottawa on Dec. 3 and 4, 1997. (Approved by Law No. 50 of July 15, 1998).

Central American Agreement for the Prevention of the Crimes of Laundering of Money and Assets, connected with illicit traffic of drugs and related crimes. Signed at Panama on July 11, 1997. (Approved by Law 51 of July 15, 1998).

International Convention to Serve Penalties in Foreign Countries for Convictions of Crimes. Subscribed at Managua, Nicaragua, June 9, 1993. (Approved by Law No. 62 of Oct. 15, 1998).

Agreement on Air Transportation Between the Republic of Panama and the United States of America, subscribed at Panama on Mar. 8, 1997. (Approved by Law No. 63 of Oct. 15, 1998).

Agreement on Cultural, Educational and Scientific Cooperation Between Chipre

(Cyprus) and the Republic of Panama subscribed at Panama on Jan. 3, 1997. (Approved by Law No. 64 of Oct. 15, 1998).

Agreement on Cultural and Educational Cooperation Between the Republic of Panama and Argentina, subscribed at Buenos Aires, Argentina on Aug. 20, 1997. (Approved by Law No. 65 of Oct. 15, 1998).

Agreement on Technical and Scientific Cooperation Between the Republic of Panama and Chile on June 5, 1996. (Approved by Law No. 66 of Oct. 15, 1998).

Agreement on Custom House Cooperation Between the Republic of Panama and Peru, signed at Lima, Peru on Nov. 6, 1996. (Approved by Law No. 67 of Oct. 15, 1998).

Agreement Between the Republic of Panama and Argentina on the Transfer of Nationals Convicted of Crimes and Serving Crime Sentences, subscribed at Buenos Aires on Aug. 20, 1997. (Approved by Law No. 68 of Oct. 15, 1998).

Agreement Between the Republic of Panama and Uruguay on Airline Services Between Their Respective Territories and Beyond. Subscribed at Panama on Feb. 18, 1998. (Approved by Law No. 70 of Oct. 28, 1998).

Agreement Between the Republic of Panama and Great Britain and Northern Ireland on Airline Services, subscribed at London on Oct. 29, 1997. (Approved by Law No. 71 of Nov. 5, 1998).

Agreement Between the Republic of Panama and Nicaragua on Air Transportation, subscribed at Montelimar, Nicaragua, on Jan. 8, 1998. (Approved by Law No. 72 of Nov. 5, 1998).

Agreement Between the Republic of Panama and Russia on Collaboration in the Cultural, Science, Education and Sports Areas, subscribed at Santa Fe de Bogota, Colombia, on Nov. 27, 1997. (Approved by Law No. 73 of Nov. 5, 1998).

International Agreement for preservation of the Atlantic Atun, subscribed at Rio de Janeiro on May 14, 1966. (Approved by Law No. 74 of Nov. 10, 1998).

Agreement on the International Program for the preservation of the Dolphins, subscribed at Washington, D.C., on May 14, 1966. (Approved by Law No. 75 of Nov. 10, 1998).

Agreement on the Air Transportation Between the Republic of Panama and Chile, subscribed at Santiago de Chile on Oct. 27, 1997. (Approved by Law No. 76 of Nov. 13, 1998).

Agreement Between the Republic of Panama and the Republic of China on Tourism Cooperation, subscribed at Panama on Sept. 8, 1997. (Approved by Law No. 77 of Nov. 13, 1998).

Agreement on Cultural Cooperation Between the Republic of Panama and Guatemala, subscribed at Guatemala on May 20, 1998. (Approved by Law No. 78 of Nov. 13, 1998).

Basic Agreement on Cultural and Educational Cooperation Between the Republic of Panama and Ecuador, subscribed at Panama, on Dec. 31, 1997. (Approved by Law No. 79 of Nov. 13, 1998).

Agreement Between the Republic of Panama and Uruguay for the Reciprocal Promotion and Protection of Investments, subscribed at Panama, on Feb. 18, 1998. (Approved by

Law No. 81 of Nov. 23, 1998).

Agreement on Technical and Scientific Cooperation Between the Republic of Panama and Uruguay, subscribed at Panama on Feb. 18, 1998. (Approved by Law No. 82 of Nov. 23, 1998).

Agreement on the Construction of the Fund for Multilateral Investments, subscribed at Washington, D.C. on Feb. 11, 1992. (Approved by Law No. 84 of Nov. 30, 1998).

Agreement Between the Republic of Panama and the Corporación Andina de Fomento, subscribed at Panama on Nov. 17, 1997. (Approved by Law No. 85 of Nov. 30, 1998).

Agreement on the Transfer of Persons Convicted, subscribed at Estrasburgo on Mar. 21, 1983. (Approved by Law No. 86 of Nov. 30, 1998).

Amendment of Montreal Protocol adopted at the Ninth Meeting of the State Members Held at Montreal from Sept. 15th to Sept. 17th, 1997. (Approved by Law No. 87 of Nov. 30, 1998).

The Kyoto protocol of the Standard Convention of the United Nations on Climatic Change, subscribed at Kyoto on Dec. 11, 1997. (Approved by Law No. 88 of Nov. 30, 1998).

International Agreement to Suppress the Terrorist Attempts with Bombs, Open to Signature at New York on Jan. 12, 1998. (Approved by Law No. 89 of Dec. 15, 1998).

Standard Treaty of the Electric Market of Central America—Subscribed at Guatemala on Dec. 20, 1996; and the protocol to the Standard Electric Market Treaty of Central America, signed at Panama on July 11, 1997. (Approved by Law No. 90 of Dec. 15, 1998).

International Agreement for the Constitution of an International Fund to Indemnify for the Damage Caused by the Contamination of Hydrocarbons, subscribed at Brussels on Dec. 18, 1997; and The Protocol of 1992 which amended the International Agreement for the Constitution of an International Fund to Indemnify for the Damage Caused by a Hydrocarbon Contamination, subscribed at London on Nov. 27, 1992. (Approved by Law No. 91 of Dec. 15, 1998).

OMPI Treaty on Copyright—Adopted at The Geneva Diplomatic Conference on Dec. 20, 1996. (Approved by Law No. 92 of Dec. 15, 1998).

OMPI Treaty on the Interpretation or Execution of Phonograms, adopted at The Geneva Diplomatic Conference on Dec. 20, 1996. (Approved by Law No. 93 of Dec. 15, 1998).

Vienna Convention on Prompt Notification of a Nuclear Accident. (Approved by Law No. 101 of Dec. 30, 1998).

Convention on Physical Protection of Nuclear Materials. Open to signature at Vienna and New York on Mar. 3, 1980. (Approved by Law No. 103 of Dec. 30, 1998).

Treaty on Prohibition to Complete Nuclear Tests and the Protocol thereof. Adopted at UN General Assembly on Sept. 10, 1996. (Approved by Law No. 104 of Dec. 30, 1998).

Interamerican Convention on Conflict of Laws Concerning Matters for Adoption of Minors. Subscribed at La Paz, Bolivia on May 24, 1984. (Approved by Law No. 105 of Dec. 30, 1998).

Basic Cooperation Agreement Between the Republic of Panama and the UN Fund for

Infants. Subscribed at Panama on June 4, 1998. (Approved by Law No. 106 of Dec. 30, 1998).

Agreement between the Government of the Republic of Panama and the Government of Cuba for the Reciprocal Promotion and Protection of Investments. Subscribed in Panama Jan. 13, 1998. Ratified by Law 5 of May 3, 1999 and published in Official Gazette No. 23.793 of May 11, 1999.

Agreement between the Government of the Republic of Panama and the Arab Republic of Egypt on Cooperation in the Fight Against Crime, subscribed at Cairo, Sept. 13, 1998 and ratified by Law 6 of May 3, 1999. Published in Official Gazette No. 23.793 of May 11, 1999.

Agreement between the Republic of Panama and the Kingdom of Spain on Legal Assistance and Judicial Cooperation in the Matter of Crimes, signed at Madrid, Spain, Oct. 9, 1998. Ratified by Law 7 of May 3, 1999 and published in Official Gazette No. 23.793, May 11, 1999.

Agreement between the Republic of Panama and the Kingdom of Spain on Cooperation in Matters of Preventions of Consumption and Control of Illicit Traffic of Drugs and Psychotropics Substances. Signed at Panama, Feb. 13, 1998 and ratified by Law 8 of May 3, 1999. Published in Official Gazette No. 23.793, May 11, 1999.

Agreement between the Republic of Panama and the Government of the Federation of Russia on Cooperation Against Illicit Traffic on Drugs and Psychotropic Substances and Their Abuse. Signed at Bogota, Colombia on Nov. 27, 1997. Ratified by Law 9 of May 3, 1999. Published in Official Gazette No. 23.793 of May 11, 1999.

Agreement between the Republic of Panama and the Republic of Chile on Cooperation on the Prevention of Drugs Use and the Control of the Illegal Traffic of Drugs and Psychotropic Substances, signed at City of Santiago de Chile, Oct. 21, 1997. Ratified by Law No. 10 of May 3, 1999. Published in Official Gazette No. 23.793 on May 11, 1999.

Protocol on Prohibitions or Restrictions in the Use of Mines, surprise Arms and other Artifacts, as it was amended May 3, 1996 (Protocol 11, as it was amended May 3, 1996, annexed to the Convention on Prohibitions or Restrictions in the Use of Conventional Arms, adopted at Geneva, May 3, 1996). Ratified by Law No. 11 of May 3, 1999. Published in Official Gazette No. 23.794 of May 12, 1999.

International Agreement for the Protection of the Vegetable Products of Dec. 2, 1996, revised at Geneva, Nov. 10, 1972 and Oct. 23, 1978. Ratified by Law 12 of May 3, 1999. Published in Official Gazette No. 23.795, May 13, 1999.

Cooperative Agreement between the Ministry of Agro Development of Panama and the Department of Agriculture of the United States of America, for the Eradication and Prevention of the Eating Worm of Cattle, the Supplement at Cooperative Agreement and other Provisions adopted. Ratified by Law 13 of May 6, 1999 published in Official Gazette No. 23.799 of May 19, 1999.

Agreement on Cultural and Educational Cooperation between the Government of the Republic of Cuba, signed at the City of Habana, Feb. 16, 1999. Ratified by Law No. 14 of May 27, 1999. Published June 17, 1999.

Basic Cooperation Agreement between the Republic of Panama and Government of the Republic of Cuba, signed at Panama Jan. 27, 1999, and ratified by Law No. 15 of May 27, 1999. Published in Official Gazette No. 23.826 of June 17, 1999.

Interamerican Convention Against the Manufacture and Illicit Traffic of Fire Arms, munitions, explosives and other related materials. Signed at Washington D.C. on Nov. 14, 1997 and ratified by Law 16, May 27, 1999. Published in Official Gazette No. 23.826, June 17, 1999.

Amendment Instrument of the Constitution of the International Labor Organization, adopted at Conference of the International Labor Organization (OIT) June 19, 1997. Ratified by Law 17 of May 27, 1999. Published in Official Gazette No. 23.820, June 17, 1999.

Agreement on Private Employment Agencies 1997 (Number 181), signed at General Conference of the International Labor Organization (OIT), June 19, 1997, ratified by Law No. 18 of May 27, 1999. Published in Official Gazette No. 23.820 of June 27, 1999.

Agreement between Republic of Panama and Hellenic Republic concerning Economic and Technical Cooperation signed at Athens on Mar. 31, 1999. Ratified by Law No. 10 of June 14, 2000. Published in Official Gazette No. 24.077 on June 19, 2000.

Agreement between Republic of Panama and Czech Republic for the Reciprocal Promotion and Protection of Investments, signed at Panama on Aug. 27, 1999. Ratified by Law No. 11 of June 14, 2000. Published in Official Gazette No. 24.077 of June 19, 2000.

Rotterdam Agreement concerning Application of the Consent Procedure on the Basis of Certain Previous Plaguicides and Dangerous Chemical Products Object of International Commerce, signed at Rotterdam, The Netherlands, on Sept. 10, 1998. Ratified by Law No. 12 of June 19, 2000. Published in Official Gazette No. 24.077 of June 19, 2000.

Amendments to Treaty for the Proscription of Nuclear Arms in Latin America (Tlatelolco Treaty). Ratified by Law No. 13 of June 14, 2000. Published in Official Gazette No. 24.077, June 19, 2000.

Agreement for Constitution of the International Organization of Mobile Telecommunications by Satellite, as amended, adopted at London in XX Meeting of the Assembly of INMARSAT on May 10, 1991. Ratified by Law No. 14 of June 14, 2000. Published in Official Gazette No. 24.077 of June 19, 2000.

Standard Agreement Relating to the Execution of the Financial and Technical Assistance, and of Economical Cooperation in Panama by virtue of the “ALA” Regulations. Signed at Panama on June 15, 1999. Ratified by Law No. 15 of June 14, 2000. Published in Official Gazette No. 24.077 of June 19, 2000.

Agreement entered into at Panama, on Oct. 28, 1999, between Republic of Panama and Republic of China regarding dispatch of the Voluntaries from the International Development and Cooperation Fund. Ratified by Law No. 16 of June 14, 2000. Published in Official Gazette No. 24.077 of June 19, 2000.

Agreement on Minimum Age for Admission to Employment (Agreement 138). Adopted on June 26, 1973. Ratified by Law No. 17 of June 15, 2000. Published in Official Gazette No. 24.077 of June 19, 2000.

Agreement regarding Prohibition of the Worst Forms of Work of Infants and the Immediate Action for its Termination, 1999 (No. 182). Adopted by General Conference of the International Labor Organization (OIT), on June 17, 1999. Ratified by Law No. 18 of June 15, 2000. Published in Official Gazette No. 24.077 of June 19, 2000.

Agreement between Republic of Panama and United States of America regarding use of Corozal Cemetery. Signed in City of Panama, on June 11, 1999. Ratified by Law No. 19 of

June 21, 2000. Published in Official Gazette No. 24.081 of June 23, 2000.

Agreement regarding Promotion of the Investments between the Republic of Panama and the United States of America. Ratified by Law No. 27 of July 7, 2000. Published in Official Gazette No. 24.093 of July 11, 2000.

Optional Protocol to the Convention on the Rights of the Infant Relating to the Sale of Infants, the Prostitution of Infants and the Use of Infants in Pornography. Adopted at General Assembly of The United Nations on May 25, 2000. Ratified by Law No. 47, Dec. 7, 2000. Published in Official Gazette No. 24.201, Dec. 15, 2000.

Optional Protocol to the Convention on the Rights of the Infant, regarding Participation of Infants in Armed Conflicts. Adopted at General Assembly of the United Nations on May 25, 2000. Ratified by Law No. 48 of Dec. 13, 2000. Published in Official Gazette No. 24.201 of Dec. 15, 2000.

Protocol to the Agreement for the Cooperation within the Framework of the Iberoamerican Conference for the Constitution of the Secretariat of Iberoamerican Cooperation (SECIB), and Statutes of the Secretariat of Iberoamerican Cooperation (SECIB). Signed at IX Summit of Iberoamerican Conference in City of Havana, Cuba, on Nov. 15, 1999. Ratified by Law No. 49 of Dec. 13, 2000. Published in Official Gazette No. 24.201 of Dec. 15, 2000.

Constitution Act of the Association of Iberoamerican States for the Development of the National Libraries of the Iberoamerican Abinian Countries. Signed at Lima on Oct. 13, 1999. Ratified by Law No. 50 of Dec. 13, 2000. Published in Official Gazette No. 24.201 of Dec. 15, 2000.

Foundation Act of the Iberoamerican Youth Organization (OIT). Signed at Buenos Aires, Argentina on Aug. 1, 1996. Ratified by Law No. 51 of Dec. 13, 2000. Published in Official Gazette No. 24.201 of Dec. 15, 2000.

Agreement Between the Government of the Republic of Panama and the Government of the Republic of Korea for the Promotion and Protection of Investments. Signed at Korea, on July 10, 2001. Approved by Law No. 1 dated Jan. 2, 2002. Published in Official Gazette No. 24,465 of Jan. 8, 2002. Exchange of Notes for entry into effect of Dec. 11, 2001 and Jan. 9, 2002. Entered into effect on Feb. 8, 2002.

Rome Statute of the International Criminal Court. Made in Rome, on July 17, 1998. Approved by Law No. 14 of Mar. 13, 2002. Official Gazette No. 24,512 dated Mar. 15, 2002. Deposit of Ratification Instrument dated Mar. 21, 2002. Shall enter into effect for Panama on July 1, 2002.

Statute of the Hague Convention on International Private Law. Adopted on Oct. 31, 1951. Approved by Law No. 19 dated May 2, 2002. Official Gazette No. 24,546 dated May 7, 2002. Deposit of Declaration dated May 29, 2002. Entered into effect for Panama on May 29, 2002.

International Treaty for Repression of the Funding of Terrorism, opened for signature at New York, on Jan. 10, 2000. Approved by Law No. 22 dated May 9, 2002. Official Gazette No. 24,551 dated May 14, 2002.

Agreement Between the Government of the Republic of Panama and the United Nations Children's Fund for the Establishment of a UNICEF Regional Office in Panama for Latin America and the Caribbean, signed in Panama on Aug. 9, 2001. Approved by Law No. 23, dated May 9, 2002. Official Gazette No. 24,551 dated May 14, 2002.

Protocol Between the Government of the Republic of Panama and the Government of the United States of America to Amend the Convention on Treatment and Protection of Investment dated Oct. 27, 1982, made in Panama on June 2, 2000. Approved by Law No. 2, dated Jan. 10, 2001. Official Gazette No. 24,219 dated Jan. 15, 2001. Exchange of Notes for entry into effect on Jan. 23, and May 10, 2001.

Agreement on Air Transportation Between the Republic of Panama and the Federal Republic of Germany, made in Panama on Dec. 13, 1999. Approved by Law No. 4 dated Jan. 10, 2001. Official Gazette No. 24,220, dated Jan. 15, 2001. Note: Pending of exchange of Ratification Instruments for its entry into effect.

Agreement on Air Transportation Between the Government of the Republic of Panama and the Government of Jamaica for Air Service Between and Beyond Its Respective Territories, given in Kingston, Jamaica, on Aug. 27, 1999. Approved by Law No. 5, dated Jan. 10, 2001. Official Gazette No. 24,221, dated Jan. 17, 2001. Exchange of Notes for its entry into effect on Jan. 5, 2000 and Mar. 5, 2001. Entered into effect on Mar. 5, 2001.

Agreement on Air Transportation Between the Government of the Republic of Panama and the Government of the Republic of Cuba Related to Air Service Between and Beyond Its Respective Territories, signed in Panama on Aug. 31, 2000. Approved by Law No. 9 dated Jan. 10, 2001. Official Gazette No. 24,226 dated Jan. 24, 2001. Exchange of Notes for entry into effect of Feb. 2, and Nov. 20, 2001. Entered into effect on Nov. 20, 2001.

Agreement Whereby the Center on Legal Advisor Concerning OMC Matters is Established, made in Seattle, on Nov. 30, 1999. Approved by Law No. 10 dated Jan. 10, 2001. Official Gazette No. 24,226 dated Jan. 24, 2001. Deposit of Ratification Instrument on Apr. 26, 2001.

Protocol on Privileges and Immunities of the Association of Caribbean States, made in Republic of Panama, on Dec. 13, 1999. Approved by Law No. 11, dated Jan. 10, 2001. Official Gazette No. 24,227 of Jan. 25, 2001. Deposit of Ratification Instrument on Jan. 28, 2002.

Cooperation Agreement on Tourism Matters Between the Government of the Republic of Panama and the Government of the United States of Mexico. Signed in Mexico D.F., on May 22, 2000. Approved by Law 21 of May 30, 2001. Official Gazette No. 24,315 of June 4, 2001. Exchange of Notes for its entry into effect on June 5 and July 28, 2001. Entered into effect on July 18, 2001.

Treaty Between the Republic of Panama and the Netherlands Kingdom for the Promotion and Reciprocal Protection of Investments. Signed in Panama, on Aug. 28, 2000. Approved by Law No. 22 of May 30, 2001. Official Gazette No. 24,315 of June 4, 2001.

Interamerican Convention on Mutual Assistance in Criminal Matters. Adopted in Nassau, Bahamas, on May 23, 1992. Approved by Law No. 52 of Oct. 17, 2001. Official Gazette No. 24,413 of Oct. 19, 2001. Deposit of Ratification Instrument on Jan. 29, 2002. Entered into effect on Feb. 27, 2002.

Agreement Between the Republic of Panama and the Kingdom of Spain on Air Transportation, made in Panama on Aug. 7, 2001. Approved by Law No. 56 of Nov. 7, 2001. Official Gazette No. 24,431 of Nov. 14, 2001.

Agreement Between the Government of the Republic of Panama and the Government of the State of Israel on Cooperation to Fight Illicit Trafficking and the Abuse of Narcotic Drugs and Psychotropic Substances and Other Major Crimes, signed in Jerusalem, on Aug. 19, 2001.

Approved by Law No. 61 of Dec. 5, 2001. Official Gazette No. 24,447 of Dec. 7, 2001.

Agreement Between the Government of the Republic of Panama and the Government of the Federative Republic of Brazil on Cooperation in the Field of the Fight Against Organized Crime, made in Brasilia, on Aug. 21, 2001. Approved by Law No. 62 of Dec. 5, 2001. Official Gazette No. 24,447 of Dec. 7, 2001.

Treaty of Educational and Cultural Interchange Between the Government of the Republic of Panama and the Government of the Republic of Paraguay, made in Asuncion, Paraguay, on Apr. 27, 2001. Law No. 74 of Dec. 26, 2001. Official Gazette No. 24,460 of Dec. 28, 2001.

Protocol between Republic of Panama and The United States of America for amendment of Agreement on Treatment and Protection of the Investment of Oct. 27, 1982, issued in Panama on June 2, 2000. Law No. 2 of Jan. 10, 2001. Official Gazette No. 24,219 of Jan. 15, 2001.

Interamerican Convention on the Elimination of all Forms of Discrimination Against the Disabled, adopted in Guatemala, Guatemala, on June 7, 1999. Law No. 3 of Jan. 10, 2001. Official Gazette No. 24,219 of Jan. 15, 2001.

Air Transport Agreement between the Republic of Panama and Government of Jamaica for air transportation among and beyond their respective territories, granted in Kingston, Jamaica, on Aug. 27, 1999. Law No. 5 of Jan. 10, 2001. Official Gazette No. 24,221 of Jan. 17, 2001.

Amendment to the Montreal Protocol Relating to Substances which Weaken the Ozone Layer, adopted in Beijing on Dec. 3, 1999. Law No. 51 of Jan. 17, 2001. Official Gazette No. 24,413 of Jan. 10, 2001.

Law No. 22 of Dec. 10, 1993 approving Agreement on Civil Aspects on International Removal of Minors, is regulated by Executive Decree No. 222 of Oct. 31, 2001. Official Gazette No. 24,422 of Nov. 1, 2001.

Convention on Control of Illegal Acts Against the Security of Marine Navigation, held in Rome on Mar. 10, 1988 and Protocol for the Control of Illegal Acts Against the Security of Fixed Platforms Located in the Continental Platform, issued in Rome on Mar. 10, 1988. Law No. 21 of May 9, 2002. Official Gazette No. 24,551 of May 14, 2002.

Agreement between the Republic of Panama and the Republic of Guatemala, for air services among their respective territories and beyond same, granted in Guatemala on Nov. 26, 1998. Law No. 30 of June 19, 2002. Official Gazette No. 24,579 of June 21, 2002.

The Republic of Panama is authorized to enter into Donation Agreement for the Financing of the Competitiveness and Sustainability Program for High Quality Coffee Exportations, to which are also subscribing parties, Central American Republics, Dominican Republic and Government of United States of America, represented by United States Agency for International Development (USAID). Cabinet Decree 2 of Jan. 15, 2003. Official Gazette No. 24,724 of Jan. 22, 2003.

Stockholm Convention on Persistent Organic Contaminants, adopted in Stockholm on May 22, 2001. Law No. 3 of Jan. 20, 2003. Official Gazette No. 24,726 of Jan. 24, 2001.

The Tampere Convention on the Provision of Telecommunication Resources for the Mitigation of Catastrophes and the Aid Operations during Events of Catastrophe, adopted in

Tampere, Finland, on June 18, 1998. Law No. 4 of Jan. 20, 2003. Official Gazette No. 24,726 of Jan. 24, 2001.

Tourism Cooperation Agreement between the Government of the Republic of Panama and the Republic of Costa Rica, subscribed in Bambito, Republic of Panama, on Nov. 29, 2001. Law No. 9 of Jan. 20, 2003. Official Gazette No. 24,726 of Jan. 24, 2003.

Basic Agreement on Technical and Scientific Cooperation between the Government of the Republic of Panama and the Republic of Costa Rica, subscribed in Bambito, Republic of Panama, on Nov. 29, 2001. Law No. 10 of Jan. 20, 2003. Official Gazette No. 24,726 of Jan. 24, 2003.

Interamerican Convention on International Permits for Radio Amateurs, adopted in Montrouis, Haiti, on June 8, 1995. Law No. 11 of Jan. 20, 2003. Official Gazette No. 24,726 of Jan. 24, 2003.

Framework Agreement between the Government of the Republic of Panama and the Republic of Ecuador, for Cooperation and Sustainable Development of Tourism. Law No. 12 of Jan. 20, 2003. Official Gazette No. 24,726 of Jan. 24, 2003.

Free Trade Treaty between Central America and Panama. Law No. 24 of Feb. 3, 2003.

Protocol between El Salvador and Panama to the Free Trade Treaty between Central America and Panama. Law No. 25 of Feb. 3, 2003.

Protocol relative to the Pollution Proceeding from sources and Terrestrial Activities of the Agreement for the Protection and Development of the Marine Environment of the Region of the Great Caribbean. Realized in Oranjestad, Aruba, on Oct. 6, 1999. Law No. 26, Mar. 26, 2003.

Agreement between The Republic of Panama and The Organization for the Prohibition of the Chemical Weapon over the Privileges and Immunities of the OPAQ, signed in The Hague, Netherlands, on Feb. 13, 2002. Law No. 27, Mar. 26, 2003.

Agreement of Cooperation for the Protection and the Sustainable Development for the Marine and Coastal Zones of the Pacific North-East, realized in Antigua, Guatemala, on Feb. 18, 2002. Law No. 28, Mar. 26, 2003.

Agreement relative to International Guarantees over Elements of Mobile Equipment and the Protocol over Specific Questions of the Elements of Aeronautical Equipment, of the Agreement relative to International Guarantees over Elements of Mobile Equipment, signed in Cape Town, on Nov. 16, 2001. Law No. 29, Mar. 26, 2003.

Protocol of 1997 that amends the International Agreement to anticipate the Pollution by the Ships, 1973, modified by the Protocol of 1978, realized in London, on Sept. 26, 1997. Law No. 30, Mar. 26, 2003.

Agreement of Mutual Cooperation Between the Republic of Panama and the Mexican United States for the Exchange of Information Concern of Financial Operations Realized Across Financial Institutions to Anticipate, to Detect and to Attack Operations of Illicit Origin or of Money Laundering, signed in Panama, on June 17, 2002. Law No. 31, Mar. 26, 2003.

Agreement about the Protection of the Cultural Sub-aquatic Patrimony, realized in Paris, on Nov. 2, 2001. Law No. 32, Mar. 26, 2003.

Agreement between The Republic of Panama and The Republic of Ecuador for the

Protection and Recovery of Cultural, Natural Goods and Other Specifics, Stolen, Imported or Exported Illicitly, signed in Panama City, on Sept. 9, 2002. Law No. 33, Mar. 26, 2003.

Agreement for the Protection, Conservation, Recovery and Return of Cultural, Archaeological, Artistic and Historical Stolen Goods, Exported or Transferred Illicitly Between The Republic of Panama and The Republic of Peru, done in Panama City, on July 2, 2002. Law No. 34, Mar. 26, 2003.

Convention about the Prohibition of Using Technologies of Environmental Modification with Military Purposes or Other Hostile Purposes, signed in Geneva, on May 18, 1977. Law No. 35, Mar. 26, 2003.

Agreement between the Republic of Panama and the Republic of Honduras about Movement of Doomed Persons, done in Roatan, Honduras, on Dec. 21, 2001. Law No. 36, Mar. 26, 2003.

Agreement between The Republic of Panama and The Republic of Costa Rica about Extradition, signed in Bambito, Republic of Panama, on Nov. 29, 2001. Law No. 37, Mar. 26, 2003.

Agreement of Free Trade between The Republic of Panama and The Republic of China. Law No. 62, Oct. 18, 1993.

List of Products and Specific Rules of Origin of the Commercial Agreement between The Republic of Panama and The Dominican Republic. Law No. 63, Oct. 28, 2003.

Agreement between The Government of The Republic of Panama and The Government of The United States of America with relation to the persons' delivery to The Penal International Court. Law No. 64, Oct. 29, 2003.

Agreement for the establishment of the Zone of Sustainable Tourism of the Caribbean. Law No. 70, Dec. 3, 2003.

Agreement between The Republic of Panama and the United Nations World Food Programme (WFP) for the establishment of the regional office of the WFP in Panama for Latin America and the Caribbean. Law No. 71, Dec. 3, 2003.

Agreement between the States Members and Associate Members of the Association of States of the Caribbean for the Regional Cooperation for Natural Disasters. Law No. 72, Dec. 3, 2003.

Agreement of Cooperation for Tourism between the Government of The Republic of Panama and the Government of Barbados. Law No. 73, Dec. 3, 2003.

Agreement of Cultural Cooperation between the Government of The Republic of Panama and The Government of Barbados. Law No. 74, Dec. 3, 2003.

Interamerican Convention against Terrorism. Law No. 75, Dec. 3, 2003.

Agreement for the Promotion and Protection Reciprocates of the Investments between The Republic of Panama and the Dominican Republic. Law No. 76, Dec. 3, 2003.

Agreement between the Republic of Panama and the Republic of Peru about Movement of Doomed Persons. Law No. 77, Dec. 3, 2003.

Agreement on Privileges and Immunities of the International Criminal Court (APIC). Law No. 20, July 7, 2004.

Amendment to Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May Be Deemed to be Excessively Injurious or to Have Indiscriminate Effects. Law No. 38, July 7, 2004.

Convention for the Safeguarding of the Intangible Cultural Heritage. Law No. 53, July 7, 2004.

World Health Organization Framework Convention on Tobacco Control. Law No. 40, July 7, 2004.

Agreement on the Privileges and Immunities of the International Tribunal for the Law of the Sea. Law No. 2, Jan. 7, 2005.

International Coffee Agreement 2001. Law No. 17, June 14, 2006.

Agreement of Free Trade between The Republic of Panama and The Republic of Singapore. Law No. 19, June 20, 2006.

Adhesion Instrument of the Government of The Republic of Panama to the Constitutive Agreement of the Central American Bank for Economic Integration. Law No. 36, Nov. 8, 2006.

Agreement between The Republic of Panama and the United States of Mexico for the Reciprocal Promotion and Protection of Investments. Law No. 37, Nov. 8, 2006.

Agreement which modifies the Air Transport Agreement between the Government of The Republic of Panama and the Government of the United States of Mexico. Law No. 38, Nov. 8, 2006.

Agreement between the Government of The Republic of Panama and the Government of the Republic of Korea regarding the Volunteers Program of Korea Abroad. Law No. 41, Nov. 21, 2006.

Technical Cooperation Agreement between the Government of The Republic of Panama and the Government of Japan. Law No. 42, Nov. 21, 2006.

Additional Seventh Protocol to the Constitution of the Universal Postal Union. Law No. 43, Nov. 21, 2006.

International Treaty on Phytogenetic Resources for Food and Agriculture. Law No. 45, Nov. 27, 2006.

International Convention on Phytogenetic Protection. Law No. 46, Nov. 27, 2006.

Convention on the Protection and Promotion of the Diversity of Cultural Expressions. Law No. 47, Nov. 27, 2006.

Framework Agreement on Cooperation between The Republic of Panama and the Bolivarian Republic of Venezuela. Law No. 48, Nov. 29, 2006.

First Protocol modifying the Bilateral Protocol between El Salvador and Panama to the Free Trade Treaty between Central America and Panama. Law No. 51, Dec. 14, 2006.

Political Dialogue and Cooperation Agreement between the European Community and its Members States, on the one hand and the Republic of Costa Rica, El Salvador, Guatemala, Honduras, Nicaragua and Panama. Law No. 55, Dec. 20, 2006.

Convention on Imprescriptibility of War Crimes and Crimes Against Humanity. Law No. 56, Dec. 20, 2006.

International Convention for the Suppression of Acts of Nuclear Terrorism. Law No. 57, Dec. 26, 2006.

Free Treaty between The Republic of Panama and The Republic of Chile. Law No. 7, Jan. 12, 2007.

Agreement on Labor Cooperation between The Republic of Panama and The Republic of Chile. Law No. 8, Jan. 12, 2007.

Agreement on Environmental Cooperation between The Republic of Panama and The Republic of Chile. Law No. 9, Jan. 12, 2007.

Convention for the Strengthening of the Inter-American Tropical Tuna Commission established by the 1949 Convention between the United States of America and the Republic of Costa Rica (Antigua Convention). Law No. 11, Jan. 23, 2007.

Convention on the Rights of Persons with Disabilities and the Optional Protocol to the Convention on the Rights of Persons with Disabilities. Law No. 25, July 7, 2007.

1988 Protocol relating to the International Convention on Load Lines. Law No. 29, July 11, 2007.

International Convention on the Control of Harmful Anti-Fouling Systems on Ships. Law No. 30, July 11, 2007.

1988 Protocol relating to the International Convention for the Safety of Life at Sea. Law No. 31, July 11, 2007.

UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects. Law No. 33, July 18, 2007.

Agreement on Air Services between The Republic of Panama and The Republic of Argentina. Law No. 34, July 18, 2007.

Convention Constituting the Multilateral Investment Fund II, adopted at 46th Annual Meeting of Board of Governors of Inter-American Development Bank. Okinawa, Japan, Apr. 9, 2005. Law No. 35, July 18, 2007.

International Convention against Doping in Sport. Paris, France, Nov. 18, 2005. Law No. 46, Nov. 8, 2007.

Agreement between Republic of Panama and Latin American Parliament. Panama, Aug. 27, 2007. Law No. 54, Dec. 14, 2007.

Treaty on Trade Promotion between Republic of Panama and United States of America. Law No. 53, Dec. 13, 2007.

International Convention on Tropical Woods. Geneva, Switzerland, Jan. 27, 2006. Law

No. 58, Dec. 21, 2007.

Treaty on Extradition between Republic of Panama and United States of Mexico. Law No. 59, Dec. 21, 2007.

Agreement on Cultural and Scientific Cooperation between Republic of Panama and Italian Republic. Rome, Italy, May. 2, 2007. Law No. 60, Dec. 12, 2007.

Protocol amending Inter-American Convention on International Amateur Radio Permit. Santiago, Chile, June 10, 2003. Law No. 61, Dec. 12, 2007.

Convention on Technical and Scientific Cooperation between Republic of Panama and Kingdom of Thailand. Havana, Cuba, Sept. 15, 2006. Law No. 62, Dec. 21, 2007.

Agreement between Republic of Panama and United Nations for establishment of Regional Office of United Nations Environment Programme (UNEP) in Panama for Latin America and Caribbean. Law No. 63, Dec. 21, 2007.

Agreement between Republic of Panama and World Organization for Animal Health (OIE) for establishment of Sub-Regional Representation Office of OIE for Central America in Republic of Panama. Brazil, Nov. 28, 2006. Law No. 64, Dec. 12, 2007.

Convention between Republic of Panama and Russian Federation on Touristic Cooperation. Moscow, Russia, May. 4, 2007. Law No. 65, Dec. 21, 2007.

Treaty on Extradition between Republic of Panama and Federative Republic of Brazil. Law No. 66, Dec. 21, 2007.

Treaty on Transfer of Sentenced Persons between Republic of Panama and Republic of Cuba. Law No. 67, Dec. 21, 2007.

Agreement between Republic of Panama and Food and Agriculture Organization of United Nations for establishment of Sub-Regional Office of FAO for Central America. Law No. 68, Dec. 21, 2007.

Cooperation Agreement in the Area of Tourism between Republic of Panama and Federative Republic of Brazil. Brasilia, Brazil, May. 25, 2007. Law No. 2, Jan. 4, 2008.

Agreement on Technical and Scientific Cooperation between Republic of Panama and Republic of El Salvador. Law No. 3, Jan. 4, 2008.

Treaty between Republic of Panama and Federative Republic of Brazil on Transfer of Sentenced Persons or Subject to Special Regimes. Law No. 4, Jan. 4, 2008.

Treaty on Legal Mutual Assistance regarding Criminal Matters between Republic of Panama and Federative Republic of Brazil. Law No. 5, Jan. 4, 2008.

Convention Concerning Safety and Health in Construction (167), adopted by General Conference of International Labour Organization. Geneva, Switzerland, June 20, 1988. Law No. 6, Jan. 4, 2008.

Agreement on Aerial Services between Republic of Panama and Federative Republic of Brazil. Brasilia, Brazil, May. 25, 2007. Law No. 7, Jan. 4, 2008.

Inter-American Convention for Protection and Conservation of Sea Turtles. Caracas, Venezuela, Dec. 1, 1996. Law No. 8, Jan. 4, 2008.

Second Protocol to the Standard Treaty of Electric Market of Central America. Campeche, Mexico, Apr. 10, 2007. Law No. 9, Jan. 4, 2008.

Second Protocol Amending the Bilateral Protocol between El Salvador and Panama to Treaty of Free Trade between Central America and Panama. Law No. 10, Jan. 4, 2008.

Bilateral Protocol between Republic of Panama and Republic of Costa Rica to Treaty of Free Trade between Central America and Panama. Law No. 17, Feb. 13, 2008.

Bilateral Protocol between Republic of Panama and Republic of Honduras to Treaty of Free Trade between Central America and Panama. Law No. 23, Apr. 25, 2008.

Agreement on Aerial Services between Republic of Panama and Republic of Cuba. Havana, Cuba, No. 5, 2007. Law No. 45, July 15, 2008.

Agreement between Republic of Panama and Kingdom of Sweden for Reciprocal Promotion and Protection of Investments. Law No. 46, July 15, 2008.

Convention on Scientific and Technological Cooperation between Republic of Panama and Socialist Republic of Vietnam. Hanoi, Vietnam, Nov. 5, 2007. Law No. 47, July 15, 2008.

Bilateral Protocol between Republic of Guatemala and Republic of Panama to Treaty of Free Trade between Central America and Panama. Law No. 48, July, 15, 2008.

Convention on Facilitation of International Maritime Traffic, 1965, amended, adopted at London, England on Apr. 9, 1965. Law No. 44, July 15, 2008.

Agreement on Implementation of Provisions of United Nations Convention on Law of Sea of Dec. 10, 1982 related to Conservation and Management of Straddling and Highly Migratory Fish Stocks. New York, Aug. 4, 1995. Law No. 64 of Oct. 29, 2008.

Agreement between Republic of Panama and European Community on certain aspects of air services. Panama, Oct. 1, 2007. Law No. 65 of Oct. 29, 2008.

Maritime Labor Convention 2006 (MLC). Adopted on Feb. 23, 2006 at 94th (Maritime) Session of General Conference of International Labor Organization (ILO). Law No. 2 of Jan. 6, 2009.

Extradition Treaty between Republic of Panama and Eastern Republic of Uruguay. Panama, June 16, 2008. Law No. 6 of Jan. 14, 2009.

International Convention on Civil Liability for damage caused by Bunker Oil Pollution of Ships. London, Mar. 23, 2001. Law No. 7 of Jan. 14, 2009.

Bilateral Protocol between Republic of Panama and Republic of Nicaragua to Free Trade Agreement between Central America and Panama. Law No. 29 of June 22, 2009.

See also category 22 Transportation, topic 22.01 Aircraft.

See also Selected International Conventions section.

1

PARAGUAY LAW DIGEST

—Scope —

Revised for 2010 edition by

PERONI SOSA TELLECHEA BURT & NARVAJA of Asunción.

(C.C. indicates Civil Code; C.de Proc. indicates Code of Procedure. All codes are cited by articles.)

Note: This revision incorporates legislation through June 30, 2009.

1 INTRODUCTION

1.01 CURRENCY:

National currency unit is “Guaraní.” Banco Central del Paraguay has exclusive right to issue bank notes and mint coins that are legal tender in all territory.

1.02 GOVERNMENT AND LEGAL SYSTEM:

Present Constitution was enacted in 1992. Paraguay is unitary, indivisible and decentralized Republic. There are legislative, judicial and executive powers. Legislature is composed of Senate and Chamber of Deputies. Legislature and President of country are elected directly every five years. Reelection for President is not permitted.

Judiciary is headed by Supreme Court composed of nine members and by courts established by law.

1.03 LEGISLATURE:

Legislative Branch.

Congress is composed of two chambers, one of senators and other of deputies. Members are elected directly by people according to law. Both chambers assemble each year in regular sessions from July 1 until June 30 of following year with recess period from Dec. 21 to Mar. 1. Chambers may also hold extraordinary sessions by decision made by one-fourth of members of any chamber, by resolution of two-thirds of members of Congress' Permanent Commission, or by decree of Executive Branch.

1.04 OFFICE HOURS AND TIME ZONE:

Paraguay is in the GMT -04:00 time zone. General business hours are from 8:00 a.m. to 12:00 p.m. and from 3:00 p.m. to 7:00 p.m. although some businesses may remain open from 12:00 p.m. to 3:00 p.m. Banking hours are from 8:45 a.m. to 2:45 p.m. for public.

2 BUSINESS ORGANIZATIONS

2.01 AGENCY:

See category 18 Property, topic 18.03 Powers of Attorney.

2.02 CORPORATIONS (SOCIEDADES ANONIMAS):

Under Paraguayan law, corporations (Sociedades Anonimas) are defined as mercantile companies. Corporations are liable for their obligations to extent of their assets. Participation of shareholders is represented by shares.

Corporate name must include Sociedad Anonima (S.A.).

Organization

Following conditions are indispensable for formation of corporation: (1) At least two shareholders; (2) capital stock must be completely subscribed; (3) corporation must have specified duration; (4) corporation may function once it is recorded in Public Registries.

Corporate By-Laws (Estatutos).

Following must be included in bylaws: (1) Full name, nationality, profession, civil status, domicile of shareholders, and number of shares subscribed by each one; (2) name of corporation and its domicile within country or abroad; (3) nature of business of corporation; (4) amount of capital subscribed and paid in; (5) nominal value of shares, and indication whether these are bearer or nominative; (6) value of assets incorporated in kind, if any; (7) basis on which distribution of profits will be made; (8) special privileges and rights, if any, conferred on founders; (9) dispositions regarding management and supervision, their respective powers and duties, and number of administrators; (10) for Duration of the Corporation, powers conferred on stockholders' meetings, provisions regulating exercise of stockholders' right to vote, and procedure to take decisions at such meetings.

Formalities Required to Establish Corporation.

Shareholders must execute corporate contract in form of public instrument, with intervention of notary public.

Corporations acquire separate legal entity upon registration in Public Registry created by Art. 345 of Law 879/81 (Registro de las Personas Jurídicas y Asociaciones).

Lack of registration will not make corporate contract void, but it may not be opposed to third parties. Shareholders, directors and any persons who have authorized acts, transactions and operations in corporate name prior to registration of corporation are jointly and severally liable for these.

Procedure for Establishment of Corporation by Public Subscription.

Corporation may also be established on basis of prospectus, which must indicate purpose and capital of company, principal provisions of bylaws, participation if any of promoters in profits of company, and date by which company will be established.

Prospectus must be rendered as public instrument, registered and published three times in important newspaper.

Subscription of shares must be made in public act or private contract certified by notary public. Name, nationality, civil status, profession, and domicile of subscribers, and number of shares subscribed must be given. Once subscriptions are made promoters must indicate when share capital must be paid in.

Date, within 20 days from time deposit of paid-in capital was made, must be set for general meeting of subscribers to resolve if corporation will be incorporated. If affirmative, general meeting must decide and approve work of promoters, bylaws of corporation, valuation of assets in kind, if any, privileges reserved for promoters, and designate administrators and directors.

Decision of general meeting must be rendered into public instrument and registered. Promoters are jointly and severally liable for obligations to third parties made before corporation was incorporated.

Management and administration of corporation is exercised by one or more directors elected by shareholders' ordinary general meeting, or designated in incorporation documents. Their number is decided by general meeting if not specified in bylaws.

Directors need not be shareholders. They may be reelected, but appointment is revocable by Shareholders Meeting. Term of directors shall be for one fiscal year unless bylaws establish otherwise. Directors must be Paraguayans or foreigners with legal residence in country.

Directors may only engage in business transactions with their corporation under special circumstances. They are forbidden to execute any business on behalf of corporation not related to purpose for which it was formed.

Corporate administrators are responsible to corporate creditors for negligence in their duty to safeguard integrity of corporation's assets.

Supervision.

One or more trustees must also be elected by ordinary general meeting to supervise management of corporation. They must be capable of performing duties assigned in bylaws, and domiciled in Paraguay. Bylaws shall determine duration of their terms, which may not exceed three fiscal years. Trustees may be reelected.

Trustees have following powers and duties: (1) Supervise administration and management of corporation, and participate without vote in shareholders' and board of directors' meetings; (2) examine corporation's books and papers whenever they deem advisable, at least once every three months; (3) call extraordinary shareholders' meetings when they consider necessary and ordinary meetings when board of directors fails to do so; (4) ensure that corporation complies with all obligations under law, as well as with decisions of shareholders' meetings.

Responsibility of Administrators.

Administrators are not liable for obligations of company except in case of nonperformance of their duties, mismanagement, or personal violation of law, or corporate bylaws. In such instances administrators are jointly and severally liable to corporation and to third parties for their acts, but directors who opposed, voted against, or were not present when illegal acts were approved, are exonerated.

Shareholders' Meetings.

Called Asambleas Generales, may be ordinary or extraordinary, and must take place in corporate domicile.

Ordinary meetings must be called at least once a year by directors or trustees, to consider and resolve following: (1) Annual report of directors, statement of accounts, balance sheet, distribution of dividends, trustees' report, and any other issue within their competence according to law and bylaws; (2) election of directors and trustees, and determination of their remuneration; (3) responsibilities of director and trustees, and their removal; (4) issue of shares.

Extraordinary meetings must be called by directors at any time, or by trustees when deemed necessary or convenient, or at request of shareholders representing 5% of corporate capital unless bylaws set other limits, to resolve following: (1) To modify bylaws; (2) increase or reduction of capital; (3) redemption, reimbursement or amortization of shares; (4) merger, transformation or dissolution of corporation; all matters related to liquidation and liquidators; (5) issue of debentures or exchange of these for shares; (6) issue of participation bonds.

Notice of meetings, including full agenda and any special requirements set forth in bylaws for participation, shall be published for five days, at least ten days before meeting. Should meeting not take place second meeting must be called within 30 days. Decisions on matters not listed in agenda are null and void.

To participate in meetings, shareholders must deposit share certificates with corporation or present certificate from bank holding shares, three days before meeting. Shareholders may be represented in meetings, but not by directors, trustees, managers or other employees of corporation.

Ordinary meetings on first call require quorum of shareholders representing majority of shares with voting rights; any number of shareholders forms quorum for second call. In both cases resolutions require absolute majority of votes present unless bylaws call for different majority.

Extraordinary meetings on first call require presence of shareholders representing 60% of shares with voting rights; on second call quorum is 30%. Bylaws may establish different percentages.

Shares.

Share certificates must be numbered, signed by one or more directors and, contain name of corporation, date and place of registration, amount of subscribed capital, number, par value and type of shares. Bearer share certificates may only be issued once they are paid in full; until that time, shareholders are given nominal provisional certificates and remain liable for payment. Bylaws may establish different kinds of shares with different rights, which may be nominal or bearer shares. Transfer of unusual shares may be subject to special conditions.

Corporation may acquire own shares when authorized by extraordinary meeting of shareholders, and such purchase may be made with liquid earnings provided shares have been paid-in fully.

Accounts.

Directors are required to prepare and present to trustees quarterly financial statements. These form basis of annual reports which must be presented to shareholders together with written approval of trustees.

Directors are also required to prepare each year inventory, detailed statement of account, report on its tenure, and whatever other documents are needed to show condition of corporation. Documents must be approved at ordinary shareholders' meeting.

Dividends.

Five percent of net profits must be set aside annually with purpose of creating reserve fund of not less than 20% of subscribed capital. Dividends may only be paid to shareholders out of corporation's net profits. Any infringement makes directors jointly and severally liable.

Issue of Debentures.

Law 772/79 and C.C. allow issue of debentures by corporations provided they fulfill certain requirements.

See also category 12 Foreign Trade and Commerce, topic 12.02 Foreign Investment.

2.03 PARTNERSHIPS:

Limited Liability Company (Sociedad de Responsabilidad Limitada).

Company may use name of one or more partners preceded or followed by words: Sociedad de Responsabilidad Limitada or S.R.L. SRL can only be commercial, even if it undertakes civil activities. May not engage in banking, insurance, or savings/loans operations.

SRL may not operate unless contract has been registered in Public Registry of Commerce. Failure to do so creates unlimited responsibility of partners towards third parties.

Capital.

Represented by nominal non-endorsable quotas of Gs.1,000 or multiples thereof.

Incorporation.

SRL may be formed by two, but no more than 25, partners after subscription of company capital and payment in cash of at least 50% thereof. No minimum capital requirement, but must be adequate for type of business company will engage in. Export and import companies must meet certain requisites imposed by Central Bank. Company capital may also be incorporated in goods or fixed assets, which are transferred to company in constitutive documents or once company contract is recorded in Public Registry of Commerce. Partners remain jointly and severally liable towards third parties for value of goods and assets incorporated as capital.

If SRL has more than five partners, transfer of quotas to third parties must be approved by partners that represent ¾ of capital; if less than five partners vote must be unanimous. Transfer of quotas among partners is unrestricted.

Partner wishing to transfer capital quotas must advise others, who must reply within 15 days. Assent is presumed if no opposition is made. Partner not able to obtain consent for transfer quotas may be authorized to do so by judge in summary proceedings. If opposition is deemed to be without cause other partners may acquire quotas under same conditions offered to or by third parties. Company may also acquire quotas with net liquid profits or by reducing its capital. Transfer of quotas must be made by Public Notary, and does not have effect until registered in Public Registry of Commerce.

Managers.

Administration and representation of SRL is charged to one or more managers (gerentes), who may be partners or not, and who have same rights and duties as directors of sociedades anónimas. There are no limitations to their terms.

Managers may not act on their own initiative in respect to any business transaction that is not included within objectives of company, nor can they assume representation of persons or commercial entities with similar business without express authorization of partners. Managers are jointly and severally liable to company and partners in case of bad management or violation of company charter.

All partners have right to take part in decisions of company. If SRL's charter does not determine how partners will reach decisions, rules of ordinary shareholder's meeting of sociedades anónimas will apply. Change of purpose, transformation, merger, or any other amendment to company's charter which imposes more responsibility to partners requires unanimous consent. Any other resolution by partners can be decided by vote of majority of capital. Each quota represents one vote.

Reserve Fund.

Five percent of actual net profits are required to be set aside annually with purpose of creating reserve fund of not less than 20% of company's capital.

Dissolution.

SRL is not dissolved by death, interdiction or bankruptcy of partners, or by dismissal of manager(s) named in contract, unless special disposition stipulate contrary. Bankruptcy of company does not imply bankruptcy of partners.

Limited Liability Personal Company.

All persons capable of entering into commerce with certain capital may form Limited Liability Personal Company.

Assets that form part of capital will be separate and independent from personal assets belonging to physical person, and respond completely to company obligations. Physical person's liabilities are limited to company total capital except in cases of intentional damage, fraud or consciously disobeying law in which cases physical person will respond with all his personal assets. Companies must be created by public instrument which must include: (a) Name, surname, civil status, nationality, profession and address of physical person; (b) company name, which must always include name and surname of physical person followed by words: “Companía Individual de Responsabilidad Limitada”, meaning Limited Liability Personal Company, as well as amount of total capital and address of company; (c) specific purpose of company; (d) amount of assigned capital; (e) value attributed to each of goods; (f) designation of administrator; this post may be filled by same physical person or his representative. Such companies are commercial to all legal effects. Total amount of capital must be deposited at company start-up. Company will stop operating if one or more of following cases occur: (a) Events stated in charter; (b) by express wish of physical person; (c) death of physical person; (d) bankruptcy of company; (e) loss of 50% or more of declared capital.

Simple Partnership.

Any partnership that is not partnership as defined by Civil Code and does not have as object commercial activity is simple partnership. Commercial activities are following: (a) Any industrial activity whose purpose is to produce services and goods; (b) any activity as intermediary; (c) carriage; (d) banking, insurance or stock trading; (e) any other activity defined by merchant law as commercial activity. Any partnership that has as object commercial activity must be recorded in Public Register of Commerce. Law does not indicate any special form for this kind of partnership, but if partners wish to limit their liability they must show contract to third parties. Even if they do so, partners who conduct business are subject to unlimited liability.

Commandite.

This partnership has two kinds of partners: (1) Those with unlimited liability, (2) those with limited liability, up to value of their shares (silent partners); firm name must contain at least name of one of active partners. When commandite does not show names of every partner, name must be followed by words “y Companía”. If silent partner adds his name to firm name he incurs unlimited liability.

General partnership rules are applicable to these companies if compatible.

Initial document of firm must indicate who are unlimited liability partners and who are silent partners. Silent partners may not manage or do business in firm name, unless they are so authorized by special power of attorney. If they do so they have unlimited liability to third parties.

Joint-Stock Company.

As in commandite this partnership has same kind of partners. Unlimited liability partners have administration of partnership. Law of corporations is applicable where pertinent and not contrary to joint-stock company bylaws.

Shareholders named as administrators can only be removed by judgment rendered by competent judge, requested by meeting of shareholders, representing at least 10% of paid-up capital.

General Partnership.

Partners have unlimited liability. Firm name must show name of one or more partners followed by words “Sociedad Colectiva” or “S.C.”. Contract establishing firm must contain: (a) Partner's names, surnames and domiciles; (b) firm name; (c) partners who have administration of firm; (d) address of partnership and its branches; (e) partnership object, etc. When contract has been made by public instrument it must be recorded within 30 days. Partners cannot enter into compatible business with object of partnership unless duly authorized by other partners.

See topic Corporations (Sociedades Anonimas), subhead Limited Liability Personal Company.

3 BUSINESS REGULATION AND COMMERCE

3.01 BILLS AND NOTES:

See topic 3.04 Drafts and Notes.

3.02 COMMERCIAL REGISTER:

See category 8 Documents and Records, topic 8.03 Records.

3.03 CONTRACTS:

Nature, form and object of contracts are governed by C.C.

Parties may freely determine their rights in contracts subject to compliance with mandatory laws, e.g., laws related to public policy and good customs that may not be forsaken or ignored.

Contracts must be interpreted and performed in good faith.

Essential requirements of contracts are: Consent, object and form. Noncompliance of form in special cases results in nullity of contract.

Consent is expressed by offer and acceptance.

Contract is considered executed in place where offer is made.

Object of contract must be definite in respect to its kind. Future inheritances cannot be object of contracts.

Applicable Law.

Form of contract: (a) If parties are present, is ruled by law of place where executed; (b) if parties are absent but one of them signed private document, is ruled by law of place where signed; (c) if executed in different places, form is governed by law of place most favorable to its validity. Contracts executed in foreign country regarding real estate located in Paraguay must be recorded in public document and duly authenticated. Will only have effects once recorded with notary public and registered by order of competent court. Legal capacity is ruled by law of domicile. When contract is to be performed in Paraguay, validity or nullity of its object, substantial defects and capacity of parties to acquire rights is governed by C.C.

Distributorships, Dealerships and Franchises.

Law 194/93 governs relationships between foreign companies and firms (collectively, "Principal") and local representatives, agents and distributors (collectively, "Dealer") in Paraguay.

Definitions.

Representation is authority granted by contract to dealer to negotiate and carry out commercial transactions for promotion, sale or distribution of products or services provided by principal. Agency is contractual relationship whereby principal grants dealer authority to act as intermediary in negotiations or contracts with clients for promotion, sale or distribution of products or services, contemplating payment of commission. Distributorship is contractual relationship between principal and dealer for purchase or consignment of products, with objective of reselling same.

Form.

Dealer may be exclusive or of any other contractual form, under terms agreed to by parties.

Application of Paraguayan Law.

Parties may freely regulate their rights by contracts governed by Civil Code, waiver of rights recognized by Decree Law 7/91 is not allowed.

Termination Without Cause.

Principal may cancel, revoke, amend or refuse to renew representation, agency or distributorship, without statement of cause, but with obligation in such case to pay dealer minimum compensation pursuant to following criteria: (a) duration of relationship; (b) average gross benefits derived from relationship during last three years of activity.

Termination With Cause.

Representation, agency or distributor relationships may be cancelled, revoked, amended or not renewed for just cause, without obligation to pay compensation for following reasons: (a) noncompliance with contract clauses; (b) fraud or breach of trust on part of dealer; (c) inability or negligence of dealer in sale of products or services; (d) continued reduction of sales or distribution of products or services for reasons attributable to dealer; except if caused by quotas or restrictions on imports and sales, fortuitous events or force majeure; (e) any act attributable to dealer that affects or prejudices marketing, sale, or distribution of products or services; (f) conflict of interest due to representation, agency or distribution of products or services that may be in competition with products or services contemplated by relationship.

Prior to termination, principal shall require dealer cure cause invoked within term of 120 days. Noncompliance by dealer allows principal to exercise its rights immediately. Curing period not required if termination is related to fraud or breach. Stated causes shall be proved before Paraguayan courts or by arbitration if thus agreed; otherwise, cancellation, revocation, amendment or refusal to renew shall be deemed to be unjustified.

Purchase of Inventory.

At termination, dealer, regardless of compensation that may correspond, has option to sell to principal, its inventory at market price.

Jurisdiction.

Parties shall submit to territorial jurisdiction of courts of Paraguay. They may compromise in all patrimonial matters or submit to arbitration before or after suit is filed, provided that no judgment shall have been issued.

Evidence of Relationship.

From date of enactment of Law, documents and contracts shall be recorded in Public Registry of Commerce. Dealer who invokes relationship by virtue of acts occurred or documents granted prior to enactment of Law, may use all types of evidence established in laws, and particularly any of following: (a) letters of authorization from principal to act as dealer for promotion, sale or distribution of products and services; (b) purchase invoices evidencing that commercial operations have been carried out on basis of authorization, at least during two years prior to enactment of Law; (c) payment of commissions to dealer by principal for commercial operations carried out for at least two years prior to enactment of Law; (d) advertising by dealer incurred at his own account and expense indicating representation, agency or distributorship of goods and services in knowledge of but without opposition of principal; (e) payment or credit of commissions or compensation to dealer by principal for operations not carried out in their territory.

Excuses for Nonperformance.

If event subsequent to execution of bilateral contract makes compliance impossible, without negligence of either party, reciprocal obligations extinguish. Had one party fulfilled its obligations consideration must be restored to him. When unpredictable and extraordinary circumstances make performance of long term excessively onerous for one party, it may claim rescission or amendment of obligations pending completion. Rescission will not be declared if claimant is guilty or if other party offers equitable amendment. In contracts accepted by one party without negotiation, adherent may be released of obligations or request amendment thereof. It is considered unfair to exclude or limit liability of dominating party; to authorize dissolution of contract or change of conditions or in any way deprive adherent of some rights without cause imputable to him; when exercise of contractual right of adherent is subject to other party's consent; to have adherent waive in advance any right based on contract to which he would be entitled in absence of such clause; to limit adherent's use of means of proof or place on him burden or proof (onus probandi); to subject adherent's right to whatever recourse available to condition or term or limit defenses or recourses in any procedure to which adherent would have been entitled; to authorize unilateral choice of competent jurisdiction.

3.04 DRAFTS AND NOTES:

Formal requirements of draft are: (1) Denomination of “Draft” inserted in text of document, in language in which it is made; (2) unconditional order of paying sum of money; (3) name of payor; (4) indication of date of payment; (5) place of payment; (6) name of payee; (7) time and place where it is issued; (8) drawer's signature.

Draft may be issued: (1) To order of drawer; (2) to order of drawee, or third person.

Liability of drawer towards drawee: Only if drawer did not provide sufficient funds to drawee; he guarantees not only payment of draft, but also its acceptance. Liability of drawee: If funds were provided, drawee is always liable to holder of draft. Anyone who signs draft on behalf of third person must be empowered to do so. Drafts may be drawn: (1) At sight; (2) at term after date; (3) at term after sight; (4) number of months after date; (5) number of days or months after date or sight. Lack of indication makes instrument sight draft. If there is any variation between what is written in numbers and in letters, latter shall be deemed valid.

Endorsements.

Drafts are always endorsable. Endorsement may be made to any person. Conditional endorsements are deemed not made and partial endorsements are null and void. Endorsers are jointly and severally liable for acceptance and payment unless otherwise stated. Valid endorsements may be made in blank, to bearer, stating beneficiary, as collateral, or endorsement giving power of attorney.

Protest.

Should be made before notary public and two witnesses. Failure to pay must be recorded next working day after draft was due. If this day is holiday or Sun. on next working day.

Notarial protest contains: Date, copy of draft with acceptances, endorsements, guarantees, and any other data; demand to drawee or person liable to accept or pay stating whether he was present or not; reasons for refusal or statement that none was offered; signature of protesting party or statement of impossibility. Lack of presentation in time, or of protest when necessary, prejudices bill against endorsers, drawers and other liable parties, but not against acceptor. Bill duly protested is sufficient evidence to request immediate embargo and subsequent sale of assets of person liable for payment.

Aval.

Guarantee third party gives in favor of persons liable for payment of draft. It must be written in same instrument, on back, after words “por Aval” or other similar words, signifying joint guarantee.

Promissory Notes.

Are ruled by same provisions as drafts. Maker takes place of acceptor.

Checks.

Following data must be inserted for validity of check: (1) Check number and account number; (2) date and place of issue; (3) order to pay sum of money; (4) bank against which it is drawn; (5) designation of place of payment; (6) name and surname, or company name, address and signature. Checks must be presented to bank within 30 days after date. Law 805/96 repeals and voids Law 941/64, which established criminal responsibilities for issuing checks without sufficient funds available or written authorization from bank to overdraw account. Further, Law 805/96 allows issuance of postdated checks.

3.05 INTEREST:

Resolution No. 3/90 from Central Bank establishes that maximum interest rate will be considered from average of active rates applied by banks and other financial institutions, calculated monthly by Central Bank.

3.06 MONOPOLIES, RESTRAINT OF TRADE AND COMPETITION:

Art. 107 of 1992 Constitution forbids monopolies and artificial increase or decrease of prices which may restrain free market competition.

Government monopolies may be established by law as protection and exploitation of public utilities.

3.07 SALES:

A general condition not to resell is void but condition not to resell to specific person is valid. Condition to resell to vendor or to repurchase from buyer is void (Repurchase Agreement). Sale may be made with preferential right to purchase but only if buyer wishes to resell in which case vendor may have preferential right to buy within three days if personal property and ten days if real property. In case of sale by installments, if buyer has paid 25% of price or has introduced improvements that equal such value contract may not be canceled by vendor. All things that can be object of contracts can be sold, even if they are future things, if their sale is not prohibited by law.

4 CITIZENSHIP

4.01 ALIENS:

See category 14 Immigration, topic 14.01 Aliens.

4.02 IMMIGRATION:

See category 14 Immigration, topic 14.02 Immigration.

5 CIVIL ACTIONS AND PROCEDURE

5.01 ACTIONS:

See topic 5.05 Prescription.

5.02 DEPOSITIONS AND DISCOVERY:

In civil cases part of evidence is obtained by: (1) “Posiciones,” (questions and answers made during course of suit by one party to another); (2) “declaraciones” (depositions of witnesses). “Declaraciones” may be taken orally before regular period for testimony, if witness is of advanced age or about to depart to place out of country or when there are other special circumstances.

Letters rogatory, with copies of questions to be asked, may be issued to another judge if examination is to take place elsewhere.

5.03 JUDGMENTS:

Foreign judgments have force provided for in treaties. In absence of a treaty, a foreign judgment may be executed if following circumstances exist: (1) that judgment was obtained in an action in personam; (2) that obligation on which action was based is valid according to Paraguay's law; (3) that decision be a final one and proper certifications and legalizations are complied with according to law of Paraguay; (4) that judgment has not been pronounced by default of condemned party.

5.04 LIMITATION OF ACTIONS:

See topic 5.05 Prescription.

5.05 PRESCRIPTION:

Prescription is governed by C.C.

Following rights and actions do not prescribe: Rights derived from family relations; action to attack null acts; action to demand partition of inherited property or condominiums that remain undivided; action of person declared presumptively dead to sue heirs for restitution of his property.

Actions must be brought within following periods after respective causes of action accrue:

Ten Years: For incapable person or his heirs against guardian to demand rendering of accounts and vice versa, period commences from date incapable person dies or incapacity ceases; those derived from right acknowledged by judgment; for petition of inheritance, period commences from date defendant took possession of inheritance; for collation of inheritance and all those not subject to lesser term.

Five Years: To demand accrued alimony pensions and price of rents; sums of money, not being principal, that must be paid annually or at shorter periods, i.e. interest; rights derived from relations between partners and with company; of company creditors to demand managers' liability.

Four Years: For heirs to demand reduction of estate of co-heir if it exceeds disposable portion, and action of reduction against third parties to safeguard heirs' legitimate portion; rights derived from endorsable or bearer documents; if they are payable at sight period commences on date of issue and if on time from due date.

Three Years: Rights derived from current account contract; merchants to demand price of goods sold to merchants; of indignity and disinheritance; period commences from date of decedent's death.

Two Years: To demand nullity of acts for error of fact, fraud, violence or intimidation (period commences from date violence or intimidation ceases or other vices are known); creditors to revoke contracts entered into by debtor in case of fraud: period commences from date creditors become advised and in any case five years after act was executed; to demand annulment of obligation incurred by incapable person without guardian's approval: period commences from date incapacity ceases; lawyers, engineers and all liberal professions to demand payment of fees; merchants to demand price of goods sold to non-merchants; liability derived from unlawful acts; partial or complete simulation, by parties to contract or by third parties: period commences from date third parties become aware of simulation and for contractual parties when supposed simulator intends to disavow simulation.

One Year: To cancel effects of donation or legacy by reason of ingratitude or indignity: period commences from date act is known by donator or decedent's heirs; owners of hotels, hospitals or similar entities for food, lodging and other related expenses; to demand payment of tuition in schools; auctioneers and brokers to demand payment of commissions; rights derived from transport contract: period commences from date passenger arrives or damage occurs or from date goods are or should be delivered, if transport began or ended abroad prescription is extended to 18 months; rights derived from insurance policy: period commences from date obligation is due, in life insurance prescription commences from date existence of benefit is known by beneficiary but may not exceed three years after damage took place.

Six Months: Purchaser to rescind contract or to be indemnified for non-apparent servitude which seller omitted to mention.

Three Months: Hidden damages action to cancel sales contract and to reduce price because of hidden defect.

Suspension of Prescription.

Prescription does not run against non-emanicipated minors, persons subject to interdiction because of mental illness, absentees and all other incapable persons during period they do not have guardian and six months after designation of guardian or until incapacity ceases.

Prescription is suspended: Between spouses; between person exercising patria potestas and minors subject to it; between guardian and minor or interdicted person until rendering of accounts is made; between companies or corporations and their managers while they are on duty; in favor of persons absent from country on public service. Suspension can be alleged only by person in whose benefit it is established. Period during which prescription is suspended is not counted.

Interruption of Prescription.

Prescription period before fact that brought about interruption is not counted. Prescription is interrupted by: Claim notified to debtor; presentation of title of credit at proceedings for settling estate of decedent or at creditors' meeting; acknowledgment of credit by debtor; by commitment between parties written into public deed to submit case to arbitrators or to amicable compounders.

Contractual Limitations.

Prescription in future may not be waived nor may parties agree to different period, but prescription already fulfilled may be waived explicitly or tacitly.

Pleading.

To claim prescription it must be alleged by person in whose favor it is established.

6 DEBTOR AND CREDITOR

6.01 ASSIGNMENTS:

Assignments of credit rights or actions are only effective regarding third parties, from time date is fixed according to law. If transfer affects real property, from date of its filing for registration in public registry. Any debtor who pays his creditor, before having knowledge of assignment, is released from obligation. Principle of bona fides governs all relationships between assignor and assignee. Sale or transfer of a credit includes that of all accessories rights. Transfers of inheritance rights and credits in litigation are permitted. Must be notarized.

6.02 ATTACHMENT:

In order to attach property in an ordinary civil action, one of following conditions must exist: (1) That debt is evidenced by certain written instruments; (2) that in case of action on bilateral contract, contract is in writing and complies with certain requirements as to its execution; (3) that debt is evidenced by commercial and accounting books kept in due form; or, (4) when debt is subject to condition, that plaintiff proves that debtor is trying to dispose of, hide or remove his property, or that responsibility of debtor has decreased after obligation was contracted. Attachment will also be issued against specific property which is object of possessory action, an attachment will be issued at request of any of parties when facts are admitted which make out a prima facie case in their favor or when a favorable judgment has been obtained.

Party who obtains an attachment must give security for costs and damages. Attachment may also be issued with summary actions known as “Executory Actions.”

6.03 BANKRUPTCY AND INSOLVENCY:

Law 154/69.

Bankruptcy declaration presumes insolvency of debtor. State of insolvency is manifested by one or more nonfulfillments of obligations that in court's criteria shows debtor as unable to pay his debt. Petition in bankruptcy can be filed by debtor, his heirs or his creditors. Debtor can avoid declaration of bankruptcy by filing in court for a creditors' meeting. Debtor who engages in commercial activities and reaches a state of insolvency is obliged by law to file for bankruptcy or creditors' meeting. Court will decide whether to accept petition for a creditors' meeting or to declare bankruptcy. If creditors' meeting is accepted, court designates a trustee in bankruptcy who will review documentation submitted to him by creditors, for which purpose there is a term not less than 20 days and not more than 40 days. Creditors will be notified of court's admission of request by publication in one newspaper and by certified post, sent by trustee.

When requesting creditors' meeting debtor will continue administrating his business and assets. Creditors cannot start or continue legal action against debtor whose petition for creditors' meeting has been accepted by court, with exception of credits guaranteed by mortgages or chattel mortgages, or credits derived from employees' and workers' salaries.

Debtor must present his payment proposal for consideration by his creditors. Representation will be limited to those whose credits that have been admitted and recognized by court. Creditors will vote to accept or turn down payment proposal submitted by debtor in special meeting called to this effect.

Only creditors authorized to vote are those with unsecured credits. Should a creditor with a privilege or guaranty vote, he automatically loses his privilege or guaranty.

Payment proposal is limited, in its scope, by law. If payment term is less than two years, debtor can propose a rebate of up to 50%; but if term exceeds two years, rebate shall not surpass 30% of credit. Maximum term authorized is four years.

If creditors turn down proposal, or, if accepted, court does not confirm it, bankruptcy shall be declared.

Bankruptcy proceedings are similar to creditors' meeting procedure, but bankrupt debtor is separated from administration of his business. Administration passes from debtor to trustee in bankruptcy to realize assets of debtor and make distribution of proceeds pro rata among unsecured creditors once secured creditors are paid off.

All capable persons, juridical or physical, can file for bankruptcy,even if they do perform commercial activities.

Bankruptcy of a corporation with a partner with unlimited liability provokes bankruptcy of this partner but not of those with limited liability nor bankruptcy of corporations of which they form part.

Bankruptcy declared in a foreign country cannot be opposed to creditors domiciled in Paraguay over assets held by debtor in country.

When court declares a bankruptcy, it has to qualify actions of debtor. Actions may be considered fortuitous, guilty or fraudulent. In last two cases, debtor may be prosecuted by criminal actions.

6.04 EXECUTIONS:

Judgments for money are carried into effect by attaching property of debtor.

Attachment of property is made in following order: (1) Money; (2) jewelry; (3) personal property or livestock; (4) real properties; (5) credits or shares; (6) salaries or pensions.

After attachment, sale of property follows. Sale is held by an auctioneer after mandatory advertisement of auction. Bidders must file bond in amount of 10% of total amount of property sold. Sale must take place at fiscal value. When nobody bids, another date will be set with reduction of 25% of value or for two-thirds of same. If in spite of price reduction, no bids are made, property will be sold without base price limitation.

Third parties may intervene to allege preferential rights but sale will not be stayed unless intervener claims ownership based on a title of earlier date than execution. (C.de Proc. art. 398-462).

7 DISPUTE RESOLUTION

7.01 ARBITRATION:

Law incorporates international criteria on matter; recognizing contractual nature of arbitral pact, and allows election of national and foreign arbiters (always in uneven number) as well as procedure to be applied throughout arbitral process. It also admits national and international arbitration, as well as institutional and independent ones, adopting principles and solutions contained in UNCITRAL Model Law on International Commercial Arbitration (1985).

Purpose of Arbitration.

Any matter of patrimonial nature and that may be compoundable may be subject of arbitration, provided that final, conclusive or executed judgment has not been rendered. Government, decentralized and autarchic entities, as well as public enterprises and municipalities may submit to arbitration their differences with national or foreign parties as long as this results from juridical acts or contracts governed by private law. Matters requiring intervention of District Attorney may not be subject to arbitration.

Arbitration Agreement—Arbitral Clause.

Arbitration agreement must be submitted in writing in binding clause included in contract or in independent document, exchange of letters or telegrams.

Composition and Appointment of Arbitral Court.

In absence of agreement between parties, three arbiters shall be appointed; each party shall designate arbiter and two arbiters so appointed shall designate third one; if one party does not appoint arbiter or if two arbiters designated do not reach agreement as concerns third arbiter, appointment shall be made by judge, at request of any of parties. In arbitrations having single arbiter, if parties do not reach agreement, judge shall appoint arbiter.

Procedure and Place of Arbitration.

In absence of agreement between parties, arbitral court may conduct arbitration in manner it deems appropriate; it may determine place of arbitration, and possesses powers to determine admission, competency and value of evidences and to order provisional precautionary measures, with due guarantee, to be made effective by means of judicial order.

Applicable Legislation—Conclusion of Proceedings.

Should parties not indicate applicable law, arbitral court shall apply law determined by norms of conflict of laws that it deems applicable.

Arbitral court shall decide in equity (amiable compositeur) only if expressly so authorized by parties in which case it is not obliged to resolve based on norms of law, but may do so “in all conscience” or “according to its best knowledge and understanding”. In all cases, court shall resolve pursuant to contract's stipulations and shall take into account commercial uses applicable to case.

Arbitral proceedings conclude: (a) With arbitral award or judgment, and (b) by resolution of arbitral court. Arbitration award must be well founded; it shall be rendered in writing with indication of place and date in which it was rendered and it shall be signed by arbiter or arbiters. Each of parties shall receive notice thereof through delivery of duly signed copy.

Remedies.

Within 15 days following receipt of award, unless parties have agreed on another term, any of parties may request to arbitral court correction of material errors, interpretation of any part of award and additional award on questions claimed but omitted in award.

Only appeal of annulment before Court of Appeal for Civil and Commercial matters having territorial jurisdiction in place where award was rendered may be brought against award.

Costs.

Parties are empowered to agree on norms relating to arbitration costs. Except as agreed between parties arbitral court's fees shall be fixed in pertinent award unless parties have agreed to comply with specific arbitration regulation on costs.

Acknowledgment and Execution of Foreign Arbitral Awards.

Foreign arbitral awards shall be acknowledged and executed in country, pursuant to treaties ratified by Republic of Paraguay. Execution shall be requested to acting Judge of First Instance for Civil and Commercial matters at domicile of person against whom award is intended to be executed or at place where property is located, at executant's choice.

7.02 ARBITRATION AND MEDIATION:

Law No. 1879 enacted on Apr. 24, 2002 governs arbitration and mediation.

7.03 MEDIATION:

Mediation is voluntary mechanism oriented towards resolution of conflicts whereby two or more individuals attempt by themselves amicable solution for their differences, with assistance of neutral and qualified third party, denominated mediator.

Mediation is applicable to all matters resulting from contractual relationship or any other type of juridical relationship provided settlement, conciliation or arbitration is feasible.

Mediator must be person of known honorability, qualifications and impartiality and his/her duties shall be to freely conduct mediation process, following principles of objectivity, equity and justice. Mediation is of confidential nature. Mediator may not be summoned as witness or for any other purpose in any subsequent legal action between same parties or for same reason. Before undertaking his/her duties, mediator must participate in special training course given by mediation center.

Mediation Hearing.

Mediation hearing may be carried out before legal action is brought or at any stage of process before final judgment rendered as res judicata is issued.

Agreements.

Throughout hearings mediator shall cooperate with parties in order to clearly determine alleged facts, positions and interests that are grounds thereof, in order to jointly prepare consensus formulas that might be approved or not by interested parties. Mediation agreement binds parties as from moment in which mediation document is executed by parties and mediator, and shall have effects of res judicata after its approved by competent judge. Should there exist pending lawsuit while mediation document is being executed, judge having jurisdiction on said lawsuit shall have competency to approve; approved shall also produce effect of concluding process.

Termination.

Mediation proceedings conclude by: (a) Execution of mediation document that includes agreement reached by parties; (b) execution of document whereby mediator and parties expressly declare impossibility to reach mediation; or (c) certification issued by center before which mediation application was submitted, expressing that it was impossible to hold hearing due to absence of one or more of parties to said hearing.

Mediation Centers.

Mediation centers are organizations having administrative and technical elements needed to support mediation proceedings and to train mediators. They must organize and maintain registry of documents containing agreements reached, and certifications regarding impossibility to reach agreement between parties.

Paraguay has recently approved International Commercial Arbitration of Mercosur by Law No. 3303 of 2007.

8 DOCUMENTS AND RECORDS

8.01 ACKNOWLEDGMENTS:

According to system in force where civil law prevails, contracts, deeds and other documents which require authentication by a public official are prepared by a notary or other authorized public official and made a part of his protocol; original documents are kept in an official register in office of notary or official. See topics 8.02 Public Instruments, and 8.03 Records.

Instruments executed in foreign countries, however, are given full recognition in Paraguay, if duly acknowledged in manner required in country where they were executed, authenticated by a consular or diplomatic agent of Paraguay, and authentication certified by Ministry of Foreign Affairs of Paraguay.

8.02 PUBLIC INSTRUMENTS:

Following are public instruments: (1) Notarial documents; (2) other instruments prepared by notaries or public officers in form provided by law; judicial proceeding and survey maps duly approved by judicial authorities; (3) judicial proceeding made as provided in laws of procedures; (4) bills of exchange accepted by Government or by official bank as its representative; (5) bills or any other credit document issued according to law; (6) registration on accounting books belonging to Public Administration; (7) registrations of public debts; (8) records of public registry; and (9) copies or photostatic copies of public instruments duly authorized.

Public instruments must be signed by interested parties who appear as having taken part in their execution. Following persons cannot be witnesses: Minors, even those emancipated; persons subject to interdiction or disability; blind persons; those who do not know how to sign; clerks of office and of other offices authorized to prepare public documents; spouse and relatives of public official to fourth degree of consanguinity and second degree of affinity; and those persons disabled by final verdict to be witnesses to public instrument.

Notarial documents must be in Spanish language. If person executing documents does not know Spanish language, document should be made in form of memorandum written in language known by parties and signed by them in presence of notary and authenticated by him. If not signed in his presence, authentication of signature must be certified by notary. It is then translated by official translator. Memorandum and translation are then placed in notary's protocol.

Notarial document must state its nature, object, names and surnames of persons executing it, whether or not they are of age, their family status, domicile, nationality, place, and date when it was signed, which may be holiday. If notary does not know parties, they must prove their identity with accurate legal document or two witnesses must identify them and document must include names, domicile or residence of witnesses. If parties are represented by agents, documents must state that power of attorney has been presented and it must be transcribed in notary's register along with document. If power has been executed in his own office, notary needs only refer to its place of record.

Notarial documents which do not state place and date of execution, name of person executing them, their signatures and which do not include power of attorney when executed by an agent and statement of presence of two witnesses and their signatures are void. Documents are also void which are not found in their proper place in notary's protocol.

Notary must give party who requests it, an authenticated copy of document. He may also give subsequent copies, but in case any of parties is required by document to do any act, he may only have subsequent copy by order of court.

8.03 RECORDS:

General Direction of Public Registries. Law 879 and C.C. determine documents to be recorded and organization of public office.

Recordable Instruments.

Instruments that must be recorded are: Those establishing rights in rem on real property and vehicles, their amendments and extinguishment; attachments of such properties and personal inhibition against disposal; contracts between husband and wife concerning property rights; adjudication of community property after divorce or legal separation of spouses as well as divorce or legal separation judgment; title to ownership of vessels of more than six tons dead weight; mortgage on vessels, lease and attachment of vessels by judicial order and their cancellation.

Requisites for Recording.

Instruments to be recorded must be passed before notary public or granted by administrative or judicial decision.

Foreign Conveyances.

Acts executed abroad regarding real estate located in Paraguay will be valid if they are in form of duly legalized public instrument and will only produce effects after being recorded by notary public by order of competent courts and recorded with public registry.

Transfer of Decedent's Title.

Title to decedent's real estate is granted to heirs and legatees by competent local courts and must be recorded.

Commercial Registry.

Law 1034 determines persons and documents to be recorded: Merchant's business license; bylaws of corporations and companies engaging in commercial activities; individual enterprises of limited liability; books of commerce; powers of attorney granted for managing enterprise and its revocation.

Vital Statistics.

Law 1266 rules on Registry of Civil Status where births, recognizances, adopters and legitimations, marriages and deaths are recorded. In rural areas where there is no registry office, Justice of Peace is in charge of these records.

9 EMPLOYMENT

9.01 LABOR RELATIONS:

Rules of labor law govern relations between workers and employers regarding subordinated and remunerated labor activity, either intellectual, manual or technical. Dependent intellectual, manual and technical workers; teachers of private educational institutions; persons exercising professional sports activities; labor unions of workers and employers of private sector; workers of State and Municipal institutions are subject to its provisions. (Art. 2 of Labor Code).

Following are not included in provisions of Code: Directors, managers, administrators, and other senior employees of firms who enjoy notorious independence in their work shall be independent of scope of application of Labor Code. In general all persons performing management and administrative functions with employers' express consent: (1) public officials and employees of state central administration and personnel of autonomous state entities in charge of economic production of goods or public services; (2) those known as “extra-territorial”, i.e. protected by diplomatic exemptions; (3) domestic service has its own regulations.

Labor Procedure Code establishes that jurisdiction cannot be delegated nor can competence be extended. Jurisdiction is exercised with respect to individual and collective legal labor conflicts in single, primary and secondary instances.

Working Hours.

Law imposes time limitations on labor: (1) (a) Daytime: eight hours per day or 48 hours per week. Daytime is from 6 a.m. to 8 p.m. (b) Nightwork: seven hours per day or 42 hours per week. Night time is from 8 p.m. to 6 a.m. (c) Mixed: 7½ hours per day or 45 hours per week. Includes parts of both, but less than 3½ hours of night time. Working hours must be distributed in two sessions at least, with half-time break. Break time is not included as working hours.

Additional working hours are allowed under special circumstances but they cannot exceed three hours per day, three days per week, or 57 hours per week, and must be paid extra. Not allowed for employees under 18.

Wages.

May be freely stipulated but cannot be less than legal minimum (Gs. 1,408,864 per month). May be paid by time units (month, fortnight, day or hour), by work units (either piecework, assignment or jobbing), by sales commissions or collection to account of employer and as percentage on future profits.

Labor Department sets minimum wages for workers in Republic according to areas and type of work performed based on cost of living studies made by National Council of Minimum Wages and by authorization of National Council of Economic Coordination and although law refers to areas, at present there is minimum wage for whole country.

Annual Bonus.

Law requires additional annual pay equivalent to one twelfth of earnings during year, provided they have worked full year with same employer. Bonus must be paid before Dec. 31.

Child Labor.

Right to work is acquired at 18. Minors over 15 and under 18 should have authorization to work issued by parents or guardian. Minors over 15 may only work: (a) At family enterprises not dangerous to their life, health or morals; (b) at trades doing work with intent of gaining knowledge of trade; (c) in agricultural and ranching activities under certain conditions.

Minors over 12 and under 15 may only work: (a) At family enterprises not dangerous to their life, health or morality; (b) at professional enterprises, performing work intended to acquire professional knowledge; (c) in agricultural and cattle activities under certain conditions.

Female Labor.

In case of pregnancy and nursing, women cannot perform any job dangerous to their life, health or morals. They are entitled to paid rest period of six weeks before and after giving birth. If more than 50 workers are employed in industrial or commercial establishment day care centers must be provided for children under two.

Every female worker, dependent or not, from private or public sector, with permanent or temporary labor contract, with or without elective job position, has paid leave benefit to undergo Pap tests and mammography.

Discrimination.

Law forbids discrimination due to age, sex, nationality, religion, social class or politics or trade union activities. Work of mentally or physically handicapped persons shall be especially protected.

Labor Unions.

Law recognizes right of workers and employees, without distinction of sex or nationality, and without need of previous authorization, to freely establish organizations, purpose of which is to study, defend, develop and protect their professional interest, and also to improve social, economic, cultural and moral status of their associates. Labor unions may be formed by white-collar workers, manual workers or mixed groups and may join in labor federations. Ratification and registration of labor unions and employer's associations must be authorized by Labor Department. Otherwise their acts are null.

According to Law guarantee of job tenure is granted to committee members in labor unions, federations and confederations duly registered and recognised by labor authorities as well as to workers conducting negotiations and transactions preparatory to recognition of labor union and those negotiating collective labor contracts or internal work regulations.

Labor Disputes.

National Constitution establishes rights and laws that govern their exercise. National Constitution sets forth, in favor of all workers of public and private sectors, right to strike in cases of conflict of interests. (Art. 98 NC). On other hand, employers have right to lockout under same conditions.

Labor Code (Arts. 358/78 LC) recognizes right to strike, lawful exercise of which is restricted for protection of general interests and public services essential to community (Art. 128 and ending provision of Art. 98, NC).

Labor Code recognizes strike and lockout rights. Collective contracts may provide that parties will not take these actions, in event of labor disputes derived from application of law. To be legally acceptable strike should be intended to obtain acceptance of collective labor contract, or compliance therewith, or eventually negotiating acceptance of contract after it expires. Upon disappearance of mandatory arbitration and operation of Junta Permanente de Conciliación collective conflicts of economic nature are resolved directly by negotiation or through organs of voluntary mediation or before Courts.

Strike Declaration.

Following requisites must be met before implementing strike decision: This must be made by General Meeting of workers themselves of work place involved (Arts. 363 and 298, §[e] LC) who shall nominate members of Strike Committee in event that they do not have union to represent them.

Meeting shall comply with the following requirements: (a) Call pursuant to manner and anticipation set forth in statutes; (b) attendance of absolute majority, decisions being pursuant to favorable opinion of one-half plus one of those present; (c) duly drawn-up minutes of meeting (Art. 297, LC); (d) decision to be adopted by secret vote of participants in meeting (Art. 298, §[e], LC); (e) prior notice: notice of strike must be given 72 hours in advance to Labor Administrative Authority and employer; (f) Joint Commission: strikers and employers shall constitute joint commission to reconcile interests which in term of 72 hours shall seek agreement; in event of disagreement, matter shall be referred to Standing Commission on Conciliation and Arbitration (JPCA) of Ministry of Justice and Labor (Arts. 284 to 320, Labor Procedural Code) or to labor courts and tribunals. Arbitration is not mandatory but is recommended alternative for solution of collective conflicts; (g) legality or illegality of strike: Art. 378, LC, sets forth that any labor court may declare legality or illegality of strike pursuant to Art. 376, LC, which expressly sets forth instances of illegal strikes.

Workmen's Dismissal Compensation.

Dismissal is restricted after ten years of seniority.

Cause for dismissal must be evidenced in lawsuit.

Indemnification for lack of prior notice, depending on seniority: (a) Up to one year, 30 days' wages; (b) up to five years, 45 days' wages; (c) Over ten years, 90 days' wages.

Indemnification for seniority: 15 days' wages per year of service or fraction of six months.

Union representatives may not be dismissed unless for just cause evidenced in lawsuit.

Pregnant women may not be dismissed.

Dismissal of pregnant women is null and void.

Social Security System.

(Law 98/92). (1) Salaried workers, in conditions previously named; (2) apprentice workers; (3) personnel of autonomous State entities or mixed corporations, in charge of any economic operating of public service; (4) teachers and professors of primary, secondary, professional and language schools, private or public and on optional basis, independent workers, with respect to risks of accidents, illness and maternity; (5) same coverage for university professors in service of public and private institutions; (6) by Law 431/73, veterans, disabled and crippled ex-servicemen of Chaco War, wife and children under age, will receive, free of charge, in case of illness or injury, medical-surgical, odontological and pharmaceutical assistance, at public hospitals and at those pertaining to autonomous State entities; (7) diplomatic agents who employ persons to whom no exemption is applied, must comply with obligations imposed on employers by Social Security provisions of receiving State. Same for consular agents.

Social Security Institute (Instituto de Previsión Social-I.P.S.) is autonomous agency in charge of directing and administrating Social Security. It covers risks of illness or accidents for salaried personnel and dependents, maternity, accidents at work and professional illness, incapacitation, old age and death of salaried workers who render services or carry on job by virtue of verbal or written labor contract, whatever their age or salary earned. This institute is also in charge of retirements and supplementary pensions. Inclusion into Social Security System is mandatory. Infractions are generally fined. Moreover, if employer has not inscribed, nor communicated entrance of employee, nor contributed for him, in case of accident, or death by accident at work, he must be responsible before I.P.S. and pay amounts corresponding to pensions and other benefits.

Incidence of contribution on salary amount is 16.50% to employer and 9% to worker. Minimum base over which day laborers and workmen doing piecework must contribute, is amount corresponding to 18 days wages. In no case will contributions be calculated over amounts smaller than minimum legal wage.

Employers Liability.

Employers are not liable for accidents suffered by employees, even those resulting in death, as risk is covered by Social Security System which pays injury, disability or death indemnization.

10 ESTATES AND TRUSTS

10.01 DEATH:

Death can be pronounced by judicial decision if person has disappeared during earthquake, shipwreck, air or terrestrial accident, fire or similar catastrophe, or armed conflict, when circumstances do not sustain reasonable doubt of survival.

Uncertainty due to lack of news in respect of life of disappeared person or absence from his domicile or last residence within Republic for period of four years is basis for presumption of death. Term is abbreviated to two years if disappeared person has not named representative to manage his estate.

Any person with legitimate interest in assets of deceased or Attorney General's office may file for judicial decision of disappearance.

Disappeared person's estate is provisionally distributed among heirs and legatees. After ten years of disappearance or after 70 years from his birth distribution becomes final.

10.02 DESCENT AND DISTRIBUTION:

According to C.C. applicable law of descent and distribution to Paraguayan or foreign heirs is law of decedent's domicile at time of death. Real estate located in Paraguay is governed by local laws. If proceedings for settling decedent's estate are initiated in Paraguay and also abroad, heirs domiciled in Paraguay receive from property located within it portion equal in value to property located in foreign country from which they were excluded by foreign law.

Estate of decedent is acquired by heirs either by will or by operation of law and is considered inherited as of decedent's death.

Physical persons already conceived have legal capacity to acquire assets by donation, inheritance or legacy but irrevocability of acquisition is subject to child being born alive and living for at least some instants after separation from mother's womb.

Heirs may waive inheritance within period of 150 days from date of real or presumptive death; if domiciled abroad period is 240 days. Acceptance is presumed to be made subject to inventory of estate. Estate accepted under benefit of inventory remains separate from heir's property with respect to debts and charges attributable to decedent's estate. In simple acceptance acceptor is obligated to pay debts and charges out of inherited assets and from his own, but on legacies only out of legated assets. Acceptance and waivers are irrevocable.

Determination of Heirship.

Heirs nearer in degree of kindred exclude others. Intestate heirs are called by law in this order: 1st: decedent's children and surviving spouse; 2d: ascendants and surviving spouse; 3d: surviving spouse; 4th: brothers and sisters and their descendants to fourth degree.

Right of Representation.

Descendants of heir who died before decedent occupy his place and inherit his portion of estate. Waiver may be made by his descendants. Descendants have unlimited right of representation. In collateral line it takes place only in favor of brothers' and sisters' children. Ascendants do not have this right.

Only part of decedent's estate may be disposed of freely by will. Compulsory heirs and percentage of estate they are entitled to are: Descendants, four fifths; ascendants, two thirds; surviving spouse, being neither descendant or ascendant, half; adoptant and adopted, half. Should there be different kinds of compulsory heirs highest percentage prevails.

Decedent's children, matrimonial or born out of wedlock, take equal shares in decedent's separate property and property belonging to conjugal partnership. Ascendants inherit only in absence of descendants.

Adopted children inherit from adoptant as do biological children.

Surviving spouse has right to inherit separate property. If there be descendants, portion equal to each of them; decedent's parents, if both are alive, third portion; if only one alive, half portion (Art. 2586 Civil Code); other ascendants, half; if neither descendants nor ascendants, total estate. Widow who has no children is entitled to one fourth of portion deceased spouse would have inherited from inlaws' estate. On community property should there be descendants or ascendants, surviving spouse has no right. (See category 11 Family, topic 11.03 Husband and Wife.) Surviving spouse is not compulsory heir if: Spouse was ill at time of marriage and dies of such illness within 30 days unless couple had been living together before; if spouse had been divorced by judgment as guilty party; if spouses had agreed to live separately or were in fact separated with no intention of living together.

Concubine of decedent inherits estate on same basis as decedent's children if relationship with concubine had duration of at least four years and relationship ended because of decedent's death. (Law 1/92).

Collateral relatives entitled to inherit are brothers or sisters and their descendants to fourth degree. Half blood brothers and sisters either matrimonial or born out of wedlock inherit half as much as those of whole blood.

If there is neither will nor intestate heirs estate is declared vacant and assets are transferred to State.

Out of court partition of inheritance is allowed if all heirs are of age and agree to partition. Partition must be judicial when: Incompetent heirs or emancipated minors are interested parties; decedent is declared presumptively dead and heirs have possession of estate; there are absent heirs or legatees whose existence is doubtful; third parties with legitimate interest oppose out of court partition.

Collation.

Value at time of legal action of assets donated to compulsory heirs by decedent during his lifetime may be brought into estate on demand. Donor may release heir of this obligation within limits of disposable portion. Following are not collatable: Expenses on food, health, descendant's education, customary or friendship gifts and amounts invested in life insurance policies.

10.03 EXECUTORS AND ADMINISTRATORS:

While estate remains undivided, administration is granted in common to heirs. Surviving spouse is administrator with other heirs collaborating. If spouse is incompetent or conflict of interest exists administrator is named by courts.

Testator may appoint one or more executors. If none appointed, heirs themselves execute provisions of will. Appointment of executor must be in one of forms required for wills but need not be in same instrument.

Persons incompetent to receive legacy can be executors. Heirs, legatees, witnesses to will, and notary before whom will was executed may also be executors.

Testator may define duties of executor. If testator makes no special provisions executor has all powers necessary to execute will. Appointment of executor does not deprive intestate heirs of possession of assets but enough property should remain in executor's possession to pay debts and legacies.

Executor can neither delegate his authority nor pass it on to his own heirs, but can act through representatives for whose actions he is fully liable.

Testator may have authorized executor to sell his property but sale may be made only if indispensable for executing will and all heirs agree or courts authorize it.

Executor has right to intervene in any action related to validity of will. Heirs may have executor removed because of incapacity or bankruptcy.

Executor is required to render account to heirs of his administration. When several executors are named, authority is executed by them in order they are named. If testator determined they act jointly they are jointly liable and any divergence must be resolved by courts. Executor's remuneration is fixed by courts and all expenses are chargeable to estate.

10.04 WILLS:

Any person aged 18 years may dispose of his property by will. Testator may revoke his will at any time before dying. Law of testator's domicile at time of making his will determines his capacity to make will but validity of contents is determined by law of testator's domicile at time of his death.

Neither deaf mutes who can neither read or write nor persons insane at time of making of will may make valid will.

Mutual or joint wills in single document are null as well as those made in separate documents by two or more testators disposing reciprocally and mutually of their estates.

Contents of will must be expression of testator's wish. He cannot delegate or empower other person to make it. All dispositions subject to any condition or charge that are physically impossible or contrary to public interest are null.

Validity of will in respect to its form is governed by law in force at time of making will. Evidence of fulfillment of requirements must result from will itself and cannot be proved by other written documents nor by witnesses. Will made in Paraguay must conform to rules of Civil Code. If will is made aboard to have full effects in Paraguay it must be made in writing and signed personally by testator, according to law of place where executed.

Nullity of will defective in form nullifies all dispositions contained therein, but nullity of one disposition does not affect others. Dispositions in favor of persons who died before testator expires are null, but other dispositions are valid. Will lapses if at time of testator's death his child born after its execution is alive. If testator marries will executed before marriage lapses.

All physical and juridical persons have legal capacity to inherit by will subject to limitations established by law. Testator may create foundation in his will. Executors, heirs or Attorney General's office are required to apply to Executive Power for approval of such foundation.

If spouse who was not pregnant marries within 300 days after first marriage has been dissolved or annulled, she loses right to any legacies or other benefits granted by her first husband in his will.

Will to be valid must be signed by testator in his usual manner. Obvious alteration of signature annuls will.

Will, and any amendments and revocations shall be registered in Will Registry which is part of General Public Registry. Lack of registration will not invalidate will.

Notary who records or is in possession of will at time of testator's death must advise courts or interested parties. There are four forms of wills: Holographic will; will by public instrument; closed will; and military will.

Holographic Will.

To be valid must be entirely in writing of testator, dated and signed by him. If part of will, even with testator's authorization, is written by other person, will is null. Wills may be written in any language. Amounts and dates may be written in figures. Will is not invalid if place where it has been made is not stated or is erroneously stated.

All testator's dispositions made after his signature must be dated and signed by him. Will may be written in letter form or in domestic book. Testator may authorize his will with witnesses, seal or deposit it with notary or take any steps to secure his last will.

Will in form of public instrument must be executed before notary public in presence of three witnesses residing in place. Notary may not be relative of testator in direct line to any degree of consanguinity or affinity. Blind person may make will in form of public instrument but deaf, dumb, or deaf mute person who cannot make himself understood in writing cannot do so.

Testator may express orally his provisions to notary in presence of witnesses or deliver to him written document.

Will must state place and date of execution, names, residence and age of witnesses and whether it was dictated or prepared by testator himself. If testator does not understand Spanish language, presence of two interpreters to translate will into Spanish is necessary and will must be written in both languages. Will must be read in presence of witnesses and signed by testator, witnesses and notary. At least two witnesses must be able to sign or one of them sign for another witness who cannot sign, and notary must so state.

Neither notary nor witnesses, their wives, or relatives up to fourth degree may take advantage of any disposition of will.

Closed Will.

Can be made by testator or another person on writing paper but all pages must be signed by testator. If he cannot sign, impediment must be stated and another person must sign for him.

Will must be delivered to notary in sealed envelope and in presence of five resident witnesses, stating that it contains testator's will. Notary certifies presentation on envelope and certificate is also signed by testator and all witnesses. At least three witnesses must be able to sign. Deaf person may execute closed will.

Military Will.

Sailors on ships of war and soldiers on campaign outside Republic, prisoners and camp followers, where there is no notary, may execute wills in writing before certain specified officers and required number of witnesses. Will is valid if testator dies within 90 days after extraordinary situation ceases.

Probate.

On testator's death, holographic will and closed will must be presented to courts of testator's last domicile. Any person who has interest in closed will may ask courts to open it. Courts take evidence, in presence of witnesses, of handwriting of testator in case of holographic will and if it is genuine, certify each page and order its recording.

Closed will cannot be opened by courts until notary and witnesses recognize their signature and that of testator. Then will is recorded. If notary and most of witnesses cannot appear before courts, evidence of handwriting is received.

Witnesses must have legal capacity to act as such, be known to notary and identified by him, understand language of testator and language in which will is written; they should be residents of place where notary is domiciled and must be of age. Neither ascendants nor surviving spouse or descendants of testator may be witnesses. Heirs, legatees, relatives of notary up to fourth degree, clerks of his office or servants may not be witnesses, nor those that are benefitted by will, nor blind, dear, mute or insane persons.

Registry.

By Law No. 105/90 Will Registry is created as part of General Public Registry Office, where all will granting must be recorded, as well as any alterations or cancellations. Noncompliance of recording does not invalidate will.

See also topic 10.02 Descent and Distribution.

11 FAMILY

11.01 ADOPTION:

Law No. 1.136/97.

Adoption is final, indivisible and irrevocable, replaces adoptee's original affiliation, and grants same rights and obligations as biological children. (Art. 3).

All kindred with natural family is extinguished, except those that impede marriage. When adoption involves child of one spouse or concubine of other sex, kindred is only extinguished when it refers to other parent.

Persons residing in other countries may adopt as long as they meet necessary requirements established by law. (Art. 6).

International adoption is granted under exceptional circumstances but is subordinated to national adoption. Preference is given to nationals or foreigners duly domiciled in Paraguay, over foreigners and nationals domiciled overseas.

Children and teenagers that may be adopted (Art. 7): (a) Father and mother orphans; (b) children of unknown parents; (c) children of biological parents who have been declared in adoption state; (d) children of spouse or concubine who gave consent according to procedure established by this law, and; (e) children who have been, for more than two years, under tutelage or custody of adoptive parent(s) with prior consent of biological parents or by Court Order.

No one may be adopted by more than one person, except when adopters are spouses or two persons of different sex living together for at least one year. (Art. 8).

Persons of either sex may adopt, independently of their civil status. Preference is given on equal opportunity basis to marriages, concubines, and women. (Art. 10).

Adopters must be (Art. 11): (a) Minimum of 25 years of age; (b) not more than 50 years of age, except when adoptee has been living for at least one year with adopter; (c) at least 25 years older than adoptee but not more than 50. In case of couple, difference of age is measured with reference to youngest adopter.

Limitations of age will not be considered when adoptee is child of one spouse or concubine with more than four years of cohabitation or relative with 4th degree of consanguinity.

Divorced and judicially separated may adopt together, as long as their conjugal life with adoptee started before divorce or juridical separation resolution, and as long as they agree on adoptee's tenancy and visit rights. (Art. 12).

Adoption may be granted to adopter who dies during adoption procedures, or to surviving spouse, if death occurs after public, voluntary and unequivocal declaration to adopt, and before final verdict. (Art. 13).

Persons affected by serious contagious illness, physical or mental disability; as well as persons who have been convicted or accused of crimes committed against child are not eligible to adopt. (Art. 14).

Adoptees, twelve years and older, must consent to adoption prior to any cohabitation with adopters. (Art. 19).

In every case Judge will consider child's opinion. If minor is 12 years old or less, Judge will consider his opinion considering his awareness and maturity.

11.02 DIVORCE:

Divorce is authorized by Law 45/91. There is no divorce without judgment of competent court. Law admits divorce by mutual consent after three years of marriage if both spouses are of age 18. Grounds for divorce are: (1) Attempt by one spouse on other's life; (2) immoral conduct of one of spouses or incitement to commit adultery, prostitution or other vices or crimes; (3) bad treatment, excessive cruelty or slanderous conduct and injury to reputation; (4) usual state of drunkenness or drug use, when affect matrimonial life, gambling when threatens family's economy; (5) permanent and serious mental disease, declared by court; (6) voluntary and malicious abandonment of family house by any of spouses, including lack of assistance to other spouse or children, or noncompliance of alimony for more than four months; (7) adultery; (8) separation for more than one year, without willingness to reconcile by any of spouses.

All evidence is allowed in divorce proceeding except deposition by spouses and testimonial evidence by their ascendants and descendants.

Reconciliation of spouses ends divorce proceedings. Spouses may remarry after 300 days of issuance of divorce decree.

See also topics 11.03 Husband and Wife, 11.05 Marriage.

11.03 HUSBAND AND WIFE:

Ruled by C.C. as modified by Law 1/92.

Rights and Obligations.

Husband and wife have same rights, obligations and duties, independent of monetary contribution to household.

Separate Property.

Each spouse is sole owner of following property: Those earned or inherited before marriage; those obtained by donation, inheritance, legacy or acquired by gift; those acquired for valuable consideration during marriage where title is previous to marriage; those obtained with own money or in exchange of assets owned by spouse; compensation for personal accidents, health insurance, personal injury or life insurance; author and patent rights; increase in value of personal property; pensions and life annuities in favor of one spouse prior to marriage; personal effects and family souvenirs, clothes, books and work tools; indemnity for damage to personal property; increase in value of personal property during marriage done with community property with right of compensation of other spouse.

Contracts.

Spouses cannot enter into contracts between them with regard to separate or community property but they may incorporate or become partners in companies of limited liability.

Domicile.

Place where spouses live together. Either spouse may temporarily abandon it to perform public duties, for work related reasons or other relevant personal matter.

Marriage Patrimonial Regimes.

Law recognizes following: (i) community property; (ii) differed participation and (iii) property separation. Patrimonial regime may be established by antenuptial agreement.

Community Property.

Property obtained during marriage. Spouses are subject to community property unless they agree to different system.

Community property includes; Earnings from work, commerce or profession of spouse; assets obtained by onerous title from common income; natural and civil fruit of community or separate property accrued during marriage; companies established during marriage; assets acquired through legal gambling, lottery or other. Both spouses have legal representation and administration of community property. Community property ends in following cases: divorce; marriage declared void; ordered by court; change of patrimonial system and death of one spouse.

Differed Participation.

That which each spouse manages, enjoys and disposes freely of separate and community property. At end of system each spouse acquires right to participate in profits obtained by other. Profits are divided equally.

Property Separation.

That which each spouse has use, administration and right to dispose his own property. Upon property separation, community property rights end.

See also topics 11.02 Divorce; 11.05 Marriage.

11.04 INFANTS:

Age of majority is 18. Minors may be emancipated: By marriage or by obtaining university degree. Emancipation is irrevocable.

Minors are subject to authority of both parents. In case of disagreement referring to practice of paternal authority court will decide under petition of party.

Parents have usufruct of their children's assets with certain exceptions, but cannot dispose of them without court authorization. In absence of parents guardian is appointed.

Contracts entered into by minors under 14 are null and cannot be ratified. If executed by minors over 14 but not emancipated they are voidable. Only minors may claim their nullity or ratify them once minority ceases.

11.05 MARRIAGE:

Following conditions are bar to marriage: Minors aged under 16 unless special permit is granted by Minors Court, in special circumstances, from age 14 on; persons already married; person suffering chronic, contagious and hereditary disease; persons suffering chronic mental illness that prevents them from reasoning, even if temporary; deaf-mute, blind-deaf and blind-mute persons, when cannot freely express their will.

Minors between ages 16 and 18 need parental or guardian authorization to marry.

Cannot marry among themselves: ascendants and descendants in direct line; relatives with affinity in direct line; adopter and his descendants with adopted and his descendants; adoptive children among themselves and with biological children of adopter; person condemned for homicide, attempted homicide or accomplice of homicide of other spouse; kidnapper with kidnapped woman during kidnapping or within three months after it ends.

Validity of marriage requires that parties' consent be given before public official. Consent can be given through attorney; special power of attorney must indicate full personal data of person principal wishes to marry and shall expire after 90 days of authorization. For execution of marriage by granted power, one of contracting parties shall be present. (Law 1266/87).

Capacity of spouses, form and validity of marriage are ruled by law of place of marriage. Marriages executed in Paraguay are dissolved by death of spouse or divorce.

See also topics 11.02 Divorce, 11.03 Husband and Wife.

Concubinage, Law 1/92.

Law protects union between men and women who make stable, public and singular life together for at least four years, have attained required age for marriage, and not affected by diriment impediments. Four year term period is satisfied when first child of couple is born.

12 FOREIGN TRADE AND COMMERCE

12.01 FOREIGN EXCHANGE:

Decree 216/89 and Central Bank Circular 9/89 established Free Fluctuating Exchange System for all imports and exports of goods and services, and for capital movements, including public and private financial payments. System is regulated by Central Bank of Paraguay by intervening in market, but rates of foreign currencies are determined by supply and demand. Import and export operations, payments of services in general and movement of private capital must be channelled through banks. Authorized Exchange Houses operate also in exchange market, buying and selling foreign currencies freely.

12.02 FOREIGN INVESTMENT:

Law 60/90 establishes incentives regime to encourage economic development, promote growth in production of goods and services, create employment opportunities, generate exports and substitute imports utilizing national resources, and incorporate efficient technology for increased and better use of national raw materials, labor and energy resources. Legal and fiscal framework allows national and foreign investors, without discrimination, to formulate investment projects, facilitating their full operational productivity.

Types of Investment.

Persons and legal entities may make investments and reinvestments in following manner: (a) In cash, in financing, in suppliers' credits or other financial instruments; (b) in capital goods necessary for development of approved investment projects; (c) in trademarks, drawings, models and industrial processes and other forms of transfer of technology subject to licensing; (d) in services and specialized technical assistance; (e) in form of leasing of capital goods; (f) in other forms as determined in regulations to be adopted by Executive Branch.

Capital goods, either imported or of local origin, must preferentially be new, of adequate technology, and in conditions of productive efficiency. Benefits contemplated are not extensive to goods and services for personal use or consumption.

Benefits.

Investment projects enjoy following benefits: (a) Total exemption from all taxes applicable to constitution, recording and registration of corporations and companies; (b) total exemption from all taxes and charges applicable to foreign exchange transactions arising out of capital contributions or operations contemplated in investment project; (c) total exemption from customs duties and similar taxes, including specific Internal Revenue levies on imports of capital goods; (d) total exemption from all taxes and other levies on remittance of interests and fees related to foreign loans, during entire term of loan, provided that (i) loans are at least US$5 million, (ii) lenders are well known financial institutions; (e) total exemption from all taxes applicable to dividends and profits generated by investment project for maximum term of ten years, provided that (i) investment be superior to US$5 million, (ii) taxes paid in Paraguay cannot be considered tax credit in country origin of investment; (f) exemption from Stamp Tax applicable to acts, contracts, payments, receipts and promissory notes, related to investment project.

Leasing of Capital Goods.

Foreign capital goods introduced into country and capital goods of national origin under leasing contracts enjoy same tax benefits under law and those applicable under System of Temporary Admission, during term of leasing contract, at which time contracts may be renewed, capital goods nationalized or reexported. Businesses engaged in leasing of capital goods may apply for same benefits.

Ships and aircraft of foreign registration, chartered or leased for period not exceeding two years, may be recorded in national register without prejudice to their original registration, provided country of original registration does so permit. Executive Branch regulates rights, obligations, formalities and benefits arising out of national registration.

General Provisions.

Beneficiaries must comply with all obligations and commitments assumed in approved investment project under penalty of cancellation of all or part of benefits granted. Detailed records of assets incorporated under investment project must be maintained in order to allow competent authorities to control their use and application.

Investment Council acts as advisory entity to Ministry of Industry and Commerce and Ministry of Finance. Membership is designated by Executive Branch with ministerial officials and representatives of private sector. Investment Council is chaired by representative of Ministry of Industry and Commerce and its members serve without remuneration. Investment Council is responsible for: (a) Advising public and private institutions on investments; (b) keeping record of applications filed and benefits granted; (c) counseling on issues related to investments not contemplated in present law.

Benefits are granted to applicant in each case by Ministerial Resolution executed jointly by Minister of Industry and Commerce and Minister of Finance. Ministry of Industry and Commerce supervises application and performance of economic development incentives; Ministry of Finance supervises all tax matters, but implementation by its departments is limited to overseeing compliance with Law, without further requirements.

Rights acquired by beneficiaries under Law are irrevocable, provided corresponding obligations are met.

12.03 FOREIGN TRADE REGULATIONS:

All importers and exporters must register as such and keep certain books of account. Most importations are subject to a system of import duties and charges both specific and ad valorem, unless expressly exempted therefrom. Special tariff concessions are granted to some products originated in member countries of Mercosur and Latin American Integration Association.

Import duties and charges are subject to constant revisions, and importations may at times be temporarily prohibited.

Exports are duty free but also subject to system of charges for service rendered, both specific and ad valorem, unless exempt therefrom, pursuant to specific incentives and rebate programs.

Maquila (Law 1064/97).

Object of special Maquila regime is to promote establishment of companies devoted to assembly or manufacture of finished export products from Paraguay to other countries. Maquila may comprise total or partial industrialization or service process, provided that local labor and other national resources are incorporated into transformation, manufacture, and repair or assembly of products. Foreign raw materials or unfinished products may enter Paraguay under Maquila contract under special customs regime. Products once totally or partially transformed must be exported within term set forth in temporary admission document.

Any natural or legal national or foreign person domiciled in Paraguay may obtain license for Maquila export program. Companies may be incorporated under any form: corporations, limited liability companies, foreign branches, or individual limited liability enterprises, without any ownership restrictions, having total or partial foreign, national or joint venture participation. Investment Law 117/91 provides equal guarantees and standing for national and foreign investments.

Fiscal Incentives of Maquiladoras.

Maquiladora System offers fiscal incentives that include exemptions on all types of taxes, local or national, and customs charges on imports and exports. Only charge is 1% tax on Value Added in Paraguay; such value includes: (i) goods purchased to comply with Maquila contract; (ii) payment of salaries and/or other services required.

Fiscal exemptions extend to following taxes: Income tax; value added tax; acts and documents tax; customs duties; customs valuation tax; consular duties; port and airport taxes; payment for regulatory information; any type of tax, rate or charge that pertains to guarantees enjoyed by companies or third parties related to Maquiladora System; any type of tax, rate or charge applied to loans destined for financing Maquiladora operations; any taxes that might be placed on remittances of funds related to Maquiladora System; any other tax, rate or charge in existence now or adopted in future, that taxes income or payments on goods coming with provisions of Maquiladora System. However, tax authority considers that 1% Maquila tax rate only replaces (i) 10% income tax general rate; (ii) 5% additional rate on distribution of profits; but considers withholding taxes on profits remittance abroad (15%) as not exempted by Maquila Law, as such tax applies to foreign shareholders, not directly to Maquiladora companies in Paraguay. This criteria is currently under discussion.

13 HEALTH

—Scope —

Sanitary Code (Law 836/80) regulates Government oversight of overall health care of population and rights and obligations of persons and companies. Ministry of Public Health and Social Welfare has jurisdiction in all matters of health and coordinates plans and actions of institutions involved in activities related to health. President establishes national policy in matters of health and social welfare.

13.01 ADVERTISING OF TOBACCO AND ALCOHOLIC BEVERAGES (Law 1333/98):

Any information purporting to orient, induce or stimulate purchase or consumption of alcohol or tobacco products or brands are deemed to be commercial advertising or publicity. Regulation does not apply to products containing ethyl alcohol that have been authorized as medicinal substances by Ministry of Public Health and Social Welfare. Advertisement through national written mass media, street advertising, in public institutions and locations open to public in print, illustration or lighting, as well as television spots are controlled. These must include, in same context of relevant advertisement and of size no smaller than 10% thereof, for products containing tobacco, legend stating: “SMOKING CAUSES CANCER AND RESPIRATORY DISEASES. Warning of Ministry of Public Health and Social Welfare”, and, for alcoholic beverages: “EXCESSIVE CONSUMPTION IS HARMFUL TO HEALTH. SALE TO MINORS UP

TO 20 YEARS OF AGE IS FORBIDDEN. Warning of Ministry of Public Health and Social Welfare.” Tobacco and alcoholic beverage advertising may not use image of minors or noteworthy persons in sports or athletic activities requiring good physical condition. Motorized sports activities are excluded. Any advertisement meant to persuade, expressly or impliedly, that tobacco or alcohol products are beneficial to health, is forbidden. Context of information is to be informative and not persuasive. Advertising and publicity of tobacco and alcoholic beverages not duly registered at Ministry of Public Health and Social Welfare is forbidden.

PROTECTION OF NON-SMOKERS (LAW 825/96).

Law 825 of 1996 enforced non-smokers' protection by forbidding tobacco use and its derivates such as pipe tobacco, cigarettes, and cigars in following quoted places: a) Roofed places, movies, theatres, libraries, museums, and any other closed environment for public activities; b) public transportation, whether by land and/ or by air, railway, and sea; c) closed environments of teaching institutions, such as classrooms or conference rooms; d) closed areas in hospitals, health clinics, health centers, First aid centers, and emergency rooms; e) customer service areas and meeting rooms at State offices; f) closed establishments for food retail sales such as supermarkets, wholesale food market, etc.; g) restaurants and pubs, except in specially set up separated smoking area; and in h) closed working environments such as mines, factories and workshops.

Aforementioned areas and places must post ``no smoking'' sign in room making sure it is visible for customers and of size no less than 30 × 14 cm.

Owner or person responsible for quoted places that does not fulfill this regulation shall be penalized with fine by municipal authorities with help from police.

13.02 HUMAN ORGANS:

Ministry regulates and controls procurement, conservation, use and provision of organs, tissues or parts from live human subjects or cadavers for use in therapy, research or teaching, pursuant to prior written and consensual declaration of will by donor or heirs. Organ transplantation, tissues or parts is allowed among human beings, according to state of art techniques, and not for purposes of experimentation. Organ transplant, tissues or parts in human beings may be performed. Condition is that at least two medical professionals, in consultation among themselves or with collaboration of other health sciences professionals, certify that donor's chances of living shall not be altered, and will fundamentally serve to prolong or improve receiver's health.

13.03 MEDICAL, DENTAL AND LABORATORY INSTRUMENTS, APPLIANCES, EQUIPMENT AND DEVICES:

Executive regulates use and marketing of medical, dental and laboratory instruments, appliances, equipment and devices, and determines maximum sale prices. Establishments devoted to manufacture, import, export or repair of medical, dental, and laboratory instruments, appliances, equipment and devices must register with Ministry prior to doing business. Ministry regulates their business.

13.04 PHARMACEUTICALS AND DRUGS:

Drugs production and marketing must adhere to regulations established by Ministry of Health and Social Welfare. Ministry determines which drugs and pharmaceuticals may be marketed, and regulates which of them is sold under registered prescription filed at point of sale or sold freely. Only authorized representatives registered in Ministry may import and export drugs, pharmaceuticals, perfumery and personal hygiene articles. Ministry may authorize import and export of products containing narcotics and other dangerous drugs.

14 IMMIGRATION

14.01 ALIENS:

Foreigners enjoy same civil rights in Paraguay as Paraguayan citizens. They may do business, follow their trade or practice their profession, buy and sell real property, make wills and marry in conformity with law, and enjoy entire religious freedom. They are not obliged to become citizens or to pay extraordinary taxes.

Naturalization is granted to foreigners that have been living for a minimum of three years in country, during which time they must have worked continuously in a productive activity, and who can prove their good conduct both in country and in country of origin.

14.02 IMMIGRATION:

Requirements to obtain residence are: (1) Criminal records issued by authorities from country of origin; (2) two photographs 2.5 x 2.5 cm.; (3) valid passport; (4) testimonial of job availability in country; (5) marriage certificate or divorce sentence; (6) birth certificate. All documents must be certified by Paraguayan Consul abroad. Authority in charge is Dirección General de Migraciones.

15 INTELLECTUAL PROPERTY

15.01 COPYRIGHT:

(Copyrights and Related Rights Law No. 1.328/98).

Protection of copyrights covers works of talent, of creative character, within literary or artistic area, whatever its form, expression, merit or goal, nationality or address of author or holder of relevant rights, or place of publication of work.

Patrimonial rights is exclusive right to perform, authorize or forbid reproduction of work by any form or procedure; public communication of work by any means; public distribution of issues of work; introduction of copies of work into country; translation, adaptation, arrangement or other transformation of work.

Public Domain.

Expiration of terms set forth in law implies expiration of patrimonial rights and determines passage of work to public domain.

Computer programs shall be protected in same terms as literary works. Protection shall extend to all forms of expression as well as operating programs and applications, either as source codes or object codes. Protection established in present law extends to any successive versions of program as well as to programs derived therefrom.

Producer of computer program is natural or legal person who assumes initiative and responsibility for work.

It is presumed that authors of computer program have assigned to producer, in unlimited and exclusive manner, patrimonial rights recognized by present law.

Aforesaid, lawful use, shall not extend to utilization by various persons, through installation of networks, workstations or similar procedure, unless by express consent of holder of rights.

Architectural Works.

Acquisition of architectural plan or project implies right to execute work planned, but consent of author is required to use same in construction of another work. Use of architectural plan in building constructed by third party failing to remunerate creative work of author shall grant latter right to collect indemnity.

Works of Plastic Arts.

Contract of sale of material contained in work of art, grants acquirer right to publicly exhibit work, for lucrative or onerous title.

News Articles.

Except as otherwise agreed, authorization for use of newspaper, magazines or other means of social communication, granted by author not having dependency relationship with news enterprise, shall only grant editor or owner of publication of right to use it only once.

Editorial contract is that which author or his rights holders, assign to editor, right to reproduce and distribute work at own expense and risk.

Contract for Edition of Musical Works.

Author assigns to editor exclusive right of edition and empowers him to perform recording and reproduction of work, audiovisual adaptation, translation, further edition and any other form of utilization of work set forth in contract.

Theater Shows and Musical Performance.

Author, his rights holders or relevant managing institution, may assign or license to natural or legal person right to represent or perform literary, dramatic, musical, musical show, pantomimic, choreographic or any other performance publicly, for economic compensation.

Phonographic Inclusion Contract.

Pursuant to phonographic inclusion contract, owner of musical work, or his representative, authorizes producer of phonograms, on basis of remuneration, to record or fix work in order to reproduce same on phonograph record, magnetic tape, digital support or any other like device or mechanism, with object of reproduction and sale of copies.

Radio Broadcast Contract.

Author, his representative or rights holder authorizes radio broadcasting enterprise to transmit his work. Provisions of present chapter also apply to transmission by wire, cable, optic fiber or other like procedure.

Performing or executing artists enjoy moral right to recognition of their names in their performances and to oppose all deformations, mutilation or any other transgression on their performance, which may prejudice their prestige or reputation.

Producers of phonograms have exclusive right to execute, authorize and forbid following: direct or indirect reproduction; public distribution, including export, lease, public loan and any other transfer of possession for profit of copies; import of copies when not authorized for territory of destination; digital communication by optic fiber, wave, satellite or any other form created or to be created, when such communication shall be equivalent to act of distribution, by allowing user to perform digital selection of work or production; inclusion of their phonograms in audiovisual shows; and modification of their phonograms by technical means. Protection is for 50 years.

Radio broadcast organizations have exclusive right to execute, authorize and forbid retransmission of their broadcast by any means or procedure, now known or to become known; recording in any form, sound or audiovisual, of their broadcasts, including that of any single image made public in broadcast or transmission; and reproduction of their performances.

Other Intellectual Rights.

Present law recognizes right of exploitation over recording of motion images, with or without sound, which shall not be creations subject to be qualified as audiovisual works.

Collective Management.

Institutions incorporated or to defend patrimonial rights recognized by present law, require authorization from Government and are subject to its control.

Legal Actions and Proceedings: Administrative Protection.

Holders of any rights recognized by present law may request cessation of unlawful activity of infringement, and demand indemnification for material and moral damages caused by infringement.

Customs has obligation to seize all copies constituting violation of copyrights and suspend free circulation of goods, whenever same may be intended for import into Republic.

Copyright holders may exercise all rights referring to civil actions and proceedings provided by law against whomever possesses, uses, designs, manufactures, imports, exports or distributes, either for sale, lease, loan or like of any device, computer programs or against whomever makes and offers to perform service, objective or effect of which, shall be allowing or facilitating escape of coding technology.

Criminal Penalties.

Penalties shall be applied to whomever, being authorized to publish work, does so criminally in any of ways stated by law.

LAW N ° 3440
PENAL LAW (modified July 2008-07-31)

II PUNISHABLE FACTS AGAINST COPYRIGHT AND RELATED RIGHTS

Article 184a.—Copyright and connected rights infrigments.

1 °.— Whom without authorization of the holder of a Copyright and Connected Rights: 1. reproduce, whole or partially, in permanent or temporary form, protected works; 2. introduce to the country, store, distribute, sell, rent, put at the disposal of the public or put of any other way in circulation copies of protected works; 3. communicate publicly whole or partially in permanent or temporary form works protected by means of not authorized reproductions; 4. re-transmit an emission of broadcasting; 5. assume falsely the condition of original holder or derivative of a work protected in everything or partly, with the intention of exercising the rights that such a condition grants; will be punished with a penalty prison up to five years or fine.

2 °.— To the works indicated in the 1st interjection there will be compared the

phonograms, artistic interpretations, translations, arrangements and other ammendments protected by the copyright.

3 °.— the person who: 1. avoids modifies, transforms, without authorization the technical measurements of protection of the works indicated in the previous interjections; or 2. produces, re-produces, obtains, stores, transfers other or offers to the public devices specifically made for facilitating the avoiding, suppression or not authorized neutralization of the technical measurements of protection of the works indicated in the previous interjections; will have with a penalty prison up to three years or fine.

4 °.— In case of condemnation it may, by request of the victim or the Prosecutor's, the publication of the judgment.

5 °.— In serious cases penalty prison may be raised up to eight years.

To determine the existence serious cases, all the circumstances will be considered, especially, if the author: 1. used methods of an industrial production or massive commercialization; 2. produced objects with an economic considerable value; 3. caused a heriditary considerable damage; or 4. used, for the achievement of the infrigment, an eighteen-year-old minor.

In the cases foreseen in the 3rd interjection the penalty prison may be increased up to five years."

III PUNISHABLE FACTS AGAINST THE RIGHTS OF INTELLECTUAL PROPERTY (TRADEMARKS)

Article 184.b. violation of the trademark rights.

1 °.— Whom that: 1. counterfeits, adulterates or fraudulently imitates a registered trademark of the same products or protected or similar services; 2. have in deposit, put in selling, or offer to sell or to put products or services with falsified, adulterated or fraudulently imitated tradmark will be punished with penalty prison up to five years.

2 °.— In these cases will punished also the attempt.

3 °.— In case of condemnation it may, by request of the victim or the Prosecutor's, the publication of the judgment.

To determine the existence serious cases, all the circumstances will be considered, especially, if the author: 1. used methods of an industrial production or massive commercialization; 2. produced objects with an economic considerable value; 3. caused a heriditary considerable damage; or 4. used, for the achievement of the infrigment, an eighteen-year-old minor.

Article 184c. OF THE VIOLATION OF THE RIGHTS OF DRAWINGS AND INDUSTRIAL

MODELS:

1 °.— the fact that, without authorization of the owner of a drawing or industrial granted model: 1. make or make to make industrial products that present the characteristics protected by the registration of a Drawing or Industrial Model, 2. have in deposit, put in selling, blindfold or offer to sell or to make to circulate products or of any other way trade industrial products that present the characteristics protected by the record of a Drawing or Industrial Model will be punished with penalty prison up to five years.

2 °.— In these cases will punished also the attempt.

3 °.— In case of condemnation it may, by request of the victim or the Prosecutor's, the publication of the judgment.

To determine the existence serious cases, all the circumstances will be considered, especially, if the author: 1. used methods of an industrial production or massive commercialization; 2. produced objects with an economic considerable value; 3. caused a heriditary considerable damage; or 4. used, for the achievement of the infrigment, an eighteen-year-old minor.

Customs Control.

Holder of right having reasons to presume that preparations are being made to import or export products that infringe this right may request customs authority to suspend import or export at time of clearance. Conditions and guarantees applicable to precautionary measures are applicable to that request and order that such authority may issue.

15.02 PATENTS:

Patents (Law 1630/2001 amended by Law 2593/2005).

Accreditation of Ownership.

Ownership of invention is granted with industrial property titles issued by Industrial Property Department as invention patent or utility model patent.

Matter Subject to Patent.

New inventions of products and procedures implying inventive activity and having industrial application.

Matters Excluded as Inventions.

Following shall not be considered inventions: (1) simple discoveries, scientific theories and mathematic methods; (2) purely esthetic creations; (3) economic, business, advertising or publicity schemes, plans, principles or methods, and those referring to purely mental or intellectual activities or playing matters; (4) computer programs considered separately; (5) diagnostic, therapeutic, surgical methods for treatment of persons or animals; and, (6) various forms of reproducing information.

Matters Excluded From Patent Protection.

Following matters excluded from patent protection: (1) inventions that, if applied commercially, would threaten public order, morality or health; human, animal or plant life or environment; and, (2) plants and animals, except microorganisms, and purely biological procedures for production of plants or animals which are not non-biologic or non-microbiologic procedures.

Patent Rights.

Right to obtain patent belongs to inventor or its rights holders and that right may be assigned by acts inter vivos or by succession. If two or more persons have made invention jointly, right to obtain patent shall belong in common to all. If several persons produce same invention independently of each other, patent shall be granted to person or his rights holder who first presents patent application or invokes first date priority for invention.

Inventions Made in Execution of Contract.

When invention has been made during fulfillment or execution of work or service contract, or of labor contract, person contracting for work or service shall have right to obtain patent, or employer, as may correspond, unless otherwise set forth in contract.

Inventions Made By Non-Inventor Employee.

If employee who is not obliged by labor contract to perform inventive activity makes invention in field of activity of his employer, or through use of data or means to which he may have access by reason of employment, he shall be obligated to communicate this fact to employer in writing.

Duration of Patent.

Invention patent shall have unextendable duration of 20 years as from date of presentation of application in country.

Publication.

18 months after presentation of application, patent will be published for five consecutive days in two newspapers. Patent granting resolution shall be published for five consecutive days in two newspapers.

Conventional License Patents.

Patent holder or applicant may grant license for exploitation of invention. Invention exploitation license shall have legal effect upon third parties as from its registration in Industrial Property Department.

Basic License Conditions.

In absence of contrary stipulations, following rules apply to exploitation licenses of invention: (1) license shall extend to all exploitation acts of license, during full validity of patent, in all national territory and in regard to any application of invention; (2) license holder may neither assign license nor grant sublicenses; (3) license shall not be exclusive, grantor retaining right to grant other licenses for exploitation of patent in country, as well as to exploit patent in country on his own; and, (4) when patent has been granted as exclusive, licensor may not, on his own, exploit license in country.

Nullity of Patent.

Patent shall be null and void: (1) if object of patent fails to constitute invention; (2) if patent has been granted for matter that fails to satisfy patentability requirements; (3) if patent fails to make known invention in sufficient and complete manner for it to be understood and for person trained in relevant technical matter to execute same; (4) if patent granted comprises more extensive divulgation than that contained in original application; and (5) if patent is granted infringing proceedings priorly stated for its granting.

Compulsory Licenses or Other Uses Due to Lack of Exploitation.

Any interested party may apply to Industrial Property Department for compulsory license after three years from concession of patent or four years after presentation of application, and where grant of compulsory license would advance public interest or prevent anticompetitive practices. Compulsory license must not be granted with exclusive rights and it cannot be assigned or sublicensed by license holder. Precautionary measures can only be granted by judge when requested by owner of patent who must prove infringement of his right.

Precautionary Measures.

One who requests precautionary measures must prove his legal standing to act and existence of infringed right through presentation of industrial property titles issued as invention patent or utility model patent and must give proof that allows presumption that infringement has been committed. Judge may require caution or enough guarantee to grant measure. Judge must always give intervention to affected party before granting precautionary measure, unless: (a) If delay in granting measure causes non-repairable damage; and (b) if there is risk that proof of infringement may be destroyed.

Utility Model Introduced in New Patent Law.

Definition of Utility Model.

Invention comprised by form, configuration or disposition of elements of device, tool, instrument, mechanism or other object, or of part thereof, that allows better or different operation, use or fabrication of object comprising same, or that offers any use or technical effect that it did not have before. Utility model shall be protected by granting of patents.

Pharmaceutical Products.

To obtain patent for pharmaceutical products, opinion of Health Department over product or procedure shall be required.

Precautionary Measures.

Besides requirements for precautionary measures mentioned above, if patents are for pharmaceutical products, following conditions must be fulfilled: (a) Reasonable probability that patent shall be declared valid if it were to be objected by defendant; (b) reasonable probability that patent shall be infringed; (c) damage that can be caused to requestor if precautionary measure is not granted shall be greater than damage that causes granting of measure; (d) expert shall grant his expert opinion over points (a) and (b) in 15 days at most; and (e) Health Department shall grant its opinion over point (c) in maximum of five days.

Validity.

Note: Pursuant to Art. 65 of Transitory Provisions of Agreement on Aspects of Intellectual Property Rights Related to Commerce (ADPIC), Patent Law 1630/2001 amended by Law 2047/2002 for pharmaceutical products shall become effective on Jan. 1, 2005.

Filing of Applications.

Application for pharmaceutical products invention patents submitted as from Jan. 1, 1995, when they fulfill requirement of being new product, process or proceeding pursuant to state of art and possess inventive level for their use in industry, shall be transacted according to requirements and provisions of Patent Law 1630/2001; however, they will not be granted prior to Jan. 1, 2003. Duration of patents so granted shall arise from application of terms established pursuant to duration of patent.

15.03 TRADEMARKS AND TRADENAMES:

Trademarks Law No. 1294/98 and Regulating Decree No. 22,365/98.

Classification.

By Decree No. 16.939/2002 Paraguay adopts 8th Edition of Nice Agreement by which classes are expanded to 45. It is in force from June 3, 2002.

Use of Trademark.

Obligation of trademark use (art. 27) which reads: “Use of the trademark is mandatory”. Otherwise, at request of interested parties, registration of trademark shall be canceled: (a) when use of trademark shall not have occurred within five years immediately following registration; (b) when use of trademark shall have been interrupted for more than five consecutive years; (c) when its use, within term stated in two previous items shall have occurred with substantial alteration of its original distinctive character as shown on relevant registration certificate.

However, it is clear that Department of Industrial Property shall not demand use of trademark in order to authorize renewal of registration already granted.

Registration of trademark shall be canceled only upon request of interested party and only pursuant to judgment of competent judge, passed with authority of res judicata.

In practice, only if third party interested in trademark which is not in use applies for same trademark and opposition is brought by holder of trademark, may that third party claim lack of use, in which case matter automatically ceases to be administrative case and records are passed on to Court in Term which shall render definitive judgment on case.

Furthermore, interested party may resort directly to Civil and Commercial Jurisdiction in order to bring suit for cancellation for lack of use.

Trademark holder bears burden to prove use. Ordinarily, plaintiff bears burden of proof.

Any means of proof is admitted, as long as products or services distinguished by trademark shall have been used in commerce or are available in market under such denomination. Even publicity of introduction of products or services is admissible as proof of use, as long as such use shall occur within four months following start of advertising campaign.

Use of trademark shall be made as it appears in registration certificate, that is, with same label. However, if use differs in slight details or secondary elements, that different use shall not constitute reason for cancellation of registration.

Finally, if trademark is registered for all products included in class, which are generally diverse, use in one of such products shall be sufficient to prevent cancellation of registration, or to bring relevant opposition.

Grace Period to Apply for Renewal.

Art. 19 of Trademarks Law establishes validity of trademark for term of ten years, which may be extended indefinitely for periods of like duration, as long as extension is applied for within last year prior to its expiration. Term of validity shall be computed from date of expiration of previous registration.

However, in order to adapt trademark legislation to that of countries of Mercosur and to Paris Convention ratified by Law 300/94, final provision was introduced in art. 19 of Law 1294/98 which reads: “Application for extension may be applied for within a grace period of six months following the date of expiration, requiring, in that case, payment of an established surcharge besides the corresponding extension fee” thereby in practice extending term of validity of registration to ten years and six months.

Border Measures.

This constitutes innovation and is expressly legislated procedure being established in c. III of Law 1294.

Holder of registered trademark who shall have good reason to believe that import or export of products with his trademark (or clearly similar thereto) is being prepared may apply directly to Customs Authority for suspension of importation or exportation at time of customs clearance, by providing said authorities with all necessary and sufficiently precise information to allow that products be recognized.

If Customs Authority finds that applicable conditions and warranties have been fulfilled (presentation of title of registration and certainty of risk of importation or exportation), it shall immediately order suspension of said importation or exportation and shall notify importer or exporter of products as well as applicant of said measure.

As from said notice, applicant of measure at border has period of ten working days to resort to judicial institution and obtain confirmation of suspension which shall be notified to Customs Authority. In event that this is not done, suspension will be canceled.

Furthermore, party affected by suspension shall have same right, and Judge may modify, revoke or confirm suspension after hearing.

If products are counterfeit and same are retained by Customs, their reexportation in their same condition shall not be permitted, notwithstanding consent of holder since matter then constitutes crime.

This is summary of three aspects whereby trademark legislation has introduced innovations which extend protection to holder of registration.

16 MINERAL, WATER AND FISHING RIGHTS

16.01 MINES AND MINERALS:

Art. 112 of Constitution determines that State has ownership of all hydrocarbons and solid, liquid or gaseous minerals found in natural state in country's territory, excepting stones or calcareous substances. State may grant concessions for prospecting, exploration and exploitation of deposits to individuals or private, public or mixed enterprises, for limited time. Concessions granted by Government require Legislative approval.

Oil and Gas Concessions.

Law 779/95 governs hydrocarbon concessions and establishes rights and obligations of parties. Government grants individual mineral concessions by contract which establish specific rights and obligations of parties and such contracts must be approved by Congress. Concessions are divided into prospecting, exploration and exploitation phases. Requirements to apply for concession are: (a) demonstrate financial capacity and technical expertise; (b) establish local branch or subsidiary, designating legal representative; (c) present activities and investment program for prospecting and exploration phases; (d) present map of area with geographical coordinates. Decree No. 6597/05 regulates specific aspects of Law 779/05.

Prospecting Permits.

Granted by Resolution of Ministry of Public Works and Communications, for one year renewable for another year, over 2,400,000 hectare area. Permit holder must post bond of US$75,000 approximately, and has preference to select one or more exploration lots in permit area.

Exploration Concessions.

Granted by contract with Government, for four years renewable for another two years, in 40,000 hectares lots to maximum area of 800,000 hectares. Concessionaire must post bond of US$.20 per hectare, and may convert into exploitation concession.

Exploitation Concessions.

Granted by contract, for 20 years renewable for another ten years, over area not to exceed 5,000 hectares. During exploitation stage concessionaire shall pay State following: (a) Land Fees: (i) one time fee of US$0.30 per hectare, and (ii) progressive annual exploitation fees from US$0.20 to US$2 per hectare; (b) royalties on production: (i) 100-5,000 barrels per day, 10%, (ii) 5001-50,000 barrels per day, 12%, (iii) over 50,001 barrels per day, 14%.

Mineral Concessions.

Law 3180/07 governs mineral concessions and establishes rights and obligations of parties. Government grants individual mineral concessions by contract approved by law, which establish rights and obligations of parties. Concessions are divided into prospecting, exploration and exploitation phases. Requirements to apply for concession are: (a) demonstrate financial capacity and technical expertise; (b) establish local branch or subsidiary, designating legal representative; (c) present activities and investment program for prospection and exploration phases; (d) present map of area with geographical coordinates.

Prospecting Phase is for one year renewable for another year, over 100,000 hectare area. Permit holder must post third party liability insurance of US$1,000,000, and has preference to select one or more exploration lots in permit area. Land Fees are US$.55 per hectare. Minimum program expenditure is US$500,000.

Exploration Phase is for two years renewable for another one year up to maximum area of 50,000 hectares. Concessionaire may convert into exploitation concession. Land Fees are US$1.30 per hectare. Minimum program expenditure is US$1,000,000.

Exploitation Phase Concessions.

Granted by contract, for 25 years renewable for similar period based on investment and production program, over area not to exceed 25,000 hectares. During exploitation stage concessionaire shall pay State following: (a) Land Fees of US$1.30 per hectare, and (b) royalties on production equivalent to 2.5% of FOB value.

16.02 OIL AND GAS EXPLORATION AND EXPLOITATION:

See topic 16.01 Mines and Minerals.

17 MORTGAGES

17.01 CHATTEL MORTGAGES:

Only one kind of chattel mortgage is recognized by law, that is recorded or registered pledge instituted by law. It is contract by which debtor assigns assets in guaranty of loan, without losing possession of them. Contract is registered and gives creditor privilege over all other creditors over those assets, as from date of recording. No subsequent pledge affecting same property may be executed by debtor, except with consent of creditor.

Recent jurisprudence gives employees' credits for salaries against a bankruptcy, privilege over one granted by chattel mortgage.

Certificate can be endorsed but endorsement has to be registered.

17.02 MORTGAGES OF REAL PROPERTY:

Mortgage cannot be placed on personal property, nor on right of usufruct or use and habitation, but when has to be placed on real property is extensive to all accessories so long as they are united to property, to all buildings erected on vacant land, to rents and results from insurance coverage. It is not divisible; properties mortgaged to secure debt are bound for whole amount and creditor may proceed against any or all of them. Only owner can mortgage property; joint owner may mortgage his share, but in case of partition, mortgage is applied on his share alone.

Mortgage must be made by a notarial act or public instrument. Instrument may be executed in a foreign country, and should be legalized and protocolized by order of civil court. They can be opposed to third parties as from date of recording in Public Registry of Mortgages or if a certificate of free disposability has been requested by a notary, up to 20 days from date of certificate.

Recording may be requested by grantor, grantee, and by anyone interested in security. Mortgages must be recorded every 20 years to be effective.

Debtor must not decrease value of mortgaged property; if he does so, mortgagee may require a deposit of an amount sufficient to make security good, and if negative may foreclose mortgage. Mortgages are foreclosed by brief, summary actions in C.de Proc.

Chattel Mortgages.

See topic 17.01 Chattel Mortgages.

18 PROPERTY

18.01 ABSENTEES:

See category 10 Estates and Trusts, topic 10.01 Death.

18.02 ADVERSE POSSESSION:

See category 5 Civil Actions and Procedure, topic 5.05 Prescription.

18.03 POWERS OF ATTORNEY:

Powers of attorney which are to be presented in court, those for administration of property and those which concern public instruments or matters which should be in form of public instruments, must themselves be in form of public instruments.

General power of attorney only confers power of administration even though power gives authority to do any act when grantee deems convenient in course of administration. Special powers are necessary for following purposes: to make payments which are not in ordinary course of administration; to make contracts extinguishing obligations which existed at time; to submit suit to arbitration; to waive jurisdiction; to renounce rights which have been acquired by prescription; to renounce right to appeal; to renounce or remit debts gratuitously, except in case of bankruptcy of debtor; to do any act related to family's right which can be done by third parties; public document authorizing these acts must specify them and mention person to whom power is granted to make any contract for purpose of obtaining, transferring, waiving or extinguishing interest in real property; this paragraph does not include authorization to mortgage or transfer real property for debts preceding power; to make gifts except in cases of small sums to employees; to loan or borrow money unless business of administration consists of lending or borrowing, or unless it is absolutely necessary to borrow money to conserve property which is being administered; to lease real property for more than five years; to make grantee bailee, unless power refers to bailments or bailment or is made as result of administration of property; to allow grantee to become surety; to perform any sort of personal services; to form company; to accept inheritances and to admit obligations existing prior to granting of power.

Power of Attorney is presumed onerous, except when contrary is agreed.

Power of Attorney may be granted to minor 18 years old.

Special power for certain acts specifically determined must be limited to them and cannot be extended to similar acts which can be considered as natural consequence of those entrusted by grantor.

He may delegate power to another but is responsible for substitute, unless he has been given express authority to substitute, and is responsible when he has named a substitute who is notoriously incompetent or insolvent. Grantee may revoke a substitute at any time.

Power terminates by revocation; by renunciation on part of grantee; when duration of time for power is due or when either of parties is dead or has become incapacitated.

It is necessary that grantee and third persons know or should have known of termination of power in order to make it ineffective with regard to them. Everything that grantee does while he is ignorant of termination of power binds grantor.

Revocation occurs when grantor gives new power to another person for same purpose and grantee is notified of same. Granting of a special power revokes a general power insofar as it affects matters dealt with in special powers.

18.04 REAL PROPERTY:

Ownership, possession and administration of real property and encumbrances thereon and their assignment are governed by C.C.

Condominium.

May be established by law, contract, will or legacy. Rules regarding partition of inheritance are applicable to partition of individualized real property.

Rights in rem on real property other than ownership and condominium are as follows:

Usufruct.

Consists of right to use and enjoy property belonging to another person without changing its substance. It may also attach to personal property.

Use and Habitation.

Consists of right granted by owner to take from land products which are necessary for sustenance of user and his family. When this right refers to house and its occupation it is called habitation.

Servitude.

Consists of temporary or perpetual right to use real property of another or exercise certain rights thereon or to prevent owner from exercising certain rights of ownership.

Mortgages.

See category 17 Mortgages, topic 17.02 Mortgages of Real Property.

Foreign Ownership.

Law 2532/2005 restricts rural property ownership to foreign naturals of Brazil, Bolivia, and Argentina in 50 km range from international border.

19 TAXATION

19.01 ADMINISTRATION:

Administration and application of Tax Law 125/91 and its amendment by Law 2421/2004 corresponds to Undersecretary of Taxes (“Sub-Secretaria de Estado de Tributación”), from Secretary of Finance (“Ministerio de Hacienda”). Municipalities administrate Municipal Law 881/81.

19.02 ALCOHOL, BEVERAGES AND TOBACCO TAXES:

Selective Tax on Consumption.

Applies to imports of goods and to their first sale in case of domestic products. Importers and manufacturers of taxable domestic products shall be liable for tax.

For imports, taxable base is Customs value plus Customs duties and fees for services. For domestically manufactured goods taxable base is ex-factory price excluding VAT and this tax.

Maximum Tax Rates.

Tobacco, up to 12%; alcoholic beverages from 8 to 12%; non-alcoholic beverages 5%; combustible (petroleum) 50%.

19.03 BUSINESS TAXES:

(1) Tax on Business Income.

Taxable Income.—All income from Paraguayan sources derived or earned from commercial, manufacturing or service activities other than personal services: sale-purchase of real estate when activity is carried out as permanent business; use of assets, and other income shown on commercial balance sheets; commercial partnerships, as well as foreign corporations or their branches, agencies, or business establishments in Paraguay; extractive industries such as mining and forestry, and certain farming activities (flower growing, forestry, bee keeping, poultry farming and others); consignment of merchandise; supply of certain services listed in law, which are subject to amendment and regulations. Excluding: (i) income from farming which is governed by specific rules applicable to sector; (ii) income from small taxpayers (those whose annual income is less than approx. US$20,000 per year); (iii) income subject to personal income tax.

Taxpayers.—Individual businesses, partnerships, associations, corporations and other private businesses; government-owned enterprises, decentralized government corporations, and mixed capital corporations; branches, agencies or businesses owned by foreign corporations. Corporations incorporated overseas shall pay tax on income paid or accredited to them. Individuals applying capital resources and personal labor jointly, for purpose of obtaining economic gain, except those involving strictly personal services or those engaged in farming. Corporative corporations, when performing same activities as other commercial/industrial companies.

Paraguayan Sources.—Business carried out, income obtained from goods located in or from entitlements used for gainful purposes in Paraguay; interest on securities and movable properties; technical assistance provided within country when utilized or applied in it; assignment of goods or rights when used even partially during agreed period, such as use of trademark or patent; international freight on goods carried to bordering countries (Argentina, Brazil, Bolivia) or Uruguay deemed as 50% from Paraguayan sources. Other freight deemed 30% from Paraguayan sources. Interests, fees and capital gains obtained abroad, provided that investor or beneficiary is established in Paraguay.

Gross Income.—Defined as difference between total earnings and cost thereof. In sales, difference resulting from deducting from gross sales any returned goods, gratuities and price discounts as applied in local business usage or custom; in sale of fixed assets, difference between sale price and cost or revalued cost of assets, minus amortizations or depreciations allowed by law. Also: Proceeds from sale of movable property or real estate received in payment, proceeds from payments to partners or shareholders; any exchange rate differences resulting from transactions in foreign currencies; net benefits resulting from collection of insurance or indemnities; proceeds from any transfer of enterprise or business firms; interest on loans or investments (advances paid to partners or employees are excluded as well as deposits placed in financial entities); any increase in net worth occurring during fiscal year other than that arising from revaluation of fixed assets or capital contributions or from exempt or nontaxable businesses.

Net Income.—Calculated by deducting from gross income all expenses incurred to obtain such income and to maintain source of income, provided they are real expenditures, duly documented, and at market price, as follows: Taxes and social benefits excluding business income tax; operating expenses of business; personnel compensation provided that (i) contribute to social security, and/or, (ii) are taxpayers of personal income tax, organization or incorporation expenses; interest and rentals or sums paid for assignment of assets and rights; losses suffered through casualties not covered by insurance; reserves or write-offs for bad debts; losses incurred as result of criminal acts; depreciation; amortization of incorporeal rights such as trademarks and patents; expenses and payments incurred overseas associated to taxable income from export and import operations; travel expenses, per diem, and other similar payments in cash or kind; gifts to State, municipalities and religious entities or to entities dedicated to social welfare or education, recognized by Tax Administration; professional fees and other compensation for personal services not subject to taxation; expenses and contributions paid to staff for health care, education, cultural development, or training. Losses incurred in any fiscal year may be set off.

Nondeductible Expenses.—Interest on loans or advances from owner of business, partners or shareholders if they are not taxpayers of personal income tax, and if interest rates are higher than average for Paraguayan banking system, this restriction is not applicable to owners/shareholders of banks and other financial institutions regulated by 861/96; penalties for tax offenses; earnings in any fiscal period retained in business as capital increases or reserve accounts, excluding those retained by financial institutions in order to comply with minimum capital level according to regulations, and 50% of earnings applied to legal reserve by same institutions. Amortization of payments for goodwill. Personal expenses of owner, partners, or shareholders, and moneys drawn on account of future earnings. Direct expenses involved in earning nontaxable income. Losses incurred in previous fiscal year. Indirect expenses are proportionally deductible.

Beneficiaries Not Domiciled in Paraguay.—Beneficiaries of Paraguayan sourced income domiciled abroad are subject to withholding tax, separately from their local branch or agency. Law establishes imputed profit margin to which rate is applied. Imputed profit margin varies as follows:

10%: Insurance or reinsurance premiums; sales of travel tickets, international freight, radio message services, telephone calls, Internet services and other similar services sent overseas from Paraguay; freight on international shipments (export freight is exempted).

15%: Gross income earned by international news agencies; gross income earned by leasing of shipping containers.

40%: Rentals on motion picture films or television programs or those of any other projection medium.

50%: Income earned from any other source not indicated before.

100%: Gross income paid or credited abroad, arising from branches, agencies, or subsidiaries located in country. Taxpayers may in such cases choose to pay taxes according to general rules governing tax by keeping adequate books of account for verification of expenses and income.

Presumptive Income.—Taxpayers who do not keep regular books of account run risk that Tax Administration may establish presumptive income on which to apply net income which in turn shall be subject to tax rate established by law. Taxpayers engaged in businesses character of which places difficulties to application of generally accepted accounting principles may request Tax Administration to apply tax regime based on presumptive income.

Tax Exempted Income.

Local companies that, due to their status as shareholders, receive dividends or distribution of profits from other local companies subject to (corporate) income tax, are considered exempted from 10% general income tax rate on that income, provided amount of that income does not exceed 30% of annual gross income of taxpayer's parent company. Once said income exceeds 30% of parent company's annual gross income, all profits obtained from other local companies would be taxed in parent company. This regulation is currently being challenged as unconstitutional before Supreme Court, but ruling is still pending. Please note that only 10% general tax rate could be exempted; not additional tax on profits distribution (5%), nor withholding tax (15 %) on profits credited or submitted abroad (those rates do not apply to companies granted with 60/90 Law Investment Promotion Law tax incentives); contributions to government and other social security funds, provided they are created or approved by Law (health, retirement or pension funds). Financial revenues obtained by such funds; interests and/or profits obtained from sales of bonds through stock market; export freight.

Revaluation of Fixed Assets.—Annual revaluation of fixed assets is mandatory and updated value shall result from applying to book value shown in previous fiscal year at percentage variation based on consumer price index as determined by competent government body.

Value of Inventories.—Merchandise in stock is carried on books either at cost of production, cost of acquisition, or at market cost at close of fiscal year, at taxpayer's option. Tax Administration may accept other systems of inventory valuation. Negotiable securities and valuables shall be booked at their market value at close of fiscal year. If not quoted on market, purchase price is used. Fixed assets and intangible assets are carried at purchase cost without prejudice of annual revaluation.

Reinvestment exemption was replaced from fiscal year 2005 by reduction on general tax (from 30% to 10%), but distribution of profits is taxed from fiscal year 2006 with additional 5% rate. 15% withholding tax is also applicable when owners/quotaholders/shareholders are nonresident entities.

Branches or agencies of companies incorporated overseas shall keep accounts separate from those of their head office. Payments of interest, royalties and for technical assistance made by branches or agencies to their head office are deductible items for payers but taxable for payees.

Tax Rates.—In general it is 10% from year 2006 and after. Distribution of net profits to owners, shareholders or partners are subject to 5% additional tax from year 2006 and after. Sums paid or credited to head offices, partners or shareholders by branches, agencies, or businesses located in Paraguay are subject to 15% tax. Income of individuals and/or entities not domiciled in country, earned independently from that paid or credited on activities conducted by branches, agencies or businesses are subject to sum of tax rates above as follows: For year 2006 and after, 10% + 5% + 15% = 30%.

(2) Tax on Farm Income.

Farming defined as business conducted for purpose of obtaining primary products, either vegetable or animal, by utilization of land, excluding (i) business of handling, processing or treating farm products unless carried out by same producer; (ii) activities subject to other income taxes are as Business Income Tax, Personal Income Tax and Small Income Tax.

Taxpayers.—Individuals; partnerships, whether incorporated or otherwise; associations, corporations, and other private entities; government enterprises, self governing agencies, decentralized entities; individuals or corporations conducting taxable businesses, including corporations incorporated overseas and their branches and agencies; owning or leasing rural land.

Usable land (SAU) is considered for application of this tax; SAU = total surface of real estates (minus): (a) areas occupied by natural or planted forests, permanent ponds, lakes, everglades; (b) other nonusable areas (as rocky and salty areas); (c) protected areas under environmental legislation; and (d) roads and highways; (i) For surfaces with SAU in excess of 300 hectares in Eastern Region and 1,500 has. in Western Region: annual gross income equals total income rendered. In order to determine net income, all expenses and investments related to tax activities are considered deductible, provided that they are duly documented according to law. For cattle raising 8% per annum of female cattle in stock is considered deductible, and maximum of 3% of mortality is admitted as deductible expense, unless proven before authorities. There are other deductible expenses according to specific activities and subject to previous approval by Secretary of Agriculture and Livestock. If net income is negative, losses could be compensated in maximum of five successive fiscal years. Tax rate is 10% on net income, (ii) for surfaces with SAU less than 300 has. in Eastern Region and 1,500 has. in Western Region: annual taxable income is determined on basis of presumptive income, according to specific zoning as follows: Zone 1, with productivity coefficient (COPNA) form 0.555 to 1.000, equivalent to 1,500 kilograms of soybean per hectare area per year; Zone 2, COPNAs from 0.31 to 0.54, equivalent to 600 kilograms of cotton fiber per hectare per year; Zone 3, COPNAs from 0.20 to 0.30, equivalent to 50 kilograms of live weight gain (for cattle) per year. Productivity coefficient applied to average (annual) prices for each product to determine annual taxable income. Tax rate is 2.5% applicable to tax income. VAT paid on purchase of inputs required by exploitation is considered tax credit, (iii) surfaces smaller than 20 has. in Eastern Region and 100 has. in Western Region are exempted.

(3) Small Businesses Tax.

This tax applies to commercial, manufacturing and service businesses other than personal services, conducted by individuals using their personal labor and capital to pursue economic gain, provided their total income in previous year did not exceed amount of Gs.100 million (equivalent to approx. US$20,000), adjustable by price index. Individuals performing import/export activities are excluded.

Tax base will be smaller amount between (i) 30% of annual gross income (presumptive) and; (ii) gross income (minus) documented expenses.

Tax rate is 10% applicable on tax base.

19.04 CONSUMPTION TAXES:

See topic 19.20 Value Added Tax.

19.05 EMPLOYMENT TAXES:

Incidence of contribution on salary is 16.5% to employer and 9% to worker. Minimum base over which day laborers and workmen doing piecework must contribute, is amount corresponding to 18 days wages. In no case will contributions be calculated over amounts smaller than minimum legal wage.

19.06 ESTATE TAX:

None.

19.07 EXCISE TAXES:

See topic 19.04 Consumption Taxes.

19.08 FOREIGN INVESTMENT TAXES:

See category 12 Foreign Trade and Commerce, topic 12.02 Foreign Investment.

19.09 GASOLINE AND SPECIAL FUELS TAXES:

Applies to sale of petroleum products (gasoline, diesel fuel, aviation fuel) in addition to and to their first sale. Taxable base is customs value plus customs duties and fees for services.

Tax Rate.

50% of Selective Tax Consumption.

19.10 GIFT TAX:

None.

19.11 INCOME TAX:

See topic 19.03 Business Taxes.

19.12 INHERITANCE TAX:

None.

19.13 LOCAL GOVERNMENT TAXES:

Municipal taxes and fees are paid to each city for wide range of services and activities. Main taxes are Commercial Licenses, Real Estate Tax, Constructions and Properties Tax.

19.14 MOTOR VEHICLE TAXES:

2% tax rate on motor vehicle value. Value is determined by Tax Authority for this tax purpose. Vehicles valued under US$30,000 are exempted. This tax is paid only once for each motor vehicle.

19.15 PERSONAL INCOME TAX:

(Note: Originally set to be in force from Jan. 1, 2006, its application was suspended, so it should enter in force from Jan. 1, 2010. Annual tax return.)

Taxable Income.

All income from Paraguayan sources derived from personal services or generating personal income: practice of professional activities, performances of personal services; 50% of income obtained as partners and/or shareholders of entities which are taxpayers of Tax on Business Income; capital gains earned occasionally through transfer of real estate, stock (quotas, shares) when not subject to Tax on Business Income (presumptive profit margin is 30%); interest and commissions; any other income not subject to Tax on Business Income and Small Business Tax.

Exempted Income.

Retirement pensions granted for extraordinary services; pensions for old age, employee death benefits, compensation for accident injuries, indemnification for maternity, indemnification for unjustified firing of employee; interests and commissions from deposits on investments in financial institutions or cooperatives, revenues from debt instruments issued by public companies regulated by Stock Exchange Commission.

Individuals will not be subject to Personal Income Tax, as follows: Year 2009: individuals with Annual Gross Income (AGI) of less than 120 Minimum Monthly Wages (MMW); Year 2010: those with AGI of less than 108 MMW; Year 2011: individuals with AGI of less than 96 MMW; Year 2012: individuals with AGI of less than 84 MMW; Year 2013: individuals with AGI of less than 72 MMW; Year 2014: individuals with AGI of less than 60 MMW; Year 2015: individuals with AGI of less than 48 MMW; and Year 2016 and after: individuals with AGI of less than 36 MMW.

Taxpayers.

Individuals, non-commercial partnerships or professional firms (law firms, accounting firms).

Deductible Expenses.

Compulsory contributions (eg. Social Security contributions); donations (limited by regulations yet to be issued); expenses made abroad when related to taxed income, local expenses related to taxed when they are duly documented; personal and family documented expenses including education, housing, health, clothing, recreation, and alimentary expenses; up to maximum of 15% of gross annual income for (i) deposits in financial institutions, cooperatives, (ii) investments on shares of public corporations, (iii) contributions to private retirement funds. Deductions are limited to amount of Gross Income (losses are not admitted).

Tax Rate.

10% is general tax rate on Personal Income.

19.16 PROPERTY TAXES:

Real Estate Tax.

Applies to real estate property located in national territory, and taxpayers are owners or users thereof. When ownership is shared tax is paid by any one of owners.

Exemption.

Real estate owned by State and municipalities; real estate owned by religious entities recognized by competent authorities devoted on permanent basis to public service; lands declared to be historic national monuments, lands owned by recognized public welfare associations and in general any piece of land devoted to hospitals or public welfare services; real estate owned by foreign governments; real estate used as permanent premises by political parties and education, cultural, social, sports or labor unions whether owned or held in usufruct; properties of Chaco War veterans provided they or their surviving spouse live thereon; properties owned by Rural Welfare Institute and lands set aside for settlement by INDERT; national parks and nature conservation reserves. In event of natural disasters such as floods land owners may request and government may reduce this tax by as much as 50%.

Tax Base.

Fiscal valuation of real estate as set by National Survey Service. Property values shall be increased until they match prices set by market following consumer price index, but increases shall not exceed 15% per annum. In case of rural properties any improvements or buildings shall not be computed in tax base.

Tax Rate.

1% of fiscal value per year, reduced by 50% in case of rural properties under five hectares in areas utilized for small scale farming, and rural properties with approved forestation/reforestation programs, under Law 536/94.

19.17 SALES TAX:

See topic 19.20 Value Added Tax.

19.18 TAX INCENTIVES AND EXEMPTIONS:

See category 12 Foreign Trade and Commerce, topic 12.02 Foreign Investment.

19.19 TREATIES AND AGREEMENTS:

Paraguay has Tax Exemption and Double Taxation treaties with following countries: Uruguay: On air transportation; Chile: On air and land transportation; Belgium: Air transportation; Germany: Air transportation; Argentina: Air, fluvial and land transportation.

19.20 VALUE ADDED TAX:

Value Added Tax (VAT).

Applicable to transfer of ownership of goods from one person or company to another; rendering of personal services and importation of goods. Excluded are personal services performed under employment.

Taxpayers.

Individuals providing personal services when their gross income in previous year exceeded average of one minimum monthly wage (approx. US$300/month for year 2009); cooperatives; individual businesses engaged in commercial, manufacturing or services businesses; partnerships and private entities in general; independent government entities, government enterprises and decentralized agencies engaged in businesses; importers of goods; nonprofit organizations (NGO) when performing commercial/industrial/services activities, subject to Business Income Tax.

Origin of Tax Liability.

For sales of goods tax obligation arises upon delivery, issue of invoice or equivalent act, whichever happens first. For public services, on due date of invoice. For services, upon issuance of invoice or collection of full or partial payment for service, upon expiration of term for payment or upon termination of service. For items of personal consumption, at moment of purchase. For imports, at time register of entry of goods into Customs is opened.

Territoriality.

All sales of goods and services in Paraguay are taxable. In case of technical assistance when used or profited from in country; in case of assignment of rights or lease of goods, when used within national territory. In case of insurance and reinsurance when they cover risks within country or when goods or persons covered are situated in or residents of country.

Tax Base.

In transactions for consideration tax base is billed net price for goods or services. To establish net price and in determining price of goods used or consumed privately same rules apply as income tax, in addition to any special provisions. In case of imports, base is Customs value plus Customs duties in addition to other taxes applicable to delivery of goods (Customs and dock fees) and internal revenue taxes, but excluding value added tax. For loans, interest, commissions and other charges accrued monthly. For real estate lease, monthly accrued lease payment. For transfer of real estate 30% of transfer price. For transfer of stock (quotas and/or shares), excess of transfer value over book value.

Exemptions.

(1) Sale of Goods: Farm products in their natural state; foreign currencies, government or private bonds, securities; petroleum based fuels; goods received through inheritance; assignment of credits, capital goods manufactured locally provided they are applied to industrial/agriculture projects granted with benefits of the 60/90 Investment Promotion law. (See category 12 Foreign Trade and Commerce, topic 12.02 Foreign Investment.) (2) Services: Interest on government or private bonds; services rendered by personnel of embassies, consulates and multilateral agencies accredited before government; fee of charge, services rendered by NGOs, political parties and other nonprofit organizations, deposits in financial institutions authorized by Central Bank of Paraguay, and in cooperatives, Home Savings and Loan system, and Public Financial Institutions. (3) Imports: Travelers baggage; diplomatic service imports; capital goods to be applied directly to productive cycle in manufacturing or farming in projects benefitted by incentives offered under Law 60/90. Goods imported to render services are not exempted even if benefited by Law 60/90.

Payment of Tax.

Fiscal debit is sum of taxes accrued (invoiced as opposed to collected) by taxable transactions in each month. Fiscal credit is sum of taxes included in purchases of goods and services on local market during month, or on imports. Tax shall be appraised on sum representing difference between fiscal debits and fiscal credits. Deduction of any fiscal credit is conditional on such credit arising from goods or services devoted directly or indirectly to transactions subject to taxation. Taxpayers rendering personal services may not deduct any fiscal credits arising from purchase of motor vehicles. When fiscal credit exceeds fiscal debits surplus may be carried over to future liquidations.

Tax Rates.

5% for assignment of rights of use of goods; 5% for transfer of real estate; maximum of 5% for sales of basis alimentary goods; 5% on interests, commissions and charges for loans; 5% for sales of pharmaceutical products; 10% for rest (general tax rate is 10%).

19.21 WEALTH TAX:

See topic 19.16 Property Taxes, subhead Real Estate Tax.

20 TREATIES AND CONVENTIONS

20.01 TREATIES AND CONVENTIONS:

Paraguay is party to several international conventions and treaties intended to protect foreign investment. World Bank Center for Settlement of Investment Disputes as independent international agency was ratified under Law No. 944/82; Inter-American Convention on International Commercial Arbitration was ratified as Law No. 611/76. New York Convention for Enforcement of Foreign Arbitral Awards and Judgments was ratified as Law No. 1879/02.

Paraguay has signed Multilateral Investment Guarantee Agency Agreement on Sept. 13, 1991. “MIGA”, created under umbrella of World Bank, insures investors against risks like expropriation, currency inconvertibility and damage produced by revolution, war or civil strikes. Similar agreement with Overseas Private Investment Corporation of U.S. is in effect. U.S. Agency has lifted restrictions regarding investments in Paraguay as sign of recognition of progress made by country.

MERCOSUR, established in 1991, is regional trade market comprised of Argentina, Brazil, Paraguay and Uruguay. Member countries liberalize trade with one another while imposing common external tariff on goods imported from nonmember countries. MERCOSUR has extended its scope by entering into free trade agreements with Chile and Bolivia. In 2001, intra-trade tariffs, have been reduced to zero, with some exemptions for Uruguay and Paraguay. In 2008, Congress authorized MERCOSUR agreement by which nationals from Member States have access to free visas from other Member States for studying, teaching and investigating purposes. In same year, Congress authorized agreement by which Member States agreed to adopt common legislation over proceedings to obtain residence permit in another Member State. In 2009, Congress authorized agreement by which Member States oblige themselves to admit university and postgraduate degrees duly granted and recognized by other Member States for teaching and investigating purposes.

1

PERU LAW DIGEST

—Scope —

Revised for 2008 edition by

CURTIS, MALLET-PREVOST, COLT & MOSLE LLP, of New York.

(Abbreviations used are: C. C. for Civil Code; C. Com. for Code of Commerce; C. C.

P. for Code of Civil Procedure; Sup. Decree for Supreme-Decree. All Codes are cited by articles thereof.)

Note: This revision incorporates legislation through Dec. 11, 2007.

1 INTRODUCTION

1.01 CURRENCY:

(Const. art. 83, Law 25295 of Jan. 3, 1991 and Law of Central Bank 26123 of Dec. 29, 1992; C.C. art. 1237).

Monetary unit is Nuevo Sol (NS/.) divided into 100 céntimos. Only Banco Central de Reserva del Perú may issue bank notes which are legal tender. Obligations in foreign currency, unless stipulated to contrary, may be paid in national currency at exchange rate prevailing at time and place of payment.

1.02 GOVERNMENT AND LEGAL SYSTEM:

Constitution in effect was approved on Oct. 31, 1993.

Tit. I establishes people's rights. Peru is democratic, independent, sovereign and social republic. Its government is one, representative and decentralized.

Legislative powers are vested in Congress. Term of members of Congress is five years.

Executive Power is vested in President assisted by Cabinet. His term is five years, he may be reelected for additional period and elected again after expiration of one presidential term, and is elected by direct suffrage by more than half of votes validly cast.

Judicial Power is vested in Supreme Court of Justice and Lower Courts established in territory of Republic. There is no death penalty except in case of treason to country while in war and terrorism.

Tit. V refers to Constitutional Guaranties including habeas corpus right of action. Court of Constitutional Guaranties is composed of seven elected members. Its jurisdiction extends over territory of Republic. Statute of limitations actions on unconstitutionality of laws is six years from date of publication. (Laws 28237 of May 28, 2004 and 28301 of July 22, 2004 as am'd).

Congress meets from July 27 to Dec. 15 and Mar. 1 to June 15 in ordinary meetings, and in extraordinary meetings whenever it is called by 5% of its members. (Congress Regulation of May 30, 1998 as am'd).

1.03 HOLIDAYS:

Jan. 1 (New Year's); Maundy Thurs. (half holiday)*; Good Friday*; May 1 (Labor Day); June 29 (SS. Peter and Paul); July 28-29 (National Independence days); Aug. 30 (St. Rose of Lima); Oct. 8 (Angamos Combat); Nov. 1 (All Saints); Dec. 8 (Immaculate Conception); Dec. 25 (Christmas). (Leg. Decree 713 of Nov. 7, 1991 as am'd).

* These are movable holidays.

1.04 OFFICE HOURS AND TIME ZONE:

Peru is in the Eastern Standard time zone. Office hours are generally from 9 a.m. to 5 p.m.

2 BUSINESS ORGANIZATIONS

2.01 AGENCY:

(C. C. 145-167, 1790-1808, 2036-2038; C. Com. 5, 50-63, 237-274).

A general power of attorney merely authorizes the agent to perform acts of administration; in order to alienate or encumber the property of the principal power must be expressly given in public instrument. Agency is compensated. Agent is obliged: (a) To discharge agency which he has accepted while it remains in effect; (b) to give notice to principal upon conclusion of business; (c) to follow instructions; (d) to render accounts. Agent is liable for acts of substitute appointed by him if appointment was without authorization or if he chooses notoriously incompetent person. Principal is obliged: (a) To reimburse agent for advances and expenses with interest and pay compensation stipulated; (b) to indemnify agent for losses caused by agency; (c) supply necessary means for performance of authorized acts.

An agency terminates by: (a) Revocation; (b) resignation of the agent; (c) death, incapacity or bankruptcy of the principal or agent; (d) termination of the business; (e) expiration of term. Appointment of new agent for same business is equivalent to revocation. Revocation takes effect from time former agent is notified. Agent who resigns must notify principal and continue to act until replaced, but he may cease in agency if he gives principal 30 days notice plus allowance for distance. So long as agent does not know of principal's death or that he should cease in agency for another reason, his acts as agent are valid.

2.02 ASSOCIATIONS:

Associations are nonprofit organizations that can be organized by natural or juridical persons. Associations legally established acquire juridical personality through recording of their articles of association, which must contain name, domicile, purpose and manner of administration. Meetings of members are called in cases provided in by-laws or at request of one-tenth of members. Association loses its existence in case of bankruptcy, and it may be dissolved by court decision at request of state's attorney in case its activities are contrary to public order or morals. (C. C. 80-98, 124-126, 2024 and 2025).

2.03 CORPORATIONS:

(General Law of Societies, Law 26887 of Dec. 5, 1997 as am'd).

Organization.

Charter and its subsequent amendments must appear in public instrument (see category 9 Documents and Records, topic 9.04 Public Instruments) which must be recorded in Mercantile Registry. Minimum of two persons and payment of at least one-fourth of capital are required to organize corporation. This rule does not apply to corporations organized by state or its agencies, which are governed by law under which they are created.

Articles of incorporation must state name, citizenship, civil status, occupation and domicile of incorporators, and should include: (a) Name of company, which cannot be same as that of any other company, and which should be followed by phrase “Sociedad Anónima” or “S. A.”; (b) object of business operations and domicile of company. Corporations organized in Peru have their domicile in Peru, except when their operations are conducted on foreign soil and domicile is established there; (c) duration; (d) date of commencing operations; (e) capital and number of shares in which it is to be divided, their par value and series. Bearer shares are not permitted; (f) unpaid capital and payment procedure; (g) description and value given to property contributed at organization; (h) rules for profit distribution; (i) special privilege, if any, granted to certain stockholders; (j) rules governing stockholders' meetings, board of directors; (k) minority representation on board and on supervisory council, which cannot be less than that established in law; (l) management; (m) when balance sheet should be submitted; (n) rules for increase or reduction of capital and for dissolution and liquidation of company; and (o) any other agreements. Also, corporations can be organized by public subscription. Promoters must make public prospectus containing all significant data, i.e., name, object, minimum capital subscription required, par value of shares, date for meeting of subscribers. This meeting requires presence of absolute majority of all shares subscribed.

Founders.

In addition to their benefits as shareholders, founders can reserve for themselves a participation up to 10% of net profits for five years. Founders are liable for actions taken in period of organization if not ratified by corporation within three months from registration date.

Stock and Stockholders.

Capital must be represented by registered shares. Shares not representing capital are forbidden. No shares can be issued for less than their par value. Each share confers one vote. No stock can be issued before company's charter is recorded in Mercantile Registry. Provisional stock certificates must be issued as registered shares. Shares and transfers thereof are recorded in a special book. Ownership is determined by recorded inscription. Shares of all types must be numbered and are issued from stubs. Until shares are fully paid first subscriber and his assignees are liable for unpaid balance. This liability extends for three years following date of transfer. Shareholders are not liable beyond amount of subscribed shares. Company cannot purchase its own shares except from profits and for purpose of canceling them, nor can it lend money on guarantee of its shares.

Stockholders' Meetings.

General assembly of stockholders holds ordinary and special meetings. Ordinary meetings are held, among other purposes, to approve balance sheet, elect members of board of directors, and to fix their salaries, to distribute profits. At special meetings, assembly, among other powers, exercises following: Removal from office of members of board and of advisory council, amending of charter and bylaws, increase or reduction of capital, dissolution of company. Meetings are called by board of directors when deemed necessary, or at request of shareholders representing one-fifth of capital. In case of refusal, petitioners can appeal to local judge. Meetings are called by public notice in local paper where judicial notices are published, not less than ten days in advance of date set for special meetings and three days for ordinary sessions. Nevertheless, this requirement may be dispensed with when convening shareholders, representing totality of capital, consent to hold meeting. Quorum to hold meetings on first call requires representation of at least half of capital. On second call, any number of shares suffices. See subhead Amendment of Articles; Change of Capital, infra, for special quorum and voting requirements.

When a resolution is against law or interests of stockholders, it can be appealed before local judge by stockholders who had not attended meeting or who voted against it.

Directors are considered agents of company and have no joint or several liability so long as they act within limits of their authority and perform their duties with “diligence of a methodical merchant.” Number of directors is determined in by-laws, if not number is three, as is term of office which cannot be for more than three years. They are elected and removed from office by stockholders. See subhead Stockholders' Meetings, supra. Director need not be stockholder. For management purposes, board has duty to appoint a manager. Appointment of directors and powers conferred by company for any purpose must be recorded in Mercantile Registry.

Minority Representation.

Companies not having a supervisory council must provide for minority representation on board of directors. To implement this each share confers as many votes as number of directors to be elected. Minority representation is not required when election of board is unanimous.

Amendment of Articles; Change of Capital.

By resolution, at special stockholders' meetings, capital may be increased or reduced through issuance of new series of shares of stock when this action has been announced in call for meeting. Required quorum is two-thirds of capital on first call and three-fifths on second call. To adopt such resolution absolute majority of total paid-in capital is required. No increase of capital can be effected until full payment of previously issued stock has been made. Capital can also be increased by transferring available reserves to capital and issuing new shares to holders of outstanding shares in proportion to stock held by them or by increasing par value of outstanding shares of stock. Bonds and debentures can also be converted into shares. Same quorum and voting requisites are applicable to other changes of charter and by-laws. Changes which would impose new obligations on shareholders will not apply to those who had opposed them. If amendment consists of transferring company domicile to foreign country, or changing objects of corporation, or prohibiting assignment of shares, shareholders voting against such resolutions have right to withdraw from company and to be reimbursed. Reduction of capital with reimbursement to stockholders can only be implemented 30 days subsequent to third publication of appropriate amendment. Creditors can oppose such resolution. Stated capital must be reduced to extent of capital loss when such loss amounts to at least 50%.

Legal Reserve.

Companies must set aside at least 10% of net earnings until reserve fund represents one-fifth of capital. See also category 22 Taxation, topic Taxes, subhead Income Tax.

Dissolution.

Quorum and number of votes required for voluntary dissolution are same as those for amendment of articles (see subhead Amendment of Articles; Change of Capital, supra). However, in special circumstances, if such requirements cannot be complied with, stockholders can request local judge to act upon matter. Corporation may also be dissolved for following reasons: Expiration of term of company; losses which had reduced capital to less than one-third; bankruptcy; continued inactivity of stockholders at their meetings; and ownership of all shares of stock by a single person. In this last case, dissolution can be avoided by admitting one or more shareholders within six months. Executive Power may also order continued existence of company contrary to resolution for dissolution of same, when activity of company is believed to be in public interest. Liquidation is carried out in accordance with articles of incorporation, except as forbidden by law.

Conversion, Merger and Spin-off.

Law regulates conversion, merger, spin-off and other forms of reorganization. Dissenting shareholder has right to withdraw from company, but he continues liable for any corporate obligations contracted before conversion, merger or spin-off.

Open Stock Corporations.

Establishment and operation of open stock corporations (sociedades anónimas abiertas or S.A.A.) is regulated by law and requires to be registered with public register of stock market. National Supervisory Commission for Business and Securities is in charge of controlling and supervising open stock corporations. (Sup. Decree 093-2002 of June 11, 2002). Minority shareholders' rights are protected by Law 26985 of Oct. 28, 1998.

Debentures.

Corporations may issue debentures with in rem surety. Interest of said debentures shall be free from basic income tax on interest. Any offer to public may be made by means of prospect subject to proper regulations of law.

Industrial Enterprises.

Law 23407 of May 28, 1982 as amended called “General Law of Industries”. See category 22 Taxation, topic Taxes.

Fishing Enterprises.

Law Decree 25977 of Dec. 21, 1992 called “General Law of Fishery” and its regulations Sup. Decree 012-2001-PE of Mar. 13, 2001 as amended and Sup. Decree 002-99-PE of Mar. 2, 1999 regulates fishing activities, specifying that hydrobiological species contained in jurisdictional sea up to 200 miles and in continental waters of Peru are in State's domain.

General Law of Fishery is comprehensive in scope, regulating most aspects of fishing industry and related activities. State as owner of hydrobiological resources may grant authorizations, fishing permits, licenses or concessions to exploit them. Such rights are not transferable. Any national or foreign individual or juridical person, whether private or of public nature may be beneficiary of exploitation rights. All fishing activities are subject to Peruvian law. Law classifies exploitation of hydrobiological resources into: Investigation activities, extraction, transformation, commercialization and services.

Special Corporations.

(C. Com. arts. 237 et seq.). There are special provisions for certain kinds of companies such as: (a) Credit companies; (b) banks of issue and discount; (c) railroad companies and public works companies; (d) general warehouse companies; (e) territorial credit banks; (f) insurance companies; (g) agricultural banks and companies.

Foreign corporations in order to do business in Peru must file and record in the mercantile registry: (a) Their articles of incorporation; (b) their by-laws; (c) a certificate stating that they are constituted and exist in accordance with laws of such country; (d) copy of minutes of its shareholders' meeting authorizing business in Perú and stated capital for operation in Perú, declaring that such activities are included in its purpose, branch's domicile, express declaration that all activities and disputes are subject to local law and jurisdiction and power of attorney of their representative. Any modifications of their articles of incorporation or by-laws must also be recorded. (C. Com. arts. 17, 21, 127, and Law 26887 of Dec. 5, 1997, arts. 403-406).

Public corporations regulated by Law 24948 of Dec. 2, 1988 as amended and its regulations. Guaranties in favor of Government or public corporations are regulated by Legislative Decree No. 215 of June 12, 1981.

Irregular Companies.

Relationship among stockholders and between them and third parties are regulated in arts. 423-432 of Law 26887 of Dec. 5, 1997.

Joint Ventures.

Contractual arrangement between two or more persons for aim of executing particular purpose. It does not create juridical person. Contract must be in writing but does not require registration. (arts. 438-448 of Law 26887 of Dec. 5, 1997).

2.04 FOREIGN CORPORATIONS:

See topic 2.03 Corporations.

2.05 LIMITED PARTNERSHIP:

See topic 2.06 Partnerships.

2.06 PARTNERSHIPS:

(General Law of Societies, Law 26887 of Dec. 5, 1997 as am'd).

Unlimited partnership (sociedad colectiva) is constituted by public instrument (see category 9 Documents and Records, topic 9.04 Public Instruments) stating: (a) Name, nationality, civil status, occupation and domicile of partners; (b) firm name; (c) object of business; (d) duration; (e) capital and capital contribution of each partner; (f) firm's domicile and agreed places where its branches, if any, will be established; (g) administration system and powers granted to managers; (h) name of administrators; (i) distribution of profits and assessment of losses, dissolution, liquidation; (j) any other legal agreements. Firm name must contain names of partners or some of them, or abbreviation “S.C.” Partnership articles must be recorded in Mercantile Registry, at which time firm becomes legal entity.

Partners are jointly and severally liable for debts of partnership. If administration of company was not reserved to one or more of partners, they may all intervene in management. All partners have right to supervise management. Resolutions of firm are adopted by majority vote, one partner one vote, but it may be agreed that vote will be in proportion of capital. In this case, if one partner represents more than half of capital, vote of another partner will be necessary to make majority. Industrial partners have no vote, except when vote is according to capital. No partner may convey his interest without consent of others.

Regarding liquidation of partnerships, most of provisions concerning liquidation of corporations are applicable.

Limited partnership (sociedad en comandita) has two kinds of partners: general partners, who have unlimited liability, and special partners, who are liable only for amount they contribute. Firm name may contain only names of general partners, or of some of them. In any case, firm name must be followed by phrase “Sociedad en Comandita,” or its abbreviation, “S. en C.” There are two kinds of limited partnership: simple and by share. Most of provisions relating to unlimited partnerships are applicable also to simple limited partnership, and most provisions related to corporations are applicable also to limited partnership by shares.

Limited Liability Company (sociedad comercial de responsabilidad limitada).—Maximum number of partners is 20. Name of company must include “Sociedad Comercial de Responsabilidad Limitada” or “S.R.L.” Liability of partners is limited to amount of their contribution. Capital is divided into participations that represent quotas of equal value. Participation is not freely transferable; partners have preemptive rights. Company may be administrated by one or more managers. Provisions related to dissolution and liquidation of corporations are also applicable to limited liability companies.

Civil company is a company formed for economic purposes, for professional practice or to perform any personal activity by any or all partners. There are two types of civil companies: ordinary and limited liability. Partners are personally and secondarily liable in ordinary companies. Limited liability has maximum of 30 partners who are not liable for social debts. Capital must be totally paid at creation. Name of one or more partners followed by “Sociedad Civil” or “Sociedad Civil de Responsabilidad Limitada” or “S.Civil de R.L.” Company articles must appear in public instrument.

3 BUSINESS REGULATION AND COMMERCE

3.01 BILLS AND NOTES:

(Law 27287 of June 19, 2000 as am'd).

General.

Commercial papers include: bills of exchange, promissory notes, checks, certificate of deposit, warrants, bank certificates in local or foreign currency; negotiable mortgage credit, bill of lading and bearer securities. To be commercial paper, instrument must contain basic requirements for particular kind of instrument, and value must be expressed in local or foreign currency; must be signed by autograph, electronic, graphic or mechanic signature. Payable to order or to bearer and transfer by endorsement, or nominative or with nonnegotiable clause and transfer by assignment.

Endorsements.

Unless there is clause to contrary, endorser is liable for acceptance and payment, jointly with other endorsers, drawer, acceptor and guarantors. He may forbid further endorsements, in which case he is not liable to new endorsees. Endorsement must appear on instrument or on separate sheet attached thereto, stating: (1) Endorsee; (2) kind and date of endorsement; and (3) name and signature of endorser. However, signature of endorser alone is sufficient and then any holder may insert there his name or negotiate bill without it, by delivery. Endorsement to bearer produces same effects of endorsement in blank. Endorsements may be made in ownership, in trust, for collection, or to person as attorney-in-fact or other similar expressions and then they do not pass title, but authorize collection and all acts related thereto.

Special Clauses.

Negotiable instruments may contain special clauses, such as extension of time, foreign currency, interests and readjustments, choice of law and choice of forum.

Guaranty.

Payment of instrument may be guaranteed by personal or by real guaranty or by any other kind of guaranty, including guaranty trust. Instrument may be secured in total or in part by personal guaranty called “aval” or by bailment. “Aval” is given by any party to instrument or by third person in writing on same instrument or additional sheet attached thereto, signed by guarantor after words “por aval” or other words signifying joint liability of signer with party for whom it is given. If this party is not mentioned, guaranty is deemed given for drawer. Guarantor who pays instrument acquires any sureties covering it and rights of holder against person for whom aval was given and those liable to him. Real guaranty must be stated in instrument and must be recorded.

Payment should be made on maturity date. Holder cannot refuse partial payment and cannot be compelled to receive payment before maturity. Instrument must be paid at place indicated in it. If instrument is not presented for payment on its due date or if payment cannot be made for causes depending on holder, any one liable person may deposit in any institution of Sistema Financiero Nacional amount thereof, at holder's cost.

Protest.

In those instruments subject to protest failure to accept or pay them, protest must be made by notary public or his secretary or by Justice of Peace where there is no notary. Protest must mention: (a) Place, hour and date; (b) name of holder; (c) name of payee; (d) identification of instrument; (e) signature of notary public or acting officer.

Right of Action.

Holder who bears legitimate title of instrument has three different actions, known as acciones cambiarias for breach of obligations of instruments. Acción directa against principal obligor and/or his guarantors; acción de regreso against endorsers and their bailors, and acción de ulterior regreso by one who paid instrument in acción de regreso, against previous endorsers.

Statute of Limitations.

For acción directa is three years, acción de regreso one year, and six months for acción de ulterior regreso. Statute of limitations for unjust enrichment is two years.

Following are among negotiable instruments regulated by law:

Bills of exchange must state: (a) Name of "bill of exchange" ("letra de cambio"); (b) place and date of issue; (c) unconditional order to pay specific amount of money; (d) drawee; (e) payee; (f) name and signature of drawer; (g) maturity date; (h) place and form of payment. Maturity date which may be: (1) on certain date, (2) at sight, (3) at certain term after acceptance, (4) at certain time after date. If maturity date is not stated, bill is payable at sight. Bill may be drawn: (a) To order of drawer or to third person; (b) to be paid by third person; (c) to be paid by drawer, in which case no acceptance is necessary; and (d) for account of another person.

Acceptance.

Bills of exchange payable at certain time after sight must be presented for acceptance within one year of issue unless drawer has specified shorter or longer period. Acceptance is expressed by signature of acceptor, which may follow word "accepted" or other equivalent expression. Mere signature suffices. If holder fails to present bill, when this is necessary, he loses his acción cambiaria on same. Drawee may request that bill be presented again for acceptance on day following first presentation. His petition must appear in protest.

Due Date.

Bills at sight are payable on presentation, which must be made within one year after issue. Drawer may shorten or extend this period and endorsers may only shorten it. If drawer stated that bill should not be presented before certain day, term runs from that date. Bills drawn at one or several months after date or after sight mature on same day of issue in month in which payment is due, but if there is no such date in that month, then on last day of same. Words "eight days" or "fifteen days" are not equivalent to one or two weeks, but words "half a month" mean 15 days. Day of issue or presentation or acceptance is not included for computation of legal or conventional periods.

Promissory notes must contain: (a) Title of "Promissory Note"; (b) place and date of issue; (c) unconditional promise to pay certain sum of money; (d) payee or person to whose order payment will be made; (e) maturity and place of payment; (f) name and signature of maker; (g) full payment or in installments.

Certified Invoices.

Used to buy goods on credit with differed payment up to one year. Instrument is definite evidence of debt and is secured by lien on purchased goods. Seller may transfer instrument. Compensatory interest may be stipulated in instrument. Regulations of bills of exchange are applicable to certified invoices.

Checks must contain: (a) Number; (b) place and date of issue; (c) order to pay specific amount of money; (d) name of beneficiary; (e) name and address of drawee bank; (f) payment place; (g) name and signature of drawer. Checks are payable at sight and may be issued to bearer; to certain person with or without to his order clause or nonnegotiable, nontransferable or not to order. Check must be presented for payment within 30 days if issued in country or abroad. No stop payment is allowed before applicable period has elapsed, except by order of court. In absence of valid stop order, bank may pay even after applicable period of presentation has

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elapsed. Drawer of check must have sufficient funds available in drawee bank. Bank refusing payment must, on day following presentation, place signed statement on check, indicating cause of refusal and date when check was presented. This statement is equivalent to protest which, however, may be made by holder, within period of presentation. They are special checks, among them certified checks, cashier's checks, crossed checks, travelers checks.

Bank Certificates.

Only institution of Sistema Financiero Nacional may issue bank certificates in local or foreign currency for at least $1,000 or its equivalent. May be payable to bearer or to order of any specified person. Time of payment cannot be longer than one year. Compensatory interest may be stipulated. May be transferred by delivery or by endorsement.

Certificates of deposit and warrants are issued by corporation organized as bonded warehouse to depositors of goods. Certificate of deposit may be transferred by endorsement to transfer ownership of deposited goods. Warrant can be transferred by endorsement to create security interest in deposited goods. In event of default, holder of warrant protests it against prior endorser and demands sale of deposited goods by bonded warehouse without judicial intervention. Proceeds of sale are applied to debt and balance to owner of goods.

3.02 COMMERCIAL REGISTER:

See category 9 Documents and Records, topic 9.05 Records.

3.03 CONDITIONAL SALES:

See topic Sales (Realty and Personalty).

3.04 CONTRACTS:

(Civil Code Arts. 312, 1351-1528, 2094, 2095; Commercial Code Arts. 1-15).

For contract to exist there must be legally capable parties, licit object, and legal form. Any contract lacking one of these requirements is not valid. Contracts obtained by fraud or mistake are void. Contracts are binding with respect to terms stated therein. Contracts must be executed and performed in accordance with rules of good faith and mutual intent of parties.

Any contract to succeed to property rights of person who has not died or whose death is not known, is prohibited. Contract related to community property between spouses is prohibited, except for granting of powers of attorney. Contracts required by law to be in form of public instrument grant parties right to compel other to execute said instrument. Contracts are governed by law of country in which they are executed. However, it is advisable to have contracts executed abroad authorized by Peruvian Consular official with formalities presented by Peruvian legislation.

Offer is not binding if it is made to person present and it is not immediately accepted (parties contracting by telephone are considered as present). Term must be fixed or fixable, if it is not indicated it shall be one year. Offer is not binding, if made to absent person and reply is not received within stated fixed period and when before offer is received, or simultaneously with offer, withdrawal of offer is made known to offeree.

If acceptance is known too late by offeror, offeror shall immediately notify acceptor, under penalty of liability for damages. Late acceptance or any change made in offer when it is accepted, is proposal of different contract. If use of trade is not to require express acceptance contract is executed if offer was not refused. Acceptance is regarded as not existing if, prior thereto or together with it, withdrawal of acceptance becomes known to offeror.

Contract is not regarded as concluded as long as parties are not in accord as to all its parts.

Contracts made by letter or telegram are perfected from time acceptance was transmitted. Contract is considered concluded at place where offer was made. One of parties cannot demand performance if he himself has not complied or offered to comply. If after execution of contract one of parties incurs loss in assets sufficient to compromise or render doubtful performance to which he is bound, other party may refuse to perform his obligation until first party gives satisfaction as to his obligation or gives sufficient guaranties of performance.

Money given by one party to other is considered indication of conclusion of contract. Right to retract may be agreed to by parties. If party who gives money retracts, he loses money. If party who receives money retracts, he must repay it doubled. Money is considered as part payment of obligation, but, if by nature of obligation this is not possible, money given must be reimbursed at time contract is performed.

Anyone who makes stipulation in favor of third party has right to compel performance of obligation. Third party has same right after giving notice of acceptance to demand performance of contract and obligee may not exonerate obligor. Obligee may reserve right to replace third party named in contract, independently of latter's wishes, and of other contracting party. This stipulation in favor of third party may be made by “inter vivos” act or by “will”.

Mercantile contracts are governed by Commercial Code and by uses of trade. These rules are supplemented by Civil Code. Peruvian law distinguishes between traders and non-traders. Traders are subject to special laws. Law of contracts is generic and applies to all contracts whether mercantile or otherwise. Commercial matters are following: Transfer of personal property for purposes of obtaining profit as permanent activity; operations of exchange; banking; brokerage; commercial paper operations; commercial agency and mediation; transportation; suretyship; corporate transactions; construction; maritime commerce. If contract is commercial as to one party it is deemed commercial as to all parties.

Applicable Law.

Parties may stipulate that contracts shall be governed by foreign legislation and jurisdiction, provided there exists link with said legislation, e.g., nationality of parties, place of performance, location of property, etc. However, said stipulation is not valid if contract refers to matters of exclusive jurisdiction of Peruvian courts, e.g., property located in Peru; contracts to be mainly performed in Peru. Contractual clauses entrusting foreign agencies with cognizance of differences which may arise in interpretation or performance of contracts and their settlement through arbitration are valid. Foreign law is not applied, however, by judge as matter of course, but must be introduced and proved in court by interested party.

Public Contracts.

(Const. art. 143, Law 26850 of July 30, 1997 t.o. 2004 Sup. Decree 083-2004-PCM of Nov. 26, 2004 as am'd and its regulations, Sup. Decree 084-2004-PCM of Nov. 26, 2004 as am'd).

Contracts executed with Government, State agencies and State enterprises are subject to special rules.

3.05 FRAUDS, STATUTE OF:

See categories 9 Documents and Records, topics Acknowledgments, Public Instruments; Property, topic Deeds.

3.06 INFORMATION TECHNOLOGY, INTERNET AND NEW MEDIA:

Protection of Personal Data.

(Const. Art. 2, §§5, 6 and 7, 200 §3, C.P.C. arts. 163 and 164, Laws 28237 of May 28, 2004, 27269 of May 8, 2000 as am'd regulated by Sup. Decree 019-2002-JUS of May 17, 2002 as am'd 004-2007-PCM of Jan. 12, 2007). Constitution protects personal data on public and private records and gives various action of habeas data. In any legal proceedings parties may elect to receive notification by facsimile, telegram, e-mail or any other means of communication. Law establishes proceedings to enforce right to request that personal data not be included in private or public database. Digital signatures to have same legal validity and effect as handwritten signatures. Law regulates digital certificates and certification service providers. Electronic certification issued by foreign entities, non-authorized in country has same legal value and effect as local certifications when its validity is recognized by competent administrative authority.

Law 28493 of Apr. 11, 2005 and Sup. Decree 031-2005-MTC of Dec. 30, 2005 regulates electronic unsolicited commercial communications (spam).

3.07 INTEREST:

(C. C. 1243-1250, 1663-1665).

Legal rate, in case there is no special agreement, is fixed by Central Bank.

Loans declaring receipt of money when in fact goods were delivered are considered sales.

Civil loans do not bear interest unless so agreed. Loans simulating receipt of larger sum than was actually received are limited to amount actually received.

Compound interest is prohibited, but interest may be compounded after year in default by written agreement.

3.08 MONOPOLIES, RESTRAINT OF TRADE AND COMPETITION:

(Arts. 61, 63 and 65 of Constitution; arts. 3, 23, 33, 36 and 38 of Law 23407, General Industry Law of May 28, 1982); Leg. Decrees 668 of Sept. 11, 1991, 691 and 701 of Nov. 5, 1991 t.o. 2000 and 716 of Nov. 7, 1991 t.o. 2000 as am'd, Sup. Decree 133-91-EF of 1991 as am'd; Law 26122 of Dec. 29, 1992 t.o. 2000; Sup. Decree 043-97-EF of Apr. 28, 1997 as am'd; Sup. Decree 011-2003 PCM of Feb. 23, 2003, Law 28587 of July 19, 2005).

Any monopolistic practice, limitation, restriction or exclusivity in manufacturing and commercialization of goods and rendering of services is prohibited. All agreements and collusive practices impeding, distorting or limiting competition are also prohibited, as well as abusive exploitation of dominant position in domestic market. Law protects local production from unfair practices of international trade, imposing countervailing duties on import of foreign goods. Dumping and subvention are considered unfair practices. Dumping is defined as import of foreign goods at lower price than normal value in place of origin or of similar goods destined for consumption or use in country of origin in arm's-length transaction. Similar good is considered one with characteristics of quality, use, nature and function resembling imported good. Normal value is determined according to method indicated by law. Subvention is defined as direct or indirect incentives, subsidies, premiums or assistance of any kind, granted by foreign governments to producers, manufacturers, transporters or exporters of goods in order to make them more competitive on international market. Decree on antidumping and compensatory duties contains regulations and administrative procedure in conformity with Agreement on Implementation of Article VI of General Agreement on Tariffs and Trade. Consumer Protection Law deals with consumers' rights to be informed; general representation and guaranties, products liability, credit operations, partial payments, unsolicited goods, lack of performance, dispute resolution, services, penalties for infringement of law and general regulations on subject. There are special regulations for advertisement of goods and services and for repression of unfair competition. Contracts with financial institutions are regulated.

3.09 NEGOTIABLE INSTRUMENTS:

See topic 3.01 Bills and Notes.

3.10 RESTRAINT OF TRADE:

See topic 3.08 Monopolies, 3.10 Restraint of Trade and Competition.

3.11 SALES (REALTY AND PERSONALTY):

(C. C. 1364, 1366, 1484-1591).

A sale is perfected when there is agreement as to the object and the price, although the object has not been delivered nor the price paid, but in the case of a sale of objects by weight, number or measure, the risk does not pass to the buyer until the objects are weighed, counted or measured or are placed at the buyer's disposal. The price may be left to the decision of a third person. In a contract of sale the period stipulated cannot exceed two years in the case of real property nor one year in the case of personalty; if nothing is stated these periods are understood. Unless otherwise stipulated each contracting party pays one-half the cost of the contract.

Certain persons are prohibited from purchasing certain property: (1) A public administrator may not buy property in his charge; (2) an agent, the property in his charge; (3) executor, property he administers; (4) judge, lawyer, notary or expert, property sold in suit in which they intervened; (5) President, Cabinet Ministers, assemblymen, congressmen and judges, national property; (6) Governors, national property in their jurisdiction.

The vendor must deliver the object sold, and warrants as to title and hidden defects. In sales of personalty, if the buyer fails to pay, the seller may dispose of the property without asking for rescission; if part of the price was paid the sale will be rescinded on petition of seller who should return amount received less compensation for damages.

If property is sold by area or contents the buyer must pay or the seller must return any excess, but if the difference exceeds one-tenth the buyer may elect to rescind the contract. Right to repurchase cannot be reserved for over two years.

In sales it is permitted to stipulate that the title shall not pass until the price is totally paid; in such event the parties must designate what part of the payments is to be considered as damages if the sale be rescinded for failure to pay the total price, but the judge may reduce the amount of the indemnity in view of all the circumstances.

A warranty is presumed even though not stipulated; the parties may agree otherwise, but such agreement is void if the defects are due to acts of the vendor. The parties may extend or restrict the ordinary rules regarding warranty.

A special law regulates the sale of personal property under the installment plan in Lima, Callao and nearby coast towns. A registry is established to record such sales. The objects sold must bear numbers or marks permitting their identification. A person acquiring objects so registered cannot convey them without the cancellation of the registry unless a document showing the consent of the original vendor be attached; persons acquiring such objects without observing these requisites must return the objects to the original vendor who recorded the sale. If an attachment be levied on a registered object, the balance owing the original vendor is a first lien on the proceeds of the sale.

3.12 STATUTE OF FRAUDS:

See categories 9 Documents and Records, topics Acknowledgments, Public Instruments; Property, topic Deeds.

4 CITIZENSHIP

4.01 ALIENS:

See category 16 Immigration, topic 16.01 Aliens.

5 CIVIL ACTIONS AND PROCEDURE

5.01 ACTIONS:

Actions for Death.

See category 12 Estates and Trusts, topic 12.02 Death, subhead Actions for Death.

Limitation of.

See topic 5.07 Prescription, subhead Limitation of Actions.

5.02 DEPOSITIONS AND DISCOVERY:

The evidence of witnesses in civil cases is taken on written or oral questions and cross questions. If the witnesses are not in the locality the judge may send letters rogatory to another judge to take the deposition. Letters rogatory from abroad to take testimony or for similar acts in Peru are complied with by Peruvian judges if legalized by a Peruvian consul. (C. C. P. 222-232).

5.03 EVIDENCE:

See topic 5.02 Depositions and Discovery.

5.04 JUDGMENTS:

Judicial resolutions may be: (a) Decrees, when relating to mere procedural matters; (b) interlocutory decisions, when deciding incidental matters; (c) judgments, when deciding the action. Judicial resolutions must: (a) Set forth the facts and the law; (b) decide all matters in controversy and only such matters; (c) be based on the merits of the case and the law; (d) clearly state the decision. (C. C. P. 119, 127).

Foreign judgments have such force in Peru as is given them by treaty; if there is no treaty they have the same force as is given to Peruvian judgments in the country where rendered. In order that a foreign judgment be executed in Peru it is necessary: (a) That it does not decide matters of jurisdiction of Peruvian courts; (b) that it be not contrary to morals, good customs or Peruvian prohibitory laws; (c) that it be definite and unappealable in country where given; (d) that defendant was duly summoned according to laws of such country; (e) that foreign court rendering judgment is competent according to their law and with international principles; (f) that no same cause of action pending between same parties in Peruvian courts; (g) that judgment is not incompatible to another judgment previously rendered that fulfilled all requirements for execution; (h) that reciprocity is duly proved. (C. C. P. 837-840, C.C. 2102-2111; Law 26572 of Jan. 3, 1996).

Enforcement of foreign judgments against Government of Peru is regulated by Law 27775 of July 5, 2002.

5.05 LIMITATION OF ACTIONS:

See topic 5.07 Prescription.

5.06 PARTITION:

See category 21 Property, topic 21.09 Real Property.

5.07 PRESCRIPTION:

(C. C. 950-953, 1989-2007, 2091, 2099; C. Com. 953-965).

Prescription is a manner of acquiring the ownership of property or extinguishing a right of action by the passing of time.

Real property is acquired by prescription by continuous possession in capacity of owner for ten years and with legal title and in good faith, in five years. Personal property is acquired by continuous possession as owner for two years with good faith or for four years without good faith.

Limitation of Actions.

Rights of action are lost by prescription in different periods, depending on kind of action, most important being: (1) Actions in rem, actions on judgments and personal actions not otherwise limited, ten years; (2) actions of lawyers, physicians, teachers, hotel keepers, experts, surveyors, architects, artisans, servants and laborers for services rendered, three years; (3) actions for support and actions by minors or incompetents against their parents, actions to annul contracts for error, fraud or duress and actions to repair damages, two years. Period of prescription does not run: (1) Against minors or incompetents not under paternal care or guardianship; (2) between husband and wife during marriage; (3) between minors and their parents or guardians; (4) between incompetents and their guardians; (5) so long as it is impossible to make claim before Peruvian court; (6) between corporations and their administrator; (7) between man and common law wife.

Rights of action in mercantile matters are lost in the following periods: (1) Actions to collect dividends or participations in the capital of companies, five years; (2) actions against managers or directors of companies, four years; (3) actions based on drafts, promissory notes, checks, coupons and other commercial documents, actions to enforce liability of brokers, actions of partners or stockholders against the partnership or corporation and vice-versa, and actions arising from maritime insurance, three years; (4) actions arising from collisions, two years; (5) actions for services rendered or supplies furnished in connection with the construction, repair or provisioning of vessels, or in connection with their sale and custody, or regarding delivery of freight by land or sea, one year; (6) actions on bonds of agents or regarding the collection of freight and passage money, six months; (7) actions arising from labor relationship, four years from day after last day of employment.

5.08 SEQUESTRATION:

When money, jewelry or credit instruments are attached they are deposited in the proper establishment or, when there is none, with a person designated by the judge. When salaries, pensions, revenues, fruits or credits are attached the judge may order that they be delivered to a depositary designated by the creditor or that the debtor retain them in his custody, at the option of the creditor. The person having their custody is considered as depositary with the rights and obligations of an administrator. The law designates the powers and obligations of administrators; in the case of rural properties, mines, vessels or industrial establishments a supervisor is appointed to watch over the administration. (C. C. P. 643, 654, 655, 661-673).

6 COURTS AND LEGISLATURE

6.01 COURTS:

Justice is administered by: (1) A Supreme Court of Justice, which hears appeals on points of law and has jurisdiction in certain other special cases; (2) superior courts, which are courts of appeal, one in each judicial district; (3) judges of first instance, who have original jurisdiction in most civil, labor, land, family and criminal matters; (4) justices of the peace. (Organic Judiciary Law, Sup. Decree 017-93-JUS of June 2, 1993 t.o. 1993 as am'd).

6.02 LAW REPORTS, CODES:

See topics 6.03 Reports, 6.04 Statutes.

6.03 REPORTS:

The judgments and resolutions of the Supreme Court are annually published in an official publication called "Judicial Annals of the Supreme Court of Justice."

6.04 STATUTES:

Laws of Peru are published in official paper by Government called "El Peruano," which appears daily. Official editions of codes and more important laws are occasionally issued. Most important are: Civil Code, Code of Civil Procedure, Code of Commerce, Stock Exchange Law, Penal Code, Code of Procedure in Criminal Matters, Mining Code, Taxation Code, Petroleum Law, Bankruptcy Law, Legislation of Customhouses, Legislation of Waters, etc.

7 DEBTOR AND CREDITOR

7.01 ASSIGNMENTS:

Assignment of right must be in writing and notified to debtor. Assignment of right carries with it securities or privileges thereof. Assignor of right guarantees its existence unless assignment is made without guaranty, but he is not responsible for solvency of debtor unless expressly stipulated. (Const. art. 2, §13; C. C. 1206-1217, 1435-1439; C. Com. 342, 343).

7.02 ASSIGNMENTS FOR BENEFIT OF CREDITORS:

Assignments for the benefit of creditors are governed by the bankruptcy law. See topic 7.04 Bankruptcy.

7.03 ATTACHMENT:

Provisional attachment may be granted either before bringing an action or during the course of the same, if the application is based on a document which is prima facie proof of the existence of the obligation and if the latter is not sufficiently secured. In case of attachment before suit the plaintiff must give bond and institute the action within ten days after the attachment if the suit is brought in the same locality; if it is brought elsewhere the court may allow a longer period depending on the distance. For suits to be instituted abroad an attachment may be issued if authorized by treaty. In actions in rem a provisional attachment may be granted if the plaintiff alleges sufficient grounds to fear the loss, destruction or deterioration of the object. The debtor is not notified of a provisional attachment nor allowed any recourse against the same until it is levied. The debtor may avoid or raise the attachment by paying the debtor giving bond.

An attachment may be issued in the course of executive actions, based on documents which authorize a summary proceeding such as: (1) Acknowledgments in court; (2) public instruments; (3) private instruments which have been specifically acknowledged; (4) bills of exchange, drafts, warrants, promissory notes, and checks; (5) any other document as provided by special laws. After attachment has been levied third party may intervene on ground that he is owner of property attached or has preferential credit. (C. C. P. 608-643, 693).

7.04 BANKRUPTCY:

(Law 27809 of Aug. 5, 2002 as am'd).

Law regulates ordinary reorganization proceedings, non-judicial process of dissolution and liquidation, bankruptcy and preventive reorganization proceedings.

Petition for ordinary declaration of insolvency by “Comisión de Procedimientos Concursales” (“Commission”) may be made by debtor or its creditors. Debtor may file insolvency petition when more than one-third of its debts are overdue or for more than 30 days or its accumulated losses are higher than two-thirds of its paid capital after deducting reserves. Creditor may file insolvency petition when its outstanding credits are overdue for more than 30 days and exceed equivalent of 50 U.I.T. (Tributary Units). After hearing debtor and determining that it is insolvent, Commission declares debtor insolvent. Creditors are given period to file their claims and their credits are valued and classified. Creditors will hold meeting at which they will decide whether (i) to approve plan of reorganization, or (ii) to approve agreement to dissolve and liquidate business. Agreements made at creditors' meeting require vote of creditors holding at least 66.6% of value of all claims in first call, and in second call, with vote of creditors representing more than 66.6% of value of represented credits.

Plan of reorganization will then be registered and notified to proper authorities. From that date, all pending actions and debt obligations are automatically stayed. At any time during process of reorganization, creditors' meeting may agree to dissolve and liquidate business.

If creditors' meeting agrees to dissolve and liquidate business, receiver will be appointed. Receiver must propose plan of liquidation to creditor's meeting, once approved receiver is empowered (i) to sell assets, (ii) to discharge debts, (iii) to extend payment terms, (iv) to refinance payment of debtor's obligations, (v) to secure payment of debts, and fees and expenses of liquidation proceedings, and (vi) to carry out necessary acts to dissolve and liquidate business. Receiver must seek declaration of bankruptcy if assets are insufficient for payment of all debts.

If declaration of bankruptcy is sought, court will order bankruptcy of insolvent, extinction of enterprise and debts uncollectable. Court order is published in official newspaper and registered at corresponding Public Registry.

Any debtor may file petition for preventive reorganization proceedings before Commission. Debtor submits to creditors for their approval global refinancing agreement, as preventive proceeding, without being declared insolvent. In case of nonpayment of any credit in accordance to terms of agreement, agreement becomes invalid. Same debtor may reapply for this proceeding after 12 months of conclusion of previous proceeding.

Commission is empowered to impose sanctions for violation of law.

For transactions invalid as to creditors of bankrupt, see topic 7.08 Fraudulent Sales and Conveyances.

For preferential payments, see topic 7.13 Liens.

7.05 EXECUTIONS:

Under a judgment ordering the payment of money, the defendant must make payment when he is formally notified of the judgment; if he fails to pay and there has been no previous attachment of his property, (see topic 7.03 Attachment) attachment is levied on property designated by the creditor. If the property attached consists of securities to bearer it is sold through a broker designated by the judge or appointed by the parties. Other property is appraised by experts designated by the judge unless the parties have agreed on a value for the case of sale. The judge orders a sale at public bidding, which is held in his office if it affects real estate, vessels, jewelry or securities to bearer when not quoted or there are no brokers in the locality. A sale must be advertised at the place of trial in a newspaper for three days in case of personal property and six days in case of real property, for first sale and for subsequent sales terms are one and three days respectively; same publications are made in place where property is situated if different from place of trial. Debtor may make payment at any time before sale. No bids are accepted of less than two-thirds appraisal. If there are no bidders as many further sales as may be necessary are advertised, in each of which value of property is reduced by 15% for purpose of bidding. If at any sale no bidders appear creditor may request that property be adjudicated to him for two-thirds of appraised amount mentioned in last call for bids. There is no right of redemption. Credit remains alive insofar as not satisfied by execution. There are special provisions regarding fulfillment of obligations concerning delivery of personal property or obligations to do or refrain from doing specific acts. (C. C. P. 720-748).

7.06 EXEMPTIONS:

The following are not subject to attachment: (1) Household furniture and other goods; (2) items of personal use, books and food belonging to debtor and his relatives; (3) vehicles, machinery, tools and utensils used by debtor in his profession, occupation or studies; (4) decorations, uniforms of public officials and employees and weapons and equipment used by armed forces and police; (5) remunerations and pensions up to five procedural reference units, any amount over can be attached up to one third; (6) alimony; (7) goods used in temples; (8) tombs; (9) State assets. There are few exceptions. (C.C.P. art. 648).

7.07 FORECLOSURE:

See category 20 Mortgages, topics 20.01 Chattel Mortgages, 20.03 Mortgages.

7.08 FRAUDULENT SALES AND CONVEYANCES:

Creditors have power to avoid gratuitous transfers which render debtor insolvent or impair creditors' ability to collect payment from debtor. Creditors have power to avoid transfers for value (i) if debtor's insolvency was notorious or should have been known by transferee, or (ii) transfer was fraudulently made for purpose of avoiding payment of future debt. However, good faith transferees for value are protected. (C.C. 195-200).

7.09 GARNISHMENT:

In general a debtor's property in possession of third persons may be attached.

7.10 HOMESTEADS:

If member of a family has no debts, payment of which will be adversely affected, he may constitute “family home” on real property destined to be used by him or his family for agriculture, industry, or as a dwelling. Such home may not be alienated, mortgaged or encumbered; but up to two-thirds of any income derived therefrom is subject to attachment for taxes, judgment debts, and claims for support. Judicial approval is required for constitution of such family home and for its revocation (C. C. 488-501).

7.11 INSOLVENCY:

See topic 7.04 Bankruptcy.

7.12 LEVY:

See topic 7.05 Executions.

7.13 LIENS:

(C. C. 1118-1131, Law 28677 of Feb. 24, 2006; Law 27809 of Aug. 5, 2002).

Liens are recognized for (a) the unpaid purchase price of real estate, (b) the cost of work or material furnished for the construction or repair of real property and (c) the value of property acquired in a partition with the obligation of paying compensation. Such liens are considered legal mortgages and their owner may require the execution of a public instrument acknowledging them for the purpose of recording such instrument in the public registry.

A creditor may hold as security property of his debtor which he may have in his possession, unless it was destined to be deposited with or delivered to a third person.

Creditor's claims are ranked in following order: (a) salaries and indemnities due to servants and employees; (b) support of debtor's family; (c) secured credits; (d) tax liabilities; and (e) other credits.

7.14 PLEDGES:

In pledge contract, personal property secures debt and gives pledge creditor preferential right to be paid with price of pledged article. Pledge article may be delivered to creditor or to third person or remain in custody of debtor. Pledge has no effect as to third persons unless it appears in writing and it is registered. On maturity of obligation creditor may demand public sale of pledge or creditor may take pledge in payment of debt as regulated by law. (Law 28677 of Feb. 24, 2006). See category 20 Mortgages, topic 20.01 Chattel Mortgages.

7.15 REDEMPTION:

See topic 7.05 Executions.

7.16 USURY:

See category 3 Business Regulation and Commerce, topic 3.07 Interest.

8 DISPUTE RESOLUTION

8.01 ARBITRATION:

(Const. arts. 62, 63, Law 26572 of Jan. 3, 1996, as am'd Arts. 837-840 C.C.P.). Law deals with domestic and international arbitration, with recognition and enforcement of foreign arbitral awards and with arbitration in commercial and investment disputes between foreign party and Peruvian Government. Law distinguishes between domestic and international arbitration based on party's domicile. Any dispute arising out of specific legal relationship, when such dispute is under proper legal control of parties may be subject to arbitration, with exception indicated by law. Arbitration agreement must be in writing, whether in form of arbitral clause in contract or in separate agreement. Invalidity of contract does not extend to arbitration clause contained therein, if reasons why contract is held invalid do not apply to such arbitration agreement. Arbitration agreement can be evidenced by any kind of document or by other means of communication which constitute record of agreement. Arbitrators may be empowered by parties to decide according to rules of law (en derecho) or ex aequo et bono (en conciencia). Arbitrators may be national or foreign individuals in full enjoyment of their rights in instances where decision is ex aequo et bono; where decision is according to rules of law they must be lawyers and of legal age. Number of arbitrators should be three unless parties have agreed on different uneven number.

Arbitrators have power to make provisional orders including interim measures of protection at request of either party, and to require any party to provide appropriate security in connection with such measures. Deadline for arbitrators to issue award is 20 days counted from day evidence is submitted.

Peru has ratified following multilateral conventions: On Recognition and Enforcement of Foreign Arbitral Awards, New York 1958 and on International Commercial Arbitration, Panama 1975.

8.02 CONCILIATION:

(Law 26872 of Nov. 12, 1997 as am'd regulated by Sup. Decree 004-2005-JUS of Feb. 24, 2005 as am'd). Dispute resolution by extrajudicial conciliation is mandatory prior to submitting dispute to litigation, except when party is domiciled abroad, prior to proceedings of precautionary measures, of execution and of constitutional guarantees, action under administrative law, family violence, rights and assets of incapacitated person. It is not mandatory when State is party. Conciliation of labor disputes must respect worker's nonwaivable constitutional rights. All conflicts regarding rights, including child support, visiting rights, liquidation of community property and other family related rights, except for crimes and offenses, and some family related conflicts may be resolved by conciliation. Civil actions for damages arising out of crimes or offenses may be subject to conciliation. Conciliation proceedings are confidential and are before Center of Conciliation or Justices of the Peace.

9 DOCUMENTS AND RECORDS

9.01 ACKNOWLEDGMENTS:

Certificates of acknowledgment as generally used in the United States are unknown in Peruvian law. Contracts, deeds and other documents requiring authentication are executed before a notary public, who certifies in the instrument itself to the facts therein set forth.

Documents executed in foreign countries are given recognition in Peru if acknowledged according to the law of the foreign country and authenticated by a Peruvian consular or diplomatic officer. (Notarial Law 26002 of Dec. 7, 1992 as am'd; C. C. P. 233-261).

9.02 COMMISSIONS TO TAKE TESTIMONY:

See category 5 Civil Actions and Procedure, topic 5.02 Depositions and Discovery.

9.03 NOTARIES PUBLIC:

In order to be a notary it is necessary: (a) To be lawyer; (b) to be Peruvian by birth in full possession of civil rights; (c) to have no physical impediment; (d) to have good reputation; (e) not to have criminal record. Notaries are appointed by superior court of respective province and their number is restricted. They keep record in which they enter, in chronological order, public instruments executed before them. Their records are under judicial supervision. Instruments bear ordinal numbers; use of ciphers and unknown characters is prohibited, also variation of handwriting, blanks and abbreviations, and differences in ink. Notary retains original of instruments in his record and issues certified copies which have effect of originals. (Law Decree 26002 of Dec. 7, 1992 as am'd; Law 26662 of Sept. 20, 1996 as am'd deals with notary jurisdiction on undisputed matters).

9.04 PUBLIC INSTRUMENTS:

Public instruments are: (a) Documents authenticated by notaries according to law (see topic 9.03 Notaries Public; category 21 Property, topic 21.05 Deeds.); (b) documents issued or authorized by public officials in the discharge of their office. As evidence, copies of public instruments issued by notary or public official have same value as originals. Public instruments are evidence of their execution and contents. Law designates numerous contracts which must appear in public instruments, including all contracts relating to alienation and encumbrance of real property, and documents which require recording in public registry.

Instruments written in foreign language must be presented with official Spanish translation in order to be accepted in evidence.

Private documents when acknowledged in court have the probative value of public instruments. When not acknowledged their value as evidence is subject to the discretion of the judge. (C. C. P. 233-261; C. C. 1411-1413).

9.05 RECORDS:

National System of Public Registries is comprised of: (a) Registry of Natural Persons, (b) Registry of Juridical Persons, (c) Registry of Real Property which includes Registries of Land, Mining Rights and Concessions for Exploitation of Public Services, (d) Registry of Personal Property and (e) Registry of Contracts. (Law 26366 of Oct. 14, 1994 as am'd). (Decree Law 19893 of May 23, 1973, Sup. Decree 20 of Aug. 3, 1973, Leg. Decree 119 of June 12, 1981, Leg. Decree 667 of Dec. 9, 1991; C. C. 70-75, 2008-2045; C. Com. 16-32, Law Decree 26127 of Dec. 29, 1992; Law 27755 of June 14, 2002 regulated by Sup. Decree 023 2003 JUS of Nov. 7, 2003).

9.06 SEALS:

Seals are used by Government officers, courts, notaries public, etc. Documents issued by public officials must bear the seal of their office. Private persons, especially merchants, sometimes use seals but they produce no special effect and are equivalent to a signature. Public instruments (q.v.) have most of the effects of a sealed instrument in the United States. (C. C. P. 235, 236).

9.07 VITAL STATISTICS:

See topic 9.05 Records.

10 EMPLOYMENT

10.01 LABOR RELATIONS:

(Const., Arts. 2, §§15, 22, 29; Civil Code Arts. 1755, 1764-1770; Commercial Code, Arts. 275-296; Law to promote employment, Leg. Decree 728 of Nov. 8, 1991 t.o. 1995 as am'd regulated by Sup. Decree 001-96-TR of Jan. 24, 1996 as am'd; Law on labor contract with foreigners, Leg. Decrees 689 of Nov. 4, 1991 regulated by Sup. Decree 014-92-TR of Dec. 21, 1992 as am'd; Law on compensation for period of services, Leg. Decree 650 of July 23, 1991 t.o. 1997 as am'd regulated by Sup. Decree 034-91-TR of Nov. 5, 1991; and 004-97-TR of Apr. 15, 1997 as am'd. Law on profit sharing, Leg. Decree 677 of Oct. 2, 1991 as am'd regulated by Sup. Decree 009-98 of Aug. 5, 1998; Law on Collective Bargaining, Law Decree 25593 of June 26, 1992 t.o. 2003 Sup. Decree 010-2003-TR of Sept. 30, 2003 regulated by Sup. Decree 011-92-TR of Oct. 14, 1992 as am'd; Law on working hours, schedule and overtime, Leg. Decree 854 of Dec. 25, 1996, t.o. 2002, regulated by Sup. Decree 008-2002-TR of July 3, 2002; General Law on Inspection of Work Place, Law 28806 of July 19, 2006 regulated by Sup. Decree 019-2006-TR of Oct. 28, 2006 as am'd; and General Law on Defense of Workers, Leg. Decree 910 of Mar. 16, 2001 as am'd regulated by Sup. Decree 020-2001-TR of June 28, 2001 as am'd).

Under labor contract, worker offers to contribute to production by his personal labor, for specified or indeterminate time, in return for payment of wages. Labor contract whether individual or collective presumes payment of wages in money; maximum workday of eight hours or 48 hours per week, overtime; weekly rest period; prohibition of work by minors under 14 years of age; limitation on work of minors under 18; equal wages for equal work without distinction of sex; indemnity compensation for accidents; compulsory insurance; and intervention by Government to ensure enforcement of laws and regulations.

In case of dismissal without justified cause employer must indemnify worker with one and half month of salary for each year of service up to 12 salaries.

Any labor contract is null and void if it subjects employee to renunciation of any of benefits granted by labor social laws. Written labor contracts and labor contracts for fixed term must be authorized by Labor Department. Collective contracts are continually being concluded between labor unions and employers. Employers must maintain register of regulations, agreements, and labor contracts that govern their work centers.

Government guarantees freedom of labor. Anyone may freely engage in any profession, industry or occupation not contrary to morals, health or public security. Contract stipulations which restrict exercise of civil, political or social rights are prohibited. System of profit sharing by employees in earnings of enterprise is in effect. Laws on safety, health and hygiene are in effect. Also, there are regulations on minimum working conditions, indemnity for length of service and for accidents.

Foreigners may work in Peru subject to limitations. Only 20% of work force of enterprise may be composed of foreigners. Only 30% of total amount of salaries paid may go to foreign hands. These limitations are subject to exception for special cases. Every labor contract with foreigner is subject to approval by Labor Department. Labor contracts are for period up to three years and are renewable.

There are two systems of pension plans, National System of Pensions under government administration and Private System of Pensions. Employees have right to elect either system, both plans are funded by employer and employee contributions. Private system is managed by private corporations. (Law Decree 25897 of Nov. 27, 1992 t.o. 1997 as am'd regulated by Sup. Decree 004-98-EF of Jan. 19, 1998 as am'd). Private system of health in addition to public social security health system exist funded by contributions of employers and employees. Employees have right of electing either system. (Leg. Decree 718 of Nov. 8, 1991 t.o. 1995).

11 ENVIRONMENT

11.01 ENVIRONMENTAL REGULATION:

(Const. arts. 2, 22, 67 and 68, Law 28611 of Oct. 13, 2005; Law 26410 of Dec. 16, 1994, Law 28245 of June 4, 2004 as am'd regulated by Sup. Decree 008-2005-PCM of Jan. 24, 2005).

Constitution establishes legal framework for environmental legislation granting to each person right to enjoy liveable and balanced environment and to demand environmental protection measures. General Environmental Law contains general rules on environmental management for all productive sectors and considers environment and natural resources as national patrimony whose protection and conservation are of social interest. Legislation related to protection and conservation of environment and natural resources are of public interest. Law contains principles such as prevention and control of environmental pollution, reparation of damages, environmental impact assessments and land use planning. National Environmental Council is coordinating body for national environmental policy. Environmental protection for mining and metallurgy, oil, electric, fishing and agriculture areas are regulated by specific legislation and by this Law. Administrative sanctions are imposed for violation of Law which includes fines; partial or total, temporary or permanent closure of facility and cancellation of operating license. Criminal sanctions include fines and imprisonment as established by Criminal Codes. Civil liability includes obligation to indemnify for damages caused or to restore environment to previous state. Resolution of some disputes arising from enforcement of Law may be subject to conciliation and arbitration.

Importation, production, handling, processing and disposing of solid waste and penalties for violation are regulated by Law 27314 of July 20, 2000 regulated by Sup. Decree 057-2004-PCM of July 24, 2004. Production, storage, packing, handling, use, treatment, recycle and dispositions of hazardous materials and toxic waste is regulated by Law 28256 of June 18, 2004.

Environmental impact assessment is regulated by Law 27446 of Apr. 20, 2001.

12 ESTATES AND TRUSTS

12.01 ADMINISTRATION:

See topic 12.05 Executors and Administrators.

12.02 DEATH:

If a person disappears leaving no one to administer his property, guardianship of the property is ordered; temporary guardianship may be appointed at relative's or interested person's request, as provided by law, after 60 days of disappearance. Such guardianship ceases and rights of succession are granted to absentee's heirs upon expiration of ten years from disappearance or five years if absentee is over age of 80 years. If disappearance arises under circumstances indicating danger of death, above period is two years. (C. C. 47, 63-66, 70, 2069).

Deaths are recorded in the Civil Register of the district. Death certificates may be obtained by application to the office of the Civil Registry of the district where the death occurred.

Actions for Death.

Under Civil Code anyone who causes damages to another is liable. Compensation includes loss of profits, personal injury and moral damages. Rights given to family members of deceased include moral damages. (C. C. 1969-1988, 2097).

12.03 DECEDENTS' ESTATES:

See topics 12.04 Descent and Distribution, 12.05 Executors and Administrators, 12.08 Wills.

12.04 DESCENT AND DISTRIBUTION:

In case of intestacy inheritance is distributed as follows in order stated: (1) Children and other descendants; (2) parents and other ascendants; (3) spouse; (4) collaterals by consanguinity of second degree; (5) collaterals by consanguinity of third degree; (6) collaterals by consanguinity of fourth degree; (7) government and public charity.

Surviving spouse is entitled to same share as a child; but such share is diminished by amount of spouse's interest in marriage community property. (See category 13 Family, topic 13.06 Husband and Wife.) If parents or ascendants inherit, spouse is entitled to same share as received by them. However, former or separated spouse has no inheritance rights. (Const. art. 2 §§16 and 6, C. C. 660-685, 815-880, 2041, 2042, 2100, 2101).

12.05 EXECUTORS AND ADMINISTRATORS:

An executor may be appointed by will. If several executors are appointed they discharge office in order of their designation unless testator states that appointment is joint or assigns commission of each. If there is no executor heirs assume charge of estate and carry out provisions of will, but if they do not agree judge appoints administrator.

An executor must have the same capacity as an agent and not be incompetent to inherit. Banks may be executors. No one is obliged to accept the office, but after accepting he cannot resign without just cause.

Executor has duty to (a) arrange funeral of testator, (b) insure security of estate, (c) make an inventory, (d) administer estate, (e) pay debts and legacies, (f) defend will if it is attacked, (g) sell property for payment of debts, prior authorization of court is required, (h) execute terms of will. He ceases in office if he fails to begin work of inventory within 90 days after death of testator. His office expires when he has finished his work or when two years have elapsed, unless longer time was allowed him by testator or as indicated by art. 796. He is entitled to compensation designated by testator, and if none be designated to 4% of amount of inventory. He must render accounts to interested parties immediately after ceasing to act, even though relieved of this duty by testator, and also during his incumbency if ordered by judge on petition of interested party. (C. C. 778-797, 831-880).

12.06 INTESTACY:

See topic 12.04 Descent and Distribution.

12.07 TRUSTS:

(Law 26702 of Dec. 6, 1996, arts. 241-274 as am'd).

Trust may be created upon property of any kind. Trust inter vivos may be by private document or by public deed and mortis causa, by will. Only banking institutions, financial institutions and insurance companies may act as trustees. To affect rights of third parties, trust on real property must be recorded in Public Register. Creditors may file petition of annulment of trust within statutory term when property has been transferred or withheld fraudulently and in detriment of their rights. In general, maximum term of trust is 30 years. Assets constitute separate estate from assets of trustee for all legal purposes, and cannot be attached or embargoed except for obligations incurred into or damage caused by performance of trust.

12.08 WILLS:

(C. C. 686-814, 2039, 2040, 2094).

Persons over 18 years of age may make wills. Dumb persons may make only closed or holographic wills, and blind and illiterate persons only wills by public instrument, which must be read to them twice. Peruvians abroad may make wills before Peruvian diplomatic or consular agent.

The following cannot be witnesses to a will: (a) Persons who are not in the exercise of their civil rights or who are blind, deaf or dumb, or who cannot read or write; (b) heirs and legatees mentioned in will, their relatives in direct line, spouse, brothers and sisters; (c) relatives of testator in direct line, brothers and sisters; (d) creditors whose only proof is statement in will; (e) spouse of officiating notary and his relatives to fourth degree of consanguinity and second of affinity, and his dependants; (f) spouse. Notary cannot be relative of testator in direct line nor collateral to fourth degree by consanguinity or second degree by affinity.

There are several kinds of wills: wills by public instruments, closed wills, holographic wills, naval wills.

Wills by public instrument are made before notary in presence of two witnesses knowing how to read and write. Notary writes will in his record and it is read by testator or some one designated by him, whereupon all sign.

Closed wills are signed by testator who encloses will in sealed envelope and declares before notary and two witnesses that envelope contains his will. Notary writes statement on envelope which is signed by all, and copies statement in his record, where it is again signed by all.

Holographic wills are written, dated and signed by testator in his handwriting. Such will must be registered within one year after death of testator.

Naval wills may be made by persons at sea before the captain and at least two witnesses. They are valid if testator dies during trip or within 30 days after arriving, and must be registered within one year.

Testamentary Dispositions.

Testators cannot freely dispose of their entire estate but only of such portion as they are not required to leave to heirs designated by law as obligatory heirs. Such heirs are descendants, parents and spouse. Testator having descendants or spouse must leave them two-thirds of his estate and may dispose freely of only one-third; having ascendants must leave them one half of his estate and may dispose freely of only other half. Spouse's share is diminished by amount of spouse's interest in community property. (See topic 12.04 Descent and Distribution.) Testator may disinherit obligatory heir for certain serious reasons involving unworthy conduct.

13 FAMILY

13.01 ADOPTION:

(C. C. 238, 377-385, 2087; Law Decree 25934 of Dec. 7, 1992 regulated by Sup. Decree 018-93-JUS of June 2, 1993, Law 27337 of Aug. 2, 2000 as am'd).

Adoption is irrevocable and extinguishes legal bonds between adopted party and natural family, must be approved by judge. Adopting party must be of good reputation and at least 18 years older than adopted party. Consent is required from spouse of adopting party, from adopted party who is over ten years old, from parents if adopted party is under their “patria potestad” or where parents are curators; from tutor, curator and family council when adopted party is incompetent. Requires personal ratification of adopting party before judge where adopting party is foreigner and adopted party is under age. Adoption where parties are subject to different jurisdictions is governed by law of domicile of adopted party in matters related to his capacity, legal age, marital status, consent by parents or legal representatives, extinction of bonds with natural family and authorization to leave country. There are special requirements for foreign adopting parties.

13.02 ALIMONY:

See topic 13.05 Divorce.

13.03 COMMUNITY PROPERTY:

See topic 13.06 Husband and Wife.

13.04 DESERTION:

See topic 13.05 Divorce.

13.05 DIVORCE:

(C. C. 24, 348-360, 382, 2070, 2081, 2082).

Divorce dissolving the marriage bond may be granted for the following causes: (1) Adultery; (2) physical or mental distress; (3) attempt against life of spouse; (4) grave insults; (5)

malicious abandonment of home for two years; (6) dishonorable conduct making life in common insupportable; (7) habitual and unjustified use of narcotics; (8) serious venereal disease contracted after marriage; (9) sentence after marriage to over two years imprisonment; (10) homosexuality after marriage; (11) separation for two years, or four years when couple has minor children; and (12) judicial declaration of impossibility of cohabitation. In case of causes (1), (3), (9) and (10) action must be brought within six months after cause comes to knowledge of offended party and in causes (2) and (4) action must be brought within six months after cause was produced.

The Code contains no specific residence requirement. Domicile in Peru is presupposed.

A divorced wife cannot use her husband's name. The children are awarded to the spouse who obtains the divorce unless the judge considers that the children's welfare demands that they be awarded to the other spouse or to a third person. If both spouses are guilty the sons over seven years go to the father and the daughters to the mother. In any case both parents are required to support the children.

Alimony not exceeding one-third spouse's income is allowed innocent spouse if other spouse is guilty party and spouse has not sufficient property and cannot work. Indigent spouse, even if guilty, is entitled to assistance from other. Alimony ceases on remarriage of spouse receiving it. In special cases judge may award damages to offended spouse.

Separation may be granted for (a) causes (1) to (10) hereinbefore designated and (b) judicial declaration of impossibility of cohabitation; (c) separation for two years, or four years when couple has minor children, and (d) separation by mutual consent for two years. In latter case judge decides as to awarding of children and alimony, following agreement of parties as far as prudent. Two months after decree of separation, it will be converted into absolute divorce on demand of either party.

Debtors of three or more payments of alimony or child support are recorded at Registry of Delinquent Debtors of Alimony and Child Support by court order upon request of beneficiary. (Law 28970 of Jan. 26, 2007 regulated by Sup. Decree 002 2007 JUS of Mar. 22, 2007).

13.06 HUSBAND AND WIFE:

(Const. art. 5; C. C. 4, 36, 287-326, 2077-2080; C. Com. 6-12).

Spouses owe each other fidelity and assistance. They must live together unless health, life, honor or business of either would thereby be gravely endangered. Husband and wife may determine domicile and decide economic questions of family. Husband and wife must supply their family with necessaries of life according to their resources and situation.

The following is separate property of each spouse: (a) Property owned at the time of marriage or acquired during marriage if the consideration antedated the marriage; (b) gifts during marriage; (c) moneys paid for insurance. Each spouse has the free administration and disposition of his or her separate property, but if the wife does not contribute to the expenses of the marriage with the fruits of her separate property, the husband may demand the administration of all or part thereof on giving bond. The separate property of either spouse is not liable for the debts of the other.

Marriage creates a property community which cannot be renounced. The marriage community property comprises: (a) The income from the separate and the community property; (b) property purchased with community funds, though standing in the name of only one of the spouses; (c) property acquired by the work, industry or profession of either spouse; (d) improvements on separate property made at the cost of the community property or by the industry of either spouse. All property of the spouses is presumed to be community property until the contrary is proved.

Either spouse is representative of marriage partnership and may administer and alienate community property. For ordinary needs of home either spouse may represent marriage partnership, but if either abuses this power it may be limited by judge. Community property is liable for debts of marriage community. Income from each spouse's property is not liable for personal debts of other spouse unless it be shown that they were contracted for benefit of family.

The marriage community is terminated by (a) death of either spouse, (b) annulment of the marriage, (c) divorce, (d) separation of property, (e) declaration of absence or (f) legal separation of spouses. On such dissolution the separate property of each spouse is set aside and the balance is evenly divided between the spouses if they are living, as in the case of divorce, or between the surviving spouse and the heirs of the deceased spouse.

Wife may freely appear in court actions. Either spouse may exercise any profession or industry, and do any kind of work outside of home, with express or implied consent of other; and if one refuses consent other one may obtain authorization of judge if he/she shows that such measure is required by interest of marriage partnership or that of family. Husband and wife cannot contract with each other in matters related to community property.

13.07 INFANCY:

(C. C. 20-23, 42-46, 418-472, 502-563, 2070; Code of the Children and Adolescents, Law 27337 of Aug. 7, 2000 as am'd and its regulations Sup. Decree 011-2005-MIMDES of Nov. 11, 2005 as am'd).

Infancy ends at the age of 18. Contracts of minors under 16 are void, and if over 16, voidable. Minors over 16 years acquire legal capacity by marriage or by getting degree authorizing them to practice profession or occupation. Married minors over 14 years reach legal capacity for purpose of recognizing child as own, child support, pregnancy expenses. Ordinarily, infants are subject to custody of their parents or guardians who have their legal representation and administration of property with limited powers of disposition. Parents exercising parental authority enjoy the usufruct of real and personal property with certain exceptions, of infant under 18. Custodial rights expire or are lost by: death of parents or child, judicial declaration of abandonment, conviction for crime against child or its interests, refusal to pay child support, child abuse, allowing them to beg, corruption of child, marriage of minor and by minor getting degree authorizing him to practice profession or occupation.

Code guarantees economic, social and cultural rights of children and adolescents. Regulates criminal proceedings when minors are involved.

13.08 MARRIAGE:

(C. C. 234, 237, 239-294, 2075-2080).

Following may not marry: (1) Minors over 16 years without court authorization; (2) persons mentally ill, though having lucid intervals; (3) persons having transmissible chronic contagious disease; (4) deaf and dumb persons who cannot express their wishes unmistakably; (5) persons already married.

Following cannot contract marriage with each other: (1) Those related by affinity or consanguinity in direct line; (2) collaterals by consanguinity to third degree, but by court order third degree may be waived for good reasons and collaterals by affinity to second degree, where such relationship arose from marriage dissolved by divorce and former spouse is living; (3) adopter with person adopted, and their families in direct line or collaterals to third degree; (4)

person condemned or under prosecution for death of spouse, with surviving spouse; (5) abductor with woman abducted.

Following marriages are likewise forbidden: (a) Of guardian, with minor or incompetent before accounts of guardianship are approved, under penalty of losing his compensation; (b) of widower or widow or divorced person without making inventory of property belonging to children, penalty being deprivation of usufruct of such property.

Persons desiring to contract marriage must apply to the mayor of the domicile of either party, or to the chief of the civil registry in the capital of the Republic or of a province. An announcement is posted for eight days and published once in a newspaper, but the mayor may for good reasons dispense with this requisite. If there is no opposition or the opposition is rejected, the marriage ceremony is performed by the mayor, or by such official, Catholic chaplain, or mayor of another town, as the mayor may delegate. Marriages having civil effects may likewise be performed by priests; priest must immediately send certificate of marriage to nearest civil registry.

Following marriages are void: (a) Those of persons mentally incapacitated; (b) those of deaf and dumb persons unable to express their wishes; (c) those of persons already married; (d) those of persons related by consanguinity or affinity in the direct line; (e) those of persons related by consanguinity to second and third degree, but judicial dispensation of third degree relationship; (f) those of persons related by affinity to second degree where relationship arose from marriage dissolved by divorce and ex-spouse is living; (g) those of person convicted or under prosecution for death of spouse, with surviving spouse; (h) those performed without intervention of competent official, except when parties acted in good faith. Following marriages may be annulled: (a) Where one of parties lacked age required by law, if action of nullity is brought on behalf of such party, but no action can be brought after minor has come of age or if female has conceived, and in any case contracting parties may confirm marriage when they come of age; (b) marriages between abductor and woman abducted; (c) where either spouse is absolutely impotent at time of marriage; (d) where one of parties was not in enjoyment of his mental faculties at time of marriage, or acted under duress, or was in error as to identity of other party, or was in ignorance of some defect of other party which would render living together insupportable, such as notoriously dishonorable life, sentence to over two years imprisonment, incurable contagious or transmissible disease, or defect which would endanger progeny. In cases mentioned in class (d) action may be brought only by aggrieved party within two years after marriage. If either spouse acted in good faith, voided marriage nevertheless produces civil effects with respect to such spouse and to children.

13.09 MARRIED WOMEN:

See topic 13.06 Husband and Wife; category 12 Estates and Trusts, topics 12.04 Descent and Distribution, 12.08 Wills.

14 FOREIGN TRADE AND COMMERCE

14.01 EXCHANGE CONTROL:

(Sup. Decrees 036-91-EF of Mar. 11, 1991 and 068-91-EF of Mar. 26, 1991).

There are no exchange control regulations. Prevailing exchange rate shall be determined by supply and demand. There is free possession, redemption and transfer abroad of foreign currency. Individual and juridical persons residing in Peru are allowed to have deposit accounts in foreign currencies in country and abroad.

14.02 FOREIGN EXCHANGE:

See topic 14.01 Exchange Control.

14.03 FOREIGN INVESTMENT:

(Const. arts. 62-64, Legislative Decree 662 of Aug. 29, 1991 and 757 of Nov. 8, 1991, Law 27342 of Sept. 5, 2000, Law 27909 of Dec. 12, 2002, Sup. Decree 162-92-EF of Oct. 12, 1992, Sup. Decree 094-92-PCM of Dec. 28, 1992, Decision 291 and 292 of Mar. 21, 1991 of Commission of Cartagena Agreement).

Foreign investment is defined as foreign source contribution made by individuals or juridical persons. Direct foreign investment may be effected in form of freely convertible foreign currency, assets, capitalization of profits, conversion of debentures in shares, investment of profits entitled to repatriation, equity contributions of intangibles or in intangible technological contributions such as mark, industrial models, technical assistance, patented or unpatented technical know-how in form of physical goods, technical documents and instructions, and any investment to development country. Foreign investors have same rights and duties as national investors, therefore they may invest in all economic activities.

Foreign investors are authorized to buy shares from national investors and to acquire shares, participations or rights held by other foreign investors in national, mixed or foreign companies.

Investments of foreign individuals with legal residence in country may be considered national investment if they comply with special requirements including declaration to waive their rights to repatriate capital and remit profits abroad. Foreign investors are entitled to repatriate capital when they sell their shares, participations or rights or when company is liquidated. Foreign investors are allowed to transfer abroad 100% profits and repatriation of capital of direct foreign investment.

Direct foreign investment may be registered at National Commission of Foreign Investments and Technology (CONITE). Investment is automatically registered by filing appropriate documents. Registration is necessary for validity of foreign investor's rights. For transfer of registered direct foreign investment no approval is required, but notice must be given to CONITE.

Foreign and national investors may enter into contract with CONITE to enjoy up to ten year guarantees of legal stability related to: tax regime, free availability of foreign currency regime, and nondiscrimination rights. Contract must be executed prior to investment and investor must comply with requirement as provided by law. Investors contracting with state-owned entity may obtain Supreme Decree by which Government guarantees all obligations of state-owned entity.

Companies are classified as follows: (a) National company where more than 80% of capital belongs to national investors, provided that in opinion of competent authority, such percentage is reflected in technical, financial, administrative and commercial management of company. (b) Mixed company where between 51% and 80% of its capital belongs to national investors, provided that in opinion of competent authority, such percentage is also reflected in technical, financial, administrative and commercial management of company. (c) Foreign companies where less than 51% of its capital belongs to national investors, or if, in case of higher national percentage such percentage is not, in opinion of competent authority, reflected in technical, financial, administrative and commercial management of company.

License agreements on transfer of technology and use and exploitation of foreign patents and trademarks must be registered with CONITE for purpose of payment of royalties. Agreements are automatically registered upon filing when payment of royalties is calculated on percentage of net sales or any other calculation form. Solution of conflicts and disputes arising from direct foreign investment or transfer of technology may be subject to arbitration.

14.04 FOREIGN TRADE REGULATIONS:

See topic 14.01 Exchange Control.

15 HEALTH

15.01 HEALTH REGULATION:

General Law of Health.

Law 26842 of July 20, 1997 as amended, considers health as public interest. Ministry of Health is in charge of regulating, planning and coordinating public and private activities related to health. Law regulates among others, rights and duties related to public health; practice of health related professions, health institutions, national and international disease control; food and beverages, cosmetic products, medical equipment, sanitary products, and pharmaceutical products; hazard substances, sanitation and safety of workplace, environmental protection, import and export of pharmaceutical products, and sanctions for infringement of Law.

Sanitary registration and control of pharmaceutical, cosmetic, sanitary products and medical equipment is regulated by Sup. Decree 010-97-SA of Dec. 23, 1997 as amended. Sup. Decree 007-98-SA of Sept. 25, 1998 as amended on sanitary control of food and beverages, regulates among others, production and preparation, storage, transportation and commercialization of food and beverages, registration of food products, food additives and raw materials; classification of food; inspection, water supply and collection of waste.

Donation and Transplant of Organs.

Law 28189 of Mar. 16, 2004 and its regulations Sup. Decree 014-2005-SA of May 23, 2005 as amended regulates donations and transplants of organs and body tissues; removal of organs and body parts from dead and living persons and death certification.

16 IMMIGRATION

16.01 ALIENS:

Aliens may not acquire or hold directly or indirectly lands, waters, mines and combustibles within a zone 50 kilometers wide along frontiers. Property acquired against such prohibition is forfeited to the Government. Likewise aliens may not acquire rural property in the border provinces or hold lands in the immediate vicinity of military posts. Aliens are generally exempted from military service and political duties, but may hold certain offices such as arbitrator, mining deputy and alderman.

Aliens in general have the same civil rights and duties as citizens both with respect to persons and property. They may do business, follow their trade or practice their profession, buy and sell real property, make wills and marry in conformity with law. Aliens may be allowed in country with temporary visa for up to 90 days. Those with immigrant status and residents with income of foreign source can stay in country indefinitely. Aliens Law regulates admission, entrance, residency and expulsion of foreigners. Aliens may be expelled by resolution of Cabinet stating reasons for expulsion. Number of aliens in profession or industry cannot exceed 20%. Similarly, number of laborers as well as of employees, separately, may not exceed that proportion in any business or concern and salaries of foreign personnel must not exceed 30% of payroll. If employees are four or less, one can be foreigner. (Leg. Decree 689 of Nov. 5, 1991 as am'd). Foreigners with foreign source income above certain amount may apply for resident with rent status and enjoy special tax treatment according to law. (Law 28072 of Sept. 26, 2003 regulated by Sup. Decree 003-2005-IN of July 11, 2005).

Rights of inheritance of aliens are governed by law of their domicile. (Const., art. 71, Alien Law Leg. Decree 703 of Nov. 5, 1991 as am'd, Law Decree 25599 of June 30, 1992; C. C. 2046, 2100, 2101).

There is a special registry of aliens which issues identity cards for which fee and annual renewal fee are paid.

See also category 2 Business Organizations, topic 2.03 Corporations.

17 INTELLECTUAL PROPERTY

17.01 COPYRIGHT:

(Const. art. 2, §8; Leg. Decree 822 of Apr. 23, 1996 as am'd, Law 28131 of Dec. 18, 2003 regulated by Sup. Decree 058-2004-PCM of July 28, 2004; C. C. arts. 18, 2093, Decision 351 of Dec. 17, 1993 of Cartagena Commission).

Law grants certain intellectual, moral and property rights to author, his successors or assignees, regarding scientific, literary and artistic works. Copyrights include all kinds of intellectual (including software), scientific, literary and artistic creations reproduced by any means. Law also protects translations, adaptations, musical arrangements and other transformation of private intellectual works; to protect these copyright works written authorization from original owner of work is necessary. Performers' rights are also protected. Literary and artistic works, performances and other productions are protected by law without requiring registration. Rights granted by law last during author's lifetime and lifetime of author's spouse, children and parents and are extended for 70 years in favor of other heirs or legatees. Producer of motion picture is protected for 70 years from first projection.

Among conventions joined are: International Convention for Protection of Literary and Artistic Works, Berne, Sept. 9, 1886; Convention on Literary and Artistic Property, Montevideo, Jan. 11, 1889; Convention on Literary and Artistic Copyright, Buenos Aires, Aug. 11, 1910; Universal Copyright Convention, Geneva, Sept. 6, 1952 and Paris revision of July 24, 1971; International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations, Rome, Oct. 26, 1961; Convention for Protection against Unauthorized Reproduction of Phonograms, Oct. 29, 1971; Agreement on Trade-Related Aspects of Intellectual Property Rights, Marrakesh, Apr. 15, 1994; WIPO Copyright Treaty, Geneva 1996, WIPO Performances and Phonograms Treaty, Geneva 1996.

17.02 INDUSTRIAL PROPERTY:

C. C. arts. 18, 2093; Decisions 486 of Sept. 14, 2000 and 345 of Oct. 29, 1993 of Cartagena Commission; Leg. Decree 823 of Apr. 23, 1996; Sup. Decree 008-96-ITINCI of May 3, 1996; Law 28126 of Dec. 13, 2003.

Invention Patents.

Any person or corporation who invents or discovers or improves something of industrial application may obtain patent. Corporations may petition patents for inventions made by persons under their employment. Any invention of products or proceedings in any technology field which are novel, represent inventive step and are susceptible of industrial application. Invention is novel when it is not within state of art. Discoveries, scientific theories and mathematical methods; literary and artistic works; natural biological process, biological material as existing in nature or resulting from isolation, including genome or germplasm of any natural being, plan, rules and methods for pursuit of intellectual activities, games or economic-commercial activities, computer programs or software, as such, and forms of representing information among others are not considered inventions. Inventions contrary to public policy, morals and against life or health of people or animals, to preserve vegetation or environment; on animal species and races and biological procedures to obtain them; inventions related to nuclear substances; and related to substances composing human body are not patentable.

Patents are granted for 20 years from filing date. Patent gives exclusive right of exploitation, but compulsory license may be granted in case of declared emergency or national security reasons, and to guarantee free competition and avoid abuse of dominant position in market. Patent owner must exploit it, directly or by granting license in any member country of Andean Pact. Industrial production or commercialization of patented product, are considered exploitation of patent.

Industrial Designs and Utility Models.

Any new design or model which may be applied to industrial object may be registered as ownership of author if no publicity thereof in any form has been made before filing application. Registration grants exclusive rights for ten years. Rights are assignable and inheritable. Utility models for new forms of objects or mechanism, provided they have practical use are registrable. Registration term is ten years from filing date. Provisions regarding patents are applicable to designs and models.

Layout-designs of integrated circuits are protected when considered original as indicated by law. Application must be filed within two years from its first commercial exploitation in any part of world, and when it has not been exploited application must be filed within 15 years from last day of year of invention. Rights may be licensed, and compulsory license may be granted; they are also assignable and inheritable. Registration is granted for ten years from filing date or from last day of year of first exploitation.

Trade Secrets.

Law also protects trade secrets and considers them as any confidential information that is valuable and provides competitive or economic advantages to owner. Information considered trade secret must be expressed in tangible form such as documents, microfilm films, laser discs or any other similar means.

Vegetal species are protected when they are novel, homogeneous, distinguishable and stable and generic designation has been assigned to them. When registered certificate of holder is issued for 15 to 25 years, depending on type of vegetal variety. Fines may be imposed for infringement of registration rights.

Trade-Marks and Commercial Services and Slogans.

Those signs sufficiently distinctive can be registered as marks. Trademark is any sign used to distinguish products or services produced or commercialized by one person from same or similar products or services produced or commercialized by another person. Following signs, among others, can be registered as marks: words or combination of words, pictures, figures, symbols, graphic elements, logotypes, monograms, portraits, labels, emblems, sounds, smells, letters and numbers, shape, packing and wrapping of products. Slogans are words, sentences or captions used as supplement to trademark. Any person or corporation may apply for registration of tradenames or commercial services or slogans employed or to be employed in relation with economic activities. Item registered may be sufficiently distinctive. Combinations of colors, letters and numbers may be registered as trademarks. Executive Power may decree mandatory registration of tradenames for canned or bottled foods and pharmaceutical products. No registration may be granted to marks, denominations, signs and emblems of State or its agencies, or international organizations recognized by Peru, except if applied for by same; to usual or necessary shapes of products or denomination and color thereof; common words or their equivalent in common languages or descriptive denominations; marks which may be confused with others registered or pending registration; geographical names if their use may suggest origin; names of dead persons, except by their heirs, or names of historical personalities; title of literary, artistic or scientific works protected by copyright without permission of owner; marks contrary to law, those against public policy, denomination of protected vegetal varieties, those identical or similar to registered trade slogans and trade names provided under circumstances public may be confused; those that are reproduction, imitation, translation or total or partial transcription of distinctive signs, locally or internationally, well known, without taking into consideration classification of goods or services concerned; or because of similarity to well-known trademarks causes confusion to public independent of classification of goods and services for which registration is applied for. Statute of limitation for action to declare invalid registration of well-known mark registered by third party is five years from date owner becomes aware of unauthorized use, there is no limitation when it has been used in bad faith. Owner of well-known marks can request cancellation or amendment of registered domain name or e-mail address affecting its exclusivity rights. Registration of generic or descriptive terms, usual or common expressions, and individual color may be registered as mark provided owner of mark can prove that mark permits consumers to identify expression with its specific good or service. Registration of trademark grants ownership thereof and exclusive right to use it during ten years, renewable, if applied for within last six months. Owner of trademark may grant license to use or exploit it. Trademarks and commercial names can be cancelled for nonuse for consecutive three years by owner or licensee in any member country of Andean Pact. Partial cancellation may be done when owner proves use of mark for some goods or services. Infringement actions and unfair competition are regulated by law.

Tradenames.

Those signs used to identify individuals or juridical persons regarding their economic activity. Even if name is not registered, law protects owner thereof for damages resulting from usurpation thereof if claimed within one year. Protection of tradename, whether registered or not, does not cover products manufactured by or dealt with by owner of name unless name is registered as trademark. Only owner of registered trademark may use it as name of his establishment, but name of establishment may not be adopted as trademark except by owner of establishment. Exclusive right to use of tradename ends with closing of establishment or termination of industry covered by name. Registration is granted for ten years and is renewable for additional ten year terms.

Trade names may be licensed.

Certification marks sign to be applied to products or services used by others whose quality or other specific characteristics have been certified by legal owner of mark, which shall be public or private entity.

Collective Marks and Origin Denominations.

Producers or traders associations may register collective marks. Origin denominations belong to State who may grant right to use them for ten years, renewable through special councils. Once corresponding government office declares protection of denomination, it may authorize organization and operation of special council in charge of administration of origin denomination. (Law 28331 of Aug. 23, 2004).

Among conventions joined are: Convention for the Protection of Industrial Property, Paris, Mar. 20, 1883; Stockholm Revision of July 14, 1967 as am'd on Sept. 28, 1979; Convention on Patents and Trademarks, Montevideo, Jan. 16, 1889; Inter-American Convention for Protection of Patents and Trademarks, Washington, Feb. 20, 1929; Lisbon Agreement for the Protection of Appellations of Origin and their International Registration of Oct. 31, 1958 as revised and as amended; Agreement on Trade-Related Aspects of Intellectual Property Rights, Marrakesh, Apr. 15, 1994.

17.03 PATENTS:

See topic 17.02 Industrial Property.

17.04 TRADEMARKS AND TRADENAMES:

See topic 17.02 Industrial Property.

18 LEGAL PROFESSION

18.01 ATTORNEYS AND COUNSELORS:

(Sup. Decree 017-93 of June 2, 1993 as am'd).

To practice law attorney must hold law degree, be active member of “Colegio de Abogados” (Lawyer's Association), and able to exercise civil rights. Attorney holding law degree from foreign university may practice law if that foreign university has entered reciprocity agreement with any Peruvian university.

19 MINERAL, WATER AND FISHING RIGHTS

19.01 MINES AND MINERALS:

(Const. art. 66, General Mining Law, Legislative Decree 109 of June 12, 1981, t.o. 1992 Sup. Decree 014-92-EM of June 2, 1992 as am'd; regulated by Sup. Decree 03-94-EM of Jan. 14, 1994 as am'd, Law 28258 of June 23, 2004 as am'd, regulated by Sup. Decree 157-2004-EF of Nov. 11, 2004, Sup. Decree 018-2005-EF of Jan. 28, 2005).

Mines in General.

Except petroleum and other hydrocarbons, mineral waters and guano, which are subject to special laws, mineral substances of all kinds in or under soil of national territory are governed by General Mining Law. Mineral deposits of any kind, including geothermic ones, belong to State and can not be alienated or acquired by adverse possession. Promotion of investment in mining activities is regarded as public interest. Exploitation of mineral and geothermic resources is done directly by State and by granting concessions to national or foreign natural or juridical persons with exception of certain government officials and their relatives. Law classifies mining activities into: (1) Informal prospecting (Cateo); (2) prospecting; (3) exploration; (4) exploitation; (5) general work; (6) processing (Beneficio); (7) refining; (8) commercialization; (9) transportation.

Informal prospecting (Cateo) and prospecting are free except on areas subject to prior private mining rights or excluded by resolution or on National Reserve areas or within areas subject to Special State Rights. They are also forbidden on property of public use, on fenced or cultivated land, on urban zones, archaeological zones or zones reserved for national defense, as well as on mineral substances of national interest reserved by State.

Commercialization of mineral products, domestically and abroad, is free.

State may declare by law, reserve of certain mineral substances of national interest, also it may create National Reserve Areas on which mining rights will not be granted, to carry out directly or indirectly activities of exploration without prejudice to acquired mining rights.

Concessions.

Mining concessions are classified as follows: exploration, exploitation, processing (Beneficio), refining, general works and transportation and may be granted to individuals or juridical persons, national or foreign. Exploration concession grants holder right to explore mining substances within its perimeter. Exploitation concessions grant right to exploit same. Processing (Beneficio) concessions grant right to install and operate plants in order to extract or concentrate valuable part of aggregate of mining substances through physical, chemical and/or physico-chemical procedures. Refining concessions grant right to purify metals from products obtained during previous procedures. General work concessions grant right to offer auxiliary services to two or more concessions. Transportation concessions grant right to install and operate continuous transportation systems between mining center and port, processing plant or refinery.

Exploration and Exploitation Concessions.

Measure unit is square of one hectare. Concessions are indivisible and their extensions may range from 100 to 1,000 hectares, rectangular in shape with sides not to exceed one to ten in ratio, with some exceptions. Concessions on continental shelf are granted for extensions from 100 to 10,000 hectares. Concessions are: (a) Metallic and (b) nonmetallic.

Holders of mining concessions have rights and duties as stipulated by law, fee of US$5 per year and per hectare, for metallic substances and US$1 for nonmetallic substances paid at filing application, and during concession period. Minimum annual production is required, equivalent to US$100, per year and per hectare, for metallic substances and US$50 for nonmetallic substances, after completion of eight years of concession. In case of noncompliance, annual fee is increased.

Applicant of processing (Beneficio) or refining concessions must pay for registration rights plus, with respect to its capacity of production if it is less than 350 metric tons, 0.5 of U.I.T.; if 350-1,000 metric tons per day, 1 U.I.T.'s; if 1,000-5,000 metric tons per day, 1.5 U.I.T.'s; over 5,000 metric tons per day, 2 U.I.T.'s for metallic substances and for nonmetallic half rate.

Applicant of general work or transportation of minerals concessions must pay 0.003 of U.I.T. for each lineal meter of projected work for registration rights to Public Registry of Mining.

Concessions may be terminated by declaration of caducity, waiver, abandon, nullity and cancellation of mining rights. Pertinent inscription should be effected at Public Registry of Mining. It may declare them subject to new petition, except concessions for processing, general works, transport of minerals concessions which by nature could not be subject to new petition. Prior owner of concession and his immediate relatives cannot petition therefor in two years following declaration.

Mining Law and Sup. Decree 038-98-EM of Nov. 25, 1998 as amended contain environmental protection regulations and Law 28271 of July 2, 2004 as amended and Sup. Decree 059-2005-EM of Dec. 7, 2005 contains regulations on identification of environmental damages caused by mining activities, liabilities and financing remedial of damages. Mining operators must file environmental rehabilitation plan to be executed during operation and closing of mines and post closing period. (Law 28090 of Oct. 13, 2003 as am'd, regulated by Sup. Decree 033-2005-EM of Aug. 14, 2005 as am'd).

Taxation.

Concession holders in mining activities are subject to all taxes as indicated by art. 73 et seq. of Mining Law. Holders of mining concessions are subject to payment of monthly royalty of 1% to 3% according with value of concentrate in international markets. Minerals without quotation in international market pay 1% of value of mineral component or gross value.

Executive power may guaranty by contract, tax stability for ten year period to holders of mining activities to obtain output of at least 350 metric tons a day and up to 5,000 metric tons a day and for 15 years over 5,000 metric tons, under conditions stipulated by law.

Hydrocarbons.

(Law 26221 of Aug. 13, 1993 as am'd t.o. 2005 regulated by Sup. Decree 032-2004-EM of Aug. 18, 2004, and Sup. Decree 32-95 of Feb. 27, 1995 as am'd). Law creates PERUPETRO S.A., government enterprise of private law which may execute license or service contracts for exploration and exploitation of hydrocarbons with private developers under various stipulated arrangements by bid or individual evaluations. Maximum contract duration is 30 years for crude oil and 40 years for unassociated natural gas and condensates. Exploration phase, may not exceed seven years in either case; it can be extended for three additional years in exceptional cases. Contract term may be extended for up to ten additional years in case discovery turns out not to be commercial due to transportation problems. Foreign companies to execute contracts must be organized as branch or local company with domicile in capital city, have Peruvian citizen as agent and renounce all diplomatic recourse. Contracting parties have free disposition of hydrocarbons produced thereunder, such right may involve entire production or certain share of production. They may sell their share of production in domestic market or abroad and keep abroad all foreign currency proceeds derived from export or domestic sale. Export of hydrocarbons and by-products are exempted from duties. Government guarantees tax and exchange regime stability. Contracting parties are subject to regular income tax. Measures necessary for environmental protection are required. At termination of contract all equipment and installation must be turned over to Government. Disputes arising from execution of contracts may be subject to international arbitration.

Environmental protection in hydrocarbon activities is regulated by Decree 015-2006-EM of Mar. 2, 2006 as amended. Law 29134 of Nov. 16, 2007, regulates environmental liabilities of companies that cease or abandon any petroleum activity.

20 MORTGAGES

20.01 CHATTEL MORTGAGES:

(C. C. 2043-2045, Law 28677 of Feb. 24, 2006).

Personal property not exempt from attachment may be given in guarantee of any obligation. Obligation may be debtor's obligation or third person's obligation, present or future, determinate or determinable, subject to formalities or not.

Chattel mortgages may be given in form of pledges in which pledged articles may be delivered to creditor or to third person or remain in custody of debtor. Pledge on chattel mortgage may be in private document acknowledged before notary and must be recorded in Registry of Pledges in order to be binding upon third parties if possession is retained by debtor. Document must contain, among others, name of parties, description and value of chattel, description of debt, term, name of depositary, date of contract. Pledge may be: (1) Specific pledge, covering specific articles of any nature, or floating pledge, covering merchandise and raw material in general; this pledge covers original articles and also those manufactured from them; and (2) tangible pledge, such as aircrafts, vessels, consumer goods, equipment, farm products or intangible pledge, such as negotiable instruments (except checks), insurance policies, warehouse receipts, bills of lading, accounts, chattel papers, patents trademarks. Pledge contract may be assigned by endorsement to specified endorsee to whom endorser is jointly liable with debtor, unless words of limitation are inserted. Endorsement of pledge document and any novation, extension or partial change must be in writing, which to be valid against third persons must be recorded. If pledge remains in debtor's possession, notice of transfer must be given to him. Pledge may be cancelled at any time by payment. If partial payment is accepted it must be noted in document and recorded. Law authorizes extra-judicial sale of chattels. Parties may agree that creditor adjudges property in payment of debt. When debtor has not fulfilled its obligations, creditor must communicate to debtor and his representative decision of adjudicating chattel. If price is less than credit, creditor has preferential right to acquire property for such price, his credit continuing with respect to balance. If price is more than credit, balance must be handed to debtor under penalty of law. It is considered invalid for any sale agreed by parties for less than two-thirds of property's value or of its commercial value at time of sale. Law provides penalties for debtors who unlawfully abandon, sell or encumber pledged property. Parties may agree to submit to arbitration any dispute arising from contract.

20.02 COLLATERAL SECURITY:

See category 7 Debtor and Creditor, topic 7.14 Pledges.

20.03 MORTGAGES:

(C. C. 1097-1122, 1956).

All real property which can be sold is subject to mortgage, but mortgages cannot be imposed on credits or leases. A mortgage may be constituted by a public instrument. Following are requisites of mortgage: (a) It must be constituted by owner having free disposal of property or by another duly authorized according to law; (b) lien must be of specific or determinable amount; (c) instrument must be recorded in real property registry; (d) it must secure specific or unspecified obligations. In order to secure documents transmissible by endorsement or to bearer mortgage instrument must also state: (a) Data relating to number and value of documents issued and secured; (b) their series; (c) date of issue; (d) time and manner of amortization; (e) designation of trustee; (f) other data to determine conditions of document; and furthermore, documents must be issued from stubbooks.

Preference among mortgages is decided by the date of registration. If the mortgaged property deteriorates so as to become insufficient, compliance with the obligation may be demanded before maturity. If the mortgage covers several parcels and the creditor forecloses on only one, in the possession of a third person, such owner may demand contributions from the owners of the other parcels. The right to impose second or further mortgages cannot be renounced. An agreement by which the creditor will become the owner of the property is void. Mortgages made abroad on Peruvian property are valid if recorded in Peru.

Vendor has lien for unpaid portion of purchase price of real property. This and certain other liens are called legal mortgages and are subject to being recorded. See category 7 Debtor and Creditor, topic 7.13 Liens.

21 PROPERTY

21.01 ABSENTEES:

See category 12 Estates and Trusts, topic 12.02 Death.

21.02 ADVERSE POSSESSION:

See category 5 Civil Actions and Procedure, topic 5.07 Prescription.

21.03 CONVEYANCES:

See topic 21.05 Deeds; category 9 Documents and Records, topics 9.03 Notaries Public, 9.04 Public Instruments.

21.04 CURTESY:

There is no estate by curtesy.

21.05 DEEDS:

(Notarial Law 26002 of Dec. 7, 1992; C. C. 2008-2017).

Before notary enters deed in his records parties must prepare and sign minute of contract or instrument, when required by law notary himself may prepare minute at request of parties. Every deed must contain: (a) Place and date of execution and name of notary; (b) name, age, domicile and profession of parties; (c) whether they appear personally or by representative and in latter case reference must be made to power of attorney; (d) civil status and nationality of parties and statement as to whether they know Spanish; (e) statement that interpreter appears for party not knowing Spanish; (f) statement that notary knows parties and that minute of the document was filed when required; (g) identification of parties by two witnesses if not known by notary; (h) insertion of minute in full; (i) statement that notary read instrument to parties in presence of two witnesses and that they ratified same; (j) signature of persons appearing and notary.

Deeds must be written by hand in the notary's registry. There can be no figures, unknown characters, variations of hand writing, blank spaces, abbreviations, words stricken out or differences in ink. The notary retains the original in his files and issues certified copies which have the force of originals.

When the instrument involves a money obligation it must set forth the nature of such obligation, the amount of the debt, the interest and the property encumbered stating where the same is situated. In conveyances of real property the area must be stated, the value of the property, the date of the latest appraisal, if any, and the price in case of sales. Certain instruments are subject to record.

See categories 9 Documents and Records, topic Records; also Taxation, topic Taxes.

21.06 DOWER:

There is no provision for dower as known in American law.

21.07 ESCHEAT:

See category 12 Estates and Trusts, topic 12.04 Descent and Distribution.

21.08 PERPETUITIES:

Entailments perpetually keeping property in one family and involving prohibitions of alienation were formerly permitted but are forbidden except for homestead (q.v.). Foundations for specific objects, however, are allowed, under general supervision of Government. (Const., art. 2, §13; C. C. 99-110, 127-129, 488-501, 882, 926).

21.09 REAL PROPERTY:

(C. C. 886-895, 938-946, 954-958, 993).

Following are considered real property: (a) Soil, undersoil and topsoil, mines and waters; (b) real estate; (c) mines granted to private persons; (d) ships and air-ships; (e) railroads and their rights of way; (f) wharves and dikes; (g) public service franchises; (h) real property rights subject to record in the public registry; (i) those indicated by law.

Ownership of real property comprises surface and also space below and above surface in so far as owner may find it useful to enjoy same. It does not comprise minerals or natural resources and archeological objects, which are governed by special laws. Floors of building may belong to several owners.

When property belongs to several persons any one may demand partition. Agreements not to divide cannot be made for more than four years but may be renewed. If no period has been stipulated four years is presumed. If property cannot be easily divided and there is no agreement among parties public sale is held and proceeds divided among owners, who have preferential right to purchase for same price.

Law Decree 22112 of Mar. 14, 1978, regulates cooperative apartments.

22 TAXATION

22.01 BUSINESS TAX:

Tax on Financial Transactions.

(Law 28194 of Mar. 25, 2004 as am'd, regulated by Sup. Decree 047-2004 EF). Most banking operations, in local or foreign currency, are taxed at 0.07% rate.

22.02 EXCISE TAX:

(Impuesto selectivo al consumo) (Leg. Decree 821 of Apr. 22, 1996 t.o. Sup. Decree 055-99-EF of Apr. 14, 1999 as am'd and its regulations Sup. Decree 29-94-EF of Mar. 28, 1994 as am'd). Tax is levied on: Producer sales and importer of cigarettes, gas, wines, jewelry, yachts and recreation boats, gambling, race tracks, among others at rates ranging from 10% to 50%.

22.03 INCOME TAX:

(Leg. Decree 774 of Dec. 30, 1993 t.o. 2004 as am'd and regulations, Sup. Decree 122-94-EF of Sept. 19, 1994 as am'd).

Object.

This tax is levied on income from Peruvian sources regardless of nationality of natural person or place of constitution of juridical person and on income earned abroad by residents of Peru. Peruvian source income is specifically defined in arts. 9 and 10 of Law. Export trade benefits related to merchandise produced, manufactured or purchased in Peru, even when it consists only of mere send off by agencies, branches, representatives or intermediaries to foreign countries always constitute Peruvian income. International activities such as transportation, communications, news services, insurance or reinsurance, film distribution and others, are subject to specific percentages to determine portion of income considered of Peruvian source.

Following are regarded as residents: (a) Peruvian nationals domiciled in Peru according to provisions of civil law; (b) foreign nationals with uninterrupted stay in Peru for at least 183 days in any 12 month period, temporary absences of less than 183 days are disregarded; (c) Peruvian nationals performing public services for Government in foreign countries; (d) juridical persons organized in Peru; (e) branches and agencies in Peru of foreign concerns; (f) undivided estates when decedent was resident at time of death; (g) multinational banks; (h) irregular companies, associations and partnerships. New residents may submit to this law after six months' stay in country, having previously registered as taxpayers.

Persons and Entities Subject to Tax.

(a) Individuals; (b) undivided estates; (c) juridical persons. Under latter are included among others following: (1) Corporations (sociedades anónimas) organized in Peru; (2) limited partnership (sociedades en comandita) organized in Peru; (3) cooperatives; (4) corporations with social ownership; (5) public corporations; (6) branches or agencies of foreign companies; (7) foundations and associations; (8) foreign societies of any kind receiving Peruvian income; (9) agricultural societies with social interest and agrarian cooperative societies of production.

Income of undivided estates is also regarded as income of single individuals until executors of heirs determine portion of each recipient.

Exemptions.

Not subject to this tax are: (a) Public sector, with exception of public corporations; (b) legally established foundations with cultural, social or health purposes; (c) entities of mutual assistance; (d) rural communities; (e) native communities; (f) universities and educational and cultural centers.

Gross income comprises all taxable income. In case of income derived from sale of property, gross income shall be difference between proceeds for sale and cost of property. Depreciation shall be deducted from cost whenever property involved is subject to depreciation.

Categories of Income.

Law establishes following:

(1) Income from Lease, Sublease and Transfer of Personal or Real Property.

Tax is levied on following: (a) Profit in cash or in kind from lease or sublease of real properties, including accessories; (b) value of improvements done by lessee or sub-lessee meaning profit to owner; (c) implied rent when owner himself occupies property, rate is 6% of property value when used as owner's residence; (d) income from lease or temporary assignment of personal or real property or intangibles.

(2) Income from Other Capital Investments (Interest, Royalties).

This category comprises: interest derived from loans, cedulas, bonds, debentures and any kind of credits as indicated by law (1), or from temporary or permanent assignment of trademarks; income from royalties, annuities and any compensation received in consideration of promise to forbear or not to do, but if promise relates to activities falling under other category income, latter applies; difference between amounts paid as premiums by insured and amounts paid received by same after agreed term elapses in life insurance and dotal policies, interest in excess payments received by members of cooperative societies, except those of laborers' cooperatives.

All transactions in cash or in kind originated by use or right to use patents, trademarks, designs, plans, secret formulas, author's rights for literary, artistic or scientific works, as well as any transaction obtained by industrial, commercial, or scientific information, are deemed as royalty arrangements.

(3) Industrial and Commercial Profits and Other Profits.

This category also includes income derived from commerce, industry, mining with certain qualifications, agriculture and cattle raising, forestry, fishing and other natural resources; from rendering services such as transportation, communication, hospitals, hotels, warehouses, banks, finance and insurance companies, brokers and other intermediaries; notary public fees; income derived from sale of personal or real estate and any other income not included in other categories. Taxpayers with combined income from categories (3) and (4) are included in category (3).

Income of concerns or entities which are not corporations is attributed to owners or members thereof even if not distributed. Same applies to losses even if not charged to their accounts.

When corporation distributes dividends in kind, except its own shares, difference between market value and applicable basis of objects distributed shall be deemed profit or loss to corporation.

Individuals, juridical persons and undivided estates with income in this category up to certain amount may elect to be subject to special regime of income tax and be taxed at monthly rate of 2.5% for income from commerce and industries and 3.5% for income from rendering services only or for income from commerce, industries and for rendering services.

(4) Income of Independent Individuals.

This category comprises income earned by professionals working alone or in association, and income of any other kind of independent workers and remuneration of members of boards of directors, attorneys-in-fact, promoters, executors, and the like.

(5) Tax on Salaries and Other Remuneration.

This tax comprises: (a) Salaries received by employees except allowances for business trips; (b) pensions derived from work; (c) workers' profit-sharings whether liquid or proprietary; (d) income derived from laborers' cooperatives received by members; (e) income derived from services contracts, as stipulated by law.

Taxpayer may not deduct from gross income income tax paid by third party except when said tax is levied on interest of financing operations with foreign beneficiaries.

Deductions from Category (1) Tax.

20% of gross income and expenses for building improvements in fortuitous cases not covered by insurance.

Deductions from Category (2) Tax.

10% of gross income.

Deductions from Category (3) Tax.

Law allows numerous deductions among them: (a) Traveling expenses up to certain amount; (b) normal business expenses; (c) interest derived from loans and expenses incurred in obtaining it and cancellation of said loans within limits; (d) taxes levied on profit-producing activity; (e) insurance premiums; (f) losses deriving from acts of God; (g) depreciation of fixed assets and losses of goods, provided they are duly proven; (h) business organization expenses which may be deducted in first year, or within ten years; (i) amounts assigned to reserves and deductions ordered by Superintendency of Banking and Insurance as well as technical reserves by insurance companies; (j) losses from bad debts; (k) salaries and other remuneration of members of board of directors, up to 6% of net profits; (l) remuneration to stockholders in corporations to ascendants, descendants or spouse, provided they actually participate in management; (m) prospecting expenses of mining companies may be deducted in same year or redeemed under terms and conditions established by General Law of Mining; (n) royalties, fees and other expenses established by Regulations; (o) periodical fees and maintenance expenses by lessee in financial lease contracts.

Deductions from Category (4) Tax.

Taxpayer may deduct 20% of gross income, but no more than 24 tributary units (U.I.T.'s).

Deductions from Category (5) Tax.

Those who received income of Category (4) and (5) may deduct 7 tributary units (U.I.T.'s). Taxpayers with income of both categories may deduct once only.

Estimated Net Income for Nonresidents and for Branches and Agencies of Foreign Corporations.

Law provides for irrefutable estimate based on percentage of gross income in following cases: (a) Insurance activities, 7%; (b) lease of aircraft, 60%; (c) international transport and communication companies for services originating in Peru, 5%, except for air transport, 1% and sea transport, 2% or totally exempted by reciprocity; (d) news agencies for services rendered to Peruvian residents, 10%; (e) distribution of motion pictures, video-tapes, etc., 20%; (f) exploration, development and transport of hydrocarbons, 25% and 15% when entered into by Peruvian residents; (g) 80% of gross income of freight companies, as indicated; (h) 20% of gross income for assignment of right for transmission of T.V. programs; (i) lease of ships, 80%; (j) lease of containers for sea freight transport, 15%.

Taxpayers domiciled in Peru shall add or set off results of several kinds of income obtained in Peru.

Rates.

(A) Individual Residents.

On sum of all taxable income: Up to 27 U.I.T.'s (Tributary Units) 15%, on excess of 27 U.I.T.'s up to 54 U.I.T.'s 21%, and 30% on excess over latter sum.

(B) Individual and Undivided Estates Nonresidents.

On income from: pensions or remuneration for personal services rendered in Peru.

(C) Resident Corporations and Legal Entities Deemed Juridical Persons.

Resident corporations and legal entities deemed as juridical persons are subject to 30% tax rate plus on dividends and other types of distribution of profits, 4.1%; nonresidents are also subject to 4.1% tax on dividends and other types of distribution of profits.

(D) Nonresident Corporations.

(a) On interest from external credits not excluded from income tax, 4.99%, as provided by law; (b) on interest paid outside country by banks and financial institutions in Peru, 1%; (c) on income derived from lease of ships and aircraft, 10%; (d) on royalties and on any other income, 30%; (e) on dividends and other type of distribution, 4.1%; (f) on technical assistance, 15%.

Simplified Regime.

(Leg. Decree 937 of Nov. 13, 2003 as am'd and its regulation Sup. Decree 097-2004-EF of July 21, 2004 as am'd). Individuals and undivided estates domiciled in country with income of third category and non-professional individuals domiciled in country with income of fourth category may be subject to simplified regime which comprises income tax, sales tax and municipal tax. To apply to this regime taxpayer's gross income must be up to certain amount per quarter. Taxpayers are divided into categories. They must pay monthly tax which varies with each category.

Tax on Net Worth.

(Law 28424 of Dec. 18, 2004 as am'd regulated by Sup. Decree 025-2005-EF of Feb. 15, 2005). Taxpayers, including branches, agencies and permanent establishments of enterprises, companies or any other foreign entity, with income of third category are also subject to tax on net assets over certain amount, at rate of 0.5%.

22.04 PROPERTY TAXES:

Tax on Real Property.

(Leg. Decree 776 of Dec. 30, 1993 as am'd). Real property, including construction and fixtures, is subject to tax. Rates are 0.2% up to 15 U.I.T.'s, 0.6% up to 60 U.I.T.'s and 1% on properties' value over 60 U.I.T.'s.

Transfer Tax (Alcabala).

(Legislative Decree 776 of Dec. 30, 1993). Tax is levied on transfer of realty, or rights on realty, at rate of 3% of adjusted transfer price. This tax must be paid by purchaser.

22.05 SALES AND USE TAXES:

Sales Tax.

Leg. Decree 821 of Apr. 22, 1996 t.o. Sup. Decree 055-99-EF of Apr. 14, 1999 as amended and its regulations Sup. Decree 29-94-EF of Mar. 28, 1994 as amended. Sales of some personal property, construction contracts, specified services and importation of goods are taxed at 17% rate, with some exemptions established in law. Tax base is constituted by value of property sold, total income for services, value of construction for construction contracts, and customs value.

Exportation of goods and services is not subject to this tax.

Transactions subject to this tax are also subject to 2% of municipal promotion tax.

22.06 TAX INCENTIVES:

Special Treatment.

Law 23407 of May 28, 1982 as am'd, and its regulations, called “General Law of Industries” establishes basic legal provisions for promoting and regulating manufacturing. It covers most of manufacturing activities; primary processing activities of raw materials are not included, those are governed by extractive industry laws.

See also category 19 Mineral, Water and Fishing Rights, topic 19.01 Mines and Minerals, subhead Mines in General.

23 TRANSPORTATION

23.01 SHIPPING:

Legislative Decree 644 of June 22, 1991 eliminates restriction for routes and operation in international transport for domestic shipping firms. Domestic companies are those incorporated and registered in Peru with no more than 49% of foreign participation. (Law 28583 of July 19, 2005, Sup. Decree 014-2006-MTC of June 2, 2006). Foreign shipping firms are excluded from cabotage, except in shipping along national border, in which they may participate subject to agreement. There is reservation of cargo to domestic shipping companies. Participation of foreign companies in transport of Peruvian cargo is subject to reciprocity. Law 26620 of June 7, 1996 regulated by Sup. Decree 028-DE-MGP of May 25, 2001 controls and surveillances of sea, rivers and lakes activities. Law is applicable, among others, to maritime waters up to 200 miles, islands within 200 miles from sea shore, land up to 50 meters from sea shore, measured on highest sea tide and river banks and lakes to highest ordinary swelling, to all vessels in jurisdictional water, and vessels with Peruvian flag anywhere, any activity of entities and individuals taking place at sea, rivers or lakes. Maritime authority is enforced by Director General de Capitanías y Guardacostas.

Law 27943 of Feb. 28, 2003 as amended and its regulations Sup. Decree 003-2004-MTC of Feb. 3, 2004 as amended regulates activities and services within National Port System, administration and operation of ports, construction, use, operation and administration of port activities and services. Classifies ports according to ownership, type of administration, purpose, location and size. Autoridad Portuaria Nacional is in charge of administration of National Port System and may execute contracts with private parties for administration of port facilities for up to 30 years term.

24 TREATIES AND CONVENTIONS

24.01 TREATIES:

Peru is a party, inter alia to following: Brussels Convention of 1924 on maritime transportation ratified by Supreme. Copyright Convention of Geneva 1952; Convention on Private International Law (Bustamante Code-Havana, 1928); Montevideo Treaty, 1980 (Latin American Integration Association); Cartagena Agreement (Andean Common Market); Inter-American Conventions on International Commercial Arbitration; Conflict of Laws concerning checks, The Taking of Evidence Abroad and The Legal Regime of Powers of Attorney to be used Abroad (Panama, Jan. 30, 1975); Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, June 10, 1958); Multilateral Trade Negotiations, the Uruguay Round, Final Act (Marrakech, Apr. 15, 1994) and Agreement establishing the World Trade Organization (Marrakech, Apr. 15, 1994).

MERCOSUR, established in 1991, is regional trade market. Member countries are Argentina, Brazil, Paraguay, Uruguay and Venezuela. Member countries liberalize trade with one another while imposing common external tariff on goods imported from nonmember countries. MERCOSUR has extended its scope by entering into free trade agreements with Chile, Bolivia, Colombia, Ecuador and Peru.

See also category 17 Intellectual Property, topic 17.01 Copyright.

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PHILIPPINE REPUBLIC LAW DIGEST

—Scope —

Revised for 2010 edition by

ORTEGA, DEL CASTILLO, BACORRO, ODULIO, CALMA & CARBONELL, of Manila.

(The following abbreviations are used with reference to Codes and Statutes of the Philippines: R.A.C. indicates Revised Administrative Code of 1917; C.A. indicates Commonwealth Act; R.A. indicates Republic Act; C. of C. indicates Code of Commerce of Spain of 1886 promulgated in the Philippines on Aug. 6, 1888; C.C. [n] indicates Civil Code of the Philippines (R.A. 386) which took effect on Aug. 30, 1950; O.G. indicates Official Gazette; R.P.C. indicates Revised Penal Code which took effect on Jan. 1, 1932; R.C. indicates Rules of Court which took effect on Jan.

1, 1964; P.D. indicates Presidential Decree; L.O.I. indicates Letter of Instruction; G.O. indicates General Order; B.P. indicates Batas Pambansa; and E.O. indicates Executive Order. Acts and statutes are also referred to by their popular names.)

Note: This revision covers laws and jurisprudence as of Oct. 1, 2009

1 INTRODUCTION

1.01 TERRITORY:

Philippine territory comprises Philippine archipelago, with all islands and waters embraced therein, and all other territories over which Philippines has sovereignty and jurisdiction. These other territories are called ``Regime of Islands" and include Kalayaan Island Group and Bajo de Masinloc or otherwise known as Scarborough Shoal.

1.02 CURRENCY:

Unit of monetary value in Philippines is peso, represented by sign “P”. Par value of peso shall not be altered except when necessary under following circumstances: (a) When existing par value would make impossible maintenance of balanced economy without depleting international reserve of Bangko Sentral, or chronic use of restrictions on convertibility of peso into foreign currencies or on transferability abroad of funds from Philippines, or undue government intervention in or restriction of international flow of goods and services; or (b) when uniform proportionate changes in par values are made by countries which are members of International Monetary Fund; or (c) when operation of any executive or international agreement to which Philippines is party requires alteration in gold value of peso.

Bangko Sentral shall have sole power and authority to issue currency, within territory of Philippines. No other persons or entity, public or private, may put into circulation, notes, coins or any other object or document which may circulate as currency or reproduce or imitate facsimiles of Bangko Sentral notes without prior authority. Bangko Sentral has authority to investigate, make arrests, conduct searches and seizures in accordance with law, for purpose of maintaining integrity of currency. All notes and coins issued by Bangko Sentral shall be fully guaranteed by Government of Republic of the Philippines and shall be legal tender in Philippines for all debts, both public and private: Provided that coins shall be legal tender in amounts not exceeding P50 for denominations of P0.25 and above, and in amounts not exceeding P20 for denominations of P0.10 or less. (R.A. 7653). It is unlawful for any person to wilfully deface, mutilate, tear, burn or destroy, in any manner whatsoever, currency, notes and coins issued by Bangko Sentral. (P.D. 247).

R.A. 8183 repealed R.A. 529 (Act to Assure the Uniform Value of Philippine Coin and Currency) which declared as null and void any obligation requiring payment of which in currency other than Philippine currency.

Although all monetary obligations shall be settled in Philippine currency parties may agree that obligation or transaction shall be settled in any currency at time of payment.

See also category 14 Foreign Trade and Commerce, topic 14.03 Foreign Exchange.

1.03 GOVERNMENT AND LEGAL SYSTEM:

Republic of Philippines became independent republic on June 12, 1898. (R.A. 4166). On Feb. 2, 1987, new Constitution, which was enacted by Constitutional Commission of 1986, was ratified by majority of votes cast in plebiscite. It contains bill of rights very similar to bill of rights contained in Constitution of U.S. and it delegates functions of government to three branches, namely, legislature, executive, and judicial. Legislative power is vested in Congress of

Philippines which consists of Senate and House of Representatives, members of which are elected directly by people. (§1, Art. VI, Constitution). Executive power is vested in President of Philippines who is elected by direct vote of people for term of six years. President is not eligible for reelection. In event of death, permanent disability, removal from office, or resignation of President, Vice-President shall become President to serve unexpired term. In case of death, permanent disability, removal from office, or resignation of both President and Vice-President, President of Senate or, in case of his inability, Speaker of House of Representatives, shall act as President until President or Vice-President shall have been elected and qualified. (§§1, 4, 8, Art. VII, ibid). Judicial power is vested in one Supreme Court and in such lower courts as may be established by law. Members of Supreme Court and judges of lower courts are appointed by President. (§§1, 9, Art. VIII, ibid).

Congress shall convene once every year on fourth Mon. of July for its regular session, unless different date is fixed by law, and shall continue to be in session for such number of days as it may determine until 30 days before opening of its next regular session, exclusive of Saturdays, Sundays, and legal holidays. President may call special session at any time. (§15, Art. VI, 1987 Philippine Constitution).

Suffrage is exercised by citizens of Philippines who are at least 18 years of age and have resided in Philippines for at least one year and in place wherein they propose to vote for at least six months preceding election. No literacy, property, or other substantive requirement shall be imposed on exercise of suffrage.

Sources of Philippine Jurisprudence.

The jurisprudence of the Philippines is based partly upon Spanish law and partly upon the law of the United States of America and its several States. It is therefore partly a civil law and partly a common law system. It is a merger of the two. The Code of Commerce of Spain, which was made effective in the Philippines during the Spanish regime, is still in force, although many of its provisions have been modified or amended by special laws and the Civil Code of the Philippines. (R.A. 386). On the other hand, many statutes have been modeled after statutes adopted in the United States and the case law of the United States is cited and given persuasive effect.

1.04 HOLIDAYS:

Thursday and Friday of Holy Week, Christmas Day and Sundays are legal religious holidays. The other legal holidays are: Jan. 1; Apr. 9; May 1; June 12; Aug. 21 (R.A. 9256); last Sun. of Aug.; Nov. 30; Eidul Fitr (movable date) (R.A. 9177); Dec. 30; Nov. 1 and Dec. 31 are nationwide special holidays; and day appointed by law for holding general election. President may, in his discretion, proclaim any other day special public holiday.

When legal holiday falls on Sun., following Mon. shall not be holiday unless proclaimed special public holiday. (L.O.I. 1087). When the day, or the last day, for doing an act required or permitted by law falls on a holiday, the act may be done on the succeeding business day. (E.O. 292).

1.05 OFFICE HOURS AND TIME ZONE:

The Philippine Republic is plus 8 hours to the universal co-ordinated (GMT +08:00) time zone. Office hours are generally from 8 a.m. to 5 p.m. although some offices hold it from 9 a.m. to 5 p.m. or 6 p.m. Banks transact their business from 9 a.m. to 3 p.m. or 5 p.m.

2 BUSINESS ORGANIZATIONS

2.01 AGENCY:

The provisions of the Code of Commerce governing agency have been repealed by the new Civil Code under which agency is presumed to be for a compensation. An agency is either general or special. An agency couched in general terms comprises only acts of administration, even if the principal should state that he withholds no power or that the agent may execute such acts as he may consider appropriate, or even though the agency should authorize a general unlimited management.

In certain specified cases and in any act of strict dominion, a special power of attorney is necessary. A special power to sell excludes the power to mortgage; and a special power to mortgage does not include the power to sell. A special power to compromise does not authorize submission to arbitration.

Third Persons.

So far as third persons are concerned, an act is deemed to have been performed within the scope of the agent's authority, if such act is within the terms of the power of attorney, as written, even if the agent has in fact exceeded the limits of his authority according to an understanding between the principal and the agent. A third person with whom the agent wishes to contract on behalf of the principal may require the presentation of the power of attorney, or the instructions as regards the agency. Private or secret orders and instructions of the principal do not prejudice third persons who have relied upon the power of attorney or instructions shown them. The agent is responsible not only for fraud, but also for negligence, which is to be judged with more or less rigor by the courts, according to whether the agency was or was not for a compensation.

When two persons contract with regard to the same thing, one of them with the agent and the other with the principal, and the two contracts are incompatible with each other, that of prior date must be preferred, without prejudice to the rules governing double sale of movable and immovable properties. If the agent has acted in good faith, the principal is liable in damages to the third person whose contract must be rejected. If the agent acted in bad faith, he alone is responsible.

If the agent had general powers, revocation of the agency does not prejudice third persons who acted in good faith and without knowledge of the revocation. Notice of the revocation in a newspaper of general circulation is a sufficient warning to third persons. The agency is revoked if the principal directly manages the business entrusted to the agent, dealing directly with third persons. A general power of attorney is revoked by a special one granted to another agent, as regards the special matter involved in the latter.

The agency shall remain in full force and effect even after the death of the principal, if it has been constituted in the common interest of the latter and of the agent, or in the interest of a third person who has accepted the stipulation in his favor. Anything done by the agent, without knowledge of the death of the principal or of any other cause which extinguishes the agency, is valid and fully effective with respect to third persons who may have contracted with him in good faith.

2.02 ASSOCIATIONS:

See topics 2.03 Corporations, 2.07 Partnerships.

2.03 CORPORATIONS:

Corporation Code of Philippines (B.P. 68) classifies corporations into stock or nonstock.

Securities and Exchange Commission is charged with implementation of provisions of Corporation Code and promulgation of rules and regulations necessary to enable it to perform its duties, particularly in prevention of fraud and abuses of controlling stockholders, members, directors, trustees or officers.

Corporations may be formed for stated purpose or purposes. Where corporation has more than one stated purpose, articles of incorporation shall indicate which is primary purpose and which are secondary purposes. Only natural persons, not less than five nor more than 15 and majority of whom are Philippine residents may form corporation. Incorporator of stock corporation must own at least one share of capital stock. Term of incorporation is 50 years and may be extended for additional periods of 50 years each by amendment of articles of incorporation. Number of directors must be not less than five nor more than 15 in case of stock corporations, nor more than 15 in case of nonstock corporations. Domestic corporations are organized by filing with Securities and Exchange Commission articles of incorporation specifying name, purpose, place of business, and term of incorporation, names of incorporators and directors, amount and kinds of capital stock, whether common, preferred or no-par value. It is required that “Inc.” or “Corporation” be added after corporate name. Also, corporate name should not be identical or deceptively similar to that of any existing corporation. Principal office of corporation shall either be in city, municipality or province. Corporation must formally organize and commence transaction of its business within two years from date of incorporation, otherwise, its corporate powers not only shall cease but corporation shall also be deemed dissolved, except, if failure is not attributable to corporation. If, on other hand, corporation commenced transaction of its business but subsequently became continuously inoperative for minimum period of five years, Securities and Exchange Commission may suspend or revoke its corporate franchise.

Of authorized capital stock, 25% must be subscribed, and at least, 25% of total subscribed stock must be paid provided that in no case shall paid-up capital be less than P5,000 although §12 of Corporation Code provides that stock corporations shall not be required to have minimum authorized capital. Any contract for acquisition of unissued stock in existing corporation or corporation still to be formed shall be deemed subscription notwithstanding fact that parties call it purchase of shares. Articles of incorporation of corporations which will engage in business activity reserved for Filipinos and/or for corporations at least 60% of capital of which must be owned by citizens of Philippines shall provide that no transfer of stock or interest which will reduce ownership of Filipino citizens to less than required percentage of capital stock as provided by existing laws shall be allowed or permitted to be recorded in proper books of corporation and this restriction shall be indicated on all stock certificates issued by corporation.

There are no requirements regarding citizenship of stockholders, provided foreign capital invested is at least US$200,000 except that Philippine Nationals must own at least (a) 60% of stock in corporations organized in Philippines for purpose of engaging in operation of public utilities, (b) 60% of stock in corporations organized in Philippines for purpose of engaging in agriculture or mining, (c) 75% of stock in corporations organized for purpose of engaging in coastwise shipping trade, or recruitment, (d) 75% of stock in corporations organized for purpose of engaging in shipping trade on bays and rivers, (e) 60% of stock in corporations organized for purpose of engaging in fishing, (f) 60% in case of banks and banking institutions, (g) 100% in case of retail trade and rice and corn industry must be owned by citizens of Philippines, (h) 60% in case of financing companies, (i) majority of voting stock in corporations organized for purpose of engaging in underwriting of securities of other corporations, (j) 60% of stock in corporations engaged in preferred area of investment and duly registered with Board of Investments, and (k) 60% of stock in corporations engaged or proposes to engage in manufacturing, processing or exporting export products listed in export priorities plan or tourism priorities plan, or if not listed, at least 50% of its sales are export sales; or if service exporter, it is engaged or, proposes to engage in rendering services payable in foreign currency, in providing services to foreign tourists and foreign travelers in areas within Tourism Priorities Plan or in exporting television or motion pictures or musical recordings produced in Philippines. In all these classes of corporations, no alien may intervene in management, operation, administration or control thereof, whether as officer, employee or laborer therein, with or without remuneration, except technical personnel whose employment may be specifically authorized by President of Philippines.

Corporation commences corporate existence from date Securities and Exchange Commission issues certificate of incorporation; and thereupon incorporators, stockholders/members and their successors shall constitute body politic and corporate under name stated in articles of incorporation for period of time mentioned therein, unless said period is extended or corporation is sooner dissolved in accordance with law.

Management of corporation is vested in board of directors. Majority of directors of all corporations organized under Corporation Code must be residents of Philippines. At all elections of directors, there must be present owners of majority of outstanding capital stock, or if there be no capital stock, majority of members entitled to vote. Cumulative voting is provided for election of directors only. Every director must own at least one share to qualify as director. No person convicted by final judgment or offense punishable by imprisonment for period not exceeding six years, or violation of Corporation Code, committed within five years prior to date of election, shall qualify as director or officer of corporation. Officers which corporations must elect at organization meeting are president, treasurer and secretary. Only president is required to be director of corporation. Any two or more positions may be held concurrently by same person except that no one shall act as president and secretary or president and treasurer at same time.

Every corporation incorporated under Corporation Code has power and capacity: (1) To sue and be sued in its corporate name; (2) of succession by its corporate name for period of time stated in articles of incorporation and certificate of incorporation; (3) to adopt and use corporate seal; (4) to amend its articles of incorporation; (5) to adopt by-laws, not contrary to law, morals, or public policy, and to amend or repeal same; (6) in case of stock corporations, to issue or sell stocks to subscribers and to sell treasury stocks; and to admit members to corporation if it be non-stock corporation; (7) to purchase, receive, take or grant, hold, convey, sell, lease, pledge, mortgage and otherwise deal with such real and personal property, including securities and bonds of other corporations, as transaction of lawful business of corporation may reasonably require; (8) to adopt plan of merger or consolidation; (9) to make reasonable donations, including those for public welfare, or for charitable, cultural or similar purposes, provided that no corporation, domestic or foreign, shall give donations in aid of any political party or candidate; (10) to establish pension, retirement and other plans for benefit of its directors, trustees, officers and employees; (11) to exercise such other powers as may be essential to carry out its purpose or purposes; (12) to increase or decrease its capital stock; (13) to incur, create or increase bonded indebtedness; (14) to sell or otherwise dispose of all or substantially all of its assets; (15) to invest corporate funds in another corporation or business or for any other purposes; (16) to declare dividends, cash, stock or property; (17) to acquire its own shares; (18) to extend or shorten its corporate term; and (19) to enter into management contracts.

One or more stockholders of stock corporation may create voting trust for purpose of conferring upon trustee or trustees right to vote and other rights pertaining to shares for period not exceeding five years at any one time provided that in case of voting trust required as condition in loan agreement, voting trust may be for period not exceeding five years but shall automatically expire upon full payment of loan. No voting trust shall be entered into for purpose of circumventing law against monopolies and illegal combinations in restraint of trade or used for purposes of fraud.

Stock Certificates.

After the reconstitution of its records in accordance with existing laws, a corporation is now authorized to issue under certain conditions new certificates of stock in lieu of those which have been lost, stolen or destroyed, upon the registered owner or his legal representative filing with the corporation an affidavit setting forth, if possible, the circumstances as to how, when and where the certificates of stock were lost, stolen or destroyed, the number of shares represented by each certificate, the serial numbers of the certificates, and the name of the corporation which issued the same. Except in case of fraud, bad faith or negligence on the part of the corporation and its officers, no action may be made against any corporation which issued certificates of stock in lieu of those lost, stolen or destroyed.

Dividends.

Board of directors of stock corporation may declare dividends out of unrestricted retained earnings which shall be payable in cash, property or stock to all stockholders on basis of outstanding stock held by them.

Stock corporations are prohibited from retaining surplus profits in excess of 100% of their paid-in capital stock, except: (1) When justified by corporate expansion projects or programs approved by board of directors; or (2) when corporation is prohibited under any loan agreement with any financial institution or creditor, whether local or foreign, from declaring dividends without its/his consent; or (3) when it can be clearly shown that such retention is necessary under special circumstances obtaining in corporation.

Merger and Consolidation.

Two or more corporations may merge into single corporation which shall be one of constituent corporations or may consolidate into new single corporation which shall be consolidated corporation. Following shall be set forth in plan for merger or consolidation: (1) Names of corporations proposing to merge or consolidate; (2) terms of merger or consolidation and mode of carrying same into effect; (3) statement of changes, if any, in articles of incorporation of surviving corporation in case of merger; and with respect to consolidated corporation in case of consolidation, all statements required to be set forth in articles of incorporation for corporations organized under Corporation Code; and (4) such other provisions with respect to proposed merger or consolidation as are deemed necessary.

Appraisal Right.

Any stockholder shall have right to dissent and demand payment of fair value of his shares in following instances: (1) In case amendment to articles of incorporation has effect of changing or restricting rights of stockholders or class of shares, or of authorizing preferences in any respect superior to those of outstanding shares of any class, or of extending or shortening term of corporate existence; (2) in case of sale, lease, exchange, transfer, mortgage, pledge or other disposition of all or substantially all of corporate property and assets; and (3) in case of merger or consolidation. Appraisal right is also extended to any stockholder in case of investment of corporate funds in any corporation or business or for any purpose other than corporation's primary purpose.

Appraisal right is exercised by stockholder who shall have voted against proposed corporate action, by making written demand on corporation within 30 days after date on which vote was taken for payment of fair value of his shares. Failure to make demand within such period shall be deemed waiver of appraisal right. If proposed corporate action is implemented, corporation shall pay to such stockholder, upon surrender of certificates of stock representing his shares, fair value thereof as of day prior to date on which vote was taken.

If withdrawing stockholder and corporation cannot agree on fair value of shares, it shall be determined by three disinterested persons and findings of majority of appraisers shall be final. From time demand for payment of fair value of stockholder's shares until either abandonment of corporate action involved or purchase of said shares by corporation, all rights accruing to such shares shall be suspended except rights to receive payment of fair value thereof. If dissenting stockholder is not paid value of his shares within 30 days after award, his voting and dividend rights shall be restored. Right of stockholder to be paid fair value of his shares shall cease when demand for payment is withdrawn with corporation's consent, or if proposed corporate action is abandoned by corporation or disapproved by Securities and Exchange Commission or if Securities and Exchange Commission determines that such stockholder is not entitled to appraisal right.

Non-stock corporation is one where no part of its income is distributable as dividends to its members, trustees, or officers. Any profit which non-stock corporations may obtain shall be used for furtherance of purpose or purposes for which corporation was organized. Provisions governing stock corporations, when pertinent, shall be applicable to non-stock corporations, except as may be covered by specific provisions regarding non-stock corporations. Non-stock corporations may be formed for charitable, religious, educational, professional, cultural, fraternal, literary, scientific, social, civil service, or similar purposes, like trade, industry, agriculture, or any combination thereof.

Right of members to vote may be limited, broadened or denied to extent specified in articles of incorporation or by-laws. Membership in non-stock corporation, and all rights arising therefrom, are nontransferable. Termination of membership shall extinguish all rights of member in corporation or in its property.

Unless otherwise provided in articles of incorporation or by-laws, board of trustees, which may be more than 15, shall as soon as organized, so classify themselves that term of office of 1/3 of their number shall expire every year; and subsequent elections of trustees comprising 1/3 of board of trustees shall be held annually and trustees so elected shall have term of three years. Trustees thereafter elected to fill vacancies occurring before expiration of particular term shall hold office only for unexpired period. Regular or special meetings may be held at any place even outside place where principal office of corporation is located provided that proper notice is sent to all members and that place of meeting shall be within Philippines.

Close corporation is corporation whose articles of incorporation provide that all of its issued stock shall: (1) Be held by not more than 20 persons, (2) be subject to restrictions on their transfers, and (3) not be listed in any stock exchange or make any public offering. Any corporation may be incorporated as close corporation, except mining or oil companies, stock exchanges, banks, insurance companies, public utilities, educational institutions and corporations declared to be vested with public interest.

Articles of incorporation may provide for: (1) Classification of shares or rights and qualifications for owning same and restrictions on their transfers; (2) classification of directors; and (3) for greater quorum or voting requirements in meetings of stockholders or directors. Also, it may provide that business of corporation shall be managed by stockholders of corporation rather than by board of directors and that all officers or employees shall be elected or appointed by stockholders instead of by board of directors. Restrictions on right to transfer shares must appear in articles of incorporation and in by-laws as well as in certificate of stock.

Pre-emptive right of stockholders shall extend to all stock to be issued, including reissuance of treasury shares, whether for money or for property or personal services, or in payment of corporate debts.

If stockholders or directors are so divided respecting management of corporation's business that votes required for any corporate action cannot be obtained, Securities and Exchange Commission, upon written petition by any stockholder, shall have power to arbitrate dispute. In exercise of such power, Securities and Exchange Commission shall have authority to make such order as it deems appropriate, including order: (1) Cancelling or altering any provision contained in articles of incorporation, by-laws, or any stockholders' agreement; (2) cancelling or enjoining resolution or other act of corporation or its board of directors, stockholders, or officers; (3) directing or prohibiting any act of corporation or its board of directors, stockholders, officers, or other persons party to action; (4) requiring purchase at their fair value of shares of any stockholder, either by corporation or by other stockholders; (5) appointing provisional director; (6) dissolving corporation; or (7) granting such other relief as circumstances may warrant.

Any stockholder may compel said corporation to purchase his shares at their fair value, which shall not be less than their par or issued value, when corporation has sufficient assets to cover its debts and liabilities exclusive of capital stock. Any stockholder may, by written petition to Securities and Exchange Commission, compel dissolution of such corporation whenever any of acts of directors, officers or those in control of corporation is illegal, or fraudulent, or dishonest, or oppressive or unfairly prejudicial to corporation or any other stockholder, or whenever corporate assets are being misapplied or wasted.

Dissolution.

Corporation may be dissolved voluntarily and involuntarily. In case voluntary dissolution does not prejudice rights of creditors having claims against corporation, dissolution may be effected by majority vote of board of directors and by resolution adopted by affirmative vote of stockholders owning at least 2/3 of outstanding capital stock or of at least 2/3 of members. Copy of resolution authorizing dissolution shall be certified by majority of board of directors and countersigned by secretary of corporation. Securities and Exchange Commission shall thereupon issue certificate of dissolution. Where dissolution of corporation prejudices rights of creditors, petition for dissolution of corporation shall be filed with Securities and Exchange Commission.

In involuntary dissolution, Securities and Exchange Commission also has jurisdiction upon filing of verified complaint and after proper notice and hearing on grounds provided by existing laws, rules and regulations.

Franchise Tax.

There is no franchise tax on private corporations, but corporations which are granted special franchises by the Legislature must pay a franchise tax in accordance with the terms of the franchise. (Act No. 2711, §1508).

Special Classes of Corporations.

Educational corporations and religious corporations are governed by special laws.

Foreign Corporations.

No foreign corporation formed, organized or existing under any laws other than those of Philippines and whose laws allow Filipino corporations to do business in their own countries or states is permitted to transact business in Philippines until after it has obtained license to transact business in Philippines in accordance with Corporation Code and certificate of authority from appropriate government agency. Application for license to do business in Philippines must show: (1) Date and term of incorporation; (2) address of principal office of corporation in country or state of incorporation; (3) name and address of its resident agent authorized to accept summons and process in all legal proceedings; (4) place in Philippines where corporation intends to operate; (5) specific purpose or purposes of corporation which it intends to pursue in transaction of its business in Philippines; (6) names and addresses of present directors and officers of corporation; (7) statement of authorized capital stock and aggregate number of shares which corporation has authority to issue; (8) statement of outstanding capital stock and aggregate number of shares which corporation has issued; (9) statement of amount actually paid in; (10) such additional information necessary to enable Securities and Exchange Commission to determine whether such corporation is entitled to license to transact business in Philippines; (11) reciprocity certificate; (12) securities satisfactory to Securities and Exchange Commission to protect present and future creditors of corporation; and (13) agreement with Securities and Exchange Commission that service of summons or other legal process may be made upon it if foreign corporation shall cease to do business in Philippines or shall be without any resident agent.

Foreign banking, financial and insurance corporations shall, in addition to above requirements, comply with provisions of existing laws applicable to them. In case of all other foreign corporations, no application for license to transact business in Philippines shall be accepted by Securities and Exchange Commission without previous authority from appropriate government agency, whenever required by law.

No foreign corporation doing business in Philippines without license shall be permitted to maintain any action to court or administrative agency in Philippines but such corporation may be sued before Philippine courts or administrative tribunals on valid cause of action recognized under Philippine laws.

Without prejudice to other grounds provided by special laws, license of foreign corporation may be revoked or suspended by Securities and Exchange Commission on any of following grounds: (1) Failure to file its annual report or pay any fees; (2) failure to appoint and maintain resident agent in Philippines; (3) failure, after change of its resident agent or of his address, to submit to Securities and Exchange Commission statement of such change; (4) failure to submit to Securities and Exchange Commission authenticated copy of any amendment to articles of incorporation or by-laws or any articles of merger or consolidation within time prescribed; (5) misrepresentation of any material matter in any application, report, or other document submitted by such corporation; (6) failure to pay any and all taxes, imposts, assessments or penalties lawfully due to Philippine government; (7) transacting business in Philippines outside of purpose or purposes for which such corporation is authorized under its license; (8) transacting business in Philippines as agent of or acting for and in behalf of any corporation or entity not duly licensed to do business in Philippines; and (9) any other ground as would render it unfit to transact business in Philippines.

See also category 4 Citizenship, topic 4.01 Aliens, subhead Corporations Owned or Controlled by Aliens; and category 14 Foreign Trade and Commerce, topic Foreign Investments and Incentives.

2.04 FOREIGN CORPORATIONS:

See topic 2.03 Corporations.

2.05 JOINT STOCK COMPANIES:

No legislation.

2.06 LIMITED PARTNERSHIP:

See topic 2.07 Partnerships.

2.07 PARTNERSHIPS:

Under Civil Code which repeals provisions of Code of Commerce on partnership, a partnership may be constituted by two or more persons in any form, except when immovable property or real rights are contributed thereto, in which case a public instrument is necessary. Every contract of partnership having a capital of 3,000 pesos or more, in money or property, must appear in a public instrument, which must be recorded with Securities and Exchange Commission. Failure to record instrument does not affect liability of partnership and members thereof to third persons.

The partnership has a juridical personality separate and distinct from that of the partners, even though the contract of partnership may not have been recorded.

A contract of partnership is void, whenever immovable property is contributed thereto, if an inventory of said property is not made, signed by the parties, and attached to the contract of partnership.

Secret Partnerships.

Associations and societies, whose articles are kept secret among the members, and wherein any one of the members may contract in his name with third persons, have no juridical personality, and are governed by the provisions of law relating to co-ownership.

Limited Partnership.

This is formed by two or more persons under the provisions of the Civil Code, having as members one or more general partners and one or more limited partners. The limited partners as such are not bound by the obligations of the partnership. Two or more persons desiring to form a partnership are required to sign and swear to a certificate, which must state, among other things, the name of the partnership, adding thereto the word “Limited”; the character of the business; the location of the principal place of business; the name and place of residence of each member, general and limited partners being respectively designated; the term for which the partnership is to exist; the amount of cash and description of property contributed by each limited partner; and the extent of his participation in the profit. The certificate is required to be filed for record with Securities and Exchange Commission.

Dissolution and Winding Up.

On dissolution the partnership is not terminated, but continues until the winding up of partnership business is completed. The grounds for dissolution of a partnership are enumerated in the law, but on application by or for a partner the court can decree a dissolution under certain specified conditions. Dissolution terminates all authority of any partner to act for the partnership, except so far as may be necessary to wind up partnership affairs or to complete transactions begun, but not then finished.

3 BUSINESS REGULATION AND COMMERCE

3.01 BANKS AND BANKING:

Bangko Sentral ng Pilipinas is established as independent central monetary authority. It shall provide policy direction in areas of money, banking and credit. It shall have supervision over operations of banks and exercise regulatory powers over operations of finance companies and nonbank financial institutions performing quasi-banking functions. (R.A. 7653).

The General Banking Law of 2000 (R.A. 337, am'd by P.D. 71; R.A. 8791) governs commercial banks, savings banks, mortgage banks, development banks, rural banks, stock savings and loan associations, and branches and agencies in Philippines of foreign banks.

Foreign banks may now operate in Philippine banking system through any one of following modes of entry: (1) by acquiring, purchasing or owning up to 60% of voting stock of existing bank; (2) by investing up to 60% of voting stock of new banking subsidiary incorporated under Philippine laws; or, (3) by establishing branches with full banking authorities. Foreign bank or Philippine corporation may own up to 40% of voting stock of only one domestic bank or banking subsidiary.

Only those among top 150 foreign banks in the world or top five banks in their country of origin as of date of application shall be allowed entry. However, Monetary Board shall adopt measures to: (1) ensure that at all times, control of 70% of resources or assets of entire banking system is held by domestic banks which are at least majority owned by Filipinos; (2) prevent dominant market position by one bank or concentration of economic power in one or more financial institutions with related interests; and (3) secure listing of shares of stocks in Philippine Stock Exchange of banking corporations established under first two modes of entry of foreign banks.

Non-Filipino citizens may become members of Board of Directors of bank to extent of foreign participation in equity of said bank.

Foreign banks authorized to operate under any of three modes of entry shall perform same functions, enjoy same privileges, and be subject to same limitations imposed upon Philippine bank of same category.

No foreign bank or banking corporation formed, organized, or existing under laws other than those of Philippines, can be permitted to transact business or maintain by itself or assign any suit for recovery of any debt, claim or demand whatsoever, until after it shall have obtained a license for purpose from Securities and Exchange Commission.

Residents and citizens of Philippines who are creditors of a branch or agency in Philippines of foreign bank have preferential rights to assets of such branch or agency.

No bank or banking institution shall enter, directly or indirectly, into any contract of guaranty or shall guarantee interest or principal of any obligation of any person, copartnership, association, corporation or other entity. However, this shall not apply to following: (a) Borrowing of money by banking institutions through rediscounting of receivables; (b) acceptance of drafts or bills of exchange; (c) certification of checks; (d) transactions involving release of documents attached to items received for collection; (e) letter of credit transactions, including stand-by arrangements; (f) repurchase agreements; (g) shipside bonds; (h) ordinary guarantees or indorsements in favor of foreign creditors where principal obligation involves loans and credits extended directly by foreign firms or persons to domestic borrowers for capital investment purposes; and (i) other transactions which Monetary Board may, by regulation, define as not covered by prohibition.

No director or officer of any banking institution shall, directly or indirectly, for himself or as representative of others, borrow any of deposits of funds of such bank, or be a guarantor, indorser, or surety for loans from such bank to others, or in any manner be an obligor for money borrowed from bank, except with written approval of majority of directors of bank, excluding director concerned. Monetary Board may regulate amount of credit accommodation that may be extended by banking institutions, to their directors, officers or stockholders.

Minor of seven years, able to read and write, with sufficient discretion, and not otherwise disqualified by any other incapacity, is authorized to deposit with and withdraw from banks without assistance of his parents and guardians. (P.D. 734).

P.D. 1034 authorizes establishment of offshore banking system in Philippines. Offshore banking refers to conduct of banking transactions in foreign currencies involving receipt of funds from external sources and utilization of such funds. Qualified to operate offshore banking units are banks organized under any law other than those of Philippines, their branches or subsidiaries. Local branches of foreign banks authorized to accept foreign currency deposits under R.A. 6426 may opt to apply for authority to operate offshore banking unit provided that upon receipt of corresponding certificate of authority to operate as offshore banking unit, license to transact business under R.A. 6426 shall be deemed automatically withdrawn. In issuing certificate of authority, following shall be taken into consideration: applicant's liquidity and solvency position; net worth and resources; management; international banking expertise; contribution to Philippine economy; and other factors such as participation in equity of local commercial banks and appropriate geographic representation. Bangko Sentral ng Pilipinas is authorized to collect fee of not less than US$20,000 upon issuing certificate of authority to operate and annually thereafter on anniversary date of such certificate.

Applicants shall submit to Bangko Sentral sworn undertaking of its head office or parent or holding company, duly supported by resolution of its board of directors, that, among others: (1) It will, on demand, provide necessary specified currencies to cover liquidity needs that may arise; (2) operations of its offshore banking unit shall be managed soundly and with prudence; (3) it will train and educate Filipinos in international banking and foreign exchange trading to reduce number of expatriates; (4) it will maintain in its offshore banking unit net office funds in minimum amount of US$1,000,000; and (5) it will start operations within 180 days from receipt of its certificate of authority. Operation and activities of offshore banking units shall be under supervision of Bangko Sentral.

Philippine Deposit Insurance (R.A. No. 3519)—Banks in Philippines are mandated by R.A. 3519 to insure their deposits with Philippine Deposit Insurance Corporation (PDIC). This is in line with state's policy of strengthening and maintaining faith and confidence in country's banking system from illegal schemes and machinations.

Under law, deposit which refers to any ``*unpaid balance of money or its equivalent received by a bank in the usual course of business and for which it has given or is obliged to give credit to a commercial checking, savings, time or thrift account, or issued in accordance with Bangko Sentral rules and regulations and other applicable laws, together with such other obligations of a bank, which, consistent with banking usage and practices…"* is insured in amount of deposit net of any obligation of depositor to bank as of date of closure but not to exceed Php500,000. In determining amount owing to depositor, all deposits beneficially owned, whether in his name or not, shall be included. Joint accounts, regardless of conjunction ``and'' or ``and/or'', shall be treated separately from individually-owned accounts.

Joint accounts are similarly subject to Php500,000 ceiling, to be divided into as many equal shares as there are individuals, juridical persons or entities in account, unless different sharing is stipulated in document of deposit. Aggregate of interests of all co-owners of account held by juridical person jointly with natural person(s) over several joint accounts whether owned by same combination of individuals, juridical persons or entities shall likewise be subject to maximum insured deposit. However, if account is jointly held between juridical person or entity and one or more natural persons, insured amount shall be presumed to belong entirely to juridical person or entity.

PDIC, however, will not pay deposit insurance for following accounts or transactions despite being defined, recorded, documented or booked as deposit: (1) Investment products; (2) fictitious, fraudulent or unfunded deposit accounts; (3) deposit accounts or transactions that are from unsafe and unsound banking practice/s as determined by PDIC in consultation with Bangko Sentral ng Pilipinas; and (4) deposits determined to be proceeds of unlawful activity as defined under R.A. No. 9160 (Anti-Money Laundering Act).

Anti-Money Laundering Law of 2001 (R.A. 9160).

It is policy of State to protect integrity and confidentiality of bank accounts and to ensure that Philippines shall not be used as money laundering site for proceeds of any unlawful activity.

Covered transaction is transaction in cash or other equivalent monetary instrument involving total amount in excess of P500,000 within one banking day. (Am'd by R.A. 9194).

Suspicious transactions are transactions with covered institutions, regardless of amounts involved, where any of following circumstances exist: (a) there is no underlying legal or trade obligation, purpose or economic justification; (b) client is not properly identified; (c) amount involved is not commensurate with business or financial capacity of client; (d) taking into account all known circumstances, it may be perceived that client's transaction is structured in order to avoid being subject of reporting requirements under Act; (e) any circumstances relating to transaction which is observed to deviate from profile of client and/or client's past transactions with covered institution; (f) any transaction that is similar or analogous to any of foregoing. (R.A.

9194).

Money Laundering Offense.

Money laundering is crime whereby proceeds of unknown activity are transacted, thereby making them appear to have originated from legitimate sources. It is committed by: (a) Any person knowing that any monetary instrument or property represents, involves, or relates to, proceeds of any unlawful activity, transacts or attempts to transact said monetary instrument or property; (b) any person knowing that any monetary instrument or property involves proceeds of any unlawful activity, performs or fails to perform any act as result of which he facilitates offense of money laundering referred to in clause (a) and (c) any person knowing that any monetary instrument or property is required under this Act to be disclosed and filed with Anti-Money Laundering Council (AMLC), fails to do so.

Prevention of Money Laundering: Customer Identification Requirements and Record Keeping.

(a) Customer Identification: Covered institution shall establish and record true identity of its clients based on official documents. Provisions of existing laws to contrary notwithstanding, anonymous accounts, accounts under fictitious names, and all other similar accounts shall be absolutely prohibited. Peso and foreign currency non-checking numbered accounts shall be allowed; (b) Record Keeping: All records of all transactions of covered institutions shall be maintained and safely stored for five years from dates of transactions; (c) Reporting of Covered Transactions: Covered institutions shall report to AMLC all covered transactions within five working days from occurrence thereof, unless Supervising Authority concerned prescribes longer period not exceeding ten working days.

Should transaction be determined to be both covered transaction and suspicious transaction, covered institution shall be required to report same as suspicious transaction.

Penal Provisions.

(a) Money Laundering: Imprisonment ranging from six months to 14 years and fine ranging from P100,000 to twice value of monetary instrument or property involved in offense, depending on act committed. (b) Failure to Keep Records: Imprisonment from six months to one year or fine of not less than P100,000 but not more than P500,000, or both. (c) Malicious Reporting: Imprisonment from six months to four years and fine not less than P100,000 but not more than P500,000 at discretion of court. (d) Breach of Confidentiality: Imprisonment ranging from three to eight years and fine of not less than P500,000 but not more than P1,000,000.

Credit Information System (R.A. 9510)—Comprehensive and centralized credit information system was created for collection and dissemination of fair and accurate information relevant to, or arising from, credit and credit-related activities of all entities participating in financial system.

In system, basic credit data of borrowers or any natural, juridical persons who avail of credit facility, are consolidated into standardized information that are uploaded into information registry or central repository. Registry is available and accessible to borrowers, participating financial institutions, and other entities allowed by law to access registry. Central Credit Information Corporation was also created who shall receive and consolidate basic credit data and to act as central registry or repository of credit information.

Information consolidated and registered in repository shall be held under strict confidentiality and shall be used only to establish borrower's credit worthiness.

3.02 BILLS AND NOTES:

Uniform Negotiable Instruments Act adopted.

Judgment Notes.

A provision in a note authorizing any attorney to appear and confess judgment against the maker in case of nonpayment at maturity, is invalid. (43 Phil. 444, 446).

3.03 COMMERCIAL REGISTER:

Every owner of an establishment shall register in Department of Trade and Industry any name used in connection with his business other than his true name.

Registration fee is P300 for each name registered, renewable every five years; such renewal to be made during first three months following expiration of five-year period from date of original registration. (Act No. 3883, as am'd by R.A. 863).

It is unlawful for any person to use or sign on any written or printed receipt, including receipt for tax on business, or on any written or printed contract not verified by a notary public, or on any written or printed evidence of any agreement or business transactions, any name used in connection with his business other than his true name, or keep conspicuously exhibited in plain view in or at place where his business is conducted, if he is engaged in a business, any sign announcing firm name or business name or style, without first registering such other name, or such firm name, or business name, or style, in Department of Trade and Industry together with his true name and that of any other person having joint or common interest with him in such contract, agreement, business transaction, or business. (Act. No. 3883, as am'd by Act No. 4147).

3.04 CONTRACTS:

Contract is a meeting of minds between two persons whereby one binds himself, with respect to the other, to give something or to render some service. (C.C.[n] §1305). In onerous contracts the cause is understood to be, for each contracting party, the prestation or promise of a thing or service by the other; in remuneratory ones, the service or benefit which is remunerated; and in contracts of pure beneficence, the mere liberality of the benefactor. (C.C.[n] §1350). Contracts without cause, or with unlawful cause, produce no effect whatever. The cause is unlawful if it is contrary to law, morals, good customs, public order or public policy. (C.C.[n] §1352).

Excuses for Nonperformance.

Following are excuses for nonperformance of contracts: (1) When contract refers to obligation which consists in the delivery of determinate thing and latter is lost or destroyed without fault of debtor, and before he has concurred in delay; (2) when contract refers to a debt, and latter is condoned or renounced; (3) when contract refers to obligation and latter is merged in the characters of creditor and debtor in one and the same person; (4) when contract is novated; (5) when contract refers to service and latter has become so difficult as to be manifestly beyond contemplation of parties; (6) when object of contract refers to things outside commerce of men; (7) when object of contract refers to intransmissible rights or upon future inheritance except in cases expressly authorized by law; (8) when contract refers to services which are contrary to law, morals, good customs, or public policy; (9) when contract refers to objects which are not possible of determination as to their kind.

Applicable Law.

Law of place of making (lex loci contractus) governs formalities of contract. Both Civil Code and Code of Commerce follow lex loci contractus rule. Civil Code does not contain any conflicts rule respecting essential validity of contracts in general.

Government Contracts.

Construction projects shall generally be undertaken by contract after competitive bidding. However, projects may be undertaken by administration or by negotiated contract only where time is of the essence, or where there is lack of qualified bidders or contractors, or where there is conclusive evidence that greater economy and efficiency would be achieved through this arrangement subject to approval of Secretary of Transportation & Communications, Secretary of Public Works and Highways, or Secretary of Energy as case may be, if project cost is less than P1,000,000 and of President of Philippines, upon recommendation of Secretary, if project cost is P1,000,000 or more. Contract may be awarded to lowest prequalified bidder where bid complies with all terms and conditions in call for bid and is most advantageous to Government. To guarantee faithful performance of contractor, he shall, prior to award, post performance bond. (P.D. 1594).

Bureau of Equipment and other officers and employees of municipal and provincial governments and Philippine Government and of chartered cities, boards, commissions, bureaus, departments, offices, agencies, branches, and bodies of any description, including government-owned companies, authorized to requisition, purchase or contract or make disbursements for articles, materials, and supplies for public use, public buildings, or public works must give preference to materials and supplies produced, made and manufactured in Philippines. (C.A. No. 138, §1). Only unmanufactured articles, materials, or supplies of growth or production of Philippines, and only such manufactured articles, materials, and supplies as have been manufactured in Philippines substantially from articles, materials, or supplies of growth, production or manufacture, as case may be, of Philippines, must be purchased for public use and in case of bidding, subject to following conditions: (a) When lowest foreign bid, including customs duties, does not exceed two pesos, award must be made to lowest domestic bidder, provided his bid is not more than 100% in excess of foreign bid; (b) when lowest foreign bid, including customs duties exceeds two pesos but does not exceed 20 pesos, award must be made to lowest domestic bidder, provided his bid is not more than 50% in excess of the lowest foreign bid; (c) when lowest foreign bid, including customs duties, exceeds 20 pesos, but does not exceed 200 pesos, award must be made to lowest domestic bidder, provided his bid is not more than 25% in excess of lowest foreign bid; (d) when lowest foreign bid, including customs duties, exceeds 200 pesos but does not exceed 2,000 pesos, award must be made to lowest domestic bidder, provided his bid is not more than 20% in excess of lowest foreign bid; (e) when lowest foreign bid, including customs duties exceed 2,000 pesos, award must be made to lowest domestic bidder, provided his bid is not more than 15% in excess of lowest foreign bid. (C.A. No. 138, §3).

Whenever several bidders participate in the bidding for supplying articles, materials, and equipment for any of the dependencies mentioned in Sec. 1 of this Act for public use, public buildings, or public works, the award must be made to the domestic entity making the lowest bid, provided it is not more than 15% in excess of the lowest bid made by a bidder other than a domestic entity, as it is defined in Act. (C.A. No. 138; §4).

In construction or repair work undertaken by government, whether done directly or through contract awards, Philippine made materials and products, whenever available, practicable, and usable, and will serve the purpose as equally as foreign made products or materials, must be used in said construction or repair work, upon proper certification of the availability, practicability, usability and durability of said materials or products by Director of Bureau of Public Works and or his assistants. (R.A. 912).

Contract for supply to, or procurement by, any government-owned or controlled corporation, company, agency or municipal corporation of materials, equipment, goods and commodities shall not be awarded to any contractor or bidder, who is not a citizen of Philippines or a corporation or association at least 60% of capital of which is owned by Filipino citizens, except citizens, corporations or associations of a country whose laws or regulations grant similar rights or privileges to citizens of Philippines. In latter case native products and domestic entities shall be given preference in purchase of articles for Government. (R.A. 5183).

To upgrade government infrastructure projects, government devised schemes whereby private sector is encouraged to initiate and undertake such projects. It could be any of following: (1) “Build, Operate and Transfer scheme” whereby project proponent undertakes construction and financing of given infrastructure project and is allowed to operate said facility over fixed term but not over 50 years to recover its expenses and to receive returns on its investment and thereafter contractor transfers facility to government agency or local government unit; (2) “Build and Transfer scheme” whereby project proponent undertakes financing and construction of infrastructure project and after completion turns it over to government agency or local government unit concerned which shall pay proponent its total investment plus reasonable rate of return; (3) “Build-Own-and-Operate” whereby project proponent is authorized to finance, construct, own, operate and maintain infrastructure project from which proponent can recover its total investment plus reasonable return thereof; (4) “Build-Lease-and-Transfer” whereby project proponent is authorized to finance and construct infrastructure project and upon its completion turns it over to government agency or local government unit on lease arrangement for fixed term and after which ownership is automatically transferred to government agency or local government unit; (5) “Build-Transfer and Operate” whereby contract on infrastructure project is given by public sector to private entity which shall build facility on turn-key basis and upon its completion, title to said project is transferred to implementing agency but private entity operates facility; (6) “Contract-Add-and Operate” whereby project proponent adds to existing infrastructure facility; (7) “Develop-Operate-and Transfer” whereby project proponent is given right to develop property adjoining infrastructure project which is being undertaken by project proponent; (8) “Rehabilitate-Operate-and-Transfer” scheme whereby existing facility is turned over to private sector to operate and maintain same for fixed period; (9) “Rehabilitate-Own-and Operate” scheme whereby existing facility is turned over to private sector to refurbish and operate with no time limitation. (R.A. 6957 as am'd by R.A. 7718).

Distributorships, Dealerships And Franchises.

Franchises are granted by government to individuals or groups of individuals establishing corporation for operation of public utility. Constitution expressly vests upon Congress of Philippines power to grant franchise, certificate or any other form of authorization for operation of public utility which in no case shall be allowed longer than 50 years. (§11, Art. XII, 1987 Constitution).

Generally, contracts of distributorships, dealerships, and franchises involving domestic company are governed by laws on obligations and contracts instituted in Civil Code. Contracts of distributorship are governed by Civil Code provision on sales. Generally, contracting parties may establish such clauses, stipulations, terms and conditions they may deem convenient provided they are not contrary to law, morals, good customs, public order or public policy. Foreign companies can engage in wholesale activities but not retail because of Retail Trade Nationalization Law (R.A. 1180 repealed by R.A. 8762) which restricts retail activities to Filipinos or Philippine corporations or partnerships wholly owned and controlled by Filipinos.

Technology transfer agreements include such contracts that involved or entered into, by and between domestic company and foreign company and/or foreign-owned company, in addition to limitations set by law, such agreement is subject to rules and regulations on technology transfer agreements issued by Bureau of Patents, Trademarks and Technology Transfer.

All technology transfer agreements must be submitted for registration at Bureau of Patents, Trademarks and Technology Transfer office but following restrictive clauses in any technology transfer agreement are prohibited: (1) Those which restrict directly or indirectly export of licensed products under technology transfer arrangement; (2) those which restrict use of technology supplied after expiry of technology transfer arrangement; (3) those which restrict manufacture of similar or competing products after expiry of technology transfer arrangement; (4)

those which require payments for patents and other industrial property rights after their expiration, termination or invalidation; (5) those which provide free of charge that major improvements made by technology recipient shall be communicated to technology supplier; (6) those which require that technology recipient shall not contest validity of any of patents of technology supplier; (7) those which restrict technology recipient in non-exclusive technology transfer arrangement from obtaining patented or unpatented technology from other technology suppliers with regard to sale or manufacture of competing products; (8) those which require technology recipient to purchase its raw materials, components and equipment exclusively, or fixed percentage of requirement, from technology supplier or person designated by him; (9) those which restrict research and development activities of technology recipient designated to absorb and adapt transferred technology to local conditions or to initiate R & D programs in connection with new products, processes or equipment; (10) those which prevent technology recipient from adapting imported technology to local conditions, or introducing innovations to it, as long as it does not impair quality standards prescribed by technology supplier; (11) those which require technology recipient to keep part or all of information received under technology transfer arrangement confidential beyond reasonable period; and (12) those which exempt technology supplier from liability for nonfulfillment of his responsibilities under technology transfer arrangement and/or liability arising from third party suits brought about by use of licensed product or licensed technology.

Technology transfer agreement has fixed term of ten years with no automatic renewal and royalty of 5% of net sales is allowed. Royalties in excess of 5% may be allowed upon prior approval of Bureau of Patents, Trademarks and Technology Transfer.

3.05 FRAUDS, STATUTE OF:

The following agreements cannot be proved except by writing, or by some note or memorandum thereof, subscribed by the party sought to be charged, or by his agent, or by secondary evidence of its contents: (a) an agreement that by its terms is not to be performed within a year from the making thereof; (b) a promise to answer for the debt, default or miscarriage of another; (c) an agreement made upon the consideration of marriage, other than a mutual promise to marry; (d) an agreement for the sale of goods, chattels, or things in action, at a price not less than 500 pesos, unless the buyer accepts and receives part of such goods and chattels; (e) an agreement for the leasing for a longer period than one year, or for the sale, of real property or of an interest therein; (f) a representation as to the credit of a third person.

Philippine Year 2000 Disclosure and Readiness Act (R.A. 8747) is aimed at providing comprehensive program to deal with challenges posed by millennium bug, protect public from effects of Y2K problem and attain Y2K readiness to uphold national interest and safeguard state of well-being of Philippines.

All sectors providing to utilities, telecommunications, transportation, finance, health care, manufacturing and government services, or other sectors and entities as may be determined by National Security Council are required to disclose Year 2000 Statement and contingency plans regarding Y2K problem.

Enforcement.

Presidential Commission on Year 2000 Compliance (EO 14) shall be assisted by National Security Council, Department of Science and Technology, National Computer Center, National Disaster Coordinating Council, and, Technology Livelihood Resource Center.

Penalties.

Failure to disclose Year 2000 Statement by sectors required will result in presumption that their systems and products are not Y2K ready. All manufacturers, distributors, producers, importers, vendors, dealers, and other entities concerned, shall be liable for damages, malfunctioning or defects of their systems and products if not Y2K ready.

3.06 INFORMATION TECHNOLOGY, INTERNET AND NEW MEDIA:

E-Commerce Law.

Legislation was recently passed governing transactions carried on over cyberspace. Known as “Electronic Commerce Act”, law covers all transactions whether commercial or noncommercial carried on electronically and provides for modes of authenticating electronic data messages or electronic documents and of safeguarding their reliability. Under law legal recognition is accorded electronic documents which shall have same legal effect, validity or enforceability as any other document or legal writing. Where law requires document to be in writing, or that document be presented or retained in its original form, requirement is met by electronic document provided its integrity and reliability is assured and document can be authenticated. Same standard is applied where law requires information to be presented or retained in its original form and information is contained in electronic data message or in electronic document. For evidentiary purposes, electronic documents become functional equivalent of written document provided that formalities required for validity of document under existing laws is observed. Thus, law provides for legal recognition of electronic signatures which shall be equivalent of person's signature on written document. §8 of law provides that “An electronic signature on the electronic document shall be equivalent to the signature of a person on a written document if the signature is an electronic signature and proved by showing that a prescribed procedure, not alterable by the parties interested in the electronic document, existed under which - a.) Method is used to identify the party sought to be bound and to indicate said party's access to the electronic document necessary for his consent or approval through the electronic signature; b.) Said method is reliable and appropriate for the purpose for which the electronic document was generated or communicated, in the light of all circumstances, including any relevant agreement; c.) It is necessary for the party sought to be bound, in order to proceed further with the transaction, to have executed or provided the electronic signature; and d.) The other party is authorized and enabled to verify the electronic signature and to make the decision with the transaction authenticated by the same.”

Law also provides for eventual use of electronic notarization systems. Ways of authenticating electronic signature are as follows: (a) Electronic signature shall be authenticated by proof that letter, character, number or other symbol in electronic form representing persons named in and attached to or logically associated with electronic data message, electronic document, or that appropriate methodology or security procedures, when applicable, were employed or adopted by person and executed or adopted by such person, with intention of authenticating or approving electronic data message or electronic document; (b) electronic data message or electronic document shall be authenticated by proof that appropriate security procedure, when applicable, was adopted and employed for purpose of verifying originator of electronic data message or electronic document, or detecting error or alteration in communication, content or storage of electronic document or electronic data message from specific point, which, using algorithm or codes, identifying words or numbers, encryptions, answers back or acknowledgment procedures, or similar security devices. Person seeking to introduce electronic data message or electronic document in any legal proceeding has burden of proving its authenticity by evidence capable of supporting finding that electronic data message or electronic document is what person claims it to be. This is established (a) By evidence that at all material times information and communication system or other similar device was operating in manner that did not affect integrity of electronic data message or electronic document, and there are no other reasonable grounds to doubt integrity of information and communication system; (b) by showing that electronic data message or electronic document was recorded or stored by party to proceedings who is adverse in interest to party using it; or (c) by showing that electronic data message or electronic document was recorded or stored in usual and ordinary course of business by person who is not party to proceedings and who did not act under control of party using record.

Electronic Commerce Act does not modify existing laws except that rules on admissibility of evidence, best evidence, and rules on perfection of contracts and transport and carriage of goods must now take within its purview legal recognition given to electronic data messages and electronic documents. Electronic Commerce Act provides that in applying rules of evidence in any legal proceeding, electronic data messages or electronic documents shall not be denied admissibility on sole ground that it is in electronic form or not in standard written form. Provided standards given under Act are met, electronic data messages or electronic documents will satisfy rule on best evidence. Contract may also now be perfected using electronic data messages or electronic documents and no contract or transaction shall be denied validity or enforceability on sole ground that contract or transaction is in electronic form. Law extends admissibility and validity of electronic data messages and electronic documents to transactions relating to transport and carriage of goods.

Penalties.

Law punishes following acts and prescribes following penalties: (a) Hacking or cracking which refers to unauthorized access into or interference in computer system/server or information and communication system; or any access in order to corrupt, alter, steal, or destroy using computer or other similar information and communication devices, without knowledge and consent of owner of computer or information and communications system, including introduction of computer viruses and like, resulting in corruption, destruction, alteration, theft or loss of electronic data messages or electronic document shall be punished by minimum fine of P100,000 and maximum commensurate to damage incurred and mandatory imprisonment of six months to three years. (b) Piracy or unauthorized copying, reproduction, dissemination, distribution, importation, use, removal, alteration, substitution, modification, storage, uploading, downloading, communication, making available to public, or broadcasting of protected material, electronic signature or copyrighted works including legally protected sound recordings or phonograms or information material or protected works, through use of telecommunication networks, such as, but not limited to, internet, in manner that infringes intellectual property rights shall be punished by minimum fine of P100,000 and maximum commensurate to damage incurred and mandatory imprisonment of six months to three years. (c) Violations of Consumer Act or Republic Act No. 7394 and other relevant or pertinent laws through transactions covered by or using electronic data messages or electronic documents, shall be penalized with same penalties as provided in those laws. (d) Other violations of provisions of this Act, shall be penalized with maximum penalty of P1,000,000 or six years imprisonment.

The Rules on Electronic Evidence (A.M. No. 01-7-01-SC; July 17, 2001) shall apply whenever electronic document or electronic data message is involved in any civil action and proceeding as well as quasi-judicial and administrative cases.

Electronic document shall be regarded as equivalent of original document under Best Evidence Rule if it is printout readable by sight or other means and shown to reflect data accurately.

Manner of authentication of electronic documents: (a) by evidence that it had been digitally signed by person purported to have signed same; (b) by evidence that other appropriate security procedures or devices as may be authorized by Supreme Court or by law for authentication of electronic documents were applied to document; or (c) by other evidence showing its integrity and reliability to satisfaction of judge.

Electronic signature or digital signature authenticated in manner prescribed is admissible in evidence as functional equivalent of signature of person on written document.

Authentication of Electronic Signatures.

Electronic signature may be authenticated in any of following manner: (a) By evidence that method or process was utilized to establish digital signature and verify same; (b) by any other means provided by law; or (c) by any other means satisfactory to judge as establishing genuineness of electronic signature.

Factors for Assessing Evidentiary Weight.

In assessing evidentiary weight of electronic document, following factors may be considered: (a) reliability of manner or method in which it was generated, stored or communicated, including but not limited to input and output procedures, controls, tests, and checks for accuracy and reliability of electronic data message or document, in light of all circumstances as well as any relevant agreement; (b) reliability of manner in which its originator was identified; (c) integrity of information and communication system in which it is recorded or stored, including but not limited to hardware and computer programs or software used as well as programming errors; (d) familiarity of witness or person who made entry with communication and information system; (e) nature and quality of information which went into communication information system upon which electronic data message or electronic document was based; or (f) other factors which court may consider as affecting accuracy or integrity of electronic document or electronic data message.

Audio, Video and Similar Evidence.

Audio, photographic and video evidence of events, acts or transactions shall be admissible provided it shall be shown, presented or displayed to court and shall be identified, explained or authenticated by person who made recording or by some other person competent to testify on accuracy thereof.

3.07 INTEREST:

Effective Jan. 1, 1983, Monetary Board of Central Bank suspended ceiling of interest rates that may be charged or collected on loans or forbearance of money, goods or credit. Rate of interest for loan or forbearance of money, goods or credits and rate allowed in judgments, in absence of contract as to such rate of interest, shall be 12% per annum. Rate of interest including commissions, premiums, fees and other charges on any loan or forbearance of money extended by pawnshop, pawnbroker or pawnbroker's agent, regardless of maturity, shall not be subject to any ceiling prescribed under Usury Law. (Central Bank Cir. 905).

Compound interest cannot be allowed except by agreement. Interest cannot be required to be paid in advance for more than one year.

Receipt of principal by creditor, without reservation with respect to interest, gives rise to presumption that interest has been paid. When judgment of court below is affirmed, legal interest is added to original judgment from date of former judgment until date of final judgment.

Usury.

Covenants and stipulations for higher rates of interest than are allowed by law are void, and usurers are subject to criminal prosecution.

3.08 LICENSES, BUSINESS AND PROFESSIONAL:

See category 2 Business Organizations, topic 2.03 Corporations, subhead Foreign Corporations; see also category 4 Citizenship, topic Aliens, subhead Corporations Owned or Controlled by Aliens.

3.09 MONOPOLIES, RESTRAINT OF TRADE AND COMPETITION:

Revised Penal Code, Art. 186 (am'd R.A. 1956), makes it unlawful for any person: (a) to enter into any contract or agreement or take part in any conspiracy or combination in the form of a trust or otherwise, in restraint of trade or commerce or to prevent by artificial means free competition in the market; (b) to monopolize any merchandise or object of trade or commerce, or combine with any other person or persons to monopolize said merchandise or object in order to alter the prices thereof by spreading false rumors or making use of any other artifice to restrain free competition in the market; (c) being a manufacturer, producer or processor of any merchandise or object of commerce or an importer of any merchandise or object of commerce from any foreign country, either as principal or agent, wholesaler or retailer, to combine in any manner with other persons for the purpose of making transactions prejudicial to lawful commerce, or of increasing the market price in any part of the Philippines of such merchandise manufactured in or imported into the Philippines, or of any article in the manufacture of which such manufactured or imported merchandise is used. Penalty is higher if offense affects any food substance, motor fuel or lubricants, or other articles of prime necessity.

Any property possessed under any contract or by any combination mentioned in the preceding paragraphs, and being the subject thereof, shall be forfeited to the Government of the Philippine Islands. If the offender is a corporation or association, the president and each one of the directors or managers of said corporation or associations or its agent or representative in the Philippine Islands, in case of a foreign corporation or association, who shall have knowingly permitted or failed to prevent the commission of such offenses, shall be held liable as principals thereof.

3.10 NEGOTIABLE INSTRUMENTS:

See topic 3.02 Bills and Notes.

3.11 PRICE CONTROL:

Price Coordinating Council consists of Secretary of Trade and Industry as chairman; Secretary of Agriculture; Secretary of Health; Secretary of Environment and Natural Resources; Secretary of Local Government; Secretary of Transportation and Communication; Secretary of Justice; Director General of National Economic and Development Authority; and one representative each from agricultural producer's sector, consumer's sector, trading sector and manufacturer's sector.

Sectoral representative of Price Coordinating Council shall be appointed by President for term of one year. Council shall meet every quarter or when President or Chairman convenes same.

Council shall have following functions: (a) to coordinate productivity distributions and price stabilization programs of government and develop comprehensive strategies to effect stabilization of prices of basic necessities and prime commodities at affordable levels; (b) make report to President and Congress of Philippines on status and progress undertaken by respective department as well as comprehensive strategies developed by Council; (c) advise President on general policy matters for promotion and improvement in productivity, distribution and stabilization of prices; (d) require from its members or any other government agency information necessary for assessing supply, distribution and price situation of any basic necessity or prime commodity; (e) publicize from time to time developments in productivity, supply, distribution and prices of basic necessities and prime commodities; (f) cause immediate dissemination of prevailing price or price ceilings imposed upon basic necessities or prime commodities whenever automatic price control over it is imposed; and (g) recommend to President imposition of price ceilings on basic necessities and prime commodities under certain conditions.

Automatic price control on prices of basic necessities and prime commodities can be imposed and are to last only for no more than 60 days, whenever following circumstances are present: (1) area is declared as disaster area or under state of calamity; (2) area is declared under emergency; (3) writ of habeas corpus is suspended in area; (4) area is placed under

Martial Law; (5) area is declared to be in state of rebellion; and (6) state of war is declared in area. (R.A. 7581).

3.12 RETAIL TRADE LAW:

Retail Trade Liberalization Act of 2000.

(R.A. 1180, repealed by R.A. 8762).

Any act, occupation or calling of habitually selling direct to general public merchandise, commodities or goods for consumption, except if capital of manufacturer, processor or laborer does not exceed P100,000 or if farmer or agriculturist sells products of his own farm, or manufacturer or processor selling products which are manufactured, processed or assembled by them through single outlet, irrespective of capitalization, or hotel-owner or inn-keeper operating restaurant irrespective of amount of capital, provided restaurant is included in, or incidental to, hotel business, shall constitute retail business.

Foreign-owned partnerships, associations and corporations formed and organized under laws of Philippines upon registration with Securities and Exchange Commission and Department of Trade and Industry, or in case of foreign-owned single proprietorships with DTI, may engage or invest in retail trade business, subject to following categories:

Category (A): enterprises with capital of less than US$2,500,000 equivalence in Philippine Pesos, shall be reserved exclusively for Filipino citizens and corporations wholly owned by Filipino citizens.

Category (B): enterprises with minimum capital of US$2,500,000 but less than US$7,500,000 equivalence in Philippine Pesos may be wholly owned by foreigners except for first two years after effectivity of this Act wherein foreign participation shall be limited to not more than 60% of total equity.

Category (C): enterprises with capital of US$7,500,000 or more equivalence in Philippine Pesos may be wholly owned by foreigners provided that in, no case shall investments for establishing store in Categories B and C be less than US$830,000 equivalence in Philippine Pesos.

Category (D): enterprises specializing in high-end or luxury products with capital of US$250,000 equivalence in Philippine Pesos per store may be wholly owned by foreigners.

Qualifications of Foreign Retailers.

(a) Minimum of US$200,000,000 net worth in its parent corporation for categories B and C, and US$50,000,000 net worth in its parent corporation for category D; (b) five retailing branches or franchises in operation anywhere around world unless such retailer has at least one store capitalized at minimum of US$25,000,000; (c) five-year track record in retailing; and (d) only nationals from, or juridical entities formed or incorporated in countries which allow entry of Filipino retailers shall be allowed to engage in retail trade in Philippines.

3.13 SALES:

The subject-matter of the contract must be a determinate thing and licit, and the vendor must have a right to transfer the ownership thereof at the time it is delivered. Things having a potential existence may be the object of the contract of sale. The efficacy of the sale of a mere hope or expectancy is deemed subject to the condition that the thing will come into existence. The sale of a vain hope or expectancy is void.

The goods which form the subject of a contract of sale may be either existing goods or "future goods," namely, goods to be manufactured, raised, or acquired by the seller after the perfection of the contract. Things subject to a resolutory condition may also be the object of the contract of sale. A contract for the delivery at a certain price of an article which the vendor in the ordinary course of his business manufactures or procures for the general market, whether the same is on hand at the time or not, is a contract of sale, but if the goods are to be manufactured specially for the customer and upon his special order, and not for the general market, it is a contract for a piece of work.

Price.

Gross inadequacy of price does not affect a contract of sale, except as it may indicate a defect in the consent, or that the parties really intended a donation or some other act or contract. If the price is simulated, the sale is void, but the act may be shown to have been in reality a donation, or some other act or contract. The fixing of the price can never be left to the discretion of one of the contracting parties. However, if the price fixed by one of the parties is accepted by the other, the sale is perfected.

Transfer of Ownership.

The contract of sale is perfected at the moment there is a meeting of minds upon the thing which is the object of the contract and upon the price. From that moment, the parties may reciprocally demand performance, subject to the provisions of the law governing the form of contracts. The ownership of the thing sold is transferred to the vendee upon the actual or constructive delivery thereof. The parties may stipulate that ownership in the thing shall not pass to the purchaser until he has fully paid the price.

When goods are delivered to the buyer "on sale or return" to give the buyer an option to return the goods instead of paying the price, the ownership passes to the buyer on delivery, but he may revest the ownership in the seller by returning or tendering the goods within the time fixed in the contract, or, if no time has been fixed, within a reasonable time. When goods are delivered to the buyer on approval or on trial or on satisfaction, or other similar terms, the ownership therein passes to the buyer (1) when he signifies his approval or acceptance to the seller or does any other act adopting the transaction, or (2) if he does not signify his approval or acceptance to the seller, but retains the goods without giving notice of rejection, then if a time has been fixed for the return of the goods, on the expiration of such time, and, if no time has been fixed, on the expiration of a reasonable time. What is a reasonable time is a question of fact.

Warranties.

Unless contrary intention appears, there is implied warranty that: (1) Seller has right to sell thing at time when ownership is to pass, and that buyer shall from that time enjoy legal and peaceful possession of thing; (2) thing shall be free from any hidden faults or defects, or any charge or encumbrance not declared or known to buyer. Implied warranty of seller, however, is not applicable to sheriff, auctioneer, mortgagee, pledgee, or other person professing to sell by virtue of authority in fact or law, for sale of thing in which third person has legal or equitable interest. (C.C. Art. 1547).

Risk of Loss.

Unless otherwise agreed, the goods remain at the seller's risk until the ownership therein is transferred to the buyer, but when the ownership therein is transferred to the buyer the goods are at the buyer's risk whether actual delivery has been made or not, except that: (1) Where delivery of the goods has been made to the buyer or to a bailee for the buyer, in pursuance of the contract and the ownership in the goods has been retained by the seller merely to secure performance by the buyer of his obligations under the contract, the goods are at the buyer's risk from the time of such delivery; (2) Where actual delivery has been delayed through the fault of either the buyer or seller the goods are at the risk of the party in fault.

Reservation of Security.

Where there is a contract of sale of specific goods, the seller may, by the terms of the contract, reserve the right of possession or ownership in the goods until certain conditions have been fulfilled. The right of possession or ownership may be thus reserved notwithstanding the delivery of the goods to the buyer or to a carrier or other bailee for the purpose of transmission to the buyer.

Where goods are shipped, and by the bill of lading the goods are deliverable to the seller or his agent, or to the order of the seller or of his agent, the seller thereby reserves the ownership in the goods. But, if except for the form of the bill of lading, the ownership would have passed to the buyer on shipment of the goods, the seller's property in the goods is deemed to be only for the purpose of securing performance by the buyer of his obligations under the contract. Where goods are shipped, and by the bill of lading the goods are deliverable to order of the buyer or of his agent, but possession of the bill of lading is retained by the seller or his agent, the seller thereby reserves a right to the possession of the goods as against the buyer.

Where the seller of goods draws on the buyer for the price and transmits the bill of exchange and bill of lading together to the buyer to secure acceptance or payment of the bill of exchange, the buyer is bound to return the bill of lading if he does not honor the bill of exchange, and if he wrongfully retains the bill of lading he acquires no added right thereby. If, however, the bill of lading provides that the goods are deliverable to the buyer or to the order of the buyer, or is indorsed in blank, or to the buyer by the consignee named therein, one who purchases in good faith, for value, the bill of lading, or goods from the buyer will obtain the ownership in the goods, although the bill of exchange has not been honored, provided that such purchaser has received delivery of the bill of lading indorsed by the consignee named therein, or of the goods, without notice of the facts making the transfer wrongful.

Lien.

Notwithstanding that the ownership of the goods may have passed to the buyer, the unpaid seller of the goods has: (1) a lien on the goods or right to retain them for the price while he is in possession of them; (2) in case of the insolvency of the buyer, a right of stopping the goods in transitu after he has parted with the possession of them; (3) a right of resale with certain limitations; and (4) a right to rescind, also with certain limitations. Where the ownership in the goods has not passed to the buyer, the unpaid seller has, in addition to his other remedies, a right of withholding delivery similar to and coextensive with his rights of lien and stoppage in transitu where the ownership has passed to the buyer. The unpaid seller's right of lien or stoppage in transitu is not affected by any sale, or other disposition of the goods which the buyer may have made, unless the seller has assented thereto.

Installment Sales.

In a contract of sale of personal property the price of which is payable in installments, the vendor may exercise any of the following remedies: (1) exact fulfillment of the obligation, should the vendee fail to pay; (2) cancel the sale, should the vendee's failure to pay cover two or more installments; (3) foreclose the chattel mortgage on the thing sold, if one has been constituted, should the vendee's failure to pay cover two or more installments. In this case, he has no further action against the purchaser to recover any unpaid balance of the price. Any agreement to the contrary is void. The same rule applies to contracts purporting to be leases of personal property with option to buy, when the lessor has deprived the lessee of the possession or enjoyment of the thing. In the foregoing cases, a stipulation that the installments or rents paid shall not be returned to the vendee or lessee is valid insofar as the same may not be unconscionable under the circumstances.

Plural Sales.

If the same thing should have been sold to different vendees, the ownership is transferred to the person who may have first taken possession thereof in good faith, if it should be movable property. Should it be immovable property, the ownership shall belong to the person acquiring it who in good faith first recorded it in the Registry of Property. Should there be no inscription, the ownership shall pertain to the person who in good faith was first in the possession; and, in the absence thereof, to the person who presents the oldest title, provided there is good faith.

Conventional Redemption.

This takes place when the vendor reserves the right to repurchase the thing sold. But the vendor cannot avail himself of the right of repurchase without complying with the stipulations which may have been agreed upon and without returning to the vendee the price of the sale and, in addition, reimbursing the vendee for the expenses of the contract, and any other legitimate payments made by reason of the sale, and for necessary and useful expenditures made on the thing sold.

Legal Redemption.

Legal redemption is the right to be subrogated, upon the same terms and conditions stipulated in the contract, in the place of one who acquires a thing by purchase or dation in payment, or by any other transaction whereby ownership is transmitted by onerous title.

Prohibited Transactions.

The husband and the wife cannot sell property to each other, except when a separation of property was agreed upon in the marriage settlements, or when there has been a judicial separation of property under Art. 136 of Family Code.

The following persons cannot acquire by purchase, even at a public or judicial auction, either in person or through the mediation of another: (1) a guardian, the property of the person or persons who may be under his guardianship; (2) agents, the property whose administration or sale may have been intrusted to them, unless the consent of the principal has been given; (3) executors and administrators, the property of the estate under administration; (4) public officers and employees, the property of the State or of any subdivision thereof, or of any government owned or controlled corporation, or institution, the administration of which has been intrusted to them, and this prohibition applies to judges and government experts who, in any manner whatsoever, take part in the sale; (5) justices, judges, prosecuting attorneys, clerks of superior and inferior courts, and other officers and employees connected with the administration of justice, the property and rights in litigation or levied upon an execution before the court within whose jurisdiction or territory they exercise their respective functions, and this prohibition includes the act of acquiring by assignment and applies to lawyers, with respect to the property and rights which may be the object of any litigation in which they may take part by virtue of their profession; (6) any others specially disqualified by law.

The foregoing prohibitions are applicable to sales in legal redemption, compromises and renunciations.

Notices Required.

A person to whom a document of title has been transferred, but not negotiated, acquires thereby, as against transferor, title to the goods subject to terms of any agreement with transferor. If the document is non-negotiable, such person also acquires right to notify bailee who issued the document of the transfer thereof, and thereby to acquire the direct obligation of such bailee to hold possession of the goods for him according to terms of the document. (C.C. [n], §1514).

Unpaid seller may exercise his right of stoppage in transitu either by obtaining actual possession of the goods or by giving notice of his claim to carrier or other bailee in whose possession the goods are. Such notice may be given either to person in actual possession of the goods or to his principal. In latter case, notice to be effectual, must be given at such time and under such circumstances that the principal, by exercise of reasonable diligence, may prevent a delivery to buyer. When notice of stoppage in transitu is given by seller to carrier, or other bailee in possession of the goods, he must redeliver the goods according to directions of seller. (C.C. [n] §1532). An unpaid seller having a right of lien or having stopped the goods in transitu may resell the goods. However, where the right to resell is not based on perishable nature of the goods or upon an express provision of the contract of sale, giving or failure to give notice of intention to resell the goods must be relevant in any issue involving the question whether the buyer had been in default for an unreasonable time before the resale was made.

Applicable Law.

See topic 3.04 Contracts, subhead Applicable Law.

3.14 SECURITIES:

Securities Regulation Code (R.A. 8799) (repealed Revised Securities Act, B.P. 178) defines securities to include participation or interests in corporation or in commercial enterprise or profit-making venture and evidenced by certificate, contract, instrument, whether written or electronic in character. It includes (a) shares of stock, bonds, debentures, notes, evidences of indebtedness, asset-backed securities, (b) investment contracts, certificates of interest or participation in profit sharing agreement, certificates of deposit for future subscription, (c) fractional undivided interests in oil, gas or other mineral rights, (d) derivatives, like options and warrants, (e) certificates of assignments, certificates of participation, trust certificates, voting trust certificates or similar instruments, (f) proprietary or non-proprietary membership certificates in corporations.

Securities and Exchange Commission.

This Code shall be administered by Securities and Exchange Commission which shall have jurisdiction, supervision and control over all corporations, partnerships or associations, who are grantees of primary franchises and/or license or permit issued by government to operate in Philippines, and in exercise of its authority, it shall have power to enlist aid of and to deputize agencies of government as well as any private institution, corporation, firm, association or person. (P.D. 1758).

Securities shall not be sold or offered for sale or distribution within Philippines, without registration statement duly filed with and approved by Commission on securities, in such form and with such substance as Commission may prescribe, shall be made available to each prospective purchaser.

On registration of securities with Commission, disclosing all information prescribed and payment of 1/10 of 1% of maximum aggregate price at which such securities are proposed to be offered; and after completion of publication is made; Commission finds that registration statement together with all other papers and documents attached thereto, is on its face complete and that requirements for protection of investors have been complied with, and unless there are grounds to reject registration statement as herein provided, it shall enter order making registration effective, and issue to registrant permit reciting that such person, its brokers and agents, are entitled to offer securities named in said certificate, with such terms and conditions as it may impose in public interest and for protection of investors. Every permit must state that issuance thereof is only permissive and does not constitute recommendation of securities permitted to be offered for sale.

Registration of Brokers, Dealers, and Salesmen.

No broker, dealer or salesman may engage in business in Philippines as such unless he has been registered as broker, dealer or salesman in office of Commission. Registration already granted may be revoked by Commission if, after reasonable notice and hearing, Commission determines that such applicant or registrant violated any provision of Code; or made material false statement in application for registration; or guilty of fraudulent act in connection with sale of securities; or demonstrated his unworthiness to transact business of broker, dealer or salesman.

Registration of Exchanges.

Any exchange may be registered with Commission under terms and conditions provided in this Code, by filing application for registration in such form and containing such information and supporting documents. If Commission finds that applicant exchange is capable of complying and enforcing compliance by its members, and persons associated with such members, with provisions of this Code, its rules and regulations, and rules of exchange, and rules of exchange are fair, just and adequate, Commission shall cause such exchange to be registered. If, after due notice and hearing, Commission finds otherwise, application shall be denied.

Margin Requirements.

To prevent excessive use of credit for purchase or carrying of securities, Commission in accordance with credit and monetary policies that may be promulgated from time to time by Monetary Board of the Bangko Sentral ng Pilipinas, shall prescribe rules and regulations with respect to amount of credit that may be extended on any security. For extension of credit, such rules and regulations shall be based upon following standard: Amount not greater than whichever is higher of (1) 65% of current market price of security, or (b) 100% of lowest market price of security during preceding 36 calendar months, but not more than 75% of current market price. Monetary Board, however, may increase or decrease above percentages, in order to achieve objectives of Government with due regard for promotion of economy and prevention of use of excessive credit.

Miscellaneous Provisions.

There are restrictions on borrowings by members, brokers, and dealers. Manipulation of security prices is unlawful. Manipulative and deceptive devices such as short sales or stop-loss orders, in contravention of rules of Commission, are prohibited. It shall be unlawful for any exchange to adopt artificial measures of price control of any nature whatsoever without prior approval of Commission. Also, fraudulent transactions and transactions on “over-the-counter markets” are considered unlawful.

3.15 STATUTE OF FRAUDS:

See topic 3.05 Frauds, Statute of.

4 CITIZENSHIP

4.01 ALIENS:

See category 16 Immigration, topic 16.01 Aliens.

4.02 CITIZENSHIP:

Citizenship Retention and Re-acquisition Act of 2003 (R.A. 9225).

Natural-born citizens of Philippines who have lost their Philippine citizenship by reason of their naturalization as citizens of foreign country are deemed to have re-acquired Philippine citizenship upon taking oath of allegiance to Republic.

Derivative Citizenship.

Unmarried child, whether legitimate, illegitimate or adopted, below 18 years of age, of those who re-acquire Philippine citizenship must be deemed citizens of Philippines.

Civil and Political Rights and Liabilities.

(a) Those intending to exercise their right to suffrage must meet requirements under §1, Art. V of Constitution, The Overseas Absentee Voting Act of 2003 (R.A. 9189) and other existing laws; (b) those seeking elective public office in Philippines must meet qualifications for holding such public office as required by Constitution and existing laws and, at time of filing of certificate of candidacy, make personal and sworn renunciation of any and all foreign citizenship before any public officer authorized to administer oath; (c) those appointed to any public office must subscribe and swear to oath of allegiance to Republic of The Philippines and its duly constituted authorities prior to their assumption of office: provided, that they shall renounce their oath of allegiance to country where they took that oath; (d) those intending to practice their profession in Philippines must apply with proper authority for license or permit to engage in such practice; (e) right to vote or be elected or appointed to any public office cannot be exercised by, or extended to those who: (1) are candidates for or are occupying any public office in country of which they are naturalized citizens; and/or (2) are in active service as commissioned or noncommissioned officers in armed forces of country which they are naturalized citizens.

4.03 IMMIGRATION:

See category 16 Immigration, topic 16.02 Immigration.

5 CIVIL ACTIONS AND PROCEDURE

5.01 ACTIONS:

See category 6 Courts and Legislature, topic 6.01 Courts; also topic Limitation of Actions.

5.02 COMPROMISE AND SETTLEMENT:

A compromise is a contract whereby parties, by making reciprocal concessions, avoid a litigation or put an end to one already commenced. (C.C. [n], §2028). Court's approval is necessary in compromises entered into by guardians, parents, absentee's representatives and administrators or executors of decedent's estate.

There may be a compromise upon civil liability arising from an offense but it does not extinguish legal penalty. No compromise upon following questions is valid: (1) civil status of a person; (2) validity of a marriage or legal separation; (3) legal separation; (4) future support; (5) jurisdiction of courts; and (6) future legitime. A compromise covers only those objects definitely stated therein or implied by its terms and constitutes res judicata upon parties.

A compromise may be annulled or rescinded on grounds of fraud, mistake, violence, intimidation, undue influence or falsity of documents, or if it refers only to one thing to which one of parties has no right as shown by newly discovered evidence, or when a compromise was agreed upon and either or both parties are unaware of existence of final judgment, or when one of parties fails or refuses to abide by compromise.

See category 8 Dispute Resolution, topic 8.01 Alternative Dispute Resolution.

5.03 DEPOSITIONS AND DISCOVERY:

By leave of court after jurisdiction has been obtained, or without such leave after answer has been served, the testimony of any person, whether a party or not, may be used by any party for any purpose if (1) witness is dead; or (2) witness resides at distance more than 100 kilometers from place of hearing, or is out of Philippines; or (3) witness is unable to attend or testify because of age, sickness, infirmity, or imprisonment; or (4) that party offering has been unable to procure attendance of witness by subpoena; or (5) exceptional circumstances exist to allow use of deposition.

Depositions may likewise be used by any party to contradict or impeach testimony of deponent who is presented as witness.

Within the Philippines depositions are taken before any judge, municipal judge or notary public on serving on adverse party notice of time and place of examination, together with affidavit showing that case is within provisions of law.

In a foreign state or country, depositions must be taken on notice before a secretary of embassy or legation, consul general, consul, vice-consul, or consular agent of Republic of the Philippines or before any person or officer as may be appointed by commission or under letters rogatory.

Deposition must be taken in the form of questions and answers, and it must be read to or by the witness and corrected by him in any particular, if desired, and must then be subscribed by the witness. No objection to the form of an interrogatory can be made at the trial unless the same was stated and recorded by the magistrate at the time of the examination, and objections are ruled on by the court at the trial. The commissioner must send the deposition to the clerk of the court in a sealed envelope or wrapper by mail or otherwise. It may be read at any stage of the action.

Modes of Discovery.

Parties to action may also resort to other modes of obtaining evidence such as by serving interrogatories to other party or by requesting adverse party to admit certain facts. Answers made to interrogatories shall be used in same manner and instances as depositions while admissions are meant to establish certain matters which thereby limit issues to be resolved. Parties may also request for production and inspection of documents, things and premises in presence of other party. When physical or mental condition of party is in controversy, person may also be subjected to examination upon discretion of court.

5.04 JUDGMENTS:

All judgments or final order determining merits of cases shall be in writing personally and directly prepared by judge, and signed by him, stating clearly and distinctly facts and law on which it is based, and filed with clerk of court. Judgment by municipal or city judge need not contain findings of fact or conclusions of law.

Except in case of default judgment (see subhead Default Judgments, infra) judgment shall grant relief to which party in whose favor it is rendered is entitled, even if party has not demanded such relief in his pleadings.

Default Judgments.

If the defendant fails to answer within the time specified in the Rules of Court, the court shall, upon motion of the plaintiff, with notice to defendant and proof of such failure, declare defendant in default, and thereupon court shall proceed to receive plaintiff's evidence and render judgment granting him such relief as complaint and facts proven may warrant. This provision applies where no answer is made, within prescribed period to counterclaim, cross claim, or third-party complaint. Judgment entered by default shall not exceed amount or be different in kind from that prayed for in demand for judgment.

Judgment on the Pleadings.

Where an answer fails to tender an issue, or otherwise admits the material allegations of the adverse party's pleading, the court may, on motion of that party, direct judgment on such pleading, except in actions for annulment of marriage or legal separation wherein material facts alleged in complaint must always be proved.

Foreign judgments have following effects: (1) in case of a judgment against a specific thing, it is conclusive upon title to thing; and (2) in case of a judgment against a person, it is presumptive evidence of a right as between parties and their successors in interest by subsequent title; but judgment may be repelled by evidence of a want of jurisdiction, want of notice to party, collusion, fraud, or clear mistake of law or fact.

5.05 LIMITATION OF ACTIONS:

Actions to recover movables prescribe eight years from the time the possession thereof is lost, unless the possessor has acquired the ownership by prescription for a less period.

Real actions over immovables prescribe after 30 years. This provision is without prejudice to what is established for the acquisition of ownership and other real rights by prescription.

A mortgage action prescribes after ten years.

The following rights are not extinguished by prescription: (1) to demand a right of way; (2) to bring an action to abate a public or private nuisance.

The following actions must be brought within ten years from the time the right of action accrues: (1) upon a written contract; (2) upon an obligation created by law; (3) upon a judgment.

The following actions must be commenced within six years: (1) upon an oral contract; (2) upon a quasi-contract.

The following actions must be instituted within four years: (1) upon an injury to the rights of the plaintiff; (2) upon a quasi-delict.

The following actions must be filed within one year: (1) for forcible entry and detainer; (2) for defamation.

All money claims arising from employer-employee relations prescribe in three years.

The foregoing limitations are without prejudice to those specified in the Civil Code, in the Code of Commerce, and in special laws.

All other actions whose periods are not fixed in the Civil Code or in other laws must be brought within five years from the time the right of action accrues.

The time for prescription for all kinds of actions, when there is no special provision which ordains otherwise, must be counted from the day they may be brought. The time for prescription of actions which have for their object the enforcement of obligations to pay principal with interest or an annuity runs from the last payment of the interest or of the annuity.

The period for prescription of actions to demand the fulfillment of obligations declared by a judgment commences from the time the judgment became final. The period for prescription of actions to demand an accounting runs from the day the persons who should render the same cease in their functions. The period for the action arising from the result of the accounting runs from the date said result was recognized by agreement of the interested parties.

The period during which the obligee was prevented by a fortuitous event from enforcing his right is not reckoned against him.

The prescription of actions is interrupted when they are filed before the court, when there is a written extrajudicial demand by the creditors, or when there is any written acknowledgment of the debt by the debtor.

The war years and the period when the debt moratorium was enforced have been held to suspend running of period of limitations.

See also category 12 Estates and Trusts, topic 12.01 Death, subhead Actions for Death.

5.06 PRESCRIPTION:

By prescription one acquires ownership and other real rights through lapse of time in manner and under conditions laid down by law. (C.C. [n], §1106). Prescription runs against all persons having full civil capacity, even against: (1) Minors and other incapacitated persons who have parents, guardians or other legal representatives; (2) absentees who have administrators, either appointed by them before their disappearance, or appointed by the courts; (3) persons living abroad who have managers of administrators; and (4) juridical persons, except State and its subdivisions. (C.C. [n], §1108.). Prescription does not run between husband and wife, even though there be separation of property agreed upon in marriage settlement or by judicial decree. Neither does prescription run between parents and children, during minority or insanity of latter, and between guardian and ward during continuance of guardianship.

All things which are within commerce of men are susceptible of prescription, unless otherwise provided by law. Property of State or any of its subdivisions not patrimonial in character is not object of prescription. (C.C. [n], §1113). Persons with capacity to alienate property may renounce prescription already obtained but not right to prescribe in future.

5.07 REPLEVIN:

When the complaint in an action prays for the recovery of the possession of personal property, the plaintiff may, at the commencement of the action or at any time before answer, apply for an order for the delivery of such property to him. He must show by his own affidavit or that of some other person who personally knows the facts: (a) that the plaintiff is the owner of the property claimed, particularly describing it, or is entitled to the possession thereof; (b) that the property is wrongfully detained by the defendant, alleging the cause of detention thereof according to his best knowledge, information, and belief; (c) that it has not been distrained or taken for tax assessment or fine pursuant to law, or seized under execution, or attachment or otherwise placed under custodia legis, or, if so seized, that it is exempt from such seizure; and (d) actual value of property.

The plaintiff must also give a bond, executed to the defendant in double the value of the property as stated in the affidavit aforementioned, for the return of the property to the defendant if the return thereof be adjudged, and for the payment to the defendant of such sum as he may recover from the plaintiff in the action.

Upon filing of such affidavit and approval of bond, court shall issue order and corresponding writ of replevin describing personal property alleged to be wrongfully detained and requiring sheriff forthwith to take such property into his custody.

If the defendant objects to the sufficiency of the plaintiff's bond, or of the surety or sureties thereon, he cannot require the return of the property; but if he does not so object, he may, at any time before the delivery of the property to the plaintiff, require the return thereof, by filing with the clerk or judge of the court a bond executed to the plaintiff, in double the value of the property as stated in the plaintiff's affidavit. If within five days after the taking of the property by the officer, the defendant does not object to the sufficiency of the bond, or of the surety or sureties thereon, or require the return of the property; or if the defendant so objects, and the plaintiff's first or new bond is approved; or if the defendant so requires, and his bond is objected to and found insufficient and he does not forthwith file an approved bond, the property shall be delivered to the plaintiff. If for any reason the property is not delivered to the plaintiff, the officer must return it to the defendant.

Third Party Claims.

If the property taken be claimed by any other person than the defendant or his agent, and such person makes an affidavit of his title thereto or right to the possession thereof, stating the grounds of such right or title, and serves the same upon the officer while he has possession of the property, and a copy thereof upon the plaintiff, the officer is not bound to keep the property or deliver it to the plaintiff, unless the plaintiff or his agent, on demand of the officer, indemnifies him against such claim by a bond in a sum not greater than the value of the property.

6 COURTS AND LEGISLATURE

6.01 COURTS:

Judiciary Act of 1984 (R.A. 1186, am'd R.A. 2613, am'd R.A. 5204, am'd R.A. 7691), Judiciary Reorganization Act of 1980, am'd Executive Order No. 33 and Philippine Constitution of 1987.

Supreme Court consists of Chief Justice and 14 Associate Justices. It may sit en banc or, in its discretion, in divisions of three, five, or seven members. All cases involving constitutionality of treaty, international or executive agreement, or law, which shall be heard by Supreme Court en banc, and all other cases which under Rules of Court are required to be heard en banc, including those involving constitutionality, application, or operation or presidential decrees, proclamations, orders, instructions, ordinances, and other regulations shall be decided with concurrence of majority of members who actually took part in deliberations on issues in case and voted thereon. Cases or matters heard by division shall be decided or resolved with concurrence of majority of members who actually took part in deliberations on issues in case and voted thereon, and in no case, without concurrence of at least three of such members. When required number is not obtained, case shall be decided en banc: Provided, that no doctrine or principle of law laid down by Court in decision rendered en banc or in division may be modified or reversed except by Court sitting en banc. (§4, Art. VIII, 1987 Constitution).

Supreme Court shall have following powers: (1) Exercise original jurisdiction over cases affecting ambassadors, other public ministers, and consuls, and over petitions for certiorari, prohibition, mandamus, quo warranto, and habeas corpus; (2) review, revise, reverse, modify, or affirm on appeal or certiorari, as law or Rules of Court may provide, final judgments and decrees of inferior courts in: (a) all cases in which constitutionality or validity of any treaty, international or executive agreement, law, presidential decree, proclamation, order, instruction, ordinance, or regulation is in question, (b) all cases involving legality of any tax, impost, assessment, or toll, or any penalty imposed in relation thereto, (c) all cases in which jurisdiction of any inferior court is in issue, (d) all criminal cases in which penalty imposed is reclusion perpetua or higher, and (e) all cases in which only errors or questions of law are involved; (3) assign temporarily judges of lower courts to other stations as public interests may require. Such temporary assignment shall not exceed six months without consent of judge concerned; (4) order change of venue or place of trial to avoid miscarriage of justice; (5) promulgate rules concerning protection and enforcement of constitutional rights, pleading, practice, and procedure in all courts, admission to practice of law, integrated bar, and legal assistance to underprivileged; (6) appoint all officials and employees of Judiciary in accordance with Civil Service Law. Supreme Court shall have administrative supervision over all courts and personnel thereof.

Office of Court Administrator consists of Court Administrator and three Deputy Court Administrators with same qualifications as Justices of Court of Appeals. This office shall assist Supreme Court in exercise of its power of administrative supervision over all courts. (P.D. 828, am'd by P.D. 842).

Judicial and Bar Council is office under supervision of Supreme Court composed of Chief Justice; Secretary of Justice; representative of Congress; representative of integrated bar; professor of law; retired member of Supreme Court and representative of private sector. It has principal function of recommending appointees to Judiciary including Supreme Court.

Court of Appeals consists of Presiding Justice and 68 Associate Justices. It shall exercise its powers, functions, and duties through 23 divisions, each composed of three members. Court may sit en banc only for purpose of exercising administrative, ceremonial, or other non-adjudicatory functions. Majority of actual members shall constitute quorum for its session en banc. Three members shall constitute quorum for sessions of division. Unanimous vote of three members of division shall be necessary for pronouncement of decision or final resolution. Motion for reconsideration of its decision or final resolution shall be resolved within 90 days from time it is submitted for resolution, and no second motion for reconsideration from same party shall be entertained. Court of Appeals shall exercise: (a) original jurisdiction to issue writs of mandamus, prohibition, certiorari, habeas corpus, and quo warranto, and auxiliary writs of processes, whether or not in aid of its appellate jurisdiction; (b) exclusive original jurisdiction over actions for annulment of judgments of appellate jurisdiction over all final judgments, decisions, resolutions, orders or awards of Regional Trial Courts and quasi-judicial agencies, instrumentalities, boards or commissions, including Securities and Exchange Commission, Social Security Commission and Civil Service Commission except those falling within appellate jurisdiction of Supreme Court; and (c) all criminal cases in which penalty imposed is reclusion perpetua or higher.

Appeal in cases where penalty imposed by Regional Trial Court (RTC) is reclusion perpetua or life imprisonment shall be by notice of appeal to Court of Appeals. (A.M. No. 00-5-03-SC). With abolition of death penalty, there is no longer any automatic review by Court of Appeals of any RTC decision.

Regional Trial Courts are courts of general original jurisdiction in 13 Judicial Regions of Philippines. They exercise original jurisdiction: (1) In all civil actions in which subject of litigation is incapable of pecuniary estimation; (2) in all civil actions which involve title to, or possession of, real property, or any interest therein, where assessed value of property involved exceeds P20,000 or, for civil actions in Metro Manila where such value exceeds P50,000 except actions for forcible entry into and unlawful detainer of lands or building, original jurisdiction over which is conferred upon Metropolitan Trial Courts, Municipal Trial Courts and Municipal Circuit Trial Courts; (3) in all actions in admiralty and maritime jurisdiction where demand or claim exceeds P300,000 or in Metro Manila where such demand or claim exceeds P400,000; (4) in all matters of probate, testate or intestate, where gross value of estate exceeds P300,000 or, in Metro Manila where such gross value exceeds P400,000; (5) in all actions involving contract of marriage and marital relations; (6) in all cases not within exclusive jurisdiction of any court, tribunal, person or body exercising judicial or quasi-judicial functions; (7) in all civil actions and special proceedings falling within exclusive original jurisdiction of Juvenile and Domestic Relations Court and of Court of Agrarian Relations as now provided by law; and (8) in all other cases in which demand, exclusive of interest, damages of whatever kind, attorney's fees, litigation expenses and costs or value of property in controversy exceeds P300,000 or, in such other cases in Metro Manila, where demand exceeds P400,000. (R.A. 7691). Regional Trial Courts exercise exclusive original jurisdiction in all criminal cases not within exclusive jurisdiction of any court, tribunal or body, except those now falling under exclusive and concurrent jurisdiction of Sandiganbayan which shall hereafter be exclusively taken cognizance of by latter. Also, they exercise original jurisdiction in issuance of writs of certiorari, prohibition, mandamus, quo warranto, habeas corpus and injunction which may be enforced in any part of their respective regions; and in actions affecting ambassadors and other public ministers and consuls. Regional Trial Courts exercise appellate jurisdiction over all cases decided by Metropolitan Trial Courts, Municipal Trial Courts and Municipal Circuit Trial Courts in their respective territorial jurisdictions. Such cases shall be decided on basis of entire record of proceedings had in court of origin. Supreme Court may designate certain branches of Regional Trial Court to handle exclusively criminal cases, juvenile and domestic relations cases, agrarian cases, urban land reform cases which do not fall under jurisdiction of quasi-judicial bodies and agencies, and/or such other special cases as Supreme Court may determine in interest of speedy and efficient administration of justice. With effectivity of R.A. No. 9346, Regional Trial Courts may no longer impose death penalty.

Metropolitan Trial Courts, Municipal Trial Courts, & Municipal Circuit Trial Courts.

Except in cases falling within exclusive original jurisdiction of Regional Trial Courts and of Sandiganbayan, Metropolitan Trial Courts, Municipal Trial Courts, and Municipal Circuit Trial Courts shall exercise exclusive original jurisdiction over all violations of city or municipal ordinances committed within their respective territorial jurisdiction; and exclusive original jurisdiction over all offenses punishable with imprisonment not exceeding six years irrespective of amount of fine, regardless of other imposable accessory or other penalties, including civil liability arising from such offenses, irrespective of nature or amount thereof provided that in offenses involving damage to property through criminal negligence they shall have exclusive original jurisdiction. Also, they shall exercise exclusive original jurisdiction over civil actions and probate proceedings, testate and intestate, including grant of provisional remedies in proper cases, where value of personal property, estate or amount of demand does not exceed P300,000 or, in Metro Manila where such personal property, estate, or amount of demand does not exceed P400,000 exclusive of interest, damages of whatever kind, attorney's fees, litigation expenses, and costs, amount of which must be specifically alleged provided that interest, damages of whatever kind, attorney's fees, litigation expenses, and costs shall be included in determination of filing fees, provided where there are several claims or causes of actions between same or different parties, embodied in same complaint, amount of demand shall be totality of claims in all causes of action; exclusive original jurisdiction over cases of forcible entry and unlawful detainer, provided that when defendant raises question of ownership in his pleadings and question of possession cannot be resolved without deciding issue of ownership, issue of ownership shall be resolved only to determine issue of possession; and exclusive original jurisdiction in all civil actions which involve title to, or possession of real property, or any interest therein where assessed value of property or interest therein does not exceed P20,000 or, in civil actions in Metro Manila, where such assessed value does not exceed P50,000 exclusive of interest damages of whatever kind, attorney's fees, litigation expenses and costs, provided in cases of land not declared for taxation purposes, value of such property shall be determined by assessed value of adjacent lots. These courts may be assigned by Supreme Court to hear and determine cadastral or land registration cases covering lots where there is no controversy or opposition, or contested lots value of which does not exceed P100,000. (R.A. 7691). In absence of all Regional Trial Judges in province or city, any Metropolitan Trial Judge, Municipal Trial Judge, Municipal Circuit Trial Judge may hear and decide petitions for writ of habeas corpus or applications for bail in criminal cases in province or city where absent Regional Trial Judges sit.

Under Administrative Order No. 08-8-7-SC, for claims wherein value does not exceed amount of P100,000.00, small claims action may be commenced by filing with court accomplished and verified Statement of Claim. No formal pleading is necessary and no attorney must appear in behalf of or represent party at hearing, unless attorney is plaintiff or defendant.

The following special courts have been created:

Court of Tax Appeals was created by R.A. 1125 and amended by R.A. 9282 which is of same level as Court of Appeals and must consist of Presiding Justice and five Associate Justices. Incumbent Presiding Judge and Associate Judges must continue in office and bear new titles of Presiding Justice and Associate Justices. Additional three Justices and succeeding members of Court must be appointed by President upon nomination by Judicial and Bar Council.

Court of Tax Appeals exercises exclusive appellate jurisdiction to review by appeal: (a) Decisions of Commissioner of Internal Revenue in cases involving disputed assessments, refunds of internal revenue taxes, fees or other charges, penalties in relation thereto, or other matters arising under National Internal Revenue Code or other laws administered by Bureau of Internal Revenue; (b) inaction by Commissioner of Internal Revenue in cases involving disputed assessments, refunds of internal revenue taxes, fees or other charges penalties in relations thereto, or other matters arising under National Internal Revenue Code or other laws administered by Bureau of Internal Revenue, where National Revenue Code provides specific period of action, in which case inaction shall be deemed denial; (c) decisions, orders or resolutions of Regional Trial Courts in local tax cases originally decided or resolved by them in exercise of their original or appellate jurisdiction; (d) decisions of Commissioner of Customs in cases involving liability for customs duties, fees or other money charges, seizure, detention or release of property affected, fines, forfeitures or other penalties in relation thereto, or other matters arising under Customs Law or other laws administered by Bureau of Customs; (e) decisions of Central Board of Assessment Appeals in exercise of its appellate jurisdiction over cases involving assessment and taxation of real property originally decided by provincial or city board of assessment appeals; (f) decisions of Secretary of Finance on customs cases elevated to him automatically for review from decisions of Commissioner of Customs which are adverse to Government under §2315 of Tariff and Customs Code; (g) decisions of Secretary of Trade and Industry, in case of nonagricultural product, commodity or article, and Secretary of Agriculture in case of agricultural product, commodity or article, involving dumping and countervailing duties under §§301 and 302, respectively, of Tariff and Customs Code, and safeguard measure under R.A. 8800, where either party may appeal decision to impose or not to impose said duties.

Court of Tax Appeals also exercises exclusive original jurisdiction over all criminal offenses arising from violations of National Internal Revenue Code or Tariff and Customs Code and other laws administered by Bureau of Internal Revenue or Bureau of Customs where principal amount of taxes and fees, exclusive of charges and penalties claimed is less than P1,000,000 or where there is no specified amount claimed it must be tried by Courts and jurisdiction of Court of Tax Appeals is appellate. It shall also exercise exclusive appellate jurisdiction in criminal offenses: (a) Over appeals from judgments, resolutions or orders of Regional Trial Courts in cases originally decided by them, in their respective territorial jurisdiction; (b) over petitions for review of judgments, resolutions or orders of Regional Trial Courts in exercise of their appellate jurisdiction over tax cases originally decided by Metropolitan Trial Courts, Municipal Trial Courts and Municipal Circuit Trial Courts.

Court of Tax Appeals exercises exclusive original jurisdiction in tax collection cases involving final and executory assessments for taxes, fees, charges and penalties; where principal amount of taxes and fees exclusive of charges and penalties claimed is less than P1,000,000 it shall be tried by proper Municipal Trial Court, Metropolitan Trial Court and Regional Trial Court. Exclusive appellate jurisdiction in tax collection cases is exercised: (a) Over appeals from judgments, resolutions or orders of Regional Trial Courts in tax collection cases originally decided by them; (b) over petitions for review of judgments, resolutions or orders of Regional Trial Courts in exercise of their appellate jurisdiction over tax collection cases originally decided by Metropolitan Trial Courts, Municipal Trial Courts and Municipal Circuit Trial Courts.

Any party adversely affected by decision, ruling or inaction of Commissioner of Internal Revenue, Commissioner of Customs, Secretary of Finance, Secretary of Trade and Industry or

Secretary of Agriculture or Central Board of Assessment Appeals or Regional Trial Courts may file appeal with Court of Tax Appeals by way of Petition for Review under Rule 42 of 1997 Rules of Civil Procedure within 30 days from receipt of decision or ruling or after expiration of period fixed by law for action. However, with respect to decisions or rulings of Central Board of Assessment Appeals and Regional Trial Court in exercise of its appellate jurisdiction appeal shall be made by filing Petition for Review under Rule 43 of 1997 Rules of Civil Procedure with Court of Tax Appeals.

Any party adversely affected by ruling, order or decision of Division of Court of Tax Appeals may file Motion for Reconsideration or New Trial with same Division within 15 days from notice thereof. Party adversely affected by resolution of Division of Court of Tax Appeals on Motion for Reconsideration or New Trial, may file Petition for Review with Court of Tax Appeals en banc. Party adversely affected by decision or ruling of Court of Tax Appeals en banc may file with Supreme Court verified Petition for Review on Certiorari pursuant to Rule 45 of 1997 Rules of Civil Procedure.

Sandiganbayan was created by P.D. 1486 and revised by P.D. 1606 as amended by R.A. 7975 and 8249. It shall sit in five divisions of three justices each. Presiding Justice and Associate Justices shall be appointed by President and cannot be removed from office except by impeachment upon grounds and in manner as provided for in constitution. Presiding Justice and Associate Justices shall have same rank, privileges, emoluments and be subject to same inhibitions and disqualifications as those provided for Presiding Justice and Associate Justices of Court of Appeals. Three Justices shall constitute quorum for sessions in division. Sandiganbayan shall exercise original jurisdiction in all cases involving: (a) Violations of Anti-Graft and Corrupt Practices Act (R.A. 3019; R.A. 1379); and c. II, §2, Title VII of Revised Penal Code where one or more of principals accused are officials occupying following positions in government at time of commission of offense: (1) Officials of executive branch occupying positions of regional director and higher, otherwise classified at Grade 27 and higher, of Compensation and Position Classification Act of 1989 (R.A. 6758), (2) Members of Congress and officials thereof classified at Grade 27 and higher, (3) members of judiciary without prejudice to provisions of Constitution, (4) Chairman and members of Constitutional Commissions, without prejudice to provisions of Constitution, and (5) all other national and local officials classified at Grade 27 and higher; (b) other offenses or felonies committed by public officials and employees in relation to their office; (c) civil and criminal cases filed pursuant to and in connection with Executive Order Nos. 1, 2, 14 and 14-A.

In cases where none of accused are occupying positions corresponding to salary grade 27 or higher or military and PNP officers mentioned above, exclusive original jurisdiction thereof shall be vested in proper trial courts pursuant to their respective jurisdictions. It shall exercise exclusive appellate jurisdiction over final judgments, resolutions or orders of regional trial courts. It shall also exercise exclusive original jurisdiction over petitions for issuance of writs of mandamus, prohibition, certiorari, habeas corpus, injunctions and other ancillary writs and processes in aid of its appellate jurisdiction.

Family Courts.

R.A. 8369 established in every province and city of the country Family Court which has exclusive original jurisdiction to hear and decide: (a) criminal cases where one or more of accused is below 18 years of age but not less than nine years of age or where one or more of victims is minor at time of commission of offense; (b) petition for guardianship; custody of children, and habeas corpus; (c) petition for and revocation of adoption of children; (d) complaints for annulment of marriage, declaration of nullity of marriage and those relating to marital status and property relation of husband and wife; (e) petition for support and acknowledgment; (f) summary proceedings arising from Family Code; (g) cases affecting status of children; (h) petition for constitution of family home; (i) cases against minors involving provisions of Comprehensive Dangerous Drugs Act of 2002; (j) violation of Special Protection of Children Against Child Abuse, Exploitation and Discrimination Act (R.A. 7610, am'd by R.A. 7658 am'd by R.A. 9231); and (k) cases of domestic violence against women and children under Anti-Violence Against Women and their Children Act of 2004.

Military tribunals shall exercise exclusive jurisdiction in: (1) All offenses committed by military personnel of Armed Forces of Philippines while in active service; (2) crimes against national security and laws of nations; (3) espionage; (4) crimes against public order, namely: rebellion or insurrection, conspiracy and proposal to commit rebellion or insurrection, disloyalty of public officers or employees, inciting to rebellion or insurrection, sedition, conspiracy to commit sedition, inciting to sedition, illegal assemblies, illegal association; (5) violations of laws of firearms and explosives; (6) usurpation of military authority, rank, title and illegal use of military uniforms or insignia; (7) crimes against personal liberty; (8) rumormongering and spreading false information; (9) violations of decrees or orders where exclusive jurisdiction is specifically conferred upon military tribunals; (10) violation of Comprehensive Dangerous Drugs Act of 2002; (11) swindling when committed in large-scale or by syndicate; (12) robbery committed by band or syndicate or when homicide and/or physical injuries have been committed by reason thereof; (13) murder committed by band or syndicate; (14) offense committed by detention prisoners detained in AFP detention centers by virtue of charges falling under exclusive jurisdiction of military tribunals (G.O. 49, as am'd).

6.02 LAW REPORTS, CODES:

Following are law reports, codes, etc. of the Philippines: Lawyers Journal, Civil Code, Code of Commerce, Rules of Court, National Internal Revenue Code, Decision Law Journal, Land Reform Code, Revised Administrative Code, Revised Penal Code, Philippine Tax Journal, Official Gazette, Philippine Reports.

See also topics 6.04 Reports, 6.05 Statutes.

6.03 LEGISLATURE:

Legislative power is vested in Congress of Philippines which consists of Senate of 24 members elected at large and House of Representatives of not more than 250 members elected by qualified electors of districts into which country is divided and through party-list system of registered national, regional and sectoral parties or organizations. (§§1, 2, 5, Art. VI, Constitution).

Congress convenes once every year on fourth Mon. of July for its regular session, unless different date is fixed by law, and shall continue to be in session until 30 days before opening of its next regular session, exclusive of Sats., Suns., and legal holidays. President may call special session at any time. (§14, ibid).

6.04 REPORTS:

The Philippine Reports, commencing from the time of the reorganization of the Supreme Court of the Philippines in 1901, contain the decisions of the Supreme Court.

Court of Appeals Reports, commencing from time of reorganization of Court of Appeals in 1936, contain decisions of Court of Appeals.

Decisions of Supreme Court and of Court of Appeals sitting en banc are now published in Official Gazette.

6.05 STATUTES:

The Philippines has a Civil Code, a Code of Commerce (insofar as its provisions have not been abrogated or repealed by special laws and the Civil Code), a Revised Penal Code, an

Election Code, a National Internal Revenue Code, Rules of Court (almost entirely supplanting provisions of Code of Civil Procedure and provisions of Criminal Procedure), and Revised Administrative Code. Laws passed by Congress are published under title Republic Acts.

See headnote to this digest for abbreviations used herein.

Uniform Acts adopted are: Negotiable Instruments and Warehouse Receipts.

7 DEBTOR AND CREDITOR

7.01 ASSIGNMENTS:

An assignment of credits and other incorporeal rights is perfected in the same way as the contract of sale. But an assignment of a credit, right, or action produces no effect as against third persons, unless it appears in a public instrument, or the instrument is recorded in the Registry of Property in case the assignment involves real property. The assignment of a credit includes all the accessory rights, such as a guaranty, mortgage, pledge or preference.

The assignor in good faith warrants existence and legality of credit at time of sale but not of solvency of debtor unless stipulated otherwise or that insolvency was prior to assignment and of common knowledge.

7.02 ASSIGNMENTS FOR BENEFIT OF CREDITORS:

A debtor may assign his property to his creditors in payment of his debts. This assignment releases the former from liability only to the net amount of the property assigned, except when the contrary is stipulated. The assignment operates as an abandonment of the universality of the property of the debtor for the benefit of his creditors, in order that such property may be applied to the payment of the credits. The initiative comes from the debtor, but it must be accepted by the creditors in order to become effective; a voluntary assignment cannot be imposed upon a creditor who is not willing to accept it. (37 O.G. 1444).

The assignment does not have the effect of making the creditors the owners of the property of the debtor, unless there is an agreement to that effect. The assignment gives to the creditors the right to proceed to the sale of the property, and to pay themselves in the amount which the proceeds of the sale permit and in the manner agreed upon. (8 Manresa, 322).

7.03 ATTACHMENT:

Writ of attachment may be had in any action brought for recovery of money or damages other than moral and exemplary on cause of action arising from law, contract, quasi-contract, delict or quasi-delict: when defendant is about to depart from Philippines with intent to defraud his creditors; in action for money or property embezzled, fraudulently misapplied or converted to his own use by defendant in fiduciary capacity; in action to recover possession of property unjustly detained, where it or any part thereof has been concealed, removed, or disposed of to prevent its being found or taken by applicant or officer; when defendant has been guilty of fraud in incurring obligation upon which action is brought; when defendant has disposed of, or is about to dispose of, his property with intent to defraud his creditors; and in action against nonresident defendant on whom summons may be served by publication. Attachment may be had at time of commencing action or any time thereafter.

In attachment case, a bond must be given to secure defendant against damage in an amount to be fixed by judge and not to exceed amount claimed.

Levy.

All orders of attachment must be served by an officer of the court.

The officer must attach and safely keep so much of defendant's property as will satisfy plaintiff's demands, unless defendant gives security, with sufficient sureties, in an amount sufficient to satisfy such demands, besides costs.

Real property standing on the records in the name of defendant or not appearing on the record, is attached by filing with the registrar of titles of land, for the province in which the land is situated, a copy of the order of attachment, together with a description of the property attached, and a notice that it is attached, and by leaving a similar copy of the order, description, and notice with the occupant of the property, if there is one.

Stocks or shares, or an interest in stocks or shares, of any corporation or company are attached by leaving with the president, or other head of the same, or the secretary, cashier, or other managing agent thereof, a copy of the order of attachment and a notice stating that the stock or interest of the defendant is attached, in pursuance of such order.

Debts and credits, and other personal property not capable of manual delivery, are attached by leaving with the person owing such debts or having such credits or other personal property in his possession or under his control a copy of the order of attachment and a notice that the debts owing by him to defendant, or the credits or other personal property in his possession or under his control, belonging to defendant, are attached in pursuance of such order.

In a criminal action the offended party may have the property of the defendant attached as a security for the satisfaction of any judgment that may be recovered from the defendant (a) when the defendant is about to depart from the Philippines; (b) when the criminal action is based on a claim for money or property which has been embezzled or fraudulently misapplied or converted to the use of the defendant who is a public officer, or any officer of a corporation, or an attorney, factor, broker, agent, or clerk, in the course of his employment as such, or by any other person in a fiduciary capacity, or for a willful violation of duty; (c) when the defendant has concealed, removed, or disposed of his personal property, or is about to do so; (d) when the defendant resides outside the Philippines.

Attachment in criminal cases is available only when the civil action for the recovery of civil liability arising from the offense charged is not expressly waived or the right to institute such civil action separately is not reserved.

Attachment may be discharged (1) when defendant gives a bond executed in favor of plaintiff equal to value of property attached; and (2) when defendant moves for an order of discharge on ground that attachment was improperly and irregularly issued.

Exemptions.

See topic 7.07 Exemptions.

7.04 BANKRUPTCY AND INSOLVENCY:

The Insolvency Law of the Philippines (Act No. 1956) deals with suspension of payments, voluntary insolvency and involuntary insolvency. It is modeled after the Spanish Code of Commerce in its provisions for suspension of payment and after the Insolvency Act of California of 1895 and the Federal Bankruptcy Law of 1898 in its other provisions.

Suspension of Payments.

A solvent debtor who foresees the impossibility of meeting his debts when they respectively fall due may petition the court for a suspension of payment of his debts. If granted, a meeting of creditors is then held upon notice to them and, provided the required number of creditors agree to the proposal for the settlement of his debts made by the debtor, such settlement is declared binding upon all creditors. If the required number of creditors fail to agree the proceeding is terminated and the creditors are at liberty to enforce their legal rights.

Voluntary Insolvency.

An insolvent debtor, owing debts exceeding 1,000 pesos, may petition to be discharged from his debts.

Involuntary Insolvency.

Three or more creditors, who are residents of the Philippines, whose credits accrue in the Philippines, and whose credits aggregate not less than 1,000 pesos, may petition that debtor be adjudicated insolvent upon proper showing of one or more acts of insolvency as set forth in statute.

Classification and Preference of Creditors.

Merchandise, effects, and any other property found among property of insolvent, ownership of which has not been conveyed to him by legal or irrevocable title, must be considered as property of other persons and must be placed at disposal of lawful owners. These include (1) dowry property remaining in hands of husband; (2) paraphernal property which wife may have acquired by inheritance, legacy or donation; (3) property and effects deposited with bankrupt or administered, leased, rented or held in usufruct by him; (4) merchandise in possession of bankrupt on commission, for purchase, sale, forwarding or delivery; (5) bills of exchange or promissory notes without indorsement remitted to insolvent for collection and all others acquired by him for account of another; (6) money remitted to insolvent, other than on current account, for delivery to a definite person in name and for account of remitter; (7) amounts due insolvent for sales of merchandise on commission and bills of exchange and promissory notes derived therefrom even when same are not made payable to owner of merchandise sold; (8) merchandise bought on credit by insolvent before actual delivery thereof and merchandise the bill of lading or shipping receipts of which have been sent to him after same has been loaded by order of purchaser and for his account and risk (in all these cases creditors of insolvent may claim merchandise so purchased by paying price thereof to vendor); and (9) goods or chattels wrongfully taken, converted, or withheld by insolvent.

Assignee.

In both voluntary and involuntary insolvency an assignee is elected by the creditors or appointed by the court to administer and liquidate the estate of the debtor and apply the proceeds pro rata to the payment of creditors.

The duly constituted family home of an insolvent may not be considered one of the assets to be taken possession of by the assignee for the benefit of creditors.

Discharge of Debtors.

At any time after three months after the adjudication of insolvency but not later than one year after such adjudication, the debtor may obtain an order discharging him from all unpaid obligations provided none of the fraudulent acts specified in the statute have been committed by him.

Receiver.

See topic 7.14 Receivers.

7.05 DEBT MORATORIUM:

Debt moratorium was declared unconstitutional as being unduly oppressive and hence is no longer in force. (Rutter v. Esteban, G. R. No. L-3708, promulgated May 18, 1953).

7.06 EXECUTIONS:

Execution shall issue as matter of right upon judgment or order that disposes of action or proceeding upon expiration of period to appeal and no appeal has been perfected. Final and executory judgment or order may be executed on motion within five years from date of entry. After lapse of said period but before it is barred by statute of limitations, judgment may be enforced by action.

Trial court having jurisdiction over case may at its discretion, grant motion of prevailing party for execution of judgment or final order even before expiration of period to appeal. After trial court loses its jurisdiction over case, motion for execution pending appeal may be filed in appellate court.

Writ of execution of judgment for money may be enforced by demanding from judgment obligor immediate payment of full amount stated in writ of execution and all lawful fees. Judgment obligor shall pay in cash, certified bank check or any other form of payment payable to judgment obligee. If judgment obligor cannot pay all or part of obligation officer shall levy upon other properties of judgment obligor not otherwise exempted from execution.

Writ of execution shall be returnable to court issuing it immediately after judgment has been satisfied in part or in full. If judgment has not been satisfied, writ shall continue in effect for period of five years.

In enforcing execution against personal property, the officer must take possession thereof. In levying on real property, the officer must file with the register of deeds of the province in which the property is situated, a copy of the writ of execution, together with a description of the property levied on and notice of the levy, and a copy of the execution, description and notice must be left with the occupant of the property, if there is any.

Property sold under execution may be redeemed within one year from date of registration of certificate of sale by paying purchase price together with interests and taxes that purchaser had paid.

A person indebted to the judgment debtor may pay to the sheriff the amount of his debt and the sheriff's receipt is a sufficient discharge for the amount so paid.

Exemptions.

See topic 7.07 Exemptions.

Supplementary proceedings after execution was returned unsatisfied are provided, whereby the execution creditor may examine the judgment debtor under oath as to his property, business or financial interests. The examination may be made before the judge of the court issuing the execution or before a referee appointed by the court. Attendance of the party or witnesses may be compelled by an order or subpoena as in other cases. A receiver of the property of the judgment debtor may be appointed in a proper case. (R.C., Rule 39, §§36-41). Similar proceedings may be had while the execution is outstanding, if the judgment creditor shows by affidavit or otherwise to the satisfaction of the court that the judgment debtor has property which he unjustly refuses to apply to the satisfaction of the judgment.

7.07 EXEMPTIONS:

Following property is exempt from attachment and execution: (a) Judgment obligor's family home as provided by law, or homestead in which he resides, and land necessarily used in connection therewith; (b) ordinary tools and implements personally used by him in his trade, employment, or livelihood; (c) three horses, or three cows, or three carabaos, or other beasts of burden, such as judgment obligor may select necessarily used by him in his ordinary occupation; (d) his necessary clothing and articles for ordinary personal use, excluding jewelry; (e) household furniture and utensils necessary for housekeeping, and used for that purpose by judgment obligor and his family, such as judgment obligor may select, of value not exceeding P100,000; (f) provisions for individual or family use sufficient for four months; (g) professional libraries and equipment of judges, lawyers, physicians, pharmacists, dentists, engineers, surveyors, clergymen, teachers, and other professionals, not exceeding P300,000 in value; (h) one fishing boat and accessories not exceeding total value of P100,000 owned by fisherman and by lawful use of which he earns his livelihood; (i) so much of salaries, wages, or earnings of judgment obligor for his personal services within four months preceding levy as are necessary for support of his family; (j) lettered gravestones; (k) monies, benefits, privileges, or annuities accruing or in any manner growing out of any life insurance; (l) right to receive legal support, or money or property obtained as such support, or any pension or gratuity from Government; and (m) properties specially exempted by law. But no article or species of property herein mentioned are exempt from execution issued upon judgment recovered for its price or upon judgment of foreclosure of mortgage thereon. All property other than as hereinbefore stated is subject to attachment and execution.

7.08 FRAUDULENT SALES AND CONVEYANCES:

All contracts by virtue of which the debtor alienates property by gratuitous title are presumed to have been entered into in fraud of creditors, when the donor did not reserve sufficient property to pay all debts contracted before the donation. Alienations by onerous title are also presumed fraudulent when made by persons against whom some judgment has been rendered in any instance or some writ of attachment has been issued. The decision or attachment need not refer to the property alienated, and need not have been obtained by the party seeking the rescission. In addition to these presumptions, the design to defraud creditors may be proved in any other manner recognized by the law of evidence. Whoever acquires in bad faith the things alienated in fraud of creditors, must indemnify the latter for damages suffered by them on account of the alienation, whenever, due to any cause, it should be impossible for him to return them. If there are two or more alienations, the first acquirer first liable, and so on successively.

Contracts made in fraud of creditors when the latter cannot in any other manner collect the claims due them, are rescindable.

When there is a deficiency of assets in the hands of an executor or administrator for the payment of debts and expenses of administration, and it appears that the deceased in his lifetime had conveyed real or personal properties or a right or interest therein or a debt or credit with intent to defraud his creditors, or to avoid a right, debt, or duty of a person; or had so conveyed such property, right, interest, debt or credit, that by law conveyance would be void as against his creditors, and subject attempted to be conveyed would be liable to attachment or execution by a creditor of deceased in his lifetime, executor or administrator may prosecute to a final judgment an action for recovery of such real property, debt, credit, right or interest therein for benefit of creditors; and he may also, for like benefit, sue for and recover goods, chattels, right or credits fraudulently conveyed by deceased in his lifetime, with the intent stated; but no executor or administrator is bound to institute such proceedings unless creditors making the application pay such part of costs and expenses, or give security therefor to executor or administrator, as court judges equitable. (R.C. Rule 87, §9).

Bulk Sales.

The sale, transfer, mortgage or assignment of a stock of goods, wares, merchandise, provisions or materials otherwise than in the ordinary course of trade and the regular prosecution of the business, or of all or substantially all of the business or trade, or of all or substantially all of the fixtures and equipment used in and about the business of the vendor, mortgagor, transferor or assignor, is fraudulent and void as against existing creditors of the vendor, mortgagor, etc., unless the following conditions are complied with. At least ten days before the sale, transfer, etc., the vendor, mortgagor, etc., must furnish to the vendee, mortgagee, etc., a verified list of creditors and make a full detailed inventory of the property to be disposed of, giving cost price of each article. The said statement must be recorded with Bureau of Domestic Trade. Each creditor of vendor, mortgagor, etc., must be notified by mail of price, terms and conditions of sale, etc., and purchase money or mortgage money must be applied pro rata to payment of such creditors. Violation of bulk sales law is punishable by fine and imprisonment. Action to attack sale must be commenced within four years after discovery of fraud. (Act 3952).

7.09 GARNISHMENT:

Process in the nature of garnishment may be obtained by supplementary proceedings in aid of attachment or execution.

7.10 INSOLVENCY:

See topic 7.04 Bankruptcy and 7.10 Insolvency.

7.11 LENDING COMPANIES:

Lending Company shall refer to corporation engaged in granting loans from its own capital funds or from funds sourced from not more than 19 persons. Lending company shall not be deemed to include banking institutions, investment houses, savings and loan associations, financing companies, pawnshops, insurance companies, cooperatives and other credit institutions already regulated by law. Term shall be synonymous with lending investors.

Requirements to be deemed lending company are as follows: (a) Lending company shall be established only as corporation. No lending company shall conduct business unless granted authority to operate by Securities and Exchange Commission (SEC); (b) minimum paid-in capital of any lending company shall be P1,000,000, provided that SEC may prescribe higher minimum capitalization if warranted by circumstances; and (c) at least majority of voting capital stock shall be owned by citizens of Philippines. In case of corporations owning shares in lending company, citizenship of individual owners of voting stock in such corporations shall be basis in computation of percentage. No foreign national may be allowed to own stock unless country of which he is national accords rights to Filipinos.

7.12 LIENS:

There is no statute creating mechanics' liens in the Philippines. Under the Civil Code, those who furnish labor or materials for work undertaken by a contractor for a lump sum have no action against the owner except for the amount in which the latter is indebted to the contractor.

Any person who has done work on personal property is entitled to retain the same as a pledge until he is paid.

7.13 PLEDGES:

The following requisites are essential to the contract of pledge: that it be constituted to secure the fulfillment of a principal obligation; that the pledgor be the absolute owner of the thing pledged; that the person constituting the pledge have the free disposal of his property or that he be legally authorized for the purpose. In addition, the thing pledged is required to be placed in the possession of the creditor, or a third person by common agreement. Third persons who are not parties to the principal obligation may secure the latter by pledging their own property. It is also of the essence of this contract that when the principal obligation becomes due, the thing pledged can be alienated for the payment to the creditor. The creditor cannot appropriate the things given by way of pledge, or dispose of them. Any stipulation to the contrary is null and void.

All movables which are within commerce may be pledged, provided they are susceptible of possession. Incorporeal rights, evidenced by negotiable instruments, bills of lading, shares of stock, bonds, warehouse receipts and similar documents may also be pledged. The instrument proving the right pledged must be delivered to the creditor, and if negotiable, must be endorsed. A pledge is ineffective against third persons if a description of the thing pledged and the date of the pledge do not appear in a public instrument.

If the thing pledged is returned by the pledgee to the pledgor or owner, the pledge is extinguished. Any stipulation to the contrary is void. If subsequent to the perfection of the pledge, the thing is in the possession of the pledgor or owner, there is a prima facie presumption that the same has been returned by the pledgee.

The creditor to whom the credit has not been satisfied in due time, may proceed before a notary public for sale of thing pledged. Sale must be made at public auction, and with notification to debtor. If at first and second auction thing pledged is not sold, creditor may appropriate it, in which case he is obliged to give acquittance for his entire claim. Sale of thing pledged extinguishes principal obligation, whether or not proceeds of sale are equal to amount of principal obligation, interest and expenses in proper case. If proceeds of sale are more than said amount, debtor is not entitled to excess, unless it is otherwise agreed. If proceeds of sale are less, neither is creditor entitled to recover deficiency, notwithstanding any stipulation to contrary.

In pledges created by operation of law, after payment of the debt and the expenses of the sale, the remainder of the proceeds of the sale shall be delivered to the obligor. But a thing under a pledge by operation of law can be sold only after a demand of the amount for which the thing is retained. The public auction should take place within one month after such demand.

Pawnshops.

These are governed by special laws relating thereto, and subsidiarily by the provisions relating to pledges.

7.14 RECEIVERS:

Verified petition for appointment of receiver may be filed with Regional Trial Court or Court of Appeals or Supreme Court by showing that party applying for appointment as receiver has interest in properties or funds thereof and that same are in danger of being lost, removed, or materially injured, and upon sufficient evidence court may appoint receiver.

A bond with sufficient sureties must be given to secure the appointment of a receiver and a receiver must give bond for the faithful performance of his duties.

When it is made to appear in an action for foreclosure of a mortgage that mortgaged property is in danger of being wasted or materially injured, and in other cases where it is made to appear that property in which the plaintiff is interested is about to be lost, wasted or destroyed, and that the appointment of a receiver is the most convenient and feasible means of preserving and administering the property, a receiver may be appointed.

The receiver is under the control of the court in which the action is pending.

Except in extreme or urgent cases, it is irregular for a court to appoint a receiver without giving the defendant an opportunity to be heard.

A receiver may be appointed in supplementary proceedings. See topic 7.06 Executions.

A receiver may be discharged when it is made to appear that the necessity for a receiver no longer exists.

7.15 REDEMPTION:

See topic 7.06 Executions; categories 3 Business Regulation and Commerce, topic Sales; Mortgages, topic Mortgages.

7.16 USURY:

See category 3 Business Regulation and Commerce, topic 3.07 Interest.

8 DISPUTE RESOLUTION

8.01 ALTERNATIVE DISPUTE RESOLUTION:

Use of Alternative Dispute Resolution to resolve conflicts is now legally permitted and actively encouraged under Rep. Act No. 9285, The Alternative Dispute Resolution Act of 2004. This law, however, shall not apply to resolution or settlement of following: (a) Labor disputes covered by Presidential Decree No. 442, otherwise known as Labor Code of the Philippines, as amended and its implementing rules and regulations; (b) civil status of persons; (c) validity of marriage; (d) any ground for legal separation; (e) jurisdiction of courts; (f) future inheritance; (g) criminal liability; and (h) those which by law cannot be compromised.

Mandatory Dispute Resolution.

In any civil action, parties and their attorneys are required to appear at pretrial conference before court to consider possibility of amicable settlement or of submission to alternative modes of dispute resolution. Failure on part of plaintiff shall cause for dismissal of action and failure on part of defendant shall cause plaintiff to present his evidence ex parte and court to render judgment on basis thereof. (Rule 18, §5, 1997 Rules of Civil Procedure).

Parties to collective bargaining agreement (CBA) are required to include in their agreement establishment of grievance machinery for adjustment and resolution of grievances arising from interpretation or implementation of their CBA and those arising from interpretation and implementation of company personnel policies. Grievances not settled before grievance machinery shall be automatically referred to voluntary arbitrator or panel of voluntary arbitrators. (Art. 260, Labor Code).

Cases arising from interpretation or implementation of Collective Bargaining Agreements and from interpretation or enforcement of company policies shall be disposed of by Labor Arbiter by directing parties to avail of grievance machinery and voluntary arbitration. Secretary of Labor and Employment may assume jurisdiction over disputes causing or likely to cause strikes or lockouts which will adversely affect national interests and certify same for compulsory arbitration.

8.02 ARBITRATION:

The Arbitration Law (R.A. 876) permits parties to submit to arbitration to one or more arbitrators any controversy existing between them at time of submission and which may be the subject of an action, or parties to any contract may in such contract agree to arbitrate any controversy thereafter arising between them. Such submission or contract is valid, enforceable, and irrevocable, save upon such grounds for revocation of any contract. Such submission or contract may include questions arising out of valuations, appraisals, or other controversies which may be collateral, incidental, precedent or subsequent to any issue between parties. The arbitration must be in writing and subscribed by parties thereto.

The law is not applicable to controversies and to cases subject to jurisdiction of National Labor Relations Commission.

Power of Arbitrators.

Arbitrators can administer oaths, subpoena witnesses, issue subpoena duces tecum, decide relevancy and materiality of evidence offered, and grant rehearing.

Award and Judgment.

The award must be in writing, signed, and acknowledged by majority of arbitrators. At any time within one month after award is made, any party may apply to court having jurisdiction for an order confirming award.

See topic 8.01 Alternative Dispute Resolution; category 10 Employment, topic 10.02 Labor Relations.

9 DOCUMENTS AND RECORDS

9.01 ACKNOWLEDGMENTS:

In the Philippines may be taken before following officers: Notary public, or any officer acting as notary public ex officio, such as clerks of Supreme Court, Regional Trial Court, Metropolitan Trial Judges, Municipal Trial Judges, Municipal Circuit Trial Judges, Chief of Division of Archives, Patents, Copyrights and Trademarks, etc. (A.C. §242).

Notary public must require person acknowledging an instrument who is liable to pay taxes on residence to exhibit his community tax certificate showing payment thereof. In addition, if person acknowledging is an alien, his alien certificate of registration must be exhibited.

In foreign country before ambassador, minister, secretary of legation, chargé d'affaires, consul, vice-consul, or consular agent of the Philippines acting within the country or place to which he is accredited; notary public or officer duly authorized by law of country to take acknowledgments of instruments in place where act is done.

When a party to the contract is an alien, in addition to his Community Tax Certificate, his Alien Certificate of Registration number, date and place of issuance thereof, and date of his last annual report must be stated in acknowledgment.

Forms.

In the case of natural persons acting in their own right:

Form

REPUBLIC OF THE PHILIPPINES)

PROVINCE/CITY OF . . . .) S.S.

BEFORE ME, a Notary Public, for and in the Province/City of . . . ., this . . . . day of . . . ., 20 . . ., personally appeared . . . . . . with Community Tax Certificates No. . . . . issued at . . . . on . . . ., and (if alien) Alien Certificate of Registration No. . . . ., issued at . . . . on . . . ., known to me and to me known to be the same person who executed the foregoing instrument and acknowledged to me that he executed the same as his free and voluntary act and deed for the uses and purposes therein set forth.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my notarial seal this . . . . . . day of . . . ., 20. . . .

NOTARY PUBLIC

My Commission expires on Dec. 31, 20. . .

(Or other Official Authorized to

administer oath)

Doc. No. . . . . . .

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Book No. . . . . . .

Series of 20 . . .

In the case of corporations, after giving all data on residence tax certificates and alien certificate of registration as in above form, the text should continue: “in his capacity as . . . . . . of . . . . . ., with Community Tax Certificates Nos. C- . . . . . . and C-1 . . . . . ., issued at . . . . . ., and . . . . . ., on . . . . . ., 20. . . . and . . . . . ., 20. . . ., respectively, to me known and known to me to be the same person who signed the foregoing instrument and acknowledged to me that he executed the same as his free and voluntary act and deed and as the free and voluntary act and deed of the corporation which he represents, for the uses and purposes therein set forth.”

In the case of deeds affecting real property, the following paragraph should be inserted between the first and second paragraphs of the above form: “I Further Certify that the foregoing instrument consists of . . . . . . pages, including this page; that it relates to a deed of (state whether sale, mortgage, release, etc.) over . . . . . . registered/unregistered parcels of land located in . . . . . ., Philippines; and that it was signed by the party/parties thereto and his/their instrumental witnesses at the bottom of the instrument and on the left hand margin of each and every other page thereof.” This additional paragraph not required if the instrument consists of only one page.

In the case of chattel mortgages, the first paragraph, after data on alien and residence certificates, should read: “to me known and known to me to be the same persons who signed the foregoing chattel mortgage and affidavit as mortgagor and mortgagee and made oath to the truth of the said affidavit,” etc.

Authentication.

An acknowledgment of a document or official record made outside the Philippines by a notary public, commissioner of deeds or other official authorized to take acknowledgments will not be admitted in evidence or recorded in the Philippines unless authenticated by an ambassador, minister, secretary of legation, charge d'affaires, consul, vice-consul or consular agent of the Republic of the Philippines resident in the jurisdiction where made.

Acknowledgments before notaries public for use in foreign countries are usually required to be authenticated by Clerk of Regional Trial Court in province where notary public is appointed, or, in case of notary public whose jurisdiction is confined to City of Manila, by Clerk of Regional Trial Court of Manila, and notarial certificates are also required to be authenticated by Executive Secretary to President of Philippines and consular officer of country in which acknowledgment is to be used.

9.02 AFFIDAVITS:

An affidavit is a statement of facts made in writing and under oath by a person before another who is authorized by law to administer oaths. Forms and solemnities of affidavits are governed by laws of country in which they are executed. But when they are executed before diplomatic or consular officials of Republic of Philippines in a foreign country, solemnities established by Philippine laws must be observed in their execution.

Uses of Affidavits.

They may be used to verify a pleading or paper in a special proceeding to obtain a provisional remedy, examination of witnesses, or stay of proceedings, or upon a motion and in any other case specially permitted by some other provisions of law. Evidence of the publication of a document, or notice required by law, or by an order of a court or judge, to be published in a newspaper, may be given by affidavit of the printer of the newspaper, his foreman, or principal clerk, annexed to a copy of the document or notice specifying the times when, and the paper in which the publication was made. If such affidavit be made in an action or special proceeding pending in a court, it may be filed with the court or the clerk thereof. In such case the original affidavit or a copy thereof, certified by the judge of the court or the clerk having it in custody, is prima facie evidence of the facts stated therein.

Form

Republic of the Philippines

City/Province of . . . . } s.s.:

I, ..., after being sworn according to law, depose and say:

That (here set forth the declaration or declarations).

. . . .

Affiant

Subscribed and sworn to before me this . . . . . . day of . . . . . ., 20. . . ., in . . . . . ., Philippines. Affiant exhibited to me his/her Residence Certificate No. . . . . . . issued at . . . . . ., Philippines, on . . . . . ., 20. . . . .

. . . .

Notary Public

My commission expires

Dec. 31, 20. . . . .

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Affidavit as Evidence.

The law only concedes it the character of prima facie evidence of the facts stated therein, but such evidence is susceptible of impeachment, since all documents attest the facts that are the origin of and the date of their execution, but do not attest the veracity of the statements therein made.

Facts alleged against an accused in a criminal case cannot be proved by affidavits. Affidavits are admissible only in special cases relating to procedure and are simply prima facie evidence. The admission of an affidavit does not constitute error when those who signed it testify in court on what they had stated in the affidavit.

9.03 NOTARIES PUBLIC:

Only qualified attorneys and certain public officials or persons qualified for the office of notary public may be appointed as notaries public. There must be at least one for each municipality. In the city of Manila notaries are appointed by Executive Judge, Regional Trial Court. In provinces they are appointed by judge of Regional Trial Court. Every notary must file oath of office. Various public officials are notaries public ex officio.

Notaries are usually appointed for a term of two years expiring on Dec. 31. Notary's authority is limited to province for which he is appointed, City of Manila being considered a province for that purpose.

A notarial seal is required. The law requires that each notary must keep a notarial register and show therein the nature of each instrument acknowledged or sworn to, date, number, and number of pages. Notarial registers must be archived in office of clerk of Regional Trial Court. Notarial fees are fixed by law. Notaries are under supervision of Regional Trial Court.

Notarial certificate must show date of expiration of commission.

A. M. No. 02-8-02-SC dated Aug. 13, 2002, requires notary public to render notarial services only at specific and appropriate address. On certain exceptional occasions or situations, notarial services may be performed in following sites: (a) public offices, convention halls, and other appropriate public places for purpose of administering oaths of office; (b) at request of parties, public function areas in hotels and other appropriate places for signing of contracts, deeds, and other documents requiring notarization; (c) residences of any party to contract, deed or other document requiring notarization; (d) hospitals and other medical institutions where party to contract is confined for treatment; (e) any place where for legal reasons party to contract, deed or other document requiring notarization may be confined, and (f) such other places as may be dictated because of emergency.

9.04 RECORDS:

All documents affecting land titles are registered with the register of deeds for the province in which the land is situated; in the cities of Manila and Baguio with the registers of deeds of said cities.

Mineral claims are registered with the mining recorder. The law provides for a mining recorder in each land district, but where no recorder has been designated the duties devolve upon the Secretary of the Provincial Board of the province in which the mineral claim is located. In the Mountain Province the mining recorder resides in the City of Baguio. (Administrative Code, §1848).

Vital Statistics.

The civil status of persons is recorded by civil registrars. There is a local civil registrar for each municipality and one for the City of Manila. All civil registrars are under the supervision of a civil registrar-general, who is the Director of Census & Statistics. (Act No. 3753).

Torrens System of registering land titles is in effect.

9.05 SEALS:

Seals are not necessary except in connection with certain official and corporate acts.

9.06 TORRENS ACT:

See topic 9.04 Records.

10 EMPLOYMENT

10.01 EMPLOYER AND EMPLOYEE:

See topic 10.02 Labor Relations.

10.02 LABOR RELATIONS:

National Labor Relations Commission shall be attached to Dept. of Labor & Employment for program and policy coordination only. It shall be composed of Chairman and 23 members. Commission may sit en banc or in eight divisions composed of three members. Commission shall have exclusive appellate jurisdiction over all cases decided by Labor Arbiters.

Labor arbiters exercise exclusive jurisdiction in: (1) Unfair labor practice cases; (2) termination disputes; (3) if accompanied with claim for reinstatement, those cases that workers may file involving wages, rates of pay, hours of work and other terms and conditions of employment; (4) claims for actual, moral, exemplary and other forms of damages arising from employer-employee relations; (5) cases arising from any violation of Art. 264 of Labor Code regarding prohibited activities, including questions involving legality of strikes and lockouts; and (6) except claims for employees compensation, social security, medicare and maternity benefits, all other claims arising from employer-employee relations, including those of persons in domestic or household service, involving amount exceeding P5,000, whether or not accompanied with claim for reinstatement. (R.A. 6715).

Public Employment Service Office Act of 1999.

(R.A. 8759).

There shall be established in all capital towns of provinces, key cities and other strategic areas Public Employment Service Office (PESO).

Public Employment Service Office (PESO) shall ensure prompt, timely and efficient delivery of employment service and provision of information on other Department of Labor and Employment (DOLE) programs. It shall (a) provide venue where people could explore various employment options and actually seek assistance they prefer; (b) serve as referral and information center for various services and programs of DOLE; (c) provide clients with adequate information on employment and labor market situation in area; and (d) network with other PESOs within region on employment for exchange purposes.

Hours of Labor.

Legal working hours for any employee in all establishments, whether for profit or not (except government employees, managerial employees, field personnel, members of family of employer who are dependent on him for support, domestics, person in personal service of another, and workers who are paid by results) shall not exceed eight in a day.

Any employee may be required by employer to perform overtime work in any of following cases: (1) When country is at war or when any other national or local emergency has been declared; (2) when it is necessary to prevent loss of life or property or in case of imminent danger to public safety due to actual or impending emergency; (3) when there is urgent work to be performed on machines to avoid serious loss or damage to employer; (4) when work is necessary to prevent loss or damage to perishable goods; and (5) where completion of work started before eighth hour is necessary to prevent serious obstruction to business of employer. Any employee required to render overtime work shall be paid additional compensation. (P.D. 850).

Weekly Rest Period.

Every employer shall give his employees a rest period of not less than 24 consecutive hours after every six consecutive normal workdays. (P.D. 850). Employer shall schedule weekly rest day of his employees, subject to collective bargaining agreement and to such rules and regulations as Secretary of Labor & Employment may prescribe, provided that preference of employee to his weekly rest day shall be respected by employer if same is based on religious grounds.

In case of force majeure, public emergencies, serious accidents and other exceptional cases as determined by Secretary of Labor & Employment, any employee may be required to work on his scheduled rest day even if it falls on Sun. or holiday, provided he is paid additional compensation of at least 30% of his regular wage. Where employees do not have regular working days by reason of nature of their work, they shall be entitled to additional compensation of at least 30% of their regular wage for work performed on Sundays and holidays. However, higher premium pay than that prescribed shall be paid by employer if stipulated in collective bargaining or other applicable employment contract. (P.D. 442).

Wages.

Effective July 8, 2008, all nonagricultural workers in Metro Manila shall receive minimum wage of P382 a day while for nonagricultural workers outside of Metro Manila, wage rates shall vary from region to region. For all plantation agricultural workers, wage rate is P186 a day while non-plantation agricultural workers, P213 a day. For workers employed by export-oriented registered cottage and handicraft industry enterprises employing not more than 30 workers, wage rate is P182 a day for workers in Metro Manila and outside Metro Manila while for workers employed in cottage and handicraft industry enterprises employing more than 30 workers, wage rate is P182 a day for workers in Metro Manila and outside Metro Manila. In Metro Manila, for those employed by retail or service establishments regularly employing not more than ten workers, wage rate is P179 a day; for those regularly employing 11 to 15 workers, wage rate is P186 a day. (R.A. 6727, am'd WO-NCR-1, 1-A, am'd WO-NCR-2, am'd WO-NCR-03, am'd WO-NCR-04, am'd WO-NCR-05, am'd WO-NCR-06, am'd WO-NCR-07, am'd WO-NCR-08).

Effective Nov. 5, 2001, all private sector workers and employees in National Capital Region receiving daily wage rate of P250 up to P290 shall receive emergency cost of living allowance in amount of P30 per day payable in two tronches: Nov. 5, 2001—P15 and Feb. 1, 2002—P15. (WO-NCR-09).

Wages must be paid in legal tender, and it is unlawful to pay such wages in form of promissory notes, vouchers, coupons, tokens or any other form alleged as legal tender. Action to enforce any claim must be brought within three years, or else it is barred.

Employers are required to pay all their rank-and-file employees 13th month pay not later than Dec. 24 of every year. (Memo. Order 28).

Child Labor.

No child below 15 years shall be employed except when he works directly under sole responsibility of his parents or guardian and his employment does not in any way interfere with his schooling. Person between 15 and 18 years may be employed for such number of hours and such periods of day as determined by Secretary of Labor & Employment; however, employment of person below 18 years in undertaking which is hazardous or deleterious in nature shall not be allowed. No employer shall discriminate against any person in respect to terms and conditions of employment on account of his age. (P.D. 850).

Children below 15 years of age may however be employed in following instances: (1) When child works directly under sole responsibility of his parents or legal guardian and only members of employer's family are employed and his employment neither endangers his life, safety, health and morals, nor impairs his normal development and parent or legal guardian shall provide child with prescribed primary and/or secondary education; or (2) child's employment in public entertainment through cinema, theater, radio or television is essential but such employment contract must be concluded by child's parents or legal guardian with express agreement of child and approved by Department of Labor and Employment. In all these instances, following requirements should be complied with: (1) employer shall secure work permit from Department of Labor and Employment; (2) employer shall ensure protection, health, safety and morals of child; (3) employer shall institute measures to prevent exploitation or discrimination taking into account system and level of remuneration, and duration and arrangement of working time; and (4) employer shall formulate and implement continuous program for training and skill acquisition of child.

Employment of child models in all commercial or advertisements promoting alcoholic beverages, intoxicating drinks, tobacco and its byproducts and gambling or any form of violence or pornography is prohibited. (R.A. 7610 as am'd by R.A. 7658 am'd by R.A. 9231).

Female Labor.

No woman, regardless of age, shall be employed, with or without compensation: (1) In any industrial undertaking between ten o'clock at night and six o'clock in morning of following day; (2) in any commercial or non-industrial undertaking other than agricultural between midnight and six o'clock in morning of following day; and (3) in any agricultural undertaking at night time unless she is given rest period of not less than nine consecutive hours. These prohibitions shall not apply: (1) In cases of actual or impending emergencies to prevent loss of life or property or in case of force majeure; (2) in case of urgent work to be performed on machineries to avoid serious loss which employer would otherwise suffer; (3) where work is necessary to prevent serious loss of perishable goods; (4) where employee holds responsible position of managerial or technical nature; (5) where nature of work requires manual skill of female workers and same cannot be performed with equal efficiency by male workers; (6) where women employees are immediate members of family operating establishment; and (7) under other analogous cases.

To insure safety and health of women employees, in appropriate cases, employer shall be required to: (1) Provide seats proper for women and permit them to use such seats when they are free from work and during working hours; (2) establish separate toilet rooms for men and women; (3) establish nursery in workplace; and (4) determine appropriate minimum age and other standards for retirement in special occupations.

No employer shall discriminate against any woman with respect to terms and conditions of employment on account of her sex. It shall be unlawful for employer to require as condition of employment or for continuation of employment that woman employee shall not get married or to stipulate that upon getting married woman employee shall be deemed resigned or separated, or to actually dismiss or discriminate against woman employee by reason of her marriage. (P.D. 850).

See topic 10.03 Social Security, subhead Benefits, catchline Maternity Benefits.

Migrant Workers.

Philippine Overseas Employment Administration (POEA) shall regulate private sector participation in recruitment and overseas placement of workers by setting up licensing and registration system. It shall also formulate and implement system for promoting and monitoring overseas employment of Filipino workers taking into consideration their welfare and domestic manpower requirements. In recruitment and placement of workers to service requirements for trained and competent Filipino workers, POEA shall deploy only to countries where Philippines has concluded bilateral labor agreements or arrangements.

For claims arising out of employer-employee relationship or by virtue of any law or contract involving Filipino workers for overseas deployment, including claims for actual, moral, exemplary and other forms of damages, Labor Arbiters of National Labor Relations Commission (NLRC) shall have original and exclusive jurisdiction to hear and decide, within 90 calendar days after filing of complaint.

Liability of principal/employer and recruitment/placement agency for any and all money claims shall be joint and several. Performance bond to be filed by recruitment/placement agency, as provided by law, shall be answerable for all money claims or damages that may be awarded to workers. If recruitment/placement agency is juridical being, corporate officers and directors and partners as case may be, shall themselves be jointly and severally liable with corporation or partnership for aforesaid claims and damages. Such liabilities shall continue during entire period or duration of employment contract and shall not be affected by any substitution, amendment or modification of said contract made locally or in foreign country. Any compromise/amicable settlement or voluntary agreement on money claims inclusive of damages under this section shall be paid within four months from approval of settlement by appropriate authority. In case of termination of overseas employment without just, valid or authorized cause as defined by law or contract, worker shall be entitled to full reimbursement of his placement fee with interest at 12% per annum, plus his salaries for unexpired portion of his employment contract or for three months for every year of unexpired term, whichever is less.

Labor Organizations.

All persons employed in commercial, industrial, and agricultural enterprises, including religious, charitable, medical or educational institutions whether operating for profit or not, have right to self-organization and to form, join or assist labor organizations for purposes of collective bargaining. Exempted from joining are: (1) government employees; (2) managerial employees; and (3) employees of religious, charitable, medical or educational institutions not operating for profit provided latter do not have existing collective bargaining agreements. Security guards are now eligible for membership in any labor organization. (Philips Industrial Dev't. v. NLRC, 210 SCRA 339). Labor organization must be registered with Dept. of Labor & Employment to be legitimate labor organization entitled to: (1) Act as representative of its members for purpose of collective bargaining; (2) be certified as exclusive representative of employees; (3) own property, real or personal, for use and benefit of labor organizations; (4) sue and be sued in its registered name; (5) undertake activities for benefit of organization and its members, including cooperative, housing welfare and other projects not contrary to law; and (6) to be furnished by employer, upon written request, with his annual audited financial statements, including balance sheet and profit and loss statement, within 30 days from date of receipt of request, after union has been duly recognized by employer or certified as sole and exclusive bargaining representative of employees in bargaining unit, or within 60 days before expiration of existing collective bargaining agreement, or during collective bargaining negotiation. (R.A. 6715).

In organized establishments, when verified petition questioning majority status of incumbent bargaining agent is filed within 60 day period before expiration of collective bargaining agreement, Med-Arbiter shall automatically order election by secret ballot when verified petition is supported by written consent of at least 25% of all employees in bargaining unit to ascertain will of employees in appropriate bargaining unit. To have valid election, at least majority of all eligible voters in unit must have cast their votes. Labor union receiving majority of valid votes cast shall be certified as exclusive bargaining agent of all workers in unit. In any establishment where there is no certified bargaining agent, certification election shall automatically be conducted by Med-Arbiter upon filing of petition by legitimate labor organization. (RA 6715).

Unfair Labor Practices.

It is unfair labor practice for employer: (1) To interfere with, restrain or coerce employees in their right of self-organization; (2) to require as condition of employment that person or employee must not join labor organization or withdraw from one; (3) to contract out services or functions being performed by union members when such will interfere with, restrain or coerce employees in their right of self-organization; (4) to initiate, dominate, assist or interfere with formation or administration of any labor organization; (5) to discriminate in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization, unless there is closed shop agreement; (6) to dismiss or otherwise prejudice against employee for having given or being about to give testimony under Labor Code; (7) to violate duty to bargain collectively; (8) to pay negotiations or attorney's fees to union or its officers as part of settlement of any issue in collective bargaining; (9) to violate collective bargaining agreement. Only officers and agents of corporations, associations or partnerships who have actually participated in, authorized or ratified unfair labor practices shall be held criminally liable.

It is unfair labor practice for labor organization: (1) To restrain or coerce employees in their right of self-organization; (2) to cause or attempt to cause employer to discriminate against employee; (3) to violate duty, or refuse to bargain collectively with employer; (4) to cause or attempt to cause employer to pay or agree to pay money or other things of value, in nature of exaction for services not performed; (5) to ask for or accept negotiations or attorney's fees from employers as part of settlement of issue in collective bargaining; (6) to violate collective bargaining agreement. (P.D. 442). Only officers or agents or members of labor associations or organizations who have actually participated in, authorized or ratified unfair labor practices shall be held criminally liable. (B.P. 130).

Strikes, Picketing and Lockouts.

State encourages free trade unionism and free collective bargaining. Workers shall have right to engage in concerted activities for collective bargaining. Right of legitimate labor organizations to strike and picket and of employers to lockout, consistent with national interest, shall continue to be recognized provided that no labor union may strike and no employer may declare lockout on grounds involving inter-union and intra-union disputes.

In cases of bargaining deadlocks, certified bargaining representative may file notice of strike or employer may file notice of lockout with Dept. of Labor and Employment 30 days before intended date thereof. In cases of unfair labor practices, notice shall be 15 days and in absence of certified bargaining representative, notice of strike may be filed by any legitimate labor organization in behalf of its members. In case of dismissal from employment of union officers duly elected, which may constitute union busting where existence of union is threatened, 15-day cooling-off period shall not apply and union may take action immediately. Decision to declare strike must be approved by majority of total union membership in bargaining unit concerned while decision to declare lockout must be approved by majority of board of directors of corporation or association or of partners in partnership. (E.O. 111). In labor disputes causing or likely to cause strikes or lockouts adversely affecting national interest, Sec. of Labor and Employment may assume jurisdiction over dispute and certify same for compulsory arbitration. Such certification shall automatically enjoin intended or impending strike or lockout. President of Philippines, however, shall have authority to intervene at any time and exercise jurisdiction over any labor dispute affecting national interest in order to settle or terminate same. Before or at any stage of compulsory arbitration process, parties may opt to submit their dispute to voluntary arbitration. Secretary of Labor and Employment, National Labor Relations Commission or voluntary arbitrator shall decide dispute within 30 calendar days from assumption of jurisdiction or certification of dispute, which decision shall be final and immediately executory ten calendar days after receipt by parties. (RA 6715). Assumption of jurisdiction by President or Secretary of Labor and Employment and certification of dispute to National Labor Relations Commission shall be immediately executory unless restrained by proper authorities. (L.O.I. 1458).

National Health Insurance Act of 1995.

(R.A. 7875). National Health Insurance Program shall provide health insurance coverage and ensure affordable and accessible health care services for all Filipino citizens. Program includes sustainable system of fund collection, management and disbursements for financing availability of basic minimum package and other supplementary packages of health insurance benefits to progressively expanding proportion of population. It is limited to paying for utilization of health services by covered beneficiaries or to purchasing health services in behalf of such beneficiaries. It is prohibited from: (1) Directly providing health care services; (2) buying and dispensing drugs and pharmaceuticals; (3) employing physicians and other professionals for purposes of directly rendering health care; and (4) owning or investing in health care facilities.

Beneficiaries must be enrolled in program to entitle them to benefits and services provided by law. Following are considered enrolled in program: (1) All persons currently eligible for benefits under Medicare Program I, including SSS and GSIS members, retirees, pensioners and their dependents; (2) all persons eligible for benefits through health insurance plans established by local governments; (3) all persons eligible for benefits as members of local health insurance plans established by Philippine Health Insurance Corporation; and (4) all persons eligible for benefits as members of other government initiated health insurance programs.

Member whose premium contributions for at least three months have been paid within six months prior to first day of his or his dependents' availment shall be entitled to benefits of program.

Employees' Compensation and State Insurance Fund provides for tax-exempt employees' compensation program whereby employees and their dependents, in case of work-connected injury or death, may promptly secure adequate income and medical benefits.

Coverage is compulsory for all employers and their employees who are subject to coverage by Social Security System provided that in case of employee who is both covered by Social Security System and Government Service Insurance System, only his employment with latter shall be considered for purposes of his coverage. Coverage also extends to Philippine citizens employed abroad. All employers and their employees already registered with Social Security System shall not be registered again because they are automatically registered for coverage under Employees' Compensation.

State Insurance Fund shall be liable for compensation to employee or his dependents except when disability or death was occasioned by employee's intoxication, willful intention to injure or kill himself or another and notorious negligence.

Contributions.

Initial monthly contribution of 1% of monthly salary credit to be paid by employers, which started Jan. 1975 and every month thereafter.

When covered employee dies, becomes disabled or separated from employment, his employer's contribution to pay monthly contributions shall cease at end of month of contingency and during such months that he is not receiving wages or salary.

Benefits.

Medical Benefits.

Immediately after employee contracts sickness or sustains injury, he shall be provided by Social Security System during period of disability with such medical services and appliances as nature of his sickness or injury may require, subject to expense limitation prescribed by Employees' Compensation Commission.

Disability Benefits.

Any employee who sustains temporary total disability shall be paid by Social Security System cash benefit equivalent to 90% of his average daily salary credit, but not less than P10 nor more than P90 a day for continuous period not longer than 120 days. Payment of benefit shall bar recovery of sickness benefit under Social Security System for same sickness, injury or disability.

Any employee who contracts sickness or sustains injury resulting in permanent total disability shall for each month until his death, be paid by Social Security System during such disability, amount equivalent to monthly income benefit plus 10% thereof for each dependent child, but not exceeding five, beginning with youngest and without substitution provided that monthly income benefit shall be new amount of monthly benefit for all covered pensioners. Monthly income benefit shall be guaranteed for five years and shall be suspended if employee is gainfully employed or recovers from his permanent total disability, or fails to present himself for examination at least once a year upon notice by Social Security System.

Any employee who contracts sickness or sustains injury resulting in permanent partial disability shall for each month not exceeding period designated herein be paid by Social Security System during such disability income benefit equivalent to income benefit for permanent total disability.

Death Benefits.

Upon covered employee's death, his primary beneficiaries shall be paid amount equivalent to covered employee's monthly income benefit plus 10% thereof for each dependent child but not exceeding five, beginning with youngest and without substitution provided that monthly income benefit shall be guaranteed for five years. In absence of primary beneficiaries, his secondary beneficiaries shall be paid lump sum benefit equivalent to 60 times monthly income benefit. (P.D. 1368). Minimum death benefit shall not be less than P15,000. (P.D. 1692, am'd P.D. 1921).

Notice of Separation.

A contract of employment without a definite period may be terminated by employee by serving a written notice on employer at least one month in advance, or by employer by serving such notice to employee at least one month in advance or within a period equivalent to one-half month for every year of service, whichever is longer. If no notice is served, payment of an amount equivalent to employee's salary corresponding to required period of notice is sufficient.

Domestics.

House helpers cannot be required to work more than ten hours a day and are entitled to four days vacation each month with pay. If a domestic is unjustly dismissed, he must be paid salary earned plus that for 15 days by way of indemnity. If he leaves without justifiable reason, he forfeits any unpaid salary due him for not exceeding 15 days. Monthly minimum compensation for house helpers shall be (1) P800 in Manila, Quezon City, Pasay City, Caloocan City, Mandaluyong

City, and municipalities of Makati, San Juan, Malabon, Navotas, Muntinglupa, Paranaque, Las Pinas, Pasig, Marikina, Valenzuela, Taguig and Pateros in Metro Manila and in highly urbanized cities; (2) P650 in other chartered cities and first class municipalities; and (3) P550 in other municipalities. Househelpers who are receiving at least P1,000 shall be covered by Social Security System (SSS) and be entitled to all benefits provided, thereunder. (R.A. 7655). Employer must furnish, free of charge to a domestic, suitable and sanitary quarters, as well as adequate food and medical attendance. Upon extinguishment of service, domestic may demand from employer written statements of nature and duration of services and efficiency and conduct of house helper.

See also topic 10.03 Social Security.

10.03 SOCIAL SECURITY:

Social Security Act (R.A. 1161, am'd R.A. 1792, am'd R.A. 2658, am'd R.A. 3839, am'd R.A. 4482, am'd R.A. 4857, am'd by P.D. 24, am'd by P.D. 177, am'd by P.D. 347, am'd by P.D. 735, am'd by P.D. 1202, am'd by P.D. 1636, am'd by E.O. 28, am'd by E.O. 102, am'd by R.A. 8282) provides for retirement, death, disability, and sickness benefits. Social Security System was created to carry out purposes of Act, under direction and control of Social Security Commission.

Coverage compulsory upon all employees not over 60 years of age on date of their employment and on employers on first day of their operation. Domestic helpers receiving salary of at least P1,000 per month are compulsorily covered. Coverage is also compulsory upon self-employed persons as determined by Commission. Effectivity of coverage of certain groups of self-employed shall be determined by Commission under such rules and regulations as it may prescribe. Philippine citizens recruited in Philippines by foreign-based employers for employment abroad may be covered by System on voluntary basis under such rules and regulations as Social Security Commission may prescribe. System commenced operations on Sept. 1, 1957.

FOR EMPLOYER - EMPLOYEE CONTRIBUTIONS

Range of Compensation	Monthly Salary Credit	Social Security	EC Employer	Total Contributions		
Employer	Employee	Total	Employer	Employee	Combined	
1,000 - 1,249.99	1,000.00	50.70	33.30	84.00	10.00	6
1,250 - 1,749.99	1,500.00	76.00	50.00	126.00	10.00	8
1,750 - 2,249.99	2,000.00	101.30	66.70	168.00	10.00	111
2,250 - 2,749.99	2,500.00	126.70	83.30	210.00	10.00	136
2,750 - 3,249.99	3,000.00	152.00	100.00	252.00	10.00	162
3,250 - 3,749.99	3,500.00	177.30	116.70	294.00	10.00	187
3,750 - 4,249.99	4,000.00	202.70	133.30	336.00	10.00	212
4,250 - 4,749.99	4,500.00	228.00	150.00	378.00	10.00	238
4,750 - 5,249.99	5,000.00	253.30	166.70	420.00	10.00	263
5,250 - 5,749.99	5.500.00	278.70	183.30	462.00	10.00	288
5,750 - 6,249.99	6,000.00	304.00	200.00	504.00	10.00	314
6,250 - 6,749.99	6,500.00	329.30	216.70	546.00	10.00	339
6,750 - 7,249.99	7,000.00	354.70	233.30	588.00	10.00	364
7,250 - 7,749.99	7,500.00	380.00	250.00	630.00	10.00	390
7,750 - 8,249.99	8,000.00	405.30	266.70	672.00	10.00	415
8,250 - 8,749.99	8,500.00	430.70	283.30	714.00	10.00	440
8,750 - 9,249.99	9,000.00	456.00	300.00	756.00	10.00	466
9,250 - 9,749.99	9,500.00	481.30	316.70	798.00	10.00	491
9,750 - 10,249.99	10,000.00	506.70	333.30	840.00	10.00	516
10,250 - 10,749.99	10,500.00	532.00	350.00	882.00	10.00	542
10,750 - 11,249.99	11,000.00	557.30	366.70	924.00	10.00	567
11,250 - 11,749.99	11,500.00	582.70	383.30	966.00	10.00	592
11,750 - 12,249.99	12,000.00	608.00	400.00	1008.00	10.00	618
12,250 - 12,749.99	12,500.00	633.30	416.70	1050.00	10.00	643
12,750 - 13,249.99	13,000.00	658.70	433.30	1092.00	10.00	668
13,250 - 13,749.99	13,500.00	684.00	450.00	1134.00	10.00	694

13,750 - 14,249.99	14,000.00	709.30	466.70	1176.00	10.00	719
14,250 - 14,749.99	14,500.00	734.70	483.30	1218.00	10.00	744
14,750 - OVER	15,000.00	760.00	500.00	1260.00	10.00	770

(Social Security Commission Resolution No. 900 - s2001)

Contributions.

Beginning as of last day of calendar month when employee's compulsory coverage takes effect and every month thereafter during his employment, employer must deduct and withhold from earnings of covered employee amount corresponding to his earnings during month in accordance with preceding schedule effective on Jan. 1, 2002.

Employer shall issue receipt for all contributions deducted from employee's compensation or shall indicate such deductions on employee's pay envelope.

Remittance of such contributions by employer shall be supported by quarterly collection list to be submitted to System at end of each calendar quarter.

Benefits.

Monthly pension shall be highest of following: (1) sum of (a) P300, plus (b) 20% of average monthly salary credit, plus (c) 2% of average monthly salary credit for each credited year of service in excess of ten years; (2) 40% of average monthly salary credit; or (3) P1,000. In no case, however, will monthly pension be less than P1,200 for members with at least ten years of service and P2,400 for those with 20 years of service.

Retirement Benefits.

Covered member who has paid at least 120 monthly contributions prior to semester of retirement and who (1) has reached 60 years old and is already separated from employment or has ceased to be self-employed, or (2) has reached 65 years shall be entitled for as long as he lives to monthly pension. Covered member who is 60 years old upon retirement but does not qualify for pension benefits above-mentioned shall be entitled to lump sum benefit equal to total contributions paid by him and on his behalf.

Monthly pension shall be suspended upon reemployment or resumptions of self-employment of retired member who is less than 65 years old. Upon death of retired member, his primary beneficiaries shall be entitled to receive pension and if he has no primary beneficiaries and he dies within 60 months from start of his monthly pension, his secondary beneficiaries shall be entitled to lump sum benefit equivalent to total monthly pensions corresponding to balance of five-year guaranteed period.

Death Benefits.

Upon death of member who has paid at least 36 monthly contributions prior to semester of death, his primary beneficiaries shall be entitled to lump sum benefit equal to 36 times monthly pension. If he has not paid required 36 monthly contributions, his primary or secondary beneficiaries shall be entitled to lump sum benefit equal to monthly pensions times number of monthly contributions paid or 12 times monthly pension, whichever is higher.

Disability Benefits.

Upon permanent total disability of member who has paid at least 36 monthly contributions prior to semester of disability, he shall be entitled to monthly pension but if he has not paid required 36 monthly contributions, he shall be entitled to lump sum benefit equivalent to monthly pension times number of monthly contributions paid or 12 times monthly pension whichever is higher.

Monthly pension and dependent's pension shall be suspended upon reemployment or resumption of self-employment or recovery of disabled member from his permanent disability.

Maternity Benefits.

Female member who has paid at least three monthly contributions in 12 month period immediately preceding semester of her childbirth or miscarriage shall be paid daily maternity benefit equivalent to 100% of her average daily salary credit for 60 days or 78 days in case of caesarian delivery subject to following conditions: (a) employee has notified her employer of her pregnancy and probable date of her childbirth; (b) full payment shall be advanced by employer within 30 days from filing of maternity leave application; (c) payment of daily maternity benefits shall be bar to recovery of sickness benefits under this act; (d) maternity benefits provided herein shall be paid for first four deliveries or miscarriages; (e) SSS shall immediately reimburse employer of 100% of amount of maternity benefits advanced to employee by employer; and (f) if employee member should give birth or suffer miscarriage without required contributions having been remitted for her by her employer to SSS, latter shall pay to SSS damages equivalent to benefits which employee member would otherwise be entitled to.

Sickness Benefits.

Any covered employee who has paid at least three monthly contributions in 12 month period immediately preceding semester of sickness, and is confined for more than three days in hospital, or elsewhere, shall for each day of confinement or fraction thereof be paid by his employer or by System if such person is unemployed or self-employed, daily allowance equivalent to 90% of his average daily salary credit. In no case shall daily sickness benefit allowance be paid for period longer than 120 days in one calendar year, nor shall any unused portion of 120 days sickness benefits be carried forward and added to total period allowable in subsequent year; neither can it be paid for more than 240 days on account of same confinement.

Employee must have paid required contribution for at least a 12 month period. 100% of daily benefit paid by an employer must be reimbursed by System.

Funeral Benefit.

Funeral grant of P12,000 shall be paid in cash or in kind, to help defray cost of funeral expenses upon death of covered member, permanently totally disabled employee or retiree.

Private Benefit Plans.

Existing plans must be integrated with the System. Benefits already earned under such plans will not be impaired. Changes in the plan resulting from integration are subject to agreement between employees and employers concerned.

All contributions collected in payment of benefits made under the Act are exempt from any tax, assessment, fee or charge, and such payments are not liable to attachment, garnishment, levy or seizure before or after receipt by the person or persons entitled thereto except to pay any debt of the covered employee to the System.

Claims.

Filing, determination and settlement of claims are governed by rules promulgated by the Commission, whose decision becomes final 15 days after notice. Judicial review is permitted, after aggrieved party has exhausted remedies before the Commission.

ENERGY:

Renewable Energy Act of 2008 (RA 9513) shall establish framework for accelerated development and advancement of renewable energy resources, and development of strategic program to increase its utilization, to effectively prevent or reduce harmful emissions and thereby balance goals of economic growth and development with protection of health and environment.

Environmental Compliance—All renewable energy explorations, development, utilization, and renewable energy systems operations shall be conducted in accordance with existing environmental regulations as prescribed by DENR and/or any other concerned government agency.

Prohibited Acts—(1) Non-compliance or violation of Renewable Portfolio Standard (RPS) rules; (2) willful refusal to undertake net metering arrangements with qualified distribution grid users; (3) falsification or tampering of public documents or official records to avail of fiscal and non-fiscal incentives provided under this Act; (4) failure and willful refusal to issue single Certification from Department of Energy (DOE); and (5) Non-compliance with established guidelines that DOE will adopt for implementation of this Act.

Penalties—Any person who commits prohibited acts, shall upon conviction thereof, suffer penalty of imprisonment of from one year to five years, or fine ranging from minimum of Php100,000 to Php100,000,000, or twice amount of damages caused or costs avoided for non-compliance, whichever is higher, or both upon discretion of court. This is without prejudice to penalties provided for under existing environmental regulations prescribed by DENR and/or any other concerned government agency.

Enforcement—Department of Energy (DOE) shall be lead agency mandated to implement provisions of this Act. National Renewable Energy Board (NREB), on other hand, shall be under DOE and shall have following powers and functions: (1) Evaluate and recommend to DOE mandated RPS and minimum renewable energy generation capacities in off-grid areas, as it deems appropriate; (2) recommend specific actions to facilitate implementation of National Renewable Energy Program (NREP) to be executed by DOE and other appropriate agencies of government and to ensure that there shall be no overlapping and redundant functions within national government departments and agencies concerned; (3) monitor and review implementation of NREP, including compliance with RPS and minimum renewable energy generation capacities in off-grid areas; (4) oversee and monitor utilization of Renewable Energy Trust Fund; and (5) perform such other functions, as may be necessary to attain objectives of this Act.

General Incentives—(1) Income tax holiday for first seven years of commercial operations of renewable energy developer; (2) duty-free importation of renewable energy machinery, equipment, and materials in first ten years after certification; (3) special realty tax rates on equipment and machinery; (4) Net Operating Loss Carry-Over (NOLCO); (5) corporate tax rate; (6) accelerated depreciation; (7) zero percent value-added tax rate; (8) cash incentive of renewable energy developers for missionary electrification; (9) tax exemption of carbon credits; and (10) tax credit on domestic capital equipment and services.

National Grid Corporation (R.A. 9511)—Franchise was granted to National Grid Corporation and its successors or assigns to manage, improve, expand, operate, maintain, rehabilitate, repair and refurbish present nationwide transmission system of Republic of Philippines. Term of franchise, which has nationwide scope, is 50 years, from date of effectivity of law.

Franchise shall also be responsible for upgrading, modernizing facilities of TransCo and to initiate and implement projects for benefit of power industry. Following are other powers, obligations and limitations of National Grid Corporation: (1) Right to operate, manage and maintain transmission system and related facilities according to industry standards; (2) authority to engage in ancillary business and any related business which will maximize utilization of assets; (3) right of eminent domain necessary to construct, expand, maintain and operate system; (4) 60% of its capital shall be owned by Filipino citizens; (5) prohibition to sell, lease, or transfer franchise either through merger or any transfer of controlling interest to any person, firm or any commercial or legal entity without prior approval of Congress; (6) prohibition to engage in anti-competitive behavior, such as but not limited to cross-subsidization, price or market manipulation, or other unfair trade practices; (7) to pay franchise tax of 3% of its gross receipts from its operations; and (8) to submit to Congress annual report of its operations and finances.

Franchise is subject to legislative amendment or repeal. Furthermore, special right is given to President of Philippines to temporarily take over operation of transmission system in times of rebellion, public peril, calamity, emergency, disaster, or disturbance of peace and order.

11 ENVIRONMENT

11.01 ENVIRONMENTAL REGULATION:

General Supervision.

Primary government agency responsible for protection, conservation, management, development and exploration of environment and natural resources is Department of Environment and Natural Resources under executive branch of government.

It is composed of Department Proper, Staff Offices, Staff Bureaus, Regional Offices, Provincial Offices and Community Offices. Authority and responsibility for accomplishment of its objectives shall be vested in Secretary of Environment and Natural Resources who is appointed by President. (E.O. 292, s. of 1987).

National Pollution Control Decree of 1976 (P.D. 984) aims to prevent, abate and control pollution of water, air and land for more effective utilization of resources.

Prohibited Acts.

No person shall throw, run, drain, or otherwise dispose of any organic or inorganic matter or any substance in gaseous or liquid form that shall cause pollution in any water, air and/or land resources of Philippines.

No person shall perform any of following activities without first securing permit from Bureau: (1) construction, installation, modification or operation of any sewage works or any extension or addition thereto; (2) increase in volume or strength of any wastes in excess of permissive discharge specified under any existing permit; and (3) construction, installation or operation of any industrial or commercial establishments or any extension, modification or addition thereof, operation of which would cause increase in discharge of waste directly into water, air and/or land resources.

Enforcement.

Environmental Management Bureau which is staff bureau of Department of Environment and Natural Resources is vested with powers and functions relating to environmental management, conservation and pollution control.

Penalties.

(1) Any person violating or failing to comply with any order or decision of Pollution Adjudication Board, or regulations issued by Bureau shall pay fine not exceeding 5,000 pesos per day for every day during which such violation or default continues; (2) any person violating any of

prohibited acts shall be liable to pay not exceeding 1,000 pesos for each day during which violation continues, or by imprisonment from two years to six years, or both fine and imprisonment.

Prevention, Control and Abatement of Air Pollution Decree (P.D. 1181) aims to prevent, control and abate emissions of air pollution from motor vehicles to protect health and welfare of people and to prevent or minimize damage to property and hazards to land transportation.

Prohibited Acts.

(1) It shall be unlawful for any owner or operator of motor vehicle to allow it to discharge air pollutants at levels greater than acceptable pollutant concentration standards; (2) owner or operator of motor vehicle shall not use his vehicle or cause or allow it to be used unless such motor vehicle meets established emission standards; and (3) no imported or locally manufactured motor vehicle shall be sold, registered, or operated after effective date of implementing rules and regulations of P.D. 1181 unless it meets established emission standards as certified by Environmental Management Bureau.

Enforcement.

Environmental Management Bureau together with other government enforcement agencies shall be responsible for prevention, control and abatement of air pollution in traffic congested areas. Within Metro Manila, this law is being implemented and enforced by Metro Manila Development Authority.

Penalties.

Any person violating this decree and/or its implementing rules and regulations shall be liable to fine not exceeding 200 pesos, 500 pesos or 1,000 pesos for first, second and succeeding offenses respectively plus suspension of vehicle's certificate of registration in cases of third and succeeding offenses.

Marine and Pollution Decree of 1976 (P.D. 979) is aimed at preventing and controlling pollution of seas caused by dumping of wastes and other matter which create hazards to human health, harm living resources and marine life, damages amenities or interferes with legitimate uses of sea within territorial jurisdiction of Philippines.

Prohibited Acts.

It is unlawful for any person: (1) To discharge, dump or permit discharge of oil, noxious, gaseous and liquid substances and other harmful substances from or out of any ship, vessel, barge, or any other floating craft, or other man-made structures at sea, by any method, means or manner, into or upon territorial and inland navigable waters of Philippines; (2) to throw, discharge or deposit, dump, or cause, suffer or procure to be thrown, discharged, or deposited (either from or out of any ship, barge, or other floating craft or vessel of any kind, or from shore, wharf, manufacturing establishment, or mill of any kind) any refuse matter of any kind or description whatever other than that flowing from streets and sewers and passing therefrom in liquid state into tributary of any navigable water from which same shall float or be washed into such navigable water; and, (3) to deposit or cause, suffer or procure to be deposited material of any kind in any place on bank of any navigable water or on bank of any tributary of any navigable water, where same shall be liable to be washed into such navigable water, either by ordinary or high tides, or by storms or floods, or otherwise, whereby navigation shall or may be impeded or obstructed or increase level of pollution of such water.

Enforcement.

Philippine Coast Guard shall have primary responsibility of enforcing laws, rules and regulations governing marine pollution.

Penalties.

Any person who violates any of prohibited acts mentioned shall be liable for fine of not less than 200 pesos nor more than 10,000 pesos or by imprisonment of not less than 30 days nor more than one year or both fine and imprisonment.

Environmental Impact Statement System.

(PD 1586) Due to policy of state to attain and maintain rational and orderly balance between socio-economic growth and environmental protection, Environmental Impact Statement System was established requiring all agencies and instrumentalities of national government as well as private firms and corporations to conduct environmental impact assessment of any project or undertaking which may significantly affect quality of environment.

Prohibited Acts.

It is prohibited for any person, partnership or corporations to undertake or operate any project or area declared environmentally critical without first securing Environmental Compliance Certificate.

Enforcement.

National Environmental Protection Council shall have jurisdiction to undertake preparation of necessary environmental impact statements concerning declared environmentally critical projects and areas.

Penalties.

Any person, corporation or partnership found committing prohibited acts, or terms and conditions of Environmental Compliance Certificate, or standards, rules and regulations issued by National Environmental Protection Council shall be punished by suspension or cancellation of its certificate and/or fine of not exceeding 50,000 pesos for every violation thereof.

Toxic Substances and Hazardous and Nuclear Wastes Control Act of 1990.

(R.A. 6969). This is aimed to regulate and keep inventory of importation, manufacture, processing, handling, storage, transportation, sale, distribution, use and disposal of all unregulated chemical substances and mixtures in Philippines including entry, storage or disposal of hazardous and nuclear wastes into country.

Prohibited Acts.

(1) Knowingly use chemical substance or mixture which is imported, manufactured, processed or distributed in violation of R.A. 6969 or its Implementing Rules and Regulations; (2) failure or refusal to submit reports, notices or other information, access to records as required by R.A. 6969, or permit inspection of establishment where chemicals are manufactured, processed, stored or otherwise held; (3) failure or refusal to comply with premanufacturing and pre-importation requirements; and (4) cause, aid or facilitate, directly or indirectly, in storage, importation, or bringing into any part of Philippine territory any amount of hazardous and nuclear wastes.

Enforcement.

Department of Environment and Natural Resources shall be agency responsible in implementation of above purposes.

Penalties.

Penalty of imprisonment ranging from six months and one day to 20 years, depending on prohibited acts committed and fine ranging from 600 pesos to 4,000 pesos is imposed upon any person violating prohibited acts under R.A. 6969. If offender is foreigner, he or she shall be deported and banned from any subsequent entry in Philippines after serving his sentence.

If offender is corporation, partnership, association or juridical person, partner, president, director or manager who shall consent to or shall knowingly tolerate such violation shall be directly liable and responsible for act of employees and shall be criminally liable as coprincipal.

Administrative fines of not less than 10,000 pesos but not more than 50,000 pesos may be imposed by Secretary of Environment and Natural Resources upon any person or entity found guilty of violating R.A. 6969 and its Implementing Rules and Regulations.

National Integrated Protected Areas Systems Act.

(R.A. 7586). This is aimed at securing and maintaining perpetual existence of all native plants and animals through establishment of comprehensive system of integrated protected areas within classification of national park as provided for in constitution.

Prohibited Acts.

Following acts are prohibited within protected areas: (1) Hunting, destroying, or mere possession of any plants or animals or products derived therefrom without permit from Management Board; (2) dumping of any waste products detrimental to protected area, or to plants and animals or inhabitants therein; (3) use of any motorized equipment without permit from Management Board; (4) mutilating, defacing or destroying objects of natural beauty or objects of interest to cultural communities; (5) damaging, and leaving roads and trails in damaged condition; (6) squatting, mineral locating, or business enterprise without permit; (7) leaving in exposed or unsanitary conditions refuse or debris, or depositing in ground or in bodies of water; and, (8) altering, removing, destroying or defacing boundary marks or signs.

Enforcement.

National Integrated Protected Areas System is placed under control and administration of Department of Environment and National Resources whereby Protected Areas and Wildlife Division is created in each of its regional offices.

Penalties.

Any person violating this law or any of its rules and regulations will be fined in amount of not less than 5,000 pesos nor more than 500,000 pesos exclusive of value of thing damaged or imprisonment for not less than one year but not more than six years. Department of Environment and Natural Resources may also impose fines and penalties.

Philippine Clean Air Act of 1999.

(RA 8749). This is aimed to prevent air pollution by providing comprehensive management program for air pollution and encouraging public to actively participate in air quality planning and monitoring.

Prohibited acts for stationary sources: (1) Exceeding standard industrial emissions set by Department of Environment and Natural Resources; (2) incineration, or burning of municipal, bio-medical and hazardous wastes.

Existing incinerators dealing with bio-medical wastes shall be phased out within three years after effective date of Act, and shall be limited to burning of pathological and infectious wastes with prior close monitoring by Department of Environment and Natural Resources.

For motor vehicles: (1) Exceeding emission standards set by Department of Transportation and Communication; (2) selling, using or registering imported or locally-assembled, new or used motor vehicle or engine that does not comply with emission standards as evidenced by Certificate of Conformity issued by Department of Environment and Natural Resources.

For other sources: (1) Smoking inside public building or any enclosed public place including public vehicles and other means of transport or in any enclosed area and outside of one's private residence, private place of work or any duly designated smoking area; (2) noncompliance by other mobile sources other than light duty vehicles, light commercial vehicles, and heavy duty vehicles shall comply with emission standards set by DENR and other appropriate agencies.

Enforcement.

Department of Environment and Natural Resources (DENR) shall be agency responsible for implementation of Act. Department's Environment Management Bureau shall be converted from staff bureau to line bureau for period of no more than two years and shall work with other government agencies in furtherance of objectives of Act.

Penalties.

For stationary sources: For any owner or operator of any source violating or failing to comply with emission standards set by Department of Environment and Natural Resources, Pollution Adjudication Board shall impose fine not exceeding 100,000 pesos per day during which such violation or default continues. In addition, PAB shall order closure, suspension of development, construction, or operations of stationary sources until proper environmental safeguards are installed.

For motor vehicles: Any vehicle violating or failing to comply with emission standards shall be impounded. Drivers and operators of such vehicles shall be liable to pay fine not exceeding 2,000 pesos, 4,000 pesos or 6,000 pesos for first, second and succeeding offenses, respectively, plus suspension of Motor Vehicle Registration in cases of third and succeeding offenses.

For violations of other provisions: Fine not less than 10,000 but not exceeding 100,000 pesos or six months to six years imprisonment shall be imposed.

For gross violations of Act: Offenders shall be punished with imprisonment not less than six years but not more than ten years.

Ecological Solid Waste Management Act of 2000.

(R.A. 9003). This is aimed to adopt systematic, comprehensive and ecological solid waste management program that shall ensure protection of public health and environment.

Prohibited Acts.

(1) Littering, throwing, dumping of waste matters in public places, such as roads or sidewalks; (2) undertaking activities or operating, collecting or transporting equipment in violation of sanitation operation and other requirements or permits; (3) open burning of solid waste; (4) causing or permitting collection of nonsegregated or unsorted solid waste; (5) squatting in open dumps and landfills; (6) open dumping, burying of biodegradable materials in flood-prone areas; (7) unauthorized removal of recyclable material intended for collection by authorized persons; (8) mixing of source-separated recyclable material with other solid waste in any vehicle, box, container or receptacle used in solid waste collection or disposal; (9) establishment or operation of open dumps; (10) manufacture, distribution or use of non-environmentally acceptable

packaging misrepresented as “recyclable” or “with recyclable content”; (13) transport and dumping in bulk of collected domestic, industrial, commercial and institutional wastes in areas other than centers and institutional wastes in areas other than centers of facilities prescribed; (14) site preparation, construction, expansion or operation of waste management facilities without Environmental Compliance Certificate required pursuant to P.D. No. 1586 and this Act and not conforming with land use plan of Local Government Unit; (15) construction of any establishment within 200 meters from open dumps or controlled dumps, or sanitary landfills or any waste disposal facility on any aquifer, ground water reservoir or watershed area or any portion thereof.

Enforcement.

National Solid Waste Management Commission shall oversee implementation of solid waste and management plans and prescribe policies to achieve objectives of this Act.

12 ESTATES AND TRUSTS

12.01 DEATH:

After an absence of seven years, it being unknown whether or not the absentee still lives, he is presumed to be dead for all purposes, except for those of succession. The absentee is not presumed dead for the purpose of opening his succession till after an absence of ten years. If he disappeared after the age of 75 years, an absence of five years is sufficient in order that his succession may be opened.

The following are presumed dead for all purposes, including the division of the estate among the heirs: (1) A person on board a vessel lost during a sea voyage, or an aeroplane which is missing, who has not been heard of for four years since the loss of the vessel or aeroplane; (2) a person in the armed forces who has taken part in war, and has been missing for four years; (3) a person who has been in danger of death under other circumstances and his existence has not been known for four years; (4) if married person has been absent for four years, present spouse may contract subsequent marriage if he or she has well founded belief that absent spouse is already dead. In case of disappearance, where there is danger of death under circumstances provided, absence of only two years shall be sufficient for present spouse to contract subsequent marriage. However, judicial declaration of presumptive death of absent spouse is necessary for purposes of contracting subsequent marriage by present spouse.

When two persons perish in same calamity such as wreck, battle, or conflagration, and it is not shown who died first, and there are no particular circumstances from which it can be inferred, survivorship is presumed from probabilities resulting from strength and age of sexes, according to following rules: (1) if both were under age of 15 years, older is presumed to have survived; (2) if both were above age of 60, younger is presumed to have survived; (3) if one be under 15 and other above 60, former is presumed to have survived; (4) if both were over 15 and under 60, and sexes be different, male is presumed to have survived; if sexes be the same, then the older; (5) if one be under 15 or over 60, and other between those ages, latter is presumed to have survived.

Actions for Death.

Civil liability based on wrongful death may arise from a crime or a quasi-delict.

Governing Laws.

Civil obligations arising from criminal offenses are governed by penal laws, subject to the provision of Civil Code on damages and human relations (1161 C.C.[n]), while civil obligations arising from quasi-delicts are governed by Arts. 2176-2194 of Civil Code and by special laws (1162 C.C.[n]).

Parties Entitled to Compensation and Parties Against Whom Action May Be Made.

Spouse, legitimate and illegitimate ascendents or descendants, and in certain cases, third persons entitled to support from deceased, may recover damages amounting to at least 3000 pesos in addition to compensation for loss of earning capacity and moral damages in certain cases. (2206 C.C.[n]).

Recent decisions have increased amount recoverable to at least P50,000. (People vs. Lugtu; Supreme Court En Banc Resolution dated Aug. 30, 1990).

If crime of rape is committed or effectively qualified by any of circumstances under which death penalty is authorized by present amended law, indemnity for victim shall be in increased amount of not less than P75,000. (People vs. Baltazar, G.R. No. 130610; Oct. 10, 2000).

Where the wrongful death is caused by a crime, obligation to indemnify devolves upon person (101 R.P.C.), or persons criminally liable, whether equally, if all are principals (109 R.P.C.), or severally, among principals, accomplices or accessories, or subsidiarily for those of other persons liable, such subsidiary liability to be enforced against the properties of principal, accomplice or accessory, in that order (110 R.P.C.), or their heirs (108 R.P.C.). Subsidiary civil liability may be enforced against certain persons, namely, (1) Those having authority or control over offender who is exempted by reason of minority, insanity (101 R.P.C.), and (2) employers, teachers, persons and corporations engaged in industry where offender is a servant, employee, pupil, workman or apprentice engaged in discharge of his duties (103 R.P.C.).

Where wrongful death is caused by a quasi-delict, obligation to indemnity is demandable not only for one's own acts or omissions, but also for those of persons for whom one is responsible. Father and, in case of his death or incapacity, mother, are responsible for damages caused by minor children who live in their company. Guardians are liable for damages caused by minors or incapacitated persons who are under their authority and live in their company. Owners and managers of an establishment or enterprise are likewise responsible for damages caused by their employees in the service of branches in which latter are employed or on the occasion of their functions. Employers are liable for damages caused by their employees and household helpers acting within scope of their assigned tasks, even though the former are not engaged in any business or industry. State is responsible in like manner when it acts through a special agent; but not when damage has been caused by official to whom the task done properly pertains, in which case what is provided in art. 2176 is applicable. Lastly, teachers or heads of establishments of arts and trades are liable for damages caused by their pupils and students or apprentices, so long as they remain in their custody. (2180 C.C.[n]).

In motor vehicles mishaps, owner is solidarily liable with his driver, if former, who was in vehicle, could have, by use of due diligence, prevented the misfortune. It is disputedly presumed that a driver was negligent, if he had been found guilty of reckless driving or violating traffic regulations at least twice within the next preceding two months. (2184 C.C.[n]). Manufacturers and processors of foodstuffs, drinks, toilet articles and similar goods are liable for death or injuries caused by any noxious or harmful substances used, although no contractual relation exists between them and consumers. (2187 C.C.[n]). Provinces, cities and municipalities are liable for damages for death of, or injuries suffered by, any person by reason of defective condition of roads, streets, bridges, public buildings, and other public works under their control or supervision. (2189 C.C.[n]). Proprietor of a building or structure is responsible for damages resulting from its total or partial collapse, if it should be due to lack of necessary repairs. (2190 C.C.[n]). Proprietors are also responsible for damages caused: (1) By explosion of machinery which has not been taken care of with due diligence, and the inflammation of explosive substances which have not been kept in a safe and adequate place; (2) by excessive smoke, which may be harmful to persons or property; (3) by falling of trees situated at or near highways or lanes, if not caused by *force majeure;* (4) by emanations from tubes, canals, sewers or deposits of infectious matter, constructed without precautions suitable to the place. (2191 C.C.[n]). Responsibility of two or more persons who are liable for a quasi-delict is solidary. (2194 C.C.[n]).

Limitation.

Responsibility for fault or negligence under Civil Code provisions on quasi-delict is distinct and separate from civil liability owing from negligence under Penal Code. But plaintiff cannot recover twice for same act or omission of defendant. (2177 C.C.[n]).

Defenses.

Where death was caused by quasi-delict there can be no recovery where deceased's own negligence was immediate cause of his death. (2179 C.C.[n]). Obligation to indemnify ceases when persons obligated prove that they observed all the diligence of a good father of a family to prevent damage. (2180 C.C.[n]).

Where death was caused by a crime, there can be no recovery for damages by way of a civil action, where in a final judgment in a criminal case, there is a declaration that the fact from which the civil right might arise did not exist. (R.C., Rule 111, §2[b]).

Prescription.

Civil actions for wrongful deaths based on quasi-delict must be brought within four years (1146 C.C.[n]), while those based on a crime must be brought within five years (1149 C.C.[n]). If there is a final judgment of conviction of a crime, action based upon judgment must be brought within ten years from date of finality of judgment. (1144 C.C.[n]).

Applicability to Foreigners.

Penal laws and those of public security and safety are obligatory upon all who live or sojourn in Philippine territory, subject to principles of public international law and to treaty stipulations. (14 C.C.[n]).

12.02 DESCENT AND DISTRIBUTION:

Succession pertains, in the first place, to the descending direct line. Legitimate children and their descendants succeed to the property of their parents and other ascendants, without distinction as to sex or age, and even if they should come from different marriages. An adopted child remains intestate heir of his parents and other blood relatives and he succeeds to property of adopting parents in same manner as legitimate child, but if he leaves no children or descendants, following rules must govern: (a) if adopted child is survived by his parents (legitimate or illegitimate) or legitimate ascendants and by his adopters, one half of estate goes to former and other half to adopters; (b) if he is survived by his spouse and illegitimate children and also by his adopters, one third goes to spouse, one third to illegitimate children and one third to adopters; (c) if he is survived by his illegitimate children and his adopters, one half goes to his illegitimate children and one half to his adopters; (d) if he is survived by his spouse and adopters, one half goes to his spouse and one half to his adopters; (e) if only adopters survive, they get entire estate; and (f) when adopters predeceased adopted and adopted died without any of heirs mentioned above, his collateral relatives will inherit under ordinary rules of legal or intestate succession. (Art. 190, E.O. 209).

In default of legitimate children and descendants of the deceased, his parents and ascendants inherit from him, to the exclusion of collateral relatives. In the absence of legitimate descendants or ascendants, the illegitimate children succeed to the entire estate of the deceased.

In the absence of legitimate descendants and ascendants, and illegitimate children and their descendants, whether legitimate or illegitimate, the surviving spouse inherits the entire estate, without prejudice to the rights of brothers and sisters, nephews and nieces, should there be any, in which case the surviving spouse is entitled to one-half of the inheritance and the brothers and sisters or their children to the other half.

If there are no descendants or ascendants, no illegitimate children and no surviving spouse, the collateral relatives within the fifth degree succeed to the entire estate of the deceased in the proportion established by law.

In default of persons entitled to succeed in accordance with the foregoing, the whole estate passes to the State. If a person legally entitled to the estate of the deceased appears and files a claim thereto with the court within five years from the date the property was delivered to the State, such person is entitled to the possession of the same, or if sold, to such part of the proceeds thereof as may not have been lawfully spent.

12.03 EXECUTORS AND ADMINISTRATORS:

Regional Trial Courts have general jurisdiction over estates of decedents, whether testate or intestate, and appoint executors and administrators.

Married woman may act as executrix or administratrix.

Law requires courts to appoint residents only as executors or administrators.

Executor or administrator must file an inventory. Administration of an estate must be kept open at least six months, with exceptions noted below.

Rules of Court provide for publication and service in all matters requiring action as well as a final accounting and partition.

Summary settlement of an estate, without appointment of administrator or commissioners, is allowed when gross value does not exceed 10,000 pesos.

A hearing shall be conducted in court having jurisdiction of estate not less than one month nor more than three months from date of last publication of a notice which shall be published once a week for three consecutive weeks in a newspaper of general circulation and thereafter, court will proceed for distribution of the estate.

When an estate has no debts and decedent has not appointed any one to partition estate and heirs are all of lawful age, they may, by agreement in writing, divide estate among themselves without court proceedings, regardless of amount or value of estate.

Right to attack sale or conveyance by decedent, see category 7 Debtor and Creditor, topic 7.08 Fraudulent Sales and Conveyances.

Allowances.

The widow and minor children of a deceased person, if the amount of the estate permits, are entitled to an allowance from the estate pending liquidations, but such allowance may be deducted from their portion, in so far as it exceeds what they may be entitled to as fruits or income.

Claims.

On the granting of letters testamentary or of administration, the court must issue a notice requiring all persons having money claims against the decedent to file them, and fix the time for filing, which must be not less than six, nor more than 12 months after first publication of notice. Immediately after such notice is issued, executor or administrator must cause same to be published for three weeks and posted in four public places in the province and two public places in the municipality where decedent last resided. Executor or administrator must file in court proof that this has been done.

Claims must be filed within time limited in notice; otherwise they are barred forever, except that a claim not presented may be set forth as a counterclaim in any action by the executor or administrator against the claimant, and except that the court may, at any time before order of distribution is entered, for cause shown and on terms, allow claim not filed in time to be filed within a time not exceeding one month.

Claim may be filed by delivering same, with necessary vouchers, to clerk of court and serving copy thereof on executor or administrator. If claim is due it must be supported by affidavit stating the amount justly due, that no payments have been made thereon which are not credited and that there are no offsets to affiant's knowledge. If claim is not due or is contingent, it must be supported by affidavit stating particulars.

Within fifteen days after service of copy of claim on executor or administrator, he must file his answer admitting or denying the claim specifically and setting forth matters relied on to support admission or denial, or stating lack of knowledge sufficient to enable him to admit or deny. Executor or administrator must allege in offset any claim which decedent had against claimant, failing in which decedent's claim is barred. Copy of answer must be served on claimant.

Admitted claims are immediately submitted by the clerk to court, which may approve them without hearing or may order that heirs, legatees or devisees be notified and heard. Otherwise, on filing of answer or on expiration of time therefor, clerk must set claim for trial and notify both parties. Court may refer claim to a commissioner. Judgment of court approving or disapproving claim must be filed with record of the administrative proceedings, with notice to both parties, and is appealable.

Order of Payment if Estate Insolvent.

After paying the necessary expenses of administration, the debts of the estate must be paid in the following order: (1) Necessary funeral expenses; (2) expenses of last illness; (3) what is owing to laborers for salaries and wages earned and for indemnities due, for the last year; (4) taxes and assessments due to the government, or any branch or subdivision thereof; (5) debts due to the province; (6) other debts.

Compensation.

An executor or administrator shall be allowed the necessary expenses in the care, management, and settlement of the estate, and for his services, four pesos per day for the time actually and necessarily employed, or a commission upon the value of so much of the estate as comes into his possession and is finally disposed of by him in the payment of debts, expenses, legacies, or distributive shares, or by delivery to heirs or devisees, of 2% of the first 5,000 pesos of such value, 1% of so much of such value as exceeds 5,000 pesos and does not exceed 30,000 pesos, ½ of 1% of so much of such value as exceeds 30,000 pesos and does not exceed 100,000 pesos, and ¼ of 1% of so much of such value as exceeds 100,000 pesos. But in any special case, where the estate is large, and the settlement has been attended with great difficulty, and has required a high degree of capacity on the part of the executor or administrator, a greater sum may be allowed. Lawyer acting as executor or administrator cannot charge estate for professional services. Fees fixed by will are in full satisfaction for services of executor. (R.C., Rule 85, §7).

12.04 TRUSTS:

Trusts are either express or implied. Express trusts are created by the intention of the trustor or of the parties. Implied trusts come into being by operation of law. The principles of the general law of trusts, in so far as they are not in conflict with the Civil Code, Code of Commerce, the Rules of Court, and special laws, are accepted.

12.05 WILLS:

All persons who are not expressly prohibited by law may make a will. Persons of either sex under 18 years of age cannot make a will. In order to make a will it is essential that the testator be of sound mind at the time of its execution. To be of sound mind, it is not necessary that the testator be in full possession of all his reasoning faculties, or that his mind be wholly unbroken, unimpaired, or unaffected by disease, injury or other cause. It is sufficient if the testator was able at the time of making the will to know the nature of the estate to be disposed of, the proper objects of his bounty, and the character of the testamentary act. A married woman may make a will without the consent of her husband, and without the authority of the court. A married woman may dispose by will of all her separate property as well as her share of the conjugal partnership or absolute community property.

Forms of Wills.

Every will must be in writing and executed in a language or dialect known to the testator. Every will, other than a holographic will, must be subscribed at the end thereof by the testator himself or by the testator's name written by some other person in his presence, by his express direction, and attested and subscribed by three or more credible witnesses in the presence of the testator and of one another. The testator or the person requested by him to write his name and the instrumental witnesses of the will, must also sign, as aforesaid, each and every page thereof, except the last, on the left margin, and all the pages must be numbered correlatively in letters placed on the upper part of each page. The attestation must state the number of pages used upon which the will is written, and the fact that the testator signed the will and every page thereof, or caused some other person to write his name, under his express direction, in the presence of the instrumental witnesses, and that the latter witnessed and signed the will and all the pages thereof in the presence of the testator and of one another. If the attestation clause is in a language not known to the witnesses, it must be interpreted to them. Every will must be acknowledged before a notary public by the testator and the witnesses. If the testator be deaf, or a deaf-mute, he must personally read the will, if able to do so; otherwise, he must designate two persons to read it and communicate to him, in some practicable manner, the contents thereof. If the testator is blind, the will must be read to him twice; once by one of the subscribing witnesses, and again, by the notary public before whom the will is acknowledged.

Holographic Will.

A person may execute a holographic will which must be entirely written, dated, and signed by the hand of the testator himself. It is subject to no other form, and may be made in or out of the Philippines, and need not be witnessed. In holographic wills, the dispositions of the testator written below his signature must be dated and signed by him in order to make them valid as testamentary dispositions. In case of any insertion, cancellation, erasure or alteration in a holographic will, the testator must authenticate the same by his full signature.

When a Filipino is in a foreign country, he is authorized to make a will in any of the forms established by the law of the country in which he may be. Such will may be probated in the Philippines. The will of an alien who is abroad has effect in the Philippines if made with the formalities prescribed by the law of the place in which he resides, or according to the formalities observed in his country, or in conformity with those which the Civil Code of the Philippines prescribes. A will made in the Philippines by a citizen or subject of another country, which is executed in accordance with law of country of which he is citizen or subject, and which might be proved and allowed by law of his own country, has same effect as if executed according to laws of Philippines.

Two or more persons cannot make a will jointly, or in the same instrument, either for their reciprocal benefit or for the benefit of a third person. Wills of this kind executed by Filipinos in a foreign country are not valid in the Philippines, even though authorized by the laws of the country where they may have been executed.

Witnesses to Wills.

Any persons of sound mind and of the age of 18 years or more, and not blind, deaf or dumb, and able to read and write, may be a witness to the execution of a will. The following are disqualified from being witnesses to a will: (1) any person not domiciled in the Philippines; (2) those who have been convicted of falsification of a document, perjury or false testimony. If a person attests the execution of a will, to whom or to whose spouse, or parent, or child, a devise or legacy is given by such will, such devise or legacy is void, but so far only as concerns such person, or spouse, or parent, or child of such person, or any one claiming under such person or spouse, or parent, or child, unless there are three other competent witnesses to such will. However, such person so attesting will be admitted as a witness as if such device or legacy had not been made or given.

Codicil.

In order that a codicil may be effective, it must be executed as in the case of a will.

Revocation.

A will may be revoked by the testator at any time before his death. Any waiver or restriction of this right is void. A revocation made outside the Philippines, by a person who does not have his domicile in this country, is valid when it is made according to the law of the place where the will was made, or according to the law of the place in which the testator had his domicile at the time; and if the revocation takes place in this country, it is operative if it is in accordance with the provisions of the Civil Code.

Allowance and Disallowance of Wills.

No will may pass either real or personal property unless it is proved and allowed in accordance with the Rules of Court.

13 FAMILY

13.01 ADOPTION:

Person of age and in possession of full civil capacity and legal rights may adopt provided he can support and care for his children, legitimate or illegitimate, in keeping with means of family. Adopter must be at least 16 years older than person to be adopted unless adopter is parent by nature of adopted or is spouse of legitimate parent of person to be adopted. Following may not adopt: (1) Guardian with respect to ward prior to approval of final accounts rendered upon termination of guardianship relation; (2) any person who has been convicted of crime involving moral turpitude; (3) alien, except former Filipino citizen who seeks to adopt relative by consanguinity; one who seeks to adopt legitimate child of his or her Filipino spouse; or one who is married to Filipino citizen and seeks to adopt jointly with his or her spouse relative by consanguinity of latter. Aliens not included in foregoing exceptions may adopt Filipino children in accordance with rules on intercountry adoption. Husband and wife must jointly adopt except when one spouse seeks to adopt his own illegitimate child; or when one spouse seeks to adopt legitimate child of his or her spouse. Following may not be adopted: (1) Person of legal age, unless he or she is child by nature of adopter or his or her spouse, or prior to adoption, said person had been treated by adopter as his or her own child during minority; (2) alien with whose government Philippines has no diplomatic relations; and (3) person who has already been adopted unless such adoption has been previously revoked or rescinded.

Written consent of following to adoption shall be necessary: (1) Person to be adopted, if ten years of age or over; (2) parents by nature of child, legal guardian or proper government instrumentality; (3) legitimate and adopted children, ten years of age or over, of adopting parent or parents; (4) illegitimate children, ten years of age or over, of adopting parent, if living with said parent and latter's spouse, if any; and (5) spouse, if any, of person adopting or to be adopted. Adoption shall have following effects: (1) For civil purposes, adopted shall be deemed legitimate child of adopters and both shall acquire reciprocal rights and obligations arising from relationship of parent and child, including right of adopted to use surname of adopters; (2) parental authority of parents by nature over adopted shall terminate and vested in adopters except that if adopter is spouse of parent by nature of adopted, parental authority over adopted shall be exercised jointly by both spouses; and (3) adopted shall remain intestate heir of his parents and other blood relatives.

If adopted is minor or incapacitated, adoption may be rescinded upon petition of any person authorized by court or proper government instrumentality acting on his behalf on same grounds for loss or suspension of parental authority. If adopted is at least 18 years of age, he may petition for judicial rescission of adoption on same grounds prescribed for disinheriting ascendant. Adopters may petition court for judicial rescission of adoption in any of following cases: (1) If adopted has committed any act constituting ground for disinheriting descendant; or (2) when adopted abandoned home of adopters during minority for at least one year, or, by some other acts, repudiated adoption. (E.O. 209).

Domestic Adoption.

Any Filipino citizen or alien residing in Philippines who has following qualifications and none of disqualifications may be eligible to adopt if he/she: (a) is of legal age; (b) is at least 16 years older than adoptee; provided, however, that minimum age gap between adopter and adoptee may not be required if adopter is biological parent or sibling of adoptee or spouse of adoptee's parent; (c) has capacity to act and assume all rights and duties incident to exercise of parental authority; (d) is of good moral character and has not been convicted of any crime involving moral turpitude; (e) is in position to support, educate and care for his/her legitimate and illegitimate children and child to be adopted in keeping with means of family; (f) has undergone pre-adoption services as required in §4 of this Act. (RA 8552).

In addition, alien may adopt if he/she: (a) is citizen of state which has diplomatic relations with Philippines; (b) has been certified by his/her diplomatic or consular office or any appropriate agency that (i) he/she is qualified to adopt in his/her country, and (ii) his/her government will allow adoptee to enter adopter's country and reside there permanently as adopted child; (c) has submitted necessary clearances and such other certifications as may be required by Department of Social Welfare and Development.

Rectification of Simulated Birth.

Any person having in his care and custody child whose birth registration has been simulated to make it appear that child is his/her own son/daughter shall file in appropriate court application for correction of birth registration and for adoption of child. He/she shall initiate said proceedings within five years from effectivity of Act and shall thereafter complete said proceedings wherein he/she shall prove that simulation of birth was made for best interest of child, and child has been consistently considered and treated as his/her own son/daughter.

Intercountry Adoption.

Any alien or Filipino citizen permanently residing abroad may file application for intercountry adoption if he/she has following qualifications and none of disqualifications:

“(a) is at least twenty-seven (27) years of age; is at least sixteen (16) years older than the child to be adopted at the time of the filing of the application, unless the applicant is the parent by nature of the child to be adopted or is the spouse of such parent by nature;

(b) if married, his/her spouse must jointly file for the adoption;

(c) has the capacity to act and assume all the rights and responsibilities to parental authority under his/her national law; has undergone appropriate counselling from an accredited counselor in his/her country;

(d) has not been convicted of a crime involving moral turpitude;

(e) is eligible to adopt under his/her national law;

(f) can provide the proper care and support and give the necessary moral values and example to the child and, in the proper case, to all his/her other children;

(g) agrees to uphold the basic rights of the child as embodied under Philippine laws, the UN Convention on the Rights of the Child, and to abide by the rules and regulations issued to implement the provisions of this Act;

(h) comes from a country

(i) with whom the Philippines had diplomatic relations;

(ii) whose government maintains a foreign adoption agency; and

(iii) whose laws allow adoption; and

(i) shall have the same qualifications and none of the disqualifications to adopt as prescribed above."

Intercountry adoption will only be resorted to if all possibilities for adoption of child under Family Code have been exhausted and it is in best interest of child.

13.02 ALIMONY:

See topic 13.03 Divorce.

13.03 DIVORCE:

Divorce in Philippines was abolished by new Civil Code (R.A. 386), which took effect on Aug. 30, 1950, and in its place legal separation is authorized. Petition for legal separation may be filed on any of following grounds: (1) Repeated physical violence or grossly abusive conduct against petitioner, common child, or child of petitioner; (2) physical violence or moral pressure to compel petitioner to change religious or political affiliation; (3) attempt of respondent to corrupt or induce petitioner, common child, or child of petitioner, to engage in prostitution, or connivance in such corruption or inducement; (4) final judgment sentencing respondent to imprisonment of more than six years, even if pardoned; (5) drug addiction or habitual alcoholism of respondent; (6) lesbianism or homosexuality of respondent; (7) contracting by respondent of subsequent bigamous marriage, whether in Philippines or abroad; (8) sexual infidelity or perversion; (9) attempt by respondent against life of petitioner; or (10) abandonment of petitioner by respondent without justifiable cause for more than one year. (Art. 55, E.O. 209).

No decree of legal separation shall be based upon stipulation of facts or confession of judgment. In any case, court shall order prosecuting attorney to take steps to prevent collusion between parties and to take care that evidence is not fabricated or suppressed. After filing petition for legal separation, spouses shall live separately from each other. Action shall be filed within five years from occurrence of cause and it shall in no case be tried before six months shall have elapsed since filing of petition. During pendency of action, court shall provide for support of spouses and their common children and shall give consideration to moral and material welfare of said children and their choice of parent with whom they wish to remain. It shall also provide for visitation rights of other parent.

Decree of legal separation has following effects: (1) Spouses shall be entitled to live separately from each other but marriage bonds shall not be severed; (2) absolute community or conjugal partnership shall be dissolved and liquidated but offending spouse shall have no right to any share of net profits earned by absolute community or conjugal partnership; (3) custody of minor children shall be awarded to innocent spouse, however, court shall take into account all relevant considerations, especially choice of child over seven years of age, unless parent chosen is unfit; and (4) offending spouse shall be disqualified from inheriting from innocent spouse by intestate succession. Provisions in favor of offending spouse made in will of innocent spouse shall be revoked by operation of law. After finality of decree of legal separation, innocent spouse may revoke donations made by him or her in favor of offending spouse, as well as designation of latter as beneficiary in any insurance policy, even if such designation be stipulated as irrevocable.

Reconciliation terminates proceedings for legal separation, if still pending, at whatever stage; and sets aside final decree of legal separation but separation of property and any forfeiture of share of guilty spouse already effected shall subsist, unless spouses agree to revive their former property regime. (E.O. 209).

13.04 HUSBAND AND WIFE:

Husband and wife are obliged to live together, observe mutual love, respect and fidelity, and render mutual help and support. Husband and wife shall fix family domicile but in case of disagreement, court shall decide. Court may exempt one spouse from living with other if latter should live abroad or there are valid reasons for exemption. Exemption shall not apply if same is not compatible with solidarity of family.

Spouses are jointly responsible for support of family. Management of household shall be right and duty of both spouses. Either spouse may exercise any legitimate profession, occupation or business without consent of other. Latter may object only on valid and moral grounds.

Property relations between husband and wife are governed in following order: (1) By marriage settlements executed before marriage; (2) by provisions of Family Code; and (3) by local custom. Future spouses may, in marriage settlements, agree upon regime of absolute community, conjugal partnership of gains, complete separation of property, or any other regime. In absence of marriage settlement, or when same is void, system of absolute community of property as established in Family Code shall govern.

In absence of contrary stipulation in marriage settlement, property relations of spouses shall be governed by Philippine laws, regardless of place of celebration of marriage and their residence except: (a) Where both spouses are aliens; (b) with respect to extrinsic validity of contracts affecting property not situated in Philippines and executed in country where property is located; and (c) with respect to extrinsic validity of contracts entered into Philippines but affecting property situated in foreign country whose laws require different formalities for its extrinsic validity.

If future spouses agree upon regime other than absolute community of property, they cannot donate to each other in their marriage settlement more than one-fifth of their present property. Donations of future property shall be governed by provisions on testamentary succession and formalities of wills. Every donation between spouses during marriage is void, except moderate gifts which spouses may give each other on occasion of family rejoicing.

Prohibitions also apply to persons living together as husband and wife without valid marriage.

When man and woman who are capacitated to marry each other, live exclusively with each other as husband and wife without benefit of marriage or under void marriage, their wages and salaries shall be owned by them in equal shares and property acquired by both of them through their work or industry shall be governed by rules on co-ownership.

Spouse of age may mortgage, encumber, alienate or dispose of his or her exclusive property, without consent of other spouse, and appear alone in court to litigate with regard to same.

Administration and enjoyment of community of property shall belong to each other. In case of disagreement, husband's decision shall prevail subject to recourse to court by wife for proper remedy which must be availed of within five years from date of contract implementing such decision.

If one spouse is incapacitated, other spouse may assume sole powers of administration. These powers do not include disposition or encumbrance without authority of court or written consent of other spouse. Neither spouse may donate any community property without consent of other, however, either spouse may without consent of other, make moderate donations from community property for charity or on occasion of family rejoicing or family distress. (E.O. 209).

13.05 INFANTS:

Emancipation takes place by attainment of majority. Unless otherwise provided, majority commences at age 18. Emancipation terminates parental authority over person and property of child who shall then be qualified and responsible for all acts of civil life, save exceptions established by existing laws in special cases. Contracting marriage shall require parental consent until age 21. (E.O. 209, am'd R.A. 6809).

13.06 MARRIAGE:

Marriage Law is found in Title I of Family Code (E.O. 209, am'd by E.O. 227), and in those provisions of Act 3613, as am'd, which have not been abrogated or repealed by Civil Code and Family Code.

Age of Consent.

Any male or female, 18 years of age or upwards, not under any of impediments in incestuous and void marriages from beginning and marriages void from beginning by reasons of public policy, may contract marriage. In case either or both of contracting parties, not having been emancipated by previous marriage, are between ages of 18 and 21, written consent of parent or guardian is necessary. When any contracting party is between age of 21 and 25, parental or guardian advice is necessary. Without such advice or if same is unfavorable, marriage license shall not be issued until after three months following completion of publication of application.

License is required, and on application therefore ten days notice must be given by local civil registrar before he will issue license, except in case of marriages in articulo mortis or at remote places. Marriages among Muslim or among members of ethnic cultural communities may be performed validly without marriage license provided they are solemnized in accordance with their customs or practices. Also, no license shall be necessary for marriage of man and woman who lived together as husband and wife for at least five years and without any legal impediment to marry each other. There are also exceptions in cases of foreigners and officers of U.S. Army or Navy, and where church requires banns, in which cases ten days notice is not required for issuance of license.

Ceremonial Marriage.

Marriages may be solemnized by: (1) Any incumbent member of judiciary within court's jurisdiction; (2) any priest, rabbi, imam, or minister of any church or religious sect duly authorized by his church or religious sect and registered with civil registrar general; (3) any ship captain or airplane chief in marriages in articulo mortis; (4) any military commander of unit to which chaplain is assigned, in absence of latter, during military operation; or (5) any consul-general, consul or vice-consul in marriages between Filipinos abroad. City and municipal mayors are now likewise authorized to solemnize marriage. (§§444 & 455, RA 7160).

Marriages shall be solemnized publicly in chambers of judge or in open court, in church, chapel or temple or in office of consul-general, consul or vice-consul except in cases of marriages contracted in point of death or in remote places in accordance with Art. 29 of Family Code, or where both parties request solemnizing officer in writing in which case marriage may be solemnized at house or place designated by them in sworn statement to that effect.

Marriage Certificate.

Person solemnizing marriage ceremony must issue certificate of marriage, in quadruplicate signed by contracting parties and attested by them, original copy to be given to contracting parties, duplicate and triplicate copies to be filed with local civil registrar where ceremony is performed, and quadruplicate copy to be retained by solemnizing officer. (Art. 23, E.O. 209).

When either or both contracting parties are citizens of foreign country, it shall be necessary for them before marriage license can be obtained, to submit certificate of legal capacity to contract marriage, issued by their respective diplomatic or consular officials. Stateless persons or refugees from other countries shall, in lieu of certificate of legal capacity, submit affidavit stating circumstances showing such capacity to contract marriage.

Marriages solemnized abroad, if valid in country where celebrated, are also valid in Philippines, except if: either or both parties did not have legal capacity to get married; marriage is immoral for being bigamous or polygamous; consent of one party is lacking because of mistake as to identity of other; one of parties at time of marriage was psychologically incapacitated to comply with essential marital obligations; marriage is incestuous; or marriage is void by reason of public policy.

Where citizen of Philippines is married to foreigner and latter thereafter obtains valid divorce abroad capacitating him or her to remarry, citizen of Philippines shall likewise have capacity to remarry under Philippine law.

Common law marriages are not recognized.

Annulment.

A marriage may be annulled upon various statutory grounds set forth in the Family Code.

14 FOREIGN TRADE AND COMMERCE

14.01 CUSTOMS:

See category 23 Taxation, topic Taxes.

14.02 EXCHANGE CONTROL:

No statutory rule.

See topic 14.03 Foreign Exchange; category 1 Introduction, topic 1.01 Currency.

14.03 FOREIGN EXCHANGE:

Bangko Sentral is authorized to suspend or restrict temporarily sales of foreign exchange, and subject all transactions in gold and foreign exchange to license under §72, R.A. 7653. Pursuant to its charter, Bangko Sentral has issued regulations relating to operation of foreign exchange and trade control in Philippines. Digest of these regulations has been published by Bangko Sentral in order to assist firms and individuals in understanding exchange and trade control regulations. See also category 1 Introduction, topic 1.01 Currency.

14.04 FOREIGN INVESTMENTS AND INCENTIVES:

Omnibus Investments Code of 1987 (E.O. 226) incorporates all foreign investment laws and various incentive schemes administered by Dept. of Trade & Industry through either Board of Investments (BOI) or Philippine Economic Zone Authority (PEZA). It gives foreign and local investors complete information on all incentives which they may avail of, alternative incentive schemes available to them and requirements for registration of foreign investments without incentives.

State shall encourage private domestic and foreign investments in industry, agriculture, mining, forestry, tourism and other sectors of economy which shall: (1) Provide significant employment opportunities relative to amount of capital invested; (2) increase productivity of land, minerals, forestry, aquatic and other resources of country, and improve utilization of products thereof; (3) improve technical skills of people employed in enterprise; (4) provide foundation for future development of economy; (5) meet tests of international competitiveness; (6) accelerate development of less developed regions of country; and (7) result in increased volume and value of exports for economy. Also, State shall extend to projects which will contribute to attainment of these objectives, fiscal incentives without which said projects may not be established in locales, number and/or pace required for optimum national economic development. Fiscal incentive systems shall be devised to compensate for market imperfections, reward performance contributing to economic development, and be cost-efficient and simple to administer. Fiscal incentives shall be extended to stimulate establishment and assist initial operations of enterprise, and shall terminate after period of not more than ten years from registration or start-up of operation unless specific period is otherwise stated.

BOI, composed of seven governors: Secretary of Trade & Industry, three Undersecretaries of Trade & Industry to be chosen by President; and three representatives from other government agencies and private sector, shall be responsible for regulation and promotion of investments. Not later than end of Mar. of every year, BOI shall submit Investment Priorities Plan (IPP) to President. Under IPP prepared by BOI, preferred areas of investment are classified as either pioneer or non-pioneer. Upon registration with BOI, enterprise becomes registered enterprise in pioneer or non-pioneer preferred areas of investment. Pioneer enterprise is registered enterprise: (1) Engaged in manufacture, processing or production of goods, products, commodities or raw materials that have not been produced in Philippines on commercial scale or (2) which uses design, formula, scheme, method, process or system or production or transformation of any element, substance or raw material into another raw material or finished goods which is new and untried in Philippines or (3) engaged in pursuit of agricultural, forestry and mining activities and/or services including industrial aspects of food processing whenever appropriate, predetermined by BOI, in consultation with appropriate department, to be feasible and highly essential to attainment of national goal in relation to declared specific national food and agricultural program for self sufficiency and other social benefits of project or (4) which produces nonconventional fuels or manufactures equipment which utilizes nonconventional sources of energy or uses or converts to coal or other nonconventional fuels or sources of energy in its production, manufacturing or processing operations provided that final product will involve substantial use and processing of domestic raw materials, whenever available, taking into account risks and magnitude of investment. Non-pioneer enterprises shall include all registered producer enterprises other than pioneer enterprises.

Qualifications of Registrants.

To be entitled to registration under IPP, applicant must possess following qualifications: (1) If natural person, he must be citizen of Philippines; if partnership or any other association, it must be organized under Philippine laws and at least 60% of its capital should be owned and controlled by citizens of Philippines; if corporation or cooperative, it must be organized under Philippine laws, at least 60% of its capital stock outstanding and entitled to vote must be owned and held by Philippine nationals, and at least 60% of members of Board of Directors must be citizens of Philippines. If corporation does not possess required degree of ownership by Philippine nationals, it must establish following circumstances satisfactorily in order to qualify for registration under IPP: (a) It proposes to engage in pioneer project which cannot be adequately filled by Philippine nationals or applicant is exporting at least 70% of its total production, (b) it obligates itself to attain status of Philippine national within 30 years from date of registration or longer period depending upon export potential of project (registered enterprise which exports 100% of its total production need not comply with this requirement), (c) pioneer area corporation will engage in is one that is not within activities reserved for Philippine citizens or corporations owned and controlled by Philippine citizens; (2) it proposes to engage in preferred project listed in current IPP within reasonable period of time; or if not listed, at least 50% of enterprise's total production is for export or it is existing producer which will export part of production under certain conditions; or that enterprise is engaged or will engage in export of products bought from one or more export producers; or enterprise is engaged or will engage in rendering technical, professional or other services or in exporting television and motion pictures and musical recording made or produced in Philippines, either directly or through registered trader; and (3) it is capable of operating on sound and efficient basis and of contributing to national development of preferred area in particular and of national economy in general.

Rights and Guarantees.

Investors and registered enterprises are entitled to basic rights and guarantees provided in Constitution. Among other rights recognized by Government are: (1) Repatriation of investment; (2) remittance of earnings; (3) right to remit at exchange rate prevailing at time of remittance such sums necessary to meet payments of interest and principal on foreign loans and foreign obligations arising from technological assistance contracts; (4) freedom from expropriation of property represented by investments or property of enterprises except for public use or interest of national welfare; and (5) there shall be no requisition of property represented by investment or property of enterprises, except in event of war or national emergency.

Incentives.

BOI registered enterprises shall be granted following incentives to extent engaged in preferred area of investment: (1) Income tax holiday—full exemption for six years for pioneer firms and four years for non-pioneer firms from date of commercial operation, extendible for another year while registered expanding firms shall be entitled to exemption for income taxes proportionate to their expansion for period of three years from commercial operation; (2) additional deduction from taxable income equal to 50% of labor expenses for five years from registration; (3) tax and duty exemption on imported capital equipment and accompanying spare parts, under certain conditions; (4) tax credit on domestic capital equipment subject to certain conditions; (5) simplification of customs procedures for importation of equipment, spare parts, raw materials and supplies, and exports of processed products; (6) unrestricted use of consigned equipment provided re-export bond is posted unless equipment and spare parts have been imported tax and duty free; (7) employment of foreign nationals in supervisory, technical or advisory positions for five years from registration, extendible for limited periods with certain exceptions; (8) exemption from all taxes and duties on importation of breeding stocks and genetic materials within ten years from date of registration or commercial operation with certain conditions; (9) tax credit on domestic breeding stocks and genetic materials equivalent to 100% provided purchase is within ten years from date of registration of enterprise; (10) tax credit for taxes and duties on raw material, supplies and semi-manufactured products used in manufacture of export products; (11) access to bonded manufacturing/trading warehouse system of registered export oriented enterprises; (12) exemption from taxes and duties on imported spare parts and required supplies and for consigned equipment; and (13) exemption from wharfage and any export tax, duty, import and fees. (E.O. 226 as am'd by R.A. 7918).

Registered Enterprises with Operations in Less Developed Areas.

Incentive are: (1) Automatic entitlement to incentives available to pioneer enterprises regardless of nationality; (2) additional deduction from taxable income equal to 100% of labor expenses for five years from registration; and (3) deduction from taxable income to extent of 100% of cost of necessary and major infrastructure and public facilities constructed.

EPZA-registered enterprises are also entitled to incentives available to BOI-registered enterprises. Additional incentives are: (1) Merchandise, raw materials, supplies, and other articles brought into export processing zone are exempt from taxes and duties subject to certain conditions; and (2) exemption from local taxes and licenses including real property taxes on production equipment or machineries.

Foreign business entity organized and existing under any laws other than those of Philippines whose purpose is to supervise, superintend, inspect or coordinate its own affiliates, subsidiaries or branches in Asia-Pacific region may be allowed to establish regional or area headquarters in Philippines subject to certain conditions, among which are following: (1) Its activities shall be limited to acting as supervisory, communications and coordinating center for its subsidiaries, affiliates and branches in region and (2) it will not derive any income from sources within Philippines and will not participate in any manner in management of any subsidiary or branch office it might have in Philippines. Regional or area headquarters shall be entitled to following incentives: (1) Exemption from income tax; (2) exemption from contractor's tax; (3) exemption from all kinds of local licenses, fees and duties; (4) tax and duty free importation of training materials; (5) importation of motor vehicles for expatriate executives and their replacement every three years provided taxes and duties are paid upon importation; and, (6) exemption from registration requirements. Expatriate executives are entitled to: (1) Multiple entry visa, valid for one year including spouses and unmarried children below 21 and exemption from payment of all fees and duties under immigration and alien registration laws; securing alien certificates of registration; and obtaining all types of clearances required by any government department or agency except notice of final departure and tax clearance from Bureau of Internal Revenue; (2) withholding tax of 15% on gross income received; (3) tax and duty free importation of personal and household effects; and (4) travel tax exemption. Foreign company which has established or will establish regional or area headquarters may be allowed to establish regional warehouses subject to following conditions: (1) Its activities shall be limited to serving as supply depot for storage, deposit, safekeeping of its spare parts or manufactured components and raw materials including packing and related activities; filling up transactions and sales made by its head offices or parent companies; and serving as storage or warehouse of goods purchased locally by home office of foreign company for export abroad; (2) it shall not directly engage in trade nor directly solicit business, promote any sale, nor enter into any contract for sale or disposition of goods in Philippines; and (3) it will not derive any income from sources within Philippines and its personnel will not participate in any manner in management of subsidiary, affiliate or branch office it might have in Philippines. Imported spare parts, raw materials and other items for use exclusively on goods stored, brought into regional warehouse from abroad to be kept and re-exported to Asia-Pacific and other foreign markets shall be exempt from payment of customs duty, internal revenue tax, export tax and local taxes.

Special investors resident visa may be issued to any alien who possesses following qualifications: (1) He has not been convicted of crime involving moral turpitude; (2) he is not afflicted with any loathsome, dangerous or contagious disease; (3) he has not been institutionalized for any mental disorder or disability; and (4) he is willing and able to invest US$75,000 in Philippines.

Foreign Investments Act of 1991 (R.A. 7042 am'd by R.A. 8179).—State shall promote and welcome investments from foreign individuals and juridical entities in activities which contribute to national industrialization and socio-economic development to extent that foreign investment is allowed in such activity by Constitution and relevant laws. Foreign investments shall be encouraged in enterprises that expand livelihood and employment opportunities for Filipinos; enhance economic value of farm products; promote welfare of Filipino consumers; expand scope, quality and volume of exports and their access to foreign markets; and/or transfer relevant technologies in agriculture, industry and support services. Foreign investments shall be welcome as supplement to Filipino capital and technology in those enterprises serving mainly domestic market.

Any non-Philippine national may do business or invest in domestic enterprise up to 100% of its capital provided it is investing in domestic market enterprise in areas outside Foreign Investment Negative List (FINL) and brings foreign capital of at least US$200,000; or it is investing in export enterprise whose products and services do not fall within Lists A & B of FINL. It is also provided that country or state of applicant must also allow Filipino citizens and corporations to do business therein.

List of Investment Areas Reserved to Philippine Nationals or Foreign Investment Negative List.

(a) List A shall consist of areas of activities where foreign equity participation in any domestic or export enterprise engaged in any activity listed therein shall be limited to maximum of 40% as prescribed by Constitution and specific laws; and (b) List B shall consist of areas of activities and enterprises regulated pursuant to law which are defense-related activities, requiring prior clearance and authorization from Dept. of National Defense or which have implications on public health and morals.

Coverage.

Act covers all investment areas of economic activities except banking and other financial institutions which are governed and regulated by General Banking Act and other laws under supervision of Central Bank.

Existing enterprises which have been issued certificates of authority to do business or to accept permissible investments under E.O. 226, P.D. 1789 and R.A. 5455, whose activities are included in Transitory FINL or in subsequent Negative Lists, are allowed to continue same activities which they have been authorized to do subject to same terms and conditions stipulated in their certificates of registration.

Those whose activities have been previously authorized under E.O. 226, P.D. 1789 and R.A. 5455, and whose activities are not in Transitory FINL or in subsequent Negative Lists may opt to be governed by provisions of Act. Said enterprises shall be considered automatically registered with SEC upon surrender of their certificates of authority to BOI. SEC shall issue new certificate of authority upon advise of BOI.

Existing enterprises with more than 40% of foreign equity which have availed of incentives under any of investment incentives laws implemented by BOI may opt to be governed by Act. In such cases, said enterprises shall be required to surrender their certificates of registration, which shall be deemed express waiver of their privilege to apply for and avail of incentives under incentives law under which they were previously registered. Subject to BOI rules and regulations, said enterprises may be required to refund all capital equipment incentives availed of.

Special Economic Zone Act of 1995.

(R.A. 7916 am'd by R.A. 8748). Government aims to encourage, promote, induce and accelerate sound and balanced industrial, economic and social development in country by providing jobs in rural areas and increasing productivity and income of every individual and family living in these areas through establishment of special economic zones ("ECOZONES") that will effectively attract legitimate and productive foreign investments.

Special economic zones are selected areas which are highly developed or which have potential to be developed into agro-industrial, industrial, tourist/recreational, commercial, banking, investment and financial centers.

Any investor within economic zone whose initial investment shall not be less than US$150,000, his/her spouse and dependent children under 21 years old shall be granted permanent resident status within economic zone. Business establishments operating within ECOZONES shall be entitled to: (1) Fiscal incentives under P.D. 66 or E.O. 226; (2) tax credits for exporters using local materials as inputs as provided by R.A. 7844 (Export Dev't. Act of 1994); (3) exemption from taxes under National Internal Revenue Code except for real property taxes on land owned by developers; (4) goods manufactured by ECOZONE enterprise shall be made available for immediate domestic retail sales; (5) additional deduction of ½ of value of training expenses incurred by ECOZONE enterprises in developing skilled or unskilled labor or for managerial or other management development programs and (6) exemption from national and local taxes and licenses.

ECOZONE developers/operators shall be entitled to following incentives: (1) Exemption from national and local taxes and licenses, and in lieu thereof, ECOZONE developer/operator shall pay 5% final tax on gross income; (2) additional deduction equivalent to ½ of value of training expenses; (3) incentives under BOT law and (4) other incentives under Code.

To avail of all above incentives and benefits, business enterprises within ECOZONES must register with Philippine Economic Zone Authority.

ECOZONE enterprises are allowed to hire foreign nationals in supervisory, technical or advisory capacity not exceeding 5% of its workforce.

Freeport Zones.

Under R.A. No. 9400, Clark Special Economic Zone (CFZ) covering lands occupied by Clark military reservations and its contiguous extensions with area of not more than 4,400 hectares, shall be operated and managed as separate customs territory ensuring free flow or movement of goods and capital equipment within, into and exported out of CFZ, as well as provide incentives such as tax- and duty-free importation of raw materials and capital equipment. However, exportation or removal of goods from territory of CFZ to other parts of Philippines shall be subject to customs duties and taxes.

No national or local taxes shall be imposed on registered business enterprises within CFZ. In lieu of said taxes, 5% tax on gross income earned shall be paid by all registered business enterprises within CFZ and shall be directly remitted, as follows: 3% to National Government, and 2% to municipality or city where they are located.

Other existing economic zones are as follows: (a) Subic Special Economic Zone; (b) Poro Point Freeport Zone; (c) Morong Special Economic Zone; and (d) John Hay Special Economic Zone.

14.05 INVESTMENTS AND INCENTIVES:

See topic 14.04 Foreign Investments and Incentives.

15 HEALTH

15.01 DRUGS AND PHARMACIES:

Generics Act of 1998 (R.A. 6675) is aimed to promote, require and ensure production of adequate supply, distribution, use and acceptance of drugs and medicines identified by their generic names or terminology.

To promote use of generic names for pharmaceutical products, special consideration shall be given to drugs and medicines that are included in Essential Drug List which shall be prepared and updated quarterly by Department of Health. Department of Health shall publish annually generic names, and corresponding brand names under which they are marketed, of all drugs and medicines available in Philippines.

Generic name of drugs shall be used by following: (1) All government health agencies and their personnel and all other government agencies; (2) all medical, dental and veterinary practitioners, shall write prescriptions using generic name; (3) any organization or company involved in manufacture, importation, repacking, marketing and/or distribution of drugs and medicines; and (5) drug outlets, including drugstores, hospital and non-hospital pharmacies and non-traditional outlets such as supermarkets and stores.

Pharmacy Law (R.A. 5921, am'd P.D. 1363, am'd E.O. 174) is aimed at regulating practice of pharmacy and setting standards for pharmaceutical education.

Minimum requirements necessary for opening and operation of drugstores and pharmacies shall be in accordance with rules and regulations prescribed by Bureau of Food and Drugs and with this Act. Application for opening of retail drugstore shall not be approved unless signed by Filipino registered pharmacist, either as owner or as supervising pharmacist.

Drugs, pharmaceuticals, poisons or devices sold in its original packing, seal of which has not been broken or tampered with, liability that may arise because of their safety, efficacy, quality and purity rests upon manufacturer or upon importer, distributor, representative or dealer, who is responsible for their distribution or sale.

Universally Accessible Cheaper and Quality Medicines Act of 2008 (R.A. 9502) is aimed at adopting appropriate measures to promote and ensure access to affordable quality drugs and medicines for all. Pursuant to this goal, effective competition policy in supply and demand of quality affordable medicines must be primary instrument of State. However, in event that full competition is not effective, State, as reserve instrument, may regulate prices of drugs and medicines.

President, upon recommendation of Dept. of Health must have power to impose maximum retail prices over all drugs and medicines. No court, except Supreme Court, must issue any temporary restraining order or preliminary injunction that will prevent immediate execution of President's exercise of this power.

No retailer must sell drugs and medicines at retail price exceeding maximum retail price approved by President. Secretary of Health may impose fines against any person or entity for violation of maximum retail price approved by President, which fine must, in no case, be less than P50,000.00 nor more than P5 million.

R.A. 9502 also amended certain provisions of Intellectual Property Code. See Category 18 Intellectual Property, topic 18.02 Patents.

Prohibited Acts.

(1) No person shall engage in practice of pharmacy provided, they have acquired all requisites for practice. (2) No medicine, pharmaceutical or drug of whatever nature and kind or device shall be compounded, dispensed, sold or resold, or otherwise be made available to consuming public except through prescription drugstore or hospital pharmacy. (3) Samples of any drug, biological product, device or proprietary medicine, which is given free to physician, shall not be resold. (4) No pharmacist shall have personal supervision of more than one pharmacy. (5) Any person who shall make false representation, to procure registration certificate as pharmacist for himself or for another. (6) Any person who shall allow anyone in his employ who is not registered pharmacist to engage in practice of pharmacy. (7) Any person who shall falsely display within establishment certificate of registration of pharmacist who is not actually and regularly employed therein. (8) To act as dummy for any alien or unqualified person for purpose of opening and operating of retail drugstore.

Enforcement.

Council of Pharmaceutical Education and Board of Pharmacy shall be responsible for implementation of provisions of this Act.

Tobacco Regulation Act of 2003 (R.A. 9211) prohibits smoking in following public places: (a) Centers of youth activity such as playschools, preparatory schools, elementary schools, high schools, colleges and universities, youth hostels and recreational facilities for persons under 18 years old; (b) elevators and stairwells; (c) locations in which fire hazards are present, including gas stations and storage areas for flammable liquids, gas, explosives or combustible materials; (d) within buildings and premises of public and private hospitals, medical, dental and optical clinics, health centers, nursing houses, dispensaries and laboratories; (e) public conveyances and public facilities including airport and ship terminals and train and bus stations, restaurants and conference halls, except for separate smoking areas; and (f) food preparation areas.

Owners and operators of enclosed places that are open to general public, private work places where smoking may expose person other than smoker to tobacco smoke shall establish smoking and nonsmoking areas. These areas may include designated smoking area within building, which may be in open space or separate area with proper ventilation which shall not be located in same room that has been designated as nonsmoking area. Designated smoking areas must bear one legible and visible sign posted namely, “SMOKING AREA” for information and guidance of all concerned. Sign shall also include warning about health effects of direct or secondhand exposure to tobacco smoke. Nonsmoking areas must likewise have sign which reads “NON-SMOKING AREA” or “NO SMOKING”.

15.02 HUMAN SECURITY:

R.A. No. 9372, otherwise called Human Security Act of 2007, was enacted to protect life, liberty, and property from acts of terrorism, to condemn terrorism as inimical and dangerous to national security of country and to welfare of people, and to make terrorism crime against Filipino people, against humanity and against law of nations.

Terrorism.

Crimes considered as terrorism are as follows: acts punishable under any of following provisions of Revised Penal Code: (a) Art. 122 (Privacy in General and Mutiny in High Seas or in Philippine Waters); (b) Art. 134 (Rebellion or Insurrection); (c) Art. 134-a (Coup d' Etat), including acts committed by private persons; (d) Art. 248 (Murder); (e) Art. 267 (Kidnapping and Serious Illegal Detention); and (f) Art. 324 (Crimes Involving Destruction). Also, acts under following laws: (a) Presidential Decree No. 1613 (Law on Arson); (b) Republic Act No. 6969 (Toxic Substances and Hazardous and Nuclear Waste Control Act of 1990); (c) Republic Act No. 5207 (Atomic

Energy Regulatory and Liability Act of 1968); (d) Republic Act No. 6235 (Anti-Hijacking Law); (e) Presidential Decree No. 532 (Anti-Piracy and Anti-Highway Robbery Law of 1974); and (f) Presidential Decree No. 1866 as amended (Decree Codifying the Laws on Illegal and Unlawful Possession, Manufacture, Dealing in, Acquisition of Disposition of Firearms, Ammunitions or Explosives). These crimes, committed for purpose of sowing and creating condition of widespread and extraordinary fear and panic among populace, in order to coerce government to give in to unlawful demand shall be considered as crime of terrorism, penalty of which is 40 years of imprisonment, without benefit of parole.

Surveillance of Suspects and Interception and Recording of Communications.

Provisions of Republic Act No. 4200 (Anti-Wire Tapping Law) to contrary notwithstanding, police or law enforcement official and members of his team may, upon written order of Court of Appeals, listen to, intercept and record, with use of any mode, form, kind or type of electronic or other surveillance equipment or intercepting and tracking devices, or with use of any other suitable ways and means for that purpose, any communication, message, conversation, discussion, or spoken or written words between members of judicially declared and outlawed terrorist organization, association, or group of persons or of any person charged with or suspected of crime of terrorism or conspiracy to commit terrorism.

Period of Detention Without Judicial Warrant of Arrest.

Provisions of Article 125 of Revised Penal Code to contrary notwithstanding, any police or law enforcement personnel, who, having been duly authorized in writing by Anti-Terrorism Council has taken custody of person charged with or suspected of crime of terrorism or crime of conspiracy to commit terrorism shall, without incurring any criminal liability for delay in delivery of detained persons to proper judicial authority, deliver said charged or detained persons to proper judicial authorities within period of three days counted from moment said charged or suspected person has been apprehended or arrested, detained, and taken into custody by said police or law enforcement personnel; provided, that arrest of those suspected of crime of terrorism or conspiracy to commit terrorism must result from surveillance under §7 and examination of bank deposits under §27 of this Act.

Judicial Authorization Required to Examine Bank Deposits, Accounts, and Records.

Provisions of Republic Act No. 1405 as amended, to contrary notwithstanding, justices of Court of Appeals designated as special court to handle anti-terrorism cases after satisfying themselves of existence of probable cause in hearing called for such purpose that: (1) Person charged with or suspected of crime of terrorism or conspiracy to commit terrorism; (2) of judicially declared and outlawed terrorist organization, association, or group of persons; and (3) member of such judicially declared and outlawed organization, association, or group of persons, may authorize in writing any police or law enforcement officer and members of his/her team duly authorized in writing by anti-terrorism council to: (a) Examine or cause examination of deposits, placements, trust accounts, assets and records in bank or financial institution; and (b) gather or cause gathering of any relevant information about such deposits, placements, trust accounts, assets, and records from bank or financial institution. Bank or financial institution concerned shall not refuse to allow such examination or to provide desired information, when so ordered by and served with written order of Court of Appeals.

Damages for Unproven Charge of Terrorism.

Upon acquittal, any person who is accused of terrorism shall be entitled to payment of damages in amount of P500,000 for every day that he or she has been detained or deprived of liberty or arrested without warrant as result of such accusation. Amount of damages shall be automatically charged against appropriations of police agency or Anti-Terrorism Council that brought or sanctioned filing of charges against accused. It shall also be released within 15 days from date of acquittal of accused. Award of damages mentioned above shall be without prejudice to right of acquitted accused to file criminal or administrative charges against those responsible for charging him with case of terrorism.

Revised Fire Code of Philippines of 2008 (RA 9514). It is policy of State to ensure public safety and promote economic development through prevention and suppression of all kinds of destructive fires and promote professionalization of fire service as profession. Toward this end, State shall enforce all laws, rules and regulations to ensure adherence to standard fire prevention and safety measures, and promote accountability for fire safety in fire protection service and prevention service.

Applicability of Code—Provisions of Fire Code shall apply to all persons and all private and public buildings, facilities or structures erected or constructed before and after its effectivity.

Prohibited Acts—(1) Obstructing or blocking exit ways or across buildings clearly marked for fire safety purposes, such as, but not limited to, aisles in interior rooms, any part of stairways, hallways, corridors, vestibules, balconies or bridges leading to stairway or exit of any kind, or tolerating or allowing said violations; (2) constructing gates, entrances and walkways to buildings components and yards which obstruct orderly and easy passage of fire fighting vehicles and equipment; (3) prevention, interference or obstruction of any operation of fire service, or duly organized and authorized fire brigades; (4) obstructing designated fire lanes or access to fire hydrants; (5) overcrowding or admission of persons beyond authorized capacity in movie houses, theatres, coliseums, auditoriums or other public assembly buildings except in other assembly areas on ground floor with open sides or open doors sufficient to provide safe exits; (6) locking fire exits during period when people are inside building; (7) prevention or obstruction of automatic closure of fire doors or smoke partitions or dampers; (8) use of fire protective of fire fighting equipment of fire service other than for fire fighting except in other emergencies where their use are justified; (9) giving false or malicious file alarms; (10) smoking in prohibited areas as may be determined by fire service, or throwing of cigars, cigarettes, burning objects in places which may start or cause fire; (11) abandoning or leaving building or structure by occupant or owner without appropriate safety measures; (12) removing, destroying, tampering or obliterating any authorized mark, seal, sign or tag posted or required by fire service for fire safety in any building, structure or processing equipment; and (13) use of jumpers or tampering with electrical wiring or overloading electrical system beyond its designated capacity or such other practices that would tend to undermine fire safety features of electrical system.

Enforcement—This Code shall be administered and enforced by Bureau of Fire Protection (BFP), under direct supervision and control of Chief of Bureau of Fire Protection, through hierarchy of organization, with approval of Secretary of Department of Interior and Local Government (DILG).

Act Further Amending Provisions of Presidential Decree No. 1866 on Illegal Possession of Firearms (RA 9516).

(1) Section 3 of Presidential Decree No. 1866, as amended, is hereby further amended to read as follows:

``*Section 3. Unlawful Manufacture, Sales, Acquisition, Disposition, Importation or Possession of an Explosive or Incendiary Device*—The penalty of *reclusion perpetua* shall be imposed upon any person who shall wilfully and unlawfully manufacture, assemble, deal in, acquire, dispose, import or possess any explosive or incendiary device, with knowledge of its existence and its explosive or incendiary character, where the explosive or incendiary device is capable of producing destructive effect on contiguous objects or causing injury or death to any person, including but not limited to, hand grenade(s), rifle grenade(s), `pillbox bomb'. `molotov cocktail bomb' `fire bomb', and other similar explosive and incendiary devices.

Provided, That mere possession of any explosive or incendiary device shall be *prima facie* evidence that the person had knowledge of the existence and the explosive or incendiary character of the device.

Provided, however, That a temporary, incidental, casual, harmless, or transient possession or control of any explosive or incendiary device, without the knowledge of its existence or its explosive or incendiary character, shall not be a violation of this Section.

Provided, Further, That the temporary, incidental, casual, harmless, or transient possession or control of any explosive or incendiary device for the sole purpose of surrendering it to the proper authorities shall not be a violation of this Section.

Provided, finally, That in addition to the instances provided in the two (2) immediately preceeding paragraphs, the court may determine the absence of the intent to possess, otherwise referred to as *'animus possidendi'*, in accordance with the facts and circumstances of each case and the application of other pertinent laws, among other things, Articles 11 and 12 of the Revised Penal Code, as amended."

(2) Section 4 of Presidential Decree No. 1866, as amended, is hereby further amended to read as follows:

``SEC3-A. Unlawful Manufacture, Sales, Acquisition, Disposition, Importation or Possession of a Part, Ingredient, Machinery, Tool or Instrument Used or Intended to be Used for the Manufacture, Construction, Assembly, Delivery or Detonation—The penalty of reclusion perpetua shall be imposed upon any person who shall wilfully and unlawfully manufacture, assemble, deal in, acquire, dispose, import or possess any part, ingredient, machinery, tool or instrument of any explosive or incendiary device, whether chemical, mechanical, electronic, electric or otherwise, used or intended to be used by that person for its manufacture, construction, assembly, delivery or detonation, where the explosive or incendiary device is capable or is intended to be made capable of producing destructive effect on contiguous objects or causing injury or death to any person.

Provided, That the mere possession of any part, ingredient, machinery, tool or instrument directly used in the manufacture, construction, assembly, delivery or detonation of any explosive or incendiary device, by any person whose business activity, or employment does not lawfully deal with the possession of such article shall be *prima facie* evidence that such article is intended to be used by that person in the unlawful/illegal manufacture, construction, assembly, delivery or detonation of an explosive or incendiary device.

Provided, however, That a temporary incidental, casual, harmless or transient possession or control of any part, machinery, tool or instrument directly used in the manufacture, construction, assembly, delivery or detonation of any explosive or incendiary device, without the knowledge of its existence or character as part, ingredient, machinery, tool or instrument directly used in the manufacture, construction, assembly, delivery or detonation of any explosive or incendiary device, shall not be a violation of this Section.

Provided, further, That the temporary, incidental, casual, harmless, or transient possession or control of any part, ingredient, machinery, tool or instrument directly used in the manufacture, construction, assembly, delivery or detonation of any explosive or incendiary device for the sole purpose of surrendering it to the proper authorities shall not be a violation of this Section.

Provided, finally, That in addition to the instances provided in the two (2) immediately preceding paragraphs, the court may determine the absence of the intent to possess, otherwise referred to as *'animus possidendi'*, in accordance with the facts and circumstances of each case and the application of other pertinent laws, among other things, Articles 1 and 12 of the Revised Penal Code, as amended."

(3) Insert a new Section 3-B, 3-C, 3-D, 4, 4-A, 4-B, 4-C, 4-D, 4-E, and 4-F in Presidential Decree No. 1866 to read as follows:

``*SEC.3-B. Penalty for the Owner, President, Manager, Director or Other Responsible Officer of Any Public or Private Firm, Company, Corporation or Entity*—The penalty of *reclusion perpetua* shall be imposed upon the owner, president, manager, director or other responsible officer of any public or private firm, company, corporation or entity, who shall wilfully or knowingly allow any explosive or incendiary device or parts thereof owned or controlled by such firm, company, corporation or entity to be used by any person or persons found guilty of violating the provisions of the preceding paragraphs."

``*SEC. 3-C. Relationship of Other Crimes with a Violation of this Decree and the Penalty Therefor.*—When a violation of Section 3, 3-A or 3-B of this Decree is a necessary means for committing any of the crimes defined in the Revised Penal Code or special laws, or is in furtherance of, incident to, in connection with, by reason of, or on occasion of any of the crimes defined in the Revised Penal Code or special laws, the penalty of *reclusion perpetua* and a fine ranging from One hundred Thousand pesos (P100,000.00) to One million pesos (P1,000,000.00) shall be imposed."

``*SEC. 3-D. Former Conviction or Acquittal; Double Jeopardy*—Subject to the provisions of the Rules of Court on double jeopardy, if the application thereof is more favorable to the accused, the conviction or acquittal of the accused or the dismissal of the case for violation of this Decree shall be a bar to another prosecution of the same accused for any offense where the violation of this Decree was a necessary means for committing the offense or in furtherance of which, incident to which, in connection with which, by reason of which, or on occasion of which, the violation of this Decree was committed, and vice versa."

``*SEC. 4. Responsibility and liability of Law Enforcement Agencies and Other Government Officials and Employees in Testifying as Prosecution Witnesses*—Any member of law enforcement agencies or any other government official and employee who, after due notice, fails or refuses, intentionally or negligently, to appear as a witness for the prosecution of the defense in any proceeding, involving violations of this Decree, without any valid reason, shall be punished with *reclusion temporal* and a fine of Five hundred Thousand pesos (P500,000.00) in addition to the administrative liability he/she may be meted out by his/her immediate superior and/or appropriate body.

The immediate superior of the member of the law enforcement agency or any other government employee mentioned in the preceding paragraph shall be penalized with prision correctional and a fine of not less than Ten Thousand pesos (P10,000.00) but not more than Fifty thousand pesos (P50,000.00) and in addition, perpetual absolute disqualification from public office if despite due notice to them and to the witness concerned, the former does not exert reasonable effort to present the latter to the court.

The member of the law enforcement agency or any other government employee mentioned in the preceding paragraphs shall not be transferred or reassigned to any other government office located in another territorial jurisdiction during the pendency of the case in court. However, the concerned member of the law enforcement agency or government employee may be transferred or reassigned for compelling reasons: *Provided,* That his/her immediate superior shall notify the court where the case is pending of the order to transfer or reassign, within twenty-four (24) hours from its approval: *Provided, further,* That his/her immediate superior shall be penalized with *prision correctional* and a fine of not less that Ten thousand pesos (P10,000.00) but not more than Fifty thousand pesos (P50,000.00) and in addition, perpetual absolute disqualification from public office, should he/she fail to notify the court of such order to transfer or reassign.

Prosecution and punishment under this Section shall be without prejudice to any liability for violation of any existing law."

``SEC 4-A. *Criminal Liability for Planting of Evidence*—Any person who is found guilty of `planting' any explosive or incendiary device or any part, ingredient, machinery, tool or instrument of any explosive or incendiary device, whether chemical, mechanical, electronic, electrical or otherwise, shall suffer the penalty of *reclusion perpetua.*

Planting of evidence shall mean the wilful act by any person of maliciously and surreptitiously inserting, placing, adding or attaching, directly or indirectly, through any overt or covert act, whatever quantity of any explosive or incendiary device or any part, ingredient, machinery, tool or instrument of any explosive or incendiary device, whether chemical, mechanical, electronic, electrical or otherwise in the person, house, effects or in the immediate vicinity of an innocent individual for the purpose of implicating incriminating or imputing the commission of any violation of this Decree."

``SEC 4-B *Continuous Trial*—In cases involving violations of this Decree, the judge shall set the case for continuous trial on a daily basis from Monday to Friday or other short-term calendar so as to ensure speedy trial. Such case shall be terminated within ninety (90) days from arraignment of the accused."

``SEC. 4-C *Authority to Import, Sell or Possess Chemicals or Accessories for Explosives* —Only persons or entities issued a manufacturer's license, dealer's license or purchaser's license by the Philippine National Police (PNP.—Firearms and Explosives Division may import any of the chemical or accessories that can be used in the manufacture of explosives or explosive ingredients from foreign suppliers, or possess or sell them to the licensed dealers or end user, as the case may be."

``SEC 4-D *Types of Chemicals/Accessories Covered*—The chemicals and accessories mentioned in the preceding Section shall exclusively refer to chlorates, nitrates, nitric acid and such other chemicals and accessories that can be used for the manufacture of explosives and explosive ingredients."

``SEC. 4-E. *Record of Transactions*—Any person or entity who intends to import, sell or possess the aforecited chemicals or accessories shall file an application with the chief of the PNP, stating therein the purpose for which the license and/or permit is sought and such other information as may be required by the said official. The concerned person or entity shall maintain a permanent record of all transactions entered into in relation with the aforecited chemicals or accessories, which documents shall be open to inspection by the appropriate authorities."

``SEC. 4-F. *Cancellation of License*—Failure to comply with the provision of Section 4-C, 4-D and 4-E shall be sufficient cause for the cancellation of the license and the confiscation of all such chemicals or accessories, whether or not lawfully imported, purchased or possessed by the subject person or entity."

16 IMMIGRATION

16.01 ALIENS:

Aliens in the Philippines are entitled to protection of life, liberty, and property. (118 U. S. 356). Due process of law, however, does not apply to political rights of aliens although it does govern in respect to their civil rights. (288 U. S. 549, 50 L.ed. 960, 33 Sup. Ct. 585). Undesirable aliens can be deported after prior investigation conducted by the President or his authorized agents and after informing alien of charge or charges against him and allowing not less than three days to prepare his defense. Said alien has right to be heard by himself or counsel, to procure witnesses in his own behalf and to cross-examine opposing witnesses. (A.C., §69, 38 Phil. 41). Knowingly and fraudulently evading payment of internal revenue taxes is ground for deportation. (R.A. 1093). "The Philippine Immigration Act of 1940" (C.A. 673), which took effect on Jan. 1, 1941, created Commission on Immigration & Deportation under supervision and control of Dept. of Justice.

Aliens are classified into immigrants and non-immigrants. (C.A. 673, §§9, 13). Immigrants are further subdivided into "quota" and "non-quota" immigrants. "Quota" immigrants must not exceed 50 of any one nationality or without nationality for any one calendar year.

To be admitted, immigrants must present an unexpired passport or official document in nature of passport issued by governments of countries to which they respectively and originally reside or other document showing their origin and identity as prescribed by regulations and valid passport visas granted by consular offices. (C.A. 613, §10).

Any alien who may not appear to examining officer at port of arrival to be clearly and beyond doubt entitled to land must be detained for examination in relation thereto by Board of Special Inquiry. (C.A. 613, §26).

A tax of P260 is collected for every alien over 14 years of age admitted in Philippines for stay exceeding 59 days. Tax is paid to Immigration Officer at port of entry. (C.A. 613, §31, as am'd by R.A. 749).

As a further step towards national security, "Philippine Alien Registration Act of 1941" was passed (C.A. 653) providing for compulsory registration and fingerprinting of resident aliens as well as aliens entering Philippines within 30 days after approval of Act. Accredited officials of foreign government recognized by Philippine Republic, or member of his official staff and family are exempt from registration and fingerprinting. "Alien Registration Act of 1950" (R.A. 562, as am'd by R.A. 578 and 751) provides for all resident aliens to register again within 120 days after approval of Act, by paying registration fee of P410. Thereafter, within first 60 days of every calendar year, all aliens must report to proper officer who will note fact on their original certificates, paying second registration fee of P110.

Political Rights.

Aliens cannot vote or hold public office.

Overseas Absentee Voting Act of 2003 (R.A. 9189) is aimed at providing system of honest and orderly overseas absentee voting that upholds sanctity of ballot.

Coverage.

All citizens of Philippines abroad, who are not otherwise disqualified by law, at least 18 years of age on day of elections, may vote for president, vice-president, senators and party-list representatives.

Disqualifications.

(a) Those who have lost their Filipino citizenship in accordance with Philippine laws; (b) those who have expressly renounced their Philippine citizenship and who have pledged allegiance to foreign country; (c) those who have committed and are convicted in final judgment by court or tribunal of offense punishable by imprisonment of not less than one year, including those who have committed and been found guilty of disloyalty as defined under Art. 137 of Revised Penal Code; (d) immigrant or permanent resident who is recognized as such in host country of residence, unless he/she executes, upon registration, affidavit prepared for purpose by Commission declaring that he/she shall resume actual physical residence in Philippines not later than three years from approval of his/her registration under this Act; (e) any citizen of Philippines abroad previously declared insane or incompetent by competent authority in Philippines or abroad.

Procedure for Application to Vote in Absentia.

(a) Every qualified citizen of Philippines abroad whose application for registration has been approved, including those previously registered under "The Voter's Registration Act of 1996", shall, in every national election, file with officer of embassy, consulate or other foreign service establishment authorized by Commission, sworn written application to vote in form prescribed by Commission; (b) every application to vote in absentia may be done personally at, or by mail to, embassy, consulate or foreign service establishment, which has jurisdiction over country where he/she has indicated his/her address for purposes of election; (c) consular and diplomatic services rendered in connection with overseas absentee voting processes shall be made available at no cost to overseas absentee voter.

Prohibited Acts.

(a) Officers or employees of Philippine government are prohibited to influence or attempt to influence any person covered by Act to vote, or not to vote, for particular candidate; (b) to deprive any person of any right secured in this Act, or to give false information as to his/her name, address, or period of residence for purposes of establishing his/her eligibility to register or vote; (c) to tamper with ballot, mail containing ballots for overseas absentee voters, election returns, including destruction, mutilation and manipulation; (d) to steal, destroy, conceal, mutilate or alter any record, document or paper; (e) for any deputized agent to refuse without justifiable ground, to serve or continue serving, or to comply with his/her sworn duties after acceptance of his/her appointment; (f) for any public officer or employee who shall cause preparation, printing, distribution of information material, or post same in websites without prior approval of Commission; (g) for any public officer or employee to cause transfer, promotion, extension, recall of any member of foreign service corps., including members of attached agencies, or otherwise cause movement of any such member from his current post or position one year before and three months after day of elections, without securing prior approval of Commission; (h) for any person who, after being deputized by Commission to undertake activities in connection with implementation of Act shall campaign for or assist, in whatever manner, candidates in elections; (i) for any person who is not citizen of Philippines to participate, by word, or deed, directly or indirectly, in any manner and at any stage of Philippine political process abroad, including participation in campaign and elections.

Administrative Naturalization Law of 2000 (R.A. 9139) is aimed at granting Philippine citizenship by administrative proceedings to aliens born and residing in Philippines, subject to certain requirements dictated by national security and interest.

Qualifications.

Applicant for Filipino citizenship must possess all of qualifications and none of disqualifications described below: (a) must be born in Philippines and residing therein since birth; (b) must not be less than 18 years of age, at time of filing of his/her petition; (c) must be of good moral character and believes in underlying principles of Constitution; (d) must have received his/her primary and secondary education in any public school or private educational institution duly recognized by Department of Education, Culture and Sports; (e) must have known trade, business, profession or lawful occupation, from which he/she derives income; (f) able to read, write and speak Filipino or any of dialects of Philippines; (g) must have mingled with Filipinos and evinced sincere desire to learn and embrace customs, traditions and ideals of Filipino people.

Disqualifications.

(a) Those opposed to organized government or affiliated with any association or group of persons who uphold and teach doctrines opposing all organized government; (b) those defending or teaching necessity of or propriety of violence, personal assault or assassination for success or predominance of their ideas; (c) polygamists or believers in practice of polygamy; (d) those suffering from mental alienation or incurable contagious diseases; (e) those who, during period of their residence in Philippines, have not mingled socially with Filipinos, or who have not evinced sincere desire to learn and embrace customs, traditions and ideals of Filipinos; (f) citizens or subjects with whom Philippines is at war, during period of such war; and (g) citizens or subjects of foreign country whose laws do not grant Filipinos right to be naturalized citizens or subjects thereof.

Procedures.

(A) Petition for Citizenship.

Any person desiring to acquire Philippine citizenship under this Act shall file with Special Committee on Naturalization, petition of five copies legibly typed and signed, thumbmarked and verified by him/her, with latter's passport-sized photograph attached to each copy of petition with processing fee of P40,000.

(B) Special Committee on Naturalization.

There shall be constituted Special Committee on Naturalization herein referred to as “Committee”, with Solicitor General as chairman, Secretary of Foreign Affairs, or his representative and National Security Adviser, as members, with power to approve, deny or reject applications for naturalization.

(C) Decree of Naturalization and Naturalization Processing Fee.

Within 30 days from receipt of notice of approval of his/her petition, applicant shall pay to Committee naturalization fee of P100,000.

(D) Status of Alien Wife and Minor Children.

After approval of petition for administrative naturalization and cancellation of applicant's alien certificates of registration, applicant's lawful wife and minor children may file petition for cancellation of their alien certificates of registration with Committee subject to payment of filing fee of P20,000 and naturalization fee of P40,000.

(E) Status of Alien Husband and Minor Children.

If applicant is married woman, approval of her petition for administrative naturalization will not benefit her alien husband but her minor children may file petition for cancellation of their alien certificates of registration with Bureau of Immigration subject to requirements of existing laws.

Penalties.

Any person who shall fraudulently make, falsify, forge, change, alter, or cause or aid any person to do same, or who shall purposely aid and assist in falsely, making, forging, falsifying, changing or altering naturalization certificate issued under this proceeding for purpose of making use thereof, or in order that same may be used by another person or persons, and any person who shall purposely aid and assist another in obtaining naturalization certificate in violation of this Act, shall be punished by fine of not more than P500,000 and by imprisonment for not more than five years, and in case that person convicted is naturalized citizen, his certificate of naturalization shall, if not earlier cancelled by Special Committee, be ordered cancelled.

Right to Engage in Various Occupations or Commercial Activities.

Aliens cannot engage in retail business (R.A. 1180 repealed by R.A. 8762) and in retail of rice or corn and by-products thereof (R.A. 3018). In bidding for government contracts like construction or repair of public works (C.A. 541) and purchase of articles for government (C.A. 138), preference is given to citizens of Philippines or to corporations organized under laws of Philippines 75% of capital stock of which is owned by such citizens. Overseas shipping business and construction of modern boats for overseas service shall be allowed to aliens provided 60% of capital of corporation organized under laws of Philippines is owned by citizens of Philippines. (R.A. 1407). No franchise, certificate, or any other form of authorization for operation of public utility shall be granted except to citizens of Philippines or to corporations organized under laws of Philippines at least 60% of capital of which is owned by such citizens. (§11, Art. XII, Constitution). Use, exploitation, and development of natural resources shall be limited to citizens of Philippines or to corporations 60% of capital of which is owned by such citizens. (§2, ibid). Aliens are excluded from ownership and management of mass media. Only citizens of Philippines or corporations or associations at least 70% of capital of which is owned by such citizens shall be allowed to engage in advertising industry. Participation of foreign investors in governing body of entities in such industry shall be limited to their proportionate share in capital and all executive and managing officers of such entities must be citizens of Philippines. (§11, Art. XII, ibid). Establishment of educational institutions, except those established by religious groups and mission boards and shall be owned solely by citizens of Philippines or corporations 60% of capital of which is owned by such citizens. (§4[2], Art. XIV, ibid). In financing companies, in case of corporations, 2/3 of all members of board of directors shall be citizens of Philippines while for partnerships, all managing partners shall be citizens of Philippines. (R.A. 5980). At least 70% of voting stock of any banking institution shall be owned by citizens of Philippines except where new bank is established as result of local incorporation of any of existing branches of foreign banks in Philippines or consolidation of existing banks in any of which there are foreign-owned voting stocks at time of incorporation. (P.D. 71). Under Investment Incentives Act, in case of registered enterprise engaged in preferred area of investment and duly registered with Board of Investments, 60% of capital stock shall be owned by citizens of Philippines and 60% of members of board of directors shall be citizens of Philippines.

Property.

Aliens cannot acquire by transfer or conveyance private land except in case of hereditary succession. (§7, Art. XII, Constitution). Mortgages of real property to aliens are allowed but alien mortgagees cannot take possession of mortgaged property during existence of mortgage except after default and for purpose of foreclosure, receivership, enforcement or other proceedings and in no case for period of more than five years from actual possession, and shall not bid or take part in sale of such real property in case of foreclosure. (R.A. 4887). No restrictions as to ownership of personal property.

Natural born citizen who has lost his Philippine citizenship and who has legal capacity to enter into contract under Philippine laws may be transferee of private lands up to maximum area of 5,000 square meters in case of urban land or three hectares in case of rural land to be used for business or other purpose. Transferee who has already acquired urban land is disqualified from acquiring rural land and vice versa. Moreover, R.A. 8179 grants to former natural-born Filipinos right to own private lands not exceeding 5,000 square meters in urban areas or three hectares in case of rural areas to be used for residential purposes.

Anti-Dummy Law prohibits following acts: (1) In all cases in which any constitutional or legal provision requires Philippine or any other specific citizenship as requisite for exercise or enjoyment of a right, franchise or privilege, for any citizen of Philippines or of any other specific country to allow his name or citizenship to be used for purpose of evading such provision and for an alien to profit thereby; (2) to falsely simulate existence of minimum of stock or capital as owned by Philippine citizens in cases of corporations wherein Constitution or law requires that 60% of stock of which must be owned by Philippine citizens; (3) to lease, transfer, permit or allow any person or corporation not qualified under law to exploit or enjoy franchise, right, privilege or business, exercise of which is reserved to Philippine citizens or corporations 60% of capital of which must be owned by said citizens; and (4) to allow disqualified person to intervene in management, operation or control of business, whether as officer, employee or laborer, except technical personnel authorized by Secretary of Justice provided that election of aliens as members of board of directors engaging in partially nationalized activities shall be allowed in proportion to their allowable participation or share in capital of such entities.

Corporations Owned or Controlled by Aliens.

No foreign corporation or corporation formed, organized, or existing under any laws other than those of Philippines is permitted to transact business in Philippines or maintain by itself or assignee any suit for recovery of any debt, claim, or demand whatever, unless it has a license required by law.

See also category 2 Business Organizations, topic Corporations, subhead Foreign Corporations; and categories 3 Business Regulation and Commerce, topic Retail Trade Law; Foreign Trade and Commerce, topic Foreign Investments and Incentives.

16.02 IMMIGRATION:

It was mutually agreed by Republic of Philippines and U.S. on Mar. 14, 1947 that U.S. have the right to bring into Philippines members of U.S. military forces and U.S. nationals employed under a contract with U.S. together with their families, and technical personnel of other nationalities (not being persons excluded by laws of Philippines) in connection with the construction, maintenance, or operation of bases. U.S. must make suitable arrangements so that such persons may be readily identified and their status established when necessary by Philippine authorities. Such persons other than members of U.S. Armed Forces in uniform must present their travel documents to the appropriate Philippine authorities for visas, it being understood that no objection will be made to their travel to Philippines as non-immigrants.

It was also mutually agreed that if the status of any person within Philippines and admitted thereto under the foregoing paragraph must be altered so that he would no longer be entitled to such admission, U.S. must notify Philippines, and must, if such person be required to leave Philippines by the latter government, be responsible for providing him with a passage from Philippines within a reasonable time, and must in meantime prevent his becoming a public responsibility of Philippines.

An alien coming to prearranged employment for whom issuance of a visa has been authorized in accordance with law, may be admitted in Philippines as a non-immigrant. Foreign nationals under employment contracts within purview of P.D. 66, their spouses and unmarried children under 21 years of age, shall be permitted to enter and reside in Philippines during period of employment of such foreign nationals provided: (1) Such aliens shall not remain in Philippines beyond period of employment authorized by Export Processing Zone Authority; (2) while in Philippines, they shall not seek any change in their admission status to any other non-immigrant status without first departing from country; and (3) they shall be subject to payment of usual visa and immigration fees. (L.O.I. 63). Aliens who are now in Philippines as non-immigrants and whose applications for immigrant visas were approved by Immigration Commissioner shall be allowed to acquire permanent residence without necessity of their visas provided that National Intelligence Security Authority of Armed Forces of Philippines and Commissioner of Immigration & Deportation shall find them qualified for permanent residence. Such adjustment of status may be allowed provided: (1) Subjects were properly documented at time of entry; (2) make proper application for adjustment of status; (3) qualified for admission as immigrants and are admissible as such; and (4) corresponding immigrant quota numbers are immediately available to such applications at time application is approved. (P.D. 419).

An alien is entitled to enter Philippines under and in pursuance of provisions of a treaty of commerce and navigation (1) Solely to carry on substantial trade principally between Philippines and foreign state of which he is a national or (2) solely to develop and direct operations of an enterprise in which, in accordance with Constitution and laws of Philippines he has invested or of an enterprise in which he is actively in process of investing, a substantial amount of capital; and his wife, and his unmarried children under 21 years of age, if accompanying or following to join him, subject to condition that citizens of Philippines are accorded like privileges in foreign state of which such alien is a national. (R.A. 5171).

It is unlawful for any individual to bring into Philippines or employ any alien not duly admitted by any immigration officer. Dismissal by employer before or after apprehension does not relieve employer of offense. (C.A. 613, am'd by R.A. 5701).

Omnibus Guidelines for the Issuance of Employment Permits to Foreign Nationals.

(DOLE Dept. Order No. 12-2001) sets out guidelines in procuring Alien Employment Permits to Foreign Nationals. Application for renewal for AEP shall be filed at least 15 days before its expiration. Failure to file application for renewal of permit within prescribed period is subject to fines of P5,000 if filed within six months after prescribed period and P10,000 if filed after six months. Failure to renew AEP within one year after its expiration shall be cause for its revocation or cancellation.

Coverage.

(a) All foreign nationals seeking admission to Philippines for purpose of employment; (b) missionaries or religious workers who intend to engage in gainful employment; (c) holders of Special Investors Resident Visa (SIRV), Special Retirees Resident Visa (SRRV), Treaty Traders Visa (9d) or Special Non-Immigrant Visa (47[a]2) who occupy any executive, advisory, supervisory, or technical position in any establishment; (d) agencies, organizations or individuals whether public or private, who secure services of foreign professionals to practice their professions in Philippines under reciprocity and other international agreements; (e) Non-Indo Chinese Refugees who are asylum seekers and given refugee status by United Nations High Commissioner on Refugees (UNHCR); (f) resident foreign nationals seeking employment in Philippines.

Exemption.

(a) All members of diplomatic services and foreign government officials accredited by Philippine government; (b) officers and staff of international organizations of which Philippine government is cooperating member, and their legitimate spouses desiring to work in Philippines; (c) foreign nationals elected as member of governing board who do not occupy any other position, but have only voting rights in corporation; and (d) all foreign nationals granted by special laws and all other laws that may be promulgated by Congress.

17 INSURANCE

17.01 INSURANCE COMPANIES:

Insurance Law of Philippines is contained now in Insurance Code of 1978 (P.D. 612, am'd P.D. 1141, am'd P.D. 1455, am'd P.D. 1460) and Civil Code. Insurance Code was taken verbatim from law of California, and courts may follow in fundamental points, at least, construction placed by California courts on California law. But when not otherwise specifically provided for by Insurance Law, contract of insurance is governed by rules of civil law regarding contracts.

Insurance Commissioner shall execute all laws relating to insurance, insurance companies and other insurance matters, mutual benefit associations, and trusts for charitable uses and have exclusive authority to regulate issuance and sale of variable contracts and to provide for licensing of persons selling such contracts, and to issue rules and regulations governing same. Any decision made may be appealed, unless otherwise specified, to Secretary of Finance. Insurance Commissioner shall have power to adjudicate claims and complaints involving any loss or liability for which insurer may be answerable under any kind of policy or contract of insurance, or contract of suretyship, or for which reinsurer may be sued under any contract of reinsurance it may have entered into, or for which mutual benefit association may be held liable under membership certificates it has issued to its members, where amount of any such loss or liability sued upon does not exceed P100,000 in any single claim, and any decision rendered shall have force of judgment.

No insurance company shall be authorized to transact in Philippines business of life and non-life insurance concurrently, unless specifically authorized to do so, provided that terms "life" and "non-life" insurance shall be deemed to include health, accident and disability insurance.

Policy Provisions.

Life or endowment policy is required to contain, among others, a provision that policy shall be incontestable after it shall have been in force during lifetime of insured for period of two years from its date of issue or date of approval of last reinstatement, except for nonpayment of premiums and except for violation of conditions of policy relating to military or naval service in time of war, and except as to provisions relating to benefits in event of disability as defined in policy, and those granting additional insurance specifically against death by accident or by accidental means, as to additional insurance against loss of, or loss of use of, specific members of body.

Foreign Insurance Companies.

The Insurance Commission must require as a condition precedent to the transaction of insurance business in the Philippine Republic by any foreign insurance company, that such company file in his office a written power of attorney designating some person who shall be a resident of the Philippine Islands as its general agent, on whom any notice provided by law or by any insurance policy, proof of loss, summons and other process may be served in all actions or other legal proceedings against such company, and consenting that service upon such general agent shall be admitted and held as valid as if served upon the foreign company at its home office.

No foreign insurance company may engage in business in the Philippines unless possessed of paid-up unimpaired capital or assets and reserve not less than that required of domestic insurance companies; and no insurance company organized or existing under the government or laws other than those of the Philippines may engage in business in the Philippines until it has deposited with Insurance Commission, for benefit and security of its policy holders and creditors in Philippines, securities which are satisfactory to Insurance Commission, consisting of good securities of Philippines, including new issues of stocks of registered enterprises as this term is defined in R.A. 5186, to actual value of not less than minimum paid-up capital required of domestic insurance companies, provided at least 50% of such securities shall consist of bonds or other evidences of debt of Government of Philippines, its political subdivisions and instrumentalities, or of government-owned or controlled corporations and entities, including Central Bank. Total investment of a foreign insurance company in any registered enterprise shall not exceed 20% of net worth of said foreign insurance company nor 20% of capital of registered enterprise unless previously authorized in writing by Insurance Commissioner.

Tax on Receipts of Insurance Companies.

Every person, company, or corporation (except purely cooperative companies or associations) doing insurance business of any sort in Philippines is subject to a tax of 5% of total premiums collected, whether such premiums are paid in money, notes, credits, or any substitute for money. However, premiums refunded within six months after payment on account of rejection of risk or returned for other reason to person insured are not to be included in taxable receipts; nor is any tax required to be paid upon reinsurance by a company that has already paid tax, or upon premiums collected or received by any branch of a domestic corporation, firm or association doing business outside Philippines on account of any life insurance of insured who is a nonresident, if any percentage tax on such premiums is imposed by foreign country where branch is established nor upon premiums collected or received on account of any reinsurance, if risk insured against covers property located outside Philippines, or insured, in case of personal insurance, resides outside Philippines, if any percentage tax on such premiums is imposed by foreign country where original insurance has been issued or perfected; nor upon that portion of premiums received by insurance companies on variable contracts (§232[2] of P.D. 612) in excess of amount necessary to insure lives of variable contract owners (C.A. 466, am'd R.A. 6110, am'd P.D. 739, am'd P.D. 1994). Quarterly return of amount of gross sales, receipts and earnings shall be filed and tax due paid within 20 days after end of each taxable quarter. Agents for foreign companies not authorized to do business in Philippines are subject to double aforesaid tax, payable at same time and subject to same penalty for delinquency. Property owners who obtain insurance direct from foreign companies are subject to tax of 5% on premiums paid, and are subject to same penalty as insurance companies for failure to pay tax.

Tax on Life Insurance Companies.

Domestic life insurance companies and foreign life insurance companies doing business in the Philippines are no longer subject to normal corporate income tax. They are, however, subject to a 10% tax on investment income received from interest, dividends and rents from all sources, whether from or without the Philippines. Determination of total net investment income is provided for. Foreign life insurance companies not doing business in the Philippines are subject to tax as any other foreign corporation on any investment income received from the Philippines. (E.O. 37).

Stamp Tax on Insurance Policies.

See category 23 Taxation, topic Taxes, subhead Documentary Stamp Taxes.

18 INTELLECTUAL PROPERTY

—Scope —

The State, recognizing need to protect and secure exclusive rights of scientists, inventors, artists and other gifted citizens to their intellectual property and creations, passed into law Republic Act 8293 otherwise known as The Intellectual Property Code of the Philippines. Law codified all laws affecting patents, trademarks, copyrights, and licensing of intellectual property and effected establishment of Intellectual Property Office composed of following: (a) Bureau of Patents which has jurisdiction over registration as well as search and examination of patent applications and design, patents and utility models; (b) Bureau of Trademarks with jurisdiction over registration, search and examination of trademark and service mark applications; (c) Bureau of Legal Affairs which may hear oppositions to applications and complaints for violations of law involving intellectual property rights where total damages claimed are not less than P200,000. It also has jurisdiction to hear cases involving cancellation of trademark, patent, utility models and industrial designs and petitions for compulsory licensing of patents; (d) Documentation, Information and Technology Transfer Bureau to, among others, provide for technical, advisory and other services relating to licensing and promotion of technology and carry out effective program for technology transfer and register technology transfer arrangements; (e) Management Information Services and EDP Bureau, which conducts automation planning, research and development, testing of systems and provides management information services to Intellectual Property Office; and (f) Administrative, Financial and Human Resource Development Service Bureau which mainly receives all applications and collect fees therefor and publishes patent applications and grants, trademark applications and registration of marks.

18.01 COPYRIGHT:

New Intellectual Property Code protects following original intellectual creations in literary and artistic domain: (a) Books, pamphlets, articles and other writings; (b) periodicals and newspapers; (c) lectures, sermons, addresses, dissertations prepared for oral delivery, whether or not reduced in writing or other material form; (d) letters; (e) dramatic or dramatico-musical compositions; choreographic works or entertainment in mime or dumb shows; (f) musical compositions, with or without words; (g) works of drawing, painting, architecture, sculpture, engraving, lithography or other works of art; models or designs for works of art; (h) original ornamental designs or models for articles of manufacture, whether or not registrable as industrial design, and other works of applied art; (i) illustrations, maps, plans, sketches, charts and three-dimensional works relative to geography, topography, architecture or science; (j) drawings or plastic works of scientific or technical character; (k) photographic works including works produced by process analogous to photography; lantern slides; (l) audiovisual works and cinematographic works and works produced by process analogous to cinematography or any process for making audiovisual recordings; (m) pictorial illustrations and advertisements; (n) computer programs; and (o) other literary, scholarly, scientific and artistic works.

Following derivative works are likewise protected by copyright: (a) dramatizations, translations, adaptations, abridgments, arrangements, and other alterations of literary or artistic works; and (b) collections of literary, scholarly or artistic works, and compilations of data and other materials which are original by reason of selection or coordination or arrangement or their contents.

Law provides for following as not being subject to copyright protection: (a) Any idea, procedure, system, method or operation, concept, principle, discovery or mere data as such, even if they are expressed, explained, illustrated or embodied in work; (b) news of the day and other miscellaneous facts having character of mere items of press information; and (c) any official text of legislative, administrative or legal nature, as well as any official translation thereof.

No copyright protection is afforded to speeches, lectures, sermons, addresses and dissertations, pronounced, read or rendered in courts of justice, before administrative agencies, in deliberative assemblies and in meetings of public character but author thereof has exclusive right of making collection of his works.

Reproduction of published work is allowed even without authorization of owner provided it is done by natural person exclusively for research and private study. But reproduction is not allowed if it is: (a) Work of architecture in form of building, or other construction; (b) entire book, or substantial part thereof, or of musical work in graphic form by reprographic means; (c) compilation of data and other materials; (d) computer program except as provided in §189; and (e) any work in cases where reproduction would unreasonably conflict with normal exploitation of work or would otherwise unreasonably prejudice legitimate interests of author.

Under new law, certain works are required to be registered and deposited at National Library and Supreme Court library for purposes of completing their records.

Copyright protection is now for term of 50 years except for broadcasts which have 20 year term and for works of applied art which have 25 year term.

18.02 PATENTS:

Under Intellectual Property Code, any technical solution of problem in any field of human activity which is new and involves inventive step and is industrially applicable are patentable.

On the other hand, non-patentable inventions now include following: (a) Discoveries, scientific theories and mathematics methods; (b) schemes, rules and methods of performing mental acts, playing games or doing business, and programs for computers; (c) methods for treatment of human or animal body by surgery or therapy and diagnostic methods practiced on human or animal body; (d) plant varieties or animal breeds or essentially biological process for production of plants or animals; (e) aesthetic creations; and (f) anything which is contrary to public order or morality.

Patent belongs not only to inventors, their heirs or assigns but also to person who commissions work in cases of inventions created pursuant to commission. Where invention is made by employee in course of his employment, patent shall either belong to employee or employer depending on whether or not invention was made in regular performance of employee's duties.

Application for patent filed by any person who has previously applied for same invention in another country which by treaty, convention, or law affords similar privileges to Filipino citizens, shall be considered as filed as of date of filing foreign application: provided, that: (a) local application expressly claims priority; (b) it is filed within 12 months from date earliest foreign application was filed; and (c) certified copy of foreign application together with English translation is filed within six months from date of filing in Philippines. Patent application is published with search results after 18 months from date. Within six months from publication, applicant must file request for substantive examination. If no request for substantive examination is filed, application will be deemed withdrawn.

Term of patent is now 20 years from filing date of application with respect to inventions; seven years without renewal with respect to utility models and five years for industrial designs which may be renewed for not more than two consecutive periods of five each.

Any person may, upon payment of required fee, petition for cancellation of patent or of any claim thereof, or parts of claim, on any of following grounds: (a) invention is not new or patentable; (b) patent does not clearly and completely disclose invention to be carried out by any person skilled in art; or (c) patent is contrary to public order or morality. Infringement of patent is redressed by civil action for damages with injunction and claim for attorney's fees and litigation expenses. Action for damages must be brought within four years. Criminal action is available only for repeat infringement. Law provides maximum of three years imprisonment and maximum fine of 300,000 pesos as penalty.

Universally Accessible Cheaper and Quality Medicines Act of 2008 (R.A. 9502) amended certain provisions of Intellectual Property Code (Rep. Act 8293) as follows: 1) Definition of inventive step has been modified in case of drugs and medicines. There is no inventive step if invention results from mere discovery of new form or new property of known substance which does not result in enhancement of known efficacy of that substance, or mere discovery of any new property or new use for known substance, or mere use of known process unless such known process results in new product that employs at least one new reactant; 2) Government Agency or third person authorized by Government may exploit invention even without consent of patent owner in certain cases. In case of drugs and medicines, if there is national emergency or other circumstance of extreme urgency requiring use of invention; or there is public non-commercial use of patent by patentee without satisfactory reason; or demand for patented article in Philippines is not being met to adequate extent and on reasonable terms, as determined by Secretary of Health; 3) Also, civil action for infringement has been determined not to apply to certain defined instances such as §72.1 and 72.4 (Termination of Patent Rights); §74 (Use of

Invention by Government); §93.6 (Compulsory Licensing); and §93-A (Procedure on Issuance of a Special Compulsory License under TRIPS Agreement of this Code; 4). Director-General of the Intellectual Property offer may get license to exploit patented invention, even without agreement of patent owner, in favor of any person who has shown his capability to exploit invention, under certain circumstances: national emergency; where public interest, in particular, national security, nutrition, health so requires; if patented invention is not being worked in Philippines on commercial scale although capable of being worked, without satisfactory reason provided that importance of patented article must constitute working or using patent; 5) §72 of Cheaper Medicines Act abolished ``national exhaustion principle'' in favor of ``rule of international exhaustion'' of patent rights. Adoption of ``international exhaustion'' rule enables government to authorize or permit importation of patented pharmaceutical products without infringing right of importation of patent holder where it has itself made patented pharmaceutical product available anywhere else in world; 6) Patent owner may no longer prevent third parties from testing, using, making, or selling patented drugs and medicines, as well as related data, if these are done solely for application and issuance of approvals by government regulatory agencies. This rule allows generics drug companies to test and register their generic version of patented drug with Bureau of Foods and Drugs in anticipation of expiration of patent protection on those products. Making and use of generic versions of patented pharmaceutical products—which would normally be acts of infringement without patent holder's authorization—would no longer be infringing activities since purpose is only to enable generics manufacturers to produce generic equivalents which may be sold commercially on day patent protection expires.

Industrial Designs.

Industrial design is any composition of lines or colors or any three-dimensional form, whether or not associated with lines or colors. Only industrial designs that are new or original are protected by new intellectual property law, while industrial designs dictated essentially by technical or functional considerations to obtain technical result or those that are contrary to public order; health or morals are not protected by law.

Rights and protection accorded to industrial design are subject to same provisions and requirements relative to patents for inventions.

Utility Models.

Registration of utility models shall be governed by same rules and requirements governing registration of patents. Only new and industrially applicable utility models are registrable.

Utility model registration shall be cancelled on following grounds: (a) claimed invention does not qualify for registration as utility model and does not meet requirements of registrability; (b) description and claims do not comply with prescribed requirements; (c) any drawing necessary to understand invention has not been furnished; and (d) owner of utility model registration is not inventor or his successor in title.

Fees.

Office Order No. 128 dated Dec. 17, 2003 is aimed at restructuring fees and charges in filing of applications with Intellectual Property Office by categorizing applicants into small and big entities. Small entity is any natural or juridical person whose assets are worth P20 million or less or any entity, agency, office, bureau or unit of Philippine Government including government owned or controlled corporations, state universities and colleges and government owned or government run schools.

Trademark applications may now be filed through online filing system pursuant to computerization program of IPO under its 2000-2004 Information Systems Strategic Plan. Applications filed via electronic means shall be entitled to 20% reduction of rates of following fees: P1,400 and P2,800 as filing fee for invention patent of small and big entity, respectively; P1,200 and P2,400 as filing fee for utility model and industrial design of small and big entity, respectively; P864 and P1,728 as filing fee for trademark of small and big entity, respectively.

Other fees and charges are as follows: minimum of P800 as publication fee; P1,800 and P3,600 as filing fee for invention patent of small and big entity, respectively; P1,500 and P3,000 as filing fee for utility model and industrial design of small and big entity, respectively; P150 and P300 for small and big entity, respectively for each claim in excess of five claims of invention patent; P750 and P1,500 for small and big entity, respectively for each embodiment in excess of one industrial design application; P750 and P1,500 for small and big entity, respectively for claim of convention priority in invention patent; P600 and P1,200 for small and big entity, respectively for claim of convention priority of utility model and industrial design; P500 and P1,000 for issuance of patent certificate for small and big entity, respectively in invention patent; P350 and P700 for small and big entity, respectively for both utility model and industrial design. Annual fee for invention patent at beginning of fifth year—P1,350 and P2,700 for small and big entity, respectively; sixth year—P1,800 and P3,600 for small and big entity, respectively; seventh year—P2,250 and P4,500 for small and big entity, respectively; eighth year—P2,700 and P5,400 for small and big entity, respectively; ninth year—P3,600 and P7,200 for small and big entity, respectively; tenth year—P4,500 and P9,000 for small and big entity, respectively; 11th year—P5,800 and P11,600 for small and big entity, respectively; 12th year—P7,200 and P14,400 for small and big entity, respectively; 13th year—P8,500 and P17,000 for small and big entity, respectively; 14th year—P10,350 and P20,700 for small and big entity, respectively; 15th year—P12,150 and P24,300 for small and big entity, respectively; 16th year—P13,900 and P27,800 for small and big entity, respectively; 17th year—P15,700 and P31,400 for small and big entity, respectively; 18th year—P18,850 and P37,700 for small and big entity, respectively; 19th year—P22,650 and P45,300 for small and big entity, respectively; 20th year—P27,150 and P54,300 for small and big entity, respectively; annual fee in excess of (5th and 20th year) P175 and P350 for small and big entity, respectively; for reinstatement of lapsed patent—P2,000 and P4,000 for small and big entity, respectively; P10,400 and P16,000 for small and big entity, respectively in filing petition for compulsory licensing of invention; P7,700 and P10,400 for small and big entity, respectively is charged for utility model and industrial design; P10,400 and P16,000 for small and big entity, respectively for petition for cancellation of invention patent; and P10,400 and P12,200 for small and big entity, respectively for petition for cancellation of utility model and industrial design.

18.03 TRADEMARKS AND TRADENAMES:

Trademarks, trade names or service marks used to distinguish goods, business and services of one from that of another may be registered with Bureau of Trademarks provided it is not one of those non-registrable marks as provided by law.

Trademark registration has term of ten years, renewable for another ten years provided that registrant files declaration of actual use within one year from fifth anniversary. Law confers upon registered owner of mark exclusive right to prevent all third parties not having owner's consent from using in course of trade identical or similar signs or containers for goods or services which are identical or similar to those in respect of which trademark is registered where such use would result in likelihood of confusion. Law also requires applicant for trademark registration to file Declaration of Use within three years from date of filing of application.

Assignment or transfer of registrations of mark is allowed provided it is not made to mislead public as regards nature, source, manufacturing process, characteristics of goods or services to which mark is applied.

Assignment must be in writing, acknowledged before notary public or other officer authorized to administer oath, and certified under hand and official seal of notary or other officer. Assignment is void as against any subsequent purchaser for value without notice, unless assignment is recorded in Patent Office. When assignment is executed in foreign country, authority of notary or other officer shall be proved by certificate of diplomatic or consular office of, or representing interest of, Government of Philippines. No assignment executed in foreign country written in language other than English or Spanish shall be recorded unless accompanied by verified English translation. No instrument will be recorded which does not, in judgment of Director, amount to assignment, or which does not affect title to trademark or tradename to which it relates.

Infringement.

Any person who, without consent of registrant, uses, sells, or advertises any reproduction, counterfeit, copy or imitation of a registered mark or trade name is guilty of infringement. Injunction may be obtained to prevent infringement and court may order infringing material to be destroyed.

No imported merchandise can be admitted entry in Philippines which copies or simulates mark or trade name registered in Philippines, or bears a mark or trade name calculated to induce public to believe that article is manufactured in Philippines, or that it is manufactured in a country other than place where it is in fact made.

Rights of Foreign Registrants.

Subject to well defined exceptions, persons who are nationals of, domiciled in, or have a bona fide or effective business or commercial establishment in any foreign country, which is a party to any international convention or treaty relating to marks or tradenames, or the repression of unfair competition to which the Philippines may be a party, are entitled to the benefits and subject to the provisions of the Trademark Law to the extent and under the condition essential to give effect to any such convention and treaties so long as the Philippines continue to be a party thereto.

An applicant for the registration of a mark or tradename, who is not a resident of the Philippines, must appoint an agent or representative in the Philippines upon whom notice or process relating to the application or registration may be served.

Firm Name, etc.

A firm name, business name or style is required to be registered in Bureau of Domestic Trade, together with true name of owner thereof and that of any other persons having joint or common interest with him in firm or business in which name is used.

See topic 18.02 Patents, subhead Technology Transfer Registry; category 3 Business Regulation and Commerce, topic 3.03 Commercial Register.

19 LEGAL PROFESSION

19.01 ATTORNEYS AND COUNSELORS:

Admission to practice of law is regulated by Rules 138, 139 and 139-B of Revised Rules of Court.

Member of Philippine Bar is commonly known as lawyer, attorney, attorney-at-law or counselor.

Eligibility.

Every applicant for admission to bar must be citizen of Philippines, at least 21 years of age, of good moral character, and resident of Philippines. He must produce satisfactory evidence of good moral character, and he must certify that no charges against him, involving moral turpitude, have been filed or are pending in any court in Philippines.

Registration as law student not required.

Educational Requirements.

Applicants for admission shall satisfactorily show that they have completed in authorized and recognized university or college (a) four-year high school course; (b) course of study prescribed for bachelor's degree in arts or sciences; and (c) four-year bachelor's degree in law.

Examination.

Examinations for admission to bar are given annually. Examinations are conducted by committee constituted by Supreme Court with Justice of Supreme Court as Chairman.

Admission Without Examination.

There are only two instances whereby persons are allowed to practice law without taking bar examination, to wit: (a) citizens of U.S.A. who, before July 4, 1946, were duly licensed members of Philippine Bar, in active practice in courts of Philippines and in good and regular standing as such may, upon satisfactory proof of those facts before Supreme Court, be allowed to continue such practice; and (b) Filipino citizens who are enrolled attorneys in good standing in Supreme Court of U.S. or in any Circuit Court of Appeals or district court therein or in highest court of any state or territory of U.S., and who can show by satisfactory certificates that they have practiced at least five years in any of said courts, that such practice began before July 4, 1946, and that they have never been suspended or disbarred. (§§3 and 4, Rule 138 Revised Rules of Court).

Foreign attorneys are allowed to practice as trademark or patent agents before Bureau of Patents, Trademarks and Technology Transfer, formerly Philippine Patent Office (which is not court) if they are registered to practice as trademark or patent attorneys in patent office of country where they reside, and proof of such registration to practice is submitted. Provided that patent office of such country allows substantially reciprocal privileges to those admitted to practice before Bureau of Patents, Trademarks and Technology Transfer.

Lien.

Attorney shall have lien upon funds, documents and papers of his clients which have lawfully come into his possession and may retain same until his lawful fees and disbursements have been paid, and may apply such funds to satisfaction thereof. He shall also have lien to same extent upon all judgments for payments of money and executions issued pursuant to such judgments.

Disbarment and Suspension.

Supreme Court, on its own motion or upon complaint under oath of another, may institute proceedings for removal or suspension of attorneys. Member of bar may be removed or suspended from his office as attorney by Supreme Court for any deceit, malpractice, or other gross misconduct in such office, grossly immoral conduct, or by reason of his conviction of crime involving moral turpitude, or for any violation of oath which he is required to take before admission to practice, or for willful disobedience of any lawful order of superior court, or for corruptly or wilfully appearing as attorney for party to case without authority so to do. Practice of soliciting cases at law for purpose of gain, either personally or through paid agents or brokers, constitutes malpractice. Court of Appeals and Regional Trial Courts may suspend attorney from practice and may recommend his disbarment by Supreme Court. Decisions of Court of Appeals and Regional Trial Courts suspending lawyer are to be elevated to Supreme Court which shall make full investigation of case and may revoke, shorten or extend suspension, or disbar attorney as facts may warrant. (§17, Rule 139-B, Revised Rules of Court).

Unauthorized Practice.

Generally, corporations are not allowed to engage in practice of law. No judge or other official or employee of superior courts or of Office of the Solicitor General, shall engage in private practice as member of bar or give professional advice to clients.

Professional Association.

Rule 139-A of Revised Rules of Court organized Integrated Bar of the Philippines, national organization of all lawyers included in Roll of Attorneys of the Supreme Court, and continued membership in this organization is requirement for lawyer to practice law.

20 MINERAL, WATER AND FISHING RIGHTS

20.01 MINES AND MINERALS:

All minerals, coal, petroleum and other mineral oils belong to State, and their disposition, exploration, development, exploitation or utilization is limited to Filipino citizens, or to corporations or associations at least 60% of capital of which is owned by Filipino citizens. Congress may, by law, allow small-scale utilization of natural resources by Filipino citizens. President may enter into agreements with foreign-owned corporations involving either technical or financial assistance for large-scale exploration, development, and utilization of minerals, petroleum, and other mineral oils according to general terms and conditions provided by law, based on real contributions to economic growth and general welfare of country. In such agreements, State shall promote development and use of local scientific and technical resources. (§2, Art. XII, 1987 Constitution).

Mineral prospecting, location, exploration, development and exploitation are of public use and benefit, and for which power of eminent domain may be invoked for entry, acquisition and use of private lands provided that any person or entity acquiring any right on such land after first publication of notice of any mining lease covering such land shall not be entitled to compensation. Subject to prior notification, prospectors or claimants of mineral lands shall not be prevented from entry into private lands by surface owners and occupants when prospecting or exploring provided that any damage done to property of surface owner shall be properly compensated. (P.D. 512).

No prospecting and location shall be allowed in: (a) Military or other Government reservations except where authorized; (b) mineral reservations; (c) lands covered by valid mining claims located and leases acquired, under previous mining laws and in accordance with this Decree; and (d) near or under buildings, cemeteries, bridges, highways, waterways, railroads, reservoirs, dams or any other public or private works unless authorized. (P.D. 1385).

Claim owner/lessee shall perform annual work obligations on his mining claims, value of which shall be that as shall be provided in regulations. For mining claims registered under P.D. 1677, annual work obligations shall start from date of recording. Holders of mining claims who have filed lease applications under P.D. 1214 shall perform annual work obligations on mining claims from date of filing of said applications, value of which shall be that as shall be provided in regulations. Such rate of work obligations may be increased at any time by Government after three months notice.

Application for lease of mining claims shall be filed with Director of Mines & Geo-Sciences within two years from date of recording, otherwise failure to do so would constitute abandonment of mining claims. No application for lease of mining claims shall be accepted unless accompanied by application fee and following: (a) Report under oath of licensed mining engineer or geologist to effect that mining claim is mineralized; (b) proof of compliance with required annual work obligations; (c) if application is filed by applicant's agent, certified copy of power of attorney granted by applicant; (d) if area applied for is public land covered by concessions or rights other than mining, written notice to permittee thereof; or requirements under P.D. 512, in case area is private land; (e) program of work proposed to be undertaken on area applied for; (f) proof of availability of technical competence and financial resources sufficient to develop claim; and (g) other documents as may be provided in regulations. Application form shall state full name, address, citizenship, civil status of applicant, his place and date of birth. (P.D. 1677).

Maximum area of mining claims which may be leased shall be: (a) In any one province: (1) to individuals, 500 hectares; (2) to mining partnerships or corporations, 5,000 hectares; (b) in entire Philippines: (1) to individuals, 1,000 hectares; (2) mining partnerships or corporations, 10,000 hectares. However, Director of Mines & Geo-Sciences with approval of Secretary of Environment & Natural Resources, may allow applicant to lease larger area not exceeding 10,000 hectares in any one province, depending upon nature of deposit, kind of minerals located, and other circumstances inherent in operation of mining claim justifying grant.

Mining lease contract shall grant lessee, his heirs, successors and assigns right to extract all mineral deposits found on or underneath surface of his mining claims covered by lease; to remove, process and utilize mineral deposits for his own benefit; and to use lands covered by lease for purpose specified therein provided Secretary of Environment & Natural Resources shall reserve right to grant and use easements in, over, through, or upon said claims as may be needed by other claim owners or lessees for right of way to enable them to have access to and/or facilitate operation of their mining claims.

Lessees are obligated to give preference to Philippine citizens in all types of mining employment insofar as such citizens are qualified to perform work efficiently; and to maintain effective programs of training and advancement commensurate with abilities of such citizens to perform satisfactorily operations involved. Lessees, however, shall not be hindered from using employees of their own selection, subject to provisions of C.A. 613, as am'd, for technical and specialized work which in their judgment and with approval of Director of Mines & Geo-Sciences requires highly specialized training in exploration, development or exploitation of mining claim provided that in no case shall each employment exceed five years and that no foreigner shall be employed as mine manager, vice-president for operations or equivalent managerial position, in charge of mining, milling, quarrying or drilling operation without passing government licensing examination or unless in special cases permitted by Director of Mines & Geo-Sciences for period not exceeding three years. (P.D. 463, am'd by P.D. 1902).

Areas containing radioactive minerals such as uranium, thorium and other elements occurring singly or in association with other minerals from which radioactive power and substances may be generated are open to mining location, registration, exploration, development and exploitation, and those who have discovered radioactive minerals and registered same with Bureau of Mines & Geo-Sciences and verified by Director of Mines & Geo-Sciences to be existing in sufficiently exploitable quantity shall be entitled to bonus of not less than P10,000. (P.D. 1101).

Mining claims and rights and other matters concerning minerals and mineral lands are governed by special laws.

Department of Energy absorbed powers and functions of Office of Energy Affairs and Energy Coordinating Council. Under this department are bureaus and services, like Energy Development Bureau; Energy Utilization Management Bureau; Energy Industry Administration Bureau; Energy Planning and Monitoring Bureau and Administrative Support Services, involved in formulation, implementation, planning and research, development and monitoring of programs and plans relative to utilization, exploration and extraction of local energy resources. Department of Energy shall prepare, integrate, coordinate, supervise and control all plans, programs, projects and activities of Government relative to energy exploration, development utilization, distribution and conservation. Authority and responsibility for exercise of mandate of Department is vested with Secretary of Energy whose powers and functions are: (1) Establish policies and standards for effective, efficient and economical operation of Department in accordance with programs of Government; (2) exercise direct supervision and control over all functions and activities of Department, as well as its officers and personnel; (3) devise program of international information on geological and contractual condition obtaining in Philippines for oil and gas exploration; (4) create regional offices and such other service units and divisions; (5) create regional or separate grids as may be necessary and beneficial; and (6) perform such other functions as may be necessary and proper to attain objectives of law. It shall also perform non-price regulatory jurisdiction, powers and functions of Energy Regulatory Board. (R.A. 7638).

Energy Regulatory Board shall, after due notice and hearing: (1) Fix and regulate prices of petroleum products; (2) fix and regulate rate schedule or prices of piped gas to be charged by duly franchised gas companies which distribute gas by means of underground pipe system; (3) fix and regulate rates of pipeline concessionaires under R.A. 387 (Petroleum Act of 1949), am'd by P.D. 1700.

Power of National Power Corporation and electric cooperatives to determine, fix and prescribe rates being charged to their customers are now exercised by Energy Regulatory Board.

Government may directly explore for and produce indigenous petroleum. It may also indirectly undertake same under service contracts. Every contract shall, subject to approval of President, be executed by Energy Development Services after due public notice, pre-qualification and public bidding or concluded through negotiations. In opening contract areas and in selecting best offer for petroleum operations, any of following alternative procedures may be resorted to by Energy Development Services: (a) May select area or areas and offer it for bid, specifying minimum requirements and conditions; or (b) may open for bidding large area wherein bidders may select integral areas not larger than maximum; or (c) area may be selected by interested party who shall negotiate with Energy Development Services for contract.

In a service contract, service and technology are furnished by service contractor for which it shall be entitled to stipulated service fee while financing is provided by Government to whom all petroleum produced shall belong. If Government is unable to finance petroleum exploration operations or in order to induce contractor to exert efforts to discover and produce petroleum as soon as possible, service contract may stipulate that if contractor furnishes services, technology and financing, proceeds of sale of petroleum produced shall be source of funds for payment of service fee and operating expenses due contractor. Contractor, who may be a consortium, shall undertake, manage and execute petroleum operations. Contract may authorize contractor to take and dispose of and market either domestically or for export all petroleum produced subject to supplying domestic requirements of Republic of Philippines on a prorata basis.

Energy Development Services shall reimburse contractor for all operating expenses not exceeding 70% of gross proceeds from production in any year, provided, that if in any year operating expenses exceed 70% of gross proceeds from production, then unrecovered expenses shall be recovered from operations of succeeding years; pay contractor service fee, net amount of which shall not exceed 40% of balance of gross income after deducting Filipino participation incentive, if any, and all operating expenses.

Contractor shall have following privileges: (a) Exemption from all taxes except income tax; (b) exemption from payment of tariff duties and compensating tax on importations of machinery and materials required for petroleum operations provided that said machinery and materials are not manufactured domestically and will be used exclusively by contractor; (c) exemption from laws, regulations or ordinances restricting construction and operation of power plants for exclusive use of contractor and exportation of machinery and equipment when no longer needed; (d) exemption from publication requirements; (e) exportation of petroleum subject to prior filling prorata of domestic needs; (f) entry, upon approval of Energy Development Services, of alien technical and specialized personnel who may exercise their professions solely for operations of contractor.

Contractor shall be entitled to: (1) Repatriate over a reasonable period capital investment actually brought into country in foreign exchange or other assets and registered with Central Bank; (2) retain abroad all foreign exchange representing proceeds arising from exports accruing to contractors over and above (a) foreign exchange to be converted into pesos in an amount sufficient to cover, or equivalent to, local costs for administration and operations of exported crude and (b) revenues due Government on such crude; however Government and contractor may stipulate currency in which Government revenues arising under (b) above are to be paid; (3) convert into foreign exchange and remit abroad at prevailing rates no less favorable to contractor than those available to any other purchaser of foreign currencies, any excess balances of peso earnings from petroleum production and sale over and above required current working balances; and (4) convert foreign exchange into Philippine currency for all purposes in connection with petroleum operation at prevailing rates no less favorable to contractor than those available to any other purchaser of such currency. (P.D. 87 am'd by P.D. 469, am'd by P.D. 781).

See also categories 2 Business Organizations, topic Corporations; Business Regulation and Commerce, topic Monopolies, Restraint of Trade and Competition.

21 MORTGAGES

21.01 CHATTEL MORTGAGES:

By a chattel mortgage, personal property is recorded in Chattel Mortgage Register as a security for performance of an obligation. If movable, instead of being recorded, is delivered to creditor or a third person, contract is a pledge and not a chattel mortgage. A chattel mortgage is not valid against any person except mortgagee, his executor or administrator, unless mortgage is recorded in Office of Register of Deeds of province in which mortgagor resides at time of making of same, or if residing without Philippines, in province in which property is situated. If property is situated in province other than that in which mortgagor resides, mortgage must be recorded in Office of Register of Deeds of both province in which mortgagor resides and that in which property is situated. (Act 1508, §4).

Payment of debts secured by a chattel mortgage may be enforced by foreclosure, judicial as well as extrajudicial, or by an ordinary action. Where debtor refuses to give up property, creditor must institute an action either to effect foreclosure directly or to secure possession as a preliminary to sale contemplated by law.

Penalty of imprisonment from one month and one day to six months or a fine amounting to twice value of property must be imposed upon (1) any person who knowingly removes any of mortgaged property to any province or city other than one in which it was located at time of execution of mortgage without written consent of mortgagee or his executor, administrator or assign; and (2) any mortgagor who sells or pledges personal property already pledged, or any part thereof, without consent of mortgagee written on back of mortgage and noted on record thereof in Office of Register of Deeds of province where such property is located. (R.P.C., §319).

Form.

The following is sufficient:

Form

This mortgage made this . . . . . . day of . . . . . ., 20. . . ., by A. B., a resident of the municipality of . . . . . ., Philippines, mortgagor, to C. D., a resident of the municipality of . . . . . ., Philippines, mortgagee, witnesseth:

That the said mortgagor hereby conveys and mortgages to the said mortgagee all of the following described personal property situated in the municipality of . . . . . ., Philippines, and now in the possession of said mortgagor, to wit:

(Insert specific description of property mortgaged.)

This mortgage is given as security for the payment to the said C. D., mortgagee, of promissory notes for the sum of . . . . . ., with interest thereon at the rate of . . . . . . per centum per annum, according to the terms of . . . . . . certain promissory notes, dated (insert dates), and in the words and figures following (insert copy of notes secured).

The conditions of this obligation are such that if the mortgagor, his heirs, executors, or administrators shall well and truly perform the full obligations above stated according to the terms thereof, then this obligation shall be null and void.

Executed at the municipality of . . . . . ., ..., this day of . . . . . ., 20. . . . .

A. B., Mortgagor.

IN THE PRESENCE OF:

(Two Witnesses)

We severally swear that the foregoing mortgage is made for the purpose of securing the obligation specified in the conditions thereof, and for no other purpose, and that the same is a just and valid obligation, and one not entered into for the purpose of fraud.

. . . .

A. B., Mortgagor

. . . .

C. D., Mortgagee.

(acknowledgment)

21.02 MORTGAGES:

Mortgage is one of different kinds of guaranty recognized by law for insuring fulfillment of an obligation contracted either by same person who secures it or by a different person. A mortgage is either real estate mortgage or chattel mortgage. The instrument by which a mortgage is created should be recorded in Registry of Deeds. The creditor cannot appropriate for himself property mortgaged or dispose of same. The mortgagor, being owner of property mortgaged, can lease, sell or mortgage it again during pendency of contract of mortgage without affecting latter.

Form.

The following is sufficient as real estate mortgage:

Form

This REAL ESTATE MORTGAGE, made and executed this . . . . . . day of . . . . . ., 20. . . ., by A.B. Co., Limited, a sociedad anonima duly organized and registered under the laws of the Philippines, with its principal office in the City of . . . . . ., as Mortgagor, in favor of C. D., over the age of majority, a widower, and a resident of . . . . . ., ..., as Mortgagee.

WITNESSETH:

THAT WHEREAS the mortgagor is justly indebted to the mortgagee in the sum of . . . . . ., Philippine currency, as evidenced by its promissory note for said sum, in the words and figures following, to wit:

(Insert copy of Promissory Note.)

WHEREAS the mortgagor has agreed to secure the payment of said note by means of a good and valid mortgage upon that certain real property hereinafter described.

NOW, THEREFORE, for and in consideration of the premises and as security for the payment of the aforesaid note, the mortgagor has sold, transferred, and conveyed, and by these presents does sell, transfer and convey, by way of first mortgage, unto the mortgagee that certain real property, together with all the buildings and improvements thereon, situated in the Province of . . . . . ., P., and more particularly described as follows:

(Insert description.)

of which the said mortgagor is the absolute registered owner in accordance with the provisions of the Land Registration Act of the Philippines, its title thereto being evidenced by Certificate of Title No. . . . . . . of the Office of the Register of Deeds of the Province of . . . .

The mortgagor agrees, during the term and existence of this mortgage, to pay and discharge at maturity all lawful taxes and assessments laid or assessed upon the land herein and hereby mortgaged, and, in default thereof, the mortgagee may pay and discharge the same, and any and all sums so paid for such taxes or assessments shall bear interest at the rate of . . . . . . per annum, and shall be considered and held to be secured by this mortgage, and be a lien on said land herein mortgaged.

The conditions of this mortgage are such that if the said mortgagor shall well and truly pay or cause to be paid to the mortgagee the above mentioned promissory note according to the terms and tenor thereof, and shall well and truly pay and discharge at maturity all lawful taxes and assessments as aforesaid, then this mortgage shall be thereby fully discharged and of no further effect, otherwise it shall remain in full force and effect and be enforceable in the manner and form provided by law.

IN WITNESS WHEREOF, the A.B. Co., Limited, the mortgagor herein, has caused these presents to be signed by its General Manager, Y. Z., hereunto duly authorized, at . . . . . ., P., on the day and year first hereinabove written.

The A.B. Co., Limited

By Y. Z., General Manager.

In the Presence of:

(Signatures.)

(Acknowledgment.)

Foreclosure is by action filed in Regional Trial Court of province where land is situated. Debtor has three months after judgment of foreclosure in which to satisfy judgment; otherwise court may issue execution and cause property to be sold by sheriff at public auction to satisfy judgment. When so stipulated in contract, mortgage may be foreclosed extrajudicially under Act 3135, as amended. This Act requires that foreclosure sale be made under special power inserted in or attached to real mortgage. In case of extrajudicial foreclosure, mortgagor has right of redemption.

Private real property may be mortgaged in favor of any individual, corporation, or association, but mortgagee or his successor in interest, if disqualified to acquire or hold lands of public domain in Philippines, shall not take possession of mortgaged property during existence of mortgage except after default and for purpose of foreclosure, receivership, enforcement or other proceedings and in no case for a period of more than five years from actual possession and shall not bid or take part in any sale of such real property in case of foreclosure. (R.A. 4882).

Redemption.

There is no right of redemption after foreclosure sale except in cases falling under the provisions of Acts No. 2747, 2938 and 3135. In no case is redemption allowed after the sale of the mortgaged property has been confirmed by the court.

Deeds of trust are not extensively used, but a few deeds of trust have been executed in the Islands to secure bond issues, principally in connection with financing sugar centrals.

Pacto de Retro.

This is a form of conveyance with the right of repurchase by the vendor on or before a fixed date. It is used as a means to secure the payment of an obligation. The vendee is entitled to possession under the pacto de retro, but he may lease the property to the vendor for an agreed rental. If the vendor fail to repurchase within the time fixed, the title is said to become “consolidated” in the vendee. The courts treat a pacto de retro as a mortgage when it is clear from the evidence that such was the intention of the parties.

Chattel Mortgages.

See topic 21.01 Chattel Mortgages.

22 PROPERTY

22.01 ABSENTEES:

A person is declared an absentee after lapse of two years without any news, or since receipt of last news, about him, or after five years if absentee left a person in charge of administration of his property. (C.C. [n], §384).

Care of Property.

An administrator is appointed by court, giving special preference to wife of absentee. (C.C. [n], §§383, 387). The administration ceases when: (1) Absentee appears personally or through an agent; (2) absentee's death is proved and his heirs appear; and (3) a third person appears claiming absentee's property. (C.C. [n], §389).

22.02 CURTESY:

There is no estate by curtesy.

22.03 DEEDS:

Land must be conveyed by written deed. The names, surnames, civil status, citizenship, post office address and domicile of the contracting parties must be stated in the deed. It is also necessary to include the name of the wife or husband of the vendee, or show that there is no such person.

Recording.

In order to affect third persons, a deed must be recorded with the proper register of deeds. See category 9 Documents and Records, topic 9.04 Records. Deed must be presented for record in duplicate, one copy being returned with notation of registration.

22.04 DOWER:

Wife has no dower interest.

22.05 LANDLORD AND TENANT:

Every lease of real estate may be recorded in the Registry of Property. Unless a lease is recorded, it is not binding upon third persons. Leases for one year or longer must be in writing under Statutes of Frauds. But where a contract made between owner of land and a lessee or tenant on share thereof has not been reduced to writing, or has not been set forth in a document written in a language known to lessee or tenant, the testimony of such lessee or tenant shall be accepted as prima facie evidence of the terms of a covenant or contract.

The lessee cannot assign the lease without the consent of the lessor, unless there is a stipulation to the contrary. When in the contract of lease of things there is no express prohibition, the lessee may sublet the thing leased, in whole or in part, without prejudice to his responsibility for the performance of the contract toward the lessor. The lessee may suspend the payment of the rent in case the lessor fails to make the necessary repairs or to maintain the lessee in peaceful and adequate enjoyment of the property leased.

If the lease was made for a determinate time, it ceases upon the day fixed, without the need of a demand. If at the end of the contract the lessee should continue enjoying the thing leased for 15 days with the acquiescence of the lessor, and unless notice to the contrary by either party has previously been given, it is understood that there is an implied new lease. If the lessee continues enjoying the thing after the expiration of the contract, over the lessor's objection, the former is subject to the responsibilities of a possessor in bad faith.

If the period for the lease has not been fixed, it is understood to be from year to year, if the rent agreed upon is annual; from month to month, if it is monthly; from week to week, if the rent is weekly; and from day to day, if the rent is to be paid daily. However, even though a monthly rent is paid, and no period for the lease has been set, the courts may fix a longer term for the lease after the lessee has occupied the premises for over one year. If the rent is weekly, the courts may likewise determine a longer period after the lessee has been in possession for over six months. In case of daily rent, the courts may also fix a longer period after the lessee has stayed in the place for over one month.

Beginning Jan. 1, 2002 and for duration of three years thereafter ending on Dec. 31, 2004, monthly rentals of all residential units in National Capital Region and other highly urbanized cities not exceeding P7,500 and monthly rentals of all residential units in all other areas not exceeding P4,000 shall not be increased annually by lessor, without prejudice to existing contracts by more than 10%. Rental shall be paid in advance within first five days of every current month or beginning of lease agreement unless contract of lease provides for later date of payment. Lessor cannot demand more than one month advance rental and two months deposit. (R.A. 9161). When lessor of house, or part thereof, used as dwelling for family, or when lessor of store, or industrial establishment, also leases furniture, lease of latter is deemed to be for duration of lease of premises.

The lease of a piece of rural land, when its duration has not been fixed, is understood to have been made for all the time necessary for the gathering of the fruits which the whole estate leased may yield in one year, or which it may yield once, although two or more years may have to elapse for the purpose.

Maximum period allowable for duration of leases of private lands to aliens or alien-owned corporations, associations or entities not qualified to acquire private lands in Philippines shall be 25 years, renewable for another 25 years upon mutual agreement of both lessor and lessee. (P.D. 471). However, foreign investors investing in Philippines shall be allowed to lease private lands for period not exceeding 50 years and renewable once for period not exceeding 25 years. (R.A. 7652).

Land tenancy on shares is governed by special laws, the stipulations of the parties, the provisions of partnership and by the customs of the place. The tenant on shares cannot be ejected except in cases specified by law.

If the lessee makes, in good faith, useful improvements which are suitable to the use for which the lease is intended, without altering the form or substance of the property leased, the lessor upon the termination of the lease must pay the lessee one-half of the value of the improvements at that time. Should the lessor refuse to reimburse said amount, the lessee may remove the improvements, even though the principal thing may suffer damage thereby. He may not, however, cause any more impairment upon the property leased than is necessary. With regard to ornamental expenses, the lessee is not entitled to any reimbursement, but he may remove the ornamental objects, provided no damage is caused to the principal thing, and the lessor does not choose to retain them by paying their value at the time the lease is extinguished. The lessor may judicially eject the lessee for any of the following causes: (1) When the period agreed upon, or the period fixed by the court, has expired; (2) lack of payment of the price stipulated; (3) violation of any of the conditions agreed upon in the contract; and (4) when the lessee devotes the thing leased to any use or service not stipulated. The ejectment of tenants of agricultural lands is governed by special laws.

22.06 REAL PROPERTY:

The following are immovable property: (1) land, buildings, roads and constructions of all kinds attached to the soil; (2) trees, plants, and growing fruits, while they are attached to the land or form an integral part of an immovable; (3) everything attached to an immovable in a fixed manner, in such a way that it cannot be separated therefrom without breaking the material or causing deterioration of the object; (4) statues, reliefs, paintings or other objects for use or ornamentation, placed in buildings or on lands by the owner of the immovable in such a manner that it reveals the intention to attach them permanently to the tenements; (5) machinery, receptacles, instruments or implements intended by the owner of the tenement for an industry or works which may be carried on in a building or on a piece of land, and which tend directly to meet the needs of the said industry or works; (6) animal houses, pigeon-houses, beehives, fish ponds or breeding places of similar nature, in case their owner has placed them or preserves them with the intention to have them permanently attached to the land, and forming a permanent part of it, and the animals in these places are included; (7) fertilizer actually used on a piece of land; (8) mines, quarries, and slag dumps, while the matter thereof forms part of the bed, and waters either running or stagnant; (9) docks and structures which, though floating, are intended by their nature and object to remain at a fixed place on a river, lake, or coast; (10) contracts for public works, and servitudes and other real rights over immovable property.

23 TAXATION

23.01 ADMINISTRATION:

The "National Internal Revenue Code of 1997" (R.A. 8424) amended National Internal Revenue Code of 1977 and all other tax statutes provides for: Income tax; estate and gift taxes; specific taxes on certain articles; privilege taxes on business and occupation; documentary stamp taxes; mining taxes; taxes on resources of banks and receipts of insurance companies; tax on corporate franchises; amusement taxes; charges on forest products; fees for sealing weights and measures; firearms tax; radio fees; tobacco inspection fees; and water rentals, and such other taxes as are or hereafter may be imposed and collected.

Administration of Code and collection of taxes are vested in Bureau of Internal Revenue, headed by Commissioner of Internal Revenue, and four assistant chiefs known as Deputy Commissioners.

Tax on Individuals.

Citizens or Residents.

Tax is imposed upon taxable compensation, business and other income received from all sources by every individual, whether citizen of Philippines or alien residing in Philippines. Rate of tax for (1) purely compensation income—graduated from 5% on taxable compensation income not over P10,000 to 34% on income over P500,000 in 1998; 33% on income over P500,000 effective Jan. 1, 1999 and 32% on income over P500,000 effective Jan. 1, 2000.

Nonresident citizens shall be taxed on their taxable income derived from all sources without Philippines as follows: 1% if not over US$6,000; US$60 plus 2% if over US$6,000 but not over US$20,000; US$340 plus 3% if over US$20,000. In computing taxable income, following deductions shall be allowed from gross income from sources without Philippines: (1) allowance for personal exemption in amount of US$2,000 if person making return is single or married person legally separated; or US$4,000 if married or head of family; and (2) total amount of national income tax actually paid to government of foreign country of his residence. (E.O. 37).

Nonresident alien is deemed doing business in Philippines if he stays in Philippines for aggregate period of more than 180 days during any calendar year. Nonresident aliens engaged in trade or business in Philippines shall be subject to tax in same manner as resident citizens and aliens on taxable income received from all sources within Philippines, except capital gains tax realized from buying and/or selling shares of stock of Philippine corporations listed in dollar or foreign currency board of exchange. Other nonresident aliens pay flat rate of 30% on their entire income from sources within Philippines. (E.O. 37).

Tax due must be paid at time return is filed but not later than Apr. 15 in case of residents of Philippines, whether citizens or aliens, whose income had been derived solely from salaries, interests, dividends, allowances, commissions, bonuses, fees, pensions, or any combination thereof. All other individuals not mentioned above, including nonresident citizens shall file their returns on or before Apr. 15. If tax due is in excess of P2,000 (US$200 in case of nonresident citizens), taxpayer may pay same in two equal installments, first installment at time return is filed and second installment on or before July 15. (E.O. 37).

Minimum wage earners shall be exempt from income taxation. Minimum wage earner is worker in private or public sector with compensation or income not more than statutory minimum wage, as fixed by Regional Tripartite Wage and Productivity Board. Exemption covers holiday pay, overtime pay, night shift differential and hazard pay received by minimum wage earner. (R.A. 9504).

Allowance for Personal Exemption for Individual Taxpayer.

There shall be basic personal exemption of Php50,000 for each individual taxpayer. For married individuals where only one of spouses has income, only such spouse shall be allowed personal exemption.

Additional exemption of Php25,000 for each dependent, not to exceed four, shall be allowed to taxpayer. Dependent is legitimate, illegitimate or legally adopted child of taxpayer, not more than 21 years of age, unmarried and not gainfully employed or, regardless of age, is incapable of self-support because of some mental of physical defect and who is living with taxpayer and chiefly dependent on him for support. Additional exemption shall be claimed by only one spouse, in case of married individuals. In case of legally separated spouses, deduction shall be claimed by spouse who has legal custody of children.

Deductions from Gross Income.

Except for taxpayers earning compensation income arising from personal services rendered under employer-employee relationship, taxpayer, other than non-resident alien, may, in lieu of availing of deductions enumerated under National Internal Revenue Code, elect standard deduction in amount not exceeding 40% of his gross sales or gross receipts. In case of corporations, organized in Philippines or organized outside Philippines but doing business in Philippines, standard deduction shall not exceed 40% of its gross income.

Tax Census Law (R.A. 2070 as am'd by R.A. 5268) provides for compilation and consolidation of data on properties, income and liabilities of residents over 21 years of age, corporations, partnerships, and other business concerns. Tax census is taken in Apr., once on or before 15th day in case of individuals and corporations using calendar year or on or before 15th day of fourth month following close of fiscal year in case of corporations using fiscal year.

23.02 ALCOHOL, BEVERAGES AND TOBACCO TAXES:

Excise tax rates imposed on alcohol products such as distilled spirits, wines and fermented liquors and tobacco products such as cigars and cigarettes, whether packed and prepared by machine or by hand have been increased under Republic Act No. 9334 which became effective on Jan. 1, 2005.

23.03 BUSINESS TAXES:

Tax on Franchises.

All franchises of radio and/or television broadcasting companies whose annual gross receipts of preceding year do not exceed P10,000,000 are taxed at 3%, while franchises of electric, gas and water utilities are taxed at 2% of gross receipts derived from business covered by law granting franchise. However, radio and television companies have option to be registered as VAT taxpayer and pay tax due thereon provided that, once option is exercised, it shall not be resolved.

Tax on International Carriers.

International air and shipping carriers doing business in Philippines are taxed at 3% of their quarterly gross receipts.

Final capital gains tax is imposed on net capital gain realized from (1) sale, exchange or other disposition of shares of stocks in any domestic corporation not traded through local stock exchange—5% on first P100,000 or less and 10% in excess of P100,000; (2) sale, exchange or other disposition of shares of stock listed and traded through local stock exchange—½ of 1% based on gross selling price of share or shares of stock; (3) sale, exchange or other disposition of real property located in Philippines classified as capital assets, including pacto de retro sales and other forms of conditional sales, by individuals, including estates and trust, is computed at rate of 6% based on gross selling price of fair market value prevailing at time of sale, whichever is higher. (E.O. 37).

Said capital gains tax shall be in lieu of tax imposed under §24 of Code and capital gains shall not be included in his gross income for purposes of computing taxpayers-sellers income tax liability. (B.P. 37).

Franchise Taxes on Corporations.

See category 2 Business Organizations, topic 2.03 Corporations.

Tax on Receipts of Insurance Companies.

See category 17 Insurance, topic 17.01 Insurance Companies.

Uniform Taxes on Wireless Stations.

All persons, firms or corporations operating a wireless receiver and/or transmitting station for wireless reception and/or transmission of wordage, pictures or other matter intended for publication, either in the public press or by means of broadcast radio news, and not devoted principally to the reception and/or transmission of advertisements, are subject to the payment of the real property tax, the basic annual and additional residence taxes, and the income tax, which are in lieu of all other taxes. They are required to pay, in addition, such fees and charges as are or may be imposed by executive order or regulation, such as filing fees, construction permit and station license fees, and annual permit fees.

23.04 CONSUMPTION TAXES:

None.

23.05 CUSTOMS DUTY AND TAX:

Customs Tariff Law of Philippines is embodied in Tariff and Customs Code of 1982 (P.D. 1464, as am'd) which covers rates of import duty, tariff rates and customs law.

No financial institution shall open any letter of credit covering imports unless applicant for such letter of credit deposits full amount of duties due on importation. Amount of duties due shall be based on declaration of applicant for letter of credit; importer subject to penalties prescribed by Code. (P.D. 1853).

In addition to any other duties, taxes and charges imposed on all importations into Philippines, there shall be levied and paid additional duty of 3% ad valorem. This additional duty shall also be levied and paid, even if importation is exempt under existing laws, except in following importations: (1) Those of government agencies or government-owned or controlled corporations with existing contracts, agreements or obligations with foreign countries, international institution, associations or organizations entitled to exemption pursuant to agreements of special laws; (2) those of diplomatic corps; (3) personal effects of returning Filipino diplomats; (4) those of bonded manufacturing warehouses; and (5) those of bonded smelting warehouses.

With respect to importations which are at present totally or partially exempt from customs duties and/or internal revenue tax under provisions of any general or special law, additional duty of 3% ad valorem shall be levied and paid, in addition to 5% customs duty imposed thereunder. (E.O. 860).

23.06 EMPLOYMENT TAXES:

See topic 23.13 Income Tax.

Social Security Tax.

None. See category 10 Employment, topic Social Security for required contributions.

23.07 ESTATE TAX:

Estate tax is graduated from 5% on net estate over P200,000 but not over P500,000 to P1,215,000 plus 20% of excess over P10,000,000.

For purposes of determining net estate subject to estate tax, following items are deductible from value of gross estate: (1) Expenses, losses, indebtedness and taxes, (2) property previously taxed, (3) transfers for public use, (4) family home, (5) standard deduction of P1,000,000; (6) medical expenses incurred by decedent within one year prior to his death but not to exceed P500,000; and (7) amount received by heirs from decedent's employer.

Tax is payable at time estate tax returns are filed which shall be within six months from decedent's death. (R.A.8424).

Real estate tax in city of Manila is 1½% of assessed value; in city of Baguio not to exceed 2% of assessed value; in municipalities from ¼% to ½% of assessed value. Provincial real estate tax is from 1/8% to 3/8% of assessed value.

Additional tax of 1% on assessed value of real property in addition to real property tax regularly levied under existing laws is imposed. However, additional tax shall not be collected if entire total assessed valuation of real property assessable to any person does not exceed P3,000, and total real property tax shall not exceed maximum of 3%. (R.A. 5447).

23.08 EXCISE TAXES:

Philippines imposes excise tax on certain goods that are imported, manufactured, produced in Philippines for domestic sale, consumption or any other disposition.

Following are classes of goods taxed: (1) Alcohol; (2) tobacco; (3) petroleum; (4) mineral; (5) automobiles; and (6) non-essential goods: (i) jewelry; (ii) perfumes and toilet wares; and (iii) yachts and other vessels intended for pleasure or sports.

23.09 FOREIGN INVESTMENT TAXES:

See category 14 Foreign Trade and Commerce, topic 14.04 Foreign Investments and Incentives.

23.10 GAMBLING AND ENTERTAINMENT TAXES:

Amusement taxes are imposed on proprietor, lessee or operator of cockpits, cabarets, night or day clubs, boxing exhibitions, professional basketball games, Jai-Alai, race tracks and bowling alleys. Rate consists of 18% in case of cockpits, 18% in case of cabarets, night or day clubs, 10% in case of boxing exhibitions, 15% in case of professional basketball games, 30% in case of Jai-Alai and race tracks, and 15% in case of bowling alleys, of gross receipts, irrespective of whether or not any amount is paid for admission. (P.D. 1959). Collection of amusement tax on paid admissions from proprietors, lessees, or operators of theaters, cinematographs, concert halls, circuses and other places of amusement was removed from Bureau of Internal Revenue and is now collected by provincial or city government under Local Tax Code.

23.11 GASOLINE AND SPECIAL FUELS TAXES:

Manufactured Oils and Other Fuels.

There shall be collected on refined and manufactured mineral oils and motor fuels specific taxes which shall attach to following goods as soon as they are in existence as such: Lubricating oils and greases; processed gas; waxes and petroleum; denatured alcohol for motive power; naphtha, regular gasoline and other similar products of distillation; premium gasoline; aviation turbo jet fuel; kerosene; diesel fuel oil; liquefied petroleum; asphalts; bunker fuel oil and on similar fuel oils having more or less same generating power; and naphtha, when used as raw material in production of petrochemical products. (R.A. 6965).

23.12 DONOR'S TAX:

Gift tax is imposed on donor only. Tax for each year is computed, at rates hereinafter mentioned, on basis of total net gifts made during calendar year. Donor pays on net gifts to all beneficiaries at rates varying from 2% if net gift is over P100,000 but not over P200,000 to P1,004,000 plus 15% of excess over P10,000,000. Gifts to educational, charitable or religious corporation, institution, foundation, philanthropic organization or research institution are exempt from gift tax provided that not more than 30% of said gifts shall be used by such donee for administration purpose. Contributions in cash or in kind to any candidate, political party or coalition of parties for campaign purposes, shall be governed by Election Code, as amended. (R.A. 8424).

Tax is payable at time return of donor is filed which shall be within 30 days after date gift is made. (R.A. 8424).

Contributions to National Book Development Fund (R.A. No. 9521) shall be exempt from donor's tax. Same shall be allowed as deduction from donor's gross income in amount equivalent to 150% of value donated. (R.A. 9521).

23.13 INCOME TAX:

Taxable compensation income includes all income payments received as result of employer-employee relationship and other income of similar nature, including compensation paid in kind, less allowable personal and additional exemptions. (R.A. 8424).

Social security benefits, proceeds of life insurance policies paid to heirs or beneficiaries upon death of insured, separation pay or any amount received by official or employee or by his heirs from his employer as consequence of separation from service of employer due to death, sickness or other physical disability or for any cause beyond control of official or employee shall be exempt from payment of income tax. (E.O. 37).

Retirement benefits, pensions, gratuities received by officials and employees, whether from Philippine or foreign government agencies and other institutions, private or public, in accordance with reasonable private benefit plan maintained by employer shall be exempt from payment of income tax provided that retiring official or employee has been in service of same employer for at least ten years and is not less than 50 years of age at time of retirement and that benefits granted shall be availed of only once. (E.O. 37).

Withholding Income Tax.

Collection at source of income tax on compensation paid on or after Jan. 1, 1954 is in force. It applies to all individuals deriving purely compensation income. Employer is constituted as withholding agent. Term employer embraces not only individuals and organizations engaged in trade or business, but organizations exempt from income tax, such as charitable organizations, clubs, social organizations and societies, as well as Government of Philippines, including its agencies, instrumentalities, and political subdivisions. Every employer making payment of compensation income shall deduct and withhold tax in amount computed in accordance with withholding tables prepared by Dept. of Finance and should be equal to tax due on employee's compensation income for entire year. Employee receiving compensation is entitled to withholding exemptions, but in order to avail of such, employee must file with his employer withholding exemption certificate. In case of change of status of employee as result of which he would be entitled to lesser or greater amount of exemption, employee shall, within ten days from such change, file with employer new withholding exemption certificate reflecting change. (R.A. 8424).

In case of married individuals, husband and wife shall be treated as separate units and shall compute separately their individual income tax based on their respective total taxable incomes provided that if any income cannot be definitely identifiable as income exclusively earned by either of spouses, same shall be divided equally between spouses for purposes of computing their respective taxable income. (R.A. 8424).

For persons who are self-employed and who are engaged in practice of profession, taxable income includes taxable income received during taxable year from all sources except following: (a) foreign source gross income derived by nonresident citizen; (b) certain passive incomes, i.e. interest income/yield from Philippine currency bank deposits and deposit substitute instruments; royalties; prizes exceeding P3,000 and winnings (except Philippine Charity Sweepstakes and Lotto winnings); dividends received from domestic corporation and share of individual partner in partnership subject to income tax (see subhead Income Tax on Corporations, infra); (c) capital gains from sales of shares of stocks; and (d) capital gains from sales of real property.

Interest from Philippine currency bank deposit and yield from deposit substitutes and from trust fund; royalties, prizes and other winnings, whether received by citizen or resident alien from sources within Philippines shall be subject to final tax at rate of 20%. Dividends received from domestic corporations and share of individual partner in partnership subject to tax by citizen or resident alien from sources within Philippines are taxed at rate of 6% effective Jan. 1, 1998; 8% effective Jan. 1, 1999; and 10% effective Jan. 1, 2000.

Income Tax of Corporations.

Domestic Corporations are subject to income tax of 35% upon taxable income derived during each taxable year from all sources within and without Philippines. All corporations, agencies or instrumentalities owned or controlled by government, including Government Service Insurance System and Social Security System are subject to same income tax as imposed upon associations or corporations engaged in similar business or industry; Resident Foreign Corporations are those organized, authorized, or existing under laws of any foreign country and engaged in trade or business within Philippines. Such corporations shall be subject to income tax equivalent to 35% of taxable income derived during each taxable year from all sources within Philippines; Nonresident Foreign Corporations are those foreign corporations not engaged in trade or business in Philippines. Such corporations shall pay tax equal to 35% of gross income received from all sources within Philippines provided that in all three kinds of corporations, effective 1 Jan. 2009, rate of income tax shall be 30%. This rate took effect on 1 July 2005. (R.A. No. 9337). Nonresident cinematographic film owners, lessors or distributors are taxed at 25%; nonresident owners of vessels chartered by Philippine nationals are taxed at 4.5%; nonresident lessors of aircrafts are taxed at 8.5% and nonresident lessors of machineries and other equipment are taxed at 7.5%; interest on foreign loan received by nonresident foreign corporation and contracted on or after Aug. 1, 1986 are taxed at 20%; dividends received by nonresident foreign corporations from domestic corporation are taxed at 15% provided country in which said foreign corporation is domiciled shall allow credit against tax due from nonresident foreign corporation, taxes deemed to have been paid in Philippines equivalent to 20% which represents difference between regular tax (35%) on corporations and tax (15%) on dividends; capital gains realized by nonresident foreign corporation from sale, exchange or other disposition of shares of stock in any domestic corporation not traded through local stock exchange, tax is 10% if not over P100,000 and 20% if over P100,000; capital gains presumed to have been realized from sale, exchange or other disposition of shares of stock listed and traded through local stock exchange, tax is ¼ of 1% based on gross selling price of shares of stock. (E.O. 37).

Persons engaged in practice of profession are taxed on their gross income derived from their distributive share in net income of partnership whether it is actually or constructively received. Net income of partnership is computed in same manner as corporation with following allowable deductions: (1) Expenses for conduct of profession; such as salaries, wages, grossed-up monitoring value of fringe benefit; provided that final tax has been paid; travel expenses, etc.; (2) interests paid or incurred on indebtedness in connection with taxpayer's profession; (3) taxes paid and incurred with taxpayer's profession, except: income tax, estate and donor's tax; (4) losses actually sustained or incurred in exercise of profession and not compensated by insurance; or other forms of indemnity; (5) bad debts due to taxpayer in connection with taxpayer's profession; (6) depreciation of properties used in exercise of profession; (7) contributions or gifts actually paid or made to government of Philippines, or any of its agencies or any political subdivisions exclusively for public purposes or to accredited domestic corporations on associations organized and operated exclusively for religious, charitable, scientific, youth and sports development, cultural or educational purposes or for rehabilitation of veterans, or to social welfare institutions or to non-governmental organizations; (8) research and development expenditures made in taxable year in connection with exercise of profession; and (9) expenses paid by employer in establishing or maintaining pension trusts for his employees.

Every general professional partnership shall file, in duplicate, annual information tax return of its income except those exempted by law.

Every corporation subject to tax shall file, in duplicate, quarterly summary declaration of its gross income and deductions on cumulative basis for preceding quarter or quarters upon which income tax shall be levied, collected and paid. Tax so computed shall be decreased by amount of tax previously paid or assessed during preceding quarters and shall be paid not later than 60 days from close of each of first three quarters of taxable year. Final adjustment return covering total net income for preceding calendar or fiscal year, shall be filed on or before Apr. 15 or on or before 15th day of fourth month following close of fiscal year, as case may be. (P.D. 1705).

Exemption from tax is granted to corporations of classes usually exempted from income tax. Corporation subject to tax may elect standard deduction in amount not exceeding 40% of its gross income. (R.A. 9504).

General professional partnerships are required to file a return of their income, stating items of gross income and allowable deductions and names and addresses and shares of partners.

Withholding of Tax at Source.

Withholding of final tax on certain incomes shall be withheld by payor-corporation and/or person and paid in same manner and subject to same conditions as provided in Tax Code. Finance Secretary may require also withholding of tax on items of income payable to persons (natural or juridical) residing in Philippines by payor-corporation and/or person as provided for by law at rate of not less than 1% but not more than 30% which shall be credited against income tax liability of taxpayer for taxable year. Withholding tax rate on interests or other payments on obligations with tax free covenant bonds is 30%. (E.O. 37).

23.14 INHERITANCE TAX:

None.

23.15 LOCAL GOVERNMENT TAXES:

None.

23.16 MINES, MINERALS AND FISHERIES TAXES:

MINING TAX.

Locator, holder or occupant of any mining claim shall pay in advance from date of registration of claim in Office of Mining Recorder, and on same date every year thereafter an annual occupation fee of P2 a hectare or fractional part thereof, until lease covering mining claim is granted. For privilege of exploring, developing and disposing of minerals from lands covered by lease, there is imposed upon lessee on coal-bearing public lands, an annual rental of five pesos per hectare or fraction thereof for each and every year for first ten years, and ten pesos per hectare or fraction thereof for each and every year thereafter during life of lease. On all mineral lands of 1st, 2d, 4th and 5th groups provided under Mining Act, two pesos a hectare or fraction thereof shall be imposed as rental. On coal, royalty shall not be less than 20 centavos a ton of 1,016 kilograms, on gold, a royalty of 1½% of actual market value, of annual gross output thereof and on all other minerals, a royalty of 2% of actual market value of gross output. There is imposed on actual market value of annual gross output of minerals produced from mineral lands not covered by lease, an ad valorem tax in amount of 2% of value of output, except gold which shall pay 1½%. (C.A. 466, am'd by R.A. 6110, am'd by P.D. 69).

23.17 MOTOR VEHICLE TAXES:

Tax on Privately-owned Passenger Automobiles, Motorcycles and Scooters.

Additional tax on privately-owned passenger automobiles, motorcycles and scooters shall be paid by owner in amount based on shipping weight or factory weight of vehicle; however, owner of a private motorcycle and scooter shall pay a fixed additional tax of P15 and that of jeep, P20. (R.A. 5448, am'd R.A. 5470).

23.18 PROPERTY TAXES:

None. See topic 23.07 Estate Tax.

23.19 SALES TAX:

Sales Tax Reform Decree of 1985.

Sales tax has been reclassified into original sales tax and subsequent sales tax. Original sales tax is imposed on producers, manufacturers and importers on first sale of products involved. Subsequent sales tax is imposed on subsequent sales of articles. (P.D. 1991, am'd P.D. 2006, am'd P.D. 2031).

23.20 STAMP TAX:

Documentary stamp taxes are imposed upon documents, instruments, loan agreements, and papers, and upon acceptances, assignments, sales and transfers of obligation, right, or property incident thereto. Among such taxes are: On every original issue, whether on organization or reorganization or for any lawful purpose, of shares of stock by any association, company or corporation, P1 on each P200 or fraction thereof, of par value, of such shares of stock, or in case of original issue of shares of stocks without par value, on actual consideration for issuance of such shares of stock; on all sales, or agreements to sell, or memoranda of sales or deliveries, or transfers of shares of certificates of stock, P0.75 on each P200 or fraction thereof, of par value, of such shares of stock, provided that in case of stock without par value, tax shall be equivalent to 25% of tax paid upon original issue; on certificates of profits or interest in property or accumulations of any association, company or corporation, P0.50 on each P200, or fraction thereof of face value; on bank checks, drafts, certificates of deposit not bearing interest, and other instruments, P1.50; on every original issue of debt instruments, P1 on each P200 or fraction thereof, of issue price of any debt instrument, provided that debt instruments with term of less than one year, proportional amount must be collected in accordance with ratio of its term in number of days to 365 days; on all bills of exchange or drafts, P0.30 on each P200 or fraction thereof of face of bill of exchange; on acceptance of payment of bill of exchange or order for payment of money purporting to be drawn in foreign country but payable in Philippines, P0.30 on each P200 or fraction thereof of face value of any such bill of exchange, or order, or Philippine equivalent of such value if expressed in foreign currency; on foreign bills of exchange and letters of credit, P0.30 on each P200 or fraction thereof, of face value, or Philippine equivalent, if expressed in foreign currency; on policies of life insurance, whereby any issuance shall be made or renewed upon any life or lives, P0.50 on each P200, or fraction thereof, of amount of premium collected; on policies of insurance on property, P0.50 on each P4, or fraction thereof, of premium; on fidelity bonds, and other insurance policies, P0.50 on each P4, or fraction thereof of premium; on all policies of annuities, whereby any annuity may be made, transferred or redeemed, P0.50 on each P200, or fraction thereof, of premium or installment payment or contract price collected; on pre-need plans, P0.20 on each P200, or fraction thereof, of premium or contribution collected; on indemnity bonds, except as may be required by legal proceedings, P0.30 on each P4 or fraction thereof of premium charged; on each certificate of damage and on every certificate issued by customs office, marine surveyor, or other person acting as such and on each certificate of any description required by law or for purpose of giving information, P15; on warehouse receipts, P15; on each Jai-Alai horse race tickets, lotto or other authorized number game, P0.10 provided if cost of ticket exceeds P1; additional tax of P0.10 on every P1 or fraction thereof; on bills of lading or receipts from P1 to P10; on proxies, P15; on powers of attorney, except acts connected with collection of claims due from or accruing to government, P5; on leases and other hiring agreements, P3 for first P2,000 or fraction thereof and additional P1 for every P1,000 or fraction thereof in excess of first P2,000 for each year of term of contract; on mortgages, pledges, and deeds of trust, P20, when amount secured does not exceed P5,000 and on each P5,000 or fraction thereof in excess of P5,000 additional tax of P10; on deed of sale and conveyance of real property, P15 when value received or contracted to be paid for such realty does not exceed P1,000 and P15 for each additional P1,000 or fraction thereof in excess of P1,000; on charter parties and similar instruments, from P500 to P1,500 according to gross tonnage of ship and duration of charter. (R.A. 9243).

23.21 TREATIES AND AGREEMENTS:

See category 25 Treaties and Conventions.

23.22 VALUE ADDED TAX:

Expanded Value-Added Tax.

All sellers of goods and services whose aggregate gross annual sales of articles and/or services exceed P1,500,000 will be covered by expanded value-added tax (VAT), unless such sales are specifically exempt. Certain sales of goods and services are either zero-rated or exempted from VAT. VAT is imposed on sale in Philippines of taxable goods and services and on imports to Philippines. VAT is based on gross selling price of goods sold or gross receipts from sale of services at rate of 0% or 10%, however, President, upon recommendation of Secretary of Finance, shall, effective Jan. 1, 2006, raise value of value-added tax from 10% to 12%, after any of following conditions has been satisfied: (a) Value-added tax collection as percentage of Gross Domestic Product (GDP) of previous year exceeds 2 4/5%; or (b) national government deficit as percentage of GDP of previous year exceeds 1½%. (R.A. No. 9337).

Among services and goods now subject to VAT are petroleum products and service provided by doctors and lawyers. VAT payable is computed as follows: if at end of any taxable quarter, output tax exceeds input tax, excess shall be paid by VAT-registered person. If input tax exceeds output tax, excess shall be carried over to succeeding quarter or quarters; provided, however, that any input tax attributable to zero-rated sales by VAT-registered person may at his option be refunded or credited against other internal revenue taxes. (R.A. No. 9361).

Any person whose sales or receipts are exempt from payment of VAT or who is not VAT-registered person must pay tax equivalent to 3% of his gross quarterly receipts.

23.23 WEALTH TAX:

None.

Residence tax is imposed annually according to wealth and income. Persons subject to tax pay P5 plus additional tax, not exceeding P5,000, according to schedule in Act. Corporations (including partnerships, associations, joint stock companies, etc.) pay P500 plus additional tax, not exceeding P10,000, according to schedule in Act. (R.A. 7160).

24 TRANSPORTATION

24.01 AUTOMOBILES:

See topic 24.02 Motor Vehicles.

24.02 MOTOR VEHICLES:

Motor vehicles must be registered and licensed by Land Transportation Office and bear number plates. Drivers must be licensed, and license of professional chauffeur must bear his photograph. (R.A. 4136, as am'd).

Tourists or transients bringing their own motor vehicles may use same during but not after first 90 days of their sojourn in Republic provided that motor vehicles display number plates for current year of some other country or state, and provided that number plates with respective names and addresses of owners thereof be registered in Bureau of Land Transportation Office prior to operation of motor vehicles.

It is unlawful for any person to compel a change in course of an aircraft of Philippine registry while it is in flight or to compel an aircraft of foreign registry to land in Philippine territory or to seize control thereof while within said territory. Loading in any passenger aircraft operating as public utility within Philippines of any explosive or poisonous substance is also prohibited except if made in accordance with regulations issued by Civil Aeronautics Administration. (R.A. 6235).

Liability of Owner.

The owner of a private motor vehicle is solidarily liable with his driver if he, being in the vehicle, could have prevented the accident by the use of due diligence. If the owner was not in the motor vehicle, his liability ceases if he exercised the diligence of a good father of a family in the selection and supervision of his driver.

Every owner of a motor vehicle must file with the proper government office the bond to be executed by a government-controlled corporation to answer for damages which may be caused to third persons.

Seat Belts Use Act of 1999.

(R.A. 8750).

Drivers and front seat passengers of motor vehicles, both private and public but not including tricycles and motorcycles, shall be required to wear or use seatbelt devices while vehicles are running on any road or thoroughfare and provided that for private vehicles, except jeeps, jeepneys, vans, buses and such other private vehicles as may be determined in implementing rules and regulations, back seat passengers are likewise required to use their seat belt devices at all times.

Act also requires car manufacturers, assemblers and distributors to ensure that seat belt devices are properly installed before distribution and sale of vehicles as determined by implementing rules and regulations and provided that manufacturers, assemblers and distributors of jeepneys may install pelvic restraint or lap belt only in driver's and front seat passengers' seats and this shall be considered as substantial compliance with requirements of this Act.

Guests.

There is no statutory restriction of liability for injury to gratuitous guest in car.

Actions Against Nonresidents.

No special provisions as to commencement.

24.03 SHIPPING:

Coastwise trade or shipping as a public utility is limited to citizens of Philippines and to corporations or other entities organized under laws of Philippines, 75% of capital of which is owned by citizens of Philippines.

The basic law on maritime commerce is Book III of the Code of Commerce. Its provisions cover vessels engaged in maritime commerce, or commerce by sea, whether foreign or coastwise; define the rights, duties and liabilities of persons who take part in maritime commerce; and treat of risks, damages, and accidents therein, as well as of proof and liquidation of averages.

Philippine Coast Guard shall be responsible for administration and enforcement of maritime laws, and registration and inspection of vessels.

It shall be unlawful for any person, association or corporation to establish, erect, or maintain any aid to maritime navigation without first obtaining authorization from Philippine Coast Guard, or interfere with any aid to maritime navigation.

The “Carriage of Goods by Sea Act,” Public Act No. 521, 74th U. S. Congress, approved on April 16, 1936, was accepted and made applicable to the Philippines by Commonwealth Act No. 65, approved on Oct. 22, 1936. The acceptance, however, was made with a proviso that nothing in said Carriage of Goods by Sea Act must be construed as repealing any existing provision of the Code of Commerce which was then in force, or as limiting its application.

Any citizen of Philippines, or any association or corporation organized under Philippine Law, 60% of capital of which is owned by citizens of Philippines, engaged or which shall engage exclusively in overseas shipping business or in construction of modern boats for overseas service shall be exempt from payment of income tax derived from overseas shipping business for period of ten years from date of approval of Act, provided that entire net income after deducting 10% thereof for distribution of profits or declaration of dividends is reinvested for construction, purchase or acquisition of vessels and equipment. Amount reinvested shall not be withdrawn for period of ten years after expiration of period of income tax exemption. (R.A. 7471).

Domestic Shipping Development Act of 2004 (R.A. 9295) is aimed at promoting Filipino ownership of vessels operated under Philippine flag. No franchise, certificate or any other form of authorization for carriage of cargo or passenger, or both, in domestic trade shall be granted except to domestic ship owners or operators.

Investment Incentives.

(a) Exemption from value added tax on importation and local purchase of passenger and/or cargo vessels of 150 tons and above, including engine and spare parts; (b) exemption from value added tax on importation of lifesaving equipment, safety and rescue equipment and communication and navigational safety equipment, steel plates, and other metal plates including marine grade aluminum plates, used for transport operations; (c) net operating loss in any taxable year immediately preceding current taxable year, which had not been previously offset as deduction from gross income shall be carried over for next three consecutive taxable years immediately following year of such loss; (d) accelerated depreciation which is not more than twice as fast as normal rate of depreciation or depreciated at normal rate of depreciation if expected life is ten years or less or depreciation over any number of years between five years and expected life if latter is more than ten years and depreciation thereon allowed as deduction from taxable income.

Maritime Industry Authority shall have jurisdiction and control over all persons, corporations, firms or entities in maritime industry. Its objectives are to: (1) Increase production in various islands and regions of archipelago through provision of effective sea linkage, (2) provide for economical, safe and efficient shipment of raw materials, (3) enhance competitive position of Philippine flag vessels in carriage of foreign trade, (4) strengthen balance of payments position by minimizing outflow of foreign exchange and increasing dollar earnings, and (5) generate new job opportunities. (P.D. 474).

For development of Philippine overseas shipping, following are direct incentives: (1) Vessels which are duly registered in Philippines and which are owned or controlled, or chartered by Philippine nationals shall have at least equal shares as vessels of another country in carriage of international cargo between Philippines and that other country; and (2) shipping lines of third-countries shall be accorded opportunities to carry balance of international cargo on such bilateral trade which cannot be carried by such vessels of Philippines and that other country. (P.D. 806).

Common Carriers.

Under the provisions of the new Civil Code, common carriers are bound to observe extraordinary diligence in their vigilance over the goods and for the safety of passengers transported by them. They are held responsible for the loss, destruction, or deterioration of the goods, unless the same is due to any of the following causes only: (1) flood, storm, earthquake, lightning, or other natural disaster or calamity; (2) act of the public enemy in war, whether international or civil; (3) act or omission of the shipper or owner of the goods; (4) the character of the goods or defects in the packing or in the containers; (5) order or act of competent public authority. In all other cases, common carriers are presumed to have been at fault or to have acted negligently. A stipulation between the common carrier and the shipper or owner limiting the liability of the former for the loss, destruction, or deterioration of the goods to the degree less than extraordinary diligence is valid, provided it be: (1) in writing, signed by the shipper or owner; (2) supported by a valuable consideration other than the service rendered by the common carrier; and (3) reasonable, just and not contrary to public policy.

Law Applicable.

The law of the country to which the goods are to be transported governs the liability of the common carrier for their loss, destruction of deterioration.

Safety of Passengers.

A common carrier is bound to carry the passengers safely as far as human care and foresight can provide, using the utmost diligence of very cautious persons, with a due regard for all the circumstances. In case of death of or injuries to passengers, common carriers are presumed to have been at fault or to have acted negligently. Common carriers are liable for the death of or injuries to passengers through the negligence or willful acts of former's employees, although such employees may have acted beyond scope of their authority or in violation of orders of common carriers. This liability of common carriers does not cease upon proof that they exercised all diligence of good father of family in selection and supervision of their employees. Common carrier's responsibility cannot be eliminated or limited by stipulation, by posting of notices, by statements on tickets or otherwise. Contributory negligence of passenger does not bar recovery of damages for his death or injuries, if proximate cause thereof is negligence of common carrier, but amount of damages must be equitably reduced.

Act Defining Liability of Ship Agents in Tramp Service (RA 9515). (1) ***Ship Agent*** shall mean person entrusted with provisioning or representing vessel in port in which it may be found; (2) ***General Agent*** shall mean ship agent appointed by ship owner or carrier in liner service for all voyages and covered by General Agency Agreement whereby agent assumes role and responsibility of its principal within Philippine territory including but not limited to, solicitation of cargo and freight, payment of discharging or loading expenses, collection of shipping charges and issuing/releasing bills of lading and cargo manifest; (3) ***Tramp Agent*** shall mean ship agent appointed by ship owner, charterer or carrier in tramp service for one particular voyage whose authority is limited to customary and usual procedures and formalities required for facilitation of vessel's entry, stay and departure in port and does not include assumption of shipowner's, charterer's or carrier's obligations with shipper or receiver for goods carried by ship; (4) ***Tramp Service*** shall mean operation of contract carrier which has no regular and fixed routes and schedules but accepts cargo wherever and whenever shipper desires, is hired on contractual basis, or chartered by any one or few shippers under mutually agreed terms and usually carries bulk or break bulk cargoes; and (5) ***Liner Service*** shall mean operation of common carrier which publicly offers its services without discrimination to any user, has regular ports of call/destination, fixed sailing schedules and frequencies and published freight rates and attendant charges and usually carries multiple consignments.

Liability of Ship Agent, General Agent and Tramp Agent—Responsibility or liability, if any, of ship agent, general agent and tramp agent shall continue to be governed by pertinent provisions of Code of Commerce: Provided, that in case of tramp agent, his liability shall not extend to obligations assumed by ship owner, charterer or carrier with shipper or receiver for goods carried by ship: Provided, further, that it is duty of tramp agent, however, to assist shipper or receiver in making cargo liability claims against ship owner, charterer, or carrier: Provided, finally, that failure or inaction to perform aforesaid duty shall subject tramp agent to applicable administrative sanctions based on Implementing Rules and Regulations (IRR) to be formulated thereon by Maritime Industry Authority (MARINA) under Department of Transportation and Communication (DOTC) and by Philippine Shippers Bureau (PSB) under Department of Trade and Industry (DTI).

24.04 AVIATION:

Air transport and regulatory are governed by Philippine Civil Aviation Authority under Civil Aviation Authority Act of 2008. (R.A. 9497). Civil Aviation Authority also has jurisdiction over restructuring of civil aviation system, as well as promotion, development, and regulation of technical, operational, safety, and security functions under Civil Aviation Authority.

25 TREATIES AND CONVENTIONS

25.01 TREATIES:

Philippines is among others, a signatory to following: (1) Convention on Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958; (2) Convention on Manufacturers' and Commercial Trademark with Kingdom of Belgium, Feb. 5, 1957; (3) Interim Trade Agreement with Switzerland, Oct. 26, 1946; (4) International Sugar Agreement, Dec. 4, 1958; (5) International Wheat Agreement, Nov. 8, 1963; (6) Trade agreement with SCAP acting in respect of occupied Japan, May 18, 1950; (7) Agreement on importation of educational, scientific and cultural materials, Nov. 22, 1956; (8) Protocol on trade relations with Swiss Confederation, Oct. 18, 1956; (9) Trade Agreement with Republic of Korea, Feb. 24, 1961; (10) Trade Agreement with Commonwealth of Australia, June 16, 1965; (11) Agricultural Commodities Agreement with U.S.A. under Title I of Agricultural Trade Development and Assistance Act, as am'd, June 25, 1957; (12) Agreement on Surplus War Property with U.S.A., Sept. 11, 1946; (13) Philippine Alien Property Agreement with U.S.A., Aug. 22, 1946; (14) Agreement with U.S. Information Service for transfer to Philippines of Radio Station KZFM, Oct. 4, 1946; (15) Agreement with U.S.A. regarding payment of public and private claims, Aug. 27, 1948; (16) Supplemental Agreement No. 3 with FAO of U.N. on technical assistance to government, Nov. 14, 1952; (17) Agreement entered into with U.S.A. for purpose of arranging for return to government of U.S. of residual total of peso funds purchased for dollars and advanced to national defense forces, Philippines, by U.S.-Ryukyus Command, Nov. 6, 1950; (18) Mutual Defense Treaty with U.S.A., Aug. 30, 1951; (19) International Convention on Recovery Abroad of Maintenance, June 30, 1956; (20) Vienna Convention on Diplomatic Relations, Nov. 15, 1965; (21) Treaty on Investments with Federal Republic of Germany, Mar. 3, 1964; and (22) Exchange of notes constituting agreement with U.S.A. supplementing Military Bases Agreement of May 14, 1947, for collection of taxes for sales of motor vehicles within Military Bases, Dec. 29, 1965.

Conventions for Avoidance of Double Taxation and Prevention of Fiscal Evasion with respect to Taxes on Income and Capital are in force with Denmark, Kingdom of Sweden, Republic of Singapore, United Kingdom of Great Britain and Northern Ireland, Canada, U.S.A., France, Pakistan, Australia, Japan, Belgium, New Zealand, Finland, Indonesia, Austria, Thailand, West Germany, Korea, Malaysia, Netherlands, Italy, Brazil, Spain, India, Norway, Israel, Romania, Hungary, China, Switzerland and Russia. (International Tax Affairs Division).

Philippines is not a party to: (1) Convention on Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters; (2) Convention on Taking of Evidence Abroad in Civil or Commercial Matters; and (3) Convention Abolishing the Requirement of Legalisation for Foreign Public Documents.

1
POLAND LAW DIGEST

—Scope —

Revised for 2009 Edition by

CHADBOURNE & PARKE LLP, of New York City, and Radzikowski, Szubielska i Wspólnicy, Sp. K. of Warsaw, Poland.

Abbreviations used are: C.C. (Polish Civil Code of 1964, as amended); C.C.P. (Code of Civil Procedure, Law of 1964, as amended); Comm.C. (Commercial Code of 1934, as amended); Comm.Comp.C. (Commercial Companies Code of 2000, as amended); and Monitor Polski official gazette.

The Republic of Poland is a member of the EU. For EU laws see European Union Law Digest.

Note: This revision incorporates legislation in force through Sept. 30, 2008.

1 INTRODUCTION

1.01 CURRENCY:

Legal currency of Republic of Poland is Zloty. PLN is commonly used abbreviation for Zloty. One zloty is divided into 100 grosz. Law of July 7, 1994 on Denomination of Zloty introduced new zloty that replaced old zloty. Greatest nominal value of banknotes is 200 zlotys. National Bank of Poland (NBP) (http://www.nbp.pl) has exclusive right to issue legal tender of Republic of Poland. Legal tender comprises bank notes (notes of NBP), coins in zloty, and grosz. Bank notes and coins issued by NBP are legal tender in Poland.

Value of bank notes, weight of coins, and dates of circulation are determined by President of NBP in consultation with Minister of Finance. President of NBP may withdraw from circulation specific kinds of legal tender. Upon expiration, tender ceases to be legal, and is subject to exchange in banks determined by President of NBP.

Principles of establishing and applying basic exchange rate of zloty in relation to foreign currencies are determined by Council of Ministers, in consultation with Monetary Policy Council and basic exchange rate of zloty is fixed by NBP. Current exchange rates of foreign currencies in zlotys are published by NBP. Banks may determine their own exchange rates which they apply in transactions with their clients.

See categories 3 Business Regulation and Commerce, topic Banks and Banking; Foreign Trade and Commerce, topic Foreign Exchange.

1.02 EUROPEAN UNION:

Republic of Poland became member of EU as of May 1, 2004. Republic of Poland is going to adopt Euro, however, no official timetable in this respect has been fixed.

1.03 GOVERNMENT AND LEGAL SYSTEM:

Preliminary Note.

Since 1989, Poland has undergone legal reforms, particularly in areas of administrative and business law. All major legislation necessary to return to market economy has been introduced, either through new enactments since 1989 or through revival and amendments of pre-World War II legislation. Pre-World War II legislation has subsequently been gradually replaced with new regulations and currently only few pre-World War II regulations remain in force. Over past few years Polish legal system has undergone changes adopting it to requirements of membership of Poland in European Union.

Poland found itself in advantageous situation when appropriate groundwork for implementing free-market-economy principles was accomplished because of many pre-WWII laws, which remained in force. Following are principal regulations of such statutes which were effective from 1930's: (a) Commercial Code of 1934 (“Comm. C.”), in relation to general partnership, limited partnership, limited liability company and joint stock company together with regulations on commercial register (replaced by Commercial Companies Code [“Comm.Comp.C.”] effective as of Jan. 1, 2001), (b) Check Law and Law on Bills of Exchange of Apr. 28, 1936, (c) Bankruptcy Decree and Decree on restructuring agreement proceedings of Oct. 24, 1934 (replaced by Law on Bankruptcy and Restructuring, effective as of Oct. 1, 2003).

In recent years several new important legislative enactments were made. Revised Law on Acquisition of Land by Foreigners now allows for purchase of real estate without permit in certain circumstances. Act on Freedom of Business Activity provides for investments without permits in most areas of economy. Foreign Exchange Law has further liberalized foreign exchange regulations and includes provisions that ease transfer of foreign currency by foreigners abroad. Liberties applicable to investors from EU countries are in most cases higher than those applicable to non-EU investors.

Polish Constitutions.

Governmental Regulation of May 3, 1791 enacted “Constitution of May 3rd”, as was noted in preamble, “for the good of society, for the preservation of freedom, for the saving of our nation and its borders.” It was first modern constitution in Europe, and, after American Constitution, second in world. During period between World Wars, Poland had two constitutions: Constitution of Mar. 21, 1921 and Constitution of Apr. 23, 1935. After World War II, government acted under Constitution of Mar. 21, 1921, but new political system quickly found reflection in Constitutional Regulation of Feb. 19, 1947 on structure and powers of highest organs of government of Polish People's Republic. Constitution of Polish People's Republic adopted on July 22, 1952 was coronation of then existing political system. Constitution of 1952 was amended several times beginning in early 1980s. During time before “Round Table” discussions, post of Commissioner for Civil Rights Protection was created, as well as Constitutional Tribunal and State Tribunal. Most important changes were made after discussions by means of amendment of Apr. 7, 1989. Name “Republic of Poland” was restored, post of president and institution of senate were created. Further amendments were passed in 1989 and 1990. In 1992, “Little Constitution” was adopted. It introduced new arrangement of powers between legislative and executive branches of government, replacing old system of government with modified system stressing separation of powers and increasing role of executive branch, particularly role of President of Republic of Poland. “Little Constitution” did not cover Bill of Rights, which was regulated by 1952 Constitution, as amended. On Apr. 30, 1997 Polish Parliament adopted new Constitution replacing “Little Constitution” and 1952 Constitution. New Constitution was approved in national referendum and published in Journal of Laws in July 1997. It entered into effect in Oct. 1997 except for its provisions concerning Constitutional Tribunal which entered into effect in year 2000.

Separation of Powers.

Constitution is based on doctrine of separation of powers, where legislative branch makes laws, executive branch carries them out, and judiciary branch interprets them and adjudicates disputes.

Parliament.

Legislative power is vested in Parliament, which consists of two houses: Sejm (http://www.sejm.gov.pl) and Senate (http://www.senat.gov.pl). Sejm is highest organ of government, and highest representative body of people; it reflects nation's sovereign rights. Sejm passes laws, adopts resolutions describing fundamental direction of governmental activities and supervises activities of government and other organs of administration. Sejm annually approves country's budget and releases government from having met budget for preceding year. Sejm consists of 460 members who are elected for term of four years. Senate consists of 100 senators who are elected for same term as Sejm. There is no session system in Polish Parliament—Sejm and Senate debate in course of sittings summoned by Marshal except for first sitting after parliamentary election which is summoned by President. In instances specified in Constitution, Sejm and Senate sitting in joint session shall act as National Assembly, with Marshal of Sejm presiding or, in his absence, Marshal of Senate.

Referendum may be called by Sejm or President with consent of Senate in order to decide matters of extraordinary importance. Results of referendum are binding if number of participants amounts to at least one half of persons entitled to vote.

Legislative Schedule.

Legislation is initiated by either members of Sejm, Senate, President, Council of Ministers or group of at least 100,000 Polish citizens who are entitled to vote in parliamentary elections. Laws are adopted by Sejm by simple majority of votes cast in presence of half of Sejm members unless Constitution requires higher majority (e.g. for change of Constitution, rejection of President's veto, etc.). Senate reviews laws, proposed budget laws and financial plans for government and has right to propose their amendments. Rejection by Sejm of amendment of law made by Senate requires absolute majority of votes. Laws are signed by President who is responsible for their promulgation. President can address Constitutional Tribunal with request to determine compliance of law with Constitution, as well as refuse to sign law and, with explanation, return law to Sejm for reconsideration. In Mar. 2006, Act of July 7, 2005 on lobbying activity in legislative process entered into force. It regulates professional lobbying and public hearing. Professional lobbying is defined as lobbying conducted for benefit of third parties in order to have their interest taken into consideration by public authorities in legislative process. Lobbyists must register with Ministry of Internal Affairs and Administration. Such registry is publicly available. Lobbyists may enter premises of Parliament and public authorities and contact government officials, who must register such contacts. New law requires that Council of Ministers and Ministers prepare at least every six months legislative schedule of draft acts directed to Parliament and executive acts along with explanation of reasons for given act and outline of proposed solutions. This information is publicly available. Any party interested in given act may participate in public hearing relating to it.

President of Republic of Poland (http://www.prezydent.pl) is highest representative of Polish nation in domestic and international relations. President is elected in popular election for five year term and may be reelected only once. Any Polish citizen over age of 35, who has full voting rights, can be elected to presidency. For violations of Constitution or laws and for crimes, President may be charged by State Tribunal. President ratifies and terminates international agreements. President must be authorized by Sejm to ratify international agreements relating to State borders, defensive alliances and ones which would significantly burden state finances or would necessitate change in law. President may, only during martial law when Sejm cannot assemble, issue decrees with force of law on advice of Council of Ministers which shall be authorized by Sejm on first assembly.

Constitutional Tribunal (http://www.trybunal.gov.pl) determines constitutionality of laws and other norm setting acts of government. Right to appeal to Constitutional Tribunal for review on constitutionality of laws is vested not only with governmental authorities such as President, Speakers of Sejm and Senate, Chief Prosecutor but also with every citizen whose constitutional freedoms or rights have been infringed by provisions of law based on which court or organ of public administration issued final decision regarding his freedoms or rights or obligations. Decisions of Constitutional Tribunal on constitutionality of laws are final and binding Sejm. Constitutional Tribunal consists of 15 judges who are selected by Sejm from outstanding members of legal community for nine year term. Chairman and Vice Chairman of Constitutional Tribunal are selected by President of Republic of Poland. Members of Constitutional Tribunal are independent and are only subject to Constitution.

State Tribunal (http://www.sn.pl/sadnajw/ts.html) determines liability of persons who hold highest public posts, as specified by law, for violations of Constitution and laws. State Tribunal may also determine criminal liability in connection with such violations, and for crimes committed in connection with exercise of public functions. Members of State Tribunal are elected by Sejm for term of Sejm. Chairman of State Tribunal is First President of Supreme Court. Judges of State Tribunal are independent and are only subject to laws.

Persons holding public posts may not engage in any economic activity. They may however be designated to manage or supervise State economic entities that is: State or communal enterprises and companies whose shares are held by Treasury of State.

Highest Control Chamber (http://www.nik.gov.pl) controls commercial, financial, organizational and administrative activities of State administration, enterprises and other organizational entities that are subject to such State administration, checks legality, effectiveness and dependability of such activities. Highest Control Chamber is subject to Sejm. President of Highest Control Chamber is elected and recalled by Sejm, with consent of Senate.

Commissioner for Civil Rights Protection (http://www.brpo.gov.pl) guards rights and freedoms specified in Constitution and other laws. Commissioner for Civil Rights Protection is elected by Sejm, with consent of Senate, for term of five years.

Government.

(http://www.kprm.gov.pl) Council of Ministers is main governmental body. President of Council of Ministers supervises Council of Ministers and all organs of governmental administration. President of Council of Ministers, Council of Ministers as whole and Ministers, issue regulations and executive orders, on basis of laws and in order to implement laws. President of Council of Ministers is nominated by President, other members of Council of Ministers are nominated by President pursuant to proposal from President of Council of Ministers. Sejm approves nominations of members of Council of Ministers by absolute majority vote. Sejm may recall Council of Ministers.

Prosecutor's Office (http://www.ms.gov.pl) safeguards compliance with laws and oversees bringing of criminals to justice. Prosecutor's Office is subject to Minister of Justice, (http://www.ms.gov.pl), who acts as Chief Prosecutor.

National Council of Radio and Television (http://www.krrit.gov.pl) safeguards freedom of speech and realization of rights of citizens to information and is to represent in radio and television popular interests. Members of National Council of Radio and Television are nominated by President, Sejm and Senate. State monopoly in radio and television has been abolished and private persons may operate radio and television businesses after obtaining concessions from National Council of Radio and Television.

Foundations of Governmental and Commercial Structure and Governmental Rights and Obligations of Citizens.

Republic of Poland is democratic country, implementing rules of social justice. Republic of Poland guarantees freedom of economic activity irrespective of forms of ownership; limitations of this freedom may only be imposed by laws. Republic of Poland protects ownership and right to inheritance and guarantees full protection of personal property. Condemnation is only allowed for public purposes and for adequate compensation. Specific constitutional rights and obligations include following: right to freedom of speech, publishing, assembling, meeting, demonstrating and of engaging in manifestations. Citizens of Republic of Poland have equal rights without regard to sex, place of birth, education, employment, nationality, race, beliefs or ancestry and social status. Polish citizens abroad are entitled to receive assistance from Republic of Poland. Citizen of Republic of Poland is to comply with Constitution and laws. Personal data of natural persons is subject to legal protection in Poland.

Regional Administration and Territorial Self-Governance.

Voivod (wojewoda) is organ of state administration and representative of government in region. Voivod is state administrative organ at regional level, appointed and recalled by Prime Minister which functions as representative of government in region. Significant reform in regional administration and territorial self-governance was launched on Jan. 1, 1999. Before Jan. 1999 there was only one territorial self-governance unit-commune (gmina). At present two additional levels of self-governance authorities have been added: district (powiat) and voivodship. Voivodship constitutes territorial unit of self-governance administration and also territorial unit of state administration. Commune, district and voivodship have legal personality and perform public tasks in their own name. Main organs of commune and district are councils elected by residents. Councils elect management boards. Main organ of voivodship is sejmik elected by residents. Sejmik elects management board of voivodship. Commune, district and voivodship as self-governance unit own real property and have other proprietary rights. All such assets and rights constitute communal, district and voivodship property.

Electoral Laws, Regulations on Elections of Sejm, Senate and President.

Elections of Sejm, Senate and President are conducted by secret ballot. Every citizen over 18 years of age has right to vote, without regard to sex, nationality, race, belief, education, length of residency, ancestry, employment or wealth. Every citizen over 21 years of age may be elected to Sejm and over 30 years of age may be elected to Senate. Women have rights equal to men. Members of armed forces have same voting rights as civilians. Persons who are mentally disturbed or whose public rights have been suspended in court proceeding do not have right to vote. Candidates to Sejm, Senate and Presidency are named by political and social organizations and voters.

1.04 HOLIDAYS:

Legal holidays are Jan. 1 (New Year's Day), Easter Monday, May 1 (Labor Day), May 3 (Constitution Day), Corpus Christi Day, Aug. 15 (Ascension Day), Nov. 1 (All Saints' Day), Nov. 11 (Independence Day), and Dec. 25-26 (Christmas Days).

Time periods expire at end of next working day if last day of period would fall on holiday or Sun.

1.05 LANGUAGE:

Law on Polish Language which came into force in May 2000 established obligation to present all documents to Polish authorities in Polish language. Generally, if agreement is concluded with consumer or employee domiciled in Poland and agreement is to be effected in Poland, such agreement should be made in Polish language. Possession of Polish language version of agreement has significant influence on power to use such agreement as evidence in courts and before administrative authorities. Requirement to use Polish language in above mentioned relations applies inter alia to: names of products and services, offers, advertising, instruction manuals, information on characteristics of goods and services, warranty conditions, invoices, bills and receipts. State and governmental authorities and institutions are obliged to use Polish language in any relations within territory of Poland.

1.06 OFFICE HOURS AND TIME ZONE:

Poland is in Central European (GMT +01:00) time zone. For summer period (typically from last weekend of Mar. until last weekend of Oct.) time in Poland is changed into GMT +02:00. Office hours are generally from 8 a.m. to 4 p.m.

2 BUSINESS ORGANIZATIONS

2.01 AGENCY:

Representation under Polish law is general concept of acting on account of principal and corresponds to American agency law. Three types of contracts express agency concept in Polish law: contract of mandate, contract of agency and contract of sale-purchase on commission. Under contract of mandate, person accepting order is obliged to act on behalf of principal in specified legal transaction. (art. 734, §1 C.C.). Under contract of agency, person accepting order (agent) is obliged for fee (commission) to act, within scope of such person's business, as intermediary on permanent basis when concluding specific contracts on behalf of principal (typically being entrepreneur) or to conclude such contracts in principal's name. (art.

758, §1 C.C.). Under contract of sale-purchase on commission, person accepting order (commission agent) is obliged for fee (commission) and within scope of his business to buy or sell movables on account of principal (commissioning party) but in commission agent's own name. (art. 765 C.C.).

Polish law distinguishes between direct and indirect agents. Agent acts on behalf of principal. Direct agent acts on behalf of disclosed principal. Indirect agent acts in his own name and principal is undisclosed. Authorization to act as agent for principal may be based on law, on statement by principal (power of attorney), or on contract between agent and principal. Indirect agent can act only pursuant to contract. Generally, representation by agent is permitted only in some cases. In field of family law, parties typically cannot act through agents.

Legal transaction consummated by direct agent within limits of his authority produces direct consequences for principal. When agent acts as indirect agent, neither undisclosed principal nor third person with whom agent dealt acquires any rights against or assumes any obligation of other. C.C. contains extensive regulations protecting rights of agent acting upon contract of agency towards principal. (art. 758-7649 C.C.).

2.02 ASSOCIATIONS:

See topic 2.03 Cooperatives.

2.03 COOPERATIVES:

Cooperative is voluntary union of unlimited number of persons, membership and membership fund of which may change, that conducts economic activities in joint interest of its members. Cooperatives are governed by Act of Sept. 16, 1982 on Cooperatives, as amended. Housing cooperatives are governed by Act of Dec. 15, 2000 on housing cooperatives. With respect to establishing by and membership of foreign citizens see category 17 Immigration, topic 17.01 Aliens. Assets of cooperative are private property of its members.

It takes at least ten individuals or three legal entities who want to establish cooperative may adopt statute of cooperative and file application for registration with registry court. Registry court approves registration after determination that statute is in accordance with law.

Since Jan. 1, 2001 cooperatives are registered in National Court Register (previously in separate register of cooperatives). Cooperative gains legal personality at time of registration into registry.

Meeting of all members of cooperative is cooperative's supreme decision-making authority. Cooperative must also have governing board and supervisory board that acts as internal control.

Cooperative's property consists of membership fees, gifts, inheritance, legacies, profits from cooperative's economic operation, profits from cooperative property and public charity. Cooperatives may organize economic activity according to general rules defined by law. Profit from such activities serves to attain charter aims and cannot be divided between members.

2.04 CORPORATIONS:

Types and Sources.

Generally, concept of corporation corresponds in Polish law to concept of legal person. Polish law recognizes two main types of business corporations, joint stock company and company with limited liability. Polish company with limited liability is generally equivalent to close business corporation in American law. Corporations may be formed for any purpose legally permissible (not necessarily business). However, in practice establishing corporations in Poland for purposes other than business is uncommon. Shareholders (stockholders) are not liable personally for obligations of corporation. In Polish law, concept of “ultra vires” acts is unknown. Polish corporation is not restricted by enumerations in its document of creation. Its legal capacity to act after deletion of Art. 36 of C.C. (as of Oct. 1, 1990) appears to be unlimited. Basic source for both types of business corporations is Commercial Companies Code of 2000 which replaced previously binding Commercial Code of 1934: joint stock company (arts. 301-490) and company with limited liability (arts. 151-300). Position of aliens in formation of business corporation is established through Law of July 2, 2004 on Freedom of Business Activity. In particular, citizens and corporations originating from state being member of European Union or party to treaty on European Economic Area may carry out economic activity in Poland on same conditions as Polish citizens and corporations. Law of Aug. 30, 1996 on Commercialization and Privatization of State Enterprises, as amended also introduced new provisions to Polish business corporation law. Provisions regarding corporate name and commercial representation (prokura) are regulated in C.C. (on Commercial representation [prokura] see category 23 Property, topic 23.03 Powers of Attorney).

Formation of Business Corporation.

Both joint-stock company and limited liability company may be formed by one or more natural or legal persons. However, limited liability company or joint-stock company may not be formed solely by single-shareholder limited liability company. Every corporation must have corporate name, which designation may be freely chosen. Important elements of articles of incorporation and statue required by law are, in particular, corporate name, time of existence, if limited, and amount of founding capital. Minimal founding capital amounts to 500,000 zlotys for joint-stock company and 50,000 zlotys for limited liability company. Corporation comes into existence by entry in National Court Register. Before registration, in period which for limited liability company starts on moment of signing of articles of association (or founding act) and for joint-stock company when all shares are subscribed for, and after signing of statutes by founders, corporations may acquire rights in their own name, including right of ownership of real estate and other rights in rem, incur obligations, sue and be sued, acting as company “in organization”. Until registration company and persons acting in its name are liable for obligations of company in organization. Shareholder of company in organization is jointly and severally liable with company for its obligations up to value of contributions which have not been made as provided for in articles of association or statutes. Upon registration company acquires legal personality and becomes party to rights and obligations of company in organization with no further legal action. Capital of corporations must not be paid up by contribution which constitutes right which is not transferable or rendering of work or services. Entire capital of limited liability company has to be contributed prior to registration of company. Transfer or other disposal of share executed before entry of any corporation to National Court Register or in relation to shares in increased capital—before registration of such increase of its founding capital is invalid.

Institutional Structure of Corporation.

Every business corporation must have two bodies: management board and shareholders' general meeting (general assembly). Polish business corporation law recognizes two types of supervisory bodies: supervisory board and revisory commission. Joint stock company must have supervisory board. Company with limited liability needs not unless its founding capital exceeds 500 thousand zlotys and number of shareholders is greater than 25.

Any legal action for which law requires resolution of general meeting of shareholders (or general assembly) or supervisory board effected without such resolution is invalid, however such resolution may as well be adopted up to two months after such legal action has been effected. Under Comm.Comp.C. resolution is required in particular for sale or lease of enterprise or any organised part of it or establishment of limited right in rem over enterprise or its part, such as for example pledge, as well as acquisition and sale of ownership title and right of perpetual use of real estate unless articles or statutes provide otherwise. Also any transfer or other disposal of right or undertaking of obligation of value exceeding twice amount of founding capital in limited liability company requires resolution of general meeting of shareholders unless articles of association provide otherwise. Resolution of general assembly adopted by majority of 2/3 of votes is required in joint stock company for transfer of property to company by its founder or shareholder for price exceeding 1/10 of paid founding capital if effected before two years after company's registration. Resolution of general meeting of shareholders is required in limited liability company for acquisition of real estate or its part of fixed assets for price exceeding ¼ of founding capital, not lower, however, than 50,000 zlotys if effected before two years after company's registration.

Mergers, Divisions and Transformations.

Mergers can be accomplished through: (1) transfer of all assets of company being acquired to other company in exchange for shares (or stock), which acquiring company issues to shareholders (stockholders) of acquired company; or (2) formation of new corporation (either joint stock or limited liability) to which assets of all merging companies are transferred, in return for shares or stock of new corporation. Corporation may merge with other corporation and/or partnership, but partnership should not be acquiring party. Also new entity should not be formed as partnership. Plan of merger should be agreed by merging companies, submitted to National Court Register, approved by auditor and announced in manner specified by Comm.Comp.C. Resolution for merger complying with law, approved by qualified majority vote of shareholders (stockholders) is required, as well as appropriate notices. Merger is effected upon day of its registry into National Court Register (day of merger). Assets of each merged company should be managed separately until all creditors whose interests arose before day of merger and who, in writing, demand payment before end of six months from announcement of merger are either satisfied or given security. During time when assets are managed separately, premerger creditors are given priority over post-merger creditors. Corporations and limited joint stock partnerships may also, upon special stipulations of Comm.Comp.C., merge with foreign companies defined in Directive 2005/56/EC of European Parliament and of Council on cross-border mergers of limited liability Companies, which are formed in accordance with law of Member State of EU or party to treaty on EEA and having their registered office, central administration, or principal place of business within Community or state being party to treaty on EEA, provided that limited joint-stock company partnership may not be acquiring party. Corporations (but not partnerships) may be divided into two or more corporations. Joint stock company must not be divided if its founding capital is not covered in full. Division may be effected through transfer of all or part of assets of corporation being subject to division to other existing or/and newly formed corporations in return for their shares. Procedures applicable to division of corporations are principally similar to merger procedures. Corporations which acquire assets of divided corporation are jointly and severally liable for liabilities specified in plan of division for three years after announcement on division up to net values of assets prescribed to each corporation in plan of division. Comm.Comp.C. contains provisions on transformation of partnerships into corporations, corporations into partnerships, partnerships of one type into partnerships of another type, joint stock companies into limited liability companies and vice versa. Transformation does not result in any change in relations between corporation and third parties. If not all shareholders (stockholders) of company being transformed become shareholders (stockholders) in new company, they should be paid in full in cash up to 10% of value of company's assets. Shareholders (stockholders) who do not participate in new corporation can, after registration of its transformation, demand pay out of amount equal to their respective shares, calculated according to special balance sheet prepared as one requirement of resolution on transformation. Specific provisions govern transformation of governmental enterprises into one-person capital corporations of State Treasury. Principal provisions are contained in Law of Aug. 30, 1996 on Commercialization and Privatization of State Enterprises.

Dissolution and Termination of Corporations.

Dissolution of corporation can be caused by: (1) grounds included in statutes or articles of association, (2) resolution of general assembly or shareholders' general meeting on dissolution of corporation, or transfer of seat of corporation outside of Poland; (3) declaration of bankruptcy of corporation; and (4) other grounds provided for by law (for example, dissolution of corporation pursuant to court decision). Dissolution of corporation occurs after liquidation. During liquidation, corporation retains its legal status. Liquidation is conducted with addition of "in liquidation" to its corporation's name. Liquidators are members of management board unless statute or articles of association or shareholders' resolution contains contrary provisions governing liquidators. If court decides that corporation should be liquidated, court can name liquidators. Liquidators must make balance sheet at beginning of liquidation. Comm.Comp.C. regulates liquidation proceeding, rules of paying creditors and division of assets of liquidated corporation. After completion of liquidation and approval of final accounts by general meeting of shareholders or general assembly, liquidators provide liquidation statement to registry court, at same time depositing demand for removal of corporation from commercial register. Aims of liquidators are to terminate current business of corporation, obtain payments from debtors, perform obligations of corporation, and transform assets of corporation into cash. New business can be obtained only if necessary to terminate old business. Real estate is sold at public auction, or without auction only upon resolution of shareholders (stockholders) and at price not lower than in such resolution.

Civil and Criminal Liability.

Member of management or supervisory body of corporation can be liable to corporation for damage that results from acts contrary to law or articles of incorporation. Member of management or supervisory body and liquidator should, when carrying out their functions, act as independent business persons and are responsible to corporation for all damage that results from lack of such care. Those who take part in formation of joint stock corporation or limited liability company and knowingly or negligently misrepresent as to coverage of founding or increased capital, are liable to company's creditors jointly and severally with company for three years from entry of company into register or registration of increase of capital. Statute of limitations is generally three years. Criminal liability of persons involved in activity of corporations is regulated in Comm.Comp.C. and Criminal Code which provide for liability for, in particular, actions causing damage to corporation, lack of notification of corporation's bankruptcy, acquisition by corporation of its own stock or shares, etc.

See category 15 Foreign Trade and Commerce, topic 15.04 Foreign Investment.

2.05 FOREIGN CORPORATIONS:

See topic 2.04 Corporations; category 15 Foreign Trade and Commerce, topic 15.04 Foreign Investment.

2.06 FOUNDATIONS:

Establishment and operation of foundations is governed by Law of Apr. 6, 1984, as amended. Foundation enjoys personality at law at moment of entry into registry. Registry is open and accessible to third parties. As of Jan. 1, 2001 foundations are entered into National Court Register.

Foundations may be established for realization of purposes corresponding with basic social and economic interests of Republic of Poland such as: health care, scientific development, education, culture and arts, social care and social security, environment and monument protection. Foundations may be established by natural persons regardless of citizenship and domicile, or legal entities located in Poland or abroad. Foundation must be located in Polish territory. Establishment of foundation, unless established in will, requires declaration of will filed in form of notarial deed. Declaration must include purpose of foundation and proprietary components aimed at its realization.

Founder is to set up charter of foundation specifying its name, location, assets, principles, forms and scope of foundation activities, composition and structure of management board, method of appointment and responsibilities and rights of board and its members. Charter may also contain other provisions, particularly those relating to conducting business activities by foundation, availability and conditions of merging with other foundations, change of charter or purpose and stipulations governing creation of other foundation organs. Founder may authorize another natural or legal person to set up charter.

Management board directs foundation's activities and represents it before third parties. Where management board violates law, charter or purpose of foundation, court acting on motion of appropriate Minister or Voivod may suspend management board and appoint receiver.

If foundation completes its objectives, or exhausts financial resources and assets, it is to be liquidated in manner specified in charter. If charter does not provide guidelines or if provisions are impossible to execute, liquidation decision should be made by court. In other cases, foundation liquidation may take place only if law so provides. If charter does not determine appropriation of remaining proprietary resources after liquidation, court is to issue decision on their designation, considering foundation purposes.

Carrying out business activity by foundation itself requires foundation to assure proper record keeping. Foundation enjoys certain income tax exemptions because of transfer of income from business activity into realization of statutory purposes. Acquisition by foundation of money, other personal property or property rights in form of succession, legacy or donation is free of taxes on successions and donations.

2.07 PARTNERSHIPS:

Polish law contemplates five forms of partnership: civil partnership (arts. 860-875 C.C.), registered partnership (arts. 22-85 Comm.Comp.C.), partnership of professionals (arts. 86-101 Comm.Comp.C.), limited partnership (arts. 102-124 Comm.Comp.C.) and limited joint-stock partnership (arts. 125-150 Comm.Comp.C.). These forms are comparable to American partnerships. C.C. states, “by partnership agreement, partners bind themselves to strive to attain common economic objective by acting in specified manner, particularly by making contributions”. (art. 860, §1 C.C.). Commercial partnership formed under Comm.Comp.C. may in its own name acquire rights, including ownership of real estate and other rights in rem, undertake obligations, sue and be sued. Commercial partnerships formed under Comm.Comp.C, enjoy so-called “handicapped legal capacity”. Rights and contributed property, as well as acquired property and property otherwise gained for partnership during its duration, constitute partnership's assets. In either form, formation of partnership is based on agreement, which in respect of civil and registered partnership must be in writing and in respect of remaining partnerships in form of notarial deed. Primary difference between civil and commercial partnerships is that latter must have formal corporate name, and must be inscribed into National Court Register. Partner of commercial partnership may transfer all of his rights and obligations to other entity only if contract on establishment of company provides so. (See topic 2.04 Corporations, subhead Mergers, Divisions and Transformations.)

Civil Partnership.

Partner's contribution may consist of property, other assets or personal services, each of which is presumed of equal value. Unless otherwise stated in partnership agreement, each partner participates equally in profits and losses, regardless of type and value of contribution. While partners may be released from participation in losses, partners cannot be excluded from sharing profits. Partner cannot make disposition of his interest in common partnership property, nor of his interest in property's particular elements. For duration of partnership, partners cannot demand division of partners' common property, and no partner's creditor can demand satisfaction from partner's share in common property of partnership nor from his interest in property's particular elements. Partners are jointly and severally liable for partnership's obligations. Each partner is entitled and obliged to manage partnership's affairs. Each partner may manage affairs, which do not exceed scope of partnership's ordinary management, without partners' resolution. If, however, before conclusion of matter, any one partner objects to its being carried out, partners' resolution is needed. Failing agreement or resolution to contrary, each partner is authorized to represent partnership to extent he is entitled to manage its affairs. If partnership was formed for unspecified period, partners may withdraw by serving notice three months in advance of end of fiscal year and for sufficient reasons may serve notice without even observing notice requirements. If partnership was formed for specific period, contrary stipulation is invalid. If, in spite of expiration of specified duration of partnership, it persists with consent of all partners, it is treated as formed for unspecified period. For sufficient reason, each partner may demand court-ordered dissolution of partnership. Partnership is dissolved as of day of declaration of its partners' bankruptcy.

Civil partnerships are not considered as separate business entities. Only partners of such partnerships are recognized, each of them separately, as entrepreneurs. Under Comm.Comp.C. civil partnership may be transformed into registered partnership upon registration in National Court Register. Transformation is obligatory if, due to amount of net income gained by civil partnership in two previous fiscal years, partnership is obliged to keep accounting books. Application for registration needs to be filed with National Court Register within three months following end of second fiscal year.

Registered Partnership operates under name which includes last names of all, one or several partners with abbreviation standing for “partnership (spólka jawna)”. For entry of commercial partnership into commercial register see category 3 Business Regulation and Commerce, topic 3.07 Commercial Register.

Contract on registered partnership needs to be executed in writing.

Each partner has right to represent partnership. Contract may provide that partner is excluded from right of representation or entitled to represent partnership jointly with another partner or procurist (i.e. holder of “prokura” for explanation of term “procura”, see category 23 Property, topic 23.03 Powers of Attorney). Deprivation of right to represent partnership against partner may only be accomplished in form of judicial decision. Partner's right to represent partnership extends to all transactions, including judicial proceedings, connected with operation of any business enterprise, including transference and encumbrance of real property and granting and revocation of prokura. This right cannot be limited with legal consequences against third parties.

Each partner is jointly and severally liable for partnership obligations with remaining partners and partnership itself. Joint liability is extended to entirety of assets and is also applied in case of bankruptcy. However, company's creditor may conduct execution from partner's asset only if execution from assets of company proves ineffective. Anyone who joins already existing partnership is liable for obligations incurred prior to his entry and any contrary provision is without effect against third parties.

Each partner has right and duty to run partnership business, unless stated otherwise. Third parties cannot be contractually designated to run partnership business with exclusion of partners. Neither right of partner to personal inquiry about partnership's business standing and its level of assets, nor his right to personal examination of books and documents of partnership, can be limited. Each partner may handle business matters without prior resolution of partners, providing such matters do not exceed scope of ordinary partnership activities. Resolution, however, is necessary before activity is carried out when at least one partner objects. Running partnership business may be entrusted to one or several partners, which is equivalent to exclusion of remaining ones from such activities. Granting of prokura (see category 23 Property, topic 23.03 Powers of Attorney) requires consent of all partners who enjoy partnership management rights and revocation may be effected by any one of them. Unanimity is required of all partners appointed to run partnership business for passing of resolutions on matters which do not exceed scope of common partnership activities if passing of resolution is required. In cases that exceed such scope, unanimity of partners, even those excluded from running partnership business, is required. Partner who runs partnership business must not receive any compensation for his personal services. Right or duty of partner to run partnership business may be revoked by means of judicial decision if based on important reasons.

Partners' contributions are considered to be equal. Partners' contribution may consist of ownership, other rights (including right to use property or rights), or rendering of services. Partner is neither entitled nor obligated to increase his contribution; he has right to equal share in profits and shares losses in same proportion, regardless of type and amount of his contribution. Partner may be exempt from obligation to cover losses if so stipulated in contract. Capital share of given partner is equal to value of his contribution actually transferred to partnership. Partner may demand every year 5% interest on his capital share even if partnership has sustained loss. Unless partnership is dissolved, no partner may require distribution of partnership assets, except for situation when partner withdraws from partnership due to termination notice, death or bankruptcy of partner, partner or his successors receive his capital share in cash or turn back of property if contributed only for use. Partners must abstain from any activities contrary to partnership interests. In general, partners are prohibited from engaging in competing business or joining another partnership as partner or as management member in particular. If this prohibition is violated, each remaining partner may require delivery of profits gained by transgressing partner, as well as demand compensation, while still holding right to dissolve partnership or demand ousting of transgressing partner.

Occurrence of any of following events may result in partnership dissolution: reasons stipulated in contract, consent of all partners, declaration of partnership's bankruptcy, death or bankruptcy of one of partners, notice to terminate, or judicial decision.

Partnership is presumed extended for unlimited period of time if reasons for termination stipulated in contract occurred, but partnership still operates upon consent of all partners. Notice of termination of partnership established for unlimited period of time may be given by partner no later than six months before end of business year. Each partner may demand dissolution of partnership by judicial decision. Despite death or bankruptcy of partner and despite notification of termination by partner or his personal creditor, partnership may still exist between remaining partners, providing it is so stipulated in contract or agreed upon by remaining partners.

Upon occurrence of reason for dissolution, partnership must be liquidated, unless another method is agreed upon. All partners become liquidators, but are free to unanimously appoint themselves or others for this function. Liquidation is carried out under partnership name. Liquidator's duties include: termination of partnership business, enforcement of claims, fulfillment of obligations and sale of partnership assets (including option of public auction). New business transactions may be entered into only when necessary to complete old ones. Liquidators must prepare balance sheet at beginning and end of liquidation. Partnership assets must be sold to cover all outstanding obligations of partnership and appropriate amount must be held in reserve to cover other obligations. Remaining portion is divided between partners according to provisions of contract. If there is no contract, contributions must be paid off first, and surplus divided proportionally to partners' participation in profit distribution. If partnership assets are insufficient to cover debts and contributions, deficit must be divided between partners according to provisions of founding contract. If there is no contract, deficit must be divided proportionally to partners' participation in losses. Same proportions must be maintained for distribution among partners of portion of deficit of insolvent partner. Liquidators are to announce completion of liquidation to delete name of firm from National Court Register.

Partnership of professionals is company created for purpose of pursuing one or more of following professions: advocate, pharmacist, architect, construction engineer, auditor, insurance broker, tax advisor, securities broker, investment advisor, accountant, physician, dentist, veterinary doctor, notary, nurse, midwife, legal advisor, patent attorney, property valuer, and sworn translator. Only persons qualified to pursue above professions may become partners in such type of partnership. Corporate name of partnership should include last name of at least one partner and additional words: "and partners" ("i partnerzy"), "and partner" ("i partner"), "partnership of professionals" ("spólka partnerska") as well as indication of profession. Execution of contract on partnership of professionals has to be done in form of notarial deed. Contract may provide that one or more partners agree to be liable as partner of registered partnership. Principally, partner is not liable for obligations of partnership which arise in connection with pursuit by remaining partners of profession in partnership, or for obligations of partnership which arise as result of acts or omissions of persons employed by partnership under employment contract or other legal basis who have been guided by another partner in provision of services connected with objects of partnership. Each partner has right to represent partnership individually unless contract provides otherwise. Partners may be deprived right of representation only for significant reasons under resolution adopted by qualified majority of votes in presence of qualified quorum. Contract may entrust representation and management of partnership to management board acting upon terms and conditions generally same as in limited liability company. Loss by all partners of right to pursue profession is one of reasons of dissolution of partnership. Provisions of Comm.Comp.C. regarding registered partnership apply respectively to partnership of professionals.

Limited partnership is partnership where with respect to creditors for partnership's obligations, at least one partner is responsible without limitation (general partner), and liability of at least one partner (limited partner) is limited. Unless stated otherwise in Comm.Comp.C., provisions applicable to registered partnerships are applicable to limited partnerships. Execution of limited partnership agreement has to be done in form of notarial deed. Corporate value of partnership should include surname of one or several partners and additional words: "limited partnership" ("spólka komandytowa"). Surname of limited partner may not be placed in corporate name of partnership. Limited partner whose name is placed in corporate name of partnership is liable towards third parties like general partner.

Limited partner is liable for limited partnership's obligations in relation to its creditors only to certain amount specified in contract which generally represents value of contribution to partnership but may be higher (partnership sum). Limited partner is free from liability within limits of amount of contribution made to limited partnership's assets. In event that contribution is returned, in part or in whole, liability is reinstated in amount of value of returned contribution. With respect to creditors, in case contribution is reduced by losses, each payment made by partnership to limited partner before completion of contributions to original amount is considered to be return. Decrease in partnership sum does not have legal effect upon creditors whose claims have arisen before decrease is registered.

Person who becomes limited partner in existing limited partnership is liable for limited partnership's obligations which exist at time that his name is entered into commercial register. In event that limited partnership agreement is entered into with commercial entity which conducts enterprise, limited partner is also liable for obligations which arose during conduct of enterprise and exist at time of entry into commercial register.

Limited partner can only represent limited partnership pursuant to power of attorney. If he enters into transaction with third party without disclosing power of attorney, he is liable for such transaction without restriction. Contrary contract provisions do not have legal effect with respect to third parties.

Limited partner has right to demand annual financial statement and to review books and documents to check their truthfulness. Pursuant to application of limited partner, registry court may, based on important reasons, require showing of balance sheet and giving of explanations, as well as allow him to review books and documents, at any time. Such rights of limited partner cannot be excluded or limited by agreement.

Unless agreement provides otherwise, limited partner does not have right or obligation to carry out limited partnership's activities. It is necessary to obtain limited partner's consent before carrying out matters outside scope of normal activities of limited partnership.

Limited partnership agreement must specify manner of division of losses and profits. In cases of doubt, limited partner participates in losses only to amount of set contribution.

Death of limited partner does not constitute grounds for liquidation of limited partnership. Heirs of limited partner should designate person who performs their rights. Activities of remaining partners carried out before such designation are binding on heirs of limited partner. Division of shares of limited partner between his heirs is effective with respect to limited partnership only with consent of remaining partners.

Limited Joint Stock Partnership is partnership where at least one partner is liable to creditors for obligations of partnership without limitations and at least one partner is shareholder who is not liable for partnership's obligations. In matters not regulated in part of Comm.Comp.C. regarding limited joint-stock partnership following provisions apply: (1) with regard to legal relationship among general partners with shareholders and third parties, as well as to contributions of general partners, except for contributions to share capital - provisions on registered partnership, (2) with regard to other matters respectively provisions on joint stock company, in particular those concerning share capital, contributions of shareholders, shares, supervisory board and general assembly. Minimum founding capital of partnership amounts to 50,000 zlotys. Corporate name includes last name of one or several general partners and additional words: “limited joint-stock partnership” (“spółka komandytowo-akcyjna”). If statutes allow new general partner to join partnership, existing shareholders may become general partner or third party may join partnership as general partner upon consent of all existing general partners. Each general partner has right to manage affairs of partnership. Contract may entrust management to one or several general partners. Supervisory board must be established if number of shareholders exceeds 25 persons. Comm.Comp.C. specifies matters which require passing resolution by general assembly or all general partners.

3 BUSINESS REGULATION AND COMMERCE

3.01 ANTI-TRUST LAWS:

See topic 3.13 Monopolies, Restraint of Trade and Competition.

3.02 BANKS AND BANKING:

Banks in Poland consist of state banks, cooperative banks, and banks formed as joint stock companies. Specialized banks are mortgage banks formed as joint stock companies. Under certain conditions banks may operate savings-construction societies as separate part of such banks' activity. Primary Polish banking legislation is Banking Law of Aug. 29, 1997 and Law on National Bank of Poland (NBP) of Aug. 29, 1997. Supervisory authority for banks is Polish Financial Supervisory Authority – Financial Supervision Commission (http://www.knf.gov.pl) (see also subhead Financial Market Supervision, infra).

Founders of banks in form of joint stock company may be legal or natural persons. Except when founder is State Treasury, foreign (i.e., having its seat outside EU) or domestic bank, credit institution (i.e., entity having its seat in EU country conducting activity consisting of accepting deposits and granting loans or issuing electronic money based on consent of relevant supervisory authority), domestic or foreign insurer, or international financial institution, number of founders cannot be smaller than three persons. Charter is granted to state bank by Minister of Treasury in agreement with Minister of Finance and in consultation with Financial Supervision Commission. Charter of joint stock company bank is adopted by bank founders. Joint stock company banks may be established with consent of Financial Supervision Commission, and in conformity with provisions provided by Comm.Comp.C. Acquirer of shares of bank in form of joint stock company is obliged to inform bank on acquisition if acquired shares, also together with previously held shares, entitle to achieve or obtain 5%, 10%, 20%, 25%, 33%, 50%, 66% or 75 of votes at bank's General Assembly and bank is obliged to inform Financial Supervision Commission of such acquisition. Party intending to directly or indirectly acquire shares of bank is obliged to obtain consent of Financial Supervision Commission for exercising voting rights from shares on bank's General Assembly if as result of acquisition of shares such shareholder achieved or exceeded 10%, 20%, 25%, 33%, 50%, 66%, 75% of votes at bank's General Assembly. Above requirements are applied accordingly to number of shares irrespective of number of votes if bank's statute provides for privileges for certain shares, it is also required in case that achieving or exceeding certain thresholds results from changes to bank's statute. Disposal of certain stakes of bank's shares requires prior notification of Commission. Notification obligations apply also to acquisition and disposal of banks' convertible bonds and depositary receipt. Foreign banks and credit institutions may open representative offices in Poland subject to consent of Financial Supervision Commission. Such representative office's activity may consist only of advertising or promotion of its parent institution. Credit institutions may undertake activity in Poland through branch or on cross-border basis. In such case they are allowed to carry on in Poland activities to which they are entitled in their host country on basis of consent of relevant banking supervision authority. Branch of credit institution may only be established subject to receipt by Financial Supervision Commission of notice from relevant banking supervision authority, containing information specified by Banking Law. Cross-border activity also requires notice from this authority. Polish law generally applies to activity of credit institution in Poland. Similar rules apply to undertaking activities by Polish banks and financial institutions in other EU countries. Branch of foreign bank may be opened on territory of Republic of Poland subject to permit issued by Financial Supervision Commission in agreement with Minister of Finance.

Basic activities of banks are: accepting monetary deposits, maintaining bank accounts, granting credits, issuing and confirming bank guarantees and letters of credit, issuing bank securities, effecting financial settlements, issuance, settlement and redemption of electronic money. Banks may also undertake other activities provided for in permit issued by Financial Supervision Commission. Banks may outsource certain legal or factual actions connected with conducting banking activity solely on basis of written agreement with entrepreneur or foreign entrepreneur, subject to fulfillment of certain requirements. Such entrepreneur or foreign entrepreneur becomes subjected to consolidated supervision of Financial Supervision Commission. Banks enjoy liberty in undertaking foreign exchange activities which, however may be subject to extraordinary limitations introduced by Council of Ministers. Commencement of bank's operations requires separate permit issued by Financial Supervision Commission. Banks are obliged to maintain financial liquidity. Banks ensure proper protection of property received into custody. Banks, their employees and mandatories are obligated to keep banking secret. Banks may issue regulations which specify following: types of savings deposits and conditions for opening and keeping savings accounts, types of credit granted and conditions of credit and loan agreements, conditions of providing safe-deposit boxes, and other banking services. Provisions of such regulations are binding upon parties unless rights and duties are otherwise stipulated by agreement. Bank may transfer claims towards its debtors or enter into sub-participation agreements with securitization funds or investment companies operating securitization funds. Bank may also transfer claims towards its debtors to corporations which are independent from bank, for purpose of issuance of securities collateralized by such claims. Transfer of claims requires debtor's consent.

Banks may grant and confirm guarantees, sureties and letters of credit to residents and foreigners according to their instructions and within limits. Guarantee and letter of credit must be in writing to be valid. While respective provisions of C.C. are applicable to bank guarantees, bank's obligation is always financial. In turnover with other EU member countries, banks realise clients' transfer orders and cash payment orders in way of cross-border transfers. Banks perform foreign exchange control within scope of provisions of foreign exchange law.

Banks may be established by foreign persons or persons with their capital participation. Foreign shareholders of banks have right to transfer abroad without restrictions dividends received from bank, proceeds from sale of bank's shares, proceeds from bank's liquidation, money received in connection with expropriation of bank's shares.

NBP (http://www.nbp.pl) is central State bank. NBP is managed by President of NBP, who is appointed and removed by Parliament upon motion of President of Republic of Poland. Activities of NBP include issuing legal tender of Republic of Poland, granting refinancing credits to other banks, carrying out monetary settlements, organizing operations in foreign currencies in accordance with provisions of foreign exchange law, performing cash service of State budget and activities as provided in Law on NBP.

Financial Market Supervision is regulated by Act on supervision over financial market which was enacted on July 21, 2006 and entered into force on Sept. 19, 2006. It introduced consolidated supervision over financial market through establishing Financial Supervision Commission which replaced authorities supervising segments of Polish financial market before that date: Securities and Exchange Commission, Insurance and Pension Funds Supervision Commission, and Banking Supervision Commission. Financial Supervision Commission took over employees of abandoned Commissions. Financial Supervision Commission is composed of Chairman appointed by Prime Minister, two deputy chairmen appointed by Prime Minister upon motion of Chairman and four members: Minister of Finance or his appointed representative, Minister of Labor and Social Policy or his appointed representative, President of NBP or delegated Vice President of NBP and representative of President of Republic of Poland. Term of office of Chairman of Financial Supervision Commission is five years. In principle, Financial Supervision Commission acts collectively, while Chairman has casting vote in case of equal number of votes for and against certain resolution. Financial Supervision Commission is supervised by and subordinated to Prime Minister.

General purposes of supervision over financial market are: assuring proper functioning of that market, its stability, safety and transparency, trust in financial market as well as assuring protection of interests of participants of financial market through realization of goals defined in specific acts regulating each of financial market segments. Act did not substantially modify regulations of aims and methods of supervision over each segment of financial market. Full scope of supervision performed by Financial Supervision Commission will includes: insurance market, pension market, capital market (including commodity exchanges), banking market as well as supervision over electronic money institutions and supplementary supervision (relating to participants of financial conglomerates). Act also established arbitration tribunal for settlement of disputes between participants of financial market, which is attached to Financial Supervision Commission C.C.P. regulations apply to proceedings conducted before tribunal.

Money laundering is regulated by Law of Nov. 16, 2000 on Counteracting Introduction into Financial Circulation of Property Values Derived from Illegal or Undisclosed Sources and on Counteracting Financing of Terrorism, as amended. Law regulates principles and procedures in counteracting use of assets from illegal or undisclosed sources in financial dealings, and also duties of entities involved in financial dealings with regard to gathering and disclosing information.

Government administration authorities responsible for counteracting use of assets from illegal or undisclosed sources in financial dealings are Minister of Finance and General Inspector of Financial Information. Tasks of General Inspector include in general: obtaining, gathering, processing, analysing of information pursuant to this Law, actions to counteract use of material assets from illegal or undisclosed sources in financial dealings.

Law provides that financial organs and persons keep confidential information secret.

Institution receiving instructions from client to perform transaction worth in excess of [Euro]15,000 (with certain exceptions for life and pension insurances; in casinos, threshold is set for [Euro]1,000) shall register such operation, both when this transaction involves single operation and when several operations are performed in circumstances suggesting that these operations are linked together. Above presented requirement applies also to transactions of any value and of whatever character if circumstances suggest that funds involved in these transactions may originate from illegal or undisclosed sources. Law provides range of institutions and entities which are obliged to keep register of above mentioned transactions along with documents pertaining to these transactions for period of five years. Obliged institutions shall identify both their clients whenever they receive from them instructions to perform operation and beneficiaries of transactions. Obliged institutions shall provide General Inspector with information about above mentioned transactions.

Information concerning transactions shall in particular include following data: (i) date and place of transaction, (ii) personal data of person carrying out transaction, (iii) sum and currency of transaction and its nature, (iv) number of bank account used to carry out transaction, (v) data concerning natural person, legal entity status in whose name transaction was carried out, (vi) identity/name and address of transaction beneficiary.

Obliged institution which is supposed to carry out transaction in circumstances justifying suspicion that this transaction is linked with perpetration of offence referred to as money laundering shall forthwith inform General Inspector about this fact in writing, indicating date of planned transaction as well as any other information about such transaction which obliged institution has. General Inspector may within 24 hours of receipt of notice request suspension of transaction for up to 48 hours. Public prosecutor may impose restriction on transaction for up to three months, restriction is valid unless within three months court does not decide on property injunction. Suspension does not create any liability on part of obliged institution. In case that restriction is imposed in breach of law State Treasury is liable for so caused damages.

See categories 2 Business Organizations, topic Corporations; Foreign Trade and Commerce, topic Foreign Exchange; Introduction, topic Currency.

3.03 BILLS AND NOTES:

Poland is party to Geneva Convention of June 7, 1930 concerning bills of exchange, and of Mar. 9, 1931 concerning checks. Polish law, like laws of all countries party to those conventions, sharply distinguishes between bills of exchange and checks. In fact, such matters are covered by two different laws, one dealing with bills of exchange of Apr. 28, 1936, and other dealing with checks of Apr. 28, 1936. Bills of exchange are based upon personal credit of parties while check drawn on bank is covered by adequate funds of maker at bank.

Bills of exchange law deals with two types of instruments. One is “drawn bill of exchange”, corresponding to American bill of exchange; other is “own bill of exchange”, corresponding to American promissory note.

Drawn bill of exchange must contain: (1) express designation as bill of exchange in any language in which bill is drawn, (2) unconditional order to pay sum certain, (3) name of drawee, (4) time of payment, (5) designation of place of payment, (6) name of person on whose behalf or on whose order payment ought to be made, (7) day and place of issuance of bill, and (8) signature of issuer. If one of above-mentioned requirements is missing, valid bill of exchange does not exist. There are, however, certain exceptions to these rules, most importantly that bill of exchange on which time of payment is absent, is considered payable at sight and bill of exchange on which place of issuance is missing is considered issued in place appearing next to issuer's name. Rules on drawn bills of exchange are applicable to own bill of exchange to extent not inconsistent with nature of own bill of exchange.

Bill of exchange may be drawn on issuer or on account of third party. Reservation of interests made by issuer is only effective on bill of exchange payable at sight or at certain time after sight. If amount is expressed in figures and words, words prevail in case of discrepancies. Validity of genuine signatures on instrument is not affected by invalidity of other signatures (e.g., in case of minority, forgery). Bills may come due at sight, at certain time after sight, at certain time after day of issuance or on certain date. Bills with another date of payment other than aforementioned or which are payable on consecutive dates are void.

Issuer of bill is liable for its acceptance and payment although his liability for acceptance can be eliminated. Unless eliminated, he has to pay to legal holder amount stated on bill discounted for payment before maturity.

Every bill of exchange can be transferred by endorsement. When issuer inserts words “not on the order”, or other tantamount reservations on instrument, bill can be effectively transferred only by simple assignment. Endorsement must be unconditional. Conditions regarding endorsement are treated as if they were not written. Endorsement on bearer is regarded as endorsement in blank. Legal holder is regarded as anyone who has bill and shows his right with non-interrupted series of endorsements and last can be in blank. Persons against whom rights of bill of exchange are vindicated cannot bring to their own defense objections based on personal relations with drawer or with previous bill holders, unless holder, when acquiring bill of exchange, was consciously acting to cause damage to debtor.

Billholder, or any person who is in possession of bill of exchange, may submit it to be accepted by drawee in place of his domicile. By accepting bill of exchange, drawee is put under obligation to pay bill when payment comes due. Bill payment may be secured by guarantee for bill of exchange in its entirety or part of bill's amount. Holder of bill which falls due on certain day or at certain later time, or after sight, may submit it to be paid on first day or within next two days after bill falls due. Billholder is not required to accept payment before bill falls due. Drawee, when paying before bill falls due, does so at his own risk. Anyone who pays on due date is therefore relieved from obligation, unless he is acting upon deceit or displays gross negligence. Drawee is required to check chain of endorsements, but not signatures of endorsers. If bill was drawn up for currency which is foreign at place bill falls due, bill amount may be paid in domestic currency, according to its value as of payment date. Foreign currency value is established according to customs of place of payment. Drawer, however, may provide that amount paid is to be calculated pursuant to exchange rate, as such is set forth in bill.

Refusal of acceptance or payment must be confirmed by public statement called protest because of nonacceptance or nonpayment. Protest because of nonacceptance is to be executed in form that states bill must be submitted to be accepted. Protest because of nonpayment of bill to be paid on certain day, after certain time following such day, or upon presentment, is to be made within two business days following payment date. If drawee ceased to pay debts, or execution concerning his property was conducted unsuccessfully, billholder may exercise his recourse remedy only after submitting bill to drawee to be paid and after executing protest.

Billholder must, within four business days following protest, notify his endorser and drawer. Notification can be done by any method, even by simply presenting bill. Anyone who drew bill, accepted it, endorsed it or guaranteed it is jointly liable to billholder. Protest must be drawn up by notary public.

Holder of protested bill is entitled to amount of bill plus cost of protest and other expenses, 6% interest from date of maturity, and for bills issued and payable in Polish legal tender, statutory interest rate, and commission of not over 1/6% of amount of bill in case of absence of contract. One who cashes bill is entitled to be reimbursed for what he paid to previous holder plus his own expenses, plus 6% interest from payment date, and for bills issued and payable in Polish legal tender, statutory interest rate, and commission of not over 1/6% of amount of bill in case of absence of contract. Subject of recourse may, unless provided otherwise, execute his right by issuing new bill of exchange for one of jointly liable persons, paid at sight and in place of domicile of party liable in return.

Period of limitations for action against acceptor is three years, beginning with payment date. Claims of billholder against endorsers and drawer are subject to one year's limitation, starting from day of protest, executed in proper time. Claims of endorsers against each other and against drawer are subject to six month limitation, commencing day endorser redeemed bill, or he himself was sued on that basis.

Capacity of person to incur liabilities under bill is determined by law of his nationality unless such law declares another law to be applicable. Liability incurred by alien is, however, binding if incurred in country according to law of which liability would be valid. As to form of obligation, lex loci is applicable, but obligations of Polish nationals need only comply with requirements of Polish law. Substantive law applicable to obligations of acceptor is law of place of payment. Obligations of other persons signed on instrument is determined by law of country where signatures were affixed. Country of payment's law determines whether bill may be accepted only in part and whether holder must accept partial payment and measures which must be taken in case of loss or theft of bill. Law of place where bill was issued determines time within which recourse must be taken. Form and limitation of protest action are ruled by law of country in which protest is taken.

Checks should be drawn on banker, who has funds of issuer on deposit subject to order, according to express or implied contract entitling issuer to dispose of such funds through checks. Instruments issued without compliance with this provision are regarded as checks in spite of noncompliance. On checks issued and payable in Poland, only banker can be indicated as drawee. Order to pay, which does not correspond to this provision, is invalid as check. Check is not subject to acceptance. Check must contain: (1) designation as check in text of instrument in language of issuance, (2) unconditional order to pay sum certain, (3) name of person which ought to pay, (4) designation of place of payment, (5) designation of day and place of issuance of check, and (6) signature of issuer. If one of above-mentioned elements is absent, document is not considered check unless some exception foreseen by law exists. Checks are payable at sight and may be drawn on (1) indicated person with additional provision “to the order” or without it, (2) indicated person with additional provision not “to the order” or another provision of equivalent meaning, or (3) to bearer. Check without indication as to whom it should be paid is also considered check to bearer.

Check drawn on indicated person, with or without provision “to the order” may be transferred by endorsement, which should be unconditional. Endorsement to bearer is equivalent to endorsement in blank. Drawer or check's holder may disallow payment of cash for check by writing across its face words “transfer to the account” or another equivalent phrase. In that event, check may be used by drawee only for clearing of book account by crediting, clearing or debiting. Book account clearing bears effects equivalent to regular payment.

Checks drawn and payable in same country should be presented for payment within ten days after they are drawn. Checks drawn in country different from place of payment should be presented for payment within 20 or 70 days, depending upon whether drawing and payment place are in same or different parts of world. For this purpose, checks drawn in European countries and payable in country located on or across Mediterranean Sea are considered drawn and payable in same part of world. Starting day of terms specified above is day indicated on check as date of drawing. Revocation of check may be effective only after time to present check expires. Revocation of check payable in Poland may be also effective if check was drawn on name or “to the order,” and sent by drawer directly to drawee and revoked before drawee fulfilled his obligation. If check has not been revoked, drawee may also pay after term for check presentment has expired. Check may be presented for payment even before date of issuance noted thereon. All parties whose obligations result from check are jointly liable in relation to checkholder. Checkholder may execute recourse against endorsers, drawer and other debtors if check was not paid when presented at proper time and refusal to pay was confirmed by protest, drawer's note on check, which shall be dated and state day of presentation, and/or statement of clearance chamber, dated and confirming that check was deposited for clearing at appropriate time, and was not redeemed. In general, payer has similar rights of recourse against previous endorsers as in case of bills of exchange.

Claims of checkholder resulting from recourse against endorser, drawer and other debtors is subject to six month limitation, starting from day of payment. Claims, resulting from recourse that debtors obligated to pay check have against each other, shall be subject to six month limitation, starting from day debtor redeemed bill, or he himself was sued on that basis.

Conflict of laws in case of checks is governed by similar principles as those for bills of exchange. Determination of who can draw upon check is governed in accordance with law applicable in country of check's payment. Laws of country where check obligations were incurred govern consequences of such obligations. Place of check's payment plays crucial role and determines, inter alia, following: (1) whether check may be paid only upon presentment, or some time after presentment and, what consequences are of affixing postponed date of issuance, (2) presentment terms, (3) whether holder is entitled to demand partial payment and whether he is required to accept it, and (4) whether drawer may revoke check or oppose its payment.

3.04 BROKERS:

Polish law does not recognize special type of broker contract. Legal basis for brokerage may be agency contract which is durable and commissioned. Maritime Code of Sept. 18, 2001 regulates maritime brokers and Laws of May 22, 2003 on Insurance Mediation Activities and of July 29, 2005 on Trading in Financial Instruments deal with insurance brokers and securities brokers. Law of Oct. 26, 2000 on commodities exchange regulates commodities brokers. Law of Aug. 21, 1997 on Real Property Management regulates real estate brokers. Maritime brokerage firms act as intermediaries for monetary gain in transactions involving contracts of buying and selling, shipping, towage and maritime insurance as well as other contracts relating to maritime trade. Maritime brokers may act as intermediaries for both parties. Maritime broker must inform party when he decides to act on behalf of other party, and when he mediates he must take into account interests of both parties. Insurance and reinsurance brokerage may be conducted either by natural or legal person who has obtained permit from Finance Supervision Commission (http://www.knf.gov.pl) and who has been entered into register of insurance brokers.

Brokerage activity is regulated by Law on Trading in Financial Instruments. Brokerage activity may be conducted by investment firms, which term includes: brokerage house, bank conducting brokerage activity, foreign investment firm conducting brokerage activity within territory of Poland and legal person having its seat in WTO or OECD Member State which conducts brokerage activity in Poland. Brokerage house may be organized in form of joint stock or limited liability company, limited or limited-joint stock partnership in which general partners are exclusively at least two brokers or investment advisers, partnership of professionals or registered partnership in which partners are exclusively at least two brokers or investment advisors—any of these entities must have its seat in Poland. Investment firms may on basis of written agreement employ agents (being natural or legal persons or entity not having legal personality) to temporarily or permanently perform intermediation within scope of investment firm activity, on its behalf and account. Investment firm's agents may not be entrusted with brokerage activity. Commission will maintain investment firms agent list.

Brokerage activity includes in particular: receiving, transferring and performing orders to acquire or dispose so called broker's financial instruments (which term includes most categories of financial instruments, see topic 3.16 Securities), acquiring and disposing broker's financial instruments on investment firm's own account, managing portfolios consisting of at least one broker's financial instrument, offering broker's financial instruments, providing services in performance of underwriting agreements as well as execution and performance of other alike agreements pertaining to broker's financial instruments. Brokerage activity may also include maintaining brokerage accounts, investment advisory, organizing alternative trade system and other activities enumerated by Law, if performed by investment firm. Undertaking brokerage activity requires consent of Commission. Law specifies number of brokers and investment advisers which investment firm is obliged to employ as well as other specific requirements for investment firms. Law provides requirements which must be met to enter person to list of brokers or investment advisers.

Real estate broker is natural person meeting requirements and holding qualifications prescribed by Law on Real Property Management and holding license issued by Minister of Construction (http://www.mb.gov.pl). Real estate brokerage services are defined as delivery of services connected with execution of agreements regarding purchase, sale or lease of immovable property.

With respect to companies with foreign participation seeking to engage in real estate brokerage, see category 15 Foreign Trade and Commerce, topic 15.04 Foreign Investment.

3.05 CARTEL LAW:

See topic 3.13 Monopolies, Restraint of Trade and Competition.

3.06 COMMERCIAL LAW:

Until Apr. 23, 1964, when C.C. became effective, there was formal distinction between civil and commercial law. Commercial law was regulated by Comm. C., which was composed of two sections: one on “merchant” and one on “commercial activities”. Introductory provisions of C.C. repealed many provisions of Comm. C. with exception of provisions concerning commercial partnerships, limited liability companies and joint stock companies, tradename, prokura (for explanation of this term see category 23 Property, topic 23.03 Powers of Attorney) and commercial register. Provisions of Comm. C. (arts. 518-524 and 531) remained in force within scope of foreign trade. Law on introductory regulations of C.C. provided that in respect to foreign trade relations provisions of C.C. concerning written form for purposes of evidence do not apply, and moreover, that seller's liability for defects of sold property may be limited or excluded subject only to reservation that such limitation or exclusion is ineffective if seller deceitfully concealed existence of defect from buyer. Latter rule, however, lost its significance after reform of C.C. in 1990. As of Jan. 1, 2001 all these regulations of C.C. were replaced by Act of 1997 on National Court Register and Comm.Comp.C.

Despite recent rapid growth of number of business entities operated as enterprise, state owned enterprises and cooperatives remain economically important legal form of enterprise operation. Consequently, law related to these entities plays important role in law of business relations.

As of Aug. 21, 2004 new Law on Freedom of Business Activity of July 2, 2004 was introduced which replaced Law on Business Activity of Nov. 19, 1999 and establishes general rules of conducting business activity applying to all entrepreneurs. Apart from general rules it regulates issuance of concessions and permits for certain activities, establishments and operations of branches and representative offices of foreign entrepreneurs (see category 15

Foreign Trade and Commerce, topic 15.04 Foreign Investment), state support for micro, small and medium size entrepreneurs, register of economic activity (see category Commercial Law, topic Commercial Register), supervision over activity of entrepreneurs. It does not regulate corporate matters of business entities, antimonopoly issues, unfair competition, etc.

Legal foundation for state enterprise as legal entity operated in form of enterprise was Law of Sept. 25, 1981 on State Enterprises, as amended, and regulations of Council of Ministers of Nov. 30, 1981, as amended. Significant supplement to these acts were Law of Jan. 31, 1989 on Finances of State Enterprises and Law of Sept. 25, 1981 on Self-Governance of State Enterprises.

Legal status of cooperatives is based upon Cooperative Law of 1982, which is undergoing constant revisions and Act of 2000 on Housing Cooperatives, as well as Act of Dec. 14, 1995 on Cooperative Savings and Loans Societies. Role of cooperatives in Polish law is to be maintained as it is in other European countries, but legal regulations are being adjusted to model that of countries with free-market economy.

There are two opinions about state enterprise as legal form of conducting business activities. Belief is that this form cannot be reformed, in economic sense, for purposes of operating effective enterprise. Consequence of this idea is privatization. Another belief is that they may be subject to appropriate commercialization, which is necessary since they will remain common form for carrying out business activities in Poland. This resulted in simultaneous changes of regulations on state owned enterprises and financing, which were primarily aimed at transformation of state enterprises into joint stock companies with State Treasury as sole stockholder.

Privatization endeavors are reflected in Law of Aug. 30, 1996 on Commercialization and Privatization of State Enterprises. Law on Commercialization and Privatization of State Enterprises provides for two methods of privatization i.e. asset privatization (direct privatization) and capital privatization (indirect privatization). Asset privatization consists of transfer of assets of liquidated small or medium size state enterprise to investor. Capital privatization consists of sale of shares to investor of company established as result of transformation of state enterprise (its commercialization).

Polish law on commercial relations consists of many separate regulations such as: laws on bills of exchange and checks, bankruptcy and restructuring law, banking law, insurance law, transportation law, industrial property law, securities law and some chapters of air and maritime law.

European Council Regulations No. 2157/2001 on Statute for European Company (SE) and Council Directive 2001/86/EC of Oct. 8, 2001 supplementing Statute for European Company with involvement of employees and Council Regulation (ECC) No. 2137/85 of July 25, 1985 on European Economic Interest Grouping (EEIG) together with fact of Polish accession to European Union resulted in Law on European Economic Interest Grouping (EEIG) and European Company (SE) which came into force on May 19, 2005. This Law, along with Council Regulations and Directives, regulate EEIG and SE establishment, registration and functioning. It also sets rules of employees' involvement in SE.

European Council Resolution No. 2157/2001 provides that company may be set up within territory of community in form of European public limited liability company (Societas Europea) on conditions and in manner laid down in Regulation. SE has legal personality. Capital of SE is divided into shares and subscribed capital may not be less than [Euro]120,000. If laws of Member State require greater subscribed capital for companies carrying certain types of activity, such laws shall apply to SEs with registered offices in that Member State. Polish law requires higher share capital among others for banks and insurance companies. Shareholder is not liable for more than amount he has contributed.

Registered office of SE must be located within community, in same Member State as its head office. SE with its registered office in Poland shall be registered in Poland; registration is made by decision of registry court proper for location of its registered office. It shall be entered into Register of Entrepreneurs being division of National Court Register. Notice of SE's registration and of deletion of such registration as well as change of SE's registered office shall be published for information purposes in Official Journal of European Communities after publication in Poland. For this purpose Polish Central Information of National Court Register transmits data to be published in Official Journal to Office for Official Publications of European Communities.

SE shall comprise general meeting of shareholders and either supervisory organ and management organ (two-tier system) or administrative organ (one-tier system) depending on form adopted in its statutes. Two-tier system corresponds to solutions applied in Polish legal system to joint-stock companies. In matters not regulated by European Council Regulation No. 2157/2001 or Polish SE Act it refers to provisions of Polish Commercial Companies Code on both supervisory and management board, with those on management board being applied in case of doubts.

EEIG also shall be entered into Register of Entrepreneurs being division of National Court Register. In matters not regulated by Council Regulation No. 2137/85 or Polish SE Act it refers to provisions of Polish Commercial Companies Code on registered company.

See category 23 Property, topic 23.04 Privatization.

3.07 COMMERCIAL REGISTER:

In Poland many registers have been maintained for economic matters: commercial register, register of cooperatives, state enterprise register, register of economic activity and foreign enterprise register. Foreign enterprise register was maintained only for enterprises established and acting under Law of July 6, 1982 on principles of conducting economic activity in Poland by foreign persons and entities, which law is losing significance because since Jan. 1, 1989 no new foreign enterprises might be established under it. Limited liability companies or joint stock companies established under Law of June 14, 1991 on Companies with Participation of Foreign Parties were registered in commercial register as other like domestic corporations. Commercial register operated according to order of Minister of Justice of July 1, 1934 and was maintained by regular court acting as register court for this type of activity. It still exists but no new entries or changes are made - in such case, company is entered to National Court Register.

National Court Register.

As of Jan. 1, 2001 by virtue of law of Aug. 20, 1997 National Court Register replaced Commercial Register and several other registers maintained for different types of business entities such as e.g. State enterprises and cooperatives, as well as nonbusiness entities, such as e.g. associations and foundations. New entry relating to “old” company requires its transfer to National Court Register. It is composed of three following sub-registers. First for entrepreneurs, to which following entities will be entered: (i) Commercial partnerships, registered partnership, partnership of professionals, limited partnership, limited joint stock partnerships, (ii) European economic interest grouping, (iii) limited liability companies, (iv) joint stock companies, (v) European companies, (vi) cooperatives, (vii) state enterprises, (viii) research and development units, (ix) foreign entrepreneurs acting based on Law of 1982 (see category 15 Foreign Trade and Commerce, topic 15.04 Foreign Investment), (x) mutual insurance companies, (xi) other legal persons if they conduct business activity (such as some associations and foundations), (xii) branches of foreign companies acting in Poland, and (xiii) main branches of foreign insurance companies. Second for nonprofit organizations: (i) Associations, (ii) other social and professional organizations, (iii) foundations, and (iv) public health care establishments. Third for insolvent entrepreneurs: (i) Individuals, (ii) partners liable with their entire property for debts of partnership, (iii) debtors obliged by courts to disclose property and, upon motion of creditor, those who failed to pay amounts adjudicated in enforceable title, (iv) persons who are deprived of right to conduct economic activity for their own account and be member of supervisory authority, representative or agent of commercial partnership, corporation, state enterprise or cooperative, and (v) debtors referred to in art. 1086 §4 of C.C.P. (i.e. alimony debtors).

Registers are held by district courts (registry courts) in Information Technology (IT) system according to unified regulations. There is one registry court for each voivodship or part of it. National Court Register is open to public. Everyone may review registry files of entrepreneurs being legal persons. Review of files of other entities requires consent of president of registry court. Everybody has access to data contained in National Court Register through Central Information Desk. Central Information Desk issues certified copies and excerpts from Register as well as official acknowledgments. Data contained in Register may not be removed therefrom unless provided by law.

Entries to Register are made upon applications unless law provides for making entries ex officio. Applications are to be filed on official forms, within seven days from date of occurrence giving rise for entry, unless law provides otherwise. Failing application within this time, court may require application under pain of fine. In case of further failure court may appoint receiver for subject entity. Court examines documents as to compliance of form and substance with law. Court examines factual accuracy of documents in case of justified doubts relating thereto. Entry should be executed within seven days of filing of application and if hearing is required, within one month. Entry is effective upon introduction of data contained in respective registry court's decision to IT system. Governmental and self-governmental authorities, courts, banks, bailiffs and notaries are obliged to forthwith inform registry courts of occurrences giving rise to entry to Register ex officio. Provisions of C.C.P. apply to procedural aspect of registration.

In entrepreneurs' register name, legal form and statistical number of each entrepreneur entered there as well as number which it had in previously existing register are disclosed. Detailed scope of information for each type of entrepreneurs is provided for by Law of 1997. Entries relating to entrepreneurs are published in official gazette.

Entry of already existing entrepreneur to entrepreneurs' registry is effected upon motion filed on official form with heretofore court or other registry authority. Motion together with registry file of entrepreneur is then transferred to new registry court. Motions should have been filed by Dec. 31, 2003. After this date currently existing entries in old registers lost validity. Entries of existing nonprofit entities are made ex officio.

Register of Economic Activity is held by communes (gminy) pursuant to provisions of Law on Business Activity of Nov. 19, 1999, which will remain in force until Mar. 30, 2009. It is maintained for individuals conducting business activity (including EU citizens who conduct business activity in Poland). Entries are made upon application. Starting from Apr. 1, 2009, register of economic activity shall be regulated by Law of July 2, 2004 on Freedom of Economic Activity.

Other registers in Poland are: (1) Official register of national economy entities (REGON), (2) ship register, (3) patent register and (4) trademark register. Official register of national economy entities is maintained by President of Main Statistics Office (http://www.stat.gov.pl) for statistics purposes. Ship register is administered by Maritime Chamber (http://www.im.gov.pl) having jurisdiction over ship's home port. Two other registers are administered by Patent Office of Republic of Poland (http://www.uprp.pl).

3.08 COMMODITIES EXCHANGE:

Commodity exchanges are regulated by Law on Commodity Exchanges of Oct. 26, 2000. Law regulates organisation, operation of and supervision over commodity exchanges, commodity clearing houses, commodity brokerage houses and brokers. Commodity exchange may be operated only in form of joint stock company and required initial capital shall amount to 3,000,000 PLN minimum. In case of commodity exchange trading exclusively in goods of specific kind, minimum initial capital shall amount to 1,000,000 PLN.

Law provides also for several other requirements to be fulfilled such as: (i) initial capital of company shall be paid in total before submitting motion to register company, (ii) payment for shares of company conducting commodity exchange cannot result from loans, credits or unevidenced sources, (iii) there can be only one vote per one share, (iv) company shall issue only registered shares.

Conducting business activity as commodity exchange, commodity clearing house and brokerage enterprises as well as entry to list of commodity brokers requires permission of Financial Supervision Commission. Company needs to provide for guaranty of conducting business activity in proper manner. Fee not to exceed equivalent of [Euro]4,500 is collected for permission and payment amounting to 0.015% of value of transactions concluded on commodity exchange shall be incurred by company conducting business activity as commodity exchange. Statute of commodity exchange shall include, besides for requirements provided in Art. 304 of Comm.Comp.C., information on shareholders and sort of goods allowed on commodity exchange. Amendments of statute need to be approved by Commission.

Law also regulates activity of commodity brokers. Commodity broker may be person that fulfils following requirements: has full legal and public capacity, has not been convicted for specified crimes and has passed exam for commodity brokers. In case of commodity brokers conducting activity in other EU countries, exam may be replaced with test of skills.

Commodity broker may be employed by commodity exchange, brokerage home or clearing house, or may act independently on its behalf and its own name. In order to act independently must be member of commodity exchange and enter into agreement with member of commodity clearing house which shall provide settlements and warrant execution by independent commodity broker transactions entered into on particular commodity exchange.

Commodity brokerage house may operate only in form of joint stock company and may issue only registered shares, unless shares are introduced to public trading.

Law prohibits, among others, possession of shares of more than one commodity brokerage house and possession by commodity brokerage house of shares of other commodity brokerage house. For acquiring 10, 20, 33 or 50% of shares of commodity brokerage house, permission issued by Commission is required. Foreign commodity brokerage house conducting activity in EU may operate in Poland in form of branch unless ratified international agreements provide otherwise.

Law also includes provisions on business secrecy and enumerates persons that are obligated to keep it.

Law also provides regulations referring to civil liability for defects of goods introduced to commodity exchange, and damage caused by untrue information, penal liability for, among others, conducting commodity exchange without required permission, disclosure of business secrets, insider trading, providing untrue data and causing artificial increase or decrease of prices of goods introduced to commodity exchange.

3.09 CONTRACTS:

Sources.

C.C. Book One, Title IV “Legal Transactions” with section: “General Provisions” (arts. 56-65), “Conclusion of Contract” (arts. 66-721), “Form of Legal Transaction” (arts. 73-81), “Defects in Declaration of Will” (arts. 82-88), “Condition” (arts. 89-94), “Representation” (arts. 95-1099). Book Three “Obligations” with two kinds of titles: general and concerning separate type of contracts. In first group, most important are: Title I “General Provisions” (arts. 353-3651), Title II “Plurality of Debtors and Creditors” (arts. 366-383), Title III “General Provisions Concerning Contractual Obligations” (arts. 384-396), Title VII “Performance of Obligations and Effects on Non-Performance” (arts. 450-497). In second group—Title XI “Sale” (arts. 535-555), Title XV “Contract for Work and Labor” (arts. 627-646), Title XVII “Lease and Tenancy” (arts. 659-709), Title XVII1 “Leasing” (arts. 7091-70918), Title XIX “Loan” (arts. 720-724), Title XX “Contract for Bank Account” (arts. 725-733), Title XXI “Mandate” (arts. 734-751), Title XXIII “Contract of Agency” (arts. 758-764), Title XXIV “Contract of Sale-Purchase on Commission” (arts. 765-773), Title XXV “Contract of Carriage” (arts. 774-793), Title XXVI “Contract of Forwarding” (arts. 794-804), Title XXVII “Contract of Insurance” (arts. 805-834), Title XXX “Contract of Storage” (arts. 853-859), title XXXI “Contract of Company” (arts. 860-875), Title XXXII “Contract of Suretyship” (arts. 876-887), Title XXXIII “Contract of Donation” (arts. 888-902). C.C. does not contain any reference to customary law. References to custom are of special character, e.g., according to art. 65, §1 “A declaration of will should be interpreted as required by the circumstances in which it was made, by the principles of social co-existence and established customs”. In commercial relations, according to decisions of Supreme Court, established customs prevail over non-mandatory provisions. Reform of C.C. in 1990 introduced new provision concerning contractual freedom: Parties concluding agreement may freely determine their legal relationship as long as its contents or aim is not contrary to nature of relationship, law or principles of social coexistence. INCOTERMS—Definitions of International Chamber of Commerce are customarily used in trade.

Applicable Law.

(Private International Law Act of Nov. 12, 1965).

In legal relations involving foreign party, parties may choose any law to regulate their contract providing that such law is related to obligation. No such requirement exists with respect to contracts governed by Maritime Code of 2001 and Air Law of 1962, as amended. Full freedom of choice of law is professed both in practice and judicial decisions as well as doctrine.

If parties did not select law appropriate for given contract, following rules may apply: (1) Law applicable in seat of stock exchange or public fair, provided that contracts were concluded thereon. (2) Law of joint domicile, providing that parties have joint domicile. (3) If none of above-mentioned rules apply, law provides for specific rules relating to particular contracts. For example: For sales contract, law where seller has his seat; for agency, mandate, work and labor, transportation, forwarding and storage contracts, law where party receiving order has its seat or residence. (4) If none of specific rules is applicable, law of country where contract consummated. Freedom of choice of law does not apply to real estate contracts. In case of real estate, law of country in which it is located is applicable. (arts. 25-30).

Legal capacity is governed by party's national law. Legal capacity of legal entity is established according to law of country in which it has its seat. When transaction is conducted within scope of enterprise operation, law of enterprise's principal place of business governs legal capacity. If foreigner, who does not have legal capacity under his national law, concludes transaction, determination of his legal capacity is governed by Polish law, if required, in order to protect parties acting in good faith. (This rule is not applicable to legal transactions of family, guardianship and succession law.) Form of transactions is controlled by law governing underlying issue, but compliance with law of country in which transaction was concluded is also acceptable. (arts. 9, 10 and 12). (See category 5 Civil Actions and Procedure, topic 5.04 Foreign Law.)

Formation of Contract.

Contracts may be concluded as result of offer and acceptance or of negotiations or of tender or auction. Offers are declarations of intent to execute contract with specific person, specifying essential contract provisions. Offer stating period within which offeror will await reply is binding on offeror until period expires. If no period was specified, offers made in presence of another party, or by telephone or other means of direct long distance communications, cease to bind if not accepted immediately; offers made in other manner cease to bind if time expires in which offeror, in normal course of business, would receive reply sent without unreasonable delay. Public display of item at place of sale at specified price is offer of sale. Acceptance of offer made with reservation concerning change or supplementation of content is considered counter offer except for such acceptance of offer in relations between entrepreneurs where it is considered acceptance of offer unless reserved changes or supplementations change offer in material way. Contract is considered concluded when offeror received declaration of acceptance; or, if such declaration was not required, when other party began performing contract. Announcements, advertisements, price lists and other information, directed to public or particular persons, are not offers, but invitations to conclude agreement. If parties conduct negotiations with aim of concluding specific contract, contract is concluded when parties reach understanding as to provisions which were objects of negotiations. Party who began or conducted negotiations in violation of good economic standards, in particular party who did not intend to conclude agreement is obliged to indemnify other party for damages incurred in connection therewith. If person conducting commercial activity received offer to conclude contract in framework of his activity from person with whom he has ongoing relationship, lack of answer is regarded as acceptance. Model contracts as in particular general conditions, regulations or form contracts issued by one party bind other party if they were delivered prior to concluding contract. When use of such model contracts is customary it is sufficient that other party could have learned of their contents. Latter does not apply to consumers except for minor day to day contracts. Model contracts are to be formulated clearly and unequivocally. (arts. 66-721, 543, 384-385).

Contract may also be concluded as result of written tender or oral auction. Announcement on tender or auction offer should specify at least time, place, terms and object of tender offer. Offer made during oral auction offer expires when another bidder makes higher offer, unless terms of tender offer provide otherwise. Conclusion of contract in oral auction offer takes place upon acceptance of offer. Offer made during written tender offer expires when another offer is chosen or tender offer is closed and no offer is accepted, unless terms of tender offer provide otherwise. Moment of formation of contract in case of written tender offer is determined in accordance with general rules on contract formation. Bidders may be requested to pay certain amount or provide security of payment of such amount (vadium) in order to participate in tender or auction offer process. Vadium is returned to bidders except for vadium paid by bidder whose offer was chosen and who fails to conclude contract. If organizer of tender or auction offer process fails to conclude contract, bidder whose offer was chosen may request payment of double amount of vadium. Party to contract concluded in tender or auction offer process may seek to invalidate such contract if other party or third person acting in concert with other party fraudulently influenced result of tender or auction offer. (arts. 701-705).

Contracts with Consumers.

Concluding contracts with consumers is regulated by Law of Feb. 16, 2007 on Competition and Consumers Protection, Law of Mar. 2, 2000 on Certain Consumers' Rights Protection and Product Liability, Law of July 20, 2001 on Consumers' Credit Law of July 27, 2002 on Special Conditions of Consumer Sale as well as by Law of Aug. 23, 2007 on counteracting unfair market practices. Natural person concluding contract with entrepreneur for purpose not related directly to such person's business activity is considered consumer. Equivocal provisions of contract are interpreted in favor of consumer. Provisions of contract with consumer unfavorable for consumer in manifest way and contradictory to good practice, such as those excluding liability to consumer for his personal injury, limit or exclude liability of entrepreneur for nonperformance or undue performance of contract etc. are considered inadmissible and do not bind consumer unless specifically agreed by consumer. This does not apply to main obligations of parties, including price, if formulated unequivocally.

Contractual provisions are declared inadmissible in court proceeding before Competition and Consumers' Protection Court in Warsaw initiated upon motion of anybody who could become party to questioned agreement, consumers' organizations, spokesmen for consumers or President of Office for Protection of Competition and Consumers (http://www.uokik.gov.pl). Judgment declaring contractual provision inadmissible is published in official gazette and such provision is entered in register of inadmissible provisions held by President of Office for Protection of Competition and Consumers. Register is open to public. Valid and binding judgment has effect in relation to third parties upon entry to register.

Use in contracts with consumers of inadmissible contractual provision which was entered to register, breaching of duty to provide consumers with reliable, true, and complete information, committing unfair market practices and unfair competition acts as well as other unlawful acts against consumers are considered practices infringing consumers' collective interests and as such are forbidden. President of Office for Protection of Competition and Consumers declares entrepreneurs' practice as practice infringing consumers' collective interests and forbids such practice by way of decision. In decision, President may also determine measures leading to discontinuance of results of infringement and impose certain obligations on infringing entrepreneur. Proceedings may be initiated upon motion of any person. Market practice towards consumers is considered unfair if it is contrary to good commercial customs and materially influences or may influence typical consumer's market behavior prior to, upon, or after conclusion of contract; unfair market practices include, in particular, misleading and aggressive practices and applying good practices codes which are contrary to law as well as financing purchases through consumers' consortia or groups. Unfair market practices may lead infringer to civil and criminal liability.

Consumer may, upon written declaration, rescind contract concluded with entrepreneur outside of premises of entrepreneur within ten days from conclusion without giving reasons and with no consequences for consumer. Rescission may not be contingent upon payment of fee by consumer. Entrepreneur should inform consumer of rescission right and hand over rescission form including entrepreneur's name and address prior to conclusion of contract; must also deliver written confirmation of conclusion of contract as well as its terms and conditions. Applicability of above provisions is excluded in relation to certain types and objects of contracts.

Contracts with consumers concluded through distant communication media (such as order forms, letters, phone, fax, TV, Internet or e-mail) without simultaneous presence of parties are considered contracts concluded in remote way if concluded with entrepreneur typically operating in such manner. Consumer is entitled to rescind contract in same manner as in case of contract concluded outside of premises of entrepreneur. Consumer is to be informed of this right through same medium as one used for making offer to him or her. Detailed contents of offer are provided for by law. Entrepreneur has to issue written confirmation of information contained in offer not later than upon commencement of his contractual performance. Consumer may not be obliged to pay price or remuneration before receipt of performance. Place and manner of filing quality claims may not cause excessive costs or difficulty to consumer. Delivery of performance not ordered by consumer is solely at entrepreneur's risk and does not have binding effect upon consumer. Applicability of above provisions is excluded in relation to certain types and objects of contracts.

Conditions of Validity of Contracts.

Contracts concluded by person without capacity to enter into legal transaction (minor under 13 years, persons mentally incapacitated) are void. However, when person concludes contract concerning ordinary, everyday matters, contract is valid when performed, unless contract injures person lacking capacity. Minors under 13 years and persons partially legally incapacitated, have limited capacity to contract. Where persons of limited capacity contract and incur obligations or dispose of rights, consent of person's statutory representative is required to validate contract. Contract concluded without required consent is valid if ratified by statutory representative. Person of limited capacity may ratify contract if full capacity is regained. Person who concluded contract with person of limited capacity may set period within which statutory representative must ratify contract; he is not bound after period passed without ratification. Full capacity to enter into legal transactions is acquired at 18 years of age. (arts. 10-22).

With certain exceptions, intent of person performing legal transaction may be expressed by conduct revealing intent (declaration of will). If law stipulates that legal transaction be written, legal transaction not in that form is invalid only if law so requires. If, by law, legal transactions must be in particular forms (e.g., notarized transaction), they are invalid if not in that form. This is not so where observance of form is required to produce specific consequences of such legal transaction. If requirement of written form is not observed and contract is not invalid, no evidence from witnesses or statements of parties concerning conclusion of contract are admissible in litigation. Exceptions are prescribed by law. C.C. provisions concerning written form for purposes of evidence do not apply to transactions between entrepreneurs. In internal relations, such evidence is admissible if both parties express consent, or if consumer requests such evidence in dispute with entrepreneur or if document makes fact of performing legal transaction probable. Courts may admit above-mentioned evidence, if due to particular circumstances of case, court deems it necessary. Supplementation or change of contract requires form set forth by law for its conclusion. If contract is in writing, termination upon consent of both parties as well as its renunciation or termination upon notice, must be in writing. If contract is concluded in particular form termination by agreement by parties must be in such particular form while renunciation or termination upon notice must be in writing. To observe written form, it is sufficient to sign document stating party's intent. Exchange of documents concludes contract if each document states one party's intent and is signed by that party. (arts. 60, 73-74, 77, 78).

Statement of intent made to another party for sake of appearance is invalid. In case of error as to essence of legal transaction, party may avoid legal consequences of statement of intent. If statement of intent is made to another person, avoidance of legal consequences is permissible in cases of error caused by that person, even if without fault, or if that person knew or easily could have known of error, this limitation does not concern gratuitous legal transactions. If error is intentionally caused by other party, legal consequences of statement of intent made under influence of error may be avoided even when mistake was not significant and when it did not concern content of legal transaction. (arts. 83, 84, 86).

Legal transaction inconsistent with law or designed to evade it, is invalid unless applicable regulation prescribes otherwise. Invalid provisions in legal transactions may be replaced by appropriate provisions of law. Legal transaction not consistent with principles of social coexistence is invalid. If legal transaction is partially invalid, rest remains valid, unless it appears from circumstances that transactions would not have been concluded without invalid provisions. Contracts for performance which is impossible are invalid. Parties who knew about impossibility of performance at time of contract and did not inform other party, must repair injury which other party sustained by concluding contract without knowledge of impossibility of performance. (arts. 58, 387).

Preliminary Contract, Contract for Benefit of Third Party, Contract of Donation.

Contract in which one or both parties bind themselves to conclude specific contract, must define essential provisions of future promised contract. If preliminary contract does not provide for period of time within which promised contract is to be concluded, it should be concluded within time period specified by party entitled to request conclusion of promised contract. If such time period is not specified during one year following entry into preliminary contract, no party may request conclusion of promised contract. If party bound to conclude contract evades conclusion, other party may demand redress of damages sustained. If preliminary contract meets requirements upon which validity of promised contract depends, particularly requirements as to form, party may bring action for conclusion of contract. (arts. 389, 390). If contract stipulated that debtor will fulfill obligation for benefit of third person, that person may demand that debtor fulfill stipulated obligation, unless contract provides otherwise. Stipulations regarding duty to perform obligation for benefit of third person cannot be withdrawn or altered, if third person declares to either party that he wishes to take advantage of stipulation. Debtor may raise objections based on contract against third person. (art. 393). In donative contract, donor obligates himself to gratuitously perform benefit to donee at expense of donor's property. Declarations of donor must be notarized to be binding. However, donative contracts concluded without being notarized become valid if promised performance was carried out. This rule does not override any provisions requiring observance of particular form for declarations by parties because of object of donation. (arts. 888, 890).

Rules of Fulfillment of Contracts.

Fundamental rule for performing obligations is principle of specific performance. This principle is seen in: priority of natural restitution over duty to compensate damage, introduction of duty to accept partial performance, limitation of right to refuse acceptance of performance because of debtor's delay, limitation of possibility of renouncing contract in event of mutual delay, and admissibility of substitute performance. Debtor must fulfill obligations in accordance with content and in manner corresponding to socio-economic purpose and principles of social coexistence; and, if there are customary practices, in manner consistent with customs. Creditors must cooperate in same manner in fulfillment of obligation. Debtors are obliged to display diligence required in relations of that type (due diligence). Due diligence is defined within framework and with consideration of professional character of that commercial activity. Creditors may demand debtor's personal performance only if this appears from content of legal transaction, law or character of performance. If debtor is obliged to provide generic goods and quality is not defined by appropriate regulations, or by contract, and does not appear from circumstances, debtor should deliver goods of average quality. (arts. 354-357).

Debtors may be jointly or separately liable for entirety of performance satisfaction; satisfaction of creditor by any debtor releases rest (joint and several liability). Until creditor is completely satisfied, debtors remain jointly and severally bound. Obligation is joint and several by force of law or legal transaction. If several persons entered into obligation concerning common property, they are jointly and severally bound, unless agreed otherwise. Debtors liable under indivisible obligation are liable to perform as joint and several debtors. (arts. 366, 369, 370, 380).

Creditors cannot refuse to accept partial performance, even though entire claim has become enforceable, unless acceptance of such performance violates established interest. If place of performance is not specified, and does not appear from nature of obligation, it must be performed where debtor was domiciled at time contract was made. Pecuniary payment must be made at place of domicile or principal place of business of creditor at moment of such payment; if creditor changed place of domicile or principal place of business after obligation created, he bears extra cost of remittance caused by change. If obligation is connected with debtor's or creditor's enterprise, domicile or principal place of business of enterprise is decisive with regard to place of performance. If time for performance is not defined or apparent from nature of obligation, obligation must be performed upon demand. If debtor becomes insolvent or, if due to circumstances for which he is liable, security of claim has been considerably reduced, creditor may demand performance, regardless of stipulated time limit. Performance under mutual contracts must occur simultaneously, unless it appears from contract, law or decision of court that one party is obliged to perform its obligation earlier. If mutual obligations must be performed simultaneously, each party may withhold performance until other party performs. Contract is terminated by performance of agreement terms. (arts. 450, 454, 455, 458, 488).

Consequences of Nonperformance of Obligations (Breach of Contracts).

Debtor must redress damage resulting from nonperformance or improper performance of obligation. Debtor is in qualified delay if he does not fulfill obligation within stipulated time limit or, if time limit not specified, when he does not fulfill obligation upon demand by creditor. In event of qualified delay by debtor, creditor may demand redress of resulting damage, regardless of whether he performed. If, however, due to debtor's qualified delay, creditor has lost interest, either completely or to predominant degree, creditor is free to refuse performance and demand redress of damage resulting from nonperformance of obligation. (arts. 471, 476, 477).

If one party delays fulfilling obligation under mutual contract, other party may indicate appropriate additional time limit for performance, under condition that, in event of passing of time limit without performance, it may renounce contract. It may also demand, either without additional time limit, or after its passing without effect, fulfillment of obligation and redress of damage. If right to renounce mutual contract was stipulated in event of nonperformance of obligation within time limit, party entitled may renounce contract without designating additional time limit in event of delay by other party. This is also true where performance of obligation by one party after expiration of time limit would have no effect on other party due to nature of obligation or purpose of contract intended by it and known to other party. Party renouncing mutual contract is obliged to return to other party everything received under contract; it may demand not only return, but also redress of damage resulting from nonperformance of obligation. (arts. 491, §1; 492; 494).

Persons obliged to pay damages are liable only for normal damages. Within above limits and without legal or contractual provision to contrary, redress of damages covers losses borne by injured persons as well as loss of profits. If injured party contributed toward occurrence or extent of damage, obligation to make redress is subject to appropriate reduction, according to circumstances and degree of fault of parties. Redress of damage may take place, either through restitution to former state or payment of appropriate sum of money, at option of injured party. If restitution to former state is impossible, or would entail excessive difficulty or cost to person liable, injured person's claim is limited to pecuniary payment. If redress of damage takes pecuniary form, amount of indemnity is determined according to prices in effect on date of assessment of indemnity, unless particular circumstances require that prices existing at another moment be taken as basis. (arts. 361-363).

If something defined generically is object of obligation, creditor may, in event of debtor's qualified delay, purchase at own expense same quantity of same type of goods or demand their value from debtor in both cases retaining claim for redress of damage resulting from qualified delay. When obligation consists of action, creditor may, while retaining claim for redress of damage, demand authorization by court to perform action at debtor's expense. Creditor is in qualified delay, when, without justification, he evades acceptance of offer of performance, refuses to perform act without which obligation cannot be fulfilled or declares to debtor that he will not accept performance. If creditor is in qualified delay, debtor may demand redress of resulting damage and place object of performance in court deposit. (arts. 479, 480, 486).

Contracts may stipulate that redress of damage resulting from nonperformance or improper performance of non-pecuniary obligation will take form of specified sum (liquidated damages) of payment. Debtor may not release himself from obligation by payment of liquidated damages without consent of creditor. Upon breach of contract, liquidated damages are owed to creditor in amount fixed regardless of amount of damage. Parties cannot demand indemnity higher than stipulated penalty unless parties agree otherwise. Debtor may demand reduction of liquidated damages if obligation was substantially performed as well as in case when liquidated damages are flagrantly exorbitant. (arts. 483, 484 C.C.).

Damages.

See subhead Consequences of Nonperformance of Obligations, supra.

Excuses for Nonperformance.

One premise of contract liability is that breach of contract results from circumstances for which debtor is liable. According to art. 471 “debtor is obliged to redress any damage resulting from nonperformance or improper performance of an obligation, unless non-performance or improper performance was result of circumstances for which debtor is not liable.” Debtor may not be held liable for breach of contract when he proves he is not responsible for breach. If nothing else appears from particular provision of law or legal transaction, debtor is liable for failure to observe due diligence. No person has liability whose breach of contract is due to act of God. Act of God is external event which cannot be foreseen or prevented (e.g., flood, earthquake, lightning striking). Incident is to be understood as event causing nonperformance or improper performance of obligation which occurred despite debtor's due diligence. Parties may determine by contract events which will be considered acts of God. Law itself makes debtor liable for certain fortuitous events, particularly when he is in qualified delay. Debtor may, by means of contract, accept liability for nonperformance of obligation owing to specified circumstances for which, by virtue of law, he is not liable. Stipulation, whereby debtor is not liable for damage intentionally caused to creditor, is not valid. (art. 473). If performance becomes impossible, due to circumstances for which debtor is not liable, obligation ceases to exist. If object of performance has been sold, lost or damaged, debtor is obliged to deliver anything gained in exchange for object as redress of damage. (art. 475).

CISG.

See topic 3.15 Sales, subhead International Sale of Goods.

3.10 INFORMATION TECHNOLOGY, INTERNET AND NEW MEDIA:

Computer programs are regulated by Law on Copyright (see category Intellectual Property) and are copyright protected as literary works if they are creations of individual character, regardless of their value, designation or form. Ideas and principles being basis of any element of computer programs or interfaces are not protected. Originators of computer programs have exclusive author's economic rights, including right to use and dispose of computer programs in any manner. Personal (non-pecuniary) copyright of originators includes authorship to computer programs and right to mark computer programs with originator's name or right to conceal such name, as opposed to personal copyright to other literary works which also includes integrity of works and their accurate use, right to decide on first publication and right to supervise use of works by purchaser.

Once commercial copyright to computer programs is transferred, purchaser may multiply computer programs or their part on any means and in any form, translate, adjust, change sequence or introduce any other changes to computer programs. Above actions do not need approval of originators, provided that they are necessary to properly use computer programs. Without approval of originators, purchaser may also have backup copy made, if it is necessary to use computer programs or observe, research and test functioning of computer programs in order to reveal their ideas and principles, if observation, research and testing is done while implementing, using, transferring and/or storing computer programs.

Commercial copyright to computer programs created by employee in performance of his/her employment duties vests in employer unless employment contract provides otherwise.

E-commerce is regulated to some extent by Law on Protection of Certain Consumer's Rights and Product Liability. Law applies to contracts with consumers entered into without both parties to contract being present simultaneously, including contracts entered into through distant communication media such as catalogue, telephone, radio, television, facsimile, e-mail, or other means of remote communication, provided that seller of services or products is entrepreneur which generally provides services or sells products through such media. Entrepreneur may use, provided it is not at consumers' cost, videophone, telephone, facsimile, automatic dialing device or e-mail to submit offers to consumers only upon their prior approval.

Law requires that at time of submitting offer to consumer, entrepreneur inform consumers of its business name, address, nature and essential features of products or services, price and compensation due for services or products and term and manner of payment, costs and term of delivery, validity period of submitted offer, minimum period for contracts on permanent or recurring performances, costs consumer has to bear for using distant communication media and other material information. In addition, entrepreneur must inform consumers of their statutory right to cancel order.

Consumer who entered into contract through distant communication media is entitled to cancel, in writing, his/her order within ten days following date of contract in case of contract for services or delivery of products in case of sales contract. If entrepreneur failed to confirm above information at delivery of products or services, consumer may cancel order within three months. In case entrepreneur confirms such information later on, three month term is shortened to ten days. Cancellation of order may not be conditioned upon payment of certain amount of money by consumer.

Contract may not require consumer to make any payment before delivery of service or products. If consumer made any advance payment, entrepreneur is obliged to return such payment with interest in case consumer cancelled order.

Consumers, unless contract stipulates otherwise, may not cancel orders in case of contracts for: delivery of software, audio and video records if consumer removed their original packaging; services or products which prices depend solely on prices on capital market; services or products which features are determined by consumer or directly concern consumer; services or products which, due to their nature, may not be returned; delivery of newspapers; lottery and betting services. Consumer may not cancel orders also in case entrepreneur commenced delivery of services or products before end of ten day period, provided consumer's approval for such early delivery.

Rights and privileges of consumers provided in Law may not be limited or excluded, also through choice of jurisdiction other than Polish.

E-commerce is also regulated by Law of July 18, 2002 on Services Rendered by Electronic Way which provides for obligations of persons rendering services by electronic way, rules of exclusions responsibilities thereof as well as rules of protection of personal data.

Database protection is regulated by Law on Database Protection of July 27, 2001 and Law on Protection of Personal Data of Aug. 29, 1997. Under Law on Database Protection subject to protection are databases understood as collection of independent works, data or other materials arranged in systematic or methodical way and individually accessible by electronic or other means if substantial investment in either obtaining, verification or presentation of database contents is required. Protection does not apply to computer programs used in making or operation of databases and authors' copyrights to database contents if they can be deemed individual creation; these are protected by Law on Copyright (see category Intellectual Property).

Law on Database Protection provides for protection rights of database producer, prohibiting extraction and/or re-utilization of whole or substantial part of database contents for 15 years from end of year in which database was completed or made accessible to public. There are three general exceptions to producer's protection: (i) Contents of nonelectronic database may be extracted for private purposes; (ii) contents of all databases may be extracted, for noncommercial purposes, as illustration for teaching or scientific research, if source is indicated; (iii) contents of all databases may be extracted and/or re-utilized for purposes of public security or administrative or judicial proceeding. Liability of persons violating producer's rights is similar to general rules of civil liability contained in Civil Code. Penalty for such violation, being petty offense, is fine.

Producer's protection is applicable to producers from Poland and other EU member states of EFTA member states. Other producers are protected insofar and to extent provided for by international agreements to which Poland is party.

Law on Protection of Personal Data determines limits to use of personal data, protecting of data pertaining to individuals and allowing identification of such individuals, which data is collected and organized within database. Collecting, recording, storing, processing, amending and transferring personal data requires approval of individuals concerned, otherwise must be allowed by laws. Processing of personal data may be performed for public benefit or for benefit of individuals concerned, or benefit of third parties, but only to extent allowed by law. Disclosing of personal data is subject to restrictions and may not infringe rights and liberties of person concerned.

Administrator of database is required to: register database with Office for Protection of Personal Data, inform individuals whose personal data is processed of administrator's name, address, purpose of database, individual's right to review and amend his/her data contained in database and individual's right to refuse to have his/her data included in database; secure database against unauthorized access and comply with decisions of Office for Protection of Personal Data which has right to inspect any database administrator.

Certain sensitive data including race, political views, religion, health, addiction, sexual preference and others may not be collected in database unless specific provision of law allows it or individual concerned gives his/her explicit approval in writing.

Digital signature to allow conclusion of transactions through Internet or electronic mail is regulated in Law on Digital Signature of Sept. 18, 2001. Law regulates following issues: conditions regarding use of digital signature and its legal consequences, business activity in scope of certification services, supervision over entities providing certification services. Law applies to entities having seat or conducting its business activity on territory of Republic of Poland. Certificate issued by entity having its seat abroad and conducting its business activity in scope of certification services abroad, is treated equally with such entity having its seat on territory of Republic of Poland or conducting certification services within territory of Poland, if at least one of following conditions is fulfilled: (i) such entity has been entered into register of qualified certifying entities, (ii) appropriate international agreements so provide, (iii) such entity fulfils requirements of Law and is accredited in EU country, (iv) entity conducting certification services, having its seat on territory of European Community, fulfilling conditions provided in Law, has issued guaranty for that certificate, (v) such certificate has been acknowledged, by virtue of Agreement on European Economic Area or international agreement concluded between European Community and third countries or international organisations, (vi) entity conducting certification services, which issued such certificate, has been acknowledged, by virtue of international agreement concluded between European Community and third countries or international organisations.

Law provides for several definitions as for example: digital signature, safe digital signature, certificate, certificate notification, qualified certificate and attested certificate. Digital signature is defined as digital data, that together with other data to which is attached or logically bound, identifies person placing signature. Safe digital signature means digital signature credited exclusively to person placing signature, is placed through electronic installations being controlled by person placing signature, is connected with data that it was attached to in manner that any later changes are recognisable. Certificate is defined as digital notification helping to verify that data of digital signature is defining person placing signature.

Safe digital signature, which is verified by qualified certificate, provides for consequences regulated in Law, if such signature was placed during period of certificate validity. If such signature was placed during time of suspension of qualified certificate used for its verification legal consequences of such signature occur upon discontinuance of supervision.

Data provided in digital form, covered by safe digital signature are equal in terms of legal consequences to documents signed by hand, unless law provides otherwise.

Safe digital signature constitutes evidence that it was placed by person, which is specified in certificate as person authorised to place digital signature. Digital signature may be marked with time. Marking with time, by qualified entity rendering certification services, results with legal consequences of authenticated date. C.C. provides for definition of authenticated date—if statutory law makes validity or specified effects of act in law dependent upon official authentication of date, such authentication shall be effective also with respect to persons who did not participate in performance of that act in law. Validity and effectiveness of digital signature cannot be refused, based on fact that it exists in digital form, or data required to verify signature does not have qualified certificate or signature was not placed by safe instrument serving to place digital signature.

Conducting business activity in scope of certification services does not require any permission or concession. Such entity is liable for all damages caused by default or improper performance of duties in scope of certification services, unless such default or improper performance is result of circumstances for which entity is not liable and it could not prevent such results despite acting in course of due diligence. Information regarding certification services which, if disclosed could cause damages to certifying entity or securest of certification, is confidential.

Entity rendering certification services issues certification based on written agreement. Invalidity of agreement on rendering certification services does not automatically cause nullity of certificate. Before agreement is concluded, such entity is obliged to provide other party with information on using certificate, manner regarding examination of petitions and conflicts and other important aspects.

Certificate is valid during period provided within. It may be revoked in case of appearance of formal or material violation.

Ministry of Economy (http://www.mg.gov.pl) keeps register of qualified entities rendering certification services. Such register is open to public.

Telecommunication, including rules of conducting and controlling telecommunication activity, rights and obligations of telecommunication entrepreneurs, rendering of common service, protection of services' users, data processing in communication, frequency allocation and others is regulated by Telecommunication Law of July 16, 2004. Pursuant to Law, business telecommunication activity is regulated activity and should be entered into register of telecommunication entrepreneurs, maintained by President of Office of Electronic Communications (http://www.uke.gov.pl). In order to render publicly accessible telecommunication services operator of public telecommunication network is obliged to conduct negotiations concerning conclusion of agreement on telecommunication access. Decision on telecommunication access is made by President of Office of Electronic Communications.

Advertising via Internet is subject to provisions of Law on Preventing and Combating Unfair Competition (see topic Monopolies, Restraint on Trade and Competition) which prohibits advertising contrary to law or public order, offending human dignity or misleading.

Government Agencies.

Internet policy is regarded as part of informative society policy, belonging to competence of Minister of Science and Higher Education (http://www.mnisw.gov.pl).

Licensing.

Activity regarding Internet and/or Internet technologies does not require any license or other permit.

3.11 INTEREST:

Interest on money is due when it results from legal transaction, law, court decision or decision of other competent institution. If interest rate is not defined, statutory rate of interest is due. Statutory interest rate is defined by regulation of Council of Ministers (currently 11.5% per annum in respect to PLN). So called “anti-usury law” of July 7, 2005, which came into force in Feb. 2006, introduced §§21, 23 to art. 359 C.C. Pursuant to these provisions, maximum interest rate resulting from transaction cannot yearly exceed fourfold of lombard rate of National Bank of Poland. If rate of interest resulting from transaction is higher than maximum interest rate, only maximum interest rate is due. Contractual provisions cannot exclude or limit provisions on maximum interest, even if foreign law was chosen as governing one. In such case, provisions of C.C. shall apply. Failing contrary reservation regarding date of payment of interest, interest is due at end of every year. When term of maturity is shorter than one year, interest is due simultaneously with payment in full. If debtor is late in fulfillment of performance of monetary obligations, creditor may demand interest for period of delay even though he has not sustained damage and delay resulted from circumstances for which debtor is not responsible. If interest rate for delay was not fixed in advance, statutory interest is due. If, however, claim bears interest rate higher than statutory rate, creditor may demand interest for delay according to higher rate. In event of debtor's qualified delay, creditor may also demand redress of damages according to general principles. (arts. 359, 360 and 481 C.C.).

3.12 LICENSES, BUSINESS AND PROFESSIONAL:

See topic 3.04 Brokers; categories 15 Foreign Trade and Commerce, topics Foreign Exchange, Foreign Investment, Foreign Trade; Intellectual Property, topic Patents and Topographies; Transportation, topic Motor Vehicles.

3.13 MONOPOLIES, RESTRAINT OF TRADE AND COMPETITION:

In field of monopolies and trade restraints, two major sources of law exist in Poland: Law of Apr. 16, 1993 on Preventing and Combating Unfair Competition (“Law of 1993”) and “Law of Feb. 16, 2007 on Protection of Competition and Consumers” (“Law of 2007”). Law of 2007 is widely applied in practice, especially in respect to market supervision and mergers and acquisitions.

Unfair Competition.

Law of 1993 contains broad provisions, according to which those who injure entrepreneur by means contrary to applicable regulations or established norms (such as commercial honesty), through libel or slander, through inducement of competitors not to perform duties, through falsely marking geographical origin of goods, through counterfeiting goods, through disclosure of technical or commercial secrets of enterprises, etc., must terminate such activities and redress damage caused and possibly provide compensation. Law of 1993 also separately covers dishonest competition acts, such as (a) infiltration of client base of enterprise through any means that can cause persons to whom enterprise offers products, goods or services to falsely believe such enterprise is source of products, goods or services; (b) falsely representing enterprise in such fashion as to confuse customers as to association with competitor, wherever such competitor may exist; (c) dissemination of false information about competitor; (d) limiting access to market for competitors through sale of products or services below their cost of production, inducement of third persons not to sell or purchase from other enterprises, differentiated treatment of clients; and (e) advertising contrary to law or public order, or misleading. Comparative advertising is admissible if it meets several criteria including among others: not being misleading, being honest, objective and verifiable, not bringing competitors, their products or services into disrepute. Law of 1993 considers as acts of unfair competition also selling to consumers goods or services connected with granting to all or part of purchasers premiums different than sold goods or services, unless they are of insignificant value, organizing avalanche sale as well as introducing into market through discount shops goods bearing brands owned by these shop's owner in amount exceeding 20% of such shop's turnover. Commercial courts have jurisdiction in case of civil closures claims based on Law of 1993. Foreign legal and natural persons benefit from Law of 1993 on basis of international agreements or on basis of reciprocity.

Protection of Competition and Consumers.

Law of 2007 contains rules of development and protection of competition and counteracting activities limiting competition of business entities and their associations and practices violating consumers' collective interests which have or may have effect in Poland, as well as determining bodies which have jurisdiction to consider such matters. Law forbids conclusions of agreements limiting competition and abuse of dominant position on market. Law forbids agreements which aim or result in elimination, limitation or other breach of competition on relevant market. List of forbidden agreements in particular includes: (i) establishing, directly or indirectly, specific prices or other terms of sales or purchases of goods; (ii) limitation or control of production or sales and technological development as well as investments; (iii) application in similar agreements with third parties onerous or not uniform terms creating various competition terms; (iv) division of sales or purchases markets; (v) tying conclusion of agreement with acceptance or fulfillment by other party of another act which is not connected with object of agreement; (vi) restricting market access or eliminating from market business entities not party to agreement; and (vii) agreeing by business entities participating in tender terms of offers, in particular regarding scope of works or prices.

Law forbids abuse of dominant position on relevant market by one or more business entities such as: (i) preventing evolution of conditions necessary for formation of development of competition; (ii) dishonest direct or indirect actions affecting prices, including too high or too low prices, long payment terms or other terms of sales or purchases; (iii) limitation of production, sales or technical development to detriment of contractors or consumers; (iv) application in similar agreements with third parties onerous or not uniform terms creating various competition terms; (v) tying conclusion of agreement with acceptance or fulfillment by other party of another act which is not connected with object of agreement; (vi) imposition of onerous contract terms providing entity that imposes such terms with unjustifiable profits; (vii) division of markets by territory, products or persons. Business entity has dominant position if it is able to prevent effective competition in relevant market because it can act significantly independently from competitors, contractors and consumers. Dominant position is presumed when entity has 40% market share.

With minor exceptions agreements concluded in breach of above provisions are entirely or in part null and void. Conclusion of agreements described above is not forbidden if they support improvement of production, distribution of goods or economic or technical development, ensure purchasers or users appropriate part of profits and which (i) do not burden business entities with limitations unnecessary to achieve such aims, (ii) do not create possibilities to eliminate competition on relevant market within scope of significant part of given goods. Council of Ministers may allow conclusion of certain kinds of agreements which meet above premises. Above prohibition also does not apply to agreements concluded between minor market participations.

Practices violating consumers' collective interests as illegal acts of business entity include using provisions of standardized contracts which are entered into register of inadmissible provisions, violating obligation to disclose to consumers true, full and reliable information and unfair or misleading advertisement.

Following actions by business entities and in some cases by natural persons require prior notification to Office for Protection of Consumers and Competition, if: (a) aggregate worldwide sales of merging entities exceeded in preceding year 1 billion EURO or (b) aggregate sales of merging entities in Poland exceeded in preceding year 50 million EURO: (a) Intent to merge; (b) takeover by purchase or acquisition of shares, other securities or in any other manner direct or indirect control on entire or part of business entity by one or more business entities; (c) establishment of business entity by business entities; (d) intent to acquire or subscribe for shares in business entity resulting in obtaining or exceeding 25% of votes at Shareholders Meeting of such entity; (e) assumption by one person of one or more of key management functions with competing entities; (f) commencement of exercise of voting rights from shares acquired as periodical collateral of liabilities or as result of bankruptcy or conciliatory proceeding. Aggregate sales of merging entities include sales by their controlling or controlled entities. Office is obliged, within two months from date when notification is filed, to issue decision agreeing to acquisition if as result of proposed transaction, dominant position is not strengthened and competition on market is not significantly limited. President of Office for Protection of Consumers and Competition may condition his agreement for above concentration, in particular upon (i) sale of entire or part of assets, (ii) losing control over other business entities, (iii) granting licenses to competitor. President of Office for Protection of Consumers and Competition may impose fines on business entities violating provisions of Antimonopoly Law and their managers responsible for such breach. In line with leniency applied by European Commission in cartel cases, also Law of 2007 introduced provisions based on which President of Office for Protection of Competition and Consumers does not impose or imposes reduced fines on cartel participants who disclose cartel to President, co-operate in proceedings, and cease to apply cartel provisions.

President of Protection of Consumers and Competition Office is central organ of governmental administration, and, as such, subject to supervision of Council of Ministers. President of Office for Protection of Consumers and Competition, who is nominated and can be recalled by President of Council of Ministers, heads Office for Protection of Consumers and Competition (http://www.uokik.gov.pl). Prime Minister can form separate branches of this Office and determine their seat, territorial and in rem jurisdiction. Business entities are required to comply with request of Office for Protection of Consumers and Competition to conduct investigation and aid in its completion. Authorized persons have, inter alia, right to: (a) enter into all locations of business entity under investigation; (b) examine all documents of entity under investigation; (c) demand explanation, including written, from employees of entity under investigation; (d) participate in collective meetings of members of entity under investigation; and (e) secure all documents and other evidence. Information obtained during course of investigation is considered secret.

Administrative proceedings envisioned in Law of 2007 are initiated by President of Office for Protection of Consumers and Competition or at notification of any person. Except for proceedings regarding concentration (mergers) such notification does not initiate proceedings but constitutes basis for initiating procedure by President of Office for Protection of Consumers and Competition. Notification is to be given in writing and should include reasons for such proceeding. President of Office for Protection of Consumers and Competition may require decision issued as result of proceedings to be immediately executed. It may also, in connection with decision, determine monetary fine to be paid to State Treasury. Law also permits imposition of monetary fine as sanction for failure to comply with terms of decision. President of Office for Protection of Consumer and Competition is also authority supervising general safety of products introduced to commercial circulation.

See category 6 Courts and Legislature, topic 6.01 Courts.

3.14 NEGOTIABLE INSTRUMENTS:

See topics 3.02 Banks and Banking, Bills and Notes, Brokers, Interest; categories 8 Debtor and Creditor, topic Pledges; Foreign Trade and Commerce, topic Foreign Exchange; Introduction, topic Currency; Mortgages, topic Chattel Mortgages.

3.15 SALES:

Sales are contracts, pursuant to which seller obliges himself to transfer ownership of particular object and buyer obliges himself to accept object and pay seller price. Objects can be movables (personal property) or immovables (real property). Provisions of C.C. governing sales are correspondingly applied to sale of energy and property rights. (art. 555). Property rights may be transferable real rights, such as perpetual lease, real servitude, pledge, or mortgage; rights in intangible goods such as copyrights, patent rights, or utility models rights; or rights of subrogation or assignment. In practice, sale can encompass bundle of several property rights, e.g., enterprise.

Consumer sales are regulated by Law of July 27, 2002 on Detailed Conditions of Consumer Sale and on Amendment of C.C. Consumer sale is sale of tangible good to natural person undertaken in course of enterprise's activity, which good is to be acquired by such person in purpose unconnected with professional or commercial activity. For warranties regarding consumer sales see subhead Product Labeling and Warranties, infra.

Parties to sales contract can specify items to be transferred. In absence of specification, following rules are applied: contract of sale, exchange, donation, or free of charge transfer of real estate to community or to State Treasury or otherwise obliges transfer of ownership to buyer, unless parties have decided otherwise; items defined only generically (fungibles) require actual transfer of possession to demonstrate ownership. Actual transfer of possession is also required for future contracts. (art. 155).

Price in sales contracts may be specified by indicating basis of calculation. If parties stipulate reasonable price, it is assumed that price at time and place of delivery is intended. Benefits, burdens and risk of accidental loss or damage pass to buyer at moment of delivery.

Sales contracts, as rule, do not require any special form. In certain cases, however, special form is required by law for sale to be valid. According to art. 158, “A contract for transfer of ownership in real estate must be in form of notarial deed”. For contract entered into through distant communication media see topic 3.10 Information Technology, Internet and New Media, subheads E-commerce and Digital signature.

If seller must deliver to place which is not place of performance, seller may deliver by entrusting item to carrier engaged in transporting such items. Buyer, however, becomes obliged to pay only after item has arrived and buyer has had opportunity to inspect item. Seller is obliged to furnish buyer with necessary legal and factual information, including instructions for use. If buyer is delinquent in payment, seller may store item at expense and risk of buyer, or may also sell item at buyer's expense. Seller must, however, first establish time limit during which buyer can pay, unless time limit is impractical because item may spoil or incur other damage. Seller is also obliged to immediately inform buyer of subsequent sale. If buyer is delinquent in payment on partial delivery, or if it is doubtful timely payments for remainder will be made, seller may withhold delivery of remainder, and designate appropriate time limit for buyer to secure payment after which, if no payment is made, he may renounce contract. (arts. 544, 546, 551, 552).

Statutory Warranties.

Applicable to non-consumers sales. Seller is liable to buyer if sale item has defect diminishing its value or utility, is of insufficient quality, or was delivered to buyer in incomplete state (“warranty for physical defects”). Seller is also liable to buyer if ownership of sale item is partially or completely vested in third party, encumbered with third party rights or sale item does not exist. Seller is released from liability for warranty if buyer knew of defect upon execution of contract. If object is defined only generically, or object is to be produced in future, seller is released from liability for warranty, if buyer knew of defect at moment of delivery. Parties may extend, limit or exclude liability for warranty. However, in consumer contracts limitations or exclusions of liability for warranty are admissible only in cases provided for by specific regulation.

Exclusions or limitations of liability for warranty are ineffective if seller deceitfully concealed defect from buyer. Seller is not liable for warranty claims for physical defects which arose after passing of risk to buyer, unless defects resulted from cause previously inherent in object. If object sold has defects, buyer may renounce contract or demand reduction of price. Buyer, however, cannot renounce contract if seller immediately remedies defect. This limitation of purchaser's contract termination right does not apply if sale item was already repaired or replaced, unless defects are unimportant. If defective objects are defined generically, buyer may demand delivery of equal amount of objects free of defects and cure of any damages resulting from delay. If items are specially designed and seller is producer, buyer may demand removal of defect, designating appropriate time limit for removal. If time limit passes without cure, buyer may renounce contract. Seller may refuse to cure defect if cure would require excessive cost. If buyer renounces contract or demands reduction of price, he may demand damages resulting from such circumstances unless defect results from circumstances for which seller is not responsible. In such latter case, buyer may seek damages only for damage which he sustained from entering into contract without knowing of defect's existence. If, when goods are shipped to buyer from another place, due to physical defect beyond seller's control buyer renounces contract or demands delivery of item free of defects, he cannot return them without previous consultation with seller and is obliged to arrange for storage at expense of seller, until seller, in ordinary course of business, is able to dispose of it as he considers best. (arts. 556-561, 566, 567).

Buyer loses his rights of warranty for physical defects if he does not inform seller of defect within one month of discovery; or if inspection is usual in given relations, if he does not inform seller of defect within one month after elapse of period during which he could have discovered it through due diligence or inspection. Minister of Economy and Labor may establish shorter time limit for notice of defects of perishables. However, in case of sale between persons involved in commerce, loss of right to warranty occurs if buyer did not inspect items within reasonable time, and did not immediately notify seller of defect and, in event defect came to light later, if he did not inform seller immediately after discovery. Dispatch of registered letter prior to expiration of time limit is sufficient for purposes of notification. Right to warranty for physical defects of items is not lost, in spite of nonobservance of either time limits for inspection or notice to seller about defects, if seller deceitfully concealed defect or assured buyer that no defects existed. (arts. 563, 564).

Buyers, against whom third persons vindicate claims concerning item sold, are obliged to immediately notify seller and ask him to join in suit. If buyer fails to do so, and third person obtains favorable decision, seller is released from liability for warranty of title, insofar as his participation in proceedings was necessary to demonstrate that third person's claims were completely or partially unjustified. If due to legal defect buyer is forced to deliver item to third person, contractual exclusion of liability for warranty does not release seller from duty to reimburse price paid, unless buyer knew rights of seller were in dispute or he purchased item at his own risk. (arts. 574, 575).

Express Warranties (Guarantees).

Applicable to non-consumers sales. If guaranty issuer, e.g. seller or manufacturer of goods issues to buyer written guarantee (express warranty) of quality, it is presumed that guaranty issuer must remove physical defects of sale items or replace sale items, if defects are discovered within time limit specified in guaranty. If no time limit is specified in guarantee, time limit is one year, starting from day when item was delivered to buyer. Unless otherwise provided for in guarantee, guaranty issuer is liable only when defect arose from inherent product defect. Buyer may exercise his rights under statutory guaranty irrespective of his rights under express guaranty. Buyer enforcing claim resulting from guarantee must bring item, at guaranty issuer's expense, to place indicated in guarantee or to place where item was delivered to him, unless it appears from circumstances that defect must be removed in place in which item was situated at moment of discovering defect. Guaranty issuer must perform duties resulting from guarantee within appropriate time, and deliver item to buyer at guaranty issuer's own expense, at place indicated in accordance with above-mentioned rules. Guaranty issuer bears risk of any accidental loss of item from time of delivery to seller to its collection by buyer. If, in fulfilling guarantee, guaranty issuer furnishes buyer with item free of defects, or has made substantial repairs to item sold, guarantee period commences from moment of furnishing new or repaired item. Guarantee period is extended for period during which buyer could not use it. (arts. 577-581).

Sale by Installments.

Installment sales allow buyer to pay seller increments of purchase price over specified time period; and product delivery is made before complete payment. Buyer may pay installments before payment comes due. In event of prepayment, buyer may deduct amount corresponding to appropriate rate of interest of National Bank of Poland. Stipulation of immediate enforceability of unpaid price for delinquent installments must be made in writing and executed with contract of sale. Seller may renounce contract of sale if buyer is delinquent in at least two installments, and amount in arrears exceeds one-fifth of contract price. In such case, seller should designate any appropriate additional time limit for payment. But, if cure period passes without effect, seller will be entitled to renounce contract. Contractual provisions less advantageous to buyer are invalid and provisions equivalent to those presented above are implied instead. (arts. 583, 585, 586).

Conditional Sales.

If seller reserves ownership of movable item until payment is complete, it is presumed that transfer of ownership took place subject to condition precedent. If item is delivered to buyer, reservation of seller's ownership must be in writing, and is effective against buyer's creditors only if document has certified date. If seller reserves ownership, seller may demand any appropriate compensation for use or damage of item upon recovery. Sales on approval or with reservations of inspection are final subject to buyer's inspection and acceptance of item. If no time limit for approval or inspection is specified in contract, seller may designate appropriate time limit. If buyer accepts item without declaring approval or inspection period, and did not designate declaration before passing of term, it is presumed that buyer finds item to be acceptable. (arts. 589-592).

Restriction of Sales or Other Conveyances.

There are works of art and other cultural items whose removal from Poland is regarded as essential loss of Polish cultural heritage. Some of such goods cannot be objects of sale, others can only be sold subject to license to transfer such goods abroad. (See: Law of Preservation of Monuments and Monuments' Custody of July 23, 2003 and Regulations on Transferring of Monuments and Goods of Monument Character Abroad of Apr. 19, 2004.)

Product Labeling and Warranties.

In accordance with Regulation of July 10, 2007 on Labeling of Foodstuffs all foodstuffs designated for final consumers or for use in dining establishments like restaurants, bars, canteens, etc. must be labeled in accordance with specific guidelines set forth in Regulation. Law of July 27, 2002 on Detailed Conditions of Consumer Sale and on Amendment of Civil Code imposes obligation that all products sold should be marked with label in Polish language and contain information on function of product, manufacturer, importer or country of origin, energy consumption, possession of permit allowing for sale on market. Liability of seller for faults of product (inadequate quality) is established on basis of Civil Code and this Law. Seller is required to address customer complaints at retail outlet. Customer may demand refund of price, decrease of price, exchange of faulty product, removal of fault.

Certificates.

Pursuant to Law of Aug. 30, 2002, on Compliance Appraisal System, domestic and imported products, which are to be introduced onto market, except for farm goods, foodstuffs and fodder, must be subjected to appraisal as to their compliance with fundamental and specific requirements adopted by competent ministers. Specific requirements are to be met by products which may be hazardous or which serve to preserve or rescue life, health, property or environment.

This Law does not apply to pharmaceuticals and building materials.

Tests for abovementioned compliance of products are conducted by producer, its authorized representative or authorized laboratory, if required. Payments for tests are made by applicants.

In case of positive result, product or manner of its manufacturing receives compliance declaration or is marked with CE certificate, in accordance with requirements set out in EU directives concerning new approach to technical harmonization and normalization.

Products which have already been introduced onto market are also controlled as to their compliance with fundamental requirements. Such control is undertaken by President of Office for Protection of Consumers and Competition and certain administrative authorities, which may, among other measures decide on withdrawal of product from circulation or its destruction, in case other measures are insufficient to eliminate risks caused by products. Introduction of product onto market which does not comply with fundamental requirements or marking it with CE certificate, is levied with penalty up to PLN 100,000.

Product Standards.

Purpose of Law of Sept. 12, 2002 on Normalization, is to ensure, in given circumstances, optimal level of harmonization and basic quality characteristics, by establishing standards to be commonly and repeatedly met. Standards are introduced in particular in order to: rationalize production and services by using recognized technical and organizational measures, eliminate technical obstacles in trade, ensure preservation of life, health and protection of environment, consumer interest and work safety, ensure quality and reliability of products, processes and services. Products which have met Polish Standards may be marked as such, provided they received certificates of compliance with Polish Standards by competent normalization entity. Application of Polish Standards is voluntary with exception of standards established by appropriate ministers as being obligatory and which in particular relate to preservation of public interest in scope of state defense and safety.

General Safety of Products.

Pursuant to Law of Dec. 12, 2003 on General Safety of Products, consumer products which are introduced to commercial circulation are to be safe i.e. comply with certain general requirements provided by law of Dec. 12, 2003 and—if applicable—specific requirements relating to given kind of products provided by separate regulations. Producers are obliged to provide adequate warnings and information on risks, prevent dangers, and—if necessary—withdraw product from circulation. President of Office for Protection of Consumers and Competition supervises safety of products and may request, among others, information or tests, issue temporary or permanent ban on introduction of product to circulation and request destruction of product if necessary. Producers and sellers have right to appeal on such measures. National systems for information on dangerous products and for monitoring of consumers' accidents are introduced.

Product Liability.

According to regulations of C.C. producer of dangerous product is liable for damages caused by such product to anybody. Dangerous product is product not assuring expected safety at its normal use. Liability for damages in property of affected party is limited to personal use property. Liability is excluded if product was not introduced to circulation or introduced outside of business activity of producer as well as if dangerous features of product could not be revealed or predicted. Manufacturer of components of product may also be held liable. Compensation for damage in property does not include product itself and lost profits. It is not due if damage in property does not exceed [Euro]500. Statute of limitation is three years but not more than ten years from introduction of given product to circulation.

International Sale of Goods.

Poland is party to United Nations Convention on Contracts for International Sale of Goods, adopted in Vienna on Apr. 11, 1980 (UNCITRAL).

See topic 3.09 Contracts; category 5 Civil Actions and Procedure, topic 5.06 Limitation of Actions.

3.16 SECURITIES:

Public trading in securities is regulated by three acts of July 29, 2005: Law on Trading in Financial Instruments, Law on Supervision over Capital Market and Law on Public Offer, Conditions of Introducing Financial Instruments to Organized System of Trade and on Public Companies, which all came into force on Oct. 24, 2005. They implemented number of relevant directives and introduced several new, changed or more detailed regulations relating to organization and supervision of capital market in Poland. Warsaw Stock Exchange ("WSE") operations are also governed by WSE rules together with WSE detailed regulations, which contain provisions concerning admission of securities to listing, continuing obligations of issuer of listed securities, organization of WSE and terms of listing. Finance Supervision Commission is supervisory authority over Polish capital market. Commission as central governmental administration organ is subject to supervision of Prime Minister. Depending on matter, Commission may introduce proceedings and controls upon application or upon its own initiative. It is empowered to impose fines on relevant parties. Commission exchanges necessary information with other Polish and foreign supervision authorities.

Law on Trading in Financial Instruments regulates principles, mode and conditions of undertaking and conducting activity in scope of trading in financial instruments, rights and obligations of participating entities and execution of supervision in this respect. Financial instruments are understood as securities (including in particular shares, rights to shares, warrants, bonds, certificates, etc.) and other instruments not being securities (including in particular participation titles in common investment institutions, money market instruments, term contracts, options, commodities' derivatives and other instruments). In principle securities being subject to trading are dematerialized and deposited (recorded) at National Deposit of Securities ("NDS"), which is depositary and clearing institution as regards securities. Law regulates principles of exchange market, over-the-counter market and alternative system of trade. It prohibits market manipulation and defines accepted market practices. Also brokers and brokerage activity is regulated by this Law (see topic 3.04 Brokers), particular types of participation in trading in financial instruments, securing investors' interests and access to information.

Law on Public Offer, Conditions of Introducing Financial Instruments to Organized System of Trade and on Public Companies regulates principles and conditions of making public offer of securities and admission of financial instruments to regulated markets, duties of issuers of securities and entities participating in trade as well as consequences of obtaining status of public company and specific rights and duties connected with holding of and trading in shares of such companies. Public proposal is considered to be proposal of acquiring in any manner of securities if it is addressed to at least 100 persons or to unidentified addressee. It may be made only through public offer. Public offer is conducted within territory of Poland, and it involves making available sufficient information on securities and conditions of their acquiring to make decision on their acquisition in exchange for consideration. Subject to exceptions provided by Law, public offering or introduction of securities to regulated market requires preparation of prospectus, its approval by Commission and its publication. Issue prospectus should be drawn up in form of: (i)

Single document, or (ii) separate documents comprising registration document, securities note and summary note. Form and manner of disclosure of prospectus is governed by Act on Public Offer and European Commission Regulation (EC) No. 809/2004 of Apr. 29, 2004, implementing Directive 2003/71/EC regarding information contained in prospectuses and format, incorporation by reference and publication of such prospectuses and dissemination of advertisements in EU. Before securities are admitted to trading on regulated market, issuer should conclude agreement with NDS to register these securities. Securities exist in uncertified form as of date of their registration under agreement with NDS. Rights attached to dematerialized securities arise as of moment such securities are first registered in securities account and inure to benefit of account holder. Under agreement on transfer of dematerialized securities, such securities are transferred upon making relevant entry in securities account. After securities have been registered by NDS, issuer can apply for admission of securities to exchange trading, which is issued by resolution of management board of WSE. In cases specified by Law, issuer is obliged to prepare and publish memorandum. Law specifies conditions under which securities of issuer having located in EU or EEA Member State admitted may be publicly offered or admitted to trading in Poland. Law also regulates, among others, information obligations and acquisition of large blocks of shares.

Pursuant to Law on Public Offer, Conditions of Introducing Financial Instruments to Organized System of Trade and on Public Companies, anyone who: (i) Has reached or exceeded threshold of 5%, 10%, 20%, 25%, 33%, 50% or 75% of total number of votes in public company; or (ii) holds at least 5%, 10%, 20%, 25%, 33%, 50% or 75% of total number of votes in such company and, as result of reducing this share, has reached respectively 5%, 10%, 20%, 25%, 33%, 50% or 75% or smaller number of votes, is obliged to notify Commission within four days of date of change in share of total number of votes or from date of learning of such change. Duty to notify Commission and relevant company also arises if: (i) Shareholder, who already owns shares of company traded on official exchange market representing more than 10% of votes at shareholders' meeting, acquires or sells shares representing at least 2% of overall number of votes at shareholders' meeting; and (ii) any person who holds shares representing more than 33% of votes at shareholders' meeting acquires or sells shares of this public company representing at least 1% of overall number of votes at shareholders' meeting.

Any acquisition of such quantity of shares in public company that results in increase in proportion of total number of votes by more than: (i) 10% of total number of votes in period of less than 60 days by entity, whose share in total number of votes in this company is less than 33%, or (ii) 5% of total number of votes in period of less than 12 months by shareholder, whose share in total number of votes in this company amounts to at least 33%, may only be effected through announcement of tender offer to subscribe for sale or conversion of these shares.

Subject to certain exceptions, threshold of 33% of total number of votes in public company may only be exceeded as result of announcement of tender offer to subscribe for sale or conversion of this company's shares in quantity that assures achievement of 66% of total number of votes. Threshold of 66% of total number of votes in public company may only be exceeded through announcement of tender offer to subscribe to sale or conversion of all remaining shares in this company.

Securities acts set forth provisions regulating civil and criminal liability of issuer of securities, persons introducing securities into public market, brokers and insiders. Issuers, underwriters, persons introducing securities into public market and persons responsible for preparation of offering documents are liable for damages resulting from false or dishonest information contained in documents relating to securities, unless such persons and persons for whom they are responsible are innocent. Protection of inside information is extensively regulated. Insider trading is criminal offense.

Law of May 27, 2004 on Investment Funds regulates activities of Investment Funds having their registered offices in territory of Republic of Poland. Investment Funds are legal persons which invest publicly or if so allowed by law, not publicly, collected financial means in securities, money market instruments or other property rights. Natural persons, legal entities and business entities which are not legal persons may participate in investment fund by acquiring investment fund's certificates or participation units.

Investment funds are managed by investment fund associations, which are supervised by Commission. Such associations may be established only in form of joint stock companies. Investment Fund Law provides for restrictions with respect to investments by Investment Funds, sets out information requirements applicable to Investment Funds, regulates supervision over Investment Funds by Commission and contains rules regarding transformations, mergers and liquidations of Investment Funds. Investment Funds may be established as open, open specialized, or closed Investment Funds.

Law of Apr. 15, 2005 on Supplementary Supervision over Credit Institutions, Insurance Companies and Investment Companies Being Part of Financial Conglomerate specifies rules of cooperation between domestic and foreign supervisory authorities. Pursuant to this Law, aim of supplementary supervision is to protect financial stability of supervised entities. Supervision is exercised through examination of capital adequacy, insider transactions, significant concentrations of risk, as well as risk management and inside control. Financial conglomerate is group which fulfills all conditions listed in art. 4 of Law. At least once a year domestic supervisory authorities shall have common meeting called “Coordination Committee for Financial Conglomerates”.

Bonds.

Law on Bonds of June 29, 1995 (“Bond Law”) governs issuance, sale and purchase and redemption of bonds. Term “bond” has been defined as security issued in series, pursuant to which issuer states that he is debtor of owner of bond (bondholder) and promises to perform obligation required under bond. Pursuant to Bond Law, following entities may issue bonds: entities with legal personality that conduct economic activities, as well as limited joint stock partnerships; territorial self governance units and their associations and city of Warsaw; other entities with legal personality which are authorized to issue bonds in accordance with applicable laws; financial institutions, in which Republic of Poland, National Bank of Poland or at least one OECD Member State is member, as well as such state's central bank, or institutions being party to agreement with Republic of Poland, regulating such institutions' activity on Polish territory and containing relevant provisions concerning issuance of bonds.

Obligation set forth in bond may be monetary or in kind. In kind obligation may require issuer to give bondholders right to portion of issuer's future profits or right to convert bond into shares of issuer, or preemptive right with respect to future share capital increases of issuer.

In accordance with Bond Law, bond may be fully or partially secured or may be unsecured. Bond may be secured in particular through: placement of security interest or mortgage on property of issuer, or guaranty by State Treasury.

Bond Law provides that issuer of bond is liable for obligations stemming from bond with all of its assets, with certain exceptions.

Bonds may be issued through public offering or purchase offer made to no more than 100 individual investors. Law of July 29, 2005 on Trading in Financial Instruments governs public offerings and public trading in bonds.

In order to protect interest of bondholders, Bond Law provides that in case that number of bondholders exceeds 15 issuer may enter into agreement with bank on representation of bondholders in front of issuer. Issuer is obliged to do so if number of bondholders exceeds 15 and bonds are secured with State Treasury guarantee. Material provisions of agreement between issuer and trustee bank have to be disclosed in prospectus. In order to serve as trustee, bank must have capital in amount of at least equivalent of [Euro]10,000,000 in Polish currency. Bond Law contains detailed requirements which need to be met by trustee bank.

Trustee bank is required to conduct periodic analyses of financial situation of issuer to analyze whether issuer is able to meet its bond obligations and is required to inform bondholders of financial situation of issuer before issuer fails to meet its bond obligations if situation creates significant risk that issuer will fail to meet its bond obligations. If trustee bank determines that issuer has failed to meet its bond obligations, it can, in particular request establishment of additional security for bond obligations, demand that issuer repays all of its obligations in full, file appropriate court claim against issuer or file for bankruptcy of issuer. Law provides for penalties applicable to, inter alia, entities that issue bonds without complying with requirements of Bond Law or who provide false information or conceal information that could have material impact on determination of ability of issuer to meet its bond obligations.

3.17 STATUTE OF FRAUDS:

See topic 3.09 Contracts.

4 CITIZENSHIP

4.01 ALIENS:

See category 17 Immigration, topic 17.01 Aliens.

4.02 IMMIGRATION:

See category 17 Immigration, topic 17.02 Immigration.

5 CIVIL ACTIONS AND PROCEDURE

5.01 ACTIONS:

Generally, any person, natural or legal, may sue or be sued in Polish courts if he or it is of capacity to be party in such process. Entities with “quasi-legal personality” under Polish Law, such as commercial partnership, may sue or be sued if applicable provisions of law grant them such “court capacity”. Rules governing procedure in civil actions are set forth in C.C.P.

Polish State and its agencies do not enjoy jurisdictional immunity within Poland. Unless otherwise regulated by law, actions against Polish State are brought against State Treasury. Any act in connection with legal proceedings brought by or against State Treasury is undertaken by authority of state organizational unit, activity of which is connected with claim, or by authority of supervising entity. Actions for State Treasury are undertaken by State Treasury Solicitor's Office (Prokuratoria Generalna Skarbu Panstwa). (As to actions against foreign state, see category 6 Courts and Legislature, topic 6.01 Courts.)

Polish law, like other laws of continental European states, does not know action in equity. Legal proceedings in Polish courts may take form, depending on nature of case, of litigation or non-litigious proceedings. Litigation is commenced by filing complaint with court. Non-litigious proceedings may be conducted pursuant to general provisions or special provisions. C.C.P. provides for special proceedings in particular with respect to: personal actions, family actions, real property, inheritance, state actions, registry proceedings, and court deposits. Service of process on defendant is accomplished ex officio by court. Before courts, parties need not be represented by advocate except for cassative complaint proceeding before Supreme Court. Incapable person is represented by guardian. There are no special modes of proof of foreign claims. For proof of foreign law, see topic 5.04 Foreign Law.

Appropriate Forum.

Appropriate venue is generally place of residence of defendant: for natural person, place where person remains with intention of permanent residence; for legal person, place of its seat. Venue for State Treasury is place of seat of state entity activity of which is connected with given claim. Seat of legal entity is place where its management is located, unless law or statute provide otherwise. Appropriate venue also may be: place of performance of contract with respect to claim regarding existence of given contract, its performance, termination and annulment as well as indemnification due because of non-performance or improper performance of such contract; place where tort was committed with respect to claim regarding such tort; location of real property with respect to claims regarding title and other legal interests in real property; or place of corporation's branch if litigation involves such branch's business. If defendant is not domiciled in Poland, general venue is determined pursuant to place of his stay in Poland or, if such place is not known or is not located in Poland, last place of defendant's residence in Poland. On jurisdiction as to subject matter, see category 6 Courts and Legislature, topic 6.01 Courts.

Costs.

Losing party is required to refund to adversary all costs necessary to claim and defend rights (costs of proceedings) upon adversary's demand. Necessary litigation costs of party represented by lawyer include compensation and expenses of such lawyer in amount determined between party and lawyer but limited by regulation issued by Minister of Justice (http://www.ms.gov.pl), court costs and costs of personal appearance of party if such appearance is required by court. Court decides on costs in each decision ending litigation in given instance. Determination of costs by courts in civil cases is generally regulated by Law of July 28, 2005 on court costs in civil matters, which entered into force as of Mar. 2, 2006. Generally, actions and procedural writs specified by law are subject to court fees. Fees may be fixed, proportional or basic. Fixed fees are required in certain matters and may not be lower than 30 zlotys and higher than 5,000 zlotys. Proportional fees are based on value of subject matter of controversy or of appeal and shall amount to 5% of such value, not less however than 30 zlotys and not more than 100,000 zlotys. In some matters part only of proportional fee is payable. Temporary fee for claims of value unassessed at moment of filing is from 30 to 1,000 zlotys. Basic fee must amount to 30 zlotys and must be collected on writs subjected to court fee for which no proportional or fixed fee has been determined. General assumption of new Law was that court fees be lowered and more writs and actions be subjected to fixed rather than proportional fee (e.g. entries of rights to land and mortgage books) as compared to previously existing regulations. New Law also introduced new rules of releasing parties from court costs and much stricter than so far rules of payment by and collection of court fees from parties as well as new rules of releasing parties from costs.

Rules of granting legal aid to persons residing or having place of regular stay in other EU Member States (except Denmark) in civil matters pending or to be initiated in Poland and to persons domiciled or having place of regular stay in Poland in civil matters pending or to be initiated in other EU Member State (except Denmark) are provided by Law of Dec. 17, 2004 on right to legal aid in proceedings in civil matters conducted in EU Member State. Legal aid includes release from court costs, providing legal assistance and representation by advocate or legal counsel (possibly speaking language of party granted legal aid) and covering by State Treasury of necessary costs of attending proceeding by party.

According to regulation issued by Minister of Justice lawyer's fee in most cases is based on value in controversy. Regulation provides rates of minimum fees for assistance in given matters. Contingency fees are considered unethical.

Security for Costs.

Unless otherwise provided for in law or in international agreements, aliens commencing civil action before Polish court must, upon defendant's demand, lodge security for court costs (art. 1119, C.C.P. subject to certain exceptions. According to 1120 C.C.P. alien need not lodge security in particular if alien has place of residence in Poland or has sufficient property in Poland for securing costs, or reciprocity exists between Poland and country of which alien is citizen, or action is based on agreement of Polish jurisdiction. Reciprocity exists with signatories of Hague Convention on Civil Procedure of 1954.

Limitation.

See topic 5.06 Limitation of Actions.

Lack of Jurisdiction.

See category 6 Courts and Legislature, topic 6.01 Courts.

5.02 APPEAL, CASSATIVE COMPLAINT, OTHER COMPLAINTS AND ERROR:

Judiciary.

Judgments of first instance court (courts of original jurisdiction) are appealable. Appeal in civil case may be filed within two weeks from delivery of judgment together with its justification to appealing party. (art. 369, §1, C.C.P.). Second instance courts may: reject, dismiss appeal, reverse lower court's decision in whole or in part and decide on merits or reverse lower court's decision and refuse to recognize original claim or discontinue whole proceedings. As result of appeal, second instance court is also allowed to reverse lower court's decision and remand case for reconsideration to lower court comprised of different judges (in specified instances, to different court) if proceeding before first instance court was null and void under law, if case requires new trial and depositions in whole or if such court has not recognized merit of case. Regional courts serve as second instance courts for lower district courts. If regional court acts in first instance, appeal is brought to appellate court. If significant legal uncertainty exists in appeal to regional or appellate court, court may postpone its decision and present case to Supreme Court. Supreme Court can answer legal question or accept case for appeal. (art. 390, §1 C.C.P.). For duration of appeal proceedings, appealed judgment cannot be enforced (with some exceptions). Second instance court may not render decision unfavorable to appellant unless adversary party also appealed decision of first instance court.

Administrative Appeals.

Decisions of administrative bodies are appealable. As general rule, supervisory entity reviews appeal unless applicable laws indicate other appellate entity as competent. Appeal may be filed within 14 days from date of delivery of administrative decision to party, and, if decision is announced orally, from day it was announced. Detailing of grounds for appeal is not necessary. It is sufficient that it appears from appeal that party is not satisfied with decision. Specific provisions may provide for other requirements as to content of appeal. Appeal is made to appropriate appellate entity through entity that issued given decision. Unless otherwise specified by law, decision is not executed before termination of time to file appeal, and filing of appeal in due time postpones execution of decision. In cases where appeal is made by all parties, entity that issued decision may set aside or modify it. Parties retain their right to appeal new decision. Appellate entity may affirm decision, reverse decision in whole or in part and decide on merits or reverse decision and discontinue proceedings before first instance entity or before appellate entity. Appellate entity is also allowed to reverse lower entity's decision in whole and remand case for reconsideration to lower entity if case requires clarification proceedings in whole or in significant part. Appellate entity may not render decision unfavorable to appellant unless original decision is clearly contrary to law or public interests. Tax decisions are subject to appeal procedure which differs from general rules described above in several aspects. Decision of appellate body may be appealed to voivodship administrative courts. Complaint against administration decisions may be brought to voivodship administrative courts within 30 days from date of delivery of decision through entity which activity or inactivity is subject of such complaint. Filing of complaint does not generally postpone execution of decision unless applicable administrative authority decides otherwise. In rendering judgment, administrative court is not confined to matters brought up on complaint but may not issue judgment unfavorable to appealing party, unless decision is invalid due to gross violation of law. Administrative court may reverse decision in whole or in part, or determine that it is invalid or contrary to law.

Judgments and decisions ending proceedings issued by voivodship administrative courts are appealable by lodging so-called cassative complaint to Supreme Administrative Court.

Administrative Courts.

Upon Law of July 25, 2002 on Administrative Courts ("Law of July 25, 2002") and Law of Aug. 30, 2002 on Proceedings before Administrative Courts ("Law of Aug. 30, 2002"), administrative court system in Poland comprises of two tiers: one being voivode administrative courts and other being Supreme Administrative Court (http://www.nsa.gov.pl). There are 16 voivodship administrative courts. Jurisdiction of each of those courts covers voivodship of its seat.

Voivodship administrative courts are courts of first instance and perform control over public administration, settle disputes between bodies of territorial self-governance units, self-governance appeal boards as well as government administrative bodies as to their cognizance and competence. Performing control over public administration, administrative courts, among other things, adjudicate complaints against: (a) administrative decisions; (b) decisions issued in administrative enforcement proceedings as well as administrative proceedings to secure claims, provided that such decisions are appellate under applicable laws; (c) local acts issued by territorial self-governance units and territorial units of government administration; (d) supervisory acts over self-governance units; (e) advance rulings concerning tax law issued by Ministry of Finance on taxpayer's request; as well as (f) inactivity of administrative bodies. Administrative courts shall settle also disputes between administrative authorities as to cognizance and competence. Voivodship administrative courts review all matters not reserved to Supreme Administrative Court. Supreme Administrative Court reviews extraordinary complaints—so-called cassative complaints—against voivodship administrative courts' judgments and decision ending proceedings, adopts resolution aiming at adjudication of juridical question given rise to significant doubt, settles disputes as to cognizance and competence as well as examines other cases reserved to that court under separate provisions. Law of Aug. 30, 2002 regulates entire proceedings before administrative courts, including procedural writs, exclusions of judges, parties, complaints, decisions, appeals, and cassative complaints to Supreme Administrative Court.

Cassative Complaint in Civil Matters.

Decision of second instance court, except for decisions in minor cases specified in C.C.P., may be again challenged by lodging so-called cassative complaint to Supreme Court (http://www.sn.pl). Cassative complaint, which replaced former cassation in Feb. 2005, shall be submitted within two months from receipt of second instance court's decision together with its justification. It may also be lodged by General Prosecutor or Commissioner for Civil Rights Protection. Cassative complaint may only be brought to court if material law was violated or provisions regulating proceedings were materially violated. Cassative complaint may not relate to determination of facts or appraisal of evidence.

Supreme Court may dismiss cassative complaint or reverse second instance court's decision in whole or in part and remand case to second instance court for reconsideration. Supreme Court may also reverse first instance court decision in whole or in part and remand case to first instance court for reconsideration. Supreme Court is empowered to refuse considering cassative complaint if it is clearly ungrounded or there is no need for interpretation of law. Supreme Court may as well issue judgment on merits if cassative complaint was based on breach of material law and there was no breach of provisions regulating proceedings.

Complaint for Declaration of Incompliance of Judgment with Law.

If party to proceedings suffered damages as result of final and binding judgment or decision of second instance court, and such decision or judgment could not and cannot be reversed or changed by way of legal measures to which party was or is entitled, such party may file complaint for declaration of incompliance with law of such judgment or decision. In exceptional cases specified by C.C.P. complaint may be lodged despite fact that party failed to use legal measures to reverse or change judgment or decision unless it may still be reversed or changed. In specified cases complaint may be lodged by General Prosecutor or Commissioner for Civil Rights Protection. It may not be lodged against judgments or decisions challenged with cassative complaint and these issued by Supreme Court. Party may request declaration of incompliance of given judgment of decision with law only once. Complaint may be lodged within two years from judgment or decision becoming final and binding. Complaint may be based on breach of substantive laws or procedural regulations which caused incompliance of judgment or decision with law if its issuance caused damages to party. Determination of facts or appraisal of evidence may not constitute basis for complaint. Supreme Court checks if complaint meets formal requirements specified by C.C.P. and, if so, it may further either reject it if it is inadmissible dismiss complaint if there are no basis to declare incompliance of judgment or decision with law or declare its incompliance with law. Declaration of incompliance does not, as rule, reverse or invalidate challenged judgment or decision. Such judgment of Supreme Court may constitute basis for claim for damages against State Treasury.

Cassative Complaint in Administrative Matters.

Judgments and decisions ending proceedings issued by voivodship administrative courts are appealable by lodging so-called cassative complaint to Supreme Administrative Court. Cassative complaint may be filed by participant of proceedings, prosecutor and Commissioner for Civil Rights Protection within 30 days following receipt of given judgment or decision together with its justification. Cassative complaint may only be brought to court if material law was violated or provisions regulating proceedings were materially violated. Supreme Administrative Court may dismiss cassative complaint or reverse judgment or decision in whole or in part and remand case to court which issued them for reconsideration. Supreme Administrative Court may as well issue judgment on merits if cassative complaint was based on breach of material law and there was no breach of provisions regulating proceedings.

Clarification, Supplementation and Interpretation of Decisions.

Courts (civil and administrative), or if applicable, administrative entity, may, ex officio (at its own initiative) or at request of party, clarify in judgment or decision, inaccuracies, mistakes in writing or calculations, or other obvious errors. Within 14 days from delivery or rendering of judgment or decision, party may also request court or administrative body to complete such judgment or decision in areas court or administrative entity was obliged to address in such judgment or decision. In most cases, court or administrative entity resolve issues that were not addressed in judgment or decision in separate judgment or decision.

Reinitiation of Proceeding.

In cases specified by law depending on type of proceedings (civil or administrative), one can request reinitiation of proceeding ending by final decision or judgment, when for example they were issued as result of crime, or when judgment was based on falsified or forged document, when, in connection with decision, evidence on which important conclusions as to facts were made turned out to be false or when Constitutional Tribunal declared that act on which decision or judgment was based violated constitution, international treaty or law. In both types of proceedings party may file for reinitiation only within specified period of time, depending on grounds for such reinitiation.

Arbitration awards may be appealable only within frame of arbitration proceedings if parties so agreed. Final arbitration awards may be voided by court on grounds specified in C.C.P. Declaration of arbitration award being void does not result in expiry of arbitration agreement unless parties so agreed. See category 9 Dispute Resolution, topic 9.02 Arbitration and Award.

Complaint on Delayed Proceedings.

Parties to civil (including enforcement of claims), criminal (also treasury criminal) and administrative proceedings, are granted right to have their matter adjudicated or executed without unjustified delay. If party's (in some cases also participant's) right to have matter adjudicated without unjustified delay was breached due to court's or court execution officer's actions or failure to act, such party may lodge complaint on such breach. Complaint may be lodged during proceeding in given matter. It is recognized by court superior over court or court execution officer which is in charge of matter except for Supreme Court and Supreme Administrative Court where complaints are recognized by these Courts. Court recognizing complaint issues judgment within two months from its lodging. It may dismiss complaint or acknowledge that there was unjustified delay in recognizing matter by relevant court or in actions of court execution officer. Upon motion of claiming party court issuing judgment may also order undertaking by court or court execution officer specified actions within specified time, but such orders may not relate to factual or legal appraisal of matter. It may also adjudicate from State Treasury if court was in delay or from court execution officer if this officer was in delay appropriate sum of money not exceeding 10,000 PLN. Based on judgment claimant may also in separate proceeding pursue from State Treasury or court execution officer claim in excess of above sum pursuant to C.C. regulations on liability of State organs. Claimant may not file another complaint in relation to further delay in same matter before one year from issuance of judgment in proceedings initiated by previous complaint. Party who failed to file complaint during delayed proceedings may claim relevant State organ's liability for delay in recognizing matter based on said regulations of C.C. but only after that matter is finally closed.

Source of Law.

Basic source of law for above-described matters is C.C.P. and Code of Administrative Procedure of June 14, 1960 (as am'd), Law of July 25, 2002 and Law of Aug. 30, 2002.

See category 6 Courts and Legislature, topic 6.01 Courts.

5.03 DEPOSITIONS AND DISCOVERY:

Legal assistance (obtaining evidence, delivery of certificates, providing information or explanations etc.) as well as service of court letters and documents in international civil law relationships are governed by arts. 1130, 1135, C.C.P. Poland concluded several bilateral treaties pertaining to broadly defined legal assistance (encompassing service of letters and documents). Poland is also party to both Conventions Concerning Civil Procedure (Hague 1905 and Hague 1954) as well as to Convention Concerning Claims for Alimony From Abroad (New York 1956), Convention on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters (Lugano 1988), and Convention on Taking Evidence Abroad in Civil or Commercial Matters (Hague 1970).

In cases of legal assistance, courts communicate with both courts and other government bodies of foreign states. They also communicate with Polish diplomatic and consular authorities through Ministry of Justice. Polish courts direct their requests for legal assistance, which is to be provided in countries which have adhered to Hague conventions, to appropriate foreign authorities of Republic of Poland. Diplomatic authorities performing consular functions, as well as consular authorities of foreign states in Poland, have right to address courts and executory officials directly. District courts and executory officials should, immediately after settling or clarifying matter, answer request which they received from consular authority of foreign state.

Polish courts provide broadly defined legal assistance on request of foreign courts and other foreign government bodies. In civil cases, requests are handled by district courts (in Polish language). If Polish court which has been requested to assist does not have jurisdiction over matter, it transfers request to appropriate court and notifies requesting body of transfer. If inaccurate or faulty address of person whom request concerns has been given, court should, ex officio, take measures to establish appropriate address.

Legal assistance may be refused by Polish court if: (a) act would be incompatible with fundamental legal principles of Republic of Poland or it would be prejudicial to its sovereignty, (b) performing requested action falls outside jurisdiction of Polish courts, or (c) state from which request for legal assistance originated refuses to provide legal assistance to Polish courts.

Acts requested by court or organs of foreign state concerning legal assistance by Polish court are performed in accordance with Polish law. Court may, however, upon request of foreign court, apply to action requested form other than one prescribed by Polish law, if said form is neither forbidden by Polish law nor contrary to fundamental legal principles (public order) of Republic of Poland. In relationships with countries that are parties to Hague conventions, if letter rogatory specifies manner in which act should be performed, court performs action as requested unless it is contrary to law of requested country.

Polish law adopted principle that if court or organs of foreign states request that court deliver letter (document) to person in Poland, without supplying translation of that letter into Polish, it is to be delivered to addressee only if he agrees to accept it. Law also requires that addressee who refuses to accept delivery must be informed of legal consequences which may arise abroad from that act.

Documents and records created to satisfy request for legal assistance (e.g., confirmation of delivery, protocols, certificates, copies of court decisions) and received request, must be returned to court or other requesting organ of foreign state in same manner in which original request was received. Records concerning satisfaction of request must be returned, accompanied by transmittal letter which must be signed by president of court and bear official seal of court. If expenses are incurred in connection with providing legal assistance at request of court or other organ of foreign state, such costs are to be paid from budget of court and reimbursement demanded in currency of given state; applicable manner of currency conversion is to be indicated. Costs are not reimbursed if international treaty ensures providing of legal assistance free of charge or does not require transfer of expenses.

5.04 FOREIGN LAW:

In international conflicts of law, substantive laws of foreign countries may be applied in Poland. Polish conflict of law rules are codified in Law of Nov. 12, 1965 on International Private Law. It is composed of 38 articles, which are divided into 12 sections: “General Provision” (arts. 1-8), “Persons” (arts. 9-11), “Form of Legal Transaction” (art. 12), “Limitation of Actions” (art. 13), “Marriage” (arts. 14-18), “Consanguinity” (arts. 19-22), “Guardianship and Tutelage” (art. 23), “Ownership and other Rights in Property” (art. 24), “Obligations” (arts. 25-31), “Labor Relations” (arts. 32-33), “Inheritances” (arts. 34-35), “Final Provisions” (arts. 36-38). In procedural matters, applicable rule is lex forum.

General rules concerning application of foreign law include following: (a) Polish law must be applied if foreign law, indicated in Law of Nov. 12, 1965 on International Private Law as applicable to certain situation, requires application of Polish law; (b) if foreign law that is law of domicile of person concerned, indicated in Law on International Private Law of Nov. 12, 1965 as applicable, requires applying other foreign law to given situation, it is to be applied thereto; (c) if more than one different legal system is applicable in state, law of such state is to indicate applicable legal system; (d) foreign law may not be applied if its application contradicts basic principles of legal order in Republic of Poland; and (e) Polish law must be applied if factors indicating which foreign law is to be applied cannot be established, or contents of applicable foreign law are not known.

Several provisions regarding foreign law recognition are included in C.C.P. According to art. 1143, court facing application of foreign law may request Minister of Justice to give text thereof and to have foreign judicial practice explained. Court may also appoint experts to familiarize it with foreign law and foreign judicial practice.

(For domestic/foreign law conflict solutions in particular situations see appropriate subject entry.)

5.05 JUDGMENTS:

In civil matters, Polish court has discretion over whether or not to recognize decision of foreign court where such decision is not subject to execution. Excluded from rule are foreign court decisions on non-proprietary matters of foreign citizens issued by court having jurisdiction according to such person's home country law, unless such decision is to be basis for contracting of marriage or for entry into registry of birth, marriage and death certificates, as well as land and mortgage registrations or any other register in Poland. Recognition of foreign judgment is subject to reciprocity provided that certain conditions are met. (art. 1146, C.C.P.). However, reciprocity is not necessary in matters which, according to Polish law, belong to exclusive jurisdiction of state where judgment was pronounced. Everyone who has legal interest may apply for recognition of foreign court's judgment.

Foreign court judgments in civil matters, which in Poland are subject to court jurisdiction and are executable, constitute executory document if foreign county provides reciprocity to Polish court judgments. Foreign court judgments relating to claims for alimony in family matters are executory documents and will be executed in Poland without international agreement but under condition of reciprocity. Poland is party to Convention on Vindication of Alimony Claims Abroad signed in New York in 1956.

Recognition of foreign court's judgment is pronounced by regional court (higher court) which would have territorial jurisdiction over case or regional court in whose district lower court which would have jurisdiction is situated, or, if neither court can be found, court having jurisdiction for City of Warsaw. Above court comprises three professional judges. Regarding enforceability, decision is made by court of domicile or seat of defendant or, if no such court can be found, higher court in whose district execution is to take place. Once order of enforceability becomes final and valid, higher court will give effect to foreign court's judgment in execution order.

Execution orders concerning foreign court judgments are subject to certain requirements. Requirements may be documented in international agreement or, in absence of such requirements, Polish law requires that judgment be pronounced after international agreement comes into force and that judgment be subject to execution in state where it was pronounced. Execution and recognition of foreign court judgments are subject to reciprocity and depend upon fulfillment of six conditions described in art. 1146, §1 C.C.P. Among conditions are following: (1) judgment of foreign court must be valid and enforceable in state in which judgment was passed, (2) matter, in accordance with Polish law or international agreement, must not belong to exclusive jurisdiction of Polish court or of courts of third country, (3) parties must have had opportunity to defend themselves, (4) judgment must not be contrary to fundamental principles of legal order of Republic of Poland, (5) in matter in which Polish law was to be applied, such law must have been applied, or foreign law applied must not differ in material way from Polish law, (6) case was not and is not subject of proceedings before Polish court.

For execution of foreign arbitral awards see category 9 Dispute Resolution, topics 9.02 Arbitration and Award; 9.01 Alternative Dispute Resolution, subhead Mediation.

5.06 LIMITATION OF ACTIONS:

Except as otherwise provided by law, property claims are subject to limitation of time.

Statute of limitations is defense that prevents claimant from enforcing right but does not extinguish obligation itself, and court cannot recognize “limitation of action” ex officio. Once statute of limitations has passed, person against whom claim is made may refuse to fulfill claim, unless he voluntarily renounces his right to raise defense of limitation. Renouncement of that right before period of limitation has passed shall be null and void. Thus, party performing obligation in spite of statute of limitations may not reclaim. Time-barred claim may be set-off, if at moment when set-off became possible, limitation period had not yet expired. Unless specific provision provides otherwise, term of limitation is ten years. For claims concerning periodical performance and claims connected with conducting of commercial activity, term of limitation is three years. Examples of shorter terms include following: (1) Claims arising from sale made within scope of activity of seller's enterprise two years; (2) claims resulting from employment contract two years from day work delivered, and if work was not delivered, from day on which, according to terms of contract, it was to be delivered; (3) claims of person who possesses bills of exchange against endorser or drawer of bill of exchange, one year counting from date of protest, in case of exception “without costs”, counting from date of payment; (4) claims of endorsers between themselves and against drawer of bill of exchange, six months, counting from day on which endorser bought bill of exchange or was summoned before court because of controversy surrounding bill. Claim certified by valid court decision or other organ called to decide cases of given type or by arbitral award, as well as claims certified by settlement made before court or arbitral tribunal, are barred by limitation on expiration of ten years, even though period of limitation of claims of that type may be shorter. If claim certified in that manner requires periodical performances, claim for such performances due in future is subject to three year period of limitation.

Limitation periods cannot be altered by contractual agreement. Period of limitation commences running on day on which claim becomes due. Case law does exist, when commencement of period of limitation is not clear. After interruption as to running of limitation, period of limitation starts anew. Running of limitation is interrupted as follows: by every act before court or other authorities called to decide cases or enforce claims of given type or before court mediator of arbitration, undertaken directly for purpose of vindicating, establishing, satisfying or securing claim; or by recognition of claim by person against whom claim exists.

5.07 PRESCRIPTION:

See topic 5.06 Limitation of Actions.

5.08 SEQUESTRATION:

See topics 5.01 Actions, Judgments; category 8 Debtor and Creditor, topics 8.03 Attachment, 8.04 Bankruptcy and Restructure, 8.05 Executions.

6 COURTS AND LEGISLATURE

6.01 COURTS:

Poland, as unitarian, nonfederal state, has single court system. Court system consists of Supreme, Common Courts, Administrative Courts and Military Courts. Common Courts are comprised of appellate courts, regional courts and district (lower) courts. They deal with cases of criminal and offence law, civil and family law, guardianship law, labor law, with exclusion of matters delegated by statute to administrative courts, military courts and Supreme Court. Following courts in Poland are of central character: Supreme Court, Supreme Administrative Court, Constitutional Tribunal and Tribunal of State. Legal bases upon which courts function are contained in following acts: Law on Common Courts of July 27, 2001; Law on Supreme Court of Sept. 23, 2002; Law on Constitutional Tribunal of Aug. 1, 1997; Law on Tribunal of State of Mar. 26, 1982, C.C.P. of Nov. 17, 1964; Law on National Court Council of July 27, 2001; Law on Administrative Courts of July 25, 2002; Law on Proceedings before Administrative Courts of Aug.

30, 2002; Law of Military Courts of Aug. 21, 1997; Ordinance of Minister of Justice on Internal Regulation on Functioning of Common Courts of Feb. 23, 2007. Most of all above acts have undergone many amendments.

National Court Council.

Law on National Court Council dated July 27, 2001 provides for regulations in scope of role, responsibilities and functioning of National Court Council.

National Court Council (http://www.krs.pl) protects independence of courts and judges and among others, undertakes resolutions in respect of applying to Constitutional Tribunal to review compliance of Acts with provisions of Constitution, nominating judges, reviewing their petitions in professional matters, adopting rules of performing judging profession and rules regarding judge training, etc. National Court Council may also decide to visit courts and examine work of particular judges.

National Court Council is composed of President of Supreme Court, Minister of Justice, President of Supreme Administrative Court, person elected by President of Republic of Poland, 15 members selected by and among Supreme Court, common courts, administrative courts and military courts judges, four Sejm members appointed by Sejm and two senators appointed by Senate.

Organization and Division of Competence Between Common Courts.

Appellate court is created for territory of at least two regional courts, regional court for territory of at least two district courts, and district court in principle for one or more communes.

Appellate and regional courts are set up to decide on appeals from judgments of regional courts. Appellate courts are composed of following divisions: civil, criminal and labor and social insurance. There is also Vetting Division in Appellate Court in Warsaw. Regional courts are composed of following divisions: civil, criminal, penitentiary, labor and social insurance (labor and social insurance courts), business (business courts). In regional court in city of Warsaw there are three additional divisions: registry, antimonopoly and community trademarks and utility designs. Regional courts serve as courts of first instance in matters such as: most of claims for intangible rights, protection of intellectual property (ex. protection of copyrights, patents, utility design and trademarks) and rights to other intangible assets; claims arising from press law; and in most cases claims in which amount in controversy exceeds 75,000 zlotys. Regional courts adjudicate matters, including commercial (economic) matters, with exception of those which have been restricted for jurisdiction by district courts or antimonopoly court. Commercial (economic) matters are those arising from civil law relationships between business entities, within limits of their economic activity. Following are also considered to be commercial cases: claims arising from contract of partnership; claims against economic entities for discontinuance of acts harmful to environment and/or payment of damages related to such, as well as prohibition or restriction of activities harmful to environment; and matters under jurisdiction of courts on basis of antimonopoly, energy, telecommunication, postal and railway transportation laws; and matters against economic entities for declaration of provisions of contracts with consumers inadmissible. Latter cases are recognized solely by Antimonopoly Court.

District courts are trial courts for all ordinary cases except those which are specifically restricted to regional courts. District Courts are composed of following divisions: civil, criminal, family, labor, land registry and economic only (in particular district courts). Minister of Justice may also create City Courts as divisions of district courts for minor cases. Occasionally depending on needs other divisions may be created by Minister of Justice. In scope of commercial (economic) matters, district courts adjudicate such matters as: claims in which amount in controversy does not exceed 75,000 zlotys; claims to issue order for payment adjudicated in writ of payment proceedings, within same value limit, and other matters delegated to such courts by separate regulations. In district courts, separate family and juvenile divisions are set up (family courts) especially to deal with matters of family and guardianship law, proceedings in juvenile cases and proceedings involving persons addicted to alcohol.

Regional courts, as well as district courts may be divided into divisions depending on need. In case of such need, civil and criminal divisions are formed.

Commercial (economic) courts are autonomous organizational units which deal with commercial (economic) matters created within framework of regional and district courts, which have their seat in cities where regional courts are located.

Antimonopoly court is autonomous organizational unit dealing with appeals from decisions of Office for Protection of Consumers and Competition and claims against economic entities for declaration of provisions of contracts with consumers inadmissible, and with telecommunication, rail transportation and energetics issues, established within Regional Court in City of Warsaw.

Administrative courts control activity of public administration and resolve competence disputes among government authorities, self-government authorities and self-government appeal boards.

Administrative courts system consists of regional (voivodship) court (being courts of first instance) and Supreme Administrative Court.

Military courts administer justice within army of Republic of Poland in criminal cases and others forwarded under respective statutes.

Military Courts system consists of Garrison Military Courts and Regional Ministry Courts.

Courts of Central Character.

Supreme Court (http://www.sn.pl) sits in Warsaw. It supervises judicatory functions of common and military courts by dealing with last resort appeals (cassative complaints) against judgments issued by courts of second instance, complaints for declaration of inconsistency with law of final and binding judgments or decisions of lower instances courts, passing of resolutions to clarify ambiguous laws or laws which have been applied by various courts in nonuniform manner, responding to questions of law pertaining to specific cases which cause ambiguities, reviewing electoral petitions and ascertainment of validity of elections.

Generally, Supreme Court ensures uniform interpretation of law. Supreme Court is divided into Labor, Social Insurance and Public Matters Chamber, Civil Chamber, Criminal Chamber and Military Chamber.

Supreme Administrative Court (http://www.nsa.gov.pl) sits in Warsaw. Basically, it supervises judicatory functions of regional (voivodship) administrative courts. Specifically, Supreme Administrative Court deals with: last resort appeals (cassative complaints) against judgments issued by regional (voivodship) administrative courts, passing of resolutions to clarify ambiguous laws or laws which have been applied by various courts in nonuniform manner, responding to questions of law pertaining to specific cases which cause ambiguities.

Judges are nominated by National Court Council and appointed by President of Republic of Poland. For example, as far as common district courts are concerned, candidate for judge should be Polish citizen who has reached age 29, completed university legal education and post graduate court or prosecutor training and has passed judicial state examination may be appointed judge. Judges are not removable from their posts, except for cases prescribed by law (e.g., President recalls judge from post on motion of National Court Council if judge has renounced his functions or has reached age of 65 years). Judges, in performing their functions, are independent and subject only to law passed by Parliament. In first instance, courts hear cases in panels of one presiding judge and two lay-judges in family and labor matters. In other cases courts hear cases in panels of one professional judge only. President of court may order case heard by three professional judges if he feels it is justified by matter's complexity. Second instance court hears majority of cases with three judge panel, even if law allows to decide appeal in closed sitting. Supreme Court adopts resolutions in various prescribed panels; of three, five or seven justices; whole chamber; joint chambers, or whole assembly. Resolutions of whole assembly of Supreme Court, joint chambers or whole chamber, at moment of their adoption, acquire authority of so-called “legal principles”. Seven judge panel may order that its resolution be given force of “legal principle”.

Enforcement.

Compulsory enforcement of common courts' judgments and other court rulings is within competence of district courts and their executive officers (bailiffs). Enforcement titles are performed by executive officers (bailiffs) with exception of those restricted to court. Judgments of foreign state courts or mediators of arbitration tribunals are enforced in same manner as judgments of domestic courts. (See categories 5 Civil Actions and Procedure, topic Judgments; Dispute Resolution, topic Arbitration and Award.)

Exclusive Jurisdiction.

Exclusive jurisdiction exists in matrimonial matters, relations between parents and children, and adoption, if both spouses have domicile in Poland, under condition that one of them is Polish citizen or has no citizenship. To exclusive domestic jurisdiction belong: matters concerning legal incapacitation, declaring as presumably dead Polish citizen or person having no citizenship domiciled in Poland, and declaration of death occurring in Poland; matters pertaining to custody and guardianship over Polish citizen or one with no citizenship but with domicile in Poland (court may refrain from performing guardianship over Polish citizen if Polish citizen is domiciled in foreign country or has property therein); and cases involving inheritance, if death occurred in Poland and deceased was Polish citizen at time of death. To exclusive jurisdiction of domestic courts belong: matters concerning real property rights, possession of real estate in Poland, and arising from renting or leasing thereof except for claims for rent, and to other matters to extent decision affects real property located in Poland.

Lack of Jurisdiction.

Polish courts do not have jurisdiction over marital matters, matters arising from relations between parents and children and in adoption matters involving foreign citizens not residing in Poland. Only under certain circumstances, Polish court may declare as presumably dead person of foreign nationality. (See category 13 Estates and Trusts, topic Death [Presumption of and Actions for].) Full jurisdictional immunity is enjoyed by persons with diplomatic status. However, it does not apply to matters specifically enumerated in C.C.P. such as: matters of real property law pertaining to private immovable property located in Poland as well as inheritance, where persons enjoying immunity are not acting on behalf of state or any appropriate international organization; and matters related to professional or commercial activity of such persons undertaken by them in Poland outside their official functions. Persons who enjoy restricted jurisdictional immunity or functional immunity (e.g., consuls), may not be sued in Polish courts as to matters related to acts undertaken in their official capacity. Polish courts do not have jurisdiction over matters concerning real property or immovables or concerning possession of immovables located abroad. Generally, if express provision of law does not provide for jurisdiction of Polish courts in specific matters, Polish courts will not have jurisdiction unless: defendant has residence, domicile or seat in Poland at moment of service of process; defendant has property or property related rights in Poland; or dispute deals with subject matter situated in Poland, inheritance opened in Poland, or obligation which arose or is to be performed in Poland.

See categories 3 Business Regulation and Commerce, topic Commercial Register; Civil Actions and Procedure, topics Actions, Appeal and Error, Foreign Law, Judgments; Dispute Resolution, topic Arbitration and Award.

6.02 LAW REPORTS, CODES:

Poland is statutory law country. Unlike common law countries, doctrine of stare decisis is unknown and thus no decisional or judiciary law (i.e., law by precedent) exists. Civil law is enacted system of law. Doctrine of Polish civil law was not favorable for customary law; no indication of such source of law is generally made in Polish system of law. However, customary law is acknowledged as important source of law, especially in foreign commercial relationships. Polish civil law accepts customs established in trade in certain practices or in regard to certain goods or services. Though court decisions lack legislative force, it is impossible to negate court's influence on civil law interpretation. Of particular significance were Supreme Court's Guiding Principles for Judiciary issued upon motion of Minister of Justice, Public Prosecutor General or First President of Supreme Court. These guidelines interpreted provisions in force and were binding upon courts. After last reform of Polish court system, Supreme Court may only pass resolutions explaining legal regulations. In all other cases, decision of higher courts is binding only in particular case, and only if matter on appeal is remanded are lower courts bound by decisions of higher court. However, decisions of higher courts are frequently followed by lower courts because of their reasoning and persuasive force.

Polish civil law is in principle codified law. Efforts in unification and codification of Polish civil law were undertaken in years 1918-1939 after Poland regained its independence. In private law, most important achievements were Code on Obligation (1933) and Comm.C. (1934). These two codes were partially replaced in 1965 by C.C. (Law of Apr. 23, 1964). Comm.C. was replaced by Comm.Comp.C. as of Jan. 1, 2001. Other important private law codes now in force include: Family and Guardianship Code (Law of Feb. 25, 1964), Labor Code (Law of June 26, 1974), Maritime Code (Law of Aug. 18, 2001), Air Law (Law of Aug. 16, 2002). Procedure for settlements of civil law disputes is provided for in C.C.P. (Law of Nov. 17, 1964).

Poland has two official journals for publication of laws: Journal of Laws of Republic of Poland and Monitor Polski Gazette. Following legal acts are published in Journal of Laws: laws, decrees, regulations, international agreements entered into by Poland and government statements related to their enforcement, announcements (e.g., announcements regarding publication of uniform texts of normative acts), decisions of Constitutional Tribunal and other legal acts, which publication therein is provided by specific stipulation of law. Monitor Polski Gazette, on other hand, contains: resolutions of Council of Ministers, executive orders of ministers and other central offices issued in order to implement laws and decrees with reference to authority stated therein as well as other instructions, decisions, directives, circular letters and announcements of state authorities and central offices. Subordinate normative acts (instructions, circular letters, directives) issued by particular ministers are usually published in official gazette of ministry, e.g., Official Gazette of Ministry of Finance, Official Gazette of Ministry of Justice.

Law reports concerning civil law are published in monthly collections of judgments of Supreme Court. Institute of State and Law of Polish Academy of Science publishes Judgments of Polish Courts. There are also other law and jurisprudence reviews and databases which are published by different entities and are available on market.

See category 3 Business Regulation and Commerce, topic 3.06 Commercial Law.

6.03 LEGISLATURE:

See topic 6.02 Law Reports, Codes; category 1 Introduction, topic 1.03 Government and Legal System.

6.04 REPORTS:

See topic 6.02 Law Reports, Codes.

6.05 STATUTES:

See topic 6.02 Law Reports, Codes; category 3 Business Regulation and Commerce, topic 3.07 Commercial Register.

7 CRIMINAL LAW

7.01 ECONOMIC CRIMES:

In Polish legal system in order to determine that given action is crime or offence, such action must be prohibited by legal acts. Primary source of Polish criminal law is Criminal Code of June 6, 1997. Criminal Code stipulates number of economic crimes. Most of them are regulated in chapters devoted to “crimes against economic turnover” and “crimes against laws of persons performing occupancy”. Criminal Code is not, however, sole source of criminal regulations. Numerous economic crimes are regulated in particular acts, as e.g., Comm.Comp.C., Banking Law, Bond Law, acts regulating public offering and trading in financial instruments, public companies and supervision over capital market, Industrial Property Law, etc. Tax-related and other crimes and offences against State Treasury are regulated in Treasury Criminal Code of Sept. 10, 1999, as amended.

Primary source of offence law is Offences Code of May 20, 1971, as amended Offences Code provides for number of economics offences, particularly in chapter devoted to offences against consumers' interests. Again, also this Code is not only source of offences law in Poland. Numerous economic offences are regulated in other acts, as e.g., Labour Code and Act on Promotion of Employment and Labour Market Institutions.

7.02 EXTRADITION:

In Polish legal system there are two extradition modes, i.e., contractual and noncontractual, which is provided for by Criminal Procedure Code. Contractual mode is applicable to states with which extradition agreement or agreement on legal turnover which contains also extradition regulations was concluded. For example, between Poland and U.S. there is Extradition Agreement dated July 10, 1996. In case of contractual prosecution, Poland is obliged to release to other state person who is subject to prosecution if extradition premises are fulfilled and there are no obstacles provided by agreement. Non-contractual (code) extradition mode may be applied in any case but it does not impose on Poland obligation to release person and does not vest calling state with any right to obtain release. Fundamental rules relating to extradition are contained in Constitution. They are following: (i) Extradition of Polish citizen is excluded (pursuant to judicial decision of Constitutional Tribunal dated Apr. 27, 2005 regulation which allowed for surrender on basis of European Arrest Warrant of Polish citizen or person granted asylum in Poland lost its power as of Nov. 5, 2006), (ii) extradition of person suspected to commit without violence crime due to political reasons in prohibited, (iii) courts adjudicate on admissibility of extradition. Latter rule is realized in such way that courts issue opinions on extradition, but ultimate decision on release of person is made by Minister of Justice (therefore this decision may be viewed as political rather than judicial).

As of May 1, 2004, regulations on European Arrest Warrant were introduced to Polish Criminal Proceedings Code. These regulations allow for surrender of person who is subject to prosecution from territory of Republic of Poland, including Polish citizens, based on decision issued solely by court. Purpose of such surrender is to allow conducting criminal proceedings against person within territory of other EU member state or realization of imprisonment of such person or other measures involving deprivation of freedom (see also above comment on

Constitutional Tribunal ruling). Institution of European Arrest Warrant replaced extradition in relations with EU member states.

8 DEBTOR AND CREDITOR

8.01 ASSIGNMENTS:

Assignment of Claim.

Creditors may transfer claims to third persons without consent of debtor unless transfer would be contrary to law, contractual stipulation, or nature of obligation. Claim and all rights connected pass to buyer, particularly claims for unpaid interest. Contract of sale, exchange, donation or other contract transfers claim to buyer unless specific provision states otherwise or parties otherwise agree. If claim is contained in writing, assignment of claim should be in writing. Notice to debtor is not required but it is advisable to prevent bona fide debtor from discharging his debt by payment to assignor. (arts. 509-518 C.C.).

Taking Over Debt.

Third persons may step into shoes of debtor, thereby releasing debtor from obligation. Debts may be assumed by contract between creditor and third person with consent of debtor or by contract between debtor and third person with consent of creditor. Consent of creditor is ineffective if creditor does not know that person taking over debt is insolvent. Contracts concerning assumption of debt must be in writing to be valid as must creditor's consent. Person assuming debts may assert all defenses of original debtor against creditor except for set-off defense from previous debtor's claim. If claim was secured by guarantee or limited right in rem established by third person, guarantee or limited right in rem ceases to exist at moment of assumption unless guarantor or third person expressly consents to continuation of security. (arts. 519-525 C.C.).

Assignment of any Property, Real or Personal.

See category 3 Business Regulation and Commerce, topic 3.15 Sales.

8.02 ASSIGNMENTS FOR BENEFIT OF CREDITORS:

See topics 8.01 Assignments, 8.04 Bankruptcy and Restructure.

8.03 ATTACHMENT:

To secure claim which can be brought to regular court or arbitration tribunal, court may issue decision on securing claim if claim is credible and lack of security could deprive creditor of possibility to execute judgment or severely impair such execution, or otherwise make impossible or difficult obtaining aims of proceedings. Security of pecuniary claims is accomplished by: seizure of tangible property, work salary, claims from bank account or other claims or property right; compulsory real estate mortgage or pledge on vessel recorded in ship register; prohibition on sale or rental of real estate not having land register book, or for which land register book was lost or destroyed, prohibition on sale of cooperative right to apartment or business premises, compulsory management over entire or parts of enterprise or farm.

If object of security is not pecuniary claim, court issues order which it considers suitable, including orders envisaged to secure pecuniary claims. In choosing appropriate means of securing claim, court takes interests of parties into account in order to assure creditors' claims or proper protection of their rights and in order to avoid charging debtor more than necessary. When security receivership is established, it will be carried out according to provisions on receivership in process of execution from real estate, with reservation that debtor cannot be nominated as receiver.

8.04 BANKRUPTCY AND RESTRUCTURE:

Bankruptcy is regulated in Poland by Bankruptcy and Restructuring Law of Feb. 28, 2003 which came into force on Oct. 1, 2003 and replaced Bankruptcy Law of Oct. 24, 1934 and Law on Composition Proceedings of Oct. 24, 1934. Law applies to debtors who are entrepreneurs, i.e. natural and legal persons, as well as entities without legal personality having legal capacity under separate laws that conduct business or professional activity in their own name. Law also applies to limited liability company and joint stock company not carrying on business activity, partners of commercial partnerships responsible for partnership's obligations without limitations, partners of professional partnerships and branches of foreign banks within meaning of Banking Law. Bankruptcy cannot be declared with respect to State Treasury, self-government entities, public independent health assistance agencies, institutions and legal persons established under legal acts, natural persons carrying on agricultural farm as well as higher education schools.

Grounds for Bankruptcy Declaration.

General ground includes insolvency of entrepreneur. Entrepreneurs are deemed insolvent when they are in default of their enforceable obligations. Entrepreneurs being legal persons or entities without legal personality having legal capacity under separate laws are also deemed insolvent when their obligations exceed value of their assets, even if they still exercise their obligations. Court may dismiss motion for bankruptcy declaration if failure to discharge obligations does not exceed three months and aggregate amount of outstanding obligations does not exceed 10% of balance sheet value of debtor's enterprise. Court shall dismiss motion for bankruptcy declaration if insolvent debtor's assets do not suffice even to cover proceedings' costs. If it is proved probable that under composition creditors would be satisfied to greater extent than under bankruptcy proceedings with liquidation of debtor, it should be declared bankruptcy with possibility to execute composition with creditors. If there are no grounds to declare bankruptcy with possibility to execute composition with creditors, court shall declare bankruptcy with liquidation of debtor. Motion for bankruptcy declaration may be filed by debtor or each of his creditors. Motion may be filed also by (1) each partner responsible without limitations for partnership obligations (with respect to registered partnership, professional partnership, limited partnership or limited joint stock partnership), (2) everyone who is authorized to represent entity individually or with other persons (with respect to legal persons or entities without legal personality but having legal capacity under separate laws), (3) founding body (with respect to state enterprise), (4) Minister of State Treasury (with respect to sole shareholder company of State Treasury), (5) each of liquidators (with respect to legal person, registered partnership, professional partnership, limited partnership or limited joint stock partnership), (6) curator appointed under art. 26 §1 of Law on National Court Register (with respect to legal person entered into National Court Register), and (7) body granting public assistance (with respect to debtor granted with public assistance of aggregate amount exceeded [Euro]100,000). Debtor is obliged to file motion for bankruptcy declaration within two weeks after ground for bankruptcy has occurred.

Motion should include (i) name, domicile or seat of debtor and in case debtor is partnership or legal person, its representatives, liquidators if appointed, and in case of partnership name and domicile of partners liable without limitations for obligations of partnership, (ii) location of debtor's enterprise or property, (iii) grounds and justification of motion for bankruptcy declaration, (iv) information whether debtor is member of payments system or securities clearing system within meaning of Act of Aug. 24, 2001 on Finality of Settlements Under Payments Systems and Securities Systems and Principles of Supervision of these Systems and (v) information whether debtor is public company according to law on public trading in securities. If debtor is entered into National Court Register or other relevant register, extract from such register should be attached to motion.

Competency of Court and Bodies Engaged in Bankruptcy Proceedings.

Proceedings for bankruptcy declaration is initiated in bankruptcy court consisting of three professional judges. Bankruptcy court is district economic court appropriate for area where main debtor's enterprise is located. If debtor does not have his enterprise in Poland, proceedings are initiated in district court appropriate for area of debtor's domicile or seat, or in case of lack of such domicile or seat, in district court appropriate for area where debtor's property is located.

Debtor and everyone who has filed motion for bankruptcy declaration are participants in proceedings. Court examines case on closed session but may schedule trial if deems it necessary. Decision on bankruptcy declaration shall be issued within two months from date of filing motion. In bankruptcy proceedings court ex officio conducts proceedings to secure claims. After filing motion for bankruptcy declaration, court immediately establishes security over debtor's property in way of appointment of temporary court supervisor or other security. Court convenes preliminary creditors' assembly if there are grounds to declare bankruptcy unless it is evident that further proceedings may be conducted solely with view to liquidating bankrupt's assets. Preliminary creditors' assembly may adopt resolutions on conducting further proceedings with possibility to execute composition or liquidation (way of conducting proceedings) and on appointment of creditors' council. On preliminary creditors' assembly composition may be executed if not less than half of number of creditors, having jointly ¾ of aggregate amount of undisputed claims or claims confirmed in executive titles, participate. Court carries out proceedings according to preliminary creditors' assembly's resolution on way of conducting proceedings and appointment of creditors' council unless those resolutions are contrary to provisions of laws.

Bankruptcy court granting bankruptcy motion issues decision on declaration of bankruptcy. Date of such court's decision is automatically date of bankruptcy declaration. Decision is immediately published in Court and Business Official Gazette and local journal and delivered to receiver, court's supervisor or administrator, bankrupt or his successors and to creditor who demanded declaration as well as to founding body (when state enterprise is declared bankrupt). In some cases decision on bankruptcy declaration is also delivered to President of National Bank of Poland and to Chairman of Finance Supervisory Commission. Decision on bankruptcy declaration is appealable only by bankrupt; and decision on refusing bankruptcy declaration, only by applicant.

After bankruptcy is declared activities of bankruptcy proceedings are conducted by judge-commissioner with exception of those reserved for court. Judge-commissioner, among other specific activities allotted to him, directs proceedings, supervises receiver, court's supervisor and administrator, specifies activities that receiver, court's supervisor or administrator may not perform without his permission or without consent of creditors' council. Receiver is appointed when bankruptcy is declared with liquidation of debtor's property. Court's supervisor is appointed when bankruptcy is declared with possibility to execute composition. Administrator is appointed when bankruptcy is declared with possibility to execute composition when debtor has been denied management of his property. Functions of receiver, court's supervisor or administrator may be performed only by natural persons having respective license or commercial partnership and companies of which partners responsible for company's obligations without limitations or members of management board have such respective license. Receiver, court's supervisor and administrator has right to compensation for their activities. New amendment to Bankruptcy and Restructuring Law limited receiver's remuneration and gave right to Court to determine its amount. Receiver, court's supervisor and administrator are obliged to submit to judge-commissioner periodical as well as final reports on their activities and financial reports. Receiver immediately takes over property, administers it, secures and commences liquidation. Receiver is entrusted in various duties: entering information on issue of decision on bankruptcy declaration in land and mortgage register as well as in other books and registers, providing bankruptcy information to: creditors, banks and institutions where debtor may have safes or deposited money or other property. Receiver is entitled to demand necessary information concerning bankrupt's property from governmental bodies and self-governmental entities or institutions. Court's supervisor may control at any time bankrupt's activities and enterprise. He performs his duties until final composition is approved or proceedings are finished in other way. Administrator takes over property, secures it and prepares inventory and financial report as well as takes any actions connected with current conducting of enterprise.

Results of Bankruptcy Declaration.

If bankruptcy is declared with liquidation of bankrupt's property, bankrupt is obliged to reveal and deliver to receiver whole property and documents connected with business activity, property and accounts as well as to present any information and explanations. If bankruptcy is declared with possibility to execute composition, bankrupt is obliged to present to judge-commissioner and court's supervisor any requested explanations regarding his property and financial documents and to enable court's supervisor to familiarise himself with bankrupt's enterprise unless court imposes on bankrupt wider ranging duties. As of date of bankruptcy declaration bankrupt's property becomes bankruptcy assets designated for satisfaction of creditors. Bankruptcy assets include property belonging to bankrupt on date of bankruptcy declaration and acquired during bankruptcy proceedings subject to certain exceptions provided for in Bankruptcy and Restructuring Law. In particular, bankruptcy assets do not include (1) possessions excluded from execution according to provisions of C.C.P., (2) remuneration for bankrupt's work in part excluded from seizure, (3) assets excluded under resolution of creditors' council, and (4) unrecoverable claims and non-transferable movables excluded by judge-commissioner. Receiver, court's supervisor or administrator determine, by way of inventory, composition of bankruptcy assets on basis of entries in bankrupt's books and unchallenged documents and estimates their value. Property components not belonging to bankrupt's property are excluded from bankruptcy assets. If bankruptcy is declared with liquidation of bankrupt's property, bankrupt loses its right to administer, use and dispose of property included in bankruptcy assets. If bankruptcy is declared with possibility to execute composition, property included in bankruptcy assets is administered by court's administrator. Court may establish administration performed by bankrupt with control of court's supervisor (bankrupt's own administration) if bankrupt is considered to perform it duly and his insolvency results from independent and exceptional circumstances. Bankrupt's acts regarding property included in bankruptcy assets are invalid. Upon bankruptcy declaration possibility to encumber bankruptcy assets with pledge, registered pledge, tax pledge, mortgage or in any other manner is in some cases excluded and in some—subjected to restrictions.

Provisions of contract, which reserve in case of bankruptcy declaration alteration or termination of legal relationship to which bankrupt is party, are invalid. Upon bankruptcy declaration alteration or termination of legal relationship to which bankrupt is party are possible only under provisions of Bankruptcy and Restructuring Law, and legal act contradictory to those provisions is ineffective with respect to bankruptcy assets even if contract provides for another effect. Upon bankruptcy declaration bankrupt and administrator are not allowed to fulfill obligations that are pursuant to Bankruptcy and Restructuring Law included in composition with creditors.

Obligations raised after bankruptcy declaration or raised before but included in composition may be fulfilled only upon consent of judge-commissioner if it is necessary to conduct business activity of bankrupt's enterprise. During bankruptcy proceedings creditor cannot terminate without consent of creditors' council lease agreement related to real estate where bankrupt's enterprise is carried out. Bankrupt's financial obligations for which time for payment has not yet matured come due as of date of bankruptcy declaration. Bankrupt's non-financial proprietary obligations change as of date of bankruptcy declaration into financial obligations and as of that date come due even if time limit for performance has not yet occurred.

Set-off of bankrupt's claim with creditor's claim is admitted if both claims existed on day of bankruptcy declaration even if one of them has not yet become due. Set-off is not admitted if bankrupt's debtor acquired claim through assignment or endorsement after bankruptcy declaration or acquired it within one year preceding bankruptcy declaration having knowledge about basis for bankruptcy declaration. Set-off is not admitted if creditor became bankrupt's debtor after date of bankruptcy declaration. Creditor who wants to exercise set-off should lodge statement thereof with producing claims. If on date of bankruptcy declaration obligations arising out from contract have not been performed, receiver may perform bankrupt's obligations and demand from another party performing its mutual obligation or may renounce contract. Law contains also several provisions related to results of bankruptcy declaration for particular kinds of contracts or agreements, e.g.: agency contract; loan agreement; agreement on securities' account, etc.

Legal acts executed by bankrupt within one year before application of motion for bankruptcy declaration and resulting in disposals by bankrupt of its property are ineffective towards bankruptcy assets if made without payment or for consideration but with value being drastically in excess of that received by bankrupt, or of that reserved for bankrupt or for third party. Legal acts against payments executed between bankrupt and spouse, relative by blood or by affinity in direct line, relative by blood or by affinity in collateral line up to second degree or adoptee or adoptive parent within six months before application of motion for bankruptcy declaration are ineffective towards bankruptcy assets. Receiver, court's supervisor or administrator may file suit for declaration that legal act is ineffective towards bankruptcy assets.

In case of declaration of bankruptcy with possibility to execute composition with creditors, court's supervisor (if appointed) shall by virtue of law join all court and administrative proceedings related to bankruptcy assets carried out against or for benefit of bankrupt. If bankrupt has been deprived of right to administer bankruptcy assets, court and administrative proceedings may be instituted and carried out only by administrator. On date of bankruptcy declaration, all court as well as administrative proceedings aimed at securing claims or enforcement proceedings carried out against bankrupt in order to satisfy claims, which are pursuant to law included by composition agreement, are suspended by virtue of law. In case of declaration of bankruptcy with liquidation of bankrupt's enterprise, all court and administrative proceedings related to bankruptcy assets may be instituted and carried out only by receiver or against him. Court as well as administrative proceedings aimed at securing claims or enforcement proceedings instituted against bankrupt before bankruptcy declaration are suspended by virtue of law as of date of bankruptcy declaration. Enforcement proceedings are discontinued by virtue of law after decision on bankruptcy declaration has been final.

Bankruptcy Proceedings.

After bankruptcy declaration bankruptcy proceedings are carried out at court that issued decision on bankruptcy declaration by panel comprised of one professional judge. Judge-commissioner convenes creditors' council through announcement: (1) in case that law provides for obligation to adopt resolution by creditors' assembly, (2) upon motion of not less than two creditors having jointly not less than 1/3 of aggregate amount of approved claims, or (3) in other situations when judge-commissioner deems it necessary. Judge-commissioner is chairman without voting right. Unless law provides otherwise, all creditors with approved claims have right to attend creditors' assembly and have voting rights. Unless law provides otherwise, resolutions are adopted, regardless of numbers of creditors present at assembly by majority of votes of creditors having not less than 1/5 of amount of claims of creditors authorized to attend particular assembly. In case creditors' council has not been appointed at preliminary meeting of creditors, judge-commissioner may establish creditors' council if he recognizes it necessary, and is obliged to establish it upon motion of creditors having not less than 1/5 of aggregate claims approved or made probable. Creditors' council consists of three to five members and one or two substitutes. Following actions connected with bankruptcy assets cannot be performed without creditors' council's permission: (1) further conducting of enterprise by receiver if enterprise is to be carried out for longer than three months from day of bankruptcy declaration, (2) renouncement of sale of enterprise in whole, (3) unrestricted sale of real estate, (4) selling of rights and claims, (5) contracting loans or credits and encumbrance of bankrupt's property with limited rights in property, (6) exercising of certain mutual contracts executed by bankrupt or terminating such contracts, and (7) acknowledgment, waiving or contracting of settlement on disputed claims.

Bankruptcy proceedings' costs comprise of court fees and expenses necessary to gain proceedings' aim and include in particular: (1) Compensation for receiver, court's supervisor and compensation of curators, if appointed unless law provides otherwise, (2) compensation for persons employed by receiver, court's supervisor or administrator upon judge-commissioner's consent, (3) costs of announcements and publications, (4) costs of creditors' assembly, (5) costs of liquidation of bankruptcy assets, (6) taxes and other charges due for period after bankruptcy declaration as well as (7) costs of business activity carried out by receiver after bankruptcy declaration. Bankruptcy proceedings' costs are covered from bankruptcy assets. Creditor has no right to demand reimbursement of costs borne during bankruptcy proceedings.

Proclamation and Recognition of Claims.

Any creditor has right to produce his claims. Personal creditor should produce his claims within designated time limit. If mortgage, pledge, tax pledge or register pledge creditors do not produce their claims, they shall be listed ex officio at claims' record. After expiration of time limit for producing claims and upon verification of produced claims, receiver, court's supervisor or administrator prepare claims' record. If creditor has produced claim after expiration of time limit to produce claims, regardless of reason, acts performed in bankruptcy proceedings are effective towards such creditor and his claim is taken into account only in plans on distribution of bankruptcy asset prepared after approval of such claim. However, claim produced after approval of final plan on distribution of bankruptcy assets, is left without adjudication. Receiver, court's supervisor or administrator presents claims' record to judge-commissioner who publishes it in Court and Business Official Gazette. Anyone interested may investigate claims' record at court's office. Within two weeks from date of publication each creditor listed at claims' record may lodge complaint to judge-commissioner. Complaint may also be lodged by creditor to whom recognition of submitted claim was refused. If no complaint has been lodged, judge-commissioner approves claims' record. Upon conclusion or discontinuation of bankruptcy proceedings excerpt from approved claims' record constitutes enforcement title against bankrupt.

Distribution of Estate Funds.

Upon bankruptcy declaration with liquidation of bankrupt's enterprise receiver immediately prepares inventory and estimation of bankruptcy assets as well as liquidation plan. Receiver presents inventory together with liquidation plan to judge-commissioner within one month from bankruptcy declaration. Liquidation plan should include proposed manner of sale of bankrupt's property in particular sale of enterprise, term of sale, preliminary estimate of expenses, and economical reasons for further business activity of bankrupt's enterprise if it is to be carried out. Receiver also prepares and presents to judge-commissioner financial statement as of day directly preceding date of bankruptcy declaration. Liquidation of bankruptcy assets is carried out by way of sale of whole enterprise or sale of organized parts thereof, sale of real estates and movables, collection of claims from bankrupt's debtors as well as exercise of other proprietary rights included in bankruptcy assets. In cases provided for in law, liquidation of movables, rights and claims may be carried out through take-over by pledge creditor. Upon declaration of bankruptcy with liquidation of bankrupt's property, bankrupt's enterprise may be carried out if it is possible to execute composition with creditors or to sell whole enterprise or organized parts thereof. Sale during bankruptcy proceedings has same effects as sale during enforcement proceedings. Bankrupt's enterprise should be sold as whole unless it is impossible and in such case organized part thereof may be sold. Sales are carried out through public tender pursuant to provisions of C.C. If public tender does not produce any effects, judge-commissioner issues decision on new public tender or allow receiver to appoint acquirer at his discretion within designated time limit and establishes minimal price and conditions of sale. Creditors' council may grant consent for unrestricted sale of property.

Liquidation of debtor's claims is carried out through enforcement. If enforcement of debtor's claims meets obstacles too difficult to overcome, claims should be transferred. Proprietary rights are liquidated through execution or transfer.

Funds of bankruptcy assets are comprised of amounts obtained as result of liquidation of bankruptcy assets and income from bankrupt's enterprise as well as interests from amounts on bank accounts unless law provides otherwise. Amounts obtained upon sale of rights and things encumbered with pledges, tax pledges, register pledges or mortgages are designated for satisfaction of those creditors whose claims are so secured before final distribution of bankruptcy assets to remaining creditors. Claims and receivables to be satisfied from funds of bankruptcy assets are divided into following categories: (1) first category—costs of bankruptcy proceedings, receivables for health, social and retirement insurance contributions, receivables under employment relationships, disability payments, receivables raised upon actions taken by receiver, (2) second category—taxes and other public charges and fees as well as social insurance premium which are not subject to satisfaction in first category due for last year before date of declaration of bankruptcy together with due interest and costs of execution, (3) third category—other claims not enumerated in fourth category together with interests for last year before bankruptcy declaration, contractual damages, proceedings' costs with enforcement costs, and (4) fourth category—interests not enumerated in above categories as well as court and administrative penalties, fines or receivables by virtue of donations and legacies. Claims acquired by way of assignment or endorsement after bankruptcy declaration are satisfied in third category if not included in fourth category. Receiver satisfies claims of first category upon consent of judge-commissioner gradually as bankruptcy funds are increased by subsequent amounts. If such claims are not satisfied thereby, they shall be satisfied upon distribution of bankruptcy funds. If funds are not sufficient to cover all claims, receivables from further category may be covered only after claims of preceding category have been satisfied.

Receiver shall prepare and present to judge-commissioner plan of distribution of bankruptcy funds. If approved, plan is immediately exercised.

After discontinuation or conclusion of bankruptcy proceedings, deposited amounts, if not to be delivered to any person specified in plan of distribution of bankruptcy funds, should be delivered to bankrupt upon his motion.

If bankruptcy proceedings involve liquidation of bankrupt's enterprise, court shall declare conclusion of proceedings after execution of final plan of distribution of bankruptcy funds or after satisfaction of all creditors.

Law regulates also bankruptcy proceedings related to particular entities (banks and social insurance agencies).

Composition Proceedings.

If bankruptcy is declared with possibility to execute composition with creditors and composition proposals have not been filed before, bankrupt should file proposals within one month. Within same time limit proposals may also be filed by court's supervisor or administrator. If bankruptcy is declared with liquidation of bankrupt's property, composition proposals may be filed by bankrupt as well as receiver and creditors' council. Court shall change decision on bankruptcy with liquidation of bankrupt's property into decision on bankruptcy with possibility to execute composition if there are grounds for that. Composition proposals should include way of restructuring of bankrupt's obligations (postponement of performance of obligations, payments in installments, reduction of debts, conversion of debts into shares, etc.) as well as justification thereof. Composition may also provide that creditors are satisfied by liquidation of bankrupt's property (liquidation composition). In such case liquidation is conducted in accordance with provisions of law on liquidation of bankruptcy assets unless composition provides for creditors taking over bankrupt's assets or for another manner of liquidation. Composition covers all claims towards bankrupt raised before date of bankruptcy declaration as well as interests on such claims for whole time of delay. Composition does not include in particular: (1) Alimony allowances, disability payments, (2) claims which upon judge-commissioner's consent were paid, (3) health, retirement and social insurance contributions, etc. After claims' record has been approved judge-commissioner prepares lists of creditors for purposes of voting over composition comprised of following categories of creditors: (1) creditors having claims by virtue of employment relationships, (2) creditors having claims secured on real property, (3) creditors being shareholders of bankrupt, and (4) remaining creditors. Within one month from day when claims' record has been approved, creditors' assembly shall be convened and creditors shall be delivered with composition proposals and information about division of creditors into particular categories. Composition may be executed if adopted by majority of creditors from each list of creditors having jointly not less than 2/3 of aggregate amount of claims entitling to vote. If composition has not been adopted, court immediately changes decision on bankruptcy with possibility to execute composition into decision on bankruptcy with liquidation of bankrupt's property and appoints receiver. Composition adopted by creditors shall be approved by court. Composition binds all creditors whose claims by virtue of law are included in composition even if they have not been placed on claim's record. Extract from claims' record together with official copy of final decision on approval of composition states enforcement title against bankrupt. Upon performance of composition court issues on bankrupt's or administrator's motion decision on performance of composition and bankrupt regains right to free administer and dispose of his property.

Restructuring Proceedings.

Bankruptcy and Restructuring Law regulates also restructuring proceedings in case of threat of insolvency of entrepreneurs. Entrepreneur is deemed threatened by insolvency if, despite exercising of his obligations, according to reasonable appraisal on his economical situation it is obvious that in short time he will become insolvent. Provisions of restructuring proceedings do not apply to entrepreneur (i) who carried out restructuring proceedings within two last years, (ii) who was included by composition within last five years, (iii) against whom bankruptcy proceedings with liquidation of bankrupt's property or including liquidation composition were carried out within last five years, or (iv) against whom motion for bankruptcy declaration was refused or bankruptcy proceedings were discontinued because of lack of property for cover proceedings' costs within last five years. Entrepreneur threatened by insolvency may lodge statement on instituting of restructuring proceedings together with restructuring plan and other financial documents as well as notarized declaration on truthfulness of data included in statement. Statement on instituting of restructuring proceedings is published in Court and Economic Gazette and in at least one local and at least one national daily newspapers and date of publication determines date of instituting of restructuring proceedings. For time period of restructuring proceedings court appoints court's supervisor. As of date of instituting of restructuring proceedings payments of entrepreneur's obligations are suspended and enforcement proceedings may not be instituted. Restructuring proceedings constitute no objection to institute any other court or administrative proceedings, even bankruptcy proceedings. Restructuring plan should guarantee restitution of entrepreneur's capacity to compete on market. Restructuring of obligations shall occur by way of composition adopted on creditors' assembly. Composition adopted by creditors should be approved by court and court may appoint supervisor for time period for performance of composition.

8.05 EXECUTIONS:

District courts and court executive officers are competent in execution matters. All execution activities are carried out by court executive officers with exception of those reserved for courts alone. Motion to initiate execution is to be filed with appropriate court or court executive officer. In cases where execution ex officio is possible, it may be carried out upon demand of court of first instance which examined case, and later directed to appropriate court or court executive officer. In motion or demand for execution ex officio, performance to be executed and method of execution is to be indicated and executory document is attached thereto.

Executory document with writ of execution is basis for execution. Executory documents include in particular: (a) decisions of court, as well as court settlements which are valid and final or subject to immediate execution, (b) arbitral award or settlement reached therein, (c) other decisions, settlements and acts which by virtue of law are subject to court execution, (d) notarial deed, in which debtor subjected himself to execution and which includes duty to pay certain amount of money or deliver other exchangeable property quantitatively indicated in deed, or duty to release individually indicated object, premises, real property or registered ship, when date of payment, delivery or release is indicated in deed, (e) notarial deed in which debtor subjected himself to pay maximum amount specified therein provided that such deed indicates conditions for conducting execution as well as date by which creditor may request writ of execution based on such deed, and (f) notarial deed in which owner of real property or creditor of claim encumbered with mortgage, who is not debtor, subjected himself to execution from that real property or claim in order to satisfy creditor whose claim is secured with mortgage, when amount of claim to be satisfied is indicated in deed or described by indexation clause, provided that such deed indicates conditions for conducting execution as well as date by which creditor may request writ of execution based on such deed.

Special procedure is established for banks. Bank books and excerpts from these books certifying declarations of debtor, lifting of obligations, renouncement of obligations, confirmation of receipt of dues or confirmation of granting of credit, amount of such credit, interest on credit and form of repayment are considered official documents and constitute basis for entries into Land Registry Books and public registries (see category 22 Mortgages, topic 22.02 Mortgages). These documents together with declaration that obligations shown therein have become due are considered execution documents.

Executory document is basis for execution for entire claim it includes and from entire assets of debtor, unless it provides otherwise. Regulations determine in detail all object limitations of execution. Executory body is not entitled to examine justification and maturity of duty covered by executory document. Debtor must be notified at beginning of execution and provided with text of executory document together with description of method of execution upon first executory act. If place of debtor's stay is not known, court will appoint him guardian ex officio if execution is to be initiated ex officio or upon creditor's request otherwise.

Execution from movables must be undertaken by executive officer of court in district in which property is located unless creditor indicates other executive officer. Execution on movables commences with their seizure, which is done by registering it in seizure protocol. Seizure may be made when movables are in possession of debtor or creditor who initiated execution. Movables in possession of third parties may be seized only upon their consent to seizure, their admission that it is debtor's property or in other circumstances specified by law. Sale of seized movables may not take place sooner than seventh day after day of seizure, unless law provides otherwise (e.g., property might be sold immediately after seizure in case it may soon get spoiled or its guarding or storage would cause excessive costs).

Execution of real property must be undertaken by executive officer of court in district in which property is located. Court execution officer summons debtor to pay his debt or otherwise he will start process of description and evaluation of property. Upon sending of summons to debtor, court's execution officer is obliged to send request to authority maintaining land registry books to make entry about initiation of execution or to file request for collection of documents. Real property is considered seized when summons is delivered to debtor. In relation to debtor to whom summons was not delivered and third parties, real property is considered seized when entry is made in land registry book or court execution officer's request is filed to collection of documents. Seizure includes real property and everything which, according to law, may be object of mortgage. Seized property is sold through public auction. Date of auction may be no earlier than one month from day of description and evaluation or before decision execution is based upon becomes binding.

If State Treasury is debtor, creditor, by presenting executory document, calls state organizational entity directly to effect performance. Such unit is required to effect performance confirmed by executory document. If executory document, drawn for certain amount of money, will not be executed within two weeks from day of delivery, creditor may request that court attach writ of execution to executory document, in order to carry out execution on bank account of appropriate state organizational entity. In case of non-monetary performance, court, upon creditor's request, is to specify date for director of appropriate state entity to carry out performance and is to fine him if he fails to perform within specified time.

Executory proceedings are governed by arts. 758, 1088 of C.C.P. Except regulation of execution from real property (which may take form of simplified execution in relation to undeveloped plots or plots developed only with buildings under construction) and movables, C.C.P. permits and regulates execution from compensation for work, bank accounts, other claims and other proprietary rights, as well as from maritime vessels. Execution of non-monetary performances is regulated in specific manner by arts. 1041-1059 of C.C.P. Execution against debtor, who carries out business activity in form of enterprise, may take form of execution on profits acquired from such activity by establishing receivership over enterprise.

8.06 FRAUDULENT SALES AND CONVEYANCES:

See topics 8.01 Assignments, Bankruptcy and Restructure; category 3 Business Regulation and Commerce, topics 3.03 Bills and Notes, 3.09 Contracts.

8.07 GARNISHMENT:

See topics 8.03 Attachment, 8.05 Executions.

8.08 LIENS:

In certain circumstances, debtors enjoy right of lien, which authorizes them to refuse performance until creditor satisfies or secures execution of debtor's claim. According to C.C., it is relative right which is ineffective against third parties. It is restricted to debtor-creditor relationships and provided only in following circumstances: (1) Persons obliged to deliver another's property may retain it until all obligations are satisfied or security given for all claims to which they are entitled including refunds for expenditures made for damages caused. Rule not applicable when duty to deliver results from tort or where return of hired, leased or borrowed property is concerned. (art. 461). (2) Due to rescission of contract, parties are obligated to return already completed performance. Each will have right of lien until other offers to meet obligation or offers to secure claim for such return. This rule is applied upon dissolution or invalidity of mutual contract. (arts. 496, 497). (3) Lessor may object to removal of property through statutory right of pledge. Lessor retains it at own risk until rent in arrears is paid or secured. (art. 670, §1).

8.09 PLEDGES:

Pledge is security claim on movable good, referred to herein as “Movable” (“Pledge on Movables” [arts. 306-326 C.C.]) or transferable rights (“Pledge on Rights” [arts. 327-335 C.C.]). Movable secures right by which creditor may satisfy claim, regardless of whose property it has become, having precedence over personal creditors of owner of movable, except those with priority by force of law. Pledge may also be established in order to secure future or conditional claim. To establish pledge on movable, contract between owner and creditor must be entered into, and object must be delivered to creditor or to third person whom parties have stipulated. If movable is being held by creditor, contract itself is sufficient to establish pledge on movables. Contract to establish pledge on rights must be in writing with certified date, even if contract to transfer right does not require such form. If establishment of pledge on rights over claim does not take form of delivery of document or endorsement, written notice to debtor of claim by pledgor is required to establish pledge on rights. Pledge may be established on movables of debtor to secure credits of bank, but such movables must be held by debtor or third party.

If at moment of establishment of pledge, object of pledge is already subject to another property right, later-established pledge has priority over right established earlier, unless pledgee acted in bad faith. Stipulation by which pledgor obliges himself to pledgee not to dispose of or charge object of pledge before expiration of pledge is invalid. Satisfaction of pledgee from charge takes place according to provisions concerning court execution proceedings. Time limitations on claim secured by pledge do not override right of pledgee to acquire satisfaction of right attached. Transfer of claim secured by pledge also transfers pledge. If claim is transferred with exclusion of pledge, pledge expires. Pledge cannot be transferred without claim which it secures. If pledgee returns movable to pledgor, pledge ceases to exist, regardless of any stipulation to contrary.

Pledgee may perform any transaction and vindicate any claim, in order to preserve right attached by pledge. If enforceability of secured claim depends upon serving of notice by creditor, pledgor may serve notice without consent of pledgee. If claim secured by pledge is enforceable, pledgee may serve notice of right attached to claim and that fulfillment of pledge obligation attaches to object of performance. If pecuniary claim secured by pledge becomes enforceable, pledgee may demand that, in lieu of payment, pledgor transfer attached right to him, to extent of amount of claim secured by pledge. Pledgee may take his part of claim before pledgor takes part due him.

Claims may also be secured by registered pledge which may be established pursuant to Law on Registered Pledges and Pledge Registry of Dec. 6, 1996. Registered pledge allows creditor to acquire security interest in pledged asset without assuming its possession. Registered pledges may be established to benefit of State Treasury, state entities, municipalities and municipal entities, Polish and foreign banks, international financial institutions, Polish lending institutions, and other entities conducting business in Poland. Establishment of registered pledge requires execution of written contract between pledgor and pledgee and its registration with Pledge Registry maintained by district court. Registered pledge may encumber movables and transferable rights. Registered pledge has priority before rights affecting pledged object subsequently established. Date of filing for registration of pledge with Pledge Registry is decisive for determination of priority between several registered pledges encumbering one pledged asset. Pledge agreement may provide pledgee with right to assume ownership of pledged asset if pledged asset belongs to one of following categories: (i) Securities admitted into public trading (provided that Financial Supervision Commission agrees to such assumption and determines its terms); (ii) commonly traded objects; (iii) objects whose value was described in pledge agreement. Pledge agreement may provide that pledgee's claims are to be satisfied from proceeds of public sale of pledged asset.

Act on certain financial collaterals of Apr. 2, 2004, which implemented Directive 2002/47/EC of European Parliament and Council of June 2, 2002 on financial collateral arrangements introduced collaterals established on financial means and financial instruments to secure financial claims or claims relating to delivery of financial instruments, including future, contingent, and periodic claims. Financial collaterals include transfer of right to financial means or instruments, financial pledge (pledge on right to financial means or instruments), and blockade on account on which securities or other financial instruments are deposited. Financial collaterals may be established by or for benefit of entities listed in Law, which include among others: National Bank of Poland and other central banks, European Central Bank, European Investment Bank, Bank for International Settlements, International Monetary Fund, multilateral development banks, investment firms, investment funds, banks, credit institutions and financial institutions, pension funds, insurers, etc. Law regulates establishment of financial collaterals and satisfaction of claims.

Pledges may arise by operation of law (“Statutory Pledges”). Statutory Pledges arise in similar ways as do Pledges on Movables. For example, Statutory Pledges arise in following situations: (a) lessors acquire Statutory Pledge of lessee's movables brought into leased property, unless such movables are not subject to seizure (art. 670 C.C.); (b) tenants renting movables which aid in conduct of farm or enterprise acquire Statutory Pledge if movables are situated within area of property of tenancy (art. 701); (c) agents acquire Statutory Pledge of principal's movables received in connection with agency contract (art. 763); (d) commission agents acquire Statutory Pledge of items constituting commission sale items (art. 773); (e) carriers and forwarding agents acquire Statutory Pledge on shipments (arts. 790, 802); and (f) warehouses acquire Statutory Pledge on goods accepted for storage (art. 859[3]).

9 DISPUTE RESOLUTION

9.01 ALTERNATIVE DISPUTE RESOLUTION:

General.

Polish law provides for dispute resolution through judicial proceedings (see category 6 Courts and Legislature, topic 6.01 Courts) and arbitration (see topic 9.02 Arbitration and Award). Extensive, amended regulation of arbitration proceedings in civil matters was introduced by Act of July 28, 2005 which came into force in Oct. 2005.

Mediation existed so far for criminal proceedings and for proceedings before regional administrative courts. Mediation regulations in civil matters were also introduced to C.C.P. in 2005. According to Labor Code employees' claims may be pursued before Settlement Commission before being brought into court but in practice this institution is rarely used.

Mandatory Dispute Resolution.

Polish labor law provides special proceeding for Group Dispute Resolution, with respect to disputes that may arise between employees represented by trade union and employers. Employees are entitled to undertake strike, only if mediation proceeding provided for is exhausted.

Voluntary Dispute Resolution.

Polish Civil Code includes general regulation of conciliatory procedure in accordance with which parties may make reciprocal concessions in scope of legal relationship existing between them, in order to settle their claims, resulting from this legal relationship or ensure their performance or execution or prevent existing or possible dispute to occur. In result of conciliation procedure parties enter into agreement before or outside court, which shall be enforceable according to general rules of law of contracts. There are special rules for termination of such agreement if parties conclude agreement acting under influence of mistake.

Mediation.

Under C.C.P. rules contracting parties, within limits of their capacity to freely incur obligations, may take controversies concerning property and non-property to arbitration mediation subject to settlement, excluding controversies concerning alimony. According to amendments to C.C.P. mediation is to be alternative to court proceedings.

Mediation proceedings are closed and voluntary, conducted under mediation agreement between parties or court order directing parties for mediation and may be conducted both before commencement of court proceedings as well as in their course. Having been confirmed by court, mediation settlement has force equally binding to settlement before court.

Mediator is freely chosen by parties or assigned by court and may be any person with full capacity to perform legal acts and fully possessed of public rights. State judges may not be mediators. Initiation of mediation proceedings interrupt running of limitation period, are confidential and their outcome is recorded in protocol filed with court.

Shall mediation settlement be enforced, enforceability statement must be issued by court. Unenforceable settlement is confirmed at closed session.

There is also special regulation for individual labor disputes. Arbitration agreement in this regard must be in writing and may only be made after dispute has taken place. According to Polish Labor Code employee may also submit claim to mediation committee before filing court suit. Such committees are special bodies which may be elected by employer and labor union(s) acting in employer's enterprise.

9.02 ARBITRATION AND AWARD:

Submission of dispute for resolution of arbitration court requires written agreement between parties. Arbitration clause concerning disputes relating to shareholding relationship entered into articles of association of commercial company is binding for that company and its shareholders. Place of proceedings before arbitration court—which is, by rule, indicated by parties and in case of failure to do so such indication is left at court's discretion taking into account circumstances of case and parties' convenience. In case arbitration court does not determine place of arbitration, such place shall be deemed territory of Poland if judgment closing proceedings has been issued in Poland. Polish courts shall have domestic jurisdiction if place of proceedings before arbitration court is in Poland. Polish courts, may also, to limited extent have jurisdiction over foreign arbitration. Agreement to arbitrate should be in writing; it may be concluded in exchanged documents as well as by remote communication means if they allow for recording its contents. It should indicate precisely object of controversy or relation which gave rise to claim. Agreement may include names of arbitrators involved, as well as one presiding arbitrator or only generally indicate number of arbitrators and way they are to be chosen. Until parties fulfill arbitration requirements, no parties may petition regular court. Agreement may indicate also foreign arbitral tribunal to which parties may bring dispute.

Arbitrators may be appointed in manner as chosen by parties; in case of failure to do so C.C.P. provides detailed rules for appointment.

Any person having full legal capacity to conduct legal transactions and fully possessed of public rights and citizenship rights may be arbitrator, excluding state judges. Unless otherwise indicated in agreement to arbitrate, when one arbitrator or presiding arbitrator is not indicated or chosen, parties may ask lower regular court to appoint arbitrator or presiding arbitrator. Party may ask that arbitrator or presiding arbitrator be excluded upon same grounds as those for which judges are excluded from judging certain cases; Polish law provides general rules for resignation and revocation of arbitrators and arbitral tribunal.

Proceedings.

Until arbitration has commenced, parties may determine procedure to be used during arbitration. When no procedure has been prescribed, arbitral tribunal may prescribe any one it deems proper. Arbitral tribunal is not bound by rules of civil procedure, but must establish all circumstances necessary to pass judgment on controversy before it. Unless parties agreed otherwise arbitration court may appoint expert or demand information, documents, other things for investigation or conduct of evidentiary proceedings. There is possibility to secure claim. Party may demand compensation in case such security was “obviously ungrounded”. Initiation of arbitration proceedings interrupts run of limitation period.

Awards.

Court decides in accordance with law relevant for given legal relation and having been authorized by parties to do in accordance with general rules of law or equity taking into account contractual provisions and customs. When making award, if there are parts of judgment on which required majority of votes cannot be reached, agreement to arbitrate ceases to be in effect in relevant scope. Awards of arbitral tribunal are passed by absolute majority vote of arbitrators, unless agreement to arbitrate requires unanimity. Awards should be in writing and include, among other things, reasons taken into account by court and basis for its award. Award of arbitral tribunal should be filed with court and or, in case of permanent arbitration courts, in such court's own archives and has legal force of common (state) court judgment after state court declares its enforceability upon party's motion. There is no appeal from award of arbitral tribunal but parties may request that award be set aside. Petition to set aside can be taken to regular court within three months of receipt of award (or decision by arbitration court as to supplementing, amending or setting aside award). Grounds upon which regular court may set aside award of arbitral tribunal include that: no agreement to arbitrate existed; one or more of parties have been denied possibility of protecting their rights before arbitral tribunal; award concerns dispute not covered by arbitration clause, award was issued in relation to illegal act/forged documents, procedural rules were not followed, case has been resolved by state court etc.

There are more than 20 permanent arbitration institutions that operate in Poland today and leading are: Arbitration Court at National Chamber of Commerce (with its seat in Warsaw), Court of Arbitration at the Polish Confederation of Private Employers ``Lewiatan'', Arbitration Court at Regional Chamber of Commerce in Katowice, Arbitration Court at Cotton Chamber in Gdynia.

Poland is party to several international arbitration conventions including UN Convention on Recognition and Enforcement of Foreign Arbitral Awards signed in New York June 10, 1958 (“UN Convention”) and European Convention on International Commercial Arbitration signed in Geneva Apr. 21, 1961.

10 DOCUMENTS AND RECORDS

10.01 ACKNOWLEDGMENTS:

Acknowledgments are taken before Polish notary public. If document prepared in Poland is to be used abroad and attested by foreign consular office, it should be acknowledged upon request of interested party in one of following ways: (1) authenticity of signature of judge and court secretary and authenticity of court's official seal appearing in court's document should be acknowledged by President of such court or judge authorized by him, (2) authenticity of signature of notary public and of official seal of notary public office on notary document should be acknowledged by President of respective regional court or judge authorized by him, (3) authenticity of signature of sworn translator and his seal on document's translation should be acknowledged by Minister of Foreign Affairs (Ordinance of Minister of Justice of Jan. 28, 2002 on Detailed Activities of Courts with respect to International Civil and Criminal Proceedings in International Relationships).

In principle, Polish law does not require, for acknowledgment of official documents prepared abroad, that they be attested by Polish office abroad. Official foreign documents enjoy same force of evidence as official Polish documents. If document, however, concerns conveyance of property located in Poland, or its authenticity is doubtful, document should be acknowledged by Polish diplomatic mission or consular office, unless Poland's international agreement provides otherwise. (art. 1138 C.C.P.). Hague Convention of 1961 on Abolishing Requirements of Legalization for Foreign Public Documents (“Hague Convention”) to which Poland became party in 2005. Hague Convention provides for certain exceptions from obligation to legalize by Polish diplomatic mission or consular offices official documents issued abroad such as: notarial deeds, court documents as well as private documents which are officially acknowledged. Instead of legalization, Hague Convention introduced uniform form of acknowledgment called “Apostille”. Such acknowledgment confirms: authenticity of signature, character of action of signing person, stamp on documents, etc. Acknowledgment of foreign documents by Polish diplomatic and consular missions abroad is explicitly required in certain laws and regulations.

Poland's international obligations in such matter result also from: Hague Conventions of 1905 and 1954 Concerning Civil Procedure, as well as of 1970 on Taking Evidence Abroad in Civil or Commercial Matters; and bilateral conventions.

10.02 AFFIDAVITS:

Statements or declarations reduced to writing and sworn to or affirmed before officer who has authority to administer oath or affirmation is unknown as item of special evidence in Polish law. Affidavit taken abroad or within Poland, like any written or printed declaration or statement of facts made voluntarily, may be used as evidence in court. In such case, court evaluates credibility and strength of evidence according to its own judgment based upon “comprehensive consideration of collected evidence material”. (art. 233, §1 C.C.P.).

Under Polish law, provision permitting for use of affidavits is not necessary for execution of affidavit for foreign use before Polish notary. Affidavit may be executed in Polish and additionally in any other language spoken by notary or any other language if sworn translator thereof is present. Affidavit's effectiveness before foreign court depends on its compliance with requirements of respective foreign law.

10.03 NOTARIES PUBLIC:

Legal position of notary in Poland is regulated by Law on Notaries, Law on Introduction of Law on Notaries and Amendment to Code of Civil Procedure and Law on Land Registry Books of Feb. 14, 1991.

Law on Notaries is divided into two parts: structure and notarial acts. Notary is appointed to perform notarial acts. In cases specified in law, notarial acts may be performed also by notary's assistant employed in notary office. Notary acts within scope of legal authority as person of public trust and enjoys protection of public functionaries. Notarial acts performed by notary according to law have power of official document. They must be executed in Polish. Notary may also perform same act in foreign language, using his own linguistic ability, which is to be confirmed in same way as in case of sworn translators, or using assistance of sworn translator. In practice, however, performance of notarial acts in foreign languages is uncommon. Notarial acts must be performed in notary office, unless nature of act or circumstances require otherwise. Notary must use official stamp with eagle effigy and may operate only one office. Minister of Justice maintains registry of notary offices and publishes list of such every year in Monitor Polski Gazette. Notaries are appointed and their offices are designated by Minister of Justice upon motion of interested party and after consultation with appropriate notary councils. Only Polish citizens may become notaries. Law on Notaries (art. 11) specifies further requirements to become notary public. Notary public is required to act according to oath and to constantly improve professional qualifications. He is obligated to keep secret circumstances of case with which he became familiar during performance of notarial acts, even after termination of his functions. Notaries are organized in form of self-government. Notary councils established for regions and National Notary Council (http://www.krn.org.pl) have legal capacity. Supervision of notaries and self-government activity is performed personally by Minister of Justice or through presidents of appeal courts or regional courts or other appointed individuals. Notary has disciplinary responsibility for professional misconduct including manifest and flagrant violation of law or transgressions to seriousness and dignity of profession.

Notary is responsible for damages he causes during performance of notarial acts pursuant to C.C.C. provisions, and is required to be very diligent in performing notarial acts. Notaries are obliged to maintain insurance against civil liability for such damages.

Following acts may be performed by notary: preparation of notarial deeds, deeds certifying inheritance, preparation of certificates, delivery of statements, execution of minutes, protests of bills of exchange and checks, safe-keeping of documents, money and securities, preparation of excerpts and copies of documents, drawing of drafts of acts, declarations and other documents upon parties' request, and performance of other activities as provided in separate regulations.

Acts and documents must be executed in clear and understandable manner. Notary public must refuse to perform activities contrary to law. If party participating in activities does not know Polish and translation is not attached thereto, notary is required to translate text himself or use assistance of translator. Signatures on notarial deeds and notarized documents must be executed personally in presence of notary. If signature on document was not executed in presence of notary, signing person must, in presence of notary, confirm signature as his own, and this fact must be mentioned by notary in document. Documents of performed, notarial acts must be transferred after ten years from execution to deeds registry archives maintained by appropriate district court for further safe-keeping. Notary may acknowledge following: authenticity of signature, compliance of copy or excerpt with submitted document, date of document presentation, and fact of someone being alive or his stay in certain place.

In cases stipulated by law, notary shall provide courts and other state authorities with written information on documents prepared by him and excerpts thereof.

Notary shall be compensated for performance of notarial act according to agreement with parties involved, but may not receive more than maximum fee for appropriate act as provided for in provisions of applicable laws. Regulation of Minister of Justice of June 28, 2004, as amended, determines maximum notary fees for notarial acts and maximum amounts by which fee for performance of notarial acts outside notarial office may be increased. In most cases notarial fee depends on value of subject matter concerned. Maximum fee amounts to: (i) in case of value up to 3,000 zlotys—100 zlotys, (ii) in case of value over 3,000 zlotys to 10,000 zlotys—100 zlotys and 3% on surplus over 3,000 zlotys, (iii) in case of value over 10,000 zlotys to 30,000 zlotys—310 zlotys and 2% on surplus over 10,000 zlotys, (iv) in case of value over 30,000 zlotys to 60,000 zlotys—710 zlotys and 1% on surplus over 30,000 zlotys, (v) in case of value over 60,000 zlotys to 1,000,000 zlotys—1,010 zlotys and 0.4% on surplus over 60,000 zlotys, (vi) in case of value from 1,000,000 zlotys to 2,000,000 zlotys—4,770 zlotys and 0.12% on surplus over 1,000,000 zlotys, and (vii) in case of value over 2,000,000 zlotys - 6,770 zlotys and 0.25% from surplus over 2,000,000 zlotys but not higher than 10,000 zlotys. For specified types of notarial acts such as sale of real estate being owned by of State Treasury Agriculture Real Estate Agency or creation of mortgage, Regulation provides for different calculation of maximum notarial fee. In some cases Regulation also provides for fixed amount of fee, e.g., notarial fee for power of attorney amounts to 30 zlotys. All fees determined in Regulation are maximum ones and as such may be decreased by notary in agreement with client.

10.04 RECORDS:

See topics 10.01 Acknowledgments, Notaries Public; categories 2 Business Organizations, topics Associations, Corporations, Foundations, Partnerships; Business Regulation and Commerce, topics Commercial Register, Contracts, Sales; Debtor and Creditor, topic Executions; Estates and Trusts, topic Death (Presumption of and Actions for); Family, topic Marriage; Intellectual Property, topics Patents and Topographies, Trademarks; Mortgages, topics Chattel Mortgages, Mortgages; Property, topic Real Property; Transportation, topic Motor Vehicles.

11 EMPLOYMENT

11.01 LABOR RELATIONS:

General.

Polish Labor Code applies to all employment matters (employment of either Polish or foreign nationals) in entities either solely Polish or with foreign participation acting on Polish territory. Polish law also regulates, among other things, social security and trade union activities.

Discharge.

Notice required to terminate employment contract concluded for unspecified period of time is: two weeks, if worker has been employed by given employer for period shorter than six months; one month, if worker has been employed at least for six months; and three months, if worker has been employed at least for three years.

Employer may not terminate contract with employee scheduled to reach retirement age in four years or earlier, or during justified absence. Women during pregnancy and trade union activists are protected against termination on specified grounds. Regulations on termination of employment contract are also applicable in case of notice to terminate working and pay conditions.

Employment contract may be terminated without notice if employee: has committed offense during his/her employment which affects his/her employment and is proven or seriously violation of his/her duties at work; because of his/her fault has been deprived of license authorizing him to perform his job; has been unable to work for period longer than three months because of disease; or for acceptable reasons has not been present at his workplace for more than one month.

Employment Contract.

Generally regulated in Polish Labor Code, however rules applying to employment contracts concluded with foreigners are contained in Act on Promotion of Employment and Labor Market Institutions, as amended. This Act imposes on foreigner undertaking employment defined in Act (as employment, performance of other paid work or holding post in management boards of entities conducting commercial activity) obligation to obtain work permit from voivod competent for seat of employer. Such permit shall be issued only if prior promise was granted to employer and foreigner obtained appropriate visa or residence permit for definite time within territory of Poland. Such requirements do not apply to foreigners who have obtained permit for settlement or status of refugee in Poland, and to those who will render work outside Poland, nor individuals from certain EU member states.

Under Polish law, employee is person employed on basis of employment contract, appointment, election, assignment or cooperative employment contract. Contractual or internal workplace regulations cannot be less favorable for employees than statutory regulations. Employees must be given written employment contract. Such contract may be concluded for either unspecified or specified time, for execution of defined task or for substitution for time period of absence of substituted employee. Each of these contracts may be preceded by temporary employment contract as probation. Probation cannot extend beyond three months. Employment contract can be dissolved if agreement is reached between parties (one party gives notice of termination of employment contract, with termination suggested within specified time for notice or before time for termination specified in contract expires).

Collective labor agreements (between unions and employers) are common in certain industries (particularly industrial production). In workplaces employing 20 or more employees where collective labor agreement has not been adopted, workplace rules and remuneration rules are introduced by employer (in consultation with trade unions, if any).

Direct and indirect discrimination is prohibited on grounds of sex, age, handicap, race, religion, nationality, political views, trade union membership, ethnic background, beliefs, sexual orientation and form of employment (for example full or part time). Regulations define direct and indirect discrimination and acknowledge harassment as form of discrimination.

Wages.

For companies with foreign participation, rules applying to remuneration of employees are established in founding act (articles of incorporation) of employer or decided upon by its management. Wages are determined and paid in zlotys. Minimum wages are set by Council of Ministers (currently 1,276 PLN).

Employees are entitled to receive remuneration only for work performed. If work stoppage is not caused by fault of employee, remuneration is paid in accordance with his rank in wage scheme. If stoppage is caused by employee, he has no right to claim remuneration. Employee bears pecuniary responsibility for damages caused to his workplace as result of his failure to perform.

Wages of employees regarded as foreigners according to income tax law are liable to tax calculated based on progressive tax rate amounting to up to 32% of wage unless stated otherwise in international agreements binding in Poland. Income gained by foreigners residing abroad as result of membership on Management or Supervisory Board is taxed at fixed rate of 20% however, residents of EU, EEA, and Switzerland are entitled to choose progressive rate regime instead of fixed rate. Taxation of income of foreigners employed in Poland is affected by provisions of Polish-US treaty of Oct. 1974 on avoidance of double taxation. Treaty permits taxation in Poland of remuneration received by US residents for work performed in Poland.

Expatriate employees are allowed to transfer foreign and Polish currency abroad without separate foreign exchange permit if funds are transferred from bank account.

Social Security.

Employee must be insured by employer in state social security system. Social insurance premium is divided into four different insurances: (1) against sickness amounting to 2.45% of employee's wage and payable only by employee, (2) against accidents amounting to 0.67% – 3.60% of employee's wage depending on job's characteristics and is paid fully by employer, (3) pension insurance amounting to 6% of employee's wage on pay up to 85,290 PLN and 25% payable by employee and 75% by employer, and (4) retiring insurance amounting to 19.52% of employee's wage on pay up to 85,290 PLN payable half by employee and half by employer. Moreover employer is obliged to collect and pay health insurance premiums for each of its employees in amount of 9% of their earned wages, less other social security premiums paid (7.75% deductible); additional 2.45% of earned wages is payable by employer to Labor Fund and 0.10% to Guaranteed Employee Benefits Fund.

Hours.

Generally, working time may not exceed eight hours per day and average of 40 hours per week consisting on average of five working days. Maximum working week is 48 hours on average (over four months rolling period) including overtime. Working hours are fixed by employer. Number of overtime hours per employee must not be greater than 150 hours per calendar year. Aside from regular wage, employee working overtime is entitled to overtime allowance amounting to 50% of his wage for working overtime at business days (and Suns. and holidays constituting employee's usual working days according to schedule of working time), and 100% of his wage for working overtime at night, Suns. and holidays not constituting employee's usual working days.

Minimum holiday entitlement is 20 days paid leave, in addition to public holidays, Sats.

and Suns. Employees cannot take pay in lieu of vacation time except on termination of employment.

Labor Unions.

Trade unions are legal in Poland. Group of ten people in plant is sufficient to initiate establishment of union. In event of collective labor disputes, case is submitted to conciliation committee elected by parties and subsequently to Public Arbitrator at common courts. If no solution is achieved, trade union may authorize strike, giving 14 days' notice.

Group Layoffs.

If due to economical or organizational reasons in period not exceeding three months employment contracts are terminated with ten employees in enterprise employing not more than 100 employees, 10% of employees in enterprise employing at least 100 employees but not more than 300, or at least 30 employees in enterprise employing 300 or more employees, procedure of consultation with trade unions has to be followed and local employment agency has to be informed at least 30 days before planned terminations of employment contracts. Employees with whom employment contracts are terminated in such procedure are entitled to compensation amount of which depends on length of employment.

Unemployment Compensation.

Pursuant to Law of Apr. 20, 2004 on Promotion of Employment and Labor Market Institutions, unemployed persons are eligible to receive compensation if they meet certain personal requirements, register with regional employment office and continue to seek employment. Regional employment offices may require unemployed to receive additional training. Persons who fail to accept offer of employment, training or public works are ineligible to receive compensation.

12 ENVIRONMENT

12.01 ENVIRONMENTAL REGULATION:

Legal framework for Environment Protection is described in particular in Law on Introducing Law on Environmental Protection as of July 27, 2001, on Wastes and other Laws, Law on Environmental Protection dated Apr. 27, 2001, Law on Packaging and Packaging Wastes as of May 11, 2001, Water Law as of July 18, 2001, Law on Recycling of Out-of-Exploitation Vehicles as of Jan. 20, 2005, Law on Wastes as of Apr. 27, 2001 and Regulations issued thereunder. Law set out obligations of administration and private persons with respect to environment protection, civil and criminal liability for violation of its provisions, and powers of administrative bodies supervising enforcement of environmental provisions.

Protection of environmental resources is ensured by specification of environment standards and limitation of emissions. In order to implement environment standards, certain programmes are created and published in voivod legal journals. Institutions of environmental protection are: National Council of Environment Protection (http://www.mos.gov.pl) and environment protection funds.

Limitation of Use of Real Estate.

Laws provide for regulations limiting scope of use of real estate due to environment protection purposes. If use of real estate because of environmental protection becomes impossible or significantly limited, person having legal title to use real estate may request to purchase real estate by entity significantly limiting or making impossible use of real estate or request compensation for incurred damage. Such request should be exercised during period of two years from entering into force of decree or law causing such limitation of use of real estate.

Amount of compensation is settled by local government in form of administrative decision.

Protection of Lands and Mineral Resources.

Land, i.e., its soil or its sculpture, is object of legal protection, and in case it is damaged or destroyed, it should be restored to its previous condition. Protection of lands is focused on maintaining it and quality in particular through rational management, keeping environmental standards and limitation of changes of environment. Law on Protection of Agriculture Real Estates and Forests as of Feb. 3, 1995 provides that high quality agricultural and forested lands may not be used for nonagricultural and non-forestation purposes, including investment purposes. Persons conducting agricultural activity are obligated to use their lands so as to preserve their agricultural value. Persons not conducting agricultural activity are obligated to abstain from any actions which may contaminate land. Persons excavating minerals are obligated to take measures which are necessary not only to protect mineral resources but also land surface, and surface and underground waters. Person failing to observe duty to protect agricultural and forested lands may, in cases specified in statute, be subject to fine or imprisonment.

Protection of Waters and Sea Environment.

Protection of water aims to protect its best possible quality and to keep its proper level ensuring protection of biological balance. Entities that cause temporary change of water relations are obliged to undertake restitution actions. Water Law regulates issues related with shaping and protection of water resources, usage of water and managing water resources. Law in particular prohibits introduction of sewage, snow or chemical substances into water. Water may be owned by State Treasury, legal entities (public water) and private persons (private water). Flowing public water is not subject to civil relations, unless it is otherwise provided for in law. Territories covered with water being property of State Treasury necessary for purposes connected with water energy, water transportation, extraction of minerals, recreational activity and other purposes provided for in Law may be transferred for use by third parties in exchange of annual fee upon notarial deed. Owner is obliged to keep water in proper condition. Owner of water may use it for so called ordinary purposes (as defined in law). Use of water for so called special purposes (as defined in law) requires permit.

Water Permissions.

Unless law provides otherwise, water permit is particularly required for: (i) specific water use, (ii) regulation of water, (iii) water construction and installations, (iv) agricultural use of sewage, (v) storage of sewage, etc. Water permit may be issued for specified period of time and, in case of permit for specific use of water, permit may be issued for period not longer than 20 years. In case of permit to introduce sewage containing dangerous substances permit may be issued for period of time not longer than ten years. Permit may be withdrawn or limited without any compensation in particular in case of violation of permit, natural decrease of amount of water, change of law, etc. Permit may be cancelled or limited upon compensation if it is justified by national interest, protection of environment or important economic reasons.

Law also provides for regulations in scope of water corporations, its bodies and supervision. Persons failing to observe water laws may be subject to fines, imprisonment and restriction of freedom.

Inland and sea waters have to be utilized in such manner so as not to destroy ecological balance and deteriorate their usefulness for people, animals, plants and state economy. Investment plans of all undertakings which may significantly influence water environment have to consider projected activity necessary to protect water environment. District (powiat) councils (see category 1 Introduction, topic 1.03 Government and Legal System, subhead Regional Administration and Territorial Self-Governance) may proscribe use of ships and other water vehicles on certain waters, if it is necessary for preservation of water environment. It is forbidden to store or otherwise place (including sinking) wastes in sea. Persons who, undertaking ground works which influence waters, do not use means necessary to preserve ecological balance or do not observe legal requirements imposed on such works may be subject to criminal sanctions and fines.

Air Protection.

Aim of air protection is to prevent excessive concentration of air pollutants and to reduce their existing concentration. Undertakings are obligated to use technologies which protect air from pollution and to monitor concentration of air pollutants. Person emitting air pollutants must apply for individual permit from organs of district (powiat) or in case of investment particularly destructive for environment—from proper body of environment protection for such emissions. Upon payment of fee, organ of environment protection issues such permit, describing maximum level of emissions by applicant. Person who exceeds such maximum permitted level may be ordered to restrain from actions producing excess emissions. Users of internal-combustion engines have to ascertain that these engines do not emit air pollutants in excess of applicable norms. Person conducting business, who fails to monitor concentration of air pollutants, may be subject to criminal sanctions and fines. Persons exceeding permitted level of air pollutant emission may be fined. Persons responsible for contamination of air which might be harmful for humans or may cause significant environmental or economic damage may be imprisoned and fined.

Protection of Plants, Animals, Landscapes, and Special Protection of Plants in Cities and Villages.

Law on Nature Conservation as of Apr. 16, 2004 provides for general protection of plants and animals, necessary to preserve ecological balance in environment. Law is focused on sustainable use of nature with consideration of nature renewal. Law on Nature Conservation specifically prohibits destruction of plants which prevent soil erosion and destruction of plants or animals important for removal of effects of pollution. Persons must abstain from activities which endanger plants in cities and villages. Trees or bushes may, generally, be removed only upon prior permit. Persons who destroy plants which prevent soil erosion, plants or animals important for removal of effects of pollution, damage trees, may be subjected to criminal sanctions and fines. Persons who remove trees of bushes without permit may be fined.

Protection of Environment Against Noise and Vibrations.

Minister of Environment (http://www.mos.gov.pl) determines permissible levels of noise or vibrations. Person producing noise or vibrations, exceeding level set by proper body of environment protection, must apply for individual permit from organs of district (powiat) and in case of investment particularly destructive for environment from proper body of environment protection. Upon payment of fee, proper body of environment protection issues such permit, describing maximum level of noise or vibrations which may be produced by applicant. Person who exceeds such maximum permitted level may be ordered to restrain from actions producing excess noise or vibrations. Persons producing noise or vibrations in excess of permitted level may also be fined.

Environment Protection Against Wastes and Other Contamination.

Regulations of environment protection against wastes and other contamination and waste economy are contained in Law of Apr. 27, 2001 on Wastes, Law of July 29, 2005 on Used Electric and Electronic Devices and Law of Sept. 13, 1996 on Maintaining Cleanness and Order in Communities. Law provides for principles of proceedings with wastes focused on protection of life and health of humans and protection of environment pursuant to principles of sustainable development. In particular it provides for principles for counteracting creation of wastes, its limitation as well as its recycling and neutralisation. Person conducting business activity that may cause production of wastes and is obliged to counteract such production or limit it and limits its negative impact, ensure recycling and neutralisation of wastes.

Law imposes on waste possessors obligation to obtain permission to produce dangerous wastes of more than one ton of wastes per year or more than 5,000 tons per year in case of other than dangerous wastes and to have accepted programme on managing dangerous wastes.

Entities that conduct their activity within scope of recycling and neutralisation of wastes, or collecting and transportation of wastes are required to obtain permission to conduct such activity. Conducting business activity in scope of collecting and transportation of wastes also requires permission.

Law prohibits imports of dangerous wastes. Pursuant to Law of June 29, 2007 on International Movement of Waste, in connection with Regulation (EC) No. 1013/2006 of European Parliament and Council of 14 June 2006 on shipments of waste, other wastes may not be imported, unless imports are authorized by Main Inspector for Environment Protection. Law also prohibits exports of dangerous wastes without prior permission. Transit of dangerous wastes through territory of Poland also requires prior permit. Main Inspector of Environment Protection may lodge objection to international movement of wastes in case entity does not follow restrictions imposed by law, permit may be cancelled, without any compensation. Voivodship Inspector for Environment Protection imposes money penalties from 50,000 to 300,000 PLN on importer or exporter of wastes for illegal (without prior permission) movement of wastes. In other cases such as using same shipping documents more than once or delivering more wastes than permitted, Voivodship Inspector for Environment Protection imposes money penalties of 30,000 to 150,000 PLN. Wastes which cannot be recycled should be stored, liquidated or disposed of, only in places which are designated for that purpose. Possessor of wastes is obliged to keep its quantity and quality evidence pursuant to catalogue of wastes and list of dangerous wastes. Such obligation does not apply to natural persons or entities which use wastes for their own needs. Storage of wastes may be conducted on territory to which business entity has legal title. Possessor of wastes is obliged first of all to recycle those wastes. If for technological reasons recycling is not possible or unjustified for economical and ecological reasons, wastes shall be neutralised in manner pursuant to requirements of environment protection and policy on wastes. Wastes that cannot be recycled should be neutralised. Only wastes that cannot be neutralised or recycled can be stored. Wastes should be collected selectively. Only wastes that previously were segregated into recyclable wastes should be naturalised.

Owners and users of houses, condominiums and other real properties are obligated to maintain their real property clean and free of any man made wastes and contamination. Persons failing to observe laws protecting environment from wastes and other contamination may be subject to criminal penalties and fines.

Law on Packages and Package Wastes.

Law provides for requirements regarding packaging and procedures related with packages and package wastes, ensuring protection of humans' life, health and protection of environment. Law defines packages as products manufactured from any allowed material, designed to store, protect, transport, deliver or present goods. Producers and importers are obliged to limit quantity and negative impact on environment of substances used to produce packages and produced package wastes. Producers, importers as well as exporters are obliged to provide local government bodies with annual reports on produced, imported or exported packages up to Mar. 31 for previous year. Persons failing to observe laws on packaging may be subject to fines.

Protection from Radiation.

Radioactive substances or equipment utilized for their production may only be used if there are sufficient safeguards protecting people and environment from radiation. Radioactive wastes may be recycled only in accordance with terms of decision by proper body of environment protection. Persons using or producing radioactive substances which may be harmful for humans or environment are obligated to monitor level of radiation to which they expose environment. Voivod keeps registry, that is updated annually, of territories on which level of radiation is exceeded. Persons failing to observe legal requirements relating to protection of people and environment from radiation may be subjected to criminal penalties and fines. Persons responsible for contamination of water, air or land which might be harmful for humans or may cause significant environmental or economic damage may be imprisoned and fined.

Exploitation of installations and machines cannot exceed allowed emission standards and cannot cause any harm for humans or environment. Emissions from installations or machines in different than regular circumstances should result only from justified technical requirements and cannot last longer than it is necessary. Technology used in new or modified installations and machines shall ensure in particular use of substances of low risk to environment or humans, rational use of water and other substances and fuels. Owner or user of installation or machine is obliged to ensure its proper work and exploitation.

Law prohibits use of sound amplification installations or machines in public areas of cities, development areas or recreational areas. Limitation does not apply to cultural, sports, religion and other legal events.

Environmental Information.

Everyone is allowed to receive from state authorities information on environment and its protection, including information on decisions, which have been issued by those authorities and environmental strategies and policies state authorities are obliged to provide all information available regarding environment relations, pollution entering environment as well as on any actions taken by those authorities in order to limit pollution. Such information is given within one month from filing motion to state authorities except for information, which is confidential—this limitation, however does not concern data on pollution emission, production of wastes and other contamination, including noise emission. District authorities may order proceeding with participation of local community, at which administrative decisions regarding pollution are made. In case planned investment may have significant influence on environment, administrative decision regarding its realization may not be undertaken without evaluation of such influence in separate proceedings.

Genetically Modified Organisms and Food.

Law on Genetically Modified Organisms dated June 22, 2001 regulates types of use of genetically modified organisms, their introduction into environment, to market and exporting of such organisms. In order for genetically modified organisms to enter market, to be used for any purpose or being introduced to environment or exported, persons or undertakings must file application with Minister of Environmental Protection for proper permission. Period of validity of permission cannot exceed ten years. In case applicant violates Law, permission may be withdrawn. In case of any new information on negative impact to human's health or to environment above mentioned permission may be withdrawn or changed.

User of genetically modified organisms may be liable for damages caused to third party or to environment, unless damage was caused by force majeure or by injured party or third party for which user is not responsible. Person failing to fulfill Law provisions may be subject to imprisonment of maximum 12 years or fine.

Issues related with genetically modified food are regulated in Law on Safety of Food and Nourishment. (See category 16 Health, topic 16.03 Food.) This law provides for obligation to disclose information on genetically modified food. Production or entering into market of genetically modified food should be preceded with investigation of Main Sanitary Inspector in respect of its safety. Main Sanitary Inspector (http://www.gis.mz.gov.pl) keeps registry of such administrative decisions.

Civil Liability for Damage of Environment.

Persons responsible for damage of environment are liable for such damage pursuant to general rules of civil liability contained in Civil Code. Person may be restrained from action, by court order, if such action is contrary to environmental laws and constitutes nuisance for its neighbors. Person may be restrained from action by administrative order if such action causes deterioration of environment.

Monetary Administrative Penalties.

Law provides for administrative monetary penalties that may be imposed in case allowed levels are exceeded as provided in respective permissions. Such violations are stated based on control of inspector of environmental protection. Amount of administrative monetary penalty may be settled by: (i) establishing amount of so called "running penalty" that is calculated in accordance with elapsed number of hours or days of violation, or (ii) assessing penalty for period in which violation took place.

Administration of Environment Protection.

Law defines structure of administration of environment protection. Administration is supervised by Minister of Environment. Administration is composed of: (i) Chief officer of group of villages, mayor or city president, (ii) starost, (iii) voivod. Law establishes Environment Protection and Water Management Funds which finance environment protection. National Environment Protection Council is responsible for creation of environment protection policy.

13 ESTATES AND TRUSTS

13.01 DEATH (PRESUMPTION OF AND ACTIONS FOR):

Missing person may be declared dead if ten years have elapsed from end of calendar year in which, according to existing information, that person was still alive. If, however, at moment of declaring him dead missing person would have attained 70 years of age, period of five years is sufficient. Missing person cannot be declared dead before end of calendar year in which missing person would have attained 23 years of age. One who is reported missing during voyage by air or sea due to disaster to vessel or airplane or any other extraordinary occurrence may be declared dead after six months from day disaster or other extraordinary occurrence took place. If such disaster to vessel or airplane cannot be confirmed, running of six-month period commences one year following day vessel or airplane was to arrive at its port of destination or, if it did not have port of destination, two years following day it was last heard from. One who is missing as result of direct danger to life not envisaged above, may be declared dead after one year following day on which danger ceased or, according to circumstances, must have ceased. (arts. 29, 30 C.C.).

It is presumed that missing person died at moment specified in decision declaring him dead. Most probable is specified as moment of presumed death or, failing any data whatsoever, first day of period on which it becomes possible to declare person dead. If time of death was specified merely by date of day, end of that day is treated as moment of presumed death. If several persons lost their lives during common threat of danger to them, it is presumed they died simultaneously. (arts. 31, 32 C.C.).

Decision to declare death, if such person is Polish citizen or is domiciled in Poland, and does not have any other citizenship, is within exclusive jurisdiction of Polish courts. Polish court may also declare foreigner dead if person authorized to submit application is domiciled in Poland, or foreign citizen had his domicile in Poland. Declaration of death, if death took place in Poland, also belongs to exclusive jurisdiction of Polish courts. (art. 1106 C.C.P.). Law on International Private Law of 1965 stipulates that when Polish court declares missing person as dead, court must apply that person's home country law. According to Law on Birth, Marriage and Death Certificates of Sept. 29, 1986, in case of declaration of death of foreign citizen or declaration of such missing person as dead, death is registered in registry office which has jurisdiction over central district of Warsaw.

See categories 5 Civil Actions and Procedure, topic Actions; Courts and Legislature, topic Courts.

13.02 DESCENT AND DISTRIBUTION:

Statutory succession consists of rules governing descent and distribution. (arts. 931-940 C.C.). These are divided into following groups:

First Group.

Deceased's children and spouse are, by force of law, first appointed to inheritance; they inherit in equal shares. However, part passing to spouse cannot be smaller than one-fourth of entire inheritance. If child of deceased did not survive, his share passes in equal shares to his children. This provision is correspondingly applied to more remote descendants.

Second Group.

In absence of descendants of deceased, his spouse, parents, brothers and sisters are by force of law appointed to inheritance. Spouse who inherits concurrently with other persons from this group receives one-half of inheritance. Remaining parts are inherited in equal shares by brothers and sisters. If one parent did not survive opening of inheritance, his share passes half to other parent and half to deceased's brothers and sisters. If, aside from spouse, only parents or only brothers and sisters are appointed to inheritance, they inherit in equal shares whatever passes jointly to parents, brothers and sisters.

Third Group embraces three situations: (a) when there are no descendants, parents, brothers, sisters and descendants of brothers and sisters of deceased, entire inheritance passes to deceased's spouse; (b) when there are no descendants or spouse of deceased, entire inheritance passes to his parents, brothers and sisters and their descendants; (c) when there is neither spouse of deceased nor relatives appointed by force of law, inheritance shall go to commune of last domicile of deceased as statutory heir. If it is impossible to determine last domicile or deceased's last domicile was abroad, estate shall go to State Treasury as statutory heir.

Some Special Rules Concerning Spouse, Adoptee and Deceased's Grandparents.

Spouse inheriting by force of law concurrently with other heirs, excluding deceased's descendants who lived with deceased at moment of his death, may demand, above spouse's share of inheritance, household objects used by spouse when deceased lived jointly with spouse or used exclusively by spouse. Spouse is excluded from inheritance if deceased had filed for divorce due to spouse's fault and demand for divorce was justified. Exclusion of spouse from inheritance is decision of court.

Adoptee inherits after adoptive parents and his blood relatives, as if he were adoptive parent's child, and adoptive parent and his relatives inherit after adoptee, as if adoptive parent were adoptee's parent. Adoptee subject to certain exceptions does not inherit from his natural ascendants and their relatives, and those persons do not inherit from him.

Deceased's grandparents, if they live in poverty and cannot obtain means of support due them from persons upon whom statutory duty of maintenance or alimony rests, may demand, from heir not charged with such duty, means of support in relation to their needs and value of his share of inheritance.

For discussion of legitimate portions, see topic 13.05 Wills.

13.03 INTESTACY:

See topics 13.02 Descent and Distribution, 13.05 Wills.

13.04 TRUSTS:

See topic 13.05 Wills; category 8 Debtor and Creditor, topic 8.04 Bankruptcy and Restructure.

13.05 WILLS:

Wills and contracts of inheritance are governed by C.C. (arts. 941-958 and 1047-1057).

Wills in General.—Disposition of property in case of death can only be made by will (testament). Will may contain disposition of only one testator. Only person with full capacity to enter into legal transaction may draw up will. Will cannot be drawn up by agent, it must be made by testator personally. Will is invalid if it was drawn up in absence of conscious or free decision-making or expression of intention; under influence of error justifying assumption that had testator not acted under influence of error, he would not have drawn up will with such content; or under influence of duress. Will must be interpreted so as to assure fullest possible fulfillment of testator's intentions. If will is ambiguous, interpretation fulfilling intent of testator's dispositions and giving them reasonable content must be followed.

Ordinary Wills.

Last will and testament can ordinarily be executed in three ways; (a) holographic will—testator may write his will in his own hand, sign it and affix date. However, lack of date does not render handwritten will invalid, if it does not give rise to doubts as to testator's capacity to draw up will, as to contents of will or as to mutual relationship of several wills; (b) notarial will—will may be drawn up by notary; and (c) oral will—testator may also draw up will by orally declaring his last will to chairman or other permanently office-holding member of local authority in presence of two witnesses. Testator's declaration is written down in protocol and dated as of time of writing. Protocol is read to testator in presence of witnesses. Protocol must be signed by testator, by person to whom will was declared, and by witnesses. If testator cannot sign protocol, it must be specified in protocol, together with reason for lack of signature. Deaf or mute persons cannot make will in such manner.

Emergency Wills.

If there is apprehension of early death of testator or if, due to specific circumstances, observance of ordinary form of will is not possible or impractical, testator may orally declare his last will in presence of at last three witnesses. There are special provisions for emergency wills during voyage on Polish ship or aircraft. Emergency wills expire six months from cessation of circumstances which justified non-observance of form of ordinary will, if testator is still living. Running period is suspended during time in which testator has no possibility of drawing up ordinary will.

Revocation of Will.

Testator may at any time revoke either entire will or any of its particular provisions. Only person with full capacity to enter into legal transaction may revoke will; it must be done personally, never through agent. Revocation of will may take place either by testator drawing up new will, or by destroying it with intent to revoke will, or stripping it of characteristics upon which its validity depends, or by making alterations in will, from which his intention to revoke its provisions is apparent. If testator draws up new will without specifying in it that he revokes previous will, only those provisions of previous will which are not compatible with contents of new will are subject to revocation.

Legitimate Portions of Inheritance.

Descendants, spouse and parents of deceased who would have been appointed to inheritance by force of law are entitled, if permanently disabled from work or minor, to two-thirds of value of share of inheritance which would have passed to them on statutory succession, and in other cases—half value of such legitimate share. If person entitled did not receive compulsory share due either in form of donation made by deceased, or in form of appointment to inheritance, or in form of legacy, he is entitled, against heir, to claim for payment of such amount of money as is needed to cover or to make up compulsory share. Deceased may deprive descendants, spouse and parents of their compulsory share by will (disinheritance), if person entitled to compulsory share persistently behaved in manner contrary to principles of social coexistence against deceased's wishes; committed intentional crime against his life, health or freedom or flagrant insult to him or one of persons closest to him; or persistently failed to fulfill his family duties to deceased. Cause of disinheritance of person entitled to compulsory share must be stated in text of will. Deceased cannot disinherit entitled person if he forgave him. Descendants of disinherited descendant are entitled to compulsory share, even though person disinherited outlives deceased. (arts. 991, 1008-1011 C.C.).

Contracts of Inheritance.

Contract over inheritance from living person is invalid, subject to exceptions stated in C.C. Statutory heir may, by way of contract with person he is to succeed, renounce his inheritance. Such contract must be concluded in form of notarial act. Contract of sale, exchange, donation or other contract binding heir to assign inheritance transfers inheritance to purchaser, unless parties have decided otherwise. Contract obliging assignment of inheritance must be concluded in form of notarial act. Same applies to contract transferring inheritance, which is concluded for purpose of performing previously existing obligation to dispose of such inheritance. Purchaser of inheritance succeeds to rights and obligations of heir.

Foreign Wills.

According to Law of Nov. 12, 1965 on Private International Law (art. 35) validity of will and other legal actions in case of death are determined by national law of testator at day of execution thereof. Compliance with form provided by law of state in which transaction was executed is also acceptable. Poland is party to Convention on Conflicts of Laws relating to Form of Testamentary Disposition signed in Hague on Oct. 5, 1961. Foreign will and each testamentary disposition is valid if its form complies with internal law of place where testator made it, or of nationality of testator, or of place of domicile of testator, or of place in which testator had his habitual residence, and, for immovables, of place where they are situated. See topic 13.02 Descent and Distribution.

14 FAMILY

14.01 ALIMONY:

See topic 14.02 Divorce.

14.02 DIVORCE:

Divorce is regulated by 1964 Family and Guardianship Code in arts. 56-61 and by C.C.P. in arts. 425-446. Poland is party to Hague Convention on Conflicts of Law and Jurisdiction relating to Divorce and Separation of June 12, 1902.

Divorce may be effectuated only by judgment of court. Mediation is allowed by court in case marriage may be sustained. Court dissolves marriage by means of divorce. Husband and/or wife may demand divorce on grounds of irreconcilable and permanent breakdown of marriage. However, although such breakdown has occurred, divorce is not permissible if as consequence well-being of parties' common minor children would suffer in any way or if judgment to dissolve marriage by divorce would be contrary to principles of social coexistence. Divorce is also not permissible if demanded by party solely at fault for breakdown of marriage unless other party consents to divorce, or if denial of such consent is under particular circumstances contrary to principles of social coexistence.

In divorce decree, court decides which party, if any, is at fault for breakdown of marriage. Court does not decide upon fault if both parties mutually consent to no-fault procedure. Legal consequences of such judgment will be as if no party were at fault.

In judgment of divorce, court decides legal custody of common children as well as level of maintenance and care costs which each parent must bear. Court may award custody of child to only one parent, restricting parental custody of other to certain rights and obligations toward child.

Divorced party who as consequence of marriage had changed his or her former last name may, in course of three months from date on which divorce judgment becomes final, through declaration made in front of registrar, return to last name which party had borne prior to marriage.

Divorced party who was not proven to be solely at fault in breakdown of marriage may, under certain circumstances, demand that other divorced party provide means of support and sustenance in degree reflecting justified needs of entitled and financial abilities of obliged. If one party was proven to be solely at fault and divorce brings about substantial deterioration of material situation of party not at fault, court may, upon demand of latter, decide that party solely at fault is obliged to provide other with means of support within his or her justifiable needs even though latter may not be in dire circumstances. Obligation to provide means of support ceases in case of marriage of divorced party. However, if obliged is divorced party who was not found to be at fault in breakdown of marriage, obligation ceases after five years from moment of granting of divorce, unless court, due to exceptional circumstances, decides on demand of entitled to prolong five year term.

According to art. 18 of Private International Law Code of 1965, law of country of which both parties are citizens at time of initiation of divorce proceedings is applicable to divorce. In absence of common national law, law of country in which both parties are domiciled is applicable. If parties do not have domicile in same country, Polish law is applicable.

In matters of jurisdiction see category 6 Courts and Legislature, topic 6.01 Courts.

14.03 HUSBAND AND WIFE:

See topics 14.02 Divorce, Infants, Marriage; category 13 Estates and Trusts, topic 13.02 Descent and Distribution.

14.04 INFANTS:

Legal standing of infant is regulated in arts. 62-113 of Family and Guardianship Code of Feb. 24, 1964 and arts. 8-22 of C.C. as well as arts. 453-458 and 568-584 of C.C.P.

Poland is party to Convention on Rights of Child (1989), European Convention on Legal Status of Children Born out of Wedlock (Strasbourg, 1975). European Convention on Recognition and Enforcement of Decisions Concerning Custody of Children and on Restoration of Custody of

Children (Luxembourg, 1980). There exists Spokesman for Child's Rights in Poland.

Children remain under parental authority until age of maturity (i.e. 18 years of age). Both parents have parental authority, but in case of judicial establishment of paternity, father does not have such authority until granted in judicial decision establishing paternity. Parental authority may also be granted to father by guardianship court after establishment of paternity.

Parental authority includes right and duty to take care of person and property of minor as well as to educate him. Minor under parental authority must obey his parents who are his legal representatives. If minor is under parental authority of both parents, each parent may act separately as minor's legal representative. Parents are obligated to administer with due diligence property of minor remaining under their parental authority. Such administration does not include minor's wages or property rendered to him to be freely used. Parents may not undertake activities exceeding scope of regular administration or grant their consent to minor without judicial permission. Parents are obligated for child support on behalf of minor, who is not able to live by himself, unless profits from minor's property are satisfactory to cover expenses of his living and education. In all other circumstances, only subject in need is entitled to alimony performances.

Law of Nov. 12, 1965 on International Private Law provides that legal relationship between parents and children is governed by child's national law (law of parent's citizenship). Establishment and denial of paternity or maternity are governed by child's national law as of moment of child's birth. Recognition of child is governed by law of country of which child is citizen. Recognition of conceived, but unborn child is governed by national law of mother. Child support performance between parents and children are governed by national law of person entitled to receive such performance (arts. 19, 20).

See category 3 Business Regulation and Commerce, topic 3.09 Contracts, subhead Conditions of Validity of Contracts.

14.05 MARRIAGE:

Marriage is regulated by Family and Guardianship Code of Feb. 25, 1964, Title I “Marriage”. (arts. 1-61). Other sources of regulations in marriage matters are: C.C.P. (arts. 425-452, 567), Law on Civil Status Registry of Sept. 29, 1986, c. VI “marriage contracting” (arts. 53-63 and arts. 14-18) of Law on Private International Law of 1965. Poland is party to Hague Convention of June 12, 1902 on Conflicts of Law Relating to Marriage and Convention on Consent to Contract Marriage, Lowest Marriage Age and Marriage Registration signed in New York on Dec. 10, 1962.

Marriage is contracted when man and woman jointly and solemnly declare in front of either civil status officer at office elected by parties or before priest of church or religion community (only those allowed by ratified international contract or statute) that they wish to enter into marriage relationship. If in front of civil status officer then marriage is contracted publicly, in presence of two mature witnesses. In latter case act of marriage must be subsequently issued by officer. Parties are also at liberty to have both civil and religious ceremony. Marriage certificate is issued immediately after contracting thereof, according to Law on Civil Status Registry. Marriage cannot be contracted before expiration of one month from day parties, intending to get married, filed statement with head of civil status office in writing that they do not have knowledge of any circumstances excluding contracting thereof (this term may be shortened because of important reasons). Under special circumstances, court may permit filing of statement to contract marriage by representative. Certificate of representation must be in writing, notarized, and include name of person with whom marriage is to be contracted. Minimum marriage age is 18. Under special circumstances, age requirement may be reduced by guardianship court to 16 for woman, providing circumstances indicate that marriage will be beneficial to future family. Marriage may not be contracted by person totally legally incapacitated, including persons mentally ill or retarded; provided, however, that person is not totally legally incapacitated and his or her condition does not endanger future offspring, court may grant permission for marriage.

Marriage may not be contracted by person already married, between relatives in direct line, between siblings or between kin (related by marriage) in direct line, unless, because special circumstances exist, court waives prohibition against marriage between kin. Additionally, marriage may not be contracted between adopter and adoptee.

Both parties in marriage have equal rights and duties. They are obliged to conjugal life, mutual assistance, faithfulness and cooperation on behalf of family they create. Spouses are required, according to their financial abilities, to satisfy needs of family they create. Both are jointly and severally liable for obligations incurred by one of them in transactions relating to satisfying family's needs. Statutory joint spouse property, which includes their possessions including their earnings and incomes from common property, is established upon marriage contraction. Objects not included as joint property remain as individual property. Creditor of one spouse may demand satisfaction from joint property provided that obligation is undertaken with consent of other spouse. Contractual extension, limitation or exclusion of statutory joint property is possible, there is also possibility of contractual exclusion of joint property with compensation of property. Such contract may as well be concluded before marriage, but must always be in form of notarial deed. Form of marriage contract is governed by law of country in which contracted. Both spouses are entitled to manage joint spousal property, unless law provides otherwise and are obliged to cooperate in this scope and to inform each other on this property status.

In event of marriage outside Poland, compliance with form required by national law of spouses is only requirement. Same principles apply to nullification of marriage. Both personal and property relations, including conclusion, amendment or dissolution of marriage settlement, are governed by national law of spouses. Property relations resulting from marriage settlement are governed by national law of spouses as of day of conclusion of settlement. When spouses do not have common national law, law of place of their domicile applies and when spouses have separate domicile, Polish law applies. Foreigner intending to contract marriage is required to file, with head officer of civil status registry office, document testifying his ability to contract marriage according to his national law. If document is difficult to obtain, court may waive requirement to present such document in non-litigious proceedings, after establishing foreigner's ability to contract marriage according to own national law. Stateless person and person whose citizenship is impossible to determine is required to file document testifying to his ability to contract marriage according to law of country in which he is domiciled.

14.06 SEPARATION:

Separation is regulated by Family and Guardianship Code in arts. 611-616 and by C.C.P. in arts. 425-446 and 5671-5675. Poland is party to Hague Convention on Conflicts of Law and Jurisdiction relating to Divorce and Separation of June 12, 1902.

Separation may be effectuated only by judgment of court. Separation does not dissolve marriage; separated spouses may not marry another person. Husband and/or wife may demand separation on grounds of irreconcilable breakdown of marriage. However, although such breakdown has occurred, separation is not permissible if as consequence well-being of parties' common minor children would suffer in any way or if judgment introducing separation would be contrary to principles of social coexistence.

In separation decree, court decides which party, if any, is at fault for breakdown of marriage. Court does not decide upon fault if both parties mutually consent to no-fault procedure or demand for separation was filed by spouses in consented way. Legal consequences of such judgment will be as if no party were at fault.

In judgment of separation, court decides legal custody of common children as well as level of maintenance and care costs which each parent must bear. Court may award custody of child to only one parent, restricting parental custody of other to certain rights and obligations toward child. Declaration of separation results in separateness of property of spouses.

Separated party who was not proven to be solely at fault in breakdown of marriage may, under certain circumstances, demand that other separated party provide means of support and sustenance in degree reflecting justified needs of entitled and financial abilities of obliged. If one party was proven to be solely at fault and separation brings about substantial deterioration of material situation of party not at fault, court may, upon demand of latter, decide that party solely at fault is obliged to provide other with means of support within his or her justifiable needs even though latter may not be in dire circumstances.

Upon consent motion of separated spouses, court declares cancellation of separation.

According to art. 18 of Private International Law Code of 1965, law of country of which both parties are citizens at time of initiation of separation proceedings is applicable to separation. In absence of common national law, of country in which both parties are domiciled is applicable. If parties do not have domicile in same country, Polish law is applicable.

In matters of jurisdiction see category 6 Courts and Legislature, topic 6.01 Courts.

14.07 SUPPORT:

See topics 14.02 Divorce; 14.06 Separation.

15 FOREIGN TRADE AND COMMERCE

15.01 CUSTOMS:

As of May 1, 2004 as result of accession to EU, Poland became member of customs union covering all EU member States. Whole EU territory is recognized as single customs territory for customs purposes. Implication of this is that as of May 1, 2004, no customs duties are imposed in trade between Poland and other EU member states (free movement of goods). Accession has also consequence of unification of customs regulations between Poland and other EU member states. Community law (in particular, Community Customs Code and Common Customs Tariff) replaced Polish Customs Code and most of national customs regulations, including Polish Customs Tariff. Community Customs Code and Common Customs Tariff are currently applicable in trade between Poland and third (i.e., non-EU) countries.

Customs Law of Mar. 19, 2004 was adopted in order to meet EU requirements and supplements EU regulations. Poland is party to World Trade Organization (WTO) and since May 1, 2004 is EU member state.

All EU member countries form customs union and apply common customs tariff on imports from outside EU and unified commercial policy toward third-country goods.

Once imported good clears customs in EU, it moves freely throughout entire customs territory.

Most of rules governing EU customs are in Customs Code. Customs code regulations include rules on origin, valuation, transit and tariff.

Imported commodities are subject to customs duty, with exceptions provided by law. Duties are assessed on basis of customs value. Customs value is established on basis of transaction value; value of identical or similar products manufactured in exporter's country; evaluation value (costs of materials and manufacturing process); value established according to WTO rules. Costs associated with import such as costs of insurance license fees, exchange rate and transport are included in customs value. Customs Code contains list of circumstances under which imported commodities are exempt from customs duty. There are exemptions from customs duty granted in conformity with reciprocity agreements concerning imports and exports of certain countries. Customs duty is established in accordance with state of commodities as of date of customs clearance and on basis of rates in force on that day.

Following customs procedures regulated in Community Customs Code may be operated in Poland: (i) Release for free circulation, (ii) transit, (iii) inward processing, (iv) outward processing, (v) temporary importation, (vi) processing under customs control, (vii) customs warehousing, and (viii) exportation. Procedures mentioned in (iii)-(vii) are called ``customs procedures with economic impact''. In order to take advantage of these procedures, authorization issued by customs authorities is required. Importer does not have to pay customs duty and VAT, but all duties must be secured (e.g., in form of bank guarantee presented to customs office).

Common Customs Tariff is applied in trade between Poland and non-EU countries. Basic rates included in Tariff, i.e., ``conventional duty rates'' are applied generally to import of goods originating in WTO countries or other countries which enjoy ``most favored nation'' treatment by EU, e.g., Russia. Preferential rates are applied for countries benefiting from tariff preferences established unilaterally by EU (particularly developing countries) or on basis of bilateral agreements between EU and certain countries (e.g., agreement establishing EEA which consists of EU, Norway, Iceland, and Liechtenstein).

EU may as well establish tariff quotas, tariff ceilings, and tariff suspensions. Tariff suspensions and quotas permit total or partial waiver of normal duties applicable to imported goods for unlimited (suspensions) or limited (quota) quantity. This is normally done for unlimited period of validity. Import outside tariff quota is made at regular (higher) duty rate as determined in Common Customs Tariff. Tariff quotas are, in most cases, managed on ``first-come first-served'' basis.

Additional customs duties in case of dumped or subsidized imports of certain goods from certain countries may also be introduced by EU. Anti-dumping, anti-subsidy, and other safeguard measures are applied after concluding formal procedure by European Commission.

TIR and ATA Conventions regulating principles of shipment of products are respected.

Rules of origin of products regulate implementation of customs tariff, import restrictions, anti-dumping procedures, preference systems and bilateral agreements.

Bilateral agreement signed Aug. 8, 1990 exists between Poland and U.S. on cooperation and mutual assistance between their customs services.

15.02 EXCHANGE CONTROL:

See topic 15.03 Foreign Exchange; category 3 Business Regulation and Commerce, topic 3.02 Banks and Banking.

15.03 FOREIGN EXCHANGE:

Foreign Exchange Law of July 27, 2002 was adopted in order to meet EU requirements. It revolutionized Polish system and practice in scope of foreign exchange transactions. It entered into force as of Oct. 1, 2002 and subsequently has been further liberalised. Law regulates foreign exchange transactions with foreign countries and trading of foreign exchange values in Poland as well as business activity related to sale and purchase of foreign exchange values and intermediation related thereto. Law defines residents as natural persons domiciled in Poland, legal persons with their seats in Poland as well as other entities with seats in Poland able to undertake obligations and acquire rights on their own behalf, branches, agencies and enterprises established in Poland by nonresidents and Polish diplomatic missions, consular offices or special missions enjoying diplomatic immunities as well as dependent, autonomic, or associated territories of EU member states unless international treaties binding upon Poland require that such territories are treated in same way as EU member states. Nonresidents are defined as natural persons domiciled abroad, legal persons with their seats abroad as well as other entities with seats abroad able to undertake obligations and acquire rights on their own behalf, branches, agencies and enterprises established abroad by residents, and foreign diplomatic missions, consular offices or special missions enjoying diplomatic immunities. Law also defines nonresidents from third countries as nonresidents from countries other than Poland and EU member states as well as other than countries-members of EEA (European Economic Area) or OECD (Organization for Economic Cooperation and Development).

Law introduced general rule that foreign exchange transactions are generally permitted unless law provides otherwise. It provides restrictions related to foreign exchange transactions which are divided into two groups: (i) restrictions provided for directly in Foreign Exchange Law, and (ii) restrictions which may be imposed through order of Council of Ministers in extraordinary situations. Both groups of restrictions do not apply when State Treasury of Poland, National Bank of Poland or state authority is party to foreign exchange transaction. Law also provides for several obligations that must be fulfilled when executing foreign exchange transactions. Persons or entities may file for permit from President of National Bank of Poland (NBP) to be released from observing obligations and restrictions. Below are examples of restrictions provided for directly in Law: (1) sending abroad and exportation by residents to third countries of Polish or foreign funds designated to business activity in such countries, (2) selling in Poland by nonresidents from third countries certain securities, claims and other rights, (3) purchasing by residents of shares in companies with seats in third countries, etc. Special restrictions may be imposed by orders of Council of Ministers provided that they are necessary to: (1) fulfill decisions of international organizations of which Poland is member, (2) ensure public order or safety, (3) ensure balance of payments, or (4) ensure stability of Polish currency. Law provides among others following obligations which must be fulfilled when exporting or importing foreign exchange values or Polish funds: (1) obligation to notify customs officers or bodies of Border Guards importation or exportation of foreign exchange gold or platinum irrespective of value as well as Polish and foreign funds in aggregate value exceeding [Euro]10,000, (2) residents are obliged to make money transfer abroad and settlements with nonresidents only through authorized banks if amount of transfer exceeds [Euro]15,000, (3) residents performing foreign exchange transactions with foreign countries are obliged to notify NBP particular data within certain time periods.

Law also regulates undertaking and conducting money exchange business and maintenance of money exchange offices. Conducting money exchange business requires entry into money exchange offices register, which is maintained by President of NBP. Money exchange business may be conducted only by natural person who has not been sentenced for fiscal offence or other crime aimed at obtaining property or personal benefits, or by company or entity not having legal personality whose partners or members of corporate bodies have not been sentenced for such crimes.

Pursuant to Foreign Exchange Law NBP controls granting permits by President of NBP, money exchange business activity as well as notification obligations.

15.04 FOREIGN INVESTMENT:

Primary legal act governing direct business activity of foreign entities in Poland (or participation in such activity) is Law of July 2, 2004 on Freedom of Business Activity. Other basic acts include: (a) Council of Ministers decree of Feb. 6, 1976, concerning conditions, procedures, and issuing permits to foreign corporate bodies and individuals to establish representative offices in Republic of Poland for purpose of conducting business; Decree of 1976 applies only to representative office established before Jan. 1, 2001 until expiry of permit for such office and (b) Law of July 6, 1982, as amended, on principles of Conducting of Economic Activity in Small

Industry by foreign parties and natural persons within Republic of Poland. Law of 1982 applies only to business activities established before Jan. 1, 1989.

"Economic activity" is defined in Law on Freedom of Business Activity as production, construction, trade and services as well as exploring, identifying and exploitation of natural resources and professional activity conducted for profit in organized and constant manner. Foreign persons are defined as legal persons having their registered seat abroad not having Polish citizenship, natural persons domiciled abroad, and companies which have no legal personality having their registered seat abroad.

Foreign investors and foreign entities forming company in Poland have to meet requirements set out in Comm.Comp.C.

Regulations of Law of 2004 came into force as of Aug. 23, 2004. According to Law of 2004, foreign persons from EU and EFTA member states may undertake and carry on economic activity in Poland on same basis as Polish entrepreneurs.

Citizens of other states than above mentioned, who have obtained, among others, permit to establish residence in Poland, permit for stay of long-term EU resident, permit to establish inhabitance for defined period, consent for tolerated stay, status of refugee in Poland, entertain temporary protection on Polish territory or are family members joining EU member states citizens, enjoy, to extent of undertaking and pursuing economic activity in Poland, same rights as Polish citizens.

Remaining foreign persons may form, for purposes of undertaking and carrying on economic activity in Poland, no other business concerns than limited partnerships, limited-joint stock partnerships, limited liability companies and joint stock companies and they may form joint stock partnerships and companies and take up or acquire their shares, unless international agreements provide otherwise. (art. 13.3 of Law on Freedom of Business Activity).

Foreign entrepreneurs may undertake business activity in Poland, within scope of activity of such foreign entrepreneur, through branches in Poland—on reciprocity basis, unless otherwise provided by international treaties to which Poland is party. Foreign entrepreneurs from EU and EFTA member states—parties to EEA agreement may establish branches in Poland on same basis as Polish entrepreneurs. Branch is subject to registration in National Court Register. Law of 2004 introduced certain special requirements for foreign entrepreneur's filing for entry into NCR. Foreign entrepreneurs may also establish representative offices in Poland purposed solely for advertising and promotion of entrepreneur. Representative office is subject to registration in register of representative offices held by Minister of Economy and Labor. Branch and representative office have to: use name of represented entrepreneur, maintain their separate accountancy books in Polish, observe certain reporting obligations. For branch and representative office person authorized to represent foreign entrepreneur must be appointed and disclosed (through name and address in Poland) in application for registration. According to Law of 2004 Minister of Economy and Labor may issue decision on cessation of activity of branch office in situations enumerated in Law.

Act of Jan. 29, 2004 on Public Procurements contains general provisions requiring procuring entities to carry on public procurement proceedings in manner ensuring fair competition and equal treatment of participants.

Certain separate laws limit foreign participation in defined scope of economic activity. This limitation applies only to activity performance of which requires obtaining of permit or concession. Radio and television broadcasting is such activity.

Other activities which require obtaining of concession by Polish and foreign entities include, among others: exploration and exploitation of natural resources; manufacturing and distribution of explosives, arms and ammunition and army and police technology, manufacturing, storage, transport, distribution of energy and fuels, protection of persons and property, air transport. There are number of other activities which require license for foreign and Polish entrepreneurs including, among others: banking and insurance activity, international transport.

See topic 15.07 Investment Protection; categories 2 Business Organizations, topics Brokers and Corporations; Citizenship, topic Aliens.

15.05 FOREIGN TRADE:

All businesses operating in Poland have equal access to international trade. This access is subject to trade policy measures introduced by EU which Poland is obliged to apply. Licensing is form of trade restriction imposed by EU with respect to certain goods and countries. Same licensing requirements apply to imports to Poland as to all EU member states. EU may also restrict trading in certain goods or in certain cases by value or volume through introducing quantitative import or export quotas. Import of goods covered by import quota outside quota system is prohibited. Quotas are allocated among entities applying for respective licenses. Licenses are valid in territory of EU with exception of circumstances when quota is limited to one or more regions of EU. When quota is entirely exhausted, import (export) is not possible until new quota is opened. System of quantitative import quotas is widely applied to importation of steel products and textiles. Other goods currently covered by quota system include, inter alia, certain Chinese footwear, tableware or kitchenware products.

Certain restrictions not related to commercial policy but serving other objectives are also applied, which introduce licensing requirements in trading in: dual-use (i.e., being of both civil and military use) goods and technologies, certain chemicals (particularly narcotic drugs and psychotropic substances) or cultural goods. Separate arrangements, which include import/export licensing, quantitative restrictions, export refunds or preferential tariff arrangements, are applied to imports and exports of certain agricultural products under Common Agricultural Policy (CAP).

Relevant licenses and permits for trading in goods for which such licenses or permits are required are issued by: Minister of Economy and Labor or by Agricultural Market Agency in cooperation with European Commission.

See topics 15.01 Customs, 15.03 Foreign Exchange.

15.06 FOREIGN TRADE REGULATIONS:

See topics 15.03 Foreign Exchange, Foreign Investment, Foreign Trade; category 26 Treaties and Conventions.

15.07 INVESTMENT PROTECTION:

Poland is active in concluding bilateral agreements on protection and support of foreign investments. Such agreements among others were signed with following countries: Albania, Argentina, Australia, Austria, Azerbaijan, Bangladesh, Belgium, Byelorussia, Bulgaria, Canada, Chile, China, Croatia, Cyprus, Czech Republic, Denmark, Egypt, Estonia, Finland, France, Germany, Great Britain, Greece, Holland, Hungary, Indonesia, India, Iran, Israel, Italy, Jordan, Kazakhstan, Kuwait, Latvia, Lithuania, Luxembourg, Macedonia, Malaysia, Republic of Moldavia, Mongolia, Montenegro, Morocco, Norway, Portugal, Romania, Saudi Arabia, Serbia, Singapore, Slovak Republic, Slovenia, South Korea, Spain, Sweden, Switzerland, Thailand, Tunisia, Turkey, Ukraine, United Arab Emirates, Eastern Republic of Uruguay, Republic of Uzbekistan and Vietnam.

These agreements provide for fair and equal treatment of investments, most favored nation provisions, and other provisions relating to providing prompt, adequate and effective compensation for expropriation, which may only be conducted for public purpose and under due process of law.

Poland is party to similar bilateral treaty with USA signed Mar. 21, 1990 concerning business and economic relations (which became effective on Aug. 6, 1994).

Currently Poland is considering adopting Washington Convention of Mar. 18, 1965 on settlement of investment disputes between states and citizens of foreign countries.

See category 19 Intellectual Property, topics 19.01 Copyright, 19.02 Patents and Topographies.

16 HEALTH

16.01 COSMETICS:

Production and trade in cosmetics is subject to Law of Aug. 30, 2002 on System of Compliance Appraisal, Law of Mar. 30, 2001 on Cosmetics and Law of Dec. 12, 2003 on General Safety of Products. Law on Cosmetics defines cosmetics as any substance indicated for external contact with human body which only or main purpose is to keep clean, to care, protect, perfume or change body appearance or improve fragrance. Producer is obliged to submit certain information about cosmetic to national system of information before day cosmetic is introduced to trade. Producer is also obliged to keep and reveal for control purposes enumerated documents, including evaluation of cosmetic's influence on people's health and all results of animal tests. Use of any substances or their extracts originating from human body, mutagenic, carcinogenic or fertility harmful is forbidden. Labeling of any product must include name, category of product, name and address of producer, country of origin if produced out of Poland and EU countries, quantity, expiry date, series, list of ingredients pursuant to INCI, instructions and warnings on usage. Information about product must be written in Polish. Producer may apply to Main Sanitary Inspector for permit for nondisclosure of one or more ingredients in cosmetic on its package. Sanitary and Commercial Inspection is in charge with supervision over labeling, trading in and adulteration of cosmetics. Law on Cosmetics also provides for producer's obligation to notify National System of Information on Cosmetics (NSI) before introducing cosmetics to trading. NSF contains information on cosmetics and harmful side effects. Doctors are obliged to report on diagnosed side effects of cosmetics to NSI. Law on System of Compliance Appraisal provides that President of Office of Competition and Consumers is supervising authority which performs supervision with help of specialized authorities (for instance Trade Inspection). Above authorities control products introduced into trade with respect to fulfillment of substantial requirements imposed by regulations and laws. Law also provides for criminal responsibility for, among others, introducing into trade and market products incompatible with substantial requirements or technical specifications.

16.02 DRUGS:

Pharmaceutical Law of Sept. 6, 2001 (which came into force Oct. 1, 2002) regulates rules and procedures of introducing and admitting into trade and marketing of pharmaceuticals, conditions of producing and conducting clinical examinations, requirements regarding advertising of pharmaceuticals, conditions of trading pharmaceuticals as well as requirements regarding drugstores, pharmaceutical warehouses and rights and tasks of Pharmaceutical Inspection. Acquisition, possessing, manufacturing and selling of substances containing narcotics and psychotropic substances may be performed only upon terms specified in separate Act of July 29, 2005 on Counteracting Drug Addiction.

Law provides for admission into trade and market of pharmaceuticals which have marketing authorization issued by appropriate authorities. Conducting business activity in scope of producing of pharmaceuticals requires obtaining permit for producing granted by Main

Pharmaceutical Inspector. Advertising of pharmaceuticals is limited and regulated. Maintenance of pharmaceutical warehouses and maintenance of drugstores requires obtaining of permit. Poland by Mutual Recognition Procedure accepts marketing authorizations issued in other EU countries.

Supervision over producing and importing pharmaceuticals, quality of pharmaceuticals as well as trading thereof is performed by Pharmaceutical Inspection (http://www.gif.gov.pl) or Main Veterinarian (http://www.wetgiw.gov.pl).

16.03 FOOD:

Production and trade in food products is subject to following regulations: Law on safety of food and nourishment, as of Aug. 25, 2006; came into force in Oct. 2006; Law of Mar. 14, 1985 on State Sanitary Inspection, Order of Minister of Health and Social Care of Dec. 23, 2002 on state supervision over food products and other regulations issued by Minister of Health and Social Care on basis of above acts regarding in particular: dietetic food products and nutriments, processing of mushrooms, admissible quantity of additional substances in products and peddler's trade. Law on Safety of Food and Nourishment provides for regulation in scope of conditions of production and trade, requirements regarding proper quality of food excluding commercial quality of farm food, hygiene at work, requirements regarding process of production of food and food control by inspectors in scope not regulated by applicable EU regulations. Food products which constitute raw materials and semi-manufactured articles, as well as products designated for consumption or use must not be harmful for people's health, spoiled or adulterated in meaning of said law and must satisfy conditions established for health protection. Labeling of any product must indicate ingredients in product, name and address of producer, expiration date and other information enumerated in Law, as must not misrepresent nature, qualities, quantity, origin of product or include expression such as “healthy” or “secure”. All this information shall also be in Polish. Penalties for breach include fine, imprisonment for up to five years, seizure of product or winding up of production plant.

16.04 SMOKING REGULATION:

Regulated by Law on protection of health against results of using tobacco and tobacco products, as of Nov. 9, 1995. Smoking is prohibited in schools, educational and recreation, sport and health care establishments, workplaces and other places of public use and out of specified areas in small restaurants. Sales from: (i) Vending machines, (ii) to persons below 18 years old, (iii) in packages containing less than 20 items or (iv) without package is forbidden. It is also forbidden to advertise in any way to or to promote tobacco products, any related accessories or any imitations thereof or any symbols related to use of tobacco. Tobacco companies may not sponsor sports, cultural, educational, health or social-political activity. Penalty for breach of law is fine up to 500,000 zlotys, and/or restriction of freedom, or forfeiture of tobacco products irrespective of their ownership.

Tobacco.

Law on producing of ethyl alcohol and tobacco products as of Mar. 2, 2001 requires permission of Ministry to conduct business activity in scope of producing, in among others, tobacco products. Law imposes certain requirements relating to supervision over producing tobacco. Penalties for breach include fine, imprisonment for up to three years, restriction of freedom.

17 IMMIGRATION

17.01 ALIENS:

Law on Aliens of June 13, 2003, as amended, defines alien as natural person who does not have Polish citizenship. (art. 2). (These regulations generally do not apply to citizens of EU or

EFTA members states). Persons without citizenship are generally regarded as aliens. Legal person (i.e., corporation) with seat abroad has status of alien. Law of Mar. 24, 1920 on purchase of real estate by foreigners, as amended, also regards as aliens any partnership of alien natural or legal persons, having no legal personality, with its seat abroad, created pursuant to foreign countries' legislation as well as legal person and commercial partnership having no legal personality with registered seat in Poland, but controlled directly or indirectly by persons who fall into one of either above limited categories. Law of July 2, 2004 on Freedom of Business Activity, defines “foreign person” which embraces: legal persons having seat abroad, natural persons domiciled abroad without Polish citizenship and entity having no legal personality but having legal capacity, which has its seat abroad.

Law on International Private Law of Nov. 12, 1965 states: “Aliens in Poland may have rights and obligations equal to Polish citizens except when laws indicate otherwise.” Aliens have essentially same rights and duties as Polish citizens except with regard to voting rights or free social security.

Foreigner, having citizenship of two or more states, is treated as citizen of only one such state. Poland is party to International Convention on Certain Issues Regarding Conflict of Citizenship Laws and protocol thereto concerning statelessness, signed at Hague in 1930.

Law of Feb. 15, 1962 on Polish Citizenship, as amended, provides that marriage of Polish citizen with person who is not Polish citizen does not alter their citizenship status. Change of citizenship by one spouse does not alter citizenship status of other spouse. (art. 3). Poland is party to International Convention on Citizenship of Married Women, signed in New York in 1957.

Acquisition of real estate by foreigners requires foreign purchasers to apply for consent of Minister of Internal Affairs and Administration, with some exceptions for citizens and entrepreneurs of EEA member states. See also category 23 Property, topic 23.05 Real Property.

Citizens of EU and EFTA member states, may undertake and carry on economic activity in Poland on same basis as Polish entrepreneurs.

Citizens of other states than above mentioned, who have obtained permit to establish residence in Poland, consent for tolerated stay, status of refugee in Poland or entertain temporary protection on Polish territory, enjoy, to extent of undertaking and pursuing economic activity in Poland, same rights as Polish citizens.

Remaining foreign persons may form, for purposes of undertaking and carrying on economic activity in Poland, no other business concerns than limited partnerships, limited-joint stock partnerships, limited liability companies and joint stock companies and they may form joint stock partnerships and companies and take up or acquire their shares, unless international agreements provide otherwise. (art. 13.3 of Law on Freedom of Economic Activity).

See topic 17.02 Immigration; categories 15 Foreign Trade and Commerce, topic Foreign Investment; Taxation, topic Taxes.

17.02 IMMIGRATION:

Poland, since Dec. 21, 2007, has been party to Schengen Agreement pursuant to which borders between Poland and other parties of Schengen Agreement no longer physically exist. At same time Polish border guard is obliged to intensify its activity on borders with Russia, Belarus, and Ukraine. Visitors for business or pleasure may enter Poland with valid passport and visa, as tourists or for long term. Visas are available at Polish embassies, consulates and voivodship offices, as well as at authorities from parties of Schengen Agreement. In particular, no visa is required for nationals of EEA member states Argentina, Israel, Japan. U.S. citizens may enter Poland without visa. Generally, visas are required for citizens of Commonwealth of

Independent States.

Alien may obtain residence permit in form of residency card. Residency cards are issued by proper authorities according to alien's intended place of residence.

Employer desiring to hire foreigner should receive opinion from employment authorities, obtain visa and work permit for his prospective employee, this does not apply while hiring European Community residents.

Alien can obtain political asylum in territory of Republic of Poland from President of Office for Repatriation and Aliens. Alien can acquire Polish citizenship provided he has resided in Polish territory under residency permit for at least five years. In special cases this requirement may be waived. Alien may be granted Certificate of Naturalization provided that person obtains documentation regarding dismissal or loss of previous citizenship. Polish citizenship granted to both parents is also extended to their minor children.

See category 11 Employment, topic 11.01 Labor Relations.

18 INSURANCE

18.01 INSURANCE COMPANIES:

Insurance companies in Poland may be established as joint stock company or mutual insurance society. Insurance company may conduct insurance or reinsurance activity, or both. Insurer may not simultaneously conduct both life insurance activity and/or other (personal and property) insurance activity.

Primary Polish insurance legislation consist of: Act on insurance activity of May 22, 2003, Act on insurance mediation of May 22, 2003, Act on insurance and pension supervision and Insured Entities' Ombudsman of May 22, 2003, Act on obligatory insurance, Insurance Guarantee Fund and Polish Communication Insurers' Office of May 22, 2003, executory acts thereto and Act on supplementary supervision over credit institutions, insurance companies and investment companies being part of financial conglomerate as of Apr. 15, 2005. General rules of insurance contracts are provided for by C.C. (arts. 805-834). Supervisory authority for insurers is Finance Supervision Commission (http://www.knf.gov.pl).

Charter of insurance company is adopted by its founders. Its registration requires prior consent of Finance Supervision Commission. Statute of insurance company established as joint stock company must be in conformity with provisions provided by Comm.Comp.C.

Entity intending to purchase or acquire directly or indirectly through dependent entities or by way of arrangements, shares or rights from shares of domestic insurance company established as joint stock company, at amount which allows to reach or exceed 10% of votes on general assembly or 10% stake in share capital, is obliged to notify Finance Supervision Commission of intended acquisition, not later than 30 days prior to acquisition. Entity intending to purchase or acquire, directly or indirectly through dependant entities or by way of arrangements, shares or rights from shares of domestic insurance company established as joint stock company, at amount which will allow to reach or exceed 20%, 33% or 50% of votes on general assembly or 20%, 33%, 50% stake in share capital, is obliged to notify Finance Supervision Commission each time of intended acquisition. It is also obliged to notify Commission of each intended other action which would result in insurance company becoming dependent entity of entity filing notification. Finance Supervision Commission may object to such transaction upon reasons specified by Act on Insurance Activity. If shares in insurance company are acquired in breach of above requirements, acquirer may not exercise voting rights from so acquired shares. Except when dominant entity is State Treasury, entity intending to dispose shares or rights from shares of domestic insurance company is obliged to notify Finance Supervision Commission of intended disposal if as result such entity's share in voting rights or share capital would fall below 10%, 20%, 33%, 50%. After effecting above acquisition or disposal, acquiring or disposing entity is obliged to notify insurance company.

Foreign insurers from EU and EFTA member states—parties to EEA agreement may undertake activity in Poland through branch or on cross-border basis. In such case they are allowed to carry on in Poland activities to which they are entitled in their home country on basis of consent of relevant insurance supervision activity. Branch of insurer from EU and EFTA member states may only be established subject to receipt by Finance Supervision Commission of notice from relevant insurance supervision authority, containing information specified by Act on Insurance Activity, Cross-border activity also requires notice from this authority, Polish law generally applies to activity of foreign insurers in Poland. Similar rules apply to undertaking activities by Polish insurance companies in other EU member states. Insurers from other states may only perform insurance activity in Poland through main branches. Main branch of foreign insurer may be opened on territory of Republic of Poland subject to permit issued by Finance Supervision Commission. Act on Insurance Activity also regulates, among others, general rules of performing insurance activity in Poland, creation and activity of mutual insurance societies, conditions of performing insurance activity by domestic insurers, financial management of insurers, insurance reporting of insurers, appointing and activity of actuaries, mergers and restructuring of insurers, and transfers of insurance contracts.

See Business Regulation and Commerce, topic Securities.

19 INTELLECTUAL PROPERTY

19.01 COPYRIGHT:

Copyrights are regulated by Law on Copyright of Feb. 4, 1994, as amended. Law provides for system of protection of copyrights in Poland. Scope of copyright covers any manifestation of creative activity of individual nature including, among others, works expressed in words, mathematical symbols, graphical signs, literary, journalistic, scientific, cartographic works, computer programs, works of fine arts, photographic works, stringed musical instruments, industrial designs, architectural and urban works, musical works and works composed of words and music, works for stage and audiovisual works. Provisions of Copyright Law apply to works: (a) whose author or co-author is Polish citizen, (b) whose author is citizen of EU or EFTA states—parties to EEA agreement, (c) which were originally published in Poland (or simultaneously in Poland and abroad), (d) which were first published in Polish language, or (e) whose protection results from international agreements.

Copyright belongs to author unless specific regulations provide otherwise. Copyright Law differentiates between personal and proprietary copyrights. Personal copyrights encompass connection of author with work such as right to authorship to work, to sign with author's name, to inviolability of content or form of work, to decide when work shall be made publicly available for first time, to supervise method of use of work and to protect good name of work, which unless Law provides otherwise, is unlimited in time and not subject to repeal or transfer. Proprietary copyrights which encompass right of author to exclusive use and dispose of work in any field of exploitation and to receive compensation for use of such work, proprietary copyrights expire after 70 years from author's death; from date of its first dissemination if author is unknown or such rights are owned by person other than author. With reference to audiovisual work from death of last of following: main director, author of screenplay, picture operator, author of dialogues, composer of music written for audiovisual work. Employer whose employee created work upon performance of his employment duties acquires proprietary copyrights to work.

Author's proprietary copyrights are transferable only in written form of agreement.

Agreement for transfer of all works or works of particular kind of same author which are to be created in future is invalid.

Poland is party to Bern Convention of Sept. 9, 1886 on Protection of Literary and Artistic Works (as am'd Berlin, 1908, and Rome, 1928), Paris Act of Bern Convention signed in Paris on June 24, 1971 and Universal Convention on Copyright of Sept. 6, 1952 signed in Geneva, verified version of which was signed in Paris July 24, 1971 and WTO Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS), Geneva WIPO Copyright Treaty of Dec. 12, 1996 and Geneva WIPO Performances and Phonograms Treaty of Dec. 12, 1996. Poland is also party to bilateral treaty with U.S. signed Mar. 21, 1990 concerning business and economic relations in which Poland agrees to enact laws for protection of certain copyrights.

See topic 19.02 Patents.

19.02 PATENTS:

Law on Industrial Property of June 30, 2000 (which came into force on Aug. 21, 2001) governs inventions, industrial and utility designs, trademarks, geographical marks and integrated circuit topographies in Poland. Poland is party to Paris Convention on Protection of Industrial Property of Mar. 20, 1883, as amended, and by Act of Stockholm signed in Stockholm on July 14, 1967. Poland is party to bilateral treaty with U.S.A. signed Mar. 21, 1990 concerning business and economic relations in which Poland agrees to enact laws on certain trade matters, including protection of certain patents, copyrights and property information. Poland is party to Convention on European Patent of Oct. 5, 1973 as of Mar. 1, 2004, and to Geneva Act of Hague Agreement concerning international registration of industrial designs of July 2, 1999, as of Aug. 5, 2008.

Patents are given to novel inventions having invention level, industrially applicable. Invention is considered novel if it is not part of technical status (it was not made public in form of writing or verbal description, publicity utilized or displayed in public before date of priority). Invention is considered meeting invention level if it is not technically obvious for specialists and is industrially applicable if it may be used in any industrial or agricultural activity. Following are not considered as inventions: (a) scientific discoveries and theories and mathematical methods, (b) creations having only aesthetic character, (c) plans, rules and methods concerning intellectual or economic activity and games, (d) creations, which could be shown in light of commonly excepted scientific rules to be impossible to use, (e) computer programs, (f) presentation of information. Patents cannot be obtained for: (a) inventions which would be in contrary to public order or good customs, (b) varieties of plants and animals, biological methods of plant and animal cultivation, (c) methods of curing and diagnosis of disease applies to surgical or therapeutic methods not to products.

Right to patent serves creator of invention. If more than one person created invention they jointly have right to patent. Right to patent for invention created during course of employment or execution of another agreement belongs to employer or commissioner, unless parties decide otherwise. If invention was created with help of economic entity, right to utilize invention for own use serves economic entity. In agreement parties may expend or limit this right.

Patent Office of Republic of Poland (http://www.uprp.pl) ("Patent Office") has authority to grant patents and patent documents. Applications for patents are made at Patent Office and include application form, description of invention, summary of description and, if necessary, drawings. From date of filing, third parties may not review patent documentation. Patent Office may engage experts to review application. Experts are obliged to not disclose data contained in application. From date of publication, third parties may review description of invention, patent claims and drawings and, within six-month period, may direct comments on grounds why patent should not be granted to Patent Office.

Party in proceeding before Patent Office is person submitting invention. In proceeding before Patent Office in matters involving, submitting, reviewing and sustaining protection of invention only Patent Attorney may act as attorney. Polish natural persons may act directly before Patent Office, foreign persons may act only through Patent Attorney domiciled in Poland.

Priority to right to receive patent for invention is determined as of date of filing of application in Patent Office, except in following situations: (a) according to provisions contained in international agreement priority in Republic of Poland is determined as of date of first proper filing of invention in indicated country, if filing of application at Patent Office occurs within 12 months following such date; (b) according to provisions contained in international agreements, priority is determined according to date of exhibition of invention on international, officially recognized exhibition in Poland or abroad if application for registration in Patent Office takes place within six months. Priority is inheritable and may be transferred to another person. On request of applicant, in order to reserve priority abroad, Patent Office issues confirmation of filing trademark for registration.

Granting of patent is issuance through conferring of patent document. Information relating to granting of patent or certificate of authorship is included in patent register. Patents are valid for 20 years from date of filing patent with Patent Office.

By obtaining patent, one receives right to exclusive use of invention. Patent holder may not abuse his right by making it impossible for third party to use patent, if such usage is necessary for domestic needs in particular public interest. Exclusive usage of patent within three years from its issuance is not considered abuse of law. Patent Office may demand from patent or license holder explanations as to usage of exclusive right. Patent for invention of production method also extends onto products obtained by this method.

Person who in good faith used invention when priority is determined, may continue to use it in same scope in his enterprise free of charge. This right also serves person who prepared all necessary facilities for use of invention. These rights may be entered into patent register. Transfer of these rights may be conducted only together with enterprise.

Patent holder may apply for additional patent for improvements or supplements which have characteristics of invention, but may not be used independently. Additional patent expires together with basic patent. Right to patent and patent itself are transferable and inheritable. Agreement to transfer rights must be in writing. Transfer of patent rights is effective with respect to third parties when such transfer is entered in patent register. Additional patent rights may be granted for pharmaceuticals and plant protection substances.

Patent holder can license another party to use invention. License agreement for its validity must be concluded in writing. At request of interested party, license can be included in patent register. Unless license agreement provides otherwise, exclusive licensee entered into patent register has same right as patent holder to pursue claims for patent violations. Also, unless license provides otherwise, granting of license does not preclude ability of patent holder to use patent or grant other licenses to use patent. Such license is non-exclusive patent license. In absence of contrary provisions in agreement, licensee may use invention to same extent as licensor. Licensee may grant sublicense if he obtains permission from patent holder; otherwise, sublicensing is prohibited. Unless specified otherwise, licensor is obligated to give licensee all technical experience necessary for use of patent that licensor holds at time agreement is executed. License expires on expiry of patent.

As result of proceeding, Patent Office may grant permission (mandatory license) to use invention that has been patented by another party, if: (a) use of invention is necessary to avert danger or eliminate conditions threatening security of State; (b) it has been ascertained that patent right is abused in instances where patent or license holder, three years after granting patent, prevents fulfilling of national market needs through making usage impossible if invention, especially if product is available in insufficient quantity, quality or excessive price; (c) it has been ascertained that initial patent holder prevents fulfilling of national market needs. Patent Office publishes decision on possibilities to apply for mandatory license. Award of mandatory license for reasons of not fulfilling national market needs may be awarded through usage of dependant patent, only if it enables crucial technical progress.

One who uses invention pursuant to mandatory patent is obligated to make appropriate payments (license fees) to patent holder. Scope and term of license, detailed requirements for license, amount of license fee, and method of payment should be specified in decision to grant mandatory license.

Law also regulates biotechnological inventions and additional security right with regards to pharmaceutical inventions and plants' protection products.

"Utility Design" entitled to protection is new and useful technical design of technical nature dealing with shape, construction or structure of permanent object. Granting of right to protection is represented by protection certificate. Patent Office has authority to grant rights of protection and issue protection certificates. Information about granting of right to protection is included in protection register. By obtaining right to protection, one receives right to exclusive use of design in Poland. Right to protection is valid for ten years from date of filing with Patent Office. Scope of protection is specified in protection provisions contained in description of protected design.

Industrial design entitled to protection is novel and original form of product, suitable for repeated reproduction, manifested especially in shape, surface characteristic, color, drawing or ornament. Form of product conditioned exclusively on technical or functional features does not constitute industrial design. Industrial design is considered novel if it was not made public, before date according to which priority right is established, in manner that would enable person to utilize solution and was not filled with earlier priority and registered. Industry design is considered original if general impression that it conveys in experienced user is different from general impression conveyed by another publicly displayed design. On evaluation of individual nature of design, scope of freedom to express creativity in development of design is considered. Industry designs cannot be obtained for designs, which would be contrary to public order or good customs.

Granting of right is represented by protection certificate. Patent Office has authority to grant rights of protection and issue protection certificates. Information on granting of right to protection is entered in protection register. By obtaining right to protection, right to exclusive use of industry design in Poland is granted for 25 years from date of filing with Patent Office.

Patent Office maintains registers of rights of protection of patents, designs, trademark and other entries required by Law on Industrial Property. It is presumed that everybody has knowledge of entries in register. Prime Minister determines rules governing maintenance of registers, requirements and procedure of making entries, review of registers and copying of copy of entry from registry. Council of Ministers determines registration charge and fees, to be paid at determined times during protection period.

Foreign persons may be entitled to rights described in law on basis of international agreements binding Republic of Poland or on principle of reciprocity.

Law on Industrial Property lists matters over which Patent Office adjudicates in commission (for example, nullification or termination of patent or right to protection for using design). Appeals from decisions of Patent Office and complaints about determinations of Patent Office are reviewed by administrative courts.

Integrated Circuit Topographies.

Law on Industrial Property of June 30, 2000 governs protection and registration of integrated circuit topographies. Integrated circuit is one or more layer, three dimensional product created from semiconductor elements forming continuous layer, their mutual conductor connections and isolating spaces inseparably compressed, in aim of fulfilling electronic functions. Integrated circuit topography is three dimensional solution expressed in any form of layout, of elements, in which at least one is active element, and all or part of connections of integrated circuit.

Integrated circuit topographies may be registered with Patent Office if they are original, i.e., are result of creator's own intellectual work and are not commonly known at moment of filing for registration. Topographies which have been in commercial use before filing in Patent Office may be registered if period of commercial usage does not exceed two years. Topographies developed 15 years ago may not be covered by registration.

Right to register with Patent Office serves creator; any person who on basis of written agreement acquired this right from creator, employer or entity which helped in creation of topography. Protection is awarded on registration of topography. Applicant is not obliged to disclose those parts of topography which are trade or production secret unless this is necessary to identify topography. Protection is awarded for period of ten years from end of calendar year in which topography was introduced to commercial circulation on file for registration with Patent Office whichever date is earlier.

Person entitled to registration acquires exclusive right to use topography for commercial or professional purposes.

Mandatory licenses may be established by Patent Office for usage of topography to which another person is entitled on same condition as patents. Person using topography on basis of awarded mandatory license is obliged to pay entitled person license fee of market value of license.

Following are not considered infringement of right to registered integrated circuit topography: (a) usage of topography in means of communication and in devices being in Poland temporarily or in products being in Poland in transit; (b) copying topography for personal purpose or exclusively for analysis, research or training; (c) creation of original topography on basis of registered one; (d) usage of topography by state if it is indispensable for safety and public order; (e) import or introduced into turnover products containing illegally used topography by person acting in good faith; (f) usage of copies and integrated circuit designs created through usage of such copy; (g) import of other usage of copies of integrated circuit design first admitted to trading in EEA.

Foreign natural and legal persons benefit from provisions of this law on basis of international agreements or on basis of reciprocity. Foreign persons may act before Patent Office exclusively through Polish Patent Attorney.

See subhead Patent Attorneys, infra.

Patent attorneys are persons entitled to provide assistance with respect to industrial property rights, defined as procurement, maintenance and execution of rights related to objects of creative activity, intended for industrial use and to names and marks, which distinguish products and services in industrial or commercial activity. Professional duties of patent attorneys in particular consist of: (1) preparation of applications to Patent Office for registration of industrial property rights; (2) participation on basis of power of attorney in proceedings before Patent Office, courts and other institutions which decide on matters of industrial property; (3) execution of agreements and performance of other activities on behalf of foreign and Polish persons.

Patent attorneys in order to practice their profession must be entered into register kept by Patent Office.

Patent attorneys are obliged not to reveal any information obtained in connection with their professional services, and may not provide services in matters, where conflict of interest may exist.

Persons domiciled in foreign country or having their seat abroad may act before Patent Office only through representation of patent attorney domiciled in Poland.

See subhead Integrated Circuit Topographies, supra; and topic Trademarks.

19.03 TRADEMARKS:

In Poland, Law on Industrial Property of June 30, 2000, governs all matters of trademark law. Trademark is any mark presented in graphic form if it may be used to distinguish goods or services of one entrepreneur from activities of another entrepreneur. In particular, trademark may be word, design, ornament, color composition, three dimensional form (including form of product or packaging), melody or other sound signal.

Priority to protection of trademark is established according to date of filing for registration with Patent Office. On basis of international agreements priority is defined according to date of first, proper filing for registration or according to date of exhibition of goods marked with such trademark on international, officially recognized exhibitions if application for registration with Patent Office takes place within six months. Priority is inheritable and may be transferred to another person. On request of applicant, in order to obtain priority abroad, Patent Office issues confirmation of filing trademark for registration in Poland (priority proof).

Protection of trademark is acquired upon registration. Registered trademark receives “protection certificate”. Patent Office of Republic of Poland administers registration process for trademarks and issues protection certificates. In order to be registered, mark should have sufficiently distinguishing features. Registration of trademark must not infringe on personal and property rights of third parties, be illegal, contrary to public order and good customs, must not mislead buyer. Protection right also cannot be given if mark: (1) was filed for registration in bad faith; (2) includes name, symbols (includes seal, colors and anthem) of Republic of Poland (same also relates to names and symbols of foreign countries and international organizations); (3) contains religious, patriotic or cultural symbols; (4) is form or other feature of goods or its packaging; (5) contains officially recognized marks used in turnover, e.g.: security marks, quality marks, legalization features to extent it could cause confusion among consumers. Apart from these examples, trademark may not be registered if it includes elements of geographic character which could mislead consumers as to origin of product. Amendment to Law on Industrial Property, effective as of Nov. 1, 2007, implements proceeding in case of protection of international trademarks. International trademark is trademark registered in accordance with provisions of Madrid Agreement concerning international registration of marks adopted on Apr. 14, 1891 and of Protocol relating to Madrid Agreement concerning international registration of marks adopted at Madrid on June 27, 1989.

Enterprise on behalf of which trademark is registered receives exclusive right to use trademark within Poland for goods covered by registration. Right lasts ten years from date of correct application for trademark in Patent Office. Trademark protection may be continued beyond term on application of authorized person for further ten year periods. Protection of trademark registration may also be alienated. Contract for transfer of such protection should be in written form. Such contract becomes enforceable against third parties from date of entry in register of trademarks.

Authorized person (authorized on basis of registration of trademark) may demand cessation of all trademark infringement or actions threatening infringement. Such person may also seek, according to general rules, remedy for damages in form of monetary compensation or ill-gotten profits. Whoever illegally introduces into commerce goods or services marked with trademark of another is subject to imprisonment of up to two years limitation of freedom or fine.

Law on Industrial Property provides possibility of “common trademark” as trademark used by organization, which has legal personality and which represents interests of entrepreneurs. This may be used by such represented entrepreneurs but not organization itself.

Foreign natural and legal persons may benefit from rights under Law in accordance with international agreements binding Republic of Poland, on basis of reciprocity. Poland is party to Madrid Agreement concerning prosecution of illegal distribution of goods, signed in Madrid in 1891, as amended in Washington in 1911, and in Hague in 1925. Poland is also member of Paris Convention on Protection of Industrial Property, signed in Paris in 1883, as amended in Washington in 1911, in Hague in 1925, and in Stockholm in 1967. Poland has as of May 1, 2004 fully implemented Council Regulation 40/94 on Community Trademark.

See topic 19.02 Patents, subhead Patent Attorneys.

Geographic Mark.

Law on Industrial Property governs protection and registration of geographical marks. Geographical marks are word marks related directly or indirectly to name of place, locality, region or state (area) which identify goods as originating from this area if quality, good opinion or other commodities features are attributes to geographical origin of goods. Foreign geographical mark may be registered in Poland only if it is registered in country of origin.

Geographical marks are: (a) regional names as marks for distinguishing goods which originate from defined area and have specific attributes connected with geographical environment; (b) marks of origin as marks for distinguishing goods which originate from defined area and have specific attributes connected with geographical origin.

Geographical marks may be registered with Patent Office of Republic of Poland. Application for registration should include: (a) Exact designation of geographical mark; (b) indication of commodities for which mark is designated; (c) exactly determined area's borders to which mark relates; (d) determination of special features of goods in particular, main physical, chemical, microbiological, or organoleptic features which are characteristics for commodity and determination of details from which result their connection with geographical environment and origin; (e) conditions of geographical mark usage containing special features of goods or other characteristics which need to be complied with by persons intending to use mark; (f) indication of entrepreneurs who use or will use this mark. Application for registration may concern only one geographical mark and one commodity.

Patent Office has authority to grant right from registration. Information about gaining right from registration is included in register of geographical marks. Registration of geographical mark may be applied for by any organization representing rights of manufacturers acting in geographical area or appropriate government or self-government authorities acting in geographical area. Registration right is not limited in time. It will however expire on date of occurrence of particular event if so provided by law. In such situation date of expiry should be ascertained by decision of President of Patent Office.

20 LEGAL PROFESSION

20.01 ATTORNEYS AND COUNSELORS:

See topic 20.02 Attorneys and Legal Counsels.

20.02 ATTORNEYS AND LEGAL COUNSELS:

Polish lawyers are divided into two categories: Advocates and Legal Counsels. Each of these professions is regulated by separate statute, both of 1982, and initially were intended to perform different roles in socialist economy. Advocates were intended to render legal services to individuals and Legal Counsels were to provide legal advice to then dominant state sector of economy. With decreasing role of state participation in economy and development of public sector, distinction between character of legal practice by these two professions is sometimes blurred. There is ongoing discussion about unifying Advocates and Legal Counsels Bar. Presently, however, Advocates and Legal Counsels are still regulated by separate statutes even though distinction between them was further diminished by amendment of both Advocates and Legal Counsels Statutes. Commencing on Sept. 14, 1997, both Advocates and Legal Counsels are allowed to represent economic and other entities as well as individuals, provided, however, that Legal Counsels may not be defense attorneys in criminal and fiscal criminal matters.

Pursuant to Law of July 5, 2002 on rendering legal services in Poland by foreign lawyers, foreign lawyers may render legal services in Poland after they have been entered onto list of foreign lawyers maintained respectively by Regional Advocates Councils or by Regional Legal Counsels Chambers, on basis of reciprocity and unless international agreement, to which Poland is party, states otherwise. Foreign lawyer rendering legal services in Poland must maintain insurance against civil liability for damages caused when practicing. Since Poland's accession to EU, lawyers from EU entered onto one of above mentioned lists may render legal services in Poland in same scope and rules as Polish lawyers. Above rule applies accordingly to lawyers of countries being party to treaty on European Economic Area which are not members of European Union who are admitted to practice in country being party to above treaty. Foreign lawyers from countries outside of EU entered onto one of above mentioned lists may render legal services in Poland only in scope of legal opinions and advice with respect to respective native country's law or international law. Such lawyers may establish only registered or limited partnership with exclusive participation of foreign lawyers, Polish advocates or Polish legal counsels. Lawyer from EU Member State may also be entered to list of advocates or legal counsels if he has qualifications to practice under professional title of EU Member State, fulfills certain conditions provided by, respectively, Advocates or Legal Counsels Statutes, is capable of writing and speaking in Polish and passed tests of skills. Law of 2002 also regulates rendering legal services by EU and non-EU lawyers on cross-border basis.

Advocates.

Goal of Advocate Bar (http://www.adwokatura.org.pl/sad.htm) is, pursuant to statute, to provide legal advice, protect civic rights and freedoms and participate in development and application of laws. Advocate Bar, consisting of Advocates and Advocate Trainees, is organized in form of self governing body. In order to be admitted to Advocate Bar person must: (a) Be of good repute, (b) enjoy full civic rights, (c) be graduate of law school either Polish or foreign which is recognized in Poland, and (d) have participated in three and half year Advocate training and passed bar exam. Following persons are exempted from obligation to participate in Advocate training and passing bar exam: (a) Professors of law and doctors with habilitation in legal studies, (b) persons who passed exam for judges, prosecutors, legal counsels or notaries, (c) persons who were counsels at Office of General Procurer of State Treasury at least for three years.

Following persons may approach bar exam without obligation to participate in Advocate training: doctors in law studies and persons who worked for at least five years during preceding eight years as court clerk or assistant to judge.

Advocates, in their practice, are only subject to laws passed by Parliament. While exercising their duties, they are entitled to same legal protection as judges and prosecutors and enjoy freedom of speech to extent determined by general character of their duties and limitations contained in laws. Advocate may be prosecuted for abuse of freedom of speech only in disciplinary proceeding. Advocates are obligated to keep confidential all information obtained in connection with performance of their services. Statute, subject to some exceptions, prohibits Advocate from entering into employment agreement. Advocate may not render legal services also if he/she has been legally incapacitated or has been considered by Regional Advocate Chamber permanently unable to perform his/her duties as Advocate. Advocate may refuse to provide legal services to person only for material reasons and has to inform such person of such reasons. Advocates' fees are based on agreement between advocate and client. Advocates perform their services either as members of Advocate cooperative, in private practice office, civil, registered or professional partnership with exclusive participation of Advocates, Legal Counsels, and/or foreign lawyers admitted to practice in Poland pursuant to Law of July 5, 2002 on rendering legal services in Poland by foreign lawyers or in limited partnership where all partners liable with all their property must be Advocates, Legal Counsels and/or foreign lawyers admitted to practice in Poland pursuant to Law of July 5, 2002 on rendering legal services in Poland by foreign lawyers. Advocate cooperatives, dominant when law on Advocates was adopted, have presently become exception in practice. Majority of Advocates have established private practices.

From Aug. 21, 2004, i.e., day of entry into force of Law on Freedom of Business Activity of July 2, 2004, advocates performing their services in private practice office or as partner of civil partnership are obliged to be registered in Register of Economic Activity. (See category 3 Business Regulation and Commerce, topic 3.07 Commercial Register.)

All practicing Advocates are obliged to maintain insurance against civil liability for damages caused when practicing.

All Advocates are members of Advocate self-government body Regional Advocate Chamber. Competencies of General Assembly of Regional Advocate Chamber include (a) election of Regional Advocate Council, Regional Disciplinary Court, Regional Supervisory Board and delegates to National Advocate Assembly, (b) approving budget of region, and (c) general supervision over activity of Regional Advocate Council and Regional Supervisory Board. Regional Advocate Council is responsible for all matters not reserved for other Advocate organs including admitting new Advocates to bar. Regional Disciplinary Court decides in disciplinary matters of bar members. National Advocate Assembly (a) elects General Advocate Council, Upper Disciplinary Court and Upper Supervisory Board, (b) exercises general supervision over General Advocate Council and Upper Supervisory Board, and (c) has rule making power with respect to principles of professional conduct by Advocates and rules of Advocate self-government. Competencies of General Advocate Council include: (a) representation of Advocate Bar, (b) supervision of Regional Advocate Councils, and (c) participation in preparation of laws and regulations concerning Advocates. Upper Disciplinary Court hears appeals from decisions of Regional Disciplinary Courts. Decision of Upper Disciplinary Court may be challenged in cassation processing before Supreme Court. Advocate ceases to be member of Regional Advocate Chamber upon: (a) death, (b) resignation, (c) becoming member of another Regional Advocate Chamber, (d) employment in police, organs of justice administration, or as notary, (e) being drafted to military, (f) loss of civic rights or right to practice law resulting from court decision, (g) disciplinary decision on expulsion from Advocate Bar, or (h) employment in Office of General Procurer of State Treasury.

Legal Counsels.

Goal of Legal Counsels Bar (http://www.kirp.pl) is, pursuant to statute, to provide legal services with exception of acting as defendant in criminal and fiscal criminal matters. In order to be admitted to Legal Counsel Bar, person must: (a) Be of good repute, (b) enjoy full civic rights, (c) have full legal capacity to undertake legal actions, (d) be graduate of law school either Polish or foreign which is deemed compatible to Polish one, (e) have participated in three and half year Legal Counsel training and passed bar exam. Following persons are exempted from obligation to have participated in Legal Counsel training and passing bar exam: (a) Professors of law and doctors with habilitation in legal studies, (b) persons who passed exams for judges, prosecutors, advocates or notaries, (c) persons who were employed for at least three years as counsel in Office of General Procurer of State Treasury. Following persons may approach Legal Counsels' exam without obligation to participate in Legal Counsel training: doctors in law studies and persons who were for defined period of time court clerks or assistants to judge.

Legal Counsels may provide legal services on basis of employment agreement, in private practice office, civil, registered or professional partnership with exclusive participation of Legal Counsels, Advocates and/or foreign lawyers admitted to practice in Poland pursuant to Law of July 5, 2002 on rendering legal services in Poland by foreign lawyers, or in limited partnership where all partners liable with all their possession are Legal Counsels, Advocates and/or foreign lawyers admitted to practice in Poland pursuant to Law of July 5, 2002 on rendering legal services in Poland by foreign lawyers.

From Aug. 21, 2004, i.e., day of entry into force of Law on Freedom of Business Activity of July 2, 2004, Legal Counsels performing their services in private practice office or as partner of civil partnership are obliged to be registered in Register of Economic Activity. (See category 3 Business Regulation and Commerce, topic 3.07 Commercial Register.)

All practicing Legal Counsels are obliged to maintain insurance against civil liability for damages caused when practicing. Legal Counsel does not have right to advise his client in any matter in which he is party interested in outcome of such matter, or in disputes where he is Legal Counsel of other party or has such relations with other party which may influence outcome of dispute. While exercising their duties, Legal Counsels are entitled to same legal protection as judges and prosecutors and enjoy freedom of speech to extent determined by need for such freedom arising under particular circumstances and limitations contained in laws. Legal Counsel may be prosecuted for abuse of freedom of speech only in disciplinary proceeding. Legal Counsels' fees are based on agreement between Legal Counsel and client.

All Legal Counsels are members of Legal Counsel self-government body Regional Legal Counsel Chamber. Competencies of General Assembly of Regional Legal Counsel Chamber include (a) election of Regional Legal Counsel Council, Regional Disciplinary Court, Disciplinary Officer, Regional Supervisory Board and delegates to National Legal Counsel Assembly, (b) approving budget of region, and (c) general supervision over activity of Regional Legal Counsel Council and Regional Supervisory Board. Responsibilities of Regional Legal Counsel Council include (a) representing professional interests of Legal Counsels in that region, (b) organization of professional training of Legal Counsels, (c) evaluation and supervision over quality of services rendered by Legal Counsels, Legal Counsel Trainees and foreign lawyers entered onto list of foreign lawyers maintained by such Regional Legal Counsel Council, and (d) cooperation with administration and other bodies in matters connected with application of law and rendering legal services. Regional Disciplinary Court decides in disciplinary matters of members of regional bar, brought by Disciplinary Officer. National Legal Counsel Assembly (a) elects National Legal Counsel Council, Upper Disciplinary Court and Upper Supervisory Board, (b) exercises general supervision over National Council and Upper Supervisory Board, and (c) has rule making power with respect to principles of professional conduct by Legal Counsels and rules of Legal Counsel self-government. Competencies of National Legal Counsel Council include (a) representation of Legal Counsel Bar, (b) opining new laws, and (c) supervision of Regional Legal Counsel Councils. Upper Disciplinary Court hears appeals from decisions of Regional Disciplinary Courts. Decision of Upper Disciplinary Court may be challenged in cassation proceedings before Supreme Court. Legal Counsel ceases to be member of Regional Legal Counsel Bar upon (a) his/her application, (b) loss in whole or in part of capacity to undertake legal actions, (c) loss of civic rights resulting from court decision, (d) death, (e) loss of right to practice law resulting from disciplinary verdict or court decision, (f) failure to pay membership fees for period exceeding one year, or (g) employment in State Treasury Solicitor's Office.

21 MINERAL, WATER AND FISHING RIGHTS

21.01 MINES AND MINERALS:

Geological and Mining Law of Feb. 4, 1994 governs rights to mineral deposits in Poland. All mineral deposits in Poland are State Treasury property and royalty payments must be paid for extractions. Right to information gained during geological and mining works shall rest with State Treasury. State Treasury's rights to mineral deposits do not include rights to land above such deposits. License is required for mineral deposit prospecting or identification, mineral extraction as well as storing of substances without tanks and waste disposal in mountain complex, including underground mining headings. License is granted by Minister of Environment Protection, competent voivod or starost, depending on type of mineral deposit, its territorial size and output. Based on license from appropriate authority, economic entities can obtain exclusive right to extract mineral within certain area for limited period of time. Economic entities that have extracted mineral have right to freely dispose of minerals unless granted license or other Polish laws provide otherwise. Upon satisfaction of certain conditions provided by Mining Law, license is transferable. License is granted under Law on Freedom of Business Activity of July 2, 2004 only.

Mining companies that have license to extract mineral deposits must present to land owner draft of agreement for use of land. If owner does not accept draft within one month, mining company may apply to mining authority for temporary permit to use land. Mining company must pay owner (possessor of land) compensation for entire period of temporary occupancy of land in amount equal to average yearly net income obtained from property during last five years. Compensation set forth in agreement between owner (possessor) of land and mining company cannot exceed above-mentioned compensation.

Mining companies are obliged to pay maintenance charge for mineral extraction to competent commune (60%) and National Environment Protection and Water Economy Fund (40%). Mining companies are obliged to prevent mining damages, repair any damages and provide land reclamation on whole mining area at company's cost. Repair of damages is limited to restoration to former state. However, if restoration to former state is impossible or cost of such restoration flagrantly exceeds damages amount, repair of damages is to take form of compensation payment. If water resources disappear or become useless for persons and for livestock as result of mining activities, compensation is to take form of new well or other means providing sufficient amount of water for persons and livestock, at least at existing level of water resources before damage. There is three year statute of limitations on claims arising from mining damages. Maintenance charge may be imposed in amount of 80 times of rate of this charge for mining companies that conduct mineral extraction without license or contrary to granted license. Any person who conducts geological activity without license or contrary to granted license and causes great damage to property is liable to penalty of imprisonment up to three years.

Building permit is required for mining construction. Mining authority determines technical conditions of mining activities. Activities of mining company are to be carried out in accordance with plan of activity confirmed by mining authority. Such activities must be controlled and supervised by persons who have authorization from mining authority. Mining companies must maintain updated geological and measure records. Mining authority is authorized to review these records.

22 MORTGAGES

22.01 CHATTEL MORTGAGES:

Polish law on chattel mortgage is pledge on movables without delivery of object to creditor or to third person. Establishing pledge on movable without delivery of item of personal property to creditor or third person on whom parties have agreed requires specific exception (for example registered pledge). (See category 8 Debtor and Creditor, topic 8.09 Pledges.) Exceptions can be regarded as equivalent to chattel mortgages in common law.

Characteristics of chattel mortgages are similar to pledges on ships. According to Maritime Code, they may take two forms depending on whether ship is entered in ship register. Pledge on ship which is entered in ship register (maritime mortgage) is subject to law on mortgages. Maritime mortgage contracts should be in written form with notarized signatures. Maritime mortgage should be also entered in ship register. Pledge on ship which is not entered in ship register is subject to provisions of civil law concerning pledges on movables. (Maritime Code of 2001, arts. 76-89).

22.02 MORTGAGES:

Mortgage is qualified right over real property and is attached to given claim as security. Most important role of mortgage is ability to attach secured claim to real property regardless of entity or person to whom it belongs. Mortgagee has priority for satisfaction before personal creditors of mortgagor unless creditors enjoy so-called "execution privileges". Institution of mortgage is governed by Law of July 6, 1982 on Land Registry Books and Mortgages. Right of perpetual usufruct may also be object of mortgage, which encompasses buildings and equipment owned by perpetual user.

Entry into land registry book is necessary to establish mortgage. Mortgage secures only financial claims and may be set only as to certain amount of money. Satisfaction of mortgage is governed by provisions on judicial execution proceedings. Any other contractual agreement is invalid. Limitation of claim secured by mortgage does not alter right of mortgagee to satisfaction. Claims secured by mortgage may not be transferred without mortgage unless law provides otherwise; mortgage also may not be transferred without claim which it secures. Mortgage is established on entire real property, including accessories, and is maintained in its entirety until entire secured claim expires. Expiration of claim secured by mortgage results in mortgage expiration, unless specific regulations provide otherwise. If mortgage is deleted from land registry book without valid legal grounds, mortgage expires after ten years. Effectiveness of mortgage security renouncement is conditioned upon mortgage deletion from registry. In case of mortgage expiration, mortgagee is obligated to accomplish all necessary activities enabling mortgage to be deleted from registry.

Declaration on establishment of mortgage should be executed in form of notarial deed, except for mortgages in favour of bank. Specific regulations concerning bank credits permit for documents issued by bank confirming granting of credit, amount of credit, interest on credit and terms of repayment to be entered into Land Registry Books to establish mortgage. These documents with declaration that provides obligation has become due, constitute execution documents without necessity to obtain writ of execution from court.

Two other mortgages exist in addition to regular type: mortgage to cover future debts and mandatory mortgage. Mortgage to cover future debts serves as security for claims for unspecified amount of money up to certain limit and usually secures existing or future claims resulting from given legal relationship or claims connected with mortgage claims, but not included in regular mortgage automatically by virtue of law. Mandatory mortgage is established upon unilateral demand of creditor to secure claim confirmed by executory document with writ of execution, specified in provisions on executory proceedings. On such basis, creditor may acquire mortgage on all real property of debtor.

See category 23 Property, topic 23.05 Real Property.

23 PROPERTY

23.01 ABSENTEES:

During their absence, persons may generally delegate authority to any person of full capacity. Exceptions prescribed by law or pursuant to legal transactions apply to citizenship, family status, and when required, personal activity. It is common to give power of attorney. Legal transactions executed within limits of representative's authority produce direct consequences for those represented. General power of attorney confers authority for all acts of ordinary management. Acts falling outside of ordinary course of business require power of attorney defining type of such acts; unless law requires specific power of attorney for particular transaction. If particular form is required to validate transaction, power of attorney to perform that transaction must be given in required form. Power of attorney may be revoked at any time unless principal renounces right to revoke on grounds justified by legal relationship underlying such power. (arts. 95-109 C.C.).

Before courts, absentee may be represented by advocate, by legal counselor in economic matters, by person who is joint party to absentee in proceedings, by strictly defined family members, by person managing its property or business or by someone who is in relationship of permanent mandate, when object of proceedings is within limit of mandate. (art. 87, §1 C.C.P.). Power of attorney may be given to sue, accept service, or accept proceedings, and is strictly construed.

23.02 DEEDS:

See category 22 Mortgages, topic 22.02 Mortgages.

23.03 POWERS OF ATTORNEY:

General power of attorney confers authorization for all acts of ordinary management. For acts going beyond scope of ordinary management, power of attorney is required for particular act or transaction. If particular form is required to make legal transaction valid, power of attorney must be in such form. General power of attorney should be made in writing to ensure its enforceability. Any limitations placed on agent's authority by principal will not affect validity of transaction concluded by agent in name of principal. Power of attorney may be revoked at any time, unless principal, for reasons justified by legal relationship underlying agency, waived his right to revoke power of attorney. Authorization expires on death of principal or agent, unless otherwise stipulated in power of attorney. If person concluded contract as agent but had no authorization to enter into transaction, validity of transaction depends on ratification by principal. If, after expiration of his authority, agent concludes transaction in name of principal within limits of original authorization, legal transaction is valid unless other party knew about expiration of authority or could easily have obtained such knowledge. Agent may appoint another agent for principal only when power of attorney sets forth such authority, or when law or legal relationship so authorizes. Agent cannot benefit from legal transaction entered into on behalf of principal unless power of attorney so stipulates, or if nature of legal transaction precludes, any possibility of infringing upon interests of principal. This provision is applied correspondingly, when agent represents both parties in transaction. (arts. 95-109 C.C.).

Polish law recognizes special class of powers of attorney called “prokura”. Only principals which are entrepreneurs can establish prokura. Prokura confers upon agent authority to enter into all transactions inside and outside of court connected with conduct of enterprise, except sale of enterprise itself, letting it for temporary use and disposal or encumbering of real estate, in which cases specific authorization is necessary. It cannot be restricted by principal in its scope of authority relative to third persons except to restrict procurist to act only with another procurist (or principal or manager of corporation), or to limit procurist to one of several branch offices of principal. Prokura confers powers upon procurist tantamount to powers of principal himself. It must be recorded in National Court Register and may be revoked at any time by principal; revocation also has to be registered in National Court Register. (arts. 1091-1099 C.C.).

23.04 PRIVATIZATION:

Law of Aug. 30, 1996 on Commercialization and Privatization provides for transformation of state enterprises into joint stock or limited liability companies (commercialization) and transferring shares of such companies to third parties (indirect privatization) or disposing of all tangible and intangible assets of state enterprise (direct privatization) as well as taking-up by other entities than State Treasury and state legal entities of shares in increased share capital of company wholly owned by State Treasury established as result of commercialization.

Commercialization of enterprise may be initiated by its founding organ, enterprise director and employees' council or by Minister of State Treasury, and is implemented by Minister of State Treasury.

Once state-owned enterprise is transformed into joint stock company, shares of such company become property of State Treasury until they are made available to public. Company established through transformation acquires all rights and liabilities of state-owned enterprise, including those arising from employment arrangements. Final balance sheet of state-owned enterprise becomes opening balance sheet of new company. Joint-stock company must establish supervisory board, two-fifths of members to be elected by employees.

Minister of State Treasury makes shares of company established as result of commercialization available to public (indirect privatization). Shares may be sold by tender, through public offering and through negotiations following public invitation. Employees are entitled to acquire gratuitously up to 15% shares of commercialized company.

Direct privatization is initiated by founding organ of state enterprise upon consent of Minister of State Treasury. Assets of privatized enterprise may be sold, contributed to company or leased. Lease of assets of state enterprise may take place if: (i) more than half of total number of employees have acquired shares of lessee, (ii) shareholders of lessee include only natural persons unless Minister of State Treasury permits participation of legal persons, (iii) amount of stock capital is not lower than 20% of combined value of establishment fund and enterprise fund, (iv) at least 20% of shares have been acquired by persons not employed with privatized enterprise.

Law of Apr. 30, 1993 on National Investment Funds and Their Privatization, as amended (“Fund Law”) served to implement mass privatization programme. State owned enterprises chosen by Council of Ministers after being transformed into joint stock companies were contributed to joint stock companies established by State Treasury (National Investment Funds). Authorities of fund are: Shareholder's Meeting, Supervisory Board, and Management Board. Funds were to be managed by specialized managerial firms. State Treasury following enactment of National Investment Fund law issued share certificates exchangeable for shares of National Investment Funds. Share certificates were distributed between whole population of Poland. Share certificates were exchanged for shares in National Investment Fund. Presently all National Investment Funds are public companies.

23.05 REAL PROPERTY:

Real estate consists of land and buildings permanently connected with land or parts of such buildings, unless pursuant to regulations such buildings or parts constitute object of ownership separate from land. Reserving exceptions prescribed by law, buildings and other installations permanently connected with land, as well as trees and other plants from moment of planting or sowing, are considered part of land. Installations, purpose of which is delivery or removal of water, steam, gas, electrical current or similar installations, are not considered part of land or building if they form component part of enterprise or institution. Rights connected with ownership of real estate are also considered parts of land.

Real estate can be object of ownership. Owner, being State Treasury or commune, can grant perpetual usufruct. In establishing perpetual usufruct, similar provisions to those governing transfer of ownership of real estate are applied. Within limits defined by laws and principles of social coexistence and by contract, perpetual user may use land to exclusion of other persons. Within same limits, perpetual user may dispose of his right by sale or inheritance. Usufruct of State Treasury or commune's land by perpetual user is for 99 years. In exceptional cases, when economic purpose of perpetual usufruct does not require using land for 99 years, it is permissible to usufruct land for shorter period. However, term must be for at least 40 years. Within last five years prior to expiration of period stipulated by contract, user may demand extension for further period of 40 to 99 years. Perpetual user may, however, make such demands earlier, if period of amortization of expenditures intended for land subject to usufruct is considerably longer than time remaining on use. Refusal to prolong is permissible only in consideration of some important social interest. Contracts for prolongation of perpetual usufructs must be notarized. Perpetual user pays rent annually throughout use period. Use of State Treasury land by perpetual user must be defined in usufruct agreement. Usufruct may be terminated before expiration of specified period if perpetual user uses land in manner obviously incompatible with its contractual purpose and particularly if, contrary to contract, user fails to erect buildings or installations specified in agreement. (arts. 232-243 C.C.). In case of expiration of perpetual use, user is entitled to compensation for buildings or other installations erected or purchased by him. Compensation should be equal to value of such buildings or installation or of date expiration of perpetual usufruct. No compensation is due for buildings or installations erected contrary to contract provisions.

Law of July 29, 2005 on Transformation of Right of Perpetual Usufruct into Ownership provides that natural persons being perpetual users of real estate for housing or garaging purposes and agricultural real estates or irrespective of destination of real estates if they have acquired perpetual usufruct right in exchange of real estates which were taken over to public ownership by virtue of Decree dated Oct. 26, 1945 on ownership and perpetual usufruct right within area of City of Warsaw prior to Dec. 5, 1990, might request that their rights of perpetual usufruct are transformed into land ownership. Legal persons may file such requests provided that they are perpetual users of premises being part of real estate for housing or garaging purposes. Transformation of right of perpetual usufruct into ownership is subject to fee accrued by applicable authorities. Under certain conditions such fee may be reduced.

Acquisition of Real Estate by Foreign Persons.

Law of Mar. 24, 1920 on Acquisition of Real Estate by Foreign Persons, as amended, provides that acquisition of real estate by foreign persons may take place after permit from Minister of Internal Affairs and Administration (http://www.mswia.gov.pl) has been granted. Minister of Internal Affairs and Administration grants permit in absence of objections from Minister of National Defense and, in event permit involves agricultural lands, consultation with Minister of Agriculture (http://www.minrol.gov.pl). Acquisition of real estate is defined by statute as any event resulting in transfer of ownership or transfer of right of perpetual usufruct to land.

Provisions of Law apply to all forms of acquisition of real estate, including contracts of exchange, sale or donation, in-kind contributions of real estate to founding capital of company and acquisition of right of perpetual usufruct to land. Execution of leases or rent agreements is not considered acquisition of real property. Statute also requires foreign person to obtain permit in order to acquire shares in Polish company which holds ownership or perpetual usufruct rights to land, if such company thereby becomes controlled company, and, if in event that such company is already controlled company, if its shares are acquired by person other than its existing shareholder. This requirement, however, does not apply to acquisition of shares in company admitted to trading on regulated market or company holding certain kinds of real properties specified by law.

Law defines “foreign person” as any of following: natural person who is not Polish citizen; legal person with registered seat outside of Poland; partnership of alien natural or legal persons, having no legal personality, with its seat abroad, created pursuant to foreign countries legislation or legal person and commercial partnership having no legal personality, with registered seat in Poland, but controlled, directly or indirectly, by persons who fall into either of above-listed categories. (In case of commercial company to control means to have directly or indirectly at least 50% of share capital.) Acquisition of real property in violation of statute is null and void. Law is not applicable to acquisitions of real property through inheritance by persons entitled to statutory inheritance, and following categories of real estate acquisitions are exempted from permit requirement: (i) acquisition of ownership right to apartment and, if necessary for living accommodation purposes, garage, (ii) acquisition of real property by foreign citizen residing in Poland for at least five years from granting permanent residency permit to it, (iii) acquisition of real estate by foreign persons, married to Polish citizen, residing in Poland for at least two years from granting permanent residency permit to it, if such real property is considered spousal common property, (iv) acquisition of real property from person who held ownership right or perpetual usufruct right to such property for at least five years and acquiring foreigner would have been entitled to statutory inheritance after such person, (v) acquisition of undeveloped properties by controlled company done in furtherance of its statute goals, if total area of real properties located within city limits in Poland, acquired by such company does not exceed 0.4 hectares, (vi) acquisition of immovable property by bank being foreign person and at same time, mortgagor, in course of taking over ownership to immovable property as result of ineffective auction in execution proceedings, (vii) acquisition or taking hold of shares by bank being foreign person in company, being owner or perpetual usufructuary of immovable property, in connection with vindication by such bank of claims resulting from effected banking operations. Above exemptions to permit requirement do not apply in situations where acquired real property is located in border zone or if it is agricultural land with area exceeding one hectare.

Citizens of EEA member states do not need permit for acquisition of real property in Poland, except for acquisition of: (i) Agricultural and forestry real properties, through period of 12 years from Poland's accession to EU (i.e., until Apr. 30, 2016), subject to certain exceptions, and (ii) second house, though period of five years from Poland's accession to EU (i.e., until Apr. 30, 2009) unless purchaser has been legally and continuously residing in Poland for at least four years or purchases such house to provide tourist services.

Foreign person wishing to acquire real estate in Poland must file application indicating: names and addresses of applicant and seller of real estate; description of real estate; terms of sale; evidence of existence of sufficient funds for purchase; explanation of purpose of purchase; and documentary evidence of applicant's connection with Poland (such as having registered seat in Poland).

Zoning.

Law of Mar. 27, 2003, as amended, on Zoning specifies scope and activities related to zoning of land and defining of methods of its use, assuming that development of ecological system should be basis of such actions, and also provides regulations and methods of resolving conflicts between interests of citizens, regional self-governing bodies and state in such matters. Zoning Law provides that local regional bodies (“gmina”) shall designate zoning and define methods of use of land located within borders of given gmina. Zoning Law governs issuance of decisions on conditions relating to construction and use of location needed in connection for construction permit. In order to be valid, such decision must conform with provisions of local zoning regulations. Such decision must be issued by head of local regional body, major or president of city. Zoning Law provides that if terms of application for decision on conditions relating to construction and use of location confirm with local zoning ordinances, then person granting such decision cannot deny terms requested and, furthermore, granting of such decision cannot be conditioned upon applicant's fulfillment of certain additional services not provided for in regulations (such as payment of supplementary fees). Before granting construction permit, appropriate organ verifies whether proposed use of parcel or location confirms, inter alia, with regional zoning ordinances.

Construction Regulation.

Law of July 7, 1994, as amended, on Construction regulates design, construction, maintenance and tearing down of buildings and defines roles of state administrative bodies in this regard. Construction Law provides that generally construction may commence only once final decision permitting such construction has been granted. Construction proposal (project) must meet requirements set out in decision on conditions relating to construction and use of location and must contain proposed use of location; architectural and construction details; declarations of appropriate entities relating to provision of utilities, if necessary; results of geological and engineering studies and geotechnical conditions relating to location of buildings, if necessary. Such proposal is approved in construction permit. Scope and form of construction project is determined in Ordinance of Infrastructure Minister of July 3, 2003. In certain cases, commencement of use of building requires occupation permit.

Protection of tenants is regulated by C.C. and by Law on protection of tenants, local community houses resources and amendments of Civil Code as of June 21, 2001 (as am'd). Law regulates issues relating to rights and obligations of tenants and protection of their rights. Law provides for many privileges of tenants in relations to lease of premises for housing purposes. Increase of rent or other dues may be imposed once during six month period of lease. In case of such increase, except for rent, it must be properly justified by landlord on request of tenant. Law provides for principles in scope of increasing amount of rent. Lease agreement may be terminated by landlord only upon observance of conditions provided by Law. Upon one month notice landlord may terminate lease agreement for, among others, following reasons: (i) after written notification tenant still uses premises contrary to agreement or in manner resulting with damages or description, (ii) tenant is in delay with payment of rent or other dues for at least three months despite landlord's written notification on intention of terminating agreement and providing additional term to proceed with those payments, (iii) tenant subleases premises without consent of landlord. Upon six months notice landlord is entitled to terminate lease agreement, among others, if it is intending to use premises for its own housing purposes provided that other housing premises were assured to tenant on not deteriorated financial conditions. Without providing tenant with other housing premises three years termination notice must be observed.

23.06 REPRIVATIZATION AND RESTITUTION:

Law on Reprivatization is still not adopted. However, claims of Catholic Church have been recognized in Law on Relation of State to Church of May 17, 1989. Further developments will be reported.

24 TAXATION

24.01 INTRODUCTION:

Tax Decree of 29 Aug., 1997 (Decree) regulates tax obligations, tax information, tax proceedings, tax control and rules on treasury secrecy. As general rule, Polish taxpayers are obliged to individually calculate their taxes. Tax obligations become due and payable in circumstances and on dates provided for in applicable legal regulations. As exception to this rule, tax office may in certain circumstances establish amount of tax obligations. Such assessed tax liability becomes due as of date of receipt by taxpayer of its tax assessment decision and is payable within 14 days from that date.

Taxpayers are liable with all their property for their tax obligations. In case of married persons, liability includes separate assets of taxpayer and joint assets of taxpayer and his or her spouse. Decree provides for two basic methods of securing tax claims: statutory and compulsory real estate mortgage and treasury lien over movables and certain rights. Such securing of tax claims is applied in principle in event that tax office issues tax assessment decision and taxpayer is in tax default.

Decree contains general rule that taxes are payable on dates provided for in applicable laws. In event that tax is established by tax office, it becomes payable within 14 days from day of receipt of this decision by taxpayer. Failure to pay taxes when due triggers obligation to pay default tax interest which accrues as of next day following tax due date at applicable tax default rate. Tax default rate is currently 15% per annum.

Tax obligations shall be barred by limitation in general on lapse of five years from end of year in which they arose. Tax obligations which are secured by statutory mortgage or treasury lien do not expire due to lapse of statute of limitations, except that after five years tax arrears may only be exacted on object of mortgage or lien.

In some cases third parties are liable with all their assets for defaulted tax obligations, jointly and severally with taxpayer. For example management board members may be held liable for defaulted tax obligations of limited liability company and joint-stock company, jointly and severally with all their property, if State Treasury is unsuccessful in its efforts to collect unpaid taxes from company through foreclosure on company's assets and it is proved that member of management board of company is responsible for failure to declare bankruptcy of company and such member fails to identify company's assets which may be used to satisfy State Treasury's tax claims. Decree provides that in certain circumstances acquirers of businesses (or part of them) are held jointly and severally liable for taxes unpaid by sellers of such businesses (or their parts).

24.02 CIVIL LAW TRANSACTIONS TAX:

Law on Civil Law Transactions Tax of Sept. 9, 2000 provides for payment of tax in connection with execution of certain contracts, some other civil law transactions and some court decrees. Law provides for particular tax rates generally ranging from 0.1% to 2% of value of particular contract or transaction.

24.03 EMPLOYMENT TAXES:

See category 11 Employment, topic Social Security.

24.04 INCOME TAX:

Corporate Income Tax Law of Feb. 15, 1992, as amended, governs taxation of income generated by legal persons, business corporations in organization and entities not having legal personality, except for partnerships. Provisions of Law apply also to partnerships not having legal personality, having their seat or management in other country, if, pursuant to this country's tax law, they are treated as legal persons and they are liable to taxation with respect to their world-wide income, notwithstanding place income is earned. Taxpayers whose principal office or management headquarters are located in Poland are liable for taxes on their worldwide income. Taxpayers whose principal office and management headquarters are located outside of Poland are liable for taxes only on their income earned in Poland.

Group of at least two companies may by way of agreement create consolidated tax group. Tax consolidation agreement should be registered with tax authorities. Establishment of consolidated tax group is effective, if certain requirements are met. They include in particular: (i) average share capital of each company must amount to at least 1,000,000 PLN, (ii) dominant company must hold directly 95% of shares of dependent companies, (iii) members of consolidated tax group may not have any unpaid taxes payable to State Treasury, (iv) dependent companies do not hold shares in share capital of other companies constituting group, (v) term of tax consolidation agreement is at least three years, (vi) consolidated tax group has at average at least 3% share of income in entire revenue of consolidated tax group.

Tax year is period of 12 consecutive full months. Unless taxpayer chooses otherwise, by submitting notice on relevant tax office, tax year is calendar year.

Tax is generally paid on taxable net income. In determining taxable net income (or net tax loss), gross income of taxpayer is reduced by costs of income generation. Corporate Income Tax Law specifies which expenditures are and which are not tax deductible. Certain types of income specified in Corporate Income Tax Law are not included in taxpayer's gross income. Also, taxable net income may be reduced by amounts of certain expenditures of taxpayers including in particular certain donations.

Tax losses incurred in tax years starting from 1999 may be carried forward for five years provided that amount deductible from taxable income in given year may not exceed 50% of tax loss that is carried forward.

Corporate income tax rate is 19%. Dividends and corporate distributions are subject to 19% flat tax. Dividends paid to companies being residents of EU, EEA, or Switzerland are tax exempt, if shareholder holds (or will be holding) not less than 10% (25% in case of Switzerland residents) of shares during period of at least two years.

Taxpayers must submit, without prior summons, declaration in standard form on amount of income (losses) generated from beginning of tax year and pay to tax office monthly advances corresponding to difference between tax payable on income earned from beginning of tax year and sum of advance tax payments payable for preceding months.

Annual tax returns should be filed with tax office within three months from beginning of next fiscal year and within this time tax payable or difference between tax payable on income shown in tax return and sum of advanced payable for preceding months should be paid.

See category 15 Foreign Trade and Commerce, topic 15.04 Foreign Investment.

Personal Income Tax Law of July 26, 1991, as amended, governs taxation of income generated by individuals. Taxpayers are: residents of Poland (unlimited taxation on their world-wide income) and residents of foreign countries, except for diplomats, if they generate income in Poland on basis of employment relationship or otherwise (limited taxation on Polish income only).

Income of married persons is taxed separately, unless spouses decide otherwise. If desired, total income of spouses, who are common owners of their communal property, may be divided by two to obtain amount of taxable income for purpose of determination of applicable tax rate. Total tax payable by spouses equals to double product of applicable tax rate and one half of total income of spouses.

Tax is generally paid on taxable net income. In determining taxable net income (or net tax loss), gross income of taxpayer is reduced by costs of income generation. Personal Income Tax Law specifies which expenditures are and which are not tax deductible. Certain types of income specified in Personal Income Tax Law are not included in taxpayer's gross income. Also, taxable net income may be reduced by amounts of certain expenditures of taxpayers including in particular certain donations.

Tax losses incurred in tax years starting from 2000 may be carried forward for five tax years provided that amount deductible from taxable income in given year may not exceed 50% of tax loss that is carried forward.

Individuals are taxed in accordance with progressive tax rate. As of 2009 tax rates are, depending on amount of taxable income, 18%, 32%. Certain types of income including income from sale of real property, prizes won at lotteries and chance games, income from undisclosed sources, and certain other types of income, are taxed in accordance with different flat rates.

Annual tax returns should be filed to tax office by Apr. 30 of next year.

Since Jan. 2004, Personal Income Tax Law provides for certain types of income generated from entrepreneurial activities to be taxed at 19% flat rate. Income subject to this special regime is taxed separately from income subject to progressive tax scale described above, and may not be combined with income from other sources (e.g., ordinary employment income). Thus, taxation of income not eligible for new 19% rate remains unaffected. To benefit from new regime, taxpayer must declare his eligibility in writing to tax authorities prior to Jan. 20 of tax year. If taxpayer commences business activities during tax year, he or she should file statement on or before day immediately preceding day activity begins, but in any event not later than date that revenue is first generated. Taxpayer will remain subject to 19% regime until he or she notifies tax authorities otherwise in writing. In order to opt out for particular tax year, this notice must be provided by Jan. 20 of that year. As general rule, individual must be engaged in business either as individual entrepreneur or through partnership-type “passthrough” entity (i.e., entity without separate taxable basis) to claim 19% tax rate.

Personal Income Tax Law specifies that individuals may not opt in to 19% rate if they are acting as individual entrepreneurs or through partnership-type entity to provide services to current or former employers that are same as, or similar to, services that taxpayer (or at least one of his or her partners) provided in preceding year or continues to provide in current tax year. In this case, taxpayer will be required to pay requisite progressive rate on all such income. Additionally, individuals providing services pursuant to enterprise management contracts, managerial contracts or agreements of similar nature (regardless of whether such contracts were entered into in connection with individual's general scope of business or for whose benefit they are performed) may not opt in to 19% taxation regime.

Personal Income Tax Law clarifies that if services being provided are distinct from those formerly or currently provided to taxpayer's employer (or previous employer), or are provided to entities other than individual's employer, then individual may be eligible for 19% rate. Additionally, former or current employee is permitted to opt in to 19% rate for income received from his or her former or current employer that is unrelated to provision of services, e.g., sales of goods. Entrepreneurs have been offered 19% rate alternative at cost of number of deductions or other relief from certain taxes, e.g., right to file joint spousal return. According to information provided by tax authorities, only about 10% of those eligible for 19% rate have chosen to opt in. This seemingly minimal interest may reflect fact that effective tax rate in Poland for most taxpayers remains below 19% given exemptions available under current progressive scale.

24.05 INHERITANCE AND DONATION TAX:

Law on Inheritance and Donation Tax of 1983. Object of taxation is acquisition by natural persons of assets located on territory of Republic of Poland or property rights executed in territory of Republic of Poland through: inheritance, donation, acquisitive prescription, gratuitous dissolution of co-ownership or legitimate portion of property to be inherited (unless authorized party has received bequest in form of donation or gift to be included in inheritance or testamentary legacy).

Acquisition of rights to savings deposit on basis of instructions given by deposit owner in case he/she dies, and acquisition of participation units on basis of instructions given by participant of investment fund, either open or specialist, in case he/she dies shall also be taxed.

Amount of tax is established depending on tax group to which acquiring person was attributed. Attribution to one of three tax groups is effected in accordance with personal relationship between acquiring person and person from whom things and property rights were acquired.

In case of closest relatives (spouse, ascendant, descendant, stepparents, stepchildren, sisters, and brothers), inheritance and donation is subject to unlimited exemption.

24.06 INHERITANCE TAX:

See topic 24.05 Inheritance and Donation Tax.

24.07 LOCAL GOVERNMENT TAXES:

Local Taxes.

Law on Local Taxes and Tariffs provides for levying upon natural persons, legal entities and organizational units without legal personality following local taxes: (a) Real estate tax, (b) tax on means of transport, and (c) local fees covering fee for trading on open market places, fee charged on tourists and fee charged on natural persons keeping dogs.

24.08 STAMP TAX:

Stamp Duties.

Law on Stamp Duties of Nov. 16, 2006 provides for payment of stamp duties in connection with proceedings carried out before administrative bodies, and preparation of documents of power of attorney to act before courts and administrative bodies. Specific rates and amounts of stamp fee are provided in Appendix to said Law.

24.09 TREATIES AND AGREEMENTS:

Polish—U.S. Treaty.

Poland and U.S. signed treaty on prevention of double taxation on Oct. 8, 1974 based upon following general principles: (a) in Poland—entities domiciled or with their seat located in Poland may deduct from Polish tax due their corresponding amounts paid in U.S., (b) in U.S.—entities domiciled or with their seat located in U.S. may deduct from U.S. tax their corresponding amounts paid in Poland.

Treaty also introduces several other principles, such as: (a) Withholding tax on dividends in country where seat of company paying dividend is located may not exceed: (i) 5% of gross dividend amount, if recipient is company holding at least 10% of shares with voting rights of company paying dividends, or (ii) 15% dividend amount in all other circumstances, (b) interest on loans and other interest is subject to taxation only in country where its recipient has tax residence, (c) withholding tax on royalties transferred to other country, in country where they arise may not exceed 10%, and (d) capital gains are generally taxed in country where taxpayer has his/her residence and are free from taxation in country in which they arise.

Poland is also bound by bilateral international agreements on prevention of double taxation, except for U.S., in particular with following countries: Albania, Australia, Austria, Belgium, Belarus, Canada, China, Cyprus, Czech Republic, Denmark, Finland, France, Germany, Great Britain, Greece, Hungary, India, Indonesia, Ireland, Israel, Italy, Japan, Republic of Korea, Malaysia, Netherlands, Norway, Pakistan, Portugal, Russia, Singapore, South Africa, Spain, Sri Lanka, Sweden, Switzerland, Thailand, Tunisia, Turkey, Ukraine, and United Arab Emirates.

24.10 VALUE ADDED TAX:

Act on Tax on Goods and Services of Mar. 11, 2004 adjusted Polish VAT regulations to those existing in EU.

Act contains definitions of supply of goods and services, taxpayer, export and import and goods. New definitions were also introduced as regards intra-Community supplies and acquisitions of goods, distance selling and new means of transport. In addition, special procedures were introduced for trade in works of art, second-hand goods, electronic commerce, etc.

VAT taxpayers are legal persons, organizational units without legal personality and natural persons carrying out independent business activity irrespective of aim or result of such activity.

Exempted from VAT (with some exceptions) are taxpayers whose total taxed sales value did not exceed in previous tax year amount of PLN 50,000 (with some exceptions). Sales value does not include, for instance, tax amount.

Following shall be subject to VAT: (1) Supply of goods for consideration; (2) supply of services for consideration in territory of Republic of Poland—i.e., each case of such services being provided to natural person, legal person or organization unit without legal personality, that does not constitute supply of goods in meaning of Act on VAT; (3) export of goods—i.e., confirmed by customs office of exporting country export of goods from territory of Republic of Poland to any country outside Community, if such export is effected by: (i) supplier or on its behalf or (ii) entity acquiring goods having its seat outside territory of Republic of Poland or on its behalf; (4) import of goods—i.e., import of goods from territory of third country to territory of Republic of Poland; (5) intra-Community acquisition of goods; (6) intra-Community supply of goods.

In particular, tax obligation arises upon supply of goods or services.

Tax is chargeable upon release of goods or completion of services or – in case of payment received earlier – upon receipt of that payment.

If supply of goods or services need to be confirmed by invoice, tax obligation arises upon issue of invoice, not later however than on seventh day from date goods were released or service was completed (above concerns also all invoices for partial provision of services).

In export of goods tax obligation arises as soon as customs office of exporting country confirms export of goods to any country outside Community. On other hand, in case of import, tax obligation arises upon creation of customs debt, subject to certain reservations.

In intra-Community supply of goods tax obligation arises on 15th day of month following month in which goods were supplied, subject to certain reservations. In intra-Community acquisition of goods tax obligation arises on 15th day of month following month in which goods being subject of intra-Community acquisition were supplied.

In Poland rates of VAT are as follows: (1) 22% (standard rate—is applicable to majority of goods and services; (2) 7% (reduced rate)—is applicable, in particular, to certain goods connected with groceries, building materials and services connected with housing construction, health care and transport of people; (3) 3% (reduced rate)—is applicable to agriculture, hunting, forestry and fishery produce; (4) 0% (preferential rate)—is applicable mainly to intra-Community supply of goods, export of goods, supply of books and specialist periodicals.

Taxpayers are obliged to file with their tax offices tax return forms for monthly periods by 25th day of month following each individual month (with certain exceptions—e.g. so-called “small taxpayers” must file their tax returns by 25th day of month following quarter for which quarterly tax return is filed.

Taxpayers are obliged, without prior summons, to calculate and pay tax for monthly period by 25th day of month following month in which tax obligation arose, to bank account of tax office (with certain exceptions).

Each taxpayer whose input VAT amount exceeds output VAT amount in calculation period has right to subtract this surplus from amount of tax due for subsequent periods or obtain refund of this surplus, which should be remitted to its bank account. Tax surplus should, as rule, be refunded within 60 days from filing tax return.

On basis taxpayer's justified application filed together with its tax return, in certain cases, tax office must refund difference within 25 days (instead of 60 days) from date tax return is filed.

25 TRANSPORTATION

25.01 AUTOMOBILES:

See topic 25.02 Motor Vehicles.

25.02 MOTOR VEHICLES:

Operator's license is required for operating motor vehicles in Poland. Minimum age is 18 years. License is valid for lifetime of licensee and must be produced to police or other authorised bodies on demand. Nevertheless, license may be suspended in case of violations regarding motor vehicles. Alien may drive within Poland for up to six months after first entry on basis of international operator's license, or, in certain cases, of valid home country license. However, operator's licenses, granted by any of EU Member States, are valid in territory of Poland without any restriction. Polish operator's license may be granted to alien on basis of international or home country license for same period of time for which original license was issued.

Vehicle Registration.

Every vehicle driven in Poland must be registered; registration plate must be displayed in front and rear and must be of requisite size. Registration tax is to be paid during time of registration. Registration card is issued by local authorities upon registration of vehicle and must be produced to police on demand; registration card is to be surrendered upon deregistration. Vehicle book is issued by vehicle seller or importer and is transferred with ownership of vehicle.

Transfers.

Registration book comes with vehicle. Upon registration of vehicle this book is issued by local registration authority, showing name of registered owner. On transfer of vehicle, book must be sent to authority for registration. Upon transfer, new registration card is issued by local authority.

Liability.

Registered owner of vehicle is liable for all injury or damage caused by operation, whether by negligence or not, if vehicle is used with his permission. Owner's strict liability is limited to certain amounts. Owner is not liable if he can prove that accident causing injury or damage was caused solely by other person's negligence.

Insurance is compulsory on motor vehicle against liability for injury or damages caused by operation of vehicle to third persons. Plaintiff is entitled to action directly against insurer.

Tourists who plan to drive while visiting Poland must have registration documents, driver's license, passport (unless it is citizen of EU member) and international insurance certificate (green card) unless they are citizens of countries that are parties to Uniform Agreement concluded between National Bureaus – regulations from May 30, 2002.

In Poland, as in all of Continental Europe, drivers drive on right-hand side of road. International road signs are used. There are no “yield” signs. Turning right on red light is allowed only if there is flashing green arrow.

Minor motor vehicle traffic violations will result in citation fine, to be paid within two weeks, however foreigners who are not domiciled in Poland will have to pay fine directly to police office.

Road Transportation.

Law on Road Transportation, dated Sept. 6, 2001 regulates issues relating to for-profit as well as not-for-profit national and international transportation as well as activity of Inspection of Road Transportation. On reciprocity basis unless international agreements provide otherwise, foreign entrepreneur entitled to conduct road transportation pursuant to law of his seat may do so on territory of Republic of Poland pursuant to principles provided in Law.

Law does not apply to transportation conducted by vehicles designed to carry up to nine persons, if not-for-profit as well as transportation with vehicles of maximum total receipt not exceeding 3.5 tons.

Undertaking and conducting transportation for-profit requires obtaining license after fulfillment by entrepreneur of certain requirements. License shall be granted for definite period not less than two years and not more than 50 years. License is issued to specified entrepreneur and may not be transferred to any third party. Transportation of persons and international transportation of goods require obtaining permission. Permissions are issued, depending on circumstances, for up to one or up to five years. Transportation of goods for own needs may be conducted after obtaining certificate of notification.

Inspection Road Transportation ensures that requirements imposed on entities conducting national and international transportation are fulfilled. Organs of Inspection are: General Inspector of Road Transportation and voivods acting within voivod inspector of transportation.

Monetary penalty may be imposed on entrepreneur that conducts transport without required license, notification or permission, failed to pay fees, or violates provisions regarding environment, toxic load, transportation of animals, time of work, traffic, etc. in maximum amount of 30,000 PLN.

25.03 SHIPPING:

See categories 3 Business Regulation and Commerce, topics Brokers, Commercial Register; Debtor and Creditor, topic Attachment; Foreign Trade and Commerce, topics Customs, Foreign Trade; Mortgages, topic Chattel Mortgages.

26 TREATIES AND CONVENTIONS

26.01 TREATIES AND CONVENTIONS:

Republic of Poland is party to, inter alia, following multilateral agreements:

General.

Bern Convention of Sept. 9, 1886 (as am'd Berlin, 1908, and Rome, 1928); Statute of Council of Europe (May 5, 1949); Treaty on Establishment of European Bank for Reconstruction and Development (May 29, 1990); Accord Establishing World Trade Organization (Apr. 15, 1994); Convention on Organization of Economic Cooperation and Development (Paris Dec. 14, 1960).

International Cooperation in Legal Matters.

Procedure.

Hague Convention relating to Procedure in Civil Matters (1905 and 1954); U.N. Convention on Recognition and Enforcement of Foreign Arbitral Awards (New York, June 10, 1958); European Convention on International Commercial Arbitration (Geneva, Apr. 21, 1961); New York Arbitration Convention; International Convention on Certain Issues Regarding Conflict of Citizenship Laws (Hague, 1930); Convention on Taking of Evidence Abroad in Civil or Commercial Matters (Hague, 1970); European Agreement on Transmission of Applications for Legal Aid (Strasbourg, 1977); UN Convention for International Sale of Goods (Vienna 1980) and several bilateral agreements; Law on International Private Law of 1965; Hague Convention of Oct. 21, 1961 on Abolishing Requirements of Legalisation for Foreign Public Documents.

Intellectual and Industrial Property.

Among others: Bern Convention of Sept. 9, 1886 on Protection of Literary and Artistic Works (as am'd Berlin 1908, and Rome 1928); Paris Act of Bern Convention signed in Paris on June 24, 1971; Universal Convention on Copyright of Sept. 6, 1962 signed in Geneva, verified in Paris, July 24, 1971; Paris Convention on Protection of Industrial Property (Paris, Mar. 20, 1883, as am'd, Stockholm, July 14, 1967). WTO Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS), Treaty on Trade and Economic Relations between Poland and USA signed July 26, 1991.

Family.

Convention Concerning Claims for Alimony Abroad (New York, 1956); International Convention on Citizenship of Married Women (New York, 1957); Hague Convention on Conflicts of Law and Jurisdiction relating to Divorce and Separation (June 12, 1902); Hague Convention on Conflicts of Law relating to Marriage (June 12, 1902); Convention on Consent to Contract Marriage, Lowest Marriage Age and Marriage Registration (New York, Dec. 1962); Convention on Conflicts of Laws relating to Form of Testamentary Disposition (Hague, 1961); Convention on Rights of Child (1989), European Convention on Legal Status of Children Born out of Wedlock (Strasbourg, 1975), European Convention on Recognition and Enforcement of Decisions concerning Custody of Children and on Restoration of Custody of Children (Luxembourg, 1980).

Trade.

Paris Convention on Protection of Industrial Property (Paris, 1883, as am'd in Washington, 1911, Hague, 1925, and Stockholm, 1967); Geneva Convention of June 7, 1930 concerning Bills of Exchange and of Mar. 9, 1931 on Checks; United Nations Convention on Contracts for International Sale of Goods (Apr. 10, 1980); Madrid Agreement Concerning Prosecution of Illegal Distribution of Goods (Madrid 1891, as am'd in Hague, 1925); Central European Free Trade Agreement (Dec. 21, 1992) and several bilateral agreements.

Tax Treaties—Avoidance of Double Taxation on Income and Property.

Poland is bound by several bilateral international agreements on prevention and avoiding of double taxation, among others with following countries: Albania, Argentina, Australia, Austria, Belgium, Bulgaria, Byelorussia, Canada, China, Croatia, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Germany, Great Britain, Greece, Holland, Hungary, India, Indonesia, Ireland, Island, Israel, Italy, Japan, Jordan, Republic of Korea, Latvia, Lithuania, Luxembourg, Malta, Malaysia, Moldova, Morocco, Norway, Pakistan, Palestine, Philippines, Portugal, Romania, Russia, Singapore, Slovakia, South African Republic, Spain, Sri Lanka, Sweden, Switzerland, Thailand, Tunisia, Turkey, Socialist Republic of Vietnam, Ukraine, USA, United Arab Emirates, Republic of Zimbabwe.

—Scope —

Revised for 2010 edition by

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C.C. (Civil Code); C.P.C. (Civil Procedure Code); C.C.C. (Code of Commercial Companies); D.L. (Decree-Law); IRS (Personal Income Tax); IRC (Corporation Tax);IMI (Municipal Property Tax); C. Pen (Criminal Code); Bankruptcy Code (Code of Special Proceedings for the Recovery of Business Enterprises and Bankruptcy).

Portugal is member of EU. See also European Union Law Digest.

Note: This revision incorporates legislation through Oct. 14, 2009.

1 INTRODUCTION

1.01 CURRENCY:

Portugal is member of EURO currency block, Portuguese escudo exchange rate being 200.482 to EURO. EURO in relation to sterling has been lately at rate of 0.914 to pound and in relation to dollar at rate about 1.486 to U.S. dollar.

1.02 GOVERNMENT AND LEGAL SYSTEM:

On Apr. 25, 1976, new Constitution of Republic of Portugal came into force. It was voted by Constituent Assembly thereafter extinguished. Political parties with representation in present Assembly of Republic, are following: Social and Democratic Centre—Popular Party (CDS-PP), Portuguese Communist Party (PCP), Ecological Party (PEV), Social Democratic Party (PSD) Block of the Left (“Bloco de Esquerda”) and Socialist Party (PS). PS has formed government after winning Sept. 2009 General Elections.

In accordance with 1976 Constitution of Republic, power is exercised by President of Republic, Assembly of Republic, Government and Courts. Constitution was first revised in 1982 to transform its “revolutionary” content into Western type text with view to better protecting private enterprise and property. Revolutionary Council was replaced by State Council and Constitutional Court. Constitution was further revised in 1989, 1992, 1997, 2001, 2004, and 2005.

Assembly of Republic is elected for four yearly legislative sessions, each session running in principle from Sept. 15 to June 15. (Arts. 171 and 174 of Portuguese Constitution).

Judicial functions are carried out by normal judicial courts: special courts for judging crimes against State or other offenses are no longer permitted.

1.03 HOLIDAYS:

National Holidays.

Jan. 1, Good Fri., Apr. 25, May 1, “Corpus Christi”, June 10, Aug. 15, Oct. 5, Nov. 1, Dec. 1, Dec. 8, and Dec. 25

Local Holidays.

Each District has its own local holidays, ones for Lisbon, Oporto, Faro and Coimbra are respectively, June 13, June 24, Sept. 7 and July 4.

1.04 OFFICE HOURS AND TIME ZONE:

Portugal is in the Greenwich Mean (GMT 0:00) time zone. Office hours are generally from 9 a.m. to 5 p.m.

2 BUSINESS ORGANIZATIONS

2.01 AGENCY:

Relation of principal and agent is expressed in contract of “mandato” which is presumed in civil law to be gratuitous, where no remuneration is stipulated in contract and object thereof is not part of agent's regular business or profession. Amongst other duties, agent must comply with instructions of his principal, must give him information requested, must promptly inform his principal of execution of instructions or of reason for nonexecution, must render accounts and must deliver to his principal whatever he may have received in performing his duties. Principal is bound to supply his agent with necessary data to carry out instructions, to pay his agent agreed remuneration, if any, and to give him provision on account according to usages, to reimburse agent in respect of any expenses which agent may reasonably have considered necessary, with legal interest as from date they were incurred and to indemnify agent against any loss or damage arising therefrom, even if principal may not have been at fault. Acts in excess of agent's authority do not bind principal. (Arts. 1157 et seq. C.C.).

Contract between principal and agent is determined by (1) Revocation by either; (2) death or interdiction of either; (3) incapacity of principal if object of contract are acts which cannot be performed without intervention of curator.

In commercial law, agency agreement is governed by D.L. 178/86 of July 13 as amended by D.L. 118/93 of Apr. 13, and is presumed to be for remuneration; its cancellation without proper cause gives rise to action for damages. Agent is entitled to lien on property of principal in his possession for purposes of agency.

2.02 ASSOCIATIONS:

Institutions of religious, cultural or sporting nature and other nonprofit associations enjoy juridical personality. Political parties must be approved by Constitutional Court.

See also topics 2.03 Corporations, 2.05 Partnerships.

2.03 CORPORATIONS:

Decree-Law 248/86, of Aug. 25, as amended by D.L. 343/98 of Nov. 6, D.L. 36/2000 of Mar. 14, D.L. 76-A/2006 of Mar. 29, and D.L. 8/2007 of June 17, created new form of undertaking, individual trader with limited liability, in addition to existing forms of commercial entities governed by commercial law, namely: Partnerships, limited partnerships, companies having stock capital in form of quotas, companies limited by shares, and cooperative societies. There is also form of association of interests known as “participation account” but association in this case concerns parties to account and not third persons.

In addition to above classification by form there is also classification according to object, such as banks, insurance companies, shipping companies, and companies having concessions from or contracts with State, in respect of which special authorities for their constitution or regulations for their functioning are necessary or applicable.

All banks and insurance companies as well as companies running basic industries such as transport, power production and distribution, pulp, cement, tobacco, except foreign owned, were nationalized in 1975; however, at present and as result of 1989 revision of Constitution new sectors have been opened to private enterprise, including banking and insurance. Several banks and insurance companies have as result been privatised.

There are two forms of limited liability corporation or company, namely companies having stock capital (sociedades por quotas) and companies having share capital (sociedades anónimas). There is also a form of limited partnership having share capital.

Companies Having Stock Capital (“sociedades por quotas”) governed basically by Arts. 197 et seq. C.C.C. (as originally approved by D.L. 262/86 of Sept. 2 and subsequent amendments latest being D.L. 185/2009 of Aug. 12). Two outstanding legal features of companies having stock capital are: (1) Division of capital into quotas or holdings of stock which may be of unequal amount; and (2) restriction of liability of stockholders to total amount of unpaid capital, i.e. stockholder may, in certain circumstances, be called on for benefit of creditors to pay not only calls in respect of his own stock, but also of any stock in respect of which there is liability outstanding.

Annual report and accounts must be filed with competent Commercial Registry.

These companies may be constituted and function with minimum of two members, minimum capital of [Euro]5,000 and minimum holding, in principle, of [Euro]100. They are extremely easy to manage.

Notwithstanding above, in accordance with D.L. 257/96 of Dec. 31, as amended by D.L. 36/2000 of Mar. 14, it is now possible to constitute company with its stock capital held by one stockholder. (Arts. 270-A et seq. C.C.C.).

Amendments to Statutes, merger, demerger, transformation, and winding-up must be approved by 3/4 of votes corresponding to capital or higher percentage if so contemplated by Statutes. (Arts. 265 and 270 C.C.C.).

Companies limited by shares (“sociedades anónimas”) are governed by more elaborate provisions (basically Arts. 271 et seq. C.C.C.) than stock companies above referred to. Prima facie, five subscribers are necessary. Minimum capital is [Euro]50,000 represented by shares of minimum nominal value of 1/100 of [Euro]each. Administration of company is entrusted to board of directors who need not be shareholders supervised by Supervisory Board, or by board of directors including Audit Committee and Statutory Auditor or by Executive Committee, General and Supervisory Board and Statutory Auditor, whilst board of general meetings serves as kind of liaison between general body of shareholders and managing boards. It is function of this board to assume chairmanship and direction of general meetings of company. Unless shorter period established in statutes, term of office of board of directors and supervisory board is four years, reelection being permitted.

Under certain circumstances, Board of Directors and Executive Committee can be replaced by Sole Director and Supervisory Board by Sole Statutory Auditor.

Companies limited by shares which are quoted on Stock Exchange must appoint Secretary for company and substitute. (Art. 446-A C.C.C.).

Secretary enjoys no managerial powers, his functions being purely administrative, i.e. preparing minutes of general meetings, Board of Directors and General Council; maintaining company's registers; certifying authenticated copies of minutes, contracts, etc.

Debenture-holders may attend general meetings of shareholders, but have no right of address or vote. Shareholders holding number of shares insufficient to entitle them to vote may appoint one of them their representative to annual general meeting and to resolve as to manner in which such representative shall vote on behalf of group capital.

The annual report and accounts must be filed with competent Commercial Registry Office, and if company's shares are quoted on Stock Exchange they must also be published in Official Gazette.

A company may deal in its own shares and debentures if so authorized by its articles.

At General Meetings held on first call to amend Statutes, or contemplating mergers, demergers, transformations and dissolutions, there must be present or represented shareholders holding at least 1/3 of capital. On second call, such General Meetings can be held regardless of number of shareholders present or represented and capital they hold. (Art. 383 C.C.C.).

Decisions on above matters both on first or second call must be passed by 2/3 of votes cast. However if on second call there are present or represented shareholders holding at least ½ of capital, such decisions can be passed by majority of votes cast. (Art. 386 C.C.C.).

Portugal has implemented Company Law Directive nos. 1, 2, 4, 6, 7, and 8.

So-called European Companies Limited by shares (Societas Europaea) are governed by D.L. 2/2005 of Jan. 4, as amended by D.L. 76-A/2006 of Mar. 29.

Stock Exchange.

Stock Exchange Code was approved by D.L. 486/99 of Nov. 13, 1999. (Several amendments including D.L. 219/2006 of Nov. 2, 2006, transposing Directive 2004/25/CE of European Parliament and Council of Apr. 21, D. L. 357-A/2007 of Oct. 31) and D.L. 185/2009 of Aug. 12, transposing Directive 2006/46/CE of European Parliament and Council of June 14.)

In both forms of company debentures may be issued subject to certain conditions. Directors, or, in case of companies having stock capital, managers “gerentes” whether or not they are share or stockholders are personally liable for unpaid taxes or debts due to State, and they are restricted as regards trading with company and carrying on similar business; trading year ends on Dec. 31 and accounts should be submitted for approval by quotaholders or shareholders before Mar. 31 (in certain cases this deadline is extended up to 31st May, e.g. companies which are obliged to submit consolidated accounts); from annual profits there must be set aside 5% for creation and maintenance of reserve fund up to 20% of nominal capital; legal acts affecting constitution of company must be published and registered; in principle there are no restrictions on foreign capital and management.

In all forms of company, resolutions may be passed unanimously in written form without need to hold general meeting, and general meetings can be held without prior convening notice, provided all quotaholders or shareholders are present or duly represented, and agree unanimously to hold general meeting with given agenda.

Other types of companies have been object of specific regulations, inter alia: Leasing companies (D.L. 72/95 of 15.4.95, as am'd by D.L. 285/2001 of Nov. 3, 2001 and D.L. 186/2002 of Aug. 21, 2002), investment companies (D.L. 260/94, Oct. 22, 1994), and holding companies (D.L. 495/88 of Dec. 30, as am'd by D.L. 318/94 of Dec. 24, D.L. 378/98 of Nov. 27, Law 30-G/2000 of Dec. 29, and Law 109-B/2001 of Dec. 27). Regional Investment Companies, which may contribute to regional development, have been granted special status, including possibility of issuing shares and bonds to public in general.

Taxation.

Commercial companies and other collective entities (such as civil and professional persons associations) are subject to IRC—Corporation Tax—which replaced former industrial tax. (IRC Code as approved by D.L. 442-B/88 of Nov. 30, numerous amendments, latest being D.L. 292/2009 of Oct. 10).

Tax is due by resident corporate entities on income obtained in Portugal. Nonresident corporate entities and those having permanent establishment in Portugal are generally subject to IRC on income obtained in country.

Depending on nature of income and on whether or not corporate entity is resident in mainland Portugal IRC rate of tax is 12.5%, 20% or 25%, and from 10% to 25%.

Companies with head office in Azores Autonomous Region are subject to reduction of 30% on IRC rates applied in Mainland Portugal. Companies with head office in Madeira Autonomous Region are subject to IRC general tax of 20%.

Nonresident corporate entities, depending on whether or not they have permanent establishment in Portugal are subject respectively to tax rates of 12.5% for taxable income up to [Euro]12,500), or 25% and from 10% to 20%.

Depending upon company's location, municipal tax, called “DERRAMA”, at rate of up to 1.5% of IRC tax assessed, giving maximum effective rate for IRC of 26.5%, may be charged.

Foreign corporations that establish any form of representation in Portuguese territory are subject to taxation with regard to their activity in country in same way as any Portuguese company and should therefore register branch in Commercial Registry so that they have juridical personality and capacity to go to court.

See also topic 2.05 Partnerships; categories 3 Business Regulation and Commerce, topic Commercial Register; Foreign Trade and Commerce, topic Foreign Investment.

2.04 LIMITED PARTNERSHIP:

See topic 2.05 Partnerships.

2.05 PARTNERSHIPS:

Principal characteristics of Portuguese partnership (“Sociedades em Nome Colectivo”) are unlimited joint and several liability of partners for debts of firm, and possession by firm of legal personality distinct from that of partners composing it. Death does not necessarily dissolve partnership, but bankruptcy of firm involves bankruptcy of individual partners. Partnerships are subject to registration. (Arts. 175 et seq. C.C.C.).

Limited partnership (“Sociedades em Comandita”) is one in which liability of one or some of partners is restricted to amount of capital they have subscribed, remainder being responsible without limit. Apart from differences inherent in limitation of liability, these associations are governed by rules applicable to ordinary partnership. Limited capital may be represented in form of shares. (Arts. 465 et seq. C.C.C.).

3 BUSINESS REGULATION AND COMMERCE

3.01 BILLS AND NOTES:

Portugal adhered to the Conventions signed at the Geneva Conference on June 7, 1930, providing for: (1) Uniform law for bills of exchange and promissory notes; (2) settlement of certain conflicts of laws in connection with bills of exchange and promissory notes; and (3) general provisions with regard to bills of exchange and promissory notes. All these Conventions took effect in Portugal from June 21, 1934.

Portugal also signed similar Conventions at Geneva on Mar. 19, 1931, with regard to cheques, which took effect in Portugal from June 21, 1934.

Legislation covering issue of cheques without cover. (D.L. 454/91 of Dec. 28. Several amendments latest being Law 48/2005 of Aug. 29.)

Payment by direct debit and by ATM predominate.

3.02 COMMERCIAL REGISTER:

Commercial Registry, governed by Commercial Registry Code, approved by D.L. 403/86 of Dec. 3 (several amendments latest being D.L. 292/2009 of Oct. 12), covers, inter alia, inscription of individual traders, commercial companies, co-ops, State owned companies, Complementary Groups of Companies, European Groups of Economic Interest and registration of juridical changes thereto. Amongst others, changes of head office, mergers and demergers, increases and reduction of capital, appointment and dismissals of Directors, yearly accounts and winding-ups must be registered. Also subject to commercial registration are certain proceedings affecting individual traders and commercial entities in general, commercial powers of attorney, establishment and closing of branches of companies, commercial agency agreements, agreements forming complementary groups of companies, European groups of economic interest, etc. Relevant applications must be made by party concerned, legally appointed representative or attorney. Fines and imprisonment may be imposed for failure to comply with requirements, and uninscribed commercial or industrial companies are considered as being of unlimited liability and cannot invoke their trading capacity to third parties.

Before constitution, corporations and other bodies corporate must apply to National Registry of Corporate Bodies (“Registo Nacional de Pessoas Colectivas”) for permission to use chosen company name, object and head office (“Certificado de Admissibilidade”). Advisable to apply also to National Registry of Corporate Bodies for provisional corporate Identity Card (“Cartão de Pessoa Colectiva”). “Certificado de Admissibilidade” must be presented to Commercial Register when registering corporations and other bodies corporate.

3.03 CONTRACTS:

Except when law specifically provides for any special formalities such as notarial public deed or written document duly stamped, contracts may even be verbal and can be proved by witnesses or other evidence.

Excuses for Nonperformance.

Apart from nonperformance due to force majeure, party to simulated contract or party who entered into contract under false pretenses or coercion may claim it to be null and void. (Arts. 240 et seq. C.C.). When due to error, consent given by one of parties does not correspond to what such party would normally and reasonably require or when there is error about identity of other party or object of contract, contracting party concerned has right to annul contract. (Arts. 247 and 251 C.C.).

Applicable Law.

As rule it is for contracting parties to choose applicable law to contract. There are exceptions, e.g., with regard to contracts relating to real estate, concession rights, banking, insurance, etc. If chosen law, however, contains provisions considered to be contrary to

Portuguese public policy, such provisions cannot apply. Private International Law rules are contained in Arts. 14 to 65 C.C.

See also category 6 Courts and Legislature, topic 6.01 Courts.

Government Contracts.

Governed by State Sector Contracts Code (Código dos Contratos Públicos), approved by D.L. 18/2008 of Jan. 29, transposing European Parliament and Council Directives 2004/17/CE and 2004/18/CE both of Mar. 31, as amended by European Commission Directive 2005/51/CE of Sept. 7, and rectified by European Parliament and Commission Directive 2005/75/CE of Nov. 16, as amended by D.L. 34/2009 of Feb. 6, D.L. 223/2009 of Sept. 11 and D.L. 278/2009 of Oct. 2.

Distributorship, Dealership and Franchises.

These contracts are not specifically provided for by Portuguese law. Agency contract rules are applied by analogy to Distributionship and Franchise. (D.L. 178/86 of July 3, as am'd by D.L. 118/93 of Apr. 13).

3.04 FRAUDS, STATUTE OF:

See category 22 Property, topic 22.03 Deeds.

3.05 INFORMATION TECHNOLOGY, INTERNET AND NEW MEDIA:

Computer Programs.

Programs with creative characteristics enjoy same copyright protection as that afforded to literary works. Right to program attributed to its intellectual creator lapses 50 years after his death. Author is entitled to make it public and to lease it. (D.L. 252/94 of Oct. 20, transposing European Council Directive 91/250/CEE of May 14, as rectified by D.L. 2-A/95 of Jan 31,,and am'd by D.L. 334/97 of Nov. 27).

E-Commerce.

Council of Ministers Resolution 115/98 of Sept. 1, instituted E-Commerce National Initiative aiming inter alia to create conditions for e-commerce development and expansion, alert economic agents to e-commerce potential, define incentives for use of Internet and other e-commerce means, and promote use of e-commerce by Public Administration. Council of Ministers Resolution 94/99 of Aug. 25, approved Guidelines for a National Electronic Commerce Initiative aimed at inter alia increasing small and medium Portuguese companies' competitiveness on global market, increase job creation in this sector, increase professional qualifications, facilitate entrepreneurial structure modernization and enhanced enterprises' competitiveness.

See also D.L. 256/2003 of Oct. 21 (transposing Directive from Council 2001/115/CE of Dec. 20), and D.L. 196/2007 of May 15.

Digital Signature.

D.L. 290-D/99 of Aug. 2 (as amended by D.L. 62/2003 of Apr. 3, transposing European Parliament and Council Directive 1999/93/CE of Dec. 13, D.L. 165/2004 of July 6), D.L. 116-A/2006 of June 16 and D.L. 88/2009 of Apr. 9 approved regime applicable to electronic documents and digital signatures. Regulatory Decree 25/2004 of July 15 regulates D.L. 290-D/99. State Electronic Certification System is governed by D.L. 116-A/2006 of June 16, as amended by D.L. 88/2009 of Apr. 9. Ministerial Order 114/2008 of Feb. 6, as amended by Ministerial Order 975/2009 of Sept. 12 regulates presentation in court of procedural documents via email and in particular certification of signatory's digital signature.

Database Protection.

Law 67/98 of Oct. 26, transposed European Parliament and Council Directive 95/46/CE of Oct. 24, regarding protection of individuals insofar as personal data processing and free circulation of such data is concerned. Control and supervision of compliance with legal and regulatory provisions in absolute respect for human rights and liberties and guarantees contemplated in Portuguese Constitution, is entrusted to National Commission for the Protection of Data.

Unless there is legal provision to contrary person is entitled to oppose, for serious and legitimate reasons related to his personal situation, processing of his personal data. Individuals can oppose use of personal data for marketing purposes, and enjoy in principle and at no cost right to freely access databases containing their personal data.

Right of access to processing of personal data relating to State Security and Criminal Prevention or Investigation must be exercised via National Commission for the Protection of Data or any other independent authority with similar powers.

Processing of personal data and protection of privacy in telecommunications are regulated by Law 41/2004 of Aug. 18, which transposed European Parliament and Council Directive 2002/58/CE of 12 July. See also Law 32/2008 of July 17, transposing European Parliament and Council Directive 2006/24/CE of Mar. 15.

D.L. 122/2000 of July 4, transposed European Parliament and Council Directive 96/9/CE of Mar. 11 regarding database legal protection. Computer-related crimes are specifically defined and punishable in accordance with Law 109/2009 of Sept. 15.

Telecommunications.

Law 5/2004 of Feb. 10, as rectified by Rectification Statement 32-A/2004 of Apr. 10, as amended by D.L. 176/2007 of May 8, Law 35/2008 of July 28, D.L. 123/2009 of May 21 and D.L. 258/2009 of Sept. 25 governs regime applicable to electronic communication services and networks, and defines powers of National Regulatory Authority.) D.L. 95/2003 of May 3 governs expropriation of Basic Telecommunications network for public interest.

Free circulation, market access and placing into service of radio and telecommunication terminal equipment is governed by Decree-Law 192/2000 of Aug. 18 (transposing European Parliament and Council Directive 1999/5/CE of Mar. 9);

See also D.L. 151-A/2000 of July 20, as amended by D.L. 167/2006 of Aug. 16 and D.L. 264/2009 of Sept. 28 that governs telecommunications network licensing, as amended by D.L. 167/2006 of Aug. 16.

3.06 INTEREST:

Apart from agreement and excluding those cases where special provision is made by law, interest does not accrue until debtor is formally notified that interest is claimed. Legal rate is established from time to time by government. (Art. 559-1 C.C.). Interest at rates of 3% or 5% above legal rate in loans are considered usurious depending on whether or not there are corporeal guarantees (mortgages, liens, etc.). (Art. 1146-1 C.C.). Interest also accrues on items in current account where there is contract of current account, and on sums received by agent for remittance to his principal. Legal interest rate is at present 4% per annum. (Ministerial Order 291/2003 of Apr. 8).

On commercial matters parties should agree upon interest in writing, and Arts. 559-A and 1146 C.C. apply. (Art. 102-1 and 2 of Commercial Code).

In absence of specified agreed rate, commercial interest rate on credits due to commercial enterprises, individuals or corporations is one specified by Finance and Justice Ministers in joint Ministerial Order. (Art. 102-3 of Commercial Code). Such rate cannot be lower than interest rate applied by European Central Bank to its most recent refinancing operation effected prior to first day of Jan. or July, depending on whether one is in first or second half of year, plus seven percentage points. (Ministerial Order 597/2005 of July 19). Rate for second half of 2009 is 8%.

3.07 LICENSES, BUSINESS AND PROFESSIONAL:

License requirements concerning Banks, Investment Firms, Leasing and Factoring Companies, Building Societies, etc. are contained in D.L. 298/92 of Dec. 31 (many amendments latest being D.L. 1/2008 of Jan. 3).

Industrial activity licensing is governed by D.L. 209/2008 of Oct. 29 as rectified by Rectification Statement 15/2009 of Feb. 10 regulated by Regulatory Decree 8/2003 of Apr. 11. See also D.L. 69/2000 of May 3, as amended by D.L. 197/2005 of Nov. 8, and D.L. 130/2005 of Aug. 16 (transposing European Council and Parliament Directive 2003/35/CE of May 26).

See category 15 Health, topics Nursing, Pharmacists, Physicians; category 16 Immigration, topic Immigration; category 17 Insurance, topic Insurance Companies; and Category 19 Legal Profession, topic Attorneys and Admission.

3.08 MONOPOLIES, RESTRAINT OF TRADE AND COMPETITION:

See topic 3.10 Restraint of Trade.

3.09 NEGOTIABLE INSTRUMENTS:

See topic 3.01 Bills and Notes.

3.10 RESTRAINT OF TRADE:

Similar to existing European Union regulations, certain practices which may affect trade and competition are prohibited and subject to fines. Amongst others, following are prohibited: (a) Agreements between undertakings, decisions by associations of undertakings and concerted practices adopted with view to preventing, distorting or restricting competition, such as: directly or indirectly fixing purchase or selling prices or other trading conditions; limiting or controlling production, distribution, technical development or investment; sharing markets or sources of supply; applying dissimilar prices or other conditions even though only occasionally; directly or indirectly refusing to buy or sell goods or services; making conclusion of contracts subject to acceptance of supplementary obligations which by their nature or as per commercial practices have no connection with purpose of such contracts; (b) any abuse by one or more undertakings of dominant position in market or of substantial portion thereof aiming at preventing, distorting or restricting competition is also considered to be in restraint of trade. (Law 18/2003 of June 11, as am'd by D.L. 219/2006 of Nov. 2, transposing Directive 2004/25/CE of European Parliament and Council of Apr. 21 and Law 52/2008 of Aug. 28). See also D.L. 446/85 of Oct. 25 as amended by D.L. 220/95 of Aug. 31, D.L. 249/99 of July 7 and D.L. 323/2001 of Dec. 17; D.L. 370/93 of Oct. 29, as amended by D.L. 140/98 of May 16, D.L. 70/2007 of Mar. 26 and D.L. 10/2003 of Jan. 18.

D.L. 10/2003 of Jan. 18 created Competition Authority.

3.11 SALES:

Contract of sale is regulated by Arts. 874 to 938 C.C. and Arts. 463 to 476 of Commercial Code. Where thing sold is determined, property therein passes by virtue of contract, independently of delivery. Otherwise property does not pass until object is determined.

Warranties.

In principle vendor warrants suitability of goods for purchaser's purposes as known to vendor. Sales of goods against sample or of a recognized standard carry corresponding warranties, otherwise sales conditional upon examination by purchaser who must make quality claim within eight days of delivery. Claims for hidden defects must be made within 30 days of discovery and within six months of delivery.

In buildings, claims on hidden defects must be lodged within one year of discovery, warranty being valid for five years. (Art. 1225 C.C.).

Notices.

See subhead Warranties, supra.

Applicable Law.

See category 3 Business Regulation and Commerce, topic 3.03 Contracts, subhead Applicable Law.

4 CITIZENSHIP

4.01 ALIENS:

See category 16 Immigration, topic 16.01 Aliens.

4.02 DOMICILE:

Concept of domicile as known to American and English law is quite alien to Portuguese law. “Domicilio” signifies place or locality of habitual residence and affects principally jurisdiction and taxation.

4.03 IMMIGRATION:

See category 16 Immigration, topic 16.02 Immigration.

4.04 NATIONALITY:

Portuguese nationality is attributable in accordance with Law 37/81 of Oct. 3 (as am'd by Law 25/94 of Aug. 19, LO 1/2004 of Jan. 15, and LO 2/2006 of Apr. 17), and regulated by D.L. 237-A/2006 of Dec. 14).

See also Ministerial Order 1403-A/2006 of Dec. 15.

Following persons are considered to be Portuguese nationals: (a) Children of Portuguese mother or father born in Portuguese territory; (b) children of Portuguese mother or father born abroad whilst their Portuguese parent is in service of Portuguese State; (c) children of Portuguese mother or father born abroad if birth is registered at Portuguese Civil Registry or that declare their wish to be Portuguese; (d) persons born in Portuguese Territory, of foreign parents, if at least one of parents was also born in Portugal and is resident, irrespective of title, in country at time of his birth; (e) persons born in Portuguese Territory, whose parents are not in service of their country, provided they declare they wish to be Portuguese, and provided one of parents resides legally in Portugal for at least five years; (f) persons born in Portuguese Territory who have no other nationality.

Children under age or incapable persons, children of father or mother who acquire Portuguese nationality can also acquire it via declaration. Foreigner who has been married to Portuguese citizen for more than three years may acquire Portuguese nationality if he/she declares their wish to do so during marriage. Divorce will not hinder Portuguese nationality if it was acquired bona fide. Following civil proceedings foreigner living in common law marriage for more than three years with Portuguese national may acquire Portuguese nationality.

Foreigner fully adopted by Portuguese national acquires Portuguese nationality.

Government confers Portuguese nationality by naturalization to foreigners provided following requirements are all met: (a) They are of full age or emancipated in accordance with Portuguese Law; (b) they have legally resided in Portuguese Territory for at least six years; (c) they are sufficiently acquainted with Portuguese language; (d) they have not been finally convicted, for crime punishable with imprisonment attaining maximum term equal to or exceeding three years in accordance with Portuguese legislation.

Government confers Portuguese nationality by naturalization to children of foreigners, under age, born in Portuguese territory, provided conditions (c) and (d) above are met, and provided that when application is lodged one of following occurs: (a) One of parents has resided legally in Portugal for at least five years; (b) children under age have concluded in Portugal first stage of their basic schooling.

Special rules apply regarding naturalization to persons born abroad with Portuguese ascendants, and to persons born in Portugal of foreign parents, who have remained habitually in country for ten years immediately prior to lodging of their application, to persons who although not stateless have had Portuguese nationality, to members of Portuguese descendents' communities and to foreigners who are asked or have provided relevant services to Portuguese State or community.

5 CIVIL ACTIONS AND PROCEDURE

5.01 ACTIONS:

Facts on which foreign claim may be based have to be proved in same way as facts on which any other claim may be grounded and foreign law, when applicable, must be proved by way of certificate issued by competent authority abroad and legalized by respective Portuguese Consulate or by expert witnesses acceptable as such to court.

Art. 52-3 of Constitution confers on all citizens right to institute, individually or via associations, for defense of common interests, class actions, in order to promote prevention, ceasing or judicial persecution of infringements to public health, consumer rights, quality of life, environmental preservation and cultural heritage, as well as to safeguard assets of State, Autonomous Regions (i.e. Azores and Madeira) or local authorities. Right to compensation is also recognized.

Class Actions are regulated by Law 83/95 of Aug. 31, rectified by Rectification Statement 4/95 of Oct. 12. See also Law 25/2004 of July 8, transposing Directive 98/27/CE of European Parliament and Council of May 19 (protection of consumer interests), and Arts. 31 et seq. of ``Código dos Valores Mobiliários'' (Stock Exchange Code) approved by D.L. 486/99 of Nov. 13, several amendments including D.L. 219/2006 of Nov. 2, 2006, transposing Directive 2004/25/CE of European Parliament and Council of Apr. 21, and D.L. 357-A/2007 of Oct. 31.

Limitation of.

See topic 5.08 Prescription and Limitation of Actions.

5.02 COSTS:

Except in cases of recognised title to legal aid, costs (i.e., court fees) are payable by losing litigant to extent of his failure to succeed. Both parties, however, have to pay substantial part of estimated costs in advance as legal action proceeds. Lawyers are only liable for costs when acting with no forensic power of attorney.

Each party bears his own lawyer's fees, and successful party cannot recover these from losing party.

Pursuant to Law 34/2004 of July 29 (transposing Directive 2003/8/CE of European Council of Jan. 27), as amended by Law 47/2007 of Aug. 28, EU nationals, other foreigners and stateless persons with valid residence permit on EU State proving insufficient financial means are entitled to legal aid. Aliens nonresiding in EU State are also entitled to such aid, provided that their respective countries afford same right to Portuguese nationals.

See also D.L. 71/2005 of Mar. 17 (transposing European Council Directive 2003/8/CE of Jan. 27) and Ministerial Order 10/2008 of Jan. 3, as amended by Ministerial Order 210/2008 of Feb. 29.

5.03 DEPOSITIONS AND DISCOVERY:

Depositions are in principle taken in Court or in preparation of criminal case before Criminal Police and are one of most effective means of submitting evidence in judicial proceedings.

Some depositions are taped. (Arts. 304-3 and 522-A CPC). See also Hague Convention of Mar. 18, 1970.

5.04 FOREIGN JUDGMENTS:

See topic 5.05 Judgments.

5.05 JUDGMENTS:

Foreign judgment must in principle be examined and confirmed by Court of Appeal as Second Instance normally Judicial District Court of residence of person against whom judgment is to be enforced. Only thereafter can it be enforced in Portugal. (Arts. 1094 et seq. C.P.C.).

Portugal has ratified Lugano Convention of Sept. 16, 1988 relating to jurisdiction and enforcement of judgments in civil and commercial matters.

5.06 LIMITATION OF ACTIONS:

See topic 5.08 Prescription and Limitation of Actions.

5.07 PARTITION:

Owners in common are at any time entitled to partition of property, unless community of property results from marriage contract, in legal association, or in common parts of condominium in horizontal property. Co-owners may agree that property remains undivided for period not exceeding five years, renewable. (Art. 1412 C.C.).

5.08 PRESCRIPTION AND LIMITATION OF ACTIONS:

Rights, as well as rights of action, may be lost by prescription, prescription period being 20 years (Arts. 309 et seq. C.C.), unless shorter period is specifically provided by law, e.g., for alimony pensions, rents, interest, dividends, etc., prescription period is five years. There are also procedural limitations on right to bring actions, e.g., actions on bills of exchange against acceptor must be brought within three years from date of falling due, this period not being subject to interruption as in case of prescription.

Title to Real Property can be obtained by adverse possession, i.e. Usucapio Libertatis. (Arts. 1287 C.C. et seq.).

6 COURTS AND LEGISLATURE

6.01 COURTS:

The courts are independent and the State is represented in them by Attorney General or one of his officials.

Parties may stipulate that certain case is to be submitted to courts of country of one of parties, or to international courts, with or without exclusion of others, as long as: (a) That court accepts appointment by parties; (b) it is considered to be of real interest to one or more parties involved; (c) it does not involve any problems concerning certain rights, immovables situated in Portugal, bankruptcy or insolvency of corporations of which head offices are situated in Portugal, or any questions related to labour matters; (d) this stipulation is in writing and has same form as contract it is supposed to protect. Otherwise, Portuguese Courts always have jurisdiction in case of contract which is to be performed in Portugal.

There are provisions for Arbitration in Law 31/86 of Aug. 29, as amended by D.L. 38/2003 of Mar. 8, and in Arts. 1525 et seq. C.P.C. Arbitration can be voluntary or compulsory, by operation of Law. In disputes involving international commercial interests parties may appoint arbitrators and choose law to be applied in event of their not having been instructed to judge in accordance with general equitable principles.

See also Ministerial Order 81/2001 of Feb. 8, and subsequent amendments, latest being Ministerial Order 709/2003 of Aug. 4.

6.02 LAW REPORTS, CODES:

Amongst others there exists following codes: Civil, Civil Procedure, Labour, Labour Procedure, Commercial, Commercial Companies, Special Proceedings for the Recovery of Business Enterprises and Bankruptcy, Notarial, Civil Registration, Commercial Registration, Real Estate Registration, Criminal, Criminal Procedure, Administrative, Stamp Duty, Value Added Tax, IRS (income tax on individuals), IRC (income tax on collective bodies), IMI (Land Tax), Industrial Property Registry, etc.

6.03 LEGISLATURE:

See category 1 Introduction, topic 1.02 Government and Legal System.

6.04 STATUTES:

Foundations of substantive civil law are contained in Civil Code, in Commercial Code and in Code of Commercial Companies. Some matters of civil law and many matters of commercial law as for instance bills of exchange, promissory notes and cheques, banking and credit regulations, insurance matters, etc. are contained in various other enactments, in form of Decrees and Laws.

Court procedure, both civil and commercial, is governed by Code of Civil Procedure approved by Decree-Law 44,129 of Dec. 28, 1961 which came into force on Apr. 24, 1962, and subsequent alterations, most recent of which are contained in Law 29/2009 of June 29.

Organization of judicial courts is contained in Law 52/2008 of Aug. 28, as amended by Law 103/2009 of Sept. 11, Law 115/2009 of Oct. 12 and D.L. 295/2009 of Oct. 13.

7 CRIMINAL LAW

7.01 EXTRADITION:

According to Art. 33-3 of Portuguese Constitution, extradition of Portuguese nationals from country is only considered if reciprocity is established in International Convention on matters of international terrorism and international organized crime, and provided applicant State ensures equitable and fair proceedings.

There can be no extradition for political reasons, nor for crimes which in accordance with applicant State are punished with death penalty or other that results in irreversible damage to physical integrity. (Art. 33-4 Portuguese Constitution).

Extradition for crimes which in accordance with applicant State are punished by prison sentence or security measure depriving or restricting freedom, for life or for indefinite term, is solely considered in cases of reciprocity as established in International Convention and provided applicant State offers guarantees that such punishment will not be applied or executed. (Art. 33-5 Portuguese Constitution).

Law 144/99 of Aug 31, as amended by Law 104/2001 of Aug. 25, Law 48/2003 of Aug. 22 and Law 115/2009 of Oct. 2009, approving Law on International Cooperation in Criminal Matters governs inter alia extradition.

Portugal has extradition treaties with Tunisia, Mexico, Brazil and Australia and is party to European Convention on Extradition (Paris Dec. 13, 1957) to its two protocols (Strasbourg Oct. 15, 1975 and Mar. 17, 1978), to Convention based on Art. K-3 of European Union Treaty on Simplified Extradition Proceedings within EU Member States (Brussels Mar. 10, 1995) and to Convention based on Art. K-3 of European Union Treaty on Extradition between EU Member States (Dublin Sept. 27, 1996).

8 DEBTOR AND CREDITOR

8.01 ASSIGNMENTS:

Credit or right may, as a rule, be freely assigned for a consideration or not, even without consent of debtor. There are special provisions forbidding assignment to certain persons of credits subject to litigation (Art. 579-1 C.C. et seq.). As between assignor and assignee, right assigned passes by virtue of assignment contract, but debtor when he has not expressly agreed with assignment is not bound thereby unless he accepts such assignment or until notice of assignment in authentic form has been given to debtor. (Art. 583-1 C.C.). Assignor guarantees to assignee existence and right to claim credit but solvency of debtor is only guaranteed by assignor to assignee if such guarantee has been expressly given in assignment contract. (Art. 587 C.C.). Party to bilateral contract may assign all or any of his rights provided other party before or after contract accepts such assignment. (Art. 424 C.C.).

8.02 ASSIGNMENTS FOR BENEFIT OF CREDITORS:

These assignments are not recognized by Portuguese law, unless all the creditors agree thereto.

New Code for Insolvency and Recovery of Enterprises, was approved by D.L. 53/2004 of Mar. 18, amended by D.L. 200/2004 of Aug. 18, D.L. 76-A/2006 of Mar. 29, D.L. 282/2007 of Aug. 7, D. L. 116/2008 of July 4 and D.L. 185/2009 of Aug. 12.

See also D.L. 316/98 of Oct. 20, as amended by D.L. 201/2004 of Aug. 18.

8.03 ATTACHMENT:

Judicial attachment of property and rights or other precautionary proceedings are permitted in certain cases as preservative or preventive measure, within a time limit before an action is commenced or in course thereof. (Arts. 619 to 622 C.C. and 406 et seq. C.P.C.). In debt cases judicial attachment can only be employed against defendant who is not registered as “trader”. In execution proceedings on judgment attachment is preliminary to ultimate sale by court of property attached. In cases of copyright infringement and infringement of industrial property (trademarks, etc.), seizure of infringing goods may also be applied for.

Provision for Indemnity.

The applicant for an attachment or for precautionary proceedings must formally undertake to indemnify the other party for the damages he may suffer as a result of such attachment or precautionary proceedings if the other party is ultimately successful.

8.04 BANKRUPTCY:

Bankruptcy laws are to be found in Code for Insolvency and Recovery of Enterprises approved by D.L. 53/2004 of Mar. 18, as amended by D.L. 200/2004 of Aug. 18, D.L. 76-A/2006 of Mar. 29, D.L. 282/2007 of Aug. 7, D.L. 116/2008 of July 4 and D.L. 185/2009 of Aug. 12.

There are specialized First Instance Courts for Recovery of Enterprises and Bankruptcy. (Law 52/2008 of Aug. 28).

New Code entered into force in Sept. 2004.

This Code regards insolvency process as constituting universal execution proceeding, having as its object liquidation of insolvent debtor's assets and distribution of resulting proceeds amongst creditors, or satisfaction of their claims in manner contemplated in Insolvency Plan (Art. 1); debtor must make application that it be declared insolvent within 60 days after date it becomes aware of its insolvent situation or within 60 days from date it should have known about it (Art. 18); in case of corporate persons, governing body charged with their management has to present application for declaration of insolvency (Art. 19).

Debtor is deemed to be insolvent when it cannot meet its due and payable obligations, and corporate persons and other autonomous entities such as deceased's estate in respect of whose activities natural person is not liable, personally and without limit, directly or indirectly, when their liabilities exceed their assets (as valued in accordance with applicable accounting standards) by wide margin. (Art. 3).

Besides debtor, insolvency declaration can be applied for by whoever is legally responsible for its debts, by any creditor or by Attorney General's Office, in cases where any one of following apply: (a) General suspension of payment of due and payable obligations; (b) failure by debtor to fulfill one or more obligations which, bearing in mind amount involved, or circumstances of failure to fulfill, demonstrates debtor's incapacity to meet timely whole of its obligations; (c) disappearance of owner of enterprise or of debtor's directors, or abandonment of premises where enterprise has its head office or main place of business, linked with debtor's lack of solvency and without designating trustworthy substitute; (d) dissipation of assets, abandonment, hurried or ruinous disposal of assets and fictitious dissipation of assets, and fictitious creation of credits; (e) lack of pledgeable assets for payment of executable debt ascertained in execution proceedings brought against debtor; (f) non-compliance with obligations envisaged in Insolvency Plan or in Payment Plan; (g) widespread non-compliance in last six months of tax debts, social security deductions and contributions, debts arising from employment contracts, or from contravention or cessation of such contracts, of rental liabilities stemming from any lease, including financial, purchase price installments or loan repayments guaranteed by respective mortgage relating to place where debtor carries out its activity or has its head office or residence; (h) in case of corporate person or other autonomous entities such as deceased's estate, in respect of which natural person is not liable for debts, personally and without limit, directly or indirectly, if liabilities greatly exceed assets as disclosed in latest approved balance sheet or if there is delay of more than nine months in approval and filing of annual accounts to which it is legally bound. (Art. 20).

In decision decreeing insolvency, Judge appoints insolvency Administrator or orders that insolvent estate be administered by debtor (Art. 36) and appoints Creditors Commission composed of three or five members in office and two alternates, one of whom must be appointed by company's employees or by its Workers' Commission if one exists (Art. 66). Creditors Meeting can waive existence of Creditors Commission. (Art. 67).

Judgment decreeing insolvency declaration is registered at Civil Registry if debtor is natural person, at Commercial Registry if there are facts relating to debtor subjected to such registry, at any public registry to each debtor is subjected, and at Real Property Registry insofar as real property is concerned and communicated to Bank of Portugal. (Art. 38). Creditors can at first meeting after appointment of Insolvency Administrator elect another person to office (Art. 53); Insolvency Administrator must present every three months brief report endorsed by Creditors Commission (if one exists) (Art. 61), and present accounts whenever judge so decides either at his own initiative or at request of Commission or Creditors Meeting (Art. 62).

Creditors Commission is responsible for overseeing activity of Insolvency Administrator and must collaborate with him. (Art. 68). Creditors Meeting is chaired and convened by Judge, with its decisions prevailing over those of Creditors Commission. (Arts. 74, 75, and 80).

Once insolvency is decreed it causes immediate maturity of all outstanding obligations not dependent upon condition precedent (Art. 91) and credits of State, Local Authorities and Social Security incurred more than 12 months before such declaration forego their privileged status (Art. 97).

Checking and graduation of debts is object of court decision. (Art. 140). Insolvency Administrator must prepare report which will be considered by Creditors Meeting, which shall deliberate over closure or maintenance of establishment(s) falling within insolvent estate. (Arts.155 and 156). Thereafter, all assets attached for insolvent estate will be sold providing that there is no resolution to contrary by Creditors Meeting. (Art. 158).

Payments are then made in following order: Insolvent estate debts, followed by debts to secured, preferential, ordinary, and subordinated creditors, with any remaining residue being paid to debtor. (Arts. 172 et seq.).

Insolvency may be culpable or fortuitous. (Art.185). Payments of insolvent estate's debts, liquidation of insolvent estate and its distribution amongst creditors and debtor, as well as debtor's responsibility once insolvency process is concluded, can be regulated in Insolvency Plan in derogation of provisions embodied in Insolvency and Recovery of Enterprises Code. (Art. 192).

Code contains specific provisions covering insolvency of natural persons and contemplates recognition in Portugal of insolvency declarations decreed overseas.

8.05 EXECUTIONS:

Judgments can be enforced, through execution proceedings, when final and binding or when law provides that appeal brought against it does not suspend its execution. Judgment is final and binding when it ceases to be subject to appeal.

Documents enacted or authenticated by notaries, lawyers, Chambers of Commerce, etc., bills of exchange, promissory notes, cheques, invoice extracts and other documents can also be executed through execution proceedings. (Arts. 46 et seq. C.P.C.).

Summary enforcement of commercial transaction debts, known as “INJUNÇÃO”, is regulated by D.L. 269/98 of Sept. 1, numerous amendments latest being D.L. 226/2008 of Nov. 20. In order for “Injunção” to be granted, debtor must be validly served with notice of application, and has 15 days to present his defense. If debtor does not pay, or does not present his defense, creditor can apply to court for execution of debt through execution proceedings.

8.06 EXECUTORS:

Property in estate does not pass to executor whose duties are to carry out instructions specifically given by testator within limits of law and, if no such instructions have been given, to: (1) Look after funeral of testator and pay respective expenses and ceremonies as may have been indicated in will or, otherwise, in accordance with usages of place where deceased died; (2) see that terms of will are carried out and, if necessary, to uphold validity thereof before courts; (3) carry out functions of “head of the family” when will does not contain any provision to contrary and when deceased did not leave surviving spouse who shares in estate as an heir or is entitled to a moiety in property owned in common. (Art. 2326 C.C.).

Functions of “head of the family” are to administer estate of deceased pending distribution of estate. (Art. 2079 C.C.).

8.07 FORECLOSURE:

See category 21 Mortgages, topic 21.03 Mortgages.

8.08 FRAUDULENT CONVEYANCES:

Nullity of simulated agreement may be pleaded judicially at any time and by any interested party, even if simulation was fraudulent. (Art. 242 No. 1 C.C.).

However, nullity of simulation cannot be pleaded by simulator against bona fide third party, i.e. against someone unaware of simulation at time his rights were created. (Art. 243 Nos. 1 and 2 C.C.).

Declaration of Insolvency makes all insolvents' debts not subject to condition precedent immediately due. (Art. 91 of Code of Insolvency and Recovery of Enterprises approved by D.L. 53/2004 of Mar.18, several amendments latest being D.L. 116/2008 of July 4).

Agreements made by bankrupt after Declaration of Insolvency are invalid as against estate in bankruptcy, unless made for valuable consideration with bona fide third parties before Insolvency Decree is registered, and provided such agreements are not included in extensive list contained in Code. (Arts. 81-6 and 121-1 of Code for Insolvency and Recovery of Enterprises).

Debtor, who, with intention of prejudicing his creditors, deliberately allows himself to become insolvent and declared bankrupt, may be condemned to maximum of five years' imprisonment or to fine of up to 600 days of prison remission. (Arts. 227 et seq. Criminal Code as approved by D.L. 400/82 of Sept. 23, amended and republished by Decree-Law 48/95 of Mar. 15, numerous amendments latest being Law 59/2007 of Sept. 4, as rectified by Rectification Statement of Oct. 31).

8.09 GARNISHMENT:

Precautionary proceedings permitted in certain cases as preservative or preventive measure, before action is brought, include procedure by which money or property of debtor in possession of third parties may be subjected to claims against debtor. (Arts. 381 et seq. C.P.C.). See also topic 8.03 Attachment.

8.10 INSOLVENCY:

Governed by Code for Insolvency and Recovery of Enterprises approved by D.L. 53/2004 of Mar. 18, as amended by D.L. 200/2004 of Aug. 18, D.L. 76-A/2006 of Mar. 29, D.L. 282/2007 of Aug. 7, D.L. 116/2008 of July 4 and D.L. 185/2009 of Aug. 12.

See also topic 8.04 Bankruptcy.

8.11 LIENS:

With respect to all credits in its favor, the State enjoys a privileged position over other creditors, whether secured or unsecured (Arts. 733 et seq. C.C.), except in event of bankruptcy where under certain circumstances State loses such privilege (Art. 97 of Code for Insolvency and Recovery of Enterprises).

8.12 PLEDGES:

To secure fulfilment of an obligation, debtor may constitute pledge of movables by delivering same for purpose, to creditor or to third party. Stock representing capital of stock company, and rights against transferable movables, may also, by special provision, be pledged. Pledges of rights are subject to formalities and publication under provisions to which rights themselves may be subject and are only allowed when rights pledged have as object movable and transmittable property. Pledge of credit is only effective after, either through Court or otherwise, notification to debtor or acceptance by debtor, unless article pledged is subject to registration, in which case it becomes effective upon registration. As rule, article pledged must be sold by court so that creditor is paid out of respective proceeds. Parties may agree that sale be effected out of court or that article be adjudicated to creditor for value which court may establish. (Arts. 666 et seq. C.C.).

9 DOCUMENTS AND RECORDS

9.01 ACKNOWLEDGMENTS:

Documents executed abroad in accordance with local law for use in Portugal do not normally require notarial or Consular legalization (Art. 365-1 C.C.), and may be translated either by Consulate, by Notary, Portuguese lawyer or sworn translator. Powers of attorney for patent or trademark applications do not require any formalities.

However, it is generally advisable to legalise documents executed abroad, with Apostille of the Hague Convention of Oct. 5, 1961 or at Portuguese Consulate.

9.02 AFFIDAVITS:

Under law governing evidence, affidavits are not considered and it is not the practice in Portuguese courts and official bodies to accept such means of proof.

9.03 FOREIGN DOCUMENTS:

See topic 9.01 Acknowledgments; category 22 Property, topic 22.03 Foreign Documents.

9.04 NOTARIAL SERVICES:

Portuguese consuls abroad have notarial powers and can draw up and attest notarial documents and contracts.

Lawyers enrolled with Portuguese Bar Association enjoy powers to legalize photocopies of documents, signatures, and translations.

See also category 22 Property, topics 22.03 Certified Photocopies, 22.07 Powers of Attorney.

9.05 NOTARIES PUBLIC:

There are Public and Private Notaries.

See topics 9.01 Acknowledgments, 9.04 Notarial Services; category 22 Property, topics 22.03 Deeds, 22.07 Powers of Attorney.

9.06 RECORDS:

All land is registrable and title can be verified by means of certificates from Real Estate Registry.

Real Estate Registry is governed by Real Estate Registry Code as approved by D.L. 224/84 of July 6, subjected to numerous amendments, latest being D.L. 185/2009 of Aug. 12.

10 EMPLOYMENT

10.01 LABOR RELATIONS:

Labor contracts are governed by Labor Code (Law 7/2009 of Feb. 12, as rectified by Rectification Statement 21/2009 of Mar. 18 and as am'd by Law 105/2009 of Sept. 14), which transposed European Council Directives 91/533/CEE of Oct. 14, 92/85/CEE of Oct. 19, 94/33/CE of June 22, 96/34/CE of June 3, 97/81/CE of Dec. 15, 98/59/CE of June 20, 1999/70/CE of June 28, 2000/43/CE of June 29, 2000/78/CE of Nov. 27, 2001/23/CE of Mar. 12 and European Parliament and Council Directives 96/71/CE of Dec. 16, 2002/14/CE of Mar. 11, 2003/88/CE of Nov. 4 and 2006/54/CE of July 5.

See also D.L. 260/2009 of Sept. 25.

Labor Code provides inter alia:

Maternity and Paternity.

Parents are entitled to protection of Portuguese society and State insofar as their children's upbringing is concerned. (Art. 33).

Parental Leave.

a) Initial Parental Leave—employed parents enjoy right to 120 or 150 consecutive days leave for child birth. Leave can be shared after childbirth. Leave is extended for 30 days in event of each parent enjoying in exclusive period of 30 consecutive days or two periods of 15 consecutive days, after Mother enjoyed mandatory leave under b) below. In event of triplets or more, leave is extended 30 days for each extra child. (Art. 40).

b) Exclusive Maternity Leave—Mother may enjoy up to 30 days initial parental leave before childbirth. Mother must take six weeks leave after childbirth. (Art. 41).

c) In event parent enjoying leave under a) above suffers from physical or mental disability, other parent is entitled to such leave or to its remainder. Same applies in case of death. (Art. 42).

d) Exclusive Paternity Leave—Father has mandatory obligation to take parental leave of ten working days, consecutive or not, within 30 days of childbirth. Five of such days must be taken consecutively after childbirth. Father further entitled to ten working days leave, consecutive or not, provided such leave is enjoyed simultaneously with Mother's leave under a) above. In event of triplets or more, leave is extended two days for each extra child. (Art. 43).

Foreign or Stateless workers authorized to work in Portugal enjoy same rights and are subject to same duties as Portuguese workers. (Art. 4).

Labor contracts entered into with Foreign or Stateless workers must be in writing and must contain identification, signatures, residence or head office of parties, reference to existence of work visa, residence permit or permit to remain in country, employer's activity, job description and salary, place of work and normal working period, amount, timing and form of payment of salary, date of contract execution and of commencement of labor contract. Worker must annex to contract identification and residence of beneficiaries in event of death caused by labor accident or disease. Contract must be executed in duplicate. (Art. 5).

Fixed Term Contracts.

Allowed in special circumstances such as, direct or indirect replacement of worker temporarily absent or prevented from working, seasonal activities, exceptional increase on employer's activities, start of new activity of uncertain duration, start of operations of company or establishment belonging to company with less than 750 workers, contracting worker looking for first job, or who has been subjected to long term unemployment, etc. (Art. 140).

Fixed term contracts can be renewed up to three times and its duration cannot exceed, depending on circumstances, 18 months for workers looking for their first job, two years on event of launching of new activity of uncertain duration, start of operations of company or establishment belonging to company with less than 750 workers, or contracting worker who has been subjected to long term unemployment, three years in remaining cases.

Only in very specific circumstances fixed term contracts for less than six months can be executed. (Art. 148).

On these contracts, trial period is 30 days for contracts of six months or more, and 15 days for contracts for less than six months. (Art. 112). Unless otherwise agreed in writing, during trial period, both parties can terminate contract without advance notice or invoking just cause. No right to compensation. (Art. 114).

Unspecified Term Contracts.

Trial period in labor contracts for unspecified term is in principle 90 days (180 days for workers occupying offices of complex technical nature, of high level of responsibility, that require special qualifications or for those involving positions of trust; 240 days for managers and senior staff). In these contracts during trial period employer can terminate contract with seven days advance notice if such period has lasted for more than 60 days, or 15 days in event trial period lasted for more than 120 days.

Maximum Normal Working Hours.

Maximum normal working hours cannot exceed eight hours day and 40 hours week. (Art. 203).

Vacations.

Worker is entitled to paid vacations every calendar year. Yearly vacations must be for 22 working days minimum. (Art. 238). Right to vacations accrues on Jan. 1 each calendar year. (Art. 237). On year of admission, and after six months, worker is entitled to two working days vacation for each month of contract up to maximum of 20 days. (Art. 239).

Justified Absences.

Absence resulting from, among others, employee's wedding (15 consecutive days), death of spouse or parent (up to five consecutive days), death of certain other relatives (up to two consecutive days), illness, accident or urgent and unavoidable assistance to close family members (up to 15 days per year) are considered justified. (Arts. 251 and 252).

National monthly minimum wage is [Euro]450,00 since Jan. 1, 2009. (D.L. 246/2008 of Dec. 18).

11 ENVIRONMENT

11.01 ENVIRONMENTAL REGULATION:

According to Art. 66 No. 1 of Portuguese Constitution everyone is entitled to environment fit for human, healthy and ecologically balanced life. It is for State, inter alia, on its own, or at request and with support of popular initiatives to prevent and control effects of pollution and prejudicial forms of erosion, to organise and promote biologically sound countryside, to classify and protect countryside and localities and to promote rational use of natural resources, safeguarding its capacity for renewal and its ecological stability. (Art. 66 No. 2 of Constitution).

Art. 52 No. 3 of Constitution confers on all, either individually or through associations for defence of interests in question, right of “Acção Popular” (Popular Action, i.e. kind of “qui tam action”, on behalf of individual and also State) to promote and prevent cessation or judicial prosecution of offenses which involve deterioration of environment, as well as to apply for compensation on behalf of injured party or parties.

There are other provisions in Portuguese Constitution regarding Environment as for instance Arts. 81(n), 91, 96 No. 1(d), 96 No. 2, 168 No. 1(g), 229 No. 1(c), and 234 No. 1.

Portugal has enacted two Laws, “Lei das Associações de Defesa do Ambiente” (Law for Associations for the Defence of Environment) (Law 35/98 of July 18, as rectified by Rectification Statement 14/98 of Sept. 11) and “Lei das Bases do Ambiente” (Basic Law of Environment) (Law 11/87 of Apr. 7 as am'd by Law 13/2002 of Feb. 19), which grant citizens, inter alia, right to prompt and accessible judicial means of obtaining compensation for damage to environment, right to representation or to participation in State organisations for general defence of environment, right to consult and be informed by associations for defence of environment at central, regional and local administrative offices relating to variety of matters including studies on environmental impact.

Penal Code provides for three environmental crimes, namely crime of damage to nature (Art. 278); crime of pollution (Art. 279) and crime of pollution endangering community (Art. 280).

See also Decree-Law 173/2008 of Aug. 26, transposing European Parliament and Council Directive 2008/1/CE of Jan. 15, D.L. 130/2005 of Aug. 16, transposing Directive 2003/35/CE of European Parliament and Council of May 26, D.L. 233/2004 of Dec. 14, which transposed Directive No. 2003/87/CE of European Parliament and Council of Oct. 13 (several amendments latest being D.L. 154/2009 of July 6), Law 50/2006 of Aug. 29 as amended by Law 89/2009 of Aug. 31, and D.L. 45/2008 of Mar. 11.

Air Pollution Control.

Governed by Art. 1346 C.C. (Emission of Fumes); Art. 8 of Law 11/87 of Apr. 7, as amended by Law 13/2002 of Feb. 19 (Basic Law of Environment); D.L. 270/2001 of Oct. 6, as amended by D.L. 112.2003 of June 4 and D.L. 340/2007 of Oct. 12, and D.L. 317/2003 of Dec. 20 (Regulations of Stone Quarries), D.L. 178/2003 of Aug. 5, transposing European Parliament and Council Directive 2001/80/CE of Oct. 23 (Protection of Atmosphere and Environment); D.L. 78/2004 of Apr. 3, as amended by D.L. 126/2006 of July 3, and Ministerial Order 80/2006 of Jan. 23 (Prevention and Control of Air Pollution).

Water Pollution Control.

Governed by Law 58/2005 of Dec. 29, transposing Directive 2000/60/CE of European Parliament and Council of Oct. 23 (Law for Waters) as amended by D.L. 245/2009 of Sept. 22; D.L. 38382 of Aug. 7, 1951 as amended by Decree-Law 61/93 of Mar. 3 (General Regulations of Urban Construction); Decree-Law 235/2000 of Sept. 26 (Pollution of Sea, Beaches, and Shores); D.L. 306/2007 of Aug. 27 (Water Quality Rules). See also Decree-Law 506/99 of Nov. 20, as amended by D.L. 261/2003 of Oct. 21, D.L. 93/90 of Mar. 19, as amended by D.L. 316/90 of Oct. 13, D.L. 213/92 of Oct. 12, D.L. 79/95 of Apr. 20, D.L. 203/2002 of Oct. 1, and D.L. 180/2006 of Sept. 6 (National Ecological Reserve), Decree 37/91 of May 18 (approves Agreement on Cooperation for Protection and against Pollution of Coasts and Waters of North-West Atlantic), and D.L. 131/2005 of Aug. 16.

Waste Disposal.

Art. 1347 C.C. (Prejudicial Installations); D.L. 468/71 of Nov. 5, as amended by Law 16/2003 of June 4, Law 54/2005 of Nov. 15, Law 58/2005 of Dec. 29 (The Law for Waters); D.L. 183/2009 of Aug. 10 transposing European Council Directive 1999/31/CE of Apr. 26, (Waste Management); D.L. 89/2002 of Apr. 9 (Strategic Plan for Administration of Industrial Residues); D.L. 270/2001 of Oct. 6, as amended by D.L. 112/2003 of June 4, by D.L. 317/2003 of Dec. 20 and D.L. 340/2007 of Oct. 12 (Regulations regarding Stone Quarries); see also D.L. 178/2006 of Sept. 5, transposing Directive 2006/12/CE of European Parliament and Council of Apr. 5 and Directive 91/689/CEE of Council of Dec. 12 (waste management) as amended by Law 64.A/2008 of Dec. 31 and D.L. 183/2009 of Aug. 10; 46/2008 of Mar. 12 (construction and demolition waste); D.L. 230/2004 of Dec. 10 transposing European Parliament and Council Directives 2002/95/CE and 2002/96/CE both of Jan. 27 (electric and electronical equipment waste); D. L. 196/2003 of Aug 23, transposing European Parliament and Council directive 2000/53/CE of Sept. 18, as amended by D.L. 64/2008 of Apr. 8 (scrapped vehicles); D.L. 130/2005 of Aug. 16 (environmental licensing); D. L. 69/2000 of May 3, as amended by D. L. 74/2001 of Feb. 26, D. L. 69/2003 of Apr. 10, Law 12/2004 of Mar. 30, D. L. 197/2005 of Nov. 8, partially transposing European Parliament and Council Directive 2003/35/CE of May 26 (Environmental Impact Juridical Regime); D.L. 183/2009 of Aug. 10 transposing European Council Directive 1999/31/CE of Apr. 26, D.L. 178/2006 transposing European Parliament and Council Directive 2006/12/CE of Apr. 5 and Council Directive 91/689/CE of Dec. 12, as amended by Law 64-A/2008 of Dec. 31 and D.L. 183/2009 of Aug. 10 (landfill); D.L. 232/2007 of June 15,, transposing Directives 2001/42/CE and 2003/35/CE of European Parliament and Council respectively of June 27 and May 26 (Environment Protection); D.L. 152/97 of June 19, several amendments latest being D.L. 198/2008 of Oct. 8 (Rules for the Discharge of Urban Waste Waters); Ministerial Order 809/90 of Sept. 10 (Rules for the Discharge of Residues from Slaughterhouses); D.L. 254/2009 of Sept. 24 (Forrestry Code); D.L. 153/2003 of July 11, as amended by D.L. 178/2006 of Sept. 5 (Storage, Collection and Burning of New and Used Oils), and Ministerial Order 505/92 of June 19 (Rules for the Discharge of Waste Waters from Cellulose Industry).

Noise Pollution.

Governed by Decree-Law 9/2007 of Jan. 17, as rectified by Rectification Statement 18/2007 of Mar. 16, and amended by D.L. 278/2007 of Aug. 1.

See also D. L. 129/2002 of May 11, as amended by D. L. 96/2008 of June 9, and D.L. 146/2006 of July 31 (transposing European Parliament and Council Directive 2002/49/CE of June 25).

Recycling.

Resolution of the Counsel of Ministers 2/93 of Jan. 7 (Use of Recycled Paper and Selective Collection of Obsolete Papers in Government Offices); D.L. 111/2001 of Apr. 6, as amended by D.L. 43/2004 of Mar.2, and D.L. 178/2006 of Sept. 5 (Recycling of Tyres), and D.L. 230/2004 of Dec.10 (transposing European Parliament and Council Directives 2002/95/CE and 2002/96/CE both of Jan. 27), as amended by D.L. 174/2005 of Oct. 25, and D.L. 178/2006 of Sept. 5 (Recycling of Electric and Electronic Equipment).

General Supervision.

“Ministério do Ambiente, do Ordenamento do Território e do Desenvolvimento Regional” (Ministry for Environment, Territorial Planning and Regional Development), Rua do Século No. 51, Lisbon; “Direcção Geral do Ordenamento do Território e do Desenvolvimento Urbano” (Directorate General of Planning of [National] Territory and Urban Development), Campo Grande, 50, Lisbon; “Instituto da Água” (Water Institute), Avenida Almirante Gago Coutinho, 30, Lisbon; “Instituto de Conservação da Natureza” (Institute for Conservation of Nature), Rua de Santa Marta, 55 Lisbon; ``Instituto do Ambiente'' (Environment Institute), Rua da Murgueira, Zambujal, Buraca, Amadora.

12 ESTATES AND TRUSTS

12.01 DEATH:

Presumption of Death.

See category 22 Property, topic 22.01 Absentees.

Actions for Death.

Inasmuch as in a specific case number of laws may be involved, it is not practicable to summarize law on this subject with accuracy and sufficient brevity for inclusion herein.

12.02 DECEDENTS' ESTATES:

See topics 12.03 Descent and Distribution, 12.06 Wills.

12.03 DESCENT AND DISTRIBUTION:

No distinction is made between realty and personalty for purposes of intestate succession.

Order of intestate succession is as follows: (1) To surviving spouse and descendants per stirpes; (2) to surviving spouse and ascendants; (3) to brothers and sisters and to their descendants; (4) to collaterals not comprised in (3) down to fourth degree; (5) to State. (Arts. 2131 to 2155 C.C.).

Surviving spouse, descendants, and ascendants are obligatory heirs, and testator subject to Portuguese law having such heirs may not freely dispose by will of more than one-third of his estate when nearest heirs are surviving spouse and one or more children (or issue of deceased children) or two or more children or surviving spouse and one or two parents; one-half when nearest is surviving spouse or one child (or issue of deceased child) or parents; one-third when nearest are ascendants other than parents. Any testamentary disposition in excess of these proportions is void as to excess. (Arts. 2156 et seq. C.C.).

Succession and executors powers are governed by personal law of deceased at time of death. (Arts. 62 et seq. C.C.).

12.04 INTESTACY:

See topic 12.03 Descent and Distribution.

12.05 TRUSTS:

Not known to Portuguese law as rule, but exceptionally provided for Madeira off-shore interests according to Decree-Law 352A/88 of Oct. 3, as amended by D.L. 264/90 of Aug. 31 and D.L. 323/2001 of Dec. 17. (See also D.L. 149/94 of May 25.)

12.06 WILLS:

There are two principal kinds of will, public and sealed. (Arts. 2204 et seq. C.C.). Public will is one written in books of, and executed before, public notary in presence of two witnesses. Sealed will is handwritten and executed before notary and two witnesses and endorsed with formal notarial act of approval. (Arts. 106 to 115 of Notarial Code, approved by D.L. 207/95 of Aug. 14, subjected to numerous amendments, latest being by D.L. 116/2008 of July 4).

Joint wills are not permitted. (Art. 2181 C.C.).

Wills made abroad by Portuguese citizens in accordance with foreign competent law only produce effects in Portugal if form observed in their execution or approval was solemn. (Art. 2223 C.C.). Generally wills made abroad are deemed to be valid as to form if in accordance with law of place where made or with personal law of testator, either at moment of execution or at moment of death or in accordance with law to which local rule of conflicts of laws may refer matter. If, however, personal law of testator prescribes, at date of execution, observance of certain formalities, under pain of nullity or ineffectiveness, even though execution takes place abroad such formalities must be observed. (Art. 65 C.C.). Intrinsic validity of will of foreigner is governed by personal law of testator. (Arts. 62 and 63 C.C.). See topic 12.03 Descent and Distribution.

13 FAMILY

13.01 ADOPTION:

Adoption is effected by court decision (Art. 1973-1 C.C.) and may, as rule, be granted if: (1) Considered to be to real advantage of child; (2) based on lawful reasons; (3) not involving unfair deprivation of other children of adopter; (4) there is reasonable assumption that link like that of parent and child will be established between adopter and child (Art. 1974-1 C.C.). Child will be taken care of by adopter during sufficient time so that court can judge convenience of constitution of this relationship. (Art. 1974-2 C.C.). When child is over 12 his consent is required. (Art. 1981-1[a] C.C.). Depending on various circumstances, adoption can be complete, adopted in this case acquiring situation equal to other children in his new family and relation to his former family being extinguished (Art. 1986-1 C.C.), or restrictive in which case only certain rights and duties between adopter and child are established (Art. 1992 et seq. C.C.).

See also D.L. 314/78 of Oct. 27, as amended by Law 133/99 of Aug. 28 and Law 31/2003 of Aug. 22, and President of Republic Decree 6/2003 of Feb.25 that ratifies May 29, 1993 Hague Convention.

13.02 ALIMONY:

See topic 13.04 Divorce.

13.03 COMMUNITY PROPERTY:

See topic 13.05 Husband and Wife.

13.04 DIVORCE:

Divorce may be applied by mutual consent or without consent by one spouse against other. Divorce by mutual consent can in certain cases be obtained at Civil Registry. Divorce without consent of one of spouses must be applied at court. (Art. 1773 C.C.). Divorce without consent can be applied for when there is de facto separation for consecutive year, alteration of mental capacity of other spouse for more than one year, and provided its seriousness jeopardizes possibility of life in common, absence, when whereabouts of absentee is unknown for more than one year, or any other facts, that independently of guilt on part of spouses, show final breakdown of marriage. (Art. 1781 C.C.).

Judicial separation of persons and property may be converted into divorce after one year. (Art. 1795-D C.C.).

Either party has right to apply for alimony in accordance with legal provisions.

13.05 HUSBAND AND WIFE:

In absence of any antenuptial agreement, marriage regime before June 1967 is community of assets and after that date community only of after-acquired assets. (Arts. 1717 et seq. C.C.). Community in both cases lasts until marriage dissolved by death or divorce or until judicial separation of persons and property, or exceptionally of property only, is decreed. Each spouse is administrator of own property and of specified property owned in common; otherwise administration of property owned in common belongs to both spouses.

Husband and wife together are entitled to dispose inter vivos of movable property administration of which belongs to both jointly and apart from certain exceptions each is entitled to dispose of own or of common property of which he or she has administration. In general, except when marriage is with separation of property, husband or wife can only dispose of or lease immovable property and/or commercial establishments whether owned in common or otherwise with consent of other spouse. Insofar as Matrimonial Home is concerned, even in event of separation of property, consent of other spouse is required. (Arts. 1682 and 1682-A C.C.).

In Private International Law marriage regime is defined according to common national law of spouses at date of celebration of marriage or in default by law of spouse's common habitual residence at time of marriage or in default, law of first common matrimonial residence. (Art. 53 C.C.).

Deceased Husband or Wife.

Surviving spouse is entitled to maintenance out of income of estate. (Art. 2018 C.C.).

13.06 INFANCY:

Age of majority is 18 (Arts. 122 and 130 C.C.), but minor is fully emancipated when he or she marries having attained 16 years of age.

Apart from some exceptions infants cannot enter into contractual obligations and are normally represented by their parents.

13.07 MARRIAGE:

Marriage celebrated abroad where one of spouses is Portuguese must be registered with Portuguese Consulate and subsequently with Central Civil Registry Department for marriage to produce effects in Portugal. (Arts. 1654 and 1664 et seq. C.C.).

13.08 MARRIED WOMEN:

See topic 13.05 Husband and Wife.

14 FOREIGN TRADE AND COMMERCE

Portugal is member of World Trade Organization. (Decree 82-B/94 of Dec. 27).

14.01 CUSTOMS:

Since number of laws may be involved in specific case, it is not practicable to summarize law on this subject with accuracy and sufficient brevity for inclusion herein.

14.02 EXCHANGE CONTROL:

D.L. 295/2003 of Nov. 21 as rectified by Rectification Declaration 9/2004 of Jan.14, and as amended by D.L. 61/2007 of Mar. 14, regulates overseas economic and financial operations and foreign exchange operations in Portugal.

“Branqueamento de Capitais” (money laundering prevention), is governed by Law 25/2008 of June 5 (transposing European Parliament and Council Directive 2005/60/CE of Oct. 26 and European Commission Directive 2006/70/CE of Aug. 1).

14.03 FOREIGN EXCHANGE:

See category 1 Introduction, topic 1.01 Currency.

14.04 FOREIGN INVESTMENT:

D.L. 203/2003 of Sept. 10 established special contractual regime for state support and incentives applicable to major investments regardless of their nationality.

See category 16.01 topic Corporations Owned or Controlled by Aliens.

14.05 FOREIGN TRADE REGULATIONS:

See topic 14.02 Exchange Control.

14.06 INDUSTRIES:

See category Business Regulation and Commerce, topic 3.07 Licences, Business and Professional.

15 HEALTH

15.01 COSMETICS:

Regulated by D.L. 189/2008 of Sept. 24 (transposing European Commission Directives 2007/53/CE and 2007/54/CE both of Aug. 29, 2007/67/CE of Nov. 22, 2008/14/CE of Feb. 15 and 2008/42/CE of Apr. 3 which am'd European Council Directive 76/768/CEE), as rectified by Rectification Statement 69/2008 of Nov. 11 and as amended by D.L. 115/2009 of May 18.

15.02 DRUGS:

Medical Drugs for Human Consumption.

Introduction in market, manufacturing, quality control and commercialization of medical drugs for human consumption is governed by D.L. 176/2006 of Aug. 30, as rectified by Rectification Statement 73/2006 of Oct. 26 and amended by D.L. 182/2009 of Aug. 7.

Medical use of narcotics and psychotropic substances is governed by D.L. 15/93 of Jan. 22, several amendments, latest being Law 38/2009 of July 7. See also Law 3/2003 of Jan. 15 (transposing European Commission Directive 2001/8/CE of Feb. 8).

15.03 HEALTH REGULATIONS:

In accordance with Portuguese Constitution (Art. 64) everyone enjoys right to protection of his health and has duty to defend and promote it (see also Law 48/90 of Aug. 24 ``Lei de Bases da Saúde'' (Health Basic Law) as amended by Law 27/2002 of Nov. 8.

This right involves existence of Universal and General National Health Service that aims to be essentially free.

It is up to Minister for Health to propose definition of National Health Policy. (Law 48/90 of Aug. 24).

Advertising is governed by D.L. 176/2006 of Aug. 30 (transposing European Parliament and Council Directives 2001/83/CE of Nov. 6, 2002/98/CE of Jan. 27, 2004/24/CE, and 2004/27/CE both of Mar. 31 and European Commission Directives 2003/63/CE and 2003/94/CE respectively of June 25 and Oct. 8) as amended by D.L. 182/2009 of Aug. 7.

Labelling and enclosed information leaflet are also regulated by D.L. 176/2006 of Aug. 30 as amended by D.L. 182/2009 of Aug. 7.

Veterinary drugs are governed by D.L. 148/2008 of July 29 (partially transposing European Parliament and Council Directives 2001/82/CE and 2004/28/CE, respectively of Nov. 6 and Mar. 31, and Commission Directives 2006/130/CE and 91/412/CEE, respectively of Dec. 11 and July 23).

15.04 NURSING:

Exercise of this profession depends upon enrollment with Portuguese Nursing Association. Enrollment regardless of nationality is restricted to holders of Portuguese University degrees conferring aptitude for initial nursing studies, to holders of general nursing diplomas, or legal equivalent, and to holders of foreign nursing University diploma, provided that in latter case equivalence to Portuguese University nursing studies is obtained.

Nationals of European Union Countries or with which Portugal has agreements benefit from special regime regarding enrollment.

Nurses are inter alia obliged to comply with Association Charter, Deontological Code and other Association regulations, to exercise their profession respecting human life and dignity, health and well-being of population. (Portuguese Nursing Association Charter as approved by D.L. 104/98 of Apr. 21, and as am'd by Law 111/2009 of Sept. 16).

See also D.L. 437/91 of Nov. 8, as amended by D.L. 248/99 of Sept. 22.

Right of establishment and freedom to provide services by nationals of other European Union Members are regulated by D.L. Law 9/2009 of Feb. 4 (transposing European Parliament and Counsel Directive 2005/36/CE of Sept. 7 and European Counsel Directive 2006/100/CE of Nov. 20).

15.05 PHARMACISTS:

Exercise of this profession is dependent upon enrollment with Portuguese Pharmacists Association. Enrollment regardless of nationality is restricted to pharmacists with diploma granted by Portuguese or foreign school, provided that in latter case equivalence to Portuguese Pharmacy Studies has been obtained. (Portuguese Pharmacists Association Charter approved by D.L. 288/2001 of Nov. 10 as am'd by D.L. 134/2005 of Aug. 16, D.L. 34/2008 of Feb. 26 and Law 22/2009 of May 20).

Pharmacists are inter alia obliged to comply with their professional deontological rules.

Enrollment with Portuguese Pharmacists Association regardless of nationality is regulated by Portuguese Pharmacists Association Charter.

There are special rules contemplating European Union national's right of establishment and freedom to provide services. Law 9/2009 of Feb. 4 transposing European Parliament and Counsel Directive 2005/36/CE of Sept. 7 and European Counsel Directive 2006/100/CE of Nov. 20.

15.06 PHYSICIANS:

Exercise of profession depends upon enrollment with Portuguese Physicians Association. Enrollment regardless of nationality is restricted to medical school graduates of Portuguese or foreign school, provided that in latter case Association has granted necessary equivalence. (Portuguese Physicians Association Charter approved by D.L. 282/77 of July 5, as am'd by D.L. 217/94 of Aug. 20).

Physicians are inter alia obliged to comply with Association Charter and Regulations, to observe their professional deontological rules and to keep professional confidentiality. (D.L. 282/77 of July 5, as am'd by D.L. 217/94 of Aug. 20).

There are special rules contemplating European Union national medical graduates right of establishment and freedom to provide services. (Law 9/2009 of Feb. 4 transposing European Parliament and Counsel Directive 2005/36/CE of Sept. 7 and European Counsel Directive 2006/100/CE of Nov. 20).

15.07 SMOKING REGULATIONS:

Basically established by Law 37/2007 of Aug. 14.

Packaging and warning on smoking packages is also governed by Law 37/2007 of Aug. 14.

Advertising.

Prohibited by Law 37/2007 of Aug. 14.

Smoking in Public Places.

Smoking is prohibited inter alia in places such as hospitals, shops, schools, buses, trains, underground trains, airports, taxis, hotels, petrol stations, underground parkings, enclosed sporting facilities, lifts, cinemas, theaters, areas reserved for persons under 18 years of age, museums, libraries, workplaces, and restaurants.

Notwithstanding above, in some areas of places such as hospitals, prisons, universities, hotels, and restaurants smoking is permitted under certain circumstances.

16 IMMIGRATION

16.01 ALIENS:

Civil status and capacity of aliens as well as their family rights and duties and successions are, as a rule, governed by their personal law. (Art. 25 C.C.). Aliens, as general rule, enjoy same civil rights as Portuguese citizens. (Art. 14 C.C.).

Citizens from Argentina, Brazil, Cape Vert, Chile, European Union, Iceland, Norway, Uruguay, and Venezuela can vote at Portuguese local elections. Citizens from Brasil, Cape Vert, and European Union can be elected at Portuguese local elections. (Home Affairs and Foreign Office Ministries Statement 9/2005 of July 8).

Entry, residence, departure and expulsion of aliens in Portugal is regulated by Law 23/2007 of July 4 (transposing inter alia European Council Directives 2003/86/CE of Sept. 22, 2003/109/CE of Nov. 25, 2004/81/CE of Apr. 29, 2004/114/CE of Dec.13, and 2005/71/CE of Oct. 12) without prejudice to Bilateral Treaties or International Convention to which Portugal is party. (See also Decree-Law 85/2000 of May 12 and D.L. 44/2006 of Feb. 24).

As rule if visa is required, it must be applied for before entry into Portugal at Portuguese Consulate.

Some visas can exceptionally be granted at Border, i.e., (a) transit visa for maximum of five days, (b) short-term visa for maximum of 15 days, (c) special visa for Humanitarian or National Interest reasons.

European Union Nationals enjoy special status. (Law 37/2006 of Aug. 9, transposing European Parliament and Council Directive 2004/38/CE of Apr. 29).

Portugal is party to Shengen Agreement, and has executed Bilateral Treaties with countries such as Brazil, Cape Verde, Guinea-Bissau and S. Tomé e Principe.

Asylum.

Foreigners and stateless individuals under persecution or seriously threatened with persecution for their activities in favour of democracy, social and national liberation, peace among nations, freedom and human rights are assured asylum.

Asylum and refugee matters are regulated by Law 27/2008 of June 30 (transposing European Council Directives 2004/83/CE of Apr. 29 and 2005/85/CE of Dec. 1)

See also Law 67/2003 of Aug. 23 (transposing Council Directive 2001/55/CE of July 20) as amended by D.L. 84/2008 of May 21.

Corporations Owned or Controlled by Aliens.

Foreigners are allowed to establish themselves in all economic sectors open to private enterprise with exception of such limitations as established in International Agreements to which Portugal is party. (D.L. 214/86 of Aug. 2 as am'd by D.L. 396/98 and D.L. 397/98 both of Dec. 17). See also Law Law 49/2009 of Aug. 5.

See also category Foreign Trade and Commerce, topic 14.04 Foreign Investment

16.02 IMMIGRATION:

In general terms foreigners are only allowed to enter country to work provided they hold necessary visa. Visa must be obtained at Portuguese Consulate.

Law 23/2007 of July 4 contemplates several types of visas: (a) Stop-over visa, (b) transit visa for maximum of five days, (c) short-term visa valid for one year, (d) temporary visa for stay up to three months (under certain circumstances can be granted for up to one year or more) for purposes such as medical treatment, sporting activities, scientific investigation or activity presupposing high technical knowledge, University lecturers, self-employment, labourers, etc., and (e) residence visa valid for four months enabling application for residence permit.

Two types of residence permits: (a) Temporary for one year and renewable for successive two year periods and (b) permanent.

Special regime exists in respect of citizens of European Union Member States. See topic 16.01 Aliens.

17 INSURANCE

17.01 INSURANCE COMPANIES:

Governed by D.L. 94-B/98 of Apr. 17, as amended by D.L. 8-A/2002 of Jan.11 (transposing European Parliament and Council Directive 98/78/CE of Oct. 27), by D.L. 169/2002 of July 25 (transposing Directive 2000/64/CE of European Parliament and Council of Nov. 7), by D.L. 90/2003 of Apr. 30 (transposing Directive 2001/17/CE of European Parliament and Council of Mar. 19), by D.L. 251/2003 of Oct. 14 (transposing Directives 2002/12/CE and 2002/13/CE of European Parliament and Council both of Mar. 5), by D.L. 145/2006 of July 31 (transposing European Parliament and Council Directives 2002/87/CE and 2005/1/CE, respectively of Dec. 16 and Mar. 9), by D.L. 357-A/2007 of Oct. 31, and by D.L. 72/2008 of Apr. 16, as rectified by Rectification Statements 32-A/2008 of June 13, and 39/2008 of July 23, D.L. 2/2009 of Jan. 5 and Law 28/2009 of June 19.

See also D.L. 176/95 of July 26, as amended by D.L. 60/2004 of Mar. 22, by D.L. 357-A/2007 of Oct. 31, and by D.L. 72/2008 of Apr. 16, as rectified by Rectification Statements 32-A/2008 of June 13, and 39/2008 of July 23. See also Ministerial Orders 292/99 of Apr. 28, and 299/99 of Apr. 30.

Supervision of insurance business lies within competence of “Instituto de Seguros de Portugal”.

18 INTELLECTUAL PROPERTY

18.01 COPYRIGHT:

Law relating to copyright is contained in Decree-Law 63/85, of Mar. 14, as amended by Laws 45/85 of Sept. 17, and 114/91 of Sept. 3, D.L. 332/97 of Nov. 27 (transposing European Council Directive 92/100/CE of Nov. 19), D.L. 334/97 of Nov. 27 (transposing European Council Directive 93/98/CEE of Oct. 29), Law 50/2004 of Aug. 24 (transposing Directive 2001/29/CE of European Parliament and Council of May 22), Law 24/2006 of June 30 (transposing European Parliament and Council Directive 2001/84/CE of Sept. 27), and Law 16/2008 of Apr. 1 (transposing European Parliament and Council Directive 2004/48/CE of Apr. 29) under which protection is afforded to authors of all intellectual works which are considered to be, amongst others, literary, artistic and scientific writings; lectures, lessons, speeches, sermons and other works of similar nature; dramatic or musical-dramatic works; choreographic works and pantomimes, stage execution of which is fixed in writing or in any other way; musical compositions whether with words or not; cinematographical works and those produced by any process similar to cinematography; drawing, painting, architecture, sculpture, engraving and lithographical works; photographical works and those produced by any process similar to photography; applied art works; pictures and geographical maps; projects, sketches and plastic works relating to geography, topography, architecture or sciences. Copyright exists during lifetime of author and another 70 years thereafter. It may be assigned for life interest, pledged, or attached in judicial proceedings.

See also D.L. 332/97 (transposing European Council Directive 92/100/CEE of Nov. 19) as amended by Law 24/2006 of June 30 and Law 16/2008 of Apr. 1 and 333/97 both of Nov. 27 (transposing European Council Directive 93/83/CEE of Sept. 27).

Transfers of copyright, as also pledges and attachments thereof, are subject to registration.

Authors' names and noms de plume are also protected, subject to registration.

Portugal is a signatory to Berne Convention.

18.02 PATENTS:

See topic 18.03 Trademarks and Patents.

18.03 TRADEMARKS AND PATENTS:

The protection and registration of Industrial Property is governed by D.L. 36/2003 of Mar. 5, as amended by D.L. 318/2007 of Sept. 26, D.L. 360/2007 of Nov. 2, Law 16/2008 of Apr. 1 (transposing European Parliament and Council Directive 2004/48/CE of Apr. 29), D.L. 143/2008 of July 27 and Law 52/2008 of Aug. 28.

Portugal is a signatory to the Convention of 1883 for the protection of industrial property and to the Conventions of 1891 for the international registration of marks and the suppression of false indications of origin.

Portugal is also signatory of June 19, 1970 Washington's Patent Cooperation Treaty, and of Munich Convention on European Trademarks of Oct. 5, 1973.

19 LEGAL PROFESSION

19.01 ATTORNEYS:

Attorneys must be enrolled with Portuguese Bar Association (“Ordem dos Advogados”). Bar Association Charter is contained in Law 15/2005 of Jan. 26, as amended by D.L. 226/2008 of Nov. 20. Acts which can only be practiced by attorneys are defined by Bar Association Charter and Law 49/2004 of Aug. 24.

Bar Association Charter regulates inter alia, eligibility, prohibitions, deontological rules, supervision, disbarment, law firms, continuing legal education and recognition of foreign professional qualifications.

Admission.

Applicants must hold law licenciate degree from Portuguese or foreign university (provided it is officially recognized or equivalent status is granted). Applicants follow two year minimum training course. Must pass exam after period of at least six months, and further exam at end of course. During course they must attend classes, work under supervision of lawyer with at least five years of enrollment, and intervene in minor court proceedings.

EU lawyers are authorized to practice under certain restrictions. (Art. 196 et seq. of Law 15/2005 of Jan. 26).

20 MINERAL, WATER AND FISHING RIGHTS

20.01 MINES AND MINERALS:

State owns all mineral deposits. (Art. 84c of Constitution). Licences for prospecting are valid for five years for mineral deposits, and for three years for hydromineral or geothermal resources. (Art. 18 of D.L. 90/90 of Mar. 16). Before licence has expired, definite concession can be applied for, which involves certain formalities. State may declare any given area closed to prospecting and grant exclusive licence to prospect to approved person or entity. See also D.L. 270/2001 of Oct. 6, as amended by D.L. 340/2007 of Oct. 12, Ministerial Order 401/2002 of Apr. 18, D.L. 112/2003 of June 4, and D.L. 317/2003 of Dec. 20.

All transactions, such as sale, mortgage or lease of concessions, must have the previous approval of competent Minister in Government.

See also D.L. 88/90 of Mar. 16.

Offshore Oil Exploitation is governed by D.L. 109/94 of Apr. 26, as rectified by Rectification Statement 64/94 of May 31. See also Ministerial Order 790/94 of Sept. 5.

20.02 WATER:

Exploitation of spring water is governed by D.L. 84/90 of Mar. 16. Industrial mineral water is governed by D.L. 85/90 of Mar. 16, whilst natural medicinal water is governed by D.L. 86/90 of same date.

20.03 FISHING RIGHTS:

Portuguese Territorial waters attain 12 nautical miles, contiguous zone 24 nautical miles. Economic Exclusive Zone reaches 200 nautical miles. Economic Exclusive Zone is subdivided in three sub-zones: (a) Continent, (b) Madeira, and (c) Azores. (Law 34/2006 of July 28).

21 MORTGAGES

21.01 CHATTEL MORTGAGES:

See topic 21.03 Mortgages.

21.02 COLLATERAL SECURITY:

See topic 21.03 Mortgages and category 8 Debtor and Creditor, topic 8.12 Pledges.

21.03 MORTGAGES:

Legal mortgage can be created inter alia over land and buildings, ships, airplanes and motor vehicles (Art. 688 C.C.). Mortgage does not operate as conveyance of property to mortgagee subject to equity of redemption, but merely creates legal charge which is enforced by sale through court on application for purpose.

Fixed plant and machinery are only covered by the mortgage where specifically referred to and described therein.

To produce effects even between parties, mortgages must be registered. (Art. 687 C.C.).

Priority of mortgages depends on date of registration.

22 PROPERTY

22.01 ABSENTEES:

When necessary to provide for administration of assets of absentee whose whereabouts is unknown and who has no legal representative or attorney or latter is unable or unwilling to act, court will appoint provisional curator. (Art. 89 C.C.). After two years absence if absentee has no legal representative or attorney, or otherwise after five years, State Attorney or any interested party may apply for legal declaration of absence for purpose of absentee's heirs inheriting his estate. (Art. 99 et seq. C.C.). Presumption of death may be applied for by spouse not judicially separated, by heirs or by anyone having right to absentee's property dependent on his death (and whether or not administration of his assets has previously been provided for as above) after ten years from last news of absentee or after five years from his attaining age of 80 whichever may occur first, but never before expiration of five years from his attaining majority. (Art. 114 et seq. C.C.). Spouse of married absentee, may marry again after presumption of death has been declared. If absentee returns, former marriage is considered as dissolved by divorce at date of presumption of death declaration. (Art. 116 C.C.).

22.02 CONVEYANCES:

See topic 22.03 Deeds.

22.03 DEEDS:

Written documents may be authentic or private. Authentic documents are those duly issued by competent public authorities or by public notaries or other officials with similar functions; all other documents are considered private documents. Private documents are considered authenticated when confirmed by parties before public notary, as provided for in Notarial Code (Art. 363 C.C.).

Foreign Documents.

Authentic or private documents issued in foreign country, in accordance with its laws, carry same weight as evidence as would those of same nature issued in Portugal. If document is not legalized, and there are justified doubts about it or its acknowledgment being genuine, its legalization may be required. Document written in foreign language must be accompanied by duly legalized translation into Portuguese. (Art. 365 C.C. and Art. 44 Nos. 1 and 2 of Notarial Code).

Notwithstanding the above, it is advisable to legalize foreign documents either before Portuguese Consulate, or by way of Apostille provided for by Hague Convention of Oct. 5, 1961.

See also category 9 Documents and Records, topic 9.01 Acknowledgments.

Authentic Documents.

Amongst authentic documents, “escrituras públicas” (public deeds written in books of notary and executed by parties thereto) are the most important and are required, inter alia, in case of: (1) Entitlement of Heirs; (2) Constitution of Associations and Foundations, as well as amendments to its statutes. (Notarial Code as am'd by D.L. 116/2008 of July 4).

Documents with notarial legalization are private documents in which handwriting and signature or only signature have been recognized by notary or his assistant as genuine.

Certified Photocopies.

Photocopies can be legally certified by notaries, lawyers, Chambers of Commerce, some local authorities, and Portuguese Post Office. (Notarial Code and Decree-Law 28/2000 of Mar. 13, as rectified by Rectification Statement 5-H/2000 of Mar. 31).

22.04 DOWER:

Abolished by D.L. 496/77 of Nov. 25.

22.05 ESCHEAT:

Bonds and shares issued by companies with head office in Portugal become property of State if for period of 20 years their holders did not collect or attempted to collect respective dividends, interest or other income, or did not by any other lawful and unequivocal manner manifest their right over such bonds or shares.

Under same circumstances, dividends, interest and other income of such bonds or shares will also become State property after period of five years.

Assets of any kind deposited or kept for safe keeping by Banks or financial institutions, become State property if for 15 years respective account has not been operated, deposit charges paid or dividends, interest and other amounts due collected, or for same period their holders have not by any other lawful and unequivocal manner manifest their right over such assets. (D.L. 187/70 of Apr. 30).

See also category 12 Estates and Trusts, topic 12.03 Descent and Distribution.

22.06 LANDLORD AND TENANT:

Leases are classified as urban or agricultural. Urban leases are either residential or nonresidential and are regulated by Law 6/2006 of Feb. 27.

Urban leases for permanent residential purposes can be for unspecified term or for fixed terms of five to 30 years, automatically renewed for three years, unless parties agree upon different renewal term.

Urban leases for nonpermanent residential purposes and for other purposes such as holidays, can be executed for term of less than five years.

It is up to parties to agree in writing to rent increases and relevant regime. In absence of agreement rents can be adjusted yearly. Each year government establishes rate of increases of rent.

Term for nonresidential purpose leases and agricultural leases not regulated by special regime can be freely agreed upon by parties. In absence of express agreement, nonresidential purpose leases are considered executed for fixed term of ten years.

Agricultural leases cannot be made for less than ten years (seven years in some cases). (D.L. 385/88 of Oct. 25, as am'd by D.L. 524/99 of Dec. 10). D.L. 294/2009 of Oct. 13 created new regime as from 2010 whereby agricultural leases are for minimum term of seven years.

There is special regime for Forestry Leases. (D.L. 394/88 of Nov. 8). Under D.L. 294/2009 of Oct. 13 as from 2010, these leases can not be entered into for more than 70 years nor less than seven years.

22.07 POWERS OF ATTORNEY:

Powers of attorney can be drawn up by notary and signed by grantor or written and signed by grantor in presence of notary; or, written and signed by grantor and confirmed by him before notary. (Notarial Code approved by D.L. 207/95 of Aug. 14, several amendments latest being D.L. 116/2008 of July 4).

Powers of attorney issued to lawyers and contemplating forensic powers are subject to simplified certification formalities.

Powers of attorney are subjected to stamp duty except those contemplating basic forensic powers.

22.08 REAL PROPERTY:

Distinction is made between immovable and movable property. Immovable property comprises rural and urban property; waters, trees, shrubs and natural fruits when connected to soil or ground and inherent rights to above are considered immovables. (Art. 204-1 C.C.). Movable property is everything not comprised above. (Art. 205 C.C.).

See category 22 Property, topic 22.03 Deeds, subhead Authentic Documents.

23 TAXATION

23.01 ALCOHOL, BEVERAGES AND TOBACCO TAXES:

See Decree-Law 566/99 of Dec. 22, several amendments latest being Law 64-A/2008 of Dec. 31.

23.02 BUSINESS TAXES:

IRC.

Commercial companies and other collective entities (such as civil and professional associations) are subject to IRC-corporate income tax. (IRC Code as approved by D.L. 442-B/88 of Nov. 30 and subsequent amendments latest being D.L. 292/2009 of Oct. 13.

Tax is due by resident corporate entities on income obtained in Portugal. Nonresident corporate entities including those not having permanent establishment in Portugal are generally subject to IRC on income obtained in country.

Where corporate entity is resident in mainland Portugal tax rate is 12.5% (for taxable income up to [Euro]12,500), 20% (simplified taxation regime) or 25% (general taxation regime for taxable income in excess of [Euro]12,500). In Madeira, normal IRC rate is 20% and in Azores, rates are 30% below those in mainland Portugal.

Nonresident corporate entities, depending on whether or not they have permanent establishment in Portugal are subject respectively to tax rates of 12.5% (for taxable income up to [Euro]12,500), or 25% (for taxable income in excess of [Euro]12,500) and to 10%, 15% or 20% depending on source of income.

Companies located in “low tax jurisdictions” that own property in Portugal are subject to higher property taxes and presumed annual rental income equivalent to 1/15th of property's rateable tax value at local tax office.

At present “low tax jurisdictions” list (Ministerial Order 150/2004 or Feb. 13, as rectified by Rectification Declaration 31/2004 of Mar. 23) is composed of 83 countries, territories and regions, including among others Andorra, Antigua and Barbuda, Dutch Antilles, Aruba, Bahamas, Bahrain, Barbados, Belize, Bermuda, Bolivia, Brunei, Channel Islands (Alderney, Guernsey, Jersey, Great Sark, Herm, Little Sark, Brechou, Jethou and Lihou), Cayman Islands, Cyprus, Costa Rica, Dominica, United Arab Emirates, Falkland Islands, Fiji Islands, Grenada, Gibraltar, Hong Kong, Jamaica, Kuwait, Lebanon, Liberia, Liechtenstein, Luxembourg (only insofar as holding companies as defined in Luxembourg Law of 31.7.29 and Grand-Duke Decision of 17.12.38), Isle of Man, Monaco, Oman, Panama, French Polynesia, Puerto Rico, Qatar, San Marino, Seychelles, Trinidad and Tobago, Turks and Caicos Islands, Uruguay, British Virgin Islands and U.S. Virgin Islands.

23.03 CONSUMPTION TAXES:

See topics 23.01 Alcohol, Beverages and Tobacco Taxes and 23.20 Value Added Tax.

23.04 CUSTOMS DUTY AND TAX:

Regulated by Decree-Law 19/92 of Feb. 5, as amended by Decree-Law 5/93 of Jan. 9, as rectified by Rectification Statement 2/93 of Jan. 30.

23.05 EMPLOYMENT TAX:

Contribution towards Social Security is levied on all salaries and wages at rate of 23.75% payable by employer and 11% payable by wage earner.

Directors and members of supervisory boards of companies enjoy special regime and different rates (company rate of 21.25%, beneficiary rate of 10%).

23.06 ESTATE TAX:

See topic 23.12 Inheritance Tax.

23.07 EXCISE TAXES:

See topic 23.01 Alcohol, Beverages and Tobacco Taxes.

23.08 FOREIGN INVESTMENT TAXES:

Foreign investment under contractual regime may benefit from tax incentives.

23.09 GASOLINE AND SPECIAL FUELS TAXES:

See Decree-Law 566/99 of Dec. 22, several amendments latest being Law 64-A/2008 of Dec. 31.

See also Ministerial Orders 1423-F/2003 of Dec. 31 and 510/2005 of June 9, as amended by Ministerial Orders 75-A/2006 of Jan. 18 and 16-C/2008 of Jan. 8.

23.10 GIFT TAX:

“Stamp Duty” at rate of 10.8% is applied to value of assets transferred by gift intervivos.

Surviving spouse, descendants and ascendants are exempted.

23.11 INCOME TAX:

For commercial companies and other collective entities see topic 23.02 Business Taxes IRC.

IRS tax (personal income tax) on earnings is due by individuals residing in Portugal and by nonresidents with income arising in Portugal. Tax is based on net income of each category of income namely: (i) Category A—Salaries; (ii) Category B—earnings of liberal professions and of agricultural, industrial or commercial activities when carried out by individuals; (iii) Category E—applied or invested capital; (iv) Category F—immovable property income (e.g. rents received by landlords); (v) Category G—net asset increases (e.g. capital gains, gambling); (vi) Category H—retirement pensions. Tax rate is variable and on sliding scale, taking into consideration inter alia whether taxpayer is single or married. In 2009, for net income of over [Euro]64,110, marginal tax rate is approximately 42%; for net income of up to [Euro]4,755, tax rate is 10.5%; intermediate tax rates are 13%, 23.5%, 34%, 36.5% and 40%.

IRS due by resident taxpayers whose earnings arise from employment contracts exercise of liberal professions, earnings from immovable property, etc. are subject to withholding tax, generally on account at varying rates.

Simplified IRS regime was introduced in 2001 for those self-employed persons earning below certain income level from sales and/or services, whereby their taxable income is estimated to be fixed percentage of income (i.e. 20% of sales; 70% of income from services) thereby dispensing with need to keep proper accounting records.

Nonresident taxpayers with income from exercise of liberal professions are subject to 20% withholding tax; interest on bank deposits is in principle subject to 20% withholding tax.

23.12 INHERITANCE TAX:

``Stamp Duty'' is applied to value of assets transferred on death at fixed rate of 10%.

Surviving spouse, descendants, and ascendants are exempted.

23.13 LOCAL GOVERNMENT TAXES:

See topic 23.15 Property Taxes.

Depending on company's location, yearly municipal tax, called ``Derrama'' at rate of up to 1.5% of assessed IRC tax (corporate income tax) resulting in maximum effective rate of I.R.C. of 26.5% may be charged.

See also topic 23.14 Motor Vehicle Taxes, subhead “Imposto Municipal sobre Veículos”.

23.14 MOTOR VEHICLE TAXES:

See Law 22-A/2007 of June 29, 2007, as amended by Law 67-A/2007 and Laws 44/2008 and 64-A/2008 respectively of Aug. 27 and Dec. 31.

23.15 PROPERTY TAXES:

IMI “Municipal Property Tax”

Rate is 0.8% for rural property and between 0.4% and 0.7% for urban property (depending on location) on tax value of immovable property. New urban property or property transferred after 1.12.2003 is subjected to rates between 0.2% and 0.4%.

In event urban property is vacant for more than one year above tax may be double, and if in ruins triple.

Immovable property owned by companies located in “low tax jurisdictions” is subjected to fixed 1% rate (2% if property is vacant or in ruins).

23.16 SALES TAX:

Land Transfer Tax “IMT” is basically levied on sales value of immovable property (or on respective tax value if higher) at following rates for mainland Portugal: (a) Rural property 5%; (b) urban property (exclusively for main and permanent dwelling purposes, exemption up to [Euro]89,700. If value exceeds [Euro]89,700 but does not exceed [Euro]557,500, progressive average rates of up to 8% apply. If more than [Euro]557,500, flat rate is 6%).

“IMT” for sale of dwelling properties in Azores and Madeira is lower, and for building plots is 6.5%. “IMT” for sale of urban property for dwelling purposes, but not for main and permanent residence is subject to following rates: exemption up to [Euro]89,700. If value exceeds [Euro]89,700 but does not exceed [Euro]534,700, progressive average rates of up to 8% apply. If more than [Euro]534,700, flat rate of 6% applies.

Purchase of rural or urban property by person residing or by company with head office in “low tax jurisdictions” is subjected to fixed rate of 8%; current list of “low tax jurisdictions”, comprising 83 entries has been established by Ministerial Order 150/2004 of Feb. 13, as rectified by Rectification Statement 31/2004 of Mar. 23. (See topic 23.02 Business Taxes.)

“IMT” is also levied on certain real property exchanges, certain partitions involving real property, on paying up of capital with real property, etc.

23.17 STAMP TAX:

Approved by Law 150/99 of Sept. 11. (Several amendments, latest being D.L. 175/2009 of Aug. 4.)

23.18 TAX INCENTIVES:

See “Estatuto dos Beneficios Fiscais”, as approved by D.L. 215/89 of July 1, several amendments latest being D.L. 292/2009 of Oct. 13.

23.19 TREATIES AND AGREEMENTS:

See category 25 Treaties and Conventions, topic 25.01 Treaties.

23.20 VALUE ADDED TAX:

“Imposto Sobre Valor Acrescentado” or “IVA” in Portuguese. Introduced by D.L. 394-B/84 of Dec. 26 in order to replace transaction tax and other small indirect taxes (several amendments, latest being D.L. 292/2009 of Oct. 13).

Following are subject to IVA: Supply of goods and provision of services against payment in territory, by taxable person; importation of goods; intra European Union acquisitions effected in Portugal.

Rates in mainland Portugal are 5%, 12% and 20% (basic rate).

In autonomous regions of Madeira and Azores rates are 4%, 8% and 14% (basic rate).

23.21 WEALTH TAX:

There is no wealth tax as such in Portugal, although unexplained increases in personal assets (houses, luxury cars, airplanes and boats) can give rise to presumed income which is subject to IRS at various rates.

24 TRANSPORTATION

24.01 AUTOMOBILES:

See topic 24.02 Motor Vehicles.

24.02 MOTOR VEHICLES:

Law governing registration of motor vehicles is contained in D.L. 54/75 of Feb. 12 and subsequent amendments latest being Law 39/2008 of Aug. 11, as regulated by Decree 55/75 of Feb. 12. (Several amendments latest being D.L. 185/2009 of Aug. 12.)

Civil liability insurance is governed by D.L. 291/2007 of Aug. 21,(partially transposing European Parliament and Counsel Directive 2005/14/CE of May 11) as amended by D.L. 153/2008 of Aug. 6.

A licence is issued by Technical Commission in whose records motor vehicle is registered, and Register of Property is kept for recording of ownership, mortgages, actions in rem, judicial attachments, transactions and charges on motor vehicles. Motor vehicle cannot be pledged but can be mortgaged. Insurance against third party risks is condition precedent to registration of any mortgage or charge. Unpaid purchase price on sale enjoys special legal charge or privilege on motor vehicle, provided it is registered. On nonpayment of secured credit, and on security being given by creditor, order will be made for seizure of motor vehicle.

Lorry and motor bus services are subject to special regulations.

24.03 SHIPPING:

Maritime laws are contained in D.L. 265/72 of July 31 (several amendments, latest being D.L. 111/2008 of June 30), Arts. 488, 574 to 675 of Commercial Code as well as Decree-Laws 349/86, of Oct. 17, 352/86 of Oct. 21, as amended by D.L. 323/2001 of Dec. 17, D.L. 191/87 of Apr. 29, D.L. 201/98 and D.L. 202/98 both of July 10, as rectified by Rectification Statements 11-P/98 and 11-Q/98 both of July 31, and amended by D.L. 64/2005 of Mar. 15. There are in addition numerous decrees regulating construction, equipment and general conditions of safety of vessels.

Questions affecting the property in, liens on, and mortgages of a ship are governed by the law of the ship's nationality.

Portugal is a signatory inter alia of Brussels Convention of 25.8.24, relating to bills of lading, of 10.4.26 on privileges and maritime mortgages, of 10.5.52 on seizure of sea vessel, of 10.10.57 on liability of owners of vessels on high seas, and of London Convention on safeguard of human life at sea of 17.6.60.

Maritime Courts (Lisbon, Leixões, Faro, Funchal and Ponta Delgada) were created by Law 35/86 of Sept. 4.

See also Decrees 42, 644 and 42, 645 of 14.11.59, Decree-Laws 431/86 of Dec. 30, 196/98, 197/98 and 203/98 all of July 10, and 384/99 of Sept. 23.

25 TREATIES AND CONVENTIONS

25.01 TREATIES:

Portugal is member State of European Union. It also has commercial treaties with several other foreign countries and in some cases (Austria, Algeria, Belgium, Brazil, Bulgaria, Canada, Cape Vert, Chile, Cuba, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Guinea-Bissau, Hungary, Iceland, India, Indonesia, Israel, Italy, Latvia, Lithuania, Luxembourg, Macau, Malta, México, Morocco, Mozambique, Netherlands, Norway, Pakistan, Peoples Republic of China, Poland, Republic of Ireland, Romania, Russia, Singapore, South Africa, South Korea, Slovak Republic, Slovenia, Spain, Sweden, Switzerland, Tunisia, Turkey, Ukraine, U.K., U.S.A., and Venezuela) treaties to avoid double taxation, though not all of them already in force, and is among others party to Brussels Convention of Dec. 8, 2004. Portugal is also party to certain conventions on service and taking of evidence abroad on civil and commercial matters. See also Selected International Conventions section.

ROMANIA LAW DIGEST

—Scope —

Revised for 2008 edition by

SALANS of Bucharest.

(Civ. Code indicates Civil Code; Civ. Pro. Code indicates Civil Procedure Code; Com. Code indicates Commercial Code; Fam. Code indicates Family Code; GEO indicates Government Emergency Ordinance; GD indicates Government Decision; GO indicates Government Ordinance; GR indicates Government Resolution.)

Note: This revision incorporates legislation through July 24, 2007.

1 INTRODUCTION

1.01 CURRENCY:

Romanian national currency is leu (lei in plural form), with fractional coin—ban (bani in plural form; 100 bani=1 leu), consisting of bills and coins. As of July 1, 2005, Romania's national currency, previously coded as ROL, has been redenominated to remove four zeros so that ROL 10,000 are now 1 new leu (RON). Highest nominal value of lei is represented by 500 lei bills.

National Bank of Romania has exclusive right to issue legal Romanian currency. (Law 312/2004, regarding status of National Bank of Romania, art. 2). National Bank may withdraw any kind of national legal tender from market. (art. 18).

1.02 GOVERNMENT AND LEGAL SYSTEM:

Romania's Constitution, adopted on Oct. 31, 2003, sets forth fundamental rules and principles relating to, inter alia, economy, public finance, rights, liberties, duties of citizens, and obligations of branches of government.

Romanian state is Republic and is characterized as: (a) national, sovereign, independent, unitary and indivisible; (b) democratic and social state, which warrants human dignity, citizens' rights and freedoms, justice, and political pluralism (art. 1-3); (c) provides national sovereignty which Romanian people exercise through representative bodies or by referendum; (d) divided into villages (in Romanian “commune”), towns and counties; (e) guarantees equality of its citizens irrespective of race, nationality, ethnic origin, language, religion, gender, political opinion, membership in political parties, estate or social origin (art. 4-2); (f) recognizes national minorities and guarantees right to preserve, develop and express ethnic, cultural, linguistic and religious differences (art. 6-1), including right to education in one's mother tongue (art. 32-3), according to principles of equality and nondiscrimination (art. 6-2); (g) allows contact with Romanians living abroad; (h) guarantees political pluralism; (i) includes right to join trade unions; and (j) validates international agreements to which it is party (“treaties ratified by Parliament become domestic laws”). (art. 11-2).

Constitutional law is construed and applied in accordance with United Nations Universal Declaration on Human Rights (10 Dec. 1948) and with treaties signed by Romanian government. In case of conflict between international and domestic law, international law is paramount except when Romanian Constitution or internal laws contain more favorable provisions. (art. 20).

Public Authorities.

Sovereign power is distributed among Parliament, Presidency, Government, Central and Local Public Administration, Judiciary, Public Ministry and Superior Council of Magistrates. Parliament makes laws, President promulgates them, Government carries them out and Courts interpret them and adjudicate disputes.

Parliament is supreme representative body of Romanian people and sole national legislative authority. (art. 61-1). It is composed of Chamber of Deputies and Senate, which are elected to four year terms by universal, equal, direct, secret and free suffrage in accordance with electoral law. (arts. 62-1, 63-1). Both Senate and Chamber of Deputies are governed by their own rules of conduct. Chamber of Deputies and Senate work either in plenary or separate sessions, and there are two ordinary sessions per year. First session starts in Feb. and may not extend beyond end of June. Second session starts in Sept. and may not extend beyond end of Dec. Extraordinary sessions take place at request of President of Republic, Permanent Bureau of each Chamber, or at request of at least one-third of number of deputies or senators.

Chamber of Deputies and Senate adopt laws, decisions and motions by majority vote. Legislators may not be made to account for their votes or political opinions. (art. 72-1). Legislative initiative belongs to Government, deputies and senators, as well as to at least 100,000 citizens with voting rights from at least one-fourth of country's counties (5,000 from each county or Bucharest). (art. 74-1). Fiscal issues, international issues, amnesty and pardon cannot be subject to citizens' legislative initiative. (art. 74-2). Chamber of Deputies, as first notified chamber, debates and adopts bills and legislative proposals for ratification of treaties or other international agreements and legislative measures deriving therefrom, as well as bills of organic laws. Other bills or legislative proposals are submitted to Senate, as first notified chamber, for debate and adoption. First notified chamber must rule within 45 days, except for complex legislation for which term is 60 days. If such terms are exceeded, bill or legislative proposal are deemed approved. After first notified chamber adopts or repeals it, bill or legislative proposal is sent to other chamber, which will make final decision. (art. 75).

Legislative Council of Romania functions as advisory body for Parliament. It unifies and coordinates all laws passed by Parliament and keeps official record of legislation of Romania. (art. 79-1).

President of Romania is elected by universal, equal, direct, secret and free suffrage. (art. 81). President's term of office is five years, commencing on date on which oath of office is taken. (art. 83-1).

President plays prominent role as representative of state and guarantor of national independence, unity and territorial integrity. President has following duties: to safeguard Constitution and proper functioning of state authorities; to act as mediator between powers in state and between state and society (art. 80); to propose candidates for Prime Minister and appoint Government based upon Parliament's vote of confidence; to dissolve Parliament if it refuses to grant Government vote of confidence within 60 days after first demand is made, but only after second demand is rejected; to conclude international treaties negotiated by Government and to submit them to Parliament for ratification; to issue Decrees.

Parliament may after consulting Constitutional Court suspend President from his duties, in case he has committed grave acts that violate Constitution.

Government effects domestic and foreign policies ratified by Parliament and exercises general management of public administration. (art. 102-1). Government consists of Prime Minister, Ministers and other members established by law.

Parliament is entitled to withdraw confidence in Government, by adopting motion of censure by majority vote of deputies and senators. (art. 113).

Judiciary.

High Court of Cassation and Justice and other courts established by law are charged with ensuring justice. Extraordinary courts may not be created. (art. 126).

Public Ministry.

Within judicial system, Public Ministry represents general interests of society and defends lawful order, and rights and liberties of citizens. (art. 131-1). Its functions are exercised by public prosecutors.

Superior Council of Magistracy is body of magistrates elected by Senate for six-year terms, except for its president who is elected for one year. (art. 133). It makes proposals to President for appointment of judges and public prosecutors. (art. 134).

Constitutional Court consists of nine judges, appointed for term of nine years. (art. 142-2). Three judges are appointed by President of Romania, three by Senate and three by Chamber. (art. 142-3). Fundamental task of Constitutional Court is to rule upon constitutionality of laws before promulgation, upon notification by any of following: President of Romania, President of either Chamber of Parliament, Government, Supreme Court of Justice, Advocate of People, number of at least 50 deputies or at least 25 Senators, as well as initiatives to revise Constitution. (art. 146-a). Court is also imbued with power to adjudicate on constitutionality of Standing Orders of Parliament and laws and orders.

Advocate of People.

In respect of defending citizen's rights and freedoms, Advocate of People is appointed by Senate, for term of five years. Advocate of People may not hold any other public or private office (art. 58-2) and must exercise powers ex officio or upon request of persons aggrieved in their rights and freedoms, within limits established by law, being supported by public authorities in exercise of powers (art. 59-1). Advocate of People must report before Parliament, annually; reports may contain recommendations on legislation or measures of any other nature for defense of citizens' rights and freedoms. (art. 60).

1.03 HOLIDAYS:

In accordance with Labor Code of Romania and National Level Collective Labor Contract, such holidays are established: (1) Jan. 1, 2—New Year; (2) May 1—International Labor Day; (3) Dec. 1—National Day of Romania. Religious days also holidays: (1) 1st and 2nd day of Easter; (2) Dec. 25 and 26—Christmas.

1.04 OFFICE HOURS AND TIME ZONE:

Romania is in +02:00 GMT time zone. Office hours are generally from 9:00 AM to 5:00 PM.

2 BUSINESS ORGANIZATIONS

2.01 ASSOCIATIONS AND FOUNDATIONS:

Citizens are equal before law and public authorities with regard to privileges and discrimination (Constitution, art. 16 paragraph 1), and enjoy right to enter into associations irrespective of sex, race, nationality, religion, culture or origin. Ordinance 26/2000 regarding associations and foundations (“OG 26”), as amended by GO 37/2003 and Law 246/2005, governs legal regime of associations and foundations.

Natural and legal entities whose purpose is to carry out activities of general or local community interest or their own noncommercial interest can set up associations and foundations that are considered to be legal entities without commercial scope. (art. 1). Associations and foundations that are established as Romanian legal entities by natural or legal foreign entities can acquire ownership right and any other real rights over property necessary to carry out scope of association or foundation.

Associations.

Association is set up by three or more persons who, upon consent, pool without any restitution right, in-kind contributions, knowledge or work volume to carry out activities of community or personal but noncommercial interest. Association acquires legal personality after registration in Associations and Foundations Registry with competent court register. Constitutive Act and Statutes of Association must be executed in notarized form or must be attested by lawyer.

Foundations.

Foundation is established by one or more persons who contribute with assets for fulfillment of purpose of general or community interest. Initial assets of foundation must be no less than equivalent of 100 minimum monthly gross salaries per economy, calculated at date of setting out foundation (RON 44,000 and approximately EURO 14,000). In view of acquiring legal status, founding member or members must conclude Constitutive Act and Statutes of Foundation in notarized form, under sanction of absolute nullity. (art. 16). Foundation acquires legal personality after registration with Associations and Foundations Registry with competent court register.

Federations.

Two or more associations or foundations may establish federation. Federations acquire legal personality and operate under conditions provided for associations with noncommercial purpose. Association or foundation members of federations keep their own legal personality as well as their own assets.

Associations and Foundations as Public Utilities.

Associations or foundations can be recognized by Romanian Government as public utility if following conditions are met: (i) Activity carried on is of general or community interest; (ii) they operate for at least three years; (iii) they present report comprising list of significant previous activities and specific programs or projects that were carried out together with balance sheets, expenses and income budgets for past three years from date of submitting registration; (iv) amount of patrimonial assets of associations and foundations for each of previous three years is at least equal with amount of initial patrimony. Association or foundation is recognized as public utility by Government decision.

Recognition of public utility gives association or foundation rights and obligations, such as: (i) Right to be granted free use of public goods; (ii) right to stipulate that foundation or association is recognized as public utility; (iii) obligation to maintain at least same level of activities and performances that led to its recognition as such; (iv) obligation to inform administrative authority in force about any amendments to Constitutive Act and Statutes, as well as to issue activity reports and annual balance sheets. Administrative authority has obligation to furnish such documents for information to any interested person; (v) obligation to publish extract of activity reports and balance sheets in Official Gazette of Romania, Part IV as well as in National Registry of legal entities without commercial scope, within three months from end of calendar year.

Registration.

Associations, foundations and federations are registered in special registers, held by courts, according to Ministry of Justice Order 954/2000 approving regulations regarding organization of Registry of Associations and Foundations, Registry of Federations and National Registry of legal persons without patrimonial purpose. Centralized registration of such associations, foundations and federations is performed by Ministry of Justice, through National Registry of legal persons without patrimonial purpose.

Incomes of Associations and Federations.

Incomes of associations, foundations or federations generally result from: (i) Membership contributions; (ii) interests and dividends resulting from investment of available funds according to law; (iii) dividends of commercial companies established by associations or federations; (iv) income obtained from direct economic activities; (v) donations, sponsorships or testamentary gifts; (vi) resources from state budget and/or local budgets; (vii) other income provided by law. (art. 46). Please note that OG 26 expressly provides that foundations' income does not consist of membership contributions.

Dissolutions.

Associations and federations are subject to dissolution under following circumstances: (i) By effect of law; (ii) by County Court or Tribunal decision; (iii) by decision of general meeting of associates. Foundations are subject to dissolution under following circumstances: (i) By effect of law; (ii) by County Court decision.

Miscellaneous.

Associations and foundations can establish commercial companies. Dividends obtained from activities performed by these commercial companies can be reinvested in such companies, otherwise they must be used in order to support scope of foundation or association. (art. 47). Foreign legal entities without commercial purpose can be recognized in Romania, under reciprocity condition, based on previous approval of Government, by registration in Registry of Associations and Foundations with Bucharest Tribunal, if they are legally established in state of origin and their statutory purposes do not contravene public order.

2.02 BUSINESS ENTITIES:

Business entities are governed by Law 31/1990 (“Company Law”), as amended.

General Provisions.

Natural and legal persons may associate and form business entities to carry out commercial activities. Business entities based in Romania are considered Romanian legal persons.

Business entities may be established as (a) general partnerships, (b) limited partnerships, (c) joint-stock companies, (d) partnerships limited by shares, and (e) limited-liability companies.

Partners in general partnerships, general partners in limited partnerships or in partnerships limited by shares are held jointly and severally liable obligations of their company and without limit for liabilities of their company. However, law provides that creditors of company must first hold company liable and, if debts are not paid within 15 days from default notice, creditors shall go against associates. Shareholders in joint-stock companies, limited partners in limited partnerships or in limited partnerships by shares, and associates in limited-liability companies are held liable within limits of their subscribed equity. Terms “associates” and “social parts” are used instead of terms “shareholders” and “shares” in referring, respectively, to equity owner and amount of equity held in limited liability companies.

Incorporation Document of Business Entity (All Types of Companies).

Incorporation document (Contract of Association and By-laws, or Constitutive Act) of business entity is signed by all shareholders or by all founders in case of joint-stock companies formed by public subscription through offering prospectus. Notarization of incorporation document is required only in three cases: (i) When company is formed by public subscription; (ii) when land is contributed to share capital; and (iii) when new company is established as general partnership or limited partnership.

Signatories of incorporation document are considered founders of such entity. Individuals convicted for fraudulent administration, abuse of trust, forgery, use of forgery, fraud, stealing, dilapidation, false deposition, persons convicted for infringements according to Law 656/2002 for prevention and enforcement of money laundering, as well as for taking prevention and fighting measures against financing terrorist acts or according to Law 85/2006 regarding insolvency procedure, as well as any other infringements provided by law cannot be founders.

Registered share capital of joint-stock company and of partnership limited by shares may not be lower than RON 90,000 (approximately [Euro]25,000). Number of shareholders in joint-stock company may not be less than two.

Registered share capital of limited-liability company may not be lower than RON 200 (approximately [Euro]60), and must be divided into equal shares of not lower than RON 10 (approximately [Euro]3). Social parts may not be represented by negotiable titles.

Limited-liability company must not have more than 50 associates.

Natural person or legal entity may be sole associate in only one limited-liability company. Limited-liability company cannot have as its sole associate, another company with limited liability (whether located in Romania or abroad) that itself has single shareholder.

Cash contributions are compulsory for incorporation of any type of company. Subsequent, in-kind contributions are permitted for all types of companies. Labor cannot be contributed to formation or increase of share capital.

Companies may have same headquarters if at least one person is shareholder in each of such companies. Several companies may have their registered headquarters at same address and in same building if: structure of this building allows functioning of several companies in separate rooms; aforementioned companies have at least one common shareholder; or at least one of shareholders is owner of building in which company's headquarters will be located.

Procedures Specific for Formation of Joint-Stock Company by Public Subscription.

Issuance prospectus must be filed with Trade Registry in county where company will be headquartered.

Company may be formed only if entire capital is subscribed, and if each subscriber has paid half of value of subscribed shares at House of Savings (in Romanian “Casa de Economii si Consemnatiuni”) or at commercial bank; remaining capital must be paid within 12 months.

Each subscriber has right to one vote in constitutive meeting, irrespective of shares subscribed and may be represented by special mandate. No person may represent more than five subscribers. Constitutive meeting is legally convened if half plus one of number of subscribers are present, and decides with simple majority of votes.

Company Registration.

Founders, first administrators, first members of Management Board or of Supervisory

Board, as case may be, or persons empowered by above-mentioned must request registration of company within 15 days from execution of registration documents. Application must also include: registration documents; proof of subscription of registered capital; proof of headquarters and name reservation; documents attesting property of in-kind contributions or documents attesting liens of such property, if any; statement on own liability regarding compliance with law of founders, first administrators, first directors or, as case may be, of first members of Management Board or of Supervisory Board and, under certain conditions, of first censors.

Company will be deemed legal entity as of date of its registration with Trade Registry. Registration is made within 24 hours from decision date of delegated judge at Trade Registry.

Subsidiaries are deemed business establishments enjoying legal status.

Branches are deemed extensions of business entities, devoid of legal status.

Foreign business entities may establish subsidiaries, branches, agencies, representative offices and other secondary headquarters in Romania, if law governing their organic statute recognizes such right.

Common Provisions Regarding Functioning of Business Entities.

Administrators may conduct all actions in order to fulfill company's object of activity within powers granted through Constitutive Act.

Administrators who have right to represent company may not transfer such right unless this power is expressly granted to them by Constitutive Act.

Administrators are jointly liable to company for: accuracy of payments made by associates; actual existence of paid dividends; existence and correct keeping of registers provided by law; exact fulfillment of resolutions of General Meetings of shareholders; strict fulfillment of duties set forth by law and Constitutive Act.

Any bill, offer, order, tariff table, prospectus, as well as any other business documents issued by company shall bear name, legal form, registered office, trade register number and sole registration code of company. Tax receipts, printed by electronic cashiers shall be exempted; they shall bear elements provided by applicable legislation. Any noticed loss of net asset shall trigger readjustment of registered capital before any distribution of profit is made. If losses in net assets are found, registered capital shall be either completed or reduced before any allocation or distribution of profit is made.

General Partnerships.

If Partnership Agreement provides that Administrators must work together, decisions shall be taken unanimously.

Partners who represent absolute majority of registered capital may elect one or more Administrators from among themselves, and set forth their powers, term of office and remuneration.

Partners may not participate, as general partners, in competing companies or companies having same object of activity, nor may they undertake transactions on their own behalf or on behalf of others, in same type of trade or in similar trade, without consent of other partners.

Partners incur joint and unlimited liability for transactions carried out on behalf of company by its representatives. Court orders obtained against company are binding on each partner.

Limited Partnerships.

Administration of limited partnerships is assigned to one or more partners.

Limited partner may conclude transactions on behalf of company only based on limited power of attorney given for specific acts.

Joint-Stock Companies; Shares.

According to Company Law, shares of SA may be "nominative" or "bearer" shares. Nominative shares may be issued in dematerialized form (i.e. by account registration) or in material form (i.e. in hard paper form). Shares issued following public tender offer follow provisions of Law 297/2004, as amended, and regulations of organized market where such shares are traded. SA's shares are freely transferable and may be listed on capital markets.

Shares may not be issued for amount lower than their nominal value. Shares not fully paid for are always nominative shares. Registered capital cannot be increased, and no new shares can be issued unless shares of previous issue have been fully paid. (art. 92).

Nominal value of one share may not be less than RON 0.1.

Shares must have equal value and grant their owners equal rights. Company may issue classes of shares granting their owners different rights.

Company may issue preferential shares with priority dividend and without voting right. Shares with priority dividends and without voting right, may not exceed quarter of registered capital and shall have same nominal value as ordinary shares.

If shareholders fail to make payments as scheduled, company must summon them to comply with their obligations, by means of common notice, published twice at 15 days interval in Official Journal of Romania, Part IV, and in wide circulation newspaper. If, subsequent to this warning, shareholders are still in default regarding their payment obligations, Board of Directors or Management Board may decide to take legal action against shareholders for obligations, or cancel such shares.

Any paid-in share amount grants right to one vote per share in General Meeting of Shareholders ("GMS"), unless otherwise provided in company's Constitutive Act (e.g. one vote for three shares).

Possibility for company to subscribe its own shares is subject to special legal conditions. If nominal value of shares that company has acquired either itself or through person acting in his name but on behalf of company, including own shares already existing in its portfolio, exceeds 10% of subscribed registered capital, shares exceeding such rate shall be disposed of within three years of their acquisition.

Company may not advance funds, nor make loans, nor provide security with view to subscription or acquisition of its shares by third party. This shall not apply to transactions concluded by banks and other financial institutions in normal course of business, nor to transactions made with view to purchase shares by or for company's employees, provided that these operations do not result in diminishing net assets under cumulated value of subscribed registered capital and reserves, which may not be distributed in conformity with law or Constitutive Act.

Shareholders who are offering to sell their shares through public tender offer must observe provisions of Capital Markets Law 297/2004.

General Meetings of Shareholders (GMS) (Joint-Stock Companies).

GMS are either Ordinary or Extraordinary. When Constitutive Act does not provide otherwise, General Meetings must be convened at company's headquarters and at place indicated in summons.

Ordinary GMS must be convened at least once a year but not later than five months following end of financial year1. Main duties of shareholders through such ordinary meetings are: to approve financial statements of company and to establish dividend; to elect and dismiss members of Board of Directors, members of Supervising Committee and censors; to appoint and revoke financial auditor of company, establishing its remuneration and duration of mandate; to determine budget and business plan of company for next fiscal year; to evaluate performance of Board of Directors and Management Board and to decide whether to pledge, lease or dissolve one or more of company's units. Decisions in ordinary GMS are taken, at first call, with quorum of at least ¼ of total number of voting rights, with majority of votes. Higher majority may be provided through company's Constitutive Act. If quorum is not met at first meeting, second meeting shall take place. At second call, decision may be approved irrespective of quorum, with majority of votes. Company's Constitutive Act cannot provide for second ordinary GMS with higher majority or minimum quorum.

Certain corporate actions require calling of Extraordinary GMS. Such Extraordinary GMS may be convened whenever necessary (e.g. for decreasing or increasing share capital, changing object of activity or headquarters, merger or spin-off). Extraordinary GMS is always necessary in order to amend Constitutive Act. Please note that exercise of some of Extraordinary GMS powers may be delegated to Board of Directors or to Management Board, such as changing of headquarters, or, within certain limits, increase of share capital.

Decisions in Extraordinary GMS are taken, at first call with quorum of ¼ of total number of voting rights, with majority of votes. If quorum is not met at first meeting, second meeting shall take place. At second call for valid meeting, required quorum is at least 1/5 of total number of voting rights and decisions are approved with majority of votes. Decisions regarding modification of main scope of activity, increase/decrease of share capital, changing of legal form, merger/spin-off, dissolution of company are taken with majority of 2/3 of voting rights of shareholders present or represented at meeting. Please note that Constitutive Act of company may provide higher majority or quorum for Extraordinary GMS. Administrators must convene GMS whenever necessary, but not sooner than 30 days from date summoning notice was published in Official Gazette. Notice of convocation shall be published in Official Gazette of Romania, Part IV and in newspaper of wide circulation in locality of company's registered headquarters or in nearest place. If all company's shares are nominative, notice of convocation may be done by registered letter or, if Constitutive Act allows it, letter transmitted by electronic means, having incorporated, attached or logically associated extended electronic signature to be delivered to address of shareholders as mentioned in Shareholders Register, at least 30 days prior to gathering of meeting. Notice of convocation must indicate place, date and agenda of meeting, and detailed description of all issues to be debated.

Board of Directors or Management Board is obliged to convene GMS immediately upon request of shareholders representing individually or jointly, at least five percent of registered capital or lower quota, in case Constitutive Act stipulates it, and in case request contains provisions that are part of meeting's prerogatives. General Meeting shall be convened within maximum 30 days and shall take place within maximum 60 days since request has been received.

Shareholders that represent entire registered capital may, if none opposed, hold GMS and approve any competent decision, without observing formalities required for its summoning.

1 Under the Romanian law, the financial year corresponds to the calendar year. For the time being, there is no possibility to choose another period as fiscal year.

If shares are encumbered by usufruct right, voting right shall revert to usufructuary in Ordinary GMS, and to owner in Extraordinary GMS. If shares are pledged, voting rights shall belong to owner.

Shareholders may be represented in GMS based on special power of attorney. Shareholders who do not have legal capacity, as well as legal entities, may be represented by attorney-in-fact who in his turn may deliver special power of attorney to third parties. Proxies must be submitted within 48 hours before meeting or within delay provided by Constitutive Act. Members of Board of Directors, directors, and, as case may be, members of Management Board and of Supervisory Board or company's accountants cannot represent shareholders, under sanction of absolute nullity if required majority was not met without their votes.

Voting rights may not be assigned. Any agreement whereby shareholder is obliged to exercise his voting right in accordance with instructions or proposals issued by company or by its representatives is deemed void.

GMS must be opened by chairman of Board of Directors or of Management Board or by their substitute. GMS shall elect from among present shareholders, one up to three secretaries who shall verify shareholders' attendance list, indicating registered capital which each one represents, minutes drawn up by technical secretary to ascertain number of shares deposited and fulfillment of all requirements provided by law or Constitutive Act for General Meeting.

Secret ballot is compulsory for election of members of Board of Administration and of censors, for their revocation, and for issuing decisions regarding Administrators' liabilities. Secret vote is mandatory for election of members of Board of Directors or of Supervisory Board, of censors or financial auditors, for their dismissal and for deciding upon liability of members of administration, management and control bodies of company.

Decisions of GMS will be valid against third parties, after they are registered within 15 days with Trade Register Office to be registered and published in Official Gazette of Romania, Part IV.

Decisions of GMS approved in accordance with law or Constitutive Act are compulsory even for those shareholders who did not attend or who voted against decision. With respect to decisions of GMS, which failed to observe law or Constitutive Act, court challenge may be submitted within 15 days from publication in Official Gazette of Romania, Part IV, by any of shareholders who did not attend meeting or who voted against and requested that such vote is mentioned in minutes of meeting.

Shareholders who disagree with resolutions taken by GMS regarding: changing of company's main scope of activity, transfer abroad of main registered office of company, changing of company's legal form, merger and division of company, have right to withdraw from company and request to company to acquire their shares. Right of withdrawal may be exercised from publication of decision of GMS in Official Gazette of Romania or from adoption of decision, as case may be.

Management of Company (Joint-Stock Companies).

Company Law provides two possibilities of management for joint-stock companies: one-tier system and two-tier system (optional).

a) One-tier system

Board of Directors assures management of company. Members of Board of Directors are called “administrators”. Board of Directors may delegate2 some of its management duties to company's directors, and if such directors are also administrators, they are called executive administrators. However, there are some competencies of Board of Directors which may not be delegated to directors: setting up of main directions of activity and development of company, setting up of accountancy and financial control system, as well as approval of financial planning, appointment and dismissal of directors and establishing their remuneration; supervision of director's activity, preparing annual report, organizing GMS and implementing its decisions, filling request for opening insolvency procedure in accordance with Law No. 85/2006 regarding insolvency procedure.

Members that are not directors are called non-executive administrators. In case of delegation of powers to directors, majority of Board of Directors members must be non-executive administrators. President of Board of Directors is elected among members. President represents company to third parties and has decisive voting right in case of deadlock situation, unless otherwise provided in company's Constitutive Act.

Also, relations between company and administrators are governed by rules enacted by civil law in respect to mandate. Company Law forbids conclusion of employment contract with directors and administrators of company in order to perform such mandate.

b) Two-tier system

Administration of company in case of two-tier system is assured by Management Board and Supervisory Board.

Management Board has one or more members, always odd number. Members of Management Board are elected by Supervisory Board, which also designates President of MB. Members can be revoked by Supervisory Board or by GMS.

Supervisory Board must have at least three members but no more than 11 and shall elect one of them as President of Supervisory Board. Members are elected and revoked by GMS. Member of Management Board cannot be at same time member of Supervisory Board. At least once every three months, Management Board must submit to Supervisory Board written report on management of company, on its activity and possible evolution. Also, it shall submit to Supervisory Board annual financial statements and annual report immediately after they were drafted.

Supervisory Board has following main duties: Exercise permanent control over management of company by Management Board; appoint and revoke members of Management Board; verify if management of company is performed in accordance with law, company's Constitutive Act and GMS' decisions; report at least once a year to GMS on supervising activity performed during respective year. Management Board represents company in relation with third parties and to courts of justice and runs day-to-day management of company. Unless provided otherwise in Constitutive Act of company, members of Management Board jointly represent company.

2 In case of joint-stock companies under the obligation to audit their financial statements, the delegation of duties to directors is compulsory.

Censors.

As general rule, SA is required to appoint three censors and one deputy-censor. In each case, number of censors must be odd. They are elected for period of three years with possibility of re-election.

SA that is not required under Romanian law to audit its financial statements may choose to appoint, by decision of Ordinary GMS, financial auditor instead of censors. However, please note that for SA under two-tier system, it is mandatory to appoint financial auditor at all times.

Issuance of Bonds (Joint-Stock Companies).

Joint-stock company may issue bearer or nominative bonds. Nominal value of bond shall not be lower than RON 2.5.

Bondholders may convene GMS to debate on their interests.

Before maturity, bonds of same issue and value may be redeemed, by drawing lots, for amount higher than their nominal value, established by company and made public at least 15 days before drawing. Convertible bonds may be exchanged for shares of issuing company.

Company's Books and Annual Financial Statements (Joint-Stock Companies).

Joint-stock companies must maintain: Shareholders Register, register of meetings and proceedings of General Meetings; register of meetings of Board of Directors, or of Management Board and Supervisory Board; register of proceedings and findings made by censors and, as case may be, internal auditors while exercising their mandate; register of bonds mentioning total number of issued and reimbursed bonds, as well as first and last name, denomination and place of residence or registered office of holders, in case they are registered; any other registers provided by special laws.

Shareholders Register and Bonds Register may be kept manually or in computer databases.

Company may enter into agreement with private independent register to keep Shareholders Register by computer.

Every year, at least 5% of company's profit must be allocated to formation of reserve fund, until it reaches equivalent of at least one-fifth of registered capital. Board of Directors or Management Board shall have duty to submit to Trade Registry, within 15 days from date of GMS, on paper support and in electronic format, or only in electronic format having attached extended electronic signature, copies of annual financial statements, accompanied by their report, report of censors or of financial auditors, as well as minutes of General Meeting, in accordance with provisions of republished version of Accountancy Law No. 82/1991.

Partnerships Limited by Shares, General Provisions.

Partnership limited by shares is governed by provisions regulating joint-stock companies, and other specific provisions of Law 31/1990.

One or more general partners manage company.

Active partners who are administrators cannot participate in proceedings of General Meetings for election of censors or, as case may be, of financial auditor, even if they hold shares in partnership.

Limited-Liability Companies.

Constitutive Act may establish that votes can be given by correspondence.

Each social part grants its owner right to one vote in General Meeting of Associates

("GMA"). Law provides that GMA shall decide upon: approval of financial statements of company and distribution of net profit; appointment and replacement of administrators, censors and auditors, as well as discharging them of liability; legal actions against administrator(s) and auditor(s) for damages caused to company; and amendment of company's Constitutive Act.

At first call, GMA takes decisions with votes representing absolute majority (50% + one) of "associates and social parts" (so-called "double majority"). For second call, meeting is valid and decisions are taken irrespective of number of associates and social parts represented in meeting. Possibility of associates to derogate from this rule is disputable, due to lack of specific provisions in Company Law.

For decisions involving amendments to Constitutive Act, unanimous vote of associates is required unless otherwise stipulated by company's Constitutive Act. Administrators must call General Meeting at company's registered headquarters at least once a year. Associates representing at least one quarter of company's equity may demand that General Meeting be convened.

Company is managed by one or more Administrators, who may or may not be associates. Such Administrators may not accept appointment as Administrators in competing companies, nor shall they trade in same type of business or in competing business, without approval of General Meeting.

Constitutive Act of company may provide for appointment of one or several censors or one financial auditor. Appointment of censors is mandatory whenever company has more than 15 associates. If not such person is appointed, those associates who are not also directors of company exercise financial oversight.

Limited-liability company may not issue bonds.

Social parts are freely transferable only between associates. Transfer of social parts to third parties requires approval of associates holding at least ¾ of share capital of company. All transfer of social parts must be registered in company's Shareholders Registry and with relevant Trade Registry to be effective against third parties.

Amendment of Constitutive Act (All Companies' Type).

Constitutive Act may be subject to modifications through decision of GMS, of Board of Directors or, as case may be, of Management Board, adopted in compliance with law, or through court decision. Additional Act comprising full text of amended provisions of Constitutive Act must be registered and entered into Trade Registry, after which it shall be ex officio submitted to Official Gazette of Romania for publication at expense of company. Notarization of Additional Act to Constitutive Act is required when it refers to increase of registered capital by in-kind contribution of land, to change of legal form of company into Partnerships, to increase registered capital through public subscription.

Decrease or Increase of Registered Capital (All Companies' Type).

Decrease of registered capital may be performed through decrease in number of social parts, reduction of nominal value of shares or of social parts, purchase by company of its own shares and subsequent cancellation of them. Reduction of registered capital shall be possible only after passing of two months from date when decision is published in Official Gazette of Romania, Part IV. Decision shall have to conform with minimum registered capital, where law provides for such minimum, to show reasons for reduction as well as procedure for its accomplishment.

Registered capital may be increased by issuing new shares or by increasing nominal value of existent shares in exchange of new contributions in cash or in-kind. New shares are issued by incorporation of reserves, except for legal reserves, as well as benefits or issue premiums, or by compensating certain due and accrued debts of company with its shares. Favorable differences resulting from patrimony revaluation shall be included in reserves without increasing registered capital. Increase of registered capital by increasing nominal value of shares may be decided only by vote of all shareholders, except for case where it is done by incorporation of reserves, benefits and issue premiums.

If increase of registered capital is made through in-kind contribution, GMS that decided upon such increase shall propose to delegated judge to appoint one or several experts to assess these contributions.

Limited liability company shall increase its registered capital in accordance with provisions regarding joint-stock companies, including debt-equity swap.

Shares issued for capital increase must be offered for subscription to current shareholders first. Shareholders also have preemption right when company issues bonds convertible into shares.

Shares issued in exchange for cash contributions must be paid, upon subscription date and in proportion of at least 30% to their nominal value, and balance remaining to be paid is no more than three years after date of publication in Official Gazette of Romania of decision of GMS.

Dissolution of Business Entities (All Companies' Type).

Company may be dissolved in any of following circumstances: Expiration of company's duration; impossibility of fulfilling company's object of activity or completion thereof; Constitutive Act is declared null; by resolution of General Meeting; by court decision at request of any shareholder due to serious dissension among shareholders that prevents company from operating; company's bankruptcy; or registered capital has fallen below legal level; number of shareholders has fallen below minimal legal number and other cause provided by law or by company's Constitutive Act.

Merger and Spin-off.

Merger or spin-off will result in dissolution, without liquidation, of company that ceases to exist, and transfer of its assets to benefiting company or companies. In exchange for such assets, shareholders of company ceasing to exist will receive shares in recipient companies, and, possibly, amount of money, which shall not exceed 10% of nominal value of shares so assigned.

Creditors of companies who take part in merger or division are entitled to adequate protection of their rights. Any such creditor, whose claims are antedate publication of draft terms of merger or of division and are not due at time of such publication, may file challenge.

In event of merger by takeover, absorbing company obtains rights and obligations of absorbed company, and in event of merger by fusion, rights and obligations of companies that ceased to exist are transferred to new established company.

Liquidation, General Provisions.

Liquidators may be natural or legal persons. Liquidators, natural persons or permanent representatives—natural persons belonging to liquidating company—should be authorized liquidators, in compliance with law.

Liquidation of General Partnerships, Limited Partnerships and Limited-Liability Companies.

Liquidators in general partnerships, limited partnerships or limited-liability companies must be appointed by all partners if Incorporation Document does not provide otherwise. In event unanimity of votes is not achieved, liquidator must be appointed by court of law.

Liquidation of Joint-Stock Companies and Partnerships Limited by Shares.

Liquidators are appointed by GMS. In event that majority is not achieved, appointment is to be made by court of law.

Offenses.

Imprisonment from one to five years is punishment for any founder, administrator, manager, executive manager or legal representative of company who is proven to have: introduced, in bad faith, untrue information regarding company's incorporation or status of its business, or concealed part or all of such information; submitted inaccurate financial statement or inaccurate data; or refused to provide experts with necessary documents.

Imprisonment from one to three years is punishment for any founder, administrator, manager or legal representative of company who is proven to have: (i) Acquired, on behalf of company, shares in other companies for price which he knows is higher than their real value, or to have sold, on behalf of company, shares held by other companies, for prices that he knows are well under their real value, with purpose of obtaining profit, for him or for others, to prejudice of company; (ii) used, in bad faith, company's assets or credit for purpose contrary to its interests or for his own benefit or in order to favor another company in which he is directly or indirectly interested; (iii) taken loan, in any form, directly or through person acting on his behalf, from company he is administering or from company under its control or from company which controls one he is administering, loan which being well superior to limit provided by law, or made arrangement so that one of these abovementioned companies grant him any kind of guarantee for his own debts; or (iv) breached provisions of Art. 183. Law however, provides in some cases non-punishment for named persons if they acted under certain conditions.

Imprisonment from six months to five years is punishment for any founder, administrator, manager, executive manager or legal representative of company, who is found to have: issued shares for value lower than their legal value or for price that is lower than nominal share or issues new shares against cash contributions, prior to full payment of previous shares; used shares that have not been subscribed or distributed to shareholders in General Meetings; granted loans or advance payments secured by company's shares; delivered shares to their holders prior to their delivery term; disobeyed legal provisions regarding cancellation of unpaid shares; or issued bonds without observing legal provisions.

Imprisonment from one month to one year or fines is punishment for any founder, administrator, manager, executive manager or legal representative of company, who: implements resolutions of General Meeting regarding company's change of legal status, merger, division or reduction of share capital, prior to expiration of terms provided by law; implements resolutions of General Meeting with regard to reduction in registered capital without having notified associates about payments due, or in absence of resolution of General Meeting exempting them from subsequent payments.

Imprisonment of two up to eight years is punishment for any founder, administrator, manager or legal representative who: spreads false information or uses other fraudulent means resulting in increasing and reducing value of company shares and bonds or of other titles it owns, with purpose of obtaining profit for him or for others, to prejudice of company; cashes or pays dividends, under any form, resulting from fictive profits or that could not be distributed, in case there is no financial statement or contrary to its outcomes.

Criminal offenses established by Law 31/1990 also apply to liquidators.

Imprisonment of three to 12 years for persons found guilty of fraudulent bankruptcy. Criminal action for offences mentioned in this title shall be exercised ex officio.

For securities companies, provisions of Law 31/1990 were amended by provisions of Law 297/2004 regarding capital markets.

2.03 CORPORATIONS:

See topic 2.02 Business Entities.

2.04 JOINT STOCK COMPANY:

See topic 2.02 Business Entities.

2.05 PARTNERSHIPS:

See topic 2.02 Business Entities.

3 BUSINESS REGULATION AND COMMERCE

3.01 AGENCY/MANDATE:

Definition.

Agency refers to legal relationship whereby agent is authorized to act on behalf of principal for some legal matter, thus binding principal with respect to third parties.

Authority and Classification.

General rules on mandates are provided by Civil Code and Commercial Code, but specific laws exist for: (i) Representation of principal during privatization process, (ii) representation of principal through intermediaries whenever sale of securities on capital markets, (iii) representation by commercial agents, (iv) representation by directors of commercial companies. Civil agency, relating to performance of civil acts, is regulated by Civil Code, arts. 1532-1559. Commercial agency, which relates to conducting business affairs on behalf of principal, is governed by Commercial Code, arts. 374-404.

Agency falls under several categories: (a) general, in which it applies to all operations (administrative acts) of concern to principal, or in particular, in which one or more specific acts are performed on behalf of principal; (b) representative, in which agent acts nomine alieno (on behalf of principal), or non-representative, in which agent acts on behalf of principal but signs document in his/her own name, as is common in commercial context (e.g. shipping contract, consignment contract); (c) gratuitous (especially in case of civil agency), or for consideration (usually in case of commercial agency).

Agency contract must meet same formality requirements as are required for general contracts under Civil Code, arts. 948-968 (e.g., capacity to conclude contract, valid consent, definite object, legal cause).

Agency contracts are consensual, becoming effective through simple agreement of parties, and may be written, verbal, or tacit. (Civ. Code, art. 1533). Usually, agency is granted through written instrument (power of attorney, authorization, delegation) in which powers and limits of agency are set forth. Notarized power of attorney is necessary if law so requires. In order to represent principal in Court, agent should usually be attorney.

Duties of Parties.

Agent has following duties: (a) To execute, in good faith, duties of agency in accordance with contract and principal's reasonable instructions (Civ. Code, art. 1539); (b) to provide evidence to principal that duties have been fulfilled according to mandate (Civ. Code, art. 1541, Com. Code, art. 382).

Principal has following duties: (a) To put at agent's disposal means necessary for fulfilling agency (Com. Code, art. 385); (b) to compensate agent as agreed (Com. Code, art. 386); (c) to reimburse agent for reasonable expenses incurred while performing within scope of agency (Civ. Code, arts. 1547 and 1549).

Legal Effect.

In concluding legal act, agent establishes direct legal relationship between principal and third party, as if principal had acted directly. Unauthorized acts concluded by agent do not bind principal, except for two cases: (a) case in which principal ratifies act, expressly or tacit (Civ. Code, art. 1546); (b) case in which third party concludes legal act in good faith with apparent agent (appearance created both by apparent agent and apparent principal—i.e. when principal terminates agency contract without informing third parties). When ratification is provided, principal is responsible to third party, unless third party accepted execution of legal act knowing that it was beyond limits of agent's power. (Civ. Code, art. 1545).

Termination.

Agency terminates upon: (a) revocation; (b) unilateral termination by agent; (c) death of either principal or agent; (d) court decree of interdiction; and (e) insolvency and bankruptcy of principal or agent. (Civ. Code, art. 1552). Party that unjustifiably revokes agency and breaches its corresponding duties shall be responsible for damages. (Com. Code, art. 391).

General Rules.

In business situations, relations between principal and agent are usually established by way of mandate contract, which has as its object “negotiation of commercial business in name and on behalf of principal”. (Com. Code, art. 374).

Mandate may be either of following: (a) with representation, when agent has representative capacity, acting in name of principal; or (b) without representation, when agent acts on behalf of principal, but signs document on its own behalf (such as commission or consignment).

In case of mandate with representation, legal document signed by agent will yield direct legal effects for principal, as if latter personally signed such contract. Representation assumes existence of power of attorney given by principal. If scope of representation is general, agent is empowered to sign all legal acts in interest of principal, except those strictly personal. If scope is special, agent is empowered to sign specific legal acts. (Com. Code, art. 375; Civ. Code, art. 1537). Also, special power of attorney is required by law in case of disposition acts where agent signs on behalf of principal (i.e., sale, donation).

Agent is obliged to act solely within limits of powers granted by principal, and must make known its quality of agency to third parties. (Civ. Code, art. 1545).

Representation in Commercial Transactions.

Merchant, either natural or legal person, may be assisted in its activity by various auxiliaries who either represent its interests or help it accomplish commercial operations. Such auxiliaries may be dependent (employees of merchant) or independent (possessing quality of merchant in their own right). First category includes delegates, commercial salesmen and commercial travelers. (Com. Code, arts. 392-404). Second category includes brokers and commercial agents.

Delegate is empowered to operate its employer's business, either at same location or different location as that of employer. (Com. Code, art. 392). Therefore, delegate is empowered to manage employer's company, at head office or at branch, and to act in name and on behalf of employer. Capacity of delegate to act as agent is general, and lasts for duration of agency. Delegate concludes and executes daily operations of unit that he manages, without having to request specific approvals for each operation except for disposition acts when special power of attorney is required. However, such rights may be restrained by agency agreement. When signing documents, delegate is obliged to add name of employer's company and make mention that it signs “by power of attorney”. Legal provisions regarding delegates also apply to representatives holding powers of attorney, who are empowered to sign only for specific purposes and who are not empowered to effect trade on regular basis.

Commercial Salesmen.

According to Commercial Code, art. 404, commercial salesmen are delegates for retail sale of goods at location of employer's business and under its supervision. Commercial salesmen possess right, at location of business, to conclude and sign commercial contracts, and to request and collect payment for price of goods, providing valid receipt in name of employer.

Commercial travelers are empowered by their employers “to negotiate or undertake operations regarding employer's business” in locations other than those where employer's business is located. (Com. Code, art. 402). They are empowered to find clients and to collect offers and orders for subsequent execution by employer. In such cases, commercial travelers have quality of agents, without representative powers, but may sign legal acts in name and on behalf of employer if they are empowered to act upon commercial transactions.

Mediators establish contact between parties that are willing to enter into business transactions, and facilitate such parties in reaching agreement. Mediators do not have representative powers, and, therefore, do not represent parties. Mediator is entitled to commission if contract is signed as result of its intervention.

Commercial Agents.

There are two categories of commercial agents: (1) those regularly empowered by one or more merchants to negotiate commercial operations without right to sign on behalf of merchant(s); and (2) those regularly empowered by one or more merchants to sign commercial contracts on behalf of merchant(s).

Usually, commercial agents act in specific town or region for commission, investigate market and provide merchant with relevant information. They also keep deposited goods. Activity of commercial agent may be organized as commission company, agency or business office. (Com. Code, art. 3, para. 7).

Foreign Representative Offices in Romania.

Foreign companies may open their own representative offices in Romania on basis of authorization issued by Ministry of Industry and Commerce under conditions provided under Decree-Law 122/1990 as amended. Issuance of authorization is subject to annual fee of approximately USD 1,200. If representative office represents more than one firm, fee is increased by 10% for each additional firm represented.

International Private Law.

According to Law 105/1992, law of state under which agent is authorized to operate applies in agency relationships, even in absence of express agreement between principal and agent. If agent utilizes professional title in performing its duties, law of jurisdiction where agent's professional office is located will apply. (art. 93). Unless otherwise agreed, law of jurisdiction where agent's professional office is located governs relations between principal and third parties. (art. 95). In exercising its authority, agent must also comply with laws of state where agency is performed. (art. 97). Law of jurisdiction where property is located governs representation that concerns administrative acts and acts of alienation regarding immovable property. (art. 100).

3.02 BANKING LAW:

General Provisions.

Emergency Governmental Ordinance No. 99/2006 ("GEO 99/2006"), governs banking activity in Romania. Banking activity in Romania shall be carried out through authorized credit institutions as defined by law in accordance with National Bank of Romania ("NBR") Licensing Norms 10/2004 and NBR Norms 11/2004.

Definitions.

GEO 99/2006, art. 7, establishes definitions for following terms and expressions: "banking activity"—receiving deposits and other funds from public and granting credits; "credit institution": (i) entity performing banking activity; and (ii) entity other than those included under (i) issuing payments in electronic currency, called institution issuing electronic currency.

Activities Permitted to Credit Institutions.

Credit institutions, Romanian legal persons, and subsidiaries of foreign credit institutions, may undertake, within limits of authorization granted to them, following activities: receive deposits and other reimbursable funds; contract loans, including consumers loans, mortgage backed loans or provide financing of commercial transactions; perform financial leasing; issue and manage payments and loan instruments (e.g., credit cards, travel cheques) including issuance of e-money; issue guarantees and undertake commitments; discount bills of exchange, including contractual bills; transfer funds; perform payments and settlements; perform transactions on its own account or on customers' accounts by means of: negotiable monetary instruments (checks, drafts, deposit certificates); hard currency; derived financial instruments; negotiable securities; intermediation (brokerage) in area of exchange securities and related services; financial/banking consulting; intermediation and subscription in placement of securities; management of customers' portfolios, on their behalf and risk; custody over and management of negotiable securities; intermediation of inter-banking market; providing services with respect to data processing in lending field.

Financial activities of foreign credit institutions may be done directly in Romania.

Authorization of Credit Institutions.

Application for authorization may be granted by National Bank of Romania only if credit institution can ensure activity development in safety conditions of professional qualifications and expertise of credit institution's management; minimum level of initial share capital; feasibility study; shareholders and founders of credit institution; shareholding structure; registered headquarters of credit institution; and credit institution's financial auditor.

Within maximum of four months from receipt of application, National Bank of Romania shall give its approval for establishing bank, or shall reject application and send written notification to applicant with regard to its decision, giving reasons why application was rejected.

Application for authorization shall be rejected if: documentation is incomplete or does not observe legal provisions in force; quality of significant shareholders or persons appointed as administrators does not correspond to necessity of ensuring prudent administration in compliance with law and banking practice; before incorporation, founders made publicly available information regarding credit institution's operations; inadequate quality of financial auditors; from evaluation of documentation submitted, as case may be, results that credit institution cannot fulfill its objectives under terms compatible with requirements provided herein and in applicable reglementations. Initial capital level is lower than one required by law; legal form is other than one provided for category of credit institution incorporation of which is contemplated.

Organization and Management of Credit Institution.

In all of its official documents, credit institution must identify itself by supplying at least following information: name and date of registration with Credit Institution Registry.

Directors and managers of credit institution must have good reputation, education, adequate expertise and competency appropriate for such position and in compliance with law.

Mandatory Requirements for Founders or Significant Shareholders of Banks.

To be significant shareholder of credit institution, such entity must be evaluated and pre-approved by NBR. In accordance with Licensing Norms 10/2004, following entities/individuals cannot be shareholders of credit institution if they are: (i) Incorporated in country (a) without diplomatic relationship with Romania, or (b) which do not require bookkeeping and issuance of financial situations, or (c) which allows anonymity with respect to shareholders/administrators; (ii) persons whose sources of funds contributed by them to share capital come from countries mentioned above; (iii) entities or individuals to be found on Romanian terrorists black list as stated in Government Emergency Ordinance 159/2001; and (iv) open investment funds, capital risk funds and any other similar entities without legal personality, as well as unions.

Confidentiality.

Credit institution shall observe confidentiality regarding transactions and services provided, including identity of account holders. (art. 49).

Operational Requirements.

Credit institution shall organize their activity in respect of rules of prudent and healthy banking procedure codified by present ordinance and regulations emitted with regard to its application.

Capital Requirements.

Registered capital of credit institution shall be fully paid up, in cash, upon date of subscription. (art. 58). Minimum level of initial capital is established by NBR through norms, but cannot be lower than equivalent of [Euro]5 million.

Upon incorporation, registered capital issued shall be deposited into account, opened with credit institution. Capital account shall be frozen until registration of credit institution with Trade Registry.

Credit institutions shall permanently maintain minimum level of required capital, in cash, according to National Bank of Romania regulations.

Safeguard Requirements.

When granting loans, credit institutions may use standard approach for determining risk weighting value to exposures or approach based on internal rating pattern, with approval of NBR. With regard to standard approach, loan quality, including exposures emerging from security, can be determined referring to evaluations performed by credit external evaluation institutions.

Credit institutions may open agencies and branches or may set up subsidiaries abroad, only with prior approval of National Bank of Romania. (art. 64).

Credit institutions may invest up to 15% of their own funds in equity of public or private non-financial companies. Total amount of such equity investments is limited to 50% of credit institution's own funds.

Significant Shareholders.

Any person who intends to purchase interest of at least 10% of registered capital of credit institution shall obtain prior approval of National Bank of Romania, in accordance with regulations of National Bank. (art. 72).

Any initial and subsequent attempt to acquire shareholding surpassing 20%, 33% or 50% of share capital of credit institution must be authorized by NBR. They must fulfill following conditions: (i) Solid and stable financial situation; (ii) source and transparency of funds to be used for participation to credit institution's capital; and (iii) to be adequately supervised in country of origin.

Contractual Documents, Registers and Records.

All loan and guarantee operations performed by credit institutions must be in written form in contractual documents, with clear reference to terms and conditions of these transactions. Credit institutions shall keep these documents and present them to authorized personnel of National Bank of Romania, upon their request. (art. 79).

Accounts, Financial Statements and Their Control.

Each credit institution must appoint as independent auditor auditing firm that has been authorized to carry out such activity in Romania under provisions of law.

Independent auditor must: draft annual report with regard to saving and crediting activity in collective system for activities in locative field, to be also remitted to National Bank of Romania.

Each credit institution must publish information with regard to developed activity in form and under terms established by law.

Safeguard Supervision of Banks.

Inspections at headquarters of credit institution must be carried out by staff members of National Bank of Romania that have been empowered for this purpose, or by independent auditors appointed by National Bank of Romania.

Information referring to foreign credit institutions operating in Romania may be conveyed to banking supervision authorities from country of origin only on mutual basis. (art. 93).

Credit institutions shall be obliged to allow access to representatives of National Bank of Romania and to independent auditors, appointed under art. 171, who perform inspection, to examine registers, accounts and operations; they shall be obliged to provide all documents and information relating to management, internal control and operations of credit institution, as required by representatives of National Bank of Romania. (art. 94).

Remedial Measures and Sanctions.

National Bank of Romania may apply sanctions in event that it finds credit institution and/or any of its directors, managers or executives liable for: breaching provision of this Law or of regulations/orders issued by National Bank of Romania for enforcement of this Law; breaching any terms or restrictions foreseen in authorization released to credit institution; undertaking fictitious operations that have no real covering; failing to report, delaying to report or supplying incorrect data with regard to indicators of banking prudence or any other indicators stipulated by regulations of National Bank of Romania; breaching measures foreseen in control documents or as consequence of them; damaging credibility and viability of credit institution through bad management of funds it was entrusted with.

Sanctions of National Bank of Romania may include: written warning to credit institution; limitation of credit institution's operations; fines ranging between 0.05 and 1% of registered capital, fines on directors, managers or executives that represent between one and six average salaries per credit institution (such fines shall be paid to State budget); withdrawal of approval given to credit institution's directors; withdrawal of credit institution's authorization. (art. 99).

Enforcement of sanctions does not eliminate material, civil, administrative, or criminal liability. (art. 106).

Measures for Special Supervision of Credit Institutions.

Following supervision and/or review of credit institution's reports, National Bank of Romania may take measures for special supervision of credit institution in cases of infringements of either terms or safeguard measures issued by National Bank of Romania or when precarious financial situations are detected. (art. 112).

Measures for Special Management of Credit Institutions.

Measures of special management of credit institution may be taken in cases where National Bank of Romania finds or is notified of following: that measures of special supervision were not successful within period of three months; solvability indicator is below half of minimum level; credit institution has repeatedly failed to observe provisions of law or regulations issued pursuant to law; credit institution administration is no longer assured by at least two persons. (art. 115).

Special management measures shall be carried out by special director, appointed by National Bank of Romania. Special director may also be specialized corporate body, incorporated under provisions of law. (art. 117).

Special director shall take over fully work of Board of Directors of credit institution, subject to special management guidelines.

3.03 BILLS AND NOTES:

Legal Provisions.

Bills and notes are governed by Law 58/1934, as amended. Law 58/1934 is based upon uniform provisions of Geneva Convention of June 7, 1930. Romania is not party to Geneva Convention.

National Bank of Romania has issued Norms 6/1994 regarding trade of banking companies and other credit companies with bills and notes, and Technical Norms 10/1994 regarding bills and notes, as amended. In addition, following National Bank of Romania related acts were adopted: Regulation 8/1994, as amended, Norms 7 and 15/1994, as amended, and Technical Norms 9 and 16/1994.

Bills of Exchange. Formation.

According to Law 58/1934 art. 1, bill of exchange includes: (a) name of bill of exchange in its title; (b) unconditional order to pay determined amount; (c) name of person who must pay (drawee); (d) due date; (e) place of payment; (f) name of beneficiary; (g) date and place of issuance; (h) signature (including name) of person issuing bill of exchange (drawer).

Drawer is liable for acceptance of bill of exchange and its payment (art. 11). After its issuance, bill of exchange is presented, prior to its expiration, to drawee at his domicile for acceptance. (art. 24). Acceptance is written on bill of exchange as “accepted”, or its equivalent, and is signed by drawee.

Acceptance and Obligations.

Drawee's signature on front side of bill of exchange is considered acceptance. (art. 28). Acceptance must be unconditional but drawee may limit his acceptance as to amount. If any other alterations are made to contents of bill of exchange while it is being accepted, it is considered refusal. (art. 29). By accepting bill of exchange, drawee undertakes to pay bill of exchange during its term. In case payment is not effected, owner of bill of exchange has direct action against drawer for everything that is due. (art. 31).

Payment of bill of exchange may be guaranteed for entire amount or for part of it. Such guarantee may be given by third party or by signatory of bill of exchange. (art. 33). Guarantee is given on bill of exchange or in annex. It is expressed by words “for guarantee” or by any other equivalent expression, and is signed by person providing guarantee. Guarantor is obliged in same manner as person for whom he provided such guarantee. When guarantor pays bill of exchange, he acquires all rights that bill of exchange provides him against person for whom he provided guarantee, and against other debtors of bill of exchange. (art. 35).

Bill of exchange may be transferred by endorsement. If drawer writes on bill of exchange words “not at order” or equivalent expression, title may be transmitted only in form and with effects of ordinary assignment. (art. 13). Endorsement must be written on bill of exchange or in its annex and must be signed by endorser. Endorsement transfers all rights resulting from bill of exchange. (art. 16).

Holder of bill of exchange is considered legitimate owner, provided he justifies his right by continuous series of endorsements. (art. 18).

Drawee and his guarantors are directly obliged to pay bill of exchange. Endorser, drawer and his guarantors are indirectly obliged to pay. Persons against whom action was initiated cannot raise exceptions to owner on basis of their personal relations with drawer or former owners. (art. 19).

Payment.

Bill of exchange must be presented for payment on due date or within two days after such date, at place and address indicated in bill of exchange. (arts. 41-42). In case owner of bill of exchange encounters refusal to pay, such owner must request that court executor protest nonpayment, which is necessary for owner to sue debtors (endorser, drawers and their guarantors), and initiate forced execution against them.

If voluntary payment was not effected, owner, once he has performed formalities mentioned above, may obtain such payment from any debtors of bill of exchange by commencing legal action or by forced execution.

Bill of exchange may constitute title for capital and interest. Granting of executory title upon bill of exchange is made by court having jurisdiction over domicile or head office of bill of exchange debtor at choice of holder of bill of exchange, or at address chosen for execution of bill of exchange. After granting of such executory title, notice of execution is made; within five days after such notice, debtor may challenge execution. If debtor's challenge is dismissed by final court decision, forced execution may be effected.

Promissory Note.

Promissory notes are regulated by Law 58/1934 arts. 104-107, regarding bills of exchange and promissory notes.

According to art. 104 of this law, promissory note must contain: (a) name of promissory note in its title; (b) unconditional promise to pay determined amount; (c) due date; (d) place of payment; (e) name of beneficiary; (f) date and place of issuance; (g) signature (including name) of issuer.

Promissory note is subject to provisions regarding bill of exchange, insofar as they are not incompatible with nature of this instrument. (art. 106). Subscriber of promissory note is bound in same way as one who accepts bill of exchange. (art. 107). Unlike bill of exchange, however, promissory note does not include name of drawee, since drawer and drawee are one and same with subscriber.

Checks are primarily regulated by Law 59/1934 and Technical Norms 9/1994, as amended. Similar to bill of exchange, check establishes legal relations between three persons. However, check differs from bill of exchange in that it is not credit title, but only payment instrument. Based on art. 291 of Law 33/1991, regarding banking activity, National Bank of Romania issued Norms 7/1994, regarding use of checks in trade of banking companies and other credit companies.

Checks are also governed under Regulation 10/1994 regarding operations involving checks effectuated by banks, as amended.

According to Law 59/1934, art. 1, check must include: (a) name of check in its title; (b) unconditional order to pay bank; (c) name of drawer; (d) place of payment; (e) date and place of its issuance; (f) signature (including name) of issuer.

Check may be issued only if drawer has cash reserves, either as bank deposit or as credit given by drawee to drawer. Failure to observe such provision is considered criminal offence and is punishable under criminal law. (art. 3). Check that stipulates it is payable to specific person may be transferred by endorsement, regardless of whether it mentions “to order of”. (art. 15).

Demand payment by check may be guaranteed in whole or in part. (art. 26). Check may be paid on sight. Check issued and payable in Romania must be presented for payment in eight days if payable in same place as issuance place, or 15 days if in other places. Check issued in foreign country and payable in Romania must be presented for payment within 30 days, and, if issued outside Europe, within 70 days. If check is payable abroad, presentation term will be determined by local law of that country. (art. 30).

International Private Law.

Law 105/1992 regarding international private law, contains following provisions regarding bills of exchange, promissory notes and checks that follows principles of Geneva Convention of June 7, 1930: (a) Person who, according to his/her national law, does not have capacity to sign bill of exchange, promissory note or check may be bound by such title if his signature was made in country where law considers him capable of being subscriber; (b) obligations undertaken by bill of exchange, promissory note or check are subject to formal conditions of law of situs where obligation was subscribed; for checks, observance of formal conditions provided by law of situs of payment is sufficient (art. 128); (c) terms established for exercise of legal action that holder of bill of exchange or promissory note may take against guarantor of drawee in case drawee does not pay are determined, in relation to any subscriber, by law of situs where title was issued (art. 129); (d) form and terms of legal action, as well as formal conditions of certain documents necessary to exercise or preserve rights for bill of exchange, promissory note or check, are established by law of situs where protest or other necessary document must be filed (art. 130).

Law 105/1992 also contains provisions that exclusively apply to bills of exchange and promissory notes, as follows: (a) effects of obligations of recipient of bill of exchange or subscriber of promissory note are subject to law of situs where such instrument is due (art. 131); (b) whether titleholder acquires right of credit over amount of instrument shall be determined by law of situs where instrument was issued (art. 132); (c) whether acceptance may be restricted to part of amount and whether titleholder is obliged to receive partial payment is determined by law of situs where bill of exchange is paid. (art. 133).

As for applicable law regarding checks, Law 105/1992 provides following provisions: (a) persons for whom check is drafted is determined by law of situs where check is due (art. 135); (b) obligations resulting from check are determined by situs where such obligations were subscribed (art. 137); (c) law of situs where check is due determines whether title must be drawn on sight or after certain time on sight, effects of post-dating, term of presentation, whether check may be accepted, certified, confirmed or authorized, and effects of such notation. (art. 138).

3.04 CONTRACTS:

According to art. 942 of Romanian Civil Code, contract is agreement between two or more persons, intended to establish, modify or to terminate legal relationship.

Sources.

Contracts are regulated in general by Civil Code of 1865 (arts. 942-985), primarily civil contracts: sale/purchase (arts. 1294-1404); exchange (arts. 1405-1409); lease (arts. 1410-1490); company (arts. 1491-1531); agency (arts. 1532-1559); commodatum (free lease) (arts. 1560-1575); lease (arts. 1576-1590); deposit and sequester (arts. 1591-1634); aleatory contracts (art. 1635); fide-jussio (accessory guarantee to main contract) (arts. 1652-1684); pledge (arts. 1685-1696), etc.

Commercial contracts and some special provisions applicable to them are provided for in Commercial Code of 1887: sale (arts. 60-73); carry-over (stock exchange contract) (arts. 74-76); current account (arts. 370-373); commercial agency and commission (arts. 374-412); transport contract (arts. 413-441); pledge (arts. 478-489); freight contract (arts. 557-591); passenger transport contract (arts. 592-600); maritime lease (arts. 601-615); maritime insurance (arts. 616-653).

Certain contracts are regulated by specific laws: commercial companies (Law 31/1990); insurance contracts (Law 136/1996); individual labor contract (Labor Code), collective labor contracts (Law 130/1996), secured transactions (Law 99/1999) etc. There is also great variety of unspecified contracts adapted to specific situations.

Under Romanian law, contract must be based upon autonomous will of parties, concept borrowed from French Civil Code of 1804. Generally speaking, Romanian model is based upon European contractual law, and was inspired by French and Italian Civil Codes.

After 1989, traditional features of contract law were restored: (a) full contractual freedom to enter into contract; (b) right to choose one's contractual party; (c) right to establish contractual clauses and to choose its form; (d) once entered into, contract is irrevocable and fully enforceable (pacta sunt servanda); (e) basis of contract's binding force is constituted by free will of parties, and State may become involved at request of interested party to support execution of contract or to sanction its non-execution in court of law.

Types of Contracts.

Contracts may be consensual, solemn or real.

Consensual contracts arise from simple voluntary agreement of parties without any formalities, i.e. sale/purchase of movable assets. (Civ. Code, art. 1295). Consensual contracts need not be in writing, although writing serves as proof of contractual relationship between parties. (Civ. Code, art. 1191).

Solemn contracts require execution of certain standard forms, of which authentic form is most frequent. (Civ. Code, art. 1171). Failure to observe solemn forms will void contract. Examples of solemn contracts are contracts for sale of land and contracts for mortgage (Civ. Code, art. 1747; Title X of Law 247/2005 regarding legal transfer of land), which must be concluded in authenticated form before public notary. Existence of authenticated form determines very existence of agreement.

Real contracts require delivery of good by one party to other. Examples of real contracts are deposit and transport of goods. (Civ. Code, arts. 1420, 1593[2]).

According to mutual or unilateral nature of obligations assumed by parties, contracts may be classified as:

Bilateral contracts in which parties are mutually obliged to one another (Civ. Code, art. 943), each of them simultaneously having both quality of creditor and quality of debtor (for instance, sale/purchase contract); or,

Unilateral contracts which bind single party, such as loan for pledge (Civ. Code, art. 944).

Gratuitous contracts arise when one of parties intends to obtain, without consideration, benefit for party with whom it is made. (Civ. Code, art. 946).

Capacity.

Any natural or legal person has capacity to enter into contract, unless incapable according to law. (Civ. Code, art. 949). See topic Infants.

According to Decree 31/1954, regarding natural and legal persons, civil capacity has two aspects: use capacity (capacity to have rights and obligations); and exercise capacity (capacity to exercise rights and assume obligations through legal acts). Use capacity begins at birth of person and ends at death. Full exercise capacity is available at age 18. Minor who is 14 or older has restricted exercise capacity. Person under judicial disability because of mental disability does not have exercise capacity and may not enter into any contract for duration of disability.

Additionally, law provides special incapacities; spouses may not contract to sell anything to each other. (Civ. Code, art. 1307). Legal entity may have only such rights as pertain to its object as established by law, by its contract or by its Statute. (Decree 31/1954, art. 34).

Formation of Contract.

Two acts are necessary for formation of contract: offer and acceptance.

Offer is voluntary statement proposing entrance into contract. In order to be valid: (a) offer must be complete. Specifically, it must include all essential elements of proposed contract, and enable voluntary agreement of parties through its simple acceptance. Incomplete offer only has value of invitation to contract; (b) offer must be made with offering party's firm intention to obligate itself; (c) offer may be written, oral or tacit (e.g., lessee's continuing occupation of premises and payment of rent after expiration of lease agreement may be construed as tacit offer to extend lease); (d) when law requires specific form (e.g., authentication or private signature), offer must comply with form; (e) offer may be addressed to specific party or to general public.

Offer to contract differs from promise to contract. Offer to contract is simple unilateral statement while promise to contract is agreement between parties. For example, owner agrees to sell good to another if latter expresses will to purchase good. This is neither offer to contract nor sale/purchase agreement; instead, it is promise to contract and owner is bound by its terms.

Acceptance is voluntary statement made by offeree to offeror accepting conditions and formalities established by offeror. In order to be valid, acceptance must: (a) contain written, verbal or tacit statement of will; (b) coincide with offer; if offeree modifies offer's elements, thus establishing new conditions or making counterproposal, it is considered counteroffer. Com. Code expressly provides that “conditional or limited acceptance is considered as refusal of first proposal and constitutes new proposal” (art. 39); (c) originate with offeree when offer was addressed to certain person; (d) not be doubtful; (e) take place before offer became ineffective.

Offer and acceptance may be revoked (Com. Code, art. 37), but only before offeror has received acceptance, which is moment when contract is concluded. Failure to observe this requirement brings forth liability for breaching party, but does not affect contract's enforceability.

Offer and acceptance become void upon death or judicial disability of either party before conclusion of contract. However, new offer and acceptance may be issued by successors.

Contracts Concluded by Correspondence (Between Absent Persons).

Under Romanian law, voluntary agreement is realized and contract is signed when offering party has knowledge of other party's acceptance (Com. Code, art. 35). Receipt of acceptance creates relative assumption that offering party has knowledge of acceptance.

Contract is executed and communication of acceptance is not necessary when following conditions are satisfied: (a) offeror must have requested immediate execution of contract; (b) offeror did not request prior answer; and (c) such answer is not necessary, according to nature of contract. (Com. Code, art. 36).

Void, Voidable Contracts.

Agreement flaws are circumstances that may void contracts because of flaws in manifestation of will of party: “Consent is not valid when it is given by mistake, obtained by violence or deceit.” (Civ. Code, art. 953).

Mistake of fact does not void contract unless it is material error. (Civ. Code, art. 954). Error regarding identity of contracting party constitutes agreement flaw only when that identity is material to contract (intuitu personae).

Coercion, as provided by Civ. Code, art. 956, occurs when one party forces agreement upon another through use of fear or intimidation. In cases of coercion, contract is void for all parties involved. (Civ. Code, art. 957). Mere fear, without violence, may not render contract void. (Civ. Code, art. 958).

Deceit may void contract when deceitful means, used by one of parties, are of such nature that it is evident that but for deceit, other party would not have entered into contract. (Civ. Code, art. 960).

Contracts entered into by mistake of fact, violence or deceit are not necessarily void, but open to voiding action.

Purpose of Contract.

Every contract must have purpose, and thus create obligation to give (transmission of right to creditor), to perform, or not to perform (action of debtor).

Action to give must refer to goods capable of being traded (Civ. Code, art. 963), determined or determinable (Civ. Code, art. 964). Future good may form object of obligation.

Purpose constitutes consideration for which party assumed its obligation. Obligation without purpose or based upon false or illegal purpose does not affect validity of contract. Additionally, contract is effective even if purpose is not expressed. Purpose is presumed until proven otherwise. Purpose is illegal when prohibited by law or when it is contrary to morals or public order. (Civ. Code, arts. 966-968).

Effects of Contracts.

Contracts legally concluded have binding power between parties. (Civ. Code, art. 969). Once contract is concluded, contractual obligations must be executed accordingly, in good faith, as provided for by Civ. Code, art. 970, being binding not only for what is expressly provided, “but also for all consequences which equity, usage or law have given to obligation”. Unilateral cancellation of contract is generally not admitted. (Civ. Code, art. 969 par. 2). In cases provided by law or by contract, however, unilateral cancellation is possible (agency contract, deposit contract, etc.). Contracts do not generally affect rights and obligation of third parties: “Conventions have effects only between contractual parties.” (Civ. Code, art. 973). However it is possible for third party to have rights arising from contract concluded between parties if parties agree so. In such case, third party can enforce rights enjoyed under contract concluded between parties directly.

Interpretation of contracts is made according to common intention of parties, and not according to literal sense of terms. When clause is ambiguous, it is construed in manner such that it may have effect (ut valeat), and not in manner such that it does not have effect (ut pereat). Clauses normally in contract are implied by law. All contract clauses are interpreted as part of whole, and each clause is given such meaning as results from entire contract. When in doubt, contract is interpreted to benefit obligor. (Civ. Code, arts. 977-985).

Requirements of Written Acts.

Conventions regarding form required for contracts to be legally valid and enforceable against third parties are governed by Civ. Code, Commercial Code, Land Law 18/1991, Land Register Law 7/1996, and other specific laws.

Special laws govern transmission of property rights and certain goods. Noncompliance with these laws entails civil sanctions—either nullity of legal act, or impossibility of proving completed legal act if written deed is explicitly required by law for evidence.

At present, there are no requirements as to form of sale contract for movables and buildings and, therefore, such goods may be alienated based on common will of parties. Transfer between parties is effected by such common will. To be enforceable against third parties, alienation deed must be recorded in land register if it concerns immovables, including buildings, according to Law 7/1996, art. 27. No such form of publicity is required for movables.

Written contract for such movable goods is not necessary for valid formation of contract, but is necessary for purpose of proving such contract, according to Civil Code. (art. 191).

Evidence of legal acts valued over ROL 250 may be made only by authenticated deed or by deed under private signature. Authenticated deeds are primarily notarized deeds. To be authenticated, deeds under private signature must be signed by parties.

Evidence through witnesses is not acceptable to disprove contents of deed, or to support other settlements prior, simultaneous or subsequent to drafting of deed even regarding amounts less than or equal to ROL 250. Parties may agree upon using witnesses in such instances if such agreement regards rights of which they may dispose. (art. 1191).

Rules set forth above do not apply when rudiment of written evidence exists. Rudiment of written evidence means any writ of party against which claim is formulated or of party represented by it; such writ must be evidence of claimed facts. (art. 1197).

These rules might not apply if claimant was unable to obtain written evidence as to claimed obligation, or was unable to preserve written evidence. (art. 1198). Impossibility of obtaining written evidence exists when obligations arise from quasi-contracts, infringements, and quasi-infringements, and contractual obligations in case of accident, or between relatives, affiliates, etc. Impossibility of preserving written evidence exists if creditor lost title that served as written evidence due to acts of God, such as theft, destruction by respondent, or lost file.

In exceptional circumstances, law stipulates special conditions. Deeds under private signature that establish bilateral conventions are not valid if they are not drafted in number of copies equal to number of parties involved. Each copy must mention number of originals. Nevertheless, failure to mention appropriate number of originals may not be argued by parties that executed written deed. (art. 1179).

Deeds under private signature whereby one party undertakes to pay certain amount or part of certain amount to another party must either be entirely drafted by party that underwrote it, or this party, before underwriting it, must add to end of deed signed notation reading “good and approved”, specifying amount in words, and sign it. Merchants are not subject to this rule. (art. 1180).

If amount mentioned in deed is different from amount noted as “good and approved”, obligation is presumed as relating to smaller amount, even if deed and notation “good and approved” are written entirely by party that undertook obligation, unless correct price can be proved. (art. 1181).

Contracts that must be written and authenticated include: Donations (Civ. Code, art. 813); conventional mortgages (Civ. Code, art. 1772); and company contracts in some instances (Law 31/1990, art. 5 item 6).

Other contracts that, in order to be proven, must be in writing include leases of dwelling premises (Dwelling Law 114/1996, art. 21) and insurance agreements (Law 136/1996, art. 10).

Com. Code contains provisions that derogate requirements of art. 1191, items 1 and 2, of Civil Code in sense that Commercial Code permits evidence through witnesses even if claim exceeds ROL 250. Art. 1191 applies also in commercial matters, but only when commercial law explicitly requires written evidence. (Com. Code, art. 55).

Requirements for Written Acts; Land.

Land may be acquired or alienated, irrespective of its location or area, by means of legal acts executed between living parties in authentic (notarized) form; otherwise they are null and void. (Title X of Law 247/2005 regarding justice and property reform, art. 2).

Authentication of written act, however, is not necessary if land is conveyed by means of legal act caused by death, e.g. by testament, or only parts of rights over land are conveyed, such as usufruct, use, etc.

Such authentication requirements apply only to land and not to buildings; thus, if conveyance includes building along with adjacent land, but contract was not authenticated, buyer acquires property right to building and right to use land; as regards ownership of land, deed represents only preliminary sale agreement.

Enforceability against third parties is subject to fulfillment of land registration formalities. Act creating real rights to piece of land must be registered with relevant land register. (Land Register Law 7/1996, republished, art. 20).

International Private Law.

Law 105/1992 regarding settlement of international private legal relations determines law applicable to contract (arts. 73-87), such as: (a) contract is subject to law agreed upon by parties; (b) choice of law applicable to contract must be expressed or must result from its content or circumstances; (c) parties may choose law applicable to entire contract or part of contract; (d) agreement regarding choice of applicable law may be modified by agreement of parties; (e) when parties cannot agree to choice of law, contract is subject to jurisdiction having most contacts; such relations are considered to exist with law of state in which debtor of contract's action has domicile, residence, business, or head office, at time of contract; and contract regarding fixed asset or temporary right over fixed asset coincides with law of state where such asset is located; (f) if no such characteristics exist, law of place where it was concluded is chosen; if parties are located in different countries, and have negotiated through exchange of letters, telegrams or telephone, contract is considered to be concluded in country of domicile or head office of party which originated offer; (g) existence and validity of parties' choice of law are determined by law they selected. If such law declares choice void, contract is governed by law indicated in items (e) and (f) above; (h) existence and validity of contract contested by one party is determined according to law that would have applied if it were considered valid; (i) legal effects of silence of party are subject to national law of such natural person or law governing status of such legal person; (j) contract between parties having their domicile or head office in different countries is considered concluded when offeror receives acceptance; (k) foreign contract law includes its material law provisions; (l) contract is subject to form conditions established by law governing its substance; contract is held valid from form point of view if parties, or their representatives, who were in different countries at time of contract's conclusion, have complied with formal conditions provided by law of either of two countries; (m) forms of publicity necessary to validate contract by which rights over goods are instituted against third parties are subject to jurisdiction where such goods are located.

3.05 INFORMATION TECHNOLOGY, INTERNET AND NEW MEDIA:

Regulatory Bodies.

Romanian government established special regulatory bodies in order to create solid basis to ensure transition to Information Society: (i) Ministry for Communications and Information Technology (“MCTI”), (ii) National Regulatory Authority for Communications (“ANRCTI”) and, (iii) General Inspectorate for Communications and Information Technology (“IGCTI”).

MCTI has strategic, regulatory, management, representation and state authority functions. Among most prominent of MCTI's duties, as set forth by GR 744/2003, as amended: drafting policies and strategies with regard to sector of electronic communications, postal services, information technology and services related to information society; ensuring that spectrum of radio frequencies and orbital positions granted to Romania are efficiently managed and used; granting licenses for use of radio-electric frequencies and establishing corresponding tariffs; ensuring legislative and institutional framework required for full liberalization of communications market and harmonization with EU legislation; regulating e-commerce, e-signature and promoting access to Internet.

According to GEO 79/2002 regarding general regulatory framework for communications, as amended, ANRC, subordinated to Government and entirely financed from extra-budgetary sources, has role of implementing national policy in field of electronic communications and postal services and to this end performs functions related to: (i) administering and managing resources whereby it plans, allocates, follows and evaluates use of resources for implementation of sectoral policies; (ii) allocating numbering resources for electronic communications services by drafting national numbering plan and future plans in this respect; (iii) drafting and adopting technical norms, initiating national standards, adopting international standards as national standards and ensuring enforcement thereof; and (iv) arbitrating and decision making in settlement of disputes between providers of networks and services in field of communications and postal services. (arts. 37, 44-48).

As per Law 510/2004 regarding organization of IGCTI, IGCTI is subordinated to Government, financed from own resources and is charged with supervising and monitoring activities in field of electronic communications. Among other things, IGCTI: (i) manages and monitors radio-electric frequency bands that have been assigned for non-governmental use; (ii) assigns radio frequencies in bands set out in national allocation table and keeps permanent record of use; (iii) ensures that operators meet all obligations in relation to use of radio frequencies; (iv) operates Electronic System of Public Acquisitions; (v) certifies e-signatures within central government; (vi) controls and supervises market for radio and electronic communications equipment.

E-Commerce.

Law 365/2002 on E-Commerce, as am'd, regulates terms under which Romania-based suppliers may perform electronic commerce activities, setting forth: (i) legal status of contracts concluded through electronic means, (ii) terms of special responsibility of service providers (in addition to general civil, contraventional or criminal responsibility), (iii) procedure for solving litigation arising out of supply of electronic service by electronic means, (iv) civil and misdemeanor sanctions, criminal offences and sanctions applicable in case of infringement of its provisions, as well as (v) controlling and supervisory entities and mechanisms.

E-signature.

Law 455/2001 on Electronic Signature modifies civil law of Romania to modern development of technology by recognizing legal validity of documents bearing electronic signatures. Law 455/2001 and its technical norms describe (i) legal regime of electronic documents, (ii) general procedure regarding rendering of certification services, (iii) procedure of voluntary accreditation and certification of service providers, (iv) regime applicable to certificates issued by foreign certification service providers and (v) aspects regarding liability of certification service providers.

Extended electronic signature is defined as one uniquely linked to and capable of identifying signatory, created by means that signatory can keep under his exclusive control, and linked to data to which signature relates in manner that permits any subsequent change of data to be detected. (art. 4). Certification service provider verifies and certifies authenticity of signatures. E-signature Law sets forth essential requirements for content of such certificate (art. 18) and prerequisites of certification of service providers (art. 20). Qualified certification service providers must have sufficient financial resources to cover damage they may cause by their electronic signature certification-related activities. (art. 22). Certificates issued by foreign entities (i.e., certification service providers having their domicile or headquarters in another country) will be treated as legally equivalent to those of Romanian service providers if: (i) certification service provider was accredited according to their local law; or (ii) accredited certification service provider having its domicile or headquarters in Romania guarantees certificate; or (iii) certificate or certification service provider that issued it is recognized by virtue of bilateral or multilateral agreement between Romania and other states or international organizations on mutual basis. (art. 40). Documents in electronic form that incorporate electronic signature or have electronic signature attached to or logically associated with it, are deemed equivalent to document under private signature or, if acknowledged by opposite party, to authentic document. (arts. 5 and 6). If written form is required as proof or validity of legal document, incorporated, attached or logically associated electronic signature, must be extended electronic signature and must be based on qualified certificate and created using secure-signature-creation device. In case of dispute, court will always direct that verification is made by expertise. Part that claims in court (i) extended electronic signature, (ii) qualified certificate or (iii) secure-signature-creation device must prove compliance with technical requirements stipulated by arts. 4 and 20. However, set of presumptions of compliance is established in case of (i) extended electronic signature based on qualified certificate issued by accredited certification service provider, (ii) accredited certification service provider or (iii) homologated (i.e., certified) secure-signature creation.

Data Protection.

Relevant legislation is Law 677/2001 regarding protection of individuals when processing and circulating their personal data, as amended, and Orders 52/2002 regarding approval of minimum safety requirements for processing personal data, 53/2002 regarding standard notification forms, and 54/2002 setting forth situations that do not require notification of People's Advocate (Rom. “Avocatul Poporului”). National Authority for Monitoring Personal Data Processing is supervisory body for monitoring compliance with data protection rules. Currently, there are only two exceptions from applicability of Law 677/2001, i.e.: (i) Processing of employees' personal data performed by employers as part of employment relationship provided such data are not disclosed to third parties, and (ii) data processing for national defense purposes. (art. 2).

Law 677/2001 defines personal data as any information relating to identified or identifiable person, while “an identifiable person” is person who may be identified, directly or indirectly, in particular by reference to identification number or to one or more factors specific to his physical, physiological, mental, economic, cultural, or social identity. (art. 3). Law 677/2001 further defines processing of personal data as any operation performed: (i) by Romania-based operators, (ii) by Romanian diplomatic missions or of Romanian consulates, or (iii) if equipment or means used for data processing are located in Romania. (art. 2).

Operator should notify National Authority for Monitoring Personal Data Processing prior to carrying out any data processing activity. In certain cases, notification of data processing is not required (i.e. processing of employee personal data by employer, meeting tax, safety or social safety obligations). National Authority for Monitoring Personal Data Processing is entitled to receive complaints, to perform investigations either at will or in response to complaints or notifications and, in case of violation of legal provisions, may rule for temporary suspension or blocking of data processing, partial or complete erasure of processed data, as well as notification of criminal investigation bodies or taking of other legal actions. (art. 21).

3.06 MONOPOLIES, RESTRAINT OF TRADE AND COMPETITION:

Legal Framework.

With regard to establishment of normal and fair competition, following regulations are in effect: Competition Law 21/1996, as republished, supplemented by regulations and instructions most of them issued by Competition Council in 2004 to further comply with acquis communautaire of European Union; and Law 11/1991, on prevention of unfair competition, as amended by Law 298/2001.

In addition to its domestic legislation, Romania signed in Brussels on Feb. 1, 1993, European Agreement establishing association between Romania, and European Community and its member states (ratified by Law 20/1993), and Interim Agreement regarding trade and trade-related matters between Romania and European Economic Community and European Community of Coal and Steel (ratified by Law 16/1993).

Romania is also party to agreement with member states of European Free Trade Association (ratified by Law 19/1993) and General Agreement on Tariffs and Trade (ratified by Decree 480/1972). Romania is WTO member since Jan. 1, 1995.

Domestic Legislation.

Arts. 5-6 of Law 21/1996 ("Law"), which are similar to arts. 81 and 82 of Treaty establishing European Economic Community (Rome 1957) as amended, prohibit anticompetitive practices and abuse of dominant position. Arts. 10-15 on economic concentrations provide for merger control harmonized with Council of European Union Regulations on control of concentrations between undertakings. Economic concentrations, which create or consolidate dominant position that leads or may lead to restriction, elimination or significant distortion of competition on Romanian market, are prohibited. Economic concentrations achieved in contradiction with aforementioned principle are sanctioned with fine up to 10% of turnover of concerned undertakings in financial year prior to transaction. Art. 5 prohibits any express or tacit agreements, decisions of association, or concerted practices between undertakings in restraint of trade and competition on Romanian market or part thereof. Art. 6 prohibits abuse of dominant position on Romanian market or part thereof by exploitative practices that affect trade and prejudice consumers. Art. 5(2) stipulates cumulative requirements for exemption of agreements, decisions of association or concerted practices from prohibition under paragraph 1. Art. 10 defines economic concentration, and art. 15 stipulates that economic concentration by commercial entities with turnovers that exceed thresholds set forth in Art. 14 shall be notified for authorization by Competition Council.

Economic concentrations fall within scope of merger control if (i) Worldwide turnover of concerned undertakings exceeds [Euro]10 million; (ii) acquiring undertaking and its group registers Romanian turnover exceeding [Euro]4 million; and (iii) acquired undertaking and its subsidiaries registers Romanian aggregate turnover exceeding [Euro]4 million. Applicable turnovers are those registered in financial year prior to transaction.

Failure to obtain authorization from Competition Council for economic concentration operations that fall within scope of merger control results in fine up to 1% of total turnover registered by concerned undertaking for fiscal year preceding year when fine is applied.

Competition Council is authority whose main purpose is regulatory—it is independent agency that reviews anticompetitive agreements, abusive conduct, state aid and economic concentrations. It has larger powers to request information and conduct onsite investigations, examine and copy business records, seal offices, enter and search headquarters or managers' domiciles. Art. 49 stipulates that any contractual arrangements, conventions or clauses in restraint of trade and competition, prohibited by arts. 5 and 6 thereof, shall be legally null.

Competition Council issued in 2004 new regulations, on acceptable remedies during merger control review and leniency guidelines designated to improve its cartel control activity. In addition, new competition regulations were issued in 2005 and 2006, most of which concern application of arts. 5 and 6 of Law. Most recent addition of May 2006 is Block Exemption Regulation concerning maritime transportation agreements.

Trade Restrictions.

Romanian Constitution of 2003 provides that State must guarantee freedom of trade and protection of fair competition (art. 135-2), and that all citizens have free choice of profession and place of work (art. 41-1). Therefore, any person is entitled to become merchant, assuming that certain conditions are met, such as existence of civil capacity (minor or person under interdiction may not be merchant). Holding certain merchant positions, however, is not compatible with being judge, prosecutor, public servant, or free professional. As provided by Governmental Resolution 1323/1990, as amended, following activities, inter alia, may not be object of commercial entity: manufacture or sale of drugs or narcotics in form other than medicine; activities which, according to criminal law, violate specific legal provisions; maritime navigation in Danube etc.

Activities in following sectors have special regulatory regime: (a) Production and trading firearms, ammunition and explosives; (b) production and trading narcotics and medicine containing narcotics; (c) extraction, production, processing of precious metals and stones for industrial use; (d) production and issuing postal stamps and fiscal stamps; (e) production and import for trading of alcohol; (f) production and import for trading of tobacco and cigarette paper; (g) organization of gambling games; (h) organization of sporting bets. Ministry of Finance and Public Finances issues licenses for conducting above-mentioned activities subject to trade restrictions.

Unfair competition is regulated by Law 11/1991, as amended by Law 298/2001. Following acts represent instances of unfair competition, and are considered misdemeanors or crimes, as case may be: (a) offer of services, by exclusive employee of company, to competing company or acceptance of such offer; (b) disclosure, acquisition or use of commercial secret by company or its employee without consent of legitimate holder of respective secret and against honest business practices; (c) conclusion of contracts by which granting of favorable conditions are subject to purchaser's bringing of new purchasers with whom supplier would conclude similar contracts; (d) communication or dissemination in public, by company, of statements regarding company or its activity that are intended to deceive or create favorable position likely to cause damage to certain competitors; (e) communication or dissemination by company of deceiving statements about competitor or competitor's products, likely to cause damage to respective competitor; (f) offering, promising or granting, either directly or indirectly, gifts or any benefits to employee of company or to its representatives so that, through unfair behavior of employee, competitor may obtain information regarding industrial process, obtain information about and use competitor's clientele, or, for purpose of obtaining other benefits for its use or for use of third party; (g) soliciting company's clientele through use of contacts established with such clientele due to position occupied in respective company; (h) dismissal or recruitment of company's employees to establish competing company which would attract clients of former company or hire employees of company in order to disorganize its activity.

Following acts represent unfair competition crimes and may result in imprisonment of up to two years or fines up to ROL 50,000,000: (a) Using firm, invention, trademark, geographic indication, industrial design or model, topographies of integrated circuits, logo or packaging likely to generate confusion with those legitimately used by another company; (b) trading counterfeited goods whose commercialization harms trademark holder and misleads consumer on products/services quality; (c) disclosure, acquisition or use of commercial secrets by third parties without legitimate holder consent, resulting from commercial or industrial intelligence; (d) disclosure or use of commercial secrets by public servants or by representatives of legitimate holders of commercial secrets representing them before public authorities; (e) production by any means, importing, exporting, depositing, marketing or selling goods/services bearing false information regarding patents, trademarks, geographic indications, industrial designs and models, topographies of integrated circuits and other types of intellectual property, origin and characteristics of respective goods or name of producer or trader in order to mislead competitors and consumers, etc.

International Private Law.

According to Law 105/1992, compensation claims based on act of unfair competition or another act that illegitimately restrains free competition are subject to law of situs where damages arose. (art. 117). Alternatively, claimant may also employ either law of situs where claimant has its head office or law governing contract between parties if unfair competition damaged relations between them. (art. 118).

Romanian courts may order payment of damages for injuries arising from unfair competition, based on foreign law, only to extent established by Romanian law for similar injuries. (art. 119).

3.07 SALES:

Provisions.

Sales are regulated by Civ. Code of 1865, and Commercial Code of 1887, which had as its model Italian Code of 1882. Civ. Code arts, 1294-1404 regulate sales of movable assets and immovable assets. Sales of immovables are regulated exclusively by civil legislation, whereas sales of movables may be regulated by commercial as well as civil legislation. (Com. Code arts. 60-73). Generally, provisions of Civil Code and that of Commercial Code are complementary in nature, and are applied only when contract has no stipulations on matter. Besides codes and special laws, usages (conventional norms) apply, especially in commercial matters (usages of trade).

Contract for Sale of Goods.

Characteristic feature of commercial sales is intention to resell acquired good. This intention must exist when good is acquired and be accepted by other party.

Sale is consensual contract concluded by simple voluntary agreement between parties, without fulfilling any formalities and without remitting sold good or payment price when concluding contract. (Civ. Code, art. 1295).

For sale to be effective certain conditions must be met: (a) contract must be validly concluded; (b) seller must own good; and (c) good must be itemized.

If goods are lost between moment of agreement and actual delivery to buyer, risk of their loss is borne by buyer, with buyer still having obligation to pay price. Contract may stipulate transfer of risks at moment of actual delivery of goods rather than at moment of sale.

In case contractual parties are not in same location, contract is considered concluded from moment tenderer has acknowledged acceptance. (Com. Code, art. 35). Acceptance is presumed acknowledged when offeror receives goods.

Seller's Duties.

According to Civil Code, seller has several important obligations: to deliver sold goods and to be responsible for loss of ownership (“eviction”) and defects. (art. 1313). Seller also has obligations of informing buyer and providing security.

Obligation of Delivery.

There are three forms of delivery for movable goods: (a) real delivery (effected through transferring material possession of good); (b) consensual delivery (when material delivery cannot occur at moment of sale, or when buyer is already in possession of good); or (c) symbolic delivery (when keys of building where goods are stored are turned over). In commercial matters, delivery occurs by transmission of good's representative titles (e.g., bills of lading and warrants). (Civ. Code, art. 1316).

Object of delivery must be good sold as it existed when contract was made. (Civ. Code, art. 1324). Obligation to deliver good includes delivering of its accessories (Civ. Code, art. 1325), as well as obligation to preserve good until delivery. Delivery must occur, unless otherwise indicated, at location of sold good at time of sale. (Civ. Code, art. 1319; Com. Code, art. 59). Delivery expenses are seller's responsibility, and expenses related to taking possession are buyer's responsibility, unless otherwise stipulated in contract. (Civ. Code, art. 1317).

Eviction Guarantee.

Seller is responsible for undisturbed ownership of good (eviction guarantee) and for defects in good. (Civ. Code, art. 1336). As consequence, seller must guarantee that transmitted property is protected against claims made by third parties challenging buyer's title over good. This guarantee is seller's obligation to ensure buyer's undisturbed ownership.

Parties may agree to increase, decrease or abolish obligation of responsibility for eviction. (Civ. Code, art. 1338). Parties may not agree to abolish seller's guarantee for his own acts either prior or subsequent to sale. When seller is responsible for eviction, buyer has right to demand compensation for purchase price, civil fruits, if owed to true owner, judicial expenses and damages. (Civ. Code, art. 1341). If buyer is only partially evicted, but eviction is material to contract, he may request annulment of sale. (Civ. Code, art. 1347).

Guarantee for Defects of Goods.

Seller is responsible for hidden defects of sold good if defects render good unusable for its ordinary purpose, or its use is so diminished that it is assumed that buyer would not have bought, or paid same price for good had buyer been aware of defects. (Civ. Code, art. 1352).

Seller is responsible solely for hidden defects (those not apparent through reasonable inspection upon delivery). (Civ. Code, art. 1353). Hidden defects should not be mistaken with good's nonconformity to contractual quality requirements. Hidden defects are also distinct from mistakes of fact as to substance, age, quality or market value of good. (Civ. Code, art. 954).

When delivered goods are nonconforming, buyer may seek several distinct actions: (a) annulment (when buyer's consent was affected by error over substance of objects of contract) (Civ. Code, art. 954); (b) rescission of sale (when goods stipulated in contract were delivered, but not with agreed quality); (c) diminishment of price proportional to defect. Buyer has right to ask for elimination of defect. If seller exercised bad faith and was aware of hidden defects, he is obliged to return money and to pay damages. (Civ. Code, art. 1356).

In commercial sale contract, seller is responsible not only for hidden defects, but also for obvious defects of goods during transport, provided that buyer reports defects within two days after receipt of goods.

Obligation to Inform Buyer.

It is seller's obligation to inform buyer upon all contracting conditions, uses, possible dangers, and necessary precautions associated with good. Obligation to inform begins in pre-contractual stage; seller must provide buyer with information he needs to make informed decision. During execution of contract, seller has obligation to provide buyer with all information related to assembly and use of goods.

Seller is responsible to buyer or third parties for damages caused by goods under normal use. Seller must check products he manufactures or sells, and inform buyer of potential dangers of good.

Buyer's Duties.

Buyer's main obligation is to pay price of goods. (Civ. Code, art. 1361). Price is paid at time and place stipulated in contract. If there are no stipulations, price must be paid when seller delivers good. (Civ. Code, art. 1362).

Buyer must pay interest on overdue payments. However, buyer may withhold payment if his enjoyment of good is disturbed or if there is danger of eviction by claim of third party. (Civ. Code, art. 1364).

Liability for Breach of Contractual Obligations.

Non-execution of contractual obligations has consequences stipulated in Com. and Civ. Codes. Non-execution exception exists whereby party is entitled to refuse to execute its own obligation if other party does not execute its correlative obligation. If buyer paid price, but seller refuses to deliver sold good, buyer has right to request annulment of contract, or taking over of good. If good has been delivered, and buyer has not paid price, seller may request annulment of contract. (Civ. Code, art. 1365). Non-breaching party may force other party to execute contract, when possible, or to ask for annulment of contract, with damages. (Civ. Code, art. 1021).

In commercial matters, if seller does not execute obligation to deliver good, buyer has right to buy good from another seller, under supervision of official agent. If buyer does not execute his obligation to take over good, seller has right to place it with registered trading house at buyer's expense, or to sell it by public auction. (Com. Code, art. 68).

International Commercial Sales.

Same provisions apply to international sales contracts as apply to domestic sales. (Civ. Code, arts. 1294 et seq.; Com. Code, arts. 60 et seq.). Romania is party to Convention of United Nations regarding contracts for international sales of goods, Vienna, Apr. 11, 1980 (ratified by Law 24/1991). It is also party to Convention regarding prescription in matters of international sales of goods, New York, June 14, 1974, as well as in Protocol modifying Convention, Vienna, 1980 (Law 24/1992).

In commercial relations between Romanian and foreign enterprises, parties may adopt INCOTERMS Regulations, elaborated by International Chamber of Commerce in Paris, and, in relations with American market, Revised American Foreign Trade Definition (RAFTD, 1941).

International Private Law.

Law 105/1992 regulates laws applicable to private sale contracts, giving priority to parties to choose applicable law. (art. 73). In absence of such choice, priority is legislation of State of buyer when concluding contract, or State of buyer's domicile or head office. (art. 88). As exception to provisions of art. 88, commercial sale contract is submitted to legislation of country where buyer has its bank account or its head office if: (a) negotiations took place and contract was signed by parties in that country; or (b) contract expressly stipulates that seller must execute his obligation to deliver goods in that country. (art. 89). Sales by auction, stock exchange or fairs are submitted to legislation of country where reception of goods took place, unless parties choose law of another jurisdiction. (art. 90). Legislation of country where reception of goods occurred establishes terms and procedures for verification of quantity and quality, as well as measures to be taken if goods are refused. (art. 92). In case of sale of land or buildings located in Romania, Romanian law will apply.

3.08 SECURITIES:

Starting with July 2004, legal framework for securities market in Romania consists of Law 297/2004 regarding capital markets (“Law 297”), Law 514/2002 approving GEO 25/2002 respecting Statute of CNVM (National Securities Commission), and subsequent legislation issued by National Securities Commission (“NSC”), such as Regulation 15/2005 regarding financial investment companies (“Regulation 15/2005”), Regulation 1/2006 regarding issuers and operations with securities (“Regulation 1/2006”), Regulation 2/2006 regarding regulated markets and alternative trading systems (“Regulation 2/2006”) and Regulation 15/2004 regarding authorization and functioning of investment management companies, collective placement bodies and depositaries (“Regulation 15/2004”).

According to Law 297, art. 2, financial instruments include: (a) Securities; (b) units in collective investment undertakings; (c) money market instruments including government securities with maturity less than one year and deposit certificates; (d) financial-futures contracts, including equivalent cash-settled instruments; (e) forward interest-rate agreements; (f) interest-rate, currency and equity swaps; (g) options to acquire or dispose of any instruments financial instrument provided above at (a) - (b), including options on currency and on interest rates; (h) derivatives on commodities; (i) any other instrument admitted to trading on regulated market in EU Member State or for which request for admission to trading on such market has been made. Further, securities include: (a) Shares issued by companies and other securities equivalent to shares in companies; (b) bonds and other forms of securitized debt, including government securities with maturity of over 12 months; (c) any other negotiable titles normally dealt in, giving right to acquire any such negotiable titles by subscription or exchange, or giving rise to cash settlement, excluding instruments of payment.

Regulated market is system for trading financial instruments which: (a) Functions regularly; (b) is characterized by fact that regulations issued or approved by NSC define conditions for operation of market, conditions for access to market and conditions governing admission to listing of financial instrument; (c) complies with all transparency and reporting requirements laid down in this law, as well as in regulations issued by NSC in accordance with EU legislation.

Regulated markets are organized and managed by legal person established under form of joint-stock company, issuer of nominal shares in accordance with Law 31/1990, authorized and supervised by NSC as marketing operator.

Public offer of securities purchase is mandatory for any shareholder or group of shareholders acting in concert that owns more than 33% of voting rights. Public tender for all outstanding shares must be launched no later than two months from moment they acquired 33%. Price under these mandatory offers must exceed certain thresholds to ensure protection of minority shareholders. Also, art. 206 of Law 297 requires delisting bid in event majority shareholder, or group of shareholders acting in concert, has more than 95% of share capital or it obtains after public offer addressed to all shareholders more than 90% of share capital; in such case majority shareholder has right to ask for remaining shares of company (“squeeze-out”) and subsequently delist. Price under this mandatory offer is regulated as it cannot fall below certain thresholds.

National Securities Commission.

Romanian National Securities Commission has role similar to that of US Securities and Exchange Commission, in that it regulates capital markets. It is responsible for all operations on capital markets, and is obliged to protect investors against unfair, abusive and fraudulent practices. It is also responsible for circulation of information regarding securities holders and issuers, as well as establishment of legal framework for brokerage activities. In addition, commission also has right to stop illegal activity, primarily through fines as well as suspension from trading.

First established in 1994, National Securities Commission is independent administrative body accountable to Romanian Parliament, to which it must submit annual reports through Budget, Finance and Bank Commissions of Senate and Chamber of Deputies. It is funded by extra-budgetary revenues, primarily through taxes on trading and offerings. Commission's management board comprises seven commissioners, who are appointed by Parliament. These commissioners have five-year mandates which can be extended only once. (GEO 25/2002, art.

3).

New capital market law has jurisdiction over following investment services: (1) Core services, such as: (i) reception and transmission, on behalf of investors, of orders in relation to one or more financial instruments; (ii) execution of such orders in relation to one or more financial instruments other than for own account; (iii) dealing in any of financial instruments for own account; (iv) managing portfolios of investments in accordance with mandates given by investors on discretionary, client-by-client basis, when such portfolios include one or more financial instruments; (v) underwriting in any financial instruments and/or placing of such financial instruments; (2) non-core services, such as: (i) safekeeping and administration of financial instruments; (ii) safe custody services; (iii) granting credits or loans to investor to allow him to carry out financial instruments transactions, where firm granting credit or loan is involved in transaction; (iv) advice to undertakings on capital structure, industrial strategy as well as advice and service relating to mergers and purchase of undertakings; (v) other services related to financial instruments underwriting; (vi) investment advice concerning financial instruments; (vii) foreign exchange services where these are connected with provision of investment services.

Only intermediaries referred to in art. 2 of Law 297 can provide investment services regarding financial instruments as part of their profession—investment firms authorized by NSC, credit institutions authorized by National Bank of Romania according to relevant banking legislation, as well as other such entities authorized in Member or non-Member States to carry out investment services.

Investment firms (SSIFs) are legal persons, established as joint-stock companies, according to Law 31/1990 (Romanian company law), which have as main object of activity provision of investment services and which function only based on authorization granted by NSC. Law 297 sets forth obligation of SSIFs to obtain prior authorization for each regulated market. Intermediaries can apply for authorization, permitting provision of one or more core or non-core services. Minimal capital requirement for these entities ranges from [Euro]50,000 to [Euro]730,000 depending on services intended to be provided. Law 297 provides for gradual schedule until Dec. 30, 2006 for these entities to increase their capital. Supervision of minimal net capital requirements is made through monthly financial reports that assess risk of investments in different categories of financial instruments.

Management companies (SAIs) are legal persons, established as joint-stock companies, according to Law 31/1990 and function only based on authorization issued by NSC. S.A.I. must have as their regular business management of undertakings for collective investment in transferable securities (OPCVM) authorized in accordance with provisions of Law 297. SAIs may also carry out following activities: (a) Management of individual portfolios of investments, including those owned by pension funds, in accordance with mandates given by investors on discretionary basis, where these portfolios include one or more financial instruments; (b) non-core services: investment advice concerning one of more financial instruments.

Single passport means to achieve integration of capital markets within European Union. Law 297 provides for possibility of providers of investment services to operate on markets of member countries upon authorizations granted in country or origin. There are minimal requirements to be met regarding investment firms (SSIFs) and management companies (SAI) that will grant them right to provide services in Member States of European Union.

New capital market law establishes Investor Compensation Fund, as joint-stock company according to its constitutive documents, preliminary approved by NSC. Fund's shareholders are intermediaries and management companies which have as their regular business management of individual investment portfolios. Market operators, central depository and other entities regulated and supervised by NSC may become shareholders of fund as well. Also, intermediaries authorized to provide investment services and management companies, which manage individual investment portfolios, must be members of Fund.

Purpose of fund is to compensate investors, in compliance with conditions set out by Law 297 or by NSC regulations, if fund members fail to return funds or financial instruments owed by or belonging to investors, which have been held on their behalf for providing investment services or managing individual investment portfolios.

Independent Register Companies.

Authorized Independent Register performs specific register activities for issuers of securities that are traded on market supervised by NSC. It only deals with securities in dematerialized form, and may register ownership rights in name of holder or in name of depositing party as agent of holder. (NSC Regulation 13/2005).

Clearing and settlement of transactions involving financial instruments, other than derivatives, may take place within clearing-settlement system. Law 297 establishes Central Depository as joint-stock company, authorized and supervised by NSC, with not only clearing and settlement attributions, but also functioning as registry for issuers. All classes of financial instruments traded on regulated market will be deposited with Central Depository. Independent registries will have to submit registries of all issuers that are traded on regulated markets or on alternative trading systems, to Central Depository. Clearing and settlement of transactions involving derivative instruments will be carried out through clearinghouse authorized by NSC.

Any entity under supervision and control of NSC must have financial auditor. Its obligations provided by Law and regulations of NSC include reporting of any fact or deed of audited entity which may amount to material breach of law, may affect continuity in activity of audited entity, may lead to incomplete audit opinion or to impossibility to form opinion, or to contrary opinion.

Provisions regarding market abuse comply with relevant European directives. Insider information is defined in order to prohibit insider trading. Market manipulation is defined and prohibited. Accepted market practices are practices that are required by NSC in accordance with EU norms.

Commodities.

Law 297 also governs organization, functioning, regulation and monitoring of exchange companies, commodities exchanges, members of commodities exchanges and clearing houses. Law is supplemented by Order 104/2002 approving Regulation 4/2002 on Regulated Markets for Commodities and Derivative Financial Instruments. “Commodities” understood to mean any movable property which is fungible by nature, and any standardized service. Commodities exchange companies must be set up as Romanian joint stock companies. Commodities exchange may only be established by obtaining authorization from NSC. Commodities are traded on Romanian Commodities Exchange, which was founded in 1992. While exchange is still relatively new, levels of transactions have increased in recent years.

3.09 TELECOMMUNICATIONS LAW:

General Provisions.

Regulatory framework for telecommunications is constituted by Government Emergency Ordinance No. 79/2002, as subsequently amended and supplemented (“Telecom Ordinance”). Telecom Ordinance establishes licensing rules for provision of electronic communications networks and services (“Telecom Services”). Provision of Telecom Services is subject to authorizations and licenses issued by ANRCTI: (i) general authorization (“General Authorization”) (see topic 3.05 Information Technology, Internet and New Media), (ii) license for using radio frequencies (“Frequency License”) (see topic 3.05 Information Technology, Internet and New Media), and (iii) license for using numbering resources (“Numbering License”). Telecom Services may be undertaken under conditions of General Authorization regime, whereas individual licenses are only required for use of radio-electric frequencies and numbering resources.

General Authorization Regime.

No restrictions on type of entity which may benefit from such General Authorization are set forth by Telecom Ordinance. (art. 4). With respect to General Authorization, ANRCTI is responsible for establishing specific nondiscriminatory, proportional and transparent requirements, based upon different types of Telecom Services, as well as rights and obligations of operators providing such services. Amongst such obligations are included obligations related to: (i) contributions to finance universal service, (ii) payment of annual monitoring tariff, (iii) interoperability of services and interconnection of services, (iv) availability of numbering resources for end-users, including conditions imposed on grounds of special laws on universal service, (v) environmental protection, (vi) consumer protection, (vii) legal interception of communications, (viii) maintaining integrity and security of public communication networks, and (ix) compliance with technical standards and specifications. (art. 5).

ANRCTI may amend or revoke such General Authorization, with observance of principles of objectivity and proportionality, only upon performing public consultation procedure, and only in one of following cases: (i) Such decision is necessary for compliance with obligations arising out of international agreements to which Romania is signatory, and (ii) circumstances under which General Authorization was issued have changed. (art. 5).

Operators authorized to provide Telecom Services enjoy: (i) right to negotiate and conclude access or interconnection contracts with any other authorized operators (art. 6), (ii) right to be appointed to provide any element of universal service either nationwide or in certain areas (art. 6) and (iii) right to access on public or private properties to install, maintain, replace or move any elements of electronic communications network (art. 22).

Any operator intending to provide Telecom Services must first notify ANRC and within seven days, ANRCTI will issue certification confirming that operator complies with requirements of General Authorization. (arts. 4 and 6). Upon issuance of such, operator will further apply to obtain Frequency License and Numbering License, process that may take additional three weeks to eight months. (arts. 15 and 18).

Frequency License and Numbering License.

Radio frequencies and numbering resources are state-owned property and their administration and management is performed based on principles of objectivity, transparency, nondiscrimination and proportionality. (art. 7).

Where technically possible and when harmful interference risk is low, ANRCTI may designate certain frequency categories that may be used freely, subject to General Authorization regime. (art. 13). Holder of Frequency License and holder of Numbering License pay annual tariffs to ANRCTI. Both tariffs must ensure optimal use of radio-electric frequencies and numbering resources and must be objectively justified, transparent, nondiscriminatory and proportionate in relation to their intended use. (art. 19).

Frequency License and Numbering License may be transferred to third party only with prior approval of ANRCTI, and only by undertaking all obligations deriving therefrom, as well as by observing all conditions set forth by license concerning transfer. Frequency License may be transferred only in its entirety, any agreement concerning assignment of right of use arising from Frequency License being null. Transfer of Frequency License or Numbering License must not result in restriction, obstruction or distortion of competition and, when use of frequencies is already harmonized at EU level, it must not lead to modification as to destination of use of such frequency in manner which contravenes this harmonized use. (art. 20).

Access to Electronic Communications Networks and to Associated Infrastructure; Interconnection.

GO 34/2002 regarding access to electronic communications networks and to associated infrastructure, as well as their interconnection approved and amended by Law 133/2007 ("Interconnection Ordinance") regulates right of operators to negotiate access and interconnection agreements, with view to establishing technical and commercial conditions of access or interconnection.

In order to ensure provision and interoperability of electronic communications services, any operator of public communications network has (i) right to negotiate interconnection agreement with any other operator of public communications network for purpose of providing publicly-available electronic communications services, including electronic communications services available to users via another public communications network interconnected with network of any two operators and (ii) obligation, when requested by third party, to negotiate interconnection agreement. (art. 4).

ANRCTI must take all necessary measures in order to ensure adequate conditions for access and interconnection, as well as interoperability of services, with observance of principles of economic efficiency, promotion of competition and maximization of end-users' benefit. Such measures may consist in imposition of: (i) obligations on legal entities controlling access to end-users, including obligation to ensure interconnection of their networks, if necessary to ensure connectivity between end-users, and (ii) obligation on operators to provide access to those elements of associated infrastructure, under fair, reasonable and nondiscriminatory conditions, if necessary to ensure access for end-users to digital radio and television broadcasting services. ANRCTI may also lay down technical or operational conditions to be met by provider or by beneficiaries of such access, if this measure is necessary to ensure normal functioning of network. (art. 5).

3.10 TRADE REGISTRY:

Obligation to Register.

Law 26/1990, as subsequently amended and republished, requires every business participant, natural or legal person, to register with Trade Registry prior to commencement of business operations. Business participants who must register include: (a) natural persons and family associations operating commercial business; (b) commercial companies and their subsidiaries, branches, representative offices and agencies; (c) national companies; (d) "Regies autonomes" (autonomous state-owned enterprises); (e) economic interest groups conducting commercial business; and (f) cooperative organizations. (art. 1). Trade Registry is public institution.

Content of Application for Registration.

Applications for registration and accompanying information are submitted on standard forms under conditions and terms provided by law and by "Methodological Norms" issued by Romanian Chamber of Commerce and Industry and Ministry of Justice and applicable since May 11, 1998.

Application for registration of natural persons must contain personal information and other information pertaining to person's commercial activities. Following information is needed for commercial companies: (a) information about founders, administrators, censors or auditors, authorized agents (proxies) and about firm itself; (b) legal form and object of activity; (c) capital structure; (d) method of profit distribution; (e) requirements necessary to establish validity of general meeting's decisions; and (f) duration of company. Any change to this information or to Incorporation Document must be registered. Transfers, donation or mortgage of commercial fund, starting procedure of reorganization or bankruptcy, criminal prosecution of business participants, and termination of business must also be reported. (art. 21). Registration with Trade Registry of company and its logo grants exclusive right of use over them. (art. 30).

Judicial Control.

Control over legality of acts or facts registered with Registry is performed by judge appointed by local tribunal. Registrations with Trade Registry are performed on basis of decision of appointed judge, final court decision or resolution issued by Manager of Office of Trade Registry. (art. 3 of Methodological Norms).

Functions of Trade Registry.

Under Law 26/1990, Trade Registry is official Registry of all business participants in Romania, and, as such, possesses three primary functions: (a) to gather all essential and recent legal and economic information regarding personal and economic activity of every business participant; (b) to insure publication of this information, as required by law, whereby registrations and their specifications contained in Registry can be made known to third parties so as to prevent them from pleading ignorance to registrations. Law 26/1990 provides that Registry must be public and establishes manner of publication (issuing copies of registrations, issuing certificates regarding registration or absence of registration of some specifications, etc.); legal publication made by Trade Registry is completed by publishing registration and any changes to company's Incorporation Document in Official Gazette of Romania, part IV; (c) to formally establish commercial company as legal person, which, according to Law 31/1990, becomes effective upon date of registration with Trade Registry.

Failure to register with Trade Registry in compliance with stipulated terms and conditions shall be penalized by fine established by court order.

Organization; Fees.

With 41 territorial offices that are subordinated to local tribunals, National Office of Trade Registry is self-sustained public institution with legal personality, subordinated to Ministry of Justice and has authority to record all national registrations according to information provided by territorial offices.

Registration fees are established by Government Decision, based upon proposal of Ministry of Justice together with Ministry of Finance.

Law 359/2004 regarding simplification of formalities for registration with Trade Registry and fiscal registration of natural persons, family associations and legal persons and authorizations for functioning of legal persons ("Law 359"), establishes administrative formalities for registration and authorization of commercial companies. Single office ("Biroul Unic") within local Trade Registry throughout Romania fulfills, on behalf of company's associates, administrators or their attorneys-in-fact, all necessary formalities for: (a) incorporation of company with competent Trade Registry; (b) issuance of unique registration code; (c) publication in Official Gazette of Romania of court decision for incorporation of company; (d) obtaining following approvals/authorizations/permits: (i) sanitary approval and/or authorization, (ii) fire protection approval and/or authorization, (iii) environmental permit and/or authorization, (iv) labor protection authorization. Term within which Single Office must issue all above is 3-5 days, as case may be, from date all required documents are filed.

Pursuant to this normative act, if applicant does not perform activity provided by constitutive or amendment document or applicant declares on his own responsibility that he fulfills conditions for authorization, Trade Registry Office will issue certificate attesting registration of declaration on own responsibility.

4 CITIZENSHIP

4.01 ALIENS:

See category 16 Immigration, topic 16.01 Aliens.

Citizenship.

Law 21/1991 as republished and amended, regarding Romanian citizenship, provides that Romanian citizenship may be acquired through birth, adoption, repatriation or upon request. (art. 4).

Upon request, Romanian citizenship may be granted to foreign citizens and stateless persons who: (a) were born and reside, on date of request, in Romania, or, although not born in Romania, have had domicile in Romania for at least eight years or have married and live with Romanian citizen for at least five years; (b) demonstrate, through their behavior and attitude, attachment to Romanian State and declare that they do not and did not perform or support actions against order or national security; (c) have turned 18 years; (d) have secured their legal means of existence, according to regulations related to regime of foreign citizens in Romania; (e) have demonstrated good behavior and had no convictions in Romania or abroad for any crimes that render them unworthy of Romanian State; (f) have sufficient knowledge of Romanian language and basic knowledge of Romanian culture and civilization to integrate in social life.

In well grounded cases, periods stipulated at paragraph 1, item a, may be reduced to half term if person requesting Romanian citizenship is well-known figure or invested in Romania amounts exceeding [Euro]500,000. (art. 8).

Minors who are children of foreign citizens or stateless persons and under 18 years old may acquire Romanian citizenship at same time as their parents. If only one of parents acquires Romanian citizenship, they shall decide upon their child's citizenship, and, in event of dispute, courts with jurisdiction over minor's domicile shall resolve issue. (art. 9).

Granting Romanian citizenship, upon request and in case of repatriation, must be effected upon proposal of Minister of Justice through Government Resolution published in Official Gazette of Romania. (art. 11).

Application for grant of Romanian citizenship must be prepared personally or through representative appointed by limited power of attorney in authenticated form, and must be accompanied by documents attesting applicant's compliance with legal provisions. (art. 12).

Above-mentioned application must be addressed to commission that operates under Ministry of Justice (art. 13) to verify applicant's compliance with legal provisions.

Commission shall publish application in Official Gazette of Romania at applicant's expense, and application shall be considered once 30 days from publication have elapsed. (art. 14).

Person that was granted Romanian citizenship upon request must take oath of faith to Romanian State either before Minister of Justice or before State Secretary appointed to this effect, within six months. (art. 19).

Romanian citizenship is effectively acquired on date of oath. After oath, Minister of Justice must issue to respective person attesting certificate. (art. 20).

5 CIVIL ACTIONS AND PROCEDURE

5.01 ACTIONS:

Action enables parties to obtain, in court, realization or recognition of rights and civil interests guaranteed by law.

Romanian Constitution grants individuals free access to justice in order to defend their legitimate rights, liberties and interests. Law may not restrain exercise of this right. (art. 21).

Besides right of plaintiff to file suit, action includes right of defendant to respond and defend himself and to file counterclaims. It also implies other activities and procedural possibilities, such as: right to ask for preventive measures, right to challenge judgment through appeal or recourse (appeal, recourse) and right to seek enforcement of judgment.

Civil actions may be regarded as following: (a) Actions for realization of right; (b) actions for assessment of right (declaratory actions); and (c) actions for constitution of rights. According to nature of claimed rights, actions may be personal (i.e., action for payment of sold merchandise), real (i.e., action concerning title or possession of real estate) and mixed actions. “Civil” actions include commercial disputes, family law disputes, administrative disputes as well as any action that is not criminal case.

Procedure employed by Romanian Courts as well as principles of civil trial are stipulated by Civil Procedure Code. Many statutes however, contain specific procedural provisions that are applied in different matters.

Summoning of Parties Before Court.

According to Civil Procedure Code, art. 112, claim must contain, inter alia: (a) Name and domicile of parties; (b) object of claim and if possible its value; (c) legal and factual basis of claim; (d) short description of evidence; and (e) claimant's signature.

Generally, at trial level, proper venue and jurisdiction is granted in either Low Court or County Court of territory where defendant's domicile is located. In cases of real estate litigation, jurisdiction is granted to court where such real estate is located. If domicile of defendant is unknown, jurisdiction belongs to court where domicile of plaintiff is located.

Actual summons, along with trial papers, are served to defendant. Within five days before first hearing, defendant may submit answer that includes: (a) Procedural exceptions (motions) regarding claimant's request; (b) legal and factual basis of answer contesting elements of plaintiff's claim; and (c) defendant's signature. (Civ. Pro. Code, art. 115).

Written evidence must be attached to summons, as well as to defendant's answer. If witnesses are requested to appear before court, their names and addresses must also be included.

Filing civil action on court docket is subject to payment of “stamp tax”, except for those actions exempted by law from payment of stamp tax (i.e., certain family law actions, actions for payment of salaries or social insurance rights, restitution matters and commercial cases are generally not exempted from payment of stamp tax). Stamp duties rates are regulated by Law 146/1997, as periodically amended and consist of either fixed tax (very low levels) or variable percentage of value of object of claim.

International Private Law.

Law 105/1992 regarding settling of international private law relations also establishes procedural norms for actions involving foreign parties. (arts. 158-162). Such norms refer to procedural requirements, object and cause of action, modality of adjudicating civil action, and evidence that may be used in international private law actions, including production of such evidence.

Romanian courts apply domestic procedural law in actions involving foreign citizens. Romanian law also determines whether legal issue pertains to procedural or substantive law. (Law 105/1992, art. 159). Capacity of each party to stand trial is governed by party's national law. (Law 105/1992, art. 158).

Object and cause of civil action are determined by law regulating background of legal relationship. Procedures applicable in trying parties are also determined by same law. (art. 160). Evidentiary material for proving legal act and proving capacity of written document that acknowledges legal act are provided by law of place where legal act was signed, or by law chosen by parties. Proof regarding facts is determined according to law of place where such facts occurred. (art. 161).

5.02 DOCUMENTARY EVIDENCE:

Documents (writings) are main evidence in any civil or commercial trial. Rules on presentation of writings are contained by Civil Pro. Code at arts. 172-176. Usually, each party produces writings it deems necessary to substantiate its claims. If writing is in possession of opposite party, court may order that party to produce writing. If that party fails to bring writing, court shall deem allegations about that writing as true.

Court may order public authority to communicate to court any document or information in its possession that could be relevant for ongoing trial.

Signature on each writing is deemed authentic until challenged for forgery. There are two types of assessment of forgery: (i) Verification of writings; and (ii) forgery (Civil Pro. Code, arts. 177-184). Checking of authenticity of signature is made either by judge or by expert that will provide his opinion, by comparing challenged writing with other writings coming from same author.

Writings in foreign language must be submitted to court accompanied by Romanian translation and certified by party using these writings. Opposite party may challenge accuracy of translation in answer to plaintiff's complaint or at hearing following acknowledgment of foreign language writing and of translation.

5.03 EXPERT REPORTS:

Assessment of factual situations that imply opinion of person knowledgeable in area of expertise may be done in civil trial through opinion of expert. Experts are randomly chosen by court from list of official experts constituted in local bureau attached to each County Court. Each party has right to appoint his counsel-expert at performance of expert report.

Report is presented in writing to court, which may order new expert report if objections of parties as to first report are found justified. Experts may be heard before court if judge, in his discretion, considers this is necessary to get certain clarifications on aspects discussed in expert report.

Most common expert reports are valuation reports, technical reports (i.e., for assessment of quality of delivered goods) and accounting reports (in commercial and criminal cases).

5.04 JUDGMENTS AND APPEALS:

Judgments are passed by judges in charge of resolving case. All judgments are motivated.

Very few categories of judgments are irrevocable from first instance level. Usually, judgments are subject to appeal and to second appeal ("recourse") limited to matters of law. In many situations, however, law limits right to appeal to one appeal only ("recourse"), which in this case is devolutive with respect to both factual and legal matters.

Foreign Judgments.

Recognition and Execution of Foreign Judgments.

Legal regime pertaining to foreign judgments is established by Law 105/1992, regarding international private law, which sets forth following provisions regarding foreign judgments: (a) Their recognition, so as to benefit from authority of adjudicated matter (arts. 166-172); (b) approval of their forced execution, in event that they are not executed willingly by party bound by judgment; and (c) their evidentiary relevance as to ascertained facts (art. 178).

For purposes of Law 105/1992, term "foreign award" means both legal acts of courts and notarized documents or any other documents issued by competent authorities of another country.

Full and Conditional Recognition of Foreign Awards.

Law 105/1992 distinguishes between full legal recognition of foreign judgments and recognition on condition that such awards comply with private international law norms.

Full legal recognition is granted to judgments regarding civil status of citizens of country where such award was given, or if award was rendered in third country, it was subsequently recognized in country of citizenship of each party. (art. 166).

Other judgments may be recognized if following conditions are fulfilled: (a) Judgment is final, according to law of country where it was made; (b) court that rendered judgment had jurisdiction to adjudicate matter according to its national laws; and (c) there is reciprocity in recognizing foreign awards between Romania and country where such award was rendered. (art. 167). Romanian law does not require specific reciprocity, either legal or diplomatic, and therefore, de facto reciprocity is sufficient, existence of which is assumed until evidence to contrary is provided. (art. 6). Romanian Ministry of Justice will assist court in establishing reciprocity.

Recognition of foreign judgments may be refused only in specific cases, namely: (a) when judgment resulted from fraudulent procedure; (b) when judgment violates public order according to Romanian law; (c) when action has already been adjudicated and judgment rendered, even nonfinal, by Romanian court, or when matter is being adjudicated by Romanian court at time of foreign court's notice. (art. 168).

Recognition Procedure.

Request for recognition is processed by County Court having jurisdiction over territory where party refusing to recognize judgment has its domicile or headquarters. Request must be filed together with: (a) Copy of judgment award; and (b) proof that such judgment is final. Additionally, request must include proof of service of process and notice of complaint to party not present before foreign court, or any official act proving that summons and court act were acknowledged, in due time, by party against whom judgment was rendered. Request may also contain proof of any other act that indicates that foreign judgment follows all regularly observed conditions.

Execution of Foreign Award.

Foreign judgments that are not willingly executed by parties obliged to execute them may be executed, at request of interested party, by court of territory where such execution is to be enforced. (art. 173, para. 1). In addition to provisions of art. 167, foreign judgments must be enforceable according to law of court that rendered it, and right to request forced execution must not violate Romanian three year statute of limitations for enforcement of judgments. (art. 174).

Exequatur Procedure.

Procedure approving enforcement of foreign award, currently called exequatur, is adversarial in-court procedure. Request must be accompanied by documents proving observance of above-mentioned international regularity conditions.

Recognition of Judgments Issued in European Union Countries.

After accession to EU, Romania applies Regulation No. 44/2001 of EU Council on jurisdiction, recognition and enforcement of judgments in civil and commercial matters and Regulation No. 805/2004 on establishment of European writ of enforcement for uncontested debts, in any dispute or legal relationship involving EU Member States aspects. Regulation No. 44/2001 provides that judgment passed in Member State is recognized de jure in other Member States and can be enforced pursuant to simple motion addressed to Court. Opposite party may, nevertheless, challenge enforcement of judgment passed in another Member State, based on reasons provided by Regulation No. 44/2001 (blatant violation of public policy, contradiction with prior judgment, issuance of judgment in violation of rules on jurisdiction, etc.).

Mention must be made that in specific matters other Council Regulations may apply, such as Regulation No. 2201/2003 of EU Council on jurisdiction, recognition and enforcement of judgments in matrimonial matters and in area of parental responsibility or Regulation No. 1896/2006 of European Parliament and European Council on institution of notification of payment procedure.

5.05 SEQUESTRATION:

See category 7 Debtor and Creditor, topic 7.02 Attachment.

5.06 TESTIMONY OF WITNESSES:

Testimony of witnesses is subject to general provisions regarding administration of evidence (Civ. Pro. Code, arts. 167-171), as well as special provisions (arts. 186-200). Written depositions are not accepted as evidence, although they are sometimes produced as part of documentary evidence submitted to court.

Law provides general guidelines for administration of evidence that prohibit following persons from acting as witnesses: (a) family members and relatives up to and including third degree; (b) spouses, even if separated; (c) persons declared by law as incapacitated; and (d) those found guilty of perjury. However, parties may agree that family members and spouses may act as witnesses. (Civ. Pro. Code, art. 189).

In cases involving civil and divorce actions, family members and relatives mentioned above may serve as witnesses, with exception of descendants, as provided by law. (Civ. Pro. Code, art. 190).

In event that legal action is delayed by refusal of witness to testify, art. 188 of Civil Procedure Code provides for possibility of issuing summons and lists applicable penalties from RON 30 to RON 500. In certain cases, penalties may be waived, subject to judge's discretion.

Following are required by law to maintain confidentiality of information received during performance of their duties, and thus, are excused from serving as witnesses (Civ. Pro. Code, art. 191): those who perform religious services, doctors, midwives, pharmacists, attorneys and notaries. Present or former public servants maintaining confidentiality of circumstances known to them while serving in their professional capacity, as well as those who may incriminate themselves or other categories of persons provided by law by their testimony may also be exempt from serving as witnesses. (art. 189).

According to art. 193 of Civ. Proc. Code, witnesses must be sworn in prior to their testimony, in person, before court. (art. 169). Testimony is given in Romanian language and if witness does not know Romanian language, authorized translator must be used, or in absence thereof, trustworthy person whose conduct shall be governed by provisions relating to experts. Judge may act as translator without having to take oath.

Law allows use of rogatory letters for administration of evidence when administration of evidence is to be made in another city or locality, or when administration of evidence occurs by delegation, by court of same level or one of lower level (if court of same level does not exist).

Rogatory letters requested between Romanian court and foreign court, are accomplished by Ministry of Justice under terms of conventions existing between Romania and foreign country.

Communication of procedural documents and obtaining of evidence in EU Member States is subject to special European law procedures, as Regulation No. 1348 of EU Council on communication of judicial and extrajudicial documents in civil and commercial matter and Regulation No. 1206/2001 of EU Council on cooperation of courts of Member States in obtaining evidence in civil and commercial matters.

Details of existing bilateral conventions, as well as EU acquis communautaire, applicable after entry of Romania in EU are maintained by Ministry of Justice and communicated annually to every Romanian court or may be found on Romanian Ministry of Justice website http://www.just.ro.

6 COURTS AND LEGISLATURE

6.01 COURTS:

Judicial branch is separate and distinct from other branches of government. Courts have jurisdiction to hear all cases in areas of civil, commercial, labor, family, and administrative law, as well as any other domain over which they have adjudicatory powers. Romanian judiciary consists of following: (a) Law Courts (judecatorie), (b) County Courts (tribunal), (c) Courts of Appeals (curte de apel), (d) High Court of Cassation and Justice (Inalta Curte de Casatie si Justitie). Additionally, Constitutional Court has jurisdiction over constitutional matters.

Main laws governing judicial system are Law 304/2004 on judicial organization, Law 303/2004 on status of magistrates, and Law 317/2004 on Superior Council of Magistrates.

Law Courts.

Several Local Courts function in every county, and one law court in each sector of Bucharest. Generally speaking, they are courts of general jurisdiction except for matters in exclusive jurisdiction of other courts.

County Courts function in principal towns of each county and in Bucharest. County Courts have jurisdiction to adjudicate in first instance following matters: commercial matters where amount at issue exceeds RON 100,000, corporate disputes, civil matters with value exceeding RON 500,000, intellectual property matters, adoptions, and actions regarding enforcement of foreign judgments. County Courts have appellate jurisdiction for judgments issued by law courts and are sharing primary jurisdiction with Courts of Appeal in administrative litigations.

Courts of Appeal.

Each Court of Appeal exercises its jurisdiction in district covering several County Courts. (Law 304/2004 art. 33). There are 15 courts of appeal in Romania. Courts of Appeal usually exercise appellate jurisdiction or judgments passed by County Courts and Law Courts and have first instance jurisdiction in administrative disputes with central administrative bodies.

At trial level, one-judge panel adjudicates actions under its direct jurisdiction, such as administrative claims regarding acts and actions of central administrative authorities. As appellate courts, two-judge panel hears initial decisions rendered by Tribunals of Justice. As courts of recourse (second appeal), three-judge panel reviews decisions of Tribunals on appeal, as well as other cases over which they have jurisdiction.

High Court of Cassation and Justice is highest court in Romania. High Court is competent to adjudicate: appeals against judgments passed by Appellate Courts and second appeals ("recourse") or judgments passed by County Courts. High Court handles some special proceedings such as request for removal of case from one court to another, request for suspension of strike and disciplinary matters for judges and prosecutors.

High Court of Cassation and Justice is organized into four sections: civil, criminal, commercial and administrative litigation, each having its own jurisdiction. High Court panels consist of either three or nine judges (for ordinary cases, there is no nine-judge panel).

Composition of Panels.

Irrespective of court where case is pending, in first instance case is heard by one-judge panel (except special proceedings before High Court), appeal by two judges panel and in second appeal ("recourse"), by three judges. At appeals, if two composing judges fail to concur in unitary solution, third judge will be appointed to turn balance in favour of one opinion.

Judges.

All judges are appointed by presidential decree based upon nominations from Superior Council of Magistrates and may not be removed once appointed. Judge must have following qualifications: (a) Romanian citizenship, (b) law school degree, (c) no criminal record, (d) knowledge of Romanian language, (e) good state of health, and (f) graduation from Magistrates' National Institute or must have passed exam for admission in profession of magistrate.

Jurisdiction of Romanian Courts.

According to Law 105/1992 concerning international law relations, Romanian courts have jurisdiction in following circumstances: (a) Defendant or one of parties to trial has his residence, office or business in Romania; (b) claimant receiving alimony lives in Romania; (c) Romania is site of contractual or noncontractual obligation; (d) railway station, street, port or airport where passengers or merchandise were loaded or unloaded is in Romania; (e) insured goods or place where risk was produced is in Romania; (f) last residence of deceased is Romania; or (g) personal property of deceased is in Romania.

In addition, Romanian courts have jurisdiction: (a) Regarding protection or custody of Romanian minors living abroad; (b) involving declaration of presumptive death of Romanian citizen (even if abroad at time of death); (c) between foreigners if they expressly agree to such jurisdiction; and (d) in cases of bankruptcy or any other legal procedure regarding cessation of payments in case of commercial company with its head office in Romania.

Romanian Courts are exclusively competent to settle matters such as: adoption of Romanian citizens or persons with no citizenship, in both cases domiciled in Romania, actions regarding inheritance if deceased person had last domicile in Romania, litigation having as object real property located in Romania.

Regulation No. 44/2001 of EU Council on jurisdiction, recognition and enforcement of judgments in civil and commercial matters contains detailed provisions on jurisdiction of courts of Member States—including Romania—with specific provisions on insurance disputes, consumer protection cases and labor disputes, as well as with provisions attesting exclusive jurisdiction of state where real estate is located for disputes related to such real estate. This Regulation also provides specific procedural provisions on joining and staying of cases, when courts of several Member States are empowered with similar dispute.

Constitutional Court hears only motions of unconstitutionality raised either during parliamentary proceedings of adoption of law or during resolution of civil and criminal trials before courts of law. Thus, during trial if one of parties raises motion or unconstitutionality of law or government ordinance, court stays proceedings until Constitutional Court issues ruling on whether law or ordinance comply with Constitution or not. Decisions of Constitutional Court are irrevocable and cannot be challenged or overturned by any authority of State.

6.02 LEGISLATION:

Romanian Legislation.

In addition to Constitution, Romanian legal system includes following categories of laws: constitutional laws, organic laws, and ordinary laws. Constitutional laws are those which amend Constitution. Organic laws govern electoral system, organization of Government, status of civil servants, legal regime of property and succession, general organization of education and other important areas. All other laws constitute ordinary laws. (See category 1 Introduction, topic 1.02 Government and Legal System.)

If bill is passed by Parliament, it is sent to President of Romania for promulgation. Prior to its promulgation, President has one chance to request that Parliament reexamine law. Once signed, law is published in Official Gazette of Romania and becomes applicable three days after its publication or at date provided by law. (Constitution, arts. 77-78).

In addition to their publication in Official Gazette of Romania, laws and other legal acts are published in monthly or quarterly collections.

Government adopts decisions and ordinances. Decisions are issued to organize execution of laws. Ordinances are issued under special enabling law, within limits and in conformity with provisions thereof. Government can also adopt emergency ordinances (which have same power as law) in exceptional cases.

Within their specific domain of activity, ministries and other administrative bodies may issue various regulations subordinated to laws, such as: orders, instructions, rules, and norms. For instance, National Bank of Romania may issue regulations regarding external assets and gold operations, in order to protect national currency. (Law 312/2004 regarding Statutes of National Bank of Romania).

Observance of Constitution represents fundamental obligation. (Constitution, art. 1). In order to guarantee supremacy of Constitution and conformity of laws with its provisions, Constitutional Court was established. This Court decides upon constitutionality of laws, Parliament rules, and Government ordinances. Court's decisions are compulsory and are published in Official Gazette of Romania. (arts. 142-147). Organization and functions of Constitutional Court are governed by Law 47/1992, as subsequently amended.

Legislative Council is special consultative body of Parliament. According to art. 79 of Constitution, Council authorizes legislative acts with view to systemize, unify and coordinate Romanian legislation, and maintains comprehensive records of Romanian legislation. Organizations and functions of Legislative Council are regulated by Law 73/1993.

Current legal system is undergoing extensive renewal requiring reevaluation of legal and institutional framework needed to support complex economic reform program. Presently, legal system is characterized by coexistence of three categories of laws: (a) Codes and laws adopted prior to 1944-1945; (b) laws adopted during communist regime; and (c) new laws, intended to revive and modernize old laws and codes, or replace laws adopted during communist regime.

In general, Romania's traditional legal system was modeled after French and Italian models; nevertheless, recent enactments follow general trend of incorporating anglo-saxon type of statutes in general legislation, mainly in specialized, technical areas. As Romania hopes to enter EU by 2007, it must meet conditions of EU's acquis communautaire, which requires Romania to standardize its laws with that of EU. As result, new legislation and implementing rules are constantly being issued.

Codes.

Primary provisions of law are divided among codes.

Civil Code (Civ. Code) was modeled after French Civil Code of 1804 and became effective Dec. 1, 1865. It includes preliminary title, “General Considerations about Effect and Application of Laws” (arts. 1-5) and following three books: Book I, “Persons” (arts. 6-460), which has since been abolished, as it constitutes object of 1953 Family Code (Fam. Code) and of Decree 31/1954 regarding natural and legal persons; Book II, “Goods and Methods of Changing Property” (arts. 461-643); and Book III, “Methods of Acquiring Property” (arts. 644-1914).

Romanian Commercial Code (Com. Code) was modeled after Italian Commercial Code of 1882 and has been in effect since Sept. 1, 1887. It contains four books: Book I, “General Considerations about Commerce” (arts. 1-489); Book II, “Maritime Commerce and Navigation” (arts. 490-694); Book III, “Bankruptcy” (arts. 695-888); and Book IV, “Exercise and Duration of Commercial Actions” (arts. 889-971). Many sections of initial provisions of Commercial Code were incorporated into other laws such as Law 58/1934 regarding bills of exchange and promissory notes, Law 59/1934 regarding checks, Law 31/1990 regarding commercial companies, Law 26/1990 regarding Register of Commerce, and Title VI of Law 99/1999 regarding secured transactions, Law 64/1995 on judicial reorganization and bankruptcy.

Civil Procedure Code (Civ. Pro. Code) was modeled after French Code of 1806 and Code of Swiss Canton of Geneva, promulgated in 1819, and has been in effect since Dec. 1, 1865. It constitutes common law procedure in civil and commercial matters. Civil Procedure Code contains seven books: Book I, “Competence of Courts” (arts. 1-40); Book II, “Contentious Procedure” (arts. 41-330); Book III, “General Provisions Regarding Non-contentious Procedures” (arts. 331-339); Book IV, “Arbitration” (arts. 340-371); Book V, “Forced Execution” (arts. 372-580); Book VI, “Various Procedures” (arts. 581-720); Book VII, “Final Provisions” (arts. 721-735).

Civil Procedure Code was substantially amended by Law 59/1993 (regarding, inter alia, competence of courts, methods of appeal, arbitration, regulation of divorce). Code was also amended by series of new normative acts such as: GEO 138/2000, GEO 59/2001, GEO 58/2003, Law 195/2004, GEO 65/2004, Law 219/2005 and Law 459/2006.

Domestic Commercial Legislation.

In addition to provisions of Commercial Code, commercial activity is regulated by series of laws primarily adopted after Dec. 1989. For example, Law 15/1990 regarding reorganization of State commercial units as regies autonomes and commercial companies, Law 31/1990 regarding commercial companies, Law 26/1990 regarding Trade Registry, Law 32/2000 regarding insurance companies and insurance surveillance, as amended, Emergency Government Ordinance 30/1997 regarding reorganization of regies autonomes, and Emergency Government Ordinance 88/1997 regarding privatization of commercial companies. Related laws were also adopted, such as: Law 12/1990 regarding protection of citizens against illegal commercial activities, Law 11/1991 regarding unfair competition, Law 85/2006 on procedure of insolvency, Decree 139/1990 regarding Chambers of Commerce and Industry, Law 84/1992 regarding free zones, Law 312/2004 regarding Statutes of National Bank of Romania, Emergency Government Ordinance 99/2006 on credit institutions and capital adequacy, Law 83/1997 regarding privatization of commercial banks where State is shareholder, Government Ordinance 10/2004 on procedure on judicial reorganization and bankruptcy of credit institutions, Law 21/1996 regarding competition, Government Ordinance 52/1997 regarding legal status of franchise contracts, Government Ordinance 51/1997 regarding leasing operations and companies, Law 297/2004 regarding capital markets, Law 15/1994 regarding amortization of fixed capital, Law 8/1996 regarding copyright and related rights, GEO 79/2001 regarding strengthening of economical and financial discipline and other provisions with financial character, Law 161/2003 regarding measures to ensure transparency in government, Law 469/2002 regarding strengthening of contractual discipline, Law 193/2000 regarding abusive terms in contracts concluded between merchants and consumers. In fiscal area, Fiscal Code applies (Law No. 571/2003 and the Fiscal Procedure Code—Government Ordinance 92/2003).

International Conventions.

Romania is party to various multilateral international conventions, such as: Convention for protection of industrial property (Paris, 1883); Convention for unification of certain rules pertaining to international air transport (Warsaw, 1929); Additional Convention to Warsaw Convention (Guadalajara, Mexico, 1961); Convention regarding international railroad transport (Bern, 1980); Convention regarding regime of navigation on Danube (Belgrade, 1948); Convention for unification of certain rules with respect to collisions between vessels (Brussels, 1910); International Convention for unification of certain rules regarding bills of lading (Brussels, 1924); International Convention for unification of certain rules regarding privileges and maritime mortgages (Brussels, 1926); United Nations Convention regarding transportation of goods on ships (Hamburg Rules) (Hamburg, 1978); York-Antwerp Rules, adopted and supplemented at International Law Association Conferences (Anvers, 1877), including all subsequent amendments (applicable by virtue of paramountcy clause); Convention regarding contract for international transport of goods on highways (Geneva, 1956); International Convention for facilitating importation of commercial samples and advertising material (Geneva, 1952); customs Conventions regarding international transport of goods covered by TIR license (Geneva, 1959); customs Convention regarding temporary transport of packaging (Brussels, 1960); European Convention regarding customs tariff of pallets used in international transport (Geneva, 1960); Customs Convention regarding privileges granted for importation of goods intended to be displayed or used in exhibitions, fairs, congresses or other similar gatherings (Brussels, 1961); Customs Convention regarding temporary importation of professional material (Brussels, 1961); Customs Convention regarding ATA license for temporary admission of goods (Brussels, 1961); Customs Convention regarding temporary importation of scientific material (Brussels, 1968); Customs Convention regarding containers (Geneva, 1972); United Nations Convention regarding contracts for international sales of goods (Vienna, 1980); Convention regarding prescription in field of international sales of goods (New York, 1974); Convention regarding recognition and execution of foreign arbitral awards (New York, 1958); European Convention regarding international commercial arbitration (Geneva, 1961); Convention for settlement of disputes regarding investment between states and persons from other states (Washington, 1965);

Convention on taking of evidence abroad in civil or commercial matters (Hague, 1970).

All and any of such Conventions shall be read together with provisions of Treaty of Accession of Romania to EU and appropriate acquis communautaire rules, which is to be implemented and applied by Romania in all areas of regulatory matters.

6.03 LEGISLATURE:

Parliament is supreme representative body of Romanian people and sole legislative authority of Romania. It is made up of Chamber of Deputies and Senate, whose members are elected to four-year terms by universal, equal, direct, secret and free vote.

Chamber of Deputies and Senate work in separate and joint sessions, and convene together in two annual ordinary meetings. At request of President of Romania, two chambers are also convened in extraordinary meetings.

Citizens belonging to ethnic minorities that have not garnered minimum number of votes required to be represented in Parliament have right to one deputy seat per ethnic group. (Constitution of Romania, art. 62).

Deputies or senators may not be detained, arrested, searched or summoned for criminal or civil court action without prior approval of chamber. Legal jurisdiction in such cases belongs to Supreme Court of Justice. Also, deputies and senators may not be held legally responsible for votes or political opinions expressed by them during their mandate. (Constitution, art. 72).

Parliament adopts constitutional amendments, organic laws and ordinary laws by majority vote. Organic laws govern, inter alia: (a) voting system, organization and functioning of political parties; (b) state of emergency, violations, penalties and execution of such penalties; (c) granting of amnesty or collective pardon; (d) organization and functioning of Supreme Council of Magistrates, courts, Public Ministry and Financial Court; (e) statute of civil servants, administrative disputes, legal regime of property and succession; (f) labor rights, trade unions and social welfare; and (g) religion.

Legislation is introduced by Government, deputies, senators and citizen's groups of at least 250,000 voters. Citizens exercising their right to initiate legislation must have legal capacity and must originate from at least one-fourth of Romania's counties. In each county and in Bucharest, at least 10,000 signatures must be gathered to support such initiative.

Organic laws and decisions regarding rules of Chambers are adopted by vote of majority of each Chamber's members. Ordinary laws and decisions are adopted by vote of majority of each Chamber's attending members.

Laws are sent to President of Romania for promulgation, to be made within 20 days from receipt of such laws. Before promulgation, President may request Parliament to reexamine law or verify its constitutionality. If so requested, promulgation of law shall be effected within maximum of ten days after receipt of law, subsequent to its reexamination or to Constitutional Court's decision conferring constitutionality on such law.

Law is published in Official Gazette of Romania and becomes applicable three days its publication or on date specified in its publication.

7 DEBTOR AND CREDITOR

7.01 ASSIGNMENTS:

Assignment of credit is contract by which assigning creditor, or assignor, transfers his rights to receive credit to another person or assignee. Debtor of assignable credit, who is referred to as assigned debtor, is third party so that assignment is fulfilled without his participation. Assigned debtor continues to have obligations for which he is responsible to assignee, provided that certain formalities are fulfilled (see details below). Otherwise, assigned debtor shall continue to be responsible to assignor. Assignment is usually performed for valid consideration and is regulated by Civil Code sections mainly by art. 1391 et seq., that are supplemented by Civil Code sections relating to sales and Law 99/1999, regarding certain measures for accelerating economic reform.

Since assignments are contracts, they must meet all of conditions required of valid contracts, as well as conditions pertaining to sales, payments and donations. In principle, all credits are assignable, including but not limited to those credits that have amount of money as their object. Assignments are made by agreement between assignor and assignee. It is not necessary to obtain approval of assigned debtor, which is third party against assignment performed between assignor and assignee; however, in order that assignment is enforceable against third parties or assigned debtor, certain formalities must be fulfilled: (a) registration of assignment with Central Electronic Archive for security interest and personal property (which is sufficient to ensure full opposability towards third parties and debtors); or (b) notification of assigned debtor informing it in regard to change of creditor (which ensures opposability only towards debtor); (c) acceptance of assignment by assigned debtor (which, in practice, essentially means consent of debtor to most assignments of credit and that ensures opposability against third party and debtor). Moreover, Art. 99 of Law 99/1999, Title VI, stipulates that assignment registered with Archives shall enjoy priority against assignment merely notified to debtor or accepted by debtor; in event of successive assignments, “first-in-time, first-in-right” principle applies, irrespective of its knowledge in regard to existence of other assignments.

Legal Effect.

Goal of assignments is to transfer credit to assignee's property at its nominal value, including all rights assignor possessed in relation to assigned debtor. Assignee becomes creditor in lieu of assignor, taking over latter's rights to receive credit. Credit itself remains unchanged; it maintains its nature (civil or commercial), as well as guarantees (which ensure fulfillment of obligation and establishment of interest rate). Assignor guarantees existence of credit and its validity when assignment is executed. This legal guarantee is implied when there is no clause in contract which refers to guarantee, but is not operational if parties to contract stipulated contractual guarantee, either smaller or bigger than legal one (legal rules on this matter are not imperative). However, assignor guarantees neither debtor's solvency nor efficacy of credit guarantees, except if otherwise agreed upon, and then, only for debtor's solvency at time of assignment and only within limits of price received.

Law 99/1999, Title VI, art. 2, item a, provides that publicity, priority and enforcement of all assignments of claims shall be subject to this law. Pursuant to art. 6, paragraph 5, among assets that fall under this law are claims (right to receive payment), and any right, whether exclusive or not, to trade movable assets or to ensure services, which may be assigned by holder irrespective of fact that assignment is subject to restrictions or needs endorsement of establishing entity or authorization of another person. Agreement prohibiting assignment of claims, or conditioning it upon assigned debtor's consent, or considering such assignment as failure to fulfill obligation shall be invalid. (Law 99/1999, Title VI, art. 22, paragraph 2). As such, according to Law 99/1999, Title VI, assignment of claims gives rise to security interest over goods assigned that is movable guarantee (pledge over such goods).

Creditor secured with security interest in certain claims may exercise following rights, at its own choice: (a) peacefully obtain possession of documents establishing right to claims; (b) take over or assign to another person claims in which security interest was established. (art. 84).

Upon assignment of secured asset consisting of money claim, assignor shall notify assignment to assigned debtor in writing. Notification may be performed either by way of deed under private signature, or by authenticated deed, and must include reference in regard to assigned claim, payable amount, its name, and mode and place of payment.

Beginning with moment in which debtor receives notification, debtor may perform its obligation only by way of payment to assignee in manner mentioned in notification. However, debtor may ask assignee to present proof regarding assignment, and, in event that such proof is not produced within 15 days after request, debtor may continue its payments to assignor.

Proof regarding assignment may be performed by way of certified copy of assignment contract, guarantee contract, or copy of assignment registration with Electronic Archives. (art. 85).

Assignment of debt, as such, is not regulated by Romanian civil law, being, as matter of principle, prohibited; however, it may be performed through other legal means such as (a) subrogation, regulated by Civ. Code, arts. 1106-1109; (b) novation (Civ. Code, arts. 1128-1131 and 1134-1137) and (c) delegation (Civ. Code, arts. 1132-1133).

Assignment of right is transfer of right, upon parties' will or in accordance with law, from initial holder of that right, assignor, to assignee. Assignment may be final or temporary, total or partial. Example of assignment of right is assignment of industrial or technological rights such as patents. (Law 64/1991 regarding patents; Law 84/1991 regarding trademarks and geographical indications).

Law 99/1999 shall not apply to assignment of succession rights and assignment of intellectual and industrial ownership rights. (art. 8, Title VI).

7.02 ATTACHMENT:

Attachment is legal proceeding requested by creditor in which defendant-debtor's property is seized to satisfy plaintiff-creditor's demand. It serves to preserve property, making it unavailable for disposition, and thereby guaranteeing repayment of debts. There are three types of attachments: (a) Attachment (Civ. Pro. Code, arts. 591-596 and 597-601); (b) Receivership (art. 596); and (c) Executory attachment (arts. 416, 417, 428, 598-601).

Attachment is initiated at request of creditor that has brought action in court for payment of debt. In some instances, creditor is required to post bond, such as when creditor has no written proof to back his claim. In this case, guarantee is valued at half of amount subject to litigation. (Civ. Pro. Code, art. 591[2]). Posting of bond is also required in commercial litigation. (Com. Code, art. 908).

Attachment may also be requested (and bond posted) when debt is not yet due, but when debtor, through his own acts, has put his assurances in doubt, or when there is danger that debtor might flee, hide his assets, or waste them. (Civ. Proc. Code, art. 591[3]).

If debtor gives sufficient guarantees in above-mentioned cases, Court may lift attachment. (Civ. Proc. Code, art. 594).

Attachment is performed by bailiffs, following same procedures as those required for execution of movable assets and only on movable assets that are not exempted from seizure and foreclosure. (Civ. Proc. Code, art. 593).

Receivership is provided by art. 598 of Civ. Proc. Code, that states that "any time there is trial regarding piece of property or possession of asset, movable or immovable, or regarding administration of common asset, Court may, upon request of interested party, approve receivership of asset or common asset, property, possession, administration or use of which is discussed."

Receivership may be approved by court even if there is no trial, against asset offered by debtor for set-off, against asset in danger of being hidden, destroyed or wasted by debtor, against assets constituting security in favor of creditor and such creditor proves debtor insolvency or such creditor has fundamental reasons to believe debtor will hide, or assets will be wasted or destroyed. (art. 599). Competent court in this case is court where asset is located. In case judicial sequester is admitted, court may ask for guarantee. Court will summon parties and rule, with decision applicable five days from its ruling. (art. 600).

Guarding of attached asset may be entrusted to holder of that asset or to third party appointed by Judge in event that parties do not agree.

In urgent cases, Court president may appoint temporary custodian, by irrevocable decision, without summoning parties until decision in trial regarding judicial sequester is issued.

Executory Attachment.

After creditor has obtained writ of enforcement for payment of debt, creditor may begin to trace movable assets of debtor. (Civ. Proc. Code, arts. 372, 380). First stage involves identifying and attaching debtor's movable goods. If attachment summons (as mentioned in art. 387 of Civ. Proc. Code) remains unanswered, bailiff may attach debtor's assets at debtor's residence or any place where debtor's movable assets are located, provided that no prior attachment has been made. (Civ. Proc. Code, art. 426). Attachment consists of making inventory of debtor's assets and impounding them. (Civ. Proc. Code, art. 416). Debtor may retain possession of attached property, but he may not depreciate or alienate it. Also, custodian may be appointed. Goods may not be sealed or removed if judge has not approved such action. (Civ. Proc. Code, arts. 420, 423).

Debtor may only oppose execution (including guaranteed attachment) by filing owed value at Casa de Economii si Consemnatiuni (CEC) or tax administration of its county. He shall deliver to bailiff receipt of deposit and petition to Court Authority, describing motives grounding his request for end or suspension of execution. Court shall immediately decide in this regard in compliance with art. 400 et seq. of Civil Procedure Code. (Civ. Proc. Code, art. 428).

No more than 24 hours from lodging of draft-minute (regarding attachment) of bailiff at Court's office, Judge, in Court Room, shall schedule day and place for sale of attached assets. (Civ. Proc. Code, art. 431-1).

7.03 ENFORCEMENT OF JUDGMENTS AND OTHER TITLES:

Code of Civil Procedure (Book 5, arts. 372-580) regulates following: direct forced execution (i.e., obligation to hand over assets), garnishment and indirect forced execution (i.e., debt is recovered through sale of assets seized from debtor).

Creditor's rights and debtor's obligations relate to person: creditor may only value his right, and debtor is responsible only for personal debt. By exception, art. 42 of Commercial Code establishes presumption of debtors' joint liability, in case of several debtors vis-à-vis same creditor.

Forced execution (enforcement) is performed by bailiffs. (Law 188/2000 on bailiffs). They perform forced execution of civil dispositions (and not criminal ones) arising out of writs of execution.

There are several types of writs of execution: (a) Court decisions (final decisions, decisions granting temporary execution, and decisions issued by foreign courts and recognized by Romanian courts); (b) liquid mature receivable attested to by notarized documents have power of writ of execution on due date (art. 66 of Law 36/1995); (c) promissory notes and bills of exchange (art. 61 of Law 58/1934); (d) bank credit agreements, corporal and personal securities established in order to guarantee bank credit shall have power of writ of execution (17, Title VI of Law 99/1999); (e) leasing agreements shall have power of writ of execution if lessee fails to return asset upon expiration of leasing and fails to exercise its option to purchase such asset, or if leasing agreement is revoked upon exclusive default of lessee (art. 8 of Law 51/1997, am'd by Law 533/2004).

No decision or writ of execution may be enforced until debtor has been notified with summoning order which shall contain, as follows: (a) Name and headquarters of bailiff; (b) date of issuance of summoning order and forced foreclosure file number; (c) name residence/headquarters of debtor; (d) term in which debtor can execute obligation on good faith and consequences of non-execution; (e) signature and seal of bailiff. Bailiff must give summons to debtor at least one day prior to any execution. (Civ. Pro. Code, arts. 387-388).

If debtor does not execute with good faith within terms mentioned in summoning order, bailiff will promptly start foreclosure.

Forced execution concerns all of debtor's movable and immovable assets, with certain exceptions allowed by law.

All assets belonging to individuals may be seized except those assets considered of strict necessity for existence of debtor and his family, and assets having strictly personal character, such as goods for domestic use, clothes, food, work tools, etc. (Civ. Pro. Code, arts. 406-408). Salaries and other monetary rights of employee may be seized only up to sum which does not exceed one-third of net salary or one half of net monthly salary of that employee, if there are concurrent debts they are satisfied in following order of preference: (a) Litigation or foreclosure costs; (b) administration costs (of foreclosed assets); (c) any other expenses for common interest of creditors; (d) state taxes; (e) debts resulting from state loans; (f) compensation for damages to public property; (g) debts resulting from bank loans, providing services and delivered goods; (h) penalties due to state; (i) other debts.

Compensation for temporary work incapacity, compensation for employee's dismissal according to law, and unemployment benefits may not be pursued unless such amounts are pursued to redress death or injury caused by debtor up to one half of their value. Benefits granted in event of death, for pregnancy and recovery therefrom, for childcare, as daily allowance and for other special purposes, and school scholarships may not be pursued for any type of debt. (Civ. Pro. Code, art. 409).

Foreclosure may be pursued against immovable assets as well, but Civil Code provides several limitations: (a) Immovable assets of underage or persons with limited capacity may not be pursued prior to sale of all movable assets in his/her possession (Civ. Code, art. 1826); (b) mortgaged immovables may be enforced with priority by mortgagee (Civ. Code, art. 1828); (c) two immovables owned by same debtor may not be pursued simultaneously, but only successively (Civ. Code, art. 1829); (d) immovables with annual revenue exceeding value of debt may not be seized. Naturally, debtor must produce evidence in this respect.

Joint Ownership.

Difficulties arise when debtor is not exclusive owner of assets subject to foreclosure. Pursuing such asset would constitute execution against third party that has no obligation towards creditor. Personal creditors of heir or associate may not seize and sell part of jointly owned immovable. Rather, such creditors must first request partitioning of immovable jointly owned. This impediment does not occur if debtor's share in immovable is well documented. (Civ. Pro. Code, art. 490).

With regard to legal status of assets owned jointly by spouses, assets acquired during marriage by either spouse are, from moment of acquisition, joint property of spouses. (Fam. Code, art. 30). Spouses are liable with their joint property for expenses incurred in administering any of that property, for obligations contracted jointly, and for obligations contracted by either of spouses necessary for day-to-day needs. If common creditors are not satisfied from joint property, they are entitled to seize spouses' private assets as well. (Fam. Code art. 34). Creditors of one spouse may not seize assets owned as joint property. After seizure of personal assets, creditor may request partitioning of joint property. By partitioning, assets attributed to each spouse will become private assets and may be object of forced execution by creditor.

Direct forced execution is execution in kind directed against object of obligation, established by title to be executed.

When debtor is forced to hand over certain movable assets, bailiff must send debtor summons to return assets voluntarily; otherwise, as case may be, court executor will seize asset from debtor and will deliver it to creditor provided contract contains specific provision as such. (Civ. Pro. Code, art. 572).

In case of immovable asset, debtor is summoned to relinquish control over immovable within five days after having received summons. If he does not release immovable by this period, bailiff shall force debtor to do so.

Indirect Forced Execution.

In case of writ of execution for monetary debt, debtor's assets are sold at auction or through direct sale. Money obtained from sale of assets, after deduction of expenses, is used to satisfy creditor's debt. If there are several creditors, money obtained from sale of assets is divided in order to satisfy their individual debts, following priority order indicated above after paying preferential debts (e.g. those guaranteed by mortgage contracts).

Law 99/1999, regarding certain measures for accelerating economic reform, stipulates special provisions regarding execution of movable assets securities. New provisions of Law 99/1999 provide that creditor may peacefully take possession of secured assets. (Law 99/1999, Title VI, arts. 63-64). If such transfer is not possible, creditor may take possession of secured asset through enforcement bodies such as bailiffs, or, as case may be, bank bailiffs (whose activity is regulated by special provisions). Enforcement body must provide reply to creditor within 48 hours. (Law 99/1999, art. 68). Procedure for capitalizing asset in order to cover primary claim is subject to shorter terms aimed at accelerating procedure of forced execution.

7.04 GARNISHMENT:

Garnishment is form of indirect foreclosure (execution) consisting of blocking money, bonds or other intangible assets by forcing third party to pay those bonds, money, intangible assets directly to debtor's creditor. (arts. 452-461 Civil Procedural Code). Garnishment may be preventative or executory, and is regulated by Civil Procedure Code, arts. 452-462 and 511-597. There are two distinct procedural functions of garnishment: (1) it serves to enforce performance of obligations; and (2) it provides guarantee for enforcement of writ of execution.

Preventative garnishment arises at request of creditor whose claim is evidenced by signed, written document that is object of court action. Creditor may be required to post bond for sum established by court. When no written document exists, bond is one half value of amount claimed by creditor. Rules applicable to preventive attachment are applied to preventive garnishments as well.

After creditor has obtained writ of execution, legalized copy will be communicated to third party who has obligation to execute as in case of executory garnishment, following conditions detailed in subhead Executory Garnishment, infra.

Executory Garnishment.

This type of garnishment is initiated at creditor's request by bailiff from debtor's or third party's domicile/headquarters, without summoning notice, by letter attached to writ of execution, and requesting third party to block relevant money, bonds or intangible assets up to executed amount. Within 15 days from communication letter, third party is obliged to block money, bonds or intangible assets and to communicate blocking to bailiff which will disburse relevant executed amount to creditor. If third party does not fulfill requirements as indicated above, within three months from when third party should have paid, bailiff will request court to validate garnishment and forced execution against third party can start.

7.05 INSOLVENCY:

On July 21, 2006, new law regulating reorganization and bankruptcy is about to enter into force. New enactment—Law 85/2006 on procedure of insolvency (“Insolvency Law”)—shall replace and modernize reorganization and bankruptcy procedures stipulated by previous Law 64/1995, as amended.

Most important change introduced by Law 85/2006 is provision for two types of procedures applicable to insolvent persons: general procedure and simplified procedure. General procedure applies to corporations and groups of economic interest as well as to any other legal entity engaged in economic activities. (art. 1 of Insolvency Law). Simplified procedure applies to individual merchants or family associations, corporations or entities found under specific circumstances (i.e., do not have any assets, management disappeared, headquarters does not correspond to registered address) or in case when such corporations or entities either failed to introduce to court documents requested for carrying on of procedure or declared their intention to be subject to simplified procedure.

Large number of technical amendments were brought in new Insolvency Law, to bring it in line with current EU legislation and also to respond to many practical aspects assessed during application of previous Law 64/1995 on judicial reorganization and bankruptcy. Their purpose was to speed up legal proceedings and to simplify them, avoiding abuses by participants to proceedings or bureaucracy. Scope of Insolvency Law is to establish collective procedure for payment of liabilities of debtor which happens to be in insolvency. Insolvency is defined as state of debtor's patrimony characterized by insufficient funds to pay debts as they come due. General procedure involves three stages: observation period, followed by reorganization and afterward by bankruptcy (if reorganization fails) or only by bankruptcy. Simplified procedure consists only of observation period followed by bankruptcy and in certain situations, simplified procedure may consist only of bankruptcy. Bodies authorized to apply Insolvency Law are courts, syndic judge, judicial administrator, special administrator, liquidator, creditor's assembly, creditors' committee, and general shareholders' meeting of debtor in case when debtor is corporation.

Procedures provided by law (with exception of appeal) are under competence of County Court, and are performed by syndic judge appointed by Chief Judge of County Court of debtor's headquarters. Decisions of syndic judge are subject to appeal to court of appeals.

Primary duties of syndic judge are as follows: to issue decision for commencement of general or simplified procedure; to rule upon debtor's opposition to creditors' petition for commencement of insolvency procedure; to appoint, by decision, temporary administrators or liquidators, and to decide upon their attributions, scope of their authority and, if necessary, until appointment of administrator or liquidator by creditors' assembly, confirmation of appointment of administrator or liquidator after its appointment by Assembly of Creditors, replacement of administrator or liquidator; to rule upon petitions for revoking debtor's right to run its business; to rule upon actions filed by administrators or liquidators for cancellation of asset transfers that were performed prior to filing petition for commencement of insolvency procedures; to rule upon actions for liability of company directors whose actions triggered insolvency; to rule upon opposition of interested parties against actions of administrator/liquidator, admission and confirmation of reorganization plan; to rule on proposal to enter bankruptcy; to rule upon objections to reports of administrator or liquidator, issuing order to close procedure. (art. 11 of Insolvency Law).

Assembly of Creditors can be convened either by administrator or liquidator or by creditors holding 30% debtor's debts. Insolvency Law provides for strict conditions on convening, and voting in Assembly of Creditors. Failure to observe such requirements may result in nullification of decision of Assembly of Creditors by syndic judge.

Creditors' committee is appointed by syndic judge and consists of three to seven members whose claims are highest in value. First Assembly of Creditors will confirm or choose different Committee of Creditors. Its main powers are: to review situation of debtors and make proposals on continuing its activity or reorganization; to negotiate terms of appointment of judicial administrator or of liquidator; to take notice and, if deems necessary, challenge before syndic judge reports of judicial administrator or of liquidator; to request revocation of debtor's right to run its business; and to file actions for cancellation of asset transfers that were performed prior to filing petition for commencement of insolvency procedure.

Special Administrator represents debtor and debtor's shareholders in insolvency procedure. He is elected by general shareholders' meeting of debtor. In cases when syndic judge decides to revoke debtor's right to run his/her business, Special Administrator shall only represent shareholders. Special Administrator may express intent of debtor to file plan for reorganization or may actually produce such plan, may file opposition in insolvency proceedings, run business of debtor under supervision of Judicial Administrator if plan has been confirmed, take part in bankruptcy and liquidation proceedings and is served with order of closing procedure.

Judicial Administrator is appointed by syndic judge and he may be confirmed/changed by Assembly of Creditors by vote of at least 50% of value of claims. Judicial Administrator must be licensed insolvency practitioner (separate laws regulate status and requirements for insolvency practitioners—Emergency Government Ordinance 86/2006).

Main obligations of Judicial Administrator are as follows: to examine economic situation of debtor and to propose either simplified or general procedure; to examine debtor's activity in context of factual situation and draft detailed report on causes that led to payment cessation, including names of persons responsible for this (such report must be delivered to syndic judge no more than 60 days after appointment thereof); to supervise administration of debtor's assets and liabilities; to put in order internal documents of debtor in cases when they were missing or incomplete; to elaborate reorganization plan; to run part or all of debtor's business activities; to establish dates of meetings of Assembly of Creditors or general shareholders' meetings; immediately report to syndic judge in case debtor does not have any assets; to file actions for cancellation of fraudulent acts concluded by debtor to creditors' detriment, of asset transfers, of trade operations concluded by debtor, and of securities established by debtor that might injure creditors' rights; to continue or terminate agreements executed by debtor; to examine debts and, if necessary, to draft objections thereto; to pursue claims for collection of debtor's receivables relating to debtor's estate or to amounts transferred by debtor prior to commencement of liquidation procedures; to conclude settlements, write off debts, discharge endorsers, and renounce to securities, upon consent of syndic judge; and to notify syndic judge of any problem that may require settlement by him/her. (art. 20 of Insolvency Law). Judicial Administrator must regularly draft reports to syndic judge and has to keep proper record of expenses he made. Actions of Judicial Administrator may be challenged before syndic judge by participants to insolvency procedure.

Liquidator is appointed in case when syndic judge initiated bankruptcy. Judicial Administrator's duties cease once liquidator's duties are established by syndic judge. Liquidator's main obligations are: (a) To examine debtor's activity in context of factual situation and draft detailed report of causes that led to payment cessation, including norms of guilty persons (such report shall be submitted to syndic judge no later than 60 days after appointment thereof); (b) to run part or all of debtor's business activity, to file actions for cancellation of debtor's fraudulent activities conducted to creditor's detriment, for cancellation of asset transfers, trade operations, or securities granted by it conducted to creditors' detriment division and inventory of assets and other measures for their preservation; (c) to maintain or terminate contracts concluded by debtor, to examine claims and where appropriate make objections to them, cashing debtor's receivables as result of assets or cash transfers made before opening of bankruptcy proceedings; (d) to receive payments on behalf of debtor and registration of such payments for debtor's account; (e) to sell off debtor's goods in accordance with law; (f) to conclude settlement agreements, discharging debts, guarantors, to release liens and guarantees (all under syndic judge approval); (g) to file request for clarification of any other issue by syndic judge whenever necessary. Insolvency procedure starts at request of either debtor or creditor or at request of specific administrative agencies for certain type of debtors (National Bank of Romania for banks, National Securities Commission for companies listed at stock exchange, Insurance Supervisory Commission for insurance companies).

Any person must request county court to initiate Insolvency Law proceedings in 30 days time from date when person knows situation of impossibility to pay person's due debts. Should debtor fail to request application of Insolvency Law for period of six months, individuals in charge of business entity are criminally liable for offence of simple bankruptcy. If debtor's petition meets conditions established by law, syndic judge must give notice regarding commencement of liquidation procedures to all creditors mentioned in petition filed by debtor. If creditors appeal such petition no more than 15 days after issuance of notification, syndic judge must summon creditors, no later than ten days after appeal, along with debtor, to hearing at which all such appeals will be settled through single decision.

Within 48 hours after registration of creditors, National Bank of Romania, National Securities and Exchange Commission or Insurance Supervisory Commission petition, syndic judge must deliver copy of petition to debtor, and require posting of another copy at door of courtroom. Upon debtor's request, syndic judge may ask petitioning creditors to deposit bond amounting to no more than 10% of value of claims. Debtor must deliver to Judicial Administrator all information required regarding its activity and assets, and list of payments and transfers of assets effected during 120-day period prior to start of proceedings. In most situations, opening of insolvency proceedings will revoke, de jure or by decision of syndic judge, right of debtor to run business. All operations will therefore be taken over by Judicial Administrator or by Liquidator, as case may be. Most important effects of opening of insolvency procedures are: staying of all other pending judicial actions for enforcement of debts of company; staying of running of statutes of limitation, freezing of shares held by company directors; restrictions on use of accounts and assets of debtor; staying of accrual of interests or liquidated damages for unsecured debts of debtor (for secured debts, interest may accrue up to stated value of security); and withdrawal of shares from listing on regulated markets, as case may be.

Enforcement of secured debts may be permitted even prior to reorganization or liquidation, with approval of syndic judge and subject to number of conditions stipulated by Insolvency Law. (art. 39).

Generally, any acts that damage creditors' interests during period of three years before bankruptcy judgment (“suspicious period”) may be declared null and void by the court if it can be proved that person that benefited from such acts was aware of fact that company has ceased making payments and that payments were made to such creditor fraudulently and in breach of principle of equality among creditors—so called “fraudulent conveyance”. Syndic judge may annul suspicious contracts after observance, or their terms and conditions, at request of Judicial Administrator or Liquidator or at request of Creditors' Committee. Insolvency Law provides that certain payments made or commitments entered into during three years before company ceased making any payments could be invalidated by court including: (a) Transfer of any debtor's assets in last three years, if such transfer was made without or for inadequate consideration, excepting sponsorships having humanitarian purposes, (b) contracts executed in last three years where debtor assumed disproportionate obligations, (c) contracts executed in last three years having purpose to damage rights of creditors, (d) any transfer of debtor's goods in last 120 days of any debt, if creditor would obtain less in bankruptcy, (e) granting in last 120 days of mortgage or lien as security for unsecured debt that arose prior to date company ceases to make payments, or (f) payment in last 120 days of any debt before it became due and payable. As well, any payment or transfers of debtor to any affiliate in last year before commencement of bankruptcy procedure may be cancelled.

Any existing agreements of debtor may be either cancelled, terminated or maintained as result of opening of insolvency proceedings regardless if they are fraudulent or not. Judicial Administrator/Liquidator is vested with exclusive power to determine whether ongoing contractual undertakings are to be terminated or continued. Labour contracts may be terminated by 15 days notice addressed to employee.

Claims of creditors must be recorded by filing within deadline established by Judicial Administrator and must be accompanied by writing attesting claim as well as by evidence of securities, if any. All claims are verified by Judicial Administrator or Liquidator (art. 66) and may be challenged before syndic judge. Tables listing creditors are prepared at different stages of procedure, ending with final table, which is basis of distribution of amounts obtained through liquidation.

Reorganization plan may be proposed by debtor, by Judicial Administrator and by creditor having at least 20% of claims, as evidenced by final table of creditors. Such plan must provide for restructuring and continuation of debtor's activity, or sale of part of debtor's estate or combination hereof. Insolvency Law has detailed provisions on content of plan and measures that may be implemented through plan, which include issuance of stock on regulated markets, debt-for-equity swap (but not for fiscal debts), or corporate modifications. As result of approval of plan, creditor's right may be significantly affected (application of plan may result in nonpayment of certain claims).

Any proposed plan is first approved formally by syndic judge. Then, at order of syndic judge, Judicial Administrator shall convene Assembly of Creditors to vote on plan or vote on one of several proposed and admitted plans. (art. 99). Voting of plan takes place according to specific rules, as creditors are divided in several categories (secured creditors, fiscal creditors, creditors that provide utilities or other goods or services during insolvency procedure, unsecured creditors) and each category gives its own vote. (art. 100). Plan is confirmed if more than half of categories of creditors voted in favour of plan and disadvantaged creditors were treated fairly and equitably. Voted plan is confirmed by syndic judge and finally gets to be implemented by Judicial Administrator and management of debtor.

If no plan is confirmed, or plan has been confirmed but debtor failed to comply with it, syndic judge orders commencement, at once, of bankruptcy procedures. Bankruptcy intervenes also in case when debtor requested application of simplified procedure or when opposition of debtor against creditor request to open procedure was denied. (art. 107).

Liquidator is appointed and shall carry on actions required for liquidation of assets of debtor or recovery of any receivables debtor might have. Sale of assets may take place in any manner in order to maximize amount to be obtained by their alienation. Sale may be done by public auction, by negotiation, asset by asset or in corpore. (arts. 117-120). Liquidator shall act on behalf of debtor, for limited purposes of liquidation.

Claims must be paid as follows: (i) Taxes, stamp duties and other expenses relating to liquidation procedure, (ii) claims derived from labour contracts, (iii) receivables representing credits that are granted by banking companies during reorganization process, (iv) fiscal debts, (v) receivables representing amounts due by debtor to third parties based on alimony, allowances for minors or payment obligations of periodic amounts intended for ensuring means of survival, (vi) receivables representing amounts established by syndic judge for debtor and his/her family maintenance, if debtor is natural person, (vii) receivables representing bank loans, plus related interests and expenses, those resulting from product deliveries, service supply and other works, and from rents, (viii) other unsecured receivables, (ix) subordinated debts, receivables resulting from loans from shareholders or associates representing at least 10% of social capital, respectively voting rights in general meeting of shareholders, or of member of economic group of interests, (x) claims from gratuitous acts.

Once liquidation procedures have ended, individual debtor shall be relieved of obligations he/she had before commencement of procedures, provided that debtor is not found liable for fraudulent bankruptcy or fraudulent payments or transfers. (art. 137).

Court may order that liabilities of corporations be borne by their administrators, managers and accountants who are found liable for certain acts including fraud. (art. 138).

7.06 LIENS:

Under Civil Code (arts. 1772 to 1745, 1780 to 1815), concept of lien derives from right of guarantee (such as pledge) or from privilege based upon concept of pledge (such as right of hotel owner or transport agent to hold goods of traveler until payment for accommodations is made). (Civ. Code, art. 1730).

Types of privileges accorded to lien holder include: (a) general privileges, which may be upon all debtor's assets (movable and immovable) (Civ. Code, art. 1726), or on all movable assets (Civ. Code, art. 1729); (b) special privileges on certain movable assets (Civ. Code, art. 1730); (c) special privileges on certain immovable assets (Civ. Code, art. 1737).

Lien is subject to privileges and mortgages of creditors or privileges or mortgages created after date assets came into custody of holder.

Lien does not grant right to claim movable assets that are in possession of another person. It operates only while goods are still in possession of holder; and ceases after assets are voluntarily returned.

Lien is indivisible and, therefore, applies to all of assets until full payment of debt. Holder is not entitled to civil interest on assets, and may not invoke such custody to obtain, by usucapio, ownership of assets.

Law 99/1999, Title VI, regarding certain measures for accelerating economic reform, art. 36, provides that “creditor who is not party to security agreement is granted privilege by way of simple effect of law, including privilege of State for due charges and has priority over real guarantee of another creditor of asset in question when said privilege is registered with Electronic Archives or is in possession of that asset.” Furthermore, art. 98 stipulates that creditors “will have priority against a real guarantee of another creditor only if they registered privilege with Electronic Archive.” Privileged creditor who does not register its privilege with Electronic Archive may lose its priority rank against another creditor.

7.07 PLEDGES:

Civil Code and Law 99/1999, Title VI, regarding certain measures for accelerating economic reform, establish legal status of pledges, as follows:

Applicability.

Based on Civil Code (arts. 1685-1696), pledge for securing performance of civil obligation is established through dispossessing of debtor of pledged asset (movable, tangible or intangible). Concluding pledge agreement in written form is required for evidentiary purposes. As regards publicity conditions of civil pledge, they are regulated by Title VI of Law 99/1999. Romanian legislation as provided by Law 99/1999, Title VI, regarding pledge, applies to following legal deeds and assets with regard to their priority order, publicity and execution: (a) all transfers of accounts receivable; (b) conditional sales, as well as any other legal deeds, regardless of their form or denomination, intended to secure performance of obligation with asset; (c) all forms of renting, including any leasing for period exceeding one year; (d) consignment agreements that have as their object pledgeable assets, as long as value of asset that shall be sold, as established in consignment agreement, is larger than equivalent in lei of [Euro]1,000; and (e) warrants and deposit receipts. (Law 99/1999, art. 2).

According to art. 6, para. 5, of Law 99/1999 following assets may be pledged: fungible and non-fungible goods; balances in-hand of deposit accounts, savings accounts or on-term deposits opened with banking or financial institutions; deposit certificates, bills of lading and other similar instruments; shares in joint-stock companies and social parts in limited-liability companies; exploitation rights of natural resources and operation of public services, subject to conditions stipulated by law; rights arising from inventions, trademarks and other intellectual, industrial or trading property rights; debt-related rights; negotiable instruments; all movable assets of debtor, which may include inventory of circulating and future assets; forest, crop, minerals and hydrocarbons that will be or have been extracted; insurance policies; rights obtained as result of renting or farming certain immovable assets; equipment, outfits, farming machinery or other similar assets; company-related rights; any right, exclusive or not, to perform transactions involving movables or supply services that may be assigned by owner regardless of whether assignment is subject to certain restrictions or requires consent of establishing party or authorization of third party; leased immovables or immovables that form object of leasing operation exceeding one year; any other similar assets.

Pledge grants secured creditor right to satisfy debt with secured asset before any other unsecured creditor, and before any other creditors whose corporal securities or rights over secured asset have inferior priority rank.

Pledge, as regulated by Romanian law, may be established with or without dispossessing debtor of secured asset. In event that debtor fails to perform its obligation, pledge gives secured creditor right to take possession of or retain secured asset, and right to sell such asset to obtain payment for secured obligation.

Pledge grants secured creditor following rights: right to inspect secured asset during debtor's working hours so as not to affect debtor's activity; right to consider that secured obligation has become claimable and to commence enforcement in event creditor notices inappropriate maintenance of secured asset or other facts likely to hinder or render enforcement impossible, as stipulated in security agreement (creditor may exercise this right only if it has reasonable commercial motives to believe that secured asset was or will be endangered or payment will be hindered).

Art. 18 of Law 99/1999, Title VI, stipulates that security agreement may refer to security interest on future assets. Such security interest produces effects at moment debtor obtains property over assets corresponding to description established in agreement. Rank of priority over future assets before third parties is established at moment when publicity formalities regarding respective security interest have been accomplished, even if such moment could appear before debtor's obtaining right over collateral.

Art. 20 provides that security agreement may stipulate that asset secures performance of future obligations. Such security interest is born when secured party transfers funds that give rise to debt, thus accomplishing condition required for existence of secured obligation. Against third parties, priority of security interest that secures future obligations starts as of date of publicity formalities in regard to security interest. This priority order must be kept, even if established before transfer of funds or before performance of other obligations required by existence of main secured obligation.

For duration of security agreement, debtor may administer or dispose of, in any manner, collateral and its products, including through lease, establishment of another security or sale. Moreover, collateral may be placed under garnishment in favor of creditor on strength of judicial execution procedure. Act of disposing collateral is valid, even if person that acquired asset is aware of contractual provision contained in security agreement that prohibits transfer or declares transfer as being equivalent to failure to perform obligation. (art. 21, Law 99/1999, Title VI).

Primary Requirements for Validity.

Pledge may be established only by way of pledge agreement. (Law 99/1999, art. 13).

Pledge on securities must be established through blocking of these securities in compliance with rules of market on which they are transacted, or based upon parties' agreement regarding securities that are not listed on authorized market. Pledge on securities may be established, according to case, through endorsement of respective securities in compliance with rules regulating them or registration of pledge with company registry in case of non-material securities.

Pledge agreement must be concluded in authenticated form or under private signature, and must be signed by debtor. Securities agreement must stipulate maximum amount of secured obligation. (arts. 14 and 15).

Pledge agreement must contain description of secured asset. Nevertheless, secured asset may be described by type, object by object, or by way of generic formula “all future and present movables”. Phrase “all movables” represents sufficient description. Nevertheless, if secured asset consists of amount of money deposited in bank account, respective account must be distinctly individualized. Likewise, pledge agreement may also stipulate creditor's right to collect, on account of debt, fruits and/or products of secured asset. In this case, conditions and proportion by which secured obligation will be reduced must be stipulated. (art. 16).

Pledge agreement can be enforced as writ of execution. (art. 17). In order to be enforceable against third parties, agreement must be registered and published in Electronic Archive.

Besides sale of pledged property under court supervision in accordance with Civil Procedure Code, Law 99/1999 establishes new rules regulating means by which creditor may take possession of such property, as well as its sale by creditor by way of simpler and less expensive procedure. According to this law, creditor may take possession of property immediately after principal obligation reaches maturity date and, at that time, debtor or any other person in possession of property must act upon creditor's request.

Furthermore, creditor may sell pledged property, either directly or by public auction, only after property has been made available to him either voluntarily or by court decision. (arts. 62-70).

8 DISPUTE RESOLUTION

8.01 ARBITRATION AND AWARD:

Provisions.

Arbitration is regulated by provisions of Book IV of Civil Procedure Code, arts. 340-370, as modified by Law 59/1993 and by Government Emergency Ordinance 138/2000, by GEO 59/2001, GEO 58/2003, Law 195/2004, GEO 65/2004 and Law 219/2005.

Main feature of Law 59/1993 is parties' contractual freedom, i.e., parties are free to use arbitration and to have it organized as they mutually agree. However, consenting parties must not elude laws concerning public order and good morals. (Civ. Code, art. 5).

Composition of arbitration court is determined by interested parties, which decide whether litigation will be adjudicated by one or more arbitrators. (Civ. Pro. Code, art. 345). Arbitrators are appointed or replaced according to established conventions governing arbitration. (art. 347). Time, place and related payment of expenses of arbitration are established by parties. (arts. 353, 354, and 359, para. 1).

Several restrictions in Book IV bind parties: (a) capacity to conclude arbitral convention and domain of disputes that may be resolved by arbitration according to which only property disputes may be submitted to arbitration, provided that they refer to rights which parties can waive (art. 340) and (b) fundamental principles of arbitral procedure (equal treatment, observance of right to defense) (art. 358). In addition, disputes over public procurement contracts can be settled only by court of law, according to Emergency Government Ordinance 34/2006, as amended. Any infringement thereof constitutes grounds for annulment of arbitral convention.

Arbitration Decision.

Arbitral award is rendered according to procedure detailed in art. 360, based on arbitral convention, applicable law and if necessary, commercial usage or, if expressly agreed upon by parties, arbitral tribunal may rule ex aequo et bono. Effects of arbitral award include: arbitral award compulsory for parties (art. 367) and once notified to parties, arbitral award has effect of court's final decision.

Value and effects of arbitration involve three stages: (a) From its issuance, award is obligatory for parties and becomes res judicata, without any other requirements; (b) from its communication, arbitration decision has effect of court's final decision (art. 363, para. 3); (c) arbitral award constitutes writ of enforcement, and may be subject to forced execution in same manner as court decision, after competent court verifies formal validity of award and affixes enforcement formula on original award (art. 368).

Overturning of Arbitral Award.

Arbitral award may be overturned by means of action for annulment based on following grounds: (a) dispute was not susceptible to settlement by arbitration; (b) arbitral court settled dispute although no arbitral convention existed, or such convention was null and void; (c) party was absent at debates and summoning procedure was not legally fulfilled; (d) arbitral award was rendered after lapse of arbitration time period of five months from constitution of arbitral court, unless parties agree otherwise (art. 353); (e) arbitration court ruled on claims that were not requested, failed to rule on requested claim, or awarded more than requested; (f) arbitral award does not include order and grounds do not indicate time and place of order, or is not signed by arbitrators; (g) arbitral order of arbitral award includes provisions which cannot be complied with; (h) arbitral award infringes public order, good morals or imperative provisions (art. 364).

Institutional Arbitration.

Book IV refers to institutional arbitration, i.e., arbitration organized by permanent institution of arbitration, which is form of arbitration aimed at facilitating resolution of disputes. For instance, Court of International Commercial Arbitration attached to Chambers of Commerce and Industry of Romania. In other major cities of country, there are arbitration commissions affiliated with county Chambers of Commerce and Industry, which are competent to adjudicate commercial disputes, provided parties have concluded arbitral conventions.

International Arbitration; Recognition and Execution of Foreign Arbitral Decisions.

In order to benefit from power of res judicata, foreign arbitral awards must be recognized in Romania in accordance with provisions of Law 105/1992, arts. 167-172, regarding conflicts of laws.

Foreign arbitral awards that are not carried out willingly may be enforced in accordance with provisions of Law 105/1992, arts. 173-177, provided, inter alia, that decision is final and not subject to appeal according to state where it was granted; court that granted award was competent to settle dispute; and reciprocity exists between Romania and that State regarding enforcement of foreign arbitral awards.

Romania is party to New York Convention on Recognition and Enforcement of Foreign Arbitral Awards and reciprocity requirement for foreign awards is therefore fulfilled by reference to New York Convention.

International Conventions.

Romania is also party to: European Convention of International Commercial Arbitration (Geneva 1961) (ratified by Decree 281/1963); and Convention for Settlement of Investment Disputes between States and Nationals of other States (Washington 1965) (ratified by Decree 62/1975).

9 DOCUMENTS AND RECORDS

9.01 ACKNOWLEDGMENTS:

Acknowledgment is declaration by which person affirms right or obligation alleged against him or fact which his opponent depends upon in legal procedure. It is unilateral act of free will that may constitute means of evidence. For example, debtor acknowledges debt or detainment of chattels or creditor acknowledges payment affirmed and made by debtor.

Acknowledgment is regulated by Civil Code, arts. 1204-1206, relating to indebtedness and payment. Procedural process for acknowledgment is regulated by legal provisions concerning administration of evidence, Civil Procedure Code, arts. 218-225.

To be effective, acknowledgment must be made according to following: (a) with awareness and free will, acknowledging importance and sincerity of act which may result in legal consequences against issuer; (b) as unilateral act of free will which is irrevocable, with exception of mistake of fact; (c) only made in relation to rights belonging to declarant and only by that party or by special mandate; and (d) it must be express and cannot be inferred by party's silence.

In addition, under Civil Procedure Code, art. 225, judge has right to imply that party's unjustified refusal to appear at interrogation, or to answer question at interrogation, constitutes acknowledgment.

Acknowledgment may be written or oral and can be made before judge or out of court.

Written acknowledgment is subject to general laws concerning written evidence. (Civ. Code, arts. 1171-1190; Civ. Pro. Code, arts. 172-184).

Oral, out-of-court acknowledgments cannot be used as evidence when agreement's subject matter cannot be evidenced by witnesses. (Civ. Code, art. 1205).

9.02 AFFIDAVITS:

Romanian law makes no specific provisions for affidavits. Under corresponding provisions of Civil Procedure Code, sworn declaration with judicial evidentiary value may be made only before judge presiding over civil or criminal case. (Civ. Pro. Code, arts. 186-200, and Code of Penal Procedure, arts. 78-87). However, if affidavit corresponding with foreign law is introduced in court, it may be used as evidence under Law 105/1992, arts. 69-72, concerning private international law relations, which provides that means of authenticating legal document, as well as its evidentiary value, are governed by laws of country where document was executed. Findings of fact are governed under law of country where affidavit is introduced.

Rulings on evidence presented in sworn declarations or affidavits (e.g., credibility of witness's testimony) are subject to Civil Procedure Code.

For introduction before Romanian court, affidavits must also be authenticated by respective foreign authorities and, subsequently, either by diplomatic mission or by respective country's consular office in Romania. Additionally, they must also be reviewed and stamped by Romanian Ministry of Foreign Affairs. Providing further authentication is unnecessary for cases in which respective countries have adopted reciprocity agreement with respect to documents formulated according to laws of each country. These formalities may be replaced by apostille provided by Hague Convention abolishing requirement of legalization for foreign public documents, to which Romania is party.

9.03 NOTARIES:

Notaries are governed by Law 36/1995, regarding notaries and notarial activities. Notaries are presented only with non-litigious civil and commercial legal relationships that they ascertain through notarized documents. (art. 1). Acts performed by notaries, bearing their seal and signature, are of public authority and have evidencing power as stipulated by law. (art. 4).

Notaries and Other Similar Authorities.

Notarial activities are performed primarily by notaries. (art. 2). By extension, such activities may also be performed by other authorities such as: (a) Romania's diplomatic missions and consular offices, and (b) secretaries of local councils in towns and villages where no notaries public exist. (art. 5). Notaries may perform their activities either at headquarters of their offices or at other locations, according to circumstances. (art. 13).

Competence.

Main duty of notaries is to acknowledge consent of parties to execution of legal document. Not all documents require notarization, but for certain operations deemed material by law, notarization is mandatory (such as real estate transactions). Notaries may also acknowledge authenticity of signatures, dates on which deeds were presented, and existence and condition of certain goods and chattels. Notaries must also maintain books regarding registration of real estate, transfer of property, inscription of mortgages on debtor's real estate, protests made against certain promissory notes and returned checks, and records in certain fields of maritime law. Notaries are vested with jurisdiction and authority to open inheritance procedures and issue inheritance certificates, except for cases of disputes arising between heirs. In addition, authenticated wills are executed by notaries. (art. 8).

Notaries may offer legal advice relating to notarial activities, other than those referring to content of acts that they prepare and certify, as specialists appointed by interested parties, as well as legal advice in preparing and concluding legal acts that have notarial character. (art. 9).

Authentication of Documents.

Before authentication, notaries must verify and establish parties' identities. Upon authentication, parties may be represented by attorney-in-fact based on authenticated limited power of attorney. (art. 58).

To obtain parties' consent, after reading documents, notary must ask parties if they have understood content of document and if document expresses their will. (art. 60, para. 1).

All originals of authenticated deed requested by parties and original that is preserved in notary's archive must be executed by parties or by their representatives before notary and, as case may be, by persons required to give consent to documents, by witnesses when their attendance is required, and, if applicable, by person that drafted deed. Each party may request at least one original of authenticated deed. (art. 64).

Document authenticated by notary, which certifies positive and liquid claim, must have power of executory title upon its maturity date. In absence of original document, duplicate or notarized copy of original existing in notary's archive will represent executory title. (art. 66).

Territorial Powers.

Notaries have general competence, except in following cases: (a) succession procedure, which falls within competence of notary located in jurisdiction where deceased person was last domiciled; (b) acts protesting promissory notes, bills of exchange and checks, which fall within competence of notary located in jurisdiction of place of payment; (c) issuance of copies and reconstitution of notarized deeds, which are performed by notary that also possesses original documents. (art. 10).

Expiration of Commission.

Notaries exercise their authority and jurisdiction, and possess right of official signature until date of resignation, retirement, dismissal, prohibition to practice, etc. (art. 23).

Forms of Association.

In Romania, notaries are organized in individual or associated notary offices with auxiliary personnel. Ministry of Justice maintains and records lists of notaries public and works regarding appointment, retirement, dismissal, etc. of notaries. (art. 14).

Fees.

Notarial acts and services provided by notaries shall be subject to stamp duties established by Government Ordinance 12/1998, as republished by Government Ordinance 30/1999.

Documents Issued in Foreign Countries.

Judicial and notarial documents issued by other countries' authorities, including notaries, may be used in Romania and have same evidentiary and substantive value as Romanian authentic document, provided that document in question complies with one of following: (i) Document is certified in accordance with local law of country of origin of document and afterwards by Romanian diplomatic or consular mission in that country; (ii) document bears apostille stipulated by Hague Convention abolishing requirement of legalization for foreign public documents, to which Romania is party; (iii) document needs no additional formality, if Romania and country of origin of document entered into convention for mutual recognition of official documents (i.e., France and Austria).

Romanian official and notarial documents (including court judgments) may be used abroad on same conditions, depending on country where one intends to use them.

10 EMPLOYMENT

10.01 LABOR RELATIONS:

General Rules.

Right to work and right to choose one's place of employment are guaranteed by Constitution of Romania. Labor relationships are regulated by Labor Code which entered into force in Romania on Mar. 1, 2003 through Law 53/2003, as amended. Further relevant laws are: Law 54/2003 regarding trade unions; Collective Employment Contract at National Level for 2007-2010; Law 168/1999 regarding settlement of collective labor disputes, as amended; Law 130/1996 regarding collective bargaining agreements, as amended; Law 90/1996 regarding labor protection, as amended; Law 19/2000 regarding public system for pensions and other social security rights, as amended; Mass Dismissal Ordinance 98/1999, as amended; Governmental Decision 1825/2006 regarding minimum base salary at country level.

Authorities.

Persons hiring personnel for commercial companies are given authority to do so through their constitutive acts, or by decision of general assembly of shareholders. In general, General Director of company or his representative is responsible for hiring personnel.

Employers have following obligations: (a) registration of labor contract within General Registry of Employees and also, with Work Inspection Department in respective county or City of Bucharest within 20 days from date of concluding it; (b) deposit within required time limits with Work Inspection Department, documents which prove payment, for current month, of: (i) Contribution for Government Social Insurance Fund, (ii) contribution for Supplementary Pension Fund, (iii) contribution for Unemployment Subsidies Fund (Law 130/1999); (c) registration of General Registry of Employees with Work Inspection Department.

Working Hours.

Romanian law has established five-day workweek and eight-hour workday. (Constitution, art. 38-3). For teenagers there is legal limit of six hours/day and 30 hours per week.

Employment.

Hiring of personnel is made only on basis of individual employment contract concluded for specific or indefinite period of time. Work performed based on civil service agreement is no longer allowed by Labor Code. As rule, individual labor contracts are for undetermined duration. Time limit of maximum of 18 months may be introduced in contract, but only in following circumstances: (i) replacement of employee whose labor contract was suspended, with exception of employee who is participating in strike; (ii) temporary increase in company's activities; (iii) activities of seasonal character; (iv) hiring of employees on basis of special laws favoring on temporary basis those who are unemployed; (v) if employee will be eligible for retirement within five years; (vi) throughout duration of mandate, if employee accepts position within union, employers' organization or other NGO; (vii) if, based on relevant legal provisions, employee may receive both salary and pension; and (viii) in other circumstances provided by special laws.

Individual employment contract includes data concerning employer and employee, nature of work, position and qualification, duration of employment, salary, other rights related to employment (bonuses, participation in profit, etc.), duration of leave and indemnification granted, rights and obligations of both parties.

To reflect modern business practices, Labor Code allows insertion of non-compete clauses in individual employment contracts. Non-compete provision is defined as (i) One that requires employee not to provide, on his behalf or someone else, activity in competition with that provided to employer and/or (ii) to not provide activity to another party that is in competition with employer. To have such clause, employer must pay employee monthly indemnity in amount equaling at least 50% of his/her salary throughout entire period covered by non-compete obligation, post-termination of labor contract. Maximum time period of non-compete covenant after termination is two years.

Temporary Work Through Employment Agent.

Labor Code provides that employer may obtain temporary employees through services of employment agent. Employment agent is private company specifically approved by Ministry of Labor, Social Solidarity and Family for such activities. Employer concludes contract with employment agent for making available temporary employees and then temporary employment contracts with temporary employees, and employment agent is responsible for payment of required taxes. Maximum duration of such contract is 12 months, but may be extended once for maximum period of 18 months (including initial 12 months).

Part-time work requires at least ten hours a week and minimum of two hours per day that is worked.

Labor Relations.

Commercial companies may negotiate with representative of employee or union regarding rules and general principles concerning labor relationship, remuneration, labor conditions, work schedule, all rights and obligations of each party to be included in collective employment contract. (Law 130/1996, art. 1).

Labor Code stipulates mandatory negotiation of collective employment contracts for companies with more than 21 employees. Individual labor contracts may not include clauses contrary to, or provisions stipulating rights lesser than, those stipulated in Collective Employment Contract at National Level. Latter sets forth minimum standards.

In event that Collective Employment Contract is changed, individual labor agreement shall be modified accordingly through additional act.

In event of privatization, all rights and obligations stipulated in Collective Employment Contract will be binding upon resulting legal entity. Employees and trade unions must be informed of privatization methods, terms and strategies, as well as of possibilities of purchasing shares. (Collective Employment Contract at National Level). Personnel dismissed under restructuring, organization, privatization or liquidation benefit from compensation that ranges from six to 12 average basic salaries based on seniority. (Mass Dismissal Ordinance 98/1999).

Salary is negotiated by parties and finalized in individual employment contracts. Salaries are periodically indexed according to rate of inflation, relevant legal provisions being published in Official Gazette of Romania. Currently minimum basic gross salary is RON 3,900 (USD 105)/month. Commercial companies, regardless of nature of capital, are required to provide employees with at least minimum guaranteed salary. Payment for overtime (more than eight hours of work per day and maximum 48 hours per week, including overtime), shall be paid with increase of 75% of basic gross salary unless employee is given free time within next 30 days after performance of overtime.

Employees may participate in distribution of company's net profits; establishment and approval of such benefit is within authority of shareholders' general meeting. Employees must also be provided with fringe benefits for special activities, leave benefits, and holidays, as agreed to by company's executive council (Board of Directors).

Employees have benefit of annual paid leave, duration of which may not be less than 21 days, and pay for leave must be equal to at least employee's monthly salary rate including seniority and management bonuses (if any).

Termination of Employment Contract.

Individual employment contracts terminate at initiative of employee who has given adequate notice. Notice of termination must be minimum of 20 working days prior to termination with respect to regular personnel, and minimum of 30 calendar days with respect to employees with management duties.

Labor Code provides that labor contract may be terminated by: (i) effect of law; (ii) mutual consent of employer and employee; and (iii) unilateral termination by either employer or employee. Unilateral termination by employer can further be for employer-related or employee-related motives.

There are certain grounds for terminating employee for reasons related to latter: (i) for serious or repeated breaches of workplace rules or labor contract provisions; (ii) if employee is detained by police for more than 30 days; (iii) pursuant to decision of competent medical expert, employee is deemed to be physically or psychologically incapable of performing tasks required by his/her employment; (iv) if employee does not correspond from professional standpoint to position he/she holds; and (v) if employee meets standard requirements for retirement but has not requested it. To dismiss employee for breach of workplace rules or of individual labor contract, or for failure to correspond from professional standpoint, employer is required to conduct preliminary investigation of circumstances leading to breach and to issue report. Employee has right to defend himself during investigation. Failure to perform disciplinary investigation leads to nullity of applied disciplinary sanction. Actually terminating employee requires even further documentation, including response to employee's allegations in his defense. But in cases of physical or psychological incapability or professional shortcoming, Labor Code stipulates that employer is required to offer new position compatible with employee's skills. If such position is not available, employer must then file request with competent territorial Agency of Employment Occupation to try to find suitable employment for employee. If position is available, then employee must respond within three days to offer. If he/she fails to do so, or if another position cannot be found at Agency for Employment Occupation, then employee is finally deemed dismissed and his/her contract ended.

Termination for employer-related motives is defined as layoff due to effective elimination of respective job position. In such case, loss of position must be effective and have real and serious motive, i.e., caused by economic difficulties. Elimination of job position must also be final, meaning that for at least nine months from effective date of elimination of respective position, employer cannot reinstate such position or positions having similar job descriptions. Employer is required to follow number of steps to minimize impact on dismissed employee providing notice minimum 20 working days before termination and notify appropriate Agency for Employment Opportunities to ask if similar positions are available elsewhere for employee.

Mass dismissals or layoffs are defined under Labor Code as dismissals within 30 calendar days as follows: (i) Ten employees, if employer has more than 20 but fewer than 100 employees; (ii) 10% of employees, if employer has more than 100 but fewer than 300 employees; and (iii) no fewer than 30 employees, if employer has more than 300 employees. Procedure of mass dismissal is long-lasting and laborious including several obligations on part of employer such as publication of social plan in consultation with union or employee representatives, proposing of programs for professional development for employees affected, information of employees representatives of all relevant information in connection with mass dismissal, consultation with unions or employees representatives regarding methods and means to avoid mass dismissals, to reduce number of employees affected and to mitigate dismissals' consequences, notification of union or employee representatives about date of issuance of termination decision on at least 30 days prior, notification of applicable territorial labor inspectorate and Agency of Employment Occupation within same 45 days. Employer who engages in mass dismissals cannot hire anyone for positions laid off for period of nine months after layoffs.

Social Protection.

Persons aged at least 16 may be legally employed, while persons aged 15 may be employed only subject to consent of parent or guardian. Teenagers may not be hired for hard labor or for work involving toxic materials or noxious subterranean conditions. (Labor Code, art. 13).

Women benefit from special rights for pregnancy and postnatal periods guaranteed by law. Maternity leave is 126 calendar days and monthly benefits amounting to 85% of basic salary that is fully funded from social insurance fund. (Law 19/2000, arts. 118, 120). Until child is two years of age either mother or father taking care of child can benefit to amount of 85% of his/her basic salary. (Law 19/2000). During pregnancy or nursing period, women may not perform night work. (Labor Code, art. 152, para. 1).

Persons with disabilities benefit from labor conditions expressly stipulated by law. Companies hiring disabled persons and complying with certain legal requirements benefit from certain tax exemptions. (Ordinance 102/1999).

Employee Liability.

Extent of employee liability is expressly stipulated by law, and is based upon illicit acts personally performed by employee in connection with his/her work, and causing damage. (Labor Code, arts. 269-275). Such damages may be recovered by company on final and irrevocable court decision.

Association.

Right of association is guaranteed by Constitution, by general right of association, pursuant to Law 54/2003 regarding trade unions, which stipulates methods of creation, organization, and operation of trade unions, as well as rights and duties thereof, guaranteeing their consultative role in drafting relevant legal texts and in adopting major decisions at company level by company management. Trade unions must be invited to participate in meetings where relevant issues are discussed and in negotiation of collective employment agreements.

Right to strike, as defined by Constitution, is general principle of law, expressly resulting from Law 168/1999, regarding settlement of collective labor disputes. This right may be exercised if other methods of settlement of collective labor disputes proved ineffective, and subject to prior notice of 48 hours to company management and is subject to approval of legal courts.

Labor Disputes.

Termination of individual employment contract must be made in compliance with law. Reasons, conditions, method, effects, and supervision of such termination, as well as parties' liabilities in case of nonobservance of relevant legal provisions, are stipulated in Labor Code.

Employees are entitled to challenge company's executive decisions that violate their rights recognized by employment contract. Employees may challenge abusive dismissal decisions of company. Employees' right to bring court action may be exercised either on individual basis or through unions and professional associations. (Labor Code, arts. 281-291).

Guarantee Fund for Payment of Salary Obligations.

Employer is required to contribute to guarantee fund for payment of salary obligations.

Protection of Employee's Contract in Event of Transfer of Business.

Labor Code states that in event that any part of business is transferred to another employer, employer benefits from same protection contained in his/her current labor contract and that transfer may not constitute ground for dismissal. Both transferor and transferee must inform and consult with affected employee's union or representatives prior to transfer.

Committee for Workplace Security and Safety.

Employers who have more than 50 employees are required to form committee for workplace safety and security. Composition and operation of such committee is to be established by Order of Ministry of Labor and Social Solidarity that has yet to be issued.

11 ENVIRONMENT

11.01 ENVIRONMENTAL REGULATION:

Environmental protection is regulated in Romania by GEO 195/2005, approving legal procedures regulating economic and social activities having material impact on environment, as subsequently amended.

General Principles.

Object of law is to regulate environmental protection as major public objective on basis of principles and strategies that lead to sustainable development of society. (art. 1). These principles and strategies are: integration of environmental policy in other policies; precaution in decision-making; prevention of environmental risks and damages; conservation of biological diversity and specific ecosystems; “polluter-pays” principle; sustainable use of natural resources; participation of public in decision-making and also free justice access for environmental problems; developing international cooperation. (art. 3). Methods of implementing principles and strategic elements are: prevention and integrated control of pollution through best available techniques of important environmental impact activities; adoption of environment policies harmonized with development programs; compulsory procedure for environmental impact assessment in initial stage of projects having material impact on environment; compulsory of environmental evaluation prior to approving certain plans and programs; correlation of environmental planning with territorial and urban planning; introduction of economic incentive-based or coercive methods; harmonization with international regulations; introduction and monitoring of conformity programs; recognition of products with low impact on environment, by granting ecological labeling; maintaining and improving environmental quality; reconstruction of damaged areas. (art. 4). State recognizes right of all persons to healthy environment and guarantees access to information and right of association in organizations, consultation in decision-making process regarding policy development and environmental legislation, plans and programs elaboration; subject to observing confidentiality rules, as stipulated by applicable legislation. (art. 5). Environmental protection shall be obligation of central and local public administrative authorities as well as of all natural persons and legal entities.

GEO 195/2005, regarding Environmental Protection, sets forth obligations for commercial entities concerning following: (a) Storage of industrial, domestic, agricultural and other wastes only in areas authorized for this purpose; (b) in case of burning of waste, employment of equipment approved by authorities for environmental protection and health; (c) restoration of natural environment in waste dumping areas, pursuant to environmental agreement and/or approval, and guarantee of funds for such restoration; (d) recovery of recycled waste and its recycling in specialized units; (e) storage of waste in underground areas, only upon environmental agreement and/or approval.

Relevant Authority and Authorization Procedure.

Relevant authority is Ministry of Environment and Water Management, its local territorial inspectorates and Administration of Danube Delta Biosphere Reservation. Relevant authority grant environmental approvals (Rom. “Avize”), agreements (Rom. “Acorduri”) and authorizations (Rom. “Autorizatii”).

Evaluation Procedure for Certain Plans and Programs.

Public environmental authorities conduct general authorization procedure and issue, as case may be, environmental approvals, agreements and authorizations. (art. 8). Obtaining environmental approval is compulsory, amongst others, in case of: sale-purchase of majority of shares, merger, division, concession, dissolution followed by liquidation and, in case of activities having impact on environment. (art. 10). Environmental agreement must be obtained in case of private or public projects related to new investment or to modification of existing one. Environmental authorization is required for new or existing activities in relation to which environmental agreement was obtained. (art. 11). Environmental approval and agreement are valid for no more than five years. Integrated environmental approval and agreement are valid for no more than ten years. (art. 16). Environmental agreement or authorization may be suspended for noncompliance, but no longer than six months and only after prior notification. After expiry of suspension period, environmental protection authorities will order termination of project or cessation of activity. (art. 17). Evaluation procedure must be public. (art. 20).

Hazardous Waste, Hazardous Substances and Chemical Preparations.

Import into Romania of wastes of any kind, for purposes of elimination is prohibited. Transit and export of wastes of any kind may be effected in accordance with agreements and conventions to which Romania is party. (art. 32). Also, legal persons that possess recyclable industrial waste must collect, sort and temporarily deposit such waste, for reutilization in their own production, for commercial purposes or for delivery towards specialized waste companies. (GEO 16/2001 regarding administration of industrial recyclable waste, art. 5).

Among others, natural and legal persons managing hazardous substances and chemical preparations have following obligations: to obtain environmental agreement or authorization, as case may be; to keep strict records on quantity, characteristics, means of assurance and to supply monthly necessary data to competent authorities; to request environmental agreement and/or permit; to monitor environment, and to identify and prevent risks; to substitute, where possible, hazardous substances and chemical preparations with less dangerous or non-dangerous substances. (art. 31).

Chemical Fertilizers and Pesticides.

Competent ministries must regulate phytosanitary products and other pesticides used in human and veterinary sanitary prophylaxis; and prepare list of maximum admissible pesticide concentration limits. (art. 37).

Nuclear.

Environmental agreements for practice or activity in nuclear field, as well as special authorization from relevant regulatory and controlling authority in field must be issued prior to environmental authorizations. For high nuclear risk installations including nuclear plants, research reactors, nuclear fuel manufacture plants, and final repositories for spent nuclear fuel authorization, must be issued by Government. (art. 46). Natural and legal persons operating in nuclear field must keep strict records of ionizing radiation sources, assure adequate protection, and promptly report any significant increase in environmental contamination and if there is connection with activity carried out. (art. 48).

Conservation of Biological Diversity.

Impact assessment must be compulsory to maintain natural habitat areas, to conserve ecosystems and to protect vegetal and animal organisms, including migratory ones, in case of activities which might impact natural habitat areas. (art. 49).

Aquatic Ecosystems.

Environmental and water management authorities must enforce legal measures by complying with international conventions to which Romania is party. Natural persons and legal entities must have following obligations: to observe emission and water quality standards; to not throw or store waste of any kind on river banks and beds; to not release waste water from vessels or floating platforms directly into natural waters. (art. 58).

Law also sets forth obligations for protection of water and aquatic ecosystem, regarding observance of standards of emissions and quality of water, discharges, residue water purification and limitation of discharges in water, stipulating access to authorized laboratories on pre-established terms and water samples for testing. Economic agents are compelled to execute all restoration works of natural resources, to ensure migration of underwater fauna and improvement of water quality, as provided by environmental agreement and authorization, and to monitor impact area.

Atmosphere.

Environmental authorities must promote regional and global policies by substantiating air quality, pollutant emissions, quality of fuels, noise restrictions, and sampling and analysis points. (art. 59). Land owners must maintain and extend protective vegetation belts and alignments, verdure spots, parks, hedges for improvement of atmospheric regeneration and sound and wind protection. (art. 62).

Terrestrial Ecosystems.

Protection of soil, subsoil and terrestrial ecosystems by adequate measures of territorial management, conservation, organization and planning must be compulsory for all holders of any title. (art. 65).

Human Settlements.

Environmental principles must be observed to assure healthy living environment. (art. 70).

Obligations of Natural Persons and Legal Persons.

Environmental protection is obligation of all natural persons and legal persons; they shall establish their own supervision systems for technological installations and processes, and analysis and control of pollutants; they must not impair natural or artificial environment by uncontrolled disposal of wastes of any kind. (art. 94).

Additional Regulation.

In addition to general provisions established by Environmental Protection Law 137/1995, other legal acts regarding same topic have been issued. Such acts are: Law 26/1996—Forestry Code, Law 107/1996—Water Law, Government Ordinance 43/1997 regarding regulation of roads, GEO 196/2005 regarding environmental fund, GEO 78/00 regarding legal regime of waste, GEO 16/01 regarding administration of industrial recyclable waste and number of orders of relevant ministries establishing methodological norms to be adhered to when licensing certain activities with impact upon environment. Such orders are:

Government Decision 1076/2004 regarding procedure for regulation of economical and social activities with impact on environment. This piece of legislation requires that Ministry of Environment and Water Management and Agency for Environmental Protection issue environmental consents for those objectives and activities stipulated in Environmental Protection Law in compliance with competencies specified in Annex 1 of said order. Other applicable Orders: Order 184/97 regarding environmental assessment procedure, Order 756/97 regarding assessment of environment's pollution, etc.

Environmental Authorization.

Ministry of Environment and Water Management as well as its territorial bodies issues environmental authorizations for all types of activities, except for cases subject to special regulations such as: nuclear-electric power stations, research reactors, factories producing nuclear fuel, deposits of burned nuclear fuel, as well as import, transit and export of waste materials of any type, microorganism cultures, and plants and animals resulting from spontaneous flora and fauna. (art. 3).

Order 462/1993 issued by Minister of Waters, Forests and Environmental Protection for approval of technical conditions regarding protection of atmosphere and Methodological Norms regarding measurement of atmospheric pollutants produced by stationary sources.

Order 44/1998 issued by Minister of Transportation regarding Norms for environmental protection as consequence of impact of roads.

In addition to national laws, Romania has adhered to number of international conventions related to topic.

12 ESTATES AND TRUSTS

12.01 DEATH (PRESUMPTION OF AND ACTIONS FOR):

When circumstances surrounding death or disappearance are such that certainty of death of particular individual is not ascertainable by direct or physical evidence, person may be declared dead by court decision. There are two situations where declaration of death is rendered: (1) where it is preceded by declaration of absence; or (2) in exceptional circumstances where no previous declaration of absence has been issued.

Declaration of Death Preceded by Declaration of Absence.

Person declared absent may subsequently be declared dead by court decision. (Decree 31/1954, art. 16, para. 2). Three conditions must be met for declaration of death: (1) final court decision for declaration of absence must be mailed at least 30 days prior to declaration of death (Decree 32/1954, art. 39); (2) four years must have passed since recording of most recent evidence indicating absentee to be alive; and (3) at least six months must have passed from posting of declaration of absence. Four-year period is calculated according to Decree 31/1954, art. 17 (see category 21 Property, topic 21.01 Absentees).

Declaration of Death Not Preceded by Declaration of Absence.

In exceptional circumstances, declaration of absence need not precede declaration of death, such as during war, railroad accidents, shipwrecks or other similar circumstances. (Decree 31/1954, art. 16, para. 3). Presence of exceptional circumstance, and its date, may be proved by evidentiary means. However, one year must have passed since occurrence of event.

Court declaration of death is stipulated in arts. 36-38 of Decree 32/1954 and is communicated to registry's office for civil status inscription. Decisions declaring death must include date of death. Date of death is established by court according to circumstances. However, if this is not possible, date of death is established as final day of month when death occurred or, if month cannot be established, as final date of year when death occurred.

Determination of date of death pursuant to declaration opens succession and terminates natural person's capacity to exercise his rights and duties. In addition, declaration has retroactive effects so that absentee is considered to have died on established date, not when decision becomes final.

Annulment of Declaration.

Amending of initially established date of death is possible if proved that such date is inexact. (Decree 32/1954, art. 43, applied by assimilation as procedure for, art. 18). If person declared dead is alive, annulment of declaration of death may be requested at any time. (Decree 31/1954, art. 20). In order to annul declaration of death, court action must be initiated with same judicial body which rendered declaration of death. (Civ. Pro. Code, art. 2, as modified by Law 59/1993). Action may be initiated by any interested party. Upon commencement of action, public hearing will be held, during which parties and conclusions of Prosecutor's Office are heard. Once annulment is granted, decision is communicated to Population Department for necessary modifications in its register.

After annulment, person declared dead may request restitution of his belongings. (Decree 31/1954, art. 20). Relationship between person wrongfully declared dead and his heirs, as well as extension of heirs' obligation to return his property, depends upon their good faith. In absence of good faith on part of heirs, restitution damages will be awarded.

Relationship between person wrongfully declared dead and third persons who, for example, may have received property from heir, will be regulated in favor of recipient only if he obtained property in good faith and for valid consideration.

Annulment of declaration of death affects family relations. If spouse of person declared dead remarries, and declaration of death is annulled afterwards, second marriage remains valid, and first marriage terminates on date of conclusion of new marriage. (Fam. Code, art. 22).

Presumption of survival has no application in Romanian legislation. If several persons died during same event, and survivorship cannot be established, they are considered to have died simultaneously. (Decree 31/1954, art. 21).

12.02 DESCENT AND DISTRIBUTION:

According to Romanian law as it relates to intestate succession, inheritance passes to deceased person's relatives in order of their class and degree.

Classes of Heirs.

First Class.

Such class consists of deceased person's children and their descendants, irrespective of gender, and includes both marital children and legally recognized nonmarital children. (Civ. Code, art. 669). Adopted children and their descendants are also members of this class.

Second Class.

This class is composed of privileged ascendants and privileged collateral heirs. If there are no heirs of first class, or if they are not eligible to inherit (i.e. they are guilty of serious act against deceased), or they reject inheritance, heirs of second class will stand to inherit, bypassing heirs of third and fourth classes. Privileged ascendants are parents of deceased, either biological parents, or through marriage or adoption. Privileged collateral ascendants are brothers and sisters of deceased, together with their descendants. Brothers and sisters include those from within or outside marriage and from fully effective adoption (for details on abrogation of restricted effect adoption, see category 13 Family, topic 13.01 Adoption). If privileged descendants or privileged collateral ancestors stand to inherit alone, they have right to total inheritance. Against privileged descendants, privileged collateral ancestors will take one-half or three-fourths of inheritance, depending on whether both or only one parent survives.

Third Class.

This class is composed of ordinary ascendants (i.e. grandparents, and great-grandparents, of deceased). They stand to inherit after ascendants, privileged descendants and collateral heirs. Ordinary ascendants may come either from within or outside marriage.

Fourth Class.

This is class of ordinary collateral heirs consisting of uncles, aunts, and primary cousins of deceased, and brothers or sisters of grandparents of deceased. Such persons stand to inherit if no one stands to inherit from first three classes. Members of this class may come from within marriage or outside marriage.

General Principles of Legal Inheritance.

Heirs stand to inherit in order of their classes, regardless of degree of relatives. Living spouse, however, who is not part of any class of legal heirs stands to inherit against each class of heirs. Within same class, relatives of closer degree take precedence over those of more remote degree for purposes of inheritance. However, as part of second class (class of privileged ascendants and privileged collateral heirs), parents of deceased (relatives of first degree) do not overtake brothers and sisters of deceased (second degree relatives), but share in inheritance. In case of succession representation, remote heir steps up in place and degree and replaces his deceased author, joining those heirs closer in degree by virtue of deceased author's share (e.g. if son died, grandson will participate together with his uncle [brother of deceased] to succession of his grandfather). (Civ. Code, art. 664). Succession representation proceeds according to straight-line descent (art. 665) and includes descendants from brothers and sisters (art. 666). Class relatives of same degree inherit in equal shares, but in case of brothers and sisters from different marriages, brothers and sisters by both mother and father will take larger share than those only by one mother or father.

If there are no legal heirs or testamentary heirs, estate of deceased reverts to state.

Inheritance Rights of Surviving Spouse.

According to Law 319/1944, surviving spouse's right of inheritance depends upon whether that person was spouse of deceased at time of succession.

Surviving spouse has right to share in inheritance, but size of his share depends upon class of heirs against whom he takes. When surviving spouse takes with class I heirs, regardless of their number, surviving spouse receives one-fourth of inheritance. When surviving spouse takes against class II heirs, his share depends upon whether he takes against both privileged descendants and privileged collateral heirs (when he receives one-third of inheritance) or he takes against only one of two mentioned categories (when he receives one-half of inheritance).

When surviving spouse takes against class III and/or IV heirs, such surviving spouse receives three-fourths of inheritance. If there are no legal heirs, or legal heirs are not eligible to inherit, or have rejected their inheritance, surviving spouse inherits entire estate of deceased.

Surviving spouse also has right to inherit furniture and objects from house shared by couple, as well as any wedding gifts, and retains this right unless he competes with heirs other than descendants of deceased. If there are class I heirs, these assets become part of estate. Surviving spouse has right to reside in house that is part of estate (Law 319/1944, art. 4), provided that spouse does not own second home and that his first is not included in descendant's own inheritance. Habitation right of surviving spouse is temporary, and generally lasts until inheritance is divided, but at least until succession commences. If surviving spouse remarries before division of inheritance, habitation right lasts until date of remarriage.

12.03 EXECUTORS AND ADMINISTRATORS:

Upon death, person's estate is transferred to his successors. Successor may decline inheritance (Civ. Code, art. 686), provided that he waives his rights no more than six months after date of death (art. 700). Waiver of inheritance must be express and effected through declaration at Notary where succession was opened. (Civ. Code arts. 696-698; art. 68, Law 36/1995).

Inheritance may be accepted unconditionally or “under benefit of inventory”. In first case, estate of decedent merges with personal assets of successor. Successor becomes responsible for liabilities of decedent's estate, not only within limits of decedent's own estate, but also within that of successor. In second case, successor may accept inheritance “under benefit of inventory”, thereby making himself responsible only within limits of assets of decedent's estate. (Civ. Code arts. 704 and 714). Debts and obligations of estate are borne by all successors (i.e. those successors who inherit all or portion of decedent's estate in which case they constitute legal successors or legatees). Legatees with title to specific asset are not obligated to bear debts and obligations of estate.

Testamentary Executor.

Usually, execution of will is performed by legal successors and universal legatees. However, testator may nominate one or more persons to serve as executor. (Civ. Code, art. 910). In this case, State Notary must issue certificate acknowledging appointment. Function of testamentary executor is to supervise proper execution of will. Powers and objectives of testamentary executor differ, depending upon whether testator granted executor possession of movable assets, or “seisin”. Executor without seisin supervises and controls execution of testamentary provisions, without actually executing provisions. (art. 916). Testamentary executor with seisin has right to execute testamentary provisions by obtaining possession of all or part of movable assets of testator. (Civ. Code, art. 911). Seisin is granted for up to one year from date of testator's death. Executor has obligation to deliver movable assets to respective legatees. In event of insufficient funds to pay legatees, executor is obliged to request sale of movable assets to obtain necessary amounts. Testamentary executor also has right to cash in inheritance claims to movable assets. (art. 916, para. 3).

Testamentary executor has duty to carry out his obligations and to provide all relevant information related to administration of estate. (Civ. Code, arts. 1539-1540).

12.04 WILLS:

Wills are regulated by Civil Code, arts. 800-812 and 856-931.

Generalities Regarding Wills.

Will is legal act by which individual, testator, anticipating death, disposes of all or part of his estate. It is unilateral, personal, solemn and revocable legal act.

Will contains dispositions, or legacies, of testator's estate at time of death, as well as other dispositions. Requirements for valid will include following: (a) capacity of testator to make dispositions; (b) free will of testator; and (c) valid cause of legal act. Under Civil Code provisions, wills must also be in writing. Nonobservance of legal requirements shall render will void.

Ordinary wills include following:

(a) Holographic Will.

Will which is entirely handwritten, dated and signed by testator. Proof of handwriting and signature of testator must be obtained by comparison with other documents. (Civ. Code, arts. 1178 and 1182).

(b) Authentic Will.

Will which must be authenticated by Notary according to law. (art. 860). In order to authenticate it, Notary verifies testator's identity, reads will's content aloud in presence of testator, and asks testator whether contents represent his last will, if contents verified, testator signs will before Notary.

Declarations made before authenticating Notary and recorded in Notary's authentication minutes can only be contested on grounds of forgery, but validity of these declarations may be contested by any means of proof.

(c) Secret Will.

Will written by testator or another person, signed by testator, closed, sealed and submitted to court for authentication is secret. Judge in receipt of will drafts minutes on separate piece of paper or on envelope containing will, certifying presence of testator, latter's declaration that will is his, and subsequently, both judge and testator sign and date minutes. (arts. 864-867).

Privileged Wills are created under following special circumstances:

(a) Maritime Will.

Drafted in two originals during sea journey by crew member or by passenger in front of ship's captain or his deputy, assisted by ship's administrative officer or his deputy and two witnesses.

(b) Military Will.

Drafted by commanding officer of military unit assisted by two witnesses. If military man is wounded or ill, will shall be drafted by chief military doctor assisted by commanding officer of hospital.

(c) Will Executed During Epidemic (Contagious Disease).

Drafted by member of local council or mayor assisted by two witnesses.

Privileged wills must be written and signed by testator, instrumental agent and by at least one of two witnesses, when procedure requires presence of witnesses, and are valid only if testator died as result of such special circumstances provided by law. Military and epidemic wills are terminated within six months after cessation of event that prevented drafting ordinary will. (Civ. Code, arts. 871-873, 876-878, 882). Corresponding figure for maritime will is three months.

Simplified Forms of Wills.

Simplified will can be created with bank deposits, containing testamentary clause which represents legacy with particular title.

Romanian citizens located abroad may create will either in form of holographic will, as provided by Romanian law, or in form provided by law of country where will is drafted. (Civ. Code, art. 885).

Revocation of Legacy.

Revocation of will may be effected by testator or by court on account of actions perpetrated by legatee.

Voluntary revocation is accomplished by testator and may be of two kinds: express voluntary revocation, effected by testator either through will or authenticated document (Civ. Code, art. 922); and tacit voluntary revocation, not expressly declared but resulting from actions of testator (arts. 921 and 923).

Court revocation is sanction for blameworthy acts perpetrated by legatee against testator or his memory.

Disinheritance is testamentary provision by which testator prevents legatees from attacking will, excluding them from legacy or reducing them to legal residue. Disinheritance is void if it promotes illegal or immoral testamentary provisions.

Succession residue is that part of legacy that rightfully belongs, according to law, to reserve heirs, and thus, cannot be freely disposed of by testator. Reserve heirs are descendants of testator without limitation as to degree (children, grandchildren, great-grandchildren and children from outside marriage), privileged ascendant (father and mother), and surviving spouse. (Civ. Code, arts. 841, 842; Family Code, art. 63).

Successor's Unworthiness.

Legatee loses his legal or testamentary succession rights if found guilty of one of following acts: murder of testator or attempted murder of testator; libelous statements about testator; or failure to disclose that testator was murdered. (Civ. Code, art. 655). However, legal doctrine and practice argues that last two cases became inapplicable.

Renouncement of Succession.

Renouncement occurs when legatee rejects succession rights offered to him. Renouncement may be effected expressly by declaration of renouncement before Notary. (Law 36/1995, art. 76). If renouncement to succession is not effected within six months from beginning of succession, such legatee will be treated in same manner as other legatees. (See also topic 12.02 Descent and Distribution.)

13 FAMILY

13.01 ADOPTION:

Legal Framework.

Adoption is regulated by Law 273/2004 regarding legal regime of adoption, whereby international adoptions, i.e., adoption of Romanian children by foreign citizens, are allowed only in case adoptive parent or his/her spouse is grandparent of child. Law 272/2004 regarding protection and promotion of childrens' rights establishes principle of best interest of child.

By way of Law 15/1993, Romania acceded to European Convention regarding Adoption of Children, concluded at Strasbourg on Apr. 24, 1967. By way of Law 84/1994, Romania also ratified Convention regarding Protection of Children and Cooperation in International Adoption, concluded at The Hague on May 29, 1993. Accession to European Convention has been made with reservation of application of art. 7 provisions in connection with age limits of adoptive parent.

Also, through Law 216/2003, Romania adhered to European Convention on recognition and enforcement of decisions concerning custody of children and on restoration of custody of children, according to which, each contracting state must appoint central authority which, free of charge, will have, inter alia, task to: (i) receive applications and assist adoption applicant and, (ii) transmit requests for information and to cooperate with other authorities. Application for adoption may be made either directly to court or to central authority of any contracting state. In Romania, central authority is Ministry of Justice.

General Provisions.

Law 273/2004, as amended, establishes legal framework for adoption:

Adoption is legal operation by which kinship of adopted child to adopting person and his/her relatives is established.

Principles for legally concluding adoption are as follows: (a) Principle of best interest of child (art. 2 lit. a); (b) principle of raising and educating child within family environment (art. 2 lit. b); (c) principle of continuing education considering child's ethnic, cultural and linguistic origin (art. 2 lit. c); (d) principle of keeping child informed and consulting him/her as appropriate to his age and maturity (art. 2 lit. d); (e) principle of efficiency in performing any act related to adoption procedure.

General requirements for legally concluding adoption are: (a) Adoption must be made solely in interest of adopted child (art. 5[1]); (b) adopted child must be minor except in cases where person is now adult but was raised while minor by adoptive parents (arts. 2 and 3); (c) adopted child must not be brother or spouse of person who adopts him/her (art. 8); (d) child cannot be adopted, simultaneously or successively by more than one adoptive person (art. 7); (e) adoptive parent must have fully legal capacity and must be at least 18 years older than adopted child (art. 19); (f) adoptive parent must prove certain moral and material guarantees for harmonious development of adopted child; (g) obtaining adoptive parent's, natural parent's and adopted child's consent, latter needed in case child is older than 10 years of age (art. 11).

Consent of parents may be expressed generally in court only after period of 60 days from child's birth.

Parents may revoke their consent within 30 days after date such consent was given.

Jurisdiction.

Approval of adoption is under competence of court. (arts. 34, 40, 61).

Court in jurisdiction where child is domiciled is court of first instance for cases concerning approval of adoptions. (Law 273, art. 61, para. 3). For cases in which competent court cannot be established, Bucharest Municipal Tribunal is competent court. (idem).

Internal Adoption.

For internal adoption to be performed, certain phases are to be covered (and relating to each phase, certain condition must be fulfilled): (a) Attesting of moral and material guarantees of adoptive parents (arts. 19-21); (b) opening by court internal adoption procedure, on basis of individual protection plan (arts. 22-24); (c) entrusting child (for minimum 90 day period) to adoptive parents (arts. 25-33); (d) approving adoption by court (arts. 34-38).

Application of person or family that wishes to adopt child must be registered with competent court.

International Adoption.

“Sine qua non” condition for concluding adoption of Romanian children by foreign citizens is that either adoptive parent or one spouse from adopting family domiciled abroad must be grandparent of child for whom internal adoption procedure has been initiated.

Application of person or family that wishes to adopt child registered with Adoption Office (established through reorganization of Romanian Committee for Adoptions) shall be transmitted by it to competent court through public service charged with child protection or through authorized private body.

Effects.

Both internal and international adoption produce effects from date on which judgment is final. Beginning with moment of adoption, consanguinity between child and his natural parents ceases. (Law 273/2004, art. 50).

Regarding adopted child, adoptive parents have all rights and obligations as natural parents.

Adopted child shall take name of adoptive parent.

13.02 DIVORCE:

Divorce is initiated by filing application in County Courts (Fam. Code, arts. 37-44; Constitution art. 44, para. 2; Law 105/1992 regarding regulation of international private law relations, arts. 22 and 23). Under present draft of Family Code (following changes made in 1993 by Law 59) there are three methods for divorce: (1) divorce for well-founded reasons; (2) divorce upon application of both spouses; and (3) divorce based on medical reasons.

Divorce for Well-Founded Reasons.

Divorce for well-founded reasons occurs when relations between spouses are gravely prejudiced and continuation of marriage is no longer possible. (Fam. Code, art. 38, para. 1). Well-founded reasons include: (1) Unjustified refusal of one spouse to live with other; (2) unjustified desertion of marital home; (3) adultery; (4) acts of violence; and (5) physiological incompatibility. Court may pronounce divorce against guilty spouse if evidence demonstrates that such spouse caused separation. Court can also permit divorce against both spouses if both have submitted divorce applications for well-founded reasons (see Civ. Pro. Code, art. 608), or when evidence demonstrates that both are at fault. In such circumstances, court decision will not cite grounds for divorce if requested by both parties. (Civ. Pro. Code, art. 617, para. 2).

Divorce Upon Application of Both Spouses.

Divorce may also be granted upon application of both spouses (Fam. Code, art. 38, para. 2) if, as of date of submission of divorce application, at least one year has passed since date of marriage, and there are no minor children from marriage. If such conditions are fulfilled, proof is not administered and court of law awards dissolution of marriage without pronouncing fault of either spouse. (Civ. Pro. Code, art. 617, para. 3).

Divorce Granted for Medical Reasons.

Either spouse can apply for divorce when either spouse's state of health makes continuation of marriage impossible. (Fam. Code, art. 38, para. 3).

Legal Effect.

Marriage is dissolved as of date Court decision becomes final and irrevocable (see Civ. Pro. Code, art. 377, para. 2). Patrimonial effects of marriage as to third parties ceases on date when notation regarding divorce decision is made in Civil Status Register or, on date when third parties receive notice of divorce. (Fam. Code, art. 39; Law 119/1996, regarding civil status documents, arts. 44, 48 and 58 and Law 105/1992).

Regarding use of post-divorce spousal names: (1) Spouses may agree that spouse who used other spouse's family name during marriage can keep such name after divorce; (2) in absence of agreement between spouses, court of law may grant this right for well-founded reasons, such as when spouse has become known in certain field and is recognized as personality under name of other spouse; (3) in all other circumstances, or court order, each spouse will use name used before marriage. (Fam. Code, art. 40).

Alimony and Support.

Upon dissolution of marriage, divorced spouse has right of support if: (a) from time before or during marriage, spouse suffers from incapacity and cannot work as result; and (b) if, within one year from divorce, incapacity to work arises as result of circumstances related to marriage. (Fam. Code, art. 41, para. 2, see also Law 105/1992, art. 34).

Alimony may be set up for up to one-third of net income of spouse obliged to pay it, subject to needs of payee and means of payer. Alimony, together with child support, may not exceed one-half of net income of obliged party. (Fam. Code, art. 41, para. 3).

If divorce is based upon fault of spouse requesting support, spouse at fault benefits from stipulations in Family Code regarding alimony for only one year from date of dissolution of marriage. (art. 41, para. 4).

In all cases, right to receive support ceases when recipient remarries. (Fam. Code, arts. 2, 38, 39, 86, 89 letter a, 93, 94, paras. 1-2, 95).

Child Custody.

Issues ancillary to divorce, such as child custody, child support obligations, and use of marital home, are decided mainly in accordance with minor's best interests. (Fam. Code, art. 38, final para.). Status of minor children is determined according to Family Code, art. 42. When deciding which parent receives custody of child, court takes into account interests of minor children, hearing directly from children if they are at least ten years of age, as well as hearing opinion of parents and of guardian authorities. Subject to court ruling, children may be placed in custody of relatives or other people, or with child-care institutions. Contribution of each parent to costs of support and education for children is also established by court. Agreement of parents as to payment of support is effective only if sustained by court (see also Family Code, arts. 86, 93, 95, 97, 101, 107).

Parental rights are exercised by parent having custody of child. (Fam. Code, art. 43). When child is assigned to one parent or to guardian, court will establish which parent will administer property of child and represent child or acknowledge his acts. Parent or guardian having custody over child has rights and duties uniquely relating to person of child. Other parent has right to have personal relations with child, and supervise child's upbringing, education and training. (Fam. Code; Constitution arts. 29, para. 6, 44, para. 1, 45, 46; Decree 31/1954 arts. 4-11).

Divorce procedure is governed by Civ. Pro. Code arts. 607-619. Divorce application must contain elements required for legal action (Civ. Pro. Code, art. 82) and details regarding names of marital children, or of those who possess legal status of legitimate children.

Divorce application should be filed with court having jurisdiction over territory of last common domicile of spouses. If there was no such domicile, or if neither spouse resides there any longer, competence belongs to court having jurisdiction over territory where defendant is located. If defendant lives abroad, application must be submitted to court having jurisdiction over territory where claimant is located. (Civ. Pro. Code, art. 607).

According to Law 105/1992, regarding international private law relations, divorce is governed by parties' national common law. If spouses have different citizenship, then common domicile rule is applied. (art. 20). If there is neither common citizenship nor common domicile, law of state where spouses had common residence, or with which spouses have in common closest relation will be applied. If one spouse was Romanian citizen at date of application for divorce and foreign law does not allow divorce or allows it under very restricted conditions, Romanian law will apply. (art. 22).

13.03 HUSBAND AND WIFE:

Matrimonial regime is governed by provisions of Family Code, enacted by Decree 32/1954.

Family Code, art. 1, para. 4 and art. 25, para. 1 stipulate that in relations between spouses, husband and wife have equal rights and equal obligations during marriage. Patrimonial relations between spouses are founded on principle of equality between sexes.

Common and Separate Assets.

Spouses may have two categories of assets: (a) Those common to spouses; and (b) those owned separately. Generally, assets acquired during marriage by either spouse are common assets. (Fam. Code, arts. 30-31). Common assets include those assets acquired by spouse individually, while married, even if that spouse's name is solely listed on document of acquisition.

Assets are common if acquired before divorce decision becomes final. (Fam. Code, art. 39).

Apart from assets acquired before marriage (Fam. Code, art. 31), following are considered separately owned by spouses: assets acquired during marriage by inheritance, legacy or donation (except when donor has stated that they shall be common); assets of personal use or for one spouse's work; assets acquired as awards or rewards; scientific or literary manuscripts, artistic designs and projects, inventions and innovative projects, and other similar assets; insurance or compensatory indemnification for damages caused to person; value representing or substituting asset owned separately by spouses. (Fam. Code, arts. 31, 33, 36).

Under Constitution, family is founded upon free consent of spouses to marriage and their full equality (art. 48), but principle of equality is not applied in separation of assets in case of divorce. Upon divorce, contribution of each spouse to acquisition of assets and their well-being is considered.

Agreements Limiting Right to Common Assets are Void.

Fam. Code aims to protect common interests of spouses and family from taking advantage of either spouse. For example, neither spouse may dispose of immovable common assets without express consent of other spouse.

System of common assets has imperative character so that neither spouse, under influence of other and under appearance of serving interests of community, may be deprived of assets. Matrimonial agreements concluded in contravention of law are null.

Spouses may not agree to relinquish their equal rights to manage, use and dispose of common assets. Agreements may not provide that certain assets acquired during marriage are separately owned by one of spouses, nor remove common character of matrimonial assets by establishing one spouse's rights over them or their shares if those assets are divided. Also, one spouse may not donate common assets during marriage. For example, Supreme Court declared to be null and void agreements by which one spouse admits not having made any contribution in acquiring assets during marriage. (Decree 31/1960). Agreement attempting to increase assets of one spouse by diminishing community assets is invalid. (Fam. Code, art. 30, para. 2). Sales between spouses are not permitted in effort to prevent them from making irrevocable donations and to protect third parties against fraud. (Civ. Code, art. 1307).

Donations between spouses are revocable, although other donations (see category 21 Property, topic 21.02 Gifts) are irrevocable legal acts. (Civ. Code, art. 934). Donations may be executed between spouses only regarding assets owned separately by them, not with regard to common assets.

Effect of Marriage or Dissolution Thereof.

Patrimonial effects of marriage cease regarding third parties from moment divorce decision is registered with Civil Status Registry or from date third parties are given notice by another. (Fam. Code, art. 39, para. 2). As result, third parties may consider those assets acquired after dissolution of marriage as assets owned separately by spouses.

Supreme Court has established that asset acquired by one spouse after dissolution of marriage with money from other spouse represents asset owned separately by spouse who acquired it, other spouse having only credit against sum remitted during marriage.

Assets acquired during de facto separation de facto of spouses are common. For such assets, Supreme Court (Civil Decision 1861/1982) established that these are common assets, however, de facto situation may determine smaller contribution for spouse who did not actually contribute to acquisition.

Marriage Terminated by Death.

In case of death of one spouse (Fam. Code, art. 37: end of marriage by death of one of spouses or by court's decision declaring death of one of them), assets acquired up to date established by court decision as date of death are common, and those acquired after this date are owned separately.

If court's decision declaring death is annulled, all assets acquired after established date of death are common, as neither marriage nor community of assets ceased. If former spouse of person declared dead has remarried, and new marriage is bona fide, community of assets from previous marriage is valid up to conclusion of new marriage.

Proof of Asset Status.

With regard to proof establishing ownership over assets, Fam. Code, art. 30, para. 3, provides for presumption of community: “feature of common asset is not to be proved”. Until proved otherwise, asset acquired during marriage is considered common and spouse claiming to own asset separately must prove it.

Any evidentiary means is admitted in order to demonstrate that assets are personal to one spouse. (art. 5, para. 1, of Decree 32/1954, derogating principle established in Civil Code, art. 1191, forbidding proof with witnesses and presumptions regarding assets valued over ROL

250 and whenever it is managed against or over amount stipulated in documents; reason for derogating common right instituted in Civil Code, art. 1191, is material and moral impossibility of elaborating upon documents [Civ. Code, art. 1198].)

In case of marriage concluded before enactment of Family Code (Feb. 1, 1954), proof of asset owned separately by spouses may be made by any evidentiary means even towards third parties. (Decree 32/1954, art. 5, para. 2). In case of marriage concluded after enactment of Family Code, proof towards third parties may be used only in conformity with Civil Code, art. 1191. In relations between spouses, proof about quality of asset owned separately may be made by any evidentiary means.

Obligations of Spouses.

According to Fam. Code, art. 32, spouses are liable with their common assets for: expenses made in managing any of common assets; obligations contracted together; obligations contracted by any of spouses for needs of marriage; for prejudice caused by one of spouses to assets of public property if by this they increased their common assets (see Decision of Constitutional Court of Sept. 7, 1993, published in Official Gazette of Romania 232 of Sept. 27, 1993).

After seizing assets owned separately by debtor spouse, his personal creditor may require separation of common assets, but only to extent necessary to cover debt. Assets attributed following such separation become separately owned. (Fam. Code, art. 33, paras. 2, 3; Civ. Pro. Code, arts. 372-580, modified through Law 59/1993).

Assets owned separately by spouses may be seized by common creditors, but only after first seizing common assets. (Fam. Code, art. 34; Civ. Pro. Code, arts. 3711-5805 as modified by GEO 138/2000 and GEO 59/2001).

Reciprocal Tacit Mandate.

Presumption of reciprocal tacit mandate is provided by Fam. Code, art. 35: “spouses together manage, use and dispose of common assets. Either spouse, exercising alone these rights is presumed to have other spouse's consent.” This presumption has relative character, as it can be overturned by proof to contrary.

Because presumption of tacit reciprocal mandate does not have absolute character, court is entitled to verify if spouse who participated in alienation of asset demonstrated disapproval by his behavior. However, right of bona fide third parties who deal with one spouse cannot be overlooked. If acquirer was of ill will, it must be proved, because presumption of good will prevails. (Civ. Code, art. 1899, para. 2).

Exception from reciprocal tacit mandate are stipulated in Fam. Code, art. 35, para. 2: neither spouse may alienate nor mortgage common land or buildings without express consent of other spouse (see also Land Law 18/1991, republished arts. 45-49; Law 50/1991, republished regarding license for construction, art. 41). Spouse who did not expressly consent to document regarding alienation or mortgage of land or construction may initiate annulment or claim, as other owner. In case of claim, express consent of other spouse is not necessary, because it benefits community of assets and, therefore, both spouses.

Although Fam. Code, art. 35, para. 2, refers only to land and constructions, it is also applied in case of other immovables: (a) by destination (Civ. Code, arts. 468-470); (b) by object (Civ. Code, art. 471, regarding usufruct of immovable goods, servitudes, actions of claiming immovables); or (c) by right (Civ. Code, arts. 493, 494). Fam. Code, art. 35, para. 2, refers only to alienation by documents between living persons, not documents in case of death (i.e. will).

Judicial practice also established exceptions from reciprocal tacit mandate, besides that stipulated by art. 35, para. 2, i.e. documents with gratuitous title between living persons, irrespective of fact whether they refer to movables or immovables. Exception to this limit, established by practice, is ordinary gifts (birthday gifts) and charity.

Division of Common Assets.

Common assets are divided between spouses upon dissolution of marriage (Fam. Code, art. 36, para. 1), either by mutual agreement between spouses, or, in case of disagreement between spouses, by court order.

Common assets may be divided, totally or partially, during marriage by court order under special circumstances. For example, if spouse has no other resources to help needy child from previous marriage or if spouse has left domicile and has not consented to alienating some of common assets. (Fam. Code, art. 36, para. 2).

Division of common assets during marriage may occur only in following cases: (a) at spouse's request; (b) at personal creditor's request (personal to either spouse); or (c) at seizure of assets of one spouse.

Assets divided during marriage become separately owned. (Fam. Code, art. 36, para. 2). Undivided assets, as well as those acquired at later date, are common assets. (Fam. Code, arts. 1-3, 30-35, 37-39).

With regard to separately owned assets, either spouse enjoys exclusive right to manage, use and dispose of separately owned assets, and either spouse may conclude legal documents during marriage with other spouse (excepting sales, Civ. Code, art. 1307) or with third parties.

13.04 INFANTS:

According to Constitution: children and young people enjoy special protection and assistance in pursuit of their rights. (art. 49, para. 1). Children born out of wedlock are equal before law with those born in wedlock. (art. 48, para. 3). State shall grant state allowances for children and benefits for care of sick or disabled children. Exploitation of minors, their employment in activities that might be harmful to their health, or morals, or endanger their life and normal development are prohibited. Minors under age of 15 may not be employed in any paid labor.

Prior Adult Consent for Execution of Legal Documents.

Persons who have reached age of 14 have limited capacity to exercise their rights: they may conclude legal documents provided that their parents or guardians consent. (Decree 31/1954, art. 9). Purpose of prior consent is to protect minors from deceit of third parties. (Fam. Code, arts. 105, para. 2, and 133). It is necessary for minor to reach age of 14 at time of contract: simply having entered year when age of 14 will be reached is insufficient.

Persons between ages of 14 and 18 years may legally conclude some types of legal documents without consent of guardian or parent, including: (a) those documents which may be concluded before age of 14 (simple documents); (b) special deposits at CEC, Insurance and Savings Bank of Romania (see Decree 31/1954, art. 10, final para.); and (c) public administration documents, if they are not harmful. (Decree 32/1954, art. 25).

If minor has reached age of 16, he may dispose of half of his estate through use of will. (Civ. Code, art. 807).

Minor who has not yet reached age of 16 cannot validly execute following legal documents without prior consent of parent or legal guardian: (a) administrative documents; (b) contracts to repair or lease goods; (c) documents involving some type of disposition, such as alienation; and (d) documents encumbering property with real charge (e.g. mortgage or security).

Legal Obligations of Minors.

Minors are forbidden from making donations or guaranteeing obligations of others not even with consent of parent or legal guardian. Also, minors may not conclude legal documents with their guardians, or their guardians' spouses, direct relatives, or siblings. (Fam. Code, arts. 128 and 133, para. 3). Legal guardian is also forbidden from making donations or guaranteeing obligations of others, on behalf of minor. (Fam. Code, art. 129).

According to norms of civil procedure, minors between ages of 14-18 may be subpoenaed personally or through their guardians. If minor has not yet reached age of 14, minor must be subpoenaed through legal representative, since law recognizes that minors under 14 do not have capacity (full or limited) to exercise their rights.

13.05 MARRIAGE:

According to Fam. Code, as promulgated by Law 4/1956, subsequently modified, and Constitution of 2003, marriage is union between man and woman based on free consent, monogamy, and contractual relationship as required by law. In order to give rise to rights and obligations associated to it, marriage must be concluded in front of representative from register of births, deaths and marriages. (Fam. Code, art. 3). Religious marriage ceremony may take place only after civil ceremony. (Constitution art. 48, para. 2).

Requirements.

To be legally concluded, marriage must be between people of opposite sex, and male must be at least 18 years of age, female at least 16 years. In special circumstances, such as pregnancy, female may marry at 15 provided that she possesses medical certificate and obtains special marriage license from local council (town hall). In addition, both future spouses should consent freely to marriage and both should inform other of their respective state of health. (Fam. Code, arts. 16-17 and Constitution art. 48, para. 1).

Marriage is denied or declared void if: (a) spouse is already married or is mentally incapacitated, mentally retarded or temporarily insane (Fam. Code art. 9); (b) parties are relatives in direct or collateral line to fourth degree (art. 6); (c) marriage is between adoptive parent and adoptive child (or their ascendants or heirs) (art. 7); (d) guardian wishes to marry minor under his ward (art. 8); (e) parties do not declare their condition of health (art. 10).

Marriage Declaration and Registration.

To marry, both parties must submit declaration of marriage. (Fam. Code, art. 12). Marriage must then be concluded within ten days, consisting of submission day of declaration and conclusion day of marriage. (Law 119/1996, art. 29). Declaration must be submitted in writing to authority of local public administration where marriage will take place. If one party lives in another town, declaration may be submitted to that town's authority, which will send declaration to former authority in 48 hours.

Marriage declaration must stipulate that: (a) Parties desire to marry; (b) each party is aware of other's state of health; (c) there are no impediments to marriage; and (d) one party will take name of other, or use both last names. (Fam. Code, art. 28).

Representative of authority of local public administration determines that parties are of age, and that above-mentioned formalities are complete. Then parties submit their birth certificates, identity documents and medical certificates and where case may be, proofs regarding end of previous marriage.

In exceptional cases, ten-day term may be reduced upon application to mayor and marriage may be concluded earlier. Exceptional cases include situations where child will be born within ten-day term, where prospective husband will be called to military duty, or when one of parties must leave to study or complete mission abroad.

Marriage declaration must be published, posting up extract copy of it on same day of registration in special place in City Hall where marriage will occur. (Law 119/1996 as modified by Law 23/1999, art. 281).

Conclusion of Marriage.

Marriage document is issued by registry for civil status documents and signed by spouses with surname chosen to be used during marriage, by two witnesses and by representative of local public administration authority. (Law 23/1999, art. 31, para. 2). Marriage may only be proved through this certificate. (Fam. Code, art. 18).

Location where marriage is concluded is chosen by spouses according to their residence. (Fam. Code, art. 11). Marriage of two Romanian citizens on board Romanian ship sailing outside of Romanian waters may be performed by ship's commander and shall be registered in ship's log. (Law 119/1996, art. 8). Marriage may not be concluded on airplane.

In order to conclude marriage, it must be possible for public to participate, in presence of two witnesses, authority's representative must take consent of parties, declaring conclusion of marriage, reading from Family Code provisions regarding rights and obligations between spouses, then drawing up certificate of marriage.

Marriage concluded in violation of norms regarding categorical impediments is null and void. (Fam. Code, arts. 4-7, 9 and 16).

If consent to marry has been given through mistaken identity, deception or threat of violence, spouse may request annulment of marriage within six months from discovery of grounds for annulment. (Fam. Code, art. 21).

For regulations concerning remarriage after marriage to person later declared dead, see category 12 Estates and Trusts, topic Death (Presumption of and Actions for).

Any person may oppose marriage between date of submission of marriage declarations and conclusion of marriage. Opposing statements are submitted in writing, stating reasons for opposition and providing proof if necessary (Fam. Code, art. 14). If challenge is well-founded, marriage will not be concluded and investigation will commence, followed by official report. If challenge is unfounded, representative of registry will proceed with marriage.

Conflict of Laws.

Law 105/1992 regarding relations in international private law states that rights acquired in foreign country are respected in Romania except when they violate public order. Art. 18 of Law 105/92 stipulates that basic conditions required to conclude marriage are determined by national law of each prospective spouse. If foreign law is more restrictive than Romanian law, latter will govern where one spouse is Romanian citizen or marriage is concluded on Romanian soil.

Required formalities for marriage are subject to laws of state where marriage is concluded. (Law 105/1992, art. 19). Marriage of Romanian citizen abroad can be concluded before competent local state authority with jurisdiction or, in presence of diplomatic agent or consular clerk of Romania. Marriage concluded in presence of Romanian diplomatic agent or consular clerk is subject to procedural requirements of Romanian law.

14 FOREIGN TRADE AND COMMERCE

14.01 CUSTOMS DUTIES:

Governing Provisions.

Acts governing application of customs duties in Romania are as follows: Customs Code adopted under Law 86/2006; Government Resolution 707/2006 approving regulation for application of Customs Code; Romania's Imports Customs Tariff GO 26/1993 regarding Romania's Import Customs Tariff, as amended; Law 98/1996, ratifying Convention for Harmonized System of Denominating and Qualifying Merchandise.

Through Law 133/1994, Romania ratified Marrakech Agreement regarding establishment of International Organization for Commerce, and through Law 20/1993, Romania ratified European Agreement for Association with European Community and its members. Romania is also member of World Trade Organization.

Trade Agreements.

Romania is member of World Trade Organization (WTO), Central European Free Trade Agreement (CEFTA), General System of Customs Preferences (GSCP), and P-16 System (custom preferences between developing countries). Free trade agreements have also been concluded with Turkey and Republic of Moldova. In addition, Romania has sign association agreement with European Union (EU) and is signatory to European Free Trade Agreement (EFTA). Based on agreements concluded, customs duties were eliminated completely in 2002 for EU and CEFTA and for EFTA in 2003.

Customs Procedures.

Romanian customs legislation is modeled on EU customs legislation. Law provides for five economic procedures: (i) Bonded warehouse; (ii) transformation under customs control; (iii) temporary admission; (iv) inward processing; and (v) outward processing (Law 86/2006, art. 107-2). Usage of economic customs regime needs previous authorization issued by customs authorities. (Law 86/2006, art. 108-1). Romanian Customs Code provides for several customs suspensions regimes, which may be granted for determined periods of time: (i) Customs transit; (ii) bonded warehouse; (iii) outward processing under suspensive regime procedure; (iv) transformation under customs control; and (v) temporary admission. (Law 86/2006-1). Suspension regimes do not require payment of customs duties, although bank guarantee equal to amount of customs duties may have to be submitted. Besides general customs clearance system, Romania has adopted simplified customs clearance procedures similar to those used in EU.

Customs regimes are economic and suspensive as indicated above, such as transit and warehousing of merchandise or active or passive processing of merchandise. (Law 86/2006, art. 107).

Customs duties for imports are determined on basis of Romanian customs regulations for imports (GO 26/1993, as subsequently am'd and Law 86/2006) using combined nomenclature of merchandise.

Present customs tariffs make distinction between imports and exports effected by legal persons as opposed to natural persons.

Customs Duties: Legal Persons.

Customs duties provided for by import regulations are expressed in percentages and apply to value of imported goods expressed in RON. (Law 86/2006).

GO 26/1993 and Law 86/2006 cite some generic categories of goods exempted from customs duties; other such categories are mentioned in special laws or resolutions arising from economic circumstances or social needs. In order to be declared exempt, goods must comply with certain conditions provided by law and they must be used solely for stated purposes of their import. Law 86/2006 provides that cases in which free traded or exported goods are exempted from import and export customs duties are determined by law. In justified cases, upon proposal of Ministry of Public Finance and of Ministry of Economy and Trade, Government approves by decision temporary exemptions or reductions of customs duties for certain categories of goods.

Customs duties are based on customs value, determined under Agreement regarding enforcement of art. VII of General Agreement for Tariffs and Trading (GATT, 1979) (“the Agreement”), to which Romania is party. (Law 86/2006, art. 57-1).

Customs value is established as provided in art. VII of GATT on basis of transaction's value namely effective paid or to be paid price when merchandise thereof is sold for export, having as destination importing country (art. 1 of Agreement), plus: (a) transport expenses outside Romania; (b) loading, unloading and handling expenses related to transport outside Romania; and (c) insurance costs outside Romania. (Law 86/2006, art. 57-2). If customs value cannot be determined as such, then basis of calculation is transactional value of identical merchandise sold for export and having as destination same importing country, at same time or almost at same time with respective merchandise. (art. 2 of Agreement). If neither provisions of art. 1 or 2 are applicable, then customs value shall be determined on basis of transactional value of similar merchandise under same conditions as those described in art. 2. (art. 3 of Agreement).

If none of above-mentioned articles shall apply, customs value of merchandise can be determined based on provisions of arts. 5 and 6 of Agreement. In case none of above-mentioned provisions can be applied, then authorities shall take into consideration reasonable means of determination, compatible with principles of present Agreement and with data available in importing country. (art. 7 of Agreement).

Operations relating to presentation of merchandise, submission of customs declarations, and storing and handling of merchandise in warehouse may be performed by Romanian legal persons having capacity of customs commissioners and licensed by National Customs Authority.

Customs Duties: Natural Persons.

Customs regulations applicable to natural persons are governed by special provisions which establish conditions and limits under which such persons may import or export goods. Natural persons must declare their goods to customs authorities for cases in which customs value is established according to list containing single value for each item or group of items, established by Ministry of Finance. (OM 1076/2006). Import of vehicles is covered by special norms.

Special duty exemptions exist that are applicable to Romanian or foreign natural or legal persons in case of small border trade, for persons sent abroad on work related to their employment, for persons moving from Romania, and for food products that can be taken abroad.

Disputes and Violations.

Disputes over application of customs regulations, establishment of customs value, and proper tariff entry may be resolved by filing complaint with issuing authority. Complaint must be filled in no more than 30 days after receipt of administrative act; Ministry of Finance's competent authorities are required to settle complaint no more than 45 days after its registration. (GO

92/2003, as am'd). Resolution may be challenged before Court, according to general procedural rules.

Violations of customs regulations include: use of customs declaration based on false documents; failure to pay duties; failure to attend customs proceedings in due time; conducting specific operations without customs license; and use of transport documents containing erroneous dates. Violations discovered by customs authorities are certified in written minutes by customs authorities. Interested party may file complaint with specific customs unit contesting such minutes.

At proposal of Ministry of Finance and Ministry of Economy and Trade, Government may temporarily permit reduction in duties or exemption from duties for certain merchandise.

Government Resolution 228/1992 introduced antidumping fees and compensatory fees to protect national producers and domestic market from unfair competition resulting from import of some products at dumping or subsidized prices or export at prices below those of national market.

14.02 DIRECT INVESTMENTS:

Legal Framework.

Investment is currently regulated, among others, by GEO 92/1997 regarding stimulation of direct investment, as amended; Law 332/2001 regarding promotion of direct investment with significant impact on economy, as amended; Law 346/2004 regarding establishment and development of small and medium-sized enterprises, as amended; Law 84/1992 regarding legal regime of free zones, as amended; GEO 24/1998 regarding disadvantaged zones, as amended; GO 14/2002 regarding establishment and operation of scientific and technological parks; GO 65/2001 regarding establishment and functioning of industrial parks.

General Provisions.

According to above-mentioned legislation, but also as provided in Romanian Constitution, investors benefit from guarantees against nationalization, eviction or other similar measures, except when such measures are of public interest, nondiscriminatory, performed in compliance with specific legal provisions and taken upon payment of equitable and effective prior indemnification. Indemnity must equal market value of expropriated investment at moment immediately preceding such expropriation or before imminent expropriation becomes known to such extent as to prejudice value of investment; any investor prejudiced by such measure is entitled to prompt examination of his case either by Romanian court or by another independent and competent authority, in compliance with international agreements to which Romania is party.

Fiscal Incentives.

Most of incentives provided by different laws in past were abolished by new Fiscal Code (Law 571/2003) which entered into force on Jan. 1, 2004.

Special incentives are available for investors that establish companies in free trade zones, as regulated by Law 84/1992. Investors in free trade zones benefit from exemption from custom duties, VAT, excises and profit tax for operations carried on such areas. Investors may also lease land or buildings in free trade zone on long term basis.

After numerous changes, investment facilities, in place as of July 2005, exist for: (i) Free trade zones (currently there are six free trade zones); (ii) fiscal and administrative facilities for SME; (iii) disfavored areas (29 of such areas); (iv) industrial parks; (v) facilities granted to holders of oil agreements; (vi) facilities for maritime navigation companies; (vii) technical logistic and administrative facilities for rural and ecological tourism; (viii) direct investments with major impact in economy and additional incentives for investments with value of more than USD 10 million; and (ix) other investments incentives granted in order to stimulate investments in Romania.

Companies qualified for investments incentives granted under several laws should explicitly opt for single incentive regime.

All incentives are subject to restrictions of Law 143/1999 as subsequently amended regarding state aid.

Guarantees and Incentives Applying to All Direct Investors under Provisions of Law 332/2001 on Direct Investments with Significant Impact in Economy ("Law 332/2001").

Any new investment: (i) Performed according to provisions of Law 332/2001, (ii) exceeding equivalent of USD 1 million, (iii) having positive effect on economy and (iv) generating new jobs, qualifies for legal regime provided by Law 332/2001. Law 332/2001 applies only to new investments that comply with its provisions and are performed after coming into force of this law. "Investors" are only private natural persons or legal entities. Direct investment may be performed based only on cash amounts, in ROL or hard currency. Time limit for effectively performing investment is maximum 30 months from registration thereof with Ministry of Development and Prognosis.

Direct Investment Law does not apply to: (i) Financial, banking or insurance sectors, and (ii) to activities that violate environmental protection norms, prejudice security and national defense interests of Romania, or impair public order, health or morals. Benefit from incentives provided by Law 332/2001 implies giving up incentives provided by other laws.

14.03 FOREIGN EXCHANGE:

Pursuant to its Statute, National Bank of Romania (NBR) issues and oversees application of foreign exchange regime in Romania.

Foreign exchange is regulated by Regulation 4/2005, issued by NBR, regarding foreign currency operations, as subsequently amended and refers to cashing, payments, compensations, transfers and credits and any other transactions denominated in foreign currency that may be performed through bank transfer, in cash, by payment instruments or other means of payment agreed or accepted by credit institutions. Above transactions are considered foreign exchange operations in local currency if they are performed between residents and nonresidents or between residents.

Foreign exchange operations are of two types: (a) Current and (b) capital-related.

Following entities are categorized as residents: (a) Romanian and foreign citizens domiciled in Romania; (b) legal persons registered in Romania as well as Romanian or foreign citizens authorized to perform independent activities in Romania; (c) branches, subsidiaries, representative offices, agencies and offices of foreign legal entities, registered and/or authorized to perform activities in Romania, embassies, consulates, representative offices or other permanent missions of Romania abroad.

Following entities are categorized as nonresidents: (a) Romanian and foreign citizens domiciled abroad; (b) legal entities and other entities headquartered abroad, as well as Romanian or foreign citizens authorized to perform economic activities abroad, embassies, consulates, representative offices or other permanent missions in Romania or international organizations or their representative offices functioning in Romania; (c) branches, subsidiaries, representative offices, agencies and offices of Romanian legal entities, registered and/or authorized to perform activities abroad; (d) embassies, consulates, representative offices or other permanent missions authorized to function in Romania.

Residents and nonresidents may acquire, hold and use any foreign currency, financial assets. (art. 5). Nonresidents may repatriate and transfer in Romania and abroad financial assets held in Romania. (art. 2-c). Purchasing/selling of foreign currency by residents and nonresidents may be performed only by intermediaries acting on foreign exchange market. (art. 17).

Any and all cashing and payments between residents can be performed in RON or foreign currency. (art. 2). Cashing and payments in foreign currency is subject to authorization regime set forth by Regulation 4/2005 and may be performed for example by: (i) Credit institutions (operations listed in their operating authorization; (ii) legal entities for operations resulting from foreign trade or from trading activities in ports, airports and other border points, or on board vehicles in international transport; (iii) individuals (incidental operations); (iv) individuals, legal entities and other entities, performing operations for which express legal provisions allowing payments in foreign currency are provided; or (v) physical and legal persons and other entities for operations carried out abroad. In addition, cashing and payments between residents may be performed in foreign currency, if special license has been obtained from NBR.

14.04 FOREIGN INVESTMENT:

At present, direct foreign investments enjoy same treatment as Romanian investments (see topic 14.02 Direct Investments). Particular provisions applicable to foreign investors are stipulated by Government Emergency Ordinance 92/1997, as amended. This Ordinance expressly establishes that investors shall be subject to same rights and obligations, regardless of whether they are resident or nonresident, Romanian or foreign. However, if foreign investor is resident of country with which Romania has concluded treaties that provides for more favourable treatment, provisions of respective treaty shall apply.

Any disputes arising between foreign investors and Romanian State as regards rights and obligations set forth under Government Emergency Ordinance 92/1997 will be settled, upon investors' choice, in compliance with procedures provided for by following: (a) Law 554/2004, regarding contentious administration, and Law 105/1992, regarding international private relations; (b) Convention for Settlement of Disputes that Arise between States and Nationals of Other States, concluded in Washington in 1965, where applicable; (c) UNCITRAL/CNUDCI Arbitration Regulations. (art. 11).

For detailed information see topic 14.02 Direct Investments.

15 HEALTH

15.01 HEALTH PROFESSIONALS:

Medical Doctors.

Under Law 95/2006 regarding reform in health area, published in Official Gazette No. 372, dated Apr. 28, 2006 (Law 95/2006), medical doctors must be natural persons and possess official titles of qualification in medicine. Medical doctors may be: (i) Romanian citizens; (ii) foreign citizens of EU or European Economic Space or citizen of Swiss Federation; (iii) their spouses, direct ascendants or descendents whose livelihood is dependant on Romanian citizen, irrespective of their citizenship; (iv) family members of citizen mentioned under (ii); (v) citizens of non-EU states' beneficiaries of permanent residents statute in Romania; or (vi) beneficiaries of long time residents statute, issued in accordance with EU regulations by one of states mentioned under (ii). (Law 95/2006, art. 370).

Additionally, medical doctors must be medically competent to exercise their profession, and they must not fall within case of legal indignity, such as conviction for crime against health or life, or court order prohibiting exercise of medical profession. Also, medical doctors must not be employees or collaborators of production or distribution unit of pharmaceutical products or sanitary materials or have state of health unsuitable to medical profile. (Law 95/2006, arts. 379, 382, 383).

Exercise of medical profession is based on certificate of membership of Romanian Medical Doctors' College. Medical doctors are organized in Romanian Medical Doctors' College (also regulated by Law 95/2006) which, among others, certifies honorability and professional morality of its members. (Law 95/2006, art. 406). Medical doctors may work in public system, or they may create private medical offices, as provided by Government Ordinance 124/1998 as republished in 2002 in Official Gazette 568 dated Aug. 1, 2002, and subsequently amended. Medical offices are entities with or without legal personality, providers of public services of medical human assistance for prevention, cure, recovery or emergency. (Law 95/2006, art. 1).

Pharmacists fall under same Law 95/2006. Pharmacist may be: (i) Romanian citizens; (ii) foreign citizens of EU or European Economic Space or citizen of Swiss Federation; (iii) their spouses, direct ascendants or descendents whose livelihood is dependant on Romanian citizen, irrespective of their citizenship; (iv) family members of citizen mentioned under (ii); (v) citizens of non-EU states' beneficiaries of permanent residents statute in Romania; or (vi) beneficiaries of long time residents statute, issued in accordance with EU regulations by one of states mentioned under (ii) (Law 95/2006, art. 553); they must not have been convicted of crime against health or life or court order prohibiting practice and they must be medically suitable for their profession. Also, pharmacists must not be medical doctors.

15.02 HYGIENE AND PUBLIC HEALTH:

General Provisions.

Hygiene and public health are regulated by Ministry of Health Order 536/1997 approving Norms of Hygiene and Recommendations regarding vital environment of population, as subsequently amended and Ministry of Health and Family Order 117/2002 as subsequently amended approving procedure of sanitary authorization of projects and objectives with impact on public health establishing contraventions as to hygiene and public health norms.

Hygiene norms are mandatory for all entities both from state and private system, as stipulated by Ministry of Health Order 536/1997. Law provides for several obligations to be followed by individuals and entities to protect public health, regarding mainly: lands for creation and development of human resorts, which must be protected against natural catastrophes, like avalanches, emanations or infiltration of toxic substances, pollution of environment, etc.; water supply systems, which must provide potable water in quantity and quality provided by national norms; collection and destruction or ecological storage of liquid and solid waste, as detailed by mentioned Order; public places (public stores, theatres, gyms, public institutions, swimming pools, cosmetic salons, etc.) must comply with certain legal conditions regarding supply with water, evacuation of liquid and solid waste, disinfecting public utilities, etc.; cosmetic products produced in Romania or imported from abroad must comply with national and international standards (Law 178/2000 on cosmetic products, as republished); Order also provides for hygiene conditions for safe development of public transport, as well as for other categories of transport of people (by railway, by air, by water, etc.); pesticides must be used in conditions provided by Norms, to ensure protection of public health.

At incorporation, traders must submit with Unique Bureau at Trade Registry statement that they comply with operating conditions of sanitary legislation.

Hygiene norms regarding food products are provided by Ministry of Health Order 976/1998 approving hygiene norms regarding production, processing, storage, transport and commercialization of food products as subsequently amended.

Hygiene Norms Regarding Drugs for Human Use.

Law 95/2006 defines drugs for human use as substances, mixture of substances that can be used or administered to humans for reestablishing, correcting or modifying physiological functions through exercise of pharmacological, immunological or metabolic action or for establishing medical diagnosis. To market such drugs, Romanian and foreign pharmaceutical companies must obtain drug marketing authorization from National Drugs Agency, which is valid for five years, after which it must be periodically extended. All drug products obtained under such authorization must be registered in Registry of Drug Products Used in Romania. Pharmaceutical companies and distributors alike, must obtain operating authorization from Ministry of Health and Family and must comply with regulations issued by National Drugs Agency. Failure to comply with these requirements may give rise to criminal prosecution. According to Law 95/2006, penalties may range from fines (between RON 10,000 and RON 30,000) to withdrawal of functioning authorization and imprisonment for counterfeiting drugs. Law 95/2006 similarly provides penalties for anyone failing to comply with regulation and if such failure has, as direct consequence, aggravation of person's illness or death.

Special laws refer to specific activities or products including: blood donations, Law 282/2005, drawing and transplant of human tissue and organs, Law 2/1998, tobacco and alcohol products, GEO 55/1999, among others.

Sanctions.

Failure to comply with legal norms of public health and hygiene is subject to Law 98/1994 regarding sanctioning of contraventions of norms of hygiene and public health. Sanctions range from RON 1,000 to RON 4,000 and could result in withdrawal of sanitary authorization.

15.03 PRIVATE HEALTH INSURANCE:

Law 95/2006 governs health insurance and voluntary health insurance.

Voluntary health insurance supplements mandatory public system (Unique National Fund) and is optional system through which insured person is entitled to indemnification for part of medical expenses exceeding package covered by public health insurance system. Voluntary health insurance contracts may complement or supplement basic package of services provided by public system. Any individual (whether Romanian, foreign citizen or stateless person) is eligible for private health insurance system.

16 IMMIGRATION

16.01 ALIENS:

Employment of Foreigners.

In compliance with Government Emergency Ordinance 92/1997, art. 4, para. 2, as modified by Law 241/1998 regarding activation of direct investments and Law 17/2000 investors in Romania may employ foreign citizens in accordance with law (see also GEO 194/2002 regarding regime of foreign citizens in Romania republished by Law 357/2003 and amended by Law 482/2004 and Government Ordinance 113/2005).

In free trade zones, foreign citizens may be employed only in management and specialized positions. (Law 84/1992, regarding status of free zones, art. 33).

Foreign shareholders themselves have right to participate in management and administration of company in accordance with law.

In principle, foreign citizens may be employed in Romania only if Romanian citizens cannot occupy vacant jobs. Therefore, this visa is granted based on preliminary approval of Office for Labor Migration. But this principle does not apply if foreigner is national of EU Member State or national of European Economic Area. (art. 8 of Law 18/2005).

Under current procedure, employer will request approval of Office for Labor Migration and prove at same time that it legally performs activities in Romania and has no outstanding liabilities and that when decided to employ foreigner fair selection has been made. (GEO 194/2002, art. 44).

To be employed by Romanian company, foreign citizen or Romanian citizen domiciled abroad must obtain work permit issued by Ministry of Labor, Social Solidarity and Family (see also Law 203/1999 as completed by GEO 172/2000 and GEO 32/2003 and am'd by Law 130/2004 regarding work permits, Law 18/2005 and Decree/Law 122/1990, regarding licensing and operation in Romania of representative offices of companies and foreign commercial entities, art. 16, para. 2). Work permit shall be granted for 12-month period with possibility to extend for another 12-months. (Law 130/2004, art. 1). Certain foreign employees are excepted from Law's general provisions: (a) Those who have established domicile on Romanian territory; (b) citizens of states of European Union, of states part of agreement related to European Economic Space and their family members; (c) those who have obtained protection in Romania; (d) those who are employees of foreign individuals or legal entities with headquarters abroad in Member States of World Trade Organization (representative offices, affiliates, subsidiaries etc.) and are on temporary assignment in Romania to company where foreign entity is shareholder; (e) foreign citizens whose access to labor market is set forth in conventions to which Romania is party or through other special laws; (f) foreign individuals employed by foreign legal entities and are on temporary assignment in Romania based on services agreement; (g) foreign individuals employed to perform teaching, scientific, artistic or any other specific temporary activities in specialized institutions based on minister's order; (h) foreign citizens temporarily employed by Romanian ministries or bodies of public administration. (Law 130/2004, art. 1).

As regards salaries of foreign personnel employed by Romanian companies, they may be paid in foreign currency since such payments are currency-related operations between residents and nonresidents provided under art. 2 of National Bank of Romania Regulation regarding foreign currency operations. (4/2005).

Personnel employed in representative offices of foreign companies in Romania may be Romanian citizens domiciled in Romania or abroad as well as foreign citizens. (Decree/Law 122/1990, art. 16, para. 1).

Employment of personnel at representative offices must be performed in accordance with law on basis of individual labor agreements establishing primary rights and obligations of parties. (Government Resolution 1222/1990, art. 11, para. 1).

Labor agreements are directly negotiated and concluded between foreign or Romanian citizens and foreign company headquartered abroad. (Decree/Law 122/1990, art. 16, para. 4).

Individual labor agreements are concluded for unlimited period of time (or maximum for limited time period of maximum 24 months under certain circumstances listed in Labor Code), and must be registered with Labor Office, in case of individuals employed by representative offices of foreign companies, and with Territorial Labor Inspectorate in other of cases. (Government Resolution 1222/1990, art. 11, para. 1).

Entry into Romania.

In compliance with GEO 194/2002 regarding regime of foreign citizens in Romania, foreigners may enter Romanian territory based on valid documents for crossing state border as well as Romanian, visa, if not otherwise stipulated by international agreements.

Foreign citizens may obtain Romanian visas from Romanian embassies or consulates in country where they are domiciled, based on preliminary approval of Romanian Ministry of Foreign Affairs. Depending on each particular case, consular department within Romanian Ministry of Foreign Affairs may request approval of Authority for Foreigners ("AFF"), which is to be issued within 30 days of such request. (art. 30).

There are several types of visas such as business visa, work visa, short stay visa, long stay visa etc. (art. 20). In case duration of stay in Romania exceeds three days, foreign citizens, except those from EU states, should notify competent police department. (art. 12).

Short stay visas allow foreign citizens to enter Romania and stay for maximum period of 90 consecutive days or for several periods of time not to exceed 90 days within six months from date of first entry. Short stay visa may not be extended and is usually granted for purposes of diplomacy, tourism, visiting, business, transportation, sports, cultural or scientific activity. In case of short stay visa for purposes of business, foreign citizen should also have health insurance and means of support (subsistence) of at least [Euro]100 or equivalent in foreign currency for each day of his entire stay. (art. 23).

Short stay visa can also be granted based on invitation from Romanian individual or company. For instance, in case of short stay business visa, Romanian company may invite simultaneously three foreign citizens. It is, however, not clear whether Ordinance allows more than three foreign citizens to be invited simultaneously by same company. Invitation is made through company's legal representatives or its main shareholder. Upon request, AFF will give clearance on invitation based on company's registration documents and criminal record certificates issued by country of domicile. Invitor cannot proceed and address new invitation, of any kind, if one of previous invitees did not leave Romania. Invitation-based visas are granted for period of up to 90 days. (art. 37).

Long stay visas allow foreign citizens to enter Romania and stay for period of 90 days. It is granted to foreigners who wish to develop economic, commercial or professional activities in Romania, seek employment or studying. Long stay visas can be extended and give foreign citizens right to obtain residence permit to live in Romania. In order to obtain extension of their stay in Romania, foreign individuals are required to apply for it with at least 30 days before visa expiration term and may be asked to be interviewed. (art. 24).

Temporary residence permits are granted to foreign individuals who obtained temporary right to stay in Romania. Temporary residence permit is automatically renewed upon request every time temporary right to stay in Romania is prolonged.

Permanent residence permits are issued to foreign individuals who obtained permanent right to stay in Romania by means of establishing domicile in Romania.

Role of residence permit is to certify identity of foreign individual and his right to stay in Romania, as well as duration and purpose for which such right was granted. (art. 104).

In case of revocation of right to stay in Romania of foreign citizen, residence permit becomes null beginning with date of revocation decision, and it is withdrawn at date when foreigner is notified. (art. 107).

17 INTELLECTUAL PROPERTY

17.01 COPYRIGHT:

In General.

Law regulating copyrights in Romania is Law 8/1996, as amended by Law 285/2004.

Provisions of Law 8/1996 are generally consistent with European Union regulations. Law provides for registration system for works in special ledger. Once intellectual work has been created, acknowledged and protected regardless of whether it is published or complete.

Author of work is natural person(s) who created that work. In cases expressly stipulated by Law, natural or legal entities, other than author, may benefit from protection granted to author. (art. 3).

Author may be person under whose name work has been made known for first time to public unless otherwise proven. (art. 4). Original works of intellectual creation in literary, artistic or scientific arena may be objects of copyright, regardless of method of their creation and specific form of expression, and independent from their value and destination. (art. 7).

Copyrights may also be established on works that were created based on one or several original works, without infringing copyrights on original works. (art. 8). Copyright also includes following “moral” rights, which may not be assigned or waived: right to decide whether, how and when work shall be made known to public or used; right to claim recognition as author; right to decide under what name work will be published; and rights to demand observance of integrity of work, and to oppose any change, retract work and seek compensation for damages relating to such work. (art. 10). Right to retraction is not applicable to computer programs. (art. 77[3]).

Copyrights on literary, artistic or scientific works are effective once such work has been created, regardless of specific form or method of expression. Proprietary rights are valid for lifetime of author. After death, such rights are inherited according to civil law for 70-year period. (art. 25).

Author or holder of copyright may assign proprietary rights to another person on contractual basis, and on exclusive or non-exclusive basis. Assignment agreement must set forth transferred rights and, in relation to each of such rights, methods of exploitation, duration and extension of assignment, and remuneration of copyright holder. Assignment of proprietary rights regarding entirety of future works is null and void. (arts. 39-41).

Rights to works created under individual employment contract accrue to author thereof unless otherwise stipulated by clause indicating assignment period for copyright. In event that length of such period is not indicated, it must be three years from date of performance of work concerned. (art. 44). Contracts regarding publication, theater and/or music performance, and renting of works of art are also governed by Law 8/1996. (arts. 48-63). Special provisions apply to cinematic and audiovisual productions. (arts. 64-71).

With regard to protection of computer programs, author of computer program benefits, inter alia, from exclusive right to authorize reproduction, translation, adjustment, arrangement, transformation and distribution of original or copies of computer program. (art. 73). Assignment of right to use computer program does not entail assignment of copyright thereto. (art. 75, para. 2).

Authorized user of computer program may make archive or backup copies without author's consent. Also, subject to certain conditions, authorization of copyright holder is not required when reproduction of code or translation of its form is indispensable in obtaining information required for interoperation of computer program with other programs. Such information may not be used for purposes other than interoperation, may not be supplied to other persons unless communication proves to be necessary for such interoperation, and may not be used for finalizing, production or commercialization of computer program, expression of which is basically similar, or for any other act affecting author's rights. (arts. 77-79).

Rights Related to Copyright.

Following is recognized and protected as holders of rights related to copyright: performing artists for their rendition of works, sound and video recording producers for their own recordings, and radio and television broadcasters for their broadcasts. (art. 94).

Performing Artists' Rights.

Performing artists have exclusive right of authorization over following: (a) Recording of his/her performance or audition; (b) reproduction of such recorded performance; (c) distribution of such recorded performance by sale or rental; (d) import in view of marketing of recorded performance or rendition; and (e) broadcast on radio or television of his/her performance or rendition, save for case where such performance or rendition has been already recorded or broadcasted, and rebroadcast via cable of recorded performance or rendition. (art. 98).

Recording Producers' Rights.

Recording producer has, among other rights, exclusive right to authorize import into internal market of legally made copies of its own recordings. Duration of recording producers' proprietary rights is 50 years, commencing on Jan. 1 of year following that when first recording was produced. (arts. 105 and 106).

Radio and television companies have exclusive proprietary right to authorize recording of their own radio or TV programs, reproduction, broadcasting, loan, rental and transmission to places accessible to public. (art. 113).

Protection of Copyrights and Related Rights.

Romanian Copyright Office is specialized government body that is solely responsible for monitoring, observing and controlling copyright legislation. (art. 137).

Procedures and Penalties.

Violation of copyrights may result in civil, administrative and criminal liability. Copyright holders may request courts to acknowledge their rights and to ascertain infringement of such rights, copyright holders may claim damages on such grounds. In establishing damages, court will take into account: either (a) criteria such as negative economic consequences, especially loss of profits, unlawful benefits achieved by perpetrator and, where applicable, other elements apart from economic factors such as moral damages, or (b) granting of damages to copyright holder representing three times amounts that would have been legally owed to copyright holder for type of use that formed object of illicit act, if aforementioned economic criteria cannot be applied. (art. 139).

Penalties provided for various violations consist of imprisonment, and fines ranging from RON 2,500 to 5,000. (arts. 139 et seq.).

Application of Law.

Foreigners who are holders of copyrights or related rights enjoy protection provided by international conventions, treaties and agreements to which Romania is party, and, in their absence, benefit from treatment equal with Romanian citizens, provided that Romanian citizens shall benefit from same treatment in respective states. (art. 147).

Authors are entitled to mention of reserved use on their original works or their authorized copies, consisting of encircled symbol © and title, and place and year of work's first publication. (art. 148).

Recording producers, performing artists and other holders of exclusive rights of producers and performing artists are entitled to include mention of reserved use on their original or authorized copies of sound or audiovisual recordings or on their covers, consisting of encircled symbol © and title, and place and year of first publication. (art. 148).

Unless proved otherwise, exclusive rights claimed by symbol © are presumed to exist, and belong to persons who use them. (art. 148).

International Treaties and Conventions.

Romania has adhered to: (i) Bern Convention for Protection of Literary and Artistic Works of Sept. 9, 1886, as revised by Act of Paris of July 24, 1971 and amended on Sept. 28, 1979, by way of Law 77/1998, and to (ii) International Convention for Protection of Performing Artists, Phonograms Producers and Radio Broadcasting Bodies, concluded in Rome on Oct. 26, 1961, by way of Law 76/1998.

Also, Romania has ratified through Law 205/2000 and Law 15/2001, respectively: (i) World Intellectual Property Organization Copyright Treaty, adopted in Geneva on Dec. 20, 1996 and (ii) Hague Agreement concerning International Registration of Industrial Designs, signed in 1925, revised at Hague and supplemented by Complementary Act of Stockholm.

17.02 PATENTS:

In General.

Rights over inventions are recognized and protected by issuance of protective patent by State Office for Patents and Trademarks (OSIM) in accordance with Law 64/1991, as republished, concerning invention patents ("Patent Law").

Government Decision 499/2003 approving Regulations for application of Patent Law sets forth proceedings for filing patent application with OSIM, terms and conditions of invention patentability, standard patent documentation and proceedings for reviewing patent applications, etc., harmonizing application of Patent Law with international legislation.

Law 93/1998, regarding transitory protection of patents, is basis upon which OSIM issues certain Rules that are published in Official Gazette of Romania upon approval by Ministry of Finance.

According to Patent Law, OSIM patent grants its holder exclusive right of exploitation for duration of patent's validity which belongs to inventor or successors to such rights.

Invention may be patented under following conditions: (a) it is new; (b) it results from activity involving invention; and (c) it has potential for industrial application. Inventions may constitute product, device, or method of production. (Patent Law, art. 7). Inventions contrary to public order and morals may not be patented. (art. 12).

Following may not be patented: discoveries, scientific theories, mathematical methods, computer programs per se, solutions with economic or organizational character, diagrams, methods of education and instruction, play systems, and discoveries of aesthetic character. (art. 13).

Application Procedure.

Patent applications filed with OSIM must be written in Romanian, and should contain identification and information pertaining to applicant, along with description of invention and, if necessary, explanatory drawings. (art. 14).

Fees.

Registration, publication and examination of patent application, as well as issuance of patent and maintenance of its validity, are subject to fees in accordance with Government Ordinance 41/1998, as amended, regarding fees on industrial property.

For entire duration of patent's validity, titleholder must pay annual fees for keeping patent current. Fees owed by foreign individuals or legal persons are paid in foreign currency to OSIM. Nonpayment of fees may result in titleholder's loss of its rights associated with patent. (Patent Law, art. 45).

Patent Rights.

Right to receive patent, which derives from registration of patent application, as well as rights associated with patent, may be transferred. Transfer may be made by assignment or by means of exclusive or non-exclusive license, as well as by legal succession or by will. Transfer registered with OSIM is effective against third parties from date of its publication in Official Bulletin of Industrial Property. (Patent Law, art. 47).

At request of any interested person, Bucharest Tribunal may issue compulsory license upon expiration of four-year term starting from date of patent application, or of three-year term starting from issuance of patent, whichever is longer, if invention was not utilized or not sufficiently utilized in Romania, and patent holder cannot justify its inactivity, and agreement was not reached with such holder regarding conditions and commercial ways for use of invention. (art. 48). Compulsory licenses are registered with OSIM.

OSIM's decisions may be contested at agency's offices by interested persons within three months from communication. (art. 53). Violations of rights concerning inventions are punishable by law, by pecuniary sanction or imprisonment.

Protection of Industrial Drawings and Models.

Law 129/1992, as amended and republished ("Law 129/1992"), provides for protection of industrial drawings and models. Rights over industrial drawings and models are recognized and safeguarded by way of title of protection granted by OSIM, which confers upon its holder exclusive right of exploitation or use within Romania.

Applications to register industrial drawings or models must encompass following: (a) identification of applicant; (b) information regarding goods in which industrial drawing or model will be incorporated; (c) summary description of new elements of industrial drawing or model; and (d) three graphic reproductions. (Law 129/1992, art. 13). Applicant for registration may be assisted by authorized industrial property advisor. For applicants that are not domiciled or do not have registered seat in Romania, aforementioned assistance is compulsory. (art. 16).

Bibliographical data of applications, as well as any reproduction, photograph, or any other graphic representation must be published in OSIM's Official Bulletin of Industrial Property within six months from its registration. (art. 23).

Any interested person may oppose in writing registration of representation. Such objections must be sent to OSIM within three months from their publication in Official Bulletin of Industrial Property. (art. 24).

Registration of representations is subject to fees in accordance with Government

Ordinance 41/1998. Nonpayment within terms provided by law will hinder registration process, and may cause non-recognition of priority and loss of holder's rights. (art. 31).

Period of validity of registration certificate, drawing or industrial model is ten years from date of registration deposit, and may be renewed for three successive periods of five years. For entire validity period of certificate, holder is required to pay fees to maintain certificate. Nonpayment of fees will result in loss of holder's rights. (art. 38).

International Treaties and Conventions.

By means of Law 611/2002, Romania has adhered to Convention on Grant of European Patents (“EPC”) adopted in Munich on Oct. 5, 1973, as amended. Under EPC, protection of inventions may be obtained in contracting states by single procedure and by establishment of certain standard rules governing patents so granted. Consequently, all European patents and petitions thereto, with respect to Romania, shall be governed by Patent Law and by EPC; in case of conflict, EPC's provisions shall prevail.

Law 32/1997 approving GO 32/1996 ratifying previous agreement between Romanian Government and European Patent Organization is still applicable to all petitions for European patents with respect to Romania, filed prior to date of EPC's entry into effect.

Through Law 3/1998, Romania has adhered to both: (i) Strasbourg Agreement concerning International Patent Classification of Mar. 24, 1971, as amended on Sept. 28, 1979 adopting common classification for patents for invention, inventors' certificates, utility models and utility certificates and to (ii) Locarno Agreement concerning International Classification for Industrial Designs of Oct. 8, 1968 as amended on Sept. 28, 1979 adopting single classification for industrial designs.

Also, Romania is party to: (i) TRIPS Agreement (“Trade-Related Aspects of Intellectual Property Rights”), (ii) Hague Agreement Concerning International Registration of Industrial Designs signed in 1925, as revised by parties at Hague and supplemented by Complementary Act of Stockholm and (iii) Patent Cooperation Treaty signed at Washington on June 19, 1970, amended on Sept. 28, 1979, on Feb. 3, 1984 and on Oct. 3, 2001 (Decree 8/1979 issued by former State Council), and has signed Patent Law Treaty adopted at Geneva on June 1, 2000.

17.03 TRADEMARKS:

In General.

Law regulating legal protection of trademarks in Romania is Law 84/1998.

Trademark is graphic sign used to distinguish goods produced or services supplied by certain natural person or legal entity from goods produced or services supplied by other natural persons or legal entities. Following may function as trademarks: words, including personal names, pictures, letters, figures, images, three-dimensional objects, and especially shape of good or of packing thereof, color combinations, or any combination of such signs. (art. 3, item a).

Right over trademark is acquired and protected through registration of respective trademark with State Office for Patents and Trademarks (OSIM). (art. 4).

Following are denied protection rights and cannot be registered: (a) trademarks that do not meet special conditions provided under Law 84/1998; (b) trademarks lacking distinctive character; (c) trademarks exclusively composed of signs or indications that have become commonly used in everyday language or in course of loyal and constant commercial practice; (d) trademarks exclusively composed of signs and indications and indicating, in trading activities, species, quality, quantity, purpose, value, geographical origin or production date of product or performance of service, or other similar characteristics; (e) trademarks exclusively composed of shape of good that is required by nature of such good to obtain technical result or to give that good substantial value; (f) trademarks that can be misleading as to geographic origin, quality, or nature of good or service; (g) trademarks containing or constituted by geographical reference, for goods that do not originate in indicated territory if use of such indication can be misleading as to real origin; (h) trademarks containing or constituted by geographical reference used to identify wines or alcoholic beverages that do not originate in territory indicated; (i) trademarks that are of vicious nature or contrary to public order; (j) trademarks that contain picture or family name of famous Romanian personality without consent of respective person; (k) trademarks containing, without authorization of competent authorities, reproductions or imitations of emblems, coats of arms, flags, signs, or official control and guarantee seals belonging to Paris Union countries and governed by art. 6 of Paris Convention; (l) trademarks containing, without authorization of competent authorities, reproductions or imitations of emblems, coats of arms, flags, other emblems, acronyms, or names, belonging to international intergovernmental organizations to which one or more Paris Union countries are members, and governed by art. 6 of Paris Convention.

Provisions of paragraph 1, items b, c and d, shall not apply if, previous to application for registration of trademark and as consequence of its use, trademark acquired distinctive character. (art. 5).

Besides reasons stipulated above, trademark is denied registration if: (a) it is identical to previously registered trademark, and goods or services for which registration was requested are same as those for which previously registered trademark is protected; (b) it is identical to previously registered trademark and is designed to be used for goods or services for which previously registered trademark is protected if possibility of confusion exists; (c) it is similar to previous trademark and is designed to be used for same or similar goods or services, if possibility of confusion or association with previous trademark exists; (d) it is identical or similar to notorious trademark in Romania used for identical or similar goods or services when application for registration was filed; (e) it is identical or similar to notorious trademark in Romania for goods or services different from those for which trademark to be registered was designed if possibility of unjustified and illegal use of distinctive features or repute of that trademark exists, or if such use could cause damage to owner of well known trademark.

Right over trademark shall be granted to natural or legal person that first submitted, according to law, application for registration of respective trademark. (art. 6).

Registration of Trademarks-Procedure.

OSIM examines registration application together with documents submitted in order to verify whether application and trademark comply with form and content conditions required for valid registration. If, upon examination of application, OSIM establishes that requirements for registration are met, it effects registration of trademark and its publication in Industrial Property Official Bulletin. Trademark is published within two months from decision regarding registration of trademark. (art. 22).

No more than three months after publication of trademark, owner of previously registered or notorious trademark, owner of previous right over image, family name, protected geographical reference, industrial design or other protected industrial right or copyright, as well as any other interested person, may file with OSIM declaration objecting to publication of trademark. (art. 23).

When decisions regarding trademark registration are pronounced final, trademarks are registered in National Register of Trademarks and OSIM issues registration certificate of trademark to owner, upon payment of relevant fees in accordance with law. (art. 28).

Registration of trademark produces effects for period of ten years starting on date when registration application met conditions stipulated by law and grants to its owner exclusive right of use over trademark. Upon owner's request, registration of trademark may be renewed every ten years, upon payment of relevant fees in accordance with law. (art. 29).

Rights over trademarks may be transferred, either through assignment or through license, at any time during protection period of trademark. (art. 39).

Termination.

Rights over trademark cease when: (a) owner expressly renounces trademark through written declaration; (b) owner of trademark loses its rights subsequent to court order for reasons stipulated by law (art. 45); (c) registration of trademark was cancelled (art. 48); (d) protection period of trademark expires and no formalities were undertaken to renew it.

For trademark registration and renewal, as well as for any other act or service rendered by OSIM regarding trademarks, fees are applied as described by Government Resolution 41/1998. Fees for trademark renewal not paid upon expiration of ten-year term may be paid during following six months at rate increased by 50%. Nonpayment of fees due for trademark registration or renewal leads to loss of date of instituting deposits.

International Treaties and Conventions.

By way of Law 4/1998, Romania has adhered to Treaty Regarding Trademarks, concluded in Geneva on Oct. 27, 1994.

By way of Decree 1176/1968, issued by former Council of State, and Law 5/1998, respectively, Romania has ratified Madrid Agreement concerning International Registration of Trademarks of Apr. 14, 1891 (as revised at Brussels on Dec. 14, 1900, at Washington on June 2, 1911, at Hague on Nov. 6, 1925, at London on June 2, 1934, at Nice on June 15, 1957, and at Stockholm on July 14, 1967) and Protocol related to Madrid Agreement concerning International Registration of Marks, signed at Madrid on June 28, 1989.

Through Law 3/1998, Romania has adhered to both: (i) Nice Agreement concerning International Classification of Goods and Services for Purposes of Registration of Trademarks of June 15, 1957 (as revised at Stockholm on July 14, 1967, and at Geneva on May 13, 1977 and amended on Sept. 28, 1979) and to (ii) Vienna Agreement concerning International Classification of Figurative Elements of Trademarks, signed on June 12, 1973 and amended on Oct. 1, 1985.

18 LEGAL PROFESSION

18.01 ATTORNEYS AND COUNSELORS:

Legal activity in Romania is governed by Law 51/1995, as amended.

Practice of Law.

Profession of lawyer is free and independent; only members of Bar Associations are entitled to practice law. (art. 1).

Bar Associations consist of all lawyers in county or in City of Bucharest. (art. 48). In order to become member of Bar, applicant must be Romanian citizen, domiciled in Romania and hold degree or doctorate in law. (art. 11). Also, candidates to enter Bar Association must pass examination in accordance with Law 51/1995, except in following instances: candidate holds degree of doctor of law or be exercised profession of judge, district attorney, notary, legal counsel or in-house legal counsel. (art. 16). Following passage of examination, candidates must practice for two years as apprentice and afterwards candidate must pass examination to be confirmed.

(art. 17).

Legal profession may be practiced individually, in association, or in corporate bodies (civil or commercial professional companies). Lawyer, associated lawyers or law firm consists of two or more associated chartered lawyers who may employ lawyers on retainer. Terms of association shall be agreed upon by parties, in accordance with civil law. Law firm and its employees may not render legal assistance to persons having conflicting interests. Law 51/1995 was amended in 2004 to allow lawyers to organize themselves into limited liability companies, where two or more lawyers may provide professional services for determined purpose. Liability limited to patrimony of such company (share capital of limited liability company is at least [Euro]10,000).

Lawyer may conduct his activities through following means: consulting, legal assistance and representation before criminal investigation bodies; defense by specific legal means of legitimate rights and interests of natural and legal persons in their relationships with public authorities, institutions and any persons; drafting of legal documents, with possibility to certify content and dates; arbitration and mediation; fiduciary activities; hosting off-the-shelf companies. (art. 3). In payment for services rendered, lawyer is entitled to fees and disbursements of all expenses incurred in interests of client.

Foreign Lawyers.

Member of foreign bar may practice law in Romania provided he meets conditions stipulated by Law 51/1995, but for Romanian citizenship. (art. 12). Member of foreign bar must not provide legal assistance related to Romanian law. Foreign lawyer can practice law in Romania solely within professional companies associated with Romanian lawyers. Foreign lawyer does not have pleading rights, orally or in writing, before courts and other jurisdictional and judicial bodies, except international arbitration courts. Fees due to foreign lawyer must be registered and paid in full in Romania. Foreign lawyer practicing law in Romania must register in special list kept by Bar Association.

Status of Lawyer.

Under Law 51/1995 legal profession is incompatible with following: (a) salaried work in other professions; (b) occupations affecting dignity and independence of legal profession, or violating code of moral conduct; (c) direct commercial activities. (art. 14).

Practice of law is compatible with several other occupations: (a) member of Parliament, counselor in local or county councils; (b) legal academic or legal research activity; (c) literary and journalism activities; (d) arbitrator, mediator or conciliator. (art. 15).

Lawyer's status is lost by occurrence of following: (a) written renunciation of right to practice legal profession, (b) death, (c) exclusion from legal profession as disciplinary measure, (d) when final sentence is passed against lawyer for penal offence, which makes him unworthy of status of lawyer. (art. 26).

Lawyer's status is suspended in following instances: (a) in case of incompatibility, (b) during period of interdiction imposed by Court or disciplinary measures, (c) for nonpayment of taxes and duties to professional bodies, for period of three months from date due until full payment, (d) at request. (art. 27).

19 MINERAL, WATER AND FISHING RIGHTS

19.01 FISHING RIGHTS:

General Provisions.

Law 192/2001 on fisheries resources, fishery and aquaculture, as subsequently amended is general legal framework for fisheries sector, regulating aspects pertaining to resource conservation (fishing quotas, fishing logbook, technical protection measures), resource control and management (setting up fishing vessels register, granting fishing licenses and introducing satellite monitoring system), organization of fish market, support to producers' associations, fisheries inspection, aquaculture, state intervention for orientation and development of fisheries sector, fisheries statistics and international agreements.

By way of Decree 2/1960 and Decree 70/1979, Romania has ratified Black Sea Fishery Convention and North-Western Atlantic Fishing Convention. Also, Romania is member of Fishery Commission for the Mediterranean Waters since 1971, with continuous presence since 1993; as FAO member, Romania participates in: (i) Fishing Committee, (ii) Central-Eastern Atlantic Ocean Fishery Committee, (iii) Fish Trading Sub-Committee, (iv) Eastfish, and (v) Consulting European Commission for inland waters fishing.

Responsible Bodies.

Management of fisheries resources belonging to public domain is ensured by three different bodies (collectively “State Administrators”), Administration of Danube Delta Biosphere Reservation, National Forests Company, and National Company for Management of Fisheries Resources (“NCMFR”). NCMFR is responsible body having general jurisdiction, operating with autonomous budget and coordinated by Ministry of Agriculture, Forests, Waters and Environment (“MAFWE”).

Among others, NCMFR's tasks are: (i) to manage fisheries resources in natural basins belonging to state, public and private property; (ii) to conclude concession agreements with legal entities having fishing as scope of activity, by authorizing such activity; and (iii) to establish and submit to central authority for approval starting prices within auctions for concession of fisheries resources. (art. 10).

Fishing Rights and Authorizing Regime.

Fisheries resources located in natural fish basins, i.e. in: (i) territorial Danube, Danube Delta and Danube's waterside liable to inundations; (ii) Razelm-Sinoe Laguna and littoral lakes; (iii) streams and rivers situated in mountain, hill, plain and their corresponding floodable areas; (iv) natural marshes and lakes; (v) storage lakes and their corresponding floodable areas; (vi) network of magistral canals of hydro ameliorative, navigation and hydro energetic systems and (vii) territorial water limits and economic exclusive area of Black Sea. Fisheries resources located in artificial fish basins, i.e. in (i) ponds; (ii) ponds and their corresponding floodable areas; (iii) trout ponds; (iv) floatable tanks for fishery; (v) artificial reproduction stations; (vi) installations for super-intensive growth, belonging to national or local public domain or to private domain; (vii) dams used for aquaculture. (art. 3).

Fishing rights for commercial purposes over fisheries resources belonging to public domain are granted by means of: (i) concession, based on public auction, to companies, fisherman associations, or other types of associations or (ii) any other means as set forth by public central authority. Fishing rights for recreational/sports purposes are only granted through concession to fishermen associations, or other types of associations. Fishing rights are granted by State Administrators through authorization/license and may be exercised through individual, non-transmissible fishing permit, issued by legal entity, which has obtained such rights through concession agreements.

19.02 MINES AND MINERALS:

Newly enacted Law 85/2003 on mining (“Mining Law”) abrogated old Law 61/1998, attempting to give maximum transparency of mining operations and fair competition, without discrimination between different forms of property and origin of capital or operator's nationality. Investments in mining are encouraged by tax and administrative incentives.

General Provisions.

Mineral resources located in territory and in subsoil of country and continental plateau, within area of Black Sea belonging to Romania are public property and belong to Romanian State. (art. 1).

Mineral resources are: coal, ferrous, nonferrous and aluminum ores, noble metal ores, radioactive rare earth ores, haloid salts, useful nonmetallic substances, useful rocks, gems and semiprecious stones, peat, therapeutic muds and peat, bituminous rocks, geothermal waters and accompanying gases, mineral waters, therapeutic mineral waters and mining and metallurgical waste products from waste dumps and decantation pools. Provisions apply to underground drinkable and industrial waters for prospecting, exploitation, determination and registration of reserves. (art. 2).

Expressions related to mineral resources and mining operations are defined as follows: “Extractive Cadastre”, specialized cadastre, representing sub-system for registration and inventory of all immovable assets used for mining activities (land, buildings, installations), from technical, economic, legal point of view; “Mining Register”, part of Extractive Cadastre, comprising all data pertaining to legal regime of surfaces of prospecting, exploration and exploitation perimeters, ownership, topographical situation of mining works, mineral and production resources/reserves; “exploitation”, operations performed underground and/or at surface for extraction, processing and delivery of mineral resources; “exploring”, research and operations for identification of ores, quantitative and qualitative evaluation of ores and determination of conditions for realization of such ores; “prospecting, exploration and exploitation perimeter”, area corresponding to projection, on surface of land, of part of crust inside which, at determined depth mineral resources are located as well as areas necessary for processing, preparation of mineral resources and stocking of mining residual products, outside area where resources are located. (art. 3).

All data and information regarding Romanian mineral resources belong to Romanian State. Holders of mining licenses and permits are entitled to use information and data only in their own interest. Transfer to third parties of data and information must only be performed with authorization of competent body. (art. 5).

Right to use lands for mining operations are granted by means of: sale purchase of lands and buildings; exchange of lands; leasing of land; expropriation based upon public utility; concession of public property land; association of owner of land and holder of license by contribution of land value to company's share capital. (art. 6). Duration of right of use of mining operations and lands is based on principle of minimum violation of property rights. Right of access to lands by right of use is negotiated between holder of license and owners of lands, with observance of principle of equity and equal treatment. Duration of right of access equals duration of mining activity. (art. 7). Carrying out mining activities or granting rights of access over land on which historical, cultural, religious monuments, archeological sites, natural reservations, sanitary protection areas and hydro-geological protection perimeters for water supply sources are located is forbidden. (art. 11).

Mineral Resources Valuation Procedures.

Prospecting is permitted on basis of non-exclusive permit issued for period of maximum three years. Holder of prospecting permit must perform volume of works at minimum value which is to be established by negotiation with contracting authority and present authorities annual and quarterly documentation regarding operations performed and results obtained. (art. 14).

Exploration is performed on exclusive license basis by quarterly tender competitions, on basis of program of works and bank guarantee sufficient for restoration of environment. (art. 20). Exploration license is granted for maximum five years, with right to extension of license for no more than three years, on basis of payment in advance of annual charge. Surface of perimeter has shape and dimensions corresponding to geological formations and structures, or to mineral resources ores, object of exploration license. License holder must present authorities annual and quarterly documentation regarding operations performed and results obtained. License holder is entitled to exploitation license for any discovered mineral resources. (art. 16).

Mining exploitation is performed exclusively on license basis for all mineral resources existing in exploitation perimeter. Exploitation license is granted to: holder of exploitation license; selected tenderer in public tender. (art. 19). Exploitation license is granted based on: feasibility study to ensure valuation of mineral resources and protection of ore; exploitation development plan; research regarding impact upon environment; environment restoration plan accompanied by bank guarantee. Exploitation license is granted for maximum of 20 years, with right of extension for successive periods of five years. Exploitation license holder must pay annual mining charge and mining royalty. (art. 20).

Provisions of license remain valid for its entire period under conditions existing as of date of its conclusion. (art. 21).

Foreign legal persons which have obtained right to perform mining operations are obliged to establish subsidiary or branch in Romania. (art. 23).

License holder may transfer rights and obligations to another legal person upon written approval of competent authority. License entitling administration is not transferable. (art. 24).

Rocks used in construction and peat may be excavated in limited quantities for limited duration. Authorization shall be issued to first applicant. (art. 28).

Competent body can annul permit/license if within 30 days as of notification receipt, holder: (i) does not fulfill its obligations as to mining operations commencement date; (ii) ceases work for more than 60 days without approval of competent body; (iii) uses unapproved exploitation methods and technologies; (iv) performs mining activities without approval; (v) lost agreement/authorization regarding environment protection and/or labor protection authorization was annulled; (vi) willingly provides authority false data and information regarding mining activity or breaches confidentiality obligations set forth by license; (vii) does not pay mining taxes and royalties within six months from their due date; (viii) does not meet required criteria and was suspended license/permit for more than one year. (art. 34).

Lessees or administrators are held liable until all environmental factors are restored according to restoration plan. Holder of license is held liable for repairing damages caused to third parties, even if such damages are identified after cessation of lease or administration. (art. 37).

License Holder's Rights and Obligations.

Holder of license has following rights: right of entry to land; to perform all mining operations provided by license; to have control over mining product quantities; to use surface or subterraneous water sources necessary for mining activities; to obtain from competent body data and information necessary for carrying on its mining operations; to interrupt activity for duration exceeding 30 days if it proves to competent body that it will improve development plan by introducing technologies and equipment; to build roads, bridges, railways, electric networks, and also other infrastructure utilities necessary for mining activities. (art. 38).

Holder of license has obligation to: draft technical and economic documentation regarding accomplishment and environment protection; start mining works within 210 days as of date of coming into force of license; obtain, draft, keep up to date and transmit to competent body, data, information and documents regarding accomplished mining activities; keep data and information received from competent body or resulting from own activity confidential; recover and protect natural associations of minerals with esthetic and scientific value (mine flowers); periodically update and submit to authorities termination of activity plan; incur costs related to technology transfer and professional training stipulated in license; perform topographical measurements; organize first aid medical services, having qualified personnel, equipment and specific materials. (art. 39).

Taxes, Tariffs and Mining Royalties.

Annual tax for prospecting is ROL 25,000 per sq. km. Annual tax for exploration shall be ROL 100,000 per sq. km. This amount doubles after two years and shall increase by five times after four years. Annual tax for exploitation is ROL 25,000,000 per sq. km. Amounts are updated by Government Resolution according to inflation rate. (art. 44).

Mining royalties collected for State budget are calculated as percentage: 2% for coals, ferrous, nonferrous and aluminum ores, noble metal ores, radioactive rare earth ores, mining waste products; rare and dispersed earth, aluminous rock, precious and semi-precious stones, bituminous rocks, therapeutic, thermo-mineral and geothermal water, along with gas that accompanies them, non-fuelling gases, muds and therapeutic tubes; 6% for nonmetallic substances; 8% for haloid salts; 6% for useful rocks, except for gems to which 10% applies. (art. 31).

Closing of Mines.

Initiative regarding mine or quarry operation termination shall belong to holder of exploitation license, which shall forward to competent body application accompanied by operations cessation plan, containing: reason for cessation, based on technical and economic documentation; technical conservation program pertaining to exploitation, including program for post-closing monitoring program of environmental factors; social protection program for personnel, involving redistribution and/or professional reconversion, financial compensation, and/or regional development measures leading to creation of new jobs; land-clearing procedure. Decision to close mine must be approved by Government. (art. 52).

Responsibilities of Competent Ministry.

Competent ministry is Ministry of Economy and Commerce and ensures development of mining activities by: drafting strategies and policies of mineral resources; assessing and approving budget for accomplishing mineral resources production by national companies; being main distributor of budgetary allocations for renewal and development, geological prospecting and exploration, technological research, environmental protection; drafting, jointly with competent authority in field of labor and social solidarity, employers' associations, and unions, programs regarding medical care and insurance for risk and accident, for rehabilitation and compensation for occupational diseases in mining; endorsing feasibility studies and development plans for national companies. (art. 56).

Competent body is National Agency for Mineral Resources, subordinated to Government with following main prerogatives: managing mineral resources and national geological resources which are property of State; establishing conditions and regulating performance of mining operations; receiving, verifying and registering information regarding mineral resources reserves; establishing tariffs; monitoring and verifying mineral resources production; endorsing documentation regarding accomplishment of geological or exploitation works; drafting instructions for enforcing Mining Law; identifying and notifying failures to observe Mining Law. (art. 55).

Final Transitory Orders.

Romanian courts will resolve litigation if parties do not agree to arbitration, including by way of international courts. (art. 61).

Organization of mining rescue stations must be established at mines or quarries. Holder must obtain endorsement of territorial inspectorate for labor protection and territorial environmental agency. (art. 65).

Nonprofit professional associations may be established to prevent mining accidents, and to ensure recovery of affected persons. (art. 66).

20 MORTGAGES

20.01 MORTGAGE:

Mortgage is real property guarantee that does not require depriving owner of possession of property. (Civ. Code, art. 1746). Mortgage can be established by agreement of parties (conventional mortgage) or in accordance with law. (Civ. Code, art. 1749). Mortgage has as its object plots of land, buildings and immovables by function. As regards immovables by function, based on Law 99/1999, Title VI, they may also form object of pledge. One who applies for mortgage must have capacity to alienate property. (Civ. Code, art. 1769). Debtor may not mortgage property in which he has only future title. (art. 1775).

Conventional mortgage contract must be in authenticated form. Also, conventional mortgage contract could be signed under private signature provided that information can be reproduced in tangible form and cannot be unilaterally changed. Conventional mortgage contract must contain guaranteed sum and mortgaged property. (Civ. Code, art. 1772, Law 99/1999, Title VI, arts. 14 and 15). Mortgage must be recorded in land book of cadastral office where property is located. Recording mortgage protects creditors against third parties and it also creates record of degree of preference of mortgage. (Civ. Code, art. 1778). Between two creditors of different degrees, one who recorded first will have priority over any subsequent creditor to full indemnification from value of mortgaged property. Recording preserves mortgage for 15 years. To renew mortgage, it must be registered again before expiration of its first term. (Civ. Code, art. 1786, para. 1).

While generally not permitted under law, mortgage over future real property (building that is constructed based on financing acquired) is permitted under Law 190/1999 and registration of such mortgage with relevant Land Registry is permitted upon registration of building permit. If construction has begun, one may register mortgage over certain defined construction stages (as defined in building permit) and evidenced by partial delivery-receipt minutes agreed to by local authority.

Mortgage loan is defined by Law 190/1999 as loan granted by certain authorized financial institutions for financing of construction, purchase, rehabilitation, consolidation or extension of immovable property for residential, industrial or commercial purpose. Authorized financial institutions include banks, mortgage loan banks, National Housing Agency and other financial institutions enabled by law.

When debt has been satisfied, mortgage is terminated and deleted from land book. If payment has been partial, recording is preserved by “reduction of inscription”. (Civ. Code, art. 1788).

Legal Effect.

Debtor as owner maintains possession of mortgaged property and it may be transferred to third party who takes subject to mortgage. (Civ. Code, art. 1790). Mortgage creditor has preference right over other creditors.

Third party may commence special procedure for “cleansing” real property of mortgage, by which third party makes offer to pay debts and expenses of mortgage, so that price of property stipulated in sale contract is paid, or, until appraised amount of property is paid if transfer is by donation. If creditor accepts this offer and new owner pays mentioned price or makes sum available, real property is “cleansed” of mortgage. (Civ. Code, arts. 1801-1818).

21 PROPERTY

21.01 ABSENTEES:

Every natural person possesses rights and duties. (Romanian Constitution; Decree 31/1954 and Decree 32/1954, both modified by Law 4/1956; Family Code, as adopted by Law 4/1953 and subsequently modified; Decree 212/1974 for ratification of International Agreement on Human, Civil and Political Rights; and Law 18/1990 for ratification of International Convention on Children's Rights). Person's capacity to exercise such rights and duties begins at birth and terminates at death. (Decree 31/1954, art. 7). Death may be ascertained directly, physically, or by court decision subsequent to judicial declaration that person is absentee (see also category 12 Estates and Trusts, topic Death [Presumption Of and Actions For]).

Declaration of Absence.

Person missing from his residence may be declared absent in court, and curator named, provided that one year has passed since most recent recorded evidence demonstrating absentee to be alive. (Decree 31/1954, art. 16). Initiation of court action for declaration cannot be made prior to end of requisite one-year period.

One-year period is calculated: (a) from date of most recently recorded evidence regarding absentee relying on oral and written testimony; (b) if date of last sighting cannot be established with precision, from last day of month when such recent evidence was recorded; or (c) from last day of year when such recent evidence was recorded. (Decree 31/1954, art. 17).

Declaration Procedure.

Procedure for declarations of absence is stipulated in Decree 32/1954. First, requests for declaration are made to Court located in absentee's last known domicile. (Decree 32/1954, art. 36 and Civ. Pro. Code, art. 2, para. 1[g], modified by Law 59/1993). Second, President of Court orders local council (city hall) and police to gather as much information as possible about absentee. (Decree 32/1954, art. 37). Third, request for declaration of absence is posted by judicial order at absentee's last known domicile and at city hall as well as through newspapers to allow those with relevant information to report it to proper authorities. President of Court may also assign custodians in city hall with task of naming curator in conformity with Fam. Code, art. 152. Curator will temporarily protect interests of absentee.

Within 30 days from posting of notice, public hearing is scheduled and following parties are called: person to be declared absent (at his last domicile), attorney (if applicable) or trustee (if no attorney exists) and representatives of city hall. Hearing takes place after conclusions of Prosecutor's Office are heard. Finally, public hearing is held to announce judicial decision, which is subject to appeal to Court of Appeals within 15 days. (Civ. Pro. Code, art. 284).

Once final, decision is posted for 30 days on door of court and of city hall in municipality where absentee last resided and is also published in newspaper indicated by judge. Decision may be communicated to department of custodial authorities for purpose of naming curator, if this was not done at trial. (Decree 32/1954, art. 39).

Legal Effect.

Declaration of absence has no effect on absentee's rights and duties since that person is considered alive until final judicial declaration of death has been rendered. (Decree 31/1954, art. 19).

Naming curator for absentee or trustee for minors of absentee is not subject to declaration of absence since measures involving legal protection of persons and property require only actual existence of absence.

Foreign citizens declared absent pursuant to Law 105/1992 (regarding regulation of private international law relations) which stipulates that conditions, effects and annulment of decision assuming death or absence, as well as decisions regarding presumption of survival or death, are determined by current national law of absentee, or, in absence of identifiable laws, Romanian law will apply. (art. 16).

21.02 GIFTS:

To be valid, gift must be made by authentic deed and signed in front of Notary. (Civ. Code, art. 813). Noncompliance with authenticity requirement voids gift. When gift contract is finalized by separate offer and acceptance, gift must be delivered within lifetime of donor. In addition, donee must have capacity to accept offer.

Minors and persons forbidden by court order do not have capacity to make gifts. (Fam. Code, arts. 129 and 133 with reference to arts. 105 and 147). Minors who have reached adult age cannot make gifts to their guardians until such guardians have been released from their duties to care for minor (except where guardian is minor's ascendant). (Civ. Code, art. 809 and Fam. Code, art. 140). Following do not have capacity to receive gift: (a) Unborn persons (Civ. Code, art. 808) and companies which have not yet acquired legal existence; (b) doctors and pharmacists who treated donor for illness which caused donor's death, as well as priests who assisted donor in religious matter during donor's last illness (Civ. Code, art. 810); (c) deaf or mute persons who cannot write, except in instances in which such persons are assisted by specially appointed person (Civ. Code, art. 816 and Fam. Code, arts. 152, 159).

Minors and others forbidden to make gifts have right to receive them. However, such gifts must be accepted in presence of their legal representatives (parents or guardians) and by their ascendants. (Civ. Code, art. 815). Legal entities may also accept gifts, provided that subject matter of gift corresponds to scope of entity's activities. (Decree 31/1954, art. 34).

Since gifts are generally irrevocable, any clause or condition which may directly or indirectly infringe upon donee's use of gift, is incompatible with essence of gifts and is void. (Civ. Code, art. 822).

Spousal Gifts.

According to arts. 826 and 937 of Civil Code, gifts between spouses are revocable at any time, regardless of whether revocation is made during or after marriage, or after death of donee. Such revocation need not involve court action and may be either express or implied.

Special Gift Categories.

(1) Secret gifts appear under guise of contract involving compensation and are valid if they meet all conditions set forth in Civil Code arts. 813-814 (requirements of signature, notarization and donor competence). (2) Indirect gifts are legal acts which are made with intention to bestow benefit, but are realized on basis of another act other than gift. Indirect gifts need not be authenticated because they are valid if made according to procedural and substantive requirements for legal acts under which they are realized.

Renunciation of debt, by which creditor refuses right of credit, also qualifies as indirect gift.

Revocation.

Parties to gift contract may stipulate in contract that, under certain conditions, contract will be automatically rescinded.

In addition, gifts may be revoked even in absence of revocation clauses in contract in following instances: (a) Ingratitude of donee refers to attempts made by donee on donor's life, violent or grave injury caused by donee to donor, as well as donee's refusal to provide donor with food when requested. (Civ. Code, art. 831); revocation action ceases when donor or his heirs, having knowledge of ingratitude, forgives donee and forgiveness is presumed when a year has passed after discovery of fact leading to revocation and donor or his heirs have not requested revocation within this period; (b) birth of child to donor gifts are revoked by right when donor had no children at time of gift's making, but subsequently, living child was born to donor. Revocation due to birth of child may not be set aside by any contrary stipulation in gift contract. (Civ. Code, art. 836).

21.03 SALE OF LAND:

Sale of land is regulated by Title X of Law 247/2005 regarding reform of property and justice.

Plots of land that are private property, irrespective of titleholder, may be alienated and acquired pursuant to provisions of this law. (Title X, art. 1).

Land may only be alienated and acquired by means of legal deeds performed between living persons, concluded in notarized form. Notarized form applies also to contracts establishing other real rights over land. (Title X, art. 2). Failure to observe provisions of art. 2 results in absolute nullity of sale/purchase or, as case may be, exchange contract.

Any transfer of ownership over land must be registered with Land Registry for it to be opposable to third parties. Registration in Land Registry can only be performed by public notaries.

Currently, foreign citizens and stateless persons cannot acquire ownership title to land in Romania. However, under changes to Romanian Constitution of 2003, and in accordance with Law 312/2005, EU citizens will be allowed to acquire land upon Romania's entry into EU, or other foreign citizens can also acquire land on basis of reciprocity established in international treaties to which Romania is party. (Const. Art. 44[2], cc. II and III—Law 312/2005). Natural persons having Romanian citizenship and domiciled abroad may acquire, by way of legal deeds concluded between living persons and inheritance, land of any kind in Romania.

22 TAXATION

—Scope —

Romanian tax legislation was significantly overhauled with introduction of new Fiscal Code, issued as Law 571/2003 and entered into force Jan. 1, 2004. Fiscal Code is complemented by Methodological Norms issued as GD 44/2004 as subsequently amended and by Fiscal Procedure Code issued on June 24, 2004, as subsequently amended. Unless specified otherwise, all references to specific articles in this section on Taxation are to Fiscal Code.

22.01 ADMINISTRATION:

Modifications.

Fiscal Code can only be modified by law. Modifications can only enter into force on Jan. 1 of year following passage of law and while law must be passed at least six months before enters into force (art. 4). However, this rule was already waived by Government when last changes were passed in 2005.

Responsible Ministry.

Ministry of Economy and Finance has authority to propose modifications and develop necessary norms for consistent application of Fiscal Code. (art. 5[1]). Ministry must also establish central tax commission responsible for developing decisions regarding consistent application of Fiscal Code. In addition, local municipal and county councils may adopt special fees for local public services. (art. 6[1]).

22.02 ALCOHOL, BEVERAGES AND TOBACCO TAXES:

See topic 22.04 Excise Taxes.

22.03 CUSTOMS DUTY AND TAX:

Applicable Laws.

Romanian Customs Code approved by Law 83/2006 has implemented Council Regulation (CEE) No. 2913/1992 for establishing Community Customs Code, published in Official Journal of European Community No. 302/1992, as subsequently changed and amended.

Customs duties are based on Customs Tariff of European Community that comprise: (i) combined nomenclature of goods; (ii) any other nomenclature which is wholly and partly based on combined nomenclature and which is established by Community provisions governing specific fields with view to application of tariff measures relating to trade in goods; (iii) rates and other items of charge normally applicable to goods covered by combined nomenclature; (iv) preferential tariff measures contained in agreements which Community has concluded with certain countries or group of countries; (v) preferential tariff measures adopted unilaterally by Community in respect of certain countries, group of countries or territories; (vi) autonomous suspensive measures providing for reduction or relief from import duties chargeable on certain goods; and (vii) other tariff measures provided for by Community legislation.

Romanian Import Customs Tariff, governed by GO 26/1993, as amended and approved by Law 102/1994, subsequently amended.

Customs Tariff is compiled based on Combined Classifications of names and codes of goods, and is presentation of six-figure codes of Harmonized System Classifications (adopted through International Convention concluded in Brussels on June 14, 1983, to which Romania became party by Law 98/1996), and is then further detailed in eight-figure codes. Adoption of Combined Classifications represents adherence to European Community legislation, and is based upon European Agreement of Association between Romania and European Community (ratified by Romania through Law 20/1993).

As matter of principle, customs duties are payable on import of goods at rates depending on nature of goods imported and on country of origin. No customs duties are levied on goods supplied within European Community's territory.

Customs duties are expressed in percent and applied to customs value of goods, expressed in RON, as declared for each type of good. Calculation of customs value is undertaken based upon Application Agreement of Art. VII of GATT. Customs duties are those taxes stipulated on registration date of import customs statement.

Through provisions of special laws, certain imports are exempt from customs duties. Moreover, upon proposal of Ministry of Economy and Finance, Government may approve temporary exemptions from or reductions in customs duties for certain categories of goods. Exemptions and reductions shall be established without discrimination to individual importers or beneficiaries.

Tariff classification rules stipulated for import of goods are also applied to exports. No customs duties are charged on export of goods.

Customs Incentives.

Legislation for leasing provides for customs incentives (duty relief) applicable to imports of movable goods under leasing transactions and payment of customs duties at end of leasing contract and only for residual value (which cannot be less than 20% of initial value).

22.04 EXCISE TAXES:

Harmonized excises are special consumption fees payable to state budget for following products derived from domestic production or from import: (a) Beer; (b) wines; (c) fermented beverages other than beer and wines; (d) intermediate alcoholic products; (e) ethyl alcohol; (f) tobacco products; (g) mineral oils, and (h) electricity. (art. 162). These products are subject to excises at moment of production in Community's territory or import in this territory. (art. 164). Excise tax is charged at moment of release for consumption or when losses or shortages of excisable products are discovered. (art. 165).

Beer.

Each economic agent who produces beer is required to submit to territorial fiscal body where producer is registered as authorized warehouse keeper, no later than Jan. 15th of each year, declaration regarding its production capacities. Small producers can benefit from reduced excises provided number of conditions are fulfilled regarding independence from other economic agents who produce beer. Excise tax for beer is [Euro]0.748 per hl and [Euro]0.43 per hl for beer produced by independent producers with annual production capacity of not more than 200 thousand hl. (arts. 169, 176).

Wine.

Excise for sparkling wines is [Euro]34.05 per hl. (arts. 170, 176).

Fermented Beverages other than Beer and Wines.

[Euro]34.05 per hl. (arts. 171, 176).

Ethyl Alcohol.

[Euro]750 per hl of pure alcohol and [Euro]475 per hl for ethyl alcohol produced by small distilleries with annual production capacity of not more than 10 hl of pure alcohol. (arts. 173, 176).

Tobacco.

Excise taxes are: (a) For cigarettes, [Euro]20.89 + 27% of maximum price declared, per 1,000 cigarettes; (b) for cigars and cigarillos, [Euro]32.13 per 1,000 pieces; and (c) for smoking tobacco, [Euro]55 per kg. (arts. 174, 176).

Mineral oils for which excise taxes are payable and applicable rates: (a) For leaded gasoline, [Euro]547 per ton; (b) for unleaded gasoline, [Euro]425.06 per ton; (c) for gas oil, [Euro]307.59 per ton; (d) for liquid petroleum gas, [Euro]128.26 per ton (used as car gas); (e) for kerosene, [Euro]469.89 per ton. (arts. 175, 176).

Starting Apr. 1, 2005, excise was also introduced for electricity. Excise is of [Euro]0.26/MWh for electricity used for commercial use and of [Euro]0.52/MWh for electricity for non-commercial use.

Other Products.

Following products are also subject to excises: (a) Natural fur products, 45%; (b) products made from crystal, 30%; (c) gold/platinum jewelry with exception of wedding bands, 15%; (d) perfume products, up to 35%; (e) guns, 100%; and (f) yachts and motor boats, up to 50%. (arts. 207, 208).

22.05 GASOLINE AND SPECIAL FUELS TAXES:

See topic Excise Tax.

22.06 INCOME TAX:

Individual is deemed resident for taxation purposes and taxed in Romania for its worldwide incomes if: (a) Romanian citizen domiciled in Romania; (b) centre of vital interests is located in Romania for more than three consecutive years, or (c) present in Romania for more than 183 days in period of 12 consecutive months ending in that fiscal year and this condition is met for more than three consecutive years. Other than that, physical persons will be taxed in Romania only for incomes obtained from Romania and only if it stays in Romania for more than 183 days in period of 12 consecutive months ending in that fiscal year. Exceptions include diplomatic/consular staff and other special categories. (art. 7[1][23]).

Income tax applies to following incomes: (a) In case of Romanian resident physical persons, with domicile in Romania, to incomes obtained from any source, both in and outside Romania; (b) in case of resident physical persons but not domiciled in Romania, only to incomes derived in Romania, which are taxed according to categories of incomes provided in Fiscal Code; (c) in case of nonresident physical persons who carry out independent activity through permanent establishment in Romania, to net income attributable to permanent establishment; (d) in case on nonresident physical persons who carry out dependent activity in Romania, to net salary income from such dependent activity.

Categories of incomes subject to income tax are incomes derived from: (a) Independent activities; (b) salaries; (c) grant of use of goods; (d) investments; (e) pensions; (f) agricultural activities; (g) prizes and gambling; (h) transfer of real property; (i) other sources. (art. 41). These concepts are defined in Fiscal Code.

Following incomes are not taxable: (a) Special assistance and other forms of support, such as maternity allowances, child care support, pensions for disabled pensioners, etc.; (b) amounts collected from insurance of any kind as compensation, with certain exceptions; (c) compensation in money or in kind received by physical person as result of material damage suffered by such person; (d) amounts received as compensation for damages caused by natural disasters, as well as for cases of disability or death, according to law; (e) incomes received from transfer of ownership rights over movable tangible goods from personal patrimony, other than gains from transfer of securities and incomes from transfer of real property; (f) scholarships; (g) amounts or goods received as inheritance or donations except real properties for which special rules apply; (h) incomes from agriculture or forestry, with some exceptions provided in Fiscal Code; as well as other categories applicable to specific categories of individuals. (art. 42).

Incomes from independent activities include: (a) Commercial incomes, (b) incomes from “free” professions and (c) incomes from intellectual property rights, obtained individually and/or in form of association, including incomes from adjacent activities. (art. 46).

Commercial incomes are incomes derived from taxpayer's provision of services or practicing of craft.

Incomes from “free professions” are incomes obtained from exercise of professions such as: physicians, lawyers, notaries, financial auditors, tax consultants, expert accountants, certified accountants, securities investment consultants, architects or other regulated professions, carried out in independent manner, in accordance with legal conditions.

Incomes from sale in any manner of intellectual property rights are derived from patents, drawings and models, samples, production marks and trademarks, technical procedures, know-how, copyrights and rights connected with copyrights and other similar rights, with certain exceptions.

Calculation of gross income includes: (a) Amounts collected and equivalent in RON of in-kind incomes obtained from carrying out activity; (b) incomes in form of interest from trade receivables or from other receivables used in connection with independent activity; (c) gains from transfer of assets from business patrimony used within independent activity, including counter-value of goods that remain after final termination of activity; (d) incomes from commitment not to carry out independent activity or not to compete with another person; (e) incomes from cancellation or exemption of certain payment obligations incurred in connection with independent activity. (art. 48[2]).

Following are not considered to be gross income: (a) Contributions in cash or equivalent in RON of contributions in kind made at inception of activity or in course of carrying out such activity; (b) amounts received in form of bank credits or loans from physical or legal persons; (c) amounts received as compensation; (d) amounts or goods received in form of sponsorship, donations, or patronage.

Deductible expenses related to incomes must satisfy following general conditions in order to be allowed as deductions: (a) Are made within framework of activities carried out for purpose of obtaining income, as justified by documents; (b) are included in expenses of fiscal year for year in which were paid; (c) must follow rules regarding depreciation as provided in Fiscal Code; (d) expenses for insurance premiums are to be made for: tangible or intangible assets from business' patrimony; assets that serve as bank guarantees for credits used in carrying out activity for which taxpayer is authorized; professional diseases, professional risk and risk against labor accidents; persons who obtain incomes from salaries, according to provisions of c. III of Fiscal Code, under condition that amount of insurance premium is taxed to beneficiary at moment of payment by payer. (art. 48[4]).

Following expenses have limited deductibility: (a) Sponsorship and expenses made according to law, within limit of 5% of computation base determined according to Fiscal Code; (b) protocol expenses, within limit of 2% of computation base determined according to Fiscal Code; (c) expenses for allowance for period that person is sent on temporary assignment or as part of delegation elsewhere for job purposes, within limit of 2.5 times legal level provided for public institutions; (d) social expenses, within limit of amount obtained by applying rate of up to 2% to salary fund annually realized; (e) losses related to perishable goods, within limits provided in normative acts; (f) expenses for luncheon coupons granted by employers, as provided by law; (g) contributions made on behalf of employees to optional occupational pensions schemes, in accordance with legislation in force, within limit of RON equivalent [Euro]200 annually per person; (h) insurance premium for voluntary health insurance, within limit of RON equivalent [Euro]200 annually per person; (i) expenses made for independent activity and for personal purposes of taxpayer or associates are deductible only for portion of expense that is related to independent activity; (j) expenses for mandatory social contributions for employees and taxpayers, as provided by law; (k) interest related to loans from physical and legal persons used in carrying out activity, based on contract concluded between parties, within limit of reference interest rate of National Bank of Romania; (l) in case of operational leasing contracts, respectively expenses of depreciation and interest for finance leasing contracts, according to legal provisions regarding leasing operations and leasing companies. (art. 48[5]); (m) dues which have been paid to professional associations within limit of 2%; (n) expenses for mandatory contribution to professional association within limit of 5% from achieved gross income.

Computation of Taxes.

Computation base is difference between gross income and deductible expenses, other than expenses of sponsorship, protocol expenses, patronage and dues paid to professional associations. Net income from independent activity is determined based on income norms. Ministry of Public Finance is to develop norms in near future that contain types of activities for which net income is to be determined based on income norms and is to specify rules that are to be used in establishing such income norms.

Incomes from salaries are all incomes in money and/or in kind obtained by physical person who carries out activity based on individual labor contract or special statute as provided by law, irrespective of period to which it refers, denomination of income or manner in which they are granted, including allowances for temporary work incapacity.

In view of taxation purposes, following are equivalent to salaries: (a) Allowances from activities carried out as public official, as provided by law; (b) allowances from activities carried out pursuant to elected position within framework of not-for-profit legal persons; (c) rights of monthly military pay, allowances, premiums, bonuses, benefits and other rights of military personnel, granted according to law; (d) gross monthly allowances, as well as amounts from net profit, due to administrators of national firms/companies, companies where state or authority of local public administration is majority shareholder, as well as “regias autonomous”; (e) amounts received by founding members of companies established by public subscription; (f) amounts received by members of general board of shareholders, members of board of directors and members of audit commission; (g) amounts received by representatives of tripartite bodies, as provided by law; (h) monthly allowances of sole shareholder, at level of value recorded in social insurance declaration; (i) amounts granted by legal persons without patrimonial purpose and other entities that are not payers of profit tax, over limit of 2.5 times legal level established for allowances received for period of delegation or temporary assignments in another locality, in Romania or abroad, for job purposes, for employees of public institutions; (j) any other amounts or benefits in nature of salary or equivalent to salaries. (art. 55[2]).

Taxable Benefits.

Benefits, with exception of those provided in Fiscal Code, received in connection with dependent activity include, but are not limited to, following and are taxable as income tax: (a) Use of any good, including vehicle of any type, from business patrimony, for personal purposes, with exception of return transport from domicile to workplace; (b) accommodation, food, clothes, personnel for household works, as well as other goods or services provided for free or at price that is less than market price; (c) non-reimbursable credits and favorable difference between preferential interest and reference interest of National Bank of Romania, for deposits and credits; (d) cancellation of monies owed by employee to employer; (e) telephone subscriptions and cost of telephone calls, including telephone cards, for personal purposes; (f) travel permits by any transport means, used for personal purposes; (g) insurance premiums paid by payer for his own employees or another beneficiary of incomes from salaries, at moment of payment of such premium, other than mandatory ones. (art. 55[3]).

Determining Taxpayer's Net Monthly Income from Salaries.

Determined by subtracting from gross salary income following expenses: (a) Mandatory contributions payable by taxpayer, as case may be; (b) personal deduction up to RON 650, depending on number of dependents on salary for salaries which do not exceed RON 300, and (c) contribution to trade union, and (d) contribution to optional pension funds within limit of RON equivalent of [Euro]200 annually.

Incomes from grant of use of goods are incomes, in money and/or in kind, resulting from grant of use of movable and immovable goods, obtained by owner, usufruct holder or other legal holder, other than incomes from independent activities. (art. 62). Taxable income is determined by subtracting 25% from gross income as deductible expenses.

Incomes from investments include: (a) Dividends; (b) taxable incomes from interest; (c) gains from transfer of securities; (d) incomes from sale-purchase operations of foreign currency, based on contract, as well as any other similar operations; and (e) incomes from liquidation, dissolution without liquidation of legal persons.

Incomes from pensions are amounts received as pensions from funds established from mandatory social security contributions made to social insurance system, including those from optional occupational pensions schemes and those financed by state budget. Monthly taxable income from pensions is determined by subtracting monthly nontaxable amount of RON 900 from pension income. (arts. 68-70).

Tax Rates.

Starting Jan. 1, 2005, Romania introduced 16% flat tax on incomes. Flat tax applies to incomes from salaries, independent activities as well as to incomes from pensions, agriculture and other incomes. Dividends are also taxed at 16% starting 2006 (16% only applies to physical persons, legal persons will continue to be imposed with 10% tax rate).

Interest is taxed with 16% for deposits made or civil contracts constituted after Jan. 1, 2006.

Starting on Jan. 1, 2007, capital gain obtained from disposal of shares will be generally taxed at 16%. By exception capital gain obtained from disposal of shares traded on stock exchange that are kept by natural person for at least 365 days will be subject to tax at 1%.

Starting on Jan. 1, 2007, income obtained by individuals from sale and transfer of real property is subject to transfer tax. Transfer tax is calculated at transaction value and ranges between 1% and 3% depending on transaction value and period of ownership of real property. For instance, for property with value of [Euro]1 million, which was owned by seller for period of five years, transfer tax amounts to approx. [Euro]10,590. Transfer tax is calculated and charged by notary public before authenticating sale-purchase contract.

Incomes from Agricultural Activities.

Include following: (a) Cultivation and sale of flowers and vegetables, in greenhouses and solaria specially designed for such purpose and/or in irrigated system; (b) cultivation and sale of shrubs, decorative plants and mushrooms; (c) operation of viticulture nursery and tree nursery and similar operations. Tax on net income from agricultural activities is 16% of net income, determined based on income norms.

Incomes from Prizes and Gambling.

Net income is difference between incomes from prizes, respectively from gambling, less nontaxable portion of RON 600. Gambling losses are not recognized for fiscal purposes and cannot be claimed as deductions; thus they remain final losses of taxpayer. Prize income from single contest is taxed at 16% and withheld at source. Gambling income is taxed at 20% and withheld at source if less than RON 10,000 and 25% if more.

22.07 LOCAL GOVERNMENT TAXES:

Object of Local Government Taxes.

Local taxes and fees are: (a) Taxes on buildings; (b) taxes on land; (c) fees on means of transport; (d) fees for issuance of certificates, permits and authorizations; (e) fees for using means of advertising and publicity; (f) taxes on shows; (g) hotel fees; (h) special fees; and other local fees. (art. 248).

Tax on Buildings.

In case of physical persons, tax rate on buildings is to be computed by applying tax rate to taxable value of building. Tax rate is 0.1% calculated to taxable value of building. Taxable base is between 45 and 669 RON/sq.m/year depending on type of building, town and whether located within municipal boundaries. If physical person owns two or more buildings that are used as dwellings and that are not rented to another person, tax on buildings is increased by percentage ranging from between 15% and 100% depending on number of extra buildings other than address of domicile. In case of legal persons, tax on buildings is to be computed by applying tax rate to book value of building. Tax rate is established by decision of local council and may be between 0.25% and 1.5% inclusively. Building tax may increase up to 10% if building has not been re-evaluated in last three years prior to current fiscal year. Building tax is charged by local authority, which is also entitled to establish effective rate applicable in each financial year. All building taxes are to be paid on annual basis in two equal installments by 31 Mar. and 30 Sept., respectively. (arts. 249-255).

Tax on land is to be paid to local budget of administrative/territorial unit in jurisdiction where land is located. Tax on land is to be determined by taking into account number of square meters of land, type of locality where land is located and zone and/or category of use of land in accordance with decisions of local council. In case of land located outside of designated urban areas (in Romanian “extravilan”) tax is to be computed by multiplying surface of land by corresponding amount (from 1 to 40 RON). Tax must be paid on annual basis in two equal installments by 31 Mar. and 30 Sept., respectively. (arts. 256-260).

Tax on Means of Transport.

This tax is to be paid to budget of administrative/territorial unit where person who owns means of transportation has his domicile, establishment or workplace as case may be. This tax is to be computed based on type, capacity of transport, or capacity of engine. Tax must be paid on annual basis in two equal installments by 31 Mar. and 30 Sept., respectively. (arts. 261-265).

Tax for Issuance of Certificates, Permits and Authorizations.

Any person that must obtain certificate, permit or other authorization must pay specified tax to specialized department of local public administration authority prior to issuance (e.g. urbanism certificate, construction authorization). (arts. 266-269).

Tax for Advertising and Publicity Services.

Tax for advertising and publicity services is to be computed by applying rate between 1% and 3% to value of advertising or publicity services. Such tax must be paid to local budget on monthly basis. Amount of fee for display of advertising and publicity is to be computed on annual basis by multiplying number of square meters, or fraction thereof, of area of advertising or publicity display by amount differing as it regards commercial activity establishment (23 RON) or any other place (17 RON). (arts. 270-272). Tax does not apply to public institution except in case of commercial purposes of publicity.

Hotel Tax.

Local council may levy tax for stay in unit of accommodation located in locality over which it has jurisdiction. This tax must be collected by legal person, which offers accommodation, at same time as registration of accommodated person. Rate to be established by local council but must be between 0.5% and 5%. In case of units of accommodation located in tourist resort, rate of fee may vary based on class of hotel accommodation. (arts. 278-281).

Taxes on Shows.

Any person that organizes artistic performance, sporting competition or other entertainment activity in Romania is required to pay show tax. Tax is computed by applying tax rate to amount collected from sale of entrance tickets and subscriptions. Current rate is between 2% and 5%. (arts. 273-277).

22.08 MICRO-ENTERPRISE TAXES:

Definition.

Micro-enterprises are special category of Romanian companies designed to assist small business by granting special tax status; it is expected that will be phased out over coming years. Micro-enterprise is Romanian legal person that cumulatively satisfies following conditions on Dec. 31 of preceding fiscal year: (a) Obtains incomes, other than those from consultancy and management, in proportion of more than 50% from its total revenues; (b) number of employees is from one to nine, inclusively; (c) incomes realized do not exceed equivalent in RON of [Euro]100,000; (d) social capital of legal person is owned by persons other than state, local authorities and public institutions; (e) does not carry out activities in following fields: banking, insurance and re-insurance, capital markets, with exception of legal persons that carry out activities of intermediaries in such fields, gambling, sports betting, casinos; (f) if their social capital is owned by shareholder or partner that is legal person that particular legal person should not have more than 250 employees. (arts. 103-104).

Taxable base of tax on incomes of micro-enterprises is represented by incomes from any source, from which following incomes are subtracted: (a) Incomes from variation of inventory; (b) incomes from production of tangible and intangible assets; (c) incomes from operations representing share-part of government subsidies and other resources for financing of investments; (d) incomes from provisions; (e) incomes resulting from cancellation of payables and other sums payable to state budget, that were not deductible expenses in computing taxable profit, according to legal provisions; (f) incomes obtained from compensations, from insurance companies, for damages to own tangible assets. (art. 108).

Tax Rate.

Incomes obtained by micro-enterprise are taxed as follows: (i) 2% in 2007; (ii) 2.5% in 2008; (iii) 3% in 2009.

22.09 MOTOR VEHICLE TAXES:

See topic 22.07 Local Government Taxes.

22.10 PROFIT TAX:

Following persons are required to pay profit tax: (a) Romanian legal persons, for taxable profit obtained from any source both inside and outside Romania; (b) foreign legal persons that carry out activity through permanent establishment in Romania, for taxable profit attributable to permanent establishment; (c) foreign legal persons and nonresident physical persons that carry out activity in Romania in association without legal personality, for portion of taxable profit of association attributable to each person; (d) foreign legal persons that obtain incomes from/or in connection with immovable property located in Romania or from sale-assignment of participation titles in Romanian legal person, for taxable profit related to such incomes; (e) resident physical persons associated with Romanian legal persons, for incomes obtained both in Romania and abroad, from associations without legal personality, for portion of taxable profit of association that is attributable to physical person. In these cases, tax payable by physical person is to be computed, withheld and remitted by Romanian legal person. (arts. 13, 14).

Computation of Taxable Profit.

Taxable profit is computed as difference between incomes realized from any source and expenses made for purpose of realization of incomes, in fiscal year, from which nontaxable incomes are deducted and to which nondeductible expenses are added. (art. 19[1]).

Nontaxable Income.

Following incomes are not taxable in computing taxable profit: (a) Dividends received from Romanian legal person; (b) dividends received from foreign legal person from EU Member State if Romanian legal person pays corporate profit tax and holds minimum of 15% of participation titles in foreign legal person for uninterrupted period of at least two years that ends on date of payment of dividends; (c) favorable differences of value for participation titles that are recorded as result of incorporation of reserves, benefits or issuance premiums by legal persons where participation titles are held, as well as differences of valuation of long term financial investments—such differences are taxable on date of their transfer for fee, assignment, withdrawal of participation titles as well as on date of withdrawal of social capital from legal person in which participation titles are held; (d) incomes from cancellation of expenses for which no deduction was allowed, incomes from reduction or cancellation of provisions for which no deduction was allowed and incomes from recovery of non-deductible expenses. (art. 20).

Deductible Expenses for Calculation of Profit Tax.

For determination of taxable profit, expenses are deductible only if they are made for purpose of obtaining taxable incomes, including those that are regulated by normative acts in force. Following are also expenses made for purpose of obtaining incomes: (a) Expenses for acquiring packaging for useful period established by taxpayer; (b) expenses made, according to law, for labor protection and for prevention of labor accidents and professional illnesses; (c) expenses for insurance premiums to insure against labor accidents, professional illnesses or professional risks; (d) expenses for advertising and publicity made in order to promote firm, products or services, based on written contract, as well as costs associated with production of materials necessary for dissemination of publicity messages and sample goods granted; (e) expenses for transport and accommodation within country and abroad made by employees and administrators, if taxpayer obtains profit in current fiscal year and/or from preceding years; (f) contributions to mutual guarantee reserve of central house of credit co-operatives; (g) subscription fees, dues and mandatory contributions, as regulated by normative acts in force, as well as contributions to fund intended for negotiation of collective labor contract; (h) expenses for vocational and professional training of employed personnel; (i) expenses for marketing, market research, promotion on existing or new markets, participation in fairs and exhibitions, business missions, publication of own informative materials abrogated; (j) expenses for research and development which do not comply with conditions of being considered accountant intangible assets; (k) expenses for improvement of management, information systems, introduction, maintenance and improvement of quality management systems, obtaining certifications of conformity with quality standards; (l) expenses for protection of environment and conservation of resources; (m) registration fees, dues and contributions owed to chambers of commerce and industry, unions and owners associations; (n) losses recorded when writing off from records uncollected receivables, as result of: (i) Completion of bankruptcy proceeding, on basis of court decision, (ii) death of debtor and impossibility of collecting receivable from their successors, and

(iii) debtor undergoes major financial problems. (art. 21).

Profit tax rate applied to taxable profit is currently 16%. (art. 17).

Exempt Taxpayers.

Following taxpayers are exempted from payment of profit tax: (a) State treasury; (b) public institutions, for public funds, including own incomes and funds realized and used according to Law 500/2002, regarding public finances as amended and GEO 45/2003, regarding local public finances, if not otherwise provided by law; (c) Romanian legal persons that pay tax on incomes of micro-enterprises; (d) Romanian foundations established as result of legacy; (e) religious societies, for incomes obtained from economic activities that are used for support of activities with charitable purpose as well as for incomes obtained from production and sale of objects and products necessary for society activity, according to law, and for incomes obtained from rents, provided that respective amounts are used, during current year or following years, for maintenance and operation of society units, for construction, repair and consolidation works of society houses and ecclesiastic buildings, for education and actions specific to religious societies, including incomes from cash compensations obtained as result of restitution measures as provided by laws regarding return of ownership rights; (f) accredited private education institutions, as well as those authorized, for incomes used, during current year or following years, according to Law 84/1995 on education, and GEO 174/2001, regarding certain measures for improvement of higher education financing, both as amended; (g) owners associations established as legal persons and dwellers associations recognized as owners associations, according to Law 114/1996 on dwellings as amended, for incomes obtained from economic activities that are used or are to be used for improvement of facilities and building efficiency, for maintenance and repair of common property; (h) guaranty fund for deposits in banking system, as established according to law; (i) fund for compensation of investors, as established according to law; and (j) National Bank of Romania. (art. 15).

Night Clubs and Betting.

Taxpayers that carry out activities in nature of night bars, night clubs, discotheques, casinos or sports betting and for which profit tax owed for activities provided in Fiscal Code is less than 5% of incomes obtained are required to pay tax equal to 5% of such incomes.

22.11 PROPERTY TAXES:

See topic 22.07 Local Government Taxes.

22.12 STAMP TAX:

There are three categories of stamp taxes: (a) Judiciary stamp taxes; (b) taxes for notaries activity; (c) extra-judiciary stamp taxes.

Judiciary taxes instituted by Law 146/1997 as amended are due each time claims are filed at any court in judicial system, at Ministry of Justice or at Prosecutors' Office by High Court of Cassation and Justice. If amounts of money can be estimated to represent value of object of such claims, then tax will be percentage of that value. Taxes are calculated by courts. Failure to pay such tax leads to rejection of claims.

Taxes for Notaries' Activities.

Starting on Jan. 1, 2007, GO 12/1998 regulating taxes for notaries' activity will be abrogated therefore, currently there are no stamp taxes for notaries' activity.

Extra-judiciary stamp taxes instituted by Law 117/1999 as amended are due for issuance of any acts by public institutions if another tax has not been set for that act.

22.13 VALUE ADDED TAX:

Value added tax (VAT) is indirect tax owed to state budget, which is paid upon transfer of goods or supply of services.

Applicable Laws.

VAT is now regulated by Title VI of Fiscal Code and related Methodological Norms, issued by Ministry of Finance. Title VI is in line with Sixth Council Directive (77/388/EEC).

Applicability.

Subject to VAT are those operations that cumulatively fulfill following conditions: (a) Delivery of goods or supply of services made for consideration; (b) place of delivery of goods or supply of services is considered to be in Romania; (c) delivery of goods or supply of services is made by taxable person; (d) delivery of goods or supply of services results from one of economic activities. Import of goods is also included in scope of application of VAT.

Taxable Persons.

Only taxable persons must pay VAT. Taxable person is any person that carries out, in independent manner and regardless of place, economic activities (production, trade or service supply) of nature of those described above, whatever purpose or result of such activities. (art. 127). Public institutions are not taxable persons for activities that are carried out in capacity of public authorities, but are taxable for such activities, which if not taxed, would produce distortions of competition.

For operations inside Romania, payers of VAT are: (a) Taxable persons registered as payers of VAT, for taxable operations carried out; (b) beneficiaries of taxable supplies of services, performed by taxable persons established abroad, regardless whether beneficiaries are registered or not as payers of VAT.

For import of goods, payers of VAT are persons that import goods to Romania.

For taxable persons established abroad, VAT obligations are satisfied either by fiscal representative in Romania, as appointed by person established abroad, or beneficiary of services, who owes VAT on behalf of supplier (where no fiscal representative is appointed).

Special Exemption Regime.

Taxable persons whose annual turnover, declared or realized, is less than threshold of RON equivalent of [Euro]35,000, hereafter referred to as exemption threshold, are exempt from VAT, but they may elect application of normal regime of VAT, for entire activity or for part of it. After exceeding exemption threshold, taxable persons may not request application of special regime, even if subsequently they realize annual turnover of less than exemption threshold provided by law. (art. 152).

Taxable persons that are VAT exempt have no right of deduction.

Operations Subject to VAT.

Operations to which VAT is applicable are divided as follows: (a) Taxable operations; (b) exempt operations with right of deduction, for which VAT is not payable, but deduction of VAT owed or paid for acquired goods or services is allowed; (c) exempt operations without right of deduction, for which VAT is not payable and deduction of VAT owed or paid for acquired goods or services is not allowed; (d) import operations that are exempt from VAT.

Taxable Operations.

VAT rate is 19% and applies to base of taxation for any taxable operation that is not exempt from VAT or that is not subject to reduced rate of VAT. (art. 140[1]).

Reduced rate of VAT is 9% and is applicable to base of taxation for following supplies of services and/or deliveries of goods: (a) Rights of admission to castles, museums, memorial houses, historical monuments, architectural and archeological monuments, zoos, botanical gardens, fairs, exhibitions; (b) delivery of books, newspapers and magazines, school manuals, with exception of those intended exclusively for publicity; (c) deliveries of prostheses and accessories to them (with exception of dental prostheses), orthopedic products, medicines for human use and veterinarian use; (d) supply of human and vet drugs; and (e) accommodations with hotel sector or within sectors with similar function, including rental of land prepared for camping. (art. 140[2]).

Exempt operations with right of deduction, for which VAT is not payable, but deduction of VAT owed or paid for acquired goods or services is allowed such as: (a) Deliveries of goods that are dispatched or transported outside European Community by supplier or by another person on his behalf, as well as by purchaser that is not established within country or by another person on his behalf; (b) supplies of services, including transport and supplies of services ancillary to transport, that are directly connected with export of goods or with goods that are placed under customs suspension regimes; (c) supplies of services for ships under ownership of navigation companies that carry out activities in special maritime regime or that operate them, as well as deliveries of ships in their entirety to such companies; (d) deliveries of goods and supplies of services for benefit of diplomatic missions, consular offices and their personnel, representative offices of international and intergovernmental organizations accredited in Romania; and (e) deliveries of goods and/or supplies of services to armed forces of foreign states that are members of NATO. (art. 143).

Exempt operations without right of deduction, for which VAT is not payable and deduction of VAT owed or paid for acquired goods or services is not allowed: (a) Medical treatment, including veterinary treatment, and closely-related operations carried out by units authorized for such activities; (b) educational activities, cultural services and activities related to social assistance and/or social protection carried out by authorized units, and deliveries of goods closely related to such activities that are performed by public institutions or other entities recognized as having such objective. (art. 141[1]).

Other operations exempt from VAT include among others: (a) Research, development and innovation activities; (b) deliveries of goods and supplies of services performed by individual agricultural producers and by associations of such producers without legal personality; (c) banking services, insurance and reinsurance operations; (d) gambling; (e) printing of books and delivery of objects and apparel of religious societies; and (f) renting real properties (except for hotel rooms, parking places, safe boxes). (art. 141[2]).

Import operations are generally taxed, with some exceptions driven by tax regime of person importing goods and/or of activity for which goods are imported, as described above.

Right of deduction arises at moment when deductible VAT becomes chargeable. (art. 145).

If acquired goods and services are intended for use for one's taxable operations, any taxable person registered for VAT purposes has right to deduct VAT for: (a) taxable operations; (b) operations resulted from economical activities for which place of supply/rendering service is deemed to be abroad, if VAT will be deductible in case such operations would have been carried on in Romania; (c) exports and other similar operations, intra-community supply, international and intra-community transport and other operations related to international traffic of goods; and (d) other specific cases detailed in Fiscal Code.

VAT may not be deducted for following: (a) Goods/services acquired by suppliers on behalf of customers that are subsequently reimbursed to them; (b) alcoholic beverages and tobacco products intended for protocol actions. (art. 145[5]).

Fiscal Period.

Fiscal period for VAT is calendar month. (art. 156).

For taxable persons that during preceding year have not exceeded turnover from taxable operations and/or exempt operations with right of deduction of [Euro]100,000, inclusively, computed using exchange rate for foreign currency from last working day of preceding year, fiscal period is calendar quarter.

Determination of Tax Payable and/or to be Reimbursed.

In case where VAT related to goods and services acquired by taxable person, that is deducted during fiscal period, is more than collected VAT, related to taxable operations, then surplus results in reporting period—negative amount of VAT. Taxable persons may carry over balance of negative amount to declaration of following fiscal period or may apply for reimbursement by marking proper box in declaration of VAT for fiscal period of reporting. Reimbursement of balance of negative amount of VAT for fiscal period of reporting may not be requested if it is less than RON 5,000, inclusively. Such balance must be carried over to declaration of following fiscal period.

In case where VAT related to taxable operations, chargeable during fiscal period, referred to as collected tax, is more than VAT related to acquired goods or services, deducted in such fiscal period, then difference results referred to as VAT payable for fiscal period of reporting.

Simplified Regime.

Following transactions between VAT registered persons are subject to simplified regime therefore no actual VAT is payable for: (a) Scrap; (b) real properties (land and buildings); (c) construction-montage works; (d) goods/services supplied from/to persons in bankruptcy; and (e) wood. In such cases, reverse charge mechanism will apply. (art. 160.1).

23 TRANSPORTATION

23.01 MOTOR VEHICLES:

Motor Vehicle Traffic is governed by two normative acts: Government Emergency Ordinance No. 195/2002 regarding traffic on public roads, republished in Official Gazette 670, dated Aug. 3, 2006, (GEO 192/2002) as amended by Law 6/2007, replacing Decree No. 328/1996, and Government Decision No. 1391/2006 for approval of Enforcement Regulation of GEO 195/2002 (“Traffic Regulation”) published in Official Gazette 58, dated Jan. 31, 2003, as amended by Government Decision No. 56/2007.

Both normative acts entered into force on Sept. 20, 2006.

Vehicle Registration.

Motor vehicles and trailers must be registered permanently, temporarily, or for testing period with police station within jurisdiction of owner's domicile or residence. (GEO 195/2002, art. 13).

Use of unregistered vehicles is prohibited. (GEO 195/2002, arts. 12 and 17[3]).

Motor vehicles and trailers, which cannot be identified due to alteration in or lack or destruction of identification numbers stamped by manufacturer, as well as vehicles and trailers assembled from pieces that cannot be identified, or those vehicles for which identity of one or more successive owners cannot be established, shall not be certified for traffic. Motor vehicles and trailers whose legal origin can be established by police are exempted from this rule. (Traffic Regulation, art. 21).

Motor vehicles and trailers may be registered only if their authenticity has been certified by Romanian Registry of Motor Vehicles (Rom. Regia Autonoma "Registrul Auto Roman"). This certification also proves that vehicle does not appear in database as being stolen. This certification is not necessary for new motor vehicles. (GEO 195/2002, art. 11).

Loss or theft of registration certificates or provisional authorizations for traffic must be reported to issuance authority within 48 hours after discovery of such occurrence. (Traffic Regulation, art. 27).

Motor vehicles declared abandoned or without owner, by law or by order of local public administration authority are being deregistered within 30 days of receiving order for such deregistration. (GEO 195/2002, art. 17).

Motor vehicles registered in other countries owned by persons who established their domicile/residence in Romania, may be driven on public roads for maximum of 90 days from entering country. (GEO 195/2002, art. 82).

In regard to international traffic, Traffic Regulation provides that vehicles and trailers registered in other countries, may travel on public roads in Romania provided they comply with technical requirements foreseen in Convention on traffic, concluded in Vienna 1968, but only for duration of civil liability insurance. (GEO 195/2002, art. 82).

Driver's Licenses.

Any person wishing to drive motor vehicle in Romania must have driver's license and be at least 18 years old, except for those driving motorcycles with engines up to 125 cm3, which may be driven by persons at least 16 years old. Motor vehicles engaged in public transportation, in transportation of dangerous substances and motor vehicles weighing more than 7.5 tonnes may only be driven after age of 21. (GEO 195/2002, art. 20).

Driver's licenses and registration certificates of motor vehicles issued in other countries are valid based on conditions provided for in International Convention Regarding Road Traffic, namely such persons may drive on Romanian public roads for maximum of 90 days from date of entering country. Citizen of state that is not member of abovementioned Convention, must have international driver's license. (GEO 195/2002, arts. 82 and 83).

Members of diplomatic missions or consulates, as well as other foreign organizations that enjoy diplomatic treatment shall undergo examination for obtaining driver's license in accordance with conditions established by Ministry of Internal Affairs and Administration and Ministry of Foreign Affairs. (GEO 195/2002, art. 28).

Sale-purchase of Motor Vehicles.

According to Civil Code, sale of motor vehicle does not require specific form or written deed for validity purposes. However, such written deed is compulsory for proving existence of transaction in front of court—ad probationem—and for registration purposes. (Government Decision 610/1992, regarding identity book of vehicles, art. 3; Instructions of Ministry of Interior, Ministry of Finance and Ministry of Transportation 290/1993, 2802/1993 and 1189/1993 regarding application of Government Resolution 610/1992).

Rental of Motor Vehicles.

There is no specific regulation focusing on rental of motor vehicles. Such activity is governed by common provisions of Civil Code regarding rental. (Civil Code, arts. 1410-1490).

24 TREATIES AND CONVENTIONS

24.01 TREATIES AND CONVENTIONS:

Romania is member of following organizations: North Atlantic Treaty Organization (NATO); Council of Europe; United Nations (UN); International Monetary Fund (IMF) and World Bank; International Bank for Reconstruction and Development (IBRD); International Finance Corporation (IFC); Multilateral Investment Guarantee Agency (MIGA); European Bank for Reconstruction and Development (EBRD); General Agreement on Tariffs and Trade (GATT); and Bank for International Settlements (BIS). Romania joined European Union in 2007.

Multilateral Treaties and Conventions to which Romania is Party.

(1) Geneva Convention providing Uniform Law for Cheques (1931); (2) Geneva Convention for Settlement of Certain Conflicts of Laws in connection with Cheques (1931); (3) Convention of New York on Recognition and Enforcement of Foreign Arbitral Awards (1958) (with following condition: “Romania will apply Convention only for disputes of contractual or non-contractual relations that are considered commercial by legislation. It shall apply Convention for Recognition and Enforcement held on territory of another contracting State. As to awards held on non-contracting State's territory it will apply Convention, but on basis of reciprocity agreed between Parties”); (4) European Convention of Geneva on International Commercial Arbitration (1961) (excepting Arrangement for Paris of 1972 applying European Convention on International Commercial Arbitration); (5) United Nations Convention of Vienna on Contracts for International Commercial Arbitration; (6) Washington Convention on Settlement of Investment Disputes Between States and Nationals of Other States (1975); (7) Charter of Paris for New Europe (1990); (8) Hague Convention on Civil Procedure (1954); (9) Hague Convention Abolishing Requirement of Legalization for Foreign Public Documents (1961); (10) Hague Convention on Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters (1965); (11) Hague Convention on Taking of Evidence Abroad in Civil or Commercial Matters (1970); (12) Hague Convention on Facilitating International Access to Justice (1980); (13) Hague Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption (1993); (14) Hague Convention on Civil Aspects of International Child Abduction (1980); (15) UN Convention against Torture and Other Cruel Inhumane or Degrading Treatment or Punishment (1990); (16) Convention INMARSTAT (1990); (17) Convention EUTELSAT (1990); (18) UN Convention on Rights of Child (1990); (19) Basel Convention on Control of Transboundary Movements of Hazardous Wastes and their Disposal (1991); (20) International Pact on Abolition of Capital Punishment; (21) Convention of Rome on International Fund for Agricultural Development (FIDA); (22) Geneva International Tin Agreement (1975); (23) Brussels Customs Convention on Temporary Importation of Packings (1960); (24) Bern Convention for Protection of Literary and Artistic Works (as revised at Stockholm); (25) Paris Convention for Protection of Industrial Property (as revised in Stockholm, 1967); (26) Madrid Agreement Concerning International Registration of Trademarks (as revised in Stockholm, 1967); (27) Convention on the Granting of European Patents (1973, as am'd); (28) UN Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity (1968); (29) Brussels Customs Convention (1968); (30) Vienna Convention on Diplomatic Relations (1961); (31) London Convention for the Safety of Life at Sea; (32) Chicago Convention on International Civil Aviation (1944); (33) Geneva Convention on Long-Range Transboundary Air Pollution (1979); (34) Bern Convention Concerning International Carriage by Rail (COTIF) (1983); (35) Rules Concerning Contract for International Carriage of Goods by Rail (CIM); (36) Rules Concerning Contract for International Carriage of Passengers and Luggage by Rail (CIV); (37) Convention on Contract for International Carriage of Goods by Road (CMR); (38) UN Convention on Carriage of Goods by

Sea (1978); (39) London Convention on International Regulations for Preventing Collisions at Sea (1972); (40) Cultural Convention of Europe (1991); (41) Conventions AELS and GATT; (42) Geneva Convention on International Recognition of Rights in Aircraft; (43) Montreal Convention for Suppression of Unlawful Acts Against Safety of Civil Aviation; (44) UN Convention relating to Status of Refugees; (45) Vienna Joint Convention on Safety of Spent Fuel Management and on the Safety of Radioactive Waste Management; (1997); (46) Adherence to Central European Free Trade Agreement (CEFTA) (1992).

Mutual Promotion and Warranty of Investments.

Following countries are those with whom Romania has entered into treaties and conventions relating to mutual promotion and warranty of investments: Armenia; Bosnia and Herzegovina; Canada; China; Cuba; Czech Republic; Ecuador; Egypt; France; Gabon; Germany; Great Britain; Greece; Hungary; Indonesia; Israel; Kazakhstan; Democratic Republic of Korea; Macedonia; Malaysia; Mauritania; Morocco; Netherlands; Qatar; Russia; Senegal; Slovakia; South Africa; South Korea; Sri Lanka; Sudan; Switzerland; Syria; Tunisia; Turkey; United Arab Emirates; U.S.A. and Uzbekistan.

Treaties for avoidance of double taxation have been executed by Romania with following states: Albania, Algeria, Armenia, Australia, Austria, Bangladesh, Belgium, Denmark, Ecuador, Egypt, Finland, France, Georgia, Germany, Great Britain, Greece, Hungary, India, Indonesia, Ireland, Israel, Italy, Japan, Jordan, Kazakhstan, Democratic Republic of Korea, Kuwait, Lebanon, Luxembourg, Malaysia, Malta, Mexico, Moldova, Morocco, Namibia, Netherlands, Nigeria, Norway, Pakistan, Philippines, Poland, Portugal, Qatar, Russia, Slovakia, South Africa, Spain, Sri Lanka, Sudan, Sweden, Switzerland, Syria, Thailand, Tunisia, Turkey, Ukraine, United Arab Emirates, U.S.A., Uzbekistan, Vietnam, Yugoslavia and Zambia.

1
RUSSIAN FEDERATION LAW DIGEST

—Scope —

Revised for 2010 edition by

REZNIK, GAGARIN & PARTNERS of Moscow, Russia.

(Primary abbreviations used: RSFSR—Russian Soviet Federal Socialist Republic; RF—Russian Federation; APK RF—Arbitration Procedure Code of RF; Const.—Constitution of RF; Civil Code—Civil Code of RF of Nov. 1994; GPK RF—Code of Civil Procedure of RF of 2003; UK RF—Criminal Code of RF of June 1996; UPK RF—Code of Criminal Procedure of 2001; KoAP RF—RF Code of Administrative Offenses; TK RF—Customs Code; MAP RF—Ministry of Antimonopoly Policy of RF; FAS—RF Federal Antimonopoly Service; MinFin RF—Ministry of Finance of RF; MinJustice RF—Ministry of Justice of RF; MinForAff RF—Ministry of Foreign Affairs of RF; MinEc RF—Ministry of Economics of RF; MNS RF—RF Ministry for Taxes and Duties; FTS of RF—Federal Tax Service; FSC—Federal Securities Commission; FSFM—RF Federal Service on Financial Markets; CBR—Central Bank of RF.)

Note: This revision incorporates legislation through Jan. 1, 2010.

1 INTRODUCTION

1.01 PRELIMINARY NOTE:

Following are full citations for each legislative source referred to in primary abbreviations above. Following certain citations is shortened version used for references in text. Constitution of RF adopted by popular referendum on Dec. 12, 1993 (“Constitution”); Civil Code of RF Part One, Part Two, Part Three, and Part Four adopted correspondingly on Nov. 30, 1994, Jan. 26, 1996, Nov. 26, 2001, and Dec. 18, 2006; Tax Code of RF Part One and Part Two, adopted correspondingly on July 31, 1998 and Aug. 5, 2000; Arbitration Procedure Code of RF of July 24, 2002; Code of Civil Procedure of RF of Nov. 14, 2002; Criminal Code of RF of June 13, 1996; Code of Criminal Procedure of RF of Dec. 18, 2001; and Code of Administrative Offenses of RF of Dec. 30, 2001.

1.02 CONSULS:

Per Decree of USSR Supreme Soviet Presidium of June 25, 1976, duties of RF consuls include protection and sale of property of RF citizens dying abroad, acceptance of inheritance by RF citizens, search for RF heirs, formalizing adoption of Russian children resident outside RF, protection of Russian citizens in foreign jails, performance of notarial functions, including administration of decedents' estates, legalization of documents of authorities functioning within consular jurisdiction, registration of civil status deeds and issuing Russian visas for admission of foreigners to RF. RF signed 1961 Hague Convention Abolishing the Requirement of Legalization for Foreign Public Documents on May 30, 1996. Consulates in U.S. located in Washington, D.C., New York, Seattle, San Francisco, and Houston.

See categories 5 Civil Actions and Procedure, topic Letters Rogatory; Treaties and Conventions, topic Treaties.

1.03 CURRENCY:

One ruble equals 100 kopeks. Presidential Decree No. 721 of May 16, 1996, mandates action by Government of Russian Federation and CBR to make Russian ruble (RUR) fully convertible currency. On Jan. 1, 1998, in accordance with Presidential Decree No. 822 of Aug. 4, 1997 “On Changing the Nominal Value of Russian Currency and the Scale of Prices” and RF Gov. Res. No. 1182 of Sept. 18, 1997, ruble was re-denominated to remove three zeros from each note as adjustment for inflation. Thus, 1,000 rubles issued prior to Jan. 1, 1998 equal one ruble issued after Jan. 1, 1998. All wholesale and retail prices for goods, services, taxes, duties, fees, wage-rates and other forms of remuneration were adjusted according to new denomination. CBR issued new coins and notes on Dec. 31, 1997.

See category 15 Foreign Trade and Commerce, topic 15.02 Exchange Control.

1.04 GOVERNMENT AND LEGAL SYSTEM:

RSFSR, pursuant to Dec. 12, 1991 ratification of treaty creating Commonwealth of Independent States (“CIS”), adopted USSR laws and normative acts pending passage of new legislation. On Dec. 25, 1991, Supreme Soviet of Russia renamed Russian Soviet Federated Socialist Republic (“RSFSR”) into Russian Federation (“RF”). (RF Law “On Renaming the State of the RSFSR” of Dec. 1991). RF Constitution made names “Russia” and “Russian Federation” interchangeable. (Const., art. 1[2]). USSR and RSFSR acts remain effective in RF, but only to extent not in conflict with RF law and regulations. RF similarly adopted all obligations of USSR under international treaties. (MinForAff RF Letter No. 11/UGP of Jan. 13, 1992).

Constitution.

Present RF Constitution adopted by popular referendum Dec. 12, 1993. (Const., § 2[1]). Constitution envisions separation-of-powers between legislature, executive and judiciary. (Id., art. 10). Individual civil rights and liberties (e.g. freedom of conscience [Id., art. 28], equal protection [Id., art. 19] and rights of criminal accused [Id., arts. 45-54]) guaranteed, as are “economic” rights and liberties such as ownership and entrepreneurship. (Id., arts. 34-37). Constitution assures citizens of affirmative “social” privileges, including rights to housing, medical care and sound environment. Constitution contains supremacy clause. (Id., art. 15[1]).

Separation of Powers.

Legislative, executive and judicial branches operate independently to check encroachments on respective spheres of authority. (Const., art. 10).

President is elected by popular vote for four-year term. President does not belong to any of three branches of authority, and is guarantor of Constitution of RF, of human rights and liberties, secures coordinated functioning of Powers. (Const., art. 80). President is also Supreme Commander-in-Chief of Armed Forces of RF. (Const., art. 87). President appoints RF Government ministers and committee chairpersons, and nominates candidates to key positions of state bodies. President may issue mandatory orders and decrees (Const., art. 90) and may dissolve State Duma under certain circumstances specified in Constitution (Const., art. 84[b]).

Legislative Branch.

Federal Assembly consists of two chambers, Federation Council and State Duma. Federation Council comprised of two representatives, from each “subject” (as defined in subhead Federal Structure, infra) of RF. (Id., art. 95; RF Law No. 113-FZ “On the Procedure for Formation of the Federation Council of the Federal Assembly of the RF”). Federation Council resolves matters of appointments, war powers, impeachment and states of emergency. (Id., art. 102). State Duma, comprised of 450 deputies, adopts federal legislation by simple majority for subsequent approval by Federation Council and President (Id., art. 105) except for federal constitutional laws which are subject to adoption by two-thirds majority vote in State Duma and subsequent three-fourths majority in Federation Council (Id., art. 108). State Duma may override (by two-thirds majority) veto of Federation Council and may supersede Presidential veto if Federation Council also supports law by two-thirds vote. State Duma also decides on appointments and initiates impeachment against President of RF. Legislative initiative is vested in President, members of Federal Assembly, Government of RF, legislative bodies of RF subjects, and in Supreme Court, Higher Arbitration Court and Constitutional Court of RF. (Id., art. 104). Both chambers normally assemble for spring and fall sessions. Federation Council meets each year for spring session since Jan. 25 till July 15 and for fall session since Sept. 16 till Dec. 31. Period of each State Duma session defined by deputies at previous session.

Executive branch is represented by Government of RF, which consists of Government Chairperson, Deputy Government Chairpersons and federal ministers. (Const., art. 110). Government's Chairperson is appointed by RF President upon State Duma consent. (Const., art. 111). Deputy Government Chairpersons and federal ministers are appointed by RF President. (Const., art. 112[2]).

Pursuant to RF President's Decrees No. 314 dated Mar. 9, 2004 and No. 649 dated May 20, 2004 (as last am'd Dec. 25, 2008), federal executive bodies divided (depending on amount of powers) into federal ministries (18 in total), federal services and federal agencies. Some federal services (such as Federal Security Service, Federal Antimonopoly Service etc.) act as independent executive bodies, but most subordinated to certain federal ministries, e.g. Federal Migration Service subordinated to Ministry of Internal Affairs. Federal agencies mostly subordinated to certain federal ministries.

Judicial Branch.

Consists chiefly of Constitutional Court, Superior and lower arbitration courts, Supreme Court and lower courts of general jurisdiction, and justices of peace. Military tribunals also exist. Appeals from decisions of military tribunals heard in courts of common jurisdiction. Appeals on administrative tribunal decisions may be heard both in courts of common jurisdiction and arbitration. Procurator's office has right to act as party in civil and arbitration courts, performing functions of prosecutor and attorney-general. President submits nominations and proposals for removal of RF Procurator-General to Federation Council for approval. See subhead Procuracy, infra; category Courts and Legislature, topic Courts.

Federal Structure.

RF consists of 83 “subjects”: 21 republics, nine territories, 46 regions, two “cities of federal significance,” four autonomous districts and one autonomous region. (Const., art. 65[1]). All 83 subjects have equal, plenary authority to regulate activities not preempted by federal law. (Id., arts. 5, 73). Federal government has exclusive jurisdiction over such issues as national security, monetary policy, civil legislation, civil, criminal and arbitration procedures, intellectual property legislation, federal taxes and duties system, foreign policy, foreign trade, judicial system, prosecution system etc. RF exercises joint jurisdiction with its ``subjects'' over such issues as, for example, real estate legislation, environment, education, administrative, labor, family legislation etc. (Id., arts. 71-72). If conflict between federal and local authority on issue of joint jurisdiction, federal law controls. (Id., art. 76[5]). RF Law No. 184-FZ ``On the General Principles of Organization of Legislative (Representative) and Executive Bodies of the State Authority of the Subjects of the Russian Federation'' of Oct. 6, 1999 (as last am'd Dec. 17, 2009) provides for general principles of demarcation of powers between federal state power bodies and state power bodies of subjects of Russian Federation. (c. 4). No agreement may alter established allocation of federal, state and joint jurisdictions as outlined in RF Constitution. (Id., art. 3[1]). Status of RF subjects stipulated by Constitution adopted Dec. 12, 1993 and Federal Treaty of Mar. 11, 1992, signed by RF subjects.

RF Law No. 184-FZ ``On the General Principles of Organization of Legislative (Representative) and Executive State Bodies of Subjects of Russian Federation'' determines: key principles of activities of state bodies of RF subjects (art. 1); powers and status of legislative bodies of RF subjects (arts. 4-10); rights and responsibilities of deputies of legislative bodies of RF subjects (arts. 11-15); organization and responsibilities of executive bodies of RF subjects (arts. 17-22); procedure of appointment of head executive person of RF subjects (art. 18); interaction between executive and legislative bodies of RF subjects (arts. 23-25).

RF Law No. 131-FZ ``On the General Principles of the Organization of Local Self-Government in the Russian Federation'' of Jan. 1, 2009 (as last am'd Dec. 27, 2009) defines key principles and guarantees of right for autonomy (arts. 1, 3) stipulates jurisdiction of RF and RF subject in sphere of self-government (arts. 5, 6), defines local government jurisdiction, defines fundamentals of organization (forms and methods) of self-government in RF. Local self-government bodies are not part of state government although they have significant power in various spheres such as municipal ownership of property and others. Powers of local self-government bodies are likely to increase with time.

Administrative Law.

Primary source of administrative law and procedure in RF is RF Code of Administrative Violations of Dec. 30, 2001 (KoAP RF). KoAP RF provides for administrative punishment (fine, arrest, reformatory job, confiscation of offence instrument, compulsory deportation of foreigners and stateless persons from RF territory etc.) for administrative offences committed by RF citizens, foreigners and stateless persons as well as by companies (expressly stipulated by KoAP RF) in different spheres such as violation of highway rules, illicit transactions with foreign currency, illicit hunting, public misconduct etc. KoAP RF describes administrative procedure and provides for administrative appeal. Administrative cases (depending on offence category) heard by justices of peace, courts of general jurisdiction, arbitration courts, and federal or regional executive bodies. Notwithstanding exclusive jurisdiction of executive bodies to hear certain types of administrative cases, administrative resolutions may be challenged in court. Since July 6, 2002 list of administrative offences and punishments restricted to that of KoAP RF and legislation of RF subjects on administrative offences which is to be adopted in conformity with KoAP RF. (KoAP

RF, arts. 1.1., 2.1.).

Administrative decisions also appealable pursuant to RF Law No. 4866-1 “On Lodging Complaints with Court on Actions and Decisions Infringing Citizens' Rights and Freedoms", restated Apr. 27, 1993 (as last am'd Feb. 9, 2009). Citizen may timely file for separate judicial review of acts or omissions of any public or private entity or official citizen believes violate citizen's rights. (Id., arts. 1, 2). Both collective and individual administrative resolutions may be contested to court; citizen shall only bring evidence of violation of his rights and liberties, i.e. he or she shall not furnish any evidence of unlawfulness of administrative resolution (burden of proof of lawfulness of resolution vests in administrative body). (Id., art. 6). RF Constitution also guarantees citizen's right to judicial review of administrative actions. (Const., art. 46[2]).

Procuracy.

According to art. 129 of RF Constitution prosecution system activities are regulated by federal laws. RF Law No. 168-FZ “On Amending the Law ‘On Procuracy of RF’” of Nov. 17, 1995 (“Procuracy Law”) stipulates objectives and duties of procuracy. Procuracy established to supervise legality and administration of justice to supervise lawfulness of inquiry and investigative and penitentiary bodies acts, protect rights of citizens through intervention in court and administrative proceedings, conduct criminal prosecutions, hear complaints (non-exclusive authority) of citizens as to rights violations, and serve other functions related to judicial process. (Id., arts. 1-3). APK RF restricts procurator's participation in arbitration proceedings to contesting acts of executive bodies of RF, RF subjects and local authorities and contesting invalid or void transactions committed by governmental bodies of RF, RF subjects or local authorities as well as by unitary enterprises or enterprises with participatory shares of RF, RF subjects or local authorities therein. (APK RF, art. 52[1]). Procurator's offices review implementation of laws and regulations by local legislative, executive and administrative bodies, as well as by legal entities, public organizations and officials. Procuracy cooperates with appropriate agencies in other states, participates in drafting laws and international treaties, concludes international treaties on judicial assistance (recognition and enforcement of civil judgments) and combats crime. Organization procedure regulated by Constitution and Federal Laws. (Procuracy Law, arts. 1-3). Certain prosecutor's powers and authorities (especially in sphere of criminal and civil procedure) are set forth in other federal laws such as Civil Procedure Code, Criminal Procedure Code etc.

Procuracy is unitary structure, with local, regional, republican and other procurators forming hierarchy up to RF Procurator-General. (Id., art. 11[1]). Procurator-General appointed on nomination by RF President and dismissed by Federation Council. (Id., art. 12). Procuratorial supervision, including court practice, generally withdrawn in favor of principle of “separation of powers” and independence of procuracy. Procuracy entitled to supervise implementation of human rights and freedoms (Id., arts. 26-28), to investigate citizens' grievances against state agencies, court actions (Id., arts. 35-39), often during pendency of consideration or appeal, and may appeal question to RF Constitutional Court. Procuracy controls pre-trial investigations (Id., arts. 29-31), and may submit “protests” to highest RF courts requesting vacation of lower court decisions (Id., art. 36). Procurators have non-exclusive right of general supervision of implementation of laws by state agencies, legislative and local self-government organs, legality of administrative acts and may protest actions inconsistent with law. (Id., arts. 21-25).

Procuracy structure has been essentially changed by RF Law No. 87-FZ “On Amending UPK RF and Procuracy Law” of June 5, 2007 (valid since Sept. 7, 2007). Investigative committee, consisting of Chief investigative authority, investigative authorities of subjects of RF and investigative authorities of cities and regions has been established under procuracy. Regulation on Investigative committee is established by President of RF. Only investigators of Investigative committee henceforth have right of execution of preliminary investigation. Investigative committee is headed by Chairman, who is also first deputy of RF Procurator-General. Chairman of Investigative committee is appointed and dismissed by Federation Council on proposal of President of RF. Deputies of Chairman of Investigative committee are appointed and dismissed by President of RF on proposal of Chairman of Investigative committee.

See subhead Administrative Law, supra; category Courts and Legislature, topic Courts.

1.05 HOLIDAYS:

Nine public holidays in RF are Jan. 1-5, New Year; Jan. 7, Christmas; Feb. 23, Defender of the Fatherland Day; Mar. 8, Women's Day; May 1, Spring and Labor Day; May 9, Victory Day; June 12, Russia Day and Nov. 4, National Solidarity. If public holiday falls on weekend, holiday shifted to next business day. (RF Labor Code, art. 112). Employer may not require work on public holidays. (Id.). Public holidays declared by presidential decree or federal law. Numerous days designated to commemorate events and professions which are not mandated public holidays.

1.06 OFFICE HOURS AND TIME ZONE:

Office hours are generally from 9 a.m. to 6 p.m. Moscow and St. Petersburg are in the +03:00 GMT time zone (three hours ahead of London time and eight hours ahead of New York time).

2 BUSINESS ORGANIZATIONS

2.01 AGENCY:

Russian law uses term “agency” for one specific type of contractual relationship (contract of agency, Civil Code c. 52). However, other relations are referred to as “agency” in common law and are regulated by diverse constructions, for example: representation (Id., c. 10), contract of commission agency (Id., c. 51), contract of commission (Id., c. 49), acting in interest of another person without commission (Id., c. 50). Cross between “trust” and “agency” under common law is contract of trust.

Power of Attorney.

Authorized attorneys' actions by virtue of law or power of attorney (maximum term of validity shall not exceed three years, compulsorily in writing) bind principal. (Id., art. 182). Acts exceeding authority bind attorney unless principal approves acts. Attorney shall act not on his/her own, neither in interest of another person, whose attorney he/she is at same time. In this latter case exclusion is made for so-called “commercial attorney”, i.e. person rendering professionally and on continuing basis business representative services. (Id., arts. 182, 184). Voluntary representation generally is executed on basis of commission. Attorney entitled to resign authority and principal entitled to revoke power of attorney at any time and these rights cannot be limited by parties' agreement. (Id., art. 188).

Under contract of commission (Id., c. 49) agent undertakes to perform specified legal actions on behalf and at expense of principal either for compensation or without same, being individually bound by principal's instructions. Principal shall issue power of attorney to agent for purpose of fulfillment of commission. Agent shall have right to transfer execution of agency to another person (substitute) subject to principal's consent or should it be necessary in circumstances given. (Id., art. 976). Contract can be terminated by initiative of either party at any time. In number of cases, for instance if commercial attorney is agent, party terminating contract shall indemnify expenses to other party, but it does not take place in general. (Id., art. 978).

Actions in interest of other people without commission (Id., c. 50) are available when it is necessary to act in interest of another person: (a) To take measures to prevent life or health hazard of person and/or damage of his/her property in case of real danger, or (b) to fulfill obligation of another person, or (c) any other rightful interest of another person. Basic legal idea of this legal institution is protection of agent incurring certain expenses in interest of another person from unreasonable refuse of interested person to indemnify expenses. In this case expenses shall be indemnified notwithstanding whether agent's actions produce positive effect or not unless lack of results is due to agent's fault. Principal's protection from services imposed on him/her by agent is rule under which principal shall be unable to take care of his/her interests. Another requirement for application of c. 50 of Civil Code is that actions are to be effected without commission, request or prior consent of interested person (otherwise rules on contractual obligations shall be applicable). If conditions for application of rules on actions in interest of other persons without commission are not observed but agent's actions were to benefit of principal agent may recover value of benefit under regulations of unjust enrichment. (Id., c. 60). Agent shall notify principal on actions effected, at earliest opportunity. If principal approves agent's actions rules of contract of commission shall apply to parties' relations if legal action were effected (contracts made, etc.), or on some other contract.

Under contract of commission agency (Id., c. 51) commission agent shall undertake to perform one or several transactions on his/her behalf but at expense of principal for remuneration. As rule these are contracts of sale of goods. If there is no fault of agent in default of agreement agent shall reserve right for compensation of costs and remuneration payment. (Id., art. 991). Agent shall not be held answerable to principal for breach of obligations by third persons, unless his/her fault occurred when choosing contractor and in case he/she assumes warranty for performance of transaction (del credere). In case of breach of obligations by third persons, agent shall on principal's demand transfer his/her rights under unexecuted transaction to principal under regulations of assignment of rights of demand (Id., arts. 382-386, 388, 389, 993). In event of declaring agent insolvent (bankrupt), his/her rights and obligations under deals with third persons shall be transferred to principal. (Id., art. 1002).

Contract of agency (Id., c. 52) provides availability of effecting legal and other actions by agent in interest of principal for remuneration: (i) If agent acts in his/her own name, but at expense of principal, binds directly agent even through principal named in transaction or he/she directly performed transaction with third persons; (ii) if agent acts on behalf and at expense of principal, principal shall be bound (Id., art. 1005). Compulsory prerequisite for contract of agency is to establish continuous relationship between agent and principal. Contract of agency shall always be commutative. Contract of agency can provide some restrictive conditions, for example, principal's obligation not to resort to services of other agents, or agent's obligation not to render services to other principals within stipulated territory. (Id., art. 1007). Unilateral recession of contract made for certain term is not available, but available for termless contract. (Id., art. 1010). Rules on contract of commission (Id., c. 49) and contract of commission agency (Id., c. 51) (depending on in whose name agent acts) shall be applied subsidiary if they do not contradict with rules of contract of agency (Id., c. 52) and contract of agency essentials (Id., art. 1011).

Trust at rendering of services for purpose of profit receiving from trust estate and maintenance of estate in due condition. Contract may be executed for benefit of beneficiary (third person). In practice, this contract is most usual in administration of real estate and securities. Money may not be independent object of trust. (Id., art. 1013[2]). Trustee does not become owner of estate transferred to him/her and is liable to store it apart from his/her own property; he/she is entitled to remuneration for services rendered and to compensation of costs and expenses incurred in connection with trust in form of part of income received as result of use of estate. During administrations of trust estate trustee acts in his/her name and is liable to inform third persons of his/her status of trustee by special mark “Trustee” beside his/her name. If he/she fails to do so he/she is personally bound by deal. Maximum term of trust is five years. (Id., art. 1016[2]).

2.02 ASSOCIATIONS:

See topic 2.05 Legal Persons, subhead Noncommercial Organizations (Nonprofit-making Organizations).

2.03 BUSINESS ASSOCIATIONS:

Joint-Stock Companies (JSC).

Rules on JSC provided in Civil Code of RF and RF Law No. 208-FZ “On Joint-Stock Companies” of Dec. 26, 1995 (“JSC Law”) (as in force on Jan. 1, 1996, last am'd by RF Law No. 352-FZ of Dec. 27, 2009). Particularities of legal order of JSC created in course of privatization if share of State in it more than 25% or if State reserves specific right, so-called “golden share” is set forth in special laws on privatization.

Equity capital of JSC is divided into shares. Members are not liable for obligations of JSC and incur risks of losses within values of their respective shares, excluding members liable with value of unpaid contributions. JSC may be open or close which shall be indicated in its company name along with words “joint-stock company”. (JSC Law, art. 7). Shareholders of open JSC are entitled to transfer their respective shares freely and without consent of other shareholders. Open JSC floats its shares by public subscription but may also choose close subscription unless any restrictions thereto provided in Articles of Association or by legislation. Number of shareholders of open JSC is not limited. JSC which shares are allotted among incorporators only or among number of persons limited in advance considered to be closed. Shareholders of closed JSC enjoy preemptive right to purchase shares sold by other shareholders (preemptive right applies to sales only). If shareholders do not exercise preemptive right, corporation itself has preemptive right if so provided by Articles of Association. Number of shareholders of closed JSC cannot exceed 50. These rules make similar closed JSC and limited liability and additional liability companies. See subhead Limited Liability Companies, infra. Open JSC obliged to publish information (profit and loss report, notices of meetings of shareholders, etc.) in all cases, closed JSC obliged to do so in order set forth by Federal executive authority on securities market only if they float securities, namely bonds to public. (JSC Law, art. 92).

JSC may be incorporated by individuals or legal entities, including sole individual or entity. Founding document of JSC is Articles of Association, requirements to which are set forth in JSC Law art. 11. Any interested person is entitled to examine Articles of Association. JSC is considered incorporated upon its state registration. All shares shall be allotted among founders on incorporation. Not less than 50% of shares shall be paid within three months upon its state registration. Company shall not be entitled to exercise activity not relating to incorporation of it until payment is made for 50% of company's shares distributed among its founders. Rest of shares shall be paid within year upon incorporation. Shareholders are not entitled to make deals with shares until they are paid in full.

JSC are entitled to issue two types of shares: ordinary and privileged shares. Each ordinary share provides its holder with equal volume of rights including vote in general meeting, dividend and right in part of assets in case of liquidation. Unlike ordinaries privileged shares do not provide holders with right of vote except for cases provided by law (for example, in case of nonpayment of dividends or when deciding on reorganization or liquidation of JSC). Privilege shares of different issues may differ in volume of rights provided by them (by value of dividends, etc.), but within single issue each privilege share provides equal rights. If JSC issues privilege shares of several types Articles of Association shall provide for value of dividends and amount payable in case of liquidation on each type of privilege shares. Total percentage of privilege shares in equity capital of JSC shall not exceed 25%. Law or Articles of Association may limit number and par value of shares and maximum number of votes of one shareholder.

Shares are nominal securities. Rights of shareholders fixed in system of registering of members. Purchaser of share does not acquire rights provided by it until transfer of rights to new holder filed with register. Shares may be issued in documentary or non-documentary form. Particularities of legal order of shares and of its turnover set forth in RF Law No. 39-FZ “On Securities Market” of Apr. 22, 1996 (last am'd by RF Law No. 352-FZ of Dec. 27, 2009).

Minimum size of equity capital of open JSC – 1,000 minimum wages, of close JSC— 100 minimum wages. Under RF Law No. 82-FZ ``On Minimum Wage'' of June 19, 2000 (last am'd by RF Law No. 213-FZ of July 24, 2009) minimum wage equals to 100 Russian rubles. JSC is entitled to increase its equity capital by increase of par value of shares (decision thereon shall be made by general meeting of shareholders) or by issuing additional shares (decision thereon shall be made by general meeting of shareholders or Board of Directors if Articles of Association provide for such powers of Board). Issue of additional shares beyond declared number is subject to modification of Articles of Association and registration thereof. Decrease of equity capital permitted upon due notification of creditors by decrease of par value of shares or by purchase of shares by company itself if provided for by Articles of Association.

Superior body of JSC is general meeting of its shareholders conducted not less than once a year (from Mar. to June). (JSC Law, art. 47). Extraordinary meetings of shareholders are also available. They are conducted upon decision of Board of Directors, or demand of auditing committee, public accountant or shareholders of company holding 10% of shares and more. JSC Law specifies in competence of general meeting of shareholders matters that may be delegated to Board of Directors of JSC in cases provided for in JSC Law. However, no matter reserved to exclusive competence of general meeting of shareholders can be delegated to executive body of JSC. Principal aim of system of JSC management is concept that general meeting of shareholders is not entitled to consider and make decisions on matters not reserved to its competence by JSC Law.

JSC Board of Directors shall be elected for term to next general meeting of shareholders by general meeting of shareholders in order set in JSC Law and Articles of Association. (JSC Law, art. 66). In general meeting, shareholders also entitled to define and change number of directors (in consideration of minimum requirements set in JSC Law) and to terminate powers of directors of Board anticipatory. Competence of Board of Directors includes many significant matters related to conducting of general meetings of shareholders (convocation of general meeting, approval of agenda, etc.), establishment of executive body and its anticipatory discharge (if Articles of Association provide for such competence), establishment of subsidiaries and representative offices, approval of internal documents of company (with certain restrictions set in JSC Law and, possibly, Articles of Association), appointment of person keeping records on shareholders of company, rescission of contract with latter, etc. In JSC with less than 50 shareholders, Articles of Association may provide for non-establishing of Board of Directors and for vesting of its rights on general meeting of shareholders.

Management of current activity of JSC and making deals on its behalf effected by its executive body being either sole or collective. Sole executive body is compulsory for any company, collective one, additionally, shall be established only if it provided for by Articles of Association. In case of establishment of collective executive body, person, appointed sole executive body shall perform functions of chairman of collective body. Upon decision of general meeting of shareholders, powers of sole executive body may be delegated to profit-making organization or individual entrepreneur. (JSC Law art. 69). Restrictions are provided for holding of more than one office in executive body and Board of Directors of JSC (no more than a fourth of Board of Directors may consist of members of collective executive body, and sole executive body may not be chairman of Board of Directors). (JSC Law, art. 66[2]).

For purpose of protection of interests of minority shareholders and creditors of company from wrongful acts of members of executive body or Board of Directors, rules provide for special procedure for making of major and related party transactions.

Major deals related to purchase, alienation or possibility of alienation of assets by company directly or indirectly, with value of assets being 25% or more of balance sheet value of company's assets on latter reporting date, except for deals accomplished in course of ordinary economic activity of company and operations relating to floatation of ordinary shares and to floatation of securities converted into ordinary shares of company. If value of these assets is 25-50% of value of company's assets, decision shall be made by Board of Directors unanimously. If unanimous decision cannot be made and if value of assets exceeds 50% of value of company's assets decision shall be made by general meeting of shareholders. Major deals made in defiance of procedure set forth in law may be judicially avoided by action filed by JSC or its shareholder. (Id., arts. 78, 79).

Related party transactions are transactions in accomplishment of which member of Board of Directors (supervisory board) of company, person performing functions of sole executive body of company, including management organization or manager, member of collective executive body of company or shareholder of company, who has jointly with its affiliated persons 20% or more of voting shares of company as well as person entitled to issue directions binding thereon is interested. In number of cases, rules concerning related party transactions are not applicable, for example when company has only one shareholder executing functions of sole executive body himself/herself. There is complicated system of determination of existence of concern therein taking account of relatives and affiliated persons of said persons. (art. 81 of JSC Law, art. 4 of Antimonopoly Law). Related party transactions shall be made subject to consent of meeting by Board of Directors joining only independent (non-interested) members, and in number of cases—subject to consent of general meeting of shareholders. Transactions contrary to procedure set forth may be judicially avoided by action filed by JSC or its shareholder.

Limited liability companies (LLC) are regulated by Civil Code of RF and Law No. 14-FZ ``On Limited Liability Companies'' of Feb. 8, 1998 (last am'd by RF Law No. 352-FZ of Dec. 27, 2009) (``LLC Law''). Such company established by one or more persons or legal entities (including foreign ones) in accordance with Articles of Association, and its equity capital is divided in participatory shares of members in equity capital of LLC (``Shares''). Members of LLC may execute agreement on execution of rights of members, which will govern relationship of members and proceedings regarding enjoyment of their rights. Company shall ensure conducting of register of members. Number of members may not exceed 50. If number of members exceeds 50, LLC should be reorganized in open JSC or production cooperative within one year. Main differences between LLC and JSC are: transfers of shares are subject to notarization; right of members to withdraw freely from LLC (if so provided by Articles of Association), absence of shares of company issued as freely turnover securities (this difference only relevant in relation to open JSC), possibility to set out limitation or restrictions of transfer of shares to third persons in Articles of Association.

LLC may not have another business company (JSC, LLC, ALC) consisting of one person (member, shareholder) as its single member. Members are not liable for obligations of LLC except for joint and several liability with respect to unpaid part of contributions to equity capital. Name of LLC shall contain words ``limited liability''. At least half of equity capital is paid prior to its registration, rest part shall be paid within one year. (LLC Law art. 16). Minimal amount of equity capital fixed by law is 10,000 rubles (about 330 USD). LLC is obliged to reduce its equity capital or declare voluntary liquidation, if on basis of results of second fiscal year net assets of LLC are less than its specified equity capital or minimum fixed by law, respectively. Decreasing of equity capital is allowed after due notice of creditors. (Id., art. 20). Increase of equity capital is allowed after it was paid in full by members. If it provided for by Articles of Association, general meeting is entitled to make decision by majority of 2/3 of total votes of members about payment of additional contributions to property of company in proportion to existing shares of members.

LLC has two-level management system. Chief management body is general meeting of members; operational management performed by executive body (sole or collective one). Articles of Association of LLC may provide for formation of Board of Directors entitled to determine and terminate powers of executive body of LLC and make other decisions as provided for by LLC Law and by Articles of Association of LLC. Law establishes same limitations for holding of more than one office in collective executive body of LLC and in Board of Directors of LLC, as for JSC. (See subhead Joint-Stock Companies.) Number of votes of each member at general meeting is, as rule, in proportion to his share, unless otherwise provided in Articles of Association. Articles of Association of LLC may establish additional rights for one of members of LLC (in practice, e.g., paramount right to purchase shares of other members as compared to all other members of LLC). Said additional rights relate to personality of member and not to shares owned by him, therefore they do not pass on to purchaser if shares are sold to him at will of this member (e.g. in case of universal succession such transaction takes place).

Member of LLC is entitled to sell or otherwise transfer his share unless Articles of Association of LLC prohibit such transfer or unless its validity requires approval of all other members of LLC. In case of sale of his share by one of members other members of company have preemption right to purchase share at price of offer to third person in proportion to their shares. Articles of Association may provide for preemption right of purchase for company if other members do not use their right of purchase. Member interested in sale of his share must notify other members and company about proposed transaction. If he has violated preemption right of purchase of other members or company, injured persons may sue for transfer to them of rights and obligations of purchaser of shares. Claim may be raised within three months after relevant persons learned of or should have learned about introduced violation. (Id., art. 21).

In case of withdrawal from company, member is entitled to receive actual value of his share which is to be paid or transferred in kind within three months following date of submission of notice to company if otherwise is not established by Articles of Association. Share of member of LLC may be charged with his personal debts by court decision if property owned by him is not sufficient to cover debts.

Rules on major and related party transactions are also extended for LLC. These rules are basically same as rules of JSC Law. (Id., arts. 45, 46).

Additional Liability Companies (ALC).

Unlike LLC, members of ALC are jointly and severally liable for debts of company, if its property is not sufficient, in equal for all members multiple of value of their contributions which is fixed in Articles of Association of ALC. In case of bankruptcy of member his liability for obligations of company passes on to other members in proportion to their contributions, unless another procedure of division of liability provided for in founding documents. (Civil Code, art. 95). Official name of ALC shall contain name of company and words “additional liability”.

State and Municipal Unitary Enterprises.

Rules on state and municipal unitary enterprises provided in Civil Code of RF and RF Law No. 161-FZ “On State and Municipal Unitary Enterprises” of Nov. 14, 2002 (last am'd by RF Law No. 318-FZ of Dec. 1, 2007). Civil Code defines state and municipal unitary enterprises as special type of legal entities founders of which have right of ownership and other real rights on property given to that legal entity. (Id., art. 48[2]). Thus, unitary enterprise itself, though being business organization, does not hold property given to it with right of ownership. In order that unitary enterprise may participate in circulation and effect deals with respect to its property, special real law is developed in Russia, with which unitary enterprise holds its property—it is “the right of economic management”.

In order to effect operations with respect to disposal of real estate, unitary enterprises should obtain consent of owner (founder). Such deals include not only sale or contribution of equity capital to another organization, but also lease and pledge. Operations with settled movable property may be effected by enterprises independently, unless otherwise provided for in law or another statutory legal act. (Id., art. 295[2]). Placing movable property and real estate in trust is legally prohibited. (Id., art. 1013[3]).

Owner of property of enterprise (state or municipal subject) is not liable for debts of enterprise except for cases where rules of secondary liability of founder of legal person apply. (Id., art. 56[3]). See topic Legal Persons for details.

Inability for owner to withdraw property of unitary enterprise by any means except for liquidation taking into account rights of all creditors serves as guaranty for creditors of such enterprise. In its turn, unitary enterprise is not liable for debts of founder (public formation) in all circumstances.

Unitary enterprises may only be established by state and municipal subjects. (Id., art. 113[1]). In name of such subjects decision to establish unitary enterprise is made by competent state or municipal authority. Same authority approves Articles of Association of unitary enterprise. Founder determines subject and objects of unitary enterprise, appoints head of enterprise, sees to proper use and integrity of property held by enterprise. Founder retains right to make decision about liquidation or reorganization of enterprise. (Id., art. 295).

Special kind of unitary enterprises are state enterprises which are established by decision of Government of Russian Federation (federal state enterprise) or by decision of agency of state authority of constituent of Russian Federation (territorial state enterprise), or by decision of agency of local self-government (municipal state enterprise). (RF Law No. 231-FZ, art. 8). State enterprises hold property not with right of economic management but with right of operational management (another type of real rights according to Russian laws). Legal regime of property of state enterprise is much stricter as compared with ordinary unitary enterprises. (Civil Code, art. 115). It manifests itself in possibility to dispose independently of products only unless this possibility is limited by legal acts. Disposal of other property is only allowed with consent of owner. Founder may at any time deprive state enterprise of property which is in its opinion unnecessary, not in use or used improperly. Guarantees to creditors of state enterprises consist in fact that Russian Federation secondarily liable for obligations of state enterprise, if its property is not sufficient.

State enterprises should be distinguished from subjects of public formation law (their founders) having civil capacity. There are three types of such public subjects: Russian Federation as whole, constituents of Russian Federation, municipal formation. Any of these formations may own property including land and natural resources and entitled to give property to state and municipal enterprises and establishments for holding, use and disposal. (Id., arts. 214-215). Transfer of property owned by public formation to ownership of individuals and legal persons is generally regulated by privatization laws of Russian Federation (Id., art. 217), establishing special regime for deals effected. Public formations are liable for their obligations (e.g. for loans obtained as result of stock floatation) with their property not settled with established enterprises with right of economic or operational management. (Id., art. 126[1]).

Production Cooperatives (PC).

Regulation of such organizations is determined in Civil Code of RF and RF Law No. 41-FZ “On Production Cooperatives” of May 8, 1996 (last am'd by RF Law No. 205-FZ of July 19, 2009) as legal form of organization of people in which they intend to participate with personal labor. Participation of legal persons in business of PC may only be established in its Articles of Association as exception. PC is established by at least five persons obligatorily making personal labor and property contributions according to Articles of Association of PC. Official name of PC must include words ``production cooperative'' or ``cartel''. Management of PC is exercised by general meeting of members and executive body (sole or collective one). Assets of PC are divided in shares of members. Part of property may be assigned to so-called ``indivisible fund'' to be used for set purposes, and members of PC have no rights to it. Profit of PC is distributed between members in proportion to their labor participation in business of cooperative, unless otherwise established in Articles of Association. If property of PC is not sufficient, liability for its debts may be imposed on members to amount specified in law or in Articles of Association.

2.04 CORPORATIONS:

See topic 2.03 Business Associations.

2.05 LEGAL PERSONS:

General Provisions.

Legal entity is organization, which has solitary property and which is liable for its obligations with this property and may on its own behalf acquire and exercise property and personal non-property rights, to discharge duties and to be party to trial as plaintiff and as defendant. (Id., art. 48). Name of legal person shall indicate its legal form. Constitutive documents of legal persons are its Articles of Association and/or Memorandum of Association both subject to approval of its incorporators. (Id., art. 52).

Subject to contents of rights of members of legal entity with regard to legal entities Civil Code divides all of permitted forms of Russian legal entities into three categories. First one includes economic partnerships and companies (corporations) and cooperatives (both consumers' and production). Members of these legal entities do not have ownership nor have any other real right in property they transfer to legal entity in exchange for membership in it. Their rights are limited to claims to relevant legal entity (right of participation in management, right of participation in profits, right to share in case of liquidation). Second category includes state and municipal unitary enterprises and institutions financed by their owners, incorporators of which remain owners and reserve other real rights in property they provide to said enterprises and institutions. Third category includes public and religious organizations (societies), charitable and other foundations and alliances of legal entities (associations and groups), incorporators and members of which have no rights with regard to assets of said legal persons. (Id., art. 48).

Subject to their objectives legal entities are classified into profit-making (main objective of which being profit earning) and nonprofit-making (organizations which do not consider profit to be their primary objective; generally there is no allocation of profits among members). (Id., art. 50[1]). Main purpose of division of legal entities into profit-making and nonprofit-making is not prohibiting profit-making activity of latter but special status given to nonprofit-making organizations by virtue of their incorporation, as some specific rules are applicable to them. Such specific rules are not applicable to nonprofit organizations until they engage in business activity de facto. As example of specific rules one can exemplify art. 401(3) of Civil Code, providing liability for breach of obligations regardless of fault, art. 1041(2) of Civil Code, permitting executing partnership agreement for purpose of deriving of profit to businessman only, art. 1015(1) of Civil Code, permitting being trustee to businessmen only (excluding unitary enterprises), etc.

Legal entity shall acquire its legal capacity upon date of registration in united state register of legal persons (Id., art. 51[2]) and legal capacity depends on its objectives stipulated in Articles of Association. Some types of activity enumerated in RF Law No. 128-FZ of Aug. 8, 2001 “On Licensing of Certain Types of Activities”, legal person may be engaged in subject to special permit (license) issued by state or municipal authorities. Activity of legal entities contrary to its objective or without necessary license may be held invalid if other party knew or should have known it would be invalid. (Id., art. 173). In practice contracts executed contrary to objective are rather seldom contested.

In general, founders (members) of legal entities are not liable for their indebtedness. One of exceptions is when founder (member) culpably assisted to occurrence of insolvency of legal entity. Bodies of legal entity when acting on behalf of it shall act in good faith and reasonably and liable for losses caused to legal entity. (Id., art. 53[3]).

Representative Offices and Branches.

Art. 55 of Civil Code provides for legal status of representative offices and branches which are not considered to be independent legal entities. Difference between them is that branch is separate unit of legal person fulfilling all functions of legal entity or part thereof (as rule they are: production of goods, execution of works, rendering of services) and these functions are not to be reduced to organization, management and representation and functions of representative office - representation. Deals on behalf of legal entity shall be made by head officers of representative offices and branches acting on basis of powers of attorney issued by head office of legal entity. Status of representative offices and branches of foreign organizations resemble status of their Russian analogues with exception of requirement of accreditation provided for certain term subject to renewal. Accreditation provided by State Registration Chamber. Supplementary requirements for representative offices of foreign organizations are provided in “Provision on Incorporation and Functioning of Representative Office of Foreign Companies, Banks and Organizations in USSR” approved by Resolution of Council of Ministers of USSR No. 1074 of Nov. 30, 1989. This Provision is applicable to extent that it does not conflict with subsequent legislation, in particular with RF Law No. 160-FZ “On Foreign Investment in Russian Federation” on July 9, 1999 (“Investment Law”).

Procedure of opening and acting of representative offices of foreign credit organizations on territory of Russian Federation governed by Order of CB RF No. 02-437 of Oct. 7, 1997.

Commercial organizations (profit-making organizations) can be incorporated as general partnerships, special partnerships, corporations limited by shares corresponding to “stock corporation”; company with limited or additional liability. All above said organizations are joined into single term “economic partnerships and companies” which generally correspond to “company” in Common Law. Besides profit-making, organizations include production cooperatives, state and municipal unitary enterprises. (Civil Code, art. 50[2]). See topic 2.03 Business Associations. Profit-making legal persons have exclusive right to use their corporate names registered simultaneously with legal entity.

Noncommercial Organizations (Nonprofit-making Organizations).

Nonprofit-making organizations (“NO”) are governed by Civil Code and RF Law No. 7-FZ of Jan. 12, 1996 “On the Non-profit-making Organizations”, last amended by RF Law No. 170-FZ of July 17, 2009 (``NO Law''). NO incorporated for social, charitable, cultural purposes and entitled to engage in commercial activity conforms to objectives provided in their founding documents. NO's benefits or its assets (with exception of nonprofit-making partnership) shall not be allotted among its members in case of its liquidation. (Id., arts. 14, 20). NO enjoy state and municipal support: legislation may provide for tax and customs privileges, availability on free of charge basis to use of state and municipal property, some tax privileges for investors in benefit of NO. Balance in NO on income-related operations resembles balance of profit-making organizations. Different types of nonprofit-making organizations (generally foundations and institutions) can be used for charitable activity, this case special status provided in RF Law No. 135-FZ “On Charitable Activity and Charitable Organizations” of Aug. 11, 1995 is applicable to them. Following are particular types of noncommercial organizations.

Consumer Cooperatives.

Voluntary associations of individuals (as rule) and legal entities (as exception), paying their contributions for purpose of satisfaction of their common material and other needs according to Articles of Association of cooperative. (Id., art. 116). “Material and other needs” does not mean deriving of profit. Legal form of consumer cooperative allows to join financial contributions of members, buy products for all members on wholesale prices and then allot products among members; as result members save difference between wholesale and consumer prices. Benefit from cooperative's activity shall be allotted among its members under its Articles of Association and in accordance with applicable legislation. Detailed regulation of rights and responsibilities of consumer cooperatives provided in Law No. 3085-1 “On the Consumer Cooperatives” of June 19, 1992, RF Law No. 66-FZ “On Horticultural, Gardening and Villatic Unions of Individuals” of Apr. 15, 1998, RF Law of Aug. 7, 2001 No. 117-FZ “On Credit Consumer Cooperatives” and RF Law No. 215-FZ of Dec. 30, 2004 “On Residential Accumulative Cooperatives”.

Public and Religious Societies.

Voluntary associations of individuals having common interests of political, spiritual or other nonmaterial character. Members do not reserve rights in property contributed and not liable for obligations of organization. Activity of public associations governed by RF Law No. 82-FZ of May 19, 1995 “On Public Unions”. Registration of public associations is not necessary except for political organizations. However civil legal capacity can accrue only upon registration. Activity of religious societies governed by RF Law No. 125-FZ “On Liberty of Conscience and Religious Societies” of Sept. 26, 1997. It declares existence of various religions, liberty of conscience, beliefs and participation in associations in pursuance of art. 19 of RF Constitution. However, Law is applicable to Russian organizations only, and foreign religious organizations are not considered to be religious societies and are entitled to have its representative offices without right to engage in religious activity. (art. 13 RF Law “On Liberty of Conscience and Religious Societies”).

Foundations.

Organizations without membership incorporated by individuals and/or legal entities by voluntary contributions for social, charitable, cultural, educational and other purposes of public utility. (art. 7 of NO Law). Foundation is entitled to engage in business activity necessary for achievement of generally useful purposes which foundation was created for and conforming to these purposes. For effecting of business activity foundations are entitled to establish economic societies (companies limited by shares, limited liability companies and additional liability companies) and to participate in same. (Civil Code art. 118[2]). Assets contributed become property of foundation. Members are not liable for obligations of foundations, neither foundation liable for obligations of its members. Members are obliged to publish annual statements on use of assets. Foundation management procedure and its forming shall be provided by Articles of Association approved by founders. Foundation can be liquidated by court decision only upon request of interested persons, grounded on law provisions. In case of liquidation property remaining after settlement of claims of creditors shall be used for objectives indicated in founding documents. (Id., art. 119[3]).

Nongovernmental Pension Funds.

RF Law No. 75-FZ “On Non-governmental Pension Funds” of May 7, 1998 defines such kind of entities as specific form of NO incorporated by individuals and/or legal persons exclusively for purposes to provide its members with nongovernmental private pensions. Nongovernmental Pension Fund is authorized to provide pensions and retirement insurance on date of acquisition of license in course provided by law. In default of license fund's activity is illegal.

State (Russian) corporation was introduced by RF Law No. 140-FZ of July 8, 1999 (amendment to NO Law) as type of NO incorporated and financed by State for social, management and other generally useful purposes. Legal status of each State corporation shall be determined by separate law. State is not liable for obligations of State corporation, neither State corporation liable for obligations of State.

Nonprofit-making Partnerships.

Established by individuals and legal entities for social, charitable, cultural, scientific, management, educational purposes, for health protection, development of physical culture and sport, satisfaction of spiritual and other noncommercial needs of persons, assertion of rights and interests of persons and legal entities, for solving of conflicts and disputes, rendering of legal services and for other generally useful purposes. (NO Law, art. 8). Not less than two founders are required. Members make their contributions for benefit of partnership and participate in management of same. Partnership is entitled to engage in business and is not liable for obligations of its members, neither are its members liable for obligations of partnership (main difference from general partnership being profit-making organization). In case of disaffiliation with partnership its member entitled to demand reimbursement of value of contribution made by him/her unless this right is limited in Articles of Association of partnership. Members of partnership may enter into foundation agreement.

Autonomous Nonprofit-making Organizations (ANO).

Organizations incorporated by legal entities or individuals for rendering of medical, educational, consulting, scientific, etc. services. There is no membership, management is conducted in accordance with founding documents; there are superior collective body and executive body. ANO's employees shall not form more than 1/3 of superior collective body board. (NO Law, art. 29[5]). Founders transfer title to certain property to ANO and after that may only supervise activity of ANO. ANO are entitled to engage in business activity for achievement of its purposes. (NO Law, art. 10).

Private Institutions are organizations established for social, cultural, management and other noncommercial purposes, which do not have full title to its property. Private Institutions are completely controlled by its founder/s (owner/s of property) who appoint/s manager, issues binding instructions and entitled to recall excess or nonused property at its own discretion. Institutions are not entitled to transfer property allotted to them by founder without his prior approval. They freely dispose of assets they receive as result of profit-making activity should same be permitted under Articles of Association of institution. (Civil Code art. 298[2]). Charge of any property of institution save monetary assets is not permitted. In case of insufficiency of monetary assets of institution its owner shall be liable for indebtedness. (Id., art. 120[2]).

Associations (Alliances).

Nonprofit-making organizations, which are entitled to join as its members either profit-making organizations only or nonprofit-making organizations only. If association (alliance) joins profit-making organizations objective of association (alliance) is coordination of business activity and protection of common interests of its members. Associations of nonprofit-making legal entities can be incorporated for any nonprofit-making purposes. Prime advantage for members of association (alliance) availability of its services for free. Members of association (alliance) remain independent but incur secondary liability for obligations of association (alliance) within limits set forth in founding documents (Articles of Association and Memorandum). Secondary liability remains valid for two years after withdrawal from association (pro rata to value of contribution made in property of association).

2.06 PARTNERSHIPS:

Partnership according to Russian legislation does not correspond to term “partnership” which is used in Anglo-American legislation. In Russian Federation partnership is understood only as commercial organization, and available variety of noncommercial organizations under name of “noncommercial partnership” practically has nothing to do with partnership, i.e. commercial organization, both from point of view of organizational construction and from point of view of responsibility of participants for entity's liabilities. See topic 2.05 Legal Persons, subhead Noncommercial Organizations (Nonprofit-making Organizations).

Civil Code foresees possibility of creation of general partnership and partnership in commendam (limited). In general partnership all participants bear unrestricted personal responsibility for debts which have arisen as result of partnership activity, that means that they are general partners. In partnership in commendam (limited), some participants (investors or special partners) do not participate in management of partnership but take risks of loss due to partnership activity within amounts invested by them. At least one partner in commendam should bear unlimited liability, that is, be general partner. In contrast to some continental European countries' legislations, it is impermissible to organize partnership that issues shares. (Id., art. 66[7]).

General partnership is partnership which participants are engaged in commercial activity on behalf of partnership and bear responsibility under its liabilities in amount of their own assets. One person may participate only in one general partnership. (Id., art. 69). Participant of general partnership should have status of individual businessman (see topic 2.07 Specific Forms of Business Conduct, subhead Small Enterprises and Individual Entrepreneurs) or commercial organization (see topic 2.05 Legal Persons, subhead Commercial Organizations [Profit-making Organizations]). (Id., art. 66[4]). Company name of general partnership should have either names (titles) of all of its participants and words “general partnership”, or name (title) of one or several participants with words “and company” and words “general partnership”.

Mutual Rights and Responsibilities of Partners.

Partnership management carried out on consensus of participants if Articles of Association do not have variant of decision making by majority of votes. Each partner has one vote if there is no other way of voting determined by Articles of Association. Management of internal problems of partnership is not same as attitude of partners towards third persons. (See catchline Management of Partnership, infra.)

Each partner should invest not less than 50% to equity capital before date of registration, and pay rest within period fixed in Articles of Association of partnership. Individual partners have no right to compete with partnership without consent of other participants. In case of violation of prohibition of competition, partnership has right to require, that partner in violation of noncompetition agreement pay appropriate damages or hand over all benefits received from competing with partnership. (Id., art. 73). Partners participate in distribution of profit and losses proportionally to their shares in equity capital if other is not provided by Articles of Association of partnership or by special agreement of partners. Complete removal of partner from participation in distribution of profits and losses, including, by common agreement, is inadmissible. When leaving partnership, participant is paid his share in assets of partnership if other is not stipulated by Articles of Association. Cession of share of partnership is possible at consent of other partners.

Management of Partnership.

Three patterns are possible: (a) Each participant has right to act on behalf of partnership in carrying out operations and other legal acts; (b) all operations of partnership are made only at consent of all participants; (c) conclusion of operations is entrusted to individual participants, and other participants may effect bargains on behalf of partnership only by proxy (power of attorney), received from participant administrating common causes by virtue of Articles of Association. Main pattern followed for lack of other regulation in Articles of Association, is first one (variant “a”). For protection of diligent third person, rule is applied according to which if third person did not know and should not have known about restriction of powers of individual copartners (that is when variants “b” and “c” are chosen), partnership may not dispute operations with him. (Id., art. 72[1]).

Rights and Responsibilities Towards Third Persons.

When partnership assets are insufficient to cover its debts, all special partners bear joint and several liability, including those who entered partnership after its foundation. Partner leaving partnership, bears responsibility under obligations which have arisen up to moment of leaving, within two years after leaving.

Dissolution.

Partnership ceases to exist when partner (whether individual or entity) terminates its participation in partnership. Termination may occur by voluntary withdrawal, death, absence, incapacity or partial incapacity, bankruptcy of partner, or creditor's execution against partner's assets in partnership to satisfy partner's debts. Voluntary withdrawal is permitted only upon reasonable excuse if period of partnership is fixed in time. Otherwise, partner may withdraw voluntarily upon six months' notice to partnership. In addition, partnership ceases to exist when partners expel member, following unanimous decision of partners. Partnership agreement may provide for continuation of partnership when member withdraws, terminates participation or is expelled. Partnership is, however, terminated upon court-ordered liquidation, insolvency or annulment of foundations agreement.

Partnership in Commendam (Limited).

Consists of general and special partners. Special partners (investors) bear risk of losses of partnership within limits of their financial contributions and do not participate in managing of partnership. In title of limited partnership there are names of all general partners and words “the limited partnership” or “partnership in commendam”, or as minimum name of one general partner and words “and Co.” and “the limited partnership” or “partnership in commendam”. If name of limited partner is indicated in name of partnership, limited partner becomes general partner. (Id., art. 82[4]).

Status of general partner in limited partnership fully complies with status of participant of general partnership, including rights, responsibilities and all restrictions fixed for latter. Special partner may act on behalf of partnership only on basis of power of attorney, but rules of his personal responsibility are not mentioned. Special partner is obliged to make his investment to assets of partnership, has right to participate in distribution of profits according to conditions of Articles of Association concluded by general partners. Leaving of partnership is admitted only upon termination of fiscal year, return of contribution is realized as provided by Articles of Association. Turn-over of shares of limited partners is similar to turn-over of shares in Open Company. See topic 2.03 Business Associations.

Dissolution.

Limited partnerships will be liquidated on basis provided for general partnerships with small correctives, for example, regarding that special (limited) partnership is saved, if there is at least one general partner and one investor in it. Additional basis to liquidation is leaving of all special partners, except for cases when general partners yield to be reorganized in general partnership and to prevent liquidation. At liquidation limited partners have preemption right to general partners on receiving their contributions from assets of partnership. (Id., art. 86).

Partnership in Participation.

Association of participants not recognized as legal entity on basis of agreement supported in Civil Code. (Id., arts. 1041-1054). This association is admitted to be created both for extract of profit, and for other valid purpose. (Id., art. 1041[1]). Only individual businessmen may be participants of association pursuing purpose of extract of profit (see topic 2.07 Specific Forms of Business Conduct, subhead Small Enterprises and Individual Entrepreneurs) or commercial organizations (see topic 2.05 Legal Persons, subhead Commercial Organizations [Profit-making Organizations]). In association with enterprise purpose all partners have joint responsibility for all community debts. (Id., art. 1047[2]). In view of unrestricted personal responsibility law does not install responsibility to deposit property contributions at foundation of partnership in participation if only participants will not agree about it. Valuation of contributions, both property, and incorporeal, is made under their free discretion. Each partner has right to act separately on behalf of partnership if other is not provided by agreement between all partners. Letter of attorney produced by other partners or agreement in writing means confirmation of authorities. Special sort of partnership in participation is private partnership. Existence of partnership is not opened in it for third persons, and only that before copartner who has concluded with them bargains bears responsibility towards his counteragents. In relations between partners responsibilities which have arisen during their joint cooperation are considered common.

2.07 SPECIFIC FORMS OF BUSINESS CONDUCT:

Joint Ventures.

Civil Code abolished joint venture as form of profit-making organization. Term “joint venture” is still used unofficially for indication on enterprise with Russian and foreign participation.

Small Enterprises and Individual Entrepreneurs.

RF Law ``On Development of Small and Middle Enterprises'' No. 209-FZ of July 24, 2007 (hereinafter ``DSME Law'') introduces specific legal and tax regimes of subjects of small and middle entrepreneurship which includes so-called ``middle enterprises'' and ``small enterprises'' which includes individual entrepreneurs.

Status of ``small enterprise'' or ``middle enterprise'' under DSME Law may be obtained by profit-making organization or by consumer cooperative. System of prerequisites for obtaining of this status are following: (1) share of state of Russian Federation, of subjects thereof, public and religious organizations (alliances), charitable and other does not exceed 25%; (2) share held by one or several legal entities not being subjects of small entrepreneurship does not exceed 25%; (3) number of employees does not exceed minimums set forth for various types of activity. Foreign citizens are entitled to participate in small-scale enterprises. Purchase by foreign legal person of more than 25% of authorized capital of same results in forfeiture of status of ``small (middle)-scale enterprise''.

Russian and foreign citizens are entitled to engage in entrepreneurship without establishment of legal entity. (Id., art. 23). Business activity is defined as ``an independent activity, performed at one's own risk, aimed at systematically deriving profit from use of property, sale of commodities, performance of work or rendering of services by persons, registered in this capacity in conformity with law-established procedure''. (Id., art. 2). Unless otherwise provided, rules of Civil Code regulating activity of profit-making organizations namely rules on increased liability (Id., art. 401[3]) are applicable to entrepreneurship of individuals.

Small and middle entrepreneurship enjoys state support on both federal and local levels and for this purpose particular state programs are elaborated. (DSME Law, arts. 6-7).

Establishment of investment funds is separate form of business conduct when members join their material contributions and transfer them for administration of specialized organization incorporated in form of open JSC, closed JSC, limited liability company, additional liability company and having license of Federal Service on Financial Markets (``FSFM''), which was previously called ``Federal Securities Commission'' (``FSC''). Incorporation of investment funds and management thereof is governed by RF Law No. 156-FZ of Nov. 29, 2001 ``On Investment Funds'' last amended by RF Law No. 281-FZ of Nov. 25, 2009. Investment fund is not considered to be legal entity but merely combination of assets (complex of assets) administered by specialized organization. Investment fund may be incorporated in two forms: (a) unit investment fund, (b) joint-stock investment fund.

Only unit investment fund is complex of assets in true sense of word, which consists of contributions of members transferred on basis of contract of trust made with specialized organization. In exchange for monetary contribution members receive securities (non-documentary) named investment shares. Subject to availability of withdrawal from investment fund (by rescission of contract of trust with request to reimburse value of investment share), unit funds are divided into open (right to withdraw at any moment), interval (right of withdrawal in repeated interval, no less than once a year) and closed (no right to withdraw before time indicated in contract). Duration of contract of trust shall not exceed 15 years, its content is equal for all members of fund (entering fund by purchase of its shares is available only subject to accession to its rules). Administering company is held liable for real damage only. (Investment Fund Law art. 16).

Joint-stock investment fund is complex of assets owned by joint-stock company and divided into two parts: (a) investment assets (subject to transfer under contract of trust to specialized administering company); (b) property necessary for functioning of open joint-stock company. Profits earned by specialized company after deduction of its remuneration shall be allotted among shareholders of said open joint-stock company. Investment funds law provides for requirements to composition and structure of investment funds, regulatory restraints for administering company's activity, control thereof and other regulations.

3 BUSINESS REGULATION AND COMMERCE

3.01 BANKS AND BANKING:

Legal regulation of banking is provided by RF Constitution, by RF Law “On Banks and Banking”, by RF Law “On the Central Bank of the Russian Federation (Bank of Russia)”, by provisions of Civil Code and other federal laws as well as statutory acts of Bank of Russia (“CBR”).

According to RF Law ``On Banks and Banking'' of Dec. 2, 1990 No. 395-1 (as last am'd by RF Law No. 352-FZ of Dec. 27, 2009) (``Banking Law'') banking system of Russian Federation includes CBR, credit organizations and branches and representative offices of foreign banks. (Banking Law, art. 2). In accordance with art. 1 of Banking Law:

Credit Organization is legal entity performing banking transactions pursuant to special permit (license) of CBR for profit-making purposes.

Bank is credit organization having exclusive right to perform following banking transactions: to attract deposits of individuals and legal entities, to place funds on its behalf and at its own expense as to refundability, payability and fixed terms, and to open and maintain bank accounts.

Banking Law and statutory acts of CBR also govern activities of nonbank credit organizations entitled to perform certain banking transactions.

Art. 5 of Banking Law includes list of banking transactions and other operations of credit organization.

Certain transactions of credit organization may be regulated by special laws. For example, transactions in precious metals and jewels by credit organization is regulated by provisions of RF Law “On Precious Metals and Jewels” No. 41-FZ of Mar. 26, 1998 (last am'd by RF Law No. 214-FZ of July 24, 2007).

Credit organizations open their branches and representative offices in RF after giving notice to CBR. (Banking Law, art. 22). Subject to approval of CBR, credit organizations may establish their branches and, after giving notice to CBR, open their representative offices in foreign countries. (Id., art. 35).

Registration of Credit Organizations and Licensing of Banking Transactions.

Credit organizations are subject to state registration with CBR and are considered established from moment of registration.

Credit organizations obtain right to perform banking transactions when license is issued by CBR. (Banking Law, art. 12). Art. 14 of Banking Law includes list of documents required for state registration of credit organization and for obtaining license to perform banking operations. Art. 6 of that law includes list of stock market transactions that do not require special license.

Generally, banks and credit organizations have right to carry out professional activities in stock market pursuant to license of Federal Service on Financial Markets (``FSFM''), which was previously called ``Federal Securities Commission'' (``FSC''). Procedure of licensing professional stock market activities in RF has been approved by Order of FSFM No. 07-21/pz-n of Mar. 6, 2007. License can be suspended or revoked in case of repeated breach of securities legislation including legal acts of FSFM within one year and in other cases. (Order of FSFM No. 07-21/pz-n, §§ 6.1, 6.9). Foreign currency contributions to pay up charter capital of foreign banks permitted by CBR Instruction No. 109-I of Jan. 14, 2004 and Directive No. 513-U of Mar. 19, 1999. Currently minimum charter capital set as 180 million rubles for new registered banks licensed to conduct all banking activities and transactions, and 90 million rubles for new registered nonbank credit institutions. (art. 11 of Banking Law).

According to CBR Directive No. 1181-U of July 25, 2002 reserve capital of bank shall be formed and used under civil legislation of RF. CBR supervises banking activity and may impose sanctions including revocation of bank license for violation of banking laws. (Banking Law, arts. 20, 41).

Bankruptcy of Banks and Credit Institutions.

Bankruptcy procedure set forth in RF Law No. 40-FZ of Feb. 25, 1999 ``On insolvency (bankruptcy) of credit institutions,'' as amended by RF Law No. 195-FZ of July 19, 2009 and by Resolution of RF Constitutional Court No. 10-P of July 3, 2001. Procedure for termination of license upon liquidation set forth in CBR Instruction No. 749-U of Mar. 1, 2000. See category 8 Debtor and Creditor, topic 8.03 Bankruptcy.

Confidentiality, Seizure and Garnishment.

All banks, including CBR, must guarantee confidentiality of account and deposit information, except for required disclosure to banking authorities, courts, RF Chamber of Account, fiscal authorities, tax police where provided for by statute, and subject to approval of public prosecutor, and preliminary investigation offices for cases under investigation. Information about transactions of legal entities and individuals is also submitted by banks and credit organizations to competent authority responsible for measures against legalization (laundering) of criminal money in cases provided for by RF Law ``On Counteraction Against Legalization (Laundering) of Criminal Money'' No. 115-FZ of Aug. 7, 2001 as amended by RF Law No. 163-FZ of July 17, 2009. Monetary funds and other values belonging to legal entities and individuals stored on accounts and in deposits in credit organizations may be arrested only by court, arbitrazh court, judge or by decree of investigatory bodies upon decision of court. Seizure of money or other valuables on accounts is executed only on basis of specific writ issued by court as provided by applicable law. (Banking Law, arts. 26, 27).

Banks with Foreign Participation.

Pursuant to Provisions of CBR No. 437 of Apr. 23, 1997 ``On Particularities of Registration of Credit Organizations with Foreign Investments'' (affirmed by CBR Order No. 02-195 of Apr. 23, 1997) (``Provisions'') as amended by CBR Directive No. 1790-U of Jan. 26, 2007, credit organizations with foreign investments means resident credit organizations with authorized capital formed with participation of funds of nonresidents regardless of their share in authorized capital. Provisions set peculiarities for registration of credit organizations with foreign investments.

Subsidiary credit organization of resident foreign bank may open branches in RF according to RF legislation and statutes of CBR after obtaining preliminary permit. CBR licenses and regulates activities of credit organizations with foreign investments.

Central Bank of Russia (“CBR”).

Activities of CBR, nonprofit legal entity, governed by RF Constitution and RF law ``On the Central Bank'' (``CBR Law'') No. 86-FZ of July 10, 2002 as amended by RF Law No. 218-FZ of Sept. 22, 2009. CBR undertakes banking activities and acts as government regulatory body. CBR Law establishes legal status, objectives, functions, scope of activities, authority and operations of CBR. Charter capital and other property of CBR are federally owned. (CBR Law, art. 2). CBR and government are not jointly liable on obligations of each other unless stipulated in law or obligations undertaken jointly. (Id., art. 2). Objectives of CBR are set in art. 3 of CBR Law and include stability of ruble, provision of unified federal monetary policy, development and improvement of banking system. CBR issues regulations within its scope of authority, binding on all federal agencies and authorities, organs of state power, all legal entities and individuals. (Id., art. 4). CBR Chairman nominated by President and appointed by State Duma for term of four years. (Id., art. 14). State Duma elects CBR Board of Directors. (Id., art. 15). Supreme authority of CBR is National Bank Board, which being collegial body determines main fields of CBR activities. (Id., art. 12).

CBR may not grant credit to RF Government for financing budget deficit or purchase government securities upon initial issuance. (Id., art. 22). CBR authorized to execute transactions: with secured loans, checks, bills of exchange, promissory notes, government securities, bonds, deposit certificates and other securities, foreign currency and payment obligations in foreign currency, precious metals and other currency assets. CBR maintains settlement and deposit operations; holds and manages securities deposited; issues guarantees and conducts operations with financial instruments used for financial-risk management; opens accounts with Russian and foreign credit institutions on RF territory and foreign states and executes other operations and transactions. (Id., art. 46). CBR may issue bonds in its own name placed and traded only among credit organizations in order to implement monetary and credit policy. CBR prohibited from acquisition of shares of credit and other institutions, with certain exceptions set forth by arts. 8 and 9 of CBR Law to perform banking transactions with legal entities having no license to perform banking transactions and with individuals, except for cases set out in art. 48 of CBR Law; to perform real estate transactions except for cases connected with management of activities of CBR, its enterprises, establishments and organizations; to be engaged in trade and production except for cases provided by CBR Law; to extend given credits (any exclusion may be made by Board of Directors). (Id., art. 49). CBR establishes, supervises and controls official ruble exchange rates of foreign currencies, establishes rules on maintenance of accounting records being state body of currency regulation control (Id., arts. 53, 54), sets obligatory reserves for credit institutions (Id., art. 38). CBR authorized to open representative offices in foreign states. (Id., art. 55).

3.02 BILLS AND NOTES:

Promissory Notes.

RF Law No. 48-FZ “On Bill of Exchange and Promissory Notes” of Mar. 11, 1997 (“Promissory Note Law”) and USSR Regulation No. 104/1341 “On Bill of Exchange and Promissory Note” of Aug. 7, 1937 (“1937 Regulation”), as applied to RF by Promissory Note Law, are primary legislation on promissory notes. Valid promissory notes or bills of exchange must contain: general designation of nature of instrument; place and exact date of execution; date payable (set date, on sight or at certain time after sight); and signature of payor. (1937 Regulation, arts. 1, 75). 1937 Regulation contains rules regarding endorsement of bill of exchange (Id., c. 2), acceptance (Id., c. 3), available guaranty (Id., c. 4), payment and date of payment (Id., cc. 5, 6), and claims for nonacceptance or nonpayment (Id., c. 7). Certain provisions governing bills of exchange apply to promissory notes. (Id., § 2, art. 77).

Bill of foreign origin, made out in foreign currency and designating RF as place of payment, may be converted into Russian rubles at official exchange rate established by CBR. Same procedure applies when bill executed in RF but payable abroad, presented for payment within RF. (Id., c. 6, § 41). Bill transferred by endorsement on back of document. (Id., c. 2, § 11).

Nonpayment of bill must be certified by act drawn up in public order (by protest to notarial office). (Id., c. 7, § 44). Losses from nonpayment recoverable with interest from due date. (Civil Code, art. 395).

Checks.

Primarily regulated by Civil Code and RF Law No. 4462-1 of Feb. 11, 1993 “Foundations of Russian Federation Legislation on Notary”. C. 46, § 5 of Civil Code governs formalities of execution and rights arising under checks. Valid checks must indicate nature of instrument, declaration of transfer of sum to payee from identifiable account, identification of currency of payment, date and place of execution and signature of payor. (Civil Code, art. 878). Check may be transferred to third party personally or through endorsement. Civil Code and RF Law No. 4462-1, art. 96 contain rules for endorsement of checks (Id., art. 880), payment on checks (Id., art. 879), and consequences of nonpayment of checks by payor bank (Id., 885) and other regulations regarding use of checks.

3.03 COMMERCIAL REGISTER:

All legal entities (both profit and nonprofit organizations), incorporated in RF (hereinafter “RF legal entities”) must be registered to become legally effective. (Civil Code, art. 51). At present, registration procedure for all legal entities is governed by Civil Code and RF Law No. 129-FZ of Aug. 8, 2001 as in force from July 1, 2002 “On State Registration of Legal Entities” (“Registration Law”) last amended by RF Law No. 352-FZ of Dec. 27, 2009. Registration Law settles relations arising out of state registration of establishing, reorganization and liquidation of RF legal entities as well as amendment of their founding documents and concerned maintenance of Unified State Register of RF legal entities. (Id., art. 1). This law specifies list of documents necessary to be presented for registration and set off grounds for denial of registration. State registration of RF legal entity made at location of its permanent executive body, which shall be indicated by founder in application for such state registration, and in case of absence of such executive body—at location of other body or person, which is authorized to represent such legal entity without power of attorney. State registration shall be completed within five working days from date of all necessary documents presented to registration body. (Id., art. 8).

In accordance with Resolution of RF Government No. 319 of May 17, 2002 ``On Authorized Federal Executive Body, Carried Out State Registration of Legal Entities'' RF Ministry of Taxes and Duties became only authorized federal executive body to carry out state registration of RF legal entities. Positive resolution of RF Ministry of Taxes and Duties for state registration of legal entity is ground for entry into Unified State Register appropriate record. (Id., art. 11).

Registration Law also defines rules of state registration of legal entities' liquidation. Liquidation of legal entity is deemed effective when fact of liquidation is recorded in Register. Recorded body publishes announcements of completed liquidation. (Id., art. 22).

RF Law may stipulate special procedure for state registration of certain types of legal entities. (Id., art. 10).

According to arts. 4, 20 of RF Law No. 160-FZ of July 9, 1999 ``On Foreign Investments in RF'', registration may be denied for commercial organization with foreign investments only in order to protect grounds of constitutional system, morality, health, rights and lawful interests or to guarantee state defense and safety.

3.04 CONSUMER PROTECTION:

RF Law No. 2300-1 ``On Consumer Rights Protection'' of Feb. 7, 1992, as last supplemented and amended by RF Law No. 261-FZ of Nov. 23, 2009 (``Consumer Law''). It also settles relations between consumers and manufacturers, producers, importers, and vendors for sale of goods, dispatch of works or provision of services; stipulates consumers' rights on acquisition of goods (works and services) of proper quality and harmless for consumers' life and health, on getting information about goods, works and services and about their producers (mfr., importers, authorized organization and vendors), on instruction, state and public protection of their interests. Consumer Law imposes liability for violations of quality standards and establishes procedures for consumers to exchange or obtain refund for low-quality merchandise. (Id., § II, arts. 18-26; § III, arts. 27-39). Agreement between consumer and producer concerning quality of consumer goods invalid if quality below statutory levels. (Id., art. 16). Consumer may file grievance with Federal Service for Control in Sphere of Consumer Rights Protection and Human Wellness. (Id., § IV, arts. 40, 41). Enforcement available through regional offices. Courts provide protection of consumers rights. Claims can be filed at defendant's location, at plaintiff's location or at place of entering or discharge of contract. (Id., art. 17). Manufacturers and importers liable for certification (with authorized state agencies) and required labeling of goods in accordance with law. (Id., art. 7). Effective edition of Law provides for serious restrictions and additional liability for manufacturers, producers and sellers of goods. Information on goods must include not only price and conditions of purchase, but also (in case if sold on credit) information about credit, periods of payment, and total sum to be paid. It's also important to mention that Consumer Law was seriously amended to guarantee protection of consumer rights.

RF Law No. 2300-1 is also applied to relationships arising from retail sale contracts and domestic work and labour contracts. (Civil Code, arts. 492, 730). Injury resulting from defective goods, or from improper labeling, subject to redress at option of victim by seller or manufacturer. (Civil Code, art. 1095). Injury resulting from defective goods, works or services subject to redress if it occurs during established time-limits of serviceability for goods or services and, if no such limit established, then if injury occurs within ten years after production of goods. Injury is subject to redress regardless of terms of injury when time-limits not set and law provides them as necessary or when there was no information about necessary activities after time-limits expiration. (Id., art. 1097). Seller or manufacturer absolved from liability if injury results from force majeure or consumer's improper use of goods. (Id., art. 1098). Consumers rights and production liability in sphere of pharmaceutical business also regulated by RF Law No. 86-FZ of June 22, 1998 “On Medicines”, as last amended by RF Law No. 309-FZ of Dec. 30, 2008.

3.05 CONTRACTS:

Contracts governed primarily by “General Law on Obligations” Part I, § 3 of Civil Code, “General Provisions on Contract” in Civil Code cc. 27-29, and by “Rules Governing Transactions” in Civil Code c. 9. (Civil Code, art. 420[2, 3]). Specific types of contracts governed by Part II of Civil Code and international conventions ratified by RF.

Parties are free to conclude contract even if relevant category of contract not expressly addressed in law, and may conclude contracts containing elements of different types of contracts (mixed contracts). (Civil Code, art. 421[1, 3]). Contract deemed concluded upon agreement by parties to all material terms (e.g., those terms deemed material or necessary by law), in form required by law. (Id., art. 432[1]). Mandatory contract terms agreed by parties unless otherwise required by law, and if not agreed by parties, then as provided in law or, if not so provided, as determined by customs of business applicable to contractual arrangements. (Id., art. 421[4, 5]). Customs of business may be deemed to include published model terms for specific categories of contracts. (Id., art. 427). In conclusion of contract parties must be legally competent and must act without fraud, threat, compulsion, violence, or mistake. (Id., arts. 168-179, 421[1]).

Contract must comply with laws in effect when contract concluded. If law adopted later establishes binding rules different from those in effect at conclusion of contract, contract terms remain in force unless new law asserts retroactive effect. (Id., art. 422[2]).

Form.

Contract may be concluded orally unless written or other form required by law. (Id., arts. 158, 159, 434). Specific forms, notarization and/or registration required for certain types of contracts, e.g., some kinds of contracts involving transactions with real property rights must be registered with proper state authorities. (Id., arts. 131, 164). (See category 23 Property, topic 23.08 Real Property.) Additional requirements on form (e.g., use of official form or affixing seal) may be imposed by law or agreement. (Id., art. 160[1]). Failure to obtain notarization or registration required by law may result in invalidation of transaction contemplated by contract. (Id., art. 165).

Offer and Acceptance.

Contract deemed concluded upon receipt by offeror of offeree's acceptance. Civil Code defines various factors relating to offer and acceptance, including irrevocability of offer, revocation of acceptance, impact of offers specifying period for acceptance, acceptance on conditions inconsistent with offer, and conclusion of contract through bidding procedures. (Id., arts. 435-445, 447).

Modification and Termination.

Contract may be modified or terminated by agreement, by court at request of one party if other party commits material breach, or upon substantial change in circumstances from those existing at time contract concluded, unless otherwise provided by law or contract. Agreement to modify or cancel contract must be executed in same form as contract, unless otherwise stipulated by law, contract or business customs. (Id., arts. 450-453).

Categories of Contracts.

Special rules in Civil Code apply to certain categories of contracts, including following:

"Compensated contract" results if party has right to consideration for performing obligation, and uncompensated if party obligated to grant something without receiving consideration. Contract presumed to be compensated unless law or contract provides otherwise. (Id., art. 423). If compensated contract fails to state price, price is that ordinarily charged under comparable circumstances for similar goods or services. (Id., art. 424[3]).

"Contract of adhesion" results if one party adheres to terms in other party's standard forms. Party that adheres may demand alteration or termination if contract deprives him of rights ordinarily granted under contracts of such category, limits liability of other party for violating its obligations, or contains other burdensome conditions which adhering party, acting reasonably, would not have accepted had it been allowed to participate in determining contract terms. Alteration or termination not permitted in relation to plaintiff's entrepreneurial activities, if adhering party knew or should have known conditions in contract. (Id., art. 428).

"Public contract" describes commercial organization's obligations when selling goods or services to general public (e.g., retail trade, common carrier, communications services, electric power, medical or hotel services). Commercial organization may not give preference to certain customers over others with respect to public contract, except as permitted by law. RF Gov. may issue binding rules on conclusion and performance of certain public contracts (e.g., standard forms). (Id., art. 426).

"Preliminary contract" is agreement to conclude contract in future on terms provided in agreement. Party that concludes preliminary contract but unreasonably evades conclusion of principal contract must compensate other party for losses incurred if court so decides. (Id., arts. 429, 445[4]). Special provisions also apply to contracts intended to benefit third party. (Id., art. 430).

Other.

Part II of Civil Code governs rules for specific types of contracts, including purchase and sale, commission, exchange and gift contracts etc. In particular, it contains rules for types of contract used in emerging market economy, including contracts for real estate sale (see category 23 Property, topic Real Property), sale of enterprises (see topic 3.10 Sales), energy supply, agency, various types of leasing, various banking activities, commercial concession (see topic 3.06 Franchises) and management in trust (see category 13 Estates and Trusts, topic 13.05 Trusts).

3.06 FRANCHISES:

Although no RF law uses term “franchise”, c. 54 of Civil Code describes Commercial Concession (“CC”), similar to franchise agreement in several respects. Under CC, one party (owner) grants other party (user) for definite consideration and for definite or indefinite term certain exclusive rights including owner's trademark and/or trade name, commercial designation (brand) and know-how, business reputation and commercial experience in specific terms, with or without indication of territory where exclusive rights will be exercised. (Civil Code, art. 1027). Provisions contained in Fourth part of RF Civil Code concerning rights to intellectual property and means of individualizing shall apply to CC agreement if they do not contradict provisions of c. 54 of RF Civil Code and subject of CC agreement. CC agreement must be registered in accordance with art. 1028(2) of Civil Code, in federal governmental body for intellectual property (Rospatent). Violation of legal requirements in regard to CC involves recession of contract. Subconcession is permitted if agreed by owner, but original user secondarily liable to owner for damages caused by subuser, unless otherwise agreed. (Id., art. 1029).

Owner undertakes to provide user with all legal and practical conditions for performance of contractual activity, including, unless otherwise agreed, technical assistance and consulting, training of user's personal and control of quality of goods and services produced by user under CC. (Civil Code, art. 1031). Owner is secondarily liable to customers for poor quality of products or services sold by user. (Civil Code, art. 1034). But owner has no right to control prices charged by user for goods and services. (Civil Code, art. 1033).

3.07 INFORMATION TECHNOLOGY, INTERNET AND NEW MEDIA:

Telecom services, including Internet, regulated by RF Law No. 126-FZ of July 7, 2003 (as last am'd by RF Law No. 188-FZ of July 18, 2009) ``On Communications''. Provision of telecommunications services subject to licensing by RF communications federal executive body. (See topic 3.08 Licenses, Business and Professional.)

E-Commerce, Digital Signature.

According to provisions of Civil Code on use of digital signature, RF Law No. 1-FZ of Jan. 10, 2002 “On Digital Signature” (Digital Signature Law) was enacted. At present time, legal control over use of digital signature executed by applying Digital Signature Law, Civil Code, RF Law No. 126-FZ of July 7, 2003 “On Communications” and RF Law No. 149-FZ of July 27, 2006 “On Information, Information Technologies and Information Protection”.

Digital signature in electronic document has same legal effect as manual signature in paper document provided following legal demands were observed: certificate signing key relating to this digital signature is not void (is effective) as of time of verification or time of signing of electronic document if time of signing is proven; authenticity of digital signature in electronic document has been confirmed; digital signature is used in compliance with information specified in certificate signing key. Certificate signing key is issued by certified centers (arts. 8-15 of Digital Signature Law) in accordance with Law. Certificate signing key shall contain particular information. (art. 6 of Digital Signature Law). Certificate signing key of authorized persons of federal executive authorities shall be registered by special federal executive authority and confirmed by issuing of certificate signing key. However, retail trade via Internet has emerged in Russia. E-commerce agreements are typically made in form of public contracts and contracts of adhesion. (Civil Code, arts. 426, 428). Where seller makes offer containing all material terms offer can be accepted electronically. (Civil Code, art. 428). (See topic 3.05 Contracts, subhead Categories of Contracts, catchline Public Contract.) In general RF Law No. 54-FZ of May 22, 2003 “On Usage of Cash Registers in Cash Payments and/or Card Payments” prohibits conduct of retail trade without cash registers.

Data Protection.

Data collected inside Russia in context of e-commerce protected by both RF Constitution and RF Law No. 149-FZ of July 27, 2006 “On Information, Information Technologies and Information Protection”. Collection, storage, use and dissemination of individual's private information without that person's consent are prohibited, unless ordered by court. Authorized owners and users of information are responsible for any violations of rules concerning use of information.

Registration of Domain Names.

In Russia, registration of second level domain names in “.RU” is available only through accredited registrars. Registration conducted on “first-come, first served” basis in accordance with rules of nonprofit organization “Coordination Center for TLD RU”. Coordination Center for TLD RU performs naming authority function under RU since 2002, including domain registration policy development, accrediting registrars and investigation of perspective projects for RU top-level domain, while Russian Institute for Public Networks (also known as RIPN and RosNIIROS), performs technical functions for RU to ensure stability of its operation. Before enactment of Fourth part of RF Civil Code, there were some court precedents on conflicts between owners of domain names and company's trademark in Russia. Now in accordance with paragraph 5, item 2, clause 1484 of Fourth part of RF Civil Code, exclusive rights to trade mark can be exercise also by registration of domain name in Internet.

Computer programs and databases protected by c 70 of Fourth part of RF Civil Code. See also category 19 Intellectual Property, topic 19.01 Copyrights.

3.08 LICENSES, BUSINESS AND PROFESSIONAL:

Certain activities require licenses from government authorities. Early in 2002, RF Law No. 128-FZ of Aug. 8, 2001 “On Licensing Certain Activities” (“Licensing Law” or “LL”) was enacted. Numerous amendments and changes to Licensing Law, latest of which made by RF Law No. 374-FZ of Dec. 27, 2009. Licensing Law defines list of activities for licensing. (LL, art. 17). Licensed activities include types of activities capable of harming rights, legitimate interests and health of citizens, national defense and security, and cultural heritage of RF nations, which cannot be regulated by methods other than licensing. (LL, art. 4).

Licenses issued by empowered authorities are valid for no less than five years (LL, art. 8), but validity period can be prolonged. Proper performance of obligations by licensee shall be supervised by licensing authority. Licenses shall be issued in standard form with blanks for inserting area and territory of use. Licenses shall not be transferred to other persons (entities).

Licenses may be suspended in case of bringing licensee to administrative responsibility for violation of license terms and conditions. Licenses may be annulled by court decision on application of licensing authority or licensor's petition. (LL, art. 13).

Decision to issue or deny license made within 45 days and acceptance of application and all supporting materials, as required by art. 9 of Licensing Law. Denial may result only from untrue or incorrect information provided by applicant to licensing authorities, or failure of applicant to comply with terms and conditions for licensing as determined by Licensing Law and relevant legal acts. License must contain: name of issuing authority and licensee; type(s) of licensed activity, term of license; taxpayer identification number; and date of relevant licensing authority's decision. (Id., art. 10). Licensing authority shall maintain register of all licenses issued under Licensing Law. (Licensing Law, art. 14). Register is available for public inspection.

Licensing Law does not apply to activities in areas of banking, foreign trade, customs, exploitation of natural resources, securities, insurance, investment funds, and several other activities. (item 2, art. 1). For applicable rules see categories 12 Environment, 15 Foreign Trade and Commerce, 21 Mineral, Water and Fishing Rights.

3.09 MONOPOLIES, RESTRAINT OF TRADE AND COMPETITION:

On Oct. 26, 2006, RF Law No. 135-FZ of July 26, 2006 “On Protection of Competition” (“Antimonopoly Law”) entered into force. Since then, RF Law No. 948-1 “On Competition and Restriction of Monopolistic Activities on Markets” of Mar. 22, 1991 and RF Law No. 117-FZ of June 23, 1999 “On Protection of Competition on Financial Services Market” (with amendments) became almost inoperative. Antimonopoly Law governs measures for prevention and curtailment of monopolistic activity and unfair competition. Antimonopoly Law applies to all arrangements that impact competition on RF markets, including activities and relationships of foreign and Russian legal entities and federal agencies of executive power, agencies of executive power of subjects of RF, agencies of local self-government. (Antimonopoly Law, art. 3[1]). Antimonopoly Law also applies to agreements executed abroad between RF or foreign companies or persons, if such agreements relate to fixed or intangible assets, or shares in RF companies or if such agreements likely to restrain competition in RF. (Id., art. 3[2]).

Antimonopoly Law prohibits dominant enterprises from withholding goods from market to increase prices, imposing unfavorable contract terms unrelated to purpose of contract (e.g., unreasonable demands for transfer of financial resources, other assets, property rights etc.), “tying” or conditioning execution of contract on acceptance of unwanted goods, establishing obstacles to market, entry establishing monopolistically high or low prices, unreasonable reduction or suspension in production of certain types of goods, etc. (Id., art. 10). Collusion between enterprises forbidden if may result in any of above consequences. (Id., art. 11). Nevertheless, above activities or collusion may be held appropriate in case they are not likely to restrain competition or to prevent any person or company to enter market of certain goods or services, or to impose any restrictions on companies present in this market. They may be also held appropriate if may result in production improvement or in stimulation of economic or technological progress or in granting adequate advantages to consumers. (Id., art. 13). Antimonopoly authorities may, inter alia, challenge agreements between competitors which are in violation of Antimonopoly Law and conducts administrative proceedings regarding violations of antimonopoly legislation. (Id., art. 23). RF Federal Antimonopoly Service (“FAS”) holds registry of legal entities with market share exceeding 35%. (Resolution of RF Gov. No. 896 of Dec. 19, 2007).

Definitions.

“Unfair competition” includes activities aimed at obtaining advantages that contradict provisions of legislation, customs of business turnover, good faith or reasonableness and may cause or have caused losses to other competitors or may prejudice business reputation. (Id., art. 4). “Dominant position” is position of enterprise in market for particular goods that enables enterprise to influence general rules of circulation of goods on certain market and/or to restrict or impede access to same market by competitors. Position generally considered dominant if single entity's share of goods on particular market exceeds 50%. (Id., art. 5). For certain cases benchmark set below 50%. Position not dominant if market share 35% or less, unless otherwise provided by federal legislation. (Id.). Any abuse of dominant position or other actions (or failure to act) forbidden by antimonopoly legislation defined as “monopolistic activity”. (Id., art. 4). Certain actions (or failure to act) may be specially defined as “monopolistic activity” by federal laws.

Current Antimonopoly Law contains no definition of “affiliates” and uses definition of “group of persons”. (Id., art. 9). Still, definition of “affiliates” present and disclosed in RF Law No. 948-1 ``On Competition and Restriction of Monopolistic Activities on Markets'' of Mar. 22, 1991.

Price Controls.

Prices in RF generally are determined by market. Prices for certain goods and services, as listed in RF Gov. Res. No. 239 of Mar. 7, 1995 (as last am'd Aug. 8, 2009), regulated by State bodies. State controls prices on products where Natural Monopolies exist. See subhead Natural Monopolies, infra. Fixation, support of monopoly high (low) prices is forbidden. (Antimonopoly Law, art. 10). Basic methodical guidelines for determining if price has been “fixed” established by Provisional Procedural Recommendations of MAP RF No. VB/2053 of Apr. 21, 1994 “Concerning Disclosure of Monopoly Prices” and No. VB/1034 of Mar. 14, 1996, “Concerning Disclosure of Monopoly High Prices”.

Federal Antimonopoly Service.

According to Presidential Decrees No. 314 of Mar. 9, 2004 “On structure of federal bodies of executive power” and No. 649 of May 20, 2004 “Matters concerning structure of federal bodies of executive power” MAP RF has been reorganized in Federal Antimonopoly Service. MAP RF supervisory and review authorities have been delegated to FAS, except for authorities in sphere of protection of consumer rights and small business support. Regional agencies of MAP RF have been included in FAS structure (Resolution of RF Gov. No. 189 of Apr. 7, 2004 “Matters concerning Federal antimonopoly service”). FAS prevents and curtails monopolistic activity and unfair competition, assists in drafting antimonopoly legislation and generally controls implementation of antimonopoly laws. (Antimonopoly Law, art. 23). FAS may sue for dissolution of legal entities in certain cases provided by antimonopoly laws. (Id.). FAS must protect commercial secrets obtained during course of its activities. (Id., art. 26).

Prior approval of FAS initiated by petition of individual or legal entity required for: (1) Acquisition by person (group of persons) exceeding 25% of voting shares in enterprises with certain levels of assets (not applicable to founders of entity at formation); (2) purchase or lease by entity (group of persons) of primary means of production or intangible assets of another entity, if book value of assets sold or leased exceeds 25% of transferor's asset value; (3) acquisition of over one-third of stock capital in limited liability company; and (4) acquisitions by person (group of persons) of controlling blocks of shares in target company or rights to hold office of its executive body. (Id., art. 28). Subject to certain terms, prior approval of FAS not required if such transactions committed by companies or persons that are members of same group of persons. Prior approval of FAS for such transactions is necessary only if net value of assets of both ``Transferee'' and ``Transferred'' exceeds 7,000,000,000 rubles, or aggregate gain from sale of goods or services of ``Transferee'' and ``Transferred'' exceeds 10,000,000,000 rubles and net assets value of ``Transferred'' exceeds 250,000,000 rubles, or one of them is listed in Register. (Id., art. 28). Prior approval of FAS also required in case of merger or accession of commercial organizations if net value of assets of both exceeds 3,000,000,000 rubles or aggregate gain from sale of goods or services of ``Transferee'' and ``Transferred'' exceeds 6,000,000,000 rubles or one of them is listed in Register. (Id., art. 27). FAS shall be notified upon completion of above-mentioned transactions only if summary book value of assets of either ``Transferee'' and ``Transferred'' exceeds 400,000,000 rubles. (Id., art. 30). Prior approval also required for creation of commercial organization in case its stock capital is paid up by securities or assets of another company and net value of assets of both its founders and of company which shares or assets used for payment of stock capital exceeds 3,000,000,000 rubles. Procedure for obtaining FAS prior approval is settled in FAS RF Order No. 129 of Apr. 17, 2008. By Res. No. 756-R of June 8, 1998, RF Government recommended FAS advise appropriate State powers regarding transactions requiring FAS approval in order to receive confirmation of positive consequences of such transactions for appropriate commodity markets, if any.

Antimonopoly Register.

Pursuant to RF Gov. Res. No. 896 of Dec. 19, 2007, state registry established for enterprises occupying dominant positions in certain markets. Threshold percentage of market share for inclusion in register by FAS is 35%. Companies may file petition to be included or removed from register on various statutory grounds regardless of state of registration of such enterprises. Such petition must be answered within four months. Register is being regularly published and updated in Internet.

Liability for Violation of Antimonopoly Legislation.

Antimonopoly Law contains general provisions on liability for violation of antimonopoly legislation. (Antimonopoly Law, arts. 37-38). Officials of federal agencies of executive power, agencies of executive power of subjects of RF, agencies of local self-government, commercial and noncommercial organizations or their executive bodies, and individuals shall bear liability for unlawful actions violating antimonopoly legislation. (Id., art. 37). In case commercial organizations occupying dominant activities, as well as noncommercial organizations performing profitability activities effect monopoly activities on regular basis, court under claim brought by antimonopoly authorities has right to compulsorily divide such organizations or to extract from their structure one or several organizations. Organizations built up following separation under court decision should not be members of one group. Period of performance of such court decision should not be less than six months. New RF Code of Administrative Violations (effective July 1, 2002 as last am'd by RF Law No. 336-FZ of Dec. 21, 2009) stipulates administrative liability for non-fulfillment of FAS RF orders and orders of executive bodies regulating natural monopolies and for non-presentation of petitions, applications or other binding information, presentation of materials containing untrustworthy information, as well as violation of advertising law etc. as fine up to 500,000 rubles. (KoAP RF arts. 19.5, 19.8). Additionally, KoAP RF established administrative liability for monopoly abuse at commodity market, execution of agreement or performing of actions restraining competition, unfair competition with fine depending on income of violator. (KoAP RF arts. 14.31-14.33). Criminal penalties include fine up to 500,000 rubles or at rate of salary or other income of condemned for period up to two years, arrest for period up to six months or deprivation of liberty up to seven years. (Criminal Code, art. 178).

Natural Monopolies.

National policy with respect to natural monopolies (``NM'') defined pursuant to RF Law No. 147-FZ of Aug. 17, 1995 ``On the Natural Monopolies'' as last amended by RF Law No. 281-FZ of Dec. 25, 2008. Term NM means condition of commodity market when satisfaction of demand is more effective without competition due to specific technological aspects of production (in connection with substantial decrease in production costs per unit of goods to extent of growing volume of output), and demand on commodity market for goods produced by subject of NM depends to lesser degree on changes of prices for these goods than on demand for other goods as result of irreplaceability of goods produced by subjects of natural monopoly. (Id., art. 3). Rules on NM applicable to business units engaged in production and sale in areas of transportation of oil and oil products along main pipelines, transportation of natural gas along pipelines; railway transport; services of transport terminals, ports and airports; electric and postal communications; electric power traffic services; heat power traffic services; efficient-dispatch management services in electric power industry, usage of inland waterways facilities. (Id., art. 4). Special state agencies oversee NM business activities. (Id., art. 5). Registers of NM businesses involved in above areas of fuel and energy, communications and transport are maintained, by Federal Tariffs Service respectively.

3.10 SALES:

Part I of Civil Code contains general rules on transactions, obligations and contracts applicable to sales. Provisions on certain categories of sales and general rules of sale provided by Part II of Civil Code. (Id., c. 30).

Sales include any undertaking by seller to convey property or goods to buyer, if buyer agrees to accept and pay for same. General rules for sales apply to sale of any property, including real estate, enterprises, stocks, currency, and property rights, unless otherwise provided by law. (Id., art. 454). No particular form required for sales contracts, unless subject matter requires written form, notarization or registration with state authorities (e.g., contracts for sale of real property). Parties generally free to determine contents of agreement unless law requires certain terms. Terms considered agreed on if contract specifies name and amount of goods to be sold. (Id., art. 455). See topic 3.05 Contracts.

Price.

In absence of contract term or regulatory act establishing price, price set by reference to sales of similar goods under similar circumstances at time contract concluded. If neither contract, legislation nor business custom indicates period over which payment to be made, buyer obliged to pay both in advance and promptly upon receipt of goods or title. (Civil Code, arts. 424, 485, 486). Buyer may pay in full or use credit. If buyer defaults on payments for goods sold on credit, seller may demand payment in full or return of unpaid goods and, unless contract provides otherwise, interest. Unless contract provides otherwise, goods sold on credit treated as pledge securing buyer's obligation to pay. (Civil Code, art. 488). If contract provides that seller retain ownership of goods until buyer pays, buyer may not sell or dispose of goods before paying in full, unless special circumstances apply pursuant to federal laws or contract, or due to nature of said goods. (Id., art. 491).

Quality.

Goods must conform to standards set in contract. If contract omits reference to quality, seller must tender goods of usual caliber for purposes stated in contract or otherwise known by seller. If seller does not know intended use, tender should conform to standards for normal use. Where statute or regulation sets quality standards, parties cannot set lower requirements. (Id., art. 469). Sales contract may provide for warranty on goods sold. (Id., arts. 470-471; see also topic 3.04 Consumer Protection, RF Law No. 2300-1 ``On Consumer Rights Protection'' of Feb. 7, 1992 as last am'd by RF Law No. 261-FZ of Nov. 23, 2009).

Defects.

Buyer receiving defective goods not previously disclosed by seller entitled to removal/repair of defects free of charge in reasonable time, compensation for expenses incurred in removing defects or discount in purchase price. If defects substantial, buyer may refuse performance and demand return of purchase price, or demand substitute goods of proper quality. (Civil Code, art. 475). (See topic 3.04 Consumer Protection.) If remedies do not compensate fully, buyer may seek consequential damages and recover other costs incurred. (See category 5 Civil Actions and Procedure, topic 5.04 Damages.) Seller liable for defects only if buyer proves defects appeared or causes of defects existed prior to transfer of goods. (Id., art. 476). Unless otherwise provided by law or contract, claims not permitted unless defects discovered within reasonable time not exceeding two years after transfer of goods. Warranty term controls if warranty provided. (Id., art. 477). Seller must notify buyer of rights of third parties to property sold. Failure to disclose third party rights entitles buyer to reduced price, rescission and/or damages unless buyer knew or should have known about third party rights. (Id., arts. 460 and 461).

3.11 SECURITIES:

Securities are documents that certify property rights, exercise and transfer of which may be effected only upon tender of documents. (Civil Code, art. 142). Recognized types of securities include stocks in corporate entities, government and municipal bonds, promissory notes, checks, depository and saving certificates, bills of lading, derivative securities, mortgage securities and investment shares in mutual funds and other instruments deemed securities by laws on securities or in procedure established by them. (Civil Code, art. 143, Presidential Decree No. 2063 of Nov. 4, 1994 ``Government Regulation of Securities Market in RF'', last am'd of Nov.

29, 2004 [``Decree No. 2063'']). RF Law No. 39-FZ ``On the Securities Market'' of Apr. 22, 1996 as last amended by RF Law No. 352-FZ of Dec. 27, 2009 (``Securities Law'') also defines so called ``issued securities'' (Id., art. 2), that are placed through issues, and give holders equal right within one issue irrespective of time acquired (Id.). Securities Law governs all matters related to issue and trade of "issued securities" and activities of professional investment institutions. (Id., art. 1). Securities Law classifies shares and bonds as "issued securities". (Id.).

According to Presidential Decrees No. 314 of Mar. 9, 2004 "On structure of federal bodies of executive power" and No. 649 of May 20, 2004 "Matters concerning structure of federal bodies of executive power" Federal Securities Commission ("FSC") has been reorganized in Federal Service for Financial Markets ("FSFM"). Supervising powers of FSC have been delegated to FSFM. Regional agencies of FSC have been included in FSFM structure. (Resolution of RF Gov. No. 206 of Apr. 9, 2004 "Matters concerning Federal service for financial markets" last am'd on July 6, 2007).

FSFM regulates securities market and activities of investment institutions. (Id., art. 40). Its functions include activities of state agencies involved in regulation of securities market, approving procedures for registration of issues by Russian and foreign legal entities and developing rules for licensing and conduct of professional activities on securities markets including self-regulating organisations, disclosure of information on securities markets. (Securities Law, art. 42). Order of decision-making by FSFM shall be determined by RF Government. (Id., art. 43). FSFM deemed party taking part in arbitration proceedings in event of bankruptcy case against professional participant in securities market. MinFin RF has substantial jurisdiction over government of securities market.

Forms of "Issued Securities".

"Issued Securities" may be: documentary securities registered in name of holder only in cases provided by law (bearer securities) and non-documentary securities registered in name of holder. (Securities Law, art. 16). Certificate for every, or, on demand by holder, for several bearer issued securities shall be given to its/their holder. Documentary securities are certified by certificates or, if they are deposited, entry in deposit account; non-documentary are certified by entry into register of securities holders or by entry in deposit account. (Id.).

Registration of Securities.

Art. 19 of Securities Law, FSFM Order No. 07-4/pz-n of Jan. 25, 2007, (as am'd on June 3, 2008), addresses registration of issued securities including bonds. Securities Law requires registration of shares issue prospectus when placed through potentially unlimited number of investors, through placement among limited number of investors, which exceed 500. (Securities Law, art. 19). Procedure for issue through public offering includes approval and publication of prospectus, registration of securities and prospectus, and placement of securities. (Securities Law, arts. 19 & 22). FSFM Regulations specify requirements for stock prospectus. Russian securities registered pursuant to requirements of Law may be placed out of Russia subject to permission of FSFM. (Securities Law, art. 16). Procedure for obtaining permission set forth in FSC Regulation No. 03-17/ps of Apr. 1, 2003.

Securities registration implemented by FSFM or other agencies determined by federal law. (Securities Law, art. 20). Currently registration implemented by MinFin RF and RF Central Bank, FSFM and FSFM regional departments listed in FSFM Order No. 04-445/pz-n of Sept. 2, 2004, given type of securities. Denial of registration for cause only and may be appealed to regular or arbitration court. (Securities Law, art. 21). Each registered issue has unique registration number identifying type of securities, issue and number of issues under unified system of securities registration maintained by FSFM (FSC Regulation No. 07-23/pz-n of Mar. 13, 2007). In case of registration of shares issue prospectus issuer must file quarterly reports and statement on any material changes in financial status of company with registration authorities. (Securities Law, art. 30). Officers of company who signed stock prospectus are jointly between each other and subsidiary with issuer liable for damages incurred by securities' holder as consequence of misrepresentations in prospectus made by such officers. (Id., art. 22.1). Term of offer for securities is limited in prospectus. Number of shares to be issued cannot exceed number of authorized shares of company as reflected in its charter. (RF Law ``On Joint Stock Companies'' No. 208-FZ on Dec. 26, 1995 as last amended by RF Law No. 352-FZ of Dec. 27, 2009, art. 28).

Securities Sales.

Title to bearer securities passes to acquirer in following cases: if certificate is issued to owner then title passes at time of transfer to acquirer; if certificates are kept in depositary and/or rights to such securities are accounted in depositary—at time of making book record in special custody account of acquirer. Title to non-documentary securities registered in name of holder passes to acquirer: in case of recording rights to securities with person conducting depositary activity—from moment of making credit entry in depositary account of acquirer; in case of recording rights to securities in system of keeping register—from moment of making credit entry in personal account of acquirer. (Securities Law, art. 29). Sale of securities not registered as required by law shall result in return of purchase price of such securities to buyer (Civil Code, art. 835) pursuant to order set forth under FSC Regulations No. 36 of Sept. 8, 1998. Transactions with securities are prohibited before they are paid in full and prospectus is registered. (art. 5 of RF Law No. 46-FZ of Mar. 5, 1999 “On Protection of Rights and Legitimate Interests of Investors on Securities Market” as last am'd by RF Law No. 205-FZ of July 19, 2009 [``Law on Protection of Investors Rights'']).

Bonds.

Security certifying that its holder has right to receive from issuer amount of bond's face value or other property at date indicated in bond. Bond may also provide for right of its holder to receive interest, fixed in it, on nominal value thereof or for other property rights. Depending on issuer—State Bonds (see subhead Government and Municipal Securities, infra) and bonds, which can be issued by legal entities (JSC and LLC). Legal entities shall have right to issue bonds for amount not exceeding equity capital or amount of security granted to them for said purpose by third persons after equity capital has been paid in full. In absence of security, bonds can be issued not earlier than third year of existence of company. Bonds can be issued in name of holder or bearer bonds. Issue, registration and other trades in bonds are governed by Civil Code, Securities Law, RF Law ``On Joint-Stock Companies'' No. 208-FZ on Dec. 26, 1995 as last amended by RF Law No. 352-FZ of Dec. 27, 2009, RF Law ``On Limited Liabilities Companies'' No. 14-FZ on Feb. 8, 1998 last amended of Dec. 27, 2009 and legislative instruments of FSFM and as for issue and registration of state Bonds—by CBR Regulation No. 219-P of Mar. 25, 2003.

Government and Municipal Securities.

General rules for issue of and transactions with securities issued on behalf of RF Government and subjects of RF provided by Securities Law, RF Law No. 156-FZ of Nov. 29, 2001 “On Institutional Investors” as last amended by RF Law No. 281-FZ of Nov. 25, 2009 (``Institutional Investors Law''), RF Law 136-FZ of July 29, 1998, “On Specifics of Issue and Transactions with Government and Municipal Securities”. Government and Municipal securities may be issued in form of bonds or other securities referred to as issued securities under Securities Law certifying right of owner thereof to receive monetary resources from issuer of securities or, depending on terms of issuance of these securities, of other assets, set interest on face value or other property rights within terms provided in terms and conditions of said issue. (Id., art, 3). Procedure for issue is determined by decision of issuer. (Id., arts. 8-9). Terms and conditions of issuance of securities of Russian Federation shall be subject to state registration in accordance with procedure established for state registration of regulatory legal acts of federal bodies' executive power. Regulatory legal act containing terms and conditions of issuance of securities of subjects of Russian Federation or municipal securities shall be subject to state registration at federal body of executive power authorized by Government of Russian Federation to compile and/or to implement federal budget. Procedure for formation of state registration number attributed to issues of state and municipal securities is determined by RF MinFin Orders No. 2N of Jan. 21, 1999 amended on July 27, 2004. 2004. Registration of RF subjects and municipal securities terms and conditions may be denied for causes provided in RF Law No. 136-FZ, art. 10. Obligations arising from securities may be guaranteed pursuant to RF budget legislation and insured as permitted by civil law. (Id., arts. 14-15).

Investment Professionals and Institutions.

Securities Law recognizes several types of professional entities engaged in securities transactions: brokers, dealers, administrators of securities, clearing operators, depositories, registrars and organizers of trading on securities market. (Securities Law, art. 2).

"Broker" acts as sale intermediary commercial (agent) on securities market in name and at expense of client or in its own name and at expense of client, acting on basis of onerous contract with client. (Securities Law, art. 3). "Dealer" engaged in securities trading in its own name and its own expense by public announcement of purchase/sale price for securities with obligation to buy/sell securities at quoted prices. (Id., art. 4). FSC Regulation No. 9 of Oct. 11, 1999 "On Endorsing the Rules of Broker and Dealer Activities on the Securities Market of Russian Federation" as last amended by FSFM Order No. 05-4/pz-n of Mar. 16, 2005 establish uniform standards governing broker and dealer activities on securities market. Administration of securities involves trust management of securities, funds to be used in transactions with securities, and (or) settling derivatives. (Id., art. 5). "Clearing activity" includes mutual settlements of securities trading. (Id., art. 6). FSC approved "The rules on clearing activity on securities market of the Russian Federation". (FSC Regulation No. 32/ps of Aug. 14, 2002 as last am'd by FSFM Order No. 07-32/pz-n of Mar. 29, 2007). "Depository" provides custodial services and/or registration of ownership rights for securities. (Id., art. 7). "Registrar's" activities include keeping of register of securities of owners that is collection, fixation, treatment, storage, and submission of data comprising system of keeping register of securities owners. (Id., art. 8). Registrar has no right to effect transactions in relation to securities of owners registered in its registry system. Registrar cannot engage in other types of professional activities on securities market. (Id., art. 10). "Investment consultant" consults on issue and placement of securities. "Investment company" organizes issue of securities and provides guarantees for placement with third parties, invests directly in securities and performs other securities transactions on its own behalf. Institutional investors issue shares to accumulate funds from investors to invest in securities and in bank account. General rules for institutional investors activity are provided by Institutional Investors Law.

Investment professionals and institutions must obtain licenses from FSFM. (Securities Law, art. 39).

Nominees.

Nominee is owner of record at share registry system, but has no ownership rights in securities. Data on nominee shall be inserted in register of shareholders by its holder under instructions of securities owner. Professional entities, depositories and brokers, can stand as nominees under particular agreements. Nominee holder may not transact with securities it holds as nominee without instructions from owner. Nominees activity is governed by Securities Law, RF Law "On Joint-Stock Companies" No. 208-FZ on Dec. 26, 1995 as last amended by RF Law No. 352-FZ of Dec. 27, 2009, Institutional Investors Law (State Property Committee of RF Inst. No. 2002-r of July 26, 1994) etc.

Mutual Funds ("MF").

At end of year 2001 Institutional Investors Law was enacted and at present legal status of MF is regulated by this Law, by Civil Code provisions (arts. 209, 1012-1026) on trust management; RF Law No. 15-FZ "On Enforcement of Part Two of the Civil Code of the RF" of

Jan. 26, 1996, art. 4; Securities Law; and Decisions of FSFM ("FSFM acts").

Institutional Investors Law defining MF as special property complex owned by joint-stock company or being in share ownership of natural persons and legal entities which is used and disposed of by management company exclusively in interests of shareholders of this joint-stock company or trustors of trust. Founders of trust on basis of trust management agreement transfer property to managing company where integrated into MF and consolidated with property of other founders of this trust. Founders of MF own property on basis of common joint interest. Period of validity of trust management agreement with managing company cannot exceed 15 years. Institutional Investors Law specifies open, closed and interval MF. According to this law, contributions to MF shall be made in monetary form, but contribution to closed MF can be made both in monetary form and by any other property in accordance with approved Regulations on beneficial ownership. (Institutional Investors Law, art. 13). Regulations on beneficial ownership of MF shall be registered by FSFM. (Institutional Investors Law, art. 19).

Managing company runs property of MF as principal, and shall denote that acting under trust.

Investment common share is registered security, certifying that founder has property rights in MF. Investment Common Share has no face value, not issued security and rights certified by it shall be written. Upon creation of MF, its Investment Common Shares can be in public circulation.

Protection of Investments in Securities.

Law on Protection of Investors Rights provides for protection of securities investors (Id., arts. 4, 6). RF Code of Administrative Violations (effective July 1, 2002) stipulates administrative liability for violations in field of securities market. (KoAP RF, arts. 15.17-15.24). FSFM and regional agencies may participate as expert in legal procedure regarding violations on securities market and apply administrative penalty to professionals on securities market and their officials.

4 CITIZENSHIP

4.01 ALIENS:

See category 17 Immigration.

4.02 CITIZENSHIP:

On May 31, 2002 new RF Law No. 62-FZ ``On Citizenship of RF'' (``Citizenship Law'') was approved by RF State Duma and came into force on July 1, 2002. (Last am'd by RF Law No. 127-FZ of June 28, 2009). New Citizenship Law establishes basic principles of RF citizenship and rules settling relations of citizenship and grounds, terms and conditions of obtaining and termination of RF citizenship.

Individuals are recognized as RF citizens if they have had Russian citizenship by July 1, 2002 or obtain such status under new Citizenship Law. Dual citizenship is acknowledged. Grounds for obtaining citizenship are following: by birth, naturalization, restoration in citizenship and some others provided by Citizenship Law (including simplified order of registration for USSR citizens such as option etc.) and by international treaties. (Citizenship Law, art. 11).

Child obtains RF citizenship by birth if at his/her birthday (a) both of his/her parents or his/her single parent have RF citizenship (irrespective of his/her place of birth); (b) one of his/her parents is RF citizen, and other one is stateless person or has been declared missing person or his whereabouts are not known (irrespective of child's place of birth); (c) one of his/her parents is RF citizen, and other one is foreign citizen providing that child was born in RF or otherwise child becomes stateless person; (d) both of his/her parents or his/her sole parent living in territory of RF are foreign citizens or stateless persons providing child was born in RF and parents or his/her sole parent are citizens of states that do not recognize child as citizen.

Child whose parents are unknown becomes RF citizen if his/her parents do not reappear within six months upon his/her discovery. (Id., art. 12).

Matters of children's citizenship regarding alteration of citizenship of their parents, tutors and guardians, and concerning their adoption regulated particularly in arts. 24-27 of Citizenship Law.

Capable foreign citizens and stateless persons 18 and over are able to file application for accruing RF citizenship in common order providing they: (a) uninterruptedly live in RF for at least five years from issuing date of registration certificate till date of applying for RF citizenship (providing term of living considered uninterrupted if applicant has left RF territory for not longer than three months a year and providing term of living of persons that have come to RF territory until 1 of July 2002 and do not have registration certificate should be calculated from registration date at place of residence); (b) undertake to observe RF Constitution and Russian Law; (c) have legal source of revenue; (d) have applied with authorized body of foreign state for renunciation of citizenship they had (such waiver is not required if this is stipulated by international treaty of RF or by Citizenship Law or if waiver of other citizenship is barred due to reasons beyond applicant's control); and (e) have command of Russian language.

Term of living in RF territory shall be shortened to one year granting at least one of following grounds occur: (a) Providing great advances in science, technique and culture; providing workmanship or profession useful for RF; (b) granting political asylum in RF; or (c) recognition of person as refugee under provisions of federal law. (Id., art. 13).

Capable foreign citizens and stateless persons 18 and over are able to file application for accruing RF citizenship in simplified order providing they: (a) have at least one parent having RF citizenship and living in RF territory; (b) have had USSR citizenship or have lived or have been living in former Soviet Republic, did not become citizen of such state, are stateless persons as a result; (c) have citizenship in state of former Soviet Republic, have graduated secondary vocational or higher vocational level of RF educational institutions after 1 of July 2002.

Matters of filing application by persons that have had USSR citizenship or have been living in former Soviet Republic regulated particularly in clauses 2-5 art. 14.

Foreign citizens and stateless persons who have registration at place of their residence on territory of RF constituent entity which was selected by them for permanent residence in accordance with State Program of Support for Resettlement in Russian Federation of Compatriots Residing Abroad may obtain RF citizenship in simplified order. (Id., art. 14).

Foreign citizens and stateless persons who have had RF citizenship may have their citizenship restored. In this case necessary term of living in RF is reduced to three years.

Applications for accruing RF citizenship or its restoration are rejected if applicants: (a) call on perforce alteration of fundamentals of RF constitutional system or otherwise threaten RF security; (b) were deported from RF under federal law requirements within five years preceding their application; (c) used false documents or deliberately reported false information; (d) are on military service, security service or work in law machinery of foreign state, unless otherwise provided by international treaty of RF; (e) have noncancelled conviction for deliberate crime committed inside/outside of RF considered as such under Russian law; (f) prosecuted by relevant RF or foreign authorities for crimes considered as such under Russian law (until judgment delivered or decision made); (g) convicted and imprisoned for actions prosecuted (until expiry of term of imprisonment).

RF citizenship shall be terminated: (a) through relinquishment of RF citizenship; (b) by other means under Citizenship Law or international treaty of RF (option, cancellation of decision to naturalize or restore RF citizenship).

Relinquishment of RF citizenship of person living inside/outside of RF takes place on basis of voluntary expression of his/her will in common order or simplified order. Relinquishment of RF citizenship of child one parent of whom is RF citizen and other one is foreigner or if his/her single parent is foreign citizen shall be performed in simplified order upon application of both parents or single one. (Id., art. 19).

Relinquishment of RF citizenship is not allowed if RF citizen: (a) obliged to fulfill duty to State established by law; (b) brought as defendant in criminal case or there exists consummated and serviceable decree regarding him or (c) doesn't have any other citizenship and guarantees of obtaining it.

Decision on acquisition or termination of RF citizenship must be cancelled if established based on false documents or deliberately false information. Fact of using false documents of deliberately reporting false information shall be established by court. (Id., art. 22).

According to art. 89 of RF Constitution, President of RF is authorized to lead citizenship legislation. Preliminary preparation is performed by federal executive authorities, which: (a) Authorized to perform monitoring and supervision functions in migration sphere (Id., art. 30) and (b) responsible for foreign affairs in respect of persons outside of RF (Id., art. 31).

4.03 EMIGRATION:

See category 17 Immigration.

4.04 IMMIGRATION:

See category 17 Immigration.

4.05 PRESS REGULATION:

No limitation on press freedoms permitted, except as provided by law. (RF Law No. 2124-1 of Dec. 27, 1991 “On Mass Media”], art. 1). Numerous amendments and changes were made to this Law, e.g. changes made by Law No. 153-FZ of July 27, 2006 concerned order of collecting information on territory of counter terrorism operation. Censorship forbidden (Id., art. 3), but forbidden to use mass media to commit crimes, disclose state or other protected by law secrets, performing of extremist activities and others. Use of TV, video, cinema and informational computer files and text processing programs related to specific mass media to influence public subconsciousness are forbidden. (Id., art. 4).

Mass Media Law outlines rules applicable to founders of mass media (Id., art. 7), registration of mass media activity (Id., arts. 8-14) and defines basic rights of journalists (Id., art. 47). Journalists obligated to verify information transmitted, preserve confidentiality of material and sources, obtain consent to distribute personal information, and inform persons when they are being recorded. State guarantees journalist's right to perform professional activities, and to retain honor, dignity, health, life and property while doing so. (Id., art. 49).

Foreign Journalists.

Representative offices of foreign mass media established with consent of RF Ministry of Foreign Affairs unless international treaty provides otherwise. Foreign representative offices of mass media registered in RF shall be set up in order prescribed by legislative acts of RF and host country, unless otherwise provided for by treaty concluded by RF. (Id., art. 55). MinForAff RF accredits correspondent. If foreign states establish limitations on Russian correspondents, Russia may reciprocate.

5 CIVIL ACTIONS AND PROCEDURE

5.01 ACTIONS:

Costs consist of state fee and expenses related to court proceedings. (GPK RF, art. 88, APK RF, art. 101). Costs of enforcement of court decision include enforcement fee and costs of execution. (RF Law No. 229-FZ of Oct. 2, 2007 “On the Enforcement Procedure” (``EP Law''), arts. 112-117).

In courts of general jurisdiction, several categories of plaintiffs whose litigation benefits state are subject to exemption from payment of costs, namely: plaintiffs in injury or death of breadwinner, alimony and other claims. Public prosecution and state run public authorities, self-governing authorities taking legal action in cases provided for in legislation, where purpose of litigation protects rights and interests of other persons are also exempted from such payments. (RF Tax Code, art. 333.36).

Depending on property status of citizen, court or judge is entitled to decrease costs turned to state's benefit, to postpone such payments or to permit to pay such costs by installments. (RF Tax Code, art. 333.20).

Provisions of arts. 333.19 and 333.36 of RF Tax Code interlinked with para. 2 of art. 333.20 of RF Tax Code and provisions of art. 89 GPK RF, preventing courts of general jurisdiction and justices of peace from exempting physical persons, upon their petition, from payment of State fee, unless other reduction of amount of State fee or respite of its payment do not provide unimpeded access to justice, were declared invalid by Decrees of RF Constitutional Court of June 13, 2006 No. 272-O and 274-O).

In arbitration procedure, public prosecution and state run public authorities, trade unions taking legal action in cases provided for in legislation, applying for protection of rights and interests of other persons shall be exempt from payment of costs turned to state's proceeds.

Each statement of claim, either initial or counter, third person's application presenting separate claims concerning subject-matter of case in already opened law suit, application (complaint) in special proceedings and cassations shall be paid based on state fee at rate provided for in RF Tax Code. Cassations and appeals shall be paid at half of state fee paid for non-property claim. (Id., 333.19, 333.21).

Costs related to suit hearing include: (1) amounts payable to witnesses, experts, specialists and interpreters; (2) expenses pertaining to on-site examination; (3) expenses pertaining to retrieval of defendant; (4) expenses related to execution of court's decision; (5) expenses related to interpreters' services, incurred by foreign citizens and stateless persons, if international agreement of RF contained nothing to contrary; (6) expenses for trip and board, incurred by parties and third persons in connection with appearance in court; (7) expenses for attorneys' services; (8) expenses for actual loss of time stipulated by provisions of art. 99 of GPK RF; (9) postal expenses of parties and other expenses recognized as necessary by court. (GPK RF art. 94).

Costs in courts of general jurisdiction shall be allocated according to provisions of art. 98 of GPK RF. Court shall award winning party compensation for all expenses incurred in connection of claim by other party even if other party was exempted from payment of costs turned into state's benefit. Should claim be sustained in part, amounts indicated in this article shall be awarded to plaintiff pro rata based on amount of claims sustained, and to defendant pro rata based on part of plaintiff's claims dismissed by court.

Costs of attorney in courts of general jurisdiction shall be compensated as follows: court shall award winning party compensation of costs of attorney's services within reasonable limits. In case attorney's services in accordance with established procedure were rendered gratuitously to winning party amount shall be collected from other party in favor of appropriate advocatory formation of which advocate is member. (GPK RF art. 100).

Under Arbitration Procedure Code of RF (art. 110), costs on business disputes and other matters within competence of arbitration courts shall be allocated between parties pro rata based on amount of claims satisfied or collected from losing party to winning one. If case results from violation of pretrial settlement of disputes by one of parties, including failure to answer pretension, court of arbitration is entitled to charge violator with costs notwithstanding result of case. (APK RF, art. 111).

State fee payment of which plaintiff was duly exempted shall be collected from defendant and deposited for benefit of federal budget pro rata based on amount of claims suspended unless defendant is exempted from payment of fee.

If there is agreement on allocation of cost between persons involved in case, court shall proceed under this agreement.

In criminal procedure in accordance with art. 50 of GPK RF, attorney appointed by investigator, public prosecutor or court, who participates in pretrial investigation or in trial shall be compensated at costs of federal budget for services.

Procedural Terms.

Legal proceedings in courts of arbitration shall be effected within terms set forth by APK RF or other RF Laws, and in default of indication in law, shall be determined by court. In general case shall be investigated in court of arbitration of first instance including preparation for hearing and making decision within term not exceeding three months after receipt of claim by court. (APK RF art. 152). Before rendering ruling, by which date of hearing is stated, court must proceed with actions to prepare such hearing. Appeal shall be filed within one month after decision is made by court of first instance. (Id., art. 259). Cassation shall be filed within two months after court decision or resolution of court of arbitration takes effect. (APK RF, art. 276). Upon application of party to case, court of arbitration renews defaulted term if it considers reasons of default to be valid.

GPK RF strictly regulates terms for proceedings in case that theoretically must be observed by courts of general jurisdiction, but these provisions are not generally applied in practice. Nonobservance of terms provided for in legislation is explained by enormous volume of cases in courts, complexity of cases and behavior of parties preventing timely disposition of cases. Civil cases shall be heard and resolved not later than two months upon acceptance of application by court, and within one month by justice of peace. (GPK RF, art. 154[1]). Cases on restoration on work and alimony collecting cases shall be resolved within one month. (Id. [2]).

Cases of complaints against actions (inaction) of public and municipal authorities, officials and state/municipal officers violating rights and freedoms of citizens, and cases of complaints against denial of departure permit from RF and of entry permit in RF shall be considered by court within ten days after submission of complaint. (GPK RF, art. 257[1]).

Law fixes terms for submission of complaints against violation of rights and freedoms of citizens.

Following term is set forth to file complaint: three months after citizen discovers violation of his/her rights and freedoms.

If consideration of case results in decision, decision shall be made immediately after hearing. In exceptional and most complicated cases, preparation of full (reasoned) decision may be postponed for no more than five days, but court shall announce operative part of decision at hearing when case is over. (Id., art. 199). Cassation or protest may be filed within ten days upon decision finally made by court. (Id., art. 338). Complaint or protest filed after said period of time shall not be considered and is returnable to appellant if there was no petition to renew term missed. (Id., art. 342).

Court of appellate jurisdiction, which as rule is court of subject of Russian Federation, shall consider case received by cassation or protest within one month upon receipt. (GPK RF, art. 348).

RF Supreme Court shall try protest or cassation case within two months after its receipt: cases on setting of date of elections of local representative body and local elective officers shall be tried within five days. (Id.).

According to RF Law No. 188-FZ of Dec. 17, 1998 and GPK RF there are justices of peace in Russian Federation, which try cases referred to their competence stated in art. 23 of GPK RF. Within their competence, Justice of peace considers following cases: (1) court order issuance; (2) divorce without dispute on matters of children; (3) division of joint property of married couple with amount of claim not exceeding 100,000 rubles; (4) other cases arising out of family relations, excluding cases on fatherhood (motherhood) impugnment, affiliation, deprivation of parents' rights and adoption; (5) ownership cases with amount of claim not exceeding 100,000 rubles, except for succession and intellectual property cases; (6) determination of rules (order) for property use; (7) other cases referred to competence of Justice of peace by federal laws.

If, upon integration of connected claims or alteration of subject of claim or advance counter-claim, new claims become cognizable to district court, they must be considered by district court.

Decision of Justice of peace may be appealed to district court. (GPK RF, art. 320). Appeal can be submitted within ten days from date decision was rendered. Appeal submitted after ten days shall be returned to appellant if he did not request extension of time or court declined to do so. (Id. art. 324[1]).

Limitation of Actions.

Civil actions must generally be commenced within three years after cause of action. (Civil Code, art. 196). Limitations period may be shortened or extended in particular instances by statute. (Id., art. 197). Parties may not contractually alter duration or application of statute of limitations period. (Id., art. 198). Statute typically runs from day claimant learned or should have learned of cause of action. (Id., art. 200). Where obligations have specific term for performance, statute begins upon expiration of term. (Id.). Civil Code defines grounds for suspension of limitations period. (Id., art. 202). Statute of limitations objection must be raised as affirmative defense to claim and, if accepted, shall cause disallowance of claim. (Id., art. 199).

Proof of Foreign Claims and Foreign Law.

According to art. 22 of GPK RF courts of general jurisdiction try cases to which foreign citizens, stateless persons, foreign entities and Russian entities with foreign investment are parties to litigation. APK RF provides specific § V “Process of Cases to which Foreigners Involved”.

Under this section: (1) Foreign organizations, international organizations and foreign entrepreneurs; stateless persons ("foreign persons") are entitled to appeal to courts of arbitration in Russian Federation in accordance with their jurisdiction rules for protection of their violated or disputed rights and legal interests equally with Russian persons. (2) Procedural privileges for foreign persons shall be granted if provided for in international agreements of RF. (3) RF Gov. may establish retaliatory restrictions in regard to foreign persons belonging to state in courts of which special restrictions of procedural rights of individuals and legal entities of Russian Federation are permitted. (4) Foreign persons shall provide court with evidence of their legal status confirming right to engage in business and other economic activities. In case of lack of provision of such evidence, court may require production of that evidence. (APK RF, art. 254).

Arbitration proceedings involving foreign persons as parties shall accord with APK RF and other RF Laws unless otherwise stated in international agreement of RF. (Id., art. 253[1]).

Courts of arbitration in Russian Federation try cases on economic disputes and other cases concerning business and other economic activities involving foreign persons as defined in APK RF as follows: (1) cases with participation of foreign persons if defendant or its property is situated in RF or in case citizen resides in RF; (2) governing body, branch or representative office of foreign person is located in RF; (3) claims arisen from contract that shall be or has been performed in RF; (4) in case of claim for indemnification of damage caused to property by virtue of action or other event supporting claim of indemnification took place in RF; (5) claims arisen from unjust enrichment that took place in RF; (6) in case of claim for protection of business reputation, claimant is located in RF; (7) claims arising from relations concerning circulation of securities issued in RF; (8) in case of claimant to case on ascertainment of fact having legal importance pointed that such fact takes place in RF; (9) claims arising from relations concerning state registration of logins, domains and other objects and rendering services in International Association of Nets "Internet" in RF, and (10) in other cases in presence of close connection of case with territory of RF. (Id., art. 247[1]). Exclusive competence of RF arbitration courts includes trial of following cases involving foreign persons: (1) on disputes related to state property of RF including disputes concerning its privatization and seizure of property for state needs, (2) on disputes where subject is immovable property situated in RF or rights thereto, (3) on disputes concerning registration and issuance of patents or certificates for trademarks, industrial designs, utility models and registration of other rights for results of intellectual activities, which shall be registered or approved by patent or certificate in RF, (4) on disputes for declaration of invalidity of entry in state registers (lists, cadastres) made by competent authorities of RF holding such registers (lists, cadastres), (5) on disputes concerning formation, liquidation and registration in RF of legal entities and individual entrepreneurs as well as impugnment of their governing bodies' decisions. Cases arising from administrative and other public relationships, to which foreign persons involved are also under exclusive jurisdiction of RF arbitration courts. (Id., art. 248). Where parties, at least one of whom is foreign person, agreed in writing that dispute already exists or could exist in relation to parties' business or other economic activities and agreement is under jurisdiction of RF arbitration court, latter will have exclusive jurisdiction on trial of such case, provided that parties' agreement did not change exclusive jurisdiction of foreign court. (Id., art. 249).

Claims filed by court of arbitration subject to observance of rules provided for above shall be considered on merits should case become arbitrable to court of another state as result of change of residence of persons participating in process or by other conditions. (Id., art. 247[4]).

Application of foreign law is governed by certain legislation. Thus, courts of general jurisdiction considering civil suits shall apply legal rules of other states in cases provided for in law or international treaty to which RF is party. (GPK RF, art. 11[4]).

Court of arbitration shall also apply legal rules of other states in cases provided for in law or international treaty to which RF is party. (APK RF, art. 13[5]).

Rules of application of foreign law are set forth in art. 14 of APK RF. In case of application of foreign law, court of arbitration ascertains availability and contents of its rules in accordance with their official construction and practice of application in relevant foreign state. For purpose of ascertaining availability and contents of foreign legal rules, court of arbitration is entitled to request competent authorities of RF and abroad for assistance and explanations or to involve some experts. If, notwithstanding efforts made, availability or contents of foreign legal rules is not ascertained, court of arbitration shall apply relevant rules of law of RF.

5.02 CONFLICTS OF LAW:

Art. 15 of Constitution provides that where international treaty of RF conflicts with other RF law, treaty shall control. (Const., art. 15[4]).

On Mar. 1, 2002 third part of Civil Code took effect, which includes § VI "International Private Law" consisting of three chapters and 39 articles.

Law applicable to civil relations involving participation of foreign citizens or foreign legal entities or civil relations complicated by another foreign factor, in particular, in cases when object of civil rights is located abroad shall be determined on basis of international treaties of RF, Civil Code, other laws and customs recognized in RF. (Civil Code, art. 1186).

Peculiarities of determining law subject to application by international commercial arbitration is established by RF Law No. 5338-1 of July 7, 1993 "On international commercial arbitration". If it is impossible to determine law subject to application on basis of above rules, law of country with which civil relation complicated by foreign factor is most closely related shall be applied. If international treaty of RF contains substantive legal norms regulating relevant relation, use of conflict of laws for matters completely regulated by such substantive legal norms is not available.

For definition of law, which should be applied, legal terms shall be construed in compliance with Russian legislation, unless otherwise required by law. (Id., art. 1187).

Where foreign law is applied court shall establish content of its norms in compliance with official construction, application practices and doctrine thereof in relevant foreign state. For purpose of establishing content of norms of foreign law court may apply in established manner to RF Ministry of Justice and other competent bodies or organizations in RF and abroad for assistance and clarification or involve expert. Persons being party to case may present documents confirming content of foreign law norms to which they refer to substantiate their claims or objections and provide other assistance to court in establishing content of these norms. If, despite measures taken in compliance with present provisions, content of foreign law norms fails to be established within reasonable term, relevant Russian law shall be applied. (Id., art. 1191).

Norm of foreign law applicable in accordance with rules of Civil Code shall not be applied in exceptional cases where consequences of application would obviously conflict with fundamentals of law and order (public order) of RF. In such case relevant norm of Russian law is applied if necessary. (Id., art. 1193).

When entering into contract, or later after contract is concluded, parties may agree between them law that shall govern their rights and obligations under contract. Law so selected by parties shall govern accrual and termination of right of ownership and other rights in rem relating to movable property without prejudice to rights of third persons. (Id., art. 1210[1]).

Where there is no agreement of parties on applicable law, contract shall be subject to law of country with which contract has closest relation. Law of country with which contract has closest relation deemed law of country where party responsible for performance of critical obligations under contract has its place of residence or main place of business, unless otherwise provided by law, terms or substance of contract or group of circumstances of case in question.

Party responsible for performance of critical obligations under contract, unless otherwise provided by law, terms or substance of contract or group of circumstances of case in question shall be: (1) seller in contract of sale; (2) donor in contract of donation; (3) lessor in contract of lease; (4) lender in contract of free use; (5) independent contractor in contract of work and labour; (6) carrier in contract of carriage; (7) forwarder in contract of transport forwarding; (8) lender (creditor) in loan contract; (9) fiscal agent in contract of factoring; (10) bank in contract of bank deposit and in contract of bank account; (11) custodian in contract of custody; (12) insurer in contract of insurance; (13) attorney in contract of commission; (14) commissioner in contract of commission; (15) agent in contract of agency; (16) holder of title in contract of commercial concession; (17) pledger in contract of pledge; (18) guarantor in contract of guarantee; (19) licensor in license contract.

Law of country with which contract has closest relation shall be as follows, unless otherwise provided by law, terms or substance of contract or complexity of circumstances of case: (1) for building contract and design and exploration contract—law of country where on whole results stipulated by contract are created; (2) for partnership in participation contract—law of country where on whole activity of partnership is pursued; (3) for contract concluded by auction, tender or commodity market—law of country where auction, tender is held or commodity market is situated.

Law applicable to contract containing elements of different contracts shall be law of country with which contract as whole has closest relation, unless otherwise provided by law, terms or substance of contract or complexity of circumstances of case in question. If contract contains trade terms used in international turnover, it is considered that parties have agreed to use in their relations customs of business turnover denoted by these terms. (Id., art. 1211).

Law applicable to contracts involving real property shall be determined as follows.

Unless contracting parties agree otherwise, contract regarding real property must be governed by laws of jurisdiction having closest relation to contract. Unless otherwise provided by laws, terms or subject matter of contract, or arises out of matter of facts, laws of jurisdiction where real property is situated will apply. Contracts relating to land plots, subsoil fields, and other real property situated in RF, RF laws must apply. (Id., art. 1213).

5.03 COSTS:

See topic 5.01 Actions, subhead Costs.

State fee amount included in Court costs determined by Part Two of RF Tax Code of Aug. 5, 2000 and RF Law No.127-FZ of Nov. 2, 2004. State fee amounts precisely described in c. 25.3 of RF Tax Code provided they depend on type and amount of claim. Civil law claims arising from criminal law procedures are not subject to state fee. (RF Criminal Procedure Code of Dec. 18, 2001 art. 44[2], Tax Code art. 333.36).

5.04 DAMAGES:

Damages in RF arise out of breach of obligations involving both tort and contract duties. Party liable for breach if at fault (intentional or by negligence), save where law or contract provides for other grounds for liability. (Civil Code, art. 401). Agreement in advance limiting one's liability for willful breach generally void. (Id., arts. 400[2], 401[4]). Damages awarded on basis of comparative fault. (Id., art. 404[1]). See topic Torts for culpability standards. Non-breaching party has duty to mitigate damages. (Id., art. 404). Damages made to legal entity or individual and its/his property must be compensated in full by party that caused damage. (Id., art. 1064[1]). In certain cases, non-breaching party may obtain compensatory damages, penalties and expenses, as well as lost profits in amount no less than breaching party's unjust enrichment. (Id., arts. 15[2], 393[1-2]).

Law or contract may provide that parties may enforce penalty clauses, while retaining ability to recover any losses exceeding penalty. (Id., art. 394[1]). If liability was insured, breaching party must compensate non-breaching party difference between insurance compensation and actual amount of damages. (Id., art. 1072). Payment of penalty and compensation for losses does not necessarily relieve obligor from duty of specific performance. (Id., art. 396).

Rule of comparative negligence generally controls in torts, but strict liability applied to certain activities. Court, in evaluation of harm caused to claimant, may consider negligence of individual who caused damage and adjust award accordingly, except where action predicated upon intentional tort. (Id., art. 1083[3]). Types of tort damages available include: compensatory; pain and suffering; lost wages; emotional distress; and wrongful death. Amount of awarded damages indexed for inflation. (Id., art. 1091). While culpability may affect award of moral and other damages (see topic 5.11 Torts, subhead Libel), punitive damages, per se, not available. If claimant was grossly negligent and person who caused damage was not at fault, amount of damages can be decreased or damages not awarded at all. (Id., art. 1083[2]).

Creditor must make claim against principal debtor before proceeding against party bearing secondary liability. (Id., art. 399). Actions of debtor's employees to perform debtor's obligations deemed to be actions of debtor itself. (Id., art. 402). See topic 5.11 Torts.

5.05 DEPOSITIONS AND DISCOVERY:

See topic 5.07 Letters Rogatory.

5.06 EXECUTION OF JUDGMENTS AND AWARDS:

Judgments of foreign courts and arbitration tribunals executed pursuant to international treaty. Execution by treaty must be sought within three years of entry of judgment or award into legal effect in country where rendered. (GPK RF, art. 409). Foreign arbitral decisions enforced pursuant to U.N. (New York) “Convention on Recognition and Enforcement of Foreign Arbitral Awards,” European Convention on Foreign Trade Arbitration of 1961 (ratified in USSR on June 27, 1962) and arts. 35-36, RF Law No. 5338-1 “On Commercial Arbitration” of July 7, 1993. Russian courts generally carry out judgments, orders and inquiries (e.g., regarding discovery matters) of foreign courts, provided execution will not threaten security of state and court receiving order is competent to administer it. (GPK RF, art. 407).

For RF domestic litigation, execution usually available only after appeal period has expired. (Id., art. 210; see category 6 Courts and Legislature, topic 6.01 Courts, subhead Appeal and Error). Civil law execution procedure basics governed by EP Law, RF Law No. 118-FZ “On the Execution Officers of Justice” of July 21, 1997; Arbitration Procedure Code, GPK RF and RF Family Code of Dec. 29, 1995 No. 223-FZ, art. 45. Enforcement of judicial acts and of acts of other bodies exercised by bailiffs. (EP Law, art. 5). Execution actions must be performed by bailiff within two months from date bailiff receives execution instrument (execution list, court order or other instruments listed in art. 12 of EP Law). Rapid execution available for satisfaction of alimony and wage claims, reinstatement at work and other cases set forth in art. 13 of EP Law. Bailiff sends judgment debtor notice and request for consensual satisfaction of judgment. (EP Law, art. 30). If claim not met within stated period, bailiff may seize and sell debtor's property, garnish wages, stipends, pensions and other revenues, or attach specific property of debtor, even if possessed by third party. (EP Law, art. 68).

If proceeds insufficient to settle all claims under execution instrument, satisfaction occurs pursuant to priority list. Claims are paid, pro rata within each class, in following order: (1)

alimony and personal injury judgments; (2) wages, royalties; (3) payments to RF budget and to state non-budget funds; (4) all other claims. (EP Law, art. 111).

5.07 LETTERS ROGATORY:

Letters rogatory (formal request from court of one country to “appropriate judicial authorities” in another country requesting service of process) from foreign states honored by RF courts on basis of international agreements only. Russia has effective bilateral agreements on legal aid in connection with civil, (family) and criminal cases with Albania, Algeria, Bulgaria, China, Cuba, Cyprus, Czech Republic, Estonia, Finland, Greece, Hungary, Iran, Iraq, Italy, Korean Democratic People's Republic, Kyrgystan, Latvia, Lithuania, Mongolia, Poland, Romania, Slovak Republic, Tunisia, Vietnam, Yemen and Yugoslavia. Additionally, Russia entered into multilateral Convention on Legal Aid and Legal Relations for Civil, Family and Criminal Cases among Azerbaijan, Armenia, Belarus, Georgia, Kazakhstan, Kyrgystan, Moldova, Tajikistan, Uzbekistan and Ukraine on Oct. 7, 2002 and Declaration of Intent to cooperate in legal areas and in connection with civil and criminal cases with Police and Justice Departments of Switzerland of Sept. 12, 1994. Consular Convention executed June 1, 1964 by U.S. and USSR became effective June 13, 1968. Pursuant to special agreement, letters rogatory may be transmitted through Department of State for execution by RF court. GPK RF provides that Russian courts will, pursuant to federal law or international agreement, carry out decisions, orders and inquiries (regarding, e.g., documents and testimony sought) of foreign courts, provided execution will not threaten security and sovereignty of RF and court receiving order is competent to administer it. (GPK RF, art. 407). In case of international commercial arbitration on RF territory, arbitration tribunal may request assistance from Russian courts pursuant to letters rogatory. (RF Law No. 5338-1 “On International Commercial Arbitration” of July 7, 1993, art. 27). Russian arbitration courts may transmit letters rogatory to other arbitration courts pursuant to procedure set forth in Arbitration Procedure Code. (APK RF, arts. 73-74 and 256).

5.08 LIMITATION OF ACTIONS:

See topic 5.01 Actions.

5.09 PRESCRIPTION:

See category 23 Property, topic 23.02 Adverse Possession.

5.10 REPLEVIN:

Lawful owner entitled to reclaim property from illegal possessor. (Civil Code, art. 301). Bona fide purchaser shall be deemed illegal possessor and return property to due owner for compensation if property lost, stolen or otherwise taken from owner's possession against his will. Recovery permitted in all cases where possessor acquired property gratuitously from intermediary without right to dispose. Money and bearer securities cannot be reclaimed from bona fide acquirer. (Id., art. 302). Owner may recover consequential income gained by bad-faith acquirer over period of dispossession. (Id., art. 303).

5.11 TORTS:

RF tort law found primarily in cc. 25, 59 and 60 of Civil Code Part II of Civil Code. With some exceptions for moral damages (see subhead Libel, infra), tort liability generally requires culpability, with burden of proof on respondent to show no harm caused. (Civil Code, art. 1064[2]). Harm caused to health or property of individual or legal entity must be compensated by tortfeasor, or if offender less than 14 years (plus in other exceptional cases) and if provided by law, then compensation by person who did not cause harm, such as parents of minor. Unless actions of respondent violate moral principles of society, harm caused with consent of claimant does not create liability for respondent. In cases provided by law, compensation required for harm caused by lawful actions. (Id., art 1064[1-3]). If danger of future harm exists, court may order respondent to stop or interrupt activity unless such termination against public interest. Such court action does not deprive individuals and legal entities from right to claim remedies. (Id., art. 1065). Employer liable for harm caused by employee during work. (Id., art. 1068). Liability for harm caused by acts state or municipal authorities as well as their officials is set forth in arts. 1069 and 1070 of Civil Code). Persons engaged in extrahazardous activities (operation of automobile included) face strict liability for damages caused, unless can establish harm result of force majeure or claimant grossly negligent. (Id., art. 1079). Contributory negligence not bar to recovery but considered in damages award, based on comparative fault. (Id., art. 1083). Wrongful death action available to persons in statutory class who can establish dependency on decedent at time of death. (Id., arts. 1088-89). Civil Code provides separate remedies rules for damage caused to life and health of individual (Id., arts. 1084-94) and product liability (Id., arts. 1095-1098; see also category 3 Business Regulation and Commerce, topic 3.04 Consumer Protection).

Libel.

Individual may petition court to demand retraction of data damaging individual's honor, dignity or business reputation, unless disseminator can prove information accurate. Such protection available posthumously. Libelous material disseminated through mass media must be retracted in same media, and injured party entitled to publication of rejoinder in same media. Injured party may demand rejoinder in court without prior application to mass media which disseminated information. (Information Letter of Presidium of Higher Arbitration Court of RF No. 46 of Sept. 23, 1999, “Judicial Overview of Settlement by Arbitration Courts of Disputes Associated with Protection of Business Reputation”, art. 1). Defamed individual also entitled to demand compensation for losses and moral damages incurred as result of defamation. (Civil Code, arts. 151-152, 1099). If moral harm results from dissemination of defamatory information discrediting individual's honor, dignity and business reputation, compensation of moral damages awarded regardless of fault of offender. (Id., art. 1100). Type of physical and emotional suffering taken into account by court when determining amount of compensation for moral harm. (Id., art. 1101). Rules protecting business reputation of individuals also applicable to business reputation of legal entities. (Id., art. 152). By RF Law No. 231-FZ of Dec. 18, 2006, protection of image of citizen was instituted in Civil Code (art. 152.1). In accordance with provisions of this article, divulgation and further use of image of citizen (including his photo, visual image and work of visual art containing his image) are allowed only following acceptance of citizen. Such acceptance is not necessary if citizen's image is used in state or public purposes; image was received during video recording in public places (meetings, forums, conferences, concerts, performances, tournaments, etc.) except when image is used as main element; and person posturized for valuable consideration.

Resolution of RF Supreme Court Plenum No. 10 “On Some Issues of Application of Law on Compensation for Moral Damages” of Dec. 20, 1994 as last amended on Feb. 6, 2007 ruled that moral damage may include suffering caused by, inter alia, alienation of relatives and friends, inability to continue in social or work-related activity, exposure of family or medical secret, and injury to honor, dignity or business reputation.

See topic Damages for tort remedies.

5.12 WAIVER:

No provision of Russian law expressly affirms validity of waiver, but numerous provisions expressly prohibit or restrict validity of waiver, e.g., citizen's full or partial waiver of legal capacity void unless otherwise provided by law (Civil Code, arts. 9[2], 22[3]), agreement between participants in partnership waiving right of participants to withdraw void (Id., art. 77[2]) and agreement limiting right of mortgagor to use mortgaged property void. Civil Code, art. 1024(1) permits trust to be terminated if settlor of trust waives rights under trust, when provided by law.

6 COURTS AND LEGISLATURE

6.01 COURTS:

Federal court system divided by subject-matter competence into state arbitration courts, courts of general jurisdiction and courts of constitutional jurisdiction. Courts of general jurisdiction hear civil and criminal actions and may review administrative decisions. Economic disputes resolved at regional and federal levels by courts of arbitration. RF Constitutional Court settles disputes concerning compliance of federal laws and normative acts with RF Constitution, jurisdiction of government bodies and individual liberties. Courts of constitutional jurisdiction of RF subjects settle disputes concerning compliance of regional laws and other normative acts with regional constitutions. Operation and structure of court system established by following federal laws: ``On Judiciary of RF'' of Dec. 31, 1996,last am'd by RF Constitutional Law No. 9-FKZ of Dec. 27, 2009 (``Judiciary Law''); ``On RF Constitutional Court'' of July 21, 1994, last am'd by RF Constitutional Law No. 2-FKZ of June 2, 2009 (``Const. Court Law''); ``On Arbitration Courts in RF'' of Apr. 28, 1995, last am'd by RF Constitutional Law No. 1-FKZ of May 7, 2009 (``Arb. Court Law''); Civil Procedure Code of Nov. 14, 2002, last am'd by RF Law No. 246-FZ of Nov. 9, 2009 (``GPK RF''); Criminal Procedure Code of Dec. 18, 2001, last am'd by RF Law No. 383-FZ of Dec. 29, 2009 (last amendments enter into force on Jan. 1, 2010 except clause 4 of Art. 3 that enter in force on Jan. 1, 2011) (``UPK RF''); Arbitration Procedure Code of July 24, 2002, last am'd by RF Law No. 205-FZ of July 19, 2009 (``APK RF''); ``On Military Courts in RF'' of June 23, 1999, last am'd by RF Constitutional Law No. 8-FKZ of Dec. 27, 2009 and ``On Justices of Peace in RF'' No. 188-FZ of Dec. 17, 1998, last am'd by RF Law No. 147-FZ of July 22, 2008. Procuracy, regulation of judicial system, as well as civil, criminal and arbitration law and procedure within exclusive jurisdiction of federal government. (Const., art. 71[o]). Courts also established by subjects of RF, but are subject to federally-established procedure.

Constitutional Court.

Court's 19 justices provide conclusive interpretation of constitutional issues and may examine normative acts of state entities and agreements between them, including Presidential decrees, normative acts of Council of Federation and State Duma. Court rules exclusively on questions of law. Interpretations of Constitutional Court binding on all judicial, legislative and executive authorities and all individuals and associations in RF. (Const. Court Law, art. 106). Right to apply for review held by: RF President; RF Gov.; both chambers of Federal Assembly (or one-fifth of deputies in either chamber); RF Supreme Court; RF Superior Court of Arbitration; and legislative/executive organs of RF constituents. (Const., art. 125[2]). Citizens may apply for Constitutional Court review when RF laws violate their rights, and when they are parties to litigation in which question of constitutional law arises. (RF Const. art. 125[4]).

Courts of General Jurisdiction.

System consists of district courts, particularized and military courts, courts of autonomous regions and districts, courts of cities of federal importance, regional and territory courts, republic supreme courts and Supreme Court of RF. (Judiciary Law, art. 4). Justices of peace are courts of subject of RF (regional courts). Jurisdiction includes all civil, criminal and some administrative matters outside of arbitration court competence. Highest court of supervision is RF Supreme Court, which has final judicial authority. (Const. RF, art. 126; Judiciary Law, art. 19). Jurisdiction of each kind of court is defined in GPK RF, arts. 22-27; UPK RF, art. 31 and KoAP RF art. 23.1, RF Law “On Military Courts in RF”, art. 7.

Civil Matters.

District courts review disputes between individuals and legal persons, government or local authorities within statutory limits, concerning domestic and labor relations, property interests and other rights and duties arising from civil, family, domestic, environmental, land and administrative legislation, which are not included in competence of justices of peace, higher courts or military courts. (GPK RF, art. 24). Higher courts of general jurisdiction consider and resolve cases as courts of second instance and in cases envisioned in GPK RF certain disputes as courts of first instance. (Id., arts. 24-27). As to personal jurisdiction, proper forum is generally respondent's place of residence or, for legal persons, place of business (Id., art. 28) or situs of property (Id., art. 29). Suit may also be brought in jurisdiction where contract executed, harm caused or respondent has branch or representative office. (Id., art. 29). Parties generally may privately stipulate jurisdiction. (Id., art. 32).

Criminal Matters.

All criminal cases tried in district courts, except where subject matter specifically assigned by federal law "On Military Courts in RF" and Criminal Procedural Code and other courts of general jurisdiction. (UK RF, art. 11). Cases heard in higher courts include crimes against state, activity related to foreign relations, disrespect for police or court process.

Justices of Peace.

Part of courts of general jurisdiction. Hear civil cases such as: cases on issue of writ, cases on property disputes if value of suit does not exceed 100,000 rubles threshold (GPK RF art. 23); family cases such as: cases on dissolution of marriage if married couple have no dispute on children, cases on division of matrimonial property, other family cases except cases on avoidance of parenthood, establishment of paternity, deprivation of paternal rights, adoption of child (Id.); criminal cases if maximum punishment does not exceed three years except cases indicated in art. 31 of UPK RF and administrative cases as indicated in art. 23.1 of KoAP RF.

State Arbitration Courts.

Current system successor to quasi-administrative network of tribunals, called state arbitrazh, established in Soviet era to resolve conflicts between state enterprises and enforce government economic plans. Reformed into judicial system in 1991, arbitration courts adjudicate so-called economic disputes between regulatory authorities, organizations and individuals engaged in entrepreneurial activity and other persons in cases stipulated by federal laws. Arbitration court system consists, in ascending importance, of arbitration regional courts/courts of subjects of RF (see category 1 Introduction, topic 1.04 Government and Legal System), arbitration appeal courts, federal circuit courts and RF Superior Court of Arbitration. (Arb. Court Law, art. 3). Arbitration system operates independently from general courts. Superior Arbitration Court is supreme judicial body that settles economic disputes and other cases examined by arbitration courts, exercises judicial supervision over these courts' activities in procedural forms, provided for by federal law, and gives explanations on matters of judicial practice. (Const., art. 127; Arb. Court Law, art. 9). Personal jurisdiction generally based on location (residence or place of business) of respondent (APK RF, art. 35), but suit may be brought, for example, at place of performance of contract, where respondent has property and/or business operations (Id., art. 36) or in forum stipulated by parties (Id., art. 37). Arbitration courts have jurisdiction over foreign and joint venture entrepreneurial persons and entities. Foreign persons (legal and natural) have equal procedural rights in bringing arbitration suits. (Id., art. 254). Arbitration courts recognize and apply rules of foreign law upon presentation of adequate proof of contents by proponent but in case of absence of adequate proof of such contents rules of RF laws shall apply. (Id., art. 14). (See category 5 Civil Actions and Procedure, topic 5.01 Actions.) Bases for personal jurisdiction over foreign respondents include representative entity on RF territory, past or future contractual obligations on RF territory, causing property or other damage through activity in RF, unjust enrichment on RF territory, and causing damage to claimant's RF reputation. Parties may also privately stipulate as to forum. (Id., art. 247). Effects and use of international agreements in state arbitration courts is clarified in "Decision of the Plenum of the Superior Arbitration Court of the Russian Federation on Operation of International Agreements in the Russian Federation as Applied to Issues of the Arbitration Process" of June 11, 1999.

Appeal and Error.

Courts of General Jurisdiction.

Two main variants of post-trial review available: cassation and judicial supervision. Appellation instance also provided for post-trial review of decisions of Justices of Peace. (GPK RF, art. 320). Provided that protest or complaint filed within ten days of civil court decision, cassation appeal to higher court available to any participant. RF Procurator may also seek appeal in certain cases. (Id., arts. 320, 336, 376, 394). Parties may raise new arguments in cassation court provided that such arguments could not be raised in court of first instance. (Id., art. 339). Cassation court may affirm, reverse and remand for reconsideration, or enter new judgment if additional collection and review of evidence not required, or reverse and terminate proceedings on case or leave application without consideration. (Id., art. 361). Upon cassation decision or termination of period for review, judgment enters into legal effect and may only be challenged either in case when material, newly-discovered or unexpected circumstances arise or within judicial supervision procedure upon petition of parties' petition or procurator's application. (Id., arts. 376, 392).

Judgments pronounced by justices of peace may be also contested in courts of common jurisdiction acting as appellate courts. (Id., art. 320[1]).

Arbitration Courts.

Three variants of post-trial review available: appeal, cassation, judicial supervision. Participants to arbitration proceeding have right to appeal decision, before it takes effect within month of receipt, for appellate review by appellate court. (APK RF, arts. 257-259). Additional evidence may be introduced upon showing it could not be offered at trial. (Id., art. 268). Claims not raised at trial cannot be made on appeal. (Id., art. 266). Appellate court may affirm, enter modified judgment or reverse and terminate proceedings on case or leave application without consideration. (Id., art. 269).

Participants have right to contest first instance or appeal judgment by filing appeal with Federal Circuit Arbitration Court (cassation court) provided judgment has entered into force, and cassation appeal is filed within two months from date of entering into force of contested judgment. (APK RF arts. 273, 274, 276). Cassation court reviews correct application of substantive and procedural law by court of first instance or appellate instance. (Id., art. 286). Court of cassation may affirm, enter modified judgment, set aside all or any previous judgments or submit case for new consideration. (Id., art. 287).

Upon entering into force judicial acts of arbitration courts may be reviewed by RF Superior Court of Arbitration within three months upon day of entry into legal force of last contested judicial act passed on given case, if other opportunities for verifying legality of said act in court have been exhausted.

Administrative Decisions.

See category 1 Introduction, topic 1.04 Government and Legal System, subheads Administrative Law, Procuracy.

6.02 LAW REPORTS, CODES:

All RF laws must be officially published to take legal effect. (Const., art. 15[3]). Conflicts between laws and regulations resolved pursuant to hierarchy described in RF Constitution. Constitution is supreme law, followed, in descending order, by federal constitutional law, federal law, presidential decrees and executive/administrative regulations. Normative acts of federal executive bodies are subject to registration with MinJustice. (See category 1 Introduction, topic Government and Legal System for relationship between federal and regional lawmaking.) Judicial decisions are not binding precedent but are increasingly persuasive in lower court practice.

RF legal system is code driven, in civil law tradition. Principal codes are Civil Code, Civil Procedure Code, Criminal Code, Criminal Procedure Code, Arbitration Procedure Code, Labor Code, Land Code, Family Code, Tax Code and Code of Administrative Violations.

Law Reports.

Newly adopted statutes, executive orders and regulations integrated in weekly publication “Sobranie Zakonadatel'stva RF” (“Collection of Legislation”). Prior to 1994, acts of legislature published in “Vedomosti” (“Registers”) of Supreme Soviet and RF legislative organs. Executive acts predating mid-1994 can be found in “Sobranie Postanovlenii Pravitel'stva RF” (“Collection of Government Resolutions”), “Sobranie Aktov Presidenta i Pravitel'stva” (“Collection of Acts of President and Government”) and “Biulleten' Normativnykh Aktov Ministerstv i Vedomstv RF” (“Bulletin of Normative Acts of Ministries and Departments of USSR”).

Judicial decisions, resolutions and explanations of highest courts published in “Biulleten' Verkhovnogo Suda RF” (“Bulletin of Supreme Court”), “Vestnik Vishego Arbitrazhnogo Suda Rossiiskoi Federatsii” (“Bulletin of Superior Arbitration Court of RF”) and “Vestnik Konstitutsionnogo Suda Rossiiskoi Federatsii” (“Bulletin of Constitutional Court of RF”).

“Collection of Treaties in Force” is compilation, with three-year delay, of conventions, treaties and bilateral agreements to which RF is signatory. Most recent agreements found in weekly executive and legislative registers, above, or in monthly Bulletin of International Treaties.

Commercial computer databases of Russian laws and regulations are available, such as Garant, Consultant Plus, Kodeks and USIS services.

6.03 LEGISLATURE:

See category 1 Introduction, topic 1.04 Government and Legal System.

6.04 STATUTES:

See topic 6.02 Law Reports, Codes.

7 CRIMINAL LAW

7.01 CRIMINAL LAW:

Criminal Code (RF Law No. 63-FZ) adopted June 13, 1996 in its latest redaction of Dec. 29, 2009. All laws imposing criminal punishment are included in system of code, comprising single body of criminal law. (UK RF, art. 1). Basic principles of code are legality, equality, justice and humanity. (Id., arts. 3-7). All criminal laws come into force from moment of adoption. (Id., art. 9). Harsher penalties cannot be imposed retroactively. (Id., art. 10). Presumption of innocence exists with all doubts resolved in favor of accused. Accused has right to avoid self-incrimination. Criminal punishment follows for sane individuals 16 years of age or older (14 years of age for more severe crimes, such as murder, sexual crimes, terrorism, etc.). (Id., art. 20). Some crimes may not entail punishment if they are of minimal seriousness (de minimis) or if it is offender's first offense. (Id., art. 76).

As amended by RF Law No. 383-FZ of June 29, 2006, UK RF and UPK RF provide opportunity for defense and prosecution to enter into pre-trial cooperation agreement to arrange issues of liability of suspect or accused depending on his(her) activities following initiation of case or after bringing charge. Once such agreement is concluded and in case certain commuting circumstances are present, punishment will not exceed half of maximum possible sentence provided by UK RF for relevant crime. (Id., art. 61).

Statute of limitations for one kind of criminal offenses ranges from two months to 20 years, depending on crime. (Id., art. 56). Severest crimes against life or social security may be punished by life imprisonment. (Id., art. 57).

Classification of crimes divided into four categories from least to most serious. (Id., art. 15). Sentence cannot exceed limit established for each specific crime. Possible penalties imposed for criminal offense include: arrest; fine; deprivation of right to hold specified offices or to engage in specified activities; deprivation of special military rank or honorary title; obligatory labor; corrective labor; limitation on military service; imprisonment in corrective military section; deprivation of liberty for definite period; deprivation of liberty for life; and capital punishment. (Id., art. 44). Women, minors under 18 years of age, men older than 65 cannot be sentenced to jail for life. (Id., art. 57). Even though death penalty included in code (Id., art. 59), President signed Protocol one of Council of Europe, which stipulates that RF will no longer impose death penalty for criminal offenses. In its Decision of Nov. 19, 2009, RF Constitutional Court declared prolongation of moratorium on death punishment in RF.

RF Law No. 383-FZ of June 29, 2006 substantially amended UK RF definition of such criminal punishment as restriction of freedom. (Id., art. 53). If earlier it prescribed detention of convict in special place without social isolation, now court convicting person to restriction of freedom may impose following obligatory limitations: not to leave his (her) living premises at certain day period, not to visit certain places, not to leave municipality, not to visit public events, not to change his(her) place of living or work or studies without prior consent of supervising body. Convict shall visit state supervising body from one to four times month for registration.

Person who committed tax crime for first time is relieved from criminal liability if fully paid outstanding tax debt and penalties.

Attorney (advocate) may become involved in case immediately upon detention or in case person is not detained, from moment of initiation of criminal case or from moment charges are brought. (Const. RF art. 48[1, 2], UPK RF, art. 49).

Foreigners in RF subject to RF criminal jurisdiction. Russians abroad subject to RF criminal jurisdiction if their act(s) constituted crime in respective country, but no punishment imposed. (UK RF, art. 12).

RF Law No. 153-FZ of July 27, 2006 (last am'd June 6, 2007) introduced property confiscation into UK RF (UK RF, c. 15.1.) which provides that money and property acquired as result of certain crimes subject to confiscation to state benefit, except for property to be returned to lawful owner. In accordance with amendments and additions made by RF Law No. 70-FZ of May 10, 2007, for purposes of strengthening struggle against extremism, liability for vandalism, committed with motive of ideological, political, racial, national or religious enmity, and also for production and issuing of Nazi symbols has been hardened.

RF Law No. 42-FZ as of Apr. 9, 2007 had strengthened liability for breach of copyrights and associated rights and for unlawful use of another's trademark. These deeds are now considered to be grave offenses.

Corruption.

RF Law No. 273-FZ ``On Prevention of Corruption'' of Dec. 25, 2008 defines corruption as abuse of official status, bribery, abuse of powers, commercial subornation or any other illegal use by natural person of his (her) official status in defiance of public lawful interest with aim of gaining any pecuniary interest such as money, valuables, other property, services, or any other pecuniary rights for him(her)self and for third persons as well as granting such advantages to such person by third persons. Such acts deemed as corruption if committed both to personal or corporate benefit.

Types of crimes related to corruption set forth by following UK RF provisions: commercial subornation (UK RF, art. 204), bribery (Id., arts. 290, 291), provocation of bribery or commercial subornation (Id., art. 304), impeding lawful entrepreneurship (Id., art. 169), illicit obtaining or disclosure of commercial, tax or bank secrets (Id., art. 183), subornation of participants of professional sports or show competitions (Id., art. 184), abuse of powers by corporate official in defiance of corporate interests (Id., art. 201), abuse of powers by auditors or notaries public to detriment of aims of their activities (Id., art. 285), abuse of powers by public officer in defiance of aims of service (Id., art. 285), forgery (Id., art. 292). Besides, in effort to stop corruption, Federal Program ``On the struggle against the organized crime'' was elaborated and approved by Government of RF. (Decision of RF Government No. 270 dated Mar. 10, 1999 last am'd dated Dec. 30, 2000). Also there is RF Law No. 115-FZ dated Aug. 7, 2001 ``On the Counteraction to Legalization (Laundering) of the Finance, Gained through the Crime'' and whole series of RF Tax Code rules aimed against corruption.

RF is party to UNO Convention against corruption of Oct. 31, 2003 (signed by RF on Dec. 9, 2003, ratified by RF Law No. 40-FZ of Mar. 8, 2006) and to Criminal Law Convention on Corruption (signed by RF on Jan. 27, 1999, ratified by RF Law No. 125-FZ of July 25, 2006).

On May 19, 2008, RF President signed Decree No. 815 ``On Measures of Struggle Against Corruption''. RF is party to several international multilateral treaties and conventions aimed at struggle against corruption.

Extradition.

Russian citizens on RF territory who commit crime abroad protected from extradition to other countries. (Const., art. 61[1]). However, foreigners in RF who commit crime abroad may be extradited. (Const. RF art. 63[2]; UK RF, art. 13). RF have increased cooperation in area of organized crime by ratifying several bilateral treaties "On Mutual Cooperation in Criminal Cases", with Canada, U.S., India, Republic of Korea, Mexico and Angola. RF is party to European Convention of Apr. 20, 1959 ``On Mutual Legal Assistance in Criminal Cases''. Such questions are also regulated by new UPK RF. (arts. 460-473). According to these articles extradition is possible not only under international agreement but under reciprocity principle.

Criminal Procedure.

On July 1, 2002, UPK RF adopted on Dec. 18, 2001 came into force. This Criminal Procedure Code is based on provisions of Constitution of RF and reflects constitutional principles of Jural State including monopoly of federal procedural law in such sphere—(Const. RF, art. 71[o]), separation of powers—(Const. RF, art. 10), State guarantee of human rights and freedoms —(Const. RF, art. 2, etc.). Superiority of common rules of law and principles of International Law (Const. RF, art. 15[4], provisions of convention for protection of human rights and fundamental freedoms), one of most important constitutional principles, was also reflected in UPK RF. UPK RF includes provisions, regulating (1) preliminary proceedings (pre-court proceedings, preliminary investigation: arts. 140-226) and (2) court proceedings of first (arts. 227-553), appellate and cassation (arts. 354-389) and supervisory (arts. 402-419) instances. UPK RF developed all constitutional provisions concerning criminal procedure, namely: adversary proceedings and equality of parties (Id., art. 15); freedom and personal immunity (Id., art. 10); limitation of individual's constitutional rights only by court decision (henceforth prosecutor cannot permit attachment or search in dwelling, or violation of postal privacy or telephone and other talks—all these matters are under exclusive court jurisdiction (Id., arts. 12, 13, 29, 108); presumption of innocence (Id., art. 14); free access for justice (Id., art. 8). Functions of prosecution, defense and settlement of criminal case are separated and cannot be assigned to same body or officer.

Hence, court is not prosecuting body and is neutral as between prosecutor and defense. (Id., art. 15). UPK RF substantially broadened rights of parties to appeal court actions made within pretrial procedure. (Id., arts. 19, 125). Court supervises actions of pretrial investigative body and prosecutor. In certain cases, UPK RF provides accused with right to apply for consideration of case by jury of 12 persons and professional judge, or three professional judges. (Id., art. 30). By RF Law No. 321-FZ of Dec. 30, 2008 (in force since Jan. 11, 2009) criminal cases related to terrorism, hostage taking, organizing and participation in illegal armed groups, organizing or participating in riots, treason, espionage activities, forced seizure of powers, mutiny, subversion were excluded from jurisdiction of jury.

There are some higher standards for evidence. Statement of accused given during pretrial investigation without advocate and not approved by him in court is inadequate evidence. (Id., art. 75). Attorney (advocate) may become involved in case immediately upon detention or, in case person is not detained, from moment charges are brought. (Const. RF art. 48[1, 2]; UPK RF art. 49[3]). In capacity of defender may act as advocate alone or together with one of immediate relatives of defendant or other person called for by latter if court so allows. At hearing of case by justice of peace abovementioned persons may represent defendant instead of advocate. (Id., art. 49). Criminal procedure permits witnesses in criminal investigations to use services of attorney to same extent as uses by accused. (Id., art. 189). Prosecutor leads prosecution and supervises legality of process activities of investigator or questor. This UPK RF settled new specific rules for criminal proceedings which are as follows: accused charged with minor crime has right upon consent of prosecutor and complainant to agree with accusation presented and apply for assignment of punishment without court hearing. Court will grant such petition if it was voluntarily made and court finds accusation good in law, supported by adequate evidence and after consultation with defender. (Id., arts. 314-316). Violation of provisions of Convention on protection of human rights and fundamental freedoms stated by European Court for Human Rights at consideration of criminal case by Russian court is unconditional ground for cancellation or amendment of court decision. (Id., arts. 413, 415).

UPK RF was amended by several RF Laws with latest as of Dec. 29, 2009, fundamental amendments and additions made by RF Law No. 87-FZ of June 5, 2007. Thus supervision of prosecutor on remedial activity of investigators has been limited in many respects. Heads of investigation bodies (Investigative committee under procuracy, Investigative committee of Ministry of Internal Affairs and investigative bodies of Federal Security Service and Federal Drug Control Service) now have functions of remedial governance of preliminary investigation. Henceforth, heads of investigative bodies are allocated with powers to pass criminal case from one investigator to the other; to check materials of criminal case; to withdraw illegal or unreasonable decisions of investigator; to provide investigators with obligatory instructions; to accept petition before court for election of measure of restraint or other remedial action which is possible according to court judgment; to accept recusations of investigator and dismiss him from further investigation; to extend term of preliminary investigation and to approve decision of investigator on discontinuation of proceedings on case (clause 39 of UPK RF).

However, prosecutor has right to withdraw decision of investigator on initiation of criminal case within 24 hours, if he considers it to be illegal or unreasonable (clause 146 of UPK RF). Prosecutor also has right to demand investigator to dispose infringements of law which he revealed during preliminary investigation. Investigator has right to appeal against prosecutor's decision. However, decision of General Prosecutor shall be final (clause 37 of UPK RF).

Besides that, prosecutor is still allocated with large powers during examination of requirements of law on receipt, registration and sanction of information on crimes. Prosecutor's competence on supervision of preliminary investigation in form of inquisition remains in full force (clause 37 of UPK RF).

Prosecutor has right not to approve conclusion to indict and to return criminal case to investigator for further investigation with his guidance. Investigator has right to appeal against such decision; however, final decision is for General Prosecutor to make (clause 221 of UPK RF).

UPK RF sets additional guaranties for natural persons and companies against abuse from part of investigating authorities. Following investigative measures may be taken only upon prior court decision: visit to living premises without consent of residing persons, search of dwelling, seizure of pledged property, personal search, except for suspect search, seizure of things and documents, containing state secrets, banking secrets or other proprietary information, arrest and seizure of correspondence, arrest of property, including cash in bank, bugging and recording phone calls.

8 DEBTOR AND CREDITOR

8.01 ASSIGNMENTS:

Assignment of claim generally permissible without consent of other party, to extent not inconsistent with law or contract, provided claim not inextricably connected with creditor, such as alimony or personal injury claim. (Civil Code arts. 382, 383). Debtor not obligated to assignee-creditor until assignor-creditor delivers documents evidencing assignment. If not notified in writing of assignment, debtor is duly discharged from obligations by making payments in full to assignor and assignee shall bear risk of such non-notification. (Civil Code, art. 382[3]). Debtor may not fulfill obligations to assignor until provided with proofs of assignment. (Civil Code, art. 385[1]). Assignment must follow same formalities of execution, notarization and registration as transaction giving rise to debt. (Id., art. 389). Initial creditor liable to assignee for invalidity of transferred claim, but not for nonperformance by debtor, unless initial creditor contractually assumes suretyship for debtor's obligation to new creditor. (Id., art. 390). Debtor may not assign obligation to third party without consent of creditor. Formalities and procedure of debt transfer same as for assignment of claim. (Id., art. 391). New debtor has right to base defense against creditor claims on relationship between creditor and initial debtor. (Id., art. 392).

Assignment of Claim for Financing.

Current or future monetary claim may be assigned to obtain or secure financing. Person obtaining financing (“Customer”) liable to person providing financing (“Financial Agent”) for validity of claim assigned (Civil Code, art. 827[1, 2]), but not liable for failure of debtor to fulfill claim (Id., art. 827[3]) unless otherwise provided by agreement between client and financial agent. Assignment of monetary right to claim may also be made as surety of customer's obligations to financial agent. (Civil Code, art. 824). Debtor obligated to pay claim to financial agent only after receiving written notification of assignment specifying claim and identifying financial agent. (Id., art. 830[1]).

If financing received for sale of claim, customer not liable to financial agent if amount received as claim less than price paid for claim. If claim assigned to secure customer's obligation to financial agent, latter must pay customer amount received from debtor in excess of claim secured to financial agent. If amounts received by financial agent from debtor less than amount secured by customer, latter must pay balance to financial agent, unless contract provides otherwise. (Id., art. 831).

If financial agent delivers claim to debtor, latter may claim set-off against amount owing on claim debtor has against customer under debtors' contract with customer, if set-off claim existed when notification on assignment of claim was received. (Id., art. 832[1]). However, debtor may not refuse to pay financial agent based on prohibition against assignment in contract between debtor and customer, unless agent was aware of prohibition. Debtor's only recourse for such violation of prohibition against assignment is against customer. (Id., arts. 832-33).

8.02 ATTACHMENT:

Upon petition of parties court may attach property or assets of party pending court decision and ultimate disposition. (APK RF, art. 90; GPK RF, art. 139). Attachment may include seizure of defendant's assets or funds in possession of defendant or third party; prohibition of certain actions by defendant; prohibition of certain property transfers between defendant and third parties and temporary prohibitions on certain alienations of property. (APK RF art. 91, GPK RF art. 140). For real property, court may direct that notice of attachment be registered with relevant registration authorities. (APK RF art. 93, GPK RF art. 140). Attachment decision may be appealed. (APK RF art. 97, GPK RF art. 145). Court may require plaintiff to provide security against possible losses of debtor resulting from attachment imposed. (APK RF art. 94, GPK RF art. 146). In case plaintiff's claim is rejected, defendant may claim against plaintiff for damages, caused by attachment. (APK RF art. 98, GPK RF art. 146).

8.03 BANKRUPTCY:

Legal entities except treasury enterprises (see category 2 Business Organizations, topic 2.03 Business Associations, subhead State Enterprises), institutions, political parties, religious organizations and sole proprietors may be declared insolvent (bankrupt) by court. Insolvency (bankruptcy) of legal entity is followed by its liquidation. Fund may not be declared insolvent if determined by law providing for establishing and activity of such fund. (Civil Code, art. 65[1]). Grounds and procedures for judicial and voluntary bankruptcy provided in Civil Code and RF Law No. 127-FZ ``On Insolvency (Bankruptcy)'' of Oct. 26, 2002 (``BL'') (last am'd by RF Law No. 374-FZ of Dec. 27, 2009). Special rules apply to lending institutions. (RF Law No. 40-FZ ``On Insolvency [Bankruptcy] of Credit Organizations'' of Feb. 25, 1999 last am'd by RF Law No. 195-FZ of July 19, 2009)—insurance companies, professional stock market participants. (Id., arts. 183, 187).

BL defines bankruptcy as debtor's failure to meet monetary obligations to creditors or obligations to effect compulsory payments to budget within three months after date obligations were due. (BL, arts. 2, 3). State arbitration courts have sole jurisdiction over proceedings of bankruptcy cases. (BL, art. 6).

Proceedings.

Bankruptcy proceedings include Supervision, Financial Rehabilitation, External Management (court-ordered rehabilitation), Competitive Proceedings, and Amicable Agreement. (BL, art. 27). Bankruptcy proceedings initiated by application filed by debtor, bankruptcy creditor(s), and authorized bodies. (BL, art. 7).

Insolvent debtor's executive body obliged to file application with court for declaration of debtor as insolvent (“application for insolvency”) within one month following emergence of insolvent corporation. Failure to file creates potential for personal liability on part of debtor's executive body for portion of debtor's obligations which arose after application should have been filed. (Id., art. 10).

Court shall decline application if it fails to comply with at least one of law requirements. (Id., arts. 43, 33). Upon acceptance of application for insolvency, court institutes supervision proceedings and appoints interim manager. (Id., art. 42). Thereafter, at initiative of creditors, external management, financial rehabilitation or receivership may be imposed by court. Amicable agreement may be concluded at any stage of bankruptcy proceedings. (Id., art. 150). External management, supervision proceedings, financial rehabilitation and amicable agreement do not apply to bankruptcy proceedings brought against banks and other credit organizations. (See RF Law No. 40-FZ “On Insolvency [Bankruptcy] of Credit Institutions”, art. 5.)

Supervision proceedings are applied to debtor in order to preserve its property, carry out analysis of its financial status, file register of creditors' claims and hold first meeting of creditors. (Id., art. 2). Interim manager is appointed by arbitration court upon recommendation of self-regulatory organization of arbitral managers. (Id., arts. 45, 65). Although management body of debtor may remain in place, certain transactions, including those listed in art. 64 of BL, may not be undertaken by debtor without advanced approval of interim manager. In event debtor's property is not properly conserved, or interim manager is hindered by debtor in performance of his duties, or debtor has committed any other legal violations, court may transfer responsibilities of debtor's management to interim manager. (Id., art. 69).

Following results of Supervision procedure, arbitration court shall issue verdict either on initiation of Financial Rehabilitation, or External Management, or Receivership or on approving amicable agreement. (Id., art. 75).

Financial Rehabilitation procedure is applied to debtor in order to restore its solvency and its repayment of indebtedness pursuant to indebtedness repayment schedule. (Id., art. 2). In course of Financial Rehabilitation creditors' claims satisfied according to financial rehabilitation plan of debtor and indebtedness repayment schedule. (Id., arts. 77, 80, 82).

Financial Rehabilitation is initiated by arbitration court pursuant to decision of creditors' meeting or upon petition of debtor's participants or of body authorized by owner of debtor's property.

As rule, arbitration court appoints administrating manager simultaneously with judicial act on initiation of Financial Rehabilitation. (Id., art. 80). In course of Financial Rehabilitation, debtor's managing bodies continue to execute their authority with limitations imposed by law. (Id., art. 82).

Following results of Financial Rehabilitation, arbitration court shall issue verdict either on termination of bankruptcy procedures, or on initiation of External Management or Receivership. (Id., art. 88).

External Management (court-ordered rehabilitation) proceedings are applied to debtor in order to restore solvency. (Id., art. 2). External manager appointed by court and assumes duties of management body of debtor. (Id., arts. 94, 96). External management initially may be instituted for up to 18 months and may be extended for additional six months. Special provisions on insolvency of certain kinds of debtors (natural oil and gas monopolies, city-forming organizations etc.) provide for extended periods of External Management. During this period, moratorium placed on satisfaction of most monetary obligations of debtor. (Id., art. 95).

Receivership applied to debtor adjudged bankrupt in order to liquidate and meet creditor claims on pro rata basis. (Id., art. 2). Once instituted, debtor's pecuniary obligations deemed due and payable. Accrual of default interest, regular interest, and other financial penalties for all types of debtor's liabilities are suspended. Restrictions apply on execution of transactions involving alienation of debtor's assets. (Id., art. 126). Receivership may last for initial period of six months, which may be extended for additional six months. (Id., art. 124).

Court appoints Receiver who is obliged to conduct inventory of debtor's property, collect debts owed to debtor by third parties, reclaim debtor's property from third parties, pursue claims against third parties who bear appending liability in connection with debtor's bankruptcy. (Id., art. 129). Receiver obliged to sell debtor's assets at open auction, unless otherwise provided by BL. (Id., art. 139).

Obligations as follows are to be settled in priority out of bankruptcy assets: debtor's arbitration costs, costs related to repayment of remunerations to arbitral manager, current utilities and operating charges, costs necessary for debtor's activities, creditors' claims arising after application for declaring debtor insolvent accepted by arbitration court but prior to declaring debtor insolvent, as well as creditors' money claims arising in course of receivership; debtor's obligation to pay wages arising after application for declaring debtor insolvent accepted by arbitration court, and debtor's salary payment obligations accrued within receivership period. (Id., art. 134). Thereafter: (1) Individuals to whom debtor liable for personal injury or wrongful death (periodic payments to be capitalized); (2) severance pay and wages for employees and payment of royalties under copyright; (3) other creditors. (BL, art. Id.). Receiver makes settlements with creditors in accordance with register of creditors' claims. Claims of each priority are satisfied following full satisfaction of claims of higher priority except for claims secured by pledge. (Id., art. 142).

Upon termination of settlements with creditors, Receiver files competitive termination report, subject to court approval. Court ruling on termination of competitive proceedings submitted to register of legal persons, and insolvent debtor is deemed liquidated as of date of its deletion from State Register.

Upon considering receiver's report on results of Receivership arbitration, court shall issue act on termination of receivership, and in case of repayment of creditors' claims, act on termination of bankruptcy procedures. (Id., art. 149).

Amicable agreement may be concluded between creditors (upon simple majority decision of creditors' committee, with all creditors, whose claims are secured by loan, voting “in favor”) and debtor, and is subject to subsequent court approval. Approving of settlement agreement by arbitration court within bankruptcy procedures serves as grounds for termination of bankruptcy procedures. (Id., art. 150). Third parties assuming rights and liabilities under amicable agreement may also enter into it. Concluding of amicable agreement terminates insolvency proceedings against debtor. (Id., arts. 150, 157).

Amicable agreement may either be challenged by court as invalid and thus be reviewed (Id., art. 162) or terminated by court decision due to debtor's non-fulfillment of its provisions in favor of at least one-fourth of creditors (Id., art. 164). In this case, insolvency procedures are recommenced against debtor. (Id., art. 163).

8.04 EXEMPTIONS:

Where compulsory execution sought, debtor (individuals) permitted to retain certain possessions including habitation (in case such habitation is only place of living for debtor and his family mates with exception of real estate under mortgage that can be seized in accordance with law), land on which above habitation situated (with exception of real estate under mortgage that can be seized in accordance with law) basic clothing, furniture, minimum foodstuffs and money of debtor and family, minimum supplies essential for continued operation of farming or professional activities and prizes and state rewards awarded to debtor. (GPK RF art. 446). Exemptions for debtors - organizations subject to regulation by special federal law.

8.05 FRAUDULENT SALES AND CONVEYANCES:

Upon suit by victim, transactions concluded under false pretenses, coercion, threat, “ill-intentioned agreement”, or concluded on conditions extremely disadvantageous to one party, may be deemed invalid by court. (Civil Code, arts. 178, 179). Wrongdoer must return proceeds of transaction in kind or compensate value in cash. Injured party must deliver to state any property it received from wrongdoer as part of fraudulent transaction. Wrongdoer must then compensate victim for actual damages incurred. (Civil Code, art. 179). No law expressly applies to fraudulent conveyances.

8.06 GARNISHMENT:

Execution upon debtor's property can be levied in amount of indebtedness. In case debtor's money not sufficient, levy can be executed upon other property owned by debtor with exception of property excluded of turnover or property not subject to levy in accordance with law (EP Law, art. 69). Execution upon property of certain legal entities and individuals provided by law. See also category 5 Civil Actions and Procedure, topic 5.06 Execution of Judgments and

Awards.

8.07 LIENS:

Addressed under topic “retention” in Civil Code, RF law regards lien as right of creditor to retain goods of debtor held by creditor in event debtor fails to timely or satisfactorily perform obligations to creditor or reimburse losses. Retention may also secure claims between parties not directly connected with goods held. Creditor may retain goods even after legal rights to goods technically transferred by debtor to third party. (Civil Code, arts. 359-60). However, when attaching residential building, court must ensure that building belongs to debtor. Satisfaction of obligations against goods subject to lien similar to procedures for execution of pledge. (Civil Code, arts. 359-60).

See topics 8.02 Attachment, Pledges; category 22 Mortgages, topic 22.01 Mortgages.

8.08 PLEDGES:

Pledge regulated by Civil Code and, to extent consistent, RF Law No. 2872-1 ``On Pledge'' of May 29, 1992 (last am'd by RF Law No. 306-FZ of Dec. 30, 2008) (``Pledge Law'') and RF Federal Law No. 102-FZ of July 16, 1998 ``On mortgage'' (last am'd by RF Law No. 166-FZ of July 17, 2009) (``Mortgage Law''). Pledge gives creditor right to preferential satisfaction from pledged property before other creditors, subject to exceptions provided by law. (Civil Code, art. 334[1]).

Pledge agreement must be in writing, must state value of and indicate which party shall retain possession of pledged property, must be notarized if underlying agreement for which security given was notarized, and must be notarized and registered if subject of pledge is immovable property. (Id., art. 339). If pledged property evidenced by security, security must be transferred to pledgee or deposited with notary unless agreement provides otherwise. (Id., art. 338[4]). Subject of pledge may be any property or property rights, including real (immovable) property, except personal claims inextricably connected with creditor (e.g., alimony), and other rights prohibited by law from being assigned. (Id., art. 336). Pledgor must own or have right of economic authority over property to be pledged. (Id., art. 335). Pledged property remains in pledgor's possession, unless otherwise provided by agreement. (Id., art. 338[1]). Pledged property left with pledgor identified by affixing markings evidencing pledge. (Id., art. 338[2]).

Unless otherwise provided by agreement, pledgee's rights extend to appurtenances of pledged property. Pledge shall extend to products and revenues received from use of property, to extent provided by agreement. (Id., art. 340[1]). Pledge of land extends to buildings or edifices situated on land, unless contract so provides. (Id., art. 340[4]). Agreement may extend pledge to prospective rights. (Id., art. 340[6]).

Pledge right arises on conclusion of contract or, if contract requires possession by pledgee, upon transfer of property to pledgee. (Id., art. 341). Rights and obligations of pledgor and pledgee in respect of pledged property defined by statute unless otherwise provided by contract. (Id., arts. 343-47). Agreements requiring that pledgee derive benefit and revenue from pledged property to repay secured obligation enforceable. (Id., art. 346).

Generally, levy on pledged property must be executed pursuant to court order. (Id., art. 349[1]). Levy on pledged movable property can be executed under out-of-court proceedings pursuant to agreement between pledgor and pledgee. (Id., art. 349[2]). Levy on pledged immovable property as well as under out-of-court proceedings executed pursuant to Mortgage Law. (Civil Code, art. 349[2], Mortgage Law, c. IX). Pledged property on which execution has been levied shall be sold at public auction according to statutory procedures. (Civil Code, art. 350, Mortgage Law, art 56, Pledge Law, arts. 28.1, 28.2).

See category 22 Mortgages, topic 22.01 Mortgages.

9 DISPUTE RESOLUTION

9.01 ALTERNATIVE DISPUTE RESOLUTION:

Disputes may be resolved in court (see categories 5 Civil Actions and Procedure, topic Actions; Courts and Legislature, topic Courts) or by alternative dispute resolution (“ADR”) mechanisms. (Const. RF, arts. 45[2], 46[1]). Most common form of ADR in RF is voluntary commercial arbitration. Parties required to include arbitration clause or conclude separate agreement to invoke jurisdiction of International Commercial Arbitration Court of Chamber of Commerce and Industry. (RF Law No. 5338-I “On International Commercial Arbitration” dated July 7, 1993, as last am'd on Dec. 3, 2008, art. 7).

Other forms of ADR are based on following legislation: RF Law No. 102-FZ of July 24, 2002 ``On Arbitration Tribunals in RF'', GPK RF (§§ 5, 6), RF Law ``On Consumer Rights Protection'' No. 2300-1 of Feb. 7, 1992 in its latest redaction of Nov. 23, 2009, RF Law No. 92-FZ of May 1, 1999 ``On Russian Trilateral Committee on Regulation of the Social and Labor Relations'', Labor Code of RF as last am'd on Nov. 25, 2009 (c. 60—individual labor disputes; c. 61 etc.—collective labor disputes).

Arbitration and Award.

Term “arbitration” has two meanings in RF legislature. One defines state court system with jurisdiction over commercial disputes through purely judicial proceedings. (See category 6 Courts and Legislature, topic 6.01 Courts, subhead State Arbitration Courts.) Other defines private ADR mechanisms commonly called arbitration in western courts. Binding conflict resolution through both ad hoc and institutional arbitrations available on voluntary, contractual basis to foreign and Russian organizations with foreign trade, shipping and investment disputes.

Federal Laws.

Resolution of international disputes by ad hoc or institutional commercial arbitration is governed by RF Law No. 5338-1 ``On International Commercial Arbitration'' of July 7, 1993 (``Arbitration Law''). Ad hoc arbitration or institutional commercial arbitration between Russian parties is governed by RF Law No. 102-FZ of July 24, 2002 ``On Arbitration Tribunals in RF'', which provisions do not apply to international commercial arbitration. This law contains similar rules as Arbitration Law for organization, procedures and execution of decisions of Russian arbitration tribunals. Arbitration Law describes requirements for recognition of arbitral awards, execution and contents of forum clauses, composition of tribunals, procedural requirements and substantive challenges to award. Jurisdiction under arbitration law is limited to trade, investment and other types of commercial disputes submitted to arbitration on basis of written arbitration agreement. Arbitral decision, regardless of country of origin, is recognized and executed by competent court in RF, if certain conditions are met. (Id., art. 35[1]). Exclusive grounds for nonrecognition include incapacity of party when arbitration agreement is executed, invalidity of agreement in jurisdiction where dispute is referred or decision is rendered, lack of fair opportunity of losing party to be heard, decision is rendered in manner violative of arbitration agreement, impropriety of subject matter for resolution by arbitration under RF law, and decision is counter to RF public policy. (Id., art. 36). Petition for nonrecognition must be submitted to RF court within three months after receipt of arbitration decision by judgment debtor. (Id., art. 34[3]).

RF Chamber of Commerce and Industry oversees operation of International Commercial Arbitration Court (``ICAC'') and Maritime Arbitration Commission which are most known current Russian institutional arbitration entities. Procedural rules of ICAC effective May 1, 1995 are valid for disputes which arose prior to Mar. 1, 2006 and procedural rules of Mar. 1, 2006 for disputes which arose after Mar. 1, 2006.

Treaties.

Conflicts between RF federal law and international treaties resolved in favor of treaty. (Const., art. 15[4]). USA and RF signed Bilateral Investment Treaty (``BIT'') June 17, 1992 (not ratified by RF), which obligates signatories to provide arbitral fora and recognize private arbitration agreements. UNCITRAL rules apply unless parties stipulate otherwise. (BIT, art. 8). Acknowledgment and execution of foreign awards also mandated under 1958 UN Convention on Recognition and Enforcement of Foreign Arbitral Awards, effective in USSR from Nov. 20, 1960 and enforced in RF pursuant to Decree of USSR Supreme Soviet Presidium of June 21, 1988.

Questions on execution of court decisions (including quasi-state decisions) on disputes appearing at execution of economic activity made by courts of CIS countries are also regulated by Agreement of CIS countries “On the Rules of Settlement of the Disputes Appearing at the Execution of Economical Activity” of Mar. 20, 1992 and partly by Agreement of CIS countries “On the Rules of Mutual Execution of the Decisions Made by the Arbitrage, Commercial or Economic Courts, on the Territory of the CIS Countries” of Mar. 6, 1998.

Proof of Foreign Law.

See category 5 Civil Actions and Procedure, topic 5.01 Actions.

9.02 ARBITRATION AND AWARD:

See topic 9.01 Alternative Dispute Resolution.

10 DOCUMENTS AND RECORDS

10.01 ACKNOWLEDGMENTS:

See topics 10.03 Notaries Public, 10.04 Seals.

10.02 AFFIDAVITS:

Russian notaries may certify affidavits for use in Russian courts international transactions and foreign or arbitral proceedings. (See, Fund. of RF Legislation on Notarization of Feb. 11, 1993; Comments to Regulations on London Court of International Arbitration of Jan. 1, 1990.)

10.03 NOTARIES PUBLIC:

Role of notary in RF differs substantially from role in common law countries. Notaries engage primarily in drafting, registering and safeguarding wills, administering decedent's estates, supervising alienation of real property, authenticating documents, certifying powers of attorney and authenticating signatures. Consular offices abroad have similar and additional functions: e.g., certifying accuracy of translations; establishing persons as living; establishing place of residence; certifying identity of applicant in comparison with photograph; certifying time of execution and submission of documents; accepting deposits of money and securities; accepting documents and evidence for safekeeping; and other notarial functions. (See category 1 Introduction, topic 1.02 Consuls.) RF signed to Hague Convention Abolishing the Requirement of Legalization for Foreign Public Documents of Oct. 5, 1961, on May 31, 1992.

RF Law ``On Fundamentals of RF Legislation on Notaries'' No. 4462-1 of Feb. 11, 1993 (``Notary Fund'') last amended July 7, 2009 allows for government-employed as well as private practitioner notaries. MinJustice RF registers both state and private notaries. In many jurisdictions, including city of Moscow, only private notaries are available. In Moscow, private notaries are registered with Moscow Government Department of Justice and are members of Moscow City Notary Chamber. In absence of notary, local executive may notarize documents.

Notaries prohibited from any activities, except for notary, scientific and teaching activities. Notaries prohibited from acting as contract negotiations intermediaries. (Notary Fund, art. 6). Notarial activities considered non-profit making. (Id., art. 1).

Same rights and obligations attach to state and private notaries, and documents certified by them have equivalent legal effect. Licensed notary who has not practiced for three years must re-qualify by exam. (Id., arts. 3, 4). Notaries must not disclose information contained in documents they examine, except on request of court, procurator, examining official or court bailiff. (Id., art. 5). Notary who intentionally discloses notarial secret liable for damages caused. License may be revoked if notary violates law. (Id., art. 17). Notary is punishable by fine or jail if use of authority contrary to designated purposes or damage caused to protected interests of society. (UK RF, art. 202). Notaries fees are established in art. 22.1 of Notary Fund.

10.04 SEALS:

Seal generally not necessary for execution of contract. (Civil Code, art. 160[1]). However, seal required for execution of certain documents (e.g., power of attorney issued by legal entity [Id., art. 185(5)] and certification of subject of pledge left with pledgor which requires seal of pledgee [Id., art. 338(2)]). Seal also necessary for notarization of documents issued by legal entity (e.g., financial documents, accounting documents). Company must have company seal (RF Law No. 208-FZ “On Joint-Stock Companies” of Nov. 24, 1995, art. 2), commonly used to validate or certify signature. Seal of company must contain its official name and place of registration in Russia. Seal may additionally indicate company name in any foreign language. Theft or destruction of seal for wrongful purpose punishable by fine or jail. (UK RF, art. 325[1]).

11 EMPLOYMENT

11.01 LABOR RELATIONS:

As of Feb. 1, 2002, new Labor Code of Russian Federation (``LC") came into force with latest amendments of Nov. 25, 2009. It has introduced many new provisions into labor relations regulation. RF Labor Code governs such aspects of labor relations as labor organization, employment with particular employer, social partnership, collective negotiations, collective contracts and agreements, participation of employees and trade unions in determination of labor conditions, application of labor legislation, liability of employers and employees, supervision and control over compliance with labor legislation, labor dispute resolution. (RF Labor Code, art. 1). First of all, LC governs relations based on employee/employer agreement on employee's personal fulfillment, for remuneration, of labor functions in compliance with internal labor rules and subject to employer's ensuring of labor conditions provided for by labor legislation, collective contracts, agreements, employment contract. (Id., art. 15). Labor Code determines primary rights and duties of employers and employees.

Labor legislation is mandatory for application by all employers (entities or individuals), regardless of their legal form and form of ownership, throughout territory of Russian Federation. (Id. art. 11).

Terms of labor contracts diminishing rights and guarantees of employees established by labor law are void and inapplicable. (Id., art. 9). Rights and guarantees of citizens in sphere of employment, procedure and conditions of unemployment, requirement that employers secure work places, role of state in employment, compensation and social guarantees also regulated by Law “On Employment of Population in the Russian Federation” No. 1032-1 of Apr. 19, 1991 as last amended by RF Law No. 367-FZ of Dec. 27, 2009, but only in that part, which does not contradict LC.

LC extends to labor relations of foreign citizens and stateless persons, organizations created or founded by them or with their participation, employees of international organizations and foreign legal entities, unless otherwise provided by law or international agreement. (LC, art. 11). In addition to LC, relations arising from activities carried out by foreign workers on RF territory governed by RF Law No. 115-FZ of July 25, 2002 ``On legal status of foreign citizens in RF'' as last amended on Dec. 27, 2009. According to this RF law, only those employers have right to recruit and use foreign workers to maintain labor activity, which received appropriate permission in authorized bodies for internal affairs. Foreign citizen entitled to work on RF territory only by having individual permission for work, which shall be given to specific employer. (Id., art. 13). Every year RF Government sets off quota of invitations for entry in RF of foreign workers, allowed to be sent by employers. (In this year 2010, quota is 611,080 invitations.)

Collective Contracts and Agreements.

LC defines collective contract as legal act regulating social and labor relations within organization or private entrepreneur which is concluded between employees and employers acting through their representatives. (LC, art. 40). It may be concluded for whole organization or for its subdivisions for maximum term of three years and may be renewed for same term.

At higher level (federal, regional, industry, territorial) authorized representatives of employees and employers may conclude agreements establishing general principles of regulation of social and labor relations and related economic relations. (Id., art. 45).

Agreements apply to employers, which are members of association of employers who have entered into agreement, and those who have joined such association or terminated their membership. (Id., art. 48).

Legal status of associations of employers and rules of their activities set forth in RF Law No. 156-FZ of Nov. 27, 2002 “On Associations of Employers”.

Trade unions may be organized to protect and represent employees' social and labor interests. (RF Law No. 10-FZ “On Trade Unions, their Rights and Guarantees for their Activity” of Jan. 12, 1996 as last am'd on Dec. 30, 2008).

Primary trade union or other representatives elected by employees represent their interests at collective negotiations, in conclusion and amendment of collective contract, control over implementation thereof, solution of labor disputes. (RF Law No. 10-FZ art. 13). New LC provides existence of several primary trade union organizations in one entity. For conducting collective negotiations they must establish common body based on proportional representation principle, depending on number of trade union members. (LC, art. 37).

Right to conduct collective negotiations, sign agreements in name of employees at level of RF, its constituents, industry, territories is delegated to respective trade unions and their associations.

Law provides for mandatory participation, in certain cases, of elected trade union body in resolving issues related to employer-initiated termination of employment contract. (Id., arts. 82, 373). Also LC provides guarantees for employees who are members of elected trade union bodies.

Individual Labor Contracts.

Individual agreements between employee and employer are made in form of labor contract (Dogovor). (Id., art. 56).

LC sets forth more detailed regulation of labor contract contents, such contract must be in writing and comprise material terms. (Id., arts. 57, 67). Labor contract is considered concluded if employee starts work on actual permission of employer, or his representative, or if employer or his representative is aware of initiation of work. When employed, employee may not be required to present documents not required by laws. When employee does not have previous labor records, employer is responsible for issuing personal employment history registration book and of providing such employee with Certificate of State Pensions Insurance. (Id., art. 65).

Unjustified denial of employment is prohibited, as well as any limitation of rights connected with sex, race, nationality, language and residence. Employee must inform applicant of reason behind denial in writing on request of latter, such denial may be appealed in court. (Id., art. 64).

Separate new chapter covering protection of employees' personal data has been included into LC. (c. 14). These provisions should be taken into consideration when employer prepares, or requests, any references, in respect of employee. Employee's personal data may be obtained from third parties by written permission of employee; employer must comply with established requirements when using information concerning employee.

Fixed-term labor contract must stipulate circumstance (reason), which are grounds for conclusion of fixed term labor contract, list of such grounds is contained in art. 59 of LC. If neither party demands termination of fixed-term labor contract and employee continues to work, labor relationship is established for indefinite term. (Id., art. 58).

If trial period is provided, such condition must be set forth in labor contract. Trial period may not exceed three months (six months for some categories of employees). Employer reserves right to terminate employment contract in event of unsatisfactory trial results, giving employee at least three-days prior written notice stating reason. Within trial period, employee may terminate employment contract at his discretion, giving employer three-day prior written notice. (Id., arts. 70, 71). Termination of employment contract is permitted on parties' agreement (Id., art. 78), expiration of contract term (Id., art. 79), unilateral termination by employee who must give to employer two-week prior notice in writing (Id., art. 80). List of grounds for termination of employment contract by employer has been supplemented by new LC provisions of which add grounds of termination such as: change of owner of company's assets (in respect of positions of chief executive of company, his deputies and chief accountant); making of unjustified decision by chief executive of organization (its subsidiary, representative office), by his deputies and chief accountant, if such decision caused damage to organization's assets; non-recurrent gross breach of labor obligations by chief executive of organization (its subsidiary, representative office), by his deputies (including breach of labor protection rules, if it has entailed or created danger of grave consequences, disclosure of secrets protected by law, etc.); production of forged or false information during conclusion of employment contract. (Id., art. 81). LC also sets forth other grounds for termination of employment contract. (Id., arts. 77, 83, 84).

Labor Hours and Leisure Time.

Regular workweek may not exceed 40 hours. (Id., art. 91). Rules providing for reduction of working day for special categories of employees (for minors, disabled persons, etc.) remain in force and are governed by art. 92 of Labor Code. Employer must provide part-time work at request of certain classes of employees such as pregnant women, parent of child younger than 14 and persons taking care of ill family member. (Id., art. 93).

Labor Code sets forth provisions requiring written consent of employee for excess of regular work time at request of employer (overtime).

New LC determines basic annual paid vacation equal to 28 calendar days. (Id., art. 115). Additional paid vacations are provided for separate categories of employees pursuant to laws and provisions of collective agreements.

Employee shall have right to take vacation after initial six months of employment, provided that employee may go on vacation earlier if he falls under particular categories of employees or pursuant to agreement of parties. (Id., art. 122).

Pursuant to agreement of parties, vacation may be split into parts provided that one part is no shorter than 14 days; employee may be recalled to work during vacation only with his consent. (Id., art. 125).

Wages.

New LC establishes that minimum wage may not be less than subsistence wage of person able to work (Id., art. 133), provided that subsistence wage shall be stipulated in pursuance of routines and term established by federal law (Id., art. 421). Presently minimum wage stated by RF Law No. 82-FZ of June 19, 2000 as last amended on July 24, 2009 stipulates amount of minimum wage as 4,330 rubles per month starting Jan. 1, 2009.

If payment of wages is delayed by more than 15 days, employee shall have right upon written notice to employer to suspend work for entire period pending payment of overdue sum, except cases when suspension of work is impermissible. (Id., art. 142). If time limits for wages payment are not observed, employer must pay established money compensation for period of delay. (Id., art. 236).

Labour Protection.

Legal grounds of relations in sphere of labour protection set forth by c. X of LC. In accordance with this RF law, different standard acts stipulating obligatory rules, procedures and criteria directed to protection of life and health of workers in process of labour activity have been passed in all spheres of RF economy.

In case of ceasing of works as result of violation of labour protection requirements not due to fault of employee, latter reserves his position with average earning. (Id., art. 220).

In case of termination of labour contract with chief executive body of company by authorized body of company, owner of company's assets or its authorized person (body) prior to its expiration and not by reason of wrongful acts of chief executive of company, company shall indemnify for prescheduled termination of contract in amount as provided by law. (Id., arts. 278, 279).

Supervision and Control of Labor Law.

Federal Labor Inspection bodies perform governmental supervision and control of compliance with Labor Law by all organizations. C. 57 of LC regulates details concerning authority, rights and obligations of state labor inspectors, routines of inspection and procedures for challenging their actions. Governmental supervision over accurate and uniform compliance with labor laws is function of prosecutors' offices. Persons violating labor law may be subject to disciplinary sanctions, civil, administrative and criminal liability. (Id., art. 419).

12 ENVIRONMENT

12.01 ENVIRONMENTAL REGULATION:

Primary legislative act governing environmental control is RF Law No. 7-FZ of Jan. 10, 2002 ``On Environmental Protection'' (``EP Law'') last amended on Dec. 27, 2009. Various regulations issued by environmental authorities purport to implement and supplement this law; however, many uncertainties and gaps in regulations make many provisions of EP Law merely declaratory. Ministry of Natural Resources and Ecology is federal executive body, responsible for working out state policy and regulation of environmental management, on environmental defense and provision of ecological safety.

EP Law establishes jurisdiction of federal and local administration and special environmental authorities over environmental matters (Id., arts. 5-10) and confirms citizens' right to enforce EP Law through court actions (Id., arts. 11-13). EP Law is basis for setting environmental norms and standards, such as environmental quality norm, permissible environmental impact, other environmental norms and environmental requirements provided by national standards. It is also basis for adoption of other environmental regulations. Norms for environmental quality, permissible environmental impact, national standards and other environmental regulations are established by special state authorities. (Id., arts. 19-29).

Special fee is assessed for negative environmental impact (air pollution, pollution and contamination of surface waters, subsurface waters and water catchment areas, subsoil and soil pollution, disposal and burial of waste, noise, heat exposure, exposure to electromagnetic fields and ionizing radiation, and other environmental impact). (Id., art. 16). Procedures for determination and limits of fee for environmental pollution, disposal of waste and other negative impacts are established by Resolution of RF Government No. 632 of Aug. 28, 1992 as amended by Resolutions No. 1428 of Dec. 27, 1994 and No. 463 of June 14, 2001. Norms of payments for air pollution by stationary and adjustable sources, for discharge of wastewater and pollutants into surface and underground water objects and for placement of industrial and consumer wastes stated by RF Government Resolution No. 344 of June 12, 2003 amended July 1, 2005 and Jan. 8, 2009.

EP Law is enforced through assessment of fines, administrative and criminal liability, and imposition on entities and individuals who caused environmental harm of obligation to compensate such harm in full. Limitation period for bringing environmental claims is 20 years. (Id., arts. 75-80).

Several kinds of activity in environment are subject to licensing. List of such activities is established by federal laws.

Treatment of industrial and consumption waste is governed by RF Law ``On Industrial and Consumption Waste'' No. 89-FZ of June 24, 1998 as amended Dec. 30, 2008. This law does not regulate disposal of radioactive waste, biological waste and waste of medical and preventive treatment institutions, discharge of harmful substances into air or water, which are governed by specific regulations of Russian law.

This law establishes waste disposal requirements such as licensing of activities in connection with disposal of hazardous waste, requirements for design, building and operation of enterprises and other facilities, requirements for waste storage facilities, transportation of hazardous waste, cross-border relocation of waste; provides norms for waste disposal, waste burial fee, state control over activities in connection with waste disposal, and establishes liability for violation of waste disposal legislation.

Environmental Due Diligence.

RF Law No. 174-FZ ``On Environmental Due Diligence'' of Nov. 23, 1995 (``Due Diligence Law'') (last am'd on Dec. 17, 2009) implements EP Law requirements on environmental due diligence (``EDD'') for projects or activities that may adversely affect environment. (EP Law, arts. 33, 40, 46, 48, and 50). This Law presumes that any proposed business or other activity is potential environmental hazard.

Application.

Due Diligence Law applies to broad range of projects and documents listed in Due Diligence Law (Id., art. 11-12) and requires EDD prior to undertaking activity that might have environmental impact. Prior to submission of materials for EDD, environmental impact of proposed business or other activity must be assessed (``Environmental Impact Assessment''). (Id., art. 14). Environmental Impact Assessment is conducted in accordance with procedures set forth in Regulation on Assessment of Environmental Impact of Business or Other Activity in Russian Federation. (Order of State Environmental Committee of Russia No. 372 of May 16, 2000). No specific exclusions from EDD review. Private activities subject to review include drafts of production sharing agreements, materials for explanation of license on activities that may have potential impact on environment, drafts of technical documentation for new technique, technology, usage of which may have potential impact on environment, drafts of technical documentation for new substances that may get into environment, objects that are subject to state environmental due diligence, specified in RF Law ``On the Continental Shelf of the Russian Federation'', RF Law ``On Exclusive Economic Zone of the Russian Federation'', and RF Law ``On Internal Waters, Territorial Sea and Contiguous Zone of the Russian Federation'', technical documentation of objects, construction, reconstruction, and capital repair of which is supposed to be performed on natural area of preferential protection, and technical documentation of extra hazardous, technically complicated and unique objects, objects of defense and security, construction, reconstruction, and capital repair of which is supposed to be performed on natural area of preferential protection in case if construction, reconstruction, and capital repair of such objects on natural area of preferential protection permitted by legislation of RF and of subjects of RF. (Due Diligence Law, arts. 11, 12).

Procedure.

During EDD applicant must prove absence of potential ecological danger. Due Diligence Law does not specify affirmative proofs necessary for favorable EDD determination. Applicant must prepay estimated EDD cost. EDD performed by committee of independent experts who must issue report within six months. Report of EDD experts is deemed report of state environmental due diligence only after it has been approved by special governmental authority authorized for EDD. Unfavorable report, which must include explanations, prohibits project. Applicant may file suit for judicial review of unfavorable decision and, if applicant prevails, new EDD conducted.

Penalties.

Applicant in violation of Due Diligence Law if: (1) fails to submit required documents, (2) falsifies materials submitted, (3) causes expert to prepare false opinion, (4) conducts project in violation of unfavorable EDD report, (5) hinders EDD procedure, or (6) conducts project differently from manner described in project proposal. (Id., art. 30). Penalties for violations assessed administratively. If high degree of adverse environmental impact results, criminal penalties may be imposed. (Id., arts. 31, 32).

Forests.

``Forest Code of the RF'' (Federal Law of Dec. 4, 2006, am'd on Dec. 27, 2009) establishes requirements for preservation and protection of RF forests, grounds for granting and termination of rights to use wooded lands. Forests located at lands of forest fund are classified according to designated purpose as protective forests, merchantable forests and reserved forests. Forests, located at lands of other categories are classified as protective forests. Authorized government agencies which are under jurisdiction of Federal and local public authorities maintain control and supervision of use of wooded lands. Wooded lands are granted to individuals and entities for use in accordance with terms set forth in RF Forest Code either on basis of right of continuous unlimited use or right of contained use of foreign wooded land (easement), lease basis or for free limited use or under forest ranges purchase and sale contract. Payments for use of forests are assessed in form of forest rent or under forest ranges purchase and sale contract.

Economic and Fishing Zone.

Pursuant to RF Law No. 191-FZ ``On Exclusive Economic Zone of the Russian Federation'' of Dec. 17, 1998 (as am'd Dec. 27, 2009) and RF Law No. 187-FZ ``On Continental Shelf'' of Nov. 30, 1995 (as am'd Dec. 27, 2009) study, research, production of natural resources in exclusive economic zone, exploration and development of sea bottom and underwater subsurface beyond territorial sea has special regime. Outer boundary of exclusive economic zone is set at distance of 200 nautical miles from starting lines for measuring width of territorial sea, and outer boundary of continental shelf is set at 200 nautical miles from starting lines for measuring width of territorial sea provided that outer boundary of underwater continental margin does not go beyond 200 nautical miles. These Laws establish requirements on protection and preservation of marine environment. All activities concerning mineral and live resources of continental shelf are subject to licensing by authorized federal authorities. RF citizens and entities, including individual entrepreneurs, foreign citizens and entities that are using water bioresources and nonliving resources, pay taxes and duties in accordance with RF tax legislation and make other payments in accordance with RF law. For fishing rights within zone, see category 21 Mineral, Water and Fishing Rights, topic 21.02 Water and Fishing Rights.

Air.

RF Law No. 96-FZ “On Air Protection” of May 4, 1999 as last amended on Dec. 27, 2009, regulates procedure for management and control of air protection and establishes economic mechanisms and incentives for preservation as well as penalties for violation of open air protection legislation.

13 ESTATES AND TRUSTS

13.01 DEATH:

Missing persons are presumed dead five years after date last seen. Period reduced to six months following disappearance under circumstances giving reason to suspect death, and to two years following disappearance within territory where military operations were effected. Official death date of entry of court order declaring person dead or supposed date of death under certain circumstances. Reappearance after declared dead or discovery of residence necessitates decision of court to revoke original decision. (Civil Code, art. 44).

Person who reappears after declared dead may demand return of any property remaining in possession of person to whom property gratuitously passed after declaration of death, with exception of money and bearer securities from bona fide acquirer. (Civil Code, arts. 46, 302). Persons to whom property of declared dead individual passed as result of commercial dealings, must return property only if aware that individual presumed dead was actually alive when they acquired property.

13.02 DESCENT AND DISTRIBUTION:

On Mar. 1, 2002 Third Part of Civil Code of RF took effect in Russia. Law of succession was substantially amended. Reform was directed at reinforcement of freedom of testament and at extension of circle of heirs.

Succession shall be by will and by operation of law.

Succession by operation of law shall take place when and where it is not changed by will. (Id., art. 1111).

Unworthy heirs, i.e. citizens who by their deliberate illegal actions directed against deceased or any of deceased's heirs or against exercise of deceased's last intentions expressed in will, who assisted or tried to assist upon receiving their inheritance or other person's inheritance or who tried to assist in increasing share of estate they or other persons are entitled to, shall not be entitled to inherit either by operation of law or by will if such circumstances have been proven in court. However, citizens to whom deceased has bequeathed property after they had lost right to inherit shall be entitled to inherit this property. (Id., art. 1117).

13.03 EXECUTORS AND ADMINISTRATORS:

Executors and Administration of Estate.

Execution of will shall be effected by heirs under will, except for cases when its execution is fully or partially effected by executor of will. (Id., art. 1133).

Testator may charge personal representative (executor) specified in will with execution of will, regardless of executor being heir or not. Citizen's consent to act as executor shall be expressed by citizen by means of signature on will or in attached application or in application filed with notary within one month after date of opening of inheritance. (Id., art. 1134).

Powers of executor of will shall be based on will whereby person is appointed as executor and executor shall be certified by certificate issued by notary. Executor of will shall take measures required for executing will, namely: (1) arrange for passage of assets of estate to heirs entitled thereto in compliance with wishes of testator expressed in will and with law; (2) take measures on his/her own or through notary for protection and administration of estate in interests of heirs; (3) receive amounts of money owed to testator and other assets for purpose of passing them to heirs, unless assets are subject to transfer to other persons. (Id., part 1, art. 1183); (4) perform testamentary dispositions or demand that heirs perform it under testamentary trust provisions (Id., art. 1137) under provisions whereby they are to execute duty (Id., art. 1139).

Executor of will shall be entitled to act in connection with execution of will in his own name, in particular, in court, other governmental bodies and institutions. Executor of will shall be entitled to reimbursement at account of estate for necessary expenses incurred in connection with execution of will and also remuneration on account of estate if there is provision to this effect in will. (Id., art. 1136).

If estate includes assets that require administration apart from preservation (enterprise, share in authorised [stock] capital of partnership or company, securities, exclusive rights etc.) notary, acting as trustee, shall make trust agreement in respect of such assets.

In case of succession by will whereby executor of will is appointed, rights of trustee shall be vested on executor of will.

Deceased's last abode, or if unknown, then location of principal part of estate, shall be deemed place of opening of inheritance. At law, inheritance can be accepted within six months after date of testator's death. Term of acceptance of inheritance may be renewed by court decision.

Testator's creditors are entitled to present their claims to heirs who have accepted their inheritance, within statutory limitation term set for relevant claims. Until acceptance of inheritance, creditors' claims may be presented to executor of will or estate may be collected to satisfy claims. In latter case, court shall suspend hearing of case until time when estate is distributed among heirs or passed to Russian Federation, Russian Federation subject or municipal entity by way of escheat.

In case testator's creditors file claims, statutory limitation term established for relevant claims shall not be broken, suspended or reinstated. (Id., art. 1175).

13.04 SUCCESSION AND INHERITANCE:

See topic 13.02 Descent and Distribution.

13.05 TRUSTS:

Civil Code identifies trust agreements as arrangement under which one party (“settlor of trust”) gives another party (“trustee”) property for certain period of time. Trustee manages property in trust for benefit of settlor of trust or third party designated by settlor of trust (“beneficiary”). (Civil Code, art. 1012[1]). Transfer of estate in trust shall not involve assignment of right of its ownership to trustee, and settlor of trust remains owner of estate transferred in trust. Trustee must perform transactions with property in trust on its own behalf, specifying in agreements that it is acting as trustee. (Id., art. 1012[3]). All types of property, movable and immovable, including but not limited to enterprises, securities, rights evidenced by securities, exclusive rights and property complexes may be subject of trusts. Specific matters of trust management of mutual investment fund are established by law. Monetary assets held in trust only when specified by law. (Id., art. 1013[2]). Settlor of trust must be owner of property held in trust unless otherwise provided by law. (Id., art. 1014). Trustee may not be beneficiary under trust arrangement. (Id., art. 1015[3]). Trust agreements must specify property in trust, name(s) of beneficiary(ies), amount and form of fee payable to trustee, and term of agreement, which may not exceed five years. Trust agreement must be in writing and registered when provided by law. (Id., art. 1017). Trustee must hold property in trust separately from own assets and maintain separate balance sheet for trust operations. (Id., art. 1018).

Under Russian law trust may be created not only by contract but also in cases provided for in legislation. Law provides for creation of trust in regard of ward if settlor of trust has authority of tutorship or guardian. Notary or executor may be settlor of trust of estate in inheritance. (Id., art. 1026).

13.06 WILLS:

Will can be created by citizens having full dispositive capacity at time it was made. Will shall be made in person. (Id., art. 1118). Law guarantees to citizens freedom of will, which could be limited only in interests of compulsory heirs, which include disabled heirs at law of first category. Deceased shall be entitled to leave by will at his/her discretion property to any person, to set heirs' shares in estate in any way, to deprive one, several or all legal heirs of inheritance without indicating reasons for such deprivation and also to include other dispositions in will in compliance with rules of present Code. Deceased shall be entitled to revoke or alter created will in accordance with rules of art. 1130 of present Code. (Id., art. 1119). (This amendment adopted by Fed. Law No. 231-FZ on Dec. 18, 2006 has come into force on 1 Jan. 2008.)

Will shall be created in writing and attested by notary. Failure to observe rules concerning written form and attestation of will shall cause invalidity of will.

Testator shall be entitled to create will without providing other persons, including notary, with opportunity of familiarizing himself with content thereof (closed will).

Citizen who is in situation that obviously threatens his/her life and who, by virtue of prevailing extraordinary circumstances, is deprived of opportunity to create will attested by notary is entitled to create will in simple written form. Citizen's last wishes set out in simple written form shall be deemed his/her will, if testator has written document in his/her own hand in presence of two witnesses content of which evidences that it is will. However such will shall no longer be valid if within one month after termination of these circumstances testator fails to create will in any other form provided for by law.

Testator shall be entitled to revoke or alter will, at any time after creation without indication of reason for revocation or alteration.

Testator is entitled, by means of new will, to revoke previous will as whole or to amend it by means of revocation or alteration of specific testamentary dispositions contained therein.

In case of invalidity of subsequent will, succession shall take effect according to previous will.

Will can be revoked by means of will revocation dispositions. Will revocation dispositions shall be created in form established for creation of will.

Succession at law takes effect if testator dies intestate, if will is declared invalid, or if part of property is not devised.

Several categories of heirs are set forth for succession at law. Legal heirs of first category are children, spouse and parents of testator. Testator's grandchildren and their issue shall inherit by right of representation. (Id., art. 1142).

If there are no heirs of first category, legal heirs of second category shall be brothers and sisters of testator and his/her grandfather and grandmother both on side of father and on side of mother. Children of brothers and sisters of testator (nephews, nieces of testator) shall inherit by right of representation. (Id., art. 1143).

Legal heirs of third category shall be brothers and sisters of parents of testator (uncles and aunts of testator). Cousins of testator shall inherit by right of representation. (Id., art. 1144).

If there are no heirs of first, second and third categories (Id., arts. 1142-1144), right to inherit by law shall be acquired by testator's relatives of third, fourth and fifth relation degree who do not qualify as heirs under preceding categories. Relation degree is determined by number of births that separate relatives from each other. Birth of testator in this case does not count.

Shall be called upon to inherit as heirs of fourth category relatives of third relation degree—great-grandfathers and great-grandmothers of testator.

As heirs of fifth category: relatives of fourth relation degree—children of nephews and nieces of testator (grandsons and granddaughters once removed) and brothers and sisters of his grandfathers and grandmothers (grandfathers and grandmothers once removed).

As heirs of sixth category: relatives of fifth relation degree—children of grandsons and granddaughters of testator once removed (great-grandsons and great-granddaughters once removed), children of his cousins (nephews and nieces once removed) and children of his grandfathers and grandmothers once removed (uncles and aunts once removed).

If there are no heirs of preceding categories, following shall inherit as heirs of seventh category by law: stepsons, stepdaughters, stepfather and stepmother of testator.

Value and procedure of calculation of compulsory share in inheritance has been changed. Value of compulsory share was reduced from 2/3 to ½ of share that would pass to compulsory heir should order of succession have not been altered by will.

Minor or disabled children of testator, his disabled spouse and parents and also disabled dependants of testator shall inherit irrespective of content of will at least half of share each of them is entitled to in case of succession by operation of law (compulsory share).

Right to compulsory share in estate shall be satisfied out of residual part of estate even if it diminishes rights of other legal heirs in that portion of estate and if intestate part of assets is insufficient to satisfy right to compulsory share, out of portion of assets that has been bequeathed. (Id., art. 1149).

Law particularly protects rights of surviving spouse. Right of inheritance that surviving spouse of testator has by will or by operation of law shall not be less than spouse's right to portion of property gained during period of marriage with testator and deemed their common property. (Id., art. 1150).

If there are no heirs at will or at law or if all heirs have been deprived of right of inheritance (Id., art. 1117), or no heir has accepted decedent's estate and no heir has indicated that he/she waives inheritance for benefit of any other heir (Id., art. 1158), decedent's estate shall be deemed escheat. Escheated property shall pass into ownership of Russian Federation by succession by operation of law. (Id., art. 1151).

Law regulates particularities of how rights in certain types of property are inherited, including bank deposits, plots of land, wages and other compensation not received by testator.

Right to funds paid by citizen as bank deposit or in any other bank account of citizen may be left by will attested by notary or by means of creation of testamentary dispositions in writing in branch of bank where account is located. Such testamentary dispositions shall have effect of will attested by notary in respect of funds kept in account.

Rights in funds in respect of which testamentary dispositions have been created in bank shall be incorporated in estate and be generally inherited in compliance with rules of Civil Code. These funds shall be distributed to heirs under certificate of right to inheritance and in compliance therewith. (Id., art. 1128).

14 FAMILY

14.01 ADOPTION:

RF Family Code (“FC”) of Dec. 29, 1995 last amended on June 30, 2008 (last amendment will come into force on July 3, 2008) allows adoption of child under 18 years when in child's interests on condition that full physical, psychological, spiritual and moral development of child shall be provided. (FC, art. 124). Adoption of siblings not allowed by different families or persons until this adoption conforms to interests of children. Adoption effective upon decision of court. Adoption of child considered by court during special proceedings stipulated by civil procedural legislation. Cases concerning adoption of Russian children by foreign persons fall within competence of courts of subjects of RF. Rights and obligations arising from adoption attach upon court decision. Prospective adoptive parent(s) must be legally competent citizens over 18 years of age. Adopted person must be at least 16 years younger than single adopting parent unless court reduces such term if found it reasonable and with exception of cases when adoption is made by stepparent. Adoption subject to state registration. (Id., art. 125). Full rights and duties of natural child acquired by adopted child, including rights of inheritance, family name and obligations to support ill or elderly parents. Also, adopted child loses full rights and duties towards natural parents. Confidentiality of adoptive status guaranteed. (Id., art. 139). Consent of child necessary if child is ten or older and is not necessary if he/she considers adopter to be his/her parent by birth and lives with him/her. Prerequisite for adoption is consent of biological parents for adoption if they are alive, their parental rights are not annulled, they are not disabled and their location is known.

Adoption of Russian child by foreign citizens or stateless persons permitted when no possibility of placing child with Russian families residing in RF, or with relatives, regardless of citizenship or place of residence. Activities of foreign adoption agencies on RF territory governed by RF Gov. Res. No. 654 of Nov. 4, 2006 ``On Activity of Foreign Agencies for Child Adoption in RF and Control thereof'', last amended on Apr. 22, 2009.

Under provisions approved by said regulation, duly accredited representative offices of foreign organizations produce documents of candidates for adoption to competent executive authority of subject of RF or to RF Ministry of Education and Science for selection of child for adoption and to court for legalizing such adoption; receive derived information about child under application of candidates for adoption; initiate invitations and provide visa support for candidates for adoption; organize reception and accommodation of candidates for adoption, render necessary assistance in execution of adoption; participate in court proceedings in hearing of cases for adoption; obtain court decisions for adoption, assist candidates for adoption in obtaining of certificate of birth of child and his passport to exit territory of Russian Federation; effect other activities for representation of interests of candidates for adoption and adoptive parents within territory of RF unprohibited by Russian legislation.

14.02 ALIMONY:

See topic 14.04 Divorce, subhead Alimony.

14.03 DISSOLUTION OF MARRIAGE:

See topic 14.04 Divorce, subhead Dissolution of Marriage.

14.04 DIVORCE:

Dissolution of Marriage.

Marriage shall be terminated by administrative order subject to mutual consent of spouses having no common minor children. (FC, art. 19). Certificate of dissolution of marriage is issued one month after filing of application. Spouses having common minor children but having reach consent on dissolution of their marriage are entitled to dissolve it judicially but by streamlined proceedings: without hearing and of course without investigation of causes of divorce and without reconciliation procedure. Court decision shall be issued one month after filing of statement of claim. Termination of marriage that lacks consent of any spouse shall be effected judicially under rules of action proceedings. In course of divorce proceedings, disputes on division of property and on determination of parent to have custody of minor children may be resolved, support may be awarded for minor children and alimony for needy or disabled spouse. Husband is not entitled to file divorce if wife is pregnant and within one year after baby's birth. (Id., art. 17). Spouses are entitled to make agreements on alimony payment. In default of agreement, following persons are entitled to demand payment of alimony from spouse with sufficient means: (a) disabled or needy spouse, (b) wife within period of pregnancy and within three years after birth of common baby, (c) needy spouse taking care of disabled child etc. (Id., art. 90).

Marriage is considered to be dissolved upon effectiveness of court decision. Marriage may be annulled upon court decision in case of breach of provisions of Family Code on terms of marriage including failing of free-will consent on marriage or in case of concealment of venereal disease or HIV infection. (Id., arts. 12-15).

Alimony includes all familial support obligations, including material support for spouse, child maintenance, and support of elderly or infirm parents. (Id., arts. 13-15). Amounts and procedures for alimony payments established by mutual written consents of spouses or other persons providing and benefiting from support (or legal representative of beneficiary).

Parents are entitled to make written and notarized agreements on support of their minor children but amount payable under this agreement is not to be less than one provided for by law. Amount of alimony collected for minor children is set forth pro rata to wages of parent liable to pay alimony. Court collects ¼ of parent's wages for one child, 1/3 for two children and ½ for three and more children. (Id., art. 81). In certain cases, court upon application of claimant is entitled to fix amount of alimony collected for minor children in fixed sum of money paid monthly.

In case of departure of person liable to pay alimony from RF for permanent residence and if there is no agreement, interested person is entitled to sue for determination of amount of alimony in fixed sum and for lump sum alimony or for provision of specific property against alimony. Court may change amount of alimony or relieve parent from his/her liability to provide money for support of children but in cases enumerated in law only.

Children who have reached age of majority and who are able to work are obliged to provide money for support of needy disabled parents. In default of agreement on payment of alimony, latter shall be collected judicially in fixed sum of money.

14.05 GUARDIAN AND WARD:

Trusteeship and guardianship used to protect rights and interests of legally incompetent persons and minors. Trusteeship established over children under age 14 as well as over citizens declared by court as lacking dispositive capacity by reason of mental disorder and court certified incompetents. (Civil Code, art. 32). Guardianship established over minors (age 14-18) and court-certified drug or alcohol abusers. (Id., arts. 31-33). Trustees are ward's representatives in transactions, acting on behalf of ward. Being legal representatives of their respective wards, trustees and guardians represent their interests in relations with any third persons without power of attorney.

Trustees and guardians appointed and supervised by local administrative bodies at place of residence of ward. (Id., arts. 34-35). Trustee or guardian usually serves without compensation and lives with ward. (Id., art. 36). Extensive rules govern management of ward's income and property. (Id., arts. 37-38). Family Code provides additional rules for guardians and wards where wards are minors. Essence of them is that trustee or guardian is to obtain prior written permit from tutorship and guardian authority for dealing, for disposition of property of ward, leasing or pledge. Head of local administration should sign such permission.

``Patronage'' guardianship established by local bodies for legally competent persons who due to health conditions cannot exercise or protect their rights. Patronage guardians appointed with acceptance of guardian and ward. (Id., art. 41). Property of ward disposed of and transactions handled by guardian with ward's consent according to trust, agency or another type of agreement between guardian and ward. (Id., art. 41[3]). Any breach of guardian's obligation under above agreement is ground for its termination. Patronage is terminated following termination of trust, agency or another type of agreement. (Id., art. 41[5]).

On Sept. 1, 2008, Federal law ``On Trusteeship and Guardianship'' adopted on Apr. 24, 2008 has come into force. Law extends rights of children deprived of parental care and is aimed to place such children to family. New Federal law ``On Trusteeship and Guardianship'' amends Civil Code, Family Code, and Housing Code of RF. Such amendments have come into force on Sept. 1, 2008.

14.06 INFANTS:

RF citizens acquire full civil rights and legal capacity at age 18. In cases where law permits marriage before age 18, citizen acquires full status from moment of marriage, even if marriage dissolved before age 18. (Civil Code, art. 21). If marriage invalid, court may deprive underage spouse of full legal capacity. Minors age 16 or over may claim full legal capacity and attendant rights under employment contract or as sole entrepreneur, with consent of parents or guardian, and when parents or guardians do not consent, by decision of court. Parents and guardians not liable for obligations of emancipated minor. (Id., art. 27). Transactions on behalf of unemancipated minors between ages six and 14 must be executed by parents or guardians, except that such minors have right to effect certain minor transactions. Parents and guardians liable for transactions and harms incurred by minor under age 14, including those effected by minor independently, unless they can prove lack of fault for breach of obligation. (Id., art. 28).

Minors of 14 to 18 years of age are entitled to enter into contractual relations only with written consent of their parents or guardians except petty daily transactions, transactions concerning minor's income (earnings, scholarship, royalties), entering into deposit agreements with banks and operating funds under deposit accounts.

Rights of minors under age 18 declared to be specifically protected, including protection while in (nursery) schools, health protection, assistance with respect to professional orientation and training of minors older than 14 years, vacation and rehabilitation, social infrastructure development, protection from harmful information and propaganda and social assistance in emergency situation. Report on status of minors annually delivered to Duma. (Law No. 124-FZ “On Major Guarantees of Rights of Infants in the RF'' of July 24, 1998, last am'd on Dec. 17, 2009).

14.07 MARRIAGE:

Men and women at least 18 years of age, or at least 16 years of age in extraordinary circumstances, may wed one month after filing application with Bureau for Registration of Acts Affecting Civil Status. Marriage may be registered at option of fiancé and fiancée with any Bureau all over Russia. (RF Law No. 143-FZ of Nov. 15, 1997 ``On Acts of Civil Status'', c. 3, last am'd Dec. 27, 2009). Rights and obligations of spouses attach on registration. (FC, arts. 10-13).

Marriage prohibited when: one applicant already married, applicants related by blood, one applicant is adopted parent of other, or one or both applicants have been certified incompetent by court or between persons who have not attained marriage age if no permit to decrease marriage age was received. (Id., art. 14).

If man and woman cohabitate or are married in church without state registration court may declare de facto marriage upon presentation of satisfactory evidence.

Registering marriage, spouses may choose common family name or continue to have antenuptial names. Common family name to be entered in marriage certificate may be surname of one of spouses or double family name formed by adding surname of wife to name of husband. (Id., art. 32).

Property.

Husband and wife have equal rights. (Const., art. 19). Spouse does not lose rights to property acquired before marriage. (Civil Code, art. 256[2]). Spouses hold after-acquired property jointly. Property possessed by either spouse before marriage remains separate and may be alienated without consent of spouse. Property acquired by one spouse during marriage becomes joint property. Inheritances/bequests and gifts to one spouse do not become joint property. Exclusive right on result of intellectual activities of one spouse belongs to author of such result. In event of dispute, court may fix spouses' shares, considering relative earning capacities. In dividing jointly acquired property, shares of spouses are considered equal, but court is entitled to deviate from principle of equal shares taking into account reasonable interests of one of spouses or their minor children. In property settlement, non-luxury items used solely by one spouse pass to that spouse without compensation to other. Luxury items retain joint property status in absence of formal agreement to contrary. Individual debts of spouses may be enforced from property owned by him/her. If personal property is not sufficient to pay debts, enforcement may be applied to share of debtor spouse in common property of spouses. If both spouses are debtors, or only one spouse is debtor, but debt was made for sake of family, such debt considered as common debt of spouses. Common debt is first enforced from common property of spouses, and then from each spouse's personal (separate) property. Marriage contract in written and notarized form can change status of acquired property and terms of possession. Marriage contract may be entered into by persons marrying or by spouses at any time before dissolution of marriage. (Id., arts. 40-44). Marriage contract regulates privity between spouses, including dissolution of marriage. Marriage contract also may fix obligations of spouses for mutual support. Non-privity between spouses, and relations between spouses and their minor children may not be subject of marriage contract.

To Foreign Nationals.

Family Code requires persons married on RF territory to satisfy qualifications for marriage according to legislation of their respective countries of citizenship (or in case of stateless persons, of jurisdiction in which they are resident) unless those requirements prohibit such marriage. Form and procedure must follow RF law. Thus, if marriage would be illegal in person's own country, marriage will be illegal in RF. If person has dual citizenship in RF and other country, requirements of RF law apply. If person has dual citizenship in two non-RF countries, person may choose which law shall apply. (Id., art. 156). RF recognizes legal marriages performed outside RF if they do not meet criteria for prohibition. (Id., art. 158).

15 FOREIGN TRADE AND COMMERCE

15.01 CUSTOMS (DUTY):

New RF Customs Code, approved by RF Law No. 61-FZ ``On the Customs Code of the RF'' of May 28, 2003 last amended Nov. 28, 2009 (``TK RF''), defines legal, economic and organizational principles of customs organization in Russia; describes organization of customs control, customs regimes for cross-border goods movements, free customs zones, types of customs payments, customs clearance procedures, customs exemptions and benefits, general provisions for violation of customs legislation, and dispute settlement procedures.

Principal customs regimes are import of goods for free circulation, reimport, transit shipments, bonded warehouses, duty-free triad, processing on outside customs territory, processing under customs control, temporary importation/exportation, free customs zone, free warehouse export and reexport. (TK RF, art. 155). Customs payments include import/export customs duties, VAT on import, excise charged on imported goods, miscellaneous charges for issuance of licenses or certificates, storage of goods, fees for customs clearance, fees for customs accompaniment of goods, payments for information and consulting and others. (Id., arts. 318, 357.1). Exemptions from customs duties found in relevant import or export tariffs and subject to frequent change. Level and applicability of duties depends on customs regime. Certain exemptions and benefits may be specifically provided by customs legislation. By special provisions of effective legislation validity of cl. 2 art. 330, cl. 2 art. 331, cl. 1 art. 345 and cl. 5 art. 432 in respect of payment to customs office of customs duties and taxes in foreign currency.

Export Duties.

RF seeking to abolish export customs duties in order to gain admission to World Trade Organization. Currently, there are still certain export duties for major export goods and resources, e.g.: oil—$270,7 per 1,000 kg; oil-well gas—5% of customs value; while natural gas—30% of customs value. (RF Gov. Regulation No. 695 of Nov. 16, 2006 last am'd on Dec. 25, 2009, Regulation No. 795 of RF Gov. of Dec. 23, 2006 last am'd on Dec. 16, 2009).

Import Tariff (Duty).

In accordance with RF Gov. Resolution No. 148 ``On Customs Tariff of Russian Federation—Code of Import Duties Rates and Nomenclature of Goods Used in External Economic Activity'' of Feb. 22, 2000 (last am'd Nov. 6, 2008) and RF Gov. Resolution No. 830 ``On Customs Tariff of Russian Federation and Nomenclature of Goods Used in External Economic Activity'' of Nov. 30, 2001 (last am'd Apr. 30, 2009). Duties charged on basis of type of goods imported, with goods allocated to certain categories listed in Nomenclature of Goods mentioned above. Basic rates established as percentage of customs value or in [Euro] or US$ per unit and range from duty-free to 100% (for nearly pure alcohol).

Import duties, benefits and preferences provided by TK RF (art. 318—last amendments of Oct. 30, 2007 concerning special protective, antidumping and compensatory duties), RF Law No. 5003-1 ``On Customs Tariff'' of May 21, 1993 (last am'd June 28, 2009) (arts. 35-37), and granted in accordance with decisions of RF Gov. and Presidential Decrees. Preferred developing countries listed in RF Gov. Decree No. 1057 of Sept. 13, 1994, and granted 25% or 100% reduction in customs tariffs. This list is subject to amendments according to level of economical development at least once in five years. System of duties, benefits and preferences tends to decrease, as result of tougher control established by state. Main productive assets contributed by foreign investors to charter capital of companies with foreign investment are exempt from customs duties provided that such investments are not subject to excise tax, constitute capital assets and are contributed within time required by company charter. (Regulation No. 883 of RF Gov. ``On Preferences in Payment of Import Customs Duty and VAT with respect to Goods Being Imported by Foreign Investors as Contributions into the Charter Capital of Companies with Foreign Investment'' of July 23, 1996).

Commencing Nov. 29, 1994, GTK RF strengthened mandatory certification procedures for imported goods, requiring proof of safety certification at time of customs clearance. (GTK Letter No. 01-13/6148 of June 3, 1994 “On Reinforcement of Customs Control on Mandatory Certified Goods” and FCS Letter No. 06-73/44906 of Dec. 19, 2006 “On List of Goods Subject for Mandatory Certification Upon Release of Goods to the Territory of Russian Federation”, as last am'd on Nov. 20, 2007).

VAT on Import.

In accordance with TK RF (art. 318) and Tax Code of Russian Federation (“Tax Code”) all imports of goods currently subject to 18% VAT with few exemptions. Reduced rate of 10% VAT applies to selected foodstuffs, goods for children, periodicals, and some medical-care products. For other kinds of goods not specified in items 1, 2 and 4 of art. 164 of Tax Code, are applied rate of 18%. (Exceptional rate of 0% is applied for certain articles [example, goods for embassies, missions, etc.—par. 1, art. 164]). VAT on imports calculated based on customs value of imported goods augmented by import duty and, if applicable, excise duty. (Tax Code, art. 160). Exports of goods and import of certain goods, e.g., uncut diamonds, technical equipment contributed by foreign investors to charter capital of companies with foreign investment, ships registered in “Russian international ship register” are exempt from VAT. (Tax Code, arts. 150, 164).

Excises on goods brought into/out of customs territory of Russia are applied in accordance with RF Customs Code and RF Tax Code. List of excise goods includes alcohol, spirits, wine, beer, other beverages, cigarettes and cigars, petrol, engine oil, automobiles, etc. (Tax Code, art. 181). Excise rates set by Tax Code, art. 193, as fixed price in rubles per unit of measurement (kg, litre, hp, etc.).

Customs Clearance Fee.

Customs clearance fee is limited by approximate amount of service and shall not exceed 100,000 rubles. (TK RF art. 357.10). Exact fees settled by RF Gov. Regulation No. 863 of Dec. 28, 2004 ``On Fees for Customs Clearance of Goods'' amended Mar. 10, 2009.

Goods may be imported into RF free of customs duty if placed in customs warehouse. (TK RF, art. 215). Temporary importation of goods allowed for two years with possible extension of term. Special provision is provided for capital assets that can be imported temporarily for 34 months, if they are possessed by foreign company or individual. (TK RF, art. 213). Temporary importation attracts monthly payments of 3% on basis of total taxes, duties and charges which would have been payable had goods been brought in for free circulation. (Id., art. 212).

Individuals entitled to import goods up to 65,000 rubles in value which do not exceed 35 kilograms free of customs duties. (RF Gov. Decision No. 718 of Nov. 29, 2003 last am'd Apr. 29, 2009). Individuals may also receive goods sent by international mail free of customs duties if value does not exceed 10,000 rubles. (Id.). Permanent residents of RF whose temporary stay in foreign country exceeds six months may import goods up to 650,000 rubles free of customs duties. (Id.). Special rules apply to import of automobiles. (RF Gov. Decision No. 718 of Nov. 29, 2003 last am'd Apr. 22, 2009). Individuals - participants of State Program on assistance of voluntary migration of compatriots living abroad and their families (President Decree No. 637 of June 22, 2006) that are jointly moving for permanent residence to Russia are discharged from payment of customs duties and taxes on goods, including automobiles (one per family), upon entering RF territory for purposes of permanent residence. Such remission provided singly and is valid during term of State Program expiring in 2012. In compliance with TK RF, art. 333 delay or extension of customs duties payment may be granted for period from one to six months by authorized customs bodies.

15.02 EXCHANGE CONTROL:

CBR implements foreign exchange control laws. Only banks licensed by CBR to perform foreign currency operations (``authorized banks'') may purchase and sell foreign currency and operate foreign currency exchange offices in RF. (RF Law No. 173-FZ of Dec. 10, 2003 ``On Foreign Exchange Regulation and Foreign Exchange Control'' [latest amendments of July 22, 2008] [``Exchange Control Law''], arts. 1, 4).

This law brought certain innovations, introducing liberal approaches to currency regulation and reducing governmental control. Since July 1, 2006, art. 7 on RF Government control of transactions connected with movement of capital is abolished. Number of governmental acts which promote same principles are to enter into force in nearest future. Changes, concerning liberalization of Russian exchange control, are in dynamic process.

New classification of securities has been introduced. They are divided into: “internal” (issued in Russian currency) and “external” (issued in foreign currency).

Moreover, new definition of “Currency valuable” is adopted. Precious metals and stones are now excluded from currency valuables.

RF Law No. 173-FZ abolishes such type of transactions as “transactions connected with movement of capital” since Jan. 1, 2007.

Another innovation is list of currency operations that can be effected without limitation by residents and authorized banks that are not classified and may be enlarged by CBR. Also right for residents to open without limitation bank accounts in member countries of OECD or FATF is granted. Since Jan. 1, 2007 (RF Law No. 173-FZ art. 26), it is possible to open such bank accounts in all countries without any limitations.

Domestic sales of goods and services for foreign currency to individuals is prohibited subject to few exceptions (payments in duty-free zone, related to international transportation services, etc.). (Id., art. 9). Nonresidents may effect all sorts of transactions between themselves in foreign currency in RF. (art. 10). All sales and purchases on RF currency markets must be executed by authorized banks. (Exchange Control Law, art. 11).

Now RF legal entities must not convert foreign currency export revenues into Russian rubles. (CBR Instruction No. 111-I of Mar. 30, 2004 with amendments of Mar. 29, 2006). Nonresidents may have and operate foreign currency accounts in Russia according to servicing bank's procedures established by Central Bank of Russia. Russian legal entities required to maintain books in rubles at exchange rate on date of transaction. (RF Law No. 129-FZ ``On Accounting'' of Nov. 21, 1996, art. 8 last am'd Nov. 23, 2009; Regulations ``On Accounting of Financial Investments'', approved by MinFin RF Order No. 126n of Dec. 10, 2002, last am'd Nov. 27, 2006).

Since Jan. 1, 2007 arts. 16, 17 of RF Law No. 173-FZ providing reservation of sum, calculated as percentage of operation, and ensuring performance of obligation of nonresident to resident abolished also as art. 21 obligatory offer of share of foreign currency earnings at domestic foreign exchange market.

15.03 EXPROPRIATION:

See topic 15.05 Foreign Investment.

15.04 FOREIGN EXCHANGE:

See topic 15.02 Exchange Control; category 1 Introduction, topic 1.03 Currency.

15.05 FOREIGN INVESTMENT:

Federal Law No. 160-FZ of July 9, 1999 “On Foreign Investments in the RF” (“Investment Law”), last amended on Apr. 29, 2008, provides various guarantees to foreign investors with respect to their investments and derived profits, such as legal protection of investment activities, right to use various forms of investments, protection against negative change in Russian legislation, right to repatriate profits, compensation in event of nationalization, etc. “Foreign investment” defined as all assets, including intellectual property, invested by foreigners to derive profit. (Investment Law, art. 2). Investor may establish wholly-owned or joint venture enterprises, purchase property including securities and investment properties, purchase right to use land and other natural resources, participate in privatization, and conduct any business not prohibited by Russian law, including granting of loans, credits, property and property rights. Investors may be foreign legal entities, foreign citizens, foreign states or international organizations. (Investment Law, art. 2).

Arts. 7, 16 don't regulate relationships involving residents of special economic zone, that invest in industrial, technic-implementary and tourist-recreational activities. (art. 1, RF Law No. 160-FZ). Investment Law guarantees protection of foreign investments under conditions no less favorable than those granted Russian residents. Investments that can be classified as priority investment projects (Id., art. 2) are protected from adverse change of legislation for investment period not longer than seven years (“grandfather clause”). (Id., art. 9).

``Foreign Investments in companies of strategic importance''.

In May 2008, new law concerning foreign investments was enacted. RF Law No. 57-FZ of Apr. 29, 2008 ``On Procedure of Investments in Economic Companies of Strategic Importance for Ensuring Country's Defense Capacity and State Security'' brought serious restrictions in legislation on foreign investments. This RF Law establishes withdrawals of restrictive nature for foreign investors and for groups of persons which include foreign investor (hereinafter – group of persons) when they participate in authorized capitals of economic companies which are of strategic importance for ensuring country's defence capacity and state security and/or when they make transactions entailing institution of control over said economic companies. Group of persons for purposes of this Law is defined in accordance with Federal Law ``On Protection of Competition'' and includes all affiliates, subsidiary and parental companies, and wide range of other connected persons. Art. 6 of RF Law No. 57-FZ includes 42 items describing activities which are of strategic importance, i.e. space activities, military arms activities, TV and radio broadcasting in territory whose population constitutes 50% or over 50% of population of RF constituent entity, geological exploration of subsoil and/or prospecting and extraction of minerals in subsoil areas of federal importance, etc. Art. 5 defines features indicating that company is under control. Art. 7 describes transaction where to RF Law 57-FZ applies. Transactions made in defiance of requirements of this Law shall be null and void. (Art. 15).

“Repatriation of Investments”.

Foreign investors guaranteed unobstructed transfer abroad of foreign currency investment proceeds and other property or information, if it was imported as investment, not subject to measures of non-tariff regulation and licensing. (Investment Law art. 12).

Expropriation.

Foreign investment not subject to nationalization, requisition or confiscation, except in special cases dictated by public interest (eminent domain). Upon nationalization or requisition, investors entitled to prompt, adequate and effective compensation. Investment disputes involving foreign participation may be settled by courts of arbitration or general jurisdiction. (Id., arts. 8, 10). Additionally, U.S. and RF concluded “Bilateral Investment Treaty” of June 17, 1992, but RF implementing legislation not yet adopted.

Guarantees and protection for capital investments (production assets, construction, machinery purchase) are granted by Federal Law No. 39-FZ of Feb. 25, 1999 “On the Investment Activity in the RF in the Form of Capital Investments” last amended July 24, 2007. Capital investments defined as investments made into capital assets including building construction, enhancement, reconstruction and technical modernization of plants, purchase of equipment, tool, surveying, etc. (Id., art. 1).

RF Government Regulation No. 302 of May 22, 2006 “On charter and activity of companies with foreign investments on the territory of restricted areas" last amended Apr. 22, 2009 provides special rules concerning companies with foreign investments on territory of such areas. To charter such company permission of Federal Security Service of RF and Ministry of Internal Affairs needed. (par. 2 of Rules).

“Investments in Natural Resources”.

RF Law No. 225-FZ “On Production Sharing Agreements” of Dec. 30, 1995, as last amended Dec. 30, 2008 (“PSA Law”) establishes legal grounds for relationships between Russian and foreign investments in exploration, development and production of mineral raw materials in RF. Under production sharing agreements, RF provides investor (Russian or foreign) with exclusive rights for exploration, development and production of mineral raw materials in subsoil area defined in agreement and operations related thereto on chargeable basis and for certain period; investor performs above operations at own risk. (PSA Law, art. 2). Production under agreement shared between RF and investor. (Id., art. 8). Under agreement, special method of taxes and duties levy is applicable for investor. (Id., art. 13). In 1999 several laws implementing PSA Law were adopted. Most significant is Federal Law No. 32-FZ of Feb. 10, 1999 “On Introduction of Amendments to the Russian Legislation with Respect to the Law on Production Sharing Agreements”. Provisions of international treaties of RF prevail over PSA Law. (Id., art. 24).

15.06 FOREIGN TRADE:

RF Law No. 164-FZ “On Basis of State Regulation of Foreign Trade Activity” of Dec. 8, 2003 (“Foreign Trade Law”) last amended Feb. 2, 2006 determines basis of regulation of foreign trade activity. “Foreign trade activity” defined as business activity in field of international exchange of goods, services, or intellectual property. (Id., art. 2). Foreign trade law includes principle of nondiscrimination among foreign trade participants subject to limitation “if not otherwise prescribed by law”. (Id., art. 4). Both Russian and foreign persons entitled to conduct foreign trade. State regulations are stated in art. 12 and list is exhaustive. They include import customs and tariff regulations, non-tariff regulations, restrictions and limitations for foreign trade of services and intellectual property; economic and administrative measures, targeted at foreign activity. New principles of activity were introduced: publicity in elaboration of state regulation methods of foreign trade (art. 15) and confidentiality, demanding state authorities to keep in secret state, commercial and other kinds of legally protected information (art. 17). Law excluded article regulating foreign entities' offices in RF, however, art. 2 contains “commercial presence” term, providing all sort of legally admissible form of foreign office in RF.

RF Law No. 63-FZ “On Measures for Protection of Economic Interests of RF in Foreign Trade of Goods” of Apr. 14, 1998, last amended on Dec. 8, 2003. These amendments have almost abolished law—except for definition of agricultural goods and possibility to adopt special duty on agricultural goods (arts. 2, 6). RF Law No. 165-FZ of Dec. 8, 2003, last amended Dec. 30, 2006 establishes security of economic interests of Russian manufacturers and applies to relations, arising from investigations prior to introduction of special measures of goods' importing.

RF Law No. 4804-1 ``On Export and Import of Cultural Resources'' of Apr. 15, 1993 last amended July 17, 2009 in part of art. 9 added by cl. 1 according to which cultural recourses that were imported to RF and produced more than 100 years ago can be exported by legal entities and individuals in accordance with provisions of law restricts export of certain historical, scientific, and cultural assets. RF Gov. Res. No. 854 ``On Licensing and Establishing Quotas for Export and Import of Goods (Services) in RF'' of Nov. 6, 1992, identifies items subject to export and import quotas and licensing. RF Law No. 114-FZ ``On Military and Technical Cooperation of RF with Foreign States'' of July 19, 1998 (last am'd May 7, 2009), and Presidential Decree No. 1062 ``On Issues of RF Military and Technical Cooperation with Foreign States'' of Sept. 10, 2005 (last am'd Dec. 17, 2007), regulate import of military hardware and technology. Specific legislative acts govern import of nuclear materials, alcohol, medicines and precious materials. Imports must correspond to technical, pharmacological, sanitary, veterinary, and ecological standards. Complimentary federal and regional measures may be assumed to promote foreign trade. (Foreign Trade Law, art. 46).

With regard to foreign trade import and export contracts CBR and FCS RF have established procedures for issue of Transaction Passports by RF residents for purposes of currency control and cooperation between authorized banks, customs authorities and RF foreign trade participants. (CBR Instruction No. 117-I ``On Procedure of Presenting Information by Residents and Nonresidents to the Authorized Banks When Effecting Foreign Currency Operations Procedure and Transaction Passport Issuance Procedure'' of June 15, 2004 last amended Aug. 12, 2008). CBR has taken steps to prevent capital flow through false contracts by requiring importers to deposit amount equal to amount of future contract delivery, unless importers provide additional guarantees from bank.

16 HEALTH

16.01 HEALTH REGULATION:

Supervision.

Under RF Health Care Fundamentals of July 22, 1993, as last amended on Dec. 27, 2009 (hereafter - ``HCF''), national health care system includes RF, federal executive health care authorities, executive health care authorities of RF subjects, Russian Academy for Medical Science which are engaged in planning and implementation, within their competence, of activities on protection of health of citizens. (HCF art. 12).

Licensing of Health Care Services.

Licensing of medical and pharmaceutical activity conducted due to legislation of RF.

Medical and pharmaceutical activities of legal entities or individual entrepreneurs are included in list of activities that require license. (HCF, art. 15; RF Law No. 128-FZ of Aug. 8, 2001 ``On Licensing of Certain Activities'' as last am'd Dec. 27, 2009, art. 17).

Licensing fulfilled by Federal Service for Supervision in Health Care and Social Development Spheres (hereafter - ``Roszdravnadzor'').

Licensing shall be issued in respect of: pharmaceutical activities; production of medicines; production of medical equipment; technical maintenance of medical equipment (unless such activities are carried on for internal needs of legal entity or individual entrepreneur); production of prosthetic and orthopedic articles; activities connected with circulation of drugs and psychotropic substances (cropping, production, manufacture, processing, storage, transportation, sales, distribution and allocation, acquisition, use, destruction) included in Category I in accordance with RF Law No. 3-FZ of Jan. 8, 1998 ``On Drugs and Psychotropic Substances'' (as last am'd July 17, 2009); activities connected with circulation of psychotropic substances (development, production, manufacture, processing, storage, transportation, release, sales, distribution and allocation, acquisition, use, destruction) included in Category III in accordance with RF Law No. 3-FZ of Jan. 8, 1998 ``On Drugs and Psychotropic Substances'' (as last am'd July 17, 2009); activities connected with circulation of drugs and psychotropic substances (development, production, manufacture, processing, storage, transportation, release, sales, distribution and allocation, acquisition, use, and destruction) included in Category II in accordance with RF Law No. 3-FZ of Jan. 8, 1998 ``On Drugs and Psychotropic Substances'' (as last am'd July 17, 2009); activities connected with use of infecting agents; medical activities.

Regulation on licensing of medical activity adopted by RF Government Resolution No. 30 of Jan. 22, 2007, am'd on Apr. 7, 2008. It establishes that medical activity includes performance of medical works and services on rendering pre-medical, emergency, out-patient-polyclinic, sanatorium, stationary (including specialized expensive) medical care on corresponding medical specialties, including implementation of preventive medical, diagnostic and therapeutic procedures and medical examinations (including forensic medical examination), application of methods of traditional medicine, and preparation of organs and tissues in medical purposes.

Term of license is five years. Upon expiry of term, license may be renewed upon application of licensee.

Health insurance exists in obligatory and voluntary forms. Obligatory health insurance is part of state social insurance provided to all citizens and financed through Federal and Territorial Funds of Obligatory Medical Insurance. (Law No. 1499-I of June 28, 1991 ``On Medical Insurance for RF Citizens'' as last am'd July 24, 2009, hereafter - ``MIL'', arts. 1, 12). Obligatory Medical Insurance Funds are financed from payments of insurees. Funds are accounted for separately from Federal and RF subjects budgets. Obligatory medical insurance for unemployed citizens is procured by governmental executive bodies of RF subjects and local administrations; obligatory medical insurance for employed citizens is procured by enterprises, institutions, organizations, individual entrepreneurs and freelancers.

Medical insurance organizations are legal entities engaged in medical insurance activities, which have state authorization (license) to carry on such activities. Licenses are issued by RF Federal Service of Insurance Supervision (Rules of licensing of medical insurance organizations engaged in obligatory medical insurance activities are approved by Resolution of RF Government No. 251 of Mar. 29, 1994 as last am'd on Oct. 14, 2005).

Health care management authorities and medical institutions may hold shares in medical insurance companies. Aggregate share held in any medical insurance organization by health care management authorities or medical institutions may not exceed 10% of total equity of such medical insurance organization. (MIL, art. 14).

Voluntary medical insurance is provided to citizens by private companies having appropriate license and supplements obligatory coverage with additional medical and other services.

State Guarantees of Medical Assistance.

Types of medical assistance provided to all citizens free of charge are determined in Program of State Guarantees of Provision of Free Medical Assistance to Citizens of the Russian Federation for 2010, approved by resolution of RF Gov. No. 811 of Oct. 10, 2009. Program is financed through budgets of all levels, obligatory medical insurance payments, and other receipts.

Program determines types, norms of provisions, norms of financial expenses for unit of scopes of medical assistance, per capita norms of financing of Program and conditions of development of rates of medical assistance provided to citizens free of charge.

Under Program citizens of RF are provided, free of charge, with pre-medical service, emergency service and specialized medical service, including hi-tech service. Medicines required in connection with ambulance service or hospitalization are also provided free of charge.

Medicines.

Circulation of medicines is governed by RF Law No. 86-FZ ``On Medicines'' of June 22, 1998 as last amended Dec. 30, 2008 (hereafter—``ML'').

All medicines produced in RF or imported into RF are subject to state control. Production, sale and application of any medicines are allowed only if medicine has been registered with federal authority responsible for medicine quality control. Registration of Russian and foreign medicines is performed by Roszdravnadzor.

Quality compliance of medicine is confirmed by certificate issued in accordance with Rules of Certification of Medicines, approved by Gosstandart of Russia (State Standardization Committee) on May 24, 2002, No. 36, last amended on Sept. 3, 2003. Medicines may be produced only by licensed production enterprises. (ML art. 13).

Mental Health Service.

Mental health services may be rendered by state and private organizations. (Law No. 3185-I of July 2, 1992 ``On Mental Health Service'', last am'd Feb. 27, 2009, art. 18, hereafter ``MHSL''). Persons undergoing psychiatric treatment may appoint representative to handle person's affairs. (MHSL, art. 7). Generally, mental health services may only be provided with patient consent. Forced psychiatric treatment may be provided on grounds specified in Criminal Code, or under involuntary admission on occasions established by Law. In such cases medical assistance is applied under decision of commission of psychiatrists, except for urgent cases. (item 11).

Person, suffering mental frustration, can be hospitalized in psychiatric hospital without his consent or without consent of his lawful representative before decision of judge if examination or treatment are possible in stationary conditions only, and mental frustration is heavy and causes: his direct danger or danger to surrounding persons; his helplessness (inability to satisfy basic vital needs by himself); essential harm to his health owing to deterioration of mental condition if person will be left without psychiatric help. (MHSL, art. 29).

Such hospitalization as well as medical treatment during hospitalization may be challenged in court by hospitalized person or his/her lawful representatives. (Id., art. 47).

In case of recovery or improvement of mental abilities, hospitalized person may be discharged from psychiatric hospital, upon his/her petition or upon petition of his/her lawful representatives, or upon decision of hospital administration. (Id., art. 40).

Control over provision of mental health services by federal psychiatric and psychoneurological institutes is exercised by federal authorities, and in respect of appropriate RF subjects institutes by authorities of such RF subjects. Control over legality of provision of mental health services supervised by RF General Prosecutor, prosecutors of RF subjects and lower prosecutors. (MHSL, art. 45).

Drugs and psychotropic substances are divided into four primary categories each of which regulated differently. (RF Law No. 3-FZ of Jan. 8, 1998, ``On Drugs and Psychotropic Substances'' as last am'd July 18, 2009 hereafter - ``DL''). First category drugs may be used only for scientific, educational, expert and criminal investigation activities. Other use or circulation on RF territory strictly prohibited. Second through fourth category drugs may be circulated subject to statutory restrictions. State has monopoly for cultivation, development, conversion, distribution and import (export) of second category drugs or psychotropic substances. Private companies may produce psychotropic substances of third and fourth categories. All types of activities connected with circulation of drugs and psychotropic substances of second and third categories on RF territory must be licensed by executive authorities of RF subjects (except for activities exercised by organizations of medicine wholesale and by pharmacies forming part of federal healthcare organizations which are licensed by Roszdravnadzor. (RF Gov. Res. No. 648 of Nov. 4, 2006 as last am'd June 12, 2008). Advertising of drugs and psychotropic substances and circulation for purpose of advertising of medicine samples containing drugs or psychotropic substances prohibited. (DL art. 46).

Transplantation of Human Organs and Tissue.

Heart, lung, kidneys, liver, bone marrow, and other organs and tissue specified by Federal executive authority exercising development of state policy and legal regulation of health care and social development may be transplanted. (RF Law No. 4180-I of Dec. 22, 1992, “On Transplantation of Human Organs and Tissue” last am'd Nov. 29, 2007, hereafter “TL”). Reproductive organs and tissue including egg cells, ovaries, testicles, embryos and sperm, as well as blood and its components are not objects of transplantation regulated by said Law. Organs and tissue may not be purchased or sold on RF Territory. Transplantation may take place only upon agreement of both donor and recipient provided transplant will not cause substantial harm to donor. Only state and municipal health institutions are permitted to conduct withdrawal, storage and transplantation of human organs and tissue. List of health institutions authorized to conduct withdrawal, storage and transplantation of human organs and tissue determined by Federal executive authority exercising development of state policy and legal regulation of health care and social development jointly with Russian Academy for Medical Science. (TL, art. 4). All information regarding recipient and donor is confidential. (TL, art. 14).

17 IMMIGRATION

17.01 ALIENS:

Aliens (foreign citizens and stateless persons) bear rights and obligations similar to those of RF citizens, as limited by federal law or international agreement. Political asylum granted in compliance with universally recognized norms of international law. (Const. RF, art. 63). As a whole, legal status of foreign citizens and stateless persons is settled in RF Law No. 115-FZ of July 25, 2002 ``On Legal Status of Foreign Citizens in RF'' as last amended by Law No. 347-FZ of Dec. 27, 2009 (amendments are enforceable as from Jan. 29, 2009). Law No. 115-FZ provides for three categories of foreign citizens and stateless persons in RF (jointly named foreign citizens under art. 2[2]): (1) Domiciling foreign citizen, (2) temporary resident foreign citizen, and (3) sojourner. Citizens of first category are required to obtain residence permit (Id., art. 8), second category - temporary residence permit (Id., art. 6), third category citizens entering territory of RF on basis of visa or, in case no visa required, on basis of migration card in due form (Id., arts. 2, 5). Migration card serves as instrument of control over temporary residence and required for each category of foreigners. (RF Federal Law No. 114-FZ art. 25.9 and Resolution of RF Government No. 413 of Aug. 16, 2004). Regulation of labor activity in RF differs depending on category of foreigner. Generally, (1) work permit for employee and (2) permit on attraction and use of expatriate employees for employer are compulsory, exceptions made for domiciling foreign citizens, employees of diplomatic missions, consular institutions, international organizations and other categories of citizens, specifically named in Law. (Id., art. 13[4]). Resolution of RF Government No. 681 of Nov. 15, 2006 introduced Procedure of issuance of abovementioned permits (``Procedure''). Application process for permit on attraction and use of expatriate employees is set in Procedure c. 2, in art. 18 of Law No. 115-FZ. Application for such permit must include decision of respective state agency on employment, draft contract including employment terms, document confirming payment of stamp duty and other documents. Permits are issued for one year (Law No. 115-FZ art. 18[3]) and nontransferable. Apart from such permit, employer has to obtain invitation for each foreigner entering RF for purpose of labor activity except non-visa foreigners. (Law No. 115-FZ art. 18[2], Order of RF Federal Agency on Migration No. 142 of June 6, 2008). Invitations are issued pursuant to quotas established by RF Government. Application process for work permit for particular foreigner is set in Procedure cl. 3 and cl. 4. Process differs depending on application of visa requirements in particular case. All permits are issued by RF Federal Agency on Migration. Special regulations of labor activity of non-visa sojourners are contained in art. 13.1 of Law No. 115-FZ. RF Code of Administrative Violations provides for heavy fines for breach of regulations on foreigners' labor activity. (Id., art. 18.15). RF Law No. 109-FZ of July 18, 2006 ``On Migratory Record of Foreign Citizens and Stateless Persons'' last amended by Law No. 199-FZ of July 19, 2009 (amendments are enforceable as from Nov. 21, 2009) regulates migratory record of foreigners i.e., fixation of information on foreigners and on their resettlement. Subject to permanent residence in RF, aliens bear same income tax obligations as RF citizens. Aliens may wed in RF following procedure established by RF law.

See category 14 Family, topic 14.07 Marriage, subhead To Foreign Nationals.

17.02 EMIGRATION:

RF Federal Law No. 114-FZ of Aug. 15, 1996, ``On Procedure for Departure from and Entrance to RF'', as last amended by Law No. 331-FZ of Dec. 12, 2009 states that every person may depart from territory of RF. Main documents, ascertaining RF citizen's identity, with which RF citizens enter and depart from RF are: passport (external), diplomatic passport, service passport and certificate of identification of seaman. (Id., art. 7). Passport valid for departure to all countries. Passport issued to citizens age 18 or older by Federal Migration Service and its local subdivisions, Ministry of Foreign Affairs RF or by diplomatic representatives (consulate) in state of permanent residence. Minors may travel with parent or guardian. Minors may travel alone, in this case at departure they must have passport and notarized consent from parent(s) or guardian(s) for departure. Consent must indicate terms of departure and state(s) of visit. Denial of external passport and departure from RF possible if applicant is involved with state secrets, state contractual obligations, or if person facing criminal charges or conviction, or has outstanding military obligations, is involved in pending civil suit, convicted for committing of crime, until execution or until discharge of punishment. (Id., arts. 10, 15).

See topic 17.03 Immigration.

17.03 IMMIGRATION:

Visas required for every foreigner entering RF, excluding cases stated by international treaties. Visa application is executed in accordance with c. 4 of RF Law No. 114-FZ of Aug. 15, 1996 last am'd Dec. 27, 2009. Application requires invitation, issued by appropriate state authority listed in Id., art. 25. Order for invitations issue is set in: Resolution of RF Government No. 665 of

Oct. 8, 2007, Min. of Foreign Affairs RF Decree No. 7203 of June 10, 2008 and Order of RF Federal Agency on Migration No. 142 of June 6, 2008. Visa issued in order affirmed by Resolution of RF Government No. 335 of June 9, 2003 by different institutions including diplomatic and consular institutions abroad. (Id., art. 7). Visa application of person who arrives for term over three months must include certificate of absence of HIV infection. (RF Law No. 38-FZ of Mar. 30, 1995, art. 10; Resolution of RF Government No. 1158 of Nov. 25, 1995). Provision does not apply to foreign diplomats or their families. Entry into RF requires payment of duty under certain circumstances, including issue or extension of entry visa or identification card of alien, issue of invitation to foreign persons, issue or extension of alien residence permit, modifications or additions to previously issued entry documents and replacement of lost or spoiled documents. (RF Tax Code art. 333.28).

See topics 17.01 Aliens, 17.02 Emigration.

18 INSURANCE

18.01 INSURANCE COMPANIES:

Insurance in RF, excluding state social security, regulated primarily by c. 48 of Civil Code, RF Law No. 4015-1 ``On the Organization of Insurance Activities in the Russian Federation'' of Nov. 27, 1992, as last amended by RF Law No. 243-FZ of Oct. 30, 2009 (``Insurance Law''). All insurance is either voluntary (based on contract between insured and insurer) or compulsory (Civil Code, art. 927). RF Law No. 165-FZ ``On the Basics of Compulsory Social Insurance'' of July 16, 1999, as last amended by RF Law No. 213-FZ of July 24, 2009, provides that compulsory insurance, protects working citizens regardless of any changes in social or material status of citizens, including changes due to circumstances beyond their control. (Art. 1). Insurance intermediation in system of compulsory social insurance is prohibited. (Id., art. 6). Civil Code provides property insurance and personal insurance. Property insurance includes risk of loss and damages insurance, risk of liability for indemnification of life, health and property insurance, risk of damages in business activity (business risk) insurance, and, when permitted by law, risk of contract liability insurance. Personal insurance includes life and health insurance, insurance against failing to achieve definite age or occurrence of other event provided by insurance contract. (Civil Code, arts. 929-934).

Insurance contract must be in writing, and must state object of insurance, nature of event(s) giving rise to claim, amount of insurance, and term. (Id., arts. 940, 942). Insurance contract becomes effective on payment of first premium, unless otherwise provided by contract. (Id., art. 957). Amount of insurance payable under one or several insurance contracts for specific property or business risk may not exceed actual value of property or estimate of potential business risk at contract formation. (Id., arts. 947, 951). Value of insured property determined by insurer, assisted by expert evaluator if needed, at contract formation. (Id., art. 945). Insured has statutory obligation to take reasonable and sufficient steps to minimize possibility of damage to insured property. (Id., art. 962). Insured must notify insurer in case of increasing level of risk, and may demand amendment of contract or higher premium if such circumstance takes place. (Id., art. 959). Conversely, insurer obligated to reimburse expenses incurred by insured in connection with reasonable measures undertaken by insured to reduce risk. Insurer relieved from obligation to pay claim if insured event intentionally caused by insured, or by nuclear explosion, military activity, social unrest or strike. (Id., arts. 963-64).

RF Law No. 40-FZ ``On Compulsory Insurance of Vehicles' Owners Civil Liability'' of Apr. 25, 2002, as last amended by RF Law No. 362-FZ of Dec. 27, 2009 provides obligatory insurance for all owners of transport facilities. Vehicles' owners have statutory obligation to insure their civil liability at their own expense, which may arise out of injury to life, health or property of third persons while using transport facilities. Underwriting rates are fixed by RF Government. Standard conditions of insurance contract are enacted by compulsory insurance regulations issued by RF Government.

Insurance Supervision.

Insurance activity in RF supervised by Federal Service for Insurance Supervision (Rosstrakhnadzor). (RF Gov. Res. No. 330 of June 30, 2004). Rosstrakhnadzor licenses and maintains state register of insurers, and controls insurer's paying capacity and activity. (Id.). Insurers may be legal entities licensed to offer specific types of insurance. Restrictions imposed on operations of foreign insurers within RF (Insurance Law, art. 6). Insurers, which are subsidiaries of foreign investors or foreign investment share in share capital of which is more than 49% may not pursue following in RF: life insurance, compulsory insurance, compulsory state insurance, property insurance relating to performance of deliveries or of work under contract for state needs, as well as insurance of property interests of state and municipal organizations. (Id., art. 6[3]). Insurers, which are subsidiaries of foreign investors (of parent organization) may pursue insurance activities in RF if foreign investor (parent organization) pursued insurance activities for at least 15 years in respective state and participated for at least two years in activities of insurance organizations set up on territory of RF. (Id., art. 6[4]). Insurers must maintain normative ratio between assets and obligations, and comply with statutory accounting and reporting procedures. (Id., art. 28). Individuals and legal entities may form noncommercial mutual insurance societies by consolidation of their assets. (Civil Code, art. 968). Prevention, limitation and suppression of monopoly and unfair competition in RF insurance market effected by federal antimonopoly body of RF. (Insurance Law, art. 31). Insurer dominating in RF insurance market systematically supervised by federal antimonopoly bodies. (FAS Order No. 36 of Mar. 10, 2005, art. 3).

Agents and Brokers.

Insurers may engage agents or brokers, provided they are registered as legal entities or individual entrepreneurs insurers and have filed notice of intent to carry out insurance intermediation ten days prior to commencing activities. (Insurance Law, art. 8[1-3]). For conclusion of reinsurance contracts with foreign insurance organizations insurers can conclude contracts with foreign insurance brokers.

Foreign Currency Operations.

RF Law No. 173-FZ of Dec. 10, 2003 “On currency regulation and currency control” allows Russian insurers to offer insurance and make settlements in foreign currency with nonresidents (foreign companies) without limitations in relation to insurance premium and insurance compensation as well as reinsurance transactions within validity period of applicable contract. Money transfer regulations and compulsory sale of part of insurer's currency revenues regulated by Instructions of RF Central Bank No. 111-I of Mar. 30, 2004. Insurance of property, risks and liabilities of commercial organizations with foreign investment and branches of foreign legal entities is voluntary. (RF Law No. 160-FZ “On Foreign Investment in the Russian Federation” of July 9, 1999, art. 19).

19 INTELLECTUAL PROPERTY

19.01 GENERAL PROVISIONS:

Fourth Part of Civil Code came into force starting from Jan 1, 2008 by RF Federal Law No. 230-FZ of Dec. 18, 2006.

As consequence of above, RF Law No. 3517-1 of Sept. 23, 1992 ``Patent Law'', RF Law No. 3520-1 of Sept. 23, 1992 ``On Trademarks, Service Marks, and Appellations of Origin of Goods'', RF Law No. 3523-1 of Sept. 23, 1992 ``On Legal Protection of Computer Programs and Databases'', RF Law No. 5351-1 of July 9, 1993 ``On Copyright and Related Rights'', RF Law No. 3526-1 ``On Protection of Integrated Circuit Layout'' of Sept. 23, 1992 lost their force.

Part IV of Civil Code applies to legal relationship arising after their coming into force. As to legal relationship arising before, Part IV applies to such rights and obligations which will arise after their coming into force.

Protected intellectual activity results and means of individualization are following: (1) Works of science, literature, art; (2) computer programs; (3) databases; (4) performances; (5) phonograms; (6) air, radio, and cable broadcasting; (7) inventions; (8) utility models; (9) industrial designs; (10) selection achievements; (11) topologies of Integrated Circuits; (12) trade secrets (know-how); (13) firm names; (14) trademarks and service marks; (15) appellations of origin of goods; and (16) commercial designations.

COPYRIGHTS:

Registration.

Copyright attaches upon creation, and does not require registration. Optional registration of computer programs, databases, and integrated circuits provided by RF Federal Executive Authority on intellectual property.

Duration of Protection.

Copyright generally endures for lifetime of author plus 70 years, with longer periods provided in certain circumstances. Neighboring rights are protected for 50 years from date of first legal disclosure. Right of publisher is protected for 25 years after first publication. Author may nominate person, in same way as executor is appointed for will, who will protect right of authorship, right to name and integrity of work. Once copyright expires, work enters public domain and may be freely used without payment of royalties.

Infringement.

Protection of intellectual property exclusive rights and means of individualization is carried out, in particular, by demanding of: (1) Declaration of right – to person who denies or otherwise disclaim right and hereby infringe interests of owner of right; (2) suppression of actions, which infringe right or endanger its infringement – to person who performs such acts or makes necessary arrangements to these acts; (3) damage compensation – to person, who illegally used result of intellectual activity or means of individualization without conclusion of agreement with owner of right (free-lance use) or otherwise infringed exclusive rights and caused damages; (4) confiscation of infringing material object– to its producer, importer, holder, carrier, seller, any other distributor, unfair buyer; (5) publication of court decision on committed violation with indication of real owner of right – to violator of exclusive right.

In order to ensure claim on infringement of exclusive rights for material objects, equipment and materials, in respect of which suggestion on infringement of exclusive right for results of intellectual activity or means of individualization was made, interim legal measures can be taken including arrestment for material objects, equipment, and materials.

In cases provided by Civil Code for separate types of results of intellectual activity or means of individualization, upon infringement of exclusive right owner of right is entitled to claim from infringer, instead of reimbursement of damages, payment of statutory compensation for infringement of stated right. Compensation is liable to penalty subject to proof of infringement fact. In this case, owner of right who pleaded for right defence is excused from proof of amount of losses.

Amount of compensation is defined by court within ambit of Civil Code on basis of nature of violation or other circumstances of case, taking into account requirements of reasonableness and equity. Right owner has right to demand from infringer payment of compensation for each instance of illegal use of results of intellectual activity or means of individualization or for committing offence on whole.

In case of infringement of exclusive rights, right owner can claim, instead of actual damages, statutory compensation equal to: (1) 10,000 to 5 million rubles at court's discretion or (2) double value of copies or double value of rightful license under similar conditions.

RF Criminal Code provides for punishment for violation of copyright and neighboring rights. Violators may be fined up to 200,000 rubles or at rate of their wages or other income of condemned for period up to 18 months, forced to obligatory works for term up to 240 hours, arrested for term up to six months or imprisoned up to six years and fined up to 500,000 rubles or at rate of their wages during period up to three years. (UK RF, art. 146).

Conventions.

RF acceded to Berne Convention on Mar. 13, 1995 (with reservation that convention would not protect works already in RF public domain on date of convention's effectiveness on RF territory). Soviet Union acceded to Universal Copyright Convention on May 27, 1973, including additional protocols 1 and 2, obligations under which were assumed by RF on Jan. 13, 1992. Russia acceded to Convention for Protection of Producers of Phonograms Against Unauthorized Duplication of Oct. 29, 1971 on Mar. 13, 1995; International Convention for protection of performers, producers of phonograms and broadcasting organizations (Oct. 26, 1961) on May 26, 2003. WIPO performances and phonograms Treaty is in force for RF since Feb. 5, 2009.

19.02 INDUSTRIAL PROPERTY RIGHTS:

RF assumed Soviet Union's obligations under Paris Convention for Protection of Industrial Property (“Paris Convention”) pursuant to MinForAff RF Letter No. 11/UGP of Jan. 13, 1992. Paris Convention defines industrial property as patents, utility models, industrial designs, trademarks, service marks, trade names, indications of source, and appellations of origin. Art. 15 of Constitution provides treaty provisions shall apply where RF law is inconsistent. (Const., art. 15[4]). Trade names are protected in RF as trademarks. Additionally, Civil Code recognizes certain information as ``know-how'' which is described as any information (industrial, technical, economic, organizational, etc.), including information about results of intellectual activity in scientific and technical sphere, and also information about means of carrying out professional activity, which derives actual or potential commercial value from being unknown to third parties; to which third parties do not have legally permissible access; and in respect to which information owner introduced regime of commercial secret. Persons or entities who obtain official and commercial secrets illegally must reimburse holder for losses incurred. Disclosure of commercial secret by employee in violation of employment agreement or by contracting party in violation of contract subjects employee or contracting party to reimbursement obligation for resulting losses if other responsibility is not provided by employment agreement with this person.

See topics 19.01 Copyrights, 19.03 Patents, 19.04 Trademarks.

19.03 PATENTS:

Civil Code recognizes property relations arising in connection with legal protection and use of inventions, utility models and industrial designs as patent rights. RF Federal Executive Authority on intellectual property registers and issues patents.

Patentability.

Inventions are generally patentable if novel, inventive (representing development beyond existing technological level) and industrially applicable. Utility models are patentable if novel and industrially applicable. Industrial designs are patentable if novel and original.

Registration.

Exclusive rights in inventions, utility models, and industrial designs are recognized and protected subject to their state registration on basis of which Federal Executive Authority on intellectual property issues relevant patent. If patent holder is non-resident of RF or foreign citizen or legal entity, application must be filed by patent attorneys registered with RF Federal Executive Authority on intellectual property acting on behalf of applicant by proxy.

Duration of Protection.

Patent valid for 20 years for invention; ten years for utility model, which may be extended up to three years; or 15 years for industrial design, which may be extended up to ten years. All periods of protection effective from date patent application filed.

Defense of patent right.

Patent-right-related disputes are solved by courts for issues related to: (1) Establishment of authorship of inventions, utility models, and industrial designs; (2) establishment of patent ownership; (3) infringements of exclusive rights of inventions, utility models, and industrial designs; (4) conclusion, execution, change, and termination of contracts on exclusive right transfer (patent expropriation) and license agreements for use of inventions, utility models, and industrial designs; (5) right of prior use; (6) right of post use; (7) amount, term, and procedure of remuneration payment to author of inventions, utility models, and industrial designs according to Civil Code; and (8) amount, term, and procedure of compensation payment provided by Civil Code. RF acceded to Patent Convention of June 1, 2000 on Aug. 12, 2009.

19.04 TRADEMARKS:

Trademarks are regulated on RF territory by Paris Convention, Madrid Agreement “On Registration of Marks” of Apr. 14, 1891 (as amended) (“Madrid Agreement”) and RF Civil Code. Russia uses International Classification of Goods and Services for the Purpose of Registration of Marks published by World Intellectual Property Organization (``WIPO") in 2001. According to Law, trademark is described as designation for identification of goods of legal entities or individual entrepreneurs. Exclusive right for trademark is certified by trademark certificate. Applications of foreign legal entities or individuals or their patent attorneys that permanently reside outside of RF must be submitted with assistance of registered RF patent attorneys.

Duration of Protection.

If mark registered and trademark certificate issued, trademark owner has exclusive right to use and dispose of mark for ten years from date application received by RF Federal Executive Authority on intellectual property, with renewal for additional periods of ten years each.

Infringement.

Goods, labels, and packaging illegally bearing trademark or designation similar to it to degree of confusion, are considered counterfeit. Right owner has right to require withholding from circulation and destroying, at violator's cost, of counterfeit items. In cases when introduction of such items into circulation is necessary for public benefit, right owner has right to require removal of illegally used trademark or designation similar to it to degree of confusion from counterfeit items at violator's cost.

RF was an original signer of WIPO Trademark Law Treaty concluded in Geneva on Oct. 27, 1994. RF approved Protocol to Madrid Agreement on Dec. 19, 1996.

20 LEGAL PROFESSION

20.01 ATTORNEYS AND COUNSELORS:

On July 1, 2002 new RF Law No. 63-FZ of May 31, 2002 ``On Advocacy and Advocatura in RF'' last amended on July 23, 2008 by RF Law No. 160-FZ (``Advocacy Law'') came into force. Advocacy Law determines advocacy as qualified legal assistance rendered by professional attorneys, who obtained advocate status under provisions of Advocacy Law, to individuals and legal entities for purpose of protection of their rights, freedoms and legitimate interests providing access to justice. (Advocacy Law, art. 1).

Advocate has right to render consulting services on legal matters (orally or in writing), to settle legal documents, to appear in trial at courts of any jurisdiction, tribunals or international commercial arbitration, to take part in execution proceedings, tax relations etc. (Id., art. 2). In some cases, legal assistance provided free of charge. (Id., art. 26). Advocate is independent in his activities and enjoys immunity from prosecution. (Id., art. 18, UPK RF, arts. 447-48).

Status of advocate may be acquired by individual having: (a) higher legal education, obtained in Russian university or academic degree on juridical specialty; (b) work experience of at least two years on juridical specialty or passed probation period in advocatory cabinet, office or bar (legal forms of advocatory institutions, their legal status detailed in arts. 21-23 of Advocacy Law); and (c) passed qualification exams. (Id., arts. 9-11).

Incapable or restrictedly capable person or person having noncancelled previous conviction for deliberate crime cannot be advocate. Advocatory status shall be conferred on person upon adjuring and lasts sine die.

Foreign citizens and stateless persons who have acquired advocatory status under Advocacy Law may provide advocacy all over Russia. Limitations must be settled only by federal law. Foreign advocates may render legal assistance on RF territory on matters regulated by law of their state. It is prohibited for foreign advocates to render legal assistance on matters concerning state secret. (Id., arts. 2-9).

Status of advocate may be suspended or abated. Suspension takes place in particular if advocate was elected for public authority or local self-government (elective representative bodies), in case of long period of illness or other circumstances impeding ability to fulfill obligations for more than six months successively, or due to military draft etc. (Id., art. 16).

Abatement takes place if following happened: (a) application in person; (b) disability or special disability of advocate declared by court; (c) death (declaration of death); (d) commitment of malefaction, discrediting advocate's honor and dignity or derogating authority of advocatura; (e) non-performance or improper performance of advocate's professional duties to principal or decisions of advocatory community; or (f) conviction of advocate in commitment of deliberate crime etc. (Id., art. 17).

Advocate's interests are represented and protected by Federal Chamber of Advocates, established on obligatory participation of advocate's chambers of RF subjects (Id., arts. 35-38), respectively consolidating advocates of every region of Russia in ratio one chamber for one subject of RF (Id., arts. 29-34).

Admission to Patent Bar.

Qualifications commission created by Federal state executive body on intellectual property can certify as patent counsels citizens having reached age of 18 with permanent residence in RF, higher legal education, four years legal experience in specialization of scope of activity of patent counsels, in which they expressed their wish to be certificated and registered as patent counsels. (RF Civil Code, art. 1247; RF Law No. 316-FZ of Dec. 30, 2008 ``On patent counsels'', arts. 2, 6).

21 MINERAL, WATER AND FISHING RIGHTS

21.01 MINES AND MINERALS:

RF Law No. 2395-1 ``On Subsoil'' of Feb. 21, 1992 as it is set forth in RF Law No. 27-FZ of Mar. 3, 1995, as last amended and supplemented on Dec. 27, 2009 (``Subsoil Law'') regulates relations arising out of geological exploration, use and protection of subsoil of Russian Federation, of its continental shelf, and out of utilization of waste products of mining and related processing industries, peat, sapropel and other mineral resources. State control over geological research, rational use and protection of subsoil is performed by authorized state executive body of mines inspectorate in cooperation with other authorized environmental and control bodies. Subjects of RF have authority to promulgate laws regulating relations arising out of use and protection of subsurface resources within scope of their competence in accordance with federal laws. (Mineral Law, art. 1.1).

Subsurface expanses and subsoil mineral resources, energy and other resources constitute state property, but mineral and other resources extracted from subsoil may constitute both state/municipal and private property. Subsoil plots may not be subject to purchase, sale, gift, inheritance, deposit, pledge or any other form of alienation, but rights to use underground resources may be alienated or assigned to extent transfer permitted by federal law. (Id., art. 1.2).

Subsoil plots are granted for use of geological research, exploration and production of mineral resources, construction and operation of subsurface facilities that are not connected with production of mineral resources, for development of specially protected geological sites, for collection of mineralogical, paleontological and other geological materials. Subsoil plots may also be granted for geological research, exploration and production of mineral resources contemporaneously.

Mineral Law defines following criteria for subsoil plots of federal level: 1) Shall contain deposits and shows of uranium, diamonds, high-purity raw quartz, yttria group of rare earths, nickel, cobalt, tantalum, niobium, beryllium, lithium, platinum group metal; 2) shall be located on territory of RF subject or subjects and shall contain since Jan. 1, 2006 according to Mineral Resources State Reserves Register data more than 70 million tons of recoverable oil, 50 billion cubic meters of gas reserves, 50 tons of vein gold reserves, 500 thousand tons of cuprum reserves; 3) internal sea waters, territorial waters, continental shelf of RF; 4) defense and security lands will be used for above purposes.

Legal entities incorporated under RF laws may use subsoil plots of federal level, except subsoil plots of RF continental shelf, unless RF Government establish additional requirements of access for legal entities incorporated under RF laws and having foreign investors in their capitals to participate in tenders or auctions for rights to use such subsoil plots.

Only legal entities incorporated under RF laws, having not less than five years experience of exploration of subsoil plots of RF continental shelf and not less than 50% of share or stock capital of which belongs to Russian Federation and/or Russian Federation may have right of direct or indirect disposal of not less than 50% of their shares (participatory shares) may use subsoil plots of RF continental shelf and territories extending to continental shelf.

Legal entities and associations of legal entities united under joint venture agreements without being incorporated may use subsoil plots on conditions of production sharing agreements.

Production of radioactive raw material and burial of radioactive waste, toxic substances and other hazardous wastes are limited to RF legal entities established in compliance with legislation of RF and possessing permission (license) on conducting of works on extraction and utilization of radioactive materials and on utilization of toxic and other dangerous wastes, issued by authorized federal executive body (Id., art. 9).

Licenses.

License of right to use natural resources granted either for fixed term (up to five years for geological exploration or up to ten years for geological exploration of subsurface areas of inland sea waters, territorial sea, and of continental shelf of RF; up to period of working mineral deposit off as determined by feasibility study; up to 25 years for production of underground water; up to one year for short-term mineral production); or unlimited term (for construction and operation of underground facilities unrelated to mine production, establishment of specially protected areas, etc.). Term of license commences on date of issue and may be extended at request of user in case of necessity of research and valuation completion or exploitation of minefield or performance of liquidation procedures provided there was no breach of license done by such user. (Id., art. 10). License certifies right of holder to use natural resources for area, term and purpose specified in license. Authorized governmental agencies and user of subsurface recourses may conclude contract, setting forth terms and conditions of use of such subsurface area, and obligations of parties under such contract. License identifies permissible activities as: geological exploration; development of mineral deposits; utilization of waste products from mining and related processing industries; use of subsoil for purposes other than mineral production; establishment of specially protected geological features; or collection of fine minerals, paleontological or other geological materials. (Id., art. 11). Res. of RF Supreme Soviet No. 3314-1 “On Procedure for Licensing Use of Underground Resources” of July 15, 1992 (“Licensing Procedure”) specifies procedure for licensing to extent consistent with RF Law “On Licensing”. It defines notion of subsurface areas provided for use, contents of license, procedure for license obtaining, including special procedures for licensing use of continental shelf subsurface and exclusive maritime economic zone of RF, for production of subsurface waters and burial of hazardous substances. Decisions on tenders and auctions for subsurface areas use, decisions on membership and work procedure of tender or auction commissions and determination of terms and conditions of such tenders and auctions concerning each subsurface area or group of subsurface areas are to be considered: (1) Concerning subsurface areas of federal significance – by RF Government; (2) concerning subsurface areas, containing fields of widespread mineral deposits or subsurface areas of local significance – by executive body of corresponding subject of RF; and (3) concerning etceteras subsurface areas – by federal agency for management of State subsurface fund or its local executive body.

Main criteria for determination of winner of tender organized for obtaining right to use portion of subsurface are scientific-technical level of programs for geological research and usage of portion of subsurface, completeness of mineral resources extraction, investment into social-economic development of territory, duration of project, effectiveness of measures for subsurface resources and environment safety and maintenance of national defense and security.

Main criteria for determination of winner of auction for obtaining right to use portion of subsurface is amount of non-recurrent payment for such right. (Mineral Law, art. 13.1).

Granting of License.

§ 12 of Licensing Procedures addresses conditions for licensing right to use continental shelf and exclusive maritime economic zone of RF. Legal treatment of continental shelf and exclusive maritime economic zone of RF, sovereign rights and jurisdiction of RF on its continental shelf and exclusive maritime economic zone of RF are settled by RF Law No. 87-FZ ``On the Continental Shelf of the RF'' of Nov. 30, 1995, last amended Dec. 27, 2009 and RF Law ``On Exclusive Economic Zone of the Russian Federation'' No. 191-FZ of Dec. 17, 1998, last amended Dec. 27, 2009. Instruction on procedures for allocation and defining boundaries of claims for use of subsurface resources in connection with development of oil, gas, gas condensate and thermal water deposits, and also for construction and operation of subsurface gas and hydrocarbon refined products storages, was approved by Resolution No. 35 of Sept. 11, 1996 of Federal

Mining and Industrial Supervision Agency amended by Decree of Rostekhnadzor No. 684 of July 13, 2006.

Grounds for Termination of Right to Use Natural Resources.

Right terminated on expiration of license, waiver by licensee or occurrence of events that prevent further exercise of rights (if they were mentioned in such license) or breakage of reissue procedure or on matters established by RF legislation on concession agreements. RF Federal Agency for Subsurface usage may terminate, suspend or limit rights if use creates threat to health of people in work zone, licensee violates license terms, licensee systematically violates rules for use and protection of natural resources, in case of force majeure, if licensee failed to start use of subsurface due to terms and conditions stated in license or liquidation of licensee. (Licensing Procedure, art. 16). Revocation of license or termination, suspension or limitation of rights are subject to appeal. (Id., art. 20).

Payments for Use of Natural Resources.

Users' fees include non-recurrent payments for use of subsurface resources in event of occurrences stipulated by license, mineral royalties, fees for geological information on subsurface resources, tender (auction) fee. Subsurface resources users pay other taxes and duties established by Russian Federation tax and duties legislation. On conclusion of production share agreements share of extracted minerals between RF and user of subsurface is required according to RF Law ``On Production Sharing Agreements''. User who is party in production sharing agreement is exempt from some taxes and other obligatory payments insofar as it is stipulated by RF Law ``On Production Sharing Agreements'' and laws of Russian Federation. Production sharing provided by production sharing agreement concluded under RF Law ``On Production Sharing Agreements'' substitutes for levy of said taxes and duties.

Share of production received by state as result of production share according to conditions of agreement on production share, or its value equivalent between RF and subject of RF on which territory given subsurface is located, is performed on basis of contracts concluded by corresponding RF executive body and executive body of subject of RF.

Procedure and amount of payments on using of subsurface and conditions of collection of such payments under agreements on production share are established by specified agreements according to RF legislation on agreement date.

Regular payments for use of natural resources are made for exclusive right to explore and assessing mineral deposits, exploration of mineral resources, geological research and assessing usability of subsoil field for construction and operation of subsurface facilities that are not connected with production of mineral resources, except engineering facilities of shallow formation (no more than five meters) used for target purposes. Subsoil Law defines minimum and maximum rate of regular payment for use of natural resources calculated per one square kilometer of field per annum. (Subsoil Law, arts. 39-43).

Tax on mineral resources production is levied in compliance with c. 26 of RF Tax Code.

Production Sharing Agreements.

RF Law ``On Production Sharing Agreements'' No. 225-FZ of Dec. 30, 1995 as last amended on Dec. 30, 2008 (``PSA Law'') permits negotiated production sharing agreements. Under production sharing agreement Russian Federation grants to business entity-investor exclusive rights for prospecting, exploration, production of minerals within subsurface area specified in such agreement in exchange for compensation and for certain term, and rights to perform operations related to such activity, while investor undertakes to perform said operation at its own expense and risk. Such agreement defines all necessary terms and conditions in connection with use of subsurface resources, including terms and routines for sharing of production between parties to contract in compliance with provisions of PSA Law. (PSA Law, art. 2).

RF Mineral Law, other laws and other normative and legal acts of RF are not applied for regulation of relations arising in process of conclusion, implementation, and termination of production sharing agreements, unless these relations are not regulated by PSA Law. Exceptions are limitations and restrictions of rights of ownership of precious metals, natural gems, radioactive raw minerals, and other metals and products, set forth in other federal laws. (Id., art. 1).

License for use of subsurface area to be issued to investor within 30 days after date of signing of agreement. License is issued for term of agreement and is to be reissued or becomes void under provisions thereof. (Id., art. 4).

Minerals that become investor's property under provisions of agreement may be exported from customs territory of Russian Federation in compliance with terms and routines set forth by provisions thereof, provided there are no limitation of quantity of minerals to be exported, except cases covered by RF Law on “State Regulation of Foreign Trade Activities”. (Id., art. 9).

On contractual basis investor has right: of free access to pipeline transportation objects; of free use of objects of pipeline and other types of transportation; of free use of objects of storage and processing of minerals without any discrimination conditions. (Id., art. 12).

Execution of PSA special taxation procedures stated in c. 26.4 of RF Tax Code and other legal acts on taxes and duties shall apply. (Id., art. 13).

PSA Law purports to take precedence over any future RF law (federal or local) except environmental laws. Adverse economic effect of future tax or other laws which do not exempt PSA shall be born by RF parties via subsequent reductions to their share of production. (Id., arts. 13, 17, 18). Provisions amending terms and conditions of PSA shall not apply in case of amendments of RF legislation on safe industrial operations, on health, subsoil and environmental protection and also in case of harmonization of above RF legislation with international standards. Provisions amending terms and conditions of PSA shall also not apply in case administrative order of respective supervisory authority is issued to procure safe industrial operations, health, subsoil and environmental protection and public and state security.

Investor is to have access to pipeline transportation. (Id., art. 12). Investor may not assign its rights without consent of RF party. In event of assignment, license must be reissued to assignee. (Id., art. 16). Russian companies have preferential right to provide services and specified percentage of equipment manufactured in Russia. (Id., art. 7). Disputes may be settled by international arbitration. (See category 9 Dispute Resolution, topic 9.01 Alternative Dispute Resolution.) Agreements to which foreign citizen or foreign legal entity is party may have provisions for waiver of jurisdictional immunity by state. (Id., art. 23). See category 12 Environment, topic 12.01 Environmental Regulation.

21.02 WATER AND FISHING RIGHTS:

Water Resources.

RF Water Code (RF Law No. 74-FZ of June 3, 2006 as last am'd and supplemented on Dec. 27, 2009) regulates relations in connection with use and preservation of water reservoirs, sets forth grounds for obtaining and termination of rights to use water reservoirs. Under general rule of use of water reservoirs, it is necessary to conclude contract of water use or obtain special decision of authorized state executive body on granting of water reservoir in utilization. (Water Code, art. 11). State control and supervision over rational use and preservation of water reservoirs is performed by authorized federal executive body (state federal control and supervision over rational use and preservation of water reservoirs) and other authorized executive bodies of subjects of RF (state regional control and supervision over rational use and preservation of water reservoirs). Users of water reservoirs shall pay water tax. Upon entering into force of Water Code, payment for use of water reservoir is made on basis of respective contract of water use upon its execution. (Water Code, art. 20).

Live Resources.

RF Law No. 52-FZ of Apr. 24, 1995 ``On Wildlife'' as last amended on Mar. 14, 2009 regulates relations in connection with preservation and use of wild animals living free in nature, and preservation of environment in zones inhabited by them. Use of live resources is to comply with federal and territorial standards, regulations, limits and norms and is to be accompanied by complex of measures for preservation and reproduction of live resources and preservation of zones inhabited by them. Control over rational use and preservation of live resources and preservation of environment inhabited thereby is function of authorized federal executive bodies and executive bodies of RF subjects. Rights of legal entities and individuals to use live resources are subject to licenses. Payments stipulated by RF tax legislation are charged for use of live resources.

Harvesting of water bioresources of exclusive economic zones of RF and of RF continental shelf, including search and catching of water biological resources, acceptance, processing, transportation, storage and handling of products, supplying of fishery vessels and facilities with fuel, water, food, tare and other materials, is regulated by RF Law “On Exclusive Economic Zone of Russian Federation” and “On Continental Shelf of Russian Federation”. Latter regulates relations in connection with production of live resources, falling under “assiduous species” of sea floor and its subsurface. Main fields, which laws determine are permissible use and fishers' rights.

Fishing on RF continental shelf is performed by RF citizens and RF entities from boats under RF flag and by foreign citizens and foreign entities in accordance with international treaties of RF in sphere of fishing and preservation of water bioresources (further on – users of water bioresources) in accordance with Federal Law “On Fishing and Preservation of Water Biological Resources” No. 166-FZ of Dec. 20, 2004 (am'd on Dec. 3, 2008) and Federal Laws ``On Exclusive Economic Zone of Russian Federation'' and ``On Continental Shelf of Russian Federation''. Compulsory preservation measure for live resources is environmental due diligence. See category 12 Environment, topic 12.01 Environmental Regulation, subhead Environmental Due Diligence.

22 MORTGAGES

22.01 MORTGAGES:

Mortgages regulated by Civil Code, RF Law No. 102-FZ ``On Mortgage (Pledge of Real Property)'' of July 16, 1998 with latest changes and amendments, inserted by RF Law No. 166-FZ (``Law on Mortgage'') and RF Law ``On Pledge'' No. 2872-1 of May 29, 1992. Law on Pledge relating to mortgage remains effective to extent consistent with law ``On Mortgage''. Business Navigation Code of RF No. 81-FZ of Apr. 30, 1999 in c. XXII settles mortgage of vessels. Law on Mortgage permits mortgage of land, enterprises, buildings (including incomplete construction) and other real property to extent same are alienable under federal legislation. State, municipal and agriculture lands are non-mortgageable except for lands mentioned in art. 62.1 of Law on Mortgage. Leasehold interests may be mortgaged. (Id., art. 5). Buildings and structures under common ownership with associated plot of land may only be mortgaged together, in same instrument, with associated plot. (Id., art. 69). Mortgage of land plot alone encumbers buildings on or erecting on plot unless otherwise stipulated in mortgage contract. (Id., art. 64). Jointly owned property where interests not divided into shares may be mortgaged only with consent of all owners. Individual share of jointly held property where interests are divisible may be mortgaged by owner without consent of other owners. (Id., art. 7). Mortgage agreements are subject to state registration. (Id., art. 10). Mortgagor retains right to use mortgaged property, and unless otherwise stipulated in agreement, retains right to derive revenues therefrom. (Id., art. 29). Mortgaged property may not be sold, gifted, exchanged or otherwise alienated without consent of mortgagee. (Id., art. 37). Unless otherwise stipulated in agreement or in Law, mortgaged property may be leased, temporarily used or encumbered by servitude without consent of mortgagee so long as such use does not exceed term of obligation secured by mortgage, and use of property serves its purpose. (Id., art. 40). Mortgaged property may be further mortgaged. (Id., c. 7). Unless otherwise agreed, mortgagor must insure mortgaged property for its full value or for amount, which is no less than amount of liability secured by such mortgage. (Id., art. 31). Levy on mortgaged property executed pursuant to court decision or by notarized agreement among concerned parties concluded after grounds for seeking levy arise. (Id., c. 9).

Mortgage deeds are issued on basis of mortgage agreements following registration (except for certain mortgage agreements set forth in law) or on basis of mortgage, evolved from law. (Id, art. 13). Rights certified by mortgage deeds may be assigned by entering into agreement, concluded in simple written form, with making appropriate note on such deeds naming new holder coupled with delivery to new holder. (Id., arts. 13[5], 48). Assignment of rights under mortgage deed entails consequences of assignment. Mortgage deeds may be pledged. Law on Mortgage contains detailed requirements for form of mortgage deeds and circulation in commerce.

23 PROPERTY

23.01 ABSENTEES:

Upon application of concerned individuals, court may declare person missing when absent for over one year. Property of missing person transferred to custodian appointed by court. Material support for missing person's dependents and satisfaction of other obligations provided out of property placed in custodian's care. If person reappears or reveals his/her sojournment court rescinds missing person declaration and dissolves fiduciary administration of person's property. (Civil Code, arts. 42-44).

Recognition as missing by court provides grounds for dissolution of marriage at registry office on spouse's initiative, as well as adoption of child without parental consent. See categories 13 Estates and Trusts, topic Death; Family, topic Divorce.

23.02 ADVERSE POSSESSION:

Citizen or legal entity other than record owner may acquire ownership of property by possession of real property openly, continuously, and in good faith for 15 years or possession of personal property for five years. Adversely acquired ownership right to immovable and other property subject to state registration, arises from moment of state registration. Adverse possessor can tack prior period(s) of possession by parties to which he is legal successor. (Civil Code, art. 234).

23.03 DEEDS:

See categories 3 Business Regulation and Commerce, topic Sales; Mortgages, topic Mortgages.

23.04 ESCHEAT:

See category 13 Estates and Trusts, topic 13.02 Descent and Distribution.

23.05 LANDLORD AND TENANT:

Commercial and residential landlord-tenant relations governed by cc. 34 and 35 of Civil Code.

Specific features of land lease are provided for in Land Code of RF No. 136-FZ of Oct. 25, 2001 (effective Oct. 30, 2001), last amended on Dec. 12, 2009 (``Land Code''), and specific features of lease of various types of carriers (sea crafts, internal navigation vessels etc.) are regulated by transport charters and codes.

Commercial Lease.

Objects of lease include land, enterprises, buildings, equipment, transport vehicles and other non-consumable property. Lease failing sufficiently to describe object invalid. (Id., art. 607). Lease with legal entity, or for term longer than one year, must be in writing. Lease for immovable property subject to state registration unless otherwise stipulated by law. (Id., art. 609). Lease of building (structure) or land plot, concluded for term of not less than a year is subject to state registration. (Civil Code, art. 651, Land Code, art. 26). Lessor liable for undisclosed property defects, and lessee may demand repair, reduction of rent, may repair and deduct cost from rent, or terminate lease. (Id., art. 612). Lessee must timely pay rent and use property only as specified in lease. Lessor must consent to sublease, which may not exceed lease term. (Id., arts. 614-15). Unless contract provides otherwise, sublease is possible without lessor's acceptance on notification of lessor except when lessor is resident of special economic zone. (Land Code, art. 22). Transfer of ownership right does not terminate lease, however termination of lease terminates any sublease. (Id., arts. 617-18). Parties may agree when and why lease shall terminate, or may ask court to terminate for certain enumerated events of material breach. (Id., arts. 619-20). Unless otherwise provided, lessee enjoys preferential right to renew lease on expiration, and is entitled to compensation for improvements made by lessee and approved by lessor. (Id., arts. 621, 623). Lease of building shall include transfer of right to use land directly beneath building, even if lessor does not own land. (Id., art. 652).

Residential lease agreements shall be concluded only with legal entities, provided that, leased dwelling shall be used by such legal entity only for individual's residence (See subhead Commercial Lease). Rent agreements shall be concluded with individual lessees (“tenants”) only. Rent is independent type of contract differing from lease. (See subhead Residential rent, infra).

Residential rent agreements divided into commercial and social rent agreements. Commercial rent takes place when rented living premises are in private property of legal entities or individuals. Commercial rent governed by Civil Code. Social rent appears when rented living premises being state or municipal property provided for temporary use and tenancy. Social rent governed by Housing Code of RF of Dec. 29, 2004. Civil Code contemplated specific feature of state/municipal housing rent is that renter's family members enjoy equal rights and obligations with renter in respect of premises. In case of tenant's death or his move or upon his request social rent agreement may be concluded with one of members of tenant's family. (Civil Code, art. 672[2]). Provision of arts. 674, 675, 678, 680 §§ 1-3 of art. 685 of Civil Code shall also apply on social rent. Other provisions of Civil Code shall apply on social rent unless otherwise provided by housing legislation (Id. art. 672[3]). Habitability of residential premises determined pursuant to housing legislation. (Id., art. 673). Rules for declaration of living premises uninhabitable is settled by Resolution of RF Government No. 47 of Jan. 28, 2006 “On approval of Regulation on procedure of declaration of premises, housing premises, uninhabitable and apartment house emergency and subject to condemnation” (am'd Aug. 2, 2007). Commercial rent agreement must be in writing. (Id., art. 674). Transfer of title to residential premises does not terminate or amend commercial rent agreement. (Id., art. 675). Rentor obligated to provide vacant habitable premises, connected to utilities. (Id., art. 676). Long term commercial rent (longer than one year) must name all individuals permanently living in premises. Unnamed adults may not live permanently in premises without consent of rentor, renter and all individuals permanently living in premises however renter may accommodate temporary tenants for up to six months previously notified rentor. (Id., arts. 677, 679-80). Residential premises may be used only for living. (Id., arts. 288, 678). Renter may not rebuild or reconstruct premises without rentor's consent. (Id.). Unless otherwise provided, maintenance repairs are responsibility of renter, major repairs are responsibility of rentor. (Id., art. 681). Term of residential commercial rent may not exceed five years. (Id., art. 683). Renter enjoys priority right to renew rent, unless rentor delivers three months notice of intent not to re-let premises for at least one year. If rentor fails to deliver notice, lease is deemed renewed on same terms for additional term. (Id., art. 684). Renter may with consent of rentor sublet residential premises, however subrenter does not enjoy renewal right of priority. (Id., art. 685). Renter may terminate tenancy with three months notice. (Id., art. 687). Court may terminate tenancy upon request of rentor for failure to pay rent for six months if longer period was not stated in agreement, or in case of delay in payment, for more than two times short term agreements, destruction or non-habitability of premises, or renter's continued disturbance of peace after rentor's warning. (Id.).

Financial leasing is purchase financing method whereby lessees/purchasers may obtain equipment, buildings or other non-consumable goods (except for land and other natural objects, as well as for property that is prohibited for free circulation or for which special procedure of usage is established by federal laws), for doing business on long term lease or lease-to-own basis. Lessor may be seller, or third party with purchase money who buys object of leasehold and leases it to lessee. Third party lessor must notify seller that property will be leased to lessee. (Civil Code, art. 665, RF Law No. 164-FZ of Oct. 29, 1998 ``On Financial Lease [Leasing]'' as am'd by RF Law No. 10-FZ of Jan. 29, 2002, RF Law of Dec. 23, 2003, RF Law of Aug. 22, 2004, RF Law of July 18, 2005 and by RF Law of July 26, 2006 [``Leasing Law''] arts. 2, 4). Lessor should notify seller that property is intended for lease to certain person. (Id., art. 667). Financial lease may stipulate that lessor select property on lessee's behalf. Property must be transferred by seller directly to lessee. (Id., art. 668).

Claims by lessee arising from contract concluded between seller and lessor which concern quality and completeness of property, term of delivery, or other instances of seller's improper performance of contract may be submitted directly to seller. (Id., art. 670). Lessee also denied right to terminate contract of sale with seller absent lessor's consent. (Id.). Lessor and lessee are joint and several creditors, with regard to seller. (Id.). Lessor not liable to lessee for seller's failure to perform unless lessor selected seller or contract stipulates lessor's liability. (Id.). If seller was selected by lessor they are jointly and severally liable to lessee for seller's failure to perform his obligations. (Id.).

If contract of financial lease provides for transfer of title to leased property to lessee total amount of contract may include redemption price of such property. (Civil Code, art. 624; Leasing Law, art. 28). Parties are entitled to agree upon set off of rental payment in redemption price. (Id.).

23.06 PERPETUITIES:

No limitations on disposition of property analogous to common law rule against perpetuities.

23.07 PRIVATIZATION:

Matters of privatization in RF are governed by several laws: RF Law No. 178-FZ of Dec. 21, 2001 ``On the Privatization'' (``Privatization Law''), which took effect on Apr. 2002 as last amended May 7, 2009. Organization and legal peculiarities of railway transport property privatization settled by RF Law No. 29-FZ of Feb. 27, 2003 ``On peculiarities of developing and disposal of railway transport property'' last amended by RF Law No. 100-FZ of June 26, 2008. Matters of privatizing residential property are governed by Law of RSFSR No. 1541-1 of July 4, 1991 (last am'd June 11, 2008).

Key features of privatization of RF subjects property or municipal property set forth by RF Law No. 159-FZ of July 22, 2008 (as last am'd July 17, 2009), main provisions of this Law remain in force until July 1, 2010. RF Law No. 220-FZ on amending art. 170 of RF Law ``On Drugs and Psychotropic Substances'', directly prohibits privatization of assets of organizations producing drugs and psychotropic substances, but allows privatization of such organizations themselves.

Before new Privatization Law was passed, privatization had been effected under laws of privatization of 1991 and 1997.

Privatization passed through two stages for investment: (1) Up to 1994—voucher privatization, when citizens of Russian Federation having received their vouchers used them as means of payment in purchase of shares of enterprises subject to privatization; followed by (2) monetary privatization when share holdings and property complexes were sold by competitions and auctions. Mass privatization has been completed; new privatization may be monetary only.

RF legislation prohibited alienation of state and municipal property for price less than normative. (Privatization Law, art. 12). Rules for determination of normative price of state/municipal property set forth by RF Government in Reg. No. 87 of Feb. 14, 2006. Thus, for example, normative price of material complex to be privatized established equal to its balance sheet value of assets. Normative price of privatizing shares owned by state or municipal institution joint stock company, share of RF, share of RF subject or municipal formation in charter capital of limited liability company, excluding normative price of shares of banking organizations, is defined on basis of composite books and records of company's summary as average value of special rates (cost of shares on basis of net balance, of exchange rates, of net wealth), increased on ratio of special right (“golden share”). Normative price of privatizing shares owned by state or municipal institution joint stock company, share of RF, of RF subject or municipal formation in charter capital of banking limited liability company, is established equal to cost of proprietary funds (capital) of joint-stock company (limited liability company), specified in order, established by CBR increased on part of privatized shares of charter capital of joint-stock company (privatized shares of charter capital of limited liability company) and ratio of special right (“golden share”).

Object of privatization is estate in state/municipal ownership excluding objects withdrawn from circulation and those, which may be in state/municipal ownership only under provision of law. (Privatization Law, arts. 1, 3). Thus under art. 5 of RF Law No. 170-FZ of Nov. 21, 1995 ``On use of nuclear energy'' (last am'd Dec. 27, 2009), nuclear materials can be owned by state or become private property of legal entities. President of Russian Federation approves list of nuclear materials that can be owned only by state. President of Russian Federation approves list of Russian legal entities (entities established under Laws of Russian Federation) that can own nuclear materials.

Only those plots of land are transferable by privatization on which privatized immobile objects are located. Land plots shall be privatized as part of privatized property complex or simultaneously with building situated on them. (Id., arts. 3, 11, 28). If immobile estate situated on plot of land has already been privatized, owner of such estate is entitled to redeem plot of land or take it on long-time lease. (Id., art. 28, Land Code, art. 36). In case separate parts of building/construction are privatized by various persons, upon privatization all owners are entitled to purchase plot of land as co-owners. (Id., art. 28).

Following persons may participate in privatization: any individuals and legal entities excluding unitary enterprises, state/municipal unitary institutions and legal entities share owned by state or by municipal institution in authorized capital of which exceeds 25%. (Id., art. 5). Is guaranteed to foreign investors their participation in privatization on conditions and in accordance with procedure provided for in laws on privatization, i.e. on equal terms with other subjects. (RF Law, No. 160-FZ of July 9, 1999 ``On Foreign Investments in RF'', last am'd by RF Law of Apr.

29, 2008, art. 14, Privatization Law, art. 5). Instrument of payment used at privatization is currency of Russian Federation, except for sales of shares outside of RF. Foreign investors participate in auctions and competitions through ``K''-type accounts (``convertible'') in authorized banks. See category 3 Business Regulation and Commerce, topic 3.01 Banks and Banking.

Under antimonopoly legislation of RF all purchasers of estate in process of privatization shall provide document certifying notification of federal antimonopoly authority or of its local body about intention to purchase estate subject to privatization. (Privatization Law, art. 16). See also category 3 Business Regulation and Commerce, topic 3.09 Monopolies, Restraint of Trade and Competition, subhead Antimonopoly Ministry.

Methods of privatization are set forth exhaustively in Privatization Law. These are: transformation of unitary enterprise into joint-stock company, sale of shares in specialized auction or competition, etc. (Id., arts. 13, 18-26). For first time were set forth in law sale outside of RF of shares of joint-stock companies and sale of shares of joint-stock company on results of its trust. (Id., arts. 21, 26).

State/municipal property subject to transfer may be encumbered with restrictions (liability to use for fixed purpose, etc.) and by public easements (provision of unimpeded access, passage, etc.). (Id., art. 31).

In 1992-1994, RF State Duma and President of RF passed State Privatization Programs and Fundamentals of State Privatization Program. They set objective of privatization, grouped objects of privatization subject to body deciding on privatization and determined objects not to be privatized and indicated means of privatization. In pursuance of new Privatization Law, RF Government shall approve annually prediction plan (program) of privatization containing specific list of federal estate planned to be privatized during relevant year with indication of terms of privatization. (Id., arts. 6-8). List shall be formed on basis of proposals made by federal executive bodies, by unitary enterprises and joint-stock companies themselves, by potential purchasers, etc., in accordance with programs of social and economic development of Russia. Shares of strategic joint-stock companies and strategic enterprises may be included in prediction plan subject to decision made by President of RF; and shares of Gazprom, RAO ``EES'', open joint-stock company, specified by item 1 part 1 art. 3 of Federal law No. 13-FZ ``On particularities of control and asset management and shares of companies conducting activities in the sphere of usage of nuclear energy, and on entering of changes to some enactments of RF'' of Feb. 5, 2007 (last am'd Dec. 1, 2007), subject of natural monopolies in sphere of railway transportation and federal state unitary enterprises that are managed by federal executive body in sphere of management of railway transport may be included into prediction plan subject to special law. (Id., art. 7). Peculiarities of privatizing railway transport property are that single entity appears as result of such privatization named open joint stock company ``Russian Railways''. Property of OJSC ``Russian Railways'' formed by withdrawal of property of federal railway transport organizations and its contribution into stock capital of OJSC ``Russian Railways''. (RF Law No. 29-FZ of Feb. 27, 2003, art. 3). Single founder of this company is Russian Federation. (Id., art. 4). All shares of OJSC ``Russian Railways'' owned by Russian Federation. Sale and other ways of their alienation, or pledge or any other disposal shall be permitted only by special RF Law. (Id., art. 7). Rights and duties of RF as shareholder of OJSC ``Russian Railways'' maintained by RF Government. (Id., art. 5). Decision on conditions of privatization of specific item of federal estate shall be made in accordance with prediction plan. (Privatization Law, art. 14).

Medium and smaller enterprises have right of first refusal to purchase real property owned by RF subjects and municipalities and held in lease by such enterprises over three years, lease payments made in time and area of leased property does not exceed certain amounts. Such property purchased at market price, determined by independent appraiser.

Public authorities of subjects of Russian Federation and local authorities shall decide independently on plans and conditions of privatization of property owned by such subjects or municipal institutions. (Id., arts. 10, 14).

Earlier state privatization programs used to set forth benefits for employees of privatized enterprises (free or privileged, or by closed subscription purchase of shares of joint-stock company into which enterprise is being transformed, etc.). Present legislation and prediction privatization plans do not provide such benefits. Rather, collective contract of employees remains in effect for period of at least three months after enterprise is privatized. (Id., art. 17). Nevertheless made but not executed till Privatization Law took effect decision on closed subscription through employees shall be executed. (Id., art. 43).

Decisions on privatization of federal estate shall be made by RF Government, which is entitled to delegate power of privatization function to federal executive body. (Id., art. 6). At present, Federal Agency on Managing of State Property is this body in accordance with Decrees of RF President No. 314 of Mar. 9, 2004 (last amended June 22, 2009) and No. 724 of May 12, 2009 and Resolution of RF Government No. 432 of June 5, 2008 (as am'd Apr. 30, 2009), which also performs functions of sale of federal property in privatization, earlier discharged by Russian Federal Property Fund, wound up by RF Government Ruling No. 947-p of June 28, 2008.

Privatization powers of RF subjects state bodies and local authorities, regarding state property of RF subjects and municipal property, defined by local legislation.

23.08 REAL PROPERTY:

Under RF law, real property equated with immovable property, generally defined as everything so tightly linked with land that it cannot be moved without causing damage to property in question. Real property includes land sites, subsoil lots and everything that is tightly linked with land, namely, objects that cannot be moved without causing damage to them in question including buildings, structures and uncompleted constructions. Real property includes also aircraft and seacraft that are subject for registration, inland ships, and spacecraft. Other property can be defined as real property under Law. (Civil Code, art. 130). RF law permits citizens and legal entities, including state and municipal entities, to own any property they are not prohibited from owning by law. (Id., arts. 212, 213). Land and natural resources not owned by citizens or legal entities defined as state owned. (Id., art. 214[2]).

Ownership and other rights in rem concerning real property, and limitations on and transfers and terminations of such rights, must be registered in uniform state register maintained by Federal Service of State Registration. Right of ownership acquired (as to newly created immovables, such as buildings) or transferred from moment of registration. (Id., arts. 131[1], 164, 219, 223). Real estate considered owned by bona fide purchaser (Id., art. 302) from date of registration of such real estate in its name except cases when owner is entitled to demand its property from such bona fide purchaser. (Id., art. 131[2]). Procedures for state registration set forth in Civil Code augmented by RF Law No. 122-FZ ``On State Registration of Rights for Immovable Property and Transactions with It'' dated July 21, 1997, also amended on Oct. 2 and 18, 2007, Nov. 8 and 23, 2008, May 13 2008, June 30, 2008 July 22 and 23, 2008, Dec. 22 and 30, 2008, Dec. 21 and 27, 2009. Right on real estate, accrual or transfer of which connected with state registration, does not accrue/transfer if registration is not duly executed. Failure to register real property rights and transactions generally invalidates right or transaction particularly in case of mortgage. (Civil Code, arts. 165, 339). In most cases of non-registration of transactions, non-registration does not void transaction, but contract (of sale of dwelling house, of sale of enterprise, of rent of building etc.) shall be deemed non-concluded. (Id., arts. 558, 560, 651). See also subhead Land Sales, infra; topics Adverse Possession, Landlord and Tenant; category Mortgages, topic Mortgages.

Termination of Real Property Rights.

Property ownership rights may be terminated pursuant to grounds and events stipulated by law. (Id., art. 235). Grounds for termination of ownership rights in and/or forcible removal of real property from its owner include levy of execution on land by court order (Id., arts. 237, 278), state buyout of private land site pursuant to eminent domain procedures (Id., arts. 279-283), confiscation of land used in manner which violates land use laws subject to subsequent sale and transfer of proceeds of sale to owner (Id., arts. 285, 286) in two latter cases realty situated on seized land shall be alienated for payment (Id., art. 239). At reacquisition of private plot of land for state or municipal purposes under arts. 279-283 of Civil Code reacquisition price includes all damages incurred by owner in virtue of such seizure, including loss of profits. Procedure for indemnification for such damages settled by Resolution of RF Government No. 262 of May 7, 2003. Termination of ownership rights in mismanaged residential premises may be done by court upon application of local authorities. (Id., art. 293). In case of appearance in RF of new law, terminating right of ownership, including right of ownership of real estate, losses incurred by owner, including cost of property, shall be paid by state. (Id., art. 306). This refers also to nationalization available by virtue of RF Law. No law of nationalization passed to date, although government is drafting act establishing grounds for and procedure of nationalizing property. (Id., art. 306).

Foreign Ownership.

RF Law No. 160-FZ of July 9, 1999 “On Foreign Investments in RF” guarantees entitlement of foreign investors for obtaining right of ownership in buildings, constructions, other immovable property and in plots of land and other natural resources under legislation of Russian Federation and its subjects. (art. 15). RF legislation does not contain any bar for obtaining right of ownership in buildings, constructions, other immovable property located on plots of land, nor any restrictions thereto.

Right of foreigners to own land plots is set forth in Land Code except for agricultural lands, alienation of which is not governed by this Code. Although Land Code does not provide equality of rights in land between Russian citizens and legal entities and foreign persons (Land Code, art. 5), on whole neither does it prevent foreigners from owning plots of land. Only in two cases are foreigners prohibited to obtain land plots in ownership (Id., art. 15): (1) in by-frontier territories, list of which shall be approved by President of Russian Federation under state frontier legislation of Russian Federation. List has not been approved to present. Up to its approval plots of by-frontier territories shall not be transferred at all to foreign ownership (Law “On Implementation on the Land Code” dated Oct. 25, 2001, last am'd Dec. 27, 2009, art. 3); (2) and in other territories specifically indicated in federal laws. Foreigners as well as citizens of RF are not entitled to obtain right of ownership in plots of land withdrawn from circulation, exhaustive list of which includes lands occupied by state natural reserves and national parks, object with usage of atomic energy, etc. (Id., art. 27 am'd by RF Law No. 15-FZ of Mar. 7, 2005). Requirements of purchase/transfer of state and municipal land to foreign ownership are onerous. (Id., art. 28). Amount of payment for land plot acquisition depends on manner of acquisition. Thus, if land acquired from individual under sale and purchase agreement, parties may agree upon price themselves. In case land plot goes to foreign ownership by means of auction for state/municipal lands sale, initial price settled by RF Ministry for property relations or by authorized state body of RF subject or by local self-government body based on independent appraiser report composed in accordance with RF legislation on appraisal activities. (Reg. of RF Government No. 808 of Nov. 11, 2001 as am'd on Dec. 29, 2008). Law does not restrict disposition of plots of land owned by foreigners (sale of land, donation, exchange, mortgage, etc.).

As for agricultural land, question of foreign ownership therein and of its transferability resolved in special RF law No. 101-FZ of July 24, 2002 ``On circulation of agricultural lands'' last amended on May 8, 2009. Under this RF Law, foreign citizens, foreign legal entities, stateless persons and legal entities having more than 50% of stock (share) capital belonging to abovementioned parties, may have right to lease agricultural land and have shares in joint property for such land. (art. 3). Therefore term of such lease agreement cannot exceed 49 years.

(Id., art. 9). Area of agricultural land plot owned by one lessee is not limited. (Id.).

Condominiums.

According to new ``RF Housing Code'' of Mar. 1, 2005, last amended Dec. 17, 2009, RF Law No. 72-FZ ``On the Partnerships of Living Space Owners'' of June 15, 1996 (``Condominium Law'') has become inoperative. § VI of this Housing Code (``HC'') presently defines and regulates organization and management of condominiums on RF territory.

Condominium is nonprofit organization, association of premises owners in multiple-dwelling house joined together for common management of immovable property of such multiple-dwelling house, utilities operation, holding, use and disposal within lawful provisions of common property of house. (HC, art. 135). Condominium becomes legal entity from its registration date.

Owners of dwellings in one multiple-dwelling house may establish only one condominium. Decision on creation of condominium shall be made at general meeting of owners and considered lawful if made by 50% of all owners of premises. (HC art. 136). Condominium has complex of general rights and obligations due to such form of nonprofit organizations. (Id., arts. 137 and 138). Condominium might be reorganized into residential or homebuilding cooperative or liquidated. (Id., arts. 140, 141).

Membership in condominium initiated by person via filing application to that effect. In case condominium in multiple-dwelling house already exists, person may become its member only upon his registration as owner of dwelling in that house. (Id., art. 143). Condominiums managed by general meeting of owners and administration having control of it. (Id., art. 144). Their competence precisely described in arts. 145-150 of RF Housing Code.

See subheads Land Sales, infra; topics Adverse Possession, Landlord and Tenant; category Mortgages, topic Mortgages.

Land Sales.

In Soviet period, private ownership of land was prohibited. All of immobile property was owned by state, cooperatives, trade unions of other public organizations, excluding some dwelling houses and summer houses, and land was owned by state exclusively. RF Constitution permits private, public and municipal ownership of land (RF Constitution, art. 9) and stipulates right of RF citizens and legal entities to freely possess, use and dispose of and provided such use neither violates rights and legal interests of other persons nor damages environment (Id., art. 36).

First attempt of transfer of land into private ownership and permission of its sale was made in Land Code of RSFSR dated Apr. 25, 1991 and in RF Law No. 4196-1 of Dec. 23, 1992 “On Right of RF Citizens to Private Ownership of Gov. Buildings and Residential Housing, Right to Land Parcels for Conducting Subsistence and Non-Commercial Farming Activity and Right of Sale of such Parcels” (invalid at present), and later in President's decrees under which land plot owners were entitled to make deals herewith. However, these rules did not apply to all kinds of land.

In Apr. 2001 c. 17 of Civil Code took effect. It concerns right of ownership and other proprietary interest in land, including regulation of alienation of plots of land. In Oct. 2001 Land Code was passed, which contains general rules of obtaining state/municipal land as private property and sale of plots of land by private owners, excluding agricultural lands, circulation of which shall be governed by special law. Individuals and legal entities own plots of land obtained on grounds provided by RF legislation. (Land Code, art. 15). In general, former state/municipal land plots are transferred for private ownership subject to payment, but it may be gratuitous in cases provided for in federal laws and in laws of subjects of RF. (Id., art. 28). Citizens, specific categories of legal entities (state and municipal authorities, public enterprises, and centers of historical heritage of former Presidents of RF), and state and municipal bodies may possess land plots correspondingly as life estates or in permanent (perpetual) use. (Id., arts. 20 and 21). Citizens and legal entities are entitled to obtain land from state/municipal government for purpose of building; such plots of land are sold in auctions and competitions. (Id., arts. 28, 30). Citizens are entitled to obtain ownership of plot of land not for building upon application to public executive body or local authority, in which case contract of sale of land plot may be concluded without conducting auction or competition. (Id., art. 34). In case of sale of land plot owned by state or municipal authorities, tenant of plot has preemptive right to purchase plot of land. (Id., art. 22).

Citizens and entities that have ownership interests in: uncompensated use, control or operative management of buildings, structures, constructions, located on land plots belonging to state or municipality, procure rights on these land plots according to present Code.

Unless otherwise provided by federal laws, citizens and entities, proprietors of buildings, structures, constructions by way of and on conditions established by present Code, federal laws have exclusive right of privatization and rent of land plots.

Religious organizations owning buildings, structures, constructions with religious and charitable purposes, located on land plots upon state or municipal property, receive property rights in these land plots gratuitously.

Religious organizations having, according to federal laws, religious and charitable purposes, on right of uncompensated use buildings, structures, constructions located on land plots upon state or municipal property, receive these land plots on right of uncompensated urgent use for term of uncompensated use. (Id., art. 36). If any building/construction privately owned is situated on such plot of land, this preemptive right belongs to owner of building/construction, but not to tenant. (Id., art. 36). If land plot owned by state/municipal authority is indivisible and building (premises therein) situated on plot of land is jointly owned by several persons, such persons are entitled to purchase plot of land for participatory share ownership. (Id., art. 36).

Private landowner is entitled to sell same at his/her own discretion, but if any immobile property owned by another person is situated on such plot of land, owner of this property shall have preemptive right to purchase plot of land. (Id., art. 35). If owner of plot of land is also owner of buildings or constructions situated on it, Land Code permits alienation of plot of land only along with these buildings/constructions. (Id., art. 35).

Private landownership is subject to state registration with uniform state register and to certify this right as well as right of ownership in other immobile property state registration certificate shall be issued. (Id., art. 26).

Sales order for agricultural lands stipulated in RF Law “On circulation of agricultural lands”. Subject of RF or if so provided by subject of RF legislation—municipal formation—has preemptive right for purchase of land plot from agricultural lands for sale price excluding case of conducting public auction. (RF Law “On circulation of agricultural lands”, art. 8). Seller of such land plot from agricultural lands must notify in writing highest executive body of RF subject or municipal formation about his intention to sell and provide all information essential for such sale including price of land plot. (Id.). In case RF subject or municipal formation does not exercise right to purchase proposed land plot or fails to notify seller within one month from date of notification, seller may sell it to third party within one year for price not less than that stated in notification. (Id.). In case proposed price was reduced or other material term changed, seller must notify highest executive body of RF subject or municipal formation about such new terms of sale. (Id.).

See also subhead Foreign Ownership, supra; topic Privatization.

Contracts of sale of real estate (“improvements”) are governed by c. 30 of Civil Code.

(Civil Code, arts. 549-58). Contract of sale of real estate shall be concluded in writing by drawing up one document and shall contain information identifying real estate subject to transfer and its price. (Id., arts. 550, 554-55). Contract itself shall be deemed concluded upon its signing and is not subject to state registration, excluding contract of sale of living quarters, but state registration is necessary for transfer of right of ownership on immovable estate. (Id., arts. 551, 558). Contract for sale of building, construction, or other real estate simultaneously transfers proprietary interest for such real estate and for land plot beneath real estate and necessary for its use. Unless otherwise provided by law, in case if seller of real estate is proprietor of land plot beneath real estate and necessary for its use, purchaser of real estate simultaneously receives proprietary interest for such land plot. Sale of real estate located on land plot which does not belong to seller on right of ownership is assumed without permission of proprietor of such land plot, unless it contradicts conditions of use of land plot, established by agreement or by law. In this case, purchaser of real estate acquires same rights on such land plot as seller had (Id., art. 552). Transfer of real estate shall be certified by deed of conveyance. (Id., art. 556). Contract of sale of living quarters where residents retain under law right to use these quarters after sale, shall contain list of these residents and their respective rights. (Id., art. 558).

24 TAXATION

24.01 INTRODUCTION:

Three kinds of taxes and duties are imposed in RF: federal taxes and duties (may only be imposed by federal laws and payable all over territory of RF); regional taxes and duties (may be imposed by federal laws and laws of RF subjects [regions]; come into force in accordance with federal law by laws of RF subjects); local taxes and duties (may be imposed by federal laws and statutory legal acts by representative bodies of local government; come into force in accordance with federal law by statutory legal acts by representative bodies of local government).

Main legislative act in sphere of taxation in RF is RF Tax Code.

Part I of RF Tax Code came into force from 1 Jan. 1999 (latest amendments of Dec. 29, 2009). Part I of RF Tax Code imposes types of taxes and duties levied in RF as well as basic principles of taxation and duties, including grounds for creation (change, termination) and procedure of execution of liabilities to pay taxes and duties, rights and obligations of participants of tax relations, responsibility for tax infringements, procedure of appeal of acts of tax authorities and actions (default) of its officials.

Part II of RF Tax Code consists of chapters dealing with particular taxes. These chapters adopted stepwise. Thus as from Jan. 1, 2001 c. 21 ``Value Added Tax'', c. 22 ``Excise Duties'', c. 23 ``Individual Income Tax'' came into force; c. 25 ``Corporate Income Tax'', c. 26 ``Tax on Mining Operations'', c. 26.1 ``Taxation System for Agricultural Producers (Unified Agricultural Tax)'', c. 28 ``Transportation tax'' came into force as of Aug. 30, 2002; c. 26.2 ``Simplified Tax system'' and 26.3 ``Tax system in form of Unified tax on imputed income for distinctive activities'' came into force as of Dec. 1, 2003; c. 26.4 ``Tax system for Production Sharing Agreements execution'' came into force as of June 10, 2003; c. 25.1 ``Duties for usage of live resources and water biological resources'', c. 29 ``Gambling industry tax'', c. 30 ``Enterprise assets tax'' came into force as of Jan. 1, 2004, c. 25.2 ``Water Tax'', c. 25.3 ``State Duty'', c. 31 ``Land Tax'' came into force as of Jan. 1, 2005. C. 27 ``Tax on Sales'' became inoperative from Jan. 1, 2004, c. 24 ``Unified Social Tax'' became inoperative from Jan. 1, 2010.

Arts. 13-15 of Part I of RF Tax Code provide for exhaustive list of federal, regional and local taxes and duties which supposed to be regulated in Part II of RF Tax Code.

Each tax is commented by Instructions of RF Ministry for Taxes and Duties (MNS RF). Presently according to Decree of RF President No. 314 of Mar. 9, 2004 ``On system and structure of federal executive bodies" (latest amendments of June 22, 2009) MNS RF reorganized into Federal Tax Service with transferring to RF Ministry of Finance its functions to pass relevant regulatory legal acts in definite sphere of regulation and to maintain expository work on RF tax and duties legislation. But in case of collision between rule of law and MNS RF instruction or particular clarification court passes judgment pursuant to rule of law, if interested person files claim.

Specific feature of Russian tax system is imposing main tax burden on legal persons. Taxes and duties paid by same are principal income source of state and exceed deductions to budget from natural persons considerably.

24.02 CUSTOMS DUTY AND TAX:

Export Duties.

See category 15 Foreign Trade and Commerce, topic Customs (Duty).

24.03 EXCISE TAXES:

See topic 24.04 Federal Taxes, subhead Excise Duties.

24.04 FEDERAL TAXES:

Excise Duties.

Since 1 Jan. 2001 excise duties have been regulated by c. 22 of RF Tax Code (latest amendments of Dec. 27, 2009). Domestic sale and import of certain goods are liable to excise duties. (c. 22, art. 182). List of goods levied by excise duties and excise rates provided for in arts. 181 and 193 of RF Tax Code. This list includes ethyl alcohol and ethyl-contained products, alcoholic beverages, beer, tobacco products, motor vehicles, petroleum, fuel oil.

Procedure and conditions of exemptions from taxation of sales of goods liable to excise duties are regulated by arts. 183 and 184 of RF Tax Code.

Value Added Tax (VAT).

Since 1 Jan. 2001 VAT has been regulated by c. 21 of RF Tax Code. VAT exists according to standard credit-account system under which tax liability is balance of collected VAT and paid VAT. According to art. 146 of RF Tax Code VAT liable are: goods, services and works sold off in RF; in-company transfer of goods (performance of works or services) for company own needs, performance of building and construction works for in-company consumption purposes, import of goods to RF customs territory.

RF Tax Code imposes three VAT rates: basic rate of 18%; 10% rate applied for explicitly listed types of food, children and medical goods as well as for certain types of printed periodicals, 0% rate applied for exported and some other goods (works, services). (c. 21, art. 164). One of ways of exemption of goods (works, services) from VAT is establishment since 1 Jan. 2001 for relevant cases of 0% VAT rate. In said cases, VAT amount paid to vendors (suppliers) is returned from RF budget according to procedure provided for in art. 176 of RF Tax Code.

Arts. 149 and 150 of RF Tax Code impose extensive list of operations exempt from VAT. VAT amount paid to vendors (suppliers) for such operations cannot be claimed for return from RF budget but is deducted from taxable base for Income Tax. (c. 21, arts. 170, 171).

Place of sale of goods is determined according to art. 147 of RF Tax Code. RF is considered place of sale either if goods allocated in RF and are not exported; or are allocated in RF at beginning of shipment or transportation. Decisive factor for many services is allocation of consumer of services. (Id., art. 148). VAT on imported goods is paid by importers simultaneously with import duty.

Sale in RF of services of lease of offices and/or living premises to foreign citizens or organizations accredited in RF not liable to taxation (exempt from taxation). Such exemption is valid in cases where laws of correspondent foreign country impose similar order in relation to Russian citizens and organizations accredited in this foreign country, or such rule is provided for in RF international treaty (agreement). (c. 21, art. 149).

Art. 161 of RF Tax Code provides for obligation of organizations and individual entrepreneurs, registered with tax authorities and purchasing goods (works, services) in RF from foreign persons not registered with tax authorities, to withhold VAT from amounts payable to vendors and to pay it to budget.

Customs Duty and Tax (Export Duties).

See category 15 Foreign Trade and Commerce, topic Customs (Duty).

Corporate Income Taxation.

C. 25 “Corporate Income Tax” of RF Tax Code, effective since 1 Jan. 2002, regulates taxation of Russian legal persons and foreign organizations acting in RF through “permanent representative offices” (concept similar to permanent institution according to Organization for Economic Cooperation and Development model) and (or) earning income from sources in Russia. (c. 25, art. 246). Term “foreign organization” is explained in art. 11 of RF Tax Code, it is broader than term “foreign legal person”.

While determining taxable income Russian legal persons must include income earned outside RF. (Id., art. 311). Procedure and specific features of taxation of foreign organizations set forth in arts. 306-310 of RF Tax Code. Specifically, term “permanent representative office” is defined for purposes of taxation in RF (Id., art. 306); procedure of taxation of foreign organizations acting through permanent representative offices is regulated in detail (Id., art. 307), acting on construction site (Id., art. 308), not acting through permanent representative offices but earning income from sources in RF (Id., art. 309). It is imposed that tax on income earned from sources in RF by foreign organization without permanent representative office shall be computed and withheld by tax agent (source of income). (Id., art. 310). Procedure of computing and withholding tax by tax agent in that case in defined. (Id.).

In certain cases, when activities of foreign organization in RF through its permanent representative office do not imply remuneration, to such organization taxable base amounting to 20% of expenses of its permanent representative office connected with corresponding activities is “attributed” pursuant to art. 307 of RF Tax Code.

Withholdings from income earned from sources in RF by foreign organization having no permanent representative office shall be made in currency of paid sums. (Id., art. 310). In respect of tax rates art. 310 of RF Tax Code makes reference to rules of art. 284 of said Code (basic tax rate is 20%, there are also special rates, including 15% for dividends, 10% for freight charge income etc.). Such income is taxed as gross income with several exceptions allowing for taxation of net profit provided that foreign organizations comply with necessary conditions. (Id., art. 309).

International agreements for avoidance of double taxation including those with USSR as party and being observed by RF may provide for lower tax rates or tax exemption. Tax exemption with source of payments or reduced taxation at source of payments made before payment of income provided that foreign organization presented to tax agent (source of payment) evidence that this organization has permanent residence in country with which RF has international agreement regulating taxation issues, which should be certified by competent authority of relevant foreign country. Return of excessively withheld tax to foreign organization is made within one month from date of submitting of application together with all necessary files attached to tax authority at place of registration of source of payment (tax agent) within three years from date of expiration of tax period when respective income gained. (Id., art. 312).

MNS RF Order No. AP-3-06/124 of 7 Apr. 2000 has approved Regulations on specific features of registration of foreign organizations with tax authorities as well as forms of number of applications and notices required pursuant to these Regulations, including registration application form, application form for issue of Certificate of Registration with tax authority, form of notice of permanent representative office of foreign organization, form of notice of income from activities in RF, form of notice of sources of investment and other income. (Id., § 1).

Since 1 Jan. 1999 new rules of determining price of goods, works and services for purposes of taxation provided for in art. 40 of RF Tax Code apply. This provision imposes general rule according to which contract price agreed upon by parties to transaction is assumed for computing taxable base. But in certain cases this price may be contested by tax authorities as not conforming to market prices amount: transactions between inter dependent persons, barter transactions, foreign export and import transactions and situations when within short period of time prices received (paid) by taxpayer for same goods vary by more than 20%. In said cases tax authorities may compare prices used by taxpayer with market prices for identical goods. If such comparison reveals price deviation for more than 20% tax authority computes additional tax and fines as if results of relevant transaction were estimated on basis of market prices for relevant goods, works or services.

Taxable income is computed by reducing earned income for amount of incurred expenses which are determined according to c. 25 of RF Tax Code. (c. 25, art. 252). Expenses comprise justified and documented expenditures made by taxpayer. Any expenditures may be considered as expenses provided that they are made in course of income earning activities. (Id.). In cases provided for in art. 265 of c. 25 expenses also include losses incurred by taxpayer. (Id.).

Groups of expenses reducing income for purposes of taxation are set forth in arts. 253-255, 260-269 of c. 25. Specific features imposed for including interests incurred under received loans into expenses. (Id., art. 269). Expenses which are not taken into account for purposes of taxation are expressly specified. (Id., art. 270).

Calendar year is tax period for income tax. Accounting periods are first quarter, half year and nine months of calendar year. (Id., art. 285). According to general rule, under results of each accounting period taxpayers compute and pay amount of quarterly advance payment of income tax on basis of tax rate and actual taxable income. Each time computation is made as progressive total amount from beginning of tax period. (Id., art. 286).

Art. 251 of c. 25 imposes extensive list of incomes not to be taken into account in determining taxable base for income tax. Special attention should be drawn to exemption from taxation of income earned by Russian organization gratuitously if transferring party (including individual) owns share in stock capital of receiving party amounting to not less than 50% or if receiving party owns share in stock capital of transferring party amounting to not less than 50% of authorized capital of transferring party. Received property is not considered as income for purposes of taxation only if said property (except for money funds) is not transferred to third persons within one year after it was received.

Since 1 Jan. 1999 branches and other separate subdivisions of Russian companies including companies with foreign capital are not considered as independent companies any longer. They just pay on behalf of their companies taxes and duties collected in territories where branches and/or subdivisions act on behalf of their companies. (RF Tax Code, art. 19). Separate subdivisions are defined as subdivisions located separately from company, with workplaces occupied for more than one month. (Id., art. 11). Russian organizations having separate subdivisions compute and pay part of income tax, which is to be paid to federal budget, at their locations without distribution of said amounts between separate subdivisions. (Id., art. 288). Payment of part of income tax to be paid to regional and local budgets is made by taxpayers at taxpayer's principal location and at location of each separate subdivision based on part of income accounting for such separate subdivisions. Two factors must be taken into account when determining part of income: unit weight of property and unit weight of employees. (Id.).

Tax Rates.

Imposed by art. 284 of c. 25 common rate of income tax is 24%. There are special rates, such as 9% for dividends received by Russian organizations from Russian organizations, 15% for dividends received by Russian organizations from foreign organizations and others. (Id.).

Dividend income received by Russian companies is taxed at 0% rate when such company owns not less than 50% of shareholding (equity) capital of company paying dividends, for period not less than 365 days, and acquisition price of such shareholding (equity) exceeded 500 mln. rub.

Tax rate of 0% on dividend income applies to dividends paid by foreign companies provided that such company resides in a state not included by Minfin RF in list of off-shore states.

Regional legislative authorities may reduce tax rate for certain categories of taxpayers within limits of part of tax paid to regional budget but such rate couldn't be less than 13.5%. (Id.).

Tax on income paid to taxpayer as dividends is withheld by source of income (tax agent) at time of income payment and transferred to budget with ten days after payment of income. (Id., art. 287).

Depreciation.

Amounts of accrued depreciation are included in expenses connected with production and sale of goods (works, services). (Id., art. 253). Mix of property to be depreciated, procedure of determining its initial value as well as procedure and methods of computation of depreciation amounts for purposes of taxation are regulated in detail by arts. 256-259 of c. 25 of RF Tax Code. Property to be depreciated is divided into ten groups depending on its useful life period. RF Government determines classification of property to be included in depreciation groups. (Id., art. 258). Special cases are provided when taxpayers entitled to apply accelerated depreciation (particularly relating to fixed capital stock which is subject of leasing agreement, to certain vehicles and number of other cases), as well as indexes applied for these purposes are specified. (Id., art. 259).

Capital increase (balance between sale price of property and depreciated cost or purchase price) is included in taxable income and is taxed using effective income tax rates. (Id., arts. 268 and 284). Initial value of fixed capital stock is restated according to statutory acts establishing procedure of re-evaluation of such stock. Until Jan. 1998 re-evaluations were made under RF Government decisions: in June 1992, Jan. 1994, Jan. 1996, Jan. 1997 and Jan. 1998. Presently basic statutory act under which re-evaluations of fixed capital stock are made is Accounting Rules of “Accounting of Fixed Capital Stock” PBU 6/01 adopted MinFin RF order No. 26n of Mar. 30, 2001 (latest amendments dated Nov. 27, 2006).

Payments and Declarations.

Foreign organizations acting in RF through permanent representative offices pay income tax following results of tax period (calendar year) and quarterly advance payments according to general procedure determined in arts. 286 and 287 of c. 25 RF Tax Code (Id., art. 307) with exemptions specified in Art. 309. Tax as result of tax period shall be paid not later than on deadline fixed for submission of tax declarations for relevant tax period, i.e. not later than on 31 Mar. of year following past tax period RF Tax Code. (Id., arts. 287 and 289). Quarterly advance payments paid not later than on deadline fixed for submission of tax declarations for relevant accounting period, i.e. not later than 28 days after end of relevant accounting period. (Id.). Moreover, arts. 286 and 287 of c. 25 determine cases, procedure and deadlines for computation and payment of monthly advance payments which are to be paid to budget without submission of tax declarations.

Russian organization or foreign organization acting in RF through permanent representative office (tax agents), paying income to foreign organizations having no permanent representative office in RF, withholds tax amount from income of this foreign organization every time payment is made to same or in each other case of receiving income by foreign organization unless otherwise provided for in RF Tax Code. Tax agent must transfer corresponding tax amount within three days after date of payment (transfer) of money to foreign organization or date of other receipt of income by foreign organization, and in case of dividends and interests transfer of tax amount shall be made within ten days. (Id., arts. 286 and 287).

Taxation of Income of Individuals.

C. 23 ``Individuals' Income Tax'' of RF Tax Code (as last am'd on Dec. 17, 2009), regulates taxation of income of individuals. Object of taxation for residents is income earned all over world, and for nonresidents—income earned from Russian sources only. (c. 23, art. 209). Agreements for avoidance of double taxation may modify these rules. (Id., art. 232). Art. 208 of c. 23 lists certain kinds of taxable income earned from sources both in RF and outside RF: dividends and payments on share holdings, insurance payments and income from lease of property, income from sale of real property in Russia etc. This list is not exhaustive. Individuals' income tax withheld at source of payment (tax agent), which may include Russian organizations, individual entrepreneurs and permanent representative offices of foreign organizations in RF. (Id., art. 226). For purposes of including in taxable base and computing tax amount, income earned in foreign currency is estimated in rubles at exchange rate of CB RF, fixed as of date of actual earning of income. (Id., art. 210). Income of married persons is taxed separately; submission of joint tax declaration is not allowed. Amendments made on Nov. 25, 2009 provide for some peculiarities in regard of taxation of income from securities trade, futures contracts and provision of loans made by securities. (Id., arts. 214.1. and 214.4.).

Income received in kind (i.e. goods, other property, works, services) is taxed subject to received items price computed on basis of market prices. (Id., art. 211). Income received as material benefit is also taxable. Money equivalent to taxable benefit is usually computed as balance between market price and actual price at which relevant property (works, services) was sold to taxpayer. (Id., art. 212).

Rates.

Pursuant to art. 224 of c. 23 following tax rates apply: common tax rate for residents is 13%; tax rate for income from lotteries, competitions, gambling, prizes obtained or organized for advertising of goods, services and works, insurance payments (to extent exceeding certain limits), savings from interest on loan amounts to 35%; tax rate for income of nonresidents amounts to 30%, apart from income received as dividends from Russian companies - in respect of such income tax rate amounts to 15%, tax rate for income received as dividends amounts to 9%, tax rate for bonds' interest income with mortgage coverage is also 9%.

Exemptions.

List of types of income of individuals exempt from taxation set forth in art. 217 of c. 23. Thus, social allowances, grants, pensions, interest on state securities and some other kinds not liable for taxation.

Deductions.

Arts. 218-221 of c. 23 impose “Standard”, “Social”, “Property” and “Professional” tax deductions. Standard tax deduction amounting to 3,000 rubles per month provided to certain categories of taxpayers such as disabled war veterans, victims of nuclear disasters, etc.; 500 rubles per month provided to such categories of taxpayers as Great Patriotic War participants, invalids from childhood and also invalids of I and II groups, etc.; 400 rubles per month—to taxpayers until moment (month) at which their joint income shall exceed 40,000 rubles; 600 rubles per month—to each taxpayers' child (until reaching age 18 and in case of full-time attendance until reaching age 24) until moment (month) at which their joint income shall exceed 280,000 rubles. Social tax deduction limited to 120,000 rubles per year provided to taxpayer if he/she had expenses for social, medical and educational needs.

Property tax deduction provided, particularly, in case of sale of real property (other property) owned by taxpayer for not less than three years within limits of total amount of received income, in case of sale of real property (other property) owned by taxpayer for less than three years within limits of received income of 1,000,000 rubles (125,000 rubles). Expenses for construction or acquisition of dwelling house or apartment in RF within limits of 2,000,000 rubles may be deducted as well.

Professional tax deductions are provided, in particular, to individual entrepreneurs and other individuals having private practice, authors of works of science, literature and arts, authors of discoveries, inventions and industrial models according to such procedure and to such extent as determined in art. 221 of c. 23.

Investment Income.

Interests paid to individuals on deposits by Russian banks are exempt from taxation, subject to certain limitations. (Id., art. 217). Dividends taxed with income tax are not exempt from taxation. (See rates above.)

Declarations and Payments.

Tax declaration of actually earned income for tax period (calendar year) must be submitted before 30 Apr. of year following past tax period. (Id., art. 229). Individual entrepreneurs, private notaries and other individuals having private practice must compute tax and submit declarations personally. (Id., art. 227). If income from employment in RF, taxable through withholding at source, is only taxpayer's income, he/she may not fill in tax declaration. If he/she has earned other income specified in art. 228 of c. 23, declaration should be filled in and submitted according to general procedure. In case of violation of deadline for submitting tax declaration penalty may be imposed on taxpayer according to such procedure and to such amount as provided for by art. 119 of RF Tax Code. Tax amount to be paid pursuant to tax declaration must be paid not later than 15 July of year following past tax period. (Id., art. 227).

Last amendments made on Dec. 27, 2009 specify that taxpayer shall not be obliged to include in declaration income that is not subject to taxation and income fully with held by tax agent if it doesn't prevent application of deductions. (Id., art. 229).

If foreign individual terminates his/her activities in Russia and leaves Russia, declaration of income actually earned during stay in Russia should be submitted not later than one month before departure. Payment of tax computed according to such declaration must be made not later than 15 days after time of its submission. (Id., art. 229).

Individual entrepreneurs, private notaries and other individuals having private practice pay advance payments of tax within tax period according to such procedure and in such time as provided for in art. 227 of c. 23. Advance payment amounts computed by tax authorities on basis of estimated income amount specified by taxpayer in “preliminary” tax declaration or actual income amount for past tax period. (Id., art. 227).

Individual entrepreneurs may switch to simplified taxation system providing for replacement of tax on income of individuals (in respect of income earned from business activities), VAT (excluded VAT to be paid under RF Tax Code at entrance of goods to RF tax territory), property tax (in respect of income earned from business activities) on income earned from business activities as well as payments and other considerations paid to individuals, calculated upon results of business activity for tax period. (Id., art. 346.11).

Insurance Payments.

In accordance with provisions of RF Law No. 213-FZ and RF Law No. 212-FZ both as of July 24, 2009, provisions of RF Tax Code on Unified social tax are cancelled from Jan. 1, 2010. Unified social tax is being substituted by insurance payments to non-budget funds. Payments will be made directly to Pension Fund, Fund of social insurance and Federal Fund of obligatory medical insurance.

Law provides for following rates, which shall be used to compute amount to be paid to each of funds. For 2010, Law provides reduced rates: 20% (from salary amount) to Pension Fund, 2.9 % to Fund of social insurance, 1.1 % to Federal Fund of obligatory medical insurance and 2% to local funds of obligatory medical insurance. From Jan. 1, 2011, rates will increase to 26%, 2.9%, 2.1% and 3% accordingly.

If total amount of salary paid to employee during year exceeds 415,000 rubles, employer shall not effect insurance payments to funds during rest of year.

Inheritance and Donation Tax.

RF Law No. 2020-1 of Dec. 12, 1991 “On Tax on Property Transferred Through Inheritance or Donation” has been cancelled by Federal Law No. 78-FZ of July 1, 2005. Thus property transferred through inheritance is exempt from taxation. Provisions in respect of cash or non-monetary incomes received from individuals in procedure of donation set forth in c. 23 RF Tax Code “Individual income tax”. Such kind of gifts as real property, transport vehicles, shares and stocks are imposed by tax at rate 13% but in any case family members and immediate relatives of donator are exempt from tax.

Tax on Mining Operations.

This tax regulated by c. 26 of RF Tax Code, being in force since Jan. 1, 2002 as last amended on Dec. 27, 2009. Payers of mining operations tax are organizations and individual entrepreneurs recognized as subsoil users according to RF legislation. (c. 26, art. 334). Tax amount depends upon value of produced minerals, tax rates vary from 3.8% to 17.5% depending on type of minerals. (Id., arts. 338, 340 and 342).

Said tax is withheld irrespective of payments made: for using subsoil—according to RF Law No. 2395-1 of Feb. 21, 1992 ``On Subsoil'' (latest amendments of Dec. 27, 2009), for using forestal resources (regional duty)—according to RF Forest Code No. 22-FZ of Jan. 29, 1997 (latest amendments of Dec. 27, 2009), for using bodies of water (federal duty)—according to c. 25.2 ``Water Tax'' of RF Tax Code came in force from Jan. 1, 2005. Additionally, RF Law No. 7-FZ of Jan. 10, 2002 ``On Protection of Environment'' (latest amendments of Dec. 27, 2009) provides for payments for adverse influence on environment, forms of such payments are to be imposed by other RF laws (art. 16).

Duties for Usage of Live Resources and Water Biological Resources.

C. 25.1 of RF Tax Code “Duties for usage of live resources and water biological resources” defines as objects of this tax live species and objects of water biological resources mentioned in art. 333.2 of RF Tax code. Payers of this tax are users of such objects (individuals and legal entities), which obtained appropriate license for such usage. (Id., art. 333.1). Tax rates indicated in art. 333.3 and vary, depending on live resources.

See also category 21 Mineral, Water and Fishing Rights.

24.05 GIFT TAX:

See topic 24.04 Federal Taxes, subhead Inheritance and Donation Tax.

24.06 INCOME TAX:

See topic 24.04 Federal Taxes, subheads Corporate Income Taxation, Taxation of Income of Individuals; topic 24.12 Regional Taxes, subhead Unified Imputed Income Tax.

24.07 INHERITANCE AND GIFT TAX:

See topic 24.04 Federal Taxes, subhead Inheritance and Donation Tax.

Water Tax.

C. 25.2 “Water Tax” of RF Tax Code came in force from Jan. 1, 2005. According to art. 333.9, following use of water objects is subject for taxation: water diversion, use of water areas, except wood floating by rafts and bags; use of water objects for electric power industry purposes without water diversion, use of water objects for wood floating by rafts and bags. Natural and legal persons, exercising special and/or specific water use are taxpayers. (art. 333.8).

Tax rates indicated in art. 333.12 of RF Tax Code and vary depending on economic region, catchment area, and on purposes of water use.

RF Water Code No. 74-FZ was enacted on Apr. 12, 2006 and came in force from June 3, 2006.

State Duty.

C. 25.3 ``State Duty of RF Tax Code'' came in force from Jan. 1, 2005 (latest amendments of Dec. 27, 2009). Since then Federal Law of Dec. 9, 1991 No. 2005-1 ``On State Duty'' became inoperative. Above chapter settles payments, which natural and legal persons pay on applying to notaries public or state authorities for performing legal acts, and when serving as plaintiffs or defendants. State duty provided by Tax Code substituted set of charges and duties, earlier regulated by various laws. State duty now paid instead of: (1) Certain license duties (art. 15 of Federal Law of Aug. 8, 2001 No. 128-FZ ``On Licensing of Certain Types of Activities''); (2) taxes on operations with securities (earlier set by Federal Law of Dec. 12, 1991 No. 2023-1 ``On Tax on Operations with Securities'', which became inoperative since coming in force of above Tax Code chapter); and (3) duty for using names ``Russia'' and ``Russian Federation'', (earlier paid under RF Law No. 4737-1 of Apr. 2, 1993 ``On Duty for Using Names ``Russia'', ``Russian Federation'' and Words and Expressions Derived From Them'' which became inoperative since coming in force of above Tax Code chapter).

State duty rates substantially changed. Tax rates now either fixed or calculated as certain percent of contract price, cost of action, etc. instead of definite proportion of minimum salary. In accordance with last amendments as of Dec. 27, 2009, State duties substantially increased from Jan. 29, 2010.

State duty payers are Russian legal persons and citizens. (art. 333.17 of Tax Code). Foreign legal or natural persons and stateless persons pay state duty in same amount and manner as set for Russian legal persons and citizens. (art. 333.18 of Tax Code).

Arts. 333.19, 333.22, 333.23 set rates of state duty paid when applying to courts of common jurisdiction, justices of peace, arbitration courts, RF Constitutional Court and constitutional courts of RF subjects.

State duty rates when paid for notarial acts set in art. 333.24 of Tax Code.

Rates of state duty paid for civil registration and for other legal acts by state civil registration and other authorized bodies set in art. 333.26.

Art. 333.28 provides rates of tax duty paid for acquisition or withdrawal from RF citizenship and for entrance to or departure from RF territory.

Art. 333.30 sets rates of tax duty paid for state registration of computer programs, data bases and topographies of integrated circuits.

Art. 333.31 sets rates of tax duty paid for legal acts of federal state bodies in sphere of assay supervision.

Art. 333.33 provides state duty rates for state registration and for other legal acts such as (became effective from Jan. 29, 2010): accreditation of branch offices of foreign companies established in RF—120,000 RUR for each branch office; mass media state registration—4,000 through 6,000 RUR; foreign citizen or stateless persons registration (residence permit)—200 RUR; state registration of rights in enterprise as property complex, contract for disposal of enterprise as property complex and encumbrance of rights in enterprise as property complex—0.1% of cost of property, property and other rights in enterprise as property complex, but not exceeding 60,000 RUR; cultural valuables export—5 through 10% of their price; right to use names ``Russia'', ``Russian Federation'' and words and expressions derived from them, in names of legal persons—50,000 RUR; state registration of securities' issuances (additional issuances) by subscription—0.2% from nominal value of issuance, but not more than 200,000 RUR; study of applications, provided by antimonopoly legislation—20,000 RUR; licensing—200 through 200,000 RUR, license duties for production and turnover of ethanol and alcoholic products up to 6,000,000 RUR.

RF Tax Code provides state duty reductions for certain categories of natural and legal persons. (arts. 333.35-333.38).

Tax Code provides extended period for return of overpaid state duty from one to three years. (art. 78 of Tax Code).

24.08 INTERNATIONAL TREATIES AND AGREEMENTS:

Tax Agreements.

Russia (ex-USSR) has agreements for avoidance of double taxation with following countries: Austria, Australia, Azerbaijan, Albania, Algeria, Argentina, Armenia, Belarus, Belgium, Bulgaria, Great Britain, Hungary, Vietnam, Germany, Greece, Georgia, Denmark, Egypt, Israel, India, Indonesia, Iran, Ireland, Iceland, Spain, Italy, Canada, Qatar, Cyprus, Kazakhstan, Kyrgyzstan, China, Cuba, Kuwait, Lebanon, Lithuania, Luxembourg, Macedonia, Malaysia, Mali, Malta, Morocco, Moldova, Mongolia, Namibia, Netherlands, New Zealand, Norway, Poland, Portugal, Romania, North Korea (PDRK), Syria, Slovakia, Slovenia, USA, Tajikistan, Turkmenistan, Thailand, Turkey, Uzbekistan, Ukraine, Philippines, Finland, France, Croatia, Czech Republic, Switzerland, Sweden, Ethiopia, Republic of South Africa, Yugoslavia, South Korea, Japan, Sri Lanka, etc.

Russian laws provide for priority of international agreements over domestic laws. In case of differences between domestic law and international agreement international agreement shall prevail. (RF Tax Code, art. 7).

24.09 LOCAL TAXES:

Tax on Individuals' Property.

Tax is imposed pursuant to RF Law No. 2003-1 of 9 Dec. 1991 ``On Taxes on Individuals' Property'' (latest amendments of Nov. 28, 2009). Tax is imposed on real property (dwelling houses, apartments, rooms, garage and other buildings, premises and installments). (Id., art. 2).

Progressive tax scale imposed for real property, varying from 0.1% for property with assessed value up to 300,000 rubles to 2% for property with assessed value of more than 500,000 rubles.

Tax on Land.

C. 31 “Tax on Land” of RF Tax Code came in force from Jan. 1, 2005. According to art. 389 objects of taxation are land plots situated within municipal entities (or federal cities Moscow and St. Petersburg) in which territory tax on land imposed. Taxpayers are legal and natural persons holding plots of land (which shall be object of taxation according to art. 389) in ownership, right of permanent (termless) use or lifetime ownership with hereditary succession. (art. 388). Tax rates provided by acts of legislation of representative municipal bodies (Moscow or St. Petersburg laws) and shall not exceed 0.3% for agricultural lands, housing, household plots (gardening, horticulture, farming); 1.5% for other land plots. (art. 394). According to art. 395 certain categories of legal and natural persons exempt from tax on land.

24.10 MOTOR VEHICLE TAXES:

See topic 24.12 Regional Taxes, subhead Transport Tax.

24.11 PROPERTY TAXES:

See topics 24.12 Regional Taxes, subhead Corporate Property Tax; 24.09 Local Taxes.

24.12 REGIONAL TAXES:

Unified Imputed Income Tax.

Tax is imposed pursuant to c. 26.3 of Part II of Tax Code came in force from Jan. 1, 2003.

Payers of said tax are organizations and individual entrepreneurs engaged in business activities in areas determined by c. 26.3 of Part II of Tax Code, art. 346.26. From date of imposing Unified Tax in territories of corresponding RF subjects payers of this tax are exempt from most federal, regional and local taxes. (Id., art. 346.26).

Procedure of computation of imputed income and of Unified Tax amount is provided for by RF subjects laws subject to provisions of Tax Code Part II. Rate of Unified Tax amounts to 15% of imputed income. (Id., art. 346.31).

Transport Tax.

Taxpayers are registered owners of vehicles which are objects of taxation. (c. 28, art.

357). Objects of taxation are: cars, motorcycles, scooters, buses and other self-propelled machines and mechanisms with pneumatic or track motion, planes, helicopters and other carriers. (Id., art. 358). Rates settled by RF subjects and range from two to 200 rubles depending on sort of carrier. Rates can be increased by RF subjects but not higher than ten times. (Id., art. 361).

Gambling Industry Tax.

This tax settled by c. 29 of RF Tax Code. Payers of said tax are organizations and individual entrepreneurs engaged in business activities in gambling sphere. Objects of taxation are gaming-table, gambling machine, totalizator desk, book desk. Every such object shall be registered in tax authorities. Rates determined on regional level within frame of 1,500 to 125,000 rubles.

Corporate Property Tax.

Presently tax is paid according to c. 30 of RF Tax Code entered in force on Jan. 1, 2004. This tax settled by RF Tax Code and appropriate laws of RF subjects and enacted by laws of RF subjects in accordance with RF Tax Code being due to payment from date of such enactment. Regional legislative authorities define tax rate within frames stated by c. 30 of RF Tax Code, procedure and terms of tax payment, form of report upon tax payments. Regional laws may contain tax exemptions and grounds for them to be applied. (RF Tax Code c. 30, art. 372). Payers of said tax are legal persons which have property that shall be object of taxation according to art. 374. (Id., art. 373).

For Russian organizations tax imposed on moveable and immoveable property (including property given for temporary holding, use, disposal and trust management, included in joint venture or received under Public-private partnership agreement), which accounted at balance of organization as fixed assets in accordance with RF bookkeeping rules. For foreign organization acting via permanent representative offices tax imposed on moveable and immoveable property, which accounted at balance of organization as fixed assets, property received under Public-private partnership agreement.

For purpose of c. 30 foreign organization shall account for objects of this taxation in accordance with RF bookkeeping rules. As compared against previous legislation art. 374 of c. 30 determines more tight and exhaustive list of property exempted from taxation. Such property in particular includes land plots and objects of environmental management (water objects and other natural resources) and property belonged on right of operative management or operating control of federal executive bodies, where uniformed services legally instituted, used by such bodies for purposes of defense, civil defense, security and law enforcement. Land is not taxed because it is object of other tax—Land Tax.

For purposes of taxation (tax base) annual average value of property to be determined. (Id., art. 375). Tax base for foreign organizations acting without permanent representative offices or owning immoveable property determined as inventory value of such property defined by state bodies of technical inventory. Tax base determined separately in respect of property, taxable at location of organization (location of registration of permanent representations office of foreign organization in tax authority), in respect of property of every separate subdivision of organization, having separate balance, in respect of every immoveable property situated out of location of organization, its separate subdivision or permanent representations office, in respect of property which is included as compound of Uniform Gas-supply System in accordance with RF Law No. 69-FZ of 31 Mar. 1999 ``On gas-supply in RF'', as well as in respect of property taxable on different tax rate. (Id. art. 376). Tax base in respect of property of foreign organization, which value for purposes of taxation determined as its inventory value, considered equal to inventory value of such property on 1st day of Jan. in that year, which should be tax period.

Order of MinFin RF No. 27n of Feb. 20, 2008 set forth new form of tax declaration and Instruction for its filing.

Tax period is equal to one year. Report periods are first quarter, half year and nine months of calendar year. (Id. art. 379). Regional legislative authorities may not determine report periods when determining this tax.

Maximal tax rate is 2.2% of annual average value of taxed property, but specific rates may be fixed depending on category of payer and objects of property. (Id., art. 380). Presently property tax rate in Moscow and St.-Petersburg amounts to 2.2%. Art. 381 sets forth huge number of exemptions for special categories of payers.

Corporate property tax payable in RF on property owned by Russian companies and situated outside RF is set off by amount of property taxes paid by Russian companies outside RF. Amount of such set-off must not exceed amount of corporate property tax payable in RF.

24.13 UNIFIED SOCIAL TAX (FEE):

See topic 24.04 Federal Taxes, subhead Unified Social Tax.

24.14 VALUE ADDED TAX:

See topic 24.04 Federal Taxes, subhead Value Added Tax (VAT).

25 TRANSPORTATION

25.01 AIRCRAFT:

RF Air Code of Mar. 19, 1997 (last am'd and supp'd on July 18, 2009) governs relations in connection with use of airspace, relations arising out of aviation activities within borders of RF, and relations arising out of traveling of RF aircraft outside RF, unless otherwise provided by laws of country hosting aircraft or by international agreement in which RF is party; and relations arising out of flights of foreign aircraft within airspace of RF, unless otherwise provided by international agreement in which RF is party. (Id., art. 5). State control over civil aviation activities is performed by authorities of unified system of air transportations organization, specially authorized body of state defense for regulation of aircraft, illegal intruders and competent bodies of airspace users, air flights services (mission and traffic control bodies) in fields of their jurisdiction.

Air Code provides for obligatory certification of developers and manufacturers of aircraft and other aviation equipment, of air transportation businesses and businesses providing services related to such transportation and aviation related works, maintenance and repair of aircraft and other aviation equipment, aerodromes, airports, personnel training institutions, aircraft, aircraft engines, aviation equipment and persons, whose activities are immediately related to flight safety or aviation safety. Such obligatory certification is onerous. Aviation personnel are subject to compulsory attestation. (Id., art. 8). Certification procedures shall be in compliance with Federal Aviation Rules “Regulation on Certification System in Civil Aviation of the Russian Federation”, approved by Order of RF Ministry of Transport and Federal Committee for Standardization and Metrology No. 106/176 of Aug. 1, 2002.

Activities consisting of air transport and support operations (internal and international) related to commercial transportation of passengers, luggage, cargo and mail, control over technical condition and safety of aircraft operation, shall be licensed in compliance with Regulation on licensing of air transportation of passengers (except for transportations performed by aircrafts of state aircraft, experimental aircraft and civil aircraft, including general purpose aircraft, free of charge) and with Regulation on licensing of air transportation of cargo (except for transportations performed by aircrafts of state aircraft, experimental aircraft and civil aircraft, including general purpose aircraft, free of charge) both approved by RF Government Regulation No. 397 of July 23, 2007, last amended and supplemented on June 27, 2008.

Flight operators must obtain compulsory insurance (liability, personal insurance of passengers etc.).

25.02 MOTOR VEHICLES:

Motor transport, generally governed by Charter of Motor and Local Overland Electric Transport of Nov. 7, 2007. Charter regulates relations in connection with rendering of services using motor and local overland electric transport. Motor vehicles governed additionally by RF Law No. 196-FZ ``On Safety of Traffic'' of Dec. 10, 1995 (as last am'd and supp'd Nov. 25, 2009) (``Traffic Law''). Potential drivers must pass medical exam, meet age specifications for vehicle for which license sought, complete certified training program, and pass qualifying exams. National and international driving licenses complying with requirements of RF international treaties are valid in RF. (Traffic Law, arts. 25-27). Right to drive may be terminated upon expiration of license, ill health, and certain felony convictions. (Id., art. 28). List of cases when driving license may be terminated for felony set forth in KoAP RF and in UK RF. Such termination effected only by relevant court decision.

26 TREATIES AND CONVENTIONS

26.01 TREATIES:

Pursuant to RF Constitution, norms established by international treaties have precedence over federal laws and acts (Id., art. 15[4]), RF Federal Law No. 101-FZ of July 15, 1995 ``On International Treaties of RF'' last amended by Law No. 318-FZ of Dec. 1, 2007. RF legislation and practice on implementation of international agreements conforms generally to provisions of Vienna Convention on Law of Treaties of May 23, 1969, brought into effect in USSR on May 29, 1986. Since demise of Soviet Union, RF has adopted all obligations of USSR under international treaties. (MinForAff RF Letter No. 11/UGP of Jan. 13, 1992). Russian legislation distinguishes between interstate, intergovernmental and interministerial agreements. However, they are all considered ``international treaties of RF''. (Id., art 3).

International Agreements Effective in RF.

MinForAff RF publishes ``Collection of Treaties in Force'' compilation of conventions, treaties and bilateral agreements to which RF is signatory. Most recent effective agreements found in executive and legislative registers, are published in monthly Bulletin of International Treaties. Effective agreements enacted in form of law are also published in weekly ``Sobranie Zakonodatel'stva RF'' (collection of laws of Russia).

Prominent treaties to which RF is signatory include: UN (New York) Convention on Recognition and Enforcement of Foreign Arbitral Awards of June 10, 1958 (effective in USSR on Nov. 22, 1960); UN (Vienna) Convention on Contracts for International Sale of Goods of Apr. 11, 1980 (effective in RF from Sept. 1, 1991, with some alterations as to contract formalities); Hague Convention the Abolishing Requirement of Legalization for Foreign Public Documents of Oct. 5, 1961 (effective in RF on May 31, 1992); Vienna Convention on Law of Treaties of May 23, 1969 (effective in USSR on May 29, 1986, with certain reservations as to jurisdiction of International Court of Justice, subsequently relaxed by USSR/RF legislation). RF also participates in most prominent universal conventions in areas such as human rights (1966 Covenants, 1950 Convention for the Protection of Human Rights and Fundamental Freedoms), international security (1968 Treaty on Non-Proliferation of Nuclear Weapons, 1999 Convention on Criminal Liability for Corruption), humanitarian law (1949 Geneva Conventions), maritime law (1982 UN Convention on the Law of the Sea) and many others. It has signed and/or ratified significant number of conventions concluded within framework of Council of Europe (2005 Convention for

Prevention of Terrorism), International Labor Organization and other international organizations.

Russia has bilateral agreements with other states to avoid double taxation, promote and protect investment and to govern consular relations, military and technical cooperation, mutual legal and judicial assistance, etc. Environmental, human rights and weapons accords comprise substantial portion of Soviet/RF treaty law.

Recent Developments.

RF acceded to UNIDROIT Convention of May 28, 1988, on international financial leasing. (RF Law No. 16-FZ of Feb. 8, 1998). RF signed Treaty on Foundation on Eurasian Economic Cooperation (Oct. 10, 2000). RF ratified Convention on Money Laundering of Nov. 8, 1990, Convention of UN against Corruption of Oct. 31, 2003, European Convention on Suppression of Terrorism of Jan. 27, 1977 and International Convention for the Suppression of Terrorist Bombings of Dec. 15, 1997. In 2001 Russia concluded Treaty on Neighborly Relations, Friendship and Cooperation with China. The Treaty Establishing the Eurasian Economic Community entered into force between RF, Belarus, Kazakhstan, Kyrgyzstan, Uzbekistan and Tajikistan. USA informed Russia on its official secession from 1972 Anti-Ballistic Missile Treaty, widely recognized as cornerstone of global security on Dec. 13, 2001 and Treaty was accordingly terminated on June 14, 2002. RF ratified Kyoto Protocol to the UN Framework Convention on Climate Change of Dec. 11, 1997, Council of Europe Convention on the Prevention of Terrorism on May 16, 2005. RF ratified Strategic Offensive Reductions Treaty (SORT) with U.S.A. of May 24, 2002 on May 29, 2003 (Law No. 62-FZ). RF ratified Agreement on Temporary Labor Activity with Korean Democratic People's Republic of Aug. 31, 2007 on Nov. 28, 2009 (Law No. 299-FZ).

Commonwealth of Independent States (“CIS”).

On Dec. 12, 1991, RF ratified Minsk Agreement creating CIS, accord later joined by total of 15 former republics of USSR. While CIS Member-States generally have adopted USSR legislation as foundation, they have full national sovereignty to amend or abolish laws and to enter into international compacts. By preamble to Commonwealth Pact, CIS states have agreed to fulfill obligations of U.N. Charter. Most prominent CIS economic accord is Agreement on Cooperation in Sphere of Foreign Economic Activity, signed in Tashkent, Uzbekistan, on May 15, 1992. On July 6, 1992, CIS Members established Economic Court of CIS to be located in Minsk, Belarus. RF has also agreed to customs union with Belarus (Jan. 6, 1995), Kazakhstan (Jan. 20, 1995), Kyrgyzstan (Mar. 29, 1996), and Tajikistan (Feb. 26, 1999). Customs Union of Russia, Belarus, and Kazakhstan is operating since Jan. 1, 2010. Set of agreements made during 2008-09 comes into force. Single customs territory of three countries means gradual removal of internal customs checkpoints as well as introduction of common external tariff, harmonized customs procedures, and joint decision-making process on trade and customs matters. Business is developing practical approach to these radical changes in customs regulations.

RF takes part in several narrower alliances created to enhance cooperation in specific areas or within specific regions (Russian-Belarusian Union, Eurasian Economic Community, Council of Collective Security). Treaties concluded within framework of these organizations provide for, inter alia, abolition of customs tariffs, visas and other obstacles to free movement of goods, capitals and persons. About 200 agreements have been signed in various spheres of cooperation. Among important documents in this sphere are number of agreements between RF and South Ossetia and Abkhazia on Socio-Economic Assistance, Protection of Borders and Friendship. Future development of integration of ex-Soviet republics remains unclear.

For discussion of treaties on judicial cooperation and assistance, see categories 5 Civil Actions and Procedure, topic Actions; Debtor and Creditor, topic Execution of Judgments and Awards. For discussion of double tax treaties, see category 24 Taxation, topic 24.08 International Treaties and Agreements. Individual topics include references to subject matter treaties where appropriate.

1
SAUDI ARABIA LAW DIGEST

—Scope —

Revised for 2009 edition by

WHITE & CASE LLP, of New York

and

LAW OFFICE OF MOHAMMED A.AL-SHEIKH

IN ASSOCIATION WITH WHITE & CASE LLP, of Riyadh, Saudi Arabia.

(Abbreviations used are: AMLR—Anti-Money Laundering Regulations; BASR—Bankruptcy Avoidance Settlement Regulations; CCL—Commercial Court Law; CHIR—Cooperative Health Insurance Regulations; CIL—Cooperative Insurance Law; CITC—Communications and Information Technology Commission; CMA—Capital Markets Authority; CML—Capital Markets Law; DZIT—Zakat and Income Tax Department; GCC—Gulf Co-Operation Council; GOSI—General Organization for Social Insurance; GTR—Government Tenders Regulations; H—Hejira; MEPA—Meteorological and Environmental Protection Authority; MIR—Mineral Investment Regulations; NIR—Negotiable Instruments Regulations; SAMA—Saudi Arabian Monetary Agency; Shari'ah—Islamic law; SCTA—Saudi Commission for Tourism and Antiquities; SIR—Social Insurance Regulations; SLL—Saudi Labor Law; SR—Saudi Riyal; SRC—Saudi Regulations for Companies; Umm Al Qura—Saudi Official Gazette; WTO—World Trade Organization. Dates used throughout refer to the Hejira calendar followed by the corresponding Gregorian calendar dates. Saudi Arabian jurisprudence follows the Hanbali school of Islam. Saudi Arabia is a member of the GCC and the Arab League.)

Note: This revision covers regulations in force up to Sept. 1, 2008.

1 INTRODUCTION

1.01 CURRENCY:

Official currency is Saudi Riyal which is divided into 100 Halalas. Saudi courts and tribunals will enforce judgment in foreign currency.

1.02 GOVERNMENT AND LEGAL SYSTEM:

In 1932, King Abdul Aziz bin Abdul Rahman Al-Faisal Al-Saud established The Kingdom of Saudi Arabia from Kingdoms of Hejaz, Nejd and their Dependencies. (Decree No. 2716 dated 17.5.1351 H. [Sept. 18, 1932]). Saudi Arabia is monarchy. Several decrees were generally understood to comprise basis of organization of government including: Organic Instructions of the Kingdom of the Hejaz (Aug. 29, 1926); Decree Constituting the Nejd a Kingdom and Uniting the Nejd with the Hejaz (Jan. 29, 1927); Decree Establishing a Council of Ministers (Dec. 29, 1931); Decree No. 2716 referred to above; and Decree No. 38 entitled Regulations of the Council of Ministers (May 11, 1958). During 1992, King Fahd bin Abdul Aziz Al-Saud issued three Royal Orders which established formalized framework of government. First royal order (Royal Order A/90 dated 27.8.1412 H. [Mar. 1, 1992]), called Basic Law of Government, in 83 articles confirms among other things Saudi Arabia's monarchical structure and its adherence to Islam and Shari'ah, and addresses independence of judiciary and certain fundamental rights of citizens and residents. Second royal order (Royal Order A/91 dated 27.8.1412 H. [Mar. 1, 1992]) establishes and empowers appointed Consultative Council (Majlis al-Shoura) comprised of 150 members (increased in 2005 from 120 members and in 2001 from 90 members) and speaker to express opinions on certain matters (such as general policy of state, interpretation of laws, and adoption of international treaties) referred to it by President of Council of Ministers. Consultative Council may also propose laws to be promulgated by King. Consultative Council meets every two weeks throughout year at dates and times fixed by Chairman of Consultative Council except during period approximately coinciding with local summer holidays. Third royal order (Royal Order A/92 dated 27.8.1412 H. [Mar. 1, 1992]) covers internal governance of various regions of Saudi Arabia and provides among other things for establishment of Provincial Council for each province. In 1993 new rules governing Council of Ministers were promulgated. (Royal Order A/14 dated 3.3.1414 H. [Aug. 20, 1993]). Council of Ministers recommends legislation to be issued by King. In 1999, Supreme Economic Council was established pursuant to Supreme Economic Council Regulations promulgated by Royal Order No. A/111 dated 17.5.1420 H. (Aug. 28, 1999) with view to developing more coordinated and integrated organizational structure and administrative framework for handling of economic issues and making and implementing economic decisions. Supreme Economic Council is chaired by Crown Prince who is also First Deputy Premier. Second Deputy Premier acts as deputy chairman. There are ten other members of Supreme Economic Council-nine ministerial members and Governor of SAMA (central bank). In Apr. 2003, King issued royal order restructuring and merging various ministries. Following royal order, Saudi Arabian ministries are: Ministry of Defense & Aviation, Ministry of Interior, Ministry of Foreign Affairs, Ministry of Justice, Ministry of Islamic Affair, Wakfs (Endowments), Call & Guidance, Ministry of Water & Electricity, Ministry of Civil Service, Ministry of Higher Education, Ministry of Education, Ministry of Culture & Information (previously known as “Ministry of Information”), Ministry of Commerce & Industry, Ministry of Petroleum & Mineral Resources, Ministry of Finance, Ministry of Economy & Planning, Ministry of Hajj (Pilgrimage), Ministry of Labor, Ministry of Social Affairs, Ministry of Agriculture, Ministry of Transport, Ministry of Health, Ministry of Communications & Information Technology and Ministry of Municipalities & Rural Affairs.

Sources of Law.

Word “law” in Saudi Arabia is understood to refer to Islamic law (in Arabic, Shari'ah). All secular regulations are subject to and interpreted in accordance with Shari'ah precepts.

Shari'ah has four primary sources. First is Quran, which Muslims believe is word of God delivered to God's messenger, Prophet Mohammed. Quran contains numerous principles and guidelines for human behavior in both secular and religious life. Second is called “Sunna”, and is comprised of that which Prophet Mohammed was reported to have said, done, or approved. (Quran, 59:7). Sunna expounds, elaborates and explains many of general rules of Quran. Third is called “Ijmah”—consensus of scholars. If at given time in history, all reputable Islamic scholars agreed on certain rule as being “Islamic” response to specific question, such agreement or consensus is treated as binding rule of Shari'ah. Fourth is “Qias”, or analogy. Feature of Shari'ah, as of other legal systems, is that application of law to specific matter should apply equally to analogous matter, because similar cases should lead to similar results.

1.03 HOLIDAYS:

Calendar.

Hejira calendar is official calendar. Hejira year is comprised of 12 lunar months, each having 29 or 30 days. Hejira year has 354 days. Minister of Commerce & Industry has directed that all Saudi entities (including Saudi entities with foreign shareholders) must have fiscal years based on Hejira calendar. There are three official holidays: Eid Al-Fittr (which follows Ramadan), Eid Al-Adh'ha (which falls during Hajj), and National Day which falls on Sept. 23.

1.04 LANGUAGE:

Official language of Saudi Arabia is Arabic. All correspondence, agreements with, and financial reports and tax returns submitted to, Saudi government and its instrumentalities must be in Arabic. In addition, all companies doing business in Saudi Arabia are required to keep their books of account in Arabic. Saudi courts and tribunals will consider and construe only documents submitted in Arabic or in Arabic translation as translated by duly licensed translator. Although English translations of many Saudi Arabian regulations are available, authoritative text thereof is Arabic text. All Saudi court or tribunal proceedings, as well as arbitration proceedings, must be in Arabic.

1.05 OFFICE HOURS AND TIME ZONE:

Saudi Arabia is in the GMT +03:00 time zone. Saudi Arabia does not observe daylight savings time. Office hours vary widely by business, but in general are from 9:00 a.m. to 1:30 p.m., Sat. through Thurs., and 5:00 p.m. to 8:00 p.m., Sat. through Wed., although some businesses, including banks, take Thursdays off. Saudi Government office hours are 7:30 a.m. to 2:30 p.m., Sat. through Wed. Official working hours of administrative departments of banks are from 9:00 a.m. to 5:00 p.m., Sat. through Wed. Banks are open to public from 9:30 a.m. to 4:30 p.m. Sat through Wed., limited number of branches are open Thurs. from 9:30 a.m. to 12 p.m.

2 BUSINESS ORGANIZATIONS

2.01 AGENCY:

Under Shari'ah, agency relationship (including granting of power to act as attorney-in-fact) is generally considered to be terminable at will by either principal or agent, notwithstanding contractual terms to contrary. In practice however, it is considered prudent to adhere to contractual termination provisions in accordance with terms thereof. In respect of natural persons, death also revokes agency.

Commercial Agents.

Prior to Mar. 24, 2007, commercial agents were regulated by Saudi Commercial Agencies Regulations (Royal Decree No. M/11 dated 20.2.1382 H. [July 22, 1962], as am'd by Royal Decree Nos. M/5 dated 11.6.1389 H. [Aug. 24, 1969] and M/32 dated 10.8.1400 H. [June 23, 1980], as supplemented by Rules of Implementation of Commercial Agencies Regulations issued under Minister of Commerce Resolution No. 1897 dated 24.5.1401 H. [Mar. 30, 1981]). Under same, non-Saudi natural persons or entities not wholly-owned by Saudis were (with exception of GCC nationals who may conduct agency business in Saudi Arabia subject to reciprocity between Saudi Arabia and relevant GCC country) prohibited from engaging in trading activities in Saudi Arabia. While “trading activities” in this context is not expressly defined in any Saudi legislation, in practice, that term has been taken to mean import, sale or trading in goods. Accordingly, it has been long-established practice for foreign manufacturers and principals to appoint Saudi agents or distributors to trade and distribute their products in local market. This practice derived support from terms of list of activities excluded from foreign investment which was amended on Mar. 24, 2007.

Saudi Supreme Economic Council (based on its authority pursuant to Foreign Investment Law) has issued decision dated Mar. 24, 2007 to open additional eight economic activities/sectors for foreign investment from list of activities excluded from foreign investment. Such recently liberalized activities include retail and wholesale trade. However, foreign investment in wholesale and retail trade (including distribution activities) will be subject to following restrictions and requirements (which are stipulated in Saudi Arabia's Schedule of Commitments to WTO, which Saudi Arabia only joined in Dec. 2005): (i) Foreign equity is limited to 51% upon accession of Saudi Arabia to WTO and to 75% after three years from date of accession, (ii) minimum foreign investment in entity may not be less than 20 million Saudi Riyals, (iii) minimum size of outlets (e.g., not permissible for mini-marts) may be prescribed, and (iv) minimum of 15% Saudi employees to be trained each year.

Commercial sales agency based on commissions remains investment area excluded from foreign investment.

With regard to franchising, Saudi Arabia's Schedule of Commitments to WTO stipulates that non-Saudis may conduct franchising activities in Saudi Arabia, subject to following requirements: (i) Foreign equity limited to 51% upon accession and to 75% after three years from date of accession, and (ii) foreign investor should be authorized in his own country to practice franchising or be partner in authorized company for period no less than five years without interruption.

Commercial agents, distributors and franchisees must have valid commercial registrations and must also register with Ministry of Commerce & Industry each time agency/distributorship/franchise relationship is entered into. As part of such registration process, agent or distributor must submit its agreement with its non-Saudi principal to Ministry of Commerce & Industry. Ministry of Commerce & Industry has published standard forms of agency/distributorship and franchise contracts but use of such forms is not mandatory. If Saudi law is not stipulated as choice of law, but dispute concerning agreement is heard before Saudi court or adjudicatory authority, Saudi courts or authorities would likely apply Saudi law notwithstanding contractual governing law clauses providing otherwise. In addition, under current Ministry of Commerce & Industry practice, arbitration under regime other than Saudi Arabia's (such as International Chamber of Commerce) or jurisdiction of foreign courts may be provided in agreements. However, submission to non-Saudi courts for adjudication will most likely not be given effect by Saudi court or adjudicating authority. For registration purposes, agreement must be entered into by foreign principal in jurisdiction of its principal place of business, attested before Saudi Arabian consulate or embassy and translated into Arabic. Registration must take place within three Hejira months of effective date of agreement. See category 5 Civil Actions and Procedure.

Failure of Saudi agent or distributor so to register with Ministry of Commerce & Industry could result in fines and other penalties to such agent or distributor, but would not render agency or distributorship agreement invalid or otherwise subject non-Saudi principal to any penalties except that, in certain circumstances, principal not having registered Saudi agent or distributor could not participate as supplier in public sector tender.

See also categories 3 Business Regulation and Commerce, topic Contracts, subhead Distributorships, Commercial Agency and Franchises; and Foreign Trade and Commerce, topic Foreign Investment.

Service Agents.

Under Decree Governing the Relationship between Foreign Contractors and Saudi Agents (Royal Decree No. M/2 dated 21.1.1398 H. [Dec. 31, 1977]), prior to tendering for or concluding public sector contract, non-Saudi contractor was required to have “Saudi service agent” who must be Saudi natural person or wholly Saudi owned and controlled entity. Only express exceptions to this requirement were in respect of armaments contracts (see also Council of Ministers Resolution No. 1275 dated 12.9.1395 H. [Sept. 17, 1975]) and government-to-government contracts, in practice from time to time public sector entities stipulate in their tender documents for other types of contracts that no service agents are permitted.

Saudi service agent could not represent more than ten foreign principals and his compensation must not exceed 5% of value of contract.

Decree requiring appointment of Saudi service agent was repealed during 2001 (Royal Decree No. M/22 dated 16.1.1422 H. [Aug. 6, 2001]).

See category 14 Foreign Trade and Commerce, topic 14.03 Foreign Investment.

2.02 ASSOCIATIONS:

See topic 2.03 Corporations.

2.03 CORPORATIONS:

SRC (Royal Decree No. M/6 dated 22.3.1385 H. [July 20, 1965], as am'd) provides for establishment, regulation, merger, liquidation and dissolution of general partnerships, limited partnerships, joint ventures, joint stock companies, partnerships limited by shares, limited liability companies, companies with variable capital, and cooperative companies. SRC expressly contemplates conversion of one type of entity into another. Subject to licensing and other restrictions outside of SRC, foreign entity can participate or invest only in joint venture, joint stock company or limited liability company. Majority of foreign investment is made through limited liability companies. Licensing of joint ventures under Foreign Investment Regulations and preceding legislation is less common and, for joint stock companies, has generally been restricted to banks, telecommunications companies and companies with government organization as shareholder. However, foreign entity engaged in professions may associate with Saudi professional to establish professional partnership under regulatory framework separate from SRC.

SRC also prohibits foreign companies from issuing or selling securities in Saudi Arabia unless prior approval of Ministry of Commerce & Industry is obtained.

Joint venture (SRC, Arts. 40-47) is unincorporated association in nature of consortium. If foreign entity is joint venture partner, it must either be licensed pursuant to Foreign Investment Regulations and commercially registered or, if consortium is party to public sector contract, provisionally licensed by Investment Authority and then Ministry of Commerce & Industry. In most circumstances, joint venture is considered as de facto general partnership.

Joint stock company (SRC, Arts. 48-148) is entity with limited liability which is entitled to (but need not) issue stock to Saudi public. Stock ownership is evidenced by certificates which may be issued in bearer form. Preference shares not exceeding 50% of capital may be issued, subject to approval of and restrictions imposed by Ministry of Commerce & Industry. Shari'ah jurists have ruled preference shares to be contrary to Shari'ah and it is understood that no Ministry of Commerce & Industry approval has been issued to date. SRC makes no other provision for issue by joint stock companies of different classes of shares. Unless otherwise provided in entity's constitutive documents and subject to certain exceptions, stockholders have preemptive rights.

Joint stock company is administered by board of directors comprised of not less than three members, each of whom must own not less than specified amount of stock. Directors may be juridical persons. Annual meetings of stockholders are required.

Accounts of joint stock company must be audited by auditor duly licensed in Saudi Arabia.

Royal Decree is required subject to certain limited exceptions to incorporate joint stock company which holds government concession, or which is public utility company, company that will receive government subsidy, company in which government or other public sector entity will participate, or bank.

If joint stock company sustains losses in excess of three-quarters of its capital, directors must convene meeting of stockholders to determine whether to dissolve company or to continue to maintain its existence, and in either case public notice must be published indicating action taken.

Limited liability company (SRC, Arts. 157-180) is entity with limited liability having at least two and not more than 50 shareholders. Sometimes also referred to as limited liability partnership, it is most common vehicle for foreign investment in Saudi Arabia. Limited liability company cannot engage in insurance, savings or banking business.

Shareholders have effective right of preemption and statutory right of first refusal if shareholder wishes to sell his shares to third party. Shares in limited liability company confer equal voting rights. Share ownership is evidenced by entity's articles of association; share certificates are not issued. Profits need not be distributed in proportion to share ownership. Among other things, any proposed shareholders' action which increases financial liability of shareholders requires unanimous approval of shareholders.

Limited liability company need not have board of managers. If company has more than 20 shareholders, management board comprised of at least three shareholders must be formed. Annual meetings of shareholders are required.

Accounts of limited liability company must be audited by auditor duly licensed in Saudi Arabia.

If limited liability company sustains losses in excess of 50% of its share capital, shareholders must meet to determine whether to dissolve company or to continue to maintain its existence, and in either case public notice must be published indicating action taken. If shareholders determine to continue, company must be made solvent, failing which shareholders shall have joint personal liability for company's debts if company continues to trade.

Foreign Corporations.

Branch offices of wholly foreign owned entities are required to obtain foreign capital investment license pursuant to Foreign Investment Regulations.

If foreign-owned entity is party to public sector contract and not otherwise licensed under Foreign Investment Regulations, registration locally known as temporary commercial registration or provisional licensing, is required by Investment Authority and then Ministry of Commerce & Industry in order to undertake such contract. (Minister of Commerce Resolution No. 680 dated 9.11.1398 H. [Oct. 10, 1978] and Foreign Investment Regulations Rules of Implementation). Provisional licensing is available only in respect of public sector contracts ("public sector" for these purposes in practice currently includes companies controlled by government and entities engaged in provision of utility services), must be applied for within 30 days of signing such contract, and is valid only in respect of such contract for duration of such contract. Each time foreign entity obtains new public sector contract (even if its public sector contracts run concurrently), provisional licensing in respect of new contract must be obtained. By its terms, Resolution No. 680 applies to prime contracts as well as to subcontracts; in practice Ministry of Commerce & Industry exercises considerable discretion in administering provisional licensing scheme, and has limited provisional licensing to certain types of prime contracts.

Foreign-owned entity undertaking multiple public sector contracts may obtain "representative office" license from Ministry of Commerce & Industry which would allow entity to establish office to supervise and coordinate its various administrative activities within Saudi Arabia. This license would be in addition to provisional licensing. Representative office is prohibited from directly or indirectly engaging in commercial activity. (Minister of Commerce Resolution No. 1502 dated 8.3.1400 H. [Jan. 26, 1980]).

Foreign-owned entity may obtain “technical and scientific services office” license from Minister of Commerce & Industry which would allow entity to establish office to offer technical and scientific services to distributors of entity's products, to conduct market and related surveys, and to undertake product research. Such office is prohibited from directly or indirectly engaging in commercial activity. (Minister of Commerce and Industry Resolution No. 1532 dated 6.6.1395 H. [June 15, 1975]).

Professional Partnership.

Saudi and non-Saudi entities engaged in “free professions” (such as engineering, law and accounting) may associate to establish professional partnership not subject to SRC under Professional Partnership Regulations (Council of Ministers Resolution No. 16 dated 16.2.1412 H. [Aug. 28, 1991]) and implementing rules therefor (Minister of Commerce Resolution No. 41 dated 8.1.1413 H. [July 8, 1992]) so long as 51% of capital thereof is owned by Saudi interests. Such entities require license issued by Ministry of Commerce & Industry, and do not provide limited liability to participants therein. New “Advocacy Law” regulating legal profession in Saudi Arabia was promulgated under royal decree and became effective in 2002.

See categories 3 Business Regulation and Commerce, topic Commercial Register and Foreign Trade and Commerce, topic Foreign Investment.

2.04 PARTNERSHIPS:

See topic 2.03 Corporations.

3 BUSINESS REGULATION AND COMMERCE

3.01 ANTI-COMMERCIAL FRAUD LAW:

Anti-Commercial Fraud Law(Royal Decree No. M/19 dated 23.4.1429 H. [Apr. 4, 2008])prohibits merchants, distributors, and manufacturers from selling, importing, or manufacturing counterfeit goods. Anti-Commercial Fraud Law requires that merchants, distributors, and manufacturers immediately notify Ministry of Commerce and Industry upon becoming aware of counterfeit goods.Perpetrators are subject to sanctions including monetary fines of up to SR one million as well as criminal prosecution resulting in maximum of three years imprisonment.

ANTI-“COVER-UP”:

Anti-Cover Up Regulations (Royal Decree No. M/22 dated 4.5.1425 H. [June 22, 2004]) and Anti Cover-Up Implementation Regulations (Minister of Commerce and Industry Resolution No. 7/M.0 dated 13.5.1426H. [June 20, 2005]) prohibits non-Saudi persons from conducting or investing in any business in Saudi Arabia without Foreign Investment Licenses and prohibits any Saudi person from assisting in such activity.

3.02 BILLS AND NOTES:

NIR (Royal Decree No. M/37 dated 11.10.1383 H. [Feb. 24, 1964], as am'd by Royal Decree No. M/45 dated 12.9.1409 H. [Apr. 18, 1989]) regulates issuance and use of bills of exchange, order promissory notes and checks. NIR protest and notice provisions have been implemented. (Minister of Commerce Resolution No. 487 dated 19.6.1411 H. [Jan. 5, 1991] and Explanatory Note). In private sector transactions, negotiable instruments may be prepared and negotiated in English language, but in order to be enforceable in Saudi Arabia must be in Arabic.

Jurisdiction over claims relating to negotiable instruments lies with Negotiable Instruments Offices, which are specialized adjudicating authorities operating under purview of

Ministry of Commerce & Industry. In order for Negotiable Instruments Office to accept action on negotiable instrument for consideration, it must first satisfy itself that instrument in question meets appropriate tests therefor stipulated in NIR.

Bills of exchange must contain: (i) Words “bill of exchange”, (ii) unconditional order to pay specified sum, (iii) name of drawee, (iv) date of maturity, (v) place of payment, (vi) name of payee, (vii) date and place of making, and (viii) signature of drawer.

Endorsements must be unconditional and partial endorsements are void. Endorsements in blank are permitted.

Bill of exchange may be drawn payable at sight, after specified period from sight, after specified period from making, or on specified day. Bill of exchange payable at sight is due upon mere presentation thereof and must be presented within a year from date of its making. Drawer may extend or shorten this period.

Acceptance must be unconditional. Bill of exchange payable after specified period from sight must be presented for acceptance within one year from date thereof unless drawer extends or shortens this period.

Any mention of or term relating to interest in bill of exchange is deemed void.

Order promissory notes must contain: (i) Order stipulation or word “order”, (ii) unconditional promise to pay specified sum, (iii) date of maturity, (iv) place of payment, (v) name of payee, (vi) date and place of making, and (vii) signature of maker.

Most of provisions in NIR relating to bills of exchange are expressed to be applicable to order promissory notes.

Any provision in note purporting to provide for alternative or successive dates of payability (such as acceleration for default clause) is considered of no effect. Demand order promissory notes must be presented for payment within one year after date of making thereof.

Checks must contain: (i) Word “check”, (ii) unconditional order to pay specified sum, (iii) name of drawee, (iv) place of payment, (v) date and place of making, and (vi) signature of maker.

Checks must be drawn on bank, and may be expressed to be payable to bearer. Check made payable to specified person is negotiable by endorsement.

Checks are payable at sight. Use of undated, postdated or incorrectly dated checks is proscribed. Issuance of check without sufficient funds on account is criminal offense.

Under NIR, checks drawn and made payable in Saudi Arabia must be presented for payment within one month from date of making; checks drawn abroad and made payable in Saudi Arabia must be presented for payment within three months from date of making, although in practice these limitations are not usually strictly adhered to.

NIR contains provisions for certified and crossed checks.

3.03 COMMERCIAL REGISTER:

Each entity (including sole proprietorships, limited liability companies with non-Saudi shareholders, and branch offices of foreign entities) conducting business within Saudi Arabia is required to be registered with Ministry of Commerce & Industry (locally referred to as commercial registration) in appropriate geographical area in which such business is being conducted.

(Commercial Register Code, Royal Decree No. 21/1/4470 dated 9.11.1375 H. [June 17, 1956] and Minister of Commerce Resolution No. 151 dated 17.8.1403 H. [May 29, 1983]).

Under commercial registration scheme, separate registration is required for head office and for branch offices of registrant. Upon due registration "commercial registration certificate" is issued which contains among other things registrant's name, address, its legal form, registered activities, name of manager(s) and directors, place and date of registration, and commercial registration number.

Commercially registered entity must include on all of its correspondence its address, commercial registration number and, in case of limited liability entity, amount of its paid-in capital.

See categories 2 Business Organizations, topic Corporations and Foreign Trade and Commerce, topic Foreign Investment.

Commercial Names Law was enacted by Royal Decree No. M/15 dated 12.8.1420 H. (Nov. 20, 1999) which requires every merchant to adopt tradename which must be recorded in Commercial Register. Commercial name must consist of Arabic or Arabized words and not contain foreign words. Exceptions are contemplated for names of foreign companies registered abroad, companies with recognized international names, and companies with foreign capital specified by resolution of Minister of Commerce & Industry. Tradename must be displayed on front of commercial premises and on all stationary and trade documentation. Such ministry will no longer issue or renew commercial registrations which include names of countries and words such as "Saudi", "royal", or "prince", nor may these be used in signage or on stationary.

3.04 CONTRACTS:

Principles of contract in Saudi Arabia derive from Shari'ah and are not codified in any statute or civil code. Quran contains numerous references to commercial contracting principles; according to Quran, God has specifically commanded Muslims to honor their contracts whether with Muslims or non-Muslims. (Quran, 5:1 and 9:4).

Under Shari'ah there is considerable freedom to contract so long as purposes of contract are lawful. In Saudi Arabia speculation ("gharar") and unproductive gain or interest ("riba") are prohibited and thus contracts having either of these as elements would be unenforceable.

Written contracts are preferred but oral contracts, if properly witnessed or proved, are enforceable. (Quran, 2:282). Contracts with minors or incompetents are void.

Damages.

Only proven direct damages are awarded for breach of contract. Damages for lost opportunity or lost profits are considered speculative and would not be awarded. It would be unusual for Saudi court or tribunal to fashion injunctive or declaratory relief or remedies.

Excuse for Nonperformance.

Generally speaking force majeure, undue hardship and impossibility are recognized grounds for nonperformance of contract.

Applicable Law.

Saudi court or tribunal would generally construe and apply only Saudi Arabian law as to matters in controversy before it, notwithstanding existence of contractual governing law clause to contrary.

Government Contracts.

Government contracts are regulated by GTR (Royal Decree No. M/58 dated 4.9.1427 H. [Sept. 27, 2006]) as supplemented by Rules of Implementation of GTR issued under Minister of Finance Resolution No. 362 dated 20.2.1428 H. (Mar. 10, 2007), which repealed Public Procurement Regulations (Royal Decree No. M/14 dated 7.4.1397 H. [Apr. 7, 1977]). Pursuant to GTR, all governmental works and procurements must be conducted by way of public tender published in Umm Al Qura and two daily newspapers. As exception, following procurements are not subject to public tender: (i) Direct purchases required on urgent basis up to SR 1 million, (ii) armory and military equipment, (iii) consultancy services (e.g. accountants and legal service providers), (iv) electrical, electronic and mechanical spare parts, (v) products and services supplied by one source of supply, and (vi) medical supplies urgently required to encounter epidemic diseases.

GTR contains sets of rules of and procedures governing, among other things, public bid requirements, direct purchases, bid submission rules, contract award rules, contract conditions, delay fines, guarantees, and means and terms of payment.

Unlike old GTR, new GTR does not distinguish between wholly Saudi-owned contractors and foreign-owned contractors in public sector contracts. (Under old GTR, contractors wholly Saudi-owned or owned by not less than 50% by Saudi interests in public sector contracts were given preference in public sector contracts.)

Wholly foreign-owned contractor or Saudi contractor having less than 51% Saudi equity ownership therein which has been awarded public sector contracts must contract not less than 30% of value of contract to wholly Saudi-owned firms. (Council of Ministers Resolution No. 124 dated 29.5.1403 H. [Mar. 14, 1983]) as clarified by Minister of Finance Circular No. 5767/404 dated 9.11.1404 H. (Aug. 6, 1984) and No. 3/1742 dated 12.3.1406 H. (Nov. 24, 1985) and Council of Ministers Resolution No. 145 dated 7.7.1406 H. (Mar. 17, 1986).

See category 2 Business Organizations, topics 2.03 Corporations and 2.01 Agency.

Distributorships, Commercial Agency and Franchises.

Following Saudi Arabia's accession to WTO, contract evidencing these types of commercial arrangements (with exception of commission-based sales agency) is no longer required to be entered into with Saudi natural persons or entities wholly owned by Saudi interests, in respect of trading activities. However, if commission-based sales agency contract is entered into, such contract must be entered into with Saudi natural persons or entities wholly owned by Saudi interests in which all of entity's directors and officers authorized to bind entity are Saudi nationals. (Saudi Commercial Agents Regulations [Royal Decree No. M/11 dated 20.2.1382 H. (July 22, 1962), as am'd by Royal Decree Nos. 5 dated 11.6.1389 H. (Aug. 24, 1969) and 32 dated 10.8.1400 H. (June 23, 1980), and as supplemented by Rules for Implementation of Commercial Agents Regulations issued under Minister of Commerce Resolutions Nos. 1897 dated 24.5.1401 H. (Mar. 30, 1981) and 1012 dated 17.9.1412 H. (Mar. 10, 1993)]).

Ministry of Commerce & Industry has published standard forms of agency/distributorship and franchise contracts but use of such forms is not mandatory. However, Ministry of Commerce & Industry will generally require agency/distributorship/franchise contracts submitted to it in connection with registration of agents/distributors/franchisees to stipulate Saudi Arabian law as governing law. Under current Ministry of Commerce & Industry practice, arbitration under regime other than Saudi Arabia's (such as International Chamber of Commerce) may be provided in such agreements.

Terminated agent or distributor or franchisee does not have automatic or statutory right to termination compensation. Absent specific contractual provisions governing termination compensation, Shari'ah would mandate compensation to wrongfully terminated agent, distributor or franchisee only if actual damages could be proved to have been sustained on account of costs incurred in expectation of continuation of agency/distributor/franchise relationship with principal. Consequential and indirect damages are generally not damages for which party may be compensated under Shari'ah.

Compensation of commercial agents is not regulated.

Three person committee has been established by Ministry of Commerce & Industry to mediate commercial agency and distributorship disputes between parties to commercial agency, distributorship and franchise agreements. Such mediation is mandatory; if unsuccessful, disputants could arbitrate or litigate.

See topic Agency.

3.05 E-COMMERCE:

Internet.

Links with and provision of Internet services are governed by Telecommunications Regulations (Royal Decree No. M/12 dated 12.3.1422 H. [June 3, 2001]) and are subject to license issued by CITC.

See category Telecommunications Services, topic Business Regulation and Commerce.

Electronic Transactions.

Electronic transactions are regulated by Electronic Transactions Regulations (Royal Decree No. M/18 dated 8.3.1428 H. [Mar. 27, 2007]). Electronic transaction is defined as any transaction concluded through electronic means such as computers. As result, e-mail communication in connection with electronic transactions should be acceptable as evidence in Saudi Arabian courts, and e-signatures as proof of signature. Executive Regulations of law were issued by CITC and published in Umm Al Qura on Apr. 19, 2008.

Cyber Crimes.

Combat of Cyber Crimes Regulations (Royal Decree No. M/17 dated 8.3.1428 H. [Mar. 27, 2007]) has been enacted by Government of Saudi Arabia to combat all types of cyber crimes such as unauthorized access to Internet sites and electronic information, electronic fraudulent transactions, etc. Such regulations provide for penalties for cyber crimes ranging from financial penalties to imprisonment depending on type of crime.

3.06 FRAUDS, STATUTE OF:

Statute of frauds is not feature of Saudi jurisprudence.

3.07 INTEREST:

Under Shari'ah as interpreted in Saudi Arabia, charging and payment of interest are prohibited. (Quran, 2:275-281 and 3:130). Although Saudi commercial banks and other enterprises in practice routinely charge and pay interest, no Saudi court or tribunal will award or enforce obligation to pay interest or obligation deemed to be in nature of interest. SAMA Committee (see category 5 Civil Actions and Procedure, topic 5.01 Actions) was created to mediate and settle disputes (including disputes as to payment of interest) between banks and their customers.

See also topic 3.04 Contracts.

3.08 INVESTMENT REGULATIONS:

CAPITAL MARKETS:

CML (Royal Decree No. M/30 dated 2.6.1424 H. [July 31, 2003]) established CMA, which is sole regulator and supervisor of capital markets in Saudi Arabia. CMA is government organization with financial, legal, and administrative independence. It reports directly to President of Council of Ministers. CMA function is to regulate and develop Saudi Arabian capital market. It issues rules and regulations for implementation of provisions of CML aimed at creating appropriate investment environment, protecting investors, and ensuring fairness and efficiency in market. CMA is governed by board of five full time members appointed by Royal Order. CML is generic legislation that provides basic framework for capital markets in Saudi Arabia and refers to specific implementing regulations to be issued by CMA. Implementing regulations provide detailed regulatory framework for various securities matters, including licensing of ``authorized persons'' and offering and marketing of securities in Saudi Arabia. CMA has already promulgated ten major implementing regulations: (i) Listing Rules, (ii) Offers of Securities Regulations, (iii) Authorized Persons Regulations, (iv) Securities Business Regulations, (v) Market Conduct Regulations, (vi) Corporate Governance Regulations, (vii) Investment Funds Regulations, (viii) Real Estate Investment Funds Regulations, (ix) Merger and Acquisition Regulations, and (x) Anti-Money Laundering and Counter-Terrorist Financing Rules. CMA is currently preparing additional rules that will apply to authorized persons. Pursuant to CML, Saudi Stock Exchange (Tadawul) was re-established as joint stock company (Royal Decree No. M/15 dated 1.3.1428 H. [Mar. 20, 2007]) whose shares are wholly owned by Public Investments Fund, investment arm of Government of Saudi Arabia. Functions of Saudi Stock Exchange (Tadawul) include management of trading in listed securities, clearance and settlement of trades in securities, deposit of securities, recordation of ownership of securities, and publishing information relating thereto.

3.09 LICENSES, BUSINESS AND PROFESSIONAL:

See category 14 Foreign Trade and Commerce, topic 14.03 Foreign Investment.

3.10 MONEY LAUNDERING:

AMLR (Royal Decree M/39 dated 25.6.1424 H. [Aug. 25, 2003]), as supplemented by Rules of Implementation of AMLR published in Umm Al Qura in volume 4147, year 83, dated 17.4.1428 H. (May 4, 2007), enacted in Saudi Arabia, requires banks and financial institutions to develop internal systems to combat money laundering, including: (1) Development and enforcement of internal policies, systems and procedures, including appointment of qualified senior officers at level of senior management to enforce policies, systems and procedures; (2) development of internal accounting and auditing systems to supervise availability of basic requirements to combat money laundering; and (3) development of ongoing training programs for officers to keep them informed of new techniques used in money laundering transactions and improving their abilities to identify such transaction, their patterns and method of combating same. AMLR require banks and financial institutions to keep records of transactions for minimum of ten years, adopt precautionary measures to uncover and prevent money laundering transaction, and impose criminal penalties for violations.

3.11 MONOPOLIES, RESTRAINT OF TRADE AND COMPETITION:

Competition Regulations (Royal Decree No. M/25 dated 4.5.1425 H. [June 22, 2004]) came into effect in Jan. 2005. Regulations refer to implementing rules which have not yet been issued. Enforcement will likely be delayed until issue of implementing rules.

Under Competition Regulations, position entitled “Counsel for Competition Protection” was created. Counsel must approve any merger, acquisition or consolidation of management of two or more entities that will create “dominant position”. Dominant position is defined as position where entity is able to influence prices in market through control of specific percentage of supply of certain product or service in industry which it operates. Specific percentage(s) will be determined in implementing rules.

3.12 SALES:

As general matter, Shari'ah mandates fair and equitable dealing among parties to sale contract. Saudi Arabia has not enacted comprehensive legislation relating to sale of goods. In absence of such legislation, sale contract should expressly include all material terms pursuant to which sale is made. Certain terms relating to title retention, repossession, remedies, disclaimers and limitation on liability, etc. may not be enforceable under Shari'ah.

Applicable Law.

See category 5 Civil Actions and Procedure, topic 5.01 Actions.

Installment Sales Regulations (Royal Decree No. M/13 dated 4.3.1426 H. [May 13, 2005]) and Installment Sales Implementation Regulations (Minister of Commerce and Industry Resolution No. 11319 dated 1.12.1426H. [Jan. 2, 2006]) regulates sales where payments are made in installments, but leases with title transfer to lessor at end of lease are not covered by these regulations. Ministry of Commerce and Industry authorized to issue licenses for companies to provide installment sales services.

Warranties.

Although under Shari'ah, certain basic warranties (such as merchantability and fitness for particular purpose) are arguably implicit, all relevant warranties should as matter of prudence be expressly included in sale contract.

3.13 TELECOMMUNICATION SERVICES:

Telecommunications services are regulated by Telecommunications Regulations (Royal Decree No. M/12 dated 12.3.1422 H. [June 3, 2001]) as supplemented by Rules of Implementations of Telecommunications Regulations issued under Minister of Communications and Information Technology Resolution No. 11 dated 17.5.1423 H. (July 7, 2002) which liberalized telecommunications sector in Saudi Arabia. Telecommunications Regulations established CITC as regulatory agency of telecommunications sector with authority to license all telecommunications service providers in Saudi Arabia. No telecommunications services may be offered or provided to public in Saudi Arabia without license issued by CITC. Mobile and fixed line telecommunications services may only be provided by Saudi public joint stock company pursuant to license approved by Council of Ministers.

Organization of CITC is regulated by CITC Ordinance (Council of Ministers Resolution No. 74 dated 5.3.1422 H. [May 28, 2001]).

3.14 TOURISM:

SCTA was created pursuant to Council of Ministers Resolution No. 9 dated 12.1.1421 H. (Apr. 17, 2000). Resolution identifies tourism as desirable production sector and designates as tourist sites land not privately owned, such as shoreline, woods, mountains, and valleys. Law authorizes SCTA to designate any other land as tourist sites and reserves right of State to exploit such sites directly or to offer such right to private sector by competitive tender.

Time share schemes in tourist sites are regulated by Tourist Real Estate Units Regulations (Royal Decree 20.8.1427 H. [Sept. 13, 2006]) and its implementing Regulation. SCTA has authority to regulate time share business which may be conducted only with license issued by SCTA. Time share contract must be for period of not less than three years.

4 CITIZENSHIP

4.01 ALIENS:

See category 15 Immigration, topic 15.01 Aliens.

4.02 IMMIGRATION:

See category 15 Immigration, topic 15.02 Immigration.

5 CIVIL ACTIONS AND PROCEDURE

5.01 ACTIONS:

Depending on subject matter of controversy, civil actions are brought before Shari'ah courts (primarily family law, and real property ownership and leasing matters), Board of Grievances (disputes with public sector, general private sector commercial disputes, enforcement of foreign judgments, trademark, copyright and patent disputes, and foreign investment license disputes), Negotiable Instruments Offices (actions based on negotiable instruments), Commission for the Settlement of Banking Disputes (locally known as SAMA Committee) (banking and finance leasing related disputes other than those involving negotiable instruments), and Commissions for the Settlement of Labor Disputes (disputes arising under SLWL).

Most private sector commercial disputes may be submitted to arbitration under Saudi Arbitration Regulations regime (Royal Decree No. M/46 dated 12.7.1403 H. [Apr. 25, 1983] and Council of Ministers Resolution No. 7/2021/M dated 8.9.1405 H. [May 27, 1985]) which among other things mandates approval of arbitration agreement by Saudi court or tribunal which otherwise would hear dispute giving rise to arbitration, and further requires such court or tribunal to hear objections to arbitral award, and to ratify award prior to judicial enforcement thereof.

Under Shari'ah doctrines applicable in Saudi Arabia, Saudi court or tribunal will most likely consider and apply only Saudi Arabian law, notwithstanding existence of contractual governing law and/or submission to non-Saudi Arabian jurisdiction clauses to contrary.

Saudi Arabia has ratified International Convention on Settlement of Investment Disputes between States and Nationals of Other States (Royal Decree No. M/8 of 22.3.1394 H. [Sept. 28, 1979]), also known as Washington Convention. In ratifying Washington Convention, such Royal Decree expressly excluded investment disputes relating to “oil and pertaining to acts of sovereignty”.

Shari'ah court civil procedures are currently regulated by Royal Decree No. M/21 dated 20.5.1421 H. (Aug. 20, 2000) come into effect on 17.6.1422 H. (Sept. 5, 2001).

New Shari'ah court criminal procedures came into effect on May 1, 2002.

5.02 DEPOSITIONS AND DISCOVERY:

Depositions and other detailed discovery devices are in general not feature of Saudi jurisprudence.

5.03 JUDGMENTS:

Foreign Judgments.

Board of Grievances has jurisdiction over applications for enforcement of foreign judgments. (Royal Decree No. M/51 dated 17.7.1402 H. [May 10, 1982]). Board of Grievances also has jurisdiction to approve requests of foreign courts to apply precautionary attachments to property or funds inside Saudi Arabia. (Royal Decree No. M/5 dated 11.2.1421 H. [May 15, 2000]). Rules of Civil Procedure in respect of Board of Grievances (Council of Ministers Resolution No. 190 dated 16.11.1409 H. [June 20, 1989]) specify inter alia manner in which applications for enforcement of foreign judgments should be filed and heard, and specifically empower Board to issue its judgment enforcing foreign judgment if foreign state where such judgment was issued would afford reciprocal treatment to judgments of Saudi courts and provided nothing in foreign judgment (such as interest) contravenes Shari'ah.

Traditionally, Saudi Arabian courts would not enforce judgments of non-Saudi courts absent specific treaty providing otherwise. This was primarily on account of what were perceived to be certain Shari'ah constraints. Saudi Arabia was party to one such treaty signed in 1952 with six other original members of Arab League, namely, Jordan, Lebanon, Syria, Egypt, Iraq and Yemen. (Agreement for the Execution of Court Decrees dated 22.2.1372 H. [Nov. 10, 1952]). In rare instances foreign judgments have been enforced in Saudi Arabia under terms of Arab League Treaty.

In 1985, President of Board of Grievances issued Board Circular No. 7 dated 15.8.1405 H. (May 5, 1985) which discusses Board's jurisdiction to rule on applications for enforcement of foreign judgments and awards, including criteria for determining such applications. In addition to requirement for Saudi Arabia and country in which foreign judgment or award is issued to be party to bilateral or multilateral agreement for reciprocal enforcement of judgments, Circular No. 7 provides Saudi Arabian party must also be accorded due process in foreign proceeding and foreign judgment or award must be final in country in which it is issued.

Saudi Arabia signed and ratified (Royal Decree No. M/4 dated 12.8.1420 H. [Nov. 20, 1999]) Arab Convention on Judicial Cooperation approved by the Council of Arab Ministers of Justice and signed at Riyadh on Apr. 6, 1983. Arab Convention on Judicial Cooperation, also known as Riyadh Convention, supersedes Arab League Treaty. With respect to reciprocal recognition and enforcement of judgments of member states, provisions of Riyadh Convention not substantially different from those of Arab League Treaty. Like Arab League Treaty, Riyadh Convention permits judicial body of country in which enforcement of judgment is sought to inquire into competence of court in country which issued judgment. Riyadh Convention also provides limited grounds for denying enforcement of foreign judgment. These grounds are similar to criteria provided in Arab League Treaty for determining whether formal prerequisites for enforcement of judgment in country in which such enforcement is sought have been satisfied (e.g. compliance with certain procedural requirements of country issuing judgment, such as jurisdiction and notice, and with fundamental legal principles, such as public policy of country in which such enforcement sought).

During 1994, Saudi Arabia acceded to New York Convention on the Enforcement of Foreign Arbitral Awards, 1958 but invoked reciprocity reservation. (Royal Decree No. M/11 dated 16.7.1414 H. [Dec. 29, 1993]).

Saudi Arabia ratified Gulf Cooperation Council Convention on Enforcement of Judgments and Judicial Representation and Notices among members of Gulf Cooperation Council. (Royal Decree No. M/3 dated 28.4.1417 H. [Sept. 11, 1996]). Gulf Cooperation Council Convention includes provisions with respect to reciprocal recognition and enforcement of judgments of courts of Gulf Cooperation Council member states and arbitral awards of arbitrators made in Gulf Cooperation Council member states which are not substantially different from those of Arab League Treaty.

Actual enforcement of such judgments, like other domestic judgments in commercial civil cases, rests with Civil Rights Department of Ministry of Interior. (Private Rights Claims Regulations, Minister of Interior Resolution No. 20 dated 21.1.1406 H. [Oct. 5, 1985]).

5.04 LIMITATION OF ACTIONS:

Under Shari'ah, specific periods of limitation are not recognized on grounds of equity and fairness unless any delay in enforcing rights itself had effect of prejudicing disputants, approach somewhat akin to doctrine of laches. Notwithstanding foregoing, various secular statutes do stipulate limitation periods. For example, claim against public sector entity arising out of public sector contract must be brought before Board of Grievances within five years from date on which cause of action first arose, absent “legal excuse”. Under SLWL, claims must be brought within 12 months.

6 COURTS AND LEGISLATURE

6.01 JUDICIARY:

Royal Decree No. A/14 dated 22.2.1426 (Apr. 4, 2005) effected restructuring of judiciary and dispute resolution bodies in Kingdom. Royal decree No. M/78 dated 19.9.1428 H (Sept. 30, 2007) enacted new regulations for Saudi Arabian courts and Board of Grievances. Among other things, new Law approved establishment of specialized courts such as Criminal Courts, Commercial Courts, and Labor Courts. Board of Grievances will become solely administrative court.

6.02 LAW REPORTS, CODES:

All statutes and most (but not all) ministerial resolutions are published in official newspaper of record, *Umm Al-Qura*. Ministry departmental circulars are frequently unpublished. Few statutes have been officially translated into English.

Stare decisis is, in accordance with Shari'ah doctrines of equity and fairness, not feature of Saudi jurisprudence. Court and tribunal decisions are not published and not publicly disclosed. Board of Grievances, Administrative Part, formerly published in Arabic excerpts from some of its decisions related to public sector disputes and administrative law matters but no longer does so.

See also category 1 Introduction, topic 1.02 Government and Legal System.

6.03 LEGISLATURE:

See category 1 Introduction, topic 1.02 Government and Legal System.

7 DEBTOR AND CREDITOR

7.01 ASSIGNMENTS:

As general rule, assignment of causes of action, claims, etc. is not enforceable under Shari'ah principles, absent agreement of party under obligation, but transfer by debtor of debt obligation is enforceable in certain circumstances absent such agreement.

7.02 ASSIGNMENTS FOR BENEFIT OF CREDITORS:

See topic 7.04 Bankruptcy.

7.03 ATTACHMENT:

Attachment in advance of judgment is available upon application to court or tribunal having primary jurisdiction in respect of merits of action, or in urgent cases by application to Ministry of the Interior. (Precautionary Distraint of Property Regulations, Royal Decree No. M/4 dated 1.3.1410 H. [Oct. 2, 1989]; see also NIR, Art. 67). Attachment applications are required to be decided within 15 days of submission to relevant court or tribunal. Most movable and real property may be attached. (CCL, Royal Decree No. M/32 dated 15.1.1350 H. [June 1, 1931], Art. 572). Party seeking attachment is required to post security, usually guarantee of Saudi Arabian bank.

Plaintiff in civil action may in certain circumstances obtain order from relevant court or tribunal restraining defendant from traveling outside of Saudi Arabia prior to or during pendency of such action. Such restriction can usually be lifted by defendant's appointment of attorney-in-fact to appear in local legal proceedings and furnishing of security. In certain circumstances individual debtor may be imprisoned for nonpayment. (Private Rights Claims Regulations, Minister of Interior Resolution No. 20 dated 21.1.1406 H. [Oct. 5, 1985]). Pursuant to Council of Ministers Resolution No. 32 issued on 4.2.1421 H. (May 8, 2000), applications made by foreign courts for attachment of property and assets in Saudi Arabia are to be made to Board of Grievances.

7.04 BANKRUPTCY:

The Saudi Arabian Bankruptcy Code (CCL, Arts. 103-149) was enacted over 60 years ago and contemplates an age when commerce was undertaken by individual traders operating entirely within Saudi Arabia. Although drafted in terms of personal bankruptcy, it is generally accepted that Code also applies to corporate bankruptcies.

Bankrupt is defined in Code as “a person whose debts exceed his assets and who is thereby unable to discharge his liability for such debts.” Code stipulates three categories of bankruptcy: “real”, “negligent” and “fraudulent”. “Real” bankrupt is defined as “a person who carries on trade with [sufficient capital]; who keeps proper books and does not spend lavishly but whose assets are lost through fire, flood or other natural causes . . . “Negligent” bankrupt is defined as “a person who . . . spends lavishly, fails to reveal to, or actively conceals from his creditors his insolvency and carries on trading until he exhausts his capital.” “Fraudulent” bankrupt is defined as “an imposter . . . [who] practises tricks and intrigues with regard to his capital or makes false entries of imaginary debts . . . in his books . . . or keeps improper books . . .” Determination of what type of bankruptcy obtains in particular case is factual matter determined by competent tribunal which at present is Board of Grievances, Commercial Part.

Under Bankruptcy Avoidance Settlement Regulations (Royal Decree No. M/16 dated 4.9.1416 H. [Jan. 24, 1996] incorporating Council of Ministers Resolution No. 129 dated 2.9.1416 H. [Jan. 22, 1996]) and its implementing rules (Ministry of Commerce & Industry Resolution No. 12 dated 14.7.1425 H. [Aug. 30, 2004]), commercial debtors (individual or corporate) may seek “amicable conciliation” with creditors through local chamber of commerce committees established for this purpose. If such conciliation is unsuccessful or if debtor believes such conciliation unlikely to succeed, BASR permits debtor to apply to Board of Grievances, Commercial Part, for order to convene “settlement procedures” with creditors under Board supervision to avoid application of Bankruptcy Code. BASR expressly provides that initiation of settlement procedures under its regime will stay litigation against debtor and will not result in acceleration of debtor's indebtedness. Settlement procedures under BASR require approval of at least two-thirds of holders of undisputed debt. In accordance with Shari'ah principles which would not permit discharge of debts by operation of law and without creditor's consent, BASR provides that creditors not joining settlement shall be repaid as determined by Board of Grievances. BASR expressly contemplates issuance of implementing rules covering procedural matters which at this writing had not yet been promulgated.

7.05 EXECUTIONS:

Upon final judgment of court or tribunal, execution can be levied on property of debtor except in respect of certain personal and professional necessaries. Debtor can be imprisoned for nonpayment of debts in certain circumstances.

7.06 FRAUDULENT SALES AND CONVEYANCES:

See topic 7.04 Bankruptcy.

7.07 GARNISHMENT:

In certain civil proceedings, creditor who holds judgment against defendant may by application to relevant Saudi court or tribunal garnish monies owing to defendant by third parties or movable property of defendant in possession of third parties.

Property Which May Not be Garnished.

In respect of civil claim maximum amount of salary or wages that can be garnished is 10%. (SLWL, Art. 119). As matter of practice, entitlements due and owing by public sector to debtor cannot usually be garnished by private sector litigant.

7.08 INSOLVENCY:

See topic 7.04 Bankruptcy.

7.09 LIENS:

See category 19 Mortgages, topic 19.02 Mortgages.

7.10 PLEDGES:

See category 19 Mortgages, topic 19.02 Mortgages.

8 DISPUTE RESOLUTION

8.01 ALTERNATIVE DISPUTE RESOLUTION:

Mandatory Dispute Resolution.

By its nature Shari'ah favors and encourages amicable resolution of disputes by mediation, but this policy is effected primarily through voluntary means. Mediation is never binding on dissatisfied disputant which always has resort to applicable judicial or quasi-judicial dispute resolution forums.

See category 5 Civil Actions and Procedure, topic 5.01 Actions.

Voluntary Dispute Resolution.

Under BASR, debtor may resort to mediation before committees established by local chambers of commerce. Ministry of Commerce & Industry has established committee to mediate disputes between commercial agents/distributors and their principals. In both instances, disputants are not foreclosed from seeking applicable judicial or quasi-judicial dispute resolution. Mediation is largely informal process and resort to formalized alternate dispute procedures and systems such as fact-finding and minitrials (as those terms are understood in Western common law jurisdictions) would be unusual.

Most private sector commercial disputes may be submitted to arbitration. Under Shari'ah, resort to arbitration requires agreement of disputants and cannot be mandatory.

See categories 3 Business Regulation and Commerce, topic Contracts; Civil Actions and Procedure, topic Actions; Debtor and Creditor, topic Bankruptcy.

8.02 ARBITRATION:

See category 5 Civil Actions and Procedure, topic 5.01 Actions.

9 DOCUMENTS AND RECORDS

9.01 ACKNOWLEDGMENTS:

Document executed before notary public in foreign jurisdiction which is required to be used in Saudi Arabia should have notary public's signature thereon authenticated by Saudi Consul in foreign jurisdiction, which typically requires one or more prior local authentications and counter-authentications in that jurisdiction. If not already executed in Arabic language, such document must thereafter be translated into Arabic by duly licensed translator and submitted to Ministry of Foreign Affairs in Saudi Arabia for further authentication. If such document is to be submitted to Saudi public notary or Saudi courts, further authentication by Saudi Ministry of Justice in Saudi Arabia will be required. Document may also be executed before foreign consul located in Saudi Arabia, followed by translation into Arabic, authentication by Saudi Ministry of Foreign Affairs and, if necessary, Saudi Ministry of Justice as aforesaid.

Certain types of documents such as Saudi limited liability company's articles of association, and real property title deeds and mortgages must be executed by and before Saudi notary public.

See topic 9.02 Notaries Public.

9.02 NOTARIES PUBLIC:

Notaries public are considered to be highly important public officials who must have same qualifications as judges in order to serve. Notaries are well versed in Shari'ah. Notaries are appointed and are under supervision of Minister of Justice and Supreme Judicial Council (highest court in Shari'ah court system and forum for consideration of matters submitted to that body by King or Minister of Justice).

See topic 9.01 Acknowledgments; categories 19 Mortgages, topic Mortgages; Property, topic Real Property.

10 EMPLOYMENT

10.01 LABOR RELATIONS:

SLL (Council of Ministers Resolution No. 219 dated 22.8.1426 H. [Sept. 26, 2005]), as supplemented by Rules of Implementation of SLL issued under Minister of Labour Resolution No. 693 dated 29.2.1428 H. (Mar. 19, 2007) applies, subject to specific exceptions, to every contract that obligates person to work for interest and benefit of employer and under employer's administration and supervision in consideration of salary, including in public and private sectors. SLL stipulates that amounts owed to workers are considered preferred claims having first priority over all property of employer (in bankruptcy or otherwise).

Although employment contract is considered valid even if not written, SLL states that work contract for non-Saudi employee should be in writing and for fixed period. If contract states no term, it is considered as having indefinite term. For non-Saudi employee, term of employee's work permit would be deemed to be contract term (i.e. no more than two years). SLL permits but does not require probationary period. Each party has right to terminate contract during probation period unless contract states otherwise. If specified period of contract has expired but employment continues thereafter, contract is effective for indefinite period. If contract is indefinite period contract, any party may terminate upon 30 day notice to other party specifying reason if employee's wage is paid on monthly basis, and not less than 15 days notice for other basis. If such notice not given, then terminating party would be obligated to pay compensation to other party equal to employee's wage for relevant notice period.

Upon termination of employment, employer must pay end of service award calculated on basis of half month's salary for each year of first five years of employment, and one month's salary for each year following first five years. Employee's most recent wage would be considered as basis for end of service award. However, if employee resigns, he would be entitled to one-third of end of service award for service of not less than two successive years and not exceeding five years, two-thirds of same if employee's employment period exceeds five successive years, and full award if employment service period is ten or more years. If employee leaves job due to force majeure, he is entitled to full end of service award.

SLL provides that employee shall not work more than eight hours per day or 48 hours per week, and that actual working hours will be decreased during Ramadan for Muslims to six hours per day or 36 hours per week. Employee is entitled to annual vacation each year of not less than 21 days which is increased to not less than 30 days if employee employed for five successive years with employer. Wages for vacation period are required to be paid in advance.

Age of retirement is 60 years for males and 55 years for females. SLL expressly regulates employment of women and juveniles (aged 15-18).

Saudization.

Non-Saudis not permitted to be employed in Saudi Arabia unless work permit is obtained from Ministry of Labor. Minister of Labor specifies from time to time areas of employment not open to non-Saudis.

11 ENVIRONMENT

11.01 ENVIRONMENTAL REGULATION:

Pollution control and related environmental regulation are responsibility of and enforced by Meteorology and Environmental Protection Administration (MEPA), established under High Order No. 7/M/8903 dated 21.4.1401 H. (Feb. 24, 1981). MEPA has issued Environmental Protection Standards (General Standards) covering among other things ambient air quality, air pollution sources, receiving water guidelines, direct discharge performance and discharge pretreatment guidelines. (MEPA Document No. 1409-01). Specific regulations have been adopted covering among other things protection of water resources (Royal Decree M/34 dated 24.8.1400 H. [July 7, 1980]), aquatic life (Council of Ministers Resolution No. 14 dated 21.1.1408 H. [Sept. 14, 1987]) and protection of wildlife areas (Council of Ministers Resolution No. 118/16 dated 23.3.1421 H. [June 26, 2000]).

GCC Environmental Policy.

Pursuant to Royal Decree No. M/3 dated 4.2.1421 H. (May 8, 2000), Saudi Arabia approved General Environmental Regulation for Gulf Cooperation Council and Environmental Assessment Regulation for Gulf Cooperation Council. Both regulations had been approved by environmental ministers of Gulf Cooperation Council member states on Apr. 20, 1994. General Environmental Regulation prohibits any act or failure to act that may result in adverse environmental effects and among other things requires that (i) precautionary and preemptive measures be implemented to ensure that such adverse effects do not occur as result of construction of any project, (ii) both public and private sectors abide by specific obligations aimed at avoiding pollution, and in case of occurrence of any such incident, terminating or mitigating effects of same, (iii) emergency procedures be developed to facilitate speedy handling of environmental disasters, advanced environmental technology and devices to deal with pollution, and (iv) policies for environmentally-friendly utilization of land and coastal areas be put in place and that environmental assessment policy be adopted. Environmental Assessment Regulation applies to long list of projects that may have environmental impact including, inter alia, those relating to extension of electricity and telephone lines and water pipelines and those affecting historical sites and natural resources, requires that environmental assessment be conducted with respect to list of activities and projects falling under its coverage, and stipulates that specific mechanism be implemented to involve governmental agencies in reviewing and making determinations in respect of assessment documentation pertaining to such activities and projects.

General Environment Regulations.

Saudi Arabian General Environmental Regulations, promulgated under Royal Decree No. M/34 dated 28.7.1422 H. (Oct. 16, 2001), and which came into effect on 24.8.1423 H. (Oct. 31, 2002), provide specific legislative underpinning to activities of MEPA and for expansion of MEPA's role and creation of even more specific environmental regulation through rules of implementation, which were published on Oct. 24, 2003 (27.8.1424 H.).

There is provision that projects existing at date of passing of Regulations have maximum of five Hejira years from date they come into effect to ensure that relevant projects comply with requirements of new Regulations. That five year period may be extended in special cases by Council of Ministers Resolution passed on recommendation of Minister of Defense & Aviation and Inspector General (who is minister with portfolio responsibility for environmental matters).

12 ESTATES AND TRUSTS

12.01 DEATH:

Matters pertaining to death are subject to Shari'ah and largely administered and adjudicated by Shari'ah courts.

Writ of death is issued by Shari'ah court upon satisfactory proof of demise. For Muslims, such writ also contains designation of heirs as established under Shari'ah. (Quran, 4:11-13). As general principle under Shari'ah, people of different religions do not inherit from each other.

Typically designated heirs will appoint by means of duly notarized power of attorney one or more of their number to act as their attorneys-in-fact to deal with deceased's affairs. If no such power of attorney is issued, all such heirs must act jointly.

Under Shari'ah, powers of attorney and agency relationships are deemed revoked by death of grantor or principal, as case may be.

Actions for Death.

Under Shari'ah, party (as determined by Shari'ah court) directly responsible for wrongful death of another must pay diyah or “blood money”. Amounts of diyah payable in circumstances of death or injury are fixed from time to time by Royal Decree. Obligation to pay and right to receive diyah apply also to non-Muslims.

See topic 12.02 Descent and Distribution.

12.02 DESCENT AND DISTRIBUTION:

Matters pertaining to disposition of deceased's property are subject to Shari'ah and largely administered and adjudicated by Shari'ah courts.

Muslim may make will devising property to nondesignated heir so long as will does not dispose of more than one-third of his estate. At least two-thirds of Muslim decedent's estate must be distributed to designated heirs in specified percentages in accordance with Shari'ah. (Quran, 4:11-13). Non-Muslim is not considered as designated heir of Muslim.

Wills should be in writing and witnessed in accordance with Shari'ah requirements. Under Shari'ah, designated heir cannot be disinherited.

See topic 12.01 Death.

12.03 EXECUTORS AND ADMINISTRATORS:

See topics 12.01 Death, 12.02 Descent and Distribution.

12.04 WILLS:

See topic 12.01 Death.

13 FAMILY

13.01 DIVORCE:

Matters pertaining to divorce, including alimony, custodial rights and child support are subject to Shari'ah and administered and adjudicated by Shari'ah courts. In divorce between Muslim and non-Muslim governed by Saudi Arabian law, non-Muslim's rights would be subject to Shari'ah principles which could have effect of circumscribing non-Muslim's property and custodial rights.

13.02 INFANTS:

Under Shari'ah, age of majority is reached when puberty has been attained together with evidence that person in question has ability to make responsible decisions. As matter of practice, age of majority in Saudi Arabia is considered to be 18. See NIR, Art. 7. Minor has no legal capacity to enter into or perform contracts.

Under SLWL, minimum age for employment is 13.

13.03 MARRIAGE:

Permission of Ministry of Interior is required for Saudi citizens wishing to marry aliens other than GCC nationals.

See topic 13.01 Divorce and category 4 Citizenship, topic 4.01 Aliens.

14 FOREIGN TRADE AND COMMERCE

14.01 EXCHANGE CONTROL:

At present time there are no exchange control regulations as to import or export of local or foreign currency or repatriation of funds, profits or capital after corporate dissolution.

SAMA has in past requested local banks to obtain SAMA's prior consent before: Inviting non-Saudi banks to participate in local syndicated SR financings; participating in syndicated SR financings arranged abroad; and participating in foreign currency syndicated loans to persons or entities not resident in Saudi Arabia. (SAMA Circular No. 5013/M/A/68 dated 1.4.1403 H. [Jan. 15, 1983]).

14.02 FOREIGN EXCHANGE:

See topic 14.01 Exchange Control.

14.03 FOREIGN INVESTMENT:

Foreign investment in Saudi Arabia was previously governed by Foreign Capital Investment Code (Royal Decree No. M/4 dated 2.2.1399 H. [Jan. 1, 1979]) and Rules of Implementation of Foreign Capital Investment Code (Ministry of Industry and Electricity Resolution No. 323 dated 10.6.1399 [May 7, 1979]).

New foreign investment regulatory regime has been enacted pursuant to Royal Decree No. M/1 dated 5.1.1421 H. (Apr. 10, 2000) including new Foreign Investment Regulations promulgated thereunder. Council of Ministers Resolution dated 5.1.1421 H. (Apr. 10, 2000) approving regulations for General Investment Authority ("Investment Authority"), agency that will administer Foreign Investment Regulations, was also issued. Implementing rules adopted by Investment Authority for the Foreign Investment Regulations (published in Umm Al-Qura, No. 3808 dated 25.5.1421 H. [Aug. 25, 2000]) (and replaced by more detailed implementing rules [published in Umm Al-Qura, No. 3904 dated 7.6.1423 H. (Aug. 16, 2002)]) provide that activities excluded from foreign investment shall be determined by Supreme Economic Council from time to time, and stipulate licensing procedure. Under implementing rules, minimum capital for agricultural projects is SR 25 million; for industrial projects, is SR 1 million; and for other projects, SR 500,000.

Investment Authority reports to Supreme Economic Council, and has 13 member board chaired by Governor and representatives of Ministries of the Interior, Foreign Affairs, Commerce & Industry, Water & Electricity, Petroleum and Mineral Resources, Finance, Economy & Planning, Labor, Social Affairs and SAMA, plus two members representing private sector appointed by President of Supreme Economic Council.

Foreign capital investment license will continue to be required to permit foreign investor to establish 100% foreign owned entity in Saudi Arabia or joint venture entity with Saudi and non-Saudi participation. Project licensed under Foreign Investment Regulations will generally enjoy all privileges, incentives and guarantees enjoyed by Saudi national projects.

Revised list of activities excluded from foreign investment was issued by Saudi Supreme Economic Council on Mar. 24, 2007 pursuant to Foreign Investment Regulations. Among excluded activities are: industrial sector—oil exploration, drilling and production, manufacturing of military equipment, devices and uniforms, and manufacturing of explosives for nonmilitary use; and in services sector—catering (e.g., food services) to military sector, investigation and security, real estate investments in Makkah and Al Madinah, Hajj and Umrah (Islamic religious pilgrimages) services, recruitment and employment services, real estate brokerage, printing and publishing (subject to exception in certain types of printing and press services), commission agents, audiovisual and media services, land transportation services (excluding inter-city passenger transport by railway), midwives and nursing services, physiotherapy services, semi-medical employees, marine fishing, venom centers, blood banks and quarantine.

Foreign Investment Regulations, in major departure from previous foreign investment regime, make no provision for income tax holidays. All licensed foreign investments are subject to Saudi Arabian taxation regime.

Under Foreign Investment Regulations, foreign investor is entitled to repatriate funds associated with its investment and is protected from confiscation of property without due process, or expropriation without “fair compensation”.

It is unlawful for foreign natural person or entity to invest or otherwise trade in name of Saudi person or entity in order to avoid applicable doing business, licensing or registration requirements. (Regulations for the Combat of Cover-Up, Royal Decree No. M/49 dated 16.10.1409 H. [May 21, 1989] and Ministry of Interior Resolution No. 2144 dated 23.5.1411 H. [Dec. 10, 1990]).

See categories 2 Business Organizations, topics Agency, Corporations; Business Regulation and Commerce, topic Contracts; Foreign Trade and Commerce, topic Foreign Trade Regulations.

14.04 FOREIGN TRADE REGULATIONS:

Saudi Arabia, together with Bahrain, Kuwait, Oman, Qatar and United Arab Emirates are members of The Gulf Co-Operation Council (GCC) whose stated purposes include coordination and unification of economic, financial and monetary policies and commercial, industrial and customs legislation of member states. (Joint Economic Agreement among the Members of The Gulf Co-Operation Council, Royal Decree No. M/13 dated 21.3.1402 H. [Jan. 16, 1982]).

See topic 14.03 Foreign Investment and category 1 Introduction, topic 1.01 Currency.

15 IMMIGRATION

15.01 ALIENS:

In general, aliens have same civil rights as citizens. Aliens are subject to jurisdiction of Saudi courts and tribunals if they reside in Saudi Arabia, or if cause of action arose out of Saudi Arabian marriage, certain other family law matters, or if cause of action relates to Saudi Arabian assets, or obligations initiated or performed in Saudi Arabia.

Only citizens and other GCC nationals may engage in commercial trading activities. Non-Saudi entities or natural persons licensed to conduct specified activities in Saudi Arabia are permitted to own real property “necessary to conduct such activities” and non-Saudi natural persons legally residing in Saudi Arabia are permitted to own residential property for personal use, in each instance after receiving license (Regulations Governing the Ownership of and Investment in Real Estate by Non-Saudis, Royal Decree No. M/15 dated 17.4.1421 H. [July 19, 2000]), although whether such licenses will actually be granted in practice remains to be seen. GCC nationals are also permitted to own real property in certain instances.

Only Saudi citizens and other GCC nationals are permitted to hold publicly traded shares of Saudi joint stock companies. However, pursuant to circular 11319/M A S/487 issued by SAMA on 22.7.1420 H. (Oct. 31, 1999), non-Saudis, whether or not residing in Saudi Arabia, are entitled to purchase units in mutual funds managed by Saudi Arabian banks which invest in shares of listed Saudi Arabian companies.

Alien (other than GCC national) must obtain visa to enter, and must obtain permit to reside in, Saudi Arabia. Visas or permits are not granted upon arrival and must be obtained in advance. Visa and residence permit requirements are onerous, subject to change without notice, and strictly observed by authorities. New measures to facilitate issue of visas to foreign businessmen and investors came into effect in 2002.

See categories 2 Business Organizations, topic Corporations; Family, topic Marriage; Foreign Trade and Commerce, topic Foreign Investment.

15.02 IMMIGRATION:

Saudi Arabian Nationality Regulations (Royal Decree No. 8/20/604 dated 22.2.1374 H. [Oct. 19, 1954]) governs all matter of citizenship and nationality including naturalization of aliens. Rules of implementation of Saudi Arabian Nationality Regulations were not published until Apr. 2005. Aliens may submit applications for citizenship to Ministry of Interior's Civil Affairs Agency. Citizenship may be granted by Council of Ministers after satisfaction of requirements including: (1) Residency in Saudi Arabia for at least ten continuous years; (2) employment in fields needed in country, as determined by point based formula; and (3) family ties in country. Non-Saudi wives and children of Saudi Arabian citizens may be granted citizenship under less rigorous standards by approval of Ministry of Interior.

See topic 15.01 Aliens.

16 INSURANCE

16.01 INSURANCE COMPANIES:

Insurance and Shari'ah.

Insurance continues to be contested issue among Shari'ah jurists. Primary issue is whether insurance is in violation of prohibitions against speculation (gharar) and unearned gain (riba) and thus invalid and unenforceable under Shari'ah.

Majority view among Shari'ah jurists in Saudi Arabia is that insurance is invalid and unenforceable. Such jurists, however, distinguish between noncooperative (insurance for profit) and cooperative insurance (takaful). Cooperative insurance, involving sharing of profits and losses among insured and otherwise structured in accordance with Shari'ah principles, is generally considered by jurists in Saudi Arabia to be valid and enforceable.

Insurance is offered in Saudi Arabia on cooperative basis by National Company for Cooperative Insurance, state owned joint stock corporation.

Regulation of Insurance.

CIL (Royal Decree No. M/32 dated 2.6.1424 H. [Aug. 1, 2003]) came into force on 25.9.1424 H. (Nov. 20, 2003). CIL supplemented by Rules of Implementation of CIL published in Umm Al Qura in volume 4153, year 84 dated 29.6.1428 H. (July 15, 2007) provides that business of insurance may only be conducted by joint stock companies registered under law and in accordance with principles of cooperative insurance consistent with provisions of Shari'ah. SAMA has been appointed as regulator under CIL. Investment linked insurance products have to be offered through local licensed banks.

Notwithstanding Shari'ah prohibitions, there has in past been active noncooperative insurance market in Saudi Arabia. Variety of insurance products, structured on noncooperative basis, are offered and underwritten by foreign and local insurers. Foreign insurance products have been offered in Saudi Arabia through local agents. SRC prohibits limited liability companies from engaging in insurance business and therefore such local agents are usually in form of partnerships or sole proprietorships carrying on insurance business under certificates of registration authorizing general trading and related activities. Such local agencies, which in view of majority of jurists were always considered in violation of Shari'ah, are not illegal under CIL. Sanctions for violation under law are fine of not more than SR one million and/or term of imprisonment of not more than four years. Furthermore, recurrence of violation of CIL would give SAMA right to apply for dissolution of relevant insurance company. It remains to be seen whether CIL will be strictly enforced and, if so, whether market will exist in future in Saudi Arabia for noncooperative insurance products.

Social Insurance.

On Apr. 1, 2001, new Social Insurance Regulations (SIR) enacted pursuant to Royal Decree No. M/33 dated 3.9.1421 H. (Nov. 29, 2000) came into effect. General Organization for Social Insurance (established under preceding legislation) is responsible for implementing SIR.

Most employees come within scope of SIR, but excluded are government officials (covered by Civil Pensions Law enacted pursuant to Royal Decree No. M/41 dated 29.7.1393 H. [Aug. 28, 1973]), members of armed forces and police (covered by special benefits plans) and certain other categories of employees. SIR is supplemented by its Rules of Implementation promulgated under Minister of Health Ministerial Resolution No. 46023/5 dated 27.3.1423 H. (June 9, 2002).

SIR covers compensation in respect of professional hazards (injuries and illness caused by work) and pensions (disability and old age).

Health Insurance.

Cooperative Health Insurance Regulations (CHIR) were enacted pursuant to Royal Decree No. M/10 dated 1.5.1420 H. (Aug. 13, 1999).

CHIR requires private sector employers to provide cooperative health insurance to non-Saudi Arabian national employees. CHIR contains provision to extend this requirement to include Saudi Arabian employees at later date.

Council of Health Insurance (COHI), headed by Minister of Health, has been established under CHIR and is responsible for its implementation, including preparation of implementing regulations. All non-Saudi Arabian nationals are covered for basic health services which include medical examinations, preventative vaccinations, maternity care, x-ray examinations, transport to medical facility, surgery and dental treatment. COHI may exempt from participation in cooperative health insurance employer that owns qualified private medical establishment for services provided to its employees.

17 INTELLECTUAL PROPERTY

17.01 COPYRIGHT:

New copyright regulations (Royal Decree No. M/41 dated 2.7.1424 H. [Aug. 30, 2003]) came into effect on Mar. 14, 2004 (22.1.1425 H.), replacing old copyright regulations (Royal Decree No. M/11 dated 19.5.1410 H. [Dec. 17, 1989] as am'd by Minister of Culture and Information Resolution No. M/011640 dated 15.5.1426H. [June 22, 2005]).

Copyright regulations cover all scientific, literary or artistic works regardless of their type, importance, manner of expression, or purpose.

Copyright regulations provide that works of foreign and Saudi authors are to be protected if they are published, acted or shown for first time in Saudi Arabia. Additionally, works of Saudi authors are always protected even if published, acted or shown for first time outside of Saudi Arabia.

Copyrights will in most cases be valid for lifetime of author plus 50 Hejira years from date of his death. Protection of sound and audio visual works, photographic works and works in applied arts is limited to 25 Hejira years from date of publication. Under rules of implementation, duration of protection afforded to computer software is 50 years from publication of software.

Violators of Saudi copyright are subject to fines and, if business, to closure for up to 15 days. Infringing works are subject to confiscation and destruction.

Saudi Arabia acceded in July, 1994 to Universal Copyright Convention as revised at Paris on July 24, 1971. In addition, Saudi Arabia acceded in Mar., 2004 to Berne Convention for Protection of Literary and Artistic Works dated July 24, 1971 and amended on Sept. 28, 1979.

17.02 PATENTS:

Regulations for Patents, Layout Designs of Integrated Circuits, Plant Varieties, and Industrial Models (Royal Decree No. M/27 dated 29.5.1425 H. [July 17, 2004] as supplemented by Rules of Implementation issued by General Directorate of Patents at King Abdulaziz City for Science and Technology No. 118828/M/10 dated 14.11.1425 H. [Dec. 26, 2004]) replaced old Patent Regulations (Royal Decree No. M/38 dated 10.6.1409 H. [Jan. 17, 1989]). King Abdulaziz City for Science and Technology is given authority to issue “protection document” in Saudi Arabia. Applicant may benefit from priority given to previous application if filed during 12 month priority period (six month for industrial design) accompanied by written declaration stating date and number of previous application and place where it was filed.

Patent (and plant patent) protection period is 20 years from date of filing application. Layout design certificate protection period is ten years from start of commercial exploitation anywhere in world. Industrial design certification protection is ten years from date of filing application. King Abdulaziz City for Science and Technology has authority to issue compulsory license to third parties to exploit invention covered by protected patent in certain circumstances.

Gulf Cooperation Council Patent Regulations of 1992 were adopted in Saudi Arabia by Royal Decree No. M/3 dated 17.5.1415 H. (Oct. 21, 1994). GCC Patent Regulations (and their implementing regulations) provide for registration and protection of patents on GCC-wide basis. GCC Patent Regulations constitute regime for patent regulation and protection which overlaps regime established in Saudi Arabia under 1989 Patent Law. There is Saudi Arabian Patent Office and GCC Patent Office. While party seeking to register patent in Saudi Arabia must elect whether to register under 1989 Patent Law or GCC Patent Regulations, in practice 1989 Patent Law is no longer being used for new patent protection.

Amendments to 1992 GCC Patent Regulations were approved by GCC Supreme Council in Nov. 1999 and amendments to its implementing regulations were approved by GCC Ministerial Council on Apr. 8-9, 2000. Royal Decree No. M/28 dated 10.6.1422 H. (Aug. 29, 2001) adopted and made effective these amendments.

Saudi Arabia acceded in Mar. 2004 to Paris Convention for Protection of Industrial Property dated Mar. 20, 1883 as revised at Stockholm on July 14, 1967.

17.03 TRADE SECRETS:

Protection of Confidential Trade Secrets Regulations (Ministry of Commerce & Industry Ministerial Resolution No. 3318 dated 25.3.1426 H. [May 4, 2005] authorized by Council of Ministers Resolution No. 50 dated 25.2.1426 H. [Apr. 5, 2005]) protects trade secrets from being divulged by third parties or official authorities who are entrusted with same.

17.04 TRADEMARKS:

Trademarks are subject of new Trademarks Regulations (Royal Decree No. M/21 dated 28.5.1423 H. [Aug. 8, 2002] as supplemented by Rules for Implementation of Trademarks Regulations issued under Minister of Commerce Resolution No. 1723 dated 28.7.1423 H. [Oct. 6, 2002]). Regulations permit person or company to register unique combination of letters, numbers, drawings, symbols, stamps, emblems or signs which are applied to category of goods or products in such way as to distinguish said goods or products from similar goods or products in marketplace.

Common descriptive names of products, emblems, insignias or flags of any state, religious symbols, or trademarks which are inconsistent with Islamic customs and values or which are deemed to be against Saudi public policy, cannot be registered. In addition, deceptive, confusing, or otherwise misleading marks may not be registered nor may marks showing image of person without that person's consent. Well known mark used by another person or company will also not be registered unless applicant can prove that it is owner of said mark.

Trademark registration is valid for ten Hejira years from date of application and is perpetually renewable for similar ten year periods. Owner of registered mark is not required to use said mark in order to maintain or renew registration, but evidence of such use is important in maintaining or defending action for infringement by another mark.

Applications for registration are filed with Ministry of Commerce & Industry, Trademarks Bureau. Decision against registrability is subject to appeal.

After initial review by Bureau, applicant must publish copy of mark and description of goods to be covered by same in official newspaper of record, Umm Al-Qura. Publication is followed by 90-day objection period during which owners of similar marks may make formal objection to registration of subject mark. Objections are filed in first instance with Ministry of Commerce & Industry, but may be referred to Board of Grievances. If no objections are filed registration of mark is issued within 90-180 days after expiration of objection period. Final registration, when issued, dates back to filing date of application for same.

Registration of trademark gives rise to legal but rebuttable presumption that registrant is owner of mark entitled to sole and exclusive use thereof. Five years of continuous, open and uncontested use of registered mark gives rise to irrebuttable presumption of ownership.

Trademark Law makes it unlawful for person fraudulently to use or imitate registered mark of another so as to deceive public or to knowingly trade in goods which have been labeled with false, misleading or imitated mark. Prior to filing of action, injured owner of registered mark may apply for seizure of infringing products, offending labels, letterhead, advertisements or other materials bearing infringing mark. In such case, action must be filed within eight days from date of seizure order. Failure to file legal action within prescribed period renders seizure order invalid.

Saudi Arabia acceded in Mar. 2004 to Paris Convention for Protection of Industrial Property dated Mar. 20, 1883 as revised at Stockholm on July 14, 1967.

18 MINERAL, WATER AND FISHING RIGHTS

18.01 FISHING RIGHTS:

Resources within territorial waters of Saudi Arabia are state's property. (Royal Decree A/90, Art. 14, dated 27.8.1412 H. [Mar. 1, 1992]). Fishing within territorial waters is not permitted without license from Ministry of Agriculture and without complying with Ministry's policies. (Council of Ministers Resolution No. 14 dated 21.1.1408 H. [Sept. 14, 1987]).

18.02 MINES AND MINERALS:

All natural deposits of petroleum, natural gas and derivatives thereof, and minerals and quarry deposits, are state's exclusive property, and exploitation thereof is regulated by royal decree.

MIR enacted by Royal Decree No. M/47 dated 20.8.1425 (Oct. 5, 2004) as supplemented by Rules of Implementation of MIR issued under Ministry of Petroleum & Mineral Affairs Resolution No. K/173 dated 30.11.1425 H. (Jan. 11, 2005) provides framework for making of applications for mineral exploration, production, processing and collection licenses (granted by Ministry of Petroleum & Mineral Affairs). Petroleum, natural gas, any by-product of petroleum or natural gas, pearls and any similar natural sea minerals are specifically excluded from application of MIR.

Supreme Council of Petroleum & Mineral Resources was established by Royal Order No. A/212 dated 27.9.1420 H. (Jan. 3, 2000), as amended by Royal Order No. A/240 dated 10.11.1420 H. (Feb. 14, 2000). Council is responsible for all matters relating to gas exploration, drilling and production, and has overall policy authority with respect to Saudi Arabian Oil Company (Saudi Aramco) which retains primary responsibility in area of oil exploration and production. Council is responsible for all investment in postproduction stages in relation to both oil and gas. Council also has overall powers of review in relation to general policy matters relating to mining.

Council is chaired by King. First Deputy Chairman is Crown Prince and First Deputy Prime Minister, and Second Deputy Chairman is Second Deputy Prime Minister. There are nine other members of Council including Ministers of Petroleum & Mineral Resources, Finance, Water & Electricity, Economy & Planning and Ministry of Communications & Information Technology.

18.03 WATER:

Water sources are public property. (Royal Decree No. M/34 of 24.8.1400 H. [July 7, 1980]). No well or dam may be constructed without license from Ministry of Water & Electricity.

19 MORTGAGES

19.01 CHATTEL MORTGAGES:

See topic 19.02 Mortgages.

19.02 MORTGAGES:

Under Shari'ah, mortgage, pledge or lien on movable property is valid only if such property is delivered into possession of pledgee. Mortgages, pledges or liens on movable property are usually not enforceable as security devices absent such possession.

Ship Mortgages and Maritime Liens.

Saudi Ship Mortgage Regulations (Royal Letter of Assent No. 9/3/8469 dated 1.9.1374 H. [Apr. 22, 1955]) provide for creation, registration and enforcement of ship mortgages on Saudi flag vessels. However, in practice it is not often clear to what extent Saudi Ministry of Communications has actually implemented substance and procedures of these regulations.

Extent to which true maritime liens can be asserted against ship is unsettled, in part because of Shari'ah constraints as to movable property referred to above. Under CCL, crews' wages, expenses for necessaries and insurance premiums are stated to be privileged and ranked, while under ship mortgage regulations similar liens are provided; precise interplay of CCL and Ship Mortgage Regulations remains unclear.

Aircraft Mortgages.

There is no provision for creation, registration or enforcement of aircraft mortgages.

Moveable Property Mortgages.

Commercial Mortgage Regulations (Royal Decree No. M/75 dated 21.11.1424 H. [Jan. 14, 2004]) came into effect on Apr. 27, 2004 (7.3.1425 H.), and permit mortgage of moveable property as security for commercial debt. Public Warehousing Regulations were recently enacted (Royal Decree No. M/29 dated 10.5.1427 H. [June 7, 2006]). Public warehouse is empowered to record mortgages created over warehoused movable assets. Such mortgage is deemed valid and enforceable against third parties despite lack of possession by mortgagee of mortgaged assets. This operates as exception to Shari'ah possession rule mentioned under topic Mortgages.

Real Property Mortgages.

This type of mortgage is permitted under Shari'ah and in practice Notary Public registers and records such mortgages both in registry kept for that purpose and by means of notation on title deed evidencing ownership of real property under new registration system referred to in category Property.

At present time, however, Notaries Public will not register or record mortgages in respect of real property where commercial banks are or are suspected by Notary Public to be involved, on grounds that such involvement implies that interest is feature of transaction. (Supreme Judiciary Council Decision No. 291 dated 25.10.1401 H. [Aug. 25, 1981]). This practice is expected to remain unchanged notwithstanding new registration system.

See categories 3 Business Regulation and Commerce, topic Interest and Documents and Records, topic Notaries Public.

20 PROPERTY

20.01 REAL PROPERTY:

Ownership of real property is evidenced by title deeds. Real property records are kept manually and administered by designated notaries public who also register ownership and record transfer of real property.

Real Property Registration Regulations (Royal Decree M/6 dated 11.2.1423 H. [Apr. 24, 2002]) allow for central registry under joint auspices of Ministry of Justice and Ministry of Municipalities & Rural Affairs where all real property rights shall be recorded, including mortgages. Regulations were scheduled to come into effect on May 18, 2004 (28.3.1425 H.). However, central registry has not been established and rules of implementation have been issued under Minister of Justice Ministerial Resolution No. 4497 dated 14.6.1425 H. (Aug. 1, 2004).

Regulations on Ownership and Splitting of Real Estate Units (Royal Decree M/5 dated 11.2.1423 H. [Apr. 24, 2002]) allow for splitting building into independent real estate units, each to be owned separately as independent entity.

Eminent Domain.

New Real Estate Appropriation for Public Use Regulations (Royal Decree No. M/15 dated 11.3.1424 H. [May 13, 2003]) were enacted superceding previous Royal Decree No. M/65 dated 16.11.1392 (Dec. 22, 1972). Regulations allow for appropriation of land by public utility companies with fair compensation to be paid to owner.

See categories 4 Citizenship, topic Aliens; Documents and Records, topic Acknowledgments; Mortgages, topic Mortgages.

21 TAXATION

21.01 ADMINISTRATION:

Taxes are levied by central government. At present time no local or regional taxes have been imposed. Tax legislation is effected by Royal Decree, resolutions of Ministry of Finance and National Economy, and circulars issued by DZIT of that Ministry. Portions of this legislation are collected and occasionally published in English.

Principal taxes are income tax and Islamic tax known as Zakat. Following types of tax are not currently levied in Saudi Arabia: consumption taxes, estate tax, excise taxes, gasoline and special fuels taxes, gift tax, inheritance tax, local government taxes, motor vehicle taxes, property taxes, sales tax, value added tax.

Disputes arising out of final income tax or Zakat assessment are considered in first instance by either Preliminary Tax Appeal Committee (PTAC) or Preliminary Zakat Appeal Committee (PZAC), respectively, each of which is attached to DZIT. Decisions of PTAC and PZAC can be appealed to Appellate Committee for Tax and Zakat Appeals; however taxpayer is required to pay full amount of tax in dispute or post security for such amount prior to filing for appeal.

See category 14 Foreign Trade and Commerce, topic 14.03 Foreign Investment.

21.02 ALCOHOL, BEVERAGES AND TOBACCO TAXES:

Alcohol is unlawful in Saudi Arabia. No taxes on beverages are currently being levied. There is 100% duty on tobacco products.

21.03 CUSTOMS DUTY AND TAX:

Customs duties are imposed on importation of many goods. Most items are subject to 5% tariff. Imported goods that are identical or similar to those produced locally are charged duty of 12% in order to protect local industries. In addition, there are number of industries that enjoy 20% tariff protection, such as mineral water and furniture, in order to protect nascent Saudi Arabian industries. Duties are calculated by applying percentage of duty to price of goods reflected on purchase invoices, including freight charges, plus additional 1% for insurance. Customs duties paid on foreign materials used in exported items are refunded.

21.04 EMPLOYMENT TAXES:

Employers are required to pay General Organization for Social Insurance (GOSI) social insurance tax on behalf of employees. Employers pay contributions of 11% of salaries of employees that are Saudi citizens and 2% of salaries of foreign employees. Saudi citizens pay additional 9% of their salaries for social insurance tax.

21.05 FOREIGN INVESTMENT TAXES:

See topic Tax Incentives.

21.06 INCOME TAX:

New income tax regime has been enacted in Saudi Arabia (Royal Decree No. M/1 15.1.1425 [Mar. 7, 2004]).

Persons or entities subject to taxation under new tax law are: (1) Resident capital company on its non-Saudi shares; (2) resident non-Saudi natural person that conducts activities in Saudi Arabia; (3) nonresident person who conducts activities in Saudi Arabia through permanent establishment; (4) nonresident person who has other income subject to tax from sources within Saudi Arabia; (5) persons engaged in natural gas investment activities; and (6) persons engaged in oil and other hydrocarbon production.

Income tax rate is 20% for all taxpayers, except for natural gas investment activity which is subject to tax rate of 30% and additional rates to maximum of 85%, and oil or other hydrocarbon activity which is subject to tax rate of 85%.

Income subject to tax includes all income, profits, gains of any type or payment resulting from carrying out of any “activity”, including capital gain or incidental income, not of any “exempt” income. Employee salary and benefits are not taxable income.

Taxpayer must file declaration in form proscribed by Minister of Finance along with payment on or before 120th day following end of taxable year (or 60th day in case of personal company). If taxpayer's income exceeds SR 1 million, certified public accountant must certify declaration.

Withholding Taxes.

Any resident (whether or not considered taxpayer under new tax law) who makes payment to nonresident from source in Saudi Arabia must withhold tax from payment as follows: (1) 5% for rents; (2) 15% for royalties; (3) 20% for management fees; (4) 5% for payments for air tickets, air-freight and maritime freight; (5) 5% for payment of international telecommunications services; and (6) 15% for any other services.

21.07 STAMP TAX:

Royal Decree promulgated in 1926 requires revenue stamps to be affixed to certain documents, however enforcement of stamp tax law appears only to be applied in respect of immigration documentation.

21.08 TREATIES AND AGREEMENTS:

Treaty addressing dual taxation has been signed with France (Royal Decree No. M/16 dated 4.12.1415 H. [May 3, 1995]), India (Royal Decree No. M/53 dated 20.8.1427 H. [Sept. 13, 2006]), Austria (Royal Decree No. M/12 dated 16.2.1428 H. [Mar. 6, 2007]), Republic of Pakistan (Royal Decree No. M/49 dated 29.7.1427 H. [Aug. 24, 2006]), Malaysia (Royal Decree No. M/28 dated 22.3.1428 H. [Apr. 10, 2007]), Republic of China, Turkey, Holland, Germany, India, Italy, South Africa, Republic of Korea, Senegal, Spain, and United Kingdom. Treaty addressing dual taxation in connection with taxes payable on income generated through operation of aircrafts has been signed with Republic of Greece (Royal Decree No. M/29 dated 22.3.1428 H. [Apr. 10, 2007]). Treaty addressing dual taxation in connection with taxes relating to income generated through aviation and maritime activities has been signed with U.S.A. (Royal Decree M/21 dated 24.10.1420 H. [Jan. 31, 2000]).

21.09 WEALTH TAX:

Zakat.

This is Islamic tax on wealth and is levied on Saudi and GCC natural persons, wholly Saudi or GCC owned entities, and Saudi or GCC shareholders of limited liability companies. While calculation of Zakat is complex, effective rate is 2.5% of net worth for natural persons, and 2.5% of total capital resources for companies. For companies, tax base for calculation of Zakat excludes fixed assets, long-term investments and deferred costs from total capital resources, but includes profits from foreign investments that do not consist of investment in real property. Profits of foreign non-real property investments are estimated by DZIT to be 15% of revenues in cases in which specific information is not available.

22 TRANSPORTATION

22.01 SHIPPING:

Primary maritime legislation is Seaports, Harbors and Lighthouses Regulations (Royal Decree No. M/27 dated 24.6.1394 H. [July 14, 1974] as am'd by Minister of Communications Resolution No. 11 dated 12.2.1406 H. [Oct. 26, 1985]). Ministry of Transport oversees and administers maritime transport activities. Vessels and others entering, using or making use of Saudi Arabia's seaports are subject to GCC Rules and Regulations for Seaports which are published in English translation.

Saudi Flag.

In order to register vessel under Saudi flag, shipowner (or in case of bareboat charter registration, demise charterer) must be Saudi natural person, wholly Saudi-owned entity, or Saudi limited liability company having not less than 51% Saudi share capital. Owning entity must have headquarters in Saudi Arabia, Saudi national experienced in maritime transport as overall manager thereof, and at least two-thirds of its directors (including such manager and chairman) must be Saudi nationals residing in Saudi Arabia. Limited liability company with foreign capital invested therein must be duly licensed under Foreign Investment Regulations.

Vessel Registration.

In order for Saudi flag vessel to trade, its owners must obtain maritime transport license (Minister of Communications Resolution No. 53 dated 24.3.1403 H. [Jan. 8, 1983]), requirements for which include evidence of applicant's foreign capital investment license (if applicable) and commercial registration. In addition, documentary requirements for appropriate type of registration must be complied with. At present time, there are four types of registration: Temporary, provisional/dual, provisional and permanent.

Under temporary registration, ship may be registered outside of Saudi Arabia by obtaining temporary certificate of registry from Saudi Embassy or Consulate abroad. Temporary registration is valid only for one voyage to enable vessel to proceed to her Saudi port of registry for provisional registration.

Provisional/dual registration is essentially bareboat registration scheme whereby foreign registered vessel which is demise chartered to Saudi demise charterer that otherwise satisfies all of nationality and related requirements applicable to actual owner, becomes registered under Saudi flag. Registration is only valid for duration of demise charter, and requires “original flag” of vessel to be relinquished during period of Saudi registration. Among requirements for this type of registration is notice from appropriate authorities of vessel's “original flag” stating that it has relinquished vessel for term of charter party. Saudi flag vessels demise chartered to foreign interests may also fly flag of another nation for duration of such demise charter, during which period Saudi registration will be suspended.

Provisional registration occurs when temporarily registered vessel first arrives at her Saudi port of registration, or when vessel at her Saudi port of registry comes under Saudi flag for first time. Vessel's presence in her Saudi port of registry is required. Documentation requirements are extensive. Upon completion of these requirements, provisional certificate of Saudi registry and trading certificate (which attests to validity of vessel's classification certificates) are issued, each with validity period of six Hejira months.

Permanent registration is available to provisionally registered vessels and must be applied for prior to expiration of provisional registration. Permanent registration is valid for five Hejira years and is renewable. Vessel must be at her port of registry to effect permanent registration. New trading certificate in respect of permanently registered vessel is issued on annual basis upon showing that all classification certificates are valid.

23 TREATIES AND CONVENTIONS

23.01 TREATIES:

Saudi Arabia is member of The Gulf Co-Operation Council, World Trade Organization and Arab League.

There is no reliable means of ascertaining all of treaties and conventions to which Saudi Arabia is party.

Certain of more significant treaties are set out below:

Multilateral.

Convention on the Settlement of Investment Disputes between States and Nationals of Other States, Washington, 1965; Agreement for the Creation of the Organization of Petroleum Exporting Countries, Baghdad, 1960; Agreement for the Establishment of an Arab Organization of OPEC, Beirut, 1968; Convention Establishing the Multilateral Investment Guarantee Agency, Seoul, 1985; Articles of Agreement of the International Monetary Fund, Formulated at the Bretton Woods Conference, 1944; Articles of Agreement of the International Bank for Reconstruction and Development, 1944; Articles of Agreement of the International Finance Corporation, Washington, 1955; Articles of Agreement of the International Development Association, Washington, 1960; Vienna Convention on Diplomatic Relations, Vienna, 1961; Treaty on Non-Proliferation of Nuclear Weapons, 1968; Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation, Montreal, 1971; Convention on the Rights of the Child, New York, 1989; International Convention on the Elimination of All Forms of Racial Discrimination, New York, 1966; Convention on the Elimination of All of Forms of Discrimination Against Women, New York, 1979; Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, New York, 1984; Convention for the Protection of Literary and Artistic Works, Berne, 1971, revised 1979; Convention for Protection of Industrial Property, Paris, 1883, revised 1967; Convention on the Privileges and Immunities of the United Nations, 1946; Stockholm Convention on Persistent Organic Pollutants, 2001; International Convention on Maritime Search and Rescue, 1979; Articles of Agreement of International Islamic Corporation for Trade Finance (Jeddah) (Royal Decree No. M/64 dated 25.9.1427 H. [Oct. 18, 2006]); Articles of Agreement of Arab Peace and Security Council (Royal Decree No. M/14 dated 1.3.1428 H. [Mar. 20, 2007]); and Articles of Agreement of Arab Zone for Mining and Industrial Development (Royal Decree No. M/31 dated 25.5.1427 H. [June 22, 2006]). Riyadh Convention on Judicial Cooperation 1983 (replacing Arab League Convention for the Enforcement of Judgments, 1952) ratified in 1999 by Saudi Arabia, is now treated as operative in Saudi Arabia. Saudi Arabia acceded in 1994 to New York Convention on the Enforcement of Foreign Arbitral Awards, 1958 and to Universal Copyright Convention as revised at Paris on July 24, 1971.

Bilateral.

(France) Convention on the Avoidance of Double Taxation with Respect to Taxes on Income and on Estates and Inheritance (with Protocol), Paris, 1982; (U.S.A.) Agreement on Guaranteed Private Investments, 1975.

SCOTLAND LAW DIGEST

—Scope —

Revised for 2010 edition by

DIGBY BROWN, Glasgow.

See categories 1 Introduction, topic 1.02 Government and Legal System; 6 Courts and Legislature, topic 6.06 Reports.

Scotland is member of EU. See also European Union Law Digest.

1 INTRODUCTION

1.01 CURRENCY:

See England Law Digest. In addition, certain Scottish banks have right to make note issues, that is, Royal Bank of Scotland, Bank of Scotland and Clydesdale Bank.

1.02 GOVERNMENT AND LEGAL SYSTEM:

So far as this subject matter is concerned, Scotland enjoys same constitution as England, and paragraphs under heading in England Law Digest may be read as equally applicable to Scotland. Similarly, subhead Executive may be read as applicable to Scotland. Scottish citizens retain right to vote in UK Parliament elections and to be represented in UK Parliament by Members of Parliament representing Scottish Constituencies. UK Parliament and UK Executive retain full powers over Scotland. Scotland Act 1998 established devolved Scottish Parliament and devolved Scottish Government. Members of Scottish Parliament are elected via form of proportional representation known as additional member system. Session of Scottish Parliament lasts maximum four years. Scottish Parliament can pass legislation on any matter not specifically reserved to UK Parliament. Reserved matters include foreign affairs and defence. Legislation must be compatible with European Convention on Human Rights. Similar restrictions are placed on members of Scottish Government, known as “Scottish Ministers”. Additional powers can be granted by Order in Council. Practice dictates UK Parliament will not be legislated in areas with legislative competence of Scottish Parliament, unless asked to do so by Scottish Parliament, known as “Sewel Motion” or proposed legislation affects whole of UK. Lord Advocate and Solicitor General for Scotland have become law officers and members of devolved government. Advocate General for Scotland established as new law officer to UK Government.

Actions of Scottish Ministers and Acts of Scottish Parliament can be challenged as outside their legislative competence. Known as Devolution issue. Now decided by Supreme Court. In *Davidson v Scottish Ministers* [2005] UKHL 74, it was held that Scottish courts do have jurisdiction to grant coercive orders (e.g. interdicts and specific implement) against Scottish Ministers and Scottish Executive, with Crown Proceedings Act 1947 containing nothing to contrary despite opposite view hitherto taken in Court of Session since *McDonald v Secretary of State for Scotland* [1994] SC 234.

Scottish Law.

Law of Scotland consists partly of enacted law and partly of common law. Historically, Scots common law is derived instead from customary laws as later supplemented heavily by Roman and canon law, and the doctrinal writings of the leading Scots jurists (known as “Institutional Writers”), such as Lord Stair; accordingly, Scotland is deemed to be a mixed jurisdiction. Scots common law is recognised by courts as binding in addition to express enactment. Enacted law may include Acts of Parliament whether Scottish or UK Parliament, Acts of Sederunt, Acts of Adjournal, Regulations issued either by department of State, and bylaw by some local authority or body having statutory powers. Act of Parliament may be either public or general statute or local or personal act. Acts of Sederunt are rules passed by Court of Session for regulating procedure in that Court and in inferior civil courts. Acts of Adjournal are passed by High Court of Justiciary for regulating procedure in that Court and in inferior criminal courts. Regulations are issued by the Government under delegated statutory authority, for example, to codify European legislation into Scots law.

Judiciary.

Judges (Sheriffs and Senators of the College of Justice) are appointed by Her Majesty the Queen on recommendation of the Scottish Ministers. Judges are expected to hear both civil and criminal cases.

Sheriff Court has exclusive jurisdiction in civil cases below £5,000, but no maximum. Certain cases involving status are outside jurisdiction of Sheriff Court. Court of Session has jurisdiction in civil cases denied to Sheriff Court and all cases above £5,000. Court of Session also hears appeals from Sheriff Court. Appeals from Court of Session are to the Supreme Court.

High Court of Justiciary is supreme criminal court. It has permanent session in Edinburgh with provision for circuit or local courts. In practice, High Court is permanently on circuit in larger towns. High Court has jurisdiction over all criminal matters in Scotland. High Court has exclusive jurisdiction in certain matter, for example, murder and rape. High Court also hears appeals in criminal matters from the District Court and the Sheriff Court.

Constitutional Reform Act 2005.

Bill received Royal Assent on 24 March 2005. It addresses four important areas:

Judicial Independence.

For first time, Act enshrines in law duty on government ministers to uphold independence of judiciary. They will be specifically barred from trying to influence judicial decisions through any special access to judges.

Reforming Lord Chancellor.

Act reforms post of Lord Chancellor, transferring his judicial functions to President of Courts of England and Wales.

Supreme Court.

Act also establishes new, independent Supreme Court, separate from House of Lords with its own independent appointments system, its own staff and budget and, ultimately, its own building. Particular relevance to Scotland will be replacement of devolution jurisdiction of Privy Council so that issues of whether Scottish Parliament is acting outside its powers will be decided by Supreme Court. It is now said in § 41(3) of new Act that “a decision of the Supreme Court on a devolution matter—(a) is not binding on that Court when making such a decision; (b) otherwise, is binding in all legal proceedings”.

Judicial Appointments Commission.

Act will establish independent commission responsible for selecting candidates to recommend for judicial appointment to Secretary of State for Constitutional Affairs. Scottish Parliament is given power to regulate appointment of Scottish judges.

1.03 HOLIDAYS:

Bank holidays in Scotland are listed in Schedule 1 of Banking and Financial Dealings Act 1971. They are New Year’s Day, 2 January, Good Friday, Early May Bank Holiday, Spring Bank Holiday, Summer Bank Holiday, St. Andrew’s Day, Christmas Day, Boxing Day and any day appointed by Royal Proclamation (Bank Holidays Act 1871). The 1971 Act does not confer rights on employees to holidays. That is contractual matter between employer and employee. Christmas Day and New Year’s Day Trading (Scotland) Act 2007 makes it criminal offence for large shops (over 280 sq. m.) to open on Christmas Day. Scottish Ministers may also apply this to New Year’s Day, but only by order of Statutory Instrument.

1.04 LANGUAGE:

The Gaelic Language Act 2005 gives Gaelic official recognition and requires all public bodies to have Gaelic language policy. It also established Bòrd na Gàidhlig. This organisation's aim is to secure status of Gaelic language as an official language of Scotland.

1.05 OFFICE HOURS AND TIME ZONE:

Scotland is in GMT time zone. Office hours are generally from 9 a.m. to 5 p.m.

2 BUSINESS ORGANISATIONS

2.01 AGENCY:

Principles of common law apply to matters relating to principal and agent. Where mercantile agent, with owners' consent, is in possession of goods or of documents of title, any sale or pledge made by him or her is valid if person taking acts in good faith (Factors Act 1889, § 2). Where mercantile agent pledges goods in security for debt or liability due before time of pledge, pledgee acquires no further right to goods than pledger himself had (§ 4).

Commercial Agents Directive 1986 was implemented in Great Britain by Commercial Agents (Council Directive 1993 [SI 1993/3053, amended by SI 1993/3173 and SI 1998/2868]). Regulations took effect from 1 January 1993 and apply to all agency agreements in force as at that date. They apply to activities of commercial agents in Great Britain, regardless of nationality of commercial agent (Reg. 1[2]), and its impact on Scots law of agency has been extensive. Regulations are protective of commercial agent. Scots law has traditionally assumed equality of bargaining power between principal and agent, and has even been more protective of principal in view of agent's ability to enter into contracts beyond confines of his or her authority. "Commercial agency" under regulations involves sale or purchase of goods, ruling out agents who provide services. Commercial agent must have "continuing authority" thus ruling out one off transactions. Given that commercial agent must act in name of principal, where agent acts on behalf of undisclosed principal, situation which is only possible in UK and not in rest of European Union, regulations will not apply (Reg. 2[1]). All other species of agency not falling within definition of "commercial agency" under regulations are regulated at common law.

2.02 ASSOCIATIONS:

Unincorporated associations do not have separate legal personality. They cannot sue or be sued in name of association. All members must be convened as pursuers or defenders. Individuals can, however, sue and be sued under a trading name.

Friendly societies are not incorporated. Societies which have objectives such as payment of money in sickness and at death are regulated by, and registered under, Act of Parliament. An Act of 1955 extends powers of societies and makes corresponding amendments for trade unions in relation to amounts payable on death. Friendly Societies Act 1974 consolidates Friendly Societies Act 1896–1971.

2.03 CHARITIES:

Charities and Trustee Investments (Scotland) Act 2005 clarifies organisations and institutions which may satisfy conditions for charitable status in Scotland. Creates new Scottish definition of charity based on principle of public benefit which is compatible with definition adopted by UK Government. Provides for enhanced range of powers for recently established Office of Scottish Charity Regulator (OSCR) which will gain responsibility for granting charitable status and maintaining statutory register of all charities operating in Scotland.

2.04 COMPANIES:

See topic 2.05 Corporations.

2.05 CORPORATIONS:

Name “Corporations” is usually applied to municipal bodies, thus, Corporation of City of Glasgow and Corporation of City of Edinburgh. These municipal bodies were abolished by Local Government Scotland Act 1973 and replaced by two-tier local authority bodies. From 1 April 1996, there has been single tier system of Local Government, such councils dealing with all functions previously carried out by District and Regional Councils except for function of water and sewerage.

Under this head may also fall those companies created by Royal Charter, or by special Act of Parliament. Such bodies are all regulated by Terms of Charter or particular Act of Parliament.

Term applied to incorporated business organisations of limited liability is “companies”. Law in regard to limited companies is contained principally in Companies Acts 1948–2006. Applicable Acts depends upon year of incorporation. Law partly revised, mainly consolidated by Companies Acts 1985 and 2006. The 2006 Act makes number of changes to all companies, private companies and shareholders. Act is attempt to simplify and consolidate company law for benefit of smaller businesses in particular.

Companies may be public or private. Most companies are private. Company will be private unless it meets certain criteria. These include: (i) minimum subscribed share capital £50,000; (ii) statement in Memorandum that it is public; (iii) name to include words “public limited company” or “plc”; and (iv) minimum number of members two. Public companies can offer shares to unknown members of general public. Private companies can offer shares only to named individuals. Additional regulations and reporting requirements apply to public companies.

Registration.

The Business Names Act 1985 regulates use of business names. From October 2009, companies can register a name which is already in index of company names but only if company to be registered forms, or is to form, part of the same group as company whose name is already on index. Otherwise use of same name is prohibited. Names can be prohibited if “too like” name already on index of company names. Certain words or phrases are prohibited from use in, or as, company name either absolutely or conditionally. Certain words or phrases require consent before used in, or as, company name.

Internal management of company is regulated by its articles of association. External management is regulated by its memorandum of association. Companies may use own form of articles and memorandum, they can also adopt style articles. If companies fail to register their own articles of association, a standard form applies by default. Which form applies depends on year of incorporation. Styles can be found in Companies (Tables A to F) Regulations 1985 and Companies (Model Articles) Regulations 2008.

Issue of Prospectus.

Where a prospectus is issued, it must contain certain details of which the following may be mentioned: number of deferred shares; names, descriptions and addresses of directors; minimum subscription; names and addresses of vendors; amount of purchase money; amount paid to promoter; and voting rights of classes of shareholders.

A company which does not issue a prospectus is not permitted to allot any shares or debentures unless prior to the first allotment there has been filed with the registrar a statement in lieu of prospectus, which must contain practically the same particulars as required in a prospectus.

Financial Reporting.

Companies are required to disclose certain financial information for benefit of creditors and investors. Different regimes exist depending on certain criteria relating to size of company and whether or not company is public or private. Companies (Audit, Investigations and Community Enterprise) Act 2004 provides improved reliability of financial reporting and independence of auditors, and strengthens power of company investigators. It also includes provisions for new “Community Interest Company”.

Bankruptcy and Diligence etc. (Scotland) Act 2007 provides for new Scottish Register of Floating Charges, to be held by keeper of Registers, which will make it easier for lending institutions to assess financial position of company.

See generally England Law Digest and European Union Law Digest.

2.06 FOREIGN CORPORATIONS:

See topic 2.05 Corporations.

2.07 JOINT STOCK COMPANIES:

Joint stock companies are not distinguished from companies. See topic 2.05 Corporations.

2.08 LIMITED PARTNERSHIP:

See topic 2.09 Partnerships.

2.09 PARTNERSHIPS:

Partnership is by agreement between two or more specific persons. It must be with a view to profit. Lack of profit does not dissolve partnership. Agreement does not have to be in writing. Where agreement is silent, partnership governed by Partnership Act 1890. Partnership is a distinct legal personality from all individual partners. Individual partners remain personally liable for whole debts and obligations of partnership. Judgment obtained against partnership can be enforced against any and all partners. Each partner has power to bind partnership in lines of partnership business. Where no time limit is expressed, partnership continues until death or until a partner gives notice of his or her intention to leave the partnership. Partnership may use names of the partners. Where it does not, names of all partners and trading name must be shown on all partnership stationery and correspondence.

Limited Partnership.

A limited partnership may be registered. Limited partnerships must contain one or more persons termed limited partners, contributing capital but who are not liable beyond the amount so contributed. A limited partner cannot take part in management. Limited partnerships must contain one or more ordinary partners. Ordinary partners can take part in management. Ordinary partners remain personally liable for the whole debts and obligations of the limited partnership (Limited Partnership Act 1907). Provisions of companies’ legislation relating to business names apply to limited partnerships if trading under a trading name.

Limited Liability Partnership.

Limited liability partnership (LLP) became possible after 6 April 2001. Governed by the Limited liability Partnership Act 2000, Limited Liability Partnership Regulations 2001 (SI2001/1090) and Limited Liability Partnerships (Scotland) Regulations 2001 (SI2001/128). All partners have limited liability for the partnership’s debts but correspondingly greater financial reporting requirements. Many provisions of companies’ legislation apply, including provisions relating to name of limited liability partnership. Reference must be made to companies' legislation as a whole to understand differences between and the merits of the two systems.

3 BUSINESS REGULATION AND COMMERCE

3.01 BILLS AND NOTES:

The law regarding bills of exchange is codified by the Bills of Exchange Act 1882. As defined by the Act of Parliament, a bill is an unconditional order in writing addressed by one person to another signed by the person giving it requiring the person to whom it is addressed to pay on demand or at a fixed or determinable future time a sum certain in money to or to the order of a specified person or to bearer (§ 3).

To preserve right of recourse, holder must duly present bill for acceptance and payment.

Every person whose signature appears on a bill is prima facie deemed to have become a party thereto for value and every holder is prima facie deemed to be a holder in due course (§ 30).

Where a bill is payable after sight, presentment for acceptance is necessary in order to fix the maturity (§ 39).

If drawee of a bill has in his or her hands funds available for payment, bill operates as an assignment of sum for which it is drawn in favour of holder from time when bill is presented to drawee (§ 52-2).

On dishonour, holder must at once give notice to drawer and each endorser, otherwise his or her right of recourse against them is discharged. Simple notice is sufficient in case of an inland bill; a notarial protest is necessary for a foreign bill.

A cheque is a bill of exchange drawn on a banker payable on demand (§ 73).

A promissory note is defined as an unconditional promise in writing made by one person to another signed by the maker, engaging to pay, on demand or at a fixed or determinable future time, a sum certain in money to, or to the order of, a specified person or to bearer (§ 83).

Three days of grace are added to time of payment fixed by bill. Where last day of grace falls on a Sunday, Christmas Day, Good Friday or day appointed by Royal Proclamation, bill is due and payable on preceding business day. When last day of grace is a bank holiday (other than Christmas Day or Good Friday) under Bank Holidays Act 1871, or when last day of grace is a Sunday and second day of grace is a bank holiday, bill is due and payable on succeeding business day (§ 14).

Provided all statutory requirements have been given effect to, there is provided in Scotland a summary method for recovery, a protest being written out and signed by notary which being registered in court books, an extract is issued having effect of a judgment of court.

Period of limitation on a bill of exchange is six years, but thereafter debt may be proved by writ or oath of debtor.

Where a bill drawn on one country is negotiated, accepted or payable in another, its validity as regards requisites in form of bill is determined by law of place of issue and its validity as regards requisites in form of supervening contracts, such as acceptance, endorsement or acceptance supra protest, is determined by law of place where particular contract was made. But a bill issued outside of UK is not invalid merely because not stamped according to law of place of issue, and where such bill conforms, as regards requisites of form, to law of UK; it may, for purpose of enforcing payment thereof, be treated as valid as between all persons who negotiate, hold or become parties to it in UK (§ 72).

3.02 COMMERCIAL REGISTER:

Companies House, a government body, maintains registers of current names of companies, limited liability partnerships and limited partnerships. Provisions of the Business Names Act 1985, Companies Act 1985 and Companies Act 2006 make provisions regarding permissible business names, public disclose, etc. See also category 2 Business Organisations, topics 2.05 Corporations, subhead Registration, 2.09 Partnerships, subheads Limited Partnership and Limited Liability Partnership.

3.03 CONTRACTS:

Obligation arises from consent. Consideration is not necessary element. Unilateral obligation is possible. Gratuitous promise proved only by writ or oath of party making it. Courts will entertain action on contract only if patrimonial interest involved.

Power to Contract.

Age of Legal Capacity (Scotland) Act 1991 came into force on 25 September 1991. Persons under 16 years have, generally, no capacity to contract. Specific exceptions apply. Minors aged 16 to 18 years have capacity to contract, but contract reducible before minor reaches 21 years if contract prejudicial to minor. Those who are incapable of understanding (*incapax*), do not have capacity to contract.

Constitution of Contracts.

Some require no special form. Others must be entered in writing. Section 1(2)(a)(i) of Requirements of Writing (Scotland) Act 1995 provides that written document subscribed by parties is necessary to constitute “a contract or unilateral obligation for the creation, transfer, variation or extinction of an interest in land”. Under §§ 1(3) and (4), parties to oral agreement, upon which one of them has acted in reliance, will be personally barred from denying existence of contract because of absence of writing. Imperfect contract may be made binding by actions of parties.

Avoidance of Contracts.

Contract may be rendered void or voidable where consent obtained by improper means, or given under error in facts. Contract induced by violence is void. Also void where object is for furtherance of illegal purpose. Impossibility of performance may or may not render contract void. Doctrine of frustration excuses performance when impossibility caused independent from volition of contracting parties. See England Law Digest, category Business Regulation and Commerce, topic Contracts, subhead Excuses for Nonperformance.

Gambling Act 2005.

Section 335 abolishes doctrine of sponsiones ludicrae by making contracts related to gambling enforceable.

Rights of Third Parties.

Contract cannot impose liability on someone not party to contract. Third party may acquire right to sue on contract under doctrine jus quaesitum tertio (see further Stair Institutions, I, 10, 5). Until Contracts (Rights of Third Parties) Act 1999, which introduced recognition of third party rights into law of England and Wales, jus quaesitum tertio was one of main features distinguishing Scots law from English law.

Remedies.

Three remedies in Scots law compel contract-breaker to perform in accordance with contract: actions for payment of debt; actions of specific implement; and actions of interdict.

Payment actions lead to further processes known as diligence to recover monies (Consumer Credit Act 1974, §§ 137–140, Bankruptcy (Scotland) Act 1985, § 61). Forum for debt enforcement in Scotland is Sheriff Court. Late Payment of Commercial Debts (Interest Act) 1998 grants rights to small businesses to claim simple interest at fixed rates by order on late payments. This was extended on 1 November 2002 to all businesses.

Specific implement is appropriate remedy when positive act of performance other than payment of money is sought.

Interdict prohibits carrying out or continuation of some action and may be permanent or interim.

Remedies Providing Substitute for Performance.

Principal remedy for breach of contract providing substitute for performance is damages. Remedy seeking damages is permissible even if performance is still possible. Rule that party could not retain defective property supplied and claim by way of damages diminution of price (actio quanti minoris) has been removed by Contract (Scotland) Act 1997.

Statutes.

Section 4 of Unfair Contract Terms Act 1977 applies to consumer contracts in Scotland.

Distributorships, Dealerships and Franchises.

No special rules exist as regards formation and termination of these types of business arrangements, and normal rules of contract law will apply.

3.04 FRAUDS, STATUTE OF:

No Statute of Frauds in Scotland. Certain contracts must be in writing, such as transactions affecting heritage and leases for more than one year.

3.05 INFORMATION TECHNOLOGY, INTERNET AND NEW MEDIA:

Overview.

There is already wealth of legislation affecting electronic or e-commerce in Scotland and this is legislation which deals with traditional commerce.

However, in recent years, there have been number of developments in law which have dealt particularly with e-commerce. Much of this legislation applies to business and to consumer transactions.

E-Commerce/Electronic Signatures.

Electronic Communications Act 2000 (25 May 2000) is Act on approval schemes for provision of cryptography support services, legal recognition of electronic signatures, removal of obstacles in other legislation to use of electronic communication and storage and update of procedures for modifying telecommunications licences.

Electronic Communications Act 2000 (Commencement No. 1) Order 2000 brings into force §§ 7, 11 and 12 of Electronic Communications Act 2000. Part 1 of Act is not yet in force.

Unsolicited Goods and Services Act 1971 (Electronic Communications) Order 2001 is made under § 8 of Electronic Communications Act 2000 and amends Unsolicited Goods and Services Act 1971 ("1971 Act") so as to make provision for orders to be placed electronically for directory entries.

Companies Act 1985 (Electronic Communications) Order 2000, made under §§ 8 and 9 of Electronic Communications Act 2000 (c. 7), modifies various provisions of Companies Act 1985 (c. 6) ("the 1985 Act") for purpose of authorising or facilitating use of electronic communications between companies and their members, debenture holders and auditors and between companies and registrar of companies.

UK Anti-Terrorism, Crime and Security Act 2001 has provisions in Part 11 giving Secretary of State powers to issue and revise code of practice relating to retention of communications data by communications providers, including Internet Service Providers (ISPs). Law imposes new set of requirements for retaining communications data, although not in relation to actual content of communications.

Consumer Protection (Distance Selling) Regulations 2000 implementing Directive 97/7/EC on distance contracts deals with prior information; written confirmation; cancellation; defence; performance; payment by card; inertia selling; restrictions on certain means of distance communication; and enforcement and redress.

Electronic Signatures Regulations 2002 (SI 2002/318) regulates supervision of certification-service-providers, their liability in certain circumstances and data protection requirements connected to their activities.

Electronic Commerce (EC Directive) Regulations 2002 (SI 2002/2013) implements requirements set out in European Parliament and Council Directive 2000/31 on certain legal aspects of information society services, in particular "electronic commerce" in Internal Market. Information society services is summarised in European Parliament and EC Council Directive 2000/31, recital 17 as covering any service normally provided for remuneration, at distance, by means of electronic equipment for processing (including digital compression) and storage of data, and at individual request of recipient of service (SI 2002/2013, reg 2[1]). Under regulations, person providing information society service must make available to recipient of service and any relevant enforcement authority, in form and manner which is easily, directly and permanently accessible, certain general information. Where reference is made to prices, it must be indicated clearly and unambiguously and must indicate whether they are inclusive of tax and delivery costs.

Privacy and Electronic Communications (EC Directive) Regulations 2003 (SI 2003/2426) effective from 11 December 2003 regulates use of publicly available telecommunications systems, location data and cookies for direct marketing purposes.

Data Protection.

Data Protection Act 1998 implementing Directive 95/46/EC on data protection deals with rights of data subjects and others; notification by data controllers; exemptions and enforcement.

Telecommunications (Data Protection and Privacy) Regulations 1999 (SI 1999 No. 2093) and Telecommunications (Data Protection and Privacy) (Amendment) Regulations 1999 (SI 2000 No. 157) are regulations implementing Directive 97/66/EC on processing of personal data and protection of privacy in telecommunications sector. It covers traffic and billing data, CLI, directories of subscribers, use of telecommunication services for direct marketing, compensation and enforcement.

Freedom of Information (Scotland) Act 2002 was passed by Scottish Parliament on 24 April and received Royal Assent on 28 May 2002. It came into force on January 2005 and introduces general statutory right of access to all types of “recorded” information of any age held by Scottish public authorities. Subject to certain conditions and exemptions, any person who makes request to public authority for information will be entitled to receive it.

Investigatory Powers.

Regulation of Investigatory Powers Act 2000 deals with access to encrypted data and interception of communications.

The Electronic Communications Act 2000.

Main purpose of Act is to help build confidence in electronic commerce and technology underlying it by providing for approvals scheme for businesses and other organisations providing cryptography support services, such as electronic services and confidentiality services. Act was passed in May 2000 and parts of it came into force in July of that year. Act also deals with legal recognition of electronic signatures and process under which they are verified, generated or communicated, and removal of obstacles in other legislation to use of electronic communication and storage in place of paper.

Act seeks to implement certain provisions of EU Directive on electronic signatures and its broad aim is similar to that of EU Directive on legal aspects of electronic commerce.

There are three parts to Act. First, section dealing with cryptography service providers concerns arrangements for registering providers of cryptography support services, such as electronic signature services and confidentiality services.

Second, provision of electronic commerce, data storage, etc. facilities is covered by legal recognition of electronic signatures and process under which they may be generated, communicated or verified. This part of Act is now in force.

In recognition of fact that much legislation predates age of electronic communications, Act gives Ministers power to make delegated legislation to remove any restrictions in other legislation which prevent use of electronic communications in place of paper. Since 22 December 2000, companies have been allowed to communicate with shareholders and Companies House by e-mail.

Final main section is concerned with modification of telecommunication licences and general matters including territorial extent of Act.

The UK’s Regulation of Investigatory Powers Act.

Act was passed in July 2000; amongst other things, it addresses rights of authorities to require any computer user to hand over decryption codes used by him or her. Authorities referred to are police, intelligence services and customs and excise.

Failure to comply with demand for key is criminal offence. Penalty for such offence is maximum of two years imprisonment and/or fine.

Act also makes reference to monitoring of electronic communications. Organisations in position to do so are ISPs—and they are concerned about costs involved in doing so. Such monitoring is only necessary if notice is issued to particular ISP by Secretary of State. It is still unclear what, if any, contribution ISP can expect to receive in meeting costs of complying with such notice.

Parts of UK's Regulation of Investigatory Powers Act came into force in October 2000.

3.06 INTEREST:

There is no statutory rate of legal interest though it is custom of court to allow interest at 8% from date of service of proceedings. Interest can run on injury compensation from date injury sustained. Interest is due on bills and notes from date of presentation of bills payable on demand, and from maturity in other cases (Bills of Exchange Act 1880, § 57). As general rule, compound interest is not due.

Usury.

There is no usury law. Courts may give relief and reopen transactions between moneylender and borrower if amounts charged for interest and other expenses are excessive or transaction is harsh and unconscionable (Moneylenders Act 1900, § 1). Interest exceeding 48% per annum is prima facie harsh and unconscionable (Moneylenders Act 1927).

3.07 LICENCES, BUSINESS AND PROFESSIONAL:

See England Law Digest, category Foreign Trade and Commerce, topic Foreign Trade Regulations.

3.08 MONOPOLIES, RESTRAINT OF TRADE AND COMPETITION:

See England Law Digest.

3.09 NEGOTIABLE INSTRUMENTS:

See topic 3.01 Bills and Notes.

3.10 SALES:

Law of sale of goods is regulated by Sale of Goods Act 1893 with important amendments contained in Supply of Goods (Implied Terms) Act 1973 and Consumer Credit Act 1974. Law of Sale of Goods has been consolidated by Sale of Goods Act 1979. The 1979 Act was amended by Sale and Supply of Goods Act 1994 which, among other things, removed English terms "condition" and "warranty" from Scottish provisions. The 1979 Act was further amended by Sale of Goods (Amendment) Act 1995 which strengthened purchaser's rights where he or she buys part of larger bulk of goods. More recent amendments have been made by Sale and Supply of Goods to Consumers Regulations 2002 (SI 2002/3045). These regulations, which came into force on 31 March 2003, were passed in order to implement European Directive on certain aspects of sale of consumer goods and associated guarantees (Directive 99/44). Regulations introduce several important changes to field of consumer protection, most notably by amending implied term as to satisfactory quality; introducing to scheme of buyer's remedies, consumer's right to repair, replacement or reduction in price of goods (although right to reduction of price was already provided in Scots law in terms of Contract [Scotland] Act 1997); and regulating consumer guarantees.

Contract of sale may be made in writing, or by word of mouth, or partly in writing and partly by word of mouth, or may be implied from conduct of parties. Contract of sale may be either of existing goods owned and possessed by seller or goods to be manufactured or acquired by seller. Price may be fixed by contract or left to be fixed in manner agreed or determined by course of dealing. Where price is not so ascertained, buyer must pay reasonable price. Time of payment is not deemed to be of essence of contract. Where sale is of unascertained goods, property does not pass until goods are ascertained. Unless otherwise agreed, payment and delivery are concurrent conditions. Remedies in cases of breach of contract are also prescribed.

Restrictions have been made by regulation on disposal of certain classes of goods particularly under Hire Purchase Agreements.

Warranties.

Sale of Goods Act sets out warranties as to quality of goods. When goods sold for particular purpose, implied condition is that goods are reasonably fit for said purpose. When goods bought by description from dealer in that class of goods, implied condition is that goods are of satisfactory quality. May be implied warranty through usage of trade. Trades Description Act 1968 prohibits false trade descriptions.

Consumer Protection.

See England Law Digest, category Business Regulation and Commerce, topic Monopolies, Restraint of Trade and Competition. Further protection given by Trades Description Act 1968, Trade Description Act 1972, Supply of Goods (Implied Terms) Act 1973 and Consumer Credit Act 1974.

Notices Required.

Non-conformity with contract entitles buyer either within reasonable time to reject goods and treat contract as repudiated, or to retain goods and treat failure as breach and make claim for compensation or damages for defects. Rejection excluded by acceptance of goods.

Applicable Law.

Interpretation and effect and rights and obligations of parties are determined basically by contract itself. Court will look to intention of parties as set out in written contract. Therefore, law applicable is that which parties agree or intend should govern it. General rule that it is incompetent to contradict or qualify terms by extrinsic evidence, but, if necessary, reference may be had to writ or oath of parties. Illegal contracts (pacta illicita) cannot be enforced by action of either party. In absence of agreement, applicable law is law of country most closely connected to place of performance of contract.

3.11 STATUTE OF FRAUDS:

See topic 3.04 Frauds, Statute of.

4 CITIZENSHIP

4.01 ALIENS:

See category 16 Immigration, topic 16.01 Aliens.

4.02 IMMIGRATION:

See England Law Digest.

5 CIVIL ACTIONS AND PROCEDURE

5.01 ACTIONS:

Jurisdiction.

Principles of jurisdiction in Scottish courts are now contained in Civil Jurisdiction and Judgments Act 1982, Schedule 8, which gave effect to European Community Convention of 27 September 1968. Amendments are contained in Civil Jurisdiction and Judgments Act 1991.

Statute gives effect to Lugano Convention or Parallel Convention on jurisdiction and enforcement of judgments in civil and commercial matters after 16 September 1988. Principal ground of jurisdiction is domicile of defender. Domicile is broader concept than residence. Unlike habitual residence, an objective intention to remain is necessary for domicile. Alternative grounds of jurisdiction include place of performance of obligation, of delictual event, of pursuer’s residence (in alimentary actions), of situation of moveable property which is subject matter of dispute and agreement to accept jurisdiction. Exceptions to domicile as ground of jurisdiction arise where subject matter of action is right to heritable property, or validity of companies, partnerships or associations.

Person may sue or be sued in Scottish courts subject to rules of procedure. Burden of proof is on party who asserts affirmative of issue.

Scots courts, with jurisdiction, can apply foreign law to the substantive issues. Scots law will always be applied to procedural questions. Questions relating to evidence such as competency of witnesses and sufficiency of proof are matters of procedure governed by rules of courts.

Court of Session has exclusive jurisdiction in actions involving status. Jurisdiction for divorce actions has now been extended to Sheriff Court by Divorce Jurisdiction, Court Fees and Legal Aid (Scotland) Act 1986.

Formation of courts, see category 6 Courts and Legislature, topic 6.02 Courts.

Act of Sederunt is legal name given to procedural rules regulating various civil legal procedures in Scotland.

Two Acts of Sederunt introducing new rules for summary causes and small claims have been approved by Court of Session. These rules came into force on 10 June 2002 and apply to all actions commenced on or after that date. Rules are contained in first Schedule to each Act of Sederunt.

In general terms, action where sum sued for exceeds £3,000 but does not exceed £5,000 must be brought as summary cause, and action where sum sued for is £3,000 or less must be brought as small claim (Small Claims [Scotland] Amendment Order 2007). There are exceptions to this rule: one of these is that action of damages for personal injury must be brought as summary cause even though sum sued for is less than £3,000.

In summary causes, and small claims, authorised lay representative may act on behalf of a party.

There are various forms of claim specified in rules: claim for payment of money; claim for recovery of possession of heritable property; claim for sequestration of rent; claim for delivery; claim for implement of obligation; and claim for damages for personal injury. Except in case of personal injury claims, there is no specific form provided for statement of claim. Statement of claim must give defender fair notice of claim and must include details of basis of claim.

Rules of citation remain largely same.

There are several forms of copy summons which should be served on defender depending on nature of action. There are four separate forms. One is for actions of payment where defender may apply for time to pay direction or time order; one is for actions for payment where no such application may be made; one is for non-monetary actions; and one is for multiple pleadings.

Copy of summons served on defender contains two dates. These are return date (basically time by which defender must return any documents of court) and seven days later calling date which is when case will be called in front of sheriff for first time.

All copy summonses contain form of response. This is where defender should state in writing any defence to action. Rules require that defender who wishes to challenge jurisdiction of court or competency of action, to defend action or to state counterclaim must complete and return form of response. Defender is expected to give notice of details of any defence. This requirement for written defence is important change from previous rule where defender was only required to appear at first calling to state defence. Copy of defence must be sent to pursuer at same time as copy is lodged with sheriff principal.

If defender includes counterclaim in form of response, pursuer who intends to oppose it must lodge answers within seven days of lodging of form of response. Copy of which must be sent to both parties.

If summary cause is not defended, pursuer may apply for decree which in most cases for payment of money will be granted without case calling in court. In case of actions for sequestration of rent or for recovery of possession of heritable property, case must be called in court even though it is not defended.

Defender may admit liability and make written application to court for decree for payment to be granted by instalments or deferred lump sum in terms of time to pay direction or time order. If pursuer is opposed to application for time to pay direction or time order pursuer must lodge motion to that effect at least two days prior to calling date. Case will then be called in court on calling date, and sheriff will decide on application. There is no provision in new rules for sheriff clerk to intimate to defender that pursuer is opposing application. Onus is on defender to ascertain position. Where defender has lodged written application for time to pay direction or time order and pursuer has failed to lodge motion either stating that he or she does not object or opposing application, sheriff may dismiss action. The sheriff may also grant decree in terms of written application.

Situations in which decree can be granted are wider than in previous rules. Decree can be recalled in following situations: where case was never defended, defender who lodged form of response but failed to appear on calling date, where pursuer failed to appear on calling date when defender who had lodged form of response appeared and where action has been dismissed because all parties failed to appear. Recall must be granted if applied for and application for recall may only be made on one occasion.

There are number of differences between old preliminary hearing and new first calling. Sheriff may continue hearing under new rules to such other date as he or she considers appropriate. It is thought that case may be continued as many times as sheriff thinks appropriate. Purpose of hearing is to achieve real progress in action in whole or in part, or by clearly focusing issues for proof when necessary. Action may be dismissed if sheriff is satisfied that action is incompetent or that there is patent defect of jurisdiction (although he or she may transfer it to appropriate Sheriff Court).

Basis of rules is that sheriff should be interventionist. Sheriff should ascertain factual basis of action and any defence and legal basis of claim and defence. This obviously requires both pursuer and defender’s agents to know their cases. Having ascertained factual and legal bases of action and defence, sheriff must “seek to negotiate and secure settlement of the action between the parties”. If sheriff is unable to secure settlement, he or she must identify and note on summons issues of fact and law which are in dispute. Sheriff should also note any facts which are agreed. Sheriff may grant decree if it appears to him or her that claim or defence as stated is not based in law, in whole or in part. Sheriff must give brief reasons for decision. Sheriff should hear parties on legal matters forthwith. Depending on nature of arguments, this will either be at that time or at continued hearing. If sheriff is satisfied that claim and defence have sound basis in law, then sheriff will fix date of proof, unless facts of case are sufficiently agreed to allow him or her to hear matter forthwith. Again, it is open to him or her to continue case to enable parties to address him or her at greater length.

New rules allow sheriff to grant decree by default if party fails to appear at hearing (other than incidental application hearing) where required to do so.

At proof, sheriff now has power to order that proof on liability or some other specified issue should be heard separately from proof on any other issue. New rules also contain provision for exchange of lists of witnesses similar to those in Ordinary Cause Rules. Also, party lodging productions must send list thereof to every other party and must also send copy of each production to every other party unless it is impracticable to do so. Further, copy of each new production must be lodged with sheriff clerk not later than 48 hours before date of proof.

Summary Applications.

Summary application is name given in Scotland to certain particular types of civil cases which can be dealt with in summary manner in Sheriff Court. Section 3(p) of Sheriff Courts (Scotland) Act 1907 defines summary application as “[a]ll applications of a summary nature brought under the common law jurisdiction of the Sheriff and all applications... brought under any Act of Parliament which provides, or according to any practice in the Sheriff Court which allows that the same shall be disposed of in a summary manner but is not more particularly defined in what form the same shall be heard, tried and determined”. In 1999, Act of Sederunt (Summary Applications, Statutory Applications and Appeals etc. Rules) 1999 was passed. This came into force on 1 July 1999 and consolidated rules for summary applications.

New Procedures for Personal Injury Actions in Court of Session.

On 1 April 2003, Act of Sederunt (Rules of the Court of Session Amendment No. 2) (Personal Injuries Actions) 2002, which substitutes c. 43 of Rules of the Court of Session, came into force. New procedures are supported by comprehensive Rules of Court. New system for dealing with these cases has been streamlined to facilitate early settlement of routine cases. New procedures provide for: early and automatic recovery of documents; simplified written pleadings; early assignment of proof diet for date around year in advance; generation of timetable which specifies dates by which certain key actions must be taken; exchange between parties of calculations of quantum and basis of claim; and pretrial meeting to identify matters that remain at issue and explore opportunities for settlement. Several practice notes have been issued to provide guidance on new system.

Similar procedure for personal injury actions in Sheriff Court where the sum sued in excess of £5,000 came into force on 1 November 2009.

Compensation Bill.

See generally English Law Digest.

5.02 DEPOSITIONS AND DISCOVERY:

Application may be made to court, before which action is pending, to have evidence of witness taken on commission. Usual grounds for application are that witness is resident abroad, proposing to go abroad or is aged or infirm. Notice must be given except in case of extreme urgency, and names of persons to be examined should be intimated.

Written interrogatories may be ordered and it is in discretion of court whether evidence should be taken by interrogatories and cross interrogatories.

Witnesses Abroad.

Where evidence of any witness abroad is material, application may be made to judge for letter of request to foreign tribunal within jurisdiction of which such witness is resident. On such letter of request being granted, it is forwarded to Foreign Secretary for transmission to such foreign court.

Actions in Foreign Court.

Where Court of Session is informed that a foreign court is desirous of obtaining evidence of person resident in Scotland, an order may be issued ordaining such person to appear to give evidence (Foreign Tribunal Evidence Act 1856). Evidence will not be taken before a court but before a commissioner (Case Baron De'Bildt, 1905, Frasers Reports 899).

Form.

The usual form of commission is as under:

Form

At...., the.... day of...., in the year...., there was produced to A.B. (here name and design Commissioner) a Certified Copy Interlocutor, dated...., pronounced by (name Judge) in the action pending before (name Court) at the instance of C.D., Pursuer, against E.F., Defender, whereby, inter alia, Commission is granted to the said Commissioner to take the oaths and examinations of witnesses in said action; of which Commission the said A.B. accepted, and made choice of G.H. to be his Clerk, and administered to him the oath de fideli administratione.

Thereafter compeared Pursuer and J.K., his Solicitor, as also the defender and L.M., his Solicitor (or as the case may be).

Compeared N.O. (designation and address) aged...., who being solemnly sworn and interrogated as witness for Pursuer (or Defender) depones.

All which is true as the deponent shall answer to God (specifying corrections).

At the conclusion of the Proof, the following docquet will be written:

What is contained on this and the.... preceding pages is the report of the Commissioner mentioned on the first page hereof.

Humbly reported by

.........., Commissioner,

.........., Clerk.

5.03 EVIDENCE:

See topic 5.02 Depositions and Discovery.

5.04 JUDGMENTS:

Judgment is vouched by extract from books of court. The judgment authorises execution. Provision is made for enforcing judgments obtained in English and Irish Courts (The Judgment Extension Act 1868). Foreign judgments are not recognised unless that foreign country has reciprocal agreements with this country for enforcement of judgments. In that event, the foreign country plaintiff must constitute his or her claim by action in the Scottish court. See also category 9 Documents and Records, topic 9.05 Records.

Summary judgments may be entered in certain cases. See categories 3 Business Regulation and Commerce, topic 3.01 Bills and Notes; 9 Documents and Records, topic 9.05 Records.

5.05 LIMITATION OF ACTIONS:

Various classes of debt are subject to limitations (properly called prescriptions) which are in respect of some classes absolute and in others conditional. In some cases, the limitation absolutely cuts off and extinguishes the right. In others, it merely limits the means of proof by which the right may be extinguished.

Holograph writings and holograph bonds are subject to 20 years limitation (Statute 1669 c. 9). After that period, authenticity must be established by debtor’s oath.

Obligation on tutors and curators and wards to account or reimburse is presumed to be satisfied if ten years have expired (Statute 1696 c. 9).

Cautionary (security) obligations are subject to limitation of seven years (Statute 1695 c. 5).

Bills of exchange and promissory notes suffer six years limitation (Statute 1783 c. 18). After expiry of that period, document cannot be founded on, and action must be laid on the debt and established by proof other than the bill.

All bargains concerning movables, or sums of money provable by witnesses, are only provable by writ or oath if not sued for within five years of making the bargain (Statute 1669 c. 9).

Merchants accounts, servants’ wages and house rents are subject to a three years prescription (Statute 1519 c. 83). After expiry of three years, it is necessary to prove both constitution and subsistence of debt by writing or oath of debtor.

There is a general prescription, the negative prescription of 20 years applicable to obligations in general not specified above. In some cases, such as servitudes, it is 40 years. Foregoing have been largely replaced by Prescription and Limitation (Scotland) Act 1973, which deals with positive prescription (period of challenge reduced to ten years in respect of all recorded titles ex facie valid and not forgeries) with negative prescription (reduced to a new period of five years) applicable to nearly all commercial transactions (extinction of right of action instead of limitation of method of proof) and with positive servitudes and rights of way (now 20 years prescription). It is not possible to contract out of Act.

Various Acts designed for the protection of public authorities (including the Crown) have been repealed or amended by the Law Reform (Limitation of Actions) Act 1954. Under Prescription of Limitation (Scotland) Act 1973, no action of damages in respect of personal injuries could be entertained by courts after three years from date of incident giving rise to claim, but Law Reform (Miscellaneous Provisions) (Scotland) Act 1980 gives power to courts to override this time limit if equitable to do so.

5.06 PRESCRIPTION:

See topic 5.05 Limitation of Actions.

5.07 PRODUCT LIABILITY:

Law in Scotland which regulates liability of manufacturers for goods they produce is consolidated by Consumers Protection Act 1987. Part 1 of this Act implements Product Liability

Directive (85/374/EEC) of European Union.

Important defence which was included under § 4 is that state of scientific and technical knowledge at relevant time was not such that producer or products of same description might be expected to have discovered defects if it existed in his or her product while they were under his or her control.

Act does not allow any liabilities to be limited or excluded by any terms of contract. Act also extended strict liability to property damage as well as to death and personal injury caused by defective product where damage is worth at least £275.

5.08 REPLEVIN:

This action is not so known. Specific property is recovered by action for delivery.

6 COURTS AND LEGISLATURE

6.01 ADMIRALTY:

Jurisdiction of admiralty as regards prize, which was vested in High Court of Admiralty, is now incorporated within jurisdiction of Court of Session. Other functions of admiralty court are with exceptions exercised by Sheriff Courts. Jurisdiction in criminal matters being with High Court of Justiciary and other criminal courts.

6.02 COURTS:

Criminal cases are dealt with by District Courts, or Sheriff Courts or High Court, depending on nature and seriousness of crime. Locus of crime bestows jurisdiction on court in particular geographical area.

Courts for civil business are supreme and inferior. Supreme Court, known as Court of Session, consists of 24 judges, together with temporary judges appointed by Secretary of State. Eight judges sitting in two divisions with equal status form Inner House or Appellate Courts. Eleven judges, each sit in their own separate Courts, forming Outer House, and are known as Lords Ordinary. Remaining judge sits permanently on Law Commission. Inner House hears appeals from Outer House judges and from Sheriff Courts. In certain classes of cases, an appeal lies from Court of Session to House of Lords. Until implementation of Law Reform (Scotland) Act 1990 (§§ 25–29), right of audience in High Court and Court of Session were limited to members of Faculty of Advocates. Attorneys are now permitted to appear. (See category 1 Introduction, topic 1.02 Government and Legal System, subhead Judiciary; see also England Law Digest.)

Principal inferior courts are Sheriff Courts. There are six Sheriffdoms divided into Sheriff Court districts each of which has its own courts. There is no limitation of amount which can be sued for in Sheriff Court. Sheriffs are provided for districts, appeal from whose decisions lies to Sheriff Principal. Each Sheriffdom has its own Sheriff Principal. Burgh, Police and Justices of Peace Courts which dealt with minor criminal matters have been abolished by District Courts (Scotland) Act 1975. Each District Council (see category 2 Business Organisations, topic 2.05 Corporations) is responsible for setting up and running District Courts. Further appeal in most cases is to the Court of Session.

Sessions.

Court of Session holds three sessions in a year, dates being fixed by Act of Sederunt.

Sheriff Courts have winter session and summer session. There is a Christmas recess.

6.03 JUSTICES OF THE PEACE:

Office of Justices of Peace was founded by Statute 1587 c. 82. Certain administrative duties are performed by justices, such as taking of affidavits and signing of documents for persons unable to write. They have also judicial duties and now operate within framework of District Courts (see topic 6.02 Courts).

6.04 LAW REPORTS, CODES:

See topic 6.06 Reports; category 1 Introduction, topic 1.02 Government and Legal System.

6.05 LEGISLATURE:

See category 1 Introduction, topic 1.02 Government and Legal System.

6.06 REPORTS:

Reports of cases are extant from very early times. Morrison's Dictionary contains decisions during year 1540. Reports are available almost without break from that time.

Court of Session.

Faculty Collection, 37 vols. 1752/1841; Court of Session Second Series, 24 vols. 1838/1862, Third Series 11 vols. 1862/1873, Fourth Series, 25 vols. 1873/1898, Fifth Series, 8 vols. 1898/1906; Court of Session cases, continuing (Publishers, William Green & Son, Edinburgh, for Faculty of Advocates); Scots Law Reporter, 61 vols. 1865/1927 (Publishers, John Baxter & Son, 39 Elden Street, Edinburgh); Scots Law Times, from 1893 on (Publishers, William Green & Sons, Edinburgh); Current Law Reports from 1950 on (Publishers, William Green & Sons, Edinburgh).

6.07 STATUTES:

See category 1 Introduction, topic 1.02 Government and Legal System.

7 DEBTOR AND CREDITOR

7.01 ASSIGNMENTS:

Movable (personal) estate may be assigned, including policies of insurance. A form of assignation (Scottish technical term) is provided by the Transmission of Moveable Property (Scotland) Act 1862. These forms need not be followed. As long as a clear intention to assign is expressed in writing, no particular form of words is necessary.

An assignation conveys no higher or better right than the grantor possessed and all defences competent against the assignor may be pleaded against the assignee.

Form.

The form prescribed is as follows:

Form

I, A.B., in consideration of &c., do hereby assign to C.D. his/her executors or assignees (or otherwise as the case may be) the bond (or other deed or property) granted by E. F. dated &c., by which (here specify any circumstances requiring to be stated in regard to nature of right assigned).

In witness whereof, (place and date of signing and names and designations of witnesses).

Intimation.

To complete legal effect of an assignation, intimation is necessary. An assignation is validly intimated: (1) by a notary public delivering a copy thereof certified as correct to holders of the fund; (2) by a copy of assignation being transmitted by post to such holders; or (3) by the debtor endorsing an acknowledgement of intimation on the assignation. A certificate of the notary in first case and a written acknowledgement of receipt in second case will be sufficient evidence of intimation.

Policy of Assurance.

An assignation does not confer any right to sue for amount of policy until written notice of debt and of purport of assignation have been given to insurance company at its principal place of business. Date on which such notice is received by company regulates priority of all claims made under assignation (Policies of Assurance Act 1867).

Proper form of assignation is as follows:

Form

I, A.B. of &c., in consideration of &c., do hereby assign unto C.D., &c., his/her executors, administrators and assignees, the within Policy of Assurance granted &c., (here describe the Policy) in witness whereof: &c.

7.02 ASSIGNMENTS FOR BENEFIT OF CREDITORS:

This is a recognised manner of dividing estate if a person be unable to meet obligations. Form used is by assignation to trustee for benefit of creditors. Deed must be assented to by creditors or debtor will not be discharged.

Court does not exercise supervision over trustee under a voluntary assignation except that trustee’s accounts are audited and his or her commission fixed by an officer of court if trust deed does not provide for these things being done by a committee of creditors.

7.03 ATTACHMENT (ARRESTMENT):

Diligence is used to refer to various procedures which can be employed to attach the assets of another to enforce payment of a debt. The main forms of diligence are arrestment, diligence against earnings, attachment and inhibition. An arrestment order “freezes” moveable property of the debtor which is in the hands of third party. Attachment applies diligence to assets of the debtor in his or her possession and is usually of two kinds: (a) Where judgment has been obtained, attachment is made in execution; (b) where judgment has not been obtained, or debt is future, attachment is made in security.

Inhibition is a form of diligence which can be exercised over heritable property. The inhibition order prevents the property from being sold or having a security granted over it.

Warrant is obtained from court and contained in judgment. In a depending action, warrant is granted on ex parte application contained in summons, and property may be attached prior to service in action. This procedure is known as arrestment on dependence of action. This applies alike to resident and nonresident.

Property Liable.

All movable goods belonging to debtor in hands of third parties or debts due to debtor can be arrested. Ships are also attachable, albeit subject to specific rules as per § 47 of the Administration of Justice Act 1956. Process of recovery prior to and following decree is governed by Debtors (Scotland) Act 1987. Wages are attachable in hands of employer who on receipt of appropriate schedule will make payments to creditor. Certain items are not arrestable, that is, items which are alimentary in nature or items which relate to the debtor's profession or trade and those deemed necessary for the well-being of the debtor and his or her family.

Attachment procedures are now governed by The Debt Arrangement and Attachment (Scotland) Act 2002. Attachment is now only competent where the debtor has been charged to pay the sum owed, the creditor has provided the debtor with a debt advice and information package, must not exceed a combined value of £1,000. Attachment can no longer take place on a Sunday or public holiday and must take place between 8 a.m. and 8 p.m. Procedures differ depending on whether the items to be attached are contained within the dwelling house of the debtor or out with the dwelling house. The general principle that operate is that only in exceptional circumstances (and by way of an "exceptional attachment order" obtained by way of court decree) will items be attached which are kept within the dwelling house of the debtor.

Release.

The judge before whom an action is pending may release attachment on such terms as to security as he or she may consider proper.

Damages.

Wrongful use of attachment renders user liable in damages if act has been malicious and without probable cause.

The Debt Arrangement and Attachment (Scotland) Act 2002 came into force on 30 December 2002. Creates national debt arrangement scheme to enable multiple debts to be assessed with support of money advisers and paid in accordance with debt payment programme over period of time. Provides for attachment, on exceptional basis, of articles kept in dwelling houses. Provides for abolition of poindings and warrant sales, that is, seizure and public auction of household goods and personal property, authorised by sheriff in order to settle unpaid debt.

Bankruptcy and Diligence etc. (Scotland) Act 2007 provides for changes in law of diligence. Provides processes for enforcing orders for payment—including creation of new protected minimum balance on arrested funds in bank accounts and establishment of new public body, Scottish Civil Enforcement Commission, to oversee and improve accountability of new single profession of court messenger replacing professions of messengers-at-arms and sheriff officers.

7.04 BANKRUPTCY (SEQUESTRATION):

Law of Bankruptcy was codified by Bankruptcy (Scotland) Act 1985. This codifying Act was amended by Bankruptcy (Scotland) Act 1993 and most recently by Enterprise Act 2002 which came into force in relation to personal insolvency on 1 April 2004. Creditor must now have debt of not less than £1,500 to petition for sequestration.

Formal bankruptcy is brought about by sequestration of debtor's estate in terms of which process such estates become vested in a trustee for creditors. Sequestration may be obtained by petition to Court of Session or to Sheriff Court of County in which debtor resides or carries on business.

Debtor can petition for his or her own sequestration if qualified creditor concurs in petition. Debtor can also petition if debt exceeds prescribed limit, debtor has not been sequestrated in previous five years and debtor is either apparently insolvent or has granted Trust Deed with trustee having complied with certain requirements contained in Act.

Petition by a creditor can only be presented when it has been established by legal process that debtor cannot pay his or her debt. Further requisites are: (1) that debtor is subject to jurisdiction of Scottish Courts; (2) that creditors have debts of at least £1,500; (3) that formal evidence of insolvency be produced; (4) that debtor has, during year before presentation of petition, either resided or had place of business in Scotland; and (5) that there has been no previous award of sequestration within the period of the last five years ending on the date before the date of presentation of the petition. Several creditors may combine so that their joint debt amounts to £1,500 or more.

A trustee under a trust deed can also petition for sequestration if the debtor has failed without good reason to comply with any term of a trust deed or reasonable instruction to the debtor by the trustee in connection with the trust deed, or where the trustee states in his or her petition that it would be in the best interests of the creditors that an award of sequestration be made.

On sequestration being awarded, interim trustee is appointed. The interim trustee will prepare a preliminary statement of the debtor's affairs which will indicate whether there is likely to be any payment of any dividend to the debtor's creditors. If petition nominates such trustee, if court is satisfied that person is qualified, he or she will be appointed interim trustee. Where no person is nominated in petition, Government official entitled "Accountant in Bankruptcy" will be appointed interim trustee.

The 1993 Act introduced provision where debtor has no assets for summary administration of sequestration of debtor's estate. Statutory meeting is usually called within 28 days of sequestration to appoint permanent trustee, although this can be dispensed with in certain circumstances. The permanent trustee is vested in the debtor's estate and is responsible for ingathering all the debtor's assets, investigating any relevant antecedent transactions and equalising any diligence. Trustee then distributes the assets amongst the creditors in the following order of priority: outlays and remuneration of interim trustee; outlays and remuneration of permanent trustee; where debtor has died, his or her deathbed and funeral expenses; creditors expenses for petitioning for sequestration; preferred debts; ordinary debts; interest on preferred debt and ordinary debt; and any postponed debt.

Bankrupt will be discharged automatically after three years, although trustee may apply to court prior to automatic discharge for extension if he or she has just cause to do so.

Debt Arrangement and Attachment (Scotland) Act 2002 enables a person to settle debts over a period of time. Advice is provided by a debt advisor and a repayment programme is set up. An approved-payments distributor will distribute the debtor's funds (including some of the debtor's wages) to his or her creditors. No element of debt or interest write off is contained within the provisions.

See also topics 7.02 Assignments for Benefit of Creditors; 7.11 Insolvency.

Insolvency (Scotland) Regulations 2003, SI 2003/2109.

It came into force on 8 September 2003 and amends Bankruptcy (Scotland) Act 1985. They bring law on personal insolvency in Scotland better in line with EC Insolvency Regulation 1346/2000 on cross-border insolvency proceedings. Scottish Regulations provide that although main insolvency proceedings can only be held in Member State where debtor has "center of his main interests" (debtor's domicile or main place of business), secondary proceedings may be held in any State where debtor has establishment and proceedings are restricted to assets in that State. EC Regulation itself has direct effect in all Member States, so that its provisions have force of law in Scotland, and Act has to be read subject thereto.

Bankruptcy and Diligence etc. (Scotland) Act 2007 provides for reducing bankruptcy period from three years to one year; taking debtor applications out of court system; and limiting right of creditors to decide to sell or dispose of debtor’s family home to within three years after bankruptcy.

7.05 BONDS:

See category 19 Mortgages, topic 19.03 Mortgages of Real Property.

7.06 EXECUTIONS:

Execution, being what is known as diligence on a decree, may proceed when days of charge or notice specified in decree or required by statute or common law have expired without payment. Such execution may issue against heritable (real) estate or movable (personal) estate. Statutory provisions for implementation of diligence contained in Debtors (Scotland) Act 1987 include sliding scale of amount arrestable according to net income; rates amended from time to time in Law Reform (Scotland) Acts. Restrictions on items that can be seized (poinded) and sold in satisfaction of decree, for example, essential household goods and tools of trade.

Execution against such heritable estate may proceed by what is termed inhibition, by which debtor is prohibited from disposing of or burdening his or her heritable property. Inhibitions prescribe in five years.

Execution may be used to attach all movables or land over which a security is held. Generally, however, heritable property is attached by sequestration. Movable property is attached by arrestment on decree followed by action of furthcoming. In terms of decree, debtor’s movables can be brought to sale by diligence known as a poinding.

7.07 FORECLOSURE:

See category 19 Mortgages, topic 19.03 Mortgages of Real Property.

7.08 FRAUDULENT CONVEYANCES:

Fraudulent conveyances may be set aside under the bankruptcy statutes. See topic 7.11 Insolvency.

7.09 GARNISHMENT:

See topic Attachment (Arrestment).

7.10 HOMESTEADS:

There are no provisions as to exemption of property except of trifling extent in House Letting Acts.

7.11 INSOLVENCY:

Insolvency at common law is a condition of inability to meet debts or obligations.

Effects.

Every form of gratuitous alienation is forbidden. It is not necessary to show fraud either on part of grantor or on part of grantee. Any creditor may challenge such transaction. Deeds, if gratuitous, made in favour of near relative or confidential friend are presumed to be fraudulent (Statute 1621 c. 18). All deeds conferring preferences on particular creditors to exclusion of general body of creditors are null (Statute 1696 c. 5). Payments in cash are not affected, nor are transactions in ordinary course of trade. See also topic 7.04 Bankruptcy (Sequestration).

Insolvency Act 1986 consolidates enactments relating to company insolvency and winding up and enactments relating to insolvency and bankruptcy of individuals.

Enterprise Act 2002 came into force in relation to corporate insolvency on 15 September 2003 and amends Insolvency Act 1986. Key changes are: (1) Holder of floating charge created on or after 15 September 2003 may not appoint administrative receiver, except in special cases; (2) court-based administration procedure in Pt. II of Insolvency Act 1986 is replaced; (3) Crown's preferential status in respect of certain debts due to agencies such as Inland Revenue has been abolished.

7.12 LIENS:

Recognised liens, more properly called retentions, are either general or special. A special lien arises in the course of a particular contract and operates as a security for fulfilment of counterpart. Retention of ship is competent for repairs not necessaries. There may be retention for carriage, for salvage or by hotel keepers over property of guests. Persons bestowing labour and skilled workmen on contract locatio operarum have a similar right for price of labour on goods. An accountant is entitled to retain books.

A general lien extends beyond immediate transactions out of which possession has arisen and operates as a security for general balance of account.

7.13 PLEDGES:

Pledge is constituted by delivery on terms or conditions proved either by writing or by witnesses. The subject of pledge must be capable of delivery such as corporeal movables, goods, wares and merchandise. Debts may also be pledged when identified with the document as in bills and notes. Title deeds may be pledged as corporeal movables but not as carrying any interest in land. Right of property and accompanying risk remain with pledgee. Creditor has no right of use. The subject of pledge cannot be sold without order of court. (See also category 2 Business Organisations, topic 2.01 Agency.)

7.14 USURY:

See category 3 Business Regulation and Commerce, topic 3.06 Interest.

8 DISPUTE RESOLUTION

8.01 ALTERNATIVE DISPUTE RESOLUTION:

At present, alternative dispute resolution movement in Scotland is at very early stage of its development. Various professional bodies including Law Society of Scotland and Chartered Institute of Arbitrators in Scotland have instituted alternative dispute resolution forums, but use of such facilities by potential litigants is entirely voluntary, and as yet not widespread.

Arbitration.

It has never been law of Scotland that agreement to oust jurisdiction of courts was invalid as contrary to public policy. Submission of certain kinds of disputes to arbitration may be required by statute (rare) or provided for in parties' contract or may be adopted by parties when dispute arises in preference to resorting to litigation.

Mandatory Dispute Resolution.

At present, there are few statutory provisions in Scots law requiring disputes which are brought before courts to be referred to other bodies for resolution. Example of such provision is that any dispute between landlord and tenant of agricultural holding arising out of tenancy must be referred to arbitration (see Agricultural Holding [Scotland] Act 1949, § 74).

Voluntary Dispute Resolution.

Statutory provision for voluntary dispute resolution includes intervention by Advisory Conciliatory and Arbitration Service (ACAS), body set up by statute to promote "good industrial relations", to facilitate resolution of individual and collective labour disputes. Under Employment Protection Consolidation Act 1978, § 134, Conciliation Officer of ACAS has duty to endeavour to promote settlement of any individual complaint (unfair dismissal from employment etc.) and thus avoid need for determination of dispute of Industrial Tribunal hearing. Participation by parties in dispute in this process is entirely voluntary. In respect of collective labour disputes, §§ 209 to 212 of Trade Union Labour Relations Consolidation Act 1992 provides for reference by ACAS, with consent of parties involved of any labour dispute to central arbitration committee or person appointed for purpose of arbitration. Decision of Central Arbitration Committee (CAC) or independent arbitrator is not legally binding on parties.

Other forms of alternative dispute resolution include Accord scheme instituted by Law Society of Scotland. This voluntary procedure provides alternative forum for resolution of disputes involving potential litigants. Involvement in process is entirely voluntary, and only when agreement is reached is determination legally binding.

9 DOCUMENTS AND RECORDS

9.01 ACKNOWLEDGEMENTS:

Requisites of attested deeds are settled partly by statute, and partly by common law. When such requisites are complied with, there is legal presumption of authenticity.

Justices of the peace, notaries and others have, however, power to take any oath or acknowledgement required by laws of a foreign country to give validity to instruments or writings designed to be used in such foreign country.

There is no special form of acknowledgement of a signature. It is advisable to have any form of acknowledgement signed either by or before a British consul.

9.02 AFFIDAVITS:

English commissioners or others are not empowered to take oaths for us in the Scottish courts, which appoint special examiners to take the evidence of a witness who cannot appear in person. The statutory form is as follows:

Form

I, A. B., of...... in the County of...... do solemnly and sincerely declare that (here set out facts in numbered paragraphs). And I make this solemn declaration conscientiously believing the same to be true, and by virtue of the Statutory Declarations Act 1835.

Declared at........, in the County of.......,

this...... day of...... 20......, before me } A. B.

....

(Name and designation of Commissioner)

Affidavit should set forth all particulars contained in above style and must be signed by deponent and also by justice, magistrate or judge ordinary before whom it is emitted.

Words "who being solemnly sworn depones" are called jurat. Deponent must actually appear before justice, magistrate or judge ordinary and he or she must be sworn. Word "swear" must be used.

Admissibility.

As person against whom affidavit is used has no opportunity of cross-examining deponent, an affidavit is not admissible after death of deponent or when deponent is abroad and refuses to give evidence before a commissioner of court.

9.03 COMMISSIONS TO TAKE TESTIMONY:

See category 5 Civil Actions and Procedure, topic 5.02 Depositions and Discovery.

9.04 NOTARIES PUBLIC:

No person can now be admitted as a notary public until he or she has been enrolled as a solicitor (Law Agents Amendment Act 1896). The commission is held from the Crown and is not limited in time. Women are entitled to obtain commissions as notaries.

Law Reform (Miscellaneous Provisions) (Scotland) Act 1990, § 37 transferred office and function of Clerk to Admission of Notaries Public to council of the Law Society of Scotland, who are elected by solicitors in Scotland.

9.05 RECORDS:

There is a very complete and reliable system of registration of deeds. Registration in public registers may be for execution, preservation or publication.

The Requirements of Writing (Scotland) Act 1995 simplified and rested in modern language rule of common law that formally executed writing is required for constitution of certain types of contracts and other obligations (obligationes literis) for performance of certain juristic acts in relation to land and for making of will or other testamentary dispositions. At same time, § 11 abolishes rule whereby certain other obligations, although capable of constitution without writing, could only be proved by writ or by oath. Homologation is also abolished and principles of rei intervenes are restated in modern language.

The 1995 Act introduced one method of formal execution (formerly there had been three). This is provided by § 2 which provides that deed is formally valid if it is subscribed by grantor. Witnesses are not required. This new method of execution is mandatory in all cases where § 1(2) requires writing and it is optional in case of any other obligation or juristic act.

Except where enactment expressly provides otherwise, document is subscribed by grantor if signed by him or her at end of last page.

Deed which is merely subscribed under § 2 is not self-evidencing. This means that onus of proving that such deed truly was subscribed by grantor would rest on any person who wished to rely on its terms. However, deed may be made self-evidencing by attestation by single witness. Section 3(1) provides that deed which bears to be subscribed by grantor and attested by signature of one witness is presumed to have been subscribed by grantor. Similarly, if deed or attesting clause contains information as to date and place of execution, deed is presumed to have been executed on that date at that place (§ 3[8]).

Deed which has not been attested can nevertheless be made self-evidencing by application to Sheriff Court (§ 4). If court is satisfied, usually by affidavit evidence, that deed was subscribed by grantor, it will cause docquet to that effect to be endorsed on deed.

Act expressly provides that conveyancing deeds must be attested (or contain court docquet under § 4) before they can be registered (§ 6).

There are three special rules pertaining to wills and other testamentary dispositions. First, when will is attested by witness, it is not self-evidencing unless it is signed by grantor on every sheet. However, will which is subscribed only and not witnessed need not be signed on every sheet.

Second, date and place of execution given in will are presumed to be correct in all cases, even where will is not attested. Finally, confirmation of execution cannot be issued in respect of will which is not self-evidencing.

Execution.

Certain deeds such as formal bonds contain consent to registration for execution and following on such registration an extract of the deed may be obtained which warrants execution in same manner as judgment of court.

Preservation.

Neither consent nor warrant is necessary to record documents in Court Books for purpose of preservation (Statute 1698 c. 4; Writs Registration Act, Scotland, 1868).

Publication.

This register applies to deeds dealing with heritable property. Such deeds must be registered. A General Register, kept at Edinburgh, is divided into separate divisions, one for each county. There are also certain Burgh Registers. Deeds may be transmitted by post. Deeds rank in order of registration (Land Registers Act, Scotland, 1868).

The Land Registration (Scotland) Act 1979 establishes Land Register of Scotland. It is intended that gradual introduction of system of registration of interests in lands should replace recording of deeds in Register of Sasines as principal method of creating real rights in land.

Personal Registers.

The Register of Inhibitions and Adjudications contains notices of actions and legal diligence (Land Registers Act 1868).

Companies Register of Floating Charges.

See category 19 Mortgages, topic 19.03 Mortgages of Real Property, subhead Limited Companies.

Defective Documents.

Law Reform (Miscellaneous Provisions) (Scotland) Act 1985 grants courts power to rectify defective documents where parties’ intentions inaccurately expressed. Previously only Court of Session (see category 6 Courts and Legislature, topic 6.02 Courts) could reduce defective documents.

9.06 SEALS:

Use of private seals has no legal significance except on share transfers. A deed to which a joint stock company is party is validly executed if sealed with common seal of company and subscribed on behalf of company by two directors or one director and secretary. Witnesses are not required (Companies Act 1948, § 32[4]).

10 EMPLOYMENT

10.01 LABOUR RELATIONS:

See England Law Digest.

11 ENVIRONMENT

11.01 ENVIRONMENTAL REGULATION:

This area of law is at present in state of transition. Environmental awareness and protection has come to forefront in last decade partly due to requirement to implement European Community legislation in this area. At present, legislation and agencies involved overlap and conflict. First step in attempting to simplify legislation and regulatory bodies was taken with passing of Environmental Protection Act 1990. This deals with pollution in relation to air, land and water. However, other relevant legislations are, for example, Nuclear Installation Act 1965, relating to radioactive material and licencing of such sites, and Part Two of Food and Environmental Protection Act 1985, which deals with use of pesticides.

Responsibility for sewage and water has been removed from Local Authority control by Local Government Scotland Act 1994 to be brought under control of three unelected Public Authorities East, West and North of Scotland Water, which are monitored by Scottish Water and Sewerage Customers Council.

Environmental Protection Act 1990 was supplemented by Clean Air Act 1993 and Environment Act 1995 extended Environmental Protection Act to Scotland. The 1995 Act created Scottish Environmental Protection Agency (SEPA) which has taken over function of National River Authority and Her Majesty's Inspector of Pollution. Central thrust of Environmental Act 1995 is to set up one National Authority, more independent of Government, and instituting uniform approach to environmental protection. Prior to passing of this Act, responsibility for enforcing antipollution controls was split between various statutory bodies such as Local Authorities and National River Authority. SEPA now has remit of enforcing protection of quality of river water, air pollution matters involving prescribed processes and substances and waste regulation.

Water Industry (Scotland) Act 2002 provides for supervision by Drinking Water Quality Regulator of duties imposed on public water authorities in relation to water quality. Water Environment and Water Services (Scotland) Act 2003 sets out the duties and powers of public authorities to protect the water environment and to regulate potential polluting activities, and sets up river basin management districts.

Control of Pollution Act 1974 sets out local councils' duty to inspect and exercise powers concerning noise abatement zones, and the process for dealing with excess noise and noise from construction sites. Control of Pollution (Amendment) Act 1989 c.14 requires carriers of controlled waste to register with the Environment Agency or SEPA and outlines the penalties (including seizure and disposal) for vehicles shown to have been used for illegal waste disposal. Natural Heritage (Scotland) Act 1991 establishes Scottish Natural Heritage (SNH) as the main body responsible for securing and promoting the conservation of Scotland's natural scenery, flora and fauna. Nature Conservation (Scotland) Act 2004 applies to Scotland only. Majority of provisions came into force on 29 November 2004. It places duties on public bodies in relation to conservation of biodiversity, increases protection for Sites of Special Scientific Interest (SSSI), amends legislation on Nature Conservation Orders, provides for Land Management Orders for SSSIs and associated land, strengthens wildlife enforcement legislation and requires preparation of Scottish Fossil Code. Act is compliant with provisions of European Convention on Human Rights, requiring consultation where rights of individual may be affected by these measures.

Land Reform (Scotland) Act 2003 establishes a right to be on land for recreational, educational and some other purposes and cross land (right to roam) if rights are exercised responsibly. It also details how rural and crofting organisations can buy land they are connected with.

Protection of Wild Mammals (Scotland) Act 2002 makes it illegal to hunt a wild mammal with a dog—e.g. fox and deer hunting—or for a landowner or occupier to knowingly allow another person to hunt a wild mammal with a dog or to allow another person to use the dog to hunt a wild mammal.

National Parks (Scotland) Act 2000 establishes National Parks in Scotland, including setting up National Park Authorities, their powers, finances and "management agreements" between National Park Authority landowners or occupiers.

Climate Change Act 2008 sets 2050 as the target for reducing greenhouse gas emissions; outlines a carbon budgeting system, greenhouse gas emissions trading schemes, financial incentives for businesses to reduce waste and recycle more and powers to charge for single use bags. Climate Change (Scotland) Act 2009 introduces a target to reduce Scotland's greenhouse gas emissions by at least 80% by 2050, with at least 42% reduced by 2020. It sets out annual targets, including emissions from international aviation and shipping.

12 ESTATES AND TRUSTS

12.01 ADMINISTRATION:

See topic 12.05 Executors and Administrators.

12.02 DEATH:

The Presumption of Death (Scotland) Act 1977 contains provisions in relation to presumption of death of missing persons. Now any person with interest can raise action of declarator of death of missing person: (a) if there are reasonable grounds for supposing missing person has died or (b) if missing person has been absent for at least seven years and there is no reason to believe that he or she is alive. This procedure will be effective for all purposes including, inter alia, dissolution of marriage, succession to property, obtaining benefits due under insurance policies.

If death has occurred within last five years and date and place of death are known, local Registrar of Deaths can furnish a copy certificate. If wider search is required, then application to Registrar of Deaths, Register House, Edinburgh, is necessary.

Actions for Death.

Civil action lies at instance of a spouse and ascendants and descendants of victim. Under Damages (Scotland) Act 1976, group of relatives entitled to claim is extended considerably. Right of damages is related to right of dependancy and support. Only spouse, parents and child (or person accepted as child of family by deceased) of victim are entitled to claim solatium. Negligence of party liable must be proved. That party can plead negligence or contributory negligence of victim to elide responsibility. From 20 January 2006, definition of immediate family for purposes of compensation payments under 1976 Act is extended to include same-sex partners, grandparents, grandchildren and siblings (Family Law [Scotland] Act 2006, § 35). See also English Law Digest and Civil Partnership Act 2005, which allows same-sex couples to register their relationships and allows them most of legal rights attendant on civil marriage.

Parent of illegitimate child has right to recover damages and solatium in respect of death of that child as if child were legitimate.

Damages cover: (a) sum representing loss of support which must be real at date of death, and (b) solatium, sum representing injury to feelings of claimant caused by the death, and (c) sum representing pain and suffering attributable to victim's awareness that life expectancy has been reduced.

This law will apply to foreigners who would require to raise claim in Scotland if delict happened there and if defendants were subject to jurisdiction of Scotland.

As to time limits, see category 5 Civil Actions and Procedure, topic 5.05 Limitation of Actions, matter dealing with personal injuries.

12.03 DECEDENTS' ESTATES:

See topics 12.04 Descent and Distribution, 12.05 Executors and Administrators, 12.09 Wills.

12.04 DESCENT AND DISTRIBUTION:

Distribution.

Net intestate estate, after deduction of rights enumerated under next headings, devolves in following order, without distinction between heritable (real) and movable estate, any surviving relative in an earlier group eliding completely any surviving relative in a later group; (1) Children; (2) either or both parents and brothers and sisters, one-half to parent or parents and one-half to brothers and sisters; (3) brothers and sisters; (4) either or both parents; (5) surviving spouse; (6) uncles or aunts, paternal or maternal line; (7) grandparent or grandparents, paternal or maternal line; (8) brothers or sisters of such grandparents; (9) ancestors of intestate remoter than grandparents, on both paternal and maternal lines, generation by generation successively and their collaterals coming before next remote generation.

There is, therefore, no distinction now by reason of age or sex. Two general principles apply to foregoing order of succession: (1) there is representation in all branches of succession, that is, where any relative, who would, if alive, have been entitled to succeed to whole or part of estate predeceased leaving issue, such issue take share which deceased parent would have received if in life; and (2) in case of collaterals, both those of full blood and those of half blood are entitled to succeed, but collaterals of full blood have preference. Collaterals of half blood rank without distinction as between those related through father or mother.

Husband and Wife.

Terce and curtesy are abolished and new kind of rights known as "prior rights" created. These rights apply without distinction as between husband and wife, and arise only in cases of intestacy or partial intestacy. They cannot supersede will of deceased. Claims for prior rights must be satisfied before legal rights. Prior rights are payable from both the heritable and the moveable estate. Prior rights are set out in §§ 8 and 9 of the Succession (Scotland) Act 1964 and can be divided into the housing right, the right to furniture and plenishings and the monetary right.

Succession (Scotland) Act 1964 relating to deaths on or after 10 September 1964 made far-reaching changes in law of intestate succession in Scotland. These have been modified by §§ (1)–(3) and Schedule (1) of Law Reform (Miscellaneous Provisions) (Scotland) Act 1968 as regards illegitimate children.

Section 8 of 1964 Act gives surviving spouse ownership or tenancy to any one house owned or tenanted (other than under Rent Restrictions Act) by intestate provided that survivor is ordinarily resident therein at deceased's death. Alternatively, it provides for the payment of a capital sum sufficient to acquire alternative accommodation. This aim is offset somewhat by a maximum value being placed on the right in order to prevent the possibility of very valuable heritable property passing entirely to the family of either spouse or civil partner to the exclusion of the intestate's blood relatives. This is currently capped at £300,000.

That also gave survivor furniture and plenishings belonging to deceased in any one house in which survivor was ordinarily resident at deceased's death. The surviving spouse or civil partner of an intestate has the right to the furniture and plenishings up to a maximum statutory value of £24,000. If the value of furniture and plenishings exceeds £24,000, surviving spouse is entitled to such part thereof up to that value as he or she may elect. There is no monetary alternative to this right.

The surviving spouse or civil partner of an intestate is entitled to a right to money from the intestate estate. Where the deceased is survived by a spouse or civil partner and issue, the maximum sum which the surviving spouse may claim is £42,000. Where the deceased is survived by a spouse or civil partner alone, then the surviving spouse is entitled to a maximum of £75,000.

Succession (Scotland) Act 1964, §§ 8(1), 8(3) and 9(1) gives power to Secretary of State to fix maximum values of prior rights from time to time by Order. Current maximum is fixed by The Prior Rights of Surviving Spouse (Scotland) Order 2005 (SI 2005/252) and rate of interest by The Interest of Prior Rights (Scotland) Order 1981 (SI 1981/805).

Legal rights of jus relicti and jus relictae remain unaltered with qualification that they are now calculated by reference only to net movable estate which remains after satisfying prior rights as above mentioned. The right of a civil partner is known as rights under § 131 of the Civil Partnership Act 2004.

In addition to these prior and legal rights, surviving spouse may also have interest in net intestate estate as shown above. See subhead Distribution, *above*.

See category 13 Family, topic 13.04 Family Law (Scotland) Act 2006, regarding provision for unmarried couples on death of partner.

Children.

Right of legitim remains unaltered with qualification that it is also calculated only by reference to net movable estate after satisfying prior rights above-mentioned. It now extends to illegitimate children. See subhead Illegitimates, *below*.

New Act also extends application of right by introducing representation. If child of deceased who would have had claim of legitim has predeceased leaving issue surviving, such issue may claim equally among them share of legitim to which parent would have been entitled on survivance. Issue includes all descendants, however remote. Different rules of entitlement apply where the claimants are of different degrees of relationship to the deceased. The division of the legitim fund can be divided *per capita* and *per stirpes.*

Illegitimates.

Succession (Scotland) Act 1964 repeals Legitimacy Act 1926, but substantially re-enacts its provisions. If mother of illegitimate child dies intestate and without lawful issue, such illegitimate child or issue of such succeeds to whole estate. If illegitimate child dies intestate without issue, or in case of woman without any illegitimate children or their issue, mother, if alive, succeeds to estate. By Law Reform (Misc. Prov.) Act 1968, illegitimate child shares equally in estate with legitimate children of deceased person. This gave the child the right to legitim from the estates of both parents, but the child could not succeed to grandparents or collaterals.

The Law Reform (Parent and Child) (Scotland) Act 1986 gave the children of unmarried parents rights in succession identical to those of children born within marriage.

The Family Law (Scotland) Act 2006 abolishes the status previously known as “illegitimacy” and it is now incompetent to bring an action of declarator of illegitimacy or legitimacy.

Adopted Children.

Prior to 1964 Act, adopted children had no rights in estate of adopting parent, only in estate of natural parents (Adoption Act 1958). Under provisions of new Act, for all purposes relating to succession, adopted children are treated as children of adopter and not as children of any other person. They have right of legitim along with natural children of adopter, and right of succession of natural children.

The Adoption and Children (Scotland) Act 2007 confirms that an adopted person (whether testate or intestate) shall be treated as the child of the adopter.

Where succession by collaterals is involved, child adopted by two spouses jointly is treated as brother or sister of full blood in question with natural children, or other adopted children of spouse. If child has been adopted by only one of spouses, he or she is treated as brother or sister of half blood.

12.05 EXECUTORS AND ADMINISTRATORS:

Executors are appointed by will of deceased, or, in intestacy, application is made to the court to make an appointment. In a competition of claimants, the appointment of an executor is made in the following order: (1) a person having a general disposition of the estate in his or her favour, such as a will; (2) the next of kin; (3) the widow or widower; (4) a creditor; and (5) a legatee. After 10 September 1964, where widow or widower takes whole estate, he or she has preference for appointment of executor.

A consul, vice-consul or consular agent of a foreign country which extends similar privilege to this country may apply for administration of estate of subject of such state dying in this country where no person is present entitled to administer such estate.

An executor appointed by will does not require to find security. In intestacy, security must be given to an amount fixed by the court.

12.06 FIDUCIARIES:

See topics 12.05 Executors and Administrators, 12.08 Trusts.

12.07 INTESTACY:

See topic 12.04 Descent and Distribution.

12.08 TRUSTS:

A trust can be created by any person who is legally capable of disposing of property, in regard to that property. Truster may confer upon trustee any legal powers he or she pleases (Trust Act §§ 3, 4).

Under the Trust (Scotland) Act 1961, it is now possible for special reasons to petition the court to vary purposes of trust.

Unlawful Trusts.

Trusts which are constituted for purposes which are illegal, or immoral, or contrary to public policy are unlawful and invalid, but to any deed, making reparation for harm done by an illegal or immoral act or contract, effect will be given.

12.09 WILLS:

A verbal legacy is effectual up to £100 Scots (i.e. £8/33), but otherwise writing is essential to validity of a will. Wills are revocable by granter at any time. Wills must be validly executed but do not require to be stamped. A will entirely in handwriting of testator and signed by him or her is effectual though not witnessed. If not written by testator, will must be witnessed by one witness, whose designation and address must be written after their signature or incorporated in body of deed. See category 9 Documents and Records, topic 9.05 Records, subhead The Requirements of Writing (Scotland) Act 1995.

No particular words or style are necessary to carry heritage; any words clearly indicating intention of testator are sufficient.

Probate.

This is known as confirmation. Sheriff of sheriffdom in which deceased died has jurisdiction in matters of probate.

Children cannot be entirely disinherited by their parent’s will. (See topic 12.04 Descent and Distribution.)

Wills Executed Abroad.

Wills validly executed by foreigners, in accordance with the law of the place of execution, are valid in Scotland, although they do not conform to Scottish requirements. Confirmation of wills by foreigners resident abroad is issued by the Commissary Court (Sheriff Court) at Edinburgh.

The Wills Act 1861, § 1 provides that every will made by a British subject outside of the United Kingdom is to be held, as regards movable estate, well-executed if made according to forms required either by: (1) law of place where will made; (2) law of place where person domiciled at time will made; (3) law in force in that part of Her Majesty’s dominions where person had domicile of origin.

A will so executed abroad will carry also heritage in Scotland (Conveyancing Act, Scotland, 1874, § 51; Foreign Jurisdiction Act 1878; Colonial Probates Act 1892).

13 FAMILY

13.01 ADOPTION:

Law consolidated by Adoption (Scotland) Act 1978. Adoption order may be made under statutes extinguishing parental rights and duties of natural parents and investing them in adopters. The 1978 Act is amended by Children Act 1989, Sch 10 Pt. II; Human Fertilisation and Embryology Act 1990, Sch 4, para 4 and Children (Scotland) Act 1995, Pt. III, Sch 2.

Only children under 18 who are unmarried can be adopted.

Either married couple or one person can adopt.

Incest and Related Offences (Scotland) Act 1986 now treats intercourse between adoptive parent and child as incest.

Adoption (Intercountry Aspects) Act 1999 governs intercountry adoption for adopters who reside in Scotland. The 1999 Act was amended and partially repealed in England and Wales, but not in Scotland.

Adoption and Children Act 2002 amends Adoption (Scotland) Act 1978 and is itself partially applicable in Scotland—principally in relation to mutual recognition of adoption and cross-border placement for adoption between England, Wales, Scotland and Northern Ireland.

Rights of Adopted Children.

See category 12 Estates and Trusts, topic 12.04 Descent and Distribution.

13.02 DESERTION:

See topic 13.05 Husband and Wife.

13.03 DIVORCE:

Under Divorce (Scotland) Act 1976, there is only one ground of divorce in Scotland, irretrievable breakdown of marriage. This is established by evidence of adultery, unreasonable behaviour, non-cohabitation for period of one year with consent of other party or non-cohabitation for period of two years. Grounds for judicial separation are now same as for divorce. Under Act, either party may apply for financial provision on divorce, such application being for either periodical allowance, capital sum or for order varying any marriage settlement taking effect on or after termination of marriage. Act gives court power to counteract certain transactions designed to avoid claim for financial provision on divorce or aliment between spouses. Aliment can now be awarded in action for interim aliment to spouse living apart by consent even where there is no reasonable cause for nonadherence. Right of husband to cite his wife’s alleged paramour as co-defender and right to sue paramour for damages are abolished. Expenses of action may still be awarded against alleged paramour in accordance with practice of court, if he or she intervenes in action. (See topic 13.04 Family Law (Scotland) Act 2006.)

Family Law (Scotland) Act 1985 outlines objectives of financial provision on divorce or nullity of marriage. Grants court power to transfer property between spouses, and regulate occupancy of matrimonial home. Creates rebuttable presumption that spouses own household goods in equal shares.

Welfare Reform and Pensions Act 1999 and Pensions on Divorce (Pension Sharing) (Scotland) Regulations 2000 (SI 2000/1051) amend and supplement Family Law (Scotland) Act 1985 in relation to pension sharing arrangements on divorce.

Domicile and Matrimonial Proceedings Act 1973 abolishes rule whereby a wife takes her husband’s domicile automatically as a domicile of dependence and it makes consequential changes in law on dependent domicile of children. Changes are not limited to jurisdiction in consistorial cases. They are quite general in their scope and will apply, for example, in relation to succession, obligations, property income tax and estate duty.

13.04 FAMILY LAW (SCOTLAND) ACT 2006:

Divorce.

Act reduces periods of time needed to establish marriage breakdown as ground of divorce from two years to one in uncontested cases and from five to two in contested ones. Desertion will cease to be grounds for divorce.

Unmarried Couples.

Act gives protection to unmarried cohabitants on breakdown of relationship or when partner dies. It allows applications to be made to court by surviving partner on death of cohabitant when that person has died intestate, in order to obtain share in deceased partner’s estate. Act introduces “domestic interdicts” for protection of unmarried persons, equivalent to matrimonial interdicts. (See subhead Matrimonial Interdicts, *below*.) Protection of Matrimonial Homes (Scotland) Act also extended to unmarried couples. Unmarried fathers who register birth of child along with mother will be given parental rights and responsibilities under Children (Scotland) Act 1995. See also English Law Digest and Civil Partnership Act 2005, which allows same-sex couples to register their relationships and allows them most of legal rights attendant on civil marriage.

Matrimonial Interdicts.

Scope extended to cover not only matrimonial home but also any other home occupied by applicant, place of work and school attended by any child in applicant's care.

Grandparents.

Act does not include provision for right of access to grandchildren for grandparents. Instead, there will be non-statutory charter for grandparents to give recognition to their role in children's lives.

13.05 HUSBAND AND WIFE:

A married woman may hold and dispose of property as freely as if unmarried. She may also sue actions at law without consent of husband. Husband is not liable for delict of his wife or for contract made by her. Parties have mutual obligation of support. Civil imprisonment is still possible in case of wilful failure to pay sums decerned for as aliment. See also category 12 Estates and Trusts, topic 12.04 Descent and Distribution. Alimentary obligations set out in Family Law (Scotland) Act 1985.

Where title deed over matrimonial home is held in name of one spouse only, "non-entitled" spouse has occupancy rights which subsist until he or she freely and without coercion renounces them by affidavit. Court may also grant limited occupancy rights to "non-entitled" partner where unmarried couple are co-habiting (Matrimonial Homes [Family Protection] [Scotland] Act 1981). See also topic 13.03 Divorce. (See topic 13.04 Family Law (Scotland) Act 2006.)

13.06 INFANCY AND CHILDHOOD:

Scotland, following Roman law, had two-tier system capacity for people under age of 18. People (girls under 12 and boys under 14) generally had no capacity; their tutors acted for them. Minors (girls from 12 to 17 and boys from 14 to 17) had limited capacity. Transactions normally required consent of their curators, in order to be valid. However, Age of Legal Capacity (Scotland) Act 1991 came into force on 25 September 1991. Act sets out new rules in private law field in relation to legal capacity of people under 18 years old to enter into transactions having legal effect. Transaction is defined to include contract, promise, gift, consenting, bringing or defending legal proceedings and acting as executor or witness to signing of document. It establishes single-tier system of upper age limit of 16. Children below 16 years of age have no capacity as general rule, although there are a few exceptions. Their parents or guardians all have to act for them. Children aged 16 and 17 now have full legal capacity, but transactions which cause them substantial prejudice may be set aside by Court on application by young person. Section 1(c) of Act sets out general areas where rules do not apply. Act does not have any effect to fields of crime and delict and does not alter any statutory age limits (such as being entitled to vote at 18); it also does not alter rules relating to appointment of curators bonis and ad litem or rights of parents under 16 towards their children.

The Law Reform (Parent and Child) (Scotland) Act 1986 makes fresh provision with respect to consequences of birth out of wedlock, rights and duties of parents, determination of parentage and taking of blood samples. Act grants equality of status to all persons whatever marital status of their parents. Law Reform (Scotland) Act 1990, § 70 gives power to courts to order party to provide blood sample on application of opponent. Failure to comply can be founded upon.

Under Children (Scotland) Act 1995, person fulfilling parental responsibility or exercising parental right to safeguard child's health, development and welfare will make decisions affecting child. Consequently, that person is obliged to have regard to child's views, taking account of child's age and maturity. Child aged 12 or more is rebuttably presumed to be of sufficient age and maturity to form view. The 1995 Act is amended by Regulation of Care (Scotland) Act 2001. (See topic 13.04 Family Law (Scotland) Act 2006.)

Child Support Act 1991, as amended by Child Support Pensions and Social Security Act 2000, provides generally that nonresident parent has responsibility for maintaining child, but shall be taken to have met that responsibility by making periodical payments calculated in accordance with 1991 Act as amended.

Children and Young People (Scotland) Act 2003.

On 12 February 2004, Scottish Parliament approved nomination of first ever Commissioner for Children and Young People. Commissioner will be responsible for promoting and safeguarding rights of children and young people up to age 18 and those up to 21 in certain circumstances.

13.07 MARRIAGE:

Marriage (Scotland) Act 1977 codifies existing legislation on constitution of marriage. Minimum age for marriage remains 16 and prohibited degrees of relationship are same as for England.

Act abolishes two of previous legal preliminaries to marriage ceremony: proclamation of banns in church and issue of sheriff's licence. Now each party to any marriage (religious or civil) to be performed in Scotland must give notice individually to district registrar with evidence of date of birth and ending of earlier marriage. Fifteen-day period of continuous residence in district by one party is no longer required. Marriage (Scotland) Act 2002 amends Marriage (Scotland) Act 1997 to allow civil ceremonies to take place in approved sites other than registry offices.

When giving notice of intended marriage, party not domiciled in any part of UK is required, if practicable, to produce certificate of capacity to marry issued by competent authority in state of his or her domicile. This requirement does not apply if person has been resident in UK for two years immediately before submitting marriage notice. Party resident in another part of UK can submit approved certificate for marriage issued in that part and need not give any other notice. Provision is also made for such certificates to be issued to Scottish residents wishing to marry abroad.

List of marriage notices must be displayed at registration office and particulars entered in marriage notice book available for inspection by intending objectors.

When Registrar is satisfied that there is no impediment to marriage (e.g. forbidden degrees, prior subsisting marriage, nonage, incapacity to understand nature of ceremony or consent to marriage, both parties of same sex, and in case of people domiciled abroad, impediment which would render marriage void ab initio under domiciliary law), Registrar will complete marriage schedule which is signed immediately after marriage by parties, both witnesses and celebrant. Family Law (Scotland) Act 2006 gives statutory form as to existing common law rules as to marriages which are void. Act removes prohibition on marriage between former "in-laws".

Family (Scotland) Act 2006 abolishes rule of law by which marriage could be constituted in Scotland by virtue of period of cohabitation with repute. This provision does not retrospectively affect validity of marriages constituted before commencement of Act.

Civil Partnership Act 2005 came into force on 5 December 2005 and allows same-sex couples to register their relationships, giving them most of legal rights attendant on civil marriage.

Period between giving of notice and issuing by Registrar of marriage schedule will normally be 14 days.

No irregular marriage by declaration contracted after 1 January 1941, is valid.

Foreign Marriages.

Marriage is recognised if constituted according to forms of country in which it is contracted.

Foreign Marriages Act 1892.

Foreign Marriages Act affords facilities to British subjects for celebration of marriage abroad at house of a marriage officer (British Ambassador, Governor, Consul, &c.) or on board one of Her Majesty's ships on a foreign station.

Provision for Scottish resident who wishes to marry outside, Scotland 1977 Act, § 7.

Prohibited Marriages.

Marriage within the undernoted degrees is forbidden: (1) ascendants and descendants to the remotest degree; (2) collaterals in first degree, that is, brothers and sisters; (3) collaterals who stand in loco parentis, that is, where one person is brother or sister to a direct ascendant of the other, thus a man may not marry his grandniece though as far removed in degree as are first cousins; (4) there is no difference between full and half blood; and (5) the degrees prohibited in consanguinity are so in affinity. Marriage with deceased wife's sister is legal. Forbidden degrees are now specified in 1977 Act.

In case of party to marriage whose gender has become acquired gender in terms of Gender Recognition Act 2004, any reference to former wife or former husband of relevant person includes (respectively) any former husband or former wife of relevant person.

13.08 MARRIED WOMEN:

See topics 13.05 Husband and Wife, 13.07 Marriage; category 20 Property, topic 20.04 Dower.

14 FOREIGN TRADE AND COMMERCE

14.01 CUSTOMS:

See England Law Digest.

14.02 EXCHANGE CONTROL:

See England Law Digest.

14.03 FOREIGN EXCHANGE:

See England Law Digest.

14.04 FOREIGN INVESTMENT:

See England Law Digest.

14.05 FOREIGN TRADE REGULATIONS:

See England Law Digest.

15 HEALTH

15.01 SCOTLAND HEALTH SYSTEM:

National health service in Scotland, available to all, was introduced on 5 July 1948. Before that date health insurance facilities were available to many persons with financial means and treatment benefits which varied according to contributions and rules of association involved. Institutional treatment was provided in voluntary hospitals and in hospitals provided by local authorities. Statute which introduced national health service in Scotland was National Health Service (Scotland) Act 1947. Other National Health Service (Scotland) Acts followed, current principal statute being National Health Service (Scotland) Act 1978 (c. 29), which consolidated provisions in earlier enactments. It has since been heavily amended.

Smoking, Health and Social Care (Scotland) Act 2005 came into force on 26 March 2006 and prohibits smoking in substantially enclosed public places. Enables Scottish Ministers by order to vary minimum age limit of those to whom tobacco may be sold. Amends Adults with Incapacity (Scotland) Act 2000 to allow persons other than registered medical practitioner primarily responsible for treatment of adult to authorise medical treatment; to include “healthcare professionals” (dentists, ophthalmic opticians and registered nurses) who will, however, only be allowed to certify for treatment in respect of their own specialist area.

Breastfeeding (Scotland) Act 2005 amends National Health Service (Scotland) Act 1978 to impose duties on ministers to support and encourage mothers to breastfeed their children. Makes it offence to prevent or stop child under age two from being fed milk in public place or licenced premises where child is otherwise lawfully permitted to be.

Human Fertilisation and Embryology Department regulates granting of licences for therapeutic human cloning research. On 8 February 2005, it granted application by Roslin Institute, Edinburgh, for licence to clone human embryos for use in research into motor neurone disease.

Human Tissues (Scotland) Act 2006 received Royal Assent on 16 March 2006. Act makes provision, inter alia, for authorisations required before transplantation, organ retention and hospital post-mortem examinations can be undertaken. Act also amends Anatomy Act 1984, which governs use of cadavers and body parts for purposes of anatomical examination, principal purpose being: to allow for practise of surgical reconstruction to be carried out on bodies and body parts and also practise of removing whole organs and parts of organs by healthcare professionals; prevent any unlicenced exhibition of bodies and body parts in public exhibitions under guise of education or art, and enable post of HM Inspector of Anatomy for Scotland to continue following changes in England and Wales.

Schools (Health Promotion and Nutrition) (Scotland) Act 2007 requires local authorities to ensure that food and drink provided in schools meet basic nutritional requirements.

16 IMMIGRATION

16.01 ALIENS:

Aliens are persons born beyond the dominions of the Crown, of parents who are not themselves natural-born subjects.

Property.

Alien may hold land and personal property as natural-born subject and may transmit title. Heirs of alien succeed to such property. Alien cannot own British ship or hold shares therein.

Immigration.

The Immigration Act 1971, British Nationality Act 1981 and Immigration and Asylum Act 1999 consolidate law relating to immigration and regulate rights of immigrants to enter UK. The Immigration (Carriers Liability) Act 1987 requires carriers to make payments to State in respect of passengers brought by them to UK without proper documents.

17 INTELLECTUAL PROPERTY

17.01 COPYRIGHT:

Copyright means the sole right to produce or reproduce original, literary, dramatic, musical and artistic work or to deliver lecture. It includes sole right: (a) to produce, perform or publish translations; (b) to convert dramatic work into novel; (c) to convert novel into dramatic work; and (d) to make records or films or any contrivance by means of which work may be performed (Copyright Act 1911, § 1). Copyright in design is provided for by the Registered Design Act 1949. Both these Acts have been incorporated in the Copyright Act 1956 and the whole field widened to embrace modern trends in television and sound broadcasts, cinematograph, films, etc. Copyright, Designs and Patents Act 1988 has amended and consolidated law in this area. Amended by Copyright and Related Rights Regulations 2003, which implement European Parliament and Council Directive 2001/29. See also Cable and Broadcasting Act 1984.

Copyright and Related Rights Regulations 2003 provides: new copyright protecting content made available by “on demand” interactive services such as websites; that making temporary copies of copyright work is permitted in limited cases such as browsing Internet material; limitation on some of UK’s exceptions to copyright; stronger protection against copyright pirates including any service providers who know that their service is being used to infringe copyright; that copyright owners will be able to prevent removal of online copyright notices; and that non-exclusive licencees can now take action against infringers where licence grants this right.

17.02 PATENTS:

The Patents Act 1977 revises substantially patent system of UK. Patent may be granted only if: (a) invention is new; (b) it involves inventive step; and (c) it is capable of industrial application. Following are not “inventions”: (a) discovery; scientific theory or mathematical method; (b) literary, dramatic, musical or artistic work or any other aesthetic creation; (c) scheme, rule or method for performing mental act, playing game or doing business, or program for computer; and (d) presentation of information. Patent will not be granted for invention publication or exploitation of which might encourage offensive immoral or anti-social behaviour or for any variety of animal or plant or any essentially biological process for production of animals or plants not being microbiological process or product of such process.

Patent Office procedure is to be laid down by Patents Rules which will issue in form of Statutory Instruments. Currently, Patents Rules 1995, SI 1995/2093, rule 46 (amended by SI 1999/3197, rule 15).

Among more important changes are: extension of term of patent to 20 years; abolition of “provisional protection” and its replacement by system of claiming priority from earlier applications; introduction of examination at application stage for inventiveness rather than mere novelty; abolition of many grounds of invalidity; and abolition of practise of allowing patents for inventions which although new in UK had been known already abroad.

Recent measures taken to contend with technological advances include provisions to govern devices designed to circumvent copy—protection of works in electronic form, see Copyright, Designs and Patents Act 1988.

Patents Act 2004 made significant changes to 1977 Act primarily to bring UK law into conformity with revised European Patent Convention (EPC 2000) and to assist in enforcement of patent rights. The 2004 Act received Royal Assent on 22 July 2004, although none of its provisions came into force on that date. Commencement Order No. 1 brought some minor provisions into force on 22 September 2004. Commencement Order No. 2 brought some of major provisions of 2004 Act into force on 1 January 2005.

International Arrangements.

"Community patents" may be granted by European Patent Office and have contrary character throughout European Economic Area (EEA). There will be transitional period of at least ten years when there will be "European Patents (U.K.)", which will be granted by European Patents Office, but once granted, it will be equivalent to British Patents as far as UK is concerned. Act also introduces patents which will be governed by system of law based on European system but which will come solely under jurisdiction of United Courts and Patent Office. Application for such patent may be made in UK and "international application" may be made under Patent Cooperation Treaty under which single application for all cooperating countries is made to and initially processed by one of selected Patent Offices and then passed to Patent Offices of countries in which patenting is sought for further processing.

Infringement.

New Act includes statutory definition, which can be summarised as unauthorised manufacture, working or use of patented product. Infringement may be prevented by interdict, and damages may be claimed.

17.03 TRADEMARKS AND TRADENAMES:

At common law, no one may copy trade mark, if purchasers may be induced to believe that they are getting goods made by owner of mark. Law was originally codified by Trade Marks Act 1938. Trade Marks Act 1994 ("TMA 1994"), which implements key provisions of Council Directive 89/104 received royal assent on 21 July 1994 and came into force fully on 31 October 1994. Act sets out new provisions in relation to registered trade marks and revokes and replaces Trade Marks Act 1938 (c. 22) and Trade Marks (Amendment) Act 1984 (c. 19).

Registration.

Register is kept at Patent Office wherein all registered trade marks are entered. No trust may be entered.

"Trade mark" means any sign capable of being represented graphically which is capable of distinguishing goods or services of one undertaking from those of other undertakings (TMA 1994, § 1). "Registered trade mark" is property right obtained by registration of trade mark under Act and proprietor of registered trade mark has rights and remedies provided by Act (TMA 1994, § 2). Certain marks will not be registered unless they have acquired distinctive character through use and certain marks and emblems attract special protection. Mark will not be registered if it is identical with earlier trade mark and goods or services for which trade mark is applied for are identical with goods or services for which earlier trade mark is protected; similarly, mark will not be registered if it is identical with or similar to earlier registered mark for that class of goods or services and there is likelihood of confusion on part of public.

Application to register must be made in writing and on acceptance is advertised by registrar. Any person may object within time specified in advertisement (TMA 1994, §§ 37, 38). On registration, certificate is granted. Registration will last for ten years and can be renewed in certain circumstances (TMA 1994, §§ 42, 43; SI 2000/136, rules 27–30).

In Scotland, proceedings for order for delivery of infringing goods, material or articles or for their disposal may be brought in Sheriff Court (TMA 1994, § 20).

In Scotland, registered trade mark is incorporeal moveable property (TMA 1994, § 22). Where registered trade mark is granted to two or more persons jointly, then they are co-proprietors of trade mark and each is entitled, without consent of others, to act in such way as would otherwise amount to infringement of trade mark (TMA 1994, § 23).

Transmissibility.

Registered trade mark is transmissible by assignation, testamentary disposition or by operation of law and may be subject of security, all in same way as other moveable property.

Cotton Marks.

Special provision is made for cotton marks, which are kept in a register at Manchester, known as the Manchester Branch.

International Agreements.

Provisions of Patent Acts as applied by orders in council apply to trade marks. See topic 17.02 Patents.

Tradenames.

See category 2 Business Organisations, topic 2.09 Partnerships.

18 LEGAL PROFESSION

18.01 ATTORNEYS AND COUNSELLORS:

Scottish Legal System recognises distinction between solicitor (Scottish term for Law Agent under Solicitors [Scotland] Act 1933) and advocate (member of Scottish Bar), two branches having developed separately. Distinction impacts on rights of audience in higher courts where only advocates traditionally had that right. Now solicitor-advocates have similar rights.

Admission to Roll of Solicitors is achieved by obtaining degree in Law, legal diploma and subsequent two years practical experience. On admission to Roll of Solicitors, solicitor is required to take out Annual Practising Certificate with at least 20 hours per annum continuing professional development. Main solicitors' regulatory body is Law Society of Scotland. Its powers are based on Solicitors (Scotland) Act 1988. Headquarters for Law Society of Scotland are 26 Drumsheugh Gardens, Edinburgh, EH3 7YR, (Telephone Number 0131 225 7411). Law Society, as one of its functions, appoints legal professionals and lay members to sit as Scottish Solicitors Discipline Tribunal who investigate complaints of professional misconduct and decide whether to censure or strike off solicitors from Solicitors Roll.

Traditional self-disciplinary role of Law Society of Scotland in relation to solicitors' branch of profession has recently seen reform. Clementi Report (published Dec. 2004, see England Law Digest) recommended for England and Wales that there should be independent complaints body (Office for Legal Complaints). Legal Profession and Legal Aid (Scotland) Act 2007 received Royal Assent on 19 January 2007. Act establishes Scottish Legal Complaints Commission, which will deal with all consumer or service complaints against lawyers which

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cannot be resolved at source. Professional bodies will retain responsibility for professional discipline and will handle complaints about conduct of practitioners. Commission will take over jurisdiction of Scottish Legal Services Ombudsman in reviewing the way professional bodies handle complaints. Chair and most members of Commission will be non-lawyers. Also, it makes provision in connection with administration of Scottish Legal Aid Fund, including establishment of register of advisers in connection with advice and assistance scheme.

Term solicitor may be broadly interpreted to mean general legal practitioner; however, often many Scottish solicitors are specialists in their own field. Consequently Law Reform (Scotland) Act 1990, §§ 25–29 extended right of audience of solicitors from inferior court, such as Sheriff Court, to superior High Court and Court of Session. This was previously exclusive domain of members of Faculty of Advocates. Individual solicitors have to satisfy requirements that they have necessary knowledge and expertise to qualify for this extended right of audience.

Faculty of Advocates is membership organisation for Scottish Bar. It is headed by Dean of Faculty and is based at Parliament House 1, Parliament Square, Edinburgh, (Telephone Number 0131 226 2881). Advocates have rights of audience in nearly all courts and tribunals in Scotland. Distinction can be made between Junior and Senior Counsel, latter having many years of experience and are also known as Queen's Counsel. In nearly all cases, instructions should be through Enrolled Solicitor, particularly if litigation is contemplated in Scotland.

18.02 SOLICITORS AND ADVOCATES:

See topic 18.01 Attorneys and Counsellors.

19 MORTGAGES

19.01 CHATTEL MORTGAGES:

Chattel mortgages are unknown. The law does not recognise any security over furniture or personal effects unless possession, actual or constructive, is transferred to the creditor. Retention of title claims in commercial contracts are frustrated if true intention is to create security over moveables.

19.02 COLLATERAL SECURITY:

See category 7 Debtor and Creditor, topic 7.13 Pledges.

19.03 MORTGAGES OF REAL PROPERTY:

Defined as a debt secured over land, or, in Scotland, a heritable security. Prior to 29 November 1970, heritable security was created by bond and disposition in security, cash credit bond and disposition in security, or ex facie absolute disposition with relative agreement or back letter. Under such writs, creditor acquired real or heritable security in addition to personal obligations of debtor. As from 29 November 1970, heritable security may be constituted only in form of a standard security (see subhead Standard Security, *below*) by virtue of Conveyancing and Feudal Reform (Scotland) Act 1970. All writs creating a heritable security required to be registered in Register of Sasines (see category 9 Documents and Records, topic 9.05 Records). Heritable securities constituted prior to 29 November 1970 may subsist in their older forms for many years to come and may be assigned, discharged or enforced in accordance with law as it stood prior to said date, subject to modifications contained in 1970 Act. Remedies available to heritable creditor where debtor has failed to comply with notice calling up security (i.e. requiring payment of loan and interest) include: (a) power of sale; (b) powers of entering into possession and rights incidental thereto; (c) powers to effect repairs, reconstruction or improvement of security subjects; and (d) foreclosure procedure whereby, in certain circumstances, creditor may, with sanction of court, become absolute proprietor of security subjects. Debtor in heritable security may dispose of subjects under burden of security, and whilst the debtor remains in possession of subjects, he or she can perform all ordinary acts incidental to ownership, but creditor's security cannot be prejudiced by contracts outside ordinary powers of management into which debtor might enter without creditor's consent.

Mortgages Rights (Scotland) Act 2001 provides that certain persons can in circumstances described in § 2 apply to have exercise of creditor's statutory right to enforce standard security suspended. Principal effect of 2001 Act is to ensure that where property is being acquired on mortgage, debtor and his or her family are given protection in event of debtor default. Concept of family in 2001 Act is extended to include same-sex and opposite-sex cohabitants of debtor.

Standard Security.

New form for securing debt over land, that is, heritable security, introduced by Conveyancing and Feudal Reform (Scotland) Act 1970, and use of which is compulsory as from 29 November 1970. Rights and remedies of creditor and debtor under this form of security are generally those stated for older forms of security (mortgages) but with modified and simplified procedure laid down in said Act; also Act prescribes form of this security, its assignation and discharge, as well as certain statutory conditions to be imparted therein.

Limited Companies.

Where limited company borrows and grants heritable security, provision is made under Companies Acts for creation of a floating charge by registration of security writ in a special register (Register of Charges), purpose of which is creation of general security to creditor affecting whole property and assets of borrowing company.

20 PROPERTY

20.01 ABSENTEES:

In absence abroad, a person may delegate authority to persons of full capacity. Power of attorney may be granted for special purpose or general power to conduct all absentee's affairs. Specific powers should be expressly conferred in deed. Power ends on absentee's return to country or death. Power also ends on subsequent senility of grantor, except where granted after 1 January 1991.

20.02 CURTESY:

Curtesy, or courtesy as it is spelled in Scotland, was name given to right of surviving husband to a life interest of heritable (real) property of his deceased wife, if he was father of a living child, which child would have been heir of wife. This right may not be defeated by will. (See also category 12 Estates and Trusts, topic 12.04 Descent and Distribution.) This right has been abolished as of 10 September 1964 by Succession (Scotland) Act 1964.

20.03 DEEDS:

Writing is required on obligations relative to land, conveyances and leases for more than one year. Attested writings are subscribed by grantor in presence of one witness or acknowledged by him or her to witness. If grantor cannot write, document may be subscribed by solicitor, notary public, or justice of the peace or parish minister, before witness who signs and testifies to having heard document read and authority given to sign (Requirements of Writing [Scotland] Act 1995). In Scotland, "deed" does not connote document under seal. See category 9 Documents and Records, topic 9.05 Records.

20.04 DOWER:

A widow has a right, known as terce, to a life interest of one-third in any heritable estate belonging to her deceased husband where there are children of the marriage. Where there are no children, the widow has a life interest in one-half of her husband's heritable estate. Terce abolished as of 10 September 1964. See category 12 Estates and Trusts, topic 12.04 Descent and Distribution.

20.05 PERPETUITIES:

Perpetuities by which a succession of persons take a life interest are illegal. It is permissible to reserve life interest in movable estate in favour only of party in life at date of deed. Any such estate held in liferent by or for behoof of a party of full age born after date of such deed belongs absolutely to such person (Trusts Act 1921, § 9).

Accumulations.

Certain prohibitions on accumulation of income to capital of trust. Thelluson Act 1800 as amended.

20.06 REAL PROPERTY:

Scottish property law was traditionally based on feudal system but has undergone recent fundamental reform. Under previous feudal system, vassal holds land under superior for payment of annual feu duty. Superior sets out conditions under which property may be held. Feu may be consolidated with superiority. Some land is held direct from Crown. Right over land without ownership may be created, for example, servitude for benefit of adjacent land. System of registration of all conveyances in central record office. The Land Registration (Scotland) Act 1979 proposes new system of registration of title to land. See category 9 Documents and Records, topic 9.05 Records. Land may be conveyed to trustees. No bar on number of persons who may hold land.

See also category 19 Mortgages, topic 19.03 Mortgages of Real Property. By Land Tenure Reform (Scotland) Act 1974, creation of new feu duties or similar payments from land is prohibited. Terms are provided for voluntary redemption of existing feu duties and such redemption is made compulsory on first sale occurring after 1 September 1974.

Abolition of Feudal Tenure etc. (Scotland) Act 2000 (asp 5), §§ 1, 71 abolished system of land tenure when it came into force on 28 November 2004, "appointed day" (largely implementing proposals in Report on Abolition of the Feudal System [Scot Law Com No. 168 (Feb. 1999)] and Abolition of Feudal Tenure etc. (Scotland) Act 2000 (Commencement No. 2) (Appointed Day) Order 2003, SSI 2003/456). Under Act, subinfeudation is no longer possible, feudal estate of dominium directum is abolished and dominium utile becomes outright ownership.

Title Conditions (Scotland) Act 2003 is related to Abolition of Feudal Tenure (Scotland) Act 2000 and came into force on 28 November 2004. It reforms and codifies law of real burdens. Real burdens being perpetual obligation, which binds one parcel of land in favour of owner of another, and neighbouring parcel of land.

The Tenements (Scotland) Act 2003 is related to Abolition of Feudal Tenure (Scotland) Act 2000 and came into force on 28 November 2004. It replaces common law in Scotland which regulated flatted property. Default management scheme to apply to all flatted buildings except to extent that no different provision made in title by real burdens. Act clarifies and codifies distribution of ownership within building, provides for compulsory insurance and makes provision for disposal of site on demolition or abandonment.

Agricultural Holdings (Scotland) Act 2003 provides specific regulation for agricultural tenancies.

Land Reform (Scotland) Act 2003 regulates: nature of right of access to Scotland's countryside; group and commercial access; land managers' entitlement to restrict right of access; land managers' liability for any injury to member of public and local authorities' regulatory role. Act also introduces right to buy provisions for community bodies.

Housing (Scotland) Act 2006 received Royal Assent on 5 January 2006 and requires seller in house sale to provide survey and information pack on property for benefit of buyers. Cost of this to seller will be recoverable from ultimately successful bidder for property. It was anticipated that scheme would come into effect in 2008, and six implementing guidances for local authorities were presented in early 2009, although concerns regarding similar scheme in England and Wales makes this uncertain. Act also provides for: new council powers to deal with poorly maintained buildings; provisions to allow local authorities to provide advice, practical assistance and loans for home improvements; and new rights for private tenants regarding basic standards of accommodation.

Crofting Reform etc. Act 2007 contains provisions that allow creation of new crofts, bring neglected crofting land back into use and extend crofting tenure beyond crofting counties. Crofts are small agricultural units situated in Shetland, Orkney, Caithness, Sutherland, Ross-shire, Inverness-shire and Argyll.

21 TAXATION

21.01 TAXATION

Following taxes are imposed by UK Parliament and are collected throughout UK on a national basis. For notes on these taxes, reference is made to England Law Digest: Income Tax; Value Added Tax; Stamp Duty; Corporation Tax; Capital Gains Tax; and Capital Transfer Tax. *Note:* Under Scotland Act 1998, new Scottish Parliament shall have power to fix basic rate of tax for Scottish taxpayers. Amount of any increase or decrease has been restricted to number not exceeding three. Power has never been exercised. The 2009 independent "Commission on Scottish Devolution" headed by Sir Kenneth Calman has proposed an extension to the taxation powers of the Scottish Parliament. These include a power to levy income tax up to 14% of the present Scottish budget and the devolution of other tax powers.

22 TRANSPORTATION

—Scope —

The Waverly Railway (Scotland) Act 2006 was passed by Scottish Parliament on 14 June 2006. Authorises re-opening of rail link between Edinburgh and Borders. Construction began on 3 March 2010 and is anticipated to be completed by 2011.

Glasgow Airport Rail Link Act 2007 was passed by Scottish Parliament and provided for railway line between centre of Glasgow and Glasgow Airport. Construction was anticipated to commence in 2008 with first trains expected in 2010. This has since been axed by the Scottish Parliament for budgetary reasons.

Edinburgh Airport Rail Link Act 2007 received Royal Assent on 19 April 2007. Link will connect Glasgow, Stirling, Perth, Fife, Inverness, Dundee and Aberdeen to Edinburgh Airport. The project was abandoned in September 2007 due to cost.

22.01 AUTOMOBILES:

See topic 22.02 Motor Vehicles.

22.02 MOTOR VEHICLES:

All motor cars must be registered. Registered number requires to be fixed to cars. Drivers must be licenced. Licence may be suspended and thereafter person disqualified from holding licence if guilty of offense. Insurance is compulsory.

Driver must stop in case of accident. Body of legislation is contained in Road Traffic Acts. See England Law Digest.

22.03 SHIPPING:

Law regulating ships and shipping is contained in Merchant Shipping Acts 1894–1979. To be deemed British ship, ship must belong wholly either to: (1) natural-born British subjects; or (2) naturalised subjects; or (3) bodies corporate established under laws of and having principal place of business in some part of dominions.

Registration.

Every British ship must be registered. Registry is made by Principal Officer of Customs of any port in Great Britain and by certain other officers in British possessions. In order that builder or purchaser of British ship may get it registered, he or she must obtain a surveyor's certificate specifying tonnage, build and other identifying particulars, have ship marked for identification and draught, and subscribe a declaration of ownership, of his or her qualification, and of time and place of building. In event of first registry, builder's certificate must also be produced. On completion of registration, registrar issues a certificate adding name of master. Certificate is not subject to detention by reason of lien.

Ownership.

No notice is taken in registry of any trust. Registered owner has absolute disposal of ship or share. Property of ordinary vessels must be divided into 64 shares. Not more than 64 individuals can be registered at same time. Body corporate may be registered in corporate name.

Liability of Owners.

The first duty is to provide a sound and seaworthy ship and furnish a competent crew. Owners are liable for negligence and faulty navigation. Any person beneficially interested, otherwise than by way of mortgage, in ship or share of ship registered in name of another is subject to all penalties as well as such registered owner.

Provisions on limitation of liability of shipowners are materially altered by Merchant Shipping Act 1979, relevant sections of which when brought into effect will give force of law to Convention on Limitation of Liability for Maritime Claims 1976. Shipowner, without admitting liability, may apply to Court of Session to limit liability and to distribute amount determined among claimants.

Sale and Mortgage.

A registered ship or share can only be transferred by bill of sale containing description identifying ship. A ship may be made security for a loan. Mortgages must be registered. Preferences depend upon order in which securities appear on the Register. Disposal of ship or of shares beyond country of registry by way of mortgage or sale may be effected by certificate of sale and mortgage.

Charter Party.

A charter party identifies ship by name, master and tonnage, and contains implied obligations that the ship is seaworthy.

Master and Crew.

Master and mate of foreign-going ship and home trade passenger ships must hold certificates from Department of Trade. It is not necessary that master be British subject. When vessel is abroad, master is accredited agent of owners, in victualling and manning ship, and in ordering necessaries. He has lien over ship for wages. Right of wages and provisions begins when seamen commence work. Such right gives lien over ship.

Passenger and Emigrant Ships.

The regulation of vessels carrying passengers and emigrants is fully provided for in Acts.

See also England Law Digest.

23 TREATIES AND CONVENTIONS

23.01 TREATIES:

See England Law Digest.

1

SINGAPORE LAW DIGEST

—Scope —

Revised for 2009 edition by

DAVID CHONG & CO., Advocates and Solicitors, Singapore.

References to “Cap.” mean Chapters of Laws of Singapore.

Note: This revision incorporates legislation through July 1, 2008.

1 INTRODUCTION

1.01 CURRENCY:

Monetary unit is Singapore dollar. Currency is issued by Board of Commissioners of Currency established under Currency Act. (Cap. 69). Monetary Authority of Singapore (“MAS”) established under Monetary Authority of Singapore Act (Cap. 186) continues to maintain its general policy against “internationalisation of Singapore dollar”. In general, however, credit facilities or arrangement of equity listings and bond issues denominated in Singapore dollars may now be lent to nonresidents of Singapore without reference to MAS provided that such facilities are used for economic activities in Singapore.

1.02 GOVERNMENT AND LEGAL SYSTEM:

Singapore has been independent republic since 9 Aug. 1965. It has written constitution (Constitution of Republic of Singapore). Any law inconsistent with Constitution is to that extent void.

Executive authority is vested in President and exercisable by President or Cabinet in accordance with Constitution. President is popularly elected. Apart from being constitutional Head of State, he also has powers to prevent government from spending reserves accumulated by previous governments, and to veto key appointments to public service. Cabinet of Ministers, headed by Prime Minister, is made up of members of Parliament.

Legislature.

Parliament.

Legislative power is vested in President and Parliament. Unicameral Parliament is elected legislature of Singapore. Proceedings are presided over by Speaker, who is member of Parliament. Bills in Parliament are read three times and passed by simple majority of members entitled to vote and present. Constitutional amendments require two-thirds majority of all members entitled to vote. Bills become law with President's assent, and come into force at date appointed in Act, or by default, upon gazetting of Act.

Nominated Members of Parliament.

Members are not elected, but appointed by parliamentary committee to sit in Parliament to participate in proceedings. Cannot vote on certain matters.

Sessions of Parliament.

Session of Parliament to be held once at least in every year. No more than six months should intervene between last sitting of Parliament in any one session and first sitting for next session.

Presidential Council for Minority Rights.

Bills are screened by this appointed council for potential adverse effects on rights of minority races. Its objections must be considered but may be overruled by two-thirds of total voting members of Parliament.

Judiciary is made up of Supreme Court and Subordinate Courts. It is headed by Chief Justice. Supreme Court consists of Judges of Appeal and Judges of High Court. Judges are appointed until retirement at 65, by President on advice of Prime Minister, after consultation with Chief Justice. Senior members of Bar are occasionally appointed to sit as Judicial Commissioners for short terms. See also category 6 Courts and Legislature, topic 6.01 Courts.

1.03 OFFICE HOURS AND TIME ZONE:

Singapore is in the + 08:00 GMT time zone. Office hours are generally from 9 a.m. to 5 p.m. (Mon. to Fri.) and from 9 a.m. to 1 p.m. (Sat.).

2 BUSINESS ORGANIZATIONS

2.01 AGENCY:

Governed by common law. Generally principal is bound by acts of his authorised agent. Agent may be authorised expressly, impliedly, or by estoppel or necessity. Agent acting outside his scope of authority may be liable for breach of warranty of authority. Agent acting for undisclosed principal is also personally liable.

See also topic 2.05 Partnerships.

2.02 ASSOCIATIONS:

See topic 2.05 Partnerships.

2.03 CORPORATIONS:

Companies Act (Cap. 50) regulates corporations. Companies Act is based on UK Companies Act 1948 and Australian Companies Acts.

Incorporation.

One or more persons (including bodies corporate) may form limited companies. Apart from issuance of at least one share, there is no prescribed minimum amount issued of share capital. Company may be readily incorporated online within one to three days for fixed registration fee of S$300. With effect from 30 Jan. 2006, concept of authorised share capital and of par value (or nominal value) of shares has been abolished.

Private company means company which by its Articles of Association restricts transfer of its shares, limits number of shareholders to 50 and prohibits invitation to public to subscribe for its shares or debentures. Company which does not impose such restrictions is public company. Public companies may invite public to subscribe for shares, usually by issue of prospectus. Name of limited company must end with word “Limited” or its abbreviation “Ltd”. Private company must, additionally, have word “Private” or “Pte” as penultimate word.

Company may be formed as limited company (liability of members limited by shares or guarantee) or unlimited company (liability of members unlimited). Unlimited company can be converted to limited company, and vice versa; but company so converted may not be reconverted.

Public company may choose to be company listed on Singapore Exchange Securities Trading Limited, if it meets listing criteria. Company listed on Singapore Exchange Securities Trading Limited is also regulated by Listing Manual of Singapore Exchange Securities Trading Limited.

Company must register its Memorandum of Association setting out its name, statement of liability of members, full names, addresses and occupations of subscribers and statement that such subscribers agree to take number of shares in capital of company as set opposite their respective names.

Company may but need not have its objects in its memorandum. Subject to provisions of Companies Act, any other written law, its memorandum or articles of association, company has full capacity to carry on or undertake any business or activity, do any act or enter into any transaction and has full rights, powers and privileges for such purposes.

Company must also file its Articles of Association which are rules governing internal regulation, duties of directors, rights of voting, etc. If Articles are not filed, statutory regulations known as “Table A” govern internal management. Applications for registrations of companies are made to Registrar of Companies, to whom proper set of Memorandum and Articles of Company is submitted.

Exempt private company is private company in which no corporation holds beneficial interest, and has no more than 20 members. Exempt private companies may make loans to its directors and to companies in which its directors are interested. Exempt private companies need not file their balance sheet and profit and loss account with their Annual Return. Exempt private company with turnover not exceeding prescribed amount and company dormant since formation or since end of previous financial year are exempted from audit requirements. See subhead Reports, infra.

Prospectus.

Any offer or invitation to public to subscribe for shares in company shall comply with prospectus requirements specified in Securities and Futures Act (Cap. 289) unless exemptions set out in Part XIII, Securities and Futures Act (Cap. 289) apply. Prospectus may not be issued unless it has been first registered with Monetary Authority of Singapore.

Reports.

Companies must file with Registrar annual return in requisite form signed by director containing specified information such as names of members, details of directors, etc. If company has share capital, return must give particulars of its share capital including extent to which it is paid up. All companies (other than exempt private companies which do not have turnover exceeding prescribed amount) are required to file audited accounts. Foreign companies registered in Singapore must deliver to Registrar return of any alteration in prescribed particulars and annual audited accounts.

In addition to foregoing, company is required to lodge with Registrar changes in share capital of company, special resolutions, changes in directors, secretary, registered office, etc.

Directors.

Must be individuals. There must be at least one director and at least one director must be ordinarily resident in Singapore.

Secretary.

Must be individual having certain qualifications and must ordinarily reside in Singapore. However, private companies are not required to appoint qualified secretaries provided secretaries appointed appear to have requisite knowledge and experience to discharge functions of secretary.

Auditors.

Company is required to appoint auditor and have its accounts audited unless it is dormant company or it is private exempt company with turnover not exceeding prescribed amount.

Registration of Mortgages.

Mortgages and charges falling within categories specified in Companies Act are, in so far as any security is conferred thereby, void against liquidator and creditor of company unless prescribed particulars and relevant instrument (or certified copy thereof) are delivered to Registrar within 30 days after date of its creation.

Categories include charges to secure any issue of debentures; charges on uncalled share capital of company; charges on shares of subsidiary of company which are owned by company; charge or assignment created or evidenced by instrument which, if executed by individual, would require registration as bill of sale; charges on land or any interest therein; charges on book debts; floating charges on company's undertaking or property; charges on calls made but not paid; charges on ship or aircraft (or shares therein); and charges on goodwill, on patent, or licence under patent, on trade mark or on copyright or licence under copyright.

Winding up.

See category 7 Debtor and Creditor, topic 7.07 Insolvency.

Foreign corporations establishing place of business or carrying on business in Singapore are required to register as foreign companies under Companies Act. Foreign organisations carrying on promotional and liaison work in selected industries may apply to set up representative offices in Singapore.

2.04 FOREIGN CORPORATIONS:

See topic 2.03 Corporations.

2.05 PARTNERSHIPS:

General.

Partnership subsists between persons carrying on business in common with view of profit and is regulated by Partnership Act. (Cap. 391). Common ownership or sharing of profits does not of itself create partnership. Act governs nature of partnership, relationship of persons dealing with partners, relations of partners to one another and dissolution of partnership and its consequences.

Limited Liability Partnerships.

Limited Liability Partnerships Act 2005 (Act 5 of 2005) ("LLP Act") was passed by Singapore Parliament on 25 Jan. 2005. Under LLP Act, Limited Liability Partnership ("LLP") is body corporate formed by being registered under LLP Act and which has legal personality separate from that of its partners. LLP has perpetual succession and any change in partners of LLP does not affect existence, rights or liabilities of LLP.

LLP must have at least two partners.

Common Law relating to partnerships does not apply to LLPs except where LLP Act applies otherwise.

Liability of Partners.

Partner is personally liable for his own wrongful acts or omissions but he will not be personally liable for wrongful acts or omissions of any other partner of LLP or for obligation of LLP.

Accounts.

LLP is required to keep proper accounting records but is not required to have records filed or audited.

Formation of Partnership.

Partnership will have between two and 20 partners. Partnership which comprises more than 20 partners must be registered as company. Exception to above is partnership formed for purposes of carrying on profession or calling which under any written law may be exercised only by persons possessing stipulated qualifications.

Partner is agent of firm and has power to bind firm. Partners of firm are bound by acts done on behalf of firm unless otherwise agreed upon between all partners. Such acts will then not be binding on firm with respect to persons having notice of that agreement.

Liability of Partners.

Every partner is jointly liable with other partners of firm for all debts and obligations of firm incurred while he is partner; and after his death, his estate is also severally liable in due course of administration for such debts and obligations, so far as they remain unsatisfied but subject to prior payment of his separate debts.

Taxation for Partnership.

Partnership is not recognised in law as separate legal persona distinct from individuals who constitute it. Hence, for tax purposes, individual partners will be assessed on their respective share of income.

Common Law.

Although Act contains certain provisions relating to creation and liability of partners, rules of equity and common law continue to apply save where they are inconsistent with provisions of Act.

3 BUSINESS REGULATION AND COMMERCE

3.01 BANKS AND BANKING:

Monetary Authority of Singapore is responsible for promotion of monetary stability and credit and exchange conditions conducive to economic growth of Singapore (Monetary Authority of Singapore Act). (Cap. 186). It oversees licensing and regulation of all activities of banks and financial institutions in Singapore.

All banks operating in Singapore are required to obtain licences from Monetary Authority of Singapore under Banking Act (Cap. 19), and to comply with provisions of Banking Act. Finance companies are regulated by same authority under Finance Companies Act. (Cap. 108).

3.02 BILLS AND NOTES:

Bills of Exchange Act (Cap. 23) is substantially similar to English Bills of Exchange Act 1882 and Cheques Act 1957. Common law applies except where inconsistent with Act. Conflicts rules are similar to those applicable in England.

3.03 BILLS OF SALE:

In general, chattel mortgages, other than mortgages and debentures registrable under Companies Act (Cap. 50) are governed by Bills of Sale Act (Cap. 24). Act is substantially similar to English Bills of Sale Acts of 1878 to 1891. Bills as defined in Act are void unless they are for S$100 or more, made in prescribed form, attested and registered with registrar of bills of sale within three clear days of execution, and not partly or wholly given in consideration of preexisting debts. Registration has to be renewed every 12 months by filing with registrar statutory declaration in prescribed form. Filed copies of bills are available for public inspection.

See also category 18 Mortgages, topic 18.01 Chattel Mortgages.

3.04 COMMERCIAL REGISTER:

Persons wishing to conduct business in Singapore must seek registration either under Business Registration Act (Cap. 32) or Companies Act (Cap. 50).

See also categories 2 Business Organizations, topics Corporations, Partnerships; Intellectual Property, topics Patents, Trademarks; Mortgages, topic Chattel Mortgages.

3.05 CONTRACTS:

Contract laws based on and largely similar to contract laws of England.

Application of English Law Act.

Under Application of English Law Act (Cap. 7A), common law of England (including principles and rules of equity), so far as was part of law of Singapore immediately before 12 Nov.

1993, continues to be part of law of Singapore (subject to such modifications as required by circumstances of Singapore and its inhabitants). In addition, certain English statutes apply (with some modification) to Singapore, these include Misrepresentation Act 1967, Unfair Contract Terms Act 1977 (except certain portions), Sale of Goods Act 1979 (except certain portions) and Minors' Contracts Act 1987 (except certain portions).

Applicable Law.

General principles as under English Law.

Excuses for Non-Performance.

Principles as under English Law; see also topic 3.11 Sales, subhead Unfair Contract Terms Act (Cap. 396).

Government Contracts.

Proceedings can be taken and enforced against Government; Government Proceedings Act. (Cap. 121).

3.06 FRAUDS, STATUTE OF:

Provisions of UK Statute of Frauds relating to contracts for sale of land, and formalities concerning creation of trusts and assignments of equitable interests have been modified as amendments to Civil Law Act (Cap. 43) pursuant to Application of English Law Act (Cap. 7A).

3.07 INFORMATION TECHNOLOGY, INTERNET AND NEW MEDIA:

Copyright Act.

Computer programs are protected as literary works under Singapore Copyright Act (Cap. 63). Multimedia works are protected as compilations. Making of transient or incidental electronic copy of material from electronic copy of material made available on network does not infringe copyright in material if making of transient copy is necessary for utilisation, viewing and/or listening of material by network user. Internet Service Providers (ISPs) are not liable if they merely act as conduits for access of materials by their users, i.e. if there is reproduction or copying of infringing materials on Internet, ISPs are not liable for copyright infringement if such reproduction or copying is incidental to ISPs providing connection/access to its network users. Nor will ISPs be held liable if copying was done at direction of network user with ISPs merely acting as telecommunication carriers e.g. hosting website at request of network user.

Electronic Transactions.

Much of common law pertaining to contracts also pertains to Internet contracts. Advertisement on website is generally construed as invitation to treat (pre-offer invitation). Electronic Transactions Act (“ETA”) (Cap. 88) essentially sets out what constitutes valid contract for transactions carried out via Internet. In absence of contrary agreement, electronic record is considered as being despatched when it enters information system that has been specifically designated by receiver for receiving that electronic record. For example, when Internet shopper responds to advertisement on website by e-mailing to e-mail address given on webvertisement, e-mail from shopper is considered as received by seller once e-mail is retrieved from ISP to mailbox of seller. This same principle is applicable to any withdrawals of acceptance or offer. “Electronic signature” means any letters, characters, numbers or other symbols in digital form attached to or logically associated with electronic record and executed or adopted with intention of authenticating or approving electronic record. Thus, electronic signature on electronic record would signify agreement of signatory to be bound by terms and conditions stated in electronic record. To minimise fraud, ETA sets out security requirements for valid electronic signature, terming it as “Digital Signature”. Digital Signature is unique mathematical code of numbers using asymmetric cryptography together with hash function such that recipient of electronic record who has access to signatory's public key, already duly certified by Certification Authority, may verify identity of signatory and that electronic record has not been tampered with since affixing of Digital Signature.

Internet.

To position Singapore as business-friendly communication and information hub, Media Development Authority of Singapore (MDA) has established Internet regulatory framework to promote growth of Internet.

MDA's approach emphasises following: (a) Instituting Light-Touch Regulatory Framework: MDA's regulatory framework for Internet is found in Broadcasting (Class Licence) Notification 2001. Under Class Licence Scheme, Internet Content Providers and Internet Service Providers are deemed automatically licensed and have to observe and comply with Class Licence Conditions and Internet Code of Practice, which outlines what is regarded as offensive or harmful to Singapore's racial and religious harmony; (b) Encouraging Industry Self-Regulation: Industry is encouraged to self-regulate and set their own standards. MDA encourages content providers in Singapore to label their sites and to develop Industry Codes of Practice; (c) Promoting Online Safety Awareness Through Public Education: To educate public on positive as well as negative aspects of Internet.

Registration of Internet Class Licensees.

Who Needs to Register.

(a) Internet Access Service Providers, Localised and Non-localised Internet Service Resellers providing computer online service; (b) political parties registered in Singapore; (c) individuals, groups, organisations and corporations engaged in providing any programme for propagation, promotion or discussion of political or religious issues relating to Singapore; and (d) Internet Content Providers who are in business of providing through Internet online newspaper for subscription fee, or other consideration.

3.08 INTEREST:

General.

Interest is payable only when allowed by statute or in accordance with contract. There is no general prohibition on rate of interest that can be charged. However, neither simple interest exceeding 12% or 18% per annum (for secured and unsecured loans respectively) nor compound interest may be charged by those carrying on business of moneylending. (Moneylenders Act, Cap. 188). Act does not apply to, inter alia, banks, and finance companies licensed under Finance Companies Act.

Prejudgment.

Interest may be awarded at Court's discretion in respect of late payment of damages or debts. Interest may also be awarded for late payment of debts, even if debt is paid before commencement of proceedings. (Civil Law Act, Cap. 43; First Schedule, Supreme Court of Judicature Act, Cap. 322).

Post-judgment interest is, subject to agreement of parties, at rate to be determined at discretion of Court, subject to limit set by Chief Justice.

3.09 LICENSES, BUSINESS AND PROFESSIONAL:

Licences are required for activities which include holding lottery draws, conducting remittance businesses, futures trading, stockbroking, carrying out finance business transactions, insurance, broadcasting, newspapers and printing, restaurants and entertainment, establishing massage and health centres, conducting import and export trade, selling and distributing liquor, conducting certain manufacturing activities, acting as travel agents, housing agents and auctioneers, driving motor vehicles, and conducting businesses as banks, fund managers, financial advisers, moneylenders, pawnbrokers or custodians for securities.

See also topic 3.01 Banks and Banking; category 13 Foreign Trade and Commerce, topic 13.02 Foreign Exchange.

3.10 NEGOTIABLE INSTRUMENTS:

See topic 3.02 Bills and Notes.

3.11 SALES:

Governed by Sale of Goods Act (Cap. 393), other related statutes and common law. Principal Act is English Sale of Goods Act 1979 (c. 54) as received into Singapore on 12 Nov. 1993. Unlike England, there is no market overt in Singapore.

United Nations Convention on Contracts for International Sale of Goods adopted at Vienna, Austria on 10 Apr. 1980 (“Convention”), has force of law in Singapore by virtue of and subject to Sale of Goods (United Nations Convention) Act (Cap. 283A). Sub-paragraph (1)(b) of Art. 1 of Convention will not have force of law in Singapore. Convention applies to contracts of sale of goods only between those parties whose places of business are in different states when states are contracting states under Convention. Provisions of Convention shall prevail over any other law in Singapore to extent of any inconsistency.

Notices Required.

Generally, notices not required under domestic sales law. Where contracts fall within United Nations Convention on Contracts for International Sale of Goods, then subject to agreement of parties, notices are required in many instances. For example, notice has to be given to avoid contract, except where other party has expressed intention not to perform, and notice of nonconformity of goods has to be given to seller in order for buyer to rely on rights based on nonconformity.

Applicable Law.

Generally, contract of sale is governed by law expressly or impliedly chosen by parties, whether such law is connected to contract or not, unless choice is illegal, not bona fide, or against public policy. In absence of choice, contract is governed by law having closest and most real connection with transaction. Governing law applies to most contractual issues, including validity, interpretation and effect of terms. Where United Nations Convention on Contracts for International Sale of Goods applies, issues relating to formation of contract and rights and obligations arising thereunder are subject to Convention rules.

Warranties.

Implied warranties are: (1) that seller has right to sell goods free from undisclosed encumbrances; (2) that goods sold are of merchantable quality, except if defect has been revealed to buyer or if buyer has examined goods and ought to have discovered it; (3) that goods are fit for buyer's purpose, provided that seller sells goods in course of business, and buyer makes known to seller particular purpose, unless buyer did not rely, or it was not reasonable for him to rely, on seller; (4) that in sale by description goods will correspond to description; and (5) that in sale by sample, goods will correspond to sample in description and quality, and that buyer will have reasonable opportunity to compare the two.

Supply of Goods Act (Cap. 394).

This is portion of English Supply of Goods and Services Act 1982 (c. 29) as received into Singapore on 12 Nov. 1993, dealing with supply and hire of goods. Warranties similar to that for sale of goods are implied.

Hire-Purchase Act (Cap. 125).

Act applies to hire-purchase of specified goods. Implied warranties are in respect of (1) title; (2) merchantability; and (3) fitness for purpose. Latter two terms will not be implied if owner informs hirer that goods are secondhand, and that warranties are excluded.

Unfair Contract Terms Act (Cap. 396).

This is English Unfair Contract Terms Act 1977 (c. 50) as received into Singapore on 12 Nov. 1993. Liability for personal injury or death resulting from negligence cannot be excluded. Exclusion clauses for other damage are subject to test of reasonableness. Seller's warranty of title cannot be excluded. Other implied warranties cannot be excluded against consumer, and can only be excluded otherwise if reasonable in all circumstances. Similar protection is given with respect to corresponding warranties arising from contracts of supply, hire or hire-purchase of goods.

Misrepresentation Act (Cap. 390).

This is English Misrepresentation Act 1967 (c. 7) as received into Singapore on 12 Nov. 1993. Contract can be rescinded for misrepresentation even if representation has become term of contract, and even if contract is executed. Court has discretion to award damages in lieu of rescission where misrepresentation is innocent. Where misrepresentation is negligent, Court may award damages in addition to or instead of rescission. Exclusion of liability for misrepresentation is subject to test of reasonableness.

Consumer Protection (Fair Trading Act) (No. 27 of 2003).

Does not apply unless supplier or consumer is resident in Singapore or offer or acceptance relating to consumer transaction made in or sent from Singapore. Excludes certain consumer transactions such as purchase of real property and transaction or activity governed by other written law such as Banking Act. Consumer entitled to sue supplier in consumer transaction involving unfair practice. Unfair practice includes misrepresentation as to quality, standard, grade, method of manufacture and extent of usage, overcharging and taking unfair advantage of consumer. Claim must not exceed prescribed limit (currently S$20,000) but consumer may choose to abandon claim in excess of prescribed limit. Limitation period for action reduced to one year.

Consumer Protection (Trade Descriptions and Safety Requirements) Act (Cap. 53).

It is offence to apply false trade description to goods or to supply goods with false trade description. Certain goods are also required to carry certain information, e.g. expiry dates, or to comply with prescribed safety requirements.

Sale of Goods (United Nations Convention) Act (Cap. 283A).

This gives effect to United Nations Convention on Contracts for International Sale of Goods signed in Vienna on 11 Apr. 1980.

4 CITIZENSHIP

4.01 ALIENS:

See category 15 Immigration.

4.02 IMMIGRATION:

See category 15 Immigration, topic 15.01 Immigration.

4.03 NATIONALITY:

See category 15 Immigration.

5 CIVIL ACTIONS AND PROCEDURE

5.01 ACTIONS:

Person may sue or be sued as long as plaintiff has valid cause of action and is able to satisfy court that it has jurisdiction to hear matter. If plaintiff resides outside Singapore, he may be ordered by court to pay money into court as security for defendant's legal costs should plaintiff eventually fail to prove his claim.

Foreign Law.

Particulars of foreign law must be given if it is pleaded. Foreign law is to be proved as facts during trial. Experts can give oral evidence of foreign law. In absence of such evidence, Singapore law will be applied. Exception to this is that court takes judicial notice of all Acts passed by Parliament of Malaysia or Parliament of UK.

5.02 APPLICABLE LAW:

See category 1 Introduction, topic 1.02 Government and Legal System.

5.03 DEPOSITIONS AND DISCOVERY:

Obtaining Evidence for Local Courts Before Trial.

Court may, in any cause or matter where it appears necessary for purposes of justice, make order for examination on oath before Judge or Registrar or some other person, at any place, of any person.

Where person to be examined on oath is out of jurisdiction, application may be made to High Court for issue of letter of request to judicial authorities of country in which that person is to be examined.

Subject to any directions contained in order for examination, any person ordered to be examined before examiner may be cross examined and reexamined.

Deposition may be received in evidence at trial of cause or matter if: (a) deposition was taken in pursuance of order of Court; (b) either party against whom evidence is offered consents or it is proved to satisfaction of Court that deponent is dead, or beyond jurisdiction of Court or unable from sickness or other infirmity to attend trial; and (c) notice of intention to use deposition is given to other party within reasonable time before trial.

Obtaining Evidence for Foreign Courts.

Under Evidence (Civil Proceedings in Other Jurisdictions) Act (Cap. 98), High Court may make orders for examination of witnesses, either orally or in writing for production of documents; for inspection, photocopying, preservation, custody or detention of property; for taking of samples of property and carrying out of experiments on or with property; for medical examination of person and for taking and testing of samples of blood from person. Order does not require person to state what documents relevant to proceedings to which application for order relates are or have been in his possession, custody or power; or to produce any documents other than particular documents specified in order as being documents appearing to be in his possession, custody or power. Person is not compelled to give evidence which he cannot be compelled to give in civil proceedings in Singapore High Court; or in civil proceedings in country or territory in which requesting court exercises jurisdiction.

Discovery.

Court may at anytime order any party to give discovery of documents by making list of documents, to be verified by affidavit, which are or have been in possession, custody or power. Party is obliged to discover documents that are relevant, which are: (a) Documents on which party relies or will rely; and (b) documents which could: (i) adversely affect his own case, (ii) adversely affect another party's case, or (iii) support another party's case.

Pre-action discovery application is permissible and discovery order may also be made against nonparty to action. Discovery of facts is by way of interrogatories which may be served with or without order. Discovery or interrogatories may be ordered if application is necessary either for disposing fairly of cause or matter or for saving of costs.

5.04 JUDGMENTS:

Judgments may be for liquidated and unliquidated claims or for declaration or other relief. Judgment in default may be entered against defendant if defendant fails to enter appearance, or does not file defence.

Foreign judgments of superior courts for fixed sums enforceable as if obtained in Singapore Court if they are recognised as such by Reciprocal Enforcement of Commonwealth Judgments Act (Cap. 264) or Reciprocal Enforcement of Foreign Judgments Act (Cap. 265). Such foreign judgments must first be registered in Singapore Court.

Other judgments not so recognised may be enforceable by action on judgment, and underlying action giving rise to judgment will not normally be retried by Singapore Court.

5.05 LIMITATION OF ACTIONS:

Regulated by Limitation Act. (Cap. 163).

Three Years.

Action for damages for negligence, nuisance, or breach of duty where damages claimed consist of or include damages in respect of personal injuries to person from date on which cause of action accrued or three years from earliest date on which person has knowledge required for bringing action for damages in respect of relevant injury.

Six Years.

Actions founded on contract or on tort; action to enforce award; action for account.

12 Years.

Actions to recover land.

Disability.

Limitation period is extended for varying periods in case of disability.

Latent Injuries and Damages.

Limitation period is extended under certain circumstances.

Fresh Accrual of Action.

Fresh accrual of action to recover any debt or other liquidated pecuniary claims on written acknowledgment or part payment of liquidated claim.

Fraud or Mistake.

Where action is based on fraud of defendant, or right of action is concealed by fraud of defendant or action is for relief from consequences of mistake, period of limitation does not begin to run until plaintiff has discovered fraud or mistake or could with reasonable diligence have discovered it.

Arbitration.

Limitation periods stated above apply to arbitration.

Maritime Actions.

Time limits for maritime collisions are laid down by Maritime Conventions Act made applicable in Singapore.

5.06 PROCESS:

Electronic Filing System (“EFS”).

EFS makes compulsory electronic filing of all “specified documents” (which includes writs and affidavits) in all civil proceedings in Supreme Court and Subordinate Courts. Documents can be filed either from law firms or through service bureaus. EFS has been extended to include electronic extracts service, electronic service of documents facility, electronic information service and electronic hearings. From 2006, modes of commencement of proceedings have been reduced from four to two: originating summons and writ of summons. References to writ also include originating summons, in following paragraph.

Service of Process Within Jurisdiction.

Where defendant is individual, writ must be served personally on each defendant. Writ is deemed to have been duly served if defendant's solicitor indorses on writ, statement that he accepts service of writ on behalf of defendant or where defendant enters appearance in action.

Writ may also be served in accordance with terms of contract if contract provides that Singapore Court has jurisdiction to hear and determine action in respect of contract or apart from such term, Singapore Court has jurisdiction to hear and determine such action; and contract provides that, in event of action in respect of contract being begun, process by which it is begun may be served on defendant, or on such person on his behalf as may be specified in contract.

In certain cases, Court may on ex-parte application authorise service of writ to be effected on agent or manager instead of overseas principal.

Where action is against corporation, writ may be served by leaving it at registered office of company.

If it appears to Court that it is impracticable for any reason to serve document personally on person, Court may make order for substituted service of that document.

Service of Process Out of Jurisdiction.

Service of originating process out of jurisdiction is permissible with leave of Court in many enumerated cases in accordance with Rules of Court, i.e., essentially where defendant or claim has some connection with forum.

Service of Foreign Process.

Service of process required in connection with foreign civil proceedings may be effected by letter of request from foreign court or tribunal requesting service on person in Singapore received by Minister and sent by him to High Court with intimation that it is desirable that effect should be given to request.

If civil proceedings are pending before court or tribunal of foreign country, being country with which there subsists Civil Procedure Convention providing for service in Singapore of process of tribunal of that country, letter of request may be from consular or other authority of that country requesting service on person in Singapore of any such process sent with letter which is received by Registrar.

6 COURTS AND LEGISLATURE

6.01 COURTS:

Supreme Court is superior court of record consisting of High Court and Court of Appeal.

Civil jurisdiction of Court of Appeal consists of power to hear and determine appeal against decision made by High Court, subject to provisions of Supreme Court of Judicature Act (Cap. 322) and other statutes which regulate terms and conditions under which appeals may be brought.

High Court has jurisdiction to hear and try action in personam or in rem: where defendant is served with writ or other originating process in Singapore or outside Singapore in accordance with Rules of Court; or where defendant submits to jurisdiction of High Court.

High Court may, however, stay proceedings by reason of Singapore not being appropriate forum.

Subordinate Courts consist of, inter alia, Family Court, District Courts and Magistrates' Courts.

Family Court deals with all family disputes including divorces, maintenance, adoption, guardianship and family violence.

District Court has jurisdiction to determine matters where value of subject matter in dispute does not exceed S$250,000 and where, in respect of proceedings for administration of estate of deceased, value of estate does not exceed S$3 million. District Court has jurisdiction to grant injunction as sole relief in action, and make binding declarations of rights whether or not any consequential relief is or can be claimed.

Magistrates' Court has jurisdiction to determine matters where value of subject matter in dispute does not exceed S$60,000.

6.02 LAW REPORTS:

Singapore Law Reports and Malayan Law Journal are two main law reports covering local court cases. For period from 1930's to 1991, both Singapore and Malaysian cases are reported in Malayan Law Journal due to historical relationship between courts of both countries.

Since 1992, however, Singapore cases are reported in Singapore Law Reports and since Jan. 2003 published by Singapore Academy of Law.

6.03 LEGISLATURE:

See category 1 Introduction, topic 1.02 Government and Legal System.

6.04 STATUTES:

Legislation enacted by Parliament is contained in Statutes of Singapore and subsidiary legislation made pursuant to statutes can be found in Subsidiary Legislation of Singapore. Both are published by Law Revision Commission under authority of Revised Edition of the Laws Act. (Cap. 275). Together, they make up principal source of written law in Singapore.

7 DEBTOR AND CREDITOR

7.01 ASSIGNMENTS:

Assignment of debts and other choses in action are permitted under Singapore law. Assignment must be absolute in nature, embodied in written form duly signed by assignor and not be in nature of charge; express notice in writing must be given to debtor, trustee or other person from whom assignor would have been entitled to receive or claim such debt or chose in action. Assignment would, however, be subject to all equities which would have been entitled to priority over assignee's rights, i.e., those which were in existence prior to and down to time when express notice of assignment was given to debtor or other persons charged with making payment to assignor.

Noncompliance does not mean that assignment is ineffective, for assignment then becomes equitable one. From procedural point of view, equitable assignee will need to bring in assignor as party to any suit to enforce assigned debt and from substantive point of view, there may be issues on whether assignee must have provided consideration to assignor, particularly for assignments of future choses in action.

Generally, priorities between competing priorities are governed by time when notice in writing has been given to debtor. In case of equitable assignments, English common law rule in Dearle v. Hall (1828) 3 Russ. 1 applies, i.e., priority of claims will be determined by priority of notices of assignment given to debtor.

7.02 ATTACHMENT:

Attachment of debts after judgment possible through garnishment (see topic 7.04 Executions) or stop notice.

Stop notice may be obtainable if person who is beneficially entitled to interest in any securities wishes to be notified of any proposed transfer or payment of those securities.

7.03 BANKRUPTCY:

See topic 7.07 Insolvency.

7.04 EXECUTIONS:

Writ of execution may be issued to enforce judgment.

Commonest form of execution proceedings is issuance of writ of seizure and sale of movable property of judgment debtor. Seizure of immovable property is also available as form of execution of judgment. Seizure and sale of properties conducted by Bailiff appointed by Court.

Where judgment debtor is individual and judgment debt exceeds S$10,000, bankruptcy proceedings may be brought against judgment debtor. Where judgment debtor is company, winding up proceedings may be brought against judgment debtor on judgment debt if debt exceeds S$10,000. See topic 7.07 Insolvency.

Debts due to be paid to judgment debtor may be garnished as form of execution proceedings. Debt must be due and owing at time of garnishment. Salaries of judgment debtor not due to be paid to judgment debtor may be garnished only after they become payable to judgment debtor.

Where judgment debtor's interest in immovable property takes form of interest under trust or where debt is not due to be paid to judgment debtor, Court may appoint receiver by way of equitable execution to receive debt or dividend when paid and hold amount for benefit of judgment creditor.

7.05 FRAUDULENT SALES AND PREFERENCE:

Individuals.

Bankruptcy Act 1995 contains provisions dealing with transactions at undervalue and unfair preferences. Transactions at undervalue within period of five years before person's bankruptcy may be set aside on Official Assignee's application to Court. Similarly for unfair preferences, these can be set aside: for unfair preferences to any person, time period is six months, and to “associates” transaction is caught if it took place within two years before bankruptcy. There is also provision for setting aside extortionate credit transactions which occur within three years before bankruptcy. Extortionate credit transactions are those which require grossly exorbitant payments, or those which are harsh and unconscionable or substantially unfair.

Companies.

Companies Act (Cap. 50) contains provisions dealing with fraudulent sales and preferences.

Any transfer, mortgage, delivery of goods, payment, execution or other act relating to property carried out by company, which had it been undertaken by individual would be void or voidable under bankruptcy law, would otherwise be void or voidable in company's winding up.

Any transfer or assignment by company of all its property to trustees for benefit of creditors is void.

Floating charge on undertaking or property of company created within six months of commencement of winding up is void except to amount of cash paid to company at time of or subsequent to creation of floating charge with interest at 5% per annum. This is inapplicable where company was solvent at time floating charge was created.

7.06 GARNISHMENT:

See topic 7.04 Executions.

7.07 INSOLVENCY:

Corporate Insolvency.

Companies incorporated in Singapore may be wound up voluntarily or compulsorily (by order of Court). Voluntary liquidation proceedings may be commenced by members of company (where company is solvent) or by creditors. Court may, at request of company, creditors or directors, place company under judicial management if Court is satisfied judicial management will bring about, inter alia, continued survival of company, or advantageous realisation of company's assets.

Receiver may be appointed if contract so provides or by way of court order.

Individual Insolvency.

Bankruptcy proceedings may be brought against individuals under various grounds, most commonly where judgment debtor has failed to pay debt exceeding bankruptcy level, currently S$10,000. Bankruptcy action may not be presented to court if debtor was either not domiciled in Singapore or had no property in Singapore or was not resident within jurisdiction of Singapore or did not carry on business in Singapore for at least one year immediately preceding time of presentation of bankruptcy papers. Debtor may seek to have himself adjudicated bankrupt. All assets of bankrupt vest in office of Official Assignee.

7.08 LIENS:

Generally, liens may arise from common law, equitable, contractual or statutory sources.

Common Law Lien.

Legal lien is unassignable personal right of security exercisable by person in possession of goods against owner of goods, but with no power of sale. General lien entitles person in possession to retain goods until all claims or accounts against owner are satisfied. These liens arise only by general usage or by express agreement. Particular lien is right to retain chattels until owner pays charges incurred in respect of those chattels.

Equitable lien is equitable right to charge real or personal property of another until certain specific claims are satisfied. It does not depend on possession and holder of lien has power of sale. Equitable liens arise in particular relationships, e.g., partners, vendor and purchasers, or from course of conduct or express agreement of parties. Equitable liens arising from contract are registrable under Bills of Sale Act. (Cap. 24).

Contractual Lien.

It is matter of interpretation of contract what rights and obligations parties intended to arise from lien.

Statutory Lien.

It is question of statutory interpretation when such lien arises, what rights and obligations attach thereto. See, e.g., statutory unpaid seller's lien under Sale of Goods Act (Cap. 393), where there is limited power of sale.

Maritime Lien.

See category 21 Transportation, topic 21.03 Shipping.

7.09 PLEDGES:

Common Law.

Pledge (pawn) is delivery of chattel as security for debt by pledgor to pledgee who is entitled to retain possession until debt is discharged. Right of possession is coupled with power of sale upon default of payment. Contract of pledge, however, does not confer title on pledgee and general property in article remains in pledgor.

Pawnbrokers Act (Cap. 222).

Act applies where person taking pawn is pawnbroker defined as including person "who carries on business of taking goods and chattels in pawn". Person is deemed to be pawnbroker under Act where goods are taken or purchased by way of security for repayment of sum of money not exceeding S$1,000.

Mere delivery of possession is adequate under Act for creation of pledge if loan secured is in excess of S$100 and if rate of interest is 10% per annum or less. However, in all other transactions or pledges with pawnbroker, notwithstanding that loan advanced may exceed S$1,000 or that value of security exceeds S$1,000, Act requires that pawnbroker must give pawner pawn ticket on accepting pawn.

Realising Security.

Pawnee has power of sale upon default in payment at stipulated time. If no time of payment is fixed, pawnee may demand for payment and if there is default consequent thereon, he may realise pawn by sale upon service of proper notice as to its intention.

Under Act, pawn which is taken for S$50 or less, and is not redeemed within six months from date of pawning, becomes absolute property of pawnbroker.

Factors Act (Cap. 386).

Pledge of documents of title to goods is deemed to be pledge of goods. Where mercantile agent pledges goods as security for antecedent debt or liability due from pledgor to pledgee, pledgee acquires no further right to goods than could have been enforced by pledgor at time of pledge.

7.10 RECEIVERS:

See topics 7.04 Executions, 7.07 Insolvency.

8 DISPUTE RESOLUTION

8.01 ALTERNATIVE DISPUTE RESOLUTION:

Mandatory Dispute Resolution.

Court may direct parties to attend pretrial conference personally, in addition to their solicitor, such that any matter including possibility of settlement of any or all issues in action or proceeding may be considered, with view to securing just, expeditious and economical disposal of proceeding. All facts disclosed and all matters considered in course of such pretrial conference are not to be communicated to court conducting trial of action or proceeding.

Voluntary Dispute Resolution.

Pending court cases may be referred to Singapore Mediation Centre of Singapore Academy of Law with consent of all parties. Administrative and mediation fees are payable. Judiciary may give waivers and refunds of court hearing fees to parties who have attempted mediation and mediation was unsuccessful. Singapore International Arbitration Centre provides facilities for systematic conduct of arbitration hearings and conciliation. Conciliator may facilitate negotiations or may be empowered by parties to take evaluative role but without power to make any binding decision on parties. International Arbitration Act (Cap. 143A) recognizes existence of conciliation agreements independently of arbitration agreements. See also topic 8.02 Arbitration and Award.

8.02 ARBITRATION AND AWARD:

Arbitration.

Arbitration Act (Cap. 10) regulates arbitration. Provisions of Act do not apply to international arbitration under International Arbitration Act ("IAA") (Cap. 143A) or to proceedings pursuant to Convention on Settlement of Investment Disputes between States and Nationals of Other States.

In arbitration conducted under Act, party may at any time after appearance, and before delivering any pleadings or taking any other steps in legal proceedings commenced by other party brought in breach of arbitration agreement, apply to court to stay proceedings. Court may stay proceedings if it is satisfied that: (a) there is no sufficient reason why matter should not be referred in accordance with arbitration agreement; and (b) applicant was, at time when proceedings were commenced and still remains, ready and willing to do all things necessary to proper conduct of arbitration.

Under IAA, court may stay legal proceedings commenced in breach of international arbitration agreement unless court is satisfied that arbitration agreement is null and void. Arbitration is international as provided under UNCITRAL rules. IAA applies UNCITRAL Model Law on International Commercial Arbitration adopted by United Nations Commission on International Trade Law on 21 June 1985 with exception of c. VIII. Relevant sections of IAA and UNCITRAL rules, however, will not apply if parties agree that any dispute that may arise between them is to be settled otherwise than in accordance with IAA or UNCITRAL rules.

Arbitral Awards.

Arbitration award under Act or pursuant to international arbitration agreement under IAA may by leave of court, be enforced in same manner as judgment or order to same effect and, where leave is so given, judgment may be entered in terms of award.

Arbitration (International Investment Disputes) Act (Cap. 11) implements Arts. 18, 19, 20, 21(a) (with Art. 22 as it applies to Art. 21[a]), 23(1) and 24 of Convention on Settlement of Investment Disputes between States and Nationals of Other States. Award pursuant to Convention may be registered and be of same force and effect for purposes of execution as if it had been judgment of High Court.

Foreign Awards.

IAA gives effect to Convention on Recognition and Enforcement of Foreign Arbitral Awards 1958. Grounds for refusal of enforcement of convention award reflect provisions stated in Convention.

Convention award may be enforced in court by action or as judgment or order to same effect and, where leave is so given, judgment may be entered in terms of award in same manner as local arbitral award as stated above. Award may be relied upon by party by way of defence, set-off or otherwise in any legal proceedings in Singapore.

9 DOCUMENTS AND RECORDS

9.01 AFFIDAVITS AND STATUTORY DECLARATIONS:

Affidavit may contain such facts as deponent is able of his own knowledge to prove. Affidavit sworn for purpose of being used in interlocutory proceedings may contain statements of information or belief with sources and grounds thereof.

Affidavit purporting to have affixed seal or signature of court, judge, notary public or person having authority to administer oaths in Commonwealth country and in case of any other country, seal or signature of consular officer of Commonwealth country in testimony of affidavit being taken before it or him may be admitted in evidence without proof of seal or signature being seal or signature of that court, judge, notary public or person.

Statutory Declaration.

Verification of facts made under oath used for cases other than judicial proceedings. Form of declaration is as follows:

I, A.B., do solemnly andsincerely declare …

And I make this solemn declaration by virtue of the provisions of the Oaths and Declarations Act (Cap. 211), and subject to the penalties provided by that Act for the making of false statements in statutory declarations, conscientiously believing the statements contained in this declaration to be true in every particular.

(signature of person making declaration)

Declared at the day of

Before me,

See also topic 9.02 Notaries Public.

9.02 NOTARIES PUBLIC:

Governed by Notaries Public Act. (Cap. 208).

Appointment.

Senate of Academy of Law is vested with power to appoint fit and proper persons to be notaries public. Such persons must be practising advocates and solicitors in Singapore, and must have so practised for at least seven years.

Functions.

In general, notaries public have and may exercise within Singapore all powers and functions ordinarily exercised by notaries public in England. But power of notary public to administer oaths or affirmations in connection with affidavits or statutory declarations, or to take or attest such affidavits or statutory declarations, is limited to certain situations as prescribed by Act.

9.03 SEALS:

Contracts under Seal.

Governed by common law.

Corporate Bodies' Contracts Act (Cap. 385).

Contracts, which if made by private persons would be required under law to be in writing, signed by parties to be charged, may be made on behalf of body corporate in writing and signed by person acting under its express or implied authority; and contracts, which if made by private persons would be valid by parol and not reduced in writing, may be made by parol on behalf of body corporate by person acting under its express or implied authority. Such contracts are valid notwithstanding that they are not executed under seal.

Practice Relating to Company Seals and Seal Books.

Company secretary usually has custody of company common seal. Directors usually pass resolution each time common seal is to be affixed to document; usually, common seals are affixed and attested to by two directors, or director and company secretary, or director and another person authorised to attest such affixation. Name of company (whether or not it is carrying on business under business name) must appear on its seal.

Where seal is frequently used, particulars of documents sealed may be entered in Seal Book and book will be produced at each board meeting (or committee authorised by board of directors) and appropriate resolutions passed.

Singapore-incorporated company may also have official seal (which must be facsimile of common seal with addition of place in which it is to be used) for use outside Singapore, if company's objects require or comprise transactions of business outside Singapore and its articles authorise such use. See also category 19 Property, topic 19.03 Deeds.

10 EMPLOYMENT

10.01 LABOUR RELATIONS:

Trade unions established after commencement of Trade Unions Act (Cap. 333) have to be registered. Such trade unions also fall under Industrial Relations Act (Cap. 136), which governs relations between trade unions and employers. Trade unions may claim recognition by employers, and upon being accorded recognition, may negotiate for collective agreements. Industrial Arbitration Courts have power to deal with trade disputes under this Act.

Employment.

Governed by Employment Act (“Act”) (Cap. 91) and common law principles.

Scope of Act.

Act affords protection for “employees”, which includes “workmen” (both terms as defined in Act). Employee's rights are then governed by contract of employment, collective agreement with relevant trade union (if applicable), and Act. Terms in Act are part of employment contract even if this is not expressly stated to be so in contract. Term in contract which is less favourable than that prescribed in Act will be regarded as illegal, null and void to extent that it is so less favourable.

However, Part IV of Act only applies to “employees” earning not more than S$1,600 per month (excluding overtime payments, bonus payments, annual wage supplements, productivity incentive payments and any allowance however described) and to all “workmen” regardless of salary.

“Employees” do not include inter alia seamen; domestic servants; or persons employed in managerial, executive or confidential positions. Where person is not protected by Act, he must look to contract of employment and collective agreement (if he is trade union member), for rights under employment.

Termination of Contracts.

Under Act, contract of service for unspecified period of time is deemed to run until terminated by either party by written notice. Period of notice required to be given is prescribed and varies depending on length of service with employer. If contract of service is terminated without notice or adequate notice, either party is entitled to salary in lieu of such notice.

In event of wilful breach of contract of service by party, other party may terminate contract without notice. Employer can dismiss employee without notice on grounds of misconduct only after due inquiry. Employer also has option of downgrading employee or suspending him from work without pay for up to one week.

If employee is not covered by Act and contract of employment is silent, termination is usually by reasonable notice according to common law. Salient provisions of Act are:

Absence Without Reasonable Excuse.

Employee is deemed to have broken contract if he continuously absents himself for more than two days without employer's prior leave or without reasonable excuse or without informing or attempting to inform employer of excuse for such absence.

Payment of Salary.

Generally, salary must be paid within seven days after last day of relevant salary period. Overtime pay must be paid within 14 days after last day of salary period during which overtime work was performed. Employer is deemed to have broken contract of service if he fails to pay salary in accordance with Act.

Part IV of Act.

Applies only to all workmen regardless of how much they earn per month, and to other employees, as defined in Act, who earn S$1,600 per month or less. Part IV of Act relates to: (1) Hours of work. Generally, employee has: (a) right not to work for more than six consecutive hours without having period of leisure; and (b) right not to work for more than eight hours a day or more than 44 hours a week. This is subject to exceptions under Act. Legal limit of working hours may be exceeded in emergencies. Overtime work is not compulsory. If employee does overtime work at employer's request, he is entitled to overtime pay of at least 1.5 times his hourly rate of pay. Employer cannot require employee to do overtime for more than 72 hours a month. (2) Holidays. Employee is entitled to paid holiday at his ordinary rate of pay on gazetted public holidays. (3) Rest days. Employee is entitled to one rest day per week which need not be Sun., but if it is not Sun., employer must give roster informing employee of his rest days in that month. Employer may require employee to work on rest day in emergencies. Employee is entitled to be paid, at maximum, his ordinary rate of pay for voluntarily working on rest days. He is entitled to double pay if he works on rest days at employer's request. (4) Annual leave. Employee's entitlement to annual leave commensurates with length of service with employer, subject to maximum of 14 days of such leave. Employee who has not completed 12 months of continuous service in any year is entitled to prorated annual leave. (5) Sick leave. Generally, employee who has served employer for at least six months is entitled, upon medical examination by doctor appointed by employer, to paid sick leave not exceeding 14 days in each year if no hospitalisation is necessary, or 60 days in each year where hospitalisation is necessary. (6) Retrenchment benefit. Retrenchment compensation is not available to employee if he has not been in continuous service with employer for at least three years at time of termination of his service for reasons as specified in Act. Quantum is not stipulated. (7) Retirement benefit. If employee has been in continuous service with employer for less than five years, he is not entitled to any retirement benefit other than sums payable under Central Provident Fund Act. (Cap. 36).

Employee's Compensation for Injury.

In general, Work Injury Compensation Act (WICA) (Cap. 354) replaces Workmen's Compensation Act w.e.f. 1 Apr. 2008 enables employees to claim compensation for personal injury caused by accidents arising out of and in course of employment; or contracts prescribed occupational disease either during employment or within specific time frame after cessation of employment, and incapacity or death of workman results from disease. Unlike Workmen's Compensation Act, WICA covers all employees (as defined therein) whether they are manual or non-manual workers with no earning cap imposed and with increase in compensations limits for claims in relation to injuries which result in death or permanent incapacity of employee.

Certain classes of employments, self-employed persons are not covered under WICA.

11 ESTATES AND TRUSTS

11.01 ADMINISTRATION:

See topic 11.04 Executors and Administrators.

11.02 DEATH:

Registration of Death.

All deaths must be registered with Registry of Death, Singapore.

Presumption of death of person may be judicially declared if man has not been heard of for seven years by those who would naturally have heard of him if he had been alive.

Presumption of Survivorship.

Where two or more persons die in circumstances rendering it uncertain which of them survived other or others, for purposes of affecting title to property, legal presumption is that younger died later than older.

Action for Causing Death.

Executor or administrator of deceased may on behalf and for benefit of dependents commence action in name of executor or administrator within three years of death against person who by reason of his wrongful act, neglect or default caused death to deceased. If there is no executor or administrator of deceased or no action is brought within six months after death by and in name of executor or administrator of deceased, action may be brought by and in name of all or any of persons for whose benefit executor or administrator could have brought it, which would include spouse, parent, grandparent, great-grandparent, child, grandchild or great-grandchild of deceased or any person who is, or is issue of, brother, sister, uncle or aunt of deceased. Damages that are recoverable would include pecuniary loss to estate, bereavement and funeral expenses.

11.03 DESCENT AND DISTRIBUTION:

In testacy, distribution of deceased's estate is governed by properly executed will. In intestate cases, distribution of deceased person's movable and immovable property is regulated by Intestate Succession Act. (Cap. 146).

In effecting distribution in intestacy, surviving spouse takes whole of estate absolutely if deceased leaves no issue and no parent. If deceased leaves issue, spouse is entitled to one-half of estate. Other half is to be distributed equally amongst children of deceased and in case any of those children is dead, descendants of children. If deceased leaves surviving spouse and no issue but parent or parents, spouse is entitled to one-half of estate and parent or parents to other half of estate. If deceased leaves no surviving spouse, descendants or parents, estate will be distributed equally amongst deceased's brothers and sisters, and in case any of them is dead, their descendants are entitled to share which he or she would have taken.

Grandparents may take whole of estate in equal portions if there are no surviving spouse, descendants, parents, brothers and sisters or children of such brothers and sisters. Uncles and aunts may take whole of estate in equal portions if there are no surviving spouse, descendants, parents, brothers and sisters or children of such brothers and sisters or grandparents.

Government is entitled to whole of estate in default of distribution under foregoing rules.

For purposes of distribution under Act, word “child” does not include illegitimate child.

Distribution provided for under Act may be affected by Inheritance (Family Provisions) Act (Cap. 138) which provides for maintenance of dependents in testacies and intestacies.

Law of Islamic Inheritance.

In case of Muslims, rules of intestate succession set out above do not apply. Distribution takes place only after legacies and debts, including funeral expenses, are paid out of property left behind by deceased.

If deceased is husband, and he leaves no issue and no parent, widow gets one-quarter. If deceased is wife and there are no issue and no parent, widower gets one-half. If deceased husband leaves issue and no parent, spouse is entitled to one-eighth of estate. On other hand, widower is entitled to one-half of his deceased wife's estate. Remaining share is to be distributed amongst children of deceased. Female children's share is generally half of male children's share.

If deceased leaves surviving spouse and no issue but parent or parents, widower is entitled to one-half of estate, and father and mother get two-thirds and one-third of remaining estate respectively. As for widow, she is entitled to one-quarter share of husband's estate and father and mother get two-thirds and one-third of remaining estate respectively.

If deceased leaves parents but no surviving spouse and children, mother will get one-third and father will get remaining two-thirds. If deceased leaves parents and children but no spouse, each parent takes one-sixth share while remaining share will be distributed among children.

11.04 EXECUTORS AND ADMINISTRATORS:

Upon death of person, whole of his property, both real and personal, devolves to his personal representatives, i.e. executors, where he has left will; and administrators, where he has died intestate, and to whom letters of representation (grant of probate and letters of administration, as case may be), are granted by Subordinate Courts or High Court. If value of estate is S$3 million or less, application for letters of representation may be made in Subordinate Courts. For estate worth more than S$3 million, application for letters of representation is to be made in High Court.

Appointment.

Executors are normally appointed by will. Administrators are appointed by Court in cases of intestacy as well as testacy where executor is not named in will.

Authority of Administrator and Executor.

Administrator obtains his authority solely from grant of letters of administration. Until grant is obtained, administrator has no authority. Executor's authority stems from will. He obtains authority to conduct affairs of deceased, moment deceased dies. It is purely to lend authority and vest proper title that letters of probate are obtained.

Grant of Probate on Testacy.

Executors appointed under will can apply for Grant of Probate.

Letters of Administration on Intestacy.

Total number of administrators who may petition for letters of administration may not exceed four. If there is minority or life interest then law requires minimum of two persons to be administrators. If there is no such interest one administrator will suffice. If trust corporation applies for letters of administration then requirement of additional person is dispensed with.

Letters of administration are usually granted to next of kin in accordance with priorities to entitlement of estate under Intestate Succession Act. (Cap. 146). Public Trustee may also administer estate if no application for letters of administration has been made provided estate is worth less than S$50,000.

Muslims' Estates.

In case of petitions made to Court for letters of representation in respect of Muslim's estate, petitions have to be accompanied by advice on inheritance law in Islam given in form of certificate by President of Syariah Court.

Renunciation.

Executor or administrator may renounce his right to apply for letters of representation.

Grant of probate and letters of administration are normally given as matter of course once petition for letters of administration is filed. However, grant may not be extracted unless clearance is obtained from Commissioner of Estate Duties.

Domicile.

Before granting letters of representation, Court requires proof of domicile. Deceased's domicile would determine validity of his will or right of his personal representatives to apply for letters of representation and question of priorities between persons contending for letters of representation.

Security.

In intestate case, administration bond equivalent to value of estate is required before grant of letters of administration can be extracted. If value of estate exceeds S$250,000, security by way of two sureties up to value of estate has to be furnished to Court to guarantee proper administration of estate. Court may dispense with sureties if all creditors and beneficiaries, being of full age and capacity consent to dispensation.

In case of testacy, no security is required.

General Powers and Duties.

In addition to powers conferred by will, personal representative is also conferred certain powers in his capacity as trustee under Trustees Act. (Cap. 337). Duties of personal representatives revolve around tasks of calling in estate's assets, determining beneficiaries and shares they are entitled to, and thereafter distributing assets.

Assets and Liabilities.

Inventory of assets and liabilities of estate is first step to be taken by personal representatives of estate to determine amount of estate duty payable and for purposes of distribution.

Creditors.

After calling in all assets of deceased and payment of funeral and testamentary expenses and estate duty, executor or administrator must ensure that debts of deceased are paid. Where estate is large, executor or administrator must place advertisement in Gazette or newspapers to give notice to all creditors that they ought to submit their claims within period stipulated, after which distribution will be made. If claim is not presented within time limited in advertisement, personal representative may distribute estate without being personally liable for debts of which he had no knowledge, but creditor may follow assets.

Accounts.

Before executor or administrator winds up administration of estate, he must submit accounts for beneficiaries' perusal and approval before distribution.

Distribution.

Duty of administrator to distribute estate in accordance with laws on intestate succession. (Intestate Succession Act, Cap. 146). In case of testacy, it is duty of personal representative to carry out terms of will. There can be no distribution of estate until debts of estate are disposed of.

Resealing Letters of Representation.

Grant of probate or letters of administration by Commonwealth country including Hong Kong SAR may be resealed by High Court. Once grant is resealed, it is as of same effect as grant of probate or letters of administration of High Court.

11.05 TRUSTS:

Common law concept of trust and equitable interests behind them are recognised and applicable in Singapore. Trustees Act (Cap. 337) generally deals with matters like trustee investments, general powers of trustees and personal representatives, appointments and discharge of trustees, agents, nominees, custodians, powers of court, and charitable trusts.

One can appoint maximum of four trustees. Usually two are appointed for disposition in trust for sale of land or in settlement of net proceeds because Act requires that, save for trust corporation, two trustees are required to give good receipt for proceeds of sale or other capital monies. (Further exception is for sale of real property by sole personal representative.)

As in England, trusts of personal property can be created without any formalities at law. Trusts of immovable property i.e. land must be evidenced by some note or memorandum in writing, and grants and assignments of beneficial interests under existing trusts have to be in writing by virtue of Statute of Frauds. (29 Car 2, c. 3). These however do not apply to implied, resulting or constructive trusts. Common law rules relating to perpetuity i.e. those dealing with remoteness of vesting of trust property and creation of perpetual trusts are applicable.

11.06 WILLS:

Governed by Wills Act. (Cap. 352). Any person of sound mind may make will. Infant cannot make will, unless he is soldier being in actual military service, or mariner or seaman being at sea.

See also category 12 Family, topic 12.04 Infants.

Formalities of Execution.

Every will must be signed at its foot or end by testator, or by some other person in his presence and by his direction, and signature must be made or acknowledged by testator as signature to his will in presence of two or more witnesses present at same time, and those witnesses must subscribe will in presence of testator. Beneficiary or his spouse must not attest to execution of will.

Alterations, which include obliteration and interlineation, made prior to execution should be authenticated by being referred to specifically in body of will itself, or by signature or initials of testator and witnesses being placed on will.

Revocation.

Will or part thereof may be revoked otherwise by another will or codicil duly executed, or by declaring intention to revoke it and executed in same as will, or by burning, tearing, or otherwise destroying will by testator, or by some person in his presence and by his direction, with intention of revoking it.

Foreign Wills.

Will is treated as properly executed if its execution conformed to internal law in force in territory where it was executed or where testator was domiciled or habitually resident either at time of execution or at death or in state of which testator was national either at time of execution or at death.

Allowance for Maintenance of Dependents.

Any dependent of deceased person may apply to Court for share of deceased's net estate for maintenance of that dependant under Inheritance (Family Provision) Act. (Cap 138). If Court is satisfied that disposition of deceased's estate by his will is such that it fails to make reasonable provision for maintenance of that dependant, Court may order that such reasonable provision be made out of deceased's net estate for maintenance of that dependant as it thinks fit.

Act is not restricted to provisions in wills: application may be made in cases of intestacies as well. However, if surviving spouse had been provided for with not less than two-thirds of income of net estate and where only other dependents are children, then no application can be made.

Persons for whom provision may be made are spouse, unmarried daughter, infant son, or daughter or son who is, by reason of some mental or physical disability, incapable of maintaining herself or himself.

Court can have regard to any past, present or future capital or income from any source of dependant of deceased to whom application relates.

Any application under Act must be made within six months from date on which representation in regard to deceased's estate is first taken out. However, this is not rigid provision and Court will allow extension of time if Court feels that complying strictly with requirements of Act may prejudice interests of dependant.

Wills Made by Muslims.

In Islamic law, testator can make bequest of only a third of his property with consent of his lawful beneficiaries. No one however can make bequest in respect of any legal Quranic heir. In other words, one cannot increase or decrease portions of those relatives whose portions are fixed in Quran nor can one deprive legal heir through bequest.

12 FAMILY

12.01 ADOPTION:

Regulated by Adoption of Children Act. (Cap. 4).

Requirements.

Before granting order under Act, court must be satisfied, inter alia, that infant is under age of 21 and is not married and both infant and petitioner are residents of Singapore. Consent of parent or parents or guardian of infant must be obtained or dispensed with by court.

Terms and Conditions of Adoption Order.

Court may impose such terms and conditions as court may think fit and in particular may require adopter by bond or otherwise to make such provision, if any, for such adopted child as in opinion of court is just and expedient.

Effect of Adoption Order.

All rights, duties, obligations and liabilities of parent or parents or guardian of adopted child are extinguished, and vest in and are exercisable by and enforceable against adopter.

Registration of Adopted Children.

Registrar of Births keeps record of children who have been legally adopted. Such registers and books are not open to public inspection or search except under court order.

12.02 DIVORCE:

Jurisdiction.

Under Women's Charter (Cap. 353) (“Act”) Court has jurisdiction to entertain proceedings for divorce, judicial separation and nullity of marriage only if: (a) either of parties to marriage is domiciled in Singapore at commencement of proceedings or habitually resident in Singapore for period of three years immediately preceding commencement of proceedings; (b) parties must have been married for at least three years unless case is one of exceptional hardship suffered by plaintiff or of exceptional depravity on part of defendant.

Ground for Divorce.

Either party to marriage may file for divorce on ground that marriage has irretrievably broken down by reason of one or more of following facts: (a) That defendant has committed adultery and plaintiff finds it intolerable to live with defendant; (b) that defendant has behaved in such way that petitioner cannot reasonably be expected to live with defendant; (c) that defendant has deserted plaintiff for continuous period of at least two years immediately preceding presentation of writ; (d) that parties to marriage have lived apart for continuous period of at least three years immediately preceding presentation of divorce and defendant consents to decree being granted; (e) that parties to marriage have lived apart for continuous period of at least four years immediately preceding presentation of writ of divorce.

Judicial Separation.

Writ for judicial separation may be presented to Court by either party to marriage on ground and circumstances set out above. Where Court grants decree of judicial separation it is no longer obligatory for plaintiff to cohabit with defendant.

Nullity of Marriage.

Either party to marriage can file for decree of nullity on ground that marriage is void if either party was already lawfully married at date of marriage or if formal requirements relating to marriage under Act were not complied with or if parties are within prohibited degrees of consanguinity.

Where marriage was celebrated outside Singapore, marriage may be invalid for lack of capacity or by law of place in which it was celebrated.

Marriage may be voidable on grounds of non-consummation due to incapacity of either party or to wilful refusal of defendant or lack of consent of either party due to duress, mistake, unsoundness of mind or otherwise, or mental disorder of either party within meaning of Mental Disorders and Treatment Act (Cap. 178) or that defendant was suffering from venereal disease in communicable form or was pregnant by some person other than plaintiff at time of marriage.

Dissolution of Marriage on Presumption of Death.

Any married person who alleges that reasonable grounds exist for supposing that other party to marriage is dead may apply to Court to have it presumed that other party is dead and to have marriage dissolved, and Court, if satisfied that such reasonable grounds exist, may make decree nisi of presumption of death and of divorce. In such proceedings, fact that other party to marriage has been continually absent from plaintiff for period of seven years or upwards, and plaintiff has no reason to believe that other party has been living within that time, is evidence that he or she is dead until contrary is proved.

Interim and Final Judgment of Divorce.

If Court is satisfied that there is ground for divorce under Act, interim judgment will be granted which will not be made absolute before expiration of three months from its grant unless Court by general or special order from time to time fixes shorter period.

When granting decree of divorce, judicial separation or nullity of marriage, Court has power to order: (a) division of matrimonial assets; (b) payment of maintenance; and (c) custody of children of marriage.

Divorce in Islam.

Divorce in Islam, although permitted, is not encouraged. Divorce can be effected by Talak, Khu'lu or Fasakh.

Divorce by Talak may be effected once husband utters words of divorce.

Where husband does not agree to divorce wife but agrees to divorce by Khu'lu (redemption), Syariah Court may assess amount of payment to be made by wife according to her status and means. Husband will then have to pronounce divorce by redemption.

Married woman may apply for and obtain decree of Fasakh (divorce or rescission by judicial decree) on any ground which is recognised as valid for dissolution of marriage by Fasakh in Islamic law including defects in either spouse such as insanity (whether intermittent or permanent), leprosy, vitiligo and dangerous contagious disease or apostasy of either spouse.

When registering divorce, President of Syariah Court has power to order: (a) division of harta sepencarian (assets acquired by them during marriage); (b) payment of maintenance during Iddah (period of continence) and payment of mutaah (consolatory gift) which wife is entitled to in event of divorce by Talak and Fasakh; and (c) custody of children of marriage. See also topic 12.05 Marriage, subhead Muslim Marriages.

12.03 HUSBAND AND WIFE:

Rights and Duties.

Under Women's Charter (Cap. 353) husband and wife are mutually bound to cooperate with each other in safeguarding interests of union and in caring and providing for children. Husband and wife have right separately to engage in trade or profession or in social activities and have equal rights in running of matrimonial household.

Wife has right to use her own surname and name separately. Wife may apply to Court for maintenance if husband neglects or refuses to provide her with reasonable maintenance.

Capacity of Married Woman.

Married woman can acquire, hold and dispose of, property and be liable for tort, contract, debt or obligation and can sue and be sued in her own name either in tort or in contract or otherwise and is entitled to all remedies and redress for all purposes and is subject to law relating to bankruptcy and to enforcement of judgments and orders.

12.04 INFANTS:

Age of majority is 21 years.

Actions By or Against Infant.

Can only be commenced by next friend and defended by guardian ad litem.

Contracts With Infants.

Following common law, generally unenforceable as against infant and voidable at option of infant, except contracts for necessaries (necessary goods and services supplied to infant) and contracts of apprenticeship, education and service. Such voidable contracts may be of two types: binding on infant unless repudiated during minority or within reasonable time of infant attaining majority, or not binding on infant unless and until ratified after attaining majority.

Infant is competent to enter into contract of service as employee under Employment Act (Cap. 91) but such contract is not enforceable as against infant unless it is for his benefit.

Wills.

Under Wills Act (Cap. 352), will made by infant is not valid unless privileged will, i.e. will made by soldier (including member of naval, marine or air forces) in actual military service or mariner or seaman at sea, even though below age of majority.

12.05 MARRIAGE:

All marriages contracted in Singapore must be monogamous and must comply with formalities laid down in Women's Charter (“Act”). (Cap. 353). Act does not, however, apply to marriage where both parties are Muslims.

Legal Requirements.

Requirements stated in Act must be satisfied before couples can get married under Act. Couples must be at least 21 years of age and one party must be resident of Singapore for at least 15 days preceding date of notice. If either party is below age of 18, special marriage licence from Minister must be obtained. Parties must not be within prohibited degrees of consanguinity unless approved by Minister.

Procedure.

Registrar of Marriages will only issue marriage licence upon expiry of 21 days' notice of intended marriage. Marriage licence is valid for three months from date of notice.

Minister may, if he thinks fit, dispense with giving of notice and may grant special marriage licence authorising solemnisation of marriage between parties named in licence. However, Minister may only exercise his discretion if there is urgent need and good reason. Special licence is valid for one month from date of issue.

Solemnisation of marriage can take place after 21 days or within three months from date of notice, subject to availability of dates. Once marriage is solemnised, it must be registered.

Muslim Marriages.

For marriage to be valid in Islam, there must be offer of marriage by one party which offer must be accepted by other party. Words must indicate with reasonable certainty that marriage has been contracted. There must be two witnesses.

Each party must be at least 16 years old. Deputy Registrar of Muslim Marriages (Kathi) may however solemnise marriage of girl under 16 if she has attained puberty.

Parties must apply to marry by completing prescribed form and making statutory declaration declaring truth of particulars given. Marriage must be registered and marriage register signed by both bride and groom. Consent of bride is necessary.

Register of Muslim Marriages must include particulars of Mas-Kahwin and of any gifts given by husband. Mas-Kahwin is obligatory payment due under law to wife at time of marriage and may be paid in cash or in kind and can either be paid promptly or deferred. See also topic 12.02 Divorce, subhead Divorce in Islam.

13 FOREIGN TRADE AND COMMERCE

13.01 EXCHANGE CONTROL:

Although there is Exchange Control Act (Cap. 99) on statute books, it has not been in operation as law in Singapore since 1 June 1978. In effect, there are no exchange control restrictions applicable in Singapore. However, there is general policy against “internationalisation of the Singapore dollar”. See also category 1 Introduction, topic 1.01 Currency.

13.02 FOREIGN EXCHANGE:

There are no exchange control regulations applicable in Singapore although authorizing legislation remains on statute books. See topic 13.01 Exchange Control.

Foreign exchange trading, however, is supervised generally by Monetary Authority of Singapore. Foreign exchange broking or advice on leveraged basis is (subject to certain exceptions) licensable under Securities and Futures Act. (Cap. 289).

13.03 FOREIGN INVESTMENT:

Exchange Control.

No exchange restrictions on flow of capital in or out of Singapore.

Tax Incentives.

Singapore actively encourages foreign investment. Under Economic Expansion Incentives (Relief from Income Tax) Act (Cap. 86), various tax incentives are given to certain pioneer enterprises, pioneer service companies, established enterprises wanting to expand, and companies exporting goods or services. Tax incentives are also given to venture capital companies, countertrade companies, international oil traders, and for warehousing and servicing operations for certain products, international consultancy services, research and development activities, headquarters operations and product development activities. There are many tax incentives under Income Tax Act. (Cap. 134). Shipping profits are exempt from tax. Other incentives include concessions for approved headquarters companies, fund management companies, securities companies, and investment companies and for Asian Currency Unit (ACU) activities.

Real Property.

There are some restrictions on types of residential property that may be owned by foreigners. (Residential Property Act, Cap. 274).

13.04 FOREIGN TRADE REGULATIONS:

Port of Singapore and Changi Airport Cargo Terminal Complex are designated free trade zone. There is little regulation over goods in transit, but there are regulations applicable to imports into, and, to lesser extent, exports out of Singapore. Subject matter of regulation includes levying of customs duties including anti-dumping tariffs, requirement of import/export licences, control of products like certain animals, wildlife, drugs, poisons, petroleum and tobacco products, control of prices for some products, and prohibition of import of products containing certain drugs, counterfeit trademarks, pornography, indecency or other undesirable elements.

See also topic 13.03 Foreign Investment.

14 HEALTH

—Scope —

Centre for Pharmaceutical Administration (“CPA”) which is governed by Ministry of Health enforces following health legislation: Medicines Act and its Regulations, Poisons Act and its Rules, Misuse of Drugs Regulations, Medicines (Advertisement and Sale) Act, Sale of Drugs Act and Smoking (Control of Advertisements and Sale of Tobacco) Act.

14.01 ADVANCE MEDICAL DIRECTIVE ACT:

Purpose of Act is to allow futile medical treatments to be withdrawn for terminally ill persons who are unable to voice their requests at that time and who may want to be spared further suffering and be allowed to die naturally in peace and with dignity. Advance Medical Directive (AMD) is thus legal document executed before doctor and another witness above 21 years of age and then registered with Registrar of AMD. Execution of AMD is entirely voluntary. Lawyer is not required. AMD forms are available from private clinics, polyclinics or downloaded from Ministry of Health website at http://www.moh.gov.sg.

14.02 DRUGS:

It is offence under Sale of Drugs Act to sell drugs containing prohibited substances or containing greater proportion than permitted under Act. Sale of adulterated drugs is offence when consumer is not given complete information regarding nature of adulteration of drug at time of purchase. Act also sets out circumstances in which drug is presumed adulterated. Penalty varies from fine to imprisonment.

14.03 FOOD:

Sale of food is governed by Sale of Food Act and enforced by Director-General of Agriculture Food and Veterinary Services. All imports, advertisements, manufacture, sale, consignment or delivery of prepacked food must bear label containing common name or description to indicate true nature of food, ingredients specified in descending order of proportions by weight, specifically including synthetic colouring tartrazine if it is present, minimum quantity of food, name and address of manufacturer, packer or local vendor or importer, distributor or agent and name of country of origin of food if food is imported. No misleading statements are allowed on labels or advertisements. Sale of food manufactured, prepared, preserved, packaged or stored under unsanitary conditions is not allowed.

14.04 GUIDELINES ON ADVERTISEMENTS CLAIMING RELATION TO MEDICAL PROFESSION:

Legislation passed by Ministry of Health, objective being to regulate claims in advertisements which claim relation to medical procedures. This is to prevent misleading of public which may not be aware of difference between PhD and MD and who may then place unwarranted importance on title “Dr”. Thus, among many other prohibitions, advertisements may not import medical endorsements or endorsements by medical professionals in specialised fields. Generic terms are permitted but not word “treatment” as that is deemed non-generic term.

14.05 MEDICINAL PRODUCTS:

All medicinal products, unless exempted, imported into or sold within country require relevant licences from CPA. Medicinal product means any substance which is administered to human beings and animals for diagnosis, prevention or treatment of ailments including preparations intended for promotion of health, for anaesthesia or for contraception. Importer of medicinal product is responsible for obtaining relevant licences failing which he can be subject to fines and forfeitures. Relevant licences are Import Licence, Product Licence, Approval to Import Medicinal Products for Re-Export and Wholesale Dealer's Licence.

14.06 SMOKING:

Smoking (Control of Advertisements and Sale of Tobacco) Act aims to dissuade smoking, especially targeting youths. This Act reduces accessibility by youths to tobacco products, bans advertisements and sales promotion of tobacco products, mandates provision of health warning labels on tobacco packs and limits tar and nicotine contents in cigarettes. Smoking (Prohibition in Certain Places) Act prohibits smoking in specific places, usually public places and public service vehicles.

15 IMMIGRATION

15.01 IMMIGRATION:

Governed by Immigration Act. (Cap. 133).

General.

Non-Singapore citizen can enter Singapore if he has valid entry or reentry permit or if name endorsed on entry or reentry permit of accompanying husband/father, or if he has valid pass, or if specially exempted by Minister For Home Affairs. He must not be prohibited immigrant.

Foreigners seeking employment in Singapore need to apply for Work Pass from Ministry of Manpower. There are few categories of work pass:

Employment Pass

Foreign professionals, executives with recognised qualifications and fixed monthly salary of more than S$2,500, may apply for one of 3 types (P1, P2, or Q) of Employment Pass.

Employment Pass P issued for foreigners seeking professional, managerial, executive, and specialist jobs. Divided into P1 Pass and P2 Pass. P1 Pass issued to foreigners earning fixed monthly salary of more than S$7,000. Foreigners who possess recognised qualifications, earning fixed monthly salary of more than S$3,500 and up to S$7,000 are issued P2 Pass.

Employment Pass Q issued to foreigners who possess recognised qualifications and earning fixed monthly salary of more than S$2,500. In lieu of recognised qualifications, skills and years of experience may be taken into consideration.

Short-Term Employment Pass issued to foreigners who wish to work in Singapore on specific project, assignment up to maximum period of one month. Applicant should earn fixed salary of more than S$2,500 and have recognised qualifications.

Personalised Employment Pass (PEP) which is not tied to any Employer is issued under new scheme. Overseas foreigner professionals, overseas former P1 holders, foreign graduates from institutes of higher learning in Singapore, P1, P2 and Q Pass holders are eligible to apply. PEP allows holder to take on employment in any sector and remain in Singapore for up to six months between jobs to evaluate new employment opportunities. Granted on strength of applicant's individual merits upon satisfaction of certain criteria. PEP issued only once. Valid for five years, not tied to any employer, and non-renewable. PEP holders continue to enjoy dependants' privileges of their original pass or dependants' pass corresponding to their higher-paying jobs.

S Pass issued to foreign mid-level skilled workers who earn fixed monthly salary of at least S$1,800. Applications assessed on quota and point system, taking into criteria, salary, education qualifications, skills, job, and type of experience. Employers are required to purchase and maintain medical insurance coverage of at least S$5,000 for their S Pass employees. Only S Pass holders who earn more than S$2,500 per month may apply for Dependent's Pass for family members.

Work Permit

There are two types:

Work Permit (Foreign Worker).— Employers of foreign employees who are 16 but below 58 years old (50 for Malaysians), taking home monthly basic salary less than $1,800 need to apply for work permit for employee. Foreign workers from Hong Kong, Macau, South Korea, Taiwan, India, Sri Lanka, Thailand, Bangladesh, Myanmar, Philippines, Pakistan, and People's Republic of China are not allowed to be in Singapore when work permit applications are being submitted. Children (seven years and above) of work permit holders who wish to study in school (National Schools) need to take and pass qualify test. Employer of Foreign Worker has responsibility to pay Foreign Worker levy and ensure worker is covered by medical insurance.

Work Permit (Domestic Worker).— New Foreign Domestic Worker (FDW) must be between age of 23 and 50 years old and have minimum of eight years of formal education. Employer of FDW is required to provide security bond, pay monthly FDW levy, and ensure that FDW is covered by medical insurance.

Others

Dependant's Pass.— Employment Pass holders and selected S Pass holders can apply for Dependant's Passes for spouse or unmarried/legally adopted children under 21 years of age.

Entrepass is Employment Pass for foreign entrepreneurs who would like to start and actively involve in new company/business in Singapore. Proposed business venture must be of entrepreneurial nature, not be engaged in illegal activities.

Employment Pass Eligibility Certificate (EPEC) allows foreigners to stay in Singapore for up to one year to facilitate job search in Singapore. It is not work pass; does not allow holder to work.

Long-Term Social Visit Pass.— Employment Pass holders (P1, P2) can apply for Long-Term Social Visit Passes for common-law spouse, unmarried daughters above 21 years of age, parents, parents-in-law, step-children, and handicapped children. Long-Term Social Visit Pass holders who wish to work in Singapore must apply for work pass.

Miscellaneous Work Pass.— From 1 Feb. 2008, certain groups of foreigners, e.g. seminar organiser and religious worker journalist, entering Singapore for short-term assignments are required to apply for Miscellaneous Work Pass.

Training Employment Pass.— Foreigners undergoing practical training attachments for professional, managerial, executive, and specialist jobs in Singapore should apply for Training Employment Pass.

Training Work Permit for unskilled and semi-skilled foreign trainees undergoing practical training for up to six months.

Passes for Confinement Nannies.— Malaysians who wish to work in Singapore as confinement nannies may apply for temporary work permit.

Work Holiday Programme allows university students, recent graduates between 17 and 30, to come to Singapore to live and work for up to six months. Foreign students from approved institutions are allowed to work without work permit.

Work Passes for Foreign Spouses of Singapore Citizens.— Foreigner married to Singapore citizen can apply for work pass to work in any economic sector.

Permanent Residence.

Controller of Immigration may issue entry permits to persons wishing to be Singapore Permanent Residents, and reentry permits to Singapore Permanent Residents wishing to reenter Singapore. Local sponsors are required for applications for entry permits. Five ways to acquire permanent residence as follows: (1) Spouse or unmarried children below 21 years of Singapore citizen or Singapore Permanent Resident. (2) Aged parents above 55 years of Singapore citizen. (3) P, Q or S work pass holders. (4) Hong Kong Residents. Special scheme for persons born in Hong Kong or who have or had rights of abode in Hong Kong. Applicant must possess, in general, acceptable educational or professional qualifications and/or relevant working experience.

In addition, foreigner may be granted permanent residence based on investment. Permanent Residence for investors administered by Economic Development Board (EDB) for foreigner who is interested to start up business or invest in Singapore. Under scheme, investor can choose either of following investment options: (1) Invest at least S$1 million in new business startup or expansion of existing business operation or; (2) invest at least S$1.5 million in new business startup, expansion of existing operation, approved Singapore-incorporated venture capital fund or Singapore-incorporated foundation or trust that focuses on economic development or; (3) invest at least S$2 million in new business startup, expansion of existing operation, approved Singapore-incorporated venture capital fund or Singapore-incorporated foundation or trust that focuses on economic development. Residential property can be purchased with not more than 50% of investment amount.

Applicant should satisfy EDB of following criteria: (1) Substantial business track record; (2) entrepreneurial background; (3) business proposal or investment plan.

Visas.

Required for entry into Singapore if foreigner is holder of: (a) Hong Kong Document of Identity; (b) Macau SAR Travel Permit; (c) Refugee Travel Document issued by Middle East countries; (d) Palestinian Authority Passport; (e) travel document issued by following countries: Afghanistan, Algeria, Commonwealth of Independent States (Armenia, Azerbaijan, Belarus, Georgia, Kazakhstan, Kyrgystan, Moldova, Russia, Tajikistan, Turkmenistan, Ukraine, Uzbekistan), Egypt, Iran, Iraq, Lebanon, Libya, Morocco, Pakistan, Saudi Arabia, Somalia, Sudan, Syria, Yemen. Foreigners holding travel documents from Bangladesh, India, Jordan, Myanmar and Tunisia will also require visa except if they hold diplomatic and official passports. In addition, foreigners holding travel documents from People's Republic of China require visa except for those with diplomatic passports for stay of up to 30 days.

Security Deposit.

Security by bond, guarantee, cash deposit or by other method, may have to be furnished as condition for issue of pass. Security provided is for purpose of ensuring compliance with immigration provisions, or conditions imposed in respect of pass.

16 INTELLECTUAL PROPERTY

16.01 COPYRIGHT AND REGISTERED DESIGNS:

Copyright.

Statute.

Copyright Act. (Cap. 63) and Copyright Regulations.

Treaties.

Singapore has been member of Berne Convention since 1998. Singapore's Copyright Act is presently in full compliance with requirements under TRIPS Agreement. In Sept. 1998, Singapore joined Berne Convention.

Protection.

Works covered under Act comprise literary (which includes computer programmes and compilations), dramatic, musical and artistic works, sound recordings, cinematograph films, broadcasts, cable programmes and typographical format of published editions of work. No registration is required.

In respect of literary, dramatic, and musical works (“works”), copyright extends to: (a) making reproductions in material form; (b) publishing unpublished work in Singapore or any country to which Act applies; (c) performing work in public; (d) communicating work to public (i.e. transmitting by electronic means including broadcast or by including work in cable programme); and (e) making adaptations of work.

In respect of artistic works, only (a), (b), and (d) apply. For sound recordings, copyright extends to making copy, renting out, publishing, and making sound recording available to public by means of digital audio transmission. For cinematographic films, copyright extends to copying film, causing film to be seen in public, and communicating film to public. In case of television and sound broadcast, copyright extends to making recording of broadcast, causing broadcast to be seen or heard before paying audience and rebroadcasting or otherwise communicating to public. As for published editions of works, copyright is confined to right to make reproduction of edition. In respect of computer programs, copyright includes entering into commercial rental arrangement for computer program.

For works, copyright has basic term of life of author and 70 years thereafter. If work published after death of author, term is 70 years from date of first publication. For sound recording and cinematograph film—70 years from year of first publication. For television and sound broadcast—50 years from year broadcast was made. For cable programme—50 years from year in which programme was first included in cable service. For published editions of works—25 years from year of first publication.

Act has provided for performers' protection and border enforcement measures.

Assignment.

Copyright can be assigned, but assignment must be in writing and signed by or on behalf of assignor.

Licence.

Copyright can be licensed either on exclusive or non-exclusive basis. Exclusive licence must be in writing. Licence binds every successor in title to copyright owner except for purchaser in good faith for value without notice (actual or constructive) of licence or person deriving from such purchaser.

Infringement of copyright takes place where, without permission of copyright owner, rights reserved exclusively to copyright owner (see supra) are exercised by someone other than copyright owner. Secondary infringement takes place where person sells, lets or hires or by way of trade offers or exposes article for sale or hire, manufactures article for sale, distributes article for purpose of trade or to an extent sufficient to prejudicially affect copyright owner, or exhibits article in public by way of trade and knows or reasonably ought to know that making of article was infringement or without consent of copyright owner. Similarly, infringement takes place if person possesses or imports article for above purposes.

Civil remedies include injunctions, delivery up of infringing copies and tools, and either damages, account of profits or statutory damages. Criminal sanctions are provided for in certain circumstances under Act and include heavy fines and even imprisonment.

Registered Designs.

Statute.

Registered Designs Act (Cap. 266) and Registered Designs Rules which repealed United Kingdom Designs (Protection) Act (Cap. 339).

Priority may be claimed for applications filed within six months from date of first application filed in Paris Convention or World Trade Organisation member country.

International Registration of Designs.

Singapore has acceded to Geneva Act of Hague Agreement. Therefore, applicant overseas who files for design application under Geneva Act of Hague system can designate Singapore as one of countries in which to register his design. Similarly, any applicant with real and effective industrial or commercial establishment in, or who is domiciled in, or national of Singapore can file application under Geneva Act of Hague system via Intellectual Property Office of Singapore.

Registrability.

To be registrable, design must be new and have features of shape, configuration, pattern or ornament applied to article by any industrial process. Design is not considered new if it has already been registered or published in Singapore or anywhere else in world before application is filed. Designs do not include method, principle of construction nor features of shape or configuration of article dictated solely by function. Designs also do not include features that are dependent upon appearance of another article to which it is intended to be integral part. They also exclude features that enable article to be connected to, placed in or around article so that either article may perform its function. Layout-designs of integrated circuits cannot be registered under Registered Designs Act but may be protected under Layout-designs of Integrated Circuits Act (Cap. 159A).

Duration.

Registered design is valid for initial period of five years from date of registration and may be extended for another two five-year periods subject to payment of renewal fees.

Rights.

Proprietor of registered design owns exclusive right to make or import registered design and any articles in respect of same into Singapore, for sale, hire or use for purposes of trade or business. Registered design may be assigned, licensed or transferred.

Infringement.

Person who does any of above acts with regard to registered design without consent of its registered proprietor is liable for design infringement. Proprietor may seek relief in form of injunctions, damages or account of profits. Court may also order delivery of infringing copies or for infringing copies to be destroyed or forfeited.

16.02 PATENTS:

Statute.

Governed by Patents Act 1995 (Cap. 221) and Patent Rules.

Treaties.

Patent Cooperation Treaty 1970; Budapest Treaty; Paris Convention.

Procedure.

For domestic application, there are four stages: (1) First stage involves filing application in requisite form with prescribed fee. Application must contain: (a) request for grant of patent; (b) specification containing description of invention; claim or claims defining matter for which applicant seeks patent protection and any supporting drawings; and (c) abstract which provides technical information concerning invention. If application is in order, filing date is given to application. (2) At second stage, Registry conducts formalities examination to ensure compliance with all formal requirements specified in Rules. If necessary, Registrar will give applicant opportunity to make amendments. (3) At third stage, applicant files request for preparation of either search report to be followed by request for examination report, or combined search and examination report in respect of invention. Alternatively, applicant may rely upon search or search and examination conducted by prescribed foreign patent office on corresponding patent application. Publication takes place as soon as possible after 18 months from declared priority date in absence of declared priority date, date of filing application. (4) Finally, patent will be granted if all requirements are met, there are no unresolved unity of invention objections, and grant of patent will not result in double patenting by applicant. For patent applications filed on or after 1 July 2004, patent may either proceed to grant within 42 months of filing date (or declared priority date) by way of default “fast track” examination system, or within 60 months by requesting “slow track” examination system. For applications which have filing or priority date before 1 July 2004, applicant must request issuance of Certificate of Grant and pay fee within 54 months.

Alternatively, international application may be filed under Patent Cooperation Treaty at any one of world-wide Receiving Offices, and Singapore may be considered as one of countries in which to seek patent protection in national phase of application. Registry in Singapore is also Receiving Office under Treaty.

Priority.

Patent applications filed in Singapore may be based on earlier application made in Singapore or in another country up to 12 months earlier provided that country is party to Paris Convention. If this is done, filing date of earlier application becomes “priority” date of new application.

Duration of Protection.

Grant of patent confers on owner exclusive right to exploit invention for 20 years from date of filing provided that renewal fees are paid annually commencing from expiration of fourth year from date of filing.

Assignment/Licence.

Rights under patent or patent application may be assigned provided assignment is in writing and signed by or on behalf of parties to transaction. Licence may also be granted for working invention which is subject of patent.

Compulsory Licence.

If necessary to remedy anti-competitive practice, Act provides for grant of compulsory licences. There are also provisions touching on Use of Patented Inventions for Services of Government where use by Government of certain inventions does not constitute infringement.

Infringement.

Patent is infringed if anyone without consent of proprietor makes, disposes of, offers to dispose of, uses or imports patented product or keeps it whether for disposal or otherwise. Same applies to patented process if unauthorised person uses it or does any of above acts in relation to product directly obtained by means of process.

Remedies include injunctions, damages, account of profits, and delivery up.

16.03 PLANT VARIETIES PROTECTION:

Statute.

Plant Varieties Protection Act (2004) and Plant Varieties Protection Rules.

Treaties.

Singapore is member of International Convention for Protection of New Varieties of Plants (UPOV). Priority may be claimed for applications filed within 12 months from date of first application in UPOV member country.

Duration of Protection.

Grant confers on owner exclusive right to produce or reproduce, condition for purpose of propagation, offer for sale, market, export, import, or stock for any aforesaid purpose for 25 years from date of grant subject to payment of annual fees.

Registrability.

Currently 15 plant genera and species are eligible for protection under Act. To be protected, candidate variety must meet criteria of novelty, distinctness, uniformity and stability and applicant must be breeder (individual or company) of candidate variety. Application must include description of candidate variety, proposed denomination of candidate variety and priority particulars, if any. Descriptions of origin and breeding of candidate variety, of botanical features of candidate variety, and of distinguishable characteristic from most similar plant variety known to applicant may be required to be provided in prescribed period for technical examination in addition to propagating material of candidate variety. Examiner will establish whether candidate variety is distinct, uniform and stable, verify that candidate variety belongs to stated botanical taxon and establish official description of variety.

Infringement occurs if anyone whom without consent of owner performs any act in scope of grant unless acts were done privately and for non-commercial purposes, for any experimental or research purpose, or for purpose of breeding another plant variety. Remedies for infringement include injunctions, account of profits or damages for losses attributable to infringement.

16.04 TRADEMARKS:

Statutes.

Governed by Trade Marks Act (Cap. 332) and Trade Marks Rules. Registration is possible for services as well as goods.

Treaties.

Priority may be claimed for applications filed within six months from date of first application in Paris Convention or World Trade Organisation member country.

Trademark means any sign capable of being represented graphically and which is capable of distinguishing goods or services dealt with or provided in course of trade by person from goods or services so dealt with or provided by any other person. “Sign” may include any letter, word, name, signature, numeral, device, brand, heading, label, ticket, shape, colour, aspect of packaging or any combination thereof. Singapore law also allows for registration of non-conventional trademarks comprising sounds or smells.

Madrid Protocol.

Singapore has acceded to Madrid Protocol. Hence, applicant overseas who files for trademark application under Madrid Protocol can designate Singapore as one of countries in which he wants his mark to be registered. Similarly, any applicant with real and effective industrial or commercial establishment in, or is domiciled in, or is national of Singapore can file application under Madrid System for International Registration of Marks via Intellectual Property Office of Singapore.

Registrability.

Trade Marks Act lists absolute and relative grounds for refusal of registration for mark. Trademarks are registrable if they satisfy trademark definition; are of distinctive character; do not consist exclusively of signs or indications which may serve, in trade, to designate kind, quality, intended purpose, value, geographical origin, time of production of goods or exclusively of signs or indications which have become customary in current language or in bona fide and established practices of trade.

Trademark cannot be registered if it contains or consists of geographical indication in respect of wine or spirit and trademark is used or intended to be used in relation to wine or spirit not originating from place indicated; if it is contrary to public policy or to morality or of such nature as to deceive public or is likely to cause confusion with earlier marks. Revised Edition 1999 of Trade Marks Act has abolished system of separating applications and registered trademarks into Part A and Part B.

Protection.

Upon registration of mark, it remains valid for initial term of ten years from date of filing of application which may then be renewed for subsequent terms of ten years each.

Assignment.

Trademark may be assigned with or without goodwill of business. Under Act, all assignments must be registered with Trade Marks Registry.

Infringement.

Infringement occurs when, without consent of proprietor, there is use of registered trademark in course of trade. Well-known trademarks are afforded greater scope of protection. If infringement proven, proprietor has recourse in form of injunction plus either demand for profits gained by infringer or damages for losses due to infringement. If use of counterfeit trademark is proven, proprietor may alternatively seek statutory damages.

Common Law Rights.

Rights of action against person for tort of “passing off” or remedies in respect thereof have not been affected by provisions of Act. To succeed, plaintiff must show: (a) goodwill or reputation in his mark or business; (b) misrepresentation made by defendant in course of trade which is calculated to injure plaintiff's goodwill or business; and (c) damage has occurred or is likely to occur.

Multi-class Applications.

Multi-class registration is now allowed. Registration will be maintained as one despite multiple classes, only one renewal needs to be effected for all classes under multi-class registration.

Recordal of Licence.

Previously, only licences relating to registered trade marks can be recorded on register. It is now possible to record licence relating to pending trade mark.

17 LEGAL PROFESSION

17.01 ADVOCATES AND SOLICITORS:

See topic 17.02 Attorneys and Counselors.

17.02 ATTORNEYS AND COUNSELORS:

Fused legal profession consisting of advocates and solicitors of Supreme Court and governed by Legal Profession Act. (Cap. 161).

Admission.

Regulated by Legal Profession Act. To qualify for admission to Bar, intending advocate and solicitor must satisfy one of following criteria:

Graduates from Singapore.

If admitted as candidate to read law at National University of Singapore ("NUS") on or after 1 May 1993, must pass final examinations with at least lower second class honours.

Graduates from U.K.

(1) If graduated from U.K. before 1 May 1993, must either be admitted as barrister or solicitor in U.K. or obtain Diploma in Singapore Law from NUS. (2) If admitted as candidate to read law in U.K. before 1 May 1993 and graduate after that date, must either be admitted as barrister or solicitor in U.K. or obtain Diploma in Singapore Law from NUS. (3) If admitted as candidate to read law in U.K. on or after 1 May 1993 and commenced reading law in U.K. before 1 Jan. 1994 and graduate before 1 Jan. 1997, must either be admitted as barrister or solicitor in U.K. or obtain Diploma in Singapore Law from NUS. (4) If admitted as candidate to read law in U.K. on or after 1 May 1993 and commence reading law on or after 1 Jan. 1994 and graduate before 1 Jan. 1997, must be full-time internal student at recognised U.K. university, and must either be admitted as barrister or solicitor in U.K. or obtain Diploma in Singapore Law from NUS. (5) If admitted as candidate to read law in U.K. on or after 1 May 1993 and commence reading law on or after 1 Jan. 1994 and graduate on or after 1 Jan. 1997, must be full-time internal student and obtain at least upper second class from recognised U.K. university and obtain Diploma in Singapore Law from NUS.

Graduates from Recognised Commonwealth Universities.

Must have commenced reading law at recognised Commonwealth universities before 1 Jan. 1994 and must graduate and must obtain certificate from Board of Legal Education that intending advocate and solicitor is of sufficient standing. Committee on Supply of Lawyers has recommended to recognise for admission to Singapore Bar: top 30% of graduating class from recognised Australian and New Zealand universities; law graduates of approved dual-degree programmes in recognised universities; and law graduates of approved two-year LLB programmes in recognised universities.

External Graduates.

As general rule, no person who on or after 1 Jan. 1996 is conferred degree of Bachelor of Laws other than as full-time candidate in U.K., will be eligible for Bar.

Person who in 1996 is conferred degree of Bachelor of Laws other than as full-time internal candidate in U.K. is eligible for admission if he is: (a) admitted as candidate for that degree before 1 May 1993; and (b) admitted as barrister or solicitor in U.K. or obtained Diploma in Singapore Law from NUS.

Malayan Practitioners.

May be admitted if Malayan practitioner has been in active practice in any part of Malaysia for continuous period of at least three years in four years immediately preceding petition for admission or if not in active practice, has satisfied Board of Legal Education in such examination as may be prescribed by Board and therefore not required to serve pupillage in Singapore or attend any course of instruction.

Hong Kong Practitioners.

May be admitted if Hong Kong practitioner has been admitted as advocate and solicitor pursuant to petition filed before 1 Jan. 1995 and is partner or associate of or employed by advocate and solicitor of at least 12-years standing. If he has practised for period of at least two years and has during that period resided in Singapore for at least 12 months in aggregate, he shall be entitled to practise as advocate and solicitor without being subject to that restriction.

Special Category.

Persons with exceptional qualifications or expertise may be exempted from any of above criteria by Minister of Law after consultation with Board of Legal Education.

Other Requirements.

Unless exempted by Board of Legal Education, all intending advocates and solicitors must serve six months' pupillage and attend course of instruction (Practical Law Course) lasting about five months. At end of course, must sit for examinations.

Immigration Requirements.

Not necessary for non-Singapore citizens to seek clearance from immigration authorities to be admitted to the Bar. But non-Singapore citizens wishing to live and work or undergo training in Singapore are required to apply to Immigration & Checkpoints Authority (ICA), 10 Kallang Road, SIR Building, Singapore 208718, Tel: 6391 6106, for employment pass or training pass as case may be. Permanent residents of Singapore within meaning of Immigration Act (Cap. 133) are not required to seek permission from immigration authorities.

Senior Counsel.

Selection committee may appoint advocate and solicitor or legal officer as Senior Counsel if by virtue of person's ability, standing at Bar he is deserving of such distinction.

Professional Bodies.

Law Society of Singapore.

39 South Bridge Road, Singapore 058673. Tel: 6538 2500. Objectives are, inter alia, to: (a) further interests of legal profession and its members; (b) assist Government and courts in matters affecting legislation, administration and practice of law; and (c) assist public in matters concerning law.

Board of Legal Education: 9th Floor, Conference Room, Subordinate Courts, 1 Havelock Square, Singapore 059724. Tel: 6534 1831. Responsible for registration of qualified persons seeking admission, training, education and examination of qualified persons and supervision over pupils.

Academy of Law: 1 Supreme Court Lane, Level 6, Singapore 178879. Tel: 6332 4388. Responsible for inter alia, promotion and maintenance of high standards of conduct, promotion of advancement and dissemination of knowledge of laws and legal system, promotion of research and scholarships and provision of continuing legal education and promotion of fellowship and social interaction amongst members of legal profession and persons in administration of law and justice in Singapore.

Enquiries relating to Diploma in Singapore Law should be directed to Director of Postgraduate Studies, Faculty of Law, NUS at 10 Kent Ridge Crescent, Singapore 119260.

Foreign law firms wishing to establish office may apply to Attorney General's Chambers: 1 Coleman Street, #10-00, Singapore 179803. Tel: 6336 1411 for approval criteria. Foreign law firm may now enter into joint venture with Singaporean law firm upon having their application approved by Attorney General. Foreign lawyers employed under such joint law ventures are entitled to practise Singapore law in areas of legal practice mutually agreed between law firms constituting Joint Law Venture provided such foreign lawyers shall not represent any party before any judicial, arbitral or tribunal or body in Singapore. Foreign law firm may also apply with Singapore law firm to be registered as Formal Law Alliance. Such registration will be on terms and conditions and for such period as Attorney General may think fit. Foreign law firm or Singapore law firm may apply for registration of more than one formal alliance and registered Formal Law Alliance may comprise more than two constituent law firms.

18 MORTGAGES

18.01 CHATTEL MORTGAGES:

Mortgages of chattel, except mortgages and debentures created by companies and registrable under Companies Act (Cap. 50), are registrable under Bills of Sale Act (Cap. 24). Mortgages of and floating charges over chattels, and any charge over any ship or aircraft, of company are registrable under Companies Act. This applies to property wherever situate for Singapore incorporated companies, and to property in Singapore for foreign companies registered in Singapore. Such charges must be registered within 30 days of execution (with extension of seven days for documents executed outside Singapore). Otherwise charge is void against liquidator and creditors of company.

Mortgages of Singapore ships are also registrable under Merchant Shipping Act. (Cap. 179). No additional provisions for registration of aircraft mortgages.

See also categories 2 Business Organizations, topic Corporations; Business Regulation and Commerce, topic Bills of Sale.

18.02 COLLATERAL SECURITY:

See category 7 Debtor and Creditor, topic 7.09 Pledges.

18.03 MORTGAGES:

Conveyancing and Law of Property Act (Cap. 61) stipulates that legal mortgages can only be created by way of deed in English language. Form of mortgage will be conveyance for freehold estates, or assignment for leasehold estates, by mortgagor of his interest in land to mortgagee with proviso for redemption when mortgage debt is repaid in future.

Equitable mortgages are also recognised, i.e., those which arise where mortgagor only has equitable interest in land or where mortgagor has deposited title deeds over land coupled with intention to create mortgage.

Act contains provisions conferring several rights and remedies to mortgagee which include foreclosure, sale, insurance, appointment of receiver and granting of leases over mortgaged property.

Registration is required for protection of legal mortgages under Registration of Deeds Act (Cap. 269) and Land Titles Act (Cap. 157), as priority of instruments under these Acts are determined according to time of registration. Equitable mortgages are protected by lodgement of caveats in relevant Registries. See category 19 Property, topic 19.07 Real Property, subhead Registration.

19 PROPERTY

19.01 ABSENTEES:

Person may delegate authority to person of full legal capacity by way of power of attorney setting out scope and nature of donee's powers and authorities.

Powers of Attorney can be made irrevocable for fixed period of time and if so, there is protection offered to purchaser from donee of such power of attorney. Powers of Attorney executed in Singapore or elsewhere, intended to be used in Singapore are in practice deposited in Registry of Supreme Court of Singapore; office copy of such Power of Attorney being so deposited is without further proof sufficient evidence of contents of instrument.

As long as memorandum and articles of association permit, company can by resolution appoint person to be attorney for corporation; and deed executed by such attorney binds company.

19.02 ADVERSE POSSESSION:

No title to land adverse or in derogation of title of proprietor of registered land can be acquired by any length of possession under Limitation Act (Cap. 163), i.e., there is no recognition of adverse possession claims under this system save for those entitled to lodge applications for possessory title and have done so before 1 Mar. 1994 or within six months thereafter.

19.03 DEEDS:

For individuals, every deed must be signed, sealed and delivered by party to be bound or by his attorney and attested by one witness.

For corporations, common seal must be used in accordance with company's Articles of Association. Usually affixing of common seal will be in presence of two directors or director and secretary. Person authorised by power of attorney to execute deeds on behalf of corporation may execute deed by signing his own name as attorney for corporation and affixing his seal thereto.

With respect to transactions involving land under Registration Of Deeds Act (Cap. 269), it is usual practice for deeds of conveyances and assignments to be certified in prescribed form by advocate and solicitor of Supreme Court of Singapore, consular officer or representative of Singapore; or notary public practising in country where execution takes place as otherwise Registry of Deeds may not accept registration of deed.

See also category 9 Documents and Records, topic 9.03 Seals.

19.04 LANDLORD AND TENANT:

Leases are generally governed by principles of contract. Parties can set out terms that should govern rights and duties of landlord and tenant.

Rights and duties are set out in contract. However, there are some implied terms on parts of both landlord and tenant.

Implied Terms on Landlord.

(1) Quiet enjoyment; (2) non-derogation from grant; and (3) fitness for human habitation.

Implied Terms on Tenant.

(1) To pay rent; (2) to maintain reasonable repairs; and (3) to permit landlord to view premises.

Some leases contain words “usual covenants”. “Usual covenants” vary with prevailing practice of the times for area and kind of premises.

Five main “usual covenants” on part of tenant are: (1) to pay rent; (2) to pay taxes except those expressly payable by landlord; (3) to keep and deliver up premises in repair; (4) if lessor is under obligation to repair, to allow lessor to enter and view premises; and (5) reentry for nonpayment of rent.

"Usual covenant" on part of landlord is to give quiet enjoyment.

Creation of Lease.

Formalities are provided in Conveyancing and Law of Property Act. (Cap. 61). Lease exceeding seven years must be by deed in English language. In regard to land under Land Titles Act (Cap. 157), lease exceeding seven years must be in prescribed form and must be registered.

Remedies for Breach of Covenant to Pay Rent.

Landlord has following remedies: (1) simply sue for money; (2) distrain under Distress Act. (Cap. 84). Writ of distress is available when rent is in arrears for period not exceeding 12 months of tenancy immediately preceding date of application for writ. Writ authorises sheriff to seize and sell goods found on leased premises, except tenant's necessary clothes and bedding, tools of trade and goods "in actual use". Tenant is given five days from date of seizure in which to pay arrears or to obtain order restraining sale; and (3) forfeiture of lease. Normally takes form of action for possession and puts end to tenant's interest altogether. Right to reenter premises and forfeit lease for breach of covenant must be expressly provided for in lease.

Termination of Lease.

Lease may come to end by expiry, notice, forfeiture, surrender, frustration or merger.

19.05 PERPETUITIES:

See category 11 Estates and Trusts, topic 11.05 Trusts.

19.06 POWERS OF ATTORNEY:

See topic 19.01 Absentees.

19.07 REAL PROPERTY:

Generally, real property law in Singapore is similar to pre-1925 English law apart from registration system. From May 2001, all real property matters in Singapore come within purview of Singapore Land Authority established pursuant to Singapore Land Authority Act.

There are four types of land grants, namely estate in fee simple, estate in perpetuity, leases and temporary occupation licences, although in practice one deals mainly with first three types. English legal concepts and instruments such as licences, easements and profits, restrictive covenants, mortgages and charges are applicable.

Registration.

Two systems of registration, namely those governed by Registration of Deeds Act (Cap. 269) and those governed by Land Titles Act (Cap. 157).

Registration of Deeds Act.

This Act provides registration of deeds of conveyances, assignments, memorandum of charges and discharges, deeds of consent to discharge of trustee, private Acts, orders of court or certificates of appointment of trustee in bankruptcy. Leases of term in excess of seven years or assignments thereof have to be registered to be effective. Leases for term not exceeding seven years or assignments thereof where accompanied by actual possession from making of such leases or assignments are not registrable. Caveats can be filed in Registry Of Deeds by persons claiming estate or interest in land or by persons who have been granted estate or interest in land by proprietor of land. Caveat subsists for five years from date of registration unless withdrawn by caveator or cancelled by order of Court. Instruments registered or entitled to be registered under this system are given priority according to date of registration and not by date of instruments or of their execution.

Land Titles Act.

This system of registration is based on Torrens system in South Australia. System is similar in application to English Land Registration Act of 1925 but without many exceptions and pitfalls thereto.

Under this system, registration of instrument is required to protect one's legal interest in property. Instruments are ineffectual until registered. Person who becomes proprietor of registered land holds land free from all encumbrances, liens, estates and interests whatsoever except those registered or notified in land-register. This is so notwithstanding person may not have dealt with proprietor or lack of good faith on part of person through whom he claims. There are exceptions, for example, fraud or forgery to which proprietor or his agent was party or in which proprietor of his agent colluded. Persons dealing with proprietor are exonerated from effect of notice of matters like previous circumstances which led to current registered proprietor being registered, notice (actual or constructive) of bankruptcy proceedings, trusts or other unregistered interests.

Priority of instruments is accorded in order of their registration or notification irrespective of dates of instruments. Save for fraud, entering of caveat to protect unregistered interest in land will give priority over any other unregistered interest not so protected at time when caveat was entered.

Under this system any person claiming interest in land may lodge caveat forbidding registration of any dealing affecting interest which is protected by that caveat. Where instrument which is prohibited by caveat is entered, Registrar of Titles will serve notice on caveator that he will register instrument unless within 30 days caveator has obtained order of Court extending operation of caveat; or instrument is uplifted or withdrawn or otherwise becomes incapable of registration. Caveat lasts for five years from date of lodgement. Filing of caveats is particularly important in dealing with equitable interests under trusts because such interests are kept off land-register. Also, purchasers who deal with fiduciary proprietor are not concerned to enquire whether dealing is within latter's powers and can assume that latter has powers of disposition of beneficial owner and as absolute proprietor.

System provides for entry of instruments protecting mortgages and restrictive covenants. Leases in excess of seven years have to be registered to gain protection.

Land Titles (Strata) Act (Cap. 158).

This deals with strata development in Singapore—registration of such titles follows Land Titles Act. Act provides, inter alia, for setting up of management corporations for strata estates and bye-laws for same, and has given extensive powers to management corporations. All strata properties under land titles registration system have to be governed in accordance with Act.

Public Housing.

Housing and Development Act (Cap. 129) deals with leases granted by Housing and Development Board in respect of flats built on land owned by it. These are usually 99-year leases and there is system of registration.

20 TAXATION

—Scope —

NOTE: Budget 2008 continues its aims to liberalize and restructure tax changes. Clarification and details on proposed tax changes will be known when law is legislated.

20.01 ADMINISTRATION:

Inland Revenue Authority of Singapore ("IRAS") is department in charge of administration and enforcement of income tax and other taxes. Legal authority is vested in Comptroller of Income Tax who is conferred with extensive powers for assessment and collection of income tax.

20.02 CUSTOMS DUTY AND TAX:

Customs.

Customs duty is levied on certain categories of goods, including motor vehicles, tobacco, liquors and petroleum. Applicable rates of customs duty and types of dutiable goods are found in Customs Act (Cap. 70) and its regulations.

20.03 ESTATE TAX:

Estate Duty.

Abolished with effect from 15 Feb. 2008.

20.04 INCOME TAX:

Payable by persons, including individuals, companies, trustees and bodies of persons, on income accruing in or derived from Singapore or remitted from overseas in respect of trade, business, vocation or employment and dividends, interest, discounts, pension, charge, annuity, rents, royalties, premiums, profits arising from property and gains or profits of income nature. But remittances of overseas income in form of dividends, branch profits and services income received from country with headline tax of at least 15% and some tax was paid in that country would be exempt from tax. Specified foreign income that does not satisfy two conditions to qualify for tax exemption will still be exempt from Singapore income tax if: (1) It is remitted under certain specific scenarios set out in IRAS circular; (2) company is able to track source of income; (3) Comptroller of Income Tax is satisfied there is no round tripping of locally-sourced income via overseas investment and taxpayer in Singapore receiving specified foreign income is not shell company. There are other conditions imposed on foreign income remitted in form of branch profits and service incomes before income is exempt from Singapore income tax. Relief in form of foreign tax credit relief may be given in respect of certain overseas income which does not meet conditions to qualify for tax exemption. Unilateral tax credit relief is granted on remittance of overseas income from non-treaty countries, subject to satisfaction of certain conditions.

Company can carry forward unutilized trade losses and wear and tear allowances to set-off against company's future chargeable income, subject to satisfaction of substantial shareholding and same business tests on certain relevant dates. Company can also carry-back current year unutilized trade losses and wear and tear allowances (capped at S$100,000) for one year, upon election, subject to satisfaction of substantial shareholding and same business tests on certain relevant dates.

Payments to nonresident in respect of royalty or other lump sum payments for use of movable properties or payment for use of or right to use scientific, technical, industrial or commercial knowledge or information are subject to withholding tax at 10% whereas payments to nonresident in respect of interest, commission, fee or other payment in connection with any loan or indebtedness are subject to withholding tax at 15% provided that such payments are not attributable to any trade or business carried on or exercised in Singapore by that nonresident or effectively connected with any permanent establishment of that nonresident in Singapore. Otherwise, payment to such nonresident would be subject to tax at prevailing corporate tax rate on their chargeable income. Payments made to international arbitrators for their services rendered in Singapore on appointment by certain institutions including Singapore International Arbitration Centre would be exempt from withholding tax. Approved law firms will be granted 50% income tax exemption on qualifying incremental income derived from international arbitration work. Scheme available from 1 July 2007 to 30 June 2012. Incentive duration will be up to five years.

Prevailing corporate tax rate is 18%. Under Partial Tax Exemption Scheme, 75% of first S$10,000 of chargeable income (excluding Singapore franked dividend income) and 50% of next S$290,000 of chargeable income (excluding Singapore franked dividend income) is exempt from corporate tax. Under Tax Exemption Scheme for start-up companies, qualifying company granted full tax exemption for first S$100,000 of chargeable income, further 50% tax exemption on next S$200,000 of chargeable income for first three qualifying consecutive years of assessment (excluding Singapore franked dividend income). Concessionary tax rates ranging from 5% to 15% are granted under various tax incentives for certain activities in financial and treasury services, general insurance companies, research and development activities, approved international shipping enterprise scheme. Tax incentives for selected types of investment can be found in Economic Incentives (Relief from Income Tax) Act (Cap. 86) and Redevelopment and Expansion Incentive. Overseas royalty and interest income that are used for research and development activities in Singapore or controlled from Singapore may be exempt from tax. Writing-down allowances is granted automatically for qualifying expenditure incurred by legal and economic owner and upon specific approval to beneficial owner.

Nonresident company is also taxed at same rate as resident company. There are no major differences in tax treatment for resident and nonresident companies except that resident company is generally able to qualify for tax benefits accorded by double taxation conventions and to be automatically granted full or partial exemption schemes mentioned above.

Tax of 18% also applies to income of trust, estate of deceased person and nonresident persons (other than nonresident individuals, Hindu joint family, which will remain at 20%). Approved institutions of public or charitable character are exempt from income tax, subject to satisfaction of certain conditions. Current tax concession of 10% granted on certain income derived by Approved Trustee Company in respect of qualifying foreign trusts is extended, to income derived on or after 17 Feb. 2006 by companies which are exempted from requirement to hold trust business licence in respect of carrying on of trust business in Singapore under Trust Companies Act 2005 and which are administering qualifying foreign trusts in Singapore.

All income derived from designated investments by foreign trust or income derived through eligible investment holding company administered by trust companies is tax exempt. Specified Singapore-sourced investment income derived on or after 17 Feb. 2006, and foreign income received on or after 17 Feb. 2006 by qualifying domestic trusts and their underlying holding companies, would qualify for tax exemption. Distributions made by qualifying domestic trusts to their beneficiaries out of such income would also be tax exempt in hands of beneficiaries.

There is no withholding tax on dividend. One-tier corporate tax system has been introduced to replace imputation tax system with effect from 1 Jan. 2003. Under one-tier corporate tax system, income tax payable on normal chargeable income of company is final tax in Singapore. Dividends distributed will be tax exempt in hands of shareholders.

Group Relief Scheme is available within group, upon election, to offset unutilized current year capital allowances, losses and donations of company against chargeable income of another company, subject to satisfaction of certain conditions.

Individual income tax rate for resident individuals is on progressive scale on chargeable income in excess of S$20,000 ranging from 2% to 20%. Overseas income received by resident individuals in Singapore is exempt from tax (exclude overseas income received in Singapore through partnership in Singapore). Interest income paid to individuals (both resident and nonresident) from any deposit with approved banks or licensed finance companies in Singapore as it will be exempt from tax. However, interest income from deposits with nonapproved banks or finance companies which are not licensed in Singapore, pawnshops, loans to companies and persons are taxable in full.

Sports will be recognized as charitable purpose eligible for income tax deduction. Gain arising from stock options granted for Singapore employment will be taxable regardless of where they are exercised.

Individual who is accorded “not ordinarily resident status” can enjoy, for five years, time apportionment of Singapore employment income, tax exemption of pre-assignment income remitted into Singapore and tax exemption on nonmandatory overseas pension or social security scheme.

Nonresident employees are taxed at 15% or at resident's rate (whichever is higher). Nonresident partners, sole-proprietors and directors are taxed at flat rate of 20% whereas nonresident public entertainers are taxed at 15%. Nonresident employees exercising employment in Singapore for not more than 60 days are exempted from tax. Remittances of overseas income by nonresident individuals in Singapore are not subject to tax.

Capital Gains Tax.

Capital gains are not taxed in Singapore. In certain circumstances, IRAS considers transaction involving acquisition and disposal of real estate, stocks or shares to be carrying on of trade, and, as result, gains arising from such transactions are taxable.

20.05 PROPERTY TAXES:

Chargeable at rate of 10% on annual value of houses, buildings and land in Singapore unless exempted. Concessionary rate of 4% is given for owner-occupied residential premises.

20.06 SALES AND USE TAXES:

Goods and Services Tax.

Levied on supply of goods and services in Singapore by registered person (including company). It must be collected by person making supply. Person is required to be registered if its annual taxable supplies exceeds or is expected to exceed S$1 million. Current Goods and Services Tax rate is 7%.

Goods and Services Tax also applies to import of goods from overseas. Exemptions and zero-rating of tax are given to many categories of supply.

20.07 STAMP TAX:

Stamp Duty.

Imposed on specified classes of instruments and may be for fixed amount or on ad valorem basis. Stamp duty was abolished with effect from 28 Feb. 1998 on all instruments except for those relating to stocks and shares and immovable property. For conveyance of land, duty is payable at progressive rate up to 3% of value; for legal mortgage, up to maximum of S$500; on sale of stocks and shares, 0.2% of amount or value of consideration, whichever is higher.

20.08 TREATIES AND AGREEMENTS:

Double taxation agreements with 58 countries have been concluded and Singapore has limited agreements with another seven. In addition, double taxation reliefs are available between Singapore and Commonwealth countries. For countries where no such arrangements are in force, unilateral tax credit relief will be granted to all income derived for services rendered to non-treaty country which is remitted to Singapore by Singapore tax resident.

21 TRANSPORTATION

21.01 AUTOMOBILES:

See topic 21.02 Motor Vehicles.

21.02 MOTOR VEHICLES:

Governed by Road Traffic Act (Cap. 276) and related subsidiary legislation.

Size and Weight Limits of Motor Vehicles.

(Unladen) weight limits of motor vehicles regulated by Act. Size limits regulated by subsidiary legislation.

Registration and Licensing of Motor Vehicles.

Motor vehicle which is kept or used in Singapore must be registered and licensed. Valid permit is required before motor vehicle can be registered. For registration of motor vehicles on or after 1 May 1990, certificate of entitlement, obtained via bidding process, must be produced before motor vehicle can be registered. Government may prescribe number of certificates of entitlement available for bidding at any one time. Certificate of entitlement is valid for ten years and is renewable for further five or ten years. Certificate of entitlement renewed for five years cannot be renewed thereafter. Land Transport Authority determines number of new vehicles allowed for registration while market determines price of owning vehicle.

Licences issued are generally for six or 12 months. Motor vehicle registered as off-peak car will be issued with restricted licence. With restricted licence, motor vehicle may not be driven during specified hours on certain days, unless supplementary licence is in force.

Electronic Road Pricing (ERP) system is being introduced as more flexible and fairer system of charging for road usage based on pay-as-you-use principle. ERP system uses dedicated short-range radio communication system to deduct ERP charges from cash cards. There is installed in each vehicle, in-vehicle unit where cash card is inserted.

Tax is also chargeable for first registration of every vehicle and for every vehicle used or kept on road in Singapore. Tax is payable upon licence taken out by person keeping vehicle.

Driving Licences.

Every driver of motor vehicle must have passed requisite driving tests and possess valid local driving licence. Non-resident may drive in Singapore with International Driving Permit issued under any International Convention on Road Traffic to which Singapore is party or if he has been licensed to drive by competent authority of country other than Singapore.

If driver has been awarded prescribed number of demerit points within specified time frame, then driving licence may be suspended for up to 36 months.

Person below 16 years is not allowed to drive motor vehicle on road. Person below 17 years is not allowed to drive any motor vehicle other than motorcycle or invalid carriage.

Use of Safety Helmets, Seat Belts and Child Restraints.

Drivers and pillion riders of motorcycles are required to wear protective helmets.

Seat belts must be fitted for drivers and front seat passengers. Motor cars and taxis registered on or after 1 Jan. 1993 must be fitted with seat belts for rear seat passengers. Driver and front seat passenger must wear seat belts. Rear seat passengers must wear seat belts if these are available for use. Child below eight years must wear approved child restraint if he is front seat passenger. If rear seat belt available for use, child below eight years must wear approved child restraint. Rear seat passengers of taxis must wear seat belts, failing which both passenger and driver are subject to penalties.

Driving Under Influence of Drink or Drugs and Use of Mobile Telephone.

Driving while under influence of drink or drugs is offence. Use of mobile telephone while driving is also offence.

Inspection of Motor Vehicles.

Motor vehicles are required to undergo inspection upon notification. Test certificate will be issued if motor vehicle passes requisite tests. It is offence to use, or cause or permit another to use, on road at any time, motor vehicle in respect of which there is no test certificate.

Third Party Insurance.

Compulsory to insure all motor vehicles in use with respect to third party risks in Singapore. Any person using, causing or permitting another to use motor vehicle without such insurance coverage commits offence. Third party victim although not privy to insurance contract, has direct claim against insurer after obtaining judgment against motorist, by virtue of rights conferred under Motor Insurance (Third-Party Risks and Compensation) Act. (Cap. 189).

21.03 SHIPPING:

Merchant Shipping.

Merchant Shipping Act (Cap. 179), regulates registration, mortgages, control of shipping, safety of shipping, construction, equipment and survey, manning, certification, masters and seamen, wreck and salvage. Maritime and Port Authority of Singapore Act (Cap. 170A) regulates among other things, employment of seamen, regulation of port, and control of seaward activities.

Port Services.

Governed by Maritime and Port Authority of Singapore Act. (Cap. 170A).

Towage.

Governed by private contract between parties.

Pilotage.

Regulated by Maritime and Port Authority of Singapore Act. (Cap. 170A).

Collisions.

Merchant Shipping (Prevention of Collisions at Sea) Regulations give effect to International Regulations for Preventing Collisions at Sea 1972 as amended. United Kingdom Maritime Conventions Act 1911 applies in Singapore.

Liens.

Maritime liens governed by common law. Statutory liens for rent and expenses of wharfinger and warehouseman provided under Merchant Shipping Act. (Cap. 179).

Pollution.

Civil liability for oil pollution by merchant ships regulated by Merchant Shipping (Civil Liability and Compensation for Oil Pollution) Act (Cap. 180). International Convention for the Prevention of Pollution from Ships 1973 as modified is given effect by Prevention of Pollution of the Sea Act. (Cap. 243).

Carriage of Goods.

Carriage of Goods by Sea Act (Cap. 33) gives effect to Hague Rules as amended by Brussels Protocol, Hague Visby Rules. Bills of Lading Act (Cap. 384) deals, inter alia with transfer of contractual rights to lawful holders of bills of lading, delivery orders and sea waybills.

Limitation and exclusion of liability of shipowners are regulated by Merchant Shipping Act and also by relevant provisions of Hague Visby Rules.

22 TREATIES AND CONVENTIONS

22.01 TREATIES:

Member, Association of South East Asian Nations (ASEAN), World Intellectual Property Organisation (WIPO), World Trade Organisation (WTO), Patent Co-operation Treaty (PCT), Madrid Protocol, Asia Pacific Economic Cooperation (APEC) and Asian Regional Forum (ARF), Financial Action Task Force, Asia Pacific Group on Money Laundering, International Aviation Treaties and UN Treaties on Human Rights. There are reciprocal trade arrangements with many countries, including Australia, Brunei, Hong Kong, Indonesia, Malaysia, New Zealand, U.K., Vietnam and Sri Lanka, providing for settlement of disputes, some by international arbitration. Also Memorandum of Understanding signed with Algeria, Bahrain, Cambodia, Canada, China, Cyprus, Korea, Philippines, Qatar, Russia, Vietnam. Singapore is party to various Bilateral Investment Treaties ("BITs") including U.K., Germany, France, Cambodia, Pakistan, Mauritius, Egypt, Jordan, Poland, Netherlands, Switzerland, Belgium-Luxembourg, Czech Republic, China, Mongolia, Vietnam and Sri Lanka. Agreements are for promotion and legal protection of foreign investments and cover four substantive areas: Admission, treatment, expropriation and settlement of disputes. Double taxation agreements with many countries (see category 20 Taxation, topic Taxes). Free Trade Agreements (FTAs) have been concluded with U.S.A., Australia, Japan, New Zealand, Jordan, Panama, Peru, China, India, Korea, member states of European Free Trade Association (EFTA), and Trans-Pacific SEP. There are also many FTA ongoing negotiations with Australia, New Zealand, India, Japan, Canada, China, Gulf Co-operation Council, Mexico, Pakistan, Peru, and Ukraine.

See also Part V of this volume for Selected Conventions to which U.S.A. and this country are parties.

1
SLOVAK REPUBLIC LAW DIGEST

—Scope —

Revised for 2010 edition by

CECHOVÁ & PARTNERS, Bratislava, Slovak Republic.

Abbreviations used are: OSP, Obciansky súdny poriadok (Civil Court Order, Act No. 99/1963 Coll., as amended); OZ, Obciansky zákonník (Civil Code, Act No. 40/1964 Coll., as amended); ObchZ, Obchodný zákonník (Commercial Code, Act No. 513/1991 Coll., as amended); ZR, Zákon o rodine (Family Act, Act No. 36/2005 Coll., as amended); ZMPSP, Zákon o medzinárodnom práve súkromnom a procesnom (Act on International Private and Procedural Law, Act No. 97/1963, as amended); ZP, Zákonník práce (Labor Code, Act No. 311/2001 Coll., as amended); SR, Slovenská republika (Slovak Republic); SKK, slovenská koruna (Slovak Crown); EUR (EURO).

Slovak Republic is member of EU. See also European Union Law Digest.

Note: This revision incorporates legislation through 31 July 2009.

1 INTRODUCTION

1.01 CURRENCY:

Until 31 Dec. 2008 Slovak Crown (SKK) divided into 100 hellers (singular “halier”, plural “halierov”) was lawful currency of SR. It was introduced shortly after split of former Czech and Slovak Federal Republic. Slovak Republic has entered into ERM II system and euro (EUR) is ex lege lawful currency of SR as of 1 Jan. 2009. Based on conversion rate set up by Council of European Union as SKK 30.126 to EUR 1, from 24 Aug. 2008 until 1 Jan. 2010, all final prices, payments, and other values with certain exceptions are to be shown dually in Slovak Crowns and also in euros. Dual prices serve just for informative purposes. In business relations between entrepreneurs, prices payments, and other values are not mandatory required to be shown dually. Conversion of currency from Slovak Crowns to euros was done ex lege on 1 Jan. 2009, including e.g. funds on bank accounts. Special regimes were set up for conversion of securities' nominal values and registered capital of companies. Values of registered capitals of business companies are from 1 Jan. 2009 regarded as denominated in euros; however, additional corporate decisions on currency conversion of concerned entities and respective registrations are mandatory required. Currency conversion enters into force by respective registration. In case of immaterialized securities other than debt securities, their issuers are required to adopt decision on conversion of nominal value of securities to euro and to ask Central Depository of Securities to register conversion to euros from 1 Jan. 2009 to 1 Jan. 2010. In case of debt securities, their issuers were required to adopt decision on conversion of nominal value of securities to euro and to ask Central Depository of Securities to register conversion to euros until 1 Dec. 2008. Central Depository of Securities was to convert nominal values of debt securities on 1 Jan. 2009 and of immaterialized securities until 1 Jan. 2010. In case of registered capital, companies are required to adopt decision on conversion of their registered capital to euro and to file application for registration with Commercial Registry until 1 Jan. 2010. If abovementioned obligations are fulfilled by obliged entities within set periods, respective authorities will not charge for registration of concerned changes related to euro conversion. According to Act No. 566/1992 Coll., as amended, National Bank of Slovakia is independent central bank of SR, being member of Eurosystem, and among other functions it participates in common monetary policy which European Central Bank sets for euro area and it controls foreign currency reserves, issue of banknotes and coins, grants loans to commercial banks, accepts deposits from commercial banks, performs supervision over banking activities, etc. It is also vested with authority to issue banking licenses and some permits concerning foreign exchange regulations. Act also regulates circulation of banknotes and coins and circumstances under which persons are obliged to accept lawful currency.

See also category 15 Foreign Trade and Commerce, topic 15.03 Foreign Exchange.

1.02 GOVERNMENT AND LEGAL SYSTEM:

Preliminary Note.

Slovak Republic (SR) declared its independence as sovereign state on Jan. 1, 1993 after taking all necessary political and legal steps at level of federate and national authorities for division of Czech and Slovak Federal Republic (C.S.F.R.). Both republics generally adopted federal laws, however, different needs and different ideas led immediately to number of legislative changes and caused differences in majority of acts and legal regulations. SR started to create its own legislation on particular subjects (e.g. competition, bailiffs, privatization). Rapid changes represent one of most obvious features of Slovak legislation especially because of full transition to market economy and harmonization of Slovak legislation with legislation of EU in connection with its accession to EU.

SR became member of U.N. on Jan. 19, 1993 and of Council of Europe on June 30, 1993. European Economic Community, European Atomic Energy Community, European Coal and Steel Community and their member countries entered into Europe Agreement with SR on Oct. 4, 1993, establishing Association between them. SR is member state of OECD and Central European Free Trade Association (CEFTA). On 1 May 2004, SR became member of EU and on 29 Mar. 2004 member of NATO.

Constitution of SR dated 1 Sept. 1992 (No. 460/1992 Coll., as amended) stipulates that SR is sovereign, democratic and law-abiding state observing general rules of international law, international treaties, which are binding on SR, and its other international obligations. Guarantees of fundamental rights and freedoms incorporated into Constitution are inspired by International Covenant on Civil and Political Rights and by International Covenant on Economic, Social and Cultural Rights. Conventions on human rights and freedoms, international political treaties, international treaties of military nature, international treaties that are basis for membership of SR in international organizations, international general economic treaties, treaties, implementation of which does not require special act, and treaties which directly stipulate rights and obligations of individuals and legal entities take precedence over Slovak laws if they were ratified and published in way stipulated by law. Under Art. 7 of Constitution (effective as of 1 July 2001) SR may, by or on basis of international treaty, which was ratified and published in way stipulated by law, transfer performance of part of its powers to European Communities and European Union. Legally binding acts of European Communities and European Union take precedence over Slovak laws.

Parliament consisting of one chamber called National Council of SR is elected by means of general election (proportional representation) every four years and has 150 members. National Council of SR shall be continually in session. National Council of SR may resolve to adjourn its session. Time of adjournment may not exceed four months within period of one year. During adjournment, session can be convened by chairman of National Council of SR before designated date. He must do so upon request submitted by Government of SR or at least one fifth of members of National Council of SR.

President—head of state with predominately representative functions is elected for five year term in general election by absolute majority of participating voters. If required majority is not attained in first round of election, two most successful candidates pass to second round of election, where simple majority of participating voters is sufficient to be elected.

Government of SR is supreme body of executive power with members accountable for exercise of its function to National Council of SR.

Constitutional Court of SR is independent judicial body protecting constitutionality consisting of 13 judges selected from among 26 persons proposed by National Council of SR and appointed by President for 12 year term. Constitutional Court decides inter alia about conformity of generally binding legal regulations with Constitution and laws, jurisdictional disputes between governmental authorities, complaints against violation of fundamental rights and freedoms by authorities, indictment of President in matter of treason, provides binding interpretation of Constitution and constitutional act.

Impartial and independent judiciary power consists of Supreme Court of SR and other Courts as stipulated by laws. Chairman of Supreme Court of SR is chairman of Courts Council of SR that submits to President of SR proposals of candidates for appointment and recalling of judges of Slovak courts and performs other functions related to judiciary power.

Prosecutor's office is headed by Prosecutor-General appointed by President upon proposal of National Council of SR. It safeguards compliance with laws and supervises bringing of criminals to justice.

As of 1 Jan. 2002, constitution introduced institution of ombudsman elected by National Council of SR for five year term, being independent body, which in extent and manner stipulated by Act No. 564/2001 Coll. on Ombudsman as amended, participates in defending of fundamental human rights and freedoms if procedures, decisions and inaction of public authorities are in conflict with legal regulation and principles of democratic and rule-of-law state.

Supreme Supervision Office of SR is independent body supervising administration of budget means, property, property rights, financial means, receivables and debts of state, public institutions and National Property Fund; or those which were guaranteed by state.

Constitution stipulates municipalities and superior territorial units (e.g. self-governing regions) as independent territorial self-governing and administrative units of SR entitled to create their own municipal bodies and to manage their own property and financial resources. Since 1 Jan. 2002 part of local state administration, previously performed by region and district offices (local state administration bodies) has been gradually entrusted to municipalities and superior territorial units. (Act No. 416/2001 Coll.). State provides financial transfers from state budget to municipalities and superior territorial units to cover performance of transferred state administration. According to Act No. 221/1996 Coll. on Territorial and Administrative Division, as amended, territory of SR is divided into eight regions and 79 districts. Each region has its own self-governing bodies.

1.03 HOLIDAYS:

Holidays in SR are regulated by Act No. 241/1993 Coll. on State Holidays, Non-Business Days and Memorial Days, as amended.

According to Act, Legal State Holidays are: Jan. 1 (New Years Day, hereby Independence Day), July 5 (Holiday of Slavic Faith Messengers—St. Cyril and Methodius), Aug. 29 (Slovak National Uprising Day), Sept. 1 (Day of Constitution), Nov. 17 (Day of Fighting for Freedom and Democracy).

Non-Business Days are following: Jan. 6 (Epiphany of Lord), Good Friday (last Fri. before Easter Monday), Easter Monday, May 1 (Labor Day), May 8 (Victory Day), Sept. 15 (Septuadolorous Virgin Mary), Nov. 1 (All Saints' Day), Dec. 24, 25, 26 (Christmas Days).

1.04 OFFICE HOURS AND TIME ZONE:

SR is in GMT+01:00 time zone. Office hours are generally from 8 a.m. to 4 p.m.

2 BUSINESS ORGANIZATIONS

2.01 AGENCY:

Representation arises by operation of law, decision of court, other state authority or upon power of attorney. If attorney acts on behalf of principal, rights and duties created by attorney are binding upon principal who gave power of attorney. Attorney cannot be person not having legal capacity for legal actions or whose interests are contrary to those of principal. Attorney may authorize another person to act in attorney's place on behalf of principal only if attorney is legal entity, or in case of individual attorney, if expressly authorized by principal. Power of attorney must be written if: (1) legal act to be performed through attorney is in writing, (2) general power of attorney is to be granted i.e. involves more than particular legal act or (3) special law requires it. If attorney acts beyond limits set by power of attorney, action is binding upon principal only if ratified by principal. However, it is deemed to be ratified, if third person to whom such action was addressed was not without undue delay notified by principal that attorney exceeded his authority.

Power of attorney expires (i) by performance of act to which it was limited; (ii) by principal's revocation; (iii) by attorney's termination; (iv) by death of attorney; (v) by death of principal (unless provided otherwise by power of attorney); (vi) when legal entity being principal or attorney ceases to exist (only if rights and obligation of such legal entity are not transferred to other legal entity).

All legal acts of legal entities are performed by their statutory representatives. Other persons may act on or behalf of legal entity if: (i) empowered by internal regulation of legal entity; (ii) empowered by persons authorized to act on behalf of legal entity; or (iii) it is usual, considering person's position in legal entity. Commercial Code slightly modifies above rules with regard to statutory representatives of corporation. If entrepreneur is individual, he acts personally or by procureur or by means of attorney.

Mandate.

Regulation of mandate is contained in OZ, §§724-732 and in ObchZ, §§566-576.

OZ Regulation.

Under mandate (“príkazná zmluva”), mandatory undertakes to look after certain matter or to accomplish some other activity on behalf of principal. Mandatory may deviate from principal's directions only if it is essential to principal's interests and if mandatory cannot obtain principal's consent in time. Mandatory must perform mandate personally; if mandatory entrusts another person with performance of mandate, mandatory is liable as if mandatory himself had performed mandate. If principal permitted mandatory to appoint representative, or if this was inevitable, mandatory is liable only for fault with regard to choice of mandatory's representatives. Principal is obliged to pay remuneration to mandatory only if it was agreed upon or when it is customary in mandatory profession (e.g. attorneys). Remuneration is to be paid even when there is no result of mandatory's activity, unless failure was caused by mandatory's breach of obligation.

ObchZ Regulation.

As far as mandate (“mandátna zmluva”) according to ObchZ is concerned, principal's undertaking to pay to mandatory certain remuneration is essential part of contract. If mandatory's professional activities include making such arrangements, it shall be presumed that some remuneration has been agreed upon. Mandatory is not bound to arrange matter personally, unless contract provides otherwise. However, mandatory is responsible for performance of mandate if it is performed by person authorized by mandatory.

Procureur.

According to relevant provisions of ObchZ, individual may be appointed as procureur by entrepreneur. Procureur is registered in Commercial Register being authorized to perform all legal acts in connection with conducting entrepreneur's business with exception of disposition of real estate and/or establish encumbrances over real estates (unless such authorization is expressly granted to procureur).

2.02 ASSOCIATIONS:

Basic regulation of associations is included in OZ (Civil Code). Unless special law provides otherwise, written agreement or foundation deed is required for establishment of any association. Association is established either on day on which it is incorporated in register specified by law if such registration is required or on day stated in foundation agreement (if no registration is required). Capacity of association to acquire rights and assume duties may be restricted only by law. Association may be dissolved by agreement, by lapse of time, by accomplishment of purposes for which it was established or by another means provided by special laws.

Associations of Citizens.

Act No. 83/1990 Coll. on Association of Citizens, as amended, provides for legal regulation of societies, unions, movements, clubs, trade union organizations and other associations of citizens. Although Act refers to citizens, foreigners and legal entities can be members of these associations. Associations are not allowed if: (i) purpose is restriction of human rights, (ii) they seek to achieve aims by illegal means, or (iii) they are armed or associate with armed persons (except for those possessing and using arms only for sport or legal hunting purposes). No permission is needed and association is formed on day of registration, following application of at least three citizens (one of them at least 18 years old) forming preparatory committee. Application is submitted to Ministry of Interior of SR together with statutes of association containing (i) name, (ii) seat, (iii) purposes, (iv) bodies of association and procedure for their creation and determination of bodies and representatives authorized to act on its behalf, (v) basic principles for management of property, (vi) organizational parts with legal capacity. If Ministry refuses to register association, members of preparatory committee may appeal to Supreme Court of SR. If activities of association breach law, Ministry shall demand association refrain from prohibited activities. If association continues to do so, Ministry can dissolve association. Dissolution may be appealed to Supreme Court of SR.

Churches and Religious Associations.

Activities of churches and religious associations are regulated by Act No. 308/1991 Coll. on Freedom of Faith and Status of Churches and Religious Associations, as amended. Only churches and religious associations registered according to this law are officially recognized by state. Application for registration must be submitted to Ministry of Culture of SR by at least three adult persons. Statute (or similar document) attached to application contains: (i) name, (ii) seat of central office of church, (iii) bodies of church and procedure for their creation and their competencies, (iv) procedure for appointment of clergymen, (v) basic principles of faith, (vi) basic principles for management of property, (vii) procedure for approving statutes (or similar document), (viii) organizational parts with legal capacity, and (ix) rights and duties of members of church or religions association. If Ministry refuses to register church, appeal may be taken to Supreme Court of SR. If activities of church breach law Ministry may cancel registration. Appeal of cancellation may be taken to Supreme Court. Salaries of clergymen are provided by state on basis of legal regulation dating back to 1949 (with several amendments). After 1989, churches were returned back property (predominantly real estate) which was confiscated from it after 1948 by state; churches continue to be supported from state budget.

Associations of Persons.

According to §§829-841 of OZ several persons (whether individual or legal entities) may associate themselves in order to endeavor jointly towards attainment of agreed purpose. However, this type of association does not have legal personality. Each of participants is obliged to engage in agreed activities and/or provide some money or other contributions to activities of association. Property provided or acquired through performance of their joint activities is considered to be in joint ownership of all participants. Participants are jointly and severally liable for obligations against third parties.

Interest Association of Legal Entities.

According to §§20f-20j of OZ legal entities may establish associations pursuing certain interests. Association is established by written agreement of founders or by constituent members' meeting (minutes of meeting must include list of members with their addresses and signatures) and statutes of association are to be attached. Association acquires its legal personality by entry into register of associations kept by Regional Office.

Foundations, Nonprofit Organizations and Nonprofit Investment Funds.

Foundation (governed by Act No. 34/2002 Coll. on Foundations, as am'd) is established by individual or legal entity for performance of charity, protection of environment, cultural heritage, health, protection and promotion of human rights, etc., with registered capital at least EUR 6,638. Foundation is legal entity with its capacity for legal acts gained at day of its registration in special register kept by Ministry of Interior of SR. Registration is made following submission of application together with foundation deed by founder. If Ministry refuses to register foundation, decision may be appealed to Supreme Court of SR. As far as protection of anonymity of donors is concerned, upon request of donor, foundation may not state his name in list of donors nor publish it otherwise. However this does not apply to rights of supervisory authorities in administrative, finance, tax and criminal matters.

Foundation may, by its own decision or on basis of agreement with third person, create foundation fund as instrument to collect financial resources for definite public purpose or individual humanitarian aid without establishment of separate legal entity. Creation of foundation fund has to be notified to Ministry of Interior of SR.

Foreign foundation may perform its activities in territory of SR only through its organizational branch or subsidiary foundation with its seat in SR and registered within register of foundations under same conditions and to same extent as domestic foundations.

Nonprofit organizations governed by Act No. 213/1997 Coll. on Nonprofit Organizations Providing Services of Public Utility, as amended, can be founded by natural person or legal entity or, as of 1 Mar. 2002, by state. Their activities can cover only areas of health care, social help and humanitarian care, creation, development, protection, renewal and presentation of spiritual and cultural values, protection of human rights and freedoms, education, training and development of physical education, research, development, scientific and technical services and information services, creation and protection of environment and protection of public health, services supporting employment and development of regions, housing/accommodation, administration, maintenance and renewal of housing stock. No minimum amount of registered capital is required. Nonprofit organization is legal entity with its capacity for legal acts gained at day of its registration in special register kept by Regional Office. Legal entity not having its seat in territory of SR and being nonprofit organization according to its governing law, can perform its activities under same conditions and to same extent as nonprofit organization founded according to this act if it satisfies conditions of registration stipulated by this act.

Under Act No. 13/2002 Coll. (so called Transformation Act), budget and contribution organizations other than those founded by state, municipalities or those founded for state defense and security purposes, will be transformed into nonprofit organizations providing services of public utility. Under this Act, government can decide, on proposal of central state authority, on transformation of particular budget or contribution organization (as person connected to state budget) into nonprofit organization as legal entity independent and separated from state.

Nonprofit investment funds are governed by Act No. 147/1997 Coll. on Non-investment Funds under quite similar conditions as foundations; anonymity of donors is always guaranteed.

Associations with International Element.

This type of association is governed by Act No. 116/1985 Coll. on Condition of Activities of Organizations with International Element, as amended, stipulating conditions for activity, for having seat in SR or for establishment of such organization in SR. International nongovernmental organizations, organizations of foreign citizens and special organizations representing Slovak interests in international non-governmental organizations are deemed to be organizations with international element. Application for permission to establish above-mentioned organization is submitted to Ministry of Interior of SR with document setting forth purposes of organization and its organization structure.

2.03 CORPORATIONS:

Under ObchZ, main legal forms of business corporations regarded as legal entities are (i) joint-stock company (a.s.); (ii) limited liability company (s.r.o.); (iii) general commercial partnership (v.o.s.); and (iv) limited partnership (k.s.). Co-operative is regulated by ObchZ as well. All business corporations, as well as co-operative are required to be registered in Commercial Register.

Joint-stock company (company limited by shares)—akciová spolocnost' (akc. spol. or a.s.) is company with registered capital stock divided into certain number and kind of shares that have designated nominal value. It may be founded by single entity (excluding single individual) or by two or more persons upon foundation agreement (foundation memorandum if established by sole founder). Foundation agreement contains name, seat (meaning actual headquarters), scope of business activities, proposed registered capital stock, number of shares, their nominal value, form, face, kind, issue rate, number of shares subscribed by individual founders, description of in-kind contributions of founders, identification of contributions administrator, projected costs of foundation, advantages to persons participating in establishment of company and, if applicable, details relevant to public shares subscription. Joint-stock company's business name must contain indication “akciová spolocnost' ”, “akc. spol.” or “a.s.”

Joint stock company may either have status of private or public joint-stock company. Public joint-stock company is company (i) that issued all or part of its shares on basis of public call for subscription of shares, or (ii) whose shares were subscribed by securities broker acting as agent under agency agreement without subsequent transfer of shares to persons pre-stipulated in agency agreement, or (iii) whose shares have been admitted for trading on stock exchanges—i.e. Bratislava Stock Exchange or other existing stock exchange. Public joint-stock company with all shares issued in form of registered (au nom) shares may transform into private joint-stock company, if: (i) It has maximum of 100 shareholders, (ii) its shares are not admitted for trading on stock exchange, and (iii) two-thirds of its shareholders agree. If it makes new public call for subscription for increase in registered capital or its shares are admitted for trading on stock exchange, it becomes public joint-stock company again.

Shares may be issued in either registered or bearer form. Both types are generally transferable and articles of association may not exclude transferability of shares admitted by stock exchange for trading. Registered shares may be issued as documentary (materialized) or book-entered (dematerialized). Bearer shares and shares traded on stock exchange market may be issued only as book-entered securities. Documentary registered shares are transferable by means of written agreement, endorsement and delivery of shares to purchaser; however, transfer is effective towards company upon its registration in company's list of shareholders kept by company or central depository of securities (“central depository”). Book-entered shares are transferable by means of registration of transfer in relevant securities holder account kept by central depository or its member, on which book-entered shares are registered. Shares traded on stock exchange market have to meet requirements of Act No. 429/2002 Coll. on Stock Exchange, as well as rules of stock exchange.

(Note: Activities of central depository were until beginning of 2004 performed by Slovak Securities Centre that obtained license of central depository under Act No. 566/2001 Coll. on Securities and Investment Services, as amended).

Company may issue ordinary shares, including collective shares (substituting more shares of same class having same nominal value) and priority shares (with possible limitation of voting rights). If company failed or decided not to pay priority dividends to holder of priority shares, voting rights are automatically acquired till priority dividends are paid-up. If company decides on conditional increase of registered capital, it may issue priority bonds, with connected right for priority subscription of new shares or convertible bonds, with connected right of exchange for company shares. These rights are separately transferable. Issue rate of shares shall not be lower than their nominal value. If it is higher, amount exceeding nominal value shall be considered as issue premium. It is not possible to issue employee shares; however, company may issue ordinary shares for distribution to its employees under certain advantageous conditions.

Company may not subscribe shares of its own stock. Founders (or in case of capital increase, members of board of directors) are liable jointly and severally for repayment of shares subscribed in breach of law by company. Company may acquire its shares only if: (i) general meeting approves acquisition and its extent and conditions of their acquisition, (ii) company's own capital will not decrease below combined amount of registered capital and reserve fund and other funds mandatory created by company under law reduced by value of unpaid registered capital if this value is not included in assets declared in balance sheet elaborated under special law, and (iii) issue rate of shares acquired is fully repaid. Above conditions need not be met in following cases: (i) Decrease of registered capital, (ii) legal succession into rights and duties of previous owner, (iii) fulfillment of duty laid down in statute or court decision related to protection of minority shareholders, (iv) acquisition of fully repaid shares free of charge, (v) acquisition of fully repaid shares through auction of debtor's assets, (vi) acquisition of shares not repaid by subscribers in case of expelling of shareholder from company. Articles of association may stipulate that prohibition of acquisition of own shares by company shall not apply and company may acquire its own shares also without approval of general meeting stating extent of acquisition, if such acquisition is necessary to repudiate major damage directly threatening company, or if company acquires its own shares for purpose of their transfer to employees within 12 months. In case that nominal value of shares acquired under (ii) to (vi) above exceeds 10% of company's registered capital, they must be sold within three years of acquisition. If shares are acquired in breach of statutory conditions, such acquisition remains valid; however, shares have to be sold within one year or registered capital has to be decreased by respective amount. Company may not perform any voting rights connected with ownership of own shares. Similar rules apply to acquisition of shares of controlling company by controlled company; these rules do not apply if company became controlled after acquisition, acts on behalf of other person that is not controlling company, or if controlled company acts as securities broker.

Joint-stock company may be established by public call for subscription of shares or without public call for subscription (so-called simultaneous subscription). Whichever manner of establishment, company's registered capital stock must be at least EUR 25,000. If subscriber has committed itself to cash contribution, subscriber is obliged to pay no less than 10% of nominal value of subscribed shares into bank account and within period specified by founder in call to subscribers. If subscriber fails to fulfill such duty, subscription shall not be effective. Minimum of

30% of nominal value of shares to be paid by monetary contribution must be paid prior to constituent general meeting. Nominal value of shares subscribed by each individual subscriber must be fully paid up within one year from company's incorporation in Commercial Register, at latest.

Constituent general meeting must be convened by founders on conditions that (i) proposed registered capital has been fully subscribed; and (ii) at least 30% of monetary contributions have been paid. If these conditions are not met, subscription is regarded as null and void and founders are jointly and severally liable to subscribers for return of all paid contributions. Quorum required for constituent general meeting is presence of subscribers holding at least 50% of total nominal value of subscribed shares who fulfilled their obligation to pay up at least 30% of shares subscribed by them prior to meeting taking place. Resolution may be adopted by simple majority of shareholders that have subscribed shares with aggregate nominal value exceeding 50% of aggregate nominal value of all shares subscribed by shareholders present at constituent general meeting. Constituent general meeting, among other things, resolves matters of company's formation, articles of association, election of company's bodies and management. Minutes of constituent general meeting are to be recorded by notary public. Decision of founders recorded by notary public substitutes constituent general meeting if company was founded without public call for subscription of shares.

Articles of association must contain: (i) Business name, (ii) seat, (iii) scope of business activities, (iv) amount of registered capital (including amount of conditional registered capital, if general meeting decided on conditional increase in registered capital or approved amount of registered capital in case of authorization of board of directors to increase registered capital), (v) data on issued share certificates, (vi) manner of convening, way of acting and powers of company's bodies and number of its members, (vii) fundamental economic rules of company's activities (details on reserve fund, distribution of profits and consequences of failure to pay subscribed shares in time), (viii) details of increase and decrease of registered capital, (ix) rules of amending of articles of association. Articles of association may also stipulate issue of different classes of shares and contain other appropriate matters.

Shareholders are entitled to share profits earned by company (dividend) and proceeds of its liquidation in case of its winding up and liquidation. They are entitled to attend general meetings, vote, ask for explanations and submit proposals. Number of shareholder's votes is determined by aggregate of nominal values of its shares, however, articles of associations may restrict voting rights by stipulating maximum number of votes per shareholder. Minority shareholders holding shares with nominal value of at least 5% of registered capital are entitled to require convocation of extraordinary general meeting of shareholders, and board of directors is obliged to call meeting in such case within 40 days from delivery of letter requesting extraordinary meeting and of agenda containing reasons why extraordinary meeting is required. Minority shareholders are also entitled to request (i) board of directors to exercise, on behalf of company, right to payment of issue rate of shares from shareholder(s) or return of payments from shareholders which company has paid in conflict of ObchZ; (ii) supervisory board to exercise, on behalf of company, right to damages or other rights that company has towards members of board of directors. If board of directors or supervisory board fails to do so without undue delay, shareholder holding shares with nominal value of at least 5% of registered capital shall be entitled to exercise, on behalf of company, such rights. Person different from shareholder who has filed action (or person authorized by him) may not perform any act on behalf of company in relevant court proceedings. However, shareholder who files claim shall bear legal expenses, unless compensation of legal cost of proceedings was awarded by court.

General meeting of shareholders of joint-stock company is its supreme body. It must be convened by board of directors at least once a year. There is no requirement on quorum of shareholders present at general meeting. Decisions are generally taken by simple majority of votes, unless articles of association or law requires higher majority. Decisions on amendment of articles of association, increase or reduction of registered capital, authorization of board of directors to increase registered capital, withdrawal of shares from trading on stock exchange, issue of priority or convertible bonds, change of legal form of company, termination of public character of company, merger, amalgamation and winding up of company must be taken by two-thirds majority of votes of present shareholders unless articles of association stipulate higher majority, and must be recorded by notary public.

Company is managed by board of directors, statutory body of company, members of which are elected by general meeting unless articles of association stipulate that they are elected by supervisory board. It decides on all matters of company, unless reserved to authority of general meeting or supervisory board.

Supervisory board elected by and reporting to general meeting supervises activities of board of directors and performance of business activities of company. It consists of at least three members. If articles of association stipulate supervisory board elects and recalls members of board of directors.

Joint-stock company is obliged to create reserve fund at time of its establishment in minimum amount of 10% of registered capital. Reserve fund shall be supplemented annually by amount stipulated in articles of association, at least 10% of net profit, until total amount of reserve fund stipulated in articles of association. However, reserve fund shall be supplemented until it reaches at least 20% of registered capital.

Joint-stock companies have to meet strict obligations in case of mergers, amalgamations or partitions, i.e. conduct agreement on merger or amalgamation or project of partition (in form of notarial deed on legal act), issue report stating reasons for merger, amalgamation or partition and receive approval of two-thirds of shareholders.

Since 1 Jan. 2008, new provisions on cross-border merger and cross-border amalgamation of companies located on territory of EEA (European Economic Area) states have been introduced to ObchZ. This regulation transposes Directive 2005/56/EC of the European Parliament and of Council of 26 Oct. 2005 on cross-border mergers of limited liability companies into OchZ.

Limited Liability Company—Spolocnost's Rucením Obmedzenýḿ (s.r.o./spol s.r.o.) is company with registered capital created by predetermined contributions of its shareholders. It may be founded either by sole founder, being individual or business entity, or by two or more persons.

ObchZ eliminates so-called “chain effect” of limited liability companies having sole shareholder. Limited liability company with sole shareholder may not be sole founder or sole shareholder of other company. Also, individual (natural person) may not be sole shareholder in more than three limited liability companies.

Guarantee of shareholder in s.r.o. for obligation of s.r.o. is limited to amount of shareholder's unpaid contribution to registered capital of company. Company is liable for its obligations with all of its assets.

Company does not issue share certificates and ownership relations are predetermined by constituent documents reflected and evidenced by extracts from relevant Commercial Register. Shareholder holds only one interest or share in s.r.o. (business interest). Business interest represents shareholder's participation in rights and obligations related to its membership in company including voting rights and rights to participate in profit distribution. It also represents pro rata participation in company's net assets. Usually, proportion of shareholder's business interests is equal to proportion of amounts of his contributions to company's registered capital, although constituent documents may alter this rule. Size of business interest of one shareholder can differ from that of another shareholder and size of business interest can be altered. Amount of any contribution of one shareholder to registered capital must be at least EUR 750, while being expressed in positive integer. Amount of registered capital of s.r.o. must be at least EUR 5,000. Shareholder's business interest may be transferred to another shareholder by means of written agreement, if approved by general meeting (unless memorandum of association stipulates otherwise). It may be transferred to third party other than shareholder of s.r.o. only if allowed by memorandum of association. S.r.o. may not acquire its own business interests. Similarly, save for exemptions stipulated by ObchZ, controlled company may not acquire business interest in controlling company. Upon written agreement, shareholder may pledge its business interest if transferability of business interest is not excluded. See also category 8 Debtor and Creditor, topic 8.09 Pledges.

S.r.o. is founded by memorandum of association (in case of sole founder by foundation deed). Memorandum of association must include: (i) Business name and seat, (ii) details of shareholders, (iii) scope of business activities, (iv) amount of registered capital including details of each shareholder's contribution to registered capital including amount of paid up contributions at time of establishment and amount of in-kind contribution, (v) details of company's first executive directors, method of their acting on behalf of company, and first members of supervisory board (if created), (vi) determination of administrator of contributions, (vii) details on reserve fund, (viii) advantages provided to persons engaged in establishment of company or obtaining approvals for its activity, (ix) anticipated costs of establishment and incorporation of company, (x) other information stipulated by law. It may also stipulate that s.r.o. will approve articles of association by which organizational structure and further issues of s.r.o. will be regulated. Signature of founder(s) on memorandum of association (foundation deed) must be notarized.

At least 30% of each monetary contribution must be paid up before submission of petition for registration of s.r.o. in Commercial Register. Aggregate value of monetary and in kind contributions paid up before incorporation must be at least 50% from minimal amount of registered capital stipulated by law. In case of sole founder, total amount of registered capital must be fully paid up before incorporation of company.

Shareholders exercise their rights related to company's management and supervision of its operation through general meeting in extent and manner stipulated by constituent documents. Share of profit that shareholder is entitled to receive is determined by ratio of paid-up contributions to total amount of registered capital, unless constituent documents provide for other division of profit.

General meeting of shareholders is supreme body of s.r.o. It adopts all major decisions, inter alia, on distribution of profit, amendment of articles of association, increase or decrease of registered capital, appointment and recall of executive directors and members of supervisory board, or winding up of company. In any event, general meeting is authorized to reserve right to decide on any matter, whether falling under legal regulation to scope of its competencies or not. Number of votes per each shareholder is determined on basis of proportion of its contribution to amount of registered capital, unless association agreement stipulates otherwise. Quorum for general meeting is satisfied when shareholders holding more than one-half of all votes are present, unless association agreement stipulates otherwise. Decisions are adopted by simple majority of votes of present shareholders, unless association agreement or law requires higher quorum. S.r.o. must hold general meeting at least once a year or if loss of company exceeded one-third of amount of registered capital, or if such loss can be expected. Minority shareholders holding at minimum 10% interest in registered capital are entitled to demand convocation of general meeting and, should directors fail to do so, shareholders have right to convene it by themselves.

Each shareholder may exercise, on behalf of company, right to payment of contribution or right to damages that company has towards shareholder(s) or right to damages towards director(s). Person different from shareholder who has filed action (or person authorized by him) may not perform any act on behalf of company in relevant court proceedings. However, shareholder who files claim shall bear legal expenses, unless compensation of legal cost of proceedings was awarded by court.

Statutory body of s.r.o. is one or more executive directors (only individuals); first executive directors are appointed by memorandum of association or foundation deed; further executive directors are appointed by decision of general meeting. Executive directors may act on behalf of s.r.o. independently, unless constituent documents stipulate otherwise. Memorandum of association or general meeting may restrict their authority to act on behalf of s.r.o.; however, such restriction is not effective vis-à-vis third parties. Decisions of executive directors on management of s.r.o. must be taken by majority of directors, unless memorandum of association stipulates higher than simple majority. ObchZ stipulates duties of directors relating to due performance of their functions and their liabilities for breaching of same. Limitation of these liabilities agreed to in constituent documents or separate agreement or waiver by company of same prior to three years of occurrence of same shall be null and void. Right of company to damages towards director(s) may also be exercised by company's creditor if receivables held by creditor may not be satisfied from company's property.

Supervisory board is established only if required by constituent document of company. Once established, it must have at least three members.

Company creates reserve fund at time and in amount stipulated in memorandum of association. If it is not created at time of company's incorporation, it must be created from first net profit according to financial statement in minimal amount of 5% from net profit, however, not more than 10% of registered capital. Reserve fund must be supplemented annually in amount stipulated in memorandum of association or articles of association, but at least in amount of 5% of net profit, up to total sum stipulated in memorandum of association or articles of association; however, at least up to amount of 10% of registered capital.

Unlimited Company—Verejná Obchodná Spolocnost' (v.o.s./ver. obch. spol.).

V.o.s. is company in which at least two persons as partners in v.o.s. company carry on business activities under common business name and bear joint and several liability for obligations of company. Any legal persons or individuals may be partners, however any person can be general partner with unlimited liability only in one company.

V.o.s. is fully liable for its obligations. If liabilities exceed assets, partners are jointly and severally liable for debts of firm to full extent of their property.

Business name should include designation “verejná obchodná spolocnost” or either of abbreviations “ver. obch. spol.” or “v.o.s.” If at least one of partner's names is used in business name, only term “a spol” (“and co.”) needs to be added.

Memorandum of association must specify business name and seat of v.o.s., names and addresses of all partners and scope of business activities. All partners must sign petition for registration of v.o.s. in Commercial Registry. Memorandum of association must be attached to petition.

Constitution, rights and duties of parties are set out in ObchZ and in memorandum of association, which typically covers issues as specific rights and obligations of partners, profit and loss distribution, if not in equal shares, circumstances in which v.o.s. may be dissolved beyond those specified in ObchZ, etc.

Obligation to contribute some capital may be agreed in memorandum of association, although v.o.s. does not create registered capital.

Any contribution made to v.o.s. becomes property of company. Memorandum of association should specify terms on which contributions of parties must be paid. If it does not, contributions must be paid within reasonable time from registration with Commercial Registry. Interest of 20% is payable on late payment of contributions unless otherwise stipulated by memorandum of association.

Partners are statutory body of v.o.s., each of them entitled to act on behalf of v.o.s. individually, unless memorandum of association stipulates that they act jointly. If only some partners are authorized by memorandum of association to act on behalf of v.o.s. in all matters, only those partners constitute statutory body of v.o.s.

As far as management of v.o.s. is concerned, each partner may act independently of others. If memorandum of association allows management of all or part of affairs of v.o.s. to be delegated to managing partners, other partners relinquish their authority to manage v.o.s. to some extent. Managing partners, are however, bound by decision of majority of partners.

Each partner may exercise, on behalf of company, right to payment of contribution or right to damages that company has towards partner(s). Person different from partner who has filed action (or person authorized by him) may not perform any act on behalf of company in relevant court proceedings. However, partner who files claim shall bear legal expenses, unless compensation of legal cost of proceeding was awarded by court.

Limited Partnership—Komanditná Spolocnost' (k.s./kom. spol.).

Limited partnership (or k.s.) is made up of limited partners, whose liability for obligations of k.s. is limited to amount of unpaid part of that partner's contributions registered in Commercial Registry, and general partners whose liability is unlimited.

Name of limited partnership must include designation “komanditná spolocnost” or abbreviation “kom. spol.” or “k.s.”. Should business name include name of any limited partner, he is liable for obligations of k.s. as general partner.

Most of provisions relating to v.o.s. apply to k.s. and most of provisions relating to s.r.o. apply to legal position of limited partners. There are, however, some differences.

In addition to containing similar terms to those included in memorandum of association for v.o.s., memorandum must specifically state which of partners are to be general partners, and which limited partners, and amount of each limited partner's contribution. Minimal contribution of limited partner is EUR 250. Memorandum of association can be amended only upon approval of all partners.

Only general partners are entitled to participate in management of business matters, although other matters are decided by simple majority vote on basis of one vote per partner, including those partners with limited liability, unless memorandum of association stipulates otherwise.

General partners are statutory body of k.s., each with right to act on behalf of k.s. individually, unless memorandum of association stipulates otherwise. If limited partner concluded contract on behalf of k.s. without prior authorization, he would be liable for obligations ensuing from contract to extent general partner would be liable for contract.

Profit is generally divided into two parts, each of which belongs to each class of partners, in proportion 1:1, unless memorandum of association stipulates otherwise. If not agreed otherwise in memorandum of association, general partners share profits equally and limited partners in proportion to their paid up contributions.

As regards right of any partner to exercise, on behalf of company, right to payment of contribution or right to damages that company has towards partner(s), same provisions of ObchZ shall apply as those mentioned above in connection with general partnership.

Cooperative—Druzstvo.

Cooperative is organization with unspecified number of members (at least five individuals or two legal entities) which is founded to undertake business activities or to otherwise satisfy needs of its members. Its name must include designation “druzstvo”.

Registered capital of cooperative is created by members' contributions. Articles of association stipulates amount of capital to be registered in Commercial Register.

Minimum registered capital is EUR 1,250. To become member of cooperative, member's basic contribution or specific proportion of contribution (stipulated by articles of association) must be paid. In latter case, rest of member's basic contribution must be paid within period of three years, unless otherwise provided by articles of association. Cooperative is fully liable for its obligations. Members are not personally liable for obligations of cooperative, however, articles of association may stipulate that in order to cover cooperative's losses, its members shall have compensation duty towards cooperative. It is possible to transfer member's rights and obligations (membership) to another cooperative member unless articles of association provides otherwise. Transfer to any nonmember is possible only upon consent of board of directors (consent is not necessary in case of housing cooperatives).

Cooperative is founded at constituent members' meeting which determines amount of registered basic capital, approves articles of association and elects board of directors and supervisory board. Record from this meeting takes form of notarial deed. Cooperative is incorporated by its registration in Commercial Registry. It is bound to create indivisible fund (which cannot be distributed among cooperative's members during existence of cooperative) equaling to at least 10% of its registered capital. Such fund shall be supplemented annually for sum equal to at least 10% of net profit, until it reaches 50% of registered capital of cooperative (if articles of association do not provide for higher amount).

General meeting of cooperative members is supreme body of cooperative. It must be convened at least once a year. It decides on all matters of cooperative, unless vested to authority of other cooperative's bodies. Board of directors is statutory body of cooperative acting on behalf of it and managing its activities. Supervisory board consists of at least three members and supervises all activities of cooperative and of board of directors. In case of small cooperatives (less than 50 members) articles of association may stipulate that powers of board of directors and supervisory board will be performed by general assembly.

State enterprise (státny podnik/s.p.) constitutes specific type of undertaking governed by Act No. 111/1990 Coll. on State Enterprise, as amended. It is defined as producer of products (goods, services or works) performing business activities independently in its own name and at its own business risk. State may regulate or restrict its activities only to extent, and in accordance with conditions, expressly stipulated by laws. State enterprise is founded by foundation memorandum upon decision of its founder (being relevant ministry or other supreme administrative body). It comes to existence by its registration with Commercial Registry. State enterprise administers: (i) Assets granted to it by relevant state authority at time of its constitution and (ii) assets acquired by state enterprise during its existence. Assets in administration of state enterprise are owned by SR. State enterprise is not responsible for obligation of SR or other entities. SR is not responsible for obligations of state enterprise, unless stipulated otherwise by law.

Statutory body of state enterprise is director acting on behalf of state enterprise in all matters and managing its activities. Some substantial decisions are subject to approval of supervisory board. Supervisory board is being established only in enterprise considered to be monopoly enterprise.

Foreign Corporations.

According to ObchZ, foreign persons may conduct business activities in SR under same conditions as Slovak persons and to same extent, unless law stipulates otherwise. Foreign person is authorized to conduct business (establishing own enterprise or branch) in SR only if registered in Commercial Registry (except for foreign individuals residing in EU or OECD member state). Business documents concerning enterprise or branch of foreign person must include, in addition to general information (see category 3 Business Regulation and Commerce, topic Commercial Registry), information on registration of enterprise or branch in Commercial Registry and information of foreign commercial registry or other registry in which foreign person is registered.

3 BUSINESS REGULATION AND COMMERCE

3.01 BANKS AND BANKING:

Banks in SR are regulated mainly by Act No. 483/2001 Coll. as amended Banking Act (“Banking Act”), Act No. 566/1992 Coll. as amended, Act on National Bank of Slovakia (“NBS”), ObchZ, and various measures of NBS.

Banking system of SR consists of central bank NBS, commercial banks, branches of foreign banks, representative offices of foreign banks and special state-owned bank established by operation of law (Eximbanka SR). Eximbanka is export-import bank established by Act No. 80/1997 Coll., as amended (bank for support of export and import activities). In addition to general banking activities, i.e. acceptance of deposits and offering of loans, bank may be licensed to provide variety of other banking services, e.g. investment in securities, financial leasing, payments and settlements, issue and administration of payment instruments, granting of bank guarantees, opening of letters of credit, collection of payments, etc.

Subject to certain exemptions relating to banks with their seats in territory of member state of EU or other contractual State of EEA (such banks may perform certain banking activities in SR also without banking license granted by NBS upon so-called European passport provisions on basis of their home license, either with or without establishment of branch office in Slovakia), bank may perform banking activities only on basis of banking license granted by NBS. Upon prior discussion with Ministry of Finance of SR (“MF”), NBS decides on granting of banking license to bank performing mortgage transactions (mortgage loans) and construction savings banks. If serious deficiencies in activities of bank persist, NBS may revoke banking license. According to Banking Act, minimum amount of registered capital of bank is EUR 16,596,959.44, and, in case bank intends to provide mortgage loans, minimum amount of registered capital is EUR 33,193,918.87.

Prudence of banking operations of commercial banks is evaluated on basis of NBS provisions prepared in conformity with international standards and recommendations of Basle Committee for Banking Supervision. Evaluation is based on processing of data from banks' accounts, submitted to NBS in form of reports on capital adequacy, credit exposure, liquidity ratios, regulation of currency positions and classification of claims.

Banking secrecy is regulated by Banking Act which stipulates that banking secrecy relates to all information and documents on matters related to client (including former clients and persons who negotiated with bank or branch of foreign bank on conclusion of transaction as well as persons on which/whom bank or branch office of foreign bank obtained data from registry of guarantees and loans kept by NBS, common register of banking information and register of clients kept by banks for purpose of evidencing unusual business operations) of bank and branch of foreign bank, which are not publicly accessible, particularly information on transactions, including balances of current and deposit accounts and status of deposits.

Several regulations aim to prevent legalization of income arising from criminal activity. Act No. 297/2008 Coll., Money Laundering Act, as amended, and certain provisions of Slovak Penal Code represent together with Banking Act relevant regulation of this area in SR.

Deposit insurance scheme is provided by Act No. 118/1996 Coll., as amended, on Protection of Bank Deposits. This Act constitutes deposit protection fund which collects and manages financial contributions from banks as well as from branches of foreign banks to use them for compensation for bank deposits held on behalf of individuals, as well as on behalf of certain categories of legal entities.

According to Banking Act, prior approval of NBS is required for acquisition or increase of capital interest or voting rights within scope of 10%, 20%, 30%, 50% in already incorporated bank in SR by one or more direct operations or concurrent act.

As of 1 Jan. 2004, Banking Act stipulates possibility of banks and branch offices of foreign banks to create so-called common register of banking information (“Register”), for purposes of preparation, conclusion, and performance of transactions with their clients. Banking Act stipulates in detail and determines conditions upon which banks and branch offices of foreign banks may disclose and provide among them information on bank loans and bank guarantees provided to their clients and other related information (including information on credibility of clients and their payment discipline) via Register.

3.02 BILLS AND NOTES:

Bills, notes and cheques are regulated by Act No. 191/1950 Coll., Note and Cheque Act (“Act”). Act is based on so called 1930 Geneva Note Agreements. Act is very precise and detailed with regard to all legal requirements for issue and formal requirements of bills, notes, cheques, including endorsements, acceptance, guarantee, maturity, payments, remedies, interventions, etc.

Note (bill) is negotiable and formal security issued either on order or on name. Note comprises unconditional promise (in case of promissory note) or unconditional order (in case of bill of exchange) of its issuer to perform payment either by himself (in case of promissory note) or by third person (in case of bill of exchange). Accordingly there are two basic types of notes: (i) bill of exchange, and (ii) promissory note.

Bill of exchange must contain: (i) word “bill” (note) in wording and in language bill of exchange is written in, (ii) unconditional order to pay certain amount of money (including currency), (iii) name of drawee (person obliged to pay holder of bill of exchange), (iv) maturity date of bill of exchange, (v) place of payment, (vi) name of person to whom or to whose order bill of exchange should be paid, (vii) date and place of issue, and (viii) signature of issuer.

Promissory note must contain almost same items as bill of exchange, (i) word “note” in its wording and in language note is written in, (ii) unconditional promise to pay certain amount of money (including currency), (iii) maturity date of note, (iv) place of payment, (v) name of person to whom or to whose order money should be paid, (vi) date and place of issue, and (vii) signature of issuer.

Any valid note can be endorsed to another person, even though it was not issued as “order note”. Transfer by endorsement can be avoided by so called “recta clause”. Recta-notes or recta-endorsements exclude further endorsements; however, they do not exclude transfer of notes by assignment.

Pursuant to provisions of Act, obligations from bill of exchange or promissory note are absolute and, save for formal requirements, no other conditions must be satisfied to enforce obligations of obligors. However, it is necessary to distinguish between: (i) direct, and (ii) indirect debtors of notes. Indirect debtors become subject to remedies if direct debtor has not paid note amount upon presentment for payment. Condition for successful settlement of note amount from indirect obligors is performance of protest (save for notes containing expressly stated clause "without protest").

Obligations of guarantor are established by written notice of "guarantee" executed on note.

Act also governs cheques. Requirements for issue of cheques are similar to those applicable to bills of exchange. Cheques can be drawn without specifying payee and transferred as bearer securities. Cheques can be drawn on banks only.

Act also contains special provisions dealing with international legal relations established by bills, notes and cheques: (i) capability of issuer, guarantor (both individuals and legal entities) to undertake under bills, notes and cheques is governed by law of country of its incorporation, (ii) form of declarations is governed by law of country in which declarations were made, (iii) consequences of declarations of issuer of promissory note, drawee of bill of exchange and drawee of cheque are governed by law of country of payment place, (iv) protests are governed by law of country in which protests should be performed. Should no currency unit of payment be marked on bills of exchange or cheques which were issued in Slovak Republic before 1 Jan. 2009 and which are payable in Slovak Republic, such bill of exchange or cheque must be treated as denominated in Slovak Crowns. Bills of exchange and cheques denominated in Slovak currency which are governed, not by Slovak law but by law of foreign country, must be converted from Slovak currency to euros or to other currency under applicable law of relevant foreign country. Bills of exchange and cheques denominated in Slovak currency must, as of 1 Jan. 2009 in Slovak Republic, be treated as bills of exchange and cheques denominated in euros and payable in euros with bill of exchange sum or cheque sum being converted and rounded from Slovak currency to euros under conversion rate and with rounding pursuant to applicable legislation. As of 1 Jan. 2009, conversion of Slovak currency to euros may be marked on bills of exchange and cheques denominated in Slovak currency under conditions stipulated by Act.

3.03 COMMERCIAL REGISTER:

For registration of all companies and cooperatives as well as other entities stipulated by law, Commercial Registers are kept at Courts in seats of Court districts (Bratislava, Banská Bystrica, Kosice, Nitra, Presov, Trencín, Trnava, Zilina). Commercial Register (Obchodný register) is public list and any person can collect information or extracts from it. All data entered into Commercial Register must be in official state (Slovak) language. Any company which has to be registered in Commercial Register comes into existence effectively on day of entry to register. Data required to be in Commercial Register are stipulated by relevant provisions of Act No. 530/2003 Coll. on Commercial Register, as amended ("Act"): (i) business name, (ii) seat, (iii) identification number (in Slovak: identifikacné císlo—ICO assigned by Court), (iv) scope of business activities, (v) legal form, (vi) names of statutory representatives, their addresses, date of birth, special number derived from birth dates including manner of acting on behalf of company and date of occurrence/cessation of their function, (vii) amount of registered capital, scope of repayment, amount of contribution of each partner in case of limited liability company; in case of joint-stock company also number, type, form, face and nominal value of shares and transferability restrictions, if any, in respect of registered (au nom) shares, (viii) designation, address and scope of activities of entity branch, including name of head of branch office, (ix) name and address of procurist and manner of acting on behalf of company, (x) names and addresses of members of supervisory board, including date of birth or special number derived from birth dates and date of occurrence/cessation of their function, (xi) court decision on invalidity of company, (xii) declaration of bankruptcy, (xiii) liquidation of company, (xiv) other facts required by law. Moreover, there are special further requirements for particular forms of legal entities. As far as foreign entities are concerned, information specified in par. (i), (ii) and (iv) above and location of branch of foreign person in Slovakia as well as name and address of its managing director, designation of register or other evidence in which foreign entity is entered into and registration number, dissolution of foreign entity, appointment of liquidator including his/her personal data and termination of liquidation, declaration of bankruptcy over property of foreign entity, approval of composition or other similar proceeding in respect of foreign entity, dissolution of branch office in SR are to be recorded. All changes to above-mentioned data should be announced to Court within 30 days period. Dealing with legal effect of registration of changes of data registered with Commercial Register, they may be divided into two categories: (i) changes of data that are effective vis-à-vis third parties at date of their effective registration with Commercial Register, and (ii) changes of data that are effective at date of their change (by agreement, decision of corporation's bodies etc.), registration with Commercial Register having only evidencing purposes. Which data falls into which category is stipulated by ObchZ or by court's practice.

Also liquidation of company (plus appointment of liquidator) and declaration of bankruptcy (plus identification of bankruptcy administrator) are subject to registration in Commercial Register.

According to Act and Governmental Decree No. 42/2004 Coll. on Business Journal, relevant facts from Commercial Registries are published in Business Journal on basis of documents sent to publisher of journal by Courts keeping Commercial Register. Commercial Register is also publicly available on Internet at www.orsr.sk.

All important corporate deeds and documents (e.g. articles of association, related PoAs, notarial deeds, any corporate deeds relating to changes thereof, restated and complete versions of documents after each significant corporate change within company, all documents related to appointment/dismissal of members of statutory bodies, annual financial statements, annual reports, auditors' reports, decisions of court on liquidation, winding-up, invalidity, cancellation/deletion of company, decisions of court on declaration of bankruptcy or approvals of restructuring, agreements on merger, amalgamation or division of companies, etc.) are to be deposited in collection of deeds existing as part of Commercial Register since 1 Jan. 2002 either in documentary form, or with effect from 1 Aug. 2007 also in electronic form. Statutory body of registered entity must submit to register court deeds that have to be deposited with collection of deeds in one counterpart within 30 days after execution thereof.

For breach of obligation to submit petition for registration of any change with Commercial Register or to deposit any document in collection of deeds, court shall impose on statutory body of company penalty up to EUR 3,310.

Each entrepreneur must state its business name, seat or place of business, legal form of legal entity, identification number (if any) on any business letters and orders made in written or electronic form, on its website, as well as in any written official contact with authorities. Entrepreneurs registered in Commercial Register or in other relevant register must also state identification of register and registration number.

In case of foreigner residing in any EU or OECD member state, who is registered in Commercial Register as person entitled to act in name and on behalf of company as its statutory body, long-term residence permit for SR is not required any more as from 5 Dec. 2001, unless such foreigner intends to effectively stay and reside in Slovakia for more than 90 days in calendar year.

Procedure.

Registration procedure is governed by relevant provisions of Act and OSP. Documents proving authenticity of facts required to be registered in Commercial Register should be attached: foundation memorandum or foundation agreement, certification on contribution to registered capital, specimen signature of persons authorized to act on behalf of company, power of attorney (if applicable), trade license or concession (see topic 3.08 Licenses, Business and Professional), residence permit (if applicable), ownership title or right of use to real estate or part thereof, address of which is registered in Commercial Register as person's seat, which ownership title or right of use does not exclude use of real estate or part thereof as seat or place of business, or consent of owner of real estate or part thereof with registration of real estate or its part as person's seat, and other documents required by law. All above-mentioned documents should be in original or in notarized copies and translated into Slovak language (if necessary) in case of filing in documentary form. In that case, also authenticity of signature on petition for registration and on power of attorney in case of representation must be verified by Notary Public. With effect from 1 Aug. 2007, filing documents in electronic form using guaranteed electronic signature of person authorised to file motion for entry of data into Commercial Register or to file documents in Collection of Deeds instead of filing original documents (or their certified copies) was also enabled. Petitions for registration of changes in Commercial Register are submitted on special registration forms introduced by Decree of Ministry of Justice of SR No. 25/2004 from 1 Feb. 2004. According to Act No. 71/1992 Coll. on Court Fees and Fee for Extract from Criminal Register as amended, with respect to Commercial Register fees are as follows: for first record in Register in case of joint stock company EUR 829.50; EUR 331.50 in case of other legal entity; EUR 165.50 in case of individual and EUR 331.50 in case of branch of legal entity; and EUR 33 in case of branch of individual; for application for record of changes in Commercial Register fees are EUR 66 (per one application, even if applied for record of more changes). As of 1 Oct. 2004, no fee is being paid for deposition of documents into Collection of Deeds. If petition is done via electronic form, above stated fees are significantly discounted.

3.04 CONTRACTS:

ObchZ (Commercial Code) sets forth fundamental principles of contractual relations applicable also to commercial contractual relations defined as: (i) contractual relations between entrepreneurs in course of their business activities, (ii) contractual relations between state, municipality or legal entity established by law as nongovernmental public institution in course of satisfying certain public needs and entrepreneurs in course of their business activities, or (iii) certain types of contract regardless of parties to contracts. Parties to contract may choose that their contractual relations (that do not fall under (i) to (iii) above) will be governed by ObchZ. Certain types of contracts are governed only by OZ (regardless of character of parties e.g. those relating to real property, insurance contracts, donation contracts); others are governed by both legal regulations, where ObchZ regulation accommodates contractual relations. Agreements between entities mentioned under (i) and (ii) above that are regulated as special contractual type by general regulations of civil law are governed by these regulations on type of agreement and ObchZ. Applicability of either OZ or ObchZ extends also to periods of limitation, liability for breach of contractual obligations etc. Principle of contractual freedom is leading principle of ObchZ which on other hand contains certain mandatory provisions applicability of which cannot be avoided. Parties may also conclude contract combining several contractual types or even not falling into any contractual type provided that content of mutual rights and obligations is sufficiently specified and not contravening mandatory provisions of law.

Excuses for nonperformance are regulated in principal by OZ; ObchZ completes provisions for excuses for subsequent nonperformance. If performance of obligation becomes impossible, liable party's duty to render performance will be discharged, however, performance of obligation shall not be considered impossible if it can be performed under more difficult conditions, with greater expenditure or only after agreed time limit. If impossibility relates only to part of performance only that part of obligation shall be terminated. (OZ, §§575, 576).

After liable party has learned of certain circumstances which make it impossible to render performance, liable party is obliged to notify approved party accordingly without undue delay. Former will be liable for damage suffered by latter due to lack of notification of impossibility of rendering performance in time.

Performance of obligation will be deemed unattainable if legal regulations passed after conclusion of contract and having unlimited time validity prohibit conduct which liable party is bound to perform under concluded contract, or stipulate that certain license is required which, however, was not granted to liable party although liable party duly applied for it. Burden of proof concerning impossibility of performance rests with liable party. (ObchZ, §352). Liable party whose obligation was extinguished due to impossibility of performance shall be obliged to compensate damage caused to approved party unless impossibility of performance was caused by circumstances excluding responsibility. Such circumstances are defined as obstacles which occur regardless of liable party's will and which prevent such party from performing its obligation if it cannot be reasonably presumed that liable party could have prevented or overcome such obstacles or their effects and at outset of obligation could not have anticipated such obstacles.

Applicable Law.

According to ZMPSP parties to agreement concerning property or commercial matters may choose any law as governing law of agreement, provided such agreement comprises “foreign element”. Foreign entity being party to agreement used to be most obvious example of fact that it constitutes foreign element in transaction and therefore choice of foreign law in such case would be recognized as valid according to Slovak law. If parties do not choose any law as governing law of agreement, their contractual relationship will be governed by law, application of which is reasonable with respect to arrangement of their relationship. Courts generally should uphold parties' choice of law and decide case in compliance with relevant rules of governing law. This opens question of choice of jurisdiction. ZMPSP allows parties to agreement to agree on jurisdiction of domestic as well as foreign Court.

There may also be cases in which choice of Slovak law would be more appropriate such as when party expects that it may be in need of prompt injunctive relief in Slovakia. In this case choice of foreign law may lead to lengthy procedures of expertise regarding foreign law.

Public Procurement.

Entities from public sector are obliged to follow rules set by Act No. 25/2006 Coll. on Public Procurement, as amended, when concluding contracts with financial compensation on supply of goods, performance of construction works and provision of services. Act regulates: (a) Public procurement for award of supply contracts, awards for performance of construction works, awards for provision of services, (b) construction works concessions, (c) competition of bids, and (d) administration in public procurement.

Act regulates public procurement of: (a) Contracts for supply of goods, subject matter of which is defined as purchase, leasing, hire-purchase, or financial or operating lease, (b) contracts for construction works, subject matter of which is performance of construction works or preparation of project documentation and performance of certain construction works set out in Act or construction of building, and (c) contract for provision of services set out in Act.

Act distinguishes two categories of procurers: (a) So-called public procurers, i.e. entities of traditional public sector (“Public Procurer”), and (b) procurers from selected sectors of industry (“Procurer”). Following entities, for instance, fall into category of Public Procurer: (i) Slovak Republic represented by its authorities, (ii) municipalities, higher regional units, (iii) legal entities established for particular purpose of fulfilment of needs in public interest of non-industrial or non-commercial nature financed fully or partially by Public Procurer or controlled by Public Procurer or in which Public Procurer elects more than one half of members of its management or supervisory body. On other hand Procurer means entities which perform in at least one activity: (i)

Energy and thermal energy sector (including electrical energy sector and gas industry), (ii) water sector, (iii) transport sector, (iv) postal services sector, and (v) sectors connected to use of geographically defined area for purposes of survey or extraction of oil, gas, coal or other solid fuels or operation of public airports, naval ports, inland ports or other similar terminal facilities, while this person is either Public Procurer, legal entity providing such activities on basis of special or exclusive rights (e.g. resulting from laws which restrict performance of above activities to one or several persons and thus significantly affect possibility of performance of activity by other persons) or legal entity on which Public Procurer exercising these activities has decisive influence (direct or indirect).

Act also contains list of exempt agreements (e.g. those containing state secret, etc.). All agreements under Act must be concluded in writing save for contracts with low value (i.e. remuneration lower than EUR 120,000, in case of construction works and EUR 30,000, in case of contracts for goods and services); otherwise Office for Public Procurement (established by Act as central administrative body for public procurement) has right to request (within period of one year from conclusion of agreement) court to declare such agreements invalid.

In connection with entering into any agreements against monetary consideration relating to concluding of contracts on goods, works or services, Public Procurers and Procurers are required to use methods and procedures of public procurement stated by Act. Public Procurement Act defines financial limits of awards for contracts which are of key importance in determination whether Public Procurer and Procurer are obliged to use methods in procurement of contracts for supply of goods, construction works or services. Both Procurers and Public Procurers are obliged to use methods of public procurement in case of contracts exceeding certain financial limits set by Public Procurement Act. In case contracts do not exceed these financial limits, only Public Procurer is obliged to use methods set by Public Procurement Act. Methods used in public procurement are: (i) Public tenders, (ii) limited tenders, (iii) negotiating proceedings with or without publicity, and (iv) competitive dialogue. Act contains rules which must be observed by Public Procurer and Procurer as well as participants in procurement process. Public tender is broadest method for public procurement declared for unlimited number of bidders interested in submitting proposal. Notice must be published in Public Procurement Journal and, in case of public procurements exceeding financial limits set by Act, also in Official Journal of EU. Act contains detailed provisions regarding financial limits for remuneration to be agreed, conditions for participation in and rules for public procurement procedure. Limited tender is declared for unlimited number of applicants; however, Public Procurer and Procurer may limit number of participants who will be called for submission of proposals for contract. Number may not be less than five and may not exceed 20 participants. Negotiating proceedings with publicity is declared for unlimited number of applicants; however, Procuring Entity may limit total number of applicants that will be called for negotiation for at least three participants. Negotiations are to take place on common basis and afterwards bidders are to submit their proposals. Negotiations without publicity may take place only if rigid conditions set by Public Procurement Act are met. Particular applicant will be called for negotiations. Competition of proposals may be utilized in procuring of especially complex projects, where public tender or limited tender may not be used. Aim of competitive dialogue is to find most appropriate way of satisfaction of needs of Public Procurer. Bids have to be evaluated only on basis of economic suitability.

Under Act Office for Public Procurement is supreme administrative body for public procurement. It supervises observance of provisions of Act and transparency of public procurement procedure, and decides on objections of participants to public procurement against wrongful conduct of legal entities in course of public procurement. In case of breach of provisions of Act or discrimination against any participant to public procurement, Office can cancel declared method of public procurement or any of its terms and conditions. If agreement subject to provisions of Act was concluded contrary to its provision, Office can, within one year after entering into agreement, file petition to relevant court for declaring such agreement invalid. Furthermore, for breach of provisions of Act, Office can impose fine up to EUR 15,000 or up to

5% of agreed price of subject of procurement.

Public Procurers and Procurers are bound to perform activities in public procurement procedure via authorized individuals recorded in special register kept by Office for Public Procurement.

Concession Procurement.

Public Procurement Act regulates process of concluding concession contracts. Concession is contract identical to contract for construction works but compensation for such work, instead of financial compensation, shall be right to use construction for agreed time. Analogously, in case of concession for services, concessionaire is entitled to take benefits from such services for agreed time instead of financial compensation. Public Procurer and entities other than Public Procurer set by Public Procurement Act are obliged to apply rules for concession procurement if value of concession contract exceeds financial limits set by Public Procurement Act. Concessionaire is individual or legal entity, or group of more than one individual or legal entity with which concession agreement was concluded, under methods and procedures regulated by Act.

3.05 EXCHANGES:

Stock Exchange.

Stock Exchange Act No. 429/2002 Coll., as amended (“Act”) effective as of 1 Sept. 2002, lays down basic framework for establishment, organization, activities of and termination of operation of stock exchange (``SE''), trading in financial instruments on regulated stock exchange market or multilateral trading system; and exercise of supervision over operation of SE and operation of multilateral trading facility. Significant amendment to Act has been adopted by Act No. 209/2007 Coll. implementing Directive 2004/39/EC of European Parliament and of Council on Markets in Financial Instruments (MIFID Directive), which came into effect in its entirety from 1 Nov. 2007. SE is organizer of regulated market including conditional trading before issuance of security authorized to organize, in terms of determined place and date, demand and offer of securities and to provide for any activities connected therewith according to Act. In addition, SE may organize deals in futures, options and other similar investment instruments and provide for any related activities. From 1 Nov. 2007, SE is authorized to perform also other business activities (e.g., operate multilateral trading facility) upon permission of NBS; provided, however that these activities relate to scope of business activities stipulated by Act and do not endanger performance activities of SE as stipulated by Act.

SE is joint stock company with its seat in Slovak Republic generally bound by ObchZ unless Act stipulates otherwise. It may be founded by no less than ten founders that are legal entities licensed to carry out trading in securities, banking activities, insurance activities or activities of asset management company under Act No. 594/2003 Coll. on Collective Investment, as amended or foreign entities with similar scope of business activities. Shares must be issued in registered book-entry form. No priority shares are allowed. Any change of form and face of SE shares is prohibited. Prohibited is also change of legal form of SE and sale of SE enterprise or part thereof. Registered stock capital of SE is no less than EUR 3,319,391. Shareholders may be only legal persons that may be founders of stock exchange, National Property Fund of SR and central depository under Act No. 566/2001 Coll. on Securities and Investment Services as amended.

SE can be established only upon permit granted by National Bank of Slovakia (“NBS”). Permit is granted for indefinite time period and cannot be transferred to any other person. Under stipulated conditions NBS will revoke permit. NBS also performs supervision over activities of SE. There is only one SE in SR: Bratislava Stock Exchange (Burza cenných papierov v Bratislave, a.s.). Slovak Stock Exchange (Slovenská burza cenných papierov, a.s.), ended its operation in

Dec. 2002. Although Act does not limit number of SEs that may operate in Slovakia, it is likely that NBS would consider size of market, which is not considerably large, in deciding about approval to incorporate another SE.

Governing bodies of SE are general assembly of all shareholders, board of directors, supervisory board and secretary general. General assembly of shareholders inter alia approves stock exchange's articles of association and any amendments thereto, decides on increase or decrease of registered stock capital, appoints and revokes members of board of directors and supervisory board.

Board of directors is statutory body of SE. Only individuals satisfying conditions prescribed by Act and approved by NBS may be appointed as members of board of directors. Board of directors inter alia approves SE rules, appoints and revokes secretary general, approves suspension of trades closed on SE, decides on securities listing, decides on other investment instruments listing, grants and revokes trading authorization. Day to day business of SE is managed by secretary general.

SE rules stipulate conditions for trading in securities and other investment instruments on SE. SE organizes trading in securities on market of listed securities and on regulated free market. Trading authorization belongs to National Bank of Slovakia and members of SE that can be legal entities licensed to provide investment services under Act on Securities and Investment Services, which are obliged to comply with provisions on adequacy of own resources or asset management company, provided such legal entity complies with SE rules. Securities can be listed only if satisfy conditions prescribed by Act and Act No. 566/2001 Coll. on Securities and Investment Services, as amended. Issuers of listed securities must fulfil obligations stipulated by Act. Participation of SE and its members in settlement and clearing of transactions is also governed by Act No. 566/2001 Coll. on Securities and Investment Services, as amended.

Commodity exchange is joint stock company with its seat in Slovak Republic governed by Act No. 92/2008 Coll., organizing trades in goods. Provisions of ObchZ apply accordingly to commodity exchange, unless stipulated otherwise. Only entities registered in Commercial Register are allowed to be founders of commodity exchange which is founded by foundation deed entered into among at least five founders. Founders must be entrepreneurs registered in Commercial Register or identical foreign register, credible and they must not create closely commented group under special act.

Licensing authority is Ministry of Economy, for trading in commodity derivates must ask National Bank of Slovakia for prior-approval.

Authorities are general assembly, supervisory board, secretary general, and exchange chamber. General assembly is supreme body of exchange, while exchange chamber is statutory and managing authority consisting of at least five members. Members of exchange chamber are elected by general assembly. Exchange chamber may create committees to perform its special activities. Day to day business is managed by secretary general, who is employee of exchange. Secretary general is elected by exchange chamber.

Eligible persons for commodity exchange trade are: (i) Commodity exchange shareholders, (ii) commodity exchange dealer, (iii) securities dealer, and (iv) legal entities created by law to regulate commodities trades or protection of state material reserves.

3.06 FRAUDS, STATUTE OF:

No general statute requiring writing in transactions. See requirements for written documents in appropriate categories/topics, e.g., Contracts; categories Business Organizations, topic Corporations; Employment, topic Labor Relations; Estates and Trusts, topic Wills; Property, topic Real Property, etc.

3.07 INFORMATION TECHNOLOGY, INTERNET AND NEW MEDIA:

Computer Programs and Database Protection.

See category 19 Intellectual Property, topic 19.01 Copyright.

E-Commerce.

As of 1 Feb. 2004, e-commerce is regulated by Act No. 22/2004 Coll. on Electronic Commerce, as amended ("Act on Electronic Commerce"), largely based on EC Electronic Commerce Directive (Directive 2000/31/EC). It covers legal relationship between providers of information society services (distant provision of services through electronic communication network) and recipients. Provision of information society services does not require any special approval or license granted by state authority and it is open to individuals and legal entities, notwithstanding whether they are entrepreneurs. However, providers of Internet services must obtain license granted by Telecommunication Office of SR (see subhead Telecommunication in this topic). Provider must identify itself by (i) name/business name, place of business and address/seat for individuals/legal entities respectively, (ii) tax identification number, if applicable, (iii) e-mail address and telephone number, (iv) register where entered and registration number, and (v) identification of authority supervising provider's provision of services. Service providers performing regulated occupation who are members of self-governing professional organizations (e.g. attorneys, authorized architects, patent agents, providers of health care) are at commercial communication in addition to general information duties obliged to provide information on respective self-governing organization and rules of profession. Unsolicited commercial emailing (spam) is prohibited.

Rules on conclusion of contracts and general rules of Civil Code and Commercial Code apply for contracts in e-commerce. Only contracts requiring administrative approval or certification, or concerning securing of obligations are excluded from contracts that may be concluded by electronic means. Pursuant to Civil Code, requirement of written form shall be satisfied if legal act is made by cable, telex or electronic means that enables identification of subject of legal act and determination of person that performed it. E-commerce document, which is considered original, should be in format guaranteeing immutability and reliability. Recipient must have possibility to correct its order. Provider must clearly and in Slovak language inform about actions needed for contract conclusion, available methods of identification and correction of errors, place of deposit of contract and its availability, and language proposed for contract conclusion. Provider must also inform on contractual terms and conditions and periods for fulfillment in form allowing recipient to reproduce material requisites of contract. Information on any other regulations or rules of provider applicable should also be disclosed. Provider must confirm recipient's order without delay. In case above relates to communication between entrepreneurs, it applies only if not agreed otherwise. Provider is not responsible for content of information transferred, in case it only transmits these without any variation, initiative to transmit or selection of recipients. Fulfillment of obligations stipulated by Act is supervised by Slovak Commerce Inspection.

Act No. 108/2000 Coll. on Consumer Protection in Peddling and Mail-Ordered Selling is also significant for e-commerce. It sets out distant seller's duty to identify itself, inform on duration of offer, and properly describe product or service, including its price, delivery and payment conditions. Purchaser is entitled to terminate contract without reason within seven workings days of purchase, except for certain specific products and services.

Electronic (Digital) Signature.

Act No. 215/2002 Coll. on Electronic Signature contains separate legal regulation of legal relations arising in connection with execution and use of electronic signature. Act stipulates definitions of basic terms, rights and obligations of persons using electronic signature, authenticity and protection of electronic documents signed with electronic signature, conditions for acknowledgment of foreign certificates. Certificates of electronic signatures are issued by certification authorities, qualified certificates of electronic signatures are issued by certification authorities accredited by National Security Authority. No special license is required for performance of certification activities and provision of certification services, except for issuing of qualified certificates. Act contains minor amendments to several acts in order to enable use of electronic signature in practice (e.g. OZ (Civil Code), OSP (Civil Procedure Code), Administrative Procedure Code, Criminal Procedure Code, Act No. 511/1992 Coll. on Taxes and Fees Administration, as amended and Act No. 145/1995 Coll. on Administrative Fees, as amended). Its provisions are further implemented in numerous decrees of National Security Authority.

Telecommunication.

Requirements for establishment and operation of electronic communication facilities and networks, and for provision of telecommunication services are regulated by Act No. 610/2003 Coll. on Electronic Communications, as amended. Electronic communications is term originating in EU Electronic Communications Regulatory Framework and covers exchange and transmission of information through electronic communication networks, other than television and radio broadcasting for non-identifiable recipients. No licensing is required for network establishment and service provision. Only fulfillment of requirements of general permit, including compliance with notification duty, is required, with exception of requirement for individual permit for use of numbers, frequencies and identification signs. Act contains certain special provisions regulating competition in area of electronic communications, with differences against general regulation on protection of economic competition in Act No. 136/2001 Coll. as amended. Relevant markets are determined by Telecommunications Office of SR (``Telecommunications Office'') based on European Union's recommended list of relevant markets and Act further stipulates rules and procedures for their analysis and for assessing significant market position of market participants. Telecommunications Office may declare certain market participants to be significant enterprise from perspective of economic competition. Such enterprise may be subject to price regulation by Telecommunications Office, with requirement to justify prices and provide its calculation methods. Telecommunications Office may set calculation methods for such enterprise. Special provisions are stipulated for rules of operation of universal electronic communication service, covering whole country and most of population. In connection with installation of electronic communication lines, rights to property including real estate may be limited and activities in determined protection zones restricted under conditions stipulated in Act. Telecommunication secrecy, protection of personal data and protection of transferred information is also regulated by this Act. For breach of duties under this Act, Telecommunications Office may repeatedly impose penalty of up to EUR 2,323,574.32.

Television and Radio Services.

Act No. 308/2000 Coll. on Broadcasting and Retransmission, as amended, stipulates conditions for radio and television broadcasting and retransmission. Act requires license for television or radio broadcasting and registration for retransmission of content via telecommunication facilities (e.g. cable retransmission) by Council for Broadcasting and Retransmission (“Council”). Act stipulates rights and obligations of broadcasters and retransmission providers in connection with requirements for broadcast content, access by public to information and news, broadcasting of advertisements, teleshopping and sponsored programs and limitations on capital or personal links between broadcasters and news publishers. Council will cancel license if broadcaster breaches Act or, if, in specific cases, broadcaster transfers stake on its equity capital to third person without prior approval given by Council. For breach of Act, Council may: (i) Impose duty to broadcast announcement on breach of Act, (ii) suspend broadcasting of program or part of it, (iii) impose fine up to EUR 165,969, or (iv) terminate license for substantial breach of Act.

Data Protection.

Protection of personal data is regulated by Act No. 428/2002 Coll. on Personal Data Protection, as amended ("Act"). Act covers only protection of data on individuals (data on legal entities is not covered). All processing of personal data (obtaining, collection, recording, organization, adaptation or alteration, retrieval, consultation, use, disclosure by transmission, dissemination, rearranging or combination thereof) may be carried out only upon consent of individual concerned, unless Act or other specific act meeting conditions prescribed by Act stipulates otherwise. Consent has to be given freely, it must be demonstrable, specific and comprehensive, stating that person concerned agrees with data processing. It is possible to process personal data without consent of person concerned in cases specified by law. Information system operator or data processor are only persons entitled to process personal data. They are inter alia obliged to: (i) ensure accuracy of processed personal data, (ii) keep them up to date, (iii) process data in way corresponding to purpose of processing, (iv) keep personal data being processed confidential, (v) protect personal data against theft, loss, destruction, unauthorized access, alteration and disclosure and for that purpose to implement required security project and appoint person supervising security of information system, and (vi) liquidate personal data after achieving purpose of data processing. According to Act, controller employing more than five people has duty to notify Data Protection Office of SR on written authorisation of responsible person (who can only be natural person), which is surveying observance of Act with regard to processing of personal data. Obligations and responsibilities of such responsible person, as well as conditions which this person has to fulfill, and also obligations of controller toward responsible person, are stipulated in Act. With regard to cross-border flow of personal data, Act differentiates: (i) Transmission of personal data within EU Member States, and (ii) transmission of personal data to third countries. Cross-border flow to third countries not guaranteeing appropriate level of protection of personal data is permitted only under specific conditions stipulated in Act. Person concerned has right to request from information system operator: (i) specific information on his/her personal data being processed, including specification of data and their source and extract of data processed, (ii) correction of incorrect or not updated personal data, (iii) liquidation thereof if objective of data processing was attained or Act was breached. Processing of specific categories of data (e.g. data concerning state of health, racial or ethnic origin, religion or political opinion) is subject to special registration of information system containing such data. Information systems containing specific data, data subject to cross-border flow or processed by third party processor are subject to registration with Data Protection Office of SR prior to commencement of personal data processing, in case they are not supervised by responsible person or other exemptions provided in Act do not apply. In case neither registration nor special registration is required, only internal record containing same information as registration shall be kept. State supervision in SR over personal data protection in information systems is performed by Data Protection Office of SR. In case duties stipulated by Act are breached, it may impose fines up to EUR 331,939.19 and publish name of violator.

3.08 LICENSES, BUSINESS AND PROFESSIONAL:

For carrying on any trade activities, Trade License is required to be obtained according to Trade Licensing Act No. 455/1991 Coll., as amended (see subhead Trade Licensing Procedure, infra). However, there are some activities excluded from Trade Licensing Act (see subhead Special Licensing Procedure, infra).

Trade Licensing Procedure.

Trade Licensing Act defines "Trade" as systematic activity of individual or legal entity performed individually in its own name and at its own liability for purpose of making profit in accordance with terms stipulated by Act. Act classifies trades into two categories, notifiable trades and trades requiring concession. Which category trade falls into is set out in annex to Act. Notifiable trades are further split into categories as follows: (i) craftsmanship trades (whereby professional skills reached by training is precondition to authorization to carry out this trade), (ii) trades requiring evidence of professional skills (whereby professional skills that do not relate to craftsmanship trades form are precondition to authorization to carry out this trade), (iii) free trades (whereby no professional skills are required). Legal entity must satisfy requirements on professional qualification necessary for obtaining of license via appointed responsible representative. Responsible representative has to be: (i) In employment relationship with company, or (ii) shareholder of company. Authorized representative of physical person must be appointed, if physical person does not meet conditions prescribed for desired trade, or trade is performed in more than one workplace. General conditions for performance of trades are: (i) age over 18, (ii) legal capacity and (iii) integrity (proved by non-criminal record statement). In case of legal person, general conditions must be fulfilled by person being its statutory body. Where trade is notifiable, it must be notified to trade licensing office local to proposed place of business and business activity may be performed as of day of notification. If stipulated conditions are satisfied local trade licensing office issues trade license. In case of concession, local trade licensing office requires standpoint or approval of specific state bodies. Entrepreneur must report to local licensing office all changes concerning facts mentioned in trade license. Relevant Trade Licensing Authorities may impose sanctions of up to EUR 6,638 for violation of this Act or for practicing any trades without license.

Special Licensing Procedures.

Certain entrepreneurial activities excluded from Trade License Act require license granted by special state authority following satisfaction of special requirements such as technical (special facilities required), organizational and material, personal, financial (minimum required capital), documentary, and other. These activities include those, performance of which is permitted only to state or legal persons stipulated by laws (e.g. postal services), and activities and services e.g. in following areas: law, accountancy, activities of sworn translators and interpreters, professional appraising and medicine, mining, energetics, insurance, banking, operations of stock exchange, collective investment and administration of investment funds, radio and television broadcasting. In some specific cases entrepreneur can carry out profession legally only as member of professional organization (e.g. advocates).

3.09 MONOPOLIES, RESTRAINT OF TRADE AND COMPETITION:

Unfair business practices of undertakings are prohibited in ObchZ and in Act No. 136/2001 Coll. on Protection of Economic Competition, as amended (“Competition Act”) effective as of 1 May 2001.

ObchZ prohibits generally any conduct that is contrary to good practices of economic competition and is capable of being detrimental to other competitors or consumers, in particular any unauthorized use of business name, false advertising, deceitful description of goods and services, misuse of names and labelings, parasitic exploitation of company's reputation, bribery, discrediting, violation of business secrets, endangering health and environment. Consumer's rights impaired by unfair competition can also be defended by organizations protecting interests of consumers.

Competition Act stipulates other forms of unlawful restrictions of competition and concentration, which are as follows: (i) agreements restricting competition, (ii) abuse of dominant position in market, (iii) concentration. Antimonopoly Office of SR (hereinafter referred to as “Office”) is public authority entitled to decide in relation to provisions of Competition Act and infringements of Arts. 81 and 82 of EC Treaty pursuant to Council Regulation (EC) No. 1/2003.

Any agreements having as their object or effect restriction of competition are prohibited unless Competition Act stipulates otherwise. They can involve (i) direct or indirect fixing of prices or other commercial terms, (ii) commitment to limit or control production, sales, investments or technical development, (iii) division of market or source of supplies, (iv) commitment to apply different conditions of trade for equal and comparable transactions to individual entrepreneurs resulting in competitive disadvantage, (v) conditions that conclusion of contracts will require acceptance of supplementary obligations that do not relate to subject matter of such contracts, and (vi) co-ordination of offers in particular in public tenders. Above-mentioned agreements are void. Save for agreements involving any of restrictions mentioned in (i)—(iii) above, and restriction of competition by cumulative effect of similar agreements exceeding 10% of relevant market, prohibition of agreements restricting competition will not apply if combined market share of parties to such agreements does not exceed 10% of relevant market of same or interchangeable products or services. Prohibition under Competition Act shall not apply to agreements restricting economic competition which at same time (1) contribute to improving production or distribution of goods or promoting technical or economical progress, (2) allow reasonable share of resulting benefits to users, (3) do not impose on parties to agreement any restrictions not indispensable to attainment of above-mentioned objectives and (4) do not allow parties to prevent competition in relation to substantial part of product concerned relevant market. Undertakings themselves will assess compliance of their agreements with Competition Act. Prohibition under Competition Act shall not apply even to certain categories of agreements (including vertical agreements, motor vehicle distribution and servicing agreements, licensing agreements for provision of technology, specialization (horizontal co-operation) agreements, research and development agreements, certain categories of agreements in insurance sector and agreements in sector of maritime transport) that may not affect trade between EU member states if they comply with conditions for exemption under respective Commission (EC) Regulations stipulating block exemptions for certain categories of agreements and concerted practices. Benefit of exemption may be withdrawn by Office under same conditions as stipulated in respective Commission Regulations (EC) for withdrawal of same by Commission.

Dominant position in market is held by one or more undertakings not being subject to substantial competition or by undertakings that behave independently due to their economic power. Abuse of dominant position is, in particular: (i) Direct or indirect enforcement of disproportionate conditions or prices in contracts, (ii) threat of restriction or restricting production, sale or technological progress to detriment of consumers, (iii) applying different conditions for equal or comparable transactions to individual undertakings resulting in competitive disadvantage, (iv) making conclusion of contract conditional upon another party accepting conditions unrelated to subject of contract, and (v) interim abuse of economic power with aim to exclude competition, abuse of dominant position by owner or administrator of unique equipment (equipment, infrastructure, place or right, acquisition or construction of which by another undertaking is not objectively possible and without access to or use of which competition could be restricted), if refuses, under conditions stated by Competition Act, to provide other undertakings with access to such unique equipment.

Concentration (merger, amalgamation, acquisition of control over whole or part of another undertaking or creation of concentrative or co-operative type of joint venture) is subject to control regime of Office if: (i) combined worldwide aggregate turnover of undertakings concerned was at least EUR 46,000,000 for past accounting period preceding concentration and, at same time, each of at least two of undertakings concerned generated Slovakian-wide aggregate turnover of at least EUR 14,000,000 for past accounting period preceding concentration, or (ii) at least one of undertakings concerned generated Slovakian-wide aggregate turnover of at least EUR 19,000,000 for past accounting period preceding concentration and, at same time, at least one of other undertakings concerned generated worldwide aggregate turnover of at least EUR 46,000,000 for past accounting period preceding concentration. For purpose of turnover calculation, worldwide and Slovakian-wide aggregate turnover shall be calculated on consolidated basis as sum of turnovers of each of undertakings concerned, undertakings being controlled by or controlling, directly or indirectly, any of undertakings concerned, plus sum of financial aid provided to each of undertakings concerned. Concentration subject to control of Office must be notified by obliged undertaking before performance of rights and obligations arising from concentration and after triggering event (e.g. conclusion of agreement). Save for exemptions stipulated by Competition Act, undertakings concerned may not perform any rights and obligations arising from concentration until decision on concentration becomes effective. On basis of notification of concentration (terms of which are provided by Decree of Office No. 204/2009

Coll.) Office will issue decision prohibiting or permitting concentration within 60 business days following delivery of complete notification (or amendment thereto), which time period can be extended by chairman of Office up to 90 additional business days. If concentration creates or strengthens dominant position on market, or, in case of creation of joint venture, coordination of behavior of undertakings concerned arising thereof is prohibited under Competition Act, Office will call upon undertakings concerned to propose conditions and obligations/remedies to remove these concerns and ensure that concentration will not lead to any competition problem. Such proposal is not binding on Office. Office may prohibit implementation of concentration until conditions imposed on parties have been fulfilled. If undertakings concerned do not fulfill conditions imposed by Office in clearance decision, Office shall annul imposed decision and issue new decision by which it will prohibit concentration in question. Office may change or repeal its decision upon request of parties or ex-officio under conditions specified by Competition Act. Parties to proposed concentration may ask Office for statement on intended concentration prior to time concentration was implemented. However, notification duty is not affected by such statement.

On basis of Council Regulation (EC) No. 1/2003, Competition Act extended investigative powers of Office in connection with investigation of infringements of Competition Act and Arts. 81 and 82 of EC Treaty.

Consumers whose rights have been violated by unlawful restriction of competition may require violating party to remedy breach. Office will fine undertakings for breaching duties stipulated by Competition Act up to 10% of their worldwide turnover for previous accounting year and, if fine is impossible to calculate, up to EUR 330,000.

Enforceable decisions of Office and other information stipulated by Competition Act are published in Commercial Bulletin, on official web site of Office (www.antimon.gov.sk) and in Office's library.

3.10 SALES:

Principal provisions on sale of goods are determined by §§409-470 of ObchZ (retail sale is governed by §§612-627 OZ). Purchase agreement must contain: (i) description of purchased goods (individual or at least stating amount and kind of goods), (ii) purchase price (or at least manner of its later determination), unless parties manifest their will to enter into purchase agreement without determining price (in such case price payable for such or comparable goods at time when agreement was concluded under terms similar to those of agreement is to be paid).

Buyer acquires title to goods at time of delivery. Before delivery of goods being transported to buyer, buyer acquires title at time when buyer acquires right to dispose of them. However, parties may agree in writing on different time of acquisition of title. If later time of acquisition of title was agreed, it is presumed that buyer acquires it when purchase price has been fully paid.

Buyer will acquire title to purchased goods even if seller is not owner of sold goods, unless at time when buyer was to acquire title he knew that seller was neither owner nor authorized to sell goods.

Notice Required.

Buyer's rights from nonconforming delivery cannot be asserted in court proceedings if buyer failed to notify seller of defects without undue delay after (i) buyer detected defects, (ii) buyer having taken professional care should have detected defects during prior obligatory check, (iii) buyer should have detected defects later, at latest within two years (or warranty period if applicable) after delivery of goods. Provisions above will not apply, if defects of goods were caused by fact known to seller at time of delivery of goods.

Warranties.

By issuing written guarantee for quality of goods seller guaranties that delivered goods will be fit to be used for agreed (and if not agreed for customary) purpose or will be of agreed (or customary) quality for certain time period. Obligation for guarantee arises from contract, or declaration of seller (e.g. in form of letter of guarantee) or marking of guarantee period or period of durability or utilization on packaging of delivered goods.

Consumer Protection.

OZ (Civil Code) stipulates general conditions for consumer protection, setting down liability of seller or service provider (save for provision of services pursuant to special regulations, e.g. by advocates, commercial lawyers, notaries public, bailiffs) for quality of products or services. Amendment to OZ effective as of 1 Apr. 2004 implemented EC directives on consumer protection by setting out special protection in relation to consumer contracts which are defined as contracts irrespective of their legal form, concluded between supplier and consumer. Supplier means person acting during conclusion and performance of consumer contract in its scope of business. Consumer means person not acting during conclusion and performance of consumer contract in its scope of business. Furthermore, Act No. 250/2007 Coll. on Consumer Protection, as amended (``Consumer Protection Act''), governs rights of consumers and duties of producers, sellers, importers and suppliers, competency of public administration authorities with respect to consumer protection, and position of legal persons created or established for purpose of consumer protection. Consumer Protection Act applies to sale of products and provision of services, where performance is being delivered in territory of Slovak Republic or where performance concerns business activities in Slovak Republic. Sellers and others are prohibited from misleading consumer, especially by giving false, unproved, incomplete, misleading, ambiguous information or failing to inform customer of real conditions of products. Provisions of Consumer Protection Act impose further obligations upon seller as follows: (i) To sell products in proper weight, size, and amount and to allow consumer to ascertain same, (ii) to sell products and provide services of standard quality, (iii) to sell products and provide services at agreed prices, (iv) to correctly charge prices when selling products or providing services, (v) to ensure compliance with hygienic conditions when selling products and providing services, (vi) when selling products and providing services, to comply with product storage conditions stipulated by producer or in separate regulation in order to prevent deterioration of product of products, (vii) to prevent product to consumer, where applicable in view of nature of product, (viii) to ensure sale of products and provision of services in way allowing for their safe use. Seller is obliged to inform consumer about characteristics of product being sold or nature of service being provided, on method of use and maintenance of product, any danger or risks linked with incorrect use or maintenance, on storage conditions and on risk linked with provided service, if necessary with respect to nature of product in form of written operation manual (this obligation can not be avoided by claim that correct or necessary information has not been made available by producer, importer, or supplier). Moreover, producer and seller is obliged to label product with data that provide trader with truthful and complete information about supplied product's characteristics.

Supervision over consumer protection is performed by Slovak Trade Inspection, which, among other powers, has power to fine for infringement of above expressed duties, to amount of EUR 331,939.19; however actual amount depends on character of infringement and scope of consequences.

Particular obligations of sellers in relation to peddling and mail-ordered sales of goods to consumers are stipulated by Act No. 108/2000 Coll. on Consumers Protection related to Peddle and Mail-ordered Sale.

Slovak Trade Inspection (Slovenská obchodná inspekcia—SOI) is state authority which controls all trade activities on Slovak market and is entitled to fine for breach of Consumer Protection Act. Competence and powers of SOI relating to supervision over protection of consumers are specifically governed by Act No. 128/2002 Coll. on State Control over Internal Market in Consumer Protection Matters. Act No. 152/1995 Coll. on Food, as amended, relates to food and tobacco products and stipulates some specific obligations of producers and sellers of these products. Food Code issued by Ministry of Health of SR and Ministry of Agriculture of SR specifies in great detail hygienic, technological and other requirements in connection with production, storage, labeling and sale of food, tobacco and cosmetic products. According to Act No. 136/2001 Coll. on Protection of Economic Competition, consumer whose rights have been violated by unlawful restriction of competition may bring lawsuit and require violating party to refrain from unlawful behavior or to remedy breach.

Prices.

Pricing Act No. 18/1996 Coll., as amended, governs process of agreeing, regulating and supervising pricing in Slovakia. Act recognizes several levels and methods of state intervention in contractual freedom in pricing formation process. Each seller or supplier subject to this Act (there are several exclusions) must prepare and prove calculation of its prices, costs and margins, upon request of supervising authorities.

Ministry of Finance and other state regulatory bodies stipulated by Act are entitled to regulate prices, if (i) extraordinary situation with direct influence on prices of goods on domestic market affecting price stability or accessibility of goods occurs, (ii) market could be impaired due to underdeveloped competitive environment, (iii) it is required by consumer protection or public interest a) during balancing of buyer's or seller's position, b) by change of exchange rate of Slovak currency, tax laws, customs laws or grant laws, (iv) provision of goods is deemed to be entrepreneurship in network industries—provision of such goods in energy sector was removed from competence of Ministry of Finance of SR and pursuant to Act 276/2001 Coll. on Regulation in Network Industries transferred to Office for Regulation in Network Industries, (v) delivery or provision of concerned goods is deemed to be operation of transport on rail, universal post service or service of postal payments.

General and standard methods of intervention are (i) stipulating prices as fixed or maximum prices; (ii) stipulating tariffs and tariff conditions; (iii) stipulating binding conditions for production, supplies and purchase; (iv) stipulating economically qualified costs and reasonable profit including scope of investment that may be included in prices or tariffs.

For natural monopolies (with exemption of energy sector) specific mechanisms are applicable, such as stipulating prices, tariffs and tariff conditions; stipulating binding conditions of production, delivery and purchase; or stipulating justified costs and appropriate profit margin (including investments) being capable of incorporation into prices and tariffs.

Applicable Law.

See topic 3.04 Contracts.

Advertisement.

Act No. 147/2001 Coll. on advertisement, as amended, stipulates general requirements for advertising, particular requirements for advertising of certain products, protection of consumers and entrepreneurs against deceptive and inadmissible comparative advertising and advertising which is unfair business practice and competence of relevant state supervisory bodies. Act defines basic terms such as advertising, product and propagator; advertising means presentation of products in any form with intention to introduce them on market. Advertising does not include designation of letterheads or envelopes with business name or trademark, marking of seat, permanent address, buildings or premises by name of person, marking of products with data that are required by special regulations to be marked thereon, publishing of annual or audit report, financial statements or other information if they must be published under special regulations.

Act stipulates general requirements for advertising e.g.: (a) it must be in compliance with good manners and rules of economic competition; (b) cannot, inter alia, (i) be deceptive or hidden, (ii) abuse consumer's confidence or lack of experience, (iii) present products production, sale or use of which is prohibited, (iv) contain any facts disparaging human dignity, discrimination of any kind, propagation of violence or products jeopardizing environment or health, (v) contain information on persons without their approval, (vi) abuse confidence of minors, and (vii) have characteristics of unfair business practices. Advertising cannot be circulated by automatic call system, telefax and electronic mail without prior consent of user. Advertising cannot be addressed to particular person, if such person has rejected delivery of such advertising in advance.

Act further stipulates conditions under which comparative advertisement is allowed. Comparative advertising means advertising that directly or indirectly mentions another competitor or its products.

Alcoholic beverages may be advertised only under conditions stipulated by Act. Such advertising may not be oriented toward minors, or state that consumption of alcohol has positive effect on physical or psychological health of individuals.

Act further prohibits advertising of tobacco products, weapons and munitions. Act also prohibits advertising of certain categories of pharmaceuticals (e.g. those not registered in Slovakia, those containing narcotics, those available only on prescription, those paid from health insurance scheme) and stipulates conditions for advertising of other categories of pharmaceuticals. Act also stipulates restrictions of advertising of nursing feed and subsequent supplementary appliances.

Food Control Agencies.

Institution for State Control of Veterinary Bioproducts and Pharmaceuticals, Institution of Public Health of Slovak Republic, Regional Institutions of Public Health, State Institution for Control of Pharmaceuticals and Slovak Trade Inspection are state supervision authorities over observance of act. They may impose duty to publish announcement on breach of act, require cessation of advertising as well as impose on propagator of advertising penalty up to amount of EUR 66,387.84 for breach of general requirements for advertising and penalty up to amount of EUR 165,969.60 on person which has ordered deceptive advertising or inadmissible comparative advertising.

Radio and television broadcasting is exempted from applicability of Act. Special regulation concerning advertising on radio and television is contained in Act No. 308/2000 Coll. on Broadcasting and Retransmission, as amended. Regulation is analogous to one contained in Act on Advertisement, with emphasis on specific aspects of broadcast advertisements and teleshopping.

4 CITIZENSHIP

4.01 ALIENS:

See category 17 Immigration, topic 17.01 Aliens.

4.02 IMMIGRATION:

See category 17 Immigration, topic 17.02 Immigration.

5 CIVIL ACTIONS AND PROCEDURE

5.01 ACTIONS:

Commencement of Proceedings.

Trial shall commence upon petition which must identify: (i) court to which it is addressed; (ii) petitioner and defending party stating name, surname, eventually date of birth and phone number, citizenship and residence of each of parties and their representatives, if appropriate; in case of legal entities data necessary for their identification must be provided, namely business name, seat and identification number if given; in case of foreign legal entity as party to trial, extract from registry or other recording in which it is registered must be attached; in case of individual—entrepreneur business name, seat and identification number if given must be provided; in case of state as party to trial specification of state and respective body acting on behalf of state must be provided; if party to proceeding is foreign entity, extract from respective Commercial Registry where foreign entity is registered shall be enclosed to petition; in case of parties being entrepreneurs, date on registration with respective registry where entrepreneur is registered shall be included in petition; (iii) matter to which it relates; (iv) true description of material facts; (v) identification of evidence claimed by petitioner; and (vi) what is claimed by petition. Petition must be signed and dated. It must be filed in appropriate number of counterparts with annexes attached so that one counterpart remains with court and one copy is delivered to each party.

Statement to Petition.

Court shall usually invite defending (respondent) party to make statement in respect of particular petition, containing clause that if party fails to give statement, court may dispose of petition by judgment by default provided that certain other conditions are met. (OSP, §153b).

Disposal of Petition.

Subject to approval by court, petitioner may amend its petition. Court will not allow amendment of petition if outcomes of prior proceedings held cannot be used in proceedings on amended petition. Court would not admit any amendment to petition if other court was competent to decide on amended petition. (OSP, §95). Petitioner may, at any time during trial, withdraw petition partially or fully. If respondent does not agree with withdrawal of petition due to serious reasons, court proceeds with trial. Respondent's refusal to consent to withdrawal is ineffective if petition is withdrawn prior to first hearing. (OSP, §96).

Counterpetition.

Respondent may also, during trial, exercise his/its rights against petitioner by counterpetition. Provisions on commencing trial, its change, and withdrawal (OSP, §97) shall apply accordingly to counterpetition for commencing trial.

Evidence.

Party and representative must produce evidence necessary to support their statements. This includes all evidence by which status of matter is disclosed, especially examination of witnesses, expert's opinions, reports and statements of authorities and legal entities, instruments, inspection and examination of parties. Court has discretion to decide which of produced evidence shall be exercised. Unless manner of producing evidence is stipulated, it shall be determined by Court. (OSP, §§120-131).

Parties must present all evidence during first instance proceeding. Additional evidence may be presented in appeal only if: (i) it concerns conditions for, or errors made in, first instance proceeding; (ii) it challenges credibility of evidence supporting first instance decision; (iii) it could not be presented in first instance proceeding without own fault of party; or (iv) appealing party has not been acknowledged by Court of above-mentioned restrictions on presenting evidence.

Costs of trial include Court fees, lost income of participants, translation fees and expenses of evidence, and legal fees for representation by lawyer (advocate). Legal fees are stipulated by Decree of Ministry of Justice of SR No. 655/2004 Coll., as amended (fee based on hourly rate, flat fee, success fee, tariff fee or combination thereof). Court fees (Act No. 71/1992 Coll., as am'd) are payable simultaneously with submission of petition in general. Generally, court fees represent 6% of value of requested recovery (minimum EUR 16.50, maximum EUR 16,596.50; in commercial matters maximum EUR 33,193.50).

Application of Foreign Law.

Subject to condition that foreign element is present in legal relationship, in property and commercial matters, courts are obliged to apply foreign law if parties agreed that their agreement will be governed by foreign law and as well as in cases directly determined to be governed by foreign law under conflict law rules (ZMPSP). ZMPSP permits courts to request information on foreign law from Ministry of Justice of SR. Ministry is entitled to issue opinion on foreign law. (ZMPSP, §53).

5.02 DEPOSITIONS AND DISCOVERY:

According to Hague Convention on Taking of Evidence Abroad in Civil or Commercial Matters (Mar. 18, 1970; No. 129/1976 Coll.), relevant foreign judicial authority may request taking of evidence or performance of another act of court (Letter of Request). Ministry of Justice of SR is authority ensuring contacts between Slovak and foreign courts. Detailed regulation is contained in Instruction of Ministry of Justice of SR of Dec. 16, 1980 No. 100/1980-L/M-v. According to ZMPSP legal assistance is provided according to Slovak legal regulations; however, it is possible to proceed according to foreign procedure regulation, if requested by foreign authority unless this is contrary to public interest in SR. There are several bilateral treaties providing for international legal assistance. (See category 26 Treaties and Conventions.) Further, cooperation between judicial authorities of EU Member States is ensured by Regulation (EC) No. 1206/2001 on cooperation of courts between Member States in taking of evidence in civil or commercial matters.

5.03 JUDGMENTS:

Enforceability of Foreign Judgments.

In absence of international treaty which provides otherwise, judgments duly obtained in courts of jurisdiction other than SR ("other jurisdiction"), as well as decisions, approved agreements and compromises duly obtained in authorities of other jurisdiction, are enforceable in SR only if: (a) Enforcement is not contrary to public order in SR; (b) judgment was not in respect of matter over which Slovak law grants to Slovak courts exclusive jurisdiction; (c) judgment was not in respect of matter of which courts of SR have already decided or there is prior foreign judgment recognized on same subject matter and such judgment was recognized or it fulfils conditions to be satisfied; (d) party to trial toward whom judgment must be recognized, was not deprived of right to act at authority or court by practice of this authority or court, especially notice of process had been given to defendant in action and defendant had been given opportunity to appear before courts of other jurisdiction; (e) judgment is final and enforceable in state in which it was issued; and (f) judgment is judgment on merits. Council Regulation (EC) No. 44/2001 of 22 Dec. 2000 on jurisdiction and recognition and enforcement of judgments in civil and commercial matters is applicable as of 1 May 2004.

5.04 PRESCRIPTION:

According to OZ legitimate possessor shall become owner of thing if possessor retains possession for continuous period of three years in case of movable thing and ten years in case of immovable thing (real estate). Possession is legitimate if possessor controls thing, has will to manage thing like possessor's own property and possessor keeps thing in good faith (during whole period). Period during which legal predecessor held thing shall be counted as part of above-mentioned period. Period is interrupted if owner claims ownership of thing. It is also possible to apply above-mentioned regulation to easements. Principle of prescription was introduced in 1983; no prescription principle applied previously since 1964.

Where ownership right or right corresponding to easement to real estate are subject to prescription, certificate of prescription needs to be issued by notary public in form of notarial deed in order to obtain legal title for inscription of such right into relevant Land Book Registry. Notarial Order strictly specifies conditions for issuance of certificate of prescription in order to make prescription more transparent.

6 COURTS AND LEGISLATURE

6.01 COURTS:

According to Art. 141 of Constitution of SR, judicial power is exercised by independent and impartial courts. Courts decide criminal and civil matters and review certain decisions of administrative bodies.

Pursuant to Act No. 757/2004 Coll. on Courts, system of courts of general jurisdiction is composed by District Courts (Okresné súdy), Regional Courts (Krajské súdy) and Supreme Court (Najvyssí súd). System of courts consists of Specialised Criminal Court (Specializovaný trestný súd), as well.

System of military courts consists of Military Local Courts (Vojenské obvodové súdy) and Higher Military Court (Vyssí vojenský súd) which is competent to decide criminal matters involving members of military forces.

District Courts hear all proceedings as court of first instance, except certain matters which are heard by Regional Courts. (OSP, §9). District Courts decide: (i) by single judge, or (ii) by commissioned employee of court.

Regional Courts are appellate courts for decisions of District Courts in first instance. They are also competent to hear some limited types of proceedings in first instance. (OSP, §9). Decisions in first instance are made by single judge or commissioned employee of court. Decisions in cases when Regional Courts decide as appellate courts are made by Senates. Senates of Regional Courts consist of presiding judge and two judges.

Supreme Court is supreme judicial authority in affairs falling within competence of courts with exception of matters decided by Constitutional Court. Supreme Court: (i) Decides appeals on decisions of Regional Courts and certain extraordinary remedies on decisions of Regional Courts, Supreme Court and military courts, (ii) issues statements and opinions unifying interpretation of laws and other legal regulations, (iii) reviews decisions of supreme state administrative bodies, and (iv) decides other matters stipulated by law. Supreme Court decides in Senates.

Judicial Council of SR was incorporated into Slovak legal system by latest amendment to Constitution of SR. This body is presided over by chairman of Supreme Court of SR and is consisting of eight judges elected by judges, three members elected by National Council of SR, three members appointed by President of SR and three members appointed by Government of SR. It submits to president of SR proposals for candidates to judges and candidates to positions of chairman and vice-chairman of Supreme Court, decides on assignment to and removal of judges from particular courts, appoints and revokes members of disciplinary senates of particular courts, etc. Act No. 185/2002 Coll. on Judicial Council of SR further stipulates in more detail competence of Judicial Council, organization, work, bodies, relations with bodies of judiciary administration and autonomy bodies of judges and ways of commencement of function of its members.

Act No. 385/2000 Coll. on Judges and Associate Justices, as amended, regulates status and position of judges, their rights and obligations arising from their position, election and appointment to and cessation of function of judge, disciplinary liability of judges, relation between judge and state. It further governs conditions of nomination for position of judge, compensation package of judges, conditions for reallocation, temporary reallocation and transfer of judges and position of associate justices. Judges are appointed by president of SR, upon proposal submitted by Judicial Council, for indefinite time period.

As of 1 Jan. 2004, Act No. 549/2003 Coll., on Court Officials, substituting Act No. 425/2002 Coll. on Higher Court Officials, became effective. Court officials are (i) Higher Court Officials, (ii) Court Clerks, and (iii) Probation and Mediation Officials. Higher Court Official may perform some tasks previously performed by judges in civil and criminal proceedings as well as bankruptcy proceedings. Act contains list of permitted tasks and additional tasks where judge may authorize Higher Court Official to act. Probation and Mediation Officials help in criminal matters to avoid imprisonment of accused person.

For Constitutional Court, see category 1 Introduction, topic 1.02 Government and Legal System.

6.02 LAW REPORTS, CODES:

According to Act No. 1/1993 Coll. on Collection of Laws, as amended, generally binding legal regulations, Constitution, constitutional and other laws, governmental decrees, decrees of ministries, other central governmental bodies and other administrative bodies if stipulated by particular laws, some decisions of Constitutional Court are published in Collection of Laws. Moreover, some central governmental bodies issue their own Bulletins including regulations from specific areas of their activities. Business Journal according to governmental Decree No. 42/2004 Coll. on Business Journal, as amended, and published in electronic and paper form, includes information which must be published according to ObchZ, information about bankruptcy procedures and other information if stipulated by particular laws (e.g. Act No. 483/2001 Coll. on Banks, as am'd).

Collection of Decisions of Constitutional Court is issued every year. Moreover, Collection of Decisions and Statements of Courts of SR is issued by Supreme Court. It should be noted that decisions of courts (excluding Constitutional Court) are not source of Slovak law in common law sense.

As of 24 Nov. 2004, Act No. 416/2004 Coll. on Official Journal of European Union has taken effect. Legally binding acts of European communities and legally binding acts of European Union published in Official Journal of European Union are effective within territory of SR.

6.03 LEGISLATURE:

National Council of SR is only constitutional legislative body of SR. Acts are adopted by absolute majority of deputies present, provided absolute majority of all of deputies is present. Constitution and constitutional acts are adopted by at least three-fifths majority of all deputies. National Council is continually in session which is suspended by means of resolution for no longer than four months.

Referendum on important issues of public interest may be requested by National Council of SR or petition of at least 350,000 citizens. Fundamental rights and freedoms, taxes, levies and state budget are not allowed to be subject of any referendum. According to decision of

Constitutional Court, Constitution cannot be directly amended by referendum.

Generally binding acts are published in Collection of Laws, entering into force 15 days after date of publication, unless provided otherwise.

7 CRIMINAL LAW

—Scope —

There are three main categories of criminal conducts in Slovak Republic: a) Administrative offences; b) offences; c) crimes.

7.01 Administrative Offences:

Administrative offence is illegal action (including omission) of person-entrepreneur or legal entity in connection to their business activities, determined as administrative offence in respective legal regulation. Administrative offences are not codified in one code or act, they are included in various legal acts; generally, if act regulates certain area of law, it also specifies what action is considered as administrative offence and sanctions which can be imposed. General sanction which can be imposed for administrative offence is penalty. Further, prohibition of certain activities or order for restitution can be imposed if stipulated by act.

Administrative offences are tried in administrative proceedings regulated by Act 71/1967 Coll. on Administrative Proceedings, as amended. However, this act regulates all administrative proceedings and does not specifically regulate administrative offences, only main principles applied for all administrative proceedings.

Administrative proceedings on administrative offences cannot commence after three years after administrative offence commencement or one year after relevant administrative authority had knowledge of administrative offence.

Since administrative offences are considered to be crimes under European Convention on Human Rights, principles of criminal proceedings should apply to proceedings on administrative offences.

Relevant administrative authorities decide on administrative offences. Appeal may be filed against decision of first instance administrative authority. Appeal is decided by superior administrative authority. Decision of appellate administrative authority may be challenged at court.

7.02 Offences:

Offence is intentional or neglect action (including omission) of natural person which contravenes or endangers interests of society and is determined as offence unless such action is administrative offence or crime. Offence represents less serious illegal action than crime.

Offences are regulated in Act 372/1990 Coll. on Offences, as amended. Certain illegal actions may be determined in other acts as offences and while Act 372/1990 Coll. on Offences, as amended, will also be applied for these offences, unless otherwise stated in specific act.

Offence, thus, can be committed only by natural person, not legal entity. To establish liability for offence, offender must be at least 15 years old.

Penalties which may be imposed for administrative offence: a) Reprimand; b) monetary penalty; c) ban of certain activities if such activities require public authority permission or consent and offence was committed in connection to this activity; d) forfeiture.

Certain restrictive measures may be imposed in case of offences against alcoholism and addiction, public order or civil co-existence. They may include prohibition of visiting public areas and buildings where alcohol is available or where sport or culture activities take place.

Offences are tried in administrative proceedings by relevant administrative authorities. Decision of first instance administrative authority may be appealed, while appeal is decided by superior administrative authority. Decision of appellate administrative authority may also be challenged at court.

Administrative proceedings must be finished within two years after commencement of offence. If administrative proceedings are not finished within this period, administrative proceedings must be suspended.

7.03 Crimes:

Crime is illegal action (including omission) determined by Act. 300/2005 Coll., Criminal Code, as amended.

Two types of crimes: a) Misdemeanour; b) felony.

Misdemeanours include: a) Negligent crimes; b) intentional crimes for which imprisonment up to five years may be imposed.

If action is recognized as misdemeanour but its seriousness is insignificant considering manner of its commitment, consequences, circumstances, fault and motive of offender, such action is not crime (misdemeanour).

Felonies include intentional crimes for which imprisonment over five years may be imposed. Criminal Code also recognizes especially serious felonies for which imprisonment at least ten years may be imposed.

Only natural persons at least 14 years old can be convicted of crimes (only person at least 15 years old can be convicted of crime of sexual abuse). Legal entities cannot be held liable for crimes. However, representatives, employees or other persons acting on behalf of legal entity may be held liable for crimes. Person insane at time of illegal action cannot be convicted of crime.

Criminal Code relates to all crimes committed in Slovakia and all crimes committed by Slovak citizen or person with permanent residence in Slovakia. Criminal Code also applies to especially serious felonies even if committed outside Slovakia and to crime committed by foreigner outside Slovakia if following conditions are met: (i) Crime is considered to be crime on territory where it was committed, (ii) offender was arrested in Slovakia, and (iii) offender was not extradited for criminal proceedings to another state; however, punishment imposed by Slovak courts cannot be stricter than that under law of state in which crime was committed. Criminal Code also applies to other crimes if so stipulated by bilateral or multilateral treaties.

Person facing criminal prosecution is deemed to be innocent, unless his guilt is declared by final court judgment.

Accused person has right to be represented by attorney during criminal proceedings.

Criminal investigation is performed by policemen under prosecutor's supervision, according to Act 301/2005 Coll., Criminal Proceedings Code, as amended.

Only courts may impose penalties for crimes. Accused or prosecutor may file appeal against court judgment (convicting or deliberating). Appeal will be decided by higher instance court. Extraordinary appeal may be filed against final court judgment, however, only for reasons stipulated by Criminal Proceedings Code, being especially matters of law. Extraordinary appeal may be submitted by (i) Ministry of Justice, (ii) general attorney, (iii) accused. Extraordinary appeal unfavorable to accused may be filed only within three months from court decision delivery. Extraordinary appeal in favor of accused may be submitted within three years from court decision delivery.

Types of penalties which may be imposed for committed crimes: 1. Imprisonment; 2. home imprisonment; 3. compulsory works; 4. monetary penalty; 5. forfeiture of property; 6. forfeiture of certain property; 7. ban of certain activities; 8. residence proscription; 9. deprivation of titles and honours; 10. deprivation of military or other ranks; 11. expulsion.

Imprisonment can be imposed for definite period up to 25 years or as life sentence. Imprisonment represents universal and most severe type of sentence. Imprisonment must be imposed if purpose of sentence cannot be reached by less severe penalty or for serious crimes.

Life sentence may be imposed only if explicitly allowed by law and if following conditions are met: a) Imposition of life sentence is necessary for effective protection of society; and b) there is no hope of offender's retrieval by imprisonment up to 25 years.

Criminal Code also implements ``three times and enough'' principle, which stipulates obligatory life sentence for specific serious crimes listed by Criminal Code, if offender had already been imprisoned two times for listed serious crimes.

Slovak Constitution does not allow death penalty abolished since Apr. 1990.

Home imprisonment up to one year may be imposed on offender of misdemeanour. Home imprisonment cannot be imposed besides imprisonment.

Offender may be sentenced to compulsory works with his approval for 40 - 300 hours, if he committed misdemeanour for which maximum five-year imprisonment may be imposed. Compulsory works cannot be imposed besides imprisonment.

If offender committed wilful crime with intention to obtain financial or proprietary benefits, court may impose on him monetary penalty of EUR 166 up to EUR- 331,939. If this condition is not met, monetary penalty may be imposed on offender of misdemeanour if he is not sentenced for imprisonment. When imposing monetary penalty, court takes into account offender's financial situation.

Court may impose on offender forfeiture of his property, if he is to be sentenced to life imprisonment or imprisonment for especially serious felony by which he tried to gain financial benefits of at least EUR 133,000 or by which he caused damage of at least EUR 133,000. Forfeiture of property must also be imposed for specified felonies, if it is proved that offender's property or part of it was acquired from illegal income.

With respect to committed crimes, following preventive/protective measures may be imposed on offenders: a) Protective treatment/therapy—in case of offender's diminished sanity or if he is not criminally liable because of insanity and its stay outside protective treatment is dangerous. b) protective education—court may order protective education to juvenile offenders. c) protective surveillance—court may order protective surveillance to offender condemned to unconditional imprisonment for especially serious felony, or to offender at least two times sentenced for imprisonment. Court cannot order protective surveillance to juvenile or person condemned to life sentence. Protective surveillance is constructed as post penitentiary care to achieve rehabilitation of offenders. d) detention - if condemned person becomes mentally ill during execution of imprisonment and according to medical report, such mental disease is incurable and his release presents serious danger for society, court may order to interrupt execution of imprisonment and placement into detention institute. Detention serves to protect society from mentally ill offenders, if there is apprehension that after execution of imprisonment they will continue in criminal activity. Court may order detention also to offender of crime with sexual motive or offender who committed second serious felony; in this case, detention will be executed after imprisonment sentence is over. Detention must take as long as protection of society cannot be reached by moderate measures. e) confiscation—if court has not ordered sentence of forfeiture of certain property, it must order confiscation of object belonging to potentially pursued or condemned person or to offender not punished by court, or of goods without control marks or technical measures, or if there is reasonable assumption that object is intended for financing terrorism, or confiscation is necessary for public order and safety.

Criminal proceedings are governed by following principles: 1. Principle of legitimate prosecution, i.e. everyone may be prosecuted as accused only for legitimate and statutory reasons, 2. principle of abstention and adequacy, which sense is to limit incidence on human rights, 3. presumption of innocence, 4. principle of legitimacy and ex-offo procedure, which means that prosecuting and adjudicating bodies are obliged to act in order to fulfill object of criminal procedure, 5. principle of legitimate (statutory) procedure, 6. ``ne bis in idem'' principle, i.e. offender must not be prosecuted twice for same crime, 7. right to be represented by attorney, 8. principle of appropriate investigation of matter of fact beyond all reasonable doubts, implying obligation for prosecuting and adjudicating bodies to clarify facts and to perform proofs in favour of and against accused, 9. principle of parties equity before court, 10. accusatory principle, i.e. court may decide only upon indictment of state prosecutor, 11. publicity principle, 12. principle of oral procedure relating to procedure before court, 13. contradictory principle related to parties equity principle.

8 DEBTOR AND CREDITOR

8.01 ASSIGNMENTS:

Slovak law expressly recognizes (i) assignments of receivables; (ii) assumption (take-over) of payables (or debt); (iii) fiduciary transfer of rights; (iv) fiduciary assignment of receivables.

Assignment of receivables may be made exclusively on basis of written agreement between creditor as assignor and assignee. No debtor's consent is required; however legal consequences of assignment are effective against debtor only from date when assignor notified debtor of assignment or assignee proves existence of assignment. Certain receivables may not be assigned, especially those which are linked to creditor's personality and expire upon creditor's death, or receivables substance of which would be changed, upon change of creditor, or receivables which cannot be enforced. Furthermore, right of creditor to assign receivable can be excluded by agreement between creditor and debtor. Generally, all accessories, accruals and attached rights are transferred to assignee together with assigned receivable, unless assignor and assignee agreed to exclude them from assignment, in which case they remain to assignor. If assignee pays for assignment, assignor may assume upon written agreement guarantee of payment by debtor, up to amount of compensation received including accrued interest. (OZ, §§524-530).

Assumption of debt can be performed in form of take-over of debt or accession to obligation. Take-over of debt requires written agreement entered into between: (1) debtor and assignee upon which assignee replaces debtor in its position if creditor grants its approval thereto, or between (2) creditor and assignee without debtor's agreement upon which assignee becomes co-debtor in addition to debtor. Accession to obligation can be performed (1) in case of monetary obligation, by written agreement entered into between creditor and assignee without approval of debtor upon which assignee becomes co-debtor in addition to debtor, both of them being jointly and severally liable to creditor, or by (2) agreement between debtor and assignee upon which assignee becomes liable vis-à-vis debtor to fulfil its obligation to creditor, however, creditor does not acquire any direct right against assignee. (§§531-534). Substance of assigned payable remains unaffected on assignment, however, security given by third parties continues to exist only if such parties approved assignment. (OZ, §§531-534). In case of sale of enterprise, obligations pass from seller to purchaser without creditor's approval by operation of law; however, seller guarantees their fulfillment by purchaser. In case of transfer of privatized property, approval of creditor is also not required; however National Property Fund of SR or Slovak Land Fund guarantees fulfillment of obligations by transferee up to amount of value of privatized property. See category 23 Property, topic 23.02 Privatization.

Fiduciary transfer of rights and fiduciary assignment of receivables, see topic 8.08 Liens. Notice of appropriation of receivables, see topic 8.04 Executions.

8.02 ATTACHMENT:

Role partially similar to attachment (not directly recognized by Slovak law) is played by injunctions used in trials. Injunction may be ordered both prior to (OSP, §74) and after commencing trial (OSP, §102) provided it is necessary to regulate relations between parties for temporary period or provided there is threat that enforcement of Court's decision would be impaired. Court of competent jurisdiction for ordering injunction is Court having jurisdiction in matter. Parties to trial are same as in underlying matter.

Court may order any party e.g. to place specific financial amount or thing in deposit with Court, not to dispose of certain assets or rights, to do something, to refrain from something or to suffer something. Injunction is ordered by Court upon petition which has to contain reasons for order of injunction; no petition is required if injunction is ordered in trial which may be commenced by Court even without petition. Decision shall be rendered by Court without undue delay, no later than within 30 days from delivery of petition to Court. Parties to trial need not be examined. Injunction shall cease in following cases: (a) if petitioner fails to file petition for commencing trial within time period determined by Court; (b) if petition in matter itself has been dismissed; (c) if remedy in matter itself has been granted in accordance with petition and 15 days have elapsed from enforceability of decision in matter; (d) if time period for which it had been ordered has elapsed.

Court shall cancel injunction if grounds upon which it has been ordered no longer exist.

Injunction can never be justified if result will be intensive impairment of claims or if relations to be protected have not been sufficiently proved. Injunction is title for execution (similar to judgment). See topic 8.04 Executions.

8.03 BANKRUPTCY:

Act No. 7/2005 Coll. on Bankruptcy and Restructuring, as amended (“Bankruptcy Act”) effective from 1 Jan. 2006 regulates solutions of debtor's bankruptcy by: (i) Liquidation of debtor's assets and collective satisfaction of its creditors in bankruptcy, or (ii) by consecutive satisfaction of debtor's creditors in manner agreed in restructuring plan. Bankruptcy Act also regulates imminent bankruptcy and discharge of bankrupt individual from his/her debts.

Basic goals for introducing Bankruptcy Act being currently in force were to: (i) Avoid any loss on value of bankrupt's property in period just prior to commencement of bankruptcy proceedings and in course of proceedings, (ii) ensure acceleration of proceedings and to take measures stimulating parties involved to act fast and have proactive approach in proceedings, (iii) increase responsibility of all parties involved in proceedings, mainly bankruptcy trustees, and (iv) avoid existing absence of conflicting provisions of international private law in area of bankruptcy.

Debtor is bankrupt if insolvent or over-debted. If debtor itself files petition for declaration of bankruptcy or application for restructuring, debtor is considered to be bankrupt. Any debtor is regarded insolvent if debtor has more than one creditor and debtor is not able to fulfill more than one of its due financial obligations. Debtor is deemed to be over-debted, if obliged to maintain accountancy under special legal regulation, has more than one creditor and value of its due obligations exceeds value of its assets.

Bankruptcy proceeding cannot commence against governmental budgetary and contributory organizations, state funds, municipalities, upper tier municipal units, or against debtor for whom state guarantees its obligations. Further, National Bank of Slovakia, Deposit Protection Fund and Investment Guarantee Fund are excluded from regime of Bankruptcy Act. Bankruptcy Act stipulates special provisions for commencement of bankruptcy proceeding against banks, health insurance companies, insurance companies and reinsurance companies. Bankruptcy proceedings fall under jurisdiction of eight selected District Courts.

Bankruptcy Proceedings.

Aim of bankruptcy proceedings is to reach proportional satisfaction of creditors' claims from debtor's assets. Bankruptcy procedure commences upon filing petition for declaring bankruptcy. Persons entitled to file petition are: (1) debtor, (2) creditor, (3) liquidator of debtor, and (4) any other person, if stipulated in special law. Debtor being bankrupt is obliged to file petition for declaration of bankruptcy within 30 days from when it learned or could have learned of its bankruptcy. Creditor is entitled to file petition for bankruptcy if debtor is in delay with fulfillment of its financial obligations for more than 30 days and it may be reasonably assumed that debtor is insolvent. Upon filing petition for declaring bankruptcy, debtor must attach list of assets and liabilities and related parties to petition for declaration of bankruptcy. If court has doubts about scope of debtor's property, it may appoint preliminary administrator, who is particularly liable to ascertain debtor's property and to review debtor's accounting books. Preliminary administrator has similar authority as bankruptcy trustee when inspecting scope of debtor's property. Within 15 days following submission of petition for declaration of bankruptcy, court shall decide either on commencement of bankruptcy proceeding or shall reject such petition commencement of bankruptcy proceeding: (a) Debtor is obliged to limit its legal actions to those in ordinary course of business, (b) debtor's assets may not be subject of enforcement or execution proceedings, if enforcement or execution proceedings are interrupted, (c) no enforcement of security may commence or continue in respect of debtor's assets for enforcement of secured receivables; this does not apply in particular to enforcement of security over financial means or bank accounts and to other cases set by Bankruptcy Act.

If all conditions for declaring bankruptcy have been met, court renders bankruptcy resolution. Law stipulates several consequences linked to declaring bankruptcy. Most relevant consequences are as follows: (1) Non-mature claims and liabilities related to bankrupt's estate are deemed to be matured from declaration of bankruptcy until cancellation of bankruptcy, (2) bankrupt's unilateral legal actions, powers of attorney and proposals for concluding contracts that have not been accepted until that time, shall cease to exist, proposals of third parties addressed to bankrupt entity not accepted by bankrupt entity until declaration of bankruptcy may be accepted only by bankruptcy administrator, (3) receivable of bankrupt entity originating after declaration of bankruptcy may not be set-off against third-party receivable originating before declaration of bankruptcy, receivable against bankrupt debtor not applied in bankruptcy proceedings, receivable acquired by assignment or transfer and receivable acquired on basis of contested legal action may not be set off against any receivable of debtor (otherwise set-off is not excluded), (4) authorization to dispose of bankrupt's estate passes to bankruptcy administrator and, if bankrupt performs any act itself, act is ineffective toward creditors, if they diminish bankruptcy estate, (5) proceedings potentially resulting in claim on bankrupt's estate are interrupted and continue upon proposal of bankruptcy administrator or other legally set subjects, save for tax and customs proceedings, juvenile maintenance proceedings, criminal proceedings, (6) proceedings on separate satisfaction or exclusion of thing from bankrupt's estate can be initiated and continued only vis-à-vis bankruptcy administrator, (7) with respect to receivable against bankrupt, no enforcement of execution proceedings can be initiated or continued, (8) right of separate satisfaction cannot be acquired save for pledge over future assets provided conditions set by Bankruptcy Act are met, (9) bankruptcy administrator acts in labor law matters instead of bankrupt, and (10) debts due to bankrupt entity shall be fulfilled to bankruptcy administrator. Additionally, either party to bilateral contract has right to repudiate contract in case contract on mutual performance was at moment of declaring bankruptcy not performed by both bankrupt and other party, or in case it was fulfilled only partially; bankruptcy administrator, however, has also right to demand due fulfillment of obligations of contracting party in this case. In event of contracts for continuous performance (e.g. lease or service agreement) bankruptcy administrator has right to terminate contract with two-month notice period if shorter notice period is not set by law or by agreement. If enterprise is part of bankrupt's estate, its operation shall not cease upon declaration of bankruptcy. Bankruptcy estate is formed of all assets (i) Belonging to bankrupt entity on day of declaration of bankruptcy, (ii) acquired by bankrupt entity during bankruptcy proceedings, (iii) assets serving as security for obligations of bankrupt entity, and (iv) other assets set by Bankruptcy Act and forms either (a) general bankruptcy estate or (b) separate bankruptcy estate of secured creditor(s). General estate is formed of all assets not belonging to any of separate bankrupt's estates of secured creditors. Separate bankrupt's estate of secured creditors is formed in respect of each secured creditor by (a) Assets securing creditor's receivable toward debtor, (b) financial means received from liquidated assets mentioned under (a) above, and (c) financial means received from liquidated assets mentioned under (a) above that remained after satisfaction or after securing satisfaction of creditors with prior ranking having security over identical asset.

In bankruptcy resolution court appoints bankruptcy administrator and invites creditors to register their claims within 45 days from date of declaring bankruptcy with bankruptcy administrator and court.

Administrator examines scope of assets of bankrupt debtor during whole bankruptcy procedure. On basis of such examination, and other information obtained in particular from list of assets submitted by bankrupt entity, information of creditors and third party administrator prepares inventory of bankrupt's estate authorizing him to liquidate bankrupt's estate. Such inventory has to be prepared within 30 days following declaration of bankruptcy and shall be prepared separately for separate bankruptcy estate for each of secured creditors and for general bankruptcy estate. Cash value of bankrupt's estate can be realized: (1) In public tender organized by administrator, (2) by entrusting auctioneer or trader in securities with sale thereof, (3) by organizing action, call of tenders or other competitive process for liquidation of debtor's assets, or (4) in other suitable manner. Bankrupt's receivables that are in dispute or difficult to enforce can be assigned for remuneration.

Save for certain claims expressly listed by Bankruptcy Act (e.g. claim of bankruptcy administrator for lump sum fee after first creditor's meeting, fulfillment of contracts by bankruptcy trustee in bankruptcy proceedings, etc.) claims filed in bankruptcy may be satisfied only on basis of distribution schedule for respective bankrupt's estate prepared by bankruptcy administrator approved by creditor's committee or respective secured creditor in case of separate bankrupt's estate of secured creditor. Claims registered against general bankrupt's estate have following priority: (i) Claims not being subordinated claims, and (ii) subordinated debt. If it is impossible to fully satisfy all claims in same class, they are settled proportionally.

Act further regulates claims that are excluded from satisfaction, such as (i) interest from receivables of creditors originated before declaration of bankruptcy accrued as from date of declaration of bankruptcy, (ii) claims of creditors resulting from legal actions without compensation, and (iii) contractual or non-contractual sanctions affecting property provided that these sanctions became enforceable after declaration of bankruptcy, and other sanctions and claims expressly stipulated by Act.

Unless international treaty binding SR stipulates otherwise, bankruptcy declared by Slovak court includes bankrupt's movable assets located abroad, unless law of foreign state allows so. If bankruptcy on debtor's assets was declared abroad, Slovak court shall recognize effects of such bankruptcy proceedings in Slovakia if foreign bankruptcy administrator proves commencement of foreign bankruptcy, its appointment and legal interest on recognition, unless other foreign or Slovak bankruptcy proceedings is pending in Slovakia. Recognition of foreign bankruptcy proceedings does not bar Slovak court from initiation of Slovak bankruptcy proceedings. Regime of cross-border insolvencies between EU Member States is regulated by Council Regulation (EC) No. 1346/2000 on Insolvency Proceedings.

Compulsory and Voluntary Composition, Restructuring.

Compulsory and voluntary composition of bankrupt debtor that was available under old Act No. 328/1991 Coll. on Bankruptcy and Restructuring, as amended, has been removed by Bankruptcy Act. As of 1 Jan. 2006, Bankruptcy Act enables debtor to enter restructuring procedure.

If debtor is at risk of bankruptcy or is already in bankruptcy, it may entrust bankruptcy administrator with preparation of restructuring appraisal to examine whether conditions for restructuring are met. However, duty to file petition for bankruptcy (provided conditions of Bankruptcy Act are met) is not affected thereby. If one or more creditors agree with debtor on required assistance, these creditors may entrust trustee with preparation of restructuring appraisal. In restructuring appraisal, bankruptcy administrator examines financial and business situation of debtor and recommends or denies restructuring of debtor. If administrator recommends restructuring, he also proposes suitable manner of restructuring. Administrator may recommend restructuring of debtor if: (i) Debtor performs business activity, (ii) debtor is bankrupt or bankruptcy is imminent, (iii) survival of at least substantial part of debtor's enterprise may be reasonably assumed, and (iv) in case of approval of restructuring higher satisfaction of creditors may be reasonably assumed compared to that in eventual bankruptcy.

Application for approval of restructuring may be filed with competent court by debtor or its creditor (with debtor's approval) if restructuring appraisal prepared by administrator (not older than 30 days) recommends restructuring. Restructuring appraisal shall be attached to application. If court finds out that application for approval of restructuring fulfills conditions of Bankruptcy Act it will decide on commencement of restructuring within 15 days from filing of application, otherwise court rejects application for approval of restructuring in same period.

Commencement of restructuring has in particular following effects: (1) No other restructuring may be commenced in respect of debtor in bankruptcy, (2) debtor may perform only legal actions in ordinary course of business, other actions are subject of approval of administrator that prepared restructuring appraisal, (3) no execution proceedings may be initiated in respect of debtor's assets for enforcement of receivable toward debtor that shall be registered in restructuring on basis of application; commenced execution proceedings are being interrupted, (4) no enforcement of security may commence or continue in respect of debtor's assets for enforcement of secured receivable toward debtor that shall be registered in restructuring on basis of application, (5) debtor's contracting party may not rescind or withdraw from contract concluded with debtor due to debtor's delay with fulfillment of its contractual obligations; such termination of contract is ineffective, (6) contractual provisions authorising debtor's contracting party to terminate contract due to restructuring are ineffective, (7) receivable toward debtor that shall be registered in restructuring on basis of application may not be set-off against debtor.

If conditions for approval of restructuring are met, court shall decide on approval of restructuring within 30 days from commencement of restructuring, otherwise court rejects application for approval of restructuring in same period. Court approving restructuring appoints administrator (who has prepared restructuring appraisal), invites creditors to register their claims with administrator and court within 30 days from approval of restructuring and sets out scope of legal actions of debtor that are subject of prior approval by administrator.

Administrator prepares final list of registered claims within ten days after expiry of period for their registration. Administrator is obliged to examine existence and validity of each registered claim with due care and to reject it if it is contestable. Debtor (or administrator if creditor filed application for restructuring) is obliged to prepare restructuring plan containing proposal for scope and manner of satisfaction of claims of creditors as well as creation, change and cancellation of participants of restructuring plan. Restructuring plan is subject of approval by creditor's committee, assembly of participant of restructuring plan, and court. Following court approval restructuring plan becomes binding upon all participants of restructuring plan.

See also topic 8.05 Fraudulent Sales and Conveyances.

Revitalization.

Note: Abolished by Act No. 364/1998 Coll.

See also topics 8.09 Pledges, 8.04 Executions.

8.04 EXECUTIONS:

Currently, there are two institutions that enforce decisions i.e. OSP (which is however very limited) and Act No. 233/1995 Coll. on Court Bailiffs and Execution Activities, as amended (Execution Order). Execution Order provides bailiff with more authority to collect claims than OSP provides to court since enforcement proceedings held by courts were limited in 2005 to care and custody of underage children.

For execution of foreign judgments see category Civil Action and Procedure, topic Judgments.

Execution title is represented by enforceable court decision adjudging right, determining liabilities or affecting property. Further, execution may also be based on: (a) Decisions of EU authorities, (b) decisions certified as European execution title, (c) notarial deeds containing legal commitment and identifying person entitled, person liable, legal ground, subject and time of fulfilment provided that person liable agreed with execution in notarial deed, (d) enforceable decisions of arbitral court and settlements approved by arbitral court, (e) heritage certificates, enforceable decisions of former state notaries and settlements approved by such notaries, (f) enforceable decisions of public authorities and municipal authorities, including blocks for fines issued by competent authority (e.g. police officer), (g) payment orders concerning taxes and statutory fees including settlements issued by tax authorities, (h) enforceable decisions in matters of social security, social insurance and pension savings, (i) other enforceable decisions and settlements expressly set by law.

Bailiffs.

By adoption of Execution Order, additional institution has been introduced to fulfill function of enforcement of obligation of debtor on basis of execution title which previously was fulfilled exclusively by courts pursuant to provisions of OSP §§251-351.

According to Execution Order, bailiff is person designated and empowered by state to enforce debtor's obligations on basis of execution titles; bailiff is independent (also economically) from state, being bound exclusively by valid legislation and provided inevitable objectivity in performing activities. Bailiff is not governmental employee but he has position of public officer. Bailiff's activities exclude employment or any similar relation or any other activities performed for consideration. Only citizen fulfilling conditions stipulated by Execution Order (i.e. legal capacity to act, university degree in area of law, integrity, practice, professional examination; civil integrity is proved by copy from criminal registry which means bailiffs are prohibited from committing any crime ever) may be appointed as bailiff. Bailiff is appointed by Minister of Justice upon proposal of Slovak Bailiffs Bar. Bailiff may employ employees. Employees may include bailiff's trainee preparing for future duties of bailiff who should also fulfill conditions stipulated by law for being admitted to Slovak Bailiffs Bar as bailiff's trainee. Bailiff may also employ other employees representing administrative and technical set-up.

Execution Proceedings.

Execution proceedings shall commence upon petition of person entitled or upon petition of anyone proving that right from execution title has been transferred to him/her. Petition should clearly show bailiff to whom it is addressed, person by whom it has been filed, matter to which it relates, objective of petition, and it should be signed and dated. In addition, it should contain exact identification of parties, i.e. person entitled (petitioner) and person liable (respondent). Petition should be accompanied by duplicate of execution title with confirmed enforceability.

Court Jurisdiction and Authorization to Perform Execution.

Person entitled may, regardless of seat of bailiff and jurisdiction of Court which issued execution title, elect which of bailiffs shall perform execution. Bailiff having been served petition for execution shall file such petition with Court within 15 days and shall apply for authorization to perform execution itself. Court shall, no later than 15 days from delivery of petition, authorize bailiff in writing to perform execution. Bailiff is entitled to start execution only after court grants authorization to perform execution.

Notice of Commencement of Execution.

Bailiff shall notify both person entitled and person liable about commencement of execution and shall invite person liable to satisfy claim of person entitled or to raise objections within 14 days of delivery of notice. At same time bailiff shall prohibit person liable to dispose of property except for settling claim of person entitled.

Objections of Person Liable Against Execution.

Person liable may raise objections against execution within 14 days of delivery of notice. Objections shall represent defense of person liable against unlawful execution with purpose to declare execution inadmissible. Upon expiry of time period for raising objections or upon delivery to bailiff of decision dismissing objections of person liable against execution, bailiff shall render execution order for performing execution. Court may, under terms and conditions stipulated in law, adjourn or suspend execution.

Method of Execution.

Execution Order precisely stipulates methods allowed for performing execution. If execution title imposes liability to pay any financial amount, execution may be performed by: (a) withholding payments from wage and other incomes; (b) notice of appropriation of receivable: (i) notice of appropriation of receivable from bank account, (ii) notice of appropriation of other receivables in money, (iii) affecting any other property rights including rights to patents, industrial design, utility design, trademarks and topographies of semiconductors; (c) execution on shareholder's business interest in company; (d) sale of movable assets; (e) sale of securities; (f) sale of immovable assets; (g) sale of business; (h) seizing driver's licence concerning child support payments. If execution title imposes any liability other than payment of financial amount, execution may be performed by: (i) clearance of real estate; (ii) dispossession of things or securities; (iii) division of common thing; (iv) performance of works and services.

For performing execution activities, bailiff has right for consideration, reimbursement of out-of-pocket expenses, and compensation for waste of time. Bailiff may require entitled person to make adequate advance payment for performance of services and reimbursement of out-of-pocket expenses. In case of failure to pay, court can adjourn execution. Person entitled and bailiff have right to be indemnified against fees and costs reasonably incurred in connection with making claim.

8.05 FRAUDULENT SALES AND CONVEYANCES:

Under OZ (Civil Code), any legal act shall be deemed invalid if made by party acting in error based in fact which was decisive for party's decision to make legal act, provided that person being addressee of legal act either induced error or was aware of it. Decisive nature of relevant fact does not have to be proved, if error was deliberately induced by addressee of legal act. Decision whether legal act shall be invalid as consequence of error on side of acting party belongs to Courts (or arbitration if parties agreed on arbitration clause).

If legal act is performed with purpose to cover other legal act, only latter legal act is deemed valid on condition it corresponds to will of parties and meets legal prerequisites. Invalidity of covered legal act cannot be declared against party that considered act as noncovered.

Legal act is invalid if its contents or purpose contradict or circumvent law or contradict good manners.

Party that entered into agreement on basis of unilateral disadvantageous conditions is entitled to withdraw from agreement. Party does not have such right in case agreement is governed by provisions of ObchZ.

Generally under OZ, creditor may demand that Court determine that legal acts adversely affecting satisfaction of its enforceable receivable shall not be legally effective against creditor (contestation of legal act). Legal acts which have been made in intention to harm its creditors, if intention must have been known to counterparts in legal act, can be contradicted provided it was made not earlier than three years before affected creditor brings court proceeding. Legal acts made with or in favour of related persons, mainly its relatives may be contradicted under similar conditions however, intention of debtor to harm its creditors is presumed in these cases and creditor must incur harm. It is also possible to contradict legal acts which harmed creditor and which were made in last three years by individual debtor with or in favor of following legal entities: (i) entity in which debtor or its close persons has at least 10% of property participation; (ii) entity in which debtor or its close persons is statutory body or member thereof, procurist or company liquidator; (iii) entity in which entity under subsection (ii) has at least 34% of property participation; this does not apply, if debtor's counterpart proves that it was impossible to recognize debtor's intention to curtail its creditor. Legal acts made by debtor which is legal entity may be contested, if they harmed creditor and were made in last three years with or in favor of following persons: (i) member of debtor's statutory body, its authorized representative (procurist) or liquidator; (ii) person close to individual under subsection (i); (iii) legal entity in which debtor or person under subsection (i) or (ii) has at least 10% property participation; (iv) legal entity in which individual under subsection (i) or (ii) is statutory body or member of statutory body, procurist or liquidator; (v) legal entity, in which legal entity under subsection (iv) has at least 34% property participation; this does not apply, if such entity proves that it was impossible to recognize debtor's intention to curtail its creditor. Affected creditor who contests legal act successfully by judicial petition may satisfy its claim from debtor's assets by which debtor's property decreased upon contested legal act or may claim compensation from party which benefited from contested legal act. Pursuant to latest amendment to OZ, creditor is also entitled to contest any legal act performed by debtor during previous three consecutive years under which debtor accepted obligation without appropriate consideration, amounting at least to amount determined by expert report or appraisal, provided such legal act: (i) caused debtor's insolvency in relation to other creditors, or (ii) was performed with intention to suspend or stop payment to creditor, or (iii) was performed with intention to assume debt which debtor would not be able to satisfy at time of its maturity.

In connection with bankruptcy proceedings, any fraudulent sales and conveyances are subject to contradiction as well. Bankruptcy Act provides that creditor or bankruptcy administrator may contest fraudulent sales and conveyances to court or to person obliged to render benefits from such fraudulent sales and conveyances within six months from declaration of bankruptcy. If such contestation is duly made, contested legal actions are ineffective toward creditors of debtor in bankruptcy. Bankruptcy Act distinguishes three categories of contestable legal actions: (i) Those made without reasonable consideration, (ii) those unreasonably favoring third parties, and (iii) those curtailing creditors.

8.06 GARNISHMENT:

Although “garnishment” is not expressly defined as term in Slovak law, it is used in some execution methods if execution title imposes liability to pay any financial amount. Such execution methods are: (a) withholding payments from wage and other incomes; (b) notice of appropriation of receivable which consists of: (i) notice of appropriation of other receivable, (ii) notice of appropriation of bank account, (iii) notice of appropriation of other property rights, or (iv) execution on business interest. In respect to withholding payments from wage according to Governmental Decree No. 268/2006 Coll. amount equal to 60% of living wages set by law (currently set to EUR 185.19 per adult) cannot be subject to garnishment. Additional amount equal to 25% of living wages set by law per person (if dependent on debtor for its subsistence including husband/wife regardless whether he/she has or has not her/his own income) are excluded from garnishment.

See also topic 8.04 Executions.

8.07 INSOLVENCY:

See topic 8.03 Bankruptcy.

8.08 LIENS:

Slovak law recognizes number of instruments securing debtor's obligations. Although there is no overall definition or joint name, for ease of reference these may be all called liens. Following liens may be available to creditors in Slovak legal system: (1) Guarantees—(a) general, (b) bank and (c) state; (2) pledges—(a) immovable (i.e. mortgage), (b) movables, (c) receivables, (d) securities, (e) business interest, (f) enterprise or part thereof, (g) intellectual property rights (patents, trademarks, topographies, utility designs), (h) set of movables (e.g. stocks, etc.); (3) fiduciary assignments of receivables; (4) fiduciary transfer of rights; (5) contractual penalty; (6) retention right; (7) agreement on withholding payments from wage and other income; (8) security; (9) acknowledgment of obligation (debt); and (10) other security instruments provided by law.

Guarantee is general instrument governed by OZ with respect to civil law relations and by ObchZ with respect to commercial law relations. Guarantee is taken in form of written declaration of guarantor upon which guarantor assumes obligation to satisfy creditor's receivable should debtor fail to do so. Future or conditional obligation of debtor can be secured by guarantee. Generally, in non-banking guarantees, accessory and subsidiary principle applies under which it is required that if debtor fails to perform despite creditor's demand for such performance, guarantor becomes obliged to satisfy creditor's receivable instead of debtor. Guarantor whose guarantee was called and used has right to require compensation from debtor. Bank guarantee is specific type of guarantee governed by ObchZ which can be given by bank as guarantor in form of written letter of acceptance. Bank's obligation to satisfy creditor could be linked with either debtor's failure to fulfill certain obligation either monetary or non-monetary or occurrence of any predetermined condition. Confirmation of bank guarantee by another bank constitutes joint and several obligation of both banks. More flexible nature of bank guarantee allows various conditions of availability of guarantee. It is not necessary that debtor fails in fulfillment of duty prior to guarantee enforcement, so accessory and subsidiary principle is inapplicable in connection with bank guarantees and creditor is entitled to send written notice directly to bank, upon which bank must fulfill its obligation under bank guarantee. In certain circumstances state or governmental guarantees may be available to secure creditor's rights under loan agreements. Availability of governmental guarantees is limited by type of entity eligible to be guaranteed debtor and restricted by nature of project so that proceeds of loan must be used for project financing that is included in development program approved by governmental resolution. State guarantees are limited by restrictions contained in Act No. 231/1999 Coll. on State Aid and Arts. No. 87, 88, 89 of Treaty on Establishment of European Communities and Council Regulation (EC) No. 659/1999. (OZ, §§546-550, ObchZ, §§313-322). Legal regulation of administration of state guarantees, conditions and process of taking over guarantees is contained in Act No. 386/2002 Coll. on State Debt and State Guarantees.

Pledges.

See topic 8.09 Pledges; category 22 Mortgages, topic 22.02 Mortgage.

Fiduciary Assignment of Receivables.

Written agreement is required. Fiduciary assignment of receivable is instrument based on assignment generally, with reservation that assignment is not definite because it only secures underlying receivable. Once such receivable is settled assignee must assign back receivable which was fiduciary-assigned. Securing receivable can belong to debtor or third party. See topic 8.01 Assignments. (OZ, §554).

Fiduciary Transfer of Rights.

Written agreement is required. OZ does not generally limit scope of rights that may be subject to fiduciary transfer. It is stipulated that only debtor may offer fiduciary transfer of rights and no third party is allowed to secure creditor's right against debtor, other than debtor. As transfer is of fiduciary nature, it ceases to exist upon fulfillment of underlying receivable. (OZ, §553).

Contractual Penalty.

Parties to contract are allowed to agree on contractual penalty. Generally, contractual penalty concept is governed by OZ. Under this arrangement party that breaches its contractual duty is obliged to pay penalty although breach did not result in damage to another party. However, compensation of damages could be claimed in addition to contractual penalty only if it was agreed between parties. Contractual penalty must be agreed in writing including its fixed amount or method of its calculation. Unless agreed otherwise, receipt of payment of contractual penalty does not mean waiver of obligation that was secured by contractual penalty arrangement. In commercial relations, certain provisions of ObchZ are applicable under which Court may in its discretion reduce amount of contractual penalty, if it finds penalty unreasonably high, taking into account volume and importance of secured obligation. (OZ, §§544-545, ObchZ, §§300-302).

Retention right is instrument recognized by OZ, applicable to persons obliged to deliver movable asset to another party. Such movable asset can be withheld as security over due receivable of person otherwise obliged to deliver movable. Retention is not allowed with respect to assets capriciously or dishonestly withheld. Creditor who retains movable asset is entitled to preferential satisfaction of its receivable in case of its enforcement from proceeds gained by sale of retained asset, even before pledgees. Retention right ceases to exist in case of satisfaction of secured receivable or in case of providing another satisfactory security. (OZ, §§151s-151v).

Agreement on withholding payments from wage and other income can be entered into between creditor and debtor for purpose of securing receivable. Written agreement is required. Amounts of withheld payments from wage or other income cannot exceed amounts of such payments in case of enforcement of obligation. See topic 8.06 Garnishment. Creditor acquires right to withhold payments vis-à-vis payer of wage or other income upon submission of agreement. (OZ, §551).

Security is usually established in form of pledge or guarantee. It can also have other forms, e.g. depositing amount of money, deposit book or movable asset with third person or notary public or bank. Securing asset or right secures receivable up to 2/3 of its estimated value, save for bank deposits and securities issued by state that are capable security up to their whole value. (OZ, §§555-557).

Acknowledgment of obligation or debt is governed by provisions of OZ with respect to civil law relations and by provisions of ObchZ with respect to commercial law relations. If debtor acknowledges its obligation or debt upon its unilateral written declaration, it is assumed that obligation or debt existed at time of its acknowledgment. Legal consequence of such act is that statute-barred time period of acknowledged obligation or debt becomes longer and equals to ten years beginning as of acknowledgment (OZ, §558), or four years beginning as of acknowledgment (ObchZ, §323).

Other security instruments provided by law include securing order issued by tax authority in case of its justified doubt that tax of taxpayer, even though not yet due or levied, will be enforceable at relevant time or it will be enforceable only with enormous difficulties. Tax authority imposes duty upon taxpayer to secure relevant amount of money in favor of tax authority, mainly by making deposit to bank or escrow account, within three days.

8.09 PLEDGES:

Pledge as accessory right serves to secure receivable and its accessories by authorizing pledgee to satisfy itself or to claim satisfaction of its receivable from subject of pledge ("security"), if its receivable is not paid duly and in time. It is creditor of secured receivable ("pledgee") who is entitled to satisfy itself or claim its satisfaction from security.

Substantial amendment to OZ and other laws in area of pledges has been approved by National Council of SR (being Slovak Parliament) effective from 1 Jan. 2003.

Pledge may be created on basis of written agreement, by agreement of successors on settlement of heritage approved by court, court's decision, decision of administrative authority, or by law.

Creation of pledge is subject to written agreement on establishment of pledge, save for cases of creation of pledge by delivery of movables to pledgee or to third person into custody.

Agreement on establishment of pledge must contain precise specification of secured receivable and precise specification of security. If value of secured receivable is not specified, agreement shall state maximum value of principal up to which receivable is secured. Security can be determined individually, or in volume and type, or in any other way so that security is determinable anytime during existence of pledge. Also creation of floating charge is possible.

Pledge can secure monetary and non-monetary receivables, as well as receivables, which could arise in future, or receivables, creation of which depends on satisfaction of condition.

In case of transfer or assignment of receivable secured by pledge, pledge is transferred to transferee of receivable together with receivable.

Pledge can be created over thing, right, another asset value, apartment or nonresidential premises, which are transferable, provided that possibility of establishing pledge is not excluded by special legal regulation. Pledge also can be created over set of things, rights or other asset values, enterprise or its part, or another collective thing.

Pledge relates not only to security itself but also to its parts, fruits and benefits, and accessories while parties may agree upon this extent in agreement on establishment of pledge differently. If receivable is subject of pledge, pledge also applies to due interests and other accessories.

Pledge can be established not only over things, rights, other asset values, apartments and nonresidential premises owned by pledgor, but also over those that pledgor will acquire in future, or those that will arise in future or which depend on condition.

Any agreement forbidding establishment of pledge are not enforceable against third parties.

One of prerequisites for creation of pledge is, in case of movable assets set of things, rights or other asset values, enterprise or part of enterprise, its registration in Notarial Central Register of Pledges ("Register of Pledges") kept by Notaries' Chamber of SR; on parts of these securities; also registration in another register stipulated by special act (e.g. trademark register, patent register) is required. Mortgage over immovable property, flats and nonresidential premises is created by their registration in land registry.

Creation of pledge over business interest is effective upon registration in Commercial Register.

Legal regulation retains possibility of establishing pledge on movables by its delivery to pledgee or to third person taking it into custody, if this is agreed between pledgor and pledgee. At same time, it enables to establish pledge on movables without handover of pledged assets, if pledge is registered in Register of Pledges. However, there is also possibility to register pledge established by handover of movable assets in Register of Pledges. This registration may be important in case of several pledges established over same security, while order in which receivables of pledgees will be satisfied depends solely on date of registration of pledge with Register of Pledges.

Petition for registration of pledge shall be submitted by pledgor, if pledge was established by written agreement. In any other case, petition shall be submitted by pledgee, unless it is stipulated by special regulation otherwise. Pledge established on basis of court decision or decision of administrative authority shall be registered on basis of such decision.

OZ also contains more detailed regulation of procedure of execution of pledge by pledgee, which can be realized in way specified in agreement on establishment of pledge, or by sale at auction according to Act No. 527/2002 Coll. on Voluntary Auctions, or by selling of security pursuant to special legal regulations (e.g. Civil Court Order, Execution Order).

See also topic 8.08 Liens; categories 22 Mortgages, topic Mortgage; Debtor and Creditor, topic Voluntary Auctions.

8.10 VOLUNTARY AUCTIONS:

Voluntary auctions, as new public proceedings, were introduced by Act No. 527/2002 Coll. on Voluntary Auctions, effective as of 1 Jan. 2003, with purpose to facilitate execution of creditors' rights resulting from pledges and mortgages established to secure their receivables. Provisions of this act do not apply to auctions regulated by special legal regulations, e.g. Civil Procedure Code, Act on Bankruptcy and Restructuring, Execution Order, etc. This act repealed old legal regulation Act No. 174/1950 Coll. on Auctions apart from Execution, as amended.

Subject of auction can be things, rights, other asset values, which are transferable, set of things, rights or other asset values, enterprise or its part, if their public sale was proposed and they meet other conditions stipulated by this Act on Voluntary Auctions. Subject of auction may not be, for instance, securities, property which can only be in ownership of state (e.g. caves, mineral deposits, etc.), municipality or specified legal entities; things subject to retention right or statutory preemption right pursuant to special legal regulations. Pledged asset may become subject to voluntary auction only with consent of pledgee.

Auction can be performed only by auctioneer holding respective trade license and meeting requirements stated by Act on Voluntary Auctions or another special act upon petition of owner of thing to be auctioned or person holding pledge or mortgage right to such thing. Auction can be executed only on basis of written agreement on auction concluded between petitioner of auction and auctioneer. Auctioneer shall publish auction notice in Auctions Registry kept by Notaries' Chamber of SR at least 15 days before auction takes place (with certain exemptions specified by Act on Voluntary Auctions). Ownership or other title being subject of auction is transferred to bidder by knock down, provided it has paid sum reached in auction within stated time limit.

9 DISPUTE RESOLUTION

9.01 ARBITRATION AND AWARD:

In disputes concerning commercial or civil law matters contracting parties may agree on domestic or foreign arbitration.

Domestic Arbitral Awards.

Act No. 244/2002 Coll. on Arbitration stipulates conditions for domestic arbitration and for enforcement of foreign arbitral awards. Certain matters are excluded from arbitration e.g. disputes arising from bankruptcy or restructuring procedure, disputes concerning real property rights and personal status. Any individual agreed on by parties, who is full-aged, has full legal capacity, relevant experience and no criminal record, may become arbitrator. Legal entities may establish their own arbitration courts. Special law stipulates conditions of establishment of arbitration courts of selected legal entities (e.g. Slovak Chamber of Commerce and Industry, Bratislava Stock Exchange). List of permanent arbitration courts is kept by Ministry of Justice of SR. Jurisdiction of arbitration courts is based on arbitration agreement or arbitration clause contained in contract. Arbitration is initiated by petition and defendant is obliged to present statement to petition within period agreed upon by parties otherwise stipulated by arbitration court. Arbitral award must solve all contentious matters of substance. If agreed to in arbitration agreement (clause), party may demand review of arbitral award by new arbitrator(s) within 15 days from date of delivery of award. Unless any party demands court, within 30 days from date of delivery of award, to cancel arbitral award, it would have same force as enforceable judgment.

Foreign Arbitral Awards.

SR is successor signatory of several international conventions concerning arbitrational matters, e.g. New York Convention on Recognition and Enforcement of Foreign Arbitral Awards, Geneva European Convention on International Commercial Arbitration, Geneva Protocol on Arbitration Clauses, Geneva Convention on Enforcement of Foreign Arbitral Awards. Enforcement of foreign arbitral award may be rejected by court, if contesting party proves, that: (i) it could not enforce its rights in arbitration proceeding, (ii) arbitration agreement (clause) was not concluded in compliance with law governing agreement or was not concluded under law of country where arbitral award was issued, (iii) was not notified about arbitration proceeding or for other material reason could not participate in arbitration, (iv) arbitral award concerns dispute not included within arbitration agreement (clause), not fulfilling conditions for resolution by arbitration, or excluded from arbitration by law governing arbitration agreement (clause) or by law of country where arbitral award was issued, (v) arbitration court was appointed or arbitration proceeded in violation of agreed terms or law of country where arbitral award was issued, (vi) arbitral award did not become effective and binding or its execution was suspended or cancelled by court of country where it was issued or which law was governing arbitral award. Court will deny recognition and enforcement of arbitration award even without request of party, if dispute is excluded from arbitration under law of SR or if recognition and enforcement would be contrary to public order in SR.

10 DOCUMENTS AND RECORDS

10.01 ACKNOWLEDGMENTS:

To be valid, documents issued in SR generally do not require verification of signatures contained on documents, if not stipulated otherwise in special law. Bodies authorized to verify signatures and copies of documents are (i) notaries (see topic 10.02 Notaries Public) and (ii) save for specific cases (e.g. documents executed in foreign language save for Czech language, documents to be used abroad, copies of identification cards, extracts from land registers kept by Cadastral Offices) also district offices and municipalities (Act No. 599/2001 Coll. on Verification of Documents and Signatures by District Offices and Municipalities, effective as of 1 Jan. 2002).

Documents issued abroad for purposes of court, administrative and other official use in SR are required to be authenticated in accordance with legal regulations of state where documents were issued and then legalized by Slovak consular officer, unless bilateral treaties on legal assistance or consular engagements stipulate otherwise. SR has entered into bilateral treaties on automatic acceptance of documents issued by official authority of other state with countries such as Belgium, France, Greece, Portugal, Austria, Spain, Tunisia, Cyprus and others. Unless bilateral treaties provide otherwise documents such as (i) birth, marriage, death certificates and other vital statistics issued by municipalities in SR are subject to verification by District Offices, and (ii) notarial and official translation authorizations and documents issued by courts in SR are subject to legalization by Regional courts and then authentication by Ministry of Foreign Affairs of SR. That does not apply in relation to countries which acceded to Hague Convention on Abolishment of Legalization for Foreign Documents (effective from 18 Feb. 2002, SR is party to this Hague Convention [Act No. 213/2002 Coll.]) or in case bilateral agreements on legal assistance with SR establish different regime. Pursuant to Hague Convention authentication of authorities of country of document's origin containing “apostille” is sufficient. Authorities entitled to issue “apostille” are Ministry of Foreign Affairs in general, Ministry of Justice and regional courts for documents issued by judicial authorities, notaries, bailiffs or official translators, and Ministry of Interior, Ministry of Education, Ministry of Health, Ministry of Defence or District Offices for other stipulated documents. SR has also entered into bilateral agreements abolishing legalization with Afghanistan, Albania, Algeria, Armenia, Austria, Azerbaijan, Belgium, Belarus, Bosnia and Herzegovina, Bulgaria, Croatia, Cuba, Cyprus, Czech Republic, France, Greece, Hungary, Italy, Kazakhstan, Kyrgyzstan, Macedonia, Moldova, Mongolia, Montenegro, North Korea, Poland, Portugal, Romania, Russian Federation, Serbia, Slovenia, Spain, Switzerland, Syria, Tajikistan, Tunisia, Turkmenistan, Ukraine, Vietnam, Yemen.

10.02 NOTARIES PUBLIC:

Notaries and their activities are governed by Act No. 323/1992 Coll., as amended (Notarial Order). Notaries are appointed by Minister of Justice of SR following selection procedure for unlimited period of time. Notaries take oath administered by Minister, who also exercises state supervision over notaries. Notaries must be Slovak citizens, possess civil integrity, have university degree of law, complete five year apprentice period, pass examination and they are not allowed to be under any disciplinary measure of debarring from notary office imposed on their person or disciplinary measures of debarring from bar of advocates, commercial lawyers, bailiffs, prosecutors or judges. Civil integrity is proved by copy from criminal registry which means notaries are prohibited from committing any intentional crime ever. There is obligatory membership in Chamber of Notaries, which is self-governed professional organization entitled to create its own bodies and to impose sanctions for violation of law of professional ethics. Notaries have seat in circuit of court to which they were assigned.

Notaries exercise following activities: issue documents, verify authenticity of signatures and authenticity of copies of official documents, certify other legally important facts, deposit documents and money, provide legal advice and act as court commissioners in estate proceedings. Notaries can employ notarial candidates and notarial trainees who are also registered at Chamber of Notaries. Some of above-mentioned activities may also be performed by notarial candidate, notarial trainee or other notarial employees. Notarial fees are stipulated by decree of Ministry of Justice No. 31/1993 Coll. on Remuneration and Compensation of Notaries, as amended.

Role of Notaries in Estate Proceedings.

Activities of notaries as court commissioners in estate proceedings are stipulated both in general provisions of OSP and special provisions of c. 5, part 3 of OSP. Notaries are authorized to do certain acts in estate proceedings according to schedule issued by chairman of Regional Court for each calendar year upon proposal of Notarial Chamber.

In cases stipulated by law, when there are no conflicts existing between heirs in respect of decedent's assets or manner of distributing estate, estate proceedings may be completed by executing certificate of heirship delivered to parties by notary acting in position of commissioner appointed by court. Unless legal conditions for executing certificate are fulfilled, and unless agreement is reached among heirs as to distribution of estate, notary shall prepare all necessary documents for court to issue resolution and proposal for court's resolution.

Notarial Chamber of SR keeps notarial central registries in electronic form which are publicly accessible also via Internet. Registries include: (1) Notarial Central Registry, (2) Notarial Central Registry of Voluntary Auction Sales, (3) Notarial Central Registry of Notarial Deeds, (4) Notarial Central Registry of Verified Signatures, (5) Notarial Central Registry of Deeds, (6) Notarial Central Registry of Testaments, and (7) Notarial Central Registry of Designated Legal Persons (i.e. legal persons under §50[4] of Act No. 595/2003 Coll. on Income Taxes, as amended, to which taxpayer may remit 2% of paid income tax). Notarial Central Registry of Testaments is not public register and it is not accessible via Internet.

Role of Notaries in Prescription Matters.

See category 5 Civil Actions and Procedure, topic 5.04 Prescription.

11 EMPLOYMENT

11.01 LABOR RELATIONS:

Labor relations are governed by ZP. ZP does not apply to relations between state and state employees, only if explicitly stipulated by Act No. 312/2001 Coll. on Civil Service, as amended, which governs these relations. Relations between employees of further public institutions are governed by ZP, unless Act No. 553/2003 Coll. on Remuneration of Certain Employees Performing Work in Public Interest, and Act No. 552/2003 Coll. on Performance of Work in Public Interest, as amended, effective since 1 Jan. 2004, does not stipulate otherwise.

Employment Contract.

Principal means of creating employment relationship under ZP is written contract. There is no overall restriction on right to create employment relationship other than general prohibition on discrimination. Basic principle, as in other jurisdictions, is that employee will carry out lawful instructions of employer in return for wage. Parties to contract must agree upon job description, place of work, date on which employment commences, and wage. In addition, labor contract must also stipulate conditions on paydays, working hours, holidays, and period of termination notice (reference to relevant provisions of respective collective bargaining agreement or provisions of

ZP is sufficient). If contract is for fixed term, it must be executed in written form and can be concluded, prolonged or repeatedly renewed only once within three years. Otherwise contract is deemed to be of indefinite duration, terminable on notice upon occurrence of limited range of termination events. Employment agreed for fixed term may be prolonged (or repeatedly renewed) for period exceeding three years only in case of (i) need to substitute employee(s); (ii) need to engage temporarily additional employees for period not exceeding eight months per calendar year; (iii) for conducting of seasoning work, repeating every year and not exceeding eight months per calendar year; or (iv) reason stipulated in collective bargaining agreement. In addition to above reasons, fixed term employment may be prolonged (or repeatedly renewed) or exceed three years, if agreed with (i) Employee who is member of statutory body or managing employee directly subordinated to statutory body, (ii) employee in area of research and development, (iii) artist, (iv) home nurse, (v) person entitled to pension payments, (vi) employee of employer having at maximum 20 employees, or (vii) other employee stipulated in special law or international treaty. It is also possible to agree on probationary period not exceeding three months during which either party is free to immediately terminate contract without giving reasons for doing so. Such period cannot be extended.

Where appropriate, contents of collective bargaining agreements are statutorily implied into individual contracts of employment. In such case, simple written contract of employment is unlikely to contain complete terms of employment.

In SR, contract of employment can be amended by mutual consent.

Reassignment.

In certain circumstances, employer must reassign employee to new duties for agreed (if not agreed, for necessary) time period. This may arise, e.g., in cases (i) when employee is unable to perform his duties due to occupational disease, (ii) if it is necessary due to enforceable decision of court or other state body, or (iii) when pregnant employee or mother of child under nine months pursuant to medical statement is unable to perform present job any longer. In these cases employee can be unilaterally reassigned only if reassignment is possible within job description and/or place of work agreed upon in contract. Otherwise, employee can be reassigned to job other than that agreed upon in contract only upon mutual agreement with employer. Regardless of above, employer can unilaterally reassign employee to work and time necessary to avert and mitigate disasters and proximate consequences thereof.

Hours of Work.

There are also restrictions on number of hours which may be worked per week. Working hours may not exceed 40 per week and in case of juvenile employees, employment in two shifts, three shifts or continuous work operations and particularly arduous or hazardous occupations, maximum figure may be lower. Working hours including overtime work may not exceed 48 hours per week in four consecutive weeks in case of symmetrical arrangement/scheduling of working hours, in four consecutive months in case of non-symmetrical arrangement/scheduling of working hours. If so agreed between employee and employer, this monitoring period may be extended to 12 consecutive months. Ordered overtime may not exceed 150 hours per calendar year and is permitted only in exceptional cases under stipulated conditions. For serious reasons, employer and employee may agree on overtime of up to 250 hours per calendar year.

Holiday entitlements are also prescribed by law. Employees (save for certain specific categories of employees) are entitled to four weeks of paid leave per annum increasing to five after 15 years' of employment experience. Employment contract or collective bargaining agreement may increase entitlement for paid leave to employees.

Termination.

Employment contract may be terminated by mutual agreement in writing. Expiry of fixed term contract is also valid form of termination, as at its expiry date or date of revocation of relevant residence permit or date of expulsion where foreigner is employed. Summary termination by employee is allowed (i) in case of serious health reasons of employee confirmed by medical statement; or (ii) if employer did not pay any salary within 15 days of its maturity; or (iii) in case of danger directly threatening employee's life or health. Summary termination by employer is option available only in limited circumstances, i.e., where employee has committed intentional criminal offense or is guilty of gross misconduct. Termination must take place within two months of date on which employer first became aware of misconduct or, in case of criminal offense, of sentence, however, not later than 12 months of triggering event. There is statutory minimum notice period of two months for regular terminations. After five years of employment with employer, notice period, in case of termination by notice given by employer, is three months. Notice takes effect by reference to complete calendar months only.

Employer may terminate contract by notice only in cases defined by ZP. These are: (1) Where dismissal is necessitated by operational changes causing redundancy of employee or by closure or relocation of employer; (2) where employee suffers from illness or disability which prevents employee from performing duties; (3) where employee is not meeting conditions for performance of work or is unsatisfactorily performing his/her tasks, having been warned within last six months that performance is deficient; and (4) where employee infringed work discipline in manner allowing summary termination, in case of continuous, less serious infringement of work discipline by employee, having been warned within last six months on possibility of termination.

Save for several exemptional cases stipulated by ZP, employer must not give notice to employee during so-called “protection period”, e.g. (i) when employee is temporarily incapable of working due to illness or injury or temporarily incapable of working at night, (ii) when female employee is pregnant or on maternity leave, or male or female employee is on parental leave, (iii) when employee carries out public office or military service.

Save for cases of giving notice for reason of infringement of work discipline or unsatisfactory work performance, employer may give notice to employee only if it has no possibility to employ such employee even as part-time employee in place of work agreed upon in employment contract or employee is not willing to accept other appropriate work offered by employer. Prior to serving summary termination or termination with notice, employer is obliged to discuss it with employee's representatives.

As far as termination of contract by employee is concerned it is possible for any reason or without stating any reason by giving two months termination notice.

Redundancy.

ZP stipulates that employee may obtain redundancy payment in amount of at least two months' average salary and three months' average salary after five years of employment with employer, in case of termination of employment by notice given by employer or agreement for reasons of organizational changes, transfer or dissolution of employer or health. Employment contract or collective bargaining agreement may provide employees with higher redundancy payment.

Specific Types of Labor Contracts.

Specific part-time employment contracts may be concluded for work of less than 15 hours per week. This may be terminated without specific reason and notice period is 30 days. Certain limitations on fixed term contracts do not apply for part-time employment. Besides employment contract there are several specific contracts on works performed outside scope of regular employment contract (i.e. contract on performance of work, contract on work activity, contract on student's brigade-work) governed by ZP, which are applicable in cases of short-term engagement.

Security and Health Protection in Employment Relations.

Besides general rules for performance of work and protection of health contained in ZP there is Act No. 124/2006 Coll. on Security and Health Protection in Work, which stipulates more precisely duties of employers, employees and some other entities in connection with preventing health damages caused by performance of work. ZP and some other legal regulations set forth specific labor conditions and protection of women, pregnant women, disabled employees and employees 15-18 years old in labor relations. Pursuant to Act No. 125/2006 Coll. on Inspection of Work, observance of provisions of ZP and other labor legal regulations is subject to supervision of relevant Offices for Inspection of Work. Duties in area of prevention of illegal employment are stipulated in Act No. 82/2005 Coll. on Illegal Work and Illegal Employment.

Foreign Workers.

Labor relations between workers and foreign employers on territory of SR, as well as labor relations between foreigners working in territory of SR and domestic employers are subject to ZP, unless ZMPSP stipulates otherwise. Pursuant to ZMPSP, parties to employment contract may agree on governing law of employment relationship. Labor relations of employees of international organization with headquarters in territory of SR established by international treaties, are subject to ZP, unless such treaties or other international conventions stipulate otherwise. Labor relations of employees of enterprises with foreign capital participation and organizations with international element with headquarters in territory of SR are subject to ZP, unless such employees work and reside in territory of same foreign country; in such case their labor relations are governed by governing law stipulated by provisions of ZMPSP. Foreigners, other than citizens of EU, European Economic Area and Switzerland can only be employed, if they hold residence permit as well as employment permit. Provisions regulating assignment of workers within EU member states, establishment and functioning of European employees' council were incorporated into ZP.

Liability for Damage.

ZP regulates liability for damages and injury caused in connection with employment relationship. This liability can apply to both employer and employee. Where damage is caused by employee's negligent act, amount of damages to be paid must not exceed amount equal to four times his average monthly salary; no such limitation will apply, if damage was caused intentionally or as result of use of alcohol or drugs or in case of special liability of employee for deficiency of values or loss of items entrusted to employee. Apart from regulation of general liability on both sides, ZP also covers special kinds of liabilities, e.g. said liability of employee for deficiency of values or loss of items entrusted to employee, liability of employer for injuries caused at work and occupational diseases of employees. Employer must be insured with Social Insurance Company for its liability for injuries and occupational diseases of employees.

Trade Unions.

ZP and Act No. 2/1991 Coll. Collective Bargaining Act regulate position of trade unions. One of basic roles of trade unions is to negotiate with employers about conclusion and conditions of collective bargaining agreements which provide for additional regulation of employment relationship binding upon parties, and which provide trade unions control over maintenance of internal salary structures and obligations of employers resulting from such agreements. Provisions of employment contracts are invalid and void if they do not comply with relevant collective bargaining agreement. In cases of failure to conclude these agreements or satisfy obligations of contractual parties, disputes are solved in process strictly stipulated by law. As ultimate remedy in collective bargaining trade unions have right to call and organize strike under conditions of law.

In addition to right of organization in trade unions, ZP allows employees of employer having at least 50 employees to elect works councils (or employees' trustee if total number of employees ranges from five to 49) having e.g. right to discuss with employer specific issues and measures relating to employees, right to request specific information and further controlling powers stipulated by ZP.

Social Security.

Employers must pay contributions to pension insurance, disability insurance, unemployment insurance, reserve fund, accident insurance, health insurance, sickness insurance and guarantee fund at rate of 35.20% of payroll, and employees must pay contributions at rate of 13.40% of their salaries. There are, however, certain caps over social security payments.

12 ENVIRONMENT

12.01 ENVIRONMENTAL REGULATION:

Fundamental legal regulation is Act No. 17/1992 Coll. on Environment, as amended, which stipulates some basic obligations concerning protection of environment. Act No. 543/2002 Coll. on Protection of Nature and Country, as amended, stipulates scope of fundamental rights and liabilities regarding protection of nature and country. In particular it stipulates scope of activities for exercise of which permission is necessary. Act also classifies those parts of country which are specially protected by prohibition or restriction of some activities (national parks etc.) and deals with protection of endangered species. Detailed rules of protection of wild animals and plants as well as regulating their trade are set by Act No. 15/2005 Coll. on Protection of Wildlife Animals and Plants and on regulating their trade. This Act broadly refers to EC legislation applicable in area of animal and plant protection, namely to Council Regulation (EC) No. 338/97 on protection of species of wild fauna and flora by regulating trade therein. There is wide range of special legal regulations concerning particular parts of environment (soil, water, air, forests, waste etc.) and permission required for construction of buildings.

Water.

Act No. 364/2004 Coll. on Waters, as amended, regulates rights and duties of individuals and legal entities in connection with surface and underground waters, connected real estate and their protection and efficient use. Act contains requirements on quality of several types of water: (i) Drinking water, (ii) water used for bathing, (iii) irrigation water, and (iv) water suitable for fish husbandry. Water Plan of Slovakia is strategic document elaborated by Ministry of Environment and approved by Slovak Government, that regulates at general level system of waters in Slovakia (consisting of various water sources e.g. lakes, rivers, underground waters, etc.), maintenance, management, protection of waters and environmental goals in such system. Act establishes rules for disposal with waters. In general, usage of waters and their offtake for personal use and for use by households (e.g. by well or pump) is permitted to anyone without special approval. Use of water for navigation, transport of wood or for mining may be performed without special approval of water authority. On other hand permit from water authority is required for activities set in Water Act inter alia for their takeoff (other than for personal use and use by households), accumulation or use of hydro-energetic potential of waters, drainage of waste waters, irrigation, etc. Further, water authority issues its consent in construction proceedings with any construction that may influence state of surface or underground waters (under conditions set by Water Act). Water authority also issues construction permit for water constructions (i.e. constructions built for purpose of utilization or disposal with waters). Water Act also sets rules for drainage of waste water to surface and underground waters. Water Act defines protected water areas, protected zones of water resources, sensible areas and vulnerable areas. Act further specifies classification, protection and administration of water flows. State water authorities are Ministry of Environment of SR, Inspectorate of Environment, regional and circuit environmental offices and municipalities. Respective authorities may in case of breach of duties impose penalty of up to EUR 165,969.59 depending on breach. Water Act establishes duty to pay fees for drainage of waste water and take off of underground waters as well as for other use of waters, such as hydroelectric use, fish husbandry or maintenance of navigation channels. As stipulated in Act No. 40/1964 Coll. Civil Code, as amended, surface and underground waters have separate ownership from land. For mineral and healing water, see category 16 Health, topic 16.02 Protection of Health, subhead Mineral and Healing Waters.

Air.

Act No. 478/2002 Coll. Air Act, as amended, regulates rights and duties of individuals and legal entities in connection with air protection. Consent of air protection authority is required for construction of certain categories of buildings that are expected to be releasing higher amounts of polluting emissions. For pollution of air, special fees based on quantity of emissions produced by relevant polluter are set down in Act No. 401/1998 Coll. on Fees for Air Pollution, as amended.

Act No. 76/1998 Coll. on Protection of Ozone Layer, as amended, stipulates conditions for production, disposal and sale of substances and products specified and prohibition of production and sale of specified substances. This Act is in line with Regulation (EC) No. 2037/2000 on substances that deplete ozone layer, which is directly applicable in SR.

Soil.

Act No. 220/2004 Coll. on Protection and Use of Agricultural Soil, as amended, stipulates obligations of users of agricultural soil. For change of certain type of agricultural soil (e.g. vineyards, arable area, grasslands, gardens, etc.) into other type of agricultural soil and for change of agricultural soil to non-agricultural soil, special permission is necessary and payments to State are paid from 1 Jan. 2009.

Forest.

Fundamental legal regulation in field of protection of forests is Act No. 326/2005 Coll. on Forests, as amended. This regulation governs protection of forestland, ownership of forestland and utilisation of forests, professional forest farming, subvention of sustainable forest development from public funds, state supervision over forests and fines imposed for violation of Act. Furthermore, special regulation stipulates payments, which are paid to state, if forest is replaced by another use.

Waste.

Act No. 223/2001 Coll. on Waste, as amended, regulates rights and duties of legal entities and individuals with regard to prevention of waste creation and waste disposal, powers of state authorities and municipalities in area of waste management, regime of import, export and transit of waste, responsibility for breach of duties in sector of waste management and establishment of Waste Recovery Fund. Regime on import, export and transit of waste is set by EC legislation, namely Council Regulation (EEC) No. 259/93 on supervision and control of shipments of waste within, into and out of European Community, Council Regulation (EC) No. 1420/1999 establishing common rules and procedures to apply to shipments to certain non-OECD countries of certain types of waste and Commission Regulation (EC) No. 1547/1999 of 12 July 1999 determining control procedures under Council Regulation (EEC) No. 259/93 to apply to shipments of certain types of waste to certain countries to which OECD Decision C(92)39 final does not apply. Act defines significant legal terms such as waste, waste originator, waste holder, waste management, waste disposal, dangerous waste, municipal waste and waste dump. Purpose of waste management is to avoid and reduce creation of waste, to recycle waste, to use waste as source of energy and to liquidate waste by manner not harming health and environment. Legal regime of waste disposal regulates powers of state administrative authorities in respect to granting approval and authorization for performance of activities in waste economy. Act establishes Waste Recovery Fund as special purpose non-state fund, in which funds for supporting collection, valuation and processing of individual sorts of waste are concentrated. Within responsibility for breach of duties, respective state administrative authority may impose penalty for breach of duties set by Act on Waste up to EUR 6,638.78, EUR 16,596.95 or EUR 165,969.59 on legal entity or individual - entrepreneur depending on specific breach.

Special regulation to Act on Waste Disposal, Act No. 529/2002 Coll. on Packages, as amended, lays down requirements for contents, characteristics and labeling of packaging materials, their use and for collection and discharge of packaging waste.

Construction Activities.

Act No. 50/1976 Coll., on Territorial Planning and Construction Rules, as amended, stipulates basic principles and obligations concerning construction of buildings and related activities. For purposes of further development of particular territory, territorial plans are adopted by government of SR, municipal and regional authorities. Further development of particular territory must be in compliance with these adopted zoning plans. These plans are adopted on level of whole territory of Slovakia, on level of region, municipality and particular zone within municipality. Act further stipulates general technical requirements for construction activities. Construction may be erected only in compliance with zoning plans and on basis of decision on placement of construction. In order to receive such decision, constructor has to prove sufficient title to land where construction should be erected (i.e. ownership, easement consisting in right to erect construction, or long-term lease). Construction work may commence only after receiving of construction permit and may be carried out only under conditions set therein. Furthermore, for any construction activity (excluding small buildings, repairs of buildings etc.) special permission is necessary, which is issued by local construction office following application of constructor. After construction is finished, construction office controls building from aspect of safety requirements and compliance with construction plans. After all criteria of safety and compliance with technical regulations, project documents and conditions set in construction permit are met, construction office issues occupancy permit allowing use of construction. To engage in construction activities defined in Act, special qualification is necessary. Part of Act deals with expropriation procedure which complies with fundamental conditions set forth by Constitution of SR. (See category 23 Property, topic 23.03 Real Property.) Duties of construction offices are performed by municipalities. Joint offices of municipalities may be created by municipalities allowing them to cope with complexity of construction proceedings.

Environmental Impacts Assessment.

Act No. 24/2006 Coll. on Environmental Impacts Assessment, as amended, stipulates conditions for environmental impact assessment (EIA): (i) Of strategic documents prior to their approval, and (ii) selected activities prior to their displacement or prior to their approval under special legal regulation which could be regarded as potential intrusion to environment; these documents and strategic activities are enumerated in annexes of Act. Proposal for intended activity is submitted to competent environmental authority, which is depending on type of strategic document or activity either Ministry of Environment of SR, Regional Office of Environment or Circuit Office of Environment. Report is prepared by entity which has submitted proposal. In case of strategic document, authority issuing strategic document is obliged to notify competent environmental authority accordingly; environmental authority undertakes investigations, reviews environmental report submitted by author of strategic document, appoints expert to report on strategic document, and ensures cooperation with other concerned state authorities prior to issuance of approval of strategic document. Similar procedure applies to approval of selected activities (of environmental relevance). However, competent environmental authority may decide, based upon review of notification submitted by applicant for selected activity, that such activity is excluded from environmental impact assessment procedure. Competent environmental authority ensures production of final assessment and on basis of it issues final statement permitting or prohibiting activity.

Industrial Pollution and Safety.

Act No. 245/2003 Coll. on Integrated Prevention and Control of Pollution of Environment, as amended, sets measures for integrated prevention and control of pollution of air, water, soil and creation of waste caused by industrial activities set in annex to Act. Measures taken as integrated control comprise permission of business operation (plant) by state authorities, control of substances, raw materials and energy used in business operations, setting of emission limit conditions for performance of business activities in plants, etc. These measures are enforced through internal and state supervision. Integrated approval procedure applies to establishment and operation of industrial facilities causing pollution. Duties in prevention of large industrial accidents are stipulated by Act No. 261/2002 Coll. on Prevention of Serious Industrial Accidents, as amended.

Environmental Fund is legal entity established by Act No. 587/2004 Coll. on Environmental Fund, as amended, that is responsible for collecting, administering and awarding financial funds in course of performance of state policy of protection and maintenance of environment. Funds are contributed to this fund from various sources set by laws of SR (e.g. fees for certain ecologically detrimental, activities, penalties, etc.). Fund provides subsidies to applicants for environmentally focused activities for purposes and under conditions set by Act.

Remedying of Environmental Damage.

Act No. 359/2007 Coll. on Environmental Prevention and Remedying of Environmental Damages, as amended, regulates: (i) Rights and duties of respective legal persons and natural persons—entrepreneurs (i.e. operators) in prevention and remedying of environmental damages including bearing of related costs, (ii) tasks of state administration bodies in prevention and remedying of environmental damages, and (iii) liability for breaching of statutory duties under this Act. Act transposes Directive 2004/35/CE on environmental liability with regard to prevention and remedying of environmental damage.

13 ESTATES AND TRUSTS

13.01 DEATH (PRESUMPTION OF AND ACTIONS FOR):

If death cannot be proved by inspection of corpse, court shall pronounce certain individual dead if person's death is proved in another manner (e.g. traffic accident). Court shall pronounce missing person dead if, taking into account all relevant circumstances, it may be assumed that person is not alive. In such case, court shall summon missing person to present himself at court or any other person to submit any report about missing person. If such person does not appear in court and no report is submitted within one year, court shall pronounce person's death, stating date of death. If it is not possible to state exact sequence of death of several natural persons, it is presumed that they have died simultaneously. After person's death has been proved or pronounced by court, inscription is made in register of deaths kept by municipalities depending on last address of residence of deceased.

In case of fatal injury, survivors of deceased to whom deceased person gave or was obliged to give support are entitled to receive compensation in form of pecuniary annuity from person responsible for death. (OZ, §448).

Human Organ Transplant.

Transplantation of human organs from dead persons is regulated by Act No. 576/2004 Coll. on Medical Care and Services Connected to Medical Care. It is presumed that person consents to organs being used for transplantation unless person disagreed with it in any written statement executed during life. Transplantation for consideration is prohibited.

13.02 DESCENT AND DISTRIBUTION:

According to OZ estate of any deceased person passes to heirs upon death. Any person may inherit by operation of law, under will, or in both ways. Upon acquisition of estate, heir shall become liable for debts of deceased person up to amount of estate that has been assigned to heir at time of death of deceased. If no heir acquires estate by testate succession, legal heirs will succeed to it instead of them. Since, according to OZ property of both spouses (unless provided otherwise by OZ) forms undivided co-ownership of spouses, after death of one of spouses' property forming co-ownership is divided. Then, shares of relevant heirs are calculated from share of deceased spouse. Intestate succession is divided into four orders of succession. Intestate's children and spouse inherit in first order of succession, each of them in equal share. Should descendants of decedent not inherit, then decedent's spouse, parents and those who lived with decedent in common household for period of at least one year form second order of succession. Each of them inherits equal share, however decedent's spouse's share is at least half of estate. Should neither decedent's spouse nor his/her parent inherit, decedent's siblings and person who lived with decedent in common household for period of at least one year form third order of succession. If one of decedent's siblings does not inherit, sibling's children acquire sibling's share of inheritance. Fourth order of succession is formed by grandparents of decedent or by their children. Any estate which was not acquired by any heir shall escheat to State.

Upon acquisition of estate, heir shall become liable for debts of deceased person up to amount of estate that has been assigned to heir at time of death of deceased.

Probate proceeding are commenced ex officio by court competent in territory of last domicile of deceased. If there is only single heir, court shall confirm to heir that estate has passed to heir. If there are two or more heirs, heirs settle inheritance by agreement at relevant court. If no agreement between heirs is reached court shall confirm acquisition of inheritance to those heirs whose rights to inheritance have been duly proven.

Incapacity to Inherit.

Person who committed intentional crime against decedent or his relatives stipulated in OZ or who acted scornfully with regard to decedent's will, may not inherit, unless decedent had forgiven him for such act.

Legitimate Shares and Disinheritance.

See topic 13.04 Wills.

Probate.

Any heir may disclaim inheritance by oral declaration in court or by written declaration sent to court within one month from day when heir was informed by court on right to disclaim. Declaration disclaiming inheritance may not be retracted nor may it be attached with conditions or reservations.

13.03 EXECUTORS AND ADMINISTRATORS:

Under Slovak law, functions of administering estate of decedent are performed by notaries public. See category 10 Documents and Records, topic 10.02 Notaries Public, subhead Role of Notaries in Estate Proceedings. Term “executor” refers to “bailiff”—official who liquidates assets of debtor. See category 8 Debtor and Creditor, topic 8.04 Executions.

13.04 WILLS:

Testator's disposition of property is limited by provisions of OZ which stipulate that descendants who are minors must receive at least as much as their intestate share in estate, adult descendants must receive at least as much as constitutes one half of their intestate share in estate. However, testator may disinherit descendant if there are reasons stipulated in OZ. Reasons must be specified in written disinheritance deed and disinheritance can be joined with will in single document. There are no limitations on amount which can be given to religious, charitable or social institutions. Will being written document signed by testator has to specify day, month and year on which it was executed; otherwise it is invalid. Joint will made by two or more testators is invalid. For holographic wills, attendance of witnesses is not necessary. If will is not handwritten by testator, it must be signed in presence of two witnesses who also sign document. Nuncupative will can be produced by any person who cannot read and/or write in presence of three persons who also sign document. Will can be made in form of notarial deed; only this form can be used if testator is minor at least 15 years of age. If shares of descendants are not stipulated in will it is presumed that shares are equal. Will is annulled by later executed will, by its revocation (in form prescribed in will) or by destruction of document containing will.

Applicable Law.

Testamentary capacity is governed by law of state of which testator was citizen at time will was executed. Same law applies to form of will; however, form of will prescribed by law of state where will was made is sufficient. Legal relations of inheritance are governed by law of state of which testator was citizen at time of death. (§§17, 18, ZMPSP).

14 FAMILY

14.01 ADOPTION:

Adoption is regulated by ZR (Act No. 36/2005 Coll., Family Act, as amended) effective from 1 Apr. 2005. Former legal regulation recognized two types of adoption: without option to cancel and with option to cancel based on serious reasons. New ZR recognizes only one type of adoption enabling to cancel adoption within six months from effectiveness of court ruling on it in case of serious reasons. Otherwise adoption cannot be cancelled.

Courts, particularly district court of adoptee's permanent residence, have exclusive power to decide on adoption. Adoption creates same relations between adopter and adoptee as relations between natural parents and children. Relationship also arises among adoptee and relatives of adopter. Adopter has same rights and duties as natural parents—e.g. duty to take systematic and consistent care of children's education and support. Court decides on adoption on basis of petition submitted by adopter. Natural parents are not participants in adoption proceedings if (i) they were deprived of parental rights, or (ii) they do not have full legal capacity, or (iii) their consent to adoption is not required (e.g. they were not interested in their child for time longer than six months, or they have already provided their consent to adoption on anonymous basis).

OSP sets time periods in which courts are supposed to make their decisions relating to adoption. Court decision that child is free for adoption must be made within three months after petition is filed, decision on adoption within one year.

Generally, consent of parents of adopted minor is required. Consent may be denied only until child has been allocated to care of future adoptive parents upon court ruling. If minor is able to assess consequences of adoption, his/her consent is required. Prior to court ruling on adoption minor has to be in care of its future adoptive parent for at least nine months which, compared to former law, indicates shortening of pre-adoption period. Court may cancel adoption due to substantial reasons in interest of minor but only within six months from effectiveness of ruling on adoption, upon petition of adoptive child or parent or even without petition. Agreement to cancel adoption is not acceptable. Adoptive parent will be registered with personal registry instead of adoptive child's parent. Adoptive child will bear surname of its adoptive parent.

Mutual relations between natural parents and adoptee are terminated through court ruling on adoption and adoptee has same position and rights to adopters as their natural child. Adoptee also becomes heir to adopter's estate. See also category 13 Estates and Trusts, topic 13.02 Descent and Distribution.

Conflict of Laws and Jurisdiction.

If adoptee is Slovak citizen, Slovak courts have exclusive jurisdiction. Adoption is governed by law of state of adopter. If adopters are spouses of different citizenship, legal conditions of both states must be fulfilled. Slovak law is also applicable if foreign law which should have applied, would not allow adoption or allows it only under extremely difficult circumstances, if at least one of spouses-adopters lives in SR for significant period of time. Permits and consents required for adoption by law of state of adoptee's citizenship must be taken into consideration.

14.02 DIVORCE:

Marriage can be dissolved exclusively upon court decision if relations between spouses are seriously and permanently disrupted so that marriage cannot fulfill its purpose, and it is impossible to expect renewal of matrimonial cohabitation from spouses. (ZR, §23). In practice, disruption must be serious, intensive and surviving for long period. Court must always take into consideration interests of minor children.

Action for divorce begins upon petition submitted to court by one of spouses. Jurisdiction in district court with seat in district of last common residence of spouses. This action also includes adjudication of rights and duties of parents after divorce with regard to minor children. Court shall especially assign which of parents will have custody of children, along with manner of contribution for support of children by other parent. Decision on rights and duties of parents as to children may be substituted by agreement of parents, approved by court. Agreement on contact of parents with children forms part of court decision on divorce.

Aliens.

According to ZMPSP, §38 Slovak court has power to dissolve marriage, if at least one spouse is citizen of SR. If neither spouse is Slovak citizen, Slovak court has jurisdiction, if (a) at least one spouse is residing in SR and court decision can be recognized in countries of domicile of both spouses, or (b) at least one spouse has residence in SR for significant period of time or (c) in case of invalidity of marriage, which can be declared also ex officio, if spouses live in SR.

Court will apply law of state of which spouses are citizens. If spouses are citizens of different states, court will apply law of SR. Slovak law will also be applied if foreign law, which normally should have applied, would not allow divorce, or allow it only under extremely difficult circumstances, if spouses or at least one of them lives in SR for significant period of time.

Unless bilateral international treaties provide otherwise, valid decisions of foreign courts regarding marriage are subject to declaration of its capacity to be enforced by decision of Slovak court.

14.03 HUSBAND AND WIFE:

Rights and duties of husband and wife are regulated by ZR (Family Act) and OZ (Civil Code).

Husband and wife have equal rights and duties in marriage. They have legal duty of common life, faithfulness, helping each other, creating healthy family environment, personal care of children, and other duties. Husband and wife decide about family matters jointly and if they disagree in essential matters, court makes decision upon petition of either spouse.

Common matters concerning things jointly owned by spouses may be handled by either of spouses. In other matters, consent of both spouses is required, otherwise validity of legal act may be challenged at court by other one.

Anything acquired by either of spouses during their marriage which may be object of ownership is subject to undivided co-ownership of spouses (common property of spouses) except things acquired by one spouse before marriage or acquired during marriage by inheritance or gift, items of personal use or for occupation purposes of one of spouses as well as things which on basis of restitution were returned to one of spouses.

Both spouses are jointly entitled to make use of all things in their undivided co-ownership; spouses also jointly cover expenses on those things or those connected with their use and maintenance. Spouses may by agreement widen or restrict extent of their undivided co-ownership recorded in form of notarial deed. Similarly, they can also make agreements on management of their joint property.

Dissolution of marriage also dissolves undivided co-ownership of spouses. For important reasons, upon petition of either spouse, court may dissolve undivided co-ownership of spouses even during existence of marriage. If co-ownership is dissolved, settlement of it shall be effected by agreement of spouses, or by court upon petition of either spouse.

Conflict of Laws.

Court will apply law of state of which spouses are citizens in any disputes relating to personal and property relations of spouses. If spouses are citizens of different states, Slovak court will apply law of SR.

14.04 INFANTS:

Status of infants is regulated by ZR (Family Act). SR is signatory to Agreement on Rights of Infants.

Both males and females reach adulthood at age of 18. Prior to this time, it can only be attained by conclusion of marriage, however, not earlier than age of 16. Once adulthood is attained by conclusion of marriage, it cannot be lost by termination of marriage, or by its being pronounced invalid.

See also topic 14.05 Marriage.

Minors possess capacity to perform only such legal acts which by their nature correspond to intellectual and volitional maturity corresponding to their age. Minors under 14 do not have penal responsibility. Persons from 14 to 18 from penal point of view are juvenile delinquents.

Infant can be represented by either or both parents, provided parents have full legal capacity, or have not been deprived of their parental rights. If parents are obliged to administer property of infants, any disposal of infant's property beyond common importance is subject to court's approval. Neither parent may represent children in legal acts involving conflict of interests (e.g. contractual property transfer) between parents and children or between children. If parents cannot represent child, court will appoint curator to infant. Curator is responsible to court and is subordinated to court supervision. Any decision of curator concerning significant matter of infant is subject to approval of court.

Conflict of Laws.

According to ZMPSP, relations between parents and children, including support of children, under conflict of laws are subject to law of state of which child is usually living. If it is in interests of protection of person or property of child, court may exceptionally take into account law of other state that has material connection with concerned matter, this relations can be regulated by Slovak law, if it is in interest of child.

Commencement and termination of curatorship are regulated by law of state of which infant is citizen. Duty to perform curatorship is regulated by law of curator's state. Relations between infant and curator are subject to law of state where curator's court or competent body is located.

14.05 MARRIAGE:

According to ZR marriage is concluded on basis of voluntary consent of fiancées to create harmonic, consistent and continual life union of man and woman. Marriage between persons of same sex is not permitted. Declaration of consent of fiancées can be made before competent governmental authority or church authority recognized by state. Two witnesses are required for validity of marriage. Citizens concluding marriage are obliged to submit specified documents and declare that no circumstances are known to them which might exclude them from entering into marriage and that they are aware of health conditions of each other. They also must declare which of their surnames will be their joint surname, or in case of decision to use their original surname, which of their surnames will be surname of their children.

There are some circumstances prohibiting conclusion of marriage. No marriage can be concluded by: (a) married man or married woman, (b) relatives of direct lineage, siblings, also relatives by adoption, (c) minors (citizens under 18 years), (d) any person whose mental defect could reduce legal capacity, as consequence. Court will pronounce any marriage under (a), (b) to be invalid. If marriage has not been concluded with serious and free will, certainty and full understanding, court may declare it void. Court can permit marriage under (d), if health conditions of citizen comply with social purposes of marriage. Marriage between minors under 18, older than 16, can also be permitted by court due to important reasons (e.g. pregnancy of woman, etc.). Marriage between minors under 16 is void. Marriage concluded as effect of or under threat of violence is void.

No limitations exist in respect of conclusion of marriage between foreigner and Slovak citizen.

See also topics 14.02 Divorce, 14.03 Husband and Wife.

15 FOREIGN TRADE AND COMMERCE

15.01 CUSTOMS DUTIES:

SR is member of European Union (EU) as of 1 May 2004 and its territory is part of customs territory of European Communities (EC) applying principle of common market without internal borders, where no export and import duties are paid among member states. Slovak customs law is based on EC customs legislation, namely Regulation (EC) No 450/2008 of European Parliament and of Council of 23 Apr. 2008 laying down Community Customs Code (Modernised Customs Code), Commission Regulation (EEC) No. 2454/93 of 2 July 1993 laying down provisions for implementation of Council Regulation (EEC) No. 2913/92 establishing Community Customs Code, Council Regulation (EEC) No. 918/83 of 28 Mar. 1983 setting up Community system of reliefs from customs duty, Council Regulation (EEC) No. 2658/87 of 23 July 1987 on tariff and statistical nomenclature and on Common Customs Tariff, Regulation (EC) No. 1889/2005 of 26 Oct. 2005 on controls of cash entering or leaving Community. All Slovak customs duties are established in accordance with Common Customs Tariff. Rules relating to origin, valuation, payment of customs debt, transit procedures are governed by EC laws.

Application of European customs legislation concerning transfer of goods between EU and third countries is in SR regulated by Act No. 199/2004 Coll. Customs Act, and its implementing Decree No. 419/2006 Coll., as amended. Provisions of Customs Act apply only to transfer of goods between EC and third countries, which is performed in territory of SR. Import and export of goods from third countries is subject to same customs duties, customs quotas, different limitations and restrictions, customs formalities or licenses, as are applied in other EU member states. Customs Act regulates competence of Slovak customs authorities when performing customs supervision, rights and obligations of importers or exporters as controlled entities and custom torts and offences. Pursuant to Customs Act, certain goods are exonerated from import and export duties, especially on basis of special status of persons having special liberties and immunities under international law, eventually on basis of special purpose of use of such goods. Customs Act stipulates notification duty for persons importing, exporting or transporting funds in cash or equivalent means of payment if total sum exceeds [Euro]10,000.

15.02 EXCHANGE CONTROL:

See topic 15.03 Foreign Exchange.

15.03 FOREIGN EXCHANGE:

Slovak Republic became member of European Monetary Union and adopted euro as national currency as of 1 Jan. 2009. In relation to introduction of euro, see also category 1 Introduction, topic 1.01 Currency.

Foreign exchange regulation has been significantly liberalized mainly by Amendment No. 456/2002 Coll. Act No. 202/1985 Coll., as amended, to Foreign Exchange Act (``Act''), which became effective as of 1 Jan. 2003, apart from certain provisions effective as of 1 Jan. 2004, eventually as of 1 May 2004 (i.e. date of accession of SR to EU). All operations with current accounts and capital accounts of balance of payments have been liberalized.

Act regulates rules of few remaining regulated foreign exchange business activities: (i) trade in foreign exchange assets which is being defined as provision of services to third persons within performance of business consisting in purchase and/or sale of foreign exchange assets, mediation or other procurement of such purchase and/or sale including accepting and giving instructions for execution or procurement of such purchase and/or sale; and (ii) provision of foreign exchange financial services which is being defined as services to third persons within performance of business consisting in execution or mediation of cross border transfers of funds in cash in Slovak or foreign currency. Licenses for performance of trade in foreign exchange assets and for provision of foreign exchange financial services (foreign exchange licenses) are granted by National Bank of Slovakia, while Act specifies in details requirements to be satisfied by applicants to obtain such licenses. Foreign exchange licenses are not granted to banks and branches of foreign banks that perform foreign exchange activities on basis of banking license, neither to securities traders and intermediaries of investment services that perform their activities on basis of license issued under Act on Securities and Investment Services.

Act keeps notification duty of residents, being defined as individuals or entities having their permanent residences or registered offices within territory of SR, applicable especially to payments, collections and transfers related to direct and other investments, financial loans, securities, operations on financial market including operations performed through nonresidents, made to and from abroad in relation to residents staying abroad and in relation to nonresidents, with exception of payments, collections and transfers related to direct and other investments, financial loans, securities, operations on financial market including operations performed through nonresidents, made in relation to branches of foreign entities located in SR, and opening and balance of accounts abroad, as well as notification duty of residents concerning assets and liabilities held abroad, value of which exceeds EUR 700,000. Foreign exchange notification duty on import and export of money was removed from Act and incorporated into new Customs Act (see topic 15.01 Customs Duties). Certain further duties and restrictions can be imposed on individuals and legal entities by Ministry of Finance of SR and National Bank of Slovakia in case of emergency in national economy.

Foreign exchange permit is not required for acquiring real estate outside territory of SR by Slovak residents, neither for acquiring shares or business interests in foreign companies and corporations.

Acquisition of real estate in SR by nonresidents was liberalized as of accession of SR to EU, with certain exceptions. Nonresidents cannot acquire ownership title to: (i) agricultural land and forest land, however, such restriction does not apply to nonresidents being (a) Slovak citizen, or (b) citizen of EU member state with temporary residence permit in SR and farming on respective agricultural land at least for three years after validity of Agreement on Accession of SR to EU; (ii) real estate acquisition of which is restricted by special laws (mineral resources, flowing waters, roads, monuments, etc.).

15.04 FOREIGN INVESTMENTS:

ObchZ provides foreign entities with same conditions for conducting business activities as Slovak entities, unless law stipulates otherwise. Foreign persons authorized to conduct business activities according to foreign law are also considered entrepreneurs under ObchZ. Any foreign person may become founder of Slovak legal entity or become sole partner in any Slovak entity. There are certain limitations of foreign participation in case of e.g. radio and television broadcasters, and operators of gambling.

SR is party to Washington Convention on Resolving Disputes Arising from Investment between States and Citizens of other States (Mar. 18, 1965) and several bilateral treaties on foreign investment protection.

See also topic 15.03 Foreign Exchange; categories 26 Treaties and Conventions, topic Treaties; Taxation, topic Tax Incentives.

15.05 FOREIGN TRADE REGULATIONS:

Companies, individual entrepreneurs and other entities registered in Commercial Register in SR may perform foreign trade activities to extent of business activities for which they are licensed. Interventions of State regulated by Act No. 42/1980 Coll. on Economic Relations with Foreign Countries, as amended, after several amendments, especially by No. 113/1990 Coll. and ObchZ have substantially been reduced. In 1996 and 1997 several acts were enacted to encourage export and restrict import. Act No. 292/2009 Coll. on Trading with Goods whose Possession is Limited from Safety Reasons, as amended (``Act''), stipulates condition of granting licenses for import and export of goods and services as listed in annex to Act.

Act No. 214/1997 Coll. on Protecting Measures in Import, Act No. 226/1997 Coll. on Subsidies and Countervailing Measures and Act No. 379/1996 on Fund for Support of Foreign Trade have been abolished as of 1 May 2005. Rights and obligations of Fund for Support of Foreign Trade have been passed to Slovak Agency for Development of Investment and Trade (SARIO). Under Act No. 80/1997 Coll. on Export-Import Bank (EXIM Bank), as amended, EXIM Bank was established as special institution for support of import and export activities. EXIM Bank provides financing export and import credits and can arrange export and import credits under conditions specified by law and insures export credits.

See also topics 15.01 Customs Duties, Foreign Exchange, Foreign Investments; categories 3 Business Regulation and Commerce, topic Sales; Treaties and Conventions, topic Treaties.

16 HEALTH

16.01 MEDICAL CARE AND MEDICAL RESEARCH:

Valid health care legislation consists of six basic laws: (i) Act No. 576/2004 Coll. on Health Care and Services Related to Health Care Provision (“Health Care Act”), (ii) Act No.

577/2004 Coll. on Scope of Health Care Covered by Public Health Insurance and on Payments for Services Related to Health Care Provision (“Act on Scope of Covered Health Care”), (iii) Act No. 578/2004 Coll. on Health Care Providers, Health Service Personnel and Health Care Professional Associations (“Providers Act”), (iv) Act No. 579/2004 Coll. on Emergency Health Service, (v) Act No. 580/2004 Coll. on Health Insurance and on Amendment and Supplement to Act No. 95/2002 Coll. on Insurance (“Health Insurance Act”), and (vi) Act No. 581/2004 Coll. on Health Insurance Companies and Health Care Supervision (“Health Insurance Companies and Supervision Act”). Office for Supervision on Provision of Health Care acts as independent supervising authority over health care system.

Provision of Medical Care.

Act on Scope of Covered Health Care defines range of health care covered by public health insurance. Public health insurance basically covers preventive examinations, emergency health care, health services necessary for determination of illness, health services provided during cure of so-called priority illnesses or during dispensarisation. Medicaments and medical devices provided during hospital care are fully covered by public health insurance. Regarding medicaments, medical devices, dietary food, subsequent spa care following after hospital or ambulance care, these might be covered fully or partially in accordance to respective register, defining list of items fully or partially covered by public health insurance. Patients with certain exceptions are obliged also to pay certain reimbursements for services provided together with health care, such as: (i) Statistical processing of drug prescriptions or medical vouchers, (ii) transportation, (iii) stay of guide person at hospital, (iv) use of emergency physician’s services, (v) elaboration of medical expert report, and (vi) provision of extract from medical documentation.

Medical care is provided to every natural person with respect to principle of equal treatment according to Antidiscrimination Act. Medical care comprises prevention, dispensarisation, diagnostics, treatment, biomedicine research, nursing service and birth assistance.

According to Health Care Act, health care provider is obliged to advise patient or his/her representative on purpose, character, effects and risks of provided medical care, as well as on possibility of selection among suggested medical care and on risks of refusal of medical care. Manner of advice must be performed in comprehensive, considerate way, without restraint and with sufficient time for making free decision on medical care and with respect to mental and health condition of person to which advice is provided. Should patient refuse to be advised on medical care, such refusal must be recorded. Patient or his/her representative must provide evincible consent with medical care, on which he/she was advised (informed consent). Informed consent is not required e.g. in case of: (i) Urgent medical care, if it is not possible to acquire it, but it is presumed, (ii) protective care imposed by court, (iii) hospital care in case of person, who spreads disease, or (iv) ambulance care if person which as result of mental disorder threatens himself or his surroundings, or state of his health may worsen seriously. Manner and contents of advise, informative consent, refusal of advise, revocation of informative consent are recorded in medical documentation of patient.

Medical Care Provided in Special Cases.

Act stipulates special conditions for performance of medical care related to biomedical research, ablation, storing and transfer of organs, tissues and cell and sterilization. Legal regime of abortion is governed by Act No. 73/1986 Coll., on Abortion, as amended. SR is party to Treaty on Protection of Human Rights and Human Dignity in Connection with Application of Biology and Medicine and on Ban on Cloning of Humans and to Additional Protocol thereto, adopted in Paris on 12 Jan. 1998.

Ablation, storing and transfer of organs, tissues and cells is carried out by biomedical institutions on basis of license issued by Ministry of Health Care. Donor for these purposes is living or dead person whose body organs, tissues and cells necessary for transplantation or scientific purposes are removed. Ablation of organs, tissues and cells from living donor for purpose of their transfer to another living person is permitted only if: (i) Presumed that ablation must not seriously threaten life of donor, (ii) direct treatment benefit can be expected, (iii) benefit of recipient will prevail over damage suffered by donor, (iv) organ, tissue or cell cannot be acquired from dead person, (v) no alternative treatment procedure with better or comparable effect is known. Only person which has full legal capacity and has granted his/her informed consent to such ablation after prior advice can be donor. In special cases, also person not having legal capacity can be donor on basis of informed consent of legal representative. Informed consent can be revoked at any time before ablation. Organs of living donor may be removed only upon consideration of experts' committee that ponders fact whether successful ablation can be reasonably expected and whether conditions for ablation have been fulfilled.

Organs from dead donor may be removed for purposes of transplantation and scientific research unless person has in course of his/her life made written statement that he/she disagrees with it. (See also category 13 Estates and Trusts, topic Death [Presumption of and Actions for].)

Biomedical Research.

Health Care Act distinguishes between medically indicated research and research without medical indication. Medically indicated research means research, expected results of which must have direct benefit for physical or mental health of participant and it may not include risks which are inadequate to expected benefit.

Biomedical research without medical indication means research from which direct benefit for physical or mental health is not expected and it can be performed only if risks connected to this research are acceptable for participant of such research. Biomedical research without indication may not be carried out on: (i) Persons hospitalized without consent, (ii) embryos, (iii) persons in custody or imprisoned, (iv) persons carrying out regular or alternative military service and persons carrying out civil service, (v) foreigners.

Prior to both types of biomedical research patients must grant informed consent to perform such research. Prior to medical research person must be advised, inter alia, on: (i) Possibility to revoke informed consent, (ii) aim of research, possible risks and expected results, (iii) base, scope and extent of all procedures, (iv) other available preventive, diagnostic and therapeutic procedures, (v) measures for event of unfavorable reactions, (vi) measures to protect privacy and personal data of participant, (vii) measures for provision of relevant compensation in case of damage of participant health status during research.

Further conditions regarding pharmaceutical, toxic-pharmacological and clinical trials are stipulated in Act 140/1998 Coll. on Drugs and Medical Devices as amended and in Decree 239/2004 Coll. on Good Clinical Practice, as amended.

Drugs and Pharmaceuticals Regulation.

Act 140/1998 Coll. on Drugs and Medical Devices, as amended, regulates: (i) conditions for issuance of license to manipulate with drugs and medical devices, (ii) examination of drugs and pharmaceuticals in process of research and production, (iii) introduction of drugs and medical devices to market, (iv) registration of drugs, (v) labeling and packaging of drugs, (vi) written information for their use, (vii) production of drugs and obligations of manufacturer, (viii) conditions of wholesale distribution of drugs and medical devices, (ix) conditions of pharmaceutical care and status of pharmacies, (x) prescription of drugs, (xi) supervision over drugs and medical devices, (xii) veterinary drugs, (xiii) powers of relevant state regulatory bodies, especially powers of State Institute for Control of Pharmaceuticals.

Directions for use must be provided with packaging and they must, amongst others, contain information on contents of single dose of drug, type of its effect expressed in way understandable for consumer, contraindications, proper usage of drug, its dosing, mechanism of its intake, description of undesirable effects that may be observed during proper intake of drug, explicit notice to consumer to report to entitled person every occurrence of undesirable effect that is not stated therein as well as date of its expiration. Name of drugs, together with information on contents of single dose of drugs, must be stated in Braille letters for blind people.

Requirements for production of drugs are stipulated in Decree of Ministry of Health No. 274/1998 Coll. on Requirements for Proper Manufacturing Practice and Proper Distribution Practice, as amended. Requirements for Proper Pharmacy Practice are laid down in Decree of Ministry of Health No. 198/2001 Coll.

Drugs and medical devices registered under Act on Drugs and Medical Devices may be fully or partially covered under obligatory health insurance scheme if included in List of Medicaments or List of Medical Devices. Under Act on Scope of Covered Health Care, special body—Categorization Committee—decides on inclusion of drugs or medical devices into respective lists, based on fulfillment of stipulated pharmaceutical and economical conditions. Ministry of Health regularly issues measures containing lists of medicaments and medical devices and their amendments.

16.02 PROTECTION OF HEALTH:

Act No. 355/2007 Coll. on Protection, Support and Development of Public Health, as amended, regulates, inter alia: (i) Organization and performance of public health, (ii) performance of prevention of diseases and other health defects, (iii) requirements for healthy living and working conditions, (iv) requirements for anti-radiation protection, (v) measures of state authorities in health field for emergency events, (vi) rights and duties of natural persons and legal entities concerning public health protection, (vii) state control of public health, and (viii) sanctions for breach of duties in field of public health. It also provides definitions of terms as ``public health'', ``determinants of health'', etc. Determinants of health are factors determining health, such as environment, working environment, genetic factors, health care, health protection and support, and life style. Act governs requirements for provision of healthy living and working conditions. Penalty up to EUR 99,581 may be imposed by public health protection authorities for breach of duties included in Act.

Protection of non-smokers is regulated by Act No. 377/2004 Coll. on Protection of Non-Smokers, as amended, which regulates conditions for protection of people against addiction to nicotine, as addictive and harmful substance contained in tobacco and tobacco products, and against adverse effects of smoking and other ways of using tobacco products harming health of smoker and non-smokers. Act also regulates conditions for protection of people against products designed for smoking not containing tobacco and conditions of selling, production, labeling and market introduction of tobacco products. Act has implemented all applicable EU directives concerning protection of non-smokers.

Every consumer pack of tobacco product, except tobacco product not designed for smoking, must include general warning (e.g. “smoking is killing”), additional warning, information on its content of harmful substances, and serial number.

It is prohibited to sell tobacco products in stores with goods for children and youth and other places easily accessible to children and youth, in all types of health-service institutions, schools, etc. It is prohibited to sell tobacco products in packaging of cigarettes of less than ten pieces and to sell tobacco products to persons under age of 18.

According to Act, it is prohibited to smoke, among others, in health-service institutions, in schools, educational facilities, universities, student dormitories, cultural institutions, publicly accessible premises of official institutions, galleries, theatres, cinemas, museums, in public transportation and its stops, station and platforms, etc. It is prohibited to smoke also in restaurants, unless they have separated part for smokers which cannot take more than 49 % of restaurant's area and be situated behind entrance door to restaurant.

Narcotics and Psychotropic Substances.

Act No. 139/1998 Coll., on Narcotics and Psychotropic Substances, as amended, governs conditions of growing, production, control, distribution, usage for scientific, research, educational, activities as well as import, export and transport of narcotics and psychotropic substances. It further provides for definitions of these terms. Only individual or legal entity that has fulfilled conditions prescribed by law may upon license issued by Ministry of Health operate with narcotics and psychotropic substances. Particular health and professional competence is required.

Alcohol.

Act No. 219/1996 Coll., on Protection against Abuse of Alcoholic Beverages and on Establishment and Running of Alcoholic Detention Rooms, as amended incorporates definition of term alcoholic beverages and it stipulates obligations of individuals and legal persons as regards prevention of alcoholism. Persons under 18 years may not consume alcoholic beverages. It further regulates examination for detection of alcohol or other addictive substances and establishment and running of alcoholic detention rooms.

Doping and Anabolics.

SR has become party to International Treaty against Doping concluded in Strasbourg on 16 Nov. 1989 that became effective for SR as from 1 July 1993. Pursuant to Act No. 578/2004 Coll. on Health Care Providers, doctors are prohibited from prescribing substances with effect of doping for other than healing purposes. Administering anabolics to person younger than 18 years or in connection with organized sports activity is criminal offence under Act No. 300/2005, Criminal Code, as amended.

Mineral and Healing Waters, Healing Spa.

Act No. 538/2005 Coll. on Natural Mineral and Healing Waters and Healing Spas and Spas, as amended, regulates recognition of natural healing and mineral waters, exploitation and protection of natural healing springs and natural mineral springs, recognition of climatic conditions suitable for healing and protection thereof, requirements for permission for operation of natural healing spas and spa medical institutions, requirements for recognition of spas, protection of spa health resorts and spa environment, rights and duties of natural persons and legal entities concerning recognition and exploitation of natural healing and mineral waters and climatic conditions, protection of natural healing and mineral springs and climatic conditions suitable for healing, as well as competence of state and municipal authorities, and sanctions for breaching of duties imposed by Act. Recognition of natural healing water or natural mineral water is granted by State Spa Committee. State Spa Committee also grants licence for exploitation and modification of natural mineral and healing sources and operation of spas. Act No. 152/1995 Coll. on Foodstuffs, specifies requirements for packaging and labelling of mineral and healing waters.

Genetic Technologies and Genetically Modified Organisms.

Act No. 151/2002 Coll. on Use of Genetic Technologies and Genetically Modified Organisms, as amended, regulates use of genetic technologies, genetic methods and techniques, as well as it sets out legal regime of genetically modified organisms and launching of genetically modified products on market. It further regulates assessment of environmental risks of genetically modified organisms to humans and environment. Genetically modified organism is such organism whose genetic material was changed by such manner that is not present at natural sexual reproduction or natural recombination. According to Act No. 152/1995 Coll. on Foodstuffs, foodstuffs containing genetically modified organisms or made of genetically modified organisms represent foodstuffs of new type. Packaging of foodstuffs of new type must state that such foodstuff contains genetically modified organisms or their parts.

17 IMMIGRATION

17.01 ALIENS:

Aliens are deemed to be any persons not having Slovak citizenship enjoying same personal and property rights as Slovak citizens excluding some political rights. (Constitution of SR and ZMPSP). Ownership of certain types of real property is limited by relevant provisions of Foreign Exchange Act. (See category 15 Foreign Trade and Commerce, topic Foreign Exchanges.) Residence permits are necessary for some stays of foreigners in SR (e.g. connected with entrepreneurial activities).

See topic 17.02 Immigration.

Corporations Owned or Controlled by Aliens.

100% ownership and control of Slovak companies by aliens is allowed.

See categories 2 Business Organizations, topic Corporations; Foreign Trade and Commerce, topic Foreign Investments.

17.02 IMMIGRATION:

According to Act No. 48/2002 Coll. on Stay of Foreigners, as amended, foreigners may enter and stay in territory of SR only with valid travel document (passport) and (i) visa or (ii) residence permit. Visas are not required in case stipulated by Slovak Government or by international treaty binding upon SR. Visas are not required for family member of citizen of Member State of EU, of other state of European Economic Area and of Switzerland (“EEA citizens”). Act recognizes: (i) airport transit visa, (ii) transit visa, (iii) short-term visa and (iv) long-term visa. Airport transit visa is specific type of visa introduced on 1 Jan. 2001 in connection with air transportation and requirements of Schengen Treaty, allowing foreigner to stay in transit area of public airport located in SR during time of waiting for airplane scheduled on flight ticket. Transit visas authorize foreigners to cross territory of SR during their way from territory of one state to territory of third state. Transit may not exceed five days. Short-term visas represent basic tourist visas, under which foreigners are entitled to single or multiple entry and stay for period mentioned therein, however not exceeding 90 days during six month period. Long-term visas can be granted by Slovak Embassy (Consulate) particularly in such cases where stay of foreigners in territory of SR is desirable due to fulfilment of obligations of SR resulting from international treaties, or if it may be granted in interest of SR. Under such visa, foreigner is entitled to enter territory of SR and stay in SR for more than 90 days within six month period. Application for granting visa must be submitted by foreigner personally (representation of foreigner on basis of proxy is not allowed) only at Slovak Embassy/Consular Office located abroad. Visa may be granted also by diplomatic mission or consular office of other EU member states than SR if stipulated so by international treaty. Representative office shall decide on visa application within 30 days from day of its delivery. Citizens from U.S.A., most of Western European and some other countries are exempted from visa requirement for short term stay.

Residence permit for temporary or permanent stay is granted by relevant foreign police department. Temporary stay may be permitted for time period necessary to achieve aim of stay (maximum for two years; maximum for five years for foreigner with residence in European Economic Area with long stay). It may be permitted only for one aim of stay (i.e. for purpose of [i] employment, [ii] performance of business activities, [iii] study, [iv] special activity, [v] for family purposes, or [vi] performance of duties by civil units of armed forces). Upon application of foreigner, stay may be prolonged up to another five years (depending on purpose of stay). To obtain permission for temporary or permanent stay, foreigner is obliged to submit documents, not older than 90 days, required by Act (e.g. document proving [i] aim of stay, [ii] resources for stay, [iii] accommodation, [iv] noncriminal record statement from home country and SR). After residence permit for temporary or permanent stay is granted, foreigner must submit document proving that foreigner has no infectious disease and document proving health insurance with relevant foreign police department within 30 days. Permanent stay is permitted in two stages as so-called “first permit for permanent stay” granted for five years, and after its expiry foreigner may apply for so-called “further permit for permanent stay” which is granted for indefinite time period. Act also recognizes new type of stay, so-called “tolerated stay”, which is granted to foreigner: (i) If there is barrier for his administrative deportation, (ii) if temporary refugee status was provided, (iii) if foreigner's departure is not possible and detention is not efficient, (iv) if foreigner is minor child found in territory of Slovak Republic, (v) who is victim of crime relating to human trafficking and is at least in age of 18, (vi) if required by respect of his private and family life.

Act effectively stipulates special regime for permanent stays of EEA citizens. EEA citizens, who intend to stay in SR and who: (i) Are employed, (ii) conduct business, (iii) study, (iv) have sufficient resources for stay and are health insured in SR, or (v) are supposed to find employment, shall have right, upon notification, for permanent stay in SR for unlimited period of time. Family members of EEA citizens may ask for permit for permanent stay.

Foreigner, who is granted short-term or long-term visa, or if no visa is required and EEA citizen, must report to local police authority: date of entry, address and expected period of stay in SR within three days following entry to SR (unless same is reported by person providing accommodation to foreigner). Foreigner granted residence permit must report beginning date of permit and any change of stay within same time period.

Further, Act stipulates control powers of police departments, evidence relating to granting visas/residence permits, entry and stay of foreigners, conditions for administrative expulsion and entry prohibition, as well as body execution of foreigner staying illegally in SR.

According to Act No. 480/2002 Coll. on Asylum, as amended, foreigner is granted status of refugee (person to whom asylum was granted) if there are serious reasons to believe that foreigner is persecuted in foreigner's homeland because of religion, race, social, political, national status, etc. Asylum may be granted to asylum seeker also for humanitarian reasons. Employment of foreigners (i.e. citizens of countries not being member states of European Union) is governed by special Act No. 5/2004 Coll. on Services of Employment, as amended. Foreigner (except e.g. refugees and foreigners with permanent stay in SR, person to whom temporary sanctuary was provided or person with status of foreign Slovak) can only be employed under permission given by Office of Labor, Social and Family Affairs. Acquisition of Slovak citizenship is governed by Act No. 40/1993 Coll. on Citizenship of SR, as amended. Any foreigner may obtain Slovak citizenship following application provided that foreigner is, inter alia, permanent resident in territory of SR for no less than eight years, foreigner was not sentenced for willful crime for period of preceding five years, and knowledge of Slovak language is proved. Notwithstanding above-mentioned, Slovak citizenship can be granted to any person married to Slovak citizen and living in SR for at least five years. Any persons up to 18 years of age follow citizenship of their parents. Any Slovak citizen may have more foreign citizenships. Special position provides Act No. 474/2005 Coll. on Slovaks Living Abroad, who need neither temporary stay permission nor employment permission. Foreign Slovak can be granted citizenship even if he consequently lives in SR only for at least three years.

18 INSURANCE

Performance of insurance is governed in SR by Act No. 8/2008 Coll. on Insurance, as amended (``Insurance Act''). Provision of services of insurance and reinsurance mediation is covered by Act No. 340/2005 Coll. on Insurance and Reinsurance Mediation, as amended, to be replaced as of 1 Jan. 2009 by Act No. 186/2009 Coll. on Financial Intermediation and Financial

Counselling. Regulation of insurance contract as type of contract which insurance company enters into with its clients, insured parties, is included in OZ. Moreover, special rules for MTPL are included also in Act No. 381/2001 Coll. on Compulsory Contractual MTPL, as amended.

As concerns insurance in SR, pursuant to provisions of Insurance Act, insurance activities can be performed in SR in principle only on basis of licence issued by NBS, being supervising authority for financial market, including insurance and reinsurance. Foreign insurance undertaking, being legal entity having its registered seat outside territory of SR as well as any other EU or EEA country, performing insurance activities under licence in state of its registered seat, may only pursue insurance activity in SR through its branch and only if it has been granted licence by NBS under Insurance Act. Insurance undertaking from other EU/EEA member state may pursue insurance activities in Slovak Republic either through its (i) branch established in SR, or (ii) on cross-border basis without establishing branch office in SR upon delivery of notification to National Bank of Slovakia from competent supervisory authority of EU/EEA home member state, where such insurance undertaking has its registered seat.

Licences for insurance mediation by insurance agent, insurance broker and licences for reinsurance mediation in territory of SR are issued by NBS. Insurance intermediary from EU/EEA member state other than SR is entitled to commence and pursue insurance mediation in SR in same extent in which it is entitled to do so in its home member state, through local branch or on cross-border basis under principle of freedom to provide services.

19 INTELLECTUAL PROPERTY

19.01 COPYRIGHT:

Basic legal regulation in respect of copyright is Copyright Act No. 618/2003 Coll., which complies with standard world criteria of laws governing copyright and harmonizes Slovak legal regulation of copyright with relevant EU legislation. Copyright Act governs relations arising from creation, use and dissemination of literary, scientific and art works, as well as collective administration of rights under Copyright Act. Aim of Act is to protect rights and lawful interest of authors, including authors of software and data bases, performance artists, producers of audio recordings and video recordings, television and radio broadcasters. Copyright to any work arises at moment when work is expressed in perceptible form regardless of its form, content, quality, purpose or form of expression. Only individual—natural person can be author of work under Copyright Act. Act differentiates between personal and material rights of author. Personal rights of author include right (i) to mark or not to mark his/her work with name or pseudonym; (ii) to decide on publication of his/her work; (iii) for inviolability of his/her work. Personal rights cannot be waived, assigned and extinct by author's death. Material rights include right (i) to use work and (ii) to give consent for any use of work. Material rights cannot be waived, assigned and cannot be subject of forced execution; they are subject of inheritance. Material rights last during author's life and 70 years following author's death in case of all types of work, unless stipulated otherwise by Copyright Act. Lawful circumstances for exploiting any work without author's consent are strictly specified in Copyright Act and include copying of work for personal use of individual (with exception of e.g. architectural work), quotation of work, copying of work by special method for needs of blind persons, inclusions in any scientific or educational works, copying of works by public library or archive for archiving purposes. Copyright Act also specifies essential type of copyright agreements which include Agreement on Work Creation and License Agreement, including certain special provisions on License Agreement for Publication of Work and on Collective License Agreement.

In case of any infringement of copyright or threat of such infringement, author has right to have its copyright be determined/declared, to claim prohibition of infringement, removal of any consequences of infringement and payment of reasonable satisfaction. Moreover, author has right to claim for information which may lead to identification of infringer and reveal extent of infringement. For committing copyright crime, offender may be sentenced to imprisonment up to eight years or fined up to EUR 331,930 or forfeiture.

Collective administration of rights is defined as representation of several persons (i) having material rights related to work, performance of artist, audio recording, audio-video recording or broadcasting ("subject of protection"), or (ii) performing material rights on basis of Copyright Act, or (iii) persons who acquired exclusive license to subject of protection for duration of material rights and for SR territory with right to grant sublicense, for their common profit at performance of their material rights to published works or works offered to be published, provided other than collective performance of such rights is not permitted or effective. Legal entities authorized to undertake collective administration of author's rights must be registered with register kept by Ministry of Culture. Copyright Act specifies in details rights and obligations of legal entities performing collective administration of rights, which obligations include, e.g., granting approval for using work of particular author, collecting royalties for exploiting works, and protecting rights of Slovak authors and foreign authors in accordance with international agreements.

Software Protection.

Copyright Act defines software to be set of commands and instructions used directly or indirectly in computer in source code form, or in object code form; technical documentation used during development of software constitutes part of software. Authorized acquirer of copy of software, even without consent of author or other holder of intellectual property rights to software is entitled to: (i) produce copy or copies of software, (ii) modify software contained in such copy, (iii) translate software contained in such copy, if such copy, translation or modification is necessary for purposes defined in Copyright Act. Consent of author or other intellectual property rights holder need not be obtained for copying of software in object code form or for retranslation of software (from object code form to source code language) with intention to obtain information which is necessary for attaining mutual cooperation of different software. Copyright Act provides for right of acquirer of software to study or examine functions of software with aim to determine principles which constitute foundation of any part of software.

Protection of Database.

Copyright Act regulates special right to database having substantial qualitative or quantitative contribution to acquisition, verification or performance of its contents, notwithstanding whether database or its contents are protected by copyright or other rights. Database is defined by Copyright Act as set of works, data or other materials independent from each other that are systematically or methodically put in order and that are individually accessible by electronic or other means. Creator of database means individual or legal entity on whose request, account and responsibility it was created.

Creator of database is authorized under special rights to database to grant consent for extracts (permanent or temporary transmission of whole content of database or any fundamental part thereof to another medium) and reutilization of whole content of database or any fundamental part thereof (any method of making available whole content of database or any fundamental part thereof by disseminating copies, through leasing, interconnection [on-line] or any other method of transmission).

Special rights to database are transferable and shall apply for 15 years from first day of year following year of database creation.

Copyright Act further regulates rights and obligations of database user. Creator of database that was generalized by whatever means may not prohibit user from extraction or reutilization of any non-fundamental part of database, irrespective of purpose of extraction or reutilization.

Authorized user of database that was generalized by whatever means may perform extraction or reutilization of fundamental part of its content also without consent of its creator, in case: (i) of extraction of content of nonelectronic database for private purposes, (ii) of extraction for illustration in educational purposes or scientific research aiming to reach noncommercial purpose, (iii) of extraction or reutilization performed for purposes of protection of public or performed during administrative or judicial proceedings.

19.02 INDUSTRIAL PROPERTY RIGHTS AND PATENTS:

Industrial property rights include rights to trademarks, inventions, designs, utility models, designations of origin, new varieties of plants and breeds of animals and topographies of microelectronic semiconductor products. SR has been, in standard way, engaged in international cooperation in field of registering and protecting patent rights (see category Treaties and Conventions).

Inventions are dealt with in Act No. 435/2001 Coll. (Patent Act, as amended) governing legal relations arising in connection with creation, legal protection and exercise of invention that is subject to patent or patent application. Act also governs patent registration with Industrial Property Office of SR. Patents are granted to any inventions in all fields of techniques and biotechnological inventions under conditions set out in Act, that are new, are results of inventing activities and are industrially exploitable. Invention is new if it does not form part of state of technology (being everything that was available to public in any way prior to date of priority right of inventor). Act also sets out several exclusions from patentability. Patent owner has exclusive right to use invention, to grant approval to use invention to any third party, to transfer patent to any third person or create pledge over patent. Patent is valid for period of 20 years from filing patent application. Act also stipulates provisions regarding application of European Patent Treaty, in particular with respect to effects of European patent application and European patent in territory of SR. Legal regulation of status and obligations of patent representatives is contained in Act No. 344/2004 Coll. on Patent Representatives.

Designs are dealt with in Act No. 444/2002 Coll. on Designs, as amended. This Act became effective as of 1 Oct. 2002 and replaced all provisions concerning industrial designs contained in Act No. 527/1990 Coll. on Inventions, Industrial Designs and Innovations, as amended, implementing EU Directive No. 98/71/EC on Legal Protection of Designs. Pursuant to this Act, design means appearance of whole or part of product resulting from features of, in particular, lines, contours, colors, shape, texture and/or materials of product itself and/or its ornamentation. Design can be protected by right to design to extent that it is new and has individual character. Design is considered new if no identical design has been made available to public before date of priority (date of priority is date on which application for registration of design is submitted or date of priority right under Paris Convention for Protection of Industrial Property). Designs shall be deemed to be identical if their features differ only in immaterial details. Design shall be considered to have individual character if overall impression it produces on informed user differs from overall impression produced on such user by any design which has been made available to public before date of priority. In assessing individual character, degree of freedom of designer in developing design shall be taken into consideration. Designs are registered in Register of Designs maintained by Industrial Property Office of SR. Design holder has exclusive right to use registered design, to prevent third persons from using it, to grant approval for using it to any third person, to transfer it to any third person or to create pledge over registered design. Registration of design is valid for period of five years from date of filing application and term may be extended for four additional five year terms.

Innovations are dealt with in Act No. 527/1990 Coll., on Inventions, Industrial Designs and Innovations, as amended. Innovations are deemed to be any technical, manufacturing or operational developments as well as solutions of problems of labor safety and health protection and living environment which may be disposed by innovator. No rights from any innovation will arise if prevented by any rights arising from patent or registered industrial design. Right to use any innovation arises at moment of entering into agreement with innovator on accepting offer for innovation and receiving consideration for same.

Any foreign person has, in respect of patent law, same rights and liabilities as Slovak person under terms of reciprocity.

Utility Models.

Act No. 517/2007 Coll. on Utility Models, protects technical solutions which are new, are result of inventiveness, and are industrially exploitable. Filing system similar to patents is used. Utility models are registered in register of utility models kept by Industrial Property Office of SR. Utility model owner has exclusive right to use it, grant consent for using it to any third person, transfer it or to pledge utility model. Registration is valid for four year term from date of filing application and may be extended for two additional three year terms.

Designations of Origin.

Act No. 469/2003 Coll. on Designations of Products Origin and Geographical Indications of Products harmonizes Slovak regulation of designations of origin with European legislation, mainly with Council Regulation (EEC) No. 2081/92 on protection of geographical indications and designations of origin for agricultural products and foodstuffs. Act defines designation of origin of product as name of certain place, region or in exceptional cases country used for designation of product originating in such place, region or country, if product's quality or characteristics are given exclusively or in substantial extent by geographical environment with its typical natural and human factors, while production, processing and preparation of such product are performed exclusively in given place, region or country. Act does not require designation of origin to be generally known as condition for its registration and protection. Further, Act introduces new institute “geographical indication of products” defined as name of certain place, region or in exceptional cases country used for designating product originating in such place, region or country if such product has specific quality, reputation or typical characteristics, which can be assigned to such place, region or country, while production, processing or preparation of such product is performed in determined geographical place, region or country. In case of geographical indication, it is not required that characteristics of product are given exclusively or substantially by geographical environment. Protection of designation of origin and of geographical indication under Act arises by its registration in relevant register kept by Industrial Property Office. Application can be submitted by association or union of producers having legal capacity, or by individual or legal entity provided it is only person producing given product in given place or region. Registered designation of origin and registered geographical indication may be used only by holder of certificate on registration of designation of origin or geographical indication or by user of registered designation of origin or geographical designation. Right to use designation of origin and/or geographical indication may not be granted by license to any third person; however any person may apply to be registered as further authorized user, if his products fulfil conditions given for already registered designation of origin. Protection of designation of origin lasts for unlimited time period. In case of infringement, holder of certificate on registration has right to claim damage, prohibition of infringement and removal of its consequences; in case of immaterial injury, holder of certificate on registration also has right to reasonable satisfaction.

Legal Protection of Plants.

Act No. 202/2009 Coll. on Legal Protection of Plants, as amended, represents legal framework for protection of industrial rights to plants (their varieties) in SR, as separate protection system complementing European system of protection as provided for by Council Regulation (EC) No. 2100/1994 on Community Plant Variety Rights which regulates also certain aspects of plant protection referred to by Act. Each entity may therefore opt for protection of variety created, developed or discovered by it within territory of European Communities on basis of right assigned by Community Plant Variety Office or only with respect to territory of SR on basis of cultivating certificate awarded by Ministry of Agriculture of SR.

This Act regulates legal protection of plant variety rights, conditions for awarding cultivating certificate to plant variety, rights and obligations of persons in area of legal protection of plant variety, competences of state administration bodies in area of legal protection of plant variety as well as imposition of fines for breach of obligations imposed by this Act and special regulation.

Basic conditions for awarding cultivating certificate to plant variety (all species and lineages of plants including hybrids between species and lineages) are according to this Act fulfilled, if concerned variety is distinct, uniform, stable, new and designated by proper denomination. Criteria for fulfillment of these conditions are contained in above mentioned Regulation and their fulfillment is in process of review of newly applied variety assessed by Central Controlling and Testing Institute in Agriculture.

If variety fulfils determined requirements, Ministry of Agriculture of SR decides on granting cultivating certificate evidencing: (i) Cultivation or discovery of variety, (ii) denomination of variety, (iii) holder of cultivating certificate, (iv) granting legal protection of variety, in particular right of owner of cultivating certificate to commercially exploit variety, (v) time period for protection of variety, (vi) right of preference, and (vii) originator of variety.

Act further stipulates details of public register of applications for granting cultivating certificates, proceedings for granting cultivating certificate as well as conditions for its transfer.

Topographies of Microelectronic Semiconductor Products.

Topographies that are product of creative activity of author and that are atypical in semiconductors industry are protected by Act No. 146/2000 Coll. on Protection of Topographies of Microelectronic Semiconductor Products, as amended. Right of protection under Act belongs to author (being natural person) unless stipulated otherwise (e.g. author's employer if such topography was created under employment relation). Right expires 15 years from first fixing or encoding of topography if not used for commercial purposes or if application for registration not submitted within that time period. Protection starts from day of first commercial use of topography, if application for registration was filed within two years thereafter or from day of filing if not commercially used before filing. Protection expires ten years from end of year when protection established. Act stipulates rules for registration of topography in register kept by Industrial Property Office and conditions for granting compulsory license. Owner of topography has exclusive right to use it, grant approval to use it to any third person and to transfer it.

Protection of Patent and Other Industrial Property Rights Owners.

In Slovak law, patent rights' owner is protected by Act No. 435/2001 Coll. according to which owner may claim that any unauthorized interference or jeopardy of rights be prohibited and that any consequences of infringement be removed. Owner may request from injuring party all information on origin of product and circumstances of its launching to market. Owner has right to be indemnified against any actual damage and lost profit. He also has right to receive reasonable satisfaction which may be claimed in money. Additional protection is stipulated in ObchZ where unfair competition results from imitating any other products, their packaging, or performances. Patent rights' owner has, according to ObchZ, right to demand that any infringer refrain from wrongful acts and to remove any wrongful condition. At same time, owner has right to receive reasonable satisfaction which may be claimed in money, compensation of damage, and recovery of any unjustified enrichment. Criminal Law specifies as criminal act any infringement of rights pertaining to protected invention, industrial design, applied design, topography of semiconductor product, or to new varieties of plants and breeds of animals. Any offender may be sentenced to imprisonment up to eight years.

19.03 PATENTS:

See topic 19.02 Industrial Property Rights and 19.03 Patents.

19.04 TRADEMARKS AND TRADENAMES:

Trademarks.

SR is signatory of all most important multilateral treaties concerning trademarks. (See topic Treaties and Conventions.)

Protection of trademarks is based on Act No. 55/1997 Coll. Trademark Act, as amended, and its supplementary decree of same year. Trademark is any designation which may be graphically plotted and which is created mainly by words (including personal names), type, digits, printings, face of product or packing, respectively, or combinations thereof able to differentiate products or services coming from various persons. Act sets out several designations that may not be registered as trademarks. Trademark is registered in trademark register kept by Industrial Property Office of SR. This act has extended disposition rights of trademark holder to include transfer of trademark, licensing and liens. Applicant acquires title to trademark on date of its registration in register. Act also allows registration of so-called collective trademarks. Any trademark may be registered as collective trademark following application submitted by ad hoc association of entrepreneurs that includes written agreement of entrepreneurs on conditions of use of collective trademark. Collective trademark cannot be subject to transfer, liens or licensing.

Priority rights are treated in standard manner, with priority determined from moment of filing application for trademark registration. Priority right provided according to international treaties should be shown by applicant in application for trademark registration and evidenced within three months from filing same.

Protection period of any registered trademark is ten years and commences on date of receiving application by Office. Protection period of any trademark may be extended upon request of trademark's owner always for period of next ten years.

Trademark's owner has exclusive right to mark by owner's trademark any products or services for which it is registered or to use it in connection with such products or services. Rights to any trademark may be fully or partially transferred to any third person by written agreement. Transfer becomes effective towards third parties on date of its registration in register. Person with permanent residence permit or seat in SR can apply for international registration of trademark to World Intellectual Property Organization. International registration has same effect as registration of trademark in register. Trademark Act also contains provisions regulating Community Trademark and possibility to submit application for registration of Community Trademark at Industrial Property Office of SR.

Essential protection of trademark owner's rights is secured by Trademark Act according to which owner has right to demand that any infringement of rights be prohibited, that any wrongful condition be removed, and that owner be indemnified against any damage. ObchZ provides for protection of trademark owner in provision of unfair competition which is deemed to be using any deceptive mark of products and services and evoking danger of exchange. Owner has right to claim any infringer to refrain from any wrongful acts and to remove wrongful condition. Owner also has right to receive reasonable satisfaction which may be claimed in money, liquidated damages, and recovery of any unjustifiable enrichment. Removal of wrongful condition may also be claimed by relevant legal entity authorized to protect competitors' interests. Further, trademark owner has right to request anyone who launches products labeled with same or substitutable trademark to submit information on origin of, and documents related to, such products. Upon application filed with relevant court, court may order products, materials or tolls used for infringement of rights to trademark to be removed from market, delivered to petitioner, destroyed or subject to other appropriate measures preventing further infringement of rights to trademark. Criminal Law protects rights pertaining to trademark in provision on infringement of rights to trademark, tradename, and protected mark of origin for which any offender may be sentenced to imprisonment up to eight years, and may be fined up to EUR 331,930, and forfeiture.

Tradenames.

According to ObchZ tradename is designation which entrepreneur (either individual or legal entity) uses when conducting business activities. Tradename of individual is person's name and surname specifying entrepreneur. Tradename of legal entity is name under which legal entity is incorporated with Commercial Register (or name under which it has been established if legal entity is not incorporated with Commercial Register). Tradename of legal entities must contain indication of their legal form. If relevant, entrepreneur must use tradename with addendum specifying its current legal status, e.g. in liquidation, under bankruptcy proceedings. Entrepreneur must avoid tradename being confused with tradename of another entrepreneur and may not evoke false perception regarding entrepreneur and its business activities. Tradename of legal entity is transferred with enterprise to its legal successor; transfer of tradename without simultaneous transfer of enterprise is not permissible and ineffective. If several persons (individuals or legal entities) are jointly conducting business activities under same tradename without having established common legal entity, they shall be jointly and severally liable for obligations that have arisen from such business activities. ObchZ provides to subject whose rights have been breached or threatened via unjustified use of its tradename right to demand that infringer refrains from wrongful action and removes wrongful results of his action. It can also require that products which breached rights relating to its tradename are removed from market and destroyed, that material and tools used during infringement are destroyed or withdrawn from circulation and that all information about origin and distribution of products or services infringing rights to tradename are supplied. Subject whose rights to tradename have been infringed has also right for recovery of unjustified enrichment, may claim reasonable satisfaction, which can provided as monetary compensation, and can claim compensation of damages. Court can rule in its decision that subject whose rights have been infringed has right to publish relevant court decision on costs of infringer. Criminal law affords protection to tradenames by specifying that when someone obtains economic benefit via unauthorized usage of designation which is identical or interchangeable with tradename of other corporation or individual, he can be sentenced to imprisonment with duration up to eight years.

20 LEGAL PROFESSION

20.01 Attorneys.

Attorneys provide clients with following legal services: Representation of clients before courts, public authorities and other legal entities, preparation of legal analyses, preparation of contracts and other documents, other forms of legal advisory. Their profession is regulated mainly by Act No. 586/2003 Coll. on Advocacy, as amended. Attorney is independent and he is bound by legal regulation and, within those limits, by instructions of his clients.

Attorney is person who is registered in Slovak Bar Association and who is entitled to provide legal services within whole territory of Slovak Republic. Slovak Bar Association is self-governing professional organization associating all attorneys. Slovak Bar Association's bodies are Conference of Attorneys, Board of Slovak Bar Association, Supervision Committee and Disciplinary Committee of Slovak Bar Association. Attorney may not be in employment or similar employment relation, with exception of pedagogical, journalistic, literary, academic or artistic activity, and he must not be engaged in activities which are incompatible with nature and ethical principles of profession of attorney.

Attorney is obliged to protect and pursue clients' rights and follow their instructions. Where such instructions are inconsistent with generally binding legal rules, attorney is not bound by them and he must advise client thereof in appropriate manner. Attorney has to act honorably and conscientiously; he has to make rigorous use of all legal means and do everything in client's interest that he regards as beneficial. In doing so, he ensures that legal services provided are purposeful and efficient. Attorney proceeds in manner that does not impair dignity of legal profession. In this respect, attorney is required, in particular, to follow rules on professional ethics and preserve confidentiality of all facts learned in during his practice as attorney.

Attorneys provide legal services for consideration which is agreed with client; if no agreement is concluded, attorney is entitled to consideration based on scale of fees stipulated by generally binding legal rules. Provision of legal services for consideration is allowed only to attorneys. Certain legal services may also provide notaries, tax advisors, patent representatives, bailiffs and other persons, however only within scope determined by legal regulations (especially by those regulating their activities). Also in-house lawyers may provide legal services but only to their employer, against their salary and only if they are employed as in-house lawyers.

20.02 Notaries.

Notary is person appointed and empowered by state to practice as notary and carry out other activities under law. Profession of notaries is regulated mainly by Act No. 323/1992 Coll. on Notaries and Notarial Activities (Notary Code), as amended. Notarial activities include: (i) Drafting and issuing of deeds of legal acts, (ii) certifying of legally significant facts, (iii) acting in matters of notarial safekeeping, (iv) legal acts in matters on Notarial Central Registers, and (v) other activities under law.

Notaries are appointed by Minister of Justice of Slovak Republic after selection procedure. Each notary holds office within geographical jurisdiction of court of first instance. Notaries shall be impartial and independent in performance of their duties. They are bound only by Slovak Constitution, laws and other generally binding legal regulations. Notary office is incompatible with entrepreneurial activities or other gainful activities, except for management of notary's own assets and those of his minor children and except for academic, publishing, pedagogical, interpreting and artistic activity.

Notary Chamber of Slovak Republic is self-governing professional organization associating all notaries and maintaining register of notaries. Notary becomes member of Notary Chamber of Slovak Republic immediately after his appointment as notary. Notary Chamber of Slovak Republic has following bodies: Conference of Notaries, Presidium of Notary Chamber, Supervisory Committee, Disciplinary Committee and Educational Committee of Notary Chamber of Slovak Republic.

20.03 Bailiffs.

See category 8 Debtor and Creditor, topic 8.04 Executions - Bailiffs.

21 MINERAL, WATER AND FISHING RIGHTS

21.01 FISHING RIGHTS:

According to Act No. 139/2002 Coll. on Fishery, as amended, fishing rights are owned by SR. Ministry of Agriculture determines fishing zones and grants performance of fishing rights to entities stated in act (e.g. Slovak Fishermen's Union, schools, organizations for administration of state property) and to persons with ownership or lease over land with water area on it. Assignment of performance of fishing right is prohibited by law. Fishing by individuals in fishing zones is allowed on basis of fishing ticket issued by local municipality for limited period of time upon administration fee and fishing permission granted by user of fishing rights or special fishing permission from Ministry upon conditions stipulated in order of Ministry. Fishing by individuals in water areas in non-fishing zones is allowed with permission issued by breeder or by entrepreneur upon fee. Law prohibits fishing during certain seasons of year, night, and emergency situations, using certain methods and exceeding daily limits or violating under size limits stipulated in order of Ministry. Each fishing zone has fishing guards and fishing farmer appointed by District Environmental Office on proposal of user.

21.02 MINES AND MINERALS:

According to Constitution of SR, minerals (including oil and natural gas), caves, underground waters, natural springs and water streams are property of SR. Act No. 44/1988 Coll., as amended, on Protection and Use of Mineral Resources and Act No. 51/1988 Coll., as amended, on Mining Activities, Explosives and State Mining Administration govern conditions for extraction and protection of mineral resources (excluding mineral waters, turf, sand). There are two main groups of minerals: (a) reserved, (b) unreserved. Reserved minerals are owned by SR. For extraction of minerals license for mining activities must be issued by Circuit Mining Authority. Also, for any research and exploration activities, except for research and exploration of unreserved minerals, permission of relevant authority, currently Ministry of Environment of SR is necessary. Permission for mining activities stipulates conditions for extraction and area of activities. There are royalty payments for extractions up to 10% of price of products manufactured from extracted reserved minerals set down by governmental decree. Entity performing mining activities is responsible for all damages to other person caused by activity.

21.03 WATER:

See category 12 Environment, topic 12.01 Environmental Regulation, subhead Water.

22 MORTGAGES

22.01 CHATTEL MORTGAGES:

See topic 22.02 Mortgage; category 8 Debtor and Creditor, topics 8.09 Pledges, 8.08 Liens.

22.02 MORTGAGE:

Although “mortgage” within meaning of common law terminology is not expressly defined as term in Slovak legislation, some acts, in particular Banking Act No. 483/2001 Coll. as amended and Bond Act No. 530/1990 Coll., as amended use mortgage as term specifying loans, banks, deals, bonds, always linked with security in real estate. Thus, mortgage may be defined, for purposes of comparison with other law, as lien on real estate. For details on real estate see category 23 Property, topic 23.03 Real Property.

General provisions on mortgages are laid down in OZ, in part dealing with liens generally, without specific definition, however with specific legally relevant details. Leading principle of mortgages, like all other liens, is to secure receivable and its accessories so that, should obligor fail to perform, creditor is entitled to be satisfied in rights from pledged asset, in case of mortgages from pledged real estate.

Instruments constituting mortgage are (i) written agreement, (ii) approved inheritance settlement; (iii) operation of law, (iv) court decision, and (v) decision of administrative body. Mortgages are registered with regionally competent cadastral administration of cadastral office.

Registration of mortgages is condition for effectiveness of mortgages created on contractual basis. Judicial mortgages, mortgages created on basis of decision of competent administrative authority, become effective at time of decision of authority and are registered at land register office for evidencing and information purposes. Mortgages created in order to secure tax or customs debts are effective by their registration in land register. Land registry approves registration upon written application with all necessary enclosures including pledge agreement. Relevant land registry should decide within 30 days from receiving application for deposition of mortgage created on basis of mutual agreement. In practice, procedure may take longer. Applicant may ask relevant land administration for accelerated proceedings, whereas additional administrative fee of EUR 265.50 shall apply. In such case, relevant land administration should decide within 15 days from receipt of application; otherwise, it is obliged to return such additional administrative fee to applicant. In practice, this 15-day period is usually met; however, risk of not meeting such period cannot be excluded.

Agreement creating mortgage must be specific concerning subject of mortgage and secured receivable. Security in form of mortgage may be given also for liability which will arise in future, or which is contingent.

In connection with ranking of two or more mortgages over one and same immovable, principle “first in time, first in right” generally applies, with priority always given to mortgage registered first in time, unless specific law stipulates otherwise. Example of such specific law may be found in Civil Court Order according to which for order of judicial mortgages shall be decisive date of submission of petition for its creation.

Mortgage loans are defined in Banking Act as long-term (at minimum of four years, at maximum of 30 years) loans secured by mortgage over real estates located in SR (even over not finalized constructions), given by mortgage bank (including foreign branches) to borrowers for purposes of (i) purchase, (ii) construction, reconstruction and/or (iii) maintenance of real estate, or for payment of loans (not mortgage) provided for purposes under (i) to (iii); funded at least of 90% through issue and sale of mortgage bonds by mortgage bank. Mortgage bonds are covered by receivables originating from mortgage loans secured by mortgage, up to 70% of value of mortgaged immovable.

Tax mortgage can be created by decision of tax authority for securing outstanding tax receivables. As of 2003, after pledge and mortgage reform was adopted, tax and customs mortgages do not bear priority over other type of mortgages (e.g. those established between private parties on basis of agreement); principle “first in time, first in right” applies to tax and customs mortgages as well. Generally after creation of tax mortgage, owner of mortgaged assets may dispose of such assets only after obtaining prior approval of tax authority.

Mortgage exercise concept is based on sale of mortgaged assets by creditor (directly, via public auction or by sale via court execution of bailiff) and use of proceeds against debt. Potential positive balance of sale is paid back to debtor.

23 PROPERTY

23.01 ABSENTEES:

In case of absence, any person may delegate authority to act on his/her behalf to (i) any other person, or (ii) lawyer, subject to provisions of law regarding power of attorney (see category 2 Business Organizations, topic 2.01 Agency).

Same position as for empowered attorney-at-law for whole Court proceedings is guaranteed by law to curator appointed by Court. Courts may appoint curator in cases where one cannot personally act in Court proceedings, there exists risk of delay and no other instruments are available, especially if one's domicile is unknown, or service of process on his/her known address abroad was unsuccessful, he/she suffers from mental disease or he/she is not able to formulate clearly. (OSP, §29). Courts may appoint curator also to legal entity, if service of process to its address registered in Commercial Register or other evidence was unsuccessful and other address is not known to court.

All documents of Court proceeding are delivered to attorney or curator.

23.02 PRIVATIZATION:

National Property Fund of SR (“NPF”), established as special purpose legal entity by law adopted by Slovak Parliament in 1991 (Act No. 253/1991 Coll. on Competence of Bodies of Slovak Republic in Matters of Transfer of State Property to Other Persons and on NPF, as amended), plays intermediary role in privatization process. NPF, special governmental agency entrusted with carrying out of privatization process, is entity to which SR transfers its property subject to privatization before it becomes private upon use of any of privatization methods set by Privatization Act, and in accordance with official decision of Slovak Government on privatization adopted on basis of privatization project.

Different methods of privatization are recognized under Act No. 92/1991 Coll. on Conditions of Transfer of State Property to Other Persons, as amended (“Privatization Act”), including but not limited to: (i) foundation of joint-stock company or other type of corporation and transfer of ownership interests in these corporations, (ii) contribution to corporation, (iii) sale of assets of enterprise or part thereof, sale of ownership interest in other legal entity, (iv) transfer of privatized property to municipalities and superior territorial units, etc.

Sale methods of privatization include: (i) direct sales to predetermined purchasers; (ii) sales in public tenders; and (iii) sales in public auction.

Making decisions on privatization by direct sale or by public auction is vested in Government of SR upon proposal of Ministry of Economics of SR. Government of SR also issues privatization decisions on privatization of corporations with monopoly status following discussion on intention and process of privatization within National Council of SR. National Council must provide statement on privatization project within 30 days from its delivery; if statement is not adopted within this time period it is deemed that National Council of SR granted its approval with privatization. Government of SR may determine ownership participation of SR in corporations with monopoly status as well as in other entities set by Privatization Act. Corporations having status of natural monopolies are listed in Privatization Act. These Slovak entities operate mainly in areas of gas, energy, post, telecommunication, railway, forest industry, etc. Other decisions on privatization are made by Ministry of Economy of SR.

Sale agreements executed between NPF and transferees in process of privatization through any sale method other than public auctions must include specific provisions as, maturity of whole purchase price and maturity of each installment thereof; conditions for repudiation of sale contract by NPF as consequence of breach of obligations by transferee of privatized assets including repudiation on ground of refusal to approve concentration that arises from privatization by Antimonopoly Office of SR, right of NPF to repudiate contract if installment of purchase price or whole purchase price has not been duly and timely paid as agreed under privatization agreement, sanction for late payment of installments of purchase price, and restriction on lease contracts regarding privatized assets until payment of whole purchase price, save for any definite term lease for period shorter than one year or indefinite term lease with notice period shorter than three months. In event of failure of purchaser of privatized entity to pay first installment or to pay in single payment whole purchase price duly and timely as agreed in privatization agreement, NPF is obliged to repudiate contract.

Upon transfer of privatized property, transferee assumes all rights and obligations related to such property, including all labor law rights and obligations vis-à-vis employees working in privatized enterprise or its branch. Consent of creditor is not required for transfer of obligations. NPF guarantees fulfillment of obligations by transferee up to amount of acquired value of privatized assets, unless it agrees with guarantor otherwise. Creditor shall be entitled to claim fulfillment of guaranteed obligations from NPF if it notified NPF on its receivable in terms of legal title and amount thereof within one year from transfer of obligations to transferee and if it used available legal means for satisfaction of such receivable towards debtor. Transferee is not allowed to extend scope of business activities to which privatized enterprise was before entitled for one year period of time. Transferee acquires right to use business name of enterprise if it is privatized as whole unless stipulated otherwise in relevant legal act or legislation. Transfer of industrial and intellectual property rights requires separate agreement. See category 8 Debtor and Creditor, topic 8.01 Assignments.

Further restrictions and liabilities are imposed on transferee of privatized assets directly by Privatization Act. Until full repayment of purchase price and fulfillment of all obligations and liabilities of transferee toward NPF, transferee is obliged to enable inspection of privatized assets and accounting documents by NPF, to ask NPF for approval of further transfer, contribution to company and pledge of privatized assets and lease of privatized assets (except for lease agreement concluded for definite period of less than one year or lease agreement concluded for indefinite period with termination period shorter than three months). Approval of NPF is needed to use proceeds from transfer of privatized assets or to contribute them to company before settlement of liabilities toward NPF.

Decisions on privatization are, in general, issued by Ministry of Economics of SR (which took over competencies of former Ministry of Administration and Privatization of National Property of SR) upon privatization projects containing statement of Antimonopoly Office of SR.

Public tenders have been also used in privatization process. These were cases when NPF intended to provide for best sale conditions combining several criteria, especially purchase price, payment conditions, obligatory investments, expansions of production and employment.

Sale through public auction may be used if purchase price would be sole criterion of sale of privatized assets; however, this method is not extensively applied.

Foreign investors may participate in all standard methods of privatization process. Non-standard methods are available only to Slovak citizens (e.g. privatization through investment coupons).

23.03 REAL PROPERTY:

General legal regulation of real estate is contained in OZ. According to OZ, real estate is deemed to be land and constructions firmly attached to ground. OZ recognizes also other special types of real estate: flats and nonresidential premises. Special legal regulation on flats and nonresidential premises is contained in Act No. 182/1993 Coll. on Ownership of Flats and Non-Residential Premises, as amended. Slovak legal concept of real estate recognizes separate ownership title to land and to building (built on land). Information concerning real property (land, buildings, flats and nonresidential premises, including buildings, flats and nonresidential premises under construction) and rights connected therewith are registered with land registry (in Slovak: “kataster nehnuteľností”) kept by appropriate cadastral administration (in Slovak: “správa katastra”) of respective cadastral office (in Slovak: “katastrálny úrad”). Information from land registry is available upon request to general public for administrative fee.

According to Act No. 162/1995 Coll. on Land Registry and on Registration of Proprietary and Other Rights to Real Estate, as amended, rights connected with real estate are registered with land registry in form of: (i) inscription, (ii) record and (iii) note. Rights connected with real estate acquired on basis of agreements and foundation deeds of legal entities are acquired effectively at date of effectiveness decision of cadastral administration on inscription of ownership except for ownership title to flats, which is acquired at date of delivery of application for inscription of ownership right, but only upon effective decision of cadastral administration. Cadastral administration maintaining respective land registry reviews formal requirements of agreements or foundation deeds, particularly right of parties to dispose of real property. On other hand, rights connected with real estate effectively acquired on basis of e.g. decisions of state authorities, knock down at auction, prescription, increase of property, processing, verified by notary public or operation of law as well as rights of lease of real estate for term of more than five years or right of administration of state property are registered in form of record in land registry for evidencing purposes only. Land registry inscribes note for expression of facts that limit owner in right to dispose of real property, in case that any person claims right to particular real estate and such right is not registered with land registry, or in case of commencement of execution, bankruptcy, expropriation proceedings or injunction proceedings prohibiting disposal of real property.

Acquisition of domestic real property by foreigners is regulated by Act No. 202/1995 Coll. on Foreign Exchange, as amended. Any foreigner may acquire real property located in territory of SR, except for: (i) land that is part of agricultural land fund or forest land fund located outside border of built-up area of municipality; this rule does not apply to foreigners (natural persons) being SR citizens (i.e. Slovak citizens residing outside SR), and foreigners being citizens of any of EU Member States and having right for temporary residence, provided they acquire land forming part of agricultural land fund on which they have been farming at least for period of three years from 1 May 2004, and (ii) acquisition of real estate which is restricted by special legal regulations (concerning e.g. exploitation of mineral resources, waters, etc.).

Besides land and buildings, Slovak law recognizes as real property also flats and nonresidential premises pursuant to special legal regulation, Act No. 182/1993 Coll. on Ownership of Flats and Nonresidential Premises, as amended. Flats and nonresidential premises are deemed to be real estate even though they are located in house and cannot be separated from each other technically. Owner of flat or nonresidential premise in house also co-owns common parts, common facilities and appurtenances of house and typically also land on which building is erected as well as adjacent land, otherwise such land is encumbered in favour of house. There are provisions concerning establishment and functions of association of owners of flats and nonresidential premises which may be formed in house for purpose of its administration. Otherwise owners of flats and nonresidential premises enter into agreement with other legal entity or individual on performance of administration of house.

Title to real estate can be expropriated or limited only under strict rules set by Constitution of SR and in regime set by Act No. 50/1976 Coll. on Territorial Planning and Construction Rules, as amended (“Construction Act”). Constitution of SR states that expropriation is possible only in public interest, in necessary extent for remuneration on basis of rules set by law. Construction Act sets rules for expropriation. According to these rules, expropriation procedure is carried out by state construction authority. Pursuant to Construction Act, expropriation of land or buildings may be done for constructions to be built in public interest, which include following: (i) Significant investments, (ii) highways and other road communication, (iii) electricity or gas facilities, (iv) railroads, (v) military objects, etc. Aim of expropriation is to reach access or otherwise restrict ownership to land and building or acquisition of easement toward land and building construction in public interest. Expropriation may be done only if there is not possibility to reach aim of expropriation by consent between parties or otherwise. Detailed procedure of expropriation is set in Construction Act.

Easements.

It is possible, under Civil Code, to limit owner's rights to real property by creating easement. Easements constrain owner of real property to extent that owner is obliged to: (i) Tolerate something (e.g. allow passage through land), (ii) refrain from something (e.g. not to build on his/its land) and/or (iii) do something (e.g. perform certain works on his/its land). Easement may be established either: (a) in favor of particular person (in personam), or (b) in favor of any owner of particular land/building (i.e. is created in favor of certain real estate) (in rem). If particular person benefits from easement, easement terminates at day of death of individual or at day of extinction of legal entity. If easement is created in favor of certain land, any future owner of such land must benefit from easement. Easements may be created by agreement, on basis of will or approved inheritance settlement, by operation of law, by decision of state authority or by exercise of certain right (prescription). Easements must be registered with land registry. Easements cease to exist upon decision of state authority or by operation of law and those created by agreement cease to exist on basis of agreement upon registration with land registry. Unless otherwise agreed, person entitled to use real estate on basis of easement is obliged to pay costs connected to maintenance and repair of used real estate; however, if real estate subject of easement is used also by its owner apart from person entitled from easement, costs must be borne proportionally on basis of level of utilization. In case that gross disproportion between rights of person benefiting from easement and owner of serving land occurs, court may cancel easement for appropriate compensation. Easement ceases to exist if permanent change to real estate prevents easement from serving needs of entitled person or from more prosperous use of real estate.

24 TAXATION

24.01 ADMINISTRATION:

Administration of Taxes.

Taxes are administered by local state tax authorities (Act No. 150/2001 Coll. on Tax Authorities as am'd). Procedure for tax collection is governed by Act No. 511/1992 Coll. on Administration of Taxes, as amended. According to this regulation, entity obtaining permission for entrepreneurial activities is obliged to register at appropriate tax authority within period of 30 days after obtaining permission (if there is obligation to deduct taxes from employee's wages in period of 15 days). If tax is not paid properly, tax authority can subject taxpayer property to lien. If there is no other way to ensure payment of taxes, tax authority can decide on execution of taxpayer property.

For breaches of this Act fine up to EUR 49,790.87 can be imposed. In case tax return is not submitted on time, fine up to EUR 16,596.95 may be imposed. Tax office may also impose penalty equal to conjunction of three times base interest rate announced by European Central Bank (currently 1% per annum) and amount of outstanding tax or due amount payable under respective tax legislation.

24.02 EXCISE TAXES:

Consumer Taxes.

Consumer tax is form of excise duty payable by producers and importers of certain goods such as mineral oils (e.g. oils, fuels and lubricants), electricity, coal, natural gas, spirits, liqueurs, beers, wine and tobacco products. (Act No. 98/2004 Coll. as am'd, Act No. 105/2004 Coll., as am'd, Act No. 107/2004 Coll., as am'd, Act No. 104/2004 Coll., as am'd, Act No. 106/2004 Coll., as am'd, Act No. 609/2007 Coll., as am'd). Tax is payable monthly on basis of submitted tax return. For due payment of these taxes, special labels for liqueurs and tobacco products have been introduced which must be stuck on all such products sold in territory of SR.

24.03 GIFT TAX:

Note: Abolished by Act No. 554/2003 Coll.

24.04 INCOME TAX:

This tax is governed by Act No. 595/2003 Coll. on Income Tax as amended. As of 1 Jan. 2004, corporate income tax is charged at flat rate of 19% on worldwide profits, i.e., worldwide income including capital gains less allowable expenditure. Corporate income tax is assessable on calendar year basis. Tax advances are payable either monthly, quarterly or annually depending on level of tax paid in preceding fiscal year. Foreign entities with permanent establishment in SR are subject to Slovak corporate income tax calculated on basis of income of permanent establishment and any other Slovak source income. Foreign entities having no permanent establishment in SR may still become subject to tax on Slovak source income if, for example, they derive income from commercial, technical or other consultancy activities in SR for period exceeding six months.

Any individual resident in SR is taxed on both domestic and foreign source income. Income tax is charged on most types of income including salaries, directors' fees, income from real estate rental, income from business activities and income from capital investment. Where income is employment income, employer must deduct tax at source. Flat tax rate is 19% and does not depend on height of income; however, starting from Jan. 1, 2007, nontaxable (deductible) part of tax base depends on height of income. It decreases and can equal to zero in case of person whose annual income exceeds 100 times minimum costs of living stipulated by law. Any individuals not resident in SR are subject to tax on Slovak source income.

Payments of interests and royalties are subject to withholding flat tax of 19%.

Rates of withholding taxes for nonresidents may be reduced upon existence of double taxation treaty between SR and income recipient's country.

Double taxation treaties may also provide for specific tax regime in other aspects.

24.05 INHERITANCE TAX:

Note: Abolished by Act No. 554/2003 Coll.

24.06 LOCAL TAXES:

Act No. 582/2004 Coll. on Local Taxes and Local Fee for Municipal Waste and Minor Construction Waste (“Local Taxes Act”) fully repealed and substituted with effect from 1 Jan. 2005 former valid legislation on local fees, real estate taxes and road tax.

Act strengthens position of municipalities and superior territorial units in area of determination of local taxes and in administration. Municipality is entitled to impose eight types of taxes, such as: (i) Real estate tax, (ii) dog tax, (iii) tax on use of public place, (iv) accommodation tax, (v) vending machine tax, (vi) non-winning (entertaining) slot machine tax, (vii) tax on entrance and parking of motor vehicle in historical part of city, and (viii) nuclear facility tax. Municipality also imposes fee for municipal waste and minor construction waste. Superior territorial unit is entitled to levy motor vehicle tax.

Revenues from these taxes constitute incomes of municipalities or superior territorial unit's budget.

24.07 MOTOR VEHICLE TAXES:

Road Tax.

Subject of this tax includes motor vehicles used for business purposes or in relation to business activities (except foreign vehicles). Tax base in case of passenger car is its engine capacity in cubic centimeters and tax base in case of commercial vehicle and bus is its total weight in tones and number of axles. Superior territorial unit is exclusively entitled to determine tax rate according to Local Taxes Act.

24.08 PROPERTY TAXES:

Note: Tax on transfer of ownership of real estate has been abolished as of 1 Jan. 2005.

24.09 REAL ESTATE TAX:

Real estate tax consists of: (i) Land tax, (ii) building tax, (iii) tax on apartments and nonresidential premises in residential house and belongs to system of local taxes.

Land Tax.

Determination of land tax base depends on type of land. Tax base for lands used for agricultural purposes is set out as acreage of lands in square meters multiplied by value of land determined per one square meter in accordance with applicable legal regulations on determination of general value of lands. Tax base of land (except agricultural land) must be set out as acreage of land in square meters multiplied by value of land per one square meter mentioned in Annex to Local Taxes Act (ranges from EUR 0 to EUR 59.73, depending on type of land and its location). Annual tax rate is stipulated as 0.25%.

Building Tax.

Tax base is set out as acreage of built-up area in square meters and annual building tax rate amounts to EUR 0.033 per each, also partially built, square meter of built-up area. Tax administrator is entitled to increase or reduce annual tax rate with effect from 1 Jan. of respective taxation period. Annual tax rate is stipulated as EUR 0.03 per each, also partially begun square meter of built-up area.

Tax on Apartments and Nonresidential Premises in Residential House.

Tax rate is identical to building tax rate, i.e. EUR 0.03 per each, also partially built, square meter of floor area of apartment or nonresidential premises, whereas tax administrator is entitled to reduce or increase tax rate. Tax base is floor area of apartment or nonresidential premises in square meters.

24.10 STAMP TAX:

Stamp taxes are collected by courts (Act No. 71/1992 Coll. on Court Fees, as am'd) and administrative bodies (Act No. 145/1995 Coll. on Administrative Fees, as am'd) for acts of those state authorities. In most cases court or administrative body shall suspend proceeding if appropriate fee is not paid by party of proceeding.

24.11 TREATIES AND AGREEMENTS:

SR is party to or has succeeded to double taxation treaties with, inter alia, following countries: Australia, Austria, Belgium, Bosnia-Herzegovina, Brazil, Bulgaria, Byelorussia, Canada, China, Croatia, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Iceland, India, Indonesia, Ireland, Israel, Italy, Japan, Kazakhstan, Korea, Latvia, Lithuania, Luxembourg, Macedonia, Malta, Mexico, Mongolia, Moldavia, Montenegro, Netherlands, Nigeria, Norway, Poland, Portugal, Romania, Russia, Serbia, Singapore, Slovenia, South African Republic, Spain, Sri Lanka, Sweden, Switzerland, Tunis, Turkey, Turkmenistan, Ukraine, U.K., U.S.A., Uzbekistan, Vietnam.

24.12 VALUE ADDED TAX:

Slovak VAT (Act No. 222/2004 Coll. as am'd) system is based on EU model and has rate of 19% except for medicaments, certain medical devices, certain medical materials certain books, brochures and leaflets listed in Act on Value Added Tax, where tax rate of 10% is applicable as of 1 Jan. 2007.

Business with turnover of more than EUR 49,790 in 12 preceding calendar months is required to register for VAT, which is payable quarterly or monthly according to turnover of business.

Examples of exempt supplies include postal services, financial services and transfer and rental of land and buildings apart from residential letting services, transfer of enterprise (or its part) if transferred to VAT taxpayer, insurance, radio and TV broadcasting, international transport, educational and scientific services and medical and social care.

Goods for export are free of VAT, but VAT on costs attributable to them is nonetheless recoverable.

According to Act No. 289/2008 Coll., as amended, for proper levy of VAT, use of special record-keeping money-chests is mandatory for all entrepreneurs selling products or providing services, if price is paid in cash. Money-chest books must be kept for ten years. Paper tape can be demanded by relevant tax authorities for control purposes.

24.13 WEALTH TAX:

No wealth taxes are applicable.

25 TRANSPORTATION

25.01 AIRCRAFT:

Act No. 143/1998 Coll. on Civil Aviation (Aviation Act), as amended, regulates in area of civil aviation performance of flights by civil aircrafts in air space of SR, competence and authorization of aviation personnel members, capability of aircraft and other products of aviation equipments, maintenance of register of aircraft and inscription of aircraft therein, establishment and operation of airports and aviation ground equipment, performance of civil aviation, aviation works and other business activities within field of civil aviation and protection of civil aviation and its safety.

Further, with regard to operation of airports and their ongoing privatization, Act No. 136/2004 Coll. on Airport Companies regulates conditions, manner of foundation and legal status of so-called “airport companies”. Airport company is joint stock company and its founder is SR, acting through Ministry of Transport, Post and Telecommunications of SR. Airport company is entitled to carry on business activities in scope of activities originally carried out by Slovak Administration of Airports as of date of establishment of airport company for 12 months following its incorporation. After expiration of this period, airport company may carry out these activities only under business authorization according to special regulations. Act on Airport Companies also regulates conditions of transfers of state interest in business activities of airport company, winding up and liquidation of airport company. When deciding on privatization of state interest in business activities of airport company holding so called priority infrastructure assets, permanent state interest shall be preserved to extent determined by Government of SR.

25.02 MOTOR VEHICLES:

Drivers in SR use right hand side of road. Pursuant to Act No. 8/2009 Coll. on Road Traffic, as amended, driving license is required to drive motor vehicle in SR. Drivers must be of sufficient health and mental capacity, and minimum age of 18 years. They must also pass examination consisting of knowledge of road traffic regulations, knowledge of motor vehicles including their maintenance, and driving test. Licenses are issued by District Police Departments for indefinite period of time. Maximum speed permitted in Slovakia is 50 kilometers per hour (km/h) in cities and municipalities, 90 km/h in roads outside municipalities and speedways and highways inside cities and municipalities, and 130 km/h in highways and speedways.

Foreigners may drive motor vehicles in SR on basis of valid home country license: (i) If it was issued by EEA Member State; (ii) if license of home country corresponds to form under Geneva Agreement on Road Traffic (1949) and under Vienna Agreement on Road Traffic (1968); (iii) international driving licence is valid at time of driving in SR and not more than one year elapsed from time of its issuance, if issued under Geneva Agreement on Road Traffic (1949); or (iv) not more than three years elapsed from time of its issuance, if issued under Vienna Agreement on Road Traffic (1968).

Only vehicles which satisfy technical operational standards required pursuant to valid legal regulation may be used in traffic in SR. Vehicles are subject to regular technical control and emission control. Certificates of technical ability are issued by offices governed by Ministry of Transport, Posts and Telecommunications of SR. Vehicles driven in SR are subject to registration with Police Department and registration number plates must be located in front and back parts of vehicle and may not be removed or damaged.

Vehicles driven on motorways and other selected roads must bear sticker indicating payment of toll varying from EUR 36.50 per year for motor vehicles whose weight is lower than 3.5 tons, or from EUR 495 to 810 for 90 days for motor vehicles with weight exceeding 3.5 tons, or from EUR 9.90 to 90 per month, or from EUR 4.90 to 40 for seven days, depending on weight of vehicle. Motor vehicle whose weight is higher than 3.5 tons may use one day toll varying from EUR 8.60 to 10.

SR is preparing for operation of road-toll system and for this purpose Act No. 25/2007 Coll. on Electronic Collection of Road-Toll for Use of Particular Parts of Road (“Road Toll Act”) was adopted. Road Toll Act regulates electronic road-toll withdrawal for use of specified roads depending on driven distance. Payment of road-toll will be applicable only for motor vehicles with weight above 3.5 tons or vehicles suit above 3.5 tons intended for goods transportation and motor vehicles intended for transportation of more than nine persons. Electronic road-toll system will use one of three technologies stipulated by Act or combination of them. National Highway Company will administrate withdrawal of road-toll. Tariff of toll will be from 6.3 c to 20.9 c per kilometer, excluding VAT, depending on type of road and vehicle. Electronic road-toll system will start from Jan. 2010. Fine up to amount of EUR 2,655 can be imposed for violating obligations by electronic road-toll payer.

Insurance of motor vehicles for liability for injury or damages is mandatory and regulated by Act No. 381/2001 Coll. as amended.

See also category 24 Taxation, topic Taxes.

25.03 RAILWAYS:

Conditions of operation of railways and performance of transportation on railways, rights and obligations of natural persons and legal entities connected therewith, rules of railways transportation on territory of SR as well as conditions of railways constructions and constructing on railways are set out by Act No. 164/1996 Coll. on Tracks, as amended that is applicable on train tracks, trams, trolley buses, cable-cars and special tracks. Act on Tracks incorporates special contractual type and form and requisites thereof, being contract on provision of services in public interest at operation of train railways which Railways of SR (“Zeleznice Slovenskej republiky”) (as legal entity established by Act No. 258/1993 Coll. on Railways of SR, as am'd) concluded with SR under which Railways of SR provide services to SR that would not be fully or partially acceptable in terms of commercial interest due to their economic disadvantage. SR is obliged to reimburse to Railways of SR provable loss incurred due to fulfillment of its obligation to procure and administer train tracks and organize transportation thereon.

In connection with transformation and restructuring of Railways of SR, aiming especially at division between railways operation on one side and provision of transport thereon on other side, Act No. 259/2001 Coll. on Zeleznicna spolocnost, a.s. (“Railway Company”) was adopted. Zeleznicna spolocnost, a.s. is joint stock company founded by SR for purposes of railway transport provision and performance of commercial activities connected therewith. According to decision of Slovak Government cargo division of Railway Company—Zeleznicna spolocnost Cargo Slovakia, a.s. was separated as joint stock company owned by SR.

Currently, new Act on Tracks and Act on Track Traffic are being prepared.

25.04 SHIPPING:

Slovak legal order distinguishes between inland navigation and marine navigation. Act No. 435/2000 Coll. on Marine Navigation, as amended, recently amended in order to comply with relevant EU legislation (Council Directive 94/57/EC of 22 Nov. 1994 on common rules and standards for ship inspection and survey organizations and for relevant activities of maritime administrations, Directive 2005/45/EC of 7 Sept. 2005 on mutual recognition of seafarers' certificates issued by Member States and amending Directive 2001/25/EC and Directive 2005/35/EC on ship-source pollution and on introduction of penalties for infringements) sets out rights and obligations of natural persons and legal entities connected with operation of marine ships and marine recreational boats, registration of marine ships and recreational boats in marine register of SR, national marine register and international marine register, marking and use of flags on marine ships and recreational boats, marine ship documents, requirements for members of crew and safety and naval accidents issues. Act on Marine Navigation further stipulates legal facts occurrence of which automatically triggers establishment of marine pledge over marine ship or other assets of marine ship owner in favor of captain of marine ship or other entitled persons to satisfy their claims stated in Act on Marine Navigation.

Conditions of performance of inland navigation, rights and obligations of natural persons and legal entities participating on inland navigation, conditions for performance of business activities in water transportation and for issuance of license to perform public water transportation, capability of ships and registration thereof, qualification and position of members of crew and examination of sailing accidents with respect to inland sailing are set out in Act No. 338/2000 Coll. on Inland Navigation, as amended. Act has recently been amended in order to transpose into Slovak law relevant EU Directive (Council Directive 96/75/EC of 19 Nov. 1996 on systems of chartering and pricing in national and international inland waterway transport in Community, Council Directive 96/35/EC of 3 June 1996 on appointment and vocational qualification of safety advisers for transport of dangerous goods by road, rail and inland waterway, Directive 2000/18/EC of 17 Apr. 2000 on minimum examination requirements for safety advisers for transport of dangerous goods by road, rail or inland waterway) and to implement relevant EU Regulations (Council Regulation (EC) No. 718/1999 of 29 Mar. 1999 on Community-fleet capacity policy to promote inland waterway transport, and Commission Regulation (EC) No. 805/1999 of 16 Apr. 1999 laying down certain measures for implementing Council Regulation (EC) No. 718/1999 on Community-fleet capacity policy to promote inland waterway transport).

Latest amendments to Act implemented Directive 2005/44/EC on harmonized river information services (RIS) on inland waterways in the Community, Directive 2006/103/EC adapting certain Directives in field of transport policy by reason of accession of Bulgaria and Romania, and Directive 2006/87/EC laying down technical requirements for inland waterway vessels and replacing Council Directive 87/714/EEC.

26 TREATIES AND CONVENTIONS

26.01 TREATIES:

On Jan. 1, 1993, SR succeeded C.S.F.R. in all international obligations. During existence of independent SR, some new treaties and conventions have been entered into. Consequently SR is party to, inter alia, following treaties and conventions:

General.

Charter of United Nations and Statutes of International Court of Justice (June 26, 1945/Dec. 20, 1965); Vienna Convention on Diplomatic Relations (Apr. 18, 1961); Vienna Convention on Consular Relations (Apr. 24, 1963); International Covenant on Civil and Political Rights (Dec. 19, 1966); International Covenant on Economic, Social and Cultural Rights (Dec. 19, 1966); Convention on Law of Treaties (May 23, 1969); Vienna Convention on the Law of Treaties between States and International Organizations and between International Organizations (May 21, 1986); Convention on Establishment of International Organization for Legal Metrology (Paris, Oct. 12, 1955); Statutes of International Atomic Energy Agency (Oct. 26, 1956); Constitution de l'Union Postale Universelle—UPC (Oct. 9, 1874); Convention on Establishment of International Civil Aviation Organization (Dec. 7, 1944); General Agreement on Tariffs and Trade—GATT (Oct. 30, 1947); Articles of Agreement of International Finance Corporation (Nov. 3, 1955) Articles of Agreement of International Development Association—IDA (Jan. 26, 1960); Convention Establishing World Intellectual Property Organization (July 14, 1967); Convention on Establishment of Secretariat of Conference on Security and Co-operation in Europe and on Privileges and Immunities of this Secretariat and Further Institutions of CSCE (Paris, Dec. 11, 1991); Council for Customs Co-operation (Brusel, Dec. 15, 1950), Europe Agreement establishing an Association between European Communities and their Member States of one part, and SR, of other part. (Luxembourg, Oct. 4, 1993); International Monetary Fund and International Bank for Reconstruction and Development—IMF (Bretton Woods, July 22, 1944); Agreement between Slovak Republic and Czech Republic on Creation of Customs Union (Prague, Oct. 29, 1992); Agreement on Nuclear Security (Vienna, Sept. 20, 1994); Agreement on Law of Sea (Montego Bay, Dec. 10, 1982); Convention on Prohibition of Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction (Paris, Jan. 14, 1993); Constitution of Food and Agriculture Organization of United Nations—F.A.O. (Oct. 16, 1945); Constitution of United Nations Educational, Scientific and Cultural Organization—UNESCO (Nov. 16, 1945); Constitution of World Health Organization—WHO (July 22, 1946); Constitution of International Labor Organization—ILO (Oct. 10, 1947); Convention on Establishment of World Meteorology Organization (Oct. 11, 1947); Convention on International Maritime Consultation Organization—IMCO (Mar. 6, 1948); Vienna Convention on Civil Liability for Nuclear Damage (May 21, 1963); Convention on Patent Co-operation (Washington, June 17, 1970); Convention on Establishment of World Tourism Organization (Sept. 27, 1970); Convention on Nuclear Safety (Vienna, Sept. 20, 1994); Constitution of World Trade Organization (WTO) (Apr. 15, 1994); Agreement of SR and Organization of United Nations for Industrial Development (UNIDO) concerning establishment of UNIDO Centrum for support of investments in Bratislava of June 25, 1999; European Charter of local municipality (self-administration), for SR effective since June 1, 2000; European Convention on Citizenship of Nov. 6, 1997, for SR effective since Mar. 1, 2000; Act of World Post Union of Sept. 15, 1999, for SR since Jan. 1, 2001; European Frame Convention on Cross-border co-operation among territories or territorial bodies of May 1, 1960, effective for SR since May 1, 2000; Agreement of Government of SR and Development Program of United Nations Organization (UNDP) on provision of supportive services of Oct. 11, 2000; Convention of Organization of Economic Co-operation and Development (Paris, Dec. 14, 1960), for SR effective since Dec. 14, 2000; Basic Agreement between SR and Holy See (Vatican, Nov. 24, 2000), effective since Dec. 18, 2000; Convention relating to Status of Stateless Persons (New York, Sept. 28, 1954), for SR effective since July 2, 2000; Convention on Reduction of Statelessness (New York, Aug. 30, 1961), for SR effective since July 2, 2000; Convention between European Communities and SR on participation in European Environment Agency and European Environment Information and Observation Network (Brussels, Oct. 9, 2000), for SR effective since Aug. 1, 2001; European Convention for the Peaceful Settlement of Disputes

(Strasbourg, Apr. 29, 1957) for SR effective since May 7, 2001; Organization of North Atlantic Treaty (NATO) (Washington, Apr. 4, 1949), effective for SR since Mar. 29, 2004; Treaty on European Economic Area (EEA) (Porto, May 2, 1992), effective for SR since May 1, 2004; Treaty on Accession to European Union between SR and member states of EC (Athens, Apr. 16, 2003), effective for SR since May 1, 2004.

Multilateral International Conventions on Legal Assistance and Enforcement of Judgments.

Hague Convention related to Court Procedure in Civil Matters (July 17, 1905); Hague Convention related to Procedure in Civil Matters (Mar. 1, 1954); New York Convention on Recovery Abroad of Maintenance (June 20, 1956); Hague Convention on the Recognition and Enforcement of Decisions Relating to Maintenance Obligations in Respect of Children (Apr. 15, 1958); Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters (Nov. 15, 1965); Hague Convention on the Taking of Evidence Abroad in Civil and Commercial Matters (Mar. 18, 1970); Hague Convention on Recognition of Divorces and Legal Separations (June 1, 1970); Hague Convention on the Recognition and Enforcement of Decisions Relating to Maintenance Obligations (Oct. 2, 1973); Hague Convention Abolishing the Requirement of Legalization for Foreign Public Documents (Oct. 5, 1961), for SR effective since Feb. 18, 2002. Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Cooperation in Respect of Parental Responsibility and Measures for Protection of Children (Oct. 19, 1996), for SR effective since Jan. 1, 2002.

Conventions Unifying Choice of Law Rules.

Hague Convention on the Law Applicable to Traffic Accidents (May 4, 1971); European Agreement on Information on Foreign Law (London, June 7, 1968).

Conventions Relating to Arbitration.

Geneva Protocol or Arbitral Clauses in Commercial Matters (Sept. 24, 1923); Geneva Convention on the Enforcement of Foreign Arbitral Awards (Sept. 26, 1927); New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (June 10, 1958); European Convention on International Commercial Arbitration (Geneva, Apr. 21, 1961).

Conventions Protecting Industrial and Copyright Rights.

Paris Convention for Protection of Industrial Property Rights (Mar. 20, 1883); Convention on Establishing World Intellectual Property Organization (July 14, 1967); Strasbourg Agreement on International Patent Classification (Mar. 24, 1971); Patent Co-operation Treaty (Washington DC, June 17, 1970); European Patent Convention (Oct. 5, 1973); Budapest Treaty on International Recognition of Deposit of Micro-organisms for Purpose of Patent Procedure (Apr. 28, 1977); Madrid Agreement Concerning International Registration of Marks (Jan. 13, 1975); Lisbon Agreement for Protection of Appellations of Origin and their International Registration (Jan. 13, 1975); Nice Agreement Concerning International Classification of Goods and Services for Purposes of Registration of Marks (July 9, 1979); Locarno Agreement Establishing an International Classification for Industrial Designs (Jan. 20, 1981); Patent Law Treaty (Geneva, May 11, 2000); Trademark Law Treaty (Geneva, Oct. 27, 1994).

Conventions on Avoidance of Double Taxation with: Algeria (income from international air transport), Australia, Austria, Belgium, Brazil, Bulgaria, Byelorussia, Canada, China (People's Republic of), Croatia, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Iceland, India, Indonesia, Ireland (Republic of), Israel, Italy, Japan, Kazakhstan, Latvia, Lithuania, Luxembourg, Malta, Mexico, Mongolia, Moldavia, Montenegro, Netherlands, Nigeria, Norway, Poland, Portugal, Republic of South Africa, Romania, Russia, Serbia, Slovenia, South Korea, Spain, Sri Lanka, Sweden, Switzerland, Tunisia, Turkey, Turkmenistan, Ukraine, U.K., U.S.A., Uzbekistan, Vietnam.

Conventions on Protection of Investment with: Austria, Belarus, Belgium, Bulgaria, Canada, China, Croatia, Cuba, Denmark, Egypt, Finland, France, Germany, Greece, Hungary India, Indonesia, Israel, Italy, Latvia, Luxembourg, Malta, Mexico, Montenegro, Netherlands, North Korea, Norway, Poland, Portugal, Romania, Russia, Serbia, Singapore, Slovenia, Spain, South Korea, Sweden, Switzerland, Tajikistan, Turkey, Turkmenistan, UK, Ukraine, U.S.A., Uzbekistan. SR is also party to Convention on Solution of Disputes Arising from Investments between States and Citizens of other States (Mar. 18, 1965).

Conventions Regulating only Various Fields of Legal Assistance with: Afghanistan, Albania, Algeria, Armenia, Australia, Austria, Azerbaijan, Belgium, Bosnia and Herzegovina, Bulgaria, Byelorussia, Croatia, Cuba, Cyprus, Czech Republic, European Union, France, Germany, Greece, Hungary, Italy, Kazakhstan, Kyrgyzstan, Macedonia (FYROM), Moldova, Mongolia, Netherlands, North Korea, Poland, Portugal, Romania, Russia, Serbia, Montenegro, Slovenia, Spain, Syria, Switzerland, Tajikistan, Tunisia, Turkey, Turkmenistan, Uganda, Ukraine, U.K., U.S.A., Vietnam, Yemen (People's Republic of).

Conventions in Field of International Transport.

Convention on International Transport by Railway—COTIF (May 9, 1980); Convention on Transport Contract in International Road Cargo Transport—CMR (Geneva, May 19, 1956); European Agreement on International Road Transport of Dangerous Products (ADR) (Geneva, Sept. 30, 1957); European Agreement on Main International Railway Lines (AGC) (Geneva, May 31, 1985); Agreement on Common Transit Regime (Jan. 1, 1988); Convention on Unification of Some Rules Concerning International Aviation Transport (Warsaw, Oct. 12, 1929); Convention on International Maritime Organization (IMO) (Geneva, Mar. 6, 1948); Convention on International Transport by Railroad of Merchandise (SMGS) (Budapest, July 10, 1951); Convention on International Transport of Persons (SMPS) (Budapest, July 10, 1951); Convention on Unification of Some Rules on International Air Transportation Executed by Person Other than Contract Transporter, amending Warsaw Convention (Guadalajara, Sept. 18, 1961); Convention on General Conditions of International Transportation of Persons by Buses (Berlin, Dec. 5, 1970), Convention on International Civil Aviation (ICAO) (Chicago, Dec. 7, 1944), effective for SR since Apr. 14, 1993; Convention on Unification of Certain Rules of International Civil Aviation (Montreal, May 28, 1999), effective for SR since Nov. 4, 2003, Budapest Convention on the Contract for the Carriage of Goods by Inland Waterway—CMNO (Budapest, 22 June 2001).

Conventions in Field of Criminal Law.

Convention on Criminal Offences and Some Other Offences Committed on Board Plane (July 24, 1984); European Convention on Extradition (Dec. 13, 1957), European Convention on Mutual Assistance in Criminal Matters (Apr. 20, 1959); European Convention on Transfer of Penal Proceedings (May 15, 1972); European Convention on Suppression of Terrorism (Jan. 27, 1977); European Convention on Transfer of Condemned Persons (Mar. 21, 1983); Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (Paris, Dec. 17, 1997); Convention on Suppression of Illegal acts against safety of maritime voyage of Mar. 10, 1988, for SR effective since Mar. 8, 2001; Rome Protocol on Suppression of Illegal acts against safety of firm platforms placed on submarine shallow of Mar. 10, 1988, for SR effective since Mar. 8, 2001; Convention on Money Laundering, Search, Seizure and Confiscation of Revenues from Crime, for SR effective since Sept. 1, 2001; European Convention on Conditionally Sentenced or Conditionally Released Offenders (Strasbourg, Nov. 30, 1964), effective for SR since Oct. 22, 2003; UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects (Rome, June 24, 1995), Rome Statute of International Criminal Court (July 1, 2002) effective for SR since Dec. 1, 2003; UN Convention against Multinational Organized Crime (New York, Nov. 15, 2000), effective for SR since Jan. 2, 2004; Treaty between SR and European Police Office (Europol) on Cooperation (Bratislava, June 13, 2003), effective for SR since Dec. 23, 2003.

1
SOUTH AFRICA LAW DIGEST

—Scope —

Revised for 2010 edition by

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Note: This revision incorporates legislation through May 31, 2009.

1 INTRODUCTION

1.01 CURRENCY:

The Currency and Exchanges Act (No. 9 of 1933) provides that notes and coins issued by South African Reserve Bank be legal tender for any amount in repayment of any loans of money.

Governor-General of Reserve Bank, is also given power to make regulations in regard to any matter directly or indirectly affecting banking, currency or exchange.

Unit of currency is Rand (R), which is subdivided into 100 cents under a decimal system. Exchange control regulations restrict import and export of currency. Treasury certificate is required on imports and exports of currency. Regulations also prohibit direct transfer of funds through bank or exchange dealer, and also manipulations between private individuals such as acquiring debts or property in foreign countries. Treasury may acquire from any resident in Republic, foreign currency held by him, existence of which must be disclosed to Treasury, and may also expropriate his securities in foreign countries. Normally payment to nonresidents of recent income and dividends and of debts resulting from commercial transactions are not restricted but other payments including capital in and out of country are governed by special regulations of Treasury.

Exchange Control Department of South African Reserve Bank, acting as agent for Treasury, together with authorised dealers (banks) control all foreign currency transactions.

See also category 14 Foreign Trade and Commerce, topic 14.03 Foreign Exchange, Foreign Trade and Investment.

1.02 GOVERNMENT AND LEGAL SYSTEM:

The Constitution of the Republic of South Africa, 1996 came into force on 4 Feb. 1997, superseding Act No. 200 of 1993.

Parliament consists of National Assembly and National Council of Provinces. Legislative authority of national sphere of government vests, subject to Constitution, in Parliament.

Parliament may determine time and duration of its sitting. Constitution provides that President may summon Parliament to extraordinary sitting at any time to conduct special business.

National Assembly consists of no less than 350 and no more than 400 members elected for five year term in accordance with system of proportional representation.

National Council of Provinces is composed of single delegation from each of nine provinces, consisting of ten delegates.

Executive authority vests in President, who is Head of State and Head of national executive. President appoints Deputy President/s and Ministers to cabinet.

Judicial authority of Republic vests in courts.

Provincial Legislative Authority.

Each province has, subject to Constitution, its own constitution and legislature. Legislative authority of province vests, subject to Constitution, in provincial legislature. Members of provincial legislature are elected in accordance with system of proportional representation.

Provincial Executive Authority.

Executive authority of provinces vests in Premier of each Province.

Fundamental Rights.

Constitution, which is supreme law of South Africa, includes chapter on fundamental rights, which binds legislature, judiciary, executive, all organs of state at and to extent applicable, all natural and juristic persons.

Legal System.

Legal system of South Africa derives from several sources, including statutory law made by legislative body, common law, African indigenous law, and foreign and international law. Ultimately, all law and conduct within territory of South Africa is governed by and is subject to Constitution of South Africa Act, 1996.

Much of South African law is based on common law which was originally grounded in Roman-Dutch legal tradition and it has evolved to include some elements of English common law, particularly in respect of corporate law. Common law has been developed through system of legal precedent which is followed and applied by South African courts.

Foreign law is not in itself source of law, but rather informs interpretation and application of law. Any court may take judicial notice of law of foreign state and of African indigenous law in so far as it can be ascertained readily and with sufficient certainty, and is not opposed to principles of public policy or natural justice. Courts are obliged to apply African indigenous law when it is applicable but subject to Constitution and any legislation that specifically deals with African indigenous law.

1.03 HOLIDAYS:

Regulated by Public Holidays Act (No. 36 of 1994).

Following are statutory holidays in Republic of South Africa:

Calendar of public holidays: New Year's Day 1 Jan.; Human Rights Day 21 Mar.; Good Friday Fri. before Easter Sun.; Family Day Mon. after Easter Sun.; Freedom Day 27 Apr.; Worker's Day 1 May; Youth Day 16 June; National Women's Day 9 Aug.; Heritage Day 24 Sept.; Day of Reconciliation 16 Dec.; Christmas Day 25 Dec.; Day of Goodwill 26 Dec.

Note: Whenever any public holiday falls on Sun., following Mon. will be public holiday. President may by proclamation in Government Gazette declare any day to be public holiday.

1.04 OFFICE HOURS AND TIME ZONE:

South Africa is in the GMT +02:00 time zone. Office hours are generally from 8 a.m. to 4:30 p.m.

2 BUSINESS ORGANIZATIONS

2.01 AGENCY:

The common law applies and although is based on Roman-Dutch law, is not dissimilar to English Law.

If an agent acts within the scope of his authority and has disclosed his principal, only the principal is liable; but if the principal has not been disclosed, the third party has a right of action against either the principal or the agent.

A power of attorney is legally necessary only to enable an agent to transfer freehold property, to pass a mortgage bond over such property or to bring a law suit. But although not essential, a principal often arms his agent with a power of attorney clearly indicating the limits of the authority conferred on the agent.

2.02 ASSOCIATIONS:

Non-trading associations may be formed and include clubs, sporting associations, etc. Such associations may either be incorporated or not. Associations for trade must either consist of partnership of persons or be incorporated. Under Companies Act (No. 61 of 1973) more than 20 persons may not be associated for trade purposes without registration of company. Exception is that certain professions including accountants, auditors, architects, attorneys, quantity surveyors, professional engineers, stockbrokers and pharmacists may now practice through medium of partnership and may have more than 20 members. In addition, no association of persons for gain or trade may now be body corporate unless it is registered as company under Companies Act as aforesaid or as close corporation in terms of Close Corporations Act (No. 69 of 1984).

Trade unions and employer organizations, in order to sue or be sued, must be registered under provisions of Labour Relations Act. (No. 66 of 1995). Trade combinations for control of certain commodities are subject to government interference, but otherwise no restrictions are imposed by common law or statute law.

Unincorporated associations, since they have no separate legal personality, experience great difficulty in contracting or owning property and as to the form under which legal proceedings may be instituted or defended. Uniform Rules of Court allow unincorporated association to sue in its own name. Only duly authorised representatives can interpose in such proceedings. Ordinarily, members do not incur any liability for obligations beyond unpaid subscriptions in terms of constitution. Constitution may, however, impose obligations on ordinary members. Members may also incur personal liability due to their participation in incurring of debt with knowledge of insufficient funds to meet obligations created thereby.

See also topic 2.03 Corporations.

2.03 CORPORATIONS:

Registration of Companies is governed by statute, Companies Act (No. 61 of 1973). New Companies Act (No. 71 of 2008), to come into effect on date to be proclaimed. Registrar of Companies with offices at Pretoria keeps register of companies and attends to administration of Act.

Establishment of Company.

To establish a company it is necessary to obtain and register a name for company which is acceptable to Registrar of Companies and to file numerous forms and documents with Registrar. These may include power of attorney for attorney to register company, which must be duly authenticated if signed outside South Africa. (See category 9 Documents and Records, topic Acknowledgments.) Also deed of incorporation, which consists of memorandum and articles of association. Memorandum sets out powers or objects of company as against third parties and merely states main objects. Except where otherwise provided in its constitution every company has plenary powers but, as between directors and shareholders, its directors only have powers under main object and all ancillary objects. Articles correspond to regulations of American corporation and set out rules for internal workings of company. Certain company forms must be signed personally by proposed directors of company.

There is also provision for registering company name as well as translated and shortened form of name of company. Provision is furthermore made for registering defensive name of business which may or may not be company. Purpose of registering defensive name is to prevent anyone else using it.

There are registration fees for various company forms. In addition, registration fee of company itself is basic amount of R350, plus additional amount of R5 for every R1,000 of nominal share capital as “creation duty”.

Private companies are companies having share capital and by their Articles of Association: (a) Restrict right to transfer shares; (b) limit number of members to 50; (c) prohibit any offer to public for subscription of any shares or debentures of company. Such company must have one but not more than 50 shareholders, and have at least one director. Such company is not required to file annual balance sheet or profit and loss account with Registrar of Companies.

Public Companies.

All companies which are not private companies are public companies for purposes of Act. In addition companies limited by guarantee are deemed to be public companies. Any private company which fails to comply with provisions of its articles regarding restriction on transfer of shares, limitation of its membership or offers shares or debentures to public forthwith becomes subject to provisions of Act as if it were a public company. Public company must consist of not less than seven shareholders and have at least two directors. It must lodge with Registrar, under cover of prescribed form, a certified copy: (a) Of annual financial statements, group annual financial statements and group reports, if any; and (b) annual financial statements of every private company controlled by that public company. Annual financial statements must be in conformity with generally accepted accounting practice, fairly present state of affairs of company and its business as at end of financial year concerned and profit and loss of company. There are no provisions which require that directors or shareholders of public or private companies must be South Africans.

Dividends paid by private or public company to South African shareholders are subject to taxation however, dividends are taxable in hands of company and not recipient.

The Close Corporations Act (No. 69 of 1984) commenced on Jan. 1, 1985. Close corporation is separate legal entity with plenary powers. Its members have limited liability except in certain instances—those instances where elements of fraud may be involved or where corporation trades while it is de facto insolvent. Its members control it. Members must make contributions. There are no shares or share capital. Member's current interest is expressed as percentage which is recorded. It is established by registering founding statement. It has perpetual succession and it continues until deregistered or dissolved.

Membership is limited to natural persons but is subject to some exceptions. It may have between one and ten members.

Founding statement contains essential information and is only official public record. It is kept up-to-date by amending founding statements. Members may also have association agreement governing their relationship and corporation's internal administrative workings. Its name must be acceptable to Registrar with letters “CC” or its equivalent in any other official language added to name of close corporation. Registration number of close corporation must be used along with its name in all notices and other official publications of close corporation, including in all bills of exchange, promissory notes, endorsements, cheques and orders for money, goods or services purporting to be signed by or on behalf of corporation and letters, delivery notes, invoices, receipts, and letters of credit of corporation.

Subject to certain requirements existing company may convert itself into close corporation or existing close corporation may convert itself into company.

New members may acquire existing interests from other members or directly from corporation. Corporation itself may also buy existing interest and interest acquired must be added to respective interests of members of close corporation. Total percentage interests of all members must always be 100% so that changes will result in adjustments. All members agree to changes. Member's contribution bears no relationship to his interest. Payments to members are as agreed by all members but in absence of agreement in proportion to their interests.

No audit is necessary. Members of corporation are however required to cause annual financial statements to be prepared in accordance with provisions of Close Corporations Act, within nine months after end of every financial year of corporation.

Taxation of close corporation itself is similar to that of private company except with certain differences but its payments to members are not taxed. Assessed losses of close corporation may be carried forward. Close corporations must make normal three provisional tax payments as company.

Companies Act, 2008 will make amendments to Close Corporations Act. When Companies Act, 2008 is implemented, new corporations will not be registered and existing companies cannot convert to corporation. Existing corporations will continue to exist but may be forced to convert should Close Corporation Act be repealed.

See also category 21 Taxation, topic Taxes, subhead Business Taxes or Licenses.

Liquidation.

A corporation unable to pay its debts may be liquidated under a compulsory winding up order issued by High Court at instance of any creditor who has direct or contingent claim. It may also be wound up voluntarily if all members so resolve at meeting.

Insolvent companies will be wound up under Companies Act, 1973. A company may be liquidated voluntarily by resolution in due form to that effect, with different procedure and consequences, and creditors may either be paid in full or may receive a pro rata share of moneys available in the liquidation.

A moratorium can be procured by a company or a creditor thereof by obtaining a judicial management order against a company when it is proved to High Court that company, if given time, can rehabilitate itself from temporary embarrassment.

The procedure for proving claims in bankruptcy (q. v.) applies to the proof of claims against a company under compulsory or voluntary liquidation but the forms should be modified to reflect that the subject matter is a company.

External Companies (Foreign Companies).

Chapter XIII of Act regulates external companies in Republic. External company other than banking company or insurance company, which establishes ``place of business'' (which is defined as place where company transacts or holds itself out as transacting business and includes share transfer or share registration office) in Republic must register as external company, within 21 days after such establishment, by lodging with Registrar following: (a) Certified copy of its memorandum (which is defined as charter, statutes, memorandum of association and articles, or other instrument constituting or defining constitution of company) and certified translation thereof in one of official languages if memorandum is not set out in such language; (b) notice of registered office and postal address of company; (c) consent of and name and address of auditor of company in Republic; (d) notice of financial year end of company; (e) list in prescribed form containing: (i) particulars of each director's full names, former names, nationality, occupation, residential, business and postal addresses and date of appointment, distinguishing directors resident in Republic and nonresident directors, (ii) particulars of local manager and secretary (as in case of directors), (iii) name and address of auditor of company in Republic. Registrar must allocate registration number to external company. After registration, external company must comply with provisions as to filing of information in terms of Act, in same manner as domestic company, as it is considered body corporate subject to all applicable provision of Companies Act. Alterations to memorandum must be lodged with Registrar within three months of such alteration. External company must, in conspicuous manner outside its places of business, display its name and country of incorporation. Information must include its registration number on letterheads, bill-heads, notices, advertisements and other official publications of company. Any trade catalogue, trade circular or business letter bearing company's name, sent to any person in Republic, must also set out names of directors and their nationality if they are not South African, together with names of local managers and local secretary. Unless registered in this manner, external company may not acquire ownership of immovable property. Provisions relating to external companies do not apply if branch of external company is incorporated as company not for gain.

External company must at all times have one or more persons resident in Republic who is authorised by company to accept service of process and any notices required to be served on company, on behalf of company.

Annual financial statements and auditor's report detailing company's financial position, trade and business in Republic must be lodged with Registrar of Companies within six months of end of financial year.

Taxation of external company differs from that of domestic company. Act provides for deregistration of external company which ceases to have place of business in Republic.

Name.

Companies must add distinctive last words or subjoined statements to their names: (a) Public company having share capital takes as last word, word “Limited”; (b) private company having share capital takes as last words, words “(Proprietary) Limited”, but if its memorandum provides that its directors are jointly and severally liable for debts contracted during their period of office, last word is “Incorporated”; (c) company limited by guarantee takes as last word, word “Limited” and subjoins statement “(Limited by Guarantee)”; (d) an association not for gain subjoins statement “Association Incorporated under section 21”; (e) external company subjoins statement “Incorporated in........ (stating country concerned)”.

Company names are protected by Companies Act (No. 61 of 1973) which also protects other names associated with companies by registration of defensive names. Company may also register translation of company's name in one or more other official language of Republic or shortened form of that company's name.

Every company and close corporation shall display its registration number after or immediately below its name in all letters, notices and other official documents.

See also category 4 Citizenship, topic 4.01 Aliens, subhead Corporations Owned or Controlled by Aliens.

2.04 FOREIGN CORPORATIONS:

See topic 2.03 Corporations; category 4 Citizenship, topic 4.01 Aliens.

2.05 JOINT STOCK COMPANIES:

See topic 2.03 Corporations.

2.06 LIMITED PARTNERSHIP:

Limited partnerships exist—en commandite partnership is where partner's identity is not disclosed to third parties. Such partners liability to partnership creditors limited to amount partner brought into partnership. Another limited partnership is anonymous partnership—partner's identity not disclosed—liability for pro rata share of partnership debt, but partner not liable to third parties but to other partners for his share of partnership debts.

2.07 PARTNERSHIPS:

Companies' Act (No. 61 of 1973) provides that no partnership may be formed of more than 20 persons, but such restriction does not apply to persons carrying on profession of public accountant or auditor, attorney, notary, conveyancer, architect, quantity surveyor, professional engineer, stockbroker, medical practitioner, dentist, psychologist, supplementary health care specialist or pharmacist.

A partnership may be constituted between two or more persons either orally, in writing or tacitly. Each of the partners must contribute something, such as capital, skill or labor, for the joint benefit of the partner and with the object of making a profit out of sharing the same. If any of these essentials are lacking, no partnership is constituted.

The liability of partners depends on terms of partnership agreement and each partner is liable in solidum for debts of partnership upon dissolution of partnership.

When estate of partnership is sequestrated, estate of each partner (other than partner *en commandite* or special partner) is simultaneously sequestrated, unless partner undertakes to pay debts of partnership and gives security for such payment.

Partnerships are extensively regulated by common law and very little legislation exists dealing directly with partnerships. Companies Act (No. 71 of 2008) is silent on matter of partnerships, save that partnership may be appointed to hold office of company secretary, subject to fulfillment of certain conditions.

3 BUSINESS REGULATION AND COMMERCE

3.01 BILLS AND NOTES:

Generally speaking, South African law of bills of exchange is same as that of England. Bills of Exchange Act (No. 34 of 1964) governs law of negotiable instruments, and does not vary to any great extent from English Act of 1882. Developments in English law have also been incorporated into Act Bills of Exchange Act provides for protection of users, accommodates technological advancements and provides for reduction of incidence of fraud.

Negotiation of Bill.

Bill must be payable to bearer or order of named payee in order to be negotiable, where instrument is payable to bearer, delivery by holder is sufficient. If bill is payable to order, endorsement by holder is necessary prior to delivery. Where transferee takes delivery as holder in due course, he may enforce payment against all parties liable on bill. (See England Law Digest.) If transferee takes as mere holder, he may still sue on bill but subject to defects of title, which are either relative or absolute. Where overdue bill is negotiated, it can only be negotiated subject to any defect of title affecting it at maturity. Where bill or note contains words prohibiting transfer, it is valid between parties thereto but transferee may not transfer it to any other person. Bill marked “nontransferable” is completely nontransferable but bill marked “not negotiable” and “a/c payee only” is transferable subject to equities. Possibility of delictual (tort) remedy against collecting bank in respect of these bills is not excluded.

Requirements of Form.

In order that instrument may be negotiated it must satisfy necessary requirements of form. Instrument must be an unconditional order in writing addressed by one person to another signed by person giving it, requiring person to whom it was addressed to pay on demand or at fixed or determinable future date, sum certain in money to or to order of, specified person or to bearer. An instrument not complying with above is not a bill of exchange. Bill is not invalid because it is not dated, and/or it does not specify value given, and/or that no value has been given therefor, and/or it does not specify place where it is drawn or payable. Stamp Duties Act (No. 77 of 1968) no longer provides for stamp duty in respect of bills and notes executed after 1 Apr. 2001. Debt instruments were previously regulated under Usury Act (No. 73 of 1968). Usury Act has now been repealed in its entirety and has been replaced by National Credit Act (No. 34 of 2005). National Credit Act became fully effective on 1 June 2007. Under Administration of Estates Act (No. 66 of 1965), all cheques or orders drawn on account opened in terms of this Act, shall be drawn in favour of named payee, and shall reflect cause of payment. Instrument must further be signed by executor of deceased estate and may not be payable to bearer.

Notice and Protesting.

Except in case of acceptor of bill and in certain circumstances maker of promissory note and drawer of cheque, then in order to make all parties to a note or bill liable, bill or note not payable on demand must be presented on due date, and if payable on demand within reasonable time, and any notice of dishonour sent to all those affected on business day next after day on which bill or note was dishonoured. It is however no longer requirement that bill or note, whether foreign or not, be protested by notary public in order to make all parties to note or bill liable but it can be done voluntarily and, if so, such protesting must be done by no later than first business day following due date.

Special provisions of Act, which are too complex for inclusion herein exist in regard to liability of avals or sureties.

Conflict of Laws.

Where bill drawn in one country is negotiated, accepted or payable in another, rights, duties and liabilities of parties are determined as follows: (a) Bills of Exchange Act provides that formal validity of bill or note is determined by law of place of issue; validity of supervening contract (i.e., acceptance or endorsement, etc.) is determined by law of place where contract was made; (b) interpretation of drawing, endorsing and acceptance is determined by law of place where contract was made; (c) where bill or note drawn or made in one country is payable in another, due date of instrument is determined according to law of place where it is payable. See also England Law Digest.

Stamps.

See subhead Requirements of Form, supra.

3.02 COMMERCIAL/CORPORATE LAW:

South African company law is governed by Companies Act, 1973, Close Corporations Act, 1984 and common law relating to these corporate entities. Company law, which is largely derived based on framework and general principles of English law, covers requirements for birth, existence or maintenance, and death of corporate entities. It is currently administered by Registrar of Companies.

Recently, Companies Act, 1973, has been subject of comprehensive review in order to bring it in line with corporate law developments, both in South Africa and internationally. Result is Companies Act, 2008, which has stated objectives of simplifying existing company law regime, increasing flexibility, ensuring corporate efficiency, providing transparency and accountability as well as predictable regulation. New Act was signed into law by President on 9 Apr. 2009 and it is anticipated that it will come into effect in around July 2010.

Companies Act, 2008 introduces many fundamental changes to company law, including abolishment of close corporations (save for those already in existence), reclassification of forms of business enterprise, overhaul of both share capital rules and provisions relating to voting powers of shareholders, codification of previous common law fiduciary duties of directors, alteration of requirements relating to takeovers and affected transactions and introduction of concept of business rescue.

Public listed company is subject to Listings Requirements of JSE Limited (``Listings Requirements''), which go beyond requirements of Companies Act, 1973. JSE Limited sets requirements for, inter alia, granting, reviewing, suspending or terminating listing of securities.

Securities Regulation Panel on Take-overs and Mergers (``SRP'') was established in terms of section 440B of Companies Act, 1973. Its role is to regulate takeovers, mergers and disposals by companies of their main assets or main business. Rules of SRP are contained in Securities Regulation Code on Take-overs and Mergers (``Code''), which has main object of ensuring fair and equal treatment of all holders of securities in relation to such transactions and provides orderly framework within which they must be conducted. Code applies where offeree company is listed or unlisted public company, statutory corporation which is or is deemed resident in South Africa or private company which is or is deemed to be resident in South Africa, but only where shareholders' interest, valued at offer price, and shareholders' loan capital, exceed R5 million and there are more than ten beneficial shareholders. Companies Act, 2008 will extend application of Code to private companies where prescribed percentage of issued securities of company has been transferred within 24-month period immediately before affected transaction or offer. Prescribed percentage, which may not be less than 10%, is yet to be determined by Cabinet.

Constitutional dispensation that was introduced in 1994 has profoundly affected corporate landscape. In addition to direct impact on corporate entities of such fundamental rights introduced by Constitution of Republic of South Africa, 1996 (``Constitution'') as dignity, equality and freedom, other legislative measures which give effect to these constitutional principles must be considered in corporate dealings. These include attempt to balance interests of employees and employers and to enhance equity in employment (see below) as well as promotion of employment and advancement of social and economic welfare of South Africans through promotion and maintenance of competition in South Africa. Potential investors should also be aware of environmental regulation and requirements of transparency and accountability of enterprises by way of promotion of access to information by stakeholders.

Constitutional mandate to advance categories of persons disadvantaged by unfair discrimination gave rise to introduction of Black Economic Empowerment (``BEE''). BEE is aimed at economic transformation of South Africa and at bringing about significant increases in numbers of black people that manage, own and control country's economy, as well as significant decreases in income inequalities. Legislation effecting BEE and Codes of Good Practice (``Codes'') published pursuant to legislation provides for seven elements against which BEE of enterprise must be measured: (1) Ownership, (2) management, (3) employment equity, (4) skills development, (5) preferential procurement, (6) enterprise development, and (7) residual factors.

Whilst private enterprises are not obliged by law to meet targets set out in Codes, effect of non-compliance is far-reaching. Enterprise that wishes to provide goods and services to any organ of state or public entity, or that is seeking license or concession from, or contract or partnership with, any organ of state or public entity, must provide evidence of its BEE status as BEE status is one of factors which will be taken into account in deciding whether or not to grant benefit being sought. Market pressure may also force enterprises to be BEE compliant by virtue of their reliance on organs of state or public enterprises or having to compete for business with other entities that may have better BEE status.

Corporate entities in South Africa are also subject to corporate governance standards set by King Commission of Institute of Directors of Southern Africa. At present, second Report on Corporate Governance in Southern Africa (King 2) is in force, with third such report (King 3) becoming effective on 1 Mar. 2010. King reports consist of code with set of principles as best practice for good governance practices that will apply to all entities, whether incorporated or not.

3.03 COMMERCIAL REGISTER:

There is no general requirement for registration of trades and businesses. However, most business undertakings require one or more of applicable trade licenses. (See topic 3.08 Licenses, Business and Professional.) As a rule, failure to obtain necessary license will not preclude suit by businessman although it will render him liable for penalties in terms of provincial ordinances. As with public companies, private companies are now also required to lodge annual returns.

Business Names Act (No. 27 of 1960) provides for control of business names but only in relation to their use and not to their registration. Registration of names of companies and close corporations are respectively regulated in terms of Companies Act (No. 61 of 1973) and Close Corporations Act (No. 69 of 1984). According to Business Names Act stationery of business shall include certain particulars relating to business, such as name under which business is conducted, and name of person conducting it. It also states which names or titles may not be used in business and provides that Registrar of Companies may in writing order any person who is carrying on any business under any name to cease using such name if it is calculated to deceive or mislead public or cause annoyance or offence to any person or is suggestive of blasphemy or indecency. Persons failing to comply will be guilty of offence.

3.04 CONDITIONAL SALES:

See topics 3.12 Sales, 3.04 Contracts.

3.05 CONTRACTS:

In general, common law rules govern. No formalities are required. Contract of sale of land must be in writing and signed by parties thereto or by their agents acting on written authority. Long lease of not less than ten years does not bind third parties unless in writing executed before notary public and registered against title deeds of property.

In addition there are two further Acts which require special formalities:

National Credit Act (No. 34 of 2005) applies to existing credit agreements and all written credit agreements between parties dealing at arm's length and concluded within Republic, subject to certain exceptions. Act defines “credit agreement” as credit facility, credit transaction, credit guarantee or any combination thereof. Act requires credit provider to conduct credit assessments on consumer and to issue consumer with quotation prior to entering into of credit agreement. All credit agreements must be in writing and consumer (borrower) must be provided with copy thereof, without charge.

Specific rights of consumers are entrenched, such as right of protection against discrimination in respect of credit, right to reasons for credit being refused and in particular, credit provider is compelled to embark on intermediary procedure of referring consumer to debt counseling before credit provider entitled to take legal steps to enforce credit agreement or re-possess goods sold in terms thereof, seriously impeding credit providers' ability to recover outstanding debt.

It is preemptory that credit providers be registered with National Credit Regulator if concluded by at least 100 credit agreements (to which Act applies) or total principal debt of all outstanding agreements concluded by credit provider (to which Act applies) exceeds R500 000, credit provider may not offer goods at lower price for cash sale of goods. Discounts on credit agreements are permitted.

Interest rates and other charges are capped in terms of regulations promulgated by Minister, interest rate may not vary unless pegged to determinable reference rate, such as prime overdraft rate.

Where lease of movable property or instalment agreement concluded at location other than registered business premises of credit providers, may be terminated by consumer within five business days after date upon which agreement is signed.

Act creates bodies of National Credit Regulator and National Credit Tribunal to monitor and enforce application of Act.

Non-compliance with Act can result in credit agreements being declared null and void with dire consequences for credit providers.

Alienation of Land Act (No. 68 of 1981).

This Act deals with sale of land (immovable property) and in particular deals with various aspects regarding contract of sale in terms of which land is disposed, regardless of whether payment is made in instalments or otherwise. To extent that payment for land is made way of instalments, consideration needs to be given to provisions of National Credit Act (No. 34 of 2005) as well. Land in this context includes land and all buildings and improvements thereon.

Act includes, *inter alia*, various provisions in effort to protect rights of purchasers under sales by instalments. Act sets out numerous statutory requirements to be contained in instalment sale agreement and incidentally requires mortgagee on request from time to time to state amount then owing on any bond over property or amount of money required to release individual property if more than one is mortgaged. It also provides for such agreements to be recorded in Deeds Office in order to give purchaser certain preference but not preference over mortgage bond registered over property prior to said registration. Provision is also made for certain payments to be held in trust until such time as it is legally possible to transfer immovable property sold and where there is instalment sale until said contract has been registered as above. §29A makes provision for five day “cooling off” period in regard to purchase of immovable property in respect of transactions of less than R250,000. Purchaser or agent may revoke his offer to purchase or terminate deed of alienation within five days after signature. §29A only applies to natural persons.

Excuses for Nonperformance.

Contracts are void and cannot be enforced in a court of law if they are unlawful, immoral, contrary to public policy or lacking in some legal formality.

Contracts are voidable at instance of grieved party for numerous reasons, inter alia being: (1) False representations (this can be either negligent, wilful and deliberate [fraud] or innocent); (2) party not having required legal capacity; (3) mistake (mistake of fact not of law); (4) force and fear; (5) undue influence; (6) mental disability; (7) impossibility of performance.

Conflict of Laws.

Intrinsic validity of a contract is determined by proper law of contract, namely law of country which has most real connection with contract. Law which governs formalities of contract is lex loci contractus (place where contract was entered into) even though contract may be totally unconnected with that system of law unless it can be shown that parties intended proper law to govern formalities. Mode of performance is determined by lex loci solutionis (place of performance) and rights and duties under contract by proper law with presumption in favour of lex loci solutionis, if choice of proper law proves indecisive. Interpretation of contract is determined by proper law unless parties clearly intend another system of law. Law governing capacity is not yet settled but party will be held to have capacity if capable by his domiciliary law or lex loci contractus.

Government Contracts.

Save for provisions of Public Finance Management Act (No. 1 of 1999) as amended, and Municipal Finance Management Act (No. 56 of 2003) as read with their respective regulations, there are no special formalities for government contracts. Aforesaid Acts basically prescribe method in which government and/or municipal asset may be disposed of and generally requires public participation and ministerial or town council consent, as case may be.

Distributorships, Dealerships and Franchises.

Franchise agreement is agreement between franchisor and franchisee whereby franchisee is granted license to operate business system devised by franchisor together with intellectual property rights such as trademarks, copyright, know-how, patents and designs which franchisor uses in his business system.

There are no special rules relating to formation and termination of these agreements. Franchisor and franchisee determine contents of their agreement including but not limited to following: (a) what intellectual property rights are applicable; (b) duties of franchisor; (c) obligations of franchisee; (d) under what circumstances agreement can be terminated; (e) what royalties are payable; (f) whether exclusive territory will be granted; and (g) whether or not franchisee will be affected by restraint covenant once franchise agreement has been terminated.

Terms “dealerships” and “distributorships” are interchangeably used for word franchise.

See also category 17 Intellectual Property, topics 17.01 Copyright, 17.02 Patents, 17.03 Trademarks and Tradenames.

3.06 FRAUDS, STATUTE OF:

The Republic of South Africa has no Statute of Frauds, but certain contracts must be in writing, for instance, purchase and sale of land, leases exceeding ten years, transfer deeds, mortgage bonds, certain credit agreements, etc.

Bills of Exchange Act (No. 34 of 1964) also makes provisions regarding negotiable instruments in order to eliminate possibility of fraud. Title of person who negotiates bill is defective if he obtained bill by fraud.

3.07 INFORMATION TECHNOLOGY, INTERNET AND NEW MEDIA:

Computer programs are protected by Copyright Act (No. 98 of 1978) which defines "computer program" as set of instructions, fixed or stored in any manner, which when used directly or indirectly in computer directs its operation to bring about result.

Copyright in computer program vests in person who exercised control over making of it and vests that person with various rights in regard to program, including making adaptation of program, publishing, public performance, broadcasting, transmitting program. Adaptation includes version in program language, code or notation different from that of program and fixation of program in or on medium different from medium of fixation of program. Lawful use and possession of program by third parties permitted in certain circumstances.

It is offence under Electronic Communications and Transactions Act No. 25 of 2002, to use computer program to unlawfully intercept or interfere with data or to overcome security measures designed to protect data.

Promotion of Access to Information Act 2 of 2000, allows officer of private or public body to refuse access to computer program owned by private body, except insofar as access is granted in terms of Act.

National Prosecuting Authority Act 32 of 1998 and South African Police Service Act 68 of 1995, contains provisions relating to unauthorised access to or modification of computer material (§40A). ``Unauthorised access'' includes access by person who is authorised to use computer but is not authorised to gain access to certain program or to certain data held in such computer or is unauthorised, at time when access is gained, to gain access to such computer, program or data.

Electronic Commerce.

The Electronic Communications and Transactions Act (No. 25 of 2002) is modeled on United Nations International Trade Law (“UNCITRAL”) precedent.

Act contains provisions relating to: (i) Facilitation of electronic communications and transactions, (ii) E-government, (iii) regulation of cryptography and authentication service providers, (iv) consumer protection, scope of Acts' application, consumer's right to information, cooling-off period, unsolicited goods, services or communications, applicability of foreign law and provides for complaints to Consumer Affairs Committee (v) scope of protection of personal information, and principles for collection of such information, (vi) protection of critical databases, (vii) domain name administration, (viii) limitation of liability of service providers and (ix) cyber-crime.

Under Act, data messages are given legal recognition, and may, subject to fulfillment of certain conditions, be used to satisfy legal requirements for document to be: (i) In writing, (ii) signed, (iii) retained or presented in original form. Act further gives legal effect to agreements concluded where one or more parties is represented by electronic agent. Act hands to government, authority to regulate and administer South African domain space known as.za domain. Domain Name Authority has been created in terms of Act to fulfill this function. Act limits liability of service providers where they have acted as mere conduits for transmission of data messages i.e. where they do not initiate transmission; select addressee; modify transmitted data; and perform their functions in automatic, technical manner without selection of data.

Broadcasting.

Broadcasting Act (No. 4 of 1999) established new broadcasting policy for Republic. Act provides classes of broadcasting activities in public's interest and Charter for South African Broadcasting Corporation Ltd. (``SABC'').

Act amended by Broadcasting Amendment Act (No. 4 of 2009) to provide for procedural issues regarding removal or resignation of SABC Board members, dissolution of Board and appointment of interim Board.

Act also amended certain provisions of Independent Broadcasting Authority Act (No. 153 of 1993) repealed and replaced by Electronic Communications Act (No. 36 of 2005), aimed at convergence in broadcasting and broadcasting signal distribution and telecommunications sectors, and provides legal framework for convergence in these sectors.

Electronic Communications Act (No. 36 of 2005) (``ECA'') regulates licensing, monitoring and enforcement of commercial and community broadcasting specifically and provides for general regulation of broadcasting industry. ECA also makes provision for formulating broadcasting frequency plans. Final Terrestrial Broadcasting Frequency Plan published under ECA on 18 Nov. 2009 provides for allotment of broadcasting frequencies in light of envisaged digital migration process which will be catered for in Digital Terrestrial Regulations to be published in 2010. Regulations on Code of Conduct for Broadcasting Service licensees were also published under ECA on 6 July 2009.

The Independent Communicators Authority of South Africa Act (No. 13 of 2000) (``ICASA ACT'') empowers regulatory authority, ICASA, in terms of EAC and ICASA Act to regulate broadcasting and telecommunications in public's interest and ensure fairness and diversity of views broadly representing South African society.

Space.

Regulated by Space Affairs Act (No. 84 of 1993). Act allows Minister of Trade and Industry to determine general policies necessary to meet international commitments and responsibilities of Republic in respect of peaceful utilisation of outer space. Such policies shall control and restrict development, transfer, acquisition and disposal of dual-purpose technologies, in terms of international conventions, treaties and agreements entered into or ratified by South African government.

Act also provides for establishment of council known as South African Council for Space Affairs. Main object of council is to implement space policies of South Africa. In order to achieve its object council may: advise Minister on any matter that may have influence on space affairs; hear representations by any person regarding space affairs in South Africa; supervise and implement matters arising from international conventions, treaties and agreements concerning space affairs entered into or ratified by South Africa; issue, amend, suspend or revoke licenses; encourage persons and authorities involved in space industry to register with council; designate knowledgeable persons from government institutions and space industry as members of committees of council to assist council in performance of its functions and provide for publication of information concerning activities of council.

South African National Space Agency Act (No. 36 of 2008) establishes and regulates South African National Space Agency which will implement policies and programmes made in terms of Space Affairs Act (No. 84 of 1993). Act also provides for promotion of peaceful use of space and co-operation in space-related activities, research in space science, advancement in scientific engineering through human capital and support of industrial development in space technologies within national government policy.

Telecommunications is governed by Electronic Communications Act (No. 36 of 2005) (``ECA'') which repealed Telecommunications Act (No. 103 of 1996) in order to provide framework for convergence in broadcasting, broadcasting signal distribution and telecommunications sectors. ECA makes provision for regulations related to licensing, license terms and conditions, monitoring and enforcement measures applicable to electronic communications services, electronic communications network services, broadcasting services, radio frequency spectrum and matters ancillary thereto. ECA makes provision for licensing of three categories of services: electronic communications services, electronic communications network services, and broadcasting services. ECA provides for two types of licenses within these services, namely, individual and class licenses.

The Independent Communications Authority of South Africa Act (No. 13 of 2000) (``ICASA Act'') established ``ICASA'' both telecommunications and broadcasting industries. ICASA Act and ECA empower ICASA to regulate broadcasting and telecommunications in public's interest to ensure fairness and diversity of views broadly representing South African society.

Independent Communications Authority of South Africa Amendment Act (No. 3 of 2006) determines functions and consolidates powers and duties of ICASA in greater detail, and provides for establishment of Complaints and Compliance Committee, appointment of inspectors, new offences and penalties and other ancillary processes.

Broadband Infraco Act (No. 33 of 2007) establishes state-owned public company responsible for increasing access and affordability of electronic communications through provision of backbone broadband infrastructure and wholesale bandwidth. Broadband Infraco (Pty) Ltd. granted electronic communications network license by ICASA on 19 Oct. 2009 to commence operations.

Regulation of Interception of Communications and Provision of Communication-related Information Act (No. 70 of 2002) regulates interception of certain communications, monitoring of certain signals and radio frequency spectrums and establishes Office for Interception Centres and Internet Service Providers Assistance Fund. Act also prohibits manufacturing, assembling, possessing, selling, purchasing or advertising of certain equipment and provides for offences and penalties for such offences.

Minister of Communications is responsible for formulation of policies in respect of telecommunications and broadcasting.

Telkom, public company, was previously only national operator licensed to provide telecommunication services. However, in 2006, Neotel was licensed as second operator.

Cellular Phones.

South Africa's cellular phone market is dominated by three providers of mobile cellular telecommunications services and started operation on 17 Nov. 2001. Mobile operators are required to obtain Individual Electronic Communications Service (I-ECS) licenses and Individual Electronic Communications Network Service (I-ECNS) licenses in terms of Electronic Communications Act (No. 36 of 2005) (``ECA'').

Mobile operators are specifically affected by End-User and Subscriber Service Charter Regulations published under ECA on 24 July 2009, which provides for reporting and monitoring of all electronic communication service licensees and electronic communications network licensees. Penalties to be levied where mobile operators fail to comply.

Regulation of Interception of Communications and Provision of Communication-related Information Amendment Act (No. 48 of 2008) requires mobile operators to register all SIM card users on respective electronic communications networks within 18 months commencing 1 July 2009, to inhibit use of cellular phones for illegal activities. Penalties to be levied where mobile operators fail to register SIM cards within prescribed period.

Satellite Communications.

ICASA has initiated policy establishing license framework for Global Mobile Personal Communications via Satellite, which is intended to provide and enhance telecommunications to areas of low teledensity and to promote universal access. On 26 Mar. 2009, broadcasting licensees invited by Independent Communications Authority of South Africa to apply for individual electronic communications network service licenses for provision of broadcasting services through satellite infrastructure.

3.08 INTEREST:

(Prescribed Rate of Interest Act [No. 55/1975]).

Where debtor fails to pay debt on due date and there has been no agreement regarding interest, creditor is entitled to claim as compensation or damages interest at legal rate currently prescribed at 15.5% per annum from such due date.

Maximum permissible interest rates on moneys owing and on leasing and hire purchase transactions fluctuate from time to time. (National Credit Act [No. 34 of 2005]). There are various Acts controlling sales by instalments and hiring and leasing contracts which are most complicated and require various formalities.

Prescribed Rate of Interest Amendment Act (No. 7 of 1997) amended principal Act to allow creditor to receive interest on unliquidated debt.

3.09 LICENSES, BUSINESS AND PROFESSIONAL:

Licensing of trades and occupations are by ordinances in respective Provinces. License fees are payable in certain cases to Government or local authority.

3.10 MONOPOLIES, RESTRAINT OF TRADE AND COMPETITION:

Competition Act (No. 89 of 1998) aims to promote economic activity within Republic and maintain high levels of competition to promote socio-economic objectives, such as diversification of ownership in favour of members of historically disadvantaged communities. Act prohibits restrictive horizontal practices (collusion between competing firms which prevent or lessen competition); restrictive vertical practices (agreements between firms and their suppliers and/or customers which prevent or lessen competition) and abuse of dominant market position.

Competition Act provides for Competition Commission to investigate, control and evaluate restrictive practices. Act also establishes Competition Tribunal and Competition Appeal Court to adjudicate on these matters.

*Competition Act amended by Competition Amendment Act (No. 1 of 2009) 1 . Introduces personal accountability for individuals which cause firm to engage in cartel conduct. Provides for market enquiry by Competition Commission. Introduces complex monopoly conduct and codifies corporate leniency policy.

There is no legislation corresponding to the Sherman Act of the United States.

Unfair Competition.

Under common law as matter of public policy there are various ways in which wrong can be committed by means of unfair trading. Normally proof of malice would be required. For example, it would be wrong for trader to injure rival trade by utilising information which latter having compiled by his own skill and labour has distributed to former, where former is aware of confidential nature of information. Also remedy would be available to party to contract who complains that third party has intentionally and without lawful justification induced another party to contract to commit breach thereof.

Trade Practices Act (No. 76 of 1976).

This Act has been almost entirely repealed by Consumer Affairs (Unfair Business Practices Act [No. 71 of 1988]) but certain sections, in particular those dealing with false and misleading statements in advertising and promotions, remain in force and have been amended by Trade Practices Amendment Act (No. 26 of 2001). Consumer Affairs (Unfair Business Practices) Act, provides mechanism for regulation of business practices. Consumer Affairs Committee was established by this Act to issue guidelines on current policy in relation to harmful business practices, to hear representations and to make investigations. Committee reports to Minister of Trade and Industry and makes recommendations upon which Minister may make ruling. This ruling may be appealed against. Full time member with legal and business skills is to be appointed to Committee and Committee will not only be responsible for investigating harmful business practises, but will also in cooperation with private sector, develop codes of conduct for consumer relations in wide range of business activities.

*Consumer Protection Act (No. 68 of 2008).

Consumer Protection Act repeals Trade Practices Act and Consumer Affairs (Unfair Business Practices) Act 2 . Consumer Protection Act aims to promote fair, accessible and sustainable marketplace; establish national standards for consumer protection and improved consumer information; prohibit unfair marketing; promote consumer responsibility; provide consistent legislative framework relating to consumer transactions. Establishes National Consumer Commission and provides for various incidental matters.

Takeovers and Mergers.

All mergers exceeding certain assets and turnover thresholds must be notified to Competition Commission in terms of Competition Act. Mergers may be prohibited if they are likely to substantially prevent or lessen competition. The Securities Regulation Code on Take-overs and Mergers eminates from Securities Regulation Panel which was established under provisions of 440B of Companies Act (No. 61 of 1973). Code is based to large extent on City Code on Take-overs and Mergers issued by London Panel on Take-overs and Mergers.

*Companies Act (No. 61 of 1973) repealed by Companies Act (No. 71 of 2008) 3 . Companies Act (No. 71 of 2008) provides for establishment of Take-over Regulation Panel and Take-over Special Committee.

Footnotes for 3.10

1 * Competition Amendment Act assented to on 26 Aug. 2009, will come into operation on date proclaimed by President.

2 * Consumer Protection Act assented to on 24 Apr. 2009, will commence (incrementally) on 24 Apr. 2010.

3 * Companies Act (No. 71 of 2008) assented to on 8 Apr. 2009, will come into operation on date proclaimed by president, but no earlier than 8 Apr. 2010.

3.11 NEGOTIABLE INSTRUMENTS:

See topic 3.01 Bills and Notes.

3.12 RESTRAINT OF TRADE:

See topic 3.09 Monopolies, 3.11 Restraint of Trade and Competition.

3.13 SALES:

Contract of sale is complete when buyer and seller have agreed that there is sale of things sold and price to be paid. However, passing of ownership in thing sold requires both contract and delivery of kind of thing sold in pursuance of contract. Contract of sale alone is not enough to pass ownership. Contract, itself, may expressly provide any desired special conditions regarding sale, e.g., consignment contract or hire purchase contract.

Although ownership does not pass until thing sold is delivered, risk and benefit of thing sold does normally pass to purchaser on completion of contract. This can be varied by express agreement.

Movable property may normally be transferred without any written formality. Where there is contract to transfer ownership of movable property as well as delivery, ownership may pass if parties intend ownership to pass even though purchase price may not have been paid. If there is no contrary intention, ownership passes on delivery if payment has been made if it is cash sale or if credit has been granted. However ownership may be retained by selling on suspensive condition better known as instalment sale transactions. See topic 3.04 Contracts.

Sales of immovable property must be in writing and signed by parties to be of any force and effect. Ownership does not pass until property is registered in name of transferee in Deeds Office. (Deeds Registries Act [No. 47 of 1937]). There are special provisions for sale of land by instalments. (Alienation of Land Act [No. 68 of 1981]).

Warranties, Express and Implied.

Seller must deliver thing sold at proper time and place and take care of it until delivery. Seller is fully responsible for promises seriously made about quantity, quality, suitability and any other attributes of thing sold. Such promises are part of contract and are called “express warranties”. Express warranties, however, must be distinguished from representations which induce contract, but are not part of it. Purchaser is entitled on breach of warranty to be put into position as if warranty had been fulfilled. Purchaser, on breach of representation, is entitled to be put in position as if he had not been induced to contract. Even without express warranty, sale is presumed to be free of latent defects which render thing sold unfit for purpose for which it was bought. Manufacturers and merchants professing special knowledge are presumed to have knowledge of any latent defects and are therefore normally liable for consequential damages as well as other penalties for latent defects. Innocent seller, other than manufacturer and merchant, of article with latent defect is not liable for damages. Breach of express warranty by seller always attracts damages. Rule of implied warranty against latent defects can be rebutted by express agreement that thing is sold as it stands, or “voetstoots” provided seller is innocent. Express warranty or serious representation must be distinguished from mere invitation to buy. Normally buyer takes risk of thing sold. Where, however, there is deliberate misrepresentation or breach of express warranty or concealment of defect amounting to fraud, buyer can cancel sale and claim damages. In case of innocent seller of thing with latent defect, buyer cannot claim damages, but can claim rescission of contract against return of purchase price for serious defect and reduction of purchase price, but no rescission if defect is minor.

Instalment Sale Transactions.

See National Credit Act (No. 34 of 2005), discussed in topic Contracts.

Control.

(Sale and Service Matters Act [No. 25 of 1964]). This Act provides for control of sale of goods and rendering of services and regulates charging of deposits in respect of return of containers of any goods sold, sale of goods by auction, display or marking of prices and marking of goods, issue and retention of invoices and conditional sales. VAT invoices are governed by VAT Act (No. 89 of 1991).

Notices Required.

In terms of Insolvency Act (No. 24 of 1936) §34(1) seller of business or goodwill or any goods or property forming part thereof except in ordinary course of that business or for securing payment of debt, is required to publish notices of sale in certain newspapers circulating in district in which that business is carried on, and in Government Gazette within period of not less than 30 days and not more than 60 days before date of transfer. If seller of business does not publish notices of sale in certain newspapers and in Government Gazette within time period, then sale is void as against his creditors for six months after sale, and void as against trustee of his estate if he is sequestrated within same period.

Applicable Law.

For rules regarding choice of law see topic 3.04 Contracts.

4 CITIZENSHIP

4.01 ALIENS:

See category 16 Immigration, topic 16.01 Aliens.

4.02 IMMIGRATION:

See category 16 Immigration, topic 16.01 Aliens.

5 CIVIL ACTIONS AND PROCEDURE

5.01 ACTIONS:

(Supreme Court Act [No. 59 of 1959]; Magistrates Court Act [No. 32 of 1944]).

Legal proceedings by way of actions for enforcement of rights are usually commenced by way of summons including any rule nisi, notice of motion or petition are commenced by way of applications (motion proceedings) which is issued by court having jurisdiction and is served upon any person or left at house or place of abode or business of any person by sheriff of court, in order that such person may be affected thereby. In matters of urgency such as interdicts, applications to stay sale in execution on grant of sequestration order, spoliation proceedings, etc., redress by way of application to Court on motion may be permitted. Class, representative or public interest actions are not permitted, save for circumstances specified in Constitution (No. 108 of 1996). Applicant has to satisfy Court that it has sufficient interest in subject matter and that alleged infringement of right in Bill of Rights has occurred.

Power of attorney in favour of attorney to act need not be filed in both High Court and Magistrates Court. Power of attorney is required in High Court and Magistrates Court if attorney's authority to act is challenged. Likewise power of attorney is not essential in applications by way of motion but applicant must have proper legal authority. Power of attorney must be properly authenticated. See category 9 Documents and Records, topic Acknowledgments (Authentication); see also category 6 Courts and Legislature, topic 6.01 Courts.

Foreign Claims.

In regard to proof of foreign claims, questions relating to competency of witnesses, methods and sufficiency of proof are matters governed by South African statute and common law, consequently no action is maintainable on foreign claim if proof of such claim is wanting in South African Law. Generally speaking oral evidence is required and statements even if given under oath are not by themselves sufficient proof of any claim. Evidence of nonresident may be obtained on commission or in some other way sanctioned by court. The Law of Evidence Amendment Act (No. 45 of 1988) empowers courts to take judicial notice of law of foreign state and indigenous law and Constitution, 1996 requires courts to take such judicial notice.

Death.

See category 12 Estates and Trusts, topic 12.02 Death.

Limitation of.

See topic 5.06 Limitation of Actions.

5.02 APPEAL AND ERROR:

See category 6 Courts and Legislature, topic 6.01 Courts.

5.03 DEPOSITIONS AND DISCOVERY:

High Court of South Africa will recognize letters of request issued by foreign countries to take evidence within Republic. Letters of request, instead of commissions to take evidence, should be issued in all cases where witnesses to be examined must be compelled to appear.

Letters of request should be addressed by the responsible department of state to the Minister of Justice for South Africa, requesting the recognition of the commission to take evidence and the giving of effect thereto in the Republic of South Africa. It is advisable to designate an advocate as commissioner, with an alternate in case he cannot act. Law of Evidence Amendment Act (No. 45 of 1988) provides that: (i) Lay down general requirements for admissibility of hearsay evidence, (ii) courts take judicial notice of law of foreign states and indigenous law, (iii) communication between spouses during marriage can be admissible in certain circumstances.

See category 9 Documents and Records, topic Acknowledgments (Authentication).

5.04 EVIDENCE:

See topic 5.03 Depositions and Discovery.

5.05 JUDGMENTS:

(Supreme Court Act [No. 59 of 1959]; Magistrates Court Act [No. 32 of 1944]).

Apart from final judgment for plaintiff or defendant, courts may grant judgment known as absolution from instance either at end of plaintiff's case or at end of whole case, especially in cases where dispute turns on plaintiff's testimony against that of defendant, neither side being proved by any documentary or other verbal evidence. This judgment leaves matter open. It is not final and upon payment of defendant's costs, plaintiff is at liberty to issue fresh summons.

Prescription of Judgments.

See topic 5.06 Limitation of Actions.

Foreign Judgments.

Action can be maintained on a foreign judgment but the defendant can plead a want of jurisdiction in the court which rendered the judgment or a defect in procedure or otherwise invalidating the judgment.

5.06 LIMITATION OF ACTIONS:

Consolidating measure Prescription Act (No. 68 of 1969) sets following periods of prescription:

Thirty years: In respect of: (1) Any debt secured by mortgage bond; (2) any judgment debt; (3) any debt in respect of any taxation imposed or levied by or under any law; (4) any debt owed to State in respect of any share of profits, royalties or any similar consideration payable in respect of right to mine minerals or other substances.

Fifteen years: In respect of any debt owed to State and arising out of advance or loan of money or sale or lease of land by State to debtor, unless longer period applies in respect of debt in question as outlined in subhead Thirty Years, above.

Six years: In respect of debt arising from bill of exchange or other negotiable instrument or from notarial contract, unless longer period applied in respect of debt in question as outlined in subheads Thirty Years and Fifteen Years, above.

Three years: In respect of any other (save where Act or other legislation provides otherwise) debt, Act sometimes provides otherwise for specific periods of prescription for claims against government and quasi-government bodies such as South African Railways and South African Police, provincial and local authorities.

When Prescription Begins to Run.

Generally, prescription shall commence to run as soon as debt is due. If, however, debtor willfully prevents creditor from coming to know of existence of debt, prescription shall not commence to run until creditor becomes aware of existence of debt. Furthermore debt shall not be deemed to be due until creditor has knowledge of identity of debtor and of facts from which debt arises (provided that creditor shall be deemed to have such knowledge if he could have acquired it by exercising reasonable care).

Completion of Prescription Delayed in Certain Circumstances.

(1) If (a) creditor is minor or insane or person under curatorship or is prevented by vis major including any law, or any order of court from interrupting running of prescription by service of judicial process (see subhead Judicial Interruption of Prescription) or (b) debtor is outside Republic; or (c) creditor and debtor are married to each other; or (d) creditor and debtor are partners and debt is debt which arose out of partnership relationship; or (e) creditor is juristic person and debtor is member of governing body of such juristic person; or (f) debt is object of dispute subjected to arbitration; or (g) debt is object of claim filed against deceased or insolvent estate of debtor or against company in liquidation or against applicant under Agricultural Credit Act (No. 28 of 1966); or (h) creditor or debtor is deceased and executor of estate in question has not yet been appointed; and (i) in all such cases, if claim in question would have prescribed before or on or within one year after date of which relevant impediment has ceased to exist then period of prescription is extended for year after day on which impediment has ceased to exist. (2) Debt which arises from contract and which would become prescribed before reciprocal debt which arises from same contract becomes prescribed, prescribes at same time as reciprocal debt. (3) Prescription in regard to any obligation or civil legal remedy suspended under Moratorium Act (No. 25 of 1963) shall be suspended for so long as suspension of such obligation or legal remedy lasts and period of such suspension shall not be deemed to form part of period of prescription (Moratorium Amendment [Act No. 27 of 1977]).

Interruption of Prescription by Acknowledgment of Liability.

(1) Running of prescription is interrupted by an express or tacit acknowledgment of liability by debtor. (2) If running of prescription is interrupted as contemplated above prescription

runs de novo from day on which acknowledgment takes place, or if debtor and creditor agree to postpone due date of debt, from date upon which debt again becomes due.

Judicial Interruption of Prescription.

Service of summons, or any judicial process claiming payment of any debt interrupts prescription. However, if creditor does not successfully prosecute his claim, such interruption shall lapse and period of prescription is deemed not to have been interrupted at all (subject to limitation that if debtor acknowledges liability, and as result creditor does not prosecute his claim, prescription runs afresh from date of such acknowledgment).

5.07 PRESCRIPTION:

See topic 5.06 Limitation of Actions.

5.08 REI VINDICATIO:

True owner of property, movable as well as immovable, which has been alienated without his consent, by one who has stolen it, or to whom it has been lent or let or given in deposit, or by any other person not having mandate to sell, may legally claim it from any one who is in possession of it, without making restitution of price paid by possessor. This right of action is known as rei vindicatio.

5.09 SEQUESTRATION:

See category 7 Debtor and Creditor, topic 7.03 Bankruptcy and 7.09 Insolvency.

6 COURTS AND LEGISLATURE

6.01 COURTS:

(Supreme Court Act [No. 59 of 1959]; Magistrates Court Act [No. 32 of 1944]).

Generally speaking, all claims for amounts up to R100,000 and all claims based on liquid documents, such as promissory notes and mortgage bonds, up to amount of R100,000 fall within jurisdiction of and should be instituted in Magistrate's Court. Unless parties consent to Magistrates Court jurisdiction all actions exceeding above in value must be brought in High Court of South Africa which has, generally speaking, unlimited jurisdiction as to amount and subject matter.

National Credit Act, Act 34 of 2005, provides for debt enforcement by means of repossession or judgment and for compensation for credit provider in respect of costs of repossession of property in excess of those permitted by Act. In terms of Act Magistrate's Court may suspend reckless credit agreement, declare and relieve over-indebtedness and rearrange consumer's obligations. Section 172(2) of Act provides that Magistrate's Court has got jurisdiction even if claim exceeds R100,000.

There are provincial divisions of the High Court in Pretoria (North High Court), Cape Town (Western Cape High Court), Pietermaritzburg (KwaZulu Natal High Court), Bloemfontein (Free State High Court), Grahamstown (Eastern Cape High Court) and Kimberley (Northern Cape High Court) and local divisions at Johannesburg (South Gauteng High Court), Durban (KwaZulu Natal High Court) and Port Elizabeth.

Supreme Court of Appeal may overrule all judgments of provincial divisions which do not fall within exclusive jurisdiction of Constitutional Court.

Constitutional Court has jurisdiction in Republic as Court of final instance over all matters relating to interpretation, protection and enforcement of Constitution.

See also category 5 Civil Actions and Procedure, topic 5.01 Actions.

6.02 LAW REPORTS:

See topic 6.04 Reports.

6.03 LEGISLATURE:

See category 1 Introduction, topic 1.02 Government and Legal System.

6.04 REPORTS:

Until end of 1946 decisions of each Provincial Division as well as Appellate Division of High Court were published annually in separate volumes. Since beginning of 1947 however all reports have been amalgamated into one set entitled South African Law Reports. These reports contain selected decisions from all provincial and local divisions as well as Supreme Court of Appeal and each is published in monthly volumes. Since 1990 criminal law decisions are published (though not exclusively) under title South African Criminal Law Reports. Decisions are published in two volumes per year. Since July 1994, Constitutional law decisions are published under title Constitutional Law Reports. Decisions published monthly.

6.05 STATUTES:

South African law is based on common law of England, Roman-Dutch law and statutes. Customary (or Indigenous) Law also applies in certain circumstances.

Prior to the union, each of the four colonies had its own statutes, but since the union some of these have been repealed and replaced by national statutes.

Purely provincial matters are governed by provincial acts and ordinances, and there is tendency to unify laws of nine provinces.

7 DEBTOR AND CREDITOR

7.01 ASSIGNMENTS:

There are no statutory restrictions, and these may be completed in any form that parties agree upon.

Assignments for Benefit of Creditors.

General provision for statutory assignments has been repealed. However under Land and Agricultural Development Bank Act (No. 15 of 2002) farmer may obtain relief from his obligations under special procedure which permits assignment of his assets for benefit of his creditors.

Private Assignments.

A debtor may agree with creditors to release him of any portion of his debts or assign his assets to them upon any terms that he can get them to accept, but no creditor can be bound unless he joins in such arrangement. There are no restrictions upon such private assignments. However, this is subject to Insolvency Act (No. 24 of 1936).

7.02 ATTACHMENT:

(Supreme Court Act [No. 59 of 1959]; Magistrates Court Act [No. 32 of 1944]).

A creditor may, by order of court, attach the goods of his debtor in execution of a judgment. Civil process of provincial or local division against any judgment shall run through Republic and may be served or executed within jurisdiction of any division.

See also topics 7.05 Exemptions; 7.07 Garnishment.

Attachment to Found Jurisdiction.

If a claimant wishes to institute action in South African courts against a foreigner who has assets within Republic, he may obtain leave from courts to attach such assets to found jurisdiction. He is thereupon at liberty to institute proceedings in a South African court. Person of foreigner can be attached by arrest *suspectus de fuga* to found jurisdiction.

7.03 BANKRUPTCY AND INSOLVENCY:

The following forms of sequestration are recognized. (Insolvency Act [No. 24 of 1936]).

(1) **Voluntary Surrender.**—This may be: (a) On application in writing of debtor or his duly authorized agent, setting forth that debtor is insolvent and tendering surrender of his estate for benefit of his creditors; (b) on like application of any person in whom is legally vested administration of estate of deceased debtor (executor) or debtor incapable of administering his estate (*curator bonis*); (c) on like application presented on behalf of partnership estate and made by all partners present or represented in Republic.

Notice of surrender must be published in the Government Gazette and in a newspaper circulating in the district concerned.

(2) **Compulsory Sequestration.**—Debtor may be declared insolvent if it is in interests of creditors and he is in fact insolvent or commits one of following acts: (a) If debtor absents himself with intent by so doing to evade or delay payment of his debts; (b) if, in answer to warrant of execution he renders return to effect that he has not sufficient disposable property to satisfy judgment obtained against him; (c) if he makes any disposition of any of his property which has effect of prejudicing his creditors or of preferring one creditor above another; (d) if he removes any of his property with intent to prejudice his creditors or to prefer one creditor above another; (e) if he makes or offers to make any arrangement with his creditors for releasing him wholly or partially from his debts; (f) if, having published notice of surrender, he omits to lodge his schedules as by law required, or fails to present his application to court on date mentioned in notice of surrender; (g) if he gives notice in writing to any of his creditors that he is unable to pay any of his debts; (h) if, being trader, he publishes notice of sale of any business or of goodwill, book debts, or assets of that business other than sales of stock in ordinary course of his trade and is thereafter unable to pay all his debts.

Compulsory sequestration of estate of a debtor may only be obtained at instance of a creditor who has a liquidated claim of not less than R100 or of creditors whose claims jointly amount to not less than R200.

In terms of amendment effective 1 Jan. 2003 Insolvency Act now requires notice of petition for sequestration to be given to employees of debtor, their registered Trade Unions, South African Revenue Service and debtor.

Proof of Claims.

A creditor who desires to prove a claim in an estate must lodge with the officer presiding at meetings of creditors a detailed statement of account preferably on the creditor's letterhead together with an affidavit in undermentioned form. Where claim is in respect of payment of purchase price of goods sold on open account and delivered to insolvent, proof of such claim must contain statement showing detailed monthly account and brief description of purchases and payments for full period of trading or for period of 12 months immediately before date of sequestration, whichever is lesser. If creditor cannot appear in person he must authorize his agent by means of a duly authenticated power of attorney to appear on his behalf.

Form

Form.

Affidavit for Proof of Claim of

In the Insolvent Estate of

Name in full of Creditor..........

Address in full..........

Total amount of claim R

I, (full name, stating relation of the deponent to the creditor as manager, secretary, general power holder, etc.) declare under oath:

(1) That...... whose estate has been sequestrated, was at the date of sequestration, and still is, indebted to...... in the sum of...... for.......

(2) That the said debt arose in the manner and at the time set forth in the account hereunto annexed.

(3) That no other person besides the said...... is liable (otherwise than as surety) for the said debt or any part thereof.

(4) That I have not/the said...... has not, nor has any other person, to my knowledge on my/his behalf received any security for the said debt or any part thereof, save and except (here insert nature, particulars and value of mortgage, pledge or other security if any).

(Signature of declarant)......

I CERTIFY THAT the deponent has acknowledged that he knows and understands the contents of this Affidavit, which was signed and sworn to before me at...... on the.... day of......, 20.....

....

Commissioner of Oaths.

If a creditor holds security against the assets of the debtor and there is a possibility of the debtor's total assets being insufficient on realization to pay the cost of administering the estate, the creditor so proving should declare that he relies entirely on his security for payment of his claim in order to avoid the possibility of paying into the estate a contribution towards the shortfall on the costs of administration.

“Security” above referred to relates only to property belonging to the insolvent and not guarantees received from third persons. Purchaser of land on instalments from seller who is made bankrupt after sale is protected to some extent in complicated manner by Alienation of Land Act (No. 68 of 1981).

If the assets of the insolvent are insufficient to pay the costs of sequestration all creditors who have proved claims are liable to contribute proportionately to make up the shortfall. Creditors are therefore advised not to prove their claims until they have satisfied themselves that there are sufficient assets to pay a distribution.

A statement of insolvent's affairs must be lodged in duplicate at office of Master of High Court or at local Magistrate's Court, with jurisdiction over insolvent if there is no Masters Office in district where it is available for public inspection.

Sales in execution of property in insolvent estate are prohibited after publication of a notice of surrender, an order of sequestration of insolvent or winding up of a company or appointment of a curator bonis.

Effects of Insolvency.

There are numerous effects of insolvency but main consequence is that all property of insolvent at date of sequestration and all property subsequently acquired by him during sequestration vest in trustee of his estate. During his insolvency insolvent accordingly may not dispose of any of his assets without his trustee's consent. Insolvent suffers disabilities and restrictions but may earn living. During insolvency he must keep accounts and pay to trustee any excess over his living expenses.

Rehabilitation of Insolvent.

Act provides that certain periods of time must elapse before insolvent can apply for his rehabilitation. Periods vary according to degree of severity of insolvency and vary from minimum of six months to five years and rehabilitation is in any event at discretion of court. Insolvent is deemed rehabilitated after ten years, unless interested person has made application, after notice to insolvent, that court orders otherwise.

Liquidation of corporations unable to pay debts, see category 2 Business Organizations, topic 2.03 Corporations, subhead Liquidation.

7.04 EXECUTIONS:

See topics 7.02 Attachment, 7.07 Garnishment.

7.05 EXEMPTIONS:

(§39 of Supreme Court Act [No. 59 of 1959]; §67 of Magistrates Court Act [No. 32 of 1944]).

In respect of any process of execution issued out of any court the following property is protected from seizure and may not be attached or sold: (a) The necessary beds, bedding and wearing apparel of the person against whose property execution is levied and of his family; (b) the necessary furniture and household utensils, not exceeding R2,000 in value; (c) the supply of food and drink in the house sufficient for the needs of such person and of his family during one month; (d) tools and implements of trade, and tools necessarily used in the cultivation of land, not exceeding R2,000 in value; (e) professional books, documents, or instruments, necessarily used by such person in his profession, not exceeding R2,000 in value; (f) such arms and ammunition as person in respect of whose property execution has been issued is required by law, regulation or disciplinary order to have in his possession as part of his equipment.

Pensions and compensation in terms of Compensation for Occupational Injuries and Diseases Act (No.130 of 1993) are exempt from sale in execution and cannot be alienated by the beneficiary.

7.06 FRAUDULENT SALES AND CONVEYANCES:

The Insolvency Act (No. 24 of 1936) renders void all dispositions made with intent to defraud creditors. They may be set aside by court at instance of trustee in insolvent estate only after bankruptcy proceedings. Various principles apply to “voidable preferences”, “undue preferences” and “collusive dealings”.

See also category 3 Business Regulation and Commerce, topic 3.12 Sales.

7.07 GARNISHMENT:

(Supreme Court Act [No. 59 of 1959]; Magistrates Court Act [No. 32 of 1944]).

Provided the debtor is left sufficient for the living expenses of himself and his dependants the courts may normally order the attachment of any debt or wages due to such judgment debtor by any other person within its jurisdiction to satisfy the judgment. In addition the magistrate's courts may similarly attach not only debts due but also debts to become due.

7.08 HOMESTEADS:

Before any private land is proclaimed as public digging, there shall be reserved to owner free and uninterrupted use of any homestead on land to be so dealt with.

Except as aforesaid, no special rules apply to protect homesteads, even in respect to creditors' claims or domestic rights.

7.09 INSOLVENCY:

See topic 7.03 Bankruptcy and 7.09 Insolvency.

7.10 LIENS:

Under common law, a lien is afforded to persons who are under obligation to render services to public or who expend money or moneys worth (such as labour) on improvement of another's property. Possession is essential requisite to retain effective lien and once possession is given up lien is destroyed and subsequent possession will not restore it.

A landlord has a special lien for unpaid rent on the tenant's goods, and also on a third person's goods brought on to the premises for use of the tenant excluding goods hypothecated in terms of Security by Means of Movable Property Act (No. 57 of 1993). Notice to landlord of ownership in third person defeats landlord's lien for rent accruing thereafter.

Carriers, hotelkeepers, boarding-house keepers, clearing agents, artificers and builders are amongst the class of persons who enjoy liens.

7.11 PLEDGES:

Practically the only effective pledge of movables is by an agreement of pledge either verbal or in writing accompanied by delivery of the movables to the creditor and by retention of same by him. Corporeal and incorporeal property may be pledged. In terms of Securities Services Act (No. 36 of 2004), dematerialized listed shares may be pledged. See also category 19 Mortgages, topic 19.01 Chattel Mortgages.

7.12 USURY:

See category 3 Business Regulation and Commerce, topics 3.07 Interest, 3.04 Contracts.

8 DISPUTE RESOLUTION

8.01 ALTERNATIVE DISPUTE RESOLUTION:

Mandatory Dispute Resolution.

§6 of Arbitration Act (No. 42 of 1965) provides that where there is agreement (in writing) between two or more parties that any dispute between them shall be referred to arbitration and one of parties initiates legal proceedings against another in respect of dispute, defendant in matter may apply to court for stay of proceedings provided he does so after having given notice of his intention to defend action, but before delivering any pleading or taking any other steps in proceedings, and if court is satisfied that there is no reason why dispute should not be referred to arbitration, court may make order staying such proceedings subject to such terms and conditions as it may consider just.

There are many references to arbitration, mediation and conciliation under various Acts of Parliament under following headings: Agriculture, Fisheries, Forests & Water (12); Commercial Law (30); Constitutional Law (14); Education (8); Energy and Mining (10); Health and Welfare (6); Labour Law (379); Procedure (248); Property—Immovable (40); Trade and Industry (57); Transport (29).

Voluntary Dispute Resolution.

Various methods of voluntary dispute resolution include, amongst others, arbitration; commissions of enquiry; conciliation; facilitation; fact-finding; hybrid forms of dispute resolution; informal discussion and problem-solving; litigation; mediation; mini-trial; negotiation and relationship-building initiatives.

Dispute Resolution Bodies.

The Association of Arbitrators (Southern Africa); Arbitration Foundation of Southern Africa (“AFSA”); Family Institute; Independent Mediation Service of South Africa (“IMSSA”); SA Association of Mediators; Commission for Conciliation, Mediation & Arbitration (“CCMA”); African Centre for the Constructive Resolution of Disputes (“ACCORD”).

See also topic 8.02 Arbitration and Award.

8.02 ARBITRATION AND AWARD:

Any matter in dispute between parties may by agreement be made the subject of arbitration except matters relating to personal status, matrimonial affairs, or to persons under a legal disability, or matters which are criminal or contrary to public policy. The form of arbitration may be decided upon by the parties otherwise the procedure laid down by legislation applies. The courts will enforce an arbitrator's award if satisfied that the arbitration was duly and fairly held.

Arbitration generally is governed by Act (No. 42 of 1965) but parties may otherwise agree so as to exclude operation of Act in whole or in part.

Certain arbitrations are compulsory by statute for example in expropriation disputes. With regard to matrimonial disputes, it is possible to have mediator mediate in terms of Mediation in Certain Divorce Matters Act (No. 24 of 1987).

9 DOCUMENTS AND RECORDS

9.01 ACKNOWLEDGMENTS (AUTHENTICATION):

(Rule 63 of Rules promulgated in terms of Supreme Court Act [No. 59 of 1959]).

(1) “Document” means any deed, contract, power of attorney, affidavit or other writing, but does not include affidavit or solemn or attested declaration purporting to have been made before officer prescribed by §8 of Justices of the Peace and Commissioner of Oaths Act (No. 16 of 1963). “Authentication” means, when applied to document, verification of any signature thereon.

(2) Any document executed in any place outside Republic is deemed sufficiently authenticated for purpose of use in Republic if it is duly authenticated at foreign place by signature and seal of office—(a) of head of South African diplomatic or consular mission or person in administrative or professional division of public service serving at South African diplomatic, consular or trade office abroad; or (b) consul-general, consul, vice-consul or consular agent of U.K. or any other person acting in any of aforementioned capacities or pro-consul of U.K.; or (c) of any government authority of such foreign place charged with authentication of documents under law of that foreign country; or (d) of any person in such foreign place who shall be shown by certificate of any person referred to in paragraph (a), (b) or (c) or of any diplomatic or consular officer of such foreign country in Republic to be duly authorised to authenticate such documents under law of that foreign country; or (e) of notary public in U.K. of Gt. Brit. and No. Ireland or in Zimbabwe, Lesotho, Botswana or Swaziland; or (f) of commissioned officer of South African Defence Force as defined in Section One of Defence Act (No. 44 of 1957) in case of document executed by any person on active service.

(3) If any person authenticating document in terms of (2) has no seal of office, he shall certify thereon under his signature to that effect.

(4) Notwithstanding anything in this rule contained, any court of law or public office may accept as sufficiently authenticated any document which is shown to satisfaction of such court or officer in charge of such public office, to have been actually signed by person purporting to have signed such document.

(5) No power of attorney, executed in Lesotho, Botswana, or Swaziland, and intended as authority to any person to take, defend or intervene in any legal proceedings in Magistrate's Court within Republic, shall require authentication: provided that any such power of attorney shall appear to have been duly signed and signature to have been attested by two competent witnesses.

9.02 AFFIDAVITS:

Procedure and formalities are similar as in England. (See England Law Digest.)

Affidavit should be headed:

Form

Case No............

In the High Court of South Africa,

(...... Division).

In re:

James Brown, Applicant, and John Smith, Respondent. Affidavit should begin: I, Jack Roe, do hereby make oath and say: —.......... Affidavit should end: ....

Deponent's signature.

I CERTIFY THAT the deponent has acknowledged that he knows and understands the contents of this Affidavit, which was signed and sworn to before me at...... on the.... day of......, 20...

..........Commissioner of Oaths.

Commissioner of Oaths must furnish his full names, business address, designation and area for which he holds appointment or office held if appointment held ex officio, below his signature wherever he certifies.

9.03 COMMISSIONS TO TAKE TESTIMONY:

See category 5 Civil Actions and Procedure, topic 5.03 Depositions and Discovery.

9.04 NOTARIES PUBLIC:

Duties of notary public usually form adjunct to work of attorney, and no one can become notary public in South Africa unless he has qualified and is admitted as attorney.

The notary's work merely includes noting bills of exchange, authenticating documents and attesting certain deeds which must be executed before a notary, such as antenuptial contracts, leases of more than ten years' duration, etc.

9.05 RECORDS:

See category 20 Property, topic 20.03 Deeds.

9.06 SEALS:

Only public authorities, corporations which in terms of their articles of association require use of seal and notaries public carry seals and are supposed to affix them to their signatures. The use of a seal by a private person or corporation has no meaning in the legal sense.

10 EMPLOYMENT

10.01 LABOUR RELATIONS:

There is legislation governing labour relations, workmen's compensation, unemployment insurance, basic conditions of employment, skills development, employment equity, and occupational health and safety.

Principal labour relations legislation is Labour Relations Act (No. 66 of 1995) which came into force on 11 Nov. 1996. Act gives effect to fundamental labour relations rights of Constitution. Act has wider ambit than predecessor and applies to all workers except those in National Defence Force, National Intelligence Agency, South African Secret Services and South African National Academy of Intelligence and Electronic Communications Security (Pty) Ltd (Comsec).

Act fosters collective bargaining without placing legal obligation on employers to bargain. Trade unions provided with organisational rights. Various bargaining forums established. Uppermost forum, constituted in terms of own legislation, is National Economic Development and Labour Council (“NEDLAC”). NEDLAC has representation from State, organised business, organised labour and civil society and responsibility to formulate co-ordinated policy on social and economic policy. Key bargaining forums constituted under Act are various sectoral bargaining councils, formed with agreement between registered unions and registered employer organisations in respective economic sectors. Bargaining councils entrusted with negotiating collective agreements, dealing with dispute resolution, promoting and establishment of training and education schemes; development of proposals for submission to NEDLAC on policy and legislation and provides industrial support services. Second forum constituted under Act, Statutory Council, generally less powers and functions than Bargaining Council. Third, Workplace Forum, allows for consultation between management and labour. Workplace Forums compliment other more adversarial forums.

Act recognises right to strike and lock-out and protects actions taken procedurally. Act recognises picketing and secondary strikes.

Act systematises law regarding unfair dismissal. Four types of unfair dismissal contemplated: automatically unfair dismissals, dismissals for misconduct, incapacity or operational requirements of business.

Dispute resolution mechanisms are altered considerably under Act. Conciliation and arbitration principal mechanisms. Statutory body, Commission for Conciliation, Mediation and Arbitration is key conflict resolution body and may make certain final awards including damages. Labour Court and its own Appeal Court separated from ordinary judiciary. Labour Court grants relief including urgent interim relief, interdicts and damages. Important functions of Court include it being first avenue of relief in certain classes of unfair dismissal, adjudicating disputes relating to freedom of association and reviewing arbitration rewards.

Basic Conditions of Employment Act (No. 75 of 1997) regulates minimum leave periods, working hours, maternity leave, family responsibility leave, sick leave, overtime, termination of employment, remuneration, employment of children and enforcement of its provisions. Employment Equity Act (No. 55 of 1998) provides measures of enforced affirmative action in workplace.

Employment Equity Act (No. 55 of 1998) ensures comprehensive anti-discriminatory legislation and establishes practical framework to redress past discrimination in work place.

Skills Development Act (No. 97 of 1998) provides institutional framework to devise and implement overall strategies to develop and improve skills of national work force.

11 ENVIRONMENT

11.01 ENVIRONMENTAL REGULATION:

There has been recent shift towards consolidating various fragmented pieces of environmental legislation. This began with enactment of National Environmental Management Act and has continued with promulgation of National Environment Management: Biodiversity Act; National Environment Management; Protected Areas Act; National Environment Management: Air Quality Act, National Environment Management: Coastal Management Act and National Environment Management: Waste Act, all of which seek to establish integrated approach to their specific area of environmental law. In addition, enforcement is being consolidated into fewer government departments with Departments of Water and Environmental Affairs having primary responsibility for environment.

Environmental rights were accorded fundamental rights status in interim Constitution Act (No. 200 of 1993) section 29: “every person shall have the right to an environment which is not detrimental to his/her health or well-being.”

Constitution of the Republic of South Africa, 1996 details scope of such rights—section 24 “Everyone has right (a) to an environment that is not harmful to their health or well being, and (b) to have the environment protected, for the benefit of present and future generations, through reasonable legislative and other measures that—(i) prevent pollution and ecological degradation; (ii) promote conservation; and (iii) secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development.”

Environment Conservation Act (No. 73 of 1989).

Though largely repealed or superseded, various regulations, including noise vibration and shock, are still in force. In addition, powers allowing competent authorities, including municipalities, to issue remediation directives, are still in force.

National Environmental Management Act (No. 107 of 1998).

Represents movement towards promotion of cooperative governance between three spheres of government and aims to reduce fragmented nature of environmental law in South Africa. Makes every government department and institution accountable for consequences that activities within its field of responsibility may have on environment. Detailed environmental impact assessment procedure must be followed in order to obtain environmental authorizations for number of listed activities. General overarching duty of care not to pollute environment is established for which liability is largely strict and retrospective in terms of National Environmental Laws Amendment Act (No. 14 of 2009).

Act grants environmental management inspectors various powers of enforcement in respect of this Act and other specific environmental management acts, including powers of search and seizure. Heavy penalties for non-compliance.

Pollution.

No system of integrated pollution control. National Environmental Management Act (No. 107 of 1998) creates overarching duty of care to prevent and minimize pollution of all aspects of environment. Waste, water, marine, and air pollution are governed by legislation referred to below.

National Environmental Management: Waste Act (No. 59 of 2008).

Regulates waste management and controls waste pollution. Imposes duties on holders of waste. Waste management licenses required for wide range of listed waste management activities relating to storage, reuse, recycling, recovery, treatment, disposal of general and hazardous waste. Transitional provisions allow for conversion of waste disposal permits issued in terms of (now repealed) section 20 of Environment Conservation Act (No. 73 of 1989). Certain industries required to submit detailed industry waste management plans. Contaminated land provisions (not yet in force) will impose strict, retrospective liability upon owners of contaminated land or persons who undertook high risk activities on contaminated land. Heavy penalties for non-compliance.

National Water Act (No. 36 of 1998)

Controls pollution of water resources, regulates water use (which is widely defined), dams, water use charges, protection of water resources, and licenses to use water, also provides for equitable access to water where past discriminatory policies have had effect. Creates duty of care not to pollute water resources. Marine pollution is controlled in terms of The Dumping at Sea Control Act (No. 73 of 1980); Marine Pollution (Control and Civil Liability) Act (No. 6 of 1981); Marine Pollution (Prevention of Pollution from Ships) Act (No. 2 of 1986); and Marine Pollution (Intervention) Act (No. 64 of 1987) and National Environmental Management: Integrated Coastal Management Act (No. 24 of 2008) discussed below.

Atmospheric Pollution Prevention Act (No. 45 of 1965).

Regulates emission of noxious and offensive gases, smoke, dust, and air pollution by vehicles. Prohibits certain processes without registration certificate.

National Environment Management: Air Quality Act (No. 39 of 2004).

Provides for prevention of pollution and ecological degradation and for ecological sustainable development while promoting justifiable economic and social development; provides for national norms and standards regulating air quality monitoring, management and control. It will replace system of registration certificates under Atmospheric Pollution Prevention Act (No. 39 of 2004) with system of atmospheric emission licenses. Various sections of Air Quality Act including those relating to atmospheric emission licenses have not yet come into force.

Minerals and Petroleum Resource Development Act (No. 28 of 2002).

Came into effect on 1 May and replaced Minerals Act (No. 50 of 1991). Act regulates prospecting for, processing and utilization of minerals and rehabilitation of surface of land during and after mining operations, but places greater emphasis on revenue, socio-economic development, equity in terms of Constitution of Republic of South Africa, 1996.

Hazardous Substances Act (No. 15 of 1973).

Provides for control of toxic, corrosive and flammable substances which may cause injury or ill health to or death of human beings (for example radioactive material outside nuclear installation); provides for division of such substances into groups in relation to degree of danger. Provides for prohibition and control of import, manufacture, sale, use, disposal, or dumping of such substances and products.

National Nuclear Regulator Act (No. 47 of 1999).

Established National Nuclear Regulator which regulates nuclear activities. It is responsible for issuing nuclear installation licenses to operators of nuclear installations.

Nuclear Energy Act (No. 46 of 1999).

Provides for establishment of South African Nuclear Energy Corporation Limited. Act prescribes measures regarding discarding of radioactive waste, and, inter alia, storage of irradiated nuclear fuel.

National Radioactive Waste Disposal Institute Act (No. 53 of 2008).

Date for commencement not yet set. Establishes National Radioactive Waste Disposal Institute which will manage radioactive waste nationally. Act applies to all radioactive waste in South Africa destined to be disposed of as waste material in authorised waste disposal facilities.

National Environmental Management: Protected Areas Act (No. 57 of 2003).

Appoints government as trustee of South Africa's protected areas. Creates eight kinds of protected areas, including landscapes and seascapes, mountain catchment areas, forests and world heritage sites, with differing levels of protection and restrictions on use of natural resources within them. National Environmental Management: Protected Areas Amendment Act (No. 31 of 2004) was enacted to provide for establishment and management of national parks and marine protected areas.

National Environmental Management: Biodiversity Act (No. 10 of 2004)

Government is appointed as trustee of South Africa's biodiversity and Act provides mechanisms for management and conservation of country's biodiversity; protection of threatened species and ecosystems; control of alien and invasive species; sustainable use of indigenous biological resources; fair and equitable sharing of benefits derived from bioprospecting; and establishment of South African Biodiversity Institute.

National Environmental Management: Integrated Coastal Management Act (No. 24 of 2008).

Date for commencement not yet set. Establishes system of integrated coastal and estuarine management. Aims include conservation of coastal environment. Ownership of coastal public property vests in citizens of South Africa and held in trust by State on their behalf. Imposes duty to avoid causing adverse effects on coastal environment. Procedure available for award of leases on coastal public property. Governs coastal and marine pollution control including discharge of effluent into coastal waters.

Marine Living Resources Act (No. 18 of 1998).

Provides for conservation of marine ecosystems and orderly exploitation, utilization of certain marine resources, and control of sea fishing. Marine Living Resources Amendment Act (No. 68 of 2000) has amended Marine Living Resources Act (No. 18 of 1998) so as to permit extension of certain rights to undertake commercial or subsistence fishing, engage in mariculture or operate fish-processing establishment; and to provide for matters connected therewith.

Conservation of Agricultural Resources Act (No. 43 of 1983).

Provides for control of over utilisation of natural agricultural resources of Republic to promote conservation of soil, water sources and vegetation, combating of weeds and invader plants.

Tourism Amendment Act (No. 105 of 1996).

Provides for amendment of Tourism Act (No. 72 of 1993) to include in objects of Tourism Board sustainability of environmental resources.

National Heritage Resources Act (No. 25 of 1999).

Provides for integrated system of management of national heritage resources and lays down principles governing national heritage resources management and heritage impact assessment process.

World Heritage Convention Act (No. 49 of 1999).

Incorporates World Heritage Convention into South African Law to provide for enforcement and implementation of it.

National Veld and Forest Fires Act (No. 101 of 1998).

Provides for methods and practices to prevent and combat veld, forest and mountain fires.

Enforcement.

Almost all environmental statutes endow administrative officials and bodies with power to enforce their provisions through investigations, issuing directives and imposing sanctions and remedies for violations.

12 ESTATES AND TRUSTS

12.01 ADMINISTRATION:

See topic 12.05 Executors and Administrators.

12.02 DEATH:

(Births and Deaths Registration Act [No. 51 of 1992]).

The fact of death must be proved, and where there is no doubt, for example if the dead body has been identified, a death is registered with the Registrar of Deaths. Where the fact of death is not beyond doubt, for example in the case of a missing person, any interested party may apply to the High Court for order presuming death for special purpose such as administering of estate. Court acts in its discretion and may require security to be filed. There is no recognized period of absence giving rise to automatic presumption of death. Similarly Court may grant leave to one surviving spouse to remarry in justifiable circumstances.

Official death certificate may be obtained from Department of Home Affairs, corner Maggs and Petroleum Street, Watloo, Pretoria.

Survivorship.

In case of death of two or more persons about the same time in a common catastrophe or any like circumstance there is no presumption on account of age or sex that one died before the other.

Actions for Death.

Where a person is killed by intentional wrongdoing or through negligence his estate has no claim for damages. Each of his dependants such as wife, child or parent, however, has claim for compensation for pecuniary loss suffered as a result of such death. Amount of damages apportioned in accordance with extent to which deceased's negligence contributed to death. (Apportionment of Damages Act [No. 34 of 1956]). Such loss is usually calculated on basis of annuity and on loss of support and maintenance. Ordinary laws regarding limitation of actions apply (see topic Limitation of Actions). There is also no special limit to amount claimable. Delictual responsibility must not be confused with obligation to indemnify dependants of workman under Compensation for Occupational Injuries and Diseases Act (No. 130 of 1993) where amount of indemnity is fixed but is due and owing independently of any fault or negligence on part of employer. Where person has committed wrong intentionally or negligently which in turn causes pecuniary loss, claim against his estate will lie to extent of such pecuniary loss. In case of contract, death of one party to contract normally does not discharge contract unless contract was personal to deceased, e.g., servant.

12.03 DECEDENTS' ESTATES:

See topics 12.04 Descent and Distribution, 12.05 Executors and Administrators, 12.08 Wills.

12.04 DESCENT AND DISTRIBUTION:

Marriage under the common law, without antenuptial contract, entitles surviving spouse to one-half of joint estate by reason of community of property which such marriage entails. See category 13 Family, topic 13.05 Husband and Wife.

By Intestate Succession Act (No. 81 of 1987) surviving spouse inherits if no descendants, descendants inherit if no surviving spouse. If there is surviving spouse and descendants, spouse takes greater of child's share or R125,000. In absence of spouse or descendants, estate is divided between relatives in ascendant and collateral lines according to formula too complicated to outline herein.

Definition of ``spouse'' includes husband and wife married according to civil marriage, as well as partner to civil union, and polygamous Muslim marriage; and is subject of constant constitutional interpretation and development.

12.05 EXECUTORS AND ADMINISTRATORS:

(Administration of Estates Act [No. 66 of 1965]; Supreme Court Act [No. 59 of 1959]).

There are two classes of executors, namely, executors testamentary (appointed by will) and executors dative (appointed by High Court).

They have full power to administer and wind up deceased estates under the supervision of High Court. Security for due administration must normally be given, and certain formalities must be complied with, such as publication of notice in Government Gazette and local newspaper, etc. It is duty of executors to file with High Court death notice and inventory. Upon completion of liquidation they must render liquidation and distribution account.

All funds accruing to minors must be deposited in the Guardian's Fund of the High Court until minor reaches majority (now 18 years of age [previously 21 years until promulgation of Children's Act (No. 38 of 2005)] or marriage), unless will provides otherwise.

In South Africa “administrator” to some extent corresponds to the English trustee.

Foreign executors wishing to administer assets within the Republic must have their letters of administration sealed by High Court of South Africa in order to become officially recognized and to enable them to realize South African assets.

Before foreign letters of administration will be recognized an executor is required to produce: (a) Official death certificate; (b) officially certified copy of letters of administration; (c) death notice giving particulars of the deceased as to age, parentage, marriage status, children, etc.; (d) inventory of South African assets; (e) power of attorney by foreign executor authorizing the Republic mandatory to apply for letters of administration in the latter's name; (f) certified copy of the will. Documents mentioned in (a), (b), (e) and (f) must be duly authenticated in terms of the Republic rules for authentication of documents. The Trust Property Control Act (No. 57 of 1988) further regulates control of trust property. See category 9 Documents and Records, topic Acknowledgments (Authentication).

12.06 INTESTACY:

See topic 12.04 Descent and Distribution.

12.07 TRUSTS:

A trust may be created by last will or act inter vivos. Trusts are frequently entered into by persons during their lifetime so as to confer benefits through trustees on third persons. The Trust Property Control Act (No. 57 of 1988) regulates administration of trusts and prescribes certain formalities in respect of trusts.

12.08 WILLS:

(Wills Act [No. 7 of 1953], Administration of Estates Act [No. 66 of 1965]).

The only essential requirements are that every page of the will must be signed by the testator. This must be done in presence of two competent witnesses who need only sign at end of will. “Sign” includes initialing and, only as regards testator, making of mark. Witness to will, person signing on behalf of testator, and person writing out will may be declared competent by Court to receive benefit from will.

Every testator has the right to add one or more codicils to his will which require the same formalities as the will itself.

Under Law of Succession Amendment Act (No. 43 of 1992) court is given powers to declare wills not executed in accordance with formalities valid if it is satisfied that document was executed or drafted by deceased, and document was intended to be deceased's will.

In event of death of testator, it is the duty of person discovering will to lodge it forthwith with Master of High Court. The Trust Property Control Act (No. 57 of 1988) further regulates control of trust property.

13 FAMILY

13.01 ABORTION:

Abortion is now available in South Africa upon request, up to 12 weeks of gestation, in terms of Choice on Termination of Pregnancy Act (No. 92 of 1996) which came into effect on 1 Feb. 1997. Abortions after 12th week allowed on health grounds where pregnancy is result of rape/incest or where continued pregnancy would affect social/economic circumstances of woman. After 20 weeks abortions only allowed if severe risks to mother or fetus exists. The Constitutional Court held that Choice on Termination of Pregnancy Act is inconsistent with Constitution of Republic of South Africa, 1996, and thus invalid. Order of invalidity has been suspended for 18 months (as from 17 Aug. 2006) to enable Parliament to re-enact Act in manner consistent with Constitution. Certain amendments were made to Act which took effect on 18 Feb. 2008.

13.02 ADOPTION:

Governed by Child Care Act (No. 74 of 1983). Adoptions are dealt with on personal basis by Adoptions Magistrate. Act is well and sympathetically administered and great care is taken to see that all formalities and secrecy (where desired) are observed and that adoption is in best interests of child. Adoption of illegitimate children by their natural fathers and natural mother's right to unilaterally consent to adoption of illegitimate child, is currently under scrutiny in light of Constitution. As result, Child Care Act has now been amended by Adoption Matters Amendment Act (No. 56 of 1998) to require consent of both parents of illegitimate child, provided father has acknowledged paternity and made identity and whereabouts known. The Child Care Act makes provision for possible access to and custody and guardianship of children born out of wedlock by natural father. If only one parent has given consent to adoption, Child Care Act provides for notice to be served on other parent, affording him/her opportunity to give or withhold consent, advance reasons why his/her consent should not be dispensed with in case of natural father of child born out of wedlock, to apply for adoption of his child.

13.03 COMMUNITY PROPERTY:

See topic 13.05 Husband and Wife.

13.04 DIVORCE:

(Divorce Act [No. 70 of 1979]).

Only grounds for divorce are: (1) Irretrievable breakdown of marriage which may be proved in various ways, (2) mental illness, and (3) continuous unconsciousness.

Court shall have jurisdiction in divorce action if both or either of parties to action or application: (1)(a) are domiciled in area of jurisdiction of court on date on which action is instituted or (1)(b) ordinarily resident in area of jurisdiction of that court on date on which action is instituted and has been ordinarily resident in Republic for period of one year immediately prior to said date; (2) court which has jurisdiction in terms of subsection (1) shall also have jurisdiction in respect of claim in reconvention or counter-application in divorce action concerned; (3) court which has jurisdiction in terms of this section in case where parties are not domiciled in Republic must determine any issue in accordance with law which would have been applicable had parties been domiciled in area of jurisdiction of court concerned on date on which divorce action was instituted; (4) provisions of Act shall not derogate from jurisdiction which court has in terms of any other law or common law.

On dissolution of marriage court may order forfeiture of patrimonial benefits having regard to duration, reasons for breakdown and misconduct of either party. (See topic 13.05 Husband and Wife.) Court may in its discretion order either party to pay maintenance to other. Factors taken into consideration are, inter alia, age of parties, earning capabilities and financial circumstances.

Court will not grant degree of divorce before it is satisfied that provision for welfare of children is made. Court has power to order either or both spouses to pay maintenance for children after dissolution of marriage. The Mediation in Certain Divorce Matters Act (No. 24 of 1987) provides that reports and recommendations may be made by family advocate in divorces where minor or dependent children are involved, aim being to safeguard interests of such children.

There are no restrictions on the right of divorced persons to remarrying each other or third persons.

13.05 HUSBAND AND WIFE:

Matrimonial Property Act (No. 88 of 1984) became effective Nov. 1, 1984. Prior to introduction of Act there were two matrimonial property regimes, namely marriage in community of property with consequences that assets of both husband and wife fell into joint estate with husband having administrative control and marriage out of community of property with antenuptial contract.

Act has abolished marital power in all marriages with consequences that in case of marriage in community of property both husband and wife have equal rights regarding administration of joint estate, but in certain instances spouse will require written consent of other spouse in executing certain contracts and transactions. Spouses who marry out of community of property and with antenuptial contract are now subject to accrual regime unless that regime is excluded, although regime itself can be modified.

Effect of accrual is, save for assets specifically excluded, that spouse whose estate shows no accrual or lesser accrual than estate of other spouse during marriage has claim against other spouse for one-half difference between accruals of respective estates. Act provides mechanism for spouses, irrespective of when married, to alter their matrimonial property regime by jointly applying to High Court. Such mechanism may be used by spouses married without accrual system to introduce system to their matrimonial property regime.

13.06 INFANCY AND MINORITY:

Infant is person under age of seven years. According to Children's Act, effective from 19 June 2006, minor is person under age of 18 years (previously 21 years of age prior to Children's Act). Minors are under certain legal disabilities, for example, they cannot enter into any contract or incur any liability without consent or assistance of their parents or guardians. (See topic 13.08 Marriage; category 3 Business Regulation and Commerce, topic 3.04 Contracts.) Infant is irrebuttably presumed to be incapable of any wrongful act. Rebuttable presumption applies to minors between seven and 14 years. In addition, subject to marriage laws of South Africa, on marriage minor attains majority for all purposes and therefore has full legal capacity. (See topic 13.05 Husband and Wife.)

Note: In respect of granting visitation rights of grandparents to minor children, our courts have shown reluctance to interfere with parental authority, save for exceptional circumstances.

13.07 MAINTENANCE:

Spouse can obtain maintenance during and after marriage. Maintenance order can be granted in High Court and in Maintenance Court (regulated by Magistrate's Court Act). Children, whether legitimate or illegitimate, have maintenance claim against both parents until no longer dependent.

South Africa has entered into various reciprocal enforcement of maintenance agreements regulating execution of foreign maintenance orders in South Africa and vice versa. Any person who fails to make payment in terms of any maintenance order is guilty of offence. (Maintenance Act [No. 99 of 1998]). Act recognises maintenance order for maintenance of child as being directed at enforcement of common law duty of child's parents to support that child. Duty to support is widely defined.

13.08 MARRIAGE:

Parties must validly consent to marry and if under age of 18, consent of both parents, if living, or guardian, or Commissioner of Child Welfare, if no parents or guardian, or if Commissioner refuses, consent of High Court is required. Marriage of minor performed without consent, provided it is not prohibited, is valid until set aside by parents who can do so before minor attains majority or within six weeks of date on which parent or guardian became aware of existence of marriage, or minor himself/herself before minor attains majority or within three months thereafter. Boys under age of 18 and girls under age of 15 may not marry without consent of Minister of Home Affairs.

In case of marriage of a previously divorced person, a certified copy of order of court granting divorce must be produced. Constitutional court ruled that prohibition of same-sex marriages was unfairly discriminatory to homosexual people and granted legislature 12 months (from Dec. 2005) within which to amend relevant legislation accordingly. Civil Union Act of 2006 then came into effect. In terms of this Act, civil union is defined as voluntary union of two persons who are both 18 years of age or older, which is solemnized and registered by way of either marriage or civil partnership, in accordance with procedures prescribed in this Act, to exclusion, while it lasts, of all others. Civil unions have same proprietary and legal consequences as marriage. Further, civil union may only be registered by prospective civil union partners who would, apart from fact that they are of same sex, not be prohibited by law from concluding marriage under Marriage Act or Customary Marriages Act.

The Recognition of Customary Marriages Act (No. 120 of 1998) came into operation on 15 Nov. 2000. Act specifies requirements for valid marriage and its registration. Act provides for equal status and capacity of spouses. Customary marriages entered into after commencement of Act are automatically in community of property if there is no antenuptial contract. Customary law governs customary marriages entered into before commencement of Act.

Prohibited Marriages.

Marriage is prohibited for: (a) Boys under the age of 18 and/or girls under the age of 15 unless with the permission of the Minister of Home Affairs; (b) mentally defective persons; (c) persons already married; (d) widowers or widows, unless they exhibit proof that portions left to minor children by deceased spouse have been suitably secured; (e) persons related within prohibited degrees of consanguinity or affinity or by virtue of adoption.

13.09 MARRIED WOMEN:

Marital power abolished in all marriages by Matrimonial Property Act (No. 88 of 1994). See topic 13.05 Husband and Wife.

See also category 20 Property, topic 20.04 Dower.

14 FOREIGN TRADE AND COMMERCE

14.01 CUSTOMS DUTIES:

Customs duties are levied on certain imported goods. Different rates apply to various categories of goods. (See Customs and Excise Act [No. 91 of 1964] i.e. of Schedule 1 thereto.) Duties on imported goods range from 0% to 30%. Depending on nature of goods, excise duty will also become payable in addition to customs duty. Petroleum products are also subject to additional levy.

Trade agreements allowing for more favourable tariff between the parties exist between Republic, Southern African Development Community (``SADC'') member state European Union and European Free Trade Association, provided certain requirements are met. In addition there is Southern Africa Customs Unions (``SACU'') Agreements between Republic of South Africa, Botswana, Lesotho, Swaziland and Namibia in terms of which, broadly speaking, members use Republic's tariff as common external tariff and goods are traded free of duty.

Republic joined SADC in Aug. 1994. Member countries are Angola, Botswana, Democratic Republic of Congo, Lesotho, Malawi, Mauritius, Mozambique, Namibia, Seychelles, Swaziland, Tanzania, Zambia, and Zimbabwe, SADC's objectives are that member countries work to reconstruct and develop entire social and economic framework of the region and preferential traffic regime exists amongst members. Republic is also member of General Agreement on Tariffs and Trade (``G.A.T.T.'') and World Trade Organisation (``WTO''). By virtue of Republic's membership of G.A.T.T. and WTO and in terms of Uruguay Round of Multilateral Trade Negotiations, tariffs on agricultural products have been compiled. For more detailed information it is suggested that one consult International Trade Administration Commission of South Africa. Being signing member of G.A.T.T. and on strength of Trade Negotiations import duties and controls will gradually be phased out. For more detailed information, it is suggested that one consult International Trade Administration Commission of South Africa.

See also category 21 Taxation, topic Taxes.

14.02 EXCHANGE CONTROL:

See topic 14.03 Foreign Exchange, Foreign Trade and Investment; category 1 Introduction, topic 1.01 Currency.

14.03 FOREIGN EXCHANGE, FOREIGN TRADE AND INVESTMENT:

Finance.

Fairly strict exchange controls have existed in Republic since 1961, promulgated as Exchange Control Regulations, 1961 in terms of Currency and Exchanges Act (No. 9 of 1933). Exchange Control Departments of South African Reserve Bank, acting as agent for Treasury, together with commercial banks as authorised dealers, control all foreign currency transactions. Dual-currency system whereby foreign companies and individuals had to invest in Republic through unit known as Financial Rand, was abolished on 13 Mar. 1995.

Government is committed to phasing out controls and all remaining exchange controls will be dismantled as soon as circumstances are favourable. As from 1 July 1997, there has been substantial relaxation of exchange controls for South African residents. South Africans are now allowed to invest limited amount of capital abroad and fixed property in SADC countries.

Limit on offshore investment by individuals is R4,000,000 per person. Duly completed tax clearance certificate from South African Revenue Services is required to be submitted to bank prior to transfer of funds. Foreign direct investments by South African corporations and Mandated Parastatals, as defined in schedule 2 of Public Finance Management Act (No. 1 of 1999). Requests to invest off-shore are considered on merit. Investor must be able to demonstrate that investment will result in long-term benefit to Republic's economy. Major corporations may apply to establish primary listings off-shore. Dividends repatriated from foreign subsidiaries are eligible for exchange control credit. Limit on foreign investment holdings of pension funds and life assurers subject to 20% overall limit while unit trusts subject to 30% overall limit. Foreign currency earnings from export of goods and services can now be retained abroad for 180 days. Reserve Bank local borrowing restrictions only apply to entities which are 75% or more foreign-owned. Discretionary allowances for individuals under 18 years restricted to R160,000 while 18 years and older restricted to R750,000 per annum.

Goods.

Import and Export control of goods is contained in Regulations to International Trade Administration Act (No. 71 of 2002), which is amended by Minister of Trade and Industry from time to time. Entrepreneurs are encouraged to export locally manufactured goods by availability of direct and indirect financial assistance. Basic rebate scheme, tied to various tax relief, exists. Control over imported goods is maintained by import permit system. Foreign currency is made freely available for permissible imports.

Present Government has, however, acceded to, and is signing member of G.A.T.T. whereby import duties and controls will gradually be phased out.

See also topic 14.04 Imports; category 1 Introduction, topic 1.01 Currency.

14.04 IMPORTS:

Importation of certain goods into Republic is controlled by permit system administered by International Trade Administration Commission.

Goods which require import permit are specified in Regulation published from time to time in terms of International Trade Administration Act (No. 71 of 2002). Regulations also contain list of those goods which are prohibited from entering Republic. Certain exceptions exist and permits may be obtained which are subject to general and/or specific conditions. See topic 14.03 Foreign Exchange, Foreign Trade and Investment; category 1 Introduction, topic 1.01 Currency.

International Trade Administration Act (No. 71 of 2002) established International Trade Administration Commission and provides for implementation of certain aspects of SACU Agreements and continued control of import and export of goods, regulate trade remedy investigations and amendment of customs duties.

15 HEALTH

15.01 FOOD:

The Foodstuffs, Cosmetic and Disinfectants Act (No. 54 of 1972) addresses manufacture, sale and importation of foodstuffs, cosmetics and disinfectants. Minister may, by notice in Government Gazette, authorize enforcement of Act by any local authority in each area of jurisdiction. Provincial health departments conduct food import control on behalf of National Department of Health. Act does not require issuing of food import permits by South Africa or of certification by exporting countries. Food may however be inspected and sampled on arrival at port and entry into country can be denied if food is not in compliance with requirements of Act. Regulations under Act address aspects relating to food additives, colourants, sweeteners, food microbiological standards, heavy metals in food, mycotoxins in food, residues of agricultural remedies in food, residues of veterinary drugs and stock remedies in food, food fortification, food irradiation, radioactivity in foodstuffs, food labeling, milk and dairy products, food for infants, young children and children, toxic seeds in foodstuffs, mineral hydrocarbons in foodstuffs and soft drinks.

Regulations promulgated under Health Act (No. 63 of 1977) address standards of hygiene relating to food and food premises, transportation of food, milking sheds, transportation of milk, inspections and investigations.

The International Health Regulations Act (No. 28 of 1974) provides for application in Republic of the World Health Assembly's International Health Regulations. National Department of Health approves source of food for consumption at ports, airports, on vessels and on aircraft. Provincial health departments currently approve premises on behalf of National Department of Health.

15.02 HEALTH CARE:

South African Constitution grants every person right of access to health care services, sufficient food and water, and social security. According to Constitution “health care services” includes right to reproductive health care. Furthermore, no one may be refused emergency medical treatment. “Social security” has been interpreted to include appropriate social assistance where person is unable to support himself or herself and dependants. State must take reasonable legislative and other measures, within its available resources, to achieve progressive realisation of these rights.

Health Act (No. 63 of 1977) provides for promotion of health of inhabitants of Republic and rendering of health services. Act defines duties, powers and responsibilities of certain authorities which render health services in Republic and provides for coordination of such health services. Health Act has been repealed to large extent by National Health Act (No. 61 of 2003), which came into force on 2 May 2005. New Act provides for structured uniform health system within Republic of South Africa, taking into account obligations imposed by Constitution of the Republic of South Africa and other laws on national, provincial and local governments with regard to health services.

15.03 HEALTH PROFESSIONS:

The Health Professions Act (No. 56 of 1974) establishes Health Professions Council of South Africa and provides for control over training, registration and practices of practitioners of health professions.

The Pharmacy Act (No. 53 of 1974) establishes South African Pharmacy Council and provides for its objects and general powers. Act extends control of council to public sector and provides for pharmacy education and training, requirements for registration, practice of pharmacy and ownership of pharmacies.

15.04 MEDICAL SCHEMES:

The Medical Schemes Act (No. 131 of 1998) provides for establishment of Council of Medical Schemes, for registration and control of certain activities of medical schemes and for protection of interests of members of medical schemes.

15.05 MEDICINES:

The Medicines and Related Substances Act (No. 101 of 1965), as amended in 2002 and 2008, provides for registration of medicines intended for human and for animal use, for registration of medical devices, for establishment of Medicines Control Council, for medicine labels to be approved by council, for prohibition on bonusing and sampling of medicines, for generic substitution of medicines, for establishment of South African Health Products Regulatory Authority and for control of medicines and scheduled substances and medical devices. The Act prohibits sale of medicines which are subject to registration if not registered provides for procedures to expedite registration of essential medicines and re-evaluation of all medicines after five years, provides for licensing of certain persons to compound, dispense or manufacture medicines and medical devices and also act as wholesalers or distributors.

The Act provides for parallel importation of drugs notwithstanding anything to contrary contained in Patents Act (No. 57 of 1978). Minister of Health may, in terms of Act, prescribe conditions for supply of more affordable medicines in certain circumstances so as to protect health of public. Patented drug can be obtained at cheaper price from foreign supplier than from local subsidiary of same manufacturer (i.e., local patent holder), provided that drug is in market with consent of patent holder. Act also provides for generic substitutions of medicines, eradication of perverse incentives, prohibition of bonusing and sampling of medicines, and regulation of purchase and sale of medicines by wholesalers. Act provides for establishment of Pricing Committee which deals with medicine pricing system, determination of maximum prices for medicines, dispensing fees of pharmacist and licensed dispensers.

15.06 NATIONAL HEALTH POLICY:

The National Policy for Health Act (No. 116 of 1990) has been repealed by National Health Act (No. 61 of 2003). New Act provides for control measures with view to promoting health of inhabitants of Republic on national and provincial level and for determination of national and provincial policies for health. New Act provides that National Health Council is responsible for advising Minister of Health on issues affecting inhabitants of South Africa on national level and provincial health departments are to develop health policies for their respective provinces.

15.07 SMOKING REGULATIONS:

Smoking in Public Places.

Since 1 Oct. 2000, smoking has been regulated by Tobacco Products Control Act (No. 83 of 1993) as amended and regulations promulgated thereunder. Smoking is only permitted in certain enumerated places subject to provisions of regulations. Separated portions of public place may be designated as smoking areas. Posting of signs as well as prescribed messages are required at such designated areas. In terms of §3(1)(a), no person shall advertise or promote, or cause any other person to advertise or promote, tobacco product through any direct or indirect means, including through sponsorship of any organisation, event, service, physical establishment, programme, project, bursary, scholarship or any other method.

Smoking in Workplace.

In terms of §(1)(*a*): No person may smoke any tobacco product in public place; any area within prescribed distance from window of, ventilation inlet of, doorway to or entrance into public place; or any motor vehicle when child under age of 12 years is present in that vehicle. Act defines **``public place''** as any indoor, enclosed or partially enclosed area which is open to public, and includes workplace and public conveyance. Furthermore, employer must ensure that employees may object to smoking in workplace in contravention of this Act without retaliation of any kind; employees who do not want to be exposed to tobacco smoke in workplace are not so exposed; it is not condition of employment, expressly or implied, that any employee is required to work in any portion of workplace where smoking is permitted: and employees are not required to sign any indemnity for working in any portion of workplace where smoking is permitted.

15.08 STERILISATION:

The Sterilisation Act (No. 44 of 1998) provides for right to sterilisation, determines circumstances under which sterilisation may be performed, specifically where person is incapable of consenting or is incompetent to consent due to mental disability.

For purposes of Act, ``**consent"** means consent given freely and voluntarily without any inducement and may only be given if person giving it has: been given clear explanation and adequate description of proposed plan of procedure; and consequences, risks and reversible or irreversible nature of sterilisation procedure; been given advice that consent may be withdrawn any time before treatment; and understood and signed prescribed consent form.

16 IMMIGRATION

16.01 ALIENS:

(Aliens Control Act [No. 96 of 1991] has been repealed by Immigration Act [No. 13 of 2002] as amended by Immigration Amendment Act [No. 19 of 2004]. South African Citizenship Act [No. 88 of 1995] is also applicable but is subject to aforesaid Immigration Act to extent of any inconsistency.)

Foreigner is subject to no disabilities and enjoys same privileges as South African national, save that foreigner wishing to immigrate to South Africa or to take up temporary employment in South Africa must apply for and obtain temporary residence permit as required in Regulations under Immigration Act. No foreigner may hold more than one permit at one time. Application for temporary residence permit must be made in country or territory of which applicant validly holds passport, or in which he/she returns regularly after period of temporary absence. Subject to intergovernmental agreements, Foreigners who did not obtain temporary residence may be admitted to Republic at port of entry on visitors permit provided that he/she qualifies for such permit and on condition that he/she report within 14 days of entry to office of department to apply. Those requiring medical treatment, in addition to holiday, business and family visitors will be provided with temporary residence permits on being admitted. Foreigners, unless naturalised, acquire no political rights or other rights reserved for citizens.

In terms of South African Citizenship Act, should South African citizen perform act that may or does result in him losing his citizenship, he may apply to Minister to retain or resume his citizenship. Use of passport other than South African passport to leave or enter Republic constitutes offence.

No person loses or acquires South African citizenship merely by reason of marriage.

Naturalization may be granted to foreigner who has resided in the Republic for a period of not less than one year and has in addition been resident in Republic for further period of not less than four years during eight years immediately preceding date of his/her application, is of good character and able to communicate in any official language of Republic, and intends to reside permanently in Republic. Naturalization is granted solely at discretion of Minister of Home Affairs. Spouse or partner in permanent same-sex life partnership with South African citizen may apply for naturalization after two years residence in Republic. Certificate of naturalisation will not be issued to any person over age of 18 years before person has made prescribed declaration of allegiance.

Immigration.

Foreigner who is holder of permanent residence permit has all rights, privileges, duties and obligations enjoyed by citizens save for those rights specifically reserved for citizens, e.g., voting rights. For good cause, as prescribed, Department of Home Affairs may attach reasonable individual terms and conditions to permanent residence permit. Two kinds of permanent residence permits may be issued to foreigner on application, namely Direct Residence (issued to foreigner who has been holder of work permit for five years and received offer for permanent employment, is spouse of citizen or resident, is child of citizen or resident) and residence on other grounds, provided Department is satisfied that foreigner is of good and sound character. Quotas for specific professional and occupational categories updated 25 May 2009.

All persons entering Republic must be in possession of valid passport.

Corporations Owned or Controlled by Aliens.

There are no special requirements save that on all company catalogues, trade circulars or business letters bearing name of the company, the full names of the directors must be set out and where such a director is not a South African citizen, his nationality as well.

See also category 2 Business Organizations, topic 2.03 Corporations.

17 INTELLECTUAL PROPERTY

17.01 COPYRIGHT:

Law has been revised and consolidated in Copyright Act (No. 98 of 1978).

Nature of Copyright.

Copyright in any work vests in author, depending on nature of work or person responsible for creation of that work, subject to various exceptions including work of employee in course of his business where it vests in his employer, provided author is qualified person, which means must be resident or domiciled in South Africa or South African Citizen or juristic body incorporated under South African law. Registration of Copyright is not required and only film copyright can be registered in South Africa.

Where author is an unqualified person, he should ensure that his copyright is valid in one of countries of Berne Convention which has reciprocal arrangements with South Africa.

Copyright includes literary, musical and artistic works, cinematographic films, sound recordings, broadcasts, program carrying signals, computer programmes and published editions. A Copyright Tribunal and Advisory Committee determines disputes and recommend amendments to Act. Copyright in musical, literary and artistic works, other than photographs, extends for life of artist or author and further extends for 50 years from end of year in which author dies. Copyright in remaining types of work (including anonymous and pseudonymous works) 50 years from making of work or first publication thereof or from end of year owner was presumed dead (whichever is shorter). Copyright is infringed when any person without license of author does or causes to be done, any act which owner has exclusive right to do.

Section 24(1)(A) of Copyright Act makes provision for copyright holder to claim “reasonable royalty” in event of copyright infringement, amount being that which notional licensee could have been required to pay.

Industrial designs are covered by Designs Act (No. 195 of 1993). Artistic work may now be covered by both Copyright Act and Designs Act, but in certain instances where three dimensional reproductions of artistic work were made available to public by or with consent of copyright owner, copyright will not be infringed if person without consent of owner makes three dimensional reproductions where authorised reproductions primarily have utilitarian purpose and are made by industrial process.

Infringement.

There are two forms of copyright infringement. Direct infringement where any of restricted acts, as set out in Copyright Act, are performed without copyright holder's authorization. Indirect infringement occurs where person deals in infringing copies of copyrighted work, or where infringing public performance of work is made or permitted.

Copyright Tribunal.

Sections 29 to 36 of Copyright Act establishes copyright tribunal. Tribunal's function is to determine disputes between licensing bodies or persons from whom licenses are required.

Assignment.

Assignment must be in writing and signed by assignee. Assignment of intellectual property to overseas entity is subject to Exchange Control approval.

Reciprocal Arrangements.

Minister for Trade and Industry may extend protection afforded by Copyright Act, to works of citizens of those countries whose laws give adequate protection to owners of copyright under South African Act. Similarly, Minister of Trade and Industry and Tourism may deny copyright to citizens of countries not giving adequate protection to work of South African citizens.

There are special reciprocal arrangements regarding copyright between U.S.A. and South Africa.

17.02 PATENTS:

See Patents Act (No. 57 of 1978).

Basis of statute originally modelled on English Law but now follows European Patent Conventions more closely. There are special procedures for applications for grants of patents for new inventions capable of being used in trade, industry or agriculture. Novelty is judged in terms of any matter made public anywhere in world prior to date of application. (§25[5] & [6]). There are also provisions for infringement actions and amendments. Patent must be novel but not obvious and contain “inventive step” of sufficient magnitude and be capable of use or application in industry. Application must be made by inventor or his duly authorised representative. Patent must be kept secret until filed (whereafter it may be used), unless patentee proves such knowledge was acquired without his consent and he diligently moved to obtain protection. Under 1978 Act patents run for 20 years with no extensions subject to payment of annual fees. There is provision for compulsory licenses if patent is dependent on existing one or if patent rights have been abused. South Africa is signatory to Patent Cooperation Treaty. In terms of International Convention if applicant for South African patent files corresponding application in Convention country within a year effective date is date of filing of South Africa application. Patents Act also prescribes certain items which cannot be patented. These include: computer programs, methods of medical treatment and certain mathematical calculations.

Reciprocal recognition of patents registered in numerous non-signatory countries has been established by proclamation of State President. In addition, South Africa also accepts Patent Co-operation Treaty which allows for single application to obtain patent protection in all Patent Co-operation Treaty member countries.

Patent law is complicated and patent matters must be dealt with by patent agent or expert.

17.03 TRADEMARKS AND TRADENAMES:

South African law is contained in the Trade Marks Act (No. 194 of 1993); which became operative on 1 May 1995 and replaces old Trade Marks Act (No. 62 of 1963) in its entirety. 1993 Act sets out to streamline South African law relating to trademarks and to keep abreast of international developments. 1993 Act takes cognisance of European Directive on Trade Marks (which requires member countries of European Union to adopt their national trademark laws in accordance with Directive's provisions) and furthermore closely resembles British Trade Marks Act 1994.

1963 Act will continue to apply to all applications and proceedings instituted before 1 May 1995. 1993 Act will apply to all new applications, oppositions, and cancellation and infringement proceedings commenced on or after aforementioned date. 1963 Act will determine validity of entry on register of trademarks existing at 1 May 1995.

Term “mark” is defined as “any sign capable of being represented graphically including a device, name, signature, word, letter, numeral, shape, configuration, pattern, ornamentation, colour or a container for goods or any combination of the aforementioned”. Trademark is used in relation to goods or services for purpose of indicating connection in course of trade between goods or services and owner of trademark. 1993 Act defines trademark in terms of its distinguishing function only. This function is sufficiently wide to embrace not only traditional origin function of trademark but also its other socioeconomic functions, such as its quality and advertising functions. This facilitates more informal licensing system, inclusion of assignment and antidilution provisions, and protection of collective and certification marks.

To be registrable, trademark must be “capable of distinguishing” goods or services of proprietor of mark from goods or services of another person. Mark can be inherently capable of distinguishing, or it can be capable of distinguishing by reason of its prior use. Discretion which Registrar had in terms of 1963 Act no longer exists and 1993 Act lists 17 grounds for refusal of application to register trademark. Under 1993 Act one cannot register trademark defensively. (This could be done in terms of 1963 Act.) 1993 Act also provides for first time for registration of collective trademarks. Registration is initially for period of ten years but is renewable in perpetuity.

Apart from statute, common law protects against passing-off of activities which are calculated to mislead public.

18 LEGAL PROFESSION

18.01 ATTORNEYS AND ADVOCATES:

(Attorneys Act [No. 53 of 1979], Admission of Advocates Act [No. 74 of 1964]).

South African legal profession is divided into two branches. Lawyers must accordingly elect whether to practice as attorneys or as advocates. They may not practice in dual capacity even if suitably qualified. They may charge according to amount of work they do either in accordance with tariff of fees if there is one or on reasonable basis if there is no such tariff of fees. Contingency Fees Act (No. 66 of 1997) provides for contingency fee arrangement between legal practitioner and client. Act provides that legal practitioner and client may enter into arrangements in terms of which legal practitioner will not be entitled to fee for services rendered unless client is successful. Agreed amount shall however be limited to 100% surcharge on lawyer's fees as calculated in terms of tariff. In case of claims sounding in money, amount agreed upon as fee may not exceed 25% of total amount awarded to client in proceedings.

The two professions are regulated in terms of three aforementioned Acts and by professional bodies—listed below—created in terms of Acts for protection and regulation of the two professions. The Rights of Appearance in Courts Act (No. 62 of 1995) regulates right of advocates and attorneys to appear in courts in South Africa. Provision is made for extension of existing right of attorneys to appear in court and for application by attorney to appear in superior courts. Subject to certain qualifications and requirements, it is possible for foreign lawyers to become members of different professional bodies and practice as lawyers or advocates in South Africa. For number of years, stakeholders have been negotiating proposed Legal Practices Bill. Latest incarnation of Bill seeks to replace Attorneys Act and Advocates Act, and regulate both branches of profession.

Representative professional body for lawyers is following: The Law Society of South Africa, Executive Director: R. Daya, Manager of Professional Affairs: L. Burger, Legal Education and Development: N. Swart, 304 Brooks Street, Menlo Park, 0102; P.O. Box 36626, Menlo Park, 1020; Tel: 012 366-8800, Fax: 012 362-0969, Docex 82 Pretoria. Website http://www.lssa.org.za.

Representative professional body for advocates is following: General Council of the Bar of South Africa, Executive Officer: Elize van den Heever: Schreiner Chambers, 94 Pritchard Street, Johannesburg, 2001. Tel: 0113363976 or 011 337 4498, Fax: 0113368970. Website http://www.sabar.co.za.

19 MORTGAGES

19.01 CHATTEL MORTGAGES:

The usual form of pledge of movable assets if there is no delivery of the assets to the creditor is by means of a notarial bond, which is registered in the Deeds Office. Notarial bond is attested by notary public and hypothecates movable property generally or specifically.

There is a subsidiary division of mortgages depending on whether the assets are specially indicated or not. If specified corporeal movable property is mortgaged, bond is termed special notarial bond. On other hand, where notarial bond hypothecates all movable assets of mortgagor, bond is general notarial bond.

Security by means of Movable Property Act (No. 57 of 1993), provides that special notarial bond hypothecating corporeal movable property, which is readily recognisable, although such property has not been delivered to mortgagee, will be deemed to have been pledged to mortgagee as if it had expressly been pledged and delivered to mortgagee.

Special notarial bonds over specified movable property confer preference over concurrent creditors in respect of free residue of insolvent estate.

In certain instances, movable property hypothecated by special notarial bond is not subject to landlord's tacit hypothec.

Act referred to above has repealed Notarial Bonds (Natal) Act (No. 18 of 1932) and has been amended by National Credit Act (No. 34 of 2005).

See also category 7 Debtor and Creditor, topic 7.11 Pledges.

19.02 MORTGAGES:

See category 20 Property, topic 20.03 Deeds.

20 PROPERTY

20.01 ABSENTEES:

Generally speaking, persons who are absent from South Africa do not suffer any disabilities in law. Where person having any property in South Africa is permanently absent from country, or his whereabouts are unknown, Master of High Court (official in charge of estates belonging to people unable to administer them) may under §73 of Administration of Estates Act (No. 66 of 1965), appoint curator dative to administer absentee's property. Where person is only temporarily absent, court may appoint curator bonis for this purpose.

The Act does not actually specify type of curator. §73 also do not distinguish between permanent or temporary absentees.

Where absence of a person results in his failing to perform any specific duty provision is made for an appropriate remedy; e.g., a debtor may be declared insolvent, if it is in interest of his creditors and he absents himself with intent by so doing to evade or delay payment of his debts.

Moneys due to a person whose whereabouts are unknown must be paid to Master of High Court.

20.02 CONVEYANCES:

See topic 20.03 Deeds.

20.03 DEEDS:

(Deeds Registries Act [No. 47 of 1937]).

Sales, exchanges and donations of immovable property must be in writing and signed by parties thereto to be of any force and effect. Ownership does not pass until property is registered in name of transferee in relevant deeds office. Save as otherwise provided in any other law no deed of transfer, mortgage bond or certificate of title or registration of any kind shall be attested, executed or registered by registrar unless it has been prepared by conveyancer practising within Republic.

Leases need not be in writing to be valid but leases for ten years or more must be registered in relevant deeds office to be valid against third parties for such period exceeding ten years.

Mortgages of immovable property and notarial bonds over movable property as well as creation, transfer and cancellation of any real rights in immovable property also require registration in deeds office.

Under Mineral and Petroleum Resources Development Act (No. 28 of 2002) which came into force on 1 May 2004, state is custodian of mineral and petroleum resources for benefit of citizens of country. Provision is made in said Act for guaranteeing security of tenure in respect of prospecting and mining operations. Registration of mining titles, other rights connected with prospecting rights and mining, stand titles, and certain other deeds and documents is effected at Mineral and Petroleum Titles Registration Office, in accordance with provisions of Mining Titles Registration Act (No. 16 of 1967).

See also category 3 Business Regulation and Commerce, topic 3.12 Sales.

20.04 DOWER:

Dower as such does not exist in South African law.

The nearest approach in Roman Dutch law is termed “Douarie.” This is a gift settled under antenuptial contract by a prospective husband on his intended spouse to take effect at the husband's death. It must be validated by marriage, when it becomes irrevocable, except in case of divorce, when court may rescind gift.

20.05 ESCHEAT:

See category 12 Estates and Trusts, topic 12.04 Descent and Distribution.

20.06 REAL PROPERTY:

Apart from mining titles, this consists of freehold and leasehold property.

21 TAXATION

21.01 BUSINESS TAXES:

Business Taxes or Licenses.

In addition to income taxation there are various business taxes paid by way of trading licenses, such as liquor license fees, commercial traveler's tax and registration fees on formation of corporations.

21.02 CUSTOMS DUTY AND TAX:

Customs Duties.

Customs duties and excise duties are prescribed for various goods at various rates. The Customs and Excise Act (No. 91 of 1964) provides for refunds, drawbacks and rebates of customs and excise duties paid on imports used in exported manufactured goods and in goods imported for re-export.

21.03 ESTATE TAX:

Death Duties.

Estate duty is payable in terms of Estate Duty Act (No. 45 of 1955) on net aggregate value of worldwide assets of South African residents after deducting liabilities, deductions and abatements. Nonresidents are subject to estate duty on South African assets. Rate of estate duty and amounts of abatements are varied from time to time. At present, there is flat rate of 20% on dutiable estate of deceased persons. Allowable deductions include liabilities at time of death and property inherited by surviving spouse. At present, there is basic abatement of R3.5 million. Unused abatement portion of deceased spouse is carried over for utilisation of surviving spouse.

21.04 FOREIGN INVESTMENT TAXES:

Foreign Exchange Gains and Losses.

Broadly speaking, any foreign exchange gains are taxable and losses deductible in the year they arise.

Foreign interest and foreign dividends received by or accrued to South African residents are generally taxable, subject to certain exemptions. With effect from 1 Mar. 2009, natural persons (individuals) qualify for maximum R3,500 exemption in respect of foreign dividends and foreign interest. Exemption applies first to foreign dividends, then to foreign interest.

Foreign dividends are exempt from income tax in South African resident's company's hands if resident company, together with any group companies, holds at least 20% of total equity share capital and voting rights.

South African residents are also taxed in proportion to their holding on amount of net income of controlled foreign company, i.e. foreign company where South African residents hold more than 50% of total participation rights or voting rights.

21.05 GIFT TAX:

Donations tax is levied at rate of 20% of value of all property donated on donors who are resident individuals or companies incorporated in, or have their place of effective management in Republic (although public companies are exempt from donations tax). Exemptions include donations to Public Benefit Organisations, donor's spouse, donations between group companies where recipient is South African resident, and donations not exceeding R100,000 per annum by natural persons and R10,000 per annum by non-natural persons.

21.06 INCOME TAX:

Income tax provisions are contained in Income Tax Act (No. 58 of 1962). This Act is amended year by year to provide for tax changes. Pay as you earn (P.A.Y.E.) system of taxation is included. Below is taxation for Mar. 2009 to Feb. 2010.

Employers have to deduct and pay employees' tax from employees' earnings. Standard Income Tax on Employees (S.I.T.E.) applies to all employees on first R60,000 of their annual income. S.I.T.E. is final liability tax which is deducted by employers. No tax returns have to be submitted by persons subject only to S.I.T.E. Where employee's remuneration exceeds R60,000 per annum, P.A.Y.E. will be deducted in addition to S.I.T.E. Self-employed persons and persons who derive taxable income which is not remuneration, for example, from profession or business, or taxable income from interest, dividends or rentals exceeding R20,000 (over 65 years of age R80,000), must register as provisional taxpayers and make two provisional tax payments per year based on estimated earnings. Tax year normally ends on last day of Feb. each year.

By special agreements between Republic and various other countries, including U.K., relief is afforded in certain circumstances against double taxation in two countries on same commercial income. These agreements are complicated and vary in each case. See category 23 Treaties and Conventions, topic 23.01 Treaties.

Tables in this topic are set out in Rand (R), South African currency.

Individuals.

In respect of persons other than companies income tax is levied on all taxable income. Income tax rates are set out in Appendix A. In addition, there is system of tax rebates which are credit against income tax payable (see catchline Rebates, infra). Certain special deductions are deductible from income and these are dealt with below.

Rebates.

There shall be deducted from income tax payable by any natural person rebates as set out below. Any rebate to which taxpayer is entitled will effectively reduce tax payable by him.

Following rebates are deductible from tax:

	Natural Persons
Primary	R9,756
Secondary	R5,400
(Persons 65 and over qualify for both primary and secondary rebates)	

Deductions from Taxable Income.

Medical Expenses.

Persons under age of 65 years can claim (i) contributions to medical aid scheme (up to certain limits); plus (ii) excess medical scheme contributions not allowed under (i) and all other medical expenses to extent that their expenses exceed 7.5% of taxable income before medical deductions. Taxpayers over 65 years can claim for medical expenses in full. If taxpayer, spouse or child is physically or mentally handicapped—all medical and disability expenses (except amounts recoverable from medical aid) paid by taxpayer can be deducted.

Donations.

Donations in cash or kind to certain designated Public Benefit Organisations. Deduction is limited to 10% of taxable income, before any deduction of medical expenses.

Dividends from companies in Republic of South Africa are exempt from income tax. Foreign dividends may be taxable in certain circumstances.

Interest (local and foreign) and taxable foreign dividends received by individuals are subject to maximum exemption of R21,000 per annum (R30,000 for persons who are 65 years or older). Of this total exemption, maximum exemption for foreign dividends and foreign interest is R3,200 per annum (to extent that R3,200 exemption is utilised, it reduces R21,000/R30,000 exemption for local interest). R3,500 exemption applies first to foreign dividends and then to foreign interest.

In assessing taxable income of individuals as well as corporations or companies there are certain other complicated additional and special deductions or allowances which apply in commerce and industry including in certain cases manufacturers, hotel keepers, exporters, industrialists in development areas, shipowners, aircraft owners, miners and farmers.

Fringe Benefits.

Employees are generally taxed on taxable value of fringe benefits received from their employer for services rendered, less any consideration paid by them.

Retirement Gratuities.

Lump sums from retirement funds are subject to R300,000 lifetime exemption, with balance being taxed on sliding scale. Exemption also granted to dismissed and retrenched employees but not to directors of companies who at any time held more than 5% of equity share capital or members' interest of company.

Pension Fund Contributions.

Deduction may not exceed greater of R1,750 or 7.5% of retirement funding income. Maximum deduction of R1,800 per annum is allowable for arrear contributions to pension funds.

Retirement Annuity Fund Contributions.

Deduction may not exceed greater of: 15% of non-retirement funding income; or R3,500 less deductible current contributions to pension funds; or R1,750. Maximum deduction for reinstatement of membership is R1,800 per annum.

Tax year for natural persons ends at end of Feb.

Rates.

See Appendix A.

Companies.

Rate of normal taxation for all companies, both public and private, other than certain mining companies, small business corporations, employment companies, and life assurance companies, is 28%. Secondary Tax on Companies (STC) is currently payable at 10% on net dividends declared. (Local branches of foreign companies are exempt from STC.) STC is tax on companies declaring dividends which will be replaced by shareholder's dividend tax in 2010. Public company for income tax purposes as distinct from private company is company in which general public has substantial interest.

Subject to application of double tax agreement nonresident companies carrying on trade through branch within South Africa are taxed at flat rate of 33%.

Close corporations are taxed at same rate as companies. See subheads Income Tax, catchline Individuals; Deductions from Taxable Income, catchline Dividends, supra.

Tax on retirement funds was abolished with effect from 1 Mar. 2007.

Gold mining companies are taxed on income derived from gold mining on special formula. Gold mining companies will pay tax at 28% of taxable income from non-gold mining activities (where they are subject to STC) and at 35% (where they do not pay STC). Other mining companies are taxed at 28% of taxable income. With effect from 1 Mar. 2010, royalty will be imposed on transfer of mineral resources under Mineral and Petroleum Resources Royalty Act (No. 28 of 2008).

A graduated company tax applies to small business corporations which have gross annual income that does not exceed R14 million. Rates are as follows: 0% on first R54,200 of taxable income; 10% on taxable income between R54,201 and R300,000; and R 25,400 plus 28% of amount by which taxable income exceeds R300,000.

Small service companies and trusts may be classified as personal service providers subject to rate of 33%.

Trusts (other than special trusts) are subject to tax at rate of 40%.

Table—Tax Rates for Natural Persons

Appendix A:

1 Mar. 2007 to 29 Feb. 2008		**1 Mar. 2008 to 28 Feb. 2009**		
Taxable income in Rand	**Rates of tax**	**Taxable income in Rand**	**Rates of tax**	**Ta**
0 - 112,500	18% of each Rand	0 - 122,000	18% of each Rand	0 -
112,500 - 1,800,000	R20,250 + 25% of the amount above R112,500	122,001 - 195,000	R21,960 + 25% of the amount above R122,000	13
180,001 - 250,000	R37,125 + 30% of the amount above R180,000	195,001 - 270,000	R40,210 + 30% of the amount above R195,000	21
250,001 - 350,000	R58,125 + 35% of the amount above R250,000	270,001 - 380,000	R62,710 + 35% of the amount above R270,000	29
350,000 - 450,000	R93,125 + 38% of the amount above R350,000	380,001 - 490,000	R101,210 + 38% of the amount above R380,000	41
450,000 and above	R131,125 + 40% of the amount above R450,000	490,001 and above	R143,010 + 40% of the amount above R490,000	52
Rebates of tax: 2008		**Rebates of tax: 2009**		**Re**
Primary	R7,740	Primary	R8,280	Pr
Age 65 and over (additional to primary rebate)	R4,680	Age 65 and over (additional to primary rebate)	R5,040	Ag (a re
Tax threshold: 2008		**Tax threshold: 2009**		**Ta**

Below age 65	+/- R43,000	Below age 65	+/- R46,000	Bel
Age 65 and over	+/- R69,000	Age 65 and over	+/- R74,000	Age

Investment Incentives.

Tax depreciation allowances of 10% are available for oil and gas pipelines, while electricity and telephone transmission lines and railway lines qualify for 5% allowance. Special capital allowances apply to research and development expenses, urban development zones, small business corporations, and manufacturing plant and machinery, as well as certain industries such as mining, farming, and hotels.

Capital gains tax was introduced with effect from 1 Oct. 2001 and is levied on all realised capital gains and certain deemed capital gains from disposals on or after that date. Capital gain or loss is difference between base cost of asset and proceeds received on disposal. Where asset was acquired prior to 1 Oct. 2001, market value as at 1 Oct. 2001 can be used to calculate base cost.

Exemptions include sale of primary residences owned by natural persons (up to R1.5 million), private motor vehicles and personal effects, certain fortuitous gains (local lottery), life assurance policy proceeds, lump sums from retirement fund, and donations/bequests to and gains derived by public benefit organisations exempt from normal tax. No capital gains tax liability arises where proceeds derived from sale of primary residence is less than R2 million.

Included in taxable income is 25% of net capital gain in respect of natural persons or special trusts and 50% of net capital gain of companies and trusts (other than special trusts). Annual exclusion for natural persons and special trusts is R17,500 and exclusion on death is R120,000. Deemed disposals will arise upon immigration or emigration by natural person.

Residence Based Tax.

South Africa has residence based system whereby residents are taxed on their worldwide income. Included in income in certain circumstances is proportionate share of controlled foreign company's net income, although net income attributable to foreign business establishment may be exempt. Nonresidents are taxed on their South African source income, subject to application of double tax agreement. Nonresidents are subject to capital gains tax on disposal of fixed property (or interest in fixed property) situated in South Africa, or disposal of any asset of permanent establishment of such person in South Africa, subject to application of double tax agreement.

Public Benefit Organisations.

Organisations which carry on “public benefit activities” may apply for tax exemption as public benefit organisation.

Donations to certain Public Benefit Organisations will be allowed as deductions up to 10% of taxable income, provided certain documentary requirements are adhered to.

Withholding Tax on Royalties or Similar Payments.

Where royalties or similar payments (including payment for use of patents, trademarks, copyrights or designs and for “know-how”) are payable to nonresident persons or companies with place of effective management outside South Africa, payments are subject to final withholding tax at rate of 12%, subject to applicable double taxation agreement.

Residents require approval from Department of Trade and Industry and Exchange Control authorities at South African Reserve Bank for royalty payments to nonresidents.

Withholding Tax on Sale of Fixed Property by Nonresident.

Withholding tax on proceeds of sale of fixed property in South Africa by nonresident will be imposed where proceeds exceed R2 million. Withholding rate is 5% where seller is natural person, 7.5% where seller is company or 10% where seller is trust.

21.07 STAMP DUTY:

Stamp Duties Act (No. 77 of 1968) has been repealed in full with effect from 1 Apr. 2009.

21.08 TRANSFER DUTY:

Transfer duty is payable by purchaser of immovable property on purchase consideration, unless sale is subject to VAT. Transfer duty payable for juristic persons is at flat rate of 8% and for natural persons, 0% on first R500,000 of purchase price, 5% of purchase price between R500,000 and R1,000,000 and R25,000 plus 8% of purchase price above R1,000,000.

Disposal of shares in company, members' interest in close corporation, or contingent right to residential property owned by discretionary trust will attract transfer duty at same rates above, where more than 50% of market value of total assets of company, close corporation or trust in question consists of residential property.

21.09 SECURITIES TRANSFER TAX:

From 1 July 2008, Securities Transfer Tax is imposed at rate of 0.25% on transfer of listed or unlisted securities.

21.10 VALUE-ADDED TAX:

Value-Added Tax (``VAT'') is levied at standard rate of 14% on supply of both goods and services. VAT accounted for by vendor is effectively VAT charged on his supplies (output tax) less VAT incurred on his inputs (input tax). Compulsory registration as vendor is required where person makes standard or zero-rated supplies of more than R1.000,000 per annum.

Three types of supplies are provided for: they are supplies at standard rate (taxed at 14%); zero-rated supplies (taxed at 0%); and exempt supplies that do not attract VAT.

22 TRANSPORTATION

22.01 MOTOR VEHICLES:

Motor vehicles are subject to certain taxes which vary according to the weight and power of the vehicle, whether required for private or business purposes. There is no Republic tax. The taxes in the various provinces differ considerably.

Motor Vehicle Carriers.

Conveyance of goods by motor service for hire or reward is controlled by Road Transportation Act (No. 74 of 1977). Cross-border transport is controlled by Cross-Border Road Transport Act (No. 4 of 1998). Transport Deregulation Act (No. 80 of 1988) repealed provisions in respect of conveyance of goods or persons in Act (No. 74 of 1977) and placed various powers and duties which originally vested in National Transport Commission into hands of South African Roads Board. The Transport Deregulation Act has been repealed in its entirety, with exception of §6, dealing with road transportation agreements regarding other governments. The Road Traffic Act (No. 29 of 1989) has been repealed and replaced by National Road Traffic Act (No. 93 of 1996) which provides for road traffic matters, and for their uniform application throughout Republic.

22.02 SHIPPING:

Various statutes, which are to large extent based on English Law, have been enacted in South Africa dealing with question of control of shipping and matters incidental thereto.

Admiralty Jurisdiction Regulation Act (No. 105 of 1983), provides for vesting of powers of admiralty courts of Republic of South Africa in Provincial and Local Divisions of High Court of South Africa and law to be applied and procedure applicable in enforcement of “maritime claims” as defined in aforementioned Act.

Courts.

Admiralty jurisdiction is vested in each provincial and local division of High Court in terms of Admiralty Jurisdiction Regulation Act for all maritime claims of whatever nature. Proceedings are commenced by arrest or attachment of ship or other property within jurisdiction. It is not ordinarily necessary to furnish security for damages. Property may be arrested for purposes of obtaining security for arbitration or legal proceedings in another jurisdiction. Sister ship arrests are possible, either of vessels in same ownership, or of ship owned by company controlled, when maritime claim arose, by person who then controlled company which owned ship in respect of which debt arose. Court has power to order examination, testing or inspection of any ship, cargo or documents for purposes of determining any maritime claim brought or to be brought or any defence thereto; these powers are not restricted to maritime claims being enforced in South Africa.

Limitation and Exclusion of Liability.

Tonnage limitation is governed by §261 of Merchant Shipping Act (No. 57 of 1951) which entitles ship owner to limit his liability according to vessel's tonnage where loss results without his “actual fault or privity”. In such case liability for loss of life or personal injury is limited to R206.67 special drawing rights per ton (one special drawing right equates to such sum in South African currency as fixed by IMF from time to time) and liability for loss of or damage to property to R66.67 special drawing rights per ton.

Ranking of Claims.

This is regulated by §11 of Admiralty Jurisdiction Regulation Act (No. 105 of 1983), which adopts in some measure relevant provisions of International Convention for the Unification of Certain Rules Relating to Maritime Liens and Mortgages (Brussels 1967).

Ships.

Ownership, mortgages, registration, construction, safety equipment, etc. are covered by Merchant Shipping Act (No. 57 of 1951). The Ships Registration Act (No. 58 of 1998) provides anew for registration of ships in Republic and came into force on 25 Apr. 2003.

Crew.

Merchant Shipping Act (No. 57 of 1951) provides for manning of ships, certification, authority, liability and welfare of Masters, Officers and Crew.

Safety.

This is governed by Chapter V of Merchant Shipping Act. International Convention for the Safety of Life at Sea, 1974 is incorporated into Merchant Shipping Act as amended by second schedule thereto. International Regulations for Preventing Collisions at Sea 1972, and Annexes thereto, also apply with regard to safety of merchant shipping at sea.

Carriage of Goods by Sea.

The Carriage of Goods by Sea Act (No. 1 of 1986) gives effect to “Hague Visby Rules”. The Sea Transport Documents Act (No. 65 of 2000), which came into effect on 20 June 2003, regulates position of certain documents relating to carriage of goods by sea.

Levies.

The South African Maritime Safety Authority Levies Act (No. 6 of 1998) which commenced on 1 Apr. 1998, provides for establishment of South African Maritime Authority and for imposition of levies by South African Maritime Safety Authority.

23 TREATIES AND CONVENTIONS

23.01 TREATIES:

Numerous trade treaties exist with Commonwealth, European and South American Countries, particularly in relation to customs duties. (See category 14 Foreign Trade and Commerce, topic 14.01 Customs Duties.) These are too numerous to be detailed here and it is suggested that nearest South Africa Trade Commissioner or Consul be consulted.

Double Taxation Agreements.

South Africa has comprehensive double taxation agreements covering number of different types of income with following countries: Algeria; Australia; Austria; Belarus; Belgium; Botswana; Brazil; Bulgaria; Canada; China (People's Republic); China (Taiwan); Croatia; Cyprus; Czech Republic; Denmark; Egypt; Ethiopia; Finland; France; Germany; Ghana; Grenada; Greece; Hungary; India; Indonesia; Iran; Ireland; Israel; Italy; Japan; Korea; Kuwait; Lesotho; Luxembourg; Malawi; Malaysia; Malta; Mauritius; Mozambique; Namibia; Netherlands; New Zealand; Nigeria; Norway; Oman; Pakistan; Poland; Portugal; Romania; Russian Federation; Saudi Arabia; Seychelles; Sierra Leone; Singapore; Slovak Republic; Spain; Swaziland; Sweden; Switzerland; Tanzania; Thailand; Tunisia; Turkey; Uganda; Ukraine; U.K.; USA; Zambia; Zimbabwe.

South Africa has also restricted agreements, relating only to income derived from shipping and aircraft business concluded with: Brazil; Portugal; Spain.

Foreign investment in South Africa is not liable to expropriation, but movements of money in and out of South Africa including into dollar and sterling exchange areas, are subject to exchange control by Treasury. See category 14 Foreign Trade and Commerce, topic 14.03 Foreign Exchange, Foreign Trade and Investment.

See also Selected International Conventions section.

1

SPAIN LAW DIGEST

—Scope —

Revised for 2010 edition by

GARRIGUES

See category 6 Courts and Legislature, topics 6.02 Law Reports, Codes, 6.04 Statutes.

Spain is member of EU. See also European Union Law Digest.

Note: This revision incorporates legislation through Jan 10, 2010.

1 INTRODUCTION

1.01 CURRENCY:

Law 46/1998, of Dec. 17, 1998, on introduction of Euro and its subsequent amendments, provides that, as from Jan. 1, 1999, national and EU currency is EURO.

See category 15 Foreign Trade and Commerce, topics 15.02 Exchange Control, 15.03 Foreign Exchange, and 15.04 Foreign Investments in Spain.

1.02 GOVERNMENT AND LEGAL SYSTEM:

Constitution was approved by Parliament on Oct. 31, 1978, and ratified by referendum on Dec. 6, 1978. It sets out Fundamental Rights of the People, such as freedom of ideas, religious Dfaith and worship, right to life and physical integrity, right to “habeas corpus”, and right of free association.

Basic Principles.

Spain is social and democratic State, its supreme values being freedom, justice, equality and political pluralism (art. 1.1); natural sovereignty belongs to Spanish people, source of all State powers (art. 1.2); State is organized as Monarchy (art. 1.3); Constitution is based on indivisible unity of country, and recognizes individual regions and nationalities’ right to be autonomous (art. 2); creation and activities of political parties and trade unions are free, provided they respect law (arts. 6 and 7); all citizens and public entities are subject to Constitution (art. 9.1).

The principle of equality, provided for in Art. 1.1 of the Constitution as supreme value in law and enshrined as basic right in Art. 14 (right to equality and not to be discriminated against on basis of gender), was subject-matter of recently passed Organic Law 3/2007 of Mar. 22, on effective equality for men and women.

This Law implements in Spanish law both Directive 2002/73/EC, on implementation of principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions, and Directive 2004/113/EC, implementing principle of equal treatment between men and women in access to and supply of goods and services.

The Crown.

The King is head of State. He monitors and moderates operation of institutions; his person is inviolable and he may not be held responsible for his acts. (art. 56). Succession to throne is hereditary. (art. 57). The King has following functions, among others: To grant royal assent to laws, to put forward candidates for President of the Government, to appoint and dismiss ministers at instance of President of the Government, to assume supreme command of armed forces and to exercise right of pardon according to law. (art. 62).

Parliament has Legislative Power.

Parliament has legislative power, represents Spanish people and is composed of two houses: Lower (Congress of Deputies) and Upper Houses (Senate) of Spanish Parliament. (art. 66).

Lower House has minimum of 300 members and maximum of 400, elected by universal, free, equal, direct and secret suffrage for four-year term. (art. 70).

Senate has 264 members, 208 of whom are elected by universal suffrage on free, direct, egalitarian and secret basis and remaining 56 are proposed by autonomous community governments. Senators have mandate of four years. (art. 69).

Both houses meet annually in two ordinary sessions; one running from Sept. to Dec. and other from Jan. to June. Houses may also hold special sessions at request of government, standing committee or by absolute majority of members of either house. (art. 73).

The following matters are of its exclusive competency: The basic conditions guaranteeing equality of all citizens before law; nationality; immigration; emigration; foreign nationals and political asylum; international relations; defense and armed forces; justice; commercial, penal and penitentiary legislation; labor legislation, subject to implementation by autonomous communities; civil, copyright and patent trademark legislation; customs, excise and foreign trade regulations; currency system and basic regulations concerning credit, banking and insurance; legislation on weights and measures; general finances and State debt; promotion and general coordination of scientific and technical research; external health measures, general coordination of and bases for health and legislation on pharmaceutical products; basic legislation and financial organization of Social Security System; maritime fisheries, merchant navy, coastal lights, general-purpose ports and airports, air transport and control of air space; railways and land transport passing through territory of more than one autonomous community; postal services and telecommunications; hydraulic resources and bodies whose waters flow through more than one autonomous community; basic environmental protection legislation; basic legislation on mines and energy; system governing manufacture, sale, possession and use of arms and explosives; basic rules relating to press, radio and television without prejudice to powers regarding development and implementation of such rules vested in autonomous community authorities; public safety, without prejudice to possible creation of police forces by autonomous communities; conditions relating to obtaining, issuing and standardization of academic degrees and professional qualifications. (art. 149).

In certain areas, Parliament may delegate power to issue regulations with legal status to government. This delegation must be given under piece of basic legislation organic law precisely defining purpose, scope and standards thereof. (art. 82).

Government.

Composed of President, two Vice-Presidents and Ministers, Government is in charge of domestic and foreign policy, civil and military administration and defense. It exercises executive functions and has statutory authority. (arts. 97 and 98).

This set-up was implemented by Law 50/1997, dated Nov. 27, which establishes principal rules concerning organization of Executive Power.

After general elections to Lower House of Parliament, King then consults with delegates from political groups with parliamentary representation and puts forward candidate for President of the Government. If absolute majority of members of Lower House of Spanish Parliament cast affirmative vote, King formally appoints him/her as President of the Government. Where such majority is not obtained, there is second vote 48 hours later, simple majority then being sufficient. If two months elapse without any vote of confidence by Lower House, King must dissolve Parliament and call general elections. (art. 99).

In cases of extraordinary and urgent necessity, government may issue interim legislative provisions in form of decree-laws, which may not affect basic State institutions, rights, duties and liberties of citizens, legal systems of autonomous communities or electoral law. The Lower House must ratify or repeal such decree-laws within 30 days of their promulgation. (art.

86).

The Judiciary.

Justice emanates from people and is administered in name of King by judges who are required to be independent, irremovable, responsible and subject only to statutory requirements. The principle of jurisdictional unity lies at heart of organization and operation of courts. (art. 117).

The Supreme Court is highest jurisdictional body in all branches of judicial system, except with regard to provisions concerning constitutional guarantees. (art. 123).

Constitutionality of Laws.

The Constitutional Court is competent to hear and rule on appeals for protection of constitutional rights against laws and regulations with legal force, conflicts of jurisdiction between State and autonomous communities, or among any of latter, and other matters entrusted to it by Constitution or by organic laws.

If, during any proceedings, judicial body considers that law applicable to case may be unconstitutional in nature, it may bring matter before Constitutional Court, although such referral may in no case give rise to stay of proceedings. (art. 163).

Local authorities.

The Constitution acknowledges and guarantees existence of municipalities and provinces as local administrative entities with full legal personality. The government and administration of municipalities is vested in town councils, whose councilors are elected by citizens by universal, free, equal, direct and secret suffrage. The government and administration of provinces is vested in provincial councils. (arts. 140 and 141).

Autonomous Communities.

The Constitution recognizes right of bordering provinces having common historical, cultural and economic characteristics to govern themselves by forming autonomous communities. (art. 143).

Parliament authorizes formation of autonomous communities and approves their charters of autonomy, which constitute basic institutional rules and regulations governing such communities under Constitution. (arts. 144 and 147). The following matters fall under jurisdiction of autonomous communities: organization of their self-governing institutions; town planning and housing; railways and roads lying entirely within their territory; agriculture and livestock breeding; woodlands and forestry; hunting and shooting; river fishing; promotion and organization of tourism and sports. (art. 148).

The Spanish State is divided into seventeen autonomous communities: Catalonia, the Basque Country, Galicia, Andalucía, Asturias, Cantabria, La Rioja, Aragón, Canary Islands, Castilla-La Mancha, Valencia, Madrid, Murcia, Extremadura, Castilla-León, Navarra and Balearic Islands, each of which is governed by provisions of their respective Charters of Autonomy. In 1995, cities of Ceuta and Melilla were declared independent cities, having their own Charters of Autonomy and systems of self-government.

Protection of Basic Rights.

A Law passed by Parliament on Dec. 26, 1978, provides for protection by Courts of following rights: freedom of speech and of association, secrecy of correspondence, freedom of religion and domicile, protection against illegal arrest and freedom of movement within Spanish territory. Another Law, dated May 5, 1982, protects right of honor, personal and family privacy and to one’s own image, to be assessed by courts in accordance with laws and social standards/customs; use of recording/filming devices for registering private life of individuals are prohibited; damages will be awarded whenever court finds rights protected by Law have been breached, and profits earned by persons infringing such rights will be taken into consideration when damages are calculated; remedies under this Law are in addition to criminal remedies. The Royal Decree of Mar. 26, 1993, created Data Protection Agency, body vested with power to implement provisions set forth in Personal Data Protection Organic Law of Dec. 13, 1999, which was implemented by Royal Decree 1720/2007 of Dec. 21, 2007. Law 5/98, dated Mar. 6, 1998, transposed European Directive 96/9/EC of Mar. 11, on the Legal Protection of Databases to Spanish Law.

Ombudsman.

The Ombudsman is appointed by Parliament for five-year term, during which time incumbent cannot be prosecuted except for flagrant crimes. (art. 54). The Ombudsman’s function is to defend individual constitutional rights, as well as to supervise activities of Autonomous Communities. Pursuant to Organic Law 3/1981 of Apr. 6, regulating Public Ombudsman, he/she may have access to all kinds of governmental documents and may suggest appropriate remedies to any irregularities detected.

Administrative Organization and Procedure.

General Aspects.

Law 30/1992 of Nov. 26 (am’d by Law 4/1999, of Jan. 13), lays down and regulates basis of legal system, administrative procedures and regime governing liability of public authorities, understood to refer to both general state authorities, autonomous community authorities, local administrative entities and certain public law entities, whose activity is subject to above law in exercise of their administrative powers. With respect to all other activities, they are subject to statutory provisions under which they were formed.

Essential Contents of Law 30/1992.

This Law regulates relations among various public authorities referred to above, with particular emphasis on promotion of mutual assistance and exchange of information. It lays down main rules for activity pursued by authorities, describes operating procedures of administrative agencies and defines interested parties as persons capable of participating in such procedures. After defining essential principles governing actions by such bodies, Law provides for general structure of administrative procedures and process for reviewing administrative acts, which are essential to understanding operating procedures of Spanish authorities. Lastly, specific rules provide for procedures to impose penalties upon, and establish regime of liability for, actions of public authorities.

1.03 HOLIDAYS:

Public holidays may not exceed 14 days per year. Every year, calendar of working days is published in Official State Gazette. Autonomous community governments may substitute up to two holidays with local festivities. In addition, each municipality may establish up to two local holidays.

1.04 OFFICE HOURS AND TIME ZONE:

Spain is in the +01:00 GMT time zone. Office hours are generally from 9 a.m. to 5 p.m.

2 BUSINESS ORGANIZATIONS

2.01 AGENCY:

Together with basic rules on this area laid down in Spanish Civil Code, contractual relations between principals and agents are regulated by Law 12/1992, of May 27, 1992, on agency agreements. This Law defines agency agreement as relationship in which individual or company called agency enters into agreement with another, on ongoing or stable basis and for consideration, to carry out commercial transactions on behalf of another or to promote and conclude such transactions on behalf of another, as independent intermediary and without assuming responsibility and risk for such transactions unless otherwise agreed.

2.02 ASSOCIATIONS:

Organic Law 1/2002, of Mar. 22, 2002, which lays down rules governing right of association, is limited in scope to nonprofit associations, and does not apply to civil, mercantile, industrial or worker-owned companies, cooperatives and mutual insurance companies, or owners or proprietors' associations, purposes and nature of which do not fall within meaning of association as it is commonly accepted.

Corporations required by legal mandate to perform certain public duties are not included when performing such duties.

Furthermore, protection afforded to right of association comes up against strict limitations in case of unlawful associations, as defined in criminal legislation.

This Law stipulates specific personal rights in of area of society. Positive rights include free and voluntary nature of foundation of associations and right to form such associations, without prejudice to terms and conditions imposed by legislation in force for exercise of such right and rights specific to members of such associations. Negative rights imply that no-one may be forced to join or to remain in association.

The Law also establishes that associations may be registered at relevant Registry, bylaws of which were implemented by Royal Decree 1497/2003, of Nov. 28, 2003. Such associations may set up their own organization within framework of Law, perform activities in pursuit of their aims pursuant to specific legislation for industry in question and, lastly, pursue their activities free from any interference from authorities, save for any such interference as may be required in light of other values, rights or constitutional freedoms that need protection at same time and of same status as right of association.

2.03 CORPORATIONS AND ASSOCIATIONS:

Spanish law recognizes two classes of legal persons: public legal persons and private legal persons.

Public legal persons are the state, autonomous communities, provinces, municipalities and range of corporations created by special laws to pursue certain State objectives. These Corporations are governed by laws which created them and by supplementary regulations.

Private legal persons may be governed by civil or corporate/commercial law. Private legal persons under civil law are governed by the Civil Code, by Associations Organic Law 1/2002, of Mar. 22, 2002, by Law 30/1994, of Nov. 24, 1994, on Foundations and Patronage, amended by Foundations Law 50/2002, of Dec. 26, 2002, which specifically takes into account economic and social reality of such entities as relevant component of "Third Sector", granting them greater autonomy for management purposes and limiting supervision carried out by authorities, as well as regulating public foundations, and by Cooperatives Law 27/1999, of July 19, 1999, implemented by Royal Decree 136/2002, dated Feb. 1, 2002, regulating Cooperatives Registry. The concept of civil law legal persons includes all private legal persons who do not join corporations for purpose of obtaining profit, as is case of associations and/or foundations of cultural, sporting or charitable nature, for medical care, pensions, co-operatives, etc. While right of association for such purposes is free, associations must draw up and register their governing bylaws or regulations. With respect to religious congregations, Spanish State recognizes personality granted to such associations under provisions of Concordat with Holy See. Pursuant to Law of July 5, 1980, on Religious Freedom, religious congregations or associations of any kind are recognized as corporations existing under Spanish law, and are duly listed in records kept by Ministry of Justice. Such listed congregations are entitled to pursue all types of ritual activities, as well as to exercise the right of freedom of expression, demonstration, etc. provided they do not break any laws or infringe public policy.

Profit-making companies are governed by the Commercial Code, the Spanish Corporations Law, the Limited Liability Companies Law, as well as their respective by-laws. The Commercial Code governs general and limited partnerships.

All business entities are generally required to be formed under public deed executed before public notary and registered at Mercantile Registry. Foreign persons forming company must submit certificate (issued by their consular officers) to Registrar providing evidence that they have necessary legal capacity to form company in accordance with laws of their own countries.

The basic features of each of the above-mentioned companies are as follows:

(a) *A "Sociedad Regular Colectiva"* (General Partnership) is a company in which all partners have unlimited and joint and several liability, and to which it is possible to contribute capital or work, or both. Unless otherwise provided for, it is managed by all partners. The agreement of all other partners is required to transfer rights of one of them.

(b) *A "Sociedad Comanditaria"* (Limited Partnership). There are two classes of partners: collective and silent (or dormant). Collective partners manage company and may contribute capital, work or both. Their liability is unlimited and joint and several in nature. Silent partners contribute capital, but cannot intervene in management-related matters, and their liability is limited to capital contributed. However, if they take part in management or where their name appears in company name, they bear unlimited joint and several liability for company's debts.

(c) *A "Sociedad de Responsabilidad Limitada"* (Limited Liability Company). These companies are governed by Law 2/1995, of Mar. 23, 1995. The minimum capital is [Euro]3,005.06, divided into participations which represent contributions made by partners to company and which must be fully paid up upon formation and upon each capital increase. As general rule, partners' liability is limited to amount contributed to company. Participations are not represented by certificates or in book entries.

The company may be formed by one or more partners and formation is carried out by means of execution of public deed before public notary that must be registered at Commercial Registry. A company acquires legal status on registration. The following details must be placed on record in public deed: (1) The identity of partner(s), be they individuals or legal entities; (2) partners' intention to form company; (3) (cash or in kind) contributions made by each partner to company and participations received as consideration; (4) structure of initial managing body and identity of persons in whom such management is vested; (5) bylaws governing company, which must state, at least, (a) company name, (b) corporate purpose, (c) fiscal year-end, (d) capital stock and (e) structure of managing body.

Participations confer certain rights on partners. As general principle, there are no restrictions on participation transfers to partners. The bylaws may vary in scope of restrictions, although, in any event, any provisions contained in bylaws which are tantamount to complete freedom to transfer participations are deemed null and void. The company may not issue debentures or other debt securities.

Partners meeting at General Meetings express maximum will of company and law sets forth provisions regarding calls for meetings, valid assembly, majorities required for adoption of resolutions, etc. The bylaws may provide for alternative managing bodies/structures and General Partners Meeting may opt for any of them. The representation and management of company is vested in directors (i.e., sole director, several directors acting jointly or jointly and severally or Board of Directors), who may be elected for unlimited term. Directors prepare financial statements and General Partners Meeting approves statements and resolves on appropriation of income/loss.

The Law contains provisions regarding capital increases and reductions, alterations of legal form, mergers, spin-offs, dissolution and liquidation.

Law 2/1995, of Mar. 23, was implemented by following legislative texts:

Law 44/2002, of Nov. 22, on Measures Reforming the Financial System, introducing amendments as regards rules on setting price of participations in event of transfers for consideration other than sale and purchase transactions.

Law 7/2003, of Apr. 1, which established new system of formation solely by up to maximum of five individuals, as well as for registration at Mercantile Registry, all in only 48 hours, using electronic and computerized means, and for expanding corporate purpose and providing significant simplification with respect to managing bodies and dissolutions, and introducing simplified accounting models.

Royal Decree 682/2003, of June 7, modifying certain aspects regarding formation by electronic means and implemented by Law 7/2003.

Insolvency Law 22/2003, of July 9, modifying details concerning dissolution of companies.

Law 3/2009 of Apr. 3, on Structural Modifications of Commercial Companies which regulates transformations, mergers (including cross-border mergers), spin-offs, cross-border change of registered office and other structural modifications.

(d) *"Sociedad Anonima"* (Corporation). These companies are governed by Law 19/1989 of July 25, and by Royal Decree 1564 of Dec. 22, 1989, amended, inter alia, by Law of Mar. 23, 1995, Law 37/1998 of Nov. 16, Law 50/1998 of Dec. 30, Law 55/1999 of Dec. 29, Law 1/2000 of Jan. 7, Law 44/2002 of Nov. 22, Law 22/2003 of July 9, Law 26/2003 of July 28, and Law 62/2003 of Dec. 30. The minimum capital required is [Euro]60,101.21, divided into shares in capital stock, and shareholders' liability is limited to amount of shares subscribed, provided such shares have been fully paid in. If they have not been fully paid in, debtors and company itself may claim difference. 25% of share capital must be fully paid in. Shares may be freely transferred, although certain restrictive covenants may be legally established. To form company of this kind, deed may be executed by only one person and must be executed before public notary, placing on record: (1) Names, surnames and ages of founders, where they are individuals, or corporate name, in case of legal persons, and their nationality and domicile in both cases; (2) founders' intention to form corporation; (3) cash, assets and rights contributed by each partner, indicating instrument under which such contributions are made and number of shares received in payment. Contributions in kind, both on formation of company and in subsequent capital increases, should be appraised by independent expert designated by Commercial Registry; (4) aggregate amount, at least approximately, of formation expenses; (5) bylaws governing corporation, which must state: (a) Company name, (b) corporate purpose, (c) term, (d) date on which it will begin to operate, (e) registered office and body competent to decide or resolve on creation, cancellation or transfer of branches, (f) corporate capital, stating, as appropriate, unpaid part and form and maximum term in which to pay capital calls, (g) number of shares into which capital stock is divided: their par value; their class and series if there are several, stating precise par value, number of shares and rights of each class; amount effectively paid in; and whether they are represented by share certificates or by book entry. When represented by share certificates, it should state whether these are in registered or bearer form and whether issue of multiple share certificates is contemplated, (h) structure of body entrusted with company's management, determining directors to whom its representation is entrusted and relevant regime. The number of directors must also be stated, which in case of Board of Directors may not be less than three, or at least maximum and minimum number of directors, term of office and system of compensation, if any, (i) system for deliberating and adopting resolutions by company's managing bodies, (j) fiscal year-end, (k) restrictions on free share transfers when this is stipulated, (l) system for ancillary obligations, if any, expressly stating their contents, whether they are rendered free of charge or for consideration, shares that include obligation to perform such ancillary obligations, and possible penalty clauses applicable in event of failure to perform such obligations, (m) special rights reserved for founders or promoters, if any; (6) full name and age of persons initially responsible for corporate management and representation, where they are individuals, or, otherwise, name of company and, in both cases, their nationality and domicile, together with same details regarding company's auditor, if appropriate. The deed may also include any legal agreements and special conditions that founders may wish to insert, provided that these do not contravene law. The public deed of incorporation must be registered at Commercial Registry. A company acquires legal status upon registration.

Law 55/1999 introduced modifications to Law 19/1989, of July 25. The amendments mainly provided for control over use of "stock options" as remuneration for senior personnel at companies (Board Directors). In order to exercise this control, such remuneration has to be established in company bylaws and must be approved by Company's General Shareholders' Meeting.

Shares may be represented by certificates or by book entry. Shares represented by certificates may be in registered or bearer form, but are subject to mandatory registration until they have been fully paid in, when their transferability is subject to restrictions, when they include ancillary services or when so required by special provisions. While shares may have different rights as regards participation in profits, right to vote must be same for all shares of same par value. Where they have different par values, right to vote must be proportional accordingly. However, possibility of company issuing nonvoting shares for par value, without exceeding one-half of the paid-in capital stock, is provided for. Nonvoting shares confer, inter alia, right to receive minimum fixed or variable annual dividend, as established in corporate bylaws.

The company is managed by Shareholders' Meeting and by directors (i.e., sole director, several directors acting jointly or jointly and severally, or Board of Directors) who are always dependent on will of shareholders as expressed at general meetings. Such shareholders may remove some or all of board members, and no provisions to contrary will be deemed valid. The General Shareholders' Meeting must be held at least once a year to approve financial statements submitted by board of directors. Aside from statutory exceptions, financial statements must be reviewed by auditors.

The Board of Directors may be elected for maximum period of six years and must elect chairman and secretary at its first meeting. The Board may appoint one or more Chief Executive Officers to manage daily business, to whom Board may delegate any of its powers. The Board may also elect executive committee formed by several directors. Dividends of at least 4% must be distributed to shareholders before directors may participate in company's profits, unless shareholders decide to allocate it to reserves.

Dividends may be freely distributed to extent that such distribution does not reduce net worth of company to less than capital stock, and where provision has been made for legal reserve.

Civil Procedure Law 1/2000, of Jan. 7, modifying wording of several procedure-related articles as result of promulgation of these Rules.

Law 44/2002, of Nov. 22, on Measures Reforming the Financial System, introducing, among others, amendments as regards rules on establishing shares price in event of transfers by different means.

Insolvency Law 22/2003, of July 9, modifying details concerning dissolution of companies.

Securities Market Law 26/2003, of July 28, introducing amendments to rights corresponding to shareholders and requirements to be met by directors when performing their duties, as well as in relation to their liability.

Law 3/2009 of Apr. 3, on Structural Modifications of Commercial Companies which regulates transformations, mergers (including cross-border mergers), spin-offs, cross-border change of registered office and other structural modifications.

(e) *Sociedad Anónima Europea* (European Company or Societas Europaea or SE). These companies are governed by Council Regulation (EC) 2157/2001, of Oct. 8, approving statutes for this type of company, and Council Directive (EC) 2001/86/EC, of Oct. 8, supplementing Statute for European Companies with regard to involvement of employees. Council Regulation (EC) 2157/2001 entered into force on Oct. 8, 2004. The statute provides for four ways of forming European limited company: by merger (available only to corporations from different Member States), formation of holding company (available to corporations and limited liability companies with their registered offices in different Member States or having subsidiaries or branches in member states other than that of their registered office), formation of joint subsidiary (available under same circumstances to any legal entities governed by public or private law), or conversion of corporation previously formed under national law. The minimum capital is [Euro]120,000, although where member state requires larger capital for companies exercising certain types of activity, same requirement will also apply to European Company with its registered office in that member state. The registered office of European Company stated in bylaws must be place in which it has its central administration, i.e., its true center of operations. A European Company can easily transfer its registered office within EC without dissolving company in one Member State in order to form new one in another Member State. Any transfer outside EC must give rise to winding-up of company on application by any interested party or competent authority. The registration and completion of liquidation at European Company must be disclosed for information purposes in Official Journal of European Communities. Every European Company must be registered in State in which it has its registered office, at registry designated by law of that State. The bylaws must establish general shareholders’ meeting and either management and supervisory board (two-tier system) or administrative board (single-tier system) as governing bodies. Finally, financial statements, taxation and winding-up are governed by national legislation applicable to company and its subsidiaries.

The Spanish Parliament has implemented above Council Regulation by means of Law 19/2005, of Nov. 14, 2005 which added c. XII to Royal Legislative Decree 1564 of Dec. 22, 1989, approving consolidated text of Spanish Corporations Law. Further to Law 19/2005, all plans for incorporation of European Companies domiciled in Spain, as well as incorporation itself, must be registered at Commercial Registry, in addition to all other formalities set forth in provisions applicable to corporations. With regard to transfer of registered office within Community, Law 19/2005 establishes right of withdrawal for shareholders that have not voted in favor of such transfer, and right to oppose transfer by creditors whose claims have arisen before date of publication of transfer plan. The Government, at proposal of Ministry of Justice, may also oppose transfer of European Company domiciled in Spain on grounds of public interest.

(f) *Sociedades Profesionales* (Professional companies). Law 2/2007 of Mar. 15, regulates companies or partnerships formed to render professional services. A professional services firm is type of concern in which professionals provide their services directly under name of firm. The partners of professional services firms may be professionals or non-professionals (although at least 75% of partners should be professional partners). Professional partners must be individuals who meet requirements established for exercise of professional activity which constitutes corporate purpose of firm and who pursue such activities within firm.

A professional services agreement must be formalized in public deed. Such deed must contain references and comply with requirements provided for in legislation regulating corporate form adopted (which could be any of those permitted by law). Furthermore, deed must state following details: 1. The identity of executing parties, stating whether or not they are professional partners; 2. The Professional Association to which executing parties belong and their membership number; 3. professional activity or activities which constitute the corporate purpose; 4. identity of persons who are initially entrusted with managing and representing firm, stating whether or not they are professional partners. The public deed of incorporation must be registered at Mercantile Registry. Upon registration, professional services firm will acquire legal personality. Registration is also mandatory at Register of Professional Services Firms of relevant Professional Association. Any change with respect to partners, be they professionals or otherwise, must be placed on record at Mercantile Registry in form of public deed.

With respect to managing body, three-fourths of its members must be professional partners. The firm and professionals who act therein must exercise professional activity which forms corporate purpose pursuant to ethical and disciplinary regime of professional activity being pursued.

The firm will be liable for corporate debts with all of its assets and liability of partners will be determined pursuant to rules of corporate form adopted, unless corporate debts derived from professional acts, for which firm and professionals who have acted, be they partners or otherwise, will be jointly and severally liable and subject to general rules on contractual or non-contractual liability.

Firms created prior to entry into force of LSP and which have characteristics specific to this corporate form, must be brought into line with specific provisions of the law and apply for registration at the Mercantile Registry within one year following entry into force of LSP.

See also category 23 Taxation, topic Taxes.

Special Corporations and Entities.

On Oct. 16, 2003, Spanish Parliament approved Collective Investment Institutions Law (hereinafter, “LIIC”), modifying legal regimen governing some of these Special Corporations and Entities. This Law was published in Spanish Official State Gazette on Nov. 4, 2003, and its provisions entered into force on Feb. 5, 2004. The modification of legal regime arose in response to obligation to transpose European Parliament and Council Directives 107/2001/EC and 108/2001/EEC into Spanish law. However, law goes beyond mere implementation of aforementioned Directives in Spanish law, as it provides for entirely new regulation for collective investment institutions in Spain. Royal Decree 1309/2005 of Nov. 4, 2005, implements provisions of regulations of Law LIIC. (hereinafter, “RIIC”).

Collective Investment Institutions are regulated by LIIC and RIIC. Collective Investment Institutions may have two different legal forms: (i) Investment Corporations and (ii) Investment Funds. The LIIC eliminates all other existing forms, such as SIM’s (“Sociedades de Inversión Mobiliaria de Capital Fijo”) and FIAMM’s (“Fondos de Inversión Mobiliaria en Activos del Mercado Monetario”).

There are two types of Collective Investment Institution, depending on type of assets they invest in: (a) Institutions investing in financial assets and (b) institutions investing in other types of assets.

(a) Among various Financial Assets Institutions, two principal investment vehicles are Variable Capital Stock Investment Corporations ("Sociedades de Inversión de Capital Variable" or "SICAV") and Investment Funds ("Fondos de Inversión" or "F.I.").

Assets suitable for investment by such financial collective investment institutions include, inter alia, financial assets, securities quoted or listed in a secondary market, shares and participations in other collective investment institutions, deposits of credit institutions that comply with certain requirements as regards their liquidity and maturity of at least 12 months, derivatives, money market instruments and financial assets not listed in any secondary market, provided that they comply with other requirements.

(b) Amongst various Non-Financial Asset Institutions are Real Estate Investment Funds ("Fondos de Inversión Inmobiliaria" or "FII") and Real Estate Investment Corporations ("Sociedad de Inversión Inmobiliaria" or "SII").

As stated above, two of most important types of investment institutions investing in financial assets are SICAVs and FIs.

(i) SICAVs are corporations with limited liability ("Sociedades Anónimas"), purpose of which is to procure publicly owned funds, assets or rights to be managed and invested in assets, rights and securities or other financial instruments, provided that investor's returns are established according to overall results. These companies must be registered at Commercial Registry and require prior clearance from Spanish regulatory authorities (CNMV). Their paid-in capital must be equal to or greater than [Euro]2,400,000. The number of shareholders may not be less than 100, and they are subject to strict information disclosure and audit requirements. SICAVs generally appoint management company ("Sociedad Gestora de Institución de Inversión Colectiva"). However, under certain circumstances, SICAVs may be self-managed.

It is worth noting that LIIC and RIIC eliminated the obligation for SICAVs to be listed on Stock Exchange. At present this possibility still exists, though vast majority of SICAVs in Spain are quoted on new MTF (Mercado Alternativo Bursátil or MAB) which has specific segment for SICAVs.

(ii) FI or Investment Funds are pools of funds by another corporation. They are formed by one or more contributions that must be recorded in agreement between management corporation and custodian. The number of FI unit-holdersmay not be less than 100. Formation requires prior authorization from, and registration at, Spanish CNMV, although there is no need for registration at Commercial Registry. The management and representation must entrusted to special management corporation ("Sociedades Gestoras de Instituciones de Inversión Colectiva"), whose paid-in capital must exceed [Euro]300,000. Investment Funds must also appoint custodian.

It must be pointed out that, under new regulations, LIIC and RIIC introduced possibility of setting up Collective Investment Institutions with sub-funds for first time. These sub-funds may also include further subdivision into classes of shares or classes of units, differentiated by fees applicable to them. The rules set forth in new law will be applicable individually to each and every sub-fund.

The LIIC and RIIC also included, for very first time in Spanish legislation, possibility of setting up hedge funds (called "Fondos de Inversión Libre in Spain). The most important features of this kind of fund are following: provisions regarding hedge funds are much more flexible than those applicable to SICAVs and FIs; hedge funds can maintain leveraged ratio of up to five times their own capital; they are also entitled to borrow securities; they are not subject to obligation to calculate their NAV on daily basis and they are not subject to investment restrictions applicable to SICAVs and FIs.

Hedge funds are products with considerable investment flexibility and are aimed at qualified investors. Initial investment of no less than [Euro]50,000 is required.

Finally, Order EHA/888/2008, of Mar. 27, 2008 (the “Order”), transposing Commission Directive 2007/16/EC into Spanish Law, provides in-depth clarify of types of financial derivative instruments that are considered eligible for financial collective investment institutions, as well as purpose of transactions—risk hedging and more effective portfolio management, with distinction between sophisticated and unsophisticated financial derivative instruments.

Also addressed by Order are classes of assets eligible as underlying assets of financial derivative instruments, as well as specific additional requirements to be met where underlying asset consists of certain assets such as credit risk, financial benchmarks or volatility of other assets.

The Order establishes certain general limits for use of financial derivative instruments due to market or counterparty risk. In any event, positions must be assessed on daily basis.

The Order establishes certain requirements to be met by financial derivative instruments not traded on organized markets (OTC), aimed at ensuring possibility of closing position in interest of collective investment institutions and avoiding conflicts of interest where counterparty belongs to same group as collective investment institution, management company or depositary.

The rules set out in new law will be applicable individually to each and every sub-fund.

Order EHA/596/2008, of Mar. 5, regulates certain aspects of legal regime governing custodian of collective investment institutions. Order EHA/3011/2007, of Oct. 4, modifies Order ECO/805/2003, of Mar. 27, on valuation rules for real estate and certain rights of some financial firms.

CNMV Circular 5/2007, of Dec. 27, regulates material events at collective investment institutions, while Order EHA/35/2008, of Jan. 14, and CNMV Circular 2/2008, of Mar. 26, set forth rules regarding accounts of collective investment schemes, disclosure obligations and other provisions for determining NAV. CNMV Circular 4/2008 sets out models regarding periodic information requirements for collective investment schemes (set to enter into force on Mar. 31, 2009)

With respect to tax-related issues, it is important to point out that any amounts received for reimbursement or transfer of shares units of collective investment institutions, (including collective investment institutions formed and domiciled in any European Union state and registered at Spanish CNMV) will be exempt from any payment of taxes in the case of individuals, where amount received by means of reimbursement or transfer is reinvested in another collective investment institution. In the case of Investment Funds, this provision applies in all cases. However, in order for such exemption to apply to SICAVs, SICAV or sub-fund must have at least 500 shareholders, and unit or shareholder may not have held stake, at any time during 12 months prior to transfer date, in more than 5% of capital of SICAV.

Moreover, profits of Capital Variable Investment Corporations, Financial Investment Funds, Real Estate Investment Funds and Real Estate Investment Corporations, provided that they have minimum number of share- or participation-holders, are taxed at special rate of 1%.

Mortgage Securitization Funds (“Fondos de Titulización Hipotecaria”) and Asset Securitization Funds (“Fondos de Titulización de Activos”).

The above funds are regulated by Law 19/1992 of July 7, Royal Decree 926/1998 of May 14, Law 2/81 of Mar. 25, and Royal Decree 716/2009 of Apr. 24, among others. Mortgage Securitization Funds are pools of mortgage share certificates (“Participaciones Hipotecarias”) that issue mortgage bonds. Asset Securitization Funds are pools of other assets, and also can issue bonds. These Funds must be formed, managed and represented by special purpose corporations, namely, Asset Securitization Companies (“Sociedades Gestoras de Fondos de Titulización de Activos”), with paid-in capital of at least [Euro]901,518.16. These companies must be authorized by Ministry of Economy and registered at Commercial Registry and Spanish CNMV. Securities issued by Mortgage and Asset Securitization Funds must be traded on organized secondary markets, unless they are offered to qualified investors only.

Venture Capital Institutions.

Venture Capital Corporations (“Sociedades de Capital Riesgo”), Venture Capital Funds (“Fondos de Capital Riesgo”) and their Management Companies are essentially regulated by Law 25/2005, of Nov. 24, 2005. Venture Capital Corporations must be registered at Commercial Registry and Spanish CNMV Special Registry in order to enjoy special tax regime, while registration at Commercial Registry is optional for Venture Capital Funds. These companies invest in non-financial and non-listed corporations by providing capital, professional advice and loans. Venture Capital Funds must be managed by management entity (“Sociedad Gestora de Entidades de Capital Riesgo”) (SGECR), although this is not mandatory for Venture Capital Corporations. The capital stock of SGECR must be greater than [Euro]300,000.

Investment Firms.

These firms are regulated by Securities Market Law 24/1988, as amended by Law 47/2007, of Dec. 19, 2007, RD 217/2008, which sets out legal regime governing Investment Firms, Royal Decree 1820/2009 of Nov. 27 (regarding acquisition and transfer of major holdings in Investment Firms), and Royal Decree 216/2008 of Feb. 15, on equity of Financial Institutions. Along with credit institutions, Investment Firms (“Empresas de Servicios de Inversión”) are entities authorized to render investment services (as defined by Directive 93/22, repealed by Directive 2004/39/EC). There are four types of Investment Firms: (a) Broker-Dealer Companies (“Sociedades de Valores”), Brokerage Companies (“Agencias de Valores”), Portfolio Management Companies (“Sociedades Gestoras de Cartera”) and Financial Advisory Services Firms (Empresas de Asesoramiento Financiero), depending on kind of services they are allowed to provide.

According to Royal Decree 948/2001 of Aug. 3, Sociedades de Valores and Agencias de Valores and Sociedades Gestoras de Carteras must sign up to a compensation scheme guaranteeing up to [Euro]100,000, the amount provided for in Royal Decree 1642/2008.

Economic Interest Groupings.

Economic Interest Groupings are regulated by Economic Interest Grouping Law (“LAIE”) 12/1991, of Apr. 29, 1991.

Law 12/1991 states that the corporate purpose of such groupings must be limited to supporting activity pursued by their members.

An agreement for formation of Economic Interest Grouping must be entered into by means of executing public deed stating, at least, following details: a) The identity of members; b) intention of executing parties to create Economic Interest Grouping; c) capital stock, if any; d) name; e) purpose; f) term and date of commencement of operations; g) registered office; and h) identity of persons entrusted with management. The deed of formation of EIG must be registered at Mercantile Registry. The name of the Grouping must necessarily contain expression "Economic Interest Grouping" or abbreviation "EIG," which is exclusive to this kind of company. The EIG is liable for its corporate debts. However, shareholders are secondarily liable for such debts, in this case on joint and several "*inter se*" basis.

EIGs must have at least two members, and any decrease in number of members to one will be deemed grounds for winding up. The admission of new members must be registered at Mercantile Registry, for which purpose public deed must be executed.

The Economic Interest Grouping Law does not contain any systematic numbering or regulation of bodies of such companies. Despite this, legal precedents generally acknowledge, in one way or another, legal existence of following two bodies: 1. The Members Meeting and 2. The Directors.

The EIG may be wound up on following grounds (Art. 18.1 of the Economic Interest Grouping Law): by unanimous agreement of members; on expiry of term or on any other ground provided for in deed; on commencement of liquidation phase, when insolvency order is made against Grouping on achievement of grouping's purpose or where it proves impossible to pursue such purpose any further corporate bodies cease to exist and operations prove impossible; in event of failure to adapt activity of Grouping to purpose thereof; due to reduction in number of members to one; and on just and proper grounds (Art. 20 of the Economic Interest Grouping Law).

Insolvency orders, death or winding up of member or loss of its status as such will not result in winding up of Grouping. However, winding up will apply where other members fail to reach agreement with respect to conditions for survival.

Temporary Joint Ventures.

Temporary Joint Ventures are regulated by Law 18/1982 of May 26, 1982. A temporary joint Venture ("UTE") is system for collaboration between companies for definite or indefinite term and for provision of specific service or work.

UTEs are governed, in corporate/commercial area, by Arts. 2, 7, and 8 of Law 18/1982, of May 26, 1982, on tax regime for joint ventures and for regional industrial development companies ("LUTE") and related provisions. A UTE is system for collaboration between enterprises for certain period of time, whether definite or indefinite, for pursuit or provision of work, service, or supply. This collaboration gives rise to new, independent enterprise that acts under same management and under name different from those of enterprises of which it is composed. The UTE can be created voluntarily or as result of tender specifications issued by authority holding invitation to tender for work or project. They must be formalized in public deed and lack separate legal personality. The business name will consist of name of one, several or all of member enterprises, to which term "Unión Temporal de Empresas" (i.e. "Joint Venture") will be added. The organizational structure of UTE is not predetermined by LUTE. In practice, it can take following forms: A) A Meeting held by companies; B) management committee; C) manager; and D) technical and administrative personnel. UTEs have duration identical to work, service or supply that comprise their purpose. The maximum duration cannot exceed 25 years, unless contracts in question involve execution of works or provision of public services, in which case maximum duration is 50 years.

Branches.

The Mercantile Registry Regulations of July 19, 1996, define branches as any secondary establishment with permanent representation and certain degree of independence of management, through which some or all of main company's activities are carried out.

The creation of branch by Spanish or foreign company only requires resolution to open secondary establishment. The resolution creating branch must be registered at Mercantile

Registry. As for form to be taken by resolution that creates or establishes branch, under Art. 95.1 of the RRM, in conjunction with Art. 94 of the RRM, opening, closing, or other acts relating to branches must be formalized in public deed. The branch will be closed when parent company so decides. Thus, branch can be closed in two ways: by decision of parent company or on termination of parent company itself. As in case of formation, closure must be formalized in public deed, which must also be registered at Mercantile Registry in order to announce such closure, just as its formation was announced.

See also category 23 Taxation, topic Taxes.

Corporations with shares traded on stock exchange.

Listed corporations (only Sociedades Anónimas can have listed shares) are mainly regulated by:

Securities Market Law 24/1988, of July 28 (as amended primarily by Law 47/2007, of Dec. 19, Laws 37/1998, of Nov. 16; 50/1998, of Dec. 30; 55/1999, of Dec. 29; 14/2000, of Dec. 29; 24/2001, of Dec. 27; 44/2002, of Nov. 22; 26/2003, of July 17; 6/2007, of Apr. 12; and Royal Law-Decree 5/2005, of Mar. 11) governing primary and secondary markets, Securities and Exchange Commission (“Comisión Nacional del Mercado de Valores”, or “CNMV”), Stock Exchanges, Investment Services Enterprises, Supervision and Disciplinary Rules and Taxation of Securities transactions.

Royal Decree 1310/2005 of Nov. 4, regulating public offerings in Spain, including securities of same type as others listed on Stock Market and those publicly offered by issuers through announcements in Spain.

Royal Decree 1066/2007 of July 27, regulates tender offer procedures, establishing cases in which such tender offers are mandatory, contents of prospectus, competing offers, and voluntary tender offers.

Decree 1506/1967 of June 30, 1967, regulating Stock Exchanges, as amended by Royal Decrees 1536/1981 of July 13, 1981, and 650/1988 of June 24. The Order of June 19, 1997, on requirements for admission to listing, amended by Order of Dec. 22, 1999, establishing New Market (“Nuevo Mercado”). CNMV Circular 1/2000 on admission to listing in New Market. Moreover, there is Stock Market of Latin American companies that are listed in Madrid in euros called “Latibex”, created by Madrid Stock Exchange.

Royal Decree 1362/2007, of Oct. 19, 2007, implementing Law 24/1988 on transparency requirements concerning issuers whose securities are admitted to trading on official secondary market or in any other regulated market in European Union. This Royal Decree establishes obligation to disclose those percentages which reach, reduce, or exceed following thresholds: 3%, 5%, 10%, 15%, 20%, 25%, 30%, 35%, 40%, 45%, 50%, 60%, 70%, 75%, 80%, and 90% of capital voting rights; and subsequent amendments of these percentages. It is also necessary to notify CNMV about any financial instruments that grant right to acquire shares with voting rights, automatically or at sole initiative of owner. CNMV Circular 2/2007, of Dec. 19, approving specimen forms for notifications of major holdings of directors and executives, transactions by issuers using their own shares, and other specimen forms.

Law 41/1999 of Nov. 12, on payment and securities settlement systems and Royal Decree 116/1992 of Feb. 14, on representation of securities by means of book entries and clearing and settlement of stock market operations, as amended by Royal Decrees 2590/1998 of Dec. 7, and 2813/1998 of Dec. 23, on Spanish clearing systems also apply.

Quoted companies must provide CNMV with certain information on ongoing basis. CNMV Circular 3/1994 amended models of public periodic disclosure regarding issuers whose securities are traded on regulated markets, and was later modified by Circular 2/2002 regulating periodic information that must be supplied by public companies. This year, CNMV Circular 1/2008, of Jan. 30, established requirements on periodic reports regarding issuers whose securities are traded on regulated markets with respect to half-yearly financial reports, intermediate management declarations and, as case may be, quarterly financial reports.

CNMV Circular 1/2004, as amended by CNMV Circular 4/2007, approved annual specimen form for corporative governance of listed corporations.

Directive 2007/36/EC on exercise of certain rights of shareholder in listed companies has yet to be transposed into Spanish law.

Law 11/2009 of Oct. 26, regulates legal and tax aspects of special type of listed corporations dedicated to investments in real estate market and known by Spanish acronym of Socimis.

Foreign Corporations.

Foreign companies setting up branch in Spain must register it at Commercial Registry for area in which they have their Spanish domicile, filing, for such purpose, duly authenticated documents providing evidence of existence of company, its bylaws in force and its directors, together with documents recording formation of branch. The following should also be recorded: details identifying branch; its domicile; activities entrusted to it, as appropriate; identity of representatives permanently appointed to branch, stating their authority; and capital allocated to branch.

Foreign Investments in Spain.

See category 15 Foreign Trade and Commerce, topic 15.04 Foreign Investments in Spain; also category 23 Taxation, topic Taxes.

See also category 3 Business Regulation and Commerce, topic 3.03 Commercial Registry.

2.04 JOINT STOCK COMPANIES:

See topic Corporations and 2.02 Associations.

2.05 PARTNERSHIPS:

See topic Corporations and 2.02 Associations.

3 BUSINESS REGULATION AND COMMERCE

3.01 BANKS AND BANKING:

Private Banks.

Regulations on banking activities differentiate between EU and non-EU applicants. As to EU credit institutions, Law 3/1994 implemented EU Directive 89/646 regulating provision of banking services and setting up branches, both of Spanish credit institutions in EU member states and of EU credit institutions in Spain. The Law sets in place swift procedures for notification to banking authorities prior to rendering banking services or setting up branches, and applicant's member state banking authority is tasked with surveying and controlling its solvency requirements. Additionally, Royal Decree 1245/1995 regulates access to banking activities by setting up banking corporations. Access to banking activities through banking corporations is subject to non-discretionary authorization from Ministry of Economy and opening of

Representative Offices (which may not render banking services directly) is subject to authorization from Bank of Spain.

With respect to non-EU applicants, access to banking activities may be gained through setting up of corporations, branches or representative offices, and, in any event, access to banking activities is subject to authorization from Ministry of Economy and compliance with principle of reciprocity. Royal Decree 1245/1995 provides for rules and regulations covering this matter.

Additionally, several limitations apply to credit institutions during their first years of existence.

The Bank of Spain is entity under public law acting with autonomy in relation to executive power. The Bank of Spain is member of European System of Central Banks (hereinafter "ESCB") and is governed by Law 13/1994 and its implementing regulations, European Union Treaty (hereinafter "Treaty") and ESCB bylaws. In addition to its tasks as ESCB member, Bank of Spain performs certain domestic duties, including, inter alia, supervision of credit institutions' solvency and their compliance with rules and regulations governing banking activities, as well as supervision of certain financial markets. For performance of its tasks, Bank of Spain is authorized to issue regulations, its relations with third parties being governed by administrative law or private law, depending on nature of transaction in question. Pursuant to Law 26/1988 (as amended), Bank of Spain is vested with broad powers over credit institutions which, in certain cases, are shared with Ministry of Economy. Among such powers are powers to impose monetary penalties, to replace boards of directors and to scrutinize credit institutions. The legal procedure to be observed by relevant disciplinary authority in connection with administrative infringements affecting financial market is provided for in Royal Decree 2119/1993 of Dec. 3, 1993.

Law 13/1985 of May 25 and Royal Decree 216/2008 of Feb. 15 provide that credit entities must maintain, on consolidated basis, certain "own resources" ratio, as defined by said legislation in conjunction with European Directive 2006/48, implementing new 2004 "Basel II" international rules in Europe.

Establecimientos Financieros de Crédito (Credit Financial Institutions).

Royal Decree 692/1996 of Apr. 26, 1996, regulates limited purpose, non-banking credit institutions, which are not entitled to receive monetary deposits from public. These entities are usually specialized in rendering of one or several financial side-services, such as financial leases, credit and management services, consumer loans, etc. The formation of credit financial institutions is subject to authorization from Ministry of Economy and registration at Bank of Spain.

Interest Rates and Fees.

Banks may freely agree on interest rates and fees with their clients within limits of their respective tariff brochures. Banks are obliged to comply with certain reporting requirements, informing their clients of effective rates.

3.02 BILLS, NOTES AND CHECKS:

Bills of exchange, promissory notes and checks are governed by Law 19/1985 of July 16, 1985, partially amended by Law 37/1998 of Nov. 16, 1998, Civil Procedure Law 1/2000 of Jan. 7, 2000, and Law 22/2003 of July 9, 2003.

Bills of exchange must display words "bill of exchange" included in text of security itself, in same language as text of security; pure and simple order to pay certain sum in euros or convertible foreign currency admitted for official listing; name of person who should pay, known as drawee; statement of date of maturity of bill; place in which payment should be made; name of person to whom payment should be made; date and place in which bill is drawn; signature of person issuing bill, known as drawer. Bills which do not comply with one or more of above established requirements will only be considered as bills of exchange under following circumstances: (a) Where maturity date of bill of exchange is not stated, it shall be deemed payable on demand; (b) unless expressly stated, place stated alongside name of drawee shall be considered as place of payment and, at same time, as domicile of drawee; (c) any bill of exchange that does not state its place of issuance shall be considered as drawn at place stated alongside name of drawer.

Any person who signs bill of exchange as representative of third party without powers of attorney to act on behalf of such third party shall be bound by bill. Should such person pay said bill, he/she will have same rights as person purportedly represented by him.

The above will also apply to any representative who exceeds his/her powers.

Bill of exchange may be drawn: on fixed date; within term calculated from issue date; on demand; or within period calculated from date of submission. Bills of exchange that state other maturity dates or successive maturity dates will deemed invalid. In bills of exchange payable on demand or within period calculated from date of submission, drawer may have corresponding amount to accrue interest, at rate of interest per annum stated on bill. Interest shall accrue from date on which bill of exchange is drawn where no other date is stated for such purpose.

Payment of bill may be guaranteed either in full or in part, and such guarantee may be given by third party or also by person signing bill.

Bills of exchange on demand will be payable on submission, and should be submitted for payment within one year from date thereof. The holder of a bill of exchange payable on fixed date or within term to be calculated from such date or on demand should submit bill of exchange for payment on its maturity date, or on one of following working days. With respect to bills of exchange domiciled in accounts opened at credit entity, submission of such bills to clearing house or system of compensation is equivalent to submission for payment.

Payment of bills of exchange drawn in convertible foreign currency admitted for official listing should be made in agreed currency, provided that obligation of payment in said currency is authorized or permitted in accordance with exchange control rules.

Transfer of bills of exchange is made by endorsement.

Notes.

Promissory notes should display words “promissory note” included in text of security itself and in same language as that of text of said security; pure and simple promise to pay certain amount in euros or in convertible foreign currency admitted for official listing; statement of maturity date of security; place in which payment is to be made; name of person to whom payment is to be made or at whose order it is to be made; date and place in which promissory note is signed, signature of person issuing security, known as signatory. Any security that fails to fulfill any of above requirements shall not be considered as promissory note except under following circumstances: (a) Where maturity date of note is not stated, it will deemed payable on demand; (b) unless specifically stated, place of issuance of security will be considered as place of payment and, at same time, as domicile of signatory; (c) when place of issuance of bill is not stated, it will be deemed to have been signed in place stated alongside name of signatory.

The Signatory of note will be bound in same way as acceptor of bill of exchange and, consequently, same provisions relating to bills of exchange are applicable to promissory notes.

Checks.

Checks should contain word "check" inserted in text of security itself, in same language as that of text of said security; pure and simple mandate to pay certain sum in euros or in convertible foreign currency admitted for official listing; name of person who is to pay, known as drawee, which should necessarily be bank; place of payment; date and place of issuance of check; signature of person issuing check, known as drawer. Any check which fails to fulfill any of above requirements will not be deemed check except under following circumstances: (a) Unless specifically stated, place stated alongside name of drawee will be deemed place of payment. Where various places are stated, check will be payable at first place stated; (b) failing these or any other statements, check should be paid at place in which it was issued, or, should drawee have no establishment at said place, at place in which drawee has its main establishment; (c) any check which has no statement of its place of issuance will be deemed to have been signed in place stated alongside name of drawer.

Checks are payable on demand. Checks submitted for payment before stated date of issuance are payable on date on which they are submitted. Submission to clearing house or system of compensation is equivalent to submission for payment.

Any checks issued and payable in Spain should be submitted for payment within 15 days. Any checks issued abroad and payable in Spain should be submitted within 20 days if issued in Europe, or within 60 days if issued outside Europe.

Drawees with funds that may be drawn on by drawer at moment of submitting a duly issued check for payment are obliged to pay. Where such drawees only have partial provisions available, they will be obliged to deliver amount of such partial provision. Any drawer who issues checks without provision of funds in possession of drawee for amount stated in check must pay holder, in addition to said amount, 10% of outstanding amount, as well as compensation for damage or loss.

Checks may not be accepted. However, drawer or holder of check may apply to drawee bank for approval to be granted for same.

Checks may be drawn for payment: (a) To particular person, with or without "by order" clause; (b) to particular person with "not by order" clause, or equivalent; (c) to bearer. Bearer checks are transferred by means of delivery or transfer. Check issued in favor of particular person with or without "by order" clause may be transferred by means of endorsement. Checks issued in favor of particular person with "not by order" or equivalent clause may only be transferred in form and with effects of ordinary assignment.

3.03 MERCANTILE REGISTRY:

The regulations governing Mercantile Registries are implemented by Royal Decree 1784/1996 of July 19, superseding former Royal Decree 1597 of Dec. 19, 1989. There is Mercantile Registry for each province and Central Mercantile Registry based in Madrid.

Registration at Mercantile Registry is mandatory, under penalty of legal nonexistence, for individual shippers, commercial companies, credit and insurance cooperatives, investment funds, pension funds, savings banks and branches of foreign companies, among other entities; registration is optional for individual entrepreneurs. Records of main dealings and agreements of registrable subjects are kept on Register, such as capital increases and decreases, amendments to bylaws or articles of association, appointment of directors and attorneys-in-fact, mergers, debenture issues, bankruptcies, etc. Other duties of Mercantile Registry include legalization of company books, appointment of independent experts (whose main task is to value property in event of company formation or mergers) and of auditors (when companies obliged to have their accounts audited fail to appoint their auditors themselves) and, lastly, filing and public disclosure of company accounts.

The contents of registration are assumed to be accurate and valid, and declaration of inaccurate Registry entries, which requires express court ruling, does not impair rights acquired pursuant to Registry by any third parties acting in good faith. Acts and agreements subject to registration and not registered may not be challenged by third parties. Registered acts and agreement are assumed to be common knowledge and ignorance thereof cannot be alleged.

The Register is public in nature and transactions or contracts recorded thereon are published in Official Mercantile Registry Gazette, kept by the Central Commercial Registry. The names of all registered companies and entities are recorded at latter, and companies or entities may not adopt name that has already been registered.

The 1996 amendment essentially provides for regime governing limited liability companies in order to facilitate their access to Mercantile Registries, regime of sole-shareholder companies ("Sociedades unipersonales"), and certain new documentary procedures.

The Instructions of Dec. 30 and Dec. 31, 1999, issued by Directorate-General of Registries and Notaries ("Dirección de los Registros y del Notariado") establish possibility of filing company's financial statements and legalizing corporate books by computer.

Finally, by virtue of Royal Decree 685/2005, of June 10, 2005, § 1 of c. XIII of Title II of Royal Decree 1784/1996 of July 19, 1996, on registration and disclosure of insolvency situations, has been amended in order to implement provisions set forth in this connection in Law 22/2003, of July 9, 2003.

3.04 COMPETITION:

Competition law in Spain is currently regulated by Law 15/2007 of July 3, which entered into force on Sept. 1, 2007 ("LDC" in its Spanish initials). Royal Decree 261/2008, of Feb. 22, implements LDC. The LDC deals with restrictive practices, abuses of dominant position, as well as mergers and State aid, and marks a substantial change from Law 16/1989.

The LDC is implemented by newly-created National Competition Commission ("NCC"), composed of investigative body (Investigation Directorate or "ID") and decision-making body (Council). The Council has President and six State-appointed members, of whom Parliament must be informed (albeit not subject to their approval). Investigations or infringement proceedings can be initiated ex officio by ID or Council and at request of any third party. Council rulings can be appealed before Administrative Courts.

Infringements.

The LDC sets forth two main infringements.

Art. 1 describes "collusive conduct". It prohibits all agreements, decisions, collective recommendations or concerted (or consciously parallel) practices, that have objective or effect (or may have the effect) of impeding, restricting or distorting competition within whole or part of national market. Agreements, which fall within general prohibition stated in Art. 1, are void unless they fall within exemption provided in Art. 1.3. Exemption is granted for pro-competitive effects in compliance with parameters set out in EC Block Exemption Regulations directly enforceable in Spain. (art. 1.4 of LDC). In line with EC law, LDC eliminates need to notify NCC of agreements. Another significant feature is leniency program against cartel agreements which is similar to that applied by European Commission formally in force since 28 Feb. 2009. Pursuant to leniency program, several investigations (dawn raids) have been carried out by NCC since mid-June 2008. However, no final decision or fines have been issued pursuant to leniency application to date as maximum duration of proceedings may take up to 18 months and it is common practice for NCC to exhaust this period.

Art. 2 prohibits any abuse of dominant position by one or more undertakings within national market (or part thereof). Art. 2 lists some examples of abusive conduct. There is no exemption for such infringements and prohibition applies even where dominant position has been established by law.

Art. 3 includes ban on unfair trading practices that distort competition and affect public interest. Although unfair trading practices are dealt with by civil courts in Spain, Art. 3 LDC empowers Spanish competition authorities to pursue unfair trading practices that seriously affect competition and public interest. The competition authorities do not only prosecute unfair trading but also effect of such conduct on market. Unfair trading is also regulated by Law 3/1991.

Undertakings that adopt prohibited or unauthorized agreements, abuse their dominant position or carry out restrictive practices may be fined up to 10% of their annual turnover (for cartels, illegal agreements between competitors and certain abuses when special circumstances affect dominant undertaking, e.g. having very high market shares) or 5% for other competition infringements (such as unlawful agreements between non-competitors and any other abuses) by Council. On Feb. 9, 2009, NCC published its Notice on method of setting fines imposed pursuant to competition law.

Merger control is regulated by LDC and Royal Decree 261/2008, of Feb. 22.

The LDC defines concentrations as those transactions with lasting impact on structure of control at undertaking concerned through: merger between two or more formerly independent companies; acquisition of control of whole or parts of one or more undertakings; creation of joint venture performing functions of autonomous economic entity on lasting basis without having objective or effect of coordinating competitive behavior of independent undertakings.

Notification of concentration is mandatory where transaction does not fall within exclusive jurisdiction of European Commission and: (i) Where combined aggregated turnover in Spain in last financial year exceeds [Euro]240 million and at least two parties have individual turnover in Spain of [Euro]60 million, or (ii) where combined market share equal to or greater than 30% is acquired or increased in Spanish market or in another geographic market defined within Spanish market, for any specific product or service.

Aggregate turnover means overall revenue from sale of products or provision of services by participating enterprises, net of tax. If one of firms in question belongs to corporate group, sales turnover for entire group may, under certain circumstances, be considered. The LDC will not apply to any transaction caught by provisions of ECMR (with exceptions provided for in ECMR) and it provides for consultation procedure so that undertaking concerned may, before notification, consult with NCC as to whether their transaction (i) constitutes concentration or (ii) exceeds thresholds referred to above.

Any project or transaction involving economic concentration caught by LDC must be notified prior to completion, and concentration cannot be carried out until express or implied approval is granted (suspension). An acquirer may request that suspension be lifted on providing due justification, even at pre-notification stage provided for in LDC. The offeror/acquirer is responsible for filing acquisitions. In case of mergers or acquisitions of joint control (joint venture), filing is done jointly by undertakings concerned. Mergers have to be filed before ID in form stipulated in schedule to implementing Royal Decree 261/2008. The Spanish notification form is similar to Form CO for filings before EC and includes information on parties, their turnover and business sectors in which they operate, basic features of transaction, details of ownership and control provisions, detailed market information, etc. The filing fees for mandatory notifications range from [Euro]3,000 to [Euro]60,000, depending on parties' aggregate turnover. The LDC now includes simplified form for concentrations which are unlikely to give rise to competition-related issues (e.g., lack of overlapping activities, minor importance or joint venture not active in Spanish market) subject to filing fee of [Euro]1,500.

Fines of up to 5% of annual turnover of company concerned may be imposed for failure to notify and early implementation, including daily penalty payments until filing is completed, for providing incorrect or misleading information and/or for failure to abide by final decision. The ID may request notification on ex officio basis, which must be filed within 20 days from date on which such requirement is issued.

This procedure has been substantially amended, limiting intervention of Government which, under Law 16/1989, decided on concentrations during second phase. If, once notified, transaction does not raise any competition concerns, Council may decide to approve operation without any express decision, within one month from notification at latest (first phase). It can also authorize transactions through formal decisions. If Council has any doubts about merger where it may impede effective competition in Spanish market, it may propose amendments or invite parties to put forward such amendments in order to obtain clearance in first phase.

Where Council considers that, despite any proposed commitments, the transaction could still impede competition, it will institute second-phase proceedings (lasting further two months). The ID will draft statement of objections describing competition issues which will then be notified to interested parties for comment. After two-month period, Council may authorize concentration (expressly or implicitly) or either impose/accept commitments, or prohibit concentration under express decision. In its assessment of concentration, Council only takes competition-related criteria into consideration during both first and second phases.

In event of prohibition or commitments during second phase, effects of Council decision will be suspended. The Ministry of Economy then has 15 days in which to refer concentration to Spanish Government. If referred, Government has one month in which to hand down its definitive ruling. If neither Ministry nor Government adopt decision within above time periods, Council's decision will enter into effect. The Government may adopt its express final decision by: (i) confirming decision of Council, or (ii) authorizing concentration, with or without conditions. Such conditions should be reasoned in light of open set of criteria based on general interest rather than competition-related criteria.

The Council has wide-ranging powers to order any appropriate measures to restore effective competition, including divestiture or cessation of control. In event of failure to comply with final decision, fine of up to 10% of Spanish turnover of undertakings concerned may be imposed. Fines of up to [Euro]12,000 can also be imposed for each day of delay in complying with Government's decision.

State Aid.

Although LDC maintains Ministry of Foreign Affairs' exclusive competence to notify European Commission of any planned public aid, from now on, CNC will receive copy of any notified aid giving it opportunity to submit report about aid before European Commission issues its Decision on existence and/or compatibility of aid or scheme. Even if such reports do not bind Commission, they may influence it. The NCC may also require any public authorities to provide information on any aid granted, even if not notified to European Commission. The NCC may prepare reports on aid schemes and address recommendations to public authorities. Under LDC, NCC must produce final annual report on State aid granted throughout year. The LDC also recognizes right of regional competition authorities to prepare reports on aid granted by regional or local authorities without infringing NCC's State-aid competences. These will be included in NCC's final annual report. Furthermore, Royal Decree 261/2008 provides that NCC must create electronic register recording all national State aid published in official journals.

Other Spanish Competition-Related Legislation.

Following Constitutional Court Judgment of Nov. 11, 1999, Law 1/2002 confirmed that, as well as National Government, Spanish regions were also competent to apply competition law. Regional legislative bodies then started to create their own competition authorities. The LDC amends several provisions of Law 1/2002, increasing information exchanged between NCC and RCAs. Moreover, NCC must inform of all complaints received concerning suspected infringing conduct affecting each region and will request that RCAs furnish their non-binding opinions in relation to both infringement and merger proceedings with significant impact in their regional territory. RCAs have already been set by regional legislation in 11 out of the 17 Spanish Autonomous Communities. Andalusia passed Competition Law 6/2007, creating Andalusia Competition Agency (Agencia de Defensa de la Competencia de Andalucía). In Aragón, Decree 29/2006 gave rise to Aragon Court of Competition and Competition Service (Tribunal de Defensa de la Competencia de Aragón and Servicio de Defensa de la Competencia). In the Basque Country, the Basque Competition Court and Competition Service for the Autonomous Community of Euskadi (Tribunal Vasco de Defensa de la Competencia and the Servicio de Defensa de la Competencia en la Comunidad Autónoma de Euskadi) were created by Decree 81/2005. Castilla y León set up the Competition Court for the Autonomous Community of Castilla y León (Tribunal para la Defensa de la Competencia de la Comunidad de Castilla y León) by means of Decree 36/2006. In Catalonia, Decree 222/2002 established the Catalonian Competition Court (Tribunal Catalán de Defensa de la Competencia). Subsequently, the Competition Court for the Autonomous Community of Valencia (Tribunal de Defensa de la Competencia de la Comunitat Valenciana) was created by Decree 169/2006. The Competition Court of Extremadura (Jurado de Defensa de la Competencia de Extremadura) was established by Law 2/2005. Law 6/2004 of July 12, 2004, created the Galician Competition Court (Tribunal Gallego de Defensa de la Competencia), while the Competition Court for the Autonomous Community of Madrid (Tribunal de Defensa de la Competencia de la Comunidad de Madrid) was enacted in Law 6/2004 of Dec. 28, 2004, and the Regional Competition Service of Murcia (Servicio Regional de Defensa de la Competencia de Murcia) under Decree 13/2004. Finally, Decree 76/2008, of June 10, 2008, created administrative bodies for defense of competition in Castilla-La Mancha.

With respect to enforcement of competition law by Spanish courts, Law 8/2003 of July 8, 2003, allows a new category of courts to hear competition law cases, namely, the Commercial Courts ("Juzgados de lo Mercantil"), in operation since Sept. 2004. The LDC eliminates requirement to obtain final administrative decision before civil claim for damages is brought, giving rise to additional legislative amendments granting Commercial Courts power to directly apply, in addition to EU competition law, national competition law (LDC). These changes led so far to very few cases of damages awards being made by specialist courts for competition law infringements. The LDC also reinforces mechanisms of information and cooperation between NCC and national courts, European Commission and other national regulatory authorities.

Royal Decree 1083/2009 of July 3, requires Spanish Administrations involved in enacting legal provisions to draft report assessing impact of given measure on different aspects, including competition. (art. 1d). Royal Decree 1083/2009 entered into force on 1 Jan. 2010.

On May 19, Royal Decree 602/2006 enacted regulations governing exemption of certain types of agreement on exchange of information regarding non-performing debt. This block exemption regulation, which mirrors similar EU legislative instruments, declares Spanish competition rules to be inapplicable to creation of registers of defaulters, provided that certain conditions are met, including, among others, open access to register by market operators and right of defaulters to require rectification of incorrect data. The Regulation will not be applicable to exchanges of information in which three main operators in relevant market hold combined market share greater than 50%.

Unfair Trading.

Unfair Competition Law 3/1991 of Jan. 10, 1991, prohibits deceptive, misleading or denigrating commercial activities. Although specific conduct is specified as unfair, Art. 5 generally establishes that conduct that objectively contravenes principle of good faith will also be deemed unfair. Claims concerning unfair trading are brought before Commercial Courts. Law 3/1991 was later amended by Law 52/1999, which introduced certain unfair practices, as well as by Law 1/2000 and Law 14/2003.

Advertising is regulated under General Advertising Law 34/1988, Art. 3 of which prohibits deceptive, subliminal and unfair advertising that may infringe individuals' constitutional rights. Art. 6 permits comparative advertising when focused on objectively tested essential characteristics of similar products or services. Law 39/2002 incorporates Art. 6 bis and defines comparative advertising.

Trade Monopolies.

With respect to postal sector, Law 24/1998 consolidates previously piecemeal regulation by deregulating services, albeit conferring universal service to present public operator. The contents of universal service are listed in Art. 15.2 and are subject to quality standards and regulated prices. Postal services open to competition require general or individual authorizations. Undertakings that have been granted individual authorizations and incumbents are subject to public service requirements. The public body in charge of universal service maintains significant exclusive rights in rendering of specific services. Law 24/1998 has recently been implemented by Royal Decrees 81/1999 and 1829/1999, and amended by Laws 50/1998, 14/2000, 24/2001, 53/2002, 10/2007 and 17/2007.

The tobacco industry has been partially deregulated since enactment of Tobacco Markets Law 13/1998. The Government maintains a monopoly for retail sales (except in the Canary Islands). However, retail sales continue to be considered public service due to tax and custom duties concerns. There are considerable limits placed on tobacco advertising due to health policies. Law 13/1998 has been implemented by Royal Decrees 1199/1999 and 6/2000, and amended by Laws 50/1998 and 14/2000. The recent Law 28/2005, which entered into force on Jan. 1, 2006, regulates sale, supply, consumption and advertising of tobacco products more strictly than was case in earlier legislation. Law 28/2005 has repealed lower-ranking regulations on this subject, as well as certain sections of Laws 34/1988 and 13/1998, and Royal Decree 1199/1999, among other Royal Decrees. Royal Decree 1/2007 implements Law 28/2005, particularly with regard to prohibitions on advertising, promotion and sponsorship.

Enhancing Competition.

Royal Decree-Law 6/2000 was adopted to enhance competition by deregulating strategic economic sectors in Spain. The measures focus, inter alia, on three energy sectors, liquid hydrocarbons, natural gas and electricity, while limiting development of largest operators in those sectors, making it easier for smaller players to enter market. This Royal Decree-Law has recently been affected by Law 1/2004 and by Royal Decree 5/2005 in relation to shop opening hours, transparency in electricity generation market and definition of principal operators in energy and fixed and mobile telephony sectors. Royal Decree 5/2005 also foresees urgent measures for increasing productivity in following industries: energy, finance, public procurement and greenhouse gas emission allowance trading. The latest amendments to Royal Decree-Law 6/2000 have been made by Royal Decree-Law 3/2006 of Feb. 24, 2006, Royal Decree 1323/2003 of Sept. 26, 2003, and Royal Decree 1298/2006 of Nov. 10, 2006.

3.05 CONTRACTS:

In general, for contract to exist there are three basic requirements: consent of contracting parties, certain subject matter/purpose, and reason to perform such contract. Any contract lacking one of these requirements shall be deemed invalid. Contracts entered into on fraudulent or mistaken pretences are null and void. Moreover, several types of contracts require certain formalities.

As a rule, all pacts, clauses and conditions which the parties deem desirable to establish are valid, provided they do not contravene law, morality or public order. However, at present there are several restrictions regarding contractual freedom for social reasons, as is case of rural or urban leases, contracts entered into by consumers, etc.

Grounds for termination of obligations:

In addition to payment or fulfillment of relevant consideration, obligations are extinguished as a result of: (a) Loss of thing owed through no fault of debtor, before debtor has defaulted; (b) conventional or tacit waivers; (c) confusion of rights, i.e., where creditor and debtor is one and same person; (d) compensation, which occurs when two persons, in their own right, are reciprocal creditors and debtors; (e) novation of parties or purpose, i.e. substitution of purpose or terms and conditions of contract, or substitution of one of parties.

Applicable Law.

By and large, and as regards their substance, contracts are interpreted and applied in accordance with Spanish Law. Parties may, however, stipulate that contract be governed by foreign legislation, provided there is a link with said legislation, such as, e.g., nationality of the parties, place of performance, location of the property, etc. In addition, Spain is party to Rome Convention of June 19, 1980, regarding law applicable to international contracts and to United Nations Convention on Contracts for the International Sale of Goods, in force since Aug. 1, 1991 (see category 25 Treaties and Conventions, topic 25.01 Treaties and Part V, Selected International Conventions).

Also lawful in Spain are contractual clauses entrusting foreign agencies or bodies with the competence to hear disputes arising in interpretation or performance of contracts and to settle such disputes via arbitration. Nevertheless, foreign Law is not applied by judges as matter of course, but rather must be adduced and proved in court by interested party. It must be noted that, as European Union-member state, judges must enforce European Union Law directly. See also category 5 Civil Actions and Procedure, topic 5.04 Judgments, subheading Arbitration.

As regards their form, contracts are governed by law of country in which they are executed. However, when they have been authorized by Spanish diplomatic or consular officials abroad, the formalities prescribed by Spanish legislation must be observed.

Regulations of General Terms and Conditions for Contracting.

Law 7/1998, of Apr. 13, 1998, as implemented by Royal Decrees 1828/1999 of Dec. 3, 1999, and 1906/1999 of Dec. 17, 1999, and amended by Laws 1/2000 of Jan. 7, 2000, 24/2001 of Dec. 27, 2001, 39/2002 of Oct. 28, 2002, and 44/2006 of Dec. 29, 2006, regulates general terms and conditions for “adhesion contracts”.

Royal Decree 1828/1999 of Dec. 3, 1999, establishes regulations governing registration of general conditions at General Conditions Registry. The Registry Office makes public general conditions of entered into by contracting companies in order to avoid any abusive consumer clauses, thereby making it possible to take legal action against illegal general contractual conditions.

Royal Decree 1906/1999 of Dec. 17, 1999, regulates general terms and conditions for contracting by telephone or by electronic means.

Law 1/2000 of Jan. 7, 2000, repealed several articles and amended others concerning various types of action that can be taken.

Law 24/2001 of Dec. 27, 2001, regulates incorporation of general terms and conditions into public deeds.

Law 39/2002 of Oct. 28, 2002, establishes who is authorized to file claims and term within which to file such claims.

Law 44/2006 of Dec. 29, 2006, improves protection of consumers and users.

Retail.

Law 7/1996 of Jan. 15, 1996, on Retail Trade, amended by Laws 55/1999, of Dec. 29, 47/2002, of Dec. 19, 3/2004, of Dec. 29, and Legislative Royal Decree 1/2007, of Nov. 16, and implemented by Royal Decrees 367/2005, of Apr. 8, 2005, and 2485/1998, of Nov. 13, 1998, lays groundwork for modernization of Spanish commercial structures, correcting imbalance between large and small traders and maintaining free and fair competition. Nevertheless, in autonomous regional communities in which there is also legislation on this issue, such legislation takes priority over Law 7/1996.

Laws 7/1996 develops principle of free enterprise, while dealing more restrictively with opening of large commercial establishments, which is made subject to specific commercial license. The requirements for establishments to be granted “Large Establishment” status will be stipulated by Autonomous Regional Communities: large establishments are those with useful sales area of over 2,500 m2. Licenses are granted by autonomous community authorities, which will assess impact that opening of large establishment could have on commercial structure of area affected.

Law 7/1996 regulates sales promotions and what are known as “Special Sales”, in bid to create legal framework for range of contractual formulas which have arisen in recent years and which must always be carried on from consumer protection standpoint, such as seasonal bargain sales, special offers or promotions, closing sales, sales with gifts, offers of direct sales, distance sales and sales by traveling sales agents, and sales under franchise systems and at public auctions.

The Law contains regulations on infringements and penalties. The latter, which have to be imposed by public authorities, range from mere warning, at least, to [Euro]601,012.10, at most. In extremely serious cases, additional penalty is imposed consisting of temporary closure of infringing business for up to one year at most.

Royal Decree 225/2006, of Feb. 24, 2006, as amended by Royal Decree 103/2008, of Feb. 1, 2008, on distance selling and registration of companies engaged in distance selling, requiring prior authorization and registration for pursuit of such activities.

Royal Decree 2485/1998, of Nov. 13, as amended by Royal Decree 419/2006, of Apr. 7, governing franchise systems and creating franchises registry.

Law 1/2004, of Dec. 21, supplementary to Retail Trade Law, provides full freedom of opening hours throughout country, albeit always within limits established in each autonomous regional community in accordance with provisions of said Law.

Law 3/2004, of Dec. 29, 2004, on measures against late payment in commercial transactions, amended Law 7/1996, of Jan. 15, 2004, in order to introduce European Parliament and Council guidelines on regime governing postponement of payments of retail suppliers.

Legislative Royal Decree 1/2007, of Nov. 16, amended by Royal Decree 231/2008 of Feb. 15, 2008, approves new version of Consumers and Users Law. Such Royal Decree 231/2008 of Feb. 15, 2008 regulates Consumer Arbitration System, and it has been amended by Royal Decree 863/2009 of May 14, 2009.

Public Procurement Contracts.

The new Public Sector Contracts Law 30/2007, of Oct. 30, has transposed into Spanish Law Directive 2004/18/EC of the European Parliament and the Council of Mar. 31, on coordination of procedures for award of public works contracts, public supply contracts, and public service contracts.

The articles of Law 30/2007 have been structured into preliminary title containing some general provisions and five books that successively regulate general configuration of public sector procurement and its structural elements, contract preparation, contractor selection and contract awarding, effects of administrative contract performance and termination, and administrative organization for procurement management.

The main new features introduced by this legislation compared with preceding legislation (Legislative Royal Decree 1/2000 of June 16, approving Revised Public Authorities Contracts Law) relate to: (i) Definition of its scope of application, (ii) setting-apart of provisions derived directly from Community law, (iii) incorporation of new rules on procurement introduced by Directive 2004/18/EC, (iv) simplification and improvement of contractual management, and (v) legal definition of new contractual concept, i.e., contracts for collaboration between public and private sectors.

Particularly noteworthy among new features of new Law is category of “contracts subject to harmonized regulation,” in other words, contracts which, by reason of contracting entity, of their type and of their amount, are subject to European Directives.

Law 30/2007 aims to regulate public sector procurement, guaranteeing principles of freedom of access to tenders, advertising and transparency of procedures and equal treatment among candidates, and ensuring efficient use of funds allocated to execution of works, supply of products and provision of services.

As regards its scope of application, “public sector contracts” are contracts for monetary consideration, whatever their legal nature, which are concluded by the bodies, agencies and entities forming part of public sector that are listed in Art. 3 of the Law, distinguishing within these between those bodies, agencies and entities which for purposes of Law itself are deemed to be Public Authorities, with respect to which mandates of Law apply in full, and awarding powers, to which Law only applies as regards preparation and awarding of contracts concluded, with their effects and termination being governed by private law.

Public sector contracts may be administrative or private in nature: 1) Contracts for works, concessions of public works, management of public services, supplies, and services, as well as contracts for collaboration between public and private sectors, are administrative in nature where they are concluded by Public Authority. In addition, if subject matter of contract is different from those indicated above but is linked to affairs or operations specific to contracting Authority or satisfies public aim in direct and immediate manner, contract will also be deemed administrative contract and 2) contracts concluded by bodies, agencies, and entities of public sector that are not Public Authorities are private contracts.

Contracts may be awarded under open, restricted, negotiated competitive dialogue procedures.

Under open procedure, any interested economic operator may submit tender.

Under restricted procedure, any economic operator may apply to participate, but only those chosen by contracting body on basis of their solvency may submit tender.

Under negotiated procedure, contract is awarded to tenderer chosen by contracting body after contracting body has consulted and negotiated terms and conditions of contract with one or more tenderers.

The Law lists and regulates following types of contracts: (a) Works contracts; (b) public works concession contracts; (c) public services management contracts; (d) supply contracts; (e) services contracts; and (f) contracts for collaboration between public sector and private sector.

For purposes of Law, works contracts are contracts that have as their purpose execution of work or execution of any of jobs provided for in Schedule I to Law.

Public works concession contracts have as their purpose performance by concession-holder of obligations established for works contract, including those of restoring and repairing existing structures, as well as conserving and maintaining built elements. The consideration to concession-holder consists of right to exploit work or of right to receive price.

A public services management contract is contract whereby Public Authority entrusts management of service for which Public Authority is responsible to individual or legal entity.

Supply contracts are those which have as their purpose acquisition, financial lease, or lease, with or without purchase option, of products or real estate.

Services contracts are contracts purpose of which is to carry out activity or to achieve result other than that of work or supply.

Contracts for collaboration between public sector and private sector are contracts whereby Public Authority engages private law entity to carry out global and integrated project consisting of any of following activities: (i) Construction, installation, or transformation of works, equipment, systems and complex products or goods, as well as maintenance, updating or renovation, operation or management thereof; (ii) integral management of the maintenance of complex facilities; (iii) manufacturing of goods and provision of services that incorporate technology specifically developed for purpose of finding more advanced and economically efficient solutions and; (iv) other activities linked to provision by Public Authority of public service that has been entrusted to it.

The Public Sector Contracts Law has been amended by Ministerial Order of Dec. 27, 2007, which makes public limits of various types of contracts for purposes of administrative procurement from Jan. 1, 2008 onwards.

Public Sector Contracts Law 30/2007 has recently been partially implemented by Royal Decree 817/2009 of May 8, in order to implement certain provisions of Law and to simplify and rationalize certain contractual mechanisms. This Royal Decree also regulates some aspects of qualification of contractors, Official Register of Qualified Enterprises and Bidders, and evaluation of criteria as regards parties.

Excluded Sectors.

The new Law 31/2007 of Oct. 30, on procurement procedures in water, energy, transport, and postal services sectors has transposed into Spanish Law Directive 2004/17/EC of the European Parliament and of the Council of Mar. 31, coordinating procurement procedures of entities operating in water, energy, transport, and postal services sectors and Council Directive 92/13/EEC of Feb. 25, coordinating laws, regulations, and administrative provisions relating to application of Community rules on procurement procedures of entities operating in above sectors.

The Law aims to regulate award procedure for certain works, supply, and services contracts between public and private entities (as defined in Law) that operate in water, energy, transport, and postal services sectors.

Distributorships, Dealerships and Franchises.

Royal Decree 378/2003 of Mar. 28, 2003, implemented Law 16/1989 of July 17. 1989, on exemptions by categories, individual authorizations and Defense of Competition Registry exempted categories of distribution, franchising, and licensing. Said Royal Decree 378/2003 of Mar. 28, 2003, was partially repealed by Competition Law 15/2007, of July 3, 2007, although said repeal was fully implemented by Royal Decree 261/2008, of Feb. 22, which implements Law 15/2007.

As things stand, this matter is not regulated under Spanish Law. Nevertheless, Regulation (EC) 2790/1999 on application of Art. 81(3) EC to categories of vertical agreements and concerted practices includes franchises among exemptions. Thus, as European regulations are directly applicable to Member States, Regulation (EC) 2790/1999 is applicable to franchises regarding competition matters in Spain. However, Regulation (EC) 2790/1999 is due to expire on May 31, 2010 when it will be replaced by new Regulation which is currently subject to consultation period.

Electronic Signature.

Electronic signatures are regulated in Directive 1999/93/EC of Dec. 13, 1999; and, in Spain, by Law 59/2003 of Dec. 19, 2003, on electronic signature, certain articles of which were amended by Law 56/2007, of Dec. 28, 2007, on Measures to Promote the Information Society, hereinafter "LISI".

While Directive draws distinction between two types of electronic signature, Spanish Law distinguishes between three different types: (i) Electronic signature: electronic data attached or associated to other data that can be used as way of identifying signatory; (ii) advanced electronic signature: electronic signature that enables signatory to be identified, is linked to data to which it related in such manner that any subsequent change to data is detectable, and is created using means that signatory can maintain under his sole control; and (iii) qualified electronic signature: advanced electronic signature based on qualified certificate and generated by secure signature creation device. In court procedures regarding supporting documentation, it has same value as handwritten signature.

Other new features introduced by Law 59/2003, in relation to above Directive, are: (i) Ability of legal entities to produce electronic signatures that identify them directly, with no need for representation by means of electronic "legal entities certificates"; and (ii) National Identity Electronic Document which will be issued by Department of the Interior (Home Office) with capability to sign electronic documents and to identify Spanish citizens through electronic means, implemented by Royal Decree 1553/2005 of Dec. 23, 2005, regulating national identity documents and their electronic signature certificates.

The main amendments and new aspects that LISI introduces to electronic signatures are following: new definition of electronic documents as "information of any nature whatsoever in electronic format, saved on electronic support according to specific format and subject to different form of identification and treatment"; admissibility of judgments and regime governing appeals; recognition of electronic signature for corporate bodies, liability of service providers; penalty regulations and dispute resolution between users and certification service providers.

Order INT/738/2006 was passed on Mar. 13, 2006, approving declaration of certification policies of Spanish Ministry of the Interior. This Order promulgates declaration of certification policies of Spanish Ministry of Interior in order to enable implementation of Electronic National Identity Document (e-DNI). Approval of this regulation has been of great use in conducting e-Government activities.

In order to strengthen relations between citizens and public authorities once and for all, Law 11/2007 of June 22, 2007 on electronic access by citizens to public services, was approved with view to regulating, among other issues, electronic filing of documents, requirements to be met by telematic registers and use of electronic signatures by public employees within scope of their functions.

3.06 FRAUDS, STATUTE OF:

Spain has no Statute of Frauds. See topic 3.05 Contracts.

3.07 INFORMATION TECHNOLOGY, INTERNET AND NEW MEDIA:

IT contracts.

This field of activity addresses contracts such as license, maintenance, outsourcing, and hosting agreements, etc. relating to computer programs.

Computer programs, like other intellectual creations, are regulated by Legislative Royal Decree 1/1996 of Apr. 12, 1996, approving Revised Intellectual Property Law, regularizing, clarifying and harmonizing existing legal provisions on this subject. With regard to computer programs, this consolidated text includes and transposes into Spanish law all community legislation passed on this question, such as Directive 91/259/EEC of May 14 on legal protection of computer programs.

Computer programs to be afforded protection as intellectual creations must be original. The protection of computer programs encompasses preparatory documentation, technical documentation and user manuals, as well as successive versions of programs.

An author is considered to be individual or group of individuals who have created program, or artificial person envisaged as copyright holder in those cases expressly provided for in consolidated text.

In case of collective works, author is deemed to be individual or company that publishes such work under his/her/its name. Collaborative works are deemed to be common property held by all authors in proportion they deem fit.

Unless otherwise agreed, where computer program is created by salaried worker in course of employment or on employer’s instructions, title to rights of use pertains to employer.

Title to rights of use includes right to make or authorize reproduction of the program, in full or in part, permanently or temporarily, as well as translation, adaptation, arrangement or any other transformation of program, and any form of distribution or public disclosure, including rental of program or copies thereof.

However, rights of use are subject to certain limits, such as reproduction or transformation of computer programs, including correction of any errors, where necessary for its use by rightful user, creation of backup copies, making of subsequent versions or derived programs; interoperability, etc.

Data Bases.

As in preceding case, data bases are considered intellectual creations and are therefore protected by Consolidated Text of the Intellectual Property Law, which includes and transposes into Spanish Law all community legislation on this matter, particularly Directive 96/9/EEC of Mar. 11, 1996.

Data bases are considered collections of works, data or other independent items arranged systematically or methodically and accessed individually through electronic means or in any other form. However, protection granted to data bases does not extend to any computer programs used in their manufacture or operation and accessible through electronic media.

From intellectual property standpoint, data bases are protected in two ways. First, they may be protected by copyright when their structure, as expression of selection or arrangement of their contents, is original. Second, they may be protected by sui generis right where the manufacturer has made substantial qualitative or quantitative investment in them, such as financial resources, time, effort and energy, or in any other resources used to obtain, verify or present their contents.

An important new feature of regulations governing data bases is creation of sui generis right, which enables manufacturer to prohibit extraction and/or reuse of all or substantial part of contents of data base, evaluated in qualitative or quantitative terms, provided that obtainment, verification or presentation of contents represents substantial qualitative or quantitative investment.

However, extraction and/or repeated or systematic reuse of non-substantial parts of contents of data base is not authorized where this entails acts that are contrary to normal operation of data base or that cause unjustified damage to lawful interests of data base manufacturer.

The Regulation of sui generis rights of data bases includes extensive and detailed catalog of rights and obligations of both manufacturers and lawful users.

Finally, another notable new development is possibility of extending term of protection of sui generis rights, 15 years after completion of manufacturing process, when one or more substantial changes are made to contents of data base, evaluated in quantitative or qualitative terms, particularly as regards modifications as result of series of additions and deletions or successive changes that constitute substantial new investment.

Electronic Business.

This area is regulated under Directive 2000/31/EC of June 8, 2000, on Electronic Business and, in Spain, in Information Society and e-commerce Services Law 34/2002, hereinafter “LSSI”. Certain articles of this law have been amended by LISI.

Furthermore, Legislative Royal Decree 1/2007 approved Revised Text of the Consumer and User Protection Law and other supplementary laws, hereinafter “TRCU”, Tit. III of which contains various mandatory obligations related to distance selling relationships with customers. This text has incorporated regulations contained in Retail Trade Law 7/1996 and its implementing regulations, which were modified by Law 47/2002 of Dec. 19, 2002, and Contractual Terms Law 7/98 and its implementing regulations.

The main obligations provided for in TRCU refer, inter alia, to commercial communications, electronic contracts, prior information on contracts, voluntary dismissal, execution of contracts, and intermediation services.

One of most important regulations contained in TRCU is to give priority to LSSI, in relation to commercial communications and electronic contracts, when contradictions arise between different provisions of these two laws.

The main contributions to Spanish law under Law 34/2002, on information society and e-commerce services, are as follows: In area of electronic contracts, LSSI reaffirms principles already established by Spanish legislation, such as principle of freedom of form for contracts concluded online. Excluded from Law are contracts which are of special nature (contracts relating to Family Law and successions) and contracts which must be recorded in public document or require involvement of public agencies, notaries, etc. in order to be valid or give rise to certain effects. In any event, these contracts will be governed by specific legislation.

The LISI has introduced various obligations concerning prior contractual information, such as making information on procedure followed to enter into contract available through adequate means in line with communication medium used, special regulations on services designed to be accessed from small screens, possibility of waiving mandatory references to law in B2B relations.

The LSSI also harmonizes rules applicable to moment of perfection of contracts concluded by telematic means, establishing as general principle that moment of perfection will be moment in which offeror knows or may know of acceptance by offeree. Lastly, it reaffirms that electronic agreements on electronic media are acceptable for the purposes of taking evidence at trial.

With respect to activities pursued by information society service providers, LSSI releases persons subject to law from obligation to obtain any kind of authorization prior to providing such services. LISI has amended this obligation to certain extent, removing rules on registration of domain names at relevant registry.

In relation to liability of information service providers, LSSI does not include any new provisions that move away from civil liability regime established in Spanish legislation currently in force. It merely establishes rules on due care to be exercised by ISSP Intermediaries, and general principle that ISSP Intermediaries will not be liable for any illegal activities pursued by third parties through their services where they are not aware of them.

Furthermore, LSSI has expanded liability regime provided for in Directive to cover search engines and providers of links. In this regard, LISI has introduced certain nuances in liability exoneration rules, specifically, when contents provider whose location has been provided acts under direction, authority, or control of links provider.

In area of commercial communications, LSSI establishes prohibition on sending commercial communications electronically, whether by e-mail or any other similar means, such as SMS, when party concerned has not requested such communication or where they have not been sent with prior consent of recipient of communication. In this regard, LISI has introduced several changes to commercial communications, such as use of the abbreviation “publi” on commercial offers, or advertiser’s obligation to be clearly identified. In any event, General Telecommunications Law 32/2003, of Nov. 3, 2003, has introduced exception to foregoing in its first final provision, and it will not therefore apply in cases where parties are bound by previous agreement, and if information society service provider has lawfully obtained recipient’s contact details and uses them to send commercial communications regarding products or services of is own company and similar to those previously contracted with client. Information society service providers must offer recipients chance to withhold consent for processing of their personal data for promotional purposes, in easy and free manner, when such data is collected, or in each commercial communication sent to recipient.

When information society service providers use mechanisms to obtain information, such as cookies, they must inform addressee of their utilization and purpose, offering opportunity to withhold consent for processing of their personal data, easily and at no expense.

Other significant modifications to LSSI include: restrictions on rendering of services and procedure of intra-Community cooperation related to adoption of restrictions on intermediation services provided by entities located in European Economic Area; various clarifications regarding information that service providers must make available to public and, in particular, for internet access and e-mail providers; authorities entitled to shut down, monitor, and supervise websites.

Finally, LISI has introduced obligation for corporations, which render services of relevant economic significance (with more than 100 employees or an annual volume of transactions calculated according to Spanish TVA regulations, of [Euro]6,010,121.04 operating in specific economic sector), to provide their users with means of electronic exchange based on use for them of qualified electronic certificates which enable electronic contracting, customer consultation of data and setting up of personalized complaints section.

With regard to legislation on general contracting conditions, Royal Decree 1906/1999, which is not applicable to financial or banking services, is worthy of note. This Royal Decree stipulates need for prior information on contractual clauses and general contracting conditions; need for documentary confirmation of contract, to be given either in writing or on any other medium at buyer's choice, containing all contractual terms and conditions; and buyer's right of termination within seven business days of receipt of product or of signing contract in case of provision of services, without penalty or expense, including cost of returning goods, although buyer may expressly waive this right.

This Royal Decree also places burden of proof on seller or provider with respect to any particular term relating to contract, and use of sound recording tapes, diskettes and electronic and telematic documents as evidence is permitted, provided that their authenticity, identity of parties, comprehensive nature of declarations and time of their dispatch and receipt are guaranteed.

It should be pointed out that Fifth Final Provision of the LSSI stipulates that: "one year after the approval of this Law, the Government shall modify Royal Decree 1906/1999". However, such amendment has yet to be made.

Lastly, it should be noted that Law 22/2007 of July 11, 2007, on distance marketing of consumer financial services, was approved, thus completing transposition into Spanish law of European Parliament and Council Directive 2002/65/EC of Sept. 23, 2002, concerning distance marketing of consumer financial services.

As far as domain names are concerned, National Domain Names Plan is especially relevant. Order ITC/1542/2005 of May 19, 2005, approved National Plan for domain names under country code for Spain (".es"). This National Plan seeks to regulate and standardize assignment of domain names under territorial code ".es". Thus, in addition to continuing with assignment of second-tier domain name ".es", five new third-tier names are created: ".com.es", ".nom.es", ".org.es", ".gob.es" and ".edu.es", which may be obtained by individuals or legal entities, as well as by other entities, such as associations and foundations. With respect to these new third-tier names, procedure has been simplified so that practically anyone may be assigned third-tier name, even where it coincides with pre-existing trademark or with trade name of company. Moreover, National Plan for domain names has created out-of-court dispute resolution procedure in order to pursue cybersquatting relating to domain names under ".es" territorial code.

Order ITC/912/2006 was passed on Mar. 29, 2006, regulating conditions with respect to quality in provision of electronic communications services. This Order lays down new requirements for those that provide services in order to improve quality of electronic communications and information that users receive about quality of such services. This is one of regulations enacted by Government in order to develop body of General Telecommunications Law 59/2003.

In relation to above, Royal Decree 776/2006, of June 23, 2006, amended Royal Decree 1287/1999, approving National Technical Plan on Digital Audio Broadcasting and Royal Decree 44/2005, approving regulations with respect to conditions for provision of electronic communication services, universal services and user protection. The main new feature established by this Royal Decree is possibility that users may receive some kind of compensation from operator in event of breakdown in Internet connection during certain period of time.

Finally, Royal Decree-Law 11/2009 of Aug. 13, 2009, regulating, for statewide concessions, provision of conditional access digital terrestrial pay television services, allows holders of state-wide digital terrestrial television public service concessions to operate in whole or in part under conditional access pay-TV format one of digital channels held by them, provided that their concession allows operation of more than one channel. This notwithstanding, conditional access systems and services used must be open.

It should also be noted that Law on Measures to Promote the Information Society, which will amend some of the above-mentioned regulations, is currently at preliminary legislative stage prior to approval.

As far as other aspects are concerned, LISI has introduced several obligations regarding public authorities, relating to medium level accessibility standards for all websites belonging to or financed by such authorities or by public corporations. They must also adopt measures in order to raise awareness, educate and bring about such accessibility standards in order to extend their use at corporations and, in particular, on websites.

Electronic Invoicing.

In Spain, electronic invoices are generally admitted on condition that authenticity of their origin and integrity of their contents are guaranteed. Therefore, three ways are admitted to send or make available electronic signatures: (i) By means of and advanced electronic signature based on qualified electronic certificate and created by secure-signature-creation device; (ii) by means of electronic data interchange (EDI), as defined in Art. 2 of Commission Recommendation 1994/820/CE of 19 Oct. 1994 relating to legal aspects of electronic data interchange, if agreement relating to exchange provides for use of procedures guaranteeing authenticity of origin and integrity of data; and (iii) by any other system expressly authorized by Spanish Tax Agency.

In order to enable effective implementation of electronic invoicing, Order EHA/962/2007 of Dept. of Treasury of Apr. 10, 2007 was approved, implementing various of provisions regarding telematic invoicing and electronic storage of invoices contained in Royal Decree 1496/2003 of Nov. 28, 2003, approving regulations governing invoicing obligations and repealing Order HAC/3134/2002. The Order includes electronic invoicing-related aspects such as mechanisms to identify and authenticate mechanisms or devices to produce and check signatures, requirements for electronic exchange of invoices systems, possibility of keeping invoices on paper, in certain cases, instead of warehouse invoices in electronic format, and possibility of keeping invoices on paper by electronic means, by digitalizing them using secure procedures that guarantee their authenticity and integrity.

It is also worth mentioning that aforementioned Order/962/2007 has been implemented by virtue of several regulations. In this respect, Order PRE/2971/2007, of Oct. 5, 2007, deals, on one hand, with way in which consent is granted by those ministerial departments or bodies that choose to agree to having invoices addressed to them sent by electronic means and, on other, with technical conditions that have to be met when sending invoices addressed to public authorities by electronic means, leaving decision as to whether or not to give such necessary consent to each entity or organization. Moreover, in order to allow business persons and professionals to exercise their right to present invoices to public authorities by electronic means, Schedule to this Order also establishes electronic invoice format that will guarantee that issued invoices may be used with any body of Administration.

Furthermore, Order/962/2007 has been further implemented by Resolution of Oct. 24 2007, issued by Tax Agency. Such Resolution establishes formalities that have to be fulfilled by development companies that wish to obtain approval for digitization software. In this respect, validity of digitized image is dependent on having in place corresponding procedures and controls that guarantee faithfulness of certified digitization, in order to ensure quality of image obtained and its metadata, regardless of when digitization software is used.

Finally, it is also worth mentioning that several Laws which have collateral influence on development of electronic invoicing have also entered into force. In this regard, Law 56/2007 of Dec. 27, on the Measures to Promote Information Society Services, introduced several obligations for purpose of promoting electronic invoicing and use of electronic means at every stage of contracting procedure. Moreover, Law 30/2007 of Oct. 30, 2007, on Contracts with the Public Authorities, has also been approved and establishes when it will be mandatory to issue e-invoices to Central Government.

Electronic Money.

The E-money Directive, published in Official Journal of European Communities on Oct. 27, 2000, was implemented in Spain with transposition of Law 44/2002 on Measures to Reform the Financial System. The transposition of said directive into Spanish legislation was carried out in Art. 21 of the Law on Measures to Reform the Financial System, which contains some of provisions established in E-money Directive and establishes, among other requirements, need to obtain prior authorization in order to issue electronic money. In addition, “Electronic Money Institutions” and its abbreviation “E.M.I.” are reserved for electronic money institutions in line with EU Directive.

Moreover, it is worth mentioning that Law 44/2002 has been implemented by Royal Decree 322/2008, of Feb. 29, on legal regime governing electronic money institutions. In this respect, above Royal Decree confirms transposition into Spain of only one of three waivers contained in E-money Directive for electronic money institutions. Consequently, only waiver contained in Art. 8(b) of the E-money Directive—whereby electronic money issued by institution is accepted as means of payment only by any subsidiaries of institution which perform operational or other ancillary functions related to electronic money issued or distributed by institution, any parent undertaking of institution or any other subsidiaries of that parent undertaking - has been transposed into Spanish law. As result, only electronic money institutions complying with requirement referred to above will be exempt from compliance with several of obligations contained in Royal Decree 322/2008.

Biotechnology.

Both emergence of, and boom in, biotechnology arose in response to Information Technologies applied to biological and genetic progress. From legal standpoint, results of biotechnological research are protected by system of patents. At present, in-depth reforms are being proposed in this field in order to adapt legal mechanisms available to Biotechnology. One such reform is sponsored by European Union and another by European Patent Office.

Of major importance within legislation on this matter is Convention for the Protection of Human Rights and Dignity in application of biology and medicine (Convention on Human Rights and Biomedicine), approved by Committee of Ministers of the Council of Europe on Nov. 19, 1996, and signed in Oviedo on Apr. 4, 1997. Certain aspects have also been contemplated in various protocols, such as protocol prohibiting human cloning and for protocol on human organ and tissue transplants. Within community sphere, Directive 98/44/EC of July 6, on the legal protection of biotechnology inventions, deals with key questions such as patentability of new inventions made through inventive work, apt for industrial application and having as their subject product which is composed of or contains biological matter or process through which biological matter is produced, transformed or used. It also provides for possibility of patenting elements isolated from human body, or those obtained in any other way through technical processes, including sequences or partial sequences of genes. Particular relevance is given to industrial application of these inventions, particularly in case of patentability of sequences or partial sequences of gene.

The Preamble of Directive 98/44/EC also refers to Convention on Biological Diversity, which was adopted by European Union under Decision 93/626/EEC (DO L 309 of 13.12.1993, p. 1).

In addition, Law No. 10/2002 of Apr. 29, 2002, which amended Patent Law, No. 11/1986 of Mar. 20, 1986, included Directive 98/44/EC of European Parliament and the Council of July 6 on legal protection of biotechnological inventions within Spanish Law. This Law is faithful transposition of said Directive, main contribution of which consisted of recognition of patentability of biological material in general terms.

The patenting of inventions with commercial use that is contrary to public policy or morals is prohibited, particularly patenting of processes to clone human beings, to modify germinal genetic identity of human beings, use of human embryos for industrial or commercial ends, and processes to change genetic identity of animals that cause suffering without obtaining substantial medical advances for man and animals from such processes.

Spanish law has developed considerable legislation in this field, such as Law 14/2006, on assisted reproduction techniques. Law 14/2007, on biomedical research, sets forth regulations on issues of discovery in biomedical research, on use of tissues and human samples, including terms and conditions for use of human embryos and fetuses, or their cells, tissues and organs. Moreover, Law 14/2007 introduces extensive regulations governing use of genetic analysis for therapeutic use and on functioning of biobanks. In addition, Royal Decree 1301/2006, on tissue establishments, has introduced technical and legal framework for such entities. This regulation applies to Cord Blood Banks. The Royal Decree transposes Directives 2004/23 and 2006/17, both on donation, deliver, storage, valuation, processing, and distribution of human cells and tissues, into Spanish law.

Law 10/2002 of Apr. 29, 2002, transposes Directive 98/44/EC solely with regard to biotechnological inventions suitable for protection under Patent Law. Nevertheless, as regards plant varieties, Law 3/2000 of Jan. 7, 2000, on protection of plant varieties obtained, modified by Law 3/2002 and implemented by Royal Decree 1261/2005 and relevant EC regulations relating to plant varieties obtained, will also be applicable.

Biotechnology is major area that impacts on other legal areas such as genetic data protection and arouses debate on questions such as possible use of workers' genetic data by employers or insurance companies, questions which have opened up rift within European Community.

In field of patent law, it is important to bear in mind first, and specifically, Royal Decree 812/2000 of May 19, modified by Law 3/2002 and implemented by Royal Decree 1261/2005, which establishes application of license procedure subject to prior examination for patent applications in food industry, and, second, in general terms, Royal Decree 996/2001 of Sept. 10, 2001, which establishes general application of license procedure for nationals subject to prior examination, which implement additional provision 5 of Patent Law 11/1986, thus finally obtaining definition of the true system for strong patents in Spain. Forthcoming Community regulations regarding the Community Patent, currently at proposal stage, must also be taken into account, entailing creation of single intellectual property instrument in European area and reducing translation, litigation, and patent procedure costs.

On another note, in Spain as in other countries, Organic Law 10/2007 has regulated DNA databases, at present only envisaged for criminal sector of population and only focused on non-codifying DNA purely for identification purposes.

Data Protection.

This area is regulated by Personal Data Protection Organic Law 15/1999 of Dec. 13, 1999, hereinafter LOPD, enacted to transpose Directive 95/46/EC of Oct. 24, 1995, on protection of individuals regarding personal data processing and free circulation of data, into Spanish legislation.

The purpose of this Organic Law is to protect, in relation to personal data processing, public freedoms and fundamental rights of individuals, particularly their right to personal and family honor and privacy. Consequently, series of conditions has been established for gathering, processing and disclosing data on individuals, which must be observed by data controllers.

Among these, obligation is established to inform data subjects when data on them is gathered, as is need to seek consent, except in those cases in which processing and disclosure of their data are expressly permitted.

In addition, individuals are entitled to access, rectify, cancel, and object to processing of their personal data. On other hand, note that possibility of international data transfers taking place is made subject to stringent conditions, abiding by instructions passed by Data Protection Agency.

At this point, it is essential to highlight significance of entry into force of Royal Decree 1720/2007, of Dec. 21, which approves regulations implementing LOPD. The principal objectives of Regulations include providing legal certainty in field of personal data protection and contributing to greater clarity in its practical application. To achieve these aims, it brings certain coherence to pre-existing framework of secondary legislation (in this regard, it is worth mentioning that regulation repeals Royal Decree 994/1999 of June 11, passing regulations on security measures for automated filing systems), consolidates past decisions and precedents from Spanish Data Protection Agency and Spanish Courts, and addresses number of issues that, during years in which LOPD has been in force, needed to be expressly regulated.

In particular, most notable new developments brought about by Regulation include exclusion from its scope of application of filing systems that merely contain data on individuals working at legal entities, as well as data relating to sole traders. With respect to obtainment of consent, it is significant that data controller must allow data subject to expressly state its refusal to grant consent to processing or disclosure of its data for purposes that are not directly related to contractual relationship, by means of ticking box. With respect to security measures, it is important to highlight that Regulation takes particularly rigorous approach to assignment of security levels and pays particular attention to hard-copy filing systems, regulating security measures applicable in such circumstances. Finally, other noteworthy issues refer to, among others, processing of minors' data, data processors and international transfers of data.

On to other matters, it should be borne in mind that LISI has borne on data protection legislation as far as exercising by data subjects of rights of access, rectification, cancellation, and objection is concerned. In this respect, note that Art. 2 of the LISI imposes obligation to have in place means of telematic communication on companies providing services of special importance to general public, by using electronic signature certificates at their clients' disposal. In particular, article establishes that such companies must make such resources available to clients in order to ensure that abovementioned rights can be exercised on terms set forth in data protection regulations.

Finally, with respect to electronic communications industry, Royal Decree 424/2005, approving Regulations on terms and conditions for provision of electronic communication services, universal service and consumer protection, was approved on Apr. 15, 2005. This Decree implements General Telecommunications Law 32/2003 of Nov. 3, 2003, and regulates certain aspects of these services, such as personal data on trade and turnover, detailed invoicing, subscribers' directories and advanced telephone services.

Lastly, it should be noted that Law 25/2007 of Oct. 18, 2007, on data retention, has also been approved. The purpose of Law is to regulate obligation on operators to withhold data deriving from or processed in framework of provision of services related to electronic communications and public communications networks.

Intellectual Property.

New technologies and, in particular, Internet, are bringing about revolution in marketing of intellectual works. The legal system must guard against copyright infringements resulting from easy duplication of intellectual property and immediate and widespread distribution of copyrighted property on Internet.

Much like legislation of many other European Union-member states, Spanish Intellectual Property Law, latest version of which was passed by Royal Legislative Decree 1/1996, does not expressly contemplate any new possibilities afforded by new technologies.

Accordingly, in order to remedy such shortcomings, and to transpose Directive 2001/29/EC, on harmonization of certain aspects of copyright and related rights in information society, into Spanish law, Law 23/2006 of July 7, 2006 was approved, thus amending Consolidated Text of the Intellectual Property Law, approved by Royal Legislative Decree 1/1996 of Apr. 12, 1996.

Within traditional right of public disclosure, this Law creates new right for authors, performers, film and record producers and broadcasting agencies to make their works available to public in such way that anyone may access them where and when they choose. This right purports to provide legal protection to sale of intellectual works on Internet.

Likewise, Law regulates use of technical means that will serve both to impede intellectual property infringements and to control digital use made of works, thus enabling authors to receive adequate compensation for rights managed through Management Entities.

The above Law also regulates certain exceptions to right to reproduction, necessary for transmissions through Internet, and it affords legal protection to technological means, intended either to avoid unauthorized access to works or to ensure efficient management of their owners' rights.

Finally, on June 5, 2006, Law 19/2006 was passed, relating to defense of intellectual and industrial property and establishing procedural rules in order to facilitate application of several European regulations. With promulgation of this Law, Government intends to enable transposition of certain regulations that have not been transposed into Spanish legal system. Additionally, this Law establishes new procedure allowing judges to adopt new measures in order to prevent any infringement of industrial or intellectual property regulation.

3.08 INTEREST:

Legal interest is approved on yearly basis in General Budget Law in force on date as from which interest shall accrue.

3.09 BUSINESS AND PROFESSIONAL LICENSES:

In Spain, administrative authorization is required to carry out a range of operations of various kinds. Noteworthy examples include construction, amplification and modification or renovation works, opening of commercial establishments and premises, possession of firearms, and use of public domain property for industrial purposes, such as water and river beds.

Such licenses and authorizations are granted by state, autonomous community, or municipal authorities, depending on which of them is competent and on regulations governing each area.

3.10 MONOPOLIES, RESTRAINT OF TRADE AND COMPETITION:

See topic 3.04 Competition.

3.11 NEGOTIABLE INSTRUMENTS:

See topic 3.02 Bills, Notes and Checks.

3.12 SALES:

A sales agreement becomes effective as soon as the contracting parties agree on the object to be sold and on its price, even where neither has been handed over. The seller provides guarantee to the buyer against loss of title and as regards the integrity of the object sold (Art. 1445 to 1520 Civil Code).

Major differences exist in Spanish law between civil and commercial sale and purchase transactions. Such differences mainly refer to matters regarding execution of agreements between absent persons, enforceability of obligations, delay, defects in subject matter and transfer of risk. The sale and purchase of movable property for resale, be it as purchased or in different form, for profit-making purposes, is of commercial nature. Installment sales are governed by Law 28/1998, of July 13, 1998, which was subsequently implemented by Order of July 19, 1999, of the Ministry of Justice, which passed Ordinance governing registration of sales of movables and was amended, with respect to court proceedings, by Civil Procedure Law 1/2000, of Jan. 7.

Spain has ratified United Nations Convention on Contracts for the International Sale of Goods. Use of 2000 Incoterms is standard practice in international trade of goods.

Notices Required.

Spanish Law does not provide for any special form in which purchasers must notify vendors of their dissatisfaction with goods received on account of defect in quantity or quality. According to provisions governing commercial sale and purchases, purchaser who examines goods upon receipt on uncontested basis is not entitled to sue vendor on grounds of flaws or defects of quantity or quality in the goods. A purchaser is entitled to sue vendor for defect in quantity or quality of goods received, provided it takes such action within four days following receipt thereof and damage is result of act of God, flaw in goods or fraud. Any purchaser who does not file claim based on hidden defects in object sold within 30 days of delivery loses any right to make claim on such grounds against vendor. The provisions governing civil sale and purchase transactions grant purchaser six months following receipt of goods in which to submit claim on grounds of hidden defects in object sold.

Applicable Law.

See topic 3.05 Contracts.

Warranties.

See subhead Notices Required, supra.

International Sale of Goods.

The United Nations Convention on Contracts for the International Sale of Goods, in force since Aug. 1, 1991. See category 25 Treaties and Conventions, topic 25.01 Treaties and

Part V, Selected International Conventions.

3.13 TELECOMMUNICATIONS:

Telecommunications Law.

General Telecommunications Law 32/2003 of Nov. 3, 2003 (hereinafter, GTA), implemented Telecommunications Regulatory Package, approved in Mar. 2002 by the EU. The GTA established more flexible measures to be applied to operators. The general system of authorizations and individual licenses applicable to operators providing telecom services and networks were replaced by mere requirement to notify NRA (National Regulatory Authority, in Spain mainly Telecommunications Market Commission). Limitations are still encountered by services or networks using radio spectrum, as this is something of scarce resource. The basic radio and television broadcasting system is excluded from scope of GTA and is contained in other legislation pending in-depth updating within new general liberalization framework. With respect to cable services, Law on urgent measures to launch digital terrestrial television, liberalized cable television and promote pluralism was approved by Lower House of Parliament on June 2, 2005. Regulations on provision of cable radio and television services were approved under Royal Decree 920/2006 of July 30, 2006. All aforementioned provisions regarding broadcasting services are going to be repealed by Draft Law on Audiovisual Communication. which is expected to be enacted during 2010.

As far as nationality of network operators and services providers is concerned, GTA sets forth general principle of no restrictions for EU- and EEA-members, and application of international agreements for non-EU members. There is no restrictions applicable to stakes held by non-EU companies in share capital of network operators and service providers have been abolished.

The GTA is designed to ensure that ex-ante obligations are applied only where level of competition in defined markets is considered to be insufficient on basis of analysis consistent with competition law methodology. In relation to assessment of Significant Market Power Operators (SMPO), criterion regarding 25% of relevant market share was substituted by such competition law methodology.

The regulatory framework implementing GTA has been set in place. Noteworthy of such regulations are as follows:

Royal Decree 2296/2004, of Dec. 10, 2004, approved regulations implementing GTA in electronic communication markets, and on access to networks and numbering. This regulation governs rights and obligations in connection with network interconnection and access to networks by all operators, defined procedures that have been used by Telecommunication Market Commission in order to define reference markets, declare operators to be holders of significant market power, and to impose certain obligations on such operator. Rules are also provided to implement provisions governing attribution and management of numbering resources as essential condition to enable operators to properly offer their services to users. Moreover, this regulation approved new National Numbering Plan and developed number portability and operators' selection procedures (call-by-call selection and pre-selection).

Following enactment of above mentioned Royal Decree, 2006 saw Telecommunications Market Commission conclude process for defining and analyzing all relevant markets listed in recommendation approved by European Commission on Feb. 11, 2003. On basis of said analysis, and after identifying markets in which ex ante obligations may be applied, Telecommunications Market Commission has concluded this procedure by imposing, maintaining or amending specific regulatory obligations for those operators declared to be Significant Market Power Operators. The Telecommunications Market Commission initiated new process for defining and analyzing all relevant markets, not only those listed in recommendation approved by European Commission on Dec. 17, 2007, but also rest of relevant markets previously analyzed in 2006. The Telecommunications Market Commission has concluded this process by third quarter of 2009.

Royal Decree 424/2005, of Apr. 15, passed regulations implementing GTA in relation to conditions for provision of electronic communication services, universal services and end user protection. First of all, this regulation established conditions that must be fulfilled by all operators that provide electronic communication services or that operate electronic communication networks. In particular, this regulations also detailed obligations applicable to operators entitled to provide telephone services. Additionally, this regulations defined universal services as number of telecommunications services that must be accessible to all citizens, regardless of their location, at affordable price and meeting certain standards. Furthermore, it established technical personal data protection-related aspects for telecommunications networks and rights of final users of telecommunication services. The regulations required certain agreements to comply with minimum legal content to be included. The Ministerial Order of Feb. 14, 2002, further regulated end users' rights, particularly with respect to fixed telephone service and premium-rate services which was implemented by Order 308/2008 of Jan. 31, with respect to mobile premium-rate services through SMS and MMS. Additionally, new regulations were approved regarding telecom end users claims and telecom operators' customer service arrangements (Ministerial Order of Apr. 12, 2007). The Consumer Protection Law 1/2007 of Nov. 17, widened end users' rights regarding telecom services.

Royal Decree 899/2009 of May 22, approved Letter of Rights of telecom services' users. This regulation, in force since Aug. 30, has removed particular provisions regarding end users' rights included in Royal Decree 424/2005. In particular, it details and extends end users' rights and, amongst others: (i) Reduces period in order for end user to communicate telecom operator its intention to terminate agreement from 15 to two working days; (ii) extends minimum legal content to be included in agreements with end users; and (iii) extends to prepaid subscribers all rights applicable to non-prepaid ones.

Royal Decree 1620/2005, of Dec. 30, passed regulations implementing GTA with respect to telecom taxes, namely: taxes on provision of telecom services, taxes on numbering, taxes on reservation of radio-spectrum assignment and taxes for administrative inspections and certifications.

The Ministerial Order of Mar. 29, 2006 (ITC/912/2006) approved regulations regarding service quality standards for provision of telecom services.

Royal Decree 863/2008, of May 23, passed regulations implementing GTA with respect to radio spectrum use. This regulation repealed Ministerial Order of Mar. 9, 2000, which approved regulations in connection with radio spectrum use. The regulation states terms and conditions for management of public domain radio spectrum in accordance with provisions of National Frequencies Attribution Chart, on basis of guidelines stipulated by International Telecommunications Union (ITU). The new regulations in connection with radio spectrum use create Public Register of concession holders with private rights to use radio-electric public domain, accessible via Internet, in order to enhance transparency of the concession award procedures. Moreover, new wording of regulations includes certain amendments related to obtainment of orbit-spectrum resources. Aside from possibility of transferring right to use radio-electric public domain, already provided for in previous regulations, new regulations state possibility of both partially transmitting such rights or of assigning radio-electric public domain rights of use regarding some of frequencies or part of geographical scope.

Royal Decree 1066/2001, of Sept. 28, 2001, establishes protective measures for radio spectrum, health protection measures and restrictions on electromagnetic fields, in accordance with Council Recommendation 1999/519/EC of July 12, as well as authorizations, planning, inspection and disciplinary rules regarding restrictions on electromagnetic fields. Royal Decree 424/2005 also modified this regulation in order to establish that operators are obliged to provide detailed study of radio-electric exposure levels.

Reference should also be made to Telecommunications Authorities: (i) The Telecommunications Market Commission is in charge of overseeing full competition in reference markets and relationships among operators, including acting as arbitrator; (ii) The Ministry of Industry, Tourism and Trade is competent on matters related to drafting regulations, public service obligations, evaluation of compliance by telecom equipments and spectrum management; and (iii) new State Agency for Radio Communications, part of Ministry of Industry, Tourism and Trade, will implement radio spectrum policy (pending to be created).

Among last developments in sector it is worthy to point out:

(1) In Jan. 2008, Telecommunications Market Commission approved publication of conclusions and main outlines regarding regulatory environment suitable for development of Next Generation Access Networks (NGAN). Likewise, on July 31, 2008, Telecommunications Market Commission approved resolution forcing Telefonica de España, S.A.U. to grant access to other telecom operators to civil works of its NGAN. On Jan. 22, 2009, Telecommunications Market Commission defined and analyzed wholesale physical access to network infrastructures and wholesale broadband access markets forcing Telefónica de España, S.A.U. to grant access to other telecom operators to civil works of its NGAN.

(2) In July 2009, Telecommunications Market Commission has modified and clarified regulations regarding mobile numbering portability, obliging all mobile operators, including mobile virtual network operators services providers or resellers, to contribute to financing of new centralized system implemented in order for mobile operators to process users' portability requests.

(3) Ministry of Industry, Tourism and Trade has launched in Sept. 2009 Public Consultation for operators to evaluate possibility of including broadband access service within universal service concept.

Finally, it should be borne in mind that current telecommunications regulatory framework is under review by European Union authorities. In particular, proposal for: (i) For Directive of European Parliament and Council amending Directives 2002/21/EC, on common regulatory framework for electronic communications networks and services, 2002/19/EC on access to, and interconnection of, electronic communications networks and services, and 2002/20/EC, on authorization of electronic communications networks and services; and (ii) Directive of European Parliament and of Council amending Directive 2002/22/EC on universal service and users' rights relating to electronic communications networks, and Directive 2002/58/EC concerning processing of personal data and protection of privacy in electronic communications sector and Regulation (EC) No. 2006/2004 on consumer protection cooperation; and (iii) regulation of European Parliament and of Council establishing European Electronic Communications Market Authority, have been discussed in European Parliament and by Member State governments in Council. Agreement on EU Telecoms Reform was reached by European Parliament and Council of Ministers on 4 Nov. 2009, after two years of discussion during legislative process. European Commission expects new telecommunications regulatory framework to be in place from 2010 onwards.

4 CITIZENSHIP

4.01 ALIENS:

See category 17 Immigration, topic 17.01 Aliens.

4.02 CITIZENSHIP:

Citizens include (art. 17 et seq of Civil Code): (1) Original Spaniards: (1.1) children born of Spanish father or mother; (1.2) children born in Spain of non-Spanish parents, provided at least one parent was born in Spain, with exception of diplomatic or consular personnel living in Spain; (1.3) individuals born in Spain of non-Spanish parents, provided that both parents are stateless or where national law of either parent grants no citizenship to child; (1.4) children born in Spain of unknown parenthood; (2) option for Spanish citizenship: (2.1) people who are or have been in Spanish custody; (2.2) those whose father or mother were original Spaniards and were born in Spain; (3) citizenship by residence: (3.1) after being legal resident of Spain for ten years; (3.2) after five years in case of refugees; (3.3) or after two years in case of nationals of Portugal, Philippines, Latin American countries, Equatorial Guinea, Andorra and Sephardis; (3.4) after one year for individuals who either: (i) were born in Spain, (ii) did not exercise their right to opt for Spanish nationality in due course, (iii) had been submitted to tutelage or guardianship of Spanish citizens or institutions during two consecutive years, (iv) had been married (for at least one year) to Spanish citizen, (v) are widow or widower of Spanish citizen, (vi) were born out of Spain to father or mother or grandfather or grandmother having been originally Spanish.

Freedom is granted for proper names of persons to be recorded in their native language, either one of languages of Spain or foreign language.

Foreign Marriage.

A Spanish spouse marrying a foreigner loses his or her nationality only where they voluntarily acquire foreign nationality.

Foreign Residence.

Spaniards who have established their residence abroad must inform Spanish diplomatic or consular officers at their foreign place of residence of their intention to do so. They will be then entered in Register of Spanish Residents. Such a declaration is also necessary for their spouse, if married, and their children.

Since Dec. 16, 2006, when Statute of Spanish Citizenship Abroad entered into force, Spanish citizens abroad have statute that governs their rights.

Dual nationality may be enjoyed with respect to Spain and most Spanish-American countries (Bolivia, Chile, Costa Rica, Ecuador, Guatemala, Nicaragua, Paraguay, Peru, Honduras and Dominican Republic, Colombia and Argentina), Portugal, Andorra, Equatorial Guinea and Philippines, subject to existence of reciprocal law. Thus, Spaniards residing in such countries do not lose their rights as Spaniards if they adopt nationality of their country of residence. Dual nationality is governed by treaty between two countries.

4.03 IMMIGRATION:

See category 17 Immigration, topic 17.02 Immigration.

5 CIVIL CLAIMS AND PROCEDURE

5.01 CLAIMS:

Civil claims may be brought before Courts by Spanish or foreign nationals. The courts decide on such claims in accordance with laws of Spain. Foreign laws may be taken into account but are considered facts from legal standpoint, and their content and enforceability must therefore be proven in order to be applied. The rules governing legal procedure are set forth in Civil

Procedure Law ("Ley de Enjuiciamiento Civil"). A range of procedures exist according to nature and amount of claim filed. In general, parties must be represented by Court Solicitor and defended by Attorney-at-law, save for certain exceptions (e.g.: in case of lawsuits involving small claims, filing of initial claims relating to newly established monetary proceedings, etc.).

Certain proceedings already instituted when Spanish Civil Procedure Law 1/2000 of Jan. 7 came into effect, are still governed by former procedural regulations, as stipulated in transitional provisions one to seven of Law 1/2000.

Note: Since 2003, all companies with sales of over eight million euros intending to file claims before civil and judicial review courts or to appeal their judgments will be obliged to pay "judicial fee". This fee consists of two components, fixed amount and variable, depending on amount of claim filed. The variable component may never be higher than [Euro]6,000.

Limitation.

See topic 5.09 Statute of Limitations.

See also category 6 Courts and Legislature, topic 6.01 Courts.

5.02 CONFLICT OF LAWS:

Under Spanish law, both Community law and International treaties prevail over national laws. In order to determine which law is applicable to certain conflict, it is necessary to distinguish between contractual and non-contractual obligations.

With regard to contractual obligations, most significant treaty to which Spain is party is Rome Convention of 19 June 1980, on the law applicable to contractual obligations. This Convention was replaced on Dec. 17, 2009 by European Regulation 593/2008 on law applicable to contractual obligations (Rome I).

With regard to non-contractual obligations, European Regulation 864/2007 on law applicable to non-contractual obligations (Rome II) came into force on Jan. 11, 2009. It is important to note that this Regulation does not affect application of international conventions to which Spain was party at time this Regulation was adopted and which laid down conflict-of-law rules related to non-contractual obligations.

These European regulations are universally applicable to both EU Members and Non-EU Members.

Spanish legislation (Spanish Civil Code in particular) is still effective to determine law applicable to certain issues excluded from scope of above-mentioned regulations, such as: Status or legal capacity of natural persons; family relationships and other relationships with comparable effects; matrimonial property regimes and property regimes of other relationships with comparable effects; obligations arising under bills of exchange, cheques, promissory notes and other negotiable instruments; arbitration agreements and agreements on choice of forum, questions governed by corporate law and other laws; constitution of trusts and relationship between settlors, trustees and beneficiaries; obligations arising from dealings prior to conclusion of contract; obligations arising from nuclear damage; obligations arising from violations of privacy and rights related to personality.

See also category 9 Dispute Resolution, topic 9.01 Alternative Dispute Resolution.

5.03 DEPOSITIONS AND DISCOVERY:

DEPOSITIONS.

Under Spanish Civil Procedure Law, party who states certain fact must prove it whenever it can be disputed by other party. Following means of evidence may be proposed by party who has burden of proof:

Examination of parties — Each party can request examination of other parties regarding any facts and circumstances possibly related to object of case.

Public and private documents — Each party may use both public and private documents to prove certain facts. Documents must be presented as soon as party has procedural opportunity. Otherwise, judge will not admit them.

If one of parties needs to prove fact with documents that are in other party's hands or in power of third person, that party may request disclosure of those documents, which shall be admitted by judge. Nevertheless, it is important to note that judge will be more reluctant to admit disclosure when it affects third person that is not party in case.

Expert opinion — This means of evidence shall be used if scientific, artistic, technical or practical knowledge is required to value relevant facts or circumstances, certainty of which must be proven. Parties can either appoint expert or ask judge to designate court expert.

Judicial inspection — This means of evidence shall be used in order to clarify facts if it is necessary or convenient for judge himself/herself to examine any place, object or person that is possibly relevant to decide case.

Witness examination — In normal circumstances, witness statements must be exchanged before trial. Nevertheless, there are several exceptions in which examination may be conducted at witness's home or through judicial assistance.

All means of reproduction of word, sound and image, as well as any other instruments that enable filing, knowledge and reproduction of words, facts, figures and mathematical operations that might be relevant to case.

Apart from abovementioned means of evidence, parties may also propose any other that could help prove certainty of any facts.

Obtaining Evidence and Foreign Tribunals.

It is quite usual for judges to require evidence from outside their national jurisdiction. Occasionally, Spanish courts are required to obtain evidence from foreign courts and at other times they may require assistance from foreign tribunals to obtain certain evidence.

With respect to framework for relations between EU-Member States (other than Denmark), Council Regulation (EC) No. 1206/2001 of May 28, 2001 is applicable, on cooperation between courts of Member States in taking of evidence in civil or commercial matters, which came into force on Jan. 1, 2004. In particular, this Regulation establishes that: (i) Request for taking of evidence must be made using form approved by this Regulation and must be served directly by applicant court to addressee court, in latter's language or in any other language admitted by EU Member State of addressee court for purpose of such communications; and (ii) evidence will be taken by addressee court, although applicant court may request attendance or participation in procedure.

In relations with countries outside EU, Spanish tribunals shall apply international treaties to which Spain is party, such as: Hague Convention of Mar. 1, 1954, on Civil Procedure, and Hague Convention of Mar. 18, 1970, on taking of evidence abroad in civil or commercial matters. In absence of international instrument, Spanish courts should apply regime established in arts. 276 to 278 of Judiciary Organic Law 6/1985 of July 1, 1985 and art. 177 of Spanish Civil Procedure Law, together with principle of reciprocity.

DISCOVERY.

Spanish Civil Procedure Law foresees certain instruments to help parties to either obtain or guarantee evidence that may not be subsequently conducted or to obtain information that may be relevant to decide whether or not to file claim.

Preliminary proceedings — This kind of procedure is regulated in arts. 256 to 263 of Spanish Civil Procedure Law and will be initiated whenever it is necessary to gather information in order to prepare future claim. This request for information must be brought before court located in ordinary address of potential defendant, in order to disclose documents or participate in proceedings. Person wishing to gather information must offer caution in order to cover any harm that preliminary proceedings may cause to other person. If, one month following completion of preliminary proceedings, requesting party unjustifiably omits to file claim caution will not be returned.

Evidence gathered before trial — This instrument, regulated in arts. 293 to 296 of Spanish Civil Procedure Law, shall be used if there is high risk of evidence not being obtained later. In these cases, request must be made to court that would be competent to hear future procedure. Once evidence is practised, applicant will have two months in which to file claim.

Guarantee of evidence — According to art. 297 of Spanish Civil Procedure Law, before initiating procedure future claimant or other party may ask court to adopt any possibly useful measure to avoid destruction or alteration, due to human conduct or natural events, of objects or their condition, which could be relevant evidence for future case, and to guarantee that this evidence will be available for case.

Furthermore, it is important to note that under Spanish law discovery does not exist in usual form foreseen under U.S./U.K. law. If foreign judicial authority requests discovery from Spanish authority, limits established in Spanish Civil Procedure Law must be upheld. According to what is allowed in art. 23 of Hague Convention of Mar. 18, 1970, on taking of evidence abroad in civil or commercial matters, Spain declared that rogatory commissions arising under “pre-trial discovery of documents”, as it is known in Common Law countries, will not be executed in Spain.

5.04 JUDGMENTS:

Decisions in Spain are mainly taken by judges in three basic forms: (a) “Providencias”, purpose of which is to decide on certain matters regarding proceedings in their various stages; (b) “Autos”, general purpose of which is to decide on procedural matters, to settle secondary related issues and to rule on appeals lodged against interlocutory decisions (e.g. decisions to grant or dismiss application for interim measures are made through autos); and; (c) “Sentencias”, which refers to final judgment of court or tribunal.

Arbitration.

See category 9 Dispute Resolution, topic 9.01 Alternative Dispute Resolution.

5.05 LIMITATION OF ACTIONS:

See topic 5.09 Statute of Limitations.

5.06 PRESCRIPTION:

See topic 5.09 Statute of Limitations.

5.07 REPLEVIN:

Spanish law foresees oral summary proceedings in order to decide on claims referring to possession. Aim of this procedure is to obtain provisional order granting possession or withholding of disputed property in favour of certain person. It is important to note that this decision will never be res judicata.

Foregoing action may be brought within one year following occurrence of acts against pacific possession.

5.08 SEQUESTRATION:

See topic 8.04 Enforcement.

5.09 STATUTE OF LIMITATIONS:

General reference:

Thirty years: Real estate claims.

Twenty years: Mortgages.

Fifteen years: All personal claims not included under other limitation periods.

Ten years: Constructions of laws or defects.

Six years: Movable asset claims.

Five years: Collection of rent levied on rural or urban property, any payments made on yearly basis maximum, collection of alimony, collection of dividends from business corporations.

Four years: Legal action to claim liability against members of Board of Directors.

Three years: Professional fees in general, claims related to bills of exchange, promissory notes and cheques.

One year: Legal action to recover possession of property, liability arising from insults or slander or from culpable breach or negligence. Work conducted, or delivery of goods to ships, shipments by land or sea, indemnification due to delay or damage to carried goods.

Six months: Collection of carrier fees, freight and damages. Claims for latent defects in sale and purchase transactions, following transaction execution date.

Two months: Although not strictly statute of limitations, insolvent debtors must submit application for insolvency within this period of time once they have detected or should have detected insolvency situation, unless debtor in insolvency proceeding is subsequently found to have acted negligently.

6 COURTS AND LEGISLATURE

6.01 COURTS:

Judiciary Organic Law 6/1985 of July 1, 1985 (as am'd by Organic Law 16/1994 of Nov. 8, 1994, Organic Law 5/97 of Dec. 4, 1997, Organic Law 6/98 of July 13, 1998, Organic Law 13/99 of May 14, 1999, Organic Law 7/2000 of Dec. 22, 2000 Organic Law 9/2000 of Dec. 22, 2000 and Organic Law 19/2003 of Dec. 23, 2003) governs organization of judiciary, division of State's division into judicial territories, operation of courts and tribunals, internal career of judges and officials serving administration of justice and State Attorney's office, as well as lawyers and court solicitors and judiciary police.

The State is divided up into judicial territories. Civil Jurisdiction is organized as follows:

Justice of Peace Offices—These judges only exist in municipalities without Court of First Instance and may only decide on civil issues involving amounts under [Euro]90.

Courts of First Instance—These courts decide at first instance on all civil matters not assigned to other courts.

Commercial Courts—These courts were created pursuant to new wording of Art. 86 of LOPJ, as drafted by Law 8/2003 of July 9, 2003. They decide, at first instance, on insolvency proceedings and other commercial matters, such as trademarks, patents, designs and copyright, advertising, etc.

Provincial Appellate Courts—These tribunals are in charge of each province. In civil order, these courts decide on appeals made against resolutions adopted by Courts of First Instance and Commercial Courts.

Supreme Court - Highest judicial body, except for matters related to constitutional guarantees. It exercises judicial power throughout Spain. In civil order, Supreme Court mainly decides appeals brought before Supreme Court, appeals for judicial review, revision or rehearing and other extraordinary appeals established by law. It is important to note that appeal to High Court is not considered third instance. This kind of appeal must be based on infringement of rules applicable in order to decide on claim and may only be brought against second instance judgments adopted by Provincial Appellate Courts: i) In relation to fundamental rights other than those acknowledged in art. 24 of Spanish Constitution, ii) when amount of claim exceeds [Euro]150,000, or iii) if solution of appeal has repealing purpose, as explained in art. 477.3 of Spanish Civil Procedural Law.

See category 1 Introduction, topic 1.02 Government and Legal System.

6.02 LAW REPORTS, CODES:

General Description.

Sources of Spanish law are regulated by Civil Code, as stated in art. 1: i) Laws, understood as any written rule enacted by legislative, ii) Custom, collection of unwritten rules used in society, and iii) General Principles of Law, basic rules reflecting community's own convictions.

Case law issued by Supreme Court may be considered complementary source of legal interpretation and application, but not source of law in itself.

Spanish legal system is governed by principles of competence and hierarchy.

According to principle of competence, certain issues must be regulated by State and others, assigned or transferred to Autonomous Communities, must therefore be regulated by same.

Regarding principle of hierarchy, rules of lower jurisdiction may not contradict rules of higher jurisdiction.

All laws must be published in Official State Bulletin (Boletín Oficial del Estado) and in Official Bulletins of Autonomous Communities before coming into force.

It should be noted that there are private collections of Legislation and Case Law that include all rules and main judicial decisions adopted in various legal fields, but this information is only available to subscribers. Some of these collections are Westlaw-Aranzadi and LaLeyDigital.

See also topic 6.04 Statutes.

6.03 LEGISLATURE:

See category 1 Introduction, topic 1.02 Government and Legal System, subhead Parliament.

6.04 STATUTES:

European Legislation.

In 1986, Spain became member of European Community and transferred its competence in certain fields and some State powers. European Treaties and rules issued by European Community institutions are directly applicable as part of national law once they are signed, ratified and published in Official State Bulletin. Any conflict between domestic and European Community legislation must be resolved by ordinary courts according to principle of supremacy of Community law.

International Treaties.

As stated by Spanish Constitution, international treaties become internal law once they have been signed, ratified and published in Official State Bulletin (Boletin Oficial del Estado).

National Legislation.

According to abovementioned principle of hierarchy, domestic legislation in Spain is based on various rules. Main issues are regulated in Codes (Civil Code and Commercial Code) and special laws (e.g. Corporations Law, Civil Register Law). However, many topics are implemented with lower-ranking rules (decrees from Council of Ministers, Orders from Ministers or Delegate Commissions, Instructions and Orders of Regulation from lower authorities).

Autonomous Community Legislation.

Autonomous Communities may approve their own legal provisions in order to organize their institutions and regulate issues assigned to them either by Spanish Constitution or State. These laws are of same rank and nature as Parliamentary laws, but they are only applicable within each Autonomous Community.

7 CRIMINAL LAW

7.01 CRIMINAL LAW:

Criminal law is set of provisions within legal system created to respond to most serious offences to fundamental rights and public freedoms of citizens. It enables State to set in motion its punitive mechanisms.

7.02 CRIMINAL PROCEDURE LAW:

Criminal procedure law regulates judicial procedure for implementation of ius puniendi of State. The main provisions that regulate criminal proceedings are described below:

Judiciary Organic Law 6/1985 of July 1, 1985.

Judiciary Organic Law 6/1985, of July 1, 1985, regulates which bodies are competent to prosecute and hear criminal proceedings, as well as essential elements of such proceedings.

This Law organizes State for judicial purposes with regard to criminal proceedings from territorial point of view, in municipalities, judicial districts, provinces and Autonomous Communities, in which various Justices of the Peace, Courts of Investigation, Criminal Courts, Central Courts of Investigation, Central Criminal Courts, Courts of Penitentiary Affairs, Courts for Violence against Women and Courts of Minors, Provisional Appellate Courts and Higher Courts of Justice have jurisdiction. The National Appellate Court and the Supreme Court have jurisdiction throughout entire country.

Judiciary Organic Law 19/2003 of Dec. 23, 2003, amending Organic Law 6/1985 of July 1, 1985, (in force since Jan. 16, 2004) expanded second criminal instance, thereby enhancing authority of Criminal Chambers of the High Courts of Justice. These criminal chambers are second criminal instance for rulings issued in first instance by Audiencias Provinciales (Provincial Courts). This law also creates Court of Appeal at the Audiencia Nacional (National Appellate Court).

In accordance with First Final Provision of above-mentioned Organic Law 19/2003 of Dec. 3, 2003, following regulations have been enacted: (i) Royal Decree 1451/2005 of Dec. 7, regulating entry requirements, vacancies, and professional promotion of civil servants of Administration of Justice (State Official Gazette—BOE—of Dec. 25, 2005); (ii) Royal Decree 1608/2005 of Dec. 30, enacting Organic Statute of Court Clerks (Official State Gazette—BOE—of Jan. 20, 2006); (iii) Royal Decree 796/2005 of June 1, 2005, enacting General Statute governing Disciplinary System of the Administration of Justice (Official State Gazette—BOE—of July 23, 2005).

Another reform to Judiciary Organic Law was carried out by Organic Law 5/2006 of June 5, 2006, and Organic Law 2/2008 of Dec. 4, 2008, supplementing Law on execution in European Union of orders freezing property or evidence within Criminal Proceedings.

A recent reform related to Judiciary Organic Law 6/1985 of July 1, 1985, came about through amendment of Organic Law 2/1979 of Oct. 3, 1979, regulating Constitutional Court, and was introduced by means of First Final Provision of Organic Law 6/2007 of May 24, 2007. In this regard, above Provision amends § 241.1 of Judiciary Organic Law in order to restrict access to appeals before Constitutional Court by introducing prior mandatory phase consisting of filing appeal before ordinary jurisdictional courts.

Furthermore, above amendment of Constitutional Court Organic Law extends term (from 20 to 30 working days) in which citizens are able to file application for declaration of fundamental rights before Constitutional Court.

The recent reforms to Judiciary Organic Law 6/1985 were made by following Organic Laws: 3/2007 of Mar. 22, on effective equality between men and women, and 13/2007 of Nov.19, 2007, on extra-territorial persecution of illegal trade in, or clandestine immigration of, people.

Latest efforts on forensic matters within preliminary proceedings developing Judiciary Organic Law 6/1985 of July 1, 1985 have crystallized in following rules: Royal Decree 1977/2008 of Nov. 28, on composition and tasks of National Commission for forensic use of DNA; Royal Decree 32/2009 of Jan. 16, that approves National Protocol of forensic medical assistance and scientific police force in crimes with numerous victims; and Order issued on Feb. 10, 2009 which creates Net of Laboratories of Biological Alert called RE-LAB.

The Criminal Procedure Law Enacted by Royal Decree of Sept. 14, 1882.

Spanish criminal procedure is governed by Criminal Procedure Law enacted by Royal

Decree of Sept. 14, 1882, which has not been amended to date. This law regulates proceedings to prosecute various criminal offences and misdemeanors, as follows: (i) Ordinary Proceedings: applicable to prosecution of felonies (subject to sentence of over nine years of imprisonment); (ii) Abbreviated Proceedings: applicable to prosecution of less serious offences (up to nine years of imprisonment); (iii) Rapid Trial Proceedings: applicable to prosecution of certain criminal offences subject to prison sentences of less that five years (following reforms instituted by Organic Law 8/2002, of Oct. 24, 2002, and Law 38/2002, of Oct. 24, 2002); (iv) Minor Offence Trials: applicable to prosecution of misdemeanors; and (v) Special Proceedings: criminal proceedings against members of Spanish Parliament and senators (implemented by Law of Feb. 9, 1912); proceedings for slander and libel against individuals; proceedings for criminal offences perpetrated through printing, engraving or other mechanical means of publication; proceedings for extradition (specifically governed by Law 4/1985, of Mar. 21, 1985, on Requested Extradition); or proceedings in absence of defendant.

Organic Law 5/1995, of May 22, Regulating Jury Trials.

Jury Trials have competence to try criminal offences of homicide, threats, failure to comply with duty to render emergency assistance, housebreaking, forest fire, breach of trust in custody of public records, corrupt practices, corruption in public office, embezzlement of public funds, fraud and illegal exaction, negotiation prohibited to civil servants and breach of trust in custody of prisoners, under Organic Law 5/1995, of May 22, on Jury Courts.

Organic Law 6/1984, of May 24, 1984, Regulating Habeas Corpus Proceedings.

The main purpose of this Law is to establish effective and swift remedies to legally unjustified arrests or those made under illegal conditions. It regulates appearance of arrestee before Judge, giving citizens who have been deprived of their freedom opportunity to make submissions against grounds of arrest or conditions thereof.

Latest Litigation Reforms.

With respect to protection of victims in relation to certain criminal offences, beginning of 2006 saw some significant legislative efforts made in order to support victims of most serious crimes. In this respect, Royal Decree 199/2006, of Feb. 17 (Official State Gazette—BOE—of Feb. 20, 2006) was enacted, amending following regulations: (i) Regulations related to aid of victims of violent crimes and crimes against sexual freedom, enacted by Royal Decree 738/1997 of May 23, 1997; (ii) Regulations governing implementation of Law 32/1999 of Oct. 8, of solidarity with victims of terrorism, enacted by Royal Decree 1912/1999 of Dec. 17; and, lastly, (iii) Regulations on implementation related to aid and compensations for victims of terrorism, enacted by Royal Decree 288/2003 of Mar. 7.

Within scope of European Union, certain regulations affecting criminal matters have been enacted, subsequently absorbed and superseded by domestic legislation. In this regard, number of rules have been passed in order to improve relations between Spanish and European Institutions, namely: (i) Law 16/2006 of June 5, 2006, regulating Eurojust National Member Statute and its relations with European Union Member States (Official State Gazette—BOE—of May 27, 2006); (ii) Law 18/2006 of June 5, 2006, on execution in European Union of orders freezing property or evidence within Criminal Proceedings (Official State Gazette—BOE—of June 6, 2006); and (iii) Law 19/2006 of June 5, 2006, whereby protection of Industrial Property Rights has been expanded and various procedural rules were established in order to facilitate application of several common resolutions (Official State Gazette—BOE—of June 6, 2006).

Moreover, due to well-known influence of International Public Law on every domestic legal system throughout this period, following treaties and agreements, among others, regarding international criminal assistance and other criminal matters, entered into force: (i) Instrument Ratifying the United Nations Covenant against Corrupt Practices, signed in New York on Oct. 31, 2003 (Official State Gazette—BOE—of July 19, 2006); (ii) The Agreement for Mutual Judicial

Assistance in Criminal Matters between the Kingdom of Spain and the Indian Republic, signed in New Delhi on July 3, 2006 (Official State Gazette—BOE—of Oct. 20, 2006); (iii) The Provisional Application of the Covenant between the Kingdom of Spain and the Islamic Republic of Mauritania on assistance for detained persons and transfer of condemned persons, signed in Madrid on Sept. 12, 2006 (Official State Gazette—BOE—of Nov. 8, 2006); (iv) Corrections to the Covenant on Judicial Assistance in Criminal Matters between the Kingdom of Spain and the Islamic Republic of Mauritania, signed in Madrid on Sept. 12, 2006 (Official State Gazette—BOE—of Dec. 7, 2006); (v) Covenant between the Kingdom of Spain and the Dominican Republic related to the enforcement of rulings, signed in Madrid on Sept. 15, 2003 (Official State Gazette—BOE—of Nov. 22, 2006); (vi) Agreement between the Kingdom of Spain and the Republic of Romania related to cooperative measures to combat delinquency, signed in Madrid on Mar. 20, 2006 (Official State Gazette—BOE—of Feb. 16, 2007); (vii) Instrument ratifying of the Extradition Treaty between the Kingdom of Spain and the People's Republic of China signed in Madrid on Nov. 14, 2005 (Official State Gazette—BOE—of Mar. 28, 2007); (viii) Instrument ratifying the Covenant on the transfer of condemned persons between the Kingdom of Spain and the People's Republic of China signed in Madrid on Nov. 14, 2005 (Official State Gazette—BOE—of Mar. 29, 2007); (ix) Instrument ratifying the Treaty on Mutual Assistance in Criminal Matters between the Kingdom of Spain and the People's Republic of China, signed in Peking on July 21, 2005 (Official State Gazette—BOE—of March 30, 2007); (x) Instrument ratifying the Treaty on the Transfer of Condemned Persons between the Kingdom of Spain and the Republic of Guatemala, signed subject to agreement in Madrid on Mar. 26, 1996 (Official State Gazette—BOE—of May 4, 2007); (xi) Agreement between Kingdom of Spain and Republic of Lithuania related to cooperative measures to detect, investigate and prevent delinquency, signed in Madrid on Dec. 3, 2007 (Official State Gazette—BOE—of Apr. 10, 2009); (xii) Treaty between Kingdom of Spain and Republic of Philippines, signed in Manila on Mar. 2, 2004 (Official State Gazette—BOE—of Mar. 26, 2009); (xiii) Covenant between Kingdom of Spain and Republic of Senegal related to cooperative measures to combat delinquency, ad referendum in Dakar on Dec. 5, 2006 (Official State Gazette—BOE—of Mar. 14, 2009); and (xiv) Provisional Application of Covenant between Kingdom of Spain and Republic of Albania related to cooperative measures to combat delinquency, signed in Tirania on May 20, 2009 (Official State Gazette—BOE—of July 4, 2009).

7.03 PENITENTIARY LAW:

General Penitentiary Organic Law 1/1979 of Sept. 26, 1979, establishes entire organization of Spanish penitentiary institutions. Its main purpose is to re-educate and re-insert in society those who have been sentenced to prison. The General Penitentiary Law also regulates detainment and custody of arrested persons, and system governing prisoners and convicts. On another note, it also establishes duty of assistance and aid to prison inmates and released prisoners.

The Law is supplemented by penitentiary regulations contained in Royal Decree 190/1996 of Feb. 9.

The Provisional Law of June 18, 1870 established rules for exercising clemency and determining procedure that should be pursued by State to grant exceptional pardon.

Royal Decree 515/2005, of May 6, 2005, established circumstances required for enforcing community service orders and permanent surveillance, certain security measures and stay of execution of custodial sentences.

A final mention should be made of two Organic Laws enacted in 2003: Organic Law 5/2003, of May 27, on competence of judge of penitentiary affairs regarding regime of visits within penitentiary centers; and Organic Law 6/2003, of June 30, on university education of prisoners.

7.04 SUBSTANTIVE CRIMINAL LAW:

Spanish Criminal Code.

Organic Law 10/1995 of Nov. 23, Criminal Code defines criminal offences and misdemeanors to which supreme form of coercive power of State is applied through criminal sentences. This provision has predominant position within Spanish legal system to extent that it has been reasonably deemed to constitute “negative Constitution”, since it is intended to safeguard basic values and principles of proper social behavior.

The Spanish Criminal Code comprises Preliminary Section, which sets forth essential guarantees and principles; Book One, which contains general provisions governing criminal offences and misdemeanors, liable parties, penalties, security measures and other consequences of criminal infringements; Book Two, which sets out statutory classification of criminal offences, conducts that constitute criminal offences and specific penalties applicable to each type of crime; and Book Three, which sets out conduct legally classified as criminal misdemeanors.

Following several amendments to Criminal Code made by Organic Law 15/2003 of Nov. 25, 2003, other relevant reforms to this Law have been enacted. By way of example, Organic Law 15/2007, of Nov. 30, on road security-related matters; aforementioned Organic Law 13/2007, of Nov. 19, on extra-territorial persecution of illegal trade in, or clandestine immigration of persons; and Organic Law 7/2006, of Nov. 21, and Royal Decree 641/2009 of Apr. 17, which provides for health protection measures and measures to combat doping in world of sport. Latter Royal Decree was partially modified (namely, arts. 47, 48. 2 and finally, definition contained in one of Annex “definitions”) by means of Royal Decree 1462/2009 of Sept. 18.

Special Statutes.

Spanish Substantive Law is rounded out with special statutes that are expressly for purpose of prosecuting specific criminal offences that Spanish legislator has decided not to include in Spanish Criminal Code. The legislative power has also decided to implement them through specific statutes. Noteworthy examples of such statutes are:

Organic Law 12/1995 of Dec. 12, 1995, on Prevention of Smuggling.

Following completion of European Union single market on Jan. 1, 1993, border controls between Member States were suppressed. This measure gave rise to increase in those taking advantage of situation and in unlawful circulation of goods outside of regular trade systems. In light of this, it was deemed advisable to penalize infringement of customs transit statutes under European Regulation No. 2913/92, of Oct. 12, establishing Community Customs Code. The International Road Transport Convention and its implementing provisions and TIR Convention must also be borne in mind in this connection.

Important reform of Law 12/2005 of Dec. 12, has been made by Additional Provision 57 of Law 30/2005 of Dec. 29, General State Budgetary, that amends section one of Additional Provision 18 of Law 46/1985 of Dec. 27, General State Budgetary, to adapt latter to Organic Law 12/1995 of Dec. 12, for repression of Smuggling, as successor of Smuggling Law 7/1982 of July 13. Mentioned Additional Provision of General State Budgetary Law specifies what must be considered “prohibited goods or articles” for purposes provided for in arts. 1.7 and 2.1d) of Organic Law 12/1995 of Dec. 12, for Repression of Smuggling. In turn, Final Provision 14 of Law 42/2006 of Dec. 28, General State Budgetary, modifies and, at same time, provides current statement of abovementioned section one of Additional Provision 18 of Law 46/1985 of Dec. 27, General State Budgetary, for purposes provided for in arts. 1.7 and 2.1d) of Organic Law 12/1995 of Dec. 12, for Repression of Smuggling (“prohibited goods or articles”).

Organic Law 5/2000 of Jan. 12, Regulating the Criminal Liability of Minors.

This Organic Law was consciously guided by following general principles: while, in formal terms, all of proceedings and measures are criminal in nature, from material point of view, such measures need to serve educational purpose as well as disciplinary one. Moreover, every guarantee is expressly recognized as strictly observing constitutional rights and special requirements are stated in interest of young offenders. Thus, procedural stages involving minors are differentiated; punishments must be adopted and enforced flexibly and taking each specific circumstance into consideration; autonomous entities have been created with two main goals: to reform and protect young offenders and to enforce measures previously imposed by a judge, monitoring their enforcement. The specific regime is generally applied to minors between ages of 14 and 18. In exceptional circumstances, it also applies to persons between ages of 18 and 21.

The end of 2006 saw enactment of Organic Law 8/2006 of Dec. 4, amending Organic Law 5/2000 of Jan. 12, 2000, (Official State Gazette—BOE—of Dec. 5, 2006). The most significant new developments introduced by this legal reform were, inter alia: (i) Amplification of cases in which judges are able to subject minors to internment in detention center; and (ii) adaptation of length of security measures imposed to importance and seriousness of crimes committed by minors (i.e. between ages of 14 and 18).

Organic Law 5/2000 of Jan. 12 has been implemented by Laws and Decrees of various Autonomous Communities, such as Castilla y León, País Vasco, Andalucía and Madrid (between 2007 and 2009).

Also enacted was Royal Decree 1774/2004 of July 30, implementing aforementioned Organic Law 5/2000 in relation to these specific matters: (i) Role of Judicial Police and intervention of multidisciplinary technical teams composed of psychologists, social workers, and mentors (in cases of foreseeable crimes committed by minors); (ii) execution of injunctive and definitive measures; and, lastly, (iii) disciplinary regime governing young offender detainment centers.

Law 19/1993 of Dec. 28, 1993, on Measures for the Prevention of Money Laundering.

In Spanish Law, prevention of money laundering is regulated by Law 19/1993 of Dec. 28, by Royal Decree 925/1995, implementing above Law, by European Union Directive 2001/97/EC of Dec. 4, 1997, on prevention of use of financial system for purpose of money laundering, by Law 19/2003 of July 5, on regulation of capital movements and economic transactions with other countries and on certain measures for prevention of money laundering, and Royal Decree 54/2005 of Jan. 21, amending regulations of Law 19/1993 and other rules to regulate banking, financial, and insurance systems. The Law applies to activities related to money laundering from unlawful activities and more easily identified by financial institutions, such as drug trafficking, terrorism, and organized crime. The recent Law 36/2006 of Nov.29, has implemented regulations regarding tax payments and fraud.

Last reforms to Law 19/1993 of Dec. 28 were made by following rules: Law 2/2009 of Mar. 31, on loans or credit agreements contracted by consumers; Order 2619/2006 of July 28, that develops Organic Law in relation to activities of currency exchange or abroad transfers management; and Order 114/2008 of Jan. 29 about observance of several duties by public notaries related to measures for prevention of money laundering.

Organic Law 11/2003 of Sept. 29, in Matters of Public Safety, Domestic Violence and the Social Integration of Foreigners.

This Law adopts measures aimed at providing suitable response to those problems which particularly worry Spanish citizens, within legislative framework that is being created to cope with this kind of problems. Organic Law 11/2003 of Sept. 29 has been implemented in Catalu~a by Law 5/2008, Apr. 24.

Organic Law 1/2004 of Dec. 28, on integrated protection measures against gender violence.

Organic Law 1/2004 of Dec. 28, on integrated protection measures against gender violence entered into force on June 28, 2005, and has been implemented by several Royal Decrees and Laws of various Autonomous Communities, such as Andalucía, Valencia, Catalu~a, Extremadura and Murcia (from 2007 to 2009), and by Law 40/2007 of Dec. 4, on Spanish Social Security System.

Organic Law 1/2004 aims to focus on prevention, awareness, and early detection of acts of gender violence. Thus, it establishes comprehensive and multidisciplinary measures from holistic approach that includes not only judicial and criminal measures, but also wide range of healthcare, educational, and social welfare measures. From strictly criminal point of view, it is worth stressing not only increase in penalties to be imposed, but also creation of courts for violence against women.

DEBTOR AND CREDITOR

8.01 ASSIGNMENTS:

The assignment of credits and rights is only effective, as regards debtor, as of date of notification of such assignment. If debtor makes payment to creditor before being notified of assignment, he/she will be released from any obligations. The assignor is responsible for existence and legitimacy of credit and also for capacity at time such assignment is made. In certain cases, assignor is also responsible for debtor's insolvency. Transfers of real estate and rights are valid vis-à-vis third parties as of registration date of such transfer at Land Registry. The principle of good faith governs all assignor-assignee relations, and former will be liable for any hidden defects during period specified by law.

8.02 ATTACHMENT:

See topic 8.04 Enforcement.

8.03 BANKRUPTCY AND/OR SUSPENSION OF PAYMENTS:

See topic 8.09 Insolvency.

8.04 ENFORCEMENT:

With respect to enforcement of court decisions, arbitral awards and court-approved agreements, law does not foresee possibility of filing claim for enforcement until 20 days have elapsed from date on which notice of decision was served. Thereafter, claim to enforce such resolutions and attach debtor's assets, may be filed without need to first request payment from debtor.

In procedures for enforcement of bills of exchange, promissory notes and cheques, plaintiff may request that judge order immediate attachment of assets if debtor fails to pay.

In other cases involving enforcement of directly enforceable instruments (first copy of public deeds, commercial contracts authenticated by notary or stock broker, etc.), once claim for enforcement is filed, debtor is required to pay. If debtor fails to pay after being requested to do so, judge may then adopt compulsory measures. If there is no specific property attached to debt, creditor would refer to list of debtor's assets. However, if creditor refuses or is unable to do so, then debtor must provide this list of assets. Furthermore, court will investigate debtor's wealth when creditor so requests. Once assets have been identified, recovery is pursued against debtor's assets in following order: Cash, short-term accounts receivable, Government or listed securities, jewels, commodities and profits, personal property, bonds listed on Stock Exchange and sold through stockbroker, real estate, salaries and financial claims, long-term accounts receivable. Remaining assets are then appraised and sold in public auction. (Civil Procedure Law 1/2000 of Jan. 7, 2000).

The Civil Procedure Law (as am'd by Organic Law 51/97 of Nov. 27, 1997) provides that, when so requested by creditor, judge will request statement of debtors's property from public registries or institutions and financial corporations.

Judgments of foreign courts may have to be enforced in Spain.

Once again, there is difference between resolutions issued by EU-Member Courts and non-EU Member Courts.

Under European law, main applicable instrument is Council Regulation (EC) No. 44/2001 of Dec. 22, 2000 on jurisdiction and recognition and enforcement of judgments in civil and commercial matters, which superseded Treaty of Brussels of Sept. 27, 1968, except for those Member within territorial scope of abovementioned Treaty which are excluded from this Regulation (e.g. Denmark).

There are other instruments that may be relevant when enforcing judicial resolution delivered by EU Member State: i) European Parliament and Council Regulation (EC) No. 805/2004 of Apr. 21, 2004, creating European Enforcement Order for uncontested claims; ii) European Parliament and Council Regulation (EC) No. 1896/2006 of Dec. 12, 2006, creating European Order for payment procedure, and iii) European Parliament and Council Regulation (EC) No. 861/2007 of July 11, 2007, establishing European Small Claims Procedure.

When enforcing judicial resolution delivered in Non-EU Member State, it is necessary to follow provisions foreseen in international instruments in force under Spanish law. Several situations may arise: i) If there is international instrument, it will establish effects of enforced resolutions in Spain; ii) if international instrument foresees that certain decision shall not be effective in Spain, then it will not be enforceable; and iii) if there is no international instrument on topic, regime established in arts. 952 to 954 of Spanish Civil Procedure Law of 1881 will apply.

8.05 EXEMPTIONS:

The beds of debtor and his/her family, daily clothes and working tools are exempt from attachment, as are wages and pensions, subject to a certain scale.

8.06 FRAUDULENT SALES AND CONVEYANCES:

Under Spanish law, creditors may exercise right of subrogation and take revocatory steps against debtor's fraudulent dealings. Under first of these procedures, creditors may subrogate debtor's rights and claims for purpose of settling debt. Under second, creditor may render null and void any covenants fraudulently executed by debtor in fraud upon law. Both options are provided for in art. 1111 of Civil Code, which expressly foresees that creditors, after attempting to attach debtor's property in order to settle their debt, may exercise all of debtor's rights and actions for same purpose, except for any rights and actions inherent thereto. Creditors may also challenge any fraudulent steps taken by debtor.

A prior requisite for exercise of these rights is prior prosecution of assets held by debtor in order to recover amount owed to creditor. Both actions are therefore secondary.

8.07 GARNISHMENT:

See topic 8.04 Enforcement.

8.08 HOMESTEADS:

See topic 8.05 Exemptions.

8.09 INSOLVENCY:

On July 9, 2003, Lower House of the Spanish Parliament approved new Insolvency Law, with general effect as from Sept. 1, 2004. This law removed former distinction between bankruptcy and suspension of payments, and created single insolvency procedure for both natural persons and legal entities.

Insolvency arises when debtor is regularly unable to meet its irrevocable obligations. Application for insolvency must be submitted to judge by debtor or by any of its creditors. The debtor has period of two months in which to file this application from date it became or should have become aware of its insolvency. Certain documents should be attached to application, such as report including all information on debtor's activity over past three years (if debtor is company, it should list all its known partners, its board of directors and auditors), inventory of all assets and rights, full list of all its creditors, accounting information from last three years and proposed agreement. If creditor is applying for debtor's insolvency, detailed description of its financial claims should also be submitted.

After analyzing all this information, judge must then decide whether or not to declare party insolvent, by either granting leave to proceed or dismissing application. The first phase following favourable decision will be appointment of receivers by judge. The judge will then leave management of procedure in hands of three receivers, who will have two months in which to submit report analyzing information provided by debtor, its financial statements, complete inventory of its assets and creditors, and their opinion on debtor's current situation.

All creditors' claims will then be acknowledged and settled according to their rank. Claims may be ranked as highly preferential, preferred, ordinary and subordinate. Highly preferential claims are those secured by mortgage or pledge. Preferred credits are any arising from salary, tax or social security obligations. Subordinate credits refer to interest, penalties, etc. The Insolvency Law defines ordinary credits as those not classified in any of these categories.

The next step is to reach creditor's arrangement, which may be one proposed by debtor or drafted by receivers. The proposed creditors' arrangement should contemplate reduction of amounts claimed or extension of timeframe. It may also contain proposal to convert claims into shares or to sell some of debtor's assets. The proposed agreement should be approved at creditors' meeting and by judge. The debtor is obliged to abide by and execute agreement. Upon reaching agreement, judge will declare party insolvent and publicly announce this circumstance.

Spanish Insolvency Law also foresees for another procedure for settlement of insolvencies, referred to as liquidation. This procedure may automatically commence if no creditors' arrangement is proposed, due to breach of agreement or if so requested by debtor. In this latter case, debtor's entire administrative authority will be held in abeyance. The receivers will prepare Liquidation Plan, which must be approved by judge, whereupon all debtor's assets will be sold and claims will be settled in preferential order.

In certain cases, if reduction in amount affects more than one third of total debt or delays in payment exceeds three years, judge will hold debtor personally liable for its insolvency or deem insolvency as non-intentional. If debtor is deemed personally liable, judge will disqualify it from managing any assets other than its own for two to 15 years and debtor will forfeit all its rights as creditor.

It should be noted that summary procedures exist which are more expeditious and simpler to manage. On Mar. 31, 2009, Official State Gazette (Boletín Oficial del Estado or "BOE") published "Royal Decree-Law 3/2009 of Mar. 27, 2009 on urgent measures related to tax, finance and insolvency in view of changes arising in economic scenario". New legislation extends availability of abridged procedure to all companies with liabilities below ten million euros which are entitled to present abridged balance sheet, unlike former legislation which only offered this procedure to companies with liabilities below one million euros.

This legislation entrusts exclusive competence to Commercial Courts for all issues related to insolvency proceeding. Organic Law 8/2003 of July 9, 2003 created these courts, which have been operating since Sept. 1, 2004.

As stated above, on Mar. 31, 2009, “Royal Decree-Law 3/2009 of Mar. 27, 2009 on urgent measures related to tax, finance and insolvency in view of changes arising in economic scenario” was enacted, and has already come into force. Besides amending certain important issues of court-supervised insolvency proceedings (“concurso de acreedores”) regulated in Insolvency Law, legislation also addresses, for first time, certain issues related to out-of-court business restructuring processes, commonly known as “debt refinancing”.

Principal amendments to Insolvency Law affect following matters: i) Refinancing agreement, ii) inability to challenge agreements and transactions entered into with public authorities, iii) arrangement with creditors, iv) early liquidation, v) updated status of certain claims, vi) receivers and independent experts, vii) public disclosure of insolvency proceedings, viii) procedural amendments, and ix) scope of application of abridged procedure.

With respect to procedural amendments, it should be noted that they affect procedures for substantial modifications in working conditions or collective holding in abeyance of employment contracts in which insolvent company acts as employer; time limits for challenging inventory and list of debtor’s creditors; appeals and “closest appeal”; hearing of challenge proceedings; court authorizations and assessment section.

With respect to insolvency matters, it should also be noted that Council Regulation (EC) No. 1346/2000 of May 29, 2000, on insolvency proceedings (Official Journal, June 30, 2000) came into force on Mar. 2, 2002. This Regulation will apply to collective insolvency proceedings entailing partial or total divestment of debtor and appointment of liquidator. On other hand, it does not apply to insolvency proceedings affecting insurance undertakings, credit institutions, investment undertakings which provide fund management or securities for third parties, or collective investment undertakings. (Art. 1). Pursuant to this Regulation, any judgment initiating insolvency proceedings that is handed down by court of Member State that is competent under Regulation shall be acknowledged in all other Member States from date it is effective in State where proceedings have commenced. (Art. 16). As far as effects are concerned, in general, judgment instituting proceedings will produce, without need for further formalities, same effects in any other Member State as under law of State initiating proceedings, unless otherwise provided for in said Regulation. (Art. 17). Lastly, Council Regulations (EC) No. 603/2005 of Apr. 12, 2005; 694/2006 of Apr. 27, 2006; and 681/2007 of June 13, 2007, all of which amend lists of insolvency proceedings, winding-up proceedings and liquidators in Annexes A, B and C to Regulation (EC) No. 1346/2000 on insolvency proceedings (Official Journal, June 20, 2007), may also be of interest. The last of these came into force on June 21, 2007, although references in Annexes A, B, and C regarding Czech Republic have been applicable since Jan. 1, 2008.

8.10 LIENS:

Liens may be created by contract, as in the case of pledges, mortgages and antichresis agreements. Liens may also be foreseen in law in following circumstances: (1) With respect to holders of a general storage warehouse receipt; (2) With respect to holders of mortgage bank bonds; (3) With respect to commission agents for goods shipped on consignment; (4) With respect to vendors, as long as goods sold are in his/her possession; (5) With respect to liens arising from a transportation agreement in favour of carrier or loader; (6) With respect to liens arising from a freight contract in favour of charterer and from a passage contract in favour of captain; (7) insurer’s lien over movable property of insured; (8) insured’s lien over legal reserves of insurance companies and prior deposits; (9) captain’s lien over salvaged goods in event of general breakdown or shipwreck.

8.11 PLEDGES:

A pledge is in rem right that secures certain debt with delivery of movable property. Pledges must be recorded in public instrument in presence of public notary. A pledge agreement entitles creditor to retain pledged item in his possession, or in that of any third parties to whom it was delivered, until claim is settled. A creditor whose claim is not settled may proceed, either before public notary or Court, to dispose of pledged assets. These two procedures are different. In order to proceed with disposal before notary, creditor must observe provisions of Pledge Law (Dec. 16, 1954), pursuant to which disposal must be carried out in a public auction, summoning debtor and pledge-holder, if any. If pledge is not disposed of at first auction, second auction may be held with same procedural formalities. If pledged thing remains unsold, creditor may request third auction or take possession of collateral, providing debtor with receipt for entire claim. On other hand, creditor may address courts (new Civil Procedure Law removed former procedure for pledge enforcements, establishing “common procedure” to enforce contracts or instruments in single public auction).

9 DISPUTE RESOLUTION

9.01 ALTERNATIVE DISPUTE RESOLUTION:

Arbitration and Award.

Law 60 of Dec. 23, 2003 on Arbitration (“Arbitration Law”) enables individuals or corporations entering into agreement to submit to one or more arbitrators for any disputes that have arisen or may arise in relation to matters for which they are free to take legal action. The Arbitration Law took its main inspiration from UNCITRAL Model Law on International Commercial Arbitration.

Arbitrations under labor law are excluded from scope of application of the Arbitration Law and only those matters within free disposition of parties according to Spanish Law can be subject of arbitration proceedings.

The Arbitration Law governs both domestic and international arbitration, although certain provisions are applicable only to international arbitration. Arbitration will be deemed to be international where: (a) Parties to dispute are domiciled in different States on date of execution of arbitration agreement; (b) place of arbitration proceedings, place in which substantial part of obligations giving rise to dispute is performed, or place with which dispute is most closely connected, are outside State in which parties are domiciled; (c) relationship giving rise to dispute involves international trade-related interests.

Where arbitration is international, foreign states or entities controlled by foreign state that are parties to arbitration proceedings duly initiated in Spain are not entitled to claim privileges and immunities of their domestic legislation in order to avoid their obligations under arbitration agreement.

The arbitration agreement must express will of parties to submit all or any of disputes which have arisen or may arise from their contractual or non-contractual legal relationship to arbitration.

The arbitration agreement must be in writing, in signed document or in exchange of letters, telegrams, telexes, faxes or other means of telecommunication that provide evidence of agreement. The arbitration agreement will also be deemed to exist provided that it is contained in some kind of electronic, optical or other format that makes it accessible for future consultation, in document to which parties make reference, or where its existence is confirmed by claimant and not denied by defendant in arbitration proceedings.

If debtor is declared subject to nontrading insolvency, any arbitration agreements to which it is party are rendered null and void during processing of insolvency, notwithstanding provisions of international treaties. Nonetheless, where there are arbitration proceedings underway on date of insolvency order, such proceedings will continue until award is definitively rendered, albeit subject to certain particular features specific to insolvency legislation for cases in which debtor's powers to manage and dispose of its assets are held in abeyance, or for cases in which debtor is submitted to external control.

Arbitration agreements prevent State Courts from ruling on disputes submitted to arbitration, provided that one of parties opposes jurisdiction of court. Arbitration proceedings already underway or to be initiated will not be stayed or set aside if party commences proceedings before State Court and other party challenges court's jurisdiction.

Where it is not possible to appoint arbitrators in accordance with procedure chosen by parties, any of parties may apply to State Court for appointment of arbitrators. The court must then take requirements established by parties concerning arbitrators into account and must take necessary steps to guarantee arbitrators' independence and impartiality.

In absence of agreement to appoint arbitrators, where parties have agreed that there will be three arbitrators, each will appoint one, and two appointed arbitrators will agree upon chairman of arbitral tribunal.

Arbitrators may be challenged if circumstances exist which give rise to justifiable doubts as to their impartiality or independence or when they do not fulfill requirements specified by parties. The parties can agree on procedure for challenging arbitrators or, failing that, arbitrators will eventually rule on challenge, unless challenged arbitrator resigns or other party accepts objection.

Arbitrators have jurisdiction to decide on their own jurisdiction and to grant interim measures. Interim measures may also be requested from State Court. The jurisdiction of arbitrators and State Courts to grant interim measures is alternative and concurrent.

While parties can decide on procedural rules, they must respect due process. In absence of agreement on procedural matters, arbitrators may decide on such matters themselves.

Arbitrators decide on issues in dispute at law or in equity, at discretion of parties. Where parties have not expressly opted for arbitration in equity, arbitrators will render their award in accordance with rules of law chosen by parties.

Unless otherwise provided for by parties, arbitrators must render their award within six months of date on which statement of defense has been submitted to arbitral tribunal. The arbitrators will be entitled, unless otherwise agreed on by parties, to extend above period by up to two months.

The award must be rendered and justified in written form, unless otherwise agreed on by parties. An award on specific terms may be rendered at request of parties pursuant to settlement agreement.

The parties may request that arbitrator make corrections and clarifications or issue supplementary award with respect to claims filed during arbitration proceedings but omitted from award.

The award may be held null and void where: (i) Arbitration agreement is nonexistent or null and void; (ii) party has not been duly notified of appointment of arbitrators or of procedural matters, or is otherwise unable to exercise its rights; (iii) arbitrators have decided on issues not submitted to arbitration or on items that are not subject to arbitration (in such cases, annulment will only affect those issues not submitted or suitable for arbitration, provided that such issues can be separated from rest); (iv) agreement between parties has not been observed in appointment of arbitrators or during arbitration proceedings, unless such agreement is contrary to mandatory provisions of Arbitration Law, or, in event that no agreement is reached between parties, where provisions of Arbitration Law have not been observed in appointment of arbitrators or during arbitration proceedings; or (v) award is contrary to public policy.

The competence to hear proceedings for annulment of award lies with Provincial Appellate Court of place in which award was rendered. An application for annulment must be filed within two months of date on which award is notified.

Awards may be enforced even where annulment proceedings are pending. The court may stay enforcement, provided that party against whom award is being enforced provides security.

Foreign arbitration awards are enforced in Spain in accordance with New York Convention of 1958, unless more favorable international treaty is applicable.

Cross-border practitioners in Spain view new Law as decisive step towards establishing Spain as ideal forum for international arbitration, given Spain’s convenient geographical location in southern Europe, its competitive cost-structure in comparison with other European forums and its linguistic and cultural ties to Latin America. Primacy is given to will of parties and procedural flexibility that permeates new Law should serve to offset any reticence when it comes to choosing Spain as seat for international commercial arbitration proceedings. Moreover, Spain’s main arbitration institutions have introduced new arbitration rules in line with Arbitration Law and with model rules of arbitration of Spanish Arbitration Club.

More than five years after Arbitration Law entered into force, case law precedents regarding its application and interpretation are relatively scarce. Nonetheless, position taken by Spanish courts in various cases brought before them is clearly favorable to arbitration. Thus, Spanish courts have been shown to be especially favorable to ordering injunctive relief in support of arbitration procedure, appointing arbitrators, or rejecting petitions to have award rendered void.

9.02 ARBITRATION AND AWARD:

See topic 9.01 Alternative Dispute Resolution.

DOCUMENTS AND RECORDS

10.01 ACKNOWLEDGMENTS:

Written or oral powers may be granted to representative. Acceptance by representative may be expressed or implied from fact that he/she makes use of such powers. Powers may be granted to one or more persons to act jointly or severally. If powers are granted for transaction subject to registration at Commercial or Property Registries (e.g., formation of companies, sale and purchase of property, etc.), they must be executed in public deed. Powers to act in trials must be granted under public deeds executed before public notary or consular officer and must be addressed to one or more solicitors.

Powers may be revoked at any moment by grantor, who may request that document be returned and no agreements to contrary may be provided for. The grantor must indemnify representative for any expenses incurred in discharge of his/her duties.

Moreover, powers of attorney granted under public deeds executed before public notary must also be revoked under public deed. Where powers of attorney have been registered at Commercial Registry, revocation thereof must also be registered at Registry for public disclosure.

In Spain, documents requiring authentication by public official must be executed before public notary and recorded in his/her protocol file. Copies of original deed are delivered on request. If notary discontinues his practice, the Notaries' Association takes charge of his/her protocol file. In foreign countries, Spanish consular officers act as notaries and may authenticate any documents requiring official recognition in Spain. Instruments executed before foreign public notaries must bear signature of notary duly authenticated by Spanish consular officer in district in which notary is domiciled, unless foreign country is party to 1961 Hague Convention on legalization of documents, in which case it is sufficient to attach apostille provided for in said Convention.

In case of corporations, any representatives acting on its behalf must be fully empowered in writing, under laws of country of said company, to execute deeds on behalf of company. All contracts affecting real estate and instruments forming profit-making corporations must be executed before public notary prior to registration. See category 2 Business Organizations, topic Corporations and 2.02 Associations; also topic Notaries.

10.02 NOTARIES:

The duties of public notaries are very important in Spain. Many documents must be executed before notary in order to have full effect. Such documents include deeds of formation for all types of companies and all contracts affecting real estate, if they are to be registered at Commercial or Property Registries, as well as affidavits and powers of attorney, to be effective in courts and before authorities.

The requirements for entry to notary profession include: to have Spanish nationality, to be over 23 years of age, and to have completed specialist studies stipulated by regulations. Notaries enter notarial profession following a competitive examination conducted before panel of experts.

Under Law 55/1999, on Tax, Administrative, and Social Measures, public notaries were merged with brokers (including combining duties of notaries with those of Licenses Brokers) into single body, in force as from Oct. 1, 2000. (Royal Decree 1643/2000, of Sept. 22, 2000).

The regulations governing public notaries have been implemented and amended on several occasions. The last amendment to such regulations was under Royal Decree 45/2007, of Jan. 19, main outcome of which include: (i) Amendments to notarial statutes, including independence among notaries, filling of vacancies and system of notarial districts; (ii) application of new technologies, and (iii) organization of public notaries. Said Royal Decree 45/2007 of Jan. 19, was partially repealed by Supreme Court Judgments of May 20, July 7, Oct. 7 and 14 and Nov. 4, 2008.

10.03 RECORDS:

The following Registries exist in Spain: (1) The Registry of Vital Statistics, at which births, marriages, deaths and naturalizations are recorded; (2) The Wills and Testaments Registry, at which all testaments executed before public notary are recorded; (3) The Property Registry, at which real estate is recorded, including any transfers, mortgages and other liens and encumbrances; mines are also recorded at this Registry; (4) The Registry of Movable Assets, for recording of credit sale agreements, pledges and other liens on such assets, ownership of, and liens on, vessels, aircraft, automobiles and industrial machinery, general contractual conditions previously established by principal, etc.; (5) The Commercial (Mercantile) Registry, at which all corporations are registered, as are their bylaws, any powers granted by their boards of directors to their managers in order to represent company, bylaw amendments, registered office, etc. Individual traders and businessmen may also be registered voluntarily; (6) The Registry of Criminal Records, at which names of all persons convicted by courts for crimes committed are recorded; (7) The Spanish Office of Patents and Trademarks, at which all patents, trademarks, trade names and other forms of industrial property are recorded; (8) The Intellectual Property Registry, at which original literary works (including software) and copyrights are recorded; (9) The Registry for classification of restrictive trade practices which are exempt from legal prohibitions; (10) The Special Registry of Investment Companies and Funds; (11) The Registry of State Contractors, at which individuals and legal entities classified as contractors are recorded; (12) The Registry of National Industrial Undertakings, where data regarding industrial products, power supply activities, minerals, research and exploitation, nuclear power and agriculture and food-industry-related facilities, etc. are recorded; (13) The Central Civil Registry of Missing Persons, at which all persons who have not been found by civil courts are recorded; (14) The Registry of Judgments on Minor Criminal Liability, at which all definitive judgments on such matters are recorded; (15) The Franchises Registry, at which franchises created in Spain are recorded; (16) The Cooperative Companies Registry, at which formation of such companies is registered; (17) The General Conditions Registry, at which all new general contractual terms and conditions are recorded; (18) The Competition Registry, at which all decisions, recommendations and practices authorized, or totally or partially prohibited, by courts for antitrust purposes are recorded; (19) The Electronic Signature Services Providers Registry, at which such providers are registered; (20) The Registry of Distance Selling Companies; (21) The National Registry of Associations, at which associations, as well as their bylaws and representative bodies, are recorded, which cooperates and collaborates with regional association registries; (22) The Registry of Foundations; (23) The General Registry of Goods of Cultural Interest; (24) The Central Registry for protection of victims of domestic violence; (25) The Registry of Insolvency Resolutions, which is web site (https://www.publicidadconcursal.es) compiling information from different registries (Commercial Registry, Property Registry, etc.) regarding personally liable debtors and appointed receivers and their removal.

11 EMPLOYMENT

11.01 LABOUR RELATIONS:

Legislative Royal Decree 1/1995, of Mar. 24, approving Consolidated Text of the Workers' Statute, has superseded basic general labor legislation and introduced new legal framework. Any worker who voluntarily provides paid services to another under management of another physical person or company, referred to as employer, falls within scope of application of labor law. The Workers' Statute is not applicable to: (1) Civil servants and employees of public entities, (2) mandatory personal services, (3) services rendered as member of company's board of directors, (4) services rendered within family, (5) services rendered by commercial agents in connection with commercial transactions, (6) other workers not included within scope of application where they fail to meet necessary requirements.

Sources of labor law are: (1) Legal provisions and regulations of State, (2) collective agreements, (3) individual employment agreements, and (4) local and professional customs.

The basic rights of workers include, inter alia: effective occupation, privacy, dignity, protection against harassment, health and safety at work, labor union membership, collective bargaining, assembly and strike. Discrimination on grounds of gender, age, race, religion, politics and language is prohibited.

Organic Law 3/2007 of Mar. 22, for effective equality between women and men, was conceived for purpose of giving effect to right to equal treatment of, and equal opportunities for, men and women, by eliminating discrimination against women in all walks of life. In field of labor and employment law, principles of equal treatment and opportunities apply to access to job market, occupational training and promotion and working conditions. The Law imposes obligation on employers to ensure equal treatment and equal opportunities in workplace by adopting measures to be negotiated and, as case may be, agreed on with workers' representatives. Companies with more than two hundred and fifty workers must prepare and implement equality plans. The Organic Law also amends Workers' Statute and provides regulations and further rights on work/life balance-related matters with, for instance, rules on holding employment contracts in abeyance, time off, leave of absence, reduced working hours, maternity and paternity leave, etc.

The minimum working age is 16. With certain exceptions, employment agreements do not need to be in written form, although any party may request execution of written agreement. Notwithstanding, following types of contracts must be executed in writing (Art. 8 of the Workers' Statute): part-time employment contracts, home- employment contracts, contracts for performance of specific works or services, substitution contracts, contracts for workers engaged in Spain in service of Spanish companies abroad, contracts for specific period exceeding four weeks, work experience contracts and apprenticeship contracts, permanent discontinuous contracts, certain special employment contracts and contracts to promote permanent hiring.

Non-competition clauses on termination of agreement are deemed valid where (Art. 21 Workers' Statute): (1) Employer has real commercial or industrial interest, (2) employee is given proper financial compensation, and (3) duration does not exceed two years in case of technicians, or six months for all other employees.

Salaries include all consideration received by employees, whether in cash or in kind, except for any amounts received by worker as indemnification or reimbursement for expenses incurred at work, social security benefits and indemnifications or compensation for relocation, suspension or dismissal. All taxes and social security contributions to be borne by employee may not be paid by employer, and all agreements providing otherwise are deemed null and void (Art. 26 of the Workers' Statute).

Ordinary working hours may not exceed average of 40 hours per week of actual work, calculated on annual basis. The minimum weekly rest period is set at 36 hours. Annual compensated vacations are set at minimum of 30 calendar days.

Pursuant to Art. 40 of the Workers' Statute (as from Law 11/1994 of May 19), geographical mobility is permitted, provided such mobility is justified on economic, technical, organizational or production-related grounds (permission from labor authorities is not required). Nevertheless examination "a posteriori" by courts on decision to transfer worker is possible in event of claim filed by affected workers who oppose such decision.

Temporary employment agencies were authorized under Law 14/1994 of June 1, 1994, amended by Law 29/1999 of July 16, 1999.

Employment agreements may be held in abeyance, (Art. 45 Workers' Statute) mainly in following cases: by mutual agreement, due to temporary incapacity of worker, imprisonment of worker while final judgment is pending, force majeure, on economic, technical, organization or production-related grounds, due to strike and lock-out by employer, on grounds validly provided for in contract, for purpose of holding representative public office, on organizational or production-related grounds, due to mandatory leaves of absence, maternity, paternity, adoption or fostering leave, risks during pregnancy and while breastfeeding, where workers are exposed to serious and imminent risk at work, and where so decided by working woman due to domestic violence. The holding of contract in abeyance gives rise to exemption from working and salary and wage payment obligations.

Pursuant to Art. 49 of the Workers' Statute, employment contracts may be terminated by mutual agreement, on expiry of term in case of temporary contracts, contractual reasons validly set forth in agreement, due to worker's resignation, death, permanent disability or retirement, due to force majeure, on economic, technical, organization or production-related grounds, under collective layoff procedures, due to employer's infringement, and on grounds of disciplinary dismissal. Authorization from labor authorities is only required in case of collective layoff procedures, i.e., when, within single 90-day period, termination affects at least: (a) ten workers, at companies with less than 100 workers; (b) 10% of workers, at companies 100 to 300 workers; (c) 30 workers, at companies with 300 workers or more. In cases of contract terminations where such limits are not exceeded, no authorization is necessary, although courts may exert subsequent control.

Personnel Restructuring (redundancy) is governed by Royal Decree 43/1996 of Jan. 19, 1996, regulating proceedings for holding in abeyance and termination (mass layoffs) of employment relationships.

Workers may terminate their employment relationships unilaterally with right to severance pay provided for in event of unfair dismissal, where any of following infringements by employer are proven (Art. 50 Workers' Statute): material changes in working conditions detrimental to their professional training or dignity, failure to make payment or continued arrears in payment of agreed salary or any other serious default by employer of its obligations, such as company's refusal to reinstate worker on their previous working conditions where court judgment has declared posting or change of working conditions to be unjustified.

A Company may terminate employment contract, subject to severance pay of 20 days' salary per year of service (up to maximum of 12 months' salary), if it proves any of following objective grounds (Art. 52 Workers' Statute): where incompetence of worker is known or subsequently comes to light, worker's failure to adapt to technical changes to their position of work, where there is objectively evidenced need to terminate jobs on economic, technical, organizational or production-related grounds, absenteeism from work reaching specific levels provided for in law, or where there are insufficient on- or off-budget financial resources in case of permanent contracts arranged directly by public authorities or by nonprofit making concerns to perform specific public plans and programs. 30 days' advance written notice of objective dismissal must be served on worker, together with statutory severance pay. A worker may always claim for unfair dismissal where he/she understands that purported circumstances have not in fact arisen, as in case of disciplinary dismissal.

An employer may dismiss employee following disciplinary grounds (Art. 54 Workers' Statute): Repeated and unjustified failure to attend, lack of discipline, oral or physical offenses, breach of good faith and abuse of trust, continued and voluntary reduction of worker's performance, habitual use of drugs and alcohol affecting performance at work, harassment of employer or other workers at company on grounds of their racial or ethnic origin, religion, disability, age, sexual orientation, sexual or gender harassment. Where court holds that dismissal is justified, employment contract is terminated and employee is not entitled to any compensation. Where dismissal is deemed unjustified, employer may choose between reinstatement or payment of compensation of 45 days of salary per year of employment, up to maximum of 42 months' salary plus back pay accruing during proceeding. When unjustified dismissal affects any of worker's representatives, option to be reinstated lies with worker, and employer is obliged to reinstate worker if latter so chooses.

Dismissal on grounds of discrimination in any form and/or in breach of fundamental rights and public freedoms of workers are prohibited under Spanish Constitution and will be rendered null and void. Additionally, dismissal shall also be rendered null and void (unless such dismissal may be deemed justified)in following circumstances: (i) Dismissal of workers during period in which employment contract is held in abeyance due to maternity or paternity, any risks during pregnancy or breastfeeding, illnesses caused by pregnancy, child birth or breastfeeding, adoption or guardianship, (ii) dismissals of pregnant employees from date on which pregnancy commences until date on which employment contract is held in abeyance, or where workers have requested leave of absence or extended leave of absence for purpose of caring for family or relatives, (iii) dismissal of employees following period in which employment relationship is held in abeyance due to maternity, paternity, adoption or guardianship, and until nine months have elapsed from such date of birth, adoption or guardianship. Any dismissal rendered null and void will immediately give rise to reinstatement of worker, who is entitled to receive salaries accrued from date of dismissal to date of reinstatement.

Worker's representatives are elected by secret, direct and free vote. At company or work center with less than 50 workers, workers may be represented by maximum of three Personnel Delegates. At companies or work centers with more than 50 workers, Workers' Committee will constitute representative body.

Collective agreements govern productivity and working conditions and may also stipulate conditions for "stability" in labor relationships. Their territorial scope may be freely determined by parties. They must be executed in writing and do not need to be approved by any government authority, although they do have to be registered with the labor authorities.

Unemployment Benefits under General Social Security System.

Royal Decree 625/1985 of Apr. 2, amended by Law 22/1992 of July 30, by Royal Decree 1/1994 of June 20, and by Law 45/2002 of Dec. 12, approving consolidated General Social Security Law, provides for following matters: unemployment benefits, whether due to dismissal or termination of employment contract, is established 70% of base amount during first 180 days, such base amount being obtained by dividing 180 by total contributions made during six preceding months. As from day 181, 60% of said base amount is applied. Unemployment benefits may not exceed 225% (in event that worker has two or more children) of monthly IPREM (Public Multi-purpose Income Indicator) increased by 1/6, and minimum amount is set at 107% or 80% (where worker does not have children) of monthly IPREM, increased by 1/6. Unemployed who intend to initiate self-employed activity can obtain capitalization of unemployment benefits up to 60 per 100 of percentage of public aid.

With respect to time during which unemployment benefit may be received, this will depend on periods of employment for which contributions were paid in six years prior to legal situation of unemployment, up to maximum of 720 days. On termination of the above two-year period, an unemployment subsidy may be received, which may be extended by up to maximum of 18 months. However, it is necessary to justify legal grounds in judgment rendered by competent authority in order for such subsidy to be received and amount of said subsidy will be equivalent to 75% of overall IPREM (Public Indicator of Revenue of Multiple Effects) in force for each year.

A worker in legal situation of unemployment who has not made minimum contributions required to receive benefit is entitled to unemployment subsidy when (i) he/she has contributed for at least three months and has family responsibilities; (ii) he/she has contributed for six months, regardless of whether or not he/she has family responsibilities.

Law 45/2002 of Dec. 12, on urgent measures to reform unemployment protection system and to enhance possibilities of employment, amended by Royal Decree 1975/2008 of Nov. 28, introduced major legislative developments as regards unemployment and social security benefits. Noteworthy among such developments are: (1) In order to be entitled to unemployment benefit, in addition to other requirements, evidence must be provided of a worker's willingness to actively seek employment and to accept suitable position. To provide such evidence, workers must sign undertaking of activity on date on which application for benefit is made. (2) Workers must apply for recognition of right to receive unemployment benefit within 15 days of the date on which he/she acquires legal unemployment status. In event of dismissal, employer's decision itself will be considered grounds for legal unemployment status, without any need to oppose such decision, (3) If, in light of claim or appeal, dismissal is deemed unjustified and company opts to pay severance, employer's obligation to pay "procedural salaries" (i.e., salaries not received by employee from effective date of dismissal until date of judgment) is provided for, although company may be released from such obligation where it deposits overall severance pay within 48 hours of dismissal. (4) Workers forfeit their right to receive unemployment benefit if they reject suitable offer of employment on three occasions. Such offer is considered to be one made by public employment services, taking following issues into account: (a) Offer deemed suitable by public employment services will be understood to include offers of employment made to worker at distance of up to 30 km from their home, unless minimum traveling time to and from work accounts for over 25% of daily working hours, if traveling costs account for over 20% of monthly wage, or where worker has opportunity to have secure suitable placement at new place of employment. Offers of employment will also be deemed suitable regardless of type of contract (permanent or temporary) or working hours (full time or part time); (b) public employment services will be entitled to modify foregoing and adapt application thereof to worker's personal circumstances. (5) Supplementary benefits received by unemployed workers over 52 of age are compatible with working as employee. In such case, employer must pay worker difference between benefit and agreed salary.

Royal Decree-Law 2/2009 of Mar. 6, 2009 on urgent measures to maintain and promote employment and to protect unemployed, establishes temporarily measures in order to reinstate rights to unemployment benefit to employees that have been formerly held in abeyance, enjoying such benefits, due to collective personnel restructuring.

Bases of Contributions to Social Security System.

Social security contributions result from applying contribution rates to contribution base. The contribution base depends on salary received, subject to certain maximum and minimum limits depending on professional category. According to Order 41/2009 of Jan. 20, of the Ministry of Work and Social Affairs, 2009 general maximum monthly base amounts to [Euro]3,166.20.

As general rule, contribution rates applicable to employers and employees under general social security program in force since Jan. 1, 2009, are 29.9% for employers and 6.35% for employees.

The total employer contribution rate is also increased by percentages for occupational accident and illness contingencies, depending on risks entailed by employee's work and activity of company, in line with system of scales established by Law 2/2008 of Dec. 23.

Assessment and Collection of Amounts under General Social Security System.

Including compensation for occupational accidents and illness, together with assessment and collection of amounts under General Social Security System.

The amounts payable to social security system and those relating to unemployment, wage guarantee fund, professional training and employment solidarity funds must be assessed and paid into collection offices by those responsible for such contributions (employers) and authorized collection agencies one month after such contributions fall due, unless any other deadline is specifically provided for.

For such purpose, employers must complete relevant official forms in accordance with legislation in force. Provision is made for companies filing and sending self-assessments of amounts and any other contributions and collection-related information via electronic data transmission system (RED).

The collection of social security contributions is governed by Royal Decree 1426/1997, of Sept. 15, and Royal Decree 2032/1998, of Sept. 25, 1998, implemented by Order of May 26, 1999 and amended by Royal Decree 1251/2001, of Nov. 16.

Minimum Wage.

Royal Decree 2128/2008 of Dec. 26, sets 2009 national minimum wage at [Euro]20.80 per day, [Euro]624 per month and [Euro]8,736 per year.

Law 2/2008 of Dec. 23, sets 2009 IPREM (Public Multi-purpose Income Indicator) at [Euro]17.57 per day, [Euro]527.24 per month and [Euro]6,326.86 per year.

Law 19/1977 of Apr. 1, regulating Right of Trade Union Membership.

Art. 1 provides that workers and employers may establish all such professional associations as they see fit for defense of their respective interests for each branch of activity, on territorial or national scale. Branch of activity means area of economic activity, profession or any other similar concept determined by employers or workers. Associations must draft their own bylaws, have full power to govern themselves and enjoy legal protection guaranteeing their independence vis-à-vis public authorities. The bylaws must contain, at least, name of association, territorial and professional scope, representative bodies vis-à-vis government and public authorities, economic resources, system of membership, system of operation, etc. Art. 2 provides that workers and employers are entitled to join such associations on sole condition that they observe bylaws. Art. 3 provides that associations formed under this Law will have full legal personality and capacity to act. They will be registered 20 days after filing their bylaws at Special Registry, unless application is made to legal authorities for ruling that bylaws contravene with Law. Art. 4 confirms that professional associations may set up federations and confederations for such purpose. Art. 5 provides that associations may only be suspended or dissolved by judicial decision on grounds of unlawful conduct of activities, or on any other statutory or bylaw grounds.

Organic Law 11/1985, of Aug. 2, 1985, regulating freedom to join trade unions, implemented certain constitutional provisions with respect to such rights. It establishes right of any worker (including administrative or statutory personnel of public administrations and excluding Institutions of Armed Forces and Judges, Magistrates and Public Prosecutors) to freely join trade union. This includes possibility of forming trade unions, freedom to join or otherwise, to elect representatives and to perform union activities.

Union organizations have right to organize themselves internally, to organize federations, not to be suspended or dissolved except under definitive court judgment and, above all, to collective bargaining, to exercise right to strike, to file complaints for collective disputes and to present candidates at union elections.

The terms on which union action should be taken within company or workplace are defined. It also provides for systems to defend against activities that may be detrimental to right to join trade unions.

The Law also defines requirements for unions to be classified as more representative and their prerogatives with representative capacity at all territorial and functional levels.

Royal Decree-Law 17/1977 of Mar. 4 on Labor Relations.

This Decree-Law expressly governs strikes, collective disputes and agreements, lockouts by employers and penalties.

Strikes may be called either by majority resolution of workers' representatives (at least 75% of workers), or directly by workers themselves at work center, where one quarter of labor force puts decision to secret vote and decision is approved by simple majority. Nevertheless, Constitutional Court Judgment 11/1981 declared that right to strike could be exercised by workers personally, by their representatives and by trade unions, but requirement that representatives' meeting be attended by 75% of representatives and that strike be supported by 25% of workers is not constitutional. Five days' advance notice of strike must be served on employer and labor authorities, or ten days in case of companies servicing public utilities. During strike, workers are not entitled to receive wages and are covered by special social security system, while right of all employees who do not wish to take part in strike must be observed at all times.

Strikes of political nature or called out of sympathy or in support of strikes intended to alter terms of collective agreement or award in force, or which do not comply with requirements of this Decree, will be deemed illegal.

Lock-outs may be declared where there is danger of serious damage to persons or property, where work center has been illegally occupied or where nonattendance is so widespread as to impede normal production activities.

Royal Legislative Decree 5/2000 of Aug. 4, 2000, approving Consolidated Text of the Labor Infringements and Penalties Law.

This Law regulates employment relationship-related infringements, infringements of obligations relating to working conditions of workers temporarily assigned to Spain within scope of cross-border provisions of services, infringements regarding workers' rights to information and consultation at EU companies and groups of companies, infringements in occupational risk prevention-related matters, infringements in matters of employment, infringements regarding temporary employment firms and their client companies, on social security issues, in matters of emigration, migratory movement, and in matters of cooperatives and obstructions to inspection.

Royal Legislative Decree 1/2002 of Nov. 29, 2002, amended by Law 11/2006 of May 16, 2006, approving Revised Pension Plans and Funds Law.

This Decree regulates contractual conditions governing creation of pension savings and instruments related to such savings, known as Pension Plans. Pension Plans are conceived as voluntary and free social insurance institutions, private benefits of which may or may not supplement obligatory social security system, but which may never replace said system. Pensions undertakings secured with internal funds have been obligatorily externalized.

Royal Decree 304/2004, of Apr. 25, approving Regulations on Pension Plans and Funds, was amended by Royal Decree 1684/2007 of Dec. 14, which superseded former regulations approved by Royal Decree 1307/1988, Sept. 30.

Law 14/1994 of June 1, 1994, on Temporary Employment Agencies.

Law 14/1994, as amended by Law 29/1999 of July 16, 1999, and by Royal Legislative Decree 5/2006, of May 9, 2006, provides workers of such companies with greater legal security in their employment with client company, promoting stable employment and improving salary conditions. A new salary-reared development means that workers hired and assigned to client companies are entitled to receive, while working at said company, at least total compensation stipulated for job to be performed under collective agreement applicable to client company, calculated by unit of time.

Royal Legislative Decree of Apr. 7, 1995, on Labor Procedure.

This Decree sets forth basic regulations governing labor procedure: dismissal procedures, industrial disputes, appeals, rules on enforcement of judgments and rules on specific procedures.

Occupational Risk Prevention.

Law 31/95 of Nov. 8, on Occupational Risk Prevention, concerned with Prevention of Risks at Work, came into force on Feb. 10, 1996, and was later amended by Law 5/2000, of Aug. 4.

This Law has also been amended by Law 54/2003 of Dec. 13, providing for more in-depth obligations on employers regarding Risk Prevention Systems. The most noteworthy of such obligations include: (i) All employers must draw up Prevention Plan; (ii) certain additional documents that must be available on request by authorities; and (iii) addition of certain new infringements.

The legal regulations governing health and safety range from highly specific and detailed rules to generic guidelines, as well as range of jurisdictions, from collective agreements to rules with statutory force and autonomous community regulations. The purpose of this law is to adopt coherent single vision in order to harmonize regulatory framework in this area, as well as to update any regulations that have become outdated.

Royal Decree 39/1997 of Jan. 17, approving Prevention Services Regulations amended by Royal Decree 604/2005, of May 19.

Law 42/1997 of Nov. 14, on Labor and Social Security Inspections.

The above law was implemented by Royal Decree 1387/2000, approving regulations for Organization and Operation of Social Security Inspections. It governs inspections both with respect to employment relations and in area of employee welfare and promotion and protection of employment.

Subsidies and Discounts to Social Security Contributions.

Law 43/2006 of Dec. 29, provides for plan of discounts to employer's social security contributions in certain cases in which it hires workers with special difficulties in accessing labor market on permanent basis, or where it transforms temporary contracts executed before June 1, 2006, into permanent contracts. These discounts are particularly important in cases of contracts executed with unemployed workers with particular difficulties in accessing labor market.

Royal Decree 1975/2008 of Nov. 28, on urgent measures to take in economic, fiscal, employment and access to housing, establishes discounts in event of hiring unemployed workers with family responsibilities, for two years, applicable until Dec. 31, 2010. Additionally, Royal Decree-Law 2/2009 of Mar. 6, 2009 on urgent measures to maintain and promote employment and to protect unemployed, establishes special measures in event of hiring workers on unemployment benefit under indefinite-term contracts until Dec. 31, 2009.

Employment Law 56/2003 of Dec. 16.

This Law sets out main employment-related objectives. It expressly provides for creation of specific employment programs in order to promote employment for workers with special difficulties in accessing labor market.

Death due to occupational accident.

In event of death of employees, dependents and even foreigners due to occupational accidents, in addition to any amounts they may receive from labor pension funds, they are entitled to public compensation paid as lump sum, consisting of six monthly installments of regulating base amount for surviving spouse and one monthly installment for any child who has lost parent. Some collective agreements establish additional obligation to formalize labor pension funds or insurance policies against risks of illness, injuries or death due to workplace accidents.

Statute of Self-Employed Workers, Approved by Law 20/2007 of July 11.

This Law was published on July 12, 2007, and entered into force three months later. It establishes general regulations governing self-employed workers and provides for special guarantees and conditions for self-employed workers who mainly depend financially on only one client.

Royal Decree 197/2009 of Feb. 23, develops Law 20/2007 of July 11, about Statute of Self-Employed Workers in terms of contract of economically dependent self-employed and registration, creating, in addition, State Register of Professional Associations of Self-Employed.

Royal Decree 1273/2003 of Oct. 10, 2003 on extension of protection in event of occupational accidents and temporal disability for self-employed workers.

12 ENVIRONMENT

12.01 ENVIRONMENTAL REGULATION:

General Environmental Protection.

Environmental legal protection is provided for in Art. 45 of the 1978 Spanish Constitution. The right to environment and duty to preserve it are conceived as fundamental rights and obligations under Constitution. In addition, Arts. 148 and 149 of the Constitution lay down basic guidelines for distribution of competencies among central and autonomous community governments.

Note that, pursuant to provisions of above articles, central government has exclusive power to enact basic environmental protection legislation, while autonomous community governments have power to establish additional rules on environmental protection and implement the basic central government legislation.

Environmental protection is also provided for in arts. 325 et seq of Spanish Criminal Code, on offences against natural resources and environment.

Environmental Liability Law 26/2007 was published in Official State Gazette on Oct. 24, 2007. The Law transposes into Spanish law European Parliament and Council Directive 2004/35/CE of Apr. 21, 2004, on environmental liability with regard to prevention and remedying of environmental damage. The Law regulates duty of operators that pursue economic or professional activity in Spain to prevent, avoid and remedy environmental damage, pursuant to Art. 45 of the Spanish Constitution and “polluter pays” and prevention principles, and establishes unlimited, strict administrative liability. The Law imposes following obligations on operators: to report existence of environmental damage or imminent threat of such damage caused by their activities; to adopt and implement measures to prevent, avoid and remedy damage; as general rule, to bear cost of such measures; to remedy environmental damage “in natura”; and to provide financial guarantee (in case of operators included in Schedule III to Law). Royal Decree 2090/2008 of Dec. 22, 2008, approving Regulations partially implementing Environmental Liability Law 26/2007 of Oct. 23, 2007, was published in Official State Gazette on Dec. 23, 2008. Purpose of Regulations is to implement Chapter IV of Law 26/2007, and Schedules I, II and IV to it, in relation to legal regime governing types of financial security, criteria for determining degree of significance of environmental damage and measures to remedy such damage.

On Dec. 15, 2004, Spain ratified Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, executed in Aarhus (Denmark) on June 25, 1998.

Under Law 27/2006, dated July 18, 2006, specific, recognized rights and obligations are established pursuant to aforementioned Convention, and legal framework currently in force was brought into line with provisions set forth in Directive 2003/4/EC and Directive 2003/35/EC. In order to exercise right to environment in interests of individual development, this Law recognizes right of access to environmental information, to participate in decision-making processes on matters that directly or indirectly affect environment, and to require administrative and judicial review of any decisions made by public authorities that may give rise to violations of environmental regulations.

Distribution of Environmental Administrative Authority in Spain.

At state level, authority responsible for environmental matters is Ministry of the Environment, set up in 1996.

Ministerial departments, as well as offices of various secretaries of State, have been reorganized under Royal Decree 432/2008 of Apr. 12, 2008. With respect to Ministry in charge of environment affairs, main new development is its integration into former Ministry of Agriculture, Fisheries and Food, which is now called Ministry of the Environment and Rural and Marine Areas. It will therefore take on functions of both Ministries, as well as those performed to date by Ministry of Development in relation to marine conservation.

At regional government level, administrative departments specializing in environmental matters within structure of respective executive governments have been set up. Moreover, wide-ranging responsibilities for environmental matters lie with municipal authorities. These responsibilities are defined in local government legislation. (Law 7/1985 on the Bases of Local Government).

Integrated Pollution Prevention and Control Regime (IPPC).

The purpose of Law 16/2002, of July 1, 2002, is to ensure integrated prevention and control of pollution arising from activities listed in Schedule I (such as energy industry, production and processing of metals, mineral and chemical industries and waste management activities, etc.), with exception of any facilities or parts thereof used for research and development of, and experimentation on, new products and processes.

The IPPC Law lays down measures designed to prevent or, failing that, reduce emissions into air, water and soil as result of abovementioned activities, including measures concerning waste, in order to achieve high level of protection of environment taken as whole. Environmental integrated authorizations will include emission restrictions for pollutants, particularly for those listed in Schedule III, as well as appropriate release monitoring requirements.

Royal Decree 509/2007 of Apr. 20, 2007, approved regulations for implementation and performance of Law 16/2002. The purpose of this Royal Decree is to establish series of basic technical and administrative measures to facilitate processing of applications for permits for new facilities that fall within scope of application of Law 16/2002, as well as adaptation of existing facilities.

Environmental Impact Assessment.

The legislation on evaluation of environmental impact of certain projects has undergone successive amendments since publication of Royal Legislative Decree 1302/1986, dated June 28, on Environmental Impact Evaluations. Due to number and importance of amendments made, new revised text was approved, namely, Legislative Royal Decree 1/2008, dated Jan. 11, 2008.

The revised Law sets forth legal regime governing environmental impact assessments for projects and ensures that environmental concerns are taken into account in such projects by incorporating environmental impact assessments into procedure for obtaining authorization or approval for project from competent administrative body in each case.

Law 9/2006, of Apr. 28, on assessment of effects of certain environmental plans and programs transposed European Parliament and Council Directive 2001/42/EC of June 27, into central government legislation. Some of plans and programs that will be subject to environmental assessment are those relating to industry, tourism and energy and urban and rural planning or land use, together with their amendments, that may have significant environmental effects, provided that they are prepared or approved by public authorities and where such preparation or approval is required under statutory or regulatory provisions, or under resolution of Council of Ministers or the Council of the Autonomous Community Government.

Air Protection.

The purpose of Law 34/2007, dated Nov. 15, on air quality and atmospheric protection, is to lay foundations for prevention, monitoring and reduction of atmospheric pollution, with aim of preventing or, failing that, minimizing harm that such pollution may cause to individuals, environment or any type of property.

In order to achieve these goals, above regulations operate in three separate spheres: First, by involving not only public authorities, but society as whole, in conservation of atmospheric environment. Second, by establishing cooperation and inter-administrative collaboration necessary to ensure effectiveness and consistency of actions taken by public authorities and to prevent malfunctions or shortages. Lastly, by ensuring that public authorities take on board air quality and atmospheric protection-related considerations in planning, definition, implementation and development of various policies for different industries, and that efforts are made to achieve sustainable development, encouraging any initiatives that contribute to conservation of atmosphere and preventing, to extent possible, any actions that are detrimental to this objective.

At present, Royal Decree 833/1975, dated Feb. 6, implementing previous Law on the Atmosphere, remains in force with respect to all matters that do not contravene new regulations.

Additionally, Ministry of Environment, observing obligation provided for in European Parliament and Council Directive 2003/87/EC of Oct. 13, 2003, establishing scheme for greenhouse gas emission allowance trading within Community, issued Law 1/2005, regulating scheme for greenhouse gas emission allowance trading, with view to encouraging effective and economically efficient reduction of such emissions.

The emission allowance trading scheme will initially apply to carbon dioxide emissions from facilities at which activities detailed in Schedule I to the Law are pursued (major emission producers in industries such as electricity generation, refineries, production and processing of iron-bearing metals, cement, lime, glass, ceramics, paper pulp, paper and cardboard), which exceed capacity thresholds established therein. Royal Decree-Law 5/2005, of Mar. 11, 2005, added cogeneration facilities to above list, regardless of industry in which they operate, as well as any combustion facilities with nominal heat capacity of over 20 megawatts which are not included in other sections. Consequently, all facilities carrying on any of emissions producing activities specified in Schedule I must be in possession of greenhouse gas emission permit issued in name of owner of such facilities.

It should also be noted that first National Allocation Plan was approved by Government under Royal Decree 1866/2004, of Sept. 6, 2004, approving 2005-2007 National Allocation Plan for emission allowances.

The Second National Allocation Plan for greenhouse gas allowances, for period from 2008 to 2012, was approved by Royal Decree 1370/2006, dated Nov. 24, 2006. This regulation establishes total allowances to be allocated for aforementioned five-year period to facilities subject to application of Law 1/2005, dated Mar. 9, as well as methodology used for calculation of individual allowance allocations. It also establishes quantities allowed for reserves of new entrants and rules for their allocation. Subsequently, under Royal Decree 1030/2007, dated July 20, and Royal Decree 1402/2007, dated Oct. 29, amendments were introduced in response to conditions imposed by European Commission and arguments put forward in process of individual allowance allocation.

Royal Decree 1264/2005, of Oct. 21, on organization and operations of National Register of Emission Allowances (RENADE), was enacted to implement certain provisions of Law 1/2005, creating instrument for disclosing and updating ownership and control of emission allowances. Furthermore, in this sense, Resolution of the Spanish Accounting and Auditing Institute (ICAC) was published on Feb. 8, 2006, approving standards for recording, measuring and disclosing greenhouse gas emission allowances, established in implementation of Spanish National Chart of Accounts in force.

Lastly, with respect to emission allowances, it should be noted that two Directives, Directive 2008/101/EC and Directive 2009/29/EC, have been approved that amend Directive 2003/87/EC. Purpose of Directive 2008/101/EC is to reduce impact on climate change attributable to aviation by including emissions from activities in this industry in EU emissions trading scheme, while Directive 2009/29/EC comprises general review of this scheme, establishing Community-wide allocation of allowances as from 2013 and that auctioning should be basic principle for allocation. These changes require Law 1/2005 to be amended and preliminary bill is being prepared to reflect them.

With respect to ozone levels in atmosphere, Royal Decree 1796/2003, of Dec. 26, established long-term objectives, target values, and alert and information thresholds for concentrations of ozone in atmosphere in community, designed to avoid, prevent or reduce any harmful effects on human health and environment as whole.

With respect to evaluation and management of environmental air quality in relation to arsenic, cadmium, mercury, nickel, and polycyclic aromatic hydrocarbons, Royal Decree 812/2007, dated June 22, implemented Directive 2004/107/EC, dated Dec. 15, establishing concentration level targets for aforementioned substances and the common methods and criteria for the evaluation of such concentrations, with aim of avoiding, preventing, or reducing any harmful effects to human health and to environment as whole.

With respect to emissions of pollutants into air by large combustion plants, Royal Decree 430/2004, of Mar. 12, 2004, which implemented Directive 2001/80/CE, regulates air emissions at combustion plants, irrespective of type of fuel used (solid, liquid or gaseous), and also establishes certain conditions for control of oil refineries' air emissions.

Finally, law is being drawn up to transpose Directive 2009/31/EC of European Parliament and of Council of Apr. 23, 2009, into Spanish law in order to establish legal framework for environmentally safe geological storage of CO2 with view to contributing to fight against climate change.

Noise.

In order to prevent, monitor, and reduce noise pollution and to avoid and reduce damage that such pollution can cause to human health, property or environment, Law 37/2003, of Nov. 17, 2003, subjects all noise emitters, whether publicly or privately owned, as well as buildings in their capacity as noise recipients, to strict requirements. Domestic, military, and labor-related activities (latter with respect to noise pollution in workplace) are excluded from scope of application of this Law. The abovementioned Law was implemented, in relation to assessment and management of ambient noise, by Royal Decree 1513/2005, of Dec. 16, and Royal Decree 1367/2007, of Oct. 19.

Water Protection.

The protection of continental and sea waters is provided for in two texts, one on "Continental Water" (Inland water) and another on Coastal and Marine Waters.

The basic legislation on continental waters is set forth in Legislative Royal Decree 1/2001 of July 20, 2001, approving Revised Water Law. This legislation arose from revision of basic wording of Water Law 29/1985 of Aug. 2, 1985, and its successive amendments. The last relevant amendments was approved by Law 62/2003, of Dec. 30, 2003, which implemented Directive 2000/60/EC, establishing framework for European Community action in field of water policy, within Spanish legal system.

The Revised Water Law was also amended by Law 11/2005, of June 22, 2005, which, among other issues, brought desalinated waters into public domain. In addition, Law 11/2005 added provisions relating to fact that government, with aim of protecting persons, environment and property, must enact Royal Decree providing for essential safety conditions to be laid down for dams and reservoirs, and establishing obligations and liabilities of their owners, safety control procedures, and duties incumbent upon public authorities.

Furthermore, Ministry of the Environment also approved Legislative Royal Decree 4/2007 of Mar. 13, 2007, amending Revised Water Law and regulating discharges of waste water into sewage system.

The implementation of preliminary Titles I, IV, V, VI and VIII of Water Law 29/1985 is set forth in Royal Decree 849/1986, approving Public Domain Water Regulations, amended by Royal Decree 606/2003, among others.

The last of these royal decrees introduces amendments in areas such as: characteristics and special aspects of procedure for concessions, overexploited aquifers, water register, effluent discharge control charges, appraisal of damage caused to water in public domain and method for payment of penalties, as well as licensing agreements for exclusive use of water.

The above Law 11/2005, of June 22, 2005, amended National Water Plan Law 10/2001. The measures contained in this law mainly relate to desalination plants, which should improve availability of resources for Mediterranean basins.

In context of this National Hydrological Plan, and with purpose of meeting requirements outlined in Revised Water Law Text and in Directive 2000/60/CE, as well as in Decision 2455/2001/CE (EC Legislation 2001, 4331), Royal Decree 907/2007 was published on July 6, 2007, approving Hydrological Planning Regulations, which, among other matters, establish mandatory content of River Basin Management Plans and National Hydrological Plan, their implementation and approval procedures, and method for monitoring and review of such plans.

Furthermore, in light of obligation on Government, as imposed by Law 11/2005 and Law 10/2001, to establish basic conditions for reuse of purified water, Royal Decree 1620/2007 was approved on Dec. 7, 2007, establishing legal framework for reuse of reclaimed water.

With respect to legislation regulating publicly owned water resources, Royal Decree 1514/2009 of Oct. 2, 2009, regulating protection of groundwater against pollution and deterioration was recently approved and transposes Directive 2006/118/EC of Dec. 12, 2006, of European Parliament and of Council, main objectives of which are to prevent and control pollution of groundwater and to establish criteria and procedures for assessing its chemical status.

As far as protection of coasts and sea is concerned, basic rules currently in force are provide for in Coast Law 22/1988. The basic aim of these rules is to establish and protect sea areas and, in particular, coastal sea areas.

As in case of continental waters, protection of sea water is based on principle that discharges are subject to prior administrative authorization and to payment of dumping fee. For such purpose, Law prohibits dumping of waste material both in sea and in protected areas, except where it has been duly authorized beforehand.

In order to prevent pollution deriving from hydrocarbons, Royal Decree 253/2004, of Feb. 13, 2004, establishes measures for preventing and combating pollution in operations consisting of loading, unloading and handling of hydrocarbons at sea and in ports. This Royal Decree applies to authorities and enterprises in charge of maritime ports, shipbuilding and repair yards, oil platforms, breaker's yards, facilities for receiving hydrocarbon waste and any other maritime facility that handles bulk hydrocarbons.

As regards civil liability deriving from damage due to pollution of seawater by hydrocarbons, Spain adhered to Protocol executed in London in 1992 which amended International Convention signed in Brussels on Nov. 29, 1969 and International Convention signed in London on Mar. 23, 2001. Abovementioned Conventions provide that owners of ships, as referred to in Conventions, are obliged to ensure that adequate compensation is paid for any incidents causing pollution damage on territory, including territorial sea, of any State party to Conventions. To ensure performance of this obligation, ship owners are obliged to take out insurance or other financial security to cover their liability for any pollution damage that may be caused, this being mandatory for all States party to Conventions. Thus, Royal Decree 1892/2004 of Sept. 10, 2004, and Royal Decree 1795/2008 of Nov. 3, 2008, establish necessary regulations for implementation of these Conventions.

Waste.

The Spanish legislation on waste is mainly set out in Law 10/1998, which applies to all types of waste, except for any waste governed by specific legislation (nuclear waste, waste water and air emissions). The main feature of law is distinction drawn between hazardous and urban waste.

With respect to packages and waste from packages, Law 11/1997, of Apr. 24, 1997, introduced mandatory return system to promote reuse. Packers may be exempt from this system where they set in place integrated management system, which requires license to be granted by autonomous community authorities. Under above Law, definition of packaging was broadened in scope. Specific conditions and requirements are regulated by Royal Decree 782/1998, which implements Law 11/1997, as amended by Royal Decree 252/2006, of Mar. 3, 2006. Furthermore, recycling and recovery targets set in Law 11/1997 were revised under said Royal Decree, and Directive 2004/12/EC, amending Directive 94/62/EC, was therefore partially transposed into central government legislation.

The disposal of waste by landfill is regulated by Royal Decree 1481/2001 of Dec. 27, 2001, as amended by Royal Decree 1304/2009, which establishes classification of landfills according to types of waste and defines minimum technical criteria for their design, construction, operation, closure, and maintenance. It also deals with adaptation of current landfills and environmental impacts to be considered in new circumstances.

In terms of waste incineration, Royal Decree 653/2003 establishes measures with which waste incineration and co-incineration activities must comply, with view to preventing or limiting risks to human health and adverse impact such activities may have on environment.

To achieve these objectives, Royal Decree imposes conditions and requirements for operating waste incineration and co-incineration facilities, as well as pollutant emission limitations that must be applied and observed, without prejudice to obligations provided for in legislation on waste, air pollution, water, coasts and integrated pollution prevention and control.

Royal Decree 1383/2002, on managing end-of-life vehicles, establishes measures to prevent generation of waste from vehicles, to regulate their collection and decontamination at end of their useful life, as well as other processing operations, with view to enhancing efficiency of environmental protection throughout vehicle's life cycle. The Royal Decree does not apply to vintage or historic vehicles of value to collectors or intended for museum purposes, either ready for use or stripped into parts.

Royal Decree 208/2005, of Feb. 25, 2005, on waste electrical and electronic equipment and management of related waste provides for measures to prevent generation of waste from electrical and electronic equipment and to reduce destruction and damage deriving from components of such items, while also regulating management thereof in order to improve environmental protection. The aim is to improve environmental compliance of all operators involved in life cycle of electrical and electronic equipment, e.g. producers, distributors, consumers and, in particular, all operators directly involved in treatment of waste from electrical and electronic equipment.

Royal Decree 1619/2005, of Dec. 30, 2005, on management of discarded tires, was enacted to prevent generation of discarded tires and to establish legal regime governing manufacture and management thereof, while also encouraging, in this order, reduction, reuse and recycling of such tires and other forms of recovery in order to protect environment. Pursuant to this Royal Decree, tire producers are obliged to take charge of management of any waste deriving from their products, and to guarantee collection and management thereof in accordance with principles set out in Law 10/1998.

Royal Decree 679/2006, of June 2, 2006, regulates management of used industrial oils and established measures to prevent environmental impact of industrial oils and reduce generation of such used oils after use, or, at least, to facilitate their recovery, preferably through regeneration or other forms of recycling.

Royal Decree 106/2008, dated Feb. 1, on batteries and accumulators and the environmental management of related waste, which implements Directive 2006/66/EC, dated Sep. 6, 2006, establishes obligations on manufacturers of portable batteries and accumulators. Noteworthy among such obligations is that obligation on producers to take responsibility for collection and management of same amount, in weight, of used batteries and accumulators that they have placed on market, whether through their own individual management systems, their participation in integrated management system or by contributing financially to public management systems.

Royal Decree 105/2008, dated Feb. 1, regulating production and management of construction and demolition-related waste, establishes legal framework for this type of waste with aim of promoting prevention, reuse, recycling, and other forms of recovery thereof, ensuring that all waste destined for disposal receives suitable treatment, and contributing to sustainable development in construction activities.

Lastly, Royal Decree 975/2009 of June 12, 2009, on management of waste from extractive industries and protection and restoration of areas affected by mining activities, transposes into Spanish law Directive 2006/21/EC, which establishes minimum requirements in order to prevent or reduce as far as possible any adverse effects on environment or on human health deriving from management of mining waste. This Royal Decree also unifies provisions on environmental protection previously regulated in mining legislation.

Soil Pollution.

Pollution of soil and obligations arising therefrom are regulated in Arts. 27 et seq. of Waste Law 10/1998 and in Royal Decree 9/2005, of Jan. 14, 2005, establishing list of potential soil-polluting activities and criteria and standards for declarations of polluted soil.

According to Art. 27, whenever soil is deemed polluted by relevant authority (autonomous community), obligation arises to clean and restore such soil. This obligation applies, primarily, to polluter, regardless of date on which pollution occurred. Where there is more than one polluter, liability is deemed joint and several. Secondarily, possessor or owner of polluted land will be liable for restoration costs.

Royal Decree 9/2005 includes almost every industrial and commercial activity obliged to report on status of their land to autonomous community governments. This Royal Decree implements regulations provided for in Waste Law by establishing methods and standards for ascertaining whether or not soil is polluted and for evaluating any risks that may affect human health or environment, with regard to nature and use of soil. The fact that soil that has been declared polluted by autonomous community authorities and any soil on which potentially soil-polluting activities have been conducted must be recorded at Property Registry.

Natural Resources.

Natural Heritage and Biodiversity Law 42/2007, dated Dec. 13, 2007, establishes basic legal framework for conservation, sustainable use, improvement, and restoration of Spain's natural heritage and biodiversity, as part of duty of conservation and with aim of guaranteeing human right to environment conducive to well-being, health, and development.

The protection of wetlands is governed by Royal Decree 435/2004, of Mar. 12, 2004, creating National Inventory of Wetlands in order to ascertain compliance by wetlands, where appropriate, to indicate any protective measures that should be included in hydrological catchment area plans.

In order to guarantee preservation and protection of Spanish forests, Law 43/2003, of Nov. 21, 2003, promotes restoration, improvement and efficient use thereof. The main principles that inspired this Law are sustainable forest management and owner responsibility. The Law enables Spanish autonomous communities to set out administrative units to be granted forest status. The above Law was amended by Law 10/2006, of Apr. 28, 2006, in order to correct certain of deficiencies and inaccuracies detected. Amendments were added regarding powers of various public authorities, and with respect to organization of mechanisms for protection and conservation of countryside, essentially with regard to combating forest fires.

New regulations governing National Parks were approved Under Law 5/2007 of Apr. 3, 2007. This law is aimed at establishing basic regime governing network and defining powers of central and autonomous community governments in management of such areas in line with Constitutional Court rulings.

Renewable Energy Sources.

Spanish Electricity Industry Law 54/1997, of Nov. 27, 1997, establishes principles governing new operating model in which generation is based on free competition. Of the most recent amendments made to this regulation, it is worth highlighting Law 17/2007, dated July 4, 2007, aimed at implementing Directive 2003/54/EC, dated 26 June, for improvements to competition and organization of electricity market.

The legal and economic framework for electricity generation activities under special scheme is regulated by Royal Decree 661/2007, dated May 26, 2007. This new regulation was established in response to need to: regulate certain technical aspects to contribute to growth of technologies under special scheme, ensure safety of electricity system and guarantee quality of supply, minimize restrictions on electricity generation; amend previous rates scheme, separating it from average or benchmark electricity rate, and include regulatory changes arising from European regulations.

Due to fact that increase in installed photovoltaic power in recent years has been much greater than expected, it has been necessary to establish new economic framework for this technology. This framework is provided for in Royal Decree 1578/2008, dated Sept. 26, 2008 which applies to photovoltaic installations definitively registered after Sept. 29, 2008.

As regards other renewable energy generation facilities that do not use solar photovoltaic technology, Royal Decree-Law 6/2009 of Apr. 30, 2009, adopting certain measures in energy industry and approving energy assistance relief ("bono social"), creates new register for pre-allocation of remuneration, which will enable Ministry of Industry, Tourism, and Trade to ascertain capacity volume associated with facilities under development and construction and its impact on costs allocated to tariff system.

The legal framework for electricity generating facilities in territorial waters is established under Royal Decree 1028/2007, dated July 20, 2007. This legislation is aimed at regulating procedures, as well as establishing required conditions and criteria, in order to obtain authorizations and administrative concessions from authorities for construction and expansion of electricity generating facilities that are physically located in territorial waters, with particular emphasis on marine wind power facilities, which must have minimum power of 50 MW.

13 ESTATES AND TRUSTS

13.01 ADMINISTRATION:

See topic 13.04 Executors and Administrators.

13.02 DEATH:

Survivorship.

In event that two or more persons with right to inherit from each other die in same event, their death is legally presumed to have happened at same time, and no transfer or rights from one to other will take place. Anyone claiming prior death of one of persons must submit evidence thereof.

Legal action in event of death.

Whoever causes death of person, whether by action or omission, willfully or at fault, must indemnify heirs of victim. The victim's heirs are entitled to take civil action against wrongdoer. Heirs may institute criminal proceedings in event that death constitutes criminal offence. The amount of indemnification is not set by law, but rather it is left to discretion of court.

Death due to occupational accident.

In event of death of employees, dependents and even foreigners due to occupational accidents, in addition to any amounts they may receive from labor pension funds, they are entitled to public compensation paid as lump sum, consisting of six monthly installments of regulating base amount for surviving spouse and one monthly installment for any child who has lost parent. Some collective agreements establish additional obligation to formalize labor pension funds or insurance policies against risks of illness, injuries, or death due to workplace accidents

Death during travel.

Subject to updates from time to time, insurance payments arising from death of person while traveling on public transport are as follows: (a) Sea and land transportation, [Euro]36,060.73 (Royal Decree 1575/1989); (b) air transport within national territory, [Euro]100,000 (Royal Decree 37/2001); (c) air transportation on international flights, approximately [Euro]18,030.36 (Warsaw Convention, amended by Montreal Protocol).

The above damages do not rule out any civil or criminal actions, where applicable.

Under resolution of Directorate-General of Health, dated July 13, 1976, interments register must be kept by administrators of cemeteries in municipalities with more than 10,000 inhabitants. Likewise, there are provisions calling for number of prior checks on health conditions in burial vaults constructed in cemeteries. The removal of corpses is regulated, and certificate granting approval from physician who is qualified mortician is necessary. Furthermore, all coffin used must be of regulation type, equipped with device for absorption of gases, etc. Authorization to remove ashes of deceased from Spain must be granted by Head of Provincial Health Office ("Jefe Provincial de Sanidad"). Non-embalmed corpses must be cremated for removal abroad.

13.03 DESCENT AND DISTRIBUTION:

Inheritances are passed on to heirs either by will (see topic 13.05 Wills) or law. The law deems all those who cannot be deprived of part of inheritance awarded by will to be obligatory heirs. Obligatory heirs are descendants and, in absence thereof, ascendants and spouse of deceased with special characteristics. Law 41/2003 of Nov. 18, 2003, on protection of inheritances of disabled persons, amended by Law 1/2009 of Mar. 25, introduces regime governing inheritance of disabled persons.

Children and direct descendants have right to two-thirds of inheritance. One-third must be distributed equally between them while other third may be disposed of freely by testator in favor of any of his children or descendants. The legitime corresponding to parents is one-half of inheritance (legitime is portion of assets that testator may not dispose of freely due to statutory reservation made in favor of certain persons.) Where both parents are alive, inheritance must be divided in half, and where only one survives, he or she receives entire inheritance, even if grandparents of other branch survive. Grandparents have right to inherit in absence of parents. In addition to one-half of assets obtained during marriage (which may be considered as earnings of marital association formed by two spouses, and in which each partner has equal share, if marriage is governed by common property arrangement), surviving spouse has usufruct of either: (1) One-third of inheritance, if he or she agrees with descendants; (2) one-half of inheritance, if he or she agrees with ascendants; or (3) two-thirds of inheritance, if he or she agrees with heirs other than ascendants or descendants.

In event of intestate death, inheritance is granted: (1) to descendants; (2) in absence thereof, to ascendants; (3) to surviving spouse; (4) to any brothers or sisters, who inherit by reason of their lineage; (5) to relatives up to fourth degree of kinship; or (6) if none of above apply, to State.

Inheritance may be accepted as is or for benefit of inventory. If accepted unconditionally, heir is liable for any debts of testator, not only with respect to estate, but also to his/her own property. Where heir accepts inheritance conditionally, estate is only liable for debts to extent of its value.

Under Art. 1011 of the Civil Code, estate may be accepted for benefit of inventory even where testator has forbidden this. An heir may request inventory detailing assets of estate to be drawn up on terms provided for by law. Heirs may also reserve term in which to decide on whether or not to accept estate. Acceptance for benefit of inventory may be served either by notary or in writ from competent court. The benefit of inventory gives rise to following effects in favor of heir: he/she will be liable for any debts or encumbrances on estate to extent of value thereof; private assets are not mixed with estate; he/she continues to maintain right to take all such action against assets of estate that he/she would have had against deceased.

13.04 EXECUTORS AND ADMINISTRATORS:

The testator may appoint one or several executors, who must be of age. Executors may act jointly or severally and they may be appointed for special or general purpose. The duty is voluntary in nature but must be accepted or refused within six days of notification. Executorship is performed for no consideration, although compensation may be paid by testator. It may not be delegated without specific consent of testator, and executor must perform his/her duties within general term of one year from death of testator.

13.05 WILLS:

Three kinds of will are recognized in Spain: (a) A holograph, which must be entirely written in testator's handwriting and need not be certified by any public officer or witnessed. On death of testator, it must be submitted to judge for authentication, whereupon it enters into effect. (b) "open will", executed before public notary, subject to certain formalities, and contents of will are known and guaranteed by notary. (c) "sealed will", which is placed in envelope by testator, who then appears before public notary and states, subject to certain formalities, that it is his will. The notary then attests to such fact on envelope. In foreign countries, Spanish consuls act as notaries for any resident Spaniards. Wills by members of military and naval services executed under serious risk of death are recognized, and certain special types of will are also valid in some regions of Spain.

Any person may render their will void and execute new one.

The testator may appoint executor to administer his/her estate and distribute it among heirs. He may also appoint guardians of any minor offspring and issue instructions as to their education, etc.

An heir may accept or refuse inheritance. An heir may either accept will unconditionally or for benefit of inventory. In first case, he/she is liable for all of testator's debts with all his/her assets. In second case, inventory is made of all property inherited and heir is only liable for testator's debts to extent of property inherited, although heir may not take possession of inheritance until such inventory has been drawn up.

14 FAMILY

14.01 SPOUSES:

Contracting parties may enter into agreement for management of their estate, including under separate property arrangement. The marriage contract may be amended after marriage. In absence of contractual terms and conditions (except in Catalonia, where separate property system applies in absence of any agreement to contrary), property rights are governed by joint property system, whereby administration of common assets is entrusted jointly to spouses, each of whom maintain full rights over their own private assets.

According to the Civil Code, marriage does not limit or restrict legal capacity of spouses and that neither spouse may freely represent other without prior consent.

Law 13/2005 of July 1 amended Civil Code in order to allow persons of same gender get married.

14.02 DIVORCE:

The provisions of Civil Code governing separation and divorce were amended under Law 15/2005 of July 8, 2005. The most significant amendments to previous regulations include: (i) Elimination of obligation to prove existence of grounds for separation or divorce; (ii) decision by one spouse is sufficient to file for divorce, other spouse may not challenge any material grounds for divorce, and judge (whose intervention is reserved for cases in which agreement cannot be reached or where contents of proposals may cause harm to interests of one of spouses or those of minor or disabled descendant) may not refuse to hear case; and (iii) filing for divorce is possible from third month following marriage unless interests of descendant or claimant justifies prior termination of cohabitation. However, if two spouses file for divorce jointly, previous regulations still apply. Moreover, Law 15/2005 also provides for amendment of related provisions regarding exercise of patria potestas and custody of minor or disabled descendants as regards parents' liability.

Applications for divorce submitted by both spouses, or by one spouse with consent of other, must be accompanied by proposal regarding custody of any children, use of family home, liquidation of assets, alimony and each spouse's contribution to any debts deriving from marriage. Alimony is set by court taking into consideration age, health, professional qualification, personal wealth and length of marriage, among other factors.

Spanish courts are competent to hear divorce cases when: (1) Both spouses are Spanish nationals; (2) both spouses are residents of Spain; (3) plaintiff is Spanish and resides in Spain; or (4) defendant is resident in Spain. Civil Procedure Law 1 of Jan. 7, 2000, effective since Jan. 8, 2001, regulates marital procedures under Art. 769 et seq., repealing provisions of Law 30/1981 of July 7, 1981.

14.03 MINORS:

Children of both sexes come of age at 18. Minors may be emancipated at age of 16 with consent of parent exercising parental authority. Emancipation is automatically granted on marriage of minor. Law 41/2003 of Nov. 18, 2003, on hereditary protection of disabled persons, provides for amendments to relationship of offspring with their parents, grandparents and relatives.

14.04 MARRIAGE:

The following methods of marriage are recognized in Spain: (1) Before civil judge or substitute, (2) before municipal authorities, (3) according to religious formalities, (4) before consular or diplomatic officer when marriage is contracted abroad. When residing abroad, Spaniards may marry pursuant to local customs. The marriage of non-Spaniards residing in Spain may be contracted in accordance with Spanish law or with personal law of either contracting party.

Religious marriage must be recorded at Civil Registry in order to be valid. Secret marriage may be authorized by Ministry of Justice.

Proof of birth, marital status and license or dispensation, if necessary, is required.

Prior to marriage, contracting parties may establish any such terms and conditions as they may deem fit regarding administration and disposition of their respective estates. Such agreement may be amended after marriage under public deed execute before public notary.

In absence of agreement, spouses' property rights are governed by common property system which distinguishes between: (1) Private property of each spouse, including property acquired by inheritance or legacy either before or after marriage, and any property owned before marriage, and (2) common property, including property acquired by any spouse after marriage deriving from personal work or industry and income from private and common property. In absence of any agreement to contrary, common property is managed jointly by both spouses.

The provisions of Civil Code governing right to get married have been amended under Law 13/2005 of July 1, 2005. Pursuant to this Law, Civil Code now authorizes same-sex marriages with same rights and obligations as marriages between persons of different sexes, especially with respect to welfare, benefits and possibility of being party to adoption processes. Additionally, all references to husbands and wives have been removed from Civil Code, other than those contained in articles relating to marital filiations, and have been replaced by term “spouses”. Furthermore, pursuant to provisions of Law 13/2005, all references to marriage under Spanish law must be deemed applicable to both same-sex marriages and marriages between persons of different sexes.

14.05 MARRIED WOMEN:

See topics 14.01 Spouses, Marriage; categories 13 Estates and Trusts, topic Executors and Administrators.

15 FOREIGN TRADE AND COMMERCE

15.01 CUSTOMS:

Customs tariffs do not apply to imports and exports between European Union or European Economic Area Member States. The EU Common Customs Tariffs fully apply to all products coming from third States since Jan. 1, 1993.

The entry of goods into Spain is subject to two main taxes: (a) customs duties on imports, according to rates established in Customs Tariffs, and (b)value added tax.

In general, entry of goods into Canary Islands, Ceuta and Melilla is subject to special taxes. In Canary Islands, goods imported from mainland are subject to special tax, Canary Islands General Indirect Tax. This special tax treatment is specifically governed by Law 20/1991, which has been amended number of times by Law on Tax, Administrative and Social Measures (accompanying General State Budget Law) each year.

It is worth noting that not only do exemptions, reductions and suspensions recognized in Tariff Law apply, but also those contained in international conventions ratified by Spain.

Smuggling

The import and export of goods without complying with customs or administrative requirements constitutes smuggling, which is considered criminal offence if amount smuggled is equal to or greater than [Euro]18,030.36, or administrative offence otherwise.

Penalties for criminal offences are prison terms of up to three years and fines of up to four times amount smuggled.

Administrative offences are punished with fines of up to three times value smuggled.

On Value Added Tax, see section 23.13 Value Added Tax.

15.02 EXCHANGE CONTROL:

Pursuant to Exchange Control Law 19/2003, Government has full powers over exchange control-related matters (except for those matters governed by special legislation). Transactions between residents and non-residents from which external payments or receipts may derive are free. Notwithstanding above, Government may subject such transactions to prior authorization, declaration and verification or any other administrative control requirements.

Royal Decree 1816/1991 of Dec. 20, 1991, provides for deregulation of foreign exchange control, affecting all payments for goods and services and capital movements.

The following transactions are deregulated: (a) Acts, business, transactions and operations which give rise to collections and payments between residents and nonresidents or transfers to or from abroad; (b) collections from and payments to foreign countries arising from transactions mentioned in (a) above; and (c) variations in debtor and creditor positions under financial or bank account. Foreign investments in Spain and Spanish investments abroad are governed by their specific regulations, as detailed in section 15.04 below.

Ministerial Order 1439/2006 of May 3, 2006, implementing provisions of Law 19/1993 on prevention of money laundering, regulates import and export of bank notes, coins and bearer bank drafts and circulation thereof within Spanish territory.

Order 1439/2006 of May 3, 2006, establishes that: (i) Any bank notes, coins and bearer bank drafts imported or exported to or from Spain for amounts exceeding total of [Euro]10,000, must be declared to Spanish Customs Authorities prior to entry or exit from Spanish Territory by filing corresponding "S-1" form (ii) any bank notes, coins and bearer bank drafts for amounts exceeding total of [Euro]100,000 in circulation in Spain must be declared to Spanish Customs Authorities prior to entry or exit from Spanish Territory by filing corresponding "S-1" form, either: (a) With Customs Authorities or (b) with registered credit institution that issued such bank notes, coins, and bank drafts, charging them against accounts opened at such institution.

Failure to make relevant declaration constitutes serious administrative giving rise to imposition of penalties provided for under art. 8 of Law 19/1993.

Law 19/1993, on prevention of money laundering, also created Spanish Anti-Money Laundering Commission (Comisión de Prevención del Blanqueo de Capitales e Infracciones Monetarias), which has been provided with wide range of powers to monitor and supervise activities of credit and financial institutions in prevention of money-laundering.

In addition to above, remittance by Spanish registered entity of bank notes, coins and bank drafts abroad is regulated by Bank of Spain circular letter 1/1994. Credit institutions are obliged to comply with prior declaration obligations to Spanish Customs authorities using forms EB, RB or BEY01 and BEY02.

See topics 15.03 Foreign Exchange, Foreign Investments in Spain, Foreign Trade Regulations; category 1 Introduction, topic 1.01 Currency.

15.03 FOREIGN EXCHANGE:

Pursuant to Law 19/2003, of July 4, Ministry of Economy and Bank of Spain are in charge of monitoring compliance with foreign exchange obligations in respect of loans and borrowings from abroad into Spain.

For monetary purposes, consideration is paid with respect to residence rather than citizenship. Consequently, same rules apply to Spanish citizens, Spanish companies, and foreigners residing in Spain, on one hand, as to foreigners and Spanish citizens residing abroad, on other. The basic legislation is contained in Royal Decree 1816/1991 of Dec. 20, 1991, and in several Circular letters issued by Bank of Spain (6/2000, 15/1992, 1/1994, 2/2001, and 3/2006).

Foreign Accounts.

Both residents and non-residents may open accounts at registered institutions in Spain, both in euros and in foreign currency.

The opening and maintenance of accounts in euros or in foreign currency abroad by residents in Spain was deregulated under Royal Decree 1816/1991 of Dec. 20, 1991, although account-holders must declare such accounts within 30 days of opening thereof and must report account movements on terms established by Bank of Spain (Circular letter 24/92 of Bank of Spain). This applies both to account-holders at bank or credit institutions abroad and to account-holders at nonresident entities which are not banks or credit institutions. Any cancellation of accounts must also be declared within 30 days.

The opening and maintenance of accounts by non-residents at Spanish registered entities is not subject to any restrictions under Royal Decree 1816/1991 of Dec. 20. Nevertheless, nonresident account-holder must furnish evidence of its non-resident status to registered entity within 30 days of date on which bank account is opened at Spanish registered entity. This non-residence status check is repeated by registered entity on bi-annual basis. The various documents required to provide evidence of entity or individual's non-resident status are set forth in § 4 of art. 2 of Royal Decree 1816/1991 of Dec. 20.

License and Technical Assistance Agreements.

License agreements were deregulated by Royal Decree 1816/1991, of Dec. 20, 1991. There is no therefore need for prior registration of any license agreements.

Loans and other financing instruments.

Royal Decree 1816/91, of Dec. 20, deregulated loans of all kinds, including loans in foreign currency and loans granted by residents to non-residents. For purposes of this section, pursuant to Bank of Spain Circular 6/2000, implementing provisions under Royal Decree 1816/91, of Dec. 20 "loans" include: (i) Any financing of residents by non-residents by virtue of acquisition by non-residents of security bonds issued by non-residents and which are not traded in official secondary market and (ii) issuance in non-Spanish secondary markets of security bonds by Spanish residents.

Notwithstanding foregoing, Royal Decree 1816/1991, of Dec. 20, established need to obtain financial transaction number (N.O.F.) before loaned funds are paid out by resident and non resident borrowers in loans received or made from/to abroad. N.O.F. numbers are simply assigned for statistical purposes by Bank of Spain.

In all cases, loans made to and received from abroad must be made through registered Spanish credit institution. In broad terms, registered Spanish institutions under foreign exchange regulations include Spanish banks, savings banks, or branches of any non-Spanish credit institution that is: (i) Registered in official registries of Bank of Spain and (ii) capable of receiving fund deposits.

In case of loans received from abroad, borrower must request that Bank of Spain assign NOF by applying in proper official forms (forms PE-1 and PE-2) and declaring main characteristics of loan, as provided for under Circular letter 6/2000 of Bank of Spain of Oct. 31, 2000. Loans for less than [Euro]3,000,000 are exempt from need to file declaration to Bank of Spain (except where lender resides in territory with tax haven status under Spanish Law), although they must be assigned number for statistical purposes by registered Spanish institution through which funds are received in Spain.

In case of loans made by Spanish residents to non-residents, lender must request that Bank of Spain assign NOF by applying in proper official forms (forms PE-3 and PE-4), and declaring main characteristics of loan, as provided for under Circular letter 6/2000 of Bank of Spain of Oct. 31, 2000. Loans for less than [Euro]3,000,000 are exempt from need to file prior declaration with Bank of Spain, except where borrower resides in territory with tax haven status under Spanish Law, although they must be assigned number for statistical purposes by registered Spanish institution through which loan funds are received in Spain.

Any loans made by residents to non-residents, and vice versa, principal of which is less than [Euro]3,000,000, must be declared by registered Spanish entities through which they are made to Bank of Spain. For such purposes, registered Spanish entities must request information on non-resident borrower or lender and purpose of loan from resident lender or borrower.

See also topics 15.02 Exchange Control, Foreign Investments in Spain, Foreign Trade Regulations; category 1 Introduction, topic 1.01 Currency.

15.04 FOREIGN INVESTMENT IN SPAIN:

The basic legislation on foreign investment in Spain is set forth in Royal Decree 664/1999 of Apr. 23, 1999, as implemented by Order of May 28, 2001.

Investor Declaration obligations are established for residents and non-residents in Spain. Residency is defined on terms of Royal Decree 1816/91 of Dec. 20, 1991.

A change to domicile of legal entities or transfer of place of residence of individual gives rise to change in classification of investment as Spanish investment abroad or foreign investment in Spain. Declarations of such changes are governed by regulations implementing Royal Decree 664/1999.

Furthermore, under Royal Decree 664/1999, any Spanish company in which foreign capital holds majority interest is not considered to be non-resident investor, and investments made by such companies in other Spanish companies are not therefore deemed foreign investment in Spain. The same applies to investments made by non-resident company in which Spanish company holds majority interest, with regard to investments made by that foreign company in other foreign companies.

Investment.

Different forms of investment are subject to regime laid down in this Royal Decree:

(a) Foreign investments are considered to be any of following investments by any individual or entity with non-resident status:

a.1) The acquisition of stake in Spanish company (including preferential subscription rights, convertible bonds, and any other analogous instrument which grants right to take up interest in capital stock of Spanish Company, together with any legal transaction whereby voting rights are acquired.

a.2) The setting up of branches and increases in their funding;

a.3) The subscription of any tradable securities representing indebtedness issued by residents (debentures, bonds, promissory notes);

a.4) The acquisition of interests in investment funds entered on Registers of the Spanish Securities and Exchange Commission;

a.5) The acquisition by nonresidents of real properties in Spain for amount exceeding [Euro]3,005,060.52, or, where investment originates from tax havens, regardless of amount;

a.6) The setting up and implementation of, or participation in, joint venture accounts, foundations, economic interest groupings, cooperatives and jointly-owned property associations, when total value of foreign investor’s interest exceeds [Euro]3,005,060.52, or where it originates from tax havens, regardless of its amount.

(b) Any of following investments are deemed investments abroad by resident individuals or entities:

b.1) The acquisition of stake in non-resident company (including preferential subscription rights, convertible bonds, and any other analogous instrument which give right to take up interest in capital stock of non-resident company, together with any legal transaction whereby voting rights are acquired)

b.2) The setting up of branches and any increases in their funding;

b.3) The subscription of any tradable securities representing indebtedness issued by residents (debentures, bonds, and promissory notes);

b.4) Acquiring interests in foreign investment funds;

b.5) The acquisition by residents of real properties in Spain for amount exceeding [Euro]1.502.530,26, or, where investment originates from tax havens, regardless of amount;

b.6) The setting up and implementation of, or participation in, joint venture accounts, foundations, economic interest groupings, cooperatives and jointly-owned property associations, where total value of foreign investor's interest exceeds [Euro]1.502.530,26 or when it originates from tax havens, regardless of its amount.

Any foreign investments not included in above list are not subject to regime under this Royal Decree. In particular, investments in real estate and joint venture accounts, foundations, etc. where amount thereof does not exceed [Euro]3,005,060.52 (or [Euro]1,502,530.26, as appropriate), unless they originate from tax havens.

Foreign investments not covered by this Royal Decree are fully deregulated and no notification is therefore required (without prejudice to any applicable industry legislation). In any event, exchange control regulations remain in force as regards reporting of cash flows to or from abroad.

Declaration Obligations.

As general rule, obligation to declare is incumbent on person making investment (non-resident or resident, as appropriate) and, in case of foreign investments in Spain, on Spanish public attesting officer who endorses transaction, where applicable.

Nevertheless, according to nature of assets in which investment is made (securities and investment funds), obligation to declare may be incumbent on credit and financial institutions, depositories or managers of assets who participate in transaction. In case of registered shares, obligor is Spanish company receiving investment.

Declaration System.

As general rule, all foreign investments and their payments are subject to regime provided for under Royal Decree 664/1999, and are under obligation to file posteriori declarations with Ministry of Economy Register of Investment.

Investments from tax havens must be declared beforehand to Foreign Investments Registry, except in following cases: investments in tradable securities issued or offered publicly, regardless of whether or not they are traded on official secondary market, and interests in investment funds entered on Registers kept by the Spanish Securities and Exchange Commission; cases in which foreign interest does not exceed 50% of capital stock of Spanish company receiving investment.

Furthermore, investments in tax havens must also be declared beforehand, except for:

investments in transferable securities issued or offered publicly, regardless of whether or not they are traded on official secondary market, and interests in investment funds; investments that do not permit investor to have effective influence on management or control of foreign company receiving such investment, and such effective influence is assumed to exist where investor’s direct or indirect interest amounts to 10% or more of capital stock of company or where, even though such percentage is not reached, interest enables investor to form part of company’s managing body, be it directly or indirectly.

It is important to note that this prior declaration is not subject to prior clearance and, once declaration has been filed, investor may make investment without awaiting notification from Spanish authorities.

Investments in National Defense-Related Activities.

Under this Royal Decree, Council of Ministers, in exercise of its powers, may suspend deregulation regime for foreign investments in Spain for activities directly related to national defense, such as activities intended for manufacture of, or trade in, arms, ammunition, explosives and material.

Nevertheless, in case of listed companies engaging in such national defense-related activities, authorization is only required for acquisitions by non-residents that exceed 5% of capital stock or those that, without reaching this percentage, enable investor to form part of company’s managing body, be it directly or indirectly.

Acquisition of Real Estate for Diplomatic Use.

By way of exception to general deregulation regime, any direct or indirect investments made in Spain by non-European Union States for acquisition of real properties intended for their diplomatic or consular missions require authorization from Council of Ministers, unless arrangement has been made to deregulate such acquisitions under system of reciprocity.

15.05 FOREIGN TRADE REGULATIONS:

Spanish foreign trade has been entirely subject to EC Regulations since Jan. 1, 1993.

1. Imports.

The system for importing goods is governed by Ministerial Order of Nov. 24, 1998 (am’d by Order of Dec. 27, 2001 and Circular of June 18, 2004). Said regime establishes following systems for importing of goods, which varies according to countries and territories from which goods come and nature of goods in question.

(a) Imports under System of Free Trade.

This is general rule applicable to all imports of goods, except those which are subject to system of administrative approval for imports. The free trade system includes certain imports that are subject to statistical monitoring prior to import. Goods subject to prior statistical control require issuance of document known as “prior notice of import”, which must be verified by Directorate-General for Foreign Trade. In order to import other types of goods, it is sufficient to submit prior notice of import, import certificate or similar document for agricultural and fishing products, as established by EC norms.

(b) System of Administrative Approval.

Imports of certain goods may be subject to national or EU restrictions. The former require import administrative approval, while the latter calls for an import license, both of which are issued by Directorate-General for Foreign Trade. Imports of goods in which payment is offset by means of export of other goods also require administrative approval. Imports which do not give rise to any payment are no longer subject to administrative approval, unless commercial regime governing such imports so requires.

(c) Payment and Domiciling.

Payments for imports are free and must be made in accordance with provisions of Royal Decree 1816/1991 of Dec. 20, 1991, and may be made subject to sole requirement that relevant registered credit institution (through which payments should be done) be notified of main features of relevant transaction. Such features mainly include name, address and taxpayer identification number of resident, name and address of non-resident, import, currency, amount in euros and subject matter of transaction. The declaration to registered credit institution must be made prior to payment, except in case of payments with bearer checks made against payer's bank account, in which case declaration must be made within 15 of date on which payment falls due at payer's account (see section 15.02 and 15.03).

(d) Procedures for the Investigation and Defense of Commercial Interests.

The Directorate-General for Foreign Trade may initiate, either officially or at request of significant percentage of industry in question, proceedings for information gathering with view to adopting measures in defense of commercial interests in event that serious loss, or possibility of serious loss, may derive from pursuit of import trade. Antidumping measures in relation to Spain are normally taken by European Commission within framework of Europe-wide measures.

2. Exports.

The exports system is governed by Royal Decree 2701/1985 of Dec. 27, 1985, and by Order of July 14, 1995, as amended by Orders of Jan. 17 and Apr. 2, 1996.

There systems for exports are as follows:

(a) Exports under Free Trade System.

All exports of goods, except those which are expressly subject to any type of restrictions, are carried out under free trade system. Exports may be subject to prior review. Where review is required due to national measures, document called Prior Export Notification must be issued or, where review is European, regard must be had to EC rules. For export purposes, certain agricultural produce may require Export Certificate or similar document under European Union regulations.

National or EU restrictions may be placed on exportation of some goods. In such case, and depending on origin of such restrictions, Export License or Export Administrative Approval issued by Directorate-General for Foreign Trade will be required.

(b) Collection and Domiciling.

Collections from exports are free, as established under Royal Decree 1816/1991 of Dec. 20, 1991 (as amended by Royal Decree 42/1993 of Jan. 15, 1993, Royal Decree 1638/1996 of May 7, 1996, and 2660/1998 of Dec. 14, 1998). The same requirements as regards payments for imports apply to collections from exports.

See also topics 15.01 Customs and 15.03 Foreign Exchange.

16 HEALTH

16.01 INTRODUCTION:

Art. 43.1 of the Spanish Constitution recognizes right to health protection.

Law 16/2003 of May 28, 2003, on cohesion and quality of National Health System, establishes coordination and cooperation procedures for public health authorities as means to grant citizens right to health protection, with common objective of guaranteeing equality, quality and social participation in National Health System. Moreover, this Law also creates specialized areas and institutions that allow participation of autonomous communities and defines particular areas in which collaboration between State and autonomous communities is essential. Law 16/2003, implementing General Health Law 14/1986, was amended by Law 29/2006 of July 26, 2006, governing safeguards for and rational use of medicines and health products.

Mention should also be made of Law 14/2007 of July 3, on biomedical research, which aims to provide answer to challenges posed by biomedical research, to attempt to use results of such research for health and welfare of general public, and encourage and promote coordination between public authorities and public and private institutions engaged in research, equipping them with best tools with which to carry out their task.

Royal Legislative Decree 1/2007 of Nov. 16, approving Revised General Consumers and Users Protection Law and other supplementary laws, establishes that consumers and users have, among others, following basic rights: (i) Protection against risks that may affect their health or integrity; (ii) protection of their legitimate economic and social interests and, in particular, against inclusion of abusive clauses in contracts; (iii) indemnification against damage and reparation of losses suffered; and (iv) correct information on goods and service. General Health Law 14/1986, and other more specific provisions ensure compliance with legislation on health matters, through various departments of Ministry of Health and through Spanish Drug Agency. The Law authorizes these departments to withdraw products from market, shut down establishments for up to five years and impose fines of up to [Euro]601,012.10 or five times value of infringing products or services.

16.02 COSMETICS:

As regards cosmetics, General Health Law 14/1986 of Apr. 25, imposes general obligation on public authorities to carry out controls on publicity and advertising with view to adapting their content to standards of accuracy in advertising, with particular emphasis on matters concerning health in order to limit anything that could be harmful to health.

Royal Decree 1907/1996 of Aug. 2, prohibits any advertising or direct or indirect mass or individual promotions in which any characteristics are attributed to cosmetics other than those recognized as specific to such products, according to relevant special legislation. Said special legislation, consisting of Royal Decree 1599/1997 of Oct. 17, on regulations governing cosmetics, provides exhaustive definition of cosmetics and expressly differentiates them from pharmaceutical products, also adding that they do not include products to be ingested, injected or implanted in human body or for protection from pollution or infection by microorganisms, fungi and parasites.

Under Royal Decree 1599/1997, Schedules of which have been modified by several Ministerial Orders from 1998 to 2009, last of these being Order of July 8, 2009, obligations are imposed on persons responsible for placing cosmetics on market (i) to provide certain information to health authorities for fast and proper medical treatment in cases of distress; (ii) to display components on label unless exclusion of one or more such components is requested for reasons of confidentiality; and (iii) to prepare and maintain technical memorandum at disposal of authorities. They are also banned from placing cosmetics containing ingredients or combinations of ingredients that have been tested on animals on market.

Royal Decree 1599/1997 of Oct. 17, was amended by Royal Decrees 2131/2004 of Feb. 25, and 209/2005 of Oct. 29, in order to transpose European Directive 2003/15 of European Parliament and of Council, of Feb. 27. Royal Decree 2131/2004 implemented provisions of

Directive with regard to more precise information to be displayed on cosmetic products concerning their durability with aim of improving information provided to consumers. Furthermore, Royal Decree 209/2005 implemented provisions of Directive regarding obligation to use alternative methods for testing cosmetic products and their ingredients other than use of animals, as result of prohibition on marketing of cosmetic products which have been subjected to animal testing. Alternative methods must be certified and adopted at EU level with due regard to validation within OECD. Royal Decree 209/2005 has also established prohibition on adding dangerous substances to cosmetic products, such as carcinogenic, mutagenic or toxic substances or substances with similar potential, unless it can be demonstrated that levels of such substances do not pose threat to health of consumers. It has also introduced further amendments to Royal Decree 1599/1997 in order to update its content, most relevant of which concerns procedures in place to grant authorization to premises of companies that manufacture cosmetic products or take part at any stage of manufacturing or importing of such products.

16.03 DRUGS:

Law 29/2006 of July 26, on safeguards for, and rational use of, medicinal and health products repealed Medicines Law 25/1990 of Dec. 20.

This new law transposes into Spanish law Directive 2004/27/EC of the European Parliament and the Council of Mar. 31, amending Directive 2001/83/EC on the Community code relating to medicinal products for human use, and Directive 2004/28/EC of the European Parliament and the Council of Mar. 31, amending Directive 2001/82/EC, on the Community code relating to veterinary medicinal products.

It also harmonizes Spanish law with Regulation (EC) No. 726/2004, laying down Community procedures for authorization and supervision of medicinal products for human and veterinary use and establishing European Medicines Agency.

Among most relevant developments under Law 29/2006 are: Provisions on guarantees of independence of professionals in industry which basically amount to more precise definition of cases in which conflicts of interest can arise, as reflected in prohibition on granting any type of incentive, reduction, non permitted discount, rebate or gift by anyone that has direct or indirect interests in production, manufacture and sale of medicines and health products; moving away from concept of pharmaceutical drug envisaged in repealed Law 29/1990, new definition of medicine for human use, concept of generic drug/medicinal product harmonized in European Union and inclusion of definition of medicine for veterinary use; inclusion, with appropriate amendment to Patents Law, of “Bolar” clause or stipulation” according to which carrying out studies and tests needed for generic drugs to be authorized is not considered to be violation of patent rights; provisions on veterinary medicines as medicines in their own right, including general rule on requirement for veterinary prescription before dispensing medicines intended for food-producing animals; new provisions on medical prescriptions and ban on activities aimed at increasing physical capacity of athletes being used in relation to placing medicines on market; precise and specific provisions on traceability obligations relating to laboratories, wholesale warehouses and pharmacies; in connection with public funding for medicines, it modifies benchmark price system (system for controlling expenditure on medicines).

To ensure that non-pharmaceutical products sold over-the-counter do not claim to possess properties of regulated drugs, Royal Decree 1907/1996, on advertising and commercial promotion of health products, activities or services, prohibits use of certain statements in promotion and labeling of products that could associate said product with health, diagnoses, therapies, treatments and curing of diseases, loss of weight, physical, psychological, sports or sexual strength, natural curing methods or recommendations for their consumption based on testimonies of real or purported patients, health professionals or famous people.

Illegal Drugs.

Arts. 368, 369, 371, and 379 of the Spanish Criminal Code penalize cultivation, preparation or trade or any other form of promotion, support, or aiding of illegal consumption of toxic, narcotic or psychotropic substances or drugs, or possession thereof. There are various aggravating factors, such as making such drugs available to minors under age of 18 or to special needs persons, or introducing or circulating such drugs in teaching centers, military units and centers, penitentiary centers or welfare centers. The manufacture, transportation, distribution, marketing or possession of equipment, materials or substances in knowledge that these will be used in illegal cultivation, production or manufacture of toxic, narcotic or psychotropic drugs or substances for such purposes is also penalized, as is driving of motor vehicles or mopeds under influence of toxic, narcotic or psychotropic drugs or substances or alcohol.

Additionally, Royal Decree 865/1997 provides for measures to control chemical substances cataloged as apt to be used for illegal manufacture of drugs.

All these activities are controlled in Spain, in general, by State security bodies and forces, particularly by judiciary police and court authorities.

16.04 LABELING AND PRESENTATION OF FOOD PRODUCTS:

Royal Decree 1334/1999, approving general labeling, presentation and advertising standards for food products, and Royal Decrees 238/2000, 1324/2002, 1380/2002, 946/2003, 2220/2004, 892/2005 1164/2005, 36/2008, and 1245/2008, in addition to Ministerial Order 3360/2004, amending former, require companies in industry to furnish essential data on composition of products, to include list of ingredients and quantities of certain ingredients or categories of ingredients, alcohol content in beverages with more than 1.2%, consume by date or date of expiry, any special storage and use conditions, particularly in case of unpacked frozen food products and frozen and ultra frozen fishing products, manner of use when this should be indicated for proper use of product, identification of company in EU, and batch and place of origin.

Additionally, said provisions require labeling to indicate, when appropriate, that product is packed in protective atmosphere, vegetable origin of starch when ingredients of food product may contain gluten, whether product contains sugar(s) and sweetener(s), whether it contains phenylalanine, and whether excessive consumption may have laxative effects. The above provisions also require that calcium- or fiber-enriched food products should include nutritional claims authorized by relevant authorities.

Technical-health regulations for fishing establishments and products for human consumption were approved by Royal Decree 1521/1984 of Aug. 1, amended by following Royal Decrees: 1437/1992, 2001/1995, 1193/2000, 1219/2002 and 1385/2009.

16.05 PRODUCTS FOR SLIMMING AND/OR SPECIAL DIETS:

Royal Decree 2685/1976 of Oct. 16 establishes technical-health regulations for preparation, circulation and trade of prepared products for slimming and/or special diets, amended on several occasions by successive Royal Decrees, last one being 867/2008, which approves specific technical-health regulations for infant formulae and follow-on formulae.

This legislation governs marketing, labeling and presentation of prepared products for breastfeeding children (under 12 months of age) and prepared products for continuation feeding, cereal-based food products and food products for breastfeeding and very young children, food products to be used in diets of low energetic value to lose weight, diet food products for special medical use, food products adapted to intense muscular wear and tear, particularly for sportsmen, and food products for diabetics.

If person responsible, who may be manufacturer or importer, does not have its domicile in Spain or where product is from non EU-member country before first being marketed, or in event of changes in composition of already marketed product, said person must notify Directorate-General for Public Health of the Ministry of Health. The notification should include standard product label.

The label must meet certain requirements depending on relevant product. Diet products should include statement “substitute for full diet for weight-control” or “substitute of a meal for weight control”, as case may be; and diet food products for special medical use should have this name for sales purposes.

Additionally, labeling of such products must contain certain information on nutritional value and ingredients, as well as important warnings according to whether or not they meet qualities specified for each product in the various provisions implemented by Royal Decree 2685/1976.

16.06 TOBACCO:

With respect to marketing of tobacco, as regulated by Law 13/1998, of May 4, Royal Decree 1079/2002 of Oct. 18, as implemented by Ministerial Order 127/2004 of Jan. 22, repealing Royal Decrees 510/1992 of May 14, and 1185/1994 of June 3, establishes obligation on all tobacco labeling units to state quantities of nicotine, tar and carbon monoxide in cigarettes and to display general statements such as “Smoking kills”, “Smoking may kill” or “Smoking seriously harms your health and that of those around you”, as well as additional statements (all of which are quoted in Schedule to the Royal Decree), to be alternated over period of time, such as “Tobacco is very addictive, do not start smoking”, “Smoking may be the cause of a slow and painful death”, etc. Moreover, it prohibits use of statements, trade names, trademarks and images or any other logos in labeled tobacco units marketed in Spain that may cause particular tobacco product to be perceived as less harmful than others. Royal Decree 1079/2002 also specifically regulates certain features of tobacco labeling such as placement, language, clarity and legibility, size, style, color and font.

On Jan. 1, 2006, Law 28/2005 of Dec. 26, entered into force, setting forth health measures with respect to smoking and regulating sale, supply, consumption and advertising of tobacco products. Its purpose is “to establish the basic restrictions on retail sale, supply and consumption of tobacco products, as well as to regulate the advertising, promotion and sponsorship of such products, with a view to protecting public health” as well as to “promote the necessary mechanisms for the prevention and control of smoking”.

Pursuant to Art. 3.1 of the Law, restrictions on sale and supply consist of express prohibition banning retail sale and supply of tobacco products in any place or by any means other than via “network of tobacconists or in vending machines located in establishments that have the required administrative authorization for vending machine sales”. Thus, since Law came into force, owners of premium points of sale have been banned from selling tobacco products over the counter.

Nonetheless, this prohibition was mitigated by Additional Provision One of Law 28/2005, pursuant to which “the over-the-counter sale of cigars and cigarettes with natural coverings is permitted in the establishments referred to under Article 8.1.c (i.e., bars, restaurants and other closed food and beverage establishments with a useful area open to customers of 100 square meters or more, if they have specified smoking areas, which have been granted administrative authorization by the Tobacco Market Commission”.

With respect to restrictions placed on sale of tobacco products, note that Law 28/2005 was amended by Royal Decree Law 2/2006 of Feb. 10, which introduced, inter alia, amendment making it possible for newspaper kiosks to sell tobacco products, on limited basis, in vending machines located inside kiosk.

In addition to introducing above restrictions on retail sales, Law 28/2005 also imposes number of new obligations on tobacco manufacturers and distributors. These obligations include, most notably: (i) Minimum number of units to be contained in packs of cigarillos and cigarettes without natural coverings, by expressly prohibiting “the marketing, sale and supply” of such products in “individual units” or in “packs of less than 20 units”; and (ii) including “an express reference to the prohibition of sales to persons under the age of 18” on packaging of tobacco products.

Furthermore, Law 28/2005 of Dec. 26, also establishes other measures, such as following: (i) Aside from tobacconists and vending machines (which cannot be placed in certain specific locations), tobacco may only be sold, as exception, at duty free shops located in airports and port terminals; (ii) parents will be liable for any penalties imposed on their minor children; (iii) tobacco may not be sold to/by persons under age of 18; (iv) smoking areas must comply with number of requirements, such as signage, insulation, ventilation, etc.; (v) penalties range from [Euro]30 to [Euro]600 for minor infringements, from [Euro]601 to [Euro]10,000 for serious infringements, and from [Euro]10,001 to [Euro]600,000 for very serious infringements.

Lastly, provisions concerning regulation of advertising, promotion and sponsorship of tobacco products not only implement Directive 2003/33/EC of European Parliament and of Council of May 26, on approximation of laws, regulations and administrative provisions of Member States relating to advertising and sponsorship of tobacco products, but also regulate free distribution or promotion of products, goods or services or any other action direct or indirect, principal or secondary purpose of which is promotion of tobacco products, as well as regulating all types of publicity, promotion and sponsorship of tobacco products in all media, information society services included, albeit with certain exceptions.

17 IMMIGRATION

17.01 ALIENS:

The rights and freedoms of foreign nationals in Spain are regulated by Organic Law 4/2000 of Jan. 11, 2000, as amended by Law 8/2000 of Dec. 22, 2000, and Organic Law 14/2000 of Nov. 20, 2000. This legislation was implemented by regulations approved under Royal Decree 2393/2004 of Dec. 30, 2004, amended by Royal Decree 1162/2009 of July 10.

At present, visa is generally required to enter Spain in case of visits for less than 90 days, except for citizens of certain countries (Regulation [EC] no. 539/2001, listing third countries whose nationals must be in possession of visas when crossing external borders and those whose nationals are exempt from such requirement, amended by Regulations 2414/2001, 453/2003, and 1932/2006).

Non-EU foreign nationals must obtain temporary residence permits for all stays of over three months. If they wish to be hired or to work on self-employed basis, they must first secure work permit, validity of which is identical to that of residence permit.

Foreign nationals who have resided in Spain for five years on temporary basis are entitled to reside in Spain indefinitely and to work on terms equal to those of Spanish citizens.

The political asylum and legal status of refugees is governed by Law 12/2009 of Oct. 30, and implemented by Royal Decree 203/1995 of Feb. 10, 1995, establishing procedures for recognition of status of refugee, standards and guarantees in place to preside over procedures for non-admission and effects of favorable or unfavorable rulings on asylum applications. Specific legal provisions are established for displaced persons as result of serious conflict or political, ethnic or religious disturbance, including access to welfare systems provided for asylum-seekers and refugees. All asylum-related matters are supervised by Directorate-General of Foreign

Nationals and Asylum-Seekers, agency created by Royal Decree 2322/1992 of Dec 29, 1992.

Nonresidents and foreign residents retain all civil rights under their national laws as regards inheritance provisions, etc. In order to accommodate European Union regulations on voting rights, Art. 13.2 of the Spanish Constitution was amended on Aug. 27, 1992, to recognize right of foreign nationals to vote in and stand at local elections, according to reciprocity criteria established by law and international treaties. See topic Citizenship, subheading Dual Nationality; categories 14 Family, topic Consorts; Foreign Trade and Commerce, topic Foreign Investments in Spain.

17.02 IMMIGRATION:

Foreigners may enter Spain with passport or visa, depending on their nationality. EU citizens and citizens of certain other European countries (Norway, Iceland, Liechtenstein and Switzerland) may enter with identity card. Non-EU foreign nationals wishing to work in Spain must apply to labor authorities for special permit and to local government of province in which they intend to reside for residence permit. EU citizens may work freely in Spain according to Royal Decree 240/2007 of Feb. 16, 2007, amended by Royal Decree 1161/2009 of July 10. Since Apr. 2007, EU citizens must be registered at Central Foreign Nationals Registry.

18 INTELLECTUAL PROPERTY

18.01 COPYRIGHT:

Copyright is governed by Spanish Intellectual Property Law, amended by Royal Decree of Apr. 12, 1996. Registration is not required in Spain since rights are automatically granted to author from date on which work is created, provided that it is original. However, it is possible to record work on Intellectual Property Register and it may be advisable to do so in order to prove ownership in event that copyright infringement takes place. Moral rights granted to author cannot be waived or assigned under Spanish law.

Royal Decree of Apr. 12, 1996, was amended by Spanish Law 23/2006 of July 7, 2006, in order to implement Directive 2001/29/EC on harmonization of certain aspects of copyright and related rights in information society; as well as by Law 19/2006 of June 5, 2006, in order to grant greater protection to intellectual property rights, implementing Directive 2004/48/EC.

Protection is given for 70 years from the date of death of author. When author is legal person, term of 70 years starts to run as from Jan. 1 of year following year in which work was lawfully published or of year of its creation if it was not published.

Spain has ratified main international conventions relating to copyright law, including: TRIPS, Berne Convention, Rome Convention, International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations and the Universal Agreement of Geneva.

18.02 INDUSTRIAL DESIGNS:

Industrial designs protect aesthetic appearance of goods (resulting, in particular, from lines, contours, shape, texture and/or materials of product itself) rather than their functional novelty, provided they meet requirements of novelty and individual character. Protection for designs may be obtained in Spain through either national, international or Community systems.

Current Industrial Design Law (Law 20/2003), which replaces prior Law dating from 1929, implements Directive 98/71/EC on legal protection of designs, and Directive 2004/48/EC on enforcement of intellectual property rights (IPR), providing more up-to-date solutions to copying, counterfeiting and piracy issues, and fostering creativity and innovation. Design registration is granted for period of five years from date of filing, renewable for further five-year periods up to maximum of 25 years.

One of most relevant features of said law is so-called ''grace period", which allows owner of design or authorized third party to disclose design, without destroying its novelty, in 12 months period prior to its application. This gives owner of design possibility of deciding whether seeking its registration is worthwhile or not.

As mentioned above, design protection may also be obtained in Spain by filing Community Design or International Design (Spain is party to Hague Agreement). Further, design proprietors may also choose to protect their designs with Unregistered Community Design, under Council Regulation (EC) No. 6/2002 on Community Designs, which confers three-year protection from date on which design was first made available to public.

18.03 PATENTS:

Inventions are fully protected under Spanish Patent Law 11/1986. In addition to this protection, Art. 273 of Spanish Criminal Code penalizes patent infringement.

Patents are obtained through general administrative procedure. Requirements for invention to be protected by patent are: (i) absolute novelty; (ii) inventive step; and (iii) industrial application.

Discoveries, scientific theories, mathematical methods, literary, scientific, artistic and any other aesthetic creations, schemes for performing mental acts, playing games or doing business are not considered patentable. Inventions contrary to public law and order, plant varieties (which are protected by special rules), animal varieties, and essentially biological processes for production of animals or plants cannot be protected by patent either.

The amendment of Patents Law by Law 10/ 2002, aimed at implementing European Directive 98/44 on legal protection of biotechnological inventions in Spain, was of particular significance. Although said law expressly states that inventions of this kind are patentable, clear restrictions are established, with view to protecting ethics and public policy by excluding patents when their exploitation is contrary to these principles.

Patents and utility models provide their owner with exclusive right to exploit invention and prevent third parties from exploiting, marketing, or trading with it without his/her consent.

Patents are granted for term of 20 years as from filing date. The patent is maintained by paying annual fees which increase gradually each year. Once 20-year period has elapsed, subject matter of patent passes into public domain and can be exploited by any third party. A Complementary Protection Certificate for pharmaceutical and psychological health products, which has been in existence since 1998, extends term of patent by up to maximum of five years, to compensate for time it took to obtain relevant administrative authorization required to market product in question.

Utility Models are granted for period of ten years. The grant of utility models also follows administrative procedure, although in this case requirements are less stringent than those applicable to patents. Only national novelty and, to lesser degree, inventive step, are required.

The characteristics of utility models are: (i) Invention must consist of object rather than process; (ii) protection is afforded to shape of object; and (iii) shape should present technical advantage.

Spain ratified 1973 European Patent Convention and became party to Patent Cooperation Treaty (PCT) on Nov. 16, 1989.

The Patent Law was amended by Law 19/2006 of June 5, 2006, in order to give greater protection to intellectual property rights, aimed at implementing Directive 2004/48/EC.

In addition to above, Patent Law was amended by Law 29/2006 of July 26, 2006, on Safeguards for and Rational Use of Medicinal Products and Medical Devices, which introduced Bolar clause into patent legislation. Again, purpose of this Law was to implement European Directive, in this case Directive 2004/27/EC.

18.04 TRADEMARKS:

Trademark protection is mainly governed in Spain by Trademarks Law 17/2001, which came into force *in toto* on July 31, 2002. Pursuant to Trademarks Law currently in force, Spanish Patent and Trademarks Office (SPTO) will only conduct ex officio examination as regards absolute grounds for refusal (*e.g.* that mark is not generic, descriptive, deceptive or contrary to public policy). Relative grounds for refusal (*i.e.* conflicting earlier rights owned by third parties) will only be examined by SPTO where notice of opposition has been given by proprietors of such earlier conflicting rights.

Current Spanish Trademarks Law fully implements First Trademark Directive (89/104 EEC), providing, *inter alia,* higher level of protection to well-known marks and marks benefitting from reputation, extending exhaustion of trademark rights to territory of Community, or incorporating concept of acquiescence. By introducing such standards, Spanish Trademarks Law is consistent with predominant systems in other European countries, providing more efficient approach to trademark protection and enforcement; particularly since implementation of IPR Enforcement Directive (2004/48/EC).

Trademark registration is valid for ten years from date of filing of application and can be renewed indefinitely for further ten-year periods. However, registration may lapse or be revoked if mark is not renewed, if it has not been genuinely used for uninterrupted period of five years, or if it becomes generic or deceptive in connection with goods and/or services it covers.

Additionally, trademark protection may be obtained in Spain by filing Community trademark or international trademark application designating Spain, as Spain is party to both Madrid Protocol and Madrid Agreement.

When deciding whether to choose between National, Community or International route for protection of certain trademark in Spain, number of factors should be considered, such as possibility of extending geographical scope of protection of mark or costs relating to each system. In some cases, these three systems both overlap and complement each other.

18.05 UNFAIR COMPETITION:

The aim of Unfair Competition Law 3/1991 of Jan. 10, 1991, is to regulate and control conduct of competitors in market.

The concept of unfair competition is very broad, since any conduct objectively contrary to good faith is deemed unfair. The law expressly includes among such forms of conduct, acts of confusion, imitation and exploitation of third party’s reputation.

The Unfair Competition Law also contains provisions on know-how, defining disclosure or exploitation of industrial or other business secrets without owner’s consent as unfair competition, even when such secrets were obtained legally, in knowledge that they were to be kept confidential.

19 THE LEGAL PROFESSION

19.01 ATTORNEYS AND COUNSELORS:

There are one or more bar associations in each province with authority within that territorial area and head office in its provincial capital. Each bar association draws up its own by-laws governing its operations, and all bar associations are subject to General Statute of the Legal Profession, regulated in Royal Decree 658/2001 of June 22. The General Council of the Legal Profession is executive agency that coordinates and represents bar associations.

General matters regarding attorney-client relations are governed by Ethical Standards of the Spanish Legal Profession (approved by General Council of the Legal Profession on Aug. 27, 2002, amended on Dec. 10, 2002, and brought into line with latest General Standards of the Spanish Legal Profession).

Jurisdiction on Admissions.

The Board of Governors of each bar association decides on applications for membership. Application is mere formality and Board of Governors therefore has no real discretionary power in deciding on membership or otherwise.

Eligibility.

Bar association membership is required to practice legal profession. To join bar association, candidate must produce evidence of following general conditions of eligibility: (1) That he/she is national of Spain or of European Union or European Economic Space member state; (2) that he/she is of legal age; (3) that he/she holds degree in law; (4) that he/she has no criminal record or any other circumstance disqualifying him/her from professional practice; (5) he/she must pay relevant membership fee; and (6) he/she must register for tax license where legally required.

Pursuant to Royal Decree 658/2001, approving General Statute of the Legal Profession on June 22, 2001, Spain has system of single bar association membership, permitting professional practice in territory other than that of bar association of which lawyer is a member. It is only necessary to notify the local bar association.

Registration as a Law Student.

A bachelor’s degree in law is required for bar association membership.

Educational Requirements.

See subheading Registration as Law Student above.

Membership applications.

See subheading Eligibility above.

Examination.

Law 34/2006, of Oct. 30, 2006, on access to lawyer and court procedural representative professions, regulates requirements for obtaining professional lawyer and court procedural representative qualifications.

Such requirements include having university law degree and providing evidence of professional competence by completing specialized training and passing professional aptitude test established in Law.

The specialized training requirement is met by successfully completing training courses which are jointly certified by Ministry of Justice and Ministry of Education and Science.

The Law has yet to take effect, given that Final Provision Three delays its entry into force by five years from date of its publication in Official State Gazette, which took place on Oct. 31, 2006.

Clerkship.

Not applicable.

Admission without Examination.

See subheading Practice by Foreign Attorneys below.

Admission Pro Hac Vice.

Not applicable.

Licenses.

Not applicable.

Privileges.

Not applicable.

Prohibitions.

Attorneys are prohibited from signing documents regarding matters entrusted to business entities, administrative agencies, or consultancy firms and from issuing legal opinions free of charge in professional journals, press or public media without authorization from Board of Governors. The Ethical Standards of Spanish Legal Profession (approved by General Council of the Legal Profession on Aug. 27, 2002, and on Dec. 10, 2002) and the General Statute of the Legal Profession (regulated in Royal Decree 658/2001 of June 22) establish rules under which lawyers may advertise their services, albeit in highly restrictive manner.

Liability.

Not applicable.

Compensation.

Attorneys receive compensation in form of fees and are not therefore subject to tariffs. Bar associations may publish guidelines on fees. A contingent fee covenant, as sole form of payment, is expressly prohibited.

Lien.

Not applicable.

Disbarment or Suspension.

The Dean and Board of Governors of each bar association are authorized to impose discipline in event of failure by attorneys to observe their professional duties. The General Statute of the Legal Profession provides following potential disciplinary measures for such cases: (a) written warning; (b) private reprimand; (c) suspension from legal practice for term of not more than two years; and (d) expulsion from bar association. In addition to expulsion from a bar association, attorney status may also be forfeited under definitive ruling concerning, as ancillary measure, disqualification from professional practice.

Unauthorized Practice.

Legal practice is incompatible with range of public offices laid down in General Statute for the Legal Profession: A lawyer incurring in any grounds for incompatibility is obliged to notify his/her respective bar association.

The following circumstances also give rise to incapacity for legal practice: (1) physical or mental disabilities which by their nature or degree make it impossible to comply with duty entrusted to attorneys of defending the interests of others; (2) disqualification or express suspension from legal practice under definitive ruling or court order; (3) disciplinary penalties involving suspension from professional practice or expulsion from relevant bar association.

All such incapacities cease to exist when grounds for such incapacity come to an end.

Mandatory Ongoing Legal Education.

Not applicable.

Specialty Certification Requirements.

Not applicable.

Professional Association (or Corporation).

No statutory authorization for formation by lawyers.

Practice by Foreign Attorneys.

Under Royal Decree 607/1986 of Mar. 21, amended by Royal Decree 1837/2008 of Nov. 8, national attorneys of EU member countries permanently established in such countries may freely render legal services in Spain on occasional basis. Such services include consultation, legal advice and actions in court.

Royal Decree 936/2001 of Aug. 3, 2001, amended by Royal Decree 1837/2008 of Nov. 8, regulating ongoing exercise of the legal profession in Spain by persons holding bachelor’s degree in Law obtained in another EU member country, provides for possibility of rendering legal services in host country merely by virtue of holding such degree, albeit with certain restrictions. Nevertheless, such restrictions cease to exist once lawyer can justify, based on series of conditions, effective and regular practice for minimum period of three years in host country dealing with matters under Law of country, thereby attaining status similar to that of lawyers from host country.

Contact Address.

Madrid Bar Association, Serrano 9-11, 28001 Madrid, tel.: 00 34 91 435 78 10, fax: 00 34 91 576 29 91; Barcelona Bar Association, Mallorca 283, 0837 Barcelona, tel.: 00 34 93 496 18 80, fax: 00 34 93 487 15 89.

20 MINERAL, WATER AND FISHING RIGHTS

20.01 FISHING RIGHTS:

Giving importance of fishing industry to Spanish economy, it is essential to control and monitor fishing activities to ensure that rational exploitation allows for conservation and regeneration of marine resources.

Law 3/2001 of Mar. 26, which expressly repealed Law 14/1998 of June 1, establishes system governing use of fishing resources, paying certain fees to guarantee that such activity remains sustainable, as only means to obtain optimum and durable use of such resources.

The Law governs sets forth strict scope of sea fishing, under exclusive competence of State, and contains essential guarantees of legal certainty in definition of basic legislation governing fishing sector, enabling regional autonomous communities to exercise their authority to develop and implement State legislation by establishing supplementary provisions in light of their own interests.

The Law also sets out basic legislation for marketing of fishing resources, regulating importance of such resources based on exclusive competence of State in such matters.

Policies to promote fishing-related research and oceanography are adopted by the Spanish Oceanography Institute, constituting essential instrument to enable proper design of fishing policy.

The Law also establishes system of infringements and penalties based on substantive rules contained in case law of Constitutional Court, differentiating material scope of sea fishing, within exclusive competence of State, from that of regulations governing fishing sector and marketing of fish products, for which competence is shared. The autonomous community authorities take charge of developing legislation and implementing basic State legislation.

Zoning-related matters are provided for in Law 20/1967 of Apr. 8, extending maritime jurisdiction by 12 miles for fishing purposes, pursuant to which following rights are vested in Spanish State: exclusive right to fish and exclusive fishing jurisdiction within six-mile zone. Within first three miles, fishing may be only carried out by Spanish nationals. Between three and six miles, private use is reserved for Spanish nationals, although access by foreign nationals who can prove that they habitually fish in that zone is permitted. Between six and 12 miles, private use by Spanish nationals is provided for, albeit allowing foreign fishing concerns which can prove habitual activity in such zones where there is prior agreement with relevant government The authority to legislate for fishing and preservation of marine resources and to implement regulations and measures laid down in International Conventions to which Spain is party must be respected and exercised.

An exclusive economic zone is defined in Economic Zone Law 15/1978, of Feb. 20. Fishing in this zone is reserved for Spanish nationals and any foreign nationals able to demonstrate habitual activity in the fishing zone, provided that there is prior agreement with relevant Government. Other fishing-related aspects are subject to mandates laid down by Community Law and by EU Fishing Policy in force since Spain joined European Union in 1986.

20.02 MINES AND MINERALS:

Mines and minerals are governed by Law 22/1973, of July 21, as recently amended by Law 12/2007 of July 2.

All mineral deposits and other geological resources are public property, exploration and use of which may be assumed by State itself or may be granted to public or private legal or natural persons.

The State may set aside special interest zones for national defense or economic development purposes. Foreign companies may take part in exploration and exploitation of reserved zones.

Deposits are classified as follows: (A) Those of little economic value and geographically restricted marketability, as well as infrastructure and construction materials; (B) mineral and thermal waters, principally; (C) those not included in foregoing sections; (D) coal, radioactive minerals, geothermal resources, bituminous rocks and geological resources of interest for energy purposes.

Following 1978 Constitution and in light of distribution of authorities for mining purposes stipulated therein, State, under various Royal Decrees, has delegated management of significant percentage of activities in this area to autonomous community authorities, including power to grant relevant permits and exploitation concessions.

Within reserved zones, autonomous community authorities may grant: exploration permits, investigation permits and direct exploitation concessions concerning resources within section (C), or section (D) resources other than those giving rise to declaration of zone as reserved area.

The use of any resources under section (A) existing on private property corresponds to owner of such property, subject to authorization from provincial mining office, and owner also has a preferential right over waters under section (B).

With respect to resources included in section (C), autonomous communities may grant: exploration permits for one year, renewable for one more year, covering from 300 to 3,000 square meters; prospecting permits for three years, renewable for further three years and, exceptionally, for further periods, covering from one to 300 square meters; exploitation concessions for 30 years, renewable for up to maximum of 90 years, covering from one to 100 mining squares (*cuadricula minera*). Mining square has 20 seconds of degree per side.

Companies holding permits and concessions must pay surface royalties, while those holding concessions must also pay for fiscal license, and they are all subject to general tax regulations.

Law 6/1977 of Jan. 4, on the Development and Promotion of Mining.

The purpose of this Law is to promote and develop, both within and outside Spain, exploration, prospecting and exploitation of mines, with view to ensuring supply of raw mineral materials for Spanish industry.

The Ministry of Industry, Tourism and Commerce is responsible for drawing up National Program for supply of raw mineral materials, which will be submitted to Government for approval every two years. This Program will establish various raw mineral materials, the directives to be followed and investment required in mining industry. The Ministry of Industry keeps Mining Register, which will function as permanent up-to-date public archive.

Tit. II of this Law deals with marketing and supply of raw materials, and Tit. III deals with financing and taxation, specifying tax benefits available.

Hydrocarbons: General Aspects.

Aims of the Law.

Law 34/1998 of Oct. 7, on hydrocarbons industry, is intended to unify existing legislation on hydrocarbons and to achieve more open regulation, expanding role of free enterprise and limiting intervention of public authorities to emergencies. The Law also aims to introduce environmental protection policies and to provide integrated approach to hydrocarbons industry. This regulation brings process of breaking up monopoly in industry to end.

Scope of the Law.

The Law sets in place legal system governing activities relating to hydrocarbons in liquid and gas form. The exploration, investigation and exploitations of deposits and underground stores of hydrocarbons are included in its scope of application, together with foreign trade, refinery, transportation, storage and distribution of crude oil and oil products, including liquid petroleum gases. Finally, acquisition, production, liquation, regassification, transportation, storage, distribution and marketing of piped gas fuels also fall within scope of application of Law.

Hydrocarbon Exploration, Investigation and Exploitation.

Hydrocarbon deposits on state-owned property form part of public domain. Hydrocarbon exploration requires prior government authorization, except in case of surface land explorations of purely geological nature. For investigation purposes, investigation permit granted through public procedure and valid for six years, which may be extended for three years, if required, granting exclusive right to investigate within area defined in permit. Finally, exploitation concession, which is granted following submission of application and by virtue of Royal Decree, authorizes its holder to exploit any resources discovered. Exploitation may be carried out by hydrocarbon extraction or by using structures for subterranean storage of any kind within area under concession for period of 30 years, which may be extended by two successive ten-year periods.

Hydrocarbon Refinery, Transportation, Distribution.

Private enterprise may pursue above activities without prejudice to their obligations under other legislation.

Thus, with respect to petroleum by-products (liquid hydrocarbons and petroleum liquid gases), crude oil refinery and transportation, storage, distribution and sale of such products are deregulated. The cases in which authorizations are required for setting up and operation of facilities used for such activities are defined and market is structured. Those subject to Law are basically defined, in addition to owners of such facilities, as wholesale operators who, in turn, sell their products to retail distributors and marketers. Certain guarantees are stipulated to guarantee supply of petroleum products, and State may adopt emergency measures in times of scarcity, establishing certain mandatory minimum reserves.

Gas Fuels: Natural Gas.

Law 34/1998 also regulates gas industry (gas fuels), which is no longer deemed public service. As result, manufacture, regassification, storage, transportation, distribution and sale of such fuel have also been deregulated on terms provided for in above Law. In particular, organization of piped-gas supplies is regulated in detail. In addition to defining authorizations necessary for operation of any facilities used for supply of these products, law differentiates between three types of persons to whom specific regulations apply within natural gas system (carriers, distributors and marketers). Finally, two types of consumers are defined: “qualified” consumers, who acquire gas from retailers freely and are defined as those whose consumption exceeds thresholds laid down in Law for each period; and other consumers who purchase from distributors in accordance with system of tariffs set by Government. Royal Decree-Law 5/2005 of Mar. 11, amended Law 34/1998, providing that all consumers of natural gas, regardless of their level of consumption, are to be classed as “qualified” consumers.

Law 12/2007 of July 2, amended Law 34/1998 of Oct. 7, on hydrocarbons industry, bringing it into line with Directive 2003/55/EC of European Parliament and of Council of June 26, 2003, on common rules for internal natural gas market.

The Law introduces measures to secure completely deregulated internal market for natural gas that could give rise to greater competition, lower prices and a better quality service for end customers.

It established transitional period (until Jan. 1, 2008) to allow for gradual adaptation of existing model to new model in force.

Recent Royal Decree-Law 6/2009 of Apr. 30, amending Law 34/1998 on adoption of certain measures in energy industry, establishes two types of procedures for grant of authorization to build and operate gas transmission pipelines: a) Grant of authorization via public competition, in case of secondary gas pipelines; and b) grant of authorization directly to company to which functions of technical manager of basic transmission network system have been attributed.

Interest for the Purpose of Mandatory Purchases.

Certain facilities are declared to be of public interest for mandatory purchase and rights of way purposes. As example, such is case of facilities and services necessary for hydrocarbon investigation and exploitation, refinery installations, transportation via oil pipelines, storage facilities and facilities intended to supply piped gas to users. The same benefit is granted to holders of concessions, permits or authorizations to carry out above activities or to erect, modify or extend facilities necessary for such purposes.

Infringements and Penalties.

The Law provides for system of infringements and penalties in order to guarantee compliance with provisions thereof.

21 MORTGAGES

—Scope —

In Spain, property is divided into personal property and real estate. Personal property is all property which can be moved to another place, either by owner or another person, while real estate is land and all objects attached thereto, such as buildings, plants and equipment installed in such way as to mean that they are inseparably joined to building, i.e. trees when uncut, elements of ornamentation, fishponds and breeding grounds, etc. Art. 334 of the Civil Code establish definition of real estate. Real estate may be offered as security for loans, under mortgage. Merchant ships are deemed real estate only when mortgaged, pursuant to Law of Aug. 21, 1893, on Naval Mortgages.

21.01 CHATTEL MORTGAGES:

The law draws distinction between chattel mortgages and pledges without removal. Both contracts must be executed before public notary and subsequently recorded at special register for chattel mortgages and pledges without removal. A failure to pay insurance premium for item entitles creditor to recover due loan.

The assets of commercial companies, automobiles and other motor vehicles, airplanes, industrial equipment, intellectual and industrial property and railroad cars may be mortgaged, providing they have not been previously pledged, mortgaged or seized, and where their acquisition price has been fully satisfied, unless, in latter case, chattel mortgage has been arranged in order to secure a deferred price.

Crops, cattle and related produce, machinery and agricultural implements may be pledged without removal. Chattel mortgages may also be established as security for demand deposits or bills of exchange. Pledge without removal may also be established on machinery for agricultural and forestry operations, animals and animal products, collections of objects of historic or artistic value, industrial machinery or stored raw materials.

(The Law of Dec. 16, 1954, on Chattel Mortgage and Pledge Without Removal, amended by Law of May 14, 1986, of Mortgages, Chattel Mortgages and Pledges without removal, and by Law 41/2007 of Dec. 7, 2007. Decree of June 17, 1955, approving regulations governing Movable Mortgage and Pledge without removal Registry. Royal Decree 1828/1999 of Dec. 3, 1999, regulating Movable Goods Registry for identifiable movable goods and securities constituted thereover.)

21.02 MORTGAGES:

Real estate may be mortgaged. Real estate mortgages must be executed in public deed before public notary and recorded at Property Registry, such record being both legal requirement and of essence for existence of mortgages. Property that may be mortgaged include crops, leases and insurance policies over property. Mortgage-related legal action becomes statute-barred after 20 years. There is special summary enforcement proceeding for mortgages. See also topic 21.01 Chattel Mortgages.

Pursuant to Mortgage Law, in order to transfer or encumber any property enforceable vis-à-vis third parties, contract must be executed before public notary and subsequently registered at Property Registry. Any person acting on behalf of company or association must prove that they have authority act in such capacity. The deed must describe property, state any liens thereover and state maximum amount for which such property can be used as collateral under such liens. (Mortgage Law of Feb. 8, 1946, as am’d by Law 22/2003 of July 9, 2003, Mortgage Regulations of Feb. 14, 1947, and Law 41/2007 of Dec. 7).

Several of articles of Royal Decree 1867/1998, which amended significant articles of Mortgage Regulations (those concerning registration of building swaps for future construction, modifications of surface and projection rights, registration of goods belonging to companies without legal personality, cancellation of certain rights for agreed term, modifications regarding disclosure, information and advice, and modification of Mercantile Registry Regulations regarding registration of Civil Companies), have been annulled by Supreme Court Judgment of Feb. 24, 2000, Supreme Court Judgment of May 22, 2000 and Supreme Court Judgment of Jan. 31, 2001.

22 PROPERTY

22.01 DEEDS:

Under Spanish law, two requirements must be met for transfer of title to real estate: (i) Execution of title deed, agreement establishing legal relationship between parties and (ii) form or delivery of possession of real estate, which may be material or symbolic.

With respect to title deed, any purchase of real property may be executed in private agreement or in public deed, although either party may require that latter be executed. Execution of deed is deemed tantamount to delivery of subject matter of agreement (symbolic transfer), unless contents of deed otherwise provide.

Deeds are issued by public notaries in order to acknowledge transactions between contractual parties. Public deeds have direct and immediate effect against third parties, and formally acknowledge ownership of real estate, liens and encumbrances, etc.

Under Law 36/2006, dated Nov. 29, 2006, on measures to prevent tax evasion, public notaries must record in public deeds both (i) taxpayer identification numbers of parties and natural or legal persons on behalf of which they act (Spanish identity card number for Spanish citizens and foreign citizen identity card number for foreign citizens), and (ii) means of payment used, recording date, amount and means of payment (check, cash, etc.). Public notaries must also record any refusal by parties to evidence such means of payment in public deed.

Moreover, registrar will not register public deed where it does not record taxpayer identification number or where public notary has recorded refusal by parties to provide details or documents related to means of payment used.

Law 24/2001 of Dec. 27, 2001, on Tax, Administrative and Social Measures (latest amendments were introduced by Legislative Royal Decree 1/2004, of Mar. 5, 2004, repealing Art. 31 with respect to rural land registration renewals, by Royal Legislative Decree 4/2004 of Mar. 5, 2004, by Law 24/2005 of Nov. 18, 2005, by Law 51/2007 of Dec. 26, 2007 and by Law 2/2008 of Dec. 23) allows remote execution of legal transactions, where two or more public notaries send each other, under advanced electronic signature (as regulated in Law 59/2003, of Dec. 19, 2003 [Legislative Reference 2003, 2975], am'd by Electronic Signature Law 56/2007 of Dec. 28, 2007), documents recording intention to execute single legal transaction. Law 24/2005 of Nov. 18, 2005, even establishes legal obligation for public notaries and registries to introduce electronic systems in order to transmit, communicate and receive information.

Documents executed abroad may be registered if they meet requirements laid down by rules of Private International Law, providing they are legalized and meet other prerequisites to be deemed valid in Spain.

Compliance with foreign formalities with respect to legal validity and capacity necessary for act in question may be evidenced, among other means, under affidavit of opinion issued by notary or Spanish consul, or by two lawyers, diplomats, consuls, or competent officials from country of applicable legislation.

The civil capacity of foreigners executing documents in Spain may be evidenced in same manner.

22.02 REAL PROPERTY:

Art. 33 of the Constitution recognizes right to own property and right to acquire property by inheritance, although such rights may be framed by law in accordance with their social purpose. While confiscation is prohibited, expropriation on justified grounds of public utility or social interest is not. The Civil Code requires courts to order restoration of property with respect to persons who have been deprived of such property. Restrictions by reason of public interest may be due to city planning, military needs, exploitation of mineral deposits, servitudes, etc.

Property may be acquired by law, occupation, gift, succession, prescription in good faith for certain period of time and as consequence of certain agreements by means of delivery (tradition).

Building Law 38/1999, of Nov. 5, 1999 (am'd by Law 53/2002, of Dec. 30, 2002), lays down basic requirements for use, safety and habitability of buildings. This Law is of enormous importance given previous lack of legislation governing building construction process, which was formerly provided for in Civil Code (under obsolete and insufficient regulations) and several regulations with obvious loopholes. This Law also defines liability of building agents towards owners and third-party purchasers, establishing following types of liability: (i) for one year, for flaws or defects affecting structural elements (this liability is exclusive to builder); (ii) for three year-term for material damage caused to building due to flaws or defects in items of construction or facilities that give rise to failure to comply with basic requirements for habitability; (iii) for ten years, where such flaws or defects originate from or affect foundation, supports, beams, metal structure, bearing walls or other structural elements which directly compromise mechanical resistance and stability of building. The Law imposes obligation to arrange number of insurance policies in order to secure such types of liability.

Once Building Law had set in place legal framework, government was then authorized to pass Technical Building Code in order to implement legal provisions set forth in Building Law. The Technical Building Code was passed under Royal Decree 314/2006 of Mar. 17, 2006 (as am'd by Ministerial Decree 984/2009 of Apr. 15), although Building Law provided for two-year period in which to approve it. The Technical Building Code sets out main requirements that buildings have to meet in accordance with their characteristics and planned use. According to this Code, building agents are free, theoretically, to decide which technical solutions are deemed more appropriate for each particular project, in order for building to comply with or even improve on basic features established by Technical Building Code. This change of scope will provide greater room for maneuver for building agents.

The Building Law amends regulations governing right of reversion provided for in Mandatory Purchase Law, stipulating that said right must be exercised within three months of notification from authorities or, failing that, in line with deadlines and circumstances contemplated in Law. The competence to decide on reversion lies with authority in possession of property or right on date on which application for reversion is made, or authority related to beneficiary of mandatory purchase. The Law also imposes obligation on reversion right-holders to register their preferential right over any potential third-party purchasers in order to recover property or right subject to mandatory purchase.

The Legislative Royal Decree 2/2008, dated June 20, 2008 (as am'd by Law 2/2008 of Dec. 23), reinstating Land Law, came into force on June 27, 2008, repealing former Law 8/2007, which, in turn, repealed former Law 6/1998.

The new Law merely sets out basic legal statute governing ownership of land, constituting framework within which autonomous regional legislators may also pass legislation on regime governing ownership of land. Until 1997, existing regional legislation was generally industry-oriented and isolated in nature, except in cases of Catalonia, Navarre and the Autonomous Community of Valencia. However, following new 1998 state law, many autonomous regions have begun to prepare their own comprehensive zoning legislation within framework of aforementioned state legislation. The autonomous communities that have thus far enacted legislation within framework of Law 6/1998 are: The Canary Islands (Law 19/2003 of Apr. 14, supplemented by Decree 48/2005, of Apr. 5, and am'd by Law 1/2006 of Feb. 7, and by Law 6/2009 of May 6), Galicia (Law 9/2002 of Dec. 30, supplemented by Circular 4/2003 of Dec. 10, by Ministerial Decree of Aug. 1, 2003, by Resolutions of July 19, 2005 and of Sept. 8, 2008, and am'd by Law 15/2004 of Dec. 29, and by Law 6/2008. It was implemented by Decree 223/2005 of June 16, by Ministerial Decree of Feb. 20, 2006, by Decree 64/2006 of Apr. 6, and by Law 18/2008 of Dec. 29), Navarre (Law 35/2002 of Dec. 20, as am'd by Regional Decree 166/2004 of Apr. 5, by Regional Law 2/2004 of Mar. 29, by Regional Law 8/2004 of June 24, by Regional Law 4/2005 of Mar. 22, by Regional Law 4/2008, and by Regional Law 6/2009 of June 5), Andalucía (Law 7/2002 of Dec. 17 as am'd by Decrees 2/2004 of Jan. 7 and 85/2004 of Mar. 2, Law 13/2005 of Nov. 11, Resolution of Apr. 27, 2006, and by Law 1/2006 of May 16), Asturias (Legislative Decree 1/2004 of Apr. 22 as am'd by Law 2/2004 of Oct. 29, as am'd by Law 7/2005 of Dec. 29, by Law 6/2004 of Dec. 28 and by Law 11/2006 of Dec. 27), Catalonia (Legislative Decree 1/2005 of July 26, am'd by Law Decree 1/2007 of Oct. 16), Madrid (Law 9/2001 of July 17, as am'd by Law 9/2003 of Mar. 26, Law 2/2004 of May 31, Law 2/2005 of Apr. 12, by Law 4/2006 of Dec. 22, by Law 7/2007 of Dec. 21, and by Law 3/2008 of Dec. 29), Extremadura (Law 15/2001 of Dec. 14, 2001, as am'd by Law 6/2002 of June 27. It was implemented by Decree 59/2003 of May 8, and by Decree 7/2007 of Nov. 14), Cantabria (Law 2/2001 of June 25, as am'd by Law 2/2003 of July 23, by Law 2/2004 of Sept. 27, by Law 7/2004 of Dec. 27, by Law 6/2005 of Dec. 26, by Law 7/2007 of Dec. 21, and by Law 2/2009 of July 3), Murcia (Legislative Decree 1/2005 of June 10. It was implemented by Decree 133/2008 of May 30), La Rioja (Law 5/2006 of May 2, am'd by Law 11/2006, and by Law 5/2008 of Dec. 23), Aragón Law 24/2003 of Dec. 26, Law 1/2008 of Apr. 4, Law 3/2009 of June 17 and Law 4/2009 of June 22), Castilla-León (Law 5/1999 of Apr. 8, am'd by Law 10/2002 of July 10, as am'd by Decree 22/2004 of Jan. 29, by Law 21/2002 of Dec. 27, by Law 13/2003 of Dec. 23, as amended by Law 9/2004 of Dec. 28, by Law 13/2005 of Dec. 27, by Law 9/2007 of Dec. 27, by Law 4/2008 of Sept. 15, and by Law 17/2008 of Dec. 23), Castilla La Mancha (Legislative Decree 1/2004 of Dec. 28, am'd by Law 12/2005 of

Dec. 27, and by Law 2/2009 of May 14), Balearic Islands (Law 14/2000 of Dec. 21, as am'd by Law 8/2003 of Nov. 25, and by Law 10/2003 of Dec. 22, and by Law 11/2006 of Sept. 14), Valencia (Law 4/2004 of June 30, as am'd by Ministerial Decree of Oct. 17, 2005, by Law 14/2005 of Dec. 23, by Law 16/2005 of Dec. 30, and by Decree 67/2006 of May 12, Decree 120/2006 of Aug. 11, by Decree 76/2007 of May 18, and Law 14/2007 of Dec. 27) and Basque Country (Law 2/2006 of June 30, as am'd by Law 11/2008 of Nov. 28 and by Law 17/2008 of Dec. 23. It was implemented by Decree 105/2008 of June 3).

Catalonia enacted Law 5/2006, of May 10, 2006, published on May 24 (am'd by Law 10/2008, dated July 10, 2008, set to enter into force on Jan. 1, 2009). This Law introduces Book Five of the Catalonian Civil Code, which deals with real property rights and includes comprehensive regulations governing array of legal concepts of particular interest for deals taking place in Catalonia from now on. In particular, it provides for wholesale regulation of Condominium Property Regime in Arts. 553-1 to 553-59. To certain extent, this new regulation of Condominium Property Regime differs in certain areas from State Condominium Property Regime Law 8/1999, of Apr. 6.

Foreign investment in real estate is fully deregulated under Royal Decree 664/1999 of Apr. 23, 1999 (supplemented by Ministerial Decree of May 28, 2001, pursuant to Ministerial Resolution of May 31, 2001). This Royal Decree establishes that only real estate acquisitions for amount in excess of [Euro]3,000,000 are subject to requirements to make subsequent declaration to Ministry of Finance. If investor is resident or has its registered address in territory defined by Spanish Government as tax haven (irrespective of amount), prior declaration is necessary. Additionally, any direct or indirect investments made in Spain by non-European Union Member States for acquisition of real estate for diplomatic or consular purposes require authorization from Council of Ministers, unless there is arrangement to free up such investments under reciprocal system.

Leases on buildings are governed by Urban Leasehold Law 29/1994 of Nov. 24, 1994 (of which Arts. 38, 39 and 40 were repealed by Law 1/2000 of Jan. 7, 2000), providing for different regulations according to whether buildings are intended for residential purposes or otherwise. The Law sets out mandatory rules on certain subject matters such as deposits and legal proceedings. In case of leases for non-residential purposes (business premises, offices, seasonal lets, etc.) legal system may be replaced by another system agreed on by parties. In case of leases for residential purposes, there are range of provisions that parties are unable to waive of their own free will.

Particularly, lessee of housing unit is entitled to remain in such unit for five years, even where shorter term was agreed on. The right of subrogation in favor of certain persons is established in event of death of lessee, and lessee has right of first refusal if lessor sells dwelling.

Given existence of lease agreements entered into under previous legislation (Id. Est. before 1985), which granted lessees right to extend lease at their discretion, new Urban Leasehold Law provides for temporary system under which this legislation remains in force for such purposes, although it introduces changes regarding two essential aspects: (i) New system of lease cancellation and subrogation is established, deemed to be more beneficial for lessor than system existing under previous legislation; and (ii) special system for rent adjustments is set in place, in attempt to mitigate lack of rent review clauses under many old agreements, bringing them into line with current market situation.

Time-sharing in Spain has undergone significant changes under Law 42/1998, governing "rights to use property on timeshare basis for tourism purposes and taxation rules" (passed on Dec. 15, 1998, and am'd by Law 14/2000 of Dec. 29, by Law 24/2001, of Dec. 27, and by Law 39/2002 of Oct. 28). The right to use property on timeshare basis entitles holder to enjoy, on exclusive basis and during specific period each year, accommodation for independent use and to receive supplementary services, such as accommodation equipped with adequate furniture. The above law grants purchasers of such rights full protection against any previous abuse by developers and is therefore highly restrictive law as far as free will of parties is concerned. One of provisions of this law consists of creation of cooling-off period of ten days following execution of deed during which purchaser may cancel agreement. The cancellation period may be extended by up to three months if agreement does not contain mandatory information. All timeshare contracts executed following enactment of law must be arranged as timeshare right systems by formalizing public deed which must be registered at Property Register. According to Law, registered owner of building must execute this public deed together with services company, unless owner renders such services itself. The contents of public deed and other requirements for entering into new contracts are subject to in-depth regulations in law. Any developers of resorts existing prior to enactment of law should note that it requires execution of deed of adaptation within two years of date on which law entered into force (Jan. 1, 2001).

Registration at Property Registry is not mandatory, although it is advisable in order to gain benefits of disclosure and, in particular, since person who first registers deed has more rights over real estate than any person registering deed thereafter. However, there are certain exceptions regarding public real estate (see Law 58/2003 of Dec. 17, as am'd by Law 36/2006 of Nov. 29, and by Law 5/2008 of Dec. 23). Moreover, certain contracts must be registered in order to have full effect, such as mortgages. See category 21 Mortgages, topic 21.02 Mortgages.

A second EU Directive has been implemented under Law 19/2003 of July 4 (amending Law 19/1993 of Dec. 28 and amended by Law 35/2006 of Nov. 26) and Royal Decree 54/2005, of Jan. 21, on international economic transactions and money laundering preventative measures. In some cases, above Law introduces legal obligations on public notaries, lawyers and attorneys regarding transactions susceptible to being used for money laundering purposes, including property development or real estate sale and purchase agreements. This Law also forbids specific activities related to capital movements and international economic transactions without relevant administrative authorizations, and introduces disciplinary system. Ministerial Law 1439/2006 of May 3, came into force on Feb. 13, 2007 in order to regulate previous declaration of movements of means of payment within scope of money laundering preventative measures. This Ministerial Law maintains previous provisions regarding declarations on entrance or exit to or from Spain of amounts in excess of [Euro]100,000.

Furthermore, as provided for in Law 36/2006, dated Nov. 29, public notaries must record any prior declarations of such movements using standard form established by said Ministerial Order in all public deeds related to transactions involving real estate.

Law 24/2001 of Dec. 27, on Tax, Administrative and Social Measures (latest amendments of which were introduced by Legislative Royal Decree 1/2004 of Mar. 5, repealing Art. 31 in relation to rural land registry renewals, by Legislative Royal Decree 4/2004 of Mar. 5, by Law 24/2005 of Nov. 18, by Law 51/2007 of Dec. 26 and by Law 2/2008 of Dec. 23), has introduced major changes relating to preventative legal security through use of electronic signatures (as regulated in Law 59/2003, of Dec. 19 [Legislative Reference 2003, 2975], am'd by Electronic Signature Law 56/2007 of Dec. 28,) that public notaries are obliged to introduce. Notarized public documents may now be sent by electronic means by public notary or registrar to another notary or registrar, to public authorities or to any body of judiciary, and uncertified electronic copies may be sent by such means to entities or individuals, provided that they have lawful interest in matter in question.

It is worth highlighting importance of Royal Decree 1093/1997, of July 4, on registration of zoning-related dealings at Property Registry (am'd by Law 4/2004 of Dec. 29, by Legislative Royal Decree 1/2004 of Mar. 5, and by Legislative Royal Decree 4/2004 of Mar. 5). Zoning transactions with significant impact on real estate possession and related rights may be recorded at Registry.

Finally, in order to guarantee legal transactions, system has been set in place for cooperation between public notaries who authorize deeds and Property Registries.

(1) Before executing deed, public notary must ascertain status of property as regards ownership, liens and encumbrances, by electronic means, without involvement of registrar, and with acknowledgment of receipt.

(2) On date of execution of deed, parties may request that public notary serve notice on relevant registry by electronic means and with acknowledgment of receipt. The registry entry expires once ten business days have elapsed if authenticated copy of deed on which it is based is not filed at registry.

Only where it is technically impossible both to access books of Registry and to send public deeds by electronic means will traditional fax system apply.

In former case, registrar must reply to request made by public notary within three days. During nine days following receipt of information, registrar must notify public notary of date of registration of any instrument that affects or modifies initial information so that, provided deed is executed within ten calendar days of receipt of information from Registry, purchaser may be informed of updated registration status.

23 TAXATION

23.01 ALCOHOL, BEVERAGES AND TOBACCO TAXES:

See section 23.04 Excise Taxes, subhead Duty on Manufacturing, catchlines Excise Duties on Alcohol and Alcoholic Beverages, Duty on Tobacco Products.

23.02 BUSINESS TAXES:

Tax on Business Activity.

This is local tax that is payable annually by artists, professionals or legal entities that engage in any business activity within municipality in question.

The amount of tax payable depends on various factors (type of activity, area of premises, net revenues, etc.). Minimum rates are published by Government and may be varied by each Municipal Council.

However, following taxpayers are exempt from this tax: (1) Individuals; (2) taxpayers subject to corporate income tax and entities without legal personality whose net sales (at group level according to Art. 42 of the Spanish Commercial Code) in previous year were under [Euro]1 million; (3) in case of taxpayers subject to nonresident income tax, exemption will only apply to those operating in Spain through permanent establishment, provided they obtain net sales of under [Euro]1 million in previous year; (4) taxpayers commencing business activity within Spanish territory, during first two tax periods in which they perform said activity.

23.03 CUSTOMS DUTY AND TAX:

Customs Import Duty.

The legislation applicable in Spain is similar to that in other EU Member States since Community Customs Code approved by Council Regulation 2913/1992 of Oct. 12, 1992 is applicable in Spain.

Most customs duties applicable in Spain are customs import duties where goods are dispatched by customs authorities. With extremely few exceptions, customs duties are levied on ad valorem basis, i.e. on CIF or like price, depending on invoice price. The remainder are minor customs duties for storage or warehousing rights and sale of rejected goods.

The Harmonized System of Classification of Goods and EEC tariff (Taric) came into force in Spain in 1987. In addition, since Spain's accession to European Community, only EC-established exemptions are applicable.

23.04 EXCISE TAXES:

Excise Duties.

In Spain there are number of excise duties in line with EU Directives, and they are governed by Law 38/1992.

Duties on consumption are levied on relevant products (alcohol and alcoholic beverages, beer, oil and gas products, tobacco and electricity) at manufacturing, processing or importation stage.

In general, excise duties are not applicable in Canary Islands, Ceuta or Melilla (excise duties on alcohol and beer are applicable in Canary Islands, and excise duty on electricity is also applicable in Canary Islands, Ceuta and Melilla).

Duty on Manufacturing.

Common Provisions.

The manufacture and import of products subject to these duties in EU are also excisable in Spain.

The duty becomes payable when products leave plant, at time of their consumption or when customs duty becomes chargeable, in case of imports.

Excise Duties on Alcohol and Alcoholic Beverages.

The excise duty on beer is levied on beer and on products consisting of mixtures of beer and other alcoholic beverages, provided alcoholic strength is over 0.5% volume.

The duty base is volume of products to which excise duty applies, at temperature of 20°, expressed in hectoliters.

The excise duty rate depends on alcoholic strength.

Excise duties on wine and fermented beverages are levied on still wine, sparkling wine, still fermented beverages and sparkling fermented beverages.

The duty base is volume of products to which excise duty applies, at temperature of 20°, expressed in hectoliters.

The duty on alcohol and derivative beverages is levied on all products with alcoholic strength of over 1.2% volume classed under CN codes 2207 and 2208 and on products with alcoholic strength of over 22% volume classed under CN codes 2204, 2205 and 2206.

The duty base is volume of pure alcohol, at temperature of 20°, expressed in hectoliters, contained by excisable products.

This duty is charged at rate of [Euro]830.25 per hectoliter of pure alcohol.

Duty on oil and gas products is levied on products such as gasoline, kerosene, gas oil, etc.

The duty base is volume of products to which duty applies, expressed in thousands of liters, at temperature of 15° C, or by weight of product expressed in metric tons, or by energy power expressed in gigajoules.

The duty rate depends on type of product (gas, kerosene, gas oil, gasoline and other petroleum derivatives).

Duty on tobacco products is levied on cigars, fine cut tobacco intended for rolling of cigarettes and other smoking tobaccos.

The duty base is value of tobacco products according to their maximum retail price or number of units, if specific rates are applied.

The duty rate depends on type of product (cigars, cigarettes, fine cut tobacco intended for rolling of cigarettes and other smoking tobaccos), and there are specific and proportional rates.

Duty on electricity is levied on electrical power.

The duty base is result of multiplying taxable amount for VAT purposes by 1.05113.

The applicable duty rate is 4.864%.

Excise Duty on Vehicle Registration.

Taxable event: first registration of new or secondhand vehicles. Date on which duty becomes payable: registration application date. Taxpayer: person or entity in whose name vehicle is first registered. Duty base: (i) In case of new vehicles, taxable amount for VAT purposes or total consideration, and (ii) in case of secondhand vehicles, their market value at date on which duty becomes payable. Duty rates will vary depending on type of vehicle, motorcycles, horsepower, CO2 emission, autonomous community of registration in Spain, etc.

Spanish legislation provides for possibility of claiming various credits (Plan Prever, transitional credits, etc.).

23.05 GASOLINE AND SPECIAL FUEL TAXES:

See section 23.04 Excise Taxes, subhead Duty on Manufacturing, catchline Duty on Oil and Gas Products.

23.06 GIFT TAX:

See section 23.08 Inheritance and Gift Tax.

23.07 INCOME TAX:

The Spanish tax authorities approved for 2007 and onwards certain laws which have implied ambitious tax reform and have amended certain relevant aspects with respect to various taxes.

Among other relevant changes, reform has involved reducing corporate income tax rate to 30%, simplifying how personal income tax is calculated, and changing rates applicable to non-resident taxpayers who do not qualify for treaty protection, particularly as regards tax rate for capital gains which has been cut substantially from former 35% to 18% 1 .

Personal Income Tax.

This tax, which is one of pillars of Spain's tax system, is currently governed by Law 35/2006 of Nov. 28, on Personal Income Tax, and partially amending laws on Corporate Income Tax, Nonresident Income Tax and Wealth Tax, and implemented by Royal Decree 439/2007 of Mar. 30.

It is direct personal tax levied equally, generally and progressively on income of individuals in accordance with their personal and family circumstances.

Tax is levied on taxpayer's actual income, "income" being understood as whole of his income, capital gains and losses regardless of place where they are obtained.

Date on Which Tax Becomes Payable.

Personal income tax becomes payable on Dec. 31 of each year, although tax period can be shorter than calendar year due to death of taxpayer.

Taxpayer.

In general, taxpayers are those individuals who have their habitual residence in Spain. An individual is deemed to have his habitual residence in Spain when he stays in Spain for more than 183 days in calendar year or where his principal center of professional or business activities or of his economic interests is located in Spain, either directly or indirectly.

Nonresident individuals who are seconded to Spain due to labour reasons, and who become tax resident in Spain, can elect to be taxed in Spain as nonresidents when certain requirements are met.

Taxable Event.

Tax is levied on income obtained by taxpayer, "income" being understood as that obtained from work, capital, business activities, imputation of income stipulated by law, and capital gains and losses.

Form of Taxation.

Individual or joint tax returns may be filed.

Joint returns may be filed by persons forming part of family unit, i.e. units made up of spouses who are not legally separated and, if any, underage children who live with their parents, and children who are of age but are adjudged to be suffering from incapacity and are subject to extended natural guardianship.

Structure of Tax.

The law distinguishes between general tax base and savings tax base.

The general base is result of adding together following two balances:

a) Balance resulting from adding and offsetting against each other, without limit, following income and attributions of income:

(1) Salary Income.

All types of consideration or earnings, regardless of their denomination or nature, which flow directly or indirectly from taxpayer's personal work and which are not income from business or professional activities are deemed to be gross salary income. Salary income is deemed to comprise both cash compensation and compensation in kind;

Deductible expenses: social security is example of most important deductible expense. All salary income generated over period of more than two years and not obtained on periodic or recurring basis, or which is classed by regulations as pluriannual income, qualifies for 40% reduction which may be increased under certain conditions for specific types of income.

Once net salary income has been calculated, following reductions will apply: (i) [Euro]2,652 in general; (ii) for net income equal to or less than [Euro]9,180.01, reduction will amount to [Euro]4,080 annually; (iii) for net income between [Euro]9,180.01 and [Euro]13,260, reduction will amount to [Euro]4,080 less result of multiplying by 0.35 difference between income obtained and [Euro]9,180.

The above-mentioned reductions will be increased in cases provided by Law (e.g. active workers over 65 years of age who prolong their labor activity).

The net salary income may not be negative as result of these reductions.

(2) Income from Real Estate.

Income from ownership of rural and urban real estate is classified as real estate income. To calculate net income, all expenses necessary to obtain it can be deducted (deductible financial, repair and maintenance expenses may not exceed gross income generated by each property; however, any excess may be deducted under identical conditions in following four years).

(3) Income from Movable Capital.

Income from movable capital is derived from assignment of own funds to entities related to taxpayer.

(4) Other Income from Movable Capital Not Considered Savings Income.

This type of income includes: (i) Income derived from intellectual property, when taxpayer is not author, (ii) income derived from industrial property not used for business activities, (iii) income derived from lease of furniture, businesses or mines or from sublease of such assets (received by sublessor) which are not business activities, and (iv) income derived from assignment of right to exploit an image or from consent or authorization for use thereof, when aforementioned assignment does not take place in course of business activity. A 40% reduction is applicable where such income is generated over more than two years or is classified by regulations as clearly pluriannual;

(5) Income from Business Activities.

Income from personal work and/or from capital which entails taxpayer's organizing his own means of production and human resources for his own account with view to participating in production or distribution of goods or services is deemed to be gross income from business activities. To determine net income, law permits deduction of expenses incurred in course of business, provided that they relate to revenues obtained in fiscal year;

(6) Imputation of Income from Real Estate.

Non-leased urban properties are included under concept of imputation of income. The law does not provide for imputation of revenues and expenses relating to taxpayer's habitual residence;

(7) Imputation of Income from Entities Under International Fiscal Transparency System.

(8) Imputation of Income from Assignment of Publicity Rights.

(9) Changes in Value of Units in Collective Investment Undertakings Established in Tax Havens.

b) The positive balance resulting from adding and offsetting against each other, exclusively, capital gains and losses which are not considered savings income (i.e. those not derived from transfer of assets). If its balance is negative, it may be offset against 25% of positive balance, if any, of income and attributions. The rest of negative balance will be offset in following four years with that same setoff rules, and legislation establishes express mandate for setoff to be made up to maximum amount that rules allow.

The savings tax base will be formed by positive balance resulting from adding up following balances:

(a) The positive balance resulting from adding and offsetting against each other, exclusively, following income:

(1) Income Received from Entity Due to Status of Partner, Shareholder, Associate or Stakeholder.

In relation to income derived from stake in equity of entities, there is an exemption limited to [Euro]1,500 applicable to dividends, premiums for attendance at shareholders' meetings, etc.;

(2) Income from Movable Capital Derived from Assignment of Own Funds to Independent Entities Not Related to Taxpayer.

(3) Monetary Return or Payment in Kind on Capitalization Transactions and Life or Disability Insurance Contracts.

If inclusion and setoff of such income against each other leads to negative result, this amount may only be offset against positive balances of this income obtained in following four years, and legislation establishes express mandate for setoff to be made up to maximum amount which rules allow.

(b) Only capital gains and losses which are classified as savings income will be included and offset against each other (e.g. capital gains or losses on transfer of assets). If such result is negative, it may only be offset against positive balances of this type of income obtained in following four years, and legislation establishes express mandate for setoff to be made up to maximum amount which rules allow.

Net Tax Base.

The general net tax base and savings net tax base are obtained as follows:

The general net tax base will be result of applying reductions for situations of dependence and old age and for contributions to social welfare systems, including those established for disabled persons, contributions to protected patrimonies of disabled. The aforementioned reductions may not generate a negative general net tax base.

The savings net tax base will be result of deducting from savings tax base remainder not applied to reduce the general tax base), if any, of reduction for compensatory pensions, but such operation may not lead to negative savings net tax base.

Reductions in net tax base to adapt tax to taxpayer's personal and family situation:

There are certain reductions which will be used first to reduce general net tax base without making it negative, while any remainder will be used to reduce savings net tax base. The main applicable reductions are: Personal Minimum Allowance: [Euro]5,151 annually which will be increased by [Euro]918 annually for persons over 65 years of age, and by [Euro]1,122 for persons over 75 years of age. Minimum for descendants: for each unmarried descendant aged under 25, or disabled descendant regardless of age, or person under guardianship or foster care arrangement living with taxpayer and not obtaining annual income above [Euro]8,000, taxpayer will be entitled to reduction of [Euro]1,836 for first, [Euro]2,040 for second, [Euro]3,672 for third and [Euro]4,182 for fourth and subsequent of these (family reductions will not apply if taxpayers generating entitlement to these amounts file personal income tax returns obtaining income exceeding [Euro]1,800 or application for refund). Minimum for ancestors: [Euro]918 for each ancestor over 65 years of age or disabled person who lives with taxpayer (or dependent boarders) and does not obtain income exceeding [Euro]8,000. For ancestors over 75 years of age, it is increased by [Euro]1,122. Minimum for disability: (i) Of taxpayer: in general, [Euro]2,316 annually, although it is [Euro]7,038 annually for disabled persons who prove disability equal to or greater than 65%. There will be increase of [Euro]2,316 annually for assistance, where need for assistance from third parties, limited mobility or disability of at least 65% is proven; (ii) of ancestors or descendants: for those that confer right to above-mentioned minimum amounts, reduction of [Euro]2,316 per person and year, although it is [Euro]7,038 annually for disabled persons who prove disability equal to or greater than 65% and increase of [Euro]2,316 annually for assistance, where need for assistance from third parties, limited mobility or disability of at least 65% is proven. For family units formed by spouses who are not separated and, where relevant, underage children or disabled persons, before application of personal and family minimum, reduction will be made of [Euro]3,400 which will be applied, first of all, to regular net tax base (which may not be negative) and subsequently, if there is surplus, to savings net tax base. This prior reduction will be [Euro]2,150 for single-parent family units, except in cases where one of children that form part of family unit lives with father or mother.

Determination of Gross Tax Payable

This is result of applying scale established by law to net tax base. Rates per scale range from: Minimum rate of 24% (15.66% for State + 8.34% for autonomous community) to net tax base of less than [Euro]17,707.20; up to maximum rate of 43% (27.13% for State + 15.87% for autonomous community) to net tax base of more than [Euro]53,407.20. Following procedure will be followed:

First, scale will be applied to general net tax base without taking into account personal and family minimum.

The sum derived from applying same scale to personal and family minimum will be deducted from resulting amount (thus, it is intended to progressively tax minimum at zero rate and, therefore, that savings is generated at minimum rates instead of current system under which reductions to base involve savings at marginal rates applicable).

Any savings net base which does not correspond to remainder of personal and family minimum will be taxed at fixed rate of 11.1% on national component, and of 6.9% on regional component, which makes total rate of 18%. This rate could be changed by General Budget Law for 2009. 2

The sum of amounts resulting from applying national and regional tax rates to general tax base and to savings tax base as described will determine national and regional gross tax payable respectively.

Net Tax Payable and Differential.

Tax credits:

The national net tax payable will be result of deducting from national gross tax payable any national tax credits for investment in habitual dwellings and 67% of tax credits for business activities, donations (25% of amounts donated to certain institutions), income obtained in Ceuta and Melilla, measures for protection and dissemination of Spanish Heritage (and of cities, collections and properties declared World Heritage), 15% tax credit on investments and expenses made in relation to such assets and company savings account; on other hand, regional net tax payable will be result of deducting from regional gross tax payable in regional tranche any tax credits for investment in habitual dwellings and 33% of above-mentioned tax credits, as well as tax credits which may be established by Autonomous Community in question exercising its powers, but (national and regional) net tax payable may not be negative.

The differential tax payable will be result of deducting from total net tax payable (regional plus national) sum of international double taxation credits, withholdings, payments on account and split payments and deductions of underlying tax in relation to income attributed by international fiscal transparency or due to assignment of image rights.

The differential tax payable may in turn be reduced by maternity tax credits (as stated, subject to limit of [Euro]1,200 annually).

Nonresident Income Tax.

Nature and Application.

Nonresident income tax is direct tax governed by Revised Nonresident Income Tax Law, approved by Legislative Royal Decree 5/2004, of Mar. 5, and implemented by Royal Decree 1776/2004, of July 30, and is levied on income obtained in Spain by nonresident individuals and legal entities.

Income Obtained Through Permanent Establishment

Where individual or legal entity is resident in country with which Spain has entered into tax treaty, provisions of that treaty and, specifically, any exceptions set forth in relation to definition of permanent establishment, determine whether or not permanent establishment exists in Spain.

If taxpayer operates in Spain through permanent establishment, income attributable to that establishment comprises following: (a) income from economic activities or operations carried on by permanent establishment; (b) income from assets used by permanent establishment; (c) capital gains or losses from assets used by permanent establishment.

As general rule, tax base is calculated pursuant to same provisions as those applied to companies resident in Spain and, consequently, is subject to 30% rate. Management expenses and general administrative expenses imputed by main office are deductible, provided that certain requirements are met.

Taxpayers operating in Spain through permanent establishment are generally obliged to keep separate accounts (pursuant to rules established for Spanish companies) and to withhold and prepay tax on same terms as resident taxpayers.

In general, permanent establishments may also apply same tax credits and tax reductions as those applicable to companies resident in Spain.

Income Obtained Not Through Permanent Establishment.

Taxpayers who obtain income without involvement of permanent establishment are taxed separately for each total or partial accrual of income obtained in Spain.

However, certain types of Spanish source income are not taxable in Spain or are exempt. For example, interest and other income from transfers to third parties of own capital as well as capital gains from movable assets obtained without involvement of permanent establishment by residents of other EU Member States are exempt in Spain.

Income distributed by subsidiary resident in Spain to its parent company resident in another EU Member State is exempt, provided that certain requirements are met (basically 10% interest must be owned for at least one year).

The following tax rates are applicable to nonresidents without permanent establishment:

Types of income Rate (%) General: 24. Special cases:*Dividends, interest and transfer or reimbursements of shares and participations in collective investment schemes: 18 3 *Income from reinsurance transactions: 1.5. *Income from international shipping or air navigation entities: 4. *Capital gains: 18 4 *Income from temporary employment contracts: 2. Last special case refers to income from retirement pensions obtained by nonresident individual. It will vary between 8% for amounts up to [Euro]12,000, 30% for following [Euro]6,700 and 40% for amounts in excess of [Euro]18,700.

The royalty payments to entities or permanent establishments residing in EU will be subject to 10% rate, under certain circumstances.

Tax Regime for Nonresidents Seconded to Spain.

Nonresident individuals who are seconded to Spain due to labour reasons, and who become tax resident in Spain, can elect to be taxed in Spain as nonresidents, when certain requirements are met. 5

Tax treaties can reduce or even completely eliminate taxation in Spain on income obtained by entities which operate without involvement of permanent establishment.

Companies without permanent establishment in Spain which are resident in country with which Spain has entered into tax treaty are not generally taxed in Spain on business profits or on capital gains (except for those deriving from real estate).

Other income (royalties, interest or dividends) is taxed at reduced rates set forth in tax treaty in question.

Spain has tax treaties in force with following countries: Algeria, Argentina, Australia, Austria, Belgium, Bolivia, Brazil, Bulgaria, Canada, Chile, China, Colombia, Croatia, Cuba, Czech Republic, Denmark, Ecuador, Egypt, El Salvador, Estonia, Finland, France, Germany, Greece, Hungary, Iceland, India, Indonesia, Iran, Ireland, Israel, Italy, Jamaica, Japan, Latvia, Lithuania, Luxembourg, Macedonia, Malaysia, Malta, Mexico, Moldova, Morocco, Netherlands, New Zealand, Norway, Philippines, Poland, Portugal, Romania, Russia, Saudi Arabia, Slovakia, Slovenia, South Africa, South Korea, Sweden, Switzerland, Thailand, Tunisia, Turkey, U.K., United Arab Emirates, U.S.A., USSR, Venezuela and Vietnam.

The tax treaty signed between Spain and former USSR is, from Spanish tax perspective, currently applicable to following republics: Armenia, Azerbaijan, Belarus, Georgia, Kazakhstan, Kyrgyzstan, Moldova, Uzbekistan, Tajikistan, Turkmenistan, and Ukraine. Notwithstanding, said tax treaty is not being applied by certain former USSR republics.

The tax treaty signed with Indonesia is also applicable to East Timor.

“Tax Sparing” Clauses Existing in Certain Tax Treaties.

Under these clauses, nonresident may claim tax credit in its country not only for tax actually paid in Spain on certain Spanish source income but also for tax that would have been paid had tax relief not existed.

Special Tax on Real Estate Owned by Nonresidents.

Nonresident entities that own real estate in Spain are subject to 3% tax per year on cadastral value of their real estate at Dec. 31 of each year. This tax is treated as deductible expense for purposes of nonresident entity’s corporate income tax.

Tax Representative.

Taxpayers are obliged to appoint individual or legal entity resident in Spain as tax representative where they: (i) Obtain income in Spain through permanent establishment; (ii) obtain income in Spain from economic activities which do not constitute permanent establishment and entitle them to deduct certain expenses; or (iii) are entities subject to pass-through regime and carry on business activities in Spain, all or portion of which are carried on by them, continuously or habitually, through facilities or workplaces of any kind, or which act in Spain through agent authorized to conclude contracts in name and for account of entity; (iv) are specifically required to do so by tax authorities because of nature or amount of income obtained; or (v) are persons and entities resident in countries or territories with which there is no effective exchange of information and that are owners of property situated or rights which are fulfilled or exercisable in Spain (except for securities listed on organized secondary markets). The appointment of tax representative must be notified to tax authorities within two months.

Corporate Income Tax.

Corporate income tax, which is direct personal tax levied on income of companies and other legal entities, is governed by Revised Corporate Income Tax Law, approved by Legislative Royal Decree 4/2004, of Mar. 5, 2004, and implemented by Royal Decree 1777/2004, of July 30.

The fundamental factor for determining whether or not entity is liable for corporate income tax is entity’s tax residence. An entity is deemed to be resident in Spain if it meets any of following conditions: it was incorporated under laws of Spain; it has its business domicile in Spain; it has its place of effective management in Spain.

Should there be conflict of tax residence, provisions of tax treaties between Spain and other countries will be applied.

Taxpayer.

Spanish law deems legal entities, except partnerships, and certain entities without legal personality, to be corporate income taxpayers.

Resident entities are taxed on their worldwide income, which includes all business profits and income from activities, income from investments unrelated to ordinary business activity and capital gains.

The *tax base* is defined as difference between period revenues and expenses. It is calculated as income or loss per books adjusted by applying tax principles. Expenses relating to business activity are deductible if they are properly recorded and supported.

The Corporate Income Tax Law provides that accrual method is generally to be used for recognizing revenues and expenses and, in any case, expenses must be accounted for in order to be deductible (except for specific exceptions such as accelerated depreciation/amortization). Timing of recognition methods used for tax purposes are usually in line with those used for accounting purposes, but where they conflict, former will prevail.

Specific Aspects of Process to Determine Taxpayer's Corporate Income Tax Base.

Specific aspects of process to determine taxpayer's corporate income tax base are:

International fiscal transparency: by application of fiscal transparency rules, any income or loss obtained by foreign company will be imputed to its Spanish parent company, provided following conditions are met: Spanish company must have interest of 50% or more in capital stock, equity or income, or hold 50% or more of voting rights, of nonresident entity; tax paid by nonresident entity (corporate income tax or similar) must be less than 75% of tax it would have had to pay under Spanish legislation; its net income must come from passive income (ownership of real estate not used for business activities, participation in equity and transfer of own capital to third parties, etc.). As of Jan. 2004, this regime is not applicable when nonresident entity resides in another EU Member State, provided that taxpayer evidences that formation and operations of nonresident entity are based on valid economic reasons and it performs business activities.

Valuation at market price: As general rule, assets must be valued at their acquisition or production cost. In some cases, however, market value must be applied for tax purposes: assets transferred or acquired for no consideration, assets contributed to entities and securities received as consideration, assets acquired by swap, etc.

Before 1 Jan. 2007, transactions between related entities might be valued by tax authorities at market prices when agreed valuation would have led either to lower taxation or to tax deferral; however, as of 1 Jan. 2007, it has become obligation for taxpayers to value their transactions with related parties at their normal market value, and from Feb. 2009, to keep at tax authorities' disposal certain relevant documentation supporting valuation made. In addition, tax authorities may adjust valuation agreed between related parties regardless of whether or not value agreed on by parties leads to lower taxation in Spain than that which would have been payable had normal market value been used, or to deferral of such taxation. OECD methods are applicable for determining market prices between related parties. The possibility of reaching "advance pricing agreements" with tax authorities is envisaged in corporate income tax legislation. Among other cases, taxpayers may submit to tax authorities proposal for valuing their transactions with related entities based on market conditions. If such proposal is approved by tax authorities, resulting valuation is valid for tax purposes for period of four tax years.

Deductibility of expenses: Depreciation/amortization is treated as deductible expense only if there is effective decline in value and such decline in value is accounted for (except for accelerated depreciation/amortization applicable to certain activities).

Art. 14 of the Revised Corporate Income Tax Law stipulates certain expenses which are not tax deductible: administrative and criminal fines and penalties, gratuities, expenses for services relating to transactions carried out directly or indirectly with persons or entities resident in tax havens, among others.

Where direct or indirect net remunerated indebtedness of entity tax resident in Spain with one or more related persons or entities not resident in Spain exceeds result of applying coefficient of three to capital for tax purposes (entity's equity excluding year's income or loss), interest accrued on excess will be treated as dividend and thus will be nondeductible for Spanish company. In general, this rule will not be applicable when nonresident related entity is tax resident in another EU Member State, unless it is resident of territory classified as tax haven. The taxpayer may submit proposals for applying higher ratio.

Offsetting of tax losses: Entities liable for corporate income tax may offset their tax losses against income obtained in tax periods ending within the following 15 years.

Tax Rates.

The standard corporate income tax rate is 30%. Special rates are applicable to certain entities such as listed collective investment institutions including real estate investment funds (1%), not-for-profit entities (10%), certain cooperatives (20%), partially exempt entities (25%) or entities engaging in oil and gas research and exploitation activities.

Specific tax incentives apply for small and medium-sized companies. To qualify for this tax regime net sales (calculated for group, if applicable) in immediately preceding tax period (or in current period in case of newly-incorporated companies) have to result less than [Euro]8 million. If entity belongs to group of companies within meaning of Art. 42 of Commercial Code, net sales figure will be calculated for group as whole. Main tax incentive for these companies is that tax rate is 25% 6 , applicable to first [Euro]120,202.41 of taxable income (any taxable income above that amount is taxed at 30%).

Footnotes for 23.07

1 A reform for 2010 is envisaged and it is likely that this tax rate would be increased up to 21 %. Please see comments in section "Next Tax Payable and Differential".

2 According to a legislative reform Bill, (to be effective from January 1, 2010) the tax rates for savings income may be increased (to 19% for the first [Euro]6,000, and to 21% thereafter). Other changes to the general tax scale have not been ruled out

3 A reform for next year 2010 is envisaged and it is likely that this tax rate would be increased up to 19 %.

4 A reform for next year 2010 is envisaged and it is likely that this tax rate would be increased up to 19 %.

5 This regime is envisaged for 2010 to be limited to those impatriates earning less than [Euro]600.000 per year.

6 It is foreseen that from January, 1, 2010, these tax rates would be temporary reduced for companies with less than 25 workers that keep or increase this employees and have net sales less than [Euro]5 million.

1
SWEDEN LAW DIGEST

—Scope —

Revised for 2009 edition by

BAKER & McKENZIE ADVOKATBYRÅ, of Stockholm.

Sweden is a member of EU. See also European Union Law Digest.

Note: This Digest not updated for 2008 edition.

1 INTRODUCTION

1.01 CURRENCY:

Central Bank of Sweden (Sw. Sveriges Riksbank) is responsible for safeguarding value of Swedish currency. Further, Central Bank promotes safe and efficient payment system. It holds monopoly on supplying banknotes and coins. Central Bank also manages Sweden's gold and foreign currency reserves.

Sweden is member of European Union. However, Sweden has not joined EMU and currency is “Krona” (SEK), and “Öre” (1/100 Krona).

In 1931 Sweden joined Great Britain in leaving the gold standard.

See also category 15 Foreign Trade and Commerce, topics 15.01 Customs, 15.02 Exchange Control, 15.06 Foreign Trade Regulations.

1.02 GOVERNMENT AND LEGAL SYSTEM:

Sweden is hereditary limited monarchy. Four fundamental statutes form constitution of Sweden: Instrument of Government of 1974, Act of Succession of 1810, Freedom of the Press Act of 1949, and Freedom of Speech Act of 1991.

Sweden is member of European Union (EU) and is obliged to follow laws of the Union.

The Executive Power.

Despite fact that Instrument of Government actually provides that King or Queen shall be Head of State, executive power has been transferred to government.

The Legislative Power is shared between government and Parliament. Parliament alone may levy taxes and controls national budget.

Members of Parliament number 349 and are elected by direct vote for four years. Citizens who have reached age of 18 on day of election are entitled to vote and are also eligible.

As Head of State, King opens Parliament session in mid-Sept., except in election year when Parliament session starts in Oct. Parliament session continues throughout year in regular sessions, but with break in activities during summer (“summer recess”), Christmas and Easter.

Judicial Power is vested in courts (see category 6 Courts and Legislature, topic 6.01 Courts), which are independent of any other authority. Persons holding judicial office may not be removed by Government without due trial and judgment.

1.03 HOLIDAYS:

Legal holidays are: Sundays amongst them Easter Day and Whitsunday, Jan. 1 (New Year's Day), Jan. 6 (Epiphany), May 1, Dec. 25 (Christmas Day), Dec. 26. (day after Christmas Day), Good Friday, Easter Monday, Ascension Day, June 6 (National Day), Midsummer Day and All Saints Day. Due days falling on Sats., Suns., legal holidays as aforesaid, Midsummer Eve, Christmas Eve, and New Year's Eve are postponed until next weekday.

1.04 OFFICE HOURS AND TIME ZONE:

Sweden is in the GMT +01:00 time zone. Office hours are generally from 9 a.m. to 5 p.m.

2 BUSINESS ORGANIZATIONS

2.01 AGENCY:

Commercial Agency.

(Act 1991:351 as am'd). Commercial agent is defined as party who in business relationship has agreed with another party, principal, to effect sale or purchase of goods by procuring offers on behalf of principal or entering into agreements in name of principal.

Most of legal provisions are mandatory to benefit of agent, e.g. provisions regarding notice period and severance pay.

If rate of commission has not been agreed, agent is entitled to commission at rate customary in agent's area of operations, or else reasonable considering overall circumstances. In certain instances agent is entitled to subsequent commission on business deals concluded after termination of agency.

Minimum period of notice of termination of indefinite term agreement is one month if agency has lasted less than a year, extended by one month per commenced year, up to six months.

Agent is entitled to reasonable severances, maximum one year's commission, upon termination if agent has provided new customers or substantially increased business with existing customers and provided that severance pay is deemed reasonable, given circumstances of particular case.

Either party is entitled to damages in case of failure by other party to fulfil his/her contractual or legal obligations, unless he/she can prove that failure is not due to negligence.

Agent is not bound by noncompetition clause beyond two years after termination of agency.

Swedish law is in conformity with EC Directive on Commercial Agents of Dec. 18, 1986.

Commission Agency.

(Act 1914:45, as am'd). Commission agent is defined as party who has agreed to sell or purchase goods or securities or other personal property on behalf of another party, but in his/her own name. Act contains less mandatory provisions for protection of commission agent, as compared to Commercial Agency Act.

2.02 ASSOCIATIONS:

See topic 2.03 Corporations.

2.03 CORPORATIONS:

Stock Corporation (company limited by shares, aktiebolag).—Act 2005:551. New Act entered into force on Jan. 1, 2006.

Introductory Provisions.

Swedish stock corporation is company carrying on activities with capital contributed by shareholders and divided into specific number of shares without personal liability of shareholders for obligations of company.

Companies may be public, offering shares or other securities to general public, or private.

Share capital shall be fixed in Swedish currency or EURO and may not be less than SEK 100,000 for private and SEK 500,000 (or equivalent in EURO) for public companies. Articles of association normally provide for range of share capital with minimum and maximum amount (maximum not to exceed four times minimum).

Act provides that if share capital is divided into more than one share, each share represents equal part of share capital. Part represented by each share in share capital constitutes quota value (Sw. kvotvärde) of share. Share may not be issued against compensation that is less than quota value of share. Part of payment for share that exceeds quota value of share shall be allocated to share premium reserve (Sw. överkursfonden).

Formation.

Company is formed by one or several founders, to be individual resident in European Economic Area or legal entity founded and with registered office within said area.

Provisions on company formation are simplified in New Act. It will no longer be possible to form limited liability companies by so-called successive formation where formation is accomplished in stages. New Act provides only for simultaneous formation, which means that all acts to form company are taken at once. In connection with formation, incorporators are to draft memorandum of association, one or more of incorporators shall subscribe for all shares, shares shall be paid and incorporators shall sign memorandum of association. Payment of subscribed shares may be made in cash or capital contributed in kind. Company is considered formed when memorandum of association has been signed by all incorporators. Company's incorporation is, however, as before conditioned on registration of company by Swedish Companies Registration Office (Sw. Bolagsverket).

Prior to registration company can neither acquire rights nor enter into obligation, nor can it sue, complain or defend in court or before any other authority. Persons acting in company's name before it is registered are personally liable for such action. At registration liability passes to company provided that obligation results from memorandum of association or has arisen subsequent to formation of company.

Articles of association shall specify: (a) Name of company, (b) municipality in Sweden where registered office of company is to be located, (c) objects of company, (d) share capital or minimum and maximum share capital, (e) number of shares or if articles of association specify minimum and maximum share capital, corresponding lowest and highest number of shares, (f) number, or minimum and maximum numbers, of directors, and auditors as well as deputy directors, if any, (g) manner for convening general meetings of shareholders, and (h) fiscal year.

Transfer restrictions in articles of association may be of three kinds: pre-emption right, consent and post sale purchase right.

Shares.

Share certificates (if issued) shall be signed by board of directors. Certificate shall state: (a) Name of company, registration number, company category, (b) name of shareholder, personal identity or registration number, (c) serial number of shares, (d) class of shares, (e) any condition clauses, and (f) date of issue. Share certificates may not be issued before full payment and registration.

Share certificate represents title to share. Bona fide holder of share certificate, who can prove his title by unbroken chain of transfers or endorsements in writing from duly registered shareholder to specific person or in blank, is protected as legitimate shareholder and is entitled to be registered as shareholder.

Board of directors shall keep share register in which all shares and shareholders shall be registered. This register, which is open to public, is basis for checking shareholders and their votes at general meeting of shareholders.

In order to simplify handling and trading of shares both for companies and individuals, Act 1998:1479 allows recording functions to be entrusted to central depository agency, which by using EDP, records all transfers, changes of share capital, etc.

Shares of different classes may be issued, e.g. preferred shares and common shares or classes of shares with different voting rights.

Increase of Share Capital.

Share capital may be increased by: (a) Amount added to share capital through bonus issuance, (b) subscription of new shares against payment (new issuance), (c) subscription for new shares in exchange for payment upon exercise of warrants issued by company, (d) issuance of new shares in exchange for convertible instruments issued by company. Resolution to increase share capital shall be adopted at general meeting of shareholders and under certain circumstances by board of directors if board has been authorised by general meeting or by board of directors subject to approval by general meeting. Act gives detailed provisions as to contents of resolution.

In conjunction with bonus issuance, share capital is increased through: (a) Amount being transferred from statutory reserve; (b) revaluation reserve or unrestricted equity pursuant to most recently adopted balance sheet; or (c) value of fixed assets being written up.

Capital Procurement.

Old Companies Act permitted warrants to be issued only together with promissory note. New Act permits issuance of warrants without connecting them to promissory note. New Act also permits equity debentures (i.e., loan where principal to be repaid is not fixed amount but tied to factors such as price of company's shares, operational results or financial position).

Reduction of share capital may take place: (a) to cover losses where unrestricted shareholders' equity equal to loss is not available, (b) for transfer to fund to be used pursuant to resolution adopted by general meeting of shareholders, or (c) for repayment to shareholders.

Reduction of share capital may be effected with or without retirement of shares.

Acquisition of Own Shares.

Public companies may under limited circumstances repurchase and sell their own shares. Repurchase must take place over regulated market within European Economic Area or, after permission from Financial Supervisory Board, over market outside European Economic Area that equals regulated market, or through public offer directed to shareholders. Sale of company's own shares must be made at regulated market within European Economic Area or, after permission from Financial Supervisory Board, over market outside European Economic Area that equals regulated market, or in accordance with provisions regarding new issuance of shares.

Company may not own (directly or indirectly) more than 1/10 of all shares in company.

Shares held by company itself are subject to restrictions detailed in Act. Act further contains detailed regulations about form of company's decision to repurchase or sell its own shares as well as regarding other formalities.

Private companies and unlisted public companies may not acquire and sell their own shares. In addition, both private and public companies (including listed public companies) are prohibited from accepting their own shares as security. Agreement which violates any of these prohibitions is invalid.

Management of Company.

Management is handled by board of directors and managing director.

Board of directors shall consist of at least three members in public companies. In private companies, board may consist of one or two members, provided that at least one deputy is appointed. Board of directors is normally elected by general meeting of shareholders. Board having more than one member shall annually adopt rules of procedure for its work. These rules shall, inter alia, state how work is to be allocated between members of board.

In public companies, board of directors shall appoint managing director. In private companies board of directors may appoint managing director. Managing director does not have to be member of board. Deputy managing director may also be appointed. Board of directors shall draw up instructions to managing director.

Managing director and at least half of members of board of directors, including employee representatives (see subhead Representation by Employees, infra), must reside in European Economic Area, unless exception is granted by Swedish Companies Registration Office. One member of board is appointed chairman. Managing director may not be chairman of board in public company.

Board of directors shall represent and sign for company. Board of directors represents company in dealing with third parties, as well as before court and other authorities. Board of directors may authorise director, managing director or any other person to represent and sign for company, unless such delegation of authority is prohibited by articles of association. Managing director may always represent and sign for company with respect to day-to-day management of company.

In New Act, change of composition of board will be effective from time when registration notification has been received by Companies Registration Office, and not immediately from decision to appoint or dismiss new board member, managing director or special signatory.

Representation by Employees (Act 1987:1245).—Local labor unions are entitled to appoint two directors and two deputies in companies or economic associations with at least 25 employees in Sweden, or three directors and three deputies if 1,000 employees or more in Sweden. Number of employees extends also to groups of companies.

Once employee directors have been appointed, right to board representation remains throughout mandate period, even if number of employees falls below 25.

General Meeting of Shareholders.

Shareholders' right to take decisions in company affairs is exercised at general meetings of shareholders. Shareholder may exercise his/her rights at general meeting of shareholders personally or by proxy.

Resolution of general meeting of shareholders shall be adopted by simple majority. In case of tie, chairman has casting vote except that election of directors and auditors shall normally be decided through drawing of lots. For certain important resolutions qualified majority is required. Annual general meeting of shareholders shall be held within six months from end of each fiscal year. At this general meeting resolutions shall be passed in respect to: (a) Adoption of income statement and balance sheet, (b) approbation of company's profit or loss according to balance sheet, (c) directors' and managing director's discharge from liability, (d) (unless articles of association provide for longer mandate period) election of directors and, if applicable, auditors, and (e) other matters which according to Companies Act or articles of association shall be dealt with at this meeting.

Extraordinary general meeting of shareholders shall be held whenever board of directors may find it appropriate or when auditor or owners of one-tenth of all shares request this for special purpose.

Auditing.

General meeting of shareholders shall elect one or more auditors for fixed term of four years. Auditor may be individual or accounting firm, and must be certified or approved. In addition, also one or more lay auditors may be appointed by general meeting of shareholders or in accordance with articles of association.

Auditor shall render report to general meeting of shareholders for every fiscal year. Auditor's report shall contain statement whether annual report has been prepared in conformity with Companies Act and Swedish GAAP, statement on directors' and managing director's discharge from liability, and statement on adoption of balance sheet, income statement and proposed allocation of company's profit or loss as made in directors' report.

Annual Report.

Annual report shall be prepared for each fiscal year. Report shall consist of income statement, balance sheet and directors' report.

Annual report shall be signed by directors and managing director.

Fiscal year shall be 12 months but may be shortened or extended up to maximum 18 months with respect to first fiscal year or otherwise in connection with change of fiscal year. Normally, calendar year is fiscal year. Fiscal year may also end on Apr. 30, June 30 or Aug. 31. When there are special reasons, Swedish Tax Agency may grant permission to use other month end closing date.

Annual report and auditor's report shall be filed with Swedish Companies Registration Office within seven months of end of fiscal year. If annual report and auditor's report are not sent to registration authority within 15 months from fiscal year end, board members and managing director become liable for obligations of company.

According to EU IAS regulation, all European companies whose shares or other securities are listed on a regulated market, are generally obligated to prepare group annual reports according to International Accounting Standards (IAS), now known as IFRS International Financial Reporting Standard. Nordic Growth Market (NGM) and OMX Nordic Exchange, Stockholm are Swedish regulated markets.

Dividends.

Resolution to distribute dividends shall be adopted at general meeting of shareholders. Dividends may be distributed only if there is sufficient coverage for company's restricted equity after distribution. General meeting of shareholders may not distribute dividends which are higher than proposed or approved by board of directors. However, shareholders representing not less than 10% of share capital may, in certain circumstances, call for distribution of certain amount of dividends.

Dividends may be distributed only provided payment appears to be justified taking into consideration: (i) Demands with respect to size of equity which are imposed by nature, scope and risks associated with operations; and (ii) company's need to strengthen its balance sheet, liquidity and financial position in general. If company is parent company, corresponding considerations shall be made with respect to group.

Company may not grant cash loans to shareholder, directors or managing director or to close relatives of such persons.

Liquidation.

General meeting of shareholders may resolve that company shall be liquidated.

Where board of directors has reason to believe that company's equity capital is less than half of share capital, or if company upon seizure lacks seizable assets, board of directors shall prepare control balance sheet and have it examined by auditors. If then it is found that equity is less than half of share capital, board shall refer as soon as possible to general meeting of shareholders question of liquidating company (technical bankruptcy). Unless balance sheet adopted at general meeting within eight months shows that equity capital is restored to share capital, board of directors shall, if general meeting does not resolve to liquidate company, apply to court to order liquidation of company.

General meeting of shareholders which resolves that company shall be liquidated may at same time suggest one or more liquidators to be appointed. Liquidators shall replace board of directors and managing director and shall be responsible for carrying out liquidation.

Auditor's appointment does not terminate by fact that company enters into liquidation.

Act gives detailed provisions for administration of liquidation.

Name of Company and Division.

Name of company shall contain word “Aktiebolag”, or “AB”, and shall be clearly distinguishable from other names previously entered into Companies Register. Where name of company is to be registered in two or several languages, each version shall be mentioned in articles of association. Registered name of public company must contain word “publikt” (public) or be followed by designation “publ.”

Stationery, invoices and order forms as well as websites of all companies must list name of company, domicile of board of directors, and registration number of company.

Secondary names may be registered in addition to name of company.

Miscellaneous.

Companies Act contains detailed provisions regarding *inter alia* merger, division of company, compulsory transfer of minority shares in subsidiary, damages, penalties and registration.

Insiders' Shareholdings.

(Acts 2005:377 and 2000:1087). Insiders as defined by law must give notice to Swedish Financial Supervisory Board of their shareholdings in stock market companies. Insider trading is criminal offence and if convicted, insider can be imprisoned for up to four years and ordered to repay profits made.

Economic Associations (Sw. ekonomiska föreningar).—Act 1987:667.

The economic association is an incorporated association of an unlimited number of individuals or corporate bodies or partnerships, created mainly for purpose of strengthening or safeguarding certain economic interests by joint action of its members. It is entered upon its registration in special registers for economic associations kept by Companies Registration Office. Registration will, in general, be granted if: (1) There are at least three members; (2) articles have been drawn up in accordance with Act (in written form) and approved by members; (3) board of directors (consisting of at least three members) and auditors have been elected.

Members of the association are not personally responsible for the liabilities of the association. The authority rests in the general meeting of the members, which has to pass or amend the articles, elect board of directors and auditors, approve operating accounts and balance sheet, distribute profits, grant release to board of directors and exercise other powers provided by Act or articles. Managing director shall be appointed if average number of employees during last two years has exceeded 200. Managing director and at least half of board members must reside within European Economic Area, unless exemption is granted. Auditors must examine conduct of business and annual report, accounts and balance sheet. Board members, auditors, liquidators, and members of association are liable for damage due to their activity on behalf of association in accordance with special rules given in Act.

New members may be admitted at any time, if no special reasons are referred to with respect to the character, the extent or the purpose of the activity of the association. If the articles do not state otherwise written application for membership must be examined by board of directors. Members may give notice of withdrawal of their memberships at any time. In articles it may, however, be stipulated that members are not allowed to withdraw their memberships for up to two years from admittance or up to five years if such stipulation has been approved by Companies Registration Office. Liquidation takes place as provided for in articles, or upon resolution of general meeting of members or in case of bankruptcy or in other cases, in accordance with Act.

Stipulations of Economic Associations Act regarding content of articles, surplus for dividend, board of directors, signing for association, annual rendering of accounts, auditing, general meeting of members and liquidation and dissolution, are very similar to those of Companies Act.

Foreign Corporations and Economic Associations.

Due to tax and various other reasons, it is often suitable for foreign enterprises that wish to conduct business in Sweden, to form Swedish subsidiary corporation. According to Act 1992:160 on Foreign Branches, however, enterprise that is legally established and registered as corporation or economic association in foreign country, and is duly engaged in business activities in that country, may do business in Sweden through branch office with independent administration.

Many of the requirements of a Swedish corporation are applicable to such branches, e.g., managing director, registration of company name, bookkeeping regulations, audit, and accounting. In all legal matters arising from business activities of Swedish branch, foreign enterprise shall be subject to Swedish law.

See also topic 2.06 Partnerships; category 22 Taxation, topic Taxes.

2.04 FOUNDATIONS:

(Act 1994:1220). Grantor may create foundation as legal entity. Foundations can be created in different ways. Most common is that grantor irreversibly transfers assets to be permanently and separately administered for specific purpose, such as scientific research or education of children. Fundraising foundation is established when grantor ordains such funds that have been raised after announcement, to promote permanent and specific purpose.

Foundations may conduct business and must have name that includes word ``stiftelse''.

Foundations with assets exceeding certain value, parent foundations and foundations conducting business must keep books and produce official annual accounts. Foundation shall have at least one qualified auditor. If foundation is bound to prepare annual accounts according to Book-Keeping Act 1999:1078, at least one auditor must be authorized. Liability of foundation is limited to its assets.

Foundation directions may only be changed or set aside with permission of Legal, Financial and Administrative Service Agency, unless grantor has stipulated that directions may be amended by trustee or council (this is however, not possible in regard to foundation purpose). Otherwise, directions can generally be changed, repealed or set aside, only if—due to changed conditions—they cannot be met or if they are obviously ineffectual or incompatible with grantor's objective.

All foundations liable to produce annual accounts must be registered in County Foundation Register, as are other foundations, if prescribed by grantor. With few exceptions, foundations are supervised by County Administrative Board.

2.05 JOINT STOCK COMPANIES:

See topic 2.03 Corporations.

2.06 PARTNERSHIPS:

General Partnership (Sw. handelsbolag).—Act 1980:1102.

General partnership is at hand, when two or more individuals or corporate bodies, agree on forming association for purpose of conducting business. Partners are without limitation, jointly and severally liable for debts of such partnerships. Relations between partners are regulated by partnership agreement and by Act.

Formation.

No special form is required. Legal existence begins with conclusion of partnership agreement and entry into commercial register.

Business Name.

The business name of a general partnership must include word “handelsbolag”.

Partners Inter Sese.

The Relation of the Partnership and the Partners to Third Persons.

A general partnership may under its business name acquire rights, incur liabilities, sue and be sued. The partnership is liable for damages caused by a partner when acting on behalf of the partnership.

In order to be valid in relation to third parties, restrictions regarding representation of the partnership must be entered in the commercial register.

Partners are jointly and severally liable (personally) for partnership's liabilities. A new partner is liable for preexisting liabilities of the partnership. Bankruptcy of the general partnership does not involve bankruptcy of the individual partners, nor vice versa. In order to receive satisfaction or security for their claims, the personal creditors of a partner may attach only his remuneration, share of the profit including interest on capital, and his share of the partnership assets. Partners are not responsible for liabilities of partnership after their resignation, on condition that creditors were aware of resignation. The commercial register must be notified of resignation of a partner, and this must also be published in certain newspapers as laid down in the Act. When this has been done, third parties are presumed to be aware of resignation.

Dissolution.

With certain exceptions, the partnership is dissolved when its agreed duration (as stated in partnership agreement) is reached or upon six months notice given by one partner. If partnership agreement does not prescribe otherwise, partnership shall immediately be dissolved upon request of partner if: (1) Another partner substantially does not fulfill his obligation according to partnership agreement; (2) upon death of partner or if partner becomes bankrupt; (3) if there is any other important ground for dissolution. Liquidation is attended to by partners, who have right to act on behalf of partnership. Upon application by partner (and if special reasons exists), court may appoint special liquidators. Court may remove liquidator at any time, but liquidator must be removed upon request of all partners.

General and limited partnership (Sw. kommanditbolag) is a contractual association of two or more individuals or corporate bodies with purpose of conducting commercial, industrial or other business. In this form of partnership at least one partner (general partner, Sw. komplementñr), however not foundation or non-profit association, is liable without limitation for debts of partnership, and one or more partners (limited partners, Sw. kommanditdelñgare) are liable for debts of partnership up to agreed amount.

Formation.

Similar to general partnership.

Firm Name.

The firm name of a general and limited partnership must include the word “kommanditbolag”.

Partners Inter Sese .—The relations between the partners are determined by the partnership agreement and as a complement to the agreement by the rules of the Act.

The Relation of the Partnership and the Partners to Third Parties.

The limited partners are not allowed to represent the partnership. An agreement is not binding for the partnership if the partnership was represented by a limited partner without power of attorney and the limitation was known to the contracting partner.

Dissolution.

Similar to general partnership.

Ordinary partnership (Sw. enkelt bolag) is at hand when two or more individuals or corporate bodies for purpose of conducting business meet agreement of doing business in form of association and it is not general partnership. Ordinary partnership may not have firm name under which it can acquire rights and assume obligations. It may as such not sue or be sued; partners may apply for registration.

Formation.

No special form is required.

Partners Inter Sese .—All partners participate jointly in the management. Urgent measures may, however, be taken without the participation of all partners if a delay would cause damage.

The Relation of the Partnership and the Partners to Third Parties.

If the partnership agreement does not provide otherwise, the creditors of a partner can execute only his share of the partnership, but the partners are jointly liable for liabilities entered into by the partners or their representative.

Dissolution.

In principal, the dissolution of an ordinary partnership follows the same stipulations as for the dissolution of a general partnership.

3 BUSINESS REGULATION AND COMMERCE

3.01 BILLS AND NOTES:

Bills of Exchange.

(Negotiable Instruments Act 1932:130).

A bill of exchange must include: (a) the designation “bill of exchange;” (b) an unconditional demand to pay a certain sum in money; (c) name of party who must pay the instrument (payer, drawee); (d) date of maturity; (e) name of place where it must be paid; (f) name of person to whom or to whose order payment must be made (payee); (g) date and place of drawing of instrument; (h) signature of party who draws the instrument (drawer). A bill of exchange must call for payment: (a) On a certain date; (b) upon presentation; (c) a certain time after presentation; or (d) a definite time after its making. If a bill of exchange is issued or accepted outside of Sweden, it is, in general, subject, as to its form, to the law of the place where the bill of exchange was signed.

Indorsement implies partly a transfer of ownership rights from the indorser to the indorsee and a demand to pay to the latter and partly also a liability in favor of the following indorsers. This liability always exists unless the indorsement indicates that it is made without recourse. Transfer is permitted without any special mention made thereof in the bill. If transfer is specifically prohibited but still takes place the new holder does not have any rights under the Negotiable Instruments Act.

Only after acceptance does a drawee become liable. Acceptance and drawee's signature must be written on bill and can be accomplished merely by drawee writing his name on face of bill. If bill of exchange is not accepted when presented holder has right of protest. Drawee to whom bill of exchange is presented for acceptance has right to demand one day of grace, and in such case bill must be presented following day. Neglect to present bill for acceptance or failure to protest same in case of nonacceptance in certain circumstances may mean loss of rights against drawer and indorsers.

If payment of a bill is refused, the holder, in order to protect his rights, must arrange to have it protested not later than the second week-day following the maturity date. In case a bill is not paid when presented for payment on or after its maturity, the acceptor is liable for payment of interest at the rate of 6% from the date of presentation and for reimbursement for protest charges, and other expenses, as well as commission amounting to one-third of 1% of amount of bill. Rights against acceptor are barred after three years from maturity. Holder of protested bill is entitled to bring action for payment against some or all of previous indorsers at same time or against any one of them separately. He has right to receive amount of bill and, in addition, 6% interest from maturity, reimbursement for protest charges and other necessary expenses, as well as commission amounting to one-third of 1% of amount of bill. Claim of holder of bill of exchange against indorser and drawer is barred one year from date of protest or, in case provision has been made for recourse without protest, from due date. Indorser's right against other indorser or against drawer is barred six months from date first-named paid bill of exchange or from date legal steps are instituted (such as court summons, claim in bankruptcy, etc.).

The negotiable instrument act also contains provisions for more rapid and effective court procedure than is the case with ordinary claims.

Checks.

(Act 1932:131). Check must contain: (a) Designation “check;” (b) unconditional demand to pay certain sum in money; (c) name of party by whom payment is to be made; (d) place of payment; (e) date and place of drawing; (f) signature of drawer. As medium of payment check must be payable only upon presentation. Check may be made payable to bearer but may, through indorsement, be made payable to specified person. When check has been paid or come into possession of drawee, it may not be circulated further. It must necessarily be payable by bank. Placing two parallel lines on face of check (crossing) indicates that payment can be made only to bank or customer of drawee bank. If name of bank is placed between parallel lines, payment must be made only to that bank, or if name of drawee bank itself appears, only to one of its customers.

If the drawee bank has placed its legal signature on the face of a check or through other notation thereon given reason to believe that the bank will honor the check, it is the duty of the bank to pay such check, when presented within the legal time limit.

The holder of a check, in order to preserve his right of recourse to the drawer or indorsers, must present same for payment within 20 days from its date or, if the check is drawn in a non-European country not bordering on the Mediterranean, 70 days.

The claim of a holder of a check against indorser, drawer and others is barred six months from the expiration of the proper presentation period. If a check debtor has paid check, his claims against other check debtors are barred six months from date of payment.

In most respects the provisions of the negotiable instrument act with regard to indorsement, order of liability, payment, recourse, etc., also are applicable to checks.

Instruments of Debt.

(Act 1936:81). Debtor under instrument of debt can invoke defence based on legal relations that led to issue of instrument. If instrument is issued by several persons without limitation of liability they are jointly and severally liable. Any of them who has paid debt has recourse against co-debtors pro rata parte. Transferor of instrument is responsible for existence of debt but not for debtor's solvency.

A negotiable promissory note is an instrument issued either to bearer or to a specified person or order, as well as an instrument in which right to mortgage property has been granted.

Debtor is not bound to honor a negotiable promissory note unless returned to him. Transferee to which a negotiable promissory note has been delivered is considered to have good title, provided, in case of an instrument payable to order, that he is able to rely on a chain of written transfers leading up to himself and provided further that he has taken in good faith. Payment to such transferee is a valid discharge unless debtor knew that payee was not proper creditor or paid negligently.

A simple instrument is an instrument payable to a specified person, transfer of which is valid against transferor's creditors only when debtor is notified thereof. Defective title to a simple instrument cannot be remedied by transferee's good faith. Rules relating to simple instruments apply to debts in general.

3.02 COMMERCIAL REGISTER:

Individuals and partnerships which are merchants are required to register name of firm and of those empowered to sign for it. Register is kept by Swedish Companies Registration Office. (Act 1974:157).

Swedish citizens resident abroad, non-Swedish residents and enterprises, except European Economic Interest Groupings, are required to apply for registration in order to carry on business in Sweden. (Act 1992:160). Business may be conducted in Sweden through branch, i.e. “filial”, office.

See also category 2 Business Organizations, topic 2.03 Corporations, subhead Foreign Corporations and Economic Associations.

3.03 CONDITIONAL SALES:

See topic 3.12 Sales.

3.04 CONSUMER CREDIT:

Act (1992:830) provides protection for consumers when purchasing goods on credit. Creditor must clearly disclose conditions under which credit is offered, e.g. actual interest rate computed per annum. Consumer retains right under agreement with supplier against new holder of right to receive payment under agreement. Act is compatible with EEC directives concerning consumer credit and was adopted as part of Swedish harmonization process with EEC laws.

3.05 CONTRACTS: (Act 1915:218).

Unless time of grace is granted oral offer must be accepted immediately and offer made by mail or telephone must be accepted within such time as offeror could reasonably estimate as being required. Time of grace in offer by mail or telegram is to be calculated to run from day letter is dated or from the time of day telegram is handed in for transmission. Acceptance must reach offeror within time stated.

Prices in advertisements, price currents etc. do not represent a legally binding offer.

Contracts are as a rule valid regardless of their form, the most important exceptions being agreements to sell real property and marriage settlements which must be in writing. See also topic 3.12 Sales; categories 10 Documents and Records, topic Records; Family, topic Husband and Wife.

Excuses for Nonperformance.

Force majeure as an excuse for nonperformance is generally observed under Swedish law.

Debtor may allege invalidity as excuse for nonperformance if forced under duress or fraudulently induced to make contract. If obligee when concluding contract took advantage of situation where he could exercise undue influence on obligor, latter is excused from performance to obligee and any third party held to be cognizant of the circumstances.

Contract is not enforceable if circumstances at its conclusion were such that it would be incompatible with honor and good faith to enforce it and obligee was aware thereof.

Conditions which are unreasonable in consideration of content of contract or other circumstances whether at making of contract or occurring later, may be modified or set aside. Other conditions may be modified or entire contract may be set aside if unreasonable condition is of such significant importance that it cannot reasonably be demanded that contract shall be valid.

Certain sum agreed to be paid as estimated damages in case of nonperformance is considered as guarantee for performance and can be claimed regardless of debtor's negligence unless combined with reservation. Such estimated damages may be reduced if exorbitant in relation to damage actually sustained. Normally they represent maximum of amount claimable by creditor.

Applicable Law.

Except as regards bills of exchange, checks, international sales of goods, and marriage settlements, there are no statutory rules governing conflicts of law in relation to contracts. Court cases are few and offer scant guidance. In general, courts will decide according to center-of-gravity method absent agreement. Convention on law applicable to contractual obligations (Rome Convention) applies to Sweden as from July 1, 1998. There is no interdiction of submission to foreign law or jurisdiction, except if contrary to Swedish public order.

Public Procurement.

(Act 2007:1091 and 2007:1092).

New EC public procurement directives (2004/17/EC and 2004/18/EC), was implemented in Sweden on Jan. 1, 2008, when Act 1992:1528 was replaced by Acts 2007:1091 and 2007:1092. Act 2007:1092 contains rules and provisions regarding public procurement of goods, services, utilities and works in fields of water, energy, transport and postal services, whereas Act 2007:1091 governs other areas. Acts also contains rules regarding appeals and damages. Acts are applicable when public contracting entities, such as local government agencies, government agencies and certain publicly owned companies plans to purchase (including rent, lease, etc.) goods or services exceeding certain threshold values. Such purchases are in principle made after call for tenders which are presented in writing and advertised. Main rule is that public procurement shall be carried out in way to achieve effective competition on market. Fundamental principles with regard to public procurement are principles of non-discrimination, equal treatment, transparency, proportionality and mutual recognition.

Distributorships, Dealerships and Franchises.

Other than Act on Franchisors' Disclosure Requirements (effective as of Oct. 1, 2006) there is no specific legislation regarding distributorship, dealership or franchise, and agreements relative thereto are generally governed by Act on Contracts and Sale of Goods Act. Subject to certain conditions, Competition Act (1993:20) exempts distributorships, franchises and other types of vertical agreements from prohibition set forth therein, by way of group exemption. With regard to compensation upon termination of distributorship, analogies with Act on Commercial Agency may be made under certain circumstances.

Act on Franchisors' Disclosure Requirements contains several key provisions concerning pre-contractual information duties for franchisors operating in Sweden and defines minimum amount of information that must be disclosed by franchisor to franchisee before entering into franchise agreement. Disclosed information has to be clear and intelligible, and handed over to franchisee in writing well in advance (according to government bill preceding Act, 14 days prior to entering into agreement is in most cases considered to be "well in advance").

Minimum disclosure requirements include following information: (a) Description of business that franchisor will conduct; (b) information on other franchisees within same system and scope of their business; (c) financial terms of business, including fees franchisee has to pay to franchisor; (d) intellectual property rights granted under franchise agreement; (e) goods or services which franchisee is required to purchase; (f) information on noncompetition requirements; (g) duration of agreement and financial consequences following termination; and (h) dispute resolution provisions.

If franchisor (or someone representing franchisor) fails to comply with these provisions, Commercial Court (Sw. Marknadsdomstolen) may impose injunction, plus fine for noncompliance.

See also topic 3.12 Sales.

3.06 FRAUDS, STATUTE OF:

Statute of Frauds concept is unknown to Swedish law. In general, very few contracts require writing to be enforceable, with notable exception of contracts for sale of real property.

3.07 INFORMATION TECHNOLOGY, INTERNET AND NEW MEDIA:

Computer programs are copyright protected as literary works (§ 1 Copyright Act), which implements EC-directive on protection of computer programs 91/250/EEC. Protection also includes draft material. To obtain copyright computer program must be original in sense that it is intellectual creation of originator. Originators have exclusive right to grant licenses, to copy, modify, translate or arrange computer programs and to distribute or hire out originals of computer programs or copies. Right of user to copy software for backup purpose cannot be excluded according to mandatory provision in Act. With certain limitation user may reverse engineer computer program to acquire information required to achieve interoperability with another independently created computer program. Copyright to computer program created by employee within employment belongs to employer if not otherwise agreed.

E-Commerce.

Act (1998:112) on Responsibility for Electronic Bulletin Boards.

According to Act, one who makes available Electronic Bulletin Board (administrator/owner), which, e.g., can be web site, is obligated to: inform users that send messages to Bulletin Board that messages can be used by other users, supervise Bulletin Board, and delete messages that are criminal, e.g., infringements of copyright, child pornography etc. If administrator/owner of Bulletin Board does not inform users properly and does not delete criminal messages, administrator/owner can be sentenced to prison or be liable to pay fine.

Distance Selling Act (2000:274).

E-commerce is to some extent regulated by this Act, since sale via Internet is regarded as service that is offered by means of organized system of distance selling. Act is applicable in B2C-situations only. With Act, EC-directive 97/7 regarding Distance Selling is implemented in Sweden. Main novelties in Act are that business entities that offer products or services to consumers need to give specific information to consumer when marketing products and services, before consumer orders products, and also when consumer receives delivery of product. Consumer must be informed regarding, e.g., right to withdraw purchase, name and address of business entity, price of product, etc. If business entities do not inform consumers correctly, they can be ordered to do so on penalty of fine.

Data Protection.

Personal Data Act (1998:204) contains provisions to protect individuals against personal integrity being violated by processing of personal data. Act is adapted to EC-directive 95/46 on Protection of Individuals with regard to Processing of Personal Data. Processing of data includes, e.g., collection, recording, storage, adaptation or alteration, compilation or retrieval. Act also applies to personal data that is transmitted, disseminated or made available by other means. Personal data may, in principle, only be processed if person who is registered (data subject) has given consent. But there are some exceptions when consent is not required, e.g., if processing is necessary in order to enable performance of contract with registered person, necessary in order to enable measures that registered person has requested to be taken before contract is entered into, or necessary in order for controller of personal data to be able to comply with legal obligation. According to main rule, all processing of personal data must be notified to Data Inspection Board. This is however not necessary if controller of personal data has notified Data Inspection Board that personal data representative has been appointed and personal data representative maintains record of processing of personal data.

Qualified Electronic Signatures.

The Qualified Electronic Signatures Act (2000:832) is based on EC Directive 1999/93/EC regarding common framework for electronic signatures. Purpose of Act is to “facilitate use of electronic signatures, through provisions regarding secure signature creation devices, qualified certificates for electronic signatures, and issuance of these certificates”. Act differentiates between electronic signatures and qualified electronic signatures. Qualified electronic signature gives issuer higher value and better security, and therefore Act has specific requirements regarding qualified electronic signatures, e.g. they must be based on qualified certificates that can only be issued by certain certification authorities. Act gives qualified electronic signature same legal status as conventional written signature.

Telecommunications are regulated by Electronic Communications Act that came into force July 25, 2003. Act implements 2002 EU Regulatory Package and is based on general duty to give notice of activities involving provision of public communications networks and publicly available communications services. Use of radio transmitters and numbers from national numbering plan requires individual authorization.

3.08 INTEREST:

Interest Act (1975:635) applies unless otherwise agreed or stipulated.

There is no liability to pay interest on debts before due date. If a definite date of payment is agreed in advance and payment is not made in due time, debtor becomes liable for interest from due date. If no date is agreed, interest is payable after one month has elapsed from day when creditor claimed payment and stated that claim includes interest. In case of damages, interest is payable one month from day when payee claimed damages and presented statement of facts, considering circumstances, can be reasonably expected by him. Irrespective of one month period, interest is payable from date of service of lawsuit.

Rate of interest is current official discount of The Swedish National Debt Office plus eight percentage points.

3.09 LICENSES, BUSINESS AND PROFESSIONAL:

See categories 4 Citizenship, topic Aliens; Foreign Trade and Commerce, topics Exchange Control, Foreign Trade Regulations.

3.10 MONOPOLIES, RESTRAINT OF TRADE AND COMPETITION:

Legislation regarding monopolies, antitrust and restraint of trade is contained in new Competition Act (2008:579), which entered into force on 1 Nov. 2008. Act mirrors EU competition rules and prohibits all agreements between undertakings, decisions by associations of undertakings and concerted practices which have as their object or effect prevention, restriction or distortion of competition in Swedish market. Agreements, decisions or provisions therein which are prohibited pursuant to aforesaid are automatically void. Act makes it possible to exempt by category certain agreements between undertakings, and for this purpose there are seven group exemptions, six of which are more or less identical with those adopted under EU competition rules regarding vertical agreements, specialization agreements, research and development agreements, patent technology transfer agreements, agreements in insurance sector and motor vehicle distribution and servicing agreements. Seventh group exemption concerns agreements between companies in taxi service for purpose of enabling them to cooperate with joint transportation activities. As of July 1, 2004 it is no longer possible to notify agreements to Competition Authority for individual exemption from prohibition in Act or apply for negative clearance. Restrictive agreements that meet criteria for exemption established by Act are not prohibited. Act also prohibits abuse of dominant position. Competent authorities under Act are Competition Authority, Market Court and Stockholm City Court. Competition Authority and Courts are empowered to apply Arts. 81 and 82 of EC Treaty.

Act provides for merger control and compulsory notification of all acquisitions of companies, mergers and concentrative joint ventures where (1) undertakings concerned have combined annual turnover in excess of SEK one billion (appr. [Euro]108.1 million/ US$148million) and (2) at least two of undertakings concerned, each achieved annual turnover in excess of SEK 200 million (appr. [Euro]21.6 million/US$29.6million), both thresholds within Sweden during preceding fiscal year. Even if second threshold is not met, Competition Authority is empowered to order notification in rare cases where special circumstances exist (for example, where strong market operator in concentrated market acquires newly established competitor to prevent new competitor to compete with acquiring company). Further, party and other participants in concentration always have right to voluntarily notify concentration, where first threshold is met. Competition Authority has extensive power of investigation, and Stockholm City Court may grant Competition Authority power to make on-the-spot investigations at undertakings. According to leniency rules member of cartel that is first company to reveal its existence and facilitates investigation may be granted immunity from fines. Certain decisions by Competition Authority or Stockholm City Court may be appealed to Market Court.

3.11 NEGOTIABLE INSTRUMENTS:

See topic 3.01 Bills and Notes.

3.12 SALES:

Sale of Goods Act (1990:931) applies to sale and exchange of chattels and to contracts for goods to be manufactured, unless otherwise agreed, or usage of trade or previous course of dealing between parties prevails. Stipulations below are non-mandatory.

Consideration is no prerequisite for validity of contract. Offer is binding. Buyer shall pay what is reasonable and when seller demands, but not until goods are delivered and examined. Delivery shall be made at seller's place of business or residence. If seller shall transport goods, delivery is made when buyer receives goods, or if transport to other place when left to carrier. Performance shall be made within reasonable time. Either party may withhold performance until performance by other party is tendered. Risk of loss passes on delivery.

Delay in performance by seller may entitle buyer to claim specific performance, if not unreasonable, or to cancel contract and, in both cases, claim damages. Cancellation applies only if breach is major or after expiration of additional period of time of reasonable length, fixed by demanding party. Buyer must notify seller of cancellation and claim damages within reasonable time.

Goods are defective if not in conformity with contract. Goods shall be fit for ordinary purpose, for particular purpose made known to seller, be in accordance with sample, and be ordinarily packaged. Goods are also defective if not in conformity with given information in advertisement or elsewhere before sale. If goods are sold “as is” they are considered defective if not in conformity with given information, seller has neglected to provide significant information regarding goods or goods are considerably worse than expected. Defective goods entitle buyer to claim reparation, delivery of substitute goods or price reduction, or to cancel contract. Buyer may also claim damages. Cancellation applies only if breach is major. Buyer must give seller notice of defect when discovered or should have been discovered. If third party on reasonable grounds claims right to goods, buyer can exercise rights as if goods were defective. Buyer who prior to sale was offered opportunity to examine goods has no right of action in respect of discoverable defects provided that seller has not acted in bad faith. Buyer is liable to examine goods on receipt. Right of action in respect of defect expires two years after receipt of goods unless otherwise guaranteed.

If buyer does not pay or cooperate to fulfillment of contract, seller has right to require performance or cancel contract. Right to cancel for late payment is contingent on buyer's major breach of contract or failure to fulfill payment after expiration of reasonable additional time fixed by seller. If goods are in buyer's possession, seller may only cancel for nonpayment if seller reserved right to such action.

Party is responsible for direct damages when delay or defect is not beyond his control. Consequential damages are rewarded in some situations.

If buyer fails to take delivery when tendered, seller is liable to keep goods but must re-sell perishable goods. Same applies to buyer in respect of rejected goods in his possession. Keeper of goods is entitled to reimbursement of expenses and has corresponding lien on goods. In case of party's insolvency, other party has right of stoppage in transit.

Warranties.

Sale implies warranty of freedom from defect and warranty of title to goods. Act is silent regarding warranty of freedom from charge in favor of third party arising from infringement of patent or other intangible right.

Conditional sales of goods are held valid vis-à-vis third parties without any further notice provided that seller has expressly reserved title to the goods. Conditional sale is generally combined with payment by installments. (Acts of 1978:599 and 1992:830). Acts provide certain protection to buyer, even if agreed otherwise between parties, in connection with seller's right to take back goods in case buyer fails to fulfill his obligations.

Consumer Sales Act (1990:932) grants to consumers certain basic rights when buying goods for private use if goods are delayed or defective. Stipulations in act correspond to Sale of Goods Act with important difference that consumer cannot be deprived of these rights by contract. Amendment introduced in 2002 entails that purchases become legally valid against seller's creditors at time of agreement in consumer sales situations.

Consumer Protection.

Marketing Practices Act (2008:486). Act applies to marketing of goods, services, real property and other objects of marketing including job opportunities. Act applies to promotion of both sales and purchases. Marketing measures that violate good marketing practice are prohibited. Act imposes stringent requirement of truthfulness for advertising and other marketing.

Court or Consumer Ombudsman may forbid undertaking to continue marketing measures that violate good marketing practice, and to continue marketing products for consumer use which are unfit for their purpose. Undertaking may be ordered to give information of importance to consumers. Undertaking that violates Act intentionally or by negligence may be imposed ``market disruption charge''. Undertaking can also be ordered to pay damages to consumers or to other tradesmen.

Acts of unfair contract clauses (1994:1512 and 1984:292) prohibit traders to use contract clauses which are considered unfair to consumers or traders.

Distance Selling Contracts Act (2005:59) is applicable when goods or services are offered through organized systems for distance sale or offered through door-to-door system. Act is mandatory and is implementation of EC- directive (02/65/EC) concerning distance marketing of consumer financial services. Act gives certain protection to consumers by stipulating e.g. that merchants must give certain information to consumers and that consumer has right to withdraw from purchase within 14 days from receipt of goods. Certain exemptions are, however, allowed from obligation to inform consumer and right for consumer to withdraw.

Product Liability Act (1992:18) is aimed at compensation for damages caused by defective products. Act allows compensation for damage in cases of personal injury and damage to other property mainly used for personal purpose. Act does not cover compensation for damage on defective product itself.

International Sales.

(Act 1964:528, based on Hague Convention 1951 on Law Applicable to International Sales of Goods). Unless application of other law is agreed between parties, law of seller's country applies. But law of buyer's country applies if contract is concluded there. According to Act on International Sales (1987:822) arts. 1-13 and 25-88 of UN Convention 1980 on Contracts for the International Sale of Goods have been adopted as part of Swedish law.

In respect of examination of goods and consequential notices, as well as steps to be taken if goods are rejected, law of country where examination shall take place applies.

Act does not refer to sales of ships, aircraft or securities, nor to sales instrumental in enforcement of court decisions or sales, covered by Consumer Sales Act (1990:932) or by Art. 5 in convention in exhibit to Act (1998:167) regarding law applicable for contracted obligations, and does not deal with parties' legal capacity, form of contract or contract's effect on third parties.

4 CITIZENSHIP

4.01 ALIENS:

See category 17 Immigration, topic 17.01 Aliens.

4.02 CITIZENSHIP:

See category 17 Immigration, topic 17.01 Aliens.

4.03 IMMIGRATION:

See category 17 Immigration, topic 17.02 Immigration.

5 CIVIL ACTIONS AND PROCEDURE

5.01 ACTIONS:

Limitation of.

See topics 5.07 Limitation of Actions, 5.04 Evidence.

5.02 DAMAGES:

(Act 1972:207). Act refers to noncontractual claims (tort liability).

Anyone who deliberately or negligently causes damage shall pay full compensation. Children under 18 and mentally deficient have restricted liability.

Employer is, irrespective of own negligence, responsible for all damage, caused by fault or negligence, on part of his employees acting in his service. Employees are liable for damages in particular circumstance only. State and municipalities are liable for damage due to incorrect procedure; this liability being restricted in different respects.

See also topic 5.09 Product Liability.

5.03 DEPOSITIONS AND DISCOVERY:

See topic 5.04 Evidence.

5.04 EVIDENCE:

At request made through Ministry of Foreign Affairs a Swedish court will take evidence on behalf of a foreign court. Writs of subpoena may be issued in connection therewith. If a sworn statement is necessary to protect a lawful right abroad, oath may be administered by a Swedish court. A Swedish court may rule that evidence be taken by a foreign court and issue a corresponding letter rogatory which is forwarded by Ministry of Foreign Affairs. (Acts 1946:816, 817, 819).

As no forms of evidence are qualified by statute as conclusive, evidence taken abroad will be sifted in same manner as and together with evidence taken directly.

Although no action is pending, evidence can be taken by a court regarding circumstances which may eventually prove important for protection of a lawful right in case of risk that such evidence would otherwise get lost. (Act of Procedure, c. 41).

If foreign law is to be applied in a suit court may take advantage of own knowledge of such law and inform itself thereof. Court may also request either party to submit proof of applicable provisions of foreign law.

5.05 FOREIGN JUDGMENTS:

See topic 5.06 Judgments.

5.06 JUDGMENTS:

Foreign judgments cannot be enforced in Sweden unless expressly authorized by Swedish law, or regulation from European Union, and such authorization exists only in few cases. For example, certain judgments of Danish, Norwegian, Finnish and Icelandic courts can be enforced in Sweden in accordance with Act 1977:595. Foreign judgments based on rules of international conventions concerning merchandise transported by rail, etc. are enforceable in Sweden. (Act 1985:193). Sweden has ratified 1968 Brussels Convention on Jurisdiction and enforcement of judgments in civil and commercial matters (Act 1998:358) and Convention on Jurisdiction and enforcement of judgments in civil and commercial matters done at Lugano on 16 Sept. 1988 (Act 1992:794) and European Union Council regulation (EG) No. 44/2001 on 22 Dec. 2000 on jurisdiction and enforcement of judgments in civil and commercial matters. Foreign arbitral awards are enforceable in Sweden pursuant to 1958 New York Convention. Application for recognition is submitted to Svea Court of Appeal.

5.07 LIMITATION OF ACTIONS:

No action for collection of debts may be started ten years after the date the debt arose. However for consumer credits time limit is three years. These periods are prolonged by informal reminder to debtor, by debtor acknowledging debt, or by creditor commencing action against debtor, whereupon new period commences. (Act 1981:130).

Certain damage claims arising out of injury incurred in transport by (i) road or rail and (ii) sea or air, are in general barred after period of three and two years respectively (see category 13 Estates and Trusts, topic 13.02 Death, subhead Action for Death).

Shorter periods apply to complaints of legatees and taxation claims.

Agreement that claim shall not be barred by limitation, or that consumer credit limitation shall be extended over three years is invalid.

If a settlement of all of a person's debts may be desirable, for example in connection with a debtor's death, divorce, declaration of incapacity, liquidation of corporations, associations, etc., it is possible upon application to the court to secure an order addressed to unknown creditors. This is an order which is published by Enforcement Authority to unknown creditors that, unless they file their claims within six months, claims will be barred. (Act 1981:131).

5.08 PRESCRIPTION:

See topic 5.07 Limitation of Actions.

5.09 PRODUCT LIABILITY:

Product liability is governed by Product Liability Act (1992:18) (“PLA”) which is based on 1985 EEC Directive (85/374) on product liability. PLA applies to personal injuries caused by all products that are defective, along with damages caused by defective product to property intended mainly for consumer use, but not to any other property.

PLA establishes presumption of liability for persons listed below of products which were defective when put into circulation. Liable under PLA are: manufacturer, producer or collector of defective product; person who has imported defective product to European Economic Area (“EEA”); subject to Brussels and Lugano conventions, person who for purpose of putting product into circulation has imported it from EFTA-state to EU or vice versa, or from EFTA-state to another EFTA-state; person who has marketed product as his by putting his name or trademark or other characteristic on it.

Presumption of liability can only be overturned if person liable under PLA proves that he did not put product into circulation within framework of any business; makes it probable that defect which caused damage did not exist at time when product was put into circulation by him; proves that defect is due to compliance of product with mandatory regulations issued by public authorities; or proves that scientific and technical knowledge at time when product was put into circulation was not such as to enable defect to be discovered.

Liability is strict, i.e. plaintiff need not show any fault on part of persons liable under PLA, nor any contractual relationship with these persons but only that product causing damage was not as safe as could reasonably have been expected. Plaintiff has to show that damage has been caused by defect under Act. Where liability of persons liable under PLA cannot be established, all persons listed above shall be liable unless any of them, within one month after claim or request for such identification has been put forward by injured person, identifies liable person. Same shall apply, in case of import to EEA and EFTA states as outlined above, if product does not indicate identity of importer.

PLA is mandatory to benefit of claimant. Standard provision limiting sellers liability for injuries or damages caused by product can therefore not prevent end-user from suing persons liable under PLA.

Statute of limitations on product liability claims is three years from time when claimant became aware or should have become aware of possibility of stating claim but not later than ten years after defective product was put into circulation by person liable under PLA.

See also topic 5.02 Damages.

5.10 SEQUESTRATION:

See category 8 Debtor and Creditor, topic 8.02 Attachment.

6 COURTS AND LEGISLATURE

6.01 COURTS:

First Instance.

There are 53 courts of first instance (``tingsrñtt''). Court is composed of one or three judges in civil cases, except in matters of family law where it consists of one judge and three lay judges. Latter also applies in criminal cases. In minor cases and at preliminary inquiries courts usually sit with one judge alone.

The courts of first instance have cognizance in all civil and criminal matters, irrespective of the amount claimed or of the gravity of the crime, with exception of matters which are assigned to special courts (see subhead Special Courts, infra). Courts of first instance also handle all such matters as probate of wills, appointments of guardians and trustees and registration of private documents, such as marriage settlements. Regarding registration of ownerships and encumbrances of real property, see category 10 Documents and Records, topic 10.04 Records.

An appeal lies to a court of appeal from judgment or order of court of first instance. However, if claimed amount is less than certain sum, or if defendant was not sentenced to sanction other than fine or was acquitted of liability for offence in respect of which more severe penalty than prison for six months is not prescribed, appeal may be obtained only under certain circumstances.

Second Instance.

The courts of appeal (``hovrñtt'') are six. They have appellate jurisdiction of civil and criminal appeals from courts of first instance within their judicial district. Court of appeal is in quorum with three or four judges, in criminal cases supplemented with two lay judges.

Mainly in cases of general interest as precedents, appeal may be obtained to Supreme Court against judgments and orders of a court of appeal.

Supreme Court (``Högsta domstolen'') sits in Stockholm and is composed of 16 judges. Court is in quorum with five judges but may in cases of special importance meet with nine judges or in pleno.

Special Courts.

In addition to general courts described above there exist several special courts, e.g. administrative courts primarily for tax matters and other disputes involving governmental authorities, real estate courts handling matters such as expropriation, court of patent appeal, market court and labor court.

6.02 LAW REPORTS:

See topic 6.04 Reports.

6.03 LEGISLATURE:

See category 1 Introduction, topic 1.02 Government and Legal System.

6.04 REPORTS:

Judgments of Supreme Court from year 1874 are to be found in "Nytt Juridiskt Arkiv," Section I, and of Supreme Administrative Court ("Regeringsrätten") from year 1909 in its yearbook "Regeringsrättens Årsbok". Complete records of decisions of lower courts do not exist, but certain important judgments of courts of second instance are published in "Svensk Juristtidning" and, since 1980, in "Rättsfall från Hovrätterna".

6.05 STATUTES:

Swedish law is based on a codification made in the year 1734. The greater part of this codified law has now been superseded by more modern laws, reference to the most important of which is made in this digest.

7 CRIMINAL LAW

7.01 CORRUPTION:

From July 1, 1999, Sweden has implemented OECD-Anti-Corruption Convention. Bill comprises OECD Convention and EU Corruption Conventions.

Any person who gives, promises or offers any bribe or improper remuneration whatever, to any employee or any person engaged in public service, whether within central or local governments, any person whose assignment is governed by any statutory regulation, any person serving in armed forces or other national defense units, any other person vested with public authority, any person acting as fiduciary in legal or economic matters, is guilty of bribery and shall be punished by fines or by imprisonment for not more than two years. If bribery constitutes serious offence, beneficiary/recipient may be punished by imprisonment for no less than six months but no more than six years.

Any employee or any other person mentioned above who accepts or requests any bribe or improper remuneration or promise of any bribe or improper remuneration, in respect of his service, is guilty of bribe-taking and shall be punished by fine or by imprisonment for no more than two years. If bribe-taking constitutes serious offence beneficiary/recipient may be punished by imprisonment for no less than six months but no more than six years. Same rule will apply if employee committed bribe-taking before taking up or after leaving service. Any such remuneration given or taken with intention to violate lawful duty of bribee will constitute criminal offence. Criterion of impropriety will be decided on basis of all factors relevant to individual case. Improper transaction is meant to influence employee in respect of his service. (Penal Code c. 17, § 7 and c. 20, § 2).

8 DEBTOR AND CREDITOR

8.01 ASSIGNMENTS:

For transfer of negotiable documents see categories 2 Business Organizations, topic Corporations, subhead Shares; Business Regulation and Commerce, topic Bills and Notes. Assignment becomes effective as against assignor's creditors through delivery of instrument to assignee. Claims in general are treated as simple instruments (see category 3 Business Regulation and Commerce, topic 3.01 Bills and Notes, subhead Instruments of Debt, last paragraph), and assignment becomes effective through notification of debtor. Assignment of incorporeal rights is made through contract.

8.02 ATTACHMENT:

There exist several types of provisional action intended to secure rights in anticipation of execution. (Code of Judicial Procedure, c. 15). Application is made to court. Protective measures may consist of having debtor's property covered by sequestration, or by order forbidding its sale or removal. Arbitrators cannot give enforceable interlocutory relief. If matter in dispute will be handled by arbitrators, application can be made to court.

8.03 BANKRUPTCY:

(Bankruptcy Act 1987:672).

Bankruptcy proceedings may be initiated on the debtor's own application or on application of a creditor who, if the debtor does not admit insolvency, must prove some circumstance indicating insolvency. In both cases application is filed with the bankruptcy court.

Announcement is made in certain newspapers and written notice sent to all known creditors.

A complete and specific list of the assets and liabilities is sworn to by the bankrupt before the bankruptcy court. The estate comprises all property belonging to the bankrupt at the time bankruptcy proceedings commence and property acquired during bankruptcy proceedings which may be subject to execution. The estate also can recover through due process property which the bankrupt may have disposed of within certain periods prior to the bankruptcy to the detriment of creditors.

The bankrupt's assets are taken possession of, administered and disposed of by trustee in bankruptcy, or, in certain cases, several trustees. Such trustee shall be specialist, primarily lawyer. His activities are controlled by commissioner's office.

Creditors must file written statements with bankruptcy court within time specified in bankruptcy order, varying from four to ten weeks thereafter. Domestic and foreign creditors have equal rights. The statements must be submitted in duplicate and be accompanied by documents (original or certified copies) on which the claims are founded. If a creditor claims priority, this must be set out in the statement. Creditor has normally full right to set off all claims.

Creditors either have priority claims or non-priority claims. Changes were made in 2003 to classes of priority claims whereby priority for landlord's claim for rent and Government's claim for taxes and charges were abolished and priority for creditors holding business mortgage was reduced.

Creditors with priority claims are now mainly: (a) Creditors holding pledged chattels or who according to law have right to retain chattels to cover their claims (e.g., craftsmen) and creditors holding pledge over certain financial instruments and creditors holding mortgages on ships and aircraft; (b) creditors holding mortgage on real estate; (c) creditors who have obtained execution against chattels; (d) creditors holding business mortgage corresponding to 55% of assets remaining when creditors a-c have been satisfied; and (e) employees' claims for wages, salaries, pensions, vacation and severance pay within certain limits.

Interest enjoys same priority as principal. Non-priority claims enjoy interest until date of bankruptcy.

After the expiration of the time set for filing of claims a creditor may still submit his statement, but he must pay expenses incurred by the delay.

After trustee has examined claims, he—as well as creditors who have filed claims—has right to make objections. Such disputed matters are taken up by so-called mediation meeting of creditors and if agreement cannot be reached matters are referred to court for decision.

The money realized from the bankrupt's assets is used first of all to pay the costs of the bankruptcy and any debts incurred during the bankruptcy.

Ordinarily a bankruptcy is ended through the payment of dividends on claims filed. Discharge from bankruptcy does not absolve a debtor from the liability later to pay that portion of his debts not covered by the payments made to creditors during the bankruptcy. This, of course, only applies to bankrupts who are non-corporate bodies.

If a debtor has made written agreements for the payment of his debts with all creditors who have filed their claims in the bankruptcy, or if he submits other evidence that they have been satisfied, bankruptcy can be cancelled upon application to bankruptcy court. If such application is granted and if debtor is corporation, bankruptcy proceedings will be converted into corporate liquidation proceeding. In this case former board of directors of bankrupt corporation will regain its powers and complete dissolution of corporation by distribution of assets to shareholders.

A simpler method of procedure is prescribed when a bankrupt's resources are insufficient to meet the costs of bankruptcy proceedings, or when it can be assumed that administration of bankruptcy estate will be of less complicated nature. Trustee is appointed by court but creditor does not file written statements of claim with court.

State Guarantee.

(Act 1992:497). Payment of employee's claims for wages, salaries and pensions which enjoy priority is guaranteed by state up to a certain maximum.

Reorganisation of Business.—Act (1996:764) on Reorganisation of Business provides alternative to bankruptcy for business considered viable or whose activities can be continued in whole or in part. Reorganisation is initiated by petition to District Court by debtor or creditor. Condition for granting such petition is that debtor is incapable of paying debts due for payment or that such incapacity will soon occur and that there is sufficient cause to assume that purpose of procedure can be achieved. Petition by creditor may be granted only if debtor has agreed. Following business reorganisation order, Court will appoint administrator to investigate debtor's financial situation, draw up reorganisation plan and endeavour to achieve settlement between parties. If it is impossible to reach settlement, Court may, upon petition by debtor, decide to initiate proceedings of official composition. Only non-preferred creditors take part in official composition procedures. These creditors must obtain at least 25% of their claims. Majority of voting creditors may force adoption of composition even if it is contested by minority. If creditors accept debtor's proposal of composition, composition will be confirmed by Court. If not, question is decided by Court after hearing. Reorganisation procedure may remain in force for period of three months, which can be extended by Court up to one year.

8.04 EXECUTIONS:

(Execution Code of 1981). Matters subject to execution are: (1) Judgments of courts; (2) agreements confirmed by court; (3) arbitration awards; (4) certain alimony agreements; (5)

orders of attachment.

Execution in order to secure payment of debts may be made on all assets of debtor with following exceptions: (1) Normal clothing and other purely personal belongings; (2) necessary furniture and household equipment; (3) necessary tools of trade; (4) lease of debtor's regular residence; (5) necessities of life required for one month or an equivalent sum of money. Execution may also be levied as garnishment. Execution must be made in such a manner that debtor suffers as little loss as possible. Real estate and taxes subject to execution only after formal application by creditor.

Property attached under execution must be listed, valued and sold at public auction or through private sale, but no more may be sold than is necessary to meet debt and costs of execution. Sale of real estate under execution is subject to complicated rules based on principle that debts secured by mortgage having priority over execution may not be disturbed but must either be paid, if payment is accepted by such creditor, or be taken over by buyer.

Even though judgments of the court have not become legally effective they may be the basis of executive action. Such attached property, however, may not be sold until the court's decision is effective. The debtor may avoid such attachment by placing other security to cover the amount of the judgment and for the damage that may ensue on account of the delay.

8.05 EXEMPTIONS:

See topic 8.04 Executions.

8.06 GARNISHMENT:

See topic 8.04 Executions.

8.07 GUARANTEE:

(Commercial Code, c. 10). Contract of guarantee may be made either orally or written. Guarantee of simple nature involves only subsidiary responsibility: liability to pay occurs only after creditor has unsuccessfully tried to collect from principal debtor through all available legal means, including execution, bankruptcy, etc. Only when guarantee contract has been entered in special form of “proprieborgen” does primary responsibility occur: guarantor undertakes guaranteed debt as his own. In this case creditor can call upon either debtor or guarantor for payment.

In case several persons have entered into a guarantee and have not made themselves liable per capita, they are bound jointly and severally.

8.08 LIENS:

The principal cases involving liens are as follows:

(1) A seller has a lien on merchandise for any costs, for example, for storage arising because of buyer's delay. Similar right accrues to a buyer in case the purchase contract is cancelled and he is entitled to damages from the seller. (Sale of Goods Act 1990:931).

(2) Whoever has repaired goods has a lien thereon for remuneration.

(3) Commission merchants, commission agents and factors, and commercial travelers have lien as to goods, samples, patterns and similar property not intended for sale. (Act 1914:45 and 1991:351).

8.09 PLEDGES:

Chattels are pledged through surrender by the proprietor of immediate possession

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through delivery to pledgee. As regards chattels in possession of a third party delivery is replaced by notification to third party either informally by pledger or by pledgee through service of a copy of the document of charge. To avoid cumbersome formalities such document should always provide that if debtor is in default pledgee is entitled to realize the pledge and satisfy his claim from proceeds. (Commercial Code, c. 10).

Financial instruments registered according to Code (1998:1479) on Accounts for Financial Instruments (office translation) may be pledged through notification and registration with authorized institution.

Aircraft may be mortgaged through registration in court of promissory note for sum certain, containing grant by registered owner of specified ship or aircraft of right to treat it as security for note. Mortgages on ships to secure payment of claim are obtained upon owner's application to Stockholm City Court. Court issues mortgage certificate of sum certain. Certificate shall be transferred to mortgagee.

Related right—business mortgage (företagsinteckning)—can be created as floating charge. Mortgage is obtained upon owner's application to central authority, mortgage certificate is issued of sum certain which certificate entitles to priority in case of distraint or bankruptcy. Business mortgage is created in all assets of applicant.

A proviso that a pledge given for fulfilment of an obligation shall be forfeited if the obligation is not properly met is invalid.

See also topics 8.03 Bankruptcy, Executions; category 20 Mortgages, topic 20.03 Mortgages.

9 DISPUTE RESOLUTION

9.01 ALTERNATIVE DISPUTE RESOLUTION:

Mandatory Dispute Resolution.

Normal procedure for resolution of dispute is court action in accordance with Code of Court Procedure, except matter assigned to special courts. See category 6 Courts and Legislature, topic 6.01 Courts.

Fee Disputes.

See category 19 Legal Profession, topic 19.01 Attorneys and Counselors, subhead Compensation.

Voluntary Dispute Resolution.

Mediation can be performed within scope of ordinary court proceedings at initiative of presiding judge. Mediation can also be performed by way of agreement between disputing parties in any controversy amenable to out of court settlement. Professionally trained mediators can be retained locally amongst judges and lawyers.

Arbitration.

Stipulation referring conflicts to be solved by arbitration is found in many national and international contracts, by application of Arbitration Act or to rules of arbitration of domestic or international arbitration institutes.

Arbitration Institute of Stockholm Chamber of Commerce has issued rules for expedited arbitration which is primarily recommended for minor disputes where parties desire speedy and inexpensive procedure.

Consumers.

Disputes between consumers and businesspersons regarding goods and services may be brought to Public Complaints Board (Allmänna Reklamationsnämnden), which issues recommendation on how dispute should be solved.

9.02 ARBITRATION AND AWARD:

(Arbitration Act 1999:116).

Any controversies amenable to out of court settlement may be submitted to decision of one or more arbitrators. Parties to a contract may in contract or special agreement, agree that any controversy arising from contract or otherwise shall be submitted to arbitration.

The Arbitration Act does not apply if the parties have reserved the right of appeal against the award.

If the arbitration agreement does not name the arbitrators or stipulate the number of arbitrators or prescribe the methods whereby they are to be chosen, then each one of the parties shall appoint one arbitrator, and those two arbitrators shall appoint a third arbitrator. If party fails to appoint arbitrator, or if arbitrators fail to agree on third arbitrator, such arbitrator may be appointed by court of first instance in district where arbitration shall take place. Arbitration clause may be supplemented, if parties so desire, by stipulations as to language of arbitration and applicable substantive law.

Each one of the parties may call for arbitration. Unless decided by parties, chairman of arbitration tribunal shall decide on time and place of meetings of tribunal. Arbitration may then proceed as in regular court proceedings, except that depositions of witnesses may not be taken under oath before arbitrators. However, at request of party arbitrators may decide that depositions under oath shall be taken in court. If parties to international arbitration have not chosen applicable substantive law, substantive law of agreed venue will apply.

Arbitrators have no means of effecting provisional measures without intervention of judicial authority.

There is no time limit stipulated in Act. Parties are thus free to agree on time limit. Majority casts vote. If award is not rendered within agreed time, arbitration agreement is null and void.

Arbitrators shall state amount of compensation to them in award. Award also contains decision on if and to what extent one party shall indemnify other for its costs. Basic rule in Swedish proceedings is that losing party pays all costs, reasonably necessary for conduct of winning party's case. Parties are vis-à-vis arbitrators jointly and severally liable to pay compensation to arbitrators.

There is no right of appeal against an arbitration award rendered under the stipulations of the Arbitration Act, except on the basis of deficiencies in form and proceedings.

An arbitration award can be enforced directly without any court confirmation or judgment. See also category 8 Debtor and Creditor, topics 8.02 Attachment and 8.04 Executions. Sweden is party both to New York Convention of 1958 and Geneva Convention of 1927.

Specific rules will apply if parties choose to provide for arbitration in Sweden under

Rules of Arbitration Institute of Stockholm Chamber of Commerce. It can be noted that American Arbitration Association and USSR Chamber of Commerce and Industry 1977 prepared "Optional Arbitration Clause for Use in Contracts in USA-USSR Trade". If parties refer to that clause, arbitration shall be in accordance with UNCITRAL Arbitration Rules and arbitration takes place in Stockholm.

Foreign.

Arbitration is considered to be foreign if it takes place outside Sweden.

A foreign arbitration award, i.e., an award rendered abroad, is valid in Sweden, except if deficient as to form or proceedings. Recognition for enforcement of a foreign arbitration award in Sweden may be obtained by application to Court of Appeal in Stockholm.

9.03 FOREIGN ARBITRATION AWARDS:

See topic 9.02 Arbitration and Award.

10 DOCUMENTS AND RECORDS

10.01 ACKNOWLEDGMENTS:

There are three types of acknowledgment in Sweden. First is that Notary Public may certify, e.g. signatures or translations. Second is that Swedish embassy or Ministry for Foreign Affairs may legalize Swedish documents. (Certain documents must be certified by Notary Public before they can be legalized, e.g. copies that lack original signature.) Third is that Notary Public may issue apostille in accordance with Convention Abolishing the Requirement of Legalisation for Foreign Public Documents, concluded Oct. 5, 1961 in Hague.

10.02 AFFIDAVITS:

Oath may be administered only by court for certain purposes. See topic 10.03 Notaries Public; category 5 Civil Actions and Procedure, topic 5.04 Evidence.

10.03 NOTARIES PUBLIC:

(Act 1981:1363).

Notaries public exist in most cities and may practice also elsewhere. Services of notaries public are not as commonly used in Sweden as in U.S. and some other countries. Notaries public do not administer oath.

See category 5 Civil Actions and Procedure, topic 5.04 Evidence.

10.04 RECORDS:

Land register in which all transfers of ownerships, changes of mortgages, etc., are entered is maintained by National Land Survey of Sweden (Sw. Lantmñteriet) which is divided into regional offices. Every transfer of real estate must be recorded in register. Fact of seller's registration combined with buyer's good faith generally gives buyer good title, except in cases of grave irregularity, such as forgery, duress, etc. (Real Property Code 1970).

Land registers referred to above are public documents and correctness of entries is guaranteed by state. Certified abstracts from register can be obtained on application.

In addition to land register mentioned above there are number of other registers, for example, company register, national register of personal status, ship register, patent register, trademark register, etc.

10.05 SEALS:

Swedish law contains no provisions concerning seals. They do not have any effect on the legality of documents.

11 EMPLOYMENT

11.01 LABOR RELATIONS:

Protection of Employment.

(Act 1982:80). Employee is normally granted basic protection of his employment. Dismissal must be preceded by efforts of transferring employee to another job. Dismissal requires objective cause. Lack of jobs and personal misbehavior may be objective cause. Employee generally has right to remain at work until dispute about dismissal has been settled. Minimum period of notice is one month. Period increases with length of service.

EC Directive on transfer of undertakings, business or parts of business, has been adopted. Buyer will assume seller's responsibilities in respect of employees transferred. Buyer is responsible also for obligations of seller with exception of pension claims.

Labor Unions Right to Co-determination.

(Act 1976:580).

Right of Negotiation.

(1) Employer bound by collective agreement to trade union: Before employer decides concerning significant change of activity, employer must on his own initiative summon to negotiations with trade union. Same applies if employer wants to carry out change of working or employment conditions for trade union members. At request of trade union, employer must also in other cases negotiate with union before issuing decision which affects members of union; (2) employer not bound by collective agreement: If employer's decision particularly concerns working or employment conditions of employees who are trade union members, employer must negotiate with trade union to same extent as mentioned under (1).

Right of Information.

(1) Employer bound by collective agreement to trade union: Employer shall (a) keep trade union to which it is bound by collective agreement continuously informed of development of production and economy of business and also of guidelines for personnel policy, and (b) allow trade union to which it is bound by collective bargaining agreement to review bookkeeping material and other documents regarding business to extent necessary for union to be able to look after interests of its members. (2) Employer not bound by collective agreement to trade union: Employer must provide information mentioned above under (1)(a) to all trade unions with members in work place.

European Works Council.

(Act 1996:359). Sweden has implemented EC Council Directive on purpose of informing and consulting employees of community-scale undertakings. (Council Directive 94/95/EC).

Hours of Labor.

(Act 1982:673). Normal working week is legally fixed at maximum of 40 hours, subject however to exceptions under special circumstances, in certain occupations or agreed by collective agreements, etc. Maximum overtime is 48 hours during period of four weeks or 50 hours during calendar month, with maximum of 200 hours of overtime per year.

Child Labor.

Children under 13 may not be employed at all, and special rules govern employment of children under 18. (Act 1977:1160).

Wages and salaries are preferred claims in case of bankruptcy and are guaranteed by state up to certain maximum. Setting off claims on employees against wages and salaries is prohibited without employee's consent, unless claim concerns compensation for deliberate damage caused in employer's service. Unless terminated immediately for major cause, employee is granted full wage during notice period irrespective of reason for termination.

Vacation.

Twenty-five days, excluding Sats., Suns. and holidays, paid annual vacation is compulsory by law. (Act 1977:480).

Workmen's compensation for accidental injuries and occupational diseases is legally prescribed, paid by government and financed by social security charges.

Health insurance providing free hospitalization, including cost of operations and other services, and doctors fees is legally prescribed, paid partly by individual, partly by government and financed through social security charges.

Pension.

For persons born before 1938: Old age pension regardless of income (AFP) and supplementary pension based on earned income (ATP). For persons born after 1953: old age pension based on income (income pension) and pension from individual government financed premium based system (premium pension). Persons born between 1938 and 1953 have mix of systems. Pension schemes include preretirement disability pension and survivors pension. To be entitled to start to collect income based pension, required age is 61, and to be entitled to collect guaranteed minimum pension (for persons who have had little or no income), required age is 65. However, general retirement age in Employment Protection Act is 67.

Group life insurance under private agreement is generally granted to industry employees, premiums paid by employers.

Unemployment insurance is voluntary and run by government-approved subsidized associations, initiated by labor unions, premiums included in union fees.

Labor Organizations.

Swedish labor is highly unionized, and labor unions are united into Confederation of Swedish Trade Unions (LO). Salaried employees are organized into Central Organization of Salaried Employees (TCO). Wages, salaries and other employment benefits are normally subject to industry-wide collective bargaining between said organizations and Confederation of Swedish Enterprise (Svenskt Näringsliv).

Labor disputes concerning employment agreements are generally settled by Labor Court. Where no collective agreement applies, disputes shall be brought before District Court of first instance, with right of appeal to Labor Court. There is no appeal against decree of Labour Court. (Act 1974:371).

Foreign Employers' Obligation to Pay Social Security Charges.

In principle, foreign employers pay mandatory social security with 32.42% (2008) for employees performing services in Sweden. Absent permanent establishment in Sweden social security is payable by 24.93 % (2008). But obligation is conditional for employees sent to Sweden for restricted period. If employee shall stay in Sweden less than 12 months, there is no obligation to pay social security. If stay is intended to exceed 12 months, employer becomes liable to pay social security unless treaties reduce such liability. Sweden has treaties with several countries, including U.S.A. Employees resident in Sweden taking employment with foreign employer may assume employer's liability to pay social security fees in absence of permanent establishment for foreign employer. See category 22 Taxation, topic 22.05 Employment Tax.

12 ENVIRONMENT

12.01 ENVIRONMENTAL REGULATION:

Basic Statutes.

Basic statute for protection of environment is Environmental Code (1998:808), covering pollution of land, water and air and almost all other environmental nuisances. Code also covers natural resources, water undertakings, quarries, chemical substances, health protection, waste, hazardous waste and civil liability for environmental damages.

Only fundamental environmental rules are included in Code. More detailed provisions will be laid down in ordinances by Government.

EC-regulations.

Membership in European Union has largely changed conditions for Swedish environmental legislation. EC regulations are directly valid and binding to same extent as national law. Directives on environment are gradually implemented. Environmental standards in EC rules are largely present in Swedish policies. Only provisions in EC rules, which have no parallel in Swedish legislation and require direct legislation, are considered necessary to be transformed into Swedish legal system. Government or nominated authority may issue directives for environmentally hazardous activities for precautionary measures, which may not be disregarded, based on Swedish membership in European Union.

Permit Procedures.

Ordinance on Environmentally Hazardous Activities and Health Protection (1998:899) lists most polluting and nuisance causing types of activities subject to examination procedures. For activities causing limited disturbances only, no permits are required. Instead there is obligation to notify of planned activities. There is also free sector of activities, not subject to approval, but which must meet substantive standards of general application of law. According to main rule, permit is always needed for water undertaking.

Environmental Code gives rules of conditions under which polluting activities may be carried on and provides general terms for balancing impact against benefit. It also contains rules on examination of applications.

Permit applications shall contain inter alia, environmental impact assessment, proposals for required precautionary measures preventing detrimental effects and proposals as to how activity should be inspected.

Authorities and Supervision.

Five regional Environmental Courts consider in first instance, inter alia, cases on permits for environmentally hazardous activities or water undertakings and cases concerning compensation or damages. On appeal, courts consider decisions of County Administrative Boards and other government agencies under Environmental Code.

Environmental Protection Agency is central supervisory authority. Chemicals Inspectorate functions as central supervisory authority for chemical products. County administrations and municipal committees exercise supervision of individual environmentally hazardous activities.

Polluted Areas.

Party conducting activity is primarily responsible for remediation of environmental damages caused by pollution to areas of land and water. Under some circumstances certain property owners can be responsible for remediation of some such damages. Property owner's responsibility is subordinated to that of party conducting activity. Preconditions for this are that there is no activity operator who can perform or pay for remediation, and property owner at time of purchase of property knew about pollution or ought to have discovered it. As regards land unit that is owned for private housing, it is precondition for liability that purchaser really knew about pollution.

Remediation includes investigation, after treatment and other measures to remedy environmental damage.

Responsibility for remediation is not subject to limitation under Limitations Act. If there are two or more parties responsible for remediation they shall be jointly and severely liable. It will be possible for seriously polluted soil or water to be designated environmental risk areas.

Sanctions.

Anyone infringing regulations of Environmental Code or directives issued in pursuance of code is liable to fine or maximum of six years imprisonment (grave crime). Business operator who in conduct of commercial operations neglects regulations issued under Environmental Code must pay environmental sanction charge. Charge may be SEK 1,000 at least and SEK 1,000,000 at most.

13 ESTATES AND TRUSTS

13.01 ADMINISTRATION:

Administration (Inheritance Code of 1958) of estate of decedent may be handled by heirs informally. Administrator appointed by court is no legal requirement. However, on application of heir or creditor, court appoints administrator. If decedent has appointed executor of his will, he will as rule be appointed administrator.

Administrator's main duties are to prepare and register with tax authorities statement of decedent's assets and liabilities, to collect assets and pay debts and to prepare estate for distribution among heirs. Administrator must before every Apr. 1 render account of his administration of estate for past year and render final account when estate is prepared for distribution.

See topic 13.04 Descent and Distribution.

Estates of decedents, Swedish or alien, domiciled in Sweden at time of death, are administered according to Swedish law.

If the decedent was domiciled abroad, but left property in Sweden, as a rule an administrator must be appointed. If such decedent was a Swedish citizen, the administration includes property abroad; if an alien, only property in Sweden is included. (Act 1937:81).

13.02 DEATH:

Petition to have person declared legally dead may be presented five years after day he or she for last time was known to be alive; or if it is very likely that person is deceased taking into consideration circumstances at time of disappearance, then when one year has passed; or if disappearance took place in connection with natural disaster, major accident or similar and it is very likely that person is deceased, then petition may be presented immediately. If it has been proved that disappeared person is deceased, petition to have person legally dead may also be presented immediately.

Petition must be filed with Tax Agency. Tax Agency summons person in question and his or her relatives to give notice to Tax Agency before certain day, fixed at least six months or two months after summons has been published in newspapers and as otherwise provided in Act. If Tax Agency on day appointed has no information that person may be alive, Tax Agency will declare him or her dead. Day of death will be fixed at most likely day of death. If it is impossible to settle such day, death day will be fixed at last day person was known alive. If five year time limit is applicable, then death day will be fixed last day of month when five year period expired.

Action for Death.

If death has been caused willfully or with negligence, wrongdoer, in discretion of court, may be liable to pay damages to such relatives of decedent who were legally entitled to support from decedent (surviving spouse, children, and, rarely, parents). Action on fatal accident occurring in transport by road, rail, sea or air must be brought within two years. See category 5 Civil Actions and Procedure, topic 5.07 Limitation of Actions. In case of motor vehicle or aircraft accident, tort liability exists irrespective of negligence. These provisions apply to citizens and foreigners alike.

13.03 DECEDENTS' ESTATES:

See topics 13.04 Descent and Distribution, 13.07 Wills.

13.04 DESCENT AND DISTRIBUTION:

(Inheritance Code of 1958). Decedent's relatives are entitled to inherit in following order:

(1) Descendants receive equal shares. If one child is dead, his issue will take his place so that each line receives an equal share.

(2) If no descendants are alive the parents or their descendants inherit. If both parents are alive they each receive half of the residue estate. If either parent is dead, his or her share is divided among the decedent's brothers and sisters or their descendants, so that each line receives equal shares. Half brothers or half sisters or their descendants inherit on the same basis as other children the share that should have been received by their father or mother.

(3) If neither parent nor their descendants are alive, the grandparents, or, if there are no grandparents, the uncles and aunts, inherit.

Other relatives do not inherit.

When married person dies, residue estate goes to surviving spouse, except if decedent leaves direct heir, who is not also surviving spouse's direct heir. Upon surviving spouse's death residue estate goes to direct heirs in marriage between spouses or—if there are no such heirs—to spouses' parents, brothers or sisters or their descendants.

Surviving partner of same sex, in Registered Partnership, is treated as surviving spouse. Since July 1, 2006 grandparent includes parent of person giving consent to insemination of partner.

Illegitimate children or their descendants inherit and are inherited from as if they were born in wedlock.

Adopted children and their descendants inherit and are inherited from as if they were adopter's children in wedlock. Adoption cuts off the right of inheritance between the adopted child and its natural relatives, except that if one spouse adopts the child of the other spouse, then the right of inheritance is the same as if the child were the mutual child of the spouses.

If no heirs are found the estate goes to a so-called inheritance fund to promote the education and upbringing of children.

Estate inventory must be drawn up and signed within three months after death and filed with appropriate tax authority within one month thereafter. On Dec. 16, 2004, Swedish Parliament approved to abolish Swedish inheritance and gift tax. As consequence of tsunami disaster in Indian Ocean, which claimed many Swedish victims, Swedish Parliament has approved bill that moves up effective date of abolition of inheritance and gift tax to Jan. 1, 2005 from Dec. 17, 2004.

Distribution of estate may not take place until decedent's debts are paid or funds for payment have been allocated or settlement has been made to effect that debts will not fall upon heir. If estate is distributed before such measures have been taken, property distributed or part of it shall go back to estate. Heir can never be personally liable for decedent's debts unless heir causes damage to creditors.

See topic 13.01 Administration.

13.05 EXECUTORS AND ADMINISTRATORS:

See topic 13.01 Administration.

13.06 TRUSTS:

Trusts in meaning of law of equity are unknown to Swedish law, since there is no system of equity jurisprudence in Sweden. See category 2 Business Organizations, topic 2.04 Foundations.

13.07 WILLS:

(Inheritance Code of 1958). Person who is 18 years of age or over, or who is or has been married even though not 18 years of age may dispose of his or her property by will. Further person who has reached 16 years of age may dispose by will of his or her earned income.

To be valid a will must be made in writing and signed by the testator in the presence of two witnesses. If in case of emergency a will cannot be made in such a form, it is possible to make an oral disposition of property before two witnesses or a holograph document signed by the testator. Such emergency wills are not valid if during a succeeding period of three months the testator could have made a normal will. Alterations and codicils to wills must follow the rules set out above.

If a decedent, having direct heirs, gives away so much of his estate by will that amount which would be received by direct heirs is less than one-half of that to which they would be entitled under inheritance law, they are entitled to apply for alteration of will.

Only lives in being at testator's death and their heirs may take under will, latter to extent that legacy falls to them absolutely at death of ascendant or other legatee. Lives in being include child begotten at testator's death and born alive thereafter. No inequality may be stipulated between such children of same parent as are unborn or unbegotten at testator's death.

After death the legatees or the administrator or the executor, as case may be, must produce will to legal heirs. If legal heirs do not contest validity of will by starting legal proceedings against legatees within six months from date when will was produced to them terms of will become binding.

14 FAMILY

14.01 ADOPTION:

A person of at least 25 years, jointly with his spouse if married, may petition the court for leave to adopt another person. No maximum age of adoptee is stipulated. (Parent Code of 1949). Homosexual couples registered in legally recognised partnership have same rights as married couples to apply to become adoptive parents. However, for inter-country adoptions, limitations and terms laid down by children's countries of origin will apply.

Consent Required.

Consent of parents or guardian is required if adoptee is under 18, and of adoptee himself if over 12.

Conditions Precedent.

No decree of adoption may be entered unless the court finds that the adoption will be to the benefit of adoptee and applicant has brought up child, or will bring up child, or there is other specific reason in favor of adoption. Payment of compensation by natural parents to adopter or vice versa is not allowed.

Jurisdiction.

Court of first instance in district where adopter resides (City Court of Stockholm if a nonresident).

Proceedings.

Report by the Children Welfare Committee in the district where adoptee resides is required.

Name.

Adoptee takes adopter's name.

Effect of Adoption.

Gives adoptee all rights of natural child. See also category 13 Estates and Trusts, topic 13.04 Descent and Distribution.

Foreigners.

(Act 1971:796). Adoption is exclusively judged under Swedish law if applicant is Swedish citizen or domiciled in Sweden. If adoptee is under 18 it shall be carefully considered if it would be of great disadvantage to adoptee if adoption would not be valid in native country of adoptee.

Foreign decree of adoption is valid in Sweden if applicant was citizen of or domiciled in foreign country when leave was given and, if adoptee was Swedish citizen or domiciled in Sweden, adoption is approved by Government.

14.02 COHABITATION:

See topic 14.04 Husband and Wife, subhead Cohabitation.

14.03 DIVORCE:

(Marriage Code of 1987). Either of spouses may obtain decree of divorce without cause upon joint or separate application. If only one of spouses wants divorce or if both or one of them has custody of child under 16, time for consideration must precede divorce. In such event either spouse has to file renewed request for divorce not less than six months but not more than one year after application was made. Otherwise, question of divorce is dropped. Separation is no requirement. Divorce is granted upon application forthwith if spouses have been separated for two years as well as in case of bigamy.

After divorce each spouse is responsible for his or her own support. In case of special need, reasonable alimony may be payable during transition period.

If spouses are separated while married, and on divorce, joint custody of children is normal but if parents disagree, court rules with regard to best interest of children.

Court decisions and agreements as to alimony payments or custody of children may be altered in case circumstances so justify. For effect of divorce on property interests, see topic 14.04 Husband and Wife.

Foreign Divorce.

Cases of divorce between aliens may be tried in Sweden under Swedish law if defendant is domiciled in Sweden or if plaintiff is domiciled in Sweden for at least one year. (Act 1904:26).

14.04 HUSBAND AND WIFE:

(Marriage Code of 1987). Basic principle underlying personal legal rights of husband and wife is that both stand as individuals enjoying equal freedom and right to decide on issues concerning family and home, including care of children, etc.

As rule, husband and wife remain owners of his or her respective property and earnings, but acquire undivided one-half interest in each other's property. Interest in such community property is realized when distributing property as result of divorce or death. Spouses are required to care for his/her community property during marriage to prevent that its value is not materially diminished to detriment of other spouse.

Marriage Code expressly provides that neither spouse may, without written consent of other party, dispose of or mortgage real estate which is community property.

Property may be deemed to be separate property of spouse, as opposed to community property, if property was declared separate by marriage settlement, or if property was acquired as gift from third party or if by inheritance on condition to be separate property of receiver.

Income from separate property will be considered as community property unless provided otherwise. Main effect of separate property is that spouse will not have dormant interest in separate property of other party.

Spouses may agree by marriage settlement that community property shall be considered separate, or vice versa. Marriage settlement may be entered into before or after wedding. In order for such settlement to be valid vis-á-vis third parties it must be registered with court and in National Marriage Settlement Register.

Spouses have general right to enter into contracts with each other. In order to protect creditors, gifts between spouses must be registered with court. This does not apply to ordinary gifts, value of which is not disproportionate to economic circumstances of donor.

As to debts, each spouse is responsible for his or her own debts, but spouses are jointly and severally liable for debts incurred jointly by them.

Cohabitation.

(Cohabitees Act 2003:376). Cohabitees Act applies only to cohabitees' joint home and joint property. By Cohabitees is meant two people who live together on permanent basis as couple and who have joint household. Whether cohabitees are of opposite sexes or of same sex is of no importance. If cohabitation is terminated, cohabitees are entitled to share joint home and joint property (division of property), but only property which has been acquired in view of cohabitation will be included when determining each party's share of such property. Request for division of property must be made no later than one year after relationship ended. Cohabitees who want to keep their financial affairs separate may conclude agreement to effect that rules on division of property contained in Cohabitees Act must not apply to their cohabitee relationship. They may also agree that certain property must not be included in division of property. Agreement must be in writing and signed by both cohabitees.

Registered Partnership.

(Act 1994:1117). Two persons of same sex may request registration of their partnership, provided that at least one of partners is Swedish citizen, domiciled in Sweden. Registered partnership has substantially same legal effect as marriage. Registered partnership is dissolved by death or by court decision.

14.05 INFANTS:

Age of majority, 18.

Infants over 16 may dispose of earnings from own work. Infants over 16 may, subject to guardian's permission, carry on business and make valid contracts within its scope. Otherwise infants' contracts made without consent are voidable by both guardian and opposite party.

In existing marriages, or when parents have custody jointly, both parents are guardians. In other cases parent having custody is guardian unless particular guardian has been appointed. Guardians' administration of minor's property is supervised by Chief Guardians.

See also topics 14.01 Adoption, Divorce, Marriage; category 11 Employment, topic 11.01 Labor Relations.

14.06 MARRIAGE:

(Marriage Code of 1987). Marriage before age of 18 requires permission by Provincial Government. Further obstacles to marriage are consanguinity or existing marriage.

Before marriage can take place nupturients have to apply to civil registry for an investigation to be made of obstacles to marriage. Application must be accompanied by nupturients' declaration in writing that no obstacles exist. Wedding must be performed by ministers, judges or person holding a license.

15 FOREIGN TRADE AND COMMERCE

15.01 CUSTOMS:

Sweden is member of European Union. Goods imported to Sweden from third countries are subject to Common Customs Tariff based on Harmonized System Nomenclature. See also European Union Law Digest and topics Exchange Control, Foreign Trade Regulations.

15.02 EXCHANGE CONTROL:

There are no exchange control restrictions in place. However, government may after consultation with Central Bank impose exchange control restrictions in exceptional situations such as, e.g., war, epidemics or extraordinary short term movement of capital. However, Central Bank still requires notification of foreign exchange transactions for statistical and tax control purposes.

See also topics 15.01 Customs, Foreign Trade Regulations; category 1 Introduction, topic 1.01 Currency.

15.03 FOREIGN EXCHANGE:

See topic 15.02 Exchange Control; category 1 Introduction, topic 1.01 Currency.

15.04 FOREIGN IMPORTS:

See topic 15.06 Foreign Trade Regulations; category 22 Taxation, topic Taxes.

15.05 FOREIGN INVESTMENT:

See topic 15.02 Exchange Control; categories 2 Business Organizations, topic Corporations; Citizenship, topic Aliens.

15.06 FOREIGN TRADE REGULATIONS:

With exception of certain products of dangerous or other particular nature, e.g. explosives, weapons, pharmaceutical products, intoxicating liquors, poisons, narcotics, tobacco, living animals and plants, goods may in general be freely imported into Sweden. Licence is required for import of motor cars and agricultural products. Export of products from Sweden is free with very few exceptions, e.g. weapons and war materials including certain high-tech products which may be classified as parts/components in such material.

See also topics 15.01 Customs, 15.02 Exchange Control.

16 HEALTH

16.01 FOOD AND DRUG REGULATION AND CONTROL:

Foodstuff.

Swedish Food Act (*SFS 2006:804*) applies in Sweden as supplement to EC regulations regarding food. Swedish Food Act is applicable to foodstuff as defined in Regulation (EC) No. 178/2002 of European Parliament and of Council of 28 Jan. 2002 laying down general principles and requirements of food law and laying down procedures in matters of food safety (``Regulation''). Food is defined in Regulation as any substance or product, whether processed, partially processed or unprocessed, intended to be, or reasonably expected to be ingested by humans including drinks, chewing gum and any substance, including water, intentionally incorporated into food during its manufacture, preparation or treatment, with exception of products to which Swedish Act on Medicinal Products (*SFS 1992:859*) is applicable. Swedish Food Act also includes snuff (Sw. *snus*) and chewing tobacco as foodstuff.

Objectives of Swedish Food Act are to ensure high level of protection for public health and for consumers' interests in relation to foodstuff. National Food Administration (``NFA''), which is government body reporting to Ministry of Agriculture, is central supervisory authority for matters relating to food, including drinking water. NFA issues regulations, exercises supervision and carries out inspections. NFA also issues regulations, *e.g.*, on labeling of food.

Medicinal Products.

Basis for Swedish legislation regarding medicinal products is found in Swedish Medicinal Products Act (*SFS 1992:859*). This act is framework law containing principles for regulations within pharmaceutical area. Act is directed toward control of medicinal and paramedicinal products. Fundamental purpose of Swedish Medicinal Products Act is protection of public health and patient's security and act contains rules on how supervisions and control of pharmaceutical market shall be conducted and also penal regulations. EC Directives are implemented into national legislation through acts and ordinances by Swedish Government and into provisions by Swedish Medical Products Agency. Swedish medicinal legislation is therefore, basically same as that of rest of EU.

Swedish Medical Products Agency (``MPA'') is Swedish national authority responsible for regulation and surveillance of development, manufacturing and sale of drugs and other medicinal products and also issue regulations within pharmaceutical area.

Regulatory system is built up around preparatory control before approval for sale, and post-control and general supervision of adaptation and suitability of production, etc. As of July 1, 2004, Product Safety Act (*SFS 2004:451*) also applies to medicinal products intended for or which can be expected to be used by consumers.

Swedish Medicinal Products Act defines medicinal products as substances or combinations of substances administered with statement that they have properties for prevention or treatment of human or animal diseases, or that can be used on or be provided to human beings or animals for purpose of recovering, correcting or modifying physiological functions through pharmacological, immunological or metabolic effect or for making diagnosis.

In area of pharmaceuticals, as well as in area of cosmetics, self-regulatory rules are very important. Swedish Association of Pharmaceutical Industry (``LIF'') branch organisation for pharmaceutical companies has established ``Rules Governing Drug Information in Sweden''. Rules are partly based on codified laws and pharmaceutical legislation and other enactments or directives issued by government agencies, and partly on nonstatutory provisions, essentially various codes of conduct.

LIF maintains system of self-regulation. Main purpose of this is realizing industry's aim of ensuring that information supplied by pharmaceutical companies, as well as their other market activities keep to high ethical standard. For this purpose two agencies have been established, Statutes of Pharmaceuticals Industry's Information Examinor (IGM) and Information Practice Committee (NBL). Agencies' activities consist primarily of monitoring market and assessing cases.

Cosmetic and Hygiene Products.

Regulations regarding cosmetic and hygiene products are found in Environmental Code, ancillary ordinances and MPA's regulations. Swedish legislation in area is mostly based on EC directives. Ultimate responsibility for safety of cosmetic and hygiene products and that regulations are complied with rests upon manufacturer and importer.

Ordinance on Cosmetics and Hygiene Products (*SFS 1993:1283*) defines cosmetic and hygiene products as substances or other preparations intended to be applied to human body's external parts or on teeth and mucous membrane in mouth cavity, for sole or main purpose of cleaning or perfuming, changing appearance, correcting odor or protection.

MPA and municipalities supervises that regulations are followed and MPA's supervisory control is carried out through written inquiries, inspections, analyses of products, *etc*.

Act on Medical-Technical Products (1993:584).

Act defines medical-technical products as products that, according to information given by producer, shall be used separately or in combination with something else, on human beings, in order to: (1) Prove, prevent, supervise, treat or alleviate disease; (2) prove, supervise, treat, alleviate or compensate injury or dysfunction; (3) examine, change or replace anatomy or physiological process; or (4) for fertilization and birth control. As from July 1, 2004, new Product Safety Act (2004:451) will also apply to medical-technical products intended for or which can be expected to be used by consumers.

Medical Products Agency, government body reporting to Ministry of Health and Social Affairs, is responsible for regulation and surveillance of development, manufacturing and sale of drugs and other medicinal products. In addition, MPA is responsible for providing information about medicines, giving permission to carry out clinical trials, approving licences and controlling natural remedies and other medicine-related products.

Swedish companies within medical devices sector have association similar to LIF, Association for Medical Technology in Sweden, interest organization that concludes pooling agreements, etc., on behalf of its members which constitute 90% of total turn-over in medical technology sector in Sweden.

17 IMMIGRATION

17.01 ALIENS:

In general foreign citizens enjoy same civil rights as Swedish citizens. Aliens are expressly entitled to inherit property in Sweden on equal terms with Swedish citizens. Generally, concept of nationality has been abandoned and concept of domicile has been adopted regarding civil capacity and family rights and other fields of law.

Exceptions.

Alien who is not citizen of Denmark, Norway, Finland or Iceland must generally have residence permit to stay in Sweden for more than three months. For citizens of U.S., Canada, most European countries and increasing number of countries in other continents, no visa is required to enter Sweden; valid passport is sufficient.

Corporations Owned or Controlled by Aliens.

No disqualifications apply to such corporations. Right of particular foreign companies, for example credit institutions, securities companies, financial institutions and foreign insurers to conduct business activities in Sweden is governed by separate legislation. See also categories 2 Business Organizations, topic Corporations, subhead Foreign Corporations and Economic Associations.

Citizenship.

Swedish citizenship through naturalization may normally be obtained by alien who: (i) is able to prove his/her identity; (ii) is over 18 years old; (iii) has permanent residence permit; (iv) has been domiciled in Sweden for at least two years if he/she is Danish, Finnish, Icelandic or Norwegian citizen, four years if he/she is stateless or refugee or five years as regards other aliens and (v) has led respectable life.

See topic 17.02 Immigration.

17.02 IMMIGRATION:

Residence permit in accordance with Swedish Aliens Act (2005:716) is required for aliens who are not citizens of one of Nordic countries to stay in Sweden for more than three months, unless visa valid for longer period of time has been granted. Residence permit must normally be obtained prior to entry into Sweden. Visa is required for citizens of several countries located outside of Schengen area for shorter visits in Sweden than three months. Citizens of EU/EEA countries or Switzerland and their immediate relatives may apply for residence permit after entry into Sweden. EU/EEA citizen who is employee, self-employed person, student or who has sufficient funds to support himself/herself is entitled to reside in Sweden, i.e. he/she and his/her family members are entitled to stay in Sweden for more than three months without residence permit. Person who has right to reside in Sweden shall register with Migrations Board no later than three months after entering into Sweden.

Work permit is required to work in Sweden due to employment in Sweden or abroad, unless alien has permanent residence permit or is citizen of EU/EEA country or Switzerland. Work permit must normally be obtained prior to entry into Sweden. If alien is to work for more than three months in Sweden, residence permit is also required. Application forms are available at Swedish embassies and consulates.

Exemption from requirement for work permit applies, for total period of less than 12 months, for alien who has specialist tasks in international group of companies and works temporarily in Sweden in that capacity.

18 INTELLECTUAL PROPERTY

18.01 COPYRIGHT:

(Swedish Copyright Act 1960:729).

Scope.

Creator of literary or artistic work has copyright therein, whether it is in writing or speech, and whether musical, dramatic, cinematographic or photographic work, work of fine arts, architecture, applied art, or expressed in some other manner. No registration is required or available for copyright protection. Computer software, databases and photographs are protected under Copyright Act. Stipulations regarding computer programs are also applicable to preparatory design material for computer programs. Translator or adapter acquires copyright in his translation or adaptation, however not in conflict with copyright in original work.

As EU member state, Sweden is subject to EC Directive 2001/29/EC, which was implemented into Act on July 1, 2005. Amendments introduced provide, e.g., authors with exclusive right to authorize or prohibit any communication to public of their works, by wire or wireless means, including making available to public of their works in such way that members of public may access them from place and at time individually chosen by them.

Creator's moral rights are protected: name of creator must be stated when his work is reproduced or published, and his work may not be altered in any manner which is prejudicial to his literary or artistic reputation, or to his individuality.

Limitations.

Exclusive copyright is subject to certain exceptions for religious, cultural or other social purposes, e.g. reproductions for private use; photographic reproductions in archives and libraries; quotations; reproduction of newspaper articles, or of works in anthologies for education; reproduction in braille; performance for religious service or education; distribution or public exhibition of copies of published works; use in administration of justice or for public security. In some of these cases compensation must be paid to creator.

Transfer.

Copyright may be transferred, in whole or in part, by assignment, inheritance or will. Act contains rules regarding assignment in connection with public performance, publishing or cinematographic works, however applicable only in absence of other agreement.

Copyright to computer programs created by employee as part of his/her employment, or after specific instructions of employer, is automatically transferred to employer, unless otherwise agreed.

Moral rights may be transferred only to limited extent.

Copyright is exempt from legal seizure as long as it remains with creator or his/her heirs.

Duration.

Protection arises at moment that work is created and continues until end of 70th year after (last surviving) author's death or, in case of photographic pictures at end of 50th year after production, and of databases at end of 15th year after production.

Performing Rights (Droits Voisins).—An artist's performance of literary or artistic works may not, without his consent, be broadcast, televised or recorded on phonograph records, films or other media. Sound recording by an artist may not be re-recorded without his consent until after 50 years. Phonograph record or other sound recording may not be copied or re-recorded without consent of producer until after 50 years. If sound recording is used in radio or television before end of 50 year period, compensation must be paid both to producer or recording and performing artist Radio or television broadcasts may not be rebroadcast or recorded without consent of broadcasting company, except for private use.

Liability.

Violation of copyright may entail damages and, if done willfully or with gross negligence, punishment by fine or imprisonment.

Applicability of the Act.

Copyright Act applies to works of Swedish citizens and persons domiciled in Sweden, to works of stateless persons or refugees having residence in Sweden, to works first published in Sweden, and to works first published by certain international organizations. Sweden is party to Berne Convention and Universal Copyright Convention, to effect that Swedish Copyright Act is applicable also in relation to those other countries which have ratified said convention or conventions. However, Swedish Act does not provide protection for a work, if period of protection has expired in country of origin.

See topic 18.02 Patents, subhead Design Patents.

18.02 PATENTS:

(Swedish Patent Act 1967:837). Patent may be granted for invention which can be utilized in industry provided it is distinctly different from what is known on day of application. Patent may be secured only by inventor or by his heirs or assignees. Foreign inventors must have a representative resident in Sweden.

When patent is granted, it is registered and published by Patent Office in print with description of invention. Anyone may file written objections within nine months after patent is granted. As a rule, patents are granted for a period of 20 years from date of application. In addition to certain fees in connection with application, annual fees increasing successively are payable in order to maintain patent.

If patent is not exercised to a considerable extent within four years of application, and also three years of its being granted, court may upon application by any other party grant compulsory license for applicant to use patent on terms and conditions determined by court. Compulsory license under patent may also be granted to holder of patent which cannot be utilized without such license. Compulsory license may further be granted for business use if warranted by important public interest reasons, and also to anybody who used invention professionally when made object of patent application.

Sweden is a party to revised International Patent and Trademark Convention of June 2, 1934, Patent Cooperation Treaty of June 19, 1970 and European Patent Convention of Oct. 5, 1973. It is thus possible to apply for both European and international patents.

Designs.

(Swedish Design Protection Act 1970:485). Protection of design can be obtained through registration provided that design is new, i.e., not earlier published and essentially different from other designs known on day of application. Registered design is valid from date of application and for period of five years from registration. Proprietor may renew registration for four additional five-year periods, except for spare parts where aggregative time of registration is 15 years. Effect of design registration is that copy or imitation of design for professional use is reserved to proprietor. As EU member state, Sweden has incorporated EC Directive 98/71/EC on Community Designs into the Design Patents Act. Community Design Regulation ([EC] No. 6/2002) is also applicable in Sweden. Community Design Regulation provides for single Community Design registration, without separate formalities, which is enforceable in all of European Union Member States. It also provides for short term unregistered design protection.

Sweden is a party to revised Paris Union of 1883 regarding industrial copyright. See also topic 18.01 Copyright.

18.03 TRADEMARKS:

(Swedish Trademark Act 1960:644). After written applications to competent authority, trademarks are protected by being registered in central register. Registration must be renewed every ten years. Exclusive right may also arise from use of trademark in manufacture, trade or other business in Sweden. Registered trademarks may be pledged by registration in central register.

Trademark Act recognizes various devices as trademarks, protection of highly respected trademarks, and obligation to make use of trademarks.

Sweden is a party to the revised International Patent and Trademark Convention of June 2, 1934, as well as Madrid Agreement and Protocol on international registrations of trademarks.

As EU member state, Sweden is also subject to Rules of Community Trademark

Council Regulation (EC) No. 40/94 of Dec. 20, 1993. These rules are added to Trademark Act.

19 LEGAL PROFESSION

19.01 ATTORNEYS AND COUNSELORS:

Jurisdiction Over Admissions.

Admission to membership of national Swedish Bar Association is granted by its Board. Authority to grant admission is vested in Bar Association by law. Advocate is person who is member of Association.

Address: The Swedish Bar Association, P.O. Box 27321, S-102 54 Stockholm, Sweden. Telephone +46 8 459 03 00, telefax +46 8 660 07 79, email: info@advokatsamfundet.se.

Eligibility.

Admission to membership of Bar Association may be granted to person who is citizen of and domiciled in Sweden or in another country within European Economic Area, has Swedish law degree (juris kandidat), has practised law for five years, of which three years under supervision of Advocate, or on his own, is known for his integrity, has shown that he is suitable for profession.

Examination.

As from Jan. 1, 2004, separate examination is required as member of Swedish Bar Association. Until then, no separate examination is required, but mandatory ethics seminar must be attended.

Admission Pro Hac Vice.—Advocates do not have monopoly. Consequently, lawyers who are not members of Association may practise as counselors, but may not use title Advocate. In order to appear in court counsel must have sufficient knowledge of Swedish language.

Privileges.

Members of Association are privileged in two respects: title of “Advocate” is reserved for them, and only member of Association can be assigned by court as defence counsel in criminal cases.

Disabilities.

Advocate may not be employed in service of government or municipality or by private person other than Advocate.

Compensation.

Fees charged shall be reasonable. Client who is dissatisfied with fee has right to call for arbitration under statute of Association at no cost to client.

Professional Ethics.

Association has issued guidelines on rules of conduct for Advocates, and exercises its disciplinary function by disciplinary committee, which may render furlings on proper conduct as well as impose admonition, warning or disbarment.

20 MORTGAGES

20.01 CHATTEL MORTGAGES:

See category 8 Debtor and Creditor, topic 8.09 Pledges.

20.02 COLLATERAL SECURITY:

See category 8 Debtor and Creditor, topic 8.09 Pledges.

20.03 MORTGAGES:

Mortgages on real estate to secure payment of claim are obtained through owner's application thereof to National Land Survey (Sw. Lantmñteriet). National Land Survey issues mortgage certificates representing specified amounts, which are used as security for debts and pledged to lender. As alternative to issuance of physical mortgage certificates, primarily Swedish banks use digital mortgages. Use of digital mortgage certificates is nowadays far more common than use of physical mortgage certificates. Digital mortgage exists only as entry in public Mortgage Deed System maintained by National Land Survey in which all mortgages are recorded. Only registered land owner, leaseholder or anyone with power of attorney may obtain extract from Mortgage Deed System regarding existing mortgages, involving any particular piece of real property. In general mortgage first applied for has priority in relation to subsequent applications. If debt secured by mortgage is not paid when due, mortgagee may through intervention by Enforcement Authority have property sold at public auction and receive payment from proceeds. (Execution Code 1981, c. 12).

See also category 8 Debtor and Creditor, topic 8.03 Bankruptcy.

Chattel Mortgages.

See category 8 Debtor and Creditor, topic 8.09 Pledges.

21 PROPERTY

21.01 ABSENTEES:

Where an heir, a legatee or a beneficiary is missing, and where it is uncertain whether or not a decedent has left heirs, and generally in other cases of need of protection and administration of property of absentees, the court may appoint a trustee to represent the interest of the absentee during his absence. See also category 13 Estates and Trusts, topic 13.02 Death.

21.02 CONVEYANCES:

See topic 21.04 Deeds.

21.03 CURTESY:

See category 14 Family, topic 14.04 Husband and Wife.

21.04 DEEDS:

Oral agreements, as a rule, are binding. However, the law requires written contracts in certain cases, for example contracts involving agreement to purchase real property, marriage settlements, etc.

See also categories 10 Documents and Records, topic Records; Family, topic Husband and Wife.

21.05 DOWER:

See category 14 Family, topic 14.04 Husband and Wife.

21.06 POWERS OF ATTORNEY:

Power of Attorney.

(Act 1915:218).

Anyone who holds himself out as having a power of attorney is responsible for such a statement and is therefore liable to damages against a third party in case the principal is not liable. In principle a legal act is not binding for the principal against the third party after the latter knows or should have known that the holder of the power of attorney exceeded his authority.

If the principal dies, the power of attorney normally remains effective. If a principal is legally declared incapable of dealing with his affairs, any legal act by the agent has no more effect than if it had been done by the principal. If the principal is declared bankrupt, a third party is not entitled to any rights in the bankruptcy based on any legal act of the agent. (Act 1915:218).

A power of attorney authorizing legal proceedings may be made either orally before the court or by a written document. (Court Procedure Code, c. 12). Such power of attorney may, under certain circumstances, be given by telegram.

Written power of attorney is always required in cases of transferring or mortgaging real estate.

21.07 REAL PROPERTY:

Real property is the land and what pertains thereto, such as buildings, permanent improvements, fences, trees, manure, etc. To a building pertains in general anything necessary for continued use of building. To factory building pertains machinery and other equipment brought to property to be used in activity there. Vehicles, office equipment and hand tools do not, however, pertain to real property. If ground and building have different owners then latter is personal property. (Real Property Code 1970).

Three Dimensional Property.

According to law, property can be defined both horizontally and vertically.

See also categories 4 Citizenship, topic Aliens; Documents and Records, topic Records; Mortgages, topic Mortgages.

22 TAXATION

22.01 ADMINISTRATION:

Swedish Tax Administration comprises as of 1 Jan. 2004 Swedish Tax Agency. New tax administration is formed by merging of National Tax Board and ten regional Tax Authorities.

Tax Agency reports to government through Ministry of Finance, although as authority it is independent of government. This means that Tax Agency, in line with other administrative authorities, is only governed by laws, ordinances, general instructions and allocation of funds. Individual tax matters are handled by Tax Agency without involvement of government.

Tax Agency is headed by Director General and employs approximately 11,500 employees.

Primary activities at Tax Agency are: handling all income, VAT and tax collection returns, tax assessments of employees, employers and legal entities, decisions on VAT and employers' contributions, real estate tax assessment, control of taxes and fees including auditing, legal proceedings, and population registration.

22.02 ALCOHOL, BEVERAGES AND TOBACCO TAXES:

Alcohol Tax.

Tax is payable on sales within country of beer, wine and spirits. Tax varies according to alcohol concentration and is SEK 1.66/litre and percentage volume for beer, SEK 7.58 - 45.17/litre for wine and similar beverages and SEK 501.41/litre of pure alcohol for spirits.

Tobacco tax is SEK 0.31/cigarette and 39.2% of retail price, however, no less than SEK 1.24/cigarette, and SEK 1.12 on each cigar and cigarillo. Pipe tobacco is taxed at SEK 1,560/kg. Tax on snuff is SEK 336/kg and on chewing tobacco SEK 402/kg.

Other excise duties include gambling tax, premium tax on group life assurance policies, advertising tax, lottery tax and tax on pesticides, fertilizers and natural gravel.

Tax on alcohol gives state SEK 10.6 billion, tax on energy, carbon dioxide and sulphur SEK 66 billion, tax on advertising SEK 1.3 billion and tax on tobacco SEK 8.6 billion. Income of over SEK 110 billion is generated through excise duties.

22.03 BUSINESS TAXES:

Business Income.

Rules governing taxation of business income are generally same for both limited companies and business activities carried on by individuals. Basically, all income from business activities is taxable. Income from capital falls under business income if capital in question has been invested in business.

Tax rates for individuals who carry on business operations are same as for income from employment. Limited companies, however, pay only 28% of their taxable income in tax.

Taxable income is calculated according to “generally accepted accounting principles” and is therefore linked strongly to company's accounts. Calculation is based on basic principles of business economics with minor adjustments for pure taxation reasons.

Business expenses incurred in obtaining or safeguarding income subject to taxation are deductible.

Stocks are valued at lower of acquisition value and net realisable value, based on first in first out (FIFO) principle.

Depreciation is permitted annually on assets invested in operations. For equipment, one method used allows depreciation of 30% per annum on book value of remaining equipment. Alternatively, depreciation can take place at rate of 20% per annum on acquisition value of remaining equipment. Cost of equipment with economic life of less than three years and equipment of lesser value can be depreciated in full. Term equipment of lesser value normally refers to equipment costing less than SEK 5,000. For medium-size companies limit is SEK 10,000 and for large companies limit is SEK 20,000.

In case of buildings, depreciation on straight-line basis is permitted at rate of 2-5% of acquisition cost depending on how building is used.

Employers' contributions are deductible when calculating taxable income from business activities. For further details, reference can be made to section dealing specifically with these charges.

Profit equalisation is possible in majority of business activities. Maximum of 30% of profit may be allocated by individuals who carry on business and natural persons who are partners in Swedish partnerships. Maximum of 25% may be allocated by legal persons. Taxpayer must add fictitious interest based on allocated amounts to business income. Amount allocated should be reversed and subjected to taxation within six years of year of its allocation.

Losses may be carried forward from year to year (with no time restriction). In case of purchased loss-making companies, or acquisition by loss-making company of another company, however, there are certain restrictions on losses carried forward.

Limited companies are permitted to have alternative financial year which ends on last day of Apr., June, Aug. or Dec. Dispensation can be granted for financial year that deviates from this.

22.04 CONSUMPTION TAXES:

Tax on Electric Power.

Energy tax of SEK 0.27/kWh is levied on electric power, and at lower rate of SEK 0.178/kWh in certain municipalities in northern Sweden. Manufacturing processes in industrial operations are subject to tax of SEK 0.005/kWh on electric power.

22.05 EMPLOYMENT TAX:

Income from Employment.

Taxation of income from employment is implemented by means of deduction of: approximately 29-35% in municipal tax, state tax of 20% on earned income between SEK 340,900 and SEK507,100 and 25% on any income above this (income year 2008).

Typical forms of income that fall within this category are: salaries, pensions, periodic payments and other similar cash payments, all types of benefits, e.g. meals, free use of company car and free travel, compensation for expenses, daily allowances, travel allowances etc.

There are other forms of income that can be classified as income from employment. These include certain transactions between partners in close company and company itself.

Deductions within income from employment category are quite limited. In principle deduction is permitted for costs necessary to acquire income in question. However, there must be very strong link between costs and income. Deductions granted apply mainly to: travel to and from work, business travel using private car, increased living expenses in conjunction with business travel.

Separate rules apply to seamen through pay as you earn system.

Employer is obliged to pay social insurance contributions for each employee. Definition of salary also includes other forms of remuneration paid by employer. Person who is self-employed is obliged to pay his/her own social insurance contributions.

Charges for employer amount to 32.42% of salary (income year 2008). People who are self-employed pay 30.71% of net income from business operations (income year 2008).

Social insurance contributions are paid along with preliminary tax. For self-employed persons there is reconciliation procedure linked to taxation of business activities.

22.06 EXCISE TAXES:

Excise Duties.

Special consumer taxes, excise duties, are levied on selected goods and services. Majority of excise duties were introduced for variety of reasons other than simply providing state with income. Duties are also means of controlling consumption. Typical excise duties include duties on energy, spirits, wine, beer and tobacco. These are among oldest taxes in Sweden.

Of 15 different excise duties, few can be mentioned in particular. See topics 22.04 Consumption Taxes, subhead Tax on Electric Power; 22.07 Gasoline and Special Fuels Taxes, subhead Tax on Fuel.

22.07 GASOLINE AND SPECIAL FUELS TAXES:

Tax on Fuel.

Fuels, e.g. petrol, oil, coal and LPG (liquefied petroleum gas), are subject to energy tax and carbon dioxide tax. Energy tax on petrol varies from SEK 2.95 to SEK 3.68 per litre, and carbon dioxide tax is SEK 2.34per litre.

Diesel oil is subject to energy tax of SEK 764-1, 663/cubic metre depending on environmental classification, and carbon dioxide tax of SEK 2, 883/cubic metre. Energy tax on heating oil is SEK 769/cubic metre.

There is also sulphur tax, which is levied at SEK 30/kg sulphur for solid or gaseous fuels and for liquid fuels SEK 27/m 3 for each 1/10th of percentage by weight of sulphur in excess of 0.05% by weight.

22.08 GIFT AND INHERITANCE TAX:

See category 13 Estates and Trusts, topic 13.04 Descent and Distribution. Effective as of 17 Dec. 2004, no Swedish inheritance tax is levied on estate of deceased who died after 16 Dec. 2004. If deceased died on 16 Dec. 2004 or earlier, inheritance tax is levied on estate left by individual who was resident in Sweden, permanently resided in Sweden, was Swedish citizen or married to Swedish citizen and has not been living outside of Sweden for more than ten years before time of his death.

Gift tax was abolished effective as of 17 Dec. 2004. Gift tax is levied on gifts before 17 Dec. 2004, if donor was resident in Sweden at time of donation or related to certain Swedish based assets.

22.09 INCOME TAX:

Income from Capital.

Generally speaking all income that falls into this income category is taxed at rate of 30% (2008) whatever size of income.

Examples of income are: dividends; interest; gains on sale of shares, bonds, real estate, personal belongings and similar assets; income from letting apartment or private residence where this does not constitute business income.

On sale of private dwelling only 22/30 of profit is taxable. Payment of tax can be deferred if equivalent dwelling or tenant-owner dwelling is purchased within year following year of sale. On sale of real estate owned for business purposes, 90% of profit is taxable.

Sale of other private real estate is taxable where profit exceeds SEK 50,000.

Losses on listed shares and listed securities taxed in same manner as shares (except for listed shares in mutual funds containing only Swedish receivables) are fully deductible against capital gains on such assets or on unlisted shares in Swedish limited liability companies and foreign legal entities. Capital losses on unlisted shares in Swedish limited liability companies and foreign legal entities are deductible only at five-sixths. If capital losses pertain to both listed and unlisted shares, losses pertaining to listed shares are deductible prior to losses on unlisted shares. Any excess amount is deductible at 70% regarding listed shares or by five-sixths of 70% if capital loss relates to unlisted shares. Tax reduction is allowed to extent that loss cannot be offset against capital gains. Amount that may be used to reduce tax on other types of income corresponds to 30% of part of deficit not exceeding SEK 100,000 and 21% of residual deficit.

22.10 INHERITANCE TAX:

See topic 22.08 Gift and 22.10 Inheritance Tax. Effective as of 17 Dec. 2004, no Swedish inheritance tax is levied on estate of deceased who died after 16 Dec. 2004. If deceased died on 16 Dec. 2004 or earlier, inheritance tax is levied on estate left by individual who was resident in Sweden, permanently resided in Sweden, was Swedish citizen or married to Swedish citizen and has not been living outside of Sweden for more than ten years before time of his death.

22.11 PROPERTY TAXES:

Real Estate Tax.

State real estate tax is levied on private, single-family homes, residential buildings on farms, rented residential and business premises, private residence abroad, vacant lot for small houses. Calculation of real estate tax is based on tax value. For residential part of building constructed in 1997 or later, no real estate tax is levied for first five years and for following five years tax is reduced by half. For single-family home tax is 1.0% of tax value. For residential part of apartment building tax is 0.4 % and industrial premises tax is 0.5%. Starting assessment year 2009, system of municipality real estate fees will partially replace stately real estate tax. Thereby, fees will be SEK 6,000 per single-family homes, however, no more than 0.75 % of real estate tax value, and SEK 1,200 per residential apartment, however, no more than 0.4 % of real estate tax value.

Real Estate Tax Valuation.

Real estate taxation is designed in such way that each building has tax value equivalent to approximately 75% of market value. Tax value is used to calculate real estate tax and wealth tax. Real estate taxation takes place through general and special real estate taxation as well as recalculation. General real estate taxation assessment takes place every sixth year as part of preset plan. Special real estate taxation assessment can take place every year for those real estate categories not subject to general real estate taxation assessment. This takes place if property has undergone material changes since previous taxation assessment.

In case of general real estate taxation assessment, real estate owner is obliged to file real estate return. Basic values decided in conjunction with public and special real estate taxation assessments are adjusted each year in light of changes in prices. Recalculated base value is tax value.

22.12 TREATIES AND AGREEMENTS:

Income tax conventions and death duty conventions exist between Sweden and Austria, Belgium, Denmark, Faeroe Islands, Finland, France, Germany, Great Britain and Northern Ireland, Hungary, Israel, Italy, The Netherlands, Norway, Spain, South Africa, Switzerland and USA.

Pure income tax conventions exist with Albania, Argentina, Australia, Bangladesh, Barbados, Belarussia, Belgium, Bolivia, Botswana, Brazil, Bulgaria, Canada, Cape Verde, Chile, China, Cyprus, Czech Republic, Egypt, Estonia, Gambia, Greece, Greenland, Iceland, India, Indonesia, Iran, Iraq, Ireland, Jamaica, Japan, Kazakhstan, Kenya, Latvia, Lebanon, Lithuania, Luxembourg, Macedonia, Malaysia, Malta, Mauritius, Mexico, Morocco, Namibia, New Zealand, Nigeria, Oman, Pakistan, Peru, The Philippines, Poland, Portugal, Romania, The Russian Federation, Singapore, Slovakia, Sri Lanka, South Africa, South Korea, Tanzania, Thailand, Trinidad and Tobago, Tunisia, Turkey, Ukraine, Uruguay, Venezuela, Vietnam, Yugoslavia, Zambia and Zimbabwe. Conventions are pending with Armenia, Uganda and Uzbekistan.

Social security conventions exist between Sweden and Austria, Canada, Chile, Croatia, Denmark, Finland, France, Germany, Great Britain and Northern Ireland, Greece, Iceland, Israel, Italy, Luxembourg, Morocco, The Netherlands, Norway, Portugal, Slovenia, Spain, Switzerland, Turkey, USA and Yugoslavia.

22.13 VALUE ADDED TAX:

VAT is state sales tax. VAT is levied at all stages in production and distribution chain on value added at each stage and is then reported to state. Hence name value added tax. VAT can also be said to be multi-stage tax as it covers several stages and is distinguished by fact that most recent stage normally carries right to make deduction or claim entitlement to repayment of VAT already paid. It is thus difference between VAT on sales (output VAT) and VAT on purchases made (input VAT) which is reported to state. VAT is thus paid only by persons who are not obliged to file VAT return and persons who are not entitled to repayment.

Sale of certain goods and services are exempt from VAT. Those who supply such goods and services do not report output VAT, nor are they entitled to make deduction for input VAT. However, there is right to repayment of input VAT on certain goods and services. In case of goods and services that are exported there is also right to repayment of input VAT.

Tax liability, i.e. obligation to pay VAT to state, arises when taxable sales of goods or services within country form part of professional business activities.

VAT should also be paid on value of acquisitions from other business entities in other EU countries liable for VAT (intra-community acquisitions) and on imports (goods and services imported into Sweden from locations outside EU). VAT is not levied on exports (goods and services exported from Sweden to locations outside EU).

Taxation functions relating to VAT are exercised by Tax Agency and Customs Authorities. Now that Sweden is member of EU, border procedures governing trade between EU countries have ceased. VAT on goods acquired within EU is handled instead through domestic taxation arrangements in each country. For Sweden this means that Tax Agency is authority that deals with taxation on purchases of goods from other EU countries.

Tax Agency deals with taxation of sales within country and EU acquisitions and Customs Authorities deal with taxation of imports.

In conjunction with 1990/1991 tax reform VAT base was broadened (primarily within service sector). Nowadays, all sales of goods and services are in principle liable for tax.

Certain areas are exempt from VAT, e.g., health care, dental care and social welfare; certain forms of education and training, e.g. compulsory junior/secondary education, high school education and further education; banking and financing services; insurance services; transfer and sale of various real estate rights.

Tax Rates.

There are three different VAT rates, 25%, 12% and 6%.

Taxation Base.

VAT is levied as certain percentage of taxation base. Taxation base is price of goods or service excluding VAT.

General VAT rate is 25%, which is charged on turnover of all goods and services with exception of foodstuffs, hotels, campsites (12%) and books, passenger transport, newspapers and certain goods and services within cultural sector (6%).

Formal Regulations.

All persons/entities liable for VAT are obliged, regardless of size of tax base, to apply for registration and to report and pay VAT for sales made in Sweden. This means that all persons/entities liable for VAT should furnish Tax Agency with information relating to turnover output and input VAT. However, when overseas trader (not established in Sweden) supplies goods or provides services in Sweden, it is, however, normally VAT registered purchaser in Sweden who is liable to pay VAT (known as reverse VAT liability). Reverse VAT liability is not applied e.g., on sale of services that have to do with cultural activities, artistic performances, sports, entertainment, education, science and similar activities. Sale of goods and services in Sweden to purchasers who are not VAT registered (private individuals) requires VAT registration in Sweden.

Special regulations apply to distance sales (threshold of SEK 320,000) made from other EU countries to private individuals in Sweden. Further, traders outside EU supplying electronic services (e.g. downloaded music, software, etc.) to private individuals in Sweden are required to register for VAT purposes (special scheme).

22.14 WEALTH TAX:

National Net Wealth Tax.

Following are liable to net wealth tax: (a) Individuals residing in Sweden, unsettled estates of decedents who at time of death were residents in Sweden, and legal entities whose members on account of their membership do not own share in property of legal entity; (b) foreign nationals temporarily residing in Sweden for maximum period of three years are deemed not to be residents for net wealth tax purposes. Wealth tax is assessed at proportional rate of 1.5% on net assets exceeding SEK 1,500,000 for singles and SEK 3,000,000 for families. Wealth tax was abolished retroactively as of Jan. 1, 2007. Consequently, no wealth tax will be levied for income year 2007 and last year during which wealth tax that will apply will be income year 2006.

23 TRANSPORTATION

23.01 AUTOMOBILES:

See topic 23.02 Motor Vehicles.

23.02 MOTOR VEHICLES:

Motor vehicles must be officially examined and registered. Only persons over 18 years of age and who have passed certain tests may drive motor vehicles. Every motor vehicle owner is obliged to take out and maintain traffic insurance which grants right to indemnity from insurance compulsory to driver, passengers or third party for damages as result of vehicle's operation. (Act 1975:1410).

23.03 SHIPPING:

(Maritime Act 1994:1009). Ship is considered Swedish and entitled to carry national flag if it is at least half owned by Swedish citizen or by Swedish legal entity. Exemption may be granted by Government or by Swedish Maritime Administration.

Vessel at least 12 meters long and four meters wide is defined as “ship” and is registered in Register of Ships (ship section) kept by Swedish Maritime Administration. Other vessels are defined as “boats” and are registered in same register (boat section) also kept by Swedish Maritime Administration, but only if used in professional trade.

Owner's liability is maximum 175,000 Special Drawing Rights (SDR) for personal injury per passenger. For cargo, maximum liability is 1 MSDR for vessels under 2,000 tonnage plus 400 SDR for each tonnage up to 30,000 tonnage, 300 SDR for 30,001-70,000 tonnage and 200 SDR for tonnage over 70,000. Tonnage follows definition in convention for uniform system of tonnage measurement of ships.

Certain claims are secured by lien on ship and cargo, such as wages of officers and crew, salvage awards, damages for collision and debts incurred by master for protecting ship and continuing voyage.

Carrier is liable for damage for period goods is in carrier's custody. Bill of Lading issued by master is regarded as signed by carrier.

Sweden is party to International Convention on collisions between vessels (Brussels, 1910); International Convention on salvage (London, 1989); and Convention on Limitation of Liability for maritime claims (London, 1976); York-Antwerp Rules 1994; International Convention on Civil Liability for Oil Pollution Damage (London, 1992); and International Convention concerning Bills of Lading (1924) and Supplementary protocol of 1968 (Hague-Visby Rules).

Sweden is not party to 1978 UN Convention on Carriage of Goods by Sea (The Hamburg Rules). However, some of Hamburg Rules apply by law.

24 TREATIES AND CONVENTIONS

24.01 TREATIES:

Sweden is party to inter alia Brussels and Lugano Conventions on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters, Brussels 1968 and 2000 and Lugano 1988, to Convention of Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters, Hague 1965, to Convention on the Recognition and Enforcement of Foreign Arbitral Awards, UN New York 1958, to Convention on the Taking of Evidence Abroad in Civil or Commercial Matters, Hague 1970, and to Convention Abolishing the Requirement of Legislation for Foreign Public Documents, Hague 1961, Act (1994:1500) on account of Sweden's membership in EU states treaties to which Sweden is party as member of EU.

See also Selected International Conventions section for Selected Conventions to which U.S. and Sweden are parties.

International Sale of Goods.

United Nations Convention on Contracts for the International Sale of Goods, in force on Jan. 1, 1989. See category 3 Business Regulation and Commerce, topic 3.12 Sales and Part V, Selected International Conventions.

1

SWITZERLAND LAW DIGEST

—Scope —

Revised for 2010 edition by

PESTALOZZI, of Zurich and Geneva.

(BGBB indicates Federal Law on Rural Land; C.C. indicates Civil Code; C.O. indicates Code of Obligations; KKG indicates Federal Law on Consumer Credits.)

Note: This revision incorporates legislation through Aug. 31, 2009.

1 INTRODUCTION

1.01 CURRENCY:

Basic monetary unit is franc of 100 centimes. Bank notes are legal tender. See also categories 3 Business Regulation and Commerce, topic Banks and Banking; Foreign Trade and Commerce, topic Exchange Control.

Liechtenstein uses Swiss franc currency and subjects its banks to monetary supervision of Swiss National Bank. See Currency Agreement of June 19, 1980.

1.02 GOVERNMENT AND LEGAL SYSTEM:

Position within Europe: see category 25 Treaties and Conventions, topic 25.01 Treaties.

(Federal Constitution of the Swiss Confederation of Dec. 18, 1998, as am'd, in force since Jan. 1, 2000.)

Switzerland (Swiss Confederation) is federation of 26 states called cantons. Six cantons send only one senator to Senate instead of two and have only one-half of vote in federal referenda requiring not only majority of voters but also majority of cantons. Each canton has its own cantonal constitution. Cantons are competent in all matters not reserved by Federal Constitution to Confederation.

Every Swiss male and female over 18 years can participate in federal, cantonal and local elections and referenda. Some cantons and municipalities extend right to vote to foreign residents.

Total revisions of the Constitution and constitutional amendments must be submitted to popular referendum and require majority of voters and of cantons (mandatory constitutional referendum). With respect to popular referenda of federal statutes, etc. (optional and mandatory legislative referendum), see subhead Legislative Power, infra. One hundred thousand voters have right to request total revision of Constitution, or constitutional amendments (Initiative).

Human Rights.

Switzerland is party to European Convention on Human Rights. Fundamental rights of individuals are set forth in Constitution. Governing principles are Rule of Law and Art. 8: "All human beings are equal before the law." Based on that provision Swiss Federal Supreme Court (see subhead Judicial Power, infra) has developed extensive practice for protection of individuals against arbitrary measures by cantonal authorities which also enforce most federal statutes. Men and women have equal rights and right to equal pay for work of equal value. Implementing statute in force since July 1, 1996. Switzerland has joined international convention on elimination of all forms of racial discrimination (1965).

Constitution guarantees special freedoms of individuals. These include: right to live in personal freedom, protection of children and young people, right to aid in distress, right to privacy, right to marriage and family, freedom of religion and philosophy, freedom of opinion and information, freedom of the media, freedom of language, right to primary education, freedom of science, freedom of art, freedom of assembly, freedom of association, freedom of domicile, protection against expulsion, extradition and removal by force, right to property, economic freedom, freedom to unionize, general procedural guarantees, habeas corpus, presumption of innocence, right of petition. Court must have jurisdiction according to rules on conflict of jurisdiction. Court cannot accept or deny jurisdiction arbitrarily. Exceptional courts are not permitted.

German, French, Italian and Romansch are national languages. The first three are official languages in which all amendments to Federal Constitution, all federal statutes, and certain decrees of Federal Assembly, Federal Government and its departments, and Federal Supreme Court are published. Three published texts are equally authentic. International treaties concluded in one of three official languages are published with translations into two others; only original text is authentic, provided treaty itself does not stipulate otherwise.

As a general rule the organization of the federal authorities is built on principle of separation of powers. Independence of courts is safeguarded by provisions of Constitution and statutes.

Legislative Power.

Legislative power is vested in Federal Parliament consisting of two chambers: (a) House of Representatives (Nationalrat, Conseil National, Consiglio Nazionale) of 200 members and (b) Senate (Staenderat, Conseil des Etats, Consiglio degli Stati) of two members for 20 cantons and one member for six cantons. There are four ordinary sessions of three weeks each in spring, summer, fall and winter per year, extraordinary sessions as necessary.

Certain matters, mainly elections, are deliberated and voted in joint session of both chambers. For all other matters separate approval of both chambers is required. Resolutions are passed in form of federal statutes or federal decrees.

Federal statutes and federal decrees must be submitted to popular referendum if requested by 50,000 voters or eight cantons. Majority of voters decide on acceptance or rejection. Same applies to federal decree approving certain International treaties, unless Federal Government concludes treaty based on prior authority by Federal Assembly. Federal decrees may be enacted at once for limited time by majority of members in each of two chambers. Such decrees, however, cease to be in force after one year, if not accepted by popular referendum if referendum was requested by 50,000 voters or eight cantons. If such decrees are not based on Constitution, popular referendum requiring majority of voters and of cantons is mandatory within one year, otherwise validity expires.

Executive Power.

Seven member Federal Government (Bundesrat, Conseil Fédéral, Consiglio Federale), elected for four years by House and Senate in joint session. Each member of Federal Government heads one department of federal administration. Every year another member acts as president and another as vice-president of Swiss Confederation with largely ceremonial powers.

Judicial Power.

The members of the Swiss Federal Supreme Court (Bundesgericht, Tribunal Fédéral, Tribunale Federale) are elected by House and Senate in joint session. See category 6 Courts and Legislature, topic 6.01 Courts.

1.03 HOLIDAYS:

Provisions for legal holidays are set by Confederation and by each individual canton. In Zürich, following are legal holidays: New Year's Day, Good Friday, Easter Monday, May 1, Ascension, Whitsun-Monday, Aug. 1, Christmas Day, and Dec. 26. If holiday falls on Sun., next day is usually not holiday. For legal purposes Sats. and Suns. are considered to be equal to legal holidays. Transactions on Sats., Suns. and holidays are legally valid.

Switzerland adheres to European Convention on the Calculation of Time Limits dated May 16, 1972.

1.04 OFFICE HOURS AND TIME ZONE:

Switzerland is in the Central European (GMT +01:00) time zone. Office hours are generally from 8 a.m. to 6 p.m.

2 BUSINESS ORGANIZATIONS

2.01 AGENCY:

Swiss law distinguishes between power of attorney and underlying legal instruments that authorize power of attorney. Specifically, power of attorney is unilateral authorization by principal that vests power to perform legal acts on behalf of principal in agent. (C.O. 32). Power of attorney may be effected by ordinary mandate or some other contract.

Ordinary Mandate.

Agent owes responsibility to principal to carry out mandate faithfully and carefully. If it is agreed upon or customary, agent is due compensation. Principal is required to reimburse agent for outlays and/or expenses incurred in duly carrying out mandate, together with any interest, and, similarly, to discharge agent from any obligations assumed. Mandate may at any time be terminated by revocation or notice by any party. Where it is terminated at unreasonable time, terminating party is required to indemnify other party for any damages arising from that termination. (C.O. 394-406).

Contracts analogous to such mandate with partially deviating provisions are: Letters and Orders of Credit (C.O. 407-411); Brokerage (C.O. 412-418); Commercial Agency (C.O. 418a-418v); Commission (C.O. 425-439); Shipping Contract (C.O. 440-457). See category 22 Property, topic 22.08 Powers of Attorney.

2.02 ASSOCIATIONS:

Associations for noneconomic or economic purposes may be created by various forms, either by agreement or by additional act of incorporation.

Associations by agreement include various forms of partnerships. See topic 2.08 Partnerships. Corporate bodies are legal entities (juristische Personen, personnes morales, persone giuridiche) and, therefore, entitled to all rights and subject to all liabilities, unless such rights and liabilities are based on human characteristics, such as sex, age or familial relationship. As general rule, corporate bodies pursuing economic goals become legal entities upon their entry in Register of Commerce. Corporate bodies not required to register become legal entities as soon as they are organized according to law. (C.C. 52-59).

Examples of legal entities include membership associations, foundations, share corporations, limited liability companies, cooperative corporations, and corporate bodies under federal, cantonal or local public law. See topic 2.03 Corporations.

2.03 CORPORATIONS:

Share Corporation.

(Aktiengesellschaft, société anonyme, società anonima). Governed by Swiss Code of Obligations. Amended Share Corporation Title has been in force since July 1, 1992.

Legal entity with fixed capital divided into shares. No personal liability of shareholders for debts and obligations of company. (C.O. 620).

Purpose.

Any defined lawful purpose is permissible, mostly business. (C.O. 620).

Corporate Name.

Chosen freely within limits of general principles on naming of companies. Share corporation's name must, in any case, include reference to its legal nature. (C.O. 950). Corporations which were incorporated under previous law are obligated to adjust their company name to revised law within two years after enactment of new provisions, i.e. until Dec. 31, 2009. (Art. 2 of interim regulations to revision of limited liability company).

See also category 3 Business Regulation and Commerce, topic 3.09 Firm and Corporate Name.

Duration of Corporate Existence.

Perpetual (or limited if provided in articles).

Incorporators.

At time of incorporation there must be at least one shareholder. (C.O. 625). No restrictions as to nationality of shareholders, but see catchline Alien Shareholders, infra.

Capital.

Minimum capital CHF 100,000. (C.O. 621).

If shareholder pays for shares in kind, or purchase of assets by corporation from shareholders or third parties is planned, details of transaction must be provided in articles. Same for privileges granted to incorporators or other persons. (C.O. 628).

Articles

Must contain following: Company name, address of domicile of company, purpose of company, amount of share capital and contributions made thereto, number, par value and types of shares, calling of general meetings of shareholders, voting rights of shareholders, bodies for administration and audit, and form in which company shall publish its notices. (C.O. 626).

Articles may provide for regulations (by-laws) specifying powers of various bodies in charge of management. (cf. C.O. 716b).

Incorporation.

Resolutions adopted in organizing meeting must be embodied in publicly authenticated deed with basic documents attached. Same applies to any amendment of articles, especially any increase or reduction of capital, and for resolution of dissolution. (C.O. 629, 631, 647, 650-651a, 736).

Ordinance of Commercial Register (Handelsregisterverordnung) as of Oct. 17, 2007 specifies necessary information for recording, namely, but not limited to, following information: Date when articles were passed, corporate name and place of registered office, purpose, proposed length of existence, amount of capital, amount paid up, number and par value of shares, types of shares issued, transferability of shares, preferential rights of certain classes of shares, property received in payment of shares, privileges granted to certain classes of shareholders or to incorporators, number of profit sharing certificates indicating content of rights connected therewith, manner in which directors and officers may act and sign for corporation, names, residences and nationalities of directors and officers, name or corporate name of auditors and their seat or registered office, and manner in which corporate announcements will be made. (Ordinance of Commercial Register 43-45).

Corporation is incorporated upon its entry in Register of Commerce. Shares issued prior to registration are void. (C.O. 643-644).

Uniform reorganization for correction and sanctioning of lack of organization. Shareholders, debtors, and officers of commercial register will have opportunity to demand court for necessary measures if required corporate bodies are missing or if corporate body is improperly constituted. (C.O. 731b).

Incorporation Tax or Fee.

Federal issuance stamp tax. (See category 23 Taxation, topic Taxes.) Notary drawing up public deed of constituent meeting is entitled to fee, fixed by cantonal law.

License.

No license required to do business, except for purposes for which public concession is required, such as insurance and railroads; for banking, see category 3 Business Regulation and Commerce, topic 3.01 Banks and Banking.

Paid-in Capital Requirements.

Upon incorporation of company, contribution of at least 20% of par value of each share must have been made whether in cash or by contribution of other assets. Contributions made, however, must total at least CHF 50,000. (C.O. 632). Special provisions apply for bearer shares that may only be issued after payment of full par value and for voting stocks that are only admissible if they were fully paid in. (C.O. 683, 693).

Amendment of articles must be approved by general meeting of shareholders or board of directors and embodied in publicly authenticated deed and be entered in Commercial Register. (C.O. 647).

Amendments to change purpose, to create shares with privileged voting rights, to restrict transferability of registered shares, increase of capital authorized or subject to condition, increase of capital out of equity against contributions in kind or for purpose of acquisition of assets and granting of special benefits, to limit or withdraw preemptive rights, to change domicile of company and dissolution of company, require consent of at least two-thirds of votes represented and absolute majority of par-value shares represented. (C.O. 704).

Increase of Share Capital.

(a) For ordinary increase of share capital, general meeting may resolve to increase share capital; resolution must then be carried out by board of directors within three months (C.O. 650, 652-652h); (b) authorized increase of share capital, general meeting may amend articles to authorize board of directors to increase share capital within, at most, two years (C.O. 651, 651a, 652-652h); (c) for conditional increase of share capital general meeting may grant conversion or option rights to employees or bondholders (C.O. 653-653i).

Reduction of Share Capital.

Resolution of general meeting to reduce capital (without simultaneously increasing original share capital using new, fully paid capital) may only be effected if auditor qualified in these matters issues report stating that, notwithstanding capital reduction creditors' claims remain covered. Auditor has to be present at general meeting. Such resolution must be published three times in Swiss Official Journal of Commerce, and in manner of publication designated in articles, notifying creditors that they may file their claims and demand payment or surety within two months of third publication date (C.O. 733). Notarized deed containing auditor's report must evidence compliance with legal provisions. Notification is not required if share capital is reduced exclusively to eliminate impairment of capital caused by losses. (C.O. 732/735).

Acquisition of Own Shares.

Corporation may purchase its own shares if freely disposable equity in necessary amount is available and if total par value of these shares does not exceed 10% of share capital or 20% of registered shares acquired in connection with restriction of transferability. Such shares cannot vote in shareholders' meeting. Special provision must be made in financial statement in amount of purchase price of shares. (C.O. 659-659b).

By-laws.

See supra, catchline Articles.

Shares.

May be issued in registered or bearer form. (C.O. 622). Corporation must keep register of owners of registered shares. (C.O. 686). Both types of shares may be issued in any proportion fixed by articles, which may also provide for subsequent changes between two types of shares and for issue of preferred shares. Minimum par value of share is CHF 0.01.-, except in case of reorganization. Bearer shares may be issued only if fully paid-up. (C.O. 622, 654, 656, 683, 687).

Articles may provide for participation capital (like nonvoting rights), which shall not exceed twice amount of share capital. Participation certificates are issued against contribution, have par value and do not grant voting rights. (C.O. 656a-656g).

Articles may provide for shares with preferential rights as to dividends, shares in case of liquidation, subscription of newly issued shares (preferred shares); founder's shares (Gründervorteile, privilèges de fondateur), dividend-right certificates (Genussscheine, bons de jouissance) or bonds convertible into shares. (C.O. 627 No. 9, 628, 654-656, 657).

Share certificates must state corporate number, seat, nominal value, paid-up amounts, kind of shares (registered or bearer), kind of share in case there are different kinds, name of owner and certification of entry in share register in case of registered shares. Document must be signed by at least one member of board of directors; if there is large number of issued shares, facsimile signature is permissible. (C.O. 622).

Transfer of Shares.

Share certificates are negotiable instruments. Bearer shares are transferred by mere transfer of instrument; registered shares must also be endorsed or assigned, and with respect to corporation, shareholder must be entered in shareholders register. (C.O. 683-686a). There are special rules in case of restriction of transfer by articles. They differ between registered shares listed and not listed on stock exchange. (C.O. 685-685g).

Shareholders have within provisions of law fundamental right to equal treatment, to vote, to contest resolutions of general meeting, to request ordinary audit, to receive dividends, and to share in distribution of assets in case of liquidation. (C.O. 660, 689, 692, 697-697b, 706, 717, 727, 745).

Alien Shareholders.

Corporation law as rule does not prevent or limit formation of corporations by aliens or nonresidents. In few areas (e.g., vessels under Swiss flag; banks; certain real estate companies; enterprises for exploitation of Swiss oil wells) special provisions require specific majority of Swiss citizens as shareholders or fulfillment of further requirements for companies controlled by foreigners. There are no limitations regarding nonresident alien shareholders of domestic subsidiaries of foreign corporations, and no extraordinary accounting procedures. See also category 22 Property, topic 22.05 Immovable Property, subhead Acquisition by Nonresidents.

Shareholders' Liabilities.

Only capital of corporation is responsible for liabilities of corporation. Shareholder is liable only up to amount of his subscription. (C.O. 620, 680).

Shareholders' Meetings.

General shareholders' meeting is highest authority of corporation. It may amend articles, elect and discharge board of directors and internal auditors, approve balance sheet, profit-and-loss statement and declare dividends. It is called by directors ordinarily within six months after close of each business year and if necessary by auditors; shareholders representing at least one-tenth of all shares may demand that shareholders' meeting be called by stating purpose of meeting and motions of shareholders in writing. Notices of meetings must be given at least 20 days in advance, unless waived by all shareholders. (C.O. 698-701).

General meetings outside of Switzerland are possible. If general meeting has to make resolutions for which publicly authenticated deed is required by Swiss law which has to be submitted to Register of Commerce, Register of Commerce can demand verification that foreign public authentication procedure is comparable with Swiss public authentication procedure. It may request expert opinion. For publicly authenticated deeds in general, law of foreign place governing public authentications must be observed, which fact has to be certified by competent foreign authority. (Ordinance of Commercial Register as of Oct. 17, 2007, art. 25).

Unless otherwise provided in articles, registered shareholder may issue written proxy to third party; in case of bearer shares possession gives right to vote. Representative shall comply with instructions of represented person. (C.O. 689-689e). For some purposes, qualified majorities may be required by law or articles, other than that absolute majority is sufficient. (C.O. 703).

Directors and Officers.

Board of directors consists of one or more members who must not be shareholders. (C.O. 707). It is no longer necessary that majority of directors must be Swiss citizens residing in Switzerland. (C.O. 708 repealed).

If there are several groups of shareholders with different legal status, articles must provide for each group right to elect at least one representative on board of directors. (C.O. 709). Articles may also provide for representative of participants on board. (C.O. 656e).

Members of board of directors are elected and released by general meeting of shareholders. (C.O. 698). They hold office for three years unless otherwise provided by articles. Term of office shall, however, not exceed six years. (C.O. 710). Vacancies are filled by general meeting only.

Reelection is possible. (C.O. 710).

Unless articles or by-laws provide otherwise, all directors manage and act and sign for corporation individually. (C.O. 718). Articles may empower board of directors to delegate in accordance with regulations management or any part thereof to one or more members of board (managing directors), or to third persons (managers). (C.O. 716b). Corporation must be represented by person domiciled in Switzerland. This person can be board member or manager. (C.O. 718). Nontransferable and inalienable powers: ultimate management of corporation and giving of necessary directives, establishment of organization, structuring of accounting system and financial controls, appointment and removal of persons entrusted with management and representations, ultimate supervision of persons entrusted with management, preparation of business report and preparation of general meeting of shareholders and implementation of its resolutions, notification of court in case of negative equity. (C.O. 716a).

Persons with power to represent corporation may carry out in name of corporation all acts which purpose of corporation may require. Corporation is liable for all acts, including torts, that its directors and officers commit in business capacity. (C.O. 718a, 722).

Statutory Auditors.

New audit provisions distinguish between ordinary and limited audit. Limited audit is compared to ordinary audit subject to higher demands concerning independence of auditors, scope and object of audit, requirements as to audit report, and duty of disclosure. Companies are obligated to perform ordinary audit if they are publicly held or exceed certain quantities as to balance sheet total, sales revenue, and employment positions. Other companies must undertake ordinary audit if certain minority of shareholders, specific provisions or decision taken by general meeting of shareholders demand for it (``opting-up''). Otherwise, they may confine themselves to limited audit. Companies that are principally obligated to ordinary audit that also have more than ten employment positions may waive audit, provided all shareholders agree (``opting-out''). (C.O. 728-729c). Federal Audit Supervisory Act provides for new state supervisory authority for auditing. This authority controls audit companies for publicly held companies, and admits auditors to audits provided by law. General meeting of shareholders elects one or more statutory auditors to check balance sheet and profit-and-loss statement against books, and check whether result and financial position of corporation so represented comply with legal requirements as to accounting and any special provisions of articles as well as existence of internal control system. (C.O. 727, 728a). At least one auditor must have domicile, seat or registered branch office in Switzerland. (C.O. 730). Corporations must appoint as auditors licensed auditor, or if public corporation, auditing firm under government oversight according to provisions of Federal Audit Supervisory Act. (C.O. 727b).

Auditors must be independent and reach audit opinion on objective basis.

Independence may neither be impaired by actual fact nor based on appearances. In particular, independence is not reconcilable with: membership on board of directors, another decision making function within corporation, or employment relationship; direct or considerable indirect participation in share capital or considerable claim or debt against corporation; close relationship with member of board of directors, or with person in decision making function, or important shareholder; participating in bookkeeping as well as rendering of other services, giving rise to risk of having to examine own work; acceptance of mandate that entails economic independence; contract conclusion with conditions not in line with market, or contract by which auditors acquire interest in audit result; acceptance of valuable gifts or special benefits. Provisions on independence may also apply to certain other members of audit firm or persons close to audit firm. (C.O. 728). Statutory auditors must submit comprehensive report to board of directors with findings on rendering of accounts, internal control system, execution and result of audit. Auditors submit summary written report to general meeting including opinion on result of audit, information on independence of auditors, information on persons who led audit and professional qualifications, recommending acceptance or rejection of annual accounts with or without reservation, and advising it with respect to annual accounts. (C.O. 728b).

Liability of Founders, Directors, Officers, Auditors and Liquidators.

Directors and other officers in charge of management, founders, statutory auditors and liquidators of corporation are responsible to corporation and its shareholders for damage caused by their willful misconduct or negligence in performing their duties. Officer who rightfully delegates duties to another legal entity is liable for any damage caused by it unless officer proves that necessary care in selection, instruction and supervision was applied. (C.O. 752-755). Except for direct damages, shareholder can bring derivative suit only. Creditors of corporation have similar claims in case corporation has been declared bankrupt. Direct and derivative personal liability under corporate, tax and social security laws has considerably increased under recent holdings by Swiss courts. (C.O. 756-757).

Claim of shareholder is barred if brought after six months after discharge by general meeting, or if shareholder has consented to discharge, or if shareholder has acquired shares with knowledge of discharge. (C.O. 758).

Dividends.

Can be declared only from audited net earnings or reserves constituted for that purpose. (C.O. 675).

Books and Records.

Corporation must keep accurate books, as required by nature and extent of its business, reflecting financial status, assets and liabilities connected with business and annual results. Board of directors prepares for each year business report which is composed of annual financial statements and annual report. Annual financial statements are composed of profit-and-loss statement, balance sheet and notes to financial statements. Notes to financial statements include information required by law, e.g. total amount of guarantees, indemnity liabilities and pledges in favor of third parties, total amount of assets pledged or assigned for securing of own liabilities, liabilities to welfare institutions and information regarding own shares. Principles applying to balance sheet and profit-and-loss statement are set forth by statute. Profit-and-loss statement and balance sheet must be signed by management. Groups of corporations must prepare consolidated financial statements. Corporations whose shares are listed on stock exchange must include important shareholders and their participations, as well as certain information about remunerations performed for members of directors' board and their participations in company in attachment to balance sheet. (C.O. 957-961, 662-674).

Merger and Consolidation.

Mergers of legal entities of same or of different legal forms are allowed under Swiss Merger Act (SMA) that came into force July 2004. Mergers are basically possible for general partnerships, limited partnerships, corporations, corporations with unlimited partners, limited liability companies cooperatives, associations, foundations, pension funds and institutions under public law. (SMA art. 4, 78 et seq., 88 et seq., 99 et seq.). Mergers between two or more legal entities may be performed without liquidation of dissolved company (SMA art. 3, para 2); its business will be transferred to surviving company by way of universal succession (SMA art. 22, para 1). Shareholders of dissolved legal entity receive shares of acquiring legal entity. (SMA art. 7).

Swiss Merger Act also regulates spin-offs (SMA art. 29 et seq.), conversions (SMA art. 53 et seq.) and transfer of assets and liabilities (SMA art. 69 et seq.) and its procedures as well as documents needed by commercial register. Special provisions for protection of creditors and employees apply.

Cross-border mergers from and to Switzerland are possible (arts. 163a and 163b of Swiss Act on International Private Law [PIL]) if applicable law of foreign company also admits such merger. Other cross-border transactions like spin-offs and transfer of assets and liabilities are allowed. (PIL art. 163d).

Dissolution.

Share corporation may be dissolved in accordance with its articles pursuant to resolution of general meeting of shareholders, in case of bankruptcy, or, with cause, by court at request of shareholders representing at least 10% of capital. (C.O. 736). As a rule, board of directors carry out liquidation of corporation, but general meeting or articles of incorporation may appoint other liquidators. At least one liquidator residing in Switzerland must have right to act and sign for corporation. Names of liquidators must be registered in Register of Commerce. Status of corporation as legal entity is not affected, but words “in liquidation” must be added to its corporate name. (C.O. 739, 740). When liquidation procedure is terminated, corporation will be deregistered in Register of Commerce with consent of tax authorities. (C.O. 746).

Transfer of Seat into and out of Switzerland.

Immigration of companies into Switzerland as well as emigration of companies out of Switzerland is permitted without liquidation and new foundation. (PIL arts. 161-163). Immigration into Switzerland is only allowed if governing foreign law permits such transfer, if company fulfills prerequisites set by foreign law, and if adaption to one of Swiss forms of legal organization is possible. (PIL art. 161). Emigration out of Switzerland may be performed if prerequisites according to Swiss Law are fulfilled and company continues to exist under foreign law. Creditors are specially protected. (PIL art. 163).

Limited Partnership with Shares.

(Kommandit-Aktiengesellschaft; Société en commandite par actions; Società in accomandita per azioni). Limited partnership with shares is corporation with corporate name and capital divided into shares with one or several jointly and severally liable partners, liable with entire property, comparable with partners of general partnership. (C.O. 764). This legal form is rarely used.

Unless specifically provided otherwise, provisions governing share corporations apply. (C.O. 764).

Corporate Name.

Corporate name must contain family name of at least one generally (i.e., unlimitedly) liable partner and indicate existence of partnership. (C.O. 947). See also category 3 Business

Regulation and Commerce, topic 3.09 Firm and Corporate Name. (C.O. 947).

Members Generally Liable.

Must be named in articles. They conduct business, act and sign for corporation, and form, by operation of law, board of directors. (C.O. 765).

Consent of members generally liable is required for resolutions of general meeting for change of purpose, extension or restriction of scope of business or extension of duration beyond period fixed in articles. (C.O. 766).

Statutory auditors must be appointed by general meeting, in which members generally liable have no right to vote. (C.O. 768).

In cases of bad faith, this supervising body may sue directors, even if their liability has been discharged. (C.O. 769).

Dissolution.

Limited partnership with shares is dissolved by retirement, death, incapacity or bankruptcy of all members generally liable. In other respects provisions for dissolution of share corporations apply. (C.O. 770). Dissolutions relating to transactions in form of mergers or conversions are regulated by Swiss Merger Act.

Limited Liability Company.

(Gesellschaft mit beschränkter Haftung; Société à responsabilité limitée; Societa a garanzia limitata). These are companies of at least one natural person or legal entity with own corporate name and common capital fixed in advance. Every member participates in common capital with its capital contribution. Each member holds at least one company share of stated capital. Articles may oblige to supplementary financial contributions or ancillary performances. (C.O. 772).

Corporate Name.

Chosen freely within limits of general principles on naming of companies. Limited liability corporation's name must, in any case, include reference to its legal nature. (C.O. 950).

Capital.

Minimum capital is CHF 20,000. (C.O. 773). Par value of company shares shall amount to minimum of CHF 100. Par value may be reduced to CHF 1 in case of financial restructuring. (O.R. 774). Shares are issued at least at par value. Capital contribution must be fully paid-in at time of incorporation. (O.R. 777c). Provisions of share corporations apply to contributions in kind, acquisition of assets, special benefits stipulated in articles. (C.O. 777c).

Articles of Incorporation.

Articles must state corporate name, place of domicile, purpose, amount of common capital, number and par value of company shares, and form of notice given by corporation. There are no restrictions as to nationality of members. To be valid, stipulations altering provisions of law must be mentioned in articles, e.g.: passing resolution regarding subsequent creation of new preferred company shares, transfer of company shares, calling of meeting of members, determination of voting rights, passing resolutions in meeting of members or by managing officers, management and representation, prohibition of managing officer to compete. All founders must execute publicly authenticated deed to effect that they incorporate limited liability corporation, abide by its articles, and appoint corporate bodies, that they have subscribed all capital contributions, and that amount required by law or by articles has been paid-in. Company is incorporated upon its entry into Register of Commerce. Any amendment of articles must be publicly authenticated and entered in Register of Commerce. (C.O. 776-780). Corporations which were incorporated under previous law are obligated to adjust their articles to revised law within two years after enactment of new provisions, i.e. until Dec. 31, 2009. (Art. 2 of interim regulations to revision of limited liability company).

Parts in Capital.

Capital contribution of member corresponds issue amount of company share. Document issued for part is only documentary proof or may be established as security in specific name. All members shall be entered with Register of Commerce with name, domicile, place of origin, number and par value of company shares. Assignment of part requires written form. Assignment contract contains same rights and duties stipulated in articles as deed regarding subscription of company shares. Assignment of company shares requires approval by meeting of members, which can deny approval without indication of reason. Articles may deviate by waiving requirement of approval of assignment, establishing reasons for justification of denial or approval, denial in case of Company offer for taking over company shares at real value, excluding assignment, denial in case of doubtful fulfillment of obligation to make supplementary financial contributions or to provide ancillary performances and security claimed by Company is not furnished. If articles exclude assignment or if meeting of members denies approval of assignment, right to withdraw for valid reasons remains reserved. If assignment requires approval of meeting of members, assignment only becomes effective upon such approval. Approval is deemed to be granted if meeting of members does not deny application for approval within six months. Company shares acquired by succession, division of estate, marital property law, debt enforcement, rights and duties attached pass without approval of meeting of members.(C.O. 784-793).

Meeting of Members.

Is supreme body of company. Voting rights of members is determined according to par value of company shares with each member having at least one vote. Articles may limit number of votes of owners of several company shares and may determine voting rights independently from par value providing that each company share gives right to one vote. In such case, company shares with lowest par value must have at least one tenth of par value of other company shares. Determination of voting right according to number of company shares does not apply to election of auditors, expert appointments for audit of management or parts thereto, passing of resolution concerning filing of action for responsibility. (C.O. 806). No voting right shall be granted to persons, who somehow participated in management for resolutions concerning release of managing officers, member assigning company shares in case of resolution concerning acquisition of own company shares by Company, members wishing to pursue activities violating duty of loyalty or prohibition to compete for resolution concerning approval of such activities. (C.O. 806a). For certain measures, exclusive competence lies with members' meeting, e.g. change of articles, appointment and removal of managers and auditors, adoption of balance sheet and profit-and-loss statement, distribution of profits, discharge of managers. (C.O. 804).

Management and Representation.

All members participate jointly in management and representation, unless articles or resolution of company provide otherwise. Articles or resolution of company may confer management and representation upon nonmembers. Each managing officer has power to represent Company. Representation of company by at least one person, such as managing officer or executive director, domiciled in Switzerland. Managers sign for limited liability company by adding their signatures to corporate name. Unless reserved by law or articles to meeting of members managing officers competent for all business affairs. Nontransferable and unalienable duties such as e.g., ultimate management of Company and giving necessary directives, establishment of organization, structuring of accounting system, financial controls, financial planning, supervision of persons entrusted with management and compliance, preparation of annual financial statements, annual report, consolidated financial statements, preparation meeting of members and implementing resolutions, court notification in case of overindebtedness. (C.O. 809-815).

Provisions on share corporations apply with certain modification to scope of representation of limited liability company. (C.O. 814).

Liability of Members.

Members of Company are only liable for supplementary financial contributions or other ancillary performances connected with their own company share. Amount must not exceed twice amount of company share. (C.O. 795-796).

Withdrawal.

Articles may grant right of withdrawal to members. Members may petition court to grant withdrawal or to dissolve corporation with cause. Company may, for same reason, request court to expel member, but only with consent of two thirds of votes represented and absolute majority of common capital. (C.O. 821-823, 804/15, 808b/9).

Dissolution and Liquidation.

Dissolution is effected according to articles by publicly authenticated resolution of at least two thirds of votes represented and absolute majority of common capital, in event of bankruptcy, or for other grounds provided in law. (C.O. 821, 821a, 804/16, 808b/11).

For liquidation, provisions for share corporations apply. (C.O. 826).

Revision.

For revision, provisions for share corporations apply. (C.O. 818).

Cooperative Corporation

(Genossenschaft, Société coopérative, Società cooperativa) Incorporated association of unrestricted number of legal entities or natural persons to further or safeguard certain economic interests by their joint action. (C.O. 828).

Corporate Name.

See subhead Share Corporation, supra.

Incorporation.

Cooperative corporation is incorporated by registration in Register of Commerce. Its articles (containing corporate name, seat, purpose, liabilities of members (if any), organization, and form of publication) must be in writing and approved by meeting of at least seven incorporators. (C.O. 830-838).

Capital.

Amount of cooperative corporation's capital cannot be determined beforehand. (C.O. 828).

Certificates of Membership.

Articles may provide for certificates of membership. Such certificates are made in member's name. They do not constitute documents of title but only documents of proof. (C.O. 852-853).

Transfer of certificate of membership confers membership rights to transferee if resolution of admittance is passed. (C.O. 849).

General Meeting, Directors and Auditors.

Supreme authority rests in general meeting of members. It has following powers: Pass or amend articles, elect directors and internal auditors, approve operating accounts and balance sheet, distribute profits, grant release to directors and exercise other powers provided by law or articles. (C.O. 879). Majority of directors must be members and Swiss citizens residing in Switzerland. (C.O. 894, 898). Auditors must examine conduct of business and yearly accounts. Directors, members of executive committee, auditors and liquidators are liable for damage due to willful violation of their duties or negligence. (C.O. 916).

Admittance and Withdrawal of Members.

New members may be admitted at any time upon written application. For as long as termination of cooperative corporation has not been decided, members may withdraw at any time subject to restrictive conditions provided for in articles. (C.O. 839-840, 842).

Liability of Members.

Members are not responsible for liabilities of cooperative corporation, unless articles provide for limited or (authorized insurance cooperative corporations excluded) unlimited responsibility of members for liabilities of cooperative corporation, or for unlimited or limited contributions of members to cover losses of cooperative corporation. (C.O. 868-871).

Dissolution.

Takes place as provided for in articles, or upon resolution of general meeting of members, or in case of bankruptcy, or in other cases provided by law. (C.O. 911).

Holding Corporations.

For such corporations law for share corporations or limited liability corporations applies. Federal and many cantonal tax laws provide advantages for holding corporations.

Applicable Law.

In principle, law of country of registration applies. (PIL 154).

See also topics 2.04 Foundations, Membership Associations; categories 3 Business Regulation and Commerce, topics Register of Commerce, Firm and Corporate Name; Property, topic Immovable Property, subhead Acquisition by Nonresidents; Taxation, topic Taxes.

2.04 FOUNDATIONS:

Foundation (Stiftung, fondation, fondazione) is legal entity, created by dedication of assets for specific purpose (charitable or business character). (C.C. 52-59, 80-89 bis).

Formation and Organization.

Dedication must be made by publicly authenticated deed or by will. It must provide for organization of foundation, which consists in most cases of foundation council. Supreme body generally designates auditor. Entry into Register of Commerce is mandatory except for family and ecclesiastical foundations. If not provided otherwise in deed, legal domicile of foundation is at its place of current administration, which must be in Switzerland. Foundation is obliged to

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accounting. Moreover, special provisions apply concerning apprehension of over-indebtedness.

Supervision.

Most foundations are subject to supervision to ensure that assets of foundation are used for intended purpose. Depending on scope of purpose, federal, cantonal or municipal authorities supervise.

Change of Purpose.

Under certain conditions, competent federal or cantonal authority is entitled to change foundation's purpose. Moreover, founder may provide amendment clause in foundation deed, which enables founder to apply for change of purpose after term of ten years.

Dissolution.

Foundations are lasting legal institutions. Foundation can be dissolved if purpose becomes unachievable or illegal or immoral. General clause entitling founder, foundation council or any other person to dissolve it at will is not permissible.

Taxation.

See category 23 Taxation, topic Taxes.

Family and Ecclesiastical Foundations.

Family and ecclesiastical foundations are governed by special provisions. (C.C. 52, 87, 335). Family foundation may be created for benefit of particular family, with following purposes: Defraying expenses of education, endowments, support of family members or similar purposes. These purposes are narrowly interpreted. Swiss courts consider family foundations for general support as invalid. Family foundations and ecclesiastical foundations need not be entered in Register of Commerce, unless, incidentally to their purpose, they conduct business. They are not subject to official supervision, unless public law provides otherwise. See category 13 Estates and Trusts, topic 13.08 Trusts.

2.05 HOLDING CORPORATIONS:

See topic 2.03 Corporations.

2.06 LIMITED PARTNERSHIP:

See topics 2.03 Corporations, 2.08 Partnerships.

2.07 MEMBERSHIP ASSOCIATIONS:

Membership association (Verein, Association, Assoziazione) is legal entity organized for nonprofit purpose. It must have constitution with provisions as to its purpose, financing, organization, and name. It need not be entered in Register of Commerce, unless, incidentally to its purpose, it conducts business. (C.C. 52-59, 60-79).

2.08 PARTNERSHIPS:

Ordinary partnership (Einfache Gesellschaft, Société simple, Societá semplice) (C.O. 530-551) is contractual association of two or more persons (individuals or entities) to achieve common purpose by joint efforts. (C.O. 530). Partnership cannot, as such, acquire rights and assume liabilities, and has no standing to sue or be sued. It may not be entered in Register of Commerce and has no company name.

Formation.

No special form required.

Rights and Liabilities of Partners as Between Themselves.

Every partner must contribute equal share in capital (goods, credits) or labor, and has equal share in profits or losses. (C.O. 531, 533). All partners participate jointly in management, unless they agree otherwise. (C.O. 535). No partner may frustrate purpose of partnership (in particular, he may not conduct business in competition with partnership). Property acquired for partnership is joint property of all partners, and not property of individual partners, unless otherwise agreed. (C.O. 544).

Rights and Liabilities of Partners as to Third Persons.

If management has been conferred upon partner, third parties may assume that such partner may act for partnership (or all partners). (C.O. 543). If partnership agreement does not provide otherwise, creditors of one partner personally can execute only his share of liquidation of partnership. But partners are jointly and severally liable for liabilities entered into by partnership or its representative. (C.O. 544).

Dissolution.

Partnership can terminate by (1) failure or achievement of purpose, (2) by agreement, (3) death, (4) incapacitation or bankruptcy of partner, (5) by judicial dissolution with cause, and, in some circumstances, (6) by timely notice. (C.O. 545). Partners remain liable to third parties. (C.O. 551). Partnership continues for purpose of winding-up until liquidation terminated. (C.O. 548-550).

General or Collective Partnership.

General or collective partnership (Kollektivgesellschaft, Société en nom collectif, Società in nome collettivo) (C.O. 552-593) is association of two or more individuals (entities cannot be partners) to conduct (commercial, industrial or other) business under joint firm name. (C.O. 552). All partners are jointly and severally responsible for liabilities of partnership. (C.O. 568). General partnership is not separate legal entity. However, it can, as such, acquire rights and assume liabilities, and it has standing to sue and be sued. (C.O. 562).

Formation.

Entry into Register of Commerce is mandatory. (C.O. 552). If purpose is not commercial, legal existence begins with registration in Register of Commerce, if purpose is commercial, legal existence begins with conclusion of partnership contract. (C.O. 553).

Firm name.

Must contain either family name of at least one partner followed with addition indicating existence of company (e.g., “& Co.”, “& Cie”, or “& Partner”), or family names of all partners. (C.O. 947).

Rights and Liabilities of Partners as Between Themselves.

Relationship between partners is laid down by partnership agreement or, in absence of such agreement, by rules for ordinary partnerships, with certain modifications relating to accounting and profit distribution (financial items). (C.O. 598-601, 557-561).

Rights and Liabilities of Partnership and Partners as to Third Persons.

General partnership is not corporation. However, it can, as such, acquire rights and assume liabilities, and it has standing to sue and be sued. Partnership is liable for torts committed and legal transactions carried out by partner when acting for partnership. (C.O. 567).

In order to be valid against third persons, restrictions as to representation of partnership must be entered into Register of Commerce. Otherwise, third parties in good faith may assume that each partner has right to act for partnership. (C.O. 563-564). With cause partner may be deprived of his right to represent partnership at any time. Third parties may only be appointed to act for partnership with consent of all partners. (C.O. 565-566).

Partners are jointly and severally liable with their entire assets for liabilities of partnership. (C.O. 568). New partner is liable for preexisting liabilities of partnership. (C.O. 569). Bankruptcy of general partnership does not entail bankruptcy of individual partners, nor vice versa. (C.O. 570-571). To receive satisfaction or security for their claims, personal creditors of partner may execute only from partner's partnership interest, remuneration, profits and share of liquidation. (C.O. 572). However, if partnership is bankrupt, has been dissolved or creditors have not been satisfied, partner can be rendered liable for claims against partnership, even if he has left partnership. This does not prejudice personal guarantee of partner. (C.O. 568).

Claims against individual partner for liabilities of partnership are unenforceable after five years after publication of partner's resignation or of dissolution of partnership in Swiss Official Journal of Commerce. (C.O. 591-593).

Dissolution.

With certain exceptions, rules governing dissolution of ordinary partnership also apply to general partnership. General partnership can also be dissolved by its filing for bankruptcy. (C.O. 574). Liquidation is attended to by partners having right to act for partnership. If partnership is dissolved, partners and, in some cases, competent court may appoint or remove special liquidators. Appointments must be entered into Register of Commerce. (C.O. 582-583).

After liquidation firm name must be cancelled in Register of Commerce. Books and documents must be deposited for ten years in place determined by partners or, in case of disagreement, by Register of Commerce. (C.O. 589-590).

See also category 3 Business Regulation and Commerce, topic 3.15 Register of Commerce.

Limited Partnership.

Limited partnership (Kommanditgesellschaft, Société en commandite, Società in accomandita) (C.O. 594-619) is association of two or more persons (individuals or entities) to conduct commercial, industrial or other business under joint firm name. At least one partner (general partner) has unlimited responsibility for liabilities of partnership and one or more partners (limited partners) are liable only up to fixed amount. Individuals may be both general and limited partners, entities may only be limited partners. (C.O. 594). Limited partnership may, as such, acquire rights and assume liabilities and has standing to sue or be sued in same manner as general partnership. (C.O. 602).

Formation.

Similar to general or collective partnership. (C.O. 594-597).

Firm Name.

Similar to general or collective partnership, must include surname of at least one general partner and indicate existence of partnership. (C.O. 947). See also category 3 Business Regulation and Commerce, topic 3.09 Firm and Corporate Name.

Rights and Liabilities of Partners as Between Themselves.

Relationship between partners is governed by partnership agreement. (C.O. 598). In absence of such agreement, provisions for general partnership apply with following changes: General partners are in charge of managing partnership. Limited partner has no rights or obligations in this respect and cannot object to ordinary business transactions. Limited partner is entitled to copy of balance sheet and of profit-and-loss statement, which may be audited by partner or by independent expert. Limited partner shares in losses only up to fixed amount of partner's contribution. (C.O. 599-601).

Rights and Liabilities of Partners as to Third Parties.

Limited partnership may, as such, acquire rights and assume liabilities and has standing to sue and to be sued in same manner as general partnership. (C.O. 602). Limited partnership is represented by general partners, same provisions as for partners in general partnerships apply. (C.O. 603).

Limited partner is jointly and severally responsible for liabilities of partnership up to amount of partner's contribution, as entered into Register of Commerce, unless partner, or partnership with partner's knowledge, has led others to believe that partner would be liable up to higher amount. (C.O. 605). Limited partner is subject to unlimited liability: (1) for transactions concluded by partner for partnership without express statement that partner acted as agent or under power of attorney, (2) for liabilities incurred before registration of limited partnership or of limitation of partner's contribution in the Register of Commerce, unless creditor knew partner's actual status, or (3) if name of limited partners forms part of firm name of partnership. (C.O. 604-609). In order to enforce their rights, creditors of limited partnership can not directly sue limited partner only after dissolution of limited partnership. (C.O. 610). For general partners, generally, same provisions apply as for partners in general partnership.

Dissolution.

Provisions for dissolution and liquidation of general partnership are applicable, except that death of, or incapacity or establishment of guardianship for, limited partner does not cause dissolution of partnership. (C.O. 619).

Limited Partnership with Shares.

See topic 2.03 Corporations.

Firm Name.

See category 3 Business Regulation and Commerce, topic 3.09 Firm and Corporate Name.

3 BUSINESS REGULATION AND COMMERCE

3.01 BANKS AND BANKING:

Banks are defined by Federal Banking Act of Nov. 8, 1934, as am'd, (“Banking Statute”), Federal Council's implementing ordinance of May 17, 1972, as am'd, (“Banking Ordinance”) and Financial Market Supervisory Authority's practice as natural and/or legal persons whose main business activity is devoted to finance area and who are engaged in publicly offering their services as depositories of money in order to finance in any way on their own account undetermined number of individuals and/or corporations which do not form part of same group as financing bank; or refinancing themselves to considerable extent from various other banks for purpose of financing for their own account undetermined number of individuals and/or corporations which do not form part of same group as financing bank. Banks in above-mentioned sense are subject of permanent supervision of Financial Market Supervisory Authority. Term “Bank” and other related terms are reserved to banks in above-mentioned sense. Banks which are directly or indirectly controlled by foreign owners are subject to additional license requirements. All banks, irrespective of whether they are controlled by Swiss or foreign owners have to comply with extensive regulation regarding equity and liquidity requirements and lending limits and are subject of special accounting and auditing rules. Business of providing auditing services to banks is reserved to qualified auditing firms which need to be licensed by Financial Market Supervisory Authority.

Swiss National Bank has specific powers to regulate Swiss currency. It may, for instance, fix limits and set mandatory reserves, require foreign currency liabilities to be covered by foreign currency assets in specific percentages and make prescriptions on public issues of shares, bonds and the like. In this context, banks are subject of certain reporting duties vis-à-vis Swiss National Bank such as filing of their annual financial statements.

Bank secrecy is safeguarded by special provision of law. However, federal and cantonal regulations on securing evidence in criminal cases take precedence. Banking Statute authorizes Swiss subsidiary bank to transmit information which is protected by bank secrecy to its foreign parent company if information in question is needed by parent company for purposes of (i) internal control within group or (ii) direct supervision of banks and other financial intermediaries subject to license. In addition, transmission of such information requires that (i) parent company and foreign supervisory authority are bound by professional or official secret and (ii) information received from Swiss bank may not be passed on to third parties unless Swiss bank has approved such passing-on or, in alternative, applicable treaty provides for general authorization of passing-on such information.

Furthermore, Banking Statute authorizes Financial Market Supervisory Authority to transmit directly information which may be protected by bank secrecy to foreign supervisory authority which is competent for supervision of banking or finance sector provided: (i) Transmitted information is exclusively required and used for purpose of performing direct supervision over banks and other financial intermediaries whose business activity may not be performed without licence; (ii) foreign supervisory authority is bound by professional or official secret; (iii) information received from Financial Market Supervisory Authority may not be passed on to third parties unless Financial Market Supervisory Authority has approved such passing-on or, in alternative, applicable treaty provides for general authorization for passing-on such information. However, passing-on of information by foreign supervisory authority to foreign public prosecutor is forbidden if relevant facts are such that Switzerland would refuse international judicial assistance to respective foreign country.

Subject to requirements and restrictions set out in previous paragraph, Banking Statute provides that Financial Market Supervisory Authority may authorize foreign supervisory authority to effect inspections of Swiss banks (subsidiaries, branch offices, and representative offices) on Swiss territory at business premises of respective Swiss bank. However, in course of such inspections, foreign supervisory authority may only request information which is necessary for consolidated supervision over respective bank. Any information which pertains directly or indirectly to particular customer within bank's asset management or depositary business may only be requested and transmitted by Financial Market Supervisory Authority to authority requesting it.

Federal Statute on International Judicial Assistance in Criminal Matters of Mar. 20, 1981, as am'd, allows granting specific assistance (such as supplying information and obtaining evidence) in cases of allegations which would, if adjudicated under Swiss law constitute criminal act, including tax fraud. For international judicial assistance in tax matters under double taxation treaties, see topic 23.15 Treaties Agreements.

Foreign banks which wish to establish branch offices, agency or representative office in Switzerland have to apply for special license with Financial Market Supervisory Authority. Details for granting of such license are laid down in Federal Council's Foreign Banks Ordinance dated 21 Oct. 1996, as am'd. These entities which are legally dependent on their foreign headquarters are subject to Swiss banking supervision with exception of requirement regarding equity ratios and risk spreading.

Acquisition of majority of shares of existing bank with Swiss ownership, acquisition of substantial part of shares of bank with foreign ownership and creation of new bank by foreigners is also subject to license of Financial Market Supervisory Authority. Preconditions include undertaking to comply with credit and foreign exchange policies of Swiss National Bank and proof of reciprocal right in respective foreign area, unless international treaties provide otherwise.

Money Laundering. See topic Money Laundering.

Swiss Collective Investment Schemes.

Federal Act on Collective Investment Schemes dated 23 June 2006 ("CISA") and two implementing ordinances on Collective Investment Schemes adopted by Federal Council and Federal Banking Commission entered into force on 1 Jan. 2007 and aimed to strengthen position of Switzerland as producer of investment funds and to bring regulation of Swiss securities funds in line with EU regulations.

Supervision by Financial Market Supervisory Authority.

Collective investment schemes are assets raised from investors for purpose of collective investment, and which are managed for account of investors. CISA distinguishes between closed-ended and open-ended investment schemes. Investors in latter are entitled to redeem their interest at net asset value.

Open-ended collective investment schemes are either established as contractual funds by dedicated fund management company or as separate investment companies with variable capital ("SICAV"). Both legal forms may be organized as so-called umbrella funds with several subfunds that assets of which are ring fenced. CISA stipulates specific regulations for three types of open-ended collective investment schemes, namely: (i) Securities funds, Swiss equivalent to UCITS in European Union (ii) other funds for traditional and alternative investments, and (iii) real estate funds. Investors in real estate funds may request redemption of their interests upon 12 months' notice as of end of business year only. Assets of any open-ended collective investment scheme must be held with mandatory Swiss depository bank.

Closed-ended collective investment schemes may be in form of limited partnerships for collective capital investments or investment companies with fixed capital ("SICAF"). Sole purpose of limited partnerships for collective investments must be collective investment. At least one partner bears unlimited liability; this general partner must be Swiss share corporation that is only engaged in single limited partnership for collective investments. Other partners are liable only up to specified amount and must qualify as so-called qualified investors. Limited partnerships for collective investment schemes may invest in risk capital (private equity and venture capital), real estate and construction projects, and alternative investments. Share companies qualify as SICAF within meaning of CISA, if they are established with collective capital management purpose and if either shareholding is not limited to qualified investors or their shares are not listed on Swiss securities exchange.

All Swiss collective investment schemes and mandatory Swiss fund management company in case of contractual funds, mandatory depository bank, general partner of limited partnerships for collective investments, Swiss portfolio manager appointed to manage assets of Swiss collective investment scheme, and Swiss fund distributors must be licensed by Financial Market Supervisory Authority and statutory documents of Swiss collective investment schemes must be approved by it.

Foreign Collective Investment Schemes.

Public promotion of interests in foreign collective investment schemes in or from Switzerland requires approval of relevant documents (prospectus, articles of association, or fund contract) by Financial Market Supervisory Authority. Approval is granted to mandatory Swiss representative, if: (i) collective investment scheme is subject to public supervision in its country of domicile, (ii) organization, investor rights, and investment policy of equivalent to provisions of CISA, (iii) designation of collective investment scheme does not provide grounds for confusion or deception, and (iv) Swiss representative and Swiss paying agent bank are appointed.

See topic 3.17 Securities; category 7 Criminal Law, topic 7.01 Criminal Law.

3.02 BILLS AND NOTES:

See topic 3.14 Negotiable Instruments.

3.03 COMMERCIAL CODE:

Swiss Code of Obligations of Mar. 30, 1911 with amendments governs contracts and corporations and other business organizations. Separate statutes cover banking, insurance, unfair competition, etc.

3.04 COMMERCIAL REGISTER:

See topic 3.15 Register of Commerce.

3.05 CONDITIONAL SALES:

See topic 3.16 Sales.

3.06 CONSUMER PROTECTION:

Price supervision statute of Dec. 20, 1985 applies to goods and services.

Contracts with consumers are normally governed by law of habitual residence of consumer. (Art. 120 Private International Law Statute).

Statutes on product liability and on consumer credit and consumer information apply.

See category 5 Civil Actions and Procedure, topic 5.07 Product Liability.

3.07 CONTRACTS:

Applicable Law.

Contract is subject to law expressly agreed on by both parties. Otherwise, applicable law is that of country of habitual residence of party that under contract is required to perform obligation that is characteristic for type of contract in question. (Art. 117 Private International Law Statute). Special conflicts rules apply to contracts on immovables or with consumers, employment contracts and license agreements. Same law is applied to contract formation. Different law may apply to specific questions such as form of contract, power of attorney, etc. See topic 3.16 Sales.

Formation.

Contract requires: (a) Mutual agreement, express or implied; (b) “causa” only in certain cases, i.e., transfer of personal or immovable property; and (c) capacity of parties to contract. Every person who is of age (18) and sound mind has capacity. Minors or disabled persons of sound mind can validly accept only purely gratuitous benefits without their guardian's concurrence.

Consideration is not required.

Contracts are valid without any special form unless the law provides otherwise. If a form is legally prescribed, its observance is usually a condition of validity. Principally prescribed forms are written form and publicly authenticated instrument—usually by notarized deed. Where parties, without requirement of law, have stipulated use of special form, presumption is that they shall not be bound unless special form is complied with. Registration of contracts is only necessary as rule in connection with immovables.

An offer including a time limit for acceptance binds offeror for period concerned. An offer with no time limit made in the presence of a prospective party or over the phone ceases to be binding if it is not accepted immediately. If made to a party at a different place it is binding until an answer should have been received, if dispatched in due course and time. Where by reason of special nature of transaction or circumstances express acceptance is not to be expected, contract is binding unless offer is refused within reasonable time.

Formal Requirements.

Written form may be mandatorily prescribed by statute or chosen by parties. (C.O. 13, 16). Document must be signed by all persons obligated thereby. According to case law, emails or any other forms of electronic transmission do not fulfill requirements of written form. However, Federal Act on Electronic Signature, effective from 1 Jan. 2005, introduced certification and recognition signature. Consequently, electronic signature certified by competent authority is deemed to be equal to handwritten signature.

Publicly authenticated instrument to extent that federal law does not have provisions, must follow form prescribed by cantonal law. (C.C. Final Title 55).

See category 10 Documents and Records, topic 10.01 Acknowledgments and Other Public Authentications.

Chosen Form.

Special form may be chosen by parties to contract, which otherwise would need no special form in order to be valid, either (a) merely as means of proof, in which case parties are bound in ordinary way before execution of form but may enforce such execution, or (b) as condition for validity of contract, whereby in case of reservation by parties, intention of parties not to be obligated before conclusion of contract in special form is presumed (C.O. 16), but not for subsequent alterations of contract.

Mandatory Form.

For certain legal acts observance of special form is required. This is condition for validity unless law provides otherwise. (C.O. 11; C.C. 7). If form is prescribed for validity of legal act, it must also be observed for any alterations, but supplementary nonessential clauses not in contradiction to act need not observe form. (C.O. 12).

Written form mandatory for: agreement for distribution of estate provided no new rights in rem are thereby created (see categories 13 Estates and Trusts, topic Executors and Administrators; Property, topic Immovable Property); assignment of rights (see category 8 Debtor and Creditor, topic Assignments); promise of gift of movable property, i.e., all kinds of property except immovables and rights in rem in immovables (C.O. 243); consumer credit contracts (Arts. 9-12 of Federal Act on Consumer Credits dated 23 Mar. 2001); several labor law specific contracts and clauses (see category 11 Employment, topic 11.01 Labor Relations).

Publicly Authenticated Instrument Mandatory.

See category 10 Documents and Records, topic 10.01 Acknowledgments and Other Public Authentications. Mandatory for inter alia: matrimonial property contract (see category 14 Family, topic Husband and Wife); public will and inheritance pact including promise of gift to be performed at death of donor (see category 13 Estates and Trusts, topic 13.09 Wills, and C.O. 245); most agreements for conveyance or encumbrance of immovable property (see category 22 Property, topic Immovable Property); incorporation and certain legal acts pertaining to share corporations and to limited partnership corporations (see category 2 Business Organizations, topic 2.03 Corporations).

Contracts of guaranty (einfache Buergschaft, cautionnement simple, fideiussione semplice [C.O. 495]), or of suretyship (Solidarbuergschaft, cautionnement solidaire, fideiussione solidare [C.O. 496]), are subject to special provisions, inter alia to following: As a rule, written form is required; and maximum amount of liability of guarantor or of surety must be mentioned in instrument, in case of suretyship also several liability of surety. Special rules apply if guarantor or surety is natural person (with exception of guaranty or suretyship in favor of Swiss Confederation including its establishments or of canton for custom duties, taxes, etc.): if amount of liability of guarantor or of surety exceeds CHF 2,000, publicly authenticated instrument containing inter alia maximum amount of liability and signature of guarantor or surety is required; for lesser amount, written form is sufficient, however with statement of maximum amount of liability in guarantor's or surety's own handwriting in instrument, in case of suretyship also solidarity clause (C.O. 493); if guarantor or surety is married and spouses not judicially separated, written consent of spouse required before or at entering of obligation. (C.O. 494). Special rules apply for subsequent alterations of such contract of guaranty or suretyship.

General Terms and Conditions.

Switzerland currently has no statutory control over content of general terms and conditions. Based on general principles of Swiss private law and Art. 8 of Federal Act on unfair competition, Swiss Federal Court developed two rules applicable to interpretation of such general terms and conditions as case law. (1) Rule of Unusualness: Clause of globally accepted general terms and conditions is not applicable if such rule is unusual for specific type of contract and if accepting party did not or did not have to anticipate such rule for specific contract. (2) Rule of Unclarity: Clause of general terms and conditions that is, even after extensive construction, still unclear, always has to be interpreted to disadvantage of composer.

Particular duties to provide access to general terms and conditions to addressees and particular duties to inform them concerning content of such terms and conditions arise in case of labor-, insurance- and package holiday-contracts.

Excuses for nonperformance are: impossibility of performance by circumstances beyond party's control, force majeure, and clausula rebus sic stantibus.

Government Contracts.

As a rule there are no special requirements for contracting with governmental bodies. However, governmental procurement is regulated, both on federal and cantonal level in accordance with principles of General Agreement on Trade and Tariffs. According to Federal Act on Governmental Procurement dated 16 Dec. 1994, as amended, prior to any conclusion of contract between federal governmental body and contracting party, tender procedure has to be established and effected usually if contract value exceeds specific limits. When establishing tender procedure, responsible governmental body has to disclose criteria relevant for decision to which competitor contract should be awarded. Tender procedure will be terminated by order of responsible governmental body specifying competitor to whom contract was awarded. This order may be challenged by way of public appeal by other competitors.

See also topics 3.06 Consumer Protection, Distributorships, Sales; categories 5 Civil

Actions and Procedure, topic Damages; Debtor and Creditor, topic Pledges; Employment, topic Labor Relations; Mortgages, topic Mortgages; Property, topic Landlord and Tenant.

3.08 DISTRIBUTORSHIPS:

Sole Distributorship.

Special contract type not covered by C.O.

Commercial Agency Agreement.

Noncompetition clause may be agreed on, but gives agent mandatory claim for compensation in case of termination. If agent has considerably enlarged circle of customers of principal and if after termination principal will enjoy considerable advantages thereby, then agent has claim for adequate compensation if principal terminates. Agent does not have claim if he is reason for termination. This claim may not exceed agent's net profit for one year calculated on basis of average of agent's net profits during past five years. (C.O. 418a-418v).

According to case law, there is no such termination compensation claim if sole distributorship is terminated.

3.09 FIRM AND CORPORATE NAME:

When doing business, any individual or association of persons must use firm or corporate name. (C.O. 944-956). No reservation of name is possible.

Selection of Firm and Corporate Names.

Meaning of name may not be deceptive or against public policy. Advertising claims may not be included in name. Firm name of individual must mention individual's last name, with or without first name. (C.O. 945).

To determine availability and admissibility of name, inquiries should be addressed to Federal Commercial Registry Office beforehand. However, clearance and actual registration by Registrar does not have binding legal effect. Aggrieved third parties may still sue for change of name.

Branch offices must use name of head office, possibly with additions valid only for branch office. Branch office of foreign enterprise must include place of business of head office and of branch office, and explicit designation as branch office. (C.O. 952).

Foreign Firm and Corporate Names.

If such names violate mandatory rules of Swiss law, they may not be used for Swiss branches of foreign enterprises.

Exclusiveness of Registered Firm and Corporate Name.

Two businesses in same relevant area may not have same name. (C.O. 946, 951).

3.10 INFORMATION TECHNOLOGY, INTERNET AND NEW MEDIA:

Computer programs are protected without registration by Federal Statute on Copyright of Oct. 9, 1992. Protection lasts for 50 years after originator's death. Ideas and principles being basis of elements of computer programs or interfaces are not protected.

Originators have exclusive right to grant license to copy, modify, translate or arrange computer programs and to distribute or hire out originals or copies of computer programs. Right of user to copy software for backup purpose cannot be contractually excluded. With certain limitations, users may reverse engineer computer programs to acquire necessary information to secure interoperability with other independently created computer programs. Commercial rights in computer programs produced by employee in conducting duties under his employment or according to instructions of employer vests exclusively in employer.

E-Commerce.

At moment, Switzerland has no specific E-Commerce law enacted. However, Swiss law provides for dispositions on electronic signature. (See category 3 Business Regulation and Commerce, topics Formal Requirements and Electronic Signature.)

Database Protection.

Data is protected by Federal Data Protection Act of June 19, 1992.

Electronic Signature.

Federal Act on Electronic Signature of 19 Dec. 2003 sets forth conditions to be met by certification authorities in order to issue electronic certificates.

Telecommunication.

Telecommunication facilities (telecommunication lines, access to networks, interconnection and other telecommunication facilities) are regulated by Federal Statute on Telecommunication of Apr. 30, 1997. Statute was fundamentally amended with effect from 1 Apr. 2007 and requires that provision of telecommunication services be announced to competent federal authority. Provision of certain telecommunication services, such as public telephone and radio communication services, is subject to concession.

Law provides for unbundling of last mile whereby suppliers are given access to local loop. Liberalization of last mile, as well as leased lines prices being subject to interconnection regime, have been imposed in advance by Ordinance on Telecommunication Services of Mar. 7, 2003, in force since Apr. 1, 2007.

3.11 INTEREST:

No interest is chargeable on money debts except when parties explicitly or implicitly agree to it, or if provided for by statute (e.g., in case of default of debtor, C.O. 104). However, in case of debts resulting from business transactions, e.g., commercial loan, interest is presumably owed. (C.O. 314).

Interest rate, unless agreed by parties, depends on custom, in case of loan presumably at rate customary for particular loan at time and place where it was made. Frequently, with special cases excepted, rate is 5% (C.O. 73, 314); in case of recourse on draft or check rate is 6% (C.O. 1045/46, 1130). For consumer credit contracts, legal rate is determined by Swiss government (Art. 14 of Federal Act on Consumer Credits dated 23 Mar. 2001) and should, as general rule, not exceed 15%. Stipulations for compound interest are not valid except when customary in business, as for current accounts and for savings bank accounts. (C.O. 314).

Federal law does not fix a maximum interest rate. However, it provides that, in case of manifest disproportion of mutual considerations of the parties, caused by one party taking advantage of distress, inexperience, or carelessness of other party, prejudiced party can rescind contract and demand restitution within one year of conclusion of contract. (C.O. 21). Cantons may fix maximum interest rate for debts secured by immovable property. (C.C. 795). Legislation against abuses by agreed interest rates may be enacted by public law (C.O. 73), and exists in several cantons, e.g., Zurich, where lenders may charge monthly maximum 1% for interest. Usury is punishable. (Swiss Criminal Code 157).

3.12 LICENSES, BUSINESS AND PROFESSIONAL:

Business Licenses.

Banks must comply with Federal Banking Act of Nov. 8, 1934, as am'd, and are subject to supervision by Financial Market Supervisory Authority.

Securities dealers must comply with Federal Stock Exchange Act of Mar. 24, 1995, and are subject to supervision of Financial Market Supervisory Authority. Professional secrecy is equivalent to bank secrecy.

Stock exchanges must obtain license under Federal Stock Exchange Act. Presently two stock exchanges, SIX Swiss Exchange and BX Berne eXchange, operate electronic trading systems.

Collective Investment Schemes and their service providers must comply with Collective Investment Schemes Act of June 23, 2006 and are subject to supervision by Financial Market Supervisory Authority.

Insurance enterprises are subject to Federal Act on Supervision of Insurance Enterprises of Dec. 17, 2004 and are supervised by Financial Market Supervisory Authority.

Covered bond institutions are subject Federal Act on issue of covered bonds of June 25, 1930, as am'd, and subject to supervision by Financial Market Supervisory Authority.

Aliens must obtain residence and work permits to exercise profitable activity in Switzerland. (See category 4 Citizenship, topic 4.01 Aliens.) Apart from this general provision and those concerning state monopolies, there are few restrictions for foreign enterprises or subsidiaries. Specific requirements apply to ownership, management and residence in connection with oil drilling and oil exploitation on lands in Switzerland (Concordat Sept. 24, 1955); pipelines (statute Oct. 4, 1963); nuclear energy (statute Mar. 21, 2003); Swiss seagoing vessels (statute Sept. 23, 1953) (see category 24 Transportation, topic 24.02 Shipping); aircraft registered in Switzerland (statute Dec. 21, 1948), banking, securities trading and brokerage, collective investments, and insurance. Authorization is not required for acquisition of Swiss immovable property if foreign enterprises will use it mainly for manufacturing, trading, or other commercial establishment. See categories 15 Foreign Trade and Commerce, topic Foreign Investment and Property, topic Immovable Property.

Professional Licenses.

Professional licenses are required for medical and other professions. See; categories 10 Documents and Records, topic Notaries Public; Legal Profession, topic Advocates and Counselors.

Money Laundering.

Federal Statute regarding combat against money laundering dated Oct. 10, 1997, as am'd, provides for various obligations of financial intermediaries (such as banks, insurance enterprises, portfolio managers, other financial intermediaries) to prevent money laundering.

Supervised by Financial Market Supervisory Authority in Bern. All financial intermediaries not subject to supervision by dedicated supervisor must join recognized self regulatory association for prevention of money laundering or apply for direct supervision by Financial Market Supervisory Authority. Supervised financial intermediaries such as banks, securities traders, collective investment schemes or insurance enterprises are subject to supervision by Financial Market Supervisory Authority.

Banks. Federal Banking Commission's Ordinance for prevention of money laundering of Dec. 18, 2002, as am'd, stipulates detailed provision that include, inter alia, duty of identifying customers and beneficial owners of assets, duty to systematically supervise transactions and money flows, duty of notifying central notification agency and Financial Market Supervisory Authority in cases of suspected attempts of money laundering and duty of temporarily freezing all assets which may be subject of suspected money laundering attempt.

Under Agreement on Swiss banks' code of conduct with regard to exercise of due diligence convention as in force since July 1, 2008 between Swiss Banker's Association and member banks, signatory banks undertake: (i) To verify identity of their contracting partners and to obtain from contracting partner declaration setting forth identity of beneficial owner of assets entrusted to bank; (ii) not to provide any active assistance in flight of capital; and (iii) not to provide any active assistance in cases of tax evasion or similar acts, by delivering incomplete or misleading attestations. Agreement does not modify obligation to observe banking secrecy, it lays down rules of good conduct in bank management.

Insurance. Financial Market Supervisory Authority's Ordinance for prevention of money laundering of Oct. 24, 2006 provides for detailed rules to be followed by insurance enterprises and insurance intermediaries.

3.13 MONOPOLIES, RESTRAINT OF TRADE AND COMPETITION:

Unfair Competition.

Applicable law is law of country in whose market unfair act has its effects or alternatively, law of country where injured firm has its registered office if violation of law exclusively affects business interests of specific competitor. Federal Statute of Dec. 19, 1986 forbids any behavior or business practice which is deceptive or infringes principle of good faith and which affects relationship between competitors or suppliers and consumers, especially incorrect, misleading or unnecessarily injurious statements on products or services of competitors or incorrect or misleading praise of one's own products or services, use of inappropriate titles or professional designations, measures which may cause confusion with goods or services of competitors, using or copying and exploiting third party work results, inducing employees or agents of competitor to betray trade secrets, any surreptitious obtainment of trade secrets, non-observance of labor conditions binding competitors, corrupting of employees, associates or agents of third company for execution or omission of actions related to professional or commercial activity (active private corruption), as well as acceptance of bribes for such actions (passive private corruption).

Persons suffering from or threatened by impairment from above mentioned unfair acts, whether as competitors or as consumers (or as trade organizations defending economic interest of their members), may request civil courts to prohibit imminent or to remove ongoing infringement. Moreover, there is tort claim for damages and compensation under general rules. If these acts are committed by employees, impaired party can also proceed against employer. Upon request of impaired party, unfair trade practices can, if committed intentionally, be subject to criminal prosecution. With regard to active corruption, employer may also be criminally prosecuted if it has not taken all necessary and reasonable measures to avoid commission of such unfair acts.

Antitrust.

Law of country of market applies. In Switzerland, no damages will be awarded beyond those permissible under Swiss law. Federal Act on Cartels and Other Restraints of Competition of Oct. 6, 1995 applies to horizontal and vertical agreements and concerted practices affecting competition, to practices of enterprises having dominant positions, and to mergers. Agreements are unlawful if they may not be justified on grounds of economic efficiency or lead to elimination of effective competition. Practices of enterprises having dominant position are deemed unlawful when such enterprises, through abuse of their position, prevent others from competing in market or when they overlay trading partners. Pre-notification of mergers is mandatory above certain thresholds (CHF 2 billion worldwide or CHF 500 million turnover in Switzerland and CHF 100 million turnover in Switzerland of at least two of enterprises concerned). Furthermore, pre-notification of mergers is mandatory - regardless of whether thresholds are met - if legally enforceable decision establishes that participating enterprise occupies dominant position in market in Switzerland, and when concentration concerns either that market or adjacent market or market up or downstream. Competition Commission may intervene if merger creates or strengthens dominant position leading to elimination of effective competition. Direct sanctions up to 10% of turnover achieved in Switzerland over last three business years may be imposed on enterprises participating in certain illicit restraints of competition such as specific horizontal and vertical agreements and unlawful practices of enterprises having dominant position. Federal Act on Cartels enables competition authorities to conduct certain investigative measures, in particular, witness hearings and dawn raids. Competition Commission is Swiss authority in charge for cooperation with authorities of European Community in case of investigations pursuant to article 11 EC-Switzerland Treaty on Air Transport.

3.14 NEGOTIABLE INSTRUMENTS:

Drafts.

(Wechsel, lettre de change et billet a ordre, cambiale e vaglia cambiario [paghero]; C.O. 991-1099). Switzerland adhered to Geneva Conventions of 1930 and 1931 concerning uniform law of Drafts and Checks, on certain rules of conflicts of laws, and on stamp tax statutes connected therewith.

Requirements as to Content.

(1) Designation as draft or bill of exchange within text of document as drawn, (2) unconditional order to pay certain sum of money, (3) name of drawee, (4) maturity, (5) place of payment, (6) name of person to whom or to whose order payment is to be made, (7) date and place of drawing, (8) signature of drawer. (C.O. 991).

Maturity.

Draft not mentioning maturity is payable at sight. Draft not mentioning place of drawing is deemed to have been drawn at place indicated with name of drawer written on draft. (C.O. 992).

Transfer.

Delivery of draft with unconditional endorsement on draft or on sheet attached, or with written assignment. If draft contains clause “not to order” or equivalent clause, transfer is effected only by delivery of draft with written assignment. (C.O. 1001-1003, 165).

Presentment and Acceptance.

Draft may be presented for written acceptance by drawee at drawee's place until date of maturity unless prohibited in terms of draft; such prohibition is permissible only under certain conditions. Acceptance binds drawee for payment at maturity. Draft payable at sight must be presented within one year from date of drawing, unless otherwise stipulated. (C.O. 1011-1019, 1024).

Draft has to be presented by holder on date of payment or on one of two following working days. (C.O. 1028).

Payment.

If draft calls for payment in currency other than legal tender at place of payment, amount may be converted into local currency at rate of exchange prevailing on date of maturity. If debtor delays payment, holder has option to demand payment either at rate of exchange in force on date of maturity or at rate prevailing on day of actual payment. Value of foreign currency is determined according to commercial custom at place of payment. Drawer may, however, in draft itself prescribe rate of exchange to be applied in converting foreign currency. (C.O. 1031).

Protest.

Drafts not accepted or not paid must be protested in usual manner, unless protest is waived. (C.O. 1034-1041, 1043).

Recourse in Default of Acceptance or Payment.

Holder may demand payment from endorsers, drawer and others liable on draft at maturity. This right also exists before maturity in case of nonacceptance, acceptor's insolvency or bankruptcy, or when execution on judgment against acceptor has been returned unsatisfied.

Any person paying draft has recourse against previous persons liable. (C.O. 1033-1052).

Days of Grace.

Not recognized; neither legal nor judicial. (C.O. 1083).

Limitation of Actions.

Actions are barred by statute of limitations. Periods: Any entitled persons against acceptor, three years after date of maturity; holder against endorsers and drawer, one year after due protest or if protest is waived one year after maturity; endorser against other endorsers and drawer, six months after date of payment or judicial enforcement. (C.O. 1069).

Insofar as drawer and acceptor of draft are unjustly enriched at expense of holder, they remain liable to holder, even when their liability has become extinguished by statute of limitations or because some formal requirements have not been met. (C.O. 1052).

Negotiable Instruments, Revenue Stamps.

Confederation may levy stamp duties on negotiable instruments (Federal Constitution art. 132); drafts may be subject to stamp duties under certain circumstances (i.e. collective capital raising).

Conflict of Laws.

Capacity of person to assume liability on draft is determined by law of country of citizenship. If capacity is denied by that law, liability nevertheless exists if signature has been given within country according to laws of which person is competent. (C.O. 1086). Form of contract on draft is governed by law of country where contract is signed. Form and time limits for protests and form of other acts necessary to exercise or preserve rights attaching to draft are governed by law of country in whose territory protest is to be made or where act is to be performed. (C.O. 1088). Effect of contracts on draft of acceptor and maker of promissory note are governed by law of place of payment. Effects of other contracts on draft are governed by law of country where contracts were signed. (C.O. 1090). Payment of draft on maturity, calculation of dates for maturity and payment and payment of draft made out in foreign currency are governed by law of country where draft is payable. (C.O. 1092). See C.O. 1086-1095.

Checks.

(C.O. 1100-1144). Check must contain designation “check”. Checks payable in Switzerland may be drawn only on banks. (C.O. 1100, 1102). Check cannot be accepted, it is payable on sight. Any provision to contrary is ineffective. (C.O. 1115). If check is “crossed,” it may only be paid to bank or to customer of drawee. If check is “especially crossed”, it may only be paid to especially designated bank or to bank's customer if bank is itself drawee. (C.O. 1123, 1124). Check may contain phrase: “for account only” or “for deposit only”, in this case payment of check in cash is excluded. (C.O. 1125).

Other Negotiable Instruments.

Law defines negotiable instrument (Wertpapier, papier-valeur, titolo di credito or cartavalore) as document to which right is connected in such way that right cannot be exercised against debtor nor transferred to third persons without document. (C.O. 965). Such instruments may be issued in name of specific creditor (C.O. 974-977) or payable to order of specifically named creditor (C.O. 1145-1152, 967-969) or to bearer (C.O. 978-989). Certain instruments are on order by operation of law, such as drafts, checks payable to specifically named person, registered shares, commercial paper (including warehouse receipts, warrants, bills of lading), mortgages issued on names. Instruments to bearer are frequently issued in Switzerland, especially for debentures and shares.

Transfer.

Full transfer may be effectuated only by delivery of instrument itself or of means procuring power over instrument. No further requirement for transfer of instruments to bearer. For instrument payable to named person written declaration of assignment by transferor either on document itself or separately is required; for instrument to order, either endorsement on instrument or sheet attached to it, or written assignment on instrument itself or separately.

Defenses.

In any kind of negotiable instrument debtor (obligor) has defenses (1) pertaining to validity and wording of instrument and (2) other defenses existing against immediate creditor.

In case of instruments to bearer or to order, other defenses of debtor based on legal relations between debtor and assignors are excluded, except in case of fraud. Defenses pertaining to validity of transfers are also excluded, but instrument to order must show uninterrupted chain of endorsements. (C.O. 979, 1007, 1146).

In case of instruments payable to named persons, additional defenses are possible based on legal relations between debtor and first creditor and all assignors; also defenses pertaining to validity of all transfers. (See category 8 Debtor and Creditor, topic 8.01 Assignments.)

Special Kinds of Negotiable Instruments.

There are various forms of negotiable instruments showing only some of features described above. Negotiable instrument may be restricted in respect of transfer so that only transfer by way of assignment and not by usual order by law is possible (so-called “recta-instrument”, C.O. 1001); instrument payable to named person may have clause that debtor is entitled (but not bound) to perform to any holder of instrument (so-called “limping bearer instrument”, C.O. 976). Instruments payable to named persons or to order may be subject to special restrictions of transfer (so-called “vinculation”), i.e., in case of registered shares, consent of legal entity according to articles is condition subsequent for transfer. (C.O. 627 No. 8, 684-686a).

3.15 REGISTER OF COMMERCE:

Anyone in trading, manufacturing or other business must register firm's name in

Register of Commerce (Handelsregister, Registre du commerce, Registro di commercio) of canton or district where seat is located. (C.O. 934). Many legal entities, such as share corporations, limited liability corporations, cooperative corporation, etc., come into existence only when entered into Register of Commerce.

Registration of Swiss corporations is effected on basis of publicly authenticated deed.

Branch offices of Swiss corporations are registered in canton or district in which branch office has its place of business after registration of main office in its own district. (C.O. 935).

Branch offices of foreign corporations are registered in same way as branches of Swiss corporations. For such branches, agent residing in Switzerland and having power of representation must be appointed.

Nonregistered corporations etc. have no legal existence. Nonregistered branch offices may still do business in Switzerland.

Registrar of Register of Commerce may levy fines on persons and firms not complying with law. (C.O. 943). Articles, names of partners, board members and officers must be registered. Authenticated signatures of persons having signing power must be deposited. (Ordinance of Commercial Register [Handelsregisterverordnung] as of Oct. 17, 2007, art. 21). Any alterations must also be registered. (C.O. 937).

Certified copies and translations of foreign articles, extract of foreign Register of Commerce (or equivalent), board resolution creating branch office and appointing resident agent must be submitted.

Unless otherwise decreed, entries are published in Swiss Official Journal of Commerce (Schweizerisches Handelsamtsblatt, Feuille officielle suisse du commerce, Foglio ufficiale svizzero di commercio). As result, third parties shall have constructive notice of registration. (C.O. 931, Ordinance of Commercial Register [Handelsregisterverordnung] as of Oct. 17, 2007, art. 1).

See also topic 3.09 Firm and Corporate Name; categories 2 Business Organizations, topics Corporations, Foundations, Membership Associations, Partnerships; Debtor and Creditor, topic Collection of Debts and Bankruptcy; Intellectual Property, topic Trademarks.

3.16 SALES:

International Sales.

Law of habitual residence of seller applies for movable objects. Choice of law is permitted. For contracts made from Mar. 1, 1991 onwards Vienna Convention on Contracts for the International Sale of Goods applies. See Part V.

Domestic Sales.

Sale of movable property is contract whereby seller agrees to deliver object of sale and to transfer ownership thereof to buyer, and whereby buyer agrees to pay purchase price to seller. (C.O. 184-215, 222-236, and also Federal Law on Consumer Credits).

In sales of movable property, unless otherwise provided by agreement or custom, delivery of property and payment of price are concurrent conditions. Price is considered as sufficiently determined if it is ascertainable. (C.O. 184). When contract for sale of personal property is entered into, benefit and risk of property pass to buyer, unless special circumstances occurred or otherwise stipulated. (C.O. 185).

In absence of contrary agreement or custom, seller must pay costs of delivery unless goods are to be shipped to place different from that of performance, in which case buyer has to bear costs of shipment. (C.O. 188, 189).

Bills of Sale.

As a rule, no special instrument is mandatory for validity of sale of movable property. Sales agreement may be oral.

Transfer of Title.

Title to movable things passes by transfer of “possession” to buyer, either of thing itself or instrument granting power of title in thing. Bona fide transferee of movable thing becomes its owner as soon as transferee's possession is protected according to rules of possession, even if transferor had no right to transfer ownership. (C.C. 714, 922-925).

When goods are sold on approval or subject to inspection, seller remains owner until approval. (C.O. 223).

Stoppage in Transitu.—Shipper may stop goods in hands of carrier, unless bill of lading has come into hands of consignee, or shipper is unable to return carrier's receipt, or consignee has been notified in writing to take delivery, or consignee has notified carrier after arrival of goods at place of destination that consignee is ready to take delivery. To exercise this right shipper need not specify any reasons. It is immaterial whether or not goods are actually in transit, provided they have not yet reached consignee. (C.O.443).

Warranties.

Seller warrants title, except if buyer knew risk of claim of third persons at time of contract. (C.O. 192). Seller warrants further, by law, quality of object of sale and its fitness for intended use, even if seller has no knowledge of defects. (C.O. 197). Agreements excluding or limiting such warranties of seller are void where seller intentionally (C.O. 192) (in case of claims of third persons) or fraudulently (C.O. 199) (in case of defects) conceals claims of third persons or defects.

Remedies of Buyer.

Upon receipt of the goods buyer should promptly inspect them and notify seller of any deficiencies lest goods are deemed to be accepted. Deficiencies which cannot be detected by customary examination are excepted, but must be communicated immediately upon later discovery. (C.O. 201).

If seller's warranty for deficiencies is established, buyer may either rescind sale or claim difference resulting from deficiencies (reduction). Court at its discretion may grant reduction even if complaint asks for rescission. (C.O. 205).

In case of delivery of fixed quantity of fungible goods buyer is entitled to claim either rescission, or reduction, or goods of same kind. Unless goods are shipped from another place, seller may forestall any claim of buyer by immediately delivering goods of same kind. (C.O. 206).

If in commercial transaction, sales agreement provides for fixed delivery date and seller defaults, it is assumed that buyer foregoes delivery and claims damages. Should buyer, however, elect to require delivery, buyer must notify seller immediately upon expiration of time limit. Buyer's damages consist of difference between contract price and price at which buyer replaces goods in good faith. Where there is market price, or commodities exchange price, buyer may claim difference between contract price and price on date fixed for performance, irrespective of whether substitute goods were purchased. (C.O. 190, 191).

Notices Required.

Notice of nonconforming delivery is preferably and customarily given in writing by registered letter. (C.O. 201).

Statute of Limitations.

Buyer's claim for warranties barred after one year of delivery to buyer even if buyer discovers deficiencies only later (unless seller has given warranty for longer period). Buyer has to file formal action in court within one year from delivery. Objections of buyer based on deficiencies are not proscribed if buyer has properly notified seller within one year. One year limitation cannot be invoked by seller, if seller's willful deceptive behavior can be proven. (C.O. 210).

Remedies of Seller.

If goods are sold only against prepayment or on terms providing for delivery against payment, seller may withdraw from contract on immediate notice if buyer has defaulted. If goods were delivered before payment and buyer defaults, seller may rescind sale and demand return of goods only if seller has explicitly reserved this right. (C.O. 214).

If buyer fails to pay in time, seller is entitled to damages, which between merchants may be determined as difference between purchase price and price obtained by seller through bona fide resale of goods. If goods have market or exchange price, seller may abstain from resale and claim difference between sales price and market or exchange price at time of performance. (C.O. 215).

Credit agreements with consumers are restricted under Federal Law on Consumer Credits of Mar. 23, 2001 (e.g. credit grantors must verify consumer's credit capacity, interest rate limited to 15% per annum, credit agreements can be revoked within seven days after signature). (Arts. 14, 16 and 28 of Federal Law on Consumer Credits).

Conditional Sales.

Sale of movables with reservation of property rights by seller is recognized in Switzerland provided such transaction has been duly recorded in Register of Reservation of Ownership. (C.C. 715). See category 10 Documents and Records, topic 10.04 Records.

Price Supervision.

Federal Statute Price Supervision of Dec. 20, 1985 applies to goods and services.

See also topic 3.08 Distributorships.

3.17 SECURITIES:

Shares and bonds may be issued into Swiss market free from any licensing or approval requirement. They must only be publicly offered and promoted with issue prospectus. Structured financial products must only be publicly offered and promoted if special simplified prospectus is prepared. Interests in Swiss and foreign collective investment schemes must only be publicly promoted with prior approval by Financial Market Supervisory Authority and on basis of continuously amended prospectus.

Takeover Offers.

Regulated in Stock Exchange Statute. Provisions apply to public tender offers for securities of Swiss corporations quoted on Swiss exchange. Takeover Board monitors takeovers. Stock Exchange Statute requires minimum disclosure by offeror, equal treatment of shareholders, etc. Board of directors of target is limited in taking defensive measures after offer is announced.

Large shareholdings in Swiss listed corporations must be reported. Obligation to make public tender offer if acquiror of securities exceeds certain thresholds.

See topic 3.01 Banks and Banking; category 7 Criminal Law, topic 7.01 Criminal Law.

4 CITIZENSHIP

4.01 ALIENS:

See category 17 Immigration, topic 17.01 Aliens.

4.02 CITIZENSHIP:

Swiss citizenship derives from citizenship of one or more Swiss cantons; cantonal citizenship is intrinsically connected with citizenship of one or more municipalities (cities or villages) within that canton. (Federal Constitution Arts. 37-38 and Federal Statute on Acquisition and Loss of Swiss Citizenship, of Sept. 29, 1952, as am'd Jan. 1, 2009).

Governing principles for acquisition and loss of Swiss citizenship are jus sanguinis, preservation of unity of family, and equality between men and women. There is no acquisition of Swiss citizenship by jus soli in Swiss law.

Acquisition.

Inter alia by (a) birth of child in wedlock, if father or mother is Swiss (except by former marriage), or out of wedlock if mother is Swiss or if father is Swiss and marries mother after birth of foreign minor child; (b) naturalization of aliens; (c) reinstatement into Swiss citizenship of certain former Swiss citizens; (d) adoption of foreign minor child by Swiss citizen or by spouses one of which is Swiss (except by former marriage).

Naturalization by ordinary procedure may be granted by Swiss canton and municipality within that canton with preceding authorization of federal authorities. Applicant must as a rule have been domiciled in Switzerland for total of 12 years, three of them during last five years preceding application. Cantonal rules on required local residence apply. Years between tenth and 20th birthday of applicant count twice. If one spouse fulfils conditions other can also apply for Swiss citizenship, if spouse has lived in Switzerland for total of five years, including year preceding application. Same rule applies to spouse of person who has already been granted naturalization in Switzerland.

Naturalization by facilitated procedure may be granted free by federal authorities, as rule with consent of canton, (a) to alien spouse of Swiss citizen if spouse has lived in Switzerland for total of five years, including year preceding application, and has been married to Swiss for three years; (b) to alien spouse of Swiss citizen who lives or has lived abroad if spouse has been married to Swiss for six years and if spouse is closely related to Switzerland; (c) to child being born before July 1, 1985 in wedlock to mother, Swiss of origin, naturalization or adoption, and alien father, if child lives in Switzerland and application is made before child turns 32; if child older than 32, its father must have lived in Switzerland for total of five years, including year preceding application; (d) to child born in wedlock to mother, Swiss by previous marriage, and alien father, if mother is related closely to Switzerland or if child lives in Switzerland and has lived there for total of six years; (e) to alien child of Swiss father out of wedlock if application is made before child turns 22, if child has been living in Switzerland for one year or has been living with father for one year or child has permanent close relation to father or if child is stateless.

Reinstatement into Swiss citizenship may be granted by federal authorities, as a rule with consent of canton, to Swiss woman who lost Swiss citizenship when marrying alien, and to Swiss citizen born abroad who lost Swiss citizenship at age 22 because of omission to register.

See infra, subhead Multiple Citizenship.

Loss.

(a) If parental relationship to parent who has given Swiss citizenship is annulled; (b) by release from Swiss citizenship; (c) by expatriation, admissible only for double or multiple citizens, see subhead Multiple Citizenship, infra; (d) by adoption of Swiss minor child by foreigner if child thereby acquires nationality of foreigner or already possesses foreign nationality of adopting person.

Release from Swiss Citizenship.

Prerequisite is that person in question possesses or has reliably been assured citizenship of another country, is not domiciled in Switzerland, and is at least 20 years old. Granted by canton or cantons of which applicant is citizen.

Minor child of applicant who is under parental power is included in release, provided such child also has no domicile in Switzerland; child over 16 must consent in writing.

Multiple Citizenship.

Subject to above exceptions, Swiss citizen who by virtue of foreign law or by naturalization acquires one or more citizenships of foreign countries does not lose thereby Swiss citizenship (multiple citizenship). However, Swiss multiple citizen born abroad loses citizenship upon becoming 22, unless registered with Swiss authority in Switzerland or abroad or written declaration to keep Swiss citizenship was filed. Reinstatement into Swiss citizenship is possible within ten years in case of excusable reasons for omission of such notification or declaration. Furthermore, Swiss multiple citizen who seriously impairs interests or reputation of Switzerland may be deprived of Swiss citizenship by federal authorities with consent of canton.

For jurisdiction of Swiss court at place of origin, Swiss citizenship suffices. For applicable law, citizenship with which person has closest connection counts. For recognition and enforcement of foreign decisions in Switzerland any citizenship will do. (Art. 23 Private International Law Statute).

Military Service.

See category 25 Treaties and Conventions, topic 25.01 Treaties.

4.03 IMMIGRATION:

See category 17 Immigration, topic 17.01 Aliens.

4.04 NATURALIZATION:

See topic 4.02 Citizenship.

5 CIVIL ACTIONS AND PROCEDURE

5.01 ACTIONS:

All actions must be brought before courts. At present, each of Switzerland's cantons has its own laws on civil procedure. In order to harmonize different procedural laws, Swiss Federal Council drafted Federal Code of Civil Procedure; its enactment is planned for Jan. 1, 2011.

Action is basically commenced in Switzerland when first procedural step is taken, such as conciliation procedure before justice of peace. Service of process is effectuated by courts, not by parties. Switzerland is signatory to Hague Convention of Nov. 15, 1965 on Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters, Hence, service of process for foreign proceedings must go through diplomatic channels and cannot be accomplished by Swiss lawyers. American lawyers may apply to local U.S. Consular Office in Switzerland for information. Lugano Convention applies. See topic 5.04 Judgments.

Swiss courts have judicial notice of foreign law but may in disputes of financial interest impose burden of proof on parties. Swiss law applies if contents of foreign law cannot be established. Switzerland is signatory to European Convention of June 7, 1968 on Information on Foreign Law.

Limitation of:

See topic 5.05 Limitation of Actions.

5.02 DAMAGES:

Party to contract is liable for damages in case of non-fulfillment, unless party proves lack of fault.

If there is no contract, general rule is that a person is liable for damage caused to another only if person has behaved unlawfully, be it willfully or with gross or slight negligence. This rule applies also to product liability. (See also topic 5.07 Product Liability.)

There are special fields where there is liability for consequences only and where fault is not required, i.e., railways, motor vehicles, nuclear, water pollution, etc.

Statute concerning compensation to victims of violent crime provides for subsidiary Government payments.

5.03 DEPOSITIONS AND DISCOVERY:

Depositions in Switzerland are taken following court orders by special court procedure.

Letters rogatory addressed to particular court or generally to any court having jurisdiction will be executed by proper authorities. Written questionnaires must accompany letters rogatory, and should be drawn with special regard for difference between common law and civil law methods of taking testimony.

Attorneys or parties may not obtain depositions for foreign court procedure except with specific permit received from Division for International Judicial Assistance, Federal Office of Justice at Federal Department of Justice and Police (http://www.ofj.admin.ch). Swiss Government will not permit commissions from foreign countries addressed to consuls, notaries, or any other individuals to be executed in Switzerland. U.S. Department of State has instructed American consular officials not to execute commissions addressed to them in Switzerland.

Depositions outside of Switzerland are obtained by courts through Swiss diplomatic channels with help either of competent foreign courts or of Swiss consular officers.

Switzerland is party to Hague Convention of Mar. 1, 1954 Civil Procedure and to Hague Convention of Mar. 18, 1970 on Taking of Evidence Abroad in Civil or Commercial Matters.

5.04 JUDGMENTS:

Judgments by courts in Switzerland in matters of private law relating to money claims or other kinds of claims must be recognized and enforced anywhere in Switzerland, provided they are res judicata, rendered by competent court, and with due citation of defendant (who in case of incapacity must have been legally represented). Same holds for money claims for federal administrative decisions, also for certain cantonal administrative decisions, e.g., tax claims and for federal and cantonal penal judgments and decisions.

Foreign judgments in civil and commercial matters are recognized and enforced: (a) under Lugano Convention of Sept. 16, 1988 on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters with Austria, Belgium, Denmark, Finland, France, Germany, Gibraltar, Greece, Iceland, Ireland, Italy, Luxembourg, Netherlands, Norway, Poland, Portugal, Spain, Sweden, U.K.: other EU and EFTA countries expected to join in course of revised Lugano Convention signed on Oct. 30, 2007, which will enter into force earliest on Jan. 1, 2011; (b) under bilateral treaties, e.g. with Czech Republic, Liechtenstein, Slovakia; (c) otherwise, Private International Law Statute applies.

For procedure of enforcement, see category 8 Debtor and Creditor, topic Collection of Debts and 8.03 Bankruptcy.

For arbitral awards, see category 9 Dispute Resolution, topic 9.02 Arbitration and Award.

5.05 LIMITATION OF ACTIONS:

Under Swiss law statute of limitations for actions is part of substantive law, not of procedural law.

Regular statute of limitations for claims is ten years, provided federal civil law does not specifically provide for different period (C.O. 127), e.g., five years for claims for rents, interests and other periodical payments, for delivery of food stuff, board, and for restaurant debts, for claims arising from craftsmen's work, for retail sales, for professional services of doctors, lawyers, legal counsels, holders of mandates, notaries, and for wages (C.O. 128), six months for right of borrower to receive loan and of lender for acceptance (C.O. 315). For claims based on responsibility against incorporators, directors, managers or liquidators of corporations statute of limitations is five years, calculated from day injured party received knowledge of damage and of person liable, at latest ten years calculated from day of damaging act. (C.O. 760). If general meeting has granted release, dissenting shareholder must file claim for responsibility within six months. (C.O. 758). Claims for torts are barred after one year from time when damaged party has received knowledge of damage and of identity of person responsible, but in any event after ten years from date injury took place, except for criminal law provides for longer statute of limitations. (C.O. 60). Certain special statutes, such as federal statutes on liability of railways etc. of Mar. 28, 1905, and on road traffic etc. of Dec. 19, 1958, provide for statute of limitations for two years. For statute of limitations of mortis causa dispositions, see category 13 Estates and Trusts, topic 13.09 Wills.

Suspension or Interruption of Statutory Period.

Statute of limitations does not commence and, if it has begun to run, is suspended in cases of certain parental or marital relations, as between parent and child, guardian and ward, between spouses, in case usufruct on debt exists, also as long as claim cannot be brought before Swiss Court. (C.O. 134).

Statute of limitations is interrupted (1) by acknowledgment of debt by debtor, particularly by payment of interest and installments, by giving pledge, mortgage or guarantee, (2) by prosecution for debt, or by bringing suit or raising defense in court or in arbitration, as well as by filing claim in bankruptcy, or by summons to appear in official conciliation proceeding. (C.O. 135).

See also categories: 3 Business Regulation and Commerce, topic 3.16 Sales, subhead Remedies of Buyers, catchline Statute of Limitations; and 1 Introduction, topic 1.03 Holidays.

5.06 PRESCRIPTION:

See topic 5.05 Limitation of Actions.

5.07 PRODUCT LIABILITY:

Federal Statute in force since Jan. 1, 1994. Mainly based on EU law. Strict liability of producer and importer for consequential damages caused by defective products. Compensation for death, personal injury and loss or damage to property in case of consumer goods.

6 COURTS AND LEGISLATURE

6.01 COURTS:

Cantonal Courts.

Most courts are cantonal courts.

Each canton has its own judicial organization, its own system of procedure (see 5 Civil Actions and Procedure, topic 4.01 Actions). Civil jurisdiction is harmonized by Federal Act on Civil Jurisdiction, in force since Jan. 1, 2001, to be incorporated into Federal Code of Civil Procedure. For its contemplated entry into force, see category 5 Civil Actions and Procedure, topic 5.01 Actions.

There are special inferior courts, such as “Justice of the Peace”, in some cantons mainly for conciliatory purposes before introduction of case to trial court.

Trial courts of general jurisdiction are variously called “District Court”, “Circuit Court”, “Court of First Instance”, “Cantonal Court”, etc.

In many matters appeal is possible to intermediate appellate court, called “Superior Court,” “Court of Appeal,” “Cantonal Court”, etc.

Commercial and industrial matters are in some cantons reserved to “Commercial Court”. Other separate courts are competent for labor, landlord and tenant, police matters, etc.

Swiss Federal Supreme Court (see category 1 Introduction, topic 1.02 Government and Legal System) with its main seat in Lausanne and chamber in Lucerne acts basically as appellate court and has final review of wide range of decisions or measures taken by cantonal and federal authorities, as in following matters: Complaints for violation of constitutional rights of individuals, recourses and complaints for violation of federal statutes on civil, penal or administrative matters, including federal tax statutes. Swiss Federal Supreme Court also has final jurisdiction in matters concerning international treaties where such jurisdiction is not reserved to other federal authorities. It only acts as trial court in special matters, such as litigation between Confederation and cantons.

The question, however, whether or not federal statute, federal decree of general obligatory character (see category 1 Introduction, topic 1.02 Government and Legal System, subhead Legislative Power), or international treaty concluded by Confederation violates Federal Constitution is not subject to review by Swiss Federal Supreme Court.

Swiss Federal Criminal Court in Bellinzona is court of first instance in criminal matters under federal jurisdiction such as money laundering, terrorism financing, and organized crime.

Swiss Federal Administrative Court with temporary seats in Berne and Zollikofen (and new, permanent seat in St. Gallen, presumably from 2012 onwards) is replacing Federal Appeals Commissions in administrative matters.

Separate Federal Military Criminal Courts have jurisdiction in matters involving federal military criminal law.

6.02 LAW REPORTS:

Major decisions of Swiss Federal Supreme Court are published currently in its official collection “Entscheidungen des Schweizerischen Bundesgerichtes, Amtliche Sammlung”, “Arrêts du Tribunal Fédéral Suisse, Receuil Officiel", and Internet (*http://www.bger.ch*). Numerous, mostly unofficial reports and periodicals, publish court decisions, e.g.: “Praxis des Bundesgerichtes”, “Blätter für Zürcherische Rechtssprechung”, “Journal des Tribunaux”, “Semaine judiciaire”, “Zeitschrift des Bernischen Juristenvereins”, “Basler Juristische Mitteilungen”, “Repertorio di Giurisprudenza Patria”.

6.03 LEGISLATURE:

See category 1 Introduction, topic 1.02 Government and Legal System.

6.04 STATUTES:

All federal statutes are published in “Amtliche Sammlung der eidgenössischen Gesetze”, “Receuil officiel des lois et ordonnance de la Confédération suisse” and in systematic looseleaf edition called “Systematische Sammlung des Bundesrechts”, “Receuil systématique du droit fédéral” (available at www.admin.ch).

Each canton publishes its statutes in its own official cantonal collection.

7 CRIMINAL LAW

7.01 CRIMINAL LAW:

Federal Criminal Code of Dec. 21, 1937 with amendments governs crimes, offenses and main delinquencies. Cantonal and federal statutes govern criminal procedure. In 2011, Federal Code of Criminal Procedure is expected to be enacted unifying cantonal procedural laws.

Art. 102 holds company criminally responsible, if during course of business crime is committed in company, which cannot be attributed to specific person due to deficient organization. If crime relates to money laundering, bribery, participation in criminal organization or terrorism financing, company is also held responsible and can be fined if it failed to put in place adequate safeguards to prevent such criminal acts by its employees.

Art. 161 forbids use or communication to third party by member of board, management or auditors of company or their agents of confidential information disclosure of which will considerably influence price of securities on stock exchange. Use of such information by tippee also falls under prohibition.

Art. 179-bis forbids direct recording of non-public conversation without consent of participants.

Art. 273 forbids to disclose manufacturing or business secrets to foreign state agency, organization or private enterprise, or their agents. Direct or indirect interest in Switzerland worthy of protection is required. Waiver of secrecy by individuals or legal entities concerned is insufficient if third parties or Switzerland have secrecy interests.

For database transfer abroad permit is required under Art. 6 Data Protection Statute.

Art. 271 forbids to exercise on Swiss territory acts for foreign state which are reserved to public officers. Foreign tax officer may therefore not make inspections on Swiss territory, even though Swiss corporation concerned may have given its consent. Any persons furthering such acts fall under same penalties. Taking of evidence or service of documents are prohibited without specific permit received from Swiss authorities. See category 5 Civil Actions and Procedure, topic 5.03 Depositions and Discovery.

Art. 305-bis and 305-ter forbid money laundering and lack of due diligence to identify customers when accepting money deposits.

Art. 322-ter forbids bribing judges, officials, experts, interpreters, arbitrators or members of armed forces in Switzerland. Art. 322 - septies provides same interdiction with regard to judges, officials, experts, interpreters, arbitrators or members of armed forces who work for foreign state or international organization. Also accepting bribes in one of these capacities is forbidden.

Art. 4a of Federal Statute on Unfair Competition of Dec. 19, 1986 forbids both bribing and accepting bribes in private sector.

Federal Statute on International Judicial Assistance in Criminal Matters of Mar. 20, 1981 defines preconditions and applicable measures regarding international judicial assistance in criminal matters.

Switzerland is party to European Convention on Assistance in Criminal Matters of Apr. 20, 1959 and to European Convention on Extradition of Dec. 13, 1957. It has concluded various similar agreements with various countries, including U.S. (Treaties, 1973, 1990).

See also category 25 Treaties and Conventions, topic 25.01 Treaties.

8 DEBTOR AND CREDITOR

8.01 ASSIGNMENTS:

Applicable Law.

Law chosen by assignor and assignee, with respect to obligor only with obligor's assent, otherwise law applicable to assigned obligation. Form of assignment governed by law applicable to contract providing for assignment.

Assignability.

Obligations are assignable without obligor's assent, unless impermissible by law, agreement, or nature of legal relationship. Obligor may not raise defense that assignment of obligation was excluded by agreement, if third person has become obligee in good faith based on written acknowledgment of indebtedness which does not mention its unassignability. (C.O. 164).

Instrument Transferring Title.

Assignment must be in writing; but promise to assign need not be in writing. (C.O. 165).

Notice.

Validity of assignment does not depend on notice to obligor. However, obligor in good faith without notice of assignment is validly discharged if he performs to former obligee. (C.O. 167).

Delivery of Evidence.

Assignor must deliver to assignee instrument evidencing claim and all existing evidence and give assignee information necessary for prosecution of claim. (C.O. 170).

Effect.

Rights connected with obligation pass ipso iure to assignee, unless inseparably connected with assignor's person. (C.O. 170).

Warranty.

In case of assignment for valuable consideration assignor warrants existence of claim at time of assignment, but warrants solvency of obligor only if so agreed. In case of assignment without valuable consideration, assignor is not even liable for existence of claim. (C.O. 171).

Defenses of Obligor.

In addition to special defenses against assignee, objections to claims of assignor (and former assignors) can also be raised against assignee, provided such objection existed at time obligor learned of assignment (C.O. 169); obligor has also defenses pertaining to validity of assignment or previous assignments.

8.02 ATTACHMENT:

Constitutes provisional security measure under Federal Statute on Collection of Debts and Bankruptcy of Apr. 11, 1889, as amended (especially Dec. 16, 1994), in order to protect creditor before effectuation of seizure in collection proceedings or bankruptcy. See topic 8.04 Collection of Debts and Bankruptcy.

Prerequisites.

Allowable for money claims of private law including establishment of security by deposit of money. In case of claim secured by pledge or mortgage attachment is only admissible for noncovered amount of claim. Creditor may be individual or legal entity, residing in Switzerland or abroad. Any movable or immovable property of debtor in Switzerland may be attached.

Grounds are: (1) Debtor has no fixed domicile; or (2) is suspected of evading obligations by flight or removal of assets; or (3) is passing through or belongs to category of persons who visit fairs and markets for claims which must be fulfilled, by their nature, immediately; (4)(a) no other attachment ground is given, (b) debtor has no domicile in Switzerland, and (c) claim has either sufficient connection with Switzerland or is based on enforceable judicial (or arbitral) award or acknowledgment of debt signed by debtor; (5) creditor has “certificate of hortfall” against debtor. In general, claims must be matured, except in case of grounds (1) or (2). Particular rules apply to attachments for claims against foreign countries.

Order to Attach.

Creditor has to file petition with competent attachment court (not arbitral tribunal) at place where property is located. Provided that existence of claim, ground for attachment and fact that there are assets at hand belonging to debtor appear to be credible, authority issues “Order to Attach” pursuant to which attachment will be effectuated similarly to seizure and recorded in document of attachment. Debtor may contest attachment by objection to be brought before competent attachment court at place of attachment within ten days after cognizance of attachment.

Indemnity.

Creditor is liable for damages resulting from unjustified attachment. Therefore attachment court usually orders creditor to furnish security.

Validation.

If creditor has not previously instituted court action or collection proceedings for claim, he must do so within ten days after receipt of document of attachment. Unless Lugano Convention applies or specific jurisdiction has been agreed upon by parties, attachment creates forum for claims against nonresidents where creditor can sue. “Objection” of debtor must be removed by creditor within ten days after communication either by applying for objection to be set aside in summary proceedings or by filing court action to have his claim confirmed. If application in summary proceedings is rejected, court action must be filed within ten days of judgment.

Alleged rights of third persons to attached property must be notified to Collection Office within reasonable time after knowledge of attachment, and in any case before distribution of proceeds otherwise they are deemed to be renounced for attachment procedure. If notified, such rights will be dealt with in separate court procedure.

If “Objection” has not been filed by debtor or has been successfully removed, creditor must continue collection proceedings within ten days of date he is entitled to, either by way of seizure or by bankruptcy against debtor. In case of seizure, attaching creditor has some preferential rights with regard to other creditors of debtor, namely, (a) creditor participates in seizure of attached property effectuated by other creditors after issuance of order to attach but before attaching creditor could request seizure provided creditor makes such request within certain period of time, and (b) creditor is entitled to recover expenses of attachment from proceeds of attached property. In case of bankruptcy attached property belongs to bankrupt estate and attaching creditor has no special preferential rights.

Release of property from attachment will be granted to the debtor against security which may, inter alia, also be given by joint and several guaranty or by deposit. See topic 8.04 Collection of Debts and Bankruptcy.

8.03 BANKRUPTCY:

See topic 8.04 Collection of Debts and Bankruptcy.

8.04 COLLECTION OF DEBTS AND BANKRUPTCY:

Collection of Debts.

Collection of money claims including establishment of security by deposit of money is regulated by Federal Statute on Collection of Debts and Bankruptcy of Apr. 11, 1889, as amended (especially Dec. 16, 1994, Mar. 24, 2000 and Dec. 19, 2003). Enforcement of other kinds of claims is subject to procedural laws of cantons so long as Federal Code of Civil Procedure has not entered into force yet. For its contemplated entry into force, see category 5 Civil Actions and Procedure, topic 5.01 Actions. Following explains summarily main features of debt collection under federal law. Periods of time are omitted; in certain instances, such periods may be extended in favor of debtor residing outside of place of collection, especially outside of Switzerland.

Initial Procedure.

Collection of debts begins with “Order to Pay” (Zahlungsbefehl, Commandement de payer, Precetto esecutivo) issued upon request of creditor by enforcement office to debtor who can then declare “Objection” (Rechtsvorschlag, opposition, opposizione). In case such declaration is made, creditor must remove such “Objection” either by applying for objection to be set aside in summary proceedings or by filing court action to have his claim confirmed. When instituting summary court procedure, creditor may obtain decree to set aside “Objection” (Rechtsoeffnung, mainlevee, rigetto), either (1) definitively, upon evidence of enforceable judgment or other decision, also foreign judgment or arbitral award or, (2) provisionally, upon evidence of publicly authenticated deed or of acknowledgment of debt signed by debtor. Provisional “removal” becomes final if debtor fails to bring ordinary court action for declaratory judgment that debt does not exist.

If “Objection” has not been declared or has been set aside by ordinary judgment or decree to set aside objection enforcement continues at request of creditor in three possible ways: (1) By seizure of specific property of debtor (Pfaendung, saisie, pigmoramento); or (2) for debts secured by pledge or mortgage, by realization of collateral (Pfandverwertung, realisation du gage, realizzazione del pegno); or (3) against ``merchants'', by bankruptcy proceedings comprising all assets and liabilities of debtor (Konkurs, faillite, fallimento).

Seizure.

Property estimated sufficient to cover debt with interest and costs will be seized; property necessary for maintenance of livelihood and profession of debtor and debtor's family is not seizable (domestic animals inclusive). Other creditors who request seizure within period of time can participate in seizure (whereby additional property may be seized for additional coverage). All those creditors form “group of creditors”, several of which can be formed for purpose of seizure of additional property. Claims of third parties for liberation of property from seizure because of ownership or security interest or another right thereto, are, if contested, adjudicated. Upon request of creditor, after certain time, seized property will be realized and proceeds distributed to creditors. Certain classes of claims are privileged, e.g., for salaries, family support payments or social security premiums. In cases of privileged creditors and of insufficient proceeds, schedule of creditors (collocation plan) is established before distribution. Schedule can be challenged in court. For unpaid claim, creditor receives “certificate of hortfall” (which does not bear interest and is subject to statute of limitations of 20 years). This constitutes ground for attachment. See topic 8.02 Attachment.

Realization of Pledge or Mortgage.

Procedure is roughly similar to procedure in case of seizure. For unpaid claim, creditor receives certificate evidencing that fact, but it does not have same legal effects as “certificate of hortfall”. See subhead Collection of Debts, topic Seizure, supra.

Bankruptcy.

Not all debtors are subject to bankruptcy proceedings, only those recorded in Register of Commerce in defined capacity (``merchants''), further those whose whereabouts are unknown, or who have defrauded their creditors, etc. Debtor otherwise not subject to bankruptcy may voluntarily declare insolvency, thereby bringing about bankruptcy proceedings. Special rules apply if liabilities exceed assets of share or cooperative corporation (C.O. 725, 903), and to liquidation of estate of decedent; see category 13 Estates and Trusts, topic 13.06 Executors and Administrators.

Initial Procedure.

As outlined above. If debt is evidenced by draft or check creditor can request special “draft collection”. Periods of time are then shorter and “Objection” has to be granted by court order. There is no initial procedure in case of bankruptcy of debtor ordinarily not subject thereto.

Opening.

At creditor's request, debtor is notified and threatened with bankruptcy. Thereafter, bankruptcy court, unless certain permissible objections of debtor are sustained, declares bankruptcy opened. This will be entered in land register within two days if real estate is at stake.

Bankrupt Estate.

Comprises all property of bankrupt except certain property necessary for maintenance of livelihood and professional activity of debtor and debtor's family. All claims against debtor due except to extent secured by realty; non-money debts are converted into money debts. Dispositions of bankrupt with regard to property of estate are not valid with respect to creditors. Claims of third persons for separation from estate of tangible property (or securities) in (exclusive) possession of bankrupt, e.g., because of ownership, are adjudicated, if contested. Return of unpaid goods forwarded to bankrupt but not yet in bankrupt's possession when bankruptcy proceedings were opened may be demanded by seller if bankruptcy administration does not pay purchase price (right of revocation in transit).

Ordinary Procedure.

Bankruptcy office draws up inventory and publishes bankruptcy, ordering all creditors and debtors to file their claims and debts. Estate is administered by bankruptcy office, which may be replaced by one or more persons elected by creditors; they may also elect committee of creditors to supervise administrators and authorize them to take certain important measures. For such elections, and for other urgent matters, meeting of creditors is held. Administration must establish schedule of creditors (collocation plan). Thereafter, second creditor's meeting passes on all matters, including realization of assets by public auction or private sale; subsequent meetings may be held. After distribution of proceeds, bankruptcy court receives final accounting, and declares bankruptcy closed. Every creditor receives “certificate of hortfall” for unpaid balance of claim. See subhead Collection of Debts, catchline Seizure.

Summary procedure may be ordered by bankruptcy court if assets do not warrant expenses of ordinary procedure. Bankruptcy office then proceeds to liquidations without participation of creditors. Any creditor can demand ordinary proceedings by advancing costs.

Closure for Lack of Assets.

If no assets are found, Bankruptcy Court orders bankruptcy closed. No “certificate of hortfall” is issued. However, within certain period of time creditor can institute execution of seizure against debtor, thereby obtaining such certificate.

Composition.

By agreement, debtor can conclude composition with all creditors.

By official procedure, three main kinds of composition (Nachlassvertrag, Concordat, Concordato) can be effectuated: (1) Stay of payment during certain time period; (2) payment of percentage of all non-privileged debts; (3) abandonment of all or part of debtor's assets to creditors (composition liquidation). Such composition is possible for any debtor, even after execution procedure has started. Except in case of opened bankruptcy, debtor must petition for stay of payments with special “composition authority”, submitting statement of assets and liabilities and draft of composition. If authority grants stay, commissioner is appointed. Same entry in land register as in case of bankruptcy within two days.

If composition liquidation is confirmed, creditor's meeting elects liquidators, and committee of creditors to supervise liquidators. Realization of assets and distribution of proceeds to creditors is similar to corresponding procedure in bankruptcy. No “certificate of hortfall” is issued.

Special statutes

Special statutes apply inter alia to banks and savings institutions, insurance companies, cooperative corporations, municipalities and other state organisations.

Foreign bankruptcy or composition

Foreign bankruptcy or composition has limited effect in Switzerland under Private International Law Statute, Art. 166 et seq.

8.05 ENFORCEMENT OF DEBTS AND BANKRUPTCY:

See topic 8.04 Collection of Debts and Bankruptcy.

8.06 EXEMPTIONS:

See topic 8.04 Collection of Debts and Bankruptcy.

8.07 GARNISHMENT:

Any property of debtor in hands of third persons or claims against them may be reached by seizure for execution or attachment. See topic 8.02 Attachment and 8.04 Collection of Debts and Bankruptcy.

8.08 LIENS:

Tangible movables and securities in hands of creditor with consent of debtor, may be retained until claim is paid, provided that claim is due and that there is natural connection to retained object. Among businessmen, this natural connection exists as soon as possession of thing as well as claim originate from their business operation. (C.C. 895).

Commission merchants have lien on goods on commission or their proceeds for advances, disbursements, commissions and accrued charges. (C.O. 434). Forwarding agents have similar rights. Common carriers and warehousemen have liens on property in their hands to extent of their charges and disbursements. (C.O. 451, 485). Landlords of business premises have lien on furniture and equipment in rented business premises for past year's rent and current six months' rent. (C.O. 268). See category 22 Property, topic 22.06 Landlord and Tenant.

8.09 PLEDGES:

Contract to pledge is governed by property law.

Movable property (inter alia with exception of cattle, aircraft and vessels) is pledged by delivery into possession of pledgee. If property is represented by document of title, delivery of title is sufficient. (C.C. 884-885). Claims are pledged by written agreement. Notification of debtor is optional, but debtor without notice may still pay pledgor and so discharge obligation. Negotiable bearer instruments may be pledged by being delivered into possession of pledgee. Negotiable instruments to name must also be endorsed or assigned in favor of pledgee. If, besides instrument representing title to merchandise, separate warrants have been issued in order to demonstrate existing pledge on merchandise, they must be given into possession of pledgee, and notice thereof must be made on any other instrument representing title to merchandise. Pledgor keeps voting right in pledged shares. (C.C. 899-905).

More than one pledge can be given on same property. Pledgor must notify first pledgee in writing and instruct pledgee to deliver, upon payment of debt by pledgor, property to second pledgee. Pledgee may sub-pledge property only with consent of owner.

Pledge is not effective as long as property remains in exclusive power of pledgor; pledge is terminated when pledgee has lost possession and right to recover possession over property.

Pledgee must return property upon payment of debt. If debt is not paid in time, pledgee may start execution proceedings or sell property by private sale, if specifically so agreed. Pledge extends to accessories and, if claims have been pledged, as rule, to income derived therefrom. Pledges give security for principal, interest and costs of execution of debt. (C.C. 886-892).

9 DISPUTE RESOLUTION

9.01 ALTERNATIVE DISPUTE RESOLUTION:

Mandatory.

In most cantons, all cases first go to Justice of Peace for conciliation. All courts may, and frequently do, promote amicable settlement.

Voluntary.

See topic 9.02 Arbitration and Award.

9.02 ARBITRATION AND AWARD:

International arbitration (where at least one party did not have its domicile or ordinary residence in Switzerland when arbitration clause was agreed) is governed by Federal Private International Law Statute. If parties have chosen arbitration rules, these govern appointment, challenge and removal of arbitrators exclusively. Arbitral Tribunal rules on its own jurisdiction. Parties or Arbitral Tribunal choose procedure and applicable law freely. Assistance of state courts available, also for interim measures issued by Arbitral Tribunal. Challenges of award may be totally excluded if both parties are non-Swiss, otherwise challenge (at best) only on limited grounds analogous to New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of June 10, 1958.

Arbitration in Geneva or Zurich is frequent, ad hoc under UNCITRAL Rules, or institutional under ICC or new unitary Swiss Chamber Rules, including fast track (http://www.swissarbitration.ch).

Domestic arbitration in all cantons is governed by Concordat of Mar. 27, 1969. However, this concordat will be replaced by provisions regarding domestic arbitration contained in Federal Code of Civil Procedure. See topic 5.01 Actions.

Switzerland is party to New York Convention of 1958. No reservations.

10 DOCUMENTS AND RECORDS

10.01 ACKNOWLEDGMENTS AND OTHER PUBLIC AUTHENTICATIONS:

Publicly authenticated documents (Öffentliche Urkunde, acte authentique, atto pubblico) are of two kinds: (a) ordinary authentication, attestation or certification of facts by public officials, which include attestation of genuineness of person's signature based on identification (Beglaubigung, legalisation, autenticazione), and other certifications, e.g., as to conformity of copy with original, correctness of extract from document or register, etc., and (b) execution of publicly authenticated act or instrument by public official pertaining to legal relevant declarations of private persons.

Publicly authenticated documentations of all kinds provide full proof of facts evidenced therein, as long as inaccuracy of content is not proven. (C.C. 9).

Blind person is bound by signature only if authenticated or if it can be proven that content of deed was known to blind person at time of signing. (C.O. 14). All cantons have provisions for ordinary authentication of signatures or of other facts. Formal requirements of such ordinary authentications are within domain of cantonal law.

Form of publicly authenticated instrument is by federal law required for many legal acts of private law. (See category 3 Business Regulation and Commerce, topic 3.07 Contracts, subhead Formal Requirements.) Formal requirements for publicly authenticated instruments are left to cantonal law, insofar as federal law does not have pertinent provisions (C.C. Final Title, 55). Federal law is applicable regarding matrimonial property contracts (C.C. 184), public wills (C.C. 499-504), inheritance pacts (C.C. 512), and certain contracts of guaranty or of suretyship (C.O. 493). Authenticating person must make sure that instrument expresses true intention, and that it complies with formal requirements of federal or cantonal law.

Authenticating persons for ordinary authentications and/or publicly authenticated instruments are designated by cantonal law; in certain instances (e.g., civil status officers) within framework of federal law. Authenticating persons are notaries, judges, clerks of courts, mayors, clerks of municipalities or districts, special officials, sometimes private persons authorized to perform certain public authentications and in this respect act as officials. See topic 10.02 Notaries Public.

Signature of authenticating persons may have to be legalized, usually if document is destined for foreign state, directly by Chancellery of State of canton where authenticating person functions. Signature of that person may further have to be superlegalized by Federal Chancellery in Berne, or by foreign embassies or consulates situated in Switzerland.

Switzerland is party to Convention abolishing requirement of legalization for foreign public documents concluded in The Hague on Oct. 5, 1961, providing for “Apostille”. See International Conventions section.

10.02 NOTARIES PUBLIC:

Legislation relating to notaries public pertains to domain of cantons. In some cantons, notaries are public officials, e.g., Zurich, Schaffhausen, Thurgau, Appenzell-Ausserrhoden, while in some cantons, function of notary is private one, e.g. in Basle-City, Berne, Aargau, Uri, Fribourg, Vaud, Neuchâtel, Geneva, Valais, Jura, Ticino. In remaining cantons, both public officials and private individuals are acting as notaries.

Notaries public and/or other authenticating persons, their functions, their fees, and keeping of their records, are subject to strict regulations and supervision.

See also topic 10.01 Acknowledgments and Other Public Authentications.

10.03 PUBLIC REGISTERS:

See topic 10.04 Records; also category 3 Business Regulation and Commerce, topic 3.15 Register of Commerce.

10.04 RECORDS:

Federal law provides for certain public registers to be maintained by cantons under supervision of Confederation. Facts recorded therein are presumed to be true and known, as long as inaccuracy of content is not proven (C.C. 9). Public registers are, with certain exceptions, public and upon request authenticated copies of certain registered facts are issued. Most important public registers are:

Register of Commerce (Handelsregister, Registre du commerce, Registro di commercio).—See category 3 Business Regulation and Commerce, topic 3.15 Register of Commerce.

Civil Status Register (Zivilstandsregister, Registre de l'état civil, Registro dello stato civile) for public recording of civil status of person. Civil Status Register is accessible if legitimate interest and other unavailability of information is proven.

Land Register (Grundbuch, Registre foncier, Registro fondiario) for the public recording of all immovables in Switzerland with rights and charges thereon as provided for by law. Certain information in Land Register is only accessible if legitimate interest is proven.

Right in rem on immovable property which by law has to be recorded in land register exists as such only if it appears in land register. (C.C. 972). Whoever in good faith relies upon recording in land register and acquires ownership or other rights in rem, is protected in this acquisition. (C.C. 973).

Register of Reservation of Ownership (Eigentumsvorbehaltsregister, Registre des pactes de réserve de propriété, Registro dei patti di riserva della proprietà) for registration of movable property transferred under reservation of ownership. (C.C. 715).

Debt Enforcement Register (Betreibungsregister, Registre des poursuites, Registro esecuzioni e fallimenti) containing records of activities of debt enforcement and bankruptcy offices. Information in Debt Enforcement Register is only accessible if legitimate interest is proven.

10.05 SEALS:

Seals on private instruments including corporate documents are unknown.

11 EMPLOYMENT

11.01 LABOR RELATIONS:

Law of habitual place of work applies. Choice of law is limited. No legal requirement to conclude written agreement, written confirmation of terms after commencement. Sex discrimination statute in force since July 1, 1996.

Statutory termination period one to three months depending on length of employment. Reasons for terminating employment must be given on request. Damages if employment “abusively” terminated. (C.O. 335 to 336b). Specific rules regarding termination of employment apply in case of mass dismissals. (C.O. 335d). Acquired rights legislation may apply in case of business transfers. (C.O. 333).

Employers are required to grant long-time employees specific types of benefits. Special family allowances are compulsory.

Federal old age and disability insurance and unemployment insurance are compulsory state insurance (see category 23 Taxation, topic Taxes, subhead Direct Federal Taxes, catchline Insurance: Old Age and Other), also specific Federal Accident Insurance for employees (Federal Statute of Mar. 20, 1981). Private pension plans and disability insurance compulsory (so called “Second Column”) Federal Statute of June 25, 1982).

Work permits: see category 4 Citizenship, topic 4.01 Aliens.

12 ENVIRONMENT

12.01 ENVIRONMENTAL REGULATION:

Various federal, cantonal and community laws directly and indirectly protect the environment, especially lakes and rivers, forests, air, etc. and regulate responsibility for people who are deemed to be cause for troubling environment. Genetically engineered organisms and pathogenic organisms are also part of environmental regulation, but now regulated in separate statute of Mar. 21, 2003, in force since Jan. 1, 2004.

Federal Environmental Protection Statute of Oct. 7, 1983, in force since Jan. 1, 1985, as amended. Following ordinances and additional statutes are of importance: Ordinance on Handling of Noxious Substances; Air Pollution Ordinance; Noise Protection Ordinance; Dangerous Substances Ordinance; Ordinance on Contaminated Soils; Disaster Protection Ordinance; Water Pollution Statute.

Following principles rank amongst most important in environmental regulation: Environmental protection through zoning law wherever possible (especially as for noise control); polluters pay; no excessive pollution levels neither at stage of creation of new building, nor during use of building; all time application of state-of-the-art technologies; waste effluents must be treated before release into public water streams; need for environmental impact assessment in case of large new projects (e.g. shopping centers, golf courses, plants for heavy industry).

“Polluters pay” legislation has become more and more detailed. Most recent amendment of Federal Environmental Protection Statute went into force on Nov. 1, 2006 and deals with split of costs for sanitation of contaminated site amongst present and former owners as well as amongst different polluters.

Since July 1, 2007, organizations (NGOs) have to obey stiffer formal rules for their legal remedies against administrative decisions affecting environment (inclusive payment of court costs if case is lost). They are no longer entitled to enter into agreement with master of major installation for additional restrictions on behalf of environment but must apply for amendment of administrative decision covering their concerns.

CO_2 reduction Statute, in force since May 1, 2000, and CO_2 ordinance, in force since June 8, 2007, regulate reduction objectives of emissions by imposing tax on companies emitting carbon dioxide. Since Jan 1, 2008 and Jan 1, 2009, tax on carbon dioxide paid by companies must increase, unless reduction objectives pursuant to CO_2 statistics are achieved. Under certain circumstances companies are entitled to obtain exemption from tax.

13 ESTATES AND TRUSTS

13.01 ADMINISTRATION:

See topic 13.06 Executors and Administrators.

13.02 CLAIMS:

See topic 13.06 Executors and Administrators; category 5 Civil Actions and Procedure, topic 5.01 Actions.

13.03 DEATH:

When exercising rights, whoever alleges death of person must prove it by Civil Status Records, or by other proof if such records are missing or proven to be incorrect. (Presumption of Life, C.C. 32, 33 subs. 1).

Survivorship.

When several persons die in a common disaster and it is impossible to prove which ones survived the others, their simultaneous death is presumed. (C.C. 32 subs. 2).

Disappearance.

In case of disappearance of person under circumstances indicating certain death, even if corpse is not seen, death may be assumed and entered in Civil Status Register by order of supervisory authority at request of any interested person. In unlikely case of return of such registered person, register can be adjusted either by rectification ex officio or by action for modification of rights. (C.C. 34, 42, 43).

Declaration of Absence.

If death of a person is highly probable, because person has either disappeared under great peril or has been absent for long time without having given any news, then at request of any person interested “Declaration of Absence” may be pronounced by competent court. Request can be presented only after one year following disappearance, and in case of absence after five years since last news. By appropriate publication court must call upon anyone in position to give information to report within stipulated time, in any case at least one year after publication. If no report has been received within that time, court pronounces person to be absent and orders corresponding entry into Civil Status Register. Rights deriving from death of person declared absent may be exercised as if death were proven. Declaration of death dissolves marriage ex officio. (C.C. 38 subs. 3; Presumption of Death, C.C. 35-38).

Death Certificate.

Death certificate may be obtained, if death occurred in Switzerland, from Civil Status Office, where death was recorded in Register of Deaths.

Actions for Death.

Damages may be collected from person who caused death of another person for (a) funeral expenses, (b) cost of healing and inability to earn living if death did not occur immediately, (c) so-called “bread-winner-damage.” Actions for (a) and (b) are as a rule limited to heirs. Claims for “tort-moral” may also be filed. (C.O. 45, 47).

Amounts awarded are as a rule very low by American standards.

See topic 13.09 Wills; categories 10 Documents and Records, topic Records; Property, topic Absentees.

13.04 DECEDENTS' ESTATES:

See topics 13.05 Descent and Distribution, 13.06 Executors and Administrators, 13.09 Wills.

13.05 DESCENT AND DISTRIBUTION:

Applicable Law.

Swiss law applies if last domicile was in Switzerland, but non-Swiss may choose law of citizenship. Swiss law applies if Swiss with last domicile abroad chooses Swiss law generally or for Swiss assets. Swiss law applies if foreign authorities do not deal with estate of Swiss citizen unless domicile law chosen. For non-Swiss with last domicile abroad, law applicable according to conflicts rules at domicile applies. Special rules for land. (Arts. 88, 90-91 Private International Law Statute ``PILS").

Swiss inheritance law makes no distinction between immovable and personal property, with certain exceptions which are mainly with respect to farmland.

If decedent dies intestate, statutory heirs inherit. Statutory heirs receive any property not disposed of by decedent. (C.C. 481 subs. 2). Thus appointed heirs and statutory heirs can inherit side by side: Expression “estate inherited intestate” used below may be entire estate or only part thereof not disposed of by decedent.

Statutory Heirs.

(1) Surviving spouse (after marital property allocation, see category 14 Family, topic 14.05 Husband and Wife) receives: (a) one-half if decedent leaves descendants; (b) three-fourths if decedent leaves no descendants, but leaves statutory heirs of line of decedent's parents; (c) whole estate if decedent leaves none of above. (C.C. 462).

(2) Children of decedent in equal shares: Predeceased child is replaced by child's descendants in all degrees per stirpes. (C.C. 457).

(3) If decedent leaves no descendants, parents of decedent each inherit one-half of estate; predeceased parent is replaced by his or her descendants in all degrees per stirpes. If predeceased parent leaves no descendants, whole estate inherited intestate goes to other parent or that parent's descendants. (C.C. 458).

(4) If decedent leaves no descendants and there are no descendants in either parental line, estate is inherited by grandparents equally on both sides. (C.C. 459).

(5) Public Body.—If decedent has no statutory heirs, estate escheats to canton in which decedent was last domiciled, or to municipality designated by that canton. (C.C. 466). As to restricted liability of public body for decedent's debts see topic 13.06 Executors and Administrators, subhead Heirs.

Plural Relationship of Blood and Half Blood.

Relative of blood related several times to decedent is entitled within group according to each of relative's positions in main stems or lower stems; half blood is entitled within group only in main stem to which half blood belongs.

Advance.

Statutory heirs are mutually bound to adjust among themselves any liberality received from decedent during lifetime, provided decedent when granting liberality intended advance against future inheritance of recipient. That intention is deemed to exist for liberalities granted by decedent to descendant as marriage portion, outfitting, transfer of property, release of debt, etc., unless decedent at any time clearly directed otherwise by disposition mortis causa, in written form or orally. (C.C. 626-632). If liberalities are not to be adjusted, they are subject to claim for reduction by an heir whose compulsory hereditary rights are thereby impaired. (C.C. 527 subs. 1). See topic 13.09 Wills, subhead Testamentary Dispositions, catchline Compulsory Heirs; also subhead Contest, catchline Suit for Reduction.

Escheat.

The right of the public body to the estate inherited intestate (see subhead Statutory Heirs, supra) has legal character of hereditary right, not of occupancy right (escheat).

For compulsory heirs, appointed heirs by disposition mortis causa, and lawsuit for invalidity or for reduction, see topic 13.09 Wills. For distinction between heirs and legatees, see topic 13.06 Executors and Administrators, subhead Succession of Heirs and of Legatees. For liabilities of heirs, renunciation of inheritance, claims against decedent, administration by heirs, partition of estate, and lawsuit for inheritance, see topic 13.06 Executors and Administrators.

13.06 EXECUTORS AND ADMINISTRATORS:

There are no special probate or surrogate's courts. Cantons must designate authorities competent for inheritance matters. No simplified procedures are available for small estates.

Succession of Heirs and of Legatees.

As general rule heir is distributee who succeeds to entire estate of decedent (assets and liabilities) or to fraction of estate, as statutory heir (see topic 13.05 Descent and Distribution) and/or as heir appointed by dispositions mortis causa (see topic 13.09 Wills, subhead Testamentary Dispositions). Upon decedent's death, immovable and movable property vests immediately by force of law as universal succession in statutory and/or appointed heirs. Several heirs constitute undivided community of heirs until distribution. Heirs become joint owners and creditors, of all of decedent's immovables, claims, and other inheritable rights; they become joint obligors of all of decedent's obligations under joint and several personal liability. (C.C. 560, 602-603).

A legatee receives a specific asset, including usufruct, by disposition mortis causa (C.C. 484) or by operation of law. Legatee is singular successor into asset and has merely personal claim against heir or heirs or legatee (sub-legacy) charged (C.C. 562 subs. 1); above-mentioned legal usufructs are, however, rights in rem (C.C. 563). Legatee is not liable for decedent's debts. See also topic 13.09 Wills, subhead Legacies.

Capacity to Acquire.

In order to qualify as heir or as legatee person must survive decedent. Unworthy person lacks capacity to acquire from decedent's estate, e.g. if person wilfully caused or attempted to cause death of decedent, or committed certain fraudulent acts in connection with decedent's disposition mortis causa; such unworthiness is removed if forgiven by decedent. (C.C. 542, 543, 539-541).

Heirs.

If there is no testamentary executor (see subhead Testamentary Executors, infra) administration, liquidation and partition of estate is left to heirs. Competent authority at decedent's last domicile must order certain protective measures, as (1) sealing of estate if provided by cantonal law, (2) inventorization if heir is under guardianship or lastingly absent without representation or requests it, or (3) appointment of official administrator of estate (see subhead Official Administrators of Estate, infra). (C.C. 551-555). **Measures Limiting Liability of Heirs**. To avoid personal liability heir may either: (a) Renounce inheritance within three months, but renunciation is presumed, if deceased's insolvency was publicly known or officially established; or (b) demand public inventory and thereafter either accept inheritance unconditionally, or renounce it, or accept it subject to inventory, which means that heirs will be liable only for debts specified in inventory; or (c) demand official liquidation, but requests for official liquidation are not granted if another heir accepts inheritance. (C.C. 566-597). Public body inheriting as statutory heir is liable only for decedent's debts to extent of property received. (C.C. 592). See topic 13.05 Descent and Distribution, subhead Statutory Heirs.

Presentation of Claims. Claims against decedent should be promptly presented because in case of public inventory (see catchline Measures Limiting Liability of Heirs, supra), authority has to call on creditors and debtors by publication to file their claims and debts within period fixed in each case, but no less than one month from first day of publication. Claims and debts appearing in public records or in decedent's papers are included in inventory as matter of course. If unsecured creditors omitted to file claims, and their claims are not otherwise included in inventory, they forfeit personal liability of heirs with respect to assets in estate. If creditor omitted to file claim without fault or if filed claim was not included in inventory; heirs are liable inasmuch as enriched by inheritance. (C.C. 582-583, 590).

Determination of Heirs. In case of intestacy, see topic 13.05 Descent and Distribution; in case of heirs appointed by disposition mortis causa, see topic 13.09 Wills.

Administration by Heirs. If no testamentary executor or official administrator (see subheads Testamentary Executors and Official Administrators of Estate, infra) has been appointed, administration of estate is right and duty of heirs, who must act jointly, not severally. At request of co-heir competent authority may appoint representative of heirs up to distribution. (C.C. 602). Representative is solely entitled to act for heirs.

Distribution by Heirs. Distribution of inheritance may be requested by any co-heir at any time, except when bound to continue community of heirs by agreement, and in certain cases provided by statute such as serious detriment to value of assets by distribution (in such case only temporary deferment is possible), and with regard to posthumous child. (C.C. 604-606).

All heirs have equal claim to assets of estate, except if statute or testator provides otherwise. If no executor is acting, heirs must establish as many portions out of estate assets as there are heirs or stems of heirs. If they do not agree, competent authority establishes portions at request of any one heir. Portions are allotted by agreement or by drawing lots among heirs. (C.C. 610-611). There are special provisions for distribution of immovable property, especially farm land. (C.C. 617-619 partially reversed by BGBB, Jan. 1, 1994). (See category 22 Property, topic 22.05 Immovable Property.) Distribution becomes binding upon heirs with acceptance of portions or with conclusion of distribution agreement in writing. (C.C. 634).

Performance of Legacies. See topic 13.09 Wills, subhead Legacies.

Testamentary Executors.

Testamentary executors may be appointed by (a) will or (b) inheritance pact, but provision in pact has nature of will and is, therefore, subject to unilateral revocation or amendment.

Eligibility. Any legally capable natural person, resident or nonresident, citizen or noncitizen of Switzerland, including legal entity located inside or outside of Switzerland, is eligible.

Issuance of Letters. Letters testamentary in sense of American practice are not executed. However, certificates containing appointment of executors are issued by judicial or administrative authorities.

Removal may be made by supervising authority on serious grounds.

Powers and Duties. Executors derive their powers directly from will, which may grant unlimited powers or powers limited to certain executorial functions. Several executors act jointly, unless will provides otherwise. If will has no limitation as to powers of executor, executor has sole power and duty to administer estate, including making sales, paying decedent's debts, distributing legacies, and distributing to heirs according to will or statute. (C.C. 518).

Notice of Appointment. Executor must be notified by authority opening will (see topic 13.09 Wills). Within 14 days after receipt of this notice, acceptance or refusal of office must be declared; silence means acceptance. (C.C. 517).

Actions. Executor sues and is sued, as rule, in executor's own name on behalf of estate.

Final Accounting. After distribution executor must render final accounting to heirs.

Compensation. Executors are entitled to proper compensation; no scale is fixed by Code. (C.C. 517). Contests on this are decided by competent authority.

Supervision. Executors are subject to supervision by competent authority.

Official Administrators of Estate.

Official administrators of estate are appointed by competent authority under specific conditions only, mainly (1) if heir is lastingly absent and without representation, provided that heir's interests require it, (2) if none of claimants can prove right to inherit satisfactorily, or if it is uncertain whether there is heir (except public body), (3) if not all heirs are known, or (4) if statute provides for it in special cases. Executor appointed by will may but does not have to be appointed as official administrator. (C.C. 554, 556). See category 22 Property, topic 22.01 Absentees.

Evidence of appointment. is by certified copy of appointing decree or special certification by appointing authority.

Powers and Duties. Official administrator must administer estate as conservatory measure. Distribution is not duty. During time for which official administrator is appointed, administrative powers of heirs or executor are suspended.

Supervision. Official administrator is subject to supervision by appointing authority.

Official Liquidation of Estate.

Official liquidation of estate is ordered by competent authority (1) at request of any heir if no other heir accepts inheritance unconditionally or subject to inventory (see subhead Heirs, supra), or (2) at request of creditors or legatees who have good reasons to fear that their claims will not be paid, unless security is given to them. (C.C. 593-594).

Procedure. Official liquidation may be handled by authority itself or by one or several liquidating administrators appointed by authority. Property of decedent is sold, immovable property by public auction unless all heirs consent to another manner of sale; all debts must be paid, and legacies distributed after payment of all debts. Any surplus is distributed to heirs. (C.C. 595-596).

Supervision. Competent authority supervises appointed official liquidators. Heirs may bring recourse against liquidation measures intended or already taken. (C.C. 595).

Liquidation of Estate by Bankruptcy Office.

If all next statutory heirs renounce inheritance, it is liquidated by bankruptcy office according to bankruptcy law. If ordinary or summary bankruptcy proceedings take place, any surplus, after performance of legacies, is distributed to statutory heirs. (C.C. 573).

Suit for Inheritance.

This special action is open to anyone who, as statutory or appointed heir, believes himself to have better right to inheritance or special property therein than actual possessor. Action must be based on title of inheritance, not on any other title. Court takes necessary measures of protection upon request of plaintiff. Limitation of such action: (1) against defendant in good faith, one year from time plaintiff learned of defendant's possession and plaintiff's own better right; in any case, after ten years from decedent's death or opening of will; (2) against defendant in bad faith, always 30 years. (C.C. 598-600). Before distribution, action against heir has to be brought by suit for distribution. See subhead Heirs, catchline Distribution by Heirs, supra. For other hereditary actions, see topic 13.09 Wills.

Compulsory Heirship and Legacies.

See topic 13.09 Wills.

Foreign Executors or Administrators and Foreign Probate.

Recognized under conditions of Arts. 92 and 96 Private International Law Statute.

13.07 FIDUCIARIES:

Transfer of property to a fiduciary is recognized. Fiduciary becomes owner of tangible property and creditor of intangible property, and assumes obligation to retransfer to transferor or to transfer to third person under certain conditions. Case Law holds that fiduciary has status of full owner or full creditor; as a rule, fiduciary property falls into bankruptcy estate of fiduciary. Certain court decisions examine possible exceptions to this rule.

Transfer of property to fiduciary is also admissible in order to give security to claim. However, if tangible movable property remains with transferor on basis of special legal ground (e.g., lease) transfer does not become effective with respect to third persons if it was intended to harm them or to violate provisions of pledge. (See category 8 Debtor and Creditor, topic 8.09 Pledges.) (C.C. 717).

See also topics 13.06 Executors and Administrators, Trusts; category 2 Business Organizations, topic 2.04 Foundations.

13.08 TRUSTS:

The Hague Convention of Oct. 5, 1961 on law applicable to trusts and their recognition has become effective on July 1, 2007, so that trusts are recognized by Swiss legal system.

See also topic 13.07 Fiduciaries; category 2 Business Organizations, topic 2.04 Foundations.

13.09 WILLS:

Hague Convention of Oct. 5, 1961 on law applicable to form of last wills applies generally. (PILS 93).

Individual may dispose of such part of property by disposition mortis causa (will or inheritance pact) to extent that law does not obligate individual to leave share of estate to certain statutory heirs (compulsory heirs). (C.C. 481).

Capacity to Make Will.

Testator must be 18 years of age and capable of judgment. (C.C. 467).

Testamentary Dispositions.

Appointed Heirs. Testator may appoint one or more heirs. Whether disposition means appointment of heir or legacy depends on will of testator. To leave entire estate or fraction means to appoint heirs. (C.C. 483). To allot net estate or fraction is legacy. As to statutory heirs, see topic 13.05 Descent and Distribution; as to distinction between heirs (statutory heirs and/or appointed heirs) and legatees, see topic 13.06 Executors and Administrators, subhead Succession of Heirs and of Legatees; also see subhead Legacies, infra.

Compulsory Heirs. Descendants, parents and surviving spouse have interest in decedent's estate not subject to will. This is calculated on basis of share which these heirs would receive if decedent had died intestate. It is: (a) Three-fourths of such share for descendants, (b) one-half for each parent, (c) one-half for surviving spouse. (C.C. 470-471).

Testator may leave to surviving spouse usufruct in whole of inheritance devolving on their common descendants. This is reduced in case surviving spouse remarries. (C.C. 473).

Under certain circumstances (such as grave wrongs against testator, officially established insolvency of heir, etc.) testator may totally or partially disregard compulsory heirship (disinherison). (C.C. 477-480).

Reversionary Heirs. Testator may appoint preliminary heir (Vorerbe, grevé, erede gravato) with obligation to deliver inheritance to subsequent heir (Nacherbe, appelé, erede sostituito) upon happening of certain event. Reversionary, subsequent heir cannot be charged with such duty. Same holds for legacy. (C.C. 488). Nondum conceptus may be designated as reversionary heir or as reversionary legatee. (C.C. 545). Preliminary heir acquires inheritance like any other appointed heir, subject to being divested thereof by happening of event provided for, in absence of such provision by death. Competent authority has to direct establishment of inventory. Preliminary heir has to give security unless relieved thereof by testator. (C.C. 490-492).

Replacement of Heirs. Testator may designate in testamentary disposition one or more persons who shall receive inheritance in lieu of heir who does not acquire it for having died earlier, or renounced it (C.C. 487), or for other reasons. Similar dispositions are possible for replacement of legatee.

Legacies. See subhead Legacies, infra.

Burdens and Conditions. Testator may impose burdens or conditions to testamentary dispositions, performance of which can be demanded by anyone interested therein as soon as disposition becomes effective. (C.C. 482).

Above dispositions may also be made in inheritance pact. See subhead Inheritance Pacts, infra.

Forms of Wills.

Hague Convention of Oct. 5, 1961 applies, except that Swiss may not make will orally abroad save in extraordinary circumstances. In Switzerland wills may be made either in publicly authenticated form, in holographic form, or orally (nuncupative wills).

Public Wills. These are publicly authenticated documents drawn up by officials designated by cantonal law. Document must be read and signed by testator and dated and signed by authenticating official. Immediately afterwards, testator must declare before two qualifying witnesses in presence of official that testator has read document and that it contains testator's will. This declaration must be certified on document by two witnesses with their signatures, together with their statement that, to their observation, testator was legally capable. In case testator does not read and sign document, procedure is somewhat different. (C.C. 499-504).

Holographic wills. Must be written from beginning to end, including year, month, and day of execution in testator's own handwriting, and signed by testator. (C.C. 505).

Nuncupative (Oral) Wills. In certain cases of emergency, testator may make oral will before two qualifying witnesses. Dispositions of testator must at once be written down by one witness with place, year, month and day of execution, be signed by both witnesses, and then deposited without delay by both witnesses with judicial authority, with declaration that testator, to observation of two witnesses, was legally capable and communicated to them this to be testator's last will under special prevailing circumstances. Instead of written record two witnesses may give oral record to judicial authority, with same declaration. Nuncupative will loses validity 14 days from time it becomes possible for testator to use one of other forms of wills. (C.C. 506-508).

Revocation.

Testator may alter or revoke will at any time. Alterations and revocations must be made by new will using one of forms described above. Will may also be revoked by destroying original document. (C.C. 509-510).

Will in which previous will is not expressly revoked replaces previous will to extent that it does not doubtlessly merely complement it. (C.C. 511).

Testamentary dispositions are not avoided, if, subsequently testator's power to testamentary disposal is restricted; they are, however, subject to reduction. (C.C. 516). See infra, subhead Contest, catchline Suit for Reduction.

Revival.

Revoked will may revive by revocation of subsequent will if such intention of testator appears from still more recent will expressing such revocation either specifically or by interpretation.

Probate.

Swiss law does not provide for probate proceedings such as known in American practice. Upon decedent's death all documents appearing to be wills must be delivered to authority of decedent's last domicile competent therefor. Within one month after delivery, decedent's will or wills must be ``opened'' by authority. Copy of entire will must be communicated to statutory heirs, appointed heirs, and executor with unlimited powers. Other persons interested receive copy to extent it concerns them. Persons with unknown abode are notified by publication. (C.C. 556-558).

Certificate of Inheritance.

If no objections have been filed by statutory heirs or by beneficiaries of prior disposition mortis causa within one month since communication to persons concerned, authority issues, upon request, certificate of inheritance to heirs appointed under will stating that they are recognized as such heirs, subject to suits contesting invalidity of will (see subhead Contest, infra), or of inheritance (see topic 13.06 Executors and Administrators). (C.C. 559).

Contest.

Suit for Invalidity. Legal defects of disposition mortis causa such as (1) incapacity of decedent at time when disposition was made, (2) dispositions made under influence of error, fraud, threats or duress, (3) immoral provisions or conditions, (4) defects of form, make disposition voidable, not null and void. Suit for invalidity or objection must be brought. (C.C. 519-520a).

Statute of limitation for court action: (a) Against defendant in good faith, one year from time plaintiff receives notice of disposition mortis causa and ground of invalidity, and in any event ten years from day of opening of will. (b) Against defendant in bad faith, thirty years. Objections are not subject to any statute of limitation. (C.C. 519-521). Dispositions with defects as to (2) above become valid if decedent does not revoke them within one year after decedent has learned of error or of fraud or after influence of duress or threats has ceased. (C.C. 469).

Suit for Reduction. Compulsory heirs who do not receive value of their compulsory share by disposition mortis causa may ask for reduction of disposition up to permitted extent by suit for reduction or by objection. Certain dispositions inter vivos, such as liberalities not subject to adjustment (see topic 13.05 Descent and Distribution, subhead Advance), and gifts made within five years before decedent's death, are likewise subject to reduction. Statute of limitations: one year since heir has learned of violation of rights, in any event ten years to be computed in case of wills from day of opening, in case of other dispositions (inheritance pact or dispositions inter vivos) from death. If previous disposition mortis causa becomes valid because later disposition has been declared invalid, statute of limitations begins to run from date of invalidation. Objections are not subject to statute of limitations. (C.C. 522-533).

Suit for Inheritance. See topic 13.06 Executors and Administrators.

Legacies.

Person to whom specific property benefit has been bequeathed is not heir but legatee. Same legal position is held by person to whom usufruct of entire estate or fraction of estate has been bequeathed. (C.C. 484). Legacies may also be made to heirs; allotment of specific piece of property in estate to heir, however, has to be regarded as direction for distribution (see topic 13.06 Executors and Administrators) and not as legacy, unless another intention of decedent appears from disposition mortis causa. (C.C. 608, subdivision 3).

Claim. Legatee has personal claim against community of heirs, or against single heir or legatee (sub-legacy) charged with legacy. If legacies exceed value of estate, or if legacy exceeds inheritance or legacy of person charged with it or compulsory inheritance right, reduction can be claimed accordingly. (C.C. 486).

Performance. Claims of creditors take precedence over legatees. If legacies are performed by heirs and if thereafter there are still debts of which heirs had no previous knowledge, heirs are entitled to claim proportionate restitution from legatees, as far as heirs could have claimed reduction of legacies, but only to extent legatees are still enriched at time when restitution is claimed. (C.C. 564-565).

Lapse. In case legatee predeceases decedent, legacy falls to person charged with it, unless another intention of decedent is shown from disposition per mortem. (C.C. 543).

Inheritance Pacts.

A person may undertake towards another person to leave entire estate or fraction of estate or legacy to other person or to third person, with or without compensation in return. Such undertakings do not have character of full obligations. Person bound by pact has, in principle, right to dispose freely inter vivos. However, dispositions mortis causa and gifts incompatible with undertakings in inheritance pact may be challenged. (C.C. 494). Inheritance pacts by which person foregoes heirship with or without compensation are also admissible. (C.C. 495-497).

Capacity to Make an Inheritance Pact.

Capacity to Make Inheritance Pact. Person making inheritance pact must have full legal capacity. (C.C. 468).

Form of Execution. Same as for public wills. Parties have to declare their intention to official at same time and subscribe document before official and two witnesses. (C.C. 512).

Form of Revocation. Pact may be revoked unilaterally by obligated person in one of forms of will, but only if, after execution of pact, heir or legatee has acted towards decedent in way giving ground to disinherit. (C.C. 513, subs. 2 and 3).

Probation. Law does not provide for ``opening'' of inheritance pacts.

14 FAMILY

14.01 ADOPTION:

Adoption in Switzerland is governed by Swiss law unless to serious detriment of child it is not recognized in country of domicile or citizenship of adopting person or spouses. (PILS 77, subs. 2).

Only a single person over 35 or spouses over 35 or whose marriage has lasted for more than five years may adopt another person who must be at least 16 years younger. (C.C. 264a-265). Adoptee, if capable of discernment, must consent and, if a minor or a person who has been placed under guardianship, parents or guardianship authorities must also consent. (C.C. 265-265d). Without consent of spouse no person can adopt or be adopted. Adoption is granted by competent authority at domicile of adopting person(s). (C.C. 268). Adoptee may take new name. Adoptee becomes adoptor's child and loses legal relationship to natural parents except to parent with whom adoptor is married. (C.C. 267). Only if adopted person is minor, does adoption by Swiss citizen convey Swiss citizenship. (C.C. 267a). Couples living in registered partnership are prohibited to adopt. (Partnership Code 28).

14.02 DESERTION:

See topic 14.03 Divorce.

14.03 DIVORCE:

Swiss courts are competent if both parties have domicile in Switzerland, if defendant has domicile or plaintiff has had domicile for one year in Switzerland or is Swiss citizen. If they have common foreign citizenship and only one party has domicile in Switzerland, that law applies unless divorce is impossible or highly impracticable under that law, then Swiss law is applicable. (PILS 59 and 61, subs. 2). Regarding registered partnership same rules are generally applicable. (PILS 65a - 65d). In case of lacking domicile and citizenship, Swiss courts at place of registration are competent. (PILS 65b). If applicable law is not familiar with registration of same-sex partnerships, Swiss law is applicable. Parties may also choose law of place of registration. (PILS 65c).

Grounds for Divorce.

Divorce may be granted (a) on mutual or parallel demand by both spouses. Unless parties submit agreement on all consequences of divorce, court regulates consequences; (b) on demand by one spouse after two years (not necessarily legal) separation; (c) on demand by one spouse before expiry of waiting period if continuation of marital relations cannot be expected due to important reasons not mainly due to claimant. Federal Supreme Court changed initial practise of setting requirements for important reasons excessively high, but they must at least have weight of two year separation. (C.C. 111-116). Dissolution of registered partnerships may be granted 1) on mutual or parallel demand by both parties. Unless registered partners submit agreement on all consequences of dissolution, court regulates consequences; 2) on demand by one registered partner after one year (not necessarily legal) separation. (Partnership Code 29, 30).

Procedure.

Is subject to Cantonal law, but following federal requirements: (a) parties must be protected from rash or ill-considered action; (b) parties will be heard together and individually; (c) after agreement concerning indirect consequences of divorce is submitted, two month reflection period, then written confirmation by both parties individually about principle of divorce and consequences, and approval by court; (d) if no agreement, both parties may submit proposals concerning consequences (C.C. 111-112). Either spouse may demand for precautionary measures during divorce procedure, in particular relating to lodging, maintenance of family, management of matrimonial property and custody of children. (C.C. 137, 175-179). Regarding dissolution of registered partnerships, procedure is simpler and faster. (Partnership Code 29).

Alimony may be allocated to party if it cannot be expected to provide for its own maintenance and pension plan. Depends on length of marriage, distribution of tasks during marriage, age, wealth, income, property, children, education and earning capacity. Alimony can be denied if party grossly violated its obligation to participate in family maintenance, provoked its own indigence, committed crime against other party or closely related person. Alimonies can be allocated by judgment or agreement. May be raised or reduced due to living costs or subsequent judgment. Law facilitates execution of alimony payments. (C.C. 125-132). After dissolution of registered partnership, each party has to earn its own living. Alimony may be allocated but more restrictively than in case of divorce. (Partnership Code 34, C.C. 125 Sec. 3, 126-132).

14.04 GUARDIAN AND WARD:

Hague Convention of Oct. 19, 1996 on jurisdiction, applicable law, recognition, enforcement and co-operation in respect of parental responsibility and measures for protection of children applies generally, as well as Hague Convention of Jan. 13, 2000 on international protection of adults. (PILS 85).

Children remain, as long as they are minors, under authority of their parents or surviving parent. (C.C. 296). Parents may not be arbitrarily deprived of parental authority. (C.C. 311 et seq.).

During marriage both parents exercise parental power. When parents live separately or have been divorced child stands under parental authority of parent to whom custody has been awarded, or under guardianship. (C.C. 297). If parents in agreement concerning consequences of divorce have agreed upon participation in care for child and in maintenance of child they may submit proposal to guardianship authorities to have joint parental authority. (C.C. 298a).

Parents are, by statute, entrusted with representation of child as against third persons. They have also right and duty to manage all of child's assets, including bequests. As a rule parents are not required to account or to give security for faithful performance of their duties in this respect. Guardianship authorities may require parents to periodically account if regarded as necessary on basis of nature and size of child's assets and personal circumstances of parents. (C.C. 318).

Guardians may be appointed officially when necessary and are under supervision of the guardianship authorities and must account at least once every two years. If competent and at least 16 years of age, ward is, if possible, consulted during accounting. (C.C. 413). Guardians and guardianship authorities are liable for losses caused willfully or by their negligence. If they are unable to pay damages, canton becomes liable. (C.C. 426, 427). As a rule, no bond is required from guardian.

See also category 22 Property, topic 22.01 Absentees.

14.05 HUSBAND AND WIFE:

Applicable Law.

Applicable law as regards matrimonial property regimes may be chosen by spouses among law of common (future) domicile and law of either spouse's citizenship, otherwise law of (last) common domicile applies. (PILS 52-54). Registered partnership: PILS 65c; registered partnership may also choose law of state where partnership was registered.

Swiss law provides three systems regulating property rights between spouses: Sharing of acquisitions (Errungenschaftsbeteiligung), community of property (Gütergemeinschaft) and separation of property (Gütertrennung). Sharing of acquisitions applies unless law or marriage property contract provides otherwise. (C.C. 181-184).

Sharing of Acquisitions.

Property earned during marriage, items for solely personal use and property owned before or inherited after marriage remains separate during marriage. Each spouse is responsible for administering his or her own property. Upon dissolution of marriage by death of spouse or divorce, personal use items and property owned before or inherited after marriage are retained by respective spouse (or, in case of death, his or her heirs). Gifts made to third parties without consent of other spouse within last five years and any other gifts made during marriage with intent of reducing other spouse's share are added to each spouse's property earned during marriage. Each spouse (or his or her heirs) receives one-half of all earned property. Other half is attributed to other spouse. (C.C. 196-220). During registered partnership, parties may establish contract containing rules in case of dissolution. Registered partners may agree to divide their property according to rules about sharing of acquisitions. (Partnership Code 25, C.C. 196 - 219).

Community of Property.

Except as permitted to be modified by marital property contract, all property brought into marriage and all income earned during marriage is jointly owned by spouses. Only items for solely personal use are considered to belong to each spouse. Community property is administered jointly. Upon dissolution of marriage by divorce, each spouse receives items for solely personal use if remaining community property is split in half. Upon dissolution by death of spouse, surviving spouse and heirs of deceased spouse split community property in half. Marital property contract may determine different dispositions in case of divorce or death. (C.C. 221-246).

Separation of Property.

Each spouse retains and administers his or her property. (C.C. 247-251). Registered partnership: Partnership Code 18.

If one spouse does not fulfill duty to provide maintenance to family, court may direct spouse's debtors to make payments to other spouse. (C.C. 177).

Property Arrangements Between Unmarried Persons.

In some cases ordinary partnership (“société simple”) may exist. See category 2 Business Organizations, topic 2.08 Partnerships.

Registered Partnership.

Swiss law provides for possibility to register same-sex partnerships. (Partnership Code of June 18, 2004, in force since Jan. 2007). Registered partnership has similar legal effects as marriage.

14.06 INFANTS:

Law of habitual residence applies.

Person attains majority on completing 18th year.

See also topic 14.04 Guardian and Ward.

Head of family is responsible for torts of child in household unless head of family can prove that care required by circumstances was observed.

14.07 MARRIAGE:

The right to marry is protected by Federal Constitution. (Art. 14; C.C. 90-136; Ordinance of Federal Government concerning Civil Status Matters [Civil Status Ordinance] of Apr. 28, 2004. Registered partnership: Civil Status Ordinance and Partnership Code).

Capacity to Marry.

Prerequisites: (1) age of 18 years, (2) power of judgment. For persons under guardianship consent by guardian is required. If consent refused by guardian, complaint may be made with cantonal authorities. (C.C. 94 Registered partnership: Partnership Code 3).

Impediments to Marriage.

Marriage between marriage lineal relatives and between siblings or half-siblings (Registered partnership: Partnership Code 4), whether related to each other by parentage or adoption, is prohibited. Adoption does not remove impediment to marriage constituted by kinship between adopted child and his issue on one hand and his adoptive family on other. Person wishing to remarry must prove that previous marriage has been annulled or dissolved. (Registered partnership: Partnership Code 4 Sec. 2).

Aliens may marry in Switzerland if permitted under Swiss law or either spouse's law of citizenship if one has domicile in Switzerland, or marriage is recognized in country of domicile or citizenship of both, or would be if divorce decreed or recognized in Switzerland would be recognized. See topic Citizenship. (See category 4 Citizenship, topic 4.02 Citizenship.) (Art. 43, Private International Law Statute [PILS 43]). Registered partnership: not possible if neither of partners is Swiss citizen or domiciled in Switzerland. (PILS 65a, 43, 44).

Preparatory Procedure before Marriage Ceremony.

Marriage to be celebrated in Switzerland requires prior preparatory procedure at Civil Status Offices of Swiss domicile of future bridegroom or bride. If both future spouses are domiciled abroad Civil Status Offices where marriage ceremony is intended to take place is competent. Future spouses have to submit request for implementation of preparatory procedure by appearing in person. If future spouses can prove that appearance in personam is unreasonable, implementation of preparatory procedure is admitted in writing. Future spouses living outside Switzerland may file such request with Swiss diplomatic or consular representative abroad. Spouses have to prove their identity with official documents and declare personally that they comply with prerequisites concerning capacity to marry. Request for preparatory procedure submitted to directing Civil Status Office must contain documentation as to domicile, birth, sex, name, parentage of common children, civil status, citizenship, capacity to marry and nonexistence of impediments. Future spouses declare personally to directing Civil Status Official (1) that all statements made in request for preparatory procedure and all documentation submitted are updated, complete, accurate and true; (2) that they are not under care of guardian; (3) that they have no relationship by blood or by adoption between parent-child nor brother-sister of whole or of half blood; (4) that they have not concealed still existing marriage (or registered partnership Ordinance of Apr. 28, 2004, 65, 75d). If preparatory procedure is admitted in writing, future spouses living outside Switzerland may make this declaration with Swiss diplomatic or consular representative abroad. (Ordinance of Apr. 28, 2004, 73, Partnership Code 5).

Civil Status Offices examine if (1) its competence is given; (2) request has been submitted in due form; (3) requested documentation and declarations have been submitted; (4) both spouses have capacity to marry; (5) no impediments to marry are at hand. If necessary, it initiates further investigations and induces future spouses to take part in them. (Ordinance of Apr. 28, 2004, 66, 75d).

If all prerequisites for marriage are met, Civil Status Offices will communicate to future spouses written decision that celebration of marriage may take place. Civil Status Offices agree upon details of celebration of marriage with future spouses or issues at request of future spouses grant of authority entitling future spouses to be married before any Civil Status Official in Switzerland. If prerequisites for marriage are not met, Civil Status Offices will refuse to celebrate marriage or to issue grant of authority entitling future spouses to be married before any Civil Status Official in Switzerland. (Ordinance of Apr. 28, 2004, 75a - 75h). Celebration of marriage may take place at earliest ten days and at latest three months after written decision that celebration of marriage may take place has been communicated to future spouses. (C.C. 97-100; Ordinance of Apr. 28, 2004, 62-69).

Marriage Ceremony.

Unless future spouse proves that it is unreasonable for them to go to marriage hall, marriage is celebrated publicly with participation of Civil Status Official at marriage hall in presence of two witnesses of age and capable of judgment. Official asks bridegroom and bride separately whether each is willing to enter into marriage with other. After affirmative answers official declares that by such mutual consent marriage is concluded. Immediately afterwards marriage certificate is given to newlyweds if one spouse is domiciled in Switzerland or is Swiss citizen. Religious marriage may optionally take place only after civil law marriage. (C.C. 97, 101-103; Ordinance of Apr. 28, 2004, 70-72. Registered Partnership: Ordinance of Apr. 28, 2004, 75i - 75l).

Reports of Marriages.

After celebration marriage must immediately be entered in Marriage Register at place of official who performed celebration. Marriage of Swiss citizen celebrated abroad is entered in Marriage Register at place of Swiss citizenship. Marriage of Swiss citizen celebrated in Switzerland or abroad must also be entered in Family Register. See category 10 Documents and Records, topic 10.04 Records, subhead Civil Status Register.

Annulment.

Marriage is null and void if one of spouses was either: (1) Already married at time of celebration of marriage and former marriage has not been dissolved by divorce or death of partner, (2) experiencing lasting incapacity of judgment, (3) or if spouses are related in prohibited degree, (4) or if one spouse does not live in (matrimonial) community, but tries to circumvent rules for federal law on foreigners (see subhead Impediments to Marriage, clause [1], supra). Action must be brought by competent authority and may be brought by anybody having interest. (C.C. 104-106). Similar regulation concerning registered partnership. (Partnership Code 9 - 11).

Marriage is voidable by one of spouses: (1) If spouse was incapable of judgment for transitory reason at time of celebration of marriage; (2) for error, if spouse declared consent to marriage but did not want to marry present spouse, or was induced to marriage by error as to qualities of other spouse; (3) for duress. Action lapses after six months from discovery of ground for avoidance or termination of duress, in any case after five years after celebration of marriage. Consequences of annulment are same as in divorce. (C.C. 107-110). Registered partnership is voidable by one of registered partners for error. Action lapses after six months from discovery of ground for avoidance, in any case after five years after celebration of registration. (Partnership Code 10).

14.08 NAMES:

Spouses select bride's or groom's family name as common family name, passed on to children. Bride can keep former family name as middle name. (C.C. 30, subs. 2, 160 registered partnership: No family name).

See also category 3 Business Regulation and Commerce, topic 3.09 Firm and

Corporate Name.

15 FOREIGN TRADE AND COMMERCE

15.01 CUSTOMS:

Customs duties are levied by Confederation. Customs revenue goes to Federal Treasury. On average, except for agricultural products, Switzerland levies rather low customs duties. Current Customs Tariff of 1985 is based on international customs nomenclature of Customs Council (HS). It comprises only specific rates, mainly imposed on gross weight. With new Customs Code of Mar. 18, 2005 and Customs Ordinance in force as of May 1, 2007, customs procedures have been harmonized with EU Customs Code.

Since July 1, 1977 exemption from duties for industrial products exists in trade relations between EU and EFTA countries and, since Feb. 1, 2005 for certain processed agricultural products. It is granted upon application and against presentation of proof of preferential origin (Warenverkehrsbescheinigung—Form EUR1). Proof of Origin confirms sufficient processing of non-originating materials in application of Free Trade Agreement EC-Switzerland or Stockholm Convention.

EFTA and EU have concluded Free Trade Agreements with Eastern and Mediterranean Countries. Under auspices of EU large parts of these agreements were interlinked by EuroMed Cumulation, creating European Free Trade Zone. Since 1996, origin rules have therefore been harmonized throughout Europe. Various Eastern European Countries have become members of EU and EU-Swiss Free Trade Agreement applies.

Switzerland is party to WTO. Trade relations with countries outside Free Trade Zone are governed by WTO rules. Switzerland grants GSP (General System of Preferences) to developing countries and on certain agricultural products. In adopting WTO 1994 agreement, Switzerland introduced and modified customs procedures (e.g. open customs warehouses and inward processing), facilitating import procedures for certain materials and processing. Such procedures are subject to authorization by Customs Authorities.

Value Added Tax on Imports (VAT).

See category 23 Taxation, topic Taxes, subhead Indirect Federal Taxes, catchline Value Added Tax (VAT).

15.02 EXCHANGE CONTROL:

Exchange Control.

See topic 15.04 Foreign Investment; category 3 Business Regulation and Commerce, topic 3.01 Banks and Banking.

Swiss National Bank has power to take measures for protection of Swiss currency including possibility to request banks to keep mandatory reserves and to control emissions.

There are no foreign exchange restrictions between U.S. and Switzerland.

15.03 FOREIGN EXCHANGE:

See topic 15.02 Exchange Control.

15.04 FOREIGN INVESTMENT:

Flow of new foreign capital and funds into Switzerland or into Swiss currency is, in general, not subject to specific restrictions and licensing apart from few cases, such as investment in Swiss immovables requiring approval of cantonal authority. Also, special authorizations are required for foreign banks operating branch offices in Switzerland, for establishment of bank under foreign control or for mergers of banks, in particular if acquiring company is not domiciled in Switzerland. Authorizations are required for foreign insurance companies for their business activities in Switzerland, as well as mergers, spin-offs, and changes of corporate forms of insurance companies. Equally, special authorizations are required for foreign enterprises in broadcasting, telecommunication, or air transport sector.

Switzerland is a party to Convention on Settlement of Investment Disputes between States and Nationals of other States concluded in Washington on Mar. 18, 1965.

15.05 FOREIGN TRADE REGULATIONS:

Imports and exports are in principle subject to control of Swiss Federal Government, Department of Economics and its subsections. Licenses are presently required for goods relating to military and economic defense, dual use products, protection of agriculture and of certain industries, and in connection with foreign trade or foreign exchange agreements. Particulars concerning these ever changing regulations should be sought from Swiss Consulates.

Switzerland is member of WTO.

Switzerland is member of European Free Trade Association (EFTA). Duties on most imports from EFTA countries were reduced to nil. Numerous Free Trade Agreement concluded between EFTA and third countries (e.g. Canada, Mexico, Singapore). Bilateral Free Trade Agreement with Japan.

On July 22, 1972, Switzerland entered into free trade agreement with European Economic Community and European Community for Coal and Steel. Import and export customs duties on industrial products have been reduced to nil. In 1999, Switzerland and EU concluded Bilateral Agreements I, which cover seven areas such as elimination of technical barriers to trade. Bilateral Agreements II, i.e. agreement on taxation and savings, Schengen/Dublin association agreement, agreement on pensions, and agreement on processed agricultural products, were ratified in 2005. Agreement on taxation and savings came into force on 1 July 2005, agreement on pensions on 31 May 2005, and agreement on processed agricultural products on 30 Mar. 2005. Schengen/Dublin came into force on 12 Dec. 2008.

See category 25 Treaties and Conventions, topic 25.01 Treaties. See also topic 15.01 Customs.

16 HEALTH

—Scope —

Swiss legislation related to health matters is governed by number of laws and ordinances dealing with requirements for medical professions, medicinal products (drugs), medical devices, regulation of food and day-to-day products, use of toxic substances, biotechnology and protection from epidemics. Legislation on health provides for various specific procedures regarding admission to certain professions, approvals for facilities and for manufacturing and marketing products.

Swiss Federal Office of Public Health ("Bundesamt für Gesundheit" or "BAG"), Swiss Agency for Therapeutic Products ("Schweizerisches Heilmittelinstitut" or

“Swissmedic”) as well as various Cantonal administration departments are governing bodies.

16.01 BIOTECHNOLOGY:

Number of regulations have recently emerged which can be distinguished in human-related area and non-human-related area. Law on Assisted Reproduction of Dec. 18, 1998 aims at protecting human dignity, personality and family against abuse and malpractice of assisted reproduction techniques. Specifically surrogacy and donations of egg cells or embryos are prohibited. Law on Stem Cells Research dated Dec. 19, 2003 sets forth conditions under which stem cells derived from human embryos can be used for research purposes. Other new legislation for human-related biotechnology are to be expected in near future and, among others, refer to genome analysis and research on human embryos.

Law on Genetic Engineering in Non-Human Organisms of Mar. 21, 2003 and number of related ordinances refer to contained use and release for research or marketing purposes of all genetically modified organisms except humans. Beside health protection issues, also environmental protection issues, labeling, and principles for ensuring co-existence between conventional and genetically modified products are addressed. Switzerland is member of Cartagena-Protocol on Biosafety of Jan. 29, 2000.

16.02 FOODS, DRUGS, DEVICES AND COSMETICS:

Regulation of Drugs and Medical Devices.

Federal Law on Drugs and Medical Devices of Dec. 15, 2000, and, based thereon, number of ordinances refer to use of drugs, medical devices and related therapies ensuring high quality, safe and effective products and protecting consumers from deception. Clinical trials need prior approval of ethic commission and notification with Swissmedic. Manufacturing, distribution, wholesale, export and import of drugs are subject to authorization by Swissmedic. For drugs, public advertisement as well as advertisement directed towards healthcare professionals are subject to rigorous restrictions. Manufacturing, distribution, export and import of most of medical devices do not require approval. However, such products are subject to standardized conformity assessment procedures and must be verifiably safe and effective in accordance with Europe-wide harmonized requirements.

Regulation and Control of Food and Other Day-To-Day Products.

Federal Law on Food and Day-to-Day Products of Oct. 9, 1992, and number of ordinances concerning specific products or specific manufacturing proceedings form basis of this legislation. Purpose is to ensure food safety and hygienic use of food and to protect consumers of deceptive marketing of food products and day-to-day products. Regulations address manufacturing, storage, transportation, distribution, sale, labeling, advertisement, importation, transfer and exportation of food, food compounds and additives, bottled water, cosmetics, articles of clothing and articles for children's use. Competent authority to implement Federal Law is BAG. In principle, all other measures to ensure effective governance, especially food control measures, fall within competence of cantonal authorities. However, in certain areas, e.g. approval of genetically modified food, BAG is exclusively competent.

16.03 MEDICAL PROFESSIONALS:

In Switzerland exercise of medical professions is subject to fulfillment of professional qualification. Qualifications for physicians, dentists, veterinarians and pharmacists are laid down in several federal ordinances. Exercise of other medical professions is subject to cantonal legislation. Based on bilateral agreements, most qualifications in field of medical and paramedical professions of nationals of Member States of European Community are recognized in Switzerland.

16.04 POISONOUS SUBSTANCES:

Swiss Federal Law on Chemicals and six relating ordinances address manufacturing, marketing, use, disposal, import and export of chemicals in comprehensive manner and, among others, comprise pesticides, disinfectants, preservatives for food, feed and timber as well as principles of good laboratory practice. Said Law on Chemicals and its ordinances correspond to large extent with regulations of European Community.

17 IMMIGRATION

17.01 ALIENS:

Conflicts.

International jurisdiction, private international law and recognition and enforcement of foreign decisions, to extent not covered by Lugano Convention Sept. 16, 1988 or other international treaties, are governed by Private International Law Statute. It covers also international bankruptcy and international arbitration.

Foreign citizens need residence permit; for gainful activity, also work permit. Easier for intragroup transferees. Temporary personnel, such as technicians or industrial workers also need work permits, unless they only come for few days as consultants. Trainees need temporary permits. No tourist visa is necessary for nationals of many countries; for U.S. citizens, valid passport suffices. All foreigners must register with police after specified stay in Switzerland.

Major change for EU and EFTA citizens after coming into force of bilateral treaty between Switzerland and EC on June 1, 2002. Free movement of persons is introduced for EU-15 Member States, quotas still apply for ten new EU Member States until 2011, extension to Rumania and Bulgaria in 2009. For non-EU/EFTA nationals, annual quota is 7,000 short term and 4,000 long term permits and requirements for work permits are more stringent. Long term permits are usually granted for one-year period but may be renewed; EU/EFTA citizens have right to renewable five year permit.

Normally, non-EC/EFTA immigrant may change employer, change of canton of residence requires approval. Most work permits are granted by cantons with consent of federal administration in Berne. Special rules apply to short-term workers, trainees and “au-pair” maids. After uninterrupted ten year residence period, year-round permit may be transformed into permanent residence permit. For citizens of many countries (UK, Germany, France, Italy, U.S.), this waiting period is limited to five years based on bilateral agreements. Regulations are very detailed and subject to yearly renewal.

“Central register of foreigners” is kept. In exceptional cases, addresses of aliens may be disclosed to foreign authorities or persons, e.g., if it appears that alien is going into hiding in Switzerland.

Aliens may not vote in federal elections and referenda. Few cantons grant voting rights to foreigners on cantonal and/or municipality level; others may follow. In foreign elections, aliens may vote by mail if foreign law so provides.

Corporations Owned or Controlled by Aliens.

See categories 2 Business Organizations, topic Corporations, subhead Share Corporation, catchline Alien Shareholders; Foreign Trade and Commerce, topic Foreign Investment; Property, topic Immovable Property, subhead Acquisition by Nonresidents.

18 INSURANCE

INSURANCE COMPANIES:

Regulation: Fully amended regulations in force since Jan. 1, 2006: Federal Act on Supervision of Insurance Enterprises of Dec. 17, 2004 (Insurance Supervision Act), Federal Council Ordinance on Supervision of Private Insurance Enterprises of Nov. 9, 2005, Financial Market Supervisory Authority Ordinance on Supervision of Private Insurance Enterprises of Nov. 9, 2005 and Financial Market Supervisory Authority Ordinance on Combating Money Laundering of Oct. 24, 2006. All types of life and non-life insurance, re-insurance, captive insurance and all persons and enterprises engaging in such activities and insurance intermediation are subject to regulation. Insurance Supervision Act introduced solvency requirements equivalent with respective requirements under EU law.

Supervision by: Financial Market Supervisory Authority.

Foreign Insurance Companies: Cross border offering and provision of insurance into Switzerland is subject to Insurance Supervision Act and prohibited with following exceptions: Re-insurance, Coverage of maritime risks, air traffic risk and risks in connection with cross border transport, coverage of risks abroad, and coverage of war risks.

Foreign insurers might receive license to engage in insurance activities in Switzerland, if they are licensed in their jurisdiction of registration, establish branch office in Switzerland and appoint as its manager person with general power of attorney, meet in jurisdiction of principal registration Swiss required capital and comply with Swiss required solvency margin, establish in Switzerland organisational fund together with corresponding assets and lodge surety in Switzerland.

18 INTELLECTUAL PROPERTY

18.01 COPYRIGHT:

Federal Statute in force since July 1, 1993 (Federal Law on Copyright and Neighboring Rights of Oct. 9, 1992, Copyright Law). Partial revision of Copyright Law to improve protection for creative works and productions used on Internet and to include latest international developments in field of copyrights and neighboring rights came into force on 1 July 2008.

Following are protected without registration or possibility of registration: literary works and artistic works, including (but not limited to) written works of any kind or purpose, musical works, acoustical works, works of art (paintings, sculptures, graphical works), scientific and technical works such as drawings, maps, models, architectural works, works of applied art, visual and audiovisual works, choreographic works, computer programs, and further adaptations (including translations) and compilations of works. Protection is granted for Swiss and non-Swiss residents.

Published works may be used and copied privately, for teaching and for internal public administration use, with notable exception of computer programs for which only backup copies are permitted. Copyright may be assigned wholly or partly, and is transferred to heirs. Moral right always remains with author, who may prevent distortion of work.

Protection lasts for 70 years after author's death (50 years for computer programs). In case of infringements, author has claims for prohibition, for removal of ongoing prejudice, and for information about origin of unlawful objects; author may further claim damages. Copyright infringement may be punishable act.

Neighbouring rights of performers, producers of sound recordings and films and broadcasting organisations are recognized and protected. Such rights encompass exclusive right to communicate to public, retransmit, broadcast, copy and issue copies of performance or recording. Protection lasts for 50 years from end of calendar year in which performance took place, recording or film was made or broadcast was initially aired, as case may be.

Semiconductor chips protected against copying under unfair competition rules. Statute for the Protection of Structures of Integrated Circuits of July 1, 1993, grants protection to uncommon three-dimensional structures of integrated circuits. Rarity required. Once registered with Federal Institute of Intellectual Property, protection lasts ten years from application or first distribution, whichever is earlier. Two years only for structures not registered but simply circulated. (Art. 9). Producer of structure has exclusive right to reproduce, circulate and exploit. Owner of structure benefits from same civil and criminal remedies against infringement as under Copyright Statute against copyright infringement.

Conventions and Treaties.

Switzerland is party to Revised Berne Convention (Paris Revision 1971), to World Copyright Convention (Paris Revision 1971), to Rome Convention of 1961 (Performers etc.), to 1974 Brussels Satellite Convention and to Geneva Convention against unauthorised Duplications of Phonograms of 1971. Switzerland is member of World Intellectual Property Organization WIPO and World Trade Organization WTO, and has adopted Agreement on Trade Related Aspects of Intellectual Property Rights, TRIPS. Switzerland is party to WIPO Copyright Treaty and WIPO Performances and Phonograms Treaty (both Geneva, 1996).

Databases.

There is no particular legislation in Switzerland. Databases enjoy protection under Copyright Law and under Federal Law against Unfair Competition.

18.02 DOMAIN NAMES:

Federal Ordinance concerning Addressing Resources in Telecommunications Sector of Oct. 6, 1997 (am'd on 1 Apr. 2007) is legal basis for assignment of domain names for country code top level domain “.ch”. Ordinance provides for registration and administration of domain names. Foundation “Switch” (http://www.switch.ch) runs registration service for country code top level domains “ch” (for Switzerland) and “li” (for Liechtenstein). Disputes concerning domain names are governed by applicable civil law provisions; for domain names registered or renewed after 1 Mar. 2004, Switch dispute resolution proceedings apply as mandatory rules. Domain names also enjoy protection under legislation against unfair competition.

18.03 PATENTS AND INDUSTRIAL DESIGNS:

Patent Act of June 25, 1954, with major revisions in 1976 (introduction of European Convention), 1995 (implementation of changes due to TRIPS), 1999 (implementation to include Supplementary Protection Certificates (SPCS) for herbicides) and 2008 (patentability and scope of protection regarding biotechnological inventions and anti-piracy measures by customs authorities). In its latest revision of Patent Act (effective as of July 1, 2009), parliament decided in favor of unilateral regional exhaustion within European Economic Aera. In case patent protection has only minor significance to functionality of goods international exhaustion will apply. However, patented goods with regulated prices - in particular pharmaceuticals - remain subject to national exhaustion. Two new federal acts are in process, regarding creation of new federal patents court and profession of patent attorneys, respectively.

Switzerland is party to following treaties: Convention of Nov. 27, 1963 on unification of certain points of substantive law on patents for invention; Patent Cooperation Treaty of June 19, 1970 (PCT); Convention of Mar. 24, 1971 on international classification of patents; Convention of Oct. 5, 1973 on mutual law to grant European Patents (European Patent Convention; as amended in 2007); Agreement of Oct. 17, 2000 on Application of Art. 65 of European Patent Convention, which substantially reduces requirements concerning translations of European patent files into official languages of contracting states; Convention with Liechtenstein of Dec. 22, 1978 on patent protection; Budapest Treaty on international recognition of deposit of microorganisms for patent procedures (Revision 1980), UPOV Convention for plant varieties of 1961 as amended in 1972 and 1978 and 1991; Patent Law Treaty of 2000. Switzerland is member of World Intellectual Property Organization WIPO and World Trade Organization WTO, and has adopted Agreement on Trade Related Aspects of Intellectual Property Rights TRIPS.

Grant of Patents.

Patents filed under local law in Switzerland are granted by Federal Institute of Intellectual Property (abbreviated FIIP), Eidgenössisches Institut für Geistiges Eigentum, Stauffacherstrasse 65/59g, 3003 Bern, for new inventions which may be used for industrial purposes. No such grant takes place if invention is either: (1) infringing dignity of human beings or creatures (e.g., methods to clone human beings or clones created with such methods) or is in another way contrary to public interest or immoral, (2) method of surgery, therapy or diagnostic applied to human or animal body, (3) species of, or procedure to breed plants or animals, except microbiological procedures, (4) subject to official pre-examination and held not to be new (see infra), (5) human body or parts thereof in its development stages, (6) naturally existing gene sequences or parts thereof. Plant variety is protected by Federal Statute of Mar. 20, 1975.

Applications must be filed with FIIP, together with accurate description of invention and summary thereof, designation of inventor, and registration fee. Applicants residing outside of Switzerland may file application only through representative residing in Switzerland (or in Principality of Liechtenstein). In essence, FIIP examines patent applications in view of formal aspects. No novelty-examination takes place. Grant, alteration or cancellation of patent is registered in Patent Register kept by FIIP, and thereafter published. Within nine months after publication, any person is entitled to object to patentability of invention. This objection, however, is limited to restricted number of substantial reasons for exclusion (e.g., infringement of human dignity).

Assignment.

A patent is considered to be industrial property. As such it can be transferred by assignment or inheritance or be subject to a license for use. If in public interest, patent may be partly or fully expropriated upon decision of Federal Government.

Licenses.

Patentee may authorize another person to use invention (license).

Compulsory license, including determination of its duration and indemnity, may be granted judicially upon petition: (a) to patentee of patent or owner of plant variety right that cannot be used without using former patent, provided later patent offers substantial technical progress; (b) to any interested person if indicated by public interest, provided patentee has rejected demand of license by petitioner without valid reasons; (c) to any person who intends to use patented biotechnological invention for scientific research; (d) to persons in order to remedy practice of unfair competition in connection with semiconductor technology and human diagnosis declared by court or other administrative authority; (e) to persons that manufacture pharmaceutical products and export these products into country that has no or not sufficient own manufacturing capacities and needs said products to fight public health problems; (f) to any interested person if patent has not been used in Switzerland during three consecutive years since its registration unless patentee starts to use patent before filing petition or has valuable reasons for not using it. In last case (f), if needs of Swiss economy are not satisfied by licenses within two years after grant of first forced license, any interested person may file complaint for judicial cancellation of patent. Such cancellation, however, does not take place with respect to citizens of countries granting reciprocity, existence of which is to be established by Federal Government and has been established with respect to U. S. A. on Jan. 28, 1908. Farmers that have obtained herbal or animal reproduction material may re-use results thereof on their own farm.

Infringement.

A patent excludes any not licensed form of industrial use of the invention. Violation of patent rights entails indemnification; if intentional it can be subject to criminal prosecution.

Expiration.

Patents expire (a) after 20 years from date on which application was filed, or (b) if patentee renounces patent in writing, or (c) in case of nonpayment of annual fee upon due date. If payment is effected only during last three of these six months additional fee is due.

Drugs and Pesticides.

Supplementary Protection Certificates (SPCs) are issued for maximum of five years for pharmaceuticals and pesticides.

Annulment.

Patents may be annulled by court if (1) there is no new invention for industrial use, or (2) subject matter cannot be covered by patent, or (3) invention is not sufficiently substantiated in its description in order that it can be carried out by expert, or (4) subject of patent goes beyond application which determined application date, or (5) patentee was not inventor or legal successor or otherwise entitled to patent. Such suit may be brought by any interested party, but in case of ground (5) only by party alleging title to patent, in which instance adjudication of patent instead of annulment may be demanded.

Industrial Designs.

Revised Federal Statute of Oct. 5, 2001, in force as of July 1, 2002. Protection concerns forms, possibly combined with colors, which may serve as models for commercial manufacturing of articles. Design protection does not cover process of manufacturing, utility or technical effect of article produced by using design or model.

Switzerland is party to following treaties: Paris Convention for protection of industrial property (Stockholm Revision of July 14, 1967); Hague Convention for International Deposit of Industrial Design and Models (London 1934); Hague Convention for International Deposit of Industrial Design and Models of Nov. 28, 1960 (Den Haag 1960); Locarno Convention for the International Clarification of Industrial Design (Revision 1979).

Application for design protection must be filed with FIIP by depositing design or model and paying fee. Publication of application can upon request be postponed for period of maximum 30 months as per date of filing of application, if it is intended to keep application secret. Applications from persons outside of Switzerland must be made by authorized representative residing in Switzerland.

Design protection is granted for periods of five years and expires in any case after 25 years or by abandonment, or in case of failure to pay fee, six months after due date.

Owners of registered industrial models and designs may request seizure of goods at customs that infringe their rights either upon given notice by custom authorities or upon their own observations. Infringing goods may be seized for up to ten days and destroyed upon request of right owner.

Any interested party may sue for annulment of protection if (1) design or model was not new at time of application (it is new if not known to public), or (2) applicant was not originator nor legal successor, or (3) misrepresentations were furnished on behalf of design or model deposited in sealed envelope, or (4) it cannot be subject matter of design protection, or (5) it conflicts with provisions of other federal statutes or treaties, or (6) is immoral.

18.04 TRADEMARKS:

Trademarks and Tradenames.—Trademark Act of Aug. 28, 1992 provides protection for trademarks of goods, servicemarks, collective marks as in force since Apr. 1, 1993.

Terms, symbols, three dimensional and acoustic trademarks which distinguish goods and/or services from other trademarks or designate source thereof can be registered as trademark with FIIP. So-called “famous trademarks” are protected in all categories of goods and/or services provided use of conflicting trademark affects or jeopardizes power of distinction or exploits reputation of famous trademark.

Collective marks and certification can be registered when accompanied by guideline indicating common characteristics of goods and/or services to be labeled therewith. Distinctive color-trademarks can be registered. Right to exclude others from using same trademark is based on date of first application, not first use. Protection of firm names depends on registration in Register of Commerce (see category 3 Business Regulation and Commerce, topics 3.09 Firm and Corporate Name; 3.15 Register of Commerce).

Application.

Trademarks may be applied for by anybody, whether Swiss or foreign. Upon request, FIIP conducts trademark searches for identical or similar trademarks.

Registration.

Trademark must be deposited with FIIP. Trademark registration is not available to: (a) Signs that belong to public domain; (b) shapes which result from nature of goods and shapes of goods or their packaging that are technically necessary; (c) misleading signs; (d) signs contrary to public order, morality or applicable law.

Assignment.

Possible for part or all goods or services of registration even without transfer of respective business. Transfer of business entails transfer of trademarks.

Expiration.

Registration of trademark lasts for ten years from date of application. Unless extended, registration will be cancelled six months after its termination. It can be indefinitely extended for subsequent periods of ten years. If registered trademark has not been used for five consecutive years, court may cancel registration upon petition of any interested party.

Declaration of Origin (reference to geographical origin of goods or services).—Indications of origin must be correct and not misleading. Origin of goods is determined by place of manufacture or by origin of basic materials and components used. Origin of services is determined by (a) registered offices of person providing service; (b) nationality of persons exercising actual control over business.

Violations.

Illegal use of trademarks, declarations of origin, and commercial distinctions, etc., entails indemnification; if intentional, criminal prosecution is also possible. Mechanism is provided for trademark owner to initiate post-registration opposition proceedings against similar or identical mark for same category of goods or services. Objection must be raised within three months from publication of registration. After three months, objecting party may pursue legal remedies.

Conventions and Treaties.

Switzerland is a party to Madrid Convention for the prohibition of false designations of origin on goods (Stockholm Revision 1967), Madrid Agreement for international registration of trademarks (Stockholm Revision 1967) and Protocol to Madrid Agreement (Madrid 1989). Treaty of Nice on International Classification of Goods and Services (Geneva 1977, am'd 1979), Paris Convention for Protection of Industrial Property (Stockholm Revision 1967). Trademark Law Treaty (Geneva 1994), Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS 1994), Convention Establishing the World Intellectual Property Organization (WIPO 1967).

See also exchange of notes with U.S. of May 14, 1883.

See also topics 18.01 Copyright and 18.03 Patents and Industrial Designs.

18.05 TRADE SECRETS/KNOW-HOW:

Trade secrets and know-how may be protected under general rules of good faith as well as under specific law rules against unfair competition and under criminal law. Employees must keep secrets which they have learned of during their employment. This also applies to know-how in so far as such know-how regards specific aspects of employer's business; however, employee may freely use personal know-how, e.g. what employee learned on job by becoming more skilled. There are no formalities required for protection of trade secrets in Switzerland and time limits on protection vary depending solely on holder's own protective measures.

19 LEGAL PROFESSION

19.01 ADVOCATES AND COUNSELORS:

Since June 1, 2002, profession of lawyers representing parties before courts is regulated by Federal Statute (Bundesgesetz über die Freizügigkeit der Rechtsanwälte, BFGA). In addition, there are cantonal laws specifying or supplementing federal rules and (partly) extending federal rules also to lawyers acting as legal advisors. BFGA provides for cantonal registers listing lawyers admitted to represent parties before courts.

Generally, lawyers admitted to Swiss bar are called Avocats/Fürsprech(er)/Advokat/Rechtsanwalt/Avvocato. They are university graduates in law (licentiatus iuris, doctor iuris or master of law), have had at least one year's clerkship with court and/or apprenticeship in law firm and have taken cantonal bar examination.

Following bar associations will assist foreign attorney seeking local counsel: Swiss Federal Bar Association: lic.iur. René Rall, Postfach 8321, 3001 Bern, Tel: 0041 31 313 06 06, Fax: 0041 31 313 06 16 (www.swisslawyers.com); Bernischer Anwaltsverband, Véronique Bachmann, Poststrasse 8, 3401 Burgdorf, Tel: 0041 34 423 11 89, Fax: 0041 34 423 11 92 (www.bav-aab.ch); Ordre des Avocats de Genève, Mme Jacqueline Empeyta, 5, rue des Chaudronniers, 1204 Genève, Tel: 0041 22 310 50 65, Fax: 0041 22 781 45 59 (www.odage.ch); Luzerner Anwaltsverband, lic.iur. Markus Haas, Winkelriedstrasse 35, 6002 Luzern, Tel: 0041 41 418 81 36, Fax: 0041 41 418 81 37 (www.lav.ch); Solothurnischer Anwaltsverband, lic.iur. Simone Kury, Löwengasse 1, 4502 Solothurn, Tel: 0041 32 622 46 41, Fax: 0041 32 622 46 44 (www.solav.ch); St. Gallischer Anwaltsverband, lic.iur. Adrian Rufener, Vadianstrasse 44, 9001 St. Gallen, Tel: 0041 71 492 03 20, Fax: 0041 71 492 03 21 (www.anwaltsverbandsg.ch); Ordine degli Avvocati del Cantone Ticino, Pascal Cattaneo, Corso San Gottardo 3, Casella postale 1342, 6830 Chiasso, Tel: 0041 91 682 86 82, Fax: 0041 91 682 95 62 (www.tiav.ch); Ordre des Avocats Vaudois, Thierry Thonney, Grand-Chêne 8, 1002 Lausanne, Tel: 0041 21 311 77 39, Fax: 0041 21 311 77 49 (www.oav.ch); Zürcher Anwaltsverband, Dr. Patrick Middendorf, Bah___nhofstrasse 61, P.O. Box 7675, 8023 Zurich, Tel: 0041 44 211 51 81, Fax: 0041 44 211

51 82 (www.zav.ch).

Confidentiality obligation extends to names of clients. Pactum de quota litis is inadmissible. Pactum de palmario, however, allowed. Advertising is allowed as long as it is objective and corresponds to public need for information.

Foreign lawyers may represent their clients freely in negotiation and arbitration in Switzerland. Attorneys from EU and EFTA countries may be admitted to represent parties before courts if they use their original title of profession. Under certain preconditions they can also obtain listing in cantonal register.

20 MINERAL, WATER AND FISHING RIGHTS

20.01 MINES AND MINERALS:

They are governed not by federal but by cantonal law. In most cantons, rights connected therewith are owned by state.

Concordat of Sept. 24, 1955 between certain cantons regulates granting of oil drilling and exploitation licenses.

20.02 FISHING RIGHTS:

Statute on fishing rights of June 21, 1991, in force since Jan. 1, 1991 as amended, stipulates principles for cantonal regulation on fishing. Main purpose is to preserve and protect diversity of species and to forward fishing research.

21 MORTGAGES

21.01 CHATTEL MORTGAGES:

Known in Swiss law only in very limited sense of pledging cattle (special rules for domestic animals), ships and aircraft by registration. See category 8 Debtor and Creditor, topic 8.09 Pledges.

21.02 MORTGAGES:

Debts may be secured by immovables either as mortgage (Grundpfandverschreibung, Hypothèeque, Ipoteca), or as mortgage note (Schuldbrief, Cédules hypothécaires, Cartella ipotecaria). Third type, land charge certificate (Gült, Lettre de rente, Cartella di rendita), is not used. Mortgage may secure any, even future or contingent, debt. It secures payments due by whoever owns piece of immovables, regardless of any personal obligation on his part. Mortgage notes are negotiable instruments issued to name or to bearer, and may be transferred as such. Mortgage note is collateral security of determined and unconditional bond.

With certain exceptions, mortgages and mortgage notes become effective upon entry in Land Register (amendment on creation of paperless variant of existing mortgage note under discussion). Maximum amount must be stated in Swiss currency. Entries, including amendments and cancellations, can be made only upon execution of publicly authenticated deed. Priority is established according to rank designated in Land Register, not according to date of registration. Stipulations to effect that upon cancellation of mortgage or mortgage note prior in rank subsequent mortgages or notes move up in rank are permitted.

When immovables are sold and buyer acknowledges personal liability for debts secured by mortgage or mortgage note on such property, liability of original debtor ends unless creditor objects within one year.

Debts secured by mortgages or mortgage notes are not subject to statute of limitations. If debt is not paid in time, creditor may execute on property, including all accessories such as plant, hotel furniture and rent accrued after execution proceedings, unless expressly stipulated otherwise. Property gives security for principal, interest and expenses for execution of debt. If there is more than one creditor, proceeds of sale are distributed by rank.

Mortgages and mortgage notes are cancelled upon entry in Land Register or upon total destruction of immovables. Cancellation or return of instrument may be requested upon payment of debt. (C.C. 793-874).

Formal proposal ready for parliamentary discussion to make major amendment of this part of C.C. which deals mainly with mortgages and modernized administration of land register. Preeminent new feature would be additional (4th) type of mortgage note with entry in land register only but without requirement to have legal instrument issued for vesting these rights. Several outdated rules will be adapted to new technical and economic demands. Important objections, however, have been made during public hearing. Amendment has not been finalized yet. However, on Apr. 27, 2009, majority of National Assembly agreed on introduction of mortgage note with entry in land register.

22 PROPERTY

22.01 ABSENTEES:

If for reasons of absence a person of age (see category 14 Family, topic 14.06 Infants) cannot act in urgent matter nor designate representative, or if property is not taken care of because person is continually absent with unknown abode or because of uncertainty as to heirs entitled to inheritance, curator (Beistand, curateur, curatore) is appointed by guardianship authority. (C.C. 392, point 1; 393, points 1 and 3; 548, subsection 1). See category 13 Estates and Trusts, topics 13.03 Death, 13.06 Executors and Administrators, subhead Official Administrators of Estate.

Escheat.

Dividends subject to five years statute of limitations. Title to movables lost by abandonment only when coupled with intention to waive title. Estate passes to canton or municipality of last domicile of intestate decedent only if no grandparents or their issue survive.

22.02 CURTESY:

Unknown in Swiss law.

22.03 DEEDS:

See topic 22.05 Immovable Property; categories 10 Documents and Records, topic Acknowledgments and Other Public Authentications; Family, topic Husband and Wife.

22.04 DOWER:

Unknown in Switzerland.

22.05 IMMOVABLE PROPERTY:

Swiss law distinguishes between immovables (Grundstuecke, immeubles, fondi), tangible movable things, (bewegliche Sachen or Fahrnis, meubles, beni mobili), and intangibles (choses in action [Forderungen or Obligationen, creances or obligations, crediti or obbligazioni] negotiable instruments, and immaterial or industrial property rights, e.g., rights on patents, trademarks).

Since Apr. 1, 2003, animals under property right aspects are no longer movable things. Animals may now be bequeathed and in case of divorce, judge has to decide who family pet follows. For long time already animals have benefited from Federal Statute on Protection of Animals. People may be fined if they torture animals or if they keep them e.g. in stables not fit for their well-being.

Following are immovables: (1) land with all buildings, plants and springs (C.C. 667), (2) independent and lasting rights entered in land register, e.g., specific building leases (right in rem), right to springs, (3) mines, (4) apartment ownership (condominium) (C.C. 655). Disposition of immovable made without reservations extends also to tangible movables which, according to local usage or intention of owner of immovable are permanently provided for its management, use or preservation, and brought in any way into relationship to immovable for its service (Zugehoer, accessories, accessori [C.C. 644-645]). Restricted rights in rem on immovables include: servitudes (C.C. 730-744), usufruct (C.C. 745-771), land charges (C.C. 782-792), mortgages (see category 21 Mortgages, topic 21.02 Mortgages). Note that major amendment of C.C. is before Federal Parliament affecting, particularly, mortgages and procedural aspects of entries, and changes in land register.

On Oct. 1, 2009, Ordinance on Register of Public Law Restrictions on landownership rights entered into force. Information on federal and cantonal public law restrictions will be efficiently and comprehensively provided to immovable property landowners.

Acquisition.

Distinction made between underlying legal ground (causa) for acquisition of ownership or restricted rights in rem on immovables and acquisition itself. Underlying legal ground gives obligatory right of entry of ownership or of restricted right in rem into land register; only such entry brings right in rem into existence (principle of entry into land register (C.C. 656, 731, 746, 776, 783-784, 799, 971). Certain exceptions of ipso jure acquisition of ownership or restricted rights in rem on immovables, e.g., in case of heirship, judgment, enforcement. In such cases entry is mere declaratory measure, which, however, is condition precedent for disposition of right. For mortgages principle of entry is as rule fully applicable.

Entry in land register pertaining to ownership or to restricted right in rem is only valid, if underlying legal ground is valid (principle of legality or of causality [C.C. 974]). However, acquisition of ownership or of restricted right in rem on immovables by acquirer relying bona fide on entry in land register is protected (principle of public faith of land register [C.C. 973]).

Kind of effect of rights in rem can be given to certain obligatory rights pertaining to immovables by way of “annotation” in land register (C.C. 959), e.g., to right of first refusal, to purchase, to repurchase, ordinary lease, usufructuary lease (C.C. 681, 683; C.O. 216, 261b, 290). Co-owners of immovable have, by virtue of law without entry in land register, right of first refusal against any third person who has acquired share in immovable. (C.C. 682).

Agreements to convey or encumber immovables to be valid agreements require in most cases public authentication (C.C. 657, 746, 776, 783, 799; C.O. 216, 243); written form suffices for certain agreements, e.g., for distribution of estate (including immovables) provided no new rights in rem are thereby created (C.C. 634; see category 13 Estates and Trusts, topic 13.06 Executors and Administrators), for servitudes (C.C. 732. Amendment under discussion on creation of new type of servitude entitling to exclusively use certain rooms in already existing building), for right of first refusal (C.O. 216, subdiv. 3). Recognition of publicly authenticated acts pertaining to immovables made outside of canton where immovable is located is left to laws of canton where immovable is situated. Certain cantons (e.g., Zurich, Berne) recognize only publicly authenticated acts made according to their own legislation by authenticating person authorized for district where immovable is located. Power of attorney for execution of publicly authenticated act duly executed at any locality is accepted.

Acquisition by Nonresidents.

Federal Statute on Acquisition of Immovables by Nonresidents of Dec. 16, 1983, in force since Jan. 1, 1985, major amendments of Oct. 1, 1997, of Dec. 14, 2001, of Mar. 22, 2002, and of Apr. 1, 2005, regulates acquisition of immovables by nonresident aliens. Foreign individual must have valid work and residence permit for Switzerland in order to acquire land (persons who have lived in Switzerland for ten or five years depending on country of citizenship or, according to latest amendment, are citizens of EU or EFTA [European Free Trade Association] and are residing in Switzerland). But, managers of foreign-controlled firms conducting business in Switzerland may acquire main residence without license. Main residence may be house or condominium apartment of up to 3,000 m2. Acquisition of real estate offering separate rooms, apartments, or houses to individuals not belonging to household of foreign acquirer is not permitted.

Swiss commercial immovable property, part of permanent business establishment, may also be acquired without license. Passive capital investments in Swiss real estate may also be executed without approval unless real estate is used for residential purposes. Acquisition may include large range of commercial transaction such as building rights, option rights, rights of first refusal, or leasing contracts with contractual period exceeding ten years. Mortgaged financing is not subject to certain mortgage limits or other credit conditions. However, certain limits must be observed: residential properties may be acquired together with commercial properties if properties are subject to zoning and building laws aimed at securing and promoting certain residential property levels in city areas. Acquisition of personal vacation homes, vacation apartments and condominiums in apartment hotels is prohibited outside certain areas, and subject to quotas distributed yearly among cantons (1,420 permits per year available in 17 cantons in alpine region of Switzerland with focus on Cantons of Grisons and Valais). Forbidden transactions are void. Persons participating in transactions for which no license was obtained can be imprisoned or fined and are barred from ever acquiring Swiss immovables. Competent public agency may sue for dissolution of legal entity violating law.

Proposal to abolish all restrictions for acquisition by nonresidents was refused by Parliament. Government to submit new proposal maintaining certain restrictions for acquisition by nonresidents. Cantons, however, will have to launch new legislation for acquisition of secondary homes before present federal statute disappears. These restrictions will be covered by Federal Statute on Zoning. (See subhead Zoning and Planning.)

Rural Land Law.

Special rules provide for restrictions on free sale, acquisition only by foreigners, price control, inheritance. (Statute, Oct. 4, 1991).

Moratorium on resale within ten years after acquisition applies to agricultural land.

Construction of buildings is subject to regular licensing by local authorities.

Zoning and Planning.

Federal Law of June 22, 1979 limits use of immovable property in general and also further construction on borders of rivers and lakes, sites of special beauty or characteristics, etc. Details are or will be laid down by cantonal statutes. Entire territory must be divided into zones, in particular building and nonbuilding zones. Every construction requires permit. Building activities in agriculture zones have been eased to some extent but mainly for farmers only. Vacation homes in old abandoned rural buildings are now permitted under very strict conditions. (Am'd as of Sept. 1, 2000). Similar easing for farmers in nonbuilding zones from Sept. 1, 2007 (modest vacation facilities in farm houses, minor craftsman shops related to farmer's activities, etc.).

See also topic 22.06 Landlord and Tenant; categories 3 Business Regulation and Commerce, topic Frauds, Statute of; Debtor and Creditor, topic Collection of Debts and Bankruptcy, subhead Composition; Documents and Records, topics Acknowledgments and Other Public Authentications, Records, subhead Land Register; Mortgages, topic Mortgages.

22.06 LANDLORD AND TENANT:

Leasing of apartments and business premises is subject to special Federal and Cantonal regulations and supervision in favor of lessees. Major amendment of basic federal law (C.O. 253-304) was turned down in public vote early 2004. Existing legislation will remain unchanged.

In foreground are protective measures with regard to notice of termination and increase of rents. Lessee who has contracted new lease or renewed lease may apply thereafter within 30 days for reduction of rent. Leases are subject to judicial review on basis of building and capital cost and comparison with leases for similar properties.

Termination of Lease.

Lessee of residential or business premises may up to 60 days before end of fixed term of lease or within 30 days after having received notice of termination of indefinite lease apply to court for an extension of lease. Court may grant two extensions up to three years for residential and up to six years for business premises, if hardship suffered by lessee exceeds importance of interests of lessor. Application for second extension must be submitted up to 60 days before end of first extension. Termination is valid only on special official form. On request reasons must be given. “Abusive” termination may be declared invalid by conciliation board or court.

22.07 PERPETUITIES:

Testator may charge an heir to pass on inheritance to another as a reversionary heir, but cannot impose similar obligation on heir.

Usufruct in favor of legal entity may not continue for more than 100 years. See also topic Immovable Property as to building leases.

22.08 POWERS OF ATTORNEY:

No special form is as a rule required; one exception is authorization to enter into surety (Buergschaft, cautionnement, fideiussione) on behalf of principal, which needs form prescribed for surety itself. (C.O. 493). Bona fide third person to whom power of attorney has been communicated by principal may rely on terms of communication; but representative may be held responsible by principal according to legal basis of power of attorney. Power of attorney can be revoked at any time by principal and, unless provided otherwise or implied by nature of business, expires in case of death, declaration of absence, loss of capacity or bankruptcy of principal and representative. Powers of attorney not expiring by death of principal are frequent in Switzerland. (C.O. 32-39).

There are two special kinds of commercial powers of attorney: (1) “Power of Procuration” for conduct of enterprise with right to sign “per procuram, par procuration”. Such power must be entered in Commercial Register, but its existence does not depend on such entry. Holder of power is deemed to be authorized with respect to bona fide third persons to perform any legal act within purpose of business except sale and charge of immovable property, authority for which must be expressly granted. Power of procuration may be restricted to branch of business, or to effect that holder of power has to act together with one or more authorized persons (joint or collective procuration); other restrictions are not valid against bona fide third persons. (C.O. 458-461). (2) “Commercial Power” for conducting business or special transactions within its purpose, without right to sign “per procuram”. This power cannot be entered in Register of Commerce. Holder of power is authorized to perform all legal acts which are usually connected with business or carrying out special transactions. Right to sign drafts, loan contracts, or to commence or conduct law suit requires express authorization. (C.O. 462). Power of procuration and commercial power does not expire at death or with incapacity of principal. (C.O. 465).

22.09 REAL PROPERTY:

See topic 22.05 Immovable Property.

23 TAXATION

23.01 ADMINISTRATION:

Fundamentals.

Taxes are levied on three levels: Confederation, Cantons and municipalities. Federal Constitution provides basic rules to define both, Confederation's and Cantons' scope of fiscal sovereignty, whereas municipalities' scope of fiscal sovereignty is defined by cantonal constitutional law. Basically, Cantons are sovereign states authorized to levy any type of tax provided that such taxation does not infringe any of Confederation's exclusive legislative competences. There are, however, only few types of taxes for which Confederation claims exclusive jurisdiction (e.g., Value Added Tax, special excise duties, stamp duties, withholding tax, and customs duties). Consequently, Cantons are given wide latitude in creation of their own tax legislation.

Federal Taxation.

Traditionally, direct taxes are levied by Cantons and municipalities, whereas indirect taxes are levied by Confederation. However, since 1915 (with exception of 1933), Confederation has also been levying direct taxes, and shares revenues from taxes with Cantons. Last amendment to Constitution to continue to share of revenues from direct taxes between Confederation and Cantons, was approved by popular referendum in 2004. Its temporary features have been extended to 2020.

23.02 CANTONAL AND MUNICIPAL TAXES:

Intercantonal Double Taxation.

Taxpayer can become subject to taxation in more than one Canton. Thus, Federal Constitution (Art. 127[3]) allows Federal Government to enact legislation to avoid that no double taxation results. To date, no statute has been enacted, but Swiss Federal Supreme Court (see category 6 Courts and Legislature, topic 6.01 Courts), by extensive case law, established principles for prevention of double taxation by Cantons.

Tax Agreements.

Cantons are parties to intercantonal treaty (Concordat) for prohibition of tax agreements, dated Dec. 10, 1949.

Capital Gains Tax.

See topic 23.08 Income and Property Taxes.

Gift Tax.

See topic 23.09 Inheritance and Gift Taxes.

Income Tax.

See topic 23.08 Income and Property Taxes.

Inheritance Tax.

See topic 23.09 Inheritance and Gift Taxes.

Property Tax.

See topic 23.08 Income and Property Taxes.

Real Estate Tax.

Real Estate Tax is levied in more than half of Cantons. It is levied at place where property is situated. Both individuals and legal entities are subject to taxation. Real Estate Tax is assessed on market value of property, without allowing for deduction of mortgage debt. Rates are between 0.03% and 0.3%.

Real Estate Gains Tax.

See topic 23.08 Income and Property Taxes.

Real Estate Transfer Tax.

In most Cantons, transfer of real estate entails special transfer tax. Authority to levy such tax remains in most cases with Cantons; in few Cantons, municipalities are also entitled to assess tax. Tax is assessed on purchase price and is usually paid by purchaser. In some cases, both purchaser and seller are subject to tax. Rates are between 1% and 3%.

Trade Tax.

Only in Canton of Geneva, individuals and legal entities having industrial or commercial enterprises in municipality are subject to this tax. Authority to levy this tax remains with municipalities. Turnover, lease costs, and number of employees form tax base.

Taxes on Motor Vehicles.

All Cantons levy annual Tax on Motor Vehicles of any kind. Technical characteristics such as cylinder, volume, horsepower and load capacity form tax base.

Dog Taxes.

This annual tax is levied either by Cantons or municipalities.

Entertainment Tax.

Few Cantons and/or municipalities levy Entertainment Tax on performances and shows for which entrance fee is charged. It is levied on ticket price or as lump sum tax, usually 10% of entrance fees or gross receipts.

Stamp Duties.

In addition to Federal Stamp Tax (see topic 23.14) few Cantons levy taxes on documents (such as court judgments, identity papers, extracts from public registers) issued to private persons by judicial or administrative authorities. Stamp duties are also levied on documents reflecting legal transactions of any kind (agreements, contracts, wills, receipts). In addition, Canton of Geneva levies registration taxes being duties on public registrations.

Stamp Duties on Playing Cards.

Such duties are levied in Canton of Valais.

Taxes on Use of Water Power.

In few Cantons, tax on hydraulic power stations is levied on owners of licensed water power stations.

Taxes on Advertising and Billboards.

These taxes are levied in few Cantons on all public advertising signs located at places accessible to public, including cinema advertising and advertising by acoustic devices.

Lottery Tax.

Taxes on not commercially organized public lotteries are levied in most Cantons.

Municipal Tax on Rentals.

Municipalities of Vaud may levy tax on rental of premises located within their territory.

Taxes on Visitors.

Tax is payable by any person taking temporary lodging in motel, apartment, or camping ground. Taxes on visitors are usually collected by tourist associations.

23.03 CUSTOMS DUTY:

See also topic 23.05 Federal Indirect Taxes.

Customs Duties.

Federal Act on Customs Duties (ZG) of Mar. 18, 2005, effective May 1, 2007. Switzerland levies customs duties on both imports and exports at rates laid down in customs tariff. There are no ad valorem duties (value of imported commodity), Switzerland levies only duties based on weight.

23.04 FEDERAL DIRECT TAXES:

Income Tax.

See topic 23.08 Income and Property Taxes.

Income Tax at Source.

See topic 23.08 Income and Property Taxes.

Profit Tax.

See topic 23.08 Income and Property Taxes.

Tax on Gaming Clubs.

Federal Act on Casinos and Gambling of Dec. 18, 1998. Confederation taxes net gaming revenues of casinos holding A or B concession. Tax rate is progressive (40% to 80%) and may be reduced for B casinos, provided that revenue from gaming club is, to high degree, utilized for good works in region, namely promoting cultural activities or for community services (sports events, activities in social sector, for community, tourism, etc.).

Withholding/Anticipatory Tax.

See topic 23.17 Withholding Tax.

Military and Civil Defense Service Exemption Tax

Federal Law on Military Defense Service Exemption Tax (WPEG) of June 12, 1959. Every male Swiss citizen between age of 20 and 30 who is exempt from military or civil defense service must pay tax on his income or minimum head tax. Rate: tax on income 3% (minimum CHF 200). This tax is reduced according to age of taxpayer and time already served in Swiss army or civil defense.

23.05 FEDERAL INDIRECT TAXES:

Tobacco Tax.

Federal law on Taxation of Tobacco of Mar. 21, 1969. This tax is levied on tobacco manufactured in or imported into Switzerland as well as on tobacco paper. Producers of domestically manufactured products are liable for tax. On imported products, those responsible for customs duties are liable for tax. Revenue from tobacco tax is earmarked for Old Age and Survivors' as well as Disability Insurance. See topic 23.13.

Beer Tax.

Federal Law on Beer Tax (BStG) of Oct. 6, 2006. Manufacturers (domestic breweries), as well as importers of alcoholic beer are liable for beer tax.

Taxes on Distilled Spirits.

Federal law on Distilled Spirits of June 21, 1932. Distilled spirits produced for general consumption by licensed distillers are wholly liable to taxation. Agricultural producers are assessed according to quantity of spirits produced, which are sold or passed on to third party at no cost, or which cannot be claimed as part of tax free allowance for private consumption. Small producers receive tax concession for certain quantity of production on condition that ingredients are exclusively domestically home-grown. 90% of revenue from tax on distilled spirits is earmarked for Old Age and Survivors' as well as Disability Insurance (see topic 23.13). Remainder of revenue is used by Cantons for prevention of alcohol addiction.

Mineral Oil Tax.

Mineral Oil Law of June 21, 1996. This tax comprises: Tax on crude oil, other mineral oils, natural gas and derivatives thereof, as well as fuels; and additional duty on fuels. Tax becomes payable at commercial stage, whereby it is passed on to consumer through product price. Rate varies greatly according to product and its uses (fuel for transport and heating, technical uses). Since July 1, 2008, reduced tax rates apply to natural gas and liquefied petroleum gas used as fuel and domestic fuel produced from certain renewable raw material is tax exempt. Half of revenue from mineral oil tax and total revenue from additional duty on fuel is earmarked for projects related to highway maintenance. Remainder of revenue is allocated for general expenditure in federal budget.

VOC Fee.

Ordinance on Fee on Volatile Organic Compounds of Nov. 12, 1997. Importers and producers of VOC are liable to steering fee of CHF 3 per kilogram VOC. Exemption applies in case of certain measures to reduce emissions of VOC. Revenue is fully refunded to Swiss population in particular by way of reduction of health insurance premiums.

Heating Oil Extra-Light Fee.

Ordinance on Fee on ``Heating Oil Extra-Light'' with sulfur content exceeding 0.1% of

Nov. 12, 1997. Importers and producers of heating oil extra-light with sulfur content exceeding 0.1% are liable to steering fee of CHF 12 per kilogram heating oil extra-light. Revenue is fully refunded to Swiss population in particular by way of reduction of health insurance premiums.

Gasoline and Diesel Fuel Fee.

Ordinance on Fee on Gasoline and Diesel Fuel with sulfur content exceeding 0.001% of Oct. 15, 2003. Importers and producers of heating oil extra-light with sulfur content exceeding 0.1% are liable to steering fee of 3 Swiss cents per liter gasoline and diesel fuel. Revenue is fully refunded to Swiss population in particular by way of reduction of health insurance premiums.

Carbon Dioxide Fee.

Federal Law on Reduction of Carbon Dioxide Emission of Oct. 8, 1999; Ordinance on Carbon Dioxide Fee of June 8, 2007. Law authorizes Federal Government to introduce steering fee on coal as well as fossil combustibles and fuels (up to CHF 210 per tonne carbon dioxide) if voluntary measures fail to reduce emission of climate-relevant carbon dioxide by 10% versus 1990 level by 2010 cannot been achieved by other measurements. As per Jan. 1, 2008, carbon dioxide fee on fossil combustibles was introduced. Rate is CHF 12 per tonne carbon dioxide; rate may be increased up to CHF 36 per tonne as per Jan. 1, 2010. High-consumption companies, large-scale consumers and consumer groups can be exempted from fee if they undertake to restrict their emissions to certain level and subsequently meet their declared target. Revenue is fully refunded to Swiss employers (based on their contribution to Old Age and Survivors' Insurance) and, by way of reduction of health insurance premiums, to Swiss population.

Motor Vehicle Tax.

Motor Vehicle Taxation Law of June 21, 1996. Motor vehicle tax of 4% is levied based on value of cars and light goods vehicles weighing not more than 1,600 kg upon import or domestic manufacture.

Heavy Vehicle Fee.

Federal Law on distance-related Heavy Vehicle Fee (SVAG) of Dec. 19, 1997. Heavy Vehicle Fee applies to heavy goods vehicles with admissible laden weight of more than 3.5 tonnes and is calculated according to three criteria: number of kilometers covered on Swiss territory, admissible laden weight of vehicle, and vehicle's emissions. Rate is periodically recalculated according to uncovered costs caused by heavy vehicles and total amount of tonne and kilometer driven by heavy vehicles (weight depends on admissible, not on laden weight). Since Jan. 1, 2008, rate is defined to 2.7 Swiss cents per tonne and kilometer. Revenue is earmarked to balance costs caused by heavy goods transport and to finance projects of public transport.

Stamp Tax.

See topic 23.14 Stamp Tax.

Value Added Tax (VAT).

See topic 23.16 Value Added Tax (VAT).

23.06 GIFT TAX:

See topic 23.09 Inheritance and Gift Taxes.

23.07 INCOME TAX:

See topic 23.08 Income and Property Taxes.

23.08 INCOME AND PROPERTY TAXES:

Intercantonal Double Taxation.

See topic 23.02 Cantonal and Municipal Taxes.

Tax Agreements.

See topic 23.02 Cantonal and Municipal Taxes.

Legal Basis.

Federal Law on Federal Direct Tax (DBG) of Dec. 14, 1990. Tax laws of 26 Cantons and of municipalities. As of Jan. 1, 2001, all cantonal tax laws are required to comply with Federal Statute on Harmonization of Cantonal and Municipal Direct Taxes (STHG). Therefore, general principles of taxation now are same in all Cantons; cantonal income and profit tax legislation follows Federal Direct Tax in structure. However, amount of deductions and tax rates are not harmonized, so taxation will still vary considerably in various Cantons.

Characterization.

Federal Direct Tax is levied on income of individuals; legal entities, including foreign partnerships, are subject to net profit taxation. Domestic partnerships are not taxable subjects. All Cantons and municipalities apply system consisting of general income tax and supplementary property tax for individuals, as well as net profit tax and capital tax for legal entities, including foreign partnerships. Domestic partnerships are not taxable subjects. Taxes are assessed for period of one year on basis of tax return to be filed by taxpayer. All taxpayers are obliged to file annual combined tax return for federal and cantonal/municipal tax purposes. Tax is assessed and collected annually by Cantons.

Income Tax.

(1) Unlimited tax liability applies to individuals: (a) Domiciled in Switzerland; (b) involved in gainful activity in Switzerland and sojourning there for more than 30 consecutive days (regardless of temporary interruptions) even if domiciled and taxable outside of Switzerland; (c) not involved in gainful activity in Switzerland, but sojourning there for more than 90 consecutive days (regardless of temporary interruptions). Persons studying or obtaining treatment in hospitals or similar institutions in Switzerland are not considered to be resident. However, unlimited tax liability does not include foreign business organizations, permanent establishments, and real estate. (2) Limited tax liability applies particularly to nonresident individuals that (a) own Swiss business organizations; (b) maintain Swiss permanent establishment; (c) own, broker, or trade with real estate in Switzerland; or (d) have claims secured by Swiss real estate; or (e) for remuneration that they receive for gainful activity in Switzerland or as members of board of directors of Swiss legal entities. Exemptions are provided for non-Swiss members of foreign diplomatic and professional consular services, as well as tax exempt international organizations.

Total income earned during calendar year is subject to income tax in case of unlimited tax liability ([1] above), e.g., income from gainful activity, as well as compensatory income (such as annuities and pensions), secondary income (such as seniority allowances and tips), income from movable and immovable property, prizes in lotteries and pools, and capital gains and increases in value of properties and rights if they were realized in course of business; except for cantonal real estate gains tax (see subhead Real Estate Gains Tax) there is no tax on capital gains realized on private assets.

Special rules apply to income from participation of at least 10% for federal income tax purposes: if such participation qualifies as business asset, only 50% of dividends and capital gains realized are subject to tax; on participation held as private assets 60% of dividends are taxable. Most Cantons have similar regimes. In general, Cantons foresee reduced taxation of dividend income only from participations in Swiss corporations. Provisions (participation of at least 5% up to 20%; or fair market value of at least CHF 2,000,000 up to CHF 5,000,000) and reduction (only 40% up to 70% of dividend taxable; or tax on dividend reduced by 30% up to 80%) vary from Canton to Canton.

Exempt are, e.g., inheritance, gifts, subsidies, and proceeds from capital insurance.

Generally, expenses related to earning of income (e.g. professional expenses) are deductible from gross income. Additional deductions are granted to children, dependents and double income married couples; insurance fees and interest on savings deposits are deductible as well. Husband and wife, and registered same-sex couples are taxed as unit. Income and property of minors is added to income and property of person who has parental power, except income from labor for which minors are taxed themselves. In case of limited tax liability ([2] above), only income taxable in Switzerland is subject to tax. Tax rates are calculated on basis of total income ([a]-[c] above) or source tax is levied on remuneration ([d] and [e] above).

Taxation on expenses (formerly called ``lump-sum taxation'') is special method of computing income tax. Non-Swiss individual becoming resident in Switzerland for first time or, after absence of at least ten years and without gainful activity in Switzerland, may opt to pay their income tax based on living expenses for himself and his family. Minimum amount taxable expenses must at least equal five times of annual rental payments of individual, or constructive annual rental payments of house owned by individual. Such lump sum tax may not be lower than regular tax on income of individual derived from Swiss sources and foreign source income for which individual claims exemption or reduction of foreign withholding taxes pursuant to double taxation agreements. Canton of Zurich abolished taxation on expenses for cantonal and municipal income tax in 2010.

Rates at which Federal income tax is levied are progressive; zero rate on first income bracket is followed by nine brackets with progressive rates, reaching maximum of 13.2% and then declining to 11.5%. There is separate tax table for married persons, registered same-sex couples living together, and single parent. Maximum overall tax rate for individuals of 11.5% applies to income over CHF 843,600 for married, registered same-sex couples living together, and single parent and to income over CHF 712,500 for others. Brackets, as well as deductions, are subject to formal indexation entering into force when inflation rate has risen by at least 7.0% since last adjustment.

In Cantons, rates are in general progressive (exceptions are, e.g., Cantons of Obwalden, Schaffhausen, and from 2012 Thurgau). Some Cantons apply separate tax table for married persons and registered same-sex couples living together; in other Cantons their income is split. Most Cantons apply multiple on basic income tax rate for cantonal, municipal and church tax. Top rates are in city of Zurich about 28.5% (Canton and city), Berne 29.9%, Geneva 33.5%, and Zug 11.6%.

Source Tax.

Source tax is levied on remuneration that nonresident individuals receive for claims secured by Swiss real estate or for gainful activity in Switzerland (e.g., employees, artists, and sportsmen) or as members of board of directors of Swiss legal entities. Employment income of resident individuals without residence permit is taxed at source (payroll tax).

Property Tax.

Tax liability. See subhead Income Tax.

Total property is subject to tax. Total property means all of taxpayer's assets and rights which have cash value (except foreign business organizations, permanent establishments, and real estate). These are usually taxed at market value. Taxable property includes in particular Swiss real estate, movable capital assets, redeemable life and annuity insurances, as well as business assets. Many Cantons foresee reduced taxation of participations in Swiss corporations. Provisions and reduction vary from Canton to Canton. Actual debts, as well as personal allowances, are deductible from gross property. Usually, certain amount is tax free (e.g., in Zurich: CHF 71,000 for singles and CHF 142,000 for married persons and registered same-sex couples living together).

Rates are generally progressive. Most Cantons apply multiple on basic income tax rate for cantonal, municipal and church tax. Annual top rates on net worth vary from Canton to Canton and municipality to municipality respectively. Top rates are in city of Zurich about 0.65% (Canton and city), Berne 0.6%, Geneva 1.0%, and Zug 0.3%.

Profit Tax.

(1) Unlimited tax liability applies to legal entities, including foreign partnerships, with domicile or effective place of management in Switzerland and Swiss investment companies with fixed capital (SICAF). However, unlimited tax liability does not include foreign business organizations, permanent establishments, and real estate. (2) Limited tax liability applies to nonresident legal entities, including foreign partnerships, (a) that own Swiss business organizations; or (b) maintain Swiss permanent establishment; or (c) own, broker, or trade with Swiss real estate; or (d) have claims secured by such immovable property. Exemptions are provided for Confederation, Cantons and other bodies organized under public law, foreign countries, and legal entities which pursue public welfare, charitable or cultural objectives.

Net profit earned during business year is subject to tax. Balance of profit and loss statement is recognized as basis for determination of taxable net profit if legal accounting rules are observed. Such net profit may be adjusted for tax purposes in case of commercially unjustified expenses or depreciations and provisions. Deductible are: Taxes; contributions to employee pension plans; and contributions to Confederation, Cantons and other bodies organized under public law, and tax exempt legal entities which pursue public welfare and charitable objectives (max. 20% of net profit); provisions for future research and development assignments to third parties (max. 10% of taxable profit but max. CHF 1,000,000).

Participation relief is granted to corporations and cooperative corporations (see topic 2.03 Corporations) having participation in other corporations of at least 10% (of capital, reserves or dividends), or with market value of at least CHF 1,000,000. They receive tax reduction pro rata of such participation's dividend income (participation relief on dividends received). Participation relief is extended to capital gains realized on alienation of participation of at least 10% (of capital, reserves or dividends) held for at least one year and acquired after Jan. 1, 1997. Gains on older participations only qualify for participation relief if they have been attained after Jan. 1, 2007.

Tax rate for federal profit tax purposes of 8.5% (i.e. effective tax rate of 7.83% as taxes are deductible) applies to corporations and cooperative corporations (see category 2 Business Organizations, topic 2.03 Corporations) as well as SICAF. Net profit of associations, foundations, and other legal entities is taxed at 4.25%.

Tax rates on cantonal level vary; three kinds of schedules apply: Flat rate, progressive rates, or combined system (with two or three tax rates relating to height of profit or ratio between taxable profit and capital). Multipliers for cantonal, municipal and church tax apply in most Cantons. Top effective (federal, cantonal and municipal) tax burden on corporations and cooperative corporations (see category 2 Business Organizations, topic 2.03 Corporations) varies between 13% and 28% of profits before taxes, e.g., in city of Zurich 21.1%, Geneva 24.2%, Zug 15.8% (from 2011 15.5%), or Sarnen 12.7%. Reduced rates apply to associations, foundations, and other legal entities.

Holding corporations and cooperative corporations are exempt from cantonal and municipal profit taxes.

Domicile and mixed corporations and cooperative corporations do not perform or do only limited performance of commercial activity in Switzerland. Subject to profit cantonal and municipal profit tax at ordinary rate is 100% of Swiss sourced income but only very modest portion of foreign sourced income (from 5% to 25%).

Capital Tax.

Tax liability: subhead Profit Tax.

Net equity is subject to capital tax, i.e., paid-in capital and reserves.

Rates of capital tax are either progressive or proportional. Multipliers for cantonal, municipal and church tax apply in most Cantons. Top effective tax burden on corporations and cooperative corporations (see category 2 Business Organizations, topic 2.03 Corporations) varies between 0.07% and 0.8% of net equity, e.g., in city of Zurich 0.172%, Geneva 0.447%, Zug 0.076%, or Sarnen 0.2%. Reduced rates apply to associations, foundations and other legal entities. In some Cantons, profit tax can be credited against capital tax.

Holding corporations and cooperative corporations benefit from substantially reduced rate, between 0.001% and 0.05%.

Domicile and mixed corporations and cooperative corporations benefit from substantially reduced rate, in general corresponding to capital tax rate of holding corporations.

Minimum Tax.

In some Cantons, legal entities are subject to minimum tax instead of regular taxes on profits and on capital, in cases where amount of former is higher than latter.

Real Estate Gains Tax.

Capital gains derived from transfer of real estate are taxed by all Cantons; Special Real Estate Gains Tax applies only to private real estate; in some Cantons, however, also gains on immovable business property are subject to special tax instead of income or profit tax. Taxable base is, generally, sale price; acquisition cost and improvement cost are deductible. Rates are progressive and depend on capital gain and period of ownership. Tax may be as high as 60% for short-term capital gains.

Poll Tax.

In some Cantons and communities, legal adults and persons performing gainful activities have to pay fixed amount of tax which is levied in addition to income tax.

23.09 INHERITANCE AND GIFT TAXES:

Legal Basis.

Tax laws of 26 Cantons.

Inheritance Tax.

With sole exception of Canton of Schwyz, all Cantons levy inheritance tax. Subject to inheritance tax are particular portions of inheritance as well as of legacies. Cantons of

Graubuenden and Solothurn assess tax on entire estate of decedent. Rate of taxes are usually progressive depending on degree of relationship and inherited amount. Devolution of estate to descendants, to surviving spouses (partly also to ancestors) is tax exempt in most of Cantons. In some Cantons, overall rate of taxes levied on transfers to non-related persons increases rapidly (e.g., Canton of Zurich 36% at approximately CHF 1,500,000). Right to tax is left to last domicile of decedent, with exception of immovable property, which is taxed at place where it is situated. Recipients of estate are liable for tax. Generally, market value of estate serves as basis for assessment. At death of decedent, inventory of estate must be made; this serves as basis for assessment.

Gift Tax.

Gifts are tax exempt in Cantons of Lucerne and Schwyz. Gifts are primarily assessed in same manner as inheritances, i.e. same personal deductions, tax exempt amounts, and tax rates apply. Assessment of gift tax is based on tax return which in most Cantons has to be filed by donee.

23.10 INHERITANCE TAX:

See topic 23.09 Inheritance and Gift Taxes.

23.11 LOCAL GOVERNMENT TAXES:

Municipal Taxes.

Municipalities levy taxes mostly as percentage of cantonal tax, fixed yearly. They also levy special taxes, mainly on real estate, or on capital gains derived from sales of real estate. (See topics 23.02 Cantonal and Municipal Taxes and 23.08 Income and Property Taxes.) Current taxes on real estate are negligible in comparison with real estate taxes in U.S. In addition, most cantons levy real estate transfer tax (and/or land register fee).

23.12 PROPERTY TAXES:

See topic 23.08 Income and Property Taxes.

23.13 SOCIAL SECURITY AND WELFARE SYSTEM CONTRIBUTIONS:

Three-columns Principal.

In Switzerland, provision for old-age, disability, and death is structured on several levels, or columns, of various interrelated pension schemes. (1) First column: Mandatory old-age survivors and disability insurance (AHV/IV). These two insurance types cover basic subsistence needs of insured in accordance with government regulations. (2) Second column: Industrial insurances (employee pension funds [BV] and accident insurance [UV]) aim to maintain recipients' accustomed standard of living. (3) Third column: To supplement government's pension schemes, individual investment in private savings plans offered by banks or insurance companies is encouraged.

Old Age and Survivors' Insurance (AHV).

Federal Law on Old Age and Survivors' Insurance (AHVG) of Dec. 20, 1946. All persons residing or working in Switzerland are insured. Contributions amount to 8.4% of employment income; half to be borne by employer, payroll deduction is made for remaining 50%. Contributions amount to 4.2% up to 7.8% of self-employed persons.

Disability Insurance (IV).

Federal Law on Disability Insurance (IVG) of June 19, 1959. All persons liable to AHV contributions are insured. Contributions amount to 1.4% of employment income; half to be borne by employer, payroll deduction is made for remaining 50%. Contributions amount to 1.4% of self-employed persons.

Compensation for Temporary Loss of Income (EO).

Federal Law on Compensation for Loss of Income for National Servicemen in Army or Civil Defense (EO) of Sept. 25, 1959. Provides partial compensation for loss of earnings during military and civil defense service (up to CHF 245 per day), and maternity leave of 98 days (up to CHF 196 per day). All persons liable to AHV contributions are insured. Contributions amount to 0.3% of employment income; half to be borne by employer, payroll deduction is made for remaining 50%. Contributions amount to 0.3% of self-employed persons.

Pension Plans—Employee Old Age, Survivors' and Disability Insurance (BV).

Federal Law on Employee Old Age, Survivors' and Disability Insurance (BVG) of June 25, 1982; Federal Law regarding Pension Cash Surrender Values of Employee Old Age, Survivors' and Disability Insurance (FZG) of Dec. 17, 1993. BVG requirements constitute legally-stipulated minimum benefits (column 2a). In practice, more comprehensive pension plans are offered (column 2b). Employees with annual wages of over CHF 20,520 are mandatorily insured; voluntary insurance for self-employed individuals. Mandatory employee old-age pension is financed by contributions from insured and its employer; employer pays at least half of total contributions. Depending on individual pension fund regulations, standard or age-related contributions may be levied on insured wages. Contributions paid under pension plan are credited to employee's individual account. However, since insurable wages and contributions fluctuate and minimum interest rates may change, it is not possible to determine end capital in advance.

When employee reaches retirement age, savings capital is translated into monthly annuity according to rules in statute. Payments are made until death. Benefits are regularly adjusted for inflation. Depending on individual pension fund guidelines, savings capital at time of retirement may be paid out in lump sum instead of annuity.

Lump sum refund of savings capital prior to retirement age is possible only under stringent circumstances. For instance, person definitively leaving Switzerland and not taking domicile in EU country is entitled to refund. Federal legislation on home ownership financing through employee pension plans stipulates that insured individuals may withdraw its pension cash surrender value to purchase home. Similarly, for same purpose, they may pledge that amount or their claim to pension benefits. If insured individual withdraws its cash surrender value, its pension benefit claim is reduced accordingly.

Accident Insurance (UV/NBUV).

Federal Law on Accident Insurance (UVG) of Mar. 20, 1981. All persons employed in Switzerland are mandatorily insured for occupational accidents and, if employed in Switzerland with at least eight weekly working hours, for non-occupational accidents; voluntary insurance for self-employed individuals. Wages up to CHF 106,800 are insured. Occupational accidents insurance to be borne by employer; contributions vary depending on company's risk level. Insurance for non-occupational accidents in general paid by employee; contributions vary depending on economic sector.

Unemployment Insurance (ALV).

Federal Law on Mandatory Unemployment Insurance and Insolvency Compensation (AVIG) of June 25, 1982. All employees liable to AHV contributions are insured. Contributions amount to 2% of insured wages, i.e., up to CHF 106,800; half to be borne by employer, payroll deduction is made for remaining 50%.

Family Allowance.

Federal Law on Family Allowance (FamZG) of Mar. 24, 2006. 26 Cantonal Laws on Family Allowance. Contributions commonly amount to 1% up to 2% of employment income, depending on Canton and compensation fund; in most of Cantons to be borne by employer. Federal Law stipulates minimum child allowance of CHF 200 (up to age of 16), and minimum education allowance of CHF 250 (age of 17 until completion of education, or up to age of 25).

23.14 STAMP TAX:

Legal Basis.

Federal law on Stamp Duties (STG) of June 27, 1973, as amended.

Characterization.

Tax liability arises if specific legal transactions—such as issuance of shares or transaction of securities or payments of premiums on insurance policies—take place. Three different types of duties have to be distinguished:

Issuance Stamp Tax.

Issuance stamp tax of 1% on issue of shares of Swiss corporations, Swiss limited liability corporations, Swiss cooperative corporations, dividend-right certificates, nonvoting shares. Tax is levied on par value and additional contributions given by shareholders without compensation. Provided that cumulated par value and additional contributions given are of market value less than CHF 1,000,000, no stamp tax is levied. No issue tax is levied on mergers, changes of legal structure, spin-off of corporations or on transfer of company's seat from abroad to Switzerland. Waiver is possible in case of debt restructuring. Issuance stamp tax is CHF 3 on dividend-right certificates without nominal value. Issuance stamp tax is also levied on bonds issued by resident debtors (0.12% for each year of duration), on bank depository bonds (0.06% for each year of duration), and on money market papers (0.06% on pro rata base up to 360 days). Former stamp taxes on bills of exchange, checks, and similar instruments were abolished.

Transfer Stamp Tax.

Transfer stamp tax on transfer of domestic or foreign securities and similar negotiable instruments. Tax is due on any transaction of securities involving Swiss securities dealer, i.e., domestic bank, securities broker, or corporations with more than CHF 10 million balance sheet assets in taxable securities; latter is liable for tax. Tax is calculated at rate of 0.15% where domestic securities are transferred and 0.3% where foreign securities are transferred. Euro bonds (bonds issued by non-domestic debtors and in foreign currencies) and other bonds denominated in foreign currencies, as well as money market papers are exempted. No transfer stamp tax if Swiss securities dealer acts as intermediary for transfer of foreign bonds if there is one foreign party. Further exceptions apply.

Stamp Tax on Insurance Premiums.

Stamp tax on insurance premiums of 5% is due on payments of premiums on insurance policies which form part of domestic portfolio of Swiss insurer or which have been concluded by Swiss resident with foreign insurer. Duty is not charged on policies covering life, old-age, illness, and accidents as well as on insurances of non-domestic property. Stamp tax of 2.5% is levied on redeemable capital life insurance and pension life insurance policies financed by single premiums.

23.15 TREATIES AND AGREEMENTS:

International Double Taxation.

Foreign immoveable property and income derived therefrom, as well as permanent establishment situated abroad are already exempted from Swiss taxation according to internal law. See topic 23.08 Income and Property Taxes.

International Treaties on Double Taxation, Income and Property Taxes.

Swiss Confederation has concluded treaties for avoidance of double taxation of income and property with following countries: (a) Albania, Algeria, Argentina (not yet in force but provisional application), Armenia, Austria, Azerbaijan, Belarus, Belgium, Bulgaria, Canada, Chile (not yet in force), China, Colombia (not yet in force), Croatia, Czech Republic, Denmark (including Faroe Islands), Ecuador, Estonia, Finland, France, Ghana (not yet in force), Germany, Hungary, Iceland, Iran, Ireland, Israel, Italy, Kazakhstan, Kuwait, Kyrgyzstan, Latvia, Lithuania, Luxembourg, Macedonia, Moldova, Mongolia, Montenegro (treaty with former Serbia and Montenegro applicable),The Netherlands, Norway, Poland, Portugal, Qatar (not yet in force), Romania, Russia, Serbia (treaty with former Serbia and Montenegro applicable), Singapore, Slovakia, Slovenia, Spain, Sri Lanka, Sweden, Ukraine, Uzbekistan, Venezuela, Vietnam; (b) regarding income only: with Anguilla (1954 treaty with U.K.), Antigua (1954 treaty with U.K.), Australia, Bangladesh (not yet in force), Barbados (1954 treaty with U.K.), Belize (1954 treaty with U.K.), British Virgin Islands (1954 treaty with U.K.), Dominica (1954 treaty with U.K.), Egypt, The Gambia (1954 treaty with U.K.), Greece, Grenada (1954 treaty with U.K.), India, Indonesia, Ivory Coast, Jamaica, Japan, Liechtenstein, Malaysia, Malawi (1954 treaty with U.K.), Malta (not yet in force), Mexico, Montserrat (1954 treaty with U.K.), Morocco, New Zealand, Pakistan, Philippines, South Korea, Saint Christopher and Nevis (1954 treaty with U.K.), Saint Lucia (1954 treaty with U.K.), Saint Vincent (1954 treaty with U.K.), South Africa, Thailand, Trinidad and Tobago, Tunisia, Turkey (not yet in force), U.K., U.S, Zambia (1954 treaty with U.K.); (c) Trade Office of Swiss Industries in Taiwan and Taiwan signed agreement of avoidance of double taxation. Negotiations with other countries took place or are still ongoing: Brazil, Costa Rica (treaty initialed), Georgia (treaty initialed), Libya, North Korea (treaty initialed), Peru, Senegal, Syria, Tajikistan (treaty initialed), United Arab Emirates (treaty initialed), Zimbabwe (treaty initialed).

Treaties generally follow pattern of Fiscal Committee of OECD. In treaties with continental European countries, country of residence or, in absence of residence, lasting sojourn is place of taxation, except if treaty rules are different. New treaty with U.S. only to some extent follows pattern of OECD Model Convention. All treaties provide that permanent establishment of enterprise in other country is taxed at place of establishment, with provisions, in some treaties, for apportionment. Immovables are taxed in country of situs.

Treaties grant relief from double taxation pursuant to withholdings at source by way of reductions (sometimes refund) or full exemption. Certain treaties provide further for limited tax credit for non-refunded withholding taxes. Under treaty with U.S., withholding tax on dividends is reduced to 15%. Dividends of Swiss or American subsidiaries held by parent to at least 10% are reduced to 5%.

On Mar. 13, 2009, Swiss Federal Council decided to withdraw its reservation to exchange of information under OECD Model Convention and to enter into negotiations on revising double taxation treaties accordingly. Thus, new treaties will allow foreign states to request information not only in cases of tax fraud but also in cases of tax evasion and even if no tax offence at all has been committed. Treaties with following countries have been renegotiated (as per Sept. 30, 2009): Austria (signed), Denmark (signed), Finland (signed), France (signed), Japan (initialed), Luxembourg (signed), Mexico (signed), Norway (signed), Poland (initialed), Qatar (treaty signed), Singapore (initialed), The Netherlands (initialed), U.K. (signed), and U.S. (signed). Except for treaty with France and U.K., exchange of information clause is limited to taxes covered by treaty. Request for information shall provide certain information (identification of person under examination, relevant period of time, statement of information sought, tax purpose for which information is sought, identification of person believed to be in possession of requested information). Automatic or spontaneous exchange of information as well as ``fishing expeditions'' are excluded. Subject to certain conditions, information received may be used also for non-tax purposes. In any case, taxpayers' rights (such as right to be notified right to appeal) remain applicable before information is transmitted.

Agreement between European Community and Switzerland relating to Savings Directive in Art. 15 applies similar rules to Switzerland than listed in Parent Subsidiary Directive and in Interest Royalty Directive for EU Member States. Agreement entered into force on July 1, 2005. Changes effected 2003 to EU Directives do not apply to Switzerland. Agreement foresees introduction of withholding tax on interest paid to residents of EU Member States in amount of 15% (for three years) then 20% (for three years) and thereafter 35%. Alternatively beneficial owners can opt for disclosure of payments to their state of residence.

Effective Dec. 31, 1962 decree concerning misuse of Swiss double taxation treaties was issued as amended Dec. 17, 1998. Swiss legal entities with nonresident beneficiaries may, as rule, enjoy reduction or refund of foreign taxes at source pursuant to double-taxation treaty only if: (a) 100% of receipts are entered into profit-and-loss statement, (b) not more than 50% are used for direct or indirect payments (in widest sense) to nonresidents, and (c) 25% are immediately distributed as dividends subject to 35% federal withholding tax. These criteria may be released for companies carrying out entire trade or business for publicly listed companies and for holding companies. Under new U.S. treaty Swiss misuse rules no longer apply; new U.S. treaty contains its own limitation on benefits clause.

Under decree of Aug. 22, 1967, Swiss resident taxpayers may under specific conditions request flat tax credit for taxes of foreign treaty countries levied on foreign dividends, interest and royalties.

Inheritance Tax.

Treaties regarding inheritance taxes with Austria, Denmark (including Faroe Islands), Finland, France, Germany, The Netherlands, Norway and Sweden are based on principle that state of last domicile has right to tax, also in regard to securities of corporations or debtors in another state, situs being of no importance. Immovables are taxable at situs. If, under specific conditions foreign state can levy its own tax, then it will, as rule, grant credit for Swiss tax.

Treaty with U.S. (1951) regarding inheritance taxes has following main features: It allows part of ordinary U.S. exemption to estate of Swiss citizen not domiciled in U.S., and also of alien domiciled in Switzerland. Further, it provides for certain tax credits for U.S. and Swiss taxes in regard to estates of U.S. citizens who were domiciled in Switzerland.

Treaty with U.K. (1993) regarding inheritance tax has following main features: State of last domicile of deceased person may tax estate fully except immovable property situated in other state, moveable property of permanent establishment or fixed base in other state and ships and aircraft belonging to enterprise of other state. Shares of U.K. company which form part of estate of person domiciled in Switzerland may be taxed in U.K.

Special Tax Treaties.

Special treaties govern singular cases of taxation: Mainly on enterprises of ships and/or airlines, with Algeria, Argentina, Bahrain, Brazil, Burundi (treaty with Democratic Republic of the Congo applicable), Chile (not yet in force), China, Democratic Republic of the Congo (formerly known as Belgian Congo and Zaire), Ghana, Iran, Israel, Kenya, Lebanon, Malta, Oman (not yet in force), Poland, Qatar (not yet in force), Russia, Rwanda (treaty with Democratic Republic of the Congo applicable), Saudi Arabia, Togo, Turkey, Uruguay, Venezuela, United Arab Emirates.

Social Security Agreements.

Swiss Confederation has concluded international social security agreements with 44 countries. Objectives of agreements are: guaranteeing equal treatment of citizens from contracting states, determination of applicable legislation, and payment of social security benefits abroad.

In accordance with Agreement on Free Movement of Persons between Switzerland and EU, relations with EU Member States are governed by provisions of Regulation (EEC) No. 1408/71 and its implementing Regulation (EEC) No. 574/72. Both regulations coordinate various European social security systems. For EFTA countries, Regulation (EEC) No. 1408/71 and No. 574/72 apply as well.

23.16 VALUE ADDED TAX (VAT):

VAT was put into effect on Jan. 1, 1995, and replaced prior Turnover Tax on goods. Change in system was essentially motivated by fact that VAT had been established in all Member States of European Community.

Legal Basis.

Federal Law on Value Added Tax (MWSTG) of June 12, 2009.

Taxation Principle.

VAT is general use and consumption tax. It is levied on domestic supply of goods and services for consideration, procurement of services from abroad and importation of goods.

Tax liability is triggered by independent occupation or commercial activity purpose of which is to generate income. Exemption applies if turnover resulting from taxable deliveries and services is below CHF 100,000 per year. Furthermore, tax liability applies to those who procure services from abroad for more than CHF 10,000 per year and those who are subject to import duty taxes.

Basis for calculation of tax on domestic deliveries and services is agreed upon respectively collected gross payment. Pre-tax deduction avoids tax cumulation (taxable purchase and taxation of turnover). Each taxable entity can deduct sum of all pre-taxes from gross taxes on its turnover (net all phase principle).

Particulars.

Law differentiates between turnovers which are exempt and those which are excluded from VAT. No tax is levied on excluded turnovers. In cases of exclusions, there is no pre-tax deduction for taxes paid in generating turnover (false exemption from taxes). Particularly, services performed in areas of health, social services, social security, education, instruction, as well as child and youth care, cultural activities, insurance sales, turnover in area of money and finance (with exception of administration of property and collection business), ownership changes of property, as well as its long-term rental, gambling, lotteries, and other types of games of chance, services from organizations under certain conditions, as well as sale of domestic postage stamps used as such, are excluded from value added taxation.

Turnovers concerning export deliveries, transport services over border, as well as services to be used or evaluated abroad are exempt from VAT. Pre-tax deduction is allowed for all taxes paid for goods and services which are necessary to generate such turnovers (true exemption).

Taxation Rates.

VAT amounts to 7.6% for every taxable sale (standard rate). On certain categories of goods reduced rate of 2.4% is applied (food and beverages, with exception of alcoholic beverages; cattle, poultry, fish; seeds, living plants, cut flowers; grain; fodder and fertilizer, etc.; medicine; newspapers, magazines, books and certain other printed matter; services of radio and television corporations [with exception]). Special rate of 3.6% applies on hotel and lodging industry.

Administration.

As rule, VAT is declared quarterly; taxable person is obliged to file VAT return with Federal Tax Administration within 60 days after end of quarter (self-declaration). Procurement of services from abroad is declared within 60 days after end of calendar year (self-declaration) if no quarterly declaration is filed. VAT on importation of goods is levied by Federal Customs Administration.

23.17 WITHHOLDING TAX:

Legal Basis.

Federal Withholding Tax Law (VSTG) of Oct. 13, 1965.

Withholding.

Confederation levies withholding tax at source on specific income from interest, annuities, dividends (including deemed dividend distributions), profit distributions, etc., if debtor is resident of Switzerland. Rate is 35%. On life insurance annuities and capital payments to residents, rate is 8% or 15%. No withholding tax is levied on royalties. Withholding tax must be withheld by payer of taxable benefit and charged to recipient of taxable benefit.

Refund/Notification.

If recipient of taxable benefit is Swiss resident individual, withholding tax is credited against cantonal and local taxes and excesses are refunded. Swiss legal entities can claim refund with Federal Tax Administration. In specific cases, reduction at source is available and notification procedure replaces payment of withholding taxes, e.g., distribution of dividend in kind or dividend distribution to Swiss corporation (see category 2 Business Organizations, topic 2.3 Corporations) that holds at least 20% of capital of subsidiary.

Further, nonresidents may, under conditions set forth in applicable double taxation treaties, obtain refunds. See topic 23.15 Treaties and Agreements, subhead International Double Taxation, catchline International Treaties on Double Taxation, Income and Property Taxes.

For intragroup cross-border dividends, refund procedure has generally been replaced as of Jan. 1, 2005, by notification procedure. Upon prior request, Swiss withholding tax is reduced at source to treaty rate provided that recipient of dividend is located in treaty country and entitled either to privileged treaty rate according to applicable double taxation treaty or to Swiss-EU Savings Agreement.

Securing.

Federal Tax Administration is authorized to request security to extent of potential withholding tax on liquidation profit of corporation: (1) If 80% of share capital is beneficially owned by nonresidents, (2) if assets consist mainly of assets located abroad or of claims against nonresidents, and (3) if corporation does not distribute every year adequate part of its net profit as dividends.

24 TRANSPORTATION

24.01 MOTOR VEHICLES:

Switzerland is a party to the International Treaty concerning Motor Vehicles of Apr. 24, 1926 and to the Treaty Concerning Temporary Importation of Private Road Vehicles, dated New York, June 4, 1954. Under the latter, motor vehicles of nonresidents and registered abroad for personal use are free from taxes and levies for sojourns in Switzerland. Switzerland and EC have concluded agreement on overland transport on June 21, 1999.

Foreigners domiciled abroad but staying temporarily in Switzerland can, under certain circumstances, obtain Swiss plates for a period up to two years without having to pay customs duties.

Insurance of motor vehicles for damages to third parties is mandatory. These may sue insurance company directly, which may claim indemnity from driver or holder under specific conditions.

24.02 SHIPPING:

Federal Statute of Sept. 23, 1953 governs Swiss sea-going vessels and Swiss vessels on foreign inland waterways. Sea-going vessel can only be registered as Swiss ship and fly Swiss flag if owner is Swiss citizen or Swiss partnership or corporation of which all partners, shareholders, or members are Swiss citizens. Further special requirements in regard to Swiss domicile have to be fulfilled. Switzerland is party to series of international conventions concerning shipping. The York/Antwerp rules of 1950 apply to general average (Havarie Grosse).

25 TREATIES AND CONVENTIONS

25.01 TREATIES:

International Sale of Goods.

United Nations Convention on Contracts for the International Sale of Goods, in force on Mar. 1, 1992. See category 3 Business Regulation and Commerce, topic 3.16 Sales and Part V, Selected International Conventions. Bretton Woods—Treaty of Oct. 4, 1991 applies.

Europe.

Switzerland is member of Council of Europe (Strasbourg) and has adhered to certain of its treaties. On Oct. 3, 1974 Switzerland adhered to Convention for Protection of Human Rights and Basic Liberties.

Switzerland is member of European Free Trade Association (EFTA) but not of EU or EEA. However, in 1972, Switzerland entered into free trade agreement with European Economic Community and European Community for Coal and Steel.

Switzerland joined Lugano Convention on recognition and enforcement of foreign judicial decisions with Austria, Belgium, Denmark, Finland, France, Germany, Gibraltar, Greece, Iceland, Ireland, Italy, Luxembourg, Netherlands, Norway, Portugal, Spain, Sweden, U.K. All EFTA and European Union members may join.

Switzerland has concluded with most European countries and series of other countries treaties concerning residence and commerce. It is member of treaty on reciprocal recognition of inspections concerning manufacture of pharmaceutical products dated Oct. 8, 1970.

On June 21, 1999, Switzerland and EC signed seven bilateral agreements on Free Movement of Persons, Air Transport, Land Transport, Technical Barriers to Trade, Research, Public Procurement and Agriculture. These agreements have entered into force on June 1, 2002. Additional bilateral agreements were concluded with EU relating i.a. to extension of Schengen/Dublin acquis and taxation on savings.

United States.

Treaty of Friendship, of Nov. 25, 1850, in force with alterations since Nov. 8, 1855, confers important rights on citizens of the two countries on basis of equal treatment of citizens of other country with her own citizens, e.g., right to free acquisition, possession and disposition inter vivos and per mortem of personal property (also of real property to extent that it may be held by foreigners) (Arts. I, V); free access to tribunals (Art. I). Treaty exempts citizens of one country from military service (not from military exemption taxes) in other country (Art. II); it also contains provisions relating to jurisdiction and applicable law in inheritance matters (Art. VI), and for consular services on basis of “most favored nation clause” (Art. VII).

Treaty of Nov. 11, 1937, regulates liability to military service and military exemption taxes of certain persons possessing citizenship of both countries, because born in one country of parents of other country. See category 4 Citizenship, topic 4.02 Citizenship, subhead Multiple Citizenship.

Treaty concerning co-operation in field of peaceful use of atomic energy of Dec. 30, 1965 as am'd on Nov. 2, 1973 and treaty between International Atomic Energy Organization, U.S. and Switzerland of Feb. 28, 1972 on measures of control in regard to material and equipment.

Interim Agreement relating to Air Transport Services, of Aug. 3, 1945, as amended.

Exchange of notes with U.S., Oct. 13, 1961, as am'd on Jan. 7, 1977, regulates certification of air-worthiness. Switzerland and U.S. are parties to Convention of Dec. 16, 1970 to fight illegal occupation of aircraft.

Under Treaty on Social Security signed on July 18, 1979, two countries grant to citizens of other country benefits of their federal old age and dependents insurance and disability insurance.

Treaty of May 25, 1973 on assistance in criminal matters permits also to give assistance against organized crime and under certain conditions piercing of Swiss Bank Secret. Special statute of Oct. 3, 1975 regulates its application in Switzerland.

Treaty of Extradition, of May 14, 1900, as amended.

Hague Convention of Nov. 15, 1965 on Service Abroad in Civil and Commercial Matters applies (various reservations).

Switzerland and U.S. (on Dec. 24, 1980) have adhered to Treaty exempting foreign public deeds from legalization of Oct. 5, 1961 and U.S. has published list of Authorities competent to apply so-called “Apostille”. See International Conventions section.

Memorandum of understanding was signed on May 3, 1980 by United States' Food and Drug Administration and Swiss Federal Office for Foreign Economic Affairs to develop standards or guidelines of good laboratory practices for laboratories conducting nonclinical experiments and to establish national programs of inspection. Switzerland and Canada concluded Mutual Recognition agreement on mutual recognition of good laboratory practice entering into force May 1, 1999. Agreements with other countries currently in negotiation.

See also categories 5 Civil Actions and Procedure, topic Judgments; Criminal Law, topic Criminal Law; Dispute Resolution, topic Arbitration and Award; Foreign Trade and

Commerce, topic Foreign Trade Regulations; Intellectual Property, topics Copyright, Patents and Industrial Designs, Trademarks; Taxation, topic Taxes, subhead International Double Taxation.

1
TAIWAN LAW DIGEST

—Scope —

Revised for 2009 edition by

LEE and LI, of Taipei, Taiwan (Formosa).

(Abbreviations used are: C. C. for Civil Code; C. C. P. for Civil Code Procedure; L.S.A. for Labor Standards Act; Sup. Ct. for Supreme Court.)

Note: This revision incorporates all legislation within scope of Digest topics approved by Governor through Oct. 3, 2008.

1 INTRODUCTION

1.01 CURRENCY:

Since 15 June 1949, New Taiwan Dollar is legal tender circulated in Taiwan. NT$1 = 100¢. Metal coins in denominations of 50¢, $1, $5, $10, $20 and $50, and paper money in denominations of NT$100, 500, and 1,000 were issued exclusively by Bank of Taiwan under constant supervision of Supervisory Committee composed of government officials and business leaders under jurisdiction of Central Bank of China prior to 30 June 2002. After that, in addition to new paper money in denomination of NT$200 and NT$2,000, they are issued by Central Bank of China exclusively. New Taiwan Dollars are covered 100% by gold, silver, foreign exchange, qualified negotiable instruments and securities.

Conversion rates of foreign exchange float against supply and demand.

1.02 GOVERNMENT AND LEGAL SYSTEM:

Preliminary Note.

Republic of China (R.O.C.) is unitary, democratic republic. Constitution of Republic of China took effect in 1947. Central government, with President as head of state, consists of five branches - Executive Yuan, Legislative Yuan, Judicial Yuan, Examination Yuan, and Control Yuan. Legislative Yuan, elected congress, exercises power to enact laws, while Executive Yuan, headed by Premier, exercises power to promulgate regulations or adopt other administrative measures for implementation of laws.

R.O.C. has three levels of local governments. Highest level includes province and special municipality. Province is subdivided into counties and cities; counties are subdivided into rural townships, urban townships, and county municipalities; special municipalities and provincial cities are subdivided into districts. Except for province, special municipality, county/provincial city, rural/urban township, and county municipality are all organs of local self-governance. (Art. 3 of System of Local Government Law).

R.O.C. adopts civil law system. Many terms and expressions contained in texts of laws have no exact English equivalents. Most laws do not have official translations and different translations may exist. In spite of civil law tradition, R.O.C.'s legal system has also been influenced by Anglo-American law in past few decades and maintains precedent system that is quite similar to that of common law countries.

In tandem with economic growth and government efforts for liberalization and internationalization, many trade and investment-related laws have been promulgated, which help attract foreign investments. Such activities have placed foreign lawyers into increasing contact with R.O.C. law.

Laws digested below are in effect in all areas under control of government of R.O.C. on Taiwan, whose present capital is in Taipei.

Constitution.

Constitution of R.O.C. was adopted by Constituent National Assembly on 25 Dec. 1946, promulgated by National Government on Jan. 1, 1947, and came into force on 25 Dec. 1947. Constitution provides, among other things, that all citizens of R.O.C., irrespective of sex, religion, race, class and partisanship, shall be equal before law. (Art. 7). Further, any citizen, arrested or detained, can seek from court writ of habeas corpus, and shall be handed over to court within 24 hours after arrest (Art. 8); and all citizens shall have freedom of domicile (Art. 10), liberty of religious belief (Art. 13), right of privacy in correspondence and in communication (Art. 12), freedom of association, speech and press (Arts. 11, 14). All citizens shall have right of voting for elections, recalls, initiatives, and referendums (Art. 17), and have right to take part in state examinations and to hold public offices (Art. 18). It is also provided that all citizens have duty of paying taxes (Art. 19), of performing military service in accordance with law (Art. 20), and of receiving compulsory education (Art. 21). R.O.C. Constitution used to protect women's political participation by providing 10% quota for Legislative Yuan election. (Art. 64). Most recent constitutional amendment strengthens women's political participation by providing that half of 34 Legislative Yuan members appointed by political parties must be women. (Const. Amend. Art. 4).

National Assembly no longer exists after most recent constitutional revisions were adopted by National Assembly and promulgated by President on 10 June 2005. (Const. Amend. Art. 1). It formerly exercised highest political powers on behalf of people, including powers to amend Constitution, to elect and recall President and Vice President, and to alter national territory. (Arts. 4, 27). Now most of former functions of National Assembly are jointly exercised by Legislative Yuan and people by way of popular referendum. (Const. Amend. Arts. 1, 4).

Constitution also includes number of provisions regarding fundamental national policies, such as providing social welfare and national health insurance; encouraging development and investment in science and technology; affirming cultural pluralism; promoting substantive gender equality, international economic cooperation, and industrial upgrading; and protecting ethnic minority groups and indigenous people. (Art. 155; Const. Amend. Art. 10). Although these provisions may not create actionable constitutional rights for individuals, they nevertheless set out important goals that State has constitutional obligation to achieve.

Under additional Arts. of R.O.C. Constitution, R.O.C. government is authorized to specify by law rights and obligations between people of Mainland-Chinese area and those of Taiwan area, and disposition of other related affairs. (Const. Amend. Art. 11). Act Governing Relations between Peoples of Taiwan Area and Mainland Area, Act Governing Relations with Hong Kong and Macau, and other relevant administrative regulations have been enacted by R.O.C. government according to Constitution.

Effective from 1996 election for ninth-term President and Vice President, President and Vice President shall be elected by entire electorate in Taiwan area. (Const. Amend. Art. 1). Then-opposition Democratic Progressive Party won presidential election in 2000 and became governing party. This is first official and peaceful transfer of government opposition since present Constitution took effect in 1947.

Constitution may be amended by two-step procedure. First, constitutional amendment must be proposed by Legislative Yuan by three-fourths of members present with quorum of three-fourths of total number of members. Popular referendum will be held to decide on proposed constitutional amendment after proposal has been publicly announced for half year. Constitutional amendment is ratified if no less than one-half of total number of entire national constituency has voted for this amendment. (Const. Amend. Arts. 1, 4). Although Constitution does not explicitly provide for substantive limitation of constitutional amending power, according to Interpretation No. 499 of Judicial Yuan (24 Mar. 2000), principles of democratic republic state, popular sovereignty, protection of fundamental rights, and separation of powers are not subject to amendment. Since 1991, to meet needs of nation prior to national unification with Mainland China, R.O.C. Constitution has undergone seven major revisions in 1991, 1992, 1994, 1997, 1999, 2000, and 2005. Most recent constitutional amendment was ratified by National Assembly on 7 June 2005, and promulgated by President on 10 June 2005.

Government.

Government is known as Central Government of R.O.C. Pursuant to Art. 35 of Constitution, President is head of state representing R.O.C. in external relations. As to organization of Government, Constitution provides, among other things, for five Yuans (departments or councils): Executive, Legislative, Judicial, Examination and Control.

According to 1947 Constitution, President was originally designed only as nominal head of state and owing to various amendments adopted in 1990's coordinator among five Yuans. However, for most of R.O.C.'s history since 1947, President has played dominant role in government. Pursuant to Art. 2 of Additional Arts. of R.O.C. Constitution, President has power to determine major policies for national security and has established National Security Council and National Security Bureau to exercise this power. President may also issue emergency decrees under certain circumstances with consent of Executive Yuan Council and ratification of Legislative Yuan. (Const. Amend. Art. 2). However, this emergency power has rarely been exercised.

Executive Yuan is highest administrative organ of government with eight ministries, some special commissions, and Central Bank. (Art. 53). Head of Executive Yuan is premier (officially known as president of Executive Yuan), who is unilaterally appointed by President. (Const. Amend. Art. 3). Executive Yuan is responsible to Legislative Yuan in three major ways. First, Executive Yuan has duty to present to Legislative Yuan statement on its administrative policies and report on its administration. Second, while Legislative Yuan is in session, its members have right to interpellate premier and heads of ministries and other organizations under Executive Yuan. Lastly, with signatures of no less than one-third of total number of its members, Legislative Yuan may propose nonconfidence vote against premier. If nonconfidence motion is approved by one-half of total number of Legislative Yuan members, premier should resign but may request President to dissolve Legislative Yuan. (Const. Amend. Art. 3). Institution of nonconfidence vote has never been used since its introduction in 1997.

Legislative Yuan, as congress, is authorized to decide on legislation, budgets, declarations of state of emergency, amnesties, declarations of war, negotiations for peace treaties, and other important matters of state. (Art. 63). If Executive Yuan deems statutory, budgetary, or treaty bill passed by Legislative Yuan difficult to execute, it may, with approval of President and within ten days of Executive Yuan's receipt of bill, request Legislative Yuan to reconsider bill. If no less than one-half of total number of members of Legislative Yuan uphold original bill, premier should immediately accept bill. (Const. Amend. Art. 3). In 1997 and 2000, Legislative Yuan was further empowered to propose alteration of national territory and to initiate impeachment and recall processes of President. (Const. Amend. Arts. 2, 4). 225 members of current Legislative Yuan serve three-year, renewable term. However, as result of 2005 Constitutional Revisions, starting from 2007, total number of Legislative Yuan members will be reduced to 113, and new members will serve four-year renewable term. Of 113 members, 73 will be elected from special municipalities, counties, and cities in Taiwan area; six will be elected from lowland and highland aborigines; and 34 will be elected from nationwide constituency and from among R.O.C. citizens residing abroad. These 34 members will be appointed by political parties in proportion to votes political parties receive in district and aborigine elections. At least half of these party delegates should be women. (Const. Amend. Art. 4). Legislative Yuan shall hold two sessions each year: from Feb. to end of May, and from Sept. to end of Dec. Whenever necessary, sessions may be prolonged. (Const. Art. 68). During recess, extra session may also be held either upon request of President or request of no less than one-fourth of Legislative Yuan members. (Const. Art. 69).

Judicial Yuan is highest judicial organ of state. (Art. 77). It has duty of establishing courts for civil, criminal and administrative suits and is empowered to administer disciplinary measures over public functionaries, to exercise judicial review, to interpret Constitution, and to reconcile conflicting constructions of laws and administrative orders. (Arts. 77, 78). Powers of judicial review and uniform interpretation of laws are exercised by Grand Justices. (Art. 79). Starting from 2003, there are 15 Grand Justices, including president and vice president of Judicial Yuan. Grand Justices are nominated and, with consent of Legislative Yuan, appointed by President. Grand Justices serve eight-year, non-renewable term. However, eight of Grand Justices appointed in 2003 (including president and vice president of Judicial Yuan) will serve term of only four years to establish staggered Council. Grand Justices also form Constitutional Court to adjudicate matters relating to dissolution of unconstitutional political parties. Political party is considered unconstitutional if its goals or activities endanger existence of state or nation's free and democratic constitutional order. (Const. Amend. Art. 5).

Examination Yuan is highest examination body of state. It is responsible for holding state examinations; regulating matters relating to qualification screening, security of tenure, pecuniary aid in case of death, and retirement of civil servants; and establishing sound legal system on matters relating to employment, discharge, performance evaluation, scale of salaries, promotion, transfer, commendation, and award of civil servants. Examination Yuan is composed of president, vice president, and 19 members, all of whom are nominated and, with consent of Legislative Yuan, appointed by President. (Const. Amend. Art. 6).

Control Yuan is highest control body of state and exercises powers of impeachment, rectification, and auditing government books. Control Yuan comprises 29 members, including president and vice president, all of whom serve term of six years. All members are nominated and, with consent of Legislative Yuan, appointed by President. (Const. Amend. Art. 7).

1.03 HOLIDAYS:

National holidays are: Foundation Day, 1 Jan.; Chinese New Year and the Eve, last day of Dec. and Jan. 1 through 2 (Lunar calendar); Peace Day, 28 Feb.; Tomb-Sweeping Day, 5 Apr.; Dragon Boat Festival, 5 May (Lunar calendar); Mid-Autumn Festival, 15 Aug. (Lunar calendar); Double Tenth National Day, 10 Oct. In addition, Labor Day, 1 May, is laborers holiday; Armed Forces Day, 3 Sept., is soldiers holiday.

1.04 OFFICE HOURS AND TIME ZONE:

Taiwan is in the +08:00 GMT time zone which is in same zone as Central Standard Time Zone. Office hours are generally from 9 a.m. to 5 p.m.

2 BUSINESS ORGANIZATIONS

2.01 AGENCY:

See category 20 Property, topic 20.02 Authority of Agency.

2.02 ASSOCIATIONS:

R.O.C. Civil Code (C. C. Arts. 45 and 46) distinguishes between associations whose object is to generate profits and associations whose object is to promote public welfare. Latter are subject to approval of registration by competent authorities before registration as legal entity.

Objectives of social affairs associations, political associations and professional associations must not be to generate profits. These associations are subject to R.O.C. Private Associations Act, which was promulgated on 10 Feb. 1942 as last amended on 11 Dec. 2002.

To establish association, articles of association must be drawn up. (P.A.A. Arts. 8 & 10 and C. C. Art. 47). Association shall have three bodies, viz., assembly, board of directors and board of supervisors with assembly with highest authority. (C. C. Art. 50). Decisions of assembly on general matters are passed by simple majority. (P.A.A. Art. 27 and C. C. Art. 52). However, resolutions on important matters, such as dismissal of member, replacement of director/supervisor, disposal of property, amendment to articles of association, and dissolution of association, require various degrees of supermajority. (P.A.A. Art. 27 and C. C. Arts. 53 & 57). All amendments to articles of association must be approved by or reported to competent authorities. (P.A.A. 54 and C. C. Art. 53).

Industrial guilds representing manufacturers are subject to Industrial Associations Act promulgated on 28 Dec. 1974 and as last amended on 11 Dec. 2002. Commercial guilds are subject to Commercial Associations Act promulgated on 26 July 1972 as last amended on 11 Dec. 2002.

Most profit-seeking associations are termed “companies” and governed by Company Act (see topic 2.03 Corporations).

2.03 CORPORATIONS:

R.O.C. Company Act provides for four forms of companies: (1) Unlimited company; (2) unlimited company with limited liability shareholders; (3) limited company; and (4) company limited by shares. Unlimited company is company organized by two or more shareholders who bear unlimited joint liability for obligations of company. Unlimited company with limited liability shareholders is one organized by one or more shareholders of unlimited liability and one or more shareholders of limited liability. In such company, shareholders of limited liability are liable only to extent of capital contributed or subscribed by them. Limited company is one organized by one or more shareholders who are liable to extent of capital subscribed by them. Company limited by shares is one organized by two or more individual shareholders or one corporate or governmental shareholder and capital of company is divided into shares and each shareholder is liable to extent of shares subscribed by him.

See also category 3 Business Regulation and Commerce, topic 3.02 Commercial Register.

Special Permission.

Should business of company require special governmental approval, such business can be undertaken only after such special permission is obtained. See category 3 Business Regulation and Commerce, topic 3.02 Commercial Register.

Foreign corporations are subject to Company Act of R.O.C. as amended on 3 Feb. 2006, and references made herein are to articles of this Act.

Foreign corporations intending to operate business in R.O.C. through branch office must first be recognized by R.O.C. government as foreign corporate entity duly registered in country of its origin. Applications for recognition and branch license shall be submitted to Ministry of Economic Affairs ("MOEA"). Under current practice, MOEA does not require proof of reciprocity for recognition of foreign company. After branch license is issued, foreign company can commence business in R.O.C.

Foreign company is required to provide following documents for applying for recognition: (1) Name, form and nationality of company; (2) business scope of company and business activities to be undertaken within R.O.C.; (3) total amount of capital and in case shares will be issued, total number of shares, types of shares, par value per share and paid-in amount; (4) amount of funds to be used for operation within R.O.C.; (5) location of its head office and that of branch office to be established in R.O.C.; (6) date of incorporation in its own country and date on which it began operating business; (7) names, nationalities and domiciles of directors and responsible persons of company; (8) names, nationalities and domiciles or residences of its litigious and nonlitigious agent and branch manager in R.O.C. and powers of attorney; (9) application for preregistration of company name; (10) photo copies of its articles of incorporation and other certificate(s) of registration in its own country; and (11) minutes of meeting of board of directors relating to application for recognition. In addition, information on foreign company such as annual revenue, profits/losses, estimated annual revenue of branch, number of employees and dates of fiscal year of branch should also be provided.

In case of any change to above registered information, application must be filed with competent authority for amendment to registration within 15 days after such change in accordance with Regulations Governing Registration and Recognition of Companies promulgated on 12 Dec. 2003 and last amended 6 June 2008. Foreign corporation which has been recognized in R.O.C. has same legal status as R.O.C. corporation.

Prior to any substitution or departure of its designated agent, foreign company must designate another agent or branch manager and file report with competent authorities for recordation. (Art. 385).

Foreign company must keep copy of its articles of incorporation and roster of shareholders of unlimited liability if any, in its branch office or in office of its agent for litigious and non-litigious agent in R.O.C. (Art. 374).

Foreign company which does not wish to operate business in R.O.C. but wishes to appoint representative in R.O.C. to do juristic acts related to its business may apply to government for establishment of representative office. (Art. 386).

2.04 JOINT STOCK COMPANIES:

See topic 2.03 Corporations.

2.05 PARTNERSHIPS:

R.O.C. Civil Code provides that partnership is contract whereby two or more persons agree to make contributions to operate joint venture. Contributions of partners and all other properties of partnership are held in common by all partners. Unless otherwise provided for by contract, accounts of partnership must be settled and its profits distributed at end of each fiscal year. If assets of partnership are not sufficient to cover liabilities, partners would be held jointly and severally liable for deficit.

Dissolution.

Partnership is dissolved in any of following situations: (1) Term of partnership agreed upon has expired; (2) partners have unanimously decided to dissolve partnership; and (3) objectives are fulfilled, or when it is impossible to accomplish such objectives.

3 BUSINESS REGULATION AND COMMERCE

3.01 BILLS AND NOTES:

Bills of exchange, promissory notes and checks are negotiable instruments within meaning of Negotiable Instruments Act of R.O.C., promulgated in 1929 and last amended 29 June 1987. Person signing negotiable instrument is liable according to tenor thereof. Seal may be affixed to negotiable instrument in lieu of signature. In case of variation between words and figures with respect to amount of instrument, words prevail. Unless otherwise provided in Negotiable Instruments Act, instrument is invalid as negotiable instrument unless it contains following particulars required by said law.

Bills of exchange must be signed by drawer and contain: (1) Words indicating that instrument is bill of exchange; (2) statement of certain sum of money; (3) unconditional order to pay; and (4) date of issue.

Promissory notes must be signed by maker and contain: (1) Words indicating that instrument is promissory note; (2) statement of certain sum of money; (3) unconditional promise to pay; and (4) date of issue; provided, however, in case of incomplete instrument, maker shall sign his name to meet requirement of essential particulars by law and maker may authorize holder to insert date of maturity and other particulars which should have been completed prior to its issue. Incomplete instrument in due course will be fully effectuated where other essential particulars have been completed, and thus, such incomplete instrument may be legally binding and effective.

Checks must be signed by drawer and contain: (1) Words indicating that instrument is check; (2) statement of certain sum of money; (3) name of payor; (4) unconditional order to pay; (5) date of issue; and (6) place of payment. Basically, check must be payable on demand only. Where check contains any statement to contrary, such statement is null and void. However, post-dated check is legally permitted as exception. Holder of check may not present check for payment before date of issue stated thereon.

3.02 COMMERCIAL REGISTER:

Commercial Registration must be handled in accordance with Commercial Registration Act, Guidelines on Business Registration, and other relevant administrative measures. Commercial Registration Act was promulgated and came into force on 28 June 1937 and last amended on 16 Jan. 2008. Guidelines on Business Registration was promulgated and came into force on 6 Mar. 1956 and was last amended on 19 Mar. 1986. In addition, Commercial Registration must be subject to other laws if no applicable stipulation is provided in foregoing regulations.

According to Art. 4 of Commercial Registration Act, any business in sole proprietorship or partnership must not start operations before completion of commercial registration except for some small businesses as stipulated in Art. 5 of Act. As for company, it must be incorporated and registered with competent authorities pursuant to Company Act, and must not start operations before completion of corporate registration and business registration pursuant to Guidelines on Business Registration. If type of business engaged in by company (or sole proprietorship or partnership) requires a special permit or special license from the government, such business or company can be registered only after such special permit or license is obtained. These types of business include but are not limited to following: Banking, insurance, customs brokering, construction, trust and investment, venture capital, securities, shipping, transportation, pharmaceutical, etc.

Furthermore, foreign company may choose to establish branch in Taiwan to transact business instead of setting up new Company under Company Act in Taiwan. If foreign company chooses to establish branch in Taiwan, it must apply for recognition pursuant to Company Act.

3.03 CONSUMER PROTECTION:

The Consumer Protection Act was passed on 11 Jan. 1994, effective on 13 Jan. 1994, and was last amended on 5 Feb. 2005. Consumer Protection Act protects consumer rights mainly in six areas: product's liability, standard contracts, special sales, advertisements, consumer protection groups, and consumer complaints and litigations.

1. Product liability: Designers, producers, manufacturers, importers and distributors of products, and providers of services (``Business Operators'') are subject to strict product liability. Business Operators must ensure that goods and services provided by them meet and comply with contemporary technical and professional standards of reasonably expected level of safety before sold goods are launched onto market, or at time of rendering services. They also are required to include warning and methods of emergency handling on conspicuous place on dangerous products or services. Business Operators also are obligated to recall products or services which may endanger safety and health of consumers.

2. Standard contracts: Terms and conditions of standard contract that violate principle of good faith and are conspicuously unfair to consumers must be null and void. Interpretations of terms and conditions of standard contract must be made in favor of consumers. Reasonable period of no less than 30 days must be given to consumers for them to review standard contracts before signing.

3. Special sales: Consumers may return products or cancel purchase contract within seven days upon receipt of such products without stating any reasons or paying any expenses or purchase price if they purchase products by mail order or in door-to-door sale.

4. Advertisements: Business Operators are obligated to ensure accuracy of contents of their advertisements and their obligations to consumers must not be less than contents of advertisements. If advertising provider knows or should have known that contents of their advertisements are inconsistent with facts but still makes inaccurate advertisements for Business Operators, it must be jointly and severally liable to consumers for their reliance upon such advertisements along with Business Operators.

5. Consumer protection groups: Consumer protection groups are vested with power to conduct tests and surveys of products and services, to provide consulting services to consumers, to assist consumers in consumer disputes, to initiate consumer litigation, and so on. Consumer protection groups can only be association or foundation.

6. Consumer complaints and litigations: Consumers may file complaints with Business Operators, consumer protection groups, or consumer service centers. If complaint is not properly handled, consumers may request mediation. If mediation is not successful, consumer litigation can be brought by consumers, representatives elected among consumers, consumer protection officials, or qualified consumer protection groups. Punitive damages are allowed if injury of consumer is caused by intentional or negligent acts of Business Operator. Business Operator may be fined up to three times amount of actual damage in event that injury of consumer is caused by its intentional act. Business Operator may be fined one time amount of actual damage in event that injury of consumer is caused by its negligence.

3.04 CONTRACTS:

Contracts are primarily governed by Civil Code. Contract is formed when parties reach agreement about essential points of their contract. Parties' agreement may be manifested by: (1) Offer and acceptance; (2) cross offers; or (3) act of party responding to offer requiring no notice of acceptance. Similar to Anglo-American legal systems, parties enjoy autonomy in determination of terms and conditions of their contract. Offer made during face-to-face negotiation ceases to be binding if not accepted at once. (C. C. Art. 156). Offer made in writing ceases to be binding if not accepted by offeree within reasonable period of time. (C. C. Art. 157). If offeror sets deadline for acceptance, acceptance must reach him or her before such deadline. (C. C. Art. 158).

With limited exceptions, such as employment guaranty; contract of mandate under which mandatary would enter into juristic acts required by law to be in writing; or transfer or creation of rights over immovables; contract does not have to be in writing.

Contracts creating third-party beneficiaries are legally enforceable, unless beneficiaries convey to either party their intention not to receive such benefits. Moreover, parties to contracts may also modify or cancel contracts before third-party beneficiaries express their intention to receive such benefits. (C. C. Art. 269). Third-party beneficiaries have right to enforce contracts against promisor.

Excuses for Nonperformance.

Parties to contract may be relieved from performance if: (1) Such performance becomes impossible due to causes not attributable to him (her), such as force majeure or other party's fault (C. C. Art. 225), or (2) other party, who is obligated to perform first, fails to perform (C. C. Art. 264).

Applicable Law.

Formation validity, and effects of contract involving foreign elements are determined by law selected by parties thereto. Where parties' intention about governing law is not clear, applicable law shall be law of country of which both parties are nationals. If parties are of different nationality, applicable law shall be lex loci actus. If contract is concluded at different places, place where offer is dispatched shall be deemed place of conclusion. If place where offer is dispatched is unknown to other party when he accepts, domicile of offeror shall be deemed place of concluding contract. If place of concluding contract spans over more than two countries or does not belong to any country, lex loci solutionis shall apply. (Art. 6, Act Governing Choice of Law in Civil Cases Involving Foreign Elements).

Government Contracts.

Contracts made by government for private economic matters are governed by same body of law that regulates nongovernment contracts (see Appeal Case No. 1838, Sup. Ct. 1930). Requirements of government procurement contracts are prescribed by Government Procurement Act (GPA).

GPA came into effect on 27 May 1999 and last amended 4 July 2007. GPA establishes complete framework for open and transparent government procurement, covering all aspects from tender procedures, contract management, acceptance, protests and complaints. GPA applies to all procurement by government agencies, public schools, public enterprises, and military agencies, as well as corporations or organizations engaged to handle procurement for aforesaid agencies.

GPA requires government agencies to publish their purchase plans in government procurement gazettes. Procurement of goods and services with value exceeding prescribed amounts should in general be made through open tender procedures. Procuring agencies may use selective or restrictive tender procedures only in specified cases with approval from authority-in-charge. GPA allows awards to be determined on most-advantageous-bid basis. Procuring agency can use ranking or point systems in categories such as technology, quality, function, commercial terms, price, and so forth to make overall judgment to award contracts.

GPA permits procuring agencies to procure on turn-key basis to meet efficiency and quality requirements. Where appropriate, calls for bids may permit joint bids by number of firms. Procuring agencies may stipulate basic qualifications in view of its requirements, but technical specifications of services or products required should not restrain competition. Terms and conditions for various kinds of procurement contracts should be drafted with reference to guidelines established by authority-in-charge of government procurement, as well as international and domestic practices.

Bid protest may be filed in case of any dispute on invitation to tender, evaluation of tender, or award of contract. Bidder harmed by act/omission of procuring entity may protest act/omission of procuring entity on grounds of violation of laws, regulations or any treaty or international agreement entered into by R.O.C. In case of unfavorable decision, appeal may be brought to Complaint Review Committee.

Distributorship, Dealerships and Franchises.

Distributorship, Dealerships.

Terms “distributor” and “dealer” are not defined in R.O.C. law. There are no specific laws regulating such contracts. As such, rights and obligations of distributor or dealer are determined by provisions of contracts entered into by parties. For any matter not provided in contract, parties should follow business practice established between parties as well as relevant provisions of R.O.C. Civil Code.

Civil Code provides for 27 types of agreements, which do not include distributor or dealer agreement. Based on court precedents and scholars' interpretations, distributor or dealer agreement may be considered as combination of three types of agreements under Civil Code: (i) Sale Contract; (ii) Commercial Agent Contract (person who is commissioned by firm to represent and act on behalf of firm in name of firm for entire or particular part(s) of business of firm); and (iii) Commission Agency Contract (person who undertakes to buy or sell goods or execute any other commercial transaction in his/her own name but on account of principal, in return for remuneration). Courts would usually consider entire business arrangement and decide which relevant provisions of law to apply. Antitrust and unfair competition provisions of Fair Trade Act also impose certain constraints on principal's control over local distributors and dealers, such as resale price maintenance or tying arrangements.

Franchises.

Term “franchises” is not defined in R.O.C. law. Franchise system in general aspect means retail sales network where franchisor grants license right to allow franchisees to use technology, know-how, management and administration system, trademarks or service marks developed and provided by franchisor, in promotion, distribution and sales of certain products or services through such network. Franchise system usually applies and uses standardized or uniformed business management and operational model and systems on specific business sector (such as fast foods, convenient stores). Management model and system incorporate following particular conditions: (1) Provision of technology and management know-how including assistance in establishing management system, administration guidelines, operational manual and specifications; (2) license of use of proprietary rights such as trademark, service mark, copyright, etc. and the manners of their usage; (3) training, technical services and assistance provided to franchisees; (4) franchise fee and other relevant payments as well as terms and conditions thereof; (5) planning of promotion programs, advertisement campaign and share of costs or expenses thereof; (6) supply of equipment, materials or goods.

Franchise contract is contractual document governing terms and conditions in relation to rights and obligations between franchisor and franchisee, which may include but not limited to technical cooperation, supply/sale of material and products and assistance on business operations.

Disclosure Requirement.

Franchise business has developed and expanded quickly and prosperously in Taiwan. It is favoured business model for businesses such as convenience stores or fast food restaurants. No special legislation in Taiwan governs franchise business or operations. However, since many advanced countries such as U.S.A. or Japan enacted special laws to govern and regulate process of soliciting franchisees to join franchise network, Fair Trade Commission of R.O.C. promulgated regulation called “The Requirements for the Franchisor to Reveal Information” (“Requirements”) in 1999 (last amended in 2005) to impose certain disclosure requirements on franchisor.

Art. 4 of Requirements provides that franchisor shall provide franchisee following information in writing at least ten days before franchise agreement is signed: (1) Name of business, capital, address, scope of business, registration date and start date for operating franchise by franchisor; (2) name of president and key managers of franchisor, and working experience related to franchise of such person; (3) franchise fee of joining franchise as franchisee, required payment during franchise period, item, amount, payment conditions, method of payment and conditions of refund payments; (4) content, valid period and limitation of licensed trademark(s), patent(s), copyright(s) that franchisee can use and any other restrictive terms or scope of use; (5) assistance and instruction for operating business and management that franchisor shall provide to franchisee; (6) segregation of business operational territories among franchisees and/or stores owned by franchisor; (7) business names and address of franchise stores joining franchise in city or county where franchisee's store is located, statistics of franchise stores of franchisor on nationwide basis and franchise stores in city or county where franchisee is located as well as number of terminated franchise contracts in preceding year; (8) restrictions on business relationship between franchisor and franchisee during term of franchise contract; and (9) conditions and resolutions of any change, termination and cancellation of franchise contract.

Failing to comply with said disclosure requirement which is unfair to franchisee(s) and has sufficiently affected trading order may subject franchisor(s) to violation of requirement under Art. 24 of Fair Trade Law and to administration fine from NT$50,000 up to NT$25,000,000. Fine can be increased to NT$50,000,000 and imposed consecutively until cessation or correction of violation.

Reporting Requirement.

In accordance with interpretations of Fair Trade Commission, use of trademark(s) or service mark(s) or logo(s) licensed by franchisor, certain control over management operations and restrictions on purchase of raw materials under franchise agreement would form controlling and subordinating relationship between franchisor and franchisee. Such relationship is regarded as form of combination as specified under Item 5 Paragraph 1 Art. 6 of Fair Trade Law, i.e. “Direct or indirect control of business operations of the other enterprise”. Therefore if franchisor has annual sales exceeding NT$10 billion or franchisee has annual sales exceeding NT$1 billion, or market share attains one-third as result of combination; or any enterprise participating in combination holds market share of one-fourth, both parties shall report franchise to Fair Trade Commission for recordation. Unless opposition is raised by Fair Trade Commission within 30 days which would then start review and screening process, franchise transaction will be deemed as approved. Said 30-day period can be extended for another 30 days.

To make filing for each franchise agreement on case-by-case basis would be wasting manpower and resources in multiple franchise projects. Fair Trade Commission has thus established “Guidelines Handling Combinations by Convenient Stores Package Filing” which allows franchisor engaging in convenient stores business to file package report for all franchisees who will join franchise in next two months. This process has substantially simplified reporting process.

As matter of fact, due to threshold having been increased in early 2002 to allow FTC focus on major combination cases, very few or no franchise operations would exceed threshold requiring filing report. In particular, new franchisee joining franchise network has no sales in previous fiscal year. Reporting requirement is thus exempted.

3.05 FRAUDS, STATUTE OF:

Under Civil Code, there is no specific statute comparable to “Statute of Frauds”, but certain kinds of agreements are required to be in written form, such as transfer of title of ownership of real property and contractual regime of matrimonial property.

3.06 INFORMATION TECHNOLOGY, INTERNET AND NEW MEDIA:

E-Commerce.

Contracts.

In principle, when person under age of 20 enters into contract, legal representative is required to act on his or her behalf or approve contract. R.O.C. (Taiwan) authorities are considering enacting special legislation for contracts entered over Internet because of difficulty in ascertaining legal responsibility in e-commerce. If there is no express mutual consent on governing law and contracting parties are of different nationalities, court will apply law of country where offer originates as governing law. In principle, R.O.C. courts will assume jurisdiction of civil matters if there is any genuine link with R.O.C. or if one party is R.O.C. citizen or company. Authorities in charge of consumer protection, Consumer Protection Commission, issued guidelines on matters that should be stipulated in standard e-commerce agreements as well as matters that shall not be stipulated in 2005. Although guidelines are for reference only, they may affect court's position on consumer protection in future.

Electronic Documents and Digital Signature.

Certain transactions, such as contracts for insurance or sale of real property, are required by law to be in writing, with signature or seal affixed. As Internet and other computer networks become means of transacting business, relevant law may be amended. R.O.C. government has, to some extent, already accepted electronic documents; under Criminal Code, electronic documents are deemed quasi-written documents.

Electronic Signature Act has become effective in 2001. Term “electronic signature” covered in Electronic Signature Act includes all forms of electronic signature, such as digital signature adopting asymmetric encryption technology. According to Electronic Signature Act, with consent of parties, hard-copy documents may be produced in electronic form with full legal effect, provided certain conditions set forth in Electronic Signature Act are met. For example, government authorities may publicly announce documents that may not be produced in electronic form and such documents will need to be produced in hard-copy form with traditional signatures.

Digital products may be covered under Consumer Protection Act. However, as digital products have yet to be properly classified as “goods” or “services”, it is unclear whether courts will recognize consumer's right to cancel agreement to purchase such items.

Electronic Payment.

Taipei Disbursement Office of the Ministry of Finance is proposing electronic payment program under which any government agency that has digital signature issued by Government Certification Authority can electronically make disbursement through financial institute to receiver.

In addition, with competent authority's prior approval granted by regulations prescribed by Central Bank of China and Art. 42-1 of the Banking Law, bank in Taiwan can issue stored-value cards, which use electronic, magnetic, or optical means to store value of money, and cardholder can use all or part of stored value to exchange for merchandise or services or to make payments. Banks are also permitted to provide internet banking services to allow its customers to conduct online fund transfer.

Intellectual Property Rights.

Domain Names.

No specific law governs protection of domain names, and whether use of domain name constitutes trademark use remains unsettled in R.O.C. In proposed amendment to Trademark Act, use of another's registered well-known trademark as domain name would be deemed infringement of trademark. Domain names are treated differently from company names. Trademark owner may not invoke Trademark Law, which prohibits person from maliciously using company name identical or similar to another's registered trademark if application date of mark was earlier than that of application date of company name, in order to request domain name owner to change its domain name.

Fair Trade Act (“FTA”) may serve as legal basis for requesting domain name registrant to cease using and/or to cancel registration of offending domain name. FTA prohibits any enterprise from using in identical or similar manner symbol signifying goods, business, or service of another person that are commonly known to relevant enterprises and consumers, if such use causes confusion with goods or services of any other person. (Art. 20 of FTA). FTA also prohibits enterprise from conducting any deceptive or obviously unfair acts that are sufficient to affect trading order. (Art. 24 of FTA).

On 23 Feb. 2000, Fair Trade Commission (“FTC”), quasi-judicial government agency in charge of unfair competition matters, made its first favorable decision to trademark/tradename owner based on Art. 24 of FTA, ruling that person who registered domain name that is identical to another person's trademark must correct its act.

FTC specifically stated that this decision was made on its own merit after considering various factors. In future, if any petition is filed regarding similar disputes, FTC will evaluate each case based on international developments of Internet, research results of scholars, and opinion of relevant industries to assist it in making its decisions.

Taiwan Network Information Center (TWNIC), nonprofit foundation formed by various government agencies and private enterprises is responsible for supervising domain name registration in Taiwan. TWNIC coordinates services for all networking communities. Registration is made on first come, first serve basis. Foreign enterprises must file application through its branch office or attorney at law.

Pursuant to Domain Name Dispute Resolution Policy published by TWNIC, complaints may be filed with authorized dispute resolution mediators in event that: (1) Domain name is identical or similar to his/her trademark, service mark, name, or other symbols and thus, causes confusion; (2) registrant has no legitimate right or interest in respect to domain name; or (3) registrant has registered or used domain name in bad faith. Taipei Bar Association and Science & Technology Law Center of Institute for Information Industry have been designated as dispute resolution mediators.

Hyperlink and Copyright/Unfair Competition.

Hyperlinking may infringe upon copyright owner's moral rights, which allow copyright owner to protect integrity of content, form or title of work. However, these rights are only infringed when reputation of owner is damaged. Hyperlinking may constitute reproduction, adaptation, or compilation of work at issue without authorization of copyright owner. If person's work is linked by website owner without authorization and work appears on website, site owner may have infringed copyright. Reproduction often occurs on Internet when image link is provided, and copyrighted work is reproduced in its entirety. Since frame links leading to page contain several copyrighted works, such devices constitute unauthorized compilations. If copyrighted work appears in part, it is deemed adaptation.

It is not yet clear who should be held responsible for infringements. Creator of link is not actually engaging in any acts of infringement, and since R.O.C. law does not recognize concept of contributory infringement, some scholars believe that creator cannot be held responsible. However, argument has also been made that user should not be held responsible for downloading images not knowing that links lead to copyrighted works.

If purpose of linker is to increase value of his own site, such act may be deemed as taking free ride on another person's efforts, constituting act of unfair competition. Art. 24 of FTA, stated supra, might be applicable.

Current Copyright Law is insufficient to deal with issues of Internet. Government is currently drafting amendments to Copyright Act to cover many of those issues.

Downloading from Internet.

R.O.C. courts have ruled that downloading works from Internet and reproducing them on CD-ROM discs without authorization of copyright owner constitutes act of reproduction in violation of Copyright Act. Such rulings suggest that works published in serial form on Internet are protected by Copyright Act.

Act of copyright owner placing his own copyrighted work on Internet does not constitute implied license for others to reproduce it. Pursuant to Copyright Act, unless authorization is clearly expressed in agreement, it shall be presumed that authorization was not given. R.O.C. Copyright Act stipulates that electronic rights management information (``ERMI'') embedded by copyright owner must not be removed or altered unless removal or alteration of ERMI of work is unavoidable in lawful exploitation of work given technological limitations at time of act, or it is technically necessary to convert recording or transmission system. If ERMI has been unlawfully removed or altered, no one must distribute or, with intent to distribute, import or possess original ERMI or any copy of such work, or publicly broadcast, publicly perform, or publicly transmit ERMI.

Except as otherwise stipulated in R.O.C. Copyright Act, technological protection measures (``TPM'') employed by copyright owners to prohibit or forbid others from accessing works must not, without legal authorization, be disarmed, destroyed, or by any other means circumvented. No equipment, device, component, technology or information for disarming, destroying, or circumventing TPM must, without legal authorization, be manufactured, imported, offered to public for use, or offered in services rendered to public.

Further, Legislative Yuan passed legislation governing peer-to-peer (``P2P'') transmission on 14 June 2007. According to amended R.O.C. Copyright Act, no Internet service provider (``ISP'') must infringe copyrights and obtain profits by providing users with any computer programs or technical means for public transmission or reproduction of copyrighted material (e.g., P2P downloading) through Internet without copyright owners' consent, or ISPs will be liable for compensation and sentenced to no more than two years imprisonment and/or fined no more than NT$500,000.

However, if ISP has no intention to provide users with software or technical means to commit infringements and obtain profits (legitimate software includes MSN Messenger, Skype, Yahoo! Messenger, and blogging software), ISP will not breach subject regulations in principle. Intention in amended Copyright Act means advertisements or any other aggressive measures to prompt, entice, incite, or persuade public to infringe copyrights by using computer programs or other technical means.

If any entity is convicted by court for infringing copyrights by means of public transmission or reproduction, public dissemination, public broadcast, public presentation, public performance, public display, adaptation, compilation, or leasing, or for providing users with any computer programs or technical means for public transmission or reproduction of copyrighted material through Internet without copyright owners' consent, it must stop infringing act immediately. If entity fails to do so, authorities may invite experts and relevant enterprises to determine whether infringement is severe. If authorities determine that infringement is severe and entity refuses to take correct action, authorities may order entity to suspend or wind up its operations.

Internet Service Provider (ISP) Responsibility.

According to Regulation for Internet Content Rating, ISP shall remove content not suitable for minors and children to review upon request of government authorities and shall implement Internet content rating mechanism in accordance with requirements set forth by government. Thus far, content rating system has yet to be finalized. Intellectual Property Office is planning to amend Copyright Act, limiting ISP's responsibility and releasing it from any liability arising from Internet user's copyright or trademark infringement. However, ISP must provide ``Notice & Take Down'' mechanism, which allows copyright owner to notify ISP that Internet user is infringing his/her copyright; ISP will then take infringing posting down immediately. In addition, ISP must provide Internet user accused by copyright owner with ``Counter Notification'' mechanism for appealing. Draft provisions are being reviewed by Legislative Yuan as of Sept. 2008.

Pornography.

To prevent and eradicate online child pornography, Regulations Governing the Rating of Internet Content designate any depiction of sexual acts or sexual obscenity, or exposure of human genitalia, employing action, image, text, dialogue, sound, picture, photograph, or any other media, that adults will not find vulgar or embarrassing in general, but that harms children or adolescents psychologically, as ``restricted'' material and not viewable by those under age of 18. Regulations stipulate that ISPs must complete their Internet rating preparations and implement ratings system within 18 months of promulgation of Regulations.

Regulations Governing the Rating of Computer Software, which became effective in July 2006, also require computer-software makers to rate computer software; four ratings are possible. If content of certain computer software meets definition of child pornography under Regulations Governing the Rating of Internet Content, as discussed above, computer software must be rated as ``restricted.'' However, Regulations are for reference only and have no binding effect on computer-software makers.

Further, Art. 29 of the Child and Youth Sexual Transaction Prevention Act stipulates that whoever through advertisements, publications, broadcasting, television, electronic signals, computer networks, or any other media induces underage person to engage in prostitution or matches third party with child prostitute, must be sentenced to imprisonment of not more than five years and must also be fined not more than NT$1,000,000.

In addition, Criminal Code and Social Order Maintenance Act also prescribe penalties for distributing illegal pornography.

Computer-Processed Personal Data Protection Act.

This Act criminalizes illegal collection, international transmission, and computer processing or use of computerized personal data such as names, fingerprints, medical histories, and financial status by public or private institutions.

Act states that collection, computer processing, or use of personal data by governmental agencies and private entities conducting certain activities may be conducted only for legitimate purposes or under authorized conditions. Draft amendment bill to this Act is being reviewed by Legislative Yuan as of Sept. 2008. After enactment of amendment bill, Act will become applicable to ``all'' private sector. However, it is unclear whether information contained in e-mail or domain name can represent individual. If information can represent individual and is considered personal data, then it is protected. If not, such personal information can be protected through privacy right under Civil Code.

Criminal Code punishes any person who uses computer to illegally reveal another's secrets, or who enters into another person's computer, bypasses their security and interferes with electronic records in such way as to cause injury to public or other person(s).

Civil Code.

Amended Civil Code adds clause to Art. 195, which allows injured party in privacy case to claim compensation for any non-pecuniary losses.

Security.

Companies seeking protection of trade secrets can look to Trade Secret Law, but that Law offers only civil liability as relief. Alternatively, companies can invoke FTL to provide protection against unfair competition.

Tax.

No special laws or regulations are enacted to govern taxation of Internet businesses. Therefore, general tax law applies.

Internet business without physical presence in R.O.C. does not have to file application for registration with tax authority in charge. However, any income of such business derived from R.O.C. sources is still subject to income tax. Any goods or services sold within R.O.C. or imported from abroad are subject to value added tax.

Criminal Jurisdiction.

According to Judicial Yuan, R.O.C. courts have jurisdiction over crimes either committed in R.O.C. or whose results occur in R.O.C. In case regarding sale of firearms by U.S. website over Internet to someone in R.O.C., it was held that R.O.C. court has jurisdiction, since sale of firearms is illegal in R.O.C. and website can be accessed from R.O.C.

3.07 INTEREST:

Debtors and creditors may agree on interest rate, subject to maximum rate specified in Civil Code, i.e., 20% per annum. In case of debt bearing interest, if no rate has been fixed by contract or by law, rate shall be 5% per annum. If interest rate agreed upon exceeds ceiling provided for by Civil Code, creditor is not entitled to claim portion of interest over ceiling. Agreement for interest on interest is, in principle, not permitted, except when it is made in writing with respect to accrued interest which has not been paid for period of over one year from due date or there shall be commercial usage that indicates otherwise.

3.08 LICENSES, BUSINESS AND PROFESSIONAL:

Practically, most of business activities, professions and means of transportation as well as all trademark and patent rights will need license or certificate from authority. (See topic 3.02 Commercial Register; categories 2 Business Organizations, topic Corporations; Intellectual Property, topics Patents, Trademarks; Transportation, topics Motor Vehicles, Shipping.)

3.09 MONOPOLIES, RESTRAINT OF TRADE AND COMPETITION:

Fair Trade Act ("FTA") was promulgated on 4 Feb. 1991, became effective on 4 Feb. 1992 and last amended on 6 Feb. 2002. FTA is enforced by Fair Trade Commission ("FTC") under Executive Yuan.

Abuse of Dominant Position by Monopoly.

FTA prohibits monopoly from abusing its dominant position. Act of abuse includes both exclusionary and exploitative abuses. Monopoly is prohibited from unfairly excluding others from market, maintaining and/or changing prices unjustifiably, requesting unjustifiable favored treatment, or otherwise abusing its dominant position. Oligopolistic firms acting in concert will be treated as monopolies if they collectively occupy dominant position.

Merger.

"Combination" under FTA is defined broadly to include statutory mergers, acquisitions of one-third or more of voting stock of or interest in another enterprise, transfer or lease in whole or major part of enterprise's business or property, exercise of effective control over business or personnel employment of another enterprise, and operation of another enterprise or regular joint operation. Failure to file pre-combination notification to FTC may result in divestiture, compulsory disposition of assets, cessation of business and/or fines.

Prior notification to FTC will be required for combination of enterprises where: (1) Combined enterprise will have one-third of market after combination; (2) one of participating enterprises has one-fourth of market before combination; or (3) annual revenues of participating enterprise exceed thresholds publicly announced by FTC. Combination can be implemented if FTC does not object within 30 days (which can be extended to 60 days if necessary) after FTC's receipt of complete filing materials.

Cartel.

Concerted actions to restrict prices, output, customers, territories or otherwise restrict each other's commercial activities are illegal, unless participants procure prior exemption from FTC. Accordingly, enterprises are prohibited from engaging in horizontal price-fixing, horizontal territorial allocation, or output restrictions. Prior exemptions can be granted by FTC if concerted action in question meets requirements of increasing efficiency, unifying standards, increasing joint research and development, or maintaining orderly import and export.

Vertical Restraint of Trade.

Agreements to fix resale price is null and void. FTA also prohibits vertical exclusionary practices such as boycott, discrimination, unfair inducement, tying arrangements, and breaches of confidence, if they are found to be unreasonably restrictive.

Unfair Practices.

FTA prohibits other means of unfair competition such as trademark infringement, false advertisement, intentional mislabeling and other acts that may confuse consumers, trade defamation, misappropriation of trade secrets, and other deceptive or unfair practices. In addition, pyramid sales schemes in which commissions, bonuses or other economic gains are principally derived from recruiting others to join plan is illegal.

Liabilities and Remedies.

FTC has power to investigate violations and to impose administrative penalties. Any person injured by any anticompetitive act or unfair methods of competition could seek injunctive relief, and treble damages may be awarded at discretion of court. Court may use unfair advantage gained by such unlawful act as measure of compensation. Violation of FTA may result in criminal liability, including imprisonment up to three years and fine up to NT$100 million. Criminal sanctions also apply to individuals working for entities engaging in such anticompetitive activities. Importantly, unrecognized foreign legal persons and entities may also bring actions pursuant to FTA if there is reciprocal protection.

IPR.

FTA does not apply to “proper” exercise of patents, trademarks and copyrights, but will apply when practice in question restricts competition in unreasonable manner.

3.10 NEGOTIABLE INSTRUMENTS:

See topic 3.01 Bills and Notes.

3.11 SALES:

Contract of sale is consummated when parties mutually agree on object to be sold and price to be paid. Vendor is bound to deliver thing sold to buyer and to cause buyer to acquire its ownership. Vendor must warrant that there is no defect in title of object, or existence of claim or right, if they are objects; such warranty is exempted if buyer was aware of title defect at time of concluding contract. Vendor of claim does not warrant solvency of debtor unless otherwise provided by contract. Vendor warrants that thing sold is free from defect in quality which would render it unfit for ordinary purposes or for particular purpose under specific contract, or which would impair or destroy its value. If buyer declines to accept thing forwarded from another place because of defect he is bound to preserve it in his custody temporarily and to prove existence of defect immediately. He may also sell thing forwarded if it is perishable or easily deteriorates, having first acquired permission therefor of authorities, chamber of commerce, or notary of place where thing is. In case of nonperformance by vendor of his duties concerning defect of thing sold, buyer has option to rescind contract or to reduce price. However, if rescission of contract would apparently be unfair to transaction, buyer may only be entitled to reduced price. Rescission of contract on account of defect in principal thing extends to its accessory. Right of rescission of contract or reduction of price of thing sold in case of defect is extinguished if not exercised within six months after buyer's notification of defect or five years after delivery, unless defect was intentionally concealed.

Unless otherwise provided by law, by contract or by custom, delivery of object sold and payment of price must take place simultaneously. Profits and risks of object sold pass to buyer at time of delivery, unless otherwise provided by contract. Right of redemption may be exercised if contract so provides, but period for exercising right cannot exceed five years. Cost of redemption must be borne by person who redeems.

Particular kinds of sales are: Sale on approval, sale by sample, sale by installments, and sale by auction. In sale by sample, vendor warrants that object sold will conform to sample.

Notices Required.

In case party to sales contract is in default, other party may specify reasonable period of time for him to perform. If party in default does not perform his obligation within such period, other party may rescind contract. In this connection, exercise of right of rescission will not affect right of party not in default to claim for damage. (C. C. 254 & 260). If according to nature of contract or expression of parties, object of contract cannot be fulfilled if performance is not effected within specific period of time, and if said period of time elapses without effectuation of performance by one party, other party may rescind contract without having to give notice required in C. C. Art. 254. (C. C. 255). Yet notice of rescission must reach other party and is irrevocable. (C. C. 258).

Applicable Law.

See topic 3.04 Contracts, subhead Applicable Law.

3.12 SECURITIES:

Unless otherwise stated, articles cited are those of Securities and Exchange Law ("SEL"), which was promulgated on 30 Apr. 1968 and last amended on 30 May 2006.

Regulatory Powers of Supervising Authority.

Financial Supervisory Commission ("FSC") is authorized by SEL to administer within comprehensive regulatory framework provided by SEL. (Art. 3).

Definition of "Security" under SEL.

Under SEL, term "security" or "securities" shall include government bonds, corporate stocks and corporate bonds, and any other securities approved by FSC. In addition, any stock warrant certificate, any certificate of entitlement to new shares, any certificate of payment or any document of title to any of foregoing securities shall be deemed as securities. (Art. 6).

Catch-all wording of this article is intended to cover interim securities or other documents that would otherwise escape being governed by SEL. Under authority granted by Art. 6, FSC has ruled that beneficial certificates issued by securities investment trust enterprises are "securities".

FSC also ruled that "the offering and sale of foreign stocks, bonds, government bonds, beneficial certificates or other securities in the nature of investment vehicles shall be governed by relevant R.O.C. securities laws and regulations, without actually defining them as securities, and that conclusion of certain "investment contracts" by overseas Chinese or foreign nationals for purpose of raising funds in Taiwan is equivalent to issuance of securities. However, criteria for determining whether any such particular contract constitutes investment contract has yet to be further defined under SEL. In Feb. 1996, Guidelines Governing the Offering and Issuance of Securities by Foreign Issuers was promulgated and last amended on May 2, 2008 ("Guidelines"). Pursuant to Guidelines, "securities" include Taiwan Depositary Receipts, stocks and bonds offered and issued in Taiwan by juristic persons organized under laws of foreign jurisdictions.

Corporate Governance.

Under SEL, independent directors of public company can be discretionary or mandatory. Public company meeting criteria set forth by FSC is required to have at least two directors or not less than one-fifth of all directors (whichever is higher) for its independent directorship. (Art. 14-2). According to FSC's ruling on Mar. 28, 2006, following two types of public companies are subject to above mandatory independent director requirement: (i) Financial holding companies, banks, bill finance companies, insurance companies and securities house subsidiaries of financial holding companies that engage in underwriting, dealing and brokerage business; and (ii) public companies other than financial institutions as listed in item (i) having paid-in capital of NT$50 billion.

In addition, public company may establish audit committee to replace its supervisorship. However, FSC may require public company meeting criteria set forth by FSC to establish audit committee. FSC has not adopted policy to require mandatory audit committee of any public company to date. Under newly amended SEL, audit committee shall have at least three members, and one of them must have accounting or financial expertise. In addition, all independent directors shall be members of audit committee with one of them to act as chairman of committee. All significant matters of public company (such as transactions of company's material assets or derivative transactions, offering, issuance, and private placement of equity securities, appointment, removal, determination of compensation of company's auditor, and matters with conflicts of interest with any of company's directors or supervisors) must be submitted to its audit committee for approval by simple majority vote. (Art. 14-5).

Furthermore, public company shall have at least five directors. In addition, unless otherwise approved by FSC, representatives designated by corporate or government shareholder are prohibited from acting as director and supervisor simultaneously. (Paras. I and II, Art. 26-3).

Unless otherwise approved by FSC: (a) More than one-half of directors shall not be spouse, parent, grandparent, child, grandchild, brother or sister of another director; and (b) at least one supervisor shall not be spouse, parent, grandparent, child, grandchild, brother or sister of another director or supervisor. (Paras. III and IV, Art. 26-3). SEL also requires public company to adopt rules governing its board meetings. (Para. VIII, Art. 26-3).

Subscription, Issuance, Public Offering and Private Placement.

Offering and issuance of securities are subject to prior FSC registration unless offer and issue of securities is made by private placement. (Arts. 22, 43-6). Under registration system, certain public offerings would automatically become effective after period from date of filing application with FSC unless FSC dissents in that period. Securities exempt from such registration requirements include government bonds, and other securities specifically authorized by FSC.

SEL defines “public offering” to mean offering of corporate stocks or bonds to “nonspecific persons” by promoters prior to incorporation of company, or by issuer prior to issuance of securities. SEL also defines “private placement” to mean offering to “specific persons” in accordance with Paragraphs I & II, Art. 43-6 of SEL by public companies.

Employees of companies limited by shares generally have preemptive rights on 10% to 15% of their company's new share issues. In addition, existing shareholders have preemptive rights over balance of newly issued shares after employees have exercised their preemptive rights in accordance with Art. 267 of Company Act. However, shareholders' preemptive rights are limited by SEL so that in cash offering of new shares by issuer whose stocks are either listed on Taiwan Stock Exchange (“TSE”) or R.O.C. Gre Tai Securities Market (“GTSM”), at least 10% of such new issuance must be set aside to be subscribed by public at same price offered to existing shareholders and employees. Public companies, whose shares are traded neither on TSE nor GTSM but are subject to disclosure requirements under SEL must also set aside for public offering at least 10% of new shares offered for cash, unless specific exemption from FSC is obtained. (Art. 28-1).

Disclosure and Reporting Requirements.

In application for registration to public offering and/or issuance of securities, issuer is required to submit prospectus in addition to those items required by Company Act. (Art. 30). Failure to provide prospectus to subscribers, making materially misleading or untrue statements, or omitting required material statements from prospectus will lead to liabilities on issuer, responsible persons, signatories of prospectus, related professionals, and underwriters. (Arts. 31 and 32). In addition, “due diligence” defense to misleading or untrue or omitted statement in prospectus to related officers of issuer and underwriters involved in drafting prospectus is also specified in SEL. (Art. 32).

Public companies are required to report and publish audited annual and semi-annual financial reports as well as first, and third, quarter financial reports that have been reviewed by their respective independent certified accountants. Public companies are also required to report and publish monthly operation statement before tenth day of following month. Events that may have significant impact on shareholders' interests or share prices also trigger reporting requirements.

Art. 25 of SEL imposes disclosure and reporting requirements regarding share ownership of managerial personnel, directors, supervisors and holders of more than 10% of shareholdings of public companies. These reports must include class, number and par value of issuer's equity securities. Such shareholders must also report monthly with issuer itemizing any changes in number of shareholdings in preceding month. Issuer is required to collect such reports and file them with FSC. Shares held by such shareholder's spouse, minor children and nominees shall be aggregated for calculation.

Art. 22-2 of SEL also provides that transfer of shares by directors, supervisors, managers or holders of more than 10% of shares of issuer may only be effected in accordance with any of following methods: (1) By transfer to nonspecific person following approval by, or registration with, FSC; (2) by transfer of over 10,000 shares which are to be traded on TSE or GTSM within daily transfer allowance and which have been held for period prescribed by FSC, within three days following reporting to FSC; or (3) by transfer within three days following reporting to FSC, by transfer to specific persons who meet certain qualifications prescribed by FSC.

Private placement is subject to post filing to FSC rather than prior approval from FSC. Private placement of securities issued by public company must be made only to following accredited investors: (i) Banks, bill finance companies, trust companies, insurance companies, securities firms or other institutions approved by FSC (collectively, “qualified financial institutions”), (ii) individuals, corporations or funds conforming to criteria prescribed by FSC, or (iii) directors, supervisors and managers of issuer or its affiliates. Excluding financial institutions mentioned in item (i), accredited investors in private placement must not exceed 35 investors. (Art. 43-6).

Resale of securities obtained through private placement is restricted. Basically, no resale of restricted securities is allowed in first year from delivery date. Resale of restricted securities below volume prescribed by FSC is permitted in second and third year. After three years have lapsed, resale restrictions no longer apply. Resale restrictions will not apply to: (i) Transfer between qualified financial institutions if securities of same class are not listed on TSE or GTSM, (ii) transfer by operation of law (e.g., inheritance), (iii) transfer of less than 1,000 shares in any three month period, and (iv) other transfers as approved by FSC. (Art. 43-8).

Preemptive rights of employees and existing shareholders of issuer as required by Company Act will be exempted in private placement. In order to qualify exemption of preemptive rights, resolution of shareholders meeting must be adopted by shareholders representing more than 50% of total issued shares present at that meeting and approved by two-thirds or more of attending shares. (Art. 43-6). Private placement is subject to certain disclosure obligations, and general solicitation of privately placed shares is prohibited. (Arts. 43-6, 43-7).

Tender Offers.

Art. 43-1 of SEL requires any person acquiring, individually or jointly with other persons, more than 10% of the total issued and outstanding shares of public company to file with FSC report within ten days after such acquisition. Such report must disclose purpose and funding source of share acquisition and any other matter as required by FSC. Under SEL acquisitions of shares in public companies are not required to be made through tender offers, if any of following is met: (i) Shares to be acquired, together with shares held by acquirer and its related person(s), do not exceed 5% of total issued shares with voting rights of target company; (ii) acquisition of shares in target company, in which 50% of total issued shares with voting rights of target company have been held by acquirer; and (iii) other circumstances prescribed by FSC.

Additionally SEL requires mandatory tender offer if acquirer alone, or together with other persons, intends to acquire shares in target company in excess of threshold prescribed by FSC (i.e. 20% of total issued scheme of target company in any 50 day period). (Art. 43-1).

Tender offer regulations allow consideration of tender offer to include domestic listed or traded share, shares or corporate bonds of acquirer if it is public company, foreign securities approved by FSC, or other properties of acquirer. Offeror must make filing with FSC and make public announcement before it may proceed with tender offer.

To protect shareholders of target company, SEL and tender offer regulations require that offeror cannot lower offering price, decrease intended level of securities, shorten offer period or change matters specifically required by FSC (Art. 43-2), that tendering shareholders may withdraw their tender at any time within tender offer period which shall be for period of no less than ten days but no more than 50 days (unless otherwise extended upon FSC's approval) and that tendered shares must be taken up pro rata by offeror if shares tendered exceed number of shares offeror seeks to purchase.

Acquirer may not make different offers to different shareholders of target company, and may not acquire target securities from any channel outside tender offer during offer period. (Arts. 43-2 to 43-3). Offeror is required to deliver tender offer prospectus upon request of shareholders of target company or when shareholders tender their shares. (Art. 43-4). Once started, tender offer may not be terminated unless acquirer is deceased, adjudicated bankrupt, or incompetent, being subject to reorganization, or financial or business conditions of target company are materially changed (to be proved by acquirer) and approval from FSC is required. Unless otherwise approved by FSC, acquirer will be prohibited from doing any subsequent tender offer for shares in same target company within one year if it fails to complete tender offer or terminate tender offer without obtaining FSC's approval. (Art. 43-5).

Insider Trading.

Art. 157 of SEL is designed to prohibit corporate “insiders” from taking advantage of their access to information by engaging in short-term trading in securities held by them. This article permits issuer to claim for disgorgement of such profits within six months of trading from directors, managerial personnel, supervisors and shareholders holding more than 10% shares of issuer.

Art. 157-1 of SEL prohibits following persons from trading stock or other equity securities of company either listed on TSE or GTSM based on material price-sensitive information prior to or within 12 hours after its public disclosure: (a) Director, supervisor, manager of company or individual who is designated by government or corporate shareholder to act as director or supervisor of company; (b) shareholder holding more than 10% of total issued and outstanding shares of company; (c) any person who has learned information due to occupational or controlling relationship; (d) any person who ceases having such status as described in preceding items for period of less than six months; or (e) any person who has learned information from any of persons described in preceding items.

Material price-sensitive information shall refer to such information regarding finance or business of company, supply and demand of such securities on market, tender offer of such securities, or any other information that would have material impact on investment decisions of reasonably prudent investor.

Persons who engaged in insider trading shall be held criminally liable and be punished with imprisonment for not less than three years but not more than ten years, and in addition thereto, fine of not less than NT$10 million but not more than NT$200 million may be imposed. If criminal income therefrom exceeds NT$100 million, punishment of imprisonment will be raised for not less than seven years, and in addition, thereto, fine of not less than NT$25 million but not more than NT$500 million.

As for civil liabilities, persons who commit insider trading shall be liable to bona fide trading counterparty for damages in amount of difference between buying or selling price prior to public disclosure of information and average closing price for ten business days after public disclosure of information. Moreover, court may, upon request of bona fide trading counterparty, treble amount for sever violation of insider trading transaction.

Anti-fraud Provisions and Civil Liabilities.

Art. 155 of SEL prohibits manipulative practices in securities trading and provides private remedy for investors injured by manipulative conduct prohibited by SEL. Persons who commit manipulative conduct will be held criminally liable and will be held liable for civil remedies to bona fide purchasers or sellers of securities. Art. 155 prohibits any transactions entered into simultaneously with purpose of creating misleading appearance of trading. This article also prohibits: (i) Transactions entered into for purpose of depressing or raising prices of securities; (ii) corresponding transactions entered into with intent to create misleading impression for brisk trading of specific security; and (iii) spreading of rumors or misleading information for purpose of manipulating such prices. In addition, Art. 155 of SEL contains provision to prohibit any direct or indirect manipulative conduct aimed at affecting prices.

Under general anti-fraud provision contained in Art. 20 of SEL, fraudulent conduct in connection with offering and sale of securities is prohibited. In addition, misrepresentation or omission in financial reports or any other relevant documents filed or published by issuer is prohibited. Violation of any of these prohibitions will result in criminal sanctions, in addition to civil sanctions that award damages to bona fide buyers or sellers.

Establishment of Securities Firms.

Criteria for the Establishment of Securities Firms (“Establishment Criteria”) was promulgated on May 17, 1988 and last amended on Oct. 2, 2007. Under Establishment Criteria, minimum paid-in capital for underwriting, dealing and brokerage operations is NT$400 million, NT$400 million, and NT$200 million, respectively. Therefore, integrated securities house operation will require total paid-in capital of NT$1 billion. Working capital requirement applicable to branches of foreign securities firms are substantially lower than capital requirements applicable to local securities firms.

Foreign access to securities firms can be made in any one of two following ways: first, any foreign investor or overseas Chinese may invest in securities operation by setting up wholly-owned subsidiary or by joint venturing with R.O.C. investors. Second, foreign securities firms may set up branch operation.

4 CITIZENSHIP

4.01 ALIENS:

See category 16 Immigration, topic 16.01 Aliens.

4.02 IMMIGRATION:

See category 16 Immigration, topic 16.02 Immigration.

5 CIVIL ACTIONS AND PROCEDURE

5.01 ACTIONS:

Person capable of undertaking liabilities by his own juristic acts has capacity to sue. Entity without juristic personality has capacity to sue if it has appointed representative or administrator. Foreigner who has no capacity to sue under law of his own country shall be deemed to have such capacity if he has capacity to sue under R.O.C. law. (C. C. P., 45, 46). Foreign corporation, whether officially recognized by R.O.C. government, may institute civil action as independent party. Except otherwise provided, service of civil complaints and summons shall be effected ex officio by clerk of court and shall be served by process-server, post office or by publication. (C. C. P., 123, 124 & 149). Service on foreign juristic persons or corporate entities having business office establishments in R.O.C. shall be effected upon by their representatives or managers residing in R.O.C. (C. C. P., 128). If person to be served on refuses to accept service without lawful grounds, service thereof shall be effected by leaving document at place of service. (C. C. P., 139). Burden of proof is on party who claims facts in his favor. Foreign law, if unknown to court shall be proved by party who cites it in his favor, yet court may ex officio investigate it. (C. C. P., 277 & 283). Means of attack or defence shall, in accordance with proceeding of litigation, be set at proper time before conclusion of oral debate. Where party has proved damage but cannot prove its amount, court should decide amount with due consideration given to all points raised in proceeding. (C. C. P., 196 & 222). Attack and defence of parties during preparation for oral debate shall be submitted to court in briefs with copy sent to other party. (C. C. P., 265).

5.02 DEPOSITIONS AND DISCOVERY:

Depositions for use in U.S. courts may be taken in R.O.C. as long as witness is willing to cooperate. Instructions should be included in regard to signature of deposition, signature and endorsement of exhibits, if any, whether or not stenographer may be employed, use of interpreter if R.O.C. witness is to be examined, whether such witness should be sworn, whether form of oath should be included in deposition, form of final certificate or return, and method of wrapping and mailing, in order that deposition may fully comply with requirements of law in jurisdiction in which it is to be used.

5.03 JUDGMENTS:

Recognized foreign judgments of foreign courts have same force and effect as final judgments of R.O.C. courts. Such judgments will not be recognized: (1) If foreign court would have no jurisdiction according to R.O.C. law; (2) if judgment was given by default without service on or notice to such R.O.C. citizen in country of foreign court according to foreign law within reasonable period or in R.O.C. through judicial assistance of R.O.C. court; (3) if judgment of foreign court is contrary to public order or good morals of R.O.C.; and (4) if there is no reciprocity as to recognition of judgments with country in court of which foreign judgment was rendered. (C. C. P. 402). Judgment of foreign court will be presumed genuine if duly authenticated by appropriate R.O.C. diplomatic or consular officer.

5.04 LIMITATION OF ACTIONS:

Claim is barred by limitation if not exercised within 15 years, unless shorter periods are provided by law.

Claims for each successive payment falling due at intervals of one year or less are barred by limitation if not exercised within five years.

Claims in respect of following are barred by limitation if not exercised within two years: charges for lodging, food, amusements, or for price of goods for consumption, and for disbursements made by inns, restaurants and places of amusement; cost of transportation and disbursements by carriers; rent due to person who carries on business of letting movables; fees, charges for medicine and remuneration of medical practitioners, druggists and nurses, and their disbursements; remuneration of attorneys, public accountants and notaries and their disbursements; restoration of things received from clients by attorneys, public accountants and notaries; remuneration of technical experts, contractors and their disbursements; claims of merchants, manufacturers and craftsmen for price of goods or products supplied.

Statute of limitation begins to run from time when claim can be exercised, but is interrupted by: (1) Demand provided that legal action was taken within six months starting from service of demand; (2) recognition of claim by debtor; or (3) initiation of legal action. Limitation which has been interrupted recommences to run from moment when cause of interruption ceases. Interruption of limitation takes effect only as between parties and their successors and assignees.

Limitation of claim for which there is mortgage or pledge or right of retention does not prevent creditor from satisfying himself out of things mortgaged, pledged or retained.

Period of limitation cannot be altered by juristic acts.

Benefit of limitation cannot be waived beforehand.

5.05 PRESCRIPTION:

One who has, with intention of being owner, enjoyed open, peaceful and continuous possession, for five years of personal property of another or, for 20 years of real property of another which ownership has not been registered, acquires ownership of personal property, or can claim to be registered as owner of real property. In cases of bona fide and faultless possession of unregistered real property, period for prescription is ten years.

6 COURTS AND LEGISLATURE

6.01 COURTS:

R.O.C. courts, except intellectual property court, administration court and military courts, consist of district courts, high courts, and supreme court.

District courts have been established in many cities of R.O.C. In each district court, in addition to regular civil proceedings, there are summary divisions handling civil summary proceedings which are applicable to cases where sum involved does not exceed NT$500,000, certain other cases involving leases, employment agreements, bailments, etc., and other cases by mutual consent of parties. Such summary divisions also handle criminal cases specified in Art. 449 of Code of Criminal Procedure and subject to application by Public Prosecutor. District courts for criminal cases may also render summary judgment if such judgment is regarded appropriate, with prior application of Public Prosecutor. District courts, other than summary divisions thereof, have general original jurisdiction, except for cases under jurisdiction of summary divisions and for certain cases which fall within original jurisdiction of high courts.

High courts are located in provincial and special districts and there are branch high courts in several large districts. National capital and special municipalities may install high courts. These courts have original jurisdiction in civil cases concerning certain election and recall litigation, and in criminal cases concerning internal or external security of nation. High courts also have jurisdiction over cases appealed to them from district courts.

Supreme Court sits at locality of national government and is court of final resort. However, in civil litigation, judgment of high court is final if sum involved is less than NT$1,500,000; in criminal litigation, judgment of high court is final if defendant is charged for crime specified in Art. 376 of Code of Criminal Procedure.

6.02 LEGISLATURE:

See category 1 Introduction, topic 1.02 Government and Legal System.

6.03 REPORTS:

Interpretations of Council of Grand Justices, Conclusion of Symposia Civil and Criminal Chamber of the Supreme Court, Supreme Court Precedent Synopses, and all civil, criminal and administrative judgments rendered after 1999 by district court, high (administrative) court and supreme (administrative) court are published on Judicial Yuan's website, http://www.nwjirs.judicial.gov.tw/FJUD/index.htm. As to judgments rendered before 1999 by each level of court, some can be found on same website and certain notable publications published by relevant judicial authorities. No English translations of decisions of R.O.C. court have been published.

6.04 STATUTES:

Major codes promulgated by R.O.C. Government include Civil Code, Code of Civil Procedure, Criminal Code and Code of Criminal Procedure. In addition, laws have been promulgated on such subjects as companies, banking, negotiable instruments, patents, trademarks, copyrights, insurance, admiralty, securities, real estate, labor unions, labor standard, consumer protection, fair trade, nationality, taxation, etc.

7 DEBTOR AND CREDITOR

7.01 ASSIGNMENTS:

Claim may be assigned unless: (1) Nature thereof prevents assignment; (2) there is agreement that claim shall not be assigned; or (3) claim is not subject to judicial attachment. Agreement mentioned in (2) cannot be asserted against bona fide third party. (C.C. Art. 294).

Security and ancillary rights shall be transferred to assignee concurrently with assignment, except for those which are inseparable from and personal to assignor. Outstanding interest payment is transferred prima facie to assignee along with assignment of principal. (C.C. Art. 295).

Unless otherwise provided by law, assignment will not be binding on debtor unless and until he is notified of assignment by assignor or assignee. Tendering assignment document to debtor has same effect of notification. (C.C. Art. 297).

Upon notification of assignment or other conduct with equivalent effect, debtor may extend to assignee his defences which were originally enforceable against assignor. (C.C. Art. 299).

Ultra vires assignment refers to assignment in which assignment has not been concluded or effected but debtor has been informed of assignment by assignor. Debtor under ultra vires assignment may extend to original assignor his defences which were enforceable against assignee. (C.C. Art. 298).

Assignor should deliver to assignee upon assignment all documentation requisite to verify assigned claim and should provide assignee information with respect to enforcement of assigned claim. (C.C. Art. 296).

Delegation of obligation, if concluded between third party and obligee (creditor), becomes effective upon conclusion of delegation agreement and obligation in question transfers to third party immediately. (C.C. Art. 300).

Delegation, if concluded between third party and obligor (debtor), becomes binding on obligee (creditor) upon obligee's consent to delegation. Obligor or third party may ask obligee to respond within certain period to proposed delegation. Obligee's inaction or lack of response should be deemed as his refusal to accept delegation, which would allow either party to delegation right to withdraw their respective promises for delegation. (C.C. Arts. 301 and 302).

7.02 ATTACHMENT:

Prejudgment/Prearbitration Attachment/Garnishment.

Art. 522 of R.O.C. Code of Civil Procedure ("Code") may be invoked by claimant to seek from court prejudgment/prearbitration protective order against debtor's property. This action is usually recommended to: (i) Exert pressure upon debtor and force it to make voluntary settlement, and (ii) secure enforcement of judgment/arbitral award that may ultimately be made by court/arbitration tribunal in favor of claimant.

Any claimant wishing to apply for prejudgment/prearbitration protective order must send to court application which includes, or is accompanied by: (i) Name and address of debtor; (ii) brief statement describing nature and circumstances of dispute, and specifying amount claimed; and (iii) copies of documentary evidence that substantiates movant's claim. If judge finds that prejudgment protective order is necessary and appropriate, judge will grant to movant order stating amount or value of security that will be required for prejudgment/prearbitration attachment/garnishment order to issue. Amount or value of security is determined at judge's discretion, usually in region of one-third of amount claimed.

Moving party must post security within 30 days after its receipt of court order. Failure to do so within prescribed period renders order void. Attachment/garnishment process may be completed within three—seven days after moving party posts security as court ordered.

Prejudgment/prearbitration attachment/garnishment order, if issued, will remain valid until suit to validate movant's claim on merits is concluded. Alternatively, debtor may post counter-security of amount equal to full amount of movant's claim asking to dissolve prejudgment/prearbitration attachment/garnishment proceedings.

Art. 529.1 of Code provides that any party against whom prejudgment/prearbitration attachment/garnishment order has been issued may demand that court fix period within which party obtaining prejudgment/prearbitration attachment/garnishment order must bring suit before appropriate court or commence arbitration to validate its claim on merits, in default of which, prejudgment/prearbitration attachment/garnishment order will be quashed. In other words, claimant will be required to bring suit or to commence arbitration against debtor within specified period (usually seven days) fixed by court, if debtor so demands.

Prejudgment Injunction.

Art. 532 of R.O.C. Code of Civil Procedure ("Code") may be invoked by plaintiff to seek prejudgment/prearbitration injunctive order from Taiwan court under certain circumstances, when prejudgment attachment may not be adequate or applicable to restrain defendant's attempt to commit act or acts before judgment/arbitral award can be rendered.

Injunction is order of court directing person to act or refraining from acting in some defined manner, on penalty of being charged with contempt. Prejudgment/prearbitration injunction is drastic and extraordinary remedy generally issued only: (i) To prevent immediate and irreparable injury to moving party; (ii) to preserve status quo during pendency of action; (iii) if moving party demonstrates reasonable probability of success on merits of underlying action; and (iv) if defendant will suffer no undue loss or inconvenience if injunction is granted.

According to Art. 534 of Code, jurisdiction over application for prejudgment injunctive order lies in court which has jurisdiction over underlying action; provided, however, that in case of urgency, moving party may motion to court of place where defendant is located or resides. Any party wishing to apply for prejudgment/prearbitration injunctive order must send to court application. If judge, after considering all of allegations and documents presented, finds that prejudgment/prearbitration injunctive order is necessary and appropriate, he/she will grant to movant order: (i) Restraining defendant's certain activities and actions; and (ii) stating amount or value of security that will be required for injunction to issue. This security is to compensate for any potential damages in case moving party fails in its claim on merits or injunction turns out to be wrongful. Amount or value of security is determined at judge's discretion upon weighing potential damages or loss that may be incurred by defendant in event of wrongful injunction.

Moving party must post security within 30 days after its receipt of court order. Failure to do so within prescribed period renders order void. Security may be posted in form of cash, government bonds, negotiable certificates of deposit issued by local banks, or any other cash equivalent. Security is refundable when underlying action is concluded favorably to party obtaining prejudgment/prearbitration injunctive order. If such party ultimately fails in its claim on merits, security is used to indemnify damages and expenses, if any, sustained by defendant who is found to have been wrongfully restrained or enjoined by prejudgment/prearbitration injunctive order.

Prejudgment/prearbitration injunctive order issued by court and copy of injunctive order application of moving party must be served upon defendant immediately after moving party posts security as ordered by court. Defendant is then bound by injunctive order from time that defendant receives order. Any person acting in contravention of injunctive order is guilty of criminal charge and may be liable for conviction to imprisonment for term not exceeding one year or fine not exceeding NT$9,000.

Like prejudgment/prearbitration attachment/garnishment, any party against whom prejudgment/prearbitration injunctive order has been issued, may demand that court fix period in which party obtaining prejudgment/prearbitration injunctive order must bring suit before appropriate court/commence arbitration to validate its claim on merits, in default of which, prejudgment injunctive order will be quashed.

7.03 BANKRUPTCY:

In Taiwan's legal system, insolvent individuals, partnerships and corporations may be entitled to benefits of Bankruptcy Act as voluntary bankrupt. Creditor may alone file involuntary petition in bankruptcy against debtor, even in cases where former is fully secured (collateralized). In addition, law specifies circumstances in which court, acting on its own initiative, may adjudge insolvent bankrupt. Bankruptcy Act's principal purpose is to equally distribute property of estate of bankrupt debtor among all creditors. For this reason, in cases where debtor has few assets, its assets are exempted under the law, or where there is only one creditor, court will dismiss case whether bankruptcy petition is voluntary or involuntary.

Bankruptcy Act requires that bankruptcy petition, whether voluntary or involuntary, be filed with court. Voluntary bankruptcy petition by debtor should be accompanied by schedule of its property, showing in detail amount, nature, location, and value, and list of all creditors, showing their residences or places of business (if known), amount due to or claimed by each of them, security held by them, if any, and what claims, if any, are contingent or disputed. Court will set time period for filing of such schedules by debtor if proceedings are involuntary. Court may, for cause shown, order that insolvent debtor be present for examination concerning conduct of his business, cause of his bankruptcy, his dealings with his creditors and all matters which may affect administration and settlement of his estate.

Judge, if adjudicating bankrupt, will appoint trustee and determine period of time (not less than 15 nor more than 90 days after adjudication) for claim filing and date of first creditors' meeting, which must be within one month after date of adjudication. Task and duties of trustee is to fix value of claims of creditors and assemble assets of estate available for distribution to these creditors. In this case, trustee is representative of estate and has capacity to sue and be sued.

For bankruptcy proceedings to be effective, all efforts by creditors to obtain repayment of their debts must stop, once debtor is adjudged bankrupt. However, Art. 108 of Bankruptcy Act indicates that stay does not apply to those creditors that acquired security interests of pledges/mortgages or liens on any debtor's assets before debtor is adjudged bankrupt. This provision entitles secured or collateralized creditors to pass through bankruptcy proceedings.

Judge should call and preside over meetings of creditors on application or on his own initiative. Trustee should attend creditors' meetings, and produce schedule of property of estate and list of creditors, and report administration of estate. Creditors may, at creditors' meeting, elect one or more supervisors subject to judge's approval. Supervisor(s) may consult with trustee in connection with administration of estate, make recommendations to trustee regarding performance of his duties, and ask judge to call creditors' meeting. Creditors' meeting has power to resolve, by majority of creditors, matters concerning management method of property of estate and as to whether bankrupt's business should continue or not.

In order to wind up bankruptcy proceedings, property of estate must be disposed of and converted into cash, with cash being parcelled out to creditors according to their priority rights. Debts and administrative expenses giving rise to estate must be first paid out of estate at any time. Court will terminate bankruptcy proceedings upon trustee's application when debts and expenses incurred in bankruptcy proceedings exceed value of estate.

Bankruptcy proceeding is often long and slow. Also, creditor's expenses in pursuing its claim in bankruptcy proceedings are not cognizable. Further, creditors are stayed from exercising their individual remedies. As practical matter, creditor usually experiences difficulties in initiating bankruptcy proceedings against his debtor, because bankruptcy regime has been seriously weakened by widely attacked reorganization regime. According to Art. 294 of Company Act, once debtor's petition for reorganization is approved by court, bankruptcy proceedings must stay. Therefore, many corporations file petitions for reorganization to avoid or halt filings of involuntary petitions in bankruptcy by creditors. In contrast to bankruptcy proceedings in which trustee is appointed to assemble estate and establish its greatest value, reorganization proceedings allow old managers and directors to remain in place; they continue to run business and can also assert all powers enjoyed by trustee in bankruptcy cases. Reorganization proceedings may take years and usually end up creating total failure. By then, creditor may find bankruptcy proceedings meaningless.

7.04 EXECUTIONS:

Generally, creditor may secure compulsory execution on any property of its debtor after favorable judgment, unless otherwise prohibited by relevant laws. Compulsory execution may also be obtained against debtor in respect of: (1) His property, money, or credits in possession or under control of, or owing by, third persons; (2) property rights other than those over personal property, real property, ships, aircraft, and claims cited in (1), e.g., intellectual property rights. Court may issue necessary orders, e.g. restraining orders, against debtor and/or against third persons to effect compulsory execution.

7.05 FRAUDULENT SALES AND CONVEYANCES:

Based on general principle of Civil Code, fictitious declaration of intent made by declarant in collusion with other party is void, but fact of it being void cannot be defence against bona fide third parties. If fictitious declaration of intent is to cover another juristic act, provisions of law with respect to such other juristic act shall apply.

Creditor or trustee in bankruptcy may apply to court for invalidation of debtor's gratuitous or non-gratuitous act if such act is detrimental to creditor's right and can be invalidated.

Debtor's acts within six months prior to adjudication of bankruptcy may be invalidated by trustee if they were: (1) Providing security for preexisting debts unless such security had been committed to before above-set date, or (2) repaying debts before their maturity.

7.06 GARNISHMENT:

See topic 7.02 Attachment.

7.07 INSOLVENCY:

See topic 7.03 Bankruptcy.

7.08 LIENS:

Lien is right to retain property for payment of debt or demand. Law relative to liens is mainly found under title “Right of Retention” in R.O.C. Civil Code. Creditor in possession of personal property belonging to his debtor may retain same provided that: (1) Where debt has matured; (2) where there is connection between occurrence of debt and personal property; and (3) where possession of personal property is legal. If debtor is insolvent, creditor may still have right of retention before debt matures. Creditor must exercise due care over property retained and may claim reimbursement for necessary expenses incurred in connection with custody thereof. If debtor has given sufficient security for performance of debt, right of retention by creditor is extinguished. Right of retention is also extinguished by loss of possession of property. Lessor of real estate has right of retention over personal property of lessee in/on real estate, to cover outstanding rent and damages he suffered.

Innkeeper may retain luggage or other property of guest pending payment for lodging, food or disbursements.

Carrier may retain goods to secure payment of freight and other expenses. Last carrier in consecutive carriage may exercise such right of retention for benefits of all.

Forwarder likewise has right of retention to secure payment of remuneration and disbursements.

7.09 PLEDGES:

Kinds of personal property which may be subject of pledge include goods and intangibles represented by legally required instruments (promissory notes, for example). Requirements for creating pledge over such items are set forth in Civil Code (“Code”). Code requires that pledgee must take possession of collateral covered by pledge. Possession may be taken by pledgee himself or by agent on his behalf. But it is clear that debtor or person controlled by him cannot qualify as such agent for pledgee. If collateral is held by third person as bailee, it is necessary for bailee to obtain consent of pledgee or acknowledge that collateral is held on pledgee's behalf. Once pledgee surrenders possession of collateral, pledge over such collateral is deemed discharged.

Taking possession of collateral is only method of creating pledge. Neither written security agreement or recorded document is legally required to create pledge. Although written agreement is not legally necessary, writing is nonetheless desirable in order to set forth various rights of parties, nature and amount of debt secured, and other related matters.

Obviously, pledge over goods is of little value, where, by nature of transaction, it is necessary that pledgee has possession of collateral. In 1963, Chattel Secured Transactions Act (“Act”) was enacted to validate chattel mortgages, conditional sales and trust receipts as security interests upon recording of such transactions at public office.

Pledge secures payments of principal debt, interest, default interest and expense of creating pledge, except as otherwise provided for in security agreement.

On default, pledgee may sell collateral by prior notice to pledgor through public sale or by court's foreclosure sale to satisfy debt from proceeds. Agreement that on default, title to collateral shall be transferred to pledgee is void; however, after maturity of debt secured, pledgee may, by agreement with pledgor, take collateral in satisfaction of debt.

7.10 USURY:

See category 3 Business Regulation and Commerce, topic 3.07 Interest.

8 DISPUTE RESOLUTION

8.01 ALTERNATIVE DISPUTE RESOLUTION:

Litigation is primary dispute resolution mechanism. Civil procedures are governed by Code of Civil Procedures (“Code”). Court hearings are in principle conducted in open court. Code does not require representation by attorneys, except for proceedings before Supreme Court. Judge is responsible for directing proceeding, investigating evidence, finding facts and determining legal consequences (such as assessing damages). There is no jury trial.

Courts of first instance (usually District Court) and second instance (usually High Court) conduct both factual and legal review. Appeals to Supreme Court may be made against judgments of second instance except where value or benefit of appeal does not exceed NT$1,500,000.

New IP trial system has just taken effect in Taiwan, which is deemed epoch of Taiwanese judicial system. See category 17, Intellectual Property, topic 17.02 Patents, subhead IP Court Organization Act and IP Case Adjudication Act.

Arbitration is alternative for resolution of disputes as authorized by Arbitration Act (“Act”). Act, enacted in 1961 and last amended in 2002, enforces arbitration agreements and arbitral awards.

Parties to dispute need to enter into written arbitration agreement. Parties are free to designate procedural rules of arbitration and determine number of arbitrators (must be odd number) and their selection. Nomination of arbitrators may be rejected by other party on grounds enumerated in Act.

Arbitral award has same binding effect between parties as that of final judgment of court between parties. In order to secure enforcement of award, Act permits pre-litigation remedies, such as provisional seizure and preliminary injunction.

Awards can be enforced after court order for enforcement is obtained. Awards may be set aside or denied enforceability under enumerated statutory circumstances.

Mediation is also dispute resolution mechanism, which is based on consensus. It can be conducted in court before initiation of litigation as authorized under Code, or out of court but under administration of local government as authorized by Act Governing Mediation by Hsiang, Chen and Shih, by Committee for Resolution of Public Nuisance Disputes as authorized by Act Governing Handling of Public Nuisance Disputes, or by Complaint Review Committee as authorized by Government Procurement Act.

9 DOCUMENTS AND RECORDS

9.01 AUTHENTICATION, LEGALIZATION:

Generally speaking, authentication/legalization requirements are subject to law of country where documents will be used. For documents made in foreign country and intended for use in R.O.C., R.O.C. government agencies or courts may require that they be legalized/authenticated first by representative office of R.O.C. government in that country before accepting documents or recognizing their legal effect.

9.02 NOTARIZATION:

Under Notary Law, both notarial officers in Court and licensed notary public can practice profession of notary. Notary public may on application of parties or other interested persons issue notarial certificates concerning juristic acts or acts relating to private rights, or certify authentication of private documents. Applicants must be properly identified. Fees vary in relation to values involved.

10 EMPLOYMENT

10.01 LABOR RELATIONS:

Labor Standards Act ("LSA") was promulgated on 30 July 1984 and effective on 1 Aug. of same year, which applies to following industries: (1) Agricultural, forestry, fishing and pasturage; (2) mining and quarrying; (3) manufacturing; (4) construction; (5) water, power and gas supplying; (6) transportation, warehousing and communication; (7) mass media; and (8) other industries designated by central authority-in-charge. LSA was revised on 27 Dec. 1996 to authorize central authority to expand its coverage to include all employment relationships by end of 1998, except for certain businesses as specifically excluded provided that workers so excluded shall not exceed one-fifth of total population of workers not employed by existing seven categories of business. So far, only a few categories of business and personnel, such as nonprofit foundations established pursuant to law, lawyers, certified public accountants and medical doctors, are exempt from jurisdiction of LSA. Such basic working conditions as labor agreements, wages, work hours, rest periods and vacations, child and female workers, retirement and pension, compensation for occupational hazards, apprentices, work rules, etc. are included in LSA. 1996 amendment also allowed employers and workers to agree upon work hours, routine holidays, public holidays and night work by females without being subject to various restrictions, provided that eligible workers are limited to supervisory or managerial personnel or professionals with special assignment and responsibilities, or personnel having supervisory or intermittent job function, or other personnel of special nature of work, as certified by central authority-in-charge, and that agreement must be in writing and must have been approved by local government authorities. (LSA 84-1).

Amendments to LSA.

Last amendment of LSA were promulgated on 14 May 2008 to extend age of compulsory retirement from 60 years of age to 65 years of age.

Labor Agreements.

Job of temporary, short-term, seasonal or specific nature may be covered by fixed-term agreement. Job of on-going nature must be subject to non-fixed-term agreement. While fixed-term agreement can be terminated without advance notice and severance pay upon expiration of agreement, non-fixed-term agreement can be terminated only if any of following events occurs and advance notice and severance pay are granted: (1) Business is closed or transferred; (2) business suffers losses or retrenchment; (3) business is suspended for over a month due to force majeure; (4) reduction of workers becomes necessary because nature of business has changed and there is no appropriate job available for worker; or (5) it is ascertained that worker is not capable of performing work assigned by employer. Of course, worker who commits wrongdoing can be dismissed at any time without advance notice and severance pay being granted. (LSA 9.11.12).

Hours of Work.

Adult workers' hours of work shall, in principle, be limited to eight hours per day and 84 hours per two weeks. Under special circumstances, working hours may be extended to 12 hour day, provided that total hours extended in month shall not exceed 46 hours. (LSA 30.32). Under 1996 amendment, business establishment is allowed to change work hours in line with certain established principles, provided that it must have been designated by central authority-in-charge for such purposes and that it has obtained consent from labor-management conference or labor union. (LSA 30, 30-1).

Statutory Basic Wage.

Prevailing minimum basic wage for adult worker is NT$17,280 per month.

As for child worker which refers to one who has reached his 15th but not 16th year of age, his work time shall not exceed eight hour day, and he shall not be employed to work between hours of 8 p.m. and 6 a.m. in ensuing morning and shall not be employed to perform any heavy and/or dangerous work. (LSA 44, 47, 48).

Female worker shall not be employed to work between hours of 10 p.m. and 6 a.m. in ensuing morning unless certain requirements are met or except for certain categories of business and personnel as designated by central authority-in-charge. (LSA 30-1.49.84-1).

Worker is entitled to take half hour break with pay after having worked for four consecutive hours and to have one day as holiday in every seven days. Worker shall be granted leave for rest with pay on all public holidays ordained by laws or regulations. In addition to official holidays, worker who has been employed continuously for specific period shall be entitled to special vacation (ranging from 7-30 days per year). If worker could not take his vacation because of reason attributed to employer, he shall be paid additional wages for period of such unused vacation. (LSA 35-39).

In case of maternity, female laborer shall be given leave for rest before and after childbirth up to total of eight weeks; she shall receive full pay during such periods if she has been employed for six months or more. (LSA 50).

Layoff Notification.

At least ten days prior to termination of employment, employers must notify local competent authority and public employment agencies of such layoff, so that latter could assist in reemployment process of discharged employees. (E.S.A. 33).

Severance Pay.

Employees who are terminated according to Art. 11 or 14 of LSA for service years under LSA shall be given severance pay at rate of one month wage for one full year of service. (LSA 17).

Retirement Benefits.

Employees who qualify for voluntary or compulsory retirement for service years under LSA shall be granted retirement benefit at rate of two-month wage for one full year of service during initial 15 years and one-month wage for one full year of service in subsequent years, subject to maximum of 45-month wage. (LSA 53, 54, 55).

1996 amendment clearly segregates calculation of severance pay and retirement benefits prior to and after application of LSA. In short, workers' entitlement to severance pay or retirement benefits for their services rendered prior to application of LSA (LSA 84-2) should be dealt with according to the then applicable regulations or in absence thereof, by rules established by business establishments or agreement between employers and employees.

Pension Fund Reservation.

Under Labor Standards Act, employer must set aside monthly amount equal to 2% to 15% of aggregate employee wages as pension fund, and deposit same into designated banks. Retirement plan and supervisory committee over pension fund must be established and registered with local government.

New Pension Schemes under Labor Pension Act.

Labor Pension Act ("LPA") took effect on 1 July 2005. LPA replaced "non-portable" pension scheme ("Old Scheme") under LSA with so-called "personal portable pension account" scheme ("New Scheme").

Under LSA, employee needs to work for same employer for certain number of years so as to receive lump sum payment of pension fund from his/her employer; while under LPA, employer shall contribute certain amount (at least 6% of employees' monthly salaries) to its employees' individual pension fund accounts per month. Hence, employee should receive his/her pension fund (monthly payments or in one lump sum) after meeting certain retirement criteria, even if he/she did not work for same employer for certain number of years.

Major points of LPA can be summarized into following points: (1) All domestic laborers who are subject to LSA shall be subject to LPA. Those laborers or managers who are not subject to LSA may also volunteer to participate in New Scheme after obtaining consent from their employers. (2) Except for annuity insurance under LPA, employers are prohibited from designing their own pension fund Scheme to replace New Scheme. (3) Contribution made by employer to employee's personal pension fund account per month shall not be less than 6% of monthly salary of such employee as per scale of employee monthly wages prescribed by government authorities. (4) For those employees who are subject to LSA before enforcement of LPA may choose to be subject to Old Scheme. If company has employees who choose to stay with Old Scheme, employer must still set aside each month pension funds for those employees within five years from enforcement of LPA to extent that amount will be sufficient to pay for pension funds of those employees when they retire. Failing to do so will subject employer to severe fines. (5) For those employees who choose New Scheme, their seniority under Old Scheme would still be recognized ("Maintained Seniority"). Unless otherwise agreed between employer and employees, Maintained Seniority will not be cashed out upon enforcement of LPA, but will be used to calculate severance pay when those employees leave their current employers. (6) When calculating severance pay of those employees under New Scheme, only their seniority under New Scheme will be used to calculate their severance pay (their Maintained Seniority will be calculated separately by applying formula under LSA). For each year of service, employee will receive severance pay equivalent to 50% of his/her average monthly salary. Total severance pay shall not exceed six monthly average wages. (7) There are two kinds of pension fund payments, monthly pension fund payments and lump sum payment. Only employees meeting certain criteria may apply for monthly pension fund payments. (8) Industries meeting certain criteria may apply with competent authorities to purchase annuity insurance under insurance-related laws, in lieu of New Scheme. Payment of annuity insurance premiums by employers shall not be less than 6% of average wages of employees. (9) Employer who violates LPA thereby causing damages to its employees shall be liable for damages/losses sustained by its employees and will incur certain penalties. Delay penalties are heavy under this LPA and may be imposed consecutively until rectification.

Employees' Welfare Fund.

Statute on the Employees' Welfare Fund, promulgated on 26 Jan. 1943, and last amended on 29 Jan. 2003, provides that all mines, factories or any other enterprises, privately or publicly owned, must set up Employees' Welfare Fund for conducting employees' welfare benefits. Term “any other enterprises” as specified in Enforcement Rules of the Statute, refers to all banks, corporations, business organizations and agricultural, fishing and animal husbandry enterprises which have 50 or more employees. Business entity operating factory or employing more than 50 persons, is subject to Statute for the Employees' Welfare Fund. Statute also stipulates that enterprise must form Employees' Welfare Committee to manage utilization of employees' welfare fund.

Protective Act for Mass Redundancy of Employees (“PAMRE”) was promulgated by President on 7 Feb. 2003 and came into effect on 9 May 2003 and last amended 23 May 2008. PAMRE mainly prescribes procedures to be followed by business entities before making redundancy that meets definition of mass redundancy. Provisions include: duty to notify labor union or labor representatives in advance and present written redundancy plan, duty to consult in good faith, and to assist workers in finding re-employment, power to prevent company officers from leaving country if in arrear of wages, retirement fund contributions, or severance pay exceeding certain amounts, and duty to provide financial statements and related information. Entities that violate PAMRE are subject to fines ranging from NT$30,000 to NT$500,000.

Labor Insurance.

Labor Insurance Act specifies that all factories, mines and any enterprises having five or more employees are obligated to apply for insurance coverage with Labor Insurance Bureau (LIB) for their employees. 70% of insurance premium is to be paid up by employer and 20% by insured employee, leaving 10% to be borne by government.

Insured employee is entitled to receive following major benefits: (a) Death payment; (b) old age payment; and (c) disability payment.

National Health Insurance.

Previously covered by labor insurance, medical care and sickness benefits (including maternity payment) are now included in national health insurance program since Mar. 1, 1995. Premiums will be shared by employer, insured and government at various percentages depending upon status of insured. Immediate dependants of insured are also subject to insurance coverage.

Employment Insurance Act was promulgated on 15 May 2002 and took effect on 1 Jan. 2003. Employment Insurance Act supersedes and extends scope of unemployment insurance provided under existing labor insurance scheme. Benefits payable under Unemployment Insurance Scheme include: (1) Unemployment benefits; (2) incentive payments for early return to employment; (3) living expenses for vocational training; and (4) assistance with insured's national health insurance contributions.

Labor Unions.

According to Labor Union Act, industrial or craft union shall be organized when in one and same area, or when in one and same industry or workshop, number of workers above full 20 years of age in one and same factory or in one and same area is over 30. There are six national unions, viz., Chinese Federation of Labor Unions, National Union of Railway Workers, National Union of Seamen, National Union of Mailmen, National Union of Mine Workers and National Union of Salt Mine Workers. In addition, there exist many unions on provincial as well as municipal levels. Union organizations became very aggressive in past several years.

Labor Safety and Sanitation Act.

In setting higher occupational safety standards to protect workers from exposure to toxic substances and hazardous working conditions, Labor Safety and Health Law, promulgated on Apr. 16, 1974 and amended on June 12, 2002, mandates installation of preventive measures in work places, subject to safety inspections.

Occupational Hazard Protection Act (“OHPA”) was taken effect on 28 Apr. 2002. Main points covered by OHPA are: (1) Net revenue from labor insurance fund for occupational accident insurance will be specifically allocated to implementing OHPA; (2) scheme under OHPA will provide income support, subsidies for purchase of medical equipment, caregiver allowances and death benefits to families to prevent occupational accident victims and their families from suffering financial hardship; (3) where occupational hazard victims are not covered by labor insurance or their employers fail to pay compensation as required by Labor Standards Act, victims or their families may apply for disability or death benefits; (4) occupational hazard victims whose ability to work is impaired will be entitled to employment training benefits; and (5) Apr. 28 of each year is designated as Workers' Memorial Day.

Settlement Act of Labor Disputes provides for rights of workers to voice their grievances and resolve their disputes with management via mediation or arbitration.

Employment and Service Act (“ESA”) promulgated on 8 May 1992 and last amended on 6 Aug. 2008, addresses promotion of nationals' employment opportunities, management of employment service agencies and employment of foreign nationals in R.O.C. Foreigners qualified for work permits are confined, inter alia, to following categories: specialists and/or technical personnel; officers in enterprises invested by overseas Chinese or foreign nationals duly approved by R.O.C. Government; teachers of public/private schools, teachers of foreign languages; sport coaches and players; religious, artistic and performing-art workers; household helpers; workers designated by central competent authority to meet requirements of important national construction projects or economic or social development projects; or other specialized personnel who are not available locally and have to be recruited from abroad with special approval of central competent authority. (ESA 46). Employer must apply for permission before employing foreign national. After arrival of approved foreign national, employer applicant should submit employment contract and permission document for issuance of work permit. (ESA 48).

Gender Equality in Employment.

Gender Equality in Employment Act (“GEEA”) was enacted on 16 Jan. 2002, and last amended on 16 Jan. 2008. Purposes of GEEA protect equal rights of both sexes in workplace, and to espouse spirit of Constitution against gender discrimination by promoting real equality between sexes. GEEA applies not only to employed individuals in general, but also to civil servants, teachers and armed service personnel.

GEEA prohibits gender discrimination in employment, prevents sexual harassment in workplace, and provides measures to promote equality in employment, such as menstrual leave, maternity leave, miscarriage leave, leave for spouse's confinement, unpaid parental leave, infant feeding time, reduction or adjustment of working hours, family care leave, and childcare provision.

11 ENVIRONMENT

11.01 ENVIRONMENTAL REGULATION:

Environment Authority.

Environmental Protection Administration (EPA) under direct supervision of Executive Yuan, is central government authority to develop environmental policy and promulgate regulations to implement existing environmental legislation. 25 Environmental Protection Bureaus (EPB), located at municipality, county or city levels, have been delegated to enforce environmental laws and regulations in their respective jurisdictions. Environmental Protection Basic Act as constitution for environmental protection was promulgated on 11 Dec. 2002. This Act requires government to promulgate laws and regulations for sustained development, invest in education for public awareness and in R&D for green technologies, set up systems for environmental and health risk impact assessment, and implement “polluter pays” policy, etc.

Factories.

New factory subject to environmental impact assessment and prior approval for factory establishment is required to complete such assessment before applying for factory establishment permit. Factory registration will not be granted upon completion of factory before pollution control approval or permit is given by environment authority. Alteration or expansion having concern of increasing pollution requires discharge permit or operation permit of environment authority before alteration of factory registration. (Factory Administration and Assistance Act promulgated on 14 Mar. 2001, Arts. 14, 15).

Same criteria applies to expansion projects of existing factories.

Air Emissions.

Air Pollution Control Act was promulgated on 23 May 1975 and last amended on 30 May 2006. EPA is empowered to designate three levels of control zones and prohibit or restrict any increase in total pollution. Air pollutants discharged from stationary air pollution sources in public or private premises should meet higher of emission standards stipulated by EPA and local government authorities. Public or private premises which have stationary sources as designated by EPA should have certain monitoring facilities and report result to local government authorities.

Air pollutants discharged by means of transportation should meet emissions standards. In case certain vehicle fails to meet standards due to poor design or installation, maker or importer of vehicle in question will be ordered to recall same type of vehicles sold for correction within given time limits. Air pollution control changes may be levied on both stationary and moving pollution sources.

Water Pollution.

Water Pollution Control Act (promulgated on 11 July 1974 and last amended on 12 Dec. 2007) authorizes EPA to set forth standards for controlling effluent water and to levy water pollution changes. EPA promulgated Effluent Water Standards (last am'd on 3 Sept. 2007). Failure to meet with standards will trigger penalty of up to NT$600,000, and failure to correct such violation within period ordered by competent authority will be given same penalty for each day it is not corrected, and, if event is substantially serious, competent authority may order suspension of business, or, if necessary, effluent permit may be cancelled or business may be forced to cease permanently. (Water Pollution Control Act, Art. 40).

Permit will be required for discharging waste or (sewage) water in any manner other than to sewerage system. (Water Pollution Control Act, Art. 14).

This Act also regulates sewerage systems and deals with waste water containing hazardous substances and other substances harmful to humans, farming and fishing or drinking water resources, etc. (Water Pollution Control Act, Arts. 27, 34).

Wastes Disposal.

Wastes Disposal Act (promulgated on 26 July 1974 and last amended on 30 May 2006) defines solid wastes into general wastes, hazardous industrial wastes and nonhazardous industrial wastes. Industrial wastes should be cleaned up and disposed of by industry itself, by wastes clean-up and/or disposal facilities jointly established by relevant industries, or by contract to qualified public or private owned wastes clean-up and/or disposal entities. Under this Act, EPA has promulgated various regulations, guideline and rulings governing collection, clean-up and disposal of specific kinds of wastes (such as containers, tires, batteries and automobiles, etc.).

Environmental Impact Assessment.

Environmental Impact Assessment Act was promulgated on 30 Dec. 1994, and last amended on 8 Jan. 2003. Any developments listed or announced by EPA should undertake environmental impact assessment in planning stage. Environmental impact statement must be submitted for examination in application for development permit. If environmental protection authorities deem it necessary to conduct second stage of environmental impact assessment, environmental impact assessment report should be provided subsequently following public hearing for review and comments by specialists, scholars, environmental protection organizations and local residents. Developments subject to environmental impact assessment includes factory establishment, industrial district development, road, railway, public rapid transportation system, harbor and airport development, gravel pit, mining, water reservoir, flood prevention facility, resort facilities, golf course, cultural, educational or medical facilities, new urban area development, high rise buildings, old urban area redevelopment, environmental protection works, nuclear and other energies development and nuclear waste storage or disposal.

Public Nuisance Dispute Resolution.

Public Nuisance Dispute Resolution Act (promulgated on 1 Feb. 1992 and last amended on 26 June 2002) introduces alternative dispute resolution mechanism. Either party in public nuisance dispute may unilaterally request mediation to be conducted by Mediation Committee at city/county level. Settlement proposals by majority votes of Mediation Committee will bind parties concerned if either party fails to object to such proposals within certain period (not more than 45 days). Damages claim may be referred, by either party, to Adjudication Committee after unsuccessful mediation. Adjudication award rendered will bind parties concerned if neither party initiates civil lawsuit within 20 days.

Others.

Various statutes, regulations, guidelines and requirements were implemented or are going to be implemented to regulate and control air pollution, noise, vibration, ocean pollution, waste disposal and recycling, soil pollution, public environmental sanitation, toxic chemicals, and drinking water, etc. Soil and Groundwater Contamination Control Act, adopting concept of current owner's responsibility to clean up contamination was promulgated on 2 Feb. 2000 and last amended on 8 Jan. 2003. Administrative and criminal punishments are imposed on owners, responsible persons of industries and industries themselves.

12 ESTATES AND TRUSTS

12.01 DEATH:

Civil Code of R.O.C. (Arts. 8, 9, 11) provides that missing person may be declared dead by court upon application of prosecutor or any interested party if he has disappeared for seven years. If missing person was over 80 years of age, he may be declared dead if he has disappeared for three years. If missing person was in special peril of his life, he may be declared dead after one year of special peril. In absence of proof to contrary, date of death specified in these instances is date of expiration of specified period in Art. 8. If several persons have perished in common disaster and it is not possible to ascertain which of them perished first, they are presumed to have died simultaneously.

Actions for Death.

Civil action lies in favor of spouse, parents and children of victims, those who pay funeral expenses, and those to whom victims are statutorily obligated to furnish maintenance. Action must be brought within two years from date when injury and tortfeasor is known to those mentioned above, but in any case, within ten years from date when wrongful death was caused. (C. C. 197). Amount of damages recoverable covers funeral expenses, damages suffered by third party to whom victim was statutorily bound to furnish maintenance, and compensation for mental anguish which is non-pecuniary suffering to spouse, parents and children of victims. (C. C. 192, 194). Court will estimate and award damages according to circumstances of each case and financial situation of parties concerned.

12.02 DECEDENTS' ESTATES:

See topics 12.03 Descent and Distribution, 12.06 Wills.

12.03 DESCENT AND DISTRIBUTION:

Successors' entitlement to inherit intestate estate, in addition to surviving spouse, come in following order: (1) Lineal blood descendants; (2) parents; (3) siblings; and (4) grandparents.

Among multiple issue mentioned in (1) above, usually in different generations, highest generation in which there are living members takes first.

Where there are multiple members in same order, they shall inherit per capita (equal share is given to each of them). Successors of inferior order cannot inherit estate unless there is no successor within superior order.

Each spouse is entitled to inherit from other regardless of whether intestate has any other successors set forth above. When surviving spouse and highest generation of issue have right to succeed, they co-take intestate's estate per capita. In case surviving spouse inherits concurrently with parent(s) (second priority) or sibling(s) (third priority) of intestate, surviving spouse takes one-half of estate; whereas remaining half shall be divided per capita by parent(s) or sibling(s). When surviving spouse shares with grandparent(s) of intestate (fourth priority), surviving spouse takes two-thirds, and remaining estate is distributed to grandparent(s) equally if both of them are alive, or entirely to sole surviving grandparent. Estate succeeds entirely to surviving spouse if there is no other successor within foregoing categories.

Limited Succession.

Successor may limit payment of deceased's debts to extent of property acquired by succession. Where there are several successors and one of them asserts limited succession, other successors are regarded as having come into limited succession also. (C.C. 1154). Successors shall report to court for limited succession within three months after deceased's death.

Disclaimer of Inheritance.

Successor may disclaim his interest in estate. Such disclaimer must be effected by written declaration to court, within three months from time when he had cognizance of succession. Notice in writing shall also be given by such successor, to extent it is practicable, to party who is entitled to succeed owing to such successor's disclaimer of his interest in estate. (C.C. 1174).

Unacknowledged Succession.

Where no heir acknowledges succession, on expiration of definite period as designated and announced by court according to Art. 1178, such part of property of deceased which remains after settlement of claims and delivery of legacies escheats to Treasury. (C.C. 1185).

12.04 EXECUTORS AND ADMINISTRATORS:

There is no designated probate division of R.O.C. courts nor any procedure exactly corresponding to probate or grant of administration.

Testator may, by will, designate executor or entrust third person to manage estate; but minor or interdicted person cannot act as executor. (C. C. 1210). Where testator did not designate executor nor third person to manage estate, family council may elect executor. Where family council cannot elect such executor, court may designate executor upon application by interested party. (C. C. 1211). Notwithstanding foregoing, if decedent died intestate, administration of estate is in hands of heirs. If there is more than one heir, estate, as whole, is owned by heirs in common before partition. (C. C. 1151). However, heirs may elect person from amongst themselves to manage estate. (C. C. 1152).

Powers of executor are broad. He is charged with making inventory, administering and managing property. (C. C. 1214-1215).

While executor is executing his duties, heir may not dispose of any of property covered by will or obstruct executor in execution of his duties.

Court or family council may remove executor for negligence or grave causes upon application of interested party. (C.C. 1218).

12.05 INTESTACY:

See topic Descent and Distributions.

12.06 WILLS:

Any person over 16 years old (except interdicted person) may freely dispose of property by will so long as he does not contravene provisions in regard to compulsory portions. Compulsory portion is important mandatory requirement for making will. This concept refers to successor's entitlement to minimum proportion of estate which cannot be deprived by testator's bequest or testator's allocation of his estate among successors by will. Provisions with respect to compulsory portions override provisions made in testator's will. Surviving spouse, lineal blood descendants and parents are entitled to compulsory portion of one-half of their respective statutory portions. Siblings and grandparents are entitled to compulsory portion of one-third of their respective statutory portions. When testator's bequest or allocation of estate by will infringes any successor's compulsory portion, that successor may recover from testator's estate compulsory portion by asking for proportional reductions from legatees or other successors. In other respects, will remains valid.

Civil Code of R.O.C. recognizes five types of wills; holographic, notarial, secret, dictated or oral. Generally, Taiwan courts have followed concept of strict construction, i.e., will must satisfy all execution formalities set out in Civil Code. Pervasive execution requirement under Civil Code for all recognized types of wills is that will must be hand-written. Taiwan courts have held will invalid if it contains any printed matter on its face.

Civil Code requires that holographic will or secret will must be in testator's handwriting. For making notarial will, testator must make oral statement of his testamentary wishes in presence of notary public. Statement must be written down by notary public and signed by testator, notary public and witnesses. For other two types of wills, instrument must be written by one of witnesses.

13 FAMILY

13.01 ADOPTION:

According to Paragraph I of Art. 1079 of Civil Code, both adopter and adoptee must consent in writing to adoption. If adoptee is minor under seven years of age and is in custody of guardian, latter needs to consent (Paragraph I of Art. 1076-2 of Civil Code). Furthermore, adoption is required to be approved by court. This article directs court not to approve any adoption if such adoption contains any ground for annulment or revocation or is against laws. According to Art. 1076-1 of Civil Code, adoption shall be consented in writing by adoptee's parent, unless under certain circumstances described therein.

According to Art. 1073 of Civil Code, adopter must be at least 20 years older than adoptee. Art. 1073-1 prohibits adopter from adopting any of his/her linear relatives by blood, or linear relatives by marriage, or collateral relatives by blood within sixth degree of relationship or by marriage within fifth degree of relationship. Art. 1075 further prohibits any person from being adopted simultaneously by two persons, unless adopters are couple.

Art. 1079-4 of Civil Code provides that any adoption in violation of any of provisions in Arts. 1073, 1073-1, 1075, 1076-1, Paragraph I of 1076-2 and Paragraph I of 1079 is null and void. Further, according to Paragraph 3 of Art. 1079 of Code, except when no guardian exists, adoption of minor of more than seven years of age without first obtaining consent from minor's guardian is revocable.

13.02 DIVORCE:

In Taiwan, there are two methods of divorce: consent or judgment.

Former is rather cost-effective method to resolve marriage. Under this method, couple terminates marriage by divorce agreement in writing bearing two witnesses' signatures and completing divorce registration with Household Registration Office.

Under Civil Code, either spouse may apply to court for divorce decree provided any following condition exists: (1) Other spouse has committed bigamy; (2) other spouse has had sexual intercourse with another person; (3) spouse has suffered ill-treatment from other spouse as to make living together intolerable; (4) one of spouses has so ill-treated linear ascendants of other spouse, or has been so ill-treated by them, that living together becomes intolerable; (5) desertion in bad faith and such desertion is on-going; (6) other spouse has attempted to kill spouse; (7) other spouse has severe and incurable disease; (8) other spouse has serious and incurable mental disease; (9) it has been uncertain for over three years whether other spouse is alive or dead; or (10) other spouse has been sentenced to more than six months imprisonment due to his/her intentional crime.

In addition, either spouse may apply for divorce decree if there are other significant reasons not attributable by him/her, which result in maintenance of marriage impossible. Judge will review case and render his/her judgment on case by case basis.

Residence.

Court in R.O.C. will generally assume jurisdiction over divorce proceedings between aliens when couple is domiciled in R.O.C. Couple's domicile will be determined by agreement of couple. Failure to conclude such agreement, court may determine domicile based upon petition. There are no requirements as to length of residence necessary after domicile is acquired before proceedings are brought. Intention is determining factor for establishment of domicile.

Proceedings.

There must always be attempt at reconciliation.

13.03 HUSBAND AND WIFE:

Husband and wife may hold property under statutory or contractual regime. (C. C. 1005 & 1017). Statutory regime prevails if spouses fail to adopt contractual regime. (C. C. 1005). Under statutory regimes, properties of husband or wife are divided into two categories: (1) Those acquired before marriage; and (2) those acquired after marriage, and husband or wife shall own their respective properties. Properties that cannot be determined as before-marriage properties or after-marriage properties shall be deemed as after-marriage property. Properties that cannot be determined whether they belong to husband or wife shall be deemed as properties commonly owned by wife and husband.

Interest generated from before-marriage properties of husband or wife during marriage shall be deemed as after-marriage properties. (C. C. 1017). Common property generally is all property that is not statutorily defined as either spouse's separate property. Art. 1031 of Civil Code provides that other than separate property all property and income of spouses constitute “common property” to be co-owned by them. Upon termination of marriage by divorce or death, Code at Art. 1040 gives each spouse immediate one-half interest in common property, and only one-half of common assets would be in estate and subject to inheritance and estate tax. In separate property regime, each spouse retains ownership and management of his or her property.

There are two types of contractual regimes: (1) Common property regime; and (2) separate property regime. (C. C. 1031 & 1044). Contract for holding of matrimonial property, without being duly recorded, may not be held against third party.

According to Art. 1030-1 of Civil Code, upon termination of relationship over statutory regime by divorce or death, spouse whose property acquired in marriage of less value at that time is entitled to receive share of one-half of difference between other's property acquired in marriage (of greater value) and his/hers.

It should be noted that before computing difference of spouses' respective property, outstanding debts owed by each spouse should be deducted from their respective properties.

Art. 1030-1 of Code requires that such spouse's right to other's property be exercised within two years after he/she knows that there exists such difference or five years after termination of relationship over statutory regime.

Husband and wife may keep their surnames after marriage. Couple may mutually agree that one party prefix spouse's surname and have prefixed surname registered at Household Administration Authority. Party prefixing spouse's surname may recover one time his/her original surname during marriage.

Husband and wife are agents to each other in daily household matters. If one of parties abuses right of agency, other spouse may restrict it, but such restriction cannot be held against bona fide third party. (C. C. 1003).

13.04 INFANCY:

Majority begins with completion of 20th year of age. Minority ends when one reaches one's majority. (C. C. 12). Minor who has not attained his seventh year of age has no disposing capacity; minor who is at or over his seventh year of age has limited disposing capacity; and minor who is married has full disposing capacity. (C. C. 13). Domicile of person having limited or no disposing capacity shall be domicile of his statutory representative. (C. C. 21). Parents are statutory representatives of their minor children. (C. C. 1086). Abandoning legal capacity as well as disposing capacity is void. (C. C. 16). For person lacking disposing capacity, making and receiving of declaration of intention shall be represented by his statutory representative. (C. C. 76). Where person having limited disposing capacity makes or receives declaration of intention, approval of his statutory representative(s) is necessary, unless declaration of intention relates to mere acquisition of legal benefit, or to necessity of his daily life according to his age and social status. (C. C. 77).

Without approval of his statutory representative, unilateral act made by person having limited disposing capacity is void, and contract entered into by such person shall become effective only upon ratification of his statutory representative. (C. C. 78 & 79). Juristic act done by person having limited disposing capacity is valid if such person has induced, through fraudulent means, opposing party to believe that he had disposing capacity or that he had obtained prior approval of his statutory representative. (C. C. 83). In case where statutory representative of person having limited disposing capacity has authorized latter to dispose of certain property, or to carry on business independently, such person has capacity to dispose of such property or carry on such business. (C. C. 84 & 85).

13.05 MARRIAGE:

To contract marriage, man must have completed his 17th year and woman must have completed her 15th year, and if either party is under 20 years of age, he or she must have consent from his or her statutory representative. Marriage must be effected in writing, which requires signatures of at least two witnesses, and by registration at Household Registration Office. Person who has spouse may not contract another marriage.

14 FOREIGN TRADE AND COMMERCE

14.01 EXCHANGE CONTROL:

See topic 14.02 Foreign Exchange and Foreign Trade.

14.02 FOREIGN EXCHANGE AND FOREIGN TRADE:

Foreign exchange and foreign trade are controlled by Government under Statute for Governing Foreign Exchange promulgated in 1949 as last am'd on 2 Aug. 1995 and other relevant regulations. Said Statute and regulations are presently enforced by Foreign Exchange Department of Central Bank of the Republic of China (Taiwan) (in respect of foreign exchange), and Financial Supervisory Commission (in respect of foreign exchange-related administration). 1978, 1986 and 1987 amendments of Statute and relevant regulations made major liberalization of foreign exchange control. Guiding principles thereof are to: (1) Permit private sectors to freely own and use trade-related (i.e., non-capital transfer) foreign exchange, (2) properly regulate capital transfers, i.e., inward and outward remittance of funds not related to trade, (3) permit appointed foreign exchange banks to freely set conversion rate of forward foreign exchange, (it adopts free floating exchange rate system, wherein conversion rate is decided by supply and demand in foreign exchange market), and (4) simplify procedures of foreign exchange-related business followed by appointed foreign exchange banks.

Aside from trade-related foreign exchange transactions, R.O.C. companies and resident individuals may, without foreign exchange approval, remit outside R.O.C. foreign currency of up to US$50,000,000 (or its equivalent) and US$5,000,000 (or its equivalent), respectively, in each calendar year. In addition, R.O.C. companies and resident individuals may, without foreign exchange approval, remit into R.O.C. foreign currency of up to US$50,000,000 (or its equivalent) and US$5,000,000 (or its equivalent), respectively, in each calendar year. Furthermore, any remittance of foreign currency into R.O.C. by R.O.C. company or resident individual in a year will be offset by amount remitted out of R.O.C. by company or individual (as applicable) within its annual quota and will not use up its annual inward remittance quota to extent of such offset. Above limits apply to remittances involving conversion of NT Dollars to foreign currency and vice versa. In addition, foreign persons, may, subject to certain requirements but without foreign exchange approval of Central Bank of the Republic of China (Taiwan), remit outside and into R.O.C. foreign currencies of up to US$100,000 (or its equivalent) for each remittance. Above limit applies to remittances involving conversion of NT Dollars to foreign currency and vice versa. However, above remittance limit does not apply to onshore foreign investors (as defined below), offshore foreign investors (as defined below), investors in certain securities, i.e., Depository Receipts and overseas convertible bonds, and foreign investors who make direct investment in R.O.C. company by submitting foreign investment application to Investment Commission of Ministry of Economic Affairs when they make remittance relating to investment.

On 30 Sept. 2003, Executive Yuan approved amendment to Regulations Governing Investment in Securities by Overseas Chinese and Foreign Nationals ("Regulations"), which took effect on same day. According to Regulations, mechanism of so-called "qualified foreign institutional investors" and "general foreign investors" as stipulated in Regulations before amendment was abolished.

Under Regulations, foreign investors are classified as either "onshore foreign investors" or "offshore foreign investors" according to their respective geographical location. Both onshore and offshore foreign investors are allowed to invest in R.O.C. securities after they register with Taiwan Stock Exchange. Regulations further classify foreign investors into foreign institutional investors and foreign individual investors. "Foreign institutional investors" refer to those investors incorporated and registered in accordance with foreign laws outside of R.O.C. (i.e., offshore foreign institutional investors) or their branches set up and recognized within R.O.C. (i.e., onshore foreign institutional investors). Offshore overseas Chinese and foreign individual investors are subject to maximum investment ceiling that will be separately determined by FSC after consultation with Central Bank of the Republic of China (Taiwan). Foreign institutional investors, on other hand, are not subject to any ceiling for investment in R.O.C. securities markets.

All private importers and exporters must obtain certificate of profit-seeking enterprise with trading business specified from and register themselves with Ministry of Economic Affairs and other competent authorities before engaging in trading businesses. Minimum requirement of paid-in capital for setting up company limited by shares is NT$500,000. Minimum requirement of paid-in capital for setting up limited company is NT$250,000. Current regulations favor trade-related foreign exchange transactions. Consequently, foreign currency earned from exports of merchandise and services may now be retained and used freely by exporters. All foreign currency needed for importation of merchandise and services may be purchased freely from appointed foreign exchange banks.

Contracts are primarily governed by Civil Code. Contract is formed when parties reach express or implied agreement. If parties agree on all essential elements of contract but do not express any intention as to non-essential points, contract is deemed to be formed. Parties' agreement may be manifested by: (1) Offer and acceptance; (2) cross offers; or (3) act of party responding to offer requiring no notice of acceptance. Similar to law of most Anglo-American legal systems, parties enjoy autonomy in formation of terms and conditions of their contract. Offer made during face-to-face negotiation ceases to be binding if not accepted at once. (C. C. Art. 156). Offer made inter absentee ceases to be binding if not accepted by offeree within reasonable period of time. (C. C. Art. 157). If offeror sets deadline for acceptance, acceptance must reach offeror before deadline. (C. C. Art. 158). Unless otherwise provided by law, contract does not have to be in writing.

14.03 FOREIGN INVESTMENT:

(*Note:* R.O.C. Government is currently deregulating foreign investment. Relevant laws and regulations are also being amended. Please consult R.O.C. law firm for updated information in this regard.)

R.O.C. Government has adopted various measures to encourage foreign investment in R.O.C. and promulgated on 14 July 1954, Statute for Investment by Foreign Nationals, which was last am'd 19 Nov. 1997. Under this Statute, foreign investment may consist of variety of assets, including, without limitation: (i) Cash; (ii) machinery and supplies required for own use; (iii) patent rights, trademark rights, copyrights, know-how or other intellectual property rights; and/or (iv) other assets as may be recognized by competent authorities. Forms of investment may include: (i) To acquire stock or capital contribution of R.O.C. company; (ii) to establish branch office, proprietary business, or partnership; and (iii) to extend loans with term of more than one year to invested businesses as referred to in (i) and (ii) above.

Investments in following businesses, however, are prohibited: (1) Businesses which are in conflict with national security, public order, good morals or businesses which might have adverse impact on national health and (2) businesses in which foreign investments are prohibited according to laws.

Investments in following businesses are subject to special approval from relevant authorities-in-charge: (1) Public utilities; (2) financing and insurance; and (3) businesses in which foreign investment is restricted according to laws and regulations. Foreign investment in service industries is being allowed by Government, such as advertisement, department store, chain stores, financial consulting services, securities-related business and export/import trading.

In 1988 R.O.C. Government also promulgated set of guidelines called “Negative Listings” (as last am'd on 16 May 2008). These guidelines set forth sectors of R.O.C.'s economy in which foreign investment is either restricted or prohibited. Those sectors not on Negative List are then open to foreign investment without any restriction.

Foreign investor is guaranteed by law to have right to remit entire annual profits of its investment. If investor transfers its investment upon Government approval, investor is guaranteed by law to repatriate 100% of its total equity investment. Privilege of remitting profits or repatriating capital is not transferable except to investor's heirs, or to transferee who has status of foreign national.

Enterprises in which foreign capital has been invested are treated on equal basis, with those of same nature, operated by R.O.C. nationals. Furthermore, if foreign investor's investment is 45% or more of total capital of duly qualified and approved investee enterprise, enterprise may be exempted from requirement that 10% to 15% of newly issued shares must be reserved for subscription by employees of enterprise. Subject to Statute for Investment by Foreign Nationals, foreign investors may also be exempted from certain restrictions in Company Act, Mining Act, Land Act, Merchant Marine and Civil Aviation Act so that they can be treated on equal basis with R.O.C. investor.

Specific protection is accorded foreign investors against requisition, or expropriation for period of 20 years from commencement of business so long as foreign capital comprises 45% or more of total capital of enterprise.

Government's policy of encouraging local and foreign private investment and enterprise was evidenced by Statute for Upgrading Industries, took effect on 1 Jan. 1991 and last amended on 11 June 2008 which provides companies with some investment incentives, such as five-year corporate income tax holiday and investment credit as well as accelerated depreciation of equipment and instruments for R & D, pollution control, energy conservation purposes, reduced withholding income tax rate on dividends received by foreign investors whose investments have been duly approved under Statute for Investment by Foreign Nationals, etc.

R.O.C. and U. S. Governments have concluded agreement whereby U. S. Government guarantees U. S. investors in R.O.C. against nonconvertibility in remittance of profits or repatriation of capital and against expropriation of investments. R.O.C. Government has also concluded similar agreements with some other governments.

R.O.C. Government has also promulgated separate but similar law to above affording encouragement, protection and privileges to Overseas Chinese investors.

14.04 FOREIGN TRADE REGULATIONS:

See topic 14.02 Foreign Exchange and Foreign Trade.

15 HEALTH

15.01 FOOD HYGIENE CONTROL:

Food hygiene standards cover food hygiene, safety and quality standards. Department of Health ("DOH") may subject food products, food additives, food-use cleansing agents, food utensils, food containers and food packaging to inspection and registration. Items so designated may not be manufactured, processed, blended, repackaged, imported or exported without inspection, registration, and issuance of permit by DOH.

Under any of following circumstances, manufacturer of foods or food additives shall not manufacture, process, prepare, package, transport, store, sell, import, export, present as gift or publicly display: (1) Those that are tainted or are rotten; (2) those that are not cooked properly and thus harmful to human health; (3) those that are toxic or contain substances or foreign materials that are harmful to human health; (4) those that are contaminated by pathogens; (5) those with pesticide residue exceeding permissible tolerance set by central competent authorities; (6) those that are contaminated by nuclear/radioactivity substances exceeding permissible tolerance level set by central competent authority; (7) those that have been marred or are counterfeits; (8) those that have passed their expiry date; or (9) those that have never been provided for human consumption or proven to be harmless to human health. Food products must be marked with expiry date; and on products so designated by DOH, names and content of nutrients and food additives must be prominently displayed in Chinese and commonly used symbols. Name, address and telephone number of company must be displayed. In case of imported food products, name, telephone number and address of company, i.e., importer, local distributor or agent, must also be indicated on labels.

DOH has announced regulation (Ref. No. Wei-Hsu-Tze-0930415482) on 25 Nov. 2004 regarding labeling of food products. According to DOH's new regulation, starting from 1 Mar. 2005, all packaged food and food additives that are manufactured after 1 Mar. 2005 must contain "expiry date" on their label. For products manufactured before 1 Mar. 2005, they can still be sold with their original labels. Given aforesaid, "expiry date" is statutory requirement. Terms other than "expiry date" such as "Best before date" or "Best taste date" or labeling of date of manufacturing and shelf life to infer expiry date will be deemed in violation of Law Governing the Administration of Food Hygiene.

DOH also announced in regulation (Ref. No. Wei-Hsu-She-09604004142) dated 13 June 2007, that food products, which are manufactured from 1 Jan. 2007, packaged in container or in packaging must be marked with place of origin or country of origin in Chinese text on external packaging. However, if external packaging is already clearly marked with manufacturer's information, such as manufacturer's address, and such information is sufficient to identify place of origin (or country of origin), goods can be deemed to be already marked with place of origin (or country of origin), and additional labeling is not necessary. In addition, place of origin of imported food products should be determined in accordance with Criteria for Determining Place of Origin of Imported Goods, jointly issued by Ministry of Finance and Ministry of Economic Affairs.

DOH is establishing regulatory system for genetically modified foods. Set of regulations include Regulations Governing the Inspection, Testing and Registration of Genetically Modified Foods, Methods for Assessment of the Safety of Genetically Modified Foods, and Regulations

Governing the Labeling of Genetically Modified Foods.

Imported raw materials will also be required to be clearly labeled as to whether they are genetically modified.

To deter false advertising, advertisements of food products and health foods are under strict scrutiny.

Foodstuff businesses designated by DOH must obtain product liability insurance in respect of their products, in order to protect consumers' interests and to spread such businesses' risk and financial burden.

15.02 HEALTH LEGISLATION:

DOH of Executive Yuan is in charge of national health affairs. Health legislation covers medical care, medical practice, nursing, promotion of genetic health, maternal and child health, medical care for physically and mentally handicapped and retarded children, prevention and control of psychiatric diseases, control of communicable diseases, prevention and control of AIDS, care of patients of rare diseases, pharmaceutical affairs, professionals in Chinese medicine and pharmacy, control of medicines, food sanitation, cosmetics, related labeling and advertisements, cessation and treatment of alcoholics and drug addicts, prevention and control of tobacco hazards, betel-nut hazards, smoke-cessation education, establishment of medical care institutions, occupational therapy institutions, nursing care institutions, pharmaceutical factories, etc.

15.03 IMPORT OF PHARMACEUTICAL AND MEDICATED COSMETIC PRODUCTS:

Import of Pharmaceutical Products.

According to Pharmaceutical Affairs Act (“Act”), anyone wishing to import pharmaceutical products into R.O.C. shall apply with Department of Health (DOH), prior to importation, for product registration, on product-by-product basis.

Different documents may be required for registration of different kinds of pharmaceutical products. In general, following documents are required when applying for product registration: (1) Carton/label/inserts; (2) free sale certificates; (3) power of attorney; (4) company profile and plant master file; (5) specification and method of analysis for raw materials and finished product; (6) analytical reports; (7) in-process control; and (8) stability test.

According to Standards for Review of Applications for Product Registration of Pharmaceutical Products, if foreign manufacturer (“Plant”) has no record of having filed any application with DOH in past two to three years, Plant needs to submit its company profile and plant master file (“PMF”) to DOH for approval first. DOH's review of PMF is to ensure that plant, which manufactures proposed pharmaceutical products to be imported, is in compliance with GMP/cGMP standards. Please be advised that no application for product registration of any pharmaceutical product of any foreign company will be accepted by DOH before PMF of said foreign company is approved by DOH.

Import of Cosmetic Products.

Under Cosmetic Hygiene Administration Act (“Act”), cosmetics are divided into two categories, i.e. cosmetics containing medical, poisonous or potent drugs (“Medical Cosmetics”) and cosmetics not containing medical, poisonous or potent drugs (“Non-Medical Cosmetics”).

Non-Medical Cosmetics refer to perfume and those products for make-up usage such as powder foundation, facial powder, eye shadow, blush, eyebrow pencil, mascara, lipstick, etc., or cosmetics not containing medical, poisonous or potent drugs such as shampoo, hair oil, cream, etc.

Medical Cosmetics refer to sunscreen product, hair dye, anti-perspirants and deodorants, hair perm and those containing ingredients as provided for in “Standard Content of Medical, Poisonous or Potent Drugs Containable in Cosmetic Products (“Standard”)” promulgated by Department of Health, Executive Yuan (“DOH”). Those products of which function is for prevention of pimples, or for teeth whitening and so on as listed or stated in its publications will also be classified as Medical Cosmetics. DOH will amend Standard from time to time.

DOH has officially announced that all general cosmetics (Non-Medical Cosmetics) can be exempted from product registration.

According to Act, before importation of any Medical Cosmetics into R.O.C., application must be filed with DOH by importer for product registration.

According to Act, only R.O.C. companies are qualified to apply for product registration of medical cosmetic with DOH.

Given above, any foreign company intending to export Medical Cosmetics into R.O.C. must appoint R.O.C. company to be its agent in R.O.C. and authorize such agent to apply for product registration with DOH.

For importation of medicated cosmetic product (“Product”), such as SPF products, local agent or distributor must file application together with relevant documents with DOH for examination of Product to be imported and issuance of import license. Application shall specify basic materials, ingredients, pigments and usage, together with label, leaflet, sample, package, container, experimental and test report and other relevant documents.

15.04 NATIONAL HEALTH INSURANCE PROGRAM:

National Health Insurance Act (“NHIA”) was promulgated on 9 Aug. 1994 and last amended on 18 May 2005, with goal to protect and preserve health of nationals. NHIA provides three types of benefits: illness, injury and child delivery.

NHIA program covers insureds and their dependents. All government and private employees, employers, self-employed individuals, professional practitioners, union members, farmers, fishermen, livestock raisers, retired servicemen, and benefit or grant recipients under social welfare programs as well as their dependents (including spouses, parents and grandparents, children and grandchildren who are below age 20 and unemployed) enjoy benefits under NHIA program.

Insurance Premiums under NHIA are calculated on basis of insured's wage rates as determined by Executive Yuan, and multiplied by number of participants. Premium rate for first year after implementation of program was 4.25% and subject to review and may be increased up to 6%. Insured's minimum wage rate is same as basic wage under Labor Standards Act and may be increased annually. When basic wage increases, premium payment will rise. For government-owned/private enterprises, employer participants, self-employed or professional practitioners, premium sharing percentage varies. Inclusion of insured's dependents and increase of sharing percentage imposes additional burden on private employer, as employer (and employees) continues to pay for labor insurance and employment insurance.

To prevent waste of medical resources, copayment is required for each outpatient and hospitalization treatment at rate ranging from 20% to 50% of medical expenses incurred, and for hospitalization, 5% to 30% of room charges. Copayment does not apply to serious injury or illness, child delivery or preventive health care.

16 IMMIGRATION

16.01 ALIENS:

Immigration Act was promulgated on 21 May 1999 and last amended on 26 Dec. 2007. Aliens who have legally and continuously resided in R.O.C. for five years during which they have resided for more than 183 day each year, or alien spouse and/or children of R.O.C. nationals who have legally resided in R.O.C. for more than ten years during which they have resided for more than 183 days each year for any five years, may apply for permanent residence with R.O.C. authorities if they: (1) Are at age of 20 or over; (2) are of decent character; (3) have considerable properties, skills or talents that are sufficient to enable them to make living; and (4) are beneficial to national interests of R.O.C.

Immigration Act also allow any foreigner who has legally resided in R.O.C. for over 20 years and ten of those for more than 183 days each year, before Immigration Act was amended on 31 May 2002, to apply for permanent residency. Under Immigration Act, foreign nationals with special contribution or sophisticated technological expertise in high demand in R.O.C. can be granted permanent residence so long as their applications are approved by special screening commission to be organized by relevant government authorities.

Aliens intending to work in R.O.C. must obtain employment permits. See category 10 Employment, topic 10.01 Labor Relations, subhead The Employment Service Act. Aliens entering into R.O.C. on resident visa must register with local police bureau within 15 days after their arrival to obtain resident certificate. Changes of residence and all changes in personal status must be reported to police within 15 days.

Any alien wishing to leave R.O.C. and come back again may report to police at his place of residence, to obtain multiple reentry permit. Aliens who want to do business in R.O.C. should obtain special permission. See category 2 Business Organizations, topics 2.03 Corporations, 2.05 Partnerships.

Land rights may be acquired by aliens whose own countries have entered into equal and reciprocal treaty with R.O.C. such as Treaty of Friendship, Commerce and Navigation between U.S. and R.O.C. For U.S. nationals, reciprocity is determined by law of their State. Aliens may acquire land only for following purposes: (1) Residence, (2) business place, office, store/shop, and factory, (3) churches, (4) hospitals, (5) schools for foreign children, (6) diplomatic and consular establishments, premises for public welfare organizations, (7) cemeteries, and (8) making investment that contributes to major domestic construction projects, economy, or to management of agricultural industry and livestock raising industry. Ownership of and claims over real property located within R.O.C. are solely governed by R.O.C. laws.

In R.O.C. aliens enjoy same civil rights as those of R.O.C. citizen within limits prescribed by law or ordinances. With respect to alien's disposing capacity, his national law shall apply. (Law Governing the Application of Laws of Civil Matters in Foreign Elements, Art. 1). R.O.C. courts recognize right of aliens to sue.

Naturalization of aliens is provided for under Arts. 3, 4, 5, 6, 7, 8, and 9 of Nationality Act of 5 Feb. 1929, last amended 27 Jan. 2006.

Marriage.

Alien who is spouse of R.O.C. citizen may apply for naturalization with Ministry of the Interior to acquire R.O.C. nationality, after he (she) meets certain qualifications provided in Arts. 3 and 4 of Nationality Act, unless he (she) retains nationality in accordance with law of his (her) country. (Nationality Act, Arts. 2, 4 and 8). Person whose spouse is alien loses R.O.C. nationality only after having been granted permission by Ministry of Interior to renounce nationality.

(Nationality Act, Art. 11, para. 3).

Corporations Owned or Controlled by Aliens.

See category 2 Business Organizations, topic 2.03 Corporations.

16.02 IMMIGRATION:

Regulations Governing Issuance of Visas of Foreign Passport Holders promulgated on 25 Aug. 1965, were abolished on 13 May 2000. Instead, Statute Governing Issuance of Visas to Foreign Passport Holders was promulgated and took effect on 2 June 1999 and last amended on 22 Jan. 2003.

Aliens holding passport of countries listed below may apply for Visa Exempt Entry to enter R.O.C. territory provided that alien holds passport that is valid for at least six months, confirmed return ticket, visa for next destination (if necessary), confirmed seat reservation for departure, and no criminal record in R.O.C. Duration of stay for Visa Exempt Entry is 30 days and no extension is permitted. (Australia, Austria, Belgium, Canada, Costa Rica, Denmark, Finland, France, Germany, Greece, Iceland, Ireland, Italy, Japan, Republic of Korea, Liechtenstein, Luxembourg, Malaysia, Malta, Monaco, Netherlands, New Zealand, Norway, Portugal, Singapore, Spain, Sweden, Switzerland, U.K. and U.S.A.)

Aliens holding passport of countries listed below may apply for Landing Visa to enter R.O.C. territory provided that alien holds passport that is valid for at least six months, confirmed return air ticket, visa for next destination and confirmed seat reservation for departure, completed application form with two photos, visa fee and no criminal record in R.O.C. Duration of stay for Landing Visa is 30 days and no extension is permitted. (Czech Republic, Hungary, Poland, Slovak and holders of U.S.A. passport with validity less than six months.)

Alien who is not eligible to apply for either Visa Exempt Entry or Landing Visa shall not be permitted to enter territory of R.O.C. without visa on his passport, travel certificate or provisional entry permit issued by R.O.C. consulate or designated agencies stationed overseas, and inspection by airport or harbor authority. Alien who wishes to make short stay or visit here shall apply for visitor visa. Validity of visitor visa shall be decided in accordance with alien whose government has reciprocal visa agreement with R.O.C. and normally visitor visa is valid for three months unless otherwise stipulated. Duration of stay for visitor visa varies from two weeks, 30 days to 60 days. Alien holder of visitor visa with duration of 60 days may, on good grounds and without “NO EXTENSION WILL BE GRANTED” restriction, apply at nearest city/county police headquarters for maximum of two extensions, each for 60 days. No extension of stay will be granted to those who hold visitor visa with duration of stay restricted to two weeks or 30 days, except for situations caused by force majeure or matters of vital importance. Visitor visa holders are not permitted to assume employment in R.O.C. without authorization. (See category 10 Employment, topic 10.01 Labor Relations.) Alien who desires to stay in R.O.C. for more than six months to engage in individual or social activities must apply for resident visa. In applying for resident visa, certificate outlining purpose of such stay and letter of guarantee issued by local resident regarding activities and means of living of applicant in R.O.C. is required. Resident visa for aliens to take up employment in foreign investment enterprise or branch of foreign company in R.O.C., will most likely be approved. Any alien holding resident visa shall apply with local police bureau for resident certificate within 15 days after his arrival. Duration of stay for resident visa is indefinite and dependent on duration of stay granted in Alien Resident Certificate. See topic 16.01 Aliens.

Pursuant to 3 July 1995 letter of Ministry of Foreign Affairs (“MOFA”) with Ref. No. Wai-84-Ling-Erh-Tzu-84315849, (1) only single-entry resident visa will be issued (after issuance of resident visa, multi-entry permit may be applied in accordance with Regulations Governing Entry, Exit, Residence and Stay of Foreign Nationals); (2) multi-entry visitor visa may be issued by

MOFA at its discretion based on principle of reciprocity on case by case basis; (3) multi-entry visitor visa with effective period from three months to five years may be applied for with R.O.C. consulate or designated agencies overseas based on principle of reciprocity.

Foreigners or designated representatives of foreign juridical persons as listed below may apply for single-entry resident visas pursuant to following conditions: (1) Foreigner whose investment has been approved in territory of R.O.C. and in operation with paid-in capital reaching amount of US$200,000; (2) upon condition (1), for each increase of investment by amount of US$500,000, additional visa may be issued for one more person. However, such additional issuance shall be limited to four persons only. See ruling set forth in MOFA's letter of 11 Aug. 1995 with ref no. Wei-84-Ling-Erh-Tzu-84818488.

If foreigners who have been granted visas fail to pursue provisions of Art. 11 of Statute Governing Issuance of Visas on Foreign Passports, Ministry of Foreign Affairs, embassies and consulates, representative offices, or other agencies authorized by Ministry of Foreign Affairs may invalidate or cancel their visas.

17 INTELLECTUAL PROPERTY

17.01 COPYRIGHT:

R.O.C. Copyright Act affords protection of work and upon completion rather than registration of work. There is no registration mechanism under R.O.C. Copyright Act. Contents of copyrights are divided into moral rights and economic rights to work. Moral rights belong exclusively to author of work, which are unassignable and non-inheritable, in respect of: (1) Releasing author's work; (2) indicating author's real name or alias or not to indicate author's name on original or reproduction of author's work or at time of releasing author's work; (3) maintaining integrity of contents, form and title of author's work. Economic rights are exclusive to author in respect of: (1) Reproducing author's work; (2) publicly reciting author's oral and/or literary work; (3) publicly broadcasting author's work; (4) publicly presenting author's audiovisual work; (5) publicly perform author's oral and/or literary work, musical work, dramatic and/or choreographic work; (6) publicly exhibiting original of author's artistic work or photographic work which has not been published; (7) adapting author's work to create derivative work or to edit author's work to create compilation; (8) leasing author's work to others.

Regarding works created during employment relationship, employee is author unless contract exists specifying employer as author, in which case contract should prevail. In cases where employee is author, however, economic rights to work are still vested in employer. In case of commissioned work, commissioned person is author and economic rights to work are vested in commissioned person or commissioner as provided by agreement between parties. Where no agreement exists, moral right and economic right to work are both vested in commissioned person, but commissioner has right of use.

Copyright may be assigned in whole or in part and may be owned by co-owners.

Economic rights to work are issued to author for duration of author's life from time of completion of intellectual work and may be inherited by author's heir for 50 years. However, in each of following cases, term of economic rights to work is only for 50 years from time of public release of such work: (1) Where work is copyrighted in name of juristic person; (2) where works are photographic work, audiovisual work, sound recording or performances.

R.O.C. Copyright Act provides compulsory license clauses including clause to musical works in respect to their recording and production for other recorded works for sale.

In case of infringement, copyright owner may prosecute penalty clause under R.O.C.

Copyright Act and may also recover damages from such infringers. Unrecognized foreign juristic person in R.O.C. may still be qualified in filing criminal complaint or private prosecution against offenses stipulated in R.O.C. Copyright Act. Remedies available to copyright owner of infringement include damages, removal of infringement and publication for final judgment. Copyright owner may claim damages equivalent to sum of profit obtained by infringer and loss suffered by copyright owner. If it is hard to prove actual damages, copyright owner may request court to determine amount of compensation within range from NT$10,000 to NT$1,000,000. In case offence is malicious and material, damages can be increased to NT$5,000,000. Offence regularly committed by person shall be prosecuted upon complaint by any party and sentence of imprisonment shall be raised to imprisonment of not more than seven years and not less than one year. Fines set further in R.O.C. Copyright Act. If case amounts to criminal offence, offender will be punished accordingly.

For preventing Internet infringement and regulating liability of ISP, R.O.C. Copyright Act is under revision. After lengthy discussion and review, Legislative Yuan passed revised articles of Copyright Act on 14 June 2007. As long as promulgation by President, revised articles of Copyright Act will take effect. Main points of 2007 amendment are adding Art. 87 I (7) and II. According to amendment, if all following requirements were met, such action would be deemed infringement of copyright: (1) Provision of computer programs or other technologies enabling public to publicly transmit or reproduce copyrighted works, (2) with intent to facilitate public, via Internet, to publicly transmit or reproduce other's works without approval or authorization of economic rights holder, (3) thus, infringing on economic rights of others and thereby gaining profits. If person advertises or takes other positive measures to abet, induce, procure, or persuade public to utilize computer program or other technology to infringe on economic rights of others, such actions shall be qualified as aforesaid “intent”. See category Information Technology, Internet and New Media, topic Criminal Jurisdiction.

“Professional criminals”, was abolished in line with amendment to R.O.C. Criminal Code. To reflect development of digital and Internet technology, R.O.C. Copyright Act had been amended several times. Main points of amendments are as follows: (1) “Technological Protection Measures” were introduced which are to be employed by copyright owners to prohibit or restrict others from accessing works. These measures are not to be circumvented without lawful authorization. (2) Performers' rights to receive remuneration for public performance of recordings were deemed unnecessary and abolished because performers can agree to sharing of profits with recording companies by contract before any such performance. (3) Compulsory arbitration was abolished in order to allow parties to resolve matters at their own discretion. (4) Injury to author's reputation through use of work shall now be regarded as infringement of copyright or plate right and subject to criminal penalties. (5) New provisions allow relevant authorities to suspend customs clearance and release of goods that are suspected of infringing copyright. If external appearance of imported goods or goods destined for export clearly arouse suspicion of Customs authorities, said authorities may request that right holder assist in verification within certain time period (within four hours from receiving notification in case of exports by air and within one business day in case of import by air and import or export by sea). If right holder does not apply to Customs for seizing of goods or institute civil or criminal proceedings within three business days, then Customs must release goods unless goods contravene other clearance regulations. (6) Distinction between copyright infringement for profit and copyright infringement not for profit has been abolished. (7) Minimum penalty for unauthorized copy of optical discs for sale or rental and for sale of illegally copied discs has been increased from detention to not less than six months imprisonment. Further, rental or sale of parallel imported optical discs is prosecutable if rights holder files complaint. (8) Amendments explicitly state that reproducing copyrighted work for personal reference or within bounds of fair use will not constitute copyright infringement. (9) Business use of pirated software is now subject to civil and criminal liability. “Technological Protection Measures” refers to equipment, devices, components, technology or other technological means employed by copyright owners to effectively prohibit or restrict others from accessing or exploiting works without authorization. Any equipment, device, component, technology or information for disarming, destroying, or circumventing technological protection measures shall not, without legal authorization, be manufactured, imported, offered to public for use, or offered in service to public. Following regulations were adopted in previous revision of R.O.C. Copyright Laws Act of 11 July 2003: (1) “Temporary reproduction” was deemed to fall within definition of reproduction. (2) Rights of transmission to public and of distribution were introduced. (3) Right of remuneration was introduced for public performance of recorded work and performances reproduced in recorded work. (4) Term “fair use” was explicitly deemed to include online fair use. (5) Outcome of copyright dispute mediations which are reviewed and approved by courts were deemed to have same force as irrevocable civil judgments. (6) Knowing use of unauthorized copy of computer program for business purposes was regarded as copyright infringement and subject to civil and criminal penalties. (7) Manufacture or sale of illegally copied optical media for purposes of sale or hire were made subject to public prosecutions. (8) Judicial police authorities were empowered with right to confiscate items used for or acquired from committing copyright infringement offences in cases where infringer has absconded and cannot be properly identified. Copyright registration system was completely abolished in 1998. R.O.C. nationals will acquire copyright upon completion in respect of: (1) Oral and literary works; (2) musical works; (3) dramatic and choreographic works; (4) artistic works; (5) photographic works; (6) pictorial works; (7) audiovisual works; (8) sound recordings; (9) architectural works; (10) computer programs. Performances are included in scope of protection.

Copyright on Foreign Intellectual Works.

Works of foreign national conforming to any of following conditions may be entitled to copyright protection under R.O.C. Copyright Act, unless otherwise provided in treaty or agreement which has been approved by resolution of Legislative Yuan: (1) Where work is first published in territory of Republic of China or in place outside territory of Republic of China and published simultaneously in territory of Republic of China within 30 days thereafter, provided that it has been duly verified, work of R.O.C. national is entitled to same protection under similar conditions in home country of said foreign national. (2) Where, according to treaty, agreement, laws, regulations, or customary practices in his/her home country, works produced by R.O.C. nationals are entitled to copyright protection in that country. Following Taiwan's entry into WTO as effected on Jan. 1, 2002, works of nationals of all WTO member nations are comprehensively protected.

Parallel importation of copyrighted works is prohibited due to Art. 87 of R.O.C. Copyright Act. As result, prior consent of copyright owner must be obtained before true copies of work can be imported by non-owner.

17.02 PATENTS:

Patent Act.

R.O.C. (Taiwan) Patent Act was first promulgated in 1944 and took effect in 1949. Patent Act went through number of changes. One of most significant amendments relates to one made in Jan. 1994, through which international patent priority claim practice was for first time brought into patent system (although R.O.C. is not member of Paris Convention). In Oct. 2001, Patent Act was amended to introduce, among others, laying open practice as well as request for examination for invention patent application, domestic priority claim practices, etc. In Jan. 2003, Patent Act was again amended, and President announced amendment on 6 Feb. 2003. 2003 amendment also brought into patent system certain significant changes, in particular changes with respect to new utility model patent practices (such as “formality examination applicable to all new utility model patent applications”, “request for new utility model technical report”, etc. In addition, opposition actions are abolished through 2003 amendment. Besides, criminal liabilities for infringement upon new utility model patents and new design patents were abolished. Except that amendment of criminal liabilities was brought into effect on 31 Mar. 2004, most of amended articles took effect on 1 July 2004.

Patent Categories.

There are three kinds of patents: Invention, New Utility Model and New Design patents, respectively. Subject matter covered by Invention patent refers to either object invention or method (process) invention that is high level creation of technical concepts in which natural rules are utilized. Subject matter covered by New Utility Model patent refers to creation or improvement with respect to form, construction or fitting of object. Subject matter of New Design patent application refers to creation made with respect to shape, pattern, color, or combination of above, which can be attributable to visual appraisals.

Publication/Laying Open Practice and Examination.

Laying open (18-month publication) practice as well as practices regarding requests for substantive examination were for first time introduced into R.O.C. patent system through Patent Act amendment of Oct. 2001. Above-mentioned new practices apply to Invention patent applications filed on or after 26 Oct. 2002. For Invention patent applications filed prior to 26 Oct. 2002 as well as all New Utility Model and New Design patent applications, above-mentioned laying-open practice does not apply. Such applications will be published in Patent Gazettes for public access only after they are allowed. For Invention patent application filed on or after 26 Oct. 2002, after receiving and examining filing documents of application, Intellectual Property Office (IPO, R.O.C. patent authorities) finds no procedural defect or grounds for nonpublication, application will be laid open after 18 months from day following date of patent filing or priority date, as case may be. Within three years from day following patent filing date, any person may file request for substantive examination of patent application. Applicant who is not satisfied with decision issued by IPO for his (her) patent application may file appeal proceedings to contest IPO's decision, including administrative appeal filed with Ministry of Economic Affairs (MOEA), administrative suit filed with administrative suit filed with Intellectual Property Court (IP Court) and appeal filed with Supreme Administrative Court, respectively.

International Priority Claim.

R.O.C. is not signatory to Paris Convention. However, according to Patent Act, patent applicant may claim priority for his (her) R.O.C. patent application as long as following reciprocity requirements are both met: (1) “applicant” of R.O.C. patent application is national from one of reciprocal countries, or has domicile or business place in one of reciprocal countries; and (2) “country” receiving “corresponding basic application (i.e., the application first filed anywhere in the world)” is one of reciprocal countries. Up to Mar. 2003, Australia, Germany, Switzerland, Japan, U.S.A., France, Liechtenstein, U.K., Austria, New Zealand, Netherlands, El Salvador, Paraguay, Costa Rica, Guatemala, Chile and Nicaragua have formed bilateral reciprocity with R.O.C. for patent priority claim purposes. After R.O.C. joined World Trade Organization (WTO) on 1 Jan. 2002, reciprocal countries been expanded to include, among others, all members of WTO. Due to political reasons, IPO will suspend its decision on priority claim based on corresponding Chinese patent application. Except for countries that already established bilateral reciprocity with R.O.C. prior to 31 Dec. 2001, date on which reciprocity between R.O.C. and any WTO member country took effect on 1 Jan. 2002, and priority date claimed by national from such WTO member state shall not be earlier than 1 Jan. 2002. Where patent application is filed by applicant from WTO member country with priority claim based on corresponding EP (The European Patent Office) or PCT (The World Intellectual Property Org.) application, priority claim shall be allowed if priority date is on or later than 1 Jan. 2002.

Period for filing patent application with priority claim is 12 months for invention or new utility model patent application and six months for new design application, which commences from filing date of corresponding basic application.

Domestic Priority Claim.

Applicant filing further R.O.C. application based on Invention application or New Utility

Model application earlier filed by him/her in R.O.C. can claim domestic priority for later filed R.O.C. application with respect to invention or creation disclosed in earlier-filed R.O.C. application. However, domestic priority claim cannot be made under any of following circumstances: (a) Where 12 months have elapsed from day following filing date of earlier filed application, (b) where international or domestic priority claim has already been made under R.O.C. Patent Act with respect to invention or creation disclosed in earlier filed application, (c) where earlier filed application is divisional application filed under Art. 33, Paragraph 1, of Patent Act, or converted application filed under Art. 102 of Patent Act, and (d) where decision of substantive examination has been rendered for earlier filed application.

If domestic priority claim is made, earlier filed R.O.C. patent application shall be deemed having been withdrawn upon expiration of 15 months from day following date of filing earlier filed application.

First-to-File Principle and Patentable Requirements.

R.O.C. patent system adopts “First-to-File” principle and “Absolute Novelty” requirement with exceptional six-month grace period if concerned prior publication or public use was made for research or experimental purposes or was made in manner of exhibiting invention or creation at trade show sponsored or recognized by R.O.C. government. In addition, six-month grace period also applies if prior disclosure is in nature involuntary disclosure (i.e., it is made against will of applicant). Inventive step creativeness requirement and industrial applicability requirement are also essential for obtaining Invention/New Utility Model patent or New Design patent, respectively.

Right to File Patent Application.

Person entitled to file patent application refers to inventor(s), or his (their) assignee(s) or successor(s). Employer is entitled to apply for patent and own patent right granted thereto for invention completed by employee in performance of his (her) job duties unless otherwise prescribed by contracts. For invention completed by employee, which has nothing to do with his (her) job duties, employee shall be entitled to right of applying for patent and patent right granted thereto on said invention. Any agreement signed by employer and employee, depriving employee's right and interest, is invalid. However, in case employee's invention is based on employer's resources or experiences, employer can implement invention within his business after paying employee reasonable compensation. For invention which is sponsored by some one other than inventor, ownership of right to apply for patent and own patent right must be decided based on agreement between both parties. If such agreement is nonexisting, inventor is entitled to right to apply for patent and own patent right.

Opposition Actions, Patent Grant and Cancellation Actions.

Patent Act that took effect prior to 1 July 2004, allowed patent application would be published in Patent Gazette for period of three months, during which anyone could file opposition against published patent application. If there is no opposition action or if opposition action(s), once filed, is (are) irrevocably dismissed, published application will mature into granted patent. At any time during patent term, anyone can file cancellation action against granted patent. Party who has retroactive interest with respect to patent may file cancellation action even after patent term has expired or has become extinguished. Opposition and cancellation actions are handled by IPO. Party who is not satisfied with decision issued by IPO for opposition action or cancellation action may file appeal proceedings with Ministry of Economic Affairs, Intellectual Property Court and Supreme Administrative Court, respectively. According to Patent Act amendment taking effect on 1 July 2004, opposition practice has been abolished. However, for opposition cases that are still pending at time when Patent Act of Jan. 2003 takes effect (i.e., on 1 July 2004), old Patent Act (Patent Act of 2001) shall govern. In addition, for approved patent applications that are published prior to 1 July 2004, any third party can still file opposition action(s) pursuant to old Patent Act.

Patent Duration.

Under Patent Act of 2001, Invention, New Utility Model or New Design patent right commences from publication date and endures for protection term of 20 or 12 years from filing date, respectively. For pharmaceutical-related or agrochemical-related patent covering either product invention or manufacturing process invention, patentee may apply for extension of patent term from two to five years if permit for practicing patent is needed under R.O.C. laws or regulations and process for obtaining permit exceeds two years from publication date. Application for patent term extension must be filed within three months from date of issuing first permit and six months prior to expiration date of original patent term. In addition, patent term extension only applies to patent cases filed on or after 23 Jan. 1994. According to Patent Act taking effect on 1 July 2004, duration of new utility model patent has been shortened to ten-year protection term (it will expire after expiration of ten years from filing date).

Enforcement Against Patent Infringement.

Infringement of patent is subject to civil liabilities only. Patentee or his (her) exclusive licensee is entitled to take actions against alleged infringer to cease any continuous infringement or prevent any threatened infringement, and/or claim damages. Patent rights are subject to certain restrictions, such as “First Sale Exhaustion Principle” and other restrictions as prescribed in Patent Act. Injured party may also seek preliminary injunction order(s) against alleged infringer. Statutory limitation for filing civil suit against patent infringement to claim damages is two years from date of knowing alleged infringement or ten years from date of infringement, whichever is earlier. Patent marking (i.e., marking of R.O.C. patent number on patented products or its packaging) is prerequisite to claim damages. However, even though patent marking is not made, right to claim for damages would not be affected if it is proved that infringer knew of, or had means of knowing of, patent.

For invention application filed on or after Oct. 26, 2002, if there is any unauthorized commercial practice of invention claimed in such invention application by third party during period from date on which invention application is laid open to date of its grant, patent applicant may seek reasonable compensation after his (her) application is granted and published as long as following requirements are met: (1) After laying open of invention application, applicant serves written notice to third party with respect to content of his (her) invention application and said third party, after receiving such notice and before invention application is allowed and published, continues to practice invention for commercial purposes; (2) applicant action for compensation is taken within two years from day following date on which application is granted and published. Patent applicant may take above actions against third party who, with knowledge of laid open invention application, makes commercial practice of invention covered in invention application.

Licensing and Compulsory Licensing.

Compulsory licensing of patent can be sought under any of following conditions: (1) In case of national emergency; (2) in case of nonprofit-making use to promote public welfare; (3) in case of failure to obtain license within considerable period of negotiation on basis of reasonable commercial terms; or (4) in case of unfair competition committed by patentee, which has been irrevocably confirmed by Fair Trade Commission or R.O.C. court. For patent covering semiconductor technology, compulsory licensing of such patent can be granted only if practice to be sought is nonprofit-making practice to promote public welfare.

There is no working requirement for maintaining patent. Owner of dominated patent (i.e. manufacturing process patent or reinvention patent) must obtain consent from owner of dominating patent (product patent or original patent) so as to practice dominated patent. Both parties may enter into cross licensing agreement. Owner of dominated patent may also seek compulsory licensing of dominating patent in case any of above-mentioned conditions are met and dominated patent involves significant technical innovation with economic value as compared to dominating patent.

Patent Annuity Payments.

Patent applicant must pay patent certificate fee and first year annuity within three months from date of receiving allowance decision for his/her patent application. Patentee must pay annuities prior to anniversary of publication date of that annuity payment year in order to keep his (her) patent in force. Late payment made within six months is acceptable by paying double amount of original amount due. If late payment is not made on time, patent shall become extinguished.

IP Court Organization Act and IP Case Adjudication Act.

New IP trial system has just taken effect in Taiwan, which is deemed epoch of Taiwanese judicial system. First of all, ``Intellectual Property Court'' (IP Court) was established on basis of ``IP Court Organization Act'' to take charge of first and second instances of IP-related civil cases, second instance of IP-related criminal cases, and first instance of IP-related administrative lawsuit cases. New IP trial system does not require that all IP cases be exclusively handled by IP Court after it started to operate; instead, IP Court only enjoys ``jurisdiction of priority'' on IP-related cases. Moreover, new system also includes new law named ``IP Case Adjudication Act'' (IP Act). IP Act not only will apply to cases handled by IP Court, but also must be applied to IP cases pending before common courts.

Determination on Validity Issue by Court.

In previous system, civil court normally had to respect IP right granted by IPO, and could not review and determine validity of asserted IP right by itself. However, under IP Act, where party claims or raises cause for revocation or cancellation of IP right, court must judge on its own accord whether claim or rebuttal is justified. If court decides that there is cause for revoking or canceling IP right, owner of IP right cannot claim any right against counter party in civil litigation. In other words, court will dismiss litigation filed by owner of IP right, or render declaratory judgment confirming non-existence of claims generated from infringement. Court's decision on validity of concerned IP right only has binding effect on said litigation, which must not extend to other enforcement action taken by owner of IP right against third parties. If defendant wants to invalidate IP right, he/she still has to file cancellation action with IPO.

Since court has to determine validity issue itself, court no longer can suspend civil proceedings in order to wait until IPO's decision on cancellation action becomes final. IP Act provides mechanism for court's utilization in dealing with validity issue: that is, court may, if necessary, order IPO examiner to participate in litigation so as to present opinions for judge's reference.

Technical Advisor.

IP Court recruits several Technical Advisor (TA) to, under judges' instructions, assist judges in reviewing technical issues, collecting technical information, analyzing and providing technical opinions. Currently, source of TA comes from IPO examiners. TA's opinions will be deemed court's internal information and, in principle, will not be disclosed to parties. However, if court wants to adopt TA's opinions as ground for judgment, parties must be allowed to debate on said opinions first.

Since only IP Court has TA within its organization, if such need comes out in patent infringement lawsuit handled by common civil court, common civil court can apply with IP Court to send TA to help judges of common court.

Confidentiality Preservation Order.

Where argument involves party's or third party's trade secrets, court may, upon request by party, issue ``Confidentiality Preservation Order'' (CPO) to counter party, agent(s), assistant(s), or other related parties, compelling them to preserve confidentiality of trade secret. One who violates CPO must be punished with imprisonment of not more than three years, detention, or in lieu thereof or in addition thereto, fine of not more than NT$100,000.

Evidence Preservation Procedure and Document Presentation Order.

In past, mechanisms of evidence preservation procedures and document presentation order under Code of Civil Procedure (CCP) is subjected to criticism due to their weak effect. This situation may be improved after IP Act took effect. According to IP Act, when court carries out evidence preservation procedure, if counter party refuses implementation of evidence preservation without justified reason(s), court may eliminate such refusal by coercive force within necessary range and may ask for assistance from police. On other hand, if holder of concerned document(s) refuses to present such document(s) as ordered by court without justified reasons, court may impose fine on holder below or of NT$30,000 and may rule compulsory execution in line with provisions of Compulsory Execution Law.

Preliminary Injunction Order.

Under CCP, petitioner for preliminary injunction order (PIO) must submit evidence to ``explain'' his/her grounds and reasons. If court deems explanation insufficient, it may grant PIO with condition that, before executing PIO, petitioner must place security bond as ``supplement'' of burden of explanation. However, according to IP Act, petitioner for PIO must fully explain disputed legal relationship, as well as facts related to necessity of PIO, including prevention of material damages, avoidance of imminent dangers or any other similar circumstances; in case explanation is insufficient, court must dismiss petition. Even if reasons for filing PIO petition have been clearly explained, court may still grant PIO with condition that petitioner must furnish security bond before executing PIO.

Furthermore, under CCP, unless respondent petitions with court to order PIO petitioner to file litigation, in principle, PIO petitioner can freely decide whether and when to file litigation to ultimately solve disputes. However, IP Act requires that petitioner file litigation within 30 days after receiving PIO; otherwise, court may, upon request or by virtue of its authority, revoke said PIO.

Integrated Circuit Layout Protection Act.

Protection of mask works was, for first time, introduced to R.O.C. intellectual property practice with enactment of Integrated Circuit Layout Protection Act (“Act”). Act was promulgated on 11 Aug. 1995 and taking effect on 11 Feb. 1996 followed by amendment in 2002, Act supplements protection available under Patent Act and Copyright Act with respect to designs of integrated circuit (“IC”) layout.

Requirements for Registration.—Act stipulates that protection is afforded only upon registration. Circuit layout allowed for registration refers to one that is originally created and not ordinary, common, or conventional to IC industry or IC layout designers. In addition, application for registration must be filed within two years from date of first commercial exploitation of layout.

Ownership of IC Layout Creations.—Right to register IC layout vests in creator of layout. However, if layout creation is completed by employee in performing his job duties, right vests in employer unless otherwise provided for in agreement. If one provides funding to another for development and creation of IC layout, right to apply for registration vests in fund provider unless otherwise agreed to by contract. Creator is entitled to right of attribution.

Registrations by Foreigners.—With regard to foreign applicants, registration eligibility is based on reciprocity. Alternatively, if foreign applicant's layout creation was first commercially exploited within R.O.C., application for registration will be permitted provided that home country of foreign applicant provide protection to R.O.C. nationals under same circumstances. Member countries of WTO are recognized as reciprocal countries for IC layout protection in R.O.C.

Application Documents and Samples.—Applicant must, among others, submit two sets of specification and drawings or photos of layout. If layout has already been commercially exploited, four sample products embodying layout must be additionally submitted. If drawings, or sample contains secrets relating to methods of manufacturing IC, secretive portions may be blocked out provided that no more than one half of each level is so blocked out.

Protection Term and Scope of Right.—Upon completion of registration, IC layout rights are conferred for period of ten years commencing from filing date of circuit layout registration or date of layout's first commercial exploitation, whichever is earlier. Owner of registered layout is entitled to preclude others from reproducing registered layout in whole or in part, and/or importing or distributing for commercial purposes registered layout or integrated circuit containing said layout. However, right is subject to limitations, including reproduction for research, educational, or reverse engineering purposes, exhaustion doctrine, independent creation, and importation or distribution of unlawfully produced IC by bona fide owner of such IC.

Compulsory Licensing.—Circuit layout rights may be subject to compulsory licenses on any of following grounds: (1) Non-profit-making use for public welfare; and (2) unfair competition committed by circuit layout right owner, as irrevocably confirmed by Fair Trade Commission or R.O.C. courts.

Remedies Against Infringement.—Circuit layout right owner is entitled to following remedies against infringement of owner's right: (1) Claim damages; (2) request removal of existing infringement; and (3) request prevention of anticipated infringement.

17.03 TRADEMARKS:

Introduction.

Historical Background.

R.O.C. Trademark Act (hereinafter referred to as “the Act”), was first promulgated in 1930, and became effective on 1 Jan. 1931. Subsequently, the Act has been amended 11 times, with latest amendment in 2003.

“First-to-file” Principle and Optional Registration.

According to the Act, it is necessary to register trademarks with Intellectual Property Office (“IPO”) to obtain rights to exclusive use of trademark. In deciding who enjoys priority in registration of mark, “first-to-file” principle is adopted, rather than “first-to-use”. In all cases, early application is always best policy for obtaining trademark protection in Taiwan.

Registration.

Who May Apply.

Any natural or juristic person who intends to obtain right to exclusive use of trademark may apply for registration of that trademark. Joint ownership is acceptable. Certification marks may be registered by juristic person, organization or government agency capable of certifying another person's goods or services. Collective membership marks may be registered by business association, social organization or any other group of juristic person which desires to exclusively use mark to identify its organization or membership. Collective trademarks may be registered by business association, social organization or any other group of juristic person which desires to exclusively use mark to identify goods or services provided by its members and to distinguish these goods or services from those provided by others.

What May Be Registered.

Any word, device, symbol, color(s), sound, three-dimensional shape or any combination thereof that distinguishes source of goods or services can be registered as trademark.

Types of Marks.

Trademark.

Mark that is used to distinguish source of goods or services.

Collective Membership Mark.

Mark that is used to indicate membership in group.

Collective Trademark.

Mark that is used to indicate goods/services provided by member of specific group.

Certification Mark.

Mark that is used to show characteristics, quality, precision, place of origin or other matters of another person's goods or services. Owner is not allowed to produce goods or services.

International Classification of Goods and Services.

Taiwan adopts the International Classification of Goods and Services under Nice Agreement, consisting of 34 classes of goods and 11 classes of services. Application under Multiple-classes application is available under Act.

Application Requirements.

Following documents and information are required for filing trademark application: (1) Power of Attorney executed by authorized person of applicant (neither legalization nor notarization is required); (2) applicant's name; (3) five prints of trademark, not larger than 8 cm by 8 cm; and (4) specification of goods and services and their classifications under International Classification of Goods and Services; and (5) filing fee of NT$3,000 (approx. US$97), NT$5,000 (approx. US$161) or NT$9,000 (approx. US$293) depending on number of designated goods.

Priority.

Trademark application may claim priority if it is filed, within six months following filing date of corresponding application in another country that provides reciprocal protection to R.O.C. citizens or companies. To claim priority, applicant must submit filing date of foreign basic application and name of foreign country together with certified copy of basic application. This may be submitted within three months following filing date. Taiwan is not member of any international convention for protection of intellectual property rights. However, under TRIPs of WTO, of which Taiwan became member on 1 Jan. 2002, priority is available to any and all trademark applications filed by WTO members.

Grounds for Rejection.

Trademark application will be rejected under any of following circumstances: (1) Trademark is not distinctive enough for registration; (2) trademark signifies shape, quality, function or other descriptions of designated goods or services unless trademark has acquired secondary meaning; (3) trademark is sign or term commonly used in relation to designated goods or services; (4) trademark is three-dimensional shape of designated goods or packaging and is indispensable for performance of function; (5) trademark is identical or similar to national flag, national emblem, national seal, military flags, military insignia, official seals, medals of Republic of China, or national flag of any other nation; (6) trademark is identical to image or name of late Dr. Sun Yat-Sen or of head of state; (7) trademark is identical or similar to mark used by government office of R.O.C. or by public show in nature of exhibition, or identical or similar to medal awarded by such government office or public show; (8) trademark is identical or similar to name, emblem, badge or mark of well-known international organization or well-known domestic or foreign institution; (9) trademark is identical or similar to R.O.C. “Quality Standard” mark or any local or foreign mark of same nature; (10) trademark violates public order or good moral of R.O.C.; (11) trademark is likely to mislead public with respect to nature, quality, or place of origin of designated goods or services; (12) trademark is identical or similar to another person's well-known trademark or mark, thus likely to cause confusion to or misidentification by relevant public, or likely to dilute distinctiveness or reputation of that person's well-known trademark or mark; provided, however, that this provision shall not apply if trademark application is filed with consent of owner of well-known trademark or mark; (13) trademark is identical or similar to another person's registered trademark or earlier filed trademark designated for use on same or similar goods or services, thus likely to cause confusion to or misidentification by relevant consumers; provided, however, that this provision shall not apply if application is filed with consent of owner of registered trademark or earlier filed trademark except when two parties' trademarks are identical and designated goods or services are identical as well; (14) trademark is identical or similar to trademark first used by another person for same or similar goods or services and applicant, due to contractual, territorial, or business connections, or any other relationship with that person, knows of existence of that person's trademark; provided, however, that this provision shall not apply if application is filed with consent of that person; (15) trademark contains image of another person, or famous name, stage name, pseudonym or alias of another person, unless application is filed with consent of that person; (16) trademark contains name of well-known juristic person, firm or other group, thus likely to cause confusion to or misidentification by relevant public; (17) trademark infringes upon another person's copyrights, patent rights or other rights and infringement is affirmed by court's final judgment; provided, however, that this provision shall not apply if application is filed with consent of that person; or (18) trademark is identical or similar to geographical indication of certain alcoholic products manufactured in country or region that has agreed to reciprocal trademark protection with R.O.C. and is designated for use on those alcoholic products.

Disclaimer.

If trademark contains any word, device, symbol, color or three-dimensional shape which is descriptive or non-distinctive and deletion of such portion will make trademark incomplete, applicant may disclaim right to exclusive use of such portion to enable registration of trademark.

Trademark Rights.

From registration date, trademark owner will enjoy right to exclusive use of mark for ten years. Act stipulates that trademark rights extend to goods or services designated in registration. Act, however, also provides that protection of trademark covers not only goods or services designated in registration but also similar goods and services. Therefore, registered goods and services concern scope of goods or services eligible for licensing and protection.

Registration.

After substantive examination, if trademark is approved for registration, IPO will issue notice of approval. Upon payment of registration fees within two months from receipt of approval, trademark will be granted registration and published in official Trademark Gazette.

Opposition.

Within three months following trademark registration date, anyone who considers that registration of trademark is in violation of Act may file opposition against it based on same grounds as those for rejection.

Invalidation.

After registration, trademark may be invalidated by interested party as result of any violation of Act that existed while obtaining registration of mark. Grounds for invalidation of trademark registration are mostly same as those for rejection. However, to invalidate trademark based on grounds referred to in items 1, 2 and 12 to 17 of "Rejection" section, invalidation action should be brought within five years from registration date, except if invalidation action was based on ground of item 12 and invalidated trademark was not filed in good faith. Once trademark registration is invalidated, registration is considered null and void ab initio.

Revocation.

After registration, trademark may be revoked due to any violation of Act that occurs during use of trademark. Such violation may include following: (1) Where trademark is used with unauthorized alteration or additional features whereby trademark is made identical or similar to registered trademark of another person used on same or similar goods or services, thus likely to cause confusion to or misidentification by relevant consumers; (2) where without good cause, trademark has not been put into use for three years after registration, or has been continuously suspended from use for three years, except where trademark has been used by licensee; (3) where assignment of trademark results in likelihood of confusion among consumers due to separate ownership of identical trademarks for similar goods or services or separate ownership of similar trademarks for same or similar goods or services, yet no appropriate distinguishing marking is affixed after assignment of trademark, except if proper distinguishing marking has been made before IPO renders decision such that no likelihood of confusion or misidentification will incur; (4) where trademark has become common sign, name or shape of goods or services as designated for trademark; (5) where trademark in use is likely to mislead public about nature, quality or place of origin of goods or services under trademark; or (6) where use of trademark has been affirmed by court's final judgment to have infringed upon copyrights, patent rights or other rights of another person.

If cause of revocation exists in respect to some of goods or services designated for registered trademark, revocation may be effected on that part of goods or services. Once trademark registration is revoked, registration is considered null and void from date of revocation.

Hearing is available for trademark dispute cases including opposition, invalidation, and revocation. If dissatisfied with IPO's decision after hearing, normal administrative appeal can be utilized, and party shall directly file administrative suit.

Assignment.

Under Act, assignment of trademark can be made with or without goodwill. Trademark registration may be partially or separately assigned based on registered goods or services. However, if assignment results in likelihood of confusion among consumers due to separate ownership of identical trademarks for similar goods or services, or separate ownership of similar trademarks for same or similar goods or services, then appropriate distinguishing markings are required.

Upon effective date of assignment, trademark rights concerned shall be transferred to assignee. However, to assert transfer of trademark rights against third parties, assignment must be recorded with IPO.

License.

License of trademark may be recorded against all or part of registered goods or services.

Any licensing of trademark must be recorded with IPO, yet such recordation may be made only after registration of trademark concerned. Unrecorded trademark license cannot be asserted against third parties, while recorded trademark license may continue its validity against assignee of licensed trademark.

Renewal.

Application for trademark renewal must be filed within six months immediately preceding or following expiration of trademark registration. Renewal application filed after expiration of trademark registration shall be subject to double government fees. Proof of use is not required for renewal. Trademark registration may be extended for term of ten years per renewal upon fulfilling formality requirements, mainly paying fees.

Appeal.

Appeal proceedings are available to interested parties dissatisfied with decision or lack of decision by IPO. According to R.O.C. Law of Administrative Appeals and Code of Administrative Court Proceedings, there are three stages for appeal proceedings, i.e. appeal with Ministry of Economic Affairs and two instances of administrative suit proceedings with Intellectual Property Court and Supreme Administrative Court. According to Act of Administrative Appeal, decision from administrative appeal should be made within three months, and such period can be extended once for up to two months. Intellectual Property Court shall substantively examine case, including examination of facts and laws, but Supreme Administrative Court shall only examine legal issues and not factual issues.

Infringement.

Committing following acts without prior consent from trademark owner or collective trademark owner are subject to criminal liability and shall be punished with imprisonment for not more than three years, detention and, in addition thereto or in lieu thereof, fine of not more than NT$200,000: (a) Using trademark identical or similar to another person's registered trademark for same goods or services; (b) using trademark identical to registered trademark or collective trademark for similar goods or services, thus likely to cause confusion to relevant consumers; (c) using trademark that is confusingly similar to registered trademark or collective trademark on same or similar goods or services, thus likely to cause confusion to relevant consumers.

Committing following acts without prior consent from trademark owner are deemed trademark infringement and are subject to civil liability: (a) Knowingly using design or word as trademark, trade name, or domain name that is identical or similar to another person's registered well-known trademark and thus diluting distinctiveness or damaging reputation of well-known trademark; and (b) knowingly using word(s) contained in another person's registered trademark as one's own company name, trade name or domain name or any other sign identifying entity or source of one's business, thus resulting in confusion to relevant consumers of goods or services.

Registrant may request Customs to suspend release of imported or exported goods that are suspected of infringing on trademark rights after fulfilling certain requirements, including explicating in writing facts of infringement and delivering bond equivalent to price of goods.

Legal Actions Against Infringement.

Investigation and Police Raid.

Primary goal in dealing with infringement matters is to prevent infringers from conducting further infringing activities and to recover damages. Initial step in campaign against infringer is to investigate alleged infringement, to collect initial evidence and to investigate infringer's operation. Once investigation reveals sufficient evidence of infringement, police raid upon premises of infringing operation is arranged in order to search for and seize counterfeit products and related sales documents. This evidence is necessary in order to assess damage claims and prosecute infringer.

Preventive Measures.

If before alleged infringer is convicted, there exists high probability of continued infringing activities, preliminary injunctions are available to halt such activities. To prevent alleged infringer from dissolving his property, provisional attachment may be sought.

Criminal and Civil Liabilities.

Under Act, infringers, who commit acts of infringement referred to in Items of Infringement section, may be subject to criminal liability and, if convicted, can face up to three years in prison. Tort liability may be imposed on infringers as well. Damages may be assessed based on claimant's loss of profit or undue enrichment obtained by infringer from sales of infringing products. To save trouble of proving damages, assumed damages are available. These assumed damages are calculated at either 500 to 1,500 times unit retail price of seized counterfeit items or total sales price of items if quantity seized exceeds 1,500 pieces. In addition, trademark owner may claim damages to reputation.

In tort action, in addition to above-listed damages, trademark owner may seek permanent injunction order to restrain and enjoin infringer from using, marketing, and/or advertising infringing products.

17.04 TRADE SECRETS:

Trade Secrets Act (“the Act”) was promulgated on 17 Jan. and took effect on 19 Jan. 1996. Enactment of Act was to supplement Criminal Code, Civil Code, and Fair Trade Law in protection of proprietary information because these laws at times cannot provide adequate and direct protection in situations involving misappropriation of intangible trade secret and know-how. Totaling 16 articles, salient points of Act include definition of and requirements for protectable information, acts that would be considered as misappropriation of trade secret, and remedies and methods to calculate damages.

Protectable Information.

Information protected under Act includes any method, technique, process, formula, program, design, or other information which can be used in production, sale or business operation. To avail protection, information must meet following requirements: (1) It is not generally known; (2) it has economic value, actual or potential, due to its secretive nature; and (3) reasonable measures have been taken by owner to maintain secrecy of information.

“Reasonableness” of protective measure required is not set out in Act or legislative explanations, and therefore it must await future clarification by courts. At minimum, trade secret owners should implement procedural protocols so that proprietary information does not lose its secretive nature.

Ownership of Trade Secrets.

Trade secret owner is one who developed or created information unless otherwise specified by Act or contract. This general rule is applicable to situation where one contracts another to develop trade secret, i.e., in work-for-hire scenario. However, if trade secret is developed or created by employee as result of performance of his job duties, employer will own trade secret unless otherwise stated in contract. This exception might create conflict with current Copyright Law, which stipulates that employee will own copyrightable work created from employee's employment duties unless otherwise specified by contract. Conflict would arise if trade secret is first manifested in copyrightable embodiment and employer has neglected to prepare agreement stipulating respective ownerships. If employee developed or created trade secret, with no relationship with his job duties, ownership of trade secret will vest in employee.

Misappropriation of Trade Secrets.

With regard to misappropriation of trade secrets, "gross negligence" is threshold for culpability. Misappropriation is defined as: (1) To acquire trade secret by improper means; (2) to acquire, use, or disclose trade secret previously acquired through improper means by another, knowingly or unknowingly due to gross negligence; (3) after acquiring trade secret originally acquired through improper means by another, to use or disclose such trade secret, knowingly or unknowingly due to gross negligence; (4) to use or disclose through improper means trade secret originally acquired; and (5) to disclose without cause or use trade secret, in respect of which law imposes duty to maintain its secrecy; "improper means" is defined as "theft, fraud, coercion, bribery, unauthorized reproduction, breach of or inducement to breach an obligation to maintain secrecy, or any other similar means."

Remedies Against Misappropriation of Trade Secrets.

Remedial measures for misappropriation of trade secret include injunctions, monetary compensation (treble damages for intentional misappropriation), and destruction or other dispositions of results of misappropriation and/or items used exclusively in misappropriation. Foreigners may enjoy trade secret protection under Act based on reciprocity principle.

Although Trade Secrets Act only became effective on 19 Jan. 1996, concept of trade secret protection is not new in R.O.C. Because of secretive nature of trade secrets, litigation involving this type of protection is expected to be difficult. This is further complicated by fact that there are no extensive discovery procedures in R.O.C. as those existing in Anglo-American legal systems, and therefore, plaintiffs have substantive difficulties overcoming burden of proof. Act will not mitigate burden of proof that plaintiff must bear in trade secret litigation. Therefore, well-structured management of proprietary information should be implemented by private sectors to minimize disputes.

18 LEGAL PROFESSION

18.01 ATTORNEYS AND COUNSELORS:

Description of R.O.C. Regulations Governing Attorneys.

Person may qualify to take R.O.C. bar examination by: (1) Graduating from law school, equivalent to four years of undergraduate legal training; (2) passing qualification test; or (3) passing court clerk examination and obtaining working experience in this position for more than four years. Attorney is licensed to practice in R.O.C. upon passing bar examination and completion of six-month training program. Foreigners can be admitted to local bars only upon passing R.O.C. bar examination and receiving special approval from R.O.C. Ministry of Justice on basis of reciprocity.

Bar passing rate remained lower than 2% for most terms of past four decades, which was then lifted to around 5% to 15% for past seven years. Ministry of Justice is responsible for general governance of R.O.C. lawyers while local bar associations self-regulate in their districts.

Contact Addresses.

Taiwan Bar Association of the R.O.C., 5F, 130 Chungking S. Rd., Sec. 1, Taipei, Taiwan, Tel: (02) 2 331-2865, Fax: (02) 2 375-5594; Taipei Bar Association, 9F No. 7, Sec. 1, Roosevelt Rd., Taipei, Taiwan, Tel: (02) 2 351-5071, Fax: (02) 2 391-3895; Kaohsiung Bar Association, 2F, 1 Shih Chung Rd., No. 171, Kaohsiung, Taiwan, Tel: (07) 215-4892, (07) 215-4893, Fax: (07) 281-0228.

Foreign Attorneys in R.O.C.

Only R.O.C.-licensed lawyers are permitted to engage in courtroom representation, unless court approves otherwise. Licensed attorneys may affiliate themselves with foreign firm, and hire foreign attorneys. Foreign attorneys are permitted to practice laws of jurisdictions where they were licensed if they have been practicing in above jurisdictions for five years. There has been recent trend of foreign attorneys, acting as consultants, rendering banking and investment services for overseas clients conducting business in R.O.C.

19 MORTGAGES

19.01 MORTGAGES:

Under Civil Code, only known security device is mortgage of real property. Instrument containing debtor's promise that creditor may treat real property as security in case of default is commonly called mortgage. When real property is used as security, it is necessary not only that there be written agreement to mortgage, but also that there be recording of signed copies of mortgage agreement at public office. There is no mortgage until such mortgage is recorded, even where parties have signed mortgage agreement.

Parties to mortgage agreement are mortgagor and mortgagee. Under R.O.C. law, before having been recognized and licensed by R.O.C. (Taiwan) authority to do business in Taiwan, foreign corporate entity is not capable of becoming mortgagee to mortgage agreement.

If two or more mortgages are created on same real property, rank of each is determined by priority of recordation. Mortgage recorded prior to another mortgage is referred to as senior or first mortgage. Priority controls disposition of foreclosure sale proceeds. When mortgage is foreclosed, property is sold free and clear of both senior and junior mortgage, and junior mortgagee receives only so much of proceeds as are surplus after senior mortgagee is paid, unless otherwise provided by laws.

Regardless of whether mortgage is viewed as title, mortgagor may convey mortgaged property, but mortgage thereon remains (so long as mortgage has been properly recorded). If neither original mortgagor nor transferee pays mortgage debt, there will be foreclosure and transferee will lose property. Transferee is liable for deficiency judgment after foreclosure sale only if mortgage debt has been assumed. As obligee, mortgagee may assign its rights to enforce debtor's promises to pay. Usually it does this by assigning mortgage claim (as evidenced by promissory note, for example), and mortgage along with it will automatically be transferred to assignee.

Mortgage secures payments of principal debt, interest, default interest and expense of foreclosing mortgage, except as otherwise provided for in mortgage agreement.

On default, mortgagee may apply to court for foreclosure sale to satisfy mortgage debt from proceeds. Agreement that on default, title to mortgaged property shall be transferred to mortgagee is void, but after maturity of debt secured, mortgagee may, by agreement with mortgagor, take mortgaged property in satisfaction of debt.

In 1963, Chattel Secured Transactions Act (“Act”) was enacted to validate chattel mortgages as security interests upon recording of such transactions at public office.

Usual characteristics of chattel mortgage are debt owed to mortgagee by mortgagor, and agreement subjecting specified tangible personal property as security for debt. According to Act, such chattel mortgages are perfected when required applicable steps have been taken. Such steps are: (i) Security agreement (chattel mortgage agreement) in writing. Basic requisites of chattel mortgage agreement are set forth in Art. 16 of Act as summarized here: (1) Agreement must be signed by both debtor and secured party; (2) agreement must name parties, and give their addresses; (3) agreement must contain statement indicating types or describing items of collateral and place where collateral is located; and (4) agreement must describe amount of debt secured; (ii) filing for record pursuant to Art. 5 of Act is also required. Act adopts system of "transaction filing". What is required to be filed for record is not, as under certain statutes, just notice (financial statement indicating merely that secured party who has filed may have security interest in collateral described), but rather signed copies of chattel mortgage agreement themselves.

Under Act, chattel mortgages are generally declared void against such persons as other creditors of mortgagor or transferees of collateral, unless such mortgages are recorded as prescribed by Act. Act requires parties to make recordation so as to give "notice to the world" that property or interest of mortgagor has already been encumbered with security interest, and thus to put subsequent creditors and transferees of collateral on notice. This requirement protects all subsequent creditors and transferees from secret, unrecorded interests of others.

According to Art. 3 of Act, secured transactions taking form of chattel mortgage shall be subject to provisions of this Act. This provision declares that Act governs validity and perfection of chattel mortgage and effect of recording. As such, chattel mortgage created by contract which is governed by any law other than Act is not recognized to be valid and enforceable in Taiwan. Nor would local public registry accept application to record such security interest.

Art. 3 of Enforcement Rules of Act spells out rules to determine where to perfect chattel mortgage. With respect to ordinary goods, general rule is that place in which to perfect chattel mortgage by recording is that of location of collateral. If collateral is automobiles, place in which to record chattel mortgage is that of location of mortgagor.

Like mortgage, foreign corporate entity, before having been recognized and licensed by R.O.C. (Taiwan) authority to do business in Taiwan, is not capable of becoming party to secured transaction taking in form of chattel mortgage.

20 PROPERTY

20.01 ABSENTEES:

Generally speaking, an absentee may be represented by an attorney-in-fact. Yet, court may by ruling prohibit person other than lawyer from acting as agent ad litem. (C. C. P. 68). Courts may render default judgment against absentee upon request of parties who are present at hearing if absentee has been properly served. (C. C. P. 385). Action against absentee whose whereabouts are unknown may be effected by publication of service. (C. C. P. 149). If absentee's whereabouts are unknown and he fails to appoint administrator for his property, his property is to be managed by person(s) in following order: (a) Spouse; (b) parents; (c) children over 20 years old; (d) grandparents living with absentee; and (e) head of household. In case it is impossible for above-named person(s) to manage property, court may upon request of interested party or prosecutor appoint curator absent. (Law of Non-Litigious Matters 109).

20.02 AUTHORITY OF AGENCY:

If authority of agency is conferred by juristic act, act of conferring must be made by manifestation of intention to agent or to counterpart of transaction. (C. C. Art. 167). Manifestation of intention which agent makes in name of principal within scope of his delegated authority shall bind upon principal. (C. C. Art. 103). No limitation or revocation of power conferred on agent can be asserted against bona fide third party, unless ignorance of third party is due to his fault. (C. C. Art. 107). At termination or revocation of power of agency agent has to return, if any, written authorization letter to party who gave it; he has no right of retention to it. (C. C. Art. 109). Person, who by his own acts represents that he has conferred authority of agency to another person, or who knowing that another person declares himself to be his agent fails to express contrary intention, is liable to third parties as if he had conferred that authority, unless third parties knew, or could have known absence of authority. (C. C. Art. 169). Juristic act done by person having no authority to act as agent is ineffective against principal unless ratified by principal. (C. C. Art. 170).

20.03 REAL PROPERTY:

Real Property is governed primarily by Civil Code and Land Act, which are augmented, among others, by Statute for Equalization of Land Rights, Urban Plan Act and Area Plan Act for utilization of land.

Real property rights (such as ownership and mortgage), their transfer, amendment and/or cancellation are required to be registered in registry kept in Land Office.

Lease requires no registration. However, lease with term of more than five years or indefinite term should be notarized by notary public, so as to obtain full protection in case that landlord sells leased premises.

Law gives authorities rather large powers in restriction of utilization of real property.

Chapter III of Land Act regulates lease of houses and land. Land Act is rather favorable to the tenant as to termination of lease and rent. See category 4 Citizenship, topic 4.01 Aliens.

Land Act as amended in Oct. 2001, permits foreigners to, for purposes of self-use, investment or public interest, acquire in their own names certain land for limited usage, and to, with prior approval of central competent authority, acquire land not prohibited from being owned by foreigners if their investment in R.O.C. is helpful to important projects or overall economy of R.O.C.

21 TAXATION

21.01 BUSINESS TAXES:

Business Tax Act was promulgated on 13 June 1931 and last amended 10 Mar. 2008. Except for banking, insurance, trust and investment, securities, short-term bills and commercial paper, and pawn enterprises which are still subject to gross business receipt tax ("GBRT") on their sales of goods or services, other business entities are governed by value-added tax ("VAT") system. GBRT is divided into several categories, i.e. 1% for reinsurance premium income of insurance business; 2% for banking, investment and trust, brokerage, stocks trading, insurance firms, short term bills and commercial paper enterprises and pawn enterprises; 15% for night clubs and restaurants with entertainment programs; 25% for liquor bars, tea houses, coffee shops and bars with attending hostesses. As to business other than above-mentioned, VAT rate is 5% currently.

21.02 CUSTOMS DUTY AND TAX:

Customs Duty.

Unless otherwise exempted by law, all imported goods are subject to import duties. No duty is leviable on export goods. Import duty is calculated on basis of "duty-paying value" according to prescribed tariff rates.

Term "duty-paying value" refers to transaction price of imported goods, which shall include commissions, handling charges and packaging costs to be borne by buyer, amount of reasonable value or discount given to buyer, royalty payments for patent or other licensing arrangements to be borne by buyer, freight, processing and handling charges upon arrival at port of importation, and insurance payments.

Under certain circumstances, customs offices are granted right to assess and recalculate true transaction price in following orders: transaction price applicable to other R.O.C. importers, transaction price of identical or similar goods imported, on domestic sales price of identical or similar goods imported, calculated price and price determined by customs based on information available.

21.03 ESTATE TAX:

All property of deceased located in Taiwan shall be subject to levy of R.O.C. estate tax, regardless of whether or not deceased resided in R.O.C. on regular basis. Deceased is regarded as having resided in R.O.C. regularly, if deceased maintained domicile or residence in R.O.C. and had stayed in R.O.C. for more than 365 days within two years immediately prior to his or her death. Property of deceased located outside Taiwan shall also be subject to estate tax if deceased is R.O.C. national who resided regularly in Taiwan. However, amount of estate tax paid to foreign government for such property outside Taiwan may be deducted from estate tax for such property.

Estate subject to levy of estate tax includes deceased's movables, immovables and other properties, such as cash, bank savings, stocks, land, home, rights of claim to mineral rights and the like. Properties having been bestowed by deceased on following persons within two years prior to death of deceased are also included: (i) Surviving spouse of deceased; and (ii) other statutory heirs of deceased and their spouses.

Estate tax shall be levied at aggregate rates ranging from 2% to 50% on net estate obtained, by subtracting all deductions and allowances from gross estate calculated according to provisions of R.O.C. Estate and Gift Tax Act.

21.04 EXCISE TAXES:

Commodity Tax.

Commodity taxes are levied on some commodities, whether locally produced or imported. Depending on category of commodity, tax is computed based on value, weight or volume.

21.05 INCOME TAX:

Income Tax Act was promulgated and enforced as of 17 Feb. 1943, and last amended 2 Jan. 2008. It governs any income arising within territorial limits of R.O.C. except where enterprise has its head office in R.O.C.; tax is collected on worldwide income, but with credits for income tax already paid outside of R.O.C. to source countries.

Income of diplomatic and consular officials and other personnel who enjoy diplomatic privilege in foreign embassies, legations and consulates in R.O.C. acquired in course of their duties is tax free.

Income of other employees in foreign embassies, legations, consulates and their affiliated organizations in R.O.C., who are nationals of foreign country concerned but who do not enjoy diplomatic privileges, is also tax free if same privilege is accorded to Chinese employees in similar positions in country concerned.

Earnings of profit-seeking enterprises including corporations, partnerships or sole proprietorships are taxed on net income. Rates vary from 0% to 25%. Dividend received by company is nontaxable.

10% retained earnings tax is imposed on corporation for its after tax earnings generated after 1 Jan. 1998 which are not distributed by end of following year after tax year. In addition, imputed credit account shall be set up to record all income tax including 10% retained earnings tax paid by company. Balance of imputed credit account is distributed proportionately along with dividends to its shareholders. Such credit is in principle allowed to offset shareholder's income tax liability.

Income tax on all salaries, wages and emoluments is withheld at source at various rates (according to marital status and number of dependents of taxpayer) or at flat rate of 10% for resident individuals, and at 20% for nonresident individuals.

For resident individuals, or business enterprise with fixed office in R.O.C., income tax is withheld at source at 10% on rents, commissions and interest payments; at 15% on royalty payments.

For nonresident individuals, or business enterprises without fixed office in R.O.C., income tax on dividend paid by corporation to shareholders is withheld at source at 20% in case investment project was approved according to Statute for Investment by Foreign Nationals or Statute for Investment by Overseas Chinese; or at 30% (for individuals) or 25% (for business enterprises) in case without approval according to same Statute, and on interest payments, commission, royalty and rents at 20%. Imputed tax credit is not available to foreign shareholder to offset withholding tax liabilities except 10% retained earnings tax.

There is consolidated income tax on composite income of local individual residents, subject to various exemptions and deductions. Rates vary from 6% to 40% according to progressive scale.

Any business enterprise with head office outside territory of R.O.C., which is engaged in international transport, construction projects, technical services or machinery and equipment leasing and cost and expenses of which are difficult to calculate, may apply to competent National Tax Administration (authorized by Ministry of Finance from Apr. 1, 2007) for approval to deem 10% (for international transport business) or 15% (for construction projects, technical services or machinery and equipment leasing) of its total business revenue as its income derived from R.O.C. whether or not it has branch office or business agent in R.O.C. Withholding tax rate is 25% on this 10% or 15% income, i.e., 2.5% or 3.75% on total business revenue.

Securities Transaction Tax.

Term “securities” is defined to include share certificates representing capital stock and debentures issued by R.O.C. companies and any other securities approved by government to be issued to public. Transaction of securities, except for government bond, is subject to securities transaction tax at rates up to 0.3% of transaction price. Securities transaction income tax (i.e., capital gains tax) will also be levied if transaction of securities would result in any income. However, capital gains tax on disposition of securities is currently suspended.

Futures Transaction Tax.

Term “Futures” is defined to include stock index futures, interest rate futures, options or options on futures and other futures. For stock index futures contracts, lowest rate is 0.0000125% and highest rate is 0.06% on contract price for each transaction as determined by Ministry of Finance. For interest rate futures contracts, lowest rate is 0.0000125% and highest rate is 0.00025% on contract price for each transaction as determined by Ministry of Finance. For option contracts or option contracts on futures, lowest rate is 0.1% and highest rate 0.6% on premium for each transaction as determined by Ministry of Finance. For other futures contracts, lowest rate is 0.0000125% and highest rate is 0.06% on contract price for each transaction as determined by

Ministry of Finance. Tax on gains realized from futures trading is suspended under 1998 amendment to Income Tax Law.

21.06 PROPERTY TAXES:

Property taxes are leviable either on ownership or for transaction of real properties, and are calculated on value assigned and published from time to time by government.

Land value tax is imposed on land other than farm land that has been assigned value and is calculated at 1% if land value does not exceed starting cumulative value. If land value exceeds starting cumulative value, additional 1.5%, 2.5%, 3.5%, 4.5% and 5.5% will be levied for excessive portion on progressive basis. Privileged rates are available for land used for residence (0.2%) or for industries, mining, private part, zoos, etc. (1%). Land value tax shall be paid by land owner or pledgee on annual basis.

Housing tax is also paid by owner or pledgee of house on yearly basis, and is calculated at different rates as follows: 1.2%-2% for residence; 3%-5% for business; and 1.5%-2.5% for private hospital, clinic, professional and nonprofit-seeking purposes.

Deed tax is leviable when person purchases, leases, exchanges, receives donation of, divides or takes possession of building, and is calculated at rate ranging from 2% (for exchange or division), 4% (for pledge), 6% (for purchase, donation or possession).

Land value increment tax is levied on increased value of land as result of title transfer, and is calculated on progressive rate ranging from 20% to 40%, depending on value increment.

21.07 STAMP TAX:

Receipts of payment, contracts for purchase and sale of movable property, contracts for hire of work and contracts for sale, pledge, transfer or division of real property, which are made or executed in Taiwan, are subject to stamp tax at rates of 0.4%, NT$12, 0.1% and 0.1%, respectively. If receipts of payment are evidenced by “government uniform invoices”, no separate stamp tax is leviable.

21.08 TAX INCENTIVES:

Income tax exemption is granted to foreign entities on specific R.O.C. source income, e.g.: (1) Business income obtained from operation inside territory of R.O.C. by foreign enterprise engaged in international transportation, provided that reciprocal treatment is accorded by foreign country concerned to international transport enterprise of R.O.C. operating in its territory; (2) royalty earnings paid to foreign enterprise for use of patent rights, trademark and/or various kinds of special authorized rights as approved by Government authorities used by important technological industries as well as payment to foreign enterprise for technical services in construction of factory of important technological industries or in production of products by designated important technological industries, all as prescribed by Government authorities; (3) interest on loans extended or guaranteed by foreign government, financing institutions wholly or partly operated by foreign government and international economic development financing institutions to or for Government of R.O.C. and/or juristic persons within territory of R.O.C.; (4) interest on credit facilities extended by foreign financing institutions to its branch office and/or other financing institutions within territory of R.O.C.; (5) interest on loans extended by foreign financing institutions to juristic person within territory of R.O.C. for financing important economic construction projects as approved by Ministry of Finance.

Statute for Upgrading Industries (“SUI”) as last amended 11 June 2008 provides following tax incentives until 31 Dec. 2009:

(1) Investment tax credit at shareholder level: in order to encourage establishment or expansion of emerging important strategic industries that offer substantial contribution to economic development, bear high risk, and urgently require assistance, if registered stocks of such enterprises have been held by investors for period of three years or more, investors may credit up to 20% of price paid for subscription of such stocks against profit-seeking enterprise income tax in case of enterprise shareholder, or 10% of price paid against 50% of consolidated income tax payable in case of individual shareholder, in year when three years holding period is up. Unused credit can be carried over for four years. Credit of 10% of price paid is to be lowered by 1% every two years beginning 1 Jan. 2000. Unused credit can be carried over for four years.

(2) Five-year income tax exemption: Company within scope of newly emerging important strategic industries may opt for exemption from profit-seeking enterprise income tax if resolution is passed at shareholders' meeting to forego shareholder tax credits. Company is also eligible for five-year income tax exemption for capital increase entirely from capitalization of undistributed earnings to undertake investment plan within scope of newly emerging important strategic industries.

(3) Investment tax credit at company level: Company may credit 5 to 20% of amount spent for designated purpose fixed assets against profit-seeking enterprise income tax up to 50% of current amount payable. Unused credit can be carried over for four years.

(4) Two-year accelerated depreciation: Service life of fixed assets of company can be depreciated over two-year period provided that use of these assets meets criteria as set forth in SUI. If fixed assets were not fully depreciated within shortened period, company may continue to depreciate these assets within remaining service life as specified in Income Tax Act and relevant rules and regulations until such fixed assets are fully depreciated.

(5) Assumption of income tax exemption in case of assets transfer: If company, within scope of newly emerging important strategic industries, resells its entire production or service equipment or application software to another company that falls within scope of newly emerging important strategic industries after transfer, tax exemptions that have not yet expired may be assumed by transferee.

(6) Assumption of tax incentives in case of merger: When company falling within scope of newly emerging important strategic industries merges with another company, post-merger company may continue to enjoy unexpired tax incentives enjoyed by companies prior to merger, provided that merger is specifically approved by competent government authorities.

(7) Business tax exemption: Is provided for research and development projects awarded by government to profit-seeking enterprises.

(8) Tax exemption for customs duty and business tax: Company that falls into one of science-based industries may, retroactively from Jan. 1, 2002, import, free of customs duty and business tax, machinery and equipment that are for its own use and are not yet manufactured in Taiwan.

21.09 TREATIES AND AGREEMENTS:

Tax treaties for avoidance of double taxation on income with Australia, Gambia, Indonesia, Malaysia, Macedonia, Singapore, South Africa, Swaziland, The Netherlands, U.K., Vietnam, Senegal, Sweden, New Zealand, Belgium and Denmark governments are currently in effect.

22 TRANSPORTATION

22.01 MOTOR VEHICLES:

Vehicle License.

Owner must register vehicle in accordance with Rules Governing Road and Traffic Safety (“Rules”). Registration is valid for period of three years. Registration plate is issued bearing assigned registration number and shall be attached at front and rear of vehicle. Vehicle license will be issued upon passing of inspection.

When title to vehicle is transferred, operation of vehicle is ceased or resumed or vehicle is worn out, owner must apply for amendment registration.

Driver License.

Driver licenses are issued upon passing of proficiency and health examinations in accordance with Rules stated above. Non-professional driver license is valid for six years and professional driver license, three years. Driver licenses issued by foreign country are recognized only for 30 days and certification by Highway Supervision Authority is required for stay over 30 days.

No person may drive vehicle on highways unless holding driver license of appropriate category as set forth in Rules or learner license. Person holding learner license must be accompanied by person holding valid driver license. Intoxicated or drugged person shall not operate vehicle.

Insurance.

Every vehicle owner shall, before application for vehicle license, secure liability insurance of not less than NT$1,500,000 for death of each person in compliance with Compulsory Vehicle Liability Insurance Law.

22.02 SHIPPING:

R.O.C. vessels are subject to provisions of Maritime Law promulgated on 30 Dec. 1929 and became effective on 1 Jan. 1931 as last am'd on 26 Jan. 2000 and Vessel Law promulgated on 4 Dec. 1930 and became effective on 1 July 1931 as last am'd on 30 Jan. 2002. As provided in Art. 1 of Maritime Act, term “vessel”, where used in this Act, refers to oceangoing vessels and vessels navigating on or in sea or waters intercommunicating with sea. Provisions of this Act are not applicable to following classes of vessel, save in case of collision: (1) Motor driven vessels whose gross tonnage is less than 20 tons or nonmotor driven vessels whose gross tonnage is less than 50 tons, (2) military vessels, (3) vessels solely used on public affairs, (4) vessels not belonging to those defined in Art. 1 of Maritime Act.

Assignment of whole or part of vessel is void unless made in writing and in accordance with following provisions: (1) In R.O.C., application must be made to governing authority at place of assignment or place where vessel is lying, and such authority must seal and certify assignment; (2) abroad, application must be made to R.O.C. Consulate, which must seal and certify assignment.

Transfer of ownership of vessel may not be pleaded against third party unless it has been registered.

As provided in Art. 2 of Vessel Act, vessels owned by: (i) R.O.C. Government, (ii) R.O.C. nationals, (iii) R.O.C. companies in conformity with specific requirements, or (iv) R.O.C. juristic persons in conformity with specific requirements may apply for approval to become R.O.C. flag vessels.

Foreign Shipping.

R.O.C. has not acceded to Hague Rules 1924 or to Visby Rules 1968. Nevertheless, 1999 Amendment to Maritime Act incorporated gist of Visby Rules.

Maritime Act, like American COGSA, applies to inward and outward voyages.

Package or unit limitation is 666.67 SDR per package or 2 SDR per kilogram, whichever is higher.

There is no provision for punitive damages for breach of carriage contract, and responsibility for damage or loss of goods is calculated according to value at destination.

Jurisdiction clauses in bills of lading have been held invalid between bill of lading holders and carriers because courts consider that these clauses are not specified through mutual consent. It is not clear whether court's holding will remain same or change as result of 1999 Amendment of Maritime Act.

Foreign shipping companies or their agents must register with Ministry of Transportation & Communications and Ministry of Economic Affairs. American ships are governed by Art. 22 of Treaty of Friendship, Commerce and Navigation between U.S.A. and R.O.C. which has been ratified by both parties. This treaty is based on reciprocity and thus duties, charges or conditions which are not imposed on R.O.C. ships will not be imposed on American ships.

Shipping Industries Act, promulgated on 3 June 1981, as last amended on 30 Jan. 2002 governs all shipping enterprises and shipping industries including carriers, agents, sea cargo forwarders, vessel charters, ship leasing and charter operation, container terminals and leasing operations and employment of sailors. Foreign ships may not solicit or receive passengers or goods for transportation in R.O.C. unless R.O.C. shipping agent has been engaged to execute or handle matters related to carriage of passengers or goods. Such restriction is not applicable to foreign shipping carriers having branch office in R.O.C.

23 TREATIES AND CONVENTIONS

23.01 TREATIES:

Generally speaking, thesis of primacy of treaties is recognized in Chinese legal system. Constitution clearly specifies that treaty must be respected. (The Constitution 141). Treaty is valid and enforceable in domestic court if it is ratified by R.O.C. In case of conflict between treaty and domestic law, treaty shall prevail where treaty is ratified after, or on same date of, promulgation of domestic law, and domestic enactment will not automatically overrule previous conflicting treaty but issue shall be presented for resolution on ad hoc basis. (See Decree of Judicial Yuan dated 27 July 1931, No. 459; Appeal case No. 1074, Sup. Ct. 1934.) Several cases indicate that court takes treaty prevalent to domestic laws. R.O.C. has ratified numerous treaties and international agreements. See also Selected International Conventions section.

1
THAILAND LAW DIGEST

—Scope —

Revised for 2010 Edition by

TILLEKE & GIBBINS, Thailand and Vietnam.

(Abbreviations used are: “A.A.”, Arbitration Act, B.E. 2543 (A.D. 2000); “A.A.M.”, Act for Adoption of Minor, B.E. 2522 (A.D. 1979); “A.B.L.”, Alien Business Law, B.E. 2515 (A.D. 1972); “A.O.L.”, Act on Conflict of Laws, B.E. 2481 (A.D. 1938); “B.A.”, Bankruptcy Act, B.E. 2483 (A.D. 1940); “B.E.”, Buddhist Era; “C.A.”, Copyright Act, B.E. 2537 (A.D. 1994); “C.A.T.”, Communication Authority of Thailand; “C.C.C.”, Civil and Commercial Code, B.E. 2535 (A.D. 1992) for Book I, B.E. 2468 (A.D. 1925) for Book II, B.E. 2472 (A.D. 1929) for Book III, B.E. 2475 (A.D. 1932) for Book IV, B.E. 2519 (A.D. 1976) and B.E. 2533 (A.D. 1990) for Book V, and B.E. 2477 (A.D. 1934) for Book VI; “C.H.S.”, Committee on Hazardous Substances; “C.I.A.”, Casualty Insurance Act, B.E. 2535 (A.D. 1992); “C.P.C.”, Civil Procedure Code, B.E. 2477 (A.D. 1934); “C.R.A.”, Commercial Registration Act, B.E. 2499 (A.D. 1956); “DIP”, Department of Intellectual Property; “D.M.R.”, Department of Mineral Resources; “E.C.N.E.Q.A.”, Enhancement and Conservation of National Environmental Quality Act, B.E. 2535 (A.D. 1992); “E.I.A.”, Environment Impact Assessments; “E.P.L.”, Exchange License; “FBA”, Foreign Business Act, B.E. 2542 (A.D. 1999); “FDA”, Food and Drug Administration; “F.S.C.”, Interest on Loan of Financial Institutions Act, B.E. 2523 (A.D. 1980); “GATS”, General Agreement on Tariffs and Services; “G.P.L.”, General License; “H.S.A.”, Hazardous Substances Act, B.E. 2535 (A.D. 1992); “I.F.C.T.”, Industrial Finance Corporation of Thailand; “L.A.”, Practicing Lawyers Act, B.E. 2528 (A.D. 1985); “L.C.”, Land Code, B.E. 2497 (A.D. 1954); “L.I.A.”, Life Insurance Act, B.E. 2535 (A.D. 1992); “L.P.A.”, Labour Protection Act, B.E. 2541 (A.D. 1998); “M.A.”, Minerals Act, B.E. 2510 (A.D. 1967); “M.N.R.E.”, Ministry of Natural Resources and Environment; “M.O.C.”, Ministry of Commerce; “M.O.I.”, Ministry of Industry; “M.O.T.C.”, Ministry of Transport and Communications; “M.V.S.P.R.A.”, Mortgage of Vessels and Sea Preferential Rights Act, B.E. 2537 (A.D. 1994); “N.A.”, Nationality Act, B.E. 2508 (A.D. 1965); “N.B.C.”, National Broadcasting Commission; “N.E.B.”, National Environmental Board; “NLA”, National Legislative Assembly; “N.T.C.”, National Telecommunications Commission; “N.T.W.A.”, Navigation in Thai Territorial Waters Act, B.E. 2456 (A.D. 1913); “P.A.”, Patent Act, B.E. 2522 (A.D. 1979); “P.C.A.”, Pollution Control Area; “P.C.D.”, Pollution Control Department; “P.L.C.A.”, Public Limited Companies Act, B.E. 2535 (A.D. 1992); “P.T.D.”, Port and Telegraph Department; “S.E.C.”, Securities and Exchange Commission; “S.P.L.”, Special License; “T.O.T.”, Telephone Organization of Thailand; “TRIPS”, Agreement on Trade-Related Aspects of Intellectual Property Rights; “TSA”, Trade Secret Act, B.E. 2545 (A.D. 2002); “WTO”, World Trade Organization; “VAT”, Value Added Tax.)

Note: This revision incorporates legislation through Oct. 29, 2009.

1 INTRODUCTION

1.01 PRELIMINARY NOTE—NEW LAWS:

New Important Laws in 1999.

(1) Act Establishing Bankruptcy Court and Bankruptcy Case Procedure, B.E. 2542 (A.D. 1999); (2) Bankruptcy Act (No. 5), B.E. 2542 (A.D. 1999); (3) Money Laundering Prevention and Suppression Act, B.E. 2542 (A.D. 1999); (4) Social Security Act (No. 3), B.E. 2542 (A.D. 1999); (5) Act Governing Leasing of Immovable Property for Commercial and Industrial Purposes, B.E. 2542 (A.D. 1999); (6) Land Code Amendment Act (No. 8), B.E. 2542 (A.D. 1999); (7) Condominium Act (No. 3), B.E. 2542 (A.D. 1999); (8) Trade Competition Act, B.E. 2542 (A.D. 1999); (9) Act Governing Prices of Goods and Services, B.E. 2542 (A.D. 1999); (10) Act Countering Market Dumping and Subsidy of Goods from Abroad, B.E. 2542 (A.D. 1999); (11) Civil Procedure Code Amendment Act (No. 17), B.E. 2542 (A.D. 1999); (12) Civil Procedure Code Amendment Act (No. 18), B.E. 2542 (A.D. 1999); (13) Patent Act (No. 3), B.E. 2542 (A.D. 1999);

(14) National Education Act, B.E. 2542 (A.D. 1999); (15) Criminal Procedure Code Amendment Act (No. 20), B.E. 2542 (A.D. 1999); (16) Criminal Procedure Code Amendment Act (No. 21), B.E. 2542 (A.D. 1999); (17) Act on Establishment of Administrative Courts and Administrative Court Procedure, B.E. 2542 (A.D. 1999); (18) Alien Business Operation Act, B.E. 2542 (A.D. 1999); (19) Protection of Plant Varieties Act, B.E. 2542 (A.D. 1999); (20) State Enterprises Corporatization Act, B.E. 2542 (A.D. 1999); (21) Securities and Exchange Act (No. 2), B.E. 2542 (A.D. 1999); (22) Provident Fund Act (No. 2), B.E. 2542 (1999); (23) Immigration Act (NO. 3), B.E. 2542 (A.D. 1999); (24) Engineers Act, B.E. 2542 (A.D. 1999); (25) Control of Fuel Oil Act, B.E. 2542 (A.D. 1999); (26) Protection and Enhancement of Thai Traditional Medicine Wisdom Act, B.E. 2542 (A.D. 1999); (27) Agricultural Futures Market Act, B.E. 2542 (A.D. 1999); (28) Cooperatives Act, B.E. 2542 (A.D. 1999).

New Important Laws in 2000.

(1) Architects Act, B.E. 2543 (A.D. 2000); (2) Civil Procedure Code Amendment Act (No. 19), B.E. 2543 (A.D. 2000); (3) Act on Organizations Allocating Frequency Waves and Supervising Radio/Television Broadcasting and Telecommunication Businesses, B.E. 2543 (A.D. 2000); (4) Local Development Tax Act (No. 3), B.E. 2543 (A.D. 2000); (5) House and Land Tax Act (No. 5), B.E. 2543 (A.D. 2000); (6) Land Code Amendment Act (No. 9), B.E. 2543 (A.D. 2000); (7) Trademark Act (No. 2), B.E. 2543 (A.D. 2000); (8) Accounts Act, B.E. 2543 (A.D. 2000); (9) Protection of Topographies (Layout-Design) of Integrated Circuits Act, B.E. 2543 (A.D. 2000); (10) Act Promulgating the Law for the Organization of Courts of Justice, B.E. 2543 (A.D. 2000); (11) State Enterprises Labour Relations Act, B.E. 2543 (A.D. 2000); (12) Small and Medium Enterprises Promotion Act, B.E. 2543 (A.D. 2000); (13) Excise Tax Act (No. 3), B.E. 2543 (A.D. 2000); (14) Narcotics Suppression and Prevention Act (No. 3), B.E. 2543 (A.D. 2000); (15) Land Development Act, B.E. 2543 (A.D. 2000); (16) Management of Partners or Shares of Ministers Act, B.E. 2543 (A.D. 2000); (17) Public Administration for Courts of Justice Act, B.E. 2543 (A.D. 2000); (18) Firearms, Ammunition, Explosives, Fireworks and Firearms Imitations (No. 9), B.E. 2543 (A.D. 2000); (19) Civil Servants' Pensions Act (No. 20), B.E. 2543 (A.D. 2000); (20) Act on Extradition between the Government of the Kingdom of Thailand and the Government of the Kingdom of Cambodia, B.E. 2543 (A.D. 2000); (21) Act on Extradition between the Government of the Kingdom of Thailand and the Government of the People's Republic of Bangladesh, B.E. 2543 (A.D. 2000); (22) Act on Extradition between the Government of the Kingdom of Thailand and the Government of the Republic of Korea, B.E. 2543 (A.D. 2000); (23) Act on Extradition between the Government of the Kingdom of Thailand and the Government of Lao People's Democratic Republic, B.E. 2543 (A.D. 2000); (24) Customs Act (No. 18), B.E. 2543 (A.D. 2000); (25) Local Government Pensions Act (No. 6), B.E. 2543 (A.D. 2000); (26) Organic Act on the Election of Members of the House of Representatives and Senators (No. 3), B.E. 2543 (A.D. 2000); (27) Act Empowering the Ministry of Finance to Combine or Dissolve Revolving Funds, B.E. 2543 (A.D. 2000); (28) Fuel Trade Act, B.E. 2543 (A.D. 2000); (29) Port Authority of Thailand Act, (No. 5), B.E. 2543 (A.D. 2000); (30) Electric Train Mass Transit Authority of Thailand Act, B.E. 2543 (A.D. 2000); (31) State Railway of Thailand Act (No. 7), B.E. 2543 (A.D. 2000); (32) Standard Qualifications of Committee Members and Officials of State Enterprises Act (No. 4), B.E. 2543 (A.D. 2000); (33) Narcotic Act (No. 4), B.E. 2543 (A.D. 2000); (34) Act Amending the Emergency Decree on the Prevention of Volatile Substance Use, B.E. 2533, (No. 2), B.E. 2543 (A.D. 2000); (35) Psychotropic Substances Act (No. 4), B.E. 2543 (A.D. 2000); (36) National Economic and Social Advisory Council, B.E. 2543 (A.D. 2000); (37) King Prajadhipok's Institute Act (No. 2), B.E. 2543 (A.D. 2000).

New Important Laws in 2001.

(1) Royal Proclamation on Thai Assets Management Corporation, B.E. 2544 (A.D. 2001); (2) Public Limited Company Act (No. 2), B.E. 2544 (A.D. 2001); (3) Act Amending the Revenue Code (No. 35), B.E. 2544 (A.D. 2001); (4) Aliens Working Act (No. 2), B.E. 2544 (A.D. 2001); (5) Excise Tax Act (No. 4), B.E. 2544 (A.D. 2001); (6) Health Promotion Foundation Act, B.E. 2544 (A.D. 2001); (7) Act Reorganizing Ministries, Public Bodies and Agreements (No. 23), B.E. 2544

(A.D. 2001); (8) Civil Service Act (No. 4), B.E. 2544 (A.D. 2001); (9) Farmers Rehabilitation and Development Act (No. 2) B.E. 2544 (A.D. 2001); (10) Act Governing Damages for Injured Party and Compensation and Expenses for Defendant in Criminal Case, B.E. 2544 (A.D. 2001); (11) Employment Service and Job-Seeker Protection Act (No. 3), B.E. 2544 (A.D. 2001); (12) Labor Relation Act (No. 3), B.E. 2544 (A.D. 2001); (13) Hazardous Substance Act (No. 2), B.E. 2544 (A.D. 2001); (14) Telecommunications Business Operation Act, B.E. 2544 (A.D. 2001); (15) Investment Promotion Act (No. 3), B.E. 2544 (A.D. 2001); (16) Act on Thailand Tourism Council, B.E. 2544 (A.D. 2001); (17) Motor Car Act (No. 11), B.E. 2544 (A.D. 2001); (18) Electronic Transaction Act, B.E. 2544 (A.D. 2001).

New Important Laws in 2002.

(1) Trade Secret Act, B.E. 2545 (A.D. 2002); (2) Arbitration Act, B.E. 2545 (A.D. 2002); (3) Direct Sale and Direct Marketing Act, B.E. 2545 (A.D. 2002); (4) Act on Establishment of Administrative Courts and Administrative Court Procedure (No. 2), B.E. 2545 (A.D. 2002); (5) Veterinary Medicine Profession Act, B.E. 2545 (A.D. 2002); (6) Excise Tax Act (No. 5), B.E. 2545 (A.D. 2002); (7) Travel Agency Business and Guide Act (No. 2), B.E. 2545 (A.D. 2002); (8) Act Amending Royal Proclamation on Customs Tariff, B.E. 2530 (No. 6), B.E. 2545 (A.D. 2002); (9) Narcotics Act (No. 5), B.E. 2545 (A.D. 2002); (10) Narcotics Suppression and Prevention Act (No. 4), B.E. 2545 (A.D. 2002); (11) Narcotics Addicts Rehabilitation Act, B.E. 2545 (A.D. 2002); (12) Act on Reorganization of Ministries, Bureaus, Departments, B.E. 2545 (A.D. 2002); (13) Organization of State Administration Act (No. 5), B.E. 2545 (A.D. 2002); (14) Credit Data Business Operations Act, B.E. 2545 (A.D. 2002); (15) Minerals Act (No. 5), B.E. 2545 (A.D. 2002); (16) Act Amending Royal Proclamation on Fraudulent Borrowings, B.E. 2527 (No. 2), B.E. 2545 (A.D. 2002); (17) National Health Security Act, B.E. 2545 (A.D. 2002); (18) National Education Act (No. 2), B.E. 2545 (A.D. 2002); (19) Compulsory Education Act, B.E. 2545 (A.D. 2002); (20) Islamic Bank of Thailand Act, B.E. 2545 (A.D. 2002); (21) Small and Medium Enterprise Development Bank of Thailand Act, B.E. 2545 (A.D. 2002); (22) Skill Development Promotion Act, B.E. 2545 (A.D. 2002); (23) Motor Chainsaw Act, B.E. 2545 (A.D. 2002); (24) Act Amending Penal Code (No. 15), B.E. 2545 (A.D. 2002); (25) Act Protecting Operations of Chemical Weapons Prohibition Organization, B.E. 2545 (A.D. 2002).

New Important Laws in 2003.

(1) Royal Proclamation Amending Excise Tax Act, B.E. 2527, B.E. 2546 (A.D. 2003); (2) Royal Proclamation Amending Excise Tax Tariff Act, B.E. 2527 (No. 4), B.E. 2546 (A.D. 2003); (3) Ministry of Education Administration Act, B.E. 2546 (A.D. 2003); (4) Artesian Water Act (No. 3), B.E. 2546 (A.D. 2003); (5) Tambon Council and Tambon Administrative Organization Act (No. 4), B.E. 2546 (A.D. 2003); (6) Witness Protection in Criminal Case Act, B.E. 2546 (A.D. 2003); (7) Derivative Act, B.E. 2546 (A.D. 2003); (8) Securities and Exchange Act (No. 3), B.E. 2546 (A.D. 2003); (9) Government Savings Bank Act (No. 3), B.E. 2546 (A.D. 2003); (10) Royal Proclamation Amending Money Laundering Prevention and Suppression Act, B.E. 2542 (1999), B.E. 2546 (A.D. 2003); (11) Social Welfare Promotion Act, B.E. 2546 (A.D. 2003); (12) Child Protection Act, B.E. 2546 (A.D. 2003); (13) Private University Act, B.E. 2546 (A.D. 2003); (14) Organization of State Administration Act (No. 6), B.E. 2546 (A.D. 2003); (15) Act Amending Penal Code (No. 16), B.E. 2546 (A.D. 2003); (16) Royal Proclamation Amending Penal Code, B.E. 2546 (A.D. 2003); (17) Wildlife Conservation and Protection Act (No. 2), B.E. 2546 (A.D. 2003); (18) Motor Car Act (No. 12), B.E. 2546 (A.D. 2003); (19) Land Transportation Act (No. 10), B.E. 2546 (A.D. 2003); (20) Teacher Council and Education Personnel Act, B.E. 2546 (A.D. 2003); (21) The Elderly Act, B.E. 2546 (A.D. 2003); (22) Places of Service Act (No. 4), B.E. 2546 (A.D. 2003); (23) Geographic Indications Protection Act, B.E. 2546 (A.D. 2003); (24) Provincial Administrative Organization Act (No. 3), B.E. 2546 (A.D. 2003); (25) Gratuity and Pension for Official Act (No. 21), B.E. 2546 (A.D. 2003); (26) Gratuity and Pension Fund for Official Act (No. 3), B.E. 2546 (A.D. 2003); (27) Judge of Court of Justice Service Act (No. 2), B.E. 2546 (A.D. 2003); (28) Municipality Act (No. 12), B.E. 2546 (A.D. 2003); (29) Act Abrogating Certain Laws Not Suitable to Present Era, B.E. 2546 (A.D. 2003); (30) Royal Decree Prescribing Power, Rights and Benefits

of Thailand Post Company Limited, B.E. 2546 (A.D. 2003); (31) Royal Decree Prescribing Time Condition on Abrogation of Law Governing Communications Authority of Thailand, B.E. 2546 (A.D. 2003).

New Important Laws in 2004.

(1) Investigation of Special Cases Act, B.E. 2547 (A.D. 2004); (2) Royal Thai Police Act, B.E. 2547 (A.D. 2004); (3) Rajabhat Universities Act, B.E. 2547 (A.D. 2004); (4) Royal Proclamation Amending Industrial Finance Corporation of Thailand Act, B.E. 2502 (A.D. 1959), B.E. 2547 (A.D. 2004); (5) Royal Proclamation on Customs Tariff (No. 3), B.E. 2547 (A.D. 2004); (6) Accountancy Profession Act, B.E. 2547 (A.D. 2004); (7) Act Amending Penal Code (No. 17), B.E. 2547 (A.D. 2004); (8) Act Amending Civil Procedure Code (No. 21), B.E. 2547 (A.D. 2004); (9) Act Amending Criminal Procedure Code (No. 22), B.E. 2547 (A.D. 2004); (10) Act on Establishment of Bankruptcy Court Procedure (No. 2), B.E. 2547 (A.D. 2004); (11) Administration of Civil Service in Tertiary Education Institute Act, B.E. 2547 (A.D. 2004); (12) Automobile Act (No. 13), B.E. 2547 (A.D. 2004); (13) Bankruptcy Act (No. 7), B.E. 2547 (A.D. 2004); (14) Government Official Salary and Emolument Act (No. 4), B.E. 2547 (A.D. 2004); (15) Gratuity and Pension for Official Act (No. 22), B.E. 2547 (A.D. 2004); (16) Hotel Act, B.E. 2547 (A.D. 2004); (17) Land Allocation for Development Act, B.E. 2547 (A.D. 2004); (18) Medical Services Act (No. 2), B.E. 2547 (A.D. 2004); (19) Medical Technology Profession Act, B.E. 2547 (A.D. 2004); (20) Military Officer Administration Act (No. 6), B.E. 2547 (A.D. 2004); (21) National Economic and Social Advisory Council Act (No. 2), B.E. 2547 (A.D. 2004); (22) National Village and City Community Fund Act, B.E. 2547 (A.D. 2004); (23) Pathumwan Institute of Technology Act, B.E. 2547 (A.D. 2004); (24) Physical Therapy Profession Act, B.E. 2547 (A.D. 2004); (25) Practice of the Art of Healing Act (No. 2), B.E. 2547 (A.D. 2004); (26) Protection of Implementation of the Office of Asian Development to Thailand Act, B.E. 2547 (A.D. 2004); (27) Teacher and Education Personnel Salary, Education Allowance and Emolument Act, B.E. 2547 (A.D. 2004); (28) Teacher and Education Personnel Service Act, B.E. 2547 (A.D. 2004); (29) Uniform of Human Rights Commissioner Act, B.E. 2547 (A.D. 2004); (30) Compensation for Damage from Marine Navigation Act, B.E. 2547 (A.D. 2004).

New Important Laws in 2005.

(1) Act Amending Criminal Procedure Code (No. 23), B.E. 2548 (A.D. 2005); (2) Act Amending Emergency Decree on Custom Duty Rate, B.E. 2530 (1987) (No. 7), B.E. 2548 (A.D. 2005); (3) Act Amending Revenue Code (No. 36), B.E. 2548 (A.D. 2005); (4) Act Establishing Institute for Promotion of Teaching Science and Technology Act (No. 2), B.E. 2548 (A.D. 2005); (5) Act Establishing Institute of Physical Education, B.E. 2548 (A.D. 2005); (6) Act on Commemorative Medals, B.E. 2548 (A.D. 2005); (7) Act on Establishing of Administration Court and Administration Court Procedure (No. 3), B.E. 2548 (A.D. 2005); (8) Act on Establishment of Juvenile and Family Court and Juvenile and Family Court Procedure (No. 3), B.E. 2548 (A.D. 2005); (9) Act on Promotion of Community Enterprise, B.E. 2548 (A.D. 2005); (10) Act Promulgating Criminal Procedure Code (No. 2), B.E. 2548 (A.D. 2005); (11) Civil Liability and Compensation from Vessel Collision, B.E. 2548 (A.D. 2005); (12) Custom Act (No. 19), B.E. 2548 (A.D. 2005); (13) Custom Act (No. 20), B.E. 2548 (A.D. 2005); (14) Gratuity and Pension for Local Official Act (No. 7), B.E. 2548 (A.D. 2005); (15) Industrial Product Standard Act (No. 6), B.E. 2548 (A.D. 2005); (16) Manufacture of Compact Disk Act, B.E. 2548 (A.D. 2005); (17) Name of Person Act (No. 3), B.E. 2548 (A.D. 2005); (18) Naradhivas Rajanagarindra University Act, B.E. 2548 (A.D. 2005); (19) Public Debt Management Act, B.E. 2548 (A.D. 2005); (20) Rajamangala Technology University Act, B.E. 2548 (A.D. 2005); (21) Emergency Decree on Public Administration in Emergency Situations, B.E. 2548 (A.D. 2005); (22) Various Continuing Transportation Act, B.E. 2548 (A.D. 2005); (23) Act Determining Toll for Use of Highways and Bridges (No. 4), B.E. 2548 (A.D. 2005); (24) Act Amending Civil and Commercial Code (No. 14), B.E. 2548 (A.D. 2005); (25) Act Amending Civil Procedure Code (No. 22), B.E. 2548 (A.D. 2005); (26) Act Amending Criminal Procedure Code (No. 24), B.E. 2548 (A.D. 2005); (27) Act on Establishment of Bankruptcy Court and Bankruptcy Court Procedures (No. 3), B.E. 2548 (A.D.

2005); (28) Act Exempting the Application of Period and Condition under Section 61 of the Civil and Commercial Code to the Loss from Tsunami Disaster, B.E. 2548 (A.D. 2005); (29) Merchant Marine Promotion Act (No. 2), B.E. 2548 (A.D. 2005); (30) Constitution of the Kingdom of Thailand (No. 1), B.E. 2548 (A.D. 2005).

New Important Laws in 2006.

(1) Government Housing Bank Act (No. 3), B.E. 2549 (A.D. 2006); (2) Act on Conversion of Dusit District Court, Taling Chan District Court, Pathumwan District Court, and Pra Kanong District Court to Changwat Court, B.E. 2549 (A.D. 2006); (3) Gratuity and Pension Fund for Officials Act (No. 4), B.E. 2549 (A.D. 2006); (4) Telecommunications Business Act (No. 2), B.E. 2549 (A.D. 2006); (5) Credit Information Act (No. 2), B.E. 2549 (A.D. 2006); (6) Act Amending Civil and Commercial Code (No. 15), B.E. 2549 (A.D. 2006); (7) Act Determining Offence Relating to Registered Partnership, Limited Partnership, Limited Company, Association and Foundation (No. 3), B.E. 2549 (A.D. 2006); (8) Commercial Registration Act (No. 2), B.E. 2549 (A.D. 2006); (9) Bank for Agriculture and Agricultural Cooperatives Act (No. 6), B.E. 2549 (A.D. 2006); (10) Act on Organisation of Ministries, Sub-Ministries and Departments (No. 2), B.E. 2549 (A.D. 2006); (11) Measurement Standard Act (No. 2), B.E. 2549 (A.D. 2006); (12) Act on Change of Court Jurisdictions of South Bangkok Civil Court, Thonburi Civil Court, Thonburi Criminal Court, B.E. 2549 (A.D. 2006); (13) National Justice Administration Development Act, B.E. 2549 (A.D. 2006); (14) Constitution of Kingdom of Thailand (Interim), B.E. 2549 (A.D. 2006); (15) Highway Act, B.E. 2549 (A.D. 2006); (16) Act Abrogating Financial Institution Assets Management Corporation, B.E. 2549 (A.D. 2006); (17) Act Prescribing Plan and Process for Decentralization (No. 2), B.E. 2549 (A.D. 2006).

New Important Laws in 2007.

(1) Agricultural Futures Trading Act (No. 2), B.E. 2550 (A.D. 2007); (2) Direct Sale and Marketing Act (No. 2), B.E. 2550 (A.D. 2007); (3) Act Amending Organic Act on Counter Corruption, B.E. 2542 (A.D. 1999), B.E. 2550 (A.D. 2007); (4) National Health Act, B.E. 2550 (A.D. 2007); (5) Protection for Operation of International Mobile Satellite Organization Act, B.E. 2550 (A.D. 2007); (6) Act Amending Emergency Decree Governing Asset Management Company, B.E. 2541 (A.D. 1998), B.E. 2550 (A.D. 2007); (7) Protection for Motor Vehicle Victims Act (No. 4), B.E. 2550 (A.D. 2007); (8) Act on Thai Red Cross Society (No. 4), B.E. 2550 (A.D. 2007); (9) Act on Assigning Officials to Hold Inquest under Sections 148 (3), (4), and (5) of Criminal Procedure Code, B.E. 2550 (A.D. 2007); (10) Factory Manufacturing Private Arms Act, B.E. 2550 (A.D. 2007); (11) Military Prisons Act, B.E. 2550 (A.D. 2007); (12) Land Allocation for Livelihood Act (No. 2), B.E. 2550 (A.D. 2007); (13) Cemetery and Crematory Act (No. 2), B.E. 2550 (A.D. 2007); (14) Act Governing Offences Relating to Computers, B.E. 2550 (A.D. 2007); (15) Chamber of Commerce Act (No. 2), B.E. 2550 (A.D. 2007); (16) Trading Association Act (No. 2), B.E. 2550 (A.D. 2007); (17) National Housing Authority Act (No. 2), B.E. 2550 (A.D. 2007); (18) Act Empowering the Management of Mutual Fund for Consumer Goods (No. 2), B.E. 2550 (A.D. 2007); (19) Building Control Act (No. 4), B.E. 2550 (A.D. 2007); (20) Fuel Oil Trading Act (No. 2), B.E. 2550 (A.D. 2007); (21) Petroleum Act (No. 6), B.E. 2550 (A.D. 2007); (22) Petroleum Income Tax Act (No. 6), B.E. 2550 (A.D. 2007); (23) Fuel Oil Control Act (No. 2), B.E. 2550 (A.D. 2007); (24) Energy Industry Act, B.E. 2550 (A.D. 2007); (25) Measures to Protect the Import of Additional Goods Act, B.E. 2550 (A.D. 2007); (26) Industrial Estate Authority of Thailand Act (No. 4), B.E. 2550 (A.D. 2007); and (27) The Trust for Transaction in Capital Market Act, B.E. 2550 (A.D. 2007).

New Important Laws in 2008.

(1) Financial Institutions Business Act, B.E. 2551 (A.D. 2008); (2) Public Limited Company Act (No. 3) B.E. 2551 (A.D. 2008); (3) Measures for Protection and Suppression of Human Trafficking Act, B.E. 2551 (A.D. 2008); (4) Credit Data Business Operation Act (No. 3), B.E. 2551 (A.D. 2008); (5) Deposit Protection Institution Act, B.E. 2551 (A.D. 2008); (6) Act Governing Electronics Business (No. 2), B.E. 2551 (A.D. 2008); (7) Products Liability Act, B.E.

2551 (A.D. 2008); (8) Contractual Parties' Interest Caretaking Act, B.E. 2551 (A.D. 2008); (9) Alien Working Act, B.E. 2551 (A.D. 2008); (10) Dangerous Substance Act (No. 3), B.E. 2551 (A.D. 2008); (11) Nationality Act (No. 4), B.E. 2551 (A.D. 2008); (12) Futures Contract Act (No. 2), B.E. 2551 (A.D. 2008); (13) Act Prescribing Offences Relating to Registered Partnership, Limited Partnership, Company Limited, Association and Foundation (No. 4), B.E. 2551 (A.D. 2008); (14) Money Laundering Prevention and Suppression Act (No. 2), B.E. 2551 (A.D. 2008); (15) Securities and Exchange Act (No. 4), B.E. 2551 (A.D. 2008); (16) Condominium Act (No. 4), B.E. 2551 (A.D. 2008); (17) Air Navigation Act (No. 11), B.E. 2551 (A.D. 2008); and (18) Protection for Operation of National Association of South East Asia Act, B.E. 2551 (A.D. 2008).

New Important Laws in 2009 (Up to Oct. 29, 2009).

(1) Royal Decree Amending Tobacco Act B.E. 2509 (No. 2), B.E. 2552 (A.D. 2009); (2) Royal Decree Amending Excise Tax Rate Act B.E. 2527 (No. 5), B.E. 2552 (A.D. 2009); (3) Money Laundering Control Act (No. 3), B.E. 2552 (A.D. 2009); (4) Act on Organization of Ministries, Sub-Ministries and Departments (No. 6), B.E. 2552 (A.D. 2009); (5) Act on Expropriation of Real Property for Metro Construction under Mass Rapid Transport Project, Chaloem Ratchamongkhon Line, in Areas of Bangsue District, Chatuchak District, Hwuykwang District, Dindang District, Ratchadhewi District, Wattana District, Klongtoey District, Pratumwan District, and Sathorn District, Bangkok, B.E. 2552 (A.D. 2009); and (6) Organic Act on Ombudsman, B.E. 2552 (A.D. 2009).

1.02 CURRENCY:

Monetary unit is Baht which is divided into 100 stangs. Bank of Thailand has exclusive right to issue bank notes which are legal tender. Obligations governed by Thai law which are payable in foreign currency may be paid in Thai currency at exchange rate prevailing in place of payment at time of payment. (C.C.C. 196).

1.03 GOVERNMENT AND LEGAL SYSTEM:

Constitution.

Thailand is constitutional monarchy. Written Constitution of 1997 was abolished by coup d’etat on Sept. 19, B.E. 2549 (A.D. 2006). Constitution of Kingdom of Thailand (Interim Edition), B.E. 2549 (A.D. 2006) provided for establishment of Constituent Assembly and Constitution Drafting Commission charged with preparing entirely new draft constitution in manner allowing members of public to participate and express opinions at every stage and taking those opinions into account when preparing draft and considering submitted motions on continued basis.

Draft constitution prepared thereafter provided for achieving common intentions of Thai people in connection with upholding of national independence and security nurturing of all religions, upholding of King as Head of State and as revered centre of national morale, adherence to democratic regime of government with King as Head of State as means to rule country, protection of rights and liberties of people, provision of public roles and participation in government and in scrutiny of exercise of State powers in concrete ways, formulation of mechanisms for ensuring that political institutions, both Legislature and Executive, achieve equilibrium and efficiency along line of parliamentary system and also that judicial institution and other independent organs perform duties in honest and fair manner.

Constituent Assembly publicized draft constitution and caused to be conducted referendum for approving draft constitution in to. It was apparent from referendum that majority of people having right to vote who were present at referendum approved new draft constitution.

Constitution of Kingdom of Thailand, B.E. 2550 (A.D. 2007) was promulgated to replace, as from date of its promulgation, Constitution of Kingdom of Thailand (Interim Edition), B.E. 2549 (A.D. 2006) promulgated on Oct. 1, B.E. 2549 (A.D. 2006).

Legislative power, executive power and judicial power under Constitution of Kingdom of Thailand, B.E. 2550 (A.D. 2007) are described below.

Legislative power is vested in National Assembly consisting of House of Representatives and Senate. House of Representatives consists of 480 members, 400 of whom are from election on constituency basis and 80 from election on proportional representation basis. Senate consists of 150 members, 76 of whom are elected from 75 provinces (one per province) and Bangkok, and 74 selected from individuals in various profession/occupations throughout country.

Executive power is vested in Council of Ministers composed of Prime Minister and not more than 35 other Ministers having duties to carry out administration of State Affairs in accordance with collective responsibility principle and appointed by King. Prime Minister must be member of House of Representatives. Prime Minister and Ministers cannot be members of local assembly or local administrator, government official holding permanent position or receiving permanent salary except political official, Election Commissioner, Ombudsman, member of National Counter Corruption Commission, State Audit Commission, or National Human Rights Commission. King has prerogative to remove Ministers from office upon advice of Prime Minister.

Judicial power for adjudication of cases is vested in courts. Judiciary is independent from executive control. Judges and justices independently try cases in accordance with Constitution and law and in name of King. Judges must not be political officials or hold political positions. King appoints and removes judges except in case of removal from office upon death.

Government administrative structure is divided into three parts by virtue of Government Administration Act B.E. 2534 (A.D. 1991).

Central government consists of offices of Prime Minister and 19 ministries. Central government includes all departments, divisions and sections within each individual ministry. Prime Minister's Office is also officially considered ministry, explaining why reference to 20 ministries is often made.

Provincial government is set up in each of 75 provinces outside of Bangkok. Bangkok Metropolis is governed under special act, namely Bangkok Metropolitan Administration Act, B.E. 2528 (A.D. 1985), amended B.E. 2534 (A.D. 1991), B.E. 2539 (A.D. 1996), B.E. 2542 (A.D. 1999), and B.E. 2550 (A.D. 2007). There is provincial governor and one or two deputy governors that have authority over personnel and provincial issues which are within domain of Ministry of Interior. Provincial governors do not have direct authority outside of Interior Ministry or in any other ministry. However, Thai government is now in process of reforming provincial administration by increasing role and authority of provincial governor to that of Chief Executive Officer (CEO) for provincial administration work in each province to increase efficiency. Within province, there are districts (amphoe), townships (tambol) and villages (muban).

Local governments in any form are created and operated from Ministry of Interior. Some local government units include provincial administrative organizations, municipalities, sanitation districts and tambol administrative bodies. These local level groups are comprised of elected individuals and operate on government grants and loans from central government. New Tambol Assembly and Tambol Administrative Organization Act, B.E. 2537 (A.D. 1994) decentralizes more power and duty to local authority in relation to public affairs and taxation in that tambol (township).

1.04 HOLIDAYS:

Jan. 1 (New Year’s Day); Mar. 1 (substitution for Feb. 28, Makha Bucha Day); Apr. 6

(Chakri Day); Apr. 13-15 (Songkran Festival); May 3 (substitution for May 1, Labor Day, for private sector only); May 5 (Coronation Day); May 10 (Royal Ploughing Day, for government only); May 28 (Wisakha Bucha Day); July 1 (Mid-Year Day, for banks only); July 26 (Asarnha Bucha Day);July 27 (Buddhist Lent Day, for government only); Aug. 12 (H.M. Queen's Birthday); Oct. 25 (substitution for Oct. 23, Chulalongkorn Day); Dec. 6 (substitution for Dec. 5, H.M. King's Birthday); Dec. 10 (Constitution Day); and Dec. 31 (New Year's Eve).

1.05 OFFICE HOURS AND TIME ZONE:

Thailand is in GMT +07:00 time zone. Office hours are generally from 8 a.m. to 5 p.m.

2 BUSINESS ORGANIZATIONS

2.01 AGENCY:

Agency may be express or implied. (C.C.C. 797). Agent is not entitled to receive remuneration unless it is provided by contract or implied from conduct between parties that remuneration shall be paid or by common practice. (C.C.C. 803). Additionally, agent is not entitled to remuneration in respect of any part of his agency which he has misconducted. (C.C.C. 818). In case remuneration is to be paid, it must be paid only after agency has come to end unless otherwise agreed. (C.C.C. 817). Agent must act according to express or implied directions of principal or customary course of business. (C.C.C. 807). Principal is bound to third party by acts done by his agent or subagent within scope of authority. (C.C.C. 820). Agent without authorization from principal cannot enter into any juristic act in name of his principal with himself or as agent of third party except for performance of obligation only. (C.C.C. 805).

Person who holds out another person as his agent or knowingly allows another person to hold himself out as his agent is liable to any third person acting in good faith. (C.C.C. 821). Principal is not liable to any act of his agent without authority or beyond scope of his authority unless principal ratifies such action or third person had reasonable grounds arising from act of principal to believe agent had authority. (C.C.C. 822, 823). Agent who makes contract on behalf of principal who is and has his domicile abroad is personally liable on contract though name of principal has been disclosed, unless terms of contract are inconsistent with his authority. (C.C.C. 824).

Express Agent.

Agent who has special authority may do on behalf of his principal whatever is necessary to perform work entrusted to him. (C.C.C. 800). Agent who has general authority may do all acts of management on behalf of his principal except: (1) selling or mortgaging immovable property; (2) letting immovable property for more than three years; (3) making gift; (4) making compromise; (5) entering action in Court; and (6) submitting dispute to arbitration. (C.C.C. 801).

Implied Agent.

Undisclosed principal may declare himself and accept any contract entered into on his behalf. Principal cannot prejudice rights of third party for any acts of agent done before agency becomes known by such party. (C.C.C. 806).

Appointment of Agent.

Law requires written appointment of agent only where transaction is required to be made in writing or if transaction is required to be evidenced by writing. (C.C.C. 798). Appointment of agent shall be evidenced by writing for cases such as sale of immovable property, vessel over six tons, etc. (C.C.C. 456). If several agents have been appointed by same principal for same matter in one contract, it is presumed that they cannot act separately. (C.C.C. 804).

Subagent.

Agent cannot appoint subagent without authorization by principal. Subagent is directly liable to principal and vice versa. (C.C.C. 814). Agent who appoints subagent designated by principal shall be liable to principal only in case where he knows of unfitness or untrustworthiness of subagent and fails to inform principal or revoke subagency. (C.C.C. 813).

Duties and Liabilities of Agent and Principal.

Agent is liable for any injury resulting from his negligence or nonexecution of agency, or from act done without or in excess of authority. (C.C.C. 812). Agent must give information of matters entrusted to him at reasonable time if requested by principal. Agent must surrender all monies and other properties received in connection with agency to principal as well as rights acquired in his own name but on behalf of principal. (C.C.C. 809, 810).

If required, principal must advance necessary sums to agent in order to perform matters entrusted to him. If agent has made advances or expenses as necessary, he can claim reimbursement from principal of such money with interest from day when payment was made. In case it is necessary if agent has assumed obligation, he may require principal to perform in his place or to give proper security if time of maturity of such has not yet arrived. Agent may also claim compensation from principal if he has suffered any damages without fault on his part from performance of agency. (C.C.C. 815, 816). However, if agent has used for his own benefit monies which he ought to have handed over to principal or to have used for principal, he must pay interest to principal from day such sums were used for his own benefit. (C.C.C. 811).

Agent is entitled to retain any property of principal in his possession by reason of agency until he has been paid all that becomes due to him on account of agency. (C.C.C. 819).

Revocation and Extinction of Agency.

Revocation of agency can be made by either party at any time. Party who revokes agency at time inconvenient to other party is liable to such party for resulting injury except in case of unavoidable necessity. (C.C.C. 826, 827). Agency for special authority is terminated after authorized events have been concluded. (C.C.C. 800). Agency also ceases when either of parties dies or becomes incapacitated or bankrupt except where it is contrary to terms of contract or nature of business. (C.C.C. 826). Agent must give account to principal after agency has ended. (C.C.C. 809). Upon extinction of agency, principal is entitled to demand submission of any power of attorney given to agent. (C.C.C. 832).

However, causes for extinction of agency resulting from either principal or agent cannot be raised against other contractual party until such extinction is informed to or becomes known by that party. (C.C.C. 830). Extinction of agency cannot be raised against third party acting in good faith, unless third party is ignorant of fact by his own negligence. (C.C.C. 831).

Commission Agency.

Commission agent is person who undertakes to buy or sell property or undertakes any other commercial transaction in his own name in course of his business on account of principal. (C.C.C. 833). Commission agent is entitled to remuneration at usual rate on every transaction concluded by him unless otherwise agreed. (C.C.C. 834). Transaction concluded by commission agent shall have same effect as if it had been concluded directly in name of principal. (C.C.C. 835).

Brokerage.

Broker is not personally liable for performance of contracts entered into through his mediation, unless he has not communicated name of one party to other party. (C.C.C. 848).

Broker is presumed to have no authority to receive on behalf of parties payment or other performances due under contract. (C.C.C. 849).

2.02 ASSOCIATIONS:

Association is created for conducting any activity which according to its nature is to be done continuously and collectively by persons other than that of sharing profits or incomes earned. (C.C.C. 78). Association must be registered and upon registration becomes juristic person. (C.C.C. 83). Directors of association carry on activities of association under law and regulations, and under supervision of general meetings. (C.C.C. 86). Association is represented by its directors in its relationship with third persons. (C.C.C. 87). General meeting shall be called by directors of association at least once a year. (C.C.C. 93). Association must have at least ten members (C.C.C. 81), each of whom is liable to debt of association for not more than amount of his subscription (C.C.C. 92). Members of association must pay their total subscription on day of becoming member or at beginning of period for payment of subscription unless otherwise provided in regulation. (C.C.C. 91).

Dissolution of Association.

Association is dissolved: (a) In cases provided for in its regulations; (b) by expiration of time fixed for its duration; (c) upon achievement of its purposes; (d) by resolution of general meeting; (e) by its bankruptcy adjudication; (f) by name struck off Register; and (g) by court order. (C.C.C. 101). After liquidation, remaining assets shall be transferred to other association or foundation or any juristic person whose object is for charity purposes as designated in regulations, or be transferred by resolution of association in general meeting, or be vested in State. (C.C.C. 107).

2.03 COMPANIES:

Under Thai law, there are two types of company: (a) Private limited company; and (b) public limited company. C.C.C. provides for private limited company; public limited company is governed by Public Limited Company Act, B.E. 2535 (A.D. 1992) as amended by (No. 2), B.E. 2544 (A.D. 2001).

Private Limited Companies.

Private limited company is juristic person, that is, legal entity distinct from its shareholders. (C.C.C. 67, 70). As juristic person, it can sue or be sued or hold title to properties, and so forth, in its name. (C.C.C. 66, 67. See also topic 2.04 Juristic Persons.) Capital of private limited company is divided into equal shares of designated nominal amount (par value) not less than Baht 5. (C.C.C. 1096, 1117). Company may not issue shares for price below their par value. If authorized by memorandum, shares may be issued at price higher than their par value but not lower than their nominal amount. (C.C.C. 1105). Shares may be common or preferred. Nature and extent of preferential rights accruing to preferred shares must be fixed by statutory meeting. (C.C.C. 1108). All shareholders have preemptive right concerning all subsequent shares issued. (C.C.C. 1222).

Share certificates shall be issued to each shareholder for shares held by him. (C.C.C. 1127). There is no minimum registered capital requirement. Upon formation of company, capital shares must be totally subscribed or allotted and at least 25% of registered capital must be paid. (C.C.C. 1104, 1105). Private limited company is prohibited from holding its own shares or taking them in pledge. (C.C.C. 1143). Private limited company may not offer its shares to public (C.C.C. 1102), whereas it may issue debentures but only with permission of Securities and Exchange Commission (S.E.C.).

Private limited company must have minimum of three individual promoters who must each subscribe at least one share. (C.C.C. 1097, 1100). It is required to have at least three shareholders, including juristic persons (if any).

Liability of shareholders is limited to any unpaid amount on shares held. (C.C.C. 1096). Accordingly, if shareholder has fully paid for his shares, he is not subject to further liability; if he has not fully paid up, his maximum liability is amount outstanding on those shares.

Shares are freely transferable. Restraints may, however, be placed on transfer of shares entered in name certificate if restriction is done pursuant to company's regulations. (C.C.C. 1129). Shares issued to bearer are transferred by mere delivery of certificate. (C.C.C. 1135). Transfer of shares entered in name certificate is void unless made in writing with numbers of shares stated and signatures of transferor and transferee and at least one witness affixed therein. Such transfer is invalid as against company and third persons until fact of transfer and name and address of transferee are entered in register of shareholders. (C.C.C. 1129).

Private limited company is managed by one or more directors, whether or not shareholders of company, elected by general meeting of shareholders. (C.C.C. 1144, 1151). Directors may be reelected and are subject to removal by general meeting at any time. (C.C.C. 1151, 1153).

Ordinary meeting which is statutory general meeting of shareholders must be held at least once a year. (C.C.C. 1171). Board of directors may call other general meetings of shareholders which are known as extraordinary meetings whenever they think fit or upon written request of shareholders holding at least one-fifth of shares of company. (C.C.C. 1172, 1173). Notice calling for general meeting must be published in local newspaper at least once and sent to all shareholders by post with acknowledgement of receipt at least seven days before meeting date or at least 14 days if matter for meeting requires special resolution approved by shareholders. (C.C.C. 1175). Unless otherwise provided in by-laws, quorum for general meeting is one-fourth of capital. (C.C.C. 1177, 1178). In case quorum is not present within one hour from time scheduled for general meeting, general meeting, if called upon shareholders' request, must be dissolved if meeting had not been summoned by shareholders, another general meeting at which no quorum is required must be called within 14 days. (C.C.C. 1179). All shareholders may vote, either in person or by proxy, unless they have special interest in resolutions. (C.C.C. 1176, 1184, 1185, 1187). Save in exceptional cases prescribed by law or unless otherwise provided in bylaws, majority vote is required in order to pass resolution in general meeting.

Dividend may, upon resolution passed in general meeting, be distributed from company's profits. No dividend may, however, be distributed until prior losses are covered. Interim dividends may be distributed out of company's profits by decision of board of directors. (C.C.C. 1201). At each distribution of dividend, company must appropriate at least 5% of profits to reserve fund until such fund amounts to 10% of registered capital or such higher proportion thereof as stipulated in bylaws. (C.C.C. 1202).

Private limited company is dissolved: (a) In cases provided for in bylaws; (b) by expiration of time fixed for its duration; (c) upon achievement of purposes; (d) by special resolution of general meeting; and (e) by bankruptcy adjudication. (C.C.C. 1236). Private limited company may also be dissolved by court on grounds prescribed by law. (C.C.C. 1237). After dissolution, company is liquidated but it is deemed to continue for such period necessary for liquidation. (C.C.C. 1249).

Public Company Limited.

Public company limited is designed for wide public shareholding. It is company established for purpose of offering shares for sale to public and liability of shareholders is limited to amount paid on shares. (P.L.C.A. 15). Fifteen or more natural persons as promoters, not less than half of whom must be residing in Thailand and whose subscription is at least 5% of shares in capital, are required. (P.L.C.A. 16, 17). Offering of shares for sale to public shall require prior permission from Securities and Exchange Commission under Securities and Exchange Act, B.E. 2535 (A.D. 1992). Once registrar accepts registration, public company limited shall become juristic person. (P.L.C.A. 41). Shares of company shall be equal in value. (P.L.C.A. 50). Share is indivisible; all shares must be fully paid up. (P.L.C.A. 53, 54). Shares may be common or preferred. Preferred share cannot be converted into ordinary share unless otherwise stipulated in bylaws. (P.L.C.A. 65). Company cannot own its shares or take them in pledge (P.L.C.A. 66), except in circumstances described under §66/1, when company may own its shares. Purchase of its own shares from shareholders must be in accordance with rules and procedures prescribed in ministerial regulation. Transfer of shares is effected by delivery of certificate endorsed by signatures of transferor and transferee with name of transferee stated therein. Such transfer binds company upon receipt of request for registration thereof and after registration has been effected, binds all third persons. (P.L.C.A. 58).

Public company limited is managed by board of directors consisting of no less than five directors, half of whom must be residents of Thailand. (P.L.C.A. 67). Directors shall be natural persons but may or may not be shareholders. (P.L.C.A. 68, 69). Directors are elected annually by general meeting of shareholders. Directors may be reelected. (P.L.C.A. 70, 71).

Annual ordinary general meeting will be called by board of directors within four months of last day of fiscal year of company. (P.L.C.A. 98). Extraordinary general meeting will be called by board of directors whenever they think fit or upon request of shareholders holding at least one-fifth of shares sold or shareholders numbering not less than 25 persons holding shares not less than one-tenth of total number of shares sold. (P.L.C.A. 99, 100). Unless otherwise prescribed by P.L.C.A., quorum for general meeting requires presence of at least 25 persons or not less than one-half of total number of shareholders holding shares amounting to not less than one-third of total number of shares sold. (P.L.C.A. 103). Unless higher vote is fixed in bylaws, resolution of general meeting requires majority vote of shareholders who attend meeting in ordinary event, and not less than three-quarters of total number of votes of shareholders who attend meeting in event of sale of business, purchase of business, making or terminating contracts of lease of business or amalgamation of business. (P.L.C.A. 107).

Dividend, upon resolution passed in general meeting, may be distributed from company profits after approval at shareholder meeting. Interim dividend may be distributed out of company profits by decision of board of directors where company by-laws permit. (P.L.C.A. 115). Company must appropriate at least 5% of its annual net profits after deduction of prior losses, if any, to reserve fund until such fund amounts to at least 10% of registered capital or such higher proportion thereof as stipulated by its bylaws or by other laws. (P.L.C.A. 116).

Balance sheet and statement of profit and loss account of company need to be prepared once a year and submitted after examination by auditor to annual general meeting for approval. (P.L.C.A. 112).

Public company limited is dissolved: (a) by resolution of general meeting; (b) by bankruptcy; or (c) by court order. (P.L.C.A. 154). After dissolution, company is liquidated but it is deemed to continue for such period necessary for liquidation. (P.L.C.A. 158).

Merger.

Under Thai law, merger of two companies is called amalgamation. All domestic corporations may amalgamate. Foreign corporations can amalgamate with domestic companies provided that business involved is not prohibited from alien participation by Foreign Business Act or any other local law. Also, Land Code prohibits foreigners from aggregately holding ownership in excess of 49% in land holding companies. Approval from Board of Investment or Industrial Estate Authority of Thailand can circumvent these laws.

In order to merge private limited companies, special resolution must be passed at general meeting of shareholders at both companies. (C.C.C. 1239). Special resolution of shareholders must be passed by not less than 3/4 of total number of votes of shareholders attending meeting and who have right to vote. (C.C.C. 1194), and be registered within 14 days after special resolution has been passed. For public limited companies, resolution of shareholders must also be passed by not less than ¾ of total number of votes of shareholders attending meeting and who have right to vote. (P.L.C.A. 146). Next, for private limited companies, company must publish at least once in local newspaper and send to all creditors letter giving notice of proposed amalgamation and requiring creditors to present within 60 days after date of notice any objection they may have. (C.C.C. 1240). If there are no objections, or if objections have been settled, amalgamation proceeds and must be registered within 14 days. (C.C.C. 1241). Share capital of new company must be equivalent to total share capital of amalgamated companies. (C.C.C. 1242). For public limited companies, company must notify in writing known creditors of amalgamation resolution within 14 days of date on which shareholders passed such resolution requiring creditors to submit any objection within two months of date on which creditors receive notice of such resolution. Notice shall be published in newspaper within above-mentioned 14 days. (P.L.C.A. 141, 147). Thereafter, chairman of Board of Directors of companies to be amalgamated shall call joint meeting of shareholders of all such companies to consider matters prescribed in §148. Such meeting shall be completed within six months of date on which all of companies have passed resolutions for amalgamation, unless joint meeting has passed resolution to extend such period of time, but total period of time shall not be more than one year. (P.L.C.A. 148). When amalgamation of companies has been accepted for registration by Registrar, former companies shall lose their status as juristic persons. (P.L.C.A. 152). Company already amalgamated and registered shall be entitled to all assets, liabilities, rights, duties and responsibilities of all former companies. (P.L.C.A. 153).

Foreign Companies.

Foreign company that wishes to do business in Thailand may set up branch office to operate business in Thailand. Unless otherwise provided in Foreign Business Act B.E. 2542 (“FBA”) or special laws, there are basically no corporate registration requirements for establishment of branch office with Ministry of Commerce if such business is not reserved in FBA. It must, however, apply for taxpayer card and VAT certificate (if its gross income will reach THB1.8 million annually) with Revenue Department.

Under Thai law, branch office is not distinct legal entity separate from its parent company. Therefore, branch office is itself treated as foreign company, and parent company can be held liable for losses and liabilities of its branch in Thailand. No Thai law specifically governs rights and powers of foreign company. Generally, foreign company enjoys same rights and powers as Thai company unless any specific legislation provides otherwise; for example, under Land Code, foreign company cannot own land in Thailand.

Foreign company and its branch office may not engage in prohibited or restricted businesses enumerated in FBA or other local laws. However, FBA does not apply to foreign companies which engage in business with Thai government's permission or whose activities are covered by agreements between their home countries and Thailand which exclude application of FBA such as Treaty of Amity and Economic Relations between Thailand and U.S. Treaty guarantees that American nationals and corporations that establish or acquire interest in commercial, industrial, financial and other business enterprises in Thailand will receive all rights and privileges afforded to Thai nationals. Treaty does not cover businesses in fields of communications, transport, fiduciary functions, banking involving depositary functions, exploitation of land or other natural resources, or domestic trade in indigenous agricultural products. In these fields, American investors do not have special treatment and therefore are subject to FBA and other applicable laws. Thailand has executed Free Trade Agreements (“FTA”) with various countries including Australia and Japan. Under relevant FTA, citizens of those countries may hold ownership in certain businesses exceeding limitation fixed by FBA.

Besides FBA, there are also several other statutes that prohibit operation of specific businesses by foreign companies and impose conditions regarding majority ownership and management by Thai nationals in companies engaging in those businesses such as Financial Institution Business Act B.E. 2551 (A.D. 2008), Thai Vessel Act B.E. 2481 (A.D. 1938), and Air Navigation Act B.E. 2497 (A.D. 1954).

Representative Office and Regional Office.

Regulations of the Office of the Prime Minister Governing Application for Establishment of Representative Office of Regional Juristic Person Respecting International Trading and Business, B.E. 2529 (A.D. 1986), and Regulations of the Office of Prime Minister Governing Application for Establishment of Regional Office of Transnational Corporation, B.E. 2535 (A.D. 1992), were canceled by new FBA as of Mar. 3, 2000.

Foreign companies may establish representative office or regional office by applying for Alien Business License under List 3(21) of FBA,"Other categories of service business". Representative office and regional office will be regarded as "branch office" of foreign company. Both representative office and regional office are not subject to Thai tax as long as they operate within prescribed scope of activities and comply with other restrictions and conditions.

2.04 JURISTIC PERSONS:

In Thai law, juristic person refers to organization created or registered according to law which is distinct legal entity separate and apart from parties composing it. (C.C.C. 1015). Juristic persons under Thai law include governmental ministries, monasteries, private and public limited companies, limited partnerships, registered ordinary partnerships, associations, and authorized foundations. Juristic persons have rights and duties in conformity with provision of law within scope of their power and duties, or objects as provided or defined by law, regulation, or constitutive act. Juristic person enjoys same rights and is subject to same duties as natural person, except those which, by reason of their nature, may be enjoyed or incurred only by natural person. Will of juristic person is declared through its representatives. (C.C.C. 65-70).

See topics 2.02 Associations, 2.03 Companies, 2.05 Partnerships.

2.05 PARTNERSHIPS:

Partnerships are governed by C.C.C. Three types of partnership are recognized by C.C.C.: (a) Ordinary partnership; (b) registered ordinary partnership; and (c) limited partnership. (C.C.C. 1013).

Ordinary Partnerships.

Ordinary partnership resembles American partnership. Of three partnership forms provided for by C.C.C., only non-registered ordinary partnership is not juristic person, that is, legal entity distinct from partners composing it. (See also topic 2.04 Juristic Persons.) Therefore, even though non-registered ordinary partnership can conduct business under its name, it may not sue, be sued, or acquire rights and obligations in its name.

All partners in ordinary partnership are jointly and unlimitedly liable for all obligations of partnership. (C.C.C. 1025). Creditor is entitled to seek performance of mature obligations due from ordinary partnership from any of its partners, who are then left with right to take legal action against other partners under law of agency. Former partner is still liable for obligations partnership incurred while he was partner; this liability is for unlimited time provided that claims are not barred by prescription. (C.C.C. 1051).

Partnership creates general mutual agency among partners whereby acts of each partner, made within scope of partnership business, bind partnership. (C.C.C. 1050). No restriction on power of any partner of non-registered partnership can be used as defense against claim by third party against non-registered partnership. (C.C.C. 1053).

Person may not become partner of ordinary partnership without unanimous consent of existing partners unless there is agreement providing otherwise. (C.C.C. 1040). In absence of agreement covering management, all partners have management rights and power to represent partnership as its agent but may not enter into contract to which another partner objects. In such case, each partner is managing partner. (C.C.C. 1033). Without consent of other partners, no partner may, either on his own or another person's behalf, carry on competing business of same nature as that of partnership. (C.C.C. 1038).

If there is no agreement to contrary, partners share profits and losses in proportion to their contributions. (C.C.C. 1044). Contributions may be in cash, property or services. (C.C.C. 1026). In case of doubt, contributions are presumed to be of equal value. (C.C.C. 1027). If partner's contribution consists only of his personal services and partnership agreement does not fix value of such services, then said partner's share of profits and losses is equivalent to average of shares of partners whose contributions are in money or other properties. (C.C.C. 1028).

Establishing ordinary partnership is simple: no filings or other public formalities are required. Ordinary partnership is deemed to be voluntary association which may arise by agreement of partners, which may be either express, as where they sign agreement, or implied, as where they simply commence business without having formally discussed terms of their partnership.

Registered Ordinary Partnerships.

Ordinary partnership may be registered with Ministry of Commerce. (C.C.C. 1064). Upon registration, it becomes registered ordinary partnership, which is juristic person. As juristic person, it is legal entity separate from its partners and can sue or be sued or hold title to properties, and so forth, in its name. (See also topic 2.04 Juristic Persons.)

Like partners in ordinary partnership, all partners in registered ordinary partnership are jointly and without limit liable for all partnership's obligations. (C.C.C. 1025). Nevertheless, their liability is, in certain aspects, totally different from that of partners in ordinary partnership. Until registration has been made, no advantage may be taken by partners or partnership against third persons in respect of existence of agreements, documents or particulars required by titles to be registered, but third persons may take advantage of such existence. However, partner or partnership which has received performance of obligation before such registration is not bound to make restitution. (C.C.C. 1023).

Ordinary partnership's creditors are entitled to seek performance of mature partnership obligations from any partner, while registered ordinary partnership's creditors are entitled to demand performance of partnership obligations from any partner only when partnership is in default. (C.C.C. 1070). Even then, this right is not absolute. If creditor brings suit against partner demanding performance of partnership obligation in default, it is within court's discretion to order creditor to enforce obligation first against partnership's assets if partner being sued proves that such assets are sufficient to satisfy all or part of obligation and that enforcement against partnership would not be difficult. (C.C.C. 1071). Thus, partners in registered ordinary partnership may be considered as sureties of partnership.

Former partner in registered ordinary partnership is liable for obligations partnership incurred while he was still partner; this liability ends two years after he ceases being partner. (C.C.C. 1068).

Public limited company may not be partner in any ordinary partnership or partner with unlimited liability in any limited partnership. (P.C.A. 12).

Limited Partnerships.

Major difference between limited partnership and both registered and unregistered ordinary partnerships is that former has two separate groups of partners: (a) One or more partners whose liability for partnership's obligations is limited to capital contributed, and (b) one or more partners who are jointly and without limit liable for all partnership's obligations. (C.C.C. 1077).

Limited partnership must be registered with Ministry of Commerce and, upon registration, becomes juristic person distinct from its partners. (C.C.C. 1078. See also topic 2.04 Juristic Persons.) Until registration, it is deemed to be ordinary partnership, and all partners have joint and unlimited liability for all partnership obligations. (C.C.C. 1079).

Contributions from unlimited partners may be in form of cash, property, or services, but those from limited partners must be in form of cash or property (not services). (C.C.C. 1083). No dividend or interest may be distributed to limited partners except out of profits made by partnership. (C.C.C. 1084).

Only unlimited partner can be managing partner. (C.C.C. 1087). In other words, limited partner cannot participate in management of partnership. If limited partner interferes with such management, he becomes jointly and without limit liable for all partnership's obligations, along with other unlimited partners. Opinions, advice and votes cast for appointment or dismissal of managers provided by partnership contract are not considered interference and would not cause limited partner to lose his status. (C.C.C. 1088). Limited partner may carry on any business, either on his own account or on account of third persons, even if such business is of same nature as that of partnership. (C.C.C. 1090).

Limited, but not unlimited, partner may transfer his share without consent of other partners. (C.C.C. 1091). Transfer of unlimited partner's share without other partners' consent does not render third-person transferee partner. (Transfer of any partner's share in ordinary or registered ordinary partnerships without consent of other partners would not render third-person transferee partner.)

If limited partnership has several unlimited partners, their relations with each other and with partnership are governed by same rules as apply to relationships between partners in ordinary partnership. Moreover, general provisions applicable to ordinary partnership also apply to limited partnership insofar as they are not excluded or modified by provisions specifically governing latter. (C.C.C. 1080). Creditor of limited partnership may not bring action against any limited partner unless partnership has been dissolved. After dissolution of partnership, creditors can enter actions against limited partner up to: (a) Part of contribution of such partner which has not been delivered to partnership; (b) such part of contribution as partner may have withdrawn from assets of partnership; and (c) dividends and interest which partner may have received in bad faith and contrary to provision of §1084. (C.C.C. 1095).

Public limited company may be limited, but not unlimited, partner in limited partnership. (P.L.C.A. 12).

Dissolution of Partnerships.

Partnership, regardless of type, is dissolved: (a) In cases provided for in partnership contract; (b) by expiration of time fixed for its duration; (c) upon achievement of its purposes; (d) by due notice of any partner given to other partners in manner prescribed by law, and (e) by death, bankruptcy or incapacity adjudication of any partner, provided in cases under (d) and (e), subsisting partners may buy shares of departing partner and, as consequence, partnership contract continues between subsisting partners. (C.C.C. 1055, 1060). Partnership may also be dissolved by court on grounds prescribed by law. (C.C.C. 1057). Registered ordinary partnership and limited partnership are dissolved if they become bankrupt. (C.C.C. 1069, 1080). After its dissolution, partnership is liquidated. (C.C.C. 1061, 1249). Registered ordinary partnership and limited partnership are deemed to continue for such period necessary for liquidation. (C.C.C. 1249).

Conversion of Registered Partnership and Limited Partnership to Limited Company.

Registered partnership or limited partnership consisting of at least three partners may be converted into limited company by consent of all partners and performance of prescribed requirements. (C.C.C. 1246/1). Board of Directors of company must register conversion into limited company within 14 days from date of full compliance with C.C.C. 1246/3.

Information about business organization is available at Department of Business Development website at http://www.dbd.go.th.

3 BUSINESS REGULATION AND COMMERCE

3.01 BILLS AND NOTES:

Bills are governed by C.C.C.

Classification of Bills.

Within meaning of C.C.C., bills are of three kinds: (1) bills of exchange; (2) promissory notes; and (3) checks. (C.C.C. 898).

Bill of exchange must contain: (a) statement that it is bill of exchange; (b) unconditional order to pay certain sum of money; (c) name or trade name of drawee; (d) maturity date; (e) place of payment; (f) name or trade name of payee who may be drawer or bearer; (g) date and place of issuance; and (h) signature of drawer. (C.C.C. 909). If any of above particulars is missing, instrument is invalid as bill of exchange except that: (i) it will be deemed to be bill of exchange payable at sight, if no maturity date is specified; (ii) if no place of payment is designated, domicile of drawee will be considered place of payment; (iii) domicile of drawer is deemed to be place at which bill of exchange was issued, if not shown; and (iv) if date of issuance is not provided, any lawful holder acting in good faith may fill in true date. (C.C.C. 910). Bill of exchange may be drawn on either drawer himself or on account of third person. (C.C.C. 912).

Promissory note must contain: (a) statement that it is promissory note; (b) unconditional promise to pay certain sum of money; (c) maturity date; (d) place of payment; (e) name or trade name of payee; (f) date and place of issuance; and (g) signature of maker. (C.C.C. 983). Similar to bill of exchange, instrument lacking any of these particulars is invalid as promissory note save in exceptional cases similar to those of bill of exchange. (C.C.C. 984). Rights and obligations of maker of promissory note are same as those of acceptor of bill of exchange. (C.C.C. 986).

Check must contain: (a) statement that it is check; (b) unconditional order to pay certain sum of money; (c) name or trade name and address of banker; (d) name or trade name of payee or mention that it is payable to bearer; (e) place of payment; (f) date and place of issuance; and (g) signature of drawer. (C.C.C. 988). Lack of any of these particulars renders instrument invalid as check, except in instances similar to those of bill of exchange. (C.C.C. 910, 989).

Several provisions of C.C.C. governing bills of exchange, except, among others, those dealing with acceptance, are applicable to promissory notes and checks in so far as they are not inconsistent with nature of these instruments. (C.C.C. 985, 989).

Endorsements.

Transfer of bill with words “not negotiable” or any equivalent expression appearing on its face may be effected only in accordance with provisions of C.C.C. governing transfer of claims. (C.C.C. 917, 985, 989; see also category 7 Debtor and Creditor, topic 7.01 Assignments). Bills of exchange and checks which are payable to bearer may be transferred by mere delivery. (C.C.C. 918, 989). Any other bill may be transferred by endorsement and delivery. (C.C.C. 917, 985, 989). Endorsements must be unconditional and partial endorsement is void. (C.C.C. 922. 985. 989). Endorsement may specify beneficiary or be in blank; however, it must be signed by endorser. (C.C.C. 919, 985, 989). Holder may fill up endorsement in blank either with his name or third person's name or endorse bill again either in blank or to third person or transfer bill to third person without endorsing it or filling up blank. Endorsement transfers all rights arising out of bill. (C.C.C. 920, 985, 989). Endorsements of bill of exchange and check which are payable to bearer operate only as guarantees (avals) for drawers. (C.C.C. 921, 989).

Acceptance is not applicable to promissory notes and checks. (C.C.C. 985, 989). Unless presentment for acceptance is prohibited by drawer (such prohibition not being allowed in case of bill of exchange drawn payable at particular place other than drawee's domicile or at certain time after sight) holder or possessor may, at any time before maturity, present bill of exchange to drawee at his residence for acceptance. (C.C.C. 927). Holder of bill of exchange payable at end of fixed period after sight, presentment for acceptance of which cannot be prohibited by drawer, must present it for acceptance within six months from its date of issuance or within such time as specified by drawer. (C.C.C. 927, 928). Mere signature of drawee on face of bill of exchange constitutes acceptance. (C.C.C. 931). By acceptance of bill of exchange, drawee becomes bound to pay amount accepted according to tenor of his acceptance. (C.C.C. 937).

Aval is guarantee given by third person or any party to bill for whole or part of payment of bill. (C.C.C. 938, 985, 989). Aval is given by having such words as “good as aval” or any equivalent expression written on bill itself or on allonge and signature of giver of aval affixed to bill. Except in case of signature of drawee or drawer, mere signature of giver of aval on front of bill constitutes aval. (C.C.C. 939, 985, 989). If party for whom aval is given is not specified, aval is deemed to be given for drawer. Giver of aval is bound in same manner as person whom he guarantees and will, upon his payment of bill, have rights of recourse against said person and all persons responsible for said person. (C.C.C. 940).

Payment.

Holder of bill of exchange or promissory note must present it for payment on its maturity date. (C.C.C. 941, 985). Holder of bill of exchange or promissory note cannot be compelled to receive payment thereof before maturity. Drawee or maker who pays before maturity does so at his own risk and peril. (C.C.C. 942, 985). Maturity date of bill of exchange and promissory note may be on demand or at sight; at end of fixed period after sight; on fixed day; or at end of fixed period after date of bill. (C.C.C. 913, 985). Bills of exchange and promissory notes which are payable on demand or at sight; at end of fixed period after sight; will be payable upon presentment and their holders must present them for payment within six months from their dates of issuance, or within such time as otherwise specified by drawer or maker. (C.C.C. 928, 944, 985). Maturity of bill of exchange payable at end of fixed period after sight is determined by date of acceptance or date of protest, as case may be. (C.C.C. 943). Promissory note payable at end of fixed period after sight must be presented for visa of maker within six months from its date of issuance, or within such time as specified by maker. (C.C.C. 986, 928). Its maturity is determined by date of visa, signed by maker of promissory note, or date of protest, which is required as evidence, for maker's refusal to give his visa. (C.C.C. 986). Check is payable on demand or to order of payee. (C.C.C. 987). In order to preserve right of recourse against endorsers and certain rights against drawer (to extent of any injury caused to drawer by failure of presentment), holder of check must present it for payment to banker within one month after date of issuance, if payable in same town of issuance, or within three months, if payable elsewhere. (C.C.C. 990). If check is presented for payment later than six months after date of issuance, or money to credit of account of customer is insufficient to meet payment under check, or notice is given that check has been lost or stolen, banker is not bound to pay it. (C.C.C. 991). Payment of crossed check must be made only to banker. (C.C.C. 994).

Protest.

Nonacceptance or nonpayment of bill of exchange must be evidenced by formal document called protest made by district officer or his deputy or attorney having license for that purpose. (C.C.C. 960, 961). There is no requirement for protest for nonacceptance of promissory note or check since acceptance is not applicable to promissory notes or checks. For promissory notes and checks, protest of nonpayment is only required in cases of nonpayment of foreign promissory notes and nonpayment of foreign check. (C.C.C. 960, 985, 989). Protest may be waived if drawer or maker (in case of foreign promissory note) or endorser stipulates in bill “without protest”, “protest not necessary” or any other equivalent expression. (C.C.C. 964, 985, 989). Protest must be made within three days following expiration of time fixed for presentment for acceptance in case of protest for nonacceptance of bill of exchange or within three days following maturity date in case of protest for nonpayment of bill of exchange or foreign promissory note or foreign check. (C.C.C. 960, 985, 989). Officer or attorney making protest shall deliver protest to person at whose request it is made, and shall also forthwith give notice thereof to person against whom it is made. (C.C.C. 962, 985, 989).

Notice of Nonacceptance or Nonpayment.

Holder of bill of exchange or foreign promissory note or foreign check, as case may be, must give notice of nonacceptance or nonpayment to his immediate endorser and drawer or maker, as case may be, within four days following day of protest, or day of presentment if protest is waived. Every endorser must within two days from receipt thereof give notice of receipt to his immediate endorser and so on through series until drawer is reached. Notice of nonpayment is also required in cases of foreign promissory note and foreign check. If any person fails to give notice within prescribed period, he is liable for any injury caused by his negligence, compensation of which is limited to amount of bill, but he does not lose his rights of recourse. (C.C.C. 963, 985, 989).

Rights of Recourse.

Holder of bill is entitled to rights of recourse against endorsers, drawers and other persons liable under bill if payment has not been made at maturity. Even before maturity, holder is also entitled to rights of recourse against such persons if: (a) drawee, drawer of check, maker of promissory note or drawer of bill of exchange which need not be accepted has become bankrupt; (b) drawee has suspended payment, even if suspension is not authenticated by judgment, or (c) execution has been levied against drawee's property without result. (C.C.C. 959, 985, 989). Holder of bill of exchange also has same rights of recourse before maturity when acceptance has been refused. (C.C.C. 959). Holder loses his rights of recourse against endorsers, drawer and other persons liable under bill but not against acceptor if: (a) he fails to present bill of exchange payable at sight or at end of fixed period after sight within prescribed period; (b) he fails to present bill of exchange for acceptance within prescribed period, in which case he loses both his rights of recourse for nonpayment and for nonacceptance unless it appears from terms of stipulation that drawer meant only to release himself from guarantee of acceptance; (c) he fails to have protest for nonacceptance of bill of exchange or protest for nonpayment of bill of exchange, foreign promissory note or foreign check made within prescribed period; and (d) he fails to present bill of exchange, protest of which has been waived, for payment within prescribed period. (C.C.C. 973, 985, 989). Holder who fails to present check for payment within prescribed period loses his right of recourse against endorsers and his right against drawer to extent of any injury caused to drawer by his failure of such presentment. (C.C.C. 990).

3.02 COMMERCIAL REGISTER:

Compulsory Registration.

According to Commercial Registration Act, B.E. 2499 (A.D. 1956) as amended by Commercial Registration Act (No. 2), B.E. 2549 (A.D. 2006), commercial registration with Ministry of Commerce of natural persons, branch offices of foreign companies, unregistered partnerships and sole proprietorships engaged in certain businesses specified in Act is compulsory. (C.R.A. 5, 6, 11). Companies, registered partnerships and other juristic persons duly organized and registered with Registrar of Partnerships and Companies of Ministry of Commerce under C.C.C. after Nov. 14, 1972 are exempted from commercial registration requirement. (C.R.A. 7, Announcement of Ministry of Commerce dated Nov. 14, 1972). If commercial registration is required, it must be applied for at Commercial Registration Division where business is located within 30 days of commencing business. (C.R.A. 10, 11).

Disclosures.

Commercial registration records information of registered business concerning capital, nature of business, trade name, name of owner (in case of individual), corporate name (in case of company), partnership name (in case of partnership), shareholders and their shareholdings (in case of company), partners and their contributions (in case of partnership), locations of principal office, branch offices, warehouses and agents, date of commencing business in Thailand and trade name of transferor of business, if applicable. (C.R.A. 12). Upon registration, commercial registration certificate which must be prominently displayed in business's premises will be issued by Commercial Registrar. (C.R.A. 14).

Penalties.

Any person failing to carry out commercial registration within specified period or willfully submitting false information is guilty of offense and liable to fine not exceeding Baht 2,000 and, in case of failure to carry out commercial registration, further fine not exceeding Baht 100 per day for continued default. (C.R.A. 19). Any person failing to prominently display commercial registration certificate in business premises is guilty of offense and liable to fine not exceeding Baht 200 and further fine not exceeding Baht 20 per day for continued failure. (C.R.A. 20).

3.03 CONTRACTS:

Formation of contract, effect of contract, rescission of contract and all other basic legal aspects of contract are governed by C.C.C. Conflict of laws rules are provided in Act on Conflict of Laws, B.E. 2481 (A.D. 1938). According to C.C.C., contract is one source of obligation. Other sources of obligation are management of affairs without mandate, unjust enrichment and tortious acts (wrongful acts). C.C.C. also provides for provisions relating to formation of and rights and obligations of parties to 23 specific contracts such as sale, carriage, loan, etc. By virtue of principle of freedom of contract underlying C.C.C., parties may create contract which is not provided for by C.C.C. Moreover, provisions of C.C.C. which are not deemed to be within law of public order or good morals are subject to contrary agreement of parties. (C.C.C. 150). Contracts giving business operator unreasonable advantage over other party(ies) may subsequently be subject to court's discretionary power to adjust terms. (See subhead Unfair Contract Terms, infra).

Formation.

Contract is created by acceptance of offer. Both offers and acceptances made to person in his presence take effect from time intention becomes known to receiver. (C.C.C. 168). Offers and acceptances made to person not in his presence take effect from time they reach other parties and are ineffective if revocation is received by such other parties previously or simultaneously. (C.C.C. 169). After offer or acceptance has been sent, death or incapacity of offeror or offeree does not impair validity of offer or acceptance as case may be except that offer in such case is invalid if offeror has declared contrary intention or if offeree knew of offeror's death or incapacity prior to acceptance. (C.C.C. 169, 360). Offer specifying period of acceptance cannot be revoked before termination of such period. (C.C.C. 354). Offer must be accepted within period of acceptance specified therein. (C.C.C. 357). Offer with no specified period of acceptance, if made to person present or by telephone, must be accepted immediately or, if made to person at distance, must be accepted within reasonable period of time during which time it cannot be revoked. (C.C.C. 355, 356). Acceptance of offer which arrives out of time constitutes new offer. Conditional acceptance constitutes both refusal and counter-offer. (C.C.C. 359). Any act which can be deemed declaration of intention to accept may give rise to contract between persons at distance at time of its occurrence if according to declared intention of offeror or ordinary usage no notice of acceptance is required. In other cases, contract between persons at distance comes into existence at time notice of acceptance reaches offeror. (C.C.C. 361).

Except for contracts which C.C.C. explicitly requires be made in writing and registered with competent official or be in compliance with other specified forms, such as sale of immovable property, mortgage, company formation, etc., contracts may be concluded orally. Contract which is not in form prescribed by law is void. (C.C.C. 152).

Contract may be void if its object is expressly prohibited by law, impossible or contrary to public order or good morals. (C.C.C. 150).

Void contract cannot be ratified. Nullity of void contract may be alleged at any time by any interested person. (C.C.C. 172).

Both juristic and natural persons having legal capacity may be parties to contract. Contract entered into by incapacitated person is voidable but only incapacitated person himself after he has recovered his capacity, his legal representative, guardian, curator or heir may have contract nullified on incapacity grounds. (C.C.C. 175). Such person may also ratify voidable contract but ratification is invalid unless it is made after ground of voidability has ceased to exist. (C.C.C. 179). Voidable contract which has been ratified is deemed to have been valid from beginning but rights of third persons are not affected thereby. (C.C.C. 177).

Concept of “consideration” requirement does not exist under C.C.C.

Excuses for Nonperformance.

If specified property under bilateral contract for creation or transfer of real right therein is lost or damaged by cause not attributable to debtor, loss or damage falls on creditor. (C.C.C. 370). If bilateral contract is subject to condition precedent and property forming its subject is lost or damaged by cause not attributable to creditor while condition is pending, creditor has option, when condition is fulfilled, either to demand performance with reduction of his counter-performance or to rescind contract provided he is also entitled to compensation if cause of loss or damage is attributable to debtor. (C.C.C. 371). In other cases, impossibility of performance of obligation by cause not attributable to either party such as force majeure is excuse for nonperformance for both parties. If performance becomes impossible by cause attributable to creditor, debtor is entitled to counter-performance. (C.C.C. 372). According to C.C.C., force majeure is event which its happening or pernicious results could not be prevented with appropriate care. (C.C.C. 8).

Effect.

Except where obligation of other party is not yet due, party to reciprocal contract may refuse performance of his obligation unless other party performs or tenders performance of his obligation. (C.C.C. 369). Contracts in favor of third persons are permissible and such third persons may demand performance directly from debtors. (C.C.C. 374). After right of third person is created, it cannot be changed or extinguished by original parties to contract. (C.C.C. 375).

Rescission.

Right of rescission is provided by C.C.C. and may also be created by contract.

Rescission is irrevocable and effected by declaration of intention to other party. (C.C.C. 386). Notice demanding performance is required before rescission unless object of contract according to its nature or declared intention of parties can be accomplished only by performance at stipulated time or within fixed period. (C.C.C. 387, 388). If performance is wholly or partly impossible because of fault of debtor, creditor may rescind contract. (C.C.C. 389). Rescission binds each party to restore other party to his condition prior to formation of contract. Rights of third persons are not impaired by rescission. Rescission does not preclude claims for damages. (C.C.C. 391).

Government Contracts.

Provisions of C.C.C. applicable to ordinary contracts also apply to government contracts. Nevertheless, special procedures concerning method of procurement set forth in Regulations of Office of Prime Minister on Procurement, B.E. 2535 (A.D. 1992) as amended by (No. 2) B.E. 2538 (A.D. 1995), (No. 3) B.E. 2539 (A.D. 1996), (No. 4) B.E. 2541 (A.D. 1998), (No. 5) B.E. 2542 (A.D. 1999) and (No. 6) B.E. 2545 (A.D. 2002) and in Regulations of Office of Prime Minister on Procurement through Electronics Procedure, B.E. 2549 (A.D. 2006), or certain relevant Cabinet Resolutions must be complied with. Generally, government contracts are awarded on basis of competitive bidding and performance bonds must be posted. Most government contracts must be finally approved by Office of Attorney General. State enterprises have their own rules of procurement which are similar to those applicable to government agencies.

Remarks: At present, draft regulation to replace/supersede Regulations of Office of Prime Minister on Procurement No. 1-6 is being reviewed by Council of State.

Privatization.

Enormous responsibilities associated with Thailand's demand for infrastructure (in transport, electricity and other public utilities) cannot be borne by government alone. Act Governing Permission to Allow Private Bodies to Join or Operate State Businesses, B.E. 2535 (A.D. 1992) (“Concessions Act”) requires all state units to get National Economic and Social Development Board's approval for concessions on government/private sector joint venture projects worth Baht 1 billion or more. If project is worth more than Baht 5 billion, proposing agency must commission feasibility studies and detailed project analyses conducted by independent consultants. Also, projects must be endorsed by committee comprised of other agencies concerned. State Enterprises Corporatization Act, B.E. 2542 (A.D. 1999) sets forth policy, committee, framework and procedures for enhancing and facilitating change of status of state enterprise from old category as organization of State under specific law, to form of limited company or public company limited while still retaining status as kind of state enterprise, through conversion of its capital to that of company whose shares are initially totally held by State (Ministry of Finance).

Applicable Law.

Unless otherwise provided by law, form of contract is governed by law of country where contract is made. (C.O.L. 9). Formation and effect of contract is governed by law of country expressly or implicitly chosen by parties. In event that chosen law cannot be ascertained, applicable law is law of their nationality if parties are of same nationality or, if not of same nationality, law of country where contract has been made. (C.O.L. 13). Capacity or incapacity of person is governed by law of his nationality except that capacity of person to enter into contract relating to immovable property is governed by law of country where immovable property is situated. Alien entering into contract not involving family law or law of succession in Thailand is deemed to have capacity for it insofar as he would be capable under Thai law notwithstanding fact that he would have no capacity or limited capacity under law of his nationality. (C.O.L. 10).

Unfair Contract Terms.

Unfair Contract Terms Act, B.E. 2540 (A.D. 1997), restricts parties' right to create valid, enforceable contractual obligation, and empowers courts to protect rights of consumers, formerly having minimal legal remedies. It promotes equal opportunities and generally protects disadvantaged parties to contract.

Eight categories of contracts covered by Act; two most relevant to consumers and businesses: consumer and standard form contracts. In both cases, contracts giving business operator unreasonable advantage over other party may subsequently be subject to court's discretionary power to adjust terms.

However, some provisions of Act may give rise to different interpretations and require outside expert to look at particular case and assist court with interpretation.

Act supplements Thailand's Civil and Commercial Code and other relevant laws and allows court to look into factors such as good faith, bargaining power, economic status and past practices of party to determine whether contract term is reasonable and enforceable.

3.04 FRAUDS, STATUTE OF:

There is no statute of frauds in Thailand. However, C.C.C. provides that: (a) Sale, contract of exchange and gift of immovable property, vessels of five tons and over, floating houses, or beasts of burden are void unless made in writing and registered by competent official (C.C.C. 456, 525); (b) contract of hire-purchase is void unless made in writing (C.C.C. 572); (c) hire of immovable property for more than three years is enforceable only for three years unless made in writing and registered by competent official (C.C.C. 538); (d) acquisition by juristic act of immovable property or of real right appertaining thereto is incomplete unless such juristic act is made in writing and registered by competent official (C.C.C. 1299); (e) divorce by mutual consent must be made in writing and certified by signatures of at least two witnesses (C.C.C. 1514); (f) will may be made by public document according to procedures set forth by C.C.C. or made in writing dated at time of making of will and certified by signatures of at least two witnesses present at time of execution (C.C.C. 1655, 1656); and (g) oral testimony is not sufficient and some written evidence of agreement signed by party liable is required to prove following contracts: (1) unless earnest money is given or there is part performance, agreement to sell or buy property sale of which must be made in writing and registered by competent official (C.C.C. 456); (2) unless earnest money is given or there is part performance, sale of movable property where agreed price is Baht 20,000 or more (C.C.C. 456); (3) hire of immovable property for three years or less (C.C.C. 538); (4) loan of sum exceeding Baht 2,000 (C.C.C. 653); (5) contract of suretyship (C.C.C. 680); (6) contract of compromise (C.C.C. 851); and (7) contract of insurance (C.C.C. 867).

All other contracts for which C.C.C. does not specifically provide forms may be executed orally.

3.05 INFORMATION TECHNOLOGY, INTERNET AND NEW MEDIA:

Electronic Transactions Act, B.E. 2544 (A.D. 2001), effective Apr. 3, 2002 (“ETA”) as amended by Electronic Transactions Act, B.E. 2551 (A.D. 2008), governs both civil and commercial transactions made electronically with few exceptions to be prescribed by Royal Decree. ETA, based on UN Model Law on Electronic Commerce (1996) and on Electronic Signatures (2001), provides legal framework to support electronic signatures, transactions and documents. Two Royal Decrees prescribing activities that fall outside ETA as well as guidelines for transactions made with public sector were adopted in 2006. Provisions relating to electronic funds transfer were made in subordinate regulation of ETA, i.e. Royal Decree Governing Control and Supervision of Electronics Payment Service Business, B.E. 2551 (A.D. 2008), which came into force Jan. 14, 2009, 120 days after publication date of Sept. 16, 2008.

Bill on Offences Relating to Computer was enacted into law by National Legislative Assembly on May 9, 2007. Bill came into force on July 2007, 30 days after its publication in Government Gazette, and pursuant to which Notification of the Ministry of Information and Communication Technology Re: Bases on Storing Computer Traffic Data of Service Provider B.E. 2550 (A.D. 2007) was issued on Aug. 21, 2007. Bill and Notification principally set forth various types of "virtual" criminal offenses and data retention requirements for service providers. Penalties of both imprisonment and fines may be applied not only to violator who is user but also to service provider.

Note: One electronic commerce-related law remains on agenda. Draft Data Protection Bill has been delayed following changes in government and is being reviewed by Council of State.

3.06 INTEREST:

General Interest Rate.

Wherever interest is to be paid, interest rate of 7.5% per annum shall apply, unless otherwise fixed by juristic act or determined by express provision of law. (C.C.C. 7). Interest on loan of money may not exceed 15% per annum. If higher interest is fixed by contract, only interest rate of 15% per annum may be charged. (C.C.C. 654). However, Supreme Court considers collection of interest at excessive rate to be contrary to public order or good morals by virtue of Act Prohibiting the Collection of Interest at Excessive Rate, B.E. 2475 (A.D. 1932) and, therefore, such excessive interest rate is void. (C.C.C. 150). Compound interest is prohibited except that parties to particular loan agreement may agree in writing to have interest due for one year or more added to principal amount and whole shall bear interest. (C.C.C. 655).

Interest rate chargeable by banks or financial institutions is regulated by Interest on Loan of Financial Institutions Act, B.E. 2523 (A.D. 1980) (I.F.A.) as amended, and relevant notifications of Bank of Thailand issued by virtue of Financial Institution Business Act B.E. 2551 (A.D. 2008) which came into force on Aug. 3, 2008 and superseded Commercial Banking Act, B.E. 2505 (A.D. 1962), as amended, or Act on the Undertaking of Finance Business, Securities Business and Credit Foncier Business, B.E. 2522 (A.D. 1979), as amended. Under I.F.A., maximum interest rates chargeable by financial institutions, which may exceed 15% per annum, are published from time to time by Announcements of Ministry of Finance as empowered by Act. (I.F.A. 4). At present, commercial banks and finance companies are, by virtue of relevant notifications, allowed to set interest rates as they see fit, provided that said banks or finance companies post announcements respecting their interest rates in conspicuous places at all of their offices and send such announcements to Bank of Thailand within prescribed period from date of announcements.

3.07 LICENSES, BUSINESS AND PROFESSIONAL:

Exercise of most professions as well as operation of factories and certain businesses such as banking, insurance, etc. are subject to licenses. Certain businesses can be operated with majority foreign ownership if not listed in Foreign Business Act, or with permission of Department of Business Development (which permission is difficult to obtain) or promotion by Board of Investment. See also categories 2 Business Organizations, topic Companies, subhead Foreign Companies; Foreign Trade and Commerce, topic Foreign Investment; Immigration, topic Aliens.

3.08 MONOPOLIES, RESTRAINT OF TRADE AND COMPETITION:

In early 1999, Parliament repealed Price Control and Anti-Monopoly Act, B.E. 2522 (A.D. 1979) and replaced it with three new interrelated laws for better protection of small business operators. Trade Competition Act, B.E. 2542 (A.D. 1999), effective Apr. 30, 1999 establishes set of rules to allow government monitoring and ensure fair private sector competition. Supervision of business operators, permitted exemptions, and recommendations for new regulations are responsibility of new Trade Competition Commission. Broadly drafted, Trade Competition Act gives significant powers to Commission and will likely be open to significant interpretation. Effective Apr. 1, 1999, Act on The Price of Goods and Services, B.E. 2542 (A.D. 1999) grants government broad power to control prices of specific goods and/or services in order to prevent price fixing and/or unfair trade practices. Protection of domestic industries by counter actions against exporters and importers who engage in market dumping and/or enjoy unfair subsidies is now governed by Commission established under Act Countering Market Dumping and Subsidy of Goods from Abroad, B.E. 2542 (A.D. 1999), which replaces Anti-Market Dumping Act, B.E. 2507 (A.D. 1964) and became effective June 30, 1999.

3.09 SALES:

Contract of Sale.

Sale is contract whereby seller transfers ownership of property to buyer, and buyer agrees to pay to seller price therefor. (C.C.C. 453).

Sale of immovable property, as well as sale of certain movables, i.e. vessels of five tons and over, floating houses and beasts of burden, is void if not made in writing and registered with competent official. Agreement to sell or to buy any of aforesaid property or promise to sell such property is enforceable by action if there is written evidence signed by party liable or deposit is given or there is partial performance. (C.C.C. 456).

Contract of sale of movable property with agreed price of Baht 20,000 or more is under same requirement. (C.C.C. 456). Fees for contract of sale, if any, shall be borne equally by both parties. (C.C.C. 457).

Transfer of Title.

Generally, title to property sold is transferred to buyer at time of execution of contract. (C.C.C. 458). If contract of sale is subject to condition or to time clause, title of property is not transferred until condition is fulfilled or time has arrived. (C.C.C. 459). For sale of unascertained property, title is not transferred until property has been marked, counted, weighed, measured or selected, or its identity has otherwise been rendered certain. (C.C.C. 460).

Delivery.

Seller is bound to deliver property sold to buyer. (C.C.C. 461). If contract of sale provides that property sold shall be sent from one place to another, delivery takes place at moment when property is delivered to carrier. (C.C.C. 463). Costs of transportation of property sold to place other than place of performance are to be borne by buyer. (C.C.C. 464). Buyer is bound to take delivery of property sold and to pay price in accordance with terms of contract sale. (C.C.C. 486). If time is fixed for delivery of property sold, it is presumed that same time is fixed for payment of price. (C.C.C. 490). Action for liability for deficiency or excess in delivery must be taken within one year from date of delivery. (C.C.C. 467). When there is no stipulation of time for payment, seller is entitled to retain property sold until price is paid (C.C.C. 468) and other than using ordinary remedies for nonperformance, seller can notify buyer who is in default, in writing, to pay price and expenses within reasonable time, then if buyer does not comply with notice, seller can sell property by public auction (C.C.C. 470). Seller shall deduct from net proceeds of public auction what is due to him for price and expenses and deliver forthwith any surplus to buyer. (C.C.C. 471).

Liability for Defect.

Seller is liable for any defect of property sold which impairs either its value or its fitness for ordinary purposes, or for purpose of contract (C.C.C. 472) except where buyer knew of defect at time of sale or would have known if such care as might be expected from person of ordinary prudence had been exercised, or if defect was apparent at time of delivery and buyer accepted property without reservation, or if property was sold by auction (C.C.C. 473). If buyer has discovered defects in property sold, he is entitled to withhold price or part thereof unless seller provides proper security. (C.C.C. 488). Buyer is also entitled to withhold price in whole or in part, if he is threatened or has good reason to believe that he is about to be threatened, with action by mortgagee or by person claiming property sold, until seller causes such threat to cease or gives proper security. (C.C.C. 489). Action for liability for defect must be taken within one year after delivery of defective property. (C.C.C. 474).

Products Liability Act, B.E. 2551 (A.D. 2008) came into effect in Feb. 2009 and will have far-reaching implications for consumers and business operators, including shift of burden of proof to business operator, joint liability of business operators throughout chain of production (not just ultimate seller/distributor), quasi-strict liability concept for business operator, notwithstanding whether damage is caused by willful act or negligence on part of business operator. Business operators have relatively limited defenses to avoid/exclude themselves from liability, punitive damages of two times amount of actual damages, and right to claim damages for mental injury which was previous not available under C.C.C.

In addition, Consumer Case Procedures Act, B.E. 2551 (A.D. 2008), which became effective in Aug. 2008, empowers courts to, amongst others, order business operators to recall unsafe products from markets or remedy damages to public at court's discretion, apply final judgment in prior consumer case to later consumer case if it involves same defendant and facts (without need to take evidence for new case), adopt inquisitorial procedure to trial allowing consumers to initiate plaint orally, order protective measures and temporary injunctions before filing of plaint, impose liability on manufacturers/importers even if manufacturers/importers are not being charged as defendant, and adjust amount of compensation if it appears unreasonably high or low. In cases where actual extent of damage cannot be estimated during trial, court may amend its judgment within ten years from original judgment.

Liability for Interference With Right of Peaceful Possession.

Seller is liable for consequences of any interference with right of peaceful possession of buyer by any person having right over property sold, except where buyer knew at time of sale that right of person causing disturbance existed. (C.C.C. 475, 476).

Agreement for exemption of liability for defects or disturbance is enforceable. (C.C.C. 483).

Sales with Right of Redemption.

Sales contract may contain right of redemption allowing seller right to redeem property sold. Should property be redeemed within period prescribed by law (ten years for immovable property and three years for movable property) or within period fixed by contract (not to exceed that prescribed by law) property title shall vest in redeemer at time redeemer pays redemption price. (C.C.C. 494-96). However, if redeemer places redemption price as deposit with Deposit Office within redemption period and renounces right to withdraw such amount, property title vests in redeemer at moment deposit is made. (C.C.C. 492).

Redemption price may be fixed in contract or property may be redeemed by reimbursing sale price together with sale costs. However, redemption price may not exceed selling price plus interest not exceeding 15% per annum. (C.C.C. 499, 500).

If sales contract with right of redemption specifies that buyer cannot dispose of property sold and he does so, he will be liable to seller for any injury caused to seller. (C.C.C. 493).

Right of redemption may be exercised by seller, his heirs, transferees of right or any person expressly allowed under contract. Redemption right may be exercised against buyer, his heirs or any transferee of property, provided that, in case of movable property, transferee knew of seller's right of redemption at time of transfer. When exercising redemption rights, redeemer takes property free from any rights created by buyer, his heirs or transferees before redemption. (C.C.C. 497-98).

3.10 TELECOMMUNICATIONS LAW:

Prior to privatization and liberalization of Thai telecommunications business, telecommunications services were provided exclusively by one government agency (Post and Telegraph Department—“PTD”) and two state enterprises (Telephone Organization of Thailand (“TOT”) for domestic and Communications Authority of Thailand (“CAT”) for international including Internet), under direct control of Ministry of Transport and Communications (“MOTC”). PTD, formerly sole body responsible for communication services, operated under three acts: Postal Services Act, B.E. 2477 (A.D. 1934), Telegraph and Telephone Act, B.E. 2477 (A.D. 1934), and Radio Communication Act, B.E. 2498 (A.D. 1955). With incorporation of TOT in 1954 and CAT in 1977, PTD's role was significantly reduced as two state enterprises took over its role of overseeing and regulating domestic and international telephone and other services. TOT and CAT were established as state enterprises under MOTC respectively by Telephone Organization of Thailand Act, B.E. 2497 (A.D. 1954) and Communications Authority of Thailand Act, B.E. 2519 (A.D. 1976). Limited private sector involvement existed in form of Build-Transfer-Operate (BTO) government concessions. Local companies, often in joint venture with foreign telecommunications companies, built network, transferred ownership to PTD, TOT or CAT, and then operated network for specified period of time with revenue-sharing. Private companies were also permitted to operate by entering into joint ventures with relevant state enterprises.

Privatization and liberalization of Thai telecommunications were planned in compliance with WTO requirements calling for full liberalization by 2006. “Master Plan for Telecommunications Development”, approved by government on Nov. 4, 1997, provided for privatization of both state enterprises, opening of market for competition, conversion of existing concessions and establishment of impartial independent regulatory body (National Telecommunications Commission) to license and supervise operators. Due to economic turmoil in Thailand and change in government, implementation of Master Plan faced repeated delays and discussions of reforms.

Positive actions from government included adoption of Trade Competition Act (A.D. 1999), used to prevent formation of monopolies and reduce unfair practices, and State Enterprises Corporation Act (A.D. 1999), which empowered government to transform state enterprises into limited companies.

TOT was privatized/liberalized in July 2002, becoming TOT Corporation Public Company Limited, with registered capital of six billion baht. It assumed all business, rights, debts and liabilities of Telephone Organization of Thailand. CAT was privatized/liberalized in Aug. 2003, becoming CAT Telecom Public Company Limited, with registered capital of ten billion baht. Both CAT and TOT offer telecommunications services to public in competition with private operators under supervision of relevant government authorities.

Organization of Frequency Wave Allocation and Supervision of Radio Broadcasting, Television and Telecommunications Enterprises Act, B.E. 2543 (A.D. 2000) and Operation of Telecommunications Business Act, B.E. 2544 (A.D. 2001), which repealed Telegraph and Telephone Act, B.E. 2477 (A.D. 1934), were adopted. They provided for creation of National Telecommunications Commission (“NTC”), regulatory body for telecom sector, and National Broadcasting Commission (“NBC”), regulatory body for broadcasting and television sectors and control their power. Operation of Broadcasting and Television Business Act, B.E. 2551 (A.D. 2008) was recently adopted, pursuant to which telecom sector and broadcasting and television must be regulated by single regulatory body instead of two separate bodies; draft amendment of Organization of Frequency Wave Allocation and Supervision of Radio Broadcasting, Television and Telecommunications Enterprises Act, B.E. 2543 (A.D. 2000) reflecting this move toward single regulatory body is currently underway.

4 CITIZENSHIP

4.01 ALIENS:

See category 16 Immigration, topic 16.01 Aliens.

4.02 IMMIGRATION:

See category 16 Immigration, topic 16.02 Immigration.

5 CIVIL ACTIONS AND PROCEDURE

5.01 ACTIONS:

Commencement of Actions.

Civil action by person whose rights under civil law are in dispute may be commenced by filing plaint (complaint) with Court of First Instance having territorial jurisdiction. (C.P.C. 55, 170). Civil case in connection with criminal offence may be brought either in court where criminal case is being tried, or in court competent to try civil cases. Civil case shall be tried in accordance with Civil Procedure Code. (C.P.C. 4). Plaint must clearly set forth plaintiff's claims, allegations on which claims are based and relief requested. (C.P.C. 172). Two or more persons may join in action as joint plaintiffs and may be joined as joint defendants where there are common interests in subject matter of suit. (C.P.C. 59). For claims not exceeding Baht 50 million, court will require claimant to deposit 2% of amount of claim (to maximum of Baht 200,000). For claims exceeding Baht 50 million, court will require additional fee of 0.1% on portion of claim exceeding Baht 50 million. (C.P.C. Sched I). In small claims (not over Baht 300,000), court fee is also 2% of claim amount to maximum of Baht 1,000. (C.P.C. 189, 190 quarter, C.P.C. Sched I [1] [a]). Usually, losing party is ordered to reimburse winning party in amount of this court fee. However, if lawsuit is terminated by compromise, then each party must bear its own costs unless otherwise agreed. In addition, if claimant is foreign entity, Thai defendant might request court to order additional security. Amount is left to court’s discretion, but ordinarily amount is not expected to exceed Baht 200,000 or so. Lawyer representing plaintiff must file power of attorney signed by plaintiff authorizing representation. (C.P.C. 61). Court may examine any pleading for form, substance, compliance with law and payment of court fees and may accept pleading, reject pleading and order party to cure defects within time and on terms ordered. Failure to comply with order will cause pleading to be rejected. (C.P.C. 18, 174). Upon acceptance, court issues summons to answer plaint. (C.P.C. 173).

Service of Process.

Within seven days from acceptance of plaint, plaintiff must request appropriate officer to serve summons to answer and copy of plaint on defendant. (C.P.C. 173). Service may be made on defendant at his domicile or place of business, in court or by defendant's acceptance of service. (C.P.C. 77). When service cannot be made, court may issue order for substituted service, by posting, advertisement or otherwise and service is effective 15 days after completion of such substituted service. (C.P.C. 79). In actions against non-domiciliary, service is made by sending process to defendant's foreign office or domicile. (C.P.C. 83 bis). Absent international treaty to which Thailand is party otherwise providing, plaintiff must provide translation of summons and plaint and other documents to be served into official language of country in which service is to be made or into English together with certification of accuracy of translation and deposit for expenses to be fixed by court. (C.P.C. 83 quarter). Absent international agreement otherwise providing (Thailand is not party to Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters 1965), court will arrange service through Ministry of Justice and Ministry of Foreign Affairs. (C.P.C. 83 septum). Service will be effective 60 days after date of such service. (C.P.C. 83 octo). Where non-domiciliary conducts business in Thailand, directly or by agent, or by written agreement has designated agent for service in Thailand, service may be sent to defendant, his business or designated agent at location of business of defendant or agent's residence. (C.P.C. 83 bis). Service on non-domiciliary is effective 30 days after date of such service. (C.P.C. 83 sex).

Answer and Additional Pleadings.

Within 15 days from date of service, defendant must file written answer admitting or denying whole or part of plaintiff's allegations, reasons for denial and may, in answer, make counterclaim. (C.P.C. 177). If counterclaim relates to matters not connected to plaint, court will order defendant to file separate case. (C.P.C. 177). Within 15 days from date of service of answer, plaintiff must file answer to counterclaim, if any. (C.P.C. 178). If date for settlement of issues has been set, parties may move to amend pleadings not less than seven days before date for settlement of issues, or seven days before commencement of trial if no date for settlement of issues has been set. (C.P.C. 180). No new claims or counterclaims may be added by amendment unless they are sufficiently related to original claims to justify joinder for trial. (C.P.C. 179). All pleadings and motions which raise issues are subject to court's examination, return for modification, acceptance or rejection in same manner as plaint. (C.P.C. 18).

Joinder of Additional Parties.

Third person not already party to pending action, by way of interpleading, may make application to court to become party where he has legal interest in result of case, or when necessary to protect his rights. Third person may, also by way of interpleading, be joined on application of existing party when existing party could sue or be sued by third party as result of outcome of pending action, or on order of court when joinder of third party is required by law or necessary in interest of justice. (C.P.C. 57).

Default Procedures.

When defendant fails to file answer, plaintiff may apply to succeed in case by default. (C.P.C. 198). Should plaintiff fail to move for default within 15 days after date answer was due, court may order that case be stricken. (C.S.P. 198). Should defendant come to court before adjudication and inform court that he intends to fight lawsuit at first opportunity and provides justification for failure to answer, court may permit answer to be filed. (C.P.C. 199). When court finds failure unjustified, court may order case to proceed without filing of answer. (C.P.C. 199). Default of answer procedure is equally applicable to plaintiff who fails to answer counterclaim. (C.P.C. 199 sex).

Should defendant fail to appear for trial (i.e. first hearing), court will declare default and order case to be tried ex parte. (C.P.C. 204). Defendant in default of answer will not be in default of appearance. (C.P.C. 198 bis, 200). Case will not be disposed of on mere ground of default of appearance and court will take such evidence and raise such points of law as court deems necessary to reach decision on merits. (C.P.C. 206). If plaintiff fails to appear, court shall issue order striking case from case list unless defendant decides to continue. (C.P.C. 202). Plaintiff can refile case, subject to prescription. (C.P.C. 203).

Pretrial Dispositive Motions.

Dispositive pretrial motions, such as motions to dismiss, for judgment on pleadings and summary judgment are not available. However, when question of law is presented which would dispense with necessity for further trial of case or material issue therein, court in its discretion may determine such question and dispose of case or any issue therein by order or judgment. (C.P.C. 24).

Discovery.

Pretrial discovery procedures such as interrogatories, broad requests for document production and discovery depositions are generally not recognized. Any party may, however, not less than seven days before date for taking evidence in first hearing, send to another party notice of facts on which he or she intends to rely and may request other party to admit such facts. (C.P.C. 100). If opposing party or third person possesses original of document which will be given as evidence at trial, court may order that original be filed with court. (C.P.C. 123). If evidence may be unavailable or difficult to produce at trial, court may, on application, take such evidence itself, or may appoint one of its judges or commission another court to do so on its behalf. (C.P.C. 101, 102). Party may request for emergency witness hearing without notifying other parties. However, such other parties may request court to subpoena such witness for cross-examination later. (C.P.C. 101/1). No evidence shall be taken without all parties having full opportunity to attend proceedings and exercise their rights. (C.P.C. 103). If parties agree and court deems fit, testimony may be taken outside of court by officer of court. (C.P.C. 103/1). If other party agrees and court deems fit, party may submit witness statement in lieu of live testimony, but it should be submitted and delivered to other party at least seven days prior to hearing, or as otherwise agreed by parties. (C.P.C. 120/1). Witness still has to present himself in court to swear that affidavit is true and accurate, and for other party to cross examine on issues stated therein. Where opposing party or third person is not domiciled in Thailand and has not yet been joined, court may order ex parte examination of witnesses. (C.P.C. 101).

Prejudgment Remedies.

At any time before judgment, if court is of opinion that defendant intends to transfer property or remove property from court's jurisdiction to defraud plaintiff or obstruct execution of court order; intends to repeat wrongful act or breach of contract complained of; is likely to waste or damage property; will register or alter registration of property to plaintiff's detriment; is avoiding service of court orders and writs; or likely to remove himself from jurisdiction or conceal or destroy property; or for other good reason, court may, on plaintiff's ex parte application, order provisional seizure or attachment of property; temporary injunction or other order minimizing trouble and injury plaintiff may thenceforward sustain; temporary withholding, amendment or revocation of property registration; or arrest and detention of plaintiff. (C.P.C. 254, 255). Court must be satisfied that suit is reasonably well grounded and there are sufficient grounds for granting protection order applied for. (C.P.C. 255). Provisional orders may be made on terms court deems appropriate, including requirement that plaintiff provide security for damages caused defendant by plaintiff's fault or negligence in securing provisional measure. (C.P.C. 257, 263). At any time after service of provisional order and before judgment, defendant may move to vacate or modify order. (C.P.C. 261, 262). In emergency cases, plaintiff may move for immediate order, subject to defendant's right to move for revocation. (C.P.C. 266, 267). Where there is reason to believe that if plaintiff is unsuccessful he or she will evade payment of court fees and expenses, or if plaintiff is not domiciled in Thailand, defendant may apply for court order requiring plaintiff to deposit security or provide guarantee for fees and expenses in amount and on terms court deems appropriate. (C.P.C. 253). If attachment is made and later withdrawn, judgment creditor must pay 2% fee on value of property attached or 1% on amount of any money attached. (C.P.C. Sched V[3][4]).

Settlement of Issues.

After plaint, answer and answer to counterclaim have been filed, court shall, except in prescribed circumstances, conduct settlement of issues (procedure similar to pretrial conference). (C.P.C. 182). Issues in dispute may be fixed according to parties' joint motion, but court will reject motion and conduct settlement of issues if it is of opinion that motion is incorrect. (C.P.C. 182). On date of settlement of issues, parties must appear and court, after examining pleadings, motions and responses to questions posed by court, will conclude issues of fact or law that are admitted, fix issues of fact or law in dispute and determine who bears burden of proof. (C.P.C. 183). Court also fixes date for taking evidence, which must be at least ten days after date for settlement of issues. (C.P.C. 184). Not less than seven days before date for taking evidence, parties must file with court list of witnesses, disclosing therein evidence on which they intend to rely at trial, and if intending to rely on court appointed expert or court inspection of evidence, must file application for appointment or inspection. (C.P.C. 88). If intending to rely on documentary evidence, party must, not less than seven days before date for taking evidence, file copies of that document with court and also send copies to other parties. (C.P.C. 90). Unless court permits otherwise, objections to admissibility of documents must be raised before documents are taken into evidence. (C.P.C. 125). If objection is made, party intending to rely on document must, if he or she possesses original, produce original on day for taking evidence. (C.P.C. 122).

Trial.

Jury trial is not available. Under Constitution of Court of Justice, all issues of law and fact are determined by three judges depending on amount in dispute or severity of criminal charge. (Constitution of Court of Justice, c. 3). Trials are conducted in open court in presence of attending parties provided that party may request closed hearings under certain circumstances. (C.P.C. 36). Burden of proof of fact falls on party alleging such fact in pleading. (C.P.C. 84/1). Witnesses are examined by direct, cross, and redirect examination (C.P.C. 117) and may be examined by court (C.P.C. 119). Relevant original documents may be admitted as evidence. (C.P.C. 87, 93). All proceedings are conducted in Thai language, and documents, if in foreign language, must be translated to Thai language. (C.P.C. 46). Translators provided by parties are permitted. (C.P.C. 46). After close of evidence, written or oral final arguments and rebuttal are presented. (C.P.C. 186). Judgments are rendered in writing, reciting particulars of case, decision of court and grounds therefor. (C.P.C. 141).

Proof of Foreign Laws.

Where foreign law is at issue, such law may be established by evidence thereof and party may offer proof by testimony of expert witness. (C.P.C. 98).

Foreign Judgments and Arbitration Awards.

Thailand is not party to any treaties or conventions on enforcement of foreign judgments and foreign judgments are not enforceable. Authenticated copies of foreign judgments may be received in evidence at trial. Thailand is party to New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958) and Geneva Convention for the Execution of Foreign Arbitral Awards (1927). Final foreign arbitration award rendered in proceeding wholly or mainly in foreign country, reciting all matters required by applicable convention, may be recognized and enforced if not contrary to public policy or morality. Court may refuse enforcement on proof of defenses such as: annulment, invalidity or lack of finality of award; lack of adequate notice during arbitration proceedings; award beyond scope of, or not disposing of issues submitted under arbitration agreement; or arbitration proceeding conducted other than in accordance with agreement of parties or law of country in which arbitration took place. (Arbitration Act, B.E. 2545 [A.D. 2002]).

Assessment for Costs and Fees.

Liability for costs of parties including lawyers' fees, witnesses' fees, costs of service of documents and other costs and fees provided for by law are borne by party losing case. Court may, however, in its discretion, order costs to be paid by prevailing party, to be apportioned between parties or to be borne by party incurring same. (C.P.C. 161). Amount of assessable court and lawyer fees is specified by law. (C.P.C. Sched II-VI).

5.02 DEPOSITIONS AND DISCOVERY:

For Use in Foreign Court.

Thailand is not party to Hague Convention on Taking of Evidence Abroad in Civil and Commercial Matters (1970). As matter of comity, Court of First Instance may compel attendance of witness to respond to questions submitted by foreign court through Letters Rogatory issued by foreign court and transmitted through diplomatic authorities of nation of foreign court to Thai Ministry of Foreign Affairs. Examination is conducted by judge. Lawyers for parties may be present and may request judge to ask supplemental questions. Judge's record of witness' answers are returned to foreign court through diplomatic channels. Deposition of witness voluntarily submitting to deposition without necessity for issuance of subpoena by Court of First Instance may be conducted in Thailand.

For Use in Thai Court.

See topic 5.01 Actions, subhead Discovery.

5.03 JUDGMENTS:

Judgment or order must be rendered upon completion of trial. (C.P.C. 133). Judgment or order of court disposing of case must decide on every claim in complaint and may not, with few exceptions, grant relief not applied for therein. (C.P.C. 142). Judgment or order must be in writing and state clearly decision of court on issues of case and decision as to costs and ground for all decisions. (C.P.C. 141). Court may not render judgment or order disposing of case in favor of any party on mere ground that opposing party fails to appear. (C.P.C. 206). Judgment or order of court, if not complied with, is enforceable by way of execution. (See category 7 Debtor and Creditor, topic 7.03 Executions.)

Foreign Judgments.

Thailand is not party to any multilateral or bilateral treaties for enforcement of foreign judgments. Foreign judgment is not enforceable, however, authenticated foreign judgment may be submitted as evidence and may be considered as persuasive authority by court. Person in whose favor foreign judgment has been pronounced must institute suit in Thai court having jurisdiction over it based on same cause of action in order to obtain Thai court's judgment. See topic 5.01 Actions.

5.04 LIMITATION OF ACTIONS:

See topic 5.05 Prescription.

5.05 PRESCRIPTION:

Claim is barred by prescription (limitation of action) after expiration of following periods, unless such period has been interrupted. (C.C.C. 193/9, /10, /14). Periods of prescription begin to run, unless otherwise provided, from date claim can be enforced. (C.C.C. 193/12).

Ten years: Claim of government for taxes (C.C.C. 193/31); claim established by final judgment or claim established by compromise agreement. (C.C.C. 193/32).

Five years: Interest in arrears; installment payments of principal; arrears of rent due to other than lessor in business of leasing chattels; arrears of salaries, annuities, pensions, maintenance and other periodic payments; claims of merchants, manufacturers and artisans for goods delivered or work rendered for debtor's business; claims of those engaged in agriculture or forestry for delivery of products thereof for other than debtor's domestic use; claims of those who sell lottery tickets, racket or similar tickets for further sale. (C.C.C. 193/33).

Three years: Claim against maker of promissory note or acceptor of bill of exchange, from date of maturity. (C.C.C. 1001).

Two years: Claims of merchants, manufacturers and artisans for goods delivered and work rendered other than for business of debtor; claims of those engaged in agriculture or forestry for delivery of products for domestic use; claims of carriers for fare, freight, fees and costs; claims of innkeepers, hoteliers, providers of food and drink and entertainment services for food, lodging services and costs; claims of those in business of leasing chattels; claims of employees and those in private service for expenses, wages or other compensation; claims of employers for advances; claims of masters of apprentices for contracted compensation and expenses; claims of educational institutions or nursing homes for fees and expenses; claims of persons providing education and maintenance for compensation and expenses; claims of those providing maintenance or training to animals for compensation and expenses; claims of practitioners of medicine, dentistry, nursing, veterinary surgeons and related fields, lawyers and expert witnesses, engineers, architects, auditors, teachers or other independent professions for compensation and expenses (C. P. C. 193/34); claims for compensation on contract of insurance, from date of loss (C.C.C. 882); claim for payment or refund of premium on insurance contract, from date due (C.C.C. 882); claims against liquidated companies and partnerships, partners, shareholders and liquidators thereof, from end of liquidation (C.C.C. 1272); claim against transferor of share of company for unpaid sums due on share, from date of entry of transfer in shareholder register (C.C.C. 1133).

One year: Avoidance of voidable act, from date notification could have been made, but not later than ten years from act (C.C.C. 181); cancellation of rights procured by fraud or prejudicial act, from date creditor knew of fraud or prejudicial act, but not later than ten years from act (C.C.C. 240); claim based on undue enrichment, from date party became aware of right of restitution, but not later than ten years from accrual of right (C.C.C. 419); claim based on wilful or negligent damage to person, property or right, from date wrongful act and identity of actor becomes known to injured party, but not later than ten years from date of act (C.C.C. 448); claim for excess or deficiency in quantity or area of property purchased, from date of delivery (C.C.C. 467); claim based on failure of purchased property to conform to sample or description, from date of delivery (C.C.C. 504); claim based on defect in property purchased, from date of discovery of defect (C.C.C. 474); claim against contractor for defect in work, from date of appearance of defect (C.C.C. 601); claim against carrier for loss, damage or delay, from, except in cases of bad faith, date of delivery or when delivery should have been made (C.C.C. 624); claim by holder of warehouse warrant against prior endorsers after timely public auction, from date of auction (C.C.C. 794); claim by holder against drawer and endorsers of bill of exchange, from date of timely protest, or if protest unnecessary, from date of maturity (C.C.C. 1002); claim for disturbance to or deprivation of possession of property, from date of disturbance or loss of possession (C.C.C. 1374, 1375); claim arising out of usufruct, from date of end of usufruct or if owner could not have known of end of usufruct, from date owner knew or should have known (C.C.C. 1428); claim of registered partnership against partner for competition against partnership, from date of competition (C.C.C. 1067); application for cancellation of marriage on ground of duress, from date spouse is free from duress (C.C.C. 1507); application for cancellation of marriage by party whose consent to marriage is required by C.C.C. 1436, from date marriage is known (C.C.C. 1510); actions for divorce and other rights of action arising from grounds specified in C.C.C. 1516 (1), (2), (3), (6), 1523, from date such grounds are or should have been known (C.C.C. 1529); claims between spouses which would, by prescription, have expired before or within one year after dissolution of marriage, from date of dissolution of marriage (C.C.C. 193/22); actions for repudiation of child, from date of birth of child but not later than ten years after date of birth (C.C.C. 1542); actions concerning inheritance, from date of death of de cujus, or date heir knows or should have known of death; actions concerning legacies, from date legatee knows or should have known of his rights under will; claim of creditor against de cujus which is subject to prescription longer than one year, from date creditor knows or should have known of death of de cujus; but not later than ten years after date of death (C.C.C. 1754); claims in favor of or against descendant which would be prescription, have expired within one year from date of death, from date of death (C.C.C. 193/23).

Six months: Claims of lessor of property based on lease contract, from date of return of leased property (C.C.C. 563); claim of grantor of right of habitation in building, from date of return (C.C.C. 1409); claim arising out of loan for use of property, from date of ending of contract (C.C.C. 649); claim arising out of deposit of property, from date of ending of contract (C.C.C. 671); claim against innkeeper or hotelier for damage to property of guest or traveller, from date of departure of guest or traveller (C.C.C. 678); claim for damage to pledged property caused by pledgee; claim for expenses incurred in maintaining pledged property; claim for injury to pledgee arising out of latent defect in pledged property; from return or auction sale of pledged property (C.C.C. 763); claim for recourse by endorser of bill of exchange against drawer and endorsers, from date of payment of bill of exchange or date of commencement of suit against claiming endorser (C.C.C. 1003); claim of disapproving shareholders based on acts of directors causing injury to company which were approved by general meeting of shareholders, from date of general meeting (C.C.C. 1170).

Three months: Action for cancellation of testamentary disposition, if ground for cancellation was known to applicant during life of testator, from date of death of testator; if ground not known during life of testator, from date applicant acquired knowledge of ground; if ground known but testamentary disposition affecting claimants interest unknown, from date applicant knew or should have known of testamentary disposition; but not later than ten years from date of death of testator. (C.C.C. 1710).

90 days: Application for cancellation of marriage on ground of fraud, from date spouse knew or should have known of fraud or one year from date of marriage. (C.C.C. 1506).

One month: Action for cancellation of any meeting summoned or any resolution(s) passed contrary to CCC provisions on Partnerships and Companies or contrary to regulations of company, from date of resolution. (C.C.C. 1195).

Claim Against Estate.

Creditor having claim against decedent (de cujus) subject to prescription longer than one year is barred from bringing action after one year from time he knew or ought to have known of death of decedent (de cujus). (C.C.C. 1754).

Actions Not Specifically Provided For.

Period of prescription for which no other period is provided is ten years. (C.C.C. 193/30).

Civil Case in Connection with Criminal Offense.

If criminal complaint is not filed, injured person's right to file civil case will be terminated under prescription provision of Penal Code. Prescription period in Penal Code is from one year to 20 years.

If criminal complaint is filed and offender comes to court prescription for filing civil case is interrupted.

In criminal case where plaintiff filed lawsuit against offender and court awards final judgment to punish offender, injured person is entitled to file civil lawsuit within prescription period stipulated in C.C.C. 193/32. (C.P.C. 51).

Interruption of Period of Prescription.

Prescription is interrupted by: debtor's acknowledgment of claim by part payment; payment of interest; giving of security or other unequivocal act of acknowledgment; creditor's commencement of action on claim, or performance of act having equal effect; creditor's application for debt in bankruptcy; creditor's submission of claim to arbitration. (C.C.C. 193/14). Commencement of action, performance of act having equivalent effect, filing of application in bankruptcy, or submission to arbitration which is terminated and disposed of on grounds of withdrawal or abandonment or entry of final judgment of dismissal does not constitute interruption. (C.C.C. 193/17, 193/18). When interruption occurs, time which has elapsed does not count for prescription purposes and new period of prescription begins to run from date interruption ceases. (C.C.C. 193/15). However, for cases in relation to consumer claims, prescription period stays during negotiation and continues to run if negotiation is terminated. (Consumer Case Procedure Act 14 and Product Liability Act 13).

New Actions.

Where court refuses to accept, returns or dismisses creditor's action, application in bankruptcy or submission to arbitration for lack of jurisdiction, or dismisses with leave to refile, and period of prescription expired pending proceedings or period would have expired within 60 days from date of final judgment or order, creditor may commence action again within 60 days from date of final judgment or order of court. (C.C.C. 193/17, 193/18).

Disabilities of Plaintiff.

When claims of minors or incompetents, including claims against his guardian, curator or legal representative would be prescribed during period of minority, or incompetency, or within one year from period minor or incompetent was without guardian or legal representative, prescription shall not be completed until one year after majority, restoration to competency or existence of guardian or legal representative. If period of otherwise applicable prescription would have been less than one year, such shorter period shall apply. (C.C.C. 193/20, 193/21). If at time prescription would end, creditor is prevented by force majeure from effecting interruption, prescription is not completed until 30 days after date of cessation of force majeure. (C.C.C. 193/19).

Contractual Limitations.

Periods of prescription fixed by law cannot be waived, extended or reduced. (C.C.C. 193/11).

Pleading.

Unless raised as defense, claim will not be dismissed on ground of prescription. (C.C.C. 193/29).

6 COURTS AND LEGISLATURE

6.01 COURTS:

Judicial system is administered under Law for Organization of Courts of Justice, B.E. 2543 (A.D. 2000). Courts consist of following: (a) Courts of First Instance, which are trial courts having original and general jurisdiction of all civil, criminal, juvenile and family matters (see category 5 Civil Actions and Procedure, topic 5.01 Actions); (b) Courts of Appeal, which determine questions of law, and under certain circumstances, questions of fact on appeal from Courts of First Instance (C.P.C. 224, 225, 230); and (c) Dika Court (Supreme Court), which determines questions of law and unless otherwise provided, questions of fact which were raised in Courts of First Instance and Courts of Appeal on appeal from Courts of Appeal and, if appeal is based only on questions of law, may determine such questions on direct appeal from Court of First Instance (C.P.C. 248, 249, 223 bis). Additionally, other courts have been established to hear matters of particular specializations. For example, separate Labor and Tax Courts have been established to consider disputes involving labor and tax issues. Separate Administrative Court has been established to adjudicate administrative cases. (Act on Establishment of Administrative

Courts and Administrative Court Procedure B.E. 2542 [1999]). In 1997, Intellectual Property and International Trade Court was established as additional Court of First Instance to consider international trade and intellectual property disputes. In 1999 Bankruptcy Court was established to consider bankruptcy and reorganization petitions under Thailand's newly amended Bankruptcy Act. Disputes arising under jurisdiction of Intellectual Property and International Trade Court, Bankruptcy (only in reorganization procedure—Act Establishing Bankruptcy Court and Its Procedures B.E. 2542, §24), Labor and Tax Courts may be appealed directly to Supreme Court without first having to appeal to Appellate Court. House of Representatives has initiated procedures to establish additional court division, Administrative Court, composed of two levels: First Instance Administrative Court and Supreme Administrative Court. This division will settle disputes arising from unjust or illegal government administration.

Intellectual Property and International Trade Court (IP & IT Court).—Opened in Dec. 1997 as additional Court of First Instance to consider international trade and intellectual property disputes. Has jurisdiction over: criminal cases regarding trademarks, copyrights and patents; civil actions regarding trademarks, copyrights, patents, and cases arising out of agreements on technology transfers or licensing agreements; civil actions concerning international sale, exchange of goods or financial instruments, services, carriage, insurance and other related legal actions; civil cases regarding letters of credit issued in connection with foregoing civil actions, inward and outward remittance of funds, trust receipts, and provision of guarantees in connection therewith; civil cases involving ship arrests, dumping and subsidization of goods or services from abroad; civil or criminal cases concerning disputes over layout-designs of integrated circuits, scientific discoveries, trade names, geographical indicators, trade secrets, plant varieties; civil and criminal cases involving offenses under §§271-275 of Criminal Code. IP & IT Court also has jurisdiction over civil cases regarding arbitration to settle above disputes.

IP & IT Court judges are judicial officials with special training in intellectual property or international trade. (§14). Court also has associate judges with specific expertise in particular areas of intellectual property or international trade. (§15). Appeals submitted directly to Supreme Court. (§38).

Conflict of Jurisdiction.

In case of conflict of court jurisdiction §248 of Constitutional Law stipulates that there shall be committee to decide and to solve problem of jurisdiction among courts: judicial court, administrative court, military court and other courts. Governing Decision of Power and Duty between courts, B.E. 2542 derived from §248 provides principles and guidelines to such committee to resolve jurisdiction problem.

7 DEBTOR AND CREDITOR

7.01 ASSIGNMENTS:

Transfer of Claims.

Claims are transferable unless otherwise agreed by parties or nature of claims does not permit it. Agreement between parties that claim is nontransferable cannot be set up against third person acting in good faith. (C.C.C. 303). Rights of mortgage or pledge existing on transferred claim and rights arising from suretyship established for such claim also pass to transferee as consequence of transfer of claim. (C.C.C. 305). Transfer of claim is effected by agreement between transferor and transferee. Transfer of obligation performance of which runs to specific creditor must be made in writing. Such transfer may not be asserted against debtor or third persons unless written notice thereof has been given to debtor or written consent has been obtained from debtor. (C.C.C. 306). Except where he has given consent without reservation, debtor may set up against transferee any defenses he had against transferor prior to receipt of transfer notice. (C.C.C. 308). Transfer of obligation performance of which runs to order or designated creditor with additional instruction that performance shall also be made to holder of instrument is not effective against debtor and third persons unless instrument is delivered to transferee with transfer endorsed thereon. (C.C.C. 309). If transferee acts in good faith in such transfer, debtor may set up against him only those defenses as appear on face of instrument or result naturally from its character. (C.C.C. 312).

Assignment of Property.

Assignment of property right, whether real or personal property, may be made by means of valid declaration of intention on part of assignor. However, in order for assignment to be effective against third persons, assignment of immovables must be recorded, and those of movables must be accompanied by delivery. If referred to real property or other rights requiring recording in Registry of Property assignment must be made in public document.

Assignment of movable property is made by agreement between parties to that effect. Gift of movable property is generally valid only upon delivery of property given. (C.C.C. 523). Gift of property sale of which must be made in writing and registered with competent official, i.e. immovable property, ships or vessels (C.C.C. 456), is valid only when so made and registered, regardless of whether delivery of property given has been made (C.C.C. 525).

Title to personal property and rights may be transferred either by public or private instrument.

7.02 ATTACHMENT:

Seizure or attachment before judgment of whole or part of defendant's property including money or property due to defendant by third person is provided for by C.P.C. as one of provisional protective measures before judgment in any action other than petty cases. Property so seized or attached must be delivered to and retained by executing officer or other official as ordered by court. (C.P.C. 254).

Grounds and Procedure.

Plaintiff may apply ex parte for provisional seizure or attachment at time of filing of complaint or at any time before judgment. (C.P.C. 266). Court may only grant application upon proof to its satisfaction that complaint has good cause with sufficient grounds for applying protective measures; and defendant, in order to delay or obstruct execution of any decree which may be made against him or in order to prejudice plaintiff, intends to remove whole or part of his property, or to remove it from jurisdiction of court or transfer, sell or dispose of such or there are, in court's opinion, other just and reasonable grounds for seizure or attachment. (C.P.C. 255).

Indemnity and Security.

Plaintiff is liable for damages which defendant may sustain from unjustified seizure or attachment based on plaintiff's fault or carelessness. (C.P.C. 263). Court may, before issuing writ of seizure or attachment, require plaintiff to deposit with court such sum of money as court thinks fit as security for indemnity. (C.P.C. 257).

Withdrawal of Writ of Seizure or Attachment.

On application by defendant or another who suffers damage because of seizure or attachment, court may withdraw writ of seizure or attachment if it is of opinion that there is insufficient grounds for issuance of writ, or for other reasonable cause. Court may make such other order it sees fit in interests of justice. (C.P.C. 261). When facts or circumstances on which provisional seizure or attachment was ordered change, court may, on its own motion or on application as described above, amend or withdraw writ of seizure or attachment. (C.P.C. 262). Writ of seizure or attachment is automatically cancelled seven days after judgment is entered in favor of defendant, subject to plaintiff moving court to continue provisional measures pending appeal; but if judgment is in favor of plaintiff, such writ is still effective until judgment has been complied with, insofar as it is necessary to secure execution. (C.P.C. 260).

7.03 EXECUTIONS:

Means of Execution.

Property belonging to judgment debtor may be seized or attached and sold by public auction if he fails to comply in whole or in part with judgment or order of court. (C.P.C. 271, 278). Execution is carried out by executing officer after court's issuance of writ of execution at request of judgment creditor. (C.P.C. 275, 278).

However, executing officer may suspend execution upon receipt of written notice from judgment creditor agreeing to suspension for stipulated period under certain conditions. Nevertheless, such temporary suspension of execution must have written consent of judgment debtor and interested third parties. (C.P.C. 292).

Rights of Other Judgment Creditors.

Property seized or attached by executing officer on behalf of one judgment creditor may not later be seized or attached on behalf of other judgment creditors. Other judgment creditors may be allowed by court to share proceeds of sale of such property if it deems that they cannot be paid out of other property of judgment debtor. (C.P.C. 290).

Arrest and Detention of Judgment Debtor.

Judgment creditor may, at any time, file application for arrest of judgment debtor for willful disobedience of judgment or order of court. If court is satisfied that judgment debtor could have complied with judgment or order by acting in good faith and that there is no alternative form of execution suitable, judgment debtor may be arrested and detained until security for compliance is posted. (C.P.C. 297, 300).

7.04 FRAUDULENT SALES AND CONVEYANCES:

Court may, upon application by affected creditor, cancel: (a) Any gratuitous conveyance of debtor's property done with debtor's knowledge that it would prejudice said creditor; and (b) any other juristic act whose subject is property right done by debtor with knowledge that it would prejudice said creditor provided that third person enriched by such act was, at time of act, aware of facts which would make it prejudicial to creditor. (C.C.C. 237). Claim for cancellation cannot be brought later than one year from time when creditor knew of cause of cancellation, or later than ten years since act was done. (C.C.C. 240).

In case of bankruptcy, such rights of actions are vested in government receiver. (B.A. 113). Debtor who made any transfer of or allowed any charge on his property which may, if he becomes bankrupt, be deemed act of giving preference is considered to be insolvent and his creditor may petition court for his bankruptcy adjudication if other requirements are met. (B.A. 8, 9). Upon application by government receiver in bankruptcy action, court may also cancel: (a) conveyances which are subject of motion for cancellation under C.C.C. 237, done one year before application for adjudication for bankruptcy and thereafter, whereby it shall be presumed that person thereby enriched knew that such act would be prejudicial to creditors (§114 of B.A. [No. 5], 1999), and (b) any act involving or any conveyance of debtor's property performed by debtor or with debtor's consent within three months before commencement of bankruptcy proceeding or within three months thereafter in order to give preference to one or some of his creditors (B.A. 114, 115).

In business reorganization of juristic person under c. 3/1 of B.A. (1999), plan preparer, plan administrator or receiver may ask court to cancel any act or conveyance debtor has committed, or allowed to be committed, with intent to place any creditors in advantageous position over other creditors, within three months before and after filing motion for business reorganization. (B.A. 90/41). If creditor placed in advantageous position is insider of debtor, court has power to order cancellation of transfer if committed between period of one year before and after filing of petition. (§90/41 of B.A. (No. 5), 1999).

7.05 GARNISHMENT:

See topics 7.02 Attachment and 7.03 Executions.

7.06 HOMESTEADS:

There is no homestead exemption law in Thailand.

7.07 LIENS:

Preferential rights entitling obligee to right to receive performance of obligation out of certain property of obligee in preference to other creditors; rights of retention: and rights of retention and sale; arise by operation of law on land and things permanently affixed (immovable property) and on all other property, both corporeal and incorporeal (movable property) as follows:

Seller's Right of Retention and Sale.

When buyer of property impairs or reduces security given for payment of purchase price, becomes bankrupt before delivery, or, without seller's knowledge, was bankrupt at time of sale, seller is entitled to retain property sold, unless buyer gives proper security. Where contract of sale did not provide date for payment of purchase price, seller may retain property until purchase price is paid. (C.C.C. 468, 469). When buyer is in default, seller may, by written notice, demand payment of purchase price and incidental charges within reasonable time. (C.C.C. 470). Upon buyer's failure to comply with notice, seller may sell property by public auction and apply proceeds to amounts due, forthwith delivering any surplus to buyer. (C.C.C. 470, 471). See also subheads Right of Retention, Special Preferential Rights in Immovable Property, Special Preferential Rights in Movable Property, infra.

Innkeeper's Right of Retention and Sale.

Innkeeper and hotelier may retain property of guest or traveler located in inn or hotel until receipt of payment for lodging and other services, including disbursements. (C.C.C. 679). Property which has been left for six weeks without payment of debt may be sold at public auction after at least one month notice of intended sale, giving short description of property to be sold and name of owner (if known), is advertised in local newspaper. (C.C.C. 679). Proceeds of sale may be applied to amounts due and surplus (if any) must be paid to owner of property or deposited at Deposit Office according to provisions of C.C.C. (C.C.C. 679). See also subheads Right of Retention, Special Preferential Rights in Movable Property, infra.

Carrier of Goods Right of Retention and Sale.

Carrier of goods may retain goods necessary to secure payment of freight and other charges. (C.C.C. 630). When consignee cannot be found or refuses delivery, carrier must give notice thereof and request instruction from sender. When giving of notice is impracticable, timely instruction not received, or sender's instructions cannot be carried out, transported goods may be deposited in Deposit Office by carrier, or in case of goods which are perishable or whose value appears insufficient to satisfy costs of carriage, may be sold at public auction. Carrier must, unless impracticable, give notice to sender or consignee of sale without delay. Net proceeds of sale may be applied to amounts due, and surplus (if any) must be forthwith delivered to person entitled to it. (C.C.C. 631, 632). See also subheads Right of Retention, Special Preferential Rights in Movable Property, infra.

Carrier of Passengers Right of Retention and Sale.

Luggage, of which passenger does not take delivery within one month after its arrival, entrusted to carrier of passengers, may be thereafter sold at public auction, and if of perishable nature, may be sold by public auction within 24 hours of its arrival. Proceeds of sale may be applied to sums due, surplus being returned to person entitled thereto. (C.C.C. 636). See also subheads Right of Retention, Special Preferential Rights in Movable Property, infra.

Right of Retention.

Obligee in lawful possession of property of obligor may, unless inconsistent with obligee's duties, contrary to instruction of obligor given before or at time of delivery of property or against public order, retain property as security for performance of obligation then due relating to property possessed. (C.C.C. 241, 242). Upon obligor's insolvency, property may be retained for performance of obligation not yet due; upon insolvency occurring or made known to obligee after obtaining possession, property may be retained notwithstanding contrary duty of obligee or instruction of obligor. (C.C.C. 243). Holder of right of retention may appropriate products and proceeds of retained property to performance of obligation in preference to other creditors. (C.C.C. 245). Loss of possession extinguishes right of retention, except in case where retained property is let or pledged with consent of obligor. (C.C.C. 250).

General Preferential Rights.

Obligee of duty or obligation arising out of: expenditures incurred for preservation, liquidation or distribution of debtor's property for common benefit of creditors; funeral expenses; taxes and rates due for current and preceding years; certain wages of clerk, servant and workman; daily necessaries provided to debtor, family members and servants for period of six months; has right of preference in all property of debtor. (C.C.C. 253-258).

Special Preferential Rights in Immovable Property.

Obligee of obligation arising out of preservation of immovable for expense of preservation, has preferential right in immovable. (C.C.C. 274). Such right retains its effect upon being registered immediately after completion of act of preservation. (C.C.C. 285). Architect, builder or contractor performing work upon immovable, has preferential right in such immovable for charges for work done and is limited to increase in value of immovable created by such work. (C.C.C. 275). Such right retains its effect by provisional estimate of cost being registered before commencement of work to extent that actual cost does not exceed provisional estimate. (C.C.C. 286). Seller of immovable, for sales price and interest, has preferential right in immovable sold. (C.C.C. 276). Right retains its effect by registration of both contract of sale and declaration of default in payment of price or interest at same time. (C.C.C. 288).

Special Preferential Rights in Movable Property.

Lessor of immovable property, for rent and other obligations of lessee, has right of preference in lessee's movable property in or on leased property; and in case of lease of land, in such movable property brought by lessee upon leased land or into buildings subservient to use of such land; in such movables destined to use of leased land and in such fruits of land as are in possession of lessee. (C.C.C. 260, 261). Innkeeper or hotelier, for lodging and other services, including disbursements, has right of preference in luggage or property of guest or traveller which is located in hotel or inn. (C.C.C. 265). Lessor of immovable, innkeeper and hotelier may enforce right of preference in same manner as pledgee. C.C.C. provisions on enforcement of pledge apply. (C.C.C. 266). See topic 7.08 Pledges. Carrier of goods, or passengers for charges of carriage and expenses, has right of preference in all property in possession of carrier. (C.C.C. 267). Obligee of obligation arising out of preservation of movable for expense of preservation of such movable and for necessary expenses incurred for having right relating to such movable preserved, acknowledged or enforced, has preferential right in such movable. (C.C.C. 269). Seller of movable for sales price and interest has right of preference in property sold. (C.C.C. 270). Supplier of seeds, young plants and fertilizers, for sales price and interest, has preferential right on products grown on land for which those things have been used within one year of use. (C.C.C. 271). Provider of agricultural services, for one year's wages, and provider of industrial services, for three month's wages, have right of preference in all products resulting from such service. (C.C.C. 272).

Priority of Holders of Preferential Rights.

When rights of holders of general preferential rights, holders of special preferential rights, pledgees and mortgagees are in conflict, their relative rights to subject property and their rank of precedence are governed by C.C.C. 277-289.

7.08 PLEDGES:

Pledge is contract whereby pledgor delivers to pledgee movable property as security for performance of obligation. (C.C.C. 747). Accordingly, delivery of pledged property, by owner thereof, as pledgor, to pledgee is essential and legally required for creation of valid pledge under Thai law. However, parties to pledge may agree to have pledged property kept by third person. (C.C.C. 749). With respect to pledge of shares, shares pledged can be set up against company and/or any third person only if creation of pledge is recorded/entered in company's book. (C.C.C. 753).

In event pledged property is right represented by written instrument, pledge shall be valid only if instrument is delivered to pledgee, and debtor of right is notified in writing about pledge. (C.C.C. 450). Accordingly, if instrument to order is pledged, creation of pledge must be endorsed upon instrument, otherwise pledge cannot be set up against third person. (C.C.C. 751). Furthermore, in case of pledge of instrument issued to named person and not transferable by endorsement, pledge must be stated on such instrument. However, it cannot be set up against debtor thereunder or any third person, unless pledge is notified to debtor. (C.C.C. 752).

Pledgor is entitled to receive performance of obligation due to him from pledged property in preference to other creditors. However, any agreement made before obligation becomes due to effect that pledgee shall, in case of nonperformance, become owner of pledged property or dispose of it otherwise than in accordance with provisions concerning Enforcement of Pledge under C.C.C., shall be invalid.

Enforcement of pledge under Thai law can be carried out by pledgee even without having to first take court action. On enforcement of pledge in case where debtor has failed to perform obligations, pledgee must first notify debtor in writing to perform obligation and accessories within reasonable time to be fixed in notice. If debtor fails to comply with notice, pledgee is entitled to sell pledged property, but only by public auction. Pledgee must also notify pledgor in writing of place and time of auction. (C.C.C. 764). If notification is impracticable, however, pledgee may sell pledged property by public auction after one month from time obligation became due. (C.C.C. 765). If several properties are pledged as security for one obligation, pledgee may sell any of such properties pledged as it may select, but pledgee may not sell more than is necessary for satisfaction of its right. (C.C.C. 768).

After enforcement of pledge, pledgee must appropriate net proceeds to extinction of obligation and accessories, and accordingly, must return surplus to pledgor or any person entitled thereto. If proceeds derived from enforcement of pledge are less than amount due, debtor of obligation still remains liable for difference.

Pledge is extinguished (1) when obligation secured is extinguished otherwise than by prescription; or (2) when pledgee allows pledged property to return into possession of pledgor. (C.C.C. 769).

8 DISPUTE RESOLUTION

8.01 ARBITRATION AND AWARD:

Arbitration and award are governed by Arbitration Act, B.E. 2545 (A.D. 2002).

Arbitration Agreement.

Parties may agree to submit existing or future civil disputes to arbitration. To be binding upon parties, such agreement must be in writing signed by parties or contained in any written communication between parties. (A.A. 11). Parties are free to agree upon arbitrators and procedures. In absence of agreed procedure or provided by A.A., arbitral tribunal may conduct arbitration proceeding as it sees fit. (A.A. 25). Claim made under contract containing arbitration clause may be struck from court if defendant raises issue of arbitration. (A.A. 14). If defendant does not raise issue, case will be litigated.

Objection to Arbitral Awards.

Either party may petition Thai court to revoke award but grounds for such petition are limited as provided by A.A. Objection to revoke award must be filed with court within 90 days after receipt of copy of award. (A.A. 40).

Enforcement of Arbitral Awards.

Arbitration award with which either party refuses to comply may be enforced only after court's judgment upholding said award is pronounced. Petition for enforcement of award must be filed with court within three years from date of award in order to be enforced. (A.A. 42).

When refusing to enforce this type of award on grounds listed in A.A., court need not consider merits of case itself. (A.A. 43, 44). Arbitral award is considered to be foreign if it takes place outside Thailand. Foreign arbitral awards rendered in member countries of New York Convention on Recognition and Enforcement of Foreign Arbitral Awards, 1958, or Geneva Convention on Recognition and Enforcement of Foreign Arbitral Awards, 1927, are recognized and enforced in Thailand which is also member of convention. (A.A. 41). Thus, foreign arbitral awards are generally enforced whereas foreign judgments are not (see category 5 Civil Actions and Procedure, topic 5.01 Actions, subhead Foreign Judgments and Arbitration Awards, topic 5.03 Judgments, subhead Foreign Judgments).

9 DOCUMENTS AND RECORDS

9.01 AFFIDAVITS:

Since Commissioner of Oath does not exist in Thailand, affidavits are not recognized under Thai law. However, if other party agrees and court deems fit, party may submit witness statement (written declaration of facts). Witness statement must be submitted and delivered to other party at least seven days prior to hearing of such witness. Witness must still appear for direct, cross, and redirect examinations. (C.P.C. 120/1). In addition, witness living outside of Thailand may be exempted from appearing if one of both parties request and court deems appropriate. (C.P.C. 120/2). Party may also request court to conduct direct, cross, and redirect examinations by means of video conference. (C.P.C. 120/4).

10 EMPLOYMENT

10.01 LABOR RELATIONS:

Labor relations are governed by Labor Relations Act, B.E. 2518 (A.D. 1975), Labor

Relations Act (No. 2), B.E. 2534 (A.D. 1991), Labor Relations Act (No. 3), B.E. 2544 (A.D. 2001), Compensation Fund Act, B.E. 2537 (A.D. 1994), Act Establishing the Labor Court Procedure, B.E. 2522 (A.D. 1979), Labor Protection Act ("L.P.A.") which came into force in Aug. 1998 and repealed Announcement of the National Executive Council No. 103, and C.C.C.

By enacting L.P.A., Parliament widened scope of protection given to employees under old Announcement No. 103. L.P.A. applies to all corporations seeking economic profit unless prescribed otherwise by Ministry of Labor but does not apply to central, provincial and local administrations, and state enterprise.

L.P.A. expands definition of employer. Business owner/entity is now considered "employer" of all its contractor's employees working at owner/entity's place of business unless contractor is recruitment service business. If employer is sub-contractor, all prior sub-contractors up to main contractor shall be jointly liable for payment of wages, overtime payments, payment for holidays and compensation payments required to be paid under L.P.A.

Working Conditions, Wages and Notice.

Employer must provide working conditions which are not less than those minimum standards set by law and must pay compensation in amount not less than minimum wage periodically established by Notification of Ministry of Labor. Employer having ten or more employees must submit written work regulations to Department of Labor Protection and Welfare and must post copy at place of work. Regulations must cover working days, regular hours and rest periods; holidays and rules for taking holiday; rules on overtime and holiday work; date and place of payment of wages, overtime pay and holiday pay; leave and rules for taking leave; disciplinary measures and punishment; procedures for submission of grievances; and procedures for termination of employment including severance pay and special severance pay.

Hours of Work.

Normal working hours shall not exceed eight hours per day and 48 hours per week for any type of work except in case of work detrimental to employees' health or body for which normal working hours shall not exceed seven hours per day with maximum 42 hours per week. Most employees working overtime are entitled to overtime pay at 1.5 times and three times normal wage rate for overtime work performed on normal working day and on holiday, respectively. However, certain employees are not entitled to overtime pay or holiday work pay, such as certain management personnel empowered to act on behalf of employer regarding conditions of employment, granting of gratuities, or termination of employment; certain sales personnel paid commission on sales; employees whose nature or condition of work requires performance outside workplace without fixed working hours, etc. After five hours of work, employer must provide a one-hour rest period. Employer and employee may agree to rest periods of less than an hour, provided total rest periods are not less than one hour per day. Rest period shall not be counted as working hours unless it exceeds two hours, in which case excess portion shall be counted as working hours.

Holidays and Vacations.

Employee is entitled to at least one-day holiday per one week of work; Sun. is usual day. In addition, minimum of 13 traditional holidays per year, including National Labor Day, must be granted. After one year of service, employees are entitled to paid annual vacation of not less than six working days.

Sick Leave/Sterilization.

Employees are entitled to sick leave if they are sick but shall be entitled to be paid only for 30 working days per year. Employees are entitled to take day leave with pay for sterilization if supported by medical certificate.

Child and Female Labor.

Male and female employees shall be equally treated unless nature or working conditions does not allow for such equal treatment. Sexual harassment against female or child employees is prohibited under L.P.A. Minimum age of employment is 15 years and no children under age of 18 may be engaged without informing Labor Inspector.

Child employees aged less than 18 and pregnant employees are not allowed to work between hours of 10 p.m. to 6 a.m., work overtime, work on holiday or do other work as prescribed by Ministry.

Pregnant employee is entitled to maternity leave of not more than 90 days per delivery and is entitled to receive pay for up to 45 days. Employers are not allowed to terminate female employee because of pregnancy.

Termination.

Employee may be dismissed for cause without notice or severance pay for: dishonestly performing duty or intentionally committing criminal offense against employer; intentionally causing damage to employer; violating work regulations or rules or lawful orders of employer after written warning has been given by employer, other than in cases when employer is not required to give warning; neglecting duty for three consecutive working days without justifiable reason; negligently causing serious damage to employer; and imprisonment by final judgment of imprisonment. If imprisonment is for offenses committed by negligence or for petty offense, employee must have caused damage to employer. When termination is without cause, employer must give notice of termination not less than one pay period before date of termination, or payment in lieu of such notice. Employer must pay severance in amount determined by length of employee's service as follows: 120 days, but less than one year, 30 days wages; one year, but less than three years, 90 days wages; three years, but less than six years: 180 days wages; six years, but less than ten years: 240 days wages; ten years and upwards: 300 days wages.

Special provision has been made for employees terminated for redundancy when companies bring in new technology to upgrade working units, manufacturing process, distribution or services. Employers are required to notify employees and Labor Inspector of termination date, reasons for such termination and list of such terminated employees, at least 60 days prior to termination. Failure in rendering proper notice or rendering less than required advance notice will cause employer to be liable for severance pay in lieu of advance notice equal to 60 days at employee's last wage rate. Where such severance pay has been paid, it is considered that employer makes payment in lieu of advance notice to employees as provided by C.C.C. In addition to usual 240 days severance pay entitlement, terminated employees employed by company for at least six years are also entitled to be paid special severance pay of 15 days per year of service for portion which exceeds six years, but not exceeding 360 days, at their last rate of wages. Period of work exceeding 180 days in any year is considered as one year.

If employer relocates business office and such relocation affects normal way of living of employees or their families, employer shall give 30 days' advance notice to employees. Employee shall be entitled to terminate employment contract if employee does not want to be relocated to new office of employer and shall receive special severance pay equal to normal severance pay.

Statutory Retirement/Employee Welfare Fund.

All employers are required to pay compensation to retired employees. Amount of compensation will vary depending on employee's last wage rate and period of employment. Retirement age for government officials is 60 years of age but may be extended to 70 for judges and public prosecutors. Retirement age for private sector depends upon employer's policy.

Employee Welfare Fund (effective upon forthcoming Ministerial Regulation and Royal Decree): Employers with ten or more employees must establish registered provident fund or provide welfare for employees in case of resignation or death. Under this plan, employer and employees are required to contribute at rate prescribed by Ministerial Regulation (capped at 5% of employees' wage/salary) to Employee Welfare Fund, which Ministry will manage.

Welfare.

L.P.A. orders establishment of following Welfare Committees: (1) Labor Welfare Committee as national organization responsible for national welfare policies; and (2) Welfare Committees to look after and make recommendations regarding companies' welfare rules for business entities with more than 50 employees.

Labor Unions.

Employees working for same employer or doing same type of work may establish labor union having objective of protecting employees' interest in conditions of employment, promoting better relationships between employers and employees and among employees themselves. Labor unions must be registered with registrar of Department of Labor and can operate only upon issuance of license. License is issued after investigation is made by registrar to confirm that regulations of union are not contrary to law and public order and do not constitute threat to national security or economy.

Workmen's Compensation.

Under Workmen's Compensation Fund Act B.E. 2537 (A.D. 1994), employers with one or more employees are required to register all employees with Workmen's Compensation Fund. Employers must contribute to fund annually at rate specified by Labor Minister by Jan. 31 of each year. Applicable rates depend upon type of business and nature of work performed. Contribution rates range between 0.2% and 1% of total wages paid to employees up to maximum of Baht 240,000. If employer fails to do so, employer must make additional payment of 3% of outstanding contribution which has not been made per month. Fund shall compensate employees for injury, illness, disappearance, or death related to work. Fund shall be used for each compensation payment as well as for medical, work rehabilitation, and funeral costs of employee. Employer must provide immediate medical care and treatment in amount as necessary but not more than rate specified by ministerial regulation for employee injury or sickness. If rehabilitation is necessary, employer must pay actual rehabilitation costs in accordance with rules prescribed by ministerial regulation. If death occurs, employer must pay funeral expenses equal to 100 times maximum daily minimum wage rate. Sick or injured employee (or his legal beneficiaries i.e., parents, spouse, children, etc.) is entitled to apply for compensation fund benefits from local social security office within 180 days from date of incident. Compensation payment requirements are contained in separate notification of Ministry of Labor. Said rates differ with nature of injury, disability, disappearance or death.

Employer is not obliged to pay compensation to employee who intentionally inflicted injury upon themselves or others, allowed another person to inflict injury upon them, or consumed intoxicants beyond limits of self-control.

10.02 SOCIAL SECURITY FUND:

Pursuant to Social Security Act, B.E. 2533 (A.D. 1990), employers with one or more employees are required to register and contribute to Social Security Fund. Such employees and government are also required to make contributions to Social Security Fund. Generally, employer and employees shall each make monthly contribution at rate of 5% of employee's wage rate (maximum of Baht 750 per month). However, according to Ministerial Regulation dated July 9, 2009, contribution rate was reduced from 5% to 3% (maximum of Baht 450) effective from July to Dec. 2009. From Jan. 1, 2010 onward, rate will be 5%. If employer fails to remit contributions to

Social Security Fund within specified time, employer is required to make additional payment of 2% of outstanding contribution which has not been made per month. Social Security Fund provides seven types of benefits to employees: sickness or injury not suffered in course of employment, maternity, disability not acquired in course of employment, death not occurring in course of employment, child welfare, unemployment, and old age pension.

11 ENVIRONMENT

11.01 ENVIRONMENTAL REGULATION:

For two decades, industrializing nation of Thailand has emphasized economic development. Concurrently, and probably as price thereof, Thailand has become environmental disaster. Both Government and general public are aware of these problems and attempts are being made to prevent further deterioration as result of future economic development.

Public pressure for environmental regulation is particularly strong in Thailand and there have been numerous demonstrations against developments and facilities which are seen to be potentially damaging to environment. In addition, H.M. the King takes keen interest in environmental matters and has strong persuasive ability.

Effective execution of Thailand's Seventh Economic and Social Development Plan (1991-1996) mandated necessity for updated environmental legislation and regulatory agency with proper scope and empowerment to achieve such objectives. Although Thailand had (and still has) uncoordinated, often overlapping, hodgepodge of some 70-plus laws and regulations of some environmental concern, legislature base required extensive revamping to carry out specific objectives of Seventh Plan. As result, in 1992, government passed six of most comprehensive pieces of environmental legislation to date and also strengthened state regulatory bodies which administer them. New legislation included Enhancement and Conservation of National Environmental Quality Act, revamped Factories Act, Hazardous Substances Act, new Public Health Act, Energy Conservation Promotion Act and revised Cleanliness and Orderliness of Country Act. Of these, first three pieces of legislation are most important in terms of their scope and impact on commerce and industry. Objectives under Thailand's Eighth Economic and Social Development Plan (1997-2001), were to utilize and conserve natural resources and environment effectively to support sustainable economic and social development. Under Ninth Economic and Social Development Plan (2002-2006), H.M. the King's philosophy of “Sufficiency Economy” has been adopted as guiding principle in development and administration of country, taking “middle way” to achieve balanced qualitative and sustainable development under wave of globalization and changing circumstances. Tenth Economic and Social Development Plan (2007-2011) was designed to enhance quality of life for Thai people by addressing traditional economic and social issues including unemployment and education, and to bring about harmony in society. As with Ninth Plan, H.M. the King’s philosophy of “Sufficiency Economy” is underlying principle of Tenth Plan. By promoting national development based on self-sufficiency, Plan offers protection against sudden economic disruption and changes bought about by globalization.

Enhancement and Conservation of National Environmental Quality Act B.E. 2535 (A.D. 1992) (“E.C.N.E.Q.A.”) authorized National Environment Board to create: (1) Policy and Prospective Plan for Enhancement and Conservation of National Environmental Quality (1997-2016) for use as framework in combined administration and management of country's environment for 20 years from 1997-2016, and (2) Plan for Management of Environmental Quality for implementing (1) so concerned government authorities and provincial authorities could use it as framework for environmental work during 1999-2006, period covered by Eighth and Ninth Plans.

However, National Environmental Board (“N.E.B.”) decided to revise 1999-2006 Plan and created Plan for Management of Environmental Quality (2002-2006) to be more practical and suited to circumstances and to be consistent with Ninth Plan. On Dec. 21, 2006 N.E.B. declared current Plan for Management of Environmental Quality (2007-2011) consistent with Tenth Plan’s objective of developing community-level economy that co-exists harmoniously with nature and surrounding environment.

Furthermore, Pollution Control Department for Ministry of Natural Resources and Environment declared National Master Plan on Cleaner Production (2002) prescribing measures and mechanism for bringing concept of cleaner production into all sectors and activities in order to implement Thai Government's obligations from signing UNEP's International Declaration on Cleaner Production.

Administration and Enforcement of Environment Legislation (General Supervision).

Art. 79 of 1997 Constitution requires government to control and eradicate pollution affecting people's health, safety and quality of life as well as to promote and support public participation in conservation, maintenance and gainful utilization of natural resources and bio-diversity on balanced basis, including participation in promotion, maintenance and protection of environmental quality in accordance with sustainable development principles.

Thailand in past two decades has become party to several international treaties including: Constitution of the United Nations Industrial Development Organization, signed on Apr. 8, 1979; Convention on International Trade in Endangered Species of Wild Flora and Fauna, ratified Mar. 21, 1983, effective Apr. 21, 1983, as amended in 1993; Vienna Convention for the Protection of the Ozone Layer, accession on July 7, 1985; UNESCO Convention Concerning the Protection of the World Cultural and Natural Heritage, accession on Sept. 17, 1987; The Montreal Protocol on Substances that Deplete the Ozone Layer, signed on Sept. 15, 1988, ratified on July 7, 1989; Basel Convention for the Control of Transboundary Movements of Hazardous Wastes and their Disposal, signed on Mar. 22, 1990, ratified on Nov. 24, 1997; United Nations Convention on Biological Diversity, Rio de Janeiro, signed June 12, 1992, ratified on Jan. 28, 2004; United Nations Framework Convention on Climate Change, Rio de Janeiro, signed June 12, 1992, ratified on Dec. 28, 1994; Agreement on Cooperation for Sustainable Development of the Mekong River Basin, signed on Apr. 5, 1995; International Tropical Timber Agreement, signed on Apr. 10, 1996; Ramsar Convention, May 1998; Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade, accession on Feb. 19, 2002; Stockholm Convention on Persistent Organic Pollutants (POPs) signed on May 22, 2002; Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction, signed on Jan. 14, 1993, ratified on Jan. 9, 2003; Memorandum of Understanding on the Conservation and Management of Marine Turtles and Their Habitats of the Indian Ocean and South-East Asia, signed on May 12, 2004; Agreement between Thailand and Brazil on Technical Cooperation on Sanitary and Phytosanitary Measures, signed on June 16, 2004; Memorandum of Understanding between Thailand and Australia on Environment, signed on July 5, 2004; Memorandum of Agreement between Thailand and Australia on Animal Management, signed on July 16, 2004; Agreement on Bilateral Co-operation on Fisheries between Thailand and Sri Lanka, signed on July 30, 2004; Memorandum of Understanding between Thailand and Sri Lanka on Co-operation on the Application of Sanitary and Phytosanitary Measures, signed on July 30, 2004; Arrangement on Environment between Thailand and New Zealand, signed on Apr. 19, 2005; Memorandum of Understanding on Environmental Protection Cooperation Between the Ministry of Natural Resources and Environment of the Kingdom of Thailand and the State Environmental Protection Administration of the People's Republic of China, signed on July 1, 2005; Memorandum of Understanding for Cooperation to Prevent and Control Transboundary Animal Diseases in the Greater Mekong Subregion, signed on July 5, 2005; Memorandum of Understanding Between the Government of the Kingdom of Thailand and the Government of the Republic of Tajikistan on the Cooperation in Narcotic Drugs, Psychotropic Substances and Precursor Chemicals Control, signed on Aug. 9, 2005.

Enhancement and Conservation of National Environmental Quality Act B.E. 2535 (A.D. 1992) (“E.C.N.E.Q.A.”), repealed National Environmental Quality Act. Under new Act, National Environment Board (“N.E.B.”), which was established in 1975 under old law, was reorganized but still serves as central agency for environmental matters. N.E.B. is responsible for providing policies and opinions on environmental and conservation issues to Council of Ministers. N.E.B. is also concerned with recommending environmental quality standards and coordinating environment-related work of other government agencies.

E.C.N.E.Q.A. contains provisions giving government officials authority to enforce environmental quality legislation. Act adopts “polluter pays” principle and provides public with legal right to information in relation to environmental matters and right to compensation from State in case of damage caused by project or business managed or supported by Government or state enterprise, including right to make complaint.

Under Act, recognized nongovernmental organizations may be allowed to register as private organizations for protection of environment and conservation of natural resources, with authority to bring court action on behalf of victims of environmental damage or pollution. E.C.N.E.Q.A. also decentralizes to local authorities power to manage environmental quality in their areas.

Ministry of Natural Resources and Environment (M.N.R.E.) generally oversees environmental concerns of Thailand. Other governmental agencies, national and local, are also authorized to regulate in their respective fields. Since scope of powers and duties of many governmental authorities may overlap, inconsistencies in environmental standards set forth by each agency are bound to occur. In event of such inconsistencies, M.N.R.E.'s standards prevail unless inconsistency is expressly authorized by E.C.N.E.Q.A. and its subsequent regulations.

One of M.N.R.E.'s primary duties concerning pollution control is to prescribe emission and effluent standards for control of discharge or emission of waste water, air pollution, and other waste products or pollutants from point sources into environment. In event that there are other standards which have been determined by another environmental agency, M.N.R.E.'s standards shall prevail over any inconsistent standard for same type of emission.

In areas deemed by N.E.B. to have aggravated pollution problem, it may designate such areas as pollution control area (P.C.A.). In this event, each provincial governor in P.C.A. is authorized to prescribe more stringent set of emission or effluent standards for their area in order to control and reduce pollution. Designated P.C.A.s under this legislation are Pattaya (Cholburi Province), Amphoe Hat Yai, Amphoe Muang (Songkhla Province), Pee Pee Islands (Krabi Province), Amphoe Ban Laem, Amphoe Muang Phetchaburi, Amphoe Tha Yang, Amphoe Cha-am (Phetchaburi Province), Amphoe Hua Hin, Amphoe Pran Buri (Prachuap Khiri Khan Province), Tambol Na Pralarn, Amphoe Chalermprakiat (Saraburi Province) and complete provinces of Phuket, Samut Prakan, Nonthaburi, Samut Sakhon, Nakhon Pathom and Pathum Thani.

E.C.N.E.Q.A. established Environmental Fund with aim of assisting government agencies, local authorities, individuals or recognized private organizations to set up systems for remediation of pollution.

Violators of E.C.N.E.Q.A. are subject to strict civil liability except on three occasions: (1) force majeure or war, (2) acts done with government approval, or (3) damages resulting from act or omission by victim or third party who is either directly or indirectly responsible for damages. Violator is liable for all damages resulting from contamination, including any expenses incurred for clean-up and value of any natural resources destroyed or damaged in process. Criminal liabilities for violations of E.C.N.E.Q.A. range from one month to five years imprisonment and/or fines of approximately US$333 to US$16,666 (Baht 10,000- to Baht 500,000).

In case of company, directors or managers of such company shall also be liable for such offenses unless it can be proved that they have no part to play in commission of such offense.

Party who owns or possesses point source of pollution planning to install on-site treatment facility, whether or not required to do so by law, is entitled to request assistance from government regarding import duties of necessary machinery, equipment and materials for facility which are not available in Thailand, and permission to bring in foreign experts and specialists concerning construction and operation of facility if such qualified persons are not available in Thailand. Foreign specialists may also qualify for exemption from taxation of their income earned in Thailand for purposes of construction and operation of facility. Applications for these perquisites under E.C.N.E.Q.A. are to be made to N.E.B. in accordance with its rules and regulations.

Addresses.

Office of Natural Resources and Environment Policy and Planning, Ministry of Natural Resources and Environment, 60/1 Soi Phibulwatana 7, Rama VI Road, Bangkok 10400, Tel. (66) 2265 6500, Fax (66) 2265 6511; Department of Pollution Control, Ministry of Natural Resources and Environment, 92 Soi Phaholyothin 7, Phaholyothin Road, Samsen Nai, Phyathai, Bangkok 10400, Tel. (66) 2298 2000, Fax (66) 2298 2002; Department of Environmental Quality Promotion, Ministry of Natural Resources and Environment, 49 Soi 30, Rama VI Road, Bangkok 10400, Tel. (66) 2278 8444-19, Fax (66) 2298 5606; Bureau of Industrial Environmental Technology, Department of Industrial Works, Ministry of Industry, 75/6 Rama VI Road, Khet Rajatewee, Bangkok 10400, Tel. (66) 2202 4000 up to 4014, Fax 2354-3390; Toxic and Hazardous Substances Control Division, Food and Drug Administration, Ministry of Public Health, 88/24 Tiwanond Road, Amphoe Muang, Nonthaburi 11000, Tel. (66) 2590 7000.

Environmental Legislation.

Wide range of environmental legislation has been enacted in Thailand in recent decades. Legislation to control all major pollutants and pollutable media is in existence. In addition to E.C.N.E.Q.A. discussed above, 1992 legislation includes revamped Factories Act, Hazardous Substances Act, Energy Conservation Promotion Act (No. 2), B.E. 2550 (A.D. 2007), new Public Health Act, and revised Cleanliness and Orderliness of the Country Act. Of these, first three pieces of legislation are most important in terms of their scope and impact on commerce and industry.

Factories Act, B.E. 2535 (A.D. 1992) has tremendous impact on business and individual polluters. Implementation of this Act is under supervision of Ministry of Industry (M.O.I.). Factories Act empowers Minister to regulate factories for prevention of disturbances, damages and danger to public or environment.

Pursuant to 1992 Factories Act, Ministry of Industry has promulgated several ministerial regulations and notifications regulating activities in business operations of factories which impact environment. One of regulations prescribes actions to be followed in disposal of waste water and waste products by factory, while one of notifications sets limits on discharge of air pollutants by factory. Measurements of value of contaminants in air are taken from air discharged from chimney during operation of factory, if appropriate, or from location determined by competent authority.

Air Pollution.

Under E.C.N.E.Q.A. “polluted air” means waste in state of exhaust, odor, smoke, gas, soot, dust, ash, or other polluting substance being so fine and light that it can collect in atmosphere.

National ambient air quality objectives have been established for number of air pollutants including sulphur dioxide, nitrogen oxides, particulates, carbon monoxide, photochemical oxidants and lead. Industrial Environmental Division of Ministry of Industry has proposed emission standards for range of pollutants including heavy metals, ammonia, chlorine and arsenic. These standards will apply to new facilities, existing facilities wishing to expand and existing facilities which are subject of air pollution complaints. Standards are also in existence for emissions from motor vehicles.

Water Pollution.

Under E.C.N.E.Q.A., “waste water” means waste in liquid state, including pollutant contained or contaminated in such liquid.

Discharge standards have been set for industrial and domestic effluents entering water. Among industrial effluents regulated in this way are chlorine, oil, grease, heavy metals and suspended and dissolved solids. Certain types of industrial facility are required to employ suitably qualified personnel to have responsibility for pollution control measures at installation. Reporting system has been established whereby facilities must provide results of analysis of discharges at regular intervals.

Water quality standards exist for drinking water and groundwater. Coastal waters and number of surface waters are subject to quality classifications and quality objectives.

E.C.N.E.Q.A. authorizes N.E.B., with advice of Pollution Control Department (P.C.D.), to set service fees for any central waste water treatment plant or central waste disposal facility that is constructed and brought into operation with governmentally related funding, including grants from Environmental Fund.

Noise and Vibration Pollution.

Under E.C.N.E.Q.A., owner or possessor of source of noise pollution exceeding levels prescribed by Pollution Control Committee has duty to install or bring into operation on-site facilities to control, dispose, reduce, or eliminate pollution. Moreover, there are number of statutes to control noise pollution such as Factories Act, B.E. 2535 (A.D. 1992) which prohibits use of machineries that cause noise and disturbance to other people and defines standards of noise levels, Public Health Act, B.E. 2535 (A.D. 1992) and Labor Protection Act, B.E. 2541 (A.D. 1998) which define standards of noise levels for entertainment events and work places.

Policy and Prospective Plan for Enhancement and Conservation of National Environmental Quality (1997-2016) has goals to control standard of point of source and noise levels of all areas in Thailand to be less than 70 decibels on average and to control noise and vibration levels from point of source to comply with vehicle and community standards.

Waste.

Under E.C.N.E.Q.A., “waste” means solid waste, refuse, waste water, polluted air, pollutant, or other harmful object discharged or derived from pollutant sources, including sludge, sediment, or residue thereof, which is in solid, liquid, or gaseous state. Facility operators are required to provide management plan for treatment and disposal of hazardous waste.

Disposal of waste at landfill sites is also regulated. Specific preventative measures such as use of impermeable liners are required and operators must establish regular programme of groundwater monitoring and retain system of records giving details of waste treated at site.

Hazardous Substances.

Under Hazardous Substances Act B.E. 2535 (A.D. 1992) as amended by Hazardous Substances Act (No. 2), B.E. 2544 (A.D. 2001) and (No. 3), B.E. 2551 (A.D. 2008) (H.S.A.), hazardous substances means explosives, flammable substance, oxidizing agent and peroxide, toxic substances and substance causing diseases, radioactive substance, mutant causing substance, corrosive substance, irritating substance and other substance either chemicals or otherwise which may cause injury to persons, animals, plants, property, or environments.

Hazardous Substance Act is under direct authority of Minister of Industry, with cooperation of Minister of Defense, Minister of Agriculture and Cooperatives, Minister of Interior, Minister of Public Health, and Minister of Natural Resources and Environment. Committee on Hazardous Substances (C.H.S.), was established under this Act and chaired by Minister of Industry with powers and duties to supervise works and activities in relation to hazardous substances.

Minister of Industry, with advice of C.H.S., is responsible for prescribing names or qualifications of hazardous substances, types of hazardous substances, list of hazardous substances (B.E. 2538 [A.D. 1995]), last updated in (B.E. 2548 [A.D. 2005]), periods of application and responsible agencies for control of hazardous substances. Appropriate ministry then administers all other regulations concerning safety precautions to prevent danger in handling, treatment and use of hazardous substances, and procedures for registration of hazardous substance. Hazardous substances are grouped into four classifications, ranging from those types which are banned outright to others that must simply comply with HSA prior to production, import, export or possession by party.

Apart from H.S.A. hazardous substances are regulated by number of statutes such as Fertilizers Act B.E. 2518 (A.D. 1975) as amended by (No. 2), B.E. 2550, Drugs Act B.E. 2510 (A.D. 1967) as amended up to (No. 5), B.E. 2530 (A.D. 1987), Control of Fuel Oil Act B.E. 2542 (A.D. 1999) as amended by (No. 2), B.E. 2550 (A.D. 2007), and Consumer Protection Act B.E. 2522 (A.D. 1979) as amended by (No. 2) B.E. 2541 (A.D. 1998). Range of standards exist which control manufacture, storage, disposal, transport, use and exposure of workers to hazardous materials. Production of hazardous substances is closely controlled. Operators are required to maintain documentation giving information on manufacture of each substance and toxic nature of such materials must be clearly shown on labels of containers. Importation, manufacture and sale of number of hazardous substances has been completely prohibited. These include pesticides DDT and dieldrin.

Under H.S.A., injuries caused by hazardous substance will subject producer, importer, carrier or possessor of said substance to civil liability without regard to knowledge so long as injuries were sustained without force majeure or fault of injured party. Same liability is imposed upon seller of substance, or one who delivers it. Criminal penalties range from one month to ten years imprisonment and/or fines of Baht 10,000-1,000,000, heftiest under any environmental law in Thailand. All these legal provisions cause a lot of concern among industry and business as heavy financial liability, civil or criminal, may be put upon them in near future.

Apart from Ministry of Public Health (FDA), Ministry of Defense, Ministry of Industry, Ministry of Agriculture and Cooperatives, Ministry of Interior and Ministry of Natural Resources and Environment also supervise and control activities concerning hazardous substances including their manufacture, importation, exportation, possession, sale and label. Licenses for such activities are required from concerned competent authorities mentioned above.

Hazardous Substance Act classifies hazardous substances into four types with different controls and supervisions and grants power to Ministry of Industry to issue list of classified hazardous substances. Ministry of Industry already issued such classified list. Aforesaid Act also imposes strict liability on all concerned importers, manufacturers, carriers, possessors, sellers, employers, wholesalers and retailers of hazardous substances.

Health and Safety.

In Jan. 1998, Parliament adopted Labor Protection Act 1998 effective Aug. 19, 1998. L.P.A. provides for strict Labor protection relating to occupational health and safety in work environments, especially for female employees and employees under 18.

Conservation of Plants and Animals.

Among numerous Acts protecting plant and animal life in Thailand are Wild Elephant Conservation Act B.E. 2464 (A.D. 1921) amended in 1960; Forest Act B.E. 2484 (A.D. 1941) as amended by Forest Act (No. 2), B.E. 2507 (A.D. 1964); Wild Animal Preservation and Protection Act, B.E. 2535 (A.D. 1992) as amended by Wild Animal Preservation and Protection Act (No. 2), B.E. 2546 (A.D. 2005); and Plant Variety Act, B.E. 2518 (A.D. 1975) as amended by (No. 2), B.E. 2535 (A.D. 1992) and (No. 3), B.E. 2550 (A.D. 2007). Another statute is Plant Protection Act B.E. 2542, which became effective on Nov. 26, 1999. Individuals using and benefiting from Thai plants are required to remunerate public and private owners of respective plant varieties. Such compensation is intended to promote biodiversity and encourages agriculturalist to conserve, maintain and develop plant varieties. Act also establishes Plant Variety Protection Board, which has authority to object to registration of plant varieties that may have ill effects on environment and public health (i.e. genetically modified plants).

Environmental Impact Assessment.

Environmental impact assessments (E.I.A.) must be carried out prior to commencement of certain developments. To further environmental quality promotion and conservation, Minister of M.N.R.E., with approval of N.E.B., also determines types and sizes of projects or activities which are likely to have environmental impact and consequently, are required to prepare E.I.A. reports of their proposed projects or activities in seeking approval.

Types of projects which will require formal assessment include petrochemical plants, oil refinery, natural gas separation or processing, thermal power plant, mining, mass transit system, commercial port, industrial estate commercial airport, iron and/or steel industry, cement industry, smelting industry other than iron or steel, pulp industry, chemical fertilizer industry using chemical process in production, pesticide industry or industry producing active ingredients by chemical process, land allocation for residential or commercial purposes, residential condominium, hotels and tourist facilities developed in close proximity to sensitive areas such as beaches and rivers, etc.

Certain types of projects located in environmentally protected areas of Phuket, Krabi and Pattaya (Cholburi) provinces, which are major tourist destinations, require E.I.A. Types of projects include residential buildings, hotels or resorts as defined by building control laws with 10-79 rooms, hospitals as defined by hospital law with 10-29 beds for patients, plants transmitting or selling electricity and factories generating steam for sale (Notification of the Ministry of Science, Technology and Environment Re: Prescribing the types and sizes of projects or activities and criteria, methods, procedures and guidelines for preparing preliminary environmental impact assessment reports in the environmentally protected areas of Phuket, Krabi and Pattaya, Cholburi, provinces, B.E. 2543 [A.D. 2000]).

E.I.A.s may only be conducted by appropriately trained individuals who are licensed by N.E.B. On completion, assessment will be submitted to N.E.B. for approval. N.E.B. has authority to insist on alteration of aspects of project if it is felt that it will have adverse effect on environment.

12 ESTATES AND TRUSTS

12.01 ADMINISTRATION:

See topic 12.04 Executors and Administrators.

12.02 DEATH:

Notification of Death.

Under Private Person Registration Act, B.E. 2534 (A.D. 1991), if death takes place at home, homeowner must notify area registrar of death within 24 hours. If home where death occurred has no owner, person who discovers body must notify registrar within 24 hours.

If death takes place outside home, person in company of deceased or person who discovers deceased must notify area registrar or other authority within 24 hours from time of death or discovering deceased. Alternatively, administrative official or police can be notified.

Due to problems of transportation and communication, director of Central Registration Office may extend time period to give notification of death as appropriate, but such period shall not be more than seven days from date of death or date body was discovered. Late report is subject to fine. In cases where person dies under unusual circumstances, nearest police station and/or coroner should be notified. Autopsy is usually performed to determine cause of death.

Death of foreign national in Thailand should be reported immediately to consular section of deceased person's embassy and to police. Consular section should also be notified if and when remains of body are to be sent overseas. Consular officials will advise about undertakers, cremation, burial or shipment of body abroad. In absence of anyone locally to look after personal effects of deceased, consular officials are usually authorized to act on temporary basis as administrators of deceased's estate in order to preserve and protect it.

Death certificate may be obtained from area registrar where death was recorded. In case of death in foreign country, Thai embassy or consular office is area registrar for any Thai or alien having residence in Thailand under Thai immigration laws. Evidence of such registration shall be recognized as death certificate. If there is no Thai embassy or consular office, official certificate issued by competent authority of that country, certified and translated by Ministry of Foreign Affairs of Thailand can be used as death certificate. (Private Person Registration Act, §28).

Presumption of Absence.

Person adjudicated by court to have disappeared is deemed to have died at completion of five years, or two years in certain specified cases. (C.C.C. 61-62). See also category 22 Property, topic 22.01 Absentees.

Presumption as to Survivorship.

When several persons have perished in common peril and it is not possible to determine who died first, law presumes that they died simultaneously. (C.C.C. 17).

Action for Death.

Person, by wrongful act, causing death to another person is bound to make compensation including funeral and other necessary expenses. If death did not occur immediately, compensation shall include cost of medical expenses and damages for loss of earnings. Any person who has been deprived of deceased person's support (spouse, descendants, parents, etc.) is entitled to compensation from liable person. (C.C.C. 443). If deceased person was bound by law to perform service in favor of third party in his household or industry, liable person shall be bound to make compensation to third person for loss of such service. (C.C.C. 445).

In case of criminal act, public prosecutor and ascendant or descendant, husband or wife of deceased person are entitled to institute criminal prosecution in court for wrongful death. (C.P.C. §2[4], §5[2], §28).

Anatomical Gift.

There is no special statutory provision for anatomical gift. Any person may make his will concerning arrangement of his properties or other matters after his death. (C.C.C. 1646).

Living will does not exist in Thailand because it is against law and public morality.

12.03 DESCENT AND DISTRIBUTION:

Estate and Statutory Heirs.

From moment of decedent's death, his estate which includes properties of every kind, as well as rights, duties and liabilities, except those which by law or their nature are purely personal to him, passes either to legatees by will or to his statutory heirs by operations of law. (C.C.C. 1599, 1603). Acceptance of inheritance is not required. Both legatees and statutory heirs are not liable in excess of shares of inheritance received by them. (C.C.C. 1601). Whole of decedent's property may be freely disposed of by will. (C.C.C. 1646). If decedent made no will or made invalid will, his whole estate must be distributed among his statutory heirs. If only certain part of decedent's estate has been disposed of by will, part of estate not disposed of by will must be distributed among his statutory heirs. (C.C.C. 1620). Unless otherwise provided in will, statutory heir who has received property under will still has normal statutory right of inheritance in part of estate not disposed of by will. (C.C.C. 1621). If decedent was married, surviving spouse is also entitled to share of inheritance as prescribed by law in estate which has not been disposed of by will. (C.C.C. 1635). Person writing will or witness thereof, or spouse of such writer or witness, cannot be legatee. (C.C.C. 1653). If there is no statutory heir or legatee or creation of foundation under will, estate devolves on State. (C.C.C. 1635, 1753).

Statutory Rights of Inheritance.

There are six classes of statutory heirs; presence of heirs or their representatives in one class excludes inheritance rights of statutory heirs in all lower classes: (a) Descendants, provided that only decedent's children which include adopted children and illegitimate children who have been legitimated by decedent, if any, are entitled to inherit (C.C.C. 1627, 1631); (b) parents, provided no representation is allowed for this class of statutory heir; (c) brothers and sisters of full blood; (d) brothers and sisters of half blood; (e) grandfathers and grandmothers, provided no representation is allowed for this class of statutory heir; and (f) uncles and aunts. (C.C.C. 1629). Only exception to this rule is that presence of descendants does not exclude inheritance rights of surviving parent or parents. In such case each parent is entitled to same share as each child. (C.C.C. 1630). Statutory heirs of class to which estate of decedent passes are entitled to equal shares. If there is only one statutory heir in such class, he is entitled to whole estate. (C.C.C. 1633).

Surviving spouse is entitled to following shares of inheritance: (i) Same share as each child in case descendants inherit; (ii) one-half of inheritance in case parents or brothers and sisters of full blood inherit; and (iii) two-thirds of inheritance in case brothers and sisters of half blood, grandfathers and grandmothers or uncles and aunts inherit. If there exists no statutory heir, surviving spouse is entitled to whole inheritance. (C.C.C. 1635).

Renunciation.

Statutory heir may renounce whole, but not part of, inheritance by express written declaration of intention which must be deposited with competent official or by entering into compromise agreement. Renunciation of inheritance is irrevocable and cannot be made subject to condition or time clause. (C.C.C. 1612, 1613).

Foreign Decedents.

Thai law applies to succession concerning immovable property of foreign decedent in Thailand, but law of his last domicile governs succession concerning his movable property. (C.O.L. 37, 38).

12.04 EXECUTORS AND ADMINISTRATORS:

Appointment, Resignation and Removal.

Testator may appoint one or more executors. (C.C.C. 1715). If person dies intestate or no executor is appointed by testator, heirs jointly carry on administration and distribution of estate and may distribute estate by severally taking possession of property or by selling estate and dividing proceeds of sale among themselves. (C.C.C. 1745, 1750). If executor or heirs are unwilling or unable to carry on or are impeded in carrying on administration or distribution of estate, court may, upon application by any heir or any other interested person or public prosecutor, appoint administrator of estate. Administrator may also be appointed by court upon application by any interested person or public prosecutor if testator's appointment of executor is, for any reason, ineffective or where there is no executor and statutory heirs or legatees are missing or are abroad or are minors. (C.C.C. 1713). Offices of executor and administrator are voluntary but executor or administrator who has accepted office may, subject to court's permission, resign only for reasonable cause. (C.C.C. 1727). Court may remove executor or administrator who has not completed inventory of estate in form prescribed by law in due time or whose inventory is unsatisfactory to court because of negligence, dishonesty or obvious incapability. (C.C.C. 1731). Executor or administrator may also be removed by court upon application, prior to completion of distribution of estate, by any interested person because of his neglect of duties or any other reasonable cause. (C.C.C. 1727).

Qualification.

Minors, bankrupts or persons of unsound mind or adjudged quasi-incompetent cannot be executors or administrators. (C.C.C. 1718).

Powers, Duties and Liabilities.

Executor and administrator have powers and duties to do all acts necessary for general administration or distribution of estate and for bringing about effect intended by express or implied order in will. (C.C.C. 1719). Executor and administrator may not execute functions through agents unless expressly or impliedly authorized by will or by order of court or required by circumstances for benefit of estate. (C.C.C. 1723). Unless otherwise provided by will, several executors or administrators of one estate must exercise powers and perform duties on majority vote. In case of tie, decision shall be made by court on application of any interested person. (C.C.C. 1726). Executor and administrator must complete distribution of estate, account of management and other work within one year or within period fixed by testator, court or majority of heirs. (C.C.C. 1732). No remuneration may be paid from estate to executor or administrator unless permitted by will or majority of heirs. (C.C.C. 1721). Executor and administrator are liable to heirs for any damage resulting from their negligence or non-execution of duties, or from act done in absence of or in excess of authority. (C.C.C. 1720).

Creditors.

Advertisement for or notices to creditors are not required by law. Prior to partition of estate, executor or administrator must have paid all known debts of estate. (C.C.C. 1736). Creditors of estate are entitled to be paid only out of property in estate. (C.C.C. 1734). Creditor of estate may: (a) Enforce his claim against any heir provided executor or administrator, if any, is also summoned by creditor to appear in action, or (b) prior to division of estate, may enforce full payment of his claim from estate. (C.C.C. 1737, 1738). Heir is liable to creditor of estate only up to value of property inherited by him and has right of recourse against other heirs for amount paid in excess of his proportionate share in obligation and may, if claim is enforced against him before division of estate, require that performance be made out of estate or secured therefrom. (C.C.C. 1738).

12.05 TRUSTS/FOUNDATIONS:

Testamentary trusts and trusts effective during lifetime of settlor are prohibited and may not be created, whether directly or indirectly, by will or juristic act. (C.C.C. 1686). Other kinds of trusts and trustees are unknown in Thailand. Testamentary dispositions may create “foundation”. (C.C.C. 1676). Foundation has exclusive purpose of public charity, religious, art, scientific, literary, education or other purposes for public benefit and not for sharing profit. (C.C.C. 110).

12.06 WILLS:

Wills may be made by persons of at least 15 years of age. (C.C.C. 25). Testator who is married may not dispose by will of more than his or her portion of community property. (C.C.C. 1481).

Forms.

Will made by Thai national in foreign country may be made either in any of hereinafter prescribed forms in which case Thai Diplomatic or Consular Officer will have same powers and duties as competent official (nai amphoe) or in forms prescribed by law of such foreign country. (C.C.C. 1667). According to C.C.C., will may be made in any of the following forms:

Allograph will is will made in writing and dated and affixed with signatures of testator and in presence of at least two witnesses. (C.C.C. 1656).

Holograph will is will entirely written, dated and signed by hand of testator himself. (C.C.C. 1657).

Open will is will made by testator's declaration of his will to competent official (nai amphoe) in presence of at least two witnesses. Such declaration must be written down and read aloud by said official to testator and witnesses. Will so written must be signed by testator who confirms that it corresponds with his declaration and by witnesses and countersigned, dated and affixed with his seal by said official. (C.C.C. 1658).

Closed will is will privately prepared and signed by testator and states name and domicile of writer, if not entirely written by testator. Will must be enclosed in sealed envelope signed by testator across place of closure and testator must, in presence of competent official (nai amphoe) and at least two witnesses, declare that enclosed document contains his testamentary dispositions. Said official must make minutes of such declaration, state date thereof and affix his seal and signature on such envelope which must also be signed by testator and witnesses. (C.C.C. 1660).

Oral will is will made orally in presence of at least two witnesses by testator who is prevented from making his will in any of above forms by exceptional circumstance such as imminent danger of death, epidemic or war. Oral will is not valid if not reduced to writing by competent official (nai amphoe) from statement of said witnesses who must appear before him without delay after oral will is made. Official's statement of will must be signed by said witnesses. (C.C.C. 1663). However, whenever testator is again able to make will in any other form, oral will so made becomes null and void one month after he has regained such capacity. (C.C.C. 1664).

Military will is will which may be made in Thailand and foreign countries at time when state of war exists in Thailand, by military men or persons acting in connection with armed forces. Military will must take form of open will, closed will or oral will and military officer or official of commissioned rank will have same powers and duties, if will is made in Thailand, as those of competent official (nai amphoe) or, if will is made in foreign country, as those of Thai Diplomatic or Consular Officer. (C.C.C. 1669).

Witnesses.

Following cannot be witnesses to wills: minors, persons of unsound mind, persons adjudged quasi-incompetent and persons who are blind, deaf or dumb. (C.C.C. 1670).

Revocation.

Testator may at any time revoke his will. Revocation may be total or partial. (C.C.C. 1693). Unless otherwise declared in will by testator, all provisions of former will which are in conflict with latter will are deemed to have been revoked but those not in conflict will still remain in force. (C.C.C. 1697). If property which is subject of will has been intentionally transferred to third person or destroyed by testator, testamentary disposition of such property is deemed to have been revoked. (C.C.C. 1696).

Foreign Wills.

Will made by foreigner in Thailand is valid if made in form prescribed by C.C.C. or in form prescribed by his law of nationality. (C.O.L. 40).

13 FAMILY

13.01 ADOPTIONS:

Governed by C.C.C. and Act for Adoption of Minor, B.E. 2522 (A.D. 1979).

Conditions.

Person not less than 25 years of age may adopt another who is at least 15 years younger. (C.C.C. 1598/19). If minor is to be adopted, consent of his parents or, in case one of his parents has died or been deprived of parental power, of his living father or mother who has parental power is required. If there is no such person to give consent or such person cannot express consent or unreasonably refuses to give his consent, or has adversely affected health, progress and welfare of minor, court may, upon application of minor's legal representative, person intending to be adoptor, or public prosecutor, allow adoption. (C.C.C. 1598/21). For minor having been deserted and taken care of by institution for child welfare under law on child welfare and protection, consent for adoption must be obtained only from said institution. (C.C.C. 1598/22). In case person to be adopted is 15 years of age or over, his consent is also required. (C.C.C. 1598/20). Married person may adopt or be adopted provided consent of other spouse is obtained, but consent is not required if spouse cannot express consent or has been missing for no less than one year in which case, application for court's permission must be made. (C.C.C. 1598/25). Concurrent adoption by person other than spouse of adoptor of minor who is adopted child of adoptor is prohibited. (C.C.C. 1598/26). Unless permission of Minister of Ministry of Social Development and Human Security is obtained, it is offense to take or send minor out of Thailand for purpose of adoption abroad. (A.A.M. 18).

Proceedings.

Adoption is valid only upon registration with competent government official. (C.C.C. 1598/27). If minor is to be adopted, person to adopt must comply with all rules and procedures provided in Act. (A.A.M. 5). Official may give order denying registration of adoption of any minor on ground that person to adopt is not qualified. Person to adopt may, within 30 days from date of receiving order, file application by motion with Court of First Instance for court's order overruling order of official. Applicant may also request Court to allow child to stay under his care pending court proceedings. Order of Court of First Instance, whether or not in favor of person to adopt, is final and non-appealable. (A.A.M. 26, 28).

Effect of Adoption.

Adopted is deemed legitimate child of adoptor but his legal rights and duties toward his natural parents are not affected by adoption. After adoption, natural parents lose parental power, if any. (C.C.C. 1598/28). Being legitimate child, adopted has legal right of inheritance from adoptor. (C.C.C. 1627). However, adoptor has no legal right of inheritance from adopted. (C.C.C. 1598/29).

Dissolution.

Adoption may be dissolved upon mutual agreement of parties, if adopted is 20 years of age or over. (C.C.C. 1598/31). If adopted is minor, adoption may be dissolved: (a) by consent of adopted's natural parents, or (b) in case adoption was allowed by court, by court's permission upon application of interested person or public prosecutor. (C.C.C. 1598/31). Adopter cannot marry adopted. (C.C.C. 1451). Adoption is dissolved upon marriage between adoptor and adopted. (C.C.C. 1598/32). Under requirements provided by law, court may also dissolve adoption in action for dissolution of adoption brought by either adoptor or adopted. (C.C.C. 1598/33). Adopted who is under 15 years of age may not bring action for dissolution of adoption without consent of person whose consent is required for adoption. (C.C.C. 1598/35). After death of adopter or dissolution of adoption, all rights and duties between adopted and natural parents revive. (C.C.C. 1598/37).

13.02 DIVORCE:

Marriage may be terminated by death, divorce, or annulment by court. Divorce can be effected either by mutual consent or court judgment. (C.C.C. 1501, 1514).

Divorce by mutual consent must be made in writing, certified by signatures of at least two witnesses, and registered with competent government official by spouses. (C.C.C. 1514, 1515).

Divorce by Judgment of Court.

Court may, on application by either spouse, grant divorce on following grounds: (a) Maintenance or recognition by either spouse of another as wife or husband, or adultery, or habitual sexual intercourse with another person; (b) misconduct; (c) physical cruelty or gross insult to other spouse or his or her ascendants; (d) desertion for more than one year; (e) final court sentence of more than one year imprisonment for offense without other spouse's participation, consent or knowledge; (f) spouses voluntarily live separately for more than three years due to inability to peacefully cohabit or by court order; (g) adjudication of disappearance by court or spouse having left domicile for more than three years and it is not known whether he or she is alive; (h) failure to give proper maintenance and support or committing acts seriously adverse to relationship of spouses; (i) insanity for over three years without likelihood of cure so that continuance of marriage cannot be expected; (j) breaking of bond of good behavior executed by him or her; (k) incurable, communicable, and dangerous disease which may cause injury to other; and (l) physical disability so as to be permanently unable to cohabit as husband and wife. (C.C.C. 1516). Right to institute action for divorce is waived by act of forgiveness by spouse. (C.C.C. 1518).

Divorce Involving Aliens.

Divorce by mutual consent is valid if permitted by laws of nationalities of spouses. (C.O.L. 26). Divorce may be effected by judgment of Thai court only when laws of nationalities of spouses permit termination of marriage by divorce. Grounds for divorce are those provided by law of place where divorce action is instituted. (C.O.L. 27).

Custody and Support of Children.

Divorce agreement should contain provisions concerning custody of children and amount of contribution which either spouse or both spouses will make to support children. In absence of such provisions or if agreement on such provisions cannot be reached, court must decide such matters. (C.C.C. 1520, 1522). Man or woman who does not obtain custody of child still has right to continue such personal relations with child as may be reasonable according to circumstances. If there is change of circumstance or it appears that person having custody of any child behaves himself or herself improperly, court may appoint new guardian, after taking into consideration happiness and interest of child. (C.C.C. 1521).

Corollary Relief.

If one spouse is found to have been solely responsible for ground of action for divorce and divorce results in other spouse's insufficient income to support himself or herself, court may, upon application made by such spouse in complaint or counterclaim in action for divorce, require that spouse against whom finding of responsibility for divorce has been rendered make payment of support to other spouse taking into consideration ability of grantor and condition of life of receiver. (C.C.C. 1526). If cruelty or gross insult, desertion, acts seriously adverse to relationship of spouses or failure to give proper maintenance and support which is ground of particular action for divorce is intentionally created by responsible spouse in such action such that action for divorce is inevitable, other spouse is entitled to compensation. (C.C.C. 1524).

Division of Property.

Upon divorce, man and woman must be equally liable for common debts and their properties must be divided equally between them. (C.C.C. 1533, 1535). Following properties are not subject to division: (a) Property acquired before marriage; (b) property for personal use, dress or ornament suitable for station in life, or tools necessary for carrying on profession; (c) property acquired by man or woman during marriage through will or gift unless it is declared by will or document of gift to be joint property; and (d) property given by man to woman as evidence of betrothal (e.g., ring or ceremonial money). (C.C.C. 1471).

13.03 HUSBAND AND WIFE:

Husband and wife are obliged to live together, unless authorized to live apart by court on grounds set forth by law, and mutually maintain and support each other according to their ability and station in life. (C.C.C. 1461).

Both husband and wife may freely engage in business or follow profession or employment without permission or consent of each other. However, debts incurred before or during marriage for which either spouse is held personally liable must be first paid out of his or her individual property not included in community property acquired after marriage and, if not enough, then paid out of his or her portion of community property (“sin somros”). (C.C.C. 1488).

Community Property.

Antenuptial agreement concerning ownership and administration of property of husband and wife executed prior to their marriage is enforceable if recorded in Marriage Register at time of marriage registration or made in writing signed by them and at least two witnesses and attached to Marriage Register which mentions its attachment. (C.C.C. 1466). Any particular clause in antenuptial agreement which is contrary to public order or good morals or provides that relations between parties regarding their property are to be governed by foreign law is void. (C.C.C. 1465).

Unless otherwise agreed in antenuptial agreement, community property (“sin somros”), as regulated by law, includes property acquired after time of marriage. Following properties (called “sin suan tua”) are excluded from community property: (a) Property of either spouse before marriage; (b) property for personal use, dress or ornament suitable for station in life, or tools necessary for carrying on profession of either spouse; (c) property acquired by either spouse during marriage through gift or inheritance, either by will or operation of law unless it is declared by will or document of gift to be joint property; and (d) property given by husband to wife as evidence of betrothal. (C.C.C. 1470, 1471). Each spouse may freely administer his or her individual property (“sin suan tua”). (C.C.C. 1473). Community property belongs to both husband and wife equally. Unless provided otherwise in antenuptial agreement, either husband or wife can manage community property without other spouse's consent, except for following which require joint consent (C.C.C. 1476): (1) Selling, exchanging, selling with right of redemption, engaging in hire-purchase, mortgaging, releasing mortgage or transferring right of mortgage on immovable property or mortgageable movable property; (2) creating or terminating whole or part of servitude, right of habitation, superficies, usufruct, or encumbrance of immovable property; (3) letting immovable property for more than three years; (4) lending money; (5) making gift, unless it is gift for charitable, social or moral purposes and is suitable to family condition; (6) making compromise; (7) submitting dispute to arbitration; (8) putting up property as guarantee or security with government official or court.

Neither spouse has right to dispose by will of more than his or her portion of community property. (C.C.C. 1481). Debts for which both spouses are jointly liable, such as (a) debts incurred in connection with business carried on by both spouses in common; (b) debts incurred in connection with management of affairs necessary for family, such as maintenance and medical expenses of household, proper education of children, etc.; or (c) debts incurred by either spouse only for his or her own benefit but ratified by other, may be paid out of both community property and their individual property. (C.C.C. 1489, 1490). Upon death or bankruptcy adjudication of either spouse or divorce, community property will be equally divided between spouses. (C.C.C. 1491, 1533, 1625).

13.04 INFANTS:

Age of majority for both sexes is 20 but upon marriage, minor of at least 17 years of age (which is legal age for marriage) is automatically emancipated. (C.C.C. 19, 20, 1448).

Capacity.

Juristic acts performed by minor without consent of his legal representative (parents or guardian) are voidable, except for those strictly personal, or suitable to his condition in life and actually required for his reasonable needs, or which entitle him to certain rights or free him from certain duties. (C.C.C. 21–24). Consent of legal representative is not required for making of will by minor of at least 15 years of age. (C.C.C. 25). Minor who has been permitted to carry on one or more businesses by legal representative has full capacity in relation to such businesses. (C.C.C. 27).

Avoidance and Ratification.

Voidable acts of minor may be either avoided by minor himself or his legal representative or ratified by his legal representative or, after he attains majority, by minor himself. (C.C.C. 175, 177). Voidable act may not be avoided more than one year after minor attains majority or ten years after act is done. (C.C.C. 181).

13.05 MARRIAGE:

Registration of Marriage.

Marriage shall be effected only upon registration in person (not by attorney-in-fact) at any amphoe (district office) in Thailand. (C.C.C. 1457, 1458). Each spouse is given marriage certificate by registrar. Common law marriage is not recognized under Thai law.

Marriage can take place only when both man and woman are 17 years of age. However, court may, for appropriate reasons, allow them to marry before attaining such age. (C.C.C. 1448).

Consent Required.

In case of marriage of minor, consent of following persons is required: (1) Both parents, if they are still alive; (2) only one parent, if other is no longer living or is unable to give consent, or under circumstances that make minor unable to ask for such consent from both parents; (3) adoptive parent, if minor is adopted child; (4) guardian, if there is no person to give consent under (1), (2) and (3) or such person is deprived of parental power. (C.C.C. 1436).

Giving consent to marriage may be made by: (1) Affixing signature(s) in Register at time of registration of marriage; (2) written consent; and (3) verbal declaration before two witnesses. Once consent has been given, it cannot be revoked. (C.C.C. 1455).

Minor may file application with court for its consent to marriage if there is no authorized person to give consent, or such person refuses or is unable to give consent, or minor is unable to ask for consent. (C.C.C. 1456).

Prohibited Marriages.

Marriage is prohibited if: (1) man or woman is insane or adjudged incompetent (C.C.C. 1449); (2) they are blood relations in direct ascendant or descendant line, or brother or sister of full or half blood, without regard as to legitimacy of relationship (C.C.C. 1450); (3) between adopter and adopted (C.C.C. 1451); and (4) man or woman is already spouse of another person (C.C.C. 1452).

Widow or divorced woman cannot register new marriage within 310 days after termination of previous marriage, unless: child has been born during such period; divorced couple remarry; there is valid doctor's certificate declaring that she is not pregnant; or court order allows marriage. (C.C.C. 1453).

Child born of parents who are not married is deemed to be legitimate child of mother. (C.C.C. 1546). Father may legitimize child by marrying mother, or with consent of child and mother, register child as his legal child or request court order. (C.C.C. 1547).

Foreign Marriages.

Marriage in foreign countries between Thais or Thais and foreigners will be recognized in Thailand if effected according to Thai law at Thai embassies or consulates, or according to law of country where marriage takes place. (C.C.C. 1459).

14 FOREIGN TRADE AND COMMERCE

14.01 EXCHANGE CONTROL:

Exchange control restrictions are set forth in Exchange Control Act, B.E. 2485 (A.D. 1942) as amended from time to time, empowering Ministry of Finance and Bank of Thailand to issue relevant regulations and notifications to control inward and outward remittance of foreign exchange, and are administered by Bank of Thailand under supervision of Ministry of Finance.

As general rule, all matters involving foreign currency are regulated by and require permission of Bank of Thailand. In particular, except for sale of foreign exchange by authorized dealers (i.e. authorized banks, companies or persons) which have been authorized and delegated certain powers to approve certain foreign exchange transactions on behalf of Bank of Thailand, no person other than such authorized dealers may buy, sell, lend, exchange or transfer any foreign exchange without permission of Bank of Thailand.

After May 22, 1990 foreign exchange control was considerably relaxed because of major liberalization by Bank of Thailand. Thailand's international financial position was elevated to Art. 8 status under International Monetary Fund Agreement. Subsequently, further regulations announced by Bank of Thailand extended scope of liberalization to include bank deposits, trade and other related transactions. At present, several transactions in foreign currency are under less strict control and can be performed merely upon obtaining approval of authorized commercial banks which are normally granted if applicants provide reasonable grounds for remittance and properly follow required procedures.

On July 2, 1997, Thailand's long-standing policy of tying value of Baht to U.S. Dollar was discontinued and Baht was allowed to “float”, effecting de facto devaluation. Baht's value is now determined by market forces.

Permitted Transactions.

Unlimited amounts of Thai Baht or foreign currency may be brought into Thailand; however, as general rule, such foreign currency must be sold or converted into Thai Baht or deposited into foreign currency account with authorized financial institutions located in Thailand within 360 days from date of receipt. Rule does not apply to foreigners temporarily staying in Thailand for not more than three months, foreign embassies, and international organizations.

Under following conditions Thai Baht may be taken out of Thailand without obtaining any further permission of Exchange Control Office of Bank of Thailand: (i) Into Vietnam and countries immediately bordering Thailand, i.e. Laos, Cambodia, Malaysia and Myanmar, up to Baht 500,000 per trip; or (ii) into other countries up to Baht 50,000 per trip.

Transactions to be Approved by Authorized Commercial Banks.

Commercial banks are authorized by Bank of Thailand to approve certain foreign exchange transactions, in its name, including: (a) Remittance of unlimited amount in payment of imported goods; however, importer importing goods valued at more than Baht 500,000 or its equivalent per transaction must submit application to customs official when submitting bill of lading; (b) remittance of up to aggregate of US$100 million or its equivalent per year for direct foreign investment (investor must have management control) or for lending to subsidiaries or parents in foreign countries (i.e. subsidiary or parent in which at least 10% of shares owned by parent company or subsidiary company resident in Thailand), and subject to certain conditions, listed companies on Stock Exchange of Thailand with positive shareholder’s equity value may remit funds for direct investment without limit and for lending to subsidiaries or parents in foreign countries of up to US$100 million for each case per year; (c) remittance of up to US$1,000,000 or its equivalent per year per remittee to relatives or family members permanently living abroad; (d) remittance of up to US$1 million or its equivalent belonging to Thai national permanently living abroad per year; (e) remittance of inherited money to heir living permanently abroad up to US$1 million or its equivalent per year per remittee; (f) remittance of unlimited amount in repayment of foreign loan and payments of accrued interest and other related fees and cost, net of all taxes, having proper documentary evidence; (g) unlimited remittance of proceeds from sale of shares having required documentary evidence; (h) remittance of unlimited amount in payment of certain types of service fees, including transport and communication, having appropriate documentary evidence; and (i) remittance of up to US$5 million for purchasing immovable properties per person per year; (j) sale of foreign currency to any buyer for traveling purposes having appropriate documentary evidence, i.e. passport and air ticket or ticket of traveling vehicle. When purchasing foreign currency for one of aforesaid purposes in amount exceeding US$20,000 or its equivalent, application must be submitted to authorized banks, together with appropriate supporting documentary evidence.

If purchasing any lesser amount, or equivalent according to market rate, purchasers are generally required to complete Foreign Currency Purchase Form as documentary evidence of currency sale.

Transactions to be Approved by Bank of Thailand.

Foreign exchange transactions involving amounts in excess of above limitations, or for purposes other than those mentioned above, require approval of Bank of Thailand. Remittance of foreign currency for investment in foreign securities or immovable property also requires Bank of Thailand approval.

14.02 FOREIGN EXCHANGE:

See topic 14.01 Exchange Control.

14.03 FOREIGN INVESTMENT:

Forms of Business Organization.

Any form of business organization may be utilized by foreign investors. Nonetheless, because of restrictions on alien participation in certain business activities in Thailand, joint venture with local partners may in some cases be required for foreign investor and will have effect of limiting percentage of his investment in prospective project. (See category 16 Immigration, topic 16.01 Aliens, subhead Companies Owned or Controlled by Aliens.) Under Thai law, joint venture can be organized in five different forms, as follows: (a) ordinary partnership; (b) registered ordinary partnership; (c) limited partnership; (d) private limited company; and (e) public limited company. Joint venture has, except for corporate income tax purposes, no defined legal meaning under Thai law. It is not recognized by law as distinct form of business organization and is merely general term used in describing agreement or contractual relationship between two or more parties (usually from two or more countries) for conduct of business or particular project which in order to carry on its business must take form of business organization recognized by law as mentioned above.

Investment Incentives.

Investment Promotion Act, B.E. 2520 (A.D. 1977), as amended by Investment Promotion Act (No. 2), B.E. 2534 (A.D. 1991) and Investment Promotion Act (No. 3), B.E. 2544 (A.D. 2001), offers various investment incentives to foreign and domestic investment considered important and useful to social and economic development of Thailand. Act is administered by Board of Investment (B.O.I.). B.O.I.'s general objective is to encourage both Thai and foreign investors to locate their projects in Thai provincial areas. Incentives for projects in provinces are more lucrative than incentives for projects in developed areas. Some incentives are not available for certain types of projects in developed areas; and certain types of projects in developed areas cannot qualify for any incentives. Incentives are subject to various conditions stipulated by B.O.I., such as amount and source of capital, value added of sales revenue, debt to equity ratio, ISO 9000 international standard certification, project location, export requirements, usage of local raw materials, efficiency and capacity of production processes, and environmental protection systems. Major incentives available under Act include: (a) guarantees against nationalization, against price control, against competition of new state enterprises; (b) permission to own land necessary for operation notwithstanding other laws to contrary, and to bring into Thailand foreign experts and skilled workers to work on promoted projects (see category 16 Immigration, topics 16.01 Aliens and 16.02 Immigration); (c) exemption from corporate income tax for period of three to eight years (capped to 100% of project investment excluding cost of land and working capital); and reduction thereof by 50% for five years after exemption period; (d) whole or partial exemption from import duties on machinery and raw or essential materials used in export products for period of from one to five years; and (e) protections such as import ban on competitive products. Additional incentives from other government organizations under other laws are available for goods produced for export.

In addition, certain activities are eligible to receive nontax incentives; included among such activities are trade and investment support offices, whose activities are permitted to go beyond activities permissible for regional offices (see category 2 Business Organizations, topic 2.03 Companies, subhead Regional Office) to end that Thailand will be regional center for trade and investment, and range from engineering, testing and training services to consulting and software design. Approved projects in this activity must be limited companies established under Thai law with minimal annual operation expenses of Baht 10 million.

In 2001, Thai Government announced BOI would gradually be restructured to provide increased support for domestic investors and small and medium-sized enterprises, provide match-making services between industry and investors, develop knowledge-based industries, and increase marketing activities. Projects already receiving privileges and benefits would not be affected by adjustment.

Special Tax Incentives.

In 2002, Finance Ministry issued regulations to formalize tax incentives for venture capital funds, including tax exemptions on dividend payments and share transfers. To be eligible for benefits, venture capital firm must be new limited or public limited company with at least Baht 200 million registered capital specially established for venture capital management as licensed by Securities and Exchange Commission. In same year, Revenue Department implemented tax incentive scheme aimed at attracting foreign entities to establish regional operating headquarters (ROH) in Thailand. Tax incentives offered to qualifying ROH, which are claimed to be highly comparative with those of other countries in region, include reduction of tax on income, royalties, loan interest, and tax exemption on dividends received from affiliated companies in region which are served by ROH. Income derived by expatriate employees for work performed for ROH outside Thailand is also tax exempted.

Industrial Estate Authority.

In order to alleviate strain on Bangkok's infrastructure and to spread benefits of development to countryside, Industrial Estate Authority of Thailand Act, B.E. 2522 (A.D. 1979), as amended in 1991 and 1996, provides assistance and special incentives for investors who operate within industrial estate. Permit to operate business in industrial estate must be obtained from governor of Industrial Estate Authority of Thailand. Major incentives available under Act include: (a) right to own land in industrial estate; (b) exemption from import duties on necessary machinery and equipment, raw materials, or other items used in manufacture of goods; (c) exemption from, and refund of, taxes on any goods sent into export industrial zone for use within export industrial zone. Location of industrial estate will determine how lucrative incentives will be. If company is promoted by B.O.I., additional incentives can be obtained under Investment Promotion Acts cited and described above.

14.04 FOREIGN TRADE REGULATIONS:

Foreign trade is essentially regulated by Act Controlling Importation and Exportation of Goods, B.E. 2522 (A.D. 1979). As general rule, imports and exports are free from external regulation, subject to controls by Ministry of Commerce in form of licensing requirements. Controls of imports and exports also exist in several other laws such as Merchant Marine Promotion Act, B.E. 2521 (A.D. 1978) and (No. 2) B.E. 2548 (A.D. 2005), Export Standards Act, B.E. 2503 (A.D. 1960), and (No. 2) B.E. 2522 (A.D. 1979), etc. Violators of regulations may be subject to criminal penalties.

Import Controls.

Minister of Commerce, with approval of Cabinet, has authority to specify classes of goods which are subject to import controls under Act Controlling Importation and Exportation of Goods, B.E. 2522 (A.D. 1979). Goods subject to control require import licenses from Ministry of Commerce.

Export Controls.

Minister of Commerce, with approval of Cabinet, has authority to specify classes of goods which are subject to export controls under Act Controlling Importation and Exportation of Goods, B.E. 2522 (A.D. 1979). Goods subject to control require export licenses from Ministry of Commerce. Export Standards Act, B.E. 2503 (A.D. 1960) and (No. 2) B.E. 2522 (A.D. 1979) further subjects certain classes of goods to export license from Commodity Standards Office of Ministry of Commerce. The ASEAN Free Trade Area negotiations, together with the successful conclusion of GATT Uruguay Round in 1994 and Thailand's accession to World Trade Organization in 1995 have brought about many changes in Thailand's tariff regime. Number of goods subject to control, as well as ad valorem tariff schedule rates, have fallen considerably in past few years.

15 HEALTH

15.01 COSMETICS:

Under Cosmetics Act, B.E. 2535 (A.D. 1992), cosmetic products are classified into three categories: (1) Specially-Controlled Cosmetics, (2) Controlled Cosmetics and (3) General Cosmetics. However, to comply with ASEAN Harmonized Cosmetics Regulatory Scheme, Ministry of Public Health has issued Notification re: Definition of Controlled Cosmetics dated Sept. 25, 2008, which provides that all cosmetics products are classified as Controlled Cosmetics. Therefore, importer or manufacturer of any cosmetic product must notify FDA of details of product and pay annual fee before importation or manufacture. Manufacturer and importer of General Cosmetics before announcement of Notification must notify Food and Drug Administration (FDA) of their products before Dec. 31, 2010.

15.02 FOOD AND DRUGS:

Health Product Registrations.

FDA and Ministry of Public Health supervise and control health product registrations.

Pursuant to Medicine Acts, B.E. 2510 (A.D. 1967), (No. 2) B.E. 2518 (A.D. 1975), (No. 3) B.E. 2522 (A.D. 1979), (No. 4) B.E. 2527 (A.D. 1984) and (No. 5) B.E. 2530 (A.D. 1987), medicine products cannot be imported into, or manufactured in, Thailand for sale unless applications for import or manufacturing licenses have been filed with and approved by FDA. Medicine product labels need to be prepared in accordance with FDA regulations issued under Medicine Acts and submitted to FDA for consideration and approval before they can be used with medicine products. Formula registrations in respect of such imported or manufactured products must also be registered with FDA. Furthermore, sale of medicine product needs sale license. For new medicine, clinical trial for such new product shall be carried out in Thai hospital in order to ensure that such new medicine is safe, not harmful to consumers. Medicine advertisement is also under FDA's strict control and approval.

FDA has responsibilities to control and supervise importation, exportation, manufacture and possession of products with hazardous substances for household or consumer's use by virtue of Hazardous Substance Act B.E. 2535 (A.D. 1992), (No. 2) B.E. 2544 (A.D. 2001) and (No. 3) B.E. 2551 (A.D. 2008). Additionally, FDA also controls, supervises and grants licenses for importation, manufacture and/or sale of medical equipment products in accordance with Medical Equipment Act, B.E. 2551 (A.D. 2008) and psychotropic substance products by virtue of Psychotropic Substances Act B.E. 2518 (A.D. 1975), (No. 2) B.E. 2528 (A.D. 1985), (No. 3) B.E. 2535 (A.D. 1992) and (No. 4) B.E. 2543 (A.D. 2000).

Regarding foods products, FDA controls manufacture and importation of their sale. By virtue of Food Act, B.E. 2510 (A.D. 1967), importer or manufacturer of food product must file application and obtain FDA's approval and license before importing or manufacturing food product in Thailand. Food label must be in compliance with Food Act and its regulations, and FDA's approval of product label must be obtained before food product can actually be imported or manufactured for sale. Formula registrations for controlled food products need to be filed and approved by FDA. Food advertisement is also under FDA's strict control and approval.

15.03 HEALTH AND SAFETY IN WORK PLACES:

Labour Protection Act 1998 provides for strict labour protection relating to occupational health and safety in work environment, especially for female employees and employees under 18 years of age.

15.04 PUBLIC HEALTH:

Constitution of Thailand provides for equal right to gain access to public health service. Under constitution, person shall enjoy equal right to receive standard public health service, and indigent shall have right to receive free medical treatment from public health centers of State, as provided by law. Public health service by State shall be provided thoroughly and efficiently and, for this purpose, participation by local government organizations and private sector shall also be promoted insofar as it is possible. Furthermore, State shall prevent and eradicate harmful contagious diseases for public without charge, as provided by law. In order to achieve aforesaid objectives, State shall thoroughly provide and promote standard and efficient public health service.

In 2001, Thai Government announced new public health policy and project generally known as “Health Care Security For All” and “30 Baht Project for Curing All Diseases” (Baht is Thai currency). National Health Care Security Act, B.E. 2545 (A.D. 2002) has now become law. Act is designed to provide for system and mechanism to accomplish aforesaid policy and project and to provide people with sustainable health care security system.

Public Health Administration.

Ministry of Public Health is responsible for public health administration and operation. Under Public Health Act, B.E. 2535 (A.D. 1992) amended by Public Health Act No. 2 B.E. 2550 (A.D. 2007), Minister of Public Health upon recommendation of Public Health Board shall issue ministerial regulations on public health matters and appropriate standard of living for people. Local authorities shall comply and work in accordance with such ministerial regulations and shall have authority to issue bylaws for such purposes including garbage elimination, building sanitation, prevention of any nuisance, control of animals, control of any enterprises harmful to health, control and licenses for market, food storage and distribution places, and control of street vendors.

Furthermore, under Act for Cleanliness and Orderliness of the Country, B.E. 2535 (A.D. 1992) Minister of Interior and Minister of Public Health are empowered to issue regulations for preservation of cleanliness and orderliness including preservation of cleanliness of public places and premises, maintenance of grass fields and plants on public roads and premises, prohibition of leaving garbage in public places and premises and maintenance of orderliness. Local authorities are responsible for enforcement of regulations.

16 IMMIGRATION

16.01 ALIENS:

Major laws in this area are: Nationality Act, B.E. 2508 (A.D. 1965) as amended by Nationality Act (No. 2), B.E. 2535 (A.D. 1992), (No. 3), B.E. 2535 (A.D. 1992), and (No. 4), B.E. 2551 (A.D. 2008), Alien Registration Act, B.E. 2493 (A.D. 1950) as amended by Alien Registration Act (No. 2), B.E. 2495 (A.D. 1952) and (No. 3), B.E. 2497 (A.D. 1954), Alien Employment Act, B.E. 2551 (A.D. 2008), Royal Decree Naming Occupations and Professions Prohibited to Aliens, B.E. 2522 (A.D. 1979) as amended by Royal Decree Naming Occupations and Professions Prohibited to Aliens (No. 2), B.E. 2536 (A.D. 1993), (No. 3), B.E. 2543 (A.D. 2000) and (No. 4), B.E. 2548 (A.D. 2005); and Foreign Business Act, B.E. 2542 (A.D. 1999) (``FBA'').

Alien is person not of Thai nationality. (N.A. 4; for definition of “alien” under FBA see subhead Corporations Owned or Controlled by Aliens, infra). Alien cannot hold any office and may not exercise any municipal, parliamentary or other franchises.

Actions by Aliens.

See category 5 Civil Actions and Procedure, topic 5.01 Actions.

Actions Against Aliens.

See category 5 Civil Actions and Procedure, topic 5.01 Actions.

Civil Rights.

Unless specifically restricted or denied by law, aliens enjoy same civil rights as Thai nationals. In general, certain restrictions in business and employment are imposed on aliens, that is, aliens are not allowed to engage in certain businesses (Foreign Business Act, B.E. 2542 [A.D. 1999]) or to perform certain occupations (Alien Employment Act, B.E. 2551 [A.D. 2008] [``Act'']). Under Act, any work alien may perform must be prescribed in Ministerial Regulations, taking into account national security, opportunity for Thai nationals to profess such work and need for alien labor in development of country. At present, Ministerial Regulations prescribing such work have not yet been issued. (They will be issued before Feb. 23, 2010, two years from date of enforcement of Act.) Without these Ministerial Regulations, all Royal Decrees, Ministerial Regulations, Notifications, Resolutions and Orders issued under old Act are still enforceable insofar as they do not contradict Act. Schedule Annexed to Royal Decree Stipulating Work in Occupations and Professions Prohibited to Aliens B.E. 2522 (A.D. 1979) issued under old Act, which closes 39 occupations to foreigners and reserves them for Thais, is still enforceable until Ministerial Regulations under Act are issued.

Aliens are prohibited from owning land in Thailand. However, several new property laws intended to aid recovery of Thai economy by increasing ability of aliens to own or lease land and condominiums have gone into effect. Land Code Amendment Act (No. 8), B.E. 2542 (A.D. 1999) entitles alien investors who bring at least Baht 40 million into Thailand to invest in business which benefits Thai economy, promotes social welfare, or is business promoted by Board of Investment to own up to one *rai* (1,600 sq. meters) of land for residential purposes. Money must be invested in Thailand for minimum of three years. Condominium Act (No. 4), B.E. 2551 (A.D. 2008), entitles certain categories of foreigners to acquire condominium units in Thailand, provided that foreign ownership in condominium project does not exceed, in aggregate, 49% of total area of all condominium units in condominium building. Exemption to alien ownership rule applies to Board of Investment and Industrial Estate Authority of Thailand projects, wherein special privileges are granted to alien companies to buy land. In addition, alien oil companies which meet requirements of Petroleum Act may also own land.

Naturalization is governed by Nationality Act, B.E. 2508 (A.D. 1965) as amended by Nationality Act (No. 2), B.E. 2535 (A.D. 1992), (No. 3), B.E. 2535 (A.D. 1992) and (No. 4), B.E.

2551 (A.D. 2008). Alien may apply for naturalization provided he has reached age of majority under both Thai law and law of country of which he is national, is of good behavior, has sound occupation, has been domiciled in Thailand for consecutive period of not less than five years at date of submission of application, and has sufficient knowledge of Thai language as prescribed by Ministerial Regulations. (N.A. 10). Above requirements shall not apply to applicant who: (a) has rendered distinguished service to Thailand or performed acts beneficial to government as deemed appropriate by Minister of Interior; (b) is child, wife, or husband of person who has been naturalized as Thai or of person who has resumed Thai nationality; or (c) was former Thai national. Granting or rejecting application for naturalization is at discretion of Minister of Interior.

Companies Owned or Controlled by Aliens.

Companies 50% or more owned by aliens are regarded as aliens under FBA. “Alien” is (1) ordinary person who has no Thai nationality; (2) juristic person not registered in Thailand; (3) juristic person registered in Thailand of following description: (a) juristic person whose capital shares are held by person under (1) or (2) from one-half thereof, or juristic person in which (1) or (2) has invested at least one-half total capital of said juristic person, (b) limited partnership or registered ordinary partnership whose managing partner or manager is person under (1); (4) juristic person registered in Thailand whose capital shares from one-half thereof are held by persons under (1), (2) or (3) or juristic person in which (1), (2) or (3) have invested at least one-half of total capital of said juristic person. FBA prohibits or restricts operation of any specifically enumerated businesses by aliens. See also categories 2 Business Organizations, topic Companies, subhead Foreign Companies; Business Regulation and Commerce, topic Licenses, Business and Professional; Foreign Trade and Commerce, topic Foreign Investment. For more information concerning FBA, see Department of Business Development website: http://www.dbd.go.th/.

16.02 IMMIGRATION:

Visa.

Immigration into Thailand is governed by Immigration Act, B.E. 2522 (A.D. 1979) as amended by Immigration Act (No. 2), B.E. 2523 (A.D. 1980) and No. 3, B.E. 2542 (A.D. 1999) and is administered by Immigration Bureau of Royal Thai Police. Unless otherwise exempted, foreigners must obtain proper visa from Thai embassy or consulate prior to entering Thailand. Foreigners in transit and tourists from over 100 countries, including U.S.A. and Canada, which have agreements with Thailand concerning visits of not more than 15, 30 or 90 days depending upon country, are not required to obtain visas before entering Thailand. However, entry permission must be obtained at airport, seaport or land border checkpoint of entry. According to Order of Royal Thai Police No. 778/2551 (A.D. 2008), foreigner whose nationality falls under category for which Minister of Foreign Affairs permits temporary stay for tourism purposes, by consent of Cabinet, may be granted multiple entries. Permissible duration of stay for each entry must not exceed 30 days from entry date, except in case of entering Thailand through immigration checkpoint at border with neighboring country (by all means except airplane), for which permissible duration of stay for each entry must not exceed 15 days from entry date. Exception is given for Malaysian citizens who arrive from Malaysian border whose permissible duration of stay must not exceed 30 days from entry date.

Permissible duration of stay is always entered in passport. There are various types of visas, with each category restricted to purpose for which visa was issued. Foreigners wishing to apply for work permit in Thailand must obtain nonimmigrant business visa, which will generally be granted for 90 days, from Thai embassy or consulate. Multiple-entry permit should be requested while submitting application if foreigner expects to travel out of Thailand frequently during 90-day period or re-entry permit can be obtained from Immigration Bureau in Thailand; otherwise visa will be automatically cancelled. Re-entry permit must be used within validity period of visa; otherwise it will be void.

Thai embassies/consulates nearest to Thailand are in Singapore, Malaysia (Kuala Lumpur and Penang), Vietnam, Laos and Hong Kong. Tourist and nonimmigrant visas usually take one day for issuance depending on number of applications processed by consulate. For more information concerning visas, see Immigration Bureau website: http://www.immigration.go.th/ and Ministry of Foreign Affairs website: http://www.mfa.go.th/.

Work Permit.

Foreigners working in Thailand are subject to Alien Employment Act, B.E. 2551 (A.D. 2008). Foreigners who intend to work in Thailand must obtain valid work permit, issued principally by Department of Employment, Ministry of Labor. Unless individual or work performed falls within exception of Act, foreigner cannot perform any act of work or service unless work permit has been obtained. Certain foreigners exempt from work permit requirements include members of diplomatic or consular missions, representatives or officials of United Nations, persons performing duties or missions under agreement between government of Thailand and another foreign government or international organization, persons with special permission from government of Thailand to enter and perform duties or missions in Thailand, etc. Exceptions to Act permit foreigners to perform work deemed necessary and urgent which can be completed within 15 days. However, Department of Employment must be informed before work begins. Term “work” is defined very broadly, i.e. “working by exerting one's physical energy or employing one's knowledge, whether or not for wages or other benefits”. Theoretically, even volunteer or charity work requires work permit.

Royal Decree Naming Occupations and Professions Prohibited to Aliens, B.E. 2522 (A.D. 1979) (still enforceable) lists 39 occupations solely reserved for Thais which are closed to foreigners. These include labor work; agriculture, forestry or fishery; brokerage or agency, except brokerage or agency in international trading; accountancy; civil engineering; architectural work; and legal service, among others. Amendments under Royal Decree Naming Occupations and Professions Prohibited to Aliens (No. 2), B.E. 2536 (A.D. 1993); (No. 3), B.E. 2543 (A.D. 2000) and (No. 4), B.E. 2548 (A.D. 2005) provided certain exceptions. Specifically, general prohibitions do not apply to labor work in fishing boats, foreign laborers who have entered into Thailand under special agreements, foreign laborers whose status has been prescribed as legal immigrants, foreign laborers who possess residence certificate, and arbitration work.

Applicant for work permit must either hold nonimmigrant visa or permanent residence permit. Nonimmigrant visa must be obtained from Thai embassy or consulate prior to entering Thailand. Application for permanent residence permit may be made only after foreigner has resided in Thailand for at least three consecutive years under extension of stay granted by Immigration Bureau. Employer or potential employer may file application for advance permission for foreigner to work before he enters Thailand. However, work permit itself will not be issued until foreigner enters Thailand on valid nonimmigrant visa. According to Act, work permit can be granted up to two years (except work permit granted under special laws which are valid equal to period granted to work under such laws). Nevertheless, validity of work permit shall not render extension of stay in Thailand under immigration law. Also, work permit is good only for particular job and employer for which it was issued and within geographic limitations specified in work permit.

Penalties for working without work permit or doing work not specified in permit include imprisonment not exceeding five years or fine up to Baht 100,000, or both. For more information concerning work permits, see Ministry of Labour website: http://www.mol.go.th/.

17 INSURANCE

17.01 INSURANCE COMPANY:

Insurance industry was supervised and regulated by Ministry of Commerce (MOC) through Casualty Insurance Act B.E. 2535 (A.D. 1992) (CIA) and Life Insurance Act B.E. 2535 (A.D. 1992) (LIA) until recent amendments imposed by Casualty Insurance Act (No. 2) B.E. 2551 (A.D. 2008) and Life Insurance Act (No. 2) B.E. 2551 (A.D. 2008), which transferred supervisory and regulatory role of MOC to Ministry of Finance (MOF). These acts permit foreign life and loss insurance companies to operate branch offices in Thailand subject to certain conditions. Office of Insurance Commission (OIC), independent government organization, was established in 2007 by enactment of Insurance Commission Act B.E. 2550 (A.D. 2007) to take over responsibility of day-to-day administration from Dept. of Insurance, MOC.

Pursuant to CIA and LIA as amended, insurance company must be public limited company. Relationships, in terms of shareholders, directors and administrators, with existing life insurance or casualty insurance companies are strictly prohibited.

Minimum registered and paid-up capital for life insurance company is Baht 500 million and is Baht 300 million for casualty insurance companies. Ordinary and preference shares must be of type bearing name of holder and with shares par value not exceeding Baht 100 per share. At least three-fourths of board members must be of Thai nationality, and foreign shareholding in insurance company must be less than 25% of total amount of shares having voting rights sold. Insurance Commission may permit holding by foreign persons of up to 49% of total amount of shares having voting rights sold and allow board members to consist of foreign persons in proportion exceeding one-fourth of total board members but proportion of foreign board members must be less than 50%. However, under certain specified events/circumstances, MOF, with recommendation of Insurance Commission, must have power to permit holding of shares and proportion of foreign board members other than as indicated in foregoing sentence, which permission may be granted with any condition or time restraint (§10 of LIA and §9 of CIA). Any shareholder found to hold shares in excess of such prescribed percentage may be required to rectify his shareholding within one month from date of notification by relevant life insurance company or casualty insurance company, as case may be (§12 of the Life Insurance Act and §11 of the Casualty Insurance Act). Existing insurance companies have certain period to comply with these additional requirements.

Foreign insurance company may apply for operating license by establishing branch office. Head office of applicant company must have been engaged in life insurance business for at least three years. Branch of foreign insurer cannot open another branch in Thailand. Brokers and agents also require license under c. IV of both Acts; and under A.B.A. (Alien Business Act) and alien employment laws, foreigners are prohibited from engaging in brokerage or agency professions with regard to insurance.

To promote integrity and competence of company, Board members, managers, or advisers to company must have “clean” business track-record and no prior convictions regarding offenses relating to property gained through dishonest means. Political servants, and generally civil servants, are prohibited from serving as Board members; however, exceptions are made if (i) civil servant purposely selected under §54 of Life Insurance Act B.E. 2535 (A.D. 1992) (L.I.A.) or §53 of Casualty Insurance Act (C.I.A.); (ii) civil servant granted approval by Minister; or (iii) company is state enterprise.

Fee for insurance licenses is Baht 4 million for life insurance and Baht 2 million for casualty insurance. Applicant must provide information from all minutes and papers detailing financial situation of company such as certificate of Partnerships and Companies Registrar showing registered capital of applicant and sample insurance policy showing premium rates and number and value of shares of all categories of company. Applicant must submit financial details; information on company's policy and plans concerning short-term and long-term operations of life insurance and casualty insurance businesses respectively, for no less than five years ahead, including expansion plans for branches in Bangkok Metropolis and regional areas; and human resources plan. For joint ventures, administrative work-plan is required if applicable. Various documents and certificates are also demanded to certify certain information respectively, for example, in regard to information on company's shares, copy of register of shareholders is required.

Insurance company must be required to place security deposit (i.e. Baht 20 million for life insurance business and Baht 3.5 million for each category of non-life insurance business such as fire insurance, maritime and carriage insurance, vehicle insurance) and maintain risk-based capital and liquid assets as required by laws. Besides cash deposits or pledges of Thai government bonds, required security deposits may include certificates, receipts or pass book of fixed deposit category (with deposit period of not less than one year, as issued by local bank to company as evidence of deposits), treasury bills issued by Ministry of Finance, bonds of government organizations or state enterprises, and bills of exchange or promissory notes (with repayment period of not less than one year, or in which government organization or state enterprise, or local bank is drawer or issuer).

In past several years, Thailand's life insurance industry has enjoyed substantial growth in value of insurance premiums received. This rise has been fueled by solid economic growth and by growing understanding among Thai middle-income owners about life insurance and casualty insurance. Government also promotes long-term saving through life insurance by allowing policyholders to deduct up to Baht 100,000 (recently increased from Baht 50,000) in income-tax calculations.

17.02 INSURANCE LAW:

General principles of Thai insurance law set out in Thai Civil and Commercial Code (“C.C.C.”). C.C.C. defines insurance contract as agreement between insurer and assured whereby insurer agrees to make compensation or pay sum of money in case of contingent loss or any other future event specified in contract and assured agrees to pay sum of money (premium). (§861). Contract is not binding unless assured has interest in event insured against. (C.C.C. §863).

Insurance contract is voidable if, at time of making, assured, or in case of life insurance, person on whose life or death payment depends, knowingly omits facts which would have induced insurer to raise premium or refuse to enter into contract, or knowingly makes false statements in regard to such facts. (C.C.C. §865 paragraph 1). Right of avoidance is extinguished if such right is not exercised within one month from time insurer had knowledge of ground of avoidance, or within five years from contract date. (C.C.C. §865 paragraph 2). If insurer would have known of undisclosed facts or false statements if insurer had exercised such care as may be expected from person of ordinary prudence, contract is valid. (C.C.C. §866).

Insurance contract not enforceable by action unless written evidence signed by party liable or his agent exists. (C.C.C. §867). Insurer not liable if loss or other event specified in contract is caused by bad faith or gross negligence of assured or beneficiary, or for loss resulting from inherent vice of subject insured, unless otherwise provided. Loss resulting from inherent vice means loss or damage resulting exclusively from fault, deficiency, defect, quality or characteristic in thing, fixed in object itself and not from without. For example, carrier would not usually be absolved from liability for loss of tomatoes damaged in transit on ground that tomatoes, being perishable, are subject to inherent vice. (C.C.C. §879). If loss caused by act of third party, insurer subrogated, up to amount paid by him, to rights of assured and beneficiary against such third person. (C.C.C. §880).

Any right to claim compensation time-barred if judicial proceedings not instituted within two-year period from date of loss. Any right to claim for payment or refund of premium time-barred if judicial proceedings not instituted within two years from date when right to payment or refund of premium became due. (C.C.C. §882).

18 INTELLECTUAL PROPERTY

18.01 COPYRIGHT:

Copyright is regulated by Copyright Act, B.E. 2537 (A.D. 1994), Royal Decree, Ministerial Regulations, Notifications of Ministry of Commerce and Notifications issued by Department of Intellectual Property (DIP).

Nature of Copyright.

In Thailand, copyright subsists in every original work of literature, drama, art, music, audiovisual materials, sound recordings, cinematographic materials, sound and video broadcasting, computer programs, disseminated sound or picture or other works in fields of literature, science, and the arts. “Literary works” has been defined to include specifically computer programs by Act itself. Copyright subsists in every original work if: (a) Author was at time of creating work, in case of unpublished work, or when work was first published, in case of published work, Thai citizen or resident at all times or most of time, in Thailand, or national or resident of member country of Berne Convention or TRIPs or (b) work was first published within Thailand or member country of Berne Convention or TRIPs, or was first published in nonmember country of Berne Convention or TRIPs and subsequently published in Thailand or in member country of Berne Convention or TRIPs within 30 days of first publication. (C.A. 4, 8).

Copyright protection does not extend to ideas, steps, processes or systems, methods of use or operation, concepts, principles, discoveries or scientific or mathematical theories. (C.A. 6). Author of work is owner of copyright subsisting in work. Copyright owner possesses exclusive right to take any action concerning work in which copyright subsists, including reproduction, adaptation, or dissemination of work to public. (C.A. 15). Author of copyright work is entitled to prohibit assignee or any person from distorting, shortening, adapting or doing anything detrimental to work causing damage to reputation or dignity of author. (C.A. 18). Copyright subsists automatically without any registration. However, copyrighted work and information concerning creation and publication of such work can and should be recorded with Department of Intellectual Property, Ministry of Commerce. Certificate of Copyright Recordation will be issued to applicant. When work is created while acting in capacity of officer or employee under hire of service, officer or employee is entitled to copyright, unless it is otherwise agreed in writing but employer is entitled to cause publication of work in accordance with purpose of hire of service. (C.A. 9). When work is created by contractor for commission, employer is entitled to copyright unless it is otherwise agreed by parties. (C.A. 10).

Performers' Rights.

Performers have exclusive rights to sound and video broadcasting or dissemination to public of performances, except when performance used in broadcasting or dissemination to public was recorded; recording of their unrecorded performance; reproduction of performance recorded without their permission or of that made for purposes other than those for which performers gave permission or of that which falls under exceptions to infringement of performer's rights. (C.A. 44). Performer shall have right to receive compensation provided that performer is resident or citizen of Thailand or substantial portion of performance occurred in Thailand or in member country of international convention on protection of performer's rights of which Thailand is also member. (C.A. 48). Performer's rights are protected for term of 50 years from last day of calendar year of performance or recording of performance. (C.A. 49). Assignment of performer's rights must be in writing, can be made either wholly or in part and, other than inheritance, if there is no period of time specified in assignment contract, it shall be deemed that assignment is for period of three years. (C.A. 51).

Assignment/License.

Copyright is transferable either in whole or in part and for limited duration or entire term of protection. (C.A. 17). Copyright owner may grant to another person license for reproduction, adaptation, dissemination to public of its copyrighted work or renting original or copy of computer program, audiovisual work, cinematographic work and sound recording with or without conditions. (C.A. 15[5]). Conditions shall not restrict fair competition as provided in Ministerial Regulations B.E. 2540 (1997) issued under Copyright Act B.E. 2537 (1994).

Term.

In general, copyright subsists for life of author and for additional period of 50 years after his death. If author is juristic person, copyright subsists for period of 50 years after work is first published or, if unpublished, after its creation. (C.A. 19).

Infringement.

Reproduction, adaptation, dissemination to public, rental of original or copy of work, publication of work by person who is not owner of copyright and without license from owner, all constitute infringement. (C.A. 15, 27, 28). Making of audiovisual material, cinematographic material, sound recording or sound and video broadcasting of sound and video broadcasting whether in whole or in part; rebroadcasting whether in whole or in part; or making sound and video broadcasting work to be heard or seen in public in return for payment of money or other commercial benefit are considered infringement of sound and video broadcasting. (C.A. 29). Computer program is infringed upon if reproduced, adapted, disseminated to public, or rented. (C.A. 30). Selling, possession for sale, offering for sale, renting, offering for rent, dissemination to public, distribution in manner prejudicial to rights of copyright owner, or importing or making order for importing into Thailand, by any person who is aware or should have been aware that particular work infringes copyrighted work is also infringement of copyright. (C.A. 31). Prescription period for (civil) action based on copyright infringement is three years from date copyright owner became aware of infringement and not more than ten years from date of infringement. (C.A. 63).

Exemptions.

There are certain exemptions from copyright infringement, e.g., act towards copyrighted work for research, study, or education (when not for profit), provided that such act neither conflicts with normal exploitation of work nor unreasonably prejudices lawful rights of owner. Since 2006, DIP initiated significant move to develop knowledge-based systems with intellectual property laws. As result, to strike balance between copyright owners' interests and interests of public, DIP issued general guidelines for fair use and three specific guidelines for education, news reporting, and software.

Despite DIP's endorsement, these guidelines are not law and have no binding authority. However, they can be viewed as explanations of Section 32-35 of Thai Copyright Act, providing practical approaches to general public as to extent of "use" in order to qualify as "fair use."

According to general guideline and as provided in Copyright Act, three general elements must be met in order for use to qualify as "fair use": (1) Use must not conflict with normal exploitation of copyrighted work, (2) use does not unreasonably prejudice legal rights of owner, and (3) use must not be commercial in nature. In addition to these basic elements, for educational use, DIP proposed in guideline for educational use that following factors should be taken into consideration: (i) Purpose of use and whether use is appropriate, (ii) nature of copyrighted work, (iii) amount used—in general, guideline suggests that using less than 10% of copyrighted work is allowed, and (iv) economic impact or effect on value of copyrighted work. With respect to news reporting, DIP proposed following considerations: (i) Whether use is within general course of news reporting through mass media and contains acknowledgment of copyright ownership, (ii) nature of copyrighted work, (iii) amount used—in general, using less than 10% of copyrighted work is permissible, and (iv) effect of use on potential market for or value of copyrighted work. As for software, guidelines suggest that applying considerations regarding nature of copyrighted work and amount used would be inappropriate. Therefore, DIP recommended analysis which focuses on purpose and economic impact of use and terms of licensing agreement in connection with computer program. Moreover, DIP suggested that different types of software should be analyzed differently. DIP provided guidelines to users as to what extent ``use'' of commercial software, shareware or trial ware, freeware, public domain software, and open source software should be deemed fair or unfair. Commercial software should be treated strictly because most of conditions would depend on terms indicated in licensing agreement. Freeware, public domain, and open source software are open to reverse engineering and/or development without prior consent or licensing agreement.

Penalties.

In general, penalties for infringement are fines up to Baht 200,000. (C.A. 69). Commercial infringement results in higher penalty of fine up to Baht 800,000 or four years imprisonment, or both. (C.A. 69). One half of fine paid by offender for infringement according to court judgment is paid to copyright owner who is then also entitled to bring civil action against infringer for other damages. (C.A. 76). In case of juristic offender, every director and manager is regarded as joint offender unless he can prove infringement was done without his knowledge or consent. (C.A. 74).

Protection of Foreign Copyrights and Performer's Rights.

Thailand has adhered to Berne Convention for the Protection of Literary and Artistic Works since 1931 and TRIPs since Jan. 1, 1995. Copyrighted work of creator from member country of either Berne Convention or TRIPs shall enjoy protection under Thai Copyright Act of 1994. Copyright Act also protects foreign performers' rights of member countries of TRIPs (C.A. 61) which according to Notification of Ministry of Commerce Re: List of Member Countries to Convention Governing Protection of Copyright or Convention Governing Protection of Performers' Rights includes more than 160 countries.

Copyright Bills: Royalty Collection Organization and Landlord and Internet Service Provider Liability.

Two Copyright Bills are being reviewed by government agencies and will be forwarded to House of Representatives for consideration. First Bill, if implemented, would regulate control of Royalty Collection Organization Reason underlining implementation is that at present, problems in collecting royalty occur as certain copyright owners or their representatives become involved in misconduct in exercising their rights by, for instance, setting conditions and regularly specifying unfair amounts of royalty. Bill will clearly identify rights and responsibilities of Royalty Collection Organization and empower authorities to monitor Organization.

Second Bill will constitute civil liability and criminal offense of landlord concerning copyright infringement once enacted. Any person who leases building or land and is aware or should have been aware that tenant used building or land for copyright infringement activities, such as unauthorized reproduction, manufacturing, or sale of copyrighted works, shall be deemed as committing infringement. Bill also allows provision constituting landlord liability to be applicable to Internet Service Provider.

Optical Disc Manufacture.

Historically, most suitable means for copyright owners to seek redress against infringers in Thailand has been to utilize specific enforcement mechanisms enshrined in Copyright Act of 1994. Unfortunately, infringement of various kinds of copyrighted works recorded in form of CD worsened. Available mechanisms at that time were not sufficient to control and suppress infringement. Legislative body therefore attempted to enact law controlling manufacturing of CD.

After many years of legal wrangling, CD Product Manufacturing Act, B.E. 2548 (A.D. 2005) which prescribes stringent requirements for optical disc production, import of equipment, and procurement of raw materials received royal approval on May 22, 2005, and came into force on Aug. 29, 2005.

Framework established by new law is premised on notification system under which manufacturers must notify authorities of their intention to manufacture discs prior to production. Copyright owners wishing to manufacture or obtain disc production services must similarly notify officials of their intention to manufacture or obtain such services unless purpose of manufacturing is for education, benefit of authorities, public interest or conservation of national culture and arts. (CD.P.M.A. 5).

Legislation seeks to control movement of production equipment by requiring notification of sales, distribution or transfer of optical disc production machinery in addition to acquisition and possession of raw materials to be used in pressing discs. Importantly, legislation introduces system of “marking” with manufacturers obliged to apply manufacturing certification marks on discs manufactured by them which will ultimately facilitate tracking of discs to their origin.

In carrying out duties under this Act, Ministerial Regulation provides that Competent Officer must be at least Class 3 government official of Department of Intellectual Property or Class 3 government official of Provincial Ministry of Commerce Department.

Competent Officer is authorized to enter into place of manufacturing between sunrise and sunset or during time of manufacturing at location for purpose of inspection. Officer can order any person to present statement or to open books of account, documents, or other evidence for inspection if such inspection would appear beneficial or if it will yield evidence to prove commission of offence under Act.

Manufacturers who fail to notify authorities of manufacture (or who fail to notify of any change in place of business) may be subject to imprisonment for term not exceeding one year and/or fine not exceeding Baht 200,000. (CD.P.M.A. 22).

Failure to comply with requirements may also expose copyright owners themselves to sanctions. For example, failure to file required notice of intention to manufacture optical discs or notice of hiring of manufacturer to perform such services is punishable with fines of up to Baht 200,000. (CD.P.M.A. 23). Failure to affix manufacturing certification mark will attract imprisonment for term not exceeding one year and/or fine not exceeding Baht 200,000. (CD.P.M.A. 26).

18.02 GEOGRAPHICAL INDICATIONS:

Geographical Indication Protection Act became effective in 2004.

Definition of Geographical Indication.

Geographical indication means name, symbol, or any other thing used to call or used in lieu of geographical origin, and which indicates that goods originating from said geographical origin are of quality, reputation, or specific characteristic of said geographical origin.

Geographical origin means area of country, zone, region, or locality, and also includes sea, lake, river, stream, island, mountain, or any other such similar areas.

Application Requirements.

Registration for protection of geographical indication is necessary. Application for registration must at least contain following: (1) details of applicant; (2) name, symbol, or any other thing used to call or used in lieu of geographical origin; (3) list of goods to be used with geographical indication; (4) details of quality, reputation, qualification, or any other distinguishing characteristic of goods to be used with geographical indication; (5) details showing relationship between goods to be used with geographical indication and geographical origin; (6) details of location of geographical origin; (7) details showing use of geographical indication on label; and (8) applicant's signature and date on which signature is executed.

Subject geographical indication must not be generic name of goods or contrary to public order, good morals, or public policy. In addition, there must be explicit evidence that such geographical indication is protected under law of such country and has been used continuously until date of filing application for registration in Thailand.

Applicants for registration are classified into three categories: (1) Administration, government agency, state enterprise, local administrative organization, or other government organization that is juristic person whose territories of responsibility cover geographical origins of goods; (2) ordinary persons, group of persons, or juristic persons operating businesses concerning goods using geographical indications and are domiciled in geographical origins of goods; and (3) consumer group or consumer organization using geographical indications.

Act also extends protection to non-Thai national wishing to apply for registration of foreign geographical indication if applicant is national of country or has domicile or actual business premises in Thailand or country that is member of international convention or treaty for geographical indications protection of which Thailand is also member.

Registration.

Application may be accepted for registration, either with or without conditions, by Registrar of Department of Intellectual Property. Announcement of Department of Intellectual Property dated May 29, 2004 provides that accepted applications must be published in Geographical Indication Gazette. Records must be available Offices of Commercial Affairs in all provinces and on Department of Intellectual Property's web site. Opposition may be lodged within 90 days from publication of application. In response to opposition, applicant must file counterstatement within 90 days from date of receipt of notification of such objection, otherwise, application will be deemed abandoned.

Opposition and counterstatement are considered by Registrar and notice of decision, together with reasons, will be sent to applicant and opposer. Both applicant and opposer are entitled to appeal to Board against Registrar's decision within 90 days from date of receipt of notice of decision. Moreover, any party dissatisfied with Board's decision can appeal to Court within 90 days from receipt of Board's decision. If either party fails to appeal to Court within said period, then Board's decision is deemed final.

Once registration is granted, protection of geographical indication takes effect from date of filing of application.

On Apr. 28, 2004 implementing regulations were issued in accordance with Geographical Indication Act to provide complete details of procedures for filing of application, advertisement of application, filing of opposition, registration, appeal, amendment of application, and cancellation.

Use of Geographical Indication.

Persons entitled to use registered geographical indication are those who manufacture registered goods in geographical source of said goods or those who engage in trade relating to such goods.

Cancellation of Registration.

Registration of geographical indication may be cancelled by Board if there is evidence showing that application for registration or registration had been wrongfully or covertly done or contained false information.

Suspension of Use of Geographical Indication.

If manufacturers of registered goods in geographical origin of goods or persons engaging in trade related to such goods fail to comply with conditions of registration, Registrar may issue order in writing to suspend use of geographical indication by those persons for period not exceeding two years from date of receiving order. Such persons are entitled to file appeal petition against Registrar's order to Board within 90 days from date of receiving order. In addition, if such persons disagree with Board's decision, they shall have right to appeal to Court within 90 days from date of receiving Board's decision. If no action is brought within such period of time, it shall be deemed that Board's decision is final.

Wrongful Acts.

Use of geographical indication in any way not indicated in application which causes confusion or deception as to (a) geographic origin of goods; or (b) quality, reputation, or other characteristic of such goods in order to cause damage to another entrepreneur is deemed wrongful act. Penalties for wrongful acts are fines of up to Baht 200,000.

18.03 INTEGRATED CIRCUIT DESIGNS:

Integrated circuit designs are protected under Act on Protection of Integrated Circuit Designs B.E. 2543 (A.D. 2000). They are not subject to law governing patents.

Definition.

Integrated circuit is defined as "product, finished or semi-finished and intended to perform an electronic function, consisting of components capable of activating electronic impulses, including parts connecting those components wholly or in part, which are combined together in a layer formation in and/or on the same semi-conductor". Circuit design is "design, layout or diagram made out in any form or manner that shows the arrangement of an integrated circuit".

Legislation protects circuit designs that are not commonplace in integrated circuit industry. It also protects circuit designs newly created through rearrangement of components and connecting parts of circuit designs or integrated circuits that are commonplace in integrated circuit industry, resulting in newly formed circuit design that is not commonplace.

Rights of Right-holder.

Right-holder has exclusive right to reproduce, import, sell or distribute in any manner for commercial purposes his protected circuit design, integrated circuit containing his protected circuit design, or product incorporating such integrated circuit. However, there are limitations to protection. Reproduction for use in course of evaluation, analysis, research or education, or reproduction for one's own benefit and not for commercial purposes, will not be deemed as infringement.

Infringement of Integrated Circuit Design.

Act lists various actions considered to be infringement of integrated circuit design. These include reproduction, importation, sale or distribution in any manner for commercial purposes of protected circuit design, integrated circuit design containing protected circuit design, or product incorporating such integrated circuit.

Application for Protection of Integrated Circuit Design.

According to provision pertaining to application for protection of integrated circuit design, circuit designer, official or employee who has created circuit design has right to apply for protection under this Act, if said integrated circuit design was created by his intellectual effort and is not commonplace in integrated circuit industry. However, if integrated circuit design is created under employment contract, employer is entitled to apply for protection. Government agency, local government, state organization or juristic person is entitled to apply for protection of integrated circuit design created under work-for-hire contract, made to order, or made under supervision of such organization unless otherwise agreed to in writing. If several persons have independently created identical integrated circuit designs, earlier applicant shall be entitled to protection.

Compulsory (Non-Voluntary) Licensing.

In compliance with TRIPS obligations in relation to semi-conductor technology, Act permits compulsory licensing of right-holder’s circuit design rights in two principal circumstances: (1) Where conduct of right-holder amounts to anti-competitive practice and (2) where necessity arises for exercising rights of right-holder for public interest or in state of war or national defense. In former case, efforts which subsequently proved to be unsuccessful, have first to be made to obtain authorization from right-holder on reasonable commercial term. In latter, state agency or state organization concerned applies for compulsory licensing upon payment of reasonably fair royalty to right-holder, provided that in case of war or national defense, compulsory licensing can simply be ordered by Prime Minister upon approval of Council of Ministers.

Term.

Right to circuit design is protected once registration is granted. Registration of circuit design is valid for ten years from filing date of application or first date of commercial exploitation, whichever is earlier. However, protection of such integrated circuit design shall expire 15 years after its creation date.

Right of right-holder expires if he renounces right to integrated circuit design by surrendering his certificate of circuit design, or dies without leaving any heirs. Order by Director-General or Board of Integrated Circuit Designs, or court judgment canceling registration of circuit design, also results in expiration of protection.

Penalties.

Under Act, anyone reproducing protected circuit design without permission of right-holder is liable to fine of Baht 50,000 to Baht 500,000. Anyone who imports, sells or distributes for commercial purposes circuit design is liable to fine from Baht 20,000 to Baht 200,000. Central Intellectual Property and International Trade Court (“IP&IT Court”) has jurisdiction over disputes related to integrated circuit designs. IP&IT Court can also order confiscation or destruction of all infringing circuit designs, integrated circuits, and infringing products or take other action to prevent resale.

Method of damage calculation in integrated circuit design actions must be placed in context of civil remedies for intellectual property infringement in Thailand in general. Where right-holder seeks civil damages, action for wrongful breach of rights may be formulated under Thai Civil and Commercial Code by way of suit akin to tort action. Such tort actions are predominantly based on §420 of Code. Right-holder may seek remedies in form of compensation for existing damages and injunction to protect against future damages.

18.04 PATENTS:

Thai Patent Act, B.E. 2522 (A.D. 1979) as amended by Patent Act (No. 2), B.E. 2535 (A.D. 1992) (“Patent Act”) and by Patent Act (No. 3), B.E. 2542 (A.D. 1999) (“revised Act”) provides patent protection for inventions and designs. Petty patent protection for inventions is available under revised Act. On Sept. 24, 2009, Thailand became member of Patent Cooperation Treaty (PCT), with PCT entering into force for Thailand on Dec. 24, 2009.

Subject Matter.

Invention, to be patentable, must be innovation or invention that creates new product or process, or improves known product or process.

Following inventions are not eligible for patent or petty patent protection: (a) microorganisms which naturally exist and their components, animal and plants or extracts from animals and plants; (b) computer programs; (c) scientific or mathematical rules or theories; (d) methods for diagnosing, treating or curing human or animal diseases; and (e) inventions which are contrary to public order or morality, public health or welfare.

Patentability.

To qualify for protection, patentable invention must be: (1) novel; (2) inventive (non obvious); (3) capable of industrial application. Invention which is new and capable of industrial application, but which lacks inventive step, is entitled only to petty patent. Petty patent holders receive same exclusive rights to exploit invention as well as rights to grant licenses to others as do ordinary patent holders.

§6 of Thai Patent Act describes invention as “new” or qualified for worldwide novelty if it does not form part of state of art, which includes one of following inventions: (1) Invention which was widely known or used by others in country before date of application for patent; (2) invention subject matter of which was described in document or printed publication, displayed or otherwise disclosed to public, in this or foreign country before date of application for patent; (3) invention already patented or petty patented within or outside Kingdom prior to date of application for patent; (4) invention for which application for patent or petty patent has already been filed outside Kingdom for over 18 months prior to date of application for patent, but patent or petty patent has not been granted; and (5) invention for which application for patent or petty patent has already been filed within or outside Kingdom, and application has been published before date of filing application in Kingdom.

Applicants may not apply for both patent and petty patent for same invention. However, applicants for patent or petty patent can change type of right applied for, from petty patent to patent and vice versa, prior to registration of invention and issuance of petty patent, or before publication of patent application, whatever case may be.

Registration.

Right to apply for patent, petty patent or design protection extends to: (1) Thai nationals or juristic persons whose principal office is situated in Thailand; (2) nationals of countries that have reciprocal patent agreements with Thailand; (3) nationals of countries that allow Thai nationals or juristic persons with their principal office in Thailand to apply for patents; (4) nationals of countries that are parties to international treaties or conventions for patent protection to which Thailand is also party; and (5) foreign applicants who are domiciled or have ongoing, functioning industrial or commercial enterprise in either Thailand or country that is member of any international treaties or conventions for patent protection to which Thailand is also party.

If applicant is not resident of Thailand, he must appoint agent whose name is registered with Director General of Department of Intellectual Property.

Priority.

Thailand became member of PCT on Sept. 24, 2009, entering into force on Dec. 24, 2009. Time limit for entering national phase in Thailand is 30 months. PCT applications with filing date after Dec. 24, 2009 are eligible to enter national phase in Thailand.

During gap before PCT enters into force, foreign applicant can file patent application in Thailand according to present Thai Patent Act, which allows member states of Paris Convention and WTO to obtain patent protection in Thailand. Under Act, all foreign applicants entitled to national treatment can claim priority right within 12 months of first foreign filing date in case of invention application, and within six months of first foreign filing date in case of design application.

If priority is not claimed, non-convention application can be filed within 18 months from first filing date, provided that application has not been made available to public by any means prior to date of filing Thai application. However, invention for which patent application was first filed more than 18 months prior is no longer patentable in Thailand. Also, design that has been made available to public by any means prior to filing in Thailand is not patentable.

Issue of whether inventions already published and/or registered in other countries can be filed in Thailand is controversial, even though application claims priority from first filing date. However, this issue is clear for design patents—Patent Examiner accepts applications for which design has already been published and/or registered before filing application in Thailand, provided that application must claim priority right of first filing date.

Publication.

Thailand has early publication system that can be deferred on request. Pre-grant opposition exists and must be filed within 90 days from publication date.

Substantive Examination.

Examination as to novelty and obviousness is not automatic and must be requested within five years after publication date. To proceed with examination, applicant needs to submit entire copy of patent and office action (if any) issued for corresponding application filed in another country, e.g., U.S.A., U.K., EP as examination of Thai case will actually be initiated upon submission of said documents to Thai Patent Office. Furthermore, it is necessary to make present claims conform essentially with approved claims in corresponding selected patent after request for examination is submitted to Thai Patent Office.

If corresponding patent is not submitted at substantive examination stage, applicant may choose to file special examination conducted either by Australian Patent Office or by Thai Administrative Agency for novelty and inventive step search.

Term of Protection

Term of patent is 20 years from filing date for inventions and ten years for designs. Term of petty patent is six years from filing date in Thailand, terms of which may be extended twice for two-year period each time.

Annuities.

Patent annuities are payable after patent is granted and beginning from fifth year of term of patent and annually thereafter. If patent is granted after beginning of fifth year, first annual fee from fifth year to year of issuance of patent shall be paid within 60 days after granting of patent. Patent holders may at one time pay in advance entire amount of annual fees instead of yearly payments.

Licensing.

Patent holder may grant license to another person. However, holder cannot impose any conditions or restrictions, or any royalty terms which tend to unfairly limit competition. License agreement and assignment of patent, petty patent or design must be in writing and registered with Department of Intellectual Property.

Compulsory License.

Application for compulsory license may be made under following circumstances: (1) If after three years from granting of patent or petty patent or four years from date of application, whichever is later, patentee or petty patentee has not enforced his lawful rights. (P.A. 46). (2) If exercise of patent rights by one party (junior patentee) may infringe rights of another patentee (senior patentee) provided that—junior patentee's invention represents substantial technological advancement which is more beneficial to economy compared to invention under patent for which license is being sought; senior patentee receives cross-license to exploit junior patentee's patent rights; and junior patentee shall not assign legal license to anyone unless assignment is made together with his own patent. (P.A. 47 and 47 bis). (3) Ministry or Department may exploit exclusive right in patent by itself or through others to carry out service for public good or for national defense, for preservation or acquisition of natural resources or environment, for prevention or alleviation of severe shortage of food or medicine or other life necessities, or for other public interests. (P.A. 51 and 52).

Termination of Protection.

Director General may ask Board to revoke patent if (1) two years after issuance of license, patentee or licensee has not manufactured product or applied process under patent in Kingdom, or for time being product is not being sold or imported for sale, or is being sold but at unreasonable price; or (2) patentee has licensed other persons to exercise rights in patent without conforming to prescribed procedures.

Infringement.

No person other than patentee or his legal successor shall have right to produce product, apply patented process, use, sell, possess for sale, offer for sale, or import into Kingdom patented product or product produced by application of patented process.

Penalties.

Infringement of patent holder's exclusive right is considered criminal offense. Penalties are fine and/or imprisonment. Besides criminal action, patent holder is entitled to take civil action against infringer requesting compensation for actual damages, loss of profits and necessary expenses incurred in enforcing rights of patent holder. In civil case of process patent infringement, burden of proof is reversed and is placed on defendant.

Patent applicant can take action against other person infringing claimed product or process only after application is granted patent. However, after application is published in Thai Patent Journal, patent applicant can send written warning to infringer to stop manufacturing and selling claimed product or using claimed process in Thailand. In such case, after patent has been issued and lawsuit has been brought to court, patent applicant is entitled to receive compensation for damages from infringer.

18.05 TRADEMARKS AND TRADENAMES:

Trademarks were first regulated under Trademark Act, B.E. 2474 (A.D. 1931), which was replaced by Trademark Act, B.E. 2534 (A.D. 1991) and amended in 2000 by Trademark Act (No. 2), B.E. 2543. Act provides legal protection through registration of trademark, service mark, certification mark, collective mark, and trademark/service mark, and license/registered user agreements.

Most recent amendments in 2000 allow protection for combination of colors or group of colors represented in special or particular manner as well as three-dimensional marks, provided that such marks are deemed distinctive by Examiner.

Company name that does not refer to juristic status, such as “Co.”, “Ltd.” or “Limited” is registrable in Thailand and there is no condition that it must be presented in stylized form. However, if company's full name shows its juristic status, name must be presented in stylized form to be registrable as trademark. In either case, company's name must not be directly descriptive of properties or characteristics of goods for which trademark is registered. Trademark which is geographical indication will not be eligible for registration.

Any interested person or juristic person who is proprietor of mark can file application for registration with Department of Intellectual Property.

Registrable Marks.

Marks traditionally shall include photographs, drawings, pictures, invented pictures, brands, names, words, texts, letters, numerals, signatures, groups of colors, shapes or three-dimensional objects or any combinations of these items.

Registrable mark must: (1) be distinctive and contain or consist of at least one of following particulars: (a) name of ordinary person, or first name and surname of individual which are not common or generic, or full name of juristic person under related laws, or tradename represented in special or particular manner and having no direct reference to character or quality of goods (b) word or clause that has no direct reference to character or quality of goods and is not geographical name according to prescription of Minister (c) group of colors represented in special or particular manner, or invented letter or numeral or word (d) signature of applicant for registration or that of some predecessor in his business or that of another with his or her permission (e) photograph of applicant or that of another with his or her permission or with consent of his or her ascendants, descendants and spouse, in case of deceased person, (f) invented picture, drawing or illustration; or (g) any other distinctive mark; (2) not be forbidden under Act; and (3) not be identical or so similar to another trademark belonging to other persons as to be confusing or misleading to public. Certain items such as royal names and royal monograms, official and national flags, etc., are prohibited for use as trademarks. Marks which do not fall within descriptions in §1(a) through 1(g) above may become registrable through prior long and extensive use and acquired distinctiveness.

Certain items are prohibited for use as trademarks such as royal names and royal monograms, official and national flags, and marks that are identical or very similar to “well-known trademarks”. According to Notification of Ministry of Commerce B.E. 2547 (A.D. 2004), “well-known mark” is mark associated with goods or services that have been sold, used or advertised, or used by any means, and in good faith, whether by its owner or his authorized representative or licensee, whether locally or abroad, to extent that mark has become well known to general public or to people in field concerned in Thailand, and have reputation that is highly accepted among consumers.

Applications for recordation of well-known mark were accepted as from Aug. 1, 2005. Owners of well-known marks who wish to record their marks as well-known marks in Thailand should submit application together with evidence proving famous reputation of their marks.

Registration.

Application for registration of trademark may be made for particular kind of goods which must be clearly declared. International Classification of Goods and Services has been adopted to replace Thailand's national classification of goods. Note that full class heading of International Classification of Goods and Services cannot be used in application and that particular goods to which registration shall apply must be specified, i.e. application for “whole class” cannot be filed. Goods must individually be specified. Separate trademark application must be filed for each class of goods.

Trademark shall be registrable only if proprietor or his representative has office or any place of business in Thailand which registrar can contact. After registration is deemed acceptable by registrar, application will be published in Trademark Gazette for 90 days. After application proceeds to publication, interested parties have 90 days from date of publication to oppose registration of mark. If no opposition is filed within this time, mark may proceed to registration. Notice is then sent to applicant for payment of registration fee within 30 days from date of receipt of notice. Registration of trademark is valid for ten years from date application was filed. Registration of trademark may be renewed for further period of ten years within 90 days before date of expiration of original registration, or of latest renewal of registration, as case may be. Process may be repeated indefinitely.

Assignment.

Rights to trademark application or registered trademark are transferable and inheritable. However, if trademark involved is associated trademark with other trademarks, transfer or inheritance can only be made as whole according to Section 50 of Thai Trademark Act, B.E. 2534 (A.D. 1993). Proprietor of registered trademark may grant license to other persons to use his trademark for any or all of goods for which it was registered.

According to Notice of Department of Intellectual Property B.E. 2543 (A.D. 2000), trademark license agreement shall at least provide: (1) conditions and terms of agreement between trademark proprietor and person applying to be authorized licensee, which enable former to control quality of goods manufactured by latter; (2) goods for which licensed trademark is to be used; (3) provision specifying that only authorized licensee has right to use trademark, or that proprietor shall authorize any person in addition to authorized licensee to use it. Trademark license agreement must be in writing and registered with Department of Intellectual Property.

Protection Afforded.

When trademark is registered, proprietor of trademark shall have exclusive right to its use with goods for which registration was granted.

Infringement.

Act imposes criminal penalties on person who forges or imitates any other person's registered trademark, service mark, certification mark or collective mark provided that mark has been registered in Thailand. Punishment includes both imprisonment of maximum four years and fine of up to Baht 400,000. However, civil action for damages for trademark infringement may be brought based on law of tort under C.C.C. Action for damages for trademark infringement cannot be taken under Trademark Act 2000 if trademark is not registered in Thailand.

Unregistered Trademark.

According to Thai Trademark Act, owner of trademark not registered in Thailand is not entitled to institute any legal proceedings in court to prevent use of mark or to recover damages for infringement. To obtain protection for unregistered trademark, owner must look to Thai Penal Code which imposes penalties on use of name, figure, artificial mark or wording in carrying on trade of another person or causing same to appear on merchandise, packing covering, advertisement, price list, commercial letter or like in order to make public believe that goods are merchandise or trade of another person. Moreover, under C.C.C. owner of unregistered trademark has right to institute court case in Intellectual Property and International Trade Court (established on Dec. 1, 1997) against any person for passing-off goods as those of true proprietor.

Owner of trademark cannot use circled letter “R” on imported goods if trademark is not registered in Thailand. Importer is subject to punishment of both imprisonment and fine for violation.

Tradenames.

Although there is no law which specifically governs tradenames, Penal Code provides that it is offense to use another person's name, figure, artificial mark or any wording in carrying on trade in order to deceive public that one's trade is that of such other person. One's imitation of sign-board or like of another person's trading premises situated nearby which is likely to make public believe that his trading premises is that of such other person is also offense under Penal Code. Unauthorized use of other person's tradename may also be considered intentional tort under C.C.C. and entitles owner of said tradename to civil action for damages.

18.06 TRADE SECRETS:

Trade secrets are protected under Trade Secret Act, B.E. 2545 (A.D. 2002) (“TSA”) effective July 22, 2002. TSA provides broad trade secret protection, including protection for pharmaceutical, food, and cosmetic formulas, advertisement and marketing strategies, etc.

Trade secrets for agricultural chemical products are further protected under Regulation of Ministry of Agriculture and Cooperatives governing Maintenance of Trade Secrets for Agricultural Chemical Products, B.E. 2547 (A.D. 2004), which was issued per Section 15 of TSA. This regulation provides for recordation of trade secret information relative to agricultural chemical products which contain new chemical substances. Department of Agricultural Techniques will protect trade secret for ten years if trade secret owner seeking protection can both demonstrate that: (1) Secret was obtained through experimentation or in such a manner that required tremendous effort, and (2) trade secret resulted from proven experiment. Protection is done by keeping secrets in locked cabinets or by digitally encrypting and password-protecting information.

Trade secrets for pharmacopoeia registration are protected in Regulations of the Ministry of Public Health on Maintenance of Trade Secrets in Respect of the Information of Pharmacopoeia Registration, B.E. 2550 (A.D. 2007), enacted in May 2008. This regulation would provide for recordation of trade secrets related to chemical, pharmaceutical, or biological information, toxicological or pharmacological information (provided it is not tested on humans), and research and study information, including test results related to pharmacopoeia registration. Trade secret owner must apply for protection under this regulation, and if information is deemed trade secret, recordation will be granted. Trade secret will be kept in locked cabinet and held for five years.

Definition.

Trade secret can be defined as: (1) trade information that is not generally known or readily accessible to groups of persons within circles that normally deal with information of said kind; (2) trade information that has commercial value due to its secrecy; and (3) trade information that has been subject to reasonable measures by its lawful controller to keep it secret.

Nature of Trade Secret.

No registration is required to obtain trade secret protection. Trade secret is transferable by juristic act or by inheritance.

Right of Trade Secret Owner.

Owner of trade secret has right to disclose, take, or use his trade secret; or permit others to use his right with any necessary condition to maintain its secrecy.

Infringement of trade secret includes act of disclosing, taking, or using trade secret without lawful consent of trade secret owner and in manner that violates fair commercial practice.

In this regard, infringer must know, or have appropriate reason to know, that his action is contrary to fair commercial practices.

Actions that are contrary to fair commercial practices include breach of contract, breach of confidence or persuasion to breach confidence, bribery, intimidation, fraud, theft, receipt of stolen property, or espionage by electronic surveillance or any other means.

Exceptions to Infringement.

Following actions shall not be considered infringement of trade secret: (1) Disclosure or use of trade secret by person who obtained such secret through juristic act without awareness or without any reason to be aware that other party acquired such trade secret by violating another person's trade secret rights; (2) disclosure or use of trade secret by government agency in charge of preserving such trade secrets in circumstances where: (a) it is necessary to protect public health and security, or (b) it is necessary for other public interests, not for commercial purposes. In this regard, particular agency that is charged with keeping and maintaining of trade secret, or state agency or any concerned person that obtained such trade secret, shall take regular measures to protect such trade secret from unfair commercial use; (3) independent discovery as result of expertise of person making discovery; and (4) reverse engineering.

However, exception under (4) cannot be applied if person who carries out such reverse engineering has entered into agreement with trade secret owner or with product seller that states otherwise. Therefore, prudence dictates express prohibition against reverse engineering when contracting for or licensing any technology or product where trade secret is at risk of exposure.

Term.

Trade secrets shall have protection as long as they are deemed secret.

Penalties under TSA are primarily criminal penalties consisting of fines, imprisonment, or both. Fine is from Baht 2,000 to Baht 2 million and imprisonment is from one month to ten years depending upon offender and offense. In event of offense committed by juristic person resulting from order, action, or lack or order or action, which must be performed in course of duty by director, manager or any person responsible for operations of such juristic person, that juristic person shall be subject to punishment pursuant to relevant provisions pertaining to offense.

19 LEGAL PROFESSION

19.01 ATTORNEYS AND COUNSELORS:

The profession is limited in Thailand to Thai nationals. However, those foreign attorneys who have obtained lifetime work permits before first Alien Employment Act was passed in 1972 are allowed to give legal advice, i.e. act as legal consultants.

Authority to regulate admission to practice law in Thailand and to discipline and supervise practicing lawyers is vested in Lawyers Council of Thailand under Lawyers Act, B.E. 2528 (A.D. 1985). Lawyers may practice law in Thailand only upon registering and obtaining license to practice law from Lawyers Council of Thailand. (L.A. 6, 33, 34). There is only one class of practicing lawyers in Thailand, that is, attorney-at-law; distinctions between solicitors, advocates, pledgers, etc., do not exist. In order to register and obtain license to practice law, applicant must be Thai national of at least 20 years of age who meets all other requirements more important ones of which are: (a) being graduate with Bachelor of Law Degree or Associate Degree in Law or Certificate in Law equivalent to Bachelor's Degree or Associate Degree from one of institutions recognized by Lawyers Council; (b) being member of Thai Bar Association; and (c) having successfully completed practical training program of Lawyers Council. (L.A. 35, 38). Practical training program of Lawyers Council is arranged by Institute of Law Practice Training twice a year. Program is divided into two parts, i.e. (1) theoretical training of at least 90 hours, and (2) practical training in courts, legal offices of ministries and government agencies and law firms of at least six months, including training on lawyers ethics and code of conduct and oral examination. After completion of both parts, lawyer is entitled to register and receive license to practice. Requirement for completion of training program is waived for applicant who was attorney-at-law, judge, public prosecutor, judge in court-martial, military prosecutor or attorney under laws concerning organization of courts-martial or who has at least one year apprenticeship in law office. (L.A. 38). Once lawyers are registered and licensed to practice law, they enjoy right to practice law throughout country and are automatically accepted as members of Lawyers Council. (L.A. 37).

Law school graduates of universities recognized by The Thai Bar Association are not required to pass bar examination in order to be irregular member of The Thai Bar Association. Bar examination is given yearly by Institute of Legal Education of Thai Bar Association for law school graduates who enroll in its one-year professional course. Lawyers passing bar examination receive title of barrister-at-law and are eligible for regular membership in The Thai Bar Association and for sitting in competitive examination to become public prosecutor or judge trainees. Being barrister-at-law, although not requirement for practicing lawyers, is considered to be prestigious since only approximately 10% of about 5,000 candidates pass bar examination each year.

20 MINERAL, WATER AND FISHING RIGHTS

20.01 MINES AND MINERALS:

Exploration and extraction of minerals in Thailand is under jurisdiction of Department of Mineral Resources (DMR), Ministry of Natural Resources and Environment. Mining industry is regulated by Minerals Act, B.E. 2510 (A.D. 1967) (``M.A.'') as amended by Minerals Act No. 2, B.E. 2516 (A.D. 1973), Minerals Act No. 3, B.E. 2522 (A.D. 1979), Minerals Act No. 4, B.E. 2534 (A.D. 1991) and Minerals Act No. 5, B.E. 2545 (A.D. 2002). Royal Proclamation, B.E. 2526 (A.D. 1983) amending Minerals Act, B.E. 2510 (A.D. 1967) and Royal Proclamation No. 2, B.E. 2528 (A.D. 1985) amending Minerals Act, B.E. 2510 (A.D. 1967) give further guidance to mining companies. Mining business falls under List Two of Foreign Business Act. B.E. 2542 (A.D. 1999) (``FBA'') which concerns national safety or security, or arts, culture and customs, or folk handicrafts, or natural resources and environment. No alien may operate any business prescribed in List Two of FBA unless permitted by Minister with approval of Cabinet. (See also category 4 Citizenship, topic 4.01 Aliens.)

Operation of Mines.

Exploration.

Mining companies must obtain license before conducting exploration and operation. There are three types of prospecting licenses: Prospecting *Atchyabat* - General License (GPL), Exclusive Prospecting *Atchayabat* - Exclusive License (EPL), and Special *Atchayabat* - Special License (SPL). GPL issued by Local Mineral Resources Office (LMRO) for one year and grants non-exclusive right to explore for minerals by way of geophysical exploration over specific area. EPL grants exclusive right to explore for minerals in specific area. EPL is valid for one year for onshore area not exceeding 2,500 *rai* (4,000,000 sq. meters) (1 *rai* = 1,600 sq. meters) and offshore area not exceeding 500,000 *rai* (800,000,000 sq. meters) for two years. Holder of EPL must comply with certain terms and conditions: (i) exploration must commence within 60 days after issue of EPL; (ii) exploration report must be filed with LMRO within 180 days after receipt of EPL; and (iii) final exploration report must be filed 30 days before expiration date of EPL. SPL, which also grants exclusive prospecting right, is issued only in circumstances where proposed exploration project requires considerable investment and special technical skills. SPL is valid for five years from issuance date and is renewable for another two years. Exploration area granted under SPL may not exceed 10,000 *rai* (16,000,000 sq. meters). Applicant for SPL must specify yearly prospecting expenses during term of SPL and may offer special benefits to government when SPL is granted. Upon receiving approval for exploration or mining, companies must have consent of owners or possessors of surface rights to land being prospected before commencing exploration.

As prescribed by Notification of Ministry of Sciences, Technology and Environment No. 1, No. 2 B.E. 2535 (A.D. 1992), and No. 3 B.E. 2539 (A.D. 1996) issued under Enhancement and Conservation National Environmental Quality Act, B.E. 2535 (A.D. 1992), mining businesses must submit Environmental Impact Assessment (EIA) reports to Office of Natural Resources and Environmental Policy and Planning of Ministry of Natural Resources and Environment.

Mining.

Mining License (``*Prathanabat*'') is required to exploit ore deposits. Mining License is granted for maximum of 300 *rai* (480,000 sq. meters) onshore and 50,000 *rai* (80,000,000 sq. meters) offshore. (M.A. §44, as am'd in 1979). Minister, with Cabinet's concurrence, may increase offshore area to more than 50,000 rai. (M.A. §45). Mining License will not be granted for period exceeding 25 years. (M.A. §54). In case of pending Mining License, Provisional Mining License (``Provisional *Pratanabat*'') which is valid for one year will be issued. Mining License may be transferred only upon approval of Minister of Industry. (M.A. §78). For more information, see Department of Primary Industries and Mines website: http//www.dpim.go.th/.

Safety of Employees.

Companies are required to arrange first aid free of charge for employees and other people in case of emergency. Any accident must be reported to local geologist in that area within 72 hours. Companies must provide fire-fighting equipment at site, arrange first aid and safety training for personnel, keep site in good condition and safe from failure or collapse, and arrange to have foreman or his representative supervise during operations.

Petroleum and Natural Gas.

Petroleum Act, B.E. 2514 (A.D. 1971) amended by Petroleum Act (Nos. 1-6), governs exploration, production, storage, transport, sale and disposal of petroleum, including natural gas onshore and offshore. Petroleum business is also under jurisdiction of Department of Mineral Resources (DMR), Ministry of Natural Resources and Environment.

Petroleum Concessions.

Petroleum concession is required for exploration, production, storage, transport, sale and disposal of petroleum including natural gas in concession area. Petroleum concession may be awarded to company which has assets, plans and expertise adequate to exploit petroleum or to applicant guaranteed by such company. Concessions are awarded on sealed bid basis to applicant who offers most favorable terms to government. Petroleum concession rules, terms and conditions are as prescribed in Ministerial Regulations including form of petroleum concession.

Petroleum Exploration and Production.

Exploration period under concession is up to six years which can be extended for another three years. Concession expires at end of exploration period unless concessionaire shows that “commercial” well has been found or determines production area. Concessionaire must commence production of petroleum within four years after production plan has been approved. Production period under concession is not more than 20 years commencing from end of exploration period, which can be extended for another ten years. (Petroleum Act, §26). In awarding concession, Department of Petroleum Resources will designate survey plot area by publication in Government Gazette. Exploration area must not exceed 4,000 sq. kilometers onshore, exploration area off-shore also includes islands located inside designate exploration off-shore area. (Petroleum Act, §28).

As prescribed by Notification of Ministry of Sciences, Technology and Environment No. 1, No. 2 B.E. 2535 (A.D. 1992) and No. 3 B.E. 2539 (A.D. 1996) issued under Enhancement and Conservation National Environmental Quality Act B.E. 2535 (A.D. 1992), petroleum distillation industry, natural gas analysis and transmutation industry, petroleum exploration and production and petroleum pipe transportation are required to submit EIA reports to Office of Natural Resources and Environmental Policy and Planning of Ministry of Natural Resources and Environment.

Taxes and Royalties.

If actual mining is initiated, mining companies must pay royalties under Mineral Royalty Rates Act, B.E. 2509 (A.D. 1966) and its amendments (latest am'd 1979), and are subject to Revenue Code taxes.

Royalties on petroleum concessions are paid on sliding scale according to production volumes, with higher marginal rates for higher levels of production as prescribed in Petroleum Act No. 4, B.E. 2532 (A.D. 1989). Taxation on petroleum operation income is imposed by Petroleum Income Tax Act, B.E. 2514 (A.D. 1971) and its amendments (latest am'd 2007), and is exempted from Revenue Code and other laws.

21 MORTGAGES

21.01 CHATTEL MORTGAGES:

Under Thai law, mortgages may be constituted on certain movable property. Provisions of C.C.C. governing general mortgages apply to chattel mortgages.

Mortgages may only be taken on following movable property registered according to law: (a) Vessels of five tons and over; (b) floating houses; (c) beasts of burden; and (d) any other movables with regard to which law may provide registration for that purpose. (C.C.C. 703).

However, mortgage of vessel 60 tons gross or more, powered by machine or machines, for use on sea by virtue of Thai Navigation Act is controlled under new Mortgage of Vessels and Sea Preferential Rights Act, B.E. 2537 (A.D. 1994) (M.V.S.P.R.A.). Provisions in C.C.C. shall be applied to mortgage of vessels under M.V.S.P.R.A. to extent that they are not in conflict with provisions in M.V.S.P.R.A. Coverage of vessels shall extend to equipment on board vessel and other things which are prescribed by law as being mandatory on board vessel, regardless of whether said items were present at time of registration of mortgage or acquired afterwards. (M.V.S.P.R.A. 9).

According to Registration of Machinery Act B.E. 2514 (A.D. 1971), owner of machine must first register with Ministry of Industry to establish ownership. After any machinery is registered, it shall be regarded as movable and can be mortgaged according to §703(4) of C.C.C. Mortgagor must produce for registrar mortgagee's letter of consent to remove registered mortgaged machinery removed in course of normal operation. Right of mortgage in removed machinery shall be regarded as continuing to exist.

Aircraft may not be mortgaged. Although Thailand is signatory to Geneva Convention on the International Recognition of Rights in Aircraft, it has not yet adopted system of registering aircraft mortgages; nor does Thailand have any domestic legislation dealing specifically with creation of security interest in aircrafts.

21.02 MORTGAGES:

It is required under Thai law that contract of mortgage be made in writing, and that registration of mortgage over mortgaged property be made with competent authority in Thailand. In regard to mortgages of machineries competent authority is Ministry of Industry. With respect to mortgage of land, competent authority is Land Department.

Properties that can be mortgaged are (i) immovable properties of any kind, and (ii) certain types of movable properties which have been registered in accordance with Thai law. Machineries must therefore be registered with Ministry of Industry first before they can be mortgaged as security under Thai law.

Contract of mortgage must contain, in Thai currency (i.e. Thai Baht), either sum certain or maximum amount for which mortgaged property is assigned as security. In any event, only owner of mortgaged property can create mortgage.

Under Thai law, when one and same property is mortgaged to several mortgagees, they rank according to respective dates and hours of registration, and earlier mortgagee shall be satisfied before later one. Accordingly, later mortgagee cannot enforce his right to injury of earlier one.

Enforcement of mortgage under Thai law can be carried out by two methods. First method of enforcement can only be handled by taking court action to obtain judgment to have mortgaged property seized and sold at public auction. In order to obtain judgment, mortgagee must have notified debtor in writing to perform obligation within reasonable time, and debtor failed to comply with said notice. In case of enforcement of mortgage wherein net proceeds from sale in public auction are less than amount due, debtor is not liable for difference unless agreement has been made otherwise.

Second remedy is for mortgagee to claim foreclosure of mortgage, subject to following conditions: (1) if debtor failed to pay interest for at least five years; (2) mortgagor has not satisfied court that value of property is greater than amount due; and (3) there are no other registered mortgages or preferential rights on same property.

It should be noted, that under Thai law, agreement made before obligation becomes due to effect that mortgagee shall, in case of nonperformance, become owner of mortgaged property or dispose of it otherwise than in accordance with provisions concerning Enforcement of Mortgage under Civil and Commercial Code of Thailand, shall be invalid.

As mortgage is legally considered secondary obligation, it can be validly created or given only as security for valid primary obligation. Thus, it is essential that primary obligation, which is to be secured by mortgage, is legal and valid obligation under applicable laws enforceable against primary debtor.

In 1997, two laws were passed to enable securitization in Thailand. Royal Proclamation on Special Purpose Juristic Persons for Securitization B.E. 2540 (A.D. 1997) and Royal Proclamation on Secondary Market Mortgage Corporation B.E. 2540 (A.D. 1997) (established as State organization to operate secondary market mortgage business) were issued to create necessary environment and vehicles for securitization.

22 PROPERTY

22.01 ABSENTEES:

Person who leaves his domicile may appoint agent with general authority to act for him. If person does not appoint agent and it is uncertain whether he is living or dead, any interested person or public prosecutor may apply to court for order for necessary management of his property. After one year has passed from day when person left his domicile or residence, if no news of him has been received, or from day when he was last seen or heard of, court may appoint manager for property. (C.C.C. 48). If person has left his domicile and it is not known whether he is living or dead for five years, court, upon application of any interested person or public prosecutor, may adjudge that person has disappeared; however, this period of time shall be reduced to two years from day person disappeared during battle or war; or when vehicle on which he had been traveling was lost or destroyed; or when he had been in other peril of his life. (C.C.C. 61). If person adjudged to have disappeared is living, he by himself, any interested person, or public prosecutor may apply to court to revoke order of disappearance. Nevertheless, all acts which had been done in good faith may not be affected by such revocation. (C.C.C. 63). See category 2 Business Organizations, topic 2.01 Agency.

Adjudication of disappearance and its revocation shall be published in Government Gazette. (C.C.C. 64).

22.02 DOWER AND CURTESY:

Dower and curtesy rights do not exist in Thai law.

22.03 LANDLORD AND TENANT:

Laws regarding lease of property or buildings fall under Hire of Property—General Provisions of C.C.C. Land, houses, condominium units and other buildings may be leased for up to 30 years, with optional renewal for up to 30 more years. (C.C.C. 540). Immovable property used for commercial or industrial purposes may be leased for up to 50 years, with optional renewal for up to 50 more years. (Act Governing Leasing of Immovable Property for Commercial and Industrial Purposes, A.D. 1999). Lease contract of immovable property for three years or less is not enforceable unless made in writing and signed by liable party. Leases of more than three years need to be registered with land office, otherwise they will be valid for only three years. (C.C.C. 538).

If lease is extinguished before end of agreed lease period, innocent party has number of recourse options. If taken to court, verdict can vary depending on specifics of case and actual damage plaintiff is able to prove to court.

At end of agreed lease period, if tenant retains possession of leased property and landlord does not object, it is deemed that lease is extended for indefinite period. (C.C.C. 570). However, if no period is agreed upon, at end of each rental period either party may terminate lease contract by providing other party notice of at least one rental period (or not more than two months' notice in case of yearly rental periods). (C.C.C. 566). Lessee cannot transfer rights to third person unless otherwise provided in contract. (C.C.C. 544).

22.04 REAL PROPERTY:

Land ownership by Thai nationals may be individual or shared. Any Thai national may purchase land in Kingdom; however if married legitimately to foreigner, Thai national and alien spouse must jointly confirm in writing that all money to be used by Thai national to buy said land is his/her own private assets or private property, and not Sin Somros or property earned jointly by them. Competent officer shall then proceed with registration of rights and juristic acts for Thai national. Otherwise, Thai law on community property under marriage provisions of C.C.C. will operate, resulting in Thais relinquishing their right to buy land upon registration of marriage to foreigner. Land issues are governed primarily by Land Code, B.E. 2497 (A.D. 1954), and its amendment Acts up to Land Code Amendment Act (No. 9) B.E. 2543 (A.D. 2000), Land Reform for Agriculture Act, B.E. 2518 (A.D. 1975), and its amendment Acts up to Land Reform for Agriculture Amendment Act (No. 3) B.E. 2532 (A.D. 1989), City Planning Act, B.E. 2518 (A.D. 1975), and its amendment Acts up to City Planning Amendment Act (No. 3) B.E. 2535 (A.D. 1992), Condominium Act, B.E. 2522 (A.D. 1979), (No. 2) B.E. 2534 (A.D. 1991) and (No. 3) B.E.

2542 (1999), Act Governing Leasing of Immovable Property for Commercial and Industrial Purposes, B.E. 2542 (A.D. 1999), Land Development Act, B.E. 2543 (A.D. 2000) and C.C.C. Land regulations are determined by Ministry of Interior.

Restrictions on Ownership by Foreigners.

In general, foreign individuals and foreign companies are prohibited from owning land in Thailand. Companies incorporated in Thailand which are more than 49% foreign-owned or which have majority of foreign shareholders may not be able to own land.

Exception to foreign ownership rule applies to Board of Investment and Industrial Estate Authority of Thailand projects. Under these projects, special privileges are given to some companies to buy land. Also, foreign oil companies meeting requirements of Petroleum Act may also own land. In addition, foreigners who bring in more than Baht 40 million for investment may purchase up to 1,600 sq.m. of land for residential purpose in specified areas.

Foreigners may own building on leased land because there are no restrictions on building ownership. Foreigners can lease land, construct building, office tower, apartment or house on leased land and own structure.

Condominium Ownership.

Formerly, foreigners could not legally own condominiums because of issue concerning common ownership of land on which condominium was situated. Condominium Act (No. 2), B.E. 2534 (A.D. 1991) now entitles certain groups of foreigners (both individuals and juristic persons) to acquire condominium units in Thailand, provided that foreign ownership in condominium project does not exceed, in aggregate, 49% of total area of all units in condominium building, and foreigners present required documentation.

Documentation.

Registration.

Land transactions in provinces are registered in land office in province where land is located. Transactions for land located in Bangkok area are registered at district land offices. All land transactions should be recorded in written document, have title deed and be registered. Since unsurveyed land is not registered, other documents are used to show ownership.

Land Documents.

Following documents evidence land ownership or possession rights.

Title Deed or “chanote” is purest form of land ownership. It ensures easy transfer and is issued mainly in urban areas. One original set is kept in district land office where registration of land transfer takes place and other original set is given to land owner.

Confirmed Certificate of Use or “ngor sor saam gor” certifies right to use land and is often issued pending title deed. Transfer of certificate is mainly completed at district land office or branch district level, as case may be.

Certificate of Use or “ngor sor saam” is similar to confirmed certificate of use, but lacks completion of formalities, such as provision of aerial photo of land. Transfer of certificate requires posting of intent at provincial land office or branch land office, district land office or branch district office, house of village headman, location of land, and municipal office (if land is in municipality). There is 30-day waiting period before transfer is registered.

Certificate of Possession or “sor kor neung” only recognizes possession and does not imply ownership rights with possession. The certificate is nontransferable; however, person in possession may transfer physical possession. This certificate is required for issuance of Certificate of Use and is most common in rural areas. Tax receipt is evidence of possession but does not confer ownership rights with possession. It is useful when applying for Certificate of Possession.

Condominium unit title deed or “nangsue kammasit hong-chut” is evidence of ownership of condominium unit. It is of similar importance to land title deed. Administrative procedures relating to registration and issuance of land title deed are applicable to registration and issuance of condominium unit title deed.

23 TAXATION

23.01 ADMINISTRATION:

Taxes are imposed both at national and local levels, with central government being main taxing authority. Ministry of Finance administers majority of tax collections through its three departments: Customs Department which is responsible for collection of import and export duties; Revenue Department which is in charge of collection of income tax, value added tax, specific business tax and stamp duty; and Excise Department which collects excise tax. Property tax and municipal tax are collected by local governments. In general, tax administration follows self-assessment system. Taxpayer has legal duty to declare his income and pay tax to authorities. Declaration and tax payment are regarded to be correct; however, additional assessments may be made by authorities in case of failure to file tax returns or filing of false or inadequate tax returns. Appeal against additional assessments is allowed.

23.02 BUSINESS TAXES:

Business Tax.

Such tax has been replaced by value added tax and specific business tax since Jan 1, 1992.

Specific Business Tax.

This tax is imposed on certain types of businesses whose “value added” is difficult to define such as banking, finance, credit foncier, life insurance, pawnshop, real estate, etc. Such businesses are considered to be outside VAT system and not subject to VAT. Specific business tax is computed on monthly gross receipt at rates varying from 0.1% to 3% (rates do not include municipal tax). Traders liable to specific business tax may have to pay VAT on business activities that are not directly related to specific businesses and on business activities that are directly related to specific businesses but are prescribed by law as business subject to VAT (i.e. provision of credit card services, consultancy services, securities brokerage and agency services, securities underwriting services, letting out movable properties on hire, etc.). Traders residing outside Thailand may be liable to specific business tax if they carry on business through place of business, agent or representative, or employee in Thailand.

Signboard Tax.

Under Signboard Tax Act, B.E. 2510 (A.D. 1967) as amended, tax is levied on signboards showing names, symbols or marks of business or advertisement. Rates specified in Signboard Tax Act are computed on signboard size ranging from Baht 3 to Baht 40 per 500 square centimeters with minimum tax payment of Baht 200 per signboard.

23.03 CUSTOMS DUTY AND TAX:

Customs duty is mainly imposed on imported and selected export goods specified by Law on Customs Tariff. Most tariffs are ad valorem. In certain cases, both ad valorem and ad naturam rates are given, and tariff that gives most revenue will apply. In general, invoice price is basis for computation of duty and normally applied to CIF (Cost, Insurance, Freight) value for import and FOB (Free On Board) for export. Customs duty is levied in accordance with Harmonized Commodity Description and Coding System or Harmonized System. Most imported goods are subject to customs duty rates of 0% to 100%. Reduction and exceptions to payment of customs duties on certain imported goods are granted to promoted persons under Investment Promotion Act to petroleum concessionaires under Petroleum Act, to members of ASEAN Free Trade Area (AFTA) and World Trade Organization (WTO), and to parties of free trade agreements or international agreements. Thailand is member of General Agreement on Tariffs and Trade (GATT) and World Trade Organizational (WTO). Thai Customs law adopts practices and standards in accordance with GATT codes in determination of customs price.

23.04 ESTATE TAX:

None.

23.05 EXCISE TAXES:

Excise Tax.

Tax is imposed on selected goods (mainly luxury goods) such as gasoline and petroleum products, tobacco, liquor, soft drinks, playing cards, crystal glasses, perfume and cosmetic products, vessels, air conditioners not over 72,000 BTU, passenger cars with less than ten seats, etc. Excise tax will be computed according to Excise Tax Tariff on ad valorem basis or at specific rate, whichever is greater. All goods subject to excise tax remain subject to VAT.

23.06 GASOLINE AND SPECIAL FUELS TAXES:

Petroleum Income Tax.

Income derived from petroleum operation of company owning interest in petroleum concession granted by Thai government and of company purchasing oil for export from concession holder is subject to income tax imposed by Petroleum Income Tax Act, B.E. 2514 (A.D. 1971) as amended. Taxes levied by Revenue Code including tax on remittance of profits and dividends are not applicable to such income. Income from petroleum operation includes gross income from sale or disposal of petroleum, gross income arising from transfer of any property or right related to petroleum business and any other income arising from conducting petroleum business. Value of petroleum delivered as payment of royalty to government must also be included in company's income from petroleum operation. Deductions, among others, are royalties, both in cash and in kind, paid to Thai government and other expenditures that can be reasonably allocated to petroleum business of company. Petroleum income tax is chargeable on net profits at rate of 50%. Net profit for petroleum income tax is computed in same manner as corporate income tax but net losses may be carried forward for ten accounting periods.

23.07 GIFT TAX:

None.

23.08 INCOME TAX:

Personal Income Tax.

Individual, whether Thai citizen or alien, who lives in Thailand for one or more periods totaling 180 days or more in any tax year (calendar year) is, for tax purposes, deemed resident of

Thailand and subject to tax on all assessable income derived from sources within Thailand, whether such income is paid within or outside Thailand, and on assessable income derived from foreign sources to extent that such income is brought into Thailand in year in which income is received. Nonresident individual is subject to tax only on assessable income from Thai sources (regardless of place of payment). Non-juristic partnerships (unregistered ordinary partnerships) and non-juristic body of persons are also subject to personal income tax.

Capital gains arising from transfer of assets are treated as ordinary income and must be included in assessable income except for those exempt from personal income tax such as proceeds of sale of movable property acquired by bequest or acquired with no intention to trade or make profit and capital gains from sale of securities, not in form of debenture or bonds, listed in Stock Exchange of Thailand.

Exclusions from assessable income are certain types of income such as moving expenses received by employee to assume employment for first time or to return to his place of origin at termination of employment, per diem or transportation expenses spent by employee exclusively and wholly for carrying out his duties, inheritance, scholarships, etc.

Deductions are: (a) For income from employment, service rendered, or copyrights, standard deduction of 40% but not exceeding Baht 60,000 and (b) for other categories of income, taxpayer may elect between standard deductions which range from 10% to 85% depending on nature of income and actual expenditure incurred in deriving such income.

Allowances, among others, are: (a) Baht 30,000 for taxpayer; (b) Baht 30,000 for taxpayer's spouse; (c) Baht 15,000 for each child (who is not over 25 years of age and is still studying) with maximum of three children plus Baht 2,000 for each child's education (in Thailand); (d) insurance premiums for taxpayer's life insurance policy covering period of at least ten years taken from insurance company in Thailand, not exceeding Baht 100,000; (e) interest paid on loan granted for acquiring houses, not exceeding Baht 100,000; and (f) contributions to provident fund, not exceeding Baht 500,000.

Personal income tax rates are at progressive rate ranging from 5% on net income not exceeding Baht 100,000 to 37% on net income exceeding Baht 4 million. Net income is arrived at by deducting all applicable deductions and allowances from assessable income. Effective from tax year 2008 onward, income tax exempted on first Baht 150,000 of net income. Tax payable of taxpayer having assessable income, other than employment income, of more than Baht 1,000,000 must be minimum of 0.5% of total amount of assessable income.

Tax credit in respect of dividend is permitted for individual domiciled in Thailand and receiving dividend from any company organized under Thai law. Credit is computed by multiplying dividend with result from dividing corporate income tax rate that company paying dividend is subject to pay by balance of 100 minus such corporate income tax rate.

Credit = dividend X [A/ 100-A]

A is corporate income tax rate that company paying dividend must pay. Such credit shall be first included as assessable income and then deducted from total amount of tax payable.

Corporate Income Tax.

Companies and juristic partnerships organized under Thai law (hereinafter “Thai companies”) are subject to taxation on their worldwide income, both from sources within Thailand and from foreign sources (see also category 2 Business Organizations, topic 2.04 Juristic Persons). Companies and juristic partnerships organized under foreign laws (hereinafter “foreign companies”) are subject to taxation only on income from sources within Thailand. Revenue Code takes view that if foreign companies carry on business in Thailand, their income arising from or in consequence of that business constitutes Thai source income. Foreign company is deemed to be carrying on business in Thailand if it has employee, representative, or go-between in Thailand to carry on its business and thereby derives income or gains in Thailand. Therefore, foreign company that establishes branch office and derives income or gains in Thailand therefrom is deemed to be carrying on business in Thailand and subject to corporate income tax for its branch office's net profits in Thailand. Wholly-owned subsidiaries of foreign companies established as companies or juristic partnerships under Thai law are deemed Thai, not foreign, companies and subject to corporate income tax. Joint venture, defined by Revenue Code as business or profit-seeking enterprise carried on jointly by company and another company, by company and juristic partnership, or by company and/or juristic partnership on one hand, and individual, non-juristic body of persons, ordinary partnership or another juristic person on other hand, is also subject to corporate income tax. Foreign companies engaged in international transportation fall within scope of corporate income tax but have special provisions attached to them.

Corporate income tax rate of 30% is, with few exceptions, imposed on worldwide net profits received by Thai companies and on Thai source net profits received by foreign companies during given tax year (accounting period). Reduced rates at progressive rates of 15% to 30% are granted to small and medium-sized enterprises (“SMEs”) and since accounting period beginning on or after Jan. 1, 2008, first Baht 150,000 of net profits of SMEs must be exempt from corporate income tax. In addition, reduce rates at flat rates of 20% and 25% are granted to companies listed on Market for Alternative Investment (MAI) and companies listed on Stock Exchange of Thailand, respectively. Regional Operating Headquarters providing qualifying services to affiliated juristic companies or partnerships or branches are subject to tax at reduced rate of 10% of net profits. Foreign companies engaged in international transportation are subject to tax at rate of 3% of gross ticket receipts collected in Thailand for transportation of passengers and 3% of gross freight charges collected anywhere for transportation of goods from Thailand in lieu of tax on net profits.

Dividends received by Thai companies or foreign companies carrying on business in Thailand are taxable as ordinary income. However, Thai company is entitled to include in its taxable income only one-half of dividends received from another Thai company, provided that shares have been held for period of at least three months before and three months after earning of such dividends (“holding period”). Thai company will be exempt from taxation on all dividends received from another Thai company if recipient company holds at least 25% of total shares with voting rights in payer company and has so held shares in complying with holding period, and payer does not hold any share in recipient company whether directly or indirectly. Thai company listed on Stock Exchange of Thailand is exempt from taxation on all dividends received from another Thai company if they comply with just holding period.

Foreign tax credit is allowed for tax paid in foreign countries by Thai companies. Foreign tax credit is allowed against Thai corporate income tax up to amount of Thai income tax payable on such income.

Business expenses and depreciation allowances generally incurred by nature of business are allowed at rates ranging from 5% to 100% per annum as deductions from gross income in order to determine net profits. However, reserves not required by law, private expenses, gifts to charitable institutions exceeding 2% of net profits, donation for education or athletics exceeding 2% of net profits, non-maintenance capital expenditure, penalties or fines imposed under Revenue Code are not allowed as deductions.

Net losses may be carried forward for five accounting periods to offset against future profits. Loss carrybacks are not allowed.

Income Tax on Foreign Companies Not Carrying on Business in Thailand.

Foreign companies which are not deemed to be carrying on business in Thailand but deriving assessable income in Thailand such as interest, dividends, royalties, professional fees, etc. are subject to income tax in form of withholding tax based on gross income. Applicable tax rate is 15% except for dividends which are subject to withholding tax at rate of 10%. Tax must be withheld at source and at time of payment by payer of such assessable income. See also category 25 Treaties and Conventions, topic 25.01 Treaties, subhead Avoidance of Double Taxation Treaties.

Additional Taxes on Remittance of Branch's Profits.

In addition to 30% corporate income tax on net profits, branch's remittance of profit abroad to its head office is subject to taxation at rate of 10% of amount actually or deemed remitted. This amount of tax must be withheld by branch.

23.09 INHERITANCE TAX:

None.

23.10 LOCAL GOVERNMENT TAXES:

Municipal Tax.

When specific business tax is paid, municipal tax at rate of 10% of specific business tax is imposed on taxpayer. When VAT is paid, rate already includes municipal tax which is charged at rate of one-ninth of VAT rate (1/9 of 6.3%).

23.11 PROPERTY TAXES:

Property Tax.

There are two kinds of property tax in Thailand: house and land tax and local development tax. Under House and Land Tax Act, B.E. 2475 (A.D. 1932) as amended, tax is imposed on owners of house, building, structure or land which is rented or otherwise put to commercial use. Taxable property under house and land tax includes houses not occupied by owner, industrial and commercial buildings and land used in connection therewith. Tax rate is 12.5% of actual or assessed annual rental value of property. Under Local Development Tax Act, B.E. 2508 (A.D. 1965) as amended, tax is imposed upon person who either owns land or is in possession of land. Tax rates vary according to assessed value of land. Allowances are granted for land utilized for personal dwellings, raising of livestock and cultivation of crops by owner. Extent of allowances differs according to location of land.

23.12 STAMP TAX:

Stamp duty is levied on 28 classes of documents and transactions listed in Stamp Duty Schedule of Revenue Code such as promissory notes, bills of exchange, leases, powers of attorney, letters of credit, checks, bills of lading, etc. Rates vary according to classification of transaction contained in instrument.

23.13 VALUE ADDED TAX:

Value Added Tax (VAT).

Tax is generally imposed at single rate of 10% (this 10% tax already includes municipal tax which is charged at rate of one-ninth of VAT rate) and applies, with few exceptions, to goods and services supplied in, or imported into, Thailand. From Apr 1, 1999 until Sept 30, 2010, VAT rate is reduced from 10% to 7%. From Oct 1, 2010, VAT rate shall return to 10% if there is no extension of reduced rate. Trader will charge VAT on sale of goods or provision of services to consumer (output tax). VAT paid by such trader itself to other traders for purchase of goods or services (input tax) is then deducted and balance remitted to Revenue Department. Thus, tax will accrue at each stage only on “value added” to goods or services in that stage. Under VAT system, tax will be eventually borne by ultimate consumer and trader is regarded as collector of tax on behalf of Revenue Department. Exclusions from VAT are business subject to specific business tax, business necessary for maintenance of life and social welfare (i.e. health care services, educational services, domestic transportation, sale of unprocessed agricultural products), cultural services, religious and charitable services. Small-scale traders whose annual turnover does not exceed Baht 1,800,000 are exempt from VAT. Traders whose annual turnover exceeds Baht 1,800,000 are subject to 7% VAT. Zero percent rate applies to certain businesses such as export of goods or services, international transportation by sea or air, sale of goods and services to United Nations-related organizations or embassies, etc. Traders who do only zero-rated supply business will not be required to collect VAT on their supplies, but can refund all VAT paid for purchase of goods and services from other traders. Services provided by traders residing abroad and utilized in Thailand are regarded as being rendered in Thailand and subject to 7% VAT. Recipient of such service must remit VAT to Revenue Department when paying service fees to overseas traders.

24 TRANSPORTATION

24.01 MOTOR VEHICLES:

Car ownership is allowed for foreigners but it is expensive. Car rental, with or without driver, is available. However, both alternatives are expensive solutions to long-term transportation needs.

Thai driver's license is needed to drive in Thailand. Although international driving licenses are recognized in Thailand, they are of limited validity and may not be acknowledged by local insurance policies. To obtain Thai license, foreigner will need: (1) interpreter; (2) medical certificate; (3) two small photos; (4) passport (both original and copy); (5) valid foreign driver's license; and (6) certifying residence letter from his embassy. Compulsory third-party automobile insurance is now mandated by law in Thailand. This includes proof of insurance for vehicles registered in other countries being driven in Thailand.

Anyone involved in vehicular accident may be subject to both criminal and civil penalties for negligent driving. If one is involved in accident which is not his fault, he is entitled to compensation if other party is capable of payment. If, on the other hand, he is at fault, he could be liable for cost of compensation and subject to impoundment of his vehicle, as well as fine or imprisonment. In case of serious bodily injury, immediate imprisonment or high cash bail is usually imposed until matter is disposed of in criminal court. On-the-spot or out-of-court settlements after accident which does not result in grievous bodily harm to another person are common and acceptable alternative in resolving incident. Foreigners usually try to reach settlement through their insurance companies. Police will often act as intermediaries to effect compromises.

24.02 MULTIMODAL TRANSPORT:

Multimodal Transport Act, B.E. 2548 (A.D. 2005).

Enacted in Oct. 2005, this Act regulates multimodal transport operations. “Multimodal transport” means carriage of goods by at least two different modes of transport under one multimodal transport contract from place in one country where multimodal transport operator takes charge of goods, to place designated for delivery in another country. Pick-up and delivery operations as specified in unimodal contract are not considered as multimodal transport.

Multimodal transport operator means any person who, on his own behalf or through another person acting on his behalf, concludes multimodal transport contract and acts as principal, assuming responsibility for performance of transport in accordance with contract. Multimodal transport operator does not include person who acts as agent of or on behalf of consignor or carriers participating in said multimodal transport operations.

No one is allowed to operate multimodal transport unless he is registered multimodal transport operator under following categories: (1) Multimodal transport operator registered in accordance with rules and procedures of Ministerial Regulations; (2) multimodal transport operator registered in foreign country recognized by Thailand by virtue of treaty or international agreement and who has registered himself with Registrar in accordance with rules and procedures of Ministerial Regulations; (3) transport operator or multimodal transport operator in foreign country who has appointed agent in accordance with rules and procedures of Ministerial Regulations.

24.03 SHIPPING:

In 1991, Thailand enacted Carriage of Goods by Sea Act, B.E. 2534 (A.D. 1991). Previously, Thai court applied Civil and Commercial Code by analogy to matter concerned. Other laws controlling maritime matters include Navigation in Thai Territorial Waters Act, B.E. 2456 (A.D. 1913) (N.T.W.A.) as amended, Thai Vessels Act, B.E. 2481 (A.D. 1938) as amended, Mercantile Marine Promotion Act, B.E. 2521 (A.D. 1978), Prevention of Ship Collision Act, B.E. 2522 (A.D. 1979), Arrest of Vessels Act, B.E. 2534 (A.D. 1991), Mortgage of Vessel and Sea Preferential Rights Act, B.E. 2537 (A.D. 1994) (M.V.S.P.R.A.), Act on Average General Damage from Navigation Danger, B.E. 2547 (A.D. 2004), Act on Civil Liability and Compensation from Ship Collision, B.E. 2548 (A.D. 2005), and Marine Rescue Act, B.E. 2550 (A.D. 2007).

Carriage of Goods by Sea Act, B.E. 2534 (A.D. 1991).

Based on terms from Hague Rules, Hague-Visby Rules and Hamburg Rules, Act became effective in Feb. 1992. Act covers definitions of terms related to maritime industry, scope of application, duties and rights of carrier and shipper when goods are carried by sea, liabilities of carrier, exclusion of liability of carrier, limitation of liability of carrier, period of prescription, bills of lading, etc.

Scope of Application.

Generally, Act applies to carriage of goods by sea from within Thai waters to outside Thai waters, and vice versa. Bill of lading may provide that law of another jurisdiction applies; however, if one of parties is Thai natural or juristic person, Act will automatically apply.

Duties and Rights of Carrier.

Under Act, carrier has duties to make vessel seaworthy, to take care of cargo, to issue bill of lading, and to notify consignee of arrival of goods at destination. Carrier is entitled to carry goods on deck where there is agreement with shipper to that effect, or there is usage of trade entitling such carriage, or there are laws or regulations entitling it. Carrier has right to freight or accessories of freight when goods have been carried to port of destination or to place agreed upon to be destination and is ready to deliver goods unless there is term in bill of lading or agreement set forth in contract for carriage of goods by sea. Carrier is also empowered to retain goods until he has been paid both freight and accessories of freight or until consignee has given reasonable security.

Liabilities of Carrier.

Generally, carrier shall be liable for damage resulting from loss of or damage to goods which have been handed over to him by shipper and from any delay in delivery while goods were in his custody. However, carrier shall not be liable for loss, damage or delay in delivery if it can be proved that such loss, damage or delay in delivery arose or resulted from exclusion of liability of carrier similar to catalogue of exceptions under Hague-Visby Rules. In addition, carrier shall not be liable for loss, damage or delay in delivery caused by or resulting from: (a) fire, unless claimant can prove that fire arose from fault or neglect on part of carrier or servant or agent of carrier; (b) carrier's taking measures that could reasonably be required of him to put out fire and to avoid or to mitigate consequences thereof, unless such loss is proved by claimant to have resulted from fault of or neglect by carrier, his servants or agents in taking such measures; (c) carrier's taking measures to save human life or taking reasonable measures to save property at sea; and (d) any special risks usually inherent in carriage of live animals, or from special nature of animals which did not result from fault or neglect on part of carrier or his servant or agents.

Limitation of Liability of Carrier.

Liability of carrier for damage resulting from loss of or damage to goods is limited to Baht 10,000 per unit of carriage or Baht 30 per kilogram of net weight of goods, whichever amount is larger. Liability of carrier for delay in delivery of goods is limited to amount equivalent to two and a half times freight payable for delayed goods, but sum must not exceed total freight payable under contract of carriage of goods by sea.

Period of Prescription.

Any right to claim for damages arising from loss of or damage to goods, or for delay in delivery of goods carried under contract of carriage of goods by sea is time barred if judicial or arbitral proceeding has not been instituted within period of one year from date on which carrier delivered goods or, where no delivery was made, from date on which goods were stipulated to have been delivered or after date on which it would have been reasonable to require delivery.

Bill of Lading means document which carrier issues to shipper under contract for carriage of goods by sea as evidence that carrier has taken goods specified in bill of lading into his custody or has loaded goods and undertakes to deliver goods to person entitled to receive them upon surrender of bill of lading. Therefore, bill of lading functions as (a) receipt for goods shipped; (b) evidence of contract of carriage; and (c) document of title.

Arrest of Vessels Act, B.E. 2534 (A.D. 1991).

Enacted in 1991, this Act provides legal means for creditor who has domicile in Thailand to bring successful action against shipowner or, at least, have subject vessel arrested until merits of claim are decided. There are several grounds on which creditor can request that court issue warrant for arrest of vessel, including contracts for use of vessel, contracts for carriage of goods by sea, charges for port facilities and mortgage of vessel. In order to seek arrest of vessel in Thailand, complainant must be domiciled in Thailand and vessel must either be already in Thai waters or about to enter Thai waters.

Application for arrest of vessel is brought by ex parte motion. This allows for timely arrest of vessel, often same day motion is filed. Arrest procedure provides creditor with some security for his claim while case is argued on its merits and provides creditor something to collect on if his complaint is found valid. When ordering arrest of vessel, court is required to stipulate amount shipowner can pledge in lieu of having vessel arrested (ordinarily in form of bank guarantee issued by Thai commercial bank). Court may require that complainant post funds as well, to guard against frivolous actions.

Mortgage of Vessel and Sea Preferential Rights Act, B.E. 2537 (A.D. 1994).

Enacted in 1994, Act deals with two main issues: (1) mortgage of vessel; and (2) sea preferential right.

Mortgage of vessel deals with general provisions, execution of contract and registration of mortgage of vessel, and effects and enforcement of mortgages. Act requires that contract for mortgage of vessel be made in writing and registered in accordance with criteria and procedures prescribed in ministerial regulations. M.V.S.P.R.A. defines vessel as vessel of size of 60 tons gross or more powered by machine or machines, regardless of whether it uses other forms of power or not, and has characteristics for seagoing use in accordance with laws controlling vessel inspection issued under law governing navigation of vessels in Thai territorial waters. Provisions of M.V.S.P.R.A. extend to enforcement of mortgage on non-Thai vessels. Act provides that contract in which owner of non-Thai vessel has committed his vessel to another person as guarantee for payment of debts shall be held to be mortgage which may be enforced in accordance with this Act if it is subject to following conditions: (a) contract made with full validity under laws of country in which vessel is registered; (b) contract has been registered in register which general public is permitted to inspect at office of state which has duty to register such contracts; and (c) it is case where plaintiff may present plaint to court in accordance with C.P.C., law governing detention of vessel, or other laws. Therefore, mortgage of vessel under foreign flag registered outside Thailand but subject to M.V.S.P.R.A. may be enforced in Thailand by mortgagee. Thai court may order mortgagor or mortgagee to sell vessel or order public auction. If mortgaged vessel is lost or damaged, coverage extends to include: compensation for tort resulting in loss of or damage to vessel or items covered by vessel mortgage rights; general average for proportion which shipowner is entitled to claim for it; salvage cost; and compensation from insurance coverage. Mortgagee possesses right to receive payment for debts from mortgaged ship before preferential creditors under C.C.C. and other creditors of owner of vessel.

Holder of sea preferential rights has right to receive outstanding amounts due to him from vessel, if subject to enforcement of sea preferential rights, before other creditors, regardless of whether or not debtor of right to claim is owner of vessel. Sea preferential right shall be valid without any registration and shall take priority over mortgage rights under this Act as well as preferential rights under C.C.C. Sea preferential rights include: claim for crew's wages; compensation for loss of life or injury to any person arising from work operations of ship; claim for vessel salvage; claim for tortious act arising from work operations of vessel, etc. Where sea preferential rights are transferred, transferee shall have same sea preferential rights as those of transferor. Where sea preferential rights have arisen before any transfer of ownership of vessel, such sea preferential rights are not extinguished by such transfer, unless transferee has notified sea preferential rights creditors to submit their claims to transferee within prescribed period, but not less than 60 days from date of notification. If sea preferential rights creditors file to submit their claims to transferee within prescribed period, sea preferential rights shall have ended.

Act on Average General Damage from Navigation Danger, B.E. 2547 (A.D. 2004).

Under Act, injured persons incurring damage directly from sacrifice of property or expenses to protect vessels and property together have right to ask for average general damage. Vessel's and property's owners who survive such danger must take part to average, losses, damages or expenses. Vessel's owners must appoint appraisers and issue letter informing conduct of general damage and name and contact place of appraisers to property's owner or person having interest in property encountering danger. Amount of general average must equal ratio between amount of general damage and total value of vessel and all property, multiplied by value of vessel or property.

Prescription period for claiming general average, in case of vessel's owner, is one year from date of notifying amount of general average to persons jointly sharing amount of general average, but not exceeding five years from date general damage occurred. In case of claim by persons incurring general damage, duration is one year from date of notifying amount of general average to persons jointly sharing amount of general average, but not exceeding seven years from date general damage occurred.

Act on Civil Liability and Compensation from Ship Collision, B.E. 2548 (A.D. 2005).

Act lays down principles concerning civil liability and calculation of compensation from ship collision, liability for which is in proportion to ratio of responsibility of each ship. However, in case of accident where each ship has exercised care in navigation in full capability, or force majeure, or cause of such collision is unknown, liability for damages falls upon each ship. If cause of ship collision arises from offenses of more than two ships and ratio of responsibility of each ship cannot be determined, each ship is equally liable for damages. Each ship is liable only to ratio of its responsibility for damages to ship and property onboard, but liable as joint debtors to damage occurred to life, body or health of persons onboard.

Claimable compensation is calculated from damages directly resulting from ship collision, including value of ship at time of collision, taking into account its life span, condition, features of operation, insurance value, value of ships of similar condition and other factors relating to ship. In case of damage to property onboard ship, with such property taking form of goods, claimable compensation, in case of loss, is calculated based on market price and at destination port where properties should have arrived, minus any expenses for transporting such property to destination port. In case of ship collision causing damage to life, body or health of person onboard, provision concerning compensation due to wrongful act (tort) as stated in C.C.C. shall apply *mutatis mutandis*.

Marine Rescue Act, B.E. 2550 (A.D. 2007).

Rescue as defined under Act means any action or activity which is engaged to rescue ships or other property facing danger at sea or in any waters. Under Act, ship master has authority to enter into rescue contract on behalf of ship owner and either ship owner or ship master has authority to enter into rescue contract on behalf of owner of property onboard ship. Act is not applicable to any rescue conducted in domestic waters where no ocean vessel is involved.

Rescuers must engage in rescue operation with reasonable care and prevent or minimize environmental damages and may seek assistance from other rescuers when appropriate. Ship master has duty to assist individuals whose life is in danger at sea to best of his ability without causing serious damage to ship or individual onboard ship.

Rescuers are entitled to reward where rescue helps ship or other property. Rewards will be determined by using following criteria: value of ship or other properties in condition as rescued, effort of rescuers, extent of success of rescue, condition and severity of danger, time spent and expenses incurred, as well as loss sustained by rescuers, risk of liability of rescuers, timeliness of service, ships and other tools used by rescuers and readiness and efficiency of rescuers. Prescription for claiming reward is two years from date on which rescue ended.

25 TREATIES AND CONVENTIONS

25.01 TREATIES:

Thailand is signatory to several multilateral treaties, conventions and agreements; following are among those concerning commerce, trade and foreign investment:

General Treaties.

(1) Berne Convention for the Protection of Literary and Artistic works, Sept. 9, 1886; (2) Convention for the Pacific Settlement of International Disputes, Oct. 18, 1907; (3) International Air Services Transit Agreement, Dec. 7, 1944; (4) Convention on International Civil Aviation, Dec. 7, 1944; (5) Charter of the United Nations and Statute of the International Court of Justice, June 26, 1945; (6) Constitution of the United Nations Food and Agriculture Organization, Oct. 16, 1945; (7) Articles of Agreement of the International Bank for Reconstruction and Development, Dec. 27, 1945; (8) Articles of Agreement of the International Monetary Fund, Dec. 27, 1945; (9) General Agreement on Tariffs and Trade (GATT), Oct. 30, 1947; (10) Convention on the International

Recognition of Rights in Aircraft, June 19, 1948; (11) Convention Establishing a Customs Co-Operation Council, Dec. 15, 1950; (12) Articles of Agreement of the International Finance Corporation, May 25, 1955; (13) Convention on Fishing and Conservation of Living Resources of the High Seas, Apr. 29, 1958; (14) Convention on the High Seas, Apr. 29, 1958; (15) Convention on the Continental Shelf, Apr. 29, 1958; (16) Convention on the Territorial Sea and Contiguous Zone, Apr. 29, 1958; (17) Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958; (18) Articles of Agreement of the International Development Association, Jan. 26, 1960; (19) Articles of Agreement Establishing the Asian Development Bank, Dec. 4, 1965; (20) Operating Agreement Relating to the International Telecommunications Satellite Organization (INTELSAT), Aug. 20, 1971; (21) Agreement Regarding International Trade in Textiles, Dec. 20, 1973; (22) General Agreement on Tariffs and Trade (GATT), Oct. 20, 1982; (23) Protocol Extending Arrangement Regarding International Trade in Textiles of Dec. 20, 1973, July 31, 1986; (24) Agreement Establishing the International Fund for Agricultural Development, June 13, 1976; (25) Constitution of the United Nations Industrial Development Organization, Apr. 8, 1979; (26) International Coffee Agreement, Sept. 16, 1982; (27) International Telecommunications Convention, Nov. 6, 1982; (28) Convention on the Law of the Sea 1982; (29) International Sugar Agreement 1987, Sept. 11, 1987; (30) Basel Convention for the Control of Transboundary Movements of Hazardous Wastes and their Disposal, Mar. 22, 1990; (31) Agreement on the Common Effective Preferential Tariff (CEPT) Scheme for the ASEAN Free Trade Area (AFTA), Jan. 28, 1992; (32) Framework Agreement on Enhancing ASEAN Economic Cooperation, Jan. 28, 1992; (33) United Nations Framework Convention on Climate Change, May 9, 1992; (34) Convention on Biological Diversity, June 5, 1992, ratified on Jan. 28, 2004; (35) Agreement on Judicial Assistance in Civil and Commercial Matters and Cooperation in Arbitration between Thailand and People's Republic of China, Mar. 16, 1994; (36) WTO Agreement, Apr. 15, 1994 of which following agreements are integral parts of it: Annex A: Multilateral. General Agreement on Tariffs and Trade 1994, Agreement on Agriculture, Agreement on the Application of Sanitary and Phytosanitary Measures, Agreement on Textiles and Clothing, Agreement on Technical Barriers to Trade, Agreement on Trade-Related Investment Measures, Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994, Agreement on Implementation of Article VII of the General Agreement on Tariffs and Trade 1994, Agreement on Reshipment Inspection, Agreement on Rules of Origin, Agreement on Import Licensing Procedures, Agreement on Subsidies and Countervailing Measures, Agreement on Safeguards, Annex B: General Agreement on Trade in Services, Annex C: Agreement on Trade-Related Aspects of Intellectual Property Rights; (37) Convention and Operating Agreement on International Maritime Satellite Organization (INMARSAT), Dec. 14, 1994; and (38) Protocol Amendment to Memorandum of Understanding Brand-to-Brand Complementation on the Automotive Industry Under the Basic Agreement on ASEAN Industrial Complementation, Mar. 1995; (39) The International Natural Rubber Agreement 1995; (40) The ASEAN Framework Agreement on Intellectual Property Cooperation, Dec. 1995; (41) The Southeast Asia Nuclear Weapon Free Zone Treaty, Dec. 1995; (42) Cultural Agreement between Thailand and Vietnam, Aug. 1996; (43) Declaration on Trade in Information Technology Products, Mar. 1997; (44) Thai-New Zealand Action Agenda, July 1997; (45) Convention Banning Landmines, Dec. 3, 1997; (46) Ramsar Convention, May 1998; (47) Agreement on Court Cooperation on Civil Cases between Thailand and Spain, June 1998; (48) Extradition Treaty between Thailand and Bangladesh, July 9, 1998; (49) Agreement on Cooperation in Narcotic Control between Thailand and Vietnam, Oct. 7, 1998; (50) Tampere Convention on the Provision of Telecommunication Resources for Disaster Mitigation and Relief Operations, Nov. 10, 1998; (51) Agreement on Cooperation in Crime Prevention and Suppression between Thailand and Philippines, Dec. 18, 1998; (52) Agreement on Carriage by Road between Thailand and Laos, Mar. 5, 1999; (53) Extradition Treaty between Thailand and Laos, Mar. 5, 1999; (54) Agreement on Cooperation in University and Research between Thailand and France, Apr. 23, 1999; (55) Extradition Treaty between Thailand and South Korea, Apr. 26, 1999; (56) Treaty on Criminal Assistance between Thailand and Norway, May 20, 1999; (57) Treaty on Cooperation in Execution of Judgments of Criminal Matters between Thailand and Norway, May 20, 1999; (58) Agreement on Carriage by Sea between Thailand and Peru, June 4, 1999; (59) Treaty on Transfer of Offenders and Cooperation in Execution of Judgments of Criminal Matters between Thailand and Denmark, June 21, 1999; (60) Gas Pact between Thailand and Malaysia, Oct. 1999; (61) Agreement on Cultural Cooperation between Thailand and Russia, Feb. 25, 2000; (62) Agreement on Military Cooperation between Thailand and France, Apr. 26, 2000; (63) Agreement between Thailand and the Czech Republic on the Transfer of Offenders and Cooperation in the Enforcement of Penal Sentences, Apr. 26, 2000; (64) Protocol on the Establishment of Diplomatic Relations between Thailand and Andorra, Apr. 28, 2000; (65) Agreement between Thailand and Vietnam on Visa Exemption for Holders of Ordinary Passports, May 9, 2000; (66) Agreement between Thailand and Cambodia to Combat Against Illicit Trafficking and Cross Border Smuggling of Movable Cultural Property and to Restitute it to the Country of Origin, June 14, 2000; (67) Agreement between Thailand and Cambodia on Cooperation for the Return of Stolen or Embezzled Vehicles, June 14, 2000; (68) Agreement between Thailand and Malaysia on Joint Venture in the Purchase and Sale of INRO's Stock, July 7, 2000; (69) Agreement between Thailand and India for Cooperation for the Utilisation of Atomic Energy for Peaceful Purposes, July 10, 2000; (70) Agreement between Thailand and Estonia on the Transfer of Offenders and on Cooperation in the Enforcement of Penal Sentences, Sept. 6, 2000; (71) Agreement between Thailand and the United States of America Regarding the Transfer of Forfeited Assets, Oct. 2, 2000; (72) Memorandum of Understanding between Thailand and China on the Cooperation in Narcotic Drugs, Psychotropic Substances and Precursor Chemicals Control, Oct. 10, 2000; (73) Memorandum of Understanding between Thailand and Canada Concerning the CIDA Regional Project Southeast Asia Fund for Institutional and Legal Development, Oct. 16, 2000; (74) Record of Deposit and Registration of the Instrument of Ratification by Thailand of the Worst Forms of Child Labor Convention 1999, Feb. 16, 2001; (75) Framework Agreement between Thailand and Cambodia on Economic Cooperation, June 18, 2001; (76) Memorandum of Understanding between Thailand and Cambodia Regarding Overlapping Maritime Claims on the Continental Shelf, June 18, 2001; (77) Memorandum of Understanding between Thailand and Myanmar on the Cooperation in Narcotic Drugs, Psychotropic Substances and Precursor Chemicals Control, June 20, 2001; (78) Air Services Agreement between Thailand and the Kyrgyz Republic, July 2, 2001; (79) Agreement between Thailand and Australia on the Transfer of Offenders and Cooperation in the Enforcement of Penal Sentences, July 26, 2001; (80) Agreement between Thailand and Germany on Sea Transportation, July 30, 2001; (81) Memorandum of Understanding between Thailand and Brunei Darussalam on Cooperation in the Field of Information and Broadcasting, Aug. 16, 2001; (82) Memorandum of Understanding between Thailand and Laos on the Cooperation in Narcotic Drugs, Psychotropic Substances and Precursor Chemicals Control, Aug. 17, 2001; (83) Cultural Agreement between Thailand and China, Aug. 28, 2001; (84) Treaty between Thailand and the Philippines on the Transfer of Sentenced Persons and Cooperation in the Enforcement of Penal Sentences, Oct. 12, 2001; (85) Agreement between Thailand and Cambodia on Visa Exemption for Holders of Diplomatic Passports, Nov. 13, 2001; (86) Memorandum of Understanding on the Cooperation in Information Technology and Information Services between Thailand and India, Nov. 28, 2001; (87) Economic Cooperation Framework between Thailand and the United States of America, Dec. 14, 2001; (88) Memorandum of Understanding between Thailand and the Netherlands on Dutch Cooperation Programme for Emerging Markets Thailand 2001-2003, Dec. 21, 2001; (89) Memorandum of Understanding between Thailand and Indonesia on Fisheries Cooperation, Jan. 17, 2002; (90) Treaty between Thailand and Nigeria on the Transfer of Offenders and Cooperation in the Enforcement of Penal Sentences, Jan. 16, 2002; (91) Cultural Agreement between Thailand and Indonesia, Jan. 17, 2002; (92) Agreement between Thailand and India on Scientific, Technical and Environmental Cooperation and Technology Transfer, Feb. 1, 2002; (93) Agreement between Thailand and India on Cooperation in the Exploration and Use of Outer Space for Peaceful Purposes, Feb. 1, 2002; (94) Agreement on Economic and Technical Cooperation between Thailand and Cuba, Feb. 4, 2002; (95) Agreement between Thailand and Croatia on Visa Abolition for Holders of Diplomatic and Official Passports, Feb. 11, 2002; (96) Cultural Agreement between Thailand and the Democratic People's Republic of Korea, Mar. 1, 2002; (97) Protocol on Consultations and Cooperation between the Ministry of Foreign Affairs of the Kingdom of Thailand and the Ministry of Foreign Affairs of the Arab Republic of Egypt, Jan. 30, 2003; (98)

Financing Agreement between the European Community and ASEAN, Feb. 4, 2003; (99) Exchange of Notes on Agreement between the Government of the Federal Republic of Germany and the Government of the Kingdom of Thailand on Amateur Radio Stations, Feb. 24, 2003; (100) Agreement between the Government of the Kingdom of Thailand and the Government of the Republic of Bulgaria on Cooperation in the Fields of Culture and Education, Mar. 17, 2003; (101) Memorandum of Understanding between the Government of the Kingdom of Thailand and the Government of the Federal Republic of Germany on Establishing a Joint Thai-German Economic Committee, Mar. 31, 2003; (102) Exchange of Notes between the Kingdom of Thailand and Serbia and Montenegro on Establishment of Diplomatic Relations, Apr. 22, 2003; (103) Exchange of Notes between the Government of the Federal Republic of Germany and the Government of the Kingdom of Thailand Concerning Amateur Radio Operations, May 7, 2003; (104) Agreement between the Government of the Kingdom of Thailand and the Government of the Union of Myanmar on the Construction, Ownership, Management, Maintenance and Use of the Second Friendship Bridge Across the Mae Sai River, May 19, 2003; (105) Treaty between the Kingdom of Thailand and the People's Republic of China on Mutual Legal Assistance in Criminal Matters, May 21, 2003; (106) Memorandum of Understanding between the Government of the Kingdom of Thailand and the Government of the Republic of Indonesia on Tourism Cooperation, May 23, 2003; (107) Agreement between the Government of the Kingdom of Thailand and the Government of the Kingdom of Cambodia on Technical Cooperation on Sanitary and Phytosanitary Measures, May 31, 2003; (108) Memorandum of Understanding between the Government of the Kingdom of Thailand and the Government of the Kingdom of Cambodia on Agricultural Cooperation, May 31, 2003; (109) Joint Ministerial Statement on the Concept Paper on Thailand-Cambodia Border Points of Entry, May 31, 2003; (110) Memorandum of Understanding between the Ministry of Education of the Kingdom of Thailand and the Ministry of Education, Youth and Sports of the Kingdom of Cambodia on Cooperation in Education, May 31, 2003; (111) Memorandum of Understanding between the Government of the Kingdom of Thailand and the Government of the Kingdom of Cambodia on Bilateral Cooperation for Eliminating Trafficking in Children and Women and Assisting Victims of Trafficking, May 31, 2003; (112) Memorandum of Understanding between the Government of the Kingdom of Thailand and the Government of the Kingdom of Cambodia on Cooperation in the Employment of Workers, May 31, 2003; (113) Memorandum of Understanding between the Government of the Kingdom of Thailand and the Government of the Kingdom of Cambodia on the Development of Road Number 48 (Koh Kong-Sre Ambel) and Road Number 67 (Sa-Ngam-Anlongveng-Siem Reap), May 31, 2003; (114) Memorandum of Understanding between the Government of the Kingdom of Thailand and the Government of the Union of Myanmar on Cooperation in the Employment of Workers, June 21, 2003; (115) Treaty between the Kingdom of Thailand and the People's Republic of China on Mutual Legal Assistance in Criminal Matters, June 21, 2003; (116) Agreement between the Thailand Trade and Economic Office in Taipei and the Taipei Economic and Cultural Office in Thailand on Agricultural Cooperation, July 24, 2003; (117) Treaty between the Kingdom of Thailand and the Republic of Korea on Mutual Assistance in Criminal Matters, Aug. 25, 2003; (118) Memorandum of Understanding between the Office of the Board of Investment of the Kingdom of Thailand and Korea on Cooperation Relating to Investment Matters, Aug. 25, 2003; (119) Memorandum of Understanding between the Government of the Kingdom of Thailand and the Government of the Kingdom of the Netherlands on the Program for Cooperation with Emerging Markets (PSOM), Aug. 29, 2003; (120) Memorandum of Understanding on Economic and Technical Cooperation between the Government of the Democratic Republic of Timor Leste and the Government of the Kingdom of Thailand, Sept. 7, 2003; (121) Agreement between the Government of the Kingdom of Thailand and the Government of the Republic of Bulgaria on Promotion and Protection on Investment, Sept. 11, 2003; (122) Agreement on Border Security Cooperation between the Government of the Kingdom of Thailand and the Government of Lao People's Democratic Republic, Oct. 16, 2003; (123) Agreement between the Government of the Kingdom of Thailand and the Government of the People's Republic of China on the Establishment of Joint Committee on Trade Investment and Economic Cooperation, Oct. 18, 2003; (124) Memorandum of Understanding between the Government of the Kingdom of Thailand and the Government of the Republic of China on the Promotion of Trade Investment and Economic

Cooperation, Oct. 18, 2003; (125) Agreement between the Government of the Kingdom of Thailand and the Government of the People's Republic of China on the Establishment of Consultation Mechanism between the Ministry of Foreign Affairs of the Kingdom of Thailand and the Ministry of Foreign Affairs of the People's Republic of China, Oct. 18, 2003; (126) Agreement on Tourism Cooperation between the Government of the Kingdom of Thailand and the Government of the Republic of Chile, Oct. 19, 2003; (127) Agreement between the Government of the Kingdom of Thailand and the Government of the United Mexican States on Cultural and Educational Cooperation, Oct. 19, 2003; (128) Memorandum of Understanding on Logistics Support between the Government of the Kingdom of Thailand and the Government of Australia, Feb. 2, 2004; (129) Treaty between the Government of the Kingdom of Thailand and the Government of the Republic of India on Mutual Legal Assistance in Criminal Matters, Feb. 8, 2004; (130) Framework Agreement on the BIMST-EC Free Trade Area, Feb. 8, 2004; (131) Memorandum of Understanding between the Government of the Kingdom of Thailand and the Government of the Socialist Republic of Vietnam on Technical Cooperation, Feb. 20, 2004; (132) Memorandum of Understanding between the Ministry of Public Health of the Kingdom of Thailand and the Ministry of Health of the Socialist Republic of Vietnam on Health Cooperation, Feb. 20, 2004; (133) Memorandum of Understanding (MOU) between the Ministry of Agriculture and Cooperatives of the Kingdom of Thailand and the Ministry of Agriculture and Rural Development and the Ministry of Fisheries of the Socialist Republic of Vietnam on Cooperation on the Application of Sanitary and Phytosanitary Measures, Feb. 21, 2004; (134) Framework Agreement on Economic Cooperation between the Government of the Kingdom of Thailand and the Government of the Socialist Republic of Vietnam, Feb. 21, 2004; (135) Agreement on Cooperation between the Government of the Kingdom of Thailand and the Government of the Socialist Republic of Vietnam on the Prevention and Fight Against Criminal Activities, Feb. 21, 2004; (136) Memorandum of Understanding between the Ministry of Labour of the Government of the Kingdom of Thailand and the Family and Community Services Portfolio of the Government of Australia Relating to Cooperation in Social Security Policies and Programs, Feb. 26, 2004; (137) Memorandum of Intent between the Government of the Kingdom of Thailand and the Government of the United States of America for the Provision of a Terrorist Interdiction Program Border Control System, Mar. 11, 2004; (138) Memorandum of Understanding between the Atomic Energy Bureau of the Ministry of Science and Technology of the Kingdom of the Republic of Korea and the Office of the Atomics for Peace of the Ministry of Science and Technology of the Kingdom of Thailand for Atomic Energy Cooperation, Mar. 24, 2004; (139) Memorandum of Understanding between the Government of Thailand and the Secretariat of the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES) for the Thirteenth Meeting of the Conference of the Parties to CITES, Apr. 23, 2004; (140) Memorandum of Understanding between the Government of the Kingdom of Thailand and the Government of the Islamic Republic of Pakistan on Combating Terrorism and Certain other Crimes, Apr. 29, 2004; (141) Memorandum of Understanding between the Ministry of Science and Technology of the Kingdom of Thailand and the Ministry of Science and Technology of the Islamic Republic of Pakistan on Scientific and Technological Cooperation, Apr. 29, 2004; (142) Memorandum of Understanding on the Conservation and Management of Marine Turtles and their Habitats of the Indian Ocean and South-East Asia, May 12, 2004; (143) Agreement on Economic Cooperation between Thailand and Hungary, June 9, 2004; (144) Air Services Agreement between Thailand and Ukraine, June 10, 2004; (145) Agreement between Thailand and Brazil on Technical Cooperation on Sanitary and Phytosanitary Measures, June 16, 2004; (146) Agreement on Cooperation on Sports between Thailand and Brazil, June 16, 2004; (147) Memorandum of Understanding between Thailand and Brazil on the Establishment of a Joint Commission for Bilateral Cooperation, June 16, 2004; (148) Memorandum of Understanding between Thailand and Korea on the Sending of Workers to Korea, June 25, 2004; (149) Memorandum of Understanding on Cooperation in Education and Training between Thailand and Australia, July 5, 2004; (150) Memorandum of Understanding between Thailand and Australia Relating to “Work and Holiday” Visas, July 5, 2004; (151) Agreement on Bilateral Cooperation between Thailand and Australia, July 5, 2004; (152) Joint Statement between Thailand and Australia Concerning Cooperation in the Fields of Telecommunications and Information Technology, July 5, 2004; (153)

Memorandum of Understanding between Thailand and Australia on Environment, July 5, 2004; (154) Thailand-Australia Free Trade Agreement, July 5, 2004; (155) Memorandum of Agreement between Thailand and Australia on Animal Management, July 16, 2004; (156) Air Services Agreement between Thailand and Djibouti, July 28, 2004; (157) Cultural Agreement between Thailand and Djibouti, July 28, 2004; (158) Agreement between Thailand and Bhutan on Exemption of Visa Requirements for Holders of Diplomatic and Official Passports, July 30, 2004; (159) Treaty between Thailand and Sri Lanka on Mutual Legal Assistance in Criminal Matters, July 30, 2004; (160) Agreement on Bilateral Co-operation on Fisheries between Thailand and Sri Lanka, July 30, 2004; (161) Memorandum of Understanding between Thailand and Sri Lanka on Agricultural Cooperation, July 30, 2004; (162) Comprehensive Framework Agreement for Cooperation between Thailand and Bhutan, July 30, 2004; (163) Memorandum of Understanding between Thailand and Sri Lanka on Cooperation on the Application of Sanitary and Phytosanitary Measures, July 30, 2004; (164) Memorandum of Understanding between Thailand and Sri Lanka on Bilateral Cooperation on Information Technology and Services, July 30, 2004; (165) Memorandum of Understanding between Thailand and Sri Lanka on Cooperation Relating to Investment Matters, July 30, 2004; (166) Framework Agreement on Economic and Technical Cooperation between Thailand and Jordan, Aug. 3, 2004; (167) Joint Statement between Thailand and China on Enhancing Cooperation in Information and Communications, Aug. 5, 2004; (168) Memorandum of Understanding between Thailand and Myanmar on Cooperation in the Field of Renewable Energy and Energy Conservation, Aug. 7, 2004; (169) Treaty between Thailand and Netherlands on the Transfer of Offenders and on Co-operation in the Enforcement of Penal Sentences, Aug. 23, 2004; (170) Agreement between Thailand and Korea on Cooperation in the Fields of Culture and Education, Aug. 25, 2004; (171) Protocol to Amend the Framework Agreement for Establishing Free Trade Area between Thailand and India, Aug. 30, 2004; (172) Agreement on Scientific and Technological Cooperation between Thailand and Slovenia, Sept. 8, 2004; (173) Cultural Agreement between Thailand and Hellenic, Sept. 21, 2004; (174) Agreement on Cultural, Scientific and Technological Cooperation between Thailand and Italy, Sept. 22, 2004; (175) Memorandum of Understanding between Thailand and Italy on the Co-operation for Small and Medium-Sized Enterprises, Sept. 22, 2004; (176) Memorandum of Understanding between Thailand and Burkina Faso on Consultations and Cooperation, Nov. 24, 2004; (177) Treaty between Thailand and Mali on the Transfer of Offenders and on Co-operation in the Enforcement of Penal Sentences, Nov. 24, 2004; (178) Memorandum of Understanding between Thailand and Kenya on Cooperation in the Field of Tourism, Dec. 2, 2004; (179) Protocol on the Liberalisation of Passenger Air Services to the Existing Agreement(s) on Air Services between Thailand and Singapore, Dec. 27, 2004; (180) Protocol on the Liberalisation of Passenger Air Services to the Existing Agreement(s) on Air Services between Thailand and Brunei, Dec. 27, 2004; (181) Multilateral Agreement on the Liberalisation of Passenger Air Services between Thailand and Brunei, Dec. 27, 2004; (182) Thailand-New Zealand Closer Economic Partnership Agreement, Apr. 19, 2005; (183) Arrangement on Environment between Thailand and New Zealand, Apr. 19, 2005; (184) Arrangement on Labour between Thailand and New Zealand, Apr. 19, 2005; (185) Arrangement on a Working Holiday Scheme between Thailand and New Zealand, Apr. 19, 2005; (186) Memorandum of Understanding between Thailand and Oman on the Exemption of Visa Requirements, Apr. 27, 2005; (187) The Protocol for the Cultural Exchange Programme between Thailand and Pakistan for the Years 2005-2009, May 9, 2005; (188) Memorandum of Understanding on the Dried Longan Barter Trade Programme for Armaments between Thailand and China, May 13, 2005; (189) Memorandum of Understanding between Thailand and India on Cooperation in the Field of Education, June 3, 2005; (190) Memorandum of Understanding between Thailand and Bhutan on Cooperation in the Field of Culture, June 4, 2005; (191) Cooperative Arrangement between the Customs Department of Thailand and the New Zealand Customs Service, June 23, 2005; (192) Memorandum of Understanding on Environmental Protection Cooperation between the Ministry of Natural Resources and Environment of Thailand and the State Environment Protection Administration of the People's Republic of China, July 1, 2005; (193) Memorandum of Understanding on the Initial Implementation at Mukdahan, Thailand and Savannakhet, Laos of the Agreement between and Among the Governments of Cambodia, China, Laos, Myanmar, Thailand, and Vietnam for

Facilitation of Cross-Border Transport of Goods and People, July 4, 2005; (194) Memorandum of Understanding on the Initial Implementation at Aranyprathet, Thailand and Poipet, Cambodia of the Agreement between and Among the Governments of Cambodia, China, Laos, Myanmar, Thailand, and Vietnam for Facilitation of Cross-Border Transport of Goods and People, July 4, 2005; (195) Memorandum of Understanding for Cooperation to Prevent and Control Transboundary Animal Diseases in the Greater Mekong Subregion, July 5, 2005; (196) Memorandum of Understanding on the Guidelines for the Implementation of the Regional Power Trade Operating Agreement—Stage No. 1, July 5, 2005; (197) Agreement between Thailand and Israel on Cooperation in the Fields of Culture and Education, July 13, 2005; (198) Memorandum of Understanding between Thailand and Laos to Combat Trafficking in Persons, Especially Women and Children, July 13, 2005; (199) Agreement between Thailand and Turkey Concerning the Reciprocal Promotion and Protection of Investments, July 24, 2005; (200) Agreement for the Establishment of an ASEAN Development Fund, July 26, 2005; (201) ASEAN Agreement on Disaster Management and Emergency Response, July 26, 2005; (202) Declaration of Intention to Accede to the Treaty of Amity and Cooperation in Southeast Asia by Australia, July 28, 2005; (203) ASEAN Declaration of Consent to the Accession to the Treaty of Amity and Cooperation in Southeast Asia by Australia, July 28, 2005; (204) Memorandum of Understanding (MOU) between the Anti-Money Laundering Office (AMLO) of Thailand and the Central Control Board (CCB) of Myanmar Concerning Cooperation in the Exchange of the Financial Intelligence Related to Money Laundering, July 30, 2005; (205) Technical Cooperation Framework between the Government of America, Acting Through the U.S. Trade and Development Agency and the Government of Thailand, Acting Through the Ministry of Foreign Affairs, Aug. 3, 2005; (206) Joint Statement between Thailand and Tajikistan on Friendship and Cooperation on the Occasion of the Official Visit to Thailand of H.E. Mr. Emomail Rahmonov, the President of Tajikistan, Aug. 9-10, 2005, Bangkok, Thailand, Aug. 9, 2005; (207) Memorandum of Understanding on the Establishment of Bilateral Consultations between the Ministry of Foreign Affairs of Thailand and the Ministry of Foreign Affairs of Tajikistan, Aug. 9, 2005; (208) Trade Agreement between the Government of Thailand and the Government of Tajikistan, Aug. 9, 2005; (209) Memorandum of Understanding between the Government of Thailand and the Government of Tajikistan on the Cooperation in Narcotic Drugs, Psychotropic Substances and Precursor Chemicals Control, Aug. 9, 2005; (210) Agreement between the Government of Thailand and the Government of Tajikistan on Cooperation in the Field of Tourism, Aug. 9, 2005; (211) Agreement between the Government of Thailand and the Government of Tajikistan on Economic and Technical Cooperation, Aug. 9, 2005; (212) Memorandum of Understanding between the Royal Thai Customs Department and the Department of Energy of the United States of America in Support of the Declaration of Principles Governing Cooperation Including the Posting of U.S. Customs and Border Protection Officers at the Port of States of America Leam Chabang, Thailand between the Royal Thai Customs Department and the Bureau of Customs and Border Protection of the United States of America, Sept. 1, 2005; (213) Agreement between the Government of Thailand and the Government of the Hong Kong Special Administrative Region of the People's Republic of China for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income, Sept. 7, 2005; (214) Air Transport Agreement between the Government of Thailand and the Government of the United States of America, Sept. 19, 2005; (215) Regional Cooperation Agreement on Combating Piracy and Armed Robbery against Ships in Asia, Sept. 19, 2005; (216) Memorandum of Understanding between the Government of Thailand and the Government of Oman on Cooperation in the Field of Tourism, Sept. 21, 2005; (217) Protocol Additional to the Agreement between the Government of Thailand and the International Atomic Energy Agency for the Application of Safeguards in Connection with the Treaty on the Non-Proliferation of Nuclear Weapons, Sept. 22, 2005; (218) Treaty between the Government of Thailand and the Government of Peru on Mutual Assistance in Criminal Matters, Oct. 3, 2005; (219) Agreement between the Government of Thailand and the Government of Costa Rica on Mutual Exemption of Visas for Diplomatic and Official (Service) Passport, Oct. 5, 2005; (220) Memorandum of Understanding on the Recruitment of Thai Workers between Thailand and Malaysia, Oct. 9, 2005; (221) Memorandum of Understanding between the Government of Thailand and the Government of Myanmar on Agricultural Cooperation, Nov. 2, 2005; (222) Memorandum of Understanding between the Government of Thailand and the Government of Cambodia on ACMECS Single Visa, Nov. 3, 2005; (223) Memorandum of Understanding between the Thai Industrial Standards Institute and the Turkish Standards Institution on Industrial Cooperation, Nov. 11, 2005; (224) Agreement on Science and Technological Cooperation between the Government of Thailand and the Government of Turkey, Nov. 11, 2005; (225) Agreement on Tourism Cooperation between the Government of Thailand and the Government of Turkey, Nov. 11, 2005; (226) Cultural Exchange Program between the Government of Thailand and the Government of Turkey for the Year 2006-2010, Nov. 11, 2005; (227) Treaty between the Government of Thailand and the Government of Belgium on Mutual Assistance in Criminal Matters, Nov. 12, 2005; (228) Treaty between Thailand and Belgium on the Transfer of Sentenced Persons and on Cooperation in the Enforcement of Penal Sentences, Nov. 12, 2005; (229) Arrangement on the Establishment of a Joint Commission between the Government of Thailand and the Government of New Zealand, Nov. 14, 2005; (230) Agreement between the Government of Thailand and the Government of the Hong Kong Special Administrative Region of China for the Promotion and Protection of Investment, Nov. 19, 2005; (231) Protocol between Thailand and Peru to Accelerate the Liberalization of Trade in Goods and Trade Facilitation, Nov. 19, 2005; (232) Agreement on the ASEAN Harmonized Electrical and Electronic Equipment (EEE) Regulatory Regime, Dec. 9, 2005; (233) ASEAN Mutual Recognition Arrangement on Engineering Services, Dec. 9, 2005; (234) Agreement to Establish and Implement the ASEAN Single Window, Dec. 9, 2005; (235) Agreement between the Governments of the Member Countries of the Association of Southeast Asian Nations and the Government of Russia on Economic and Development Cooperation, Dec. 10, 2005; (236) Kuala Lumpur Declaration on the Establishment of the ASEAN Charter, Dec. 12, 2005; (237) Kuala Lumpur Declaration on the ASEAN Plus Three Summit, Dec. 12, 2005; (238) Agreement between the Government of Thailand and the Government of Russia on the Terms of Visa Exemption for Mutual Visits of the Nationals of Thailand and of Russia, Dec. 13, 2005; (239) Joint Declaration of the Heads of State/Government of the Member Countries of ASEAN and the Head of State of the Russian Federation on Progressive and Comprehensive Partnership, Dec. 13, 2005; (240) Framework Agreement on Comprehensive Economic Cooperation among the Governments of the Member Countries of ASEAN and the Republic of Korea, Dec. 13, 2005; (241) Agreement on Dispute Settlement Mechanism under the Framework Agreement on Comprehensive Economic Cooperation among the Governments of Member Countries of ASEAN and the Republic of Korea, Dec. 13, 2005; (242) Kuala Lumpur Declaration on the East Asia Summit, Dec. 14, 2005; (243) Convention between the Government of Thailand and the Government of Belarus for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income and on Property, Dec. 15, 2005; (244) Agreement between the Government of Thailand and the Government of Jordan for the Promotion and Protection of Investment, Dec. 15, 2005; (245) Memorandum of Understanding between the Government of Thailand and the Government of Indonesia on Agricultural Cooperation, Dec. 16, 2005; (246) Cultural Agreement between the Government of Thailand and the Government of Chile, Jan. 20, 2006; (247) Air Transportation Agreement between Thailand and Peru, Feb. 27, 2006; (248) Customs Cooperative Arrangement between the Customs Department of the Kingdom of Thailand and the Customs and Excise Department of Hong Kong, China Regarding Cooperation and Mutual Administrative Assistance in Customs Matters, Mar. 1, 2006; (249) Protocol on Cooperation between the Ministry of Foreign Affairs of the Kingdom of Thailand and the Ministry of Foreign Affairs of the Republic of Azerbaijan, June 19, 2006; (250) Cultural Agreement between the Government of the Kingdom of Thailand and the Government of the Hashemite Kingdom of Jordan, June 19, 2006; (251) Agreement between the Ministry of Agriculture and Cooperatives of the Kingdom of Thailand and the Ministry of Agriculture, Forests and Rural Development of Romania on Cooperation in Agriculture, June 20, 2006; (252) Arrangement on Mutual Cooperation between the Royal Thai Police of the Kingdom of Thailand and the National Police Agency of the Republic of Korea, June 23, 2006; (253) Agreement between the Government of the Kingdom of Thailand and the Government of the Republic of Ghana on Economic, Scientific, Technical, and Cultural Cooperation, July 4, 2006; (254) Agreement on Economic, Trade, Investment and Technical Cooperation between the Government of the Kingdom of Thailand and the Government of the Republic of the Gambia, July 5, 2006; (255) Joint Communique on the Establishment of

Diplomatic Relations between the Kingdom of Thailand and Antigua and Barbuda, July 7, 2006; (256) Treaty between the Kingdom of Thailand and Australia on Mutual Assistance in Criminal Matters, July 27, 2006; (257) Working Arrangement on Cultural Exchange Program between the Government of the Kingdom of Thailand and the Government of the People's Republic of Bangladesh for 2006-2010, Aug. 6, 2006; (258) Cultural Agreement between the Government of the Kingdom of Thailand and the Government of Argentine Republic, Aug. 14, 2006; (259) Agreement between the Government of the Kingdom of Thailand and the Government of Argentine Republic on Visa Exemption, Aug. 14, 2006; (260) Cultural Agreement between the Government of the Kingdom of Thailand and the Government of Mongolia, Aug. 17, 2006; (261) Protocol on Diplomatic Consultation between the Ministry of Foreign Affairs of the Kingdom of Thailand and the Ministry of Foreign Affairs and Francophonie of the Republic of Congo, Aug. 24, 2006; (262) Air Services Agreement between the Government of the Kingdom of Thailand and the Government of the United Republic of Tanzania, Aug. 26, 2006; (263) Memorandum of Understanding between the Ministry of Labour of Thailand and the Ministry of Labour of the Republic of Korea under the Employment Permit System, Aug. 30, 2006; (264) Memorandum of Understanding on Tourism Cooperation between the Ministry of Tourism and Sports of the Kingdom of Thailand and the Ministry of Tourism of Hellenic Republic, Sept. 5, 2006; (265) Agreement on Scientific and Technical Cooperation between the Government of the Kingdom of Thailand and the Government of Republic of Panama, Sept. 15, 2006; (266) Memorandum of Understanding on Scientific and Technical Cooperation between the Ministry of Science and Technology of the Kingdom of Thailand and the Ministry of Science, Technology, and Environment of Republic of Cuba, Sept. 15, 2006; (267) Additional Protocol to the Protocol between the Kingdom of Thailand and the Republic of Peru to Accelerate the Liberalization of Trade in Goods and Trade Facilitation, Nov. 16, 2006; (268) Memorandum of Understanding between the Ministry of Foreign Affairs of the Kingdom of Thailand and the Ministry of Foreign Affair International Trade and Worship of the Argentine Republic for Political Consultations and other Matters of Common Interest, Nov. 19, 2006; (269) Letter of Intent (LOI) on Defence Industry, Science and Technology Cooperation between the Commission of Science, Technology, and Industry for National Defence of the People's Republic of China and the Ministry of Defence of the Kingdom of Thailand, Mar. 20, 2007; (270) Agreement on Economic, Trade and Technical Cooperation between the Government of the Kingdom of Thailand and the Government of the United Arab Emirates, Apr. 22, 2007; (271) Joint Action Plan on Thailand-China Strategic Cooperation between the Government of the Kingdom of Thailand and the Government of the People's Republic of China (2007-2011), May 28, 2007; (272) Agreed Minutes between the Kingdom of Thailand and the European Community, May 29, 2007; (273) Agreement between the Government of the Kingdom of Thailand and the Government of the Kingdom of Swaziland on the Enforcement of Penal Sentences, June 5, 2007; (274) Protocol on the Establishment of Diplomatic Relations between the Kingdom of Thailand and the Republic of Montenegro, June 6, 2007; (275) Greater Mekong Sub-region Cross Border Transport Agreement, June 21, 2007; (276) Executive Program of Cultural Exchange between the Government of the Kingdom of Thailand and the Government of the Republic of India for the Years 2007-2009, June 23, 2007; (277) Memorandum of Understanding between the Ministry of Agriculture and Cooperatives Thailand and the International Rice Research Institute, June 27, 2007; (278) Memorandum of Understanding between and among the Government of the Lao People's Democratic Republic, the Kingdom of Thailand and the Socialist Republic of Vietnam on the Initial Implementation of the Agreement between and among the Government of the Kingdom of Cambodia, the People's Republic of China, the Lao People's Democratic Republic, the Union of Myanmar, the Kingdom of Thailand, and the Socialist Republic of Vietnam for the Facilitation of Cross-Border Transport of Goods and People at Lao Dansavanh, the Lao People's Democratic Republic, at Savannakhet, the Lao People's Democratic Republic and Mukdahan, the Kingdom of Thailand, Aug. 23, 2007; (279) Memorandum of Understanding between the Federal Bureau of Investigation and the Royal Thai Police on the Exchange of Information Concerning Transnational Organized Crime, Aug. 27, 2007; (280) Cooperation Agreement on IOM Services in Facilitating Labour Migration of Thai Agricultural Workers to Israel between the International Organization for Migration and the Department of Employment, Ministry of Labour of the Kingdom of Thailand, Sept. 19, 2007; (281)

Agreement between the Government of the Kingdom of Thailand and the Government of the Republic of Panama on the Exemption of Visa Requirements for Holders of Diplomatic and Official Passports, Sept. 24, 2007; (282) Memorandum of Understanding between the Government of the Kingdom of Thailand and the Government of the United Arab Emirates in the Field of Manpower, Nov. 1, 2007; (283) Memorandum of Understanding between the Government of the Kingdom of Thailand and the Government of the Lao People's Democratic Republic on the Construction Project of the Route No. 13 North-Sangkhalork Road (Luang Prabang, the Lao People's Democratic Republic, Nov. 2, 2007; (284) Arrangement between and among the Government of the Lao People's Democratic Republic, the Kingdom of Thailand, and the Socialist Republic of Vietnam on the Operation of the Tourism and Transport, Nov. 2, 2007; (285) Memorandum of Understanding between Government of Kingdom of Thailand and Government of Kingdom of Bahrain on Enhancement of Mutual Cooperation in Field of Oil and Gas, Dec. 11, 2007; (286) Agreement between Government of Kingdom of Thailand and Government of Lao People's Democratic Republic on construction of 3^d Friendship Bridge Thai-Laos at Nakhon Phanom-Kammon, Dec. 12, 2007; (287) Agreement between Government of Kingdom of Thailand and Government of People's Republic of China on Establishment and Status of Cultural Centers, Dec. 17, 2007; (288) Agreement between Government of Kingdom of Thailand and Government of Kingdom of Cambodia on Implementation of ACMECS Single Visa, Dec. 17, 2007; (289) Agreement between Government of Kingdom of Thailand and Government of Islamic Republic of Pakistan on Cooperation in Transfer of Offenders and Enforcement of Penal Sentences, Dec. 20, 2007; (290) Additional Protocol to Comprehensive Framework Agreement for Cooperation between Kingdom of Thailand and Kingdom of Bhutan, Jan. 11, 2008; (291) Memorandum of Understanding on Health Cooperation between Ministry of Public Health of Kingdom of Thailand and Ministry of Health of Kingdom of Bahrain, Jan. 24, 2008; (292) Agreement between Government of Kingdom of Thailand and Government of Union of Myanmar for Promotion and Protection of Investments, Mar. 14, 2008; (293) Agreement on Joint Traffic Working Over Railway between Government of Kingdom of Thailand and Government of Lao People's Democratic Republic, Mar. 30, 2008; (294) Paris Convention for Protection of Industrial Property, May 2, 2008; (295) Memorandum of Understanding between Government of Kingdom of Thailand and Government of Union of Myanmar on Development of Dawei Deep Seaport and Road Link to Bangkok, May 19, 2008; (296) Memorandum of Understanding between Ministry of Foreign Affairs of Kingdom of Thailand and Federal Ministry for Economic Cooperation and Development of Federal Republic of Germany regarding Joint Development Cooperation with Third Countries through ``Partnership Programme'', June 5, 2008; (297) Agreement between Government of Kingdom of Thailand and Government of Oriental Republic of Uruguay on Exemption of Visa Requirements for Holders of Diplomatic and Official Passports, July 3, 2008; (298) Agreement between Government of Kingdom of Thailand and Government of State of Kuwait on Economic and Technical Cooperation, Aug. 13, 2008; (299) Memorandum of Understanding on Conducting of Bilateral Consultations between Ministry of Foreign Affairs of Kingdom of Thailand and Ministry of Foreign Affairs of State of Kuwait, Aug. 13, 2008; (300) Service Commitment Agreement of EPS-KLT between Department of Employment of Kingdom of Thailand and Human Resources Development Service of Korea, Aug. 29, 2008; (301) Memorandum of Understanding between Government of Kingdom of Thailand and Government of Socialist Republic of Vietnam on Vocational Training Development in ACMECS Countries, Nov. 6, 2008; (302) Agreement for Extension of Validity of Memorandum of Understanding on Sending of Workers to Republic of Korea between Ministry of Labor of Republic of Korea and Ministry of Labor of Kingdom of Thailand on Aug. 30, 2006, Nov. 29, 2008; (303) Memorandum of Understanding between Ministry of Commerce of Kingdom of Thailand and Ministry of Trade of Republic of Indonesia, Feb. 26, 2009; (304) Memorandum of Understanding between Ministry of Labor of Kingdom of Thailand and Ministry of Labor of Republic of Korea on Sending of Workers to Republic of Korea under Employment Permit System, Apr. 12, 2009; (305) Memorandum of Understanding between Government of Kingdom of Thailand and Government of Union of Myanmar on Cooperation to Combat Trafficking in Persons, Especially Women and Children, Apr. 24, 2009; (306) Agreement between Government of Kingdom of Thailand and Government of Lao People's Democratic Republic on Exchange of Right to Lease of Land for Consular Use, May 13, 2009; (307) Reciprocity Agreement on Amateur Radio Licenses between Kingdom of Belgium and Kingdom of Thailand, June 10, 2009; (308) Treaty between Kingdom of Thailand and Japan on Transfer of Sentenced Persons and on Cooperation in Enforcement of Sentence, July 22, 2009; (309) Agreement between Kingdom of Thailand and Kingdom of Cambodia on Transfer of Sentenced Persons and on Cooperation in Enforcement of Penal Sentences, Aug. 5, 2009; (310) Protocol of Exchange of Instruments of Ratification of Treaty between Kingdom of Thailand and Republic of Poland on Mutual Assistance in Criminal Matters, Signed at Bangkok on Feb. 26, 2004, Sept. 4, 2009; (311) Addendum to Memorandum of Understanding between Government of Kingdom of Thailand and Royal Government of Cambodia on Exchange of Traffic Rights for Cross-Border Transport through Aranyaprathet-Poipet Border Crossing Points, Sept. 17, 2009; and (312) Patent Cooperation Treaty, Sept. 24, 2009.

See also Selected International Conventions section, for text of Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958.

Trade and Investment Agreements.

(1) Thailand has international trade agreements with numerous countries, including Argentina, Australia, Austria, Bangladesh, Brazil, Bulgaria, Cambodia, Canada, Chile, China, Czech Republic, Egypt, Germany, Hungary, India, Iran, Iraq, Japan, Kenya, Kuwait, Laos, Malaysia, Morocco, Myanmar, the Netherlands, New Zealand, North Korea, Oman, Pakistan, Peru, Philippines, Poland, Romania, Russia, Senegal, South Africa, South Korea, Taiwan, Tajikistan, Tunisia, Turkey, Uruguay, Vietnam and Yugoslavia. (2) Thailand has signed investment treaties with several countries, including Argentina, ASEAN, Bahrain, Bangladesh, Belgo-Luxemburg, Bulgaria, Cambodia, Canada, People's Republic of China, Croatia, Czech Republic, Egypt, Finland, Germany, Hong Kong, Hungary, India, Indonesia, Israel, Jordan, Laos, Myanmar, the Netherlands, North Korea, Peru, Philippines, Poland, Romania, Russia, Slovenia, South Korea, Sri Lanka, Sweden, Switzerland, Taiwan, Tajikistan, Turkey, the U.K., Vietnam and Zimbabwe. (3) The Treaty of Amity and Economic Relations between the United States and Thailand, signed on May 29, 1966 and ratified at Washington D.C. on May 8, 1968, allows U.S. nationals and companies to establish companies or branch offices in Thailand for trade and investment. See category 2 Business Organizations, topic 2.03 Companies, subhead Foreign Companies.

Avoidance of Double Taxation Treaties.

Thailand has signed bilateral agreements concerning double taxation with number of other countries to eliminate or mitigate double taxation of income. These countries are Armenia, Australia, Austria, Bahrain, Bangladesh, Belgium, Bulgaria, Canada, China, Cyprus, Czech Republic, Denmark, Finland, France, Germany, Hong Kong, Hungary, India, Indonesia, Israel, Italy, Japan, South Korea, Kuwait, Laos, Luxembourg, Malaysia, Mauritius, Nepal, the Netherlands, New Zealand, Norway, Oman, Pakistan, the Philippines, Poland, Romania, Russia, Seychelles, Singapore, Slovenia, South Africa, Spain, Sri Lanka, Sweden, Switzerland, Turkey, Ukraine, the U.K., United Arab Emirates, U.S.A., Uzbekistan and Vietnam. Thailand has signed (but not yet ratified) double taxation agreements with following countries: (1) Belarus, (2) Egypt, (3) Malta, (4) Mongolia, (5) Morocco, (6) Myanmar, (7) Taiwan, (8) Tajikistan, and (9) Tunisia. Thailand is currently negotiating double taxation agreements with Brunei, Estonia, Greece, Kazakhstan, Kenya, Lithuania, Mexico, Moldova, Portugal and Senegal.

1

TURKEY LAW DIGEST

—Scope —

Revised for 2010 edition by

YILMAZ OZ of Ankara.

(Con. indicates Constitution; C. C. indicates Civil Code; C. C. P. indicates Code of Civil Procedure; C. Obl. indicates Code of Obligations; Com. C. indicates Commercial Code; C. E. and B. indicates Code on Execution of Debts and Bankruptcy; O.J. indicates Official Journal. See also category 6 Courts and Legislature, topic 6.05 Statutes.)

Note: This revision incorporates legislation through Aug. 31, 2009.

1 INTRODUCTION

1.01 CURRENCY:

Issue of banknotes is under monopoly of Turkiye Cumhuriyeti Merkez Bankasi (Central Bank of Republic of Turkey), organized under Law 1211, Jan. 26, 1970 (as am'd by Law 5728, Feb. 2008). Main currency unit is Turkish Lira (``TL''). Coins are also issued, at various denominations, under authority of Undersecretariat for Treasury and Foreign Trade. (Law 1264, June 6, 1970).

Although monetary system is legally based on gold, paper money is issued by Central Bank, having same legal tender privileges. These notes are not yet convertible and may be issued against such items as gold, foreign exchange, securities and negotiable instruments.

Exchange rate of Turkish Lira is readjusted daily according to fluctuation of foreign exchange currencies in world market.

By Law for Protection of Value of Turkish Currency (Law No. 1567), Feb. 20, 1930, as last amended per Law 5827, Dec. 2008, special powers have been bestowed on Council of Ministers to regulate by decree foreign exchange transactions. With decrees (mainly, Decree No. 32, Aug. 7, 1989) and circulars so far promulgated under this law, exchange controls have largely been abolished. Most important provisions of the current system may be summarized as follows: (1) Import and export of Turkish currency as well as of negotiable instruments in Turkish currency is substantially liberalized. Persons entering Turkey are free to bring any amount in currency or negotiable instruments in Turkish currency and those leaving country may have maximum of $5,000 equivalent to TL; (2) foreign exchange may be freely imported to country, and is not subject to any restriction and its origin is not investigated; (3) foreigners who come to Turkey can export foreign currency in amount that they have declared at their entrance when this amount is over $5,000. No declaration is required for sums below $5,000 (***Note***: Similar rules and limits apply to precious metals [i.e. gold and platinum] and precious stones and/or jewelry containing same, as brought in and out by travelers); (4) foreigners may repurchase foreign exchange from banks in Turkey against TL, provided that sum does not exceed foreign exchange that they have converted into TL in Turkey; (5) investments and engagements in commercial activities in Turkey by persons domiciled abroad and activities of same nature abroad by persons domiciled in Turkey are subject to provisions of relevant laws and agreements.

See also category 15 Foreign Trade and Commerce, topics 15.03 Exchange Control; 15.06 Foreign Investment.

1.02 GOVERNMENT AND LEGAL SYSTEM:

Constitution as adopted by Constituent Assembly on Sept. 24, 1982 has been approved by referendum held on Nov. 7, 1982 (as last am'd per Law 5735, Feb. 2008).

General Principles.

Turkish State is a republic (Con. 1) based on the principles of human rights and is a national, democratic secular and social (i.e. welfare) state bound by the rule of law (Con. 2). Sovereignty is unconditionally vested in the nation. No exclusive person, group or class can, under any circumstances, be entrusted with the exercise of sovereign power. No person or organ can exercise any public authority which does not emanate from Constitution. (Con. 6). No law can be contrary to provisions of Constitution. (Con. 11).

Fundamental Rights.

Constitution provides practically for all democratic and civil liberties, rights and obligations. (Con. 12 to 65). Personal liberty and domicile are inviolable, except where provided by law and authorized by judiciary. (Con. 17, 21, 26). Freedom of speech and writing (Con. 25), press (Con. 28) movement (Con. 23) meeting (Con. 34) and association (Con. 33) are safeguarded. Every person may act as claimant or defendant in lawsuit for protection of his rights and interests. (Con. 36). No one can be punished for act which at time it was committed was not punishable by specific stipulation of law.

Criminal liability is personal. No one can be forced to make a statement or to bring evidence incriminating himself or his near relations. (Con. 38). Capital punishment is abolished. (Con. 38). In cases of disputes arising from discrepancy of provisions concerning fundamental rights and obligations, international conventions will prevail over national legislation. (Con. 90). Elementary education is compulsory and free. (Con. 42).

Social and Economic Rights.

Right of private property is recognized. This can be limited only by law. Its use can not be contrary to public interest. (Con. 35). Expropriation for public interest by paying real value is possible. (Con. 46). State is authorized to nationalize private enterprises by paying their real value. This payment, when allowed by law, can be made in equal installments over five years, with interest, if unpaid. (Con. 46). Law 2942 on Expropriations (1983) as am'd by Law 5177, May 2004. Every worker is entitled to have proper working conditions (Con. 48) and rest with pay (Con. 50). State is required to take measures to assure that workers receive wages in proportion to their work and in every case to assure them dignified standard of living. Organization of unions is free. (Con. 51). Right of collective bargaining and to strike are recognized. (Con. 53, 54).

Political Rights.

All citizens of age 18 are electors. Ballot is personal, equal, free, secret and direct. Political parties can be founded without prior approval. All political parties have to adhere to principles of human rights and to those underlying Constitution. (Con. 68, 69).

Legislature.

Turkish Parliament is named The Turkish Grand National Assembly. Enacting, amending or repealing laws, declaring amnesties, approving State Budget are among prerogatives of Turkish Grand National Assembly. (Con. 87).

Turkish Grand National Assembly is composed of 550 representatives elected by direct universal ballot. (Con. 75). All citizens who have reached age of 25 can be elected. (Con. 76). Elections for National Assembly take place every four years. (Con. 77).

National Assembly convenes on Oct. 1 of each year without invitation. It remains in session throughout year that follows, but can take recess for maximum of three months. (Con. 93).

Executive.

President of Republic is elected by Grand National Assembly by secret ballot from among its own members or from outside for term of five years. President is eligible for second term. (Con. 101). (For possible system changes, see Note to Legislature above). President is head of state. (Con. 104). Council of Ministers is composed of Prime Minister and ministers. Prime Minister is directly appointed by President of Republic from among members of Grand National Assembly. Ministers are selected by Prime Minister from among members of Grand National Assembly of Turkey or from outside. (Con. 109). Complete budgetary system is provided for. (Con. 161).

For administrative purposes country is divided into provinces (ils) and these in turn into minor divisions (ilce, bucak, koy). (Con. 126).

Judiciary.

Justice is administered by independent courts in the name of Turkish People. (Con. 9). See also category 6 Courts and Legislature, topic 6.01 Courts.

Constitutional Court decides on controversies relating to constitutionality of laws and of internal regulations of Grand National Assembly. It also tries, as a high court, the President of the Republic, ministers and some other high officials. (Con. 148).

Council of State Danistay is highest administrative and consultative court composed of several departments. It is established by constitution and is subject to Law No. 2575 dated Jan. 6, 1982. Council of State acts as court of first instance or as court of appeals in administrative and tax cases referred to it by law. In both cases its decisions are final and binding. It also gives opinion on concessions, draft laws and regulations prepared by Council of Ministers.

Special-purpose courts such as Administrative Courts, Tax Courts (as well as Regional Administrative Courts, for appellate review of certain judgments issuing from latter two) handle special matters prescribed under their appropriate laws. There is also Council of Accounts which acts as court on cases of misappropriation by civil servants who act as paymasters of government funds.

1.03 HOLIDAYS:

Per Law No. 2429 (Mar. 1981 as last am'd by Law 5892) weekend holiday must consist of minimum of 35 hours from noon Sat. until Mon. morning. However, in practice, banks and company offices (as well as government offices, in line with provision in Law No. 657 of July 1965) are closed all day Sat.

Other national holidays (per Law 2429) : Republic's Day, from noon on Oct. 28th through midnight Oct. 29th; New Year's Day, Jan. 1st; National Sovereignty and Children's Day, Apr. 23d; Labor and Solidarity Day, May 1st, Commemoration of Ataturk and Youth and Sports Day, May 19th; Victory Day, Aug. 30th; and two religious holidays (falling on different dates each year, following Lunar Calendar) namely, Sugar Holiday celebrating end-of-Ramadan 3 days and Sacrificial Holiday 4 days.

1.04 OFFICE HOURS AND TIME ZONE:

Turkey is in the GMT+02:00 time zone. Daylight saving time is applied in summer months. Office hours are generally from 9 a.m. to 5 p.m.

2 BUSINESS ORGANIZATIONS

2.01 AGENCY:

No special form is prescribed for powers of attorney or proxies, however, to have effect they must be executed before notary. Powers may be revoked any time. Agent is free to resign, but premature resignation causing loss to principal may invite liability. All bona fide transactions with agent are binding upon principal, unless latter has publicised revocation prior thereto. Powers involving conduct of business and/or commercial representation must be recorded at register of commerce.

2.02 CORPORATIONS:

Term corporation under this heading is akin to joint stock company or societe anonyme in European law.

Corporations are legal entities. In order to form corporation there must be at least five founders executing Articles of Incorporation before notary. Articles, inter alia, must contain name, object, amount of capital (minimum TL 50,000), investment in kind (if any). (Com. C. 277, 279). If gradual formation mode is used, founders must put up at least 10% of capital and seek authorization of Ministry of Industry and Commerce prior to any public offering. Upon receipt of such authorization public may be invited to subscribe. When capital is fully subscribed to and 25% thereof is paid in, Formative General Meeting of Shareholders is held, in order to approve actions taken by founders and to elect or ratify election of board and auditors. Thereafter application is made to local commercial tribunal for ratification of formation. Tribunal so ratifies and directs commercial registrar to register corporation and publicize its formation in Commercial Registry Journal after insuring that contribution required per Law No. 4077 on Consumers' Protection (at two per mille of capital) has been duly paid into Central Bank.

Corporations whose shareholders exceed 250 are deemed open to the public and are subject to additional special requirements (e.g., closer supervision by Capital Market Council as formed under Law No. 2499, July 30, 1981).

Corporation may also be organized instantaneously, if at least five founders subscribe to all shares and pay in 25% of capital. In this mode, authorization from Ministry is sought forthwith upon execution of Articles before notary, and, based on such authorization, ratification by commercial tribunal and subsequent registry and publication could follow. (Com. C. 303).

Face value of shares must be TL 1 or multiples thereof. While preferred shares are possible, stock with no par value is not allowed. Corporation may issue bonds but outstanding amount thereof cannot exceed paid-in capital. Shares may be issued at premium but not at discount. Liability of shareholders is limited to amount subscribed for.

Each share entitles holder to at least one vote. Provided this rule is observed, weighted voting rights may be granted to specified classes of shares. (Com. C. 373, 401).

Administration and representation of corporation vests with Board of Directors composed of minimum of three members, as elected by shareholders. Corporation is required to have one to five auditors, similarly elected.

Unless higher quorum is required under law or Articles of Incorporation, at least one-fourth of capital must be represented at regular shareholders' meetings. If this is not obtained at first meeting, second meeting is held wherein resolutions may be adopted without regard to amount of capital represented. (Com. C. 372). Quorum of two-thirds is required for decisions regarding any amendments to articles relative to objectives and fields of endeavor, or, increase or decrease of capital, or, dissolution. (Com. C. 388).

Setting aside of reserves is required at 5% of each year's profits, until it reaches 20% of capital. (Com. C. 466).

See also topic 2.03 Limited Companies.

(*Note:* Draft law substantially revising Commercial Code is in Parliament's agenda.)

2.03 LIMITED COMPANIES:

A limited company is a form of commercial association in which liability of all partners is limited to amount invested and capital is not divided into shares represented by share certificates. Transfer of a share in company is valid only if this fact is notified to company and recorded in share register. For this purpose it is necessary that at least three-fourths of shareholders give their consent to transfer and consenting shareholders own at least three-fourths of capital. Limited companies can deal in any business except insurance and banking. They are organized by a notarized contract which among other points must contain name, main office, purpose, total capital and amount undertaken by each partner, procedure of announcements to be made and term of company. This contract is submitted for authorization of Ministry of Industries and Commerce. After authorization is obtained company is registered at Commercial Register and this fact, with text of contract, is published in Commercial Register Gazette of Turkey. This authorization is not granted unless all capital is subscribed for and 25% paid. Minimum number of partners is two and maximum 50. Minimum amount of capital is TL 5,000 with each share being no less than TL 25. Limited companies with more than 20 partners have partners' meetings held according to rules governing those of corporations. (Com. C. 503-556).

2.04 NONPROFIT ORGANIZATIONS:

Associations and societies are organizations wherein seven or more individuals or corporate entities bring together their knowledge, skill and activities for common nonprofit, charitable, scientific or artistic purpose or for any other lawful purpose which do not run afoul of basic principles of Constitution. They are regulated by provisions of Constitution (Art. 33), Civil Code (Arts. 56-100) and more specifically by those of Law on Associations (No. 5253, Nov. 4, 2004, as last am'd per Law 5728 in Feb. 2008 and Regulations in supplement thereof).

Associations acquire legal personality when founders prepare, sign and file by-laws with authorities. No prior authorization, preregistry or publicising are required. However, defects, if any, in by-laws, as identified by authorities must be corrected within 30 days of notification therefor.

Associations may enter into transactions, acquire and dispose of property, all within premises of their by-laws. When engaged in profit-making activities, they would be subject to taxation. They may operate in or collaborate with similar organizations in foreign countries. Foreign-incorporated associations may do so in Turkey based on permit obtained from Ministry of Interior Affairs. Subject to prior notification to local authorities, Turkish associations are authorized to procure aid from abroad.

Foundations.

Foundation is a corporate body created by dedication of property for a specific purpose. Whole of a property or its realised or realisable income as well as rights which have economic value may be subject of a foundation. (Law No. 5737 of Feb. 2008 and Arts. 101-117 of C. C., as last am'd by Law 5737).

Formation and Organization.

Foundation is established either by authenticated deed or by will and assumes legal entity by being registered at local court which notifies General Direction of Foundations, of creation of a foundation.

Supervision.

Foundations are subject to supervision of General Direction of Foundations. Supervising authority takes care that provisions of deed of foundation are carried out and property of foundation is used for purpose to which it has been dedicated.

Dissolution.

Foundation is a lasting legal entity but can be dissolved under certain conditions. Foundation of which purpose has become unobtainable is automatically dissolved. Also foundation whose purposes become illegal or immoral is dissolved by competent court on application of supervising authority.

2.05 PARTNERSHIPS:

Ordinary partnership is simplest form of business association. It does not have legal personality separate form partners and is administered by partners themselves. All partners are jointly liable in unlimited fashion for their transactions towards third persons.

General partnership (kollektif sirket) is formed as legal entity under notarized contract copy of which is filed with and publicised by commercial registar. Business is conducted under firm name containing names of at least one of partners and indicating type of partnership. Liability of partners is joint and unlimited. Unless otherwise provided in contract all partners could represent partnership.

Special partnership (komandit sirket) also as legal entity has two types of partners: General (komandite) partners who have unlimited liability and Special (komanditer) partners who are liable only to extent of their contribution to capital. Special partners who allow their name to appear on firm name or who participate in running of partnership business become liable with all their property.

Special partnership with shares (eshamli komandit sirket) is cross between general partnership and full corporation. Limited portion of capital is divided into shares owned by special partners. Business is administered by general partners. Rules governing shares and meetings of corporations are applicable in this type of partnership too.

Business partnership (is ortakligi) is consortia of companies assuming specific contract job overlapping into several successive calendar years, being treated as single taxable entity.

3 BUSINESS REGULATION AND COMMERCE

3.01 BANKS AND BANKING:

Banking in Turkey is governed by Law No. 5411 (O.J. Nov. 1, 2005, bis; as last am'd per Law 5766, June 2008). Aligning itself more with EU legislation, this Law contains extensive rules aimed at stability and confidence in financial markets; efficient operation of credit system and protection of rights and interests of deposit holders. Law applies to: (1) Banks of deposit; (2) participation banks; (3) development and investment banks; (4) financial holding companies; and (5) branches of foreign banking institutions of same nature.

Organization.

Banks must be organized by eligible founders as corporations (societes anonymes) with fully-paid registered shares. Persons who have previously been convicted of certain crimes are ineligible. Foreign banks desiring to engage in banking operations in Turkey must have corporate or equivalent status under laws of their country of origin.

Capital.

Minimum amount of capital required is TL 30 million (TL 20 million for Development and

Investment Banks). Branches of foreign banks permitted to operate in Turkey must meet same requirement.

Permits.

Two-tiered system is in place. Initially Permit for Establishment must be obtained followed by License for Operations. Banking Regulatory and Supervisory Authority (BDDK), autonomous public agency in Ankara, exercises wide-ranging powers over banking matters, including grant or revocation of licenses, carrying out independent auditing, ordering handover or management of failing banks to Savings Deposit Insurance Fund (TMSF), another public agency, etc.

Other Key Features.

Existing banks and institutions are granted one-year period to adapt to new rules. Members of Board of Directors and General Managers are required to have at minimum, masters degree in law, economics, finance, banking or equivalent fields, as well as, minimum of ten years' experience. Bank's accounts are subject to audit by independent auditors who are to be held responsible for any damages they inflict on third parties on account of their audit function. Independent auditors must arrange for adequate insurance to cover such liability.

3.02 BILLS AND NOTES:

All actions in respect of bills of exchange, promissory notes and checks are brought before the tribunals of commerce.

Bill of exchange must contain: (1) The word bill of exchange, in the language in which it is written; (2) an unconditional order to pay a certain sum of money; (3) the name of the drawee; (4) term; (5) place of payment; (6) name of the payee; (7) place where it is made and date; (8) signature of the drawer. No statement of consideration is necessary. (Com. C. 583).

There are no days of grace. Bills falling due on a holiday are payable on the succeeding business day. The holder must present the bill for payment on the due date or within two business days thereafter. The endorsers and the guarantors of a bill of exchange are jointly and severally liable to the holder for its payment. Bills may be prepared in several copies. Each copy must contain a serial number; otherwise each is considered a separate bill.

Promissory note must contain: (1) The words promissory note in the language in which it is written; (2) an unconditional promise to pay a certain sum of money; (3) term; (4) place of payment; (5) name of the payee; (6) place where it is made and date; (7) signature. Notes are subject to the rules relating to bills of exchange, in so far as these concern maturity, endorsement, joint and several liability, payment, payment for honor, protest, rights and duties of the holder, conflict of laws and limitation.

Check must contain: (1) The word check in the language in which it is written; (2) an unconditional order to pay a certain sum of money; (3) name of the drawee; (4) place of payment; (5) place where it is made and date; (6) signature. A check must be payable at sight. The rules governing the liability of endorsers and drawer and protests are the same as those for bills of exchange. Crossed checks, with the same general principles, are used in Turkey. Banks are required to notify Central Bank as to holders of checking accounts, in order that register thereof be maintained. Severe penalties (including prison terms) are provided, along with civil liability, for issuers of bad checks. (Law No. 3167, Mar. 19, 1985).

In the matter of conflict of laws the following rules prevail: Capacity to assume obligations under a bill of exchange is governed by the law of the state of which a person is a citizen; the form of the obligation is governed by the law of the state where it is made; rules concerning protest and all other steps to safeguard the interests of the parties concerned are governed by the laws of the country where such steps are to be taken.

3.03 COMMERCIAL REGISTER:

Attached to each basic court trying commercial cases and subject to supervision of this court there is organized an office of Commercial Register. (Com. C. 26). Matters relating to traders and to commercial companies and all other matters required by law to be registered in a Commercial Register must be so registered. Failure to register a matter or refusal to do so when notified by Commercial Registrar, may entail a fine. (Com. C. 35). Those who make false statements in bad faith to Registrar for registration are both fined and imprisoned.

Commercial Registers are open to public and all entries, unless otherwise provided by law are published in full in official Commercial Register Gazette. (Com. C. 37). Any person may examine records and documents in a Commercial Register and may obtain certified copies. (Com. C. 37).

Those who make untrue statements in Commercial Register are liable for damages caused to third parties. (Com. C. 40). For records in Register responsibility of state is definitely established; that is, state may be sued for damages in case a third party suffers because of a statement in Commercial Register.

See also categories 2 Business Organizations, topics Corporations, Limited Companies, Partnerships; Documents and Records, topic Records.

3.04 CONSUMER PROTECTION:

Law No. 4077 (Feb. 1995, as last am'd per Law 5728, Feb. 2008) provides for protection of consumers against fraud and deceptive trade practices. It contains detailed rules as to accurate advertising, proper labelling, buyers' right to return and demand free repairs or replacement within specified time following purchase, payment on basis of instalment-plan, door-to-door sales, e-trade, after-sale services, warranty, consumer credits and Consumers' Council, etc. No plain language statute exists.

See also category 2 Business Organizations, topic 2.02 Corporations.

3.05 CONTRACTS:

Contracts are governed by Code of Obligations of 1926 (taken almost verbatim from Swiss Federal Code).

A contract requires: (a) Mutual agreement, express or implied; (b) a causa, or cause, only in certain cases such as transfer of personal or real property; and (c) capacity of parties to contract. Every person who has reached age of majority which is 18 and is discriminating has legal capacity. Discriminating minors can validly accept only purely gratuitous benefits without concurrence of their guardians.

Unless otherwise provided by law, contracts are valid without any special form. In cases where a form is prescribed it is usually a condition of validity. Principal forms prescribed for validity are written form and publicly authenticated instrument such as notarial deed and title registration for real estate. Where parties, without requirement of law, have stipulated use of a special form, contract entered into does not become binding unless such form is complied with. (C. Obl. 16). Contracts concerning real estate must be executed before land registrar and registered in Title Deeds Office.

If offer is made with a time limit offerer is bound with his offer until end of this limit. If no acceptance is expressed within time prescribed offer ceases to be binding. (C. Obl. 3). An offer with no time limit, made in presence of other party or by phone ceases to be binding if it is not accepted immediately. (C. Obl. 4). When an offer without fixing a time limit has been made to a person not present, offerer is bound until moment when he can expect a reply dispatched in due course and time. (C. Obl. 5). Where, by reason of special nature of transaction or circumstances, an express acceptance is not to be expected the contract is presumed to have been concluded unless offer is rejected within a reasonable time. (C. Obl. 6).

Excuses for Nonperformance.

Impossibility of performance by circumstances beyond debtor's control, force majeure, clausula rebus sic stantibus and nonperformance on part of other contracting party.

Applicable Law.

Formal validity of contract is determined by laws of place of contracting (locus regit actum). Under reservation of public policy, parties to contract are free to determine and to choose applicable law. If such determination is not made, as a rule, law of place of performance will apply.

Government Contracts.

These are governed by Law No. 4734 on Public Procurements (as last am'd per Law 5812, Dec. 2008) and Law No. 4735 on Standardized Type Contracts (Jan. 22, 2002) which went into effect on Jan. 1, 2003. In general, these laws aim to align Turkey's legislation with that of European Union and to ensure transparency, competition, fairness and effective use of public resources. With these laws, Turkey aims to eliminate abusive and corrupt practices in public procurements. Certain procurements in public sector are, nevertheless, excluded from scope of these laws. Contracts related to national defense, security and intelligence, as well as, contracts aimed at foreign-financed projects which stipulate different tender rules are examples of excluded contracts. Also exempted are SEEs (State Economic Enterprises) and enterprises which are marked for privatization but only insofar as their activities, per international norms, involve instant-decision-making required by international market conditions. (sub-Art. 3[g] of Law 4734). Public Procurements Board is authorized, from time to time, to announce list of such agencies as will be exempt.

Under new rules, government agencies will not be able to invite tenders unless adequate funds are already allocated. Law sets threshold values on public contracts whereby foreign contractors will not be allowed to participate in tenders below certain value. If contract price is above thresholds, local contractors may enjoy 15% discount. Local firms venturing with foreign partners are not to benefit from such discounts.

See also topic 3.06 Frauds, Statute of.

3.06 FRAUDS, STATUTE OF:

Turkey has no special statutes of fraud. However, where party to contract has been induced to enter into contract by wilful fraud of other party, defrauded party is not bound by contract, even though misrepresentation was not material. Where party to contract was wilfully defrauded by third person, such party is bound by contract unless other contracting party had or should have had knowledge of fraud when entering into contract. (C. Obl. 28). Right of defrauded party to sue is forfeited within one year from time he obtains knowledge about fraud. (C. Obl. 31).

See, however, topic Contracts, as to formal requirements; also topic Consumer Protection.

3.07 INFORMATION TECHNOLOGY, INTERNET AND NEW MEDIA:

Computer Programs.

These are treated as literary works subject to copyright protection. (Law No. 5846 on

Intellectual Property, Dec. 1951, as last am'd by Law 5728, Feb. 2008). Unauthorized transfer of computer program into Internet (and thereby its opening to surfing public for free or unauthorized downloading) is akin to infringement of copyright and could be cause for both civil action for damages and criminal prosecution.

E-Commerce.

Internet has found very wide application in Turkey. However, efforts to codify have not kept apace with fast-changing cyber environment and such matters as ownership, authority, liability still remain largely unregulated. In principle, Turkey is trying to adopt and emulate same principles and rules as are evolving within European Union in this regard. At present, it may suffice to note that there is no need for permit or license to render services as Internet Service Provider or Content Provider (WebSite). Establishment of data lines is under monopoly of TURK TELEKOM (mainly Government-owned corporation) which could offer them based on type subscription agreements. (Law No. 406 of Feb. 1924, as last am'd by Law 5809, Nov. 2008).

There is no set definition or form for contract between subscriber and service-provider. Contract between ISS and subscriber may be termed as contract calling for enterprise, whereas contract between owner of WebSite and surfer who downloads digital product offered by former could be held akin to sale contract, albeit, signed by and between parties which are not present at given time and place. However, in either case, buyer (end-user) could benefit from protection available under Law No. 4077 (Feb. 1995) regarding Protection of the Consumer (in cases such as fraud, misrepresentation, repair or return of defective materials, failure to furnish promised end such as hotel or plane reservations, or electronic-wire transfers by banks etc.). Further, it is conceivable that rules regarding unfair competition as contained in not only Law No. 4054 (Dec. 1994), but Code of Obligations and Commercial Code, as well, could be invoked in cases wherein allegations of such competition are involved.

Turkish Penal Code (No. 5237 of Sept. 29, 2004) as last am'd by Law 5918, July 2009 provides for severe penalties (prison terms ranging from one to six years plus fines, coupled with temporary ban on professions, if perpetrators happen to be professionals) in such cases as illegal acquisition and/or use for personal gain of computerized programs and data; altering and/or faking of computerized data; and, destroying, hacking or infecting systems with virus.

Law No. 5561 (O.J. May 23, 2007) contains provisions to regulate Internet transmissions and to fight against crimes committed through such. It authorizes Telecom Authority to take measures in preventing indecent or vulgar postings or those aiming at sexual exploitation of juveniles; holds service providers and website designers/developers liable for violations which are punishable by imprisonment and/or fines.

Digital Signature.

Under Turkish law, aside from minor exceptions allowing mechanical types, signatures of binding nature have to be entered by hand. (Art. 14 of Code of Obligations). However, Electronic Signature Act (Law No. 5070, Jan. 23, 2004, as am'd by Law 5728, Feb. 2008) allows legal transactions to be concluded in and through use of cyber space. Turkish Telecommunications Administration is identified as certifying authority and depository agency. Parallel provisions have been inserted into Code of Obligations and the Civil Litigation Procedures Act holding electronic signature having same degree of proof as in signatures affixed by hand, and holding it tantamount to definitive proof until proven wrong.

Act contains stiff imprisonment penalties plus fines for cases of fraud.

Telecommunications.

Establishment of phone lines, wireless facilities, access to Turkish-owned satellites and networks, connections and other telecommunications facilities are regulated under basic

Telegraph and Telephone Act No. 406 (Feb. 1924) and Wireless Act No. 2813 (Apr. 1983) both as last am'd by Law 5809, Nov. 2008, entitled as Electronic Communications Act.

Under these laws Ministry of Communications is designated as government agency in charge, working closely with Board of Telecommunications. Also, mainly Government-owned Turkish Telecommunications Corporation (TURK TELEKOM) has been created with authority to engage in all types of telecom services, including setting up and operation of networks of transmission systems and other infrastructure. Ministry has authority to grant non-exclusive licenses for mobile phones (GSM or other), as well as, for pagers, data networks, cable TV and satellite systems for up to 49 years.

3.08 INTEREST:

In commercial matters, parties can freely fix rate of interest. (Com. C. 8). Compounding of interest is not permitted, except on quarterly basis in current accounts and in commercial loans. (Com. C. 8 and 94).

Law No. 3095 (Dec. 1984) as amended by Law No. 4489 (Dec. 1999) provides that if interest is required by law but contract is silent about rate, rediscount rate applied by Central Bank of Turkey to short-term credits as of 31st of Dec. of previous year shall be applicable. Same rule applies to default interest as well. If contract itself provides for higher rate, said rate becomes applicable to defaults thereunder, too. In contracts involving payments in foreign currency: (a) unless contract stipulates higher contractual or default interest, highest rate as paid by government-owned banks to one-year time deposits in foreign currency involved, shall be applied; (b) creditor shall have right to demand payment by conversion of foreign monies owed by Turkish Lira at buy-rate applied by Central Bank on due date or date of actual payment.

Special Decree-Law 90, Oct. 6, 1983, and amendments thereto, provide for procedure of fixing interest rates to be received and paid by those who are engaged in loan transactions, including banks.

3.09 LICENSES, BUSINESS AND PROFESSIONAL:

See topic 3.10 Monopolies, Restraint of Trade and Competition.

Licensing.

See category 15 Foreign Trade and Commerce, topic 15.06 Foreign Investment.

3.10 MONOPOLIES, RESTRAINT OF TRADE AND COMPETITION:

There are two kinds of monopolies: Production or import and sale of certain consumer goods, and, performance of certain public services.

Production or import and sale of certain consumer goods is under monopoly of Directorate General of Monopolies, attached to Ministry of Finance and Customs, e.g.: Spirits and alcoholic drinks, with exception of wine and beer; salt; playing cards, etc.; public services like railroads; gas and (with minor exceptions) electricity, etc.

Special permits and licenses are required for certain business activities, i.e., in field of banking, insurance, aviation, chemistry, pharmacy, private hospitals and clinics, etc. To obtain such permit, necessary qualification or financial potency to conduct such business generally must be proven.

See topic 3.16 Unfair Competition.

3.11 NEGOTIABLE INSTRUMENTS:

See topic 3.02 Bills and Notes.

3.12 PRIVATIZATION:

Program to privatize government-owned properties in variety of subsectors (particularly in power generation, telecommunications, transport, petroleum, and banking) is being implemented since 1984. With enactment of special law (Law No. 4046 of Nov. 1994, as am'd by Law No. 5728 in Feb. 2008) this program has gained momentum in line with rapid transformation Turkish economy has been undergoing, and with EU membership candidacy and globalization of world economy. Privatization Administration established pursuant to said Law oversees implementation of program under direction of Privatization High Council.

3.13 PROTECTING ANIMALS:

Law No. 5199 adopted on June 24, 2004, aims to assure decent treatment of, comfortable lives for and prevention of cruelty against animals. Detailed rules are laid out regarding stray animals; hygienic slaughtering; conduct of scientific experiments etc. Infractions are punishable by pecuniary fines.

3.14 SALES:

A contract of sale may be made by notarial act or in the form of a private agreement which may be oral or written.

A sale may be proved by documents signed by the parties or by witnesses and by means of other satisfactory evidences. The sale is complete when the agreement is concluded and, unless the contrary is specifically provided for in the contract or understood from the circumstances, the risk falls on the buyer from this moment. In the following cases, however, the risk falls on the seller even after the conclusion of the sale: (1) Where the property sold is designated in kind but not separated; (2) when goods have to be shipped and seller has not yet given up his hold on such goods; (3) where the contract is conditional and such conditions have not yet been fulfilled.

If no price is mentioned and goods are sold and delivered the buyer pays the market price current at the time and place of the contract. (C. Obl. 209).

Obligations of seller are following: (1) Delivery, all expenses of delivery being borne by seller in absence of contrary stipulation or custom; (2) warranty against dispossession, any stipulation to be free from such responsibility being void in case seller is aware of rights of third persons; (3) warranty of conformity of goods sold to description or to sample and against defects that render goods sold unfit for purpose for which they were bought or which reduce their value greatly. Liability for latent defects exists even if seller was unaware of them. (C. Obl. 194).

When defects in goods sold are discovered or when they are found not to have qualities mentioned in contract, buyer is free either to rescind contract or to have price reduced. (C. Obl. 204).

Obligations of the buyer are: (1) To pay the price; and (2) to receive the goods. When the buyer refuses to pay the price, in sales where the delivery is to be made after the payment, the seller can rescind the sale. (C. Obl. 211). In commercial sales, however, the seller may serve a notice on the buyer and fix a delay after which he has the right to request the court to have the goods sold for the account of the buyer.

F. O. B. and C. I. F. Sales.

Legal provisions concerning these two types of commercial sale are almost identical with generally accepted rules in world trade.

Conditional Sales.

A sale of personal property (including livestock) with reservation of ownership by seller is possible, provided such transaction is authenticated by Notary Public of domicile of buyer and duly recorded in special Register of Reservation of Ownership. (C. C. 940).

Notices Required.

If one of parties does not fulfill its obligations properly, for example buyer does not make payment accordingly or seller does not deliver in time or delivered goods are defective, notice must be given to other party. In general, orally given notice is sufficient. However, for sake of proof it is advisable to give notice through notary public or by registered letter. In commercial transactions, in order to put other party in default, this notice must be given either through notary public or by registered letter or by cable. (Com. C. Art. 20).

Buyer is under obligation to examine delivered goods with such dispatch as is reasonable and in case of defect notify seller. In case of defects which were not patent on customary examination and are found later, notice must be given forthwith upon their discovery. (C. Obl. Art. 198). In cases of commercial transactions, if defect is obvious, notice must be given within two days from date of delivery. If defect was not obvious, buyer must have goods examined within eight days, and, in case of defects, give notice within that term. (Com. C. Art. 25).

Applicable Law.

See topic 3.05 Contracts.

3.15 SECURITIES:

Securities Exchange.

Capital Market Law No. 2499 of July 28, 1981, as last am'd by Law 5728 in Feb. 2008 has created Capital Market Authority with wide powers to regulate and oversee whole spectrum of capital market activities by publicly-traded companies, investment partnerships, investment funds and intermediary firms (primarily, in Istanbul Securities Exchange), as well as, launching in Turkey of securities of foreign-origin.

Law aims for protection of investors and provides for stringent requirements for listing in stock exchange and for public offerings. Corporations, investment partnerships and investment funds with 250+ shareholders are deemed as publicly traded.

3.16 UNFAIR COMPETITION:

Main body of rules governing fair competition are in Law No. 4054 (O.J. Dec. 13, 1994) as last am'd per Law 5728 in Feb. 2008, which contains elaborate provisions parallel to those being applied in European Union. Independent board of broad powers has been created to monitor and intercept market developments detrimental to competition and issue heavy fines to violators wherever indicated.

There are also complementary rules in Code of Obligations (Art. 48) taken almost verbatim from Swiss Federal Code of 1926, with further elaborations in Commercial Code (Arts. 56-65).

See also categories 15 Foreign Trade and Commerce, topic Anti-Dumping Laws; Intellectual Property, topics Patents, Trademarks and Tradenames.

4 CITIZENSHIP

4.01 ALIENS:

Status of aliens in Turkey is based upon Treaty of Lausanne (July 24, 1923) and on special conventions and treaties made with different countries and Law No. 5683 of July 1950 as last am'd per Law No. 5728 in Feb. 2008. On condition of reciprocity, aliens have access to courts of justice; may own, transfer and otherwise dispose of all types of personal property. Similarly with respect to real property, except that they may not own in areas of exclusion as may be decreed by Council of Ministers and their holdings may not exceed 10% of surface area of towns and boroughs which have their city planning in place. (Art. 35 of Land Title Act, as am'd by Law No. 5782 in July 2008). Aliens are not subjected to taxation any heavier than Turkish citizens. (Con. 74).

In matters of personal status such as marriage, divorce, matrimony, capacity, inheritance of personal property, etc., only national courts of the aliens have jurisdiction. In case both parties to the case sign a written statement accepting the jurisdiction of Turkish courts, the latter decide the case according to the national law of the parties.

Residence.

Per Law No. 5683 (July 15, 1950) registration and residence permit are required of those who intend to stay for longer than one month and those who intend to seek employment. Tourists and triptique-holders are exempt thereof up to four months. For those seeking employment, work visa and permit are required to be obtained, in principle, from Turkish Consuls abroad, before entry into Turkey.

See also subhead Employment of Aliens, infra.

Civil Rights.

Aliens on Turkish soil have same protection as Turkish citizens both for themselves and their belongings; except that rights and liberties granted to Turkish citizens by Constitution may be limited by legislation and in conformity with rules of international law in case of aliens. (Con. 16). Practically speaking, position of aliens in civil matters is nearly same as that of Turkish citizens.

Actions by Aliens.

Aliens suing in Turkey may be required, at request of defending party to give such guaranty as court may fix, considering costs of suit and damages to which alien plaintiff might be sentenced. (C. C. P. 97). However, treaty arrangements are reserved. Since, under Law No. 1574 (1972), Turkey ratified The Hague Convention on Civil Procedures (Mar. 1, 1954), alien should be able to request court to set aside request for guaranty. (Art. 17 of said Convention).

Actions Against Aliens.

Where an alien is resident in Turkey civil and/or penal actions may be commenced against him. There are cases where alien not resident in Turkey may be summoned before Turkish courts. These cases are those concerning real estate situate in Turkey, contracts entered into or to be performed in Turkey, debts attached in Turkey, bankruptcy declared in Turkey and sea accidents. Ministry of Justice is authorized to allow alien who has been sentenced to prison term in Turkey to be repatriated to his/her own country in order for sentence to be completed in alien's home country penitentiary. (Law No. 4780, Jan. 8, 2003).

Corporations Owned or Controlled by Aliens.

There are no disqualifications applying to corporations owned or controlled by aliens in Turkey.

See also categories 8 Debtor and Creditor, topic Bankruptcy; Foreign Trade and Commerce, topic Foreign Investment; Intellectual Property, topics Copyright, Trademarks and Tradenames; Transportation, topic Shipping.

Employment of Aliens.

(Law No. 4817 of Mar. 6, 2003, as last am'd per Law 5665 in May 2007). Unless otherwise mutually exempted under treaties to which Turkey is party, work permit is required in addition to residence permit, for employment of aliens in Turkey (including those self-employed). For self-employed, permit may be issued on condition that they have resided in Turkey continuously for five years. Absences due to travels abroad totalling less than six months, do not affect continuity.

Work permits are issued by Ministry of Labor and Social Security to aliens (and to members of their family who have lived together for at least five years) upon their application or their employers. Aliens who have resided in Turkey continuously for eight years or who have worked total of six years, as well as persons falling into certain categories such as immigrants, refugees, those who have given up Turkish citizenship by permission, citizens of EU countries, may be issued permanent permits. Certain jobs are reserved for Turkish citizens. Work permits are issued, initially, for one year, but are extendable up to six years under certain conditions. Permits may be restricted to given economic sector, or profession or geographical limit.

4.02 IMMIGRATION:

See category 17 Immigration.

4.03 TURKISH CITIZENS:

Matters concerning citizenship (e.g., as birthright or through acquisition or reacquisition; voluntary or automatic loss etc.) are regulated under terms Law No. 403 of Feb. 1964 (as last am'd by Law 5901, June 2009). Central office in Ministry of Interior provides for computer-based depository of citizenship records on nation-wide basis. Every citizen is issued special Citizenship Number. See category 17 Immigration.

5 CIVIL ACTIONS AND PROCEDURE

5.01 ACTIONS:

All actions must be brought before law courts. There is however a summary procedure for collection of debts before special authorities (i.e., Execution Office) if claimant can produce written proof (like enforceable judgment; promissory notes or acknowledgment of debt signed by debtor, etc.).

Rules governing procedure of civil actions are set forth in Code of Civil Procedure.

Parties are not required to be represented by an attorney-at-law and may handle their cases personally.

See categories 4 Citizenship, topic Aliens, subhead Actions by Aliens; Courts and Legislature, topic Courts.

Limitation of.

See topic 5.05 Limitation of Actions.

5.02 DEPOSITIONS AND DISCOVERY:

In principle, testimony is taken by competent court, with witness appearing personally. Rogatory commissions, both within and from outside of Turkey are allowed. (C. C. P. Arts. 253-257). When Turkish courts take evidence on behalf of foreign courts, Turkish procedural rules apply. Turkey has ratified The Hague Convention on Civil Procedures (Law-1574, Mar. 1954), as well as, The Hague Convention Abolishing the Requirement of Legalisation for Foreign Public Documents (Law-3028, June 1984).

Per Decree No. 2004/7894 (O.J. Oct. 2, 2004) Turkey has joined Additional Protocol of June 7, 1968, to European Union Convention on Information on Foreign Law.

See category 10 Documents and Records, topic 10.02 Acknowledgments.

5.03 FOREIGN JUDGMENTS:

See topic 5.04 Judgments.

5.04 JUDGMENTS:

Foreign judgments are enforced in Turkey by decision of Turkish court to that effect under one of conditions set forth under category Dispute Resolution, topic Arbitration.

5.05 LIMITATION OF ACTIONS:

All claims, unless otherwise stipulated in the law, are barred after ten years. (C. Obl. 125). The following are subject to a five-year period: Rent, interest, professional fees, wages, and retail trade debts. (C. Obl. 126). The above mentioned periods cannot be changed by agreement. All actions for damages due to torts are barred after one year. Different periods running from six months to five years are applied in special cases of civil and commercial law.

Running of limitations is interrupted by: (1) Admission of the claim by the debtor; (2) commencement of legal proceedings; (3) application of the creditor to the receivers in bankruptcy. (C. Obl. 133).

The fact that a claim is secured by a pledge does not prevent the running of limitation; provided, however, that the creditor reserves the right to collect his claim by sale of the pledge. (C. Obl. 138).

All letters of guaranties issued for certain period of time shall be valid within duration indicated in said letter of guaranty. It is permissible for guarantor (e.g., bank) to stipulate in its letter that if beneficiary does not submit claim in writing, prior to stated expiry thereof, the guarantee shall become null and void. (C. Obl. 110 as am'd in July 1981).

5.06 PRESCRIPTION:

See topic 5.05 Limitation of Actions.

5.07 REPLEVIN:

The action most similar to replevin in Turkish law is an action to recover property wrongfully acquired, in which both the return of property and damages may be ordered by the court. Temporary measures for the protection of property thus disputed may be taken. This action must be brought within a year from the time the owner learns that he has the right to recover.

5.08 SEQUESTRATION:

In case of litigation about the ownership of movable property or real estate, courts may order it to be attached or taken into legal custody, and provisional measures for the safekeeping of such property may be decreed.

6 COURTS AND LEGISLATURE

6.01 COURTS:

(Law No. 5235, O.J. Oct. 7, 2004).

There are various types and categories of courts exercising jurisdiction over civil, criminal, commercial, executionary, labor, military, juvenile, consumer, administrative and tax matters. Competence and jurisdiction of each are determined under law. There is no jury trial.

In civil and criminal matters, composition of courts ranges from single Justice of Peace to single-Judge Executionary and/or Labor Courts, to Courts (civil and/or criminal) of First Instance (of either one-judge or panel of three), to Central Criminal Tribunals, as well as, Commercial Tribunals.

Regional Civil and/or Criminal Courts as envisioned to be established within two years pursuant to said Law, are in process of being established. These courts will sit as appellate level courts over judgments issuing from Courts of First Instance. However, Court of Cassation in Ankara (Yargitay) with its specialized chambers composed of five-judge panels will continue to sit as final highest level appellate court in civil and criminal matters, while Council of State (Danistay) will be sitting as final reviewing authority on administrative, governmental and tax matters.

Military justice is administered under its special law. Military Court of Cassation in Ankara sits as final highest appellate court in regard to judgments issued by Courts Martial.

See also category 1 Introduction, topic 1.02 Government and Legal System, subhead Judiciary.

6.02 LAW REPORTS, CODES:

See topics 6.04 Reports, 6.05 Statutes.

6.03 LEGISLATURE:

See category 1 Introduction, topic 1.02 Government and Legal System.

6.04 REPORTS:

Constitutional Court and State Council reports are being published regularly.

6.05 STATUTES:

Turkish legal system is based upon continental European legal system. Turkish Civil Code (C. C.) and Code of Obligations (C. Obl.) are basically translations of Swiss Civil Code and Code of Obligations. Commercial Code (Com. C) is based on German, Swiss and French laws. Central European legal publications, like text books, commentaries, law journals and court decisions, are common sources frequently used for interpretation and application of Turkish laws. Thus, Turkish legal system is not strange or different for those familiar with European continental laws.

Legislation.

Legislative power is vested in Turkish Grand National Assembly. This power cannot be delegated. (Con. 7).

Constitution is supreme law of country. No law can be contrary to any of its provisions. (Con. 11). Constitutional Court renders rulings as to constitutionality of laws and internal regulations of Grand National Assembly. (Con. 148).

Codes and Statutes.

Some important codes are: Civil Code; Code of Obligations; Criminal Code; Code of Commerce: Code of Civil Procedure; Code of Criminal Procedure, etc.

International Treaties.

See category 25 Treaties and Conventions, topic 25.01 Treaties.

Regulations are issued by Council of Ministers providing for mode of application of statutes. Regulations cannot be in conflict with laws and must be reviewed and approved by Council of State. They must be signed by President and promulgated in same manner as statutes. (Con. 111).

Instructions or Communiques are directives issued by ministries and public corporate bodies with purpose of assuring application of statutes and regulations related to their particular field of activity and in conformity with such statutes and regulations. Instructions must be published in Official Journal.

Decrees or ordinances are legal provisions issued by Council of Ministers which do not require approval of Parliament and have same sanctions as laws. They are issued by Executive on basis of authority granted by Parliament.

See also category 1 Introduction, topic 1.02 Government and Legal System.

7 CRIMINAL LAW

7.00 In General

Criminal offenses are punishable under Criminal Code No. 5237 (O.J. Oct. 12, 2004) and Criminal Trial Procedures Law No. 5271 (O.J. Dec. 17, 2004), both as last am'd by Law 5918, July 2009.

Minor offenses (e.g., disobeying ordinances by competent authorities; vagrancy; gambling; smoking in public areas; drunkenness; fouling of environment; declining to present identification; unauthorized posting of posters, etc.) which are punishable only by administrative monetary fines and/or administrative sanctions are classified as and treated under separate heading of Misdemeanors (Law No. 5236, O.J. Mar. 31, 2005, bis). Fines are assessable by authority specified in relevant law. Where unspecified, highest administrator of relevant public agency and/or public prosecutors are authorized. Appeal could be taken before local Justice of Criminal Peace. Judgments for administrative sanctions involving confiscation of offending materials are issued by courts. Appeal could be taken before local Criminal Tribunal.

Turkey is party to several international treaties and conventions (U.N. and/or EU) dealing with criminal matters. Of recent, Turkey joined U.N. Convention Against Transnational Organized Crime. (Law 4800 of Jan. 30, 2003).

7.01 ANTIQUITIES:

Unauthorized collection, purchase or export of antiquities is illegal and punishable by stiff penalties (both imprisonment and fines). (Law No. 2863 of July 21, 1983).

7.02 BRIBERY:

Special law has been adopted (Law No. 5176 of May 25, 2004, creating Ethics

Administration of Public Officials) with authority to determine and to follow application of principles of ethical behavior expected of public officials, in order to insure proper overseeing of public interest, transparency, impartiality, honesty and accountability.

Turkey is also party to European Convention on Prevention of Bribery of Foreign Public Officials in International Business Transactions (Law No. 4782 of Jan. 2, 2003), as well as U.N. Convention Against Corruption (Law No. 5506 of May 18, 2006).

7.03 EXTRADITION:

Turkey has adhered to European Convention of Dec. 13, 1957, on Extradition. (Law No. 7376, Nov. 18, 1959). Additionally, Turkey has extradition treaties with several (17) countries. See also category 5 Civil Actions and Procedure, topic 5.04 Judgments.

7.04 MONEY LAUNDERING:

Law No. 4208 (Nov. 19, 1996) as last am'd by Law 5549 in Oct. 2006, contains elaborate provisions aimed at preventing and, in case of infractions, providing for fines and prison terms for laundering of illegal monies. Certain monetary transactions are subject to verification and reporting of identities.

Financial Crimes Investigation Board (MASAK) has been formed pursuant to Law No. 5549 (O.J. Oct. 18, 2006) entitled Law on Prevention of Laundering of Crime Proceeds. This law amended several articles of Law 4208. Utilizing counsel and assistance from Council to Coordinate Combat Against Fiscal Fraud and from existing government auditors and inspectors, MASAK operates under Ministry of Finance. Public agencies and organizations, as well as individuals and corporate bodies engaged in wide variety of businesses (banking, insurance, securities markets, foreign exchange, mail and transport, organizers of lotteries and parimutuels, real property, precious metals and stones, dealing in antiques and any others as may further be designated by Council of Ministers) are charged with duty to report suspicious financial transactions. Board has powers to subpoena information and data, and access to computer systems of other relevant public agencies. Failure to cooperate may result in administrative fines. Confiscation of suspect proceeds is possible.

8 DEBTOR AND CREDITOR

8.01 ASSIGNMENTS:

The consent of the debtor is not necessary for the assignment of a claim by the creditor to a third person, except in cases where the law or agreement prohibits the assignment or where the claim is unassignable by nature. (C. Obl. 162). An assignment must be in writing. If the debtor pays the claim to the assignor or to one of the previous assignees (in case there are several) before any of the assignees or assignors notify him, he is discharged. (C. Obl. 165). When a dispute arises as to who should be paid the debtor may refuse to pay, or may discharge himself by depositing the amount in a court. (C. Obl. 166). If the assignment of a claim is made for consideration the assignor impliedly warrants the existence of a claim at the time of the assignment. Unless expressly so stipulated, he is not liable for the insolvency of the debtor. (C. Obl. 169). The assignee acquires all the rights and privileges of the assignor excepting those that are personal. In addition to special defenses vis-a-vis assignee, debtor has all defenses against assignor (and former assignees) provided such defenses existed at time debtor was informed of assignment. (C. Obl. 167).

8.02 ATTACHMENT:

This remedy constitutes provisional security measure provided for by Law No. 2004 on Execution of Debts and Bankruptcy (June 9, 1932, as last am'd by Law No. 5358, May 31, 2005) in order to protect creditor before effectuation of seizure or bankruptcy in execution proceedings.

Attachment of the property of the debtor is allowed where an unsecured debt is due; and even though the debt has not matured the writ may be issued where the debtor (1) has no fixed domicile or (2) is suspected of trying to evade his obligations by flight or removal of assets. (C. E. and B. 257).

Writ is issued by court on ex parte application of creditor. (C. E. and B. 258). Creditor is liable for any damages that may arise due to attachment, and may be required to give a bond. (C. E. and B. 259). Attachment gives no prior lien on goods. Creditor must begin suit within seven days after writ of attachment is communicated to him. See also category 5 Civil Actions and Procedure, topic 5.08 Sequestration.

8.03 BANKRUPTCY:

Only traders (including legal entities such as partnerships and corporations) are subject to law of bankruptcy. (Com. C. 20). In all cases declaration of bankruptcy is made by a commercial court. A previous notification through Execution Department is necessary, except that a declaration of bankruptcy may be made without such previous notification: (1) Where debtor has no residence, or absconds, makes fraudulent transactions to prejudice his creditors, or hides his property while execution is taking place; (2) where a trader stops payments on his debts; (3) where a corporation is insolvent; (4) where debtor himself applies to court to be declared bankrupt.

The bankruptcy decree divests the bankrupt of the control of his property. All his property subject to execution forms a masse (estate). Such property as he may acquire during bankruptcy is also included. All debts of the bankrupt except those secured by a real estate mortgage become due. Interest keeps accruing even after initiation of bankruptcy. Preferential payments can be made to creditors whose claims are secured by pledge or mortgage. Proceeds of sale from such properties are paid directly to those creditors, after deduction of outstanding customs duties, land taxes, etc. Ordinary, or non-preferential creditors are combined within six specific groups. Creditors of same group receive equal payments. Creditors with claims for wages, funeral expenses; debtor's minor children and his wife are combined within group one.

As soon as bankruptcy is declared a list of all the property belonging to the debtor is prepared by the Execution Department. Notices are put in the newspapers calling all creditors to a meeting. They elect a bankruptcy commission. The judicial liquidation then takes place. This must be terminated within six months.

Foreigners in Turkey are subject to bankruptcy upon the same basis as Turkish citizens. (C.E. and B. 154-256).

In general a foreign adjudication of bankruptcy may be enforced in Turkey only after being submitted to, and approved by a Turkish court.

8.04 EXECUTIONS:

Execution is granted in respect of judgments as well as of acknowledgments made before a notary and settlements made in a court. In case of ordinary and commercial debts the creditor, before going to the court, may serve a payment order on the debtor. If no objection is brought against this order within seven days (this term is five days for negotiable instruments) the claim is assumed to have been admitted and is executed.

The debtor is obliged to make a declaration giving a detailed account of his property sufficient to pay his debt. Moveable goods are seized and real estate is attached by registration on official record. All property must be sold by auction through the execution department. In exceptional cases movables may be sold by private agreement.

8.05 GARNISHMENT:

Any property of debtor, in his possession or in hands of third persons or claims against them may be reached by seizure for execution, up to amount of creditor's claim. (C. E. and B. Art. 85).

8.06 LIENS:

Creditor who with consent of debtor is in possession of personal property or securities of latter has right to retain them until claim is paid, provided claim is due and has a natural connection with property retained.

In case of merchants this connection is deemed to exist when possession of property and claim result from their commercial relations. (C. C. 950).

A warehouseman has a lien for the warehousing fees on the goods stored. (C. Obl. 476). A common carrier has a lien for freight, etc., on the goods transported. (C. Obl. 442). Landlords (C. Obl. 267) and hotel keepers (C. Obl. 482) have liens for rent and charges on the goods of tenants and guests.

8.07 PLEDGES:

Movable objects and assignable rights and claims may be pledged. The pledge is not complete until the pledgee takes possession of the goods pledged. (C. C. 939). Goods in transit and in warehouses may be pledged by endorsement of securities. Pledgee is liable for any damage of pledged articles unless he proves that damage has been caused without his fault. All stipulations to effect that creditor shall forfeit goods pledged in case of nonpayment are void. Pledged goods can only be sold through Execution Department.

See also topic 8.03 Bankruptcy.

9 DISPUTE RESOLUTION

9.01 ALTERNATIVE DISPUTE RESOLUTION:

Mandatory Dispute Resolution.

This is provided for in some rare instances. Where required, modes and procedures of selection of mediators and/or arbiters are shown in their special laws.

According to Law No. 2822 (May 5, 1983) on Collective Bargaining, Strikes and Lockouts, in case of deadlocked negotiations in collective bargaining, dispute may be referred to mediator who would be appointed either jointly by parties or selected from among official list by draw of names, or, similarly appointed by court. Mediator would be asked to render opinion in 15 days, strictly in advisory capacity. If mediator fails to get parties to agree, strike and/or lockout could be announced. Invoking public health and safety or national security grounds, Government has authority to decree deferral thereof for 60 days, during which parties and/or Minister of Labor could demand referral of dispute for final resolution by High Arbitration Board (eight-person body headed by President of that Division of High Appeals Court charged with review of labor disputes). Same Board would also resolve similar disputes in such areas of endeavor or work sites wherein strikes and lockouts are prohibited by law.

Law No. 3533 (June 29, 1938) requires mandatory settlement of disputes between government agencies, as follows: If dispute is between two agencies whose budgets are contained in national budget, member of cabinet is to act as final arbiter. Where dispute involves agencies whose budgets are treated only as adjunct to national budget, one of heads of divisions of High Court of Appeals, or, in disputes between municipalities and other government agencies or entities wholly-owned by government, highest local court official would act as final arbiter.

Law No. 5548 (O.J. Oct. 13, 2006) established Public Inspection Agency (Kamu Denetimi Kurumu) akin to Ombudsman in some European countries. Comprising one Chief and ten Inspector/Auditors appointed for five-year terms, this Agency is to review and assess complaints by citizens (and aliens on basis of reciprocity) regarding administrative practices and procedures. Filing of complaint temporarily stops legal period to file suit against administrative action. Review of complaint must be completed in six months. Agency has subpoena powers to summon relevant information and data.

Voluntary Dispute Resolution.

Voluntary Arbitration, per se, is recognized mode of dispute resolution. Code of Civil Litigation Procedures contains detailed rules relevant to arbitration in Turkey. (Arts. 516-536).

See also topic 9.02 Arbitration.

9.02 ARBITRATION:

Between Turkish Parties.

Contracting parties may elect to submit dispute to arbitration (excepting those which may relate to public order). To be valid, it must be written into original contract or subsequent agreement. No special format is required. Unless otherwise contracted, three arbitrators are appointed by court. Arbitrators must adjudge issue within six months of its referral. Parties could specify shorter period. Unless extended by mutual consent of parties, if award is not reached within agreed period, arbitration process is rendered null and void and competent court would take over.

Decision is reached by majority and unless otherwise provided for, no hearings are conducted. Award is appealable. When finalized, award is certified by court and can thereafter be executed. (C. C. P. 516-530).

Arbitral Awards Given in Foreign Countries.

On condition that exequatur is obtained by competent Turkish court, finalized foreign arbitral awards which have been issued with observance of due process may be enforced and executed in Turkey. Awards running afoul of public morals or public order, or, those which Turkish law bars resolution through arbitration cannot be enforced. Also, to obtain exequatur, existence of reciprocity between Turkey and country from where award is issued (based either on treaty, or, local law or practice) must be proven. (Law No. 2675, May 20, 1982).

In Disputes Involving Foreign Element.

Law Nos. 4501 (Jan. 22, 2000) and 4686 (July 5, 2001) were adopted, following constitutional amendment (Law No. 4446, Aug. 1999) allowing international arbitration in certain types of disputes.

Law No. 4501 treats specifically arbitration in disputes resulting from concession-type of agreements involving public services whereas Law No. 4486 establishes, in broader terms, procedures to be followed in invoking international arbitration involving foreign element (defined basically as those contracts wherein parties have legal domiciles and/or business seats located in different countries).

Reserved are provisions of international treaties and conventions to which Turkey is party.

Conventions to Which Turkey is Party.

By Law Nos. 3460 (June, 1988), 3730 and 3731 (May, 1981) Turkey has joined International Convention (ICSID) on Settlement of Investment Disputes between States and Nationals of Other States, and has ratified European Convention on International Commercial Arbitration signed in Geneva, Apr. 24, 1961, as well as, New York Convention of June 10, 1958, on Recognition and Enforcement of Foreign Arbitral Awards (in commercial matters and on condition of reciprocity).

See also topic 9.01 Alternative Dispute Resolution; category 5 Civil Actions and Procedure, topic 5.04 Judgments.

10 DOCUMENTS AND RECORDS

10.01 ACCESS TO INFORMATION:

Law No. 4982 (Oct. 2003, as last am'd by Law 5432 in Nov. 2005); Regulations thereon (Apr. 27, 2004).

Right recognized therefor for everyone (including resident foreigners and corporate entities, but only as regarding their own status and fields of activity).

Government units are required to furnish requested information within 15 days. Excluded are: data classified as confidential; government secrets, economically sensitive data; information on tasks and activities of civilian and military intelligence agencies; pending judicial or administrative investigations; communications; private data; commercial secrets; intellectual property.

10.02 ACKNOWLEDGMENTS:

Acknowledgments made before a notary public are prima facie evidence in courts. Documents acknowledged before a notary public in foreign countries and intended for use in Turkey, should be made in accordance with lex loci and legalized by Turkish consular officers or other political representatives. Such documents also are accepted as prima facie evidence. (C. C. P. 296).

Turkey has ratified (Law No. 3028, Decree 84/8373Sept. 16, 1984) The Hague Convention of Oct. 5, 1961, on Abolishing the Requirement of Legalisation for Foreign Public Documents. Apostille issued by competent authority of State from which document emanates should be sufficient.

10.03 NOTARIES PUBLIC:

Notaries are public servants. They are appointed by Ministry of Justice from among holders of law degrees who have successfully completed novitiate of one year (lawyers, judges and prosecutors excepted). They must post bond, amount of which varies according to their gross annual notarial income. Papers and documents of legal nature as made and acknowledged before and authenticated by notaries are deemed official and held as prima facie evidence before courts. Notaries keep copies of all transactions authenticated by them. (Law on Notaries Public, No. 1512, dated Jan. 18, 1972).

10.04 RECORDS:

The Commercial Code requires the establishment of a commercial register at each district. This register is under the control of the commercial court of the district. The names of all traders, partnerships, corporations and agents, with information concerning their activities are recorded.

Personal status, marriages, divorces, births, deaths, changes of name, etc., are recorded by a government department.

10.05 SEALS:

Public authorities and commercial corporations have seals, but such seals have no value unless accompanied by the signature of the person in authority. Signatures of private persons must be in their own handwriting; only those who cannot write may use a seal or a sign legalized by a notary.

11 EMPLOYMENT

11.01 LABOR LEGISLATION:

Scope of Legislation.

Main pieces are: (a) Labor Code (Law 4857, June 10, 2003, as last am'd by Law 5728 in Feb. 2008); (b) Trade Unions Law (Law 2821, May 5, 1983, as am'd); (c) Collective Bargaining, Strike and Lockout Law (Law 2822, May 5, 1983, as am'd); (d) Social Security Act (Law 5510, June 2006, as last am'd by Law 5917, June 2009); (e) Unemployment Insurance Act (Law 4447, Jan. 2002).

Main Features.

Contracts for individual employment for specified period in excess of one year must be in writing. Maximum trial period allowed is two months (or, up to four months, if agreed). Contracts of unspecified duration may be terminated by either party by advance notice of two to eight weeks, depending on length of service, and only on justifiable grounds.

Maximum work is 45 hours per week (traditionally, applied to blue-collar type workers over five or six-day period) while it is up to 40 hours per week over five days for white-collar types.

Regular (non-sporadic) overtime for maximum of three hours per day (maximum 90 days/year) requires worker's consent. Unless higher rate is stipulated in union contracts, overtime requires 50% more pay in addition to regular wages.

Minimum wages, as redetermined biannually by special commission comprised of representatives of government and unions, do apply.

At privately-owned worksites (excepting subsurface or sub-water sites) employing 50 or more workers, 3% of work force must be allocated to handicapped persons. In government worksites, 4% of work force must be allocated to handicapped while 2% to ex-convicts.

Workers are entitled to paid weekly holiday, which, as rule, is Sun. (for white-collar workers, Sat. and Sun.). Those working on Suns. are given weekly holiday on another day of week. For general holidays, they are entitled to full day's wage for each holiday on which no work is done. For actual work on any such day, workers receive double wage. They are also entitled to paid annual vacation from 14 to 26 days, depending on length of service with employer. Union contracts may provide for longer vacation periods.

Workers are entitled to seniority compensation equal to one month's pay for each year of service (not to exceed similar benefit to which highest civil servant may be entitled upon retirement, calculated per coefficients ordained each year in national budget), in case of pensioning due to retirement or disability or of being dismissed by employer.

Strike and Lockout.

Workers of age 16 and over (excepting military personnel, civil servants in government and high-echelon administrators of state-owned enterprises) are free to join any union of their choice within job classification of their worksite. Unions have right, under certain conditions, to negotiate collective labor contracts with employers. Upon request of one fourth of workers in jobsite vote must be taken for strike, which would go into effect unless simple majority votes it down.

Employers also have the right to form their unions. Lockout is permitted under certain conditions.

Strikes and lockouts may be deferred for 60 days maximum, per decree by Council of Ministers, on grounds of public health or national security.

Social Security.

Under Social Security and General Health Insurance Act, all workers (excepting civil servants who are covered under separate Pension Fund rules) are subject to social security for following coverages: (a) Work accidents and professional sickness; (b) maternity; (c) sickness; (d) old age and disability; and (e) unemployment. Both employer and employee contribute their respective shares of premiums, subject to wage-salary ceiling determined by Government semi-annually. These premiums are collected and deposited through payroll deductions.

For those starting work after Apr. 30, 2008, Law calls for retirement until 2036, basically, at age 58 for women and 60 for men, coupled with social security premiums payments for 7,200 days for those employees employed by one or more employers under Employment contract (except 9000 days for self-employed). Retirement age to be raised at two-year intervals from 2036 to 59 for women and 61 for men, and eventually, to 65 for all, starting in calendar 2048.

Death benefits too are payable to survivors. Self-employed people are also covered under similar schemes. They are required to pay their premiums for similar benefits, into agencies specifically created therefor.

11.02 SOCIAL SECURITY:

See topic 11.01 Labor Legislation.

12 ENVIRONMENT

12.01 ENVIRONMENTAL REGULATION:

Notable pieces of relevant laws and regulations include: Environmental Protection Act (No. 2872, Aug. 9, 1983 as last am'd per Law No. 5491 in May 2006); Law No. 3086 (1984) on Coastal Strips; Law No. 1380 (1971) Concerning Marine Life; Regulations re Protection of Air Quality (Nov. 2, 1986), re Controls on Water Pollution (Sept. 4, 1988), re Environmental Impact Assessment of (proposed) Investments (Feb. 7, 1993), re Controls on Imports of Dangerous and Deleterious Substances (June 5, 1986).

Ministry of Environment and Forestry (Cevre ve Orman Bakanligi) in Ankara is agency entrusted with authority to oversee environmental matters.

13 ESTATES AND TRUSTS

13.01 DEATH:

Death certificates and permits for burial are issued by local municipalities (eldermen in villages).

Presumption for death and surviving successors are determined under court decrees.

In case two or more persons die under circumstances which make it impossible to determine the order in which death has occurred, all of them are presumed to have died at the same time. (C. C. 29).

If a person, whose body cannot be found, has disappeared under circumstances which necessarily indicate his death, he is presumed dead. (C. C. 31).

In case a person disappears while in danger of death or in case the death of a person, from whom no news has been received for a long time, appears to be probable, the judge, on request of parties whose rights depend upon his death, may decide on the absence of the person concerned. (C. C. 32). In order that judge may be requested to render this decision, at least one year from danger of death or five years from last news must have elapsed. Then announcement is made and, at least a year from this announcement must elapse. (C. C. 33). In case person in question does not appear or no news is received from him by end of this term, judge decides on absence and all rights dependent upon death are acquired as if person had actually died. (C. C. 35).

13.02 DECEDENTS' ESTATES:

See topics 13.03 Descent and Distribution, 13.04 Wills.

13.03 DESCENT AND DISTRIBUTION:

No distinction is made between real and personal property. Distribution among heirs takes place as follows: (1) Heirs of the first degree are the descendants of the decedent, children receive equal shares, children of deceased children take their parents' share. (C. C. 495). (2) If there be no descendants decedent's property is divided equally between his father and mother, or if they are deceased, property goes to their descendants. (C. C. 496). (3) If there be none of above mentioned heirs, property of decedent goes to grandparents, and in case they are deceased, to their descendants. (C. C. 497).

Illegitimate children inherit as though legitimate. (C. C. 498).

Surviving Spouse.

If the decedent left issue, the surviving spouse takes one-fourth of estate. If decedent left no issue, but left parents or descendants of parents, surviving spouse takes one-half of estate. If decedent left neither issue, parents nor descendants of parents, but left grandparents or descendants of grandparents, surviving spouse takes three-fourths of estate. If decedent left none of relatives mentioned above, surviving spouse takes entire estate. (C. C. 499).

Escheat.

If there be no persons entitled to take a decedent's estate, the property escheats to the state. (C. C. 501).

13.04 WILLS:

All persons above 15 and who are discriminating are capable of making wills disposing of their property. In order to make a contract of heirship one must have attained the age of majority.

Any condition not immoral or unlawful may be attached to the will or to a contract of heirship. (C. C. 557).

Wills may be made in one of the following ways: (1) Formal wills are drawn by notaries or similar officials, who are obliged to keep originals or legalized copies on file. (C. C. 531-549). Such wills must be signed by testator and by officials in charge. (2) Will may be prepared by testator himself. In this case entire will, including date and place of execution, must be written in testator's own handwriting. No witnesses are required. Such wills are deposited with justice of peace or with notary public to be kept either open or in sealed envelope. (3) In cases of emergency, such as impending death, war, etc., when testator cannot make will in any other way he may declare his desires to two witnesses whom he requests to have such desires written at their earliest convenience.

Reserved Portions.

The part of the property which can be disposed by will or contract of heirship is limited to that which the law does not obligate a person to leave to his lawful heirs. Descendants, parents, brothers and sisters, husband or wife have certain interests in the estate of the decedent of which they cannot be deprived by will. (C. C. 505). Shares of these heirs are following portions of shares which they would take in case of intestacy: For descendant one-half; for each parent one-fourth; for each brother or sister one-eighth; for surviving spouse whole share, if congregating with descendants, and three-fourths thereof if he or she is congregating with heirs other than descendants. (C. C. 506).

Any of the heirs may be deprived of inheritance by the will of the decedent if he has been guilty of a great wrong against the testator or against one of his near relatives or if he is gravely negligent of his duties towards the testator.

14 FAMILY

14.01 ALIMONY:

See topic 14.04 Divorce.

14.02 COMMUNITY PROPERTY:

See topic 14.06 Husband and Wife.

14.03 DESERTION:

See topic 14.04 Divorce.

14.04 DIVORCE:

Grounds.

Separation up to three years or divorce is grantable in cases of adultery; attempt against life of spouse and cruelty; committing of crime; leading infamous life; desertion; untreatable insanity rendering common life intolerable after lapse of minimum of one year; marital union undergoing severe shock and inability to resume common life. Right to action is forfeited if guilty spouse is pardoned by other, in cases of adultery, attempt to life or cruelty, or, of leading infamous life.

Jurisdiction.

Court at plaintiff's domicile has jurisdiction. Aliens residing in Turkey may sue for separation or divorce. Grounds therefor and legal consequences thereof are to be decided upon in accordance with laws of country which is common to both parties (provided same is not against public morals or order of Turkey). When parties are of different nationality, laws of their common domicile, or lacking same, laws of their common residence, and lacking that, Turkish law would govern.

Name.

The divorced wife reacquires the surname which she had before the marriage. If it is determined that she has vested interest therein and that it would not harm ex-husband, court may permit divorcee to continue using her ex-husband's surname.

Alimony.

If the spouse who is not guilty falls into poverty on account of the divorce, the other party, even if not guilty, may be ordered to pay alimony to such spouse for a period not exceeding one year.

Remarriage.

If one of the parties is guilty he or she may be forbidden to remarry for a period not less than one and not more than two years. A divorced wife cannot remarry for 300 days, but this term may be shortened by court order.

Annulment of Marriage.

See topic 14.08 Marriage.

14.05 GUARDIANSHIP:

See topic 14.07 Infancy.

14.06 HUSBAND AND WIFE:

In order to have capacity to enter into marriage or to rescind or amend it, one must possess discriminatory powers. Minors and interdicted persons must be granted permission by their legal representatives, or, by court, if such permission is unjustly denied. (C. C. 126, 128). Upon joint application by parties, formal marriage permit (valid for six months) is to be issued by appropriate authority (either municipality in townships, or, elderman in villages). (C. C. 134). Marital union is represented by each of spouses with joint and several liability towards third parties. (C. C. 188-189).

Though prenuptial contracts are still very much uncommon, parties are required to adopt one of property regimens listed in law in regard to marital property rights. This may be done by executing formal contract either prior to or after conclusion of marriage. (C. C. 203-204). In lack thereof, parties are assumed to have opted for Participation in Properties Acquired During Course of Marriage. (C. C. 202, 218). This regimen covers all personal property owned by each of spouses prior to marriage (including, by definition, property already inherited or acquired by gift inter vivos), as well as, all property acquired during course of marriage (unless expressly excluded, including incomes accruing on personal property during course of marriage). In this regimen, each of spouses has authority to administer property, with each remaining liable for his/her debts with all his/her property. At time of dissolution of marriage or death of one of spouses, formal evaluation is conducted and properties are retrieved (with due regard of possible added values accruing during marriage). (C. C. 225-226, 228).

Alternatively, parties may elect either of property regimens known as Separation of Properties (C. C. 242) or Community of Properties (C. C. 256). Under former, both spouses continue to keep ownership of their property and manage same, whereas under latter, all property is owned and administered jointly by spouses. Community is liable for debts of either. Upon death of spouse, unless different split has been agreed to, property is divided half-and-half between surviving spouse and heirs of deceased. (C. C. 276).

In case of justifiable reasons, court may order conversion of existing regimen to Separation of Properties. (C. C. 206).

14.07 INFANCY:

Children remain, as long as they are minors, under authority of their parents. Parents may not be arbitrarily deprived of such authority. (C. C. Art. 335). During existence of marriage relationship both parents exercise parental power. When parents cannot agree, father's determination is decisive. When parents have been divorced child stands under parental authority of spouse to whom its custody has been awarded by court. (C. C. Art. 337).

Guardians may be appointed officially when necessary (i.e., loss of parents, etc.) and are under supervision of guardianship authorities (i.e., courts) and must account to authorities.

14.08 MARRIAGE:

The minimum age at which marriage may lawfully be contracted is 17 in case of males and 15 in case of females. In exceptional cases, however, the court may allow marriage at 16, parents and guardian being consulted. (C. C. 124). Only discriminating persons may marry. Consent of guardian or parents is necessary in case of minors. (C. C. 125).

Licenses are issued by municipalities or, eldermen in villages. Except when allowed by court license cannot be given before publication of banns. Ceremony may be performed by municipal authorities only. No religious ceremony can take place unless certificate of marriage is received from officer of civil status. (C. C. 143).

Prohibited Marriages.

Intermarriage among the following is forbidden: Parents and descendants, whether parenthood is legitimate or not; brothers and sisters; uncles and nieces; aunts and nephews; a man and parents or descendants of his wife; a woman and parents or descendants of her husband; adopted children or their spouses and adopting parents. (C. C. 129).

Annulment.

Any interested person or public prosecutor directly may petition to annul marriage. Marriage is void where one of parties is already married, where one of parties was not discriminating at time of ceremony, or where intermarriage was legally forbidden. Either spouse may petition for annulment when he or she was not of sound mind at time marriage took place, or was deceived about material fact non-existence of which would make married life unbearable, or where one of parties was led into marriage by fraud or duress.

Common law marriages are not recognized.

14.09 MARRIED WOMEN:

Wife acquires husband's surname with marriage. However, she may elect using surname which she had before marriage, alongside her husband's. (C. C. 173, 187).

See topics 14.04 Divorce, Husband and Wife, Marriage; category 13 Estates and Trusts, topic 13.03 Descent and Distribution.

15 FOREIGN TRADE AND COMMERCE

15.01 ANTI-DUMPING LAWS:

Law No. 3577 of June 14, 1989 (as last am'd by Law 4412, July 1999) contains some rules aiming at prevention of dumping and unfair competition in import of goods.

15.02 CUSTOMS DUTIES:

See topic 15.07 Foreign Trade Regulations.

15.03 EXCHANGE CONTROL:

See topics 15.06 Foreign Investment, Foreign Trade Regulations; category 1 Introduction, topic 1.01 Currency.

15.04 EXPROPRIATION:

See category 1 Introduction, topic 1.02 Government and Legal System, subhead Social and Economic Rights.

15.05 FOREIGN EXCHANGE:

See topics 15.06 Foreign Investment, Foreign Trade Regulations; category 1 Introduction, topic 1.01 Currency.

15.06 FOREIGN INVESTMENT:

Under Law No. 4875 (June 2003 as last am'd by Law 5782, July 2009) regarding Direct Foreign Investments, investment by foreign parties in Turkish venture or business is permitted, without need for any prior clearance (except, in case of banks, private finance institutions, insurance, factoring and financial leasing companies, holdings and exchange bureaus). Law allows free foreign investments into new company or branch to be formed in Turkey (unless prohibited under international treaties or special laws), through imports of cash, securities (foreign corporate equities but not government bonds), machinery and equipment, intangibles such as industrial and intellectual property rights, valuation of machinery and equipment and intangibles to be made within framework of Turkish Commercial Code while valuation of foreign securities will be performed in accordance with rules of country of origin or through international valuation agencies, or through such values as reinfusion of profits, proceeds, credits or other pecuniary values or natural resource exploration or extraction rights retained or obtained in Turkey; stipulates equal treatment of foreign investors with domestic; guarantees that no expropriation could take place unless public welfare exists and counterparts are paid; allows free transfers through use of banking system, of net profits, dividends, sales and liquidation proceeds, royalties, license and/or management fees; allows companies in which foreigners hold interest to own and hold real property in Turkey as may be needed for their operations; (pursuant to Law 5782 adopted in July 2008 to correct ruling of unconstitutionality of this feature, not to exceed 10% of total surface area of any given town or borough which has city planning in place); calls for alternative dispute resolution modes such as national or international arbitration or conciliation in disputes arising from private investment contracts, as well as, those arising from concession agreements for conduct of public services; eliminates requirement to obtain approval of share transfers; allows employment of foreigners in companies or branches formed.

Law emphasizes equal rights with domestic investors; abrogates minimum capital requirements; envisions safeguards against expropriation, and allows national or international arbitration as modes of dispute resolution. Treasury Undersecretariat is empowered to oversee application of this law, and to that end, is authorized to issue amplificatory communiqués.

Turkey adhered to Oct. 11, 1985 and June 24, 1987 Conventions (Washington D.C.) regarding Multilateral Investments Guarantee Association, as well as, the submission to the International Centre for Settlement of Investment Disputes (ICSID) of any disputes (excepting those concerning real property located in Turkey) arising from foreign investments authorized under current legislation and on which investment activities have actually commenced. (Laws No.

3453 and 3460, June 2, 1988).

See also category 1 Introduction, topic 1.01 Currency.

15.07 FOREIGN TRADE REGULATIONS:

Import-export regimens are usually announced for each calendar year by Government decrees. Currently, these have largely been liberalized. Import-export may be effected by using Turkish currency, as well.

Imports (except on no-charge basis) are effected under Importer's Certificates. License along with payment of relative fee is required. Advance posting of bond is not required anymore. In addition to customs duties and related taxes, all imports are subject to payment of VAT, as well as, certain premiums into special Fund created for financing of low-cost Mass Housing Projects.

Exports are effected under Exporter's Certificates. No license required (except pre-recordation on certain items). Export transactions are exempt from all taxes, fees and charges. Certain portions of export revenues are held tax-exempt and some of proceeds obtained from exports, in foreign exchange, may be kept by exporter for his own needs.

Customs-Union Agreement with E.U., calling for mutual elimination and/or reduced rates for customs duties in imports, went into effect on Jan. 1, 1996.

Turkey has adhered to the U.N. Convention (Vienna, Apr. 11, 1980) on International Sale of Goods (Law 5870, Aug. 2009).

Free Trade Zones.

Several are established per Law No. 3218 of (June 6, 1985 as last am'd by Law 5810, Aug. 2008).

Investment Incentives.

Incentives system was substantially overhauled per Decree 2009/15199 (O.J. July 16, 2009). New sophisticated package adopted regional and sectoral approach by which all 81 provinces of Turkey are grouped into four Regions, based on stage of development and disallowing incentives, except for selected sectors. Investment minimums prescribed are: TL 1 million for Regions I and II; and TL 500,000 for lesser-developed Regions III and IV. All Regions are to benefit from reductions in income and corporate taxes (ranging from 25 to 80 % - and even higher if investment is launched prior to Dec. 31, 2010); assumption of employer's share of social security premiums by Treasury; allocation of land; exemptions from VAT and customs-duties; and possibility of importing used equipment for certain projects. Investments in Regions III and IV, as well as, in R & D and waste-disposal projects shall, additionally, be entitled to interest-rebates (with certain caps) from Treasury from two to five points on loans covering 70 % of total investment. Major size investments could also be extended exemptions from VAT and custom-duties.

16 HEALTH

16.01 ANTI-DRUG LEGISLATION:

Turkey has adhered to most of international treaties dealing with addictive or soporific drugs; illegal drug trafficking etc. (notably, 1988 UN Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances - per Law No. 4136, Nov. 1995).

Domestic legislation includes Law No. 2313 (June 1933, as last am'd by Law No. 5549 in Oct. 2006) on Control of Soporific Substances (which places preparations for and import-export and domestic sale of such substances under strict control and supervision of Ministry of Health & Social Assistance); Law No. 3298 (June 1986) setting provisions regarding Government-controlled cultivation and production of opium poppies; Law No. 4208 (Nov. 1996) which treats monies obtained from illegal drug trafficking as black money subject to confiscation. All of above-cited laws provide for severe penalties in case of infractions.

16.02 PUBLIC HEALTH:

Constitution (Art. 56) prescribes that everyone has right to live in healthy and balanced environment.

To ensure life in health both in body and spirit is State's duty. State performs this duty by making use of and by supervising health organizations in both public and private sectors. To ensure dissemination of health services on nation-wide basis, general (public) health insurance scheme could be instituted.

In line with above parameters, Law No. 1262 (May 1928) regulating manufacturing, packaging, labelling and marketing of medicaments and cosmetics; Law No. 1593 (Apr. 1930) on Public Health and Law No. 3359 (May 1987) as Basic Law (as last am'd by Law 5335 in Apr. 2005) on Health Services have been adopted. In these, Ministry of Health & Social Assistance has been broadly empowered to issue regulations and take appropriate measures for protection of public health (including preventive measures such as public vaccinations, inoculations and quarantine powers); to supervise, control and establish tariffs for hospitals and other health facilities; to design and promulgate Turkish Codex for pharmacological products; to grant or deny licenses for marketing of medical and/or cosmetic products; to place restrictions on imports; to institute price controls; to classify drugs to be dispensed on prescription-only basis; to inspect and investigate laboratories and medical plants; to register and periodically announce list of licensed products; to issue clearances for advertisement in media etc. Laws contain penalties for such offenses as misbranding, adulteration, false advertising, misrepresentation, improper labelling, and marketing of unlicensed products.

16.03 SMOKING:

Law No. 4207 (Nov. 1996) as amended by Law No. 5727 in Jan. 2008, bans and provides for penalties for smoking in public places (defined as wherein more than five public servants are working); in hospitals, schools, cultural institutions, sport arenas, public conveyances etc. Law requires creation of special smoking-areas in such places. Cigarette packages are required to contain health warning. Tobacco advertisements are banned. TV channels are required to air antismoking programs for at least 90 minutes per month.

17 IMMIGRATION

17.01 ALIENS:

See category 4 Citizenship, topic 4.01 Aliens.

17.02 IMMIGRATION:

Persons of Turkish extraction who wish to emigrate individually or in groups into Turkey are deemed immigrants under terms of Law No. 2510 of June 1934 (as last am'd by Law 5727, Jan. 2008). They are issued Turkish citizenship immediately based on decree of Council of Ministers.

Foreign persons who are of Turkish extraction, or, who are married to Turks, or, who have no citizenship (stateless), or, foreigners who have resided in Turkey continuously for five years may be admitted into Turkish citizenship by decree of Council of Ministers. (Law No. 403 of Feb. 1964, as last am'd by Law No. 5203, July 2004).

See category 4 Citizenship, topic 4.03 Turkish Citizens.

18 INTELLECTUAL PROPERTY

18.01 COPYRIGHT:

Copyright issues from provisions of Law No. 5846 of 1951 (as last am'd by Law No. 5728 in Feb. 2008) on Works of Intellect and Art. Copyrightable items include works of fine arts, scientific, literary and musical works, motion pictures and computer programs.

Rights of copyright holders (including aliens whose works are first published in Turkey, or, whose works are first published abroad and covered by international treaties to which Turkey is party) cover wide range from authorship to publication, reproduction, rearrangements, stage productions, translations, broadcasting, etc. Copyright belongs to author during his/her lifetime and to his/her heirs for period of 70 years following death. Copyright infringements could result in both civil claims and criminal prosecution.

Turkey has joined Rome Convention on Protection of Performing Artists, Phonogram Producers and Broadcasting Entities (Law-4115, July 1995), as well as, Berne Convention on Protection of Literary and Artistic Works, as am'd in Paris (1979), with reservation as provided in Art. 33/1 thereof (Law-4117, July 1995). By Law No. 5647 in May 2007, Turkey adhered to WIPO Convention on Copyrights.

18.02 INDUSTRIAL PROPERTY:

Protection is available for such property (including industrial designs and geographical signs of origin). Turkey has joined Locarno Agreement of Oct. 8, 1968 on Establishing an International Classification for Industrial Designs (as am'd on Sept. 28, 1979).

See topics 18.04 Patents, Trademarks and Tradenames; category 3 Business Regulation and Commerce, topic 3.16 Unfair Competition.

18.03 INTELLECTUAL PROPERTY RIGHTS:

See topic 18.01 Copyright.

18.04 PATENTS:

Patent matters are governed under Law/Decree No. 551 (O.J. June 27, 1995), as am'd by Law/Decree No. 566 (O.J. Sept. 22, 1995) and Law 5194, June 2004 and by Regulations issued by Ministry of Industry and Commerce. Per Law-4115 (O.J. July 12, 1995) Turkey also became party to several treaties and conventions (The Paris Convention of 1883 on the Protection of Industrial Property, as am'd under London and Stockholm texts, respectively, in 1934 and 1967; The Washington Convention of June 19, 1970, on Cooperation on Patents, as am'd on Oct. 2, 1979 and Feb. 3, 1994. Also, Budapest Treaty of Apr. 28, 1977 on International Recognition of the Deposit of Microorganisms for Purposes of Patent Procedure [as am'd on Sept. 26, 1980]).

Applications through duly authorized agents must be filed with and publicized in Official Bulletin by Turkish Patents Institute (TPE). For those who have already filed for registry in country signatory to Paris Convention, preferential right is accorded, if application is made in Turkey within 12 months of such filing abroad. Protection is accorded unto applicant from date of application. However, rights emanating from patents and/or applications therefor are assertable vis-à-vis third parties only after registry in Patents Register. Approved patents are registered for 20 years (if granted with search duly conducted), and for seven years (if granted without due search). (For so-called Useful Models period of protection is limited to ten years.) Patents must be in use within three years of registry. Patent infringements could give rise to both civil claims and criminal prosecution.

Duly observing relevant procedures, patents may be assigned and/or licensed on exclusive or non-exclusive basis.

Protection is available to all private individuals or corporate persons domiciled or doing business in Turkey as well as to persons who are qualified therefor under Paris Convention of 1883 (as am'd), and to private or corporate citizens of such foreign countries as have accorded similar protection to Turks. (Patents for pharmaceutical production procedures and products have become available only from Jan. 1, 1999 onwards.)

Protection similar to patents is also available for industrial designs (and geographical signs of origin).

See also category 3 Business Regulation and Commerce, topic 3.16 Unfair Competition.

18.05 TRADEMARKS AND TRADENAMES:

Trademarks (including service marks, warranty marks, marks held jointly in name of group of companies) and tradenames are protected under provisions of Law/Decree No. 556 (O.J. June 27, 1995) as am'd (by Law 5194, July 2004) and by Regulations issued by Ministry of Industry and Commerce.

Applications through duly authorized agents must be filed with, approved and publicized in Official Bulletin, by Turkish Patents Institute (TPE). For those who have already filed for registry of their mark in country signatory to Paris Convention, preferential right is accorded, if application is made in Turkey, within six months of such filing abroad. No right of action against infringement exists until such filing is effected. Approved marks are registered for ten years and may be renewed as often as desired. Trademark infringements could give rise to both civil claims (including compensation for damages, confiscation and destruction of counterfeit items, corrective advertisements), as well as, criminal prosecution.

Duly observing relevant procedures, trademarks may be assigned, fully or in part, and may be licensed on exclusive or non-exclusive basis. Protection is available to all private individuals or corporate persons domiciled or doing business in Turkey as well as to persons who are qualified therefor under Paris Convention of Mar. 20, 1883 on Protection of Industrial Property, and to private or corporate citizens of such foreign countries as have accorded similar protection to Turks. Turkey has joined Madrid Protocol of June 27, 1989 on International Registration of Marks.

See also topic 18.02 Industrial Property; category 3 Business Regulation and Commerce, topic 3.16 Unfair Competition.

19 LEGAL PROFESSION

19.01 ATTORNEYS AND COUNSELORS:

Pursuant to the Act on the Legal Profession (No. 1136 of Mar. 19, 1969, as **last** am'd by Law 5921, Feb. 2009) practice of law is deemed liberal profession having nature of public service.

Requirements as to eligibility are: (a) being graduate of law school in Turkish university (or, if graduate of foreign law school, having passed exam in such courses not taken that are included in curriculum of Turkish law schools), (b) having successfully concluded apprenticeship for one year (first six months in court system, and balance with established lawyer), (c) maintaining domicile within area of bar with which candidate desires to be listed, (d) not having any impediments to practice (e.g., not having been condemned for any felonies, or, declared bankrupt, or, serving as someone's employee, etc.).

Turkey does not have barrister/solicitor distinction of Anglo-Saxon practice. Licensed attorney can plead before every level of courts anywhere in Turkey, even outside of local bar. Somewhat resembling professional firms or associations in some Western countries, lawyers in Turkey are permitted to join together to form Joint Attorneys Bureau.

Offenses against attorneys are treated same as those against judges.

Foreign lawyers cannot directly represent their clients in Turkish jurisdiction, unless they meet criteria listed above. Representation and practice may be arranged only through association with Turkish attorneys already qualified and registered with local bar.

More than one lawyer working together but not as partnership is listed as Avukatlik Bürosu. Those who opt to work through formal corporate partnerships must be listed as Avukatlik Ortakligi. Foreign law partnerships may operate in Turkey on basis of reciprocity. However, they must incorporate locally and limit their services to counselling on foreign and international law only. Client representation before courts may be arranged through already qualified and registered Turkish attorneys.

Foreign lawyers needing local assistance may contact: Trkiye Barolar Birligi (Union of Turkish Bar Associations) at: 1366 sk. No. 3, Oguzlar Mh. Balgat, Ankara Phone: 90-312 2863100. Website: http://www.barobirlik.org.tr, or by Bar Associations in major cities such as Ankara (http://www.ankarabarosu.org.tr), Istanbul (http://www.istanbulbarosu.org.tr), Izmir (http://www.izmirbarosu.org.tr), Adana (http://www.adanabarosu.org.tr), and Bursa (http://www.bursabarosu.org.tr).

20 MINERAL, WATER AND FISHING RIGHTS

20.01 FISHING RIGHTS:

Fisheries and marine life are treated under Law No. 1380 (Mar. 22, 1971).

Licensing requirements, bans on fishing through use of explosives, trolling etc., as well as, seasonal bans on fishing of certain species do apply.

20.02 MINING CODE:

Mining Code (Law No. 3213 of June 1985) as last amended by Law No. 5446 in Dec. 2005 introduced further incentives to promote new and increased exploration and production. It treats minerals under five different Groups: Group I: (a) sand, gravel used for construction and (b) tile clays, marl and rocks used in cement and ceramics industries; Group II: marbles, decorative stones, travertine, limestone, dolomite, calsite, granite, sienite, andesite, basalt and similar (metamorphic) rocks; Group III: salts, carbon dioxide extracted from sea, lakes and springs; Group IV: (a) caolene, bentonite, chloride, sodium, potassium, lithium, calcium, magnesium, nitrates, iodine, fluor, bromide, borates, strontium, barite, trona, feldspar, etc., and (b) coals, anthrasites, asphaltites, bituminous shales and schists, radioactive minerals such as uranium, radium, thorium; and (c) gold, silver, platinum, copper, zinc, iron, pyrite, manganese, chrome, mercury, antimony, tin, vanadium, arsenic, molybdenum, tungsten, cobalt, nickel, cadmium, bismuth, titanium, aluminum, etc.; Group V: most known precious and semi-precious stones, as well as, meerschaum and crystals, etc.

Code provides for only Turkish nationals and/or companies incorporated in Turkey to hold Exploration License (Groups II, III and IV) or Exploration Certificate (Group V) or Direct Operational License (Groups I/a and I/b), depending on Group classification and surface area. Principle of precedences observed in applications. Necessary environmental impact studies are required to be completed in three months. Exploration Licenses and Certificates are valid for three years initially, extendable for two more years (only for Group IV).

In case of discovery, these may be converted to Operational Licenses (minimum five years for Group I/a and minimum ten years for others, extendable up to 60 years) and Operational Certificates (Group V, minimum five years, extendable). If not converted to operational, licenses and certificates expire at end of term. Expired areas subject to relicensing on open bidding. If there are no takers, areas are declared open. Government royalty applies at rate of 2% of pit-head sales in Groups I and V, and 4% in others. If ores are processed in self-owned plants in Turkey, only half royalty is collected. 30% surcharge applies if extraction is from Treasury-owned and/or public domain lands. Private land on which access is not obtained on basis of fair negotiation can be expropriated.

20.03 OIL AND GAS LEGISLATION:

In recent years, as part of its efforts to liberalize markets, Turkey has been regrouping its oil and gas legislation under more general rubric of Energy.

Law No. 4628 (Electricity Market Act of Feb. 2001, as last am'd by Law No. 5784 in July 2008) created Electricity Power Regulatory Authority (EPRA) to regulate and oversee electric power generation, supply and distribution. However, with advent of Law No. 4646 (May 2001 also as last am'd by Law 5784) entitled Natural Gas Market Act EMRA was restructured as Energy Market Regulatory Authority (EMRA) with vast powers encompassing electricity, natural gas and petroleum matters. This was followed by legislation under Law No. 5015 (Dec. 2003) entitled Petroleum Market Act) under which EMRA has taken over all regulatory and supervisory functions relative to marketing (broadly defined, to include refining, processing, storing, transmission, wholesale marketing and distribution—even through gas stations at local levels), leaving within scope of Petroleum Law No. 6326 (Mar. 1954) only exploration and production of country's oil resources which are stated to be in public domain.

Draft law replacing Law 6326 in its entirety and introducing new incentives was adopted by Parliament under Law No. 5574 in Jan. 2007. However, upon Presidential veto of several of its features, it was returned to Parliament for further action and is still pending before new Parliament following general elections in July 2007.

20.04 RENEWABLE ENERGY SOURCES:

Law 5346 (adopted May 10, 2005) entitled Renewable Energy Sources (as last am'd by Law No. 5784 in July 2008) aims at encouragement and expansion in use of renewable energy sources. It provides for possibility of special incentives in investments in power-generation facilities using such sources; local manufacturing and procurement of electromechanical systems; power-generation through use of solar cells and bio-mass and research, as well as, support of research and development efforts in these areas.

NUCLEAR ENERGY

Law No. 5654 (May 2007) as am'd by Law 5710 in Nov.2007, authorizes Government to have nuclear power plants built.

20.05 WATER RIGHTS:

In general, water resources (rivers, streams, inland lakes, etc.) are in public domain.

Mineral waters, spas and hot springs are subject to concessions issued by provincial administrations pursuant to Law No. 927 (June 30, 1926).

Private owners can freely utilize spring waters located in their land and create servitudes thereon for benefit of others. (C. C. Art. 756).

Acts damaging and destroying water resources, diverting of riverbeds and willful causing of floods are treated under Criminal Code as felonies calling for severe punishments. (Arts. 181-182, 185).

21 MORTGAGES

21.01 CHATTEL MORTGAGES:

Movable property can be mortgaged (pledged) only by delivery to another to hold as security for a debt or performance of an obligation (dead pledge). (C. C. 939). Animals may be pledged whereby animal remains in holding of owner by registering in special official register. (C. C. 940).

21.02 COLLATERAL SECURITY:

See category 8 Debtor and Creditor, topic 8.07 Pledges.

21.03 MORTGAGES:

A mortgage contract can only be made before land registrar and in authentic form. Mortgage does not take effect until registered. No limitation runs on a debt that is secured by mortgage. Contracts allowing creditor to declare a forfeiture of property in case of nonpayment are void.

22 PROPERTY

22.01 ABSENTEES:

If, for reasons of illness, absence or similar reasons, a major cannot act in an urgent matter, nor designate a representative and in case property is not taken care of because a person is continuously absent and his whereabouts is unknown and also in case of uncertainty as to the heirs entitled to an estate, a curator is appointed by Peace Court. (C. C. 426-427, 586).

22.02 ESCHEAT:

See category 13 Estates and Trusts, topic 13.03 Descent and Distribution.

22.03 LEASING:

Arrangements for minimum period of four years are allowed on financial leasing arrangements regarding capital goods. (Law No. 3226, June 10, 1985 as last am'd by Law 5728, Feb. 2008).

22.04 REAL PROPERTY:

In civil law, rights are classified as personal or real. Personal right is right such as preemptive right to purchase or right of first refusal, assertable against certain person or persons. Real right, on other hand, is right in property which follows property and may be claimed against any person. Ownership is real right of broadest scope. Other real rights mainly are servitudes, coalescence, usufruct and mortgage.

Property.

In Turkish law, property has multiple meanings. First and foremost, it denotes thing which is subject to real rights. It could also mean real right involved. Property is classified as movable (personal or chattel) or immovable (real).

Immovable Property.

Property which cannot be moved such as land and buildings is called immovable property. Rights which are registered in title-deed registry as independent and permanent rights are also considered immovable property. (C. C. 704).

Movable Property.

Property which can be carried from one place to another is movable property. Such things as electricity, gas and steam which are not considered as immovable are movable property. (C. C. 762).

Title-deed registry has been established for purpose of evidencing due transfer of possession and ownership of real property, as well as, rights placed thereon such as mortgages, servitudes, easements and rights-of-way. Registry is kept by state in various districts in cities, townships and rural areas. (C. C. 997). Principles governing registries are: (a) No transfers may be effected nor real rights acquired unless parties execute formal contract thereon and have it entered in registry (C. C. 1008 and 1021); (b) registry when coupled with good faith denotes presumption of ownership; (c) registries are open to public (C. C. 1020); (d) state is liable for damages resulting from improper registration (C. C. 1007).

Ownership of land entails exclusivity of possession of underlying layers of ground and air space above it to usable limits. (C. C. 718). Legal restrictions apply to minerals, hydrocarbons and forests which are deemed state property. All buildings and plants on and springs sourced from land are deemed part thereof and are registered in title-deed registry together with land itself. (C. C. 756). Condominium ownership of independent parts of building is also registrable. (C. C. 998 and Law No. 634, June 23, 1965, as am'd). New land created by landfills, mud slides etc. becomes state property. (C. C. 708).

Acquisition of Immovable Property.

(a) To have legal effect, title transfers must be recorded in title-deed registry (C. C. 706); (b) property not previously registered, if held by same person without contest for 20 consecutive years may be claimed and registered as his property (C. C. 713); (c) ownership of person erroneously listed in registry but holding property in uncontested fashion for ten consecutive years cannot be challenged (C. C. 712).

Foreign ownership of immovable property is permitted only if located within municipal areas and only on basis of reciprocity.

See categories 4 Citizenship, topic Aliens; Foreign Trade and Commerce, topic Foreign Investment.

23 TAXATION

23.01 ADMINISTRATION:

Note: Tax legislation undergoes frequent changes. Summary below reflects status as of July 2008. Taxes are, generally, assessed and paid on annual basis. Fiscal year starts on Jan. 1st.

Tax Procedures Code.

Law No. 213 of Jan. 4, 1961, as last amended by Law 5904, July 2009, provides for detailed rules in regard to registry of taxpayers, principles of accounting and bookkeeping (computerized or otherwise), mandatory use of uniform chart of accounts, evaluation and revaluation of assets, and assessment, collection and settlement of or litigation procedures against taxes, levies, fees, surcharges and similar fiscal burdens. Code also contains elaborate provisions regarding fines and penalties (including jail terms) for tax infractions as well as, regarding mandatory cosigning of annual tax returns by certified accountants or fiscal advisors.

23.02 ALCOHOL, BEVERAGES AND TOBACCO TAXES:

See topic 23.13 Special Consumption Tax.

23.03 BUSINESS TAXES:

Expenditure tax (Law No. 6802 of July 1956 as last am'd by Law No. 5766 in June 2008) in banking and insurance transactions at basic rate of 15% (but 5% per decree), one per mille in foreign currency transactions.

23.04 CORPORATION TAX:

As part of alignment with EU norms, Turkish Corporate Tax system underwent complete overhaul per Law 5520 (June 21, 2006) as last amended by Law 5921, Aug. 2009.

Entities subject to this tax are: capital stock companies (including special partnerships with shares) and foreign firms of same type; cooperatives; public economic enterprises; economic enterprises owned and operated by associations and foundations; business partnerships (on elective basis).

Economic enterprises owned and operated by foreign states are also subject to corporation tax under same conditions as applying to their Turkish counterparts. Some government-owned enterprises, as well as certain types of corporate incomes, are tax-exempt.

New Law redefines concealed profits; introduces such new notions as controlled foreign companies, taxable income resulting from transfer pricing, and filing of consolidated returns.

Turkish-incorporated or domiciled companies pay corporate tax on world-wide income, while companies non-domiciled in Turkey are treated as limited taxpayers being liable for tax only on their Turkish earnings.

Rate of Tax.

Net corporate profit is subject to tax at 20%, also to prepaid temporary taxes on quarterly basis. Withholding tax at basic rate of 15% (but reduceable by five points at discretion of Council of Ministers) applies to selected incomes of full taxpayers. Rate of withholding tax is 30% of any remittances to companies operating in tax-haven type of countries as determined and announced by Council of Ministers. Foreign companies and their branches in Turkey are also subject to withholding on income realized from progress payments; professional services; real property; securities; sale of intangibles; dividends from local companies; participation in fairs and exhibitions and on net-after-tax income being remitted to home offices. Lower rates may be available for these companies and their Turkish branches under treaties concluded for avoidance of double taxation.

Returns for previous calendar year are fileable by Apr. 25 of year that follows. If their end-of-year assets or annual turnovers exceed limits announced by Finance Ministry, taxpayers must file returns electronically using Internet. Tax is payable by Apr. 30.

23.05 CUSTOMS DUTY AND TAX:

Various and sundry customs duties (at variable rates, at time of import of dutiable goods, along with other ancillary taxes and levies).

23.06 GASOLINE AND SPECIAL FUELS TAXES:

See topic 23.13 Special Consumption Tax.

23.07 INCOME TAX:

Per basic Law No. 193 of 1960, as last amended by Law 5921, Aug. 2009, income of real persons is subject to progressive income tax 15 to 35%. Taxable income consists of net sum total of all earnings and/or income accruing during calendar year.

Salary and wage earners pay income tax on basis of payroll withholdings usually at lower rates. For taxpayers with income of more than one variety, tax is assessed on basis of annual returns filed by Mar. 25 of subsequent calendar year and paid in two instalments (Mar. and July). Certain income levels are mandatory to be reported, so as to meet minimum living standards.

Real persons who are residents of or live in Turkey more than six months during any calendar year are liable for Turkish tax on worldwide income (full tax liability). Those who do not fall into this category must pay tax only on income realized in Turkey (limited tax liability). Employees temporarily assigned by employer abroad to work in Turkey for specific projects of limited duration do not incur full liability, and, in certain cases (such as those enjoying diplomatic status or those performing non-gainful liaison functions), they may be held exempt from Turkish income tax.

Temporary Tax.

Taxpayers are required to prepay Temporary Tax calculated as percentage of net income during previous three months (at 15% for individual merchants and professionals; and at 20% for corporate taxpayers). This tax is payable by 15th day (for corporations) and 17th day (for professionals and individual merchants) of second month following end of relevant quarter.

Withholding.

In certain cases income tax is withheld at source in full or at percentage (in which latter case, it serves as credit towards taxpayer's final tax liability for calendar year in question).

Foreign Tax Credit.

Taxpayers resident in Turkey and paying similar taxes on their incomes abroad are entitled to claim credit, in amounts proportionate to such foreign-earned income.

23.08 INHERITANCE TAX:

See topic 23.09 Inheritance and Transfer Tax.

23.09 INHERITANCE AND TRANSFER TAX:

All personal and real property inherited by, or bequeathed or donated to real or juridical persons is subject to this tax, unless exempted. All property escheating, bequeathed or donated to state, municipalities and villages, personal property bequeathed or donated to places of worship, charitable hospitals and asylums, all house chattels and personal property inherited from descendants, father, mother, spouse and small portion of value of all presents and gifts customarily exchanged among friends and relatives are tax-exempt.

In all cases tax (varying from 1% to 10% in inheritance and from 10% to 30% in gifts) is ascending one both as regards to amount inherited or received and to kinship between donor/testator and beneficiary. Exempted amounts, which are readjusted upwards each year in line with government-announced ratios, are available for each surviving spouse and descendant (correspondingly higher for spouses when there are no descendants).

23.10 LOCAL AND MUNICIPAL TAXES:

There are various municipal taxes and levies.

23.11 MOTOR VEHICLE TAXES:

Motor vehicle taxes (applicable at flat rates re-determined for each year per revaluation ratios over previous, depending on age and size).

23.12 PROPERTY TAXES:

Real Property Taxes.

These are assessed on basis of value appraised by local authorities every four years. Said value is recalculated at end of each interim year, by using revaluation ratios announced, taking into consideration inflation rate of then-ending calendar year, for purposes of determining value on which title transfer fees are to be collected, in case ownership of property is to change hands. Rates of property taxes vary between one to six per mille, depending on category (residence, building, developed or undeveloped land) under which property falls.

23.13 SPECIAL CONSUMPTION TAX:

One-off tax introduced per Law No. 4760 (June 12, 2002) as last amended by Law 5904, July 2009. It is collected either at flat rate or as percentage of value (with certain exceptions) under four different listing of goods during manufacturing stage or importation. First list calling for flat tax based on unit of consumption (liter or kilogram) comprises of fuels, natural gas, mineral oils and solvents; second list calling for tax ranging from 1% to 80% includes automotives, motorcycles, aircraft and helicopters and yachts; third list includes alcoholic beverages (with tax up to 63% depending on alcoholic content) and tobacco products (at 58%) and carbonated drinks (at 25%); fourth list calls for tax rate from 6.7% to 20% and covers items such as caviar, perfumes, cosmetics, furs (other than lamb, mutton and goat), toiletries, books, newspapers and periodicals, dinnerware, crystalware, precious stones, pearls. White goods and other home appliances, air conditioners, radios, TV sets, videos, phones, equipment for parlor games etc. are taxed at 6.7%.

On certain categories, Government is authorized to raise tax several-fold or reduce it all the way down to zero. Flat rates are subject to monthly readjustments based on changes announced in wholesale price index and Government is authorized to have them calculated in currencies other than Turkish lira.

23.14 STAMP TAX:

Per basic Law No. 488 of July 1964, as last amended by Law 5838, Feb. 2009, stamp tax is applicable (either flat or at proportionate rates for example, 7.5 per mille on contracts specifying sum, albeit subject to maximums announced for each calendar year, in form of cash and/or stamps affixed to certain papers some of which are printed by Government under label valuable papers). Flat rates are redetermined for each calendar year based on revaluation ratios announced at beginning of each year.

Fees.

These are collected under such different headings as: Judiciary, Notary, Tax Litigation, Property Title Registry, Consular Certifications, Passports, Visas, Authentications, Ships & Ports, Mining and Oil and Gas Concessions, Various Licenses, Diplomas, Gun Permits, Exporter's Licenses, Motor Vehicle Registry and Inspections, Telecommunications Equipment, Customs, Country Exit Fees etc. (either flat or at percentage, based on revaluation ratios announced at beginning of each year, taking into consideration inflation registered for previous year).

23.15 TAX INCENTIVES:

These include liberal depreciation rates, five-year loss-carry-forward, annual revaluation of assets, 100% write-off for R & D outlays, exemptions from stamp taxes and fees on certain papers, as well as, from customs duties and its ancillaries, and, from value added tax on capital goods imported.

See topic 23.04 Corporation Tax and category 15 Foreign Trade and Commerce, topic 15.06 Foreign Investment and 15.07 Investment Incentives.

23.16 TREATIES AND AGREEMENTS:

Avoidance of Double-Taxation.

Turkey has treaties with: Albania, Algeria, Austria, Azerbaijan, Bahrain, Bangladesh, Belarus, Belgium, Bosnia-Herzegovina, Bulgaria, Canada (for air transport incomes only), China, Croatia, Czech Republic, Denmark, Egypt, Estonia, Ethiopia, Finland, France, Germany, Great Britain, Greece, Hungary, India, Indonesia, Iran, Israel, Italy, Japan, Jordan, Kazakstan, Kirghizstan, Kuwait, Lebanon, Lithuania, Luxembourg, Macedonia, Malaysia, Moldova, Mongolia, Morocco, Netherlands, Norway, Uzbekhistan, Pakistan, Poland, Portugal, Qatar, Romania, Russia, Serbia-Montenegro, Singapore, Slovakia, Slovenia, South Africa, South Korea, Spain, Sudan, Sweden, Syria, Tajikistan, Thailand, Tunisia, Turkish Republic of Northern Cyprus, Turkmenistan, Ukraine, U.S.A., as well as, with Saudi Arabia, Switzerland and some of the Emirates (for certain transport incomes only).

23.17 VALUE ADDED TAX:

Value added tax (V.A.T.) currently, at basic rate of 18%, applies to all deliveries of goods and services (with minor exceptions) grouped under two lists. Invoking its authority granted under law, Government, from time to time, decrees reduced rates for selected items (e.g., 8% for basic food staples).

24 TRANSPORTATION

24.01 MOTOR VEHICLES:

Land traffic is controlled by Law 2918 (Oct. 13, 1983 as last am'd by Law 4925, July 19, 2003). Owners must register vehicles, obtain license plate and pay yearly taxes. Import of motor vehicles into Turkey is subject to customs duties and ancillaries, when imported from non-E.U. countries.

Foreign-registry motor vehicles of nonresidents are free from taxes, duties and levies, for temporary sojourns in Turkey. Foreigners domiciled abroad but working on special assignment in Turkey may obtain special Turkish plates for two years (extendable for another three years), without having to pay customs duties but upon posting of appropriate surety.

Insurance coverage for public liability is mandatory at government-ordained minimums.

24.02 SHIPPING:

Only vessels owned by Turkish citizens can fly Turkish flag. Aliens could hold only minority interest in Turkish corporation whose vessel flies flag. (Com. C. 823). In many instances liability of owner is limited to vessel and its freight.

The owner of a vessel is liable for the negligence and the fault of the crew. If he is also faulty, he is personally liable. Suits for damages are brought against the ship owners or against masters even in cases where they are not personally liable.

Liens, due to such claims as averages, salvage fees, wages, port expenses, etc., peculiar to maritime law, do not require actual possession of the vessel.

Vessels are registered by special bureaus. Purchase and sale of ships must be recorded.

Cabotage.

Coastal trade and maritime services (piloting, salvage etc.) are reserved for Turkish-flag carriers and citizens. (Law No. 815, Apr. 19, 1926).

25 TREATIES AND CONVENTIONS

25.01 TREATIES:

Ratification and Force of International Treaties.

Ratification of treaties entered into with foreign states and international organizations in behalf of Turkish Republic is dependent upon approval of Turkish Grand National Assembly through enactment of a law.

Treaties which regulate economic, commercial and technical relations and which are to be in force for period not to exceed one year may be put into effect on publication, provided they do not entail any financial commitment for state and provided they do not infringe upon status of individuals and upon ownership rights of Turkish citizens in foreign countries. Such treaties, within two months after their publication, must be submitted to Grand National Assembly for information.

Agreements concluded in connection with implementation of an international treaty and economic, commercial, technical and administrative treaties concluded pursuant to authority provided by laws are not required to be approved by Grand National Assembly. Economic and commercial treaties or treaties affecting rights of individuals cannot go into effect unless published.

All treaties involving amendments in Turkish legislation must be ratified by Grand National Assembly through enactment of a law. International treaties duly put into effect carry force of law. No recourse to constitutional court may be made in regard to these treaties.

Treaties on Reciprocal Promotion and Protection of Investment have been concluded with Afghanistan, Albania, Algeria, Argentina, Australia, Austria, Azerbaijan, Bangladesh, Belarus, the Benelux Countries, Bosnia-Herzegovina, Bulgaria, Chile, China, Croatia, Cuba, Czech Republic, Denmark, Egypt, Estonia, Ethiopia, France, Finland, Georgia, Germany, Great Britain, Greece, Hungary, India, Indonesia, Iran, Israel, Italy, Japan, Jordan, Kazakhstan, Kyrgyzstan, Kuwait, Latvia, Lebanon, Lithuania, Macedonia, Malaysia, Malta, Moldova, Mongolia, Morocco, Netherlands, Uzbekistan, Pakistan, Philippines, Poland, Portugal, Qatar, Romania, Russia, Slovakia, Slovenia, South Africa, South Korea, Spain, Sweden, Switzerland, Syria, Tajikistan, Tunisia, Turkmenistan, Turkish Republic of Northern Cyprus, Ukraine, Yemen, Yugoslavia, and U.S.A.

1
VIETNAM LAW DIGEST

—Scope —

Revised for 2010 edition by

TILLEKE & GIBBINS CONSULTANTS LIMITED of Bangkok and Phuket, Thailand and Hanoi and Ho Chi Minh City, Vietnam.

(Abbreviations used are: “ALUT”, Agricultural Land Use Tax; “BCC”, Business Cooperation Contract; “BIT”, Business Income Tax; “BOT”, Build-operate-transfer; “BT”, Build-transfer; “BTO”, Build-transfer-operate; “CC”, Civil Code; “CL”, Commercial Law; “COV”, Copyright Office of Vietnam; “DPI”, Department of Planning and Investment of Provincial People's Committee; “FIE”, Foreign Investment Enterprise; “FIL”, Foreign Investment Law; “IED”, Import-Export Duties; “JVE”, Joint Venture Enterprise; “LC”, Labor Code; “LCI”, Law on Credit Institutions; “LCP”, Law on Criminal Procedure; “LEB”, Law on Enterprise Bankruptcy; “LLC”, Limited Liability Company; “LOE”, Law on Enterprises; “LOPC”, Law on Organization of People's Court; “LSOE”, Law on State Owned Enterprises; “LURTT”, Land Use Right Transfer Tax; “MARD”, Ministry of Agriculture and Rural Development; “MOST”, Ministry of Science and Technology; “MPI”, Ministry of Planning and Investment; “NA”, National Assembly; “NOIP”, National Office for Intellectual Property; “NRRT”, Natural Resources Royalty Tax; “OECJ”, Ordinance on Enforcement of Civil Judgments; “OOCE”, Ordinance on Economic Contract; “PIT”, Personal Income Tax; “PVPO”, Plant Variety Protection Office; “SC”, Shareholding Company; “SBV”, State Bank of Vietnam; “SCT”, Special Consumption Tax; “SOE”, State Owned Enterprise; “VAT”, Value Added Tax; “VIAC”, Vietnam International Arbitration Center; “WIPO”, World Intellectual Property Organization.

Note: This revision incorporates legislation through Sept. 1, 2009.

1 INTRODUCTION

1.01 CURRENCY:

Currency of Vietnam is the Dong. Banknotes circulate in denominations of 500d, 1,000d, 2,000d, 5,000d, 10,000d, 20,000d, 50,000d, 100,000d, 200,000d and 500,000d. Coins were reintroduced at end of 2003 in denominations of 200d, 500d, 1,000d, 2,000d and 5,000d. Vietnamese Dong is hedged to U.S. Dollar and exchange rate is approximately 16,500 Vietnamese Dong to 1 U.S. Dollar.

1.02 GEOGRAPHY:

Vietnam is 1,750 km long, with coastline of 3,250 km, and total land area of 330,000 square km. Two cities dominate country: Hanoi and Ho Chi Minh City. Hanoi, in north, is government seat with official population of 6.4 million. Ho Chi Minh City, in south, is commercial center with official population of 7.1 million. Other major urban centers are Hai Phong, population of 1.9 million, Da Nang, 1.2 million, Nha Trang, 500,000, and Hue, 600,000.

Total population is 86 million, making it world's 14th and Asia's fifth most populous country, second only to Indonesia in South East Asia. Vietnam has diverse population. Almost 87% are ethno-Vietnamese, 2% ethnic Chinese and remainder consists of about 60 ethno-linguistic minority groups called “Montagnards” in French, or “highlanders”, Khmers, and Chams (descendants of Champa Kingdom). Seventy-nine percent of population lives in rural areas. Forty-seven percent is under 25 years old (of which 26% is under 15 years old). Sixty-four percent is of working ages. Ninety percent of adult populace is literate. Vietnam's population is expected to reach 88-89 million in 2010.

1.03 GOVERNMENT AND LEGAL SYSTEM:

Vietnam remains one of very few committed socialist states in world where communist party is dominant. Ultimate ideology and policy rest with Communist Party of Vietnam (“CPV”) led by its elite Politburo and executive Secretariat, which make all major decisions of Party, State and Government through CPV resolutions and directives. Key leader posts of National Assembly (“NA”), State, and Government are held by members of CPV Politburo while most ministerial positions, Chief Justice of Supreme People's Court, Chief Procurator of Supreme People's Procuracy, and Chairs of people's councils and committees (local administration) are held by members of CPV Central Secretariat. While CPV continues to be leading force of State and society, non-CPV members can run for deputies of NA and other political posts in Vietnam.

NA is highest state organ and ultimate expression of people's sovereignty which is vested with constitutional and legislative power. Current legislature of NA has 498 deputies, who are elected by universal suffrage according to district. There have been four constitutions from date Vietnam declared independence from French colonization on Sept. 2, 1945. Most recent, passed at eighth legislature session on Apr. 15, 1992, was amended and supplemented by Resolution No. 51/2001/QH10 of NA dated Dec. 25, 2001. NA has authority to: (i) Pass and amend constitution by two-thirds majority vote and pass and amend laws by majority vote; (ii) define organization and activities of NA, State Presidency, Government, People's Court, People's Procuracy and local administration; (iii) elect, release from duty or remove from office State President, Vice President, Chair and Vice Chairs of NA, Standing Committee of NA, Prime Minister, Chief Justice and judges of Supreme People's Court, and Chief Procurator of Supreme People's Procuracy; (iv) approve proposals of State President on members of Council of National Defense and Security; (v) approve Prime Minister's proposals on appointment, release from duty or removal from office of Deputy Prime Ministers, ministers and other members of Government; (vi) appraise reports of State President, Standing Committee of NA, Government, Supreme People's Court and Supreme People's Procuracy; (vii) pass socio-economic development plans, national financial and monetary policies and state budgets; (viii) decide on fundamental foreign policies, matters of war and peace and grants of general amnesty; (ix) ratify and abrogate international agreements and treaties at President's proposals; (x) decide on organization of national referendum; and (xi) invalidate legal instruments enacted by State President, National Committee of NA, Government, Prime Minister, Supreme People's Court and Supreme People's Procuracy which are contrary to Constitution, laws and resolutions of NA. (1992 Constitution, Art. 84). NA convenes twice each year per schedule fixed by Standing Committee. Normally, first session takes place in Apr.-May, while second session is held in Oct.-Nov. NA may hold special sessions at request of Standing Committee, President, Prime Minister or one-third of total NA members.

Standing Committee of NA (“SCNA”) is permanent sitting body of NA and acts on behalf of NA when it is not in session. SCNA promulgates ordinances on matters entrusted to it by NA and presents draft laws to NA. It also has authority to: (i) Interpret Constitution, laws and ordinances; (ii) suspend implementation of legal documents issued by Government, Prime Minister, Supreme People's Court and Supreme People's Procuracy which are contrary to Constitution, Laws and Resolutions of NA and present such legal instruments to NA for invalidation; (iii) invalidate legal instruments issued by Government, Prime Minister, Supreme

People's Court and Supreme People's Procuracy which are contrary to Ordinances and Resolutions of SCNA; (iv) abrogate inappropriate resolutions of People's Councils, give guidance to or disband the People's Councils whenever Council's action harms interests of people; and (v) organize referendums following decisions of NA and make decision on general military mobilization. (1992 Constitution, Art. 91).

President, as head of State, acts on behalf of Vietnam in domestic and foreign affairs. President has authority to: (i) Promulgate legislation and proclaim laws and ordinances passed by NA and SCNA; (ii) act as commander of armed forces and serve as Chair of Council of National Defense and Security; (iii) propose to NA election and removal of Vice President, Prime Minister, Chief Justice of Supreme People's Court and Chief Procurator; (iv) appoint and dismiss Deputy Prime Ministers, ministers and other members of Government by resolution of NA; (v) appoint and dismiss Deputy Chief Justice, judges of Supreme People's Court, Deputy Chief Procurator and Procurators of Supreme People's Procuracy; (vi) appoint and receive ambassadors; (vii) sign international agreements; and (viii) grant and revoke Vietnamese nationality and grant pardons. (1992 Constitution, Art. 104).

Executive power in Vietnam is vested with Government, cabinet style body headed by Prime Minister, and three levels of local administration: provincial and municipal authorities, urban and rural districts, and urban wards and rural communes. Government is defined by Constitution as executive body of NA and highest state administrative body of Vietnam. (1992 Constitution, Art. 109). Government promulgates decrees which generally provide regulations on implementation of laws and ordinances. Decrees are often accompanied by more detailed “Regulations”. Government may issue resolutions while Prime Minister may issue Prime Minister's decisions to direct administrative matters and implement NA's resolutions. Circulars are issued by individual ministries or jointly by ministries and usually provide guidance as to how particular ministries will administer laws, ordinances, decrees or Prime Minister's decisions. Government resolutions or directives may not be legal instruments but are policy outlines issued by Government and Prime Minister indicating that ministries, state agencies and provincial People's Committees should be set up to deal with issues. In addition to passing legislative regulations, Prime Minister has authority to: (i) Propose to NA institution of new ministries or dissolution of existing ministries; (ii) suspend implementation of or abrogate decisions, directives and circulars issued by ministers and decision and directives of People's Committees; (iii) direct activities of Government and People's Committees; (iv) administer foreign affairs; and (v) sign and ratify international agreements on behalf of Government. (1992 Constitution, Art. 114).

Local administrative authorities exercise control, administration and formulation of development policies for localities. Each local administrative unit has elected People's Council, which in turn elects its executive body called People's Committee headed by Chair of People's Committee. In addition to passing legislative documents for localities, Chair of People's Committee has authority to: (i) Suspend execution of or abrogate inappropriate decisions of state agencies under their jurisdiction, and (ii) suspend execution of inappropriate decisions or resolutions of People's Councils at lower level and request People's Councils at same level to revise or abrogate such decisions or resolutions. (1992 Constitution, Art. 124).

Vietnamese law is statutory in nature. Common law neither applies nor is it recognized in Vietnam. However, common law practice may be prominent in Vietnamese court system. People's Supreme Court, based on summation of hearings and judgments of court system in country, from time to time draws up guidelines and instruction on rulings over matters or issues on which law is silent or has inconsistencies or vague stipulations. Guidelines and instructions on rulings represent official opinions of Supreme People's Court on interpretation and application of law in such particular matters or issues and lower court will apply guidelines and instructions to their rulings in similar cases.

By law, legality of legislative instruments enacted by lower level authorities is weaker than those enacted by higher authorities. However, in practice, implementing decrees or even circulars seem to be more important because they provide in detail interpretation of law provisions and procedures for implementation. Recital of each legal instrument normally sets out other legal instrument to which it is subordinate. If one instrument is intended to replace previous one, that fact is normally mentioned at end of instrument.

In 1986, Vietnam instituted its “Doi Moi”, or “renovation”, reform program to move from centrally-planned Marxist economy to state-regulated market economy with socialist orientation. Key elements of this program include: promotion of private sector; phase-out of most price controls; reform of industrial policy to give State-owned entities greater autonomy; restructure of banking system; adjustment of foreign exchange rates; replacement of farm collectives with privatized family farming; and new foreign investment law. First foreign investment law (FIL) was centerpiece of “Doi Moi” and was passed in 1987, amended and supplemented twice, in 1990 and 1992. Current FIL, which replaced 1987 FIL and all amendments and supplements, was passed by National Assembly on Dec. 29, 1996, then amended and supplemented on June 9, 2000. FIL is supported by companion legislation covering matters such as taxation, banking, foreign exchange, labor, import and export, technology transfer, and corporate governance. FIL guarantees that invested capital and assets of foreign investors shall not be requisitioned or expropriated and enterprises of foreign investors shall not be nationalized. Hanoi-based Ministry of Planning and Investment (MPI) is in charge of setting investment policy and is in charge of investment on national basis.

Decree 108/2006/ND-LP of Government dated Sept. 22, 2006 authorizes provinces and cities directly under central Government to license investment projects. Prime Ministerial approval is required for projects in certain fields with special conditions. For example, Prime Ministerial approval is required for projects in fields including, inter alia: construction of airports and sea ports, mining, television and radio, casinos, cigarette production, universities, and industrial zones. (Decree 108/200, Art. 37). Industrial Zone, Export Processing Zone and High Technology Zone Authorities also have power to grant investment licenses. Foreign investors may implement investments through joint venture enterprises, foreign wholly owned enterprises, business cooperation contracts, and build-operate-transfer, build-operate, or build-transfer arrangements. Vietnam continued to liberalize economy, promote private sector development and foreign investment, modernize legal framework and received official entry into WTO in 2006. Recent new laws or amendments current laws including new Civil Code, Commercial Law, new Law on Enterprises, Investment Law, Intellectual Property Law, Maritime Code, Law on Electronic Transactions, Law on Environmental Protection, Law on Anti-Corruption, Law on Import-Export Duties, amendment to Law on VAT and Law on Special Consumption Taxes, Ordinance on Foreign Exchange, Law on Real Estate Business, Law on Housing, etc. were enacted in last few years.

Vietnam has concluded bilateral negotiations with major trading partners, including EU and U.S.A., and many multilateral negotiations, paving way for its WTO membership at end of 2006. In these negotiations, Vietnam has committed itself to cutting or eliminating import tariffs on foreign products, opening its markets, and providing national treatment to foreign investors and goods and service providers. Vietnam is also negotiating bilateral trade agreement with Japan.

1.04 HOLIDAYS:

Vietnam follows both Gregorian (solar) and Chinese (lunar) calendars. Holidays fall on different dates on each calendar. Lunar calendar begins in 2637 B.C. and has 29 or 30 days each month, with 365 days in a year. Every four years, one month is added between third and fourth months so that pace between calendars is maintained.

Tet (Tet Nguyen Dan), or Vietnamese New Year, is most important annual festival. It marks new lunar year and advent of spring and falls in late Jan. or early Feb. Reunification Day is commemorated on Apr. 30. Other major holidays are International Labor Day, May 1, and

Vietnam National Day, Sept. 2, commemorating establishment of nation by Ho Chi Minh in 1945, Hung King Day and first day of year according to solar calendar. According to Vietnamese Labor Law, workers have nine public holidays each year; four days for lunar New Year (one on last day of old moon and three first days of new moon); one day for solar New Year (Jan. 1); Apr. 30; May 1; one day for Hung King Day and Sept. 2. If one of the nine days is on Sat. and Sun., following Mon. or Tues. will be day off.

1.05 LANGUAGE:

Vietnamese language (Kinh) is spoken throughout country and is combination of Mon-Khmer, Tai and Chinese. Some ethnic minority groups do not speak it fluently. There are minor differences between the way it is spoken in North, Central and South. It is tonal language and meaning of word changes depending on how pronounced. There are six tones in north and five in central and south.

Main Western languages spoken are French, English and Russian. English has become very important in professional and commercial dealings. Since reunification teaching of Russian has been stressed throughout country. Other languages widely taught are Chinese, German, Japanese, Spanish, and Arabic.

1.06 OFFICE HOURS AND TIME ZONE:

Vietnam is seven hours ahead of Greenwich Mean Time and because of proximity to equator has no daylight saving time (summer time). Office hours are usually from 7:30 or 8 a.m. to 11 or 11:30 a.m. or 12 noon, when they close for lunch; then from 1:30 or 2 p.m. to 4:30 or 5 p.m. All government offices are closed on Sats. and Suns. Most businesses are closed only on Suns. Museums are generally closed on Mons. as well. Shops are normally open seven days a week from 8 a.m. to 9 p.m.

2 BUSINESS ORGANIZATIONS

2.01 CORPORATIONS:

Private Corporation.

Legislation.

On Nov. 29, 2005, National Assembly of Vietnam passed, among others, Law on Enterprises No. 60/2005/QH11 and took effect on July 1, 2006. Decree No. 59/2006/ND-CP of Government dated June 12, 2006 on list of goods and services which are subject to business prohibition, business restrictions or business conditions. Decree No. 88/ND-CP of Government dated Aug. 28, 2006 on business registration. Decree No. 95/2006/ND-CP of Government dated Sept. 8, 2006 on conversion of state-owned enterprises into one-member limited liability companies.

Law on Enterprises (“LOE”) provides uniform legal framework for domestic and foreign invested companies and regulates establishment, organization, management, and operations of: (i) Limited liability companies (“LLCs”); (ii) limited liability shareholding companies (“SCs”); (iii) (unlimited liability) partnerships; and (iv) private enterprises in Vietnam. LOE governs both foreign and domestic invested enterprises, i.e. enterprises established in aforesaid forms.

Government has issued list of businesses not allowed under LOE and Law on Investment (“LOI”) including trading of: (i) Weapons, ammunition, army uniforms and outfits, technical military equipment of armed forces; (ii) narcotics; (iii) toxic chemicals; (iv) products of reactionary, depraved, superstitious nature or products detrimental to ethical education; (v) fireworks of all kinds; (vi) toys harmful to health or ethical education of children (including electronic games); (vii) pet medicine or pesticide regardless of whether licensed to be used in Vietnam; (viii) rare and precious plants and wild animals; (ix) seaproducts which are prohibited from being exploited or which contain excessive toxic medicine or deadly poison; (x) fertilizers not on list of permissible types for production, trading and use in Vietnam; (xi) plants not on list of permissible types for production, trading or animals harmful to human beings, other animals, environment or eco-system; (xii) toxic minerals; (xiii) imported sewage causing environmental contamination; (xiv) medicines, vaccines, healthcare products, cosmetics, chemicals, pesticides not on list of types permissible for use in Vietnam; (xv) healthcare equipment impermissible for use in Vietnam; (xvi) food additives nutritious factors, function foods, radical or gene foods impermissible in Vietnam; (xvii) asbestos products or materials; (xviii) prostitution, sex procurement and women and children trafficking; (xix) casinos and gambling; (xx) investigation influencing to benefit of Government, entities or individuals; (xxi) service of marriage brokerage having foreign elements; and (xxii) adoption having foreign elements.

Following types of business require practice certificate: (i) Legal service; (ii) medical service and pharmaceuticals; (iii) veterinary service; (iv) construction designing service; (v) auditing service; (vi) stock brokerage; (vii) production, processing, bottling, packaging, and trading of chemicals used for protection of cultivated plants; (viii) transportation means designing service; and (ix) trade of antiques and business secrets. In these types of businesses, at least one among owners or managerial officers of limited liability or shareholding company, or all partners of partnership or owner or managing director of private enterprise must have practice certificate for relevant service.

For other types of business such as banking, insurance, mining, petroleum or others, minimum legal capital levels or business license may be required as per stipulation of specific laws or ordinances.

LOE distinguishes between right to: (i) Establish and manage enterprises and (ii) to contribute capital to enterprises. Foreign organizations, and individuals who do not permanently reside in Vietnam can contribute capital to limited liability companies; joint stock companies, partnerships in accordance with LOE and LOI.

LOE does not require business founders to obtain Business License; only Business Registration Certificate issued by provincial authority is required. Certificate will be issued within 15 days from date of receiving legitimate application dossier and payment of registration fee. Application consists of: (i) Application (in standard form); (ii) company's charter; (iii) list of business founders; (iv) certification of competent authority on legal capital of enterprises, if required by law; and (v) copy of practice certificate.

LOE specifies detailed requirements on contents of Charter, organizational structure, rights and responsibilities, working procedures of management bodies for each type of company and enterprise.

LOE provides that limited liability or holding company can be divided into two or more companies of same type (division of company), or it can transfer part of its assets to establish one or more companies of same type (spin off). Also under this Chapter, two or more companies of same type can be consolidated to be new company (consolidation), and one or more companies of same type can merge with another company (merger). Limited liability companies can be converted to be shareholding companies and vice versa.

Under LOE, enterprise is dissolved on following events: (i) Expiration of operation term without extension; (ii) decision of owners; (iii) enterprise lacks sufficient number of members for six consecutive months; and (iv) business registration certificate is revoked. Government has not provided detailed guidelines on procedures of enterprise dissolution and liquidation. Business registration certificate will be revoked on following events: (i) Failing to commence business for one year after date of certificate; (ii) ceasing to operate for one full year without informing registration authority; (iii) failure to report on activities to registration authority for two consecutive years; (iv) failing to report on activities within six months after written notice from authority; and (v) conducting prohibited businesses.

Limited Liability Company (LLC) is private company with capital paid in full by all members. Each member is responsible for debts or other liabilities of company to extent of his contributed capital to company. Member of LLC can be individual or organization. LLC, which must have at least two members, can have up to 50 members. LLC may not issue shares of any kind. LLC gains legal entity status on date of its business registration certificate. (LOE, Art. 38). Capital may be transferred freely among members but transfers to persons not already members may be made only if other members do not wish to buy. (LOE, Arts. 43 and 44). LLC has members council, chairman of members council and general manager. If LLC has more than 11 members, LLC must have control committee. Member's council is highest authority which decides, inter alia, increase, decrease of capital; amendment to Charter; loan, investment and assets sale of more than 50% value of company's assets; establishment of branches and representative office; reorganization and dissolution of company.

LLC increases legal capital by: (i) Increasing capital contributed by existing members; (ii) adjustment corresponding to increase of company's assets value; and (iii) admitting new members. LLC decreases legal capital by: (i) Returning part of capital members pro rata with their contribution; (ii) purchase of contributed capital and (iii) adjustment corresponding to devaluation of company's assets. Decrease of capital is allowed only if ability of payment of due debts after decrease remains secured. (LOE, Art. 60). LLC may distribute profits to members only after paying all taxes and other financial dues and after distribution ability of payment of due debts remains secured. (LOE, Art. 61).

In LLC, 65% majority vote is required for all matters as decided by Board of Members of LLC, except decisions of Board of Members with respect to: (i) Revision of and supplementation to charter of company; (ii) reorganization or dissolution of company; and (iii) investment or sale of company assets with value of 50% or more of total asset value of company as recorded in most recent audited report shall require 75% majority vote.

One-Member Limited Liability Company.

One-member LLC is company owned by one organization which is liable for all debts and other assets liabilities within company's capital. Owner can transfer all or part of capital of company to other organizations and/or individuals. One-member LLC may not issue shares of any kind. One-member LLC gains legal entity status on date of issuance of its business registration certificate. (LOE, Art. 63).

Owner may select either Board of Management and General Manager or Chairman of company and General Manager for company's management. (LOE, Art. 67).

One-member LLC may adjust capital by: (i) Increase or decrease of capital contributed by owners; and (ii) adjustment of capital corresponding to value of company's assets. (LOE, Art. 76).

Shareholding Company (SC) must have at least three shareholders. Company may issue shares to public. SC gains legal entity status on date of issuance of its business registration certificate. (LOE, Art. 77).

Company's capital is divided into equal parts called shares, each with par share value. SC must have ordinary shares and may have extraordinary shares. Holder of ordinary shares can attend shareholders meeting and have voting rights according to number of shares held.

Extraordinary shares can be voting extraordinary shares, dividend extraordinary shares, refundable extraordinary share or others stipulated by SC's charter. Only organizations authorized by government and founding shareholders can hold extraordinary voting shares and have, among other rights of ordinary shareholder, more voting rights as stipulated by company's charter; however, extraordinary voting shareholders may not transfer extraordinary voting share to any other person. Extraordinary dividend shareholders are entitled to fixed dividend and bonus dividend payment and other rights of ordinary shareholder except right to attend and vote in shareholders meeting or to nominate candidate to board of management and control committee of SC. Refundable extraordinary shareholders can get refund of capital contributed upon their request and in accordance with terms and conditions of such refundable extraordinary shares and have other rights of ordinary shareholder except for right to attend and vote in shareholders meeting or to nominate candidate to Board of Management and control committee of SC.

In first three years from date of business registration certificate, founding shareholders of SC must hold at least 20% ordinary shares allowed to be offered for sale. Such shares of founding shareholders may be transferred to person not already shareholder if approved by shareholders meeting. After three years, this restriction will be void. (LOE, Art. 84).

SC can issue bonds, convertible bonds and other securities.

Shareholders meeting is highest authority of SC. Board of Management is statutory body of SC and General Manager is in charge of day-to-day management. General Manager can be representative of SC between either third party or government.

Under LOE, in joint stock company, decisions of shareholders meeting shall be lawful if approved by shareholders representing at least 65% of total voting shares present at meeting. However, decisions of shareholders meeting with respect to: (i) Type of shares, total amount of shares and each type of shares to be issued; (ii) revision of and supplementation to charter of company; (iii) reorganization or dissolution of company; and (iv) investment or sale of company assets with value of 50% or more of total asset value of company as recorded in most recent audited report, must be approved by shareholders representing at least 75% total voting shares present at meeting.

Foreign invested enterprises, i.e. joint venture enterprises (“JVEs”) and 100% foreign owned enterprises, which were licensed before July 1, 2006 (effective date of LOE) have option to re-register their business and investment in accordance with LOE, i.e. most likely as either LLCs or SCs, depending on number of investors and their objectives. Re-registration must be completed within five years from effective date of new LOE, i.e. by July 1, 2011. If foreign invested enterprises licensed before July 1, 2006 choose not to re-register their business and investment in accordance with new law, management of such enterprises shall have to follow their existing charter and investment license.

Foreign investors have more choices of legal form for their subsidiary in Vietnam which could be any of: (i) Limited liability company (“LLC”), which includes (a) two-member LLC, which must have two and not more than 50 members, and (b) one-member LLC, which is wholly owned by individual or organization; (ii) limited liability joint stock or shareholding company (“SC”), which must have more than three shareholders; or (iii) unlimited liability partnership, which must have at least two individual partners.

For enterprises established under previous Law on Foreign Investment, all matters of joint venture enterprise can be decided by board of management by simple majority (i.e. 51% of vote), except for appointment/dismissal of General Director and Deputy General Director and amendment of JVE's charter, which require unanimous approval. Therefore, if foreign investor in joint venture enterprise wishes to convert joint venture enterprise into LLC or SC under new LOE, foreign investor will generally need to hold at least 65% of equity interest/shares in LLC or SC if it wants substantial management control.

There is no longer minimum requirement on capital contribution of foreign investors or minimum capitalization requirement (previously, being 30% of legal capital of JVE or 30% of total investment capital respectively). This shall be very welcome change to real estate developers since they will no longer have to bury huge legal capital in company after completion of sale of developed properties.

Under LOE, legal representative of LLC and SC must reside in Vietnam. If he/she is absent from Vietnam for more than 30 days, he/she must authorize in writing another person to carry out his/her powers and obligations.

Holding company is now available to foreign invested enterprises. Law defines holding company as one that owns more than 50% or charter capital or issued shares, or has direct or indirect rights to appoint majority or all members of Board of Directors or General Manager, or has right to modify charter. Holding company form will be convenient for foreign investors which have different projects in Vietnam. Under current Law on Foreign Investment, this is not available.

2.02 PARTNERSHIP:

Partnership is enterprise established by at least two partners and can have members contributing capital. Partner must be individual with professional qualifications, credibility and shall be responsible for debts of partnership by all of his assets while responsibilities of members are just limited by capital contributed to partnership. Partnership shall be neither legal entity status nor allowed to issue securities of any kind. (LOE, Art. 130).

Partners have rights to manage partnership and conduct business activities under name of partnership and are jointly liable for liabilities of partnership. Members shall not be entitled to manage partnership but to profit by earnings distributed by partnership.

Partners council, comprised of all partners, is highest authority of partnership. Unless otherwise regulated in Charter, following matters require approval from three-fourths of partners: (i) Operation plans; (ii) amendments to Charter; (iii) admission of new partner or member; (iv) expelling partner; (v) decision on investment plan; (vi) loans or other forms of capital mobilization; granting loans equivalent to or more than 50% charter capital; (vii) purchase of assets equivalent or more than charter capital; (viii) approval of annual fiscal statements, distributed profits; and (ix) dissolution. (LOE, Art. 135).

2.03 PRIVATE ENTERPRISES:

Private Enterprise is enterprise owned by individual who will be responsible for all enterprise's activities by all his own assets. (LOE, Art. 141).

Owner must register enterprise and capital with provincial business registration agency. Owner has sole authority and responsibility for his enterprise. Owner can employ another person to manage enterprise, but in this case this employment must be declared and owner is still responsible for all activities of his enterprise. (LOE, Art. 142 and Art. 143).

Owner may lease enterprise to other(s) provided that written report and notarized copy of lease contract is submitted to business registration body and tax office. During lease term, owner is still responsible for activities of enterprise in his capacity as enterprise owner. Owner also has right to sell his enterprise and notice in writing must be submitted to business registration body 15 days prior to date of transfer. (LOE, Art. 144 and Art. 145).

2.04 STATE OWNED ENTERPRISES:

State Owned Enterprise (SOE) is economic organization where State owns entire charter capital or holds majority shares of contributed capital. SOEs are set up in key and important sectors or areas and take role of leading economy in socialist orientation.

It is mandatory for state-owned enterprises which were established under LOE 2003, before effective date of new LOE, i.e. July 1, 2006, to be converted into LLCs or SCs. Conversion must be completed within four years from effective date of new LOE, i.e. by July 1, 2010. For those related to national security and defense, special regulations of Government shall also apply. After July 1, 2006, SOEs shall be established under LOE similar to other private enterprises.

Government's rights over contributed capital are exercised with following principles: (i) Government acts as investor; (ii) capital is secured and developed; (iii) rights of investor are separate from those of state manager; (iv) execution of investor's rights is distinguished from business rights of enterprises; and (v) rights and obligations of capital owner are exercised in concentrated and united manner.

LSOE does not divide SOEs into Business SOEs and Public Service SOEs but imposes more obligations while at same time giving more favorable rights to SOEs which conduct public services.

Vietnam is currently pushing privatization of SOEs in many sectors by converting these enterprises into shareholding companies. Foreign investors are permitted to acquire shares of equitized SOEs and shareholding companies or equity interests of limited liability companies, partnerships or cooperatives.

LSOE facilitates stronger privatization of SOEs and puts SOEs in position of equality with enterprises established under LOE.

3 BUSINESS REGULATION AND COMMERCE

3.01 BANKS AND BANKING:

State Bank of Vietnam (SBV).

Legislation.

Law on State Bank of Vietnam promulgated in Dec. 1997, effective on Oct. 1, 1998, as amended and supplemented on June 17, 2003; Decree No. 96/2008/ND-CP on functions, responsibilities and organization of State Bank of Vietnam (SBV).

SBV, governmental agency and central bank of Vietnam, implements national monetary policies on lending, interest, foreign exchange and reserves. It also governs issuance and circulation of bank notes and coins; conduct of credit activities; conduct of accounts, clearing, settlement and treasury activities; conduct of foreign exchange activities and control; and banking inspection.

SBV has branch in every central city or province with delegated powers of SBV in that location.

Credit Institutions.

Legislation.

Law on Credit Institutions promulgated in Dec. 1997, effective on Oct. 1, 1998, as amended and supplemented on June 15, 2004 (LCI); Decree No. 141/2006/ND-CP on legal capital of credit institutions; Decree No. 22/2006/ND-CP on organization and operation of branch of foreign bank, joint venture bank, 100% foreign bank and representative offices of foreign credit institutions in Vietnam; Decree 146/2005/ND-CP on financial mechanism of credit institutions; Decree No. 69/2007/ND-CP on foreign investors purchasing shares in Vietnamese commercial banks; and Decree No. 59/2009/ND-CP on Organization and Operation of Commercial Banks.

Under LCI, credit institutions include state-owned institutions, joint stock institutions, cooperatives and foreign invested institutions. Credit institutions are put into two groups, banking and non-banking. Banking group includes commercial banks, development banks, investment banks, policy banks, people's credit funds, cooperation banks, credit cooperatives, joint venture banks, wholly owned foreign banks, and foreign bank branches. Non-banking group includes local, joint venture and 100% foreign invested financial companies and finance-leasing companies.

Foreign Credit Institutions.

Foreign bank branches, joint venture banks with up to 50% foreign ownership, and banks with 100% foreign-owned capital are allowed to open and operate in Vietnam. Foreign credit institutions are allowed to open representative offices which cannot conduct any revenue-generating activities in Vietnam. Joint venture and 100% foreign-owned non-banking credit institutions may also set up and operate in Vietnam. Foreign individual or organization that is not foreign credit institution may hold up to 5% of total authorized shares of Vietnamese commercial bank. Foreign credit institution may hold up 10% of total authorized shares of Vietnamese commercial bank, 15% in special circumstances for “foreign strategic investor”, and 20% in special cases subject to approval of Prime Minister of Vietnam. Foreign ownership in Vietnamese commercial bank may not exceed 30%.

SBV is responsible for granting or withdrawing licenses, managing and inspecting operations of foreign credit institutions in Vietnam.

Minimum legal capital prescribed for foreign bank branch is US$15 million, for joint venture banks and banks with 100% foreign-owned capital approximately US$60 million, and for joint venture or 100% foreign invested non-banking credit institution approximately US$8 million.

Application for setting up representative offices in Vietnam must include: (i) Application; (ii) banking license of foreign credit institution; (iii) written approval of foreign competent authority allowing foreign credit institution to open representative office(s) in Vietnam; (iv) annual reports, financial statements, auditors reports in most recent three years of foreign credit institution; and (v) name and curriculum vitae of chief representative.

Application to open foreign bank branch must include: (i) Application; (ii) business plan for first three years; (iii) charter of foreign bank; (iv) curriculum vitae and academic degrees of general director of foreign bank branch; (v) license of foreign bank; (vi) written approval of foreign competent authority permitting foreign bank to open branch; (vii) written document from foreign competent authority certifying legal compliance and financial status of foreign bank during three previous years; (viii) written document from foreign competent authority guaranteeing ability to supervise foreign bank and branch; (ix) audited annual financial statements of foreign bank for most recent three years; (x) credit rating from international credit rating organization for foreign bank; (xi) undertaking and guarantee from foreign bank; and (xii) summary of history, development, and operation of foreign bank, including future development.

Application to establish joint venture bank or bank with 100% foreign-owned capital must include: (i) Application; (ii) business plan for first three years; (iii) curriculum vitae and academic degrees of board of management, board of controllers, and general director; (iv) list of capital contributing members; audited annual financial statements of capital contributing members for most recent three years; (v) joint venture contract; (vi) licenses for establishment and operation of capital contributing members; written consent from foreign competent authority authorizing establishment of joint venture bank or bank with 100% foreign-owned capital; (vii) written document from foreign competent authority certifying legal compliance and financial status of authority guaranteeing ability to supervise foreign bank and branch; (ix) credit rating from international credit rating organization for foreign bank; (x) charters of capital contributing members; (xi) draft charter of joint venture bank or bank with 100% foreign-owned capital; (xii) undertaking and guarantee from capital contributing members; and (xiii) summary of history, development, and operation of capital contributing members, including future development.

Application to establish shareholding non-banking credit institutions ("SNBCI") must include: (i) Request for issuance of license in standard form promulgated by State Bank; (ii) charter on organization and operation of SNBCI; (iii) plan on establishment of SNBCI; (iv) minutes of initial meeting of general meeting of shareholders approving items relevant to establishment of SNBCI; (v) minutes of meeting of board of management electing chairman of board and general director (director); (vi) minutes of meeting of inspection committee electing head and members of inspection committee; (viii) decision of board of management appointing general director (director); (viii) application file of shareholder (e.g., application to purchase shareholding, documents relating to shareholder's identification or shareholder's business registration, and documents evidencing financial capacity of shareholder); (ix) people proposed to be on board of management or inspection committee, or to act as executives; (x) list of shareholders and capital contribution of each shareholder; (xi) letter from people's committee of province or city under central authority granting approval for SNBCI to set up its head office within locality; and (xii) letter confirming ownership of or legal right to use head office.

Application for setting up joint venture or 100% foreign invested non-banking credit institutions must include: (i) Application; (ii) draft of charter; (iii) business plan for first three years of operation; (iv) name, curriculum vitae, education certificates of founders, members of board of management, control board and general director; (v) capital contribution, schedule and list of shareholders; (vi) financial status and information of major shareholders; (vii) written approval of provincial People's Committee stating where head office is to be located; (viii) articles of association of foreign credit institution; (ix) operating license of foreign credit institution; (x) written approval of foreign competent authority allowing foreign credit institution to operate in Vietnam; (xi) annual reports, financial statements, and auditor's reports in most recent three years of foreign credit institution; (xii) joint venture contract if for joint venturing; and (xiii) name and curriculum vitae of general director of joint venture or 100% foreign invested credit institution.

Duration of Operation in Vietnam.

Maximum duration of foreign bank branch, joint venture bank, and bank with 100% foreign-owned capital must be 99 years, but duration of foreign bank branch must not exceed parent bank. Duration of representative office of credit institution must not exceed operation of credit institution. Extensions may be granted to foreign bank branch, joint venture bank, bank with 100% foreign-owned capital and representative office.

License fee of US$5,000 charged for representative offices of foreign credit institutions in Vietnam, US$30,000 for foreign bank branches and joint venture banks; US$10,000 for 100% foreign owned and joint venture non-banking credit institutions; US$5,000 for joint venture bank branches and non-banking credit institution branches; and US$3,000 for representative offices of foreign non-banking credit institutions.

WTO Commitments.

Vietnam has committed itself to allowing foreign banks to establish foreign wholly owned banks. These subsidiaries will receive national treatment and are allowed to accept unlimited local currency deposits from legal entities and issue credit cards.

3.02 COMMERCIAL REGISTER:

Commercial registration under Vietnamese laws means business registration and registration of other commercial or noncommercial activities necessary for company business operations.

Business Registration.

Enterprises must register their business with DPI of People's Committee of provinces or cities directly under central government. (See category 2 Business Organizations, topic 2.01 Corporations.) Business Registration Certificate evidences legal status of enterprises.

If company wishes to open branch offices or move legal office to another place in same provinces, or to amend scope of permitted activities, to alter registered capital, registration application must be filed with same DPI and contain original copy of business license, board of director's resolution on amendments to be made, bank certificate showing capital increase (in case of capital increase), and house leasing agreement or housing certificate (if company is moving office location). To open branch offices or move legal offices to other provinces, registration application must be filed with DPI where new branch offices or legal offices are located. DPI where company has legal office will update or revoke old Business Registration Certificate.

For foreign investors entering into Vietnamese market for first time, investment certificate issued by competent licensing authorities also serves as business registration. Members of management board, director, and vice directors of foreign invested enterprises should be registered at DPI where enterprise is located. If foreign invested enterprise wishes to change name, and/or position of persons on registered list, it should obtain re-registration from DPI for those changes.

Other Types of Registration.

Registration for Patent, Utility Solution, Industrial Design, Trademark, Appellation of Origin of Goods, Layout Design of Integrated Circuit (Topography) (Industrial Property Right), Copyright and New Plant Variety Protection.

All organizations and individuals, domestic or foreign, are entitled to submit applications for obtaining protection of their intellectual property and copyright in Vietnam.

National Office for Intellectual Property (NOIP) of Ministry of Science and Technology (MOST) is authorized agency to receive, consider applications, and issue certificates for protection of industrial property rights.

Copyright Office of Vietnam (COV) is authorized agency to receive, consider and grant copyright certificates.

Plant Variety Protection Office (PVPO) under Ministry of Agriculture and Rural Development (MARD) is authorized agency to receive, consider and grant new plant variety protection certificate.

Registration for Import Rights of Companies with Foreign Invested Capital in Vietnam.

Foreign invested companies have right to import directly or authorize dealers to import machinery, equipment, raw materials and goods for investment activities. For investment activities in sectors of importation, exportation, distribution and other commercial services, foreign invested companies must follow regulations of LOI, Law on Commerce and international treaties of which Vietnam is member. (LOI, Art. 15; Decree No. 108/2006, Art. 14).

Registration of Licensing Contracts.

For industrial property rights based on registration, contracts for transfer of industrial property rights must be registered by competent authorities while contracts for use of industrial property rights take effect under agreement between parties but only with respect to third party if such contract is registered with competent authorities. (Law on Intellectual Property, Art. 148).

Assignment contract for rights to plant variety must be registered with State administrative body in accordance with procedures stipulated by law. Assignee becomes plant variety protection certificate holder from date of registration of contract. (Law on Intellectual Property, Art. 194).

Registration of Technology Transfer Contracts.

It is not compulsory for technology transfer contracts to be registered but contracting parties have right to register such contracts if they wish. MOST issues certificates of registration of technology transfer contracts in case of technologies belonging to investment projects for which Prime Minister of Government provides investment approval. Department of Science and Technology (DOST) is authorized to issue certificates of registration of technology transfer contracts in case of technologies outside those stipulated above. However, contracts for technology on list of technologies restricted for transfer take effect after competent authorities issue technology transfer permit. MOST conducts evaluations and issues technology transfer permit if technology is on list of technologies restricted. (Law on Technology Transfer, Art. 19; Decree 133, Arts. 6, 9, and 11).

Business Registration of Foreign Legal Consultancy Companies.

Foreign law firms, permitted by Ministry of Justice to establish branch offices, 100% foreign-owned companies or joint venture company in Vietnam in accordance with Decree No. 28/2007/ND-CP dated Feb. 26, 2007 (see category 15 Legal Profession, topic 15.01 Attorneys and Counselors), must register business activities with Provincial Department of Justice.

Registration of Pharmaceutical Companies or Products.

Foreign pharmaceutical companies, wishing to distribute their products in Vietnam must register their respective companies and products with Ministry of Health of Vietnam.

Registration of Mortgaged or Pledged Properties.

Moveable and immovable properties may be mortgaged or pledged to creditors to secure their interests. Registration takes place when pledge or mortgage contract is executed. Vietnam Committee for Civil Aviation Administration is entitled to certify mortgaging contracts for planes, while Vietnam Seagoing Vessels Registration Department certifies ship mortgage contracts. Mortgaging or pledging contracts for immovable properties and land use rights of individuals must be registered with People's Committee of commune or ward where mortgaged or pledged properties are located. Mortgaging or pledging contracts for immovable properties and land use rights of organizations or entities must be registered with provincial Land and Housing Department. Mortgaging or pledging contracts for other properties or assets may be registered with National Office of Secured Transaction Registration under Ministry of Justice or its branch. (Decree 08, Art. 8.2).

Representative offices of foreign business entities specializing in sale of goods and directly related activities must carry out procedures for notification of activity to related authorities within 45 days from issuance date of representative office license. Representative offices of foreign business entities which operate in special commercial sectors (banking, finance, legal services, culture, education, tourism or other sectors as stipulated by law) carry out procedures in accordance with provisions in specific legal instruments.

Law firms are no longer allowed to establish representative office but can apply to Ministry of Justice to set up branch office. These branches can do business in Vietnam and must obey tax regulations of Vietnamese Government. (Decree No. 28/2007/ND-CP).

Registration of Seagoing Vessels and Crews.

All seagoing vessels which: (i) Have main engine capacity of 75/KW or more; (ii) have tonnage of 50 GRT or more or capacity of 100DWT or more or design water length of 20 meters or more; and (iii) operate on overseas routes; must be registered with Vietnam Seagoing Vessels Registration. (Law on Marine, Art. 15).

Registration of Vietnamese Staff.

Employers recruit Vietnamese staff directly or through employment agencies. Employer makes announcement for at least seven days in mass media such as newspaper, radio or television prior to receipt of job applications in its head office. Recruitment announcement includes number of workers, requirements, professional or trade skills and qualifications and training levels, duration of labor contract, salary and other incomes, working conditions, required documents, time limit for lodging job application and date and time of recruitment. Within time limit of seven days after end of recruitment, employer is required to provide list of recruited workers at local Department of Labor, War Invalids and Social Affairs or management committee of industrial zone, export processing zone or high-tech zone. (Decree 39/2003, Art. 8).

Reporting Regime.

Prior to July 5 and Jan. 5 each year, employers provide report on status of their employment of workers and their requirements to recruit labor for first six months of year, followed by report for whole year to their local Department of Labor, War Invalids and Social Affairs or to their managing ministries or to management committee of industrial zone, export processing zone or high-tech zone.

Registration of Franchising Agreements.

Franchising agreements between domestic individual/organization with foreign parties, including those located in export processing zones or non-tariff zones, must be registered with Ministry of Industry and Trade; while franchising agreements between domestic parties must be registered with Department of Trade of province or city where franchising activities are proposed to be carried out.

3.03 CONTRACTS:

With establishment of Democratic Republic of Vietnam (in 1945) and then reunification in 1975, contract laws have developed gradually under Socialist Republic of Vietnam regime.

In first legal document on contracts, Decree No. 97-SL issued by President Ho Chi Minh on May 22, 1950, basic principles of Vietnamese civil laws were first discussed. Second significant legal document was Decree No. 735/TTg on Apr. 10, 1957 (issued with Temporary Regulation on Business Contracts). This decree covered provisions governing contractual relationship between economic units such as state-owned enterprises, cooperatives, and private sector. All contracts are governed by principles of free will, equality, honesty, and are for mutual benefit of all parties and for benefit of development of national economy.

Until 1960, no clear distinction between civil contracts and economic/business contracts existed. After 1960, socialist economy was initiated and new laws on economic contracts were issued separating laws on contracts from laws on civil contracts. These new laws assisted State to better manage socialist economy. However, economic contracts during this period did not correctly reflect demand and supply in relationship to market, and were simply tool to execute State's economic goals. Execution of economic contracts was not based on mutual agreements between contractual parties, but instead was compulsory obligation of economic units vis-à-vis the State. Scope of economic contracts was limited to State-owned and collective sectors.

Not until 1986, with new economic policy, was Vietnamese contract law really developed, with several types of contract becoming available for growing economy including economic, civil, and commercial contracts. All are based on four main principles: they must be valid, voluntary contracts, made between parties with equal bargaining power, for mutual benefit. When Commercial Law was introduced in 1997, there was confusion in distinguishing between economic and commercial contracts. It was basically understood that commercial contracts were economic contracts, but not all economic contracts were commercial contracts. Economic contracts were generally governed by Ordinance on Economic Contracts of Sept. 25, 1989, while commercial contracts were first subject to Commercial Law 1997 and then to Ordinance on Economic Contracts 1989. This confusion was cleared by introduction of new Civil Code and Commercial Law and cancellation of Ordinance on Economic Contracts 1989 as of Jan. 1, 2006. Under current contract laws of Vietnam, there are two types of contracts: civil contract and commercial contract.

Civil Contract.

Legislation.

1992 Constitution of Vietnam as amended by Resolution No. 51/2001/QH10 dated Dec. 25, 2001 (c. II “The economic regime” and c. V, “Basic rights and responsibilities of citizens”); Civil Code adopted by National Assembly on June 14, 2005 (CC), effective Jan. 1, 2006, replacing 1995 Civil Code (CC); Civil Procedures Code (CPC) adopted by National Assembly on June 15, 2004, effective Jan. 1, 2005, replacing both Ordinance on Procedure for Settlement of Civil Cases, State Council, on Oct. 29, 1989; and Ordinance on Enforcement of Civil Judgments, Standing Committee of the National Assembly, effective July 1, 1993.

Parties of Civil Contract.

2005 Civil Code (CC) has replaced 1995 CC. Under CC, parties to civil contract are: (i) Individuals having legal capacity to engage in civil acts (See CC, Arts. 14–20); (ii) legal entities established or permitted to be established as private companies by competent authorities; legally permitted to own and be responsible for properties on which companies are established; and able to file civil actions or be sued; (iii) households and cooperatives (CC, Arts. 106 and 111); (iv) foreign organizations and individuals (CC, Art. 758).

Formation.

Civil contracts may be formed in writing, verbally, or by performance of specific activity when law does not otherwise prohibit. (CC, Art. 401[1]). If law provides that contract be formed in writing, certified by Notary Public, and registered, then these provisions must be complied with. (CC, Art. 401[2]). Pledge, mortgage or third-party guarantee is executed to guarantee performance of civil contract. Civil contract takes effect from moment it is entered into. (CC, Art. 405). CC states civil contact is entered into when: (i) Proposing party receives acceptance on entering into contract of other party; (ii) time limit for response expires without response if parties agreed in contract that non-response is response of acceptance; (iii) parties to oral contract agree on contents of contract; or (iv) last party signs written contract. (CC, Art. 404).

Execution.

Civil contracts must be executed with principles of honesty, mutual benefit and trust kept in mind. Now, quality, quantity, and category must be ensured and contract must be executed in time and in accordance with agreements of all parties. It must also not infringe upon interest of

State, public interest, or legal rights and interests of third parties. (CC, Art. 412). CC further provides for execution of both unilateral and bilateral contracts as well as execution of contracts for benefit of third parties. CC also provides for means to amend or to terminate unilaterally such contracts.

Types of civil contracts discussed throughout CC include contracts for sale and purchase of moveable properties (Arts. 428 to 449); contracts for sale and purchase of house (Arts. 450 to 455); moveable property exchange contracts (Arts. 463 to 464); property donation contracts (Arts. 465 to 470); property loan contracts (Arts. 471-479); property leasing contracts (Arts. 480 to 511); property borrowing contracts (Arts. 512 to 517); service contracts (Arts. 518 to 526); transport contracts (Arts. 527 to 546); processing contracts (Arts. 547 to 558); bailment contracts (Arts. 559 to 566); insurance contracts (Arts. 567 to 580); and power-of-attorney contracts (Arts. 581-584).

Dispute Settlement.

Any disputes arising from civil contract must first be resolved by direct negotiations between parties. Civil disputes are settled by district level people's court or at civil court at provincial people's court. Appeals are filed at civil court at provincial level people's court or at civil court at supreme people's court.

Commercial Contract.

Commercial Law was adopted on June 14, 2005 and became effective on Jan. 1, 2006, replacing 1997 Commercial Law. Number of implementing decrees was issued by Government such as Decree No. 12/2006/ND-CP dated Jan. 23, 2006 on international trade, purchasing and selling agent, processing and transit of goods with foreign trader; Decree No. 19/2006/ND-CP dated June 20, 2006 on origin of goods; Decree No. 20/2006/ND-CP dated June 20, 2006 on commercial inspection services; Decree No. 35/2006/ND-CP dated Mar. 31, 2006 on franchising; Decree No. 37/2006/ND-CP dated Apr. 4, 2006 on commercial promotion; Decree No. 57/2006/ND-CP dated June 9, 2006 on electronic commerce; Decree No. 59/2006/ND-CP dated June 12, 2006 on services and goods subject to business prohibition or restrictions or business conditions; and Decree No. 158/2006/ND-CP dated Dec. 28, 2006 on goods trading through Goods Transaction Center. Number of other implementing decrees shall be issued by Government. Commercial contracts such as import-export contracts signed between foreign party and Vietnamese party are also governed by local import-export laws, as well as international trade treaties and customs. In addition, Commercial Law identified following as commercial contracts: Contracts for purchase of goods; contracts for purchase of goods through commodities exchange (Art. 63); contracts for provision of services (Art. 74); contracts for provision of commercial promotion services (Art. 90); contracts for provision of commercial advertisement services (Art. 110); contracts for display and introduction of goods and services (Art. 124); contracts for trader's representative (Art. 142); purchase, sales authorization contracts (Art. 159); contracts for commercial agent (Art. 168); contracts for goods processing (Art. 179); contracts for provision of commodities auction services; contracts for transit of goods (Art. 251); contracts for property leasing; and franchising contracts (Art. 285).

Commercial disputes are settled by district level People's Court or at Economic Court at provincial People's Court. Appeals are filed at Economic Court at provincial level People's Court or at Economic Court at Supreme People's Court.

Foreign Investment Contract.

Under Law on Investment (LOI) which took effect July 1, 2006, three forms of investment vehicles exist: Joint venture enterprise (JVE); business cooperation contract (BCC); and wholly foreign-owned entity. JVE and BCC are executed between Vietnamese party and foreign party in accordance with FIL. Build-operate-transfer (BOT), build-transfer-operate (BTO) or build-transfer (BT) projects are allowed for infrastructure projects under FIL.

3.04 INTEREST:

State Bank of Vietnam (SBV) determines and then announces discount rate and minimum interest on deposit for financial institutions. Maximum interest on loans is no longer imposed. SBV allows commercial banks to freely determine interest on loans as dictated by market conditions. Interest takes two forms. (1) Earned interest occurs when investor deposits money with bank and bank pays interest to investor. Approximate current interest rates for demand savings deposits: 10% per annum for Dong and 5% per annum for U.S. Dollar. (2) Interest on loans occurs when banks lend money and interest accrues at higher rate than earned interest. Current rate of interest on commercial bank loans is 1.5% per month for dong and 7% per annum for U.S. dollar.

If loan is overdue, overdue rate is 150% of original loan interest and applied to unpaid balance until it is fully paid.

3.05 LICENSES, BUSINESS AND PROFESSIONAL:

Many kinds of licenses-permits-approvals are granted under Vietnamese law by relevant State authorities (“licensing”). Licenses discussed below include, but are not limited to, those issued to domestic organizations and individuals, or to foreign organizations and individuals.

Accounting and auditing operation permits issued by Ministry of Finance. This ministry is also responsible for issuing permits to foreign invested enterprises on adoption and application of accounting systems in these enterprises.

Business Establishment Licenses.

State owned enterprise establishment licenses issued by governing ministries or Prime Minister or provincial People's Committee. Business registration certificate with respective People's Committee of province or city directly under central government evidences legal status of enterprise.

Business termination or dissolution permits issued by same agency which granted business license. Applications must clearly state duration and procedures for liquidation of assets and time limit for payment of all outstanding debts and satisfying property obligations.

Commercial arbitration center licenses issued by Ministry of Justice and center then must register itself with provincial department of justice where center is located.

Construction permits issued by Ministry of Construction or relevant provincial People's Committee or Industrial Zone, Export Processing Zone and Hi-Tech Zone authorities, depending on size, location and nature of project.

Credit institution establishment and other credit operation licenses are to be issued by State Bank of Vietnam.

Foreign Company Resident Representative Office Licenses.

Representative office licenses for foreign trading companies are issued by Trade Department of province or city directly under central government where representative office is to be located. Representative office licenses for foreign tourist companies are issued by Vietnam General Administration of Tourism. Foreign insurance company representative office licenses are issued by Ministry of Finance. Foreign credit institution (bank or financial institution) representative office licenses are issued by State Bank of Vietnam. Licenses for setting representative office of foreign cultural, educational or occupational training organizations are issued by Prime Minister, Minister of Training and Education, Minister of Culture and Information, or Minister of Labor, War Invalids and Social Affairs.

Foreign investment registration and termination or dissolution permits are issued by either MPI, provincial People's Committee or Industrial Zone, Export Processing Zone and Hi-Tech Zone authorities.

Foreign law firm branch, Vietnamese-foreign law partnership, and wholly owned foreign law office or partnership licenses are issued by Ministry of Justice.

Non-profit foreign cooperation, research organization representative office licenses are issued by Ministry of Foreign Affairs. (Decree No. 06/2005/ND-CP dated Jan. 19, 2005).

Foreign Pharmaceutical and Medical Companies and Products.

Licenses to conduct operations in medicines and raw medicinal materials in Vietnam (for companies wishing to export medicines and materials to Vietnam), certificates of eligibility to conduct operations in medical equipment in Vietnam (for companies wishing to do medical equipment business in Vietnam), registration licenses for circulation of foreign medicines for treatment or prevention of human diseases in Vietnam (for each pharmaceutical product) are issued by Ministry of Health.

Insurance company licenses including foreign invested insurance company licenses are issued by Ministry of Finance and foreign invested credit institution licenses are issued by State Bank of Vietnam.

Licenses for establishment of representative offices of foreign securities companies or joint ventures of securities companies in Vietnam are issued by State Securities Commission of Vietnam.

Work permits for foreigners working in Vietnam are issued by provincial labor department. Foreigners registered with state agency as members of limited liability company with two or more members; owner of one-member limited liability company; members of Board of Management of Shareholding Company; foreigner entering Vietnam to offer services; foreigner entering Vietnam to work to resolve emergency situation which Vietnamese experts or foreign experts currently in Vietnam are unable to deal with; and foreign lawyers who have been granted certificate to practice law in Vietnam by Ministry of Justice are not required to obtain work permits.

Other Licenses.

Vietnam's Aviation Agency is responsible for granting licenses to foreign, commercial airlines wishing to fly in and out of Vietnam, while applications for foreign, noncommercial airlines wishing to fly in and out of Vietnam must be submitted to Vietnam's Aviation Agency as well as to Vietnam Ministry of Foreign Affairs and Ministry of Defense for consideration.

3.06 SALES:

Legislation.

Civil Code (CC), promulgated by NA on June 14, 2005 and Commercial Law adopted by NA on June 14, 2005 (depending on classification of transaction).

Sales contract may be civil contract or commercial contract. Sales contracts are regulated according to status of parties (juridical persons, licensed businesspersons or non-licensed individuals) and category of contract, e.g., civil (governed by Civil Code and including all consumption-based contracts), or commercial (governed by Commercial Law). As yet there is no uniform law regulating all forms of sales contracts.

Ownership of goods is transferred from buyer to seller on date buyer receives goods except as otherwise agreed by parties or as stipulated by law. If sale goods are registered goods, ownership transfers on date property registration is complete. (CC, Art. 439 and CL, Art. 62).

Sale of certain types of properties must be certified by notary public and registered with competent State bodies. This includes house purchasing contracts, transfer of land-use right certificates, and sale contracts for aircraft or ships.

Commercial Law provides option of sale of certain goods through Commodities Exchange using commodity forward contract or commodity option contract.

4 CITIZENSHIP

4.01 IMMIGRATION:

See category 12 Immigration, topic 12.01 Immigration.

5 CIVIL ACTIONS AND PROCEDURE

5.01 CIVIL ACTIONS:

Legislation.

Civil Code, promulgated by National Assembly (NA) on June 14, 2005 and effective Jan. 1, 2006; Civil Procedures Code adopted by National Assembly on June 15, 2004 effective on Jan. 1, 2005 (CPC); Law on Enforcement of Civil Judgments adopted by National Assembly on Nov. 14, 2008, effective July 1, 2009, replacing Ordinance on Enforcement of Civil Judgments of Standing Committee of National Assembly dated Jan. 28, 2004; Decree No. 70/CP dated July 1, 1997 of Government on court fees; Ordinance on Court Costs and Fees promulgated by National Assembly Standing Committee on Feb. 27, 2009, effective July 1, 2009; and Law on Organization of People's Courts adopted by NA in 1992 as amended and supplemented in 1994, 1995, and 2002. (LOPC).

Current court system in Vietnam consists of criminal courts, civil courts (including family and intellectual property), economic courts (including maritime), labor courts, and administrative courts. Military and other courts set by law; in some cases NA may decide to set up special court. (LOPC).

Deposition.

With respect to civil, labor and economic lawsuits, litigants are each obligated to provide evidence to substantiate their case. (4 CPC, Art. 6). Court may verify and collect evidence but only in cases prescribed by law. Admissible evidence must be legal, objective, and relevant. Types of evidence obtained before trial admissible in Vietnamese courts are documentary evidence including, but not limited to, tangible items, related documents, laboratory results and evaluation.

Litigant may also provide written interrogatories to court at pretrial level for other litigant(s) to answer if some issues are still unclear. At request of litigants or, if it is deemed necessary, presiding judge may take deposition of witnesses. (CPC, Art. 87).

In civil, labor and economic courts, presiding judge within one jurisdiction may ask another Vietnamese court located outside his jurisdiction to collect or verify certain evidence for his use. (CPC, Art. 93).

Judgments.

Civil court trial panel consists of presiding judge and two jurors. In special cases, trial panel may consist of two judges and three jurors. Final judgment by such court is determined by majority vote. Decision or judgment must state: full name of trial court; number and date of registration of case; number of judgment and date of passing judgment; full names of trial panel members, court secretary, prosecutor, assessor, translator; full names and addresses of plaintiff, defendant, person who has right and interest relating to case, organization, filing suit, legal representative, person protecting legal rights and interest of litigants; disputed object; number, date of decision of bringing case to be heard; open hearing or closed hearing; date and place of court hearing; request of plaintiff, defense of defendant, request of related persons; point of view of court; item, point, article of legal documents referred by court; legal basis for accepting or not accepting request of concerned parties; judgment of court on each issue; court fee; right of litigants to appeal. (CPC, Art. 238).

Copy of judgment must be delivered to litigants, organization filing lawsuit and prosecutor of same level within ten days from judgment issuance date. (CPC, Art. 241).

At appeal level, panel, consisting of three judges, will determine whether to maintain or revise or cancel lower court judgment by majority vote. Decision of appeal court is final and binding on litigants. (CPC, Art. 53, Art. 275, Art. 279).

Enforcement of Judgments.

Legislation.

Law on Enforcement of Civil Judgments adopted by National Assembly on Nov. 14, 2008, effective July 1, 2009 (LECJ), replacing Ordinance on Enforcement of Civil Judgment; Decree 173/2004/ND-CP dated Sept. 30, 2004 of Government stipulating procedures, enforcement and administrative sanctions in field of enforcement of civil judgments (Decree 173/CP), as amended by Government Decree 60/2009/ND-CP of July 23, 2009, effective Sept. 18, 2009.

Introduction.

Judgments or decisions of Civil Court, Economic Court, Labor Court; decisions in sentences relating to properties or property rights of Criminal Court, Administrative Court are subject to enforcement provisions of LECJ.

General Principle.

Debtors and successful party must comply with judgments and rulings and request relevant law enforcement bodies for enforcement. (LECJ, Art. 7). Application must be attached to copy of court sentence/decision. (LECJ, Art. 31).

Within five working days after receipt of documents, heads of relevant law enforcement bodies must issue decision on enforcement. (LECJ, Art. 36).

Debtors have 15 days maximum for voluntary execution of court decisions, failing which enforcement authorities must apply coercive enforcement measures. (LECJ, Arts. 45 and 46).

Coercive enforcement measures specified in Art. 71 of LECJ: (1) Seizing funds from debtor's bank account; recovery and handling of debtor's money and value-papers; (2) garnishment of debtor's income; (3) seizing debtor's properties including assets kept by third party; (4) exploitation of debtor's assets; (5) compelling transfer of physical property, property rights and papers; (6) prohibiting or compelling debtor to do or not to do specific acts.

Duration of Enforcement.

For five years after such judgment became effective, successful party may submit documents for enforcement thereof. Should such party fail to request enforcement within such period, judgment shall lapse. (LECJ, Art. 30).

Statute of Limitations.

CPC divides civil cases into two types: (i) Civil disputes which include civil disputes, marriage and family disputes, trading and commercial disputes, and labor disputes; and (ii) civil requests which include requests relating to civil, marriage and family, trading and commercial, and labor matters. If there is no provision by law, time limit for requesting competent court to settle civil dispute is two years from date when rights and/or legal interests of individual or organization were infringed, while time limit for filing civil request is one year from date right to request arose. (CPC, Arts. 1, 159). Statute of limitations for inheritance claim is ten years from opening of inheritance. Statute of limitations for requesting inheritor to pay off material liabilities of deceased is three years from opening of inheritance. (CC, Art. 645). Commercial law provides statute of limitations for commercial disputes, which is two years from moment rights or interests of one party are infringed upon by other party, except statute of limitations for claims against logistic service provider is nine months from delivery of goods by logistic service provider. (CL, Art. 319).

Replevin action is available in Vietnam as in other jurisdictions.

Sequestration.

In economic, labor and civil courts, judge may order sequestration of witnesses at request of either party in order to insure that in-court testimony of each witness is not colored by what another witness said. (CPC, Art. 58.2.c).

6 COURTS AND LEGISLATURE

6.01 COURT FEES:

Legislation.

Decree 70/CP dated on June 12, 1997 of Government providing regulations on court fees and legal fee. (Decree 70/CP).

On Feb. 27, 2009, National Assembly Standing Committee amended provisions regarding court costs and fees as provided by Decree 70/CP. (OCCF).

OCCF classifies court fee as court fee for disputes without and with value.

Court Fee of Disputes Without Value.

Economic Disputes.

Court fee for court of first instance is VND 2,000,000 for disputes without value; and for court of appeal is VND 200,000 for disputes with and without value. (OCCF, Annex, Section I.1).

Civil Disputes.

Court fee for court of first instance is VND 200,000 for disputes without value; and for court of appeal is VND 200,000 for disputes with and without value. (OCCF, Annex, Section I.1).

Labor Disputes.

Court fee for court of first instance is VND 200,000 for disputes without value; and for court of appeal is VND 200,000 for disputes with and without value. (OCCF, Annex, Section I. 1).

Administrative Disputes.

Court fee for both court of first instance and court of appeal is VND 200,000, and for court of appeal is VND 200,000. (OCCF, Annex, Section I.1). OCCF does not classify administrative disputes as disputes with and without value.

Criminal Court Fee.

The court fee for both court of first instance and court of appeal is VND 200,000.

Court Fee of Disputes With Value.

General Principle.

Court fee for court of appeal for economic, civil, labor disputes is fixed as indicated above; and for court of first instance is calculated by percentage of value of dispute.

6.02 COURTS:

Legislation.

1992 Constitution; Resolution No. 51/2001/QH on amendment and supplementation to some articles of 1992 Constitution; Law on Organization of People's Court adopted by National Assembly in 1992 and its Amendment and Supplementation in 1994 and 1995; Law No. 33/2002/QH10 on Organization of People's Court adopted by National Assembly on Apr. 2, 2002 and effective on Oct. 1, 2002 will replace same Law of 1994 and 1995; Law on Organization of People's Procuracy of 1992; Law No. 34/2002/QH10 on Organization of People's Procuracy adopted by National Assembly on Apr. 2, 2002 and effective on Oct. 1, 2002 will replace same Law of 1992.

People's Courts and People's Procuracy are responsible for preserving and protecting socialist legal system, People's right to mastery, State assets and collective property, and citizens' lives, property, freedom, honor and dignity. (Constitution, Art. 26).

Judiciary consists of People's Supreme Court, local People's Courts, and military tribunals. In special circumstances, National Assembly may establish other special courts. Vietnamese judicial system has traditionally focused on criminal matters and has only recently begun to recognise its possible role in civil and commercial cases. However, even Vietnamese legal practitioners admit present judicial system is ill-equipped to handle dispute resolutions involving foreign investors. New division, Economic Courts, created to deal with complicated commercial matters including foreign investments.

Supreme People's Procuracy with approximately 6,000 officers acts as public prosecutor, “supervising and controlling compliance with the law by ministries, organs of ministerial rank, other organs under Government, local organs of power, economic bodies, social organizations, people's armed units and citizens”. (Constitution, Art. 137). It may initiate public prosecution, and act in civil court cases to represent People's and State's interests.

Note: Under amended 1992 Constitution and Law No. 34/2002/QH10, Supreme People's Procuracy shall no longer be authorized to supervise and control compliance with law by governmental agencies. It shall only exercise right to prosecution and supervising juridical activities.

Ministry of Justice performs administrative and supervisory functions over Vietnam's legal system, managing local people's courts and regional military tribunals, and is involved in drafting legislation. Following nonprofit bodies directly under Ministry; Institute for Research into Legal Science; University of Law and its Ho Chi Minh branch; Legal Newspaper and Democracy and Legal Magazine.

Note: From Oct. 1, 2002, Ministry of Justice is no longer authorized to perform its management over local people courts and regional military tribunals. This function is to be transferred to Supreme People's Court. There will be ordinance issued by Standing Committee of National Assembly covering this issue.

At local levels, Ministry delegates its role and responsibility to: Provincial level: Office of Justice; District level: Bureau (or Office) of Justice.

Each province or district has respective Department of Civil Judgment Enforcement. These Departments report directly to Ministry's Central Department of Civil Judgments.

Supreme People's Court includes (1) Criminal Court; (2) Civil Court; (3) Economic Court; (4) Labor Court; (5) Administrative Courts; (6) Central Military Court; and (7) Repeal Court. Local people's courts are divided into two levels: provincial and district. Provincial people's court includes Criminal Court, Civil Court, Economic Court, Labor Court and Administrative Courts. District level people's courts are not divided into specialized courts but have specialized judges.

Chief Justice of Supreme People's Court is elected or dismissed by National Assembly upon proposal of State President. Deputies Chief Justice and Judges of Supreme People's Court are appointed or dismissed by State President. Judges of local people's courts are appointed or dismissed by Chief Justice of Supreme People's Court upon proposal of Committee for Judge Selection. Chief Justice and Deputies Chief Justice of local people's courts are appointed and/or dismissed by Chief Justice of Supreme People's Court after obtaining agreement from local people's council. (Law No. 33/2002/QH10, Art. 41).

6.03 LEGAL FEES:

Introduction.

OCCF specifies legal fees in specific cases: (1) Settlement of specified civil affair: for first instance and appeal is VND 200,000 (OCCF, Annex, Section II.1); (2) Settlement of civil affairs related to commercial arbitration activities: (a) Legal fee for requesting court to designate or change arbitration is VND 200,000; (b) Legal fee for requesting court to reconsider arbitration awards or competence of arbitration tribunal to settle dispute, or for appealing arbitration-related court ruling, is VND 300,000; (c) Legal fee for requesting court to apply, change or cancel emergency arbitration-related provisional measures is VND 500,000 (OCCF, Annex, Section II.2); (3) Recognition and enforcement of foreign civil judgments or foreign arbitral awards in Vietnam: Fees to petition Vietnamese courts for recognition and enforcement of civil judgments, foreign court decisions, and foreign arbitral awards in Vietnam: (a) VND 2,000,000 for resident individuals in Vietnam, agencies and organizations which have head offices in Vietnam; (b) VND 4,000,000 for nonresident individuals in Vietnam, agencies and organizations which do not have head offices in Vietnam; (c) VND 200,000 for appealing court rulings (OCCF, Annex, Section II.3); (4) Bankruptcy procedures: Legal fee for filing application to commence bankruptcy procedures is VND 1,000,000; (5) Consideration of lawfulness of strikes: Legal fee for consideration of lawfulness of strikes is VND 1,000,000; (6) Request for arrest of seagoing ships: Legal fee for arrest of seagoing ships is VND 5,000,000; (7) Request for arrest of aircraft: Legal fee for arrest of aircraft is VND 5,000,000; (8) Judicial mandate by foreign courts in Vietnam: Legal fee for judicial mandate by foreign courts in Vietnam is VND 5,000,000 (OCCF, Art. 4; Annex, Section II.4).

7 DEBTOR AND CREDITOR

7.01 BANKRUPTCY:

Legislation.

On June 15, 2004, National Assembly issued Law on Bankruptcy which came into force on Oct. 15, 2004, replacing Law on Enterprise Bankruptcy of Dec. 30, 1993 (LOB). LOB, which consists of nine chapters and 95 articles, provides regulations on conditions and filing of application requesting initiation of bankruptcy procedures; conditions and procedures for recovery of business activities; procedures for asset liquidation and declaration of bankruptcy; rights, obligations and responsibilities of applicant filing request for declaration of bankruptcy; rights, obligations and responsibilities of enterprise, cooperative to be declared bankrupt.

Scope.

Regulations on bankruptcy in Vietnam apply to enterprises including state owned enterprises and foreign invested enterprises and cooperatives. (LOB, Art. 2).

Jurisdiction.

District-level people's court has jurisdiction over requests for opening insolvency of cooperatives registered in same district. Jurisdiction over requests for opening insolvency of enterprises and other cooperatives rests with provincial people's courts.

Opening of Insolvency.

Court may, within 30 days from receipt of petition for opening of insolvency filed by creditors, issue decision on opening insolvency of enterprise if there is proof enterprise is insolvent. (LOB, Art. 28).

Debtor.

Any business is insolvent when it is unable to pay debts due on demand by creditors. (LOB, Art. 2). Following persons (individuals, organizations) may petition court for opening insolvency of enterprise: unsecured creditors, partly secured creditors, trade unions or representative of workers/employees. (LOB, Arts. 13-14). It is obligation of enterprise owner or legal representative of insolvent to petition court for opening insolvency of enterprise under LOB. (Arts. 15-18).

Creditor.

New LOB does not define who are creditors. Nevertheless, LOB defines secured creditor as creditor holding security over property of debtor for debt due to creditor (Art. 6.1); partly secured creditor as creditor holding security over property of debtor and value of property is less than debt due (Art. 6.2); unsecured creditor as creditor not holding security over property of debtor for debt due to him from debtor (Art. 6.3). Under LOB, creditors also include workers/employees of enterprises acting through trade unions or worker representatives and guarantors of insolvent after having paid its debts and becoming unsecured creditors.

Unsecured creditor or partly secured creditor has right to submit petition to court for opening insolvency of enterprise if creditor's claim for any debt due has been dispatched but debt has not been paid by enterprise (debtor). However, secured creditor is not allowed to carry out above mentioned because his interest is secured by property of debtor. If enterprise is unable to pay salaries or any other amounts due to its employees and is possibly insolvent, trade union representative or representatives of employees, if no such trade union exists, has right to submit petition to court for opening insolvency of enterprise. As result, trade union or representatives of employees are considered to be creditor.

Procedure.

Either one or combination of following creditors may submit petition to People's Court (economic court) for opening insolvency of enterprise/debtor: unsecured creditors, partly secured creditors, trade union, representative of employees, and enterprise (itself). Within 30 days after receiving petition, economic court must decide to open insolvency of enterprise or not. (LOB, Art. 27). If insolvency is opened, decision of court must be sent to insolvent, creditors, People's Procuracy Office of same level, and published in central or local newspapers for three consecutive publications within seven days from its date. (LOB, Art. 29). Judges must also issue decision to form insolvent asset management and liquidation unit (trustees) comprising executor, court clerk, representative of creditors, representative of insolvent and, if necessary, representative of trade union, or other agencies.

Within 60 days from last day of publication of petition, creditor(s) may submit their claims against debtor to court. Claims should include following information: amount of debt including debts due and undue; secured and unsecured debts, and evidences of such debts. Creditors who fail to submit such claims must be considered as abandoning their rights to claim against debtor. (LOB, Art. 51). Group of trustees has 15 days from expiration date of time limit for filing claims to complete list of creditors and amount of debts owed. Upon expiration of this period, group of trustees shall close list of creditors. (LOB, Art. 52).

First meeting of creditors must be held by judge 30 days after date when list of creditors was closed. Following issues must be decided at meeting: trustees' reports on business and financial status of insolvent, asset inventories, list of creditors and others in debt to insolvent; comments of insolvent's representative or owner on trustees' reports and proposals on reorganization of business, capability and schedule of payments to creditors, consideration and approval of plans for insolvency proceedings. (LOB, Arts. 61 and 64).

Judge must issue decision on applying insolvent business recovery procedures or applying asset liquidation procedures. Upon completion of liquidation procedures, judge must issue decision on declaration of enterprise bankruptcy.

Priorities.

Assets of debtor shall be paid first to secured creditors. If value of pledged and mortgaged properties is not enough to pay secured creditors, such creditor shall be entitled to share in distribution of remaining assets of debtor together with unsecured creditors. If value of mortgaged or pledged properties is greater than debts, difference thereof shall be included in value of remaining assets of debtor.

Remaining assets are all assets of debtor after pledged and mortgaged properties have been paid to secured creditors. They shall be distributed in following order: (i) Fees and other expenses described by law incurred during course of resolving bankruptcy case; (ii) any unpaid salaries, severance pay, or social insurance described by law and other interests provided for by collective labor agreements and labor contracts; and (iii) unsecured debts due to creditors whose names appear in list of creditors corresponding to remaining assets of debtor. Tax liabilities are no longer given priority. State and creditors are treated equally. Tax debts now are unsecured debts. If value of remaining assets of debtor is sufficient to pay debt to creditors, claim of each creditor shall be fully satisfied. If value of remaining assets of debtor is insufficient to pay debts to creditors, each creditor shall be paid part of their claim in proportion to debts due to them.

7.02 PLEDGES:

Pledge is written contract whereby pledgor delivers to pledgee its own property as security to ensure performance of obligation. Pledge contract, which must be in writing, may be separate contract or appendix of main contract. (CC, Art. 327). Delivery of pledged property by owner thereof, as pledgor, to pledgee creates effectiveness of pledge under Vietnamese law. (CC, Art. 328). Furthermore, pledgee may not enjoy fruits or benefits generated from such property without prior consent from pledgor. (CC, Art. 332[3]). Pledged properties must be those lawfully owned by pledgor and those which are permitted by law to be in transaction. Registration of pledge is no longer required unless parties so agree or laws so provide for certain properties.

Government issued Decree 163/2006/DN-CP dated Dec. 29, 2006 on secured transactions which replaced Decree No. 165/1999/ND-CP dated Nov. 19, 2009. Under Art. 4, Decree 163, property used as security must be as agreed by parties and must be owned by obligor or third party which undertakes to use such property in order to secure performance of obligation owed by obligor to party with rights. Property used as security may be current property or future property and must be permitted to be traded.

Property may be used to effect several pledges as long as total value of guaranteed obligations does not exceed that property's value. (CC, Art. 324[1]). Decree 163 allows parties to use property with value lower than those of secured obligations, unless otherwise stipulated by law.

Pledged property may be applied to ensure performance of several obligations. In such case, each pledge contract must be in writing and pledgor must inform following pledge about prior pledge. (CC, Art. 324[2]). Nonperformance of one obligation will trigger settlement of all other obligations at which time order of priority in payment due to different pledgees will be determined based on policy of “first-register, first-payment”. Registered pledges shall have priority over non-registered pledges, or where there are no registered pledges, settlement will be based on “first come, first served” policy. (CC, Art. 324[5]). If no agreement exists as to disposal of pledged property in case of nonperformance, pledged property may be auctioned off. (CC, Art. 336). In case pledged properties include various properties, pledge can select specific properties for disposal. Pledgee shall compensate pledgor if he disposes of pledged properties to unnecessary extent, causing loss or damage to pledgor. (CC, Art. 337).

Pledge is extinguished when (i) Civil obligation secured by pledge contract has been terminated; (ii) pledge contract has been cancelled or substituted by another security; (iii) pledged property has been disposed of to settle nonperformance of obligation or performance in variance to pledge contract; or (iv) as agreed by parties. (CC, Art. 343).

Pledging contract for immovable properties and land use rights of individuals must be registered with people's committee of commune or ward where pledged properties are located. Pledging contract for immovable properties and land use rights of organizations or entities must be registered with provincial Land and Housing Department. Pledging contract for other properties or assets may be registered with National Office of Security Transaction Registration under Ministry of Justice or its branch.

8 DISPUTE RESOLUTION

8.01 ARBITRATION AND AWARD:

Introduction.

There was, until promulgation of Ordinance 08 on July 1, 2003, no legislation governing enforcement of arbitration adjudicated by Vietnamese arbitrators in Vietnam. However, Vietnam acceded to New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards on Aug. 31, 1995, effective Nov. 1995 (“The Convention”). This accession followed adoption of

Ordinance on the Recognition and Enforcement of Foreign Arbitral Awards in Vietnam ("Ordinance") which became effective Jan. 1, 1996. This Ordinance enables arbitrations held both outside and within Vietnam by foreign arbitrators, which are according to Vietnamese law as adjudged by Vietnamese judges, to be enforceable in Vietnam. This Ordinance has recently been replaced by Civil Procedures Code adopted by National Assembly on June 15, 2004 and effective on Jan. 1, 2005 (CPC).

Arbitration in Vietnam may take place at nongovernmental commercial arbitration centers. Five or more Vietnamese arbitrators are needed to establish economic arbitration center according to Ordinance No. 08/2003/PL-UBTVQH11 on Commercial Arbitration (Art. 14) (Ordinance 08). Upon issuance of Ordinance 08, judgments made by Vietnamese Commercial Arbitrator may be enforceable in Vietnam in same manner as civil judgment.

As in China, arbitration, after amicable conciliation, is favorable means of resolving international commercial disputes. Prior to 1987, international commercial disputes were settled by Vietnam Foreign Arbitration Council, which has now been merged with Vietnamese Maritime Arbitration Council and is known as Vietnam International Arbitration Centre (VIAC). VIAC, nongovernmental organization, is attached to Vietnam Chamber of Commerce and Industry, quasi-governmental and powerful business organization. VIAC has no compulsory jurisdiction and may only act where parties agree to refer disputes to it. Awards issued by VIAC are final and binding upon parties and are not reviewable by domestic courts. Parties to dispute may select their own arbiters from panel of both Vietnamese and foreign law experts. If parties cannot agree on arbiters, Chairman of VIAC may name presiding arbiter.

Foreign arbitration may now be enforced in Vietnam under 1958 New York Convention on Recognition and Enforcement of Foreign Arbitral Awards. CPC gives Vietnamese courts power to recognize and enforce in Vietnam foreign arbitrage awards from countries with which Vietnam has signed international convention or on basis of reciprocal interest. (Art. 343). Successful party to foreign award ("claimant") must pay court fees and may only file written request for recognition and implementation to competent Vietnamese court via Ministry of Justice. This can only be done if unsuccessful party ("respondent") has business operation or resides in Vietnam or if property being subject of dispute is in Vietnam at time of request. (Art. 344).

Written request must include full name and address of both parties and legal representative of successful party in Vietnam, if any, or address of relevant property in Vietnam and requests of successful party. (Art. 364). Documents to be enclosed with request include documents provided under Convention. If international Convention does not specify documents to be attached or there is no convention relating to matter, then Vietnamese original or notarized and certified copy of foreign arbitrage award and copy of arbitration agreement or arbitration clause certified, translated, and legalized in accordance with Vietnamese laws should be attached to request. (Art. 365).

Panel of Vietnamese judges will not retry substantive issues already determined by foreign arbitrators. However, respondent can request panel of judges to set aside award if respondent could affirmatively prove that parties to arbitration agreement do not have capacity to sign agreement; arbitration agreement has no legal effect under law of country which parties have elected to apply, or under law of country where arbitration was held if no governing law was chosen; claimant did not receive timely notice of appointment of arbiters, procedure to be followed or for some other reason party was prevented from exercising rights; award was based on issues which party did not agree to arbitrate or beyond arbitration agreement by parties. If arbitrable issues are severable, those may be recognized and enforceable; composition of arbiters or arbitration proceedings do not conform to arbitration agreement or laws of country where arbitration was held; foreign arbitrage award has been dismissed or suspended by competent authority of country where award was made. In addition, foreign arbitrage award will not be recognized and enforced in Vietnam if court decides that dispute should not have been settled by arbitration, or recognition and enforcement is contrary to basic Vietnamese principles. (Art. 370).

In contrast, foreign arbitrage award which is recognized and enforceable has same legal effect as legally effective decision issued by Vietnamese court and its enforcement by appropriate enforcement agency is treated like civil Vietnamese judgment. (Art. 375).

Appellant wishing to appeal to Supreme People's Court in Vietnam for nonrecognition and nonenforcement of foreign arbitrage award must file appeal with such Court within 15 days from date of Provincial People's Court's issuance of any court decision. (Art. 372).

New Legislation.

On Feb. 25, 2003, Standing Committee of National Assembly of Vietnam issued Ordinance No. 08/2003/PL-UBTVQH11 on Commercial Arbitration (Ordinance 08) which became effective on July 1, 2003. Ordinance 08 supersedes Government Decree No. 116/CP on Organization and Operation of Economic Arbitration Centers. Issuance of Ordinance 08 marked fundamental change in mechanism of enforcement of arbitrations adjudicated locally, which are now ensured by law to be executed and enforced on equal basis with court decisions or judgments. Ordinance 08 also makes ad hoc arbitration available for first time in Vietnam. Parties may select established arbitration center or arbitration panel consisting of arbiters appointed by parties.

Implementation of Ordinance 08 is supplemented by Government Decree No. 25/2004/ND-CP dated Jan. 15, 2004 (Decree No. 25/2004) and Resolution of Council of Judges of People's Supreme Court No. 05/2003/NQ-HDTP dated July 31, 2003.

Arbiters.

Under Ordinance 08, only Vietnamese citizens with graduate degree and at least five years of work experience in graduate field can be arbiters. It is not clear under Ordinance 08 whether arbiters need any professional registration or license. Further government guidelines may clarify arbiter's qualifications.

Commercial Arbitration Centers.

Commercial arbitration center can be established by five or more Vietnamese citizens who are qualified to be arbiters. Recommendation from Vietnam Lawyers Association (Hoi Luat Gia Viet Nam) (see category Legal Profession) is required. License for setting up commercial arbitration center is issued by Ministry of Justice. Application submitted to Ministry of Justice for establishment of commercial arbitration center includes: (i) Application including name, address and profession of founders, selected jurisdiction of center, place of principal office and agreement of founders on appointment of President of center; (ii) resume, educational degrees, certification of professional practice of founders; (iii) Arbitration Rules; and (iv) introduction letter from Vietnam Lawyers Association (Hoi Luat Gia Viet Nam). License for establishment and approval of Rules may be granted by Ministry of Justice within 45 days from receipt of application. (Decree 25/2004, Art. 5). Within 30 days from date of license, commercial arbitration center must register its activities with provincial department of justice where center is located. Failure to register results in withdrawal of license. Registration package includes: (i) Application for registration clearly stating address of principal office of center; (ii) notarized copy of license of center; and (iii) list of center's arbitrators. Registration is granted by provincial department of justice within seven days from receipt of application. (Decree No. 25/2004, Art. 7). License fee is 500,000d and registration fee is 200,000d.

Jurisdiction.

Under Ordinance 08, arbitration may be used to settle disputes arising from or relating to commercial activities including trade of goods, service provision, distribution, trade representation, agency, consignment, rent, lease, financial lease, construction, technology, licensing, consulting, investment, finance, banking, insurance, exploration, exploitation, air, inland waterway and railway transportation and other commercial activities provided by law. Definition of commercial activities under Ordinance 08 is broader than that under Commercial Law, which views commercial activities as strictly related to trade of goods and trade services.

When parties have selected arbitration as method of dispute resolution and one party then refers dispute to court, court may accept to hear only if parties' agreement on selection of arbitration as method of dispute resolution is found invalid.

Parties' agreement on selection of arbitration is invalid if: (i) Dispute arises from or related to noncommercial matter; (ii) signatory is unauthorized; (iii) signatory does not have full judicial personal capacity; (iv) parties' agreement does not clearly specify subject of dispute or which specific arbitration dispute should be referred to and parties failed to make supplemental agreement; (v) parties' agreement on selection of arbitration was not made in writing; (vi) signatory was under duress and cheated, and filed request to declare agreement on selection of arbitration invalid within six months from date of agreement and before arbitration panel opened its first hearing session.

Governing Law.

Dispute between Vietnamese parties shall be settled by arbitration under law of Vietnam. Dispute between parties of different nationalities shall be settled by arbitration under law of country mutually selected by parties, provided that application of such foreign law is not contrary to basic principles of Vietnamese laws. Arbitration panel selects governing law if parties fail to reach agreement on selection of governing law.

Statute of Limitations.

Unless otherwise prescribed by law, in case parties have agreed on settlement of dispute by arbitration, dispute must be referred to arbitration for settlement within two years from date dispute arises.

Procedures.

Dispute shall be settled by arbitration panel established by arbitration center or set up by disputing parties in accordance with Arts. 25 and 26 of Ordinance 08. Arbitration panel is composed of one or three arbitrators as agreed by parties with majority decision in case of three arbitrators. In event parties fail to appoint arbitrator, arbitrator(s) shall be appointed by president of center, if dispute is to be settled by arbitration panel established by center, or by provincial People's Court, if dispute is to be settled by arbitration panel set up by parties, upon request of plaintiff. Arbitrators may be appointed from list of arbitrators of arbitration centers. Foreign arbitrators are permitted where dispute involves foreign element. Foreign arbitrators must be qualified as arbitrators in accordance with laws of their home countries. In disputes involving foreign elements, arbitration panel may apply other procedures upon mutual agreement of parties. (Ordinance 08, Art. 49).

Interim Urgent Measures.

During arbitration process, where rights and legitimate interests of concerned party are infringed upon or in danger of being infringed upon, such party may file written request to provincial People's Court of locality where arbitration panel handling dispute is located seeking application of one or more interim urgent measures of: (i) Safe protection of evidences and proofs being destroyed or in danger of being destroyed; (ii) inventory of disputed property; (iii) prohibition of transfer or change in conditions of disputed property; (iv) sealing and storing disputed property; and (v) freezing bank accounts. (Ordinance 08, Art. 33). Party seeking application of interim urgent measure must provide satisfactory proof of grounds for applying such measure and pay security deposit as per decision of court to prevent abuse of interim urgent measures. In any event, value of disputed property under interim urgent measures shall not be more than claimed material liability amount of other party. (Ordinance 08, Art. 34).

Award.

Arbitration award is final and binding.

However, party may file written request to provincial People's Court where award is issued for cancellation of award within 30 days from receipt of award. (Ordinance 08, Art. 50). Court shall not review substantive matter of dispute but only validity of request for cancellation of award and permitted grounds for cancellation, which are: (i) Absence of arbitration clause; (ii) invalidity of arbitration clause; (iii) composition of arbitration panel and fulfillment of procedures are not consistent with parties' agreement; (iv) arbitration panel has no jurisdiction to hear dispute; (v) arbitrators violate their obligations during settlement process; (vi) award is contrary to public interest of Socialist Republic of Vietnam. (Ordinance 08, Art. 54). Parties may appeal court's decision to Supreme People's Court within 15 days from date of court's decision. Arbitration award is enforceable in the same manner as civil judgment.

9 DOCUMENTS AND RECORDS

9.00 In General

Legislation.

New Law on Notarization. National Assembly of Vietnam recently promulgated Law on Notarization No. 82/2006/QH11 dated Nov. 29, 2006 effective on July 1, 2007 (“LON”). Decree No. 79/2007/ND-CP on Issuance of Copies of Original Registries, Certifications of Copies from Original Documents and Certification of Signatures, promulgated by the Government on May 18, 2007 (“Decree 79”). Decree 02/2008/ND-CP detailing and guiding implementation of number of articles of Law on Notarization dated Jan. 4, 2008 (``Decree 02'').

As of July 1, 2007, authority for notarization and certification is now clearly defined. Notary Office is no longer authorized to certify true copies and true signatures. Such authorization is now done by People's Committee of wards and districts. Notary Office is now in charge of notarizing contracts and civil transactions.

Notarization of Contracts and Civil Transactions.

Notary Office may notarize written contracts and transactions, including transactions related to real property. Notary Office may also attest to various items as set forth in the LON. (LON, Art. 4). Notary Office must inspect contracts and transactions, and if provision inconsistent with the law, Notary Office must point such out to the parties and request revision thereto. If revision is not made, Notary Office may refuse to notarize document. (LON, Art. 35[5]). Under LON, documents are generally required to be notarized within two days after receipt by Notary Office. In complicated cases, notarization process may take longer, but may not exceed ten days. (LON, Art. 38[2]).

Certification of Copies and Signatures.

In regard to certification of copies and signatures, authority is delineated as follows: (1) District-level Justice Division, under District Peoples' Committees, may certify copies of original documents in foreign language, and certify the signature of translators of documents from foreign language to Vietnamese or from Vietnamese to foreign languages and certify signatures of documents in foreign language; (2) People's Committee at Ward or Village level may certify copies of original documents in Vietnamese, and certify signatures of documents in Vietnamese; (3) Foreign embassies and consulates of Vietnam may certify copies of documents in Vietnamese or English, as well as signatures thereon. (Decree 79, Art. 5).

9.01 SEALS:

Legislation.

Decree No. 58/2001/ND-CP of Government dated Aug. 24, 2001 on Management and Use of Seals (Decree 58/CP), effective on Sept. 10, 2001, as amended by Decree No. 31/2009/ND-CP dated Apr. 1, 2009 effective June 1, 2009 (``Decree 31'').

Official seals are used by all state authorities, political organizations, social-political organizations, social-professional organizations, public associations, economic organizations, armed forces units, foreign organizations in Vietnam (organizations) and certain state officers. Seal conveys legal validity of documents sent out by organizations or officers. (Decree 58/CP, Art. 1). General Department of Police under Ministry of Public Security and provincial police department are authorized to grant permission for making seals. Organization establishment license or registration and seal making application must be submitted to police department. Once seal application is approved, permit for seal making will be granted and applicant shall have to pay fee as stipulated by law. (Decree 58/CP, Arts. 9 and 10). Current fee of around $11 is charged for making seal, which must be manufactured by nominated shops and in conformity with standard size and shape determined by police department. Red is only color of ink allowed to be used with seal.

Seals brought in from abroad by foreign diplomatic missions, consulate offices, representatives of international organizations (UN system), consular sections, military attaché sections, and other sections under foreign diplomatic missions in Vietnam should be registered with Ministry of Foreign Affairs of Vietnam before use. Other foreign agencies and nongovernmental organizations wishing to use their own foreign seals in Vietnam shall have to register seals with Ministry of Public Security. (Decree 58/CP, Art. 11). Once application is approved, seal registration will be granted.

10 EMPLOYMENT

10.01 LABOR RELATIONS:

Legislation.

Vietnam's Labor Code promulgated by National Assembly on June 23, 1994 and effective on Jan. 1, 1995 which has been amended and supplemented by Law No. 35/2002/QH10 adopted by National Assembly on Apr. 2, 2002 and effective on Jan. 1, 2003 (LC) and Law No. 74/2006/QH11 adopted on Nov. 29, 2006 and effective on July 1, 2007 and Law No. 84/2007/QH11 adopted on Mar. 2, 2007 and effective on Apr. 11, 2007; Decree No. 44/2003/ND-CP of Government dated May 9, 2003 providing detailed regulations on implementation of some Articles of LC on labor contracts (Decree No. 44/CP); Decree No. 114/2002/ND-CP of Government dated Dec. 31, 2003 providing detailed regulations on implementation of some Articles of LC on wages and salaries (Decree No. 114/CP); Decree No. 195/CP of Government dated Dec. 31, 1994 providing detailed regulations and guidance for implementation of Articles of LC on working time and rest time (Decree No. 195/CP) as amended by Decree No. 109/2002/ND-CP of Government dated Dec. 27, 2002; Decree No. 196/CP of Government dated Dec. 31, 1994, providing detailed regulations and guidance for implementation of Articles of LC on collective labor contract (Decree No. 196/CP) as amended by Decree No. 93/2002/ND-CP of Government dated Nov. 11, 2002; Decree No. 96/2006/ND-CP of Government dated Sept. 14, 2006 on interim trade unions in enterprises; Official Dispatch No. 4388/LDTBXH-CSLDVL of

Ministry of Labor, War Invalids and Social Affairs dated Dec. 13, 2002 on registration of collective labor contracts; Decree No. 06/CP of Government dated Jan. 20, 1995, providing detailed regulations and guidance for implementation of Articles LC on labor safety and hygiene (Decree No. 06/CP) as amended by Decree No. 110/2002/ND-CP of Government dated Dec. 27, 2002; Decree No. 34/2008/ND-CP of Government dated Mar. 25, 2008 on employment and management of expatriate employees (Decree 34); and Circular No. 08/2008/TT-BLDTBXH of MOLISA dated Mar. 25, 2008 providing guidelines for implementation of Decree 34; Decree No. 62/2009/ND-CP of Government dated July 27, 2009 providing detailed regulations on implementation of Articles of Law on Medical Insurance; Decree 127/2008/ND-CP of Government dated Dec. 12, 2008 effective on Jan. 1, 2009 providing detailed regulations and implementing guidelines on Articles of Law on Social Insurance regarding job loss insurance (Decree 127).

General.

Labor Code (LC) is initial regulation of Vietnam regarding labor in market-oriented economy. Code mainly regulates labor relations between wage-earning employee and employer. (LC, Art. 1). Labor relations are established and implemented through negotiation and agreement based on principles of non-coercion, equality, cooperation, and respect for legitimate rights and interests of both sides.

Labor Contracts.

Labor contract is much different from employment relationship under centrally-planned economy, which was administrative formality. Labor contract is agreement between employer and employee on job, working conditions, and rights/obligations of both sides in labor relationship. (LC, Art. 26). Labor contract should be agreed to by both sides and should contain following provisions: type of work; working time; rest time; wage; work site; duration of contract; conditions for labor safety and health; and social insurance for workers. (LC, Art. 29). According to LC, there are three types of labor contracts: labor contract without duration; labor contract with definite duration of one to three years; labor contract of seasonal character or for specific work with duration of less than one year. (LC, Art. 27). Labor contract with definite duration of less than one year or of one to three years will ultimately become contract without duration if employee continuously works for employer, and rights and obligations of parties thereto will be governed by law relating to employment contracts without duration. Labor contract may be signed directly between employer and employee or between employer and legally authorized representative of group of employees. Employee may enter into labor contracts with several employers provided that he/she is able to perform assigned work and comply with regulations on working time and rest time. In case of employment of minors allowed under LC, there must be written consent of parent or guardian for labor contract signed with employee aged less than 15 years. Under LC, either employee or employer has right to unilaterally terminate contract before term in number of cases. (LC, Arts. 37, 38). Labor contracts must be in writing except for temporary jobs with duration of less than three months and jobs as housemaid. (LC, Art. 28).

Wages.

Employee's wage can be agreed upon by employer and employee and paid according to labor productivity, quality or effectiveness of work but may not be lower than minimum wage set by Government. (LC, Art. 55).

According to LC, employer is able to choose specific form of payment from following: by hour/day/week/month worked, based on productivity as specified by contract. However, specific type of payment must be maintained for certain period and employee must be well informed of any changes to ensure stability of employee's life. (LC, Art. 58). Furthermore, LC provides that worker who works extra hours during night be paid additional 30% (minimum) of day wage. (LC, Art. 61). Schedule of allowances, bonuses, pay raise and other incentives may be agreed upon in following ways: labor contract; collective labor agreement; as stipulated in statute of enterprise. (LC, Art. 63). Under amended LC, from Jan. 1, 2003 annual bonus for employee is no longer compulsory. Based on annual business results and work performance of employee, employer may decide on bonus award. Employer shall be responsible for issuing internal regulations on bonus award, on which consultation with grass roots trade union is required. Changes in current annual bonus schemes established as compulsory under old law should be made in consultation with grass roots trade union and agreement with employees. Overtime payment is now increased from 200% to 300% of normal salary if worker works overtime on public holidays or annual leave days. (LC, Art. 132).

Hours.

Labor Code is based on theory that right to work and right to rest are fundamental rights of employees in market-oriented economy and should be protected by law.

Maximum working time is eight hours per day and 48 hours per week. If employer and employee mutually agree, extra hours may be added but must not exceed 50% of total normal working hours (for total of 12 hours per day, including normal working hours and extra working hours) or 200 hours per year or 300 hours per year in special cases (normally in garment and food processing industries). From Oct. 2, 1999, civil servants only work 40 hours per week. Government encourages all business sectors to apply this 40 hour workweek for employees.

Employee is entitled to have at least one day (24 hours) of rest per week. If holiday falls on rest day, employee is to have additional day of rest immediately following said holiday. Employee working for 12 months in enterprise or under employer is entitled to annual leave with full wages paid. Number of days for annual leave may range from 12 to 16 days corresponding to working conditions of employment. (LC, Arts. 72-74).

Occupational Health and Safety Measures.

Regulations on occupational health and safety shall cover labor safety and hygiene of working environment, obligations of employers and employees; organizations and individuals who are directly concerned with labor production; as well as government and trade unions. Labor Code defines following concepts: labor accidents, occupational diseases, and rights of employee who is victim of labor accident or occupational disease.

Social Insurance.

Labor Code's aim is to expand and gradually improve material well-being of employee and his/her family in event that said employee is affected by illness, pregnancy/child birth, retirement, death, industrial accident, occupational disease, retrenchment, or any other difficulty. Two types of social insurance exist: voluntary and obligatory social insurance, which applies to various categories of workers and enterprises. (LC, Art. 140). Obligatory social insurance shall apply to all employment with term of three months or more in all enterprises and organizations. Employer is responsible to contribute maximum of 15% of total wage fund while contribution of each employee is 5% of his/her wage. (LC, Arts. 141, 149).

Job Loss Insurance.

For enterprises employing over ten employees, both employer and employee pay to job loss insurance fund 1% of monthly salary. This applies only to employees who are Vietnamese citizens with labor contracts longer than 12 months or indefinite term. (Decree 127, Arts. 2, 3 and 25). If enterprises pay on behalf of employees then paid amount must be 2%. Salary used for premium is not higher than 20 months' general minimum salary enacted by Government at time of payment for job loss insurance. (Decree 127, Art. 27).

Payment duty for work loss allowances or retrenchment allowances to employees in case of termination of labor contracts transfers from employer to job loss insurance fund. However, employers are still responsible for work loss allowances or retrenchment allowances for employment before Jan. 1, 2009. (Decree 127, Art. 41).

Trade Unions.

LC recognizes trade unions. Law on Trade Unions was passed by National Assembly on July 10, 1990, which defines functions, powers and obligations of trade unions and role of trade unions with respect to matters which fall under Government jurisdiction. Trade unions are established to promote the rights and interests of employees. In most cases, newly established business and existing businesses are required to allow trade union organization to be established within their entity. Law on Trade Unions gives no specific criteria for establishment of trade unions; however, obstructing formation of unions or discrimination against union members is strictly prohibited and punishable under law. (LC, Art. 154).

Law on Trade Unions is silent on whether more than one trade union can be active in one place of employment. Under law, trade unions have obligation to serve interests and protect rights of employees. In addition, they are obligated to act as employees' liaison to State and to employer. Foreign invested enterprises and offices of foreign business cooperation agreement having union organizations operating in accordance with Law on Unions pay 1% of salary funds for union dues.

Resolution of Labor Disputes.

According to Art. 157 of LC, labor disputes are defined as disputes over rights relating to employment, wages, earnings, working conditions, implementation of labor contracts, collective labor agreements and vocational training process. Disputes are either between individual employee and employer or between employee body and employer.

Procedures to resolve labor disputes differ according to type of labor dispute. Competent state agencies or organizations in charge of resolving disputes are: Council of Labor Arbitration at enterprise level or labor arbitrator of district labor agency; Council of Labor Arbitration at provincial level (only for collective labor disputes); and Labor Court. If employee does not agree with decision of Council of Labor Arbitration in collective labor dispute, employee has right to appeal to Labor Court for resolution or to stage strike.

Procedures regulating labor lawsuits are no longer independent procedures. Labor lawsuits proceed in similar manner as civil case in accordance with provisions of Civil Procedural Code.

Labor Relations in Foreign Invested Enterprises and Other Foreign Organizations in Vietnam.

Recruitment of Vietnamese nationals by foreign offices, branches, etc. must first be attempted through local labor agents. If agents fail to supply qualified candidates within 15 days, these entities can directly employ Vietnamese nationals. From Jan. 1, 2003, foreign invested enterprises (established under Law on Foreign Investment in Vietnam) may directly recruit employees instead of obligatorily recruiting through local labor supplying agencies.

Foreigners working in Vietnam must obtain work permit from provincial Department of Labor, War Invalids and Social Affairs. Work permit will be valid for maximum three years and may be renewable. (Decree 34, Art. 4). Members of board of management of joint stock company, members of board of shareholders of limited liability company, owners of limited liability companies, foreigners entering Vietnam to offer services, and foreign lawyers licensed by Ministry of Justice to practice in Vietnam are not required to obtain work permit. Foreigners working in Vietnam for less than three months or foreign experts retained to resolve emergency matters that local experts or foreign experts currently in Vietnam may not be able to resolve are also not required to obtain work permits. (Decree 34, Art. 9). In these cases, Vietnamese employer or partner must report to provincial Department of Labor, War Invalids and Social

Affairs at least seven working days prior to foreign workers commencing work in Vietnam their names, ages, nationalities, passport numbers, dates of commencement and dates of completion of work.

Wages and salaries and other monetary benefits for Vietnamese employees are denominated in Vietnamese dong in foreign investment enterprises or BCC parties, or possibly in US dollar in other foreign offices and paid in Vietnamese dong.

Government of Vietnam has set general minimum basic wage or salary for Vietnamese employees working in foreign invested enterprises or BCC parties, which currently is VND 1,200,000 for enterprises located in urban districts of Hanoi and Ho Chi Minh City; VND 1,080,000 for enterprises located in suburban districts of Hanoi and Ho Chi Minh City and urban districts of Hai Phong, Bien Hoa and Vung Tau cities; or VND 950,000 for enterprises in other locations.

11 FOREIGN TRADE AND COMMERCE

11.01 CUSTOMS:

Legislation.

Commercial Law adopted by National Assembly on June 14, 2005 and effective Jan. 1, 2006; Customs Law No. 29/2001/QH10 adopted by National Assembly on June 29, 2001, effective on Jan. 1, 2002 as amended by Law No. 42/2005/QH11 adopted by National Assembly on June 14, 2005; Government Decree No. 154/2005/ND-CP dated Dec. 15, 2005 guiding implementation of some articles of Customs Law on issues of customs procedures, inspection and supervision; Decree No. 12/2006/ND-CP of Government dated Jan. 23, 2006 on implementation of Commercial Law provisions on activities of international sales and purchases; sales and purchase agents, processing; and transit of goods with foreigner (Decree 12/2006); Law on Export and Import Duties promulgated by National Assembly on June 14, 2005 which came into effect on Jan. 1, 2006; Decree No. 149/2005/ND-CP on implementation of LEID issued by Government, on Dec. 8, 2005 (Decree 149/2005); Decree No. 97/2007/ND-CP of Government dated June 7, 2007 on administrative fines and/or compulsory sanctions applicable to breaches of regulations in customs sector; Decree No. 18/2009/ND-CP of Feb. 18, 2009, amending articles of Government Decree No. 97/2007/ND-CP of June 7, 2007, on handling of administrative violations and coercive enforcement of administrative decisions in customs domain.

Introduction.

Vietnam customs is centralized and organized under Government through Ministry of Finance. Stated purpose of customs law is to create favorable conditions for export and import activities and exit and entry across borders of Vietnam in accordance with law of Vietnam and international treaties and practices relating to customs activities. (Customs Law, Arts. 1 and 5).

Customs Duties.

Vietnamese Government strongly encourages export and provides guidance for efficient use of imports in manufacturing and general consumption to protect and develop domestic production, increase effectiveness of export and import activities, expand foreign economic and trade relations, and contribute towards achieving national social and economic goals.

Minister of Finance is responsible for instructing organizations and managing collection of import and export duties. (LEID, Art. 27). Chairman of Provincial People's Committee is responsible for instructing organizations and coordinating collection of import and export duties in province. (LEID, Art. 26). Organizations and individuals who import or export goods are required to: (i) Make declaration fully, accurately and transparently; (ii) take responsibility for declared contents; and (iii) submit customs declaration to customs office, calculate and pay duties into State budget. (LEID, Art. 13). Custom office is responsible for checking and collecting import and export duties. (LEID, Art. 27).

Goods subject to duty include: (i) Goods imported or exported through Vietnam's border-gates or border, including goods imported or exported through land or river way border-gates, seaports, airports, transnational railway stations, international post offices or other customs clearance posts; (ii) goods brought from non-tariff zones into domestic market or from domestic market into non-tariff zones (non-tariff zones include export-processing zones, export-processing enterprises, tax-suspension zones, bonded warehouses, special trade economic zones, trade-industrial zones and other economic zones set up under decisions of Prime Minister); and (iii) other sold-purchased goods which are considered imported or exported goods. (Decree No. 149/2005, Art. 1).

Certain goods are banned from import or export and certain others are subject to conditional import-export. Such goods are listed in Government Decree No. 12/2006. Goods banned from import include: (i) Weapons, ammunition, explosives (except for industrial explosives), military arms and equipment; (ii) narcotics; (iii) depraved and reactionary cultural materials and products, toys harmful to children and public security; (iv) firecrackers (except signal flares for maritime security (in accordance with guideline of Ministry of Transportation); (v) used consumer products and home appliances in categories of textile and garment, footwear, electronics, cooling appliances, electrical home appliances, health equipment, interior decoration, home appliances made from pottery, glass, metal, plastic, rubber and other material, second-hand information technology products; (vi) kinds of stationeries banned from circulation in Vietnam; (vii) right-hand drive automobiles (including converted drive vehicles or disassembled vehicles) except for special purpose vehicles with right-hand drive for running in narrow areas including crane lorries, breakdown lorries, road sweeper lorries, spraying lorries, rubbish lorries, passenger buses at airport, pick-up trucks, concrete-mixer lorries, vans working in parks and golf courses; (viii) used equipment, vehicles including engines, frames, inner tubes, tires, accessories, motion cars, tractors and two-wheel and three-wheel vehicles, underframe of motion cars and tractors (including new underframe with second-hand motion and/or second-hand underframe with new motion), bicycles, motion two-wheel and three-wheel vehicles, ambulances, all kind of cars with structure and functions altered from original design; (ix) residues, waste, cooling equipment using C.F.C.; (x) products, materials containing asbestos of amphibole groups; and (xi) toxic chemicals in Table 1 regulated by convention on chemical weapons. Goods banned from export are: (i) Weapons, ammunition, explosives (except for industrial explosives), military equipment; (ii) relics, ancient objects, national treasures, antiques belonging to people and mass organizations; (iii) logs and sawn timbers from domestic natural forest woods; (iv) wild, precious and rare animals and plants are rare and precious animal and plant varieties in Group IA and IB; (v) rare aquatic products; (vi) cipher equipment, cipher programs and software of state secret; (vii) toxic chemicals of Group I stipulated in convention on chemical weapons. Details of such goods are listed under Circular 04/2006/TT-BTM dated Apr. 6, 2006 of Ministry of Trade on implementation guidelines of Decree No. 12/2006. Enterprises of all economic sectors are entitled to import or export goods not on list of goods banned from import-export or list of goods subject to conditional import-export. These enterprises must have registered their activities and goods in Business Registration Certificates and must have obtained registration code at provincial customs departments, but are not required to obtain import-export business licenses granted by MOT.

If enterprise wishes to import-export banned goods, it must obtain permission from Prime Minister. Goods, subject to conditional import, export, may be imported or exported only after obtaining permission or quotas issued by MOT or other specialized management ministries.

Goods which are not subject to duty payment, provided that all customs formalities are carried out, include: (i) Goods in transit, humanitarian aid goods, nonrefundable aid goods of foreign governments, United Nations organizations, inter-governmental organizations, international organizations, foreign non-governmental organizations, foreign economic organizations or foreigners for Vietnam and vice versa for socio-economic development or other humanitarian aid and emergency relief to remedy consequences of wars, natural disasters and epidemics; (ii) goods exported from non-tariff zones to foreign countries; (iii) goods imported from foreign countries into non-tariff zones for use in non-tariff zones only; (iv) goods transported from one non-tariff zone to another; and (v) petroleum products which are subject to natural resources tax paid to state budget when exported. Goods exempt from import-export duties include: (i) Goods temporarily imported for re-export or temporarily exported for re-import for exhibitions/trade fairs or displays; (ii) machinery, equipment, professional instruments temporarily imported for re-export or temporarily exported for re-import in service of work within certain period of time; (iii) movable assets brought into or out of Vietnam by Vietnamese or foreign organizations or individuals within prescribed limit; (iv) imported goods and exported goods of foreign organizations or individuals entitled to diplomatic privileges or immunity in Vietnam; (v) goods imported for processing for foreign parties shall be exempt from import tax and processed products exported to foreign parties shall be exempt from export tax, goods exported to foreign countries for processing for Vietnamese parties shall be exempt from export tax and when processed products re-imported shall be exempt from import tax on value of goods exported to foreign countries for processing under contract; (vi) imported goods and exported goods within duty-free luggage quotas of persons on entry or exit; (vii) certain goods imported to create fixed assets entitled to investment promotion, investment projects funded by Official Development Aid sources (applicable also to cases of expanding scale of projects or replacing or renewing technologies); (viii) plant saplings and animal breeds permitted to be imported for execution of investment project in domains of agriculture, forestry or fishery (applicable to cases of expanding scale of projects or replacing or renewing technologies); (ix) certain goods imported by BOT enterprises and subcontractors for execution of BOT, BTO or BT projects (applicable to cases of expanding scale of projects or replacing or renewing technologies); (x) certain equipment and devices imported for first time to create fixed assets of projects which are entitled to investment incentives and investment projects funded with ODA capital such as hotels, office buildings, apartments for rent, dwelling houses, trade and technical service centers, department stores, golf courses, tourist resorts, sports centers, medical examination and treatment, training, cultural, financial, banking, insurance, audit and consultancy service establishments; (xi) certain goods imported in service of petroleum activities; (xii) shipbuilding establishments shall be exempt from export tax on exported seagoing vessels and from import tax on machinery and equipment imported to create their fixed assets, means of transport included in investment project's technological lines, which are certified by Ministry of Science and Technology, imported to create their fixed assets and raw materials, supplies and semi-finished products in service of shipbuilding activities, which cannot be produced in Vietnam; (xiii) raw materials and supplies imported in direct service of production of software products, which cannot be produced in Vietnam, shall be exempt from import tax; (xiv) goods imported for direct use in scientific research and technological development, including machinery, equipment, spare parts, supplies and means of transport which cannot be produced in Vietnam, technology which cannot be created in Vietnam, scientific documents, books, newspapers and electronics, scientific and technological information sources shall be exempt from import tax; (xv) certain raw materials, supplies and accessories imported for production activities of investment projects which are on list of industries in which investment is particularly encouraged or list of geographical areas of exceptional socio-economic difficulties or investment projects of producing mechanical, electric or electronic accessories and spare parts shall be exempt from import tax for five years after commencement of production; and (xvi) goods produced, processed, re-processed in non-tariff zones without using raw materials and accessories imported from foreign countries, when being imported into domestic market shall be exempt from import tax. In cases of using raw materials and accessories imported from foreign countries, when goods are being imported into domestic market, only import tax on imported raw materials and supplies constituting these goods must be paid. Machinery, equipment and means of transport (except under 24-seat cars designed for passenger-cum-cargo) temporarily imported for re-export by foreign contractors for construction of ODA-funded works or projects in Vietnam shall be exempt from import tax upon import and exempt from export tax upon re-export.

Certain goods which may be exempted from duty payment, subject to consideration of Ministry of Finance and related Ministries, branches, include: (i) Goods imported for purposes of security, national defense, scientific research, education and training; (ii) gifts or sample goods from foreign organizations and individuals to Vietnamese organizations and individuals and vice versa within prescribed limits; and (iii) duty free goods imported for duty free shops.

Customs Duty Calculation.

Basis for calculating amount of import and export duty is: (i) (for goods items subject to tax rates expressed a percentage [%]), (1) actual imported or exported quantity of each item listed on declaration form, (2) dutiable value (as defined below), and (3) rates of duty applicable to each item (explained below); (ii) (for goods items subject to absolute tax rate), (1) actual imported or exported quantity of each goods item, indicated in customs form/declaration, and (2) absolute tax rate set for goods unit. Duty will be paid in Vietnamese currency, or freely convertible foreign currency. (Decree No. 149/2005, Arts. 6 and 8).

Dutiable value is determined for: (i) Exports: by contract selling price at border-gates of exportation excluding insurance and transportation costs determined according to provisions of law on customs valuation of export; and (2) imports: by actual paid price at first border-gate of importation under contracts determined according to provisions of law on customs valuation of import. (Decree No. 149/2005, Art. 7). In practice, customs authority may verify declared import value of goods by checking goods prices in international market through available resources including Internet to determine value for calculation of import tax to avoid under value declaration.

Conversion of foreign currencies into Vietnamese dong for determination of dutiable value is average exchange rate of interbank foreign currency market listed daily by State Bank of Vietnam. Customs duties are paid in Vietnamese dong or convertible foreign currencies. (Decree No. 149/2005, Arts. 7 and 8).

Rates of import duty include ordinary tax rates; preferential tax rates and especially preferential tax rates. Ordinary tax rates shall apply to goods imported from countries that have no agreement on most favored national treatment in their trade relation with Vietnam or do not apply special import preferences to Vietnam. Preferential tax rate applies to goods imported from countries or groups of countries that have agreement on most favored nation treatment in their trade relations with Vietnam. Especially preferential tax rate applies to goods imported from countries or groups of countries that have agreement with Vietnam on special import tax preferences under free trade area instructions, tariff coalitions or aim to create favorable conditions for border trade exchange and other cases of special preferential treatment. Ordinary tax rates shall be 50% higher than preferential tax rates. (Decree No. 149/2005, Art. 9).

Organization of Implementation.

Ministry of Finance (MoF) shall be responsible for organizing and directing collection of import, export duties; regulating conditions of and procedures for tax exemption, consideration for tax exemption or reduction, tax refund, collection of tax arrears and handling of tax-related violations; taking prime responsibility for, and coordinating with State Bank of Vietnam in promulgating regulations on and guiding credit institutions in providing information on taxpayers in service of inspection of import-export duties collection. Provincial People's Committee is authorized to direct coordination of collection and management of import-export duties in respective province. (Decree No. 149/2005, Arts. 25 and 26).

Time Limit for Payment of Import-Export Duties.

Time limit for payment of export duties shall be 30 days from date taxpayers register customs declarations. Taxpayers who have not committed tax fraud, have no tax debts and have complied with laws on reporting are given preferential time limit for payment of duties of: (i) 275 days, counting from date taxpayers register customs declaration, for supplies and raw materials imported for production of goods for export; (ii) 15 days, from expiry of temporary import duration or temporary export duration, for goods temporarily imported for re-export or temporarily exported for re-import respectively; or (iii) 30 days, after taxpayers register customs declaration, for other imported goods. For taxpayers who have failed to observe tax laws properly but have tax liability guaranteed by credit institution, time limit is duration of guarantee but not longer than time limit applicable to taxpayers who have observed tax laws properly. Taxpayers who have failed to observe tax laws properly and have no guarantee from credit institution have to pay full import duties before receiving goods. For imported consumer goods, import duties must be paid in full before receipt of goods, even if there is guarantee from credit institution. Tax must be paid no later than 30 days from date taxpayer registers customs declaration. (Decree No. 149/2005, Art. 14).

Dealing with Breaches.

Taxpayers violating LEID shall be dealt with as follows: payment overdue: fine of 0.1% (one thousandth) of overdue amount for each late day shall be imposed, if payment is delayed for more than 90 days enforcement of payment shall be applied; failing to comply with provisions on declaration and registration for tax payment as prescribed by law, depending on nature and seriousness of violations: administrative sanctions will be imposed against tax-related violators; falsely declares or evades paying tax: to pay in addition to full tax amounts, fine equal to one to five times of evaded tax amount, depending on nature and seriousness of their violations. Violators failing to pay taxes and/or fines according to tax-handling decisions shall be forced to do so through following measures: (a) Banks, other credit institutions or treasuries shall be forced to deduct sums of money from violator's deposit accounts to pay taxes and/or fines into State budget according to tax-handling decisions of tax agencies or competent agencies; (b) goods and materials temporarily seized for 30 days to ensure full collection of tax amounts and/or fines; (c) auctioning temporarily seized goods and materials in accordance with provisions of law to ensure full collection of tax amounts and/or fines; (d) customs agencies shall not carry out export or import procedures for taxpayer's subsequent shipments until full tax amounts and/or fines have been paid.

Within 60 days from date of registration of customs declaration, if taxpayers themselves discover error of tax amount shortage and actively pay such shortage into state budget, they shall be exempt from sanctions.

If tax evasion in large amounts is discovered, or despite having been administratively sanctioned for tax-related violation, taxpayer continues to commit such violations again or commits another serious violation, he/she shall be examined for other criminal liability as provided by law. (Decree 149/2005, Art. 23).

11.02 FOREIGN EXCHANGE:

Legislation.

Law on State Bank of Vietnam (SBV) and Law on Credit Institutions promulgated by National Assembly on Dec. 12, 1997, effective as from Oct. 1, 1998; Law on amendment and supplementation to some articles of Law on State Bank of Vietnam on June 17, 2003; Law on amendment and supplementation to some articles of Law on Credit Institution on June 15, 2004; Ordinance No. 28/2005/PL-UBTVQH11 dated Dec. 13, 2005 on foreign exchange; and Government Decree No. 160/2006/ND-CP, dated Dec. 28, 2006 on foreign exchange control, replacing Decree No. 63/1998/ND-CP dated Aug. 17, 1998 on foreign exchange control; and Decree No. 96/2008/ND-CP dated Aug. 26, 2008 on functions, authorities and organization of SBV.

Introduction.

Vietnamese currency is the dong and is issued by State Bank of Vietnam (“SBV”). SBV is responsible for management of foreign exchange and regularly issues rules and regulations controlling foreign exchange. It is also responsible for licenses to organizations and private persons for foreign exchange transactions. It is also responsible for organization and management of foreign currency interbank market and foreign exchange market in Vietnam. All acts of import, export, purchase, sale, transfer, and payment of foreign exchange are subject to State regulations on management of foreign exchange.

General Principles.

Foreign exchange transactions can only be made through SBV, credit institutions or other organizations or persons authorized by SBV. Residents and nonresidents are prohibited from purchasing, selling, making payments or loans in foreign currencies and publishing prices in foreign currencies except when authorized by SBV.

All foreign currency received from export of goods or provision of services or other transactions must be deposited in accounts at banks permitted to carry out business using foreign exchange, except for some cases of payment in cash, which shall be considered and approved by SBV. (Decree 160/2006, Art. 6.3).

Foreign exchange legislation divides entities into two groups: residents and nonresidents with different regulations for each group. Residents include: (i) Economic entities of all sectors established and operating in Vietnam; (ii) credit institutions established and operating in Vietnam; (iii) all state agencies, armed forces, organizations of all kinds operating in Vietnam; (iv) representative offices of those named in (i), (ii) and (iii); (v) diplomatic missions or representative offices of Vietnam located overseas; (vi) Vietnamese citizens residing in Vietnam or residing abroad for period of less than 12 months and those working for (iv) and (v) and accompanying persons; (vii) Vietnamese citizens going abroad for tourism, study, treatment of illness or to visit relatives; and (viii) foreign citizens residing in Vietnam for more than 12 months, except for those entering Vietnam for tourism, study, treatment of illness or working for foreign diplomatic missions or representative offices of foreign traders in Vietnam. Nonresidents include all other entities or persons. Governor of SBV has right to decide when it is not clear whether person is resident or nonresident.

Allowable Uses of Foreign Exchange.

Foreign exchange can be used for: (i) Transactions with authorized credit institutions and other organizations; (ii) internal capital transfer by resident entities and subsidiaries; (iii) capital contribution by residents to foreign investment projects in Vietnam; (iv) payment to residents under export-import consignee contracts; (v) payment to contractors by investors or main contractor for overseas transfer; (vi) payment to residents being insurance entities in relation to goods or services requiring overseas re-insurance; (vii) payment to residents doing business in field of duty-free shop or offshore storage; (viii) payment of customs or services fees to customs offices or agencies from nonresidents; (ix) payment of immigration-related fees or charges to diplomatic missions; (x) salary payment to foreigners; (xi) bank transfer between nonresidents or payment of exported goods or services to residents; and (xii) other cases determined by SBV Governor.

Foreign Currency Accounts Held by Entities in Vietnam.

Resident and nonresident entities are allowed to open foreign currency accounts with authorized credit institutions for: (i) Collection from overseas; (ii) collection from permissible sources in Vietnam; (iii) cash collection as SBV's guidance which will be provided later; (iv) sales to authorized credit institutions; (v) payment to or transfer for current transactions, capital transactions and other permissible transactions in Vietnam; (vi) conversion to other foreign currencies or other measures of payment in foreign currency; (vii) cash withdrawal for out-of-pocket expenses of employees during business trips abroad; (viii) payment or transfer for salaries, wages and/or allowance to foreigners; and (ix) transfer to overseas or domestic accounts of nonresidents or for payment to resident for exported goods and services. (Decree 160, Art. 30).

Foreign Currency Accounts Held by Individuals in Vietnam.

Resident and nonresident individuals are allowed to open foreign currency accounts with authorized credit institutions for: (i) Collection from overseas; (ii) collection from permissible sources in Vietnam; (iii) cash collection as SBV's guidance which will be provided later; (iv) sales to authorized credit institutions; (v) payment to or transfer for current transactions, capital transactions and other permissible transactions in Vietnam; (vi) conversion to other foreign currencies or other measures of payment in foreign currency; (vii) donations, inheritance in accordance with laws; (viii) cash withdrawal; (ix) transfer to overseas or domestic accounts of nonresidents; and (x) transfer to saving accounts with authorized credit institutions. (Decree 160, Art. 30).

Overseas Bank Accounts.

Residents being organizations and individuals who are permitted to open accounts and deposit foreign currencies in foreign countries include: (i) Credit institutions for foreign exchange transactions made overseas; (ii) economic organizations having branch or representative office overseas or having foreign loans and demand for such account under commitment with foreign partners; (iii) diplomatic missions or representative offices of Vietnam located overseas; (iv) Vietnamese citizens residing overseas. Detailed guidance on conditions, procedures for aforesaid approval have not yet been issued. (Decree 160, Art. 31).

Obligation to Sell Foreign Currencies.

At present, resident organizations shall no longer be required to sell their foreign currencies to banks.

Foreign currency revenues in form of aid, donation, and sponsorship are not required to be sold to banks if donors or sponsors otherwise agree.

Right to Buy Foreign Currencies.

Resident organizations can buy foreign currencies from authorized banks for current payment demands upon submitting to banks proper proof and documents certifying real demand for foreign currencies.

Nonresident organizations having Vietnamese dong from legal transactions can buy foreign currencies from authorized banks. Organizations must submit to banks: (i) Application; (ii) proof and documents certifying legal Vietnam dong revenues; and (iii) confirmation of fulfillment of tax payment from competent tax authority, in cases of early termination of operation in Vietnam.

Foreign individuals having foreign currencies in bank accounts can transfer money abroad or withdraw cash to take overseas. If foreign currency amount carried upon exiting Vietnam exceeds allowed limit, SBV permit is required. Foreign individuals having legal revenues in Vietnamese dong can buy foreign currencies at authorized banks and can transfer money abroad.

Resident organizations, which are foreign invested enterprises and parties to business cooperation contracts investing in projects of special significance under Government programs, may be entitled to foreign exchange guaranty which will be considered and granted by Prime Minister and stipulated in Investment License. Commercial banks and SBV have responsibility to supply enough foreign currency to meet demand of such organizations. (Decree 108/2006, Art. 16).

Border Declaration.

Governor of SBV will decide, from time to time, allowed limit of foreign currency carried in cash when entering or exiting Vietnam. Current limit is US$7,000 or equivalent amount in other currencies. Any amount greater than US$7,000 equivalent must be declared at customs office at border. When exiting Vietnam with foreign currencies greater than allowed limit, Vietnamese or foreign citizens must submit to customs offices SBV permit, except those who, upon their departure from Vietnam, carry unspent currencies declared upon entry into Vietnam.

Capital Transactions in Foreign Currencies.

All money transferred for purpose of foreign borrowing, loan payments, foreign lending and collections must be made through authorized banks and only after registration with SBV.

Foreign investors can transfer profits, allocated revenues and other legal incomes abroad after fulfilling financial obligations (tax payments and others) with State of Vietnam. When transferring abroad profits, allocated revenues and other legal incomes, foreign investors must submit to authorized bank: (i) Notarized copy of financial statements audited by authorized auditors; (ii) minutes of Board of Management on allocation of profits or revenues; and (iii) confirmation of competent tax authority on fulfillment of financial obligations. When remitting abroad legal capital, reinvestment capital, or implementation capital in business cooperation contracts, foreign investors must submit to authorized bank: (i) Notarized copy of business liquidation report approved by licensing authority; and (ii) confirmation of competent tax authority on fulfillment of financial obligations.

Exchange Rate of Vietnamese Dong.

SBV announces average exchange rate of Vietnamese dong against US dollar in interbank foreign currencies market in mass media on daily basis. This rate is used as basis for: (i) commercial banks to set their own exchange rates within limits set by SBV from time to time; (ii) calculation of import-export duties; (iii) setting exchange rates of Vietnamese dong and other foreign currencies; (iv) calculation of bidding prices in national bid evaluation; (v) conversion of foreign currencies in foreign invested projects; and (vi) implementation of other state financial and monetary policies. (Decision 64/1999/QD-NHNN).

Interbank Foreign Currencies Market.

Governed by SBV decision 101/1999/QD-NHNN13 dated Mar. 26, 1999 issuing regulations on organization and operation of interbank foreign currency market and SBV Decision No. 206/2000/QD-NHNN13 dated July 11, 2000 on revision to Decision 101.

This market is organized and controlled by SBV. SBV shall act as final buyer or seller and may intervene in any transaction for benefit of national monetary policies. Only credit institutions which have license to conduct foreign exchange business, good record of foreign exchange activities and have capable facilities and personnel, are permitted to join market. Currencies allowed to be traded are determined by SBV from time to time. Minimum amount traded is US$50,000 or equivalent per transaction. Forms of transaction are Spot, Forward, Swap or others permitted by SBV. Exchange rate of US dollar to Vietnamese dong is decided by supply and demand factors within limits set by SBV. Exchange rates of other currencies are decided by General Directors of member banks.

11.03 FOREIGN INVESTMENT:

Introduction.

Vietnam is now in process of unifying its legislative framework on investment in order to create common legal system for both domestic and foreign investments. For these purposes, on Nov. 29, 2005, National Assembly of Vietnam adopted Law on Investment No. 59/2005/QH11 ("New LOI") and Law on Enterprises No. 60/2005/QH11 ("New LOE") which apply to all enterprises established by domestic and/or foreign investors. These New LOI and New LOE entered into effect on July 1, 2006 and replaced all former laws governing foreign investment and domestic investment, such as Law on Foreign Investment in Vietnam of 1996 and its amendments of year 2000; Law on Enterprises of 1999 and Law on State Owned Enterprises of 2003. However, Article 170 of New LOE stipulates that foreign invested companies which were established before July 1, 2006 have right to select either re-registering their operations under New LOI and New LOE or not re-register. If such foreign invested companies decided not to re-register their operations under New LOI and New LOE, these companies shall still continue operating within scope of investment licenses within duration stipulated by investment licenses granted to them and these companies shall continue to be governed by former legal system on foreign investment in Vietnam. Therefore, former regulations on foreign investment still apply to many companies, and these regulations are described below.

Foreign Legislation.

Law on Foreign Investment promulgated by National Assembly on Nov. 12, 1996 (FIL); Law No. 18/2000/QH10 on amendment and addition to some articles of Law on Foreign Investment in Vietnam adopted by NA on June 9, 2000 (AFIL); Decree No. 24/2000/ND-CP of Government dated July 31, 2000 on implementation of FIL and AFIL (Decree 24) as amended by Decree No. 27/2003/ND-CP of Government dated Mar. 19, 2003 (Decree 27); Decree No. 62/1998/ND-CP of Government issuing regulations on BOT, BTO and BT under foreign investment; Decree No. 02/1999/ND-CP dated Jan. 27, 1999 on amendment to Decree 62 on Regulations on BOT, BTO and BT under foreign investment.

Introduction.

Vietnam allows investment by foreigners in many sectors, but encourages investment in export production, use of high technology, protection of ecological environment, research and development, agriculture, forestry and aquatic products, intensive labor employment, processing of raw materials, efficient utilization of natural resources and infrastructure projects, projects in form of build-operate-transfer, build-transfer-operate or build-transfer. Investment in mountainous and remote areas and areas with difficult economic conditions is also encouraged. Vietnam prohibits foreign investment in sectors and geographical areas that may damage national defense and security, historical and cultural relics, Vietnamese tradition and customs, environment and ecology, foreign poisonous or hazardous waste processing or production of poisonous chemicals or elements banned by international conventions. Decree 24/2000/ND-CP provides lists of especially encouraged, normally encouraged, restricted, prohibited investment projects and areas of investment encouraged. These lists have been revised by Decree No. 27.

Main Business Forms.

Foreign investors can invest in Vietnam in three forms: Joint Venture Enterprise ("JVE"), Business Cooperation Contract ("BCC") and Enterprise with 100% Foreign Owned Capital ("EFOC"). Build-Operate-Transfer ("BOT"), Build-Transfer-Operate ("BTO"), and Build-Transfer ("BT") investments are allowed for infrastructure projects. (FIL). Duration of foreign invested enterprises or business cooperation contract shall not exceed 50 years. Government may decide longer term but not more than 70 years for certain projects. (FIL). There are no guidelines as to which projects shall have duration of more than 50 years.

Joint Venture Enterprise (JVE).

JVE refers to enterprise jointly established in Vietnam by two parties or several parties involved on basis of joint venture contract or agreement; or new enterprise established in Vietnam as result of cooperation between foreign-invested enterprise and Vietnamese party or between any such joint venture and foreign partner on basis of joint venture contract. (FIL). JVE could also be established by licensed JVE operating in Vietnam with foreign investor, or Vietnamese enterprise, or licensed JVE, or enterprise with 100% foreign capital operating in Vietnam. JVEs also include enterprises set up by existing 100% foreign enterprise joint venturing with Vietnamese enterprises; health care, education and scientific research establishments or with overseas Vietnamese. JVE is established as limited liability company and as Vietnamese legal entity. Liability of each party is limited to amount of legal capital contributed. (Decree 24, Art. 11).

Foreign party may make its contribution of capital in: foreign currency, Vietnamese currency generated from investment activities in Vietnam, equipment, machinery, plant, building facilities, industrial property rights, technical know-how, technical processes, and technical services. Vietnamese party to joint venture may make its contribution of capital in: Vietnamese currency, foreign currency, value of land-use right, natural resources, value of right to use water surface and sea surface, equipment, machinery, plant, building facilities, industrial property, technical know-how, technical process and technical services. (FIL). Legal (paid-up) capital of JVE must be at least 30% of total project investment. For certain infrastructure development projects, forestation projects, projects in specially promoted areas or bigger projects, legal capital can be 20% or more of total project investment if approved by licensing authority.

Foreign party/parties in JVE must contribute at least 30% of legal capital of JVE. For certain fields, Government may stipulate maximum percentage foreign investors can contribute to legal capital of JVE, i.e. for maritime service JVE, ceiling is 49%; for securities JVE, 30%.

Business Cooperation Contract (BCC).

BCC is established by document signed between two or more partners to carry out investment activities in Vietnam without establishing legal juridical person. (FIL).

Enterprise with 100% Foreign Owned Capital (EFOC).

EFOC refers to enterprise in Vietnam whose capital is wholly owned by foreign investor(s). (FIL). It is established as limited liability company, self-managed and takes full responsibility for its business results. (Decree 24, Art. 21). Decree No. 27 also allows existing foreign invested companies to venture with other existing foreign invested companies and/or foreign investors in setting up new foreign invested companies in Vietnam.

Build-Operate-Transfer Project (BOT).

BOT is document signed between Vietnamese competent agency and foreign investor to build and operate infrastructure project for certain period of time; upon expiration of specified time, foreign investor transfers project to State of Vietnam without compensation. (FIL).

Build-Transfer-Operate (BTO).

BTO is document signed between Vietnamese competent agency and foreign investor for infrastructure project; upon completion of project foreign investor transfers it to State of Vietnam; Vietnamese government gives foreign investor right to operate project for certain period so that investor can recoup his investment and earn reasonable profit. (FIL).

Build-Transfer (BT).

BT is document signed between authorized Vietnamese agency and foreign investor to build infrastructure project; upon completion, foreign investor transfers project to State of Vietnam; in return, Vietnamese government offers favorable conditions to foreign investor to carry out another project to allow investor to recoup his investment and to earn reasonable profit. (FIL).

Alternative Business Forms.

(a) Representative Offices.

(Decree No. 72/2006/ND-CP dated July 25, 2006). Any foreign economic organization except airlines, credit institutions or insurance companies, holding valid business registration under laws of own country, can establish one or more representative offices in Vietnam. Branch rep offices are no longer allowed. Rep offices are subsidiaries of foreign economic organizations, which will be liable for all activities of rep offices in Vietnam before Vietnamese law. Rep offices are allowed to: (i) Promote and formulate commercial or tourist cooperation projects in Vietnam; (ii) promote and identify opportunities for sale of products or services in Vietnamese market; and (iii) supervise or monitor implementation of contracts signed between mother company and Vietnamese parties. Rep offices are not permitted to engage in any direct revenue-generating activities in Vietnam. Chief representative may enter into commercial contracts with Vietnamese parties for and on behalf of mother company under authorization on case-by-case basis.

Licensing Process.

General Administration of Tourism of Vietnam is responsible for administration of licensing of rep offices of foreign tourist organizations. Department of Industry and Trade are responsible for administration of licensing of rep offices of other commercial foreign organizations. To obtain license, organization must submit application with: (i) Application for establishment of rep office (standard form); (ii) certified copy of business registration certificate with notarized Vietnamese translation; and (iii) certified copy of audited financial report in latest fiscal year with notarized Vietnamese translation. Licensing authority has 15 days to issue license. Within 45 days from date of license, rep office must be open for operation and notification on activities, address, and number of foreign and Vietnamese staff must be submitted to licensing authority.

(b) Branch Offices.

Branches are subsidiaries of foreign organizations, which will be liable for all activities of branches in Vietnam.

According to Decree No. 72/2006/ND-CP dated July 25, 2006, foreign businesses are allowed to establish branch offices in Vietnam to carry out purchasing activities and other activities directly related to goods purchasing in accordance with Branch Establishment License and Vietnamese Law. Branches in banking and finance, legal services, culture, education and tourism comply with specialized regulations. In general, branches of foreign organizations are allowed to (i) rent offices and to lease or purchase equipment and facilities necessary for operation of branch; (ii) recruit Vietnamese and foreign employees to work in accordance with law of Vietnam; (iii) enter into contracts in Vietnam in accordance with activities stated in license for establishment of such branch; (iv) open Vietnamese dong and foreign currency accounts at banks licensed to operate in Vietnam; (v) remit profits abroad; (vi) have seal bearing name of branch.

According to Decree 92/2007/ND-CP dated June 1, 2007, any foreign tourism organization, which meets conditions listed below, could be considered for one branch license in Vietnam to engage in tourist services: (i) Foreign tourism organization must hold valid business registration under laws of own country; (ii) having conducted tourism business for at least five years since establishment and (iii) complete and valid dossiers. Branches of foreign tourism organizations in Vietnam are allowed to engage in (i) Tourist accommodation business; (ii) Tourist transportation business; (iii) Business of development of tourist resorts and tourist destinations; and (iii) Business in other tourist services.

Licensing Process.

General Administration of Tourism of Vietnam is responsible for administration of licensing of branches of foreign tourist organizations. MOIT is responsible for administration of licensing of branches of other commercial foreign organizations.

Application for branch license must include: (i) Application for setting up branch office in Vietnam (standard form); and (ii) certified copy of business registration certificate with notarized Vietnamese translation. Within 15 days from date of receipt of legitimate application, licensing authority will issue branch license.

Branch has different rights from rep office, chiefly right to earn profit from its business activities. Among obligations of branch office is 25% business income tax. Withholding tax for income remitted abroad applicable to foreign branches has been abolished.

(c) Investment in Capital Contribution and Buying shares of Vietnamese Companies.

According to Prime Minister's Decision No. 88/2009/QD-TTg dated June 18, 2009 (which amended Prime Minister's Decision No. 36/QD-TTg dated Mar. 11, 2003) (Decision 88), foreign investors including (i) foreign organizations established outside Vietnam and its branches both overseas and in Vietnam; (ii) organizations established in Vietnam in which foreign party's contribution is more than 49%; (iii) foreign individuals without Vietnamese nationality, residing overseas or in Vietnam, may contribute capital or purchase shares in Vietnamese enterprises such as equitized state-owned enterprises, shareholding companies, limited liability companies, partnerships and private enterprises in sectors which are not prohibited by laws.

Foreign investors are entitled to subscribe for initial shares initial issued by holding company or equitized owned-state enterprises, shares from quantity of shares eligible to be offered for sale and/or additionally issued shares of Shareholding Company and are entitled to acquire shares from shareholders of unlisted company or publicly listed company on Stock Exchange.

Limitation of ratios of capital contribution or purchase of shares by foreign investors in Vietnamese companies will depend on business sectors. In securities sector, foreign investors will be allowed to hold up to 49% of shares in unlisted and public joint stock company and foreign ownership cap will remain at 30% for domestic commercial banks. With respect to local companies carrying out services mentioned in WTO Commitments of Vietnam, foreign ownership cap is in accordance with provisions of its WTO Commitments and must comply with state-owned enterprises equalization plans if foreign investors contribute capital or purchase shares of such enterprises. For Vietnamese companies conducting business lines for which laws do not impose any restriction, foreign ownership cap is not limited.

Foreign investors are entitled to contribute capital or purchase shares by Vietnamese dong or freely convertible foreign currencies. Foreign investors may also purchase shares or contribute capital in form of assets, machinery, equipment, raw materials, goods, technology transfer, industrial property rights or other in-kinds.

Foreign investors have following rights: (i) Pledge shares in credit relations and as mortgage for ensuring execution of civil obligations in accordance with Vietnamese law; (ii) transfer share ownership and/or engage in activities in securities market when company is listed, in accordance with Law on Enterprise and Law on Securities; (iii) assign capital contribution portions and adjust investment capital during process of conducting business in accordance with Vietnamese laws and charter of entity; (iv) convert investment capital recoveries and profit from investment activities in Vietnam into foreign currency for remittance overseas after paying taxes to State of Vietnam and to related parties; (v) participate in management of enterprises to which foreign investor contributed capital or in which it purchased shareholding in accordance with Law on Enterprise and charter of entity; (vi) to have same rights and interests as domestic investors investing in shareholding companies, limited liability companies and partnerships. (Decision 88, Art. 11).

Purchase of shares, transfer of dividend incomes and share transfer incomes of investors must be made through Vietnamese credit institutions or foreign credit institutions operating in Vietnam.

(d) Investment in Buying Shares of Listed Company in Vietnam Stock Exchange.

According to Prime Minister's Decision No. 55/2009/QD-TTg dated Apr. 15, 2009, foreign organizations and individuals are allowed to purchase issued shares of listed companies or issued bonds in Vietnam Stock Exchange. Investors must be registered with Vietnam Stock Exchange through custody organizations. All foreign investors are allowed to hold not more than 49% of total shares of one company listed in Stock Exchange while there is no limit for foreign investors holding bonds listed in Stock Exchange. Foreign investors are also allowed to hold not more than 49% of charter capital of joint venture securities company or joint venture fund management company.

Approval Process for Main Business Forms.

Approval and issuance of investment licenses are made in either one of two processes: registration for investment license or evaluation for issuance of investment license.

Registration for Investment License.

To be entitled to benefit of registration for investment license process, project must meet following conditions: (i) It is not project under Group A (see catchline Evaluation for Issuance of Investment License, infra); (ii) it conforms to approved planning; (iii) it is not project that environmental impact report is required to be prepared; and (iv) 80% of its output products are for export; or it is non-Group A project investing into industrial zone in especially promoted or promoted economic sectors; or it is manufacturing project with investment capital of up to $5 million.

Application, made in Vietnamese language or in Vietnamese and another common foreign language, in five sets including at least one original set, includes: (i) Application form; (ii) joint venture contract and charter of joint venture enterprise or charter of 100% foreign owned enterprise or business cooperation contract; and (iii) certification on legal and financial status of investors.

Within 15 days from date of receipt of application document, licensing authority will issue its approval, which is investment license.

Evaluation for Issuance of Investment License.

Evaluation of foreign investment projects includes: (i) Legal status and financial capacity of foreign and Vietnamese investors; (ii) conformity of proposed project with government's plan for socio-economic development; (iii) socio-economic benefits including creation of new production capabilities, professions, products and market expansion; ability to create employment for working class; and generation of financial revenue; (iv) technical skills and technology to be applied, reasonable use and protection of resources, and protection of environment; and (v) reasonable land use, and valuation of assets to be contributed as capital by Vietnamese party (if any). (Decree 24, Art. 108).

Consideration and approval of projects: (1) Prime Minister decides on Group A projects: (a) projects without regard to investment capital volume: (i) construction of infrastructure for industrial zones, EPZs, hi-tech zones, urban zones, BOT, BTO and BT projects, (ii) construction and business of seaports, airports, air transport and maritime transport, (iii) oil and gas, (iv) post and telecommunications service, (v) publishing, printing service (except for printing of technical documents, packaging material, marks, labels or normal tags for shoes, garments, textile products), press, radio, television broadcasting, advertising attached to advertisement publication, cinematography, art performance, game, health care and medical establishments, education, scientific research, manufacturing medicines for human use, (vi) insurance, finance, auditing, inspection, (vii) exploring and exploiting rare and precious natural resources, (viii) construction of houses for sale, and (ix) national defense and security projects; (b) projects with invested capital of US$40 million or more in fields of electricity, mining, metallurgy, cement, chemicals, mechanical engineering, hotels, apartments for lease, tourist, resorts, entertainment complexes; and (c) projects using five or more hectares of urban land or 50 or more hectares of other land. (2) MPI decides on Group B projects (all projects not in Group A or projects decided by provincial People's Committees or provincial Authority of Industrial Zones, Export Processing Zones and Hi-Tech Zones). (3) Hanoi and Ho Chi Minh City's People's Committees decide projects with invested capital of US$10 million or less and all other provincial People's Committees decide projects with invested capital of US$5 million or less. Not all provincial People's Committees are allowed to issue investment licenses to projects of (a) building national highways, railways; (b) cement, metallurgy, electricity, sugar, alcohol, beer, cigarette, cigar and tobacco production, manufacturing and assembling motorcycles and automobiles; (c) travel service; (d) cultural, training or education projects; and (e) building and trading supermarkets. (4) Certain provincial Authorities of Industrial Zones, Export Processing Zones and Hi-Tech Zones are authorized to decide on projects within such industrial zones, export processing zones and hi-tech zones with invested capital of up to US$40 million except those falling into Group A category above. Land leases are considered simultaneously in evaluation of project if licensing authority is provincial People's Committee. If licensing authority is MPI, investors must obtain in advance proposal of provincial People's Committee on land lease price and agreement on land clearance and compensation procedures and submit these documents along with application for investment license. (Decree 24, Art. 89). Dossiers on technology transfer (if it is part of capital contribution) (Decree 24, Art. 81); environmental impact statements if investment is included on list of projects requiring impact statement issued by Ministry of Science and Technology (Decree 24, Art. 82); and preliminary designs illustrating architectural blueprint with general planning design (Decree 24, Art. 95) are also required for evaluation.

Licensing Authority.

If approved, MPI issues investment licenses for Group A and B projects and provincial People's Committee or provincial Authority on Industrial Zones and Export Processing Zones issues investment licenses for projects under its authorization. Investment license is also certificate of registration.

Application for evaluation for investment license, made in Vietnamese language or in Vietnamese language and another common foreign language, in 12 sets for Group A projects or eight sets for other projects, including one original set, include: (i) Application form; (ii) joint venture contract and joint venture charter or charter of 100% foreign owned enterprise or business cooperation contract; (iii) feasibility study detailing discussion of economic and technical aspects; (iv) written certification of legal status and financial standing of parties; and (v) other documents on technology transfer, environmental impact report, land lease and preliminary designs, if any.

For Group A projects, MPI will, within 30 working days from receipt of legitimate application after obtaining opinion from concerned ministries and provincial People's Committee, submit its evaluation of projects to Prime Minister. Prime Minister will issue decision within ten working days thereafter. MPI will issue investment license within five working days from receipt of Prime Minister's approval.

For Group B projects, MPI will complete its evaluation and issue investment license within 30 days from receipt of legitimate application.

For projects under its authority, provincial People's Committee or Authority on Industrial

Zones and EPZs will complete its evaluation and issue investment license within 30 days from receipt of legitimate application.

MPI, provincial People's Committee or Authority on Industrial Zones and EPZs may require additional documents for evaluation or amendment and revision of application documents and will issue written request within 20 days after receipt of legitimate application.

After licenses are issued, foreign invested enterprises must publish following information in central or local newspaper in three consecutive issues: (i) Name and address of enterprise or location of implementation of business cooperation contract, and name, address of branch, representative office or management office, if any; (ii) name, address of joint venture or business cooperation parties or foreign investors; (iii) legal representative of enterprise (i.e., to appear before court, arbitration and other state agencies of Vietnam); (iv) number and date of investment license, licensing authority, duration of enterprise or business cooperation contract; and (v) business scope and purposes. (Decree 24, Art. 27).

Joint Venture Enterprises.

Joint venture contract should contain: (i) Name, nationality, address, and authorized representatives of JVE parties; name and address of JVE; (ii) business scope and purposes; (iii) investment capital, legal capital, legal capital proportion, timetable and form of capital contribution, construction schedule; (iv) major products, proportion of goods for export and for domestic markets; (v) duration of JVE; (vi) legal representative of JVE; (vii) rights and obligations of JVE parties; (viii) financial principles of JVE; (ix) revision and termination of joint venture contract, transfer, operation termination and JVE dissolution; and (x) breach of contract and dispute resolution. Joint venture contract must be signed by authorized representatives of JVE parties on every page and in full on last page. Joint venture contract takes effect on date of investment license. (Decree 24, Art. 12).

Charter should include: (i) Name, address of JVE; name, address, nationality of authorized representative of JVE parties; (ii) business scope and purpose; (iii) investment capital, legal capital, legal capital proportion, timetable and form of capital contribution; (iv) JVE management structure; (v) procedures for adopting decisions of JVE; dispute resolution principles; (vi) legal representative of JVE; (vii) financial principles of JVE; (viii) ratio of distribution of profits and losses; (ix) labor relations; employment and training; (x) JVE duration, conditions for operation termination and JVE dissolution; and (xi) procedures for amendment or supplementation of charter. Charter must be signed by authorized representatives of JVE parties on every page and in full on last page. Charter will be registered with licensing authority. (Decree 24, Art. 13).

Business Cooperation Contracts.

Business cooperation contract should include: (i) Name, address, authorized representative of BCC parties, transaction address or address of place where project is to be implemented; (ii) business scope and purposes; (iii) contribution of parties, profit or loss sharing, contract performance schedule; (iv) major products, proportion of goods for export and domestic markets; (v) duration of contract; (vi) rights, obligations of BCC parties; (vii) financial principles; (viii) amendment and termination of contract, transfer conditions; and (ix) breach of contract, dispute resolution. Business cooperation contract must be signed by authorized representatives of BCC parties on every page and in full on last page. Contract takes effect on date of investment license. (Decree 24, Art. 7).

Enterprises with 100% Foreign Owned Capital.

Charter should include: (i) Name, address of enterprise; name, address, nationality of authorized representative of foreign investors; (ii) business scope and purpose; (iii) investment capital, legal capital, legal capital proportion, timetable and form of capital contribution; (iv) legal representative of JVE; (v) financial principles of enterprise; (vi) labor relations; employment and training; (vii) enterprise duration, conditions for operation termination and enterprise dissolution; and (viii) procedures for amendment or supplementation of charter. Charter must be signed by authorized representatives of foreign investors on every page and in full on last page. Charter will be registered with licensing authority. (Decree 24, Art. 22).

BOT, BTO, BT projects are decided by Prime Minister. Foreign investors may invest into BOT, BTO and BT projects officially listed by governmental agencies. Selection of BOT, BTO or BT investors through open bidding will be decided by Prime Minister. For projects not listed, investors are required to prepare project pre-feasibility study and if approved by Prime Minister, investor can apply for investment license.

For BOT or BTO or BT projects, investors must establish BOT company. BOT company will be legal entity and will operate from date investment license was issued by licensing authority. BOT companies are entitled to tax incentives and investment protection.

Application for investment license must be submitted to licensing authority with following documents: (i) BOT or BTO or BT contract initialed by contracting parties; (ii) joint venture contract if it is BOT joint venture company; (iii) charter of BOT company; (iv) project feasibility study; (v) material supply contract initialed or agreed in principle; and (vi) information on legal capacity and financial standing of investors.

BOT, BTO, BT contracts must include: (i) Nationality, registered address and authorized representative of contracting parties; (ii) goals and scope of activities; (iii) investment capital and paying-in schedule; (iv) capacity, technology and machinery and equipment, design requirements and technical standards, quality standards, quality supervision and control; (v) environmental protection measures and provisions; (vi) land use conditions, infrastructure, supporting facilities for construction and operation; (vii) construction schedule, duration of BOT company, time of transferring project; (viii) rights and obligations of parties, guaranty commitment and risk allocation; (ix) provisions of pricing, tolls, fees, charges, and receivables; (x) obligation to maintain normal operation of project; (xi) consultancy, inspection of design, equipment, implementation, completion and maintenance; (xii) technical conditions, operating conditions, quality of project when being transferred, principles of evaluation of project and transfer procedures; (xiii) validity of contract and events of early contract termination, provision of assignment; (xiv) dispute settlement body and procedures between contract parties and risk allocation between BOT company and governmental agencies; (xv) contract breaches by parties and settlement; (xvi) force majeure and settlement principles; (xvii) supports and commitments of governmental agencies; and (xviii) conditions to implement other projects (in case of BT contract).

Within 15 days after Prime Minister's approval, licensing authority will issue investment license. There is no time limit set for approval of application by Prime Minister. License will include: (i) Major terms and conditions of contract; (ii) investment capital, goals and duration of project; (iii) requirements of designs, technology, status and conditions of maintaining normal operation of project when it is transferred to Vietnamese State; (iv) tax and financial obligations; (v) land use right and supporting facilities; (vi) conditions of environmental protection; (vii) principles of pricing, adjustment of tolls, fees and charges; (viii) regulations regarding converting Vietnamese dong to foreign currencies; (ix) machinery, equipment and import and export of goods; (x) rights and obligations in running project/business and other projects (for BT investors); (xi) principles of project evaluation for transfer; and (xii) commitments of government and other agencies.

Application Fees.

Vietnam has introduced new incentive to encourage foreign investment into Vietnam. From July 1, 1999, there are no application fees for foreign direct investment projects in Vietnam.

Organization and Management of Enterprises.

Joint Venture Enterprises.

Highest body in charge is board of management. Each party appoints members to board in proportion to capital contribution but Vietnamese party must have at least two members on board. If joint venture involves one Vietnamese party and more than one foreign party or one foreign party and more than one Vietnamese party, Vietnamese or foreign party shall have at least two members on board. (FIL). Most important issues concerning operation of enterprise, including: (i) Appointment and dismissal of General Director, first Deputy General Director; and (ii) amendment or supplement to charter of JVE requires unanimous vote of board members present at Board meeting. Other matters require majority of board members to be present at meeting. (AFIL).

Chairman of board of management is appointed by agreement of parties. General director and deputy general director are appointed and dismissed by board and take responsibility for management and direction of JVE's activities. (LFI). Either general director or first deputy general director of JVE must be Vietnamese citizen residing in Vietnam. (Decree 24, Art. 20).

Business Cooperation Contract Parties.

Parties to business cooperation contract are fully entitled to determine own business programs and plans in conformity with provisions of business cooperation contract and investment license. If necessary, BCC parties may agree to set up coordination committee to implement BCC. Foreign parties to BCC may set up and be responsible for operation of management office in Vietnam, which will represent foreign parties in implementation of BCC. Management office may engage in business activities within scope stipulated in BCC and investment license. Management office must be registered with licensing authority.

Enterprises with 100% foreign owned capital are fully entitled to determine own business programs and plans and management organization of enterprise in accordance with charter and investment license.

Equitization of Foreign Invested Enterprises.

Government issued Decree No. 38/2003/ND-CP dated Apr. 15, 2003 and effective on May 22, 2003 allowing certain foreign invested enterprises to be converted from limited liability company to shareholding company. This marks dramatic change in Vietnam's policies on foreign investment, paving way for existing or future foreign invested companies to exist in form of shareholding businesses. Foreign investors shall have more flexibility in terms of capital mobilization and liquidity. In meantime, this is only pilot project and few foreign invested enterprises selected by authorities may be allowed to be converted into foreign invested shareholding company (“FISHC”) if following conditions are met: (i) Investors have fully paid up committed capital contribution in compliance with investment license; and (ii) enterprise has been active for no less than three years, and last year before conversion must produce business profits. One or more founding foreign investors must still hold at least 30% of charter capital after conversion until end of company's registered duration. Shares owned by founding foreign investors must be name shares.

Ministry of Planning and Investment, in coordination with Ministry of Finance and other related ministries and agencies, shall be in charge of selecting few foreign invested companies qualified for conversion and submitting list to Prime Minister for approval.

Application dossier for conversion must be made in eight sets, out of which there must be original document set. Application shall be submitted to MPI including: (i) Application for conversion signed by general director of enterprise; (ii) conversion plan; (iii) report of activities of enterprise before conversion; (iv) draft of charter of FISHC; and (v) resolution adopted by board of management or by enterprise's owners approving conversion plan. Within 30 days after receiving application dossier, MPI shall collect opinions from related ministries and agencies and then submit its proposal to Prime Minister for approval. Upon receipt of Prime Minister's approval, which shall be given in writing to enterprise, it shall organize and complete: (i) Announcing in public media and giving notice to debtors of conversion; (ii) selling shares; (iii) summoning first meeting of shareholders of adopting company's charter and appointing board members; and (iv) appointing of general director or director by management board and taking over management of enterprise. MPI shall issue amended investment license approving conversion.

New Investment Law.

National Assembly of Vietnam adopted new Law on Investment on Nov. 29, 2005 (LOI). LOI became effective on July 1, 2006 and replaced Law on Foreign Investment in Vietnam of 1996, Law on Amendment and Supplementation to the 1996 Law on Foreign Investment in Vietnam of 2000, and Law on Encouragement of Domestic Investment of 1998. New Law on Investment (LOI) covers both direct and indirect investment activities in Vietnam, although its main focus is on direct investment. Direct investment includes: (i) Setting up wholly owned economic organization; (ii) joint venture with domestic investors; (iii) Business Cooperation Contract (BCC), Building-Operate-Transfer (BOT), Build-Transfer-Operate (BTO), Build-Transfer (BT); (iv) investment in business, technological expansion; (v) contributing share capital in newly established) Vietnamese entity (at ratio determined by Vietnamese government); and (vi) merger and acquisition. Indirect investment, though under scope of new LOI, is, however, subject to laws on stocks and securities and includes: (i) Investment in stocks, shares, bonds and other valuable instruments; (ii) investment through securities investment funds; or (iii) investment through financial institutions.

New LOI creates uniform legal framework for and levels playing field between domestic and foreign investment. Currently, there are two separate systems applicable to domestic and foreign investment. Basically, new LOI is applicable to both domestic and foreign investors carrying out investment projects in Vietnam including: (i) Enterprises registered under Law on enterprises; (ii) collectives, cooperatives registered under current law on cooperatives; (iii) foreign invested enterprises licensed before this new LOI; (iv) private enterprises, business households, individual investors; (v) foreign individuals or businesses, overseas Vietnamese, aliens; and (vi) other organizations as prescribed by law (currently these include medical establishments, training organizations, for-profit cultural centers, etc.).

Under FIL, foreign invested enterprises can only be in form of limited liability no-share company. Under new LOI, investors can select appropriate form of business entity for carrying out investment projects in Vietnam from among several forms prescribed under new LOI and other laws: (i) Limited liability no-share company (or limited liability company); (ii) limited liability share company (or joint stock company); (iii) partnership; or (iv) holding company. Foreign invested enterprise cannot be in form of cooperative, collective, or business household.

Current system of double pricing is completely abolished. Same statutory fees, charges or prices of goods, commodities or services under price control of Government shall apply to both domestic and foreign invested enterprises.

Under FIL, duration of foreign invested company has to be same as lease period of land where investment project is located. Under new law, duration of foreign invested enterprise can be open. However, land lease term applicable to investment projects is still fixed at 50 years, or 70 years in exceptional cases. Therefore, for specific direct investment project, project term shall be only 50 years, or 70 years in exceptional cases. Foreign invested enterprise under new law can implement various direct investment projects. Under current law, separate foreign invested enterprise has to be set up for each project.

New LOI provides investment covenants as follows: (i) No nationalization or confiscation of investors' capital, assets and properties by administrative measures; (ii) compensation or payment at market value to investors if expropriation or requisition of their assets is necessary with no discrimination; (iii) payment of compensation in freely convertible currencies and without restriction on remittance of such payment; (iv) protection of intellectual properties of investors in investment activities and technology transfer under respective laws; (v) remittance of legitimate capital and assets in freely convertible currencies in accordance with FOREX control regulations; and (vi) assurances in case of change of laws that (a) investors shall be entitled to better incentives and rights under new laws, or (b) if new laws provide less favorable incentives and less rights, investors shall be entitled to continue to enjoy previous incentives and rights, offset damages against taxable income, adjust business objectives of investment project or receive compensation in necessary cases.

With respect to opening investment market, new law simply provides that Vietnam shall comply with committed agenda. This needs to be clarified further by Government decree. Of interest, in its WTO commitment Vietnam may fully open its investment market in two years from date it is admitted to WTO. New LOI specifically allows foreign invested enterprise to act as sales agent in Vietnam for other organizations or individuals with same type of products as those produced or manufactured by such foreign invested enterprise.

New LOI codifies elimination of trade-related investment measures to make Vietnamese investment framework consistent with WTO TRIPS. There shall be no compulsory or statutory requirements to investors regarding: (i) Purchase of local commodities or services from designated suppliers; (ii) minimum requirement on export of commodities or services; limitation of quantity, value or types of commodities or services for export and for sale in local market; (iii) import volume within limit of export volume, or self-balancing of foreign exchange from export revenue with import expenditure; (iv) localization ratio of goods manufactured locally; (v) minimum level of local research and development; (vi) supply of goods or services at designated locations; or (vii) opening principal place of business at designated location.

New LOI still separates domestic invested companies from foreign invested companies. Foreign invested enterprises are: (i) Enterprises established in Vietnam by foreign investors to carry out investment projects; (ii) enterprises in which foreign investors purchase shares; (iii) enterprises which foreign investors acquire; or (iv) enterprises which merge with foreign investors' companies. Though it is not clear, foreign invested enterprise with less than 49% foreign equity holding may be considered as domestic enterprise. New LOI provides that foreign invested enterprise with less than 49% foreign equity holding enjoys equal rights as domestic invested enterprise.

Foreign invested enterprises are subject to additional stipulations with regard to conditional projects as outlined in agenda of Vietnam's international commitments.

Licensing and/or investment registration procedures and requirements are still different for domestic and foreign invested enterprises. Foreign invested enterprises may select foreign or international arbitration to resolve disputes with other parties. This option may not be available to domestic enterprises.

New LOI streamlines project licensing procedures. There are three categories of licensing procedures: (i) Business registration (only); (ii) investment registration; and (iii) investment evaluation and registration.

Business registration only applies to domestic investment projects with invested capital below VND 15 billion (USD 943,990), excluding conditional projects. There is no formality to be completed by investor unless recording of investment incentives is desired (in which case, investment registration must be carried out). Investor is required to obtain only business registration certificate issued under Law on Enterprises from business register which takes ten working days to grant certificate.

Investment registration procedures apply to domestic investment projects with invested capital of more than VND 15 billion (USD 943,990) and less than VND 300 billion (USD 18,880,000), excluding conditional projects; and foreign investment projects with invested capital below VND 300 billion (USD 18,880,000), excluding conditional projects. Investors are required to prepare investment registration documents in prescribed form at provincial People's Committee acting through Department of Planning and Investment. For foreign invested projects, investors must obtain investment certificate which is also business registration certificate in case of initial establishment of economic organization to undertake first investment project from provincial People's Committee acting through Department of Planning and Investment. Under LOI, authority has 15 days to grant investment certificate. For domestic projects, investors may obtain investment certificate, if desired, but must carry out business registration under Law on Enterprises separately.

Investment evaluation/certification procedures apply to domestic investment projects with invested capital of more than VND 300 billion (USD 18,880,000), foreign investment projects with invested capital of more than VND 300 billion (USD 18,880,000) and conditional projects. Investors are required to apply for and obtain investment certificate. Investors' application for investment certification and approval shall be evaluated and approved by various authorities including Prime Minister, Ministry of Planning and Investment and provincial Peoples' Committees depending on prescribed subcategory of projects: (i) Projects below VND 300 billion (USD 18,880,000) which are in conditional sectors; (ii) projects over VND 300 billion (USD 18,880,000) which are in conditional sectors; and (iii) projects over VND 300 billion (USD 18,880,000) which are not in conditional sectors. For foreign invested projects, investors must obtain investment certificate which is also business registration certificate in case of initial establishment of economic organization to undertake first investment project from Ministry of Planning and Investment or provincial People's Committee acting through Department of Planning and Investment. Under LOI, authorities have 30 days or 45 days in extended case to grant investment certificate. For domestic projects, investors may obtain investment certificate, if desired, but must carry out business registration under Law on Enterprises separately.

Effectiveness of new investment registration system and details of new requirements and documents are still unknown pending issuance of guidelines by Government. Slow work progress and delays can be expected for a while after new law takes effect.

Under new LOI, granting of investment privileges will still be based on preferred investment areas and geographical locations. Investors may be entitled to privileges if investing in: (i) Manufacturing of new materials, new energy, high-tech, biotech, IT and engineering products; (ii) farming and processing of agricultural, aquacultural and forest products, making salt, new plant and animal breeds and varieties; (iii) projects using high-tech, environmentally friendly, R&D; (iv) projects using intensive labor force; (v) infrastructure development and larger projects; (vi) education, training, healthcare, physical training and cultural projects; (vii) development of traditional industries; and (viii) other areas promoted by government. Investors may also be entitled to privileges if investing in: (i) Locations of difficult and especially difficult socioeconomic conditions; and (ii) industrial zones, high-tech zones, export processing zones, and economic zones. Privileges and details of investment areas and locations by districts are to be specified by Government.

New LOI provides no new investment incentives. Tax-related incentives are in accordance with tax laws and include: (i) Preferential treatment on income earned from dividend distribution; (ii) exemption on income earned from technology transfer in projects which fall under preferred investment projects in accordance with tax laws; (iii) import tax exemption on machinery, materials, means and other goods imported to implement investment projects in accordance with import-export taxation laws; and (iv) enterprise can carry losses forward for not more than five years and can make fast depreciation of capitalized assets (maximum two times than what is provided by regulations). Land lease for investment project is capped at not more than 50 years (or 70 years for exceptional projects) but land lease renewal is now possible.

List of investment restrictions remains same under new LOI and includes: (i) Projects that may negatively impact on national defense and security and public interest; (ii) historical relics, culture, morals and customs and traditions; (iii) public health, natural environment and resources; or (iv) projects that process imported toxic substances, manufacture prohibited toxic and hazardous chemicals or use prohibited elements under international treaties. Definition of conditional projects under new LOI is broader, while that of specific conditional projects has been made more specific by Government to include sectors impacting on national defense and security, social order and safety; banking and finance sector; sectors impacting on public health; culture, information, press and publishing; entertainment services; real estate business; exploration, survey, and exploitation of natural resources, ecological environment; development of education and training and other sectors in accordance with law.

11.04 FOREIGN TRADE REGULATIONS:

Legislation.

Commercial Law adopted by NA on June 14, 2005; Decree No. 12/2006/ND-CP of Government dated Jan. 23, 2006 on implementation of Commercial Law provisions on international sales and purchases, selling and purchasing agency activities, processing with foreign countries and foreign goods in transit in Vietnam (Decree 12/2006); Decree No. 23/2007/ND-CP regarding trading activities of foreign-invested companies; Decision No. 10/2007/QD-BTM announcing schedule for implementation of trading and distribution activities; Decree No. 158/2006/ND-CP dated Dec. 28, 2006 detailing provisions of Commercial Law on sale and purchase of goods via Commodity Exchange; Decree No. 06/2008/ND-CP dated Jan. 16, 2008 on sanctioning of administrative violations in commercial activities; and Decision No. 36/2008/QD-BTC dated June 12, 2008 providing list of commodities and tariff to implement Agreement on Common Effective Preferential Tariff (CEPT) (Decision 36). Under Decision 36, goods imported from ASEAN countries to Vietnam must be taxed from 0% to 40%.

Vietnam remains one of poorest nations in the world even after launching economic liberalization reform in 1986. Since demise of Soviet bloc, Vietnam has had to rely on other foreign investors, in particular, its Asian neighbors Hong Kong, Singapore, Taiwan, Korea, and Japan, to assist in economic development.

Extensive government regulation of import/export activities exists; import levels are fixed by Ministry of Trade, through both tariff and nontariff means, such as production subsidies, quotas and prohibited imports. State-owned enterprises had virtual monopoly over import business licenses before 1994.

Certain goods for import-export are subject to permit, approval, registration, standards or decision of Ministry of Trade, Ministry of Agriculture and Rural Development, Ministry of Aqua-Agriculture, Ministry of Culture and Information, Ministry of Health, Ministry of Industry, Ministry of Natural Resources and Environment, Ministry of Transportation, State Bank of Vietnam and Ministry of Post and Telecommunications. (Decree 12/2006).

Under Decree No. 12/2006, all business organizations including foreign invested enterprises, are entitled to import and export goods that are registered in business registration certificate after registering import-export activities with provincial customs department.

Tariff rates are calculated to encourage imports of capital goods and raw materials and intermediate goods for domestic processing and reexport and to discourage import of most consumer goods. Ministry of Finance sets minimum price levels based on quality of goods and estimated price for such goods in region adjacent to where goods are imported to prevent importer fraud.

Government also promotes export production and discourages consumer goods imports through nontariff measures such as quotas and import limits. Ministry of Trade also publishes list of prohibited items for import.

State subsidizes production of strategic raw materials to meet annual production targets set by MPI. This practice insulates domestic industry from foreign competition and boosts exports.

12 IMMIGRATION

12.01 IMMIGRATION:

Legislation.

Ordinance No. 24/2000/PL-UBTVQH10 of Standing Committee of National Assembly dated Apr. 28, 2000 on entry, exit and residence of foreigners in Vietnam (Ordinance 24), which took effect on Aug. 1, 2000 replacing Ordinance of Feb. 21, 1992 on entry, exit, residence and travel of foreigners in Vietnam; Government Decree No. 21/2001/ND-CP dated May 28, 2001 on implementation of Ordinance 24 (Decree No. 21/CP) supplemented by Inter-Ministerial Circular No. 04/2002/TTLT/BCA-BNG of Ministry of Public Security and Ministry of Foreign Affairs dated Jan. 29, 2002 (Circular No. 04/TTLT); as amended by Inter-Ministerial Circular No. 01/2007/TTLT/BCA-BNG, (Circular No. 01/TTLT); and Decree No. 136/2007/ND-CP dated Aug. 7, 2007 on exit and entry of Vietnamese citizens (Decree 136).

Visa.

Visas are mandatory for all visitors to Vietnam except those who are exempted under Agreements or Treaties signed by Vietnam with other countries. Currently, only Philippine, Indonesian, Singaporean, Laotian and Thai citizens carrying ordinary passports are not required to have visa if length of visit is less than 21 days for Philippine citizens and less than 30 days for citizens of latter countries. Vietnam unilaterally exempts from visa requirements citizens of Japan and South Korea from July 1, 2004 and citizens of Denmark, Norway, Finland and Sweden from May 1, 2005 if visiting Vietnam for less than 15 days.

Visas can be obtained from Immigration Department under Ministry of Public Security, Consulate Department under Ministry of Foreign Affairs, and overseas Vietnamese diplomatic missions or consulates. Authorities shall issue visa or refuse to issue visa within five working days. (Ordinance 24, Art. 4). Visas can be issued at Vietnamese international entry points to visitors entering Vietnam to: (i) Attend relative's funeral service or visit relative suffering from serious illness; (ii) visit under tours organized by Vietnamese international travel agents; or (iii) render emergency technical assistance, or to visitors coming from place with no Vietnamese mission or consulate, or to visitors on other emergencies.

Visas can be one or multiple entry, valid for maximum 12 months and not renewable.

For those entering Vietnam on invitation or under sponsorship of organization, business, foreign invested enterprise, representative office, or foreign branch office in Vietnam, visa approval must first be obtained by sponsor from Immigration Department under Ministry of Public Security. Visa will then be obtained by visitors from overseas Vietnamese mission or consulate.

For those entering Vietnam on invitation or under sponsorship to carry on licensed investment projects or cooperation contracts with inviting or sponsoring persons or organizations, or to work in registered offices in Vietnam and for their blood relatives, visa may be valid for maximum 12 months. For those entering Vietnam on invitation or under sponsorship for other purposes, visa may be valid for maximum six months. For those entering Vietnam without invitation or sponsorship, visa will be for one entry and valid for maximum 15 days.

Foreign residents staying in Vietnam for more than six months can invite or sponsor foreigners entering Vietnam for personal visits.

Visa fee is US$25 for single visa; US$50 for multiple visa valid for six months; and US$100 for multiple visa valid up to 12 months.

Residency.

Foreigners residing in Vietnam may be granted Permanent Resident Certificate if they are: (i) Oppressed fighters for freedom and national independence, for socialism, for democracy and peace, or for scientific causes; (ii) persons who have made great contribution to cause of national construction and defense of Vietnam; and (iii) spouses, children, parents of Vietnamese citizens residing in Vietnam. Permanent Resident Certificates are issued by Immigration Department under Ministry of Public Security. Permanent Resident Certificate will be withdrawn when holder emigrates to another country or is deported out of Vietnam.

Foreigners who have temporarily resided in Vietnam for more than one year may be granted Temporary Resident Certificate, valid for one to three years.

Holders of resident certificate are exempted from visa.

13 INSURANCE

13.01 INSURANCE COMPANIES:

Legislation.

Law on Insurance Business (LIB) No. 24/2000/QH10 dated Dec. 9, 2000 became effective on Apr. 1, 2001; Government Decree No. 45/2007/ND-CP dated Mar. 27, 2007 provides guidelines on implementation of LIB with regard to insurance, reinsurance, insurance brokerage and agency businesses (Decree 45/2007); Decree No. 46/2007/ND-CP dated Mar. 27, 2007 providing regulations on financial scheme applied to insurance companies and insurance brokerage companies.

Insurance Companies.

Forms of insurance company allowed under LIB include: state owned company, shareholding company, joint venture and 100% foreign invested company. LIB specifies company must be in form of enterprise with charter formulated in conformity with LIB or other laws. (LIB Art. 63). Based on this, it can be understood that state owned insurance company has legal status with charter formulated in accordance with LOE; and Law on State Owned Enterprises shareholding insurance company has legal status and charter in accordance with LOE; and joint venture and 100% foreign invested company have limited liability company status and charter in accordance with new LOI. Other conditions for issuance of license are: legal capital of company must meet level stipulated by Government, and company must have managerial personnel qualified in insurance business.

Application for license includes: (i) Application in standard form; (ii) draft of company charter; (iii) list of founding shareholders together with copy of ID card or passport or other relevant documents and juridical record (for individual), or copy of business registration certificate and/or certificate of incorporation; authorization letter and copy of ID card or passport of representative person (for organization); (iv) certification issued by bank authorized to operate in Vietnam on charter capital deposited in escrow account with this bank; (v) business plans for first five years of operation which are in compliance with proposed scope of works clearly pointing out options for allocation of reserves, re-insurance plans, capital investment, business results, payment liabilities and capacity and economic benefits of establishment of company together with technical procedures, procedures for internal control, procedure for risks management; (vi) names, resumés and certificates proving qualifications of managerial personnel of company; (vii) legal capital, capital contribution, list of shareholders holding 10% or more of legal capital; financial standing and other information on these shareholders; and (viii) principles, articles and fees, commissions on insurance products of company.

Licensing authority is Ministry of Finance (MOF). If approved, MOF will issue license within 60 days from receipt of duly filed application. Upon grant of license, insurance companies and insurance brokerage shall pay license fee in accordance with current regulation on fee.

Insurance companies are not allowed to engage simultaneously in life and non-life insurance business except that life insurance companies may offer health and accident insurance policies as substitute products for life insurance policies to clients.

Insurance company is obligated to obtain MOF approval for its policies, terms and fee schedules for life, health and human accident insurance products before offering to public. However, for non-life insurance products, non-life insurance company is allowed to proactively establish and implement its policies, terms and fee schedules. MOF will issue minimum polices, terms and fee schedules for obligatory insurance products. (Decree 45/2007, Art. 20).

Insurance companies are allowed to invest in Vietnam only in: (i) Purchasing government bonds; (ii) purchasing shares and bonds of other enterprises; (iii) real estate business; (iv) capital contribution in other enterprises; (v) lending in accordance with Law on Credit Institutions; and (vi) deposits in credit institutions. Government will issue detailed regulations on fields of investment and ratio of capital allowed to be invested in each field to ensure payment capacity of insurance company.

Agents include organizations and individuals authorized by insurance companies. To be insurance agent, individual must: (i) Be Vietnamese citizen permanently residing in Vietnam; (ii) be 18 years of age or more with full civil person judicial status; and (iii) hold insurance agent training certificate issued by insurance company or Vietnam Insurance Association. To be insurance agent, organization must: (i) Be legally established in Vietnam; and (ii) have qualified individual agents for agent activities.

Agents may be authorized by insurance companies to: (i) Introduce and sell insurance products; (ii) arrange for execution of insurance contracts; (iii) collect insurance fees; (iv) arrange for compensation settlement and payment; and (v) do other work in accordance with insurance contract.

If agent violates agent contract with insurer, resulting in damages to legal rights and benefits of insured, insurer must be responsible for insurance contract with insured, and agent will be responsible for compensating insurer.

Brokers.

Insurance brokers are companies legally established under LIB and other laws. Brokers are allowed to: (i) Provide information on insurance products, terms, conditions, fees and insurers to purchaser; (ii) provide consultancy service to purchaser in risk evaluation; selection of insurance products, terms, conditions, fees and insurers; (iii) negotiate and arrange for execution of insurance contract between purchaser and insurer; and (iv) do other work authorized by purchaser. Broker must: (i) Conduct its services faithfully; and (ii) compensate insurance purchaser for damages caused by broker or broker's services. Broker is prohibited from disclosing information that may cause damage to rights and benefits of insurance purchaser.

Foreign Investment.

Foreign insurance and insurance brokerage companies may be allowed to set up joint venture or 100% foreign invested insurance or insurance brokerage company in Vietnam in accordance with LIB and other laws. They may also be allowed to set up representative offices in Vietnam.

To establish insurance company, foreign insurance company must satisfy conditions including: (i) Legally operating at least ten years in accordance with laws of country of main office calculated to submission date of its license in Vietnam; (ii) permit from authorized agency in own country for its investment in Vietnam; (iii) total assets valued US$2 billion minimum in previous year; and (iv) foreign company has not violated regulations on insurance business of main office within three years before submission year of license in Vietnam. For insurance brokerage company in Vietnam, foreign insurance company also must satisfy conditions including: (i) Legally operating at least ten years in accordance with laws of country of main office calculated to submission date of its license in Vietnam; (ii) permit from authorized agency in own country for its investment in Vietnam; (iii) foreign company conducted business profitably for three years before submission of its license in Vietnam; and (iv) foreign company has not violated regulations on insurance business of country of main office within three years before submission of its license in Vietnam.

Application documents required for 100% foreign-owned insurance company are: Application; draft of charter; confirmation of bank on charter capital held in escrow account; operation plan for first five years; documents proving ability, qualifications and expertise of managers, executives; rules, clauses and conditions, scales of premiums and commissions re insurance products; charter and establishing license of investor; POA to general director in Vietnam; list of total assets and annual certified financial reports of investors for last three years; permission from competent body of original country.

Rep Offices.

Conditions for issuance of rep office license are: (i) Foreign insurance or insurance brokerage company has been in operation for at least five years; and (ii) foreign insurance or insurance brokerage company has cooperation relationship with Vietnamese parties. Application for rep office license includes: (i) Application in standard form; (ii) incorporation and/or operation license or certificate of foreign company; (iii) annual balance sheets, financial statements certified by independent auditors for last three years of foreign company; (iv) name and resumé of Chief Representative in Vietnam; and (v) company profile of foreign company and summary of cooperation with Vietnamese parties.

Rep office license is valid for maximum five years and renewable. License fee and renewal fee is 1 million dong (US$63). Rep office is obligated to submit to Ministry of Finance first half-year activity report before July 30 and annual activity report before Mar. 1 every year.

Compulsory Insurance.

Under LIB, compulsory insurance policies in Vietnam are: (i) Civil liability insurance of motor vehicle owners and civil indemnity insurance of aviation transformer to customers; (ii) professional indemnity insurance for legal consultancy activities of law firms or lawyers; (iii) professional indemnity insurance for legal activities of insurance brokers; and (iv) fire and explosion insurance. Standing Committee of NA may stipulate other compulsory insurance policies.

Compulsory health insurance and social security insurance for employees are not subject to LIB but to Labor Code. See category 10 Employment, topic 10.01 Labor Relations.

14 INTELLECTUAL PROPERTY

14.01 COPYRIGHT:

Introduction.

Before July 1, 1996, copyright protection in Vietnam was governed by Ordinance on Copyright Protection issued by Standing Committee of National Assembly, Dec. 2, 1994. Copyright protection is now regulated by Civil Code, enacted June 14, 2005 and effective on Jan. 1, 2006 (“CC”) and Intellectual Property Law, enacted Nov. 29, 2005 and amended on June 19, 2009 (``IPL").

Legislation.

Civil Code (CC); Intellectual Property Law; Government Decree No. 100/2006/ND-CP dated Sept. 21, 2006 providing guidelines on implementation of number of provisions on copyright stipulated in CC and IPL (Decree 100/2006); Ordinance Amending and Supplementing a Number of Articles of the Ordinance on Administrative Penalties, adopted by Standing Committee of the National Assembly on Apr. 2, 2008, effective Aug. 1, 2008; Decree No. 47/2009/ND-CP dated May 13, 2009 providing sanctions on administrative violations of copyright and related rights (Decree 47/2009); and Criminal Code of 1999 adopted by National Assembly on Dec. 21, 1999 and amended most recently on June 19, 2009 (Criminal Code).

Vietnam became party to Berne Convention for Protection of Literary and Artistic Works on Oct. 26, 2004, to Geneva Convention for Protection of Producers of Phonograms against Unauthorized Duplication of their Phonograms on July 6, 2005, and will soon join Rome Convention on protection of performers, recorded tape producers, and radio broadcasting organizations. On Jan. 12, 2006, Vietnam joined Brussels Convention Relating to Distribution of Programme-Carrying Signals Transmitted by Satellite.

Number of international treaties relate to copyright in Vietnam, including Agreement between Government of Socialist Republic of Vietnam and Government of United States on Establishment of Copyright Relations, which was signed in 1998; and Bilateral Trade Agreement between Government of Socialist Republic of Vietnam and United States, which contains many provisions on copyright.

Nature of Copyright.

Copyright protection promotes creation of literary, artistic, scientific and technical works; develops national, modern, and human culture; and extends cooperation and exchange of culture, science and technology with other nations. In Vietnam, copyrights consist of moral and economic rights of proprietor to his work. (IPL, Art. 18).

Responsibility for copyright protection and lawmaking in Vietnam rests with Ministry of Culture and Information in conjunction with other ministries and branches that are given such responsibility. These responsibilities include drafting and submitting legal bills and ordinances on copyrights; registering and managing protection of copyrights; inspecting; controlling and solving infringements of copyrights; and implementing international control of copyrights. Copyright Office under administration of Ministry of Culture and Information is assigned responsibility for copyright of literary and artistic works, while National Office of Intellectual Property (NOIP) under administration of Ministry of Science and Technology may be assigned responsibility for copyright of other certain works. There are yet no detailed regulations on copyrights handled by NOIP.

Who is Covered.

In Vietnam, different types of copyright protection are extended to authors who directly create work and copyright holders. (IPL, Art. 13). Copyright holders may be: authors, co-authors, organizations and individuals who assign tasks to authors or enter into contract with authors, heirs of authors, assignees, state, public. (IPL, Arts. 37-43). Laws explicitly stated who could obtain copyright protection: work produced or owned by any Vietnamese person, organization, or collection of individuals, using real name or pseudonym, whether produced in Vietnam or abroad, may be protected in Vietnam.

IPL states that foreigners may gain copyright protection in Vietnam if their copyrightable works were first published in Vietnam and not yet published in any other country or if their copyrightable works were published in Vietnam within 30 days after publication for first time in other countries. Foreigners may also gain copyright protection in Vietnam under bilateral or multilateral treaty on copyright protection where Vietnam is member.

According to Decree 100/2006, individual or organization who is author, co-author or copyright owner or neighboring rights owners of works have right to file application for protection of his/her copyright. Application should be submitted to National Office for Copyright for Literature and Artistic Works (also called Copyright Office of Vietnam or "COV") under Ministry of Culture and Information or to Department of Culture and Information of province or city where author or owner resides. (Art. 37).

Scope of Protection.

IPL extends copyright protection to: (i) Literary works, scientific works, textbooks, teaching courses and other works expressed in written language or other characters; (ii) lectures, speeches or other oral works; (iii) journalistic works; (iv) musical works; (v) theatrical works; (vi) cinematographic works and works created by process analogous to cinematography; (vii) plastic art works and applied art works; (viii) photographic works; (ix) architectural works; (x) sketches, plans, maps and drawings related to photography or scientific works; (xi) folklore and folk art works; and (xii) computer programs and data collections. Derivative works may be protected only if such protection is not prejudicial to copyrights in works used to create such derivative works. Works not protected by IPL include: (i) News of day as mere items of information; (ii) legal documents, administrative documents, documents of juridical domain and its official translations; and (iii) process, systems, operational methods, concepts, principles and data. (IPL, Art. 15).

Under IPL, related rights are protected as copyrightable subject matter in respect of following subject matter: (i) Performance may be protected provided that it is made by Vietnamese citizens in Vietnam or abroad, or it is made by foreigners in Vietnam, or it is fixed on audio and visual fixation, or it is not yet fixed on audio or visual fixation but has been broadcasted, or it is protected pursuant to international treaty of which Vietnam is member; (ii) audio and visual recordings may be protected provided that it belongs to audio and visual recording producers having Vietnamese nationality, or it belongs to audio and visual recording producers protected pursuant to international treaty of which Vietnam is member; (iii) broadcasts and satellite signals carrying coded programs may be protected provided that program belongs to broadcasting organization of Vietnamese nationality, or it belongs to broadcasting organization protected pursuant to international treaty of which Vietnam is member. Performance, audio and visual fixation, broadcasts and satellite signal carrying coded programs may be protected only when it is not prejudicial to other copyrights in work. (IPL, Art. 17).

Copyright Registration.

Copyright arises on creation of copyrightable work, but registration creates presumption of ownership. Application for copyright of literary or artistic works is registered with Copyright

Office under administration of Ministry of Culture and Information or with Department of Culture and Information of province or city where applicant resides or registers its headquarters which are responsible for receiving, considering and granting certificate to applicant.

IPL designates copyrights into moral rights and economic rights. Moral rights include: (i) Right to give titles to their works; (ii) right to affix real names or pseudonyms to their works, to have real names or pseudonyms acknowledged when their works are published or used; (iii) right to publish their works or authorize other to publish their works; (iv) right to protect integrity of their works and to forbid other person to modify, edit or distort their works in whatever form causing harm to honor and reputation of author. Economic rights, under IPL, include: (i) Right to make derivative works; (ii) right to display their work to public; (iii) right to reproduce their works; (iv) right to distribute or import original or copies of their works; (v) right to communicate their works to public by wireless or non-wireless means, electronic information network or other technical means; and (vi) right to lease original or copies of cinematographic works and computer programs. Depending on each type of specific type of work, author and/or owner may be granted different moral and economic rights.

Author who is concurrently owner of works have all moral rights and economic rights. Author who is not works' owner shall have moral rights except right to publish their works or authorize others to publish his/her works unless such is agreed to with other concerned parties. Owner, who is not author, has all economic rights, and right to publish his/her works or authorize others to publish his/her works, unless concerned parties agree otherwise. (IPL, Arts. 19, 20, 37-41).

IPL further protects rights of performers, rights of producers of audio and visual fixation, and rights of broadcasting organizations.

Rights of Performers.

Rights of performers also include moral rights and economic rights. Moral rights comprise: (i) Rights to have name acknowledged when performing, when distributing audio and visual fixation or when broadcasting performance; and (ii) right to protect integrity of imagery of performance, and to prevent others from modifying, editing or distorting works in any way prejudicial to honor and reputation of performer. Economic rights shall include exclusive right to exercise or authorize others to exercise rights as follows: (i) To fix live performance in form of audio and visual fixation; (ii) to directly or indirectly reproduce performance in form of audio and visual fixation; (iii) to broadcast or communicate to public in any other way unfixed performance so that it may be accessed by public, except where such performance is intended to be broadcast; and to distribute to public original performance and copies thereof by sale, rental or distribution by any technical means which are accessible by public. Performers who invested in producing performance shall have both moral rights and economic rights. Where performers do not invest in producing performance, performers shall have moral rights while investors shall have economic rights to performances. (IPL, Art. 29).

Rights of Producers of Audio and Visual Fixation.

Producers of audio and visual recordings shall have exclusive right to exercise or to authorize others to exercise: (i) to direct or indirect copy their audio and visual recording; or (ii) to distribute to public their original audio and visual recording and copies thereof by sale, rent or distribution by whatever technical means which are accessible by public. (IPL, Art. 30).

Rights of Broadcasting Organizations.

Broadcasting organizations shall have exclusive right to exercise, or to authorize others to exercise rights as follows: (i) To broadcast or rebroadcast their broadcasts; (ii) to distribute their broadcasts to public; (iii) to formulate their broadcast; and (iv) to reproduce formulated broadcast. (IPL, Art. 31).

Term of Protection of Copyright.

Copyright protection term differs with respect to moral rights versus economic rights.

All moral rights, except for right to publish or to permit others to publish such work, are protected in perpetuity. (IPL, Art. 27).

Economic rights and rights to publish works or authorize others to publish works enjoy term of protection as follows: cinematographic, photographic, and anonymous works shall have term of protection of 75 years as from date of first publication. Dramatic works shall be protected for whole life of author and for 50 years after his death. In case of work of joint authors, term of protection shall expire on 50th year after death of last surviving co-author. (IPL, Art. 27).

Term of Protection of Neighboring or Related Rights.

Rights of performers shall be protected for 50 years calculated from following year of performance. Rights of producers of audio and visual fixation shall be protected for 50 years calculated from following year of publication or 50 years calculated from following year after creation of any unpublished audio and visual recording. Rights of broadcasting organizations shall be protected for 50 years calculated from year following broadcast. (IPL, Art. 34).

Transfer of Copyright Protection.

Only certain moral rights of proprietor are transferable, such as right to publish or to permit others to publish work. (IPL, Art. 45). But all economic rights of proprietors, assignors, or assignees are transferable in part or in entirety by assignment contract or according to inheritance law. (IPL, Art. 45).

Licensing.

Any person or organization seeking to use copyrighted work must sign written contract with proprietor or assignee of work. Contract for licensing copyrights or related rights should specify principal contents such as: full names and addresses of licensor and licensee; basis for license; scope of license; price and method of payment; rights and obligations of concerned parties; liability for contractual breach. (IPL, Art. 48[1]). Performance, amendment, termination or cancellation of contract for licensing copyright or related right must be in compliance with CC. (IPL, Art. 48[2]).

Infringement.

IPL defines 16 acts of infringement of copyright and ten acts of infringement of neighboring or related rights.

Infringements of copyright includes: (i) Appropriating copyright in literary, artistic or scientific work; (ii) impersonating author; (iii) publishing or distributing work without permission from author; (iv) publishing or distributing work of joint authors without permission from co-authors; (v) modifying, editing or distorting work in any way which prejudices honor and reputation of author; (vi) copying work without permission from author or copyrights holder, except where allowed by IPL; (vii) making derivative work without permission from author or copyright holder work used for making such derivative work except in case allowed by IPL; (viii) using work without permission from copyright holder and without paying royalties, remuneration or other material benefits in accordance with law, except in case allowed by IPL; (ix) leasing out work without paying royalties, remuneration or other material benefits to author or copyright holder; (x) duplicating, producing copies of, distributing, displaying or communicating work to public via communication network or digital means without permission from copyright holder; (xi) publishing work without permission from copyrights holder; (xii) deliberately destroying or de-activating technical measure applied by copyright holder to protect copyright in his/her work; (xiii) deliberately deleting or modifying electronic information in work regarding management of rights to such work; (xiv) manufacturing, assembling, transforming, distributing, importing, exporting, selling or leasing out equipment when knowing, or having ground to know, that such equipment may de-activate technical solutions applied by copyright holder to protect copyright his/her work; (xv) making and selling work with forged signature of author of such work; and (xvi) importing, exporting or distributing copies of work without permission from copyright holder.

Infringements of neighboring rights, include: (i) Appropriating rights of performer, producer of audio and visual recordings, or of broadcasting organization; (ii) impersonating performer, producer of audio and visual fixation or broadcasting organization; (iii) publishing, producing and distributing performance, audio and visual recording or broadcast without permission from performer, producer of audio and visual recording or from broadcasting organization; (iv) modifying, editing or distorting performance in any way which prejudices honor and reputation of performer; (v) copying or reciting from performance, audio or visual recording or broadcast without permission from performer, producer of audio or visual recording or from broadcasting organization; (vi) deliberately deleting or modifying electronic information regarding management of copyrights without permission from related right holder; (vii) deliberately destroying or de-activating technical measures applied by related right holder to his/her rights; (viii) publishing, distributing or importing for public distribution performance, copies of fixed performance or audio and visual recording knowing, or having grounds to know, that electronic information regarding management of right has been deleted or modified without permission from related right holder; (ix) manufacturing, assembling, transforming, distributing, importing, exporting, selling or leasing out equipment knowing or having grounds to know, that such equipment assists in illegally decoding satellite signals carrying coded programs; and (x) deliberately receiving or relaying satellite signal carrying coded programs without permission from legal distributor.

Vietnamese law provides for number of remedies and sanctions for copyright infringement. Infringers may be subject to administrative fines of up to VND 500 million (approximately US$31,000) under Decree 47/2009. Under amended Ordinance on Administrative Penalties, aggrieved rightsholders may sue for damages and lost profits in civil court. In cases of commercial scale infringement meeting certain thresholds, criminal penalties may apply.

Vietnamese copyright law provides for number of situations in which it is permissible to exercise exclusive right of author or copyright holder without obtaining permission (analogous to “fair use” situations in other jurisdictions). For example, it is acceptable to make reproductions for scientific research and teaching purposes for individuals; to quote from work for purpose of commenting and illustration in another work; to take extracts from work for articles, periodicals, audiovisual programs and documentaries; to take extracts from work for teaching and examination purposes without misrepresenting view of author and not for commercial purposes; for archival and research purposes in libraries; for performance of theatrical works, songs, and musical compositions done in public places for motivational purposes; to make live recordings or televising performances as stipulated for current news or teaching work; to take photographs or videos of graphic, architectural, photographic works, and works of applied arts displayed in public places for sake of introduction thereof; transformation of works into embossed scripts for blind or importing copies of another's work for personal use. (IPL, Art. 26).

14.02 PATENT LAW:

Legislation.

Civil Code (CC) enacted by NA on June 14, 2005, effective Jan. 1, 2006; Intellectual Property Law (IPL) adopted by NA on Nov. 29, 2005, effective July 1, 2006; Decree No. 103/2006/ND-CP of Government dated Sept. 22, 2006 on implementation of IPL regarding industrial properties (“Decree 103”); Circular No. 01/2007/TT-BKHCN of Ministry of Science and

Technology on implementation of Decree 103 (“Circular 01/2007”).

Introduction.

Intellectual Property in general, and patents in particular, are now regulated by CC and IPL. CC became effective Jan. 1, 2006 and IPL became effective July 1, 2007 replacing regulations of Vietnam on IP which were stipulated by CC.

Treaties.

Vietnam is member of Paris Convention for Protection of Industrial Property and World Intellectual Property Organization (WIPO), established by Stockholm Convention on July 14, 1967. WIPO provides registration services for intellectual property and facilitates transfer of intellectual property from developed countries to less developed countries.

Vietnam is also member of Patent Cooperation Treaty. Thus, Vietnamese patent laws must conform to these intellectual property treaties.

Registration of Patents.

Vietnam's patent law provides protection for inventions, utility solutions (utility models and petty patents), and industrial designs. IPL stipulates conditions for protection of inventions, utility solution and industrial designs. Criteria for protection of utility solution is less stringent than those of invention. IPL provides definitions of invention, utility solution, and industrial design. According to IPL, Art. 4.12, invention/utility solution means technical solution in form of product or process which is intended to solve problem by application of natural laws. According to IPL, Art. 4.13, industrial design means outward appearance of product embodied in three dimensional configuration, lines, colours, or combination of such elements. Invention may be eligible for protection in form of grant of invention patent if it satisfies three conditions, including: (i) It is novel; (ii) of inventive nature; and (iii) has industrial application. If invention satisfies only conditions (i) and (iii), such invention may be granted protection as utility solution patent. (IPL, Art. 58). Industrial design may be protected if such design satisfies following conditions: (i) It is novel; (ii) of creative nature; and (iii) has industrial application. (IPL, Art. 63). Nonpatentable subject matters for inventions and utility solutions include: (i) Scientific discoveries or theories, mathematical methods; (ii) schemes, plans, rules and method for performing mental act, training domestic animals, games and business methods; and computer programs; (iii) presentation of information; (iv) solutions concerning aesthetic characteristics only; (v) plant varieties and animal breeds; (vi) processes of plant or animal production which are principally of biological nature, other than microbiological process; (vii) human and animal disease prevention methods, diagnostic and treatment method. (IPL, Art. 59). Nonpatentable subject matters for industrial design include: (i) Outward appearance of product which is necessarily due to technical features of product; (ii) outward appearance of civil or industrial construction works; and (iii) shape of product which is invisible during use of product.

Patent Application Filing.

Right to file patent application in Vietnam belongs to creator proprietor/author, of invention, utility solution, or design, unless his right to industrial property has been assigned to another party such as his employer. Employer has right to industrial property when invention, utility solution, or industrial design uses funding and facilities of employer. As result, right to file patent applications belongs to employer or organization. Furthermore, right to file patent applications may also belong to inventor's successor in title.

For invention, utility solution, or industrial design made during execution of scientific-technological research and development contract, right to file application for protection belongs to employing party, except if otherwise provided for in contract.

For invention, utility solution, or industrial design made by author during his execution of contract signed with other individuals or organizations, right to file application for protection belongs to those individuals or organizations unless otherwise stipulated in contract.

For invention, utility solution or industrial design made in basic unit under labor contract, right to file application for protection belongs to basic unit unless otherwise provided for in contract.

For invention, utility solution or industrial design, right to file application for protection, including already-filed application, may be transferred to another organization or person through Deed of Assignment.

Filing Principle.

In Vietnam, first-to-file principle applies, making filing date of patent application of crucial significance in protecting one's patent rights.

Filing Requirements.

Applications for inventions, utility solutions, and industrial designs are submitted to National Office of Intellectual Property (NOIP) or any other entity or agency designated by NOIP to receive applications. Application for invention/utility solution may be filed covering two or more inventions that are technically linked to form single general inventive concept. Application for industrial design may be filed covering one industrial or more industrial designs in following cases: (i) Industrial designs of set of products consisting of numerous items expressing single general inventive concept and used together or for common purpose; and (ii) industrial design may be accompanied with one or more variants of industrial design provided that all variants express single general inventive concept and that they are more significantly different from such industrial design. To file invention, utility solution or industrial design application, following documents must be submitted together: (i) Application form, (ii) specification in Vietnamese of invention, utility solution with claims and abstract, along with drawings, diagrams, calculations, and other illustrations that depict alleged invention (if necessary) or specification in Vietnamese of industrial design including description of design, claims, and drawings/photographs showing all characteristic features of design; (iii) power of attorney (if any); (iv) documents that show legal right to file application, especially in case of applicant who has received application filing right from another person; (v) documents evidencing priority right, if claimed; and (vi) receipts for application filing fee and application publication fee. (IPL, Art. 100).

Some documents listed above may be submitted later. For PCT application, (i) Original power of attorney and (ii) original deed of assignment can be submitted within 34 months from earliest priority date. Under practice of NOIP, (i) Priority documents and (ii) deed of assignment (if inventor[s] and applicant[s] in international phase are same as those of national phase), are not required by NOIP. For national application (both invention and utility solution) and industrial design application, original power of attorney may be submitted to NOIP within one month from filing date. Original deed of assignment of priority right and certified copy of first filed original application to claim convention priority right may be submitted within three months from filing date. Original deed of assignment is only required when requested by NOIP to submit within one month from date of NOIP's request. (Circular 01/2007, Items 23.4, 33.3). Except Vietnamese translation of certified copy of first filed original application that is only required when requested by NOIP, other documents submitted must be translated into Vietnamese. Industrial design application requires five sets of photographs or drawings and if industrial design includes protected trademark, trade name, geographical indication, or industrial design, documents verifying ownership or right to use such trademark, trade name, geographical indication, or industrial design may be required by NOIP within one month from date of such requirement. Specifically, application form prescribed by NOIP requires following information: Name, address, and nationality of applicant(s); name, address, and nationality of inventor(s); and date, place, and registration number of first filed application.

Applications for inventions and utility solutions must strictly follow requirements on format (made on A4 paper, portrait presentation except for diagram, layout, table which can be presented in landscape, four margins of 20 mm each), contents and languages as prescribed by Circular No. 01/2007. Declaration requesting grant of invention or utility solution patent should state class of technical solution to be protected according to international patent classification scheme under Strasbourg Agreement. If applicant fails to do so, NOIP shall do classification and applicant must pay classification service charges. For applications for inventions and utility solutions on or relating to genetic sequences or parts thereof, genetic sequences must be described and listed according to §2(ii), WIPO ST25 standard. NOIP may request applicant to submit electronic information carriers, readable by common electronic means, which contain nucleotide sequences and amino acid sequences identical with sequences listed in description of invention or utility solution. For applications for inventions or utility solutions regarding biomaterials, samples of such biomaterials must be deposited with agency to be authorized by MOST not later than date of filing application. Samples shall be used for substantive examination.

Provisions of PCT agreements apply to international invention or utility solution applications. NOIP is agency that receives international applications in Vietnam, corresponds with International Bureau and international searching authorities, examines and processes international applications of Vietnam origin. NOIP handles only international applications made in English and Russian. International searching and preliminary examining authorities for international applications of Vietnam origin include Patent Office of Australia, Austria, Russia, Sweden, South Korea, and European Patent Office.

Applications for industrial designs must strictly follow requirements on format (made on A4 paper, portrait presentation except for diagram, layout, table which can be presented in landscape, four margins of 20 mm each), contents and languages as prescribed by Circular No. 01/2007. Declaration requesting grant of industrial design patent should state class of industrial design to be protected according to international industrial design classification scheme under Locarno Agreement. If applicant fails to do so, NOIP shall do classification and applicant must pay classification service charges.

Filing Procedures.

Invention.

Application should be filed with NOIP which will review application within one month of filing date to ensure that all formalities have been complied with. If application is accepted, priority date will become effective. If application does not meet requirements on formalities, NOIP will send preliminary notice advising NOIP's intention to refuse accepting application as proper. Applicant will have one month to lodge his/her opposition to such preliminary notice or revise information and document as requested by NOIP. If applicant fails to lodge his/her reply or revise information or documents or if such revised information or documents still do not meet requirements, NOIP will send official refusal letter to applicant and partial refund of fee to such applicant if refund is requested. (Item 13; Circular 01/2007). If accepted as proper, application will be published in NOIP Industrial Property Gazette within two months from date of acceptance (for PCT application) and in 19th month from earliest priority date or filing date (if not claiming priority) or within two months from date of acceptance, depending on which date is later (for national application). Request for substantive examination of invention may be made by applicant or any third party within 42 months from filing date or priority date to NOIP. Such time limit for request for substantive examination of utility solution shall be 36 months from filing date or priority date. (IPL, Art. 113). Such time limit may be extended but no longer than six months without legitimate reasons. (Item 25.1.a.2; Circular 01/2007).

Substantive examination of subject application as to its registrability will be conducted within 18 months from date of receiving request for substantive examination if such request is submitted after filing date within or within 12 months from publication date. If application is accepted for registration, it will be registered with NOIP and patent will be granted upon payment of granting fee by application as regulated. If application is rejected by NOIP, applicant may either appeal, or revise application for utility solution and resubmit it for approval by NOIP. If NOIP decides to deny registration, it is required to notify applicant of reason for decision. If patent is granted, it will be registered with NOIP and patent certificate issued to applicant(s). Patent recorded in National Register Book on Industrial Property and will be published in NOIP Industrial Property Gazette.

Industrial design applications must be filed with NOIP which reviews application for compliance with formalities within one month from receipt of application. Procedures for formality examination of industrial design application are same as those invention/utility solution. If accepted as proper, application will be published in NOIP Industrial Property Gazette within two months from date of acceptance. Substantive examination of industrial design's registrability will be conducted within seven months from publication date. If industrial design satisfies all criteria for protection and applicant has paid fee as regulated, NOIP will grant patent. Decision on granting certificate is then published in Industrial Property Gazette.

Rejection and Appeal.

If NOIP rejects invention, utility solution or industrial design, it notifies applicant(s) immediately, either directly or through official agents. NOIP is obliged to state reason for rejecting application.

IPL does not have separate chapter for rejection and appeal. However, before issuing official refusal letter, NOIP would send letter to applicant informing its intention of rejection stating reasons and stipulating time limit for applicant to oppose and/or supplement, revise application dossier. Art. 14, Decree 103 stipulates that any applicant and any entity with rights and interests directly relating to decision or notification regarding processing of application for registration of industrial property issued by State administrative body for industrial property must have right to lodge appeal with such State administrative body for industrial property or to file suit with court. If at expiry of stipulated time limit for resolution of appeal by level directly issuing decision or notice relating to industrial property (first time appeal), appeal has not been resolved, or appellant disagrees with decision on resolution, applicant or any entity with rights or interests directly relating to such decision must have right to lodge appeal with MOST (second time appeal) or file suit with court. If at expiry of time limit for resolution of second time appeal (appeal still has not been resolved) or if appellant disagrees with decision on resolution of Ministry of Science and Technology, applicant or any person with rights or interests directly related to such decision must have right to institute court proceedings. Time limit for lodging first time appeal must be 90 days from date on which appellant knew or received information about decision or notice on processing application for industrial property registration. Time limit for lodging second appeal must be 30 days from date of expiry of time limit for resolution of first appeal if by such date first appeal is not resolved, or calculated from date on which appellant knew or received information about decision resolving first appeal. Within time limit of ten days from date of receipt of any appeal relating to issuance, amendment, termination, rescission, or extension of validity of protection title, person authorized to resolve such appeal must issue notice accepting jurisdiction or in case of refusing jurisdiction to hear appeal must specify reasons for refusal. Further procedures relating to appeal shall be stipulated by law on appeal and denouncement.

Opposition and Cancellation Actions.

Opposition: Any third party has right to file opposition against NOIP's decision to grant title of protection. Opposition must be made in writing and must be filed with NOIP at any time during whole life of patent. (IPL, Art. 96).

Cancellation of title of protection before expiration of term of validity is recorded in Register at NOIP, and published in Official Gazette of Industrial Property. (IPL, Arts. 98, 99). IPL further provides wider range of grounds for cancellation or suspension of patent registration. Certificate of protection may be cancelled where, at time of issuance of such certificate, subjects stated therein do not meet criteria required by law; certificate of protection is issued to person who does not have right to submit application; and other circumstances stipulated by law. (IPL, Art. 96). Effectiveness of protection certificate may be suspended if patent owner fails to pay annuity within prescribed time; and other circumstances stipulated by law. (IPL, Art. 95).

Terms of Protection.

Registration of patent becomes effective on granting date, having duration of 20 years reckoned from legitimate filing date. Title of protection of utility solution is patent utility solution which becomes effective from granting date for ten years from legitimate filing date. Term of protection for industrial designs is five years from legitimate filing date.

No renewal is available for inventions or utility solutions. Registered industrial design with maximum protection of five years may be extended for two successive five-year periods. (IPL, Art. 93).

Inheritance Rights.

Rights of invention, utility solution, or industrial design are inheritable. (IPL, Art. 115).

Infringement.

Patent proprietor of invention, utility solution, or industrial design owns exclusive rights to patent, including right to possess, use, and transfer rights. Third party use without proprietor's consent considered infringement and is actionable. Proprietor is responsible for initiating action against infringers and determining amount of compensation due him, based on economic benefits gained by infringers, use of his invention, utility solution or industrial design.

Remedies.

Proprietor of infringed intellectual property can demand that competent State authority stop infringement. Another option is relief through Vietnamese courts. Generally, proprietors of patented inventions, utility solutions, or industrial designs may receive better results from negotiating with infringer before going to respective governmental agency or court such as People's Court for relief, as judicial avenues for relief are rarely best first step. In addition to being of questionable efficiency, patent laws are relatively new and untested.

Industrial Property Rights of Foreign Organizations and Individuals.

Industrial property rights of foreign individuals and juridical persons for which State has issued certificate of protection will be protected in accordance with Vietnamese laws and international treaties to which Vietnam is signatory party. (IPL, Art. 2).

Protection of Layout Designs (Topographies) of Semiconductor Integrated Circuits.

Legislation.

Intellectual Property Law adopted by National Assembly of Vietnam dated Nov. 29, 2005, effective on July 1, 2006 (“IPL”); Government Decree No. 103/2006/ND-CP dated Sept. 22, 2006 on implementation of IPL regarding industrial property rights (“Decree 103/2006”); Circular No. 01/2007 of Ministry of Science and Technology dated Feb. 14, 2007 on implementation of Decree 103/2006 (“Circular 01/2007”).

Conditions for Protection.

In order to be protected, topography must be original, that is result of creator's own intellectual efforts and is commercially novel, that is, it was not widely known among creators of topographies and manufacturers of semiconductor integrated circuits at time it is created. (IPL, Arts. 68, 70). Principles, processes, systems or methods operated by semiconductor integrated circuits or information or softwares contained in semiconductor integrated circuits are not protected under IPL. (IPL, Art. 69).

Application Filing.

Right to file application for protection of topography of semiconductor integrated circuits belongs to: (i) Creator who created topography on its own resources; and (ii) organization or individual who invested money and material means for creator to create applying topography. Right to file application for protection of topography is transferable and inheritable. If two or more organizations or individuals have jointly created or invested in creation of topography, right to file application belongs to all such organizations and/or individuals and application can only be filed with consent of all of them. (IPL, Art. 86).

Filing Requirements and Procedures.

Application for protection of topography of semiconductor integrated circuits must be made in Vietnamese language and submitted to NOIP. Each application may include request for protection of only one topography. NOIP shall review application within one month from filing date to ensure that all formalities have been complied with. If application is accepted, NOIP will send notice of acceptance of legitimate application to applicant. After accepted, application will be published in IP Official Gazette within two months upon acceptance date. If there is no opposition by third parties submitted within three months upon publication of application or there are no legitimate reasons for such opposition, NOIP will send notice to applicant informing its intention to issue certificate for registration, stating therein time limit for applicant to pay fee for granting certificate. If application does not meet all statutory requirements, NOIP will send notice informing its intention to refuse application. Applicant will have one month to oppose notice or remedy defects as required by NOIP.

Appeals.

Applicant or any third party may appeal NOIP rejection to grant protection, rejection of request of suspension of protection or request of revocation of protection within 90 days from date of receiving rejection notice or becoming aware of rejection to Director of NOIP. Director of NOIP is required to respond within 30 days from date first appeal is filed, or 45 days in complicated cases. If Director of NOIP does not settle appeal within time limit for settling appeal or appellant is not satisfied with settlement, appellant may either submit second and final appeal to Minister of MOST or initiate lawsuit within 30 days from date time limit expires or date of first settlement. Final decision of MOST is due in 45 days for normal cases or 60 days for completed cases from date second appeal is filed. (Decree No. 103/2006, Art. 14).

Term of Protection.

Title of Protection for topography of semiconductor integrated circuit is Certificate of Layout Design of Semiconductor Integrated Circuits which is effective from issuance date for shortest duration among periods of: (i) Ten years from filing date; (ii) ten years from first commercial exploitation authorized by persons having right to file application for protection or by persons authorized by such persons having right to file application; and (iii) 15 years from date topography was created. (IPL, Art. 93).

Protection.

During effective period of Certificate, owner of topography has exclusive use of topography and may license use of protected topography to third party. Owner also has right to seek enforcement against third party infringement. (IPL, Arts. 124, 125). Creator has right to: (i) Be named as creator of topography in Certificate, National Registry and publishing materials published in relation to topography; (ii) receive remuneration from owner for creation of topography in accordance with agreement with owner or in absence of agreement with owner, at least 10% of profits gained by owner from use of topography and at least 15% of total licensing royalty amount received by owner; and (iii) seek enforcement of his right. Creator's rights are transferable and inheritable. (IPL, Arts. 122, 135).

Uses which may not be considered infringements include: (i) Use for noncommercial purposes such as private use, use for evaluation, analysis, research and teaching; (ii) use of protected topography for purpose of maintaining operation of foreign transportation means in transit or temporarily keeping such in territory of Vietnam; and (iii) use of topography without knowing or having obligation to know that such topography is under protection. (IPL, Art. 125).

Licensing must be made in written contract and is valid from date it is registered with NOIP. Transfer of IPRs in topography must also be made in written contract and registered with NOIP. (IPL, Arts. 138, 148).

Protection of New Plant Varieties.

Legislation.

Civil Code (CC) enacted by NA on June 14, 2005 and effective Jan. 1, 2006; Intellectual Property Law adopted by NA on Nov. 11, 2005 and effective July 1, 2006 (IPL); Decree No. 104/2006/ND-CP of Government dated Sept. 22, 2006 on implementation of IPL regarding rights to new plant varieties (Decree 104/2006). International Convention for the Protection of New Plant Varieties (acceded Dec. 24, 2006).

Conditions for Protection.

In order to be protected, new plant variety must: (i) Belong to protected branches and species of plants listed by Ministry of Agriculture and Rural Development (MARD); (ii) be distinctive; (iii) be uniform; (iv) be stable; (v) be commercially new; and (vi) bear appropriate appellations and be easily distinguishable from those of other plant varieties of same species, which are widely known. (IPL, Arts. 158-163).

Application Filing.

Right to file application for protection of new plant variety belongs to: (i) Breeders who have personally selected and bred or discovered and developed plant variety by their own efforts and financial sources; (ii) organizations and individuals who fund breeders to select and breed or discover and develop such plant variety by job assignment or hiring, unless otherwise agreed; (iii) organization and individuals who are transferees of, or who inherit right to register for protection of plant variety; or (iv) State, if such plant variety were selected and bred or discovered and developed by State budget or under projects managed by State. (IPL, Art. 164).

Filing Principle.

“First to file” principle applies in case there is more than one application for protection of same new plant variety.

If at same filing date, there is more than one application for protection of same new plant variety, certificate for protection must only be granted to individual(s)/organization(s) for filing of sole application as agreed by all individual(s)/organization(s) who file applications at same filing date. Where it is impossible to reach agreement, New Plant Variety Protection Office (PVPO) must consider grant of certificate for protection to individual(s)/organization(s) deemed to be first to select and breed or discover such new plant variety. (IPL, Art. 166).

Filing Requirements and Procedures.

Application for protection of new plant variety includes: (i) Application form; (ii) photo and technical specification made on set form; (iii) Power of Attorney ("POA"), if any; (iv) documents evidencing registration right, if any; (v) documents evidencing priority right, if any and (vi) receipt for payment of fee and charges. Application must be made in Vietnamese, except for POA, documents evidencing registration rights, documents evidencing priority rights and other supported documents. (IPL, Art. 174). In addition to such documents mentioned above, foreign applicant shall also submit one of documents, as follows: documents evidencing such foreign applicant is national of country that entered into international treaty on protection of new plant variety with Vietnam; or documents evidencing such foreign applicant has permanent residential address in Vietnam or has plant variety production or trading establishment in Vietnam; or documents evidencing that such foreign applicant has permanent address in country that entered into with Vietnam international treaty on protection of new plant variety. (Decree No. 104/2006; Art. 7).

Foreign organizations or individuals that have permanent residential address in Vietnam or have plant variety production or trading establishment in Vietnam may directly submit or authorize IP agents to represent them in submitting applications. Those that do not have permanent residential address in Vietnam or plant variety production or trading establishment in Vietnam must employ local IP agents to submit applications and carry out related procedures. (IPL, Art. 165).

Application for protection of new plant varieties shall be submitted to PVPO under MARD. Within 15 days upon receipt of application dossier, PVPO shall conduct formality examination. If accepted by PVPO, such legitimate application shall be published in specialized magazine on plant variety within 90 days from date of acceptance. If not accepted, PVPO shall send notice of refusal of acceptance of legitimate application, or request applicant to supplement or revise such application. (IPL, Arts. 176, 177).

Upon receipt of complete and legitimate application, MARD shall conduct appraisal of substantive examination of varieties. If conditions required are all met, Minister of MARD shall issue decision to grant protection certificate. Term of protection is 20 years for new plant varieties, and 25 years for woody plants, as from granting date. (IPL, Art. 169).

Assignment and Licenses.

Assignment and license of new plant variety must be made by written contract. Assignment contract must be registered with APNPV by assignee. (IPL, Arts. 192, 194).

14.03 TRADEMARK LAW:

Legislation.

Civil Code (CC) enacted by NA on June 14, 2005 and effective Jan. 1, 2006; Intellectual Property Law (IPL) adopted by NA on Nov. 29, 2006 and effective July 1, 2006; Decree No. 103/2006/ND-CP of Government dated Sept. 22, 2006 on implementation of IPL (Decree No. 103/2006); Circular No. 01/2007/TT-BKHCN dated Feb. 14, 2007 of Ministry of Science and Technology on implementation of Decree No. 103/2006 (Circular 01/2007).

Treaties and Conventions.

Vietnam has acceded to Paris Convention for the Protection of Industrial Property of Mar. 20, 1883, and its revision in Stockholm on July 14, 1967. Vietnam has also signed Madrid Agreement of Apr. 14, 1891, also revised in Stockholm in 1967. Vietnam is member of WIPO and has adopted International Classification of Goods and Services system which divides goods and services into 45 classes. Trademark laws in Vietnam must conform to above treaties. Madrid Protocol entered into effect in Vietnam on July 11, 2006.

Industrial Protection Authority.

National Office of Industrial Property (NOIP), under administrative control of Ministry of Science and Technology (MOST), is responsible for registration and protection of trademarks (as well as other industrial properties). Once trademark is registered, protection from infringement may be sought through provincial or municipal level Market Management Bureau Economic Police or Customs offices, or through People's Court.

Scope of Protection.

Trademarks and symbols used to distinguish same category of products or services from various business or production facilities, may be in form of words, images or combination of these elements, and in one or more colors. (IPL, Art. 72).

Certain trademarks may be denied registration including: Symbols identical or confusingly similar to national flags or national emblems; symbols identical with or confusingly similar to emblems, flags, armorial bearing, abbreviated names or full names of Vietnamese state bodies, political organizations, socio-political organizations, socio-politico-professional organizations, social organizations or socio-professional organizations or with international organizations, unless permitted by such bodies or organizations; symbols identical with or confusingly similar to real names, aliases, pseudonyms or images of leaders, national heroes or famous personalities of Vietnam or foreign countries; symbols identical with or confusingly similar to certification seals, check seals or warranty seals of international organization which require that their symbol must not be used, unless such seals are registered as certification marks by such organizations; or signs which cause misunderstanding or confusion or which deceive consumers as to origin, property, use, quality, value or other characteristics of goods or services. (IPL, Art. 73).

Trademark Protection Applicants.

Individuals, legal persons and/or other parties legally conducting production or business activities are entitled to apply for certificates of trademark protection for their goods. Any individual, legal persons, and other entities legally carrying out manufacturing or service activities are entitled to file application for Trademark Registration Certificate (sometimes referred to as “Protection Certificate”) or service mark. Further, any individual, legal persons, and other entities legally carrying out commercial activities are entitled to file application for Trademark Registration Certificate covering products marketed by them but manufactured by others provided that such manufacturers do not use such trademark for respective products and do not oppose application. Lawfully established collective organizations shall have right to register collective marks to be used by members of such collective organizations pursuant to regulations on use of collective marks; for symbols indicating geographical origin of goods or services, right for registration shall belong to local collective organizations representing members operating in such geographical localities. Organization with function of controlling and certifying quality, properties, origin or other relevant criteria of goods or services shall have right to register certification marks, provided that such organizations are not engaged in production or trading of such goods or services. Two or more organizations or individuals shall have right to jointly register mark in order to become co-owner if, such mark is used in names of all co-owners or used for goods or services which are produced, trade with participation of all co-owners; and use of such mark does not cause confusion to consumers as to origin of goods or service. (IPL, Art. 87).

Under CC, industrial property rights of foreign individuals and/or legal persons granted certificates of protection for their industrial property by Vietnam are protected by Vietnamese laws as well as industrial property treaties to which Vietnam is signatory party. (CC, Art. 775).

Application Filing Requirements.

Application may include many different products and services to be covered by same trademark. Complete application must include Declaration Form which is attached with trademark pattern (standard form issued by NOIP; two sets); mark specimen (nine samples) and list of goods or services bearing such mark, agreement on use of collective trademark or certification trademark if trademark requesting protection is collective marks or certificate marks (one set); Power of Attorney, if any; documents certifying applicant's legal right to file application (if applicant has been assigned application filing right by another); Documents certifying priority right, if claimed; Official application receipt for charges. (IPL, Arts. 100, 105; Circular 01/2007, Item 37).

Complete application filed must be in Vietnamese except for Power of Attorney; documents certifying registration right; documents certifying priority right; or other supporting document which may be made in foreign languages but must be translated into Vietnamese, if requested by NOIP. (IPL, Art. 100). As Vietnamese language is Romanized, applicants are not required to register Vietnamese translation of mark, although advisable, as such registration will protect owner from would-be infringers capitalizing on goodwill of mark simply by adopting Vietnamese equivalent. In practice, only marks in Chinese require Romanized translation of mark and its meaning. If mark contains letters/words in languages other than Vietnamese, their pronunciation must be clearly noted and meaning (if any) must be translated into Vietnamese. (Circular 01/2001, Item 37.4d[iii]).

Filing Procedure.

Prior to filing trademark application with NOIP, applicant should conduct trademark search of trademark he plans to register. Search may be conducted by one of Vietnam's authorized trademark agents. Information produced by search may provide applicant with better chance to protect his trademark by anticipating avoidable objections. Search will also indicate whether similar or identical mark has already been registered or applied for. If similar mark has been registered, chances of rejection are higher.

Once search has been successfully conducted, applicant files application with NOIP and pays application fee. As Vietnam follows “first to file” rule, date on which NOIP receives application is crucial. If trademark seeking protection is already protected by registration in treaty country, then priority date is date of original application. If products bearing trademark are exhibited in official exhibition in Vietnam, then date of exhibition serves as priority date if application is filed within six months of exhibition.

If application is complete and accepted by NOIP, its priority date will be recognized and effective with respect to any conflicting applications. If application is deemed incomplete, it is returned to applicant and process must be reinitiated. Only in cases where applicant is deemed to have disclosed substance of trademark in original, albeit incomplete application, will applicant receive priority right of original application. NOIP has nine months to complete review of trademark application for its acceptance to registration. (Circular 01/2007, Item 15.8).

Once mark is registered, registration certificate is issued to proprietor and mark is entered into National Register of Marks. Registered mark will then be published in NOIP Industrial Property Gazette.

Appeals.

If trademark registration is denied by Registrar, written explanation must accompany rejection letter. Applicant has 90 days (or time period stipulated in rejection letter) from date of receiving or becoming aware of refusal notice to file first appeal. NOIP is required to respond to first appeal within 30 days from date first appeal is filed, or 45 days in complicated cases. If NOIP denies appeal, appellant may either submit second and final appeals to MOST, or commence lawsuit in accordance with administrative procedures, within 30 days after time limit for settling first appeal has expired but appeal has not yet been settled, or from date appellant receives or becomes aware of decision on settlement of first appeal. Final decision of MOST is due within 45 days from date second appeal is filed, or 60 days in complicated cases. (Decree 103/2006, Art. 14).

Term of Protection.

Trademark Protection Certificate is referred to as Certificate of Trademark Registration which is effective from issuance date for duration of ten years from legitimate filing date. Well-known marks shall be protected indefinitely on basis of widespread use according to provisions of Art. 75 of IPL, without requiring completion of registration procedures. (Decree 103/2006, Art. 6.2). International registration of trademark shall be protected by State of Vietnam from date international registration is published in International Trademarks Gazette of WIPO until expiry of validity of such international registration pursuant to Madrid Agreement. Use of mark is compulsory and subject to termination and cancellation as provided by IPL and other implementation legislation. Mark registration may be renewed indefinitely in ten-year increments, provided that renewal application is filed six months prior to expiration date of previous term of protection or later, but not later than six months from expiration date of Trademark Certificate. Person who requests renewal must pay renewal fee and 10% of renewal fee for each month late. (Circular 01/2007, Item 20.4).

Cancellation.

Any third party has right to lodge request with NOIP for cancellation of validity of trademark registration certificate or International Trademark Registration within five years from granting. For cases where rights are established as result of bad faith of such registrant, trademark may be cancelled at any time during term of registration. (IPL, Art. 96).

Interested party may also cancel registered trademarks, and MOST circular states that in order to proceed with action against registered mark, third party must have widely and continuously used mark with respect to goods or services identical (or confusingly similar) to those which disputed mark is registered for, prior to disputed mark's registration. Mark must be “well known” among consumers due to products being sold bearing mark; or advertised using mark; or be mark which has gained recognition in international market; mark for which substantial sales figures can be substantiated; mark used over long period of time; or mark which has obtained registrations worldwide.

Registered mark may also be cancelled if not used for period of five consecutive years prior to date on which note requesting suspension is issued without adequate legal reason. Registration may also be terminated if manufacturing or commercial establishment owning mark no longer carries on activities. (IPL, Art. 95).

Assignment and Licenses.

Proprietor of protected mark may assign or license his rights to another person. Assignment of joint marks shall only be effected simultaneously for all joint marks. For well-known marks, assignment must ensure maintenance of prestige of goods or services bearing such well-known marks. Assignment of rights to trademarks must not cause confusion as to properties or origins of goods or services bearing such marks. (IPL, Art. 159.4). License or assignment must be registered with NOIP and following documents must accompany registration: two declaration forms for registration of assignment or license; two copies of original license contract or assignment; original registration certificate of mark concerned; letter of consent of co-owners, if any; power of attorney, if any; and fee and charge receipt. (Circular 01/2007, item 47).

Enforcement.

While trademark registration is valid, owner of trademark or transferee under license contract has exclusive use of mark in relation to goods or services for which it is registered. Trademark violations are more easily detected than patent or copyright violations. Trademark infringer may face civil or criminal sanctions in Vietnam.

Enforcement of registered mark can take several forms. If owner of registered trademark or his/her empowered authorized agent discovers infringement has occurred, he/she or agent may request infringers to terminate such act of trademark infringement and request competent authorities to handle acts of infringement. In practice, however, owner of registered trademark usually contacts Market Control Department in order to stop infringement, as one of its functions is to oversee market activities, including trademark use. Other enforcement agencies include: Inspectorate of Ministry of Science and Technology or local Departments of Science and Technology; police; and customs authorities.

Civil action, though not most pragmatic method of enforcement, is only option available if civil damages are sought from infringer. Civil complaint is filed in People's Court of province or city under central government. If there is foreign individual/organization involved in trademark infringement, case shall be heard at civil court of Hanoi or Ho Chi Minh City. It may take long time before decision is handed down and, though court decides on relief given. Some remedies available are interim injunction; damages calculated by lost profit to trademark holder due to infringing activities; destruction of infringing or counterfeit goods; or public apology at infringer's expense.

Trademark owner may seek criminal action by filing complaint with public prosecutor, and must supply evidence of infringement to support such case. Case is heard by local People's Court. In case of foreign complainant, People's Courts of either Hanoi or Ho Chi Minh City will adjudicate case. Criminal remedies available are seizure and destruction of infringing goods; fines (maximum being VND 200 million [approx. US$11,000]); jail sentence (maximum of up to three years). (Criminal Code, Arts. 170a and 171).

Bureau for protection of customers' interests, in response to complaint filed by trademark owner, is empowered to temporarily seize infringing goods while awaiting outcome of case, provided sufficient evidence exists to support infringement claim. Rightsholders may register their trademarks with customs to seek more focused monitoring of infringing imports or exports; it is therefore possible for Customs personnel to detect counterfeit trademarks and take effective action against infringers.

Most practical method by far of enforcing trademark rights is through informal action. Foreign company may empower attorney/agent to act on its behalf. Attorney/agent would then contact local authorities and enlist their aid in stopping infringement activities, and/or send cease-and-desist letters to infringers. Letters, signed by attorney, warn infringers that activity is in violation of Vietnamese law, and warn of civil and criminal actions which might be taken if infringing activity does not stop. They may also publish warnings to consumers in local newspapers that infringing products are on market. Such warnings are accompanied by educational information on how consumer may recognize genuine articles from counterfeit ones.

Well-known Mark.

IPL newly defines well-known mark as “mark being widely recognized by consumers throughout territory of Vietnam”. IPL clearly defines criteria for determination of well-known mark to include: (i) Significant number of related consumers who are aware of trademark through purchase, use of goods or services bearing such trademark or through advertising; (ii) large territorial scope within which goods or services bearing trademark are circulated; (iii) significant revenue from sale of goods or supply of services bearing trademark or volume of goods sold or services supplied; (iv) significant consecutive periods of time of use of trademark; (v) reputation of goods or services bearing trademark; (vi) number of countries granting protection to trademark;

(vii) number of countries recognizing trademark to be well-known; and (viii) value of trademark in form of implemented assignment, licensing, and capital contribution. Proprietary right over well-known trademark is automatically created through use of mark in commerce and is not subject to any registration with NOIP, although registration is recommended.

Certification Mark.

IPL introduced for first time certification mark. Certification mark is defined as trademark that is allowed by owner to be used in connection with goods or services of other entities and individuals for purpose of certification of characteristics in origin, ingredient, material, mode of manufacture of goods, mode of provision of services, quality, accuracy, safety or other characteristics of goods or services bearing such trademarks. Along with certification marks, owner must issue regulation of use of certification mark, of which main contents include: (i) Name of legal entity, individual who is owner of certification mark; (ii) conditions for use of certification mark; (iii) characteristics of goods or services being certified by certification mark; (iv) mode of evaluation of characteristics of goods or services and mode of supervision of use of certification mark; and (v) expenses (if any) that users of certification mark must pay for certification or protection of trademark.

Industrial Property Rights of Foreign Organizations and Individuals.

Industrial property rights of foreign individuals and juridical persons to industrial property or to new plant varieties for which Socialist Republic of Vietnam has issued certificate of protection or recognized for protection, will be protected in accordance with Vietnamese laws and international treaties in which Vietnam is signatory party. (CC, Art. 775).

15 LEGAL PROFESSION

15.01 ATTORNEYS AND COUNSELORS:

Legislation.

Law on Lawyers adopted by National Assembly of the Socialist Republic of Vietnam dated June 29, 2006 (“LL”) came into effect on Jan. 1, 2007 and replaced Ordinance No. 37/2001/PL-UBTVQH10 dated July 25, 2001 of Standing Committee of National Assembly on Lawyers (Ordinance 37). Decree No. 28/2007/ND-CP of Government dated Feb. 26, 2007 on implementation of some article of LL (“Decree 28/2007”) came into effect on Mar. 22, 2007, and replaced Decree No. 94/2001/ND-CP of Government dated Dec. 12, 2001 on implementation of Ordinance 37 and Decree No. 87/2003/ND-CP of Government dated July 22, 2003 on practice of foreign lawyers in Vietnam.

Introduction.

Substantial economic reforms have been implemented in Vietnam in late 1980s. With industrialization and modernization, both local and foreign lawyers and consultants have been presented with numerous challenges and opportunities and their services have become indispensable. With increased importance of these professions, need for regulation has arisen.

Provisional Decree 1945.

Law practice in Vietnam is very different from that of western world due primarily to fact that Vietnamese lawyers are under administrative and political restraint. Besides having obligations to his client, Vietnamese lawyer also has obligations to State. Thus, in pursuing his client's interests, he must also ensure that these interests conform to those of State.

In 1945, after Vietnam regained its independence, Democratic Republic of Vietnam (now referred to as Socialist Republic of Vietnam) was established. Before 1946 Constitution, Provisional Decree continued to recognize bar associations formed during former regime and introduced changes regarding conditions for practicing law in Vietnam, one significant change being that lawyers had to be Vietnamese nationals. Decree also specified certain rights granted only to lawyers. One such right enabled Vietnamese lawyers to represent clients in all Vietnamese courts, including military courts.

In practical application, Decree was not strictly adhered to. Despite reaffirmation by Constitutions of 1959 and 1980, and Criminal Code of person's right to legal defense, large gap existed between what was stipulated by Constitution and what was implemented due to lack of government attention in enforcement, war, and lack of training available for law graduates. All these factors eventually led to dissolution of lawyers' associations.

1987 Ordinance and 1989 Government Decree played significant role in revival of legal profession in Vietnam during period of great economic and political change. Vietnamese lawyers are now increasingly active in public and business community and profession is growing rapidly.

Lawyers' associations reemerged from 1989 decision of People's Committee in Ho Chi Minh City and both lawyers' associations and bar associations now exist in Vietnam.

Lawyers' associations began to form in Hanoi in 1955 and are open to all Vietnamese citizens working in legal fields including lawyers, court clerks, prosecutors, judges, and even policemen. Associations' activities are both social and professional. These associations also have political tone as they were formed soon after French withdrawal from Vietnam. Government expects members to work for Vietnamese benefit, to be instruments of communist/socialist government, and to act as role models.

Bar Associations.

No bar associations were formed until 1987, when State Council (now Standing Committee of National Assembly) adopted Ordinance on Bar Associations (Ordinance) which provides that bar associations may be established in provinces, cities or in special administrative units. Ordinance places bar associations and their members under control of Ministry of Justice, People's Council, and People's Committee of city or province where located. It also stipulates that People's Committees (administrative and political organizations) in city or province monitor activities of bar association and members. Nevertheless, as bar association, membership rights are limited to lawyers (although it is neither mandatory nor right for lawyers) and do not apply to members of state agencies unless they are law researchers or professors; bar associations maintain more legal focus than lawyers' associations. For example, bar associations contribute significantly to drafting laws and act as informal body of legal advisors to government.

Under LL, bar association is recognized as social and professional association of lawyers which can be established in provinces and cities under central government. Bar associations and lawyers may set up National Lawyer's Organization for representation of bars and lawyers of entire country. Bar association can be formed in every province or city under central government by at least three lawyers. Provincial people's committee grants license to set up bar association upon receipt of agreement from Minister of Justice. As of date, bar associations have been formed in all 64 provinces and cities under central government, while National Lawyer's Organization is not yet been set up. Each bar association has its own articles of association, which must be approved by Provincial people's committee. Bar association has rights and responsibilities to, among others: (i) Present and protect legitimate rights and interests of lawyers in practicing profession; (ii) supervise and coordinate with bar associations in other localities to supervise compliance with law, code of ethics and professional conduct by member lawyers and lawyers who practice in legal practice organization and branches located in localities, to discipline lawyers; (iii) supervise and coordinate with bar associations in other localities to supervise operation of legal practice organizations and their branches and liaison offices; request legal practice organization to cease acts in violation of law and, if necessary, propose competent state authority to deal with such act; (iv) organize registration and oversee legal apprenticeship; (v) receive application files for legal practice certificate and propose Ministry of Justice to issue lawyer's practicing certificates; (vi) organize registration for membership of bar association; movement of lawyers of bar; request National Lawyer's Organization to issue Lawyer's Card; (vii) assign legal practice organization to appoint or appoint by itself lawyers practicing in their own capacity to participate in legal proceeding at request of body conducting legal proceedings; (viii) conduct mediation and conciliation for disputes between legal apprentices and lawyers and legal practice organizations, and between clients and legal practice organizations and lawyers; (ix) settle compliance and denunciations according to its competence; (x) summarize and exchange experiences, conduct training on professional skills and implement other measures to improve professional qualifications of lawyers; (xi) gather comments, opinions and proposals of lawyers; (xii) organize lawyers to take part in dissemination of laws and legal education; (xiii) submit reports to National Lawyer's Organization about organization and operation of Bar; and (xiv) submit to Ministry of Justice, provincial people's committees any resolution and/or decisions issued by bar association in accordance with law and upon request. National Lawyer's Organization is set up for representation of all lawyers and bar associations in whole country. Under LL, National Lawyer's Organization is social and professional organization enjoining status of legal entity, having its own common seal, bank account and article of association. Article of Association of National Lawyer's Organization shall be adopted by general meeting of lawyer members which then must be submitted to Ministry of Justice for approval. Under LL, National Lawyer's Organization has tasks, powers and responsibilities as follows: (i) Represent and protect legitimate rights and interests of lawyers and bar associations in whole country; (ii) issue and supervise compliance with rules of professional ethics and conduct for lawyers; (iii) coordinate with Ministry of Justice in issuing lawyers apprenticeship regulation in conducting professional training for lawyers and check and assessment of apprentice's performance; (iv) organize regularly continuing legal education courses on legal knowledge and practicing skills for lawyers; (v) summarize and exchange experiences concerning legal practice in whole country; (vi) issue samples of uniform of lawyers participating in court proceeding and sample of Lawyer's I.D. Card; issue, exchange and withdraw Lawyer's I.D. Card; (vii) provide for exemption from and reduction of remuneration, pro bono legal aid provision by lawyers and settlement of dispute regarding remuneration and payment of expenses to lawyers; (viii) stipulate apprenticeship fees, fees for admission to Bar associations and membership fees; (ix) settle complaints and denunciations with its competence; (x) collect and communicate feelings, wishes, opinions and proposals of lawyers; (xi) participate in lawmaking, legal research, legal dissemination and education; (xii) carry out international cooperation activities on lawyers; (xiii) provide Ministry of Justice with resolutions and decision issued by National Lawyer's Organization in accordance with laws and/or upon receipt of request; and (xiv) other rights and obligation as prescribed by its articles of association. (Art. 65, LL).

Lawyer's Qualification Requirements and Conditions.

To become lawyer, applicant must meet following requirements: Must be Vietnamese Citizen who is loyal to fatherland; complies with constitution and laws; possesses good moral; obtained bachelor of law degree; obtained certificate for professional legal practice; completed apprenticeship; in good health condition; passed apprenticeship exam and obtained lawyer practicing license; and member of bar association. (LL, Arts. 10, 11).

Bar Association Membership Requirements.

LL stipulates membership requirements for bar associations. To join, applicant must obtain lawyer practicing license. (LL, Art. 20).

Rights and Obligations of Vietnamese Lawyer.

To practice law, lawyer (called luat su in Vietnamese) must be member of bar association and hold valid practice license issued by Ministry of Justice. To be qualified for license, lawyer must have completed 18 months as lawyer trainee in law office or partnership and passed evaluation examination jointly organized by Ministry of Justice and Lawyer's National Organization after completion of training period.

Under LL, Vietnamese lawyer has right to: (i) Practice law, select manner of legal practice and legal practice organization in forms stipulated by law; (ii) practice law in entire territory of Vietnam; (iii) practice law abroad; and (iv) exercise other right stipulated by law. (Art. 21, LL). Lawyer may practice in any court in Vietnam, regardless of locality of bar association membership. Vietnamese lawyer may represent clients in: (i) Criminal cases (under Arts. 35 and 36, Law on Criminal Procedure); (ii) civil cases, including marriage and family cases, trading, commercial, labor cases and/or disputes (Civil Procedures Code, Arts. 1, 9 and 63); and (iii) administrative cases (under Art. 23, Ordinance on Procedures for Settlement of Administrative Cases). Furthermore, lawyer may represent parties in disputes brought to arbitration or other judicial forums, provide legal advice and any other legal services to citizens and organizations, and receive fees in accordance with agreement with clients.

Lawyer has obligation to: (i) Comply with principles for legal practice; (ii) use lawful measures to protect legitimate rights and interests of his/her clients; (iii) participate in legal proceedings upon request by body conducting legal proceeding and under assignment by bar association; (iv) provide pro bono legal aid; and (v) other obligations as prescribed by law. LL specifically prohibits lawyer from: (i) Providing legal services to clients whose rights and interests are in conflict in same criminal, civil or administrative case, or in same civil or another matter stipulated by law; (ii) intentionally providing false evidence; inciting detained, charged or accused person or concerned party to give untrue statement or file unlawful complaint or denunciation; (iii) disclosing information about case or client which he or she became aware during his/her legal practice, except where client consents in writing to such disclosure or law provide for contrary; (iv) extorting or deceiving clients; (v) receiving or asking for any sum of money or other benefits from clients other than remuneration and cost which have been agreed with clients in contract for providing legal services; (vi) getting in touch with or contacting person conducting legal proceeding, another cadre or public official in order to commit act contrary to law in settlement of case; (vii) abusing legal practice and/or lawyer's capacity to cause adverse impact on national security and/or public order or safety, or to infringe upon interests of State, public or legitimate rights and interests of agencies, organizations, and individuals.

Lawyers may practice law in one legal practice organization which is established under form of law office, law partnership, limited liability law firm with one founding member, or limited liability law firm with several founding members. Lawyer may also practice as individual under contract for providing legal service or working for establishment under labor contract. (Art. 49, LL).

Luat gia is another term commonly used in Vietnam to refer to person who has graduated from law university or holds equivalent legal knowledge but has not been registered as lawyer (luat su). Luat gia is eligible for membership in luat gia associations. To be member of luat gia association, applicant must have good character and be recommended by two members of luat gia association. Members of luat gia association may include licensed lawyers. Many luat gia provide legal consultancy services. To represent clients before court, luat gia is required to have power of attorney from client and approval from either head of Office of Investigation, prosecutor, chief judge or court council (normally comprised of judge and two jurors).

Law office can be established by one licensed lawyer under form of individual enterprise. Founding lawyer is chief of office and has unlimited liability for office.

Law office can provide litigation, consultancy, and other legal services.

Law office is registered with provincial Department of Justice. Registration is granted within ten working days from submission of application.

Law partnership can be established by at least two licensed lawyers. Partners have fiduciary unlimited liability for partnership.

Law partnership is registered with provincial Department of Justice. Registration is granted within ten working days from submission of application.

Limited liability law firms include limited liability law firms of two or more members and limited liability law firms of one member. Limited law firm of two or more members shall be established by at least two lawyers while one-member law firm shall be established by only one lawyer.

Limited liability law firm is registered with Department of Justice of province or city where head office of law firm is located. Registration is granted within ten working days open receipt of complete application dossier.

Legal fees are usually based on mutual agreement between lawyers and clients in agreement on provision of legal services. Generally, in criminal cases, legal fee shall not exceed ceiling level stipulated by government; for criminal case in which lawyer participates at request of body conducting legal proceeding, lawyer shall be entitled to receive legal fee and travel expense at level stipulated by government. (LL, Arts. 56, 57).

Transition Stipulation.

LL took effect on Jan. 1, 2007 and replaced Ordinance No. 37 on Lawyers of 2001. Lawyers licensed in accordance with Ordinance 37 shall be allowed to continue to practice. Those who have been apprentices under Ordinance 37 shall continue apprenticing under LL but their apprenticeship card shall be invalid. Lawyer I.D. Cards issued under Ordinance 37 shall be valid until such is changed by National Organization of Lawyers for new Lawyer I.D. Card. Within six months as of from Jan. 1, 2007, law offices and/or law partnerships established under Ordinance 37 shall have to convert into law offices or law partnerships as stipulated by LL. Within six months as of from Jan. 1, 2007, organization providing legal service as stipulated by law on enterprises of 1999 that wish to continue providing legal service shall have to convert into one of statutory forms stipulated by LL. Foreign lawyers, branch offices of foreign law firm, 100% foreign law firms or Vietnam-Foreign law partnership established under Decree No. 87/2003/ND-CP dated July 22, 2003 of Government shall continue practicing in Vietnam under LL. Bar association established under Ordinance 37 shall not be required to re-establish. While waiting for establishment of National Organization of Lawyers, Ministry of Justice shall be responsible for organization of examination after apprenticeship and Bar Association shall be responsible for issuance of Lawyer I.D. Card.

Legal Consulting Firms.

Resulting from 1987 Foreign Investment Law of Vietnam and increased development, new legal profession, existing outside regulating scope of Ordinance developed. Vietnamese lawyers working for consultation firms and companies, formed pursuant to Vietnamese Company law or under guidelines of state agencies or social organizations, provide legal advice mainly to foreign and domestic business enterprises. Presently, amount of legal advice rendered through consultation firms has surpassed that rendered through government offices. As most of these consultation firms are not members of bar associations, their lawyers are not qualified to participate in litigation. They may provide legal representation only on Vietnamese laws, usually in investment and business areas.

Foreign Lawyers Practicing in Vietnam.

With increased foreign investment came many foreign lawyers. Vietnamese government responded by allowing foreign legal firms to open representative offices in Vietnam. (Having representative office status does not allow foreign lawyers to practice law in Vietnam.) On July 8, 1995, government enacted Decree 42/CP on Regulations Concerning Legal Consulting of Foreign Lawyers' Organization in Vietnam (Decree 42) that allowed foreign law firms to open branches in Vietnam. Decree 42/CP then has been replaced by Government Decree No. 87/2003/ND-CP dated July 22, 2003 providing regulations on practice of foreign law organizations and foreign lawyers in Vietnam (Decree No. 87/2003). By issuance of LL, foreign lawyers practicing in Vietnam are now governed by LL which is supplemented by Government Decree No. 28/2007/ND-CP dated Feb. 26, 2007. (Decree 28/2007).

Under LL, foreign lawyers are allowed to provide legal consultancy on international law and foreign laws as well as provide legal services concerning foreign laws. Foreign lawyers may also provide legal consultancy on Vietnamese laws if he/she obtained bachelor of law diploma issued by university of Vietnam and meets all requirements as for Vietnamese lawyer. However, foreign lawyers are not yet allowed to participate in any legal proceedings in Vietnam. Foreign lawyers practice in Vietnam as member of foreign law firm or branch office of foreign law firm in Vietnam, or work under agreement for foreign law firm in Vietnam or for branch office of foreign law firm in Vietnam or Vietnamese legal practice organization. Foreign law firm branches or wholly owned foreign law firms are now allowed to employ Vietnamese lawyers and, through Vietnamese lawyers, they can provide legal advice on Vietnamese law but still cannot participate in judicial procedures of Vietnamese courts as representatives or barristers.

Foreign lawyers who wish to work in Vietnam must also obtain license to practice international law in Vietnam. License of foreign lawyers is valid for five years and renewable.

Licenses are issued by Ministry of Justice of Vietnam (“MOJ”).

Branch of foreign law firm is dependent office of foreign law firm which has unlimited liability for its operations under Vietnamese law. Limitation of two branches in Vietnam no longer exists. Application for branch license submitted to Ministry of Justice includes: (i) Application; (ii) copy of license for establishment of parent law firm of home country authorities; (iii) brief introduction of history and operation of parent law firm; (iv) list of lawyers proposed to work in branch; and (v) letter of appointment of branch director. Branch director can be either Vietnamese lawyer or foreign lawyer.

Foreign Law Firm.

One or more foreign law organizations may also set up limited-liability wholly foreign owned law firm in Vietnam, referred to as foreign law firm. Application for establishment of foreign law firm, submitted to MOJ, includes: (i) Application for establishment of foreign law firm; (ii) copies of license(s) for establishment of parent law firm(s) of home country authorities; (iii) brief introduction of history and operation of parent law organization(s); (iv) list of foreign lawyers and/or Vietnamese lawyers proposed to work at firm and copy of license to practice law and lawyer I.D. cards; and (v) draft of charter of firm. Director of firm is legal representative of firm before Vietnamese law and can be either foreign lawyer or Vietnamese lawyer.

Limited Liability Joint Venture Law Firm.

One or more foreign law organizations may also join with one or more Vietnamese legal practice organization (law offices or law firms) to set up limited liability joint venture law firm (“Joint Venture Law Firm”). Application for establishment of Joint Venture Law Firm, submitted to MOJ, includes: (i) Application for establishment of Joint Venture Law Firm; (ii) copies of license(s) for establishment of parent law firm(s) of home country authorities and copy of certificate of practice registration of Vietnamese legal practice organizations; (iii) brief introduction of history and operation of foreign law organizations and Vietnamese legal practice organizations; (iv) list of foreign lawyers and/or Vietnamese lawyers proposed to work at Joint Venture Law Firm and copy of license to practice law and/or lawyer I.D. card of each lawyer; (v) draft of charter of Joint Venture Law Firm; and (vi) joint venture contract.

Legal Education in Vietnam.

In order for there to be standard of legal professionalism in Vietnam, all Vietnamese lawyers must have Bachelor of Law degree and complete training course before being accepted as trainee lawyers.

Teaching of contemporary law is still new in Vietnam. Hanoi University of Law, established in 1979, and its branch in Ho Chi Minh City, are only designated law schools. Recently, National University of Social Sciences also introduced law course offered for either two or four years. Classes are taught mainly by professors trained in Vietnam or other socialist countries.

Typical law curriculum covers subjects in both law and politics. As there is very limited teaching of law and free market economy concepts, curriculum changes needed to assist law students to handle changing political and legal environment in Vietnam are presently underway.

Lawyer training in Vietnam is conducted by Judicial Academy under Ministry of Justice. Lawyer training course covers: (i) Legal regulations on lawyer practice; (ii) litigation skills; (iii) legal consulting skills; and (iv) ethical standards and professional morals of lawyers. Training programs are decided by Ministry of Justice. Course duration is at least six months. At end of course, completion certificate will be granted if participant passes final examinations.

16 MINERAL, WATER AND FISHING RIGHTS

16.01 MINES AND MINERALS:

Legislation.

Mineral Law (Law) promulgated by National Assembly on Mar. 20, 1996 and effective Sept. 1, 1996, as amended on June 14, 2005. Government Decree No. 160/2005/ND-CP (Decree 160/2005) dated Dec. 27, 2005 on implementation of Law; Decree No. 150/2004/ND-CP (Decree 150/2004) dated July 29, 2004 on regulations on administrative sanction against violation of state management of minerals.

Mineral Law replaces Ordinance on Mineral Resources issued in Aug. 1989 and provisions of all previous mineral legislation remain except for provisions contrary to current Law. Decree No. 160 (Art. 17) specifies organizations which are allowed to conduct mineral activities. For entities and individuals granted licenses under previous legislation, conditions stated in unexpired license still apply, unless contrary to Law or unless licensee elects to apply provision of Law. (Law, Art. 13). Foreign enterprises and individuals investing in mining activities in Vietnam are subject to Law unless international convention to which Vietnam is party stipulates otherwise.

Under Law, minerals are defined as resources found underground, on land surface in form of natural accumulations of useful minerals, and mineral substances in solid, liquid or gaseous states, which are exploitable. (Law, Art. 3).

“Mining activities” are not expressly defined under Law. However, mining activities appear to encompass: (1) Basic geological investigation activities; (2) basic geological investigation of mineral resources; (3) mineral prospecting; (4) mineral exploration; and (5) mineral exploitation. Basic geological investigation involves research and study of structure and development history of earth's crust and related mineralization thereof. Basic geological investigation of mineral resources involves overall evaluation of mineral resources' potential on basis of basic geological investigation, to serve as scientific basis for orientation of mineral prospecting and exploration activities. Mineral prospecting involves study of geological documentation on mineral resources and actual field surveys aimed at identifying prospective areas for mineral exploration. Mineral exploration covers searching for and discovering reserves of minerals, determining their quality and establishing technical requirements for extraction including collection and testing of bulk samples and preparing feasibility studies on mineral exploration. Mineral exploitation requires basic construction of mines, excavation and production and other activities directly related to mineral extraction. Mineral processing involves classification (grading) and adding value to minerals. (Law, Art. 3).

Mining activities may be carried out in three areas: “restricted areas”, “bidding areas”, and “common areas”. Restrictive areas are subject to restrictive conditions stated in bidding results. Common areas involve mineral activities carried out without restrictions applicable to restricted areas or bidding areas. (Law, Art. 13). Government will list restricted areas and bidding areas in implementing legislation.

Licenses.

Law provides for five types of licenses: mineral prospecting, mineral exploration, mining, secondary mining, and processing licenses. Rights and obligations differ for each license. Duration of exploration license cannot exceed two years with maximum extension of two more years. Prospecting license cannot exceed one year with maximum extension not exceeding another two years. (Law, Art. 21[2]). Mining license may be granted for maximum of 30 years with maximum extension of another 20 years. (Law, Art. 31[3]).

Ministry of Natural Resources and Environment issues licenses for: (i) Mineral prospecting; (ii) mineral exploration; and (iii) exploitation and processing of all kinds of minerals except those under authority of provincial People's Committee. Provincial People's Committee issues licenses for: (i) Mineral prospecting, exploration, exploitation, processing for manufacture of popular construction materials and peat; (ii) mineral exploitation, processing in areas which have been inspected, evaluated or explored, approved as to mineral volume but not in approved plans for exploitation and processing of Vietnam or not listed under national mineral resources. (Law, Art. 56, am'd).

Mining Authorities.

Ministry of Natural Resources and Environment regulates mining activities and must report to Government. Mineral Reserves Assessment Council assists Government in appraisal and approval of mineral reserves.

Entities engaged in mining activities must pay mineral resource tax based on actual commercial mining quantity and selling price. Mining activities are also subject to royalty tax under Ordinance on Royalties, June 1, 1998 and its amendment in 2008.

Mining activities must also comply with Environmental Protection Law and Land Law. All permanent mineral prospecting and exploration activities affecting land surface require land lease contracts signed with Government. Exploitation of underground minerals not requiring use of land surface or temporary mineral prospecting and exploration activities not affecting land surface do not require foreign investor to take out land lease.

17 MORTGAGES

17.01 MORTGAGES:

Under Vietnamese law, mortgage of property is contract under which mortgagor uses its own property to secure performance of civil obligation toward mortgagee without delivering such property to mortgagee. Any asset can be used as mortgaged property, provided that such property must be lawfully owned by mortgagor. (CC, Art. 342). All mortgages must be in writing either in separate document or in annex attached to principal contract, and notarized, certified or registered if required by law. If mortgaged property is under insurance policy, insurance payment belongs to mortgaged property and is paid to mortgagee if in mortgage agreement, and mortgagor has obligation to notify insurer of mortgage.

Mortgagor is entitled to: (i) Exploit utilization of, and enjoy yields and profits from mortgaged property, except in cases where yields and profits also belong to mortgaged property as agreed upon; (ii) invest in mortgaged property so as to increase value of mortgaged property; (iii) sell and replace mortgaged property if such property is commodity circulated in process of production and/or business, in this case, right to request purchaser to make payment or right to receive money or property formed by received money shall become mortgaged property in place of sold-mortgaged property; (iv) sell, exchange or donate mortgaged property other than commodity circulated in process of production and/or business, if so agreed by mortgagee; and (v) lease and lend mortgaged property but with notification to lessee or borrower that leased or lent property is being mortgaged, and mortgagee has to be notified of such. (CC, Art. 349).

Mortgagee is entitled to: (i) Demand third party lessee or borrower to stop using mortgaged property if such use may lead to depreciation or loss of value of mortgaged property; (ii) inspect use of mortgaged property without interfering in such use; (iii) require mortgagor to provide information about status of mortgaged property; (iv) require mortgagor to apply measures to protect value of mortgaged property; (v) require mortgagor or third party keeper to deliver mortgaged property for enforcement of mortgage; (vi) inspect formulation process of mortgaged future property; and (vii) demand disposal of mortgaged property and be entitled to priority of payment. (CC, Art. 351).

Mortgagor is required to preserve and maintain and apply necessary protection measures to avoid depreciation in value of mortgaged property, including cessation of exploitation of utilization of mortgaged property. (CC, Art. 348). Mortgagee is required to return all relevant documents to mortgagor upon mortgagor's fulfillment of obligation. (CC, Art. 350).

In contrast to western principles, mortgage contract in Vietnam only represents single transaction guaranteeing performance of obligation and does not convey to creditor all incidents of legal ownership, for under CC, mortgagee does not have legal right to sell off encumbered property when term to perform obligation becomes due and mortgagor fails to perform it or performs it at variance with mortgaged agreement. Mortgagee may demand that mortgaged property be auctioned off and net sale proceeds to be applied to pay off unperformed obligation or improperly performed obligation, after deducting maintenance and auction expenses. (CC, Arts. 336, 338 and 355).

Mortgage is extinguished when: (i) Obligation secured by mortgage is performed; (ii) mortgaged property cancelled or substituted by another security; (iii) mortgaged property disposed of; or (iv) as per agreement of parties.

Registration of Contract of Mortgage.

Mortgage contract for immovable properties and land use rights of individuals must be registered with People's Committee of commune or ward where mortgaged properties are located. Mortgage contract for immovable properties and land use rights of organizations or entities must be registered with provincial Land and Housing Department. Mortgaging contract for other properties or assets may be registered with National Office of Security Transaction Registration under Ministry of Justice or its branch.

Real Property.

Mortgage of Buildings, Residential Houses.

Ownership of buildings and residential houses is possible in Vietnam but not land ownership. Mortgage of real estate must distinguish mortgage of buildings and houses from land. Each type of mortgage is governed by different set of regulations.

Mortgage of buildings and residential houses is currently governed by Civil Code (CC); Decree 163/2006/ND-CP dated Dec. 29, 2006 on security transactions; Decree 08/2000/ND-CP dated Mar. 10, 2000 on registration of security transactions.

Mortgage of buildings or houses is governed by all regulations mentioned above and by Arts. 342 through 357 of CC. CC requires all mortgages to be in writing either in separate document or in annex attached to principal contract. Mortgage of real estate must be notarized, authenticated or registered. Mortgaged property will be retained for use by mortgagor unless parties agree otherwise to transfer it to mortgagee or to third party until performance of obligation is satisfied. (CC, Art. 349).

Mortgage of Land-Use Right Certificate.

Land mortgage is governed by Arts. 715-721 of Civil Code (CC) and Land Law issued by National Assembly on Nov. 26, 2003 (“2003 Land Law”); Decree No. 181/2004/ND-CP dated Oct. 29, 2004 on implementation of Land Law; Decree No. 163/2006/ND-CP dated Dec. 29, 2006 on security transactions; Decree 08/2000/ND-CP dated Mar. 10, 2000 on registration of security transactions.

Family households, individuals using land or leased land may take out loan by mortgaging land use rights at credit institution licensed to operate in Vietnam or to economic organization or individuals for production, business. (2003 Land Law, Art. 113.7).

Family household and individuals using land leased from State with rental amount paid for in whole or for most of duration of lease agreement have right to mortgage their land use rights and construction/assets attached to that land.

Land use rights for land leased from State by family households or individuals who pay rental annually cannot be mortgaged. However, assets attached to that land can be mortgaged. (2003 Land Law, Art. 114.1.c).

Family households, individuals holding land use rights to residential land; or specialized-use land may mortgage land use right to Vietnamese economic credit organization or may mortgage land use right to individual. Mortgage agreements must follow standard forms and must be registered with People's Committee of Commune where land is located.

Economic organizations may also mortgage land use rights at credit organizations licensed to operate in Vietnam if: (i) Land was assigned by State with collection of land use levy paid not from State budget source (Art. 110.2.d); (ii) land was legally transferred paid not from State budget source (Art. 112); and (iii) land was leased from State (Art. 111).

Organizations having been assigned land by State without collection of land use levy for agricultural, forest production, and aquatic or salt making or with land leases from State for which rental is annually paid are not allowed to mortgage land use rights but assets attached to land can be mortgaged. Land use rights mortgage agreements between domestic economic organizations and Vietnamese credit organizations must be registered with Land and Housing Department of province/city where land is located.

According to Government Decree No. 88/2009/ND-CP, Dec.10, 2009, ``Land-use right Certificate'' will be replaced by ``Certificate of land use rights, house ownership and ownership of other assets attached with the land", unifying four previous Certificates: Certificate of land use right, Certificate of house ownership, Certificate of land use right and house ownership and Certificate of construction work ownership.

Mortgage of airplanes is governed by Law on Civil Aviation No. 66/2006/QH11 adopted by National Assembly on June 29, 2006; Decree No. 70/ND-CP dated Apr. 20, 2007 on Registration of Nationality and Rights of Civil Aircraft; Decision No. 267/2003/QD-TTg of Prime Minister dated Dec. 19, 2003 providing regulations on functions, duties, and rights of Aviation Administration of Vietnam; and Civil Code No. 33/QH11 adopted by National Assembly on June 14, 2005.

Airplanes can be mortgaged. Agreements for mortgage of airplanes must be registered with Aviation Administration of Vietnam. Mortgagee is responsible for submitting application for registration of mortgage agreement and paying registration fee.

Registration of airplane mortgages shall be cancelled by Aviation Administration of Vietnam when one of following events occur: (i) There is written confirmation of cancellation of registration from mortgagee; (ii) document(s) proving that debts or obligations guaranteed by mortgaged property has been fulfilled/completed and certified/confirmed by mortgagee; (iii) judgment of Vietnamese court for cancellation of mortgage agreement; and (iv) judgment issued by foreign court, and such judgment is recognized and executed in Vietnam by Vietnamese competent court.

Mortgage of Seagoing Vessel.

Seagoing Vessel Mortgaging is governed by Maritime Code (MC) adopted by National Assembly on June 14, 2005; Decree No. 29/2009/ND-CP of Government dated Mar. 26, 2009 on registration, sale and purchase of seagoing vessels. (Decree No. 29/2009).

According to Maritime Code, mortgaging of seagoing vessels in Vietnam must comply with and be carried out in accordance with Vietnamese laws, and mortgage agreements must be in writing. (MC, Art. 33).

Mortgaging of seagoing vessels must be registered with regional Registry of Seagoing Vessels and be recorded in National Registration Book of Seagoing Vessels. (Decree No. 29/2009, Arts. 17 and 20). Mortgage of vessels may take effect only after it has been recorded in National Registration Book of Seagoing Vessels. (MC, Art. 35[2]). Organizations and individuals who wish to register mortgage agreement should submit to regional registry of seagoing vessels following documents: application for registration of seagoing vessel and mortgage agreement. Applicant must make payment for registration of mortgage for seagoing vessel to Regional Registry of Seagoing Vessels at level set by Ministry of Finance. Seagoing vessel registration is terminated if there is written document of mortgagee confirming termination of seagoing vessel mortgage agreement. Mortgage termination must also be registered with Regional Registry of Seagoing Vessels.

18 PROPERTY

18.01 PROPERTY OWNERSHIP:

Real Property.

Land Law No. 13/2003/QH11, adopted on Nov. 26, 2003 and effective on July 1, 2004 (Land Law No. 13/2003), replaced 1993 Land Law, its amendments in 1998 and 2001, and Ordinance on rights and obligations of foreign individuals and organizations leasing land in Vietnam and its 1998 amendment (2003 Land Law). In June 2009, National Assembly issued Law

No. 34/2009/QH12 amending and supplementing Art. 126 of Law on Housing and Art. 121 of Land Law. (Amended Land Law 2009).

Land, in Vietnam, is to be owned by all people. (2003 Land Law, Art. 5). State exercises right of representing ownership and performs uniform state management over land. 2003 Land Law stipulates functions, responsibilities, rights of state organizations and bodies for management over land. Authority to assign land, to lease land, and to recover land is assigned to provincial and district people's committees. (2003 Land Law, Arts. 37, 44). State may also recover all or part of assigned land when: (i) State uses land for purposes of defense, security, national interest, public interest, economic development; (ii) organizations which are assigned land by State with or without collection of land use levies or are leased land, are dissolved, go bankrupt, move to other location, reduce or no longer have land use demands; (iii) land is not used for prescribed purposes or is not used efficiently; (iv) land users deliberately destroy land; (v) land assignment by competent state agency was not lawful; (vi) land is encroached upon or occupied due to user's irresponsibility in letting land be encroached upon or occupied; (vii) individual land users die without any heirs; (viii) land users voluntarily return land; (ix) land users deliberately refuse to fulfill their obligations toward State; (x) duration of use of land, which is assigned or leased by State for definite term, cannot be extended upon expiry; (xi) land for regular crops is not used consecutively for 12 months; land for perennial plant cultivation is not used consecutively for 18 months; land for forestation is not used consecutively for 24 months; and (xii) land assigned or leased by State for execution of investment projects is not used consecutively for 12 months or use is 24 months slower than schedule inscribed in investment project approval. (2003 Land Law).

No organization or individual may buy, sell, or appropriate land by unlawful means. Individuals or family households that use land other than leased land have right to transfer land-use rights; to exchange rights to use agricultural land in same communes, wards or townships with other households and individuals; to lease land-use rights to organizations, households, individuals or overseas Vietnamese investing in Vietnam; to leave by inheritance; to present as gift or donate land-use rights; to mortgage land-use rights; and to contribute capital with land-use rights to organizations, households, individuals and/or overseas Vietnamese for production and/or business cooperation. (2003 Land Law, Art. 113). Family households or individuals who use leased land may sell, leave by inheritance, present or donate their own assets attached to leased land; mortgage or provide guarantee with their own property attached to leased land to credit organizations or individuals for loans. (2003 Land Law, Art. 114).

Family households or individuals who have leased land from State and have paid entire land-use levy or land-use levy has been paid in advance for many years and remaining land-use levy is for duration of more than five years have rights to: transfer land-use rights; lease land-use rights to organizations, households, individuals or overseas Vietnamese investing in Vietnam; leave by inheritance; present as gift or donate land-use rights; mortgage land-use rights; and contribute capital with land-use rights to organizations, households, individuals and/or overseas Vietnamese for production and/or business cooperation. (2003 Land Law, Art. 114).

Amended Land Law affirms right to own residential house and residential land for Vietnamese residing overseas. Any Vietnamese residing overseas who is permitted to reside in Vietnam for three months or more is entitled to own house in Vietnam if (i) such person has Vietnamese nationality; or (ii) Vietnamese origin and one of following: returning for direct investment in Vietnam; contributing to country; being scientist, cultural activist or having special skills needed by body or organization of Vietnam and working in Vietnam; or having husband or wife who is Vietnamese citizen living in Vietnam. Person of Vietnamese origin issued visa exemption certificate and permitted to reside in Vietnam for three months or more is entitled to own one separate residence or one apartment in apartment block. Previously, this duration had been six months. (Amended Land Law 2009, Art. 1).

Amended Land Law also provides use rights and obligations to Vietnamese residing overseas who own residential housing in Vietnam. Rights and obligations are similar to those of Vietnamese citizens using land. Vietnamese residing overseas are entitled to lease and/or authorize others to manage house on residential land. (Amended Land Law 2009, Art. 2).

On June 29, 2006, National Assembly of Vietnam passed Law on Real Estate Business No. 63/2006/QH11, effective Jan. 1, 2007 (REBL). Under REBL, real estate business activities comprise: (i) Real estate business and (ii) real estate business services. Any organization or individual conducting real estate business must establish enterprise or co-operative and must have legal capital of at least 6 billion Vietnamese Dong (about USD375,000).

REBL allows domestic individuals and organizations, foreign individuals and organizations, and Vietnamese residing overseas to conduct real estate business and business services within specified scope. Domestic individuals and organizations are permitted to conduct real estate business within scope including: (i) Investing in construction of houses and buildings; (ii) purchasing houses and buildings for sale, lease, or grant of hire purchase; (iii) leasing houses and buildings for subletting; (iv) investing in upgrade of leased land and infrastructure in order to assign or lease out land with completed infrastructure; and (v) receive assignment of land use right and invest in infrastructure works in order to assign or lease out land with infrastructure. Foreign organizations and individuals are allowed to conduct real estate business within following scope: (i) Invest in creation of houses and buildings for sale, lease out or grant of hire purchase and (ii) invest in upgrading infrastructure works on leased land in order to lease out land with completed infrastructure. Domestic and foreign individuals and organizations and Vietnamese residing overseas are permitted to conduct all types of real estate business services including: (i) Real estate brokerage; (ii) real estate valuation; (iii) real estate trading floor; (iv) real estate consultancy; (v) real estate auctioning; (vi) real estate advertising; and (vii) real estate management. (Law on Real Estate Business; Art. 9, 10).

Regarding ownership of residential housing sector, see Law on Residential Housing promulgated on Nov. 29, 2005, effective Jan. 1, 2006, by National Assembly (LRH). Government issued Decree No. 90/2006/ND-CP of Sept. 6, 2006 which details and guides implementation of LRH. Under LRH, individuals and organizations entitled to own residential houses in Vietnam must comprise: (i) Domestic organizations and individuals regardless of place of business registration or registration of permanent residence; (ii) Vietnamese residing overseas; and (iii) foreign organization and individuals.

Resolution on pilot scheme permitting foreign organizations and individuals to purchase and own residential houses in Vietnam was passed by National Assembly on June 2008. On June 3, 2009, Government issued Decree No. 51/2009/ND-CP implementing articles of pilot scheme. Five groups are eligible to buy apartments in Vietnam: (i) Individuals who invest directly in Vietnam or who are hired for management positions by local or foreign-invested companies in Vietnam; (ii) foreigners who receive certificates of merit or medals from president or government for their contribution; (iii) foreigners who work in social-economic fields, hold bachelor’s degree or higher and possess special skills or knowledge that Vietnam needs; (iv) foreigners who are married to Vietnamese; and (v) foreign-invested enterprises operating in Vietnam that need to buy houses for employees. This group excludes companies operating in real estate sector. To own apartment, foreign individual must be living in Vietnam, must have permission from competent State Body of Vietnam to reside in Vietnam for period of one or more years, and must not belong to category of persons entitled to diplomatic or consular immunity under Vietnamese law. Enterprises with foreign-owned capital must have investment certificate.

Housing that foreign organizations and individuals may own is limited to apartments in commercial housing development project. Each foreigner can own only one apartment at one time. If foreigner or foreign invested company is bequeathed with or inherits home in Vietnam, they can only own apartment in commercial housing development project; for other forms of housing, they can only receive equivalent value in money. Foreign organizations or individuals must sell or donate their residential house within 12 months of ownership expiration. Foreign organizations or individuals can sell or donate their residential house at expiry of 12 months from date of issuance of ownership certificate.

Foreign individuals may own apartment for maximum period of 50 years as from date of issuance of residential house ownership certificate. Foreign-invested company can own apartment for period corresponding to duration stipulated in its investment certificate including any extended duration.

This Resolution takes effect on Jan. 1, 2009 and must be temporarily applicable for five years.

19 TAXATION

19.01 INTRODUCTION:

Vietnam introduced new tax reform laws in 1998, which took effect Jan. 1, 1999. Major changes are that VAT has replaced turnover tax, and profit tax has been replaced by business income tax.

Current system includes following taxes: agricultural land use tax (ALUT), business income tax (BIT), import-export duties (IED), land use right transfer tax (LURTT), personal income tax (PIT), natural resource royalty tax (NRRT), special consumption tax (SCT), and value added tax (VAT), and Business License Tax (BLT).

National Assembly recently adopted Law on Management of Taxes No. 78/2006/QH11 dated Nov. 29, 2006 effective July 1, 2007 (“LMT”). LMT governs issues such as: registration, declaration, payment and imposing of taxes; procedures for tax refunds, exemptions or reductions; recording of taxable amount or penalties; management over information on taxpayers; tax inspection, audit; enforcement of administrative decisions regarding taxes; handling violations of taxation laws, regulations; and settlement of claim and denouncement regarding taxes. Under LMT, taxpayers shall proactively register, declare and calculate taxable amount then make payment to relevant taxation authorities. Currency for tax payment and calculation is Vietnamese dong. Tax may be also paid in foreign currencies in accordance with guideline by Government.

19.02 CONSUMPTION TAXES:

Special Consumption Tax (SCT).

Legislation.

Law on SCT No. 27/2008/QH12, passed on Nov. 14, 2008 by National Assembly and effective on Apr. 1, 2009 except for alcohol and beer which are included as of Jan. 1, 2010; Government Decree No. 26/2009/ND-CP dated Mar. 16, 2009.

Taxpayers.

All organizations and individuals who produce or manufacture or import: (i) Cigarettes, cigars; (ii) alcohol; (iii) beer; (iv) vehicles of less than 24 seats; (v) motorcycles with cylinder capacity above 125cm3; (vi) aircraft and yachts; (vii) gasoline of various kinds; (viii) air conditioners with capacity of 90,000 BTU or less; (ix) playing cards; (x) votive gilt paper and objects or services thereof; (xi) discotheque; (xii) massage, karaoke; (xiii) casinos, jackpots, slots; (xiv) betting; (xv) golf; and (xvi) lotteries.

Those goods will not be subject to special consumption tax if they are: (i) Goods directly exported by manufacturing or processing establishment, or sold for export or another manufacturing establishment is authorized to sell them for export; (ii) goods imported in following cases: Humanitarian aid or non-refundable aid; gifts to State bodies, political organizations, socio-political organizations, socio-political-professional organizations, social organizations, socio-professional organizations and units of People's Armed Forces; and presents or gifts to individuals in Vietnam within limits stipulated in Government regulations; goods transported from port to port, goods transported on roads which cross border gates or borders of Vietnam, and goods in transit as stipulated in Government regulations; temporary imports for re-export and temporary exports for re-import within period when import or export duty is not payable pursuant to law on import and export; personal belongings of foreign organizations and individuals within standards on diplomatic immunity status; goods carried within limits of permitted duty-free baggage; and goods imported for duty-free sale pursuant to law; (iii) aircraft and yachts used for business purposes being transportation of cargo, passengers and tourists; (iv) ambulances; vehicles transporting prisoners; hearses; vehicles designed with both seating and standing room for 24 or more passengers; and vehicles operating in entertainment and sporting areas which are not registered for circulation and which do not enter road traffic; and (v) goods imported from abroad into non-tariff zone, goods from within Vietnam sold to non-tariff zone and only used within such zone, and goods purchased and sold as between non-tariff zones, except for passenger vehicles of less than 24 seats.

Tax Rate.

Tax rate for: Cigarettes 65%; alcohol from 25% to 50%; beer 45% applied Jan. 1, 201.—Dec. 31, 2012 period, and 50% afterward; vehicle of less than 24 seats from 10% to 60%; motorcycle 20%; aircraft and yachts 30%; gasoline 10%; air conditioners 10%; playing cards 40%; votive paper 70%; discotheque 40%; massage, karaoke, casinos, jackpots, slots, and betting 30%; golf 20%; and lotteries 15%.

Tax Calculation.

Tax is calculated by multiplying taxable value of goods or services by tax rate.

19.03 CUSTOMS DUTY AND TAX:

Import-Export Duty (IED).

Legislation.

Law on IED dated June 14, 2005 which became effective on Jan. 1, 2006 and replaced Law on IED dated Dec. 26, 1991; Law on amendments to Law on IED dated July 5, 1993; Law 04/1998/QH10 dated May 20, 1998 on amendments to 1991 Law on IED, Art. 25 of Law on Encouragement of Domestic Investment; Art. 47 of Law on Foreign Investment in Vietnam; Item 2 of Art. 2 of Law on Science and Technology; and Art. 34 of Law on Petroleum (LIED), Decree No. 149/2005/ND-CP dated Dec. 8, 2005 on implementation of LIED (Decree 149/2005), Decree No. 108/2006/ND-CP dated Sept. 22, 2006 on implementation of Law on Investment (Decree 108/2006).

Normal import duty rates apply to imported goods or services from countries without Most-Favored-Nation status. Normal rates shall be equal to 150% of preferential tax rate applicable to same goods specified in preferential import tariff. Preferential rates apply to imported goods or services from Most-Favored-Nation countries. Special preferential rates apply to goods or services from countries which have signed agreements with Vietnam.

19.04 INCOME TAX:

Business Income Tax (BIT).

Legislation.

Law No. 14/2008/QH12 on BIT passed by National Assembly on June 3, 2008 and effective Jan. 1, 2009; Government Decree No. 124/2008/ND-CP dated Dec. 11, 2008.

Taxpayers.

Vietnamese enterprises, foreign enterprises, co-operatives, professional entity establishments and any other organizations engaging in business activities with profits.

Taxable Incomes are incomes generated from business, production and service activities. Taxable incomes are turnover minus reasonable expenses and costs.

Other taxable income includes: Income from capital transfers or real estate transfers; income from ownerships of or right to use assets; income from transfer, leasing or liquidation of assets; interest from loans; income from sales of foreign currencies; income from recoveries from contingency reserves; income from bad debts which were written-off and are now recoverable; income being debts payable to unidentifiable creditors; income from business omitted in previous years; other income from business activities earned inside and/or outside Vietnam.

Tax Rate.

Universal BIT rate is 25%.

Tax rate of 32% to 50% is applied to business establishments conducting business of search, exploration, exploitation of crude oil, natural gas and other precious and rare natural resources. Specific rate shall be decided by Prime Minister on case by case basis upon proposal of Minister of Finance.

BIT for Foreign Investment.

Universal BIT rate of 25% is applied to foreign invested enterprises or foreign parties to business cooperation contracts under FIL.

Foreign invested enterprise or foreign party to business cooperation contracts under FIL continues to enjoy tax incentives in accordance with Investment License. Upon expiry of incentive period stipulated in Investment License, BIT rate of 25% shall apply.

BIT for Foreign Contractors.

Foreign contractors and subcontractors doing business in Vietnam not under FIL, who adopt Vietnamese accounting and invoicing systems subject to BIT rates as above. For those who do not adopt Vietnamese accounting and invoicing systems, BIT is deemed to be certain percentage of taxable turnover of contractor: (i) 1% with respect to distributing, supplying products, materials, raw materials, machineries, equipment in Vietnam; (ii) 5% with respect to services; (iii) 2% with respect to construction; (iv) 2% with respect to production, trading, transportation; or (v) 10% with respect to lending interest and author's emoluments.

BIT Incentives.

Newly established businesses or investors investing in listed areas of promoted investment or locations of difficult or specially difficult socio-economic conditions, as listed under Decree No. 108/2006, or using larger workforce shall be entitled to preferential BIT rates of 10%, 15%, and 20% for first ten years or duration of project and/or BIT exemption for up to four consecutive years from year of making profits and reduction up to 50% for up to nine years thereafter.

Withholding Tax on Remittance of Incomes Abroad.

From Jan. 1, 2004, no withholding tax is imposed on remittance of income abroad.

Personal Income Tax.

Legislation.

Personal Income Tax Law No. 04/2007/QH12 (PITL) adopted by National Assembly on Nov. 21, 2007 and effective Jan. 1, 2009; Decree No. 100/2008/ND-CP of Government dated Sept. 8, 2008 on implementation of number of articles of PITL effective on Jan. 1, 2009 replacing provisions on management of income tax applicable to high income earners in Decree No. 85/2007/ND-CP of Government dated May 25, 2007 implementing Law on Management of Tax (Decree 100); Circular No. 84/2008/TT-BTC of Ministry of Finance dated Sept. 30, 2008 guiding implementation of number of articles of PITL and Decree 100 (Circular 84); Circular No. 62/2009/TT-BTC of Ministry of Finance dated Mar. 27, 2009 amending and supplementing Circular 84.

Taxpayers.

Personal income tax (PIT) is assessed on worldwide income of Vietnamese citizens, income of foreigners working in Vietnam, and income of foreigners not residing in Vietnam but earning income in Vietnam. (Decree 100, Art. 2).

Taxable Income.

PIT payers fall within two categories, residents and nonresidents. Residents are those who are in Vietnam for 183 days or more during (i) calendar year or (ii) within 12-month period from date of first arrival in Vietnam, or who have regular residential location in Vietnam which includes either registered permanent residence or rented property under lease agreement with term of at least 90 days within tax calculation year. Residents are to pay PIT on income arising either within or outside Vietnam. Nonresidents need only pay PIT for income arising within Vietnam. (PITL, Art. 2). Taxable income includes income from business, salaries or wages, capital investments, capital transfers, real property transfers, winnings or prizes, royalties, franchises, and inheritance or gifts of securities. (PITL, Art. 3).

Income Tax Basis.

Basis for income tax payment is individual's taxable income multiplied by applicable tax rate. (Ordinance on PIT, Art. 8).

Tax Rate.

Progressive income tax rates for resident individuals vary from 5% to 35%. Resident individuals are now allowed personal deduction of VND 4,000,000 per month (VND 48,000,000 per year) and dependent deduction of VND 1,600,000 per month for each dependent.

Tax rate on other assessable income of resident individuals is: (i) 5% for incomes from capital investments; (ii) 5% (on income over VND 10,000,000) for incomes from royalties and franchises; (iii) 10% (on income over VND 10,000,000) for incomes from winnings or prizes; (iv) 10% (on income over VND 10,000,000) for incomes from inheritances and gifts; (v) 20% for incomes from capital transfers (on net gains) or 0.1% for incomes from security transfers (deemed percentage of proceeds); (vi) 25% for incomes from real property transfers (on net gains) or 2% for incomes from real property transfers (deemed percentage of proceeds).

Income tax rate for nonresident individuals is: (i) 1% to 5% (depending on type of business income) for business income; (ii) 20% for salaries or wages; (iii) 5% for capital investment; (iv) 0.1% (on sales proceeds) for capital transfer; (v) 2% (on sales proceeds) for real property transfer; (vi) 5% (on income over VND 10,000,000) for royalties, commercial franchises; and (vii) 10% (on income over VND 10,000,000) for winnings, prizes, inheritance or gifts.

Tax Exemption.

Following types of income are not subject to PIT: (i) Incomes from transfer of real estate between spouses; parents and their children; adoptive parents and their adopted children; fathers-in-law or mothers-in-law and daughters-in-law or sons-in-law; grandparents and their grandchildren; or among blood siblings; (ii) Incomes from transfer of residential houses, rights to use residential land and assets attached to residential land received by individuals who have only residential house or land plot each; (iii) Incomes from value of land use rights of individuals allocated land by state; (iv) Incomes from receipt of inheritances or gifts that are real estate between spouses, parent and their children; adoptive parents and their adopted children; fathers-in-law or mothers-in-law and daughters-in-law or sons-in-law; grandparents and their grandchildren; or among blood siblings; (v) Incomes of households and individuals directly engaged in agricultural or forest production, salt making, aquaculture, fishing and trading of aquatic resources not yet processed into other products or preliminarily processed aquatic products; (vi) Incomes from conversion of agricultural land allocated by State to households and individuals for production; (vii) Incomes from interests from life insurance policies; (viii) Incomes from foreign exchange remittances; (ix) Wages paid for night shift or overtime work, which are higher than those paid for day shifts or prescribed working hours in accordance with law; (x) Retirement pensions paid by Social Insurance; (xi) Incomes from scholarships, including: (a) Scholarships granted from State budget; (b) Scholarships granted by domestic and foreign organization under study promotion programs; (xii) Incomes from indemnities paid under life insurance policies, non-life insurance policies, compensations for labor accidents, compensations paid by State and other compensations as provided for by law; (xiii) Incomes received from charity funds licensed or recognized by competent state agencies and operating for charity, humanitarian or non-profit purposes; (xiv) Incomes received from governmental or non-governmental foreign aid for charity or humanitarian purposes approved by competent state agencies. (PITL, Art. 4).

Tax Treaties.

Personal income tax paid in other countries may be applied as credit and deducted from income tax payable in Vietnam. In event of any inconsistency between tax treaty in force and Vietnamese tax provisions, treaty shall prevail. (PITL, Art. 9).

Under PITL, PIT rate on transfer of land use right shall be either: 25% of taxable income or 2% of price of transfer.

Under PITL, from Jan. 1, 2009, any income earned from real estate transaction is subject to PIT at rate of 25% imposed on profit earned from real estate transaction or 2% imposed on purchase price.

19.05 MINES, MINERALS AND FISHERIES TAXES:

Natural Resources Royalty Tax (NRRT).

Legislation.

Ordinance on NRRT No. 05/1998/PL-UBTVQH10 issued by Standing Committee National Assembly which took effect on June 1, 1998, as amended by Ordinance No. 07/2008/UBTVQH12 passed on Nov. 22, 2008 effective on Jan. 1, 2009; NTTR Implementing

Decree No. 05/2009/ND-CP dated Jan. 19, 2009 (Decree 05); Ministry of Finance's Circular No. 124/2009/TT-BTC dated June 17, 2009; Law on Oil and Natural Gas promulgated by National Assembly on July 6, 1993, which took effect on Sept. 1, 1993; Law amending and supplementing number of articles of Law on Oil and Gas adopted by National Assembly on June 9, 2000 which took effect on July 1, 2000 as amended by Law No. 10/2008/QH12; Decree 48/2000/ND-CP dated Sept. 12, 2000 on implementation of Law on Oil and Gas which came into effect on Sept. 28, 2000 as amended by Government Decree 149/2005/ND-CP dated Dec.12, 2005 and Decree 05.

Taxpayers are all organizations and individuals conducting natural resources exploitation including foreign invested enterprises and foreign parties to business cooperation contracts.

In case of joint venture in which Vietnamese parties contribute to legal capital of joint venture enterprise by natural resources, joint venture enterprise is exempt from NRRT for such natural resources.

In case of other joint venture contracts, business cooperation contracts or products sharing contracts, royalty tax paid by businesses or foreign partners must be specified in contracts and shall be calculated in proportion to amount of products shared by Vietnamese parties. Vietnamese parties are responsible for NRRT payment.

Taxable Products.

Groups of products subject to royalty tax are: (i) Metallic mineral resources; (ii) nonmetallic mineral resources except natural water; (iii) oil; (iv) natural gas; (v) natural forest products; (vi) natural marine products; (vii) natural water; (viii) coal gas; and (ix) other resources.

Tax Calculation.

NRRT is calculated by quantity of actual commercial output, taxable value and royalty rate. Quantity of actual commercial output means amount, weight or volume of actual output of resources within tax period, irrespective of purpose of exploiting resource. Value of each unit exploited is selling price without VAT of that unit at exploitation site at time royalty tax is calculated. Royalty rates vary from 0% to 40% depending on resources exploited.

Reduction and Exemption.

Business establishments exploiting natural resources which have suffered from losses due to natural disaster or sudden accident may be exempted from NRRT imposed on natural resources that had been lost. Individuals, organizations exploiting marine products at offshore areas by high-capacity vehicles may be exempted from NRRT for five years upon obtaining of exploitation license and enjoined 50% deduction of NRRT for next five years. Law also provides for reduction and exemption in certain other cases of natural resource exploitation.

19.06 PROPERTY TAXES:

Agricultural Land Use Tax (ALUT).

Legislation.

Law on ALUT passed on July 10, 1993, effective Jan. 1, 1994.

Taxpayers.

Any individual or organization using land for agricultural or aquacultural production is subject to ALUT. Foreign investors using agricultural land in Vietnam must pay only rent for land use in accordance with FIL in Vietnam and are not subject to ALUT.

Land Use Right Transfer Tax (LURTT).

From Jan. 1, 2004, there is no longer Land Use Right Transfer Tax. Income earned from land use right transfer by businesses is taxable under BIT at rate of 28% and at rate of 25% as of Jan. 1, 2009. Income earned in such transaction by individuals or family households may be subject to personal income tax under PITL as of Jan. 1, 2009.

19.07 TREATIES AND AGREEMENTS:

Avoidance of International Double Taxation.

By Aug. 2008, Vietnam had concluded bilateral Agreements on Avoidance of Double Taxation with 56 countries and territories: Algeria (signed on Dec. 6, 1999, not yet effective), Australia (signed on Oct. 13, 1992, effective Dec. 30, 1992), Bangladesh (signed on Mar. 22, 2004, effective Aug. 19, 2005), Belarus (signed on Apr. 24, 1997, effective Dec. 26, 1997), Belgium (signed on Feb. 28, 1996, effective June 25, 1999), Bulgaria (signed on May 24, 1996, effective Oct. 4, 1996), Canada (signed on Nov. 14, 1997, effective Dec. 16, 1998), Ceylon (signed on Oct. 4, 2005, effective July 7, 2006), China (signed on May 17, 1995, effective Oct. 18, 1996), Cuba (signed on Oct. 26, 2002, effective June 26, 2003), Czech (signed on May 23, 1997, effective Feb. 3, 1998), Denmark (signed on May 31, 1995, effective Apr. 24, 1996), Egypt (signed on Mar. 5, 2006, not yet effective), France (signed on Feb. 10, 1993, effective July 1, 1994), Finland (signed on Nov. 21, 2001, effective Dec. 26, 2002), Germany (signed on Nov. 16, 1995, effective Dec. 27, 1996), Hungary (signed on Apr. 26, 1994, effective June 30, 1995), Iceland (signed on Apr. 3, 2002, effective Dec. 27, 2002), India (signed on Sept. 7, 1994, effective Feb. 2, 1995), Indonesia (signed on Dec. 22, 1997, effective Feb. 10, 1999), Italy (signed on Nov. 26, 1996, effective Feb. 20, 1999), Japan (signed on Oct. 24, 1995, effective Dec. 31, 1995), Korea (North) (signed on May 3, 2002, not yet effective), Korea (South) (signed on May 20, 1994, effective Sept. 11, 1994), Laos (signed on Jan. 14, 1996, effective Sept. 30, 1996), Luxembourg (signed on Mar. 4, 1996, effective May 19, 1998), Malaysia (signed on Sept. 7, 1995, effective Aug. 13, 1996), Mongolia (signed on May 9, 1996, effective Oct. 11, 1996), Myanmar (signed on May 12, 2000, effective Aug. 12, 2003), Netherlands (signed on Jan. 24, 1995, effective Oct. 25, 1995), Norway (signed on June 1, 1995, effective Apr. 14, 1996), Pakistan (signed on Mar. 25, 2004, not yet effective), Philippines (signed on Nov. 14, 2001, effective Sept. 29, 2003), Poland (signed on Aug. 31, 1994, effective Dec. 21, 1994), Romania (signed on July 8, 1995, effective Apr. 24, 1996), Russia (signed on May 27, 1993, effective Mar. 21, 1996), Singapore (signed on Mar. 2, 1994, effective Sept. 9, 1994), Spain (signed on Mar. 7, 2005, effective Dec. 22, 2005), Sri Lanka (signed on Oct. 26, 2005, effective Sept. 28, 2006), Switzerland (signed on May 6, 1996, effective Oct. 12, 1997), Sweden (signed on Mar. 24, 1994, effective Aug. 8, 1994), Taiwan (signed on Apr. 6, 1998, effective May 5, 1998), Thailand (signed on Dec. 23, 1992, effective Dec. 31, 1992), UK (signed on Apr. 9, 1994, effective Dec. 15, 1994), Ukraine (signed on Apr. 8, 1996, effective Nov. 22, 1996), Uzbekistan (signed on Mar. 28, 1996, effective Aug. 16, 1996), Brunei Darussalam (signed on Aug. 16, 2007, not yet effective), Oman (signed on Apr. 18, 2008, not yet effective, and Ireland (signed on Mar. 10, 2008, not yet effective), Hong Kong (signed on Dec. 16, 2008); Austria (signed on June 2, 2008, not yet effective); Slovakia (signed on Oct. 27, 2008, effective Jan. 1, 2010); Venezuela (signed on Nov. 20, 2008, effective May 26, 2009); Morocco (signed on Nov. 24, 2008, not yet effective); United Arab Emirates (signed on Nov. 24, 2008, not yet effective); Kuwait (signed on Mar. 10, 2009, not yet effective); Qatar (signed on Mar. 8, 2009, not yet effective).

These agreements provide business income tax including BIT on technology transfer royalties and income from capital transfer, personal income tax and withholding tax on remittance of incomes abroad. Some agreements address taxation on assets.

19.08 VALUE ADDED TAX:

Value Added Tax (VAT).

Legislation.

Law on Value Added Tax, passed on June 3, 2008 by National Assembly at its 12th session (VAT Law) and effective Jan. 1, 2009 and replacing Law No. 02/1997, Law No. 07/2003, and repealing Art. 2 of Law No. 57/2005. Government Decree No. 123/2008/ND-CP detailing implementation of Law on Value Added Tax. (Decree No. 123). Ministry of Finance Circular No. 129/2008/TT-BTC dated Dec. 26, 2008 providing guidelines for implementing Decree No. 123. (Circular No. 129).

Taxpayers.

Any individual or organization having production or conducting business of value added taxable goods or services in Vietnam and any importer of value added taxable goods.

Taxable Goods and/or Services.

Any goods or services for production, manufacturing, business and consumption in Vietnam are value added taxable except: (i) Products of cultivation, husbandry, aquaculture, seafood and fisheries not yet processed into other products or only subject to conventional preliminary treatment in stages of production, catching, sale and import; (ii) Animal breeding stock and plant varieties including breeding eggs, young animals, seedlings, seeds, sperm, embryos and genetic materials; (iii) Water supply and drainage; ploughing and harrowing land; dredging canals and ditches inside fields for agricultural production; harvesting agricultural products; (iv) Salt products produced from seawater or natural salt mines; pure salt, iodine salt; (v) State owned residential houses sold by State to existing tenants; (vi) Transfer of land use rights; (vii) Life insurance, student insurance, insurance of domestic animals and plants varieties, crop insurance and re-insurance; (viii) Credit services; securities business activities; assignment of capital; derivative financial services including interest rate swaps, forward contracts, futures contracts, options, foreign currency sales and other derivative financial services as stipulated by law; (ix) Medical health services, veterinary services including medical examination, treatment, disease prevention for humans and animals; (x) Public postal and telecommunications services and internet services globalized pursuant to program of Government; (xi) Public hygiene services and water drainage in urban streets and residential areas; maintenance of zoos, public gardens, parks, trees in streets, public lighting systems; and funeral services; (xii) Maintenance, repair and construction of cultural, artistic and public buildings and of infrastructure and welfare housing, funded by public contributions and humanitarian aid; (xiii) Education and vocational training as stipulated by law; (xiv) Radio and television broadcasting funded by State budget; (xv) Publication, importation and distribution of newspapers, magazines, specialized newsletters, political books, textbooks, teaching materials, law books, technical and scientific books, books printed in languages of ethnic minorities, propaganda pictures, photos and posters, including in form of disks, tapes and electronic databases; and printing of money; (xvi) Public passenger transportation by bus and electrical vehicles; (xvii) Machinery, equipment and materials which are not yet produced domestically and which are required to be imported for direct use in scientific research and technological development activities; machinery, equipment, replacement parts, specialized means of transportation and materials which are not yet produced domestically and which are required to carry out prospecting, exploration and development of petroleum and natural gas fields; aircraft, drilling platforms and watercraft not yet produced domestically and required to form fixed assets of enterprises or leased from foreign parties for use in production and business in order to be sub-leased; (xviii) Specialized arms and weaponry required for national defence and security; (xix) Imported goods in following cases: humanitarian aid and non-refundable aid; gifts to State bodies, political organizations, socio-political organizations, socio-political-professional organizations, social organizations, socio-professional organizations and units of People's Armed Forces; donations and gifts to individuals in Vietnam at level stipulated by Government; personal effects of foreign organizations and individuals under diplomatic immunity regulations; hand luggage within duty-free limits; goods and services sold to international organizations and foreign individuals for humanitarian aid and non-refundable aid for Vietnam; (xx) Goods in bordergate transit or transit via territory of Vietnam; goods temporarily imported and reexported and goods temporarily exported and re-imported; raw materials imported for manufacture or processing of goods for export in accordance with contracts with foreign parties; goods and services purchased and sold between foreign parties and non-tariff zones, and purchased and sold as between non-tariff zones; (xxi) Technology transfers pursuant to Law on Technology Transfer; intellectual property transfers pursuant to Law on Intellectual Property; and computer software; (xxii) Gold imported in bar and foil not yet processed into fine art articles, jewellery and other products; (xxiii) Exported natural resources and (mined) minerals not yet processed as stipulated in regulations; (xxiv) Artificial body parts for ill people; crutches, wheelchairs and other specialized apparatus used by disabled people; (xxv) Goods and services of business individuals being people with average monthly income lower than minimum wage applicable to domestic organizations and enterprises.

Businesses and individuals are not entitled to VAT credits applicable to input materials and services used for production of goods or services that are not subject to VAT.

Tax Rates.

Tax rate of 0% is applied to exported goods and services, international transportation, and to goods and services not subject to VAT and which are exported, except: (i) Technology transfers and intellectual property transfers to foreign countries; (ii) offshore reinsurance services; credit services, assignment of capital and derivative financial services; (iii) post and telecommunications services; and exported natural resources and mined minerals which have not yet been processed as prescribed in VAT Law.

Tax rate of 5% is applied to: (i) Clean water for manufacturing and living purposes; (ii) Fertilizers; ore used for production of fertilizers; pesticides and growth stimulants for animals and crops; (iii) Feed for cattle, poultry and other animals; (iv) Digging and ploughing services, dredging canals, ditches, ponds and lakes for agricultural production; planting, raising and pest control of crops; semi-processing and preserving agricultural products; (v) Products of cultivation, husbandry and aquaculture not yet processed, except for products prescribed in VATL; (vi) Semi-processed latex; semi-processed resin; netting, cord and fibre for weaving fishing nets; (vii) Fresh food produce; forestry products not yet processed except for wood, bamboo shoots and products prescribed in VATL; (viii) Sugar; by-products obtained in manufacture of sugar comprising sugar-cane dregs, bagasse and sugar dregs; (xi) Products made from jute, sedge, bamboo, rattan, thatch, coconut fibre, coconut shell, water hyacinth, and other handmade products produced by using agricultural raw materials; semi-processed cotton; newsprint; (x) Specialized machinery and equipment for agricultural production including ploughs, harrows, sewing machines, seeding machines, rice-plucking machines, reaping machines, combined reaping and threshing machines, harvesters for agricultural produce, insecticide spraying machines and pumps; (xi) Medical equipment and instruments; medical sanitary cotton and bandages; preventive and curative medicines; pharmaceutical products and pharmaceutical materials which are raw materials for producing preventive and curative medicines; (xii) Teaching and study aids including models, drawings, blackboards, chalk, rulers, compasses, specialized equipment and tools for teaching, research and scientific experiments; (xiii) Cultural activities; exhibitions; physical training and sports activities; artistic performances; film production; importation, distribution and screening of films; (xiv) Children's games; books, except for books prescribed in Art. 5.1 of VAT Law; (xv) Scientific and technological services as stipulated in Law on Science and Technology.

Tax rate of 10% is applied to other goods or services which are not subject to tax rate of 0% or 5%.

VAT for Foreign Contractors.

Tax Calculation.

There are two methods of tax deduction or direct calculation on added value.

In method of tax deduction, payable tax is equal to output value added tax minus input value added tax. In another method of direct calculation on added value, payable tax is equal to added value of goods or services multiplied by VAT rate.

Tax deduction method is applied to all foreign individuals or organizations doing business in Vietnam which do not fall under Law on Investment, Law on Petroleum and Law on Credit Institutions, who have permanent establishment in Vietnam or are resident of Vietnam, and whose terms of business in Vietnam according to contract last 180 days or more from date contract comes into force and apply Vietnamese Accounting Systems.

Method of direct calculation on added value is applied to foreign contractors who do not apply Vietnamese accounting and invoice systems.

For foreign entities and individuals doing business in Vietnam not under Law on Foreign Investment in Vietnam and, who do not apply Vietnamese accounting and invoice systems, added value is regulated in percentage of gross taxable turnover; 50% for services, machinery and equipment leasing business, and insurance, 50% for construction and installation without supplying materials and/or equipment, 30% for construction and installation when supplying materials and/or equipment and 30% for other production, manufacturing and transportation.

Tax declaration and payment should be made monthly by taxpayers with annual settlement at end of each fiscal year (Dec. 31). For foreign entities or individuals having production or supply of taxable goods or services in Vietnam, but not having office in Vietnam, their Vietnamese counterparts are responsible for declaring and withholding tax amounts from payment to such foreign entities and individuals and pay taxes owed to Vietnamese tax authorities.

20 TREATIES AND CONVENTIONS

20.01 TREATIES AND CONVENTIONS:

ASEAN.

Vietnam became official ASEAN member state in July 1995. ASEAN now comprises all ten Southeast Asian countries: Brunei, Cambodia, Indonesia, Laos, Malaysia, Myanmar, Philippines, Singapore, Thailand and Vietnam. Vietnam then officially acceded to ASEAN Free Trade Area (AFTA) Framework Agreement in Dec. 1995 and began implementing Common Effective Preferential Tariffs (CEPT) scheme from Jan. 1, 1996.

Vietnam and European Union (EU) signed Framework Cooperation Agreement on July 17, 1995 which provides mutual grant of Most Favored Nation (MFN) trading status by both parties in accordance with GATT principles. Exported manufactured goods of Vietnam to EU enjoy duty free entry in accordance with Generalized System of Preferences (GSF). Vietnam and EU also maintain comprehensive textile and garment trade agreement since 1992 under which Vietnam reduces import duties for textile and garment imports into Vietnam from EU and, in return, EU relaxes quota restrictions for textile imports into EU from Vietnam.

Vietnam and USA signed in July 2001 Bilateral Trade Agreement (BTA) which took effect in Dec. 2001. Under BTA, both parties enjoy MFN trading status. BTA covers trade in goods, trade in services, investment, intellectual property, right of appeal and transparency matters and general business facilitation issues but does not cover textile and garment trading relationship between two countries. BTA provides Vietnam with road map for opening its market and reforming its legal systems in various areas. Fulfilling its undertaken commitments under BTA is important for Vietnam as it continues to pursue its application to join WTO, which was submitted in 1995.

WTO.

Vietnam officially became member of WTO in Jan. 2007 after 12 years of negotiation.

Other Trade Agreements.

In addition to above, Vietnam has signed trade agreements with: Argentina (signed in 1996, effective June 1, 1997); Australia (signed in 1990, effective June 14, 1990; Bangladesh (signed on Sept. 24, 1996); Belarus (signed in 1992, effective Apr. 19, 1997); Benin (signed in 1996, effective Nov. 25, 1996); Bulgaria (signed on Apr. 2, 2001); Burkina Faso (signed in 1996, effective Nov. 22, 1996); Cambodia (signed in 1998, effective Mar. 24, 1998); Canada (signed in 1995, effective Jan. 25, 1996); Chile (signed in 1993, effective Feb. 25, 1995); China (signed in 1991, effective Nov. 7, 1991); Congo (signed on Oct. 27, 2002); Cuba (signed in 1996, effective June 22, 1996); Czech Republic (signed in 1994, effective Nov. 14, 1994); Egypt (signed in 1994, effective Feb. 21, 1995); Estonia (signed in 1992, effective May 3, 2000); Gabon (signed in 1996, effective Nov. 28, 1996); Greece (signed in 1996, effective Oct. 7, 1997); Hungary (signed in 1992, effective May 19, 1992); India (signed in 1997, effective Aug. 5, 1997); Indonesia (signed in 1995, effective Mar. 12, 1996); Iran (signed in 1994, effective Aug. 31, 1994); Iraq (signed on Nov. 15, 2002); Israel (signed on Aug. 25, 2004); Jordan (signed in 1997, effective Aug. 12, 1997); Kazakhstan (signed in 1994, effective Dec. 27, 1995); Korea (North) (signed on May 3, 2002); Korea (South) (signed in 1993, effective June 13, 1993); Kuwait (signed in 1995, effective Oct. 12, 1995); Laos (signed in 1998, effective Feb. 17, 1999); Latvia (signed in 1995, effective Feb. 20, 1996); Lebanon (signed on Aug. 12, 2003, effective Dec. 30, 2004); Libya (signed on Oct. 17, 1983); Lithuania (signed in 1995, effective July 17, 1996); Malaysia (signed in 1992, effective Jan. 25, 1994); Mali (signed in 1994, effective Apr. 26, 1994); Malta (signed on Nov. 30, 1977); Moldova (signed in 2000, effective Feb. 27, 2001); Mongolia (signed in 1999, effective Dec. 13, 1999); Morocco (signed on June 28, 2001); Mozambique (signed on Nov. 14, 2003); Myanmar (signed in 1994, effective May 13, 1994); Namibia (signed on May 30, 2003); New Zealand (signed in 1994, effective July 18, 1994); Nigeria (signed on June 21, 2001); Norway (signed in 1997, effective Aug. 1, 1997); Kingdom of Oman (signed in 2004, effective Oct. 18, 2004); Pakistan (signed in 2001, effective Oct. 29, 2001); Palestine (signed on Nov. 18, 1994); Papua New Guinea (signed on Sep. 20, 1997); Peru (signed on July 3, 1998); Philippines (signed on Jan. 9, 1978); Poland (signed in 1991, effective Mar. 17, 1992); Romania (signed in 1991, effective Mar. 27, 1992); Russia (signed on Aug. 15, 1991); Saudi Arabia (signed in 1994, effective Aug. 31, 1994); Singapore (signed in 1992, effective May 31, 1993); Slovakia (signed in 1994, effective Aug. 31, 1994); South Africa (signed in 2000, effective June 12, 2001); Sri Lanka (signed on Mar. 3, 1978); Sudan (signed in 1995, effective Sept. 30, 1995); Switzerland (signed in 1993, effective Aug. 4, 1994); Syrian Arab (signed on May 12, 1994); Tajikistan (signed in 1999, effective May 20, 1999); Tanzania (signed on Oct. 8, 2001); Thailand (signed on Jan. 11, 1978); Togo (signed in 1995, effective Nov. 2, 1995); Tunisia (signed in 1994, effective Aug. 24, 1995); Turkey (signed in 1997, effective Oct. 22, 1997); Ukraine (signed in 1992, effective Oct. 18, 1994); Uzbekistan (signed in 1994, effective Jan. 17, 1996); Yemen (signed in 1991, effective June 10, 1991); Zimbabwe (signed on Sept. 28, 2001).

—Scope —

Revised for 2009 edition by

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Note: This revision incorporates legislation through October 8, 2008.

1 INTRODUCTION

1.01 CURRENCY:

In accordance with Decree of President of Ukraine “On Monetary Reform in Ukraine” of Aug. 25, 1996, National Bank of Ukraine completed monetary reform which resulted in issuance of hryvnia (UAH) as local Ukrainian currency and its hundredth part (kopeck) on Sept. 2, 1996. Currently, banknotes with face value of 1, 2, 5, 10, 50, 100, 200 and 500 hryvnias and coins with nominal value of 1, 2, 5, 10, 25, 50 kopecks and 1 UAH are in circulation.

Ukraine's central state bank, National Bank of Ukraine, has primary responsibility for stability of currency. National Bank of Ukraine conducts unified governmental policy regarding currency operations; establishes rate of exchange between local currency and foreign currency; exclusively regulates issuance and flow of money in circulation; and, establishes type of bank notes, nominal value thereof, distinctive features and protection system.

1.02 GOVERNMENT AND LEGAL SYSTEM:

Constitution.

On June 28, 1996, Ukrainian Parliament-Verkhovna Rada of Ukraine-accepted new Basic Law, in spite of conflict on major articles between communists and democrats and between President and Verkhovna Rada. Date of enactment is effective date. Since that time, June 28 is celebrated in Ukraine as Constitution Day.

On Dec. 8, 2004, amid political turmoil, Verkhovna Rada adopted amendments to Constitution, which turned Ukraine from presidential to parliamentary-presidential republic starting long awaited political reform aimed to democratize political system through transferring more powers to Verkhovna Rada from President. These amendments appeared as result of political compromise between “orange” camp of supporters of then-leader of opposition and current President Victor Yuschenko and “white-blue” camp of then and nowadays Prime Minister Victor Yanukovich. Current constitution of Ukraine is Constitution, dated June 28, 1996 in edition of Dec. 8, 2004.

Preamble states: “We, the Ukrainian people, expressing sovereign will, as supported by a many-century history of creation of Ukrainian state and on the basis of the right for self-determination exercised by the Ukrainian nation, exercising care for providing all human rights and freedoms, adequate conditions for life, and for development and strengthening of a democratic, social, legal state, being fully aware of responsibility before God, previous, current and future generations, proclaim this Constitution as Basic Law of Ukraine.”

Ukraine had number of prior constitutions in its history. 1710 Constitution of Pylyp Orlyk declared integrity and inviolability of borders and ratified principles of separation of power and independence of Ukraine; however, this constitution never took effect, having only historic importance because it's first document of such kind in world. 1917 February Revolution in Russia started period of permanent power struggle in territory of Ukraine. Quasi-governmental structures appearing during Russian Civil War on territory of Ukraine had their own “constitutions” which were in effect for very short term and most of their provisions had never been applied, however some of these constitutions contained number of progressive provisions for that time and democratic provisions. Ukrainian Popular Republic (UNR) and Western Ukrainian Popular Republic (ZUNR) adopted their Ukrainian Constitutions in 1918, as well as Hetmanat of P. Skoropadskiy (sponsored by Germany dictatorship of former Russian General attempting to establish monarchy in Ukraine) whose Law on interim government system was in fact constitutional document. From 1922 and beginning of Soviet period of Ukrainian history, Constitution of Ukraine was created in accordance with Constitution of Soviet Union. Ukrainian Soviet Socialist Republic had four constitutions—of 1919, 1929, 1937 and 1978. Latest Soviet Constitution of 1978 with modifications and amendments was in effect until June 28, 1996.

Separation of Powers.

In accordance with Constitution, Ukraine is republic. All power in Ukraine belongs to people. Ukrainian people constitute all citizens of Ukraine of all nationalities and are bearers of sovereignty and only source of power. People realize state power directly through elections, referenda and other forms of democracy, and through agencies of state power and local self-governance.

State power is carried out by three branches: legislative, executive and judicial.

In Ukraine, principle of supremacy of law is in effect. Constitution is highest law of land and constitutional norms may be applied directly. Laws and other legal acts must not be in contravention of Constitution and constitutional laws of Ukraine. Applying to court for protection of constitutional rights and freedoms directly on basis of Constitution of Ukraine is guaranteed. Individuals are equal in rights and freedoms and are equal under law.

State guarantees equality of protection of all forms of ownership and economy. In Ukraine, right of private ownership for land is proclaimed.

Parliament.

Exclusive body of legislative power in Ukraine is Verkhovna Rada of Ukraine which is competent to legislate on any issues of state and social life of Ukraine, except for those which are settled exclusively by All-Ukrainian Referendum, or are within competence of President of Ukraine, executive and judicial power, oblasts, Autonomous Republic of Crimea, and agencies of local self-governance.

Verkhovna Rada consists of 450 deputies of Ukraine elected directly by people for five years. Any citizen of Ukraine, eligible to vote, not younger than 21 on day of election, and resident of Ukraine for not less than five years, may be deputy of Ukraine. Deputies of Ukraine fulfill their duties on full-time basis; while holding deputy mandate, deputies may not pursue other activities except for those stipulated by laws.

Legislative immunity is guaranteed. Deputies cannot be detained or arrested without consent of Verkhovna Rada.

Ordinary sessions of Verkhovna Rada of Ukraine commence on first Tues. of Feb. and on first Tues. of Sept. of each year.

Extraordinary sessions of Verkhovna Rada of Ukraine are called by Chairman of Verkhovna Rada of Ukraine at request of President of Ukraine or 150 deputies. In case state of emergency or state of war is declared by President of Ukraine, Verkhovna Rada assembles in two-days time without calling.

Following activities are within competence of Verkhovna Rada: (i) Introduction of modifications and amendments to Constitution; (ii) assignment of all-Ukrainian referendum; (iii) approval of State budget; (iv) preparation and enactment of laws; (v) approval and election to positions stipulated by Constitution (one third of Constitution Court, Ombudsman on Human Rights, etc.); (vi) confirming, entering into and renouncing of international agreements, and other authorities stipulated by Constitution. Law of Ukraine “On Introducing changes to Constitution” of Dec. 8, 2004 broadens competence of Verkhovna Rada in forming government of Ukraine: Prime Minister is appointed by Verkhovna Rada upon President's proposal based on propositions of Coalition of Deputy Factions. Other members of Cabinet of Ministers of Ukraine are appointed by Verkhovna Rada upon Prime Minister's proposal. Number of chief officers of major governmental bodies are appointed by Verkhovna Rada upon President's proposal or solely by Verkhovna Rada.

Verkhovna Rada approves list of Committees of Verkhovna Rada which conduct legislative drafting work.

Right of legislative initiative in Verkhovna Rada belongs to deputies, President of Ukraine and Cabinet of Ministers of Ukraine. Upon review in committees and discussion at session of Verkhovna Rada, law must be signed by Chairman of Verkhovna Rada and immediately given to President. President affixes his signature to law and makes it available to public within 15 days or vetoes it and sends it back to Verkhovna Rada with reasons for veto and proposals for second review. If in course of such review law is adopted by two thirds of Verkhovna Rada, President will be obligated to sign it and make available to public within ten days. If President fails to do so, law, without any delay, is made available to public by Chairman of Verkhovna Rada. Law comes into effect in ten days from date of official publication, unless otherwise provided by law itself.

State budget of Ukraine is approved annually by Verkhovna Rada at submission of Cabinet of Ministers. Control over use of funds is carried out by Accounting Office on behalf of Verkhovna Rada.

Parliamentary control over compliance with constitutional rights of people is carried out by Ombudsman of Verkhovna Rada of Ukraine on human rights.

President of Ukraine is head of state and acts on its behalf. President of Ukraine is elected by Ukrainian citizens on basis of common, equal and direct electoral right by secret ballot for period of five years.

Any citizen of Ukraine eligible to vote, 35 years or older, who has been residing in Ukraine for last ten years and speaks state language may be elected President. One person cannot be President for more than two consecutive terms.

President, on basis of and in enforcement of Constitution and laws of Ukraine, issues resolutions and decrees which are binding in Ukraine.

President has right to dissolve Verkhovna Rada of Ukraine in cases stipulated by Constitution. President upon propositions of Coalition of Deputy Factions suggests to Verkhovna Rada candidate to post of Prime Minister. President suggests to Verkhovna Rada candidates to posts of Minister of Foreign Affairs, Minister of Defense and Head of Security Service of Ukraine, appoints General Prosecutor with consent of Verkhovna Rada.

President announces state awards, issues pardons, and supervises Council of National Security and Defense.

Title of President is protected by law and belongs to holder of office forever unless President has been impeached.

Next election of President of Ukraine will take place on last Sun. of last month in 2009 and on that date every five years thereafter.

Government.

Cabinet of Ministers of Ukraine is highest body of state executive power of Ukraine. Cabinet of Ministers of Ukraine is responsible to President and Verkhovna Rada and is accountable to and controlled by Verkhovna Rada of Ukraine.

Cabinet of Ministers along with other powers conducts financial, monetary, investment, price, credit, custom and tax policy of Ukraine, develops and ensures compliance with state budget, coordinates activities of ministries, regional state administrations and other bodies of executive power subordinated to Cabinet of Ministers, etc.

Executive power in regions and districts is executed by local state administrations. Heads of local state administrations are appointed by President of Ukraine upon submission by Cabinet of Ministers of Ukraine. If regional or district rada votes by two-thirds majority non-confidence to head of local administration, it results in resignation of head of appropriate local administration.

Judiciary.

(a) Prosecutor's Office.

General Prosecutor, and prosecutors subordinated to him, have following obligations: initiation of government actions in court; supervision of compliance with laws by agencies which conduct investigative activities; investigation of crimes on issues within competence of prosecutor's office; representation of interests of individual or state in court.

General Prosecutor of Ukraine is appointed and dismissed by President of Ukraine with consent of Verkhovna Rada of Ukraine for five years. Prosecutors of regions (lands), districts and cities are appointed by General Prosecutor of Ukraine.

(b) Courts.

Judiciary system of Ukraine consists of Constitutional Court and courts of general jurisdiction.

People of Ukraine directly participate in operation of justice system through people's representative to court and juries.

System of courts is built on territorial and specialty principles. Supreme Court of Ukraine is highest court.

Constitution guarantees judicial independence and immunity; attempting to influence judges of general jurisdiction is impermissible. Judges may be in office for unlimited period. Individual who is older than 25, has higher education in law and was employed in law for not less than three years may be recommended for position of judge. First appointment for position of professional judge for period of five years is fulfilled by President, all other judges except for judges of Constitutional Court of Ukraine are elected for unlimited period by Verkhovna Rada.

High Council of Justice functions as court supervision and administration of justice system in Ukraine. High Council submits proposals on appointment and dismissal of judges, supervises and controls activity of judges of all levels. High Council consists of 20 members: Verkhovna Rada of Ukraine, President of Ukraine, Assembly of Judges of Ukraine, Assembly of

Advocates of Ukraine, Assembly of Representatives of Higher Legal Schools and Scholarly Institutions each appoints three members, and All-Ukrainian Conference of Procuracy Officers—two members each, to High Council of Justice.

(c) Constitutional Court of Ukraine decides questions of constitutionality of legal issues under Constitution of Ukraine and officially interprets Constitution and laws of Ukraine, supervises legitimacy of impeachment of President.

Constitutional Court consists of 18 judges. President of Ukraine, Verkhovna Rada and Judges' Congress each appoint six judges of Constitutional Court of Ukraine. Judges are appointed for nine year period without right of reappointment. Head of Constitutional Court is elected from its judges for three year term by secret ballot.

Regional Administration and Territorial Self-Governance.

System of administrative units comprising territory of Ukraine consists of Autonomous Republic of Crimea, regions (oblasts), cities, districts, towns and villages. Ukraine includes 24 regions, Autonomous Republic of Crimea, cities of Kyiv and Sevastopol.

Local self-governance is conducted by territorial communities of village, town and city residents directly or through village, town and city radas elected by them. Agencies of self-governance representing collective interests of territorial communities of village, town and city residents are district and regional radas. Issue of village, town, district, city and regional radas and executive bodies thereof are agencies of self-governance. Local rada may consist of counselors elected by residents of this territory for five-year period. Executive committee of village, town or city rada together with village, town or city rada itself is headed by village, town or city golova (mayor) who is elected for four-year period by territorial communities of village, town and city residents. District or regional rada elects its chairman who also heads executive apparat of appropriate district or regional rada. Self-governance radas function within limits of powers established by Constitution and laws: they manage communal property, approve and control budgets of respective administrative units, establish local taxes and fees, ensure conduct of local referenda, etc.

Autonomous Republic of Crimea has its own constitution adopted by Verkhovna Rada of Autonomous Republic of Crimea and approved by Verkhovna Rada of Ukraine. Laws and enactments of Verkhovna Rada of Autonomous Republic of Crimea and resolutions of Council of Ministers of Autonomous Republic of Crimea must be in compliance with Constitution and laws of Ukraine. Verkhovna Rada of Autonomous Republic of Crimea, within limits of its power, approves resolutions and decisions, creates and determines procedure for activity of its agencies of legislative and executive power and local self-governance. Head of Council of Ministers of Republic of Crimea is appointed by Verkhovna Rada of Republic of Crimea with approval of President of Ukraine.

System of regional administration and territorial self-governance in Kyiv and Sevastopol is subject to regulation by special laws. Law on city of Kyiv provides for Kyiv City Golova to unite its office with office of Head of Kyiv City State Administration and with office of Chairman of Kyiv City Council. In Sevastopol, special law is yet to be approved; therefore office of Sevastopol City Golova is held by Head of Sevastopol City State Administration who is appointed in way set forth for heads of local administrations.

Regulations on Amendments to Constitution.

Draft law on introduction of amendments and modifications to Constitution may be submitted to Verkhovna Rada by President of Ukraine and one-third of constitutional membership of Verkhovna Rada. Law on introduction of amendments and modifications to Constitution as parliamentary initiative is approved by Verkhovna Rada by not less than two-thirds of votes of its membership as determined by Constitution. Amendments and modifications to such parts as General Principles, Elections, Referendum and On Introduction of Amendments and Modifications to Constitution must be additionally approved by All-Ukrainian Referendum. Issue of change of territory must be decided exclusively by All-Ukrainian Referendum.

Amendments and modifications to Constitution which are aimed at liquidation of independence and territorial integrity of Ukraine or intend to change constitutional regime, restrict or cancel forms of ownership, rights and freedoms of people guaranteed by Constitution may not be introduced. Under circumstances of state of emergency, introduction of amendments and modifications to Constitution are not permitted.

Second submission of amendments and modifications which were adopted earlier is permitted only after one year. Draft law is reviewed only upon availability of Constitutional Court of Ukraine.

1.03 HOLIDAYS:

In accordance with Labor Code of Ukraine such holidays are established: (1) Jan. 1—New Year; (2) Jan. 7—Christmas; (3) Mar. 8—International Women's Day; (4) May 1, 2—International Day of Peoples' Solidarity; (5) May 9—Victory Day; (6) June 28—Constitution Day; (7) Aug. 24—Independence Day.

Three religious days also holidays: (1) Christmas (but if Sat. or Sun., then following Mon.), (2) Mon. after Easter and (3) Mon. after Witsunday (Pentecost). All per Julian calendar, not Gregorian.

At request of nonorthodox religious societies registered in Ukraine, enterprises, institutions, and organizations give to individuals, who profess such religions, three days off in order to celebrate important holidays. Those who celebrate such holidays are to work at any three other days during year.

1.04 OFFICE HOURS AND TIME ZONE:

Ukraine is in Eastern European, i.e., to +02:00 GMT time zone. Office hours are generally from 9 a.m. to 6 p.m. (may be longer for lawyers).

2 BUSINESS ORGANIZATIONS

2.01 AGENCY:

Under Ukrainian civil law, relations which in U.S. are regulated by agency agreements, are regulated by (i) mandate agreement and (ii) commission agreement.

In accordance with mandate agreement, agent is obligated to take certain legal actions on behalf of principal and at principal's expense. Parties to any mandate agreement may be competent individuals and legal entities. Legal entities may act only as permitted under articles of incorporation thereof. In accordance with general provisions on form of agreements, mandate agreements may be verbal or written. Term of mandate agreement is established in mandate agreement. Under mandate agreement, agent must act on behalf of principal personally, except for events when agent is forced to entrust substitute to secure interests of principal.

Transformation of Ukraine to market economy considerably broadened sphere of application of mandate agreements, as this is useful and profitable legal form of carrying out various middleman services with participation of such commercial structures as broker offices, sales agents, etc.

In commission agreement, commission agent is obligated on principal's instruction and with compensation to carry out one or several agreements for principal in his own name and at principal's expense.

Commission agreements regulate representative relations mainly for trade and intermediary transactions.

Commission agreements are used in such new areas of commercial activity as trade on stock exchange and must be written; often trade and intermediary transactions under such agreements are combined with additional services, such as insurance, transportation of goods, etc. Parties to commission agreements may be individuals and legal entities. Agreements must be executed in written form.

Both mandate agreements and commission agreements are based on representation relations; but with respect to former direct representation is meant, while latter is realized on basis of indirect representation.

In addition, mandate agreements may be made with or without indemnity, while commission agreements are always made with indemnity.

2.02 ASSOCIATIONS:

Individual freedom of association is guaranteed by Constitution and legislation of Ukraine, in particular by Law of Ukraine “On Associations of Citizens”, June 16, 1992.

Association is voluntary nongovernmental (public) union of persons established on basis of common interests in order to jointly fulfill their rights and interests.

Association of persons, regardless of name (congress, association, foundation, etc.) established under said law is recognized either as political party or as public organization.

Association which activity is aimed against state interests and threatens national security (e.g. forcible replacement of constitutional system and illegal changing of territorial integrity of country; undermining of security of country through carrying out activity in favor of foreign countries; propaganda of war, violence or cruelty, fascism or new-fascism) is prohibited in Ukraine.

Associations are created and operate on basis of voluntariness, equality of rights of members, self-government, legality and publicity. Associations are free to choose directions of their activity. Associations of Ukrainian persons may have status of all-Ukrainian (nationwide), local and international.

Associations can be duly recognized as all-Ukrainian (nationwide) associations in cases when (1) their activity covers entire Ukraine and (2) they have local divisions (chapters) in majority of oblasts. Political parties are created and operate in Ukraine as all-Ukrainian (nationwide) associations.

Associations with activity involving particular administrative-territorial unit or region, have status of local associations. Territory may be specified by association independently.

Association is international if its activity involves Ukraine and at least one foreign country.

Establishment and Termination of Associations.

Political parties are established at initiative of any Ukrainian person over 18 years old, whose competence is not limited by court, and who is not kept incarcerated. Members of political parties may only be citizens of Ukraine who are over 18.

Political parties and international public organizations must be registered with Ministry of Justice. Petition for registration of political party must be confirmed (supported) by not less than 1,000 citizens of Ukraine who have right to vote, and must include charter (by-laws), protocol of constituent assembly (congress) or general meeting, information on structure of central charter bodies, data on local centers, documents confirming payment of registration fee. Political parties should also attach their program (strategy) documents.

Rights of political parties include, among others: (1) Right to use state-owned media, as well as right to establish private media; and (2) finance various NGOs, and other associations in compliance with relevant laws of Ukraine.

Political parties are non-for-profit organizations. Political parties may own movable property, real estate, vehicles, equipment, and such other property acquiring of which is not prohibited by law. Political parties may rent or lease necessary property.

Political parties cannot be financed: (1) By state or municipal bodies, except in cases provided by law; (2) by state-owned or municipality-owned entities or by entities in which state or municipal bodies, as well as foreign entities have stake; (3) by foreign states, foreign citizens, foreign entities or other foreign businesses; (4) by charitable or religious organizations; (5) by anonymous persons; or (6) by political parties that do not belong to block of political parties.

Political parties, institutions and organizations established by them, may not set up enterprises (except for mass media) nor engage in economic and other commercial activity, except for distribution of public and political literature, other propaganda materials, products with symbols of such parties, maintenance of festivals, holidays, exhibitions, lectures, and other political arrangements.

Political parties have right to establish or join international unions, provided that their charters anticipate creation of consultative or coordinating central agencies only.

Other Associations.

Founders of associations may be citizens of Ukraine, citizens of other countries, persons without citizenship over 18 years old, or over 15 years old for youth/children's organizations.

Decision to establish association is taken by Constituent Assembly (Conference) or General Meeting.

Members of associations (except for youth/children's organizations) may be persons over 14 years old. Age qualification for membership in youth and children organizations is established by charter thereof.

Association operates on basis of its charter, which must include name of association, its status and legal address, goal and purposes, conditions and membership procedure, rights and duties of members, and some other provisions.

Legalization (acknowledgment) of association is obligatory and is carried out through registration or notice of establishment thereof, otherwise activity of associations not legalized (acknowledged) and may be forcibly dissolved by court as illegal.

Association acquires status of legal entity upon its registration. Legalization of public organization is carried out by Ministry of Justice of Ukraine, its local agencies, executive committees of rural, municipal or city Radas respectively. Government agency legalizing association, is required to publish such information in newspapers.

Founders of any association must submit application for registration thereof which must include charter (by-laws), protocol of constituent assembly (congress) or general meeting, information on structure of central charter bodies, data on local centers, documents confirming payment of registration fee.

Public organization and unions thereof may be legalized (acknowledged) by notifying in writing Ministry of Justice of Ukraine, its local agencies, executive committees of rural, municipal or city Radas respectively. Associations may have funds and other property necessary for carrying out their charter activity.

Associations may obtain ownership of funds and other property transferred by founders, members (participants) or state, acquired as result of entrance and membership fee, individual donations, enterprises, institutions and organizations, and ownership right for property purchased with associations' funds, or on other terms which are not prohibited by law.

Public organizations may obtain ownership of property and funds obtained as result of economic and other commercial activity of self-financing institutions, organizations and enterprises established by these public organizations.

In order to realize charter goals and purposes, associations may carry out required economic and other commercial activity by creating self-financing institutions and organizations with status of legal entities, and establishing enterprises in manner established by legislation.

In case of law violation by association, following penalties may be incurred: fine, warning, temporary prohibition of some activities, temporary prohibition of all activity, and, forced dissolution.

Public organizations and unions thereof may in accordance with their charters establish or join international public (nongovernmental) organizations, create international unions of associations, maintain direct international contacts and relations, make respective agreements, and participate in taking measures which are not in contravention of international obligations of Ukraine.

International public organizations, branches, sections, representative offices, and other structural units of public (nongovernmental) organizations of foreign countries operate in Ukraine in accordance with Ukrainian law.

2.03 BUSINESS ASSOCIATIONS:

Civil Code of Ukraine of Jan. 16, 2003 and Law of Ukraine “On Business Associations”, Sept. 19, 1991, as amended, establish five types of business associations: joint-stock associations; limited liability associations; additional liability associations; full liability associations; and limited partnership associations.

Although names of these five types of business associations are presented here in literal translation into English language, on closer comparison entities bear some similarity to American entities such as corporations, partnerships and associations. Generally, business associations are defined as enterprises, organizations and entities established by agreement (written or verbal) by legal entities and/or individuals by joining of property and entrepreneurial activity for purpose of earning profit. Business associations are legal entities which may conduct all legal entrepreneurial activity, enjoy property and personal non-property rights, make commitments, and act in court and Court of Arbitration on their own behalf. Founders of business associations may be Ukrainian and foreign individuals and/or legal entities and/or persons without citizenship. Enterprises, organizations and entities which are participants of associations, do not cease being separate legal entities.

Joint-stock, limited and additional liability associations are established and operate on basis of charter; full liability and limited partnership associations are established and operate on basis of foundation agreement. Foundation documents must indicate type of association, its subject matter, purposes, founders, participants, name, legal address and other information. Name of association must contain type of association. Association acquires status of legal entity from day of its state registration. Association is entitled to establish affiliates, subsidiaries and representative offices in and outside Ukraine. Founder's contribution to charter capital may be made in cash (including hard currency) and in kind of: buildings, premises, equipment and other material valuables, securities, land use rights, water and other natural resources as well as rights to use buildings and premises. Use of state budget funds, funds obtained as credit and collateral may not be used for formation of charter fund. Activity of association is terminated through its reorganization (merging, joining, division and spin-off) or liquidation.

Joint-Stock Association (Joint-Stock Company).

Joint-stock company has charter fund, divided into certain number of common shares of definite equal nominal value. Joint-stock company is liable under its obligation only to limits of its property. Shareholders are liable for company only within limits of shares they own. Charter fund of joint-stock company cannot be less than sum equivalent to 1,250 minimal wages, based on minimal wage rates effective at moment of creation. Starting from July 1, 2007, minimum wage constitutes 440 UAH, and starting from Oct. 1, 2007—460 UAH. Joint-stock companies may be of two forms: open joint-stock company, shares thereof are distributed through public subscription and trading at stock exchanges; and, closed joint-stock company, its shares are distributed only among founders and cannot be distributed by public subscription and trading at stock exchange. Founders of open joint-stock companies shall publish information on issuance of shares according to requirements stipulated by Securities and Stock Exchange Commission.

Joint-stock companies have following structure: (a) Highest body—General Meeting of Shareholders; (b) Supervisory Council, which may be appointed by General Meeting of Shareholders and which controls activity of management; creation of Supervisory Council is obligatory in joint-stock companies with more than 50 shareholders; (c) executive bodies: management board, which directs joint-stock company activity, and Audit Committee, which controls financial and economic activity of management board. Members of Supervisory Council, as well as any other officers of joint-stock company, shall not be members of Audit Committee.

On Sept. 17, 2008, new Law on Joint-Stock Companies was adopted by Verkhovna Rada. However, as of Oct. 8, 2008, Law was not signed by President and thus, it cannot enter into force. It is unpredictable whether President will sign Law or will use his right of veto.

Law On Joint-Stock Companies, in general, complies with EU Directives provisions in sphere of corporate governance and is in line with principles of corporate governance recommended by Organization of Economic Cooperation and Development, as well as international corporate governance principles. Essential advantage of Law On Joint-Stock Companies is that it creates legal conditions to protect rights of shareholders in Ukraine and removes many gaps in current legislation regarding establishment and operations of joint-stock companies.

If President signs law, it will come into force in six months from moment it is officially published except for second sentence of second part of Art. 20, which comes into force in two years from moment it is published (``the stocks of companies exist only in electronic format").

Limited liability company has its charter fund divided into shares, as determined by foundation documents, though initially it may have only one founder. Participants of limited liability companies are liable only within limits of their contributions. Charter fund of limited liability companies may not be less than equivalent of 100 minimal wages, based on minimal wage rate in effect at moment of creation. Participant of limited liability company is obligated to contribute its share of charter capital within one year from state registration. Participant withdrawing from limited liability company will be paid value of share of association's property pro rata to participant's share in charter fund.

Participants' meeting shall be highest body of limited liability company. Director or board of directors is highest executive body of limited liability company. Audit committee controls activity of board of directors.

Additional liability company is treated under Ukrainian Law as limited liability company with several differences. Additional liability company has charter capital, divided into shares. Law does not specify required amount of charter fund additional liability company is to have and provides that such amount is to be stipulated in constituent documents. Participants of such company shall be responsible for its obligations, with their contributions into charter capital; in cases of insufficiency of those sums, additional property belonging to them shall be reapportioned on pro rata basis as each participant's contribution. Limits of responsibility of participants is provided in foundation documents.

Full liability company is created by individuals and/or legal entities all of whom undertake joint entrepreneurial activity and remain liable for company's obligations with all of their property. Constituent agreement of full liability association describes size, form and procedure of share contribution and manner in which participants take part in activity of full liability company. Management of full liability company may be carried out either by all participants or by one or several of them who act on company's behalf and is conducted by joint consent of all participants. Law provides several restrictions on engaging of full liability company's participants in other business or entrepreneurial activity. Participant is responsible for company's obligations without regard to whether they were incurred after or before joining association.

Limited partnership company is company where at least one participant (partner) is fully liable (both by its contributions to charter fund and by its own property) for company's obligations and responsibility of at least one participant (limited partner) is limited. Legal status of such association is equal to complete association but management of limited association is carried out by participants (partners) with full liability. If two or more participants take full responsibility in operation of limited partnership company, they are jointly responsible for debts of their company. Limited partnership company shall terminate its activity when all of participants with full responsibility withdraw from association. In event of liquidation of limited partnership company, funds remaining after all payments are distributed first among partners, and then among limited partners.

2.04 CORPORATIONS:

See topic 2.03 Business Associations.

2.05 FOREIGN CORPORATIONS:

See topic 2.03 Business Associations; category 14 Foreign Trade and Commerce, topic 14.04 Foreign Investment.

2.06 FOUNDATIONS:

Charitable organization acquires status of legal entity from day of its state registration. Procedure of registration is specified by Resolution of Cabinet of Ministers of Ukraine “On Approval of Provision for Order of State Registration of Charitable Organizations”, Mar. 30, 1998. State registration of international, Ukrainian and local charitable funds is carried out by Ministry of Justice of Ukraine and its local agencies.

Founders of charitable organizations must submit application for registration thereof which must include charter; protocol of Founding Meeting (Congress); information on founders and central charter bodies; data on local offices; documents confirming payment of registration fee.

Charitable organization operates on basis of charter, which must include name and legal address, goal and purposes, rights and duties of members, conditions and membership procedure, and other provisions.

Charitable organizations have following structure: (a) highest body—General Meeting; (b) executive bodies: management board and president (director); (c) Supervisory Council, which may be appointed by founders.

Charitable organizations may have funds and other property acquired as result of: founders' contributions; donations made by individuals and legal entities; charitable lotteries and auctions; other charitable campaigns; income from deposits and securities; and other sources not prohibited by law.

Law of Ukraine “On Charity and Charitable Organizations”, Sept. 16, 1997 with changes and amendments of Mar. 7, 2002, establishes following forms of charitable organizations: charitable fund; charitable institution; membership charitable organization; foundations; missions; leagues.

Specific form of charitable organization is established by founders in Charter.

Law of Ukraine “On Humanitarian Aid” of Oct. 22, 1999 envisages that charity organizations, among others, can be recognized as recipients of humanitarian aid. Said law also provides that only those entities that were duly recognized as recipients of humanitarian aid and registered with Single Registry of Recipients of Humanitarian Aid can enjoy, among others, tax and customs benefits, when receiving humanitarian aid. Said law envisages tax benefits for individuals and legal entities donating their funds, property or other assets for charity activity. Charity organizations that receive donations from their members and other charity donations are also exempt from taxation and other payments on such income.

Majority of currently existing and operating funds of Ukraine were established in accordance with Resolutions of Parliament of Ukraine regarding each such fund. These funds operate under special provisions developed by Parliament committees.

3 BUSINESS REGULATION AND COMMERCE

3.01 BANKS AND BANKING:

Banking system of Ukraine consists of National Bank of Ukraine and other banks, which are established and operate on territory of Ukraine in accordance with provisions of Law “On Banks and Banking Activity”. Banks in Ukraine may operate as universal or specialized institutions.

Bank shall independently determine trends of its activity and specialization as to types of operations. National Bank of Ukraine shall regulate activity of specialized banks through economic norms and normative provision of operations performed by these banks. Bank shall acquire status of specialized bank when over 50% of its assets represent assets of same type. Bank shall acquire status of specialized savings bank when over 50% of its liabilities represent deposits of physical persons.

National Bank of Ukraine issues regulations and instructions setting norms in accordance with provisions of Constitution of Ukraine, Law “On Banks and Banking Activity”, Law “On National Bank of Ukraine”, other legislative acts and own normative acts. Instructions of National Bank of Ukraine, adopted within limits of its authority, are obligatory for all legal entities and individuals.

It is prohibited for central governmental and local self-government authorities to in any way influence management or employees of banks in course of execution of their official duties or to interfere with bank activity, except for cases specified by Laws of Ukraine.

In Ukraine, banks are founded in form of joint stock companies or cooperative bank.

Statutory capital of National Bank of Ukraine is owned by State of Ukraine. It is special central body of state administration, legal status, tasks, functions, powers, and organizational principles of which are defined by Constitution of Ukraine, Law “On National Bank of Ukraine”, and other laws of Ukraine. Location of National Bank is city of Kyiv.

National Bank of Ukraine is central bank of country. Basic function of National Bank under Constitution of Ukraine is to provide for stability of monetary unit of Ukraine. National Bank conducts state policy in areas of money circulation, credit, promotion of monetary unit, interbank accounts, banking system activities in general, and exchange rates of establishment as against other currencies.

National Bank of Ukraine organizes state deposits of country, preserves reserve funds of banknotes, precious metals and gold and currency reserves. National Bank of Ukraine represents interests of Ukraine in relations with central banks of other countries, at international banks and other financial and credit organizations, where interstate cooperation is stipulated at central bank level.

National Bank of Ukraine issues permission to organize commercial banks in country by registration thereof and issues general or individual licenses for conduct of banking operations. National Bank of Ukraine maintains State Registry of Banks, currency exchanges and other financial and credit institutions. Commercial banks acquire status of legal entity and may conduct banking transactions only upon registration in this Registry and with relevant municipal authorities.

Commercial banks of different kinds and forms of ownership are organized on stock or share basis. Legal entities and individuals (except for local and central legislative bodies, their executive bodies thereof, political and trade union organizations, societies and parties, public foundations) may be founders and shareholders of commercial banks. According to NBU Regulation No. 375 “On Procedure of Creation and State Registration of Banks, Affiliates, Representative Offices and Divisions” of Aug. 31, 2001 legal entities or individuals willing to acquire material share (ten or more percent of charter fund) in bank or increase it up to 10 or more, 25 or more, 50 or more or 75% or more of charter fund must obtain prior written permission from National Bank of Ukraine. If individuals or legal entity acquired material share of charter fund without NBU permission, NBU may prohibit such shareholders from exercising right of acquired shares.

To establish commercial bank following documents must be submitted: (a) registration application, (b) founding documents, (c) decision of founders to establish bank, (d) business plan for one year and activity strategy of bank for next three years that specifies activities that bank plans to perform, (e) information on good standing of those participants that will hold essential participation in bank; in case bank founder is legal entity, information should be provided on members of board of directors and holders of essential participation in legal entity, (f) accounting and financial statements for legal entities on last four reporting periods (quarters), and for individuals - certificate from state tax administration on income for last reporting period (year), (g) information on membership of supervisory council, management board (board of directors), and auditing committee, (h) copy of receipt certifying payment of registration fee, (i) notarized copies of foundation documents of members, that are legal entities and would hold essential participation in bank, (j) copies of report on holding of open subscription to shares - for bank established as open joint stock company, (k) data on professional skills and business reputation of bank chairman and members of management board (board of directors) and chief accountant of bank.

National Bank of Ukraine, within one week after documents for state registration were submitted, shall open temporary account for accumulation of subscription fees of founders and other bank participants. Decision on state registration or denial of registration is taken by National Bank of Ukraine within one month from submitting of all documents.

Registration of banks is performed through relevant entry in State Bank Registry. National Bank of Ukraine issues State Registration Certificate to bank. After bank acquires status of legal entity and obtains general banking license, it may begin conducting banking transactions specified in license.

To establish bank with foreign capital, its founders are obliged to obtain preliminary permit from National Bank of Ukraine. In order to obtain preliminary permit for establishing bank with foreign capital following documents submitted to National Bank of Ukraine: (a) application as for preliminary permit; (b) information on founders, their business reputation; (c) permit of foreign controlling body to participate in establishing of bank in Ukraine or assurance of foreign founder as to absence in legislation of country of origin of demand to obtain such permit; (d) information on underwriter and its business reputation. Application is considered by National Bank of Ukraine within one-month period. Thereafter bank provides National Bank of Ukraine with following documents: (a) notarized copy of decision, from management body of foreign investor on participation in bank in Ukraine; (b) written consent on participation of foreign investor in bank in Ukraine issued by state or another authorized controlling body of country, where head office of foreign investor is registered, if required by law of such country; (c) notarized extract from trade (banking) register or other official document confirming registration of foreign participant issued in country, where head office of foreign investor is registered; (d) notarized copy of foreign audit firm conclusion, from place it was issued, on financial state of foreign investor of last full fiscal year. In cases when foreign investor is individual he/she shall submit: (a) Written consent for participation of foreign investor in bank in Ukraine, issued by state or another authorized controlling body of country, law of which requires such permit; or written assurance of foreign investor as to absence of demands for preliminary permits for investments abroad in legislation of country of residence; (b) form questionnaire containing information that individual has no previous convictions. Decision on state registration or denial of registration is taken by National Bank of Ukraine within three months from submission of all documents. National Bank of Ukraine approves provision on licensing of banks in Ukraine. Registration fee and fee for introduction of amendments and modifications into founding documents is 3,400 UAH, which is approx. 701 USD. Registration is conducted within one month upon receipt of application and other documents required for registration.

Commercial banks are obliged by law to take necessary steps to prevent money laundering. These, among others, include identification of all clients of bank (both legal entities and individuals) that have bank accounts therein; persons that make cash transactions for amount exceeding 50,000 hryvnias (approx. 10,000 USD) without opening bank account therein. For these purposes commercial banks may request from their clients certain documents and/or certificates to prove that transactions are not subject to money laundering. Commercial banks are forbidden to open anonymous bank accounts. Each year National Bank of Ukraine controls commercial banks internal procedures regarding anti money-laundering measures.

Minimum amount of charter capital for commercial banks is established in amount of ten million euro at official exchange rate of Ukrainian currency unit. Commercial bank may own real estate, total value of which does not exceed 25% of its charter fund with premises used by bank departments not included in this restriction.

Commercial banks may organize leagues, associations and other unions for coordination of its activity and protection of interests. Banks are prohibited from making written and oral agreements for purpose of restricting competition in banking activity and monopolization of services related to credits, interest rates, etc.

3.02 BROKERS (COMMODITY):

Concept of “broker” is term of recent usage in Ukraine; brokers did not exist under prior political regime. Term “broker” as intermediary is found only in Law of Ukraine “On Commodity Exchange” of Dec. 10, 1991. Thus, broker is individual registered at exchange in conformity with charter thereof, whose obligations are to act on behalf of founders, Ukrainian and foreign legal entities and individuals, members of exchange. Brokers represent members of exchange and conduct exchange transactions by seeking contracts and submitting of transactions for registration at exchange; only brokers and members of exchange are permitted to conduct exchange transactions. Quantities of brokers on any commodity exchange are determined by exchange committee (council). Brokers are entitled to ascertain availability and quality of goods, as well as solvency (paying capacity) of buyer, to propose alternative terms and conditions of contracts and to undertake any other actions which do not contradict clients' interests. Brokers are prohibited to disclose commercial secrets concerning clients' transactions conducted at exchange with their participation and to serve two or more clients simultaneously, if there is conflict of their interests.

Ukrainian law also contains term “intermediary activity”, essence of which is “brokerage”. Law of Ukraine “On Securities and Stock Market” of Feb. 23, 2006, regulates, among others, intermediary activity on issuance and turnover of securities. Such activity is conducted exclusively by banks and legal entities, which sole business activity are securities transactions (hereinafter referred to as stock brokers). Stock brokers are entitled to conduct activities such as: (i) Brokerage; (ii) dealing; (iii) underwriting; and (iv) securities management.

See also topic 3.12 Securities; category 2 Business Organizations, topic 2.01 Agency.

3.03 COMMERCIAL LAW:

Under Soviet legal system, economic law was designated as branch of legislation which regulated economic activity of socialist enterprises. Legal norms, creating economic laws were not codified in universal code. Most important legislative provisions were “Provisions on Socialist State Manufacturing Enterprises”, “Provisions on Deliveries”, “Provisions on Contractual Agreements for Capital Construction”, etc. Many held view that economic relations were regulated by state, civil, administrative or other laws, thus it was not correct to regard economic relations as separate branch of law. Actually, many provisions which regulated economic relations were contained in Civil Code and Code on Violations of Competence.

Major legislative acts devoted to regulating business in Ukraine are following: Civil and Commercial Codes of Ukraine, both effective from Jan. 1, 2004, Laws of Ukraine “On Economic Associations”, of Sept. 19, 1991, as amended (hereinafter as “Companies Law”) “On Licensing of Certain Types of Economic Activities” of June 2000 as amended, “On Foreign Economic Activity” of Apr. 16, 1991.

Civil Code of Ukraine stipulates general provisions on all kinds of business entities, sets forth demands to internal structure thereof and outlines their status; regulates relations between individuals, legal entities, as well as between individuals and legal entities. Commercial Code establishes general principles of functioning of business entities, their interaction and among themselves, natural persons and state, procedures for establishing and conducting

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entrepreneurial activity, etc.

Commercial Code specifies types and structures of enterprises as well as provisions for organization, registration, reorganization and liquidation thereof. Law designates enterprise as independently operating legal entity that is founded for satisfaction of public and personal needs through engagement in production, scientific-research and commercial activity provided for in law.

Enterprise maintains its own financial existence, bank accounts, and corporate seal with name, possesses its own property and also trademark for products (goods) and services.

Commercial Code stipulates for existence of following types of enterprises: Private enterprise which is established on basis of property of individual (individuals) and/or legal entity (entities); collective enterprise which is established on basis of property collectively owned by two or more persons; communal enterprise which is established on basis of property owned by territorial community; state enterprise based on state property including “exclusive state enterprise”; enterprise which is established on basis of property of different forms of ownership; enterprise with foreign investment (if amount of foreign capital in charter fund is more than 10%); foreign enterprise (if amount of foreign investment is 100%). Other forms of enterprises may be established in Ukraine in cases stipulated by law.

Companies Law, Sept. 19, 1991 stipulates types of business entities, permitted to be established in Ukraine, their organizational structure, provisions for their organization and operation, and rights and obligations of participants and founders thereof.

Pursuant to Companies Law business entities are enterprises, organizations and institutions, established by agreement of legal entity (entities) and/or individuals to join their property and entrepreneurial activity in order to obtain profit.

Law recognizes following business entities: joint-stock company (open and closed), limited liability company, additional liability company, full liability company and limited partnership.

Companies are legal entities, they may undertake any entrepreneurial activity which is not in contravention to Ukrainian laws. They may acquire property and individual non-property rights, acquire obligations, act in court or arbitrate in their own name. Companies may own: property transferred by founders and participants thereof; products obtained as result of their business activity; profits; other property obtained by means which are not prohibited by law.

Companies acquire all rights of legal entity from date of their state registration. Companies may create affiliates, representative offices and subsidiaries in Ukraine and abroad in accordance with Laws of Ukraine.

Companies Law also provides definition of each of above mentioned associations, and particulars of their charter, procedures for formation of charter capital, bodies of management and control, and envisages liquidation procedures.

See category 2 Business Organizations, topic 2.03 Business Associations.

3.04 COMMERCIAL REGISTER:

See topic State Register (Commercial Register).

3.05 CONTRACTS:

General provisions regarding obligations arising from contracts, are regulated by Civil Code of Ukraine, Book V.

Conclusion of Contracts.

Contracts are deemed executed if parties thereto agreed on all significant conditions and terms thereof. Significant are conditions and terms recognized as such by law or required for particular agreements, and all conditions and terms agreed to by parties thereto (e.g. price—in purchase-sale agreements).

If parties agree to conclude contract in certain form, then such contract is recognized as executed from date of execution (unless mandatory notarization or state registration is required for such contract by virtue of law). If offer of contract indicates period within which acceptance should be given, then contract is deemed executed provided that acceptance was made within such period. If offer of contract is made without fixed period for reply, then contract is deemed executed on condition that acceptance by other party was immediate if offer was verbal, or within commonly required period if offer was written.

Subject to mutual agreement of parties', disputes arising between such parties in course of performance of contract's terms may be referred for review by regular or special court of arbitration.

In event that party to contract anticipated that contractual obligations are to be performed in favor of third person, then such performance of obligations may be required by both parties to contract or third party, unless otherwise provided by agreements or results from its content.

Conditions of Effectiveness.

In accordance with Civil Code (Civil Code, c. 4), individual civil competence (individual competence to acquire civil rights and create civil obligations as result of individual's actions) begins at age of 18. In event that person under 18 years gets married, then such person is deemed competent from date of marriage.

Minors at age of 14 through 18 may enter into contracts with consent of their parents or trustees. They may conclude contracts for retail trade, disposal of their wages, stipends, carry out copyrights for their works and/or inventions. Contracts of minors under 14 are concluded in their names by their parents/trustees, except for contracts for retail trade.

Trustees make contracts in name of persons recognized by court as incompetent as result of mental illness, or mental defect. Individual whose competence is limited by court as result of alcohol abuse or drugs, and individual who is under trusteeship, may carry out contracts on disposal of property only upon trustee's written consent.

Contracts may be both verbal and written (simple or notarial). Under general rule, contracts which are carried out while being concluded, may be verbal. Written contract (simple or notarial) is required in certain transactions: contract for purchase-sale of house must be certified by notary; contracts of enterprises, institutions, organizations between themselves or with individuals, except for contracts which are carried out while being concluded; contracts which require state registration; and contracts, sum of which exceeds 20 untaxed minimums of individuals' income.

Contracts concluded abroad should be executed in accordance with form accepted in foreign country. Noncompliance with form required by law will result in recognizing contracts as invalid only in instances when form is directly anticipated by special law regulating such contracts. Noncompliance with form of foreign trade contracts and procedure of signing thereof will result in recognizing such contracts as invalid. Noncompliance with simple written form of contracts results in depriving parties thereto of witnesses' testimony in case of dispute.

Following contracts can be recognized invalid by court: contracts which contradict legislation, in particular those encroaching property rights of minors; contracts concluded by minors under 14, and minors of 14 through 18 without parents' (trustees') consent (unless parents or trustees approve contract when they become aware of existence of contract); contracts concluded by individuals recognized as incompetent, or with limited competence, or unable to understand meaning of their actions; contracts concluded as result of significant mistakes, or fraud, or violence, or threat, or coincidence of difficult circumstances; contracts concluded only pro forma, without intent to create legal consequences are deemed invalid; contracts concluded in order to hide other contracts (sham contracts) if detected, are regulated by rules which apply to contracts they hide.

Such contracts which are deemed invalid or recognized as such by court are invalid from date of conclusion thereof.

Execution of Contracts.

Obligations should be executed duly and within established period. Unilateral refusal to carry out obligations and unilateral modification of contractual provisions are not permitted, unless otherwise stated in law and provided by terms of contract. If period of fulfilling obligations is not established by contract, then creditor may demand fulfillment thereof at any time, and debtor must fulfill obligations within seven days upon receipt of demand, unless immediate fulfillment is anticipated by contract. Individual debtor may fulfill obligations ahead of time, unless otherwise is provided by contract or law. Premature fulfillment of obligations between enterprises and organizations is permitted only if such provision is anticipated by law or contract, or under creditor's consent.

If place of execution of obligation is not specified by contract or law, then obligation may be fulfilled: for obligation to transfer buildings, at location thereof; for financial obligations (except for obligations of enterprises and organizations), at creditor's residence; for any other obligations, at debtor's residence, if debtor is legal entity, at location thereof.

Payments under financial obligations between enterprises and organizations are effected through financial institutions.

Financial obligations may be expressed and are subject to payment in Ukrainian currency. In accordance with Decree of Cabinet of Ministers “On Regime (System) of Currency Regulation and Currency Control”, Feb. 19, 1993, residents trading in products (work, services), rights of intellectual property and other property rights for foreign currency in Ukraine are obligated to obtain individual licenses in manner and within period established by National Bank of Ukraine.

If several creditors/debtors are parties to contract, then each creditor may request execution and each debtor must fulfill obligations on pro rata basis, provided that respective obligations or demands are not joint. Joint obligations or demands arise if they are anticipated by contract or established by law, in particular when objects cannot be divided. Under joint obligations, each creditor may demand realization of obligations in full amount, and, respectively, each debtor is fully responsible for fulfillment of such obligations.

Assurance of Execution of Obligations.

Execution of obligations may be ensured in accordance with law of contract by forfeit (penalty, fine), bail, mortgage, vendor's lien or guarantee, or debtor's deposit.

Forfeit (penalty, fine) is sum of money established by law or contract which should be paid by debtor to creditor in event of failure to fulfill or untimely fulfillment of obligation. Forfeit contract should be executed in written form. Breach of such contracts result in recognizing such contracts as ineffective.

Under bail agreement, bailsman is responsible before creditor in event of nonfulfillment of obligations by debtor. Obligation fulfillment may be assured by bail fully or in part. Bailsman has right to receive payment from debtor for fulfillment of obligations of latter.

Under pledge, in event that debtor fails to fulfill obligations secured by pledge, creditor (pledgee) may get satisfaction from value of pledged property, which is his privilege as against other creditors. Pledge arises by contract or by law (see category 18 Mortgages, topic 18.02 Mortgages).

Under contract of guarantee, guarantors are liable for other persons' obligations to creditors of these persons. Guarantee contracts should be executed in written form.

Responsibility for Breach of Contracts.

In event of breach or untimely fulfillment by debtor of obligation, debtor must compensate creditor's losses resulting from such breach or nonfulfillment. Losses mean creditor's expenses, loss or damage of property, or profit lost as result of debtor's nonfulfillment of obligations.

If forfeit (penalty, fine) for nonfulfillment of obligations is established, then losses are compensated in part which was not covered by forfeit, if stipulated by agreement. Otherwise forfeit is paid along with compensation of losses. Amount of debtor's forfeit may be reduced by court if nonfulfillment or inadequate fulfillment of his obligations resulted from creditor's malice or ill-will or negligence.

Termination of Obligations.

Obligations may be terminated: if carried out in timely manner; if extinguished by comparable conditions whose term expired; with parties' agreement; as result of debtor's death if obligation must be fulfilled by debtor only; as result of creditor's death, if obligation was fulfilled personally for creditor; as result of liquidation of legal entity (debtor or creditor).

3.06 INTEREST:

Term “interest” means payment which is made by borrower in favor of creditor as compensation for use of funds or property for certain period. Interest includes: (i) payment for use of funds or goods (work, services), received on credit; (ii) payment for use of funds for deposit; (iii) payment for purchase of goods in installments.

Interest is calculated in form of percent for capital amount of indebtedness or fixed amounts. Interest arising from sale of bonds, t-bills or depository certificates, issued by borrower is determined by calculating interest on nominal value of such security (discount amount).

Payments under other civil and legal agreements, irrespective of fact whether they were established in absolute (fixed) prices or percent to amount of agreement or other value base is not deemed interest.

3.07 LICENSES, BUSINESS AND PROFESSIONAL:

Licensing is system of issuing permissions for conduct of certain types of activity. Following types of licensing exist in Ukraine: (i) general licensing of certain kinds of entrepreneurial activity; (ii) licensing of banking activity; (iii) licensing of financial services activity; (iv) permits for certain types of entrepreneurial activity as specific type of licensing; (v) licensing of foreign economic activities (import and export of goods, work and services); (vi) licensing in sphere of power industry and nuclear energy exploitation; (vii) licensing in field of intellectual property; (viii) licensing in field of education; (ix) licensing of manufacturing and trade of ethyl, cognac and fruit alcohol; (x) licensing of manufacturing and trade of alcoholic beverages and tobacco products; (xi) licensing of broadcasting channels; (xii) licensing of foreign property

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investment by Ukrainian residents.

Licensing of Entrepreneurial Activity.

Law “On Licensing of Certain Types of Activity”, June 1, 2000 and Resolution of Cabinet of Ministries of Ukraine “On Approval of List of State Licensing Authorities”, Nov. 14, 2000 specify list of activities which are subject to licensing and agencies which are authorized to issue such licenses: (i) Ministry of Environmental Protection and Natural Resources of Ukraine—activity connected with use of waste, including, but not limited to, hazardous waste; storing and utilization of depleted chemical power sources; (ii) Ministry of Internal Affairs—manufacturing, repair and sale of sport, hunters' firearms and ammunition for such arms; cold steel, professional arms and gas pistols; substances of lachrymatory and irritant action; maintenance of shooting galleries, shooting grounds; provision of security services and services connected with protection of state and other properties, sale of fireworks and related goods; (iii) Ministry of Justice—gathering, filing, saving, protecting and using information constituting loan history; (iv) Ministry of Finance—for extraction of precious metals and precious stones and for manufacturing and sale of goods with precious metals and stones; for production of securities; for issue and holding lottery; (v) Ministry of Transport and Communication—for transportation of passengers and cargo by railway transport; (vi) Ministry of Health—for conduct of doctor's (medical) practice; (vii) Ministry of Industry Policy—for manufacturing and sale of extremely hazardous chemicals; collection, processing, purchase and sale of scrap metal and wastes of metal; (viii) Council of Ministers of Autonomous Republic of Crimea, oblast, Kyiv and Sevastopol city state administration—for creation and maintenance of gambling enterprises; (ix) Ministry of Labor—for provision of intermediary services in course of employment abroad.

Decision on issuance of license or refusal to issue license must be adopted within ten days from date of receipt of required documents.

Licensing of Banking Activity.

See topic 3.01 Banks and Banking.

Permits for Certain Kinds of Entrepreneurial Activity.

Actually this is additional type of licensing in sphere of retail trade, trade in foreign currency and provision of services in gambling business.

According to Law of Ukraine “On Patenting of Certain Types of Business Activities”, trade permit is issued by agencies of State Tax Administration of Ukraine at location of subjects of entrepreneurial activity on basis of application to acquire trade permit; such permit entitles holder to conduct aforementioned entrepreneurial activity.

However, trade permit does not certify right to intellectual property.

Following businesses are subject to permitting: (i) retail trade which is conducted by retail trade locations. According to legislation objects of retail trade are shops which are located in separate premises, kiosks, tents, automobile stores, vendors' tables, etc. Value of retail trade license is established by agencies of local self-governance and cannot exceed monthly payment of: 60-320 hryvnias in Kyiv and regional centers, 30-160 UAH in Sevastopol, in cities of regional subordination and district centers and up to 80 UAH in other areas. Trade by Ukrainian producers in their own products is not subject to this law. Subjects of entrepreneurial activity which conduct retail trade exclusively in goods of national production, such as: bread, wheat and rye flour, salt, sugar, vegetable oil, beef and pork, potato, fruits, vegetables and berries are not required to obtain trade permit. Favorable trade permit is issued to those subjects of entrepreneurial activity which conduct retail trade exclusively in goods of national production, such as: periodicals, monthly tickets, coal, illuminating and condensed gas, peat briquettes, peat in pieces for heating, children's food products; (ii) trade in foreign currency cash: trade operations with foreign currency cash which are carried out by subjects of entrepreneurial activity or structural (separate) subdivisions thereof at exchange offices are subject to permit requirement. Price of such permit is 960 UAH (approximately - 92 USD) for calendar month and term of its effectiveness is 36 calendar months; (iii) activity in sphere of gambling business: use of slot machine with monetary award or prize (4,200 UAH per year); use of gambling table with roulette wheel (192,000 UAH per year); use of other gambling tables (144,000 UAH per year for each table); bowling lane (6,000 UAH for one year for each track); use of table for billiards (1,800 UAH for one year). Term of effectiveness of permit is 60 calendar months, payment is made every quarter of year.

Subjects of entrepreneurial activity are responsible for violation of requirements of this law in following way: (i) In event of delay of payment—fine in amount of 120% of annual interest rate of NBU on sum of shortage for period of delay; (ii) for violation of procedure of use of trade permit—fine in amount of one month value of trade permit; (iii) for carrying out operation which is subject to this law without obtaining permit—fine in double amount of value trade permit for complete term of effectiveness thereof.

Licensing of Export and Import of Goods.

Law of Ukraine "On Foreign Economic Activity" of Apr. 16, 1991, and Regulation No. 47 of Ministry of Economy "On procedure of issuance of one-time individual licenses" of Apr. 17, 2000, establish procedure for issuance of one-time licenses for import/export transactions. According to Regulation Ministry of Economy has exclusive rights to issue licenses, and also may delegate right to issue licenses to local state authorities for: (i) Import/export (barter) transactions which value does not exceed 40,000 USD; (ii) import/export (barter) transactions which value does not exceed 250,000 USD in event of delivery of goods upon advanced payment for export or delivery of goods in advance for import. Decision on issuance of license is made within 15 days after submission of appropriate documents. General licenses are obtained only by enterprises authorized by government. All other subjects of entrepreneurial activity obtain one-time licenses for each separate contract. Resolution of Cabinet of Ministers of Ukraine specifies that import to Ukraine of slag and other wastes of manufacturing of steel and cast iron, plant-protecting chemicals, pharmaceuticals, veterinary preparations and cosmetic means is subject to licensing.

See also category 14 Foreign Trade and Commerce.

Licensing in Field of Intellectual Property.

See category 16 Intellectual Property.

Licensing of Manufacturing and Trade in Ethyl, Cognac and Fruit Spirits; Licensing of Manufacturing of Alcoholic Beverages and Tobacco Products.

Following types of activity are subject to licensing: (i) manufacturing and trade in ethyl spirits. Such trade may be carried out exclusively by state enterprises; (ii) manufacturing of cognac and fruit spirits. Such manufacturing may be conducted at state enterprises and wine-producing enterprises irrespective of ownership forms on condition that such enterprises upon enactment of this law had appropriate license and such products are intended for their own manufacturing demands without right of sale; (iii) manufacturing of alcoholic beverages and tobacco products is conducted by subjects of entrepreneurial activity irrespective of their ownership forms on condition of obtaining license.

License is issued upon submission of application by subject of business activity and on basis of documents specified by Law of Ukraine "On State Regulation of Manufacturing and Trade in Ethyl, Cognac, Fruit Spirit, Alcoholic Beverages and Tobacco Products" of Dec. 19, 1995.

License is issued for five years, yearly license fee is: (i) for manufacturing of ethyl, cognac and fruit spirits and alcoholic beverages—780 UAH per annum (approx. 150 USD); (ii) for manufacturing of tobacco products—780 UAH per annum (approx. 150 USD).

License for import, export and wholesale trade in ethyl, cognac and fruit spirits is issued only to state enterprises which are authorized by Cabinet of Ministers of Ukraine. Annual license for export or import of ethyl, cognac and fruit spirit is 780 UAH (approximately 150 USD) and for wholesale trade — 500,000 UAH (approx. 99,000 USD).

Five years term license for import, export and wholesale trade in alcoholic beverages and tobacco products is issued to subjects of business activity irrespective of their ownership forms. Annual license for export or import of alcoholic beverages and tobacco products is 780 UAH (approx. 150 USD) and for wholesale trade — 500,000 UAH (approx. 99,000 USD). Abovementioned law stipulates particular quotas for import of alcoholic beverages (except for cognac).

Business entities shall be subject to financial sanctions in form of fines in event of: undue registration as excise duty payer; manufacturing, wholesale (including export and import) and retail sale of ethyl, cognac and fruit spirits, alcoholic beverages and tobacco products without license or with violation of rules established for trade thereof; retail trade in alcoholic beverages and tobacco products without quality certificate.

Licensing of Right to Use TV and Radio Broadcasting Channels.

National TV and Radio Council is authorized to issue licenses for right to use broadcasting channels to TV and radio organizations including those which broadcast using their own technical and communications means.

Amounts of license fees are reduced: (i) by 20% if TV or radio organization broadcasts at least 1.5 hours of nationally produced educational or children's programs per diem; (ii) by 30% if TV or radio organization broadcasts at least 1.5 hours of its own produced educational or children's programs per diem.

Licenses are issued by National TV and Radio Council for following types of broadcasting: (i) Satellite; (ii) air; (iii) cable; (iv) wire; and (v) multichannel. Licenses for air broadcasting and multichannel broadcasting are issued on tender basis; others - without. Tender for issuing licenses is announced and held by National TV and Radio Council. Conditions of tender, list of documents necessary to submit for tender and principles of selection of winner are stipulated by Law of Ukraine ``On TV and Radio Broadcasting'' as amended on July 18, 2008. Each participant of tender shall deposit tender guaranty, specified by National TV and Radio Council, which, however, must not exceed 10% of license fee. Winner of tender must be announced five days after end of tender. Tender guaranty must not be repaid to participants that have not won in tender. Price of license depends on type of communications and size of broadcasting area. License is issued for period not less than seven years for air broadcasting and ten years for cable broadcasting. Fee for use of radio frequencies depends on type and capacity of communications.

Individual Licenses for Conduct by Residents of Property Investments Outside Ukraine are issued by Ministry of Economy on basis of documents set forth by law and for appropriate fee.

Unified License Register was created in order to register all agencies which issue licenses to subjects of business activity which obtain licenses and types of such issued licenses.

Register is maintained by License Chamber at Ministry of Economy.

See also Laws of Ukraine “On Patenting of Certain Types of Business Activity” as of

Mar. 23, 1996, “On State Regulation of Manufacturing and Trade in Ethyl, Cognac, Fruit Spirits, Alcoholic Beverages and Tobacco Products” as of Dec. 19, 1995; Cabinet of Ministers’ Resolution No. 1755 “On validity of license to conduct certain kinds of economic activities, rates and charges for its issuance” as of Nov. 29, 2000; Cabinet of Ministers’ Resolution No. 1658 “On procedure of forming, maintaining and using inventories of license register and filing them with Unified license register” as of Nov. 8, 2000 and “On Manner of Issuance of Individual Licenses for Conduct by Residents of Property Investments Outside Ukraine” as of Feb. 19, 1996; Decision of National Commission on Communication Management in Ukraine “On Approving Regulation on Arranging and Conducting of Tenders for Receiving Licenses for Use of Radio Frequencies in Ukraine”, No. 131 dated Nov. 24, 2005 and others.

See also topics Brokers (Commodity), Commercial Law, State Register (Commercial Register); category 14 Foreign Trade and Commerce, topics 14.03 Foreign Exchange, 14.05 Foreign Trade and Foreign Investment, 14.04 Foreign Investment.

3.08 MONOPOLIES, RESTRAINT OF TRADE AND COMPETITION:

Antitrust Laws.

Various aspects of Ukraine's antimonopoly legislation merit consideration when undertaking formation of Ukrainian venture. According to latest changes in Antimonopoly Law prior approval of Antimonopoly Committee of Ukraine (AMC) for concentration of two or more legal entities is required if aggregate asset value or aggregate sales volume of all of participants in transaction for previous fiscal year exceeds hryvnia equivalent of [Euro]12 million at exchange rate of National Bank of Ukraine as of last day of immediately preceding fiscal year, provided that: aggregate asset value or aggregate sales volume of at least two of participants of concentration (calculated on worldwide basis) exceeds hryvnia equivalent of [Euro]1,000,000; and aggregate asset value or aggregate sales volume of at least one participant of concentration (including members of group) on territory of Ukraine exceeds hryvnia equivalent to [Euro]1 million. Regular statutory review period at AMC is 45 calendar days consisting of 15 calendar days within which AMC decides whether or not application is acceptable for review, following which AMC has 30 days to review application. Clearance process may be delayed further if AMC commences hearings due to complexity of matter or any likelihood or threat of concentration having damaging effect on competition. In this case, entire review period may constitute up to three months.

According to Law of Ukraine “On Protection of Economic Competition”, Jan. 11, 2001, as amended, following transactions are considered to be regarded as concentration: (1) Consolidation of business entities or merger of one business entity to another business entity; (2) obtaining control directly or indirectly by one or several business entities over one or several business entities or parts thereof; (3) creation of legal entity (group) by two or more other legal entities, where neither of legal entities that created group ceased to exist, subject to absence of non-competition agreement between group and its members or between members of group; and (4) direct or indirect purchase or acquisition in any other way of shares, that ensure achievement or exceeding 25 or 50% of votes in major managing bodies of business entity.

Law of Ukraine “On Protection of Economic Competition” regulates legal principles restricting monopoly and prohibiting unfair competition in entrepreneurial activity.

According to provisions of this Law, following actions are deemed as violations of antimonopoly law: (i) setting prices or other conditions of acquisition or sale of commodities; (ii) restricting manufacturing and marketing of commodities, technical and technological development, investments or placing them under control; (iii) allocating markets or sources of supply on basis of territory, range of commodities, sales or acquisition volumes, range of sellers, purchasers or consumers, or on other basis; (iv) distorting results of tenders, auctions and competitions; (v) removing other economic entities, purchasers or sellers from market or restricting their access to market; (vi) applying different conditions to equivalent agreements with different economic entities, thus placing them into unfavorable competitive position; (vii) concluding agreements with other economic entities based on their acceptance of additional conditions, not related to subject matter of such agreements in terms of their contents or under trade and other fair practices in business activities; (viii) considerably restricting competitiveness of other economic entities on market without objective reasons therefor.

Pursuant to this Law state policy restricting monopoly may be carried out by authorized agencies and may include financial, material and technical, informational, consulting and other support to entrepreneurs, which assist development of competition. Demonopolization of economy and development of competition in Ukraine are guaranteed according to specific program which is developed by Cabinet of Ministers of Ukraine and approved by Verkhovna Rada of Ukraine (Parliament).

Antimonopoly Committee of Ukraine within limits of its competence supervises observance of antimonopoly legislation, protection of entrepreneurs' and consumers' interests as result of such violations, including in sphere of state purchases, including abuse of monopoly position and unfair competition.

Antimonopoly Committee of Ukraine acts on basis of Constitution of Ukraine, Law of Ukraine ``On Antimonopoly Committee of Ukraine'', other law and enactments of Ukraine and international agreements to which Ukraine is party.

Antimonopoly Committee of Ukraine is established by Verkhovna Rada of Ukraine and consists of Head of Antimonopoly Committee and ten state officers.

Antimonopoly Committee of Ukraine is subordinate to Cabinet of Ministers of Ukraine and accountable to Verkhovna Rada of Ukraine. Antimonopoly Committee of Ukraine submits annual reports to Verkhovna Rada of Ukraine on its activity.

Head of Antimonopoly Committee of Ukraine is appointed by Verkhovna Rada of Ukraine based on candidate submitted by President of Ukraine. Antimonopoly Committee of Ukraine's officers are appointed by President of Ukraine based on candidate submitted by Prime Minister of Ukraine, which, in turn, is submitted pursuant to recommendations of Head of Antimonopoly Committee of Ukraine.

Antimonopoly Committee of Ukraine establishes regional departments and determines their competence. Antimonopoly Committee of Ukraine and its regional departments constitute system of agencies of Antimonopoly Committee of Ukraine, headed by Head of Committee.

In order to prevent monopoly position of certain business entities in markets, creation, reorganization (merger, joining), liquidation of business entities, creation of associations, concerns, interbranch, regional and other organizations, transformation of governing agencies into aforementioned associations, entry of business entities to associations in events specified by effective legislation is performed on condition of obtaining consent of Antimonopoly Committee of Ukraine.

Officers of state agencies, enterprises and individuals who undertake entrepreneurial activity without creation of legal entity shall be responsible according to Administrative Code and effective legislation for: abuse of monopoly position; unfair competition; discrimination of enterprises by state agencies; non-provision, undue provision of information or provision of inaccurate information to Antimonopoly Committee of Ukraine and its regional departments; misfeasance or malfeasance of decision of Antimonopoly Committee and its regional departments. Fines are recovered according to court procedure.

If entrepreneurs, agencies and other interested persons do not agree with decisions of Antimonopoly Committee of Ukraine and territorial administrations thereof, they may appeal to court with petition for cancellation or modification, partially or completely, of decisions of Antimonopoly Committee and territorial administrations thereof. Submission of petition does not suspend decisions for time of consideration if court does not decide to suspend or terminate effectiveness of such decisions. Damages caused by Antimonopoly Committee and territorial administrations thereof, are compensated at expense of state budget irrespective of faults of officers of Antimonopoly Committee and territorial administrations thereof.

3.09 NEGOTIABLE INSTRUMENTS:

Negotiable instruments are not used in Ukraine.

See topic 3.12 Securities.

3.10 PROMISSORY NOTES:

Ukraine has been participant to Geneva Convention on promissory notes since 1930. New legislation of Ukraine on promissory notes as well as legislation of former Soviet Union which is not in contravention to Ukrainian legislation is effective in Ukraine.

Promissory note is security certifying absolute monetary commitment of drawer to pay definite sum of money to drawee at fixed term.

Following types of promissory notes are issued: ordinary and endorsement. Ordinary promissory note is signed by debtor and is commitment of debtor to pay definite sum of money to any individual. Endorsement promissory note is drawn and signed by creditor and is order of creditor to debtor to pay out indicated sum to third person. Promissory note with term of payment not fixed shall be regarded as liable to payment when produced.

Promissory note may be endorsed. In this case person who endorses promissory note acquires all rights of demand on promissory note. Endorsement must not contain any limitations in its effectiveness. All limitation terms and conditions included in promissory note, are deemed invalid.

Upon expiration of its term, promissory note must be presented to payer. Refusal of payer to pay or present promissory note for acceptance must be certified by special document. Bearer of promissory note may commence action when payment was not duly paid. In specific cases specified by law (for example under bankruptcy) such action may be commenced earlier.

3.11 SALES:

Sale-purchase agreements are contracts, pursuant to which seller obliges himself to transfer ownership of particular object and buyer obliges himself to accept such object at seller's price. Apart from material objects, property rights and rights of demand (assuming such demand has no personal character) can be purchased pursuant to sale-purchase agreement. Civil Code provides that objects of property (goods) can be sold in event when they are going to be produced, bought or otherwise acquired by seller in future. Objects can be movable or immovable if law does not prohibit acquisition of such objects. Law may specify procedure of object's acquisition (for example specific procedure for purchase of foreign currency). Sale-purchase agreement is effective from moment it is signed by parties. Price is essential provision of agreement and shall be included therein. While making agreement, seller is obligated to notify buyer of all rights of third parties in connection with object which is subject of sale. Nonobservance of this requirement entitles buyer to demand lower price or to cancel agreement and receive compensation for damages. If seller violates agreement and does not transfer goods which are sold to buyer, buyer is entitled to demand transfer of goods and to receive compensation for losses caused by delay of transfer, or to cancel agreement and demand compensation for losses. If buyer violates agreement and refuses to accept goods or to pay established price, seller is entitled to demand acceptance of goods and payment by buyer of price as well as to receive compensation of losses caused by delay in acceptance of goods or, cancel agreement and demand compensation of losses.

Quality of goods must correspond to agreement's provisions; if there are no provisions on quality in agreement, then quality of goods must correspond to requirements generally commercially established. If seller sells goods of inferior quality (if buyer was not informed on this issue and did not agree to such inferior quality), buyer is entitled to demand either to substitute goods for higher quality goods or to reduce sale price, or to improve quality of goods and receive compensation for improvement of quality by buyer, or to cancel agreement with compensation of losses to buyer.

Buyer is entitled, within guarantee term (assuming such term was indicated for particular object), to make claim on quality of goods to seller if seller did not inform buyer about defects in quality before transferring goods to buyer. Otherwise, term for claim makes two years. If object of sale agreement is house or building, such claim may be made within three years after transfer thereof to buyer; if day of transfer is impossible to determine or buyer owned this building prior to making sale-purchase agreement, then within one year period after date of registration of sale-purchase agreement in established manner.

If third party, on grounds which arose before sale of goods, commences action against buyer on confiscation of goods, then buyer is obliged to notify seller of this action and seller is obliged to participate in such action on buyer's side. If buyer does not notify seller of such action, then seller is exempted from responsibility. If, pursuant to decision of regular court or arbitration court, object sold to buyer is confiscated from buyer, seller must compensate losses to buyer.

Goods may be sold on credit. In this event, value of object is paid in installments within established period or in full after certain period of time. In event seller sells goods with warranty, seller is obliged, within warranty period, to remedy defects in object or substitute object for another object of proper quality.

3.12 SECURITIES:

Law of Ukraine “On Securities and Stock Market” of Feb. 23, 2006 sets forth conditions, and procedure for issuance of securities, and regulates intermediary activity in organizing trade of securities in Ukraine.

In accordance with this law, following types of securities can be issued and traded in Ukraine: shares, bonds, company bonds, local self-government bonds, government bonds, treasury bonds, investment certificates, depository certificates, promissory notes, mortgage, privatization and other securities.

Law of Ukraine “On State Regulation of Stock Market in Ukraine” of Oct. 30, 1996 provides for licensing of following stock market activity: (i) Brokerage; (ii) dealing; (iii) underwriting; (iv) securities management; (v) asset management; (vi) mortgage asset management; (vii) depositary activity with respect to securities; (viii) depositary activity of custodian; (ix) maintenance of registered securities owners; (x) arrangement of trade on stock exchange; and (xi) clearing-settlement activity with respect to securities.

Governmental regulation of stock market is performed by State Commission on Securities and Stock Market.

Procedure for issuance of securities is established by aforementioned Commission.

State Commission on Securities and Stock Market on May 26, 2006 adopted by separate decisions licensing requirements for conduct of following professional activities on stock market: (a) Depositary activity with respect to securities; (b) arrangement of trade on stock exchange; (c) depositary activity of custodian; (d) trade in securities (brokerage, dealing, underwriting and securities management); (e) asset management.

Permit may be obtained only by business entities. For business entity dealing activity constitutes exclusive activity, which should be reflected in its statutory documents.

Decision of State Commission on Securities and Stock Market No. 345 of May 26, 2006 provides for procedure for obtaining licenses for conduct of various professional activities on stock market and list of documents required from applicants for obtaining such licenses. For example, to obtain license for conduct of trade in securities, applicant along with application must submit to State Commission on Securities and Stock Market list of documents, including copies of founding and registration documents; auditors' report certifying payment of statutory capital of applicant; excerpt from unified state registry that certifies state registration of applicant; audited financial statement of applicant; list of founders (owners) of applicant; list of legal entities at least 5% of statutory capital of which is owned by applicant; documents certifying rights of ownership of applicant for premises in which professional activities will be conducted; list of senior managers of applicant and professionals that will directly conduct professional activities of applicant; balance sheet of applicant provided, however, that any and all lists, information, reports submitted by company were executed not later than two months before submission and are duly signed by director and sealed with company's seal.

Professional activity on trading in securities may be carried out by business entities for which transactions with securities are exclusive activity. Statutory capital of securities trader shall be payable in cash and it should not be less than: (i) UAH 120,000 (approx. USD 24,000) for conduct of dealing activity; (ii) UAH 300,000 (approx. USD 60,000) for conduct of brokerage activity and (iii) UAH 600,000 (approx. USD 120,000) for conduct of underwriting activities.

Permission to conduct any kind of activity on issuance of and trading in securities will not be granted to securities traders, which directly or indirectly own share of statutory capital of other dealers of securities in amount of 10% or more.

Aforementioned Decision also provides for number of certified professionals that securities trader of each kind (dealer, broker, underwriter or securities manager) should employ in order to obtain license. Traders that conduct dealing activities should employ at least two certified professionals. For traders involved in broking, underwriting or management of securities, threshold is set at three certified professionals. Business entities involved in conduct of two or more kinds of securities trading activities should employ at least four certified professionals. Certified professional shall not be employed with more than two securities traders, but shall not be employed with other licensed participants of stock market.

In accordance with Permanent Regulation on Approving Circulation of Securities and Bonds Issued by Enterprises of Ukrainian Issuers Outside Ukraine, approved by State Commission on Securities and Stock Market on Oct. 17, 1997, No. 36 Ukrainian companies issuing securities cannot place their first issuance thereof outside Ukraine. Aforementioned Regulation only refers to issuers with charter funds not less than five million UAH. Issuer entitled to place securities outside Ukraine only upon obtaining respective permit from State Commission on Securities and Stock Market. Issuance of securities (bonds) and information of such negotiation shall be registered by State Commission on Securities and Stock Market to obtain permit. Placement of securities outside of Ukraine is only permitted in amount not exceeding 25% of charter fund of such Ukrainian issuer.

Law of Ukraine “On National Depository System and Characteristics of Computerized Circulation of Securities in Ukraine” of Dec. 10, 1997 defines legal principles of securities circulation within National Depository System and peculiarities of computerized circulation of securities, determines structure of National Depository System, its participants and forms of securities issuance. This Law also specifies types of depository activities and regulates National Depository System's activity.

Permit for depository activity of custodian may be obtained by banks or securities traders: (i) That employ three or more licensed professionals in field of depository activity; (ii) charter fund of which (or any share of it) is not owned by custodians, securities traders, or other licensed participants of stock market; (iii) charter fund of which is fully paid and constitutes at least UAH 1,000,000 (UAH 1,400,000 for asset management companies); (iv) that are appropriately equipped and possess premises to duly conduct their obligations.

Securities Commission Decision No. 345 “On Approval of Procedure and Conditions for Issue of License and Conduct of Certain Types of Professional Activity on Stock Market, Reissue of License, Issue of Duplicate and Copy of License”, dated May 26, 2006 specifies terms and conditions and list of documents to be submitted to State Committee on Securities and Stock Market to obtain permit to conduct depository activities.

Activity on Maintaining Registry of Owners of Registered Securities shall be conducted by registrar on basis of Permit for such activity. Permit is issued to registrar in accordance with Securities Commission Decision No. 345 by State Commission on Securities and Stock Market or its local branches.

If number of owners of issuer's registered securities exceeds 150, issuer is obligated to entrust maintenance of registry to registrar by entering into appropriate agreement.

Anti-Monopoly Committee of Ukraine exercises control over adherence to requirements of antimonopoly laws in course of securities circulation.

See also section 3.08 Monopolies, Restraint of Trade and Competition.

Stock Exchange.

In accordance with Law of Ukraine “On Securities and Stock Market” of Feb. 23, 2006, stock exchange may be formed by not less than 20 founders which are dealers of securities and have permission to conduct professional activity related to securities market or by their association, which consists of at least 20 traders. Only permitted forms of incorporation of stock exchange under Ukrainian law are: (i) Limited liability company; and (ii) subsidiary of association of traders. Participation interest of each of traders cannot exceed 5%. Stock exchange may only conduct its activity upon obtaining respective license from State Securities Commission.

Stock exchange shall be created as nonprofit organization for purpose of arranging for purchase and sale agreements in terms of securities and derivatives. It shall not conduct operations with securities on its own behalf and on clients' commissions, and shall not act as depository.

Should number of members of stock exchange drop to less than 20 members, activity of stock exchange will be terminated. Should only 20 members remain in stock exchange and new members are not accepted within six months, activity of stock exchange will also be terminated. Members of stock exchange may only be licensed securities traders. Should license of any of traders be cancelled, its participation in stock exchange will be suspended.

Stock exchange shall conduct its activity pursuant to its charter, which, among other things, shall define corporate structure thereof; formation of its management bodies and their competence, grounds and conditions of termination of its activity. Stock exchange shall provide State Securities Commission following information: (i) List of securities traders that are permitted to conclude agreements at respective stock exchange; (ii) list of securities that have passed listing; and (iii) amounts of traded securities (number of securities; total value of concluded agreements; securities' rate with breakdown per each issuer) for period of time estimated by State Securities Commission. Forms of respective reports and their submission procedure shall be established by State Securities Commission. Latter shall control provision of respective information.

Over-the-counter security trading activity is conducted under certificate of commercial informational system, which may be obtained by joint stock companies and limited liability companies that meet following requirements: (i) Such legal entities were founded by at least 20 traders; (ii) participation interest/share of each of trader thereof does not exceed 5%; (iii) such legal entity is duly registered with State Securities Commission; and (iv) foundation whose founding documents and rules are in compliance with requirements of law and Regulation on Organizationally Arranged Over-the-Counter Commercial-Information Systems approved by State Commission on Securities and Stock Market of Dec. 23, 1996.

Any decision made by Securities Commission or its Branches may be appealed in regular court or Commercial Court. Should international agreements of Ukraine set forth rules different from those set forth by Law of Ukraine on securities and stock exchange, provisions of international agreement will be applied.

3.13 STATE REGISTER (COMMERCIAL REGISTER):

Under Ukrainian law, enterprises of all ownership forms must be registered by state registrator of executive committee of local state administration at location of enterprise in accordance with Civil Code of Ukraine and Law of Ukraine “On State Registration of Legal Entities and Individuals-Entrepreneurs” of May 15, 2003. Upon registration local state administration must include legal entity on single state register of legal entities and individual entrepreneurs of Ukraine.

Enterprise will acquire rights of legal entity upon such registration.

Where any changes to founding documents of enterprise are done by founders, such changes shall be submitted to local state authority for registration.

State register includes following data: identification code (number); name of entity; kinds of business activities; location; form of property; type of enterprise; official address; phone and fax number; name of director, founders, investors; data on state registration, reregistration, reorganization, liquidation; and data on economical activity. Such data as identification code (number); name; postal code; territory code; location; phone and fax numbers; name of director can be provided to citizens, entities and state bodies upon their request. All other information is considered to be confidential.

3.14 STATUTE OF FRAUDS:

See topic 3.05 Contracts.

4 CITIZENSHIP

4.01 ALIENS:

See category 15 Immigration, topic 15.01 Aliens.

4.02 IMMIGRATION:

See category 15 Immigration, topic 15.02 Immigration.

4.03 NATIONALITY:

Constitution of Ukraine and Law of Ukraine “On Ukrainian citizenship”, dated Jan. 18, 2001, settle principles of legislation of Ukraine concerning citizenship: principles of unique citizenship, persons, impossibility of deprivation of citizenship of Ukraine, confession of right on change of citizenship, impossibility of automatic acquisition of citizenship, equality of citizens, and retaining of citizenship regardless of place of residence. Ukrainian legislation explicitly forbids dual citizenship. (Art. 4 of Constitution of Ukraine). If individual obtains (of his or her own free will) citizenship of other state, he or she is automatically deprived of Ukrainian citizenship.

According to Law of Ukraine “On Ukrainian citizenship”, following individuals are considered Ukrainian citizens: (1) All citizens of former Soviet Union, who at moment of declaration of independence of Ukraine (Aug. 24, 1991) resided in Ukraine; (2) individuals who, regardless of race, color, political, religious and other beliefs, sex, ethnical and social origin, property status, place of residence, language and other signs, resided in Ukraine at moment of effectiveness of Law of Ukraine “On Ukrainian citizenship” (Nov. 13, 1991) and were not citizens of other states; (3) individuals who arrived to Ukraine for permanent residence after Nov. 13, 1991 and in whose passports of former USSR citizens there was stamp “citizen of Ukraine”, as well as these individuals' children who have not reached 18 years of age; (4) individuals who acquired Ukrainian citizenship according to laws and international treaties of Ukraine.

Art. 6 of Law provides grounds for acquisition of Ukrainian citizenship, which include following: (1) By soil (birthright); (2) by territorial origination; (3) by naturalization; (4) by renovation of citizenship; (5) by adoption; (6) by establishing guardianship or custody over child, or by placing child with orphanage (family type of orphanage), child-care institution, medical care institution, or foster family; (7) by establishing custody over incapable person; (8) in connection with Ukrainian citizenship of one or both parents of child; (9) by establishing or recognizing parental rights; (10) according to other grounds envisaged in international treaties of Ukraine.

Law of Ukraine “On Ukrainian citizenship” provides for simplified procedure of obtaining Ukrainian citizenship for foreigners or stateless persons who themselves or whose family members (i.e., grandparents, parents, children, grandchildren or siblings [at least one of abovementioned individuals]) were born or permanently resided prior to declaration of independence of Ukraine (Aug. 24, 1991) on territory that is now territory of Ukraine, provided such individuals filed written obligation to terminate foreign citizenship. Children of such individuals under age of 14 automatically obtain Ukrainian citizenship. Children of such individuals aged 14-18 years have to consent to become Ukrainian citizens.

5 CIVIL ACTIONS AND PROCEDURE

5.01 ACTIONS:

In accordance with Civil Procedure Code of Ukraine of 2004 as amended, which regulates proceedings of civil actions, any person may sue or be sued in court in established manner. Adult persons and legal entities may appeal to court personally or entrust commencement of action in court to representative. Rights of minors and fully or partially incapable persons are represented in court by parents, guardians or trustees thereof. (See category 19 Property, topic 19.01 Absentees.) Actions of legal entities are brought to court by management of legal entity which acts within authority granted to it by charter or representatives thereof which act within competence granted to them by charter. Provisions of Civil Procedure Code, effective on day action is brought, should be applied.

Proceedings against state of type which have been developed in U.S., have not yet been legally established in Ukraine. Proceedings against state are governed by Administrative Procedure Code of Ukraine. As state management has been modified, claim to court to commence action against state is now permitted and is effectuated according to principle that "everything is allowed which is not prohibited by law". Such claims sometimes occur but they are aimed mainly against officer or agency.

Ukraine laws, like other laws of continental European states, do not include equity action. Legal proceedings in courts of Ukraine may take form of: (i) Precept proceedings—in some cases (when following actions are brought: claims, based on legal transactions (contracts) made in written form; claims for recovering salary payment; claims on compensation of expenses in connection with detection of defender, debtor, child or debtor's transport means) civil court is authorized to issue precepts that have same legal force as court decision; (ii) litigation proceedings—main subjects of which are disputes arising from civil, family, labor, land and cooperative legal relations; (iii) special justicement proceedings—main characteristic of which is non-litigation. List of such cases is also given in Civil Procedure Code of Ukraine: (1) On recognition of person as fully or partially incapable and renewal of person's capability; (2) child adoption; (3) on recognition of person as absentee or deceased; (4) on identification of legally important facts; (5) on renewal of rights for lost bearer securities; (6) granting right to marriage, re-establishing of marriage, etc.

Jurisdiction.

In its broadest sense, jurisdiction means all civil cases which are subject to consideration and decision at any level of court system. There are two kinds of jurisdiction: common—distribution of civil cases among separate levels of court system—and territorial—distribution of cases among separate courts depending on territory of such courts. (See also category 6 Courts and Legislature, topic 6.01 Courts.)

Costs include duty and expenses connected with consideration of case, namely: (i) Expenses to be paid for provision of information and technical services; (ii) amounts which must be paid for civil legal aid; (iii) expenses connected with appearance before court; (iv) expenses connected with involvement of witnesses, experts, interpreters and conduction of forensic examinations in consideration of case; and (v) expenses to be paid for examination at place of case and other expenses connected with consideration of case. Court or judge, on basis of property status of citizen, may release such citizen from payment of state court fees. Every petition on commencement of action, primary or supplementary, petition on contract disputes, petition of third party who independently appeals to court on subject of dispute, complaints, issuance of second copy of court decision, is subject to court fee in amount specified by Decree of Cabinet of Ministers of Ukraine No. 7-93 Jan. 21, 1993 "On State Duty" as amended, until law of Ukraine on court duty enters into force.

Prevailing party must be compensated for all court expenses by other party, even if this party is exempted from court expenses in favor of state. If claim is partially allowed, share of allowed claim is paid by defendant, and share of abandoned (disallowed) claim is paid to state budget by claimant. Court expenses must be paid by each party in proportion to part of claim which was abandoned. If winning party is exempted from court fees then court fees must be paid by other party to state budget. If claim of claimant exempted from court fees is abandoned, then expenses are paid by state. In case of termination of matter as result of cancellation thereof by claimant, expenses are paid, upon defendant's request, by claimant. Upon cancellation of claim by claimant, his expenses are not compensated by defendant, except for instances when claimant cancels claim as result of defendant's voluntary satisfaction of claimant's requirements.

Security for Costs.

There is no special provision in Civil Procedure Code concerning liability for aliens commencing civil actions before Ukrainian courts to post security for defendant's costs.

See also topics 5.04 Foreign Law, Limitation of Actions; category 6 Courts and Legislature, topic 6.01 Courts.

5.02 APPEAL AND ERROR:

See categories 6 Courts and Legislature, topic Courts; Dispute Resolution, topic Arbitration and Award.

5.03 DEPOSITIONS AND DISCOVERY:

See category 6 Courts and Legislature, topic 6.01 Courts.

5.04 FOREIGN LAW:

Foreigners and persons without citizenship are subject to national law with respect to their legal capacity. Some exceptions may be specified by Ukrainian law. With respect to competence of foreigners, law of country of his/her citizenship will apply. Civil competence of persons without citizenship is determined by law of country of their permanent residence. Civil competence of foreigners and persons without citizenship with respect to agreements made by them in Ukraine and obligations resulting from damage caused in Ukraine, is determined by Ukrainian law. Recognition of foreigners and persons without citizenship incompetent or partially competent is executed in accordance with Ukrainian law. Form of agreement made abroad must correspond to requirements of law that governs substance of contract. Rights and obligations of parties of foreign economic agreement are determined by law that has closest connection with agreement unless otherwise provided by agreement of parties.

Form and term of effectiveness of power of attorney are specified by law of country where power of attorney was issued. Limitation period is determined pursuant to law of country which is applied to determine rights and obligations of parties. Right to own property is determined by law of country where such property is located. Inheritance relationships are determined by law of country where testator had last resided.

If international agreement establishes rules different from those of Ukrainian law, then rules of international agreement will apply.

5.05 JUDGMENTS:

Generally, judgments of foreign courts are valid and executed on territory of Ukraine only on basis of international or bilateral agreements of Ukraine or ad hoc agreements between Ukraine and other states. Recognition of foreign court decisions means recognition by domestic court of foreign country decision. However, there is distinction between “recognition of foreign judgment” and “enforcement of foreign judgment”: judgment may be recognized by Ukrainian court and either enforced or not enforced (depending on whether judgment is enforceable or not according to Ukrainian legislation). Foreign country court decision may be enforced by Ukrainian court within three years of its entering into force. Generally there is no need to turn to Ukrainian court for foreign country court decision to be recognized.

5.06 PRESCRIPTION:

See topic 5.09 Statute of Limitations.

5.07 SECURITY FOR COSTS:

See topic 5.01 Actions.

5.08 SEQUESTRATION:

See topic 5.01 Actions; category 7 Debtor and Creditor, topics 7.03 Bankruptcy, 7.05 Execution of Court Decisions.

5.09 STATUTE OF LIMITATIONS:

General period within which action can be brought to assert legal right is three years.

One year limitation period applies to actions involving: penalties; defaults in sold goods; supply of products of bad quality; refute of non-confident information in mass media; untimely fulfillment of contract work; termination of gift agreement; claims against actions of testament executor. Claims on concealed defects in contract works are subject to shortened one year limitation, except for instances when one of parties to contract for construction of houses and premises is individual; in this event usual three year limitation applies.

Statute of Limitations begins to run from date right to claim arises. Right to claim arises from date when individual finds out or should have found out about violation of rights.

Limitation period may be terminated or cancelled: (i) if extraordinary and unavoidable circumstances prevent party from bringing claim; (ii) for reason of delay in fulfillment of obligations specified by legislation (moratorium); (iii) if claimant or defendant serves in Army which is under military alert. Limitation period is terminated if such circumstances arose or existed for last six months of claim; if limitation period does not exceed six months, limitation period is terminated during its course. Limitation period is continued from day of cessation of circumstance which was basis for termination. For claims concerning compensation for damages, connected with harm caused to health or death, limitation period is suspended, upon petition of victim or victim's dependent requesting to provide pension or allowance support until decision on providing pension support or refusal is made.

Expiration of limitation period for claim before claim is raised is ground for refusal of claim. Court of general jurisdiction, commercial court or third party arbitration may enforce expired claim if it finds valid reason for so doing.

Limitation of action does not apply to: claims arising from breach of personal non-property rights, except for instances provided for by legislation; claims of state organizations for refunding of property by cooperative and other public organizations or individuals; in other occasions specified by law.

6 COURTS AND LEGISLATURE

6.01 COURTS:

Judicial power in Ukraine is realized by means of civil, economic, administrative, criminal and constitutional justice rendering. Ukraine is civil law country, whose courts are divided into courts of general jurisdiction and Constitutional Court of Ukraine. Structure, procedure and operation of Ukrainian courts is established in accordance with Law “On judicial system of Ukraine” (“Law”), which came into effect on 1 June 2002. According to Ukrainian Constitution courts are comprised of general and specialized courts. Law establishes that new system of general jurisdiction courts consist of local courts, appellate courts (created on basis of regional courts), Court of Appeal of Ukraine, specialized courts and Supreme Court of Ukraine. Courts perform their functions as trial courts or courts of first instance; appellate courts or courts of second instance.

Constitutional Court of Ukraine is only agency with constitutional jurisdiction in Ukraine. Task of Constitutional Court is to guarantee superiority of Constitution of Ukraine as Basic Law of state throughout Ukraine. Constitutional Court consists of 18 judges. President of Ukraine, Verkhovna Rada of Ukraine and Congress of Judges of Ukraine appoint six judges each to Constitutional Court. Judge of Constitutional Court of Ukraine is appointed for nine years without right of second tenure. Chairman of Constitutional Court is elected at special plenary session from judges of Constitutional Court only for three years by secret ballot.

Constitutional Court decides and reports on issues concerning: (i) constitutional status of laws and other enactments of Verkhovna Rada of Ukraine, decrees of President of Ukraine, resolutions of Cabinet of Ministers of Ukraine, legal enactments of Verkhovna Rada of Autonomous Republic of Crimea; (ii) compliance of Constitution of Ukraine with effective international agreements of Ukraine or international agreements which are submitted to Verkhovna Rada of Ukraine for approval of their mandatory status; (iii) compliance with constitutional procedure of investigation and review of cases on impeachment of President of Ukraine; (iv) official interpretation of Constitution and laws of Ukraine.

Issues of legality of enactments of state administrative agencies, authorities of Autonomous Republic of Crimea and local self-governance agencies and other issues delegated to competence of courts of general jurisdiction are not within competence of Constitutional Court.

Grounds for determining unconstitutionality of enactments in whole or in part by Constitutional Court are (i) noncompliance with Constitution of Ukraine; (ii) violation of review, approval or implementation procedure established by Constitution of Ukraine; (iii) exceeding constitutional authorities in course of approval of such decisions.

Decisions of Constitutional Court are approved and its reports are provided at plenary session, provided that not less than ten judges of Constitutional Court voted for them. Decisions and reports of Constitutional Court are mandatory. In event that Constitutional Court regards legal enactments of Verkhovna Rada of Ukraine, President of Ukraine, Cabinet of Ministers of Ukraine, Verkhovna Rada of Autonomous Republic of Crimea or certain provisions thereof unconstitutional, such enactment will be declared null and void from date of approval by Constitutional Court of resolution on unconstitutional status thereof.

Also see categories 6 Courts and Legislature, topic Law Reports, Codes; Introduction, topic Government and Legal System.

General Jurisdiction Courts.

System of general jurisdiction courts in Ukraine is organized in accordance with territoriality and specialization principles. Individuals or legal entities that wish to defend their rights and freedoms must apply to court at place of their residence - local court. According to Law, local courts have jurisdiction over criminal, civil and administrative matters.

System of specialized courts will consist of economic, administrative and other courts, defined as such by Law. It also provides for creation of martial-law (military) courts in system of local specialized courts. Those entities that wish to protect their economic interests or file complaint against state authorities must apply to relevant specialized court—either economic or administrative. Local economic courts will consider cases in sphere of economic relations and other matters, defined by procedural law. Jurisdiction of local administrative courts extends to relations in sphere of state and municipal administration. Administrative courts are now in process of being established; before establishment of those courts, courts of general jurisdiction are to decide on issues lying within sphere of competence of administrative courts.

Appellate courts are above local courts. Law distinguishes general appellate courts and specialized appellate courts (economic and administrative). Appellate courts consist of court chambers—in civil cases and criminal cases. Appeals in economic and administrative cases must be filed with respective specialized appellate courts.

In accordance with procedural codes of Ukraine appellate complaints are submitted by parties concerned to impugn judgment of first instance court within ten days in civil, 15 days in criminal cases and within ten days in commercial cases after judgment was ruled. Appellate complaint must be submitted through first instance court, which originally considered case, except in civil court, where complaint must be submitted directly to appellate court. When reviewing case, appellate court reviews legality and validity of award of first instance court within boundaries of appellate complaint. It can also detect new facts and research new evidence. Appellate judgments take effect immediately after their ruling. At same moment judgments of first instance court lose their validity.

Law introduces new legal institution—Court of Appeal of Ukraine consisting of court chambers in civil and criminal cases, as well as martial-law court chamber. Court of Appeal is to be created within six months after enactment of Law. Court of Appeal shall review appeals of first instance cases, which were reviewed by appellate courts—generally cases of grave criminal offences.

Provisions of Law which serve basis for functioning of Cassation Court of Ukraine are officially recognized unconstitutional by Decision of Constitutional Court of Ukraine of Dec. 11, 2003. Currently Supreme Court of Ukraine and highest specialized courts perform functions of Cassation Court and consider cassation suits. Pursuant to Law, Cassation Court shall consist of court chambers—chamber in civil cases and criminal cases, as well as martial-law chamber. Cassation Court shall review cassation cases in civil and criminal matters—now it is prerogative of Supreme Court of Ukraine. Revision of cases in Cassation Court shall be performed in collegiums composed of not less than three judges.

In accordance with procedural codes of Ukraine, cassation complaints are to be submitted by parties concerned to impugn judgment of first instance court, only in event of substantive or procedural infractions, and judgments of appellate courts. Basis for cassation challenge is wrong application of substantive and procedural norms by court. Cassation suit in civil cases must be submitted within two months after judgment ruling by appellate court. In criminal cases this term varies from one month to six months depending on violation. Cassation complaint must be submitted through first instance court, which considered case originally. After complaint is transmitted to Cassation Court, court during ten days studies reasons stated in complaint necessary to submit it for consideration of respective panel of judges. In cassation procedure, case must be considered by panel of five judges. In accordance with results of case consideration, Cassation Court shall rule resolution, which: (i) Denies cassation complaint and leaves judgment unchanged; (ii) abolishes court judgment and transfers case for new consideration; (iii) abolishes court judgment by closing case; (iv) abolishes court judgment or leaves in effect court judgment, which was mistakenly abolished by appellate court; (v) rules new decision without redirection of case for new consideration. Cassation Court judgments take effect after their approval and are not subject for impugnment.

High Specialized Courts.

Law envisages creation of system of specialized courts subordinated to High Specialized Courts—High Economic Court of Ukraine, High Administrative Court of Ukraine and other courts, as established by law. High Specialized Courts shall perform function of cassation instance for specialized courts. Formation of system of administrative courts is planned to be accomplished within three-year term. For time being, local courts of general jurisdiction shall perform functions of local administrative courts. High Specialized Courts shall be comprised of court chambers considering certain categories of cases depending on specialization. High Specialized Courts shall consider cassation complaints of respective court jurisdiction; analyze, study and cumulate court practice; assist lower courts to ensure identical application of Constitutional norms and laws in court practice; perform other functions.

Supreme Court of Ukraine is highest judicial body in system of general jurisdiction courts. Supreme Court of Ukraine is vested with competence to perform cassation review until Cassation Court of Ukraine is created. Among powers of Supreme Court are following: performing function of repeated cassation after case has been considered by courts of general jurisdiction in cassation procedure; considering other cases with exceptional circumstances as envisaged by law; providing courts with interpretations and comments regarding application of legislation on basis of analysis of court statistics; providing its opinion with regard to detecting elements of offence in activities of President of Ukraine; addressing Constitutional Court regarding dubious legislative acts to review their constitutionality; performing other activities in accordance with laws of Ukraine.

Supreme Court of Ukraine is comprised of court chambers in civil, criminal, economic and administrative cases as well as martial-law court collegium. Number of judges in each court chamber shall not exceed 12. Law provides for creation of Presidium of Supreme Court of Ukraine, which is to be established within three-month term. Presidium shall be responsible for organizational, financial, personnel and other internal matters. Plenum of Supreme Court is collegiate body responsible for election and dismissal of Head as well as judges of Supreme Court; creation of court chambers and appointment of their heads; provision of interpretation and comments to courts of general jurisdiction; performing other functions in accordance with laws of Ukraine.

Legal Innovations in Ukrainian Judicial System.

Law introduces new legal institutions in court system—jury and jurymen. Jury and jurymen shall be engaged in court hearings in cases, envisaged by procedural laws, ensuring as established by Constitution direct public partaking in justice rendering. It is planned that jurymen shall take part in civil and criminal cases, when it is important to give moral evaluation of parties' behavior. Jury shall be created within appellate courts and shall consider only grave criminal offences by first instance. Besides, such jury may be set up only at petition of accused. Jury shall consist of Ukrainian citizens who reached age of 30 and permanently live in respective area. People's assessors shall be citizens of Ukraine who reached age of 25 and permanently live in area of court jurisdiction. When considering case, jury and jurymen shall enjoy same rights, guarantees and immunities as professional judges.

Law specifies individuals entitled to initiate disciplinary prosecution of judges. They are members of Parliament of Ukraine, Ombudsman of Ukraine, Head of Supreme Court of Ukraine or respective High Specialized Court, Minister of Justice of Ukraine, head and members of respective council of judges of Ukraine.

International Treaties.

Foreign individuals, enterprises and organizations may apply to Ukrainian courts and enjoy rights equal with those of Ukrainian citizens, enterprises, and organizations.

Ukrainian courts carry out matters and judgments transferred to them in established manner by foreign courts, when executing particular procedural acts (distribution of written notifications, other documents, interrogation of parties and witnesses, conduct of expert examination, etc.), except for instances when: (i) such actions are in contravention of sovereignty or threaten security of Ukraine; (ii) such actions are not within competence of court.

Performance of requests for actions of foreign courts is carried out on basis of Ukrainian laws. Procedure of executing decisions of foreign regular courts and courts of arbitration in Ukraine is established by respective international treaties of Ukraine.

6.02 LAW REPORTS, CODES:

Ukraine is country of code law. (See http://www.rada.gov.ua.) General sources of Ukrainian law are laws and agreements and, in some branches of law, customs and usage approved and codified by state such as Air Code and Maritime Code. Unlike countries of common law, doctrine of court and administrative precedent is not widely applied, but it would be wrong to state that judicial and administrative precedent is completely unusual for Ukraine. There is also electronic resource available where Ukrainian court decisions can be found http://www.reyestr.court.gov.ua.

Ukrainian laws are hierarchically organized with Constitution of Ukraine at top. Present Constitution, adopted by Verkhovna Rada of Ukraine on June 28, 1996, and amended on Dec. 8, 2004, establishes principles of distribution of power, forms of state and territorial order, competence of executive and administrative agencies, courts and self-governing bodies. Next level in this hierarchy consists of Constitutional laws: which either amend and modify Constitution or are anticipated by Constitution (those on issue of Ukrainian citizenship, on referendum and election, on status of deputy of Ukraine, on Cabinet of Ministers, on status of judges, on legal status of oblasts, etc.). Next level consists of current laws, which constitute bulk of legislation of Ukraine with codes as most important unified legislative acts on top. Lowest stage in legislative system are decrees and orders of government branches and divisions, i.e.: decrees and instructions of President of Ukraine; resolutions of Verkhovna Rada of Ukraine; resolutions and instructions of Cabinet of Ministers; enactments of ministries and agencies (orders, instructions, etc.); resolutions of local Radas; and, local enactments, i.e. those which are intended for certain group of citizens, for example: students, servicemen, etc. Such decrees and orders are issued on basis of existing enabling laws and must correspond to them.

Currently Ukrainian legislation is being codified. Essentially, every branch of Ukrainian law is regulated by respective Code (Civil Code, 2003; Dwelling Code, 1983; Economic Procedural Code, 1991; Land Code, 2001; etc.). But numerous amendments and modifications must be included into Codes as consequence of changes in economy and policy of Ukraine.

Verkhovna Rada of Ukraine (Parliament) consisting of 450 deputies is only legislative body in Ukraine. Verkhovna Rada is authorized to consider and decide any issue which, according to Constitution of Ukraine, is not within competence of state executive or juridical authorities and which must not be decided exclusively by national referendum. Verkhovna Rada approves laws, resolutions and other enactments by majority of its duly-elected membership.

Law of Ukraine “On International Agreements of Ukraine” as of June 29, 2004, establishes that international agreements duly made and ratified by Ukraine become integral part of national legislation of Ukraine and apply in manner specified for standards of national legislation. On basis of internal Ukrainian legislation there is priority of international law. In event when provisions of Ukrainian and international laws contradict each other, provisions of international laws apply.

Ukraine has three official journals for publication of laws and other legislative and government enactments: newspaper “Holos Ukrainy” and magazine “Vidomosti Verkhovnoyi Radi Ukrayini” are editions of Verkhovna Rada, and newspaper “Uryadoviy Kuryer” is publication of executive branch of Ukrainian government.

6.03 LEGISLATURE:

See topic 6.02 Law Reports, Codes; category 1 Introduction, topic 1.02 Government and Legal System.

6.04 REPORTS:

See topic 6.02 Law Reports, Codes.

6.05 STATUTES:

See topic 6.02 Law Reports, Codes; category 3 Business Regulation and Commerce, topic State Register (Commercial Register).

7 DEBTOR AND CREDITOR

7.01 ASSIGNMENTS:

Assignment of claims and transfer of debt are regulated by Civil Code of Ukraine. (par. 47). Under some instances while obligations are still in effect, original creditor or debtor may be substituted. For example, in case when assignment of claims, legal succession takes place or debtor's obligations are fulfilled by pledgor.

Assignment of Claim.

Creditors may assign their rights to other persons. Assignment of claims personal to creditor (e.g., alimonies, social security payments, pension, recovery of losses caused by injury or death, etc.) is prohibited.

In some instances, creditors are required to transfer claims to other persons. For instance, creditor to whom debt is paid by trustee is obligated to transfer his rights to latter, for use by him for retroactive claim against debtor.

As result of assignment of claim to new creditor, whole complex of rights, including all rights which provide for realization of such claims (e.g., right to impose forfeit), are also transferred from original creditor. Original creditor is obligated to transfer all documents which confirm transfer of claim (e.g., receipt) to new creditor. Creditor assigning claim to another creditor is liable to such creditor only for invalidity of assigned claim and is not liable for nonfulfillment of obligations, unless original creditor stands bail for debtor.

Consent is not required for assignment of claim to be effective, but debtor should be notified in writing about assignment of claim to new creditor.

Transfer of Debt.

Debt may be transferred to new debtor only with creditor's consent, otherwise such transfer is ineffective. Person assuming debt may assert all defenses of original debtor against creditor (e.g. to ask for delay of realization) if such right was given by creditors to original debtor.

If debt is transferred to new debtor, then bond given earlier and mortgage established by third person to assure fulfillment of obligations becomes ineffective unless third person agrees to bear liability for new creditor. If mortgage was established by original debtor,, it remains effective after transfer of debt to new debtor, unless contrary is stated in agreement or law.

Assignment of claim and transfer of debt should be executed in same form as was established for agreement on which claim or debt is based.

7.02 ASSIGNMENTS FOR BENEFIT OF CREDITORS:

See topic 7.01 Assignments.

7.03 BANKRUPTCY:

Issues of bankruptcy are governed by laws of Ukraine “On Renewal of Debtor's Solvency or Recognition as Bankrupt” as of May 14, 1992, as amended (hereinafter as “Bankruptcy Law”); and “On Banks and Banking Activity”, by c. 23 of Economic Code of Ukraine, by Economic Procedure Code of Ukraine, and by other applicable laws and regulations.

Under Ukrainian legislation only legal entities and individuals-subjects of entrepreneurial activity can be recognized as bankrupt. Thus subject of bankruptcy procedure is debtor that is insolvent with respect to its ability to fulfill its pecuniary obligations as established by commercial court. According to Ukrainian legislation individual cannot be declared bankrupt. Individuals, who lack funds or evade from repaying their debts can be sued in court and creditors' demands can be satisfied by virtue of debtor's property and other assets.

Pursuant to Bankruptcy Law, creditors can be legal entity or individual, which have claims confirmed by appropriate documents in proper manner concerning pecuniary obligations of debtor, and also state tax authorities and other state agencies, which supervise due and proper payments of taxes and duties (other compulsory payments). Law provides that during bankruptcy proceedings interests of creditors are represented by committee of creditors.

State policy on prevention of bankruptcy and securing procedures on renewal of debtor's solvency or recognition as bankrupt is carried out by State Department on Bankruptcy Affairs. Under Law, State Department on Bankruptcy Affairs has following functions: propose to commercial court candidates for insolvency practitioner (property manager, bail out administrator or liquidator) of state enterprises or enterprises which have 25% of state property share in their charter funds and which are subject to bankruptcy procedure; organize training system for insolvency practitioners (property managers, bail out administrators and liquidators); license individuals who are subjects of entrepreneurial activities and carry out activity as insolvency practitioners (property managers, bail out administrators or liquidators); arrange unified database on enterprises subjects to bankrupt case. Law specifies that insolvency practitioner must be appointed by commercial court from number of persons registered by State Department on Bankruptcy Affairs as insolvency practitioners. Furthermore, insolvency practitioner should be individual which is subject of entrepreneurial activity with legal or economic background or has special knowledge, unconcerned with debtor or creditor and obtained license of insolvency practitioners.

Founders (participants or shareholders) of debtor, property owners, state executive bodies obliged to take appropriate measures within scope of their authorities in order to prevent bankruptcy of enterprise-debtor. Law regulates procedures of prejudicial bail out.

Debtor is subject to following bankruptcy judicial procedures: management of debtor's property; amicable agreement between debtor and creditor; bail out of debtor (renewal of solvency); liquidation of bankrupt. Commercial court may commence bankruptcy case on basis of written petition of any creditor or debtor if incontestable claims of creditors to debtor in total amount to not less than 300 minimal salaries (approximately $33,600 starting from Oct. 1, 2008) and are not satisfied by debtor within three months upon established due date.

Pursuant to Bankruptcy Law judge of commercial court may accept petition on commencement of bankruptcy case, decline or return it to petitioner without consideration. In event of acceptance of petition, judge must not later than within five days upon its submission issue and provide to parties and Ministry of Economy of Ukraine resolution on commencement of bankruptcy case. Resolution specifies acceptance of petition to consideration of commercial court, initiation of procedure of management of debtor's property, appointment of property manager, date of preparatory court meeting which must take place not later than on 30th day upon acceptance of petition. During preparatory court meeting judge considers submitted documents and objections of debtor, listens to explanations of parties. For purpose to reveal all creditors and persons which intend to participate in bail out of debtor, during preparatory meeting judge makes resolution ordering petitioner within ten days to submit announcement on commencement of bankruptcy case to official printed media of Verkhovna Rada or Cabinet of Ministers of Ukraine.

Based on results of consideration of petition in preparatory meeting judge makes resolution of following: amount of creditors' claims, date of completion by property manager of registry of creditors' claims which must be prepared and filed to commercial court for approval not later than two months and ten days after preparatory court meeting; date of preliminary court meeting which must be held not later than three months after preparatory court meeting; date of first general creditors' meeting; and finally, date of court meeting on which resolution on debtors' bail out, or adjudication in bankruptcy and opening of liquidation procedure, or completion of bankruptcy proceedings is to be made, and which must be held not later than six months after preparatory court meeting.

Bankruptcy Law specifies events when commercial court makes resolution on adjudication in bankruptcy and opens liquidation procedure with appointment of liquidator. Liquidation procedure cannot exceed 12 months, however commercial court may extend this term for six months. Since resolution on adjudication in bankruptcy is made: entrepreneurial activities of bankrupt must be terminated; term of fulfillment of money obligations and obligations for payment of taxes and duties (compulsory payments) is deemed expired; penalties (fine, etc.), interest and other economic sanctions on all types of bankrupts' indebtedness stop to be charged; financial information of bankrupt is no longer deemed confidential.

Priority of satisfying creditors' claims is established by law. General ranking of priorities, thus, is as follows: (1) Secured creditors, employees' severance payments, expenses of Fund of Individual Deposits Insurance (for banks), enforcement and liquidation expenses; (2) employees' wages and payments in connection with claims associated with harm to health or life; (3) taxes and fees; (4) unsecured creditors; (5) employees' contributions into capital fund of company; (6) other claims. Claims of lower priority are satisfied only after claims of superior priority are paid in full. If funds are not sufficient to satisfy claims of one priority, they are distributed among such creditors *pari passu*.

Provided, commercial court passes resolution on liquidation of legal entity-bankrupt, property remaining after satisfaction of creditors' claims shall be transferred into ownership of owner of such legal entity or its authorized body. Liquidator must submit to commercial court report and liquidation balance after completing settlements with creditors. Commercial court approves liquidators' report and liquidation balance upon hearing of liquidators' report and opinions of member of creditors' committee. If based on liquidation balance no property remains after satisfaction creditors' claims, commercial court makes resolution on liquidation of legal entity-bankrupt. If bankrupt had property sufficient to satisfy all creditors' claims, bankrupt shall be deemed free from debt and may continue entrepreneurial activity thereof.

7.04 ENFORCEMENT OF JUDGMENT AND ATTACHMENT:

When court decides in favor of plaintiff after trial, plaintiff may request court for certain guarantees that defendant, though unwilling, will be forced to fulfill decision of court. Court or commercial court, at request of parties or on its own initiative, may take steps to guarantee actual fulfillment of its judgment. Securing claim is permitted at any stage of civil or commercial court case, if failure to take measures may make enforcement of judgment decision more difficult or impossible. New Civil Procedure Code of Ukraine of Mar. 18, 2004 and Commercial Procedure Code of Nov. 6, 1991, which regulate issue of securing of claim, do not contain list of circumstances when application of securing measures is appropriate; issue of securing claim is decided on case-by-case basis by judge or arbitrator. For example, in civil matters such as payment of alimony, salary, and compensation of losses caused by damage to health or bereavement of breadwinner, judge may on own initiative decide on need to secure claim or judgment. Depending on circumstances court may decide on complete or partial securing of claim/judgment. Claim may be secured by: attachment of property or pecuniary sums belonging to defendant; prohibition of certain conduct; establishment of obligation to certain conduct; prohibition of other persons from taking certain conduct regarding claim; suspension of collecting on basis of documents according to which recovery is executed in undisputed manner; suspension of sale of contested property. (Art. 152 of Civil Procedure Code and Art. 67 of Commercial Procedure Code).

Concept of “securing claim/judgment” also exists in Criminal Procedure Code of Ukraine. In this context, civil claim is considered by court along with criminal case and is raised against defendant or persons materially responsible for actions of defendant for material damages as result of crime. Criminal Procedure Code, Dec. 28, 1960 specifies obligations of investigating agency, investigator, prosecutor and court in securing civil claim when information is available that crime caused material damages to victim or necessitated health care expenses for treatment of victim. (art. 29). In all other instances Civil Procedure Code applies.

Certain actions to secure claims are restricted by law. Securing claim is not permitted by: attachment of wages, pension, stipend/scholarship, financial aid or social security. But these restrictions are not applicable to claims on alimony, and compensation for damages caused by crime, injury, other harm to health, or death of individual.

In deciding to secure claim, court must take into consideration interests of both plaintiff and defendant. For example, upon petition of one party and considering explanations of other party, court may permit substitution of one method of securing claim by another or permit several means of securing claim. If plaintiff loses claim, defendant may after decision is final, demand from plaintiff compensation for losses caused to defendant by securing plaintiff's claim.

Court may cancel decision of judge on securing claim. Decisions on securing claim may be appealed, but petition on protest does not suspend decision on securing claim and does not prevent case from further consideration.

7.05 EXECUTION OF COURT DECISIONS:

Law of Ukraine “On State Executive Service” of Mar. 24, 1998 determined organization and activity of state executive service whose purpose is to carry out decisions of courts and other agencies. Bodies of state executive service are Department of State Executive Service of Ministry of Justice of Ukraine, divisions of state executive service of Chief Administration of Justice of Ministry of Justice of Ukraine in Autonomous Republic of Crimea, oblasts, Kyiv and Sevastopol City Administrations of Justice, district and city divisions, district in cities divisions of state executive service of administrations of justice. State executors are officers of state executive service and entrusted to enforce court decisions specified by law.

Enforcement of court decisions and other documents which under Ukrainian law are subject to forced execution is carried out pursuant to provisions of Civil Procedure Code of Ukraine and Law of Ukraine “On Executive Proceeding”, dated Apr. 21, 1999.

Enforcement of court decisions and resolutions is carried out by executive officers, and, in cases directly anticipated by law, enforcement activities are carried out by bank agencies, State Tax Administration, etc. Main agent of execution activities is executive officer. Officer is governmental official.

Demands of executive officer (regarding executions of court decisions) must be complied with by all enterprises, institutions, organizations, authorities and individuals.

Execution of particular decision is carried out by executive officer within jurisdiction in which debtor's property is located, or where debtor resides or works.

If debtor is legal entity, then execution is carried out at location of its agency or property.

Executive document is issued upon any effective court decision and should include name of court which issued letter, matter, date of decision, effective date of decision, date of issuance of executive letter, full names and addresses of claimant (person in favor of whom debtor must carry out certain actions) and debtor.

Executive officer commences execution activities at request of claimant, or prosecutor, or persons who may apply to court with claims for protection of rights of other persons (trustees, parents, etc.). Letters regarding alimony, compensation of losses resulting from crime, compensation of damage, confiscation of property, are transferred by court directly to executive officer and claimant is notified.

Executive documents may be presented for forced execution for following period: executive letters—for three years; decisions of commissions on labor disputes—for three months; decisions of governmental agencies (governmental employees), on administrative cases—for three months; all other documents—for one year.

Decisions on execution of periodic payments may be presented for execution within whole period for which such payments were adjudged.

Time period which was missed for valid reasons may be renewed by court.

Executive officer cannot participate in execution of decision if officer, spouse of officer, or close relatives have any interest in execution of decision.

When commencing execution of decision, executive officer sends writ to debtor offering voluntary execution. If period of realization was not established by court decision, then executive officer establishes following periods for voluntary execution: in matters of expulsion from lodgings period is 15 days, in other matter it is not more than seven days. When commencing execution of decision concerning confiscation of property or periodic payments, no voluntary execution term can be established.

Executive officer proceeds to forcible execution if debtor does not execute court decision within established period. Following forcible means of execution are recognized in law: exaction of debtor's property by attachment and sale thereof; exaction of debtor's wages, other earnings, pensions, and stipends; alienation from debtor and transfer to claimant of certain items specified in court decision; other measures anticipated by court's decision.

These measures are taken no later than six months from day of decision on beginning of executive proceeding, except for measures on enforcement of decisions of intangible nature which are taken not later than two months from day of decision on beginning of executive proceeding.

Executive officer may postpone execution of decision of court not more than ten days. Execution of court decision may be delayed or divided into parts or manner of execution may be changed pursuant to resolution of court initiated by executive officer, debtor or creditor.

Executive proceeding is suspended: in case of claimant's or debtor's death, or declaring any of them as being dead or lost, or termination of legal entity which is party to executive proceeding, in claims for which legal succession is possible; recognition of claimant or debtor legally incapable; if debtor is doing military service and this makes executive proceeding impossible; if claimant is doing military service (in which case executive proceeding is suspended on claimant's request); in case of submission of claim for release of property from attachment; if court admitted to consideration claim against actions of authorities or officers authorized to consider administrative offence cases; if court stops executive proceeding based on executive document; in case of suspension by authorized officer of execution of decision or executive proceeding; in case of initiation by commercial court of bankruptcy proceeding against debtor if pursuant to applicable law, claim of claimant is subject to moratorium imposed by commercial court, except for cases when executive proceeding is at stage of distribution of funds collected from debtor; if prosecutor lodged cassation appeal against court decision; in case of submission to court of request to substitute party which withdrew from proceedings by its legal successor; in case of postponement of execution of decision by court which issued executive document; if debtor has funds on deposit or other similar accounts which funds are unavailable till certain term, and debtor does not have any other property which could be forfeited; in other cases envisaged by applicable law.

Execution of decisions is terminated in instances of: claimant's refusal from enforcement of court decision; acknowledgment by court of amicable agreement between debtor and claimant; debtor's or claimant's death, or declaring any of them as being dead or lost, or termination of legal entity which is party to executive proceeding, in claims for which legal succession is impossible; expiration of period established by law for certain type of enforcement; cancellation of decision of court or other agency (officer), which was supposed to be executed based on executive document, or recognition by court of executive document as unenforceable; written refusal of claimant from acceptance of things exacted from creditor in course of execution of decision on transfer of things to creditor, or destruction of thing which had to be transferred to creditor in kind; transfer of executive document to liquidation commission in case of liquidation of debtor which is legal entity or to insolvency practitioner in case of declaration of debtor's bankruptcy; return of executive document without execution on request of court or other authority (officer) which issued such document, or on written request of claimant; actual and complete enforcement of decision in accordance with executive document; transfer of executive document to other relevant unit of Executive Service; actual and complete enforcement of decision in course of enforcement of decision of European Court of Human Rights; and in other cases envisaged by applicable law.

In event of termination of execution of decision, except for certain cases envisaged by applicable law, attachment and all other measures taken by court executive officer for forcible execution are cancelled. Terminated executive proceedings cannot be recommenced, except for certain cases envisaged by applicable law.

As general rule, within ten days of any action under claim, debtor or claimant may raise claims regarding actions of executive officers in connection with execution of decisions or refusal to carry out such actions. Claim is presented to court or to Head of Local Department of State Executive Service.

Sums exacted by court executive officer from debtor are used to compensate execution costs and to pay executive fees and remaining sums are used for satisfaction of claimant's demands. Any amount remaining after satisfaction of claimant's demands is given back to debtor.

7.06 FRAUDULENT SALES AND CONVEYANCES:

See category 3 Business Regulation and Commerce, topic 3.05 Contracts.

7.07 GARNISHMENT:

See topic 7.05 Execution of Court Decisions; category 10 Employment, topic 10.01 Labor Relations.

7.08 PLEDGES:

See category 18 Mortgages, topic 18.01 Chattel Mortgages.

8 DISPUTE RESOLUTION

8.01 ALTERNATIVE DISPUTE RESOLUTION:

General.

Practically, Ukraine has only judicial proceedings for dispute resolution (see category 6 Courts and Legislature, topic 6.01 Courts) and arbitration (see topic 8.02 Arbitration and Award);

latter topic also covers arbitration in foreign business context.

Mandatory Dispute Resolution.

See general comment above. But for certain types of individual labor disputes, parties must submit claim to labor dispute committee before filing court suit. Such committees are special bodies elected by employees of companies with over 15 employees.

Voluntary Dispute Resolution.

See general comment above. Enforceability of agreement on nonjudicial dispute resolution procedure other than arbitration is doubtful.

8.02 ARBITRATION AND AWARD:

Art. 16 of Civil Code of Ukraine stipulates protection of civil rights is exercised by civil courts. Art. 17 of Civil Procedure Code of Ukraine also provides that civil cases may be considered by arbitration tribunal. According to Law "On Arbitration Tribunals", adopted May 11, 2004, ("Law") term "arbitration tribunal" (in Ukrainian "tretejskiy sud") is considered as nongovernmental independent body, created by agreement or decision of parties, who possess interest to award disputes in civil and commercial matters. This new Law is applicable to disputes among individuals, legal entities except commercial disputes involving foreign parties.

Disputes between Individuals.

Provisions of new Law "On Arbitration Tribunals" ("Law") are applicable to arbitration of disputes arising between individuals. They set forth that Ukrainian individuals based upon their respective written agreement may submit to arbitration tribunal any dispute except for disputes arising from labor and family relations. Arbitration tribunal may consist of one or more arbitrators as agreed upon by parties. Law also provides certain rules of arbitral proceedings as well as mandatory requirements regarding form of arbitration agreement and arbitral award. Arbitral award can be submitted for enforcement to regular court of district where arbitral proceedings took place. However, settlement of disputes between Ukrainian individuals through arbitration gained no popularity yet.

Disputes between Legal Entities.

General Regulations.

In addition to few provisions of Civil Code and Civil Proceedings Code which generally stipulate possibility of referring civil disputes to arbitration tribunal, Art. 12 of Commercial Proceedings Code also sets forth that Ukrainian enterprises and organizations may submit disputes falling within competence of economic courts (economic disputes) to arbitration tribunals, except disputes concerning: (i) Matters involving claim of legal invalidity and (ii) disputes relating to conclusion, alteration, cancellation, termination and performance of economic contracts based on state order. Along with general declarations of possibility to resort to arbitration, Ukrainian law contains certain provisions which substantially impede or reduce effectiveness of arbitration between legal entities. Thus, it is not clear whether arbitration tribunal chosen by agreement of parties may be regarded as exclusive and final forum for resolution of disputes. In practice, Ukrainian legal entities never resort to arbitral settlement of their purely domestic economic disputes, all such matters are submitted to economic courts.

Arbitral settlement of disputes involving foreign parties is based on specific and more clear legal rules and therefore is practically workable. Art. 26 of Law of Ukraine "On Regime of Foreign Investments", Mar. 19, 1996, No. 93/96-BP, provides that disputes between foreign investors and state of Ukraine relating to state regulation of foreign investments and activity of enterprises with foreign investments are subject to resolution by Ukrainian regular courts unless otherwise provided by international treaties of Ukraine. All other disputes are subject to resolution by regular courts, economic courts or, pursuant to agreement of disputing parties, by arbitration tribunals either within or outside of Ukraine. According to Art. 38 of Law of Ukraine "On Foreign Economic Activity", Apr. 16, 1991, No. 959-XII, disputes between Ukrainian and foreign parties arising from or in connection with their foreign economic activity may be subjected to resolution by Ukrainian regular courts, economic courts or, pursuant to agreements of disputing parties, by International Commercial Arbitration Court and Maritime Arbitration Commission of Chamber of Commerce and Industry of Ukraine or by any other forum for dispute resolution provided that that is not in contravention with effective laws of Ukraine or is envisaged by international treaties of Ukraine.

Law of Ukraine "On International Commercial Arbitration", Feb. 1994, provides most detailed regulation concerning settlement of disputes arising in international trade, and takes into account arbitration provisions specified in international treaties of Ukraine and substantially follows model law adopted in 1985 by UNCITRAL and recommended by General Assembly of UN for use by member states in their legislation.

Law "On International Commercial Arbitration" applies to international commercial arbitration if place of arbitration is in Ukraine. However, certain provisions of this Law also apply in cases when arbitration takes place abroad.

According to Law following disputes may be submitted upon agreement of parties to International Commercial Arbitration: (i) disputes relating to contractual or other civil relations arising in course of international economic activity provided that commercial enterprise of at least one of parties is located outside of Ukraine and (ii) disputes between enterprises with foreign investments and between international associations and organizations set up in Ukraine, disputes between their participants and their disputes with other Ukrainian legal entities. Term "commercial" should be given wide interpretation so as to cover matters arising from all relationships of commercial nature, whether contractual or not. Relationships of commercial nature include, but are not limited to, following transactions: any trade transaction for supply or exchange of goods or services; distribution agreements; commercial representation or agency; factoring; leasing; construction; works; consulting; engineering; licensing; investment; financing; banking; insurance; exploitation agreement or concession; joint venture and other forms of business cooperation; carriage of goods or passengers by air, sea, rail or road. Parties are free to determine number of arbitrators, manner of their appointment and their nationality. Parties are also free to choose law which is to govern their relations, giving parties freedom to choose more than one legal system.

Law does not allow any regular or other court intervention in matters which are subject to International Commercial Arbitration except as in few cases expressly set forth by that Law, for example, parties prior to or during arbitration proceedings may appeal not only to arbitral tribunal but also to regular court with request to take interim protective measures.

Arbitral decision and award, irrespective of country in which it was made shall be recognized as final and binding upon parties and is enforceable upon written application of relevant party to respective regular court of Ukraine. Recognition or enforcement of arbitral award, irrespective of country in which it was made, may be refused only at request of party against which it is invoked, if that party furnishes to competent court where recognition or enforcement is sought proof that: (i) party to arbitration agreement was under some incapacity or agreement is not valid under law to which parties have subjected it; or (ii) party against which award is invoked was not given proper notice on appointment of arbitrators or on arbitration proceedings or for other grounded reasons it was not allowed to present its case; or (iii) award deals with dispute not contemplated by or not in conformity with arbitration agreement or contains decisions on matters beyond scope of arbitration agreement; or (iv) composition of arbitral panel or arbitral procedure did not conform with agreement of parties or failing such agreement was not in accordance with law of country where arbitration proceedings took place; or (v) award has not become binding upon parties or has been set aside or suspended by court of country in which or under law of which that award was made; or (vi) court finds that (a) subject-matter of dispute is not capable of being settled by arbitration under Ukrainian law; or (b) award is in conflict with public policy of Ukraine.

In accordance with this Law, International Commercial Arbitration Court is independent permanently operating arbitration agency of Chamber of Commerce and Industry of Ukraine. Chamber of Commerce and Industry of Ukraine approves Regulations of International Commercial Arbitration Court procedure of computing arbitration duties, arbitrator's fees and other arbitral expenses, and facilitates its activity.

In addition, in accordance with Law, Maritime Arbitration Commission is created in Ukraine, which is also independent permanently operating arbitration agency of Chamber of Commerce and Industry of Ukraine.

Maritime Arbitration Commission provides arbitration on disputes arising from contractual and other civil relations resulting from commercial navigation irrespective of whether parties thereof are subjects of Ukrainian or foreign, or only Ukrainian, or only foreign law. In particular, Maritime Arbitration Commission will settle issues arising from relations connected with: (1) freight of vessels, maritime transportation of shipments, transportation of shipments through mixed navigation (rivers and seas); (2) maritime insurance and reinsurance; (3) purchase-sale, lien and repair of vessels and other floating means; (4) salvage of maritime vessels or by navy vessels; (5) hoisting of vessels and other property lost at sea; (6) collision of vessels, and with damage of port premises, means of navigation, other objects, etc. caused by vessels.

Maritime Arbitration Commission will also deal with other disputes, provided that parties thereof agree on transfer of case for its settlement. Commission will also settle disputes transferred by parties for settlement in accordance with international treaties.

Detailed provisions of Law “On International Commercial Arbitration”, when taken together with 1958 New York Convention on Recognition and Enforcement of Foreign Arbitral Awards and European Convention on International Commercial Arbitration, 1961 to which Ukraine is signatory, provide comprehensive framework for resolution of disputes arising under international commercial transactions. (See also category 22 Treaties and Conventions.)

9 DOCUMENTS AND RECORDS

9.01 ACKNOWLEDGMENTS:

Documents issued by foreign authorities may be acknowledged in Ukraine under following regimes: (a) Legalization; (b) aposillization; and (c) notarial certification. On 10 Jan. 2002 Ukraine acceded to 1961 Hague Convention abolishing requirement of legalization for foreign public documents. Accession to this Convention significantly simplified existing procedure of acknowledgment of documents in Ukraine issued by foreign authorities, as well as acknowledgment in foreign countries, which are parties to that Convention, of documents issued by Ukrainian authorities.

Procedure of attachment of Apostille is regulated by common Order of Ministry of Foreign Affairs, Ministry of Education and Science and Ministry of Justice of Ukraine “On Rules of Attachment of Apostille on Official Documents, Purposed for Use on territory of Other States” of Dec. 5, 2003 (“Rules of Attachment of Apostille”) and Order of Ministry of Justice of Ukraine “On Amount and Procedure of Payment for Service of Attachment of Apostille” of Dec. 18, 2003.

According to Rules of Attachment of Apostille, Apostille is attached onto documents: (a) Issued by adjudicative bodies of Ukraine; (b) issued by prosecutive bodies and agencies of Ministry of Justice; (c) administrative documents; (d) documents certifying education and diplomas; (e) notarized documents.

To state bodies, which are authorized to attach Apostille onto documents belong: Ministry of Justice of Ukraine, Ministry of Education and Science of Ukraine and Ministry of Foreign Affairs of Ukraine. It is necessary to submit original document or its duly notarized copy and document certifying payment for service of attachment of Apostille. Apostille is attached in period of five days after submission of forementioned documents. This term may be extended to 20 days in case authenticity of signatures and seals on submitted documents.

Payment for attachment of Apostille is set in approximate amount of $10 for individuals and $17 for legal entities.

Should be noted, that Rules of Attachment of Apostille are applied only to documents originating from states, which are members of 1961 Hague Convention abolishing requirement of legalization for foreign public documents. According to Convention, Ukraine's accession is valid only in relation to those member states which have not expressed any objections to it within six months and 60 days after being informed of accession by Netherlands Foreign Affairs Ministry.

For documents originating from states other than those that joined 1961 Hague Convention abolishing requirement of legalization for foreign public documents legalization procedure involves number of steps: (1) Documents are to be notarized by local notary; (2) documents are to be certified by appropriate ministry, court or other authority in applicant's home country; (3) documents are to be legalized by Ukrainian consulate in country of documents' origin; (4) documents are to be translated into Ukrainian, and translation must be certified by Ukrainian notary prior to submitting of such documents to local authorities.

Several means of legalization exist for various types of documents: (1) In event of legalization of documents concerning registration of acts of civil status (certificates of birth, death, marriage, documents on education and academic level), documents shall be submitted for legalization by Consular Department of Ministry for Foreign Affairs of Ukraine or consular agencies of abroad in original only. (2) Documents issued by ministries, agencies, institutions, organizations and enterprises, shall be submitted for legalization as printed copies to be confirmed by First State Notary Agencies (in oblasts and cities in Kyiv and Sevastopol). Signatures of notaries shall be confirmed by respective entries in Ministry of Justice of Ukraine, and further, signatures of officers of Ministry of Justice shall be confirmed by Consular Department of Ministry for Foreign Relations of Ukraine. Documents so executed shall be recognized by foreign diplomatic representative offices in Ukraine as legally effective. (3) Documents executed abroad and intended for use in Ukraine, upon notary confirmation by notary of respective country and government agencies of consular area may be legalized by consular agency of Ukraine in such country.

Legalization of documents shall be subject to payment by concerned individuals and legal entities of consular fee and actual costs connected with carrying out of such actions.

9.02 AFFIDAVITS:

Statements or declarations reduced to writing and sworn to or affirmed before officer who has authority to administer oath or affirmation is unknown as item of special evidence in Ukrainian Law.

9.03 NOTARIES PUBLIC:

Legal position of notary in Ukraine is established by Law of Ukraine “On Notary Activity” of Sept. 2, 1993 and Code of Civil Procedure of Ukraine of Mar. 18, 2004.

"Notaries of Ukraine" means system of agencies and officers appointed to certify rights and facts of legal importance, and to perform other notarial acts in order to make them trustworthy. In Ukraine notary acts are performed by state or private notaries. Documents executed by state and private notaries have equal legal effectiveness.

In foreign countries notarial acts are performed by consular agencies of Ukraine, or, in specified cases, by diplomatic representative offices of Ukraine.

Notary may be citizen of Ukraine with legal education (University, Academy, Institute) and six months of practical training in state notary office or at private notary office, who passed qualification exam and obtained certificate confirming right for notary activity. Person previously convicted of crime cannot become notary.

State notary offices are established and terminated by Ministry of Justice of Ukraine. State notary office is legal entity and is headed by manager.

State notary is also appointed and dismissed by agencies of justice of Council of Ministers of Republic of Crimea, oblasts, and administrations of Kyiv and Sevastopol.

State notary office may certify agreements (for example, contracts, wills, powers of attorney, marriage contracts, etc.), issue certificates for right of inheritance; issue certificates on acquisition of housing at public auction; confirm compliance of copies and excerpts with submitted documents; confirm authenticity of signatures on documents and translation of documents; confirm existence of person or residence in definite place; take money and securities for escrow; issue executive resolutions, etc.

Performance of notarial acts is compensated by state-set fee.

Private Notary Activity.

Registration of private notary activity is carried out by departments of justice of Rada of Ministers of Republic of Crimea, oblasts, Kyiv and Sevastopol state administrations upon application of person entitled to notary activity. Upon receipt of registration certificate, private notary is required to start notarial activity within three months.

Private notary performs same notarial acts as state notary, except for following: imposition and removal of prohibition of alienation of housing, flat, country house, garage, land parcel, other real estate; issuing ownership certificate for share in joint property of couple in event of spouse's death; issuing inheritance certificate; taking measures for protection of inheritable property; certifying agreements of lifelong support; certifying authenticity of powers of attorneys and signatures on documents to be used abroad; certifying signatures of parents and custodians on consent on adoption of child.

Private notary is compensated for performance of notarial acts by agreement between notary and individual or legal entity.

Notarial acts are performed in state notary offices, in state notary archives, in private notary's office, or premises of executive committees of village, municipal or city councils. If person cannot appear in above mentioned places, or if it is required by specific features of agreement to be certified, then notarial acts may be performed outside above mentioned places. Notarial acts are performed upon payment on date when all required documents are submitted. Performance of notarial acts may be suspended, if officers of enterprises, institutions and organizations are required to submit additional information or documents, or if, in accordance with law, notary questions absence of persons interested in matter.

In course of notarial act notary and other officials must identify person, his representative or representative of enterprise, institution, or organization which requested such notarial act. Such person is identified under his passport or other documents which exclude any doubts regarding person's identification.

Notary or official performing notarial act, shall refuse to perform such act if such acts are in contravention of law; such acts are performed by another notary or officer; petition for performance of notary acts is given by incompetent person or representative within required authority; agreement to be made on behalf of legal entity is in contravention of purposes specified in charter or provisions thereof.

Interested person who considers performance or refusal to perform notarial act as incorrect, may appeal to district or city people's court at place of location of respective state notary office, state notary archive, executive committees of village, municipal or city council, or private notary's office.

Documents compiled abroad with participation of foreign authorities or issued by them shall be accepted by notaries, provided that such documents were acknowledged by Ministry of Foreign Affairs of Ukraine. Documents which were not acknowledged shall be accepted by notaries in instances anticipated by law of Ukraine or international treaties to which Ukraine is party. If provisions on notarial acts specified by international treaties differs from Ukrainian law, then provisions of international treaties will apply. If notarial acts which were not anticipated by law of Ukraine are related by international treaties to sphere of notary's competence, then notary will perform this act in manner established by Ministry of Justice of Ukraine.

9.04 RECORDS:

See topics 9.01 Acknowledgments, Notaries Public; categories 2 Business Organizations, topics Associations, Corporations, Foundations; Business Regulation and Commerce, topics Contracts, Sales, State Register (Commercial Register); Debtor and Creditor, topic Execution of Court Decisions; Estates and Trusts, topic Death; Intellectual Property, topics Patents, Trademarks; Mortgages, topics Chattel Mortgages, Mortgages; Property, topic Real Property; Transportation, topic Motor Vehicles.

10 EMPLOYMENT

10.01 LABOR RELATIONS:

General Provisions.

Basic law of Ukraine on labor is Code of Laws of Ukraine on Labor, Dec. 10, 1971, and laws on related topics, in particular: Laws of Ukraine “On Collective Contracts and Agreements”, July 1, 1993; “On Labor Protection”, Oct. 14, 1992; “On Basic Principles of Social Protection of Labor Veterans and Other Elderly People in Ukraine”, Dec. 16, 1993; “On State Service”, Dec. 16, 1993; Law “On Remuneration of Labor”, Mar. 24, 1995; “On Vacations”, Nov. 15, 1996; “On Procedure of Accommodation of Collective Labor Disputes”, Mar. 3, 1998; “On Employment of Population”, Mar. 3, 1991; “On Basics of Social Protection of Invalids in Ukraine”, Mar. 21, 1991; adoption of other enactments shall be made in accordance with Labor Code of Ukraine. Currently, legislators are drafting new Labor Code of Ukraine.

Labor legislation of Ukraine regulates labor relations of employees of all enterprises, institutions and organizations irrespective of their forms of property, kinds of activities and branch operations. Particulars regarding employment of members of cooperative societies, collective farms, rental organizations and joint ventures are determined by charters thereof and current legislation. If international contract or agreement in which Ukraine participates, provides other than Ukrainian labor legislation, then rules of international agreement or contract will apply. Labor relations of foreigners in Ukraine are regulated by Law of Ukraine “On Legal Status of Foreigners”, Feb. 4, 1994. Law indicates that foreigners have rights and duties in labor relations equal to Ukrainians; unless otherwise provided by special labor legislation, this provision is effective. Foreigners permanently residing in Ukraine have right to be employed at enterprises, institutions and organizations or to undertake other activity on basis and in manner which is established for Ukrainian citizens. Foreigners immigrating to Ukraine for purpose of employment for definite period of time may undertake labor activity in accordance with permission to be employed obtained in established manner. Foreigners may not be appointed to certain positions or involved in certain types of labor activity if pursuant to Ukrainian law only Ukrainian citizens may occupy such posts or be involved in such activity.

Arising of Labor Relations.

Labor relations can be established pursuant to labor agreement or labor contract. Labor contract is special form of labor agreement and can be used in instances permitted by law. Labor agreements are concluded, as general rule, on basis of employee's application, which should be accepted by employer. Latter issues internal order by which employee is included in employer's personnel. Labor agreements are oral, as rule, and concluded for indefinite duration until terminated.

Labor contract is also basis for establishment of labor relations. Some positions may require additional basis. For example, certain state officers must be appointed or elected.

Labor agreements and labor contracts are different regarding certain features. Content of labor agreement includes essential provisions (on salary, position, place, conditions of work, amount of work; term and form of agreement) and additional provisions (on probation period) determining rights and obligations of parties. Conditions and terms of labor contract are established by agreement of parties. Contract is deemed concluded at moment of agreement of parties on all issues. Labor contract may be established for undetermined period of time, for certain term, or for time required to accomplish designated task. Labor agreement may be concluded in oral or written form, unless written form is obligatory under law. Labor contracts are often concluded in writing. Ukrainian law requires labor contract to be in writing if: employees are hired for special purpose; labor contracts for definite term are concluded for work in regions with specific environmental, geographical and geological conditions and high risks for health; temporary labor contract is made with minor citizens; employee insists on execution of contract in written form if parties to labor contract are individuals.

Pursuant to Resolution of Cabinet of Ministers “On Regulation of Contract Form of Labor Agreement”, Mar. 19, 1994, contract must meet certain requirements: (i) employer cannot include provisions on full material liability of employee if such liability is not anticipated by law; (ii) it is prohibited to establish by contract procedure for deciding labor disputes other than anticipated by law; (iii) contracts must be made in conformity with form of contract developed by Ministry of Labor of Ukraine. So, contract may not include provisions on agreeing upon labor conditions violating law. Currently contractual form is established by legislation for such groups of employees as: (i) Heads of state enterprises and structural subdivisions thereof; (ii) officers of state administrations except for those who are appointed; (iii) heads of institutions of higher education and structural subdivisions thereof, subordinated to Ministry of Education of Ukraine. Formally employee is deemed employed upon issuance of order of head of enterprise or organization. Within five days employee must have all required entries in his labor book which is main document on labor activity of employee. Information on job, incentives and awards for work at enterprise, institution or organization are included in labor book. Entries on dismissal are made in conformity with exact wording of effective legislation and with reference to respective article or paragraph of law.

Upon establishing labor contract, probation period may be established for employee. Probation period cannot exceed three months—for officers; one month—for workers. Probation period cannot be established for minor citizens, for young specialists after graduation from colleges, technical and vocational schools, disabled, etc.

Foreign individuals can be legally employed in Ukraine on condition of prior obtaining of work permit.

Termination of Labor Relations.

General grounds for termination of labor agreement are specified in Art. 36 of Labor Code of Ukraine and they are: (1) Parties' consent (for labor agreements for indefinite duration); (2) expiration of period of agreement if no party intends to continue agreement (for labor agreements for definite duration). Upon expiration of period of agreement and on condition of actual continuation of labor relations, labor agreement is automatically converted into agreement for indefinite duration; (3) induction of employee into military or alternative service; in this case employee is paid dismissal allowance in amount not less than employee's average salary for two months and employee has right to continue his work after demobilization; (4) termination of agreement concluded for specific term; (i) on employee's initiative— agreement for indefinite duration may be terminated with obligatory written notification of employer at least two weeks in advance; in event of violation of labor legislation or terms and conditions of collective labor agreement on this issue by employer—within period determined by employee; contract concluded for definite period is subject to termination, at employee's request, in event of disease, disability thereof or violation of labor legislation, collective or labor agreement by employer. When terminating labor agreement as result of violation by employer of labor legislation or terms and conditions of collective and labor agreement employee is paid dismissal allowance in amount not less than one month's salary; in event of violation of legislation in provision of labor, employee is paid not less than three average monthly salaries; (ii) on employer's (or authorized body's) initiative—labor contract concluded for definite period as well as labor contract for unspecified period may be terminated on employer's initiative only on grounds specified by legislation or agreement of parties. Guarantee against groundless dismissal of employee exists because employer must approve such dismissal in each particular case, except for some events, with trade union. Owner must appeal with written petition indicating reasons and grounds for dismissal to trade union agency, which must consider petition in 15 days and pass decision. Once decision is made, trade union has to inform owner within three day period. If employer does not receive decision of trade union agency, appeal is considered sustained. Decision of trade union agency is effective for one month term. Terms and conditions as well as grounds of termination of labor agreement on employer's initiative are specified by Arts. 40, 41 of Labor Code of Ukraine: (a) Changes in organization of manufacturing and labor process, including reorganization and change of profile of enterprise, institution or organization, and reduction of staff thereof; (b) nonconformity of employee to job or position for reason of insufficient qualification thereof or bad health preventing work performance and in case when permission to access state secret information is cancelled with regards to employee; (c) systematic failure to fulfill employee's duties, specified by labor contract or regulations of labor schedule, for invalid reasons, if earlier this employee has been subjected to penalties or chastisement; (d) absence at enterprise and neglect of duty (including absence at enterprise during any period exceeding three hours) for invalid reasons; (e) absence at enterprise and neglect of duty, in course of period exceeding four months running, for reason of temporary disability to work, except for leave for pregnancy and child delivery as well as diseases in course of which job is preserved for employee for longer period, i.e. tuberculosis—12 months, etc. Employees disabled as result of professional disease or labor disablement have right to continue their job after rehabilitation of ability to work or establishment of official disability; (f) readmission to enterprise of employee who was involved in job before; (g) attendance at enterprise, institution or organization in intoxicated or narcotic state; (h) depredation at enterprise, institution, organization (including petty larceny) of property, established by effective sentence of court or other body, which is competent to penalize; (i) inappropriate actions of employee whose job is connected with monetary means and other material valuables, resulting in distrust by employer; (j) in case of administrative official, if such official even once violates his/her duties; (k) inappropriate behavior of employee which is incompatible with continuation of his work. Consent of trade union bodies is not obligatory upon dismissal under grounds indicated in provision (a) only in case of liquidation of enterprise; in provisions (f), (h) and (i) as well as upon dismissal of employee who is not member of trade union organization or dismissal from enterprise where there is no trade union organization. It is not permitted to dismiss employee in course of his temporary disability or vacations (except for instances specified by provision (e) or complete liquidation of enterprise). Dismissal allowance is paid to employee who is dismissed in accordance with provisions (a) and (f) in amount not less than employee's average monthly salary. Dismissal at trade union agency request: trade union agency which was entrusted by personnel to sign collective agreement, may demand cancellation of labor agreement (contract) with officer who violates labor legislation and does not fulfill duties on collective agreement. (5) Transfer of employee, upon his consent, to another enterprise or transfer to elective post: upon expiration of term of elective post, employees who transferred to elective posts have right to be employed in their former position; (6) refusal of employee to be transferred to another location together with enterprise, institution or organization and his refusal to continue work for reason of considerable changes in labor conditions, i.e. position, job, etc., in this event employee is paid dismissal allowance not less than average monthly salary; (7) effectiveness of court sentence, under which employee was incarcerated (except for cases of probationary sentence or suspended sentence), penitentiary works, outside location of employee's enterprise, and other punishments, which exclude further continuation of previous job; (8) grounds, provided by contract.

Working Hours. Vacation.

Duration of working time of employees in Ukraine cannot exceed 40 hours per week. Shortened working time is 36 hours for minor citizens and for those who are employed at enterprises with harmful labor conditions. Enterprises may determine shortened working hours for women having minor children in collective agreement of enterprise. All employees have annual vacations (with preservation of job) paid at average salary.

Labor Code establishes following holidays: New Year's Day (Jan. 1); Orthodox Christmas (Jan. 7); International Women's Day (Mar. 8); Days of International Workers' Solidarity (May 1 and 2); Victory Day (May 9); Constitution Day (June 28); and Ukrainian Independence Day (Aug. 24). Easter and Trinity also are holidays of one Sunday each.

Ukrainian labor laws provide for basic annual vacation of at least 24 calendar days. Of these 24 calendar days, minimum of 14 are consecutive calendar days to be used for employee's main annual vacation. Employee may use remaining ten days of vacation in any combination, provided that each unused part of vacation starts on day of week that immediately follows last day of most recent used part of vacation.

Certain categories of employees are entitled to longer basic vacations and/or additional annual vacations, including following: for disabled employees — 26 or 30 calendar days; for employees under age 18 – 31 calendar days; for employees working in hazardous occupations - up to 35 calendar days in addition to basic 24 days; and for employees with irregular working hours—up to seven calendar days in addition to basic 24 days.

Certain vacations are available, over and above general limits, for special purposes. These include vacation periods of ten days to four months for educational purposes. Under special regulations, longer vacations also may be allowed for certain creative activities such as completing thesis or writing book. In addition, employee may be eligible to take unpaid vacation, ranging from three to 60 days, depending on legal reason.

After six months of employment, employee is entitled to take annual vacation calculated for first year of employment. If vacation is granted earlier than six months, its duration shall be determined pro rata period of work. Annual vacations for second and following years may be taken at any time during respective year.

Salary.

Salaries of employees of enterprises cannot be less than minimal amount established by state (minimum wage) and are subject to indexation in manner specified by Ukrainian law.

In Law “On Remuneration of Labor”, “minimum wage” is defined as “statutorily established minimal level of monthly wages for simple, unqualified work”. Minimum wage does not include bonuses, awards or other incentives and compensatory payments.

Minimum wage is established annually by Parliament on petition of Cabinet of Ministers coterminously with approval of state budget.

Contractual wages are to be determined by negotiated labor contracts between employer and workers at national, regional or manufacturing (collective) levels, in accordance with effective legislation. Forms and systems of payments, labor standards, tariffs, rates, conditions of establishment and amounts of raises, additional charges, bonuses and other incentives and compensatory payments are to be determined by enterprise in labor agreement which observes norms and guarantees of effective legislation.

Wages in Ukraine must be paid in Ukrainian currency, by checks in manner established by Cabinet of Ministers, with approval of National Bank of Ukraine in bank-to-bank nonmonetary transfers (only with written authorization of employee), or in kind. However, payment of wages with debt instruments or other script is prohibited.

By way of exception, collective agreement may provide for partial disbursement of salary in kind (at prices not exceeding prime cost) in amount not exceeding 50% of salary accrued during month in those sectors or occupations, where such disbursement, which is equivalent to labor remuneration in monetary terms, is usual or desirable for employees, except for commodities, whose list shall be specified by Cabinet of Ministers of Ukraine.

Guarantees, Privileges and Compensations.

Labor Code of Ukraine establishes following kinds of guarantees, compensations and privileges: guarantees against deductions from salaries—such may be executed only in instances specified by legislation (child support, etc.); deductions from dismissal allowances and other compensations are not permitted; privileges for women—opportunity to grant leave on pregnancy and child delivery, leaves with preservation of partial salary on taking care of children; prohibition against dismissal of pregnant women; privileges for young people—prohibition against employment of minors in some kinds of jobs, restrictions on dismissal.

Labor Disputes.

(Part 15 of Labor Code).

Labor disputes are considered by committees on labor disputes and courts.

Committees on labor disputes are elected among employees at general meeting of enterprise with number of employees not less than 15. Committees on labor disputes are primary bodies of investigation of labor disputes arising at enterprises except for labor disputes of judges, investigators, employees of prosecutor's office, employees of educational, scientific and other institutions of prosecutor's office (particulars of investigation of such disputes are determined by specific legislation on such categories of employees) and labor disputes which are subject to investigation in court. Employee may appeal to committee on labor disputes within three month period from day when employee learned of violation of his/her rights. Committee on labor disputes must within ten day period from day of submission of petition, investigate dispute. Dispute is investigated in presence of appealing employee and employer or representatives of employer. In case of disagreement with decision of committee on labor disputes, employee or employer may appeal this decision in court within ten day period upon receipt of entry of protocol of committee's meeting. Decision of committee on labor disputes is subject to fulfillment by employer within three day period upon expiration of ten day period required for appeal. Decision on restoring employee to his/her post must be fulfilled outright.

Local (city and district) courts consider labor disputes upon petitions of: (a) employee or employer, if they do not agree with decision of committee on labor disputes; (b) prosecutor if he thinks that committee's decision is in contravention of current legislation. Such courts also consider disputes upon petitions of: (a) employees of enterprises with no committee on labor disputes; (b) employees on restoring their posts irrespective of grounds of termination of labor contract, on change of date and reason for dismissal, on payment of forced absence at enterprise, except for disputes on dismissal of employees of elective paid posts of public and other associations upon decision of bodies which elected these employees; employer on compensation of damage caused to enterprise by employees; as well as disputes on refusal to employ such categories of employees as: employees who were invited by transfer from other enterprise, young specialists having graduated from higher educational institutions and receiving recommendation to this enterprise, pregnant women, women having children under three years old or disabled child, single mothers having children under 14, elective employees upon expiration of period of their authority.

Trade Unions and Organizations of Employers.

In accordance with Constitution of Ukraine, Labor Code of Ukraine and Law of Ukraine “On Trade Unions”, Sept. 15, 1999, and Law “On Organizations of Employers”, May 24, 2004, employees are entitled to join trade unions and employers are entitled to join organizations of employers. Both entities act according to their charters.

Trade unions in Ukraine are public, nonprofit organizations that unite citizens based on their profession or occupation. Creation of trade union does not require approval of state authority. All trade unions in Ukraine have equal rights. Employees are free to join any trade union if they meet membership requirements established by union's charter. Employee may not be required to join trade union, and employment discrimination based on membership in trade union is prohibited.

Membership dues are collected by trade unions according to procedures established under their respective charters. Trade unions are entitled to engage in following activities, among others: (i) Representing employees in collective bargaining; (ii) making legislative proposals and participating in drafting of labor laws; (iii) providing employees with advice and protection with respect to their individual employment; and (iv) monitoring employers' compliance with labor laws and regulations.

Trade union, when properly authorized, may represent employees in collective bargaining irrespective of their union membership. In most cases, trade union member may not be dismissed on employer's initiative without union's consent. Employer is required to consult with trade union committee when establishing internal work regulations and vacation schedules.

Employment of People with Disabilities.

Pursuant to Art. 2 of Law of Ukraine ``On Foundations of Social Protection of People with Disabilities in Ukraine'' dated Mar. 19, 1991, people with disabilities are individuals with proven disorder of body functions caused by diseases, traumas or by inborn defects, that result in limitation of their vital functions which require social assistance and protection.

Company duly incorporated in Ukraine which employs at least eight employees should comply with requirements to employ such socially protected people. Thus, if company employs between eight and 25 individuals, it is required to employ at least one person with disabilities. If number of employees exceeds 25, number of disabled individuals employed by company should be not less than 4% of total work force. Company in breach of aforementioned requirements, accrues liability in amount of average annual salary of employee of company multiplied by number of positions, which should have been occupied by disabled individuals.

11 ENVIRONMENT

11.01 ENVIRONMENTAL REGULATION:

Basic Laws on Protection of Environment.

Area of protection of environment in Ukraine is regulated by Law “On Environmental Protection”, June 25, 1991, which applies to land, water, forests, minerals, air, and by other specific laws developed in accordance with above Law.

Law “On Environmental Protection” sets forth legal, economic and social basis for environmental protection. This Law regulates protection, replenishment and use of natural resources, provision of ecological safety, minimization of negative influence of economic and other activities on environment, maintenance of natural resources, genetic fund, scenery and other natural complexes. Law includes provisions on authorities of managing agencies in area of environmental protection, ecological rights of individuals, economic arrangements for providing environmental protection, issues of natural reserve fund, responsibilities for infringement of laws on environmental protection.

Specific Legislation.

Air.

Law “On Protection of Atmospheric Air”, Oct. 16, 1992 is basic legislation in this area; it establishes following: (a) Norms of ecological safety of air; (b) marginal norms of acceptable discharge of wastes into air and other harmful influence of physical and biological factors by stationary sources; (c) marginal norms for contaminating substances released into air in course of operation of technological and other equipment, premises and objects; (d) norms for use of air as raw material of basic production application; (e) norms of content of contaminating substances in waste gases of transferrable sources and harmful influence of their physical factors. Norms are developed and/or approved by Ministry of Health of Ukraine and Ministry of Environmental Protection of Ukraine.

Enterprises, institutions and organizations whose activity is connected with discharge of contaminating substances into air are obligated to assure ongoing effective work and maintenance in good standing of premises, equipment and devices including equipment used for cleanup and reduction of levels of other harmful influence, to control scope and structure of contaminants which are discharged into air, to have contingency plans on environmental protection for events such as accidents and unfavorable meteorological conditions, and to take measures for elimination of reasons for and consequences of contamination of environment.

Organizational and economic arrangements should exist to provide protection and effective use of air. These arrangements anticipate following: (a) Establishing limits of contamination and other harmful discharges into air; (b) establishing limits for use of air as raw material of basic production application; (c) establishing norms and amounts of fees for discharge of contaminants into atmospheric air and other harmful influence on it; (d) establishing norms of payment for exceeding discharge limits, other harmful influence, and issuing permits for use of air; (e) providing enterprises, institutions, organizations and individuals with tax credit and other exemptions in course of introduction by them of technological processes resulting in minimal or no waste, or for energy or resource saving technological processes, performance of other environmental protective arrangements in accordance with laws.

Procedure for establishing discharge limits, levels of harmful influence of physical and biological factors, and normative fees for contamination of air, shall be established by Cabinet of Ministers of Ukraine.

Any infringement of air protection laws shall result in administrative or criminal responsibilities in accordance with Ukrainian laws.

Water.

Water Code of Ukraine is basic document in area of water protection. This Code anticipates conditions of placement, design, construction and operation of enterprises, premises and other objects which influence condition of water; prohibition of discharges of wastes and harmful substances for which marginal levels of concentration in water are not established; protection of surface of water and ice surface of reservoirs and water piping, protection of water from contamination and trash; establishing of protective sanitation areas and zones; arrangements for protection of waters from exhaustion.

Any infringement of water protection laws shall result in administrative or criminal responsibilities in accordance with Ukrainian laws.

Land, Forest, Resources.

Land Code of Ukraine, Forest Code of Ukraine and Code of Ukraine on Resources regulate procedure for use and protection of lands, forests and resources. These laws specify environmental, sanitary and technical standards, competence of agencies which conduct state control over use and protection of lands, forests and resources as well as responsibility for violation of legislation in these spheres.

Contamination from Industrial, Household and Other Waste.

Law “On Wastes” of Mar. 5, 1998 determines legal and economic activity directed at waste volume reduction, recycling, waste transportation and waste management issues. Law “On Environmental Protection” anticipates obligation of enterprises, institutions, organizations and individuals to take effective steps in order to reduce amounts of waste and to decontaminate, process, safely store and bury waste. Storage, conservation or placement of waste shall be permitted in areas defined by local councils of people's deputies within limits specified by these councils with observance of sanitary and environmental norms only on condition that special permit is available; storage, conservation or placement of wastes shall be conducted by method which ensures possibility of further economic use thereof and safety for environment and people's health.

Environmental Safety of Vehicles.

Manufacturing and maintenance of vehicles and other transportation equipment whose exhausts and discharges contain contaminants exceeding established norms shall be prohibited in accordance with previously mentioned Law “On Environmental Protection”. Heads of transport organizations and owners of vehicles shall be responsible for observance of norms of discharge and exhaust limits and limits of permitted levels of physical influence on environment which have been established for respective type of vehicles.

Environmental Examination.

Law “On Environmental Examination”, Feb. 9, 1995 determines list of objects which are subject to this examination. This list includes draft laws, documents on introduction of new techniques, technologies, materials, substances which may negatively affect environment. Environmental examination can be carried out in connection with ecological situation that took place in certain cities or regions, or other activities which have considerable negative effect on environment. Examination shall be carried out by Special Authorized Central State Executive Body, its local agencies, specialized committees and institutions established by them, agencies of Ministry of Health, public environmental organizations. Conclusions of state environmental examination are mandatory for fulfillment.

Law regulates grounds, conditions and terms and procedures for environmental examination, content and period of effectiveness of results and procedures for appealing of these conclusions. Persons whose fault in violation of legislation in sphere of environmental examination are subject to disciplinary, administrative, civil or criminal responsibility.

General Supervision.

Environmental protection shall be governed by Cabinet of Ministers of Ukraine, Councils of People's Deputies, executive agencies thereof, and authorized state agencies on environmental protection: Ministry of Ecology and Natural Resources, State Committee on Issues of Ecological Policy, Use of Nature and Liquidation of Consequences of Chernobyl Accident; Ministry of Health, Ministry on Emergency Situations and Protection of Population from Consequences of Chernobyl Accident, State Committee of Ukraine on Land Resources.

Public control shall be conducted by public inspectors on environmental protection in accordance with Regulations approved by Ministry of Environmental Protection.

Settlement of Disputes in Sphere of Environmental Protection.

Disputes in sphere of environmental protection shall be settled by general court, economic court, councils of peoples' deputies or agencies established by them within limits of their competence and according to procedure established by effective legislation of Ukraine.

Responsibility for Violation of Legislation on Environmental Protection.

Grounds and conditions and terms of this responsibility are anticipated by Law of Ukraine “On Environmental Protection” and special enactments—Water, Forest, Land Codes, Law of Ukraine “On Protection of Atmospheric Air”, etc. as well as by Administrative Code, Civil Code and Criminal Code.

Damage caused as result of violation of legislation on environmental protection shall be subject to compensation regardless of other penalties.

12 ESTATES AND TRUSTS

12.01 DEATH:

These matters in Ukraine are regulated by c. 6 of Civil Code of Ukraine, 16 Jan., 2003. Death is registered by state agencies of civil registration, and certificate of death is issued. Missing person may be declared dead by court proceedings. Absence of information about missing person at his domicile for three years shall be sufficient ground for such court decision.

If missing person disappeared under life threatening circumstances (for example, flood, earthquake, etc.) or other circumstances raising presumption of person's accidental death (for example, shipwreck), then above mentioned period may be reduced to six months.

Military person or any other person who disappeared without trace during course of military action may be declared dead by court proceedings not earlier than two years from day of termination of such military action. Assuming certain circumstances court may declare such person dead in six months after person's disappearance.

Where missing person is adjudicated dead by court proceedings, date of death is date of such court decision. If person disappeared under life threatening circumstances or circumstances raising presumption that such person is dead by accident, then date of presumed death of such person may be declared by court as date of death thereof.

If person declared dead reappears, or place of his/her presence becomes known, respective decision will be cancelled by court.

12.02 DESCENT AND DISTRIBUTION:

According to Civil Code of Ukraine, rights and duties shall be inherited. Inheritance of some kinds of property (such as real estate, land slots) by foreigners is subject to special procedure and requirements.

Descent is realized by law and by will. Descent is realized by law when and if such descent was not changed by will.

Descendants may be persons who were alive on date of decedent's death, and decedent's children who were conceived during lifetime but born after decedent's death.

Any persons taking life of decedent or his descendants on purpose or making attempt on life thereof, have no right of inheritance, unless decedent was aware of such attempt, but nonetheless had included such person into will.

Parents have no right to inherit from children after parental rights terminated, provided that such rights were not reinstated as of date of inheritance. Persons, who persistently avoided support obligations to decedent, have no right to inherit after him, provided that such circumstances were confirmed by court proceedings.

First Level of Descendants.

In course of descent by law, decedent's children (including adopted), spouse, and parents (adoptee) inherit in equal parts. After born child of decedent is also first level descendant.

Decedent's grandchildren and great-grandchildren are descendants by law, provided that on date of decedent's death parent who would have been descendent is dead; they inherit in equal parts share which would have been inherited by their deceased parent by law.

Second Level of Descendants by Law.

In absence of deceased's descendants of first level or in event such descendants do not accept inheritance, deceased's brothers and sisters, and his/her grandparents inherit in equal parts.

Inheritance by Dependents.

Disabled or minor persons who were dependent on deceased for not less than five years prior to his/her death, inherit by law. Should other descendants also exist, they will inherit in equal parts with descendants of level involved in inheritance.

Inheritance by Adopted Persons.

Adopted persons and heirs thereof inherit from adoptive parent and/or his/her relatives, and as descendants are equal with adoptive parent's natural children or heirs thereof. Adopted persons do not inherit from their parents and other blood relatives in line of ascent, or their brothers and sisters.

In inheriting after death of adopted person or his/her heirs, adoptive parents and their relatives are equal to parents and other blood relatives of adopted person. Natural parents or other blood relatives in line of ascent, and his/her brothers and sisters do not inherit, by law, after death of adopted person or his/her heirs.

By will every individual may leave all property or part of it to one or several persons, both included and not included in group of descendants by law, and to state or firms, institutions, organizations.

Regardless of testament provisions, however, minor children, disabled adult children, disabled spouse or parents of deceased inherit certain part of property.

Remainder of property which is not inherited is divided among descendants by law to whom another part of property was left by testament, unless otherwise provided for by testament.

Also see topic 12.05 Wills.

12.03 INTESTACY:

See topics 12.02 Descent and Distribution, 12.05 Wills.

12.04 TRUSTS:

See topic 12.05 Wills; category 7 Debtor and Creditor, topic 7.03 Bankruptcy.

12.05 WILLS:

Wills and relations arising from inheritance are governed by cc. 84-90 of Civil Code of Ukraine.

Wills in General.

Individual may dispose of his/her property at death by will (testament) and may leave all property to other individuals, legal entities or state. Will (testament) must be made by testator personally, it cannot be drawn up by representative or agent. Only person with full capacity to enter into legal transaction may draw up will; otherwise will (testament) can be found invalid. Will is deemed invalid if it was executed as result of fraud, violence, threat or was drawn up by individual in absence of conscious or free decision-making or expression of intention. Special entry about all wills, that were drawn up and certified by Registrar in accordance with law, as well as modified wills, must be filed with Sole Register of Wills and Inheritance Cases, which is kept by Ministry of Justice of Ukraine.

Ordinary Wills.

Last will and testament must: be written, indicate place and date of its execution; be signed by testator, and be certified by notary. In areas where there are no notary offices, local agency of state power certifies testament. Will may be signed by individual other than testator only when testator cannot sign will as result of physical defects, disease or other reason. Then, at testator's request, will may be signed by another individual other than heir in presence of notary or other officers, as specified in Code, with reason for lack of testator's signature indicated on document.

In Ukraine notary certification of testament is executed by notary in presence of testator. Per testators request witnesses can be invited. Notary is authorized to certify testator's will, authenticity of his signature, and capacity thereof by notary stamp. According to testator's words, notary compiles testament either via handwriting or use of any technical means. In such case testator is obliged to read out will aloud and sign it. Information of testament is confidential and is protected by law.

Emergency Wills.

Civil Code of Ukraine (art. 1252) specifies instances when wills which are not certified by notary are equal to certified wills drawn up by citizens sailing on Ukrainian ships that are certified during navigation by captains thereof; and wills made by individuals who are in hospitals, sanatoriums, special homes for disabled or old people that are certified by medical personnel thereof, etc.

Modification and Revocation of Will.

Testator may at any time alter or revoke will. Modification or revocation of will may be done either by submitting petition to respective agency where will is executed or by testator's drawing up new will. New will cancels previous one either entirely or in particular provisions thereof which contradict previous will.

Legitimate Portions of Inheritance.

Civil Code of Ukraine (art. 1241) specifies persons who inherit certain part of property of deceased irrespective of content of will. They are: disabled or minor descendants (children), natural and adopted, disabled spouse, disabled parents or adopters and dependents, who were supported by deceased for not less than five years before his/her death. According to Ukrainian law, these persons inherit not less than two-thirds of value of inheritance which would have passed to them according to legal procedure. Heirs of second level and grandchildren are not subject to this rule even when there are no heirs of first level. Law establishes specific category of heirs, disabled dependents who were supported by testator for not less than a year. Family relationship is of no importance in such cases; on condition that there are other heirs, dependents will inherit on equal terms with heirs of level that is in process of inheritance; on condition that there are no heirs of first or second level dependents will inherit independently. Dependents are entitled to inherit on two conditions: they must be disabled and supported by testator for not less than five years. Women of 55 and older, men of 60 and older, invalids irrespective of fact that they get pension, persons under age 16 and students under 18 are disabled persons. Disabled person is deemed supported if fully supported by testator or got material aid which was main and permanent source of existence for disabled. Fact that dependent got pension or aid from testator (irrespective of fact whether testator was obligated to provide dependent with this aid or did voluntarily) as well as place of residence (whether dependent resided with testator or separately) is of no importance. Civil Code of Ukraine anticipates right of individual to disinherit either according to current law or by will of those persons who committed intentional crime against his/her life or life of any heirs.

Foreign Wills.

Validity of will and other legal actions to inheritance are determined by national law of country of testator's latest residence. Capacity of individual to draw up or revoke will, as well as contracts of inheritance, are specified by national law of testator at day of execution thereof. Will and revocation thereof shall not be deemed invalid as result of nonobservance of its form if it is in conformity with requirements of such documents provided by law of Ukraine. If property to be transferred by will is building located in Ukraine, then form of this will, and capacity of individual to draw up or revoke it, is determined by law of Ukraine.

See also category 9 Documents and Records, topic 9.03 Notaries Public.

13 FAMILY

—Scope —

From Jan. 1, 2004 new Family Code of Ukraine, passed on Jan. 10, 2002, superseded Code of Marriage and Family, passed back in 1969.

13.01 ADOPTION:

Adoption of children is permitted exclusively in their interests and through court's decision.

Children, given up by parents at maternity house, may be adopted upon reaching age of two months under written consent of parents.

Adoption is performed upon application of individual willing to adopt child, in accordance with court procedures.

Any capable adult may adopt at least of 21 years, except when adopter is relative. Age difference between adopter and adoptee must be not less than 15 years if adoptee is child or 18 years if adoptee is adult;.age difference between adopter and child must not be more than 45 years..

Adopters cannot be: (i) Individuals who have restricted capacity; (ii) incapable individuals; (iii) individuals deprived of parental rights; (iv) individuals who once adopted child but that adoption was cancelled or void because of their own fault; (v) individuals registered in dispensary with mental disorder or addiction to drugs; (vi) individuals addicted to alcohol or narcotics; (vii) individuals who do not have permanent place of residence or do not have legal source of regular income; (viii) individuals suffering from diseases registered by Ministry of Health of Ukraine; (ix) unmarried foreign individuals save as foreign individual is child's relative.

Notarized consent of parents is required for adoption.

Such consent is not required if (i) parents are unknown; (ii) parents are deprived of paternity rights; (iii) parents are recognized incapable or missing; (iv) parents (or one of them) have not lived with child for over six months and without serious reasons do not support or show parental interest in child.

Application for adoption by foreign individuals is submitted to State Department on Adoption and Child's Rights Protection. Confidentiality of adoption does not extend to instances of adoption by foreign individuals.

Adoption of child who is citizen of Ukraine is performed if such child has been registered with State Department on Adoption and Child's Rights Protection for not less than one year. In instances when foreign individuals are relatives of such child or if such child suffers from disease included into special list developed by Cabinet of Ministers, adoption is performed without compliance with established periods.

Adopted children reserve their citizenship until they reach age 18.

Adoption arises from date of effectiveness of court decision on adoption.

Priority right for adoption is granted to relatives of adoptee and citizens of countries which participate in international adoption treaties.

In accordance with resolution of Mar. 25, 2006, State Department on Adoption and Child's Rights Protection was established at Ministry of Youth, Education and Sports. It assists in settling orphans in families of Ukrainian and foreign individuals by means of adoption; creates database on children who lost parents; provides necessary information to Ukrainian and foreign individuals about adoptable children; issues permits to custody and care agencies for adoption in established manner of children by foreign individuals.

13.02 ALIMONY:

See topic 13.03 Divorce.

13.03 DIVORCE:

Marriage may be dissolved only by divorce upon petition of one or both parties.

However, both spouses do not have right to commence divorce action without wife's consent during wife's pregnancy and for one year after child's birth, unless one of spouses has committed misbehaviour against other spouse or fatherhood of (future) child is affiliated upon other person.

Divorce may be obtained by court judgment; or by grant of state registration agencies in event of mutual consent and when husband and wife are without minor children.

Disputes concerning jointly owned property or alimony, custody of common child or alimony for disabled spouse are decided by court upon petition of either party. In issuing divorce decree, court takes measures to protect interests of minor children and disabled spouse.

Divorce from persons: who are recognized as absentees; who are recognized as incapable as result of disease or mental defect; and, who are incarcerated for period not less than three years is granted by state registration agencies.

In event when spouse who was incarcerated or trustee of incompetent spouse commences dispute on child custody, or joint property or child support in favor of incompetent spouse, then divorce is issued by court.

Marriage is deemed dissolved upon registration of divorce with state registration agencies.

In event of divorce, parent (who does not have custody of minor child) provides material support for minor children in amount which is determined based on state of health and material state of child and alimony payer and other essential circumstances.

When spouse obligated by court to provide material support refuses to voluntarily do so, other spouse may appeal to court with support petition.

Divorce of Ukrainian citizens from foreign citizens and between foreign citizens is effectuated in accordance with current legislation of Ukraine.

13.04 HUSBAND AND WIFE:

Marriage is regulated by Family Code of Ukraine. Ukrainian law considers marriage as equal and voluntary union of man and woman. Marriage requires voluntary consent of parties who must be at least minimum marriage age: 17 years for women and 18 for men. Only under extenuating circumstances may minimum marriage age be reduced. Marriage may not be contracted by any person already married, between relatives in direct line, between siblings or kin in direct line, between adopter and adoptee, or between disabled as result of mental disease. Law anticipates that parties in marriage are required to know about state of health of each other.

Parties intending to get married personally submit established application form to state registration agency by their free choice, regardless of their place of residence. They must show documents certifying their identity. Party who was previously married must also submit document which confirms termination of previous marriage. After receipt of application, state registration agency appoints date and time of marriage registration taking into account that period between submission of application and state registration of marriage must not be shorter than one month. Under valid circumstances, this period may be shortened. It is permitted to conclude marriage contract which specifies property rights of spouses, procedure of division of property in case of divorce, etc. Marriage contract must not be in contravention of effective legislation.

Fictitious marriage (marriage without intention to create family) is deemed invalid. Marriage is terminated as result of death of spouse or declaration of spouse as deceased or on basis of court judgment. During life of spouses, marriage may be dissolved only by divorce upon petition of one or both parties, prosecutor or trustee of incapable spouse. According to general rule, divorce may be obtained by court judgment; or by grant of state registration agencies in event of mutual consent and when husband and wife are without minor children. Upon registration of divorce, spouse may demand last name which spouse had before marriage.

Property obtained by parties during marriage is joint property. Every spouse has equal rights in joint property irrespective of availability of independent income or salary and amounts thereof. All issues concerning property are decided jointly. Every spouse may require division of property obtained during marriage or within three years after divorce. In addition to joint property, each spouse may own personal property.

Property relations (privities) of man and woman who live as one family but did not register marriage are subject to same regulations and get same protection as those of spouse.

13.05 INFANTS:

Basic provisions of legal standing of infant are specified by Family Code of Ukraine, Law of Ukraine “On State Pension to Families with Infants” Nov. 21, 1992, “Provision on Procedure of Appointing and Payment of State Allowance to Families with Infants” Dec. 27, 2001.

Mutual rights and obligations of parents and infants are based on origin of children certified in established manner. If child was born in registered marriage then his origin is certified by entry on parents' marriage. If parents are not in registered marriage, then origin of child is established by submission of joint application of parents to state registration agencies. It is assumed that husband of child's mother is father of child. Entry on paternity may be subject to dispute. If state registration agencies refuse to recognize person as father of child, paternity may be established by court decision. If person who has registered as mother or father of child did not dispute this fact during his or her life then this fact cannot be subject to dispute.

Paternity may be established upon petition of one of parents as trustee of child, person who supports child or child at reaching age of 18, according to court procedure. Child gets name under parents' consent, patronymic which is granted to child, is father's first name, in case when mother is not in registered marriage with father of child, and there is no recognition of paternity, then patronymic is determined by first name of person who is registered as child's father. Child receives last name of one of parents or their joint last name. Parents have equal rights and duties concerning child even if marriage is dissolved. Parents may be deprived of paternity under certain circumstances.

Parents protect rights and interests of minor children (except for minor children who contracted marriage) and are their legal representatives. Parents are obligated to support their minor and disabled adult children who need material support. If parents refuse to do so, then expenses for material support may be exacted by court procedure. Children may be adopted and trustees for children may be established.

13.06 SUPPORT:

See topic 13.03 Divorce.

14 FOREIGN TRADE AND COMMERCE

14.01 INTRODUCTION

On May 16, 2008, Ukraine became 152d member of World Trade Organization (WTO). Joining WTO will allow Ukraine to develop increased trade and investment ties with other WTO countries, particularly those in European Union, trade with which currently makes up more than 30% of Ukraine's foreign trade. Most of legal acts required to make Ukraine's regulatory regime meet WTO requirements came into force either on Jan. 1, 2008, or upon Ukraine's actual accession to WTO on May 16, 2008.

Perhaps main impact of Ukraine's WTO accession will be liberalization of Ukraine's international trade in goods through reduction and elimination of import and export tariffs and restrictions.

Ukraine's WTO accession is key component of Ukraine's continued integration into global market. It is very important signal for foreign investors and should provide them with greater incentive to invest in Ukraine, particularly in agricultural and services sectors.

CUSTOMS:

Ukraine has exclusive customs jurisdiction over territory of Ukraine including territory of artificial islands, equipment and premises created in maritime zone of Ukraine. Customs border of Ukraine, also referred to as “unified customs territory of Ukraine”, coincides with its state border with exception of boundaries of special customs zones.

Three types of customs duty exist in Ukraine: ad valorem, which is assessed in percent to customs value of commodities and other items which are subject to customs duty; specific, assessed in specific money amount for unit of commodities and other items subject to customs duty; combined, which combines these two types of customs duty.

Common Customs Tariff of Ukraine means systematized list of customs duty rates which are applied to products/goods which are imported to or exported outside customs territory of Ukraine.

Law of Ukraine “On Common Customs Tariff of Ukraine” of Feb. 5, 1992 as amended specifies procedure of formation and application of common customs tariff of Ukraine upon import of products/goods to territory of Ukraine. Duty is paid in national currency of Ukraine and in foreign currency.

Import duty on products/goods is levied upon import thereof into Ukraine. Preferential rates of import duty specified by Common Customs Tariffs apply to products/goods imported from countries which, along with Ukraine, are members of customs alliances, which have specific customs zones with Ukraine, according to specific preferential customs rules pursuant to international agreements in which Ukraine participates, and from developing countries; customs privileges and preferential rates of import duty, specified by Common Customs Tariff of Ukraine, apply to products/goods imported from countries or economic communities, with respect to which Ukraine has policy of facilitating trade and import. Full (general) customs duty rates are applied to other commodities.

Duty is not paid upon import of products/goods imported to special investment and innovation technological parks and acquired according to production sharing agreements. Duty is not paid upon import of pharmaceuticals and its substances, equipment for nonconventional and renewable sources of energy provided goods is not produced in Ukraine and lists of which are approved by Cabinet of Ministers.

Establishment of new and alteration of current import duty rates, envisaged by Customs Tariff of Ukraine is carried out by Verkhovna Rada, with consideration of conclusions of Cabinet of Ministers of Ukraine. Import duty rates for excisable goods are established and changed by Verkhovna Rada of Ukraine.

Imported products/goods are subject not only to customs but to sanitary, veterinary, radiological and ecological control as well. Transit of products/goods through Ukraine's customs border are subject to customs control. Vehicles, commodities and other property of international foreign organizations and representations must be declared by customs offices of Ukraine by submitting application with precise information on commodities and purpose of transfer thereof.

Customs Code of Ukraine determines exemptions for diplomatic and consular representative offices, representatives and members of delegations of foreign countries, international organizations, representations of foreign states. Joint ventures with participation of Ukrainian and foreign legal entities and individuals, foreign enterprises, organizations and representations thereof, foreign employees of these organizations and representations and members of their families may enjoy certain exemptions from import/export duties established by legislation.

According to law there are peculiarities regarding stamping of alcohol beverages and tobacco products in course of import to Ukraine. See category 20 Taxation, topic Taxes.

Rates of customs fees, which are levied for customs legalization of goods, established by Resolution of Cabinet of Ministers “On Rates of Customs Fees” of Jan. 18, 2003.

Export duty is assessed on products/goods upon export thereof outside Ukraine and is paid in national currency. To determine customs duty value, currency of contract is converted into national currency of Ukraine according to current rate of exchange of National Bank of Ukraine as of day of customs declaration submission.

Products/goods, works, services exported by subjects of entrepreneurial activity within export quota limits, and commodities manufactured of imported raw materials, are exempted from export duty.

Subject of entrepreneurial activity may postpone payment of export duty by issuing promissory note to pay export duty at later date, in accordance with Instruction of Ministry of Finance of Ukraine No. 95 as of Nov. 23, 1993 “On approval of procedure of issuance, accounting and submitting for payment of promissory notes while paying export duty”.

Some products/goods may be subject to seasonal import/export duty for period not exceeding four months.

According to procedure of transportation of imported and exported goods through customs border of Ukraine, customs clearance and transit of such goods, subject of entrepreneurial activity must receive permission for import, export and transit of goods and, if required, specification of goods must be attached.

Specific duty applies in order to protect economic interests of Ukraine, Ukrainian manufacturers and in events specified by legislation of Ukraine upon import/export of products/goods, i.e.: specific customs duty; antidumping customs duty; countervailing duty. Specific duty applies: (i) in order to protect Ukrainian manufacturers; (ii) in order to protect national manufacturers, if goods similar to or competitive with domestic are imported to Ukraine in quantities and on conditions, which may cause damage; (iii) in order to prevent violation of national interests by participants of foreign economic activity; (iv) as response to discrimination and/or unfriendly actions of some countries, customs alliances and economic communities thereof, restricting legal rights and interests of Ukrainian business and/or derogating interests of Ukraine. Antidumping duty applies: (i) according to Law “On Protection of National Manufacturers against Dumping Import” in event of import to Ukraine of goods, subject to dumping, which causes damage to national manufacturers; (ii) in event of export out of Ukraine of goods at substantially lower prices than prices of other exports of similar or competitive goods at moment of export, if such export causes damage.

Countervailing duty applies: (i) according to Law “On Protection of National Manufacturers against Subsidized Import” in event of import into Ukraine of goods, subject to subsidized import, which causes damages to national manufacturers; (ii) in event of import into Ukraine of goods, in manufacturing, processing, sale, transportation, consumption and export of which subsidies were used, if such import causes damages.

Specific duties shall apply upon decision on implementation of antidumping, countervailing or specific measures imposed according to Law “On Protection of National Manufacturers against Dumping Import”, Law “On Protection of National Manufacturers against Subsidized Import”, Law “On Specific Measures upon Import to Ukraine”. Preferences to import shall be suspended, terminated or not established, if such import is subject to antidumping, countervailing or specific measures.

Products/goods which are acquired in Ukraine and exported out of Ukraine by citizens of Ukraine, foreign individuals and persons without citizenship are not subject to customs duty, if quantities of such products/goods shall not exceed quantity of goods established by Cabinet of Ministers.

Exemptions.

Following categories of products/goods are exempted from customs duty: vehicles, which regularly deliver international shipments as well as fuel, food and other property necessary for normal operation of vehicle during trip; material and technical equipment as well as fuel, raw material for industrial processing, food and other property, exported from Ukraine to ensure manufacturing activity of Ukrainian-owned and Ukrainian leased enterprises and organizations, fishing ships, production which is later imported to Ukraine; currency of Ukraine, foreign currency and securities; products/goods damaged before crossing border and cannot be used as materials or products/goods; products/goods imported into Ukraine for official and individual use or are exported from Ukraine by organizations and individuals, enjoying right, pursuant to international agreements of Ukraine, to be exempted from paying import and export duty; products/goods originally from Ukraine but reimported to Ukraine without refining or processing as well as foreign products/goods which are reexported from Ukraine without refining and processing; other goods and products/goods specified by Cabinet of Ministers of Ukraine.

Although customs tariffs have now been lowered, domestic producers still have right to protection if import of foreign products causes or threatens to cause them serious economic damage, by means such as customs tariffs, safeguard measures, anti-dumping duties, and countervailing duties. Subject to 30% export duty, 1 Ukrainian enterprises may now export raw materials—including certain metallurgical products, alloyed iron and non-ferrous scrap metal. Export restrictions on precious metals and stones other than gold, silver, and diamonds have also been removed. Over next seven to ten years, Ukraine will gradually reduce its export duties on oilseeds (from 17% to 10%), live cattle (from 50% to 10%) and animal skins (from 30% to 20%).

No customs duty is assessed on sums of money which Ukrainian citizens receive on postal orders from abroad.

If international agreement of Ukraine establishes rules which differ from those of customs legislation of Ukraine, then rules of international agreement will apply.

In 1992 Ukraine joined 1950 Convention on Establishment of Council of Customs Cooperation.

In 2006, Ukraine joined Convention on simplification and harmonization of customs procedures.

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[1] The rate is to be reduced in steps over five years. However, only appropriately licensed metallurgical processing enterprises are allowed to export such products.

14.02 EXCHANGE CONTROL:

See topic 14.03 Foreign Exchange; category 3 Business Regulation and Commerce, topic 3.01 Banks and Banking.

14.03 FOREIGN EXCHANGE:

Currency exchange is governed by Law “On Procedure of Settlements in Foreign Currency”, Sept. 23, 1994 and decree of Cabinet of Ministers “On System of Currency Regulation and Currency Control” which establish regime of currency transactions, determine general principles of currency regulation, authority of state agencies, functions of banks and other financial institutions in regulation of currency transactions, rights and obligations of subjects of currency relations, procedure of currency control, responsibility for violation of currency legislation.

Currency transactions are transactions connected with transfer of ownership right for currency, except for transactions which are conducted between Ukrainian residents in Ukrainian currency; transactions connected with use of currency in international turnover as means of payment, with transfer of debts and other liabilities subject of which is currency; transactions connected with import, export, transfer and shipping of currency to and from Ukraine.

Subjects of currency regulations are divided into two categories: residents and non-residents. “Residents” are individuals (citizens of Ukraine, persons without citizenship) who permanently reside in Ukraine including those who temporarily live abroad; legal entities, subjects of entrepreneurial activity, which do not have status of legal entity (subsidiaries, representative offices, etc.) with their place of business in Ukraine, which operate in Ukraine on basis of Ukraine law; diplomatic, consular, trade and other official representative offices of Ukraine abroad which have immunity and diplomatic privileges as well as subsidiaries and representative offices of enterprises and organizations of Ukraine abroad, which do not undertake entrepreneurial activity. “Nonresidents” are individuals (foreign individuals, citizens of Ukraine, persons without citizenship) who reside out of Ukraine including those who temporarily live in Ukraine; legal entities, subjects of entrepreneurial activity, which do not have status of legal entity (subsidiaries, representative offices, etc.) with principal place of business outside Ukraine, which are established and operate in accordance with laws of foreign state, including legal entities and other subjects of entrepreneurial activity with participation of legal entities and other subjects of entrepreneurial activity of Ukraine; foreign diplomatic, consular, trade and other official representative offices, international organizations and their subsidiaries located in Ukraine which have immunity and diplomatic privileges as well as representative offices of other organizations and firms which do not conduct entrepreneurial activity on basis of Ukrainian law. Residents and nonresidents have right to own currency. Residents have right also to own currency outside Ukraine, except for instances specified by laws. Residents and nonresidents have right to conduct currency transactions taking into consideration restrictions established by legislative enactments on currency. Only method of payment of conditions and obligations without any limitations in Ukraine is currency of Ukraine. If residents buy foreign currency through authorized banks in order to ensure fulfillment of obligations to nonresidents, National Bank of Ukraine is entitled to set time limit within which residents must transfer such amounts into currency accounts of nonresidents.

National Bank of Ukraine issues individual and general licenses for currency transactions, subject to regime of licensing specified in Decree "On System of Currency Regulation and Currency Control". General licenses are issued to commercial banks and other financial and credit institutions of Ukraine for conduct of currency transactions, which do not require individual licenses. Individual licenses are issued to residents and nonresidents to conduct single currency transaction. Individual licenses are required for following transactions: (a) export, transfer and shipping of currency outside Ukraine except for: export, transfer and shipping of foreign currency for amount specified by National Bank of Ukraine by individual residents outside Ukraine, export, transfer and shipping by resident and nonresident individuals of foreign currency earlier legally imported by them outside Ukraine, payments in foreign currency paid by residents outside Ukraine to fulfil commitments to nonresidents as payment for production, services, works, rights of intellectual property and other ownership rights, except payment for currency, payments of interest for credits, income or profit from foreign investment in foreign currency outside Ukraine, export of foreign investment conducted earlier in foreign currency in event of termination of investment activity; (b) import, transfer and shipping of Ukrainian currency outside Ukraine; (c) credits for residents in foreign currency if terms and amounts of such credits do not exceed norms established by Ukrainian law; (d) use of hard currency as means of payment or collateral in Ukraine; (e) transfer of currency at accounts outside Ukraine except: opening by individual—residents of accounts in foreign currency for period they stay abroad, opening by authorized banks of correspondent accounts, opening of accounts in foreign currency by residents; (f) investment abroad, including acquisition of securities, except for securities or other corporate rights, obtained by individual-residents as gift or inheritance.

Receipt of license for currency transaction by one party automatically grants permission to other parties to transaction or third persons thereof, unless otherwise provided by terms and conditions of individual license.

Residents and nonresidents are permitted to settle accounts in foreign currency in following events: (i) payment of customs duty, customs fee, tollage, consular fees, provision of services at territory of customs houses; (ii) purchase of fuels and lubricants, food and provision of services at territory of international ports, airports, railway stations of Ukraine, servicing to foreign vehicles, planes, ships, trains, passengers and members of crews—accounts are settled pursuant to invoice or contract which anticipates payment in cash in hard currency; (iii) payment for hotel services; (iv) payout of foreign currency in cash for credit or debit cards in authorized banks.

Basis for acceptance by authorized banks of foreign currency is copy of invoice and copy of customs declaration which shows that payer legally imported currency into Ukraine.

Resolution of National Bank of Ukraine, dated July 17, 2001 N 275 approved Procedure on Issuance to Banks of Bank Licenses, Written Permits and Licenses to Perform Certain Transactions which specifies bank operations required to be licensed and documents to be submitted to obtain license. New license may be obtained by commercial banks only if charter funds of such banks are fully contributed. License permits following operations: (i) acceptance of deposits from legal entities and individuals; (ii) maintenance of checking accounts of clients; (iii) allocation of debt capital on bank's behalf, on its own conditions and risk. Given fact that bank has obtained bank license, following transactions may be performed without written permit: (i) providing guarantee, surety and other commitments on behalf of third persons; (ii) acquiring right of claim for liabilities' fulfillment against commodities delivered or services provided, taking risk of fulfillment of such claims and acceptance of payments (factoring); (iii) leasing; (iv) storage services and safe-deposit of valuables and documents; (v) issuance, purchase, sale and servicing of cheques, bills of exchange, etc.; (vi) issuance and transactions with bank payment cards; (vii) consulting and information services as to bank transactions.

Residents and nonresident individuals may sell foreign currency to authorized banks and other financial institutions, licensed by National Bank of Ukraine or through such banks as intermediaries to other individual residents.

Individual residents may purchase foreign currency from authorized banks and other financial institutions, licensed by National Bank of Ukraine or through such banks as intermediaries from other individual residents and nonresidents.

Foreign currency is used as means of payment in settling accounts between residents and nonresidents through authorized banks. According to Decree of Cabinet of Ministers “On Regime (System) of Currency Regulation and Currency Control”, nonresident employers are deprived of right to pay wages to employees in foreign currency. Settlement of accounts in Ukrainian currency between residents and nonresidents in trade turnover is permitted on condition that individual licensed by National Bank of Ukraine. Hard currency gains of residents must be transferred from abroad within terms required for payment of contractual debt, but not later than 90 days from time exported production crosses Ukrainian border; or in case of export of works or services, from time act or other document, confirming performance of works or services is signed.

Currency and other property of residents which is outside Ukraine is subject to mandatory declaration to National Bank of Ukraine. Currency transactions of residents and nonresidents are subject to currency control. Obligations to declare currency and other property are also subject to currency control. National Bank of Ukraine is main agency of currency control. Authorized banks control currency transactions which are conducted by residents and nonresidents in these banks. State Tax Inspection conducts financial control of currency transactions of residents and nonresidents in Ukraine. State Committee on Communications controls enforcement of rules for shipping currency outside Ukraine. State Customs Committee of Ukraine controls enforcement of rules for transferring of currency through customs border of Ukraine.

National Bank of Ukraine (``NBU'') has recently substantially amended rules on carrying cash and bank metals 2 across border of Ukraine and rules on sending money by post or international express mail. These amendments took effect on July 27, 2008, when Regulation on Movement of Cash and Bank Metals across Customs Border of Ukraine 3 (``New Regulation'') came into force, replacing previous regulation 4  (``Old Regulation''). Besides permitting larger amounts of cash and bank metals to be brought into and out of Ukraine, New Regulation has lifted many import and export restrictions and established simpler and clearer system of requirements. As result, since July 27, 2008, individuals have been able to carry cash into and out of Ukraine with maximum value of [Euro]10,000 without declaring it, and any larger amount upon submitting written declaration to Ukrainian customs authorities. Official representatives of legal entities can also carry cash across Ukrainian border in any amount after having submitted written declaration. New Regulation is considerable liberalization, since according to Old Regulation, only small amounts (generally, no more than 3,000 USD) could be brought into or out of Ukraine without submitting written declaration to Ukrainian customs authorities. To carry larger amounts (in general, more than 10,000 USD for individuals and 3,000 USD for legal entities), NBU individual license or special permit needed to have been obtained, process which could have taken months. New Regulation has also relaxed requirement to confirm source of money being carried across Ukrainian border. After July 27, 2008, individuals and official representatives of legal entities need only to confirm source if they carry money with value exceeding [Euro]10,000, in which case they need to furnish customs authorities with evidence of bank account withdrawal for funds over [Euro]10,000. New Regulation has increased amount of money individuals can send out of Ukraine by post or by international express mail from 100 USD to [Euro]300. In addition, New Regulation has increased quantity of bank metals individuals may take out of Ukraine from 200 to 500 grams. It has also prohibited any person (except for special representatives of Ukrainian banks) from carrying more than 500 grams of bank metals into Ukraine. With exception of this last prohibition, New Regulation is liberalizing one, which may facilitate cross-border movement of cash and bank metals.

Violation of currency laws is subject to civil, administrative and criminal penalty. Sanctions are applied to residents and nonresidents: if commercial bank conducts currency transactions without general license, such bank will pay penalty in amount equal to value of transaction converted into Ukrainian currency according to official exchange rate as of transaction day and this bank may be excluded from Republican bank register; if commercial bank conducts currency transactions, without individual license, such bank will pay penalty in amount equal to value of transaction converted into Ukrainian currency according to official exchange rate for transaction day; if commercial bank or other financial institution trades currency without license and/or violates terms and conditions of trading currency at interbank currency exchange of Ukraine, such institution will pay penalty in amount equivalent to value of transaction converted into Ukrainian currency according to official exchange rate as of transaction day and this institution may be excluded from State Registry of Banks; if resident does not observe procedure of settling accounts established by law, such resident will pay penalty in amount equivalent to value of transaction converted into Ukrainian currency according to official exchange rate as of transaction day. Penalty is also levied in wrong accounting on currency transactions, and for nonobservance by residents of currency declaration rules. Sanctions and penalties specified by this provision are applied by National Bank of Ukraine or institutions authorized by it. Actions on penalties may be plead in accordance with court procedure.

Footnotes for 14.03

[2] Gold, silver, platinum and metals of the platinum group in the form of bullion, powder and coins.

[3] NBU Resolution No. 148 on The Regulation on Movement of Cash and Bank Metals across the Customs Border of Ukraine dated May 27, 2008.

[4] NBU Resolution No. 283 on The Regulation on Movement of Ukrainian Currency, Foreign Currency, Bank Metals, Payment Documents, Other Banking Documents and Payment Cards across the Customs Border of Ukraine dated July 12, 2000.

14.04 FOREIGN INVESTMENT:

Currently, foreign investment activity in Ukraine is governed primarily by Law “On Foreign Investment Regime”, dated Mar. 19, 1996.

Foreign investors may be: legal entities, established in accordance with legislation other than Ukrainian; individuals with permanent place of residence outside of Ukraine; foreign states, international governmental and nongovernmental organizations; and other subjects of investment activity, that are deemed as such according to legislation of Ukraine.

Foreign investments in Ukraine may be carried out in: any foreign currency which is recognized as such by National Bank of Ukraine; Ukrainian currency in event of reinvestment in object of initial investment or any other objects of investment, provided that profit tax is paid;

acquisition of movables or real property and associated property rights; securities, including corporate rights (ownership of share in charter fund of foreign or Ukrainian legal entity) expressed in foreign currency; monetary claims and right of claim for performance of contractual obligations which are guaranteed by banks and have value in convertible currency; any rights of intellectual property value of which is verified by laws of investor's country or international traditions and expert evaluation in Ukraine; rights for conduct of economic activity including rights for use of natural resources provided in accordance with laws or agreements whose value in convertible currency is verified in accordance with investor's country or international traditions; other valuables not prohibited by law.

Foreign investments in Ukraine may be carried out in following form: as share participation in enterprises which are established together with Ukrainian individuals and legal entities, or acquisition of share of existing enterprises; as establishment of enterprises owned by foreign investors, affiliates and other separate subdivisions of foreign legal entities, or full acquisition of operating enterprises; as acquisition of movable property and real estate not directly prohibited by legislation of Ukraine; as acquisition, independently or with participation of Ukrainian legal entities or individuals, of rights to use land and concessions, to use natural resources in Ukraine; as acquisition of other ownership rights; and, as investments in other forms not directly prohibited by legislation of Ukraine, including forms established without creating legal entities under agreements with subjects of economic activity. Law “On Regime of Foreign Investment” also establishes category of foreign investment in form of contractual joint venture between foreign investors and Ukrainian entities for joint manufacturing or production, cooperation in manufacturing and other forms of joint investment activity that do not require formation of legal entity if such contracts provide for foreign investment in territory of Ukraine. Parties to this type of contractual joint investment activity are required to maintain separate accounting books, records and reporting for operations connected with joint activity, and are entitled to open separate accounts in Ukrainian banks for purpose of making payments and settlements connected with joint activity. Property imported to Ukraine by foreign investor for purpose of carrying out joint investment activity under contract (and not designated for sale or consumption) for period of at least three years is exempt from customs duties. If, however, property is sold prior to expiration of three year period following entry of that property on balance sheet of joint activity, customs duties must be paid. Agreements creating type of contractual joint venture are subject to registration with Ministry of Economy and European Integration.

Enterprise with foreign investment is enterprise of any organizational form created in accordance with Ukrainian legislation, provided that foreign investment in its charter fund constitutes not less than 10%.

State registration of foreign investments is executed by Executive Committee of city, district (in cities), district Councils of People's Deputies within three days from date of actual contribution of investment.

See also topics 14.05 Foreign Trade and Foreign Investment, Investment Protection; category 3 Business Regulation and Commerce, topic State Register (Commercial Register).

Law “On Taxation of Profit of Enterprises”, dated May 22, 1997, provides that enterprises with foreign investment pay profit tax on equal basis with other Ukrainian companies commencing on July 1, 1997. This Law effectively abolishes five year tax profit exemption for enterprises with foreign investments registered before Jan. 1, 1995.

See also topic Foreign Trade and 14.04 Foreign Investment.

14.05 FOREIGN TRADE AND FOREIGN INVESTMENT:

Foreign economic activity is regulated by Laws of Ukraine “On Foreign Economic Activity”, Apr. 16, 1991, as amended, “On Common Tariff”, Feb. 5, 1992; by Decrees of Cabinet of Ministers of Ukraine “On Common Customs Tariff of Ukraine”, Jan. 11, 1993, “On Quotation and Licensing of Export of Goods (Works, Services)”, Jan. 12, 1993, and “On State Guarantees for Foreign Credits, in Ukraine according to International Agreements”, Mar. 17, 1993.

Subjects of foreign economic activity are: (i) individuals—residents of Ukraine, foreign citizens and persons without citizenship who are competent in accordance with Ukrainian legislation and permanently reside in Ukraine; (ii) legal entities that are permanently located in Ukraine (enterprises, organizations and associations of all kinds, including joint-stock and other kinds of economic associations, societies, concerns, consortia, trade houses, intermediary and consulting companies, cooperatives, financing institutions, international associations, organizations, etc.) including legal entities, property and/or assets which are fully owned by foreign subjects of economic activity; (iii) associations of individuals, legal entities, legal entities and individuals, which, in accordance with law of Ukraine, are not legal entities but are permanently located in Ukraine and in accordance with civil law; (iv) structural units of foreign subjects of economic activity, which are, according to Ukrainian law, not legal entities but are permanently located in Ukraine (departments, subsidiaries, etc.); (v) joint ventures with participation of Ukrainian and foreign subjects of economic activity registered and permanently located in Ukraine; and, (vi) other subjects of economic activity as specified by Ukrainian law.

Ukraine, as well as other countries taking part in economic activity in Ukraine, may participate in foreign economic activity represented by government agencies, local government agencies and administration, and act as legal entities.

Subjects of foreign economic activity regardless of forms of ownerships and other characteristics may conduct activities on equal basis.

Individuals may conduct foreign economic activity from moment of acquiring civil competence. Individual permanent residents of Ukraine acquire this right if they are registered as entrepreneurs in accordance with Law of Ukraine “On State Registration of Legal Entities and Individuals - Entrepreneurs”, adopted May 15, 2003. Individual non-permanent residents of Ukraine enjoy this right if they are subjects of economic activity in accordance with law of country of their residence or citizenship. Legal entities have right to conduct foreign economic activity according to founding documents thereof from moment of registration. Foreign economic activity of subjects may be suspended as result of their violation of Ukrainian law as foreign economic activity.

Representative Offices.

Foreign subjects conducting foreign economic activity in Ukraine may open representative offices in Ukraine.

Pursuant to Ukrainian law, before commencing operations, representative office (``RO'') of foreign company must undergo series of mandatory registrations with various Ukrainian State authorities. Registration of RO must undertake certain steps to function validly in Ukraine.

First of all, RO must be registered with Ministry of Economy of Ukraine (``Economy Ministry''). To obtain such registration, foreign company must submit application package with information on proposed RO to Economy Ministry. Under applicable regulations, Economy Ministry must issue registration certificate within 60 days of receipt of application package and payment of filing fee..

Registration certificate issued by Economy Ministry will serve as basis for number of ancillary registrations which RO must obtain, including, without limitation, following: (i) Registration with tax authorities as taxpayer with respect to corporate profits tax (``CPT'') and value added tax (``VAT'').We note that under Ukrainian tax rules, only so—called ``commercial representative offices,'' *i.e.,* representative offices which qualify as permanent establishments

(``PEs'') for Ukrainian CPT purposes, are required to register with tax authorities. Generally, under Ukrainian tax regulations, PE is established if RO of Company in Ukraine constitutes fixed place of business through which business of Company is wholly or partially carried out and activities of RO do not fall under any PE exemptions (*e.g.,* as being of preparatory or auxiliary nature). Thus, if it is contemplated that RO will carry out commercial activities in Ukraine, it is advisable for RO to register as PE with Ukrainian tax authorities. 5 PE is taxed as Ukrainian legal entity for CPT purposes. As matter of practice, representative offices of foreign companies are commonly registered as PEs. Further, if RO carries out commercial activities in Ukraine, it may need to be registered as VAT payer. 6 Again, in practice, commercial representative offices of foreign companies are frequently registered as VAT payers with Ukrainian tax authorities; (ii) registration with State Statistics Committee of Ukraine; (iii) registration with local office of Pension Fund of Ukraine; (iv) registration with local office of State Social Insurance Fund for Temporary Incapacity to Work; (v) registration with local office of State Social Insurance Fund for Unemployment; (vi) registration with local office of State Social Insurance Fund for Industrial Accidents and Work-Related Illnesses; and (vii) registration with customs authorities (if it is contemplated that RO will conduct cross-border transactions, such as, for example, importing equipment from abroad).

In addition to above registrations, RO will also need to sign office lease in Ukraine (this may even be necessary for registration with Economy Ministry). 7 Moreover, RO must also open bank account(s) with Ukrainian bank(s) and obtain official stamp in Ukraine for certifying RO's documents (*e.g.,* regular tax returns and other reporting documents, *etc.*).

According to Ukrainian corporate law, day-to-day operations of RO are managed by Head of RO, whose scope of authority should be determined by power of attorney issued by Company. Ukrainian law does not require that Head of RO in Ukraine be Ukrainian national. Thus, Company may authorize either foreigner or Ukrainian national to be Head of RO and to manage RO in Ukraine.

Further, Ukrainian law does not require that Head of RO be employee of RO or Company. Therefore, Company may either employ Head of RO through RO, or provide for alternative legal arrangement (*e.g.,* using independent contractor or seconding employee of Company to RO). In all cases, according to current Ukrainian legislation, such foreigner would need work permit to act as Head RO in Ukraine. 8

If Company chooses to authorize Ukrainian national to serve as Head of RO, it might be advisable to employ such Ukrainian national at RO. In this case, labor book for Head of RO as well as other employment related documentation may be kept by GDIP, however, RO will be liable for withholding personal income taxes and social security contributions on behalf of Ukrainian national.

Generally, process of closing RO is burdensome and time consuming. By and large, liquidation process for RO could take four to six months (or longer, if RO has had extensive commercial activity and/or depending on speed within which tax authorities can arrange and complete tax audit) and would be carried out in following stages: (i) Adoption by Company of decision to close RO (after this, RO can notify its employees' in writing that they can be terminated in two months as described above); (ii) written notification of Economy Ministry regarding planned liquidation of RO; (iii) notification of following Ukrainian authorities regarding liquidation of RO: tax authorities; state social insurance funds (where the RO was registered); and customs authorities (if registered); (iv) publication of notification regarding liquidation of RO in press; (v) preparation of liquidation balance sheet, conducting liquidation audit by state tax authorities (or other state agencies) and independent audit, and carrying out other liquidation formalities; (vi) destruction of stamp of RO; and (vii) receipt of decision from Economy Ministry canceling state registration of RO.

Pursuant to Ukrainian corporate law, RO would be treated as subdivision of Company, foreign legal entity. Thus, Company, as legal entity, may be held liable for illegal activities which may occur in RO, if any. Moreover, under Ukrainian procedural rules, foreign legal entity may be sued in Ukrainian court if, *inter alia,* such foreign legal entity maintains representative office in Ukraine. Thus, Company can potentially be sued and held liable in Ukraine for activities of RO (or its officials) if cause ever arises (in tort, under contract or otherwise) while Company maintains RO in Ukraine.

Under Ukrainian criminal law, only individuals can be held criminally liable. Thus, theoretically, if Head of RO commits criminal offense in Ukraine (tax related or in any other way related to RO), Company (or RO) cannot be held liable for such actions in Ukraine.

Foreign Economic Agreements; Choice of Law.

Subjects of foreign economic activity may conclude any kinds of international agreements or contracts except those which are directly and exclusively prohibited by Ukrainian laws. Foreign economic agreement may be deemed invalid by court or court of arbitration if it is not in conformity with requirements of Ukrainian or international laws. Form of foreign economic contract is determined by place of making thereof. Agreement made abroad may not be deemed invalid as result of violation of form if it is made in accordance with requirements of Ukrainian laws. Form of agreement regarding real estate located in Ukraine is determined by Ukrainian laws. Rights and obligations of parties of foreign economic agreements or contracts are defined by place of its conclusion unless otherwise agreed by parties. Place of agreement is determined by Ukrainian laws. Rights and obligations of parties of foreign economic agreements or contracts are defined by proper law of contract. Where parties of foreign economic agreements have not made choice of law by consent, then applicable is law that has closest connection to contract. Law that has closest connection to contract is considered to be law of country of residence or location of: seller in sale-purchase agreement; lessee in property lease agreement; licenser in license agreement on application of exclusive or non-exclusive rights; bailee in bailment agreement; consignor in consignment agreement; trustee in trustee agreement; haulage contractor in transportation agreement; expeditor shipper in expedition shipment agreement; insurer in insurance agreement; creditor in credit agreement; donor in gift agreement; guarantee in guarantee agreement; mortgagee in mortgage agreement.

Law of country where intellectual property rights are required to be protected is applied to foreign contracts concerning intellectual property. Law of country where joint venture is established and registered applies to foreign economic agreement on establishment of joint venture. Law of country where auction, tender or exchange is located, applies to foreign economic agreements made at auction, tender or contest. All subjects of foreign economic activity have right to freely choose banking and financial for opening currency accounts for settling their foreign economic activity accounts.

For purpose of specifying details of provisions of Art. 6 of Law “On Foreign Economic Activity”, Law of Ukraine “On International Private Law”, June 23, 2005, Resolution on Form of Foreign Economic Agreements was developed. This Resolution applies in course of executing purchase-sale agreements for goods (services, work) and barter agreements between Ukrainian and foreign subjects of entrepreneurial activity irrespective of ownership forms and businesses.

Such agreements must stipulate following terms: (i) name, number of agreement, date and place of execution; (ii) preamble which specifies full names of parties to agreement, country of registration, and documents used by parties in course of making agreement; (iii) subject matter of agreement, which sets forth actions to be performed by each party; (iv) amount and quality of goods (work, services), and amount of work and period for performance thereof; (v) basic terms of delivery of goods (acceptance of work or services); (vi) price and aggregate value of agreement; (vii) payment terms (manner, procedure and period for financial settlements and guaranteed of performance of mutual obligations); (viii) terms of acceptance of goods (work, services); (ix) packaging and marking; (x) force majeure; (xi) sanctions and complaints; (xii) place of arbitration (country and applicable law); (xiii) legal addresses, mail and payment requisites.

Under agreement additional terms and conditions may apply, such as insurance quality guarantees, terms of attracting agents, transporters, protection of trademarks, procedure of payment of taxes, duties, procedure of introducing changes and amendments to agreement, etc.

Under Ukrainian law, parties to foreign economic contract are permitted to select foreign law as governing law. Under Ukrainian law, parties to foreign economic contract (i.e., contract between Ukrainian party and foreign party) are generally free to choose law other than Ukrainian law to govern contract. For example, Art. 6, Section 9 of Law of Ukraine ``On Foreign Economic Activity'' (``FEAL'') permits parties to foreign economic contract to choose, either at time of execution of contract or by subsequent agreement, law that defines their respective rights and obligations. If, however, parties to foreign economic contract do not choose governing law, FEAL prescribes certain rules for determining applicable law, depending upon subject matter of contract.

If dispute under foreign law governed foreign economic agreement were brought before Ukrainian court, Ukrainian court should recognize that choice of law. Although Ukrainian law is silent on manner in which foreign law should be applied and construed by Ukrainian courts, general legal doctrine indicates that it should be applied and construed in same manner as it would by courts of chosen jurisdiction. In practice, however, there have been virtually no published decisions in which Ukrainian courts have applied foreign law. Given likely unfamiliarity of many Ukrainian courts with most foreign law systems, as well as probable lack of access to most foreign law materials, it is quite possible that Ukrainian court would not interpret chosen law in manner similar to that which court sitting in contract's choice of law country would.

In practical terms, Ukrainian courts should apply foreign law upon proof of relevant provisions of law, but they may refuse to apply foreign law to extent that foreign law is contrary to public policy in Ukraine or applies to procedural matters or to choice of remedies to protect or enforce party's rights in Ukraine. (As general matter, Ukrainian courts [as with most legal systems] will not apply rules of foreign law which contradict public policy or public order of Ukraine.) Notwithstanding foregoing, while Ukrainian court should uphold application of foreign law, we are unaware of extent to which Ukrainian court would, in practice, apply laws of foreign jurisdiction. In particular, Ukrainian court may apply provisions of Ukrainian law to extent that court is unable to determine content of foreign law or that evidence submitted to Ukrainian court with respect to law other than Ukrainian law is not accepted by court.

In addition, please note that under recent Law of Ukraine ``On Private International Law'' (June 23, 2005), parties' choice of foreign law would not limit effect of any mandatory rules of Ukrainian law. Given lack of precedent concerning application of this law, it is difficult to predict how Ukrainian courts will interpret and apply it with respect to what constitutes mandatory rules of Ukrainian law.

List of legal and normative acts of Ukraine which regulate issues of form, procedure of execution and performance of foreign economic agreements (contracts): Civil Code of Ukraine; Law of Ukraine “On Foreign Economic Activity”, Apr. 16, 1991; Law of Ukraine “On Procedure of Settling Accounts in Foreign Currency”, Sept. 23, 1994; Law of Ukraine “On Transactions with Supplied Raw Materials in Foreign Economic Relations”; Decree of Cabinet of Ministers of Ukraine “On System of Currency Regulation and Currency Control”; Decree of President of Ukraine “On Measures regarding Maintenance of Accounts under Agreement made by Ukrainian Subjects of Entrepreneurial Activity”; Decree of President of Ukraine “On Use of International Rules of Interpreting Commercial Terms”; Order of Cabinet of Ministers of Ukraine and National

Bank of Ukraine No. 444 dated June 21, 1995 “On Typical Payment Terms of Foreign Economic Agreements (Contracts) and Typical Forms of Protective Restrictions in Respect of Foreign Economic Agreements (Contracts) which Stipulate Settlement of Accounts on Foreign Currency”.

Ukrainian corporate legislation is in state of continual development as reforms towards European legislative norms take place. Number of draft legislative acts are currently being developed to establish more civilized and investor-friendly rules of corporate governance and protection of shareholder rights. Pending these reforms, foreign investors have tended to structure their corporate relations in Ukraine through shareholders agreements governed by English, Delaware or other non-Ukrainian laws. However, rights of shareholders, including foreign investors, have recently become much more vulnerable in Ukraine since issuance of Recommendations No. 04-5/14 ``Regarding Practice of Application of Legislation During Consideration of Cases Arising Out of Corporate Relations'', by High Commercial Court of Ukraine on Dec. 28, 2007 (``Recommendations''). Recommendations were supposedly issued to harmonize commercial court practice and were circulated to all Ukrainian commercial courts. Yet certain qualifications in Recommendations do not correspond to provisions of number of existing Ukrainian legislative acts, *inter alia,* Laws of Ukraine ``On Private International Law'', ``On Regime of Foreign Investments'', ``On International Commercial Arbitration'', as well as Civil Code of Ukraine and Code of Commercial Procedure.

In particular, and of perhaps greatest concern to foreign investors is last section of Recommendations dealing with corporate governance and protection of shareholder rights. This section states, *inter alia,* that: (i) Shareholders agreements governed by nonUkrainian law are *a priori* null and void; and (ii) shareholders in Ukrainian companies cannot resort to international commercial arbitration in case of disputes. Recommendations are evidently protective for Ukrainian shareholder. There is no doubt that application of Recommendations by Ukrainian courts would discourage Western investors from doing business in Ukraine which would of course not be to benefit of Ukrainian economy. Although observance of Recommendations is not obligatory for Ukrainians commercial courts (they are merely set of general recommendatory guidelines for Ukrainian commercial courts to follow), fact that High Commercial Court of Ukraine, which is one of highest appeal 9 bodies in Ukraine, issued them may cause Ukrainian commercial courts to observe them. As consequence, both Western investors in Ukraine and Ukrainian legal experts have heavily criticized Recommendations and have lobbied Ukrainian state authorities to try to have them withdrawn. It is to be hoped that significant amount of attention drawn to this issue by those lobbying may soon lead to point where High Commercial Court of Ukraine reconsiders its position and withdraws or amends Recommendations. In meantime, Recommendations remain valid and any attempt by Western investor to enforce international arbitration awards arising out of shareholder agreements in Ukraine, in particular, on basis of New York Convention on Recognition and Enforcement of Arbitration Awards of 1958, may prove unsuccessful. However, Western shareholders of Ukrainian companies who have signed shareholder agreements governed by nonUkrainian laws may still hope to enforce those agreements outside Ukraine to extent that those Ukrainian companies hold assets abroad.

Taxation of Foreign Economic Activity.

Taxation of foreign economic activity is based on common rules and principles.

See topics 14.01 Customs, Foreign Investment; category 20 Taxation, topic Taxes.

5 We note that the activities of an individual acting on behalf of the Company in Ukraine may, under certain circumstances, constitute a PE in Ukraine. A PE will be deemed to exist if, under Ukrainian taxation regulations and the Japan-Ukraine double taxation treaty, such individual qualifies as a so-called ``dependent agent'' of the Company, *i.e.* such individual acts on behalf of the Company in Ukraine and has and habitually exercises the authority to conclude contracts in the name of the Company.

6 Generally, VAT registration is mandatory if the aggregate value of the RO's operations subject to VAT has exceeded UAH 300,000 (approximately US $60,000 at the current official exchange rate) at any time during the most recent twelve months.

7 Please note that office lease contracts for a term of one year or longer are subject to notarization and state registration in Ukraine.

8 Previously, heads of a RO were not required to obtain a work permit to perform their work duties in Ukraine. Such norm, however, is currently not in effect, thereby mandating all foreigners to work in Ukraine only upon obtaining a valid work permit.

9 More specifically, the High Commercial Court of Ukraine is a ``cassation'' body—decisions of courts of the lowest level and courts of appeal may be contested there.

14.06 FOREIGN TRADE REGULATIONS:

See topics 14.03 Foreign Exchange, 14.04 Foreign Investment, Foreign Trade and 14.04 Foreign Investment.

14.07 INVESTMENT PROTECTION:

There are five principal Ukrainian government guarantees for protection of foreign investments: (1) reimbursement and compensation of damages to foreign investors (including lost profit and moral damage) caused by actions or passivity of state agencies of Ukraine or its officers, which are in contravention of effective legislation of Ukraine; (2) guarantees in event of termination of investment activity: in this event foreign investor has right to be repaid for its investments in kind or in currency of investment in amount of actual contribution and income from this investment by no later than six months from day of termination of activity thereof; (3) guarantees of transfer of incomes, profits and other amounts connected with foreign investments: foreign investor is guaranteed free transfer of its profits, incomes and other costs in foreign currency, obtained on legal basis in connection with foreign investments abroad after payment of taxes, duties and other indispensable fees; (4) guarantees against forced deductions as well as illegal actions of state authorities and officers thereof: foreign investments in Ukraine shall not be subject to nationalization. Only in special cases such as disaster, natural catastrophes etc. may they be requisitioned with compensation. (5) Guarantees against modifications of legislation: in event new specific law of Ukraine on foreign investments modifies terms and conditions of protection of foreign investments, specific legislation which was in force at moment of registration of investment will apply to foreign investments during ten years from day of effectiveness of this new legislation.

Related enactments: Laws of Ukraine “On Protection of Foreign Investment in Ukraine” of Sept. 10, 1991; and “On Regime of Foreign Investment” of Mar. 19, 1996.

See also topics: Customs, Foreign Investment, Foreign Trade and Foreign Investment; category Taxation, topic Taxes.

15 IMMIGRATION

15.01 ALIENS:

Law of Ukraine “On Legal Status of Foreigners and stateless persons” as of Feb. 4, 1994 defines foreign individuals as those, who have citizenship of foreign states and who are not citizens of Ukraine, and stateless individuals, namely persons who do not belong to citizenship of any state.

Foreigners enjoy rights equal with Ukrainians and have duties equal with Ukrainians unless otherwise provided by Constitution of Ukraine, or relevant laws of Ukraine, or by international agreements of Ukraine.

On territory of Ukraine, foreigners are entitled to conduct investment, foreign economic and other kinds of entrepreneurial activity stipulated by legislation of Ukraine. While conducting these kinds of activities they enjoy rights equal with Ukrainian citizens and fulfill duties equal with Ukrainian citizens unless otherwise provided by Constitution of Ukraine, or relevant laws of Ukraine.

Foreigners, who regularly reside in territory of Ukraine, enjoy medical care equal to that of its citizens. Starting with Oct. 1, 1996, all other foreigners, except for those employed with embassies and consulates of foreign countries, must pay for medical care.

Foreigners enjoy right for social security, including right to receive pension and other forms of social assistance in accordance with effective legislation and international agreements of Ukraine. In case definite period of work is required for pension to be obtained, foreigner's period of work abroad may also be included into his/her total period of work in manner and on grounds established by effective legislation and international agreements of Ukraine.

Foreigners who regularly reside in Ukraine, enjoy right to housing on conditions and in manner, established for citizens of Ukraine, unless otherwise provided by legislation of Ukraine. Foreigners may acquire ownership rights to housing in accordance with legislation of Ukraine. (See also category 19 Property, topic 19.05 Real Property.)

Foreigners who regularly reside in Ukraine, enjoy rights to education equal with Ukrainians. All foreigners pay for education, unless otherwise provided by legislation of Ukraine and other International Agreements of Ukraine.

Foreigners, who permanently reside in Ukraine, shall have right to join, on grounds equal with Ukrainian citizens, legally recognized societies of citizens unless otherwise provided by effective legislation of Ukraine and if not otherwise specified by charters of these societies. Foreigners cannot be members of political parties of Ukraine.

Foreigners may get married and divorced with Ukrainian citizens and other individuals, in accordance with legislation of Ukraine. Foreigners have rights and duties regarding marriage and family relations equal with Ukrainians.

Entering, leaving and transit through territory of Ukraine by foreigners (foreign individuals and persons without citizenship) is regulated by provisions approved by Cabinet of Ministers of Ukraine. Foreigners may enter or leave Ukraine with their effective national passports or other documents substituting such passports. Foreigners entering Ukraine should obtain entrance visas at consular offices, Ukraine's Embassies and consulates abroad unless otherwise provided by legislation of Ukraine or relevant international agreements of Ukraine.

Legal entities or individuals which host foreigners are responsible for due execution of documents regarding right of foreigners to stay in Ukraine, traveling in territory of Ukraine and leaving Ukraine after expiration of specified term of stay. Ukrainian enterprises (institutions, organizations) joint ventures or foreign enterprises (institutions, organizations) duly registered in Ukraine as well as individuals which reside or temporarily stay in Ukraine in connection with studying, training, etc. may host foreigners. Foreign citizens, cruise tourists who travel by sea and river ships, may go ashore without visas.

According to Resolution of Cabinet of Ministers of Ukraine No. 1074 ``On Rules of Entering, Exiting, and Transit of Foreign Citizens and Stateless Individuals through the Territory of Ukraine'', dated Dec. 29, 1995, foreigners and stateless individuals who enter Ukraine temporarily are registered only at border checkpoints. Foreigners and stateless individuals who enter Ukraine for permanent residence, education, internship or employment are registered with internal affairs authorities. After accession of Ukraine to World Trade Organization, foreigners and stateless individuals from member states of WTO can have their passports registered for legal stay in Ukraine for term not exceeding 180 days for year. (See also topic 22.02 WTO Accession.)

Following persons are relieved from registration with Ministry of Internal Affairs: Heads of countries, representatives of governmental delegations and members of families thereof; persons under 18; foreigners who came to Ukraine for not more than 180 days, etc. Following persons are registered with Ministry of Foreign Affairs: employees of diplomatic organizations and services, members of their families and guests thereof; employees of international organizations; foreign journalists and reporters; passports of representatives of state and public organizations and members of their families who came on unofficial visit are registered at request of diplomatic services.

Term of effectiveness for registration of national passport of foreigner is extended pursuant to same procedure as registration. In event of visa entrance to Ukraine, registration of passport is conducted after extension by agency of internal affairs of term of effectiveness for entry visa.

Extension of term of stay on private matters is conducted on basis of written petition of foreigner and under consent of hosts; this term cannot exceed one year. Extension of term of stay may be refused in event of unavailability of resources to pay costs or termination of reasons for stay.

Restrictions on traveling and choice of residential location are permitted if needed for security of Ukraine, safeguard of public order, protection of health, protection of rights and public interests of citizens and other individuals who reside in Ukraine.

Foreigner is not allowed to leave Ukraine in following cases: when foreigner is under juridical or preliminary investigation, or in case action has been already commenced, upon expiration of term of action's conduct; before expiration of term of his punishment or his release from punishment, if foreigner was sentenced by court for crime; when foreigner's departure is in contravention of security interests of Ukraine.

Foreigner's departure from Ukraine can be postponed upon execution on his property in order to resolve liabilities by such foreigner to individuals and legal entities of Ukraine.

In event of visit of foreigner or person without citizenship to Ukraine for purpose of employment, employer must receive permission for such foreigner to be employed in State Center of Employment of Ministry of Labor of Ukraine or upon its permission in centers of employment of Republic of Crimea, oblasts or cities of Kyiv and Sevastopol. (See also topic 15.02 Immigration.)

Foreigners are taxed in accordance with effective legislation and international agreements of Ukraine. (See also category 20 Taxation, topic Taxes.)

Foreigners enjoy all variety of judicial protection of their person, property and lawful rights.

Foreigners as participants of legal process enjoy legal rights equal with Ukrainian citizens. Foreigners may not vote in elections nor be elected to state government bodies and self-government bodies or participate in referenda.

Foreigners, who commit crime, violate their competence or other infringements, bear responsibility on common grounds.

Foreigners are not subject to general military duty; they do not serve in Army of Ukraine or in other army troops, formed in accordance with effective legislation of Ukraine.

If international agreements of Ukraine establish standards other than these which are specified in domestic Ukrainian Law, standards of international agreements will apply.

Resolution "On Rules of Entrance of Foreigners to Ukraine, Their Leaving of Ukraine and Transit through Territory of Ukraine," dated Dec. 29, 1995. Cabinet of Ministers' Resolution No. 2028 "On Approval of Procedure of Work Permits to Foreigners and Stateless Persons", dated Nov. 1, 1999.

See topic 15.02 Immigration.

15.02 IMMIGRATION:

Entry and exit of foreigners, i.e. individuals who have citizenship of foreign countries and who are not citizens of Ukraine and stateless individuals, to/from Ukraine is regulated by multilateral and bilateral treaties entered by Ukraine and regulations of Cabinet of Ministers of Ukraine.

Foreigners, i.e. individuals who have citizenship of foreign countries and who are not citizens of Ukraine and persons without citizenship, may immigrate to Ukraine for permanent residence or employment for definite period of time or may temporarily be in Ukraine. Foreigners may enter Ukraine with valid national passports or documents which substitute for passport, and visa, unless Ukrainian legislation or relevant international treaties provide otherwise.

Foreigners who immigrate for permanent residence or temporary employment in Ukraine must obtain special certificates. Foreigners who are in Ukraine on other legal grounds, are deemed to have entered Ukraine temporarily. They must register passports or documents which substitute for passports and must leave Ukraine after expiration of designated term. When changing residences, they must notify respective agencies of internal affairs where their passports are registered.

Foreigner may obtain status of refugee on grounds and in manner specified by Law of Ukraine "On Refugees", dated June 21, 2001.

Pursuant to Constitution and Law of Ukraine "On Ukrainian Citizenship" foreigners may obtain Ukrainian citizenship.

Individuals who are to be employed by company located in Ukraine are to obtain work permit. Work permit is issued by State Employment Center of Ministry of Labor and Social Policy of Ukraine. Permission to be employed is basis for issuance of visa for entrance into Ukraine by foreigner. Employer must submit application, copy of draft of contract, copy of charter, copy of registration certificate of subject of entrepreneurial activity, copies of foreign employees' diplomas, certificate of paid taxed issued by local tax authority and receipt on payment of fee for application to be considered.

Starting Jan. 1, 2000, all categories of individuals that were previously exempt from requirement of obtaining work permits no longer enjoy such right. Only exemptions remaining are those provided for by international treaties concluded by Ukraine; however, such exemptions do not apply to Ukrainian companies with foreign investment. Following categories of foreigners do not need work permit in Ukraine: foreigners who have certificate for residence in Ukraine; refugees; foreigners hired by investors for positions, specified in product sharing agreements (PSA); employees of foreign mass media accredited for work in Ukraine; representatives of foreign maritime fleet and foreign air companies, who grant services in Ukraine; actors and art workers who work in Ukraine according to their profession; employees of emergency and rescuing services. Permission for employment is issued for term not exceeding one year but this term may be extended; to do so, employer must address State Employment Center of Ministry of Labor and Social Policy of Ukraine one month before expiration of previous term. For taxation purposes, foreigners employed in Ukraine are to obtain tax identification number issued by any local tax authority.

16 INTELLECTUAL PROPERTY

16.01 COPYRIGHT:

Ukraine's current copyright and related rights legislation originates in two sources: first, national legislation—Arts. 41, 54 of Constitution of Ukraine adopted in fifth session of Verkhovna Rada of Ukraine on June 28, 1996; Chapter Four “Intellectual Property Law” of Civil Code of Ukraine of Jan. 16, 2003; Law of Ukraine “On Copyright and Related Rights” of Dec. 23, 1993; Resolution of Cabinet of Ministers of Ukraine No. 72 “On Minimal Rates of Author's Fee (Royalty) for Use of Objects of Copyright and Related Rights” of Jan. 18, 2003; Resolution of Cabinet of Ministers of Ukraine No. 1756 “On State Registration of Copyright and Contracts Related to Author's Right to Artwork” of Dec. 27, 2001; Art. 472 of Civil Code of Ukraine and Art. 176 of Criminal Code of Ukraine, and Book Four “Intellectual Property Law” of Civil Code; and, second, international conventions and agreements to which Ukraine is signatory—“Convention on Copyright of 1952” of Dec. 23, 1993; “Berne Convention for Protection of Literary and Artistic Works (Paris Act of July 24, 1971, as amended on September 28, 1979)” (May 31, 1995); “Agreement on Cooperation in sphere of Protection of Copyright and Related Rights” (Jan. 27, 1995) and WIPO Agreement on Copyright (Sept. 20, 2001).

Works of science, literature, arts, regardless of form, designation, value and means of creation (written and verbal works, musical, choreographic, dramatic works, computer programs, photos, works of art), collections of works, staging treatments, texts of translation for duplication and others are objects of copyright.

Protection is granted to authors, regardless of citizenship and permanent residence, whose works are published for first time, or are not published but exist in some form in Ukraine; authors whose works were published for first time abroad, and within next 30 days were published in Ukraine, regardless of author's citizenship and permanent residence; and, authors who are citizens of Ukraine or permanently reside in Ukraine, regardless of territory where their works were published for first time.

Person whose name is indicated on sample of work made available to public, or on manuscript, or on original work of art, is author, unless otherwise proved in court proceedings.

Ukrainian law draws distinction between author's non-property rights, which may belong to author as natural person only, and copyrights, which may belong to other subjects. Theory that legal person may be author and subject to author's non-property rights is negated.

Authors have following non-property rights: To be recognized as authors and to be identified by name in connection with use of their works; to prohibit use of his/her name, if author wants to remain anonymous; to choose pseudonym (pen name) in connection with use of work; to oppose any distortion, deterioration, any other change or other infringement on work which may be harmful to author's honor and reputation; to promulgate work.

Author has following property rights: exclusive use of work in any form and by any means; to permit or prohibit use of work by any means, including reproduction of works; performance of works in public; demonstration in public; any repeated performance on air or by wares of works by another organization; translation of works; alteration, adaptation, arrangement or other similar changes of works; distribution of works by sale, alienation by other means or through rent or lease or other transfer prior to first sale; rent after first sale, other alienation of copies of audiovisual works, musical works, and works in form of phonogram or readable by machines; import of copies of works, etc.

Exclusive copyrights for works of architecture, bridge building, landscaping also include right to participate in actual execution of project.

Individual holding copyright may ask for reimbursement for any use of his/her work, except that following uses are permitted without consent of author or other person who has copyright, provided that author's name and source are mentioned for use of quotation of published work, including quotations of newspaper and magazine articles in press surveys; free use of quotations in form of short excerpts from performances and works; use of works of literature and art in scope which is proved by purpose of its use; as illustration in publications; in copying sound or depiction of original; reproduction of works for court and administrative proceedings, scope of which is proved by this purpose; performance of musical works in public in course of official or religious ceremonies or funeral, scope of which is proved by nature of such ceremonies.

Compensation may be as onetime payment, or as percent of sale price for each copy, or each use of work, or as combination of such payments.

Copyrights are effective during author's life and 70 years thereafter, except in instances anticipated by Art. 24 of Law “On Copyright and Related Rights”. Author's ownership rights may be inherited, may be transferred (assigned) by author or any other owner to other person. Authors have such rights as right to make works available to public, right to get reimbursement for use of his/her work, etc.

Ukraine is member of World Intellectual Property Organization (WIPO), which is one of 16 specialized agencies of U.N. WIPO, which as of June 30, 2008, had 184 state members, is responsible for promoting protection of intellectual property throughout world through cooperation among States, and for administrating various multilateral treaties dealing with legal and administrative aspects of intellectual property. Ukraine, along with other 163 state members as of June 30, 2008, is party to Berne Convention for Protection of Literary and Artistic Works (1886). Convention rests on following three principles: (i) Works originating in one of contracting States (that is, works by author who is national of such State or works which were first published in such State) must be given same protection in each other contracting State as latter grants to works of its own nationals (principle of “national treatment”); (ii) such protection must be conditional upon compliance with any formalities (principle of “automatic” protection; (iii) such protection is independent of existence of protection in country of origin of work (principle of “independence” of protection). Convention also contains series of provisions determining minimum protection to be granted as well as special provisions available to developing countries which want to make use of them.

Since May 16, 2008, Ukraine is member of World Trade Organization (WTO) and its legislation corresponds with WTO standards of intellectual property protection. Civil Code of Ukraine regulates intellectual property rights in conformity with international and national legislation of Ukraine.

16.02 PATENTS:

Relations which arise in connection with acquisition and realization of ownership right for inventions, useful (applicable) models, industrial samples and trademarks of goods and services and topographies of microchips in Ukraine, are regulated by Laws of Ukraine “On Protection of Rights for Inventions and Utility Models” of Dec. 15, 1993, “On Protection of Rights for Trademarks of Goods and Services” of Dec. 15, 1993, “On Protection of Rights of Topographies of Micro-chips” of Nov. 5, 1997, and by Stockholm edition of Paris Convention of Protection of Industrial Property of 1967 (“Basic Provisions Concerning International Relations in Sphere of Legal Protection of Industrial Property”).

Patent is certificate (verification) which is issued by competent state agency—State Department of Intellectual Property and confirms ownership right on invention, utility model, industrial design(s), topographies of microchips or trademarks of goods/services. Effective term of such certificate is computed from date of application to State Department of Intellectual Property, and is: (i) for invention—20 years; (ii) for useful (applicable) model—ten years; (iii) for industrial design(s)—15 years: (iv) for trademarks of goods/services and topographies of microchips—ten years.

Patentable invention may be either product or means. Patent issued for means of manufacturing product shall extend as well to ultimate product manufactured by such means.

Patentable utility model may be design execution of device.

Patentable industrial design(s) may be form (shape), picture (pattern), color execution, or combination thereof, which are used to distinguish product and to meet aesthetic and ergonomic needs.

Patentable trademark may be verbal, pictorial, volumetrical and other symbols and combinations thereof executed in any color or combination of colors.

Patentable topographies of microchips may be fixed on material carrier geometrical topography of microchip's elements aggregation and their connections.

Legal protection is provided to any invention, utility model, industrial design(s) or trademark which is not in contravention of public interests, principles of humanism and morality, and are competitive, namely: (i) Invention should be new, with level of originality and applicable for industrial needs; (ii) utility model should be new and applicable for industry; (iii) industrial sample should be new and applicable for industry.

Legal protection is provided to topographies of microchips which are registered by State Department of Intellectual Property and topography of microchip should be original.

Right of patent for inventions, utility models, industrial design(s), topographies of microchips is to: inventor (author) or successors thereof. Inventor (author) shall be owner of copyright which is unalienable private right, and protection of which is not limited in term; employer, provided that invention, utility model, industrial design(s) or topography of microchip is created in connection with realization of professional obligation or at employer's order; successor of inventor (author) or employer; first applicant, whose application to Ministry of Education is dated earlier, provided that invention, useful (applicable) model or industrial sample or topography of microchip were created as result of separate work.

Applicant whose date of application to State Department of Intellectual Property is earlier, shall have right to patent.

Individual willing and entitled to obtain patent, shall apply to State Department of Intellectual Property, through patent agent. After that State Department of Intellectual Property shall conduct examination in accordance with provisions established by legislation.

Patent shall be issued within one month after registration by state agencies. If group of persons have collective right to obtain patent, one patent only shall be given to all of them.

Rights and obligations arising from patent, become effective from date of publication of information concerning issuance of patent, provided that annual fee for effectiveness of patent is paid. At request of patent owner, violation of his rights must be terminated, and person who violated such rights shall compensate losses caused to patent owner.

16.03 TRADEMARKS:

Law “On Protection of Rights for Goods and Services Trademarks”, Dec. 15, 1993, governs legal protection of trademarks.

Regulations of Cabinet of Ministers of Ukraine approved by Resolution of Cabinet of Ministers No. 543, May 22, 2001 establishes procedure for payment of fees for actions connected with protection of rights for inventions, utility models, industrial design(s), and trademarks for goods and services.

Trademark is mark by which goods and services of enterprises are distinguished from similar goods and services of other enterprises. Mark is recognized trademark exclusively by State Department of Intellectual Property. Mark presented as trademark must be new, easy to mark goods with and meet requirements of industrial ethics. In particular, trademark may be word, design, ornament, sound signal or combination of such elements. Legal protection is acquired upon registration. Registered mark receives “protection certificate”, which is issued to its owner. Owner of trademark, personally or through patent agent, submits application for registration to State Department of Intellectual Property. Application relates to one mark only and contains: written request on registration of trademark; design of trademark, list of goods and services, subject to trademark compiled in accordance with international classification of goods and services for registration of trademark; name of applicant and its legal address. Applicant must pay fee for application to be submitted. Date of application is date of receipt by State Department of Intellectual Property of such materials as: petition for registration of trademark executed in Ukrainian language in free form; information on applicant and applicant's address executed in Ukrainian language; element, which looks like sign which can be trademark; information on list of goods or services, for which trademark is applied for.

Applicant is given two months to introduce modifications. If discrepancy is not eliminated within this period, application is deemed invalid. Otherwise date of application shall be date of receipt by State Department of Intellectual Property of corrected materials. If, according to results of examination conducted by State Department of Intellectual Property, mark meets all requirements for trademark to be legally protected, then State Department of Intellectual Property forwards to applicant decision on registration of trademark. Otherwise application is rejected. On basis of decision on registration of trademark and on condition registration fee is paid, State Department of Intellectual Property publishes information on issuance of certificate in official bulletin and in state register of trademarks for goods and services. Within one month after state registration State Department of Intellectual Property issues certificate on trademark of goods and services. Certificate is effective within ten years from date of submission of application to State Department of Intellectual Property and may be continued by State Department of Intellectual Property for ten years upon petition of owner, submitted during last year of effectiveness of certificate.

Certificate grants its owner exclusive right to use and dispose trademark at its own discretion, to prohibit other persons and entities to use trademark without owner's permission, except for instances when use of trademark is not deemed as violation of owner's rights under this law. Owner of certificate may transfer ownership right on trademark to any person, who is his/her successor. Owner may make license agreement for use of trademark with any person. Such agreements are effective only upon their registration with State Department of Intellectual Property. If trademark is not used or used insufficiently in Ukraine for three years from date of publishing information on issuance of certificate, any person may appeal to court or court of arbitration with petition to terminate certificate before trademark expires. Certificate is not effective when owner does not timely pay fee for continuation of its effectiveness. Certificate may be terminated on basis of decision of court or court of arbitration when trademark is transformed into mark which is generally used for goods and services of definite kind after date of submission of application. No person, besides owner, has right to reregister trademark within three years after termination of certificate. Any person may register trademark in foreign countries. Pursuant to Madrid Agreement On Registration of Trademarks, application for registration of trademarks in foreign countries is submitted to State Department of Intellectual Property. Applicant or other person under applicant's consent bears expenses for registration of trademark in foreign countries.

Foreigners and persons without citizenship have rights equal to rights of Ukrainian citizens, anticipated by law “On Protection of Rights for Trademarks for Goods and Services”, pursuant to international laws of Ukraine or on basis of principle of reciprocity. Foreigners or persons without citizenship who reside or who are located outside Ukraine realize their rights in relations with State Department of Intellectual Property through representatives, registered in accordance with Instruction on representatives on intellectual property, approved by Cabinet of Ministers of Ukraine.

See also topics 16.01 Copyright, 16.02 Patents.

17 MINERAL, WATER AND FISHING RIGHTS

17.01 MINES AND MINERALS:

Use of resources is regulated by Code of Ukraine on Mineral Resources, Law of Ukraine “On Protection of Environment”, dated June 25, 1991, Mining Law of Ukraine, dated Oct. 6, 1999, Law of Ukraine “On Natural Monopolies”, Apr. 20, 2000 and certain other enactments.

All resources are property of Ukrainian nation. Enterprises, institutions and citizens, including foreign entities, may be users of resources. Citizens have right to freely use these resources for satisfaction of their everyday life demands without ownership of these resources by separate individuals.

Subjects of entrepreneurial activity must obtain special license to: search or prospect for deposits of minerals, develop deposits of minerals, fulfill engineering and prospecting works for objects of energy, develop state communication systems, defense complexes, gas pipes, main pipelines, bridges, tunnels, electric power stations, airports, and city ports in unstable seismic zones. Separate license is issued for every kind of activity. To obtain license application must be submitted. License issued for development of geological prospecting works at mine does not include right to its exploitation, but holder of such license has priority right to obtain license for exploitation.

Issuance of licenses to exploit mines is executed only after expert evaluation of deposits of minerals in established manner and transfer of mine to entrepreneur. License holder has exclusive right to fulfill activity according to license within limits of territory described in license. Other legal entities or individuals may work at this parcel only upon consent of main user and upon receipt of additional license.

18 MORTGAGES

18.01 CHATTEL MORTGAGES:

See topic 18.02 Mortgages.

18.02 MORTGAGES:

Law On Mortgages, June 5, 2003 (became effective on Jan. 1, 2004) establishes that collateral may include traditional real estate, objects located on and integrally related to land, also airplanes, sea and river vessels, "space objects" (i.e., satellites and space craft).

Unfinished Construction.

Mortgage Law establishes that unfinished construction can be mortgaged as mortgage over land plot..

Land.

Under law, land can be mortgaged, although law requires that mortgage of agricultural land must comply with certain legal limitations (Art. 15) established by other legislative acts, primarily by Land Code. Limitations include restrictions, prohibitions and Moratorium (see topic Land 19.02) established by Land Code with respect to alienation of agricultural land and usage in accordance with its designated status (i.e., agricultural land may be used primarily for agricultural purposes). Land Code does not allow foreign individuals or foreign companies to acquire agricultural land; thus, when foreclosing on agricultural land, such land cannot be sold to foreigners. Also limitation is that mortgaged agricultural land may be sold only through public auction, although foreclosure procedures are available for other kinds of mortgaged property. Mortgage Law establishes that agricultural land may be mortgaged after Jan. 1, 2005, non-agricultural land can be mortgaged before that date. Mortgage Law also amends Art. 133 of Land Code previously required all kinds of land to be mortgaged only to banks. Under revised law, only agricultural land must be mortgaged to banks and non-agricultural land can be mortgaged to other financial institutions, other business entities and individuals.

Enterprise.

Civil Code stipulates that enterprise, as integral property complex, is real estate which can be sold, pledged, leased or otherwise used. Enterprise are mortgageable under Mortgage Law.

Establishing Mortgage, Priority and other Formalities.

Establishing Pledge.

Contractual mortgage is established by notarized written agreement, and mortgage agreement becomes effective from moment of its notarization. On Jan. 1, 2004, state duty for notarization was reduced to 0.01% of contractual value of collateral. Mortgage is conditional on underlying secured obligation and is not enforceable where no valid debt exists. Mortgage Law (Art. 18) identifies crucial provisions each mortgage agreement must contain (such information about mortgagor and mortgage holder, detailed description of collateral, description and amount of secured obligation, term of payment, and issuance or non-issuance of mortgage note), and failure to include any such provision in mortgage agreement may cause agreement to be declared null and void by court, however, such agreement does not become null and void automatically. Mortgage agreement may outline in detail steps to be taken upon default with respect to taking custody of collateral and its ultimate sale.

Registration and Priority.

Requirement mortgages must be registered with State registry of mortgages to secure priority before other secured creditors. (Art. 4). Failure to register mortgage does not undermine its validity, mortgages will lose priority against registered mortgage holders. Mortgage Law requires mandatory state registration in following instances: (i) When mortgage note is issued, (ii) when object of unfinished construction is mortgaged, (iii) when mortgaged property will be owned by mortgage holder in future.

Increase of Secured Obligation and Priority.

Mortgage Law requires amount of secured obligation and terms of repayment be included in notice to be filed when registering mortgage with state registry. Also law requires any increase of principal amount of secured obligation or interest also be registered with state registry. (Art. 19). Art. 19 establishes any increase of secured obligation will be subordinated to all mortgages registered before registration of such increase in secured obligation.

Appraisal by licensed appraiser will still be necessary when foreclosing on mortgaged property.

Insurance.

Mortgage Law requires debtor to insure mortgaged property against loss or damage unless such obligation is imposed by mortgage agreement on mortgage holder.

Mortgage Notes.

Mortgage Law introduces security (transferable mortgage-backed security)—mortgage note—which evidences unconditional right of its holder (whether initial mortgage holder or subsequent purchaser of mortgage note) to claim fulfillment of secured obligation by debtor, and in event of default, provides holder with right to foreclose on collateral. Mortgage note issued in respect of money debt only and where provided for in mortgage agreement. Mortgage note issued following execution of mortgage agreement. Upon issuance of mortgage note, only current holder of such security may demand payment of secured obligation and, upon default, foreclose on collateral.

Transferability.

Mortgage note is transferable by mortgage holder by endorsement to any third party. No consent of debtor for such transfer is required. New holder of mortgage note would have same rights as previous mortgage holder. Mortgage holder-seller is required to notify debtor in five days period about transfer of mortgage note and is required to make sure that all subsequent payments under secured obligation must be made to new holder of mortgage note, otherwise holder of mortgage note will have claim against mortgage holder-seller. Debtor can defend against mortgage note holder's demand for payment only if debt is already repaid or mortgage note is issued as result of fraud, coercion or threats aimed against debtor, without knowledge or complicity of holder of mortgage note. Mortgage notes may also be pledged.

Registration.

Issuance of mortgage note must be registered with state registry of mortgages concurrently with registration of mortgage. State registration of transfer of mortgage note not mandatory and left to discretion of new holder.

Form.

Mortgage note issued on special forms which will be introduced by State Securities Commission and Stock Market. Mortgage Law specifies information that must be included on mortgage note, making it negotiable document and providing basis for claim against debtor with respect to secured obligation and collateral.

Cancellation.

Upon fulfillment of secured obligation, mortgage note must be cancelled and returned to debtor of secured obligation. Returned mortgage note must be kept by debtor as evidence of fulfillment of secured obligation.

Mortgage Securities.

Banks and other financial institutions authorized to issue mortgage securities and mortgage bonds. Procedure for issuance and circulation of mortgage certificates will be established by separate Law ``On Mortgage Bonds'' dated Dec. 22, 2005 (as amended).

Law “On Mortgage Crediting, Transactions with Consolidated Mortgaged Debt and Mortgage Certificates”, dated June 19, 2003 (as amended), adopted after Mortgage Law, provides detailed procedures for issuance and circulation of mortgage certificates, but not mortgage bonds. Law of Ukraine “On Mortgage Bonds” stipulates legal basis for issuance and circulation of mortgage bonds and their mortgage warrant, as well as state regulation and control in area thereof.

18.03 PLEDGES:

In Ukraine, Civil Code regulates general issues of pledging property and specific provisions are provided by Law “On Pledges”, of Oct. 2, 1992. In accordance with this Law, pledge is used to secure obligations.

Pledgee (creditor) has right for satisfaction before other creditors in event of pledgor's failure to realize obligations secured by pledge.

Pledge results from agreement or law. Pledge secures any obligations arising from credit (bank credits), purchase-sale, rent, transportation and other agreements.

Pledge may secure potential future obligations, provided that there is agreement of parties specifying amount of such pledge. Real estate in Ukraine is used for pledge. Other property and property rights may also be used as collateral for pledge. Certain property by virtue of specific character, or law may not be pledged. State owned national cultural and historical valuables which are registered or are subject to registration in State Register of National Cultural Property, however, cannot be objects of pledge.

In Ukraine following forms of pledge are distinguished: (1) Hypothecation or pledge of land, real estate under which land and/or property which is object of mortgage is kept by pledgor or third person. Object of hypothecation may be property connected with land, namely buildings, premises, flat, enterprise (its structural subdivision) as entire property complex, and other property regarded by legislation as real property. Under Ukrainian law, object of hypothecation may also be land parcels and perennial plants owned by individuals as private property. (2) Pledge of turnover goods or processing. Objects of such pledge may be raw materials, partially assembled products, assembly parts, etc. (3) Pawn, which means pledge of movables transferred by pledgor for pledgee's ownership. Under agreement between pledgee and pledgor, object of pledge may be left with pledgor, provided it is locked and sealed by pledgee (hard pledge). If object of pledge is of particular importance, pledgor must confirm existence of pledge by marks on object. (4) Pledge of property right means pledge of right for claims on obligations in which pledgor is creditor of present and future claims. (5) Pledge of securities is carried out by transfer of entry (endorsement) and transference of endorsed security to pledgee.

Object of pledge may be substituted only with pledgee's consent.

Collectively (jointly) owned property may be pledged only under consent of all co-owners.

Pledge agreement must be executed in writing. With parties' consent, pledge agreement may be certified by notary where required by one of parties thereto, even though not required by Ukrainian law. Pledge agreement should include name (name, patronymic and last name) and location (residence) of parties thereto, nature of claim secured by pledge, its amount, period of realization of obligations, description, value, location of property, and any other terms. If object of pledge is real estate, transportation means, space object, turnover goods or goods under processing, then agreement must be certified by notary on basis of respective legislative documents. Notary certification of pledge agreement is carried out at place of registration of transportation means and space objects, or at place of location of enterprise (for agreements on turnover goods or under processing).

If parties to pledge agreement fail to meet requirement as to form and notary certification thereof, then agreement is recognized as ineffective.

If object of pledge is not subject to obligatory insurance pursuant to Ukrainian legislation, parties may agree on insuring object of pledge for agreed amount, which, however, shall not exceed market price of such object.

Pledge right arises from date of making pledge agreement, or, if agreement is certified by notary, from date of notary certification thereof. If object of pledge is to be kept by pledgee in accordance with agreement or law, then pledge right arises from date of transfer of object to pledgee. If such transfer was carried out prior to making agreement, then pledge right arises from date of making such agreement.

Pledge of goods may be carried out through transfer of document for disposition of goods (as security) to pledgee. Securities transferred for pledge may be kept in notary office or in bank.

Pledge of moveable property may be registered in State Registry of Encumbrances of Moveable Property as of date of creation of registry. Priority right of pledge right shall arise on date of registration.

Pledgee has right to satisfy fully his claims at expense of pledged property, as of date of actual satisfaction, including interest, recovery of losses (or forfeit) resulting from delay, costs for maintenance of pledged property, and costs for satisfaction of obligations secured by this pledge, unless otherwise provided by pledge agreement.

Imposition of fine against pledged property is carried out under decision of court, arbitration court, and in uncontested manner on basis of instructions of notary agencies.

Pledge of movables regulated by Law “On Pledges” and Civil Code. Pledge of movable property (except for pledge of transport vehicles) need no notarization; simple written form sufficient. It can be registered with State Registry of Encumbrances of Moveable Property. Registration goes only to issues of priority between pledgees.

Pledge of Inventory.

Law “On Pledges” distinguishes pledge of inventory (goods in turnover or in processing) from standard pledge of movables because of specific features: pledged must be defined by generic characteristics, pledgor may transfer such pledged inventory to third party which would obtain such inventory free of pledge. But all new inventory acquired by pledgor, provided that its description matches to description established by pledge agreement, automatically becomes pledged.

Pledge of Shares.

No notarization requirement, it is subject to registration with Registry of Encumbrances. Pledge of shares must be reflected either (for shares issued in documentary form) in share registry maintained by share registrar or (for shares issued in electronic form) in securities account of owners of shares maintained by custodian/depositary, depending in what form shares issued.

Pledge of Property (Contract) Rights.

No notarization requirement. For discussion of registering it with Registry of Encumbrances. In order to make it enforceable, obligor countersigns acknowledgment stating that it agrees with provisions of pledge agreement and that it will follow instructions of pledgee if pledge is enforced.

Pledge of Ownership Interest in Limited Liability Company.

Based on provisions of Law ``On Pledges'', property and property rights may be objects of pledge. At same time, effective Ukrainian law does not expressly state whether corporate rights may be subject to pledge. Based on common business practice and essence of corporate rights, corporate rights are considered specific form of property rights, therefore, such object may be pledged. However, taking into account lack of provisions regulating pledge of corporate rights and enforceability of such type of collateral in Ukrainian security interest law, in order to mitigate possible risks associated with such type of security, due regard should be paid to certain issues. Pledge of corporate rights is one of weakest types of collateral which may be used in securing obligations. Therefore, if decided to use pledge of corporate rights as collateral, it is strongly recommended to use it as additional security, together with mortgage of real estate or pledge of movables as main security instrument under loan agreement.

Pledge of Bank Accounts.

No statutory provisions.

19 PROPERTY

19.01 ABSENTEES:

Personal Representative.

If individuals cannot personally realize their rights and duties for legal or actual reasons, then they may delegate authority to representative as means to realize rights and duties. Legal reasons for incapacity include: individual under age 18; limited or complete incapacity of individual; lack of status of organization as legal entity. Actual reasons include circumstances which hamper individuals to realize their rights and duties: disease, absence in residential area, legal illiteracy, etc.

Representation shall mean agreement made by representative on behalf of represented individual on basis of power of attorney, law or enactment, which creates, alters or terminates civil rights and duties of represented individual. Representative may not conclude agreements on behalf of represented individual neither with respect to himself nor to other individual, whose interests he/she represents simultaneously.

Agreement which, by its character, may be realized only personally, is prohibited to be concluded by representative. Representative cannot sign will nor register marriage on behalf of person represented.

Power of Attorney.

Relations regarding issuance of and acting under power of attorney are regulated by section 17 of Civil Code of Ukraine. Voluntary representation shall be based on agreement or power of attorney (contrary to legal representation which is based on law or enactment). Power of attorney may be issued only by capable individuals and legal entities within limits of their charter rights and obligations. Minor citizens (15-18 years old) may independently issue powers of attorney within limits of rights they may realize personally (disposition by their grants, wages, copyrights). Legal entity may be submitted with power of attorney only to make agreements which are not in contravention of its charter. Power of attorney is executed in written form and may be (i) simple or (ii) notarized. When absentee issues power of attorney for receiving his salary or other payment and his correspondence, then his power of attorney may be certified by officials of organization where trustee is employed or by administration of hospital where trustee is being treated. Powers of attorney to make agreements which are to be notarized and those for proceedings related to state and public organizations must be certified by notary. Following kinds of powers of attorney shall be equivalent to certification by notary: powers of attorney of military personnel and other individuals who are patients in hospitals, sanatoriums and other military medical institutions, which are certified by directors, their deputies and doctors of these institutions; powers of attorney of military personnel, as well as employees, workers, and members of families thereof located at military institutions and organizations, where there are no state notary offices, which are certified by commanders of areas thereof; powers of attorney of individuals who are in penal institutions, which are certified by heads thereof.

Agreement made by individual, who is not authorized to make such agreement or who acts in excess of his/her authority on behalf of other individual, shall create, alter and terminate civil rights and duties of represented individual only in event of future approval of agreement by represented individual.

Term of power of attorney is not limited. Power of attorney certified by state notary, is executed for legal acts outside Ukraine and does not include term of effectiveness thereof, it shall be in force till revocation thereof by individual who issued it.

Power of attorney without indication of date of its issuance shall be deemed invalid.

According to content and extent of authorities which are delegated to representative, following three kinds of powers of attorney may be distinguished: general powers of attorney shall be issued for execution of various agreements and other legal proceedings during certain period of time; special powers of attorney shall be issued for execution of number of similar agreements or other; single powers of attorney shall be granted for execution of definite agreement or other legal proceedings.

Individual who issued power of attorney may at any time revoke it and individual who acts on basis of power of attorney may reject it. (Arts. 237-250, Civil Code of Ukraine).

Individuals may plead their causes personally or through their representatives. Representation as act of civil right must be distinguished from proceeding representation: on civil matters in court, commercial court, or in criminal proceedings.

In event individual, deemed absentee in established manner, must take part in proceedings, trustee appointed for protection and disposition of property of absentee, shall be representative thereof.

If inheritance not adopted and if successor of deceased individual takes part in proceedings, trustee appointed for protection and disposition of inherited property shall be representative of successor.

Before courts, absentee may be represented by licensed attorney, in which case no power of attorney is required, or by any person (even without legal background, except in criminal proceedings) on basis of power of attorney.

Documents which confirm powers of representatives shall be power of attorney (for civil and commercial proceedings) or oral statement of trusted included in protocol of court proceedings and order of bar association (for licensed attorneys in criminal proceedings only).

Following individuals cannot be representatives in court: individuals acting in same court hearing as: secretary of court hearing, interpreter, expert, consultant, witness; judges, investigators and prosecutors except where they act as parents and trustees (i.e. legal representatives) or representatives of respective state body-party to case or involved as third party to case. (Art. 41 of Civil Procedure Code of Ukraine).

19.02 LAND:

In Ukraine land relations are governed by Land Code of Ukraine, adopted on Oct. 25, 2001. Form of state act for right of perpetual use of land is specified by respective Resolution of Cabinet of Ministers of Ukraine No. 449, dated Apr. 2, 2002.

Ownership of land exists in following forms: state, municipal, private.

According to current Code land is treated as commodity which may be sold, purchased, exchanged, donated or pledged subject to certain restrictions provided by law. Under old Code (repealed) it was not possible to acquire land for commercial purposes and legal entities were only allowed to use it, not own it.

Citizens of Ukraine acquire title to land parcels under: (a) Acquisition under sale-purchase agreement, donation, exchange contract, or another agreement governed by civil law; (b) free of charge conveyance of state and municipal lands; (c) privatization of land parcels, which had earlier been allocated for use by such individuals; (d) acceptance of inheritance; (e) allotment of land share in kind due to such individuals.

Foreigners (individuals and legal entities) and stateless individuals may purchase non-agricultural land parcels within boundaries of residential areas in connection with purchase of real estate located on such land parcels, as well as for construction of new real estate objects connected with business activity of such purchaser in Ukraine; foreigners (individuals and legal entities) and stateless individuals may purchase non-agricultural land parcels outside residential areas only in connection with purchase of real estate located on such land parcels. Title to land parcels may be acquired by foreigners and stateless individuals, in case of: (a) Acquisition by virtue under sale-purchase agreement, donation, exchange contract, or another agreement governed by civil law; (b) buy-out of land parcels, on which real estate objects owned by such individuals are located; (c) acceptance of inheritance. However, agricultural lands accepted as inheritance by foreigners and stateless individuals must be alienated within one year.

Current Ukrainian legislation forbids sale of agricultural land in Ukraine to any person. Similarly, it is forbidden to change designated purpose of agricultural land parcels. As of today, there is so-called moratorium on alienation of agricultural land. Until Law on State Land Cadastre and Law on Land Market are adopted, following actions are prohibited: (i) To contribute land parcels 10 (pai) into share capital of companies; (ii) sale and purchase of agricultural land plots that are in state and municipal ownership, except for their reacquisition by government for public needs; (iii) purchase, sale or any other means of alienation, as well as any change in special purpose 11 of: land plots, which are used for purpose of commercial agricultural production (``*tovarne silskohospodarske vyrobnytstvo*''), owned by citizens and legal entities; land plots allocated *de facto* (i.e., with certain boundaries on territory) to owners of land parcels with purpose of individual farming activities; land parcels. Exceptions are made only for transmission by inheritance, exchange of land plot into another land plot in accordance with law, or reacquisition of land plots by government for public needs. As specified above, purchase, sale or any other means of alienation of land plots and land parcels would only be possible after Law on State Land Cadastre and Law on Land Market are adopted. Agreements concluded in violation of above limitations are invalid from date of such agreements (registration).

Title to permanent use of land parcel shall be understood as right to possess and use land parcel owned by state or community without specification of time period. Title to permanent use of land parcel from among state or municipal lands shall only be granted to state or municipal enterprises, institutions and organizations.

One of most discussed innovations is set out in Art. 21, Section 4 of Law ``On Alterations to Some Legislative Acts of Ukraine'' of June 3, 2008. Newly adopted provision provides for new procedure for sale and lease communally owned and state owned land. Thus, now any land in state or communal ownership can be alienated or leased only via by land auction. However, required leasehold cannot be alienated by its lessee to any third party. New procedure is not applicable to leasing those land plots where real estate objects belonging to prospective owners or tenants are located; land plots for communal facilities, for building of public welfare, and affordable housing, land plots for resource development and special water utilization according to special approvals (licenses) obtained and for use by religious organizations legalized in Ukraine.

On Apr. 17, 2008, Resolution of Cabinet of Ministers of Ukraine No. 394 was adopted, introducing procedure for conducting land auctions. President of Ukraine via this Order of Apr. 17, 2008 suspended this Resolution and constitutional inquiry on its constitutionality has been submitted to Constitutional Court of Ukraine. In fact, Resolution No. 394 is still not in force. Precise procedure for conducting land auctions is to be established by legislation. Situation is vague. It is obvious that period of time will be needed to launch process in proper way.

Right to lease land parcel is paid possession and use of land parcel, under contract, for term, which is required by lessee to exercise entrepreneurial and other activities. Land parcels may be leased to citizens and legal entities of Ukraine, foreigners and stateless individuals, foreign legal entities, international associations and organizations, as well as foreign states. Land parcel may be leased for short term (up to five years) and for long term (up to 50 years). Subject to lessor's consent, leased land parcel or part thereof may be granted by lessee for possession and use by another party (sublease).

Right of land servitude is right of land owner or land user to use another's land parcel(s) that is owned or used by another person free of charge or for payment subject to certain restrictions. Land servitudes may be permanent and temporary. Establishment of land servitude must not result in deprivation of owner of land parcel, subjected to land servitude, of right to possess, use and administer such land parcel. Land servitude must be implemented in way, which is least burdensome for owner of land parcel, subjected to servitude.

Owners or users of land parcels may require establishing following land servitudes: (a) right of passage afoot or on bicycle; (b) right of passage on transport facility on available road; (c) right to install and operate power transmission and communication lines, pipelines, other service lines; (d) right to lay water line from another's natural water reservoir that is situated on land plot that is owned or used by another person or via another's land parcel to land parcel; (e) right to discharge water from land parcel to or via neighboring land parcel; (f) right to take in water from natural water reservoir located on neighboring land parcel and right to pass to natural water reservoir; (g) right to water cattle from natural water reservoir located on neighboring land parcel and right to drive cattle to natural water reservoir; (h) right to drive cattle on available road; (i) right to install scaffolding and store construction materials for refurbishment of buildings and structures; (j) other land servitudes.

Footnotes for 19.02

10 Land parcel here is a translation of *zemelna chastka (pai),* which means a parcel of land, which is transferred into the collective ownership of a collective agricultural enterprise (cooperative, company), and which has a price and measured in the conditional (*umovnykh*) cadastral hectares, and which constitutes an equal participation share of the enterprise member in the land-parcels pool of such enterprise, and which can be allotted *de facto* (with certain boundaries on the territory) on demand of such enterprise member, pursuant to a procedure established by applicable law. After such allotment is performed, the land parcel becomes a land plot. The analysis of this definition provides that a land parcel means a hypothetical right of a member of an agricultural enterprise to receive a land plot *de facto*, the size of which constitutes an equal share of the pool of land parcels divided into a number of members of a respective agricultural enterprise. The pool of land parcels is the territory *de facto* granted to such agricultural enterprise.

11 This means that during the moratorium, privately-owned agricultural land cannot be rezoned for any non-agricultural use, including any commercial use.

19.03 POWERS OF ATTORNEY:

Ukrainian agency law recognizes three participants (i) agent, (ii) principal, and (iii) third persons.

Principal is individual or legal entity, on whose behalf agent takes legally significant actions. Principal may be (i) any individual from moment of birth, or (ii) any legal entity from date of commencement of activity thereof.

Agent is individual or legal entity authorized to perform legally significant actions on behalf of and in interests of principal. Individuals acting as agents are fully competent, and have no statutory restrictions. Legal entities may represent individuals or other legal entities, provided such activity is in accordance with articles of incorporation thereof.

Third persons are individuals or legal entities with which principal's rights and obligations are established, modified or terminated as result of agent's actions.

Authority of agent may be based on power of attorney, law or regulation. Agent cannot conclude agreements on behalf of principal either with himself, or with any other person simultaneously represented by such agent.

Any agreement made on behalf of principal by agent unauthorized to make such agreement, or exceeding its authority, creates, modifies or terminates civil rights and obligations of principal only if such agreement is approved by such principal.

Agent must personally carry out appropriate actions. Agent may delegate carrying out of its actions on behalf of principal to another person only if authorized by principal, or if forced by circumstances to do so in order to protect interests of principal.

Agent, who delegated his authority to another individual, is obligated to notify principal, and provide principal with all necessary information regarding individual to whom authority was delegated. Failure to carry out this obligation will result in agent's continuing responsibility for actions of individual to whom such authority was delegated.

Power of attorney shall be terminated at: expiration of its effective term; cancellation of power of attorney by principal; rejection by agent of power of attorney; termination of legal entity on behalf of whom power of attorney was issued; termination of legal entity to which power of attorney was issued; death of principal who issued power of attorney, recognition of such person as incompetent or with restricted competence or disappearance thereof; death of person for whom power of attorney was issued, recognition of such person as incompetent or with restricted competence or disappearance thereof.

Power of attorney may at any time be canceled by principal, or rejected by agent to whom it was issued.

19.04 PRIVATIZATION:

Legal, economic and organizational bases for privatization of state owned property and, property owned by Autonomous Republic Crimea are regulated by Law "On Privatization of State Property" of Mar. 4, 1992; Law "On Privatization of Small State Enterprises (Small Privatization)" of Mar. 6, 1992; Law "On Lease of Property of State Enterprises and Organizations", Apr. 10, 1992; Law of Ukraine "On State Privatization Program" of May 18, 2000, which approved state privatization program for 2000-2002 is still effective (however respective changes were introduced annually); Law "On Privatization Certificates", Mar. 6, 1992 and other laws and enactments of President of Ukraine, Verkhovna Rada (Parliament) and Cabinet of Ministers and other legislative enactments.

Privatization Objects, Purchasers, and Supervision Agencies.

State owned objects which are subject to privatization include: (a) Property of enterprises, sections or other subdivisions which divide into independent self-efficient enterprises and form integral property complexes in cases if such dissociation will not affect production facility of enterprise such part thereof is dissociating; (b) uncompleted construction; (c) state owned shares (quotas) in property of economic and other associations and (d) land plots on which objects of privatization are located.

Following objects of state property cannot be privatized: (i) Objects essential for performance of state functions, its defense, its economic independence, and objects of national ownership of Ukrainian people; (ii) objects of social development, maintenance and improvement of cultural potential, spiritual values; (iii) objects over which state control ensures protection of individuals against effect of uncontrolled manufacturing, use or distribution of dangerous products, services of facilities; (iv) objects which provide for vital functions of state as whole.

Enterprises of Military Force of Ukraine may be privatized, provided that 51% of their shares remain state ownership.

Under agreement with Cabinet of Ministers of Ukraine one can privatize property complexes of: (i) Enterprises which hold monopoly in market of certain goods; (ii) enterprises of military-industrial complex subject to conversion; (iii) enterprises privatized with attraction of foreign investments under international agreements of Ukraine; (iv) other objects defined by Parliament of Ukraine.

List of objects (enterprises) which are not subject to privatization is approved by Parliament at submission of Cabinet of Ministers. List is subject to permanent changes and modifications.

Governmental policy in area of privatization shall be carried out by State Property Fund of Ukraine, its regional branches and representative offices in districts and cities.

Purchasers of privatization objects may be Ukrainian citizens, foreigners, individuals without citizenship, legal entities, incorporated in Ukraine (apart from: (i) Legal entities, 25 or more percent of which is owned by State of Ukraine; (ii) state bodies of Ukraine), and legal entities incorporated outside of Ukraine.

Incentives for privatization may come from State Property Fund, its regional branches and representative offices in districts and cities.

Decisions on privatization of any object shall be made by State Property Fund or appropriate state privatization agency.

Ways of Privatization.

Privatization of state property may be performed by one of following means: (a) Selling shares (interests) held by state in business companies at auction, by contest, at stock exchange and by other means which provide for publicity and competition of purchasers; (b) selling integral property complexes of state enterprises on competitive basis which are privatized, or majority interest of open joint stock companies; (c) buyout of property of state enterprise in accordance with alternative privatization plan.

In cases of privatization of property of state enterprise as integral property complex by means of its purchase at auction appropriate purchase-sale agreement between purchaser and seller must be concluded. Such agreement should include business plan or privatization plan commitments of parties, which are established by terms and condition of auction, contest or buyout; in regard: improvement of technical equipment of enterprise; maintaining of production facilities and production specifics of enterprise; maintaining previous number of employees, improving their working conditions; compliance with competition law; finishing construction of residential buildings; investing in monetary form only, defining amount and terms of investing; repayment of debt and other obligations envisaged by law. Purchase-sale agreement must be legalized. Ownership for privatization object is transferred from moment of complete payment for purchased object. Owners of privatized objects shall have priority right for long-term lease of land parcels occupied by such objects with further rights of buy out of these parcels according to effective legislation of Ukraine, provided it is not directly prohibited by Cabinet of Ministers of Ukraine or respective local council.

Privatization of Land Plots.

State privatization bodies subject to order, established by Cabinet of Ministers of Ukraine shall sell land plots that are owned by state, where objects (buildings) of privatization are located. Alienation of land plots owned by state shall be performed under sale-purchase agreement subject to relevant provisions of Land Code of Ukraine.

Financial Conditions in Privatization.

State property may be acquired with purchasers' own and/or borrowed funds. In process of privatization, foreign investors, purchasers and enterprises with foreign investments shall pay value of state property in national currency.

Small Privatization.

Privatization of property of small enterprises (small privatization) shall be carried out in compliance with Law of Ukraine “On Privatization of Small State Enterprises (small privatization)”, Mar. 6, 1992. This Law shall apply to industrial sectors which are subject to first priority privatization: processing industry, manufacturing of construction materials, light and food industries, construction, some types of transport, trade and meal service facilities, consumer services, housing maintenance and repair industries. Small privatization is carried out by means of buyout, sale at auction or by tender.

Privatization in Agro-Industrial Complex.

Law of Ukraine “On Specifics of Privatization of Property in Agro-Industrial Complex”, dated July 10, 1996 establishes details of legal regulation of privatization of agro-industrial complex. Law specifies procedure for privatization of property of enterprises which process agricultural raw materials, state enterprises, agricultural enterprises established on basis of collective farms, state farms and experimental enterprises, fishery and forestry enterprises. Resolution of Verkhovna Rada “On Procedure of Putting into Effect of Law of Ukraine On Specifics of Privatization of Property in Agro-Industrial Complex”, dated July 10, 1996, approves list of enterprises and organizations of agro-industrial complex which may privatize their property with approval of Cabinet of Ministers of Ukraine.

Objects of state land and housing funds shall be privatized according to specific procedure—see topic 19.05 Real Property.

19.05 REAL PROPERTY:

“Real estate” consists of land, buildings located on land, or parts of such buildings.

Land.

Ukraine has no specific law concerning real estate. Land rights are established by Land Code of Ukraine as of Oct. 25, 2001 as amended.

In accordance with Land Code, there are three forms of land ownership: (i) state, (ii) municipal, and (iii) private. These three forms are equal under law.

According to Land Code, land is to be treated as commodity, which may be sold, purchased, exchanged, donated or pledged for various commercial purposes subject to conditions and restrictions provided by it. Also, small forests and water ponds (five hectares and three hectares, respectively) may be privately owned. Bigger forests and ponds, as well as islands and beaches may only be leased. Lands in Ukraine are divided into following major categories: (i) Agricultural lands; (ii) lands for residential construction; (iii) lands of natural reserve fund; (iv) lands for recreation and rehabilitation; (v) cultural and historic lands; (vi) forest lands; (vii) lands occupied by water; (viii) lands for industry, transportations, telecommunications, energy, defense or of different type.

Land Code now simplifies procedure for change of designation of land plots. In particular, agency dealing with issues of changing designation of land plots, previously vested with Parliament, is now shifted to local Councils and state authorities of executive power.

As mentioned in topic 19.02 Land, Land Code establishes moratorium on sale of agricultural land plots in Ukraine, as well as change of designated purpose of land plots of agricultural land until Law on State Land Cadastre and Law on Land Market are adopted. Also, until Jan. 1, 2015 area of agricultural land plot that may be privately owned may not exceed 100 hectares. Moreover, until Jan. 1, 2008, it is forbidden to contribute land ownership and use rights to charter capital of legal entities.

Moratorium for sale of agricultural land was extended according to law of Ukraine “On Amending Laws of Ukraine” dated June 1, 2008. According to said law, agricultural land subject to moratorium is set to go on market if certain laws, establishing rules for circulation of state and municipal lands and lands used for agricultural production, are adopted by Ukrainian parliament. Supporters of moratorium's extension state that it is necessary to prevent 33 million hectares of agricultural land in Ukraine from falling into hands of “unscrupulous” persons through murky deals, as virtual non-existence of rules that regulate land market leave current holders of agricultural land unprotected. Opponents of extension argue that vast amounts of agricultural land have already shifted into private hands through various illicit mechanisms. They also accuse certain politicians, who allegedly are themselves large land owners, of hypocrisy and of attempting to impede development of free market for land.

We should notice that simplified procedure is provided for acquisition of land plots that are currently in use as process of actual allocation of such land plots is already completed. On other hand, unallocated land plots which are owned by state may be acquired by prospective owner only after full process of land plot allocation is completed. Sale of such land plots should be carried out within 30 days after date that plan of land allocation is issued by specialized land use organizations. As for individuals, they have right to privatize land plots, which are currently used by them free of charge.

Right to privatize agricultural land plots can only be granted for purposes of producing of agricultural goods to: (i) Citizens of Ukraine with degree or work experience in field of agriculture or that deal with agricultural goods production; and (ii) legal entities incorporated in Ukraine that deal with agricultural goods production.

Land Code also sets number of legal requirements for procedure of conducting public auctions for sale of land. Such sales may be conducted in form of open auction or as sealed tender. Land plot owner is entitled to choose actual form of sale for land plot.

Another innovation in field of land law is right to pledge (mortgage) privately owned land. However, only Ukrainian banks may act as pledgees, and then only if they comply with requirements established by law. Thus, land plots may not be used as collateral to secure performance of obligations to nonbanking entities. Land owners and land users are required to use land in accordance with its designated purpose, to comply with environmental protection laws, to regularly provide information on land plot's condition to state authorities, etc. Failure to use land plots in accordance with their designated purpose and failure to correct violations of environmental protection rules may be ground for termination of land use and, in certain cases, of land ownership rights. However, confiscation of land plot from its owner is possible only on basis of court decision. In certain cases, land plot may be bought out by relevant state and local authorities for public purposes, provided that such condemnation is agreed to by its owner and proper compensation is provided (similar to right of eminent domain in western jurisdictions). If owner does not agree to such condemnation or price, issue is to be resolved in court.

After Jan. 1, 2002, potential investor is allowed to acquire nonagricultural land, with exception of beaches, roads and strategically important state owned lands such as lands of railways, air transport, pipelines, atomic energy, space system, etc. Nonagricultural land parcels may be acquired by any individual and any type of legal entity. There are no limitations imposed on ownership by nonresidents of nonagricultural land plots, other than those imposed on Ukrainian residents. Accordingly, foreign legal entities are allowed to own land plots within city limits in case of acquisition of real estate objects and for construction of structures in connection with carrying out their business activity in Ukraine as well as land plots outside of city limits in case of acquisition of real estate structures situated on such land plots. Foreign legal entities and individuals are entitled to participate in privatization of land as well. However, sales of state owned land plots to foreign entities should be carried out by Cabinet of Ministers of Ukraine and should be agreed to by Parliament. Sale of municipal land plots to foreign entities should be carried out by appropriate local Council and agreed to by Cabinet of Ministers. Foreign countries willing to acquire state owned land plots and municipal land plots, for example, with purposes of placing their embassies and consulates, will need to file application with Cabinet of Ministers.

Agricultural land may also be held in private ownership by legal entities and individuals, with exception of foreign legal entities and individuals. However, sale or other alienation of such land, with exception of exchange or inheritance, might be allowed only after Jan. 1, 2008. Agricultural land plots inherited by foreign legal entities and individuals are subject to alienation within one year following inheritance.

Land parcel may be in joint ownership with identification of share of each party of joint ownership (shared joint title) or without identification of shares of each party of joint ownership (joint title in common). Individuals and legal entities may be subjects of joint title to land. District and oblast councils may be subjects of title to land parcels of territorial communities. Joint title to land shall be certified by state certificate of title to land. Shared joint title to land parcel shall occur in case of: (i) voluntary merger of land parcels by their owners; (ii) acquisition of title to land parcel by two or more individuals under civil agreements; (iii) acceptance of inheritance of land parcel by two or more individuals; (iv) under court ruling.

Title to permanent use of land parcel shall be understood as right to possess and use land parcel owned by state or community without specification of time period. Title to permanent use of land parcel from among state or municipal lands shall only be granted to state or municipal enterprises, institutions and organizations and non-governmental organizations of disabled, their associations, enterprises, institutions and organizations where they work.

Right to lease land parcel shall be understood as paid possession and use of land parcel, under contract, for term, which is required by lessee to exercise entrepreneurial and other activities. Land parcels may be leased to citizens and legal entities of Ukraine, foreigners and stateless individuals, foreign legal entities, international associations and organizations, as well as foreign states. Land parcel may be leased for short term (up to five years) and for long term (up to 50 years). Subject to lessor's consent, leased land parcel or part thereof may be granted by lessee for possession and use by another party (sublease).

Citizens of Ukraine shall be entitled to free transfer to them of parcels of state or municipal lands of following size: (i) for individual agricultural household—not in excess of 2.0 hectares; (ii) for gardening—not in excess of 0.12 hectares; (iii) for construction and maintenance of house, household buildings and premises (backyard) in rural settlements—not in excess of 0.25 hectares, in villages—not in excess of 0.15 hectares; in cities—not in excess of 0.10 hectares; (iv) for construction of individual cottage—not in excess of 0.10 hectares; (v) for construction of individual garage—not in excess of 0.01 hectares. Enterprises, institutions and organizations conducting geological surveying, exploration, geodetic and other prospecting activities may perform such activities under agreement with owner of land or in concurrence with land user. Right to land parcel may be restricted by legislation or contract by way of specifying: (i) Prohibition to sell or alienate it otherwise to certain parties during specified period; (ii) prohibition to lease (sub-lease) land parcel; (iii) prerogative purchase right in case of sale thereof; (iv) condition for inheritance to be accepted only by specified heir; (v) condition to start and complete construction at or development of land parcel within specified time frames; (vi) prohibition to exercise certain activities; (vii) prohibition to change designated purpose of land parcel, landscape, and appearance of real estate; (viii) condition to undertake construction project, to repair or maintain road or section thereof; (ix) condition to meet environmental protection requirements or to perform specified work; (x) condition to grant right to hunt, fish, gather wild plants on land parcel during specified period and according to established procedure; (xi) other obligations, restrictions or conditions.

Right for privatization of uncompleted construction and land allocated (rented) for such purpose, and gasoline stations and attached parcels is granted to: citizens of Ukraine, foreign citizens, persons without citizenship; any legal entity registered in Ukraine (provided participation interest of its charter capital owned by state [if any] does not exceed 25%); and any legal entity of any foreign country.

Decision on privatization of uncompleted construction and gasoline stations is made by State Property Fund of Ukraine, privatization agencies of Republic of Crimea and other administrative-territorial units. These decisions are made at same time as decisions on privatization (rent) of land parcels. Privatization of uncompleted construction and gasoline stations is carried out through sale at auctions or on competitive basis. Privatization of uncompleted construction can also be made through transferring such objects into charter fund of state-owned enterprise with further privatization of enterprise or shares/participation interest thereof.

Purchaser's land ownership right of uncompleted construction or gasoline station is effective from date of issuance of State Ownership Act by local body of State Committee of Ukraine on Land Resources. Appropriate entry shall be made in land-cadastre documents.

Presidential Decree “On Urgent Measures for Expediting Land Reform in Area of Agricultural Production” No. 666/94 of Nov. 10, 1994 regulated privatization of land parcels which are used agricultural enterprises and organizations. Currently, only Art. 3 of this Decree is still effective.

Law of Ukraine “On Specifics of Privatization of Objects of Uncompleted Construction” of Sept. 14, 2000, permits privatization of land parcels which were allocated in established manner for construction together with objects of uncompleted construction. Such objects of uncompleted construction can be privatized by: (i) Citizens of Ukraine, foreigners, stateless persons; (ii) legal entities, registered in Ukraine; (iii) legal entities registered in foreign states. Following entities cannot participate in privatization: (i) legal entities, in charter fund of which state property share exceeds 25%; (ii) state power authorities; (iii) state privatization authority officials; (iv) legal entities, whose property is in municipal ownership; (v) local self-governing bodies.

Buildings.

Apartments in multi-apartment buildings and single dwelling houses, which were privatized by tenants as provided by law, are also recognized as real estate.

Owner of privatized housing has right at his own discretion to sell housing, transfer it as gift, rent, exchange, pledge or carry out other agreements which are not prohibited by law. Procedure of realization of such right by owner of housing is regulated by Civil Code of Ukraine.

Ukrainian law does not provide restrictions for foreign individuals or legal entities to purchase or lease buildings or apartments. Purchase-sale agreements for purchase of buildings or apartments are subject to notarization and state registration. Starting from Jan. of 2007, lease agreements for lease of buildings or apartments for term less than three years do not require notarization and state registration (prior term was one year or less). This amendment will eliminate burdens on landlords and tenants in short-term rental market to comply with notarization and registration requirements. Leases for term longer than three years can be notarized by either public or state notaries, and if such notaries have access to Unified State Registry of Agreements, they can also register agreements in that registry (make state registration). Note that as of Jan. 1, 2007, fee for notarization of leases has been reduced from one per cent of agreement price to 0.1 per cent of agreement price.

19.06 REPRIVATIZATION AND RESTITUTION:

Constitution of Ukraine explicitly provides for possibility of nationalization of private property (i) only as exception (ii) with purpose of public need (iii) on condition of prior and full compensation and (iv) on grounds and under procedure envisaged by law. Law on nationalization (reprivatization) of private property, as provided for by Constitution, does not exist in Ukraine. Constitution declares that forced alienation of private property with further full compensation is only possible during military or emergency situations, declared as such by President of Ukraine with further approval by Ukrainian parliament.

20 TAXATION

20.00 In General

Constitution of Ukraine provides that taxation system, taxes and duties, as well as penalties for noncompliance (in particular, with tax legislation) may be established by laws only.

Law “On System of Taxation” of June 25, 1991, Law “On Taxation of Profits of Enterprises” of Dec. 28, 1994, Law ``On Value Added Tax'' of Apr. 3, 1997, Law ``On Tax on Incomes of Individuals'' of May 22, 2003, Decree of Cabinet of Ministers of Ukraine ``On Local Taxes and Duties'' of May 20, 1993 and other enactments determine principles of taxation system in Ukraine, taxes, duties, and other obligatory payments to budgets and contributions to state special funds, as well as rights and obligations of taxpayers.

Establishment and cancellation of taxes and duties (mandatory fees) payable to budgets and state special funds, and tax holidays for taxpayers thereof is performed by Verkhovna Rada of Ukraine, Verkhovna Rada of Autonomous Republic of Crimea and village, municipal, city radas pursuant to taxation legislation.

Payers of taxes and duties (mandatory fees) are legal entities and individuals which in accordance with laws of Ukraine are obligated to pay taxes and duties (mandatory fees). Objects of taxation are profits (income), value added to products (work, services), value of products (work, services), including customs value or its material indices, specific use of natural resources, property of legal entities and individuals and other objects specified by laws on taxation.

Rates of taxes and duties, procedure of their crediting to budgets and state special funds are established by Verkhovna Rada of Ukraine, Verkhovna Rada of Autonomous Republic of Crimea and village, municipal, city radas pursuant to taxation legislation. Responsibility for accurate computation, timely payment of taxes and duties (mandatory payments) and compliance with law on taxation vests with payers of taxes and duties (mandatory payments) in accordance with law of Ukraine.

Ukraine imposes two levels of taxes: (i) general state taxes and duties, and (ii) local taxes and duties (mandatory payments).

General state taxes and duties are established by Verkhovna Rada of Ukraine and are imposed all over Ukraine.

According to effective tax system, Ukrainian government may levy following general taxes and duties: (i) Value added tax; (ii) excise tax; (iii) corporate profits tax, including dividends paid to budget by communal and treasury (kazenne) enterprises; (iv) personal income tax; (v) customs duty; (vi) state duty; (vii) real estate tax; (viii) land tax; (ix) rental payments; (x) tax on owners of motor vehicles; (xi) tax on fishery, hunting, etc.; (xii) duty for mineral-exploration rights; (xiii) tax on specific use of natural resources; (xiv) tax on pollution of environment; (xv) payment to Chernobyl Fund for purpose of liquidation of consequences of Chernobyl accident; (xvi) duty to Pension Fund; (xvii) duty to State Innovation Fund; (xviii) trade permit fee; (xix) fixed agricultural tax; (xx) duty on development of viticulture, gardening and hops cultivation; (xxi) unified duty collected in frontier checkpoints; (xxii) payment for use of radiofrequency resource of Ukraine; (xxiii) duties paid to Guaranty Individuals Deposit Fund; (xxiv) duties for electric and heating power resource; (xxv) duties for making concert tours; (xxvi) court duty; (xxvii) duty established as special mark-up on tariff for natural gas.

Local taxes and duties may be imposed by local authorities and include: (i) Parking duty; (ii) tax on sale of imported goods; (iii) duty for trading at market; (iv) duty for issuance of document for apartment; (v) resort duty; (vi) duty for participation in race at hippodrome; (vii) duty on winnings at racecourse; (viii) duty paid by individuals playing totalizator; (ix) advertising tax; (x) duty for right to use local symbols; (xi) duty for right to make films and other TV and movie programs; (xii) duty for right to conduct local auctions, contest sales and lotteries; (xiii) municipal tax; (xiv) duty for issuance of retail trade permit; (xv) fee for owners of dogs.

Taxable transactions are established by appropriate tax and duty laws. Taxes and duties which, according to law, are included in price of goods (services) are paid irrespective of results of financial and business activity.

20.01 ADMINISTRATION:

According to Law of Ukraine “On State Tax Service in Ukraine” No. 509 dated Dec. 4, 1990, State Tax Service of Ukraine includes Central State Tax Administration of Ukraine and state tax administrations of Republic of Crimea, Kyiv, Sevastopol, as well as state tax inspectorates in oblasts, regions, cities and regions of cities. State tax authorities exercise control over compliance with tax legislation, correctness of computation, completeness and timeliness of payment of taxes and duties to state, impose fines and penalties on individuals and legal entities in case of violation of tax legislation. State Tax Administration of Ukraine also issues explanations with regard to tax legislation which are mandatory for all state tax administrations and inspectorates of Ukraine. Administration(s) of higher level may cancel (decisions) resolutions of subordinated administration(s), in case of their noncompliance with effective legislation. Decision of State Tax Administration of Ukraine may be appealed to court.

20.02 ALCOHOL, BEVERAGES AND TOBACCO TAXES:

Excise Duty For Alcohol Beverages and Tobacco Goods.

Decree of Cabinet of Ministers of Ukraine ``On Excise Duty'' of Dec. 26, 1992 regulates excise in Ukraine. Law “On Excise Duty for Alcohol Beverages and Tobacco Goods” of Sept. 15, 1995 regulates peculiarities of excise on alcohol beverages and tobacco goods. Payers of excise tax alcohol beverages and tobacco goods are: (a) Ukrainian manufacturers of alcohol beverages and tobacco goods; (b) customers at request of which such products are manufactured under give and take terms; (c) subjects of entrepreneurial activity, including enterprises with foreign investments irrespective of data of registration hereof, which import alcohol beverages and tobacco goods to Ukraine for use by them or for production needs of for purpose of sale; (d) individuals who import to customs territory of Ukraine alcohol beverages and tobacco goods in amount subject to import duty; (e) legal entities and individuals, international organizations and branches thereof which sell alcohol beverages and tobacco goods in customs territory of Ukraine.

Revenues from selling of alcohol beverages and tobacco goods produced in Ukraine; value of supplied alcohol beverages and tobacco goods that were manufactured by Ukrainian producers of supplied raw materials under tolling agreements; customs value of alcohol beverages and tobacco goods imported into Ukraine are subject to taxation.

Excise rates are established by Parliament by Law ``On Rates of Excise Duty on Tobacco Goods'' of Feb. 6, 1996 and Law ``On Rates of Excise Duty on Ethyl Alcohol and Alcohol Beverages'' of May 7, 1996. Rates are fixed for alcohol beverages and combined (both fixed and ad valorem) for tobacco goods.

Alcohol beverages and tobacco goods must be marked by excise duty stamps. Import of tobacco goods and alcohol beverages to Ukraine without such stamps is prohibited.

Resolution of Cabinet of Ministers of Ukraine “ On Introducing of New Sample of Excise Duty Stamps with Holographic Protection Means for Placing them onto Alcohol Beverages and Tobacco Goods” of Apr. 23, 2003 No. 567, governs these issues.

20.03 BUSINESS TAXES:

Corporate Profits Tax.

Law of Ukraine “On Taxation of Profit of Enterprises” of Dec. 28, 1994, (hereinafter as “Corporate Profits Tax Law”) as amended, regulates taxation of profits of corporate taxpayers in Ukraine.

Taxpayers are: (i) resident business entities, institutions, organizations conducting activities aimed at receiving profits both in and outside territory of Ukraine, as well as their affiliates, branches and other separate subdivisions; (ii) nonresident individuals and legal entities which receive Ukrainian-source income; (iii) permanent establishments of nonresidents which receive Ukrainian source income or carry out representative functions.

Taxable profits are subject to tax at basic rate of 25%. Taxable profits are computed as adjusted taxable income less deductible expenses and depreciation charges.

Adjusted taxable income includes all incomes received by taxpayer from all types of activities, except for exempted items. As general rule, taxable income must be recognized on earlier of date on which advance is received, or date when goods or services are supplied.

Deductible expenses include expenses incurred in relation to taxpayer's business activities. Law establishes restrictions on deductibility of some types of expenses. For example, for tax purposes following items are not deductible: (a) Expenses not supported by relevant documents; (b) business trip expenses for individuals who are not employees; (c) expenses related to financing of management bodies; (d) expenses related to repairs of fixed assets in excess of 10% aggregate book value of all fixed assets as of 1 Jan. of year (excess is capitalized).

Payments for goods or services to foreign entity located in tax havens may be deductible for 85% only. Corporate Profits Tax Law established some restrictions on deductibility of interest, if Ukrainian company is 50% or more owned or controlled by nonresident or tax-exempt persons, and interest is paid to those persons or their related parties.

As general rule, deductible expenses can be recognized on earlier of date on which taxpayer consumed inventory or services (sold goods), or date on which he made prepayment for them. When taxpayer makes prepayment to nonresident, tax-exempt entity or entity paying tax at reduced rates, he can recognize deductible expenses on date on which he receives prepaid goods or services.

Depreciation charges of fixed assets are computed quarterly, using reducing balance method. Taxpayer may use any depreciation rate up to maximum quarterly rates, which may equal 2%, 6%, 10% or 15% depending on type of asset. Land may not be depreciated. Intangible assets may be amortized using straight-line method over lesser of asset's useful economic life or ten years.

Tax losses of taxpayers, which are incorporated in Ukraine, may be carried forward indefinitely.

Tax returns are filed quarterly, within 40 calendar days of end of quarter. In 2008, taxpayers are also liable to file tax return for 11 months within 20 calendar days of end of Nov. 2008. Tax must be paid within ten calendar days from day on which return is required to be filed.

20.04 CUSTOMS DUTY AND TAX:

See category 14 Foreign Trade and Commerce, topic 14.01 Customs.

20.05 EXCISE TAXES:

Excise Tax is regulated by Decree of Cabinet of Ministers “On Excise Duty”, Dec. 26, 1992, Order of State Customs Committee of Ukraine dated Jan. 21, 2000 No. 33 that approved ``Instruction on Procedure of Imposition of Excise Duty upon Import of Goods by Legal Entities-Subjects of External Business Activity” and other legislative acts. Subjects of business activity which manufacture excisable goods (products) in Ukraine and business entities which import excised goods (products), nonresidents which manufacture excisable goods (products) in Ukraine directly through their representative offices, individuals which import excisable goods (products) and individuals which receive excisable goods (products) from outside of Ukraine; legal entities and individuals which buy excisable goods (products) from tax agents pay excise tax. List of excisable goods and products is established by Law ``On Rates of Excise Duty and Import Duty on Some Goods (Products)'' of July 11, 1996, Law ``On Rates of Excise Duty on Tobacco Goods'' of Feb. 6, 1996, Law ``On Rates of Excise Duty on Ethyl Alcohol and Alcohol Beverages'' of May 7, 1996 and Law ``On Rates of Excise Duty on Some Transport Means and Car Bodies'' of May 24, 1996. Following goods and products shall be considered as excisable: alcohol beverages, ethyl spirit, tobacco products, some transportation means and car bodies, petroleum products, coffee and chocolate products, some fur products, video/audio equipment, etc. Excise duty can be calculated as follows: (a) As percentage of revenues from sale of excised goods (products) less VAT; (b) as fixed amount for item of excisable goods (products) sold; (c) simultaneously as percentage of sales revenues and as fixed amount for item of goods (products) sold; (d) as percentage of sales revenues, but not less than fixed amount for item of sold goods (products). Excise tax is not imposed on sale of excised goods (products) exported.

Excise Duty on Imported Goods.

Customs value of excisable goods shall be subject to taxation taking into account actually paid customs duties. Business entities which manufacture excisable goods (products) and subjects of entrepreneurial activity which import excised goods (products) pay excise tax. Excise duty on imported goods must be paid simultaneously with customs duties. Any and all privileges existing earlier with respect to payment of excise duty have been cancelled under Law “On Some Issues of Taxation of Excisable Goods” of Nov. 16, 1995.

20.06 FOREIGN INVESTMENT TAXES:

Law of Ukraine “On Regime of Foreign Investments”, dated Mar. 19, 1996, as amended treats foreign investors neither more favorably nor less favorably than Ukrainian residents. Any income received by nonresidents from sources within Ukraine is subject to taxation pursuant to procedure and according to rates specified in Corporate Profits Tax Law unless otherwise provided by relevant international treaty between Ukraine and nonresident's country of origin. Ordinarily such income is taxed at 15% upon repatriation of income to nonresident. Tax on profit from investing in corporate rights is 30%.

20.07 GASOLINE AND SPECIAL FUELS TAXES:

Excise Duty for Petroleum Products.

Law “On Rates of Excise Duty and Import Duty for Some Goods (Products)” of July 11, 1996, as amended, specifies following petroleum goods which are subject to excise duty: (i) Light distillates; (ii) special gasolines; (iii) motor and aviation gasolines; (iv) medium distillates; (v) petroleum products for other purposes (diesel fuel, etc.) Procedure of payment of excise duty for petroleum goods is same as other excisable goods. (Also see topic 20.05 Excise Taxes, subheads Excise Tax, and Excise Duty on Imported Goods.)

Petroleum Rental Payments.

Pursuant to Decree of President “On Rental Payments for Petroleum and Natural Gas Extracted in Ukraine” of Dec. 21, 1994, as amended, and Order of Ministry of Finance “On Procedure of Calculation and Payment of Petroleum and Gas Rent to State Budget” of Feb. 20, 1998, Ukrainian enterprises extracting gas or oil are required to pay special rental payments dependent on volume of gas or oil sold. Rates of rental payments are fixed by amount in U.S. dollars per ton or thousand of cubic meters for gas or oil respectively and are paid in hryvnias. Rental payments are included in gross price of gas (oil).

20.08 INCOME TAX:

Personal Income Tax.

Law ``On Tax on Incomes of Individuals" of May 22, 2003 (hereinafter as Personal Income Tax Law), is principal law regulating taxation of individuals.

Law defines term “personal income tax” as fee paid by individual for services provided to such individual by local community on which territory where such individual has registered address or where entity that withholds tax is located.

Tax agent is Ukrainian resident legal entity, its affiliate, or Ukrainian individual, or representative office of foreign legal entity in Ukraine, responsible for calculating, withholding and remitting personal income tax to state budget on behalf and at expense of taxpayer, and for submitting required data to tax authorities. Ukrainian employers, as payers of salaries, must be principal tax agents. Law recognizes other entities as tax agents: banks paying interest on deposits, notaries certifying real estate sale-purchase agreements.

Law (Art. 8) establishes that personal income tax calculated and withheld by tax agent must be remitted to state budget concurrently with payment of income to individual. Payments must be made by same payment order submitted to bank by entity making payment. Ukrainian banks are not allowed to accept payment orders for salary and other types of payments of taxable income to individuals unless orders provide for remittance of personal income tax to state budget. Law imposes certain obligations on tax agent and Ukrainian bank effectuating payment to individual, making them primarily responsible for proper calculation and remittance of personal income tax to state budget. As mentioned, personal income tax is primarily calculated and remitted to state budget by employers, with individual responsible for paying tax on income which is not taxed at source of payment.

Under Law, taxable income is determined by deducting certain types of expenses and social tax exemptions from gross income.

Income received by individual offset by amount of tax credits (comprising deductible expenses and social tax exemptions), is subject to taxation. For Ukrainian residents, taxable income includes any of following: gross monthly income, annual taxable profit determined by deducting tax credits from gross annual income, and/or income subject to taxation upon its payment and on which personal income tax was remitted to state budget at moment of its payment to individual. Following income of individual is included in taxable income and is subject to taxation: salary and remuneration payments, including various types of benefits provided to employee as set by Law; income received from sale of intellectual property rights, royalties and other similar payments; gifts and inheritance received by taxpayer as set by Law; amounts of insurance benefits within limits set by legislation; income received from transactions with real estate, including its sale and lease; income received from transactions with movable property as set by Law; income received in form of compensation for property and/or nonmaterial damages as set by Law; amounts of debt before state tax authorities which is not recoverable due to ending of limitation period, within limits set by legislation; income received in form of interest earned on bank deposits, dividends, royalties, gambling winnings, which were not taxed at moment of their payment; income from certain types of investments as set by Law.

Tax credit is amount of expenses incurred by taxpayer in connection with acquisition of goods, works and services from Ukrainian residents within reporting period and amount of accrued ``social tax exemptions'', which can be deducted from taxable income received in such reporting period. Law lists number of social tax exemptions which may be enjoyed by various categories of citizens.

Taxation of individual's income depends on individual's tax residency status in Ukraine.

Person is considered tax resident in Ukraine, if he has place of abode in Ukraine. However, if person also has place of abode in another country, several tiebreaker rules apply to determine whether that person should be treated as Ukraine tax resident. individual may also elect voluntarily that his main place of abode (and therefore tax residence) is in Ukraine. Nonresidents are individuals who are not treated as tax residents of Ukraine.

Standard rate of 15% is applicable to most types of income, including salary, dividends, royalties and investment income. Special tax rates apply in some cases (e.g., inheritance, gifts, interest from deposits).

All employment income is subject to personal income tax except for exempt items, main of which are as follows: (a) Provision of accommodation or tangible assets for use free-of-charge is not taxable in some cases; (b) benefits in form of free use of vehicles do not constitute taxable income in some cases; (c) per diems paid to employee during business trip within limits approved by Cabinet of Ministers of Ukraine; (d) reimbursement of business trip expenses properly documented.

Tax agents must pay tax to state not later than date of payment of income to individuals. Tax in respect of income that is accrued but not paid to individuals should be paid to state within 20 calendar days following end of reporting month. Tax agents file quarterly reports on income paid to individuals and amount of withheld tax.

Taxpayer is not required to file income tax return if his only income during reporting year income is received from tax agents. However, if individual wishes to claim tax credit for expenses incurred during year or claim foreign tax credit, then individual may file return.

Individual who receives taxable income from entities or sources that are not tax agents is required to file personal income tax return with tax authorities by Mar. 31 of year following reporting year. Tax due on return must be paid by Apr. 10. Payment must be made in local currency.

Taxation of Nonresidents.

Taxable income of foreign nationals who are tax residents in Ukraine is determined in same manner as for Ukrainians. Law provides for right of every nonresident individual receiving income from Ukrainian sources to establish personal income tax residency in Ukraine by declaration or registration as self employed person in Ukraine and to pay personal income tax at standard rate of 15%.

Foreigners with nonresident tax status are subject to Ukrainian personal income tax only on Ukrainian-source incomes. Law establishes that following types of income of nonresidents must be considered income from source in Ukraine: salary from labor activities in Ukraine; income from business activities in Ukraine; interest on debt issued by resident; dividends and royalties paid by resident; income from leasing real or personal property located in Ukraine; income from sale of real estate located in Ukraine, etc.

Ukrainian-source income earned by nonresidents in form of interest, dividends or royalties is taxed at the same rates as for residents, unless double tax treaty provides for otherwise. Law is unclear whether standard or double tax rate applies to salary income earned by nonresidents in Ukraine.

Any other Ukrainian-source income, including salary and director's fees paid by nonresident employer, is taxed at double tax rate (that is, 30%). However, tax treaties often provide for exemption of income earned by individuals from short term visits to Ukraine from Ukrainian personal income tax.

Law establishes if income of nonresidents paid to nonresident by other nonresident, such income has to be remitted to bank account opened by receiving nonresident in Ukrainian bank. Such bank would be considered tax agent responsible for calculation and remittance of tax to state budget. Law establishes that when such income is paid by one nonresident to another by cash or in any other form, receiving nonresident would be under obligation to calculate and remit tax to state budget next banking day after receipt of such compensation. When entering into contract with nonresident pursuant to which nonresident must receive income from Ukraine, Ukrainian resident would be obliged to specify tax rate which would apply to payments to be made to nonresident in agreement.

Taxation of Income of Ukrainian Residents Received From Abroad.

Law obligates Ukrainian resident to pay personal income tax on any amounts resident receives from foreign sources. Amounts must be included into personal income tax return submitted annually. If pursuant to international treaty, taxpayer has right to decrease amount of tax to be paid in Ukraine by amount of personal income tax or its equivalent paid abroad, such calculations have to be shown in tax return. Amount of credit is limited to amount of Ukrainian personal income tax that would arise from equivalent income in Ukraine. Individual shall obtain confirmation of foreign taxes paid issued by foreign tax authorities.

Tax on income obtained in foreign currency, is paid in Ukrainian hryvnia. Income obtained in foreign currency is converted into Ukrainian hryvnia at exchange rate established by National Bank of Ukraine as of date of obtaining thereof.

20.09 LOCAL GOVERNMENT TAXES:

Decree of Cabinet of Ministers of Ukraine ``On Local Taxes and Duties'', dated May 20, 1993 as amended and modified regulates local taxes.

Local taxes and duties (mandatory payments), mechanisms of their imposition and procedure of their payment and crediting to local budgets are established by village, settlement, city radas in accordance with above list and within limits of marginal amounts of rates pursuant to and within rates established by laws of Ukraine.

Identification of taxpayers, maximum rates, procedure for payment of local taxes are specified by Decree of Cabinet of Ministers of Ukraine “On Local Taxes and Duties”, dated May 20, 1993 as amended and modified.

Among local taxes, principal ones are payable and computed as follows:

Advertising tax is payable by legal entities placing advertisement in mass media, on outdoor advertising or through other means. Maximum rate of tax equals 0.5% of value of advertisement services. Advertising agencies or other entities that place advertisements shall collect tax.

Municipal tax is payable by legal entities monthly and calculated as maximum of 10% of individual non-taxable allowance (currently — 1.7 Ukrainian hryvnia), multiplied by number of employees.

Duty for use of local symbols is payable by legal entities that use local symbols (e.g., city emblem) for commercial purposes. Maximum rate of duty equals 0.1% of value of goods/services using local symbols that are sold.

Local state authorities provide for procedures for payment of local taxes to state according to list of local taxes and within maximum rates established by Decree.

20.10 MOTOR VEHICLE TAXES:

Tax on Owners of Motor Vehicles, Other Movable Machines and Mechanisms.

This tax is regulated by Law of Ukraine “On Tax on Owners of Motor Vehicles, Other Movable Machines and Mechanisms” of Dec. 11, 1991, as amended. Tax on owners of motor vehicles tax is levied on enterprises, associations and organizations which are legal entities, foreign legal entities, citizens of Ukraine, foreign citizens and individuals without citizenship, that conduct initial registration in Ukraine, register or reregister motor vehicles and/or own motor vehicles duly registered in Ukraine. Law specifies objects of taxation and tax rates which depend on: type of vehicle; displacement volume (100 cm [cubic]) or engine power (1 kW) or length (100 cm). Amount of tax is determined on basis of tax rate in ECU and one of aforementioned technical characteristics of vehicle.

Following entities are exempt from tax: (i) Certain categories of handicapped individuals, veterans of World War Two and other elderly individuals; (ii) certain categories of individuals-victims of Chernobyl catastrophe; (iii) with 50% exemption—agricultural enterprises for agricultural vehicles; and (iv) some other categories of individuals.

20.11 PENSION AND SOCIAL SECURITY CHARGES:

Both employers and employees in Ukraine are required to pay duties—contributions to various funds pursuant to Laws of Ukraine “On Duty for Mandatory State Pension Insurance”, dated June 26, 1997, ``On Mandatory State Social Insurance regarding Temporary Loss of Ability to Work and Funeral Expenses'', dated June 4, 2008, ``On Mandatory State Social Insurance regarding Unemployment'', dated Mar. 2, 2000 and ``On Mandatory State Social Insurance regarding Accident at Work and Professional Disease that Caused Loss of Ability to Work'', dated Sept. 23, 1999.

Taxable base for contributions (both employee and employer) is capped. From July 1, 2008 cap is 9,735 Ukrainian hryvnia and from Oct. 1, 2008 - 10,035 Ukrainian hryvnia per month.

Rates of contributions are established by Laws of Ukraine ``On Duty for Mandatory State Pension Insurance'', dated June 26, 1997, ``On Rates of Contributions to Some Types of Mandatory State Social Insurance'', dated Jan. 11, 2001 and ``On Insurance Tariffs for Mandatory State Social Insurance regarding Accident at Work and Professional Disease that Caused Loss of Ability to Work'', dated Feb. 22, 2001.

Resident employer is liable to pay social security contributions in respect of his Ukrainian and foreign national employees at following rates: (a) 33.2% to State Pension Fund; (b) 1.5% to Temporary Loss of Ability to Work Fund; (c) 1.3% to Unemployment Fund and (d) from 0.66% to 13.6% (depending on level of accident risk of entity's industry sector) to Accidents at Work Fund.

Employees are required to pay: (a) 2% to State Pension Fund; (b) 1% as Temporary Loss of Ability to Work Fund; and (c) 0.5% to Unemployment Insurance Fund.

Employer is responsible for calculating and deducting all contributions and remitting them to state budget. Also, employer must file quarterly reports to social security funds and monthly reports to State Pension Fund.

20.12 PROPERTY TAXES:

Tax on Real Estate and Fixed Assets.

Although Law “On System of Taxation” provides for possibility of application of tax on real estate and fixed assets, to date such taxes have not been implemented.

Payment for use of land is established by law “On Payment for Land” of July 3, 1992. Payments for use of land in Ukraine are treated either as land tax (when land is owned or used on basis of temporary or permanent use rights) or as rent (when land is leased). tax rate depends on nature and location of land. Law establishes different rates for use of agricultural land; land of inhabited localities; land for industry, transport, environmental, historical and other purposes. Part of land parcel in use which exceeds established quotas is taxed on increased rate. Rate of land tax does not depend on results of business activity of users. Certain types of legal entities (e.g., national parks, state power bodies, educational and cultural institutions, charity and religious organizations) are exempt in full from land tax.

Land users pay land tax from date right to use land parcel is established. Calculation of land tax is based on data from State Land Cadastre. Land tax is charged annually but paid monthly.

20.13 TAX INCENTIVES:

Ukraine currently has very few incentives. In particular, Corporate Profits Tax Law provides for some incentives for publishing, energy, agricultural industries, non-for-profit organizations.

20.14 TAXATION OF NONRESIDENTS. WITHHOLDING TAX:

Ukrainian source income payable to nonresident by Ukrainian resident or permanent establishment of foreign entity is subject to withholding tax.

Ukrainian source income includes following main types of income: interest, dividends, royalties, income payable for freight or engineering services, leasing (rental) income, income from disposal of immovable property located in Ukraine, gains from trade in securities or other corporate rights, income from unincorporated joint venture in Ukraine, income from operations under long term agreements in Ukraine, agent fees, premium for (re)insurance of risks in Ukraine or insurance of residents from risks abroad.

Payable proceeds or other compensation for goods and services (supplied by nonresident or his permanent establishment to Ukrainian resident) does not qualify as Ukrainian source income and, therefore, is not subject to withholding tax.

Standard withholding tax rate is 15%. Special tax rate is established for freight income (6%) and insurance activity (0% or 12%; see below). Potentially, withholding tax rate can be reduced based on double tax treaty.

Income from advertising services provided by nonresident in Ukraine is subject to 20% tax payable by Ukrainian resident from his own funds. Payer cannot enjoy treaty protection in respect of this type of income.

Ukrainian insurer that makes payments to nonresident under (re)insurance agreement shall tax such amounts: (i) if financial reliability rating of nonresident (re)insurer meets requirements established by authorized state body, then 0% tax shall apply; (ii) in other cases, income payer shall pay 12% tax from his own funds. Tax rate cannot be reduced under tax treaty.

Withholding tax is payable by Ukrainian income payer to State not later than on date of income remittance.

(See also category 20.14 Treaties and Agreements.)

20.15 TREATIES AND AGREEMENTS:

Ukraine has network of 62 treaties on avoidance of double taxation in force. Treaties allow reduction of withholding tax rate for dividends, interest or royalties to 0%, 2%, 3%, 5%, 7%, 10% or 12%.

Most favorable treaty is Ukraine-Cyprus treaty, which provides for 0% withholding tax on payment of dividends, interest and royalties. However, Ukraine currently renegotiates this treaty. Ukraine has not ratified new treaty yet. New treaty provides for 5%/15% withholding tax rates for dividends and 10% rate for interest and royalties.

Also, Ukraine has favorable treaties with Netherlands, Germany, Sweden, United Kingdom, U.S.A., etc.

By Order No. 470 dated May 6, 2001, Cabinet of Ministers of Ukraine established procedure for exemption from (reduction of) taxation of Ukrainian source income according to double tax treaties. According to procedure, Ukrainian payer of income can reduce withholding tax rate, if he obtains from nonresident income recipient its residence certificate issued by authorities of treaty country. Authorities can issue residence certificate in form prescribed by above Order or in form prescribed by legislation of treaty country. In second case, certificate must be properly legalized (apostilled), translated into Ukrainian and contain number of mandatory entries. Certificate is valid for calendar year of its issuance.

Ukrainian bank or financial institution paying interest to nonresident bank can enjoy treaty protection if such payer provides extract from international catalogue ``International Bank Identifier Code'' (edition S.W.I.F.T., Belgium & International Organization for Standardization, Switzerland), which confirms that recipient (nonresident bank) is resident of treaty country. In this case, Ukrainian payer is not required to obtain residence certificate from recipient.

(See also category 22 Treaties and Conventions.)

20.16 VALUE ADDED TAX:

Law of Ukraine “On Value Added Tax”, of Ukraine on Apr. 3, 1997 (hereinafter as VAT Law) is principal law regulating VAT. VAT Law identifies taxpayers of VAT, determines its objects, tax base, rates, lists VAT-free and VAT-exempt operations, provides specifics of taxation of export/import transactions, establishes requirements for tax invoice, rules for remittance of VAT payments to budget.

Taxpayer is: (i) Any person that is doing business or planning to start up business and is willing to be registered as VAT payer; (ii) any person that shall mandatorily be registered as VAT payer; (iii) any person which imports (sends) goods (related services) in volumes that are subject to VAT pursuant to provisions of VAT Law to Ukraine's customs territory. List of persons —subject to mandatory registration as VAT payers is provided in VAT Law.

VAT-registration is mandatory where volume of taxable supplies exceeded 300,000 Ukrainian hryvnia (approximately 59,400 USD) for past 12 calendar months. Voluntary VAT-registration is

available by election.

Standard tax rate is 20% and generally applies to (i) supply of goods and services where place of supply is in Ukraine, including when supply is made without consideration; (ii) importation of goods into Ukraine; (iii) purchase of services from nonresident suppliers (under reverse charge mechanism).

Export of goods and supply of services ancillary to export of goods, as well as international transportation of goods (from border to point outside of Ukraine; from point outside of Ukraine to border; between two points outside of Ukraine) are zero-rated.

VAT Law provides for list of transactions which are not subject to VAT. These are as follows, among others: (i) Issuance, placement and cash sale of securities; (ii) interest or commission element of lease payments pursuant to financial lease agreement in maximum amount which is not more than double of refinancing rate of NBU; (iii) transfer of pledged property pursuant to loan agreement and its return to pledgor after expiry of such agreement; (iv) provision of insurance and reinsurance services.

For imported goods, VAT is based on higher of contractual price stated in import invoice or customs value, increased by amount of cost of bringing those goods to Ukraine, excise taxes and duties payable at time of importation, and any payments for use of intellectual property incorporated into goods.

Input VAT is: (i) Fully creditable, if incurred on purchases designated for use in VATable transactions within business activities; (ii) not creditable, if incurred on purchases designated for use in out-of-scope or exempt transactions; and (iii) partly credited, where acquired goods/services are used in both VATable and exempt supplies.

Entitlement to input tax credit arises as follows: (i) For domestic purchases—on earlier date of payment to supplier or date on which VAT invoice is received; (ii) for imported goods—on date tax is paid at customs; (iii) for services acquired from nonresidents—in period following filing VAT return in which relevant amount of output VAT was recorded.

Claim for input tax must be supported by valid VAT invoice issued by VAT-registered person or duly executed import customs declaration.

Some transfer pricing rules are applicable for VAT purposes. Refer to Transfer pricing section.

VAT is internal tax and not regulated by any international treaties except those ratified by Verkhovna Rada of Ukraine prior to Oct. 1, 1997.

20.17 TRANSFER PRICING:

Ukrainian transfer pricing rules essentially follow international arm's length principle.

For corporate profits tax purposes, transfer pricing rules apply to transactions between related parties, as well as to transactions with nonresidents and nonregular taxpayers. Corporate Profits Tax Law provides specific definition of related party for Ukrainian tax purposes.

If transaction is subject to transfer pricing rules, then: (a) Seller's taxable income shall be determined based on contractual price, but not less than arm's length price for goods or services being sold; and (b) buyer's deductible expenses shall be determined based on contractual price, but not more than arm's length price for goods or services being purchased.

For VAT purposes, if arm's length price exceeds contractual price by more than 20%, then seller must assess output VAT based on arm's length price. If contractual price exceeds arm's length price by more than 20%, then input tax credit should be based on arm's length price.

Contractual price is presumed to be arm's length price, unless tax authorities prove otherwise. Legislation provides for various methods based on which arm's length price can be determined. However, in practice, tax authorities not easily accept other methods than CUP (comparable uncontrolled prices) method.

Way law is constructed would make it very difficult for tax authorities to sustain adjustment. Ultimately, tax authorities would also need to demonstrate any assessment to satisfaction of courts.

21 TRANSPORTATION

21.01 AUTOMOBILES:

See topic 21.02 Motor Vehicles.

21.02 MOTOR VEHICLES:

Driver's license is required for operating motor vehicle in Ukraine. Minimal age varies according to type of vehicle to be driven: citizens over 16 may operate motor vehicles and motor side-cars; citizens over 18 may operate all categories and types of cars, and trams and trolley buses; citizens over 19 may operate buses and trucks equipped for transportation of more than eight passengers.

Citizens of Ukraine, aliens and persons without citizenship are permitted to operate motor vehicles of certain category provided they have driver's licenses of appropriate category.

Local and international driver's licenses issued in accordance with International Convention on Traffic, are valid in Ukraine. Procedure for issuance of such licenses is established by Cabinet of Ministers.

Person seeking to obtain license to operate motor vehicles is required to have special training course at specialized driver's school, provided that such school is licensed for driver training.

Driver's license can be terminated (i) if subsequent health condition hampers safe operation of vehicle, or (ii) if driver fails to carry out established obligations foreseen by legislation.

Termination of right to operate motor vehicles shall be realized by removal of driver's license by authorized officers of State Auto Inspection at Ministry of Internal Affairs of Ukraine; list of such officers shall be specified by legislation of Ukraine.

Alien driver's licenses (for tourists, business travelers and diplomats) that meet requirements of International Convention on Traffic of 1968 shall be effective in Ukraine only if vehicles are operated during tourist trips, international transportation of cargo, business trips, duration of which is less than year.

If alien is in Ukraine for permanent residence, driver's license must be exchanged for Ukrainian license upon his/her medical examination. Driver's licenses of aliens who have operated motor vehicles for 12 months or more will be exchanged without tests. Driver's licenses of persons who have not operated motor vehicles for 12 months will be exchanged upon passing written and driving exams. Employees of foreign diplomatic and consulate representative offices in Ukraine, permanent representatives of mass media and other foreign organizations will be issued Ukrainian driver's licenses without exams/tests and medical examinations, provided such persons have effective international driver's licenses or licenses issued by their countries, on condition that countries of their residence are parties to International Convention of Traffic.

If foreigner or person without citizenship has no national or international driver's license, Ukrainian driver's license shall be issued for such person in accordance with Ukrainian laws. International driver's licenses obtained by Ukrainian drivers abroad will be subject to exchange for national documents in accordance with Ukrainian laws.

Registration is required for automobiles and other motor vehicles. State registration shall be carried out by agencies of State Auto Inspection at Ministry of Internal Affairs of Ukraine in accordance with procedure of registration which shall be established by Cabinet of Ministers of Ukraine of its Resolution dated Sept. 7, 1998.

Mandatory Third Party Motor Vehicle Liability Insurance.

On July 1, 2004 Ukraine's Parliament adopted Law “On Mandatory Insurance of Third Party Civil Liability for Motor Vehicle Owners” (``Mandatory Insurance Law''). Law became effective on Jan. 1, 2005. Law requires all motor vehicle owners in Ukraine to obtain insurance for any damage caused to third parties as result of automobile accidents, and imposes fines for violations. Licensing and average annual premiums for Civil Liability Insurance are regulated by State Commission for Regulation of Financial Services Markets in Ukraine, state regulator for insurance market. Mandatory Insurance Law amended Code of Administrative Violations to allow traffic police to fine drivers and car owners who are not in possession of proper Civil Liability Insurance certificates beginning on Apr. 1, 2005. Average annual premium for Civil Liability Insurance, which is set by Financial Services Commission, is approximately USD55. Average insurance premium for driver is calculated on basis of table of coefficients set forth in Mandatory Insurance Law and insurance companies are not allowed to charge higher rates. Retired citizens, persons with disabilities, war veterans and other categories of drivers specified in legislation may buy Civil Liability Insurance at lower premiums; higher premiums are set for drivers in large metropolitan areas, less experienced drivers, owners of cars with more powerful engines, and drivers of cars used as taxis.

Rule of road in Ukraine is to drive on right side of road. International road signs are used.

If international treaty of Ukraine establishes rules other than provisions of legislation of Ukraine on traffic, then provisions of international treaty should apply.

21.03 SHIPPING:

See categories 3 Business Regulation and Commerce, topics Brokers (Commodity), State Register (Commercial Register); Foreign Trade and Commerce, topics Customs, Foreign Trade Regulations; Mortgages, topic Chattel Mortgages.

22 TREATIES AND CONVENTIONS

22.01 INTERNATIONAL TREATIES:

See topic 22.02 Treaties.

22.02 TREATIES:

This issue in Ukrainian law is regulated by Law of Ukraine “On International Treaties of Ukraine”, dated June 29, 2004.

Law establishes procedure of signing, implementation and denunciation of international treaties of Ukraine with purpose of most appropriately ensuring protection of national interests, and most appropriately achieving aims, tasks and principles of foreign policy of Ukraine in accordance with Constitution of Ukraine.

Law is applied to all international treaties of Ukraine—interstate and intergovernmental treaties—which have been regulated by international law, regardless of their name and form of signing (i.e. Treaty, Agreement, Pact, Protocol, Exchange Letters, etc.).

Generally, provisions of Law correspond to provisions of Vienna Convention on Law of Treaties of May 23, 1969, to which Ukraine has been party since June 13, 1986.

Law provides that signed and ratified treaties of Ukraine are integral part of Ukrainian legislation, and if norms of international treaties of Ukraine contradict Ukrainian domestic legislation, norms of international treaties prevail due to supremacy of international law.

General of Public Law Nature.

Ukraine is charter-member of United Nations Organization and Statutes of International Court of Justice, Vienna Convention of Diplomatic Relations, Vienna Convention of Consular Relations, Universal Declaration of Human Rights, International Covenant on Economic, Social and Cultural Rights, International Covenant on Civil and Political Rights, Optional Protocol to International Covenant on Civil and Political Rights.

Avoidance of Double Taxation.

Ukraine has network of 57 double taxation treaties in force with following countries: Algeria, Armenia, Austria, Azerbaijan, Belarus, Belgium, Brazil, Bulgaria, Canada, China, Croatia, Czech Republic, Denmark, Egypt, Estonia, Finland, France, Georgia, Germany, Greece, Hungary, India, Indonesia, Iran, Israel, Italy, Kazakhstan, Kyrgyzstan, Kuwait, Republic of Korea, Latvia, Lebanon, Lithuania, Macedonia, Moldova, Netherlands, Norway, Poland, Portugal, Romania, Russian Federation, Serbia and Montenegro, Slovakia, Slovenia, South Africa, Sweden, Switzerland, Syria, Tajikistan, Thailand, Turkey, Turkmenistan, United Arab Emirates, United Kingdom, U.S.A., Uzbekistan and Vietnam. In addition, five old treaties of former USSR remain in effect with following countries until such time as Ukraine enters into new treaties: Cyprus, Japan, Malaysia, Mongolia and Spain.

Currently, Ukraine negotiates new treaty with Cyprus. It has not been ratified yet.

Europe.

Ukraine is member of Council of Europe Statute. Treaties of Council of Europe ratified by Ukraine (with date of ratification) Statute of Council of Europe (9 Nov. 1995), General Agreement on Privileges and Immunities of Council of Europe (6 Nov. 1996), Convention for Protection of Human Rights and Fundamental Freedoms (11 Sept. 1997), Protocol to Convention for Protection of Human Rights and Fundamental Freedoms (11 Sept. 1997), Protocol to General Agreement on Privileges and Immunities of Council of Europe (6 Nov. 1996), European Cultural Convention (13 Jan. 1994), European Convention on Extradition (11 Mar. 1998), European Convention on Mutual Assistance in Criminal Matters (11 Mar. 1998), Protocol No. 2 to Convention for Protection of Human Rights and Fundamental Freedoms, Conferring upon European Court of Human Rights Competence to Give Advisory Opinions (11 Sept. 1997), Protocol No. 3 to Convention for Protection of Human Rights and Fundamental Freedoms, Amending Articles 29, 30 and 34 of Convention (11 Sept. 1997), Protocol No. 4 to Convention for Protection of Human Rights and Fundamental Freedoms, Securing Certain Rights and Freedoms other than Those Included in Convention and in Protocol No. 1 (11 Sept. 1997), European Convention on Supervision of Conditionally Sentenced or Conditionally Released Offenders (28 Sept. 1995), Protocol No. 5 to Convention for Protection of Human Rights and Fundamental Freedoms, Amending Articles 22 and 40 of Convention (11 Sept. 1997), European Convention on Information on Foreign Law (13 June 1994), European Convention on Transfer of Proceedings in Criminal Matters (28 Sept. 1995), Additional Protocol to European Convention on Extradition (11

Mar. 1998), Additional Protocol to European Convention on Information on Foreign Law (13 June 1994), Second Additional Protocol to European Convention on Extradition (11 Mar. 1998), Additional Protocol to European Convention on Mutual Assistance in Criminal Matters (11 Mar. 1998), Convention on Conservation of European Wildlife and Natural Habitats (5 Jan. 1999), European Outline Convention on Transfrontier Co-operation Between Territorial Communities or Authorities (21 Sept. 1993), Convention on Transfer of Sentenced Persons (28 Sept. 1995), Protocol No. 6 to Convention for Protection of Human Rights and Fundamental Freedoms Concerning Abolition of Death Penalty (4 Apr. 2000), Protocol No. 7 to Convention for Protection of Human Rights and Fundamental Freedoms (11 Sept. 1997), Protocol No. 8 to Convention On Protection of Human Rights and Fundamental Freedoms (11 Sept. 1997), European Charter of Local Self-government (11 Sept. 1997), European Convention On Prevention of Torture and Inhuman or Degrading Treatment or Punishment (5 May 1997), Convention on Laundering, Search, Seizure and Confiscation of Proceeds from Crime (26 Jan. 1998), Protocol No. 11 to Convention On Protection of Human Rights and Fundamental Freedoms, Restructuring Control Machinery Established thereby (11 Sept. 1997), Framework Convention On Protection of National Minorities (26 Jan. 1998), Convention on Recognition of Qualifications Concerning Higher Education in European Region (14 Apr. 2000).

Apostille Convention.

On 10 Jan. 2002 Verkhovna Rada of Ukraine passed Law "On accession of Ukraine to Convention abolishing requirement of legalization for foreign public documents" ("Law"), signed on 5 Oct. 1961 at Hague Conference on International Private Law.

Investment Protection.

Treaty on Partnership and Cooperation between countries of European Union and Ukraine of 1994 (in force on Mar. 1, 1998), European Energy Charter 1994, Agreement on Cooperation in Investment Field of Dec. 24, 1993 (Ashgabat). Ukraine has signed 22 bilateral investment treaties (BITs), which regulate investment relations between two states' parties to BIT. On Mar. 3, 2005, Ukraine has ratified Civil Convention on Abolition of Corruption.

International Sale of Goods.

United Nation Convention for International Sale of Goods (Vienna, 1980), in force on Feb. 1991. See Part V, Selected International Conventions.

WTO Accession.

On Apr. 10, 2008, Verkhovna Rada of Ukraine ratified Protocol ``On accession of Ukraine to WTO'' signed on Feb. 5, 2008 in Geneva. Ukraine gained membership in WTO since May 16, 2008. Main legislative changes relate to access of goods and services to markets in following areas: (i) Insurance; (ii) agriculture; (iii) metal export; (iv) banking; (v) intellectual property; (vi) media; (vii) customs procedures; and (viii) services market.

See also category 14 Foreign Trade and Commerce.

1
VENEZUELA LAW DIGEST

—Scope —

Revised for 2008 edition by

CURTIS, MALLET-PREVOST, COLT & MOSLE LLP, of New York.

(Abbreviations: C. C.—Civil Code; C. Com.—Code of Commerce; C. C. P.—Code of Civil Procedure; D.F.L.—Decree with Force of Law; L.L.—Labor Law.)

Note: This revision incorporates legislation through Dec. 7, 2007.

1 INTRODUCTION

1.01 CURRENCY:

Monetary unit is bolívar, divided in 100 cents. Banco Central is only bank which may issue bank notes. Accounts in Venezuela must be in bolívares and international transactions contracted in foreign money may be entered in that currency but must also show bolívar equivalent. Obligations in foreign money may be paid in national currency at exchange rate prevailing at time of payment, or in agreed currency. (Const. Art. 318, Central Bank Law of July 19, 2005, Arts. 94, 95, 110, 115 and 116).

1.02 GOVERNMENT AND LEGAL SYSTEM:

Constitution promulgated on Dec. 30, 1999.

República Bolivariana de Venezuela is democratic and social Federal State of law and justice. Country is divided into Capital District, States, federal dependencies and federal territories; federal territories are organized in municipalities.

Executive power is vested in President elected by direct popular vote for six years, may be reelected for additional term. Vice-President is elected by popular vote at same time as President.

Legislative power is vested in National Assembly. Number of representatives is determined on basis of population and are elected by direct popular vote for five years and may be reelected for two consecutive terms.

Judicial system includes among others: Judicial Power, Supreme Court of Justice and other Courts established by law, Ombudsman Office and Public Defender Office.

By Law of Feb. 1, 2007 Executive Power is empowered to issue decree laws regulating following areas: transformation of government institutions; public participation; reorganization of public offices; social and economic; finance and fiscal; personal safety and legal protection; science and technology; land distribution and territory division; security and national defense; infrastructure, transportation and services; and energy, for 18 months.

1.03 HOLIDAYS:

Jan. 1 (New Year's); Maundy Thursday*; Good Friday*; April 19 (Declaration of Independence); May 1 (Labor Day); June 24 (Battle of Carabobo); July 5 (Independence Day); July 24 (Bolivar's Birthday); Oct. 12 (Columbus Day); Dec. 25 (Christmas). (L.L. Art. 212, Law of June 22, 1971).

* These are movable holidays.

Regional holidays: Feb. 3 (Sucre's Birthday), Cumana, State of Sucre; Mar. 10 (Vargas' Day), port of La Guaira; Mar. 19 (St. Joseph), port of Puerto Cabello, State of Carabobo; Sept. 8 (Cocomoto), Las Piedras port, State of Falcon; Oct. 24 (Urdancia's Birthday), Maracaibo, State of Zulia; Nov. 14 (General Anzoategui's Birthday), Puerto La Cruz, State of Anzoategui; Nov. 18 (Chiquinquira Day), Maracaibo, State of Zulia.

1.04 OFFICE HOURS AND TIME ZONE:

Venezuela time zone is one hour later than Eastern Standard Time in the United States. That is -05:00 GMT. Office hours are generally from 8 a.m. to 6 p.m.

2 BUSINESS ORGANIZATIONS

2.01 AGENCY:

An agency may be express or tacit and may be accepted expressly or tacitly. It may be general or special.

A general agency comprises only acts of administration; in order to compromise, alienate, mortgage or execute other than ordinary administrative acts, the power must be expressly conferred. The agent must render accounts to the principal and in case he acts through another he is liable to the principal if he had no right to substitute or if he wrongfully selected the substitute or gave him instructions. The principal is obliged to reimburse the agent for losses suffered through the agency if through no fault of the agent and must pay him interest on advances.

The agency is terminated by: (1) Revocation; (2) resignation of the agent; (3) death or insolvency of the principal or agent; (4) incapacity of the principal or agent if the acts to be done require the approval of a curator. The principal may freely revoke the agency but such revocation does not affect third persons who in ignorance thereof contracted in good faith with the agent. The appointment of a new agent for the same business causes the revocation of the former agency from the day the appointment is announced. The agent may resign by notifying the principal, and if such resignation causes damage to the principal he must indemnify the damage unless he could not continue exercising the agency without suffering serious damage himself. Action taken by an agent who does not know that his powers have been revoked is valid if the parties acted in good faith. (C. C. Arts. 1684-1712, C. Com. arts. 376-409).

2.02 ASSOCIATIONS:

Associations legally established acquire a juridical personality through the recording of their articles of association, which must contain the name, domicile and object of the association and the manner of administration. The by-laws of the association must also be filed. (C. C. Art. 19).

2.03 CORPORATIONS:

(C. Com. Arts. 202-226, 242-352 and Law of Oct. 22, 1998, “Ley de Mercado de Capitales”).

Incorporation.

Articles of incorporation must state: (1) The name and domicile of the company, of its establishments and of its representatives; (2) object; (3) amount of capital subscribed and amount paid in; (4) name and domicile of the shareholders or number or nominal value of the shares, whether the latter are registered or to bearer, whether registered shares can be converted into bearer shares and vice versa, and when and for what amounts payments are to be made by the shareholders; (5) value of credits and other properties assigned to the company by the incorporators; (6) rules relating to balances and distribution of profits; (7) special rights reserved to promoters; (8) number of directors and their rights and obligations, stating who can sign for the company; (9) number of financial inspectors; (10) rights of stockholders meetings and any special rules relating to votes; (11) when company is to begin and end.

Corporations may be formed by an instrument executed by all the subscribers of the capital stock and stating who are to be the directors and financial inspectors until the first stockholders meeting. They may also be constituted by public subscription in which case the promoters publish a prospectus inviting subscriptions. For the definitive constitution of the company the entire amount of the capital must be subscribed and each shareholder must have paid in at least one-fifth of the amount of the shares subscribed by him, unless a larger sum is required by the articles of incorporation. If property other than money is assigned to the company, the shareholders must approve the same and the value given thereto. No special privilege in shares or bonds can be reserved to the promoters but they can be granted not exceeding one-tenth of the profits for a period not exceeding five years.

Stockholders meetings, unless otherwise provided in the by-laws, require the presence of holders of shares representing more than one-half of the corporate capital. If a sufficient number do not appear at the regular meeting, another is attempted three days later and if a sufficient number is still lacking, another call issues for a period of five days for a meeting at which any number of stockholders suffices for a quorum. Calls for meetings are issued by the directors and published in a newspaper. Directors must issue calls if required by stockholders representing one-fifth of the capital. Unless otherwise provided by the by-laws, the presence of stockholders representing three-fourths of the capital and the vote of stockholders representing at least one-half the capital, is required for: (1) Dissolution of the company before the period specified; (2) extension of the company; (3) fusion with another company; (4) sale of corporate property; (5) reimbursement or increase of capital; (6) reduction of capital; (7) change of object; (8) revision of the by-laws with respect to aforesaid matters. If a sufficient number of stockholders does not attend, another call is issued for a meeting at which any number of stockholders may be present, but the decisions of such meeting must be published and must be ratified by another meeting called in the regular manner at which any number of stockholders may be present. Stockholders may be represented by proxies, but neither directors, financial inspectors nor managers can be proxies.

Directors of a corporation may be one or more in number and need not be stockholders. They are elected by the stockholders. As security for their actions they must deposit in the treasury of the company such number of shares as may be determined in the by-laws. When there are several directors one-half of the number constitutes a quorum unless the by-laws provide otherwise. Unless otherwise provided in the by-laws, the directors continue in office for two years and may be re-elected. Directors cannot intervene in matters in which they have a personal interest. Every six months they must prepare a summary account of the company's assets and liabilities. They are also required to prepare financial statements, with vouchers, showing the status of the corporate capital, the amounts paid in and those owing, the profits obtained and losses suffered. Within ten days after the approval of the statement by the stockholders, a copy of such statement and of the report of the financial inspectors must be filed with the judge of commerce.

Financial inspectors, one or more in number, who need not be stockholders, are elected by the stockholders to inspect the accounts of the directors and report thereon to the stockholders meetings. They may examine books, correspondence and all other documents of company. Any stockholder may complain to these inspectors regarding acts of directors which he considers improper and inspectors must refer to such complaints in their report to stockholders. If complaint is made by stockholders representing one-tenth of capital inspectors must report as to matters complained of. If they consider complaints well founded and urgent they may call meeting of stockholders.

Ordinary management of the business may be confided to managers or other agents, whether stockholders or not, whose appointment and powers are regulated by the by-laws.

Shares of stock must all be of the same value and they carry the same rights unless otherwise provided by the by-laws. Stock certificates must state: (1) Name of the company, its domicile, the place where the by-laws are registered, mentioning the date and number of the registration; (2) amount of the capital, the value of the share and if there are several kinds of shares, a statement as to their preferences and the amount of the different classes; (3) date when the regular annual meeting of stockholders is held according to the by-laws; (4) duration of the company. Shares which are not fully paid must be registered shares. A company cannot purchase its own shares except when authorized by the stockholders' assembly and when the purchase is made with the profits of the company. A company cannot make loans with the guarantee of its own shares. Shares of stock cannot bear interest and dividends can be paid only from liquidated and collected profits.

Reserve.

Annually at least 5% of the profits must be set aside to form a reserve fund until an amount is reached as designated in the by-laws and which cannot be less than 10% of the capital.

Obligations, whether bearer or registered, cannot be issued for an amount exceeding the capital paid in and still subsisting according to the latest balance. This prohibition does not apply to bills of exchange or books of deposit or other documents arising from a specific business. Issues of obligations require the same majority of shareholders as is required for dissolution of the company and other special resolutions.

Dissolution.

If it should become apparent that the capital has diminished by one-third, the shareholders must decide whether they will make up the loss, or limit the capital to the smaller sum, or place the company in liquidation. Commercial companies are dissolved by: (1) Expiration of their term; (2) failure or cessation of the purpose of the company; (3) final accomplishment of such purpose; (4) bankruptcy; (5) loss of capital; (6) resolution of the shareholders; (7) incorporation with another company. The shareholders' meeting which decides upon the dissolution appoints the liquidators.

Corporate Fees and Taxes.

Corporations are required to pay an annual municipal license tax depending on the importance of their business, but never very large. A tax of one per mil on the corporate capital is paid once upon organization and on further capital increases (Judicial Tariff). Bearer shares are subject besides to a special tax. (See category 22 Taxation, topic Inheritance Tax.) Assignments of these securities are subject to a similar tax.

Cooperative companies have a variable capital, indefinite duration and an unlimited number of members, not less than seven. Each member has one vote, whatever the number of his shares. They are subject to special regulation of the Government and are governed in general by the rules relating to corporations. (D.F.L. 1440 of Aug. 30, 2001).

Insurance companies (D.F.L. 1545 of Nov. 9, 2001, regulated by Decree 3232 of Jan. 20, 1999) are subject to strict regulations and supervision. Among other requirements, they have to be organized as corporations, by at least five shareholders who may be natural or juridical persons, with minimum capital indicated by law and with nominative shares all of one class. Also required is deposit in Banco Central to operate.

Limited liability companies have some characteristics of a corporation and some of a partnership. Capital is divided into quotas of equal par value of Bs. 1,000 or a multiple thereof. Liability of quotaholders is limited to amount of their respective quotas. The company is administered by one or more persons who need not be quotaholders. Company must have financial inspectors if its capital exceeds certain amount. Unless otherwise provided, limited liability companies are governed by provisions of the Code of Commerce relating to corporations and partnerships insofar as applicable. (C. Com. Arts. 312-336).

Foreign Companies.

Companies constituted abroad which have their principal seat of business in Venezuela are considered Venezuelan companies. Those constituted abroad and having only branches in the Republic, or business which does not constitute their principal object, preserve their nationality but are considered domiciled in Venezuela. Foreign corporations must register in the registry of commerce of the place where they have their agency and must publish in a local paper their articles of incorporation and a duly legalized copy of the respective articles of the laws of their nationality. They must also file a copy of their by-laws. All foreign companies must have a representative in Venezuela enjoying full powers except the power to alienate the enterprise or concession, unless such power is also given to him expressly.

Foreign companies which have no branches or exploitations in Venezuela may nevertheless do business in the country and appear in court. All persons contracting in name of companies constituted abroad and not duly registered in Venezuela are personally and jointly liable for obligations contracted in country and company itself may also be sued. See also subhead Insurance Companies, supra.

Public Corporations.

D.F.L. 1555 of Nov. 13, 2001 regulated by Decree 4032 of Nov. 1, 2005; and Decree 2371 of Apr. 24, 2003 regulate public bids contracts of services and purchase of goods by public entities and state corporations, giving preference to contracting of services and purchase of goods locally before resorting to foreign sources. By Organic Law of Public Credit, of Oct. 26, 1992, public institutions require special authorization to engage in credit negotiations.

2.04 FOREIGN CORPORATIONS:

See topic 2.03 Corporations.

2.05 LIMITED PARTNERSHIP:

See topic 2.06 Partnerships.

2.06 PARTNERSHIPS:

(C. Com. Arts. 200-358; C. C. 1649-1683).

General partnership (compañía en nombre colectivo) is one in which all the partners are liable jointly and to an unlimited extent for the partnership obligations. They are considered as legal entities in the same manner as corporations. The firm name can contain only names of partners unless the partnership is a successor of another and so describes itself. Partnership must file with the court of commerce an extract from the partnership agreement, stating: (1) Names and domicile of the partners; (2) name of the partnership and its object; (3) name of the partners authorized to sign for the partnership; (4) period during which the partnership will continue. This extract is also published in a newspaper of the locality or, if there is none, by posters. The liability of the partners cannot be limited by any clause of their contract but creditors cannot bring suit against them without first having brought suit against the partnership. The partnership can be obligated only by the partners authorized to appear, but any partner whose name appear in the firm name may act for the firm. Partners cannot be interested in other firms having the same object except with the consent of their associates, nor can they do business of the same kind for their own account or for a third person. Partnerships are dissolved by: (1) Expiration of their term; (2) failure or cessation of their object; (3) full attainment of their object; (4) bankruptcy; (5) loss of their capital; (6) decision of the members; (7) incorporation with another firm.

Limited partnership (compañía en comandita) is one in which social liabilities are guaranteed by unlimited and solidary responsibility of one or more partners, so called solidary partners or special partners, and for limited responsibility up to certain amount of one or more partners called silent partners. Capital of so called silent partners may be divided into shares. They constitute legal entities. Name of limited partner cannot appear in firm name; if it does, he is liable for firm's obligations. Limited partners cannot perform any act of administration or be general agents of firm but they may be special agents if this is clearly expressed. Interest of special partners may be represented by shares.

Temporary partnership (asociación en participación) arises when a person gives to one or more persons a participation in some or all of his commercial operations. In such cases third persons have rights and obligations only with respect to the person with whom they contracted. The participants have no property rights in the object of the association, their rights being limited to receiving an accounting of the funds contracted by them.

Civil partnership may be formed by any two or more persons who contribute something in order to divide the resulting profits. If there is no agreement as to its duration it is considered contracted for an unlimited time, but in such cases it may be dissolved at the option of any of the parties. When two or more associates have been entrusted with the administration of the partnership without a further determination of their attributes, each can act alone. If it was stipulated that they must act by unanimous consent or majority vote, such agreement must be observed unless the case is an urgent one where failure to act might produce irreparable injury. If there has been no special stipulation as to the method of administration, it is presumed that the associates have reciprocally given each other the power to administer and each associate may make use of the property of the association in a reasonable manner and may obligate the others to contribute to the expenses of the association, but he cannot make innovations in the real estate of the association if the others do not consent.

Foreign Partnerships.

See topic 2.03 Corporations.

3 BUSINESS REGULATION AND COMMERCE

3.01 BANKS AND BANKING:

(Const. Arts. 318, 319; General Banking D.F.L. 1526 of Nov. 3, 2001, and its regulations, Decree 2371 of Apr. 24, 2003).

Credit operations which are typical banking operations are reserved to banks and credit institutions. They are governed by General Banking Law. Activities of banks and credit institutions must be carried out in accordance with abovementioned law, Commercial Code, regulations issued by national Executive and resolutions issued by Central Bank of Venezuela or national Executive through Superintendency of Banks.

Central Bank purpose is to create and maintain monetary credit and exchange conditions favorable to monetary stability, to economic equilibrium of country and to orderly development of economy.

Inspection, supervision and control of banks and credit institutions is responsibility of Superintendency of Banks.

Financial leasing operations are subject to supervision of Superintendency of Banks.

3.02 BILLS AND NOTES:

A bill of exchange must contain: (1) Statement that it is a bill of exchange; (2) order to pay a specific sum; (3) name of drawee; (4) maturity date, the bill being considered a sight draft if no date is stated; (5) place of payment; (6) name of person to whom or to whose order payment is to be made; (7) date and place of issue; (8) signature of drawer. A bill drawn at sight, or at a certain time after sight, may bear interest, which, unless otherwise expressed, is 5%. The drawer guarantees acceptance and payment. He may exempt himself from guaranteeing acceptance, but not from guaranteeing payment.

Endorsements must be unconditional. Endorsements to bearer are invalid but blank endorsements are allowed. Unless otherwise stated, the endorser guarantees acceptance and payment. An endorsement after maturity has the same effect as if made before maturity, but after protest, or the time allowed for protest, it has merely the effect of an assignment.

Bills of exchange must be presented for acceptance before maturity or at the time indicated in the bill. Those drawn at a certain period after sight must be presented within six months from their date unless a different time is stipulated by the drawer, but the endorsements may reduce such time limits. The drawee may demand that the bill be presented to him a second time on the day after the first presentation. Acceptance may be partial, but cannot be otherwise modified.

There are no days of grace. Failure to pay or accept must be evidenced by protest. Protest for failure to pay must be made on the day of maturity or on one of the following two working days. Protest for failure to accept must be made before the end of the period for acceptance. The holder must, within four working days, notify his endorser and the drawer of the failure to accept or pay and each endorser must notify the previous endorser within two days. In suing on the bill the holder may claim: (1) The amount of the bill with interest if stipulated; (2) interest at 5% from maturity; (3) the cost of the protest and other expenses; (4) a commission of 1/6% of the amount of the bill, unless a smaller amount was stipulated. In case of failure to present a bill at the proper time or to protest it for lack of acceptance or payment, the holder loses his rights against all persons except the acceptor. In case the presentation of the bill or the making of the protest are impeded by force majeure the respective periods are extended, but the holder must advise his endorser and attach a statement of such advice to the bill. If the force majeure continues over 30 days from maturity all actions may be exercised without presentation or protest.

Promissory notes must state: (1) Date; (2) amount in words and figures; (3) maturity; (4) person to whom or to whose order payment shall be made; (5) whether for value received and in what manner or for what account. Most of the rules covering bills of exchange are applicable to promissory notes.

Checks must state the amount payable and date. They may be drawn to bearer. They may be payable at sight or within a period not exceeding six days after presentation. Many of the rules relating to bills of exchange apply to checks, including the protest requirements. Checks must be presented within eight days after the date of issue, if payable in the same place where issued, and within fifteen days if drawn elsewhere. The holder who fails to present a check within these periods, or to demand payment at maturity, loses his rights against the endorsers and also against the drawer, if the amount of the check is no longer available through acts of the drawee. (C. Com. Arts. 410-502).

3.03 COMMERCIAL REGISTER:

See category 9 Documents and Records, topic 9.05 Records.

3.04 CONDITIONAL SALES:

See topic Sales (of Realty and Personalty).

3.05 CONTRACTS:

(Civil Code art. 1133 et seq.).

A contract is closed with offeror's knowledge of acceptance. Essential requirements for existence of a contract are: (a) Consent (b) a licit object (c) a licit consideration.

All civil contracts for an amount in excess of 2,000 Bolivares must be in written form. Parol evidence of their existence is not admissible.

Formalities of contracts are governed by law of place of execution. However, it shall be necessary to comply with Venezuelan law when latter requires that contracts be executed by means of either public or private instruments.

Art. 107 et seq. of Commercial Code, governs commercial contracts, which are those executed among merchants or with a merchant. Contracts executed abroad to be performed in Venezuela shall be governed by Venezuelan law unless otherwise provided by parties.

Contracts with Government and with its agencies are regulated by D.F.L. 1555 of Nov. 13, 2001 and Decree 2371 of Apr. 24, 2003.

3.06 FRAUDS, STATUTE OF:

See category 9 Documents and Records, topic 9.04 Public Instruments.

3.07 INFORMATION TECHNOLOGY, INTERNET AND NEW MEDIA:

Law on Data Messages and Electronic Signatures.

D.F.L. 1204 of Feb. 10, 2001 regulated by Decree 3335 of Dec. 14, 2004 regulates electronic messages and signatures, considering them to have same legal validity and effect as handwritten signatures and paper documents according to law. Law establishes rules for determining time and place that data message will be deemed issued and received, as well as rules regarding acknowledgments of receipt. It also regulates digital certificates and certification service providers. Superintendencia de Servicios de Certificación Eletrócnica authorizes and supervises entities providing electronic certification services, and requirements for certification entities to be authorized, and included sanctions to certification entities for noncompliance with their obligations under law. Electronic certification issued by foreign entities, non-authorized in country has same legal value and effect as local certifications when its validity is guaranteed by local certification entity, otherwise will only be considered as presumption or as circumstantial evidence.

Special Law Against Information Technology Crimes.

(Law 48 of Oct. 30, 2001). Law protects systems using information technologies, prevents and punishes crimes committed against these systems or any of their components, or crimes committed using such technologies, under terms provided by Law. Infringement of law is tried in country, even when crime was committed abroad, and its effects were in country. Crimes are divided into groups, depending on type of protection being sought, among them are: against systems using information technology, against private property, against children. In case of crimes against property and economic nature, violator must indemnify victim by paying amount equal to damage caused. Penalties provided by law are imprisonment, fines, seizure of equipment used to commit crime, community work, ban on practicing profession, art or industry and/or on working in any company or institution engaged in activities in that field.

Science, Technology and Innovation Organic Law.

(Law of Dec. 7, 2005 regulated by Decree 4891 of Oct. 9, 2006). Law creates National System of Science, Technology and Innovation formed by private and public institutions, individuals and juridical persons that generate and develop scientific and technological knowledge for purpose of sharing and cooperation among them and contribute to development of country. Such system is financed by contributions of large enterprises which must pay between 0.1% to 0.5% of gross income from activities indicated by law.

3.08 INTEREST:

The legal civil rate of interest is 3% but the parties may agree on any other rate not exceeding the current rate by one-half and in no case over 12%. Mercantile debts bear interest at the rate current in the market, not exceeding 12%. Usury is punishable by fine and imprisonment. (C. C. Arts. 1745-1748; C. Com. Art. 108; Law 247 of Apr. 9, 1946 as am'd).

3.09 MONOPOLIES, RESTRAINT OF TRADE AND COMPETITION:

(Const., Arts. 112-114, 117, Anti-Trust Law of Dec. 30, 1991 regulated by Decrees 2775 of Jan. 21, 1993 and 1311 of May 2, 1996; Decree 230 of June 1, 1955; Decree 3303; Law on Consumer Protection of Apr. 30, 2004, regulated by Decrees 2270 and 2271 of May 21, 1992, 2755, 2756 of Jan. 14, 1993 and 3072 of July 15, 1993; Law on Unfair Foreign Trade Practices of June 18, 1992 regulated by Decree 2883 of Apr. 5, 1993; Decree-Law 250 of Aug. 10, 1999 on protective measures; Customs Law, Decree-Law D.F.L. 150 of May 25, 1999).

The constitution guarantees freedom of work and industry with such limitations as those indicated in Constitution and law for human development purposes, security, sanitation, environmental protection and social interest. Monopolies for exclusive exercise of any industry are therefore prohibited. Temporary privileges may be granted only with regard to copyrights, patents and trademarks and for establishment and exploitation of railroads, canalization systems, telephone and telegraph lines and other communication systems.

Constitution authorizes State to enact rules for preventing undue rise in prices and maneuvers tending to obstruct or restrict economic freedom. Law empowers Executive to prohibit importation of certain merchandise or to subject it to granting of special licenses. Executive is empowered to fix wholesale prices and retail prices for articles that are of prime necessity. Rental of urban and suburban buildings of commercial or industrial sites is subject to regulation and control.

Anti-trust law promotes and protects free competition, prohibits monopolistic and oligopolistic practices and any other unfair practice that may limit economic freedom. Law is applied to individuals and to public or private juridical persons and nonprofit organizations engaged in economic activities.

Law prohibits any practices, arrangements or agreements that limit or restrict free competition such as manipulation of production or distribution of goods, of technological development or investment; economic concentration leading to domination of part or whole market; abuse of dominant position in market; unfair competition, especially misleading or false advertising, promotion of goods and services based on false statements, commercial bribery, infringement of industrial secrets and counterfeiting of products. Government may allow some monopolistic practices as exception. “Superintendencia para la Promoción y Protección de la Libre Competencia” is in charge of enforcing this law, and it is empowered to impose fines in case of infringement.

Law on consumer protection regulates organization, management, inspection, coordination and execution of measures, plans and programs adopted in country for legal protection of consumers; investigation of consumer services and consumer products, their price structure and education, promotion and reporting of needs, interests and problems of consumers.

It also regulates lease of personal property, contracts for public or private services, electronic commerce, labeling of product, responsibility of supplier, adhesion contracts, sales on credit contracts, warranties, profiteering, hoarding and usury, advertisements, credit sales, dispute resolution by conciliation and arbitration. Noncompliance with law is considered administrative offense or crime and penalties include imposition of fines and imprisonment up to six years. Law is of public order and consumer's right may not be waived.

Law protects local production from unfair practices of international trade, imposing countervailing duties on import of foreign goods. Dumping and subvention are considered unfair practices. Dumping is defined as import of foreign goods at lower price than normal value in place of origin. Normal value is determined according to method indicated by law. Subvention is defined as direct or indirect incentives, subsidies, premiums or assistance of any kind, including preferential exchange rate granted by foreign governments to producers, manufacturers, transporters or exporters of goods in order to make them more competitive on international market. Anti-dumping and Subsidies Commission is in charge of enforcing this law.

Protective measures may be issued to protect local production from massive import of same or similar products that may cause pecuniary loss to local producers. Such measures may be increase of import taxes, surcharges and quotas. They are issued temporarily while investigation takes place and definitely for periods up to six years, which can be extended up to three more years.

See also category 14 Foreign Trade and Commerce, topic 14.04 Foreign Investment.

3.10 NEGOTIABLE INSTRUMENTS:

See topic 3.02 Bills and Notes.

3.11 RESTRAINT OF TRADE:

See topic 3.09 Monopolies, 3.11 Restraint of Trade and Competition.

3.12 SALES (OF REALTY AND PERSONALTY):

A sale is perfect between the parties and the title passes to the purchaser from the moment the parties manifest their consent in legal manner. The article sold remains at the risk of the buyer although there has been no delivery, except that, if the sale was by weight, count or measure, it is not perfect until these acts have been realized. A sale may be absolute or subject to a condition precedent or subsequent. The price of a sale must be determined by the parties or may be left to be determined by a third person. The costs of the instrument of sale and other accessories are payable by the purchaser. Parents cannot purchase property of the children under their care, nor guardians the property of persons under their guardianship, nor agents the property entrusted to them for sale, nor can attorneys make contracts of sale with their clients regarding matters handled by them.

The principal obligations of the vendor are delivery and warranty of the object sold. The object sold must be delivered as described in the contract. If real estate is sold at a fixed price per unit and the area is found to differ from that stated in the contract there is an adjustment in the price, but the purchaser may withdraw if the excess is more than one-twentieth. Where the object is sold as a whole and is found to vary more than one-twentieth from the size stated in the contract an adjustment of the price may be demanded unless otherwise stipulated.

Warranty covers defects which were not apparent but does not cover those which could be seen. The parties may by agreement increase or limit the usual warranty of the vendor.

Options to repurchase are valid but cannot be stipulated for a longer period than five years, although this period may be extended from time to time. (C. C. Arts. 1161, 1197-1200,

1474-1557).

Conditional sales on installments are governed by Law 491 of Dec. 26, 1958.

4 CITIZENSHIP

4.01 ALIENS:

See category 16 Immigration.

5 CIVIL ACTIONS AND PROCEDURE

5.01 ACTIONS:

Actions for Death.

See category 12 Estates and Trusts, topic 12.03 Death, subhead Actions for Death.

Limitation of.

See topic 5.06 Prescription, subhead Limitation of Actions.

5.02 DEPOSITIONS AND DISCOVERY:

Testimony is usually taken in civil cases on written interrogatories with the right to the other party to ask questions orally or in writing. Judges may commission other judges to take such interrogatories. Orders of foreign courts regarding the examination of witnesses and similar matters will be executed by decree of the judge of first instance of the respective locality, provided they come together with letters rogatory of the judge who issued them and are legalized by a diplomatic or consular officer of Venezuela or go through diplomatic channels, and provided that some person has been designated to pay the expenses. (C.C.P. Arts. 477-510, 857, 858).

5.03 EVIDENCE:

See topic 5.02 Depositions and Discovery.

5.04 JUDGMENTS:

Judgments must state the reasons on which they are founded. A judgment is considered to impose a judicial mortgage on the judgment debtor's property, but the lien is not effective until recorded in the registry with respect to such property. See category 20 Mortgages, topic 20.03 Mortgages.

Foreign judgments will be executed in Venezuela if they fulfil the following conditions: (1) That it was given by competent authority and not in derogation of Venezuelan jurisdiction; (2) that it has force of res judicata in State where rendered; (3) that it was rendered in personal actions, civil or mercantile; (4) that defendant was legally summoned and given sufficient time to answer complaint; (5) that it does not interfere with local judgment; (6) that it does not refer to rights of real estate located in Venezuela and that judgment is not in conflict with public policy or Venezuelan public law. (C. C. P. 242-254, 850-858, Law of Aug. 6, 1998).

5.05 LIMITATION OF ACTIONS:

See topic 5.06 Prescription.

5.06 PRESCRIPTION:

Prescription is a method of acquiring a right or extinguishing an obligation through lapse of time. In default of provisions designating a shorter time, actions pertaining to real estate are barred by prescription in 20 years and personal actions in ten years, even in the absence of just title and good faith. When real property is acquired by an instrument duly recorded, title by prescription arises in ten years from the date of recording.

Limitation of Actions.

The following actions are barred in the periods designated:

Twenty years: Actions on judgments.

Five years: Actions to set aside conveyances in fraud of creditors; to oblige partners to pay firm debts; actions in connection with maritime obligations where no other period is provided by law.

Three years: Actions to recover rentals; to recover interest or amounts payable in one year or shorter periods; to require attorneys to account for papers or other matters; actions on bills of exchange against the acceptor.

Two years: Actions to recover amounts due for support; to recover lawyers' fees, registrars' fees, agents' salaries, fees of physicians, surgeons and druggists, compensation of teachers, engineers, architects and surveyors, hotel and board bills, the value of merchandise sold by merchants to others who are not merchants, fees of judges, court clerks and bailiffs, wages of servants, laborers and mechanics; actions to recover personal property lost or stolen.

One year: Actions against the maker and endorsers of bills of exchange and promissory notes; for supplies for vessels and wages in connection with the construction and repair of vessels; for wages of crews and for delivery of merchandise transported.

Six months: Actions of endorsers against each other and against the maker; actions for the recovery of freight and passenger charges and contributions for gross average.

Prescription is interrupted by a judicial demand, by a recognition of the obligation and, in case of credits, by extrajudicial demand. (C. C. Arts. 1346, 1952-1988; C. Com. Arts. 371-375, 479-480, 889-897).

5.07 SEQUESTRATION:

Sequestration will be allowed with regard to: (1) Personal property which is the object of the litigation, when the defendant is irresponsible or it is feared that he may hide, alienate or deteriorate it; (2) the matter in litigation when its possession is doubtful; (3) community property or spouse's property equivalent in amount to community property, when said spouse is administrating community property and dissipating it; (4) parts of decedent's estate when they are claimed as legal portion of heir; (5) real property which defendant has purchased and is enjoying without having paid purchase price; (6) matter in litigation when after judgment against possessor he appeals without giving bond; (7) leased property when defendant has failed to pay rental or is allowing property to deteriorate or is not making agreed improvements or lease expires, if date of expiration is set by contract in public or private document. In order to obtain order of sequestration it is necessary to submit proof to court showing grave presumption that remedy should be granted. Sequestration may be raised by giving bond. (C. C. P. Arts. 585-590, 599).

6 COURTS AND LEGISLATURE

6.01 COURTS:

There is national judiciary system composed of Ombudsman Office, Public Defender Office, inferior courts and Supreme Court of Justice which is highest tribunal of Republic. Federal Court has jurisdiction in various criminal and civil matters involving government or high officials.

Courts are: (a) Municipal courts for minor civil and commercial matters, (b) Courts of First Instances for decisions of civil, commercial and criminal matters and appeals of lower courts, (c) Courts of Appeals which hear appeals from courts of first instances in civil, commercial and criminal matters and Superior Courts which hear appeals from courts of first instance in civil and commercial matters and exercise special functions, (d) Supreme Court of Justice which can, in certain cases, review decisions of superior courts, exercises various special functions and has administrative supervision over courts. There are similar courts in various states. Labor matters are under jurisdiction of Labor Tribunals of First Instance and Labor Superior Courts. (See category 10 Employment, topic 10.01 Labor Relations.) (Const. Arts. 253-261; Organic Law of the Judicial Power of Sept. 8, 1998; Organic Law of Supreme Justice Court of May 19, 2004).

6.02 LAW REPORTS, CODES:

See topics 6.04 Reports, 6.05 Statutes.

6.03 LEGISLATURE:

Congress meets at Caracas from Jan. 5 to Aug. 15, and from Sept. 15 to Dec. 15 every year. Special sessions may be called to consider matters designated in the call. (Const., Arts. 219-220).

By Law of Feb. 1, 2007 Executive Power is empowered to issue decree laws regulating following areas: transformation of government institutions; public participation; reorganization of public offices; social and economic; finance and fiscal; personal safety and legal protection; science and technology; land distribution and territory division; security and national defense; infrastructure, transportation and services; and energy, for 18 months.

6.04 REPORTS:

The decisions of the Supreme Court of Justice are published in Official Gazette. They are also published in annual memorial submitted by court to Congress.

6.05 STATUTES:

The laws of Venezuela are published in the official newspaper, the “Gaceta Oficial,” which appears daily except on holidays, and also in an annual publication called Compilation of the Laws and Decrees of Venezuela. Official editions of important codes and other laws are also occasionally issued. Among the principal codes and laws are the following: National Constitution; Civil Code; Code of Civil Procedure; Penal Code; Code of Criminal Procedure; Code of Commerce; Customs Law; Treasury Law; Mining Law; Law governing Hydrocarbons and other Combustible Minerals; Labor Law; Organic Law of Public Credit; Law of Administrative Procedures.

7 DEBTOR AND CREDITOR

7.01 ASSIGNMENTS:

The assignment of a credit, right or action is perfect from the moment there is agreement as to the thing assigned and the price, even before there is tradition. Tradition is effected by delivering the document proving the debt or right. The assignee has no rights against third persons until the debtor has been notified of the assignment or has accepted it. The assignment of a credit carries with it the accessories thereof, such as securities. The assignor of a credit guarantees its existence unless the assignment is made without guaranty, but he is not responsible for the solvency of the debtor unless expressly stipulated. (C. C. Arts. 1549-1557).

7.02 ASSIGNMENTS FOR BENEFIT OF CREDITORS:

An assignment for the benefit of creditors may be made in good faith by a debtor who, as a consequence of unavoidable misfortunes, is unable to pay his creditors. It may be made by agreement with the creditors or under judicial order. The court will not allow the assignment if the debtor has: (1) Alienated part of his assets in the previous six months without leaving sufficient to pay all his debts; (2) paid a creditor within the preceding six months to the damage of the other creditors; (3) wasted his assets or is himself responsible for his difficulties; (4) obtained an extension from his creditors; (5) failed to repay amounts administered by him for the government; (6) hidden part of his assets; (7) inserted fictitious items in his list of debts. By unanimous approval of creditors the court may allow the assignment in the first four cases but under no circumstances in the last three.

The following acts of the debtor effected after the assignment or within 20 days previous thereto are void: (1) Alienation of property without valuable consideration; (2) giving of special security for debts contracted before the said period; (3) payments of unmatured debts; (4) payments of matured debts made otherwise than in money or negotiable paper.

The results of the assignment are: (1) Interest ceases on all debts except those especially secured; (2) unmatured debts fall due; (3) debts are extinguished up to the amount covered by the assignment; (4) if the assignment is insufficient to pay all debts and the debtor afterwards acquires further property, he must complete payment with such property.

The creditors may permit the debtor to continue administering the property and make any agreement they consider advisable, with the approval of two-thirds of the creditors present holding three-quarters of the credits, or three-quarters of the creditors present holding two-thirds of the credits. (C. C. Arts. 1934-1949).

7.03 ATTACHMENT:

In any state of a litigation either of the parties upon producing evidence constituting a grave presumption in favor of the right demanded, may ask for: (1) Prohibition of the alienation or encumbrance of real property; (2) sequestration of specific property; (3) attachment of personal property. The order for attachment may also be granted, even though the legal requirements are not covered, if the petitioning party gives bond. All such preliminary orders must be vacated if the other party gives bond.

After judgment an attachment is issued against real and personal property belonging to the debtor and designated by the creditor, for an amount equal to double the judgment.

If a third party intervenes before judgment and claims the property in dispute or under attachment, the judgment in the principal suit will not be executed unless bond be given, but if the intervention is based upon a document authorizing a summary action, no bond will be admitted and the principal action is continued and intervention is decided separately unless its decision is fundamental for decision of principal action. If objection be made to attachment issued by virtue of judgment, it is decided by court in brief summary proceeding. (C. C. P. Arts. 523-607).

7.04 BANKRUPTCY:

A merchant whose assets exceed his liabilities, but who is obliged to suspend payments, may apply to the Court of Commerce for authorization to liquidate his business in a period not exceeding twelve months. The court appoints a receiver and calls a meeting of creditors, and after hearing their report gives its decision. During the period of liquidation no ordinary actions can be brought against the debtor for collection of debts and the debtor may make any agreements with the creditors.

If not covered by the foregoing provisions a merchant who ceases payments is considered in bankruptcy. Bankruptcy may be of three kinds: (1) Fortuitous, if arising from fortuitous causes or force majeure; (2) culpable, if occasioned by imprudent or dissipated conduct of the bankrupt; (3) fraudulent, if it involves fraudulent acts of the bankrupt to the damage of his creditors. In the last two cases the debtor is subject to punishment under the Penal Code. If a corporation falls into culpable or fraudulent bankruptcy its promoters and directors are subject to punishment if they have not complied with the law.

Within three days after ceasing payments the debtor must advise the court and file his balance and a statement of the reasons for the bankruptcy. Creditors may demand a declaration of bankruptcy although their credits have not matured. The court appoints a receiver and thereafter the administration of the estate belongs to the creditors through the receivers. An inventory is made and a general meeting of creditors called, at which the creditors may propose that instead of the court bankruptcy proceedings, the liquidation be effected by the creditors, for which purpose a liquidator may be appointed by the court and a committee of three creditors elected to assist him.

As a result of the declaration of bankruptcy all debts of the bankrupt mature. The following may be recovered: (1) Bills of exchange and other documents of credit given to the bankrupt or to a third person for him, if remitted merely for collection; (2) merchandise consigned for sale for account of the owner or deposited with the bankrupt, while unchanged in kind and capable of identification, also the unpaid part of the purchase money for such merchandise; (3) merchandise shipped to the bankrupt, if not yet delivered in his warehouses or any other warehouses at his disposal, but recovery cannot take place if the bankrupt sold the merchandise, without fraud, before its arrival.

The receivers make a list of debts and preferences and the creditors' meeting passes on their report, disagreements being decided by the court. The debtor may at any time make settlements with the creditors if they accept unanimously. If unanimity cannot be obtained, a meeting of creditors is called and propositions are accepted which secure the vote of two-thirds of the creditors representing three-fourths of the credits, or three-fourths of the creditors representing two-thirds of the credits. A fraudulent bankrupt cannot make agreements with the creditors. If no agreement is made the property is sold and distributed. Sales of personal property are public but the judge may authorize private sales. Real property must be sold with the formalities observed in the sale of real property of minors. (C. Com. Arts. 898-1081).

See also topic 7.08 Fraudulent Sales and Conveyances.

7.05 EXECUTIONS:

After a final judgment the court, upon the petition of a party, issues an order for the attachment of property of twice the amount of the judgment. The sale of the property is announced by posters and advertisements. The value of the property is assessed by a commission of three persons appointed, one by each party and the third by the parties or the court. The property is offered at public sale but no bid of less than one-half of such assessed valuation is accepted. If no admissible bid is received the property is again advertised for a brief period and in such second offer the lowest bid must be two-fifths of the valuation, unless the parties agree otherwise. If there is still no bid the property is again offered, this time in rental for the purpose of paying the debt out of the rents. The creditor may in such case agree to take it in antichresis, i.e., to administer it and pay himself out of the income. If at such third offer there is no bid the property is put up a fourth time at which the lowest bid is one-third the valuation, unless the valuation commission considers such offer inadvisable by reason of market conditions, in which event the property remains in deposit and the sale is postponed for six months or until one of the parties asks for a new valuation. In case of personal property the third offer is made on a basis of one-third of the assessed valuation. Once a sale is made there is right of replevin. (C. C.

P. Arts. 523-584).

7.06 EXEMPTIONS:

The following are not subject to attachment or sale under execution: (1) The bed of the debtor, his wife and his children; (2) clothing of the same persons and furniture and utensils strictly necessary for the debtor and his family; (3) books, tools and instruments necessary for the exercise of the debtor's profession or trade; (4) minimum salary except for claim for alimony and child support when remuneration is more than minimum salary but is less than double one-fifth of excess, when remuneration is over double of minimum salary, one-third. Loans and compensations or any other credit owed to employees related to work percentages vary according with amount involved; (5) homesteads (q.v.); (6) cemetery lots and their accessories; (7) participations in profits by laborers under Labor Code or contractual provision or similar benefits, including Christmas bonus, except that 50% thereof may be attached for support of family or payments upon dissolution of community property in marriages or de facto unions. (C. C. Art. 1929; L.L. Arts. 162-164).

7.07 FORECLOSURE:

See category 20 Mortgages, topic 20.03 Mortgages.

7.08 FRAUDULENT SALES AND CONVEYANCES:

Conveyances of property without valuable consideration made after suspension of payments or within a period of ten days before such suspension, are null and void with respect to creditors, and likewise mortgages, pledges, etc., given for debts contracted before said period of ten days. Other conveyances and contracts executed after suspension of payments and before bankruptcy proceedings may be annulled if the person contracting with the debtor was aware of his situation. Creditors may attack any acts of the debtor executed in fraud of their rights. Acts executed without valuable consideration by the debtor when insolvent or which cause him to become insolvent are considered executed in fraud of creditors; likewise acts executed by him when his insolvency was notorious, also guarantees given by insolvent debtor to secure unmatured debts. Actions to set aside such acts may be brought within five years from the date on which the creditors had notice of the same; if they relate to acts of a bankrupt they must be brought within a year after it appears that there is no agreement with the creditors. Acts simulated by the debtor to defraud his creditors may also be set aside within five years from the time they have notice thereof. (C. Com. Arts. 945, 946; C. C. Arts. 1279-1281).

See also topic 7.02 Assignments for Benefit of Creditors.

7.09 GARNISHMENT:

The proportion of salaries and pensions attached cannot exceed one-fifth of their amount. (C. C. Art. 1929). Attachments can be issued against property of the debtor in the hands of third persons.

7.10 HOMESTEADS:

A person may constitute a homestead for himself and family. The homestead may consist of a house alone or a house and lands. Homestead is constituted by writing filed with judge of first instance designating persons in whose favor it is constituted and property. It is exempted from attachments by creditors and cannot be alienated or encumbered without hearing persons for whose benefit it was established and without judicial authorization. When last participating person dies or ceases to have interest, property returns to heirs of persons constituting homestead. (C. C. Arts. 632-643).

7.11 INSOLVENCY:

See topic 7.04 Bankruptcy.

7.12 LIENS:

The following credits enjoy general liens on all the personal property of the debtor; (1) Legal expenses incurred to preserve the property; (2) funeral expenses; (3) expenses of the last illness not exceeding three months; (4) domestic wages not exceeding three months; (5) maintenance of debtor and family for the last six months; (6) national and municipal taxes during the current year and the previous year.

The following credits enjoy liens on specific personal property: (1) Credits secured by pledge, with regard to the property pledged; (2) credits for the construction, preservation or improvement of an article, while that article is in the hands of the creditor; (3) debts for seeds and for work of cultivation and collection of crops, with respect to the respective fruits; (4) rents of real property for not exceeding two years, with respect to the crops obtained during the year and to everything used for cultivating the property or required for the object to which it is devoted; (5) debts to innkeepers with respect to the effects of the guest; (6) transportation expenses, with respect to the articles transported while they are in possession of the carrier or within three days thereafter if in possession of the person to whom delivered; (7) credits for pensions or rents, with regard to the products of the estate charged therewith; (8) amounts due by public employees, with regard to salaries owing to them; (9) salaries of employees of a commercial or industrial concern, for a period of three months prior to the date of bankruptcy or assignment to creditors, with respect to the personal property belonging to the establishment.

The following are liens on real property: (1) Expenses incurred for the benefit of creditors in the attachment, deposit or public sale of the property; (2) taxes for the current and preceding year, recording fees and inheritance taxes. (C. C. 1863-1876). Due debts from merchant to merchant give a right of retention of the debtor's chattels in the creditor's possession. The same right arises regarding non-matured debts in case of the debtor's insolvency. (C. Com. 122-123).

7.13 PLEDGES:

By the contract of pledge the debtor delivers an article to the creditor as security for a debt. The pledge must be delivered into the physical possession of the creditor or a third person designated by the parties. If the article is worth over Bs. 2,000 the transaction must be set forth in writing. If the debt is not paid at maturity the creditor may have the pledged article sold at a judicial sale. (C. C. Arts. 1837-1854).

Pledges without delivery are permissible under certain circumstances. See category 20 Mortgages, topic 20.01 Chattel Mortgages.

7.14 REDEMPTION:

See topic 7.05 Executions; category 20 Mortgages, topic 20.03 Mortgages.

8 DISPUTE RESOLUTION

—Scope —

(Law of Apr. 7, 1998, C.P.C. Arts. 312, 608-629).

8.01 ARBITRATION:

Any dispute that is subject to settlement may be submitted to arbitration, with exceptions indicated by law. Law deals with domestic and international arbitration that may be according to rules agreed to by parties or subject to rules of arbitration center. There are two types of arbitration: de jure and in equity. Arbitration agreement must be in writing, in form of arbitral clause or in separate agreement. Arbitration is to resolve future disputes arising out of particular legal relationship or already existing dispute, whether or not dispute is pending judicial decision. Once arbitration agreement is adopted, it is exclusive means for resolving that matter. Evidence of arbitration agreement is any kind of document that constitutes record of agreement. Number of arbitrators should be three, unless parties agree on another number. Parties are free to establish place of arbitration and language used. Approval of Board of Directors and authorization of competent Minister is necessary for mixed companies with 50% or more of public capital to agree to submit to arbitration disputes arising out of contract. Arbitrators have authority to grant provisional remedies and to request any party to post bond. If no time is indicated, award must be rendered within six months from installation of arbitral tribunal. Deposit of arbitrator's fees and estimated expenses must be in advance. Arbitral award is enforceable by local courts without exequatur. Recognition or execution of foreign arbitral awards is according to international conventions, this law and Code of Civil Procedure.

8.02 CONVENTIONS:

Convention on the Recognition and Enforcement of Foreign Arbitral Awards, New York, 1958; Interamerican Conventions on International Commercial Arbitration, Panamá, 1975 and on Extraterritorial Validity of Foreign Judgments and Arbitral Awards, Montevideo, 1979.

9 DOCUMENTS AND RECORDS

9.01 ACKNOWLEDGMENTS:

Acknowledgments are made before notaries public and in certain cases before judicial officers. Usually two witnesses are required, of legal age, able to write Spanish and known to maker of document. If notary does not know maker of document two additional witnesses, known to him, are required to identify such maker. Relatives of notary and maker within second degree cannot be witnesses. Public acknowledgments of private documents are made before judicial officers. (Decree 3019 of Nov. 11, 1998 as am'd; Public and Notary Registry Law in Law of Dec. 22, 2006).

9.02 COMMISSIONS TO TAKE TESTIMONY:

See category 5 Civil Actions and Procedure, topic 5.02 Depositions and Discovery.

9.03 NOTARIES PUBLIC:

(Decree 3019 of Nov. 11, 1998 as am'd, Law of Dec. 22, 2006).

Notaries public must be Venezuelans, lawyers with at least five years of professional experience, and give bond before taking office. They keep books in which contracts, deeds, powers of attorney and other documents are inscribed and signed. Such books are preserved as public records. Notaries also register protests of negotiable instruments and intervene in opening of wills, authorize electronic transactions, certify autograph and electronic signatures and finger prints. They supply certified copies of documents as executed in their records. In some jurisdictions notaries are replaced by registrars in charge of record offices, before whom parties appear to acknowledge deeds, mortgages, etc., and in certain cases by judicial officers.

9.04 PUBLIC INSTRUMENTS:

Evidence of witnesses is not admissible to prove establishment or extinction of obligation when amount involved exceeds Bs. 2,000, nor is such evidence admissible to vary terms of written instrument. There are two kinds of written instruments: public and private. Public instruments are those acknowledged before registrar or other public officer and may be used as evidence against third persons. Private instruments merely obligate parties and have no specific date with respect to third persons except from date when one of signers dies or becomes unable to write or when instrument is filed in public registry or presented in court. (C. C. Arts. 1355-1393).

9.05 RECORDS:

Public Registry where all acts and contracts related to real property are recorded, among them, transfers, encumbrances, mortgages, partition, easements; Mercantile Registry is for recording of all acts and contract related to individual and corporate merchants, registration of foreign companies doing business in Venezuela, legalization of merchants' books, among others; Principal Registry for recording of births, marriages and death, divorce and separation judgments, annulment of marriage, adoptions, emancipation, guardianship, naturalization and academic, ecclesiastic and scientific degrees, among others. (C. C. Arts. 445-524, 1913-1928; Law of Dec. 22, 2006). See category 12 Estates and Trusts, topic 12.10 Wills.

There is no estate by curtesy. See categories 12 Estates and Trusts, topics Descent and Distribution, Wills; Family, topic Husband and Wife.

9.06 SEALS:

Seals are used by the government departments, registry offices and courts but not by private persons. Documents issued by public officials must bear their official seal. For private persons documents executed as public instruments take the place of sealed instruments. See topic 9.04 Public Instruments.

9.07 VITAL STATISTICS:

See topic 9.05 Records.

10 EMPLOYMENT

10.01 LABOR RELATIONS:

Rights of employees and laborers are regulated principally by Constitution (Arts. 87-96); Labor Law of June 10, 1997 regulated by Decree 3235 of Jan. 20, 1999 as amended; Law of Aug. 13, 2002 regulated by Decree 4447 of Apr. 25, 2006; Law of July 25, 2005 regulated by Decree 5078 of Dec. 22, 2006.

Labor Relations.

Law protects any labor relationship which exists between provider and receiver of personal services in exchange of monetary compensation. In any company or establishment at least 90% of workers must be Venezuelans, no more than 10% foreigners and remunerations paid to them cannot exceed 20% of total remunerations paid by employer. In contracts for indeterminate period, advance notice of termination must be given, varying from one week to one month according to length of service.

Eight-hour day is in effect with a maximum of 44 hours per week, for day shift and seven hours per day with maximum of 35 hours per week for night shift.

Paid Vacations.

Vacation period is 15 working days plus one additional day for each year worked, up to maximum 15 additional days. Workers also receive vacation allowance equal to minimum seven days' salary plus one day's salary per year of employment after first year, up to total of 21 days' salary.

Wages must be paid in money. Executive power may appoint commissions to designate minimum wages. Workers are entitled to a participation of 15% in net profits of establishments where they render services, in amounts equal to 15 days' salary to four months' salary. In certain cases Executive may issue resolution ordering distribution in form of bonuses when profits failed to materialize.

Profit Sharing.

Employer must distribute no less than 15% of net profit among all employees calculated according to law.

Day Care Centers.

Employers with more than 20 employees must have day care centers for infants and children up to six years of age. Employer may also comply with this obligation by payment of day care center fee to any public or private institution, or sharing expenses of day care center with various companies.

Women and Minors.

Children under 14 may not be employed in industrial, commercial or mining work. Minors under 18 and women may not be employed for night work, except for certain services, nor in mines, nor in certain other establishments. There are special provisions to protect pregnant women.

Workmen's compensation is payable in case of labor accidents and occupational diseases in amounts specified in law.

Organic Law on Prevention, Conditions and Environment of Work protects and guarantees workers' rights and increases employers' liability for work-related health and safety obligations. It makes employers jointly and severally liable for health and safety of contractors' workers and workers of outsourcing companies.

Unemployment Fund.

Law on System of Benefits of Employment of Aug. 29, 2005 establishes unemployment fund under administration of Social Security, to provide temporary financial support to workers who have lost their jobs. Contribution is equal to 2.50% of regular monthly salary received by workers up to ten minimum salaries. 80% of such contribution is paid by employer and 20% is paid by employee.

Conciliation boards and labor tribunals endeavor to settle collective conflicts and insure the proper enforcement of the Labor Law.

Labor exchanges under the supervision of a national employment agency attempt to coordinate labor supply and demand.

Organic law of labor procedure deals with special procedures for subpoenas, for classification of dismissals, reinstatement and payment of back wages. Law guaranties: impartiality but grants protection to workers as provided for in Constitution and labor laws. Judge has discretionary power to order payment for amounts not requested by worker, or payment of more than amount claimed when claims have been proven in court. It establishes brief oral procedure open to public, free of charges. Judges must evaluate evidence according to rules of reasonable person and, in case of doubt, to be more favorable to worker. Judge may suggest alternative solutions such as conciliation, mediation and arbitration.

11 ENVIRONMENT

11.01 ENVIRONMENTAL REGULATION:

(Const. Arts. 127-128; Organic Environmental Law of Dec. 22, 2006, Criminal Environmental Law of Jan. 2, 1992 as am'd). Constitution establishes legal framework for environmental legislation granting to all persons right to enjoy ecologically balanced environment, and duty to government to protect environment, biological diversity, generic resources, ecological process, among others. Environmental and sociocultural impact statement is compulsory for all activities that may damage environment. Organic Environmental Law establishes general rules for conservation, protection, control, exploitation and improvement of environment to benefit quality of life; deals with environmental planning and administration; environmental impact assessments and contains list of activities which are considered to potentially damage environment; law contains economic and tax incentives for those activities that promote environmental protection. President and his cabinet are in charge of environmental policy formulation. Conservation, protection and improvement of environment are declared to be of public utility and general interest. Criminal Environmental Law defines crimes against environment, establishes its sanctions and preventive, punitive and corrective measures to repair damages caused. Within environmental protection are air, water, hazardous waste and noise pollution.

Air.

Stationary and mobile sources of emissions of pollutant elements must control emissions to maintain them within maximum permissible levels. Facilities with stationary source of emission must obtain operating license, which contains mandatory conditions.

Water.

Handling, treatment and disposal of waste water is regulated. Special permit is required to discharge pollutants to any body of water including municipal sewer system. Mandatory conditions include discharge limits, sampling and analysis. Conservation, use and recuperation is regulated by Law of Dec. 29, 2006.

Residue and Solid Waste.

Law on Residue and Solid Waste of Oct. 21, 2004 regulates production, handling, storage, collection and transportation, transfer, use or process of domestic, commercial, industrial or any other non-hazardous residue and solid waste with purpose of maximum utilization in order to reduce minimum disposal and avoid human risk and damage to environment. Importation and exportation of non-hazardous residue and solid waste is permitted under certain conditions. Administrative fines are imposed for infringement of law, without exclusion of civil and criminal liability.

Hazardous Waste.

Waste is considered hazardous when it is explosive, ignitable, corrosive, reactive and toxic among others. List of hazardous materials and waste is published in official gazette. Registration must be obtained before generating or handling hazardous waste. Generator is responsible for its elimination, including final treatment. There are requirements for locations and containers for storing hazardous waste and recycling. Importation of hazardous waste is sanctioned with imprisonment from three to six years. (Law 55 of Nov. 13, 2001). Law on Substances, Materials and Hazardous Waste regulates production, use, recollection, storage, transportation, treatment and final disposition of substances, materials and hazardous waste, including among them waste produced by hospital and any health establishment, radioactive waste and pesticides. Sanctions for infringement of law include fines, closing of establishment and imprisonment for up to eight years.

Noise.

Stationary and mobile sources of noise must control production to maintain them within maximum permissible levels. Permissible levels vary within each zone. Facilities with stationary source of noise must comply with operating schedule within zone.

Environmental impact statements are required for activities such as mining, metallurgy, chemical industry, energy production, construction materials and infrastructure construction. Regulations which implement law set forth requirements, procedures, conditions and limits that must be complied with. Administrative or criminal penalties are imposed for violations of laws. Sanctions include fines and imprisonment, depending on whether hazardous material or waste, air pollution, or water pollution is involved; temporary or permanent closure of facility, arrest of company officials and revocation of permits, depending on gravity of offense and prior violations.

12 ESTATES AND TRUSTS

12.01 ADMINISTRATION:

See topic 12.06 Executors and Administrators.

12.02 CLAIMS:

See topic 12.06 Executors and Administrators.

12.03 DEATH:

A person who disappears is presumed an absentee if the absence is for two years, or three years if he left an agent to administer his property. The presumptive heirs may petition to have him judicially declared an absentee. Ten years thereafter, or if 100 years elapse from the date of the absentee's birth, he may be judicially presumed dead and definitive possession of his property may be decreed. (C. C. Arts. 418-444).

Deaths are recorded in the Civil Register. Death certificates may be obtained from the Registrar of the district where death occurred. Nominal fees are fixed by local regulation.

Actions for Death.

Within the few provisions of Civil Code dealing with torts, art. 1196 provides that a wrongdoer is liable for material and moral damages resulting from his tortious act and that the court may grant an indemnity to relatives, including in-laws, and spouse of a decedent for their suffering resulting from the wrongful death. Automobile insurance is compulsory. See category 23 Transportation, topic 23.02 Motor Vehicles.

12.04 DECEDENTS' ESTATES:

See topics 12.05 Descent and Distribution, 12.06 Executors and Administrators, 12.10 Wills.

12.05 DESCENT AND DISTRIBUTION:

In the case of intestacy the rule of succession is as follows: (1) Ascendants are succeeded by their legitimate children and the legitimate descendants of the latter whose filiation is proved legally. Surviving spouse has share equal to that of child whose filiation is proved legally. (2) If deceased has no children or descendant whose filiation is legally proved, his estate is divided as follows: (a) If there are ascendants and surviving spouse, inheritance is divided in half; (b) if there are no ascendants, inheritance is shared by surviving spouse and brothers and sisters of deceased, and their children. (3) If none of foregoing rules can be applied, estate goes to nearest collaterals, but not beyond sixth degree, collaterals of half blood having same rights as collaterals of whole blood. (4) If there is lack of heirs estate goes to nation. Persons guilty of certain criminal or dishonorable acts towards decedent cannot inherit. (C. C. Arts. 807-832).

Adopted Children.

See category 13 Family, topic 13.01 Adoption.

12.06 EXECUTORS AND ADMINISTRATORS:

Minors and persons incapable of obligating themselves cannot be executors. It is the executor's duty to provide for the funeral, pay legacies, carry out the provisions of the will and pay debts, if under the will he is in possession of the entire estate. He must conclude his duties within the time designated by the testator or, if no time was designated, within a year, which period may be extended by the judge. The office of executor is voluntary, but once accepted cannot be resigned without the court's approval, and carries no remuneration unless one was designated by the testator.

Immediately upon the death of a person the ownership and right of possession of his estate pass to his heirs. Heirs may accept their share of the estate unconditionally or subject to inventory. Unconditional acceptance may be express or implied and involves the assumption of the payment of debts and legacies. Acceptance subject to inventory must be given in writing to the competent court and the inventory must be formally made before a judicial authority. The heir in actual possession of the estate must make an inventory within three months or such further time as may be allowed by the court, otherwise he is considered to have accepted unconditionally. Within forty days after the inventory is terminated, the heirs must state whether they accept the inheritance, but heirs in possession of the estate and who had no intervention in its administration may make their decision within ten years, unless an action is meanwhile brought against them by an interested party, and with respect to minors and incapacitated persons, the period runs for a year counting from the time when the incapacity ends. During the time of deliberation the estate is in charge of a curator who is either the heir or a person appointed by the court. The effect of acceptance subject to inventory is that the heir need pay debts and legacies only to the extent of the value of the property received by him and not out of his personal property, and that he may relieve himself of all obligations by abandoning the estate to the creditors and legatees. Unless otherwise determined by the testator the heirs who accept unconditionally are jointly liable for the payment of the debts of the estate, the portion of an insolvent heir being distributed among the others. An heir who pays more than his portion may proceed against the other heirs for the difference. (C. C. Arts. 967-1125).

12.07 FIDUCIARIES:

See topics 12.06 Executors and Administrators, 12.09 Trusts.

12.08 INTESTACY:

See topic 12.05 Descent and Distribution.

12.09 TRUSTS:

Trusts may be created in a will or by an inter vivos act and may comprise personal or real property. Trust agreements must be recorded at Mercantile Registry and trust of real property must also be recorded in Registry of Real Property in order to be valid against third persons. Trust may be created for benefit of several persons successively provided all were living at time trust enured to first beneficiary. Trust in favor of juridical person may not exceed 30 years. Only banks and insurance companies organized in Venezuela and authorized by government may act as trustees. Trust is terminated: (a) Upon realization of purpose for which it was created or if said realization becomes impossible; (b) upon termination of its duration or occurrence of condition subsequent; (c) upon renouncement of all beneficiaries; (d) upon revocation by creator of trust if so provided in instrument; and (e) in absence of beneficiary, if no substitution is possible. (Law of July 26, 1956 as am'd).

12.10 WILLS:

All persons may make wills except: (1) Minors below 16 years of age unless they have been married; (2) persons declared incapacitated for intellectual defects; (3) persons non compos mentis; (4) deaf and dumb persons and dumb persons who cannot write.

Persons guilty of serious offenses against the testator are incapable of inheriting from him. The following are also incapable of inheriting: (1) Churches and mortmain institutions; (2) clerics and ministers of religion, unless such person be a spouse, ascendant, descendant or blood relative within the fourth degree of the testator. Legacies in favor of the registrar or witnesses who intervene in the making of the will are invalid.

Witnesses to wills must be of age, able to read and write, and know the testator. The following cannot be witnesses; Blind persons; deaf and dumb persons; those who do not know Spanish; relatives within the fourth degree of consanguinity or second of affinity of the registrar before whom the will is made; heirs and legatees mentioned in the will and their relatives in the said degrees in case of an open will; any one who could not act as witness in court.

There are two classes of wills: Ordinary and special. The ordinary will is open or closed.

An open will is one declared by the testator before witnesses, who thus learn of its contents. It may be executed; (a) in accordance with the provisions of the public registry law, before a registrar and three witnesses, recording the document in the public registry; (b) without recording, before a registrar and three witnesses; (c) before five witnesses, in which event it must be acknowledged in court within six months by at least two of the witnesses and also by the testator if he still lives. If executed before a registrar, the will may be submitted to him in complete form or may be drawn up under his supervision, but in any case it must be read before the witnesses.

A closed will is one enclosed in an envelope which is closed and sealed in the presence of a registrar and five witnesses. In delivering the same to the registrar the testator must declare that the enclosed document is his will and state whether or not it is written and signed by him. A minute of the delivery is written on the envelope and signed by the testator and witnesses and registrar. Persons unable to read cannot make a closed will.

Special wills are: (1) Those made in case of epidemics before a registrar or judicial authority in the presence of two witnesses who may be of either sex but must be at least 18 years old. Such wills lapse within two months after the epidemic ceases or the testator re-moves elsewhere. (2) Maritime wills, which may be made during a voyage before the captain and two witnesses. Such wills are effective only until the lapse of two months from the time the testator reaches a point where he might make another will. (3) Military wills, which may be made before certain military officers during a campaign.

Foreign wills are valid if made in accordance with the laws of the place where executed, but they must be in authentic form and may not be oral or holographic, nor can they be joint wills of several persons. They may also be made in accordance with Venezuelan laws and executed before a representative of Venezuela at the place of execution.

A testator cannot dispose of the legal portion of his estate which by law must be set aside for his descendants, ascendants and surviving spouse. Such legal portion is one-half the participation which those persons would have in case of intestacy. (See topic 12.05 Descent and Distribution.) The balance of the property may be freely disposed of. (C. C. Arts. 833-992).

13 FAMILY

13.01 ADOPTION:

Adoption is irrevocable and extinguishes legal bonds between adopted party and natural family, must be approved by judge after testing period. Adopting party must be 25 years old and at least 18 years older than adopted party or ten years when adopted party is son or daughter of spouse of adopting party. Adopted party must be under 18 years old. Consent is required from spouse of adopting party, from adopted party who is over 12 years old, from parents if adopted party is under their parental authority. There are special requirements for foreign adopting parties. Adoption may be declared void for violation of law. (Organic Law for Protection of Child and Adolescent Arts. 406-449).

13.02 ALIMONY:

See topic 13.04 Divorce.

13.03 COMMUNITY PROPERTY:

See category 13 Family, topic 13.05 Husband and Wife.

13.04 DIVORCE:

Following are causes for absolute divorce: (1) Adultery of wife; (2) voluntary abandonment; (3) cruelty, making life in common impossible; (4) attempt of either spouse to corrupt children or connivance in such corruption; (5) penitentiary sentence; (6) habitual drunkenness or drug addiction; (7) legal separation for more than one year without reconciliation or separation in fact for more than five years. In last case divorce is granted on mere petition of either party upon notice to other; (8) interdiction of either spouse for serious psychical disturbances that make life in common impossible, but previously assuring that ill spouse has financial support and is under medical treatment.

The grounds for legal separation are the same as the first six causes for divorce, and, in addition, mutual consent of the spouses.

No particular length of residence is required but domicile within the jurisdiction is a prerequisite.

Upon the institution of an action of divorce or separation, the judge may: (1) provide who is to have charge of children during litigation; (2) order inventory of all common assets.

In all divorce and separation cases the Department of Public Prosecution is a party to assure good faith. Children are definitely awarded to the innocent party and if both are at fault, the court determines who is to have charge of them, but up to the age of seven years children may remain with their mother unless court, for serious reasons, determines otherwise.

After a divorce the parties may freely remarry, except that the woman cannot remarry for ten months after dissolution of the marriage, unless a child is born within that period or medical certificate is issued stating that she is not pregnant. (C. C. Arts. 185-196).

13.05 HUSBAND AND WIFE:

Husband and wife have same rights and duties; they should live together and owe each other fidelity and assistance. In special cases, they can live separately, with authorization of judge; in such cases conjugal domicile is last common residence. Both must contribute reciprocally to each other's needs, in proportion to their respective resources and incomes. Both have right of decision with respect to matters relating to their joint married life.

Unless otherwise provided by an antenuptial agreement property of marriage partnership is considered community property. Separate property of spouses is composed of property each brings to marriage and of additional property acquired during marriage by gift, inheritance, legacy, or otherwise by gratuitous transfer. Each spouse may freely administer and dispose of separate property, but may not give it away or renounce inheritance without consent of other spouse. Acts of administration by either spouse for other, with toleration of other, are valid. There can be no sale of property between husband and wife.

The community property comprises: (1) all property acquired during the marriage at the cost of the community capital; (2) everything obtained through the industry, profession, salaries or wages of the husband or the wife; (3) the fruits and revenues of the common property and of the separate property of each spouse. All the property is presumed to belong to the community so long as it is not proved to be separate property. The community property is liable for: (1) debts and obligations contracted by either spouse in cases where each spouse has the right of administration; (2) rents and interest payable for the community property and the separate property of the spouses; (3) minor repairs to separate property; (4) all expenses of administration of the community; (5) maintenance of the family and education of the children; (6) support of ascendants of either spouses if the income from the separate property of such spouse is insufficient. Liability for illicit acts of either spouse does not affect the other's separate property or interest in the community.

Neither spouse may alienate community property without consent of other. If either spouse dissipates property so administered, other spouse may appeal to court for protection or request separation of property. Marriage community is extinguished by dissolution of marriage, by absence declared by court and by judicial separation of property of the spouses. There is then liquidation; separate property of each spouse is set apart and balance is divided. (Const. Arts. 75, 76, C. C. Arts. 137-183, 1481).

13.06 INFANCY:

(Const. Arts. 78, 79, C. C. Arts. 18, 46, 261-263, 266-277, 281, 301-412, 1144, 1347-1349; Organic Law for Protection of Child and Adolescent Arts. 347-364).

The age of majority is 18. Contracts of minor are voidable; if entered into by his fraud in concealing his age he cannot contest them, but mere misrepresentation of age is not enough. Minors are subject to parental authority of their parents, which includes custody, legal representation and administration and enjoyment of infant's not excepted real and personal property's usufruct; but father who acknowledged his child after birth was recorded gets no usufruct. In absence of parents guardian is appointed. Parents and guardians have restricted powers of disposition. Parental authority may be removed by court decision for violation of parental duties.

13.07 MARRIAGE:

Following marriages are invalid: (a) those of males under 16 years and females under 14 except in cases established by Law; (b) those of persons manifestly and permanently impotent; (c) those of persons non compos mentis; (d) those of persons already married; (e) those of ministers of religion which forbids their marrying; (f) between ascendants and descendants by consanguinity or affinity; (g) between brothers and sisters; (h) between spouse and person guilty of killing or attempting to kill other spouse.

The following marriages are forbidden: (a) Between uncles and nieces and descendants of nieces and between aunts and nephews and descendants of nephews; (b) between brothers-in-law and sisters-in-law when the former marriage was dissolved by divorce; (c) between a person and the adopted child of that person or the spouse or descendants of the adopted child or between an adopted child and the spouse of the person adopting; (d) between guardian and ward until the accounts of the guardianship are proved. The impediments of cases (a), (b) and (d) may be waived by the competent judge.

The following marriages are likewise forbidden: (a) Those of women formerly married until ten months after the termination of the former marriage, unless a child was born in meantime or medical certificate of nonpregnancy is issued; (b) those of males or females under 18 years unless consent of parents or authorization of judge has been obtained.

Persons intending to marry must advise an official authorized to perform the ceremony, who posts an announcement for eight days in a public place of the domicile of each party. The marriage may be performed by the civil chief of the district, or the first civil authority or the judge of the parish or municipality, or the president of the municipal council or of the communal board, and a record is inscribed in the civil registry. After such civil marriage the parties may, if they choose, have a religious ceremony, but a religious ceremony without a previous civil ceremony is prohibited.

Venezuelans marrying abroad must, within six months, notify the first civil authority of the parish or municipality of their last domicile in Venezuela so that the proper entry may be made in the civil registry. An alien marrying in Venezuela must file evidence that he is not married and is able to contract marriage under the law of his nationality. Alien married couples who become domiciled in Venezuela must, within one year after arriving in the country, have a record of their marriage inscribed in the civil registry.

Invalid marriages may be annulled, but if contracted in good faith they produce civil effects with regard to the parties and the children. Marriages contracted in violation of legal prohibitions are not subject to annulment but the parties are liable to punishment. Constitution recognizes common law marriage under conditions indicated by law. (Const. Art. 77, C. C. Arts. 41-136).

13.08 MARRIED WOMEN:

See topics 13.05 Husband and Wife, 13.07 Marriage.

14 FOREIGN TRADE AND COMMERCE

14.01 CUSTOMS DUTIES:

See category 22 Taxation, topic 22.02 Customs Duty and Tax.

14.02 EXCHANGE CONTROL:

(Law on Foreign Exchange Violations of Sept. 5, 2005, Decree 2330 of Mar. 6, 2003).

Foreign exchange market is controlled by Central Bank. Currency transactions are made only through Banco Central de Venezuela or for its account at single floating rate of exchange based on supply and demand. By foreign exchange agreements between Minister of Finance and Central Bank of Venezuela single exchange rate is fixed and terms and conditions for purchase and sale of foreign currency are established. Comisión de Administración de Divisas (CADIVI) is in charge of administration, coordination, control, requirements, procedures and restriction of foreign currency. Purchasers of foreign currency must register with Comisión. Entry and exit of foreign currency, on amounts over $10,000, into and out of local market and its negotiation is subject to report with CADIVI. Noncompliance with this is subject to Law on Foreign Exchange Violation. Exporters are required to sell export revenues to Central Bank.

14.03 FOREIGN EXCHANGE:

See topic 14.02 Exchange Control; category 1 Introduction, topic 1.01 Currency.

14.04 FOREIGN INVESTMENT:

(Const. Arts. 301-302, Decree 2095 of Feb. 13, 1992, Decision 291 and 292 of Mar. 21, 1991 of Commission of Cartagena Agreement; Law-Decree 356 of Oct. 10, 1999 regulated by Decree 1867 of July 11, 2002).

Foreign investment is defined as foreign source contributions made by foreign individuals or juridical entities in freely convertible currency, tangible property or in intangible technological contributions such as mark, industrial models, technical assistance, patented or unpatented technical know-how in form of physical goods, technical documents and instructions. Reinvestments made by foreign individuals or entities in local currency originating from profits, capital gains, interest, amortization of loans, liquidation of companies and sale of shares, participations and any other funds which foreigners are entitled to remit abroad, as well as investments made with funds resulting from debt-equity swaps, are regarded as foreign investment. Foreign investors have same rights and duties as national investors, except as expressly indicated in special laws and Decree 2095. Law provides legal stability to domestic and foreign investors and for new or exiting investments, except as indicated by law. Expropriations only for public and social interest. Compensation for expropriation must be equal to fair price and must include interest up to date of payment, paid in convertible currency and may be transferred abroad without any restrictions.

Superintendencia de Inversiones Extranjeras (“SIEX”), which is attached to Ministerio de Hacienda, has jurisdiction over foreign investment in all areas except domestic banking, insurance, petrochemicals, coal, mining and external public credits. Latter areas are under jurisdiction of other agencies.

Except when foreign investment is made contrary to rules limiting foreign investment in certain areas, no prior authorization is required for foreign investment to participate in national, mixed or foreign companies (as such companies are defined below). However, foreign investment must be registered with SIEX within 60 days following date of registration with Commercial Registry. Value of foreign investment, of reinvestments and of increases of capital must be evidenced through SIEX.

Foreign and national investors may enter into contract with Government to enjoy up to ten year guarantees of legal stability related to tax regime, to export promotion policies and to specific benefits and incentives granted to investor. Contract must be executed prior to investment and investor must comply with requirement as provided by law. Contracts must be approved by National Integrated Tax Administration (SENIAT); and authorized by Congress.

For foreign investment purposes, companies are classified as follows: (a) “National company”, one in which more than 80% of capital belongs to national investors, provided SIEX considers that technical, financial and commercial management is 80% or more in hands of national investors; (b) “mixed company”, one whose capital belongs to national investors in proportion which may fluctuate between 51% and 80% provided SIEX considers that management is controlled by national investors 51% to 80%; (c) “foreign company”, one whose capital in hands of national investors amounts to less than 51%, or if national investors hold more equity, when SIEX nevertheless considers that management control in hands of national investors is less than 51%.

National investors are State, national individuals, nonprofit juridical local entities, national companies and foreign individuals who reside in country for at least one year (or less if approved by SIEX) with appropriate visas and waive repatriation rights and rights for remittance of profits abroad.

Foreign companies are authorized to establish or incorporate branches or subsidiaries, provided that they notify SIEX of such establishment or incorporation. Solution of conflicts and disputes arising from direct foreign investment or transfer of technology may be subject to arbitration.

Decree permits foreign investment in all economic activities. However, following limitations apply as to participation percentage of foreign investment: Television, radio, newspapers published in Spanish language, companies providing professional services regulated by domestic laws are reserved to national companies.

There are also limitations as to participation of foreign investors with regard to concessions related to hydrocarbons, iron ore; and investments related to national defense.

Foreign investors may acquire shares, participations or rights held by other foreign investors in national, mixed or foreign companies without prior authorization provided they notify SIEX within 60 days following acquisition. They also may acquire shares in local stock markets with no further limitations than those set forth in regulations governing stock markets. However, at end of each year foreign investor must notify SIEX of such investments still in his hands.

Foreign investors may reinvest profits of registered foreign investment without prior approval, provided SIEX is notified.

There is no legal limitation on profit amounts foreign investors may remit abroad, provided: (i) Applicable taxes have been paid; and (ii) profits are computed at end of fiscal year. Temporary restrictions to transfers of funds may be imposed due to extraordinary economic or financial circumstances seriously affecting national balance of payments or international monetary reserves which cannot be resolved by any other means.

Foreign investors are entitled to repatriate their original investments plus any capital gains.

License agreements on transfer of technology and use and exploitation of foreign patents and trademarks do not require prior authorization. All transfer of technology agreements must be registered with SIEX.

By Law of Feb. 1, 2007 Executive Power is empowered to issue decree laws regulating following areas: transformation of government institutions; public participation; reorganization of public offices; social and economic; finance and fiscal; personal safety and legal protection; science and technology; land distribution and territory division; security and national defense; infrastructure, transportation and services; and energy, for 18 months.

14.05 FOREIGN TRADE REGULATIONS:

See topic 14.02 Exchange Control.

15 HEALTH

15.01 HEALTH REGULATIONS:

Organic Law of Health.

(Law of Sept. 17, 1998). Law regulates all matters concerning health care, including organization of public health system; health services; health care establishments and centers; financing health system; medical personnel; preventive medicine; rights and guarantees of patients. Ministerio de la Salud, is in charge of planning health care policies.

Medicine Law.

(Law of Aug. 11, 2000). Law regulates production, packaging, import, export, storage, distribution and registration of medicines.

16 IMMIGRATION

—Scope —

Law of Migration and Alienage of Apr. 27, 2004 regulates admission, entrance, stay, registry, control and information of exit and re-entrance of alien to country and their rights and duties. Aliens may enter country as: non-immigrants, temporal immigrants, and permanent immigrants. Non-immigrants may enter country and stay there up to 90 days, renewable for another 90 days without performing lucrative activities. Temporal immigrants may enter country for purpose of performing temporary authorized activity and stay until done. Permanent immigrants are those who enter country with intention to stay there and are duly authorized to do so.

16.01 ALIENS:

Aliens in general have the same civil rights and duties as citizens, both with respect to persons and property. Aliens cannot hold public office, except certain positions. Aliens who violate laws or whose presence may disturb public order may be refused admission or expelled from territory. Foreign nations can hold no property in Republic except buildings for their embassies or legations. No contract of public interest made by Federal Government, States or Municipalities can be assigned to foreign Government or to companies not domiciled in country without approval of National Assembly, and all such contracts are subject to local laws even without express clause stating that all controversies arising from contract are subject to decision by Venezuelan Courts and cannot give rise to foreign claims. Alien must register within 30 days from entrance date. (Law of Migration and Alienage of Apr. 27, 2004; Const., Arts. 21, 150, 151).

17 INTELLECTUAL PROPERTY

17.01 COPYRIGHT:

Copyrights include all kinds of intellectual (including software), scientific, literary and artistic creations reproduced by any means. Law also protects translations, adaptions, musical arrangements and other transformation of private intellectual works; to protect these copyright works written authorization from original owner of work is necessary. Performers' rights are also protected. Literary and artistic works, performances and other productions are protected by law without requiring registration. Work is deemed created by sole fact of realization of thought of author, even if unfinished.

Author has moral and property rights which terminate 60 years from Jan. 1 of year following year of his death. Upon death rights pass pursuant to rules of descent or provisions of will. An inter vivos or testamentary trust may be created. If forced heirs' rights are not respected, these may have some claims over royalties or periodic proceeds. Upon marriage, copyrights already existing continue being separate property of author during his life even if pre-nuptial agreement is executed to contrary, but if community property system prevails rights are considered to belong one-half to surviving spouse. Author rights on works created during marriage which is under community are community rights. Producer of motion picture is protected for 60 years from Jan. 1 of year following year of first projection and performer's right is protected for 60 years from Jan. 1 of year following year date of performance for non-recorded performance or date of publication when performance is recorded.

Assignment of exploitation rights must be made for a royalty measured in proportion to proceeds of the assignee, unless the calculation or supervision are impracticable or expenses therefor excessive or if nature or conditions of exploitation make it impossible; in such cases, or when author resides abroad lump sum may be agreed upon. A life annuity may be agreed in lieu of royalty. Assignment of publication rights of certain limited kinds of books may be made for a lump sum. Author has right to revoke assignment at any time during his life, regardless of agreement to the contrary, upon indemnifying assignee. There are special provisions for assignment of rights of representation of works, edition, publication of newspaper or magazine articles.

Author rights may be recorded at Intellectual Production Registry and deposit of copy of work must be made in Registrar's office. However, lack of said deposit does not prejudice protection of rights. Assignments, use rights, and similar acts may be recorded.

An author may obtain an injunction to prevent violation of his rights. He may have the illegal objects or copies and tools for their making destroyed or sequestered under certain circumstances. Violation of author rights constitutes a crime.

This law applies when author or one of co-authors, if several, is Venezuelan national or domiciliary or a refugee or stateless person, or if the work is first published in Venezuela or republished there within 30 days after first publication. Other works are protected pursuant to international treaties or, in absence thereof, by applying reciprocity rule. (Const. Art. 98, Law of Sept. 16, 1993 and Decision 351 of Dec. 17, 1993 of Cartagena Commission regulated by Decree 1769 of Mar. 25, 1997).

Venezuela ratified Universal Copyright Convention on Apr. 27, 1966.

17.02 PATENTS:

Any invention of products or proceedings in any technology field which are novel, represent inventive step and are susceptible of industrial application. Invention is novel when it is not within state of art.

Discoveries, scientific theories and mathematical methods; natural biological process, biological material as existing in nature or resulting from isolation, including genome or germplasm of any natural being, plan, rules and methods for pursuit of intellectual activities, games or economic-commercial activities, computer programs or software, as such, and forms of representing information; literary and artistic works; among others are not considered inventions. Inventions contrary to public policy, morals and against life or health of people or animals and environment; on animal species and races and biological procedures to obtain them; inventions related to nuclear substances, and related to substances composing human body are not patentable. Patents are granted for 20 years from application date. Patents are subject to annual tax according to their classification and registration fee is payable for their assignment. Persons desiring patent apply to Registry of Industrial Property which causes application to be published and, if there is no opposition, issues certificate. Patent owner must exploit it, directly or by granting license in any member country of Andean Pact. Industrial production or importation, distribution and commercialization of patented product, are considered exploitation of patent. Utility models for new forms of objects or mechanism, provided they have practical use may be registered. Registration term is ten years from filing date. Compulsory license must be granted for lack of use for three years from granting date or four years from application date. Licensee must use patent within two years from license date. They also must be granted when antitrust practices are proved.

Industrial designs, any new design which may be applied to industrial object may be registered as ownership of author if no publicity thereof in any form has been made before filing application. Registration is granted for ten years.

Law also protects trade secrets and considers them as any confidential information that is valuable and provides competitive or economic advantages to owner. Information considered trade secret must be expressed in tangible form such as documents, microfilm films, laser discs or any other similar means.

Vegetal species are protected when they are novel, homogeneous, distinguishable and stable and generic designation has been assigned to them. When registered certificate of holder is issued for 20 or 25 years, depending on type of vegetal variety.

Provisions regarding patents are applicable to utility models and industrial designs. Venezuela approved Convention for the Protection of Industrial Property, Paris, Mar. 21, 1883, Stockholm Revision of July 14, 1967 as am'd on Sept. 28, 1979. (Const. Art. 98, Decisions 486 of Sept. 14, 2000 and 345 of Oct. 29, 1993 of Commission of Cartagena Agreement, Decree 3136 of Dec. 23, 1998).

Layout-designs of integrated circuits are protected when considered original and indicated by law. Application must be filed within two years from its first commercial exploitation anywhere in world, or within 15 years from last day of year of invention was created, when it has not been exploited. Rights may be licensed, and compulsory license may be granted; they are also assignable and inheritable. Registration is granted for ten years from filing date or from last day of year of first exploitation.

17.03 TRADEMARKS AND TRADENAMES:

(Const. Art. 98, Decision 486 of Sept. 14, 2000 of Commission of Cartagena Agreement, Decree 2887 of Apr. 15, 1993).

Those signs visible and sufficiently distinctive can be registered as marks. Trademark is any sign used to distinguish products or services produced or commercialized by one person from same or similar products or services produced or commercialized by another person. Following signs, among others, can be registered as marks: words or combination of words, pictures, figures, symbols, graphic elements, logotypes, monograms, portraits, labels, emblems, sounds, smells, letters and numbers, shape, packing and wrapping of products. Slogans are words, sentences or captions used as supplement to trademark.

Following, among others, cannot be used as trademarks (1) forms and color of product; (2) generic terms; (3) local common names used to describe products; (4) immoral expression or designs; (5) geographical names; (6) letters, names, words, coat of arms and emblems used by national or international organizations; (6) trademarks similar to others, protecting articles of same kind; (7) name or picture of person without consent; (8) title of literary, artistic or scientific works protected by copyright without permission of owner; (9) marks contrary to law, those against public policy, denomination of protected vegetal varieties, those identical or similar to registered trade slogans and tradenames provided under circumstances public may be confused; those that are reproduction, imitation, translation or total or partial transcription of distinctive signs, locally or internationally, well known, without taking into consideration classification of goods or services concerned; or because of similarly to well-known trademarks causes confusion to public independent of classification of goods and services for which registration is applied for. Registration of generic or descriptive terms, usual or common expressions, and individual color may be registered as mark provided owner of mark can prove that mark permits consumers to identify expression with its specific good or service. Persons desiring trademark apply to Registry of Industrial Property which causes application to be published and if it considers it in order and there is no opposition, issues certificate. Term of registration is ten years subject to renewal for period of ten years. Renewal application can be filed during six months after expiration of ten-year period. Trademarks can be cancelled for nonuse for consecutive three years by owner or licensee in any member country of Andean Pact. Statute of limitation for action to declare invalid registration of well-known mark registered by third party is five years from date owner becomes aware of unauthorized use; there is no limitation when it has been used in bad faith. Owner of well-known marks can request cancellation or amendment of registered domain name or e-mail address affecting its exclusivity rights. Partial cancellation of trademark may be requested when owner proves use of mark for some goods or services. Infringement actions providing for precautionary and frontier measures and criminal actions; and unfair competition related to trade secrets and unfair competition actions, are regulated by law.

Tradename is any sign that identifies economic activity, enterprise or mercantile establishment. Tradenames are independent from company denomination, and both can coexist. Exclusive right is acquired by first used in commerce and terminates with activities of enterprise. Tradenames may be licensed.

Tradenames may be registered under the same formalities as trademarks.

Use of word NORVEN or N.V. is restricted to industrial products satisfying standards of Commission of Industrial Norms which will authorize it.

Certification marks sign to be applied to products or services used by others whose quality or other specific characteristics have been certified by legal owner of mark, which shall be public or private entity.

Producers or traders associations may register collective marks. Origin denominations belong to State who may grant right to use them for ten years, renewable.

Conventions.

Convention for the Protection of Industrial Property, Paris, Mar. 21, 1883, Stockholm Revision of July 14, 1967 as am'd on Sept. 28, 1979.

18 LEGAL PROFESSION

18.01 ATTORNEYS AND COUNSELORS:

(Law of Dec. 16, 1966 and its regulations Decree 2714 of Dec. 22, 1992).

To practice law, attorney must hold law degree from local university and be registered with any “Colegio de Abogados” and with “Instituto de Previsión Social del Abogado”. Attorney holding foreign law degree may be registered if such degree is revalidated. National of foreign country holding local law degree is allowed to practice law only if his country of origin allows Venezuelans to practice law. Imprisonment up to nine months is imposed to those who illegally practice law.

19 MINERAL, WATER AND FISHING RIGHTS

19.01 MINES AND MINERALS:

(Const. Art. 12, Mining Law, Decree-Law 295 of Sept. 5, 1999 regulated by Decree 1234 of Mar. 6, 2001).

Mining in General.

State is owner of all mines or mineral deposits within its territory. Mining activity is regarded as public interest. State may grant concessions to local or foreign individuals locally domiciled; private entities, local or foreign, organized under local laws or duly authorized for exercise of commerce in country, with exception of certain government officials and foreign states. Mining concessions are considered real property and may be alienated, transferred, encumbered, leased, subleased. Concessions may be terminated by cancellation, nullity and waiver. All disputes related to mining activities must be resolved by local courts and according to local laws.

Exploration and Exploitation Concessions.

Concessions are divisible and their extension may be up to 6,156 hectares. Holders of mining concessions have rights and duties as stipulated by law, including payment of annual fee per hectare paid at filing of application and during concession period. Concessions for exploration and exploitation are granted for maximum period of 20 years, which can be extended for ten year periods. Illegal exploitation of minerals is subject to fines and assets are confiscated.

Taxation.

Concessions holders in mining activities are subject to quarter surface royalty per hectare, after four years of concession. Exploitation is subject to monthly tax at rates indicated by art. 90 of law. Duty free importation of capital goods and raw materials necessary for mining operations may be granted.

Petroleum.

(Const. Arts. 12 and 302, Law of May 16, 2006, Decree 1123 of Aug. 30, 1975 as am'd).

Petroleum industry is public utility and of social interest enjoying preferential right to utilize surface with right to expropriation on payment of compensation. Government has right to explore or exploit petroleum, asphalt and other hydrocarbons, manufacture, refining, transportation and storage, domestic and foreign trade of substances exploited or refined.

Exploration, exploitation, initial transportation and storage is reserved to State. Such activities can be carried out by State, state owned corporation or joint venture companies with more than 50% of shares held by State for 20-year period, renewable up to 15 years longer. Ministry of Energy and Mines may grant licenses and permits to private investors for refining and commercialization activities. Dispute arising from execution of such agreements is subject to arbitration and to local courts decisions, according to law.

Royalty and Taxes.

In addition to royalties of 30% and 3.33% calculated on amount exploited, petroleum activities are subject to following taxes: Surface tax of 100 UTs per square kilometer per year on undeveloped areas, subject to annual increase of 2% during first five years and to 5% annual increase thereafter; fuel consumption tax at 10% rate per cubic meter on hydrocarbon by-products produced and consumed as fuel; general consumption tax on hydrocarbon by-products sold in local market at rate between 30% and 50% of price per liter paid by final consumer; extraction tax equal to 1/3 of value of liquid hydrocarbons extracted and registration tax of 0.1% on sales value of exported hydrocarbons, according to law.

Exploration, exploitation, processing, industrialization, transportation, distribution and commercialization of hydrocarbon gases is regulated by Decree-Law 310 of Sept. 12, 1999 and its regulation Decree 840 of May 31, 2000.

20 MORTGAGES

20.01 CHATTEL MORTGAGES:

Chattel mortgage may be placed on: (1) Business enterprises or stock in trade; (2)

motorcycles, automobiles, passenger vehicles, freight vehicles, locomotives, railroad cars and other equipment; (3) aircraft; (4) industrial machinery; (5) intellectual property rights (copyrights, literary property, patents and industrial property); and (6) vessels. (Law of Chattel Mortgages and Pledges without Delivery of Dec. 20, 1972, Law of Dec. 13, 2005).

20.02 COLLATERAL SECURITY:

See category 7 Debtor and Creditor, topic 7.13 Pledges.

20.03 MORTGAGES:

Mortgages have no effect unless recorded. They cover real property and all its improvements and accessories. They are of three kinds: legal, judicial and conventional.

Legal mortgages are various mortgages granted by act of law: (1) the vendor has a legal mortgage on the real estate sold for the unpaid part of the selling price; (2) co-heirs and partners have a mortgage on the common property; (3) wards have a mortgage on designated property of their guardians.

Judicial mortgages are judgment liens. A judgment creates a lien equal to double the amount of the judgment. The judgment creditor designates the property of the debtor on which this mortgage should be filed.

Conventional mortgages are the usual mortgages created by act of the parties. They rank according to the date of recording. They are subject to recording fees that vary according to amount of capital plus minor dues. In case of foreclosure owner of property is given four days to pay, after which proceedings continue as in case of execution of judgment. If mortgage debtor or owner of property files opposition, sale is suspended unless creditor gives bond. There is right of replevin. (C. C. Arts. 1877-1912; C. C. P. Arts. 660-665).

21 PROPERTY

21.01 ABSENTEES:

See category 12 Estates and Trusts, topic 12.03 Death.

21.02 CONVEYANCES:

See topic 21.04 Deeds.

21.03 CURTESY:

There is no estate by curtesy. See categories 12 Estates and Trusts, topics Descent and Distribution, Wills; Family, topic Husband and Wife.

21.04 DEEDS:

Deeds must state the name, age, profession and domicile of the parties, and the date of the instruments in words, give a clear description of the property, and if real estate is involved they must refer to the deed by which the grantor acquired his rights. Two witnesses are required and the deed must be acknowledged before the registrar. Deeds must be written by hand, but typewritten documents from abroad will be recorded, having first been recopied by hand. Real consideration must be stated; if fair consideration does not appear registrar may designate value for tax purposes. Recording fee varies from 0.5% of consideration to 1% plus minor sums depending on length of document. (C. C. Arts. 1913-1924; Public and Notary Registry Law of Dec. 22, 2006).

21.05 DOWER:

There is no provision for dower. See categories 12 Estates and Trusts, topics Descent and Distribution, Wills; Family, topic Husband and Wife.

21.06 ESCHEAT:

See category 12 Estates and Trusts, topic 12.05 Descent and Distribution.

21.07 PERPETUITIES:

Property may be left by will to various persons successively but they must be persons in being at the time of the death of the testator. (C. C. Art. 963).

21.08 REAL PROPERTY:

Real property may be such either by nature, by destination or by reason of the object to which it refers. Real property by nature consists of lands, mines, buildings, waters, ungathered crops, herds of cattle or sheep while in their pasture, etc. Real property by destination consists of objects placed on the estate for service and cultivation, such as farming animals and implements, fertilizers, machinery, etc. Real property because of the object with which it is connected consists of easements, mortgages, usufruct, etc. When property belongs to more than one owner, the vote of the majority decides as to its administration. Any co-owner may demand the partition of the property unless there is an agreement not to divide, but no such agreement can be made for a longer term than five years. (C. C. Arts. 526-530, 759-770). Law of Aug. 17, 1983 regulates co-operative apartments.

22 TAXATION

—Scope —

Organic Taxation Code (Law 42 of Oct. 15, 2001) comprises provisions for tax exonerations, surcharges on delinquent payments, penalties, collection procedures, appeals, statute of limitations and other regulations applicable to all national taxes, except to customs taxes and state and municipal taxes, in which cases applicable only as supplement. It overrules provisions of previous special tax laws.

The income of the Government is derived principally from: (a) Customs revenues; (b) taxes collected under the petroleum and mining laws (see category 19 Mineral, Water and Fishing Rights, topic 19.01 Mines and Minerals); (c) income tax; (d) stamp taxes; (e) inheritance taxes; (f) registry fees.

22.01 BUSINESS TAXES:

Financial Transactions.

(D.R.V.F.L. 5620 of Oct. 3, 2007). Tax is applied to financial transactions of juridical persons and entities without legal status. Withdrawals from or debits to checking and savings accounts, escrow accounts or any other type of demand deposits, trust funds, liquid assets fund or any financial instrument with banks and financial institutions, are taxed at 1.50% rate. Tax is in force until Dec. 31, 2008.

Gambling Activities Tax.

(Law of Apr. 25, 2007). Tax is applied to exploitation, operation and organization of gambling and betting activities, such as lotteries, bingo halls, casinos, horse races and slot machines, among others. By monthly payments at rates between 10% and 50% on monthly gross income depending on activity; and between 100 TU and 320 TU per month on game table installed in casinos, slot machine installed in casino or bingo hall, as indicated by law.

Franchise Taxes.

See category 2 Business Organizations, topic 2.03 Corporations, subhead Corporate Fees and Taxes.

22.02 CUSTOMS DUTY AND TAX:

Customs Law.

(D.F.L. 150 of May 25, 1999). Law establishes three types of import duties: Ad valorem, specific and mixed. Rates are fixed in terms of “Tax Units”. Applicable rates to calculated customs duties are fixed by customs tariff, which classifies merchandise as taxable, nontaxable, restricted and forbidden. Fines and imprisonment are imposed for violation of law, and closing of business in case of contraband.

22.03 FREE ZONES:

(Law of Aug. 4, 1991 regulated by Decree 2492 of July 4, 2003). Activities in free zones are: industrial when dedicated to assembling, producing or to any other economic process of goods to be exported or reexported; for services when dedicated to performing any service related to foreign trade; and commercial when dedicated to commercialization of national or foreign goods to be exported or reexported. Free zones can be publicly or privately administrated, installation and operation is authorized by “Ministerio de Hacienda”. Importation of raw material and capital goods are exempted from duties and taxes, and income arising from export of goods in exempted from income tax for ten years. Income arising from other activities is exempted from income tax.

22.04 INCOME TAX:

(Law of Feb. 15, 2007 regulated by Decree 2507 of July 11, 2003).

Natural persons (including decedents' estates) and juridical persons domiciled in Venezuela are subject to different tax rates on net income derived from economic activities realized or property located in Venezuela or outside country. Nonresidents or nondomiciled in country are taxed on income of Venezuelan source. Foreign income tax payment can be credited against Venezuelan income tax liability. Net income could be in money or in kind.

Exemptions and Exonerations.

Venezuelan public entities, Venezuelan Investment Fund, charitable institutions, workmen's compensation for accidents, some insurance compensation, and gifts and inheritance, among others, are tax exempt.

Tax structure is based not only on nature of recipient of income, individual or juridical person, but also on type of activity producing income. Income is classified, for practical purposes, in three major categories: (1) Corporate and business income derived from all industrial or commercial activities except mining and oil; (2) income derived from mining or petroleum activity, and from related activities such as refining and transportation of minerals, by individuals, corporations and other juridical persons. Business income from buying and exporting minerals, and royalties derived from all above activities are also included; (3) income other than that classified in categories 1 and 2 received by individuals and decedents' estates, e.g., wages, salaries, professional fees, rents from leasing real property, etc.

Deductions follow same principle that applies to determine taxable income; only those costs and expenses incurred in Venezuela can be deducted. In general, deductions are allowed only for disbursements actually made during taxable year. Different deductions are allowed in computing taxable income corresponding to above income categories. Law establishes limits to deduction of interest paid directly or indirectly to related parties.

Category 1.

Gross income, for purpose of tax under this category, is computed by deducting from gross receipts: cost of goods destined for sale or for processing in Venezuela, or of goods necessary to raise income; commissions, if based on normal percentages; freight and insurance. Cost of goods acquired by barter (exchange swap) or in performance of obligation is fair market value thereof at date of transaction. Insurance companies are permitted to deduct indemnifications, payments on policies which have terminated, and other similar disbursements. Net income is finally established by deducting from gross income salaries, wages and other remuneration for services to taxpayer, interest on loans, taxes paid on goods from which income is derived, and taxes on commercial operations other than this tax, depreciation, losses not covered by insurance, royalties, etc. Total deduction for salaries or other payments for services to directors or managers of corporations cannot exceed 15% of gross income. In case of juridical persons other than corporations, above are not allowed if directors or managers share profits and losses of concern. Tax Office may reduce deductions for salaries and other payments for services if dividend payment may be reasonably presumed when compared to salaries which are normally paid by similar companies.

Net income of certain activities is established in the law in terms of fixed percentages of gross income; foreign moving picture producers, 25%; international news agencies, 15%; foreign technical assistance, 30% and technological services, 50%; foreign concerns exporting goods to Venezuela on consignment, 25%; international airlines, 10%; insurance companies, 30%; royalties or similar passive income, 90% of gross receipts. This rule is only for those who are not domiciled in Venezuela. Entities engaged in noncommercial professions and which are not domiciled in Venezuela; net income is set at 90% of gross receipts. Income from foreign sources not specifically taxed in law earned by national individuals or Venezuelan “comunidades” or “comunidades” domiciled in Venezuela is subject to proportional 40% tax on 35% of gross income.

Category 2.

Gross income is computed by deducting from gross receipts corresponding to this income category cost of products sold and services rendered within Venezuela, and which correspond to those described above in Category 1. Net income, under this category, is also computed by deducting from gross income deductions allowed in Category 1. Special rules apply for allowable amount of certain deductions. In case of royalties deduction allowed for administrative expenses actually paid is limited to maximum of 5% of income realized.

Category 3.

Net income is computed by deducting from gross income corresponding to this category, 774 UTs. (tributary units) or payments not otherwise deductible, of medical and dental expenses actually paid, interest paid in connection with acquisition of home up to 1,000 UTs., rent on dwelling used as home up to 800 UTs., amounts for education of children under 25, hospitalization insurance premiums, paid to companies domiciled in country. Amount for transfer of main house shall not be taken into account for purposes of gross income under certain conditions. Additionally, tax reduction is granted in amount of 10 UTs. (tributary units) for taxpayer himself, for his spouse, and for each of his dependents.

Losses must be calculated separately for each of categories. Net losses in one category may be deducted from net profits on another of taxpayer's income categories. Total net losses may be carried forward three years.

Rates.

Corporate tax rates are 15% on net yearly income up to 2,000 UTs. (tributary units); on excess up to 3,000 UTs., 22%, and 34% on excess of latter sum. Royalties and similar participations derived from mining activities pay tax at 60% rate. Petroleum companies pay tax at 50% rate. Rates for personal income taxes range from 6% on amounts over 1,000 UTs. (tributary units), increasing progressively until it becomes 34% on excess over 6,000 UTs. (tributary units), for individuals locally domiciled; same rates apply to decedents' estates. For individuals nonresident rate is 34% on all taxable income. Late payment of taxes is subject to 18% annual interest. Income arising from lottery games, and track betting is taxed at flat rate of 16%. Transfers of shares traded at stock exchanges are taxed at 1% rate. Other transfer of shares are taxed as normal income and subject to withholding. Dividends and/or other profit distributions paid by corporations and limited liability companies from income not subject to income tax at corporate level are subject to withholding tax taxed at time of payment, as indicated by law.

Returns.

Natural persons and decedents' estates with net income in excess of equivalent to 1,000 UTs. (tributary units) or gross income of more than 1,500 UTs. (tributary units) must file annual sworn return. All juridical persons established in Venezuela or foreign corporations and individuals nonresident must file return regardless of amount of income.

Husband and wife must file joint return except when under system of separation of property. However, wife may file separate return for her own professional fees and salaries or pensions. When filing separately there is no deduction for other spouse.

Withholding.

Payment of salaries, pensions, lottery prizes, etc., are subject to withholding. Commissions to brokers in real estate transactions, interest from capital loans, payments for rights to exhibit movies and for television rights, insurance premiums and royalties paid to nonresidents are also subject to withholding. Withholding rate varies.

Failure to withhold taxes carries a penalty of 100% of amount to be withheld.

Fixed assets revaluation with adjustment for inflation based on consumer price index for taxpayers that carry out business activities is regulated by law.

Tax deduction of 10% is granted for five years to new investments in industrial activities, construction, electricity, telecommunications, science and technology; for tourist industry 75%, for agricultural, fishery, livestock activities 80%; additional 10% for investments in programs or assets for environment upgrading.

22.05 INHERITANCE AND GIFT TAXES:

Inheritance tax depends on the amount of the inheritance and the degree of relationship. It ranges from 1% in cases where the amount received by ascendants, descendants or spouse does not exceed 15 UTs. (tributary units) to 55% in cases where amount received by collaterals beyond fourth degree, relatives by affinity, or unrelated persons exceeds 4,000 UTs. (tributary units). Inheritance under 75 UTs. of ascendants, descendant, spouse, parents and adopted child are exempted. There is reduction of tax between 5% and 40% in inheritance under 100 UTs. to spouses, children under 21 years, persons over 60 years, among others. Inheritance of shares of registered open capital corporation with market value up to 500 UTs. is exempted. Same rates are applied to gifts of real or personal property over 25 UTs. (Law of Oct. 5, 1999).

22.06 LOCAL GOVERNMENT TAXES:

State Taxes.

The states derive their revenues principally from: (a) appropriations in the national budget; (b) stamped paper; (c) other taxes imposed by the state legislatures. (Const., Art. 167).

Municipal Taxes.

The municipalities receive their income largely from municipal licenses and permits and from rural land taxes.

22.07 STAMP TAX:

Stamp Taxes and Stamped Paper.

A tax stamp is applied on certain documents such as personal identity cards, passports, certificates of registration of trademarks, patents, professional diplomas, passenger transport tickets going abroad, wherever purchased, etc. Also, practically every document addressed to or issued by judicial or administrative authorities must be on stamped paper. (Stamp Tax Law of Oct. 5, 1999 regulated by Decree 2269 of May 21, 1992 as am'd).

22.08 VALUE ADDED TAX:

(D.R.V.F.L. 5189 of Feb. 26, 2007 regulated by Decrees 206 of July 10, 1999 and 236 of Aug. 25, 1999). Tax is levied on transfer, exportation and importation of goods and rendering services at rate of 9%. There is surcharge of 10% on goods considered by law as luxury such as jewelry, caviar, fighting bulls, recreational helicopters, airplanes and small planes, motorcycles and urban vehicles. Basic foods, medicines, medical services, gasoline and public transportation, import of vessels and navigation equipment, raw material, accessories, parts for shipyard industry and machinery and equipment for handling cargo, books and magazines, newspapers, among others, are exempted.

23 TRANSPORTATION

23.01 AIRCRAFT:

Civil Aviation Law regulates air transportation of passengers, luggage, cargo and mail, license and permits for operation, registration certificate, ownership, lease, manufacture, attachment, as well as use of airplanes for scientific, exhibition, advertising, industrial, agricultural, sanitation, sports, teaching and tourism purposes. Law establishes limit for indemnification for damages to passengers and cargo and penalties for infringement of law. Aircraft used for air transportation may only be registered if they are owned by Venezuelan individuals or juridical persons. Local air transportation is reserved to national companies. (Law of May 31, 2005, D.F.L. 1446 of Sept. 18, 2001 as am'd).

On June 15, 1955, Venezuela became party to Warsaw Convention of 1929, and ratified International Convention on Civil Aviation, signed at Chicago, Dec. 7, 1944.

23.02 MOTOR VEHICLES:

Motor vehicles must be registered and covered by guarantee to secure liability for property damages and personal injuries, for minimum amounts. Owners are liable for driver's liability. Public transportation of passengers and cargo may be rendered by Venezuelans and foreign residents in country only. Statute of limitations for damages caused by traffic accidents is 12 months. (D.F.L. 1535 of Nov. 8, 2001; Regulations by Decree 2542 of May 7, 1998).

23.03 SHIPPING:

Law divides vessels into categories, according to tonnage and regulates maritime mortgage and attachment, lease of vessels, charter party, cargo and passenger transportation and maritime insurance. Statute of limitations for actions arising out of maritime insurance contract is three years. Vessels owned by or leased to Venezuelan individuals or juridical persons and to foreign investors domiciled in country that comply with foreign investment regulations may be registered at Maritime Registry. All vessels registered in Venezuela are considered of Venezuelan nationality. Vessels can belong to several owners under common or joint tenancy. Law establishes special admiralty procedures. (Laws of Nov. 14, 2002, Jan. 4, 2006, Dec. 11, 2002 regulated by Decree 2581 of Aug. 25, 2003 and Dec. 20, 2002; Ds.F.L. 1506 of Oct. 30, 2001 as am'd, 1551 of Nov. 12, 2001).

24 TREATIES AND CONVENTIONS

24.01 TREATIES:

Convention on petroleum policy and formation of organization of petroleum exporting countries, signed at Baghdad on Sept. 14, 1960 by Venezuela and Iraq, Iran, Kuwait, and Saudi Arabia; Convention on Private International Law (Bustamante Code) Havana 1928; Universal Copyright Convention, Apr. 27, 1966; Latin American Economic System (SELA) Treaty of Panama 1975; Montevideo Treaty 1980 (Latin American Integration Association [LAIA]); Inter-American Conventions: On conflicts of laws concerning checks, on extraterritorial validity of foreign judgments and arbitral awards, on conflicts of laws concerning commercial companies, on proof of and information on foreign law, additional protocol to inter-American convention on letters rogatory, and on general rules of private international law, signed at Montevideo on May 8, 1979; on international commercial arbitration, on taking evidence abroad and on legal regime of powers of attorney to be used abroad, signed at Panama on Jan. 30, 1975; Convention on the Recognition and Enforcement of Foreign Arbitral Awards, New York, 1958; Convention on the settlement of investment disputes between states and nationals of other states, Washington, Aug. 18, 1993; Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organization (Rome, 1961), Universal Copyright Convention (Geneva, 1952) Revised 1971; Convention on abolishing the requirement of legalization for foreign public documents, The Hague, 1961.

MERCOSUR, established in 1991, is regional trade market. Member countries are Argentina, Brazil, Paraguay, Uruguay and Venezuela. Member countries liberalize trade with one another while imposing common external tariff on goods imported from nonmember countries. MERCOSUR has extended its scope by entering into free trade agreements with Chile, Bolivia, Colombia, Ecuador and Peru.

Tax Treaties.

For avoidance of double taxation. Income Tax Law provides, in Art. 3 that treaties are applicable only when taxpayer proves that he is resident of country in question and has complied with provisions of treaty. Tax treaties effective with following countries: Barbados, Belgium, Bolivia, Colombia, Czech Republic, Denmark, Ecuador, France, Germany, Indonesia, Italy, Netherlands, Norway, Peru, Portugal, Sweden, Switzerland, Trinidad and Tobago, U.K. and U.S.

—Scope —

Revised for 2008 edition by

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(Abbreviations used are: C. C., Civil Code; C. Com., Code of Commerce; C. C. P., Code of Civil Procedure; C. M. A., Code of Minors and Adolescents. Numbers refer to the articles of these codes.)

Note: This revision incorporates legislation through Dec. 10, 2007.

1 INTRODUCTION

1.01 CURRENCY:

Monetary unit is Peso Uruguayo ($) divided into 100 centésimos. (Law 16226 of Oct. 26, 1991 and Decree 636/992 of Dec. 22, 1992).

See also category 13 Foreign Trade and Commerce, topic 13.02 Exchange Control.

1.02 GOVERNMENT AND LEGAL SYSTEM:

Uruguay is democratic republic with representative form of government. Legislative power is vested in General Assembly which has two Chambers with members elected by direct popular vote for five years. Executive power is vested in President acting with ministers or with council of ministers. President is elected by direct popular vote for five years. To hold these offices for new term, five years must elapse from expiration date of first term. Judicial power is vested in Supreme Court of Justice created to regulate administration of Justice. Government and administration of each of departments in which Republic is divided is vested in “intendente” (executive), and Junta (legislative board). Semi-autonomous administrative agencies provide services for and regulate various industrial and commercial activities, their degree of decentralization being determined by law. (Constitution of 1967 as am'd).

Law 17033 of Nov. 20, 1998 establishes exclusive economic zone located beyond territorial waters. Economic zone shall be extended to 200 nautical miles counted from baseline. Republic enjoys within this exclusive economic zone rights of sovereignty for purposes of exploration, exploitation, conservation and administration of natural resources; and jurisdiction for purpose of establishment and utilization of artificial islands, installations and structures; protection and preservation of marine environment; and marine scientific investigation. Uruguay is party to U.N. Convention on Law of the Sea, of Dec. 10, 1982.

1.03 HOLIDAYS:

Jan. 1 (New Year's); Jan. 6 (Epiphany); Mon. and Tues. Carnival*; Holy Week*; Apr. 19 (Crusade of the 33 Liberators); May 1 (Labor Day); May 18 (Battle of Las Piedras); June 19 (Artigas Birthday); July 18 (Constitution Day); Aug. 25 (Independence Day); Oct. 12 (Columbus Day); Nov. 2 (All Souls' Day); Dec. 25 (Christmas). (Law 14,977 of Dec. 14, 1979 as am'd).

*These are movable holidays.

1.04 OFFICE HOURS AND TIME ZONE:

Uruguay's time zone is two hours later than Eastern Standard time in U.S. (-04:00 GMT). Office hours are generally from 8 a.m. to 4 p.m.

2 BUSINESS ORGANIZATIONS

2.01 AGENCY:

An agency may be express or tacit. It is express when it appears in a public or private instrument or is given by letter or correspondence or even orally. It is tacit when the owner of the business is present or knows the action taken by the other person and makes no objection. Instruments containing revocation, substitution, limitation, suspension or renunciation of agency must be recorded in general registry for powers of attorney. Agency may be gratuitous or for remuneration; it is presumed gratuitous when no remuneration is stipulated, unless it refers to powers conferred by law or to work pertaining to profession or business of agent.

An agency is general when given for all business of the principal or for all business with one or two specific exceptions, and special when it relates only to one or more specified matters A special agency may be absolute, allowing the agent to act according to his discretion, or limited if rules are prescribed which are to cover his action.

A general agency comprises only acts of administration. In order to make compromises, alienate, mortgage or perform any act affecting ownership, a special power of attorney is required. The power to compromise does not include the power to submit to arbitration.

An agency is perfected by the acceptance of the agent, which may be tacit, as when the agent begins to act under the agency. There may be one or more principals or one or more agents; in the latter case if the business was not distributed the agents may divide it among themselves unless specifically forbidden to do so.

An agent is liable for failure to carry out the agency. He must abstain from carrying it out when its execution would clearly be injurious to the principal. He may appoint a substitute if not forbidden to do so, but he is liable for the acts of the substitute if he was not expressly empowered to appoint one or if, having been so empowered, he chooses a notoriously incompetent or insolvent person. An agent cannot purchase for himself objects belonging to the principal or sell his property to the principal, unless expressly authorized to do so. If instructed to borrow money at interest he may himself make the loan at the current rate of interest, but he cannot without authorization borrow for himself money belonging to the principal. An Agent must give accounts of his administration.

The principal is liable for the actions of the agent within the limits of the agency but he is not liable for what the agent may do beyond such limits unless he expressly or tacitly ratifies the same. He must advance to the agent the sums required for the execution of the agency and must reimburse the agent for all expenses and losses incurred in connection with the agency.

The agency is terminated by: (a) The termination of the business for which it was given; (b) the expiration of its period or the occurrence of the condition upon which its termination depended; (c) revocation; (d) renunciation by the agent; (e) death of the principal or agent; (f) bankruptcy or insolvency; (g) marriage of a woman agent; (h) cessation of the functions of the principal if the agency was given in the exercise of such functions. (C. C. 2051-2101).

Representative of foreign firm is any individual or juridical person locally domiciled who in autonomous and habitual manner renders his services to promote or prepare, sale of goods or services offered by foreign firms by payment of commission or percentage by foreign firm. Representatives of foreign firms must be registered at National Registry of Representatives of Foreign Firms. (Law 16497 of June 15, 1994 and Decree 369/994 of Aug. 22, 1994).

2.02 ASSOCIATIONS:

The law grants legal personality to state, treasury, municipalities and Catholic Church. Other institutions and associations which are recognized by authorities are also considered as legal entities with civil rights and obligations. (C. C. 21).

In order to be recognized as a legal entity a resolution must be obtained from Ministry of Culture and Education. For that purpose articles of association and by-laws must be submitted and recorded in special registry called “registry of juridical persons.” Record must state name and object of association, its domicile, date of resolution acknowledging it, its duration or that it is founded for indeterminate time, its property or capital, extensions, modifications of by-laws and dates of respective approvals, etc. (Decree Apr. 13, 1925).

2.03 CORPORATIONS:

(Law 16060 of Sept. 4, 1989 as am'd).

Corporations are designated by name accompanied by words “Sociedad Anónima” or abbreviation “S.A.” At least two shareholders are required for organization and continued legal existence of corporation.

Corporate capital is divided into shares. Responsibility of shareholders is limited to their shares. 50% of capital shall be subscribed and 25% paid in on incorporation. Minimum capital in local currency is required by law.

There are “open” and “closed” corporations. “Open” corporations are: (1) Those which have their shares traded on Stock Exchange; (2) those established by public subscription; or (3) those which issue debentures. “Closed” corporations are those which do not fulfill any of above requirements. Corporations may be established by private or public subscriptions. Corporate documents may be private or public documents. In any case they should contain: (1) Name of shareholders; (2) name and domicile of corporation; (3) purpose; (4) duration; (5) capital, kind, number, value of shares, manner and time of payment; (6) organization, administration and control by stockholders; (7) distribution of dividends; and (8) any other agreement such as stockholders' meetings, etc.

Corporate documents require administrative authorization. Corporate documents and respective authorization must be recorded in Public Register of Commerce and extract of such documents published. Any amendment of by-laws must be filed and published in like manner.

When corporation is established by public subscription, promoters draw up prospectus. It must be approved by administrative authority and recorded at Register of Commerce. Organization meeting must be called after subscription period, to decide on incorporation, approval of deed of incorporation, report of promoters, evaluation of contribution other than money, and other matters.

Management.

Corporation may be managed by administrator or by board of directors appointed by stockholders' meeting for one year period. Directors may be reelected and need not be shareholders. Open corporations must be managed by board of directors. Stockholders' meetings are ordinary, extraordinary or special. Ordinary meetings are held at least once a year in order to approve financial statements, distribution of profits, appointment of members of board of directors and comptroller (síndico).

Extraordinary meetings may be held at any time to decide matters especially enumerated by law such as modification of articles of incorporation, dissolution, issuance of bonds, etc. Stockholders may be represented by proxies.

Open corporations are subject to government supervision.

Stock.

Capital, number of shares and par value must be specified. Shares may be common, preferred or “de goce” according to rights granted to shareholders. Shares may be nominative or bearer shares. Shares may be represented by certificates, but so long as they are not fully paid up they must be nominative. Amount of corporate capital and value of shares may be increased or reduced by modification of articles of incorporation. Corporations are authorized to issue debentures which may be converted into shares.

Dissolution.

Corporations are dissolved by expiration of term, when all shares are owned by one person, resolution of stockholders, conclusion of purpose for which it was constituted, bankruptcy, or loss of more than 75% of its capital.

Foreign corporations must comply with same requisites as local companies with regard to registration and publication of corporate documents. Their acts and operations are subject to local laws.

Corporations, limited partnerships issuing shares of stock can own or exploit land in rural areas, provided stock of owner company is represented by nominative shares and their stockholders are physical persons; unless corporation has industrial purpose or land is used for reforestation for energy purpose. (Law 13,608 of Sept. 8, 1967 as am'd by Law 13,892 of Oct. 19, 1970; Law 14,095 of Nov. 17, 1972 as am'd; Law 14,252 of Aug. 22, 1974; art. 494 of Law 16320 of Nov. 1, 1992 and Decree 59/993 of Feb. 2, 1993).

2.04 FOREIGN CORPORATIONS:

See topic 2.03 Corporations.

2.05 LIMITED PARTNERSHIP:

See topic 2.06 Partnerships.

2.06 PARTNERSHIPS:

(Law 16060 of Sept. 4, 1989 as am'd).

General partnership (sociedad colectiva) requires partnership articles appearing in a public or private document. Such articles must contain: (a) Names and domicile of founders; (b) firm name; (c) administration of partnership; (d) business in which partnership is to engage and capital contributed by each partner in money, credits or effects, stating value given to latter or basis on which appraisement is to be made; (e) participation of each partner in profits and losses; (f) duration of partnership and manner of liquidation; (g) any other clauses necessary to determine rights and obligations of partners among themselves or towards third persons. Partnership articles are recorded in Registry of Commerce.

Partners are jointly and severally liable for the operations of the partnership to an unlimited degree. If partnership is engaged in specific business, prohibition of partners to engage in business relates only to business of same kind.

Unless otherwise stipulated profits are distributed in proportion to the interest of each partner. An industrial partner, unless otherwise agreed, receives a share equal to that of the capitalist partner having the smallest participation and in his relations with his copartners does not participate in losses.

If there are several managing partners and no specific functions are assigned to them and it is not stipulated that they must act together, any one of them may perform all acts of management. If it was stipulated that neither can act for the other, joint action is necessary. If nothing is stated as to the form of management, each partner has the right to act for the others.

Unless otherwise stipulated, the partnership articles cannot be changed to allow operations foreign to the original object of the partnership without unanimous consent; in other cases a majority vote decides and votes are computed in proportion to the capital invested, the smallest capital being entitled to one vote and the number of votes of the others being ascertained in comparison with the smallest vote.

Partnership may be entirely dissolved: (a) By expiration of its term or by termination of business for which it was constituted; (b) by accord of all partners; (c) by entire loss of capital; (d) by bankruptcy of partnership or of any partner.

Upon the dissolution of the partnership its business must be liquidated by the managing partners, adding to the firm name the words “in liquidation,” unless the partnership articles provide otherwise or the partners entrust the liquidation to one of the partners or to a third person. Private property of the partners cannot be levied upon for payment of the partnership debts until all the partnership property has been attached. Liquidators cannot make compromises regarding the partnership interests without the special written authorization of the partners.

Limited partnership (sociedad en comandita) is composed of “comanditados” who are jointly liable without limitation for partnership debts and “comanditarios” whose liability is limited to amount of their contribution. Requisites as to constitution and registration of these partnerships are same as for general partnerships.

The name of “comanditarios” cannot appear in firm name under penalty of making him jointly liable, nor can he have any intervention in management of partnership even as attorney-in-fact of managing partners. Rules regulating management and liquidation of general partnerships are also applicable to limited partnerships.

Limited liability companies, for their formation, require minimum of two partners and maximum of 50.

Contract of formation may be private or public document, in any case it should contain: (1) Name of partners; (2) name and domicile of company; (3) purpose; (4) duration; (5) capital, value and number of quotas, manner and time of payment; (6) administration; and (7) distribution of profits, supervision, transfer of quotas.

Liability of partners is limited to amount of their contribution. Capital is divided into quotas of equal value, indivisible and may not be represented by negotiable certificates. Minimum and maximum amount of capital is fixed by law. 50% of contribution per partner paid in cash must be paid upon formation and balance within two years. Contribution in kind must be fully paid upon formation. Shares may not be transferred to third persons except with consent of majority of members representing three-fourths of capital. Legal reserve of 20% of capital must be formed by setting aside 5% of annual profits.

3 BUSINESS REGULATION AND COMMERCE

3.01 BILLS AND NOTES:

Law 14,701 of Sept. 12, 1977 as amended, which regulates existing provisions of Commercial Code governing this subject, supersedes such provisions as follows:

Bills and notes must contain: (a) Name of type of instrument; (b) place and date of issue; (c) right evidenced by instrument; (d) place and date to exercise such right; (e) signature of maker. Payment of bills and notes may be guaranteed, absolutely or partially, by guarantee called “aval”, which must appear in writing on instrument or on document annexed thereto, and must bear signature of person granting same (avalista). Powers of representation to bind oneself in instrument may be granted by power of attorney (mandato) or by letter addressed to presumptive holder. Instruments may be nominative (to order of given person), which are presumed to be to order, or to bearer. Order instruments are transferred by endorsements and delivery.

Endorsement of bills and notes must contain following in order to be valid: (a) Name of endorsee; (b) type of endorsement; (c) place and date; (d) signature of endorser or his representative. Blank endorsements must bear endorser's signature. Endorsements may transfer title, right to prosecute action or be by way of guarantee. Transfer of bearer instruments is effected by mere delivery thereof.

Bills of exchange must contain, in addition to aforementioned requirements: (a) Unconditional order to pay sum certain; (b) name of drawee; (c) maturity date; (d) name of payee. Bills without indication of maturity date will be considered drawn at sight. Bill may be drawn: (a) To order of drawer; (b) against drawer himself; or (c) to order of third party. Drawer guarantees payment and may guarantee acceptance.

Endorsement transfers title to instrument, and can be made in favor of drawee, drawer or of third party. It must be written on draft or on document attached thereto, and signed by endorser, and may fail to designate beneficiary, in which case it is blank endorsement. Holder of blank endorsement may: (a) Fill in blank space with its name or name of another person; (b) reendorse bill of exchange in blank or in favor of another person, (c) deliver bill to third party, without endorsing it.

Acceptance must be written on draft with word “acepto” and must be signed by drawee. It may be limited to part of amount. By acceptance, drawee assumes obligation to pay bill of exchange at maturity. Bill may be drawn: (a) At sight; (b) at certain time after sight; (c) at certain time after its date of issue; (d) at fixed date. Payment of bill at sight must be made when it is presented. Period for drafts drawn at certain time after sight is counted from date of acceptance or protest. Holder of bill payable at fixed date, or at certain date or at sight must be presented for payment on day on which bill must be paid, or on one of two immediately succeeding working days. Payment of bill which matures on nonworking day must be made on first working day succeeding same.

Protest for failure to accept or pay must be made before notary. Protest for failure to accept does not exempt holder of bill from obligation to protest it again if not paid. Draft to be protested must be presented to notary within two days following date on which it was to have been accepted or paid, and must be protested within two immediately succeeding working days from submission to notary.

Actions for nonacceptance and for nonpayment are set forth in Arts. 99-108 of this law.

Cancellation by judge may occur in case of loss, theft or destruction of bill. Bond must be posted to safeguard rights of holder.

Prescription for actions will be: (a) Three years against acceptor; (b) one year against endorsers and drawer; (c) six months for action of one endorser against other endorsers and drawer. Prescription for action for recovery of money is one year.

Promissory notes and similar documents may contain in addition clauses on: payment of current or moratorium interest in event of default due to expiration of maturity date; designation of domicile; choice of forum; payable at sight, on certain date or period after date. Installment payments may be agreed upon. There is refutable presumption that promissory notes are authentic and will be entitled to executive action without protest or judicial recognition of signature. They are subject to same provisions as those governing bills of exchange, to extent applicable.

Checks are subject to general provisions of this law and to those relating to bills of exchange, as well as to Law 14,412 of July 27, 1975 as amended and its regulations, to extent that they are not opposed to it.

Certificates of deposit and warrants may be issued by any depository corporation organized as bonded warehouse to depositors of goods. They must contain all requirements stipulated by law, value must be expressed in local or foreign currency, and may be payable to order or to nominee. Certificate of deposit may be transferred by endorsement to transfer ownership of deposited goods. Warrant can be transferred by endorsement to create security interest in deposited goods. In event of default, holder of warrant does not need to protest it against prior endorser; he may demand sale of deposited goods by bonded warehouse with or without judicial intervention. Proceeds of sale are applied to debt and balance to owner of goods. Certificates of deposits and warrants are subject to Law 17781 of June 4, 2004 and by same provisions as those governing securities; warrants are also subject to special regulation on bills of exchange, to extent applicable.

3.02 COMMERCIAL REGISTER:

See category 9 Documents and Records, topic 9.04 Records.

3.03 CONTRACTS:

(Civil Code, Book IV, Commercial Code Arts. 191-298; 935-1028; 299-934; 1159-1432. Law 8888; Sept. 28, 1932 on computation of contractual periods and terms.)

For existence of contract, law requires following: Capable parties, valid consent, licit object, lawful cause and licit form. Legal capacity is acquired at 18 years of age. (See category 12 Family, topic 12.06 Infancy.) Contracts obtained by fraud are void. Contracts are binding with respect to terms stated therein. Contracts may be made on future objects, provided they are determinable but, they cannot be made on right to inherit from living person even with his consent. Cause of onerous contract is advantage or benefit that one party receives from other. In gratuitous contracts it is liberality of giver. Consent must be obtained without violence, mistake or fraud. Oral proposal is without effect if not accepted immediately unless offeror wishes to maintain offer. Contract made by correspondence is perfected at place and at moment acceptance reaches offeror. Until that time, offeror may withdraw his offer unless he has agreed to await answer or to maintain offer for fixed time. Conditional acceptance is binding when party who proposed condition receives reply from other party advising that he agrees to condition. If no time was fixed, offeror who has agreed to await answer and who receives acceptance within 24 hours, when residing in same city, or within 30 days plus time necessary for communications when residing elsewhere, is bound by contract if he does not notify acceptor of change of intention. If contract, in order to exist, requires additional legal formality, delivery of object or compliance with formalities are necessary. Either party may freely withdraw if formality is not fulfilled unless previous contract compels it to make formal contract.

In computing period of time by number of days, date of contract is not counted. For periods computed by months, months are counted without taking into account different number of days they have. If due date falls on holiday, time is extended to first business day thereafter. If no period of time is stipulated and no period is fixed by law, fulfillment of obligation is due ten days after its date. Mercantile contracts are governed by Commercial Code and by uses and traditions of trade. These rules are supplemented by Civil Code. Commercial character of contract does not depend on whether contracting parties are merchants, but on its object or purpose. Commercial Code defines under each kind of contract features which make it commercial. In contract of sale transfer of ownership is effected by actual or implied delivery of object only; as long as this transfer has not happened, vendor continues as owner.

Valid contracts bind parties to comply with obligations expressly contracted. Terms of contract may be modified only by mutual agreement. Contract must be fulfilled in good faith and obligates parties to perform not only what is expressly stated therein but anything else in its nature required by equity, usage or law. Contract that is relatively void is extinguished by judicial declaration of its nullity. Relative nullity occurs whenever there is defect in consent or when one contracting party has relative incapacity. Relative incapacity may be invoked only by party who contracted without necessary capacity or whose consent was defective. Nullity produced by unlawful object or cause or resulting from omission of necessary formality is absolute. Absolute nullity must be declared by judge and it may be invoked by any person having interest, except one who benefited from invalid payment. Contracts do not have consequences as to third parties unless certain formalities have been met, e.g. recording in appropriate register. Stipulation in contract in favor of third party is legal.

Applicable Law.

Parties may stipulate that contracts shall be governed by foreign legislation and jurisdiction, provided there exists link with said legislation. However, said stipulation is not valid if contracts refer to matters of exclusive jurisdiction of Uruguayan courts, e.g. contracts to be performed in Uruguay.

Public Contracts.

(Law 15637 of Sept. 28, 1984 and Law 15903 of Nov. 10, 1987, Decree 108/992 of Mar. 16, 1992). Contracts executed with Government, State agencies and State enterprises are subject to special rules.

3.04 FRAUDS, STATUTE OF:

See category 9 Documents and Records, topic 9.03 Public Instruments.

3.05 INFORMATION TECHNOLOGY, INTERNET AND NEW MEDIA:

Digital Signature.

(Law 17243 of June 29, 2000, art. 25, regulated by Decree 382/003 of Sept. 17, 2003). Digital signatures to have same legal validity and effect as handwritten signatures when they are authenticated according to informatics technology. Certification service providers do not require authorization to operate. Law regulates digital certificates and certification service providers. Electronic certification issued by foreign entities, has same legal value and effect as local certifications when its validity is recognized by competent administrative authority and reciprocity treatment is granted in their country to certifications issued in Uruguay.

3.06 INTEREST:

In order that a loan may produce interest an express written agreement is necessary; an oral agreement produces no effects in court.

Legal interest is 12%. (C. C. art. 2207).

Interest, compensation or commissions above 75% of average normal market rate prevailing for similar operations during preceding quarter are considered criminal usury and punishable with imprisonment from six months to four years. (Law 14,095 of Nov. 17, 1972 as am'd; Law 14,887 of Apr. 27, 1979).

3.07 MONOPOLIES, RESTRAINT OF TRADE AND COMPETITION:

Right of industrial monopoly may be granted to persons wishing to establish new industries beneficial to country's economy, under certain conditions. Initial capital must be at least of 20,000 pesos and a bond of 5% of the capital must be deposited as guarantee which will be forfeited in specific cases of failure to fulfill certain conditions. Objection to granting of an industrial monopoly may be made by persons proving that they are exploiting or implanting in country an industry for which privilege is requested. Government may abolish concession if it becomes prejudicial to general interest and other industrialists wish to exploit said industry under system of free competition. In such case, interested industrialists must indemnify owner of privilege.

Industrial monopoly lasts for nonrenewable period of nine years. It cannot be granted for production of combustible liquids, drugs or chemicals used in pharmacy, etc. Besides end of term of concession, law provides additional grounds for termination of monopoly. (Law 10079 of Nov. 14, 1941 as am'd by Law 10281 of Nov. 20, 1942).

Antitrust.

(Law 18159 of July 20, 2007, Decree 500/991 of Sept. 27, 1991 as am'd). Law promotes and protects free competition and prohibits unfair practices that may limit economic freedom, with exceptions indicated by law. It is public policy, therefore, that any agreement in violation of law is invalid. Law is applicable to individuals and public or private juridical persons, national or foreign, profit and non-profit engaged in economic activities, and to companies operating abroad whose acts or activities may produce effects in local market. Infringement of economic order implies joint responsibility of enterprise and of its administrators. Law prohibits acts or conduct that may harm general economic interest, expressed in any form, related to production and trade of products and services, which purpose is or may result in distortion or restriction of competition or access to market, or constitute abusive dominant position in market are prohibited by law, among others: price arrangement between competitors; productions arrangement; market division; combined bids; refusal to sell goods or to render services; retaining of products or consumer goods; underselling; setting arbitrary resale prices on distributors, retailers and representatives; retaining of products or consumer goods. Acts and agreements between enterprises that may be considered as economic concentration are subject to prior notice to authority in charge of enforcing law, when sales are over certain amount or participation in market is 50% or more of relevant market, as indicated by law. Authorization is required for creation of monopolies as result of acts of economic concentration that do not prevent others to participate in market. Statute of limitations in connection to prohibit practices is five years from date conduct was performed. Sanctions are applied for infringement of law. Comisión de Promoción y Defensa de la Competencia is authority in charge of enforcing law.

Law prohibits acts or conduct that may harm general economic interest, expressed in any form, related to production, processing, distribution and commercialization of goods and services, which purpose is or may result in distortion or restriction of competition or access to market, or constitute abusive dominant position in market.

Local production is protected from unfair practices of international trade by imposition of countervailing duties on import of foreign goods. Dumping and subvention are considered unfair practices. Dumping is defined as import of foreign goods at lower price than normal value of similar or same product in origin or export place in normal commercial transactions. Normal value is determined according to method indicated by law. Subvention is defined as financial assistance from government or public organization in country of origin or exporting country to producer or exporter, such as direct or indirect incentives, premiums, repayment or similar advantages in order to make them more competitive on international market.

Consumer Protection: (Law 17250 of Aug. 11, 2000 as am'd regulated by Decree 244/000 of Aug. 23, 2000 and Decree 308/002 of Aug. 9, 2002). Law is considered of public interest and therefore rights cannot be waived. It deals with consumer's rights, general representations and guaranties, offers, abusive practice of commerce, adhesion contracts, lack of performance, advertisement, civil liability and penalties for infringement of law. Dirección General de Comercio, government agency in charge of supervising enforcement of law.

3.08 NEGOTIABLE INSTRUMENTS:

See topic 3.01 Bills and Notes.

3.09 SALES (REALTY AND PERSONALTY):

A sale is perfected from the moment when the parties agree on the article sold and on the price, except: (a) In case of real property, easements, or estates of decedents, as the sale of such property is perfected only by the execution of a public instrument; (b) if the contracting parties stipulate that the sale shall not be considered perfected until the execution of a public or private instrument.

A sale may be made on installments or under condition precedent or subsequent. Sale of property of another is valid, without prejudice to rights of owner so long as they are not extinguished by prescription. Purchase of property already belonging to purchaser is not valid and purchaser is entitled to restoration of any amount he may have paid.

The following sales are prohibited: (a) Parents cannot buy the property of their children under their parental authority; (b) guardians cannot buy property of their wards; (c) public employees cannot buy property sold through their intervention; (d) judges, notaries and court officials cannot buy property sold in a litigation in which they intervened.

The principal obligations of the vendor are delivery and warranty of the thing sold. By virtue of warranty the vendor guarantees the quiet possession of the thing sold and that it has no hidden defects; nevertheless it may be stipulated that the vendor does not warrant.

The principal obligation of the purchaser is to pay the price at the place and time designated in the contract; if there is no agreement on this point payment must be made at the place and time of delivery of the thing sold; if the sale is on credit or usage allows time for payment, the price is payable at the domicile of the purchaser. The purchaser must pay interest on the purchase price: (a) If so agreed; (b) if the article sold produces fruits or revenues; (c) if he is in default.

It may be agreed that in case the price is not paid at the time stipulated the sale shall be void. It may also be agreed that if within a period not exceeding six months another person should offer a better price the sale will be void; but in such case the first purchaser may keep the article if he pays the excess price comprised in the new offer. Likewise it may be stipulated that the vendor may within a period not exceeding three years recover the property sold, by reimbursing to the purchaser either a specific amount or the purchase price; in such case the purchaser is entitled to 90 days notice in the case of real property or 15 days notice in the case of personalty, and if the property is of a kind which bears fruit from time to time in consequence of work or money investment the restoration cannot be required until after the collection of the fruits. (C. C. 1661-1756).

3.10 STATUTE OF FRAUDS:

See category 9 Documents and Records, topic 9.03 Public Instruments.

4 CITIZENSHIP

4.01 ALIENS:

See category 15 Immigration, topic 15.01 Aliens.

5 CIVIL ACTIONS AND PROCEDURE

5.01 ACTIONS:

Actions for Death.

See category 11 Estates and Trusts, topic 11.02 Death, subhead Actions for Death.

Limitation of.

See topic 5.05 Prescription, subhead Limitation of Actions.

5.02 DEPOSITIONS AND DISCOVERY:

All testimony of witnesses is by deposition. The party desiring the examination of witnesses must make a petition to the court stating the name and residence of the witness and indicating facts on which witnesses are to be examined. Each witness must be examined separately and contrary party may cross-examine. Deposition is written out and signed by witness, with counter-signature of judge. When witness resides away from place of trial, deposition is taken by judge of his residence under letters rogatory. (C. C. P. 142, 154-164).

5.03 JUDGMENTS:

(C. C. P. 195-202, 527, 537-543).

Judgments are classified as: (a) Interlocutory, when they render an incidental decision which does not terminate the litigation; and (b) definitive, when they relate to the principal object of the suit. There are also mere orders or decrees relating to procedure. Judgments must contain express and precise decisions and declare the rights of the parties. They must set forth the findings of fact and the considerations of law.

Foreign judgments may only be enforced if: (a) Document containing it complies with all formalities required for its authenticity in country of origin; it is duly legalized and translated into Spanish; (b) judgment was rendered by court with subject matter jurisdiction, it is final judgment, and it is not in conflict with public policy; (c) defendant was legally summoned and due process of law has been followed. Supreme Court of Justice decides whether or not foreign judgment should be executed by local courts after hearing defendant and attorney general. If execution is granted, papers are sent to respective court and judgment is executed according to procedure of executory action.

5.04 LIMITATION OF ACTIONS:

See topic 5.05 Prescription.

5.05 PRESCRIPTION:

Prescription is a method of acquiring property by virtue of possession or extinguishing rights of action by failure to enforce them.

By acquisitive prescription real and personal property may be acquired belonging to individuals, companies, the state and public establishments and corporations. Real estate and real estate rights are acquired by possession for ten years among present persons and twenty years among absent persons, with good faith and just title. Good faith consists in believing that the person from whom the article was received is the owner and is authorized to alienate it; just title is understood to mean a title derived from an act executed with the legal formalities and capable of transferring ownership. Real property and real rights may also be acquired by prescription without just title and without good faith, but in such case possession must continue for thirty years. Personal property may be acquired by possession for three years with just title and good faith whether between present or absent persons; but if the possessor of stolen property purchases the same in a public fair, market or sale or from a person who usually sells similar property, the owner cannot demand its delivery without reimbursing the possessor. Personal property may also be acquired by prescription without just title or good faith by possession for six years, but this rule does not apply to the thief who stole the article or to his accomplices.

The period of prescription for extinguishing rights of action depends upon the nature of the action. The most important are: (a) Real estate actions not otherwise limited, thirty years; (b) personal actions not otherwise limited, twenty years; (c) summary actions (see category 7 Debtor and Creditor, topic 7.03 Attachment), ten years; (d) liability actions against judges and lawyers, suits for construction or repair of party walls, suits for paving taxes, five years; (e) actions for aliments, royalties, interest and amounts payable annually or in shorter periods, four years; (f) actions of lawyers and notaries for their fees, actions of physicians and druggists for their fees and medicines furnished, actions of teachers or keepers of boarding schools for tuition and board, actions of merchants and artisans for goods sold if the debtor lives in the country (if he lives abroad the period is four years), actions of teachers of science and arts for fees payable to them monthly, two years; (g) actions for salaries and wages to servants and workmen with whom annual contracts are made, one year; (h) actions of innkeepers for rooms or board, six months.

Limitation of Actions.

Commercial actions are limited by the following prescriptive periods: (a) Actions derived from commercial obligations whether contracted in public or private instruments and not otherwise limited, twenty years; (b) actions derived from endorsable paper, if debt was not acknowledged in separate document; actions of third parties against partners, actions on accounts current, delivered and accepted, actions for interest on money lent, actions for annulment or rescission, four years; (c) actions for merchandise furnished, if debtor is nonresident, four years, and if he is resident, two years; (d) actions to enforce commercial obligation proved only by witnesses, two years; (e) actions based on insurance policies, one year if obligation was contracted in country, or three years if contracted abroad; (f) actions of artisans and laborers whose compensation is adjusted per annum, actions for common average, for delivery of freight, for damage to freight, for freight charges and demurrage, for salaries of crews and for supplies to vessels, one year; (g) actions of brokers, of innkeepers and of employees whose pay is adjusted per month, six months. (C. C. 1188-1244; C. Com. 1013-1029).

See also category 11 Estates and Trusts, topic 11.02 Death, subhead Actions for Death.

5.06 SEQUESTRATION:

See category 7 Debtor and Creditor, topics 7.03 Attachment, 7.05 Executions.

6 COURTS AND LEGISLATURE

6.01 COURTS:

Justice is administered by: (a) Supreme Court of Justice and for Contentious-Administrative Matters which reviews decisions of courts of appeals totally or partially revoking judgments of lower courts and has various additional functions; (b) courts of appeals which hear appeals from law judges, in civil, criminal and labor cases; (c) judges of first instance (juzgados letrados) for labor, civil, criminal, family, customs, and contentious-administrative matters over certain amount; (d) departmental judges with jurisdiction in civil and contentious-administrative matters; (e) court of misdemeanors; and (f) justices of peace with jurisdiction in certain minor civil, commercial, contentious-administrative and fiscal matters in rural areas. (Const., arts. 233-261, 307-321, Laws 15750 of June 24, 1985 as am'd and 15524 of Jan. 9, 1984 as am'd).

6.02 LAW REPORTS, CODES:

See topics 6.04 Reports, 6.05 Statutes.

6.03 LEGISLATURE:

General Assembly convenes Mar. 1 in each year and continues in session until Dec. 15, except on election year, it continues in session until Sept. 15 and first annual meeting of each new general assembly which begins Feb. 15. (Const., art. 104).

6.04 REPORTS:

Uruguay judicial decisions need be followed only in the case in which they were given, and are not necessarily regarded as precedents for other cases. (C. C. 12).

6.05 STATUTES:

Uruguayan laws are published in a daily Government paper called “Diario Oficial.” Another official publication called “Registro Nacional de Leyes, Decretos y Otros Documentos” appears annually with indices.

7 DEBTOR AND CREDITOR

7.01 ASSIGNMENTS:

As towards third persons an assignee of a credit is not considered as owner until the debtor is notified. The notification is effected by exhibiting the credit document, which must bear a note signed by the assignor and designate the assignee. The assignment is ineffective as towards the debtor so long as he is not notified and does not consent to the assignment or renew his obligation toward the new creditor; when it becomes effective the debtor is bound to pay the new creditor and no one else. If the debtor does not wish to acknowledge the assignee as creditor he must declare his refusal within three days after being notified; after this period he is considered to have consented. If he refuses his consent he may make use of all defenses against the assignee which he might have alleged against the assignor.

The assignment of a credit comprises all accessory rights such as guarantees, pledges and mortgages. An assignor in good faith is liable for the existence and legality of the credit unless he assigns it as doubtful; but he is not liable for the solvency of the debtor or guarantors unless otherwise agreed or unless the insolvency was publicly known and occurred prior to the assignment. When the solvency of the debtor is guaranteed by agreement, such guarantee refers to present solvency and not to future solvency, unless otherwise agreed. An assignor in bad faith is liable for the solvency of the debtor and for all expenses and damages. (C. C. 1757-1766; C. Com. 563-571).

The foregoing provisions are not applicable to bills of exchange, promissory notes, bearer shares and other mercantile credit documents which are governed by the Code of Commerce or special laws. See category 3 Business Regulation and Commerce, topic 3.01 Bills and Notes.

An assignment of credits must be recorded when it involves rights on real property. See category 9 Documents and Records, topic 9.04 Records.

7.02 ASSIGNMENTS FOR BENEFIT OF CREDITORS:

An assignment for benefit of creditors may be made by a debtor who in consequence of inevitable accident is unable to pay his debts. The debtor may request it notwithstanding stipulations to the contrary, and the judge must admit it upon a hearing. Any creditor may demand that the debtor prove that he is without fault. Creditors must accept the assignment unless the debtor: (a) Has been convicted of theft, forgery or fraudulent bankruptcy; (b) has obtained deductions or extensions from his creditors; (c) has squandered his property; (d) has not truthfully set forth the condition of his business or has resorted to fraudulent practices. Property not subject to attachment need not be included in the assignment. After the assignment has been offered and while it is under advisement by the judge the assignor cannot be sued by any creditor. Upon the admission of the assignment the creditors may dispose of the property and its revenues until their credits are paid, but the assignment does not convey the ownership of the property to the creditors, and the credits are extinguished only up to the amount realized from the property. With respect to property acquired after the assignment, the debtor may retain what is necessary for a modest subsistence, according to his class and circumstances, and is obliged to pay any balance when his fortune improves. After an assignment the creditors may by majority vote leave the administration of the property to the debtor and make such agreements with him as they consider advisable, without prejudice to the rights of the preferred creditors. (C. C. 1494, 2359-2367).

7.03 ATTACHMENT:

(C.C.P. 260, 311-317, 335, 336, 353-362, 377 et seq.).

Provisional attachment may be issued when court considers it is necessary for protection of creditor's right when satisfaction of credit may be otherwise lost. Creditor must give bond to secure costs and damages.

Attachments will also be issued in summary actions. Such actions may be brought on certain documents when they carry obligations of paying specific and past due sums. Such documents are: (a) Public instruments; (b) acknowledged private documents; (c) bank checks, bills of exchange or promissory notes; (d) acknowledged merchandise invoices; (e) final judgments and arbitration awards; (f) credits guaranteed by mortgage or pledge; (g) settlements; (h) agreements executed in conciliation proceedings.

A third person may intervene in the attachment alleging ownership of the property attached. The proceeding which follows depends on whether or not the property is recorded at Public Registry.

7.04 BANKRUPTCY:

A merchant who ceases in the current payment of his mercantile obligations is considered in a state of bankruptcy. A merchant debtor or a mercantile company, except corporations, may avoid a declaration of bankruptcy by making an agreement with creditors, which may be extrajudicial or judicial.

For the purpose of making an extrajudicial agreement the debtor must apply to the court and file: (1) A draft settlement signed by (a) the majority of creditors representing at least three-fourths the total liabilities, and (b) the majority of persons representing at least three-fourths the mercantile liabilities; (2) explanation of the causes of the suspension of payments; (3) a statement of the assets and liabilities. The majority of the creditors holding mercantile credits may appoint one or more supervisors to watch over the business of the debtor. The judge orders the publication of the agreement and grants the debtor a provisional moratorium which suspends the execution of personal judgments. Other suits may continue to judgment but merchandise belonging to the business of the debtor cannot be attached in executions for personal credits. Suits may be brought and attachments issued on privileged credits. The agreement is approved by the court unless there is opposition from creditors. (C. Com. 1524-1530).

For the purpose of making a judicial agreement the debtor files his petition with the same documents required for an extrajudicial agreement except that in place of the draft agreement signed by the creditors he submits the bases on which he proposes a settlement. The judge grants a provisional delay, designates an accountant to watch over the business and make a report, and calls a meeting of creditors. Such meeting is held, presided over by the judge. The creditors vote on the debtor's proposition; if they accept, the judge approves it; if they reject, a declaration of bankruptcy follows.

During the pendency of the proceedings relating to the creditors' agreement the debtor cannot sell, encumber or lease his real property or sell or pledge his personal property without permission of the judge nor can he leave the country without such permission. Privileged creditors cannot vote on the settlement unless they waive their preferences; the waiver is without effect if the settlement is not approved by the judge.

A declaration of bankruptcy may be made on the petition of a debtor or of one or more creditors or by the judge of his own motion. Upon the declaration of bankruptcy the business of the bankrupt must be liquidated.

The bankruptcy of a partnership carries with it the bankruptcy of the general partners, but the bankruptcy of a partner does not involve the bankruptcy of the partnership. A bankruptcy declared in a foreign country does not prejudice creditors in Uruguay with respect to their rights as to the property situated in Uruguay or with respect to settlements they may have made with the bankrupt. When a bankruptcy has been declared in Uruguay the creditors appearing in a bankruptcy abroad are entitled only to what remains after the creditors of the Uruguayan bankruptcy have been paid.

A merchant who ceases payments must within five days file with the judge a statement of the condition of his business, setting forth the reasons for his failure. Creditors may request the declaration of bankruptcy if they present documents on which execution might issue and against which the debtor alleged no valid defense when payment was demanded. A bankruptcy may be (a) Casual; (b) culpable; (c) fraudulent.

From the time of the declaration of bankruptcy the bankrupt loses the administration of his property. Suits cannot be prosecuted against him but must be directed against the receiver. All his unmatured debts fall due. (C. Com. 1531-1597).

The following acts of the bankrupt within sixty days before the declaration of bankruptcy are void: (a) Gratuitous gifts and alienations; (b) conveyances of real estate in payment of unmatured debts. The following acts may be annulled if performed in fraud of creditors: (a) Mercantile contracts or operations within ten days before the bankruptcy; (b) loans within six months before the bankruptcy if actual delivery is not proved; (c) alienations of real estate in the month preceding the bankruptcy; (d) all contracts made within two years before the bankruptcy in which fraudulent simulation is proved. All sums paid by the bankrupt within fifteen days prior to the bankruptcy, for obligations maturing later, must be returned to the estate. (C. Com. 1602-1612).

A receiver is appointed and a meeting of creditors called to discuss and approve the credits. The creditors appoint a vigilance committee. Propositions between the bankrupt and the creditors may be made with the approval of two-thirds the creditors representing three-fourths the approved credits or three-fourths the creditors representing two-thirds the approved credits.

The personal credits are divided into four grades; the first three representing preferred credits which are paid in their order, and any balance is used for the payment of credits of the fourth class. The property of the bankrupt is sold by the receiver.

A bankrupt may be discharged: (a) If the bankruptcy was casual; (b) if, in the case of a culpable or fraudulent bankruptcy, the bankrupt has served his punishment or the same has prescribed; (c) if he pays all his debts or is released by creditors representing three-fourths of the total liabilities; (d) upon the elapsing of five years after the bankruptcy, if it is proved that no estate remains, that he has no further property and that at least 50% of the creditors who appeared have been paid. (C. Com. 1613-1781).

As to priorities in case of bankruptcy, see topic 7.11 Liens.

7.05 EXECUTIONS:

(C.C.P. 387-396).

When attachment has been levied and order of execution is issued, attached property is appraised and thereupon offered for public auction. Sale is made on basis of two thirds of appraised value, unless parties had agreed by contract that it may be made to highest bidder. If there is no bidder, new auction is called on basis of 50% of appraisement. If there is no bidder, property is adjudicated to plaintiff unless he decides to waive this right and keep his credit.

7.06 EXEMPTIONS:

The following earnings and property are not subject to attachment or execution: (a) All wages and salaries of private and public employees and retirement payments, but one-third of rights may be attached for alimony debts and one half for child support debts; (b) articles of personal use of debtor and his family and household articles except parlor furniture; (c) professional books; (d) machinery and instruments used by debtor to teach science or art except if debt is for their price; (e) foodstuffs and combustibles in possession of debtor sufficient for consumption of his family for three months; (f) purely personal rights such as that of habitation; (g) real property given to debtor with declaration that it is not subject to attachment, provided its value was judicially appraised at time of delivery, but any additional value may be attached; (h) national or municipal taxes and revenues; (i) public properties; (j) religious articles; (k) private property in cemeteries; (l) uniforms and military equipment; (m) author's copyrights. (C. C. P. 381; C. C. 1180).

Homestead Exemption.

See topic 7.09 Homesteads.

7.07 FORECLOSURE:

See category 19 Mortgages, topic 19.03 Mortgages.

7.08 FRAUDULENT SALES AND CONVEYANCES:

Contracts having a false or illicit consideration are of no effect.

As to void and voidable acts of a bankrupt, see topic 7.04 Bankruptcy.

7.09 HOMESTEADS:

Homestead exempt from attachment and execution may comprise a dwelling house or an occupied or cultivated rural property, including in the latter case the necessary machinery and utensils, and working animals. Maximum value of homestead exemption is fixed every year by government. (Law 15597 of July 10, 1984 as am'd).

7.10 INSOLVENCY:

See topic 7.04 Bankruptcy.

7.11 LIENS:

The Law divides personal privileged credits in bankruptcy and insolvency matters into three classes of which the second may be regarded as comprising liens. The first class comprises: (a) Costs and expenses for the common benefit of the creditors and costs of administration during insolvency proceedings; (b) funeral expenses in certain cases; (c) expenses of last illness; (d) doctor's and attorney's fees, salaries and wages of employees, workmen and servants during one year before bankruptcy; (e) articles for maintenance of bankrupt and his family during one year before bankruptcy; (f) public or municipal taxes; (g) sums paid to custom house by customs agents for duties on merchandise dispatched and other expenses for forwarding merchandise.

The second class comprises: (a) Transportation costs, with respect to the objects transported; (b) credits of innkeepers, with respect to property of the debtor in the inn; (c) cost of seeds and cost of cultivation and harvest, with respect to the crop of the last year; (d) rentals, with respect to personal property of the tenant on the property, and in case of rural property also with respect to the crop of that year; (e) the purchase price with respect to the object purchased, so long as such object is in the possession of the vendor; (f) costs of construction, improvement or preservation of a thing while the same is in possession of the debtor; (g) salvage costs with respect to the thing salvaged and its products; (h) salaries of captain and crew for the last voyage, with respect to the vessel and freight earnings; (i) amounts lent for the purchase, repair or provisioning of a vessel, with respect to such vessel or its sales price; (j) expenses of general average with respect to the freight; (k) credits of the shipper for the articles shipped, with respect to wagons, boats and other accessories of the transport; (l) maritime loans with respect to the object for which they were made.

The third class comprises: (a) Credits of the treasury against revenue collectors and administrators; (b) credits of national establishments of charity or education and credits of municipalities, churches and religious communities against collectors and administrators of their funds; (c) claims of child against property of parent for child's property which was administered by parent and no longer exists in kind; (d) claims of persons under guardianship against their guardians, curators or guarantors of such persons.

With respect to certain properties the law considers that a claim is not a privileged credit but a property claim, as in the case of claims for property given in deposit, pledge, rental bailment, etc. (C. Com. 1732-1760; C. C. 2368-2371).

7.12 PLEDGES:

The contract of pledge consists in the delivery of personal property to secure a credit and gives the creditor the right to be paid preferentially from the object pledged. A credit may be given in pledge by delivering the credit document, but the debtor must be advised not to pay any one other than the pledge creditor.

The creditor must carefully keep the pledge and is liable for damages suffered by it through his fault, having the same obligations as a depositary. Any clause depriving the creditor of the right to ask for the sale of the pledged article is void.

In case of nonpayment of the debt at maturity the creditor may request sale of the pledged property at public auction or its adjudication to himself for the minimum price which would be accepted from another; when there is no period stipulated the creditor may request such sale when ten days have elapsed from the time he formally demanded that the debtor comply with the obligation. It may be agreed that the pledge be sold extrajudicially, in which case if it consists in a quoted security it is delivered to a broker for sale, otherwise it is delivered to a public auctioneer. The creditor is paid from the proceeds of the sale and the balance is delivered to the debtor. If upon the sale of the pledge the price is insufficient to cover entire debt it is applied first to the interest and expenses and the balance to the principal.

If the debtor pays the secured credit the creditor must restore the pledge; but he may retain it if he holds other credits against the debtor which have the following requisites: (a) That they are liquid and certain; (b) that they were contracted subsequent to the obligation secured by the pledge; and (c) that they became demandable before the payment of such obligation. (C. C. 2292-2321).

See category 19 Mortgages, topic 19.01 Chattel Mortgages.

7.13 USURY:

See category 3 Business Regulation and Commerce, topic 3.06 Interest.

8 DISPUTE RESOLUTION

—Scope —

(C.P.C. arts. 293-298, 472-507).

8.01 ARBITRATION:

Any individual or collective dispute that may be subject of settlement is allowed to be submitted to arbitration, unless law provides otherwise. Parties may submit to arbitration any dispute arising during course of lawsuit and regardless of its stage. Arbitration may be voluntary or compulsory. Arbitrators may be selected by parties, by courts or by arbitral institutions. Unless parties agree in appointing sole arbitrator or on his appointment by court, number of arbitrators shall be three or five. Parties are free to agree on procedure to be followed in arbitration.

8.02 CONCILIATION:

Judicial dispute resolution by conciliation of controversies arising out of all matters subject to settlement, except those expressly indicated by law. Conciliation is allowed at any time, even when dispute is pending court decision. Dispute resolution by conciliation is mandatory prior to submitting dispute to litigation, except matrimonial actions, reorganization and bankruptcy, and labor disputes, among others.

Dispute resolution arising out of international commercial relations between individuals and legal entities domiciled in member countries of southern common market. MERCOSUR may be submitted to arbitration to Centre for Conciliation and Arbitration of International Arbitration Court for Mercosur.

8.03 CONVENTIONS:

Convention on the Recognition and Enforcement of Foreign Arbitral Awards, New York, 1958, Inter-American Convention on international commercial arbitration, Panama, 1975, Inter-American Conventions on Extraterritorial Validity of Foreign Judgments and Arbitral Awards, Montevideo, 1979 and International Commercial Arbitration Agreement of Mercosur, Buenos Aires, July 23, 1998.

9 DOCUMENTS AND RECORDS

9.01 ACKNOWLEDGMENTS:

Documents which require authentication are executed before a notary public, who in the instrument itself certifies to its execution. He retains the original and issues certified copies. (Notarial Law 1421 of Dec. 31, 1878 as am'd).

Documents executed abroad are accepted as valid if executed in accordance with the laws of the respective country and duly legalized to be effective in Uruguay. (C. C. 6, 1574-1580). Customary procedure with respect to documents executed in U.S. is to have signature of American notary certified by county clerk or other competent official and signature of latter certified by Uruguayan diplomatic or consular representative. (C. C. P. 72). Powers of attorney granted abroad must also be translated and notarized in Uruguay. (Decree 155 of Feb. 22, 1968 as am'd by Decree 175/992 of May 5, 1992).

9.02 NOTARIES PUBLIC:

In order to be a notary it is necessary: (a) To pass special law course; (b) to be citizen and if naturalized to have been so naturalized at least three years; (c) to be 23 years of age; (d) to be honest and of good habits; (e) to take necessary oath before high court of justice, which grants authorization.

A notary must register his signature and notarial scroll. The following cannot be notaries: (a) Persons below 23 years of age; (b) deaf and dumb persons; (c) blind persons; (d) persons criminally prosecuted; (e) convicts or exconvicts; (f) members of the clergy or of the army.

Notaries keep a protocol or register containing all documents executed before them. (Law July 13, 1897; Decree-Law 1421 of Dec. 31, 1878 as am'd; Law 16320 of Nov. 1, 1992, arts. 293-296).

9.03 PUBLIC INSTRUMENTS:

The following are public instruments: (a) Instruments executed before a notary and entered in a public protocol or registry; (b) instruments executed before any functionary authorized by law to certify them; (c) instruments of an official character issued by a competent official in accordance with required forms and within the limits of his powers. Others are private instruments. Instruments executed abroad must come with the legalization of a legation, consulate or vice-consulate of Uruguay.

Public instruments are conclusive evidence of the fact of their execution and of their date. With respect to the parties they are proof of the obligations and discharges declared therein. Numerous contracts must necessarily appear in a public instrument, among them being contracts of sale and exchange of real property, mortgages, contracts relating to easements, articles of marriage, etc. The lack of a public instrument cannot be supplied by other evidence.

Private instruments judicially acknowledged by the party against whom they are alleged, or declared acknowledged in the manner provided by law, have the same effect as public instruments with respect to the parties. The date of a private instrument cannot be alleged against a third person except as of the date: (1) When the document was exhibited in court or in a public office and remained on file; (2) when one of the signers died; (3) when it was recorded in a public registry.

A writing, either public or private, is required for obligations involving over 100 readjustable units exclusive of interest. (C. C. 1574-1599; C. C. P. 165-176).

9.04 RECORDS:

(a) Property Registry, divided into (i) Personal Property Section which includes (1) Registry of Motor Vehicles, (2) Registry of Chattel Mortgages, (3) National Registry of Aircraft (Law 17292 of Jan. 25, 2001 regulated by Decree 63/001 of Feb. 23, 2001), and (ii) Real Property Sections; (b) National Registry of Personal Acts, with following Sections: Interdictions, Matrimonial Regime, Powers of Attorney, “Universalidades” (inheritance rights) and Co-ops; (c)

Registry of Commerce (Law 16871 of Sept. 28, 1997 as am'd regulated by Decree 99/998 of Apr. 21, 1998).

10 ENVIRONMENT

10.01 ENVIRONMENTAL REGULATION:

(Const. art. 47, Law 16466 of Jan. 19, 1994 and its regulations Decree 349/005 of Sept. 21, 2005; Law 17220 of Nov. 11, 1999 and Law 17283 of Nov. 28, 2000).

Constitution establishes legal framework for environmental legislation and imposes on each person duty to refrain from destroying or polluting environment. Law contains such principles as protection, conservation, prevention and control of environmental pollution, reparation of damages; right of individual to enjoy healthy and balanced environment.

Environmental impact statements are mandatory for projects having environmental impact, such as, mining, petroleum, oil and gas pipelines, energy generating plants, ports, airports, railroads, roads, manufacturing plants, disposal of hazardous waste and dams, among others in order to obtain authorization to start projects. Failure to comply with obligation to prevent damage to environment, clean-up plans and with legal provisions are sanctioned with temporary suspension of projects. Environmental liability is regulated by general principles of Civil Code which creates obligation to indemnify for damages caused or to restore environment to previous state. Entry of hazardous waste into country is prohibited. Environmental protection for areas such as water pollution and handling and treatment of hazardous waste are regulated by specific legislation.

11 ESTATES AND TRUSTS

11.01 ADMINISTRATION:

See topic 11.05 Executors and Administrators.

11.02 DEATH:

Where a person has disappeared for a period of four years, or six years if he left an attorney in fact, he may be judicially declared an absentee. The declaration may not be made until one year after publication in a newspaper. Administration of his estate may then be provisionally granted. If the absence continues for 15 years thereafter, or if 80 years elapse from the date of the absentee's birth, an interested party may petition for definitive administration of the absentee's property and any security given for the provisional administration is released. (C. C. arts. 55-80).

All deaths must be recorded in the Civil Register of the place where death occurs. Application for death certificates must be made to the Chief of the Civil Registry. A nominal fee is charged.

Actions for Death.

There is no statute creating wrongful death action, although this could be supported by the general provision of Civil Code (arts. 1319 et seq.) on torts. Tort actions are limited to four years.

11.03 DECEDENTS' ESTATES:

See topics 11.04 Descent and Distribution, 11.05 Executors and Administrators, 11.07 Wills.

11.04 DESCENT AND DISTRIBUTION:

In case of intestate succession the estate of the decedent goes to his legitimate or natural descendants, without prejudice to the marital portion pertaining to the surviving spouse. If there are no legitimate or natural descendants estate goes to legitimate ascendants of nearest degree and to spouse; in this case it is divided into two parts. If there is only one of said classes of heirs, such class receives entire estate.

In case of lack of classes of heirs above mentioned, estate goes one-half to legitimate or natural brothers and sisters and one-half to adopted children; if one or other of these two classes is lacking, other receives entire estate.

In case of the lack of two classes of heirs above considered, estate goes to adopting father or mother and to legitimate or natural collaterals from third and fourth degree.

The right of representation exists, and a deceased heir, or an heir who cannot or will not accept the inheritance, are represented by their descendants. The legitimate descendants and the natural descendants acknowledged or declared as such have the right of representation.

The marital portion is one-fourth of the estate, unless there are legitimate descendants or natural descendants acknowledged or declared as such, in which case it is equal to share of each child as obligatory heir. (See topic 11.07 Wills.) If spouse is left more by will than amount of marital portion, excess is considered as testamentary inheritance.

If there is a total lack of legal heirs, the estate goes to the public treasury. (C. C. 36, 881-895, 1011-1036).

11.05 EXECUTORS AND ADMINISTRATORS:

A testator may appoint one or more executors. If there is no executor appointed or the appointee does not qualify, the execution of the last will of the testator pertains to the heirs.

Minors cannot act as executors. Executor may decline to accept office, but after acceptance he must discharge it, except in cases where attorney in fact is permitted to resign. See category 2 Business Organizations, topic 2.01 Agency.

The office of executor cannot be delegated, but the executor may appoint agents for whose acts he is liable. When there are several executors, they are jointly liable unless their powers were divided by the testator or the judge and they restricted themselves to their respective duties.

An executor must make a formal inventory of the estate unless the heirs are all persons capable of administering their property and unanimously determine that no inventory be made. He must also summon the creditors of the estate by newspaper advertisements. The powers and obligations given by the law to executors cannot be amplified nor waived by the testator.

An executor may be removed on the petition of the heirs for his fault or fraud. If no compensation was designated by the testator the judge determines it, taking into consideration the value of the estate and the amount of work involved. The office continues during the time designated by the testator. If no time was designated, the period is one year, subject to extension. Upon terminating his office the executor must render accounts. (C. C. 964-997).

11.06 TRUSTS:

Trust may be created by open or close will or by inter vivos by private contract or public deed and may comprise personal or real property. Trust of real property must be recorded in Public Registry. Any individual or entity may be appointed as trustee, but only financial corporations duly authorized may act as financial trustees and must be registered at Registry Public of Trustees. Property in trust must be kept separate from other trustees' assets, and subject only to obligations derived from trust. Maximum term of trust is 30 years. Trust is terminated: upon occurrence of condition subsequent or expiration of its term; upon revocation by settler of trust if so provided in instrument, or by any other condition stipulated in contract and in Law. (C. C. 865-867; Law 17703 of Oct. 4, 2003 regulated by Decree 516/003 of Dec. 11, 2003 as am'd).

11.07 WILLS:

(C. C. 779-1010).

The following cannot make wills: (a) Males below 14 years of age and females below 12; (b) persons who have been declared mentally unsound; (c) persons who although they have not been declared mentally unsound are not at the time in their sound mind, by reason of insanity, intoxication or otherwise; (d) persons who cannot clearly express their will by word or in writing. The following cannot inherit: (a) Persons not conceived at the time the estate vests or who were not born alive or did not live 24 hours; (b) associations or corporations which by law are prohibited from inheriting; (c) the father confessor of the testator in his last illness, also the relatives of such father confessor within the fourth degree and the persons who live with him, also his church or community, unless the father confessor is a relative of the testator within the fourth degree, but this impediment refers only to the will made during the illness during which the confession was given; (d) the notary before whom the will is made, his wife, his relatives within the fourth degree, his employees and the witnesses to the will; (e) persons convicted of an attempt or crime of homicide against the decedent or against the spouse or descendants of the testator; (f) a male heir who is of age and who knowing of the violent death of the decedent does not notify the authorities within 60 days; (g) persons who voluntarily accused the decedent of a serious crime; (h) relatives who did not have an insane testator taken care of; (i) persons who by force or fraud interfered with the making of the will.

A will may be either: (a) Solemn; or (b) less solemn or special. A solemn will is one in which all solemnities required by law are observed; a less solemn or special will is one in which some of the solemnities may be omitted by virtue of special circumstances. A solemn will may be open or closed: it is open when the testator communicates his will to the notary and witnesses, and it is closed when the notary and witnesses have no knowledge of its provisions. A will must always be in writing.

Solemn open will must be executed before a notary and three witnesses. The notary must know the testator or assure himself as to his identity and so state in the instrument. He must read the instrument to the testator in the presence of the witnesses; during the reading all the witnesses must be present at one time; the will must be signed by the testator, the notary and the witnesses. If the testator cannot sign, this must be stated, as well as his request that one of the witnesses sign for him; such witness signs for the testator and must also sign as witness. If any of the witnesses cannot sign another one signs for him but in any case at least two must sign. A will thus executed is effective without need of any judicial action.

Solemn closed will requires a notary and five witnesses, of whom at least three must know how to write. The testator must sign the will whether it was written by himself or by another at his request, but if for any reason he cannot sign it, he must declare before the notary and witnesses that he has read it and state the reason why he does not sign. Persons who cannot read may not execute a closed will. The testator closes and seals the paper or the envelope and gives it to the notary and witnesses, declaring that it contains his last will, written and signed by him. The notary writes a statement on the envelope and the same is signed by the testator, the notary and all the witnesses who are able to write, not to be less than three in number. If the testator cannot sign, this must be stated and a witness signs for him. In order that a closed will may be effective it must be submitted to a competent judge, who opens it following the procedure established by law.

Less solemn or special wills are allowed in certain special cases, such as sudden attack or accident, imminent danger of death, being a soldier or prisoner or hostage in times of war, being on a vessel at sea, etc.

Testamentary Disposition.

A testator may fully dispose of his property only in so far as the law does not oblige him to make provision for the following: (a) Aliments owing to certain persons; (b) the marital portion to which an indigent spouse is entitled and which is one-fourth of the estate, unless there are legitimate descendants, in which event the spouse shares equally with the children; (c) the legal portions which the law assigns to certain classes of heirs, namely, legitimate and natural descendants and legitimate ascendants. The total amount of such legal portions ranges from one-half to three-fourths of the estate, depending on the number and relationship of the heirs. Such obligatory heirs may be disinherited for specified grave reasons. (C. C. 779-1010).

Foreign Wills.

A will made abroad by a Uruguayan citizen can be made by public instrument in accordance with the foreign law or before a diplomatic or consular official of Uruguay. In the latter case the witnesses must be at least two, preferably Uruguayans or foreigners domiciled in Uruguay or at the place of execution; furthermore the rules applicable to solemn open wills must be observed, the instrument must bear the seal of the legation or consular office and the rubric of the respective official at the beginning and end of each page; and a certified copy must be sent to the Department of Foreign Affairs of the Republic, which after legalizing the signature of the diplomatic or consular agent forwards the document to the proper judge.

12 FAMILY

12.01 ADOPTION:

C.M.A. arts. 135-160.

Adopting party must be over 25 years of age and 15 years older than adopted party. There are two types of adoption: full adoption (adopción legitimada) and partial adoption (adopción simple). Full adoption gives adopted person identical status with that of natural child, creating lines of kinship between adopted person and adoptive parent's family. Full adoption extinguishes legal bonds between adopted person and his natural parents and family and it is irrevocable. Partial adoption creates same juridical ties between adopted and adopting parties as exist between parents and children; but does not create any legal relationship between adopted party and family of adopting party, nor between latter and family of adopted party. Partial adoption does not extinguish legal bonds between adopted person and his natural parents and family. Partial adoption may be revoked. International adoption where parties are subject to different jurisdictions and domicile is governed by international convention and by law of domicile of adopted party in matters related to his capacity, legal age, consent by parents or legal representatives, authorization to leave country and adopting parents in matters of their legal capacity, consent and other requirements. Change of nationality is not produced by adoption. International adoption has same legal effect as full adoption.

12.02 ALIMONY:

See topic 12.04 Divorce.

12.03 COMMUNITY PROPERTY:

See topic 12.05 Husband and Wife.

12.04 DIVORCE:

Divorce dissolves marriage bond. It may be demanded in following cases: (a) Adultery of either spouse; (b) conviction of attempted murder of spouse; (c) grave cruelty or insults; (d) proposal of husband to prostitute wife; (e) attempt of either spouse to prostitute children or connivance in such prostitution; (f) continual quarrels and disputes which make married life impossible; (g) when one of spouses is sentenced to penitentiary for over ten years; (h) abandonment for over three years; (i) after three years of uninterrupted separation provided one of spouses consents; (j) incapacity of one spouse due to permanent illness declared by court; (k) mutual consent; (l) will of wife alone.

After decreed sentence of divorce, former spouse must help to maintain economic status of incapacitated party jointly with other persons obliged to provide support. Delinquent payment of alimony and child support are registered at Interdictions Section of National Registry of Personal Acts according to Law 16871 of Sept. 28, 1997 as amended.

In any case provisional separation of spouses is decreed by court. Husband may demand that house be specified where wife is to live during proceedings. Temporary situation of minor children is determined by court, as well as amounts to be paid for alimony of wife and maintenance of children and for wife's expenses in proceedings. After provisional separation is decreed spouses may make agreements as to definitive custody of children, except when cause of divorce is attempt to prostitute children. If there is no agreement or until one is made, children below five years of age are confided to mother; with respect to those over five, judge decides after hearing parents.

A divorce by will of wife alone can be decreed only after two years of marriage.

In the case of a divorce by mutual consent, the spouses must personally appear before the judge who endeavors to reconcile them. If there is no reconciliation, judge will decree provisional separation and judge specifies period of three months after which spouses again appear to reaffirm their desire to be divorced. If at such hearing spouses persist in their desire to be divorced, divorce is decreed but if spouses do not appear case is closed.

For the divorce by the will of the wife alone she must appear before the judge, who summons the parties for a hearing for the purpose of endeavoring to reconcile them. If the husband does not appear and if no reconciliation is effected, the judge designates a new hearing to be held after six months, at which the wife must again appear to reiterate her petition. At the second hearing the judge designates a third hearing to be held after one year, when the wife must again reaffirm her petition. At such final hearing the judge once more summons the spouses to endeavor to reconcile them. If the husband does not appear or if there is no reconciliation, the divorce is decreed.

The competent court is the court of the husband's domicile, except for divorce by the will of the wife alone, in which case it is the court of the wife's domicile. Domicile is considered to mean the permanent residence or establishment.

Divorce dissolves marital community. If cause was adultery guilty party loses property rights in marriage community. (See topic 12.05 Husband and Wife.)

A separation may be granted for the same causes which are causes for divorce except mutual consent and the sole desire of the wife. Three years after the judgment of separation either of the spouses may request that it be converted into a divorce. In such case the divorce is granted as a matter of course and the other spouse is notified. (C. C. 145-197).

12.05 HUSBAND AND WIFE:

Husband and wife have equal civil capacity. The marriage domicile is determined by mutual agreement and the spouses contribute to the expenses of the home in proportion to their economic situation. The wife may freely administer and dispose of her private property.

Before marriage, the spouses may make agreements regarding property they then own or which they may later acquire, and the administration of the same; such agreements must state the property of each spouse and its value and the debts of each.

Community Property.

If there is no agreement on subject, marriage creates marriage community with respect to property of spouses. They retain as their private property what each one brings to marriage or receives during marriage as gift or by inheritance. Following property belongs to marriage community: (a) Property acquired for valuable consideration during marriage at cost of common property; (b) whatever is acquired by industry, profession, employment or work of either spouse; (c) property acquired by chance; (d) fruits, revenues and interest obtained from common property and from separate property of spouses; (e) whatever is received by either spouse on account of usufruct of property of children of former marriage; (f) increase in value of separate property of either spouse. Whatever is owned by either spouse at dissolution of marriage is considered as marriage community property unless it be proved that it was owned by such spouse before marriage or was acquired by inheritance, legacy or gift.

Each spouse has administration of his/her own assets and those of community which are under his/her name or were brought by him or her to community. Any real estate, business or agricultural enterprise, belonging to community, whether in name of either or both spouses, may be alienated or encumbered only with consent of both.

Either spouse may, at any time, request the termination of the marriage community, the liquidation of its assets and their distribution among the spouses. In case of such separation the spouses must contribute to the support of the home and the education and support of the children in proportion to their respective property.

The marriage community is dissolved by: (a) annulment of the marriage; (b) dissolution of the marriage; (c) judgment of separation; (d) judicial dissolution at the request of either spouse; (e) declaration of absence of either spouse. (C. C. 33, 127-130, 1938-2018; Law 10783 of Sept. 18, 1946).

12.06 INFANCY:

(C. C. arts. 252-430, 1278-1280; C.M.A. arts. 23-33).

The age of majority is 18. Contracts by males under 14 and females under 12 are void and contracts of minors over those ages are voidable except those permitted to emancipated minors. Ordinarily, infants of the marriage or acknowledged as natural by father are subject to parental authority of both parents and not acknowledged by father are subject to maternal authority. Parental authority includes custody, legal representation and administration plus enjoyment of usufruct of minor's real and personal property, with certain exceptions. Parents granting emancipation may reserve one-half of such usufruct until majority. In absence or incapacity of parents guardian is appointed. Parents and guardians have restricted powers of disposition.

12.07 MARRIAGE:

(C. C. 83-115, Regulations June 2, 1885).

Only marriages having civil effects are marriages performed before official of civil status.

Persons under age of 18 cannot marry without express consent of their parents, ascendant in nearest degree or guardian.

Before marriage is performed a proceeding must be had before a justice of peace to show that no impediments exist. Justice issues publications in a newspaper and by edict calling on those who know of any impediment to state same. If none are reported official of civil status and contracting parties determine on a time for marriage and ceremony is performed before four witnesses.

Following causes are bars to marriage: (a) Fact that male is less than 14 or female less than 12 years of age; (b) lack of consent; (c) an undissolved previous marriage; (d) relationship in direct line by consanguinity or affinity; (e) relationship between brothers and sisters; (f) homicide, attempted homicide, or complicity of homicide of a spouse, with respect to other; (g) failure to perform a religious marriage when same was stipulated as a condition and compliance thereof is demanded on same day of civil ceremony.

Foreign Marriages.

Marriages performed abroad in accordance with foreign laws or in accordance with Uruguayan laws have the same effects in Uruguay as if performed in that country. If a Uruguayan marries abroad in violation of Uruguayan laws, the violation has the same effect as if committed in the country. A marriage legally dissolved abroad but which could not have been dissolved under Uruguayan laws does not enable a spouse to marry again in Uruguay so long as the other spouse is living. A marriage, however it might have been dissolved according to the laws of the foreign country where it was contracted, can be dissolved in Uruguay only in accordance with Uruguayan laws.

12.08 MARRIED WOMEN:

See topics 12.05 Husband and Wife, Marriage; categories 11 Estates and Trusts, topic Executors and Administrators; Property, topic Dower.

13 FOREIGN TRADE AND COMMERCE

13.01 CUSTOMS:

Common External Tariff approved by member countries of southern common market (MERCOSUR) is in effect; each member country has list of goods excluded from common external tariff and subject to their own duty rates. Most goods traded among member countries are not subject to tariff or quota restrictions.

13.02 EXCHANGE CONTROL:

Law 12670 of Dec. 17, 1959 constitutes enabling legislation for current provisions of foreign exchange regulation. Currency transactions are made only through Central Bank or for its account and order. Purchase and sale of foreign currency is governed by supply and demand. Central Bank administers fund for stabilization and protection of currency, which through intervention in free market prevents speculation and variations in currency quotations.

Law 14,629 of Jan. 5, 1977 as amended, and its regulations established single tax applied to imports with basic rate of 35% based on value in customs as defined by Brussels Council for Customs Corporation except when official c.i.f. prices exist. This rate may be increased, reduced or eliminated by Executive Power.

13.03 FOREIGN EXCHANGE:

See topic 13.02 Exchange Control.

13.04 FOREIGN INVESTMENT:

Promotion and protection of investments are considered of national interest. Foreign investors have same rights and duties as national investors. No authorization or prior registration is required except for electricity, hydrocarbons, basic petrochemicals, atomic energy, exploitation of strategic minerals, livestock, cold storage industries, financial operations, railways, telecommunication, press and those activities reserved by law to state enterprises. Government guarantees free remittance abroad of profits and repatriation of capital, as well as any money related to investment, in free convertibility currency. Law includes any investment for purpose of acquiring fixed or intangible assets. Tax incentives are granted as indicated by Law. Government guarantees legal stability as related to tax regime and nondiscrimination rights. (Law 16906 of Jan. 7, 1998 regulated by Decrees 59/998 of Mar. 4, 1998, 92/998 of Apr. 21, 1998, Decree 311/005 of Sept. 19, 2005 and 455/007 of Nov. 26, 2007).

13.05 FOREIGN TRADE REGULATIONS:

See topic 13.02 Exchange Control.

14 HEALTH

14.01 FOOD AND DRUG REGULATION:

(Const. art. 44, Decree 95/994 of Mar. 2, 1994).

Constitution imposes obligation to State to promote full physical, moral, and social development of all inhabitants of country and to provide free of charge preventive and curative treatment to those in need. Ministry of Health controls importation, production, storage, distribution and marketing of food products.

Decree No. 315/994 of July 5, 1994 as amended, National Bromatological Regulations for, among others, food additives; handling; storage, packing, transportation and marketing of food; meat and meat products; fish and fish products; eggs and egg products; milk and milk products; cocoa and cocoa products; salt, condiments, sauces, and soups and broths; water and nonalcoholic beverages; alcoholic beverages; and ice cream.

Law 15443 of Aug. 5, 1983 as amended and its regulations Decree No. 521/984 of Nov. 22, 1984 as amended, regulates importation, production, processing, and marketing of medicines and related products for human use.

Law 15703 of Jan. 11, 1985 as amended regulates distribution, commercialization and sale of medicines, cosmetics and medical appliances for human use.

Transplant and Donation of Organs.

(Law 14005 of Aug. 17, 1971 as am'd, Law 16628 of Nov. 23, 1994, Decree 160/006 of June 2, 2006). Law regulates donations and transplants of organs; removal of organs and body parts, from dead and living persons, death certification. Minister of Public Health is in charge of Registro Nacional de Órganos y Tejidos.

15 IMMIGRATION

15.01 ALIENS:

In general aliens enjoy same civil rights and have same civil obligations as citizens.

They may acquire property and carry on business and industries. When they own local property or carry on personal activities, they can acquire Uruguayan citizenship after five years of permanent residence, this term is reduced to three years if they have settled family. (Const., art. 78; C. C. 22; Immigration Decree of Feb. 28, 1947 as am'd; Law 16340 of Dec. 23, 1992 regulated by Decree 119/004 of Mar. 31, 2004, grants special treatment to retired foreigners who become permanent residents in Uruguay).

16 INTELLECTUAL PROPERTY

16.01 COPYRIGHT:

Copyright may cover any literary, scientific or artistic creation, including software and data bases, layouts, books, pictures, maps, music, theatrical works, motion picture scripts, paintings, drawings, sculptures, etc. Law protects artists, performers, phonogram producers and broadcasting organizations. It comprises right to alienate, publish, reproduce, translate, execute and circulate in any manner. Inventions of employees made pursuant to employment contract are presumed assigned to his employer for his exclusive use. Rights are protected by law without requiring registration. Imprisonment is provided for illegal edition or reproduction of intellectual works.

Author preserves his right during his life and his heirs or legatees keep it for 50 years thereafter from Jan. 1 of year following author's death; anonymous or pseudonymous works are protected for 50 years from day work was accessible to public, and collective works are protected 50 years after date of first publication, phonograms are protected for 50 years from date of first publication and broadcasting is protected for 50 years from first transmission. (Copyright Law 9739 of Dec. 17, 1937, as am'd; Regulation by Decree 154 of May 3, 2004).

16.02 PATENTS:

(Law 17164 of Sept. 2, 1999 regulated by Decrees 225/99 of July 27, 1999 and 11/00 of Jan. 13, 2000).

Law grants moral and patrimonial rights to inventors. Moral right is right to be recognized as inventor. This right is inalienable, perpetual and transferable. Patrimonial rights are those rights protected by patents. Any individual or entity, national or foreign may hold property of any patent. Patent is any new invention of products or proceedings that represent inventive step and are susceptible of industrial application. Invention is novel when it is not within state of art. Discoveries, scientific theories and mathematical methods, computer programs considered by themselves, scientific, literary and artistic works, among others are not considered inventions. Inventions contrary to public policy, morals, health, environment, diagnostic, therapeutic and surgical methods are not patentable. Pharmaceutical products and chemical products for agriculture are patentable after Nov. 1, 2001, but applications for priority may be filed any time before such date. Patents are granted for 20 years from filing date. Patent grants exclusive right to exploit it, but compulsory license may be granted to guarantee free competition and avoid abuse of dominant position in market and in case of declared emergency or national security reasons and lack of exploitation by owner or licensee after three years from granting date or four years from application.

Utility models are defined as tools, instruments, apparatus, equipment or objects which, as result of modifications in their disposition or configuration, have different function with regard to integral parts thereof or present different advantage as far as their utilization, use or manufacture is concerned. Utility models are new when they are not within state of art, and may be registered for term of ten years counting from application date, extendable for five years. Provisions regarding patents are applicable to utility models.

Industrial designs are new designs which may be applied to industrial or handcrafted objects. They may be registered as ownership of author if no publicity thereof in any form has been made before filing application. Industrial designs contrary to public policy or morals are not registrable. Registration is granted for ten years from filing date, renewable for five years. Provisions regarding patents are applicable to industrial designs.

Infringement of patents, utility models and industrial designs rights is sanctioned with imprisonment from six months to four years.

16.03 TRADEMARKS AND TRADENAMES:

(Law 17011 of Sept. 18, 1998 and its regulations, Decree 34/999 of Feb. 3, 1999 and Decree 146/001 of May 3, 2001).

Law defines mark, as those signs, visible or invisible, able to distinguish goods or services of one person, from those of another person; those which are distinctive, novel and special. Among others, following are not considered as marks: national, international or foreign denominations, signs and emblems; expressions or designs contrary to public policy, morals or good habits; technical, commercial or common names describing products or services that are to be protected by mark or their qualities, gender or nature; letters and numbers with no special shape, name of vegetal varieties. Foreign trademarks can be registered only by their owner or with his authorization. Protection is granted to international well-known marks not registered in Uruguay. Statute of limitations for cancellation of illegally registered well-known marks is 15 years from registration, and no limitation if bad faith is proved. Registration is granted for ten years from registration date and it is renewable. Use of trademark is not compulsory. License agreements must be recorded in order to be effective against third parties. Sanction imposed for infringement of law is imprisonment for three to six years. Statute of limitations for criminal or civil action is four years from infringement or one year from day legitimate owner found out violation.

Conventions.

Nice Agreement Concerning the International Classification of Goods and Services for the Purposes of the Registration of Marks, 1957 as reviewed and amended; International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations, Rome, 1961; Paris Convention for the Protection of Industrial Property, as reviewed and amended; Locarno Agreement Establishing an International Classification for Industrial Designs, 1968 as amended; Strasbourg Agreement Concerning the International Patent Classification, 1971 as amended; Vienna Agreement Establishing an International Classification of the Figurative Elements of Marks, 1973 as amended; WIPO Copyright Treaty, Geneva, 1996.

17 LEGAL PROFESSION

17.01 ATTORNEYS AND COUNSELORS:

(Law 15750 of June 24, 1985).

To practice law one must hold law degree from Universidad de la República, be 21 years old and be registered with and sworn by Supreme Court of Justice. Supreme Court of Justice has disciplinary power and may impose fines or suspend attorney from practicing law.

18 MINERAL, WATER AND FISHING RIGHTS

18.01 MINES AND MINERALS:

(Mining Code, Law 15242 of Jan. 8, 1982 as am'd and its regulation, Decree 110/982 of Mar. 26, 1982; Law 14,181 of Mar. 29, 1974 as am'd).

Mines in General.

State is owner of all mineral and fossil substances, whoever may be owner of surface. Mining activity is regarded as of public interest. Mines constitute real property distinct from surface, although both may be possessed by same owner. They may be alienated and encumbered in accordance with rules of Civil Code, but ownership is not considered as transferred nor is mortgage effective for third persons until recorded in Mining Registry. Law classifies mineral deposits, whether beneath or on surface, at sea or on land, into: (1) Deposits of fossil fuels, which includes petroleum, natural gas, coking coal, lignite, peat, bituminous rocks, petroleum sands and other deposits of mineral substances or other elements that may be used to generate energy industrially; (2) those mineral deposits included in Mining Reserve or in Registry of Vacant Mines; (3) all deposits of mineral substances, both metallic and non-metallic, which are not included in foregoing classes. It includes also those deposits of class (4) when mineral substance is used as raw material for industry or it is subject to certain exploitation requirements for better economical results in exploitation of mine; (4) deposits of non-metallic mineral substances that are directly used as construction materials, without previous industrial process that determines physical or chemical transformation of mineral substance. Mining titles are granted to following parties: On mineral deposits under class (1) above only on behalf of state and state agencies and companies; and on mineral deposits under classes (2), (3) and (4) above, on behalf of any party in accordance with rules and requirements under Mining Code and regulations thereof. State may contract, under its responsibility, carrying out of prospecting, exploration or exploitation by third parties.

State as owner of mineral and fossil substances may grant mining titles that are transferable. Any national or foreign natural or juridical person, whether of private or public nature may be beneficiary of mining title. All mining activities and disputes are subject to Uruguayan law and jurisdiction, and any agreement to contrary is null and void. Law classifies mining rights into: (1) Prospecting, (2) exploration, and (3) exploitation. (1) Prospecting rights are granted for term that goes from 12 to 24 months. This term may be extended for additional 12 months but 50% of original area allocated must be released. Maximum area allocated for each prospecting title is 100,000 hectares and 200,000 hectares to any one individual or legal entity. (2) Exploration rights are granted for two years, which may be extended twice for periods of one year each; in such case 50% of area allocated must be released. Maximum area allocated for each exploration title is 1,000 hectares and 2,000 hectares to any one individual or legal entity. (3) Exploitation rights are granted for term of 30 years, which may be extended for successive periods of 15 years each, as long as mineral is being exploited. Each exploitation title covers maximum of 500 hectares and 1,000 hectares for specific mineral to any one individual or legal entity, which may be increased by governmental authorization. Law establishes causes for expiration and cancellation of mining titles; in such cases mining deposits will become vacancies, available to direct request by any person.

Mining Tax.

Mining rights are subject to tax as follows: (1) Prospecting right N$100 pesos for each 100 hectares or fraction thereof for original term, and N$200 pesos for each extension of such term for each remaining 100 hectares or fraction thereof; (2) exploration right: for first year N$200 pesos per hectare or fraction thereof, for second year N$400 pesos per hectare or fraction thereof and for third year and any subsequent year N$600 pesos per hectare or fraction thereof (increased by Decree 571/985 of Oct. 24, 1985); (3) exploitation right: as from moment of use of concession percentage of market value of gross product extracted from mine. For first five years of exploitation 5% (2% to state and 3% to owner of surface) and for following years of exploitation 8% (3% to state and 5% to owner of surface). Beneficiaries of deposits of class (4) will compute their tax from beginning of exploitation at rate of 10% (5% to state and 5% to owner of surface).

Law 15294 of June 23, 1982 as amended establishes special tax on hydrocarbons.

Exemption of import duties of machinery, equipment, tools and their parts used for mining activities related to metallic minerals is granted by Decree 609/986 of Sept. 10, 1986.

19 MORTGAGES

19.01 CHATTEL MORTGAGES:

Personal property including livestock, farm products, motor vehicles, commercial or industrial establishments, industrial property and credits may be given in guarantee of any obligation. Pledged property may be delivered to creditor or remain in custody of debtor. When delivered to creditor who acts as depositary, who cannot be authorized to appropriate and apply it to his credit although he may sell it through court at public auction or through broker when so authorized under certain procedural rules. If possession is retained by debtor, pledge contracts must be in writing and recorded in Registry of Pledges Without Delivery in order to be binding upon third parties. Pledge of motor vehicles, commercial or industrial establishments, industrial property and forest must be recorded in corresponding registry. Debtor is subject to imprisonment if transfers pledged property without authorization of creditor or abandons property. Sales may be agreed upon by public auction through court or, when authority is granted, through third person. Pledge may be cancelled at any time by payment. Foreclosure action is summary. See also topic 19.03 Mortgages. (C.C. 2239-2272, 2292-2321, Decree Law 14,701 of Sept. 12, 1977 and Law 17,228 of Jan. 7, 2000).

19.02 COLLATERAL SECURITY:

See category 7 Debtor and Creditor, topic 7.12 Pledges.

19.03 MORTGAGES:

Uruguayan legislation considers a mortgage as a pledge of real property which remains in possession of the debtor. Mortgages are created by agreement of the parties and must always appear in a public instrument and be recorded in the mortgage registry. Without these requisites they have no effect. Their date is counted only from the day of record. The record of a mortgage must contain: (a) The name and domicile of the creditor and of the debtor and of their representatives who ask for the record; (b) date and nature of the contract guaranteed by the mortgage and designation of the archive where it is to be found; (c) description of the property; (d) amount; (e) date of the record and signature of the registrar.

A mortgage can only be placed on real property, whether owned in fee or for life, ships and aircraft; never on future interests. The mortgage covers all accessories and improvements added to the property; it also covers the insurance of the mortgaged property and the fruits pending at the time of foreclosure. In case of nonpayment and creditor may cause the property to be sold in judicial proceedings at public sale, and if there is no legal bid, to have it adjudicated to him for the minimum price at which a third person could legally have bought it. (See category 7 Debtor and Creditor, topic 7.05 Executions.) Stipulations that the creditor may take over the mortgaged object or privately dispose of the same are void, as are also stipulations which would deprive the creditor of the power to demand the sale of the property when the credit becomes demandable.

If the property is lost or deteriorates so as to become insufficient to secure the debt, the creditor is entitled to ask that additional property be subjected to the mortgage, unless he consents to receive different security; or he is entitled to demand immediate payment of the debt, although it may not have matured. In the foreclosure proceedings the creditor may have the property sold, whoever may possess it and under whatever title; the only exception is, when a third person has acquired the property in a public sale after personal summons of the mortgage creditors.

It is allowable to stipulate the upset price of the property for the case of foreclosure. The usual proceedings of the executive action may also be waived; in such case, the judge immediately orders the sale; if the waiver did not also contain a designation of the price, such price is determined by appraisement. See category 7 Debtor and Creditor, topic 7.05 Executions.

A mortgage is extinguished: (a) By extinction of the principal obligation and by all other usual means by which obligations are extinguished; (b) by termination of the right of the person who constituted it; (c) by the expiration of the term for which it was constituted; (d) by cancellation by the creditor. Mortgages prescribe in 30 years. (C. C. 2322-2348, C. Com. 773).

20 PROPERTY

20.01 ABSENTEES:

See category 11 Estates and Trusts, topic 11.02 Death.

20.02 ADVERSE POSSESSION:

See category 5 Civil Actions and Procedure, topic 5.05 Prescription.

20.03 CONVEYANCES:

See topic 20.05 Deeds; category 9 Documents and Records, topic 9.03 Public Instruments.

20.04 CURTESY:

No estate by curtesy. As to rights of surviving husband see categories 11 Estates and Trusts, topics Descent and Distribution, Wills; Family, topic Husband and Wife.

20.05 DEEDS:

Instruments executed before a public notary are written in his protocol; they may be written by hand with indelible ink or by typewriter. They begin by stating date and place. No abbreviations or initials may be used to designate names or places and all amounts must be written out. Parties are identified by stating their business, their residence, whether they are single, married or widowed and in latter cases name of spouse, and other data. Amendments and corrections in body of instrument are not permitted but must be indicated by notary before signature. Notary retains original signed copy in his protocol and delivers certified copy to parties requesting same. For further certified copies judicial order is required. Certified copies may be typewritten or printed but indelible ink must be used. In court notarial copies have effect of originals. (Decree-Law 1421 of Dec. 31, 1878, as am'd).

See also categories 9 Documents and Records, topic Records; Family, topic Husband and Wife.

20.06 DOWER:

No dower estate as in American law. For rights of widow, see categories 11 Estates and Trusts, topics Descent and Distribution, Wills; Family, topic Husband and Wife.

20.07 PERPETUITIES:

A testator may designate a second person to receive an inheritance if the first person appointed fails to accept it, but no further limitation is allowed. Specifically the following provisions are forbidden: (a) those declaring all or part of the estate inalienable; (b) those designating a remainderman after the death of the heir; (c) those leaving property to an individual to be applied in accordance with instructions left by the testator. (C. C. 858-869).

20.08 REAL PROPERTY:

Trees and plants are considered real property so long as they are attached to the soil by their roots; also pending fruits of such plants. Articles permanently devoted to the use, cultivation and benefit of a parcel of real property are considered as real property although they might without detriment be separated therefrom, as for example paving tiles, water pipes, agricultural and mining implements, animals used on the farm and placed thereon by the owner, fertilizers, presses, machinery, etc. The products of real property and its accessories, such as grass, timber, fruits, soil or sand, metals, etc., are considered personalty even before being separated, for the purpose of conceding a right in favor of a third person. (C. C. 463-470).

21 TAXATION

—Scope —

Law 14306 of Nov. 19, 1974, as amended (Fiscal Code) containing procedural regulations applicable to all taxes and numerous regulations; Decree 388 of Aug. 17, 1992; Decree 338/996 of Aug. 28, 1996; Law 18038 of Dec. 27, 2006 as amended.

21.01 ADMINISTRATION:

“Dirección General Impositiva”, of Ministry of Economy and Finance, is in charge of administration, control and collection of most federal taxes, which are:

21.02 BUSINESS TAXES:

Tax on Control of Corporation.

(Law 17502 of May 29, 2002 as am'd regulated by Decree 450 of Nov. 20, 2002). Establishment of corporation is taxed at rate of 1.50% on minimum capital required by law and is taxed at 0.75% for each closing of tax year.

Investment companies are taxed at rate of 0.3% upon their capital and surplus (Decree 338/996 of Aug. 28, 1996 as am'd regulated by Decree 664/979 of Nov. 19, 1979).

Tax on Insurance.

(Law 17296 of Feb. 21, 2001, art. 558 regulated by Decrees 49/001 of Feb. 22, 2001 and 159/001 of May 7, 2001). Public and private insurance companies, their agencies, branches and establishments, domiciled and nondomiciled in country, are taxed on gross income from risk insurance and reinsurance contracts, renewals or extensions. Rates are from 5% to 15% depending on type of risk; for life insurance rate is up to 0.5%. For insurance companies not authorized to operate in country, rates may be increased up to 40%. Other insurance companies are exempt from taxation.

21.03 EMPLOYMENT TAX:

Payroll Tax.

Law 15294 of June 23, 1982 as amended by Decree 143 of Apr. 30, 2004 establishes tax on salaries. Rates paid by employees vary according to amount received. Employers pay 2% of monthly payroll regardless of salary levels.

21.04 EXCISE TAXES:

Internal Specific Tax.

(Decree 338/996 of Aug. 28, 1996 as am'd, Decree 96 of Feb. 21, 1990 as am'd). Tax levied on first sale or import of certain products at different rates which are subject to frequent changes.

21.05 FREE ZONES:

(Law 15921 of Dec. 17, 1987 as am'd regulated by Decree 454 of July 8, 1988 as am'd, Decree 311/005 of Sept. 19, 2005). Free zones can be publicly or privately owned and are administrated by "Dirección de Zonas Francas". All types of industries, trading centers and services are allowed to operate there. They are exempted from all Uruguayan present and future taxes, except contributions to state social security. Enterprises operating in free zones must employ 75% Uruguayan nationals. Authorization for lower percentage may be obtained in some cases. Dividends or profits paid or credited to nonresident individuals or juridical persons are not exempted if they are taxed in their country of domicile and get credit of tax paid in Uruguay. No restrictions exist for entering to and exit from free zones of goods, negotiable instruments, Uruguayan and foreign currencies and precious metals.

21.06 INCOME TAX:

Tax on Income from Economic Activities.

(Law 18083 of Dec. 27, 2006 as am'd regulated by Decree 150 of Apr. 26, 2007 as am'd). Tax on income from economic activities is assessed on net Uruguayan source income derived from any activities earned or received by taxpayers during fiscal year. Tax is levied on resident legal entities and permanent establishments of non-resident entities.

Following taxpayers are taxed on their total adjusted income from Uruguayan source: (1) Corporations and limited partnerships (Sociedades en Comandita por Acciones); (2) all other commercial companies; (3) agricultural companies; (4) permanent establishments of non-resident entities; (5) government enterprises; (6) closed credit investment funds; (7) trusts; (8) de facto companies; (9) any other commercial, industrial, agricultural or service company; and (10) individuals with income over certain amount or opt to be subject to this with respect to part or all of their income.

Income is considered derived from Uruguayan sources when derived from activities performed in, or from property located in, or rights used in, Uruguay, independently of nationality, domicile or residence of participants in transactions and place where these are agreed upon.

Gross income is obtained by deducting costs of acquisition or production from total net sales. Other nonoperating items are considered as forming part of gross income. In general, any increase in net worth is taken as gross income, including exchange differences arising from transactions in foreign currency when transactions are subject to tax.

Exempt from this tax are income from exempt activities or income earned by airlines and shipping companies. Income from livestock and agriculture activities subject to tax on sale of agricultural goods.

Income derived from activities of cultural and educational institutions, sports associations and nonprofit organizations, international organizations of which Uruguay is member, dividends paid or credited to individuals or legal entities domiciled abroad unless they are taxed in recipient country and credit is granted there for tax locally paid, exchange losses on debts on foreign exchange income received by banks or financial institutions constituted abroad and not having branches in Uruguay derived from loans or advances to local banks are all tax exempt.

In order to determine net income all expenses necessary to obtain and maintain taxable income are deductible from gross income.

Fixed assets, excluding those located abroad may be amortized at annual rates based on their useful life.

Other deductions expressly authorized are: Extraordinary losses not covered by insurance; fiscal losses for previous three years adjusted for inflation; donations to public entities; justifiable bad debts; amortization of organization expenses; contributions for workers' welfare; depreciation; amortization of intangible property; interests; and taxes.

Rates.

Rate of 25% is levied on net taxable income. Tax is payable on monthly advance payments calculated according to formula.

Personal Income Tax.

(Law 18083 of Dec. 27, 2006 as am'd regulated by Decree 148/007 of Apr. 26, 2007 as am'd). Tax is levied on Uruguayan sourced income at rates ranging from 10% to 25% for income from salaries, pensions and income of independent work and from 3% to 12% for income from capital investments in real property and movable assets and from capital gains from sale of real estate and other patrimony transfers, with exceptions and deductions as indicated by law.

Income Tax on Non-Residents.

(Law 18083 of Dec. 27, 2006 as am'd regulated by Decree 149/007 of Apr. 26, 2007 as am'd). Any income from local source obtained by nonresidents is taxed at rates ranging from 3% to 12% rate on gross income, with certain exceptions. Dividends and profits remittances are subject to withholding tax as indicated by law.

Tax on Exploration or Exploitation of Hydrocarbons.

Tax rate of 15% applicable to 50% of obtained income will be paid by contractor under exploration or exploitation contract. Taxpayer may choose to pay said tax in kind, at rate of 7.5% of his corresponding total amount of hydrocarbons. Executive Power may grant exemption of this tax. (Decree 338/996 of Aug. 28, 1996).

21.07 PROPERTY TAXES:

Tax on Transfer of Real Property.

(Law 18064 of Nov. 27, 2006, Decree 338/996 of Aug. 28, 1996 and its regulations Decree 252/998 of Sept. 16, 1998, Decree 38/007 of Jan. 29, 2007). Transfer of rights on real property is taxed at 2% to be paid by transferee and transferor, at 4% to be paid by beneficiaries when transfer is free, and at 3% to be paid by heirs and legatees.

21.08 SALES AND USE TAX:

Sales Tax.

Tax on Transfer of Agricultural Products.

(Decree 338/996 of Aug. 28, 1996 as am'd and its regulations, Decree 15 of Jan. 24, 1996, Decree 538/003 of Dec. 24, 2003, Decree 265 of July 25, 2007). Tax is levied on some transfers of some agricultural and cattle raising products. Maximum rate is 2.5% calculated on price of products. Same products are also subject to 2 per mil tax calculated on sales price as indicated by Decree 338/996 of Aug. 28, 1996.

21.09 TAX INCENTIVES:

Law 14178 of Mar. 28, 1974 as am'd, regulated by Decree 703 of Sept. 5, 1979, grants tax incentives for promotion of industrial activities.

Law 17547 of Aug. 22, 2002 regulated by Decree 524 of Dec. 19, 2005, grants tax incentives for promotion and development of industrial parks.

See also category 13 Foreign Trade and Commerce, topic 13.02 Exchange Control.

21.10 VALUE ADDED TAX:

(Decree 338/996 of Aug. 28, 1996 as am'd regulated by Decree 220 of Aug. 12, 1998 as am'd).

Tax is applied to: (a) Goods circulated within country; (b) services rendered within country and exportation of services; and (c) importation of goods into country.

Basic tax rate is 22%, while minimum is 10%. Minimum tax is applicable to such things as medications, and other items. There are several items and services which are totally exempted.

21.11 WEALTH TAX:

Tax on Patrimony.

(Law 18083 of Dec. 27, 2007 and its regulations, Decree 600 of Sept. 21, 1988 as am'd). This tax is levied on net worth of natural persons, family units, undivided estates, numbered bank accounts, as well as domestic and foreign legal entities. Tax is applied to difference between assets and liabilities adjusted in accordance with law and its regulations.

For natural persons, family units and undivided estates, tax is applied exceeding untaxable minimums established from time to time in accordance with following scale: Up to one time nontaxable minimum, 0.7%; from one time to two times nontaxable minimum, 1.1%; from two times to four times minimum 1.4%; from four times to six times minimum, 1.9%; from six times to nine times minimum, 2%; from nine times to 14 times minimum, 2.2%; for excess over 14 times minimum, 2.5%. For banks and financial institutions 2.8%, for other juridical persons, rate is 1.5%; for debentures, savings certificates or other similar assets, rate is 3.5%; for companies regulated by Law 11073 of June 24, 1948 as amended, rate is 3%.

22 TRANSPORTATION

22.01 AIRCRAFT:

Aeronautical Code, Law 14305 of Nov. 29, 1974. Code deals with aircraft nationality, license and permits for operation, registration certificate, ownership, lease, manufacture, attachment, encumbrance of aircraft, passengers and freight transportation; and maximum carrier's liability in case of accidents; and loss or damage to baggage; and freight and penalties for infringement of Code. National aircraft must be registered and owners thereof must be domiciled in country. If owner is corporation, must be organized according to local laws, with nominative shares, owners of 51% of capital and two thirds of directors or administrators must be domicile in country.

22.02 SHIPPING:

Uruguayan flag may be used by merchant vessels holding permanent or temporary registry. Application for permanent registry must be made within four months of date of provisional registry. Applicant may be individual or juridical person locally domiciled. Registered vessels are required to travel to local ports but in case they do travel to port of registration, they are required to transport Uruguayan mail to and from local port, and deserting or surviving mariners of Uruguayan nationality. All acts related to registered vessels must be registered at National Vessels Registry. At least 75% of crew of Uruguayan vessels must be Uruguayan citizens. (Law 10945 of Oct. 10, 1947 as am'd, Law 16387 of June 27, 1993 as am'd regulated by Decree 426/994 of Sept. 20, 1994 as am'd).

Coastwise trade reserved to national vessels is enforced at third party request against those foreign flag vessels of countries enforcing coastwise trade reserve. (Laws 12091 of Jan. 23, 1954, Law 14650 of May 12, 1977 as am'd and Decree 31/994 of Jan. 25, 1994).

Territorial waters include zone of six miles from coast plus six miles for police purposes. For purposes of regulating foreign fishing vessels, Uruguayan sovereignty extends 200 nautical miles from coast. (Decree of Feb. 21, 1963; Decree 604/969 of Dec. 3, 1969). Foreign vessels fishing in Uruguayan territorial waters are extensively regulated, requirements being laid down concerning exploitation of sea resources in general, as well as definitions given with regard to fishing and hunting sea life. (Law 13833 of Dec. 23, 1969).

23 TREATIES AND CONVENTIONS

23.01 TREATIES:

Multilateral Treaties.

Multilateral Trade Negotiations, The Uruguay Round, Final Act, Marrakech, Apr. 15, 1994 and Agreement Establishing the World Trade Organization, Marrakech, Apr. 15, 1994. International Convention for the Unification of Certain Rules relating to Maritime Liens and Mortgages, International Convention for the Prevention of Pollution of the Sea by Oil, International Convention on Telecommunications, International Convention on Facilitation of International Waterborne Transportation (Convention of Mar del Plata), and treaty creating Latin American Integration Association (LAIA), Asunción Treaty, signed on Mar. 26, 1991 creating southern common market “MERCOSUR”. Uruguay is party to following Pan-American conventions of June 19, 1935, approved by Law 9529 of Dec. 18, 1935: Convention on the Repression of Smuggling (with Brazil, Chile and Ecuador); Convention Relative to Creation of Pan-American Tourist Passport and of Transit Passport for Vehicles (with Paraguay); Convention Relating to Transit of Airplanes (with Chile, Ecuador, and Mexico); Convention for Creation of Pan American Commercial Committees (with Dominican Republic).

Note: MERCOSUR, established in 1991, is regional trade market. Member countries are Argentina, Brazil, Paraguay, Uruguay and Venezuela. Member countries liberalize trade with one another while imposing common external tariff on goods imported from nonmember countries. MERCOSUR has extended its scope by entering into free trade agreements with Chile, Bolivia, Colombia, Ecuador and Peru.

ALB
ALBERTA LAW DIGEST

—Scope —

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(Citations, unless otherwise indicated, refer to Revised Statutes of Alberta, 2000 (R.S.A. 2000), Annual Statutes of Alberta are cited by year and chapter number; R.S.C. indicates Revised Statutes of Canada, 1985; S.C. indicates Annual Statutes of Canada; A.R. indicates Alberta Regulation; A.R.C. indicates Alberta Rules of Court; W.W.R. refers to Western Weekly Reports. See category 6 Courts and Legislature, topic 6.04 Reports.)

Note: This revision incorporates legislation through 2009.

1 INTRODUCTION

1.01 GOVERNMENT AND LEGAL SYSTEM:

There is one session of Legislature per year. This can be divided up into one or two sittings. Traditionally, there is always Spring Sitting, and Government decides whether there will be Fall Sitting. Under Constitution Act, 1982, Legislature is required to meet at least once every 12 months.

1.02 HOLIDAYS:

Every Sun., New Year's Day, Alberta Family Day, Good Friday, Easter Monday, Victoria Day (1st Mon. prior to May 25), Queen's Birthday (fixed by Proclamation), Canada Day (July 1), Labor Day (1st Mon. in Sept.), Thanksgiving Day (fixed by Proclamation), Remembrance Day, Christmas Day, Dec. 26 or when that date falls on Sun. or Mon., then Dec. 27 and any other day which may by proclamation be declared holiday. (c. I-8, § 28[1][x]). Where time limited for doing anything expires or falls upon holiday, time so limited extends to and thing may be done on first following day that is not holiday. (c. I-8, § 22[1]).

In cases involving documentation with government branches or services, time shall be extended to first following day that office is open. (c. I-8, § 22[2]).

Transactions on Sundays or Holidays.

Validity of Sun. observance legislation has been successfully challenged as being violation of Canadian Charter of Rights and Freedoms. ([1985] 1 S.C.R. 295).

1.03 OFFICE HOURS AND TIME ZONE:

Alberta is in the Mountain (GMT -07:00) (GMT -06:00 during daylight savings time [2:00 a.m. second Sun. of Mar. - 2:00 a.m. first Sun. of Nov.]) time zone. Office hours are generally from 9 a.m. to 5 p.m.

2 BUSINESS ORGANIZATIONS

2.01 AGENCY:

Common law rules apply with regard to agency.

Attorney in Fact.

Transfer of land may be executed by attorney in fact, provided that upon registration of same he must register original copy of power of attorney which power of attorney has not been revoked. (c. L-4, § 115).

Public Service Vehicles.

Repealed by Traffic Safety Act now in force.

2.02 ASSOCIATIONS:

Formation.

Five or more persons may become incorporated under Societies Act for any useful purpose, other than for purpose of carrying on trade or business (c. S-14, § 3) by subscribing to declaration of incorporation setting forth objects of society and filing same with Registrar of Companies, together with copy of proposed by-laws of society and information re subscribers (c. S-14, § 9).

Liabilities.

No member of an incorporated society is liable in his individual capacity for debts of society. (c. S-14, § 21).

Actions.

From date of certificate of incorporation, subscribers and members have all of powers, rights and immunities vested by law in corporation. (§ 14).

Dissolution.

Society may be dissolved where sufficient cause is shown and Registrar is satisfied that incorporation of society should be revoked and cancelled (§ 33); society surrenders its certificate of incorporation by special resolution (§ 34); society is wound up pursuant to Part 17 of Business Corporations Act if surrender is accepted by Registrar. (§ 35).

Rights and Powers.

No society shall have capital divided into shares, or declare any dividend, or distribute its property among its members during society’s existence. Interest of member in society is not transferable. (c. S-14, § 4).

Special Associations.

Special legislation governs formation and operation of religious, agricultural, co-operative, co-operative marketing and building associations.

Unincorporated Associations.

Common Law rules apply.

Professional Associations.

See topic Corporations subhead Professional Corporations.

Charitable Immunity.

See category 5 Civil Actions and Procedure, topic 5.07 Damages.

2.03 CORPORATIONS:

The Business Corporations Act (c. B-9) ("Act") was proclaimed in force on Feb. 1, 1982. It is similar to statutes in Manitoba, New Brunswick, Ontario, Saskatchewan and British Columbia and to Canada Business Corporations Act. (R.S.C. 1985, c. C-44). It applies to all new corporations incorporated pursuant to Act, and to existing companies continued under Act. Act, however, does not contain any provisions regarding incorporation of nonprofit corporations. Pending enactment of new regulation, Part 9 of Companies Act (c. C-21) will continue in force for incorporation of such corporations. Professional corporations may be incorporated under Act. Professional corporations may be incorporated under Act where approval of articles by governing body of profession that is less than two years old is sent to Registrar. (§ 7[2]). While Act does not per se restrict purposes for which corporation may be incorporated, other provincial legislation regarding incorporation of specific types of corporations must be considered, e.g. Cemetery Companies Act (c. C-4), Alberta Insurance Act (c. I-3), Loan and Trust Corporations Act (c. L-20), Societies Act (c. S-14), Municipal Government Act (c. M-26), Women's Institute Act (c. W-13), Religious Societies' Lands Act (c. R-15), Agricultural Societies Act (c. A-11), Cooperatives Act (c. C-28.1) and Credit Union Act (c. C-32). It is still possible to have corporation incorporated pursuant to special act of legislation assembly of Alberta.

Part 1. Interpretation and Application.

Application.

Act will apply to every corporation incorporated and every body corporate continued as corporation under Act that has not been discontinued under Act.

"Corporation".

As defined in Act means body corporate incorporated or continued under Act and not discontinued under Act. "Body corporate" as defined in Act includes company or body corporate wherever or however incorporated. (c. B-9, § 1).

Part 2. Incorporation.

Incorporators.

One or more persons may incorporate by signing articles of incorporation and forwarding same, together with supporting documentation to Registrar of Corporations. (c. B-9, §§ 5, 7).

Certificate of Incorporation.

Upon receipt of articles of incorporation in prescribed form Registrar must issue certificate of incorporation and corporation comes into existence on date shown in certificate of incorporation. (c. B-9, §§ 8, 9).

Publication of Name.

Corporation must set out its name in legible characters in all contracts, invoices, negotiable instruments and orders for goods or services issued by corporation. (c. B-9, § 10[8]).

Other Name.

Corporation shall not have name that is prohibited by regulations or subject to regulations, is identical or similar to name of another corporation unless corporation has been dissolved for six or more years if that name is confusing or misleading. (c. B-9, § 12).

Designating Number.

If requested to do so by incorporators or by extra-provincial corporation about to continue as corporation, Registrar must assign to corporation as its name designated number determined by him. (c. B-9, § 11).

Personal Liability under Pre-incorporation Contracts.

Subject to certain exceptions including express provision in written contract negating personal liability, person who enters or purports to enter into written contract in name of or on behalf of corporation before it comes into existence is deemed to warrant that corporation will come into existence within reasonable time and that contract will be adopted within reasonable time thereafter. Breach of these warranties may result in liability for corporation and person who purported to act in name or on behalf of corporation. (c. B-9, § 15).

Pre-incorporation and Pre-amalgamation Contracts.

Corporation may, within reasonable time after it comes into existence, by any action or conduct signifying its intention to be bound thereby, adopt written contract made before it came into existence in its name or on its behalf and upon such adoption: (a) Corporation is bound by contract and is entitled to benefits thereof as if corporation had been in existence at date of contract and had been party thereto; and (b) person who purported to act in name of or on behalf of corporation ceases, except as court may order on application by any party to contract, to be bound by or entitled to benefits of contract. (c. B-9, § 15).

Part 2.1 Unlimited Liability Corporations.

Part 2.1 of Act sets out specific rules relating to unlimited liability corporations. Liability of each shareholder of unlimited liability corporation is unlimited in extent and joint and several in nature. (§ 15.2). Subject to other defences under Limitations Act, claimant must bring action within two years of when shareholder ceases to be shareholder. Former shareholder not liable for liability that did not exist at moment when he/she ceased to be shareholder.

Articles of Incorporation.

In addition to meeting requirements under Act, articles of incorporation, amalgamation, amendment, continuance or conversion of unlimited liability corporation must contain express statement that liability of each shareholder of unlimited liability corporation for any liability, act or default of unlimited liability corporation is unlimited in extent and joint and several in nature. (§ 15.3).

Continuance of Extra-Provincial Corporation.

Extra-Provincial Corporation is one that is not incorporated under Act but carries on business in Alberta. If extra-provincial corporation is continued as unlimited liability corporation: (a) Property of extra-provincial corporation continues to belong to unlimited liability corporation; (b) if prior to continuance shareholders had unlimited liability, then unlimited liability corporation and its shareholders continue to be liable; (c) if prior to continuance shareholders were not liable for acts of corporation, then unlimited liability corporation continues to be liable for obligations of unlimited liability corporation from date shown on certificate of continuance; (d) existing cause of action, claim or liability to prosecution of extra-provincial corporation includes unlimited liability corporation and its shareholders; (e) civil, criminal or administrative action or proceedings pending by or against extra-provincial corporation may continue to be prosecuted by or against unlimited liability corporation or its shareholders; and (f) conviction against, or ruling, order or judgment in favour of or against, extra-provincial corporation may be enforced against or by unlimited liability corporation or its shareholders. (§ 15.5[1]).

When extra-provincial corporation that was incorporated as unlimited liability corporation is continued as limited corporation: (a) Shareholders of extra-provincial corporation as it existed prior to date shown on certificate of continuance continue to be liable for any liability, act or default of extra-provincial corporation that existed as of date shown on certificate of continuance; (b) existing cause of action, claim or liability to prosecution is unaffected; (c) civil, criminal or administrative action pending by or against extra-provincial corporation as it existed prior to date shown on certificate of continuance or by or against limited corporation; and (d) conviction against, or ruling, order or judgment in favour of or against unlimited liability corporation may be enforced against or by shareholders of extra-provincial corporation as it existed prior to date shown on certificate of continuance or against or by limited corporation. (§ 15.5[2]).

Conversion to Limited Corporation.

In addition to Act applying: (a) Shareholders of unlimited liability corporation as it existed prior to amendment or amalgamation continue to be liable for any liability, act or default of unlimited liability corporation that existed as of date shown on certificate of amendment or amalgamation; (b) existing causes of action, claim or liability to prosecution is unaffected; (c) civil, criminal or administrative action or proceeding pending by or against unlimited liability corporation may continue to be prosecuted by or against limited corporation; and (d) conviction against, or ruling, order or judgment in favour of or against, unlimited liability corporation may be enforced by or against shareholders of unlimited liability corporation as it existed prior to amendment, amalgamation or continuance or by or against limited corporation. (§ 15.6[1]).

Subject to Act, if limited corporation amalgamates with unlimited liability corporation and resulting corporation is unlimited liability corporation: (a) Shareholders of amalgamated unlimited liability corporation are liable for any liability, act or default of amalgamated unlimited liability corporation, whether it arises before or after date shown on certificate of amalgamation; (b) existing causes of action, claim or liability to prosecution pertaining to amalgamating unlimited liability corporation or amalgamating limited corporation as it existed prior to amalgamation includes shareholders of amalgamated unlimited liability corporation; (c) civil, criminal or administrative action or proceeding pending by or against amalgamating unlimited liability corporation or amalgamating limited corporation as it existed prior to amalgamation may continue to be prosecuted by or against amalgamated unlimited liability corporation or by or against its shareholders; (d) conviction against, or ruling, order or judgment in favour of or against, amalgamating unlimited liability corporation or by or against its shareholders; and (e) conviction against or ruling, order or judgment in favour of or against, amalgamating unlimited liability corporation or amalgamating limited liability corporation as it existed prior to amalgamation may be enforced by or against amalgamated unlimited liability corporation or by or against its shareholders. (§ 15.6[2]).

If articles of limited corporation are amended to convert it to unlimited liability corporation: (a) Shareholders of limited corporation as it existed prior to date shown on certificate of amendment become liable for any liability, act or default of limited corporation that existed as of date shown on certificate of amendment, and for any liability, act or default or unlimited liability corporation on and from date shown on certificate of amendment; (b) existing cause of action, claim or liability to prosecution includes shareholders of unlimited liability corporation; (c) civil certificate of amendment may continue to be prosecuted by or against unlimited liability corporation or its shareholders; and (d) conviction against, or ruling, order or judgment in favour of or against, limited corporation as of date shown on certificate of amendment, may be enforced by or against unlimited liability corporation or its shareholders. (§ 15.6[3]).

Continuation of Actions After Dissolution.

Act applies to body corporate that before its dissolution was unlimited liability corporation, in addition: (a) Liability of shareholders for obligations of unlimited liability corporation arising from action and proceedings commenced before its dissolution or within two years after dissolution is unlimited; and (b) any shareholder, including past shareholder, who last ceased to be shareholder within two years prior to date of dissolution, may be held responsible for full amount of any claim against unlimited liability corporation that originated before dissolution, regardless of amount received by shareholder on distribution of corporation's property at dissolution. (§ 15.7).

Warning on Certificate.

Unlimited liability corporation must ensure that each share certificate issued displays in prominent position on face information that liability of owner of share or shares represented by certificate for any liability, act or default of unlimited liability corporation is unlimited in extent and joint and several in nature. Liability is unaffected by any failure to comply with this. (§ 15.9).

Part 3. Capacity and Powers.

Capacity of a Corporation.

Corporation has capacity and, subject to Act, rights, powers and privileges of natural person. (c. B-9, § 16[1]).

Extra-territorial Capacity.

Corporation has capacity to carry on its business, conduct its affairs and exercise its powers in any jurisdiction outside Canada to extent that laws of such jurisdiction permit. (c. B-9, § 16[2]).

Part 4. Registered Office and Records.

Registered Office.

Corporation must at all times have registered office in place within Alberta specified in its articles and notify Registrar of address for service or within 15 days of any change of address of its registered office. (c. B-9, § 20).

Corporate Records.

Corporation must prepare and maintain, at its records office or at any other place in Alberta designated by directors, records containing: (a) Articles and by-laws, and all amendments thereto, and copy of any unanimous shareholder agreement; (b) minutes of meetings and resolutions of shareholders; (c) copies of all notices of directors or notices of change of directors; (d) securities register in prescribed form; (e) financial statements; and (f) disclosure information regarding material contracts with directors or officers. (c. B-9, § 21[1]).

Corporation may keep its corporate accounting records at place outside Alberta only if records are available for examination, by means of computer terminal or other technology, during regular office hours at registered office or any other place in Alberta designated by directors, and corporation provides technical assistance to facilitate this. (§ 21[8.1]).

Directors' Records.

Corporation must prepare and maintain at its registered office or records office or at such other place as directors think fit adequate accounting records and records containing minutes of meetings and resolutions of directors and any committee thereof which records must be open to inspection by directors at all reasonable times. (c. B-9, § 21[7]).

Records in Alberta.

Where accounting records of corporation are kept at place outside Alberta, there must be kept at registered office or records office or other office in Alberta accounting records adequate to enable directors to ascertain financial position of corporation with reasonable accuracy on quarterly basis and those records must be open to inspection by directors at all reasonable times.

(c. B-9, § 21[8]).

Corporation may keep its corporate accounting records at place outside Alberta only if records are available for examination, by means of computer terminal or other technology, during regular office hours at registered office or any other place in Alberta designated by directors, and corporation provides technical assistance to facilitate this. (§ 21[8.1]).

Shareholder Lists.

If corporation is distributing corporation any person, upon payment of reasonable fee and upon sending to distributing corporation or its transfer agent statutory declaration in prescribed form may upon application require corporation or its agent to furnish within ten days from receipt of statutory declaration list setting out names of shareholders of corporation, number of shares owned by each shareholder and address of each shareholder as shown on records of corporation. (c. B-9, § 23[5]).

Use of Shareholder List.

List of shareholders obtained in this manner shall not be used by any person except in connection with: (a) Effort to influence voting of shareholders of corporation; (b) offer to acquire shares of corporation; or (c) any other matter relating to affairs of corporation. (c. B-9, § 23[11]).

Form of Records.

All registers and other records required by Act to be prepared and maintained may be in bound or loose-leaf form or in photographic film form, or may be entered or recorded by any system of mechanical or electronic data processing or any other information storage device that is capable of reproducing any required information in intelligible written form within reasonable time. (c. B-9, § 24[1]).

Corporate Seal.

Instrument or agreement executed on behalf of corporation by director, officer or agent of corporation is not invalid merely because corporate seal is not affixed thereto. (c. B-9, § 25[2]).

Part 5. Corporate Finance.

Shares of corporation must be in registered form and without nominal or par value. (c. B-9, § 26[1]).

Transitional.

Where body corporate is continued under Act, share with nominal or par value issued by body corporate before it was so continued is, for purpose of Act, deemed to be share without nominal or par value. (c. B-9, § 26[2]).

Class of Shares.

Articles may provide for more than one class of shares. Where they so provide, Articles must set out rights, privileges, restrictions and conditions attaching to shares of each class. (c. B-9, § 26[4]).

Class Voting.

If corporation has only one class of shares, rights of holders of those shares equal in all respects and include rights: (a) To vote at any meeting of shareholders (c. B-9, § 26[3]); (b) to receive any dividend declared by corporation; and (c) to receive remaining property of corporation on dissolution. If more than one class of shares, aforementioned rights must attach to at least one class of shares, but all rights need not be attached to same class. (c. B-9, § 26[4]).

Issue of Shares.

Subject to articles, by-laws, any unanimous shareholder agreement, and any shareholder preemptive right, shares may be issued at such times and to such persons and for such consideration as directors may determine. (c. B-9, § 27[1]).

Shares Nonassessable.

Shares issued by corporation are nonassessable. Holders not liable to corporation or its creditors in respect thereof. (c. B-9, § 27[2]).

Consideration.

Share must not be issued until fully paid in money or in property or past services that is fair equivalent of money corporation would have received if share had been issued for money. (c. B-9, § 27[3]).

Consideration Other than Money.

In determining whether property or past services is fair equivalent of money consideration, directors may take into account reasonable charges and expenses of organization and reorganization and payments for property and past services reasonably expected to benefit corporation. (c. B-9, § 27[4]).

Property.

For purposes of section 27, “property” does not include promissory note or promise to pay given by person buying share or person who deals not at arm’s length, within meaning of expression in Income Tax Act (Canada), with person buying shares. (c. B-9, § 27[5]).

Splitting of Shares.

Where only one class of shares issued, directors may authorize splitting of shares by resolution and if authorized, must notify shareholders within 60 days. When more than one class of share issued, each class must vote separately on special resolution to approve proposed splitting. (§ 27.1).

Stated Capital Account.

Corporation must maintain separate stated capital account for each class and series of shares issued, and consideration received by corporation for each share issued must, with some exceptions, be added to stated capital account maintained for shares of that class or series. (c. B-9, § 28).

Restriction.

Corporation must not reduce its stated capital or any stated capital account except in manner provided in Act. (c. B-9, § 28[11]). On issue of share, corporation must not add to stated capital account amount greater than consideration received for share. (§ 28[4]).

Shares in Series.

Articles may authorize, subject to any limitations set out in them, issue of any class of shares in one or more series and may do either or both: (a) Fix number of shares in each series and determine designation, rights, privileges, restrictions and conditions attaching to shares of each series; (b) authorize directors to fix number of shares in each series and determine designation, rights, privileges and conditions attaching to shares of each series at time shares are issued. (§ 29[1]).

Series Participation.

If any cumulative dividends or amounts payable on return of capital in respect of series of shares not paid in full, shares of all series of same class participate ratably in respect of accumulated dividends and return of capital. (c. B-9, § 29[2]).

Restrictions on Series.

No rights, privileges, restrictions or conditions attached to series of shares authorized under these provisions shall confer upon series greater voting rights than attach to shares of any other series in same class then outstanding or give priority in respect of dividends or return of capital over shares of any other series in same class then outstanding. (c. B-9, § 29[3]).

Pre-emptive Right.

If articles or unanimous shareholder agreement so provide, no shares of class (other than shares to be issued: [a] For consideration other than money; [b] as share dividend; or [c] pursuant to exercise of conversion privileges, options or rights previously granted by corporation) may be issued unless shares first offered to shareholders holding shares of that class and those shareholders have pre-emptive right to acquire offered shares in proportion to their holdings of shares of class, at such price and on such terms as those shares are offered to others. (c. B-9, § 30).

Options and Rights.

Corporation may issue certificates, warrants or other evidences of conversion privileges, options or rights to acquire securities of corporation; conditions must be set out therein. (c. B-9, § 31[1]).

Transferable Rights.

Conversion privileges, options and rights to acquire securities of corporation may be transferable or nontransferable, and options and rights to acquire may be separable or inseparable from any securities to which they are attached. (c. B-9, § 31[2]).

Reserved Shares.

Where corporation has granted privileges to convert any securities issued by corporation into shares, or into shares of another class or series, or has issued or granted options or rights to acquire shares, if articles limit number of authorized shares corporation must reserve and continue to reserve sufficient authorized shares to meet exercise of such conversion privileges, options and rights. (c. B-9, § 31[3]).

Corporation Holding Its Own Shares.

Except as provided in Act, corporation must not hold shares in itself or in its holding body corporate and must not permit any subsidiary corporation to acquire shares of corporation. Corporation must cause subsidiary body corporate that holds shares of corporation to dispose of them within five years from date became subsidiary or date of continuance under Act. (c. B-9, § 32).

Corporation may from time to time hold shares in itself, or subsidiary may from time to time hold shares in corporation, for maximum of 30 days. (§ 32[2.1]). After 30 days, corporation or subsidiary must: (a) Cancel shares, on condition that if articles of corporation limit number of authorized shares, cancelled shares may be restored to status of authorized but unissued shares; (b) return consideration received by corporation or subsidiary to person who paid it; and (c) cancel entry for consideration in stated capital account of corporation or subsidiary. (§ 32[2.2]).

Corporation may, in capacity of legal representative, hold shares in itself or in its holding body corporate unless it or holding body corporate or subsidiary of either of them has beneficial interest in shares. (c. B-9, § 33[1]).

Corporation may hold shares in itself or in its holding body corporate by way of security for purposes of transaction entered into by it in ordinary course of business that includes lending of money. (c. B-9, § 33[2]).

Acquisition of Corporation’s Own Shares.

Subject to Act and its Articles, corporation may purchase or otherwise acquire shares issued by it. (c. B-9, § 34[1]).

Limitation.

Corporation must not make any payment to purchase or otherwise acquire shares issued by it (other than to satisfy claim of shareholder who dissents following certain actions by corporation or order of court) if there are reasonable grounds for believing that: (a) Corporation is, or would after payment be, unable to pay its liabilities as they become due; or (b) realizable value of corporation’s assets would after payment be less than aggregate of its liabilities and stated capital of all classes. (c. B-9, § 34[2]).

Alternative Acquisition of Corporation’s Own Shares.

Notwithstanding foregoing but subject to Act and its articles, corporation may purchase or otherwise acquire shares issued by it to: (a) Settle or compromise debt or claim asserted by or against corporation; (b) eliminate fractional shares; or (c) fulfill terms of non-assignable agreement under which corporation has option or is obliged to purchase shares owned by director, officer or employee of corporation unless there are reasonable grounds for believing that (d) corporation is, or would after payment be, unable to pay its liabilities as they become due; or (e) realizable value of corporation’s assets would after payment be less than aggregate of its liabilities and amount required for payment on redemption or in liquidation of all shares holders of which have right to be paid prior to holders of shares to be purchased or acquired. (c. B-9, § 35).

Redemption of Shares.

Subject to Act and to its articles, corporation may purchase or redeem any redeemable shares issued by it at prices not exceeding redemption price stated in articles or calculated according to formula stated in articles. (c. B-9, § 36[1]).

Corporation must not make any payment to purchase or redeem any redeemable shares issued by it if there are reasonable grounds for believing that: (a) Corporation is, or would after payment be, unable to pay its liabilities as they become due; or (b) realizable value of corporation’s assets would after payment be less than aggregate of (i) its liabilities, and (ii) amount that would be required to pay holders of shares that have right to be paid, on redemption or in liquidation, ratably with or prior to holders of shares to be purchased or redeemed. (c. B-9, § 36[2]).

Other Reduction of Stated Capital.

Corporation may by special resolution reduce its stated capital for any purpose including: (a) Extinguishing or reducing liability for amount unpaid on any share; (b) distributing to holder of issued share of any class or series amount not exceeding stated capital of class or series; and (c) declaring stated capital to be reduced by amount not represented by realizable assets, unless for any purpose other than (c) above there are reasonable grounds for believing that (i) corporation is, or would after reduction be, unable to pay its liabilities as they become due; or (ii) realizable value of corporation’s assets would be less than aggregate of liabilities. (c. B-9, § 38).

Limitation.

Action to enforce liability due to reduction in stated capital must be commenced within two years of date of action complained of. (c. B-9, § 38[5]).

Adjustment of Stated Capital Account.

Upon purchase, redemption or other acquisition by corporation under Act of shares or fractions thereof issued by it, corporation must deduct from stated capital account maintained for class or series of shares purchased, redeemed or otherwise acquired amount equal to result obtained by multiplying stated capital of shares of class or series by number of shares of class or series or fractions thereof purchased, redeemed or otherwise acquired, divided by number of issued shares of class or series immediately before purchase, redemption or other acquisition. (c. B-9, § 39[1]).

Cancellation or Restoration of Shares.

Shares or fractions thereof issued by corporation and purchased, redeemed or otherwise acquired by it must be cancelled or restored to status of authorized but unissued shares. (c. B-9, § 39[6]).

Repayment.

Debt obligations issued, pledged, hypothecated or deposited by corporation not redeemed by reason only that indebtedness evidenced by debt obligations or in respect of which debt obligations issued, pledged, hypothecated or deposited is repaid and those obligations remain obligations of corporation until discharged. (c. B-9, § 40[1]).

Acquisition and Reissue of Debt Obligations.

Debt obligations issued by corporation and purchased, redeemed or otherwise acquired by it may be cancelled or, subject to any applicable trust indenture or other agreement, may be reissued, pledged or hypothecated to secure any obligation of corporation then existing or thereafter incurred, and any such acquisition and reissue, pledge or hypothecation is not cancellation of debt obligations. (c. B-9, § 40[2]).

Enforceability of Contract.

Contract with corporation providing for purchase of shares of corporation is specifically enforceable against corporation except to extent that corporation: (a) Is or would after payment be unable to pay liabilities as they come due, or (b) realizable value of corporation’s assets would after payment be less than aggregate of liabilities and stated capital of all classes. (c. B-9, § 41[1]).

Commission for Sale of Shares.

Directors may authorize corporation to pay reasonable commission to any person in consideration of his purchasing or agreeing to purchase shares of corporation from corporation or from any other person, or procuring or agreeing to procure purchasers for any such shares. (c. B-9, § 42).

Dividends.

Corporation must not declare or pay dividend if there are reasonable grounds for believing that: (a) Corporation is, or would, after payment be, unable to pay liabilities as they become due; or (b) realizable value of corporation’s assets would be less than aggregate of liabilities and stated capital of all classes. (c. B-9, § 43). Corporation may pay dividend in money or property or by issuing fully paid shares of corporation. (c. B-9, § 44).

Financial Assistance.

"Financial assistance" means financial assistance by means of loan, guarantee or otherwise (§ 45[1]). Corporation may give financial assistance to any person for any purpose. (§ 45[2]).

Disclosure of Financial Assistance.

Corporation must disclose to its shareholders, in accordance with regulations, financial assistance that corporation gives to: (a) Shareholder or director of corporation or affiliated corporation; (b) associate of shareholder or director of corporation or affiliated corporation; or (c) any person for purpose of or in connection with purchase of share issued or to be issued by corporation or affiliated corporation. (§ 45[3]). However, corporation not required to disclose to shareholders financial assistance given: (a) To any person in ordinary course of business if lending of money is part of ordinary business of corporation; (b) to any person on account of expenditures incurred or to be incurred on behalf of corporation; (c) to holding body corporate if corporation is wholly owned subsidiary of holding body corporate; (d) to subsidiary body corporate of corporation; (e) to employees of corporation or affiliates (i) to enable employee or affiliate to purchase or erect or to assist them in purchasing or erecting living accommodation for their own occupation, or (ii) in accordance with plan for purchase of shares of corporation or any of its affiliates to be held by trustee; or (f) to any person if all shareholders have consented to giving financial assistance. (c. B-9, § 45[4]). Contract made by corporation in contravention of section may be enforced by corporation or by lender for value in good faith without notice of contravention. (c. B-9, § 45[5]).

Shareholder Immunity.

Shareholders of corporation not, as shareholders, liable for any liability, act or default of corporation except for any money or property received by them as result of improper reduction of stated capital, liabilities for breach of their duties as directors as result of unanimous shareholders agreement and where action has been commenced against corporation after dissolution for extent of amount received by shareholder on distribution, if action brought within two years of dissolution. (c. B-9, § 38[4], § 46).

Part 6. Security Certificates, Registers and Transfers.

Transfer of securities governed by Securities Transfer Act (c. S-4.5), which came into force Jan. 1, 2007. Act attempts to modernize law regarding transfer of securities and harmonize these laws with Articles 8 and 9 of U.S. Uniform Commercial Code and comparable legislation in Ontario. Act introduces concept of "security entitlement," which reflects bundle of rights beneficial owner has against its securities intermediary and helps to eliminate problems associated with tracing underlying assets through indirect holding system. Act also indicates that "control" is best available method for perfection with respect to security entitlement. Finally, Act clarifies conflict of laws rules with respect to where security interest must be perfected.

"Security" means obligation of issuer or share, participation, or other interest in issuer or in property or enterprise of issuer that is (i) represented by security certificate in bearer or registered form, or transfer of which may be registered on books maintained for that purpose; or (ii) one of class or series, or by terms divisible into class or series, of shares, participations, interests, or obligations, and that (A) is dealt in or traded on securities exchanges or markets; or (B) is medium for investment and by terms expressly provides that it is security. (c. S-4.5, § 1[ff]).

"Registered Form" means form in which (i) security certificate specifies person entitled to security and (ii) transfer of security may be registered on books maintained for that purpose or security states it may be so registered. (c. S-4.5, § 1[aa]).

"Bearer Form" means form in which security payable to bearer of security certificate according to certificate's terms but not by reason of endorsement. (c. S-4.5, § 1[c]).

Rights of Holder.

Every security holder entitled, at his option, to certificate that complies with Act or non-transferable written acknowledgment of his right to obtain such security certificate from corporation in respect of securities of corporation held by him. (c. B-9, § 48[1]).

Restrictions.

Restriction on transfer of security imposed by issuer ineffective against person without knowledge of restriction unless (a) Security is certificated security and restriction noted conspicuously on certificate; or (b) security is uncertificated security and registered owner given notice of restriction by person required to give such notice. (c. S-4.5, § 62).

Securities Records.

Corporation must maintain securities register in which it records securities issued by it in registered form for period of time prescribed in regulations, showing with respect to each class or series of securities: (a) Names, alphabetically arranged, and latest known address of each person who is or has been security holder; (b) number of securities held by each security holder; and (c) date and particulars of issue and transfer of each security. (c. B-9, § 49[1], § 49[2]). Such information must be kept for period of at least seven years after security holder ceases to be security holder. (Business Corporations Regulation, A.R. 118/2000, § 25).

Dealings with Registered Holder.

Corporation or trustee under trust indenture to which corporation party may generally treat registered owner of security as person exclusively entitled to vote, to receive notices, interest, dividends or other payments in respect of security, and otherwise exercise all rights and powers of owner of security. (c. B-9, § 50[1]).

Part 4 of Act contains provisions governing purchase of corporate securities.

Title of Purchaser.

Purchaser of certificated or uncertificated security acquires all rights in security that transferor had power to transfer, except purchaser of limited interest in security who acquires rights only to extent of interest purchased, and purchaser of security who as previous holder had notice of adverse claim does not improve his/her position by virtue of taking from protected purchaser. (c. S-4.5, § 69). Protected purchaser, in addition to acquiring rights of purchaser, also acquires purchaser's interest in security free of any adverse claim. (c. S-4.5, § 70).

Part 7. Corporate Borrowing.

Part 7 of Act (c. B-9) sets out specific rules relating to: (a) Trust indentures under which debt obligations issued by corporation in distribution to public; and (b) qualifications of trustees appointed under such indentures. Rules require compliance with statutory standards relating to trustee qualifications, conflict of interest and duties; rights of holders of debt obligations to obtain information; and rights of trustee to demand information from issuing corporation. Trustee's statutory duties apply irrespective of contradictory or exculpatory clauses in trust indenture. These provisions substantially same as corresponding provisions of Canada Business Corporations Act although drafting differences may be found to be of importance.

Personal Property Security Act (c. P-7).

Governs registration of all personal property security interests, including corporate debt obligations. Corporate debt obligations relating to real property must be registered at appropriate

Alberta Land Titles Office. No distinction under Personal Property Security Act between corporate debt instruments and other debt instruments. All security instruments treated in accordance with Personal Property Security Act. “Prior security interest” registered under Act prior to Oct. 1, 1990 is deemed to be valid until Oct. 1, 1993 but may be further continued by registration at Personal Property Registry in accordance with Personal Property Security Act. See category 20 Mortgages, topic 20.04 Personal Property Security.

Part 8. Receivers and Receiver-Managers.

Part 8 of Act (c. B-9) sets out statutory standards and delegates to court discretion concerning qualifications, functions, rights, powers and duties of receiver and receiver-manager, including standing with respect to directors, liquidator or trustee in bankruptcy. Receiver required to submit financial statements in form that directors would have been required to submit to shareholders. Directors’ powers that receiver-manager authorized to exercise may not be exercised by directors until discharge of receiver-manager.

Part 9. Directors and Officers.

Subject to unanimous shareholder agreement, directors must manage or supervise management of business and affairs of corporation. (c. B-9, § 101[1]).

Corporation must have one or more directors but “distributing corporation”, being corporation whose issued securities were part of distribution to public, remain outstanding and are held by more than 15 persons, must have not fewer than three directors, at least two of whom are not officers or employees of corporation or its affiliates. (c. B-9, § 101[2]).

By-laws.

Unless articles, by-laws or unanimous shareholder agreement otherwise provide, directors may, by resolution, make, amend or repeal any by-laws that regulate business or affairs of corporation. (c. B-9, § 102[1]). Directors shall submit by-law, or amendment or repeal of by-law to shareholders at next meeting of shareholders and shareholders may by ordinary resolution confirm, reject or amend by-law, amendment or repeal. (§ 102[2]). By-law or amendment or repeal of by-law is effective from date of directors’ resolution until confirmed. Confirmed as amended or rejected by shareholders or not submitted to shareholders if by-law is confirmed or confirmed as amended, it continues in effect in form in which so confirmed. (§§ 102[3][4]).

Qualifications of Directors.

Following persons disqualified from being director: (a) Anyone less than 18 years of age; (b) anyone who is represented adult as defined in Adult Guardianship And Trusteeship Act or is subject of certificate of incapacity under Public Trustee Act, is formal patient as defined in Mental Health Act, is subject of order under The Mentally Incapacitated Persons Act appointing committee of his person or estate or both or has been found to be of unsound mind by court elsewhere than in Alberta; (c) person who is not individual; or (d) person who has status of bankrupt. (c. B-9, § 105[1]).

Further Qualifications.

Unless articles otherwise provide, director not required to hold shares of corporation. (c. B-9, § 105[2]).

Residency.

At least one-quarter of directors must be resident Canadians. (c. B-9, § 105[3]).

Election of Directors.

Subject to unanimous shareholders agreement and articles, shareholders of corporation must, by ordinary resolution at first meeting of shareholders and at each succeeding annual meeting at which election of directors is required, elect directors to hold office for term expiring not later than close of next annual meeting of shareholders following election. If term not expressly stated, term ends at close of next annual meeting. Not necessary that all directors elected at meeting of shareholders hold office for same term. (c. B-9, § 106).

Cumulative Voting.

Articles may provide for cumulative voting at election of directors. (c. B-9, § 107).

Ceasing to Hold Office.

Directors cease to hold office when they: (a) Die or resign; (b) are removed in accordance with Act; or (c) become disqualified under Act. (§ 108).

Filling Vacancy.

Subject to Act, unanimous shareholder agreement and articles, quorum of directors may fill vacancy among directors, except vacancy resulting from increase in number or minimum number of directors or from failure to elect number or minimum number of directors required by articles. If directors not entitled to fill vacancy, or if there is not quorum of directors, must call special meeting of shareholders to fill vacancy. If not called by directors, may be called by any shareholders. (c. B-9, § 111[1]).

Meeting of Directors.

Unless articles otherwise provide, directors may meet at any place upon such notice as by-laws require. (c. B-9, § 114[1]).

Quorum.

Subject to articles or by-laws, majority of number of directors appointed constitutes quorum at any meeting of directors and, notwithstanding vacancy among directors, quorum may exercise all powers of directors. (c. B-9, § 114[2]).

Canadian Majority.

Directors, other than directors of holding corporation earning less than 5% of gross consolidated revenues in Canada, must not transact business at meeting of directors unless at least one-quarter of directors present are resident Canadians. Exception available if: (a) Resident Canadian director unable to be present approves in writing or by electronic means, telephone or other communication device business transacted at meeting; and (b) number of resident Canadian directors present at meeting plus any resident Canadian directors who so approve equals at least one-quarter of directors present at meeting. (c. B-9, § 114[3][4]).

Participation by Telephone.

If by-laws so provide or subject to by-laws, all directors consent, director may participate in meeting of directors or committee thereof via electronic means, telephone or other communication facilities that permit all persons participating in meeting to hear each other. Director so participating deemed for purposes of Act to be present at that meeting. (c. B-9, § 114[9]).

Delegation.

Directors may appoint managing director who is resident Canadian or committee of directors and delegate to such managing director or committee subject to limitations set forth in Act, any powers of directors. If directors of corporation, other than holding corporation earning less than 5% of gross consolidated revenues in Canada, appoint committee of directors, at least one-quarter of members of committee must be resident Canadians. (c. B-9, § 115 [1][2]).

Limitations.

Managing director or committee does not have authority to: (a) Submit matter to shareholders for approval; (b) fill vacancy among directors or auditor; (c) appoint additional directors; (d) issue securities except as authorized by directors; (e) declare dividends; (f) purchase or redeem shares of corporation except as authorized by directors; (g) pay commission for sale of share; (h) approve management proxy circular; (i) approve financial statements; or (j) adopt, amend or repeal by-laws. (c. B-9, § 115[3]).

Validity of Director's Acts.

Act of director is valid notwithstanding: (a) Irregularity in director's election or appointment; (b) defect in director's qualifications; or (c) noncompliance with residency requirements under Act. (§ 116).

Resolution in Lieu of Meeting.

Subject to articles, by-laws or unanimous shareholders agreement, resolution in writing, signed by all directors entitled to vote on that resolution at meeting of directors or committee thereof, is as valid as if passed at meeting of directors or committee thereof. Resolution in writing dealing with all matters required by this Act to be dealt with at meeting of directors, and signed by all directors entitled to vote at that meeting, satisfies all requirements of this Act relating to meetings of directors. (c. B-9, § 117).

Directors' Liability.

Directors who vote for or consent to resolution authorizing issue of share for noncash consideration jointly and severally liable to corporation for any amount by which consideration received is less than fair equivalent of money that corporation would have received if share issued for money on date of resolution. Director not liable if proves did not know and could not reasonably have known that share issued for consideration less than fair equivalent of money corporation would have received if share issued for money. (c. B-9, § 118).

Further Directors' Liabilities.

Directors of corporation who vote for or consent to resolution authorizing: (a) Purchase, redemption or other acquisition of shares contrary to §§ 34, 35, or 36 of Act; (b) commission contrary to § 42 of Act; (c) payment of dividend contrary to § 43 of Act; (d) financial assistance contrary to § 45 of Act; (e) payment of indemnity contrary to § 124 of Act; or (f) payment to shareholder contrary to § 191 or § 242 of Act jointly and severally liable to corporation for any amounts so distributed or paid and not otherwise recovered by corporation. (c. B-9, § 118[3]). Director not liable, however, if relies in good faith on: (a) Financial statements of corporation represented to him by officer or corporation or in written report of auditor of corporation fairly to represent financial condition of corporation; or (b) report of lawyer, accountant, engineer, appraiser or other person whose profession lends credibility to statement made by him. (c. B-9, § 123[3]).

Liability of Directors for Wages.

Directors jointly and severally liable to employees of corporation for all debts not exceeding six months wages payable to each such employee for services performed for corporation while they are directors. Directors' liability for wages subject to certain defences and limitations. (c. B-9, § 119[1]).

Disclosure of Director's or Officer's Interest in Material Contract or Material

Transaction.

Director or officer of corporation who: (a) Is party to material contract or material transaction or proposed material contract or material transaction with corporation; or (b) is director or officer of or has material interest in any person who is party to material contract or proposed material contract with corporation, must disclose in writing to corporation or request to have entered in minutes of meetings of directors nature and extent of interest. (c. B-9, § 120[1]).

Time of Disclosure by Interested Director.

Unless proposed contract or transaction dealt with by resolution in writing in lieu of meeting, disclosure required by interested director must be made: (a) At meeting at which proposed contract or transaction first considered; (b) if director not then interested in proposed contract or transaction, at first meeting after he becomes so interested; (c) if director becomes interested after contract or transaction is made, at first meeting after he becomes so interested; or (d) if person interested in contract or transaction later becomes director, at first meeting after he becomes director. (c. B-9, § 120[2]).

Proposed Contract or Transaction Dealt With by Written Resolution.

Where proposed contract or transaction dealt with by resolution in writing instead of at meeting, disclosure of interest in material contract or transaction must be made forthwith upon receipt of resolution or, if director not interested in proposed contract or transaction at time of receipt of resolution, at first meeting after he becomes interested. (c. B-9, § 120[3]).

Time of Disclosure by Interested Officer.

Disclosure required by interested officer who is not director must be made: (a) Forthwith after becoming aware that contract or proposed contract to be considered or has been considered at meeting of directors; (b) if officer becomes interested after contract is made, forthwith after he becomes so interested; or (c) if person interested in contract later becomes officer, forthwith after he becomes officer. (c. B-9, § 120[4]).

Time of Disclosure Where Contract or Transaction Not Subject of Shareholder Approval.

If material contract or transaction or proposed material contract or transaction is one that, in ordinary course of corporation’s business, would not require approval by directors or shareholders, interested director or officer must disclose in writing to corporation or request to have entered in minutes of meeting of directors nature and extent of interest forthwith after director or officer becomes aware of contract or transaction or proposed contract or proposed transaction. (c. B-9, § 120[5]).

Voting After Disclosure.

Director must not vote on resolution to approve contract or transaction in which he is interested unless contract is: (a) Security arrangement for money lent to or obligations undertaken by him for benefit of corporation or affiliate; (b) relating primarily to remuneration as director, officer, employee or agent of corporation or affiliate; (c) for indemnity or insurance under § 124 of Act; or (d) with affiliate. (c. B-9, § 120[6]).

Sufficient Disclosure of Director’s Interest.

General notice to directors by director or officer is sufficient disclosure of interest in any contract or transaction between corporation and person in which director has material interest or is director or officer if: (a) Notice declares director is director or officer or has material interest in person and is interested in any contract or transaction between corporation and person and states nature and extent of director’s interest; (b) at time of disclosure required by provisions in this Act extent of director's interest not greater than stated in notice; and (c) notice given within 12 months immediately preceding time disclosure required by provisions in this Act. (c. B-9, § 120[7]).

Avoidance Standards.

Material contract or transaction between corporation and directors or officers, or between corporation and other person of which director or officer of corporation is director or officer or in which director has material interest: (a) Neither void nor voidable by reason only of that relationship or by reason only that director with interest in contract or transaction present at or counted in quorum at meeting of directors or committee thereof that authorized contract; and (b) director, officer, former director or former officer of corporation to whom profit accrues as result of making contract or transaction is not liable to account by reason only of holding office; if director or officer disclosed interest in accordance with Act, contract or transaction approved by directors or shareholders and contract or transaction reasonable and fair to corporation at time approved. Even when required disclosure not made in accordance with this Act, director or officer acting honestly and in good faith not accountable to corporation or shareholders for profit realized from material contract or material transaction and material contract or material transaction is not void or voidable by reason of only of interest of director or officer in material contract or material transaction if: (a) Material contract or material transaction approved or confirmed by special resolution shareholder meeting; (b) sufficient disclosure of nature of interest made to shareholders before material contract or material transaction approved or confirmed; and (c) material contract or material transaction reasonable and fair to corporation when approved or confirmed. (c. B-9, § 120[8][8.1]).

Consequences for Failure to Disclose.

Court may, on application of corporation or shareholders set aside material contract or material transaction on terms it thinks fit, or require director or officer to account to corporation any profit or gain realized. Previous section repealed and replaced by 2005 Amending Act. (c. B-9, § 120[9]).

Disclosure Subject to Shareholder Agreement.

This section subject to any unanimous shareholder agreement. (c. B-9, § 120[10]).

Appointment of Officers.

Subject to articles, bylaws or unanimous shareholder agreement: (a) Directors may designate offices of corporation, appoint individuals to offices, specify their duties, and delegate their powers to manage business and affairs of corporation except as provided by this Act; (b) director may be appointed as officer; and (c) one individual may hold multiple offices. (c. B-9, § 121).

Duty of Care of Directors and Officers.

Every director and officer in exercising powers and discharging duties must: (a) Act honestly and in good faith with view to best interests of corporation; (b) exercise care, diligence and skill that reasonably prudent person would exercise in comparable circumstances; and (c) comply with Act, regulations, articles, by-laws and unanimous shareholder agreement. (c. B-9, § 122).

No Exculpation.

Subject only to provisions in unanimous shareholder agreement, no provisions of contract, articles, by-laws, or resolution relieves director or officer from duty to act in accordance with this Act or regulations or relieves director or officer from liability for breach of that duty. (c. B-9, § 122[3]).

Restrictions on Special Consideration.

If director elected by holders of class or series of shares, employees, creditors, or class of employees or creditors, director may give special, but not exclusive consideration to their interests when determining if transaction or course of action is in best interests of corporation. (c. B-9, § 122[4]).

Dissent by Director.

Director who votes for or consents to resolution or action not entitled to dissent under sub. (1). (c. B-9, § 123[2]).

Reliance on Financial Statements or Professional Reports.

Director not liable under above provisions if relies in good faith on: (a) Financial statements of corporation represented to him by officer of corporation or in written report of auditor of corporation fairly to reflect financial condition of corporation; or (b) report of lawyer, accountant, engineer, appraiser or other person whose profession lends credibility to statement. (c. B-9, § 123[3]).

Indemnification.

Except in respect of action by or on behalf of corporation to procure judgment in its favour, corporation may indemnify director or officer, former director or officer or person who acts or acted at corporation’s request as director or officer of body corporate of which corporation is or was shareholder or creditor, and director’s heirs and legal representatives, against all costs, including amount paid to settle action or satisfy judgment, reasonably incurred by director in respect of any civil, criminal or administrative proceeding to which director is made party by reason of being or having been director or officer of such corporation or body corporate, if: (a) Director acted honestly and in good faith with view to best interests of corporation; and (b) in case of criminal or administrative action or proceeding enforced by monetary penalty, director had reasonable grounds for believing that his conduct was lawful. (c. B-9, § 124[1]).

Indemnification by Approval of Court.

Corporation may with approval of Court indemnify person referred to in foregoing paragraph in respect of action by or on behalf of corporation or body corporate to procure judgment in its favour, to which he is made party by reason of being or having been director or officer of corporation or body corporate, against all costs, reasonably incurred by him in connection with such action if conditions in clauses (a) and (b) are met. (c. B-9, § 124[2]).

Right to Indemnity.

Notwithstanding the above, corporation must indemnify any such person who has been substantially successful in defence of any civil, criminal or administrative proceeding to which he is made party by reason of being or having been director or officer of corporation or body corporate and who is fairly and reasonably entitled to indemnity and fulfils conditions set out in sub. (1)(a) and (b) above, against all costs, reasonably incurred by him in respect of such proceeding. (c. B-9, § 124[3]).

Advancement of Funds for Indemnification Purposes.

Corporation may advance funds to defray costs, charges and expenses of proceedings mentioned above but advanced funds must be repaid if conditions of § 124(3) not met. (c. B-9, § 124[3.1]).

Directors’ and Officers’ Insurance.

Corporation may purchase insurance for benefit of any such person against liability incurred in capacity as director or officer of corporation or in capacity as director or officer of another body corporate if he acts or acted at corporation's request, except where liability relates to failure to act honestly and in good faith with view to best interests of corporation or body corporate. (c. B-9, § 124[4]).

Directors' and Officers' Remuneration.

Directors may fix remuneration for directors, officers and employees of corporation subject to articles, bylaws and unanimous shareholder agreement. (c. B-9, § 125[1]).

Disclosure of Remuneration.

Disclosure of directors', officers' and employees' remuneration must be made as prescribed. (c. B-9, § 125[2]).

Part 10. Insider Trading.

Insider means: (a) Corporation, in respect of purchase or other acquisition by it of own or affiliate's shares; (b) affiliate of corporation; (c) director or officer of corporation; (d) person who beneficially owns or exercises control or direction over at least 10% of voting rights attached to voting shares of corporation; (e) person employed or retained by corporation on professional or consulting basis; and (f) person who receives specific confidential information from insider or deemed insider and who has knowledge that person giving information is insider or deemed insider. (c. B-9, § 126).

Deemed Insiders.

Director or officer of body corporate that is insider of corporation is deemed insider of that corporation. Director or officer of subsidiary corporation is deemed insider of holding corporation. If person deemed to beneficially own shares owned by body corporate or controlled thereby, body corporate is deemed to beneficially own shares owned by affiliates. (c. B-9, § 127).

If body corporate becomes insider of corporation or enters into business combination with corporation, or corporation becomes insider of body corporate or enters into business combination with body corporate, director or officer is deemed insider of opposing entity for previous six months or any shorter period during which director or officer held office. (c. B-9, § 128).

Definition of Business Combination.

In paragraph above, "business combination" means acquisition of all or substantially all property of one body corporate by another or amalgamation of two or more bodies corporate. (c. B-9, § 129).

Civil Liability.

Insider who, in connection with transaction in security of corporation or any of its affiliates, makes use of any specific confidential information for his own benefit or advantage that, if generally known, might reasonably be expected to materially affect value of security is: (a) Liable to compensate any person for any direct loss suffered by that person as result of transaction, unless information known or in exercise of reasonable diligence should have been known to that person at time of transaction; and (b) accountable to corporation for any direct benefit or advantage received or receivable by insider as result of transaction. (c. B-9, § 130).

Limitation.

Civil proceedings must be commenced within two years of completion date of transaction giving rise to cause of action. (c. B-9, § 130[2]).

Part 11. Part 11. Shareholders.

Place of Meetings.

Meetings of shareholders must be held at place within Alberta provided in by-laws or, in absence of such provisions, at place within Alberta that directors determine. (c. B-9, § 131[1]).

Meeting Outside of Alberta.

Meeting of shareholders may be held outside of Alberta if all shareholders entitled to vote at that meeting so agree. (c. B-9, § 131[2]).

Shareholder Participation by Electronic Means.

Subject to regulations, shareholders or other persons entitled to attend meeting permitted to participate by telephone or other two-way communication facilities that permit all participants to hear or communicate with each other if: (a) By-laws so provide; (b) subject to by-laws, all shareholders entitled to vote give consent. Person participating by such electronic means deemed present at meeting. (c. B-9, § 131[3]).

Shareholder Meeting Entirely by Electronic Means.

If by-laws so provide, and in accordance with applicable regulations, if any, directors or shareholders who call shareholder meeting may determine that meeting will be held entirely by electronic means that permit all participants to communicate adequately with each other. (c. B-9, § 131[3.1]).

Place of Meeting Determined by Articles.

If articles so provide, meetings of shareholders may be held outside Alberta. (c. B-9, § 131[4]).

Calling Meetings.

Directors: (a) Must call annual meeting of shareholders not later than 18 months after incorporation or amalgamation and subsequently no later than 15 months after holding last preceding annual meeting; and (b) may at any time call special meeting of shareholders. (c. B-9, § 132).

Record Dates.

Directors may fix in advance date as record date for purpose of determining shareholders: (i) Entitled to receive payment of dividend; (ii) entitled to participate in liquidation distribution; or (iii) for any other purpose including right to receive notice of or to vote at meeting. (c. B-9, § 133).

Notice of Meeting.

Notice of time and place of meeting of shareholders must be sent not less than 21 days nor more than 50 days before meeting to: (a) Each shareholder entitled to vote at meeting; (b) each director; and (c) auditor of corporation. (c. B-9, § 134[1]).

Special Business.

All business transacted at special meeting of shareholders and all business transacted at annual meeting of shareholders, except consideration of financial statements and auditor's report, fixing number of directors for following year, election of directors and reappointment of incumbent auditor, deemed to be special business. (c. B-9, § 134[6]).

Notice of Business.

Notice of meeting of shareholders at which special business to be transacted must state: (a) Nature of business in sufficient detail to permit shareholder to form reasoned judgment thereon; and (b) text of any special resolution to be submitted to meeting. (c. B-9, § 134[7]).

Amendment of Special Resolutions.

Text of special resolutions may be amended at shareholders meeting if amendments not material or correct manifest errors. (c. B-9, § 134[8]).

Waiver of Notice.

All persons entitled by this Act to receive notice of meeting may waive notice of meeting in any manner. Attendance of shareholder or other person at meeting of shareholders is waiver of notice of meeting, except when shareholder or other person attends meeting for express purpose of objecting to transaction of any business on ground that meeting is not lawfully called. (c. B-9, § 135).

Registered Holder or Beneficial Owner of Shares Proposal.

Registered holders or beneficial owners of shares entitled to vote at annual meeting of registered holders or beneficial owners of shares may: (a) Submit to corporation notice of any matter related to business or affairs of corporation that registered holders or beneficial owners of shares proposes to raise at meeting; and (b) discuss at meeting any matter in respect of which registered holders or beneficial owners of shares would have been entitled to submit proposal. (c. B-9, § 136[1]).

Persons Eligible To Make Proposal.

To be eligible to make proposal, person must: (a) Be registered holder or beneficial owner of prescribed number of shares for prescribed period; (b) have prescribed level of support of other registered holders or beneficial owners of shares; (c) provide to corporation name and address and names and addresses of registered holders or beneficial owners of shares who support proposal; and (d) continue to hold or own prescribed number of shares up to and including day of meeting. (c. B-9, § 136[1.1]).

Information Circular.

Corporation that solicits proxies must set out registered holder or beneficial owner of shares' proposal in management proxy circular or attach proposal thereto and, if requested by registered holder or beneficial owner of shares, must include in management proxy circular or attach thereto statement by registered holder or beneficial owner of shares of not more than 200 words in support of proposal, and name and address of registered holder or beneficial owner of shares. (c. B-9, § 136[2][3]).

Nomination for Director.

Shareholder's proposal may include nominations for election of directors if proposal signed by one or more registered shareholders of shares together representing at least 5% of shares or 5% of shares of class of shares entitled to vote at meeting to which proposal to be presented or by beneficial holders of shares representing in same aggregate percentage of shares. This provision does not preclude nominations made at meeting of shareholders. (c. B-9, § 136[4]).

Exclusion of Registered Holders or Beneficial Owners of Shares Proposal.

Corporation not required to set out shareholder's proposal or supporting statement of shareholder in management proxy circular or attach proposal or statement thereto if: (a) Proposal not submitted to corporation at least 90 days before anniversary date of previous annual meeting of shareholders; (b) is clear that proposal is submitted by registered holders or beneficial owners of shares primarily for purposes of enforcing personal claim or redressing personal grievance against corporation or its directors, officers or security holders, or primarily for purpose of promoting general economic, political, racial, religious, social or similar causes; (c) registered holders or beneficial owners of shares requested corporation to include proposal in management proxy circular relating to meeting of shareholders held within two years preceding receipt of such request, and shareholder failed to present proposal, in person or by proxy, at meeting; (d) substantially same proposal submitted to registered holders or beneficial owners of shares in management proxy circular or dissident's proxy circular relating to meeting of shareholders held within two years preceding receipt of request of registered holders or beneficial owners of shares and proposal was defeated; or (e) rights conferred by this provision being abused to secure publicity. (c. B-9, § 136[5]).

Notice of Refusal.

Corporation refusing to include registered holders or beneficial owners of shares proposal in management proxy circular must, within ten days after receiving proposal, notify that registered holder or beneficial owner of shares of intention to omit proposal from management proxy circular and send him statement of reasons for refusal. (c. B-9, § 136[7]).

Registered Holders or Beneficial Owners of Shares Application to Court.

On application of registered holders or beneficial owners of shares claiming to be aggrieved by corporation's refusal to include proposal in management proxy circular, court may restrain holding of meeting to which proposal is sought to be presented and make any further order it thinks fit. (c. B-9, § 136[8]).

Application of Corporation.

On application of corporation or person claiming to be aggrieved by proposal, court may order application omitted from management proxy circular and make any order it thinks fit if satisfied that exclusionary provisions apply. Proxy meets requirements for exclusion under this Act. (c. B-9, § 136[9]).

Shareholder List.

Corporation must prepare list of shareholders entitled to receive notice of meeting arranged in alphabetical order and showing number of shares held by each. (c. B-9, § 137[1]).

Examination of List.

Shareholder may examine list of shareholders: (a) During usual business hours at records office of corporation or at place where its central securities register maintained; and (b) at meeting of shareholders for which list was prepared. (c. B-9, § 137[4]).

Quorum.

Unless by-laws otherwise provide, holders of majority of shares entitled to vote at meeting of shareholders present in person or by proxy constitute quorum. (c. B-9, § 138[1]).

Quorum of Shareholders May Conduct Business.

If quorum present throughout meeting and bylaws so provide, shareholders present may proceed with business of meeting. (c. B-9, § 138[2]).

Adjournment.

If quorum not present at opening of meeting, shareholders may adjourn meeting but may not proceed with any other business. (c. B-9, § 138[3]).

Single Shareholder Meeting.

If corporation has only one shareholder, or only one holder of any class or series of shares, shareholder present in person or by proxy constitutes meeting. (c. B-9, § 138[4]).

Right to Vote.

Unless articles otherwise provide, each share of corporation entitles holder thereof to one vote at meeting of shareholders. (c. B-9, § 139[1]).

Voting Rights of Body Corporate.

If body corporate or association is shareholder of corporation, corporation must recognize individual authorized to represent body corporate at meetings of shareholders of corporation. Individual authorized to represent body corporate or association may exercise all powers as if body corporate were individual shareholder. (c. B-9, § 139[2][3]).

Voting Rights of Joint Shareholders.

Unless bylaws provide otherwise, if two persons hold shares jointly, one such shareholder present at meeting may vote shares in absence of co-shareholders and if two or more joint shareholders are present they may only exercise powers of single shareholder. (c. B-9, § 139[4]).

Voting.

Unless by-laws otherwise provide, voting at meeting of shareholders is by show of hands except where ballot demanded by shareholder or proxyholder entitled to vote at meeting. (c. B-9, § 140[1]).

Proof of Results.

Entry in minutes of proceedings that resolution was carried or defeated in sufficient proof of results of vote. (c. B-9, § 140[3]).

Voting By Telephone or Other Electronic Means.

Unless by-laws provide otherwise, and in accordance with any applicable regulations, vote may be held, entirely by electronic means, telephone or other communication facility. (c. B-9, § 140[4]).

Attending Meeting and Voting by Telephone or Other Electronic Means.

Unless by-laws provide otherwise, and in accordance with any applicable regulations, person participating in meeting of shareholders by electronic means may vote, if entitled to do so, by electronic means, telephone or other communication facility that corporation has made available for that purpose. (c. B-9, § 140[5]).

Resolution in Lieu of Meeting.

Resolution in writing signed by all shareholders entitled to vote on that resolution is as valid as if passed at meeting of shareholders. Resolution in writing dealing with all matters required to be dealt with at meeting of shareholders and signed by all shareholders entitled to vote at that meeting satisfies all requirements of Act relating to meetings of shareholders. Copy of resolution to be kept with minutes of meeting. (c. B-9, § 141).

Requisition of Meeting.

Registered holders or beneficial owners of not less than 5% of issued shares of corporation that carry right to vote at meeting sought to be held may requisition directors to call meeting of shareholders for purposes stated in requisition, but beneficial owners of shares do not hereby acquire direct right to vote at meeting that is subject of requisition. (c. B-9, § 142).

Meeting Called by Court.

If impracticable to hold shareholder meeting in manner prescribed by by-laws and this Act, upon application by director or voting shareholder, court may order meeting to be called, held and conducted in manner directed. Court may order quorum requirements be varied or dispensed with at such meeting. (c. B-9, § 143[1][2]).

Court Review of Election.

Corporation, shareholder or director may apply to court to determine any controversy with respect to election or appointment of director or auditor of corporation. (c. B-9, § 144[1]).

Pooling Agreement.

Written agreement between two or more shareholders may provide that shares held by them shall be voted as therein provided. (c. B-9, § 145).

Unanimous Shareholder Agreement.

May provide for: (a) Regulation of rights and liabilities of shareholders; (b) regulation of election of directors; (c) management of business and affairs of corporation including restriction or abrogation of powers of directors; and (d) any other matter permitted under Act. (c. B-9, § 146[1]).

Effect on Bona Fide Purchasers.

Person who acquires shares of corporation subject to existing unanimous shareholders agreement deemed to be party to agreement, whether or not person had actual knowledge of agreement, and share transfer or issuance does not terminate agreement. Bona fide purchaser without actual knowledge may: (a) Rescind contract under which shares acquired from corporation; or (b) if protected purchaser under Securities Transfer Act and transferor's share certificate did not reference unanimous shareholder agreement, file notice of objection with corporation and be paid fair value of shares, and recover from transferor amount by which consideration paid for shares exceeds fair value. (c. B-9, § 146[2]-[6]).

Effect on Shareholder.

Shareholder party to unanimous shareholder agreement has all rights, powers, liabilities and duties of director of corporation to which agreement relates to extent that agreement restricts powers of directors to manage business and affairs of corporation, and directors are thereby relieved of duties and liabilities to same extent. (c. B-9, § 146[7]).

Part 12. Proxies.

Definitions.

"Form of proxy" means written or printed form that, on completion and execution by or on behalf of shareholder, becomes proxy; "proxy" means completed and executed form of proxy by means of which shareholder appoints proxyholder to attend and act on shareholder's behalf at meeting of shareholders; "registrant" means person required to be registered to trade or deal in securities under laws of any jurisdiction. (c. B-9, § 147).

Appointing Proxyholder.

Shareholder entitled to vote at meeting of shareholders may by means of proxy appoint proxyholder, as well as alternative proxyholders, who need not be shareholders, to attend and act at meeting authorized and with authority conferred by proxy. (c. B-9, § 148[1]).

Execution of Proxy.

Proxy must be executed by shareholder or by shareholder's attorney authorized in writing. (c. B-9, § 148[2]).

Validity of Proxy.

Proxy is valid only at meeting in respect of which it is given or any adjournment of that meeting. (c. B-9, § 148[3]).

Revocation of Proxy.

Shareholder may revoke proxy: (a) By depositing duly executed instrument in writing at registered office of corporation any time until and including last business day prior to meeting or by depositing duly executed instrument with chair of meeting on day of meeting; or (b) in any manner permitted by law. (c. B-9, § 148[4]).

Mandatory Solicitation.

Management of corporation that is not private issuer within meaning of Securities Act must concurrently with giving notice of meeting of shareholders send form of proxy in prescribed form to each shareholder entitled to receive notice unless all shareholders entitled to vote at meeting of shareholders agree in writing to waive proxy requirements. (c. B-9, § 149).

Soliciting Proxies.

Person must not solicit proxies unless: (a) If solicited by or on behalf of management of corporation, management proxy circular in prescribed form, either as appendix to or as separate document accompanying notice of meeting; or (b) in case of any other solicitation, dissident's proxy circular in prescribed form stating purposes of solicitation, sent to auditor of corporation, each shareholder whose proxy solicited and, if solicitation other than by or on behalf of management, to corporation. These requirements do not apply if corporation has fewer than 16 shareholders entitled to vote at meetings of shareholders. (c. B-9, § 150[1][2]).

Copy to Executive Director.

Person required to send management proxy circular or dissident's proxy circular must, if corporation distributing corporation, concurrently file copy thereof with Executive Director under Act together with copy of notice of meeting, form of proxy and any other documents for use in connection with meeting. (c. B-9, § 150[3]).

Exemption Orders.

On application of interested person, Alberta Securities Commission established under Securities Act (Alberta), if corporation is distributing corporation, or court, if corporation is not distributing corporation, may exempt such person from above requirements respecting proxy solicitation, which order may have retrospective effect. (c. B-9, § 151).

Attendance at Meeting.

Person who solicits proxy and is appointed proxyholder must attend or cause alternative proxyholder to attend meeting in respect of which proxy is given and comply with directions of appointing shareholder. (c. B-9, § 152[1]).

Rights of Proxyholder.

Proxyholder has same rights as appointing shareholder to speak at meeting of shareholders, to vote by way of ballot and vote by way of show of hands except where proxyholder has conflicting instructions from more than one shareholder. (c. B-9, § 152[2]).

Duty of Registrant.

Shares of corporation registered in name of registrant or nominee and not beneficially owned by registrant must not be voted unless registrant forthwith, after receipt of notice of meeting, financial statements, management proxy circular, dissident proxy circular and any other documents other than form of proxy, sent to shareholders by or on behalf of any person for use in connection with meeting, sends to beneficial owner copy of those documents; and except where registrant has received written voting instructions from beneficial owner, written request for such instructions. (c. B-9, § 153[1]).

Voting Instructions from Beneficial Owner.

Registrant must not vote or appoint proxyholder to vote shares held in registrant's name or in name of registrant's nominee that registrant does not beneficially own unless registrant receives voting instructions from beneficial owner. (c. B-9, § 153[2]).

Instructions to Registrant.

Registrant must vote or appoint proxyholder to vote any such shares in accordance with any written voting instructions received from beneficial owner. (c. B-9, § 153[4]).

Non-Compliance with Provisions.

Contravention of provisions governing registrant's duties does not render void any meeting of shareholders or any action taken at meeting of shareholders. (c. B-9, § 153[6]).

Limitation.

Nothing in these provisions gives registrant right to vote shares that registrant is otherwise prohibited from voting. (c. B-9, § 153[7]).

Court Orders.

If form of proxy, management proxy circular or dissident's proxy circular contains untrue statement of material fact or omits material fact required or necessary to make statement true in light of circumstances in which it was made, upon application of interested person or Executive Director of distributing corporation, court may make any order it thinks fit including: (a) Order restraining solicitation, holding of meeting or any person from implementing or acting on any resolution passed at meeting to which misleading document relates; (b) order requiring correction of any form of proxy or proxy circular and further solicitation; or (c) order adjourning meeting. (c. B-9, § 154).

Form.

Prescribed form for proxies, management proxy circulars and dissident's proxy circulars are forms for proxies and information circulars prescribed for purposes of Securities Act. (Business Corporations Regulation, A.R. 118/2000, § 19).

Part 13. Financial Disclosure.

Annual Financial Statements.

Directors of corporation, except corporation subject to and complying with Securities Act (Alberta) provisions regarding placing financial statements before shareholders at every annual meeting, must place before shareholders at every annual meeting: (a) Comparative financial statements as prescribed by Act; (b) report of auditor, if any; and (c) any further information respecting financial position of corporation and results of its operations required by articles, by-laws or any unanimous shareholder agreement. Shareholders may at any time, by unanimous resolution, waive right to receive financial statements or other documents referred to above. (c. B-9, §§ 155[1] and 156[1][3]).

Content of Financial Statement.

Financial statements required under Act must include at least balance sheet, statement of retained earnings, income statement and statement of change in financial position. In addition, statements must fairly present corporation's financial position, and be prepared in accordance with GAAP (as set out in Handbook of the Canadian Institute of Chartered Accountants). Statements must be prepared in accordance with preceding financial year. This provision does not preclude persons who are not members of Institute of Chartered Accountants from preparing financial statements referred to herein. (A.R. 118/2000, § 21).

Disclosure of Remuneration.

At every annual meeting, directors of corporation must give document to shareholders disclosing aggregate remuneration paid to directors and five highest officers and employees of corporation other than directors. Document disclosing remuneration may be part of or attached to annual financial statements provided for by Act and must relate to same time period as statements. (A.R. 118/2000, § 23[1][2]).

Financial Assistance Disclosure.

Corporation that gives financial assistance pursuant to Act must disclose to shareholders within 90 days of giving financial assistance: (1) Identity of recipient of financial assistance and recipient's relationship to corporation; (2) description of nature and extent of financial assistance, amount, terms on which assistance was given, and purpose of financial assistance. (A.R. 118/2000, § 25.1[1][2]).

Disclosure of Increase.

Corporation must disclose increase in amount of financial assistance and changes to terms on which assistance given within 90 days of change. (A.R. 118/2000, § 25.1[3]).

Disclosure of Outstanding Balances.

If disclosure of financial assistance made and obligation still outstanding, corporation must give document to shareholders disclosing: (a) Outstanding balance at end of most recent fiscal year on loan made to recipient by corporation or loan of recipient guaranteed by corporation; and (b) nature and extent of any breach by recipient of recipient's obligation to repay loan or whether any liability under guarantee has been invoked in respect of loan of recipient guaranteed by corporation. (A.R. 118/2000, § 25.1[4]).

Exemption.

Distributing corporation may apply to Alberta Securities Commission ("Commission") for order authorizing corporation to omit from its financial statements any item prescribed, or to dispense with publication of any particular financial statement prescribed, and Commission may, if it reasonably believes that disclosure of information therein contained would be detrimental to corporation, permit such omission on such reasonable conditions as it thinks fit. (c. B-9, § 156[2]).

Consolidated Statements.

Corporation shall keep at its records office copy of financial statements of each subsidiary body corporate and of each body corporate the accounts of which are consolidated in financial statements of corporation. (c. B-9, § 157[1]).

Examination.

Shareholders of corporation and their agents and legal representatives may on request examine above statements during usual business hours of corporation and may make extracts therefrom free of charge unless on application to court, court is satisfied that such examination would be detrimental to corporation or subsidiary body corporate and bars such right and makes any further order it thinks fit. (c. B-9, § 157[2][3]). This right of examination also includes document disclosing remuneration of directors and five highest paid officers and employees of corporation, other than directors. (A.R. 118/2000, § 23).

Approval of Financial Statements.

Directors of corporation must approve above financial statements and approval must be evidenced by signature of one or more directors or facsimile version of signature reproduced on statements. (c. B-9, § 158[1]).

Disclosure Requirements.

Corporation must not issue, publish, or circulate copies of financial statements unless statements are: (a) Approved and signed in accordance with this provision; and (b) accompanied with report of auditor, if any. (c. B-9, § 158[2]).

Copies to Shareholders.

Corporation must not less than 21 days before each annual meeting of shareholders or before signing of shareholders' resolution in lieu of annual meeting, send copy of financial statements, report of auditor, if any, and any other information required by articles, by-laws or any unanimous shareholders agreement to each shareholder, unless corporation has been informed in writing that shareholder does not want copy of these documents. Shareholders may at any time, by unanimous resolution, waive right to receive financial statements or other documents referred to above. (c. B-9, § 159[1][3]).

Copies to Executive Director.

Distributing corporation must at least 21 days before each annual meeting of shareholders or forthwith after signing of shareholders' resolution in lieu of annual meeting and in any event not later than 15 months after last date when last preceding annual meeting should have been held, or resolution in lieu of annual meeting should have been signed, file copy of financial statements, report of auditor, if any, and any other information sent to shareholders or to public authority or recognized stock exchange with Executive Director. (c. B-9, § 160[1]).

Interim Financial Statements.

If distributing corporation sends interim financial statements or related documents to shareholders or is required to file such statements to public authority or stock exchange, corporation must forthwith file copies with Executive Director. (c. B-9, § 160[2]).

Compliance by Subsidiary Corporations.

Subsidiary corporation not required to comply with this provision if: (a) Financial statements of holding corporation are in consolidated or combined form and include accounts of subsidiary; and (b) consolidated or combined financial statements of holding corporation are included in documents filed with Executive Director by holding corporation in compliance with this provision. (c. B-9, § 160[3]).

Qualification of Auditor.

Unless granted exemption by court order, person is disqualified from being auditor of corporation if he is not independent of corporation, its affiliates and directors and officers of corporation and its affiliates. (c. B-9, § 161).

Appointment of Auditor.

Shareholders of corporation must appoint auditor by ordinary resolution, at first annual meeting of shareholders and at each succeeding annual meeting, to hold office until close of next annual meeting. (c. B-9, § 162[1]).

Failure to Appoint Auditor.

If auditor is not appointed at meeting of shareholders, incumbent auditor continues in office until his successor is appointed. (c. B-9, § 162[3]).

Remuneration of Auditor may be fixed by ordinary resolution of shareholders or, if not so fixed, may be fixed by directors. (c. B-9, § 162[4]).

Dispensing with Auditor.

Shareholders of other than distributing corporation may resolve not to appoint auditor with consent of all shareholders including those not otherwise entitled to vote, but resolution valid only until next succeeding annual meeting of shareholders. (c. B-9, § 163).

Ceasing to Hold Office.

Auditor ceases to hold office upon death, resignation or removal pursuant to ordinary resolution at special meeting. Resignation of auditor is effective at time written resignation is sent to corporation or at time specified in resignation, whichever is later. (c. B-9, § 164).

Removal of Auditor.

Shareholders of corporation may by ordinary resolution at special meeting remove auditor from office except auditor appointed by court. (c. B-9, § 165).

Filling Vacancy.

Subject to articles of corporation, directors must forthwith fill vacancy in office of auditor. (c. B-9, § 166[1]).

Tenure of Interim Auditor.

Auditor appointed to fill vacancy holds office for unexpired term of auditor’s predecessor. (c. B-9, § 166[4]).

Court-Appointed Auditor.

If corporation does not have auditor, court may, on application of shareholder or, if corporation is distributing corporation on application of Executive Director, appoint and fix remuneration of auditor to hold office until another auditor is appointed by shareholders. (c. B-9, § 167[1]).

Right to Attend Meeting.

Auditor of corporation is entitled to receive notice of every meeting of shareholders and, at expense of corporation, to attend and be heard thereat on matters relating to duties as auditor. (c. B-9, § 168[1]).

Auditor Compellable to Attend Meeting.

If director or shareholder of corporation, whether or not shareholder entitled to vote, gives written notice to auditor or former auditor at least ten days before shareholders meeting, auditor or former auditor must attend at expense of corporation and answer questions relating to duties as auditor. Director or shareholder who sends to auditor must send copy of notice to corporation. (c. B-9, § 168[2][3]).

Right to Address Resignation or Removal.

Auditor who resigns or is removed from office is entitled to submit written statement to corporation giving reasons for resignation or reasons for contesting removal. (c. B-9, § 168[5]).

Proposed Replacement.

Whether through removal or at end of auditor's term, corporation will make statement on reasons for proposed replacement of auditor. Auditor may make statement commenting on proposed replacement. (c. B-9, § 168[5.1]).

Content of Auditor's Report.

Auditor's report must contain: (1) Statement as to scope, extent and nature of auditor's examination; (2) statement as to whether or not, in auditor's opinion, financial statements fairly represent financial position of corporation; and (3) statement of any concerns or qualifications auditor has as to whether financial statements were prepared according to GAAP. (A.R. 118/2000, § 22).

Duty to Examine.

Auditor of corporation must make examination necessary to enable auditor to properly report on financial statements required to be placed before shareholders. (c. B-9, § 169[1]).

Right to Information.

On demand by auditor, directors of corporation must furnish all information and explanations in possession of directors, officers, employees agents or auditors of any subsidiary of corporation that are necessary, in opinion of corporation's auditor, to make examination and report required by Act. Person giving information or explanations not civilly liable if communication made in good faith. (c. B-9, § 170[2][3]).

Audit Committee.

Unless dispensed with by order of Alberta Securities Commission, distributing corporation must have and other corporations may have audit committee. Audit committee of distributing corporation shall be composed of not less than three directors of corporation, majority of whom are not officers or employees of corporation or any of its affiliates. Auditor of corporation is entitled to receive notice of every meeting of audit committee and, at expense of corporation, to attend and be heard thereat. (c. B-9, § 171).

Duty of Committee.

Audit committee must review financial statements of corporation before such financial statements are approved by directors. (c. B-9, § 171[4]).

Notice of Meeting.

Auditor of corporation is entitled to receive notice of every meeting of audit committee and, at expense of corporation, to attend and be heard there at. If requested by audit committee, auditor shall attend every meeting held during auditor's term of office. (c. B-9, § 171[5]).

Error in Financial Statements.

Director or officer of corporation must forthwith notify audit committee and auditor of any error or misstatement of which he becomes aware in financial statement that auditor or former auditor has reported on. If auditor or former auditor of corporation is notified or becomes aware of error or misstatement in financial statement upon which he has reported, and if in his opinion error or misstatement is material, he must inform each director accordingly. (c. B-9, § 171[7][8]).

Duty of Directors.

When auditor or former auditor informs directors of such error or misstatement in financial statement, directors must: (a) Prepare and issue revised financial statement or otherwise inform shareholders; and (b) if corporation is distributing corporation, it must file revised financial statements with Executive Director or must inform Executive Director of error or misstatement in same manner as it informs shareholders. (c. B-9, § 171[9], as am'd).

Qualified Privilege (Defamation).

Any oral or written statement or report made under Act by auditor or former auditor of corporation has qualified privilege (for purpose of law of defamation). (c. B-9, § 172).

Part 14. Fundamental Changes.

Amendment of Articles.

Articles of corporation may by special resolution be amended to change: corporation's name; restrictions on business; number, classes, designations, rights, privileges and restrictions on its shares; number of directors (subject to right of incumbent directors and cumulative voting provisions); restrictions on transfer of shares; statement establishing unlimited liability of shareholders; or any other provision that is permitted by Act to be set out in articles. (c. B-9, § 173).

Constrained Shares.

Subject to class voting provisions and reduction of stated capital provisions of Act, distributing corporation may by special resolution amend its articles to constrain issue or transfer of its shares: (a) To persons who are not resident Canadians; or (b) to enable corporation or affiliates to qualify under any laws of Canada referred to in regulations (i) to obtain license to carry on business, (ii) to become publisher of Canadian newspaper or periodical, or (iii) to acquire shares of financial intermediary as defined in regulations. Distributing corporations may remove any constraint on issue or transfer of shares by special resolution. (c. B-9, § 174).

Proposal for Amendment.

Directors or any shareholder entitled to vote at annual meeting may make proposal to amend articles. Notice of meeting of shareholders at which proposal to amend articles is to be considered must set out proposed amendment and where applicable, must state that dissenting shareholder is entitled to be paid fair value of his shares in accordance with Act, but failure to make that statement does not invalidate amendment. (c. B-9, § 175).

Class Votes.

Holders of shares of class or series (if such series is affected by amendment in manner different from other shares of same class) are entitled to vote (whether or not shares of such class or series otherwise carry right to vote) separately as class or series upon proposal to amend articles to: (a) Increase or decrease any maximum number of authorized shares of such class; (b) increase maximum number of authorized shares of class having rights or privileges equal or superior to shares of such class; (c) effect exchange, reclassification or cancellation of all or part of shares of such class; (d) add, change or remove rights, privileges, restrictions or conditions attached to shares of such class; (e) increase rights or privileges of any class of shares having rights or privileges equal or superior to shares of such class; (f) create new class of shares equal or superior to shares of such class; (g) make any class of shares having inferior rights or privileges to that class equal or superior to shares of that class; (h) effect exchange or create right of exchange of all or part of shares of another class into shares of such class; or (i) constrain issue or transfer of shares of such class or extend or remove such constraint. Amendments provided for in this section are approved when shareholders of class or series of shares entitled to vote separately pass amendment by special resolution. (c. B-9, § 176).

Effect of Amendment.

No amendment to articles affects existing cause of action or claim or liability to prosecution in favour of or against corporation or its directors or officers, or any civil, criminal or administrative action or proceeding to which corporation or its directors or officers is party. (c. B-9, § 179[2]).

Amalgamation.

Two or more corporations, including holding and subsidiary corporations, may amalgamate and continue as one corporation. Each corporation proposing to amalgamate must enter into agreement setting out terms and means of effecting amalgamation. (c. B-9, §§ 181, 182).

Name of Amalgamated Corporation.

When two or more corporations amalgamate, name of amalgamated corporation may be identical to name of one of amalgamating corporations if name is not numbered name. (A.R. 118/2000, § 8).

Shareholder Approval of Amalgamation Agreement.

Directors of each amalgamating corporation must submit amalgamation agreement for approval, upon proper notice, to meeting of holders of shares of amalgamating corporation of which they are directors. (c. B-9, § 183[1], [2]).

Voting Rights.

Each share of amalgamating corporation carries right to vote in respect of amalgamation whether or not it otherwise carries right to vote. (c. B-9, § 183[3]).

Adoption of Amalgamation Agreement.

Amalgamation agreement is adopted when shareholders of each amalgamating corporation have approved of amalgamation by special resolutions of each class or series of such shareholders entitled to vote thereon. Before issue of certificate of amalgamation, agreement may be terminated by directors. (c. B-9, § 183[4][5][6]).

Vertical Short-form Amalgamation.

Holding corporation and one or more of its wholly-owned subsidiary corporations may amalgamate and continue as one corporation without entering into amalgamation agreement and without obtaining shareholders approval if amalgamation is approved by resolution of directors of each amalgamating corporation and resolutions provide that: (a) Shares of each amalgamating subsidiary corporation shall be cancelled without any repayment of capital in respect thereof; (b) except as prescribed, articles of amalgamation shall be same as articles of incorporation of amalgamating holding corporation; (c) no securities shall be issued by amalgamated corporation in connection with amalgamation; and (d) stated capital of amalgamated corporation and amalgamated holding corporation will be same. (c. B-9, § 184[1]).

Horizontal Short-form Amalgamation.

Two or more wholly-owned subsidiary corporations of same holding body corporate may amalgamate and continue as one corporation without entering into amalgamation agreement and without obtaining shareholder approval if amalgamation is approved by resolution of directors of each amalgamating corporation and resolutions provide that: (a) Shares of all but one of amalgamating subsidiary corporations shall be cancelled without any repayment of capital in respect thereof; (b) except as may be prescribed, articles of amalgamation shall be same as articles of incorporation of amalgamating subsidiary corporation whose shares are not cancelled; and (c) stated capital of amalgamating subsidiary corporations whose shares are cancelled shall be added to stated capital of amalgamating subsidiary corporation whose shares are not cancelled. (c. B-9, § 184[2]).

Effect of Certificate of Amalgamation.

On date shown in certificate of amalgamation: (a) Amalgamation of amalgamating corporations and their continuance as one corporation become effective; (b) property of each amalgamating corporation continues to be property of amalgamated corporation; (c) amalgamated corporation continues to be liable for obligations of each amalgamating corporation; (d) existing cause of action, claim or liability to prosecution is unaffected; (e) civil, criminal or administrative action or proceeding pending by or against amalgamating corporation may be continued to be prosecuted by or against amalgamated corporation; (f) conviction against, or ruling, order or judgment in favour of or against, amalgamating corporation may be enforced by or against amalgamated corporation; and (g) articles of amalgamation are deemed to be articles of incorporation of amalgamated corporation and certificate of amalgamation is deemed to be certificate of incorporation of amalgamated corporation. (c. B-9, § 186).

Amalgamation with Extra-Provincial Corporation.

Corporation may amalgamate with extra-provincial corporation and continue as one corporation under Act where extra-provincial corporation is authorized to amalgamate with corporation by laws of jurisdiction where extra-provincial corporation is incorporated and one is subsidiary wholly owned by other. Such corporations must enter into amalgamation agreement as prescribed by Act. Such amalgamation is adopted when: (a) Agreement is approved by directors of both corporations and (b) extra-provincial corporation has complied with laws of its jurisdiction. (c. B-9, § 187[1][3][4]).

Continuance of Extra-Provincial Corporation in Alberta.

Extra-provincial corporation may, if authorized by laws of its jurisdiction, apply to Registrar for certificate of continuance. On date shown on certificates: (a) It becomes corporation to which Act applies; (b) articles of continuance are deemed to be articles of incorporation; and (c) certificate of continuance is deemed to be certificate of incorporation. Provisions of corporation's articles of continuance may vary from provisions of extra-provincial corporation's act of incorporation, articles, letters of patent, memorandum or articles of association so long as variation can be effected by way of amendments to articles under this Act. When extra-provincial corporation is continued as corporation: (a) Property of extra-provincial corporation continues to be property of corporation; (b) corporation continues to be liable for obligations of extra-provincial corporation; (c) existing cause of action, claim, liability or prosecution is unaffected; (d) action/proceeding by/against extra-provincial corporation may be continued to be prosecuted by/against corporation; (e) conviction/ruling/order/judgment in favour of/against extra-provincial corporation may be enforced by or against corporation. (c. B-9, § 188[1][5][7]).

Continuance (Export).

Corporation may, if it is authorized by special resolution of shareholders and Registrar is satisfied that its proposed continuance in another jurisdiction will not adversely affect creditors or shareholders of corporation, apply to appropriate official or public body of another jurisdiction requesting that corporation be continued as if it had been incorporated under laws of that jurisdiction. (c. B-9, § 189[1]).

Right to Vote.

Each share of corporation carries right to vote in respect of continuance whether or not it otherwise carries right to vote. (c. B-9, § 189[3]).

Approval by Special Resolution.

Application for continuance becomes authorized when shareholders have approved it by special resolution. (c. B-9, § 189[4]).

Prohibition.

Corporation shall not be continued as body corporate under laws of another jurisdiction unless those laws provide in effect that: (a) Property of corporation continues to be property of body corporate; (b) body corporate continues to be liable for obligations of corporation; (c) existing cause of action, claim or liability to prosecution is unaffected; (d) civil, criminal or administrative action or proceeding pending by or against corporation may be continued to be prosecuted by or against body corporate; and (e) conviction against, or ruling, order or judgment in favour of or against corporation may be enforced by or against body corporate. (c. B-9, § 189[9]).

Extraordinary Sale, Lease or Exchange.

Sale, lease or exchange of all or substantially all property of corporation other than in ordinary course of business of corporation requires approval of shareholders in accordance with provisions of this Act. (c. B-9, § 190[1]).

Right to Vote.

Each share of corporation carries right to vote in respect of such sale, lease or exchange whether or not it otherwise carries right to vote. (c. B-9, § 190[4]).

Separate Vote by Class or Series.

Holders of class or series of shares of corporation are entitled to vote separately as class or series in respect of sale, lease or exchange of all or substantially all property of corporation only if that class or series is affected by transaction in manner different from shares of another class or series. (c. B-9, § 190[5]).

Shareholder Approval.

Such sale, lease or exchange is adopted when holders of each class or series entitled to vote thereon have approved of sale, lease or exchange by special resolution. (c. B-9, § 190[6]).

Right to Dissent.

Holders of shares of any class of corporation may dissent if corporation resolves to: (a) Amend its articles to add, change or remove any provisions restricting or constraining issue or transfer of shares of that class; (b) amend its articles to add, change or remove any restriction upon business or businesses that corporation may carry on; (c) amend its articles to add or remove express statement establishing unlimited liability of shareholders; (d) amalgamate with another corporation, otherwise than amalgamation of holding corporation and one or more of its wholly-owned subsidiaries, or with extra-provincial corporation where one is wholly-owned subsidiary of other; (e) be continued under laws of another jurisdiction; or (f) sell, lease or exchange all or substantially all its property, unless changes due to court ordered reorganization.

(c. B-9, § 191[1]).

Dissent by Class or Series.

Holder of class or series of shares entitled to vote pursuant to provisions for class vote may dissent if corporation resolves to amend articles in manner described therein unless change is to increase or decrease maximum number of shares authorized for that class. (c. B-9, § 191[2]).

Payment for Shares.

In addition to any other right he may have, shareholder who complies with this provision is entitled, when action approved by resolution from which he dissents or order becomes effective, to be paid by corporation fair value of shares held by him in respect of which he dissents, determined as of close of business on day before resolution was adopted or order made. (c. B-9, § 191[3]).

Objection.

Dissenting shareholder must send to corporation, at or before any meeting of shareholders at which resolution referred to above is to be voted on, written objection to resolution, unless corporation did not give notice to shareholder of purpose of meeting or of his right to dissent, then within reasonable time of learning of resolution and right. (c. B-9, § 191[5]).

Offer to Pay.

Unless otherwise ordered, upon application to fix fair value corporation must send written offer to each dissenting shareholder to pay amount considered by directors to be fair value of shares. (c. B-9, § 191[7]).

Same Terms.

Every offer made for shares of same class or series must be on same terms and contain or be accompanied by statement showing how fair value was determined. (c. B-9, § 191[9]).

Powers of Court.

Upon shareholder application to court to value shares, court may direct as to: (a) Joining dissenting shareholders as parties; (b) trial of issues and interlocutory matter; (c) paying to shareholder of all or part of sum offered by corporation for shares; (d) depositing of share certificates with court, corporation, or transfer agent; (e) appointing and paying independent appraisers; (f) serving documents; and (g) burden of proof on parties. Court must: (a) Fix fair value for shares for all dissenting shareholders; (b) order judgment against corporation in that amount; (c) fix time for corporation to pay dissenting shareholders; and (d) fix time at which dissenting shareholder ceases to become liable for any new liability, act or default of corporation. (c. B-9, § 191[12][13]).

If corporation cannot legally pay shareholder under Act, despite judgment, shareholder may: (a) Withdraw his notice of objection in which case corporation is deemed to consent to withdrawal and shareholder is reinstated to his full rights as shareholder; or (b) retain status as claimant against corporation, to be paid as soon as corporation is lawfully able to do so or, in liquidation, to be ranked subordinate to rights of creditors of corporation but in priority to its shareholders. (c. B-9, § 191[19]).

Limitation.

Corporation must not make payment to dissenting shareholder under these provisions if there are reasonable grounds for believing that: (a) Corporation is or would after payment be unable to pay its liabilities as they become due; or (b) realizable value of corporation's assets would thereby be less than aggregate of its liabilities. (c. B-9, § 191[20]).

Part 15. Corporate Reorganization and Arrangements.

"Reorganization" Defined.

In following provisions, "order for reorganization" means court order made under: (a) Relief from oppression provisions of Act; (b) Bankruptcy and Insolvency Act approving proposal; or (c) any other Act of Parliament or of Legislature that affects rights among corporation, its shareholders and creditors. (c. B-9, § 192[1]).

Powers of Court.

If corporation is subject to order for reorganization, its articles may be amended by such order to effect any change that might lawfully be made by amendment of articles under Act. (c. B-9, § 192[2]).

If court makes order for reorganizations court may also: (a) Authorize issue of debt obligations of corporation, whether or not convertible into shares of any class or having attached any rights or options to acquire shares of any class, and fix terms thereof; and (b) appoint directors in place of or in addition to all or any of directors then in office. (c. B-9, § 192[3]).

Articles of Reorganization.

After such order has been made, articles of reorganization in prescribed form shall be sent to Registrar together with Notice of Change of Directors and/or Notice of Change of Registered Office, Records Office and address for service by mail, if applicable. (c. B-9, § 192[4]).

Effect of Certificate.

Reorganization becomes effective on date shown in certificate of amendment and articles of incorporation are amended accordingly. (c. B-9, § 192[6]).

No Dissent.

Shareholder is not entitled to dissenting shareholders' appraisal remedy if amendment to articles of incorporation is effected under this provision. (c. B-9, § 192[7]).

"Arrangement" Defined.

Includes: (a) Amendments to articles, (b) amalgamation of two or more corporations, (c) amalgamation of body corporate with corporation which results in amalgamated corporation subject to Act, (d) division of business of corporation, (e) transfer of all or substantially all property of corporation to another body corporate in exchange for money, property or securities, (f) exchange of securities of corporation held by security holders for property, money or other securities of this or another body corporate which is not take-over bid under Act, (g) liquidation and dissolution of corporation, (h) compromise between corporation and its creditors or corporation and its shareholders or holders of debt obligations, or (i) any combination thereof. (c. B-9, § 193[1]).

Powers of Court.

Corporation, security holder, or creditor of corporation may apply to court for order approving arrangement as long as no other practical method to effect arrangement under Act. (c. B-9, §§ 192[2][3]).

Court shall, unless it dismisses application: (a) Order meeting of shareholders or class or classes of shareholders to vote on proposed arrangement; and (b) order meeting of creditors, holders of debt obligation, options, rights to acquire securities or any class of those persons if court considers that those persons are affected by proposed arrangement.

Court may, with respect to those meetings: (a) Give directions with respect to: (i) calling and notice of meeting; (ii) conduct of meeting; (iii) requisite majority to pass resolution; and (iv) any other matter it thinks fit; and (b) make order appointing counsel to represent shareholders. (c. B-9, § 192[4]).

After requisite meetings and resolutions, court hears application and may: (a) Approve proposed arrangement; (b) amend and approve proposed arrangement; or (c) refuse to approve arrangement, and make any further order. (c. B-9, § 193[9]).

Articles of Arrangement.

Once court approved, corporation must send copy of order, articles of arrangement in prescribed form, and other documents, if applicable, to Registrar for filing. (c. B-9, § 193[10]).

Arrangement approved by court binds corporation and all other persons. (c. B-9, § 193[13]).

Part 16. Takeover Bids.

Compulsory Purchase.

Takeover bid means offer made to shareholders to acquire all shares of any class of offeree corporation not already owned by offeror, and includes repurchase by corporation of all shares of any class which leaves outstanding voting shares. (c. B-9, § 194[g]).

Take-over bid is deemed to be dated as of date on which it is sent. (c. B-9, § 195[1]).

Subject to unanimous shareholders agreement, where offerees holding at least 90% or more of shares relating to bid have accepted takeover bid, offeror may acquire remaining shares held by dissenting offerees within shorter of time limited in bid for its acceptance or within 120 days after date of bid. Offeror’s notice to acquire must concurrently be delivered to dissenting shareholders and offeree corporation within 60 days after termination date of bid and in any event within 180 days after date of takeover bid. Dissenting shareholders can accept same terms as in takeover bid or demand payment of fair value. Shareholders electing payment of fair value must give notice. (c. B-9, §§ 195[2][3], 196[1]).

On application, court shall fix fair value for shares of each dissenting offeree who is party to application. (c. B-9, § 202).

Part 17.

Liquidation and Dissolution.

Part 17 of Act contains detailed provisions concerning substantive and procedural law on liquidation and dissolution of corporation which is not insolvent within meaning of Bankruptcy and Insolvency Act of Canada. This Part governs, among other things, revival of corporation dissolved under Act, dissolution of corporation that has not commenced business and making of proposal for voluntary liquidation and dissolution of corporation.

Insolvency.

Proceedings to dissolve or liquidate and dissolve shall be stayed if corporation insolvent within meaning of Bankruptcy and Insolvency Act of Canada. (c. B-9, § 207).

Dissolution by Directors or Shareholders in Special Cases.

Corporation that has not issued shares and has no property and no liabilities may be dissolved at any time by all directors. Corporation that has no property and no liabilities may be dissolved by special resolution of shareholders. Corporation whose liabilities have been assumed by parent corporation may be dissolved by special resolution of shareholders. Articles of Dissolution shall be sent to Registrar. Corporation ceases to exist on date shown in certificate of dissolution from Registrar. (c. B-9, § 211[1][2][2.1][4][6]).

Dissolution by Registrar.

Where corporation: (a) Has not commenced business within three years after date shown in its certificate of incorporation; (b) has not carried on business for three consecutive years; or (c) is in default for period of one year in sending to Registrar any notice or document required by Act, Registrar may dissolve corporation by issuing certificate of dissolution under Act or Registrar may apply to court for order dissolving corporation. (c. B-9, § 213[1]).

Grounds for Dissolution.

Registrar or any interested person may apply to court for order dissolving corporation if corporation has: (a) Failed for two or more consecutive years to comply with requirements of Act with respect to holding of annual meetings of shareholders; (b) carried on any business or exercised any power that it is restricted by its articles from carrying on or exercising; (c) denied access to corporate records to persons authorized under Act to have access to same; (d) failed to comply with certain of financial disclosure requirements of Act; or (e) procured any certificate under Act by misrepresentation. (c. B-9, § 214[1]).

Corporation ceases to exist on date shown in Certificate of Dissolution. (c. B-9, § 214[5]).

Other Grounds for Liquidation and Dissolution Pursuant to Court Order.

Court may order liquidation and dissolution of corporation or any of its affiliated corporations upon application of shareholder: (a) If court is satisfied that in respect of corporation or any of its affiliates; (i) any act or omission of corporation or any of its affiliates effects result; (ii) business or affairs of corporation or any of its affiliates are or have been carried on or conducted in manner; or (iii) powers of directors of corporation or any of its affiliates are or have been exercised in manner; that is oppressive or unfairly prejudicial to or that unfairly disregards interests of any security holder, creditor, director or officer; or (b) if court is satisfied that: (i) unanimous shareholder agreement entitles complaining shareholder to demand dissolution of corporation after occurrence of specified event and that event has occurred; or (ii) it is just and equitable that corporation should be liquidated and dissolved. (c. B-9, § 215[1]).

Application for Supervision.

Application to court to supervise voluntary liquidation and dissolution under this Part must state reasons, verified by affidavit of applicant, why court should supervise liquidation and dissolution. (c. B-9, § 216[1]).

Part 17. Appointment of Liquidator.

Part 17 outlines powers of court upon application to liquidate and dissolve corporation and in connection with dissolution or liquidation and dissolution of corporation. (c. B-9, § 218).

When making order for liquidation of corporation or at any time thereafter, court may appoint any person, including director, officer or shareholder or any other corporation, as liquidator of corporation. (c. B-9, § 221[1]).

Part 17 outlines duties, powers and responsibilities of liquidator in connection with liquidation of corporation under Act. (c. B-9, §§ 222–223).

Continuation of Actions.

Subject to § 15.7 and notwithstanding dissolution of corporation under Act: (a) Civil, criminal or administrative action or proceeding commenced by or against corporation before its dissolution may be continued as if corporation had not been dissolved; (b) civil, criminal or administrative action or proceeding may be brought against corporation within two years after its dissolution as if corporation had not been dissolved; and (c) any property that would have been available to satisfy any judgment or order if corporation had not been dissolved remains available for such purpose. (c. B-9, § 227[2]).

Reimbursement.

Notwithstanding dissolution of corporation, shareholder to whom any of its property has been distributed is liable to any person claiming in above civil, criminal or administrative action or proceeding to extent of amount received by that shareholder upon such distribution, and action to enforce such liability may be brought within two years after date of dissolution of corporation. (c. B-9, § 227[4]).

Part 18. Court Order for Investigation.

Security holder may apply to court, ex parte or upon such notice as court may require, for order directing investigation to be made of corporation and any of its affiliated corporations. (c. B-9, § 231[1]).

Grounds.

If, upon application, it appears to court that: (a) Business of corporation or any of its affiliates is or has been carried on with intent to defraud any person; (b) business or affairs of corporation or any of its affiliates are or have been carried on or conducted, or powers of directors are or have been exercised in manner that is oppressive or unfairly prejudicial to or that unfairly disregards interests of security holder; (c) corporation or any of its affiliates was formed for fraudulent or unlawful purpose or is to be dissolved for fraudulent or unlawful purpose; or (d) persons concerned with formation, business or affairs of corporation or any of its affiliates have in connection therewith acted fraudulently or dishonestly; court may order investigation to be made of corporation and any of its affiliated corporations. (c. B-9, § 231[2]).

Powers of Court.

Part 18 outlines power of court upon investigation application. (c. B-9, § 232[1]).

Copy of Report.

Inspector appointed by court shall on request produce to interested person copy of any order made under §§ 231 or 232(1). (c. B-9, § 233[3]).

Power of Inspector.

Inspector has powers set out in order of court appointing him. (c. B-9, § 233[1]).

Part 19. Remedies, Offences and Penalties.

Commencing Derivative Action.

Complainant may apply to court for leave to bring action in name and on behalf of corporation or any of its subsidiaries, or intervene in action to which any such body corporate is party, for purpose of prosecuting, defending or discontinuing action on behalf of body corporate, except that no such action may be brought and no leave may be granted unless court is satisfied that: (a) Complainant has given reasonable notice to directors of corporation or its subsidiary of his intention to apply to court if directors of corporation or its subsidiary do not bring, diligently prosecute or defend or discontinue action; (b) complainant is acting in good faith; and (c) it appears to be in interest of corporation or its subsidiary that action be brought, prosecuted, defended or discontinued. When all directors of corporation or subsidiary are named as defendants, notice to directors by complainant of intention to apply to court is not required. (c. B-9, § 240[1][2][3]).

"Complainant" means: (a) Registered holder or beneficial owner, or former registered holder or beneficial owner, of security of corporation or any of its affiliates; (b) director or officer or former director or officer of corporation or of any of its affiliates; (c) creditor in respect of derivative action or oppression application; or (d) any other person who, in discretion of court, is proper person to make application under this Part. (c. B-9, § 239).

Powers of Court.

In connection with such action, court may at any time make any order it thinks fit including, without limiting generality of foregoing: (a) Order authorizing complainant or any other person to control conduct of action; (b) order giving directions for conduct of action; (c) order directing that any amount adjudged payable by defendant in action shall be paid, in whole or in part, directly to former and present security holders of corporation or its subsidiary instead of to corporation or its subsidiary; (d) order requiring corporation or its subsidiary to pay reasonable legal fees incurred by complainant in connection with action. (c. B-9, § 241).

Commencing Oppression Action.

Complainant may apply to court for order under following provision. (c. B-9, § 242[1]).

Grounds.

If, upon application by complainant to court for order, court is satisfied that in respect of corporation or any of its affiliates: (a) Any act or omission of corporation or any of its affiliates effects result; (b) business or affairs of corporation or any of its affiliates are or have been carried on or conducted in manner; or (c) powers of directors of corporation or any of its affiliates are or have been exercised in manner that is oppressive or unfairly prejudicial to or that unfairly disregards interests of any security holder, creditor, director or officer, court may make order to rectify matters complained of. (c. B-9, § 242[2]).

Powers of Court.

In connection with such application, court may make any interim or final order it thinks fit except to revoke certificate of amalgamation. (c. B-9, § 242[3][4]).

Duty of Directors.

If such order made by court directs amendment of articles or by-laws of corporation: (a) Directors shall forthwith send articles of reorganization in prescribed form and other documents required by Act in connection therewith to Registrar; and (b) no other amendment to articles or by-laws shall be made without consent of court, until court otherwise orders. (c. B-9, § 242[5][6]).

Court Approval to Discontinue.

Application made or derivative or oppressive action brought or intervened in under this Part must not be stayed, discontinued, settled or dismissed for want of prosecution without approval of court given upon such terms as court thinks fit and, if court determines that interests of any complainant may be substantially affected by such stay, discontinuance, settlement or dismissal, court may order any party to application or action to give notice to complainant. (c. B-9, § 243[2]).

Application to Court to Rectify Records.

If name of person is alleged to be or to have been wrongly entered or retained in, or wrongly deleted or omitted from, registers or other records of corporation, corporation, security holder of corporation or any aggrieved person may apply to court for order that registers or records be rectified. (c. B-9, § 244[1]).

Powers of Court.

In connection with such application, court may make any order it thinks fit. (c. B-9, § 244[3]).

Court Order for Directions.

Executive Director of Alberta Securities Commission may apply to court for directions in respect of matter concerning Executive Directors' duties under Act and on such application court may give such directions and make any further order it thinks fit. (c. B-9, § 245).

Appeal from Registrar's Decision.

Person who feels aggrieved by decision of Registrar: (a) To refuse to file in form submitted to Registrar any articles or other document required by Act to be filed by Registrar; (b) to issue or to refuse to issue certificate of revival or to impose terms on revival; (c) to correct or to refuse to correct certificate, notice, articles or another document under Act; (d) to approve, change or revoke name, or to refuse to approve, change or revoke name under Act; (e) to refuse to permit continued reference to shares having nominal or par value; (f) to refuse to issue certificate of discontinuance under Act; (g) to refuse to revive corporation under Act; (h) to dissolve corporation under Act; (i) to refuse exemption respecting fees for extra-provincial corporation; or (j) to cancel registration of extra-provincial corporation; may apply to court for order requiring Registrar to change his decision and upon such application court may so order and make any further order it thinks fit. (c. B-9, § 247[1]).

Appeal from Commission's Decision.

Person who feels aggrieved by decision of Commission to refuse to grant exemption regarding distribution to public and distributing corporation exemptions may appeal to Court of Appeal. (c. B-9, § 247[2]).

Restraining or Compliance Order.

If corporation or any shareholder, director, officer, employee, agent, auditor, trustee, receiver, receiver-manager or liquidator of corporation contravenes Act, regulations, articles, by-laws or unanimous shareholder agreement, complainant or creditor of corporation may, in addition to any other right he has, apply to court for order directing any such person to comply with, or restraining any such person from acting in breach of, any provisions thereof, and upon such application court may so order and make any further order it thinks fit. (c. B-9, § 248).

Offences with Respect to Reports.

Person who makes or assists in making report, return, notice or other document required by Act or regulations to be sent to Registrar, Executive Director or any other person or filed with Executive Director that: (a) Contains untrue statement of material fact; or (b) omits to state material fact required therein or necessary to make statement contained therein not misleading in light of circumstances in which it was made; is guilty of offence and liable to fine not exceeding $5,000 or to imprisonment for term not exceeding six months or to both. (c. B-9, § 251[1]).

If body corporate guilty of such offence, then, whether or not body corporate has been prosecuted or convicted, any director or officer of body corporate who knowingly authorizes, permits or acquiesces in such offence is also guilty of offence and liable to fine not exceeding $5,000 or to imprisonment for term not exceeding six months or both. (c. B-9, § 251[2]).

Immunity.

No person is guilty of any such offence if untrue statement or omission was unknown to him and in exercise of reasonable diligence could not have been known to him. (c. B-9, § 251[3]).

Offence.

Every person who, without reasonable cause, contravenes provision of Act or regulations for which no penalty is provided is guilty of offence and liable to: (a) If body corporate, fine not exceeding $1,000; and (b) if individual, fine not exceeding $1,000, maximum imprisonment of one month or both. (c. B-9, § 252).

Order to Comply.

If person is found guilty of offence under Act or regulations, any court in which proceedings in respect of offence are taken may, in addition to any punishment it may impose, order that person to comply with provisions of Act or regulations for contravention of which he has been convicted. (c. B-9, § 253[1]).

Part 20. General.

Notice to Directors and Shareholders.

Notice or document required by Act, regulations, articles or by-laws to be sent to shareholder or director of corporation may be sent by mail addressed to, or may be delivered personally to: (a) Shareholder at his latest address as shown in records of corporation or its transfer agent; and (b) director at his latest address as shown in records of corporation or in last notice of directors or notice of change of directors. (c. B-9, § 255[1]).

Notice to and Service Upon a Corporation.

Notice or document required or permitted to be sent to or served upon corporation may be sent by registered mail to registered office or post office box designated as address for service by mail, or delivered to registered office. Notice of intent to dissolve corporation may be sent by ordinary mail to registered office or post office box and is deemed to have been received or served at time it would be delivered in ordinary course of mail despite being returned as undeliverable. (c. B-9, § 256[1][2][3][4]).

Waiver of Notice.

Notice or documents required to be sent, by Act or regulation, may be waived or abridged at any time with written consent of person entitled to receive it, which may be sent by electronic means. (c. B-9, § 258[1][2]).

Certificate of Corporation.

Certificate issued on behalf of corporation stating any fact that is set out in articles, by-laws, unanimous shareholder agreement, minutes of meetings of directors, committee of directors or shareholders, or in trust indenture or other contract to which corporation is party may be signed by director, officer or transfer agent of corporation. (c. B-9, § 260[1]).

Regulations.

Subject to following provisions, Lieutenant Governor in Council may make regulations: (a) Prescribing any matter required or authorized by Act to be prescribed; (b) requiring payment of fee in respect of filing, examination or copying of any document or in respect of any action that Registrar is required or authorized to take under Act, and prescribing amount thereof; (c) prescribing format and contents of annual returns, notices and other documents required to be sent to Registrar or to be issued by him; (d) prescribing requirements for attendance at meeting or holding meeting by electronic means; (e) prescribing rules with respect to exemptions permitted by Act; (f) prescribing that standards of accounting body named in regulations be followed; (g) respecting circumstances under which corporation or extra-provincial corporation is prohibited from being incorporated or registered with, having, carrying on business under, identifying itself by or changing its name to specified name or kind of name; (h) respecting form of, period of time for keeping, and disposal of records of corporation; (i) prescribing maximum fee for issuing security certificate pursuant to transfer; (j) prescribing period of time for which information in securities register must be kept; (k) respecting disclosure of financial assistance to shareholder, director, associate thereof, or to person who purchases shares, of corporation or affiliate; and (l) respecting unlimited liability corporations. (c. B-9, § 266).

Annual Return.

Every corporation shall, on prescribed date, send to Registrar annual return in prescribed form for filing. (c. B-9, § 268[1]).

Inspection and Copies.

Person who has paid prescribed fee is entitled during usual business hours to examine document required by Act or regulations to be sent to Registrar and to make copies of or extracts therefrom. (c. B-9, § 271).

Application to Federally-Incorporated Corporations.

The provisions dealing with foreign corporations apply in part only in regard to corporations incorporated under Act of Parliament of Canada. The province has no jurisdiction to enact legislation directed at such federally-incorporated corporations. However, legislation passed by Legislature of Province for other purposes is valid even though it affects federally-incorporated corporations indirectly: federally-incorporated corporations are compelled to register and to pay annual registration fees and companies engaged in certain businesses are required to obtain provincial licenses.

Continuation.

Alberta companies which did not apply to Registrar for certificate of continuance under new Act within prescribed time periods dissolved upon expiry of those time periods. (c. B-9, § 273[17]).

Extra-Provincial Registration.

Extra-Provincial corporation required to register if carrying on business in Alberta as defined in Act. Certain obligations imposed upon such corporations as to display of name on documents, etc. Disabilities and penalties exist for failure to register. (c. B-9, Part 21).

Other Extra-Provincial Legal Entities.

Lieutenant Governor in Council may make regulations regarding organizations formed outside of Alberta which are: (a) Recognized as legal entities under laws of that jurisdiction, (b) not qualified to be registered under Act as extra-provincial corporations, and (c) not qualified to be registered under Partnership Act as partnership or limited partnership. (c. B-9, §§ 298, 299).

Taxation.

See category 22 Taxation, topic 22.03 Business Taxes.

Professional Corporations.

If name of corporation in articles of incorporation contains words “Professional Corporation”, incorporator must send Registrar evidence of approval of articles by or on behalf of governing body of appropriate profession or occupation. (c. B-9, § 7[2]).

2.04 FOREIGN CORPORATIONS:

See topic 2.03 Corporations.

2.05 JOINT STOCK COMPANIES:

No statutory provisions. Rules regulating corporations apply.

2.06 LIMITED PARTNERSHIP:

See topic 2.08 Partnerships.

2.07 LOAN CORPORATIONS:

See topic Trust and 2.07 Loan Corporations.

2.08 PARTNERSHIPS:

Interpretation.

“Partnership” means relationship that subsists between persons carrying on business in common with view to profit. (c. P-3, § 1).

Partnership Declaration.

All persons associated in partnership for trading, manufacturing, contracting or mining purposes must file with Registrar of Corporations appointed under Business Corporations Act (c. B-9) signed declaration containing names, occupations and residential addresses of each partner; name of firm under which they carry on or intend carrying on business; length of time it has existed or is to exist; and declare persons named are sole members of such partnership (c. P-3, §§ 106, 108). Declaration must be filed within six months after formation of partnership. (c. P-3, § 109). Similar declarations must be filed if there is change in: (a) Membership of partnership, (b) firm name under which members intend to carry on business, or (c) residential address of each member of firm. Failure to file requisite declarations within time specified in Act is offence punishable by maximum fine of $500. (c. P-3, §§ 109, 112).

Declaration of Dissolution.

When partnership dissolved, any member of partnership may sign and file with Registrar declaration stating: (a) Name of partnership dissolved; (b) its address; and (c) partnership is dissolved and date on which it was dissolved and signed in presence of witness. (c. P-3, § 116).

Liability of Partners.

Under judgment against partnership, writ of enforcement may be issued against partnership or any member of partnership who: (a) Entered defence to action as partner; (b) having been served, failed to enter defence; (c) admitted that he/she was partner in pleading; or (d) was adjudged to be partner unless that member was outside of jurisdiction when statement of claim was issued and he (i) was not served with statement of claim, within jurisdiction, as partner; (ii) did not enter defence as partner; or (iii) was not served with statement of claim as partner outside of jurisdiction with leave of court. (A.R.C., Rule 82).

Judgment against firm required for writ of enforcement against partnership property. (c. P-3, § 26).

Each partner jointly liable for debts of firm incurred while partner and jointly and severally liable for wrongful acts, omissions, and misapplication of money or property of third person by firm. (c. P-3, §§ 11-15).

Liability for Actions of Other Partners.

Each partner is agent of firm and other partners for purpose of partnership business. Acts of partner in usual course of business of firm bind firm and partners unless: (a) Partner has no authority to act; and (b) person dealing with that partner knows partner has no authority or does not know or believe him to be partner. (c. P-3, §§ 6, 7).

Act or instrument relating to business of firm and executed under firm name or in another manner showing intention to bind firm, by authorized person, whether partner or not, binds firm and partners. (c. P-3, § 8). Newly admitted partner not liable for past acts of partnership but retired partner liable, unless agreed otherwise among newly constituted partnership and creditors. (c. P-3, § 20).

Dissolution.

Partnership is dissolved by expiry of fixed term, termination of single adventure or undertaking for which it was created, or by notice of partner of intention to dissolve partnership. (c. P-3, § 36). Unless agreed otherwise, it may also be dissolved by death or bankruptcy of partner or by assignment of partner’s property to creditors. (c. P-3, § 37). Partnership is also dissolved if business unlawful or upon court order on grounds of unsound mind, incapacity, or guilty conduct of partner prejudicially affects carrying on business, if court deems it not reasonably practicable to carry on business if partner committing breach of partnership agreement, if business can only be carried on at loss, or if court deems it just and equitable. (c. P-3, §§ 38, 39).

Administration of Partnership Property.

Partnership property must be held and applied exclusively for purposes of partnership and in accordance with partnership agreement. (c. P-3, § 23).

Upon dissolution, each partner entitled to have property of partnership applied in payment of debts and liabilities of firm and to have surplus assets applied to what is due to partners after deducting what is due from partners of firm. Upon termination of partnership, any partner may apply to court to wind up firm. (c. P-3, § 43).

Limited Partnerships.

Limited partnership is formed upon filing certificate with Registrar of Corporations setting out firm name, character of business, names and residential addresses of general and limited partners, term of existence, amount of cash and property contributed by each limited partner or to be contributed, time contribution is to be returned, share of profits or income to which limited partners entitled, rights of assignment, right to admit additional limited partners, rights of priority, right to continue partnership or on death, retirement or incompetency of general partner; and right of limited partners to receive property other than cash in return for contribution. (c. P-3, § 52). Partners may limit liability to contribution of capital through registered limited partnership but must not: (a) Contribute services to limited partnership; (b) appear in firm name; or (c) take part in control of partnership business. (c. P-3, §§ 54, 55, 64).

Limited partnerships must include one or more general partners who have rights, powers, restrictions and liabilities of partners of non-limited partnerships. (c. P-3, §§ 51, 56).

There are numerous provisions governing operation of limited partnerships. (c. P-3, Part 2).

Limited Liability Partnerships.

Part 3 establishes limited liability partnerships for partnerships consisting of partners carrying on business in profession regulated by Alberta statute that allows members to carry on business as professional corporation. Profession's governing body may pass rule or by-law limiting application of Part 3. Limited liability partnership is created by way of certificate issued by Registrar of Corporations. Extra-provincial limited liability partnership may also register provided they would qualify under Alberta law. (c. P-3, Part 3). Name of Alberta limited liability partnership must end with "Limited Liability Partnership" or "LLP". (A.R. 105/2009, § 5[1]).

Extra-Provincial Limited Partnerships.

Partnership Regulation (A.R. 105/2009) governs registration of designated extra-provincial limited partnerships and designated extra-provincial limited liability partnerships. (c. P-3, § 80.1).

TRUST AND LOAN CORPORATIONS:

Loan and Trust Corporations Act (c. L-20), proclaimed in force on Jan. 16, 1992. It repeals previous Trust Companies Act and constitutes complete amalgamation and revision of legislation governing trust and loan companies in Alberta. It applies to all new incorporations of trust or loan companies and existing trust companies are to be continued under it.

Part 1. Interpretation and Application.

Application.

Act will apply to every trust corporation or loan corporation incorporated or continued under Act which has not been discontinued under Act.

"Trust corporation" as defined in Act means body corporate incorporated or operated for purposes of offering its services to public as executor, administrator, trustee, receiver, bailee, agent, custodian, liquidator, sequestrator, assignee or guardian or trustee of minor's estate or estate of mentally incompetent person, and carrying on deposit-taking business but does not include bank, treasury branch, loan corporation or credit union. "Loan Corporation" as defined in Act means body corporate incorporated or operated for purpose of carrying on deposit-taking business but does not include bank, treasury branch, trust corporation or credit union. "Body Corporate" means any body corporate with or without share capital and wherever or however incorporated. (c. L-20, § 1[1]).

Part 2. Incorporation.

Loan corporation or trust corporation may be incorporated in Alberta by issuance of letters patent by Lieutenant Governor in Council on recommendation of Minister. (c. L-20, § 6).

Application for letters patent shall be filed with Minister, and notice of application must be published in Alberta Gazette and in local newspaper. (c. L-20, § 7).

Conditions for Issuing Letters Patent.

Letters patent shall not issue unless Lieutenant-Governor in Council is satisfied that establishment of additional provincial loan or trust corporation is in public interest, proposed management is fit to manage corporation, proposed capital and share structure are acceptable, any person who will hold or beneficially own 10% or more of any class of shares has adequate financial resources and is fit to hold shares, each proposed director is fit to be director of corporation, depositors of corporation will be adequately protected, proposed plan of operation of corporation is feasible, and corporation intends to offer to public services set out in application for incorporation. (c. L-20, § 8). Trust or loan corporation will come into existence on date set out in its letters patent. (c. L-20, § 13).

Capacity.

Subject to Act, regulations, by-laws and any terms imposed on registration, loan or trust corporation has capacity and rights, powers and privileges of individual, and may carry on business in any jurisdiction outside Alberta to extent that laws of that jurisdiction permit. (c. L-20, § 14).

Amendments.

Minister may issue supplementary letters patent to amend letters patent of trust corporation in variety of ways. (c. L-20, § 17).

Requirements surrounding name of trust or loan corporation and organization and commencement of corporation are similar to those governing corporations incorporated under Alberta Business Corporations Act. (c. L-20, §§ 20-26).

Part 3. Registration.

Trust Corporations Register and Loan Corporations Register are established. (c. L-20, § 28).

Trust and loan corporation incorporated in Canada, Alberta and other provinces may apply for registration under Act, but application for registration of extra-provincial loan or trust corporation must be accompanied by consent authorizing Minister to conduct examinations at head office of corporation and written undertaking that corporation will provide to Minister any information that Minister requires. (c. L-20, §§ 29-32).

Stated Capital.

In order to be registered, trust corporation which is to be prohibited from carrying on deposit-taking business and is not fully owned by financial institution, must have stated capital account of at least $2 million. If trust corporation is wholly owned by financial institution, and will be prohibited from carrying on deposit-taking business, stated capital account must be at least equal to amount required by Minister. In any other case, that is, where corporation is going to carry on deposit-taking business, stated capital account of corporation must be at least $3 million in case of loan corporation and $5 million in case of trust corporation, unless greater amount is specified by Minister. Further, corporation must have capital base which is adequate and at least equal to corresponding capital account amount for that corporation. Corporation must also establish, to satisfaction of Minister, that it meets conditions set out above for incorporation of trust or loan corporation. (c. L-20, § 35). If Minister is not satisfied as to any or all matters referred to in § 35, or for any other reason, Minister may reject application or approve registration of applicant subject to any terms, conditions and restrictions. (c. L-20, § 36).

Part 4. Principal Place of Business, Records and Returns.

Requirements imposed on corporation under this part of Act are similar to those imposed on corporations under Alberta Business Corporations Act. (c. L-20, §§ 39-50).

Personal Information Protection Act, c. P-6.5, amends Loan and Trust Corporations Act to provide that provincial corporation shall not disclose any residential address kept by provincial corporation under § 40.

Part 5. Shares and Shareholders.

Requirements in this part of Act are similar to those in corresponding part of Alberta Business Corporations Act.

Minister's Consent to Transfer or Issue.

Transfer or issue of voting shares of corporation cannot occur without Minister's consent if transfer or issue would result in person or persons related to that person owning more than 10% of any class of issued and outstanding shares of corporation. (c. L-20, § 77).

Part 12 of Business Corporations Act and regulations made thereunder, and Part 16 of Business Corporations Act (except § 195[3]) apply with respect to loan or trust corporation as if it were corporation within meaning of that Act. Those sections of Business Corporations Act deal with proxies (Part 12) and take-over bids (Part 16). (c. L-20, §§ 99 and 100).

Part 6. Directors and Officers.

Provisions under this part of Act are similar to those in Part 9 of Business Corporations Act, with exception that greater restrictions are placed on persons who may be directors of trust or loan corporation under Act.

Trust or loan corporation must have at least five directors. (c. L-20, § 101[2]). Individual who is less than 18 years old, of unsound mind, represented (2008 c. A-4.2, § 139) adult, bankrupt, director of non-affiliated corporation or who has been convicted of indictable offence or offence against Act within last five years may not be director. (c. L-20, § 105).

Residency.

At least three-quarters of directors of loan or trust corporation must be ordinarily resident in Canada. (c. L-20, § 104). Further, no business shall be transacted at meeting of directors unless majority of directors present are ordinarily resident in Canada. (c. L-20, § 122[1]).

Duties and Liabilities of Directors.

Duties and liabilities imposed on directors of trust or loan corporation are similar to those imposed on directors of corporation incorporated under Business Corporations Act. (c. L-20, §§ 130-135).

Part 7. Insider Trading.

Provisions governing insider trading in this part of Act are similar to those governing insider trading in Part 10 of Alberta Business Corporations Act. (c. L-20, §§ 138-141).

Part 8. Auditors and Financial Statements.

Qualifications.

Auditor must be permitted by law to engage in audit that is intended to be relied on by third parties, and must be independent of corporation, its affiliates, and directors and officers of corporation and its affiliates. (c. L-20, § 142).

Part 8 sets out rights, duties and liabilities of auditor.

Part 9. Restricted Party Transactions.

Application.

This part does not apply to provincial trust corporation whose registration is subject to term, condition or restriction prohibiting it from carrying on deposit-taking business. (c. L-20, § 162[1]).

Designation.

Minister may designate any person as restricted party of loan or trust corporation if of opinion that person is acting or has acted jointly with restricted party of corporation with respect to entering into transaction, guarantee or investment which would be prohibited if entered into by restricted party or there exists between person and corporation any interest or relationship that might reasonably be expected to affect exercise by corporation of its best judgment with respect to transaction, guarantee, or investment. Further, Minister may designate as restricted parties of corporation two or more persons who have agreed, pursuant to any formal or informal agreement or understanding, to act jointly in respect of shares of corporation or any entity which own shares or controls entity that owns shares. (c. L-20, § 163).

Prohibited Transactions.

Except as provided in Act, no provincial corporation may enter into any transaction with restricted party of corporation, enter into any guarantee on behalf of such restricted party or make investment in any securities of such restricted party. (c. L-20, § 164[1]).

During 12 month period after person ceases to be restricted party of corporation, corporation may not enter into any transaction with such person unless it has been authorized by board of directors of corporation and is at fair market rate. (c. L-20, § 165[1]).

Board Approval Required.

With prior approval of board of directors, trust or loan corporation or its subsidiary may enter into contract with restricted party for provision of management services to or by corporation, for lease of real estate or personal property, for pension and benefit plans, stock options, and other reasonable commitments incidental to employment, for provision of goods or services other than management services for term not to exceed five years, for acquisition or sale of prescribed securities, for making of loan to or guarantee of obligations of entity, other than financial institution, in which corporation beneficially owns shares, or for any other transaction permitted by regulations. (c. L-20, § 167). Approval must be in writing and conform to certain requirements. (c. L-20, § 166).

Board Approval Not Required.

Without prior approval of board of directors of corporation, trust or loan corporation may enter into new transaction with restricted party for minor or general expenditures, sale of goods or provision of financial services normally sold or provided to public by corporation in ordinary course of business, for taking of deposit from restricted party, or any other transaction permitted by regulations. (c. L-20, § 168).

Loans.

Conditions under which corporation or subsidiary may make loan to director, officer, employee, spouse or adult interdependent partner of director or officer are set out in Act (c. L-20, § 169[1]).

Financial Institutions.

Loan or trust corporation may make loan to, enter into transaction with, or guarantee obligations of restricted party that is financial institution with prior approval of board of directors of corporation. (c. L-20, § 170).

No transaction or guarantee or investment under this Part may be in excess of prescribed limits. (c. L-20, § 171).

Trust and Estate Funds.

Trust Corporation shall not enter into transaction with restricted party using funds, other than deposits, held by corporation as fiduciary. (c. L-20, § 173).

Where transaction, guarantee or investment prohibited under this Part takes place, any interested person may apply to court for order setting aside transaction, allowing for damages, or any other order court thinks fit. (c. L-20, § 179).

Part 10. Capacity and Powers.

Application.

This part does not apply to provincial trust corporation prohibited from carrying on deposit-taking business. (c. L-20, § 180).

General Powers.

Subject to Act and regulations, loan or trust corporation may not engage in or carry on any business other than generally providing financial services, with exception that trust corporation may exercise fiduciary powers referred to in Act, and loan or trust corporation may engage in provision of real property brokerage services and acquire, hold, repair, lease, or otherwise deal with real property. (c. L-20, § 181).

Only registered loan or Trust Corporation may engage in deposit-taking business, unless permitted by any other enactment. (c. L-20, § 182). Only registered trust corporation may offer its services to public as executor or administrator or trustee, or guardian or trustee of minor's estate or estate of mentally incompetent person, unless otherwise authorized by other legislation. (c. L-20, § 183).

No registered loan corporation may carry on business as receiver, liquidator, or sequestrator, or as custodian of property. (c. L-20, § 184).

Registered trust or loan corporation may not, other than as principal, carry on any securities activities requiring filing of prospectus or registration under Securities Act, but may otherwise carry on securities activities. (c. L-20, § 186).

Loan or trust corporation may not engage in any leasing activity that financial leasing corporation within meaning of regulations is not permitted to engage in. (c. L-20, § 187).

Receiving Deposits.

Loan or trust corporation may, for purposes of investment, receive money repayable on demand or after notice, or repayable on fixed date on expiry of fixed term. Loan corporation may issue debentures or other evidence of indebtedness appropriate to debtor and creditor relationship created by receipt of money, and trust corporation may issue investment certificates or other evidence of receipt of money appropriate to trust relationship created by receipt of money. (c. L-20, § 188).

Trust corporation receiving money must earmark in respect of it securities, or cash and securities, equal to full aggregate amount of money received, and shall refer to this as "depositors liability fund". Assets of such funds are held by corporation in trust for benefit of depositors to extent of corporation's liability to them. In order to exercise powers set out in this section, loan or trust corporation must be member of Canada Deposit Insurance Corporation or have its deposits insured by another public agency prescribed by Minister. (c. L-20, § 188).

Base.

Corporation must maintain its capital base at not less than levels required by § 35(b), and such capital base shall meet leverage ratio and risk rated average ratio requirements set out in regulations. (c. L-20, § 189).

Loan or trust corporation may borrow money by way of issue of subordinated notes having denomination not less than prescribed amount. (c. L-20, § 190).

Pledging Assets.

Except as provided in Act, no provincial corporation shall directly or indirectly pledge any part of its total assets, except to Government of Canada for Canada Savings Bonds, to Canada Deposit Insurance Corporation or other public company prescribed by Minister, or for other transactions permitted by regulations. Otherwise, corporation may pledge any of its own assets as security for debt obligation of corporation only if it is in respect of money borrowed to enable corporation to meet short term requirements for liquid funds, and total debt obligation of corporation in relation to which assets are pledged will not exceed 50% of corporation's capital base. (c. L-20, § 191).

Guarantees.

Loan or trust corporation may not guarantee on behalf of any person payment or repayment of any sum of money unless it is fixed sum of money, and person on whose behalf guarantee is given has unqualified obligation to reimburse corporation for full amount of payment to be guaranteed. (c. L-20, § 192).

Limit on Borrowing.

Trust corporation may not borrow money except from eligible financial institution, Bank of Canada or another person approved by Minister unless it is borrowing by way of subordinated notes, or is borrowing as authorized by § 191. (c. L-20, § 193).

Other Prohibited Activities.

No loan or trust corporation may carry on business as insurer, information management corporation, or carry on any other prescribed activity. (c. L-20, § 194). Notwithstanding § 194(1), loan or trust corporation may hold restricted insurance agents certificate pursuant to Insurance Act. (c. L-20, § 194[2]).

Part 11. Investments.

Application.

This Part does not apply to trust corporation prohibited from carrying on deposit-taking business, and this Part does not apply to funds, other than deposits held by corporation as fiduciary. (c. L-20, § 195).

Prudent Investment Standards.

Loan or trust corporation must adhere to prudent investment standards in making investment decisions and in managing its total investments. Prudent investment standards are those which reasonably prudent person would apply to investments made on behalf of another person with whom there exists fiduciary relationship to make such investments without undue risk of loss or impairment and with reasonable expectation of fair return or appreciation. (c. L-20, § 196).

Liquidity.

Corporation must at all times keep available in prescribed manner and amount securities of prescribed kind, or cash, or both securities and cash, for liquidity purposes. (c. L-20, § 198). Provincial corporations must maintain at least 45% of total assets in listed investments. (A.R. 171/92, § 22).

Personal Loans.

Corporation may make personal loans to individuals in amounts not exceeding prescribed amounts. (c. L-20, § 199).

Commercial Loans.

Loan or trust corporation may make commercial loans, aggregate amount of which shall not exceed 5% of total assets of provincial corporation, unless this amount is increased by Minister. Commercial loan does not include residential mortgage loan referred to in § 201, mortgage loan on improved real estate in Canada where amount advanced is 75% or less of market value of real estate, acquisition of bankers' acceptances, acquisition of securities that are widely distributed, loans to or fully secured by Government of Canada, government of province or territory, or government that is member of Organization for Economic Cooperation and Development, acquisition of securities that are issued or guaranteed by one of above governments, granting of certain letters of credit, guarantees and other prescribed instruments, making of deposits in prescribed financial institution, making of loans to university, municipality, hospital board, regional health authority or school board, acquisition of common shares in body corporate, financing provided to individual up to prescribed aggregate amount, or any other prescribed form of financing. (c. L-20, § 200).

Mortgage Lending.

Loan or trust corporation may purchase or make loans on security of mortgage on improved real estate in Canada. Where such mortgage is residential mortgage, amount advanced under mortgage must not exceed 75% of market value of real estate unless excess amount is guaranteed or insured by government of province or territory of Canada, or by insurance policy. (c. L-20, § 201).

Where corporation acquires improved real estate by means of realizing security held on real estate, real estate may be retained for period not to exceed seven years or any longer period allowed by Minister. (c. L-20, § 202).

Investment in Real Estate.

Loan or trust corporation may acquire improved real estate in Canada for purpose of producing income or that is or is to be occupied by corporation for its own use, so long as total value of real estate so acquired does not exceed prescribed limits. (c. L-20, § 203).

Prohibited Investments.

No corporation may directly or indirectly make loans or other investments in any person or any two or more persons that to knowledge of corporation are connected, in aggregate amount exceeding prescribed amount, unless investment is in securities issued or guaranteed by Government of Canada or province, or mortgages which are insured under National Housing Act or insured by policy of mortgage insurance, or any other prescribed investment vehicles. (c. L-20, § 204).

Except to protect value of existing asset or in respect of assets acquired as part of amalgamation or in any other circumstance prescribed by Minister, no corporation shall acquire assets that are in default because of nonpayment of interest, principal or dividend. (c. L-20, § 205).

No corporation may beneficially own more than 10% interest in partnership, trust, fund or other unincorporated association or organization unless organization is carrying on business that may be carried on by body corporate referred to in § 207(4) (see catchline Limitation of Shareholding, infra). (c. L-20, § 206).

Corporation may only enter into hedging agreements under limited circumstances. (A.R. 171/92, § 27).

Limitation on Shareholding.

No corporation may beneficially own shares to which are attached more than 10% of voting rights attached to all of issued and outstanding voting shares of body corporate, except for following bodies corporate: loan or trust corporation with approval of Minister, financial leasing corporation, body corporate that is securities dealer, body corporate that is insurer, real property brokerage corporation or real property corporation, factoring corporation, mutual fund distribution corporation, investment counseling corporation, portfolio management corporation, service corporation, information management corporation, bank, or prescribed body corporate. Notwithstanding above, loan or trust corporation may not own more than 10% of voting shares in body corporate if that body corporate owns more than 10% of voting shares of another body corporate which is not body corporate referred to above. (c. L-20, § 207).

Divestment Order.

Where corporation owns shares in body corporate as permitted above, and body corporate is carrying on business in unsound manner that imperils corporation's investment or if body corporate, being subsidiary, fails to provide information to Minister, Minister may order that corporation divest itself of all or part of its beneficial ownership. (c. L-20, § 208).

Collateral Security.

Corporation may take real or personal property as collateral security for any advance or any debt due to corporation, in addition to any other security for advance or debt required under Act. (c. L-20, § 209).

Common Trust Funds.

Trust corporation may invest money held by it as fiduciary, other than deposits, in one or more common trust funds of trust corporation. (c. L-20, § 211).

Part 12. Fundamental Changes and Arrangements.

Amalgamation.

Loan or trust corporation shall not amalgamate with any other corporation except as authorized under this Act. Two or more provincial corporations may amalgamate and continue as one corporation. One or more provincial corporations may, with approval of Minister, amalgamate with one or more extra-provincial corporations and continue as one provincial corporation, or may amalgamate under laws of another jurisdiction for purpose of continuing as one extra-provincial corporation. (c. L-20, § 214).

Special Approval.

With approval of Minister, body corporate that is not provincial trust or loan corporation may amalgamate with trust or loan corporation and become trust or loan corporation. (c. L-20, § 215).

Purchaser Sale of Assets.

Loan or trust corporation may sell all or substantially all of its assets to corporation incorporated in Canada, or may purchase all or substantially all of assets of corporation incorporated in Canada if purchasing corporation assumes all or substantially all of liabilities of vendor corporation. (c. L-20, § 216).

Provisions governing amalgamation agreements and shareholder approvals are similar to those found in Alberta Business Corporations Act. However, such agreements must then be approved by Minister. (c. L-20, § 219).

Corporation may also purchase voting shares to which are attached not less than 67% of voting rights of corporation for purpose of acquiring assets of another corporation in Canada or amalgamating with such corporation. No such purchase shall be made without prior approval of Minister. (c. L-20, § 222).

Where amalgamation or purchase and sale of assets have been effected, all fiduciary obligations of original corporation are continued. (c. L-20, § 223).

Arrangements.

“Arrangement” means division of business carried on by provincial corporation, and exchange of securities of provincial corporation held by security holders for property, money or other securities of corporation. Application may be made to court by loan or trust corporation or security holder or creditor for order approving arrangement in respect of corporation. (c. L-20, § 225).

Part 13. Liquidation and Dissolution.

Dissolution of loan or trust corporation may be effected by issuance of letters patent dissolving corporation as authorized by special resolution of shareholders or resolution of directors if there are no shareholders, where corporation has no property and no liabilities. (c. L-20, § 227).

Upon such application, Lieutenant Governor in Council may, on recommendation of the Minister, issue certificate of intent to dissolve. (c. L-20, § 229).

Minister or any interested person may, at any time during liquidation of provincial corporation, apply to court for order that liquidation be continued under supervision of court in accordance with this Part. Court may so order and may make any further order it considers appropriate. (c. L-20, § 236).

Duties, powers and liabilities of liquidator are also set out in this Part. (c. L-20, §§ 244-250).

Part 14. Administration and Enforcement.

This Part sets out provisions relating to confidentiality of information, indemnity agreements, requirements for approvals and consents of Minister, review of Minister’s decisions by review board or by court, Minister’s ability to demand information from corporation, Minister’s ability to undertake special examination of business or affairs of corporation, compliance orders, suspension and revocation of registration, powers of Minister, and payment of expenses of proceedings.

Dissolution by Court.

Court may on application of Minister or any other interested person make order for liquidation and dissolution of corporation where corporation has contravened Act or regulations and court is satisfied that it is in public interest that corporation be liquidated and dissolved. (c. L-20, § 290).

Act provides for derivative actions and for relief by court from oppression and unfairness similar to remedies provided by Alberta Business Corporations Act. (c. L-20, §§ 292, 293).

Part 15. Offences and Penalties.

This Part sets out prohibitions on several actions, such as use of particular names, misuse of confidential information, representations that corporation's solvency or financial standing is vouched for by government or Minister, and false or deceptive statements.

§ Penalties for offences under Act are generally fine of $100,000 for first conviction and $200,000 for each subsequent conviction. Where offence is making false or deceptive statements, person is also liable to imprisonment for not more than two years. (R.S.A. 2000, c. L-20, § 306).

Part 16. General.

This Part deals with priority of government claims, unclaimed deposits, contracts with minors, publication of notices, and regulations.

3 BUSINESS REGULATION AND COMMERCE

3.01 BANKS AND BANKING:

Banks and banking are primarily regulated by dominion statute: Bank Act, S.C. 1991, c. 46. However, loan and trust corporations are governed by provincial Loan and Trust Corporations Act, c. L-20. Credit unions are regulated by provincial Credit Union Act, c. C-32. See also Alberta Treasury Branches Act, c. A-37.

Prerequisites to Acting in Fiduciary Capacity.

Registered corporation may engage in provision of real property brokerage services and acquire, hold, maintain, improve, develop, repair, service, lease, dispose of or otherwise deal with real property. Registered trust corporation may offer its services to public as executor, administrator, trustee, bailee, agent, custodian, receiver, liquidator, sequestrator, assignee or guardian or trustee of minor's estate, or of estate of mentally incompetent person, and carry on deposit-taking business. However, registered corporations must not engage in or carry on any business other than business generally appertaining to business of providing financial services. (Loan and Trust Corporations Act, c. L-20, § 181).

Reports.

Registered corporations must prepare annually and send to Minister not later than three months after end of each fiscal year annual return in prescribed form relating to fiscal year. In case of provincial corporation, annual return must be accompanied by financial statements and report of auditor for fiscal year to which return relates, copy of resolution of directors approving annual return and any other documents and information prescribed by Minister. In case of extra-provincial corporation, annual return must be accompanied by financial statements and auditor's report on them for fiscal year to which return relates. Where any of required financial statements are in consolidated form, they must be accompanied by separate audited financial statements in respect of provincial corporation or extra-provincial corporation, as case may be, where it is holding body corporate or subsidiary. Registered corporations must also send to Minister copy of every statement of financial nature relating to corporation that is furnished to its shareholders within five days after furnishing of statement to shareholders. Registered provincial corporations must send to Minister notice of any change in membership of board of directors within 30 days after effective date of change. (c. L-20, §§ 46-47).

Investigations.

Minister may, for purpose of examination or other inquiries set in Loan and Trust Corporation Act, require registered corporation, and certain related parties thereof, to provide Minister with requested documents, within reasonable period of time. Minister may also periodically examine any aspect of business or affairs of provincial corporation or its subsidiaries in order to determine: corporation's condition and ability to meet its obligations, whether corporation is following sound business and financial practices, procedures and standards of management of corporation and whether or not corporation is in compliance with Loan and Trust Corporations Act. Minister may also order that special examination of matter be made by special examiner appointed by Minister. (c. L-20, §§ 272-274).

Unclaimed Deposits.

Generally speaking ten years after last transaction has taken place in account bank must pay to Bank of Canada an amount equal to amount owing by bank to depositor. Depositor may demand payment from Bank of Canada at any time but will only receive interest on deposit with Bank of Canada for maximum of ten years from day on which payment was received by Bank of Canada. (Bank Act, S.C. 1991, c. 46, § 438).

Capital Requirements.

See category 2 Business Organizations, topic Trust and 2.07 Loan Corporations.

3.02 BROKERS:

Real Estate Act, c. R-5 governs general practice of real estate trading industry. Real Estate Council in Alberta sets and enforces industry standards and administers Real Estate Act.

Brokers must be licensed, and no person who is not licensed may act or hold himself out as a real estate broker. (c. R-5, § 17). Persons wishing to be licensed as agent must apply to Real Estate Council in Alberta. (c. R-5, § 17). Real Estate Council may make rules respecting issuing of licenses. (c. R-5, § 12). Council also has power to suspend licenses when, inter alia, agent contravenes Act or regulations. (c. R-5, § 43).

Compensation.

Action for services in sale of land or interest therein is not maintainable unless contract to pay, or some note or memorandum thereof, is in writing or completed transaction has resulted. (c. R-5, § 22).

Foundations.

Alberta Real Estate Foundation is administered by board of governors in accordance with Regulations. Purposes of Foundation are: (i) Promote education and law reform and other projects and activities to advance and improve real estate industry; and (ii) undertake projects as directed by Minister. (c. R-5, § 64).

Funds.

Real Estate Assurance Fund was established for purpose of paying, in whole or in part, judgments against industry members of classes provided for in Regulations where judgment is based on finding of fraud or breach of trust with respect to transactions of business. (c. R-5, § 57).

Mortgage brokers must obtain appropriate authorization from Council and are regulated in their advertising and other conduct. (c. R-5, § 17).

Sale of Real Estate Located Outside of Alberta.

Anyone trading in Alberta in real estate outside Alberta must be licenced and file prospectus with Executive Director of Real Estate Council. These requirements do not pertain in respect of isolated trade in real estate when that trade is not part of continued successive transactions of similar nature. (c. R-5, § 26).

Deposits Regulation.

Only corporations registered under Loan and Trust Corporations Act, or given express authority by statute may engage in deposit taking business. (c. L-20, § 182).

3.03 CARRIERS:

Dominion railways and provincial railways extending beyond province are governed by Dominion statute and by regulations of Canadian Transport Commission at Ottawa. Railways are also governed by Railway Act. (c. R-4). Dominion pipelines and provincial pipe lines extending beyond province are also governed by Dominion statute and by regulations of National Energy Board, at Ottawa. Purely provincial railways are governed by Alberta law and by regulations of Alberta Transportation Safety Board. (c. R-4). Purely provincial pipelines are governed by Alberta law as contained in The Pipeline Act. (c. P-15). Energy Resources Conservation Commission and, if applicable, Alberta Utilities Commission regulate intra-provincial pipelines. (c. P-45). Since Jan. 1, 2008, Alberta Energy and Utilities Board (EUB) has been separated into two distinct regulatory bodies: Energy Resources Conservation Board (Energy Resources Conservation Act, c. E-10) which regulates oil and gas industry and Alberta Utilities Commission (Alberta Utilities Commission Act, c. A-37.2) which regulates utilities industry.

Discrimination and excessive rates are prohibited under Public Utilities Act and Regulations. (c. P-45, §§ 90-91, 100).

3.04 COLLECTION AGENCIES:

Fair Trading Act, c. F-2, and Collection and Debt Repayment Practices Regulations (A.R. 194/99). Subject to some exceptions, persons carrying on activities of collection agency must be licensed. (c. F-2, § 111). License of collector may be canceled or suspended. (c. F-2, § 112).

3.05 CONSUMER PROTECTION:

See topic 3.16 Sales.

There is no “plain language” or similar legislation in force in Alberta.

3.06 CONTRACTS:

Common Parties Contracts and Conveyances Act has been repealed but relevant provisions still exist governing certain cases such as easements or restrictive covenants in conveyances between common parties. (Law of Property Act, c. L-7, §§ 10-13). Contracts otherwise governed generally by common law principles. One exception to this principle exists for easements and restrictive covenants between common parties (see Land Titles Act, c. L-4, §§ 67-72).

Distributorships and Dealerships.

Franchises Act, c. F-23, §§ 4-6, requires disclosure document with defined content to be provided to franchisee 14 days before execution or payment, whichever is first. Lists circumstances where disclosure document is not required. See topic 3.08 Franchises.

3.07 FACTORS:

Where a mercantile agent is, with the consent of the owner, in possession of goods or of the documents of title to goods, any sale, pledge or other disposition of the goods made by him to any person in good faith when acting in the ordinary course of business of a mercantile agent is as valid as if he were expressly authorized by the owner of the goods to make the same. And where a person having sold goods continues in possession of the goods or documents of title thereto the delivery or transfer by that person, or by a mercantile agent acting for him, of the goods or documents of title under any sale, etc. to any person receiving same in good faith and without notice of previous sale, is of the same effect as if the person making the delivery or transfer were expressly authorized by the owner of the goods to make the sale. (Factors Act, c. F-1, §§ 2, 10).

Liens.

If owner gives possession of goods to other person for sale or on consignment, or has shipped goods in name of another person and consignee is unaware person is not owner of goods, consignee has same lien on goods as if person were owner and may transfer lien to another person. (c. F-1, § 8).

3.08 FRANCHISES:

Franchises in Alberta are governed by Franchises Act, c. F-23. Alberta and Ontario (Arthur Wishart Act [Franchise Disclosure, 2000, S.O., 2000, c. 3]) are first Canadian provinces which to date have enacted specific legislation dealing with franchises. PEI passed franchises legislation in 2006 (Franchises Act, R.S.P.E.I. 1988, c. F-14.1) and New Brunswick in 2007 (Franchises Act, S.N.B. 2007, c. F-23.5).

Franchise Definition.

“Franchise” means business in which goods or services distributed under marketing or business plan prescribed in substantial part by franchisor that is substantially associated with trademark, trade name, logotype or advertising of franchisor, and that involves continuing financial obligation to franchisor by franchisee and significant continuing operational controls by franchisor on operation of business or payment of franchise fee. (c. F-23, § 1[1][d]).

Disclosure Documents.

Franchisor must give every prospective franchisee copy of its disclosure document at least 14 days before signing of any agreement relating to franchise or any payment of consideration. Document must comply with requirements of Regulations (A.R. 240/95, §§ 2, 3), including all material facts, certificate signed by franchisor stating document contains no untrue statement of material fact, etc., financial statements of franchisor for recent fiscal year prepared in accordance with G.A.A.P., and all proposed franchise agreements. (A.R. 240/95, §§ 2, 3, c. F-23, § 4). Franchisor must provide, in writing, to prospective franchisee description of any material changes. (c. F-23, § 4[4]). Payment of consideration does not include payment of fully-refundable deposit, defined in Regulations as maximum of 20% of initial franchise fee. (c. F-23, § 4[6] and A.R. 240/95, § 5).

Exceptions.

Franchisor not required to provide financial statements in disclosure document if franchisor has net worth of $5 million, or $1 million if franchisor is controlled by corporation whose net worth is more than $5 million, and if franchisor has at least 25 franchisees conducting business during previous five-year period from disclosure document, has conducted business continuously for at least five years preceding disclosure document date, or is controlled by corporation meeting either of these requirements. (A.R. 312/2000, § 1).

Exemptions from requirement of franchisor to deliver disclosure document include: sale of franchise by franchisee if he is not franchisor or associate or corporate employee of franchisor, and sale is not effected by franchisor; sale of franchise to officer or director of franchisor who held office for at least six months; sale of additional franchise to existing franchisee; renewal or extension of existing franchise agreement; sale of franchise that has total annual investment not exceeding $5,000 (A.R. 240/95, § 6, c. F-23, § 5); sale of franchise by executor, receiver, trustee in bankruptcy, etc. on behalf of person other than franchisor; sale of right of person to sell goods/services within retail establishment as department or division of establishment if not required to purchase goods/services from operator of retail establishment; and sale of fractional franchise (defined as franchise granted to person whose sales do not exceed 20% of total sales of business—c. F-23, § 1[1][c] and A.R. 240/95, c. F-23, § 6).

Other.

Requirement that franchisor delivers disclosure document to franchisee does not apply to sale of franchise if agreement was entered into prior to Nov. 1, 1995, and prospectus or statement of material facts was given in compliance with former Act. (c. F-23, § 22[1]).

Fair Dealing.

Every franchise agreement imposes on each party duty of fair dealing in its performance and enforcement. (c. F-23, § 7).

Right to Associate.

Franchisor cannot prohibit or restrict franchisee from forming organization of franchisees or from associating with other franchisees. Franchisor must not directly or indirectly penalize franchisee from engaging in such activities. (c. F-23, § 8). If franchisor contravenes this provision, franchisee has right of action for damages against franchisor. (c. F-23, § 11).

Remedies.

If franchisee suffers loss because of misrepresentation contained in disclosure document, franchisee has right of action for damages against franchisor and every person who signed document. If document contains misrepresentation, franchisee is deemed to have relied on it. (c. F-23, § 9). All parties found liable in action under Act are jointly and severally liable. (2000, c. F-23, § 12). Act states rights of action conferred by Act are in addition to and do not derogate from any other rights parties have at law. (c. F-23, § 15). Franchisor not liable for misrepresentation where: it proves franchisee purchased franchise with knowledge of misrepresentation (c. F-23, § 10[1]); person other than franchisor not liable if person proves disclosure document given without that person’s knowledge or consent (c. F-23, § 10[2]); person other than franchisor not liable unless person did not conduct investigation sufficient to identify misrepresentation or they believed there was misrepresentation (c. F-23, § 10[3]). Exemptions from liability also provided relating to statements made on authority of expert. (c. F-23, § 10[2][c]).

Rescission.

Where franchisor fails to give franchisee disclosure document in accordance with time requirements of Act, prospective franchisee can rescind franchise agreement by giving notice of cancellation no later than 60 days after receiving disclosure document or no later than two years after granting of franchise, whichever occurs first. (c. F-23, § 13). Notice of cancellation operates to cancel franchise agreement. (c. F-23, § 14[1]). Franchisor must compensate franchisee within

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30 days of receiving cancellation notice for any net losses franchisee has incurred in acquiring, setting up and operating franchised business. (c. F-23, § 14[2]).

Governing Law, Jurisdiction and Waivers.

Law of Alberta applies to all franchise agreements. (c. F-23, § 16). Any choice of law or choice of forum clauses in franchise agreements designating venue or law outside Alberta is void. (c. F-23, § 17). Any waiver or release by franchisee of any rights given under Act or Regulations is void. (c. F-23, § 18).

Self-Government.

Lieutenant Governor-in-Council can designate one or more bodies to govern franchising and to promote fair dealing among franchisors and franchisees in Alberta, though none has been designated yet. Any such body must be corporation and capable of governing persons involved in franchising. Lieutenant Governor-in-Council can make Regulations dealing with administration, exercise of powers, duties and functions of designated body, and levy of fees. (c. F-23, § 21).

3.09 FRAUDS, STATUTE OF:

The Imperial Statute of Frauds (29 Car. 2, c. 3) is in force in Alberta as “received statute”. Fourth section provides as follows: “No action shall be brought whereby to charge any executor or administrator upon any special promise to answer damages out of his own estate; or whereby to charge the defendant upon any special promise to answer for the debt, default, or miscarriage of another person; or to charge any person upon any agreement made in consideration of marriage; or upon any contract or sale of lands, tenements or hereditaments, or any interest in or concerning them; or upon any agreement that is not to be performed within the space of one year from the making thereof; unless the agreement upon which action shall be brought, or some memorandum, or note thereof, shall be in writing and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorized.”

Contracts of Sale.

Under the Sale of Goods Act no contract for the sale of goods of the value of $50 or upwards is enforceable unless the buyer accepts part of the goods so sold and actually receives the same or gives something in earnest to bind the contract or in part payment, or unless some note or memorandum in writing of the contract is made and signed by the party to be charged or his agent in that behalf. (c. S-2, § 6).

Services in Connection with Sale of Land.

No action shall be brought to charge any person, either by way of commission or otherwise for services rendered in connection with the sale of land, or interest therein, unless: (a) Brokerage agreement or memorandum thereof is in writing; signed by party to be charged or his agent thereunto lawfully authorized in writing or (b) party to be charged has effected sale or lease of land or interest in it as result of services of such agent, and has executed transfer or lease or agreement of sale of land entitling purchaser to possession of land which has been signed by all parties and delivered to purchaser. (Real Estate Act, c. R-5, § 22).

3.10 INFORMATION TECHNOLOGY, INTERNET AND NEW MEDIA:

Computer Programs.

See Canada Law Digest (category Intellectual Property, topic Copyright).

Database Protection.

See Canada Law Digest (category Intellectual Property, topic Copyright).

Electronic Media.

Filing of returns (Alberta Corporate Tax Act, c. A-15, § 36.1), marketing (Fair Trading Act, c. F-2), and certain other applications, for example, fuel tax reimbursements (A.R. 62/2007) can be facilitated through electronic media. Minister has authority to regulate marketing of goods and services through electronic media and Internet (Fair Trading Act, c. F-2, § 42). Proclamation in 2003 of Electronic Transactions Act further expanded scope of legal enforceability of electronic documents. (R.S.A. 2001, c. E-5.5). Federal electronic document enforceability is dealt with under Part 2 of Personal Information Protection and Electronic Documents Act. (S.C. 2000, c. 5).

Internet.

Internet is approved means of advertising cemetery and funeral services. (Cemeteries Act, c. C-3, § 70[4], Funeral Services Act, c. F-29, § 12[3]).

Telecommunications.

Court applications may be made by telecommunication in situations where party cannot attend court. (A.R.C., A.R. 390/68, § 385.1). This includes telewarrants (Environmental Protection and Enhancement Act, c. E-12, § 206; Water Act, c. W-3, § 132), and applications for extension of warrants (Mental Health Act, c. M-13, § 11). In general, telecommunications are governed by federal legislation due to interprovincial links that exist in Canadian telecommunications.

3.11 INTEREST:

Loan Agreements.

See generally Canada Law Digest. Subject to some exceptions, there are disclosure requirements on credit grantors and lessors to disclose total cost of credit to borrowers and lessees. (Fair Trading Act, c. F-2, Part 9). Cost of credit is determined by taking into account several items which might otherwise be excluded from interest rate calculation. (c. F-2, § 59). There are obligations on credit grantor to disclose changes in interest rates under fixed credit agreements. (c. F-2, Part 9). Acceleration clause only effective upon written notice of default or other event. There are disclosure requirements with respect to advertisements stating or implying that no interest is payable for certain period. If these disclosure requirements are not met, it is deemed to represent that transaction is unconditionally interest-free during relevant period. (c. F-2, § 76). Interest must also be expressed in accordance with Interest Act, otherwise lender is limited to statutory rate. (R.S. 1985, c. I-15).

Unconscionable Transactions.

If a court decides that, by virtue of circumstances, cost of a loan is excessive and transaction is unconscionable court may open transaction and adjust its terms. (Unconscionable Transactions Act, c. U-2, § 2).

3.12 LICENSES, BUSINESS AND PROFESSIONAL:

No person may engage in designated business unless person holds licence under Fair Trading Act, c. F-2, § 104. Person must apply for license from Director. (Fair Trading Act, c. F-2, § 126). Regulations may require person to submit security for certain types of licences. (c. F-2, §§ 126[1][d], 130). Before Director refuses to issue or renew licence or suspends or cancels licence, applicant or licensee must be given written notice thereof and opportunity to make representations to Director unless that person is under investigation by Director. (c. F-2, § 128). Licensee must maintain at least three years of financial information which may be inspected by Director. (c. F-2, § 132). Licensee may be required to set up trust accounts. (c. F-2, § 133). Licensee must notify Director of change of address, partnership and offices and directors. (c. F-2, § 134). Regulatory board may be set up to fund potential claims by persons who have suffered losses by licensee. (c. F-2, § 137). Municipalities are empowered to enact licensing by-laws covering businesses, business activities and persons engaged in business. (Municipal Government Act, c. M-26, § 7[e]).

Certain classes of persons and equipment are required to be licensed under statute, regulation or municipal by-law, such as real estate and insurance agents, auctioneers, peddlers, vendors and oil construction and other equipment. See also topic Motor Vehicles. Bona fide commission travelers selling wholesale to retailer are among few exceptions to this requirement.

Federal Government imposes few nominal license fees.

Public Charitable Campaigns.

Provision is made for registration and supervision of public charitable fund-raising campaigns. (Charitable Fund raising Act, c. C-9).

Collection Agencies.

Person licensed under Private Investigators and Security Guards Act cannot act as collector of accounts. (c. P-23, § 16). Collection agency or collector must be licensed. (Fair Trading Act, c. F-2, § 111). Insurers, bankruptcy trustees, lawyers, real estate agents, and others designated by regulation are exempt. (Fair Trading Act, c. F-2, § 110).

3.13 MONOPOLIES, RESTRAINT OF TRADE AND COMPETITION:

See Canada Law Digest.

3.14 NEGOTIABLE INSTRUMENTS:

See Canada Law Digest, category Business Regulation and Commerce, topic Bills and Notes.

3.15 RESTRAINT OF TRADE:

See Canada Law Digest, category Business Regulation and Commerce, topic Monopolies, Restraint of Trade and Competition.

3.16 SALES:

The Bills of Sale Act was repealed effective Oct. 1, 1990 by Personal Property Security Act, S.A. 1998, c. P-4.05. Where goods are purchased but left in possession of vendor, purchaser may protect his interest by registering financing statement. (Sale of Goods Act, c. S-2, § 26[1], Factors Act, c. F-1, § 9[2]). See category 20 Mortgages, topic 20.04 Personal Property Security.

Conditional Sales.

Conditional Sales Act repealed effective Oct. 1, 1990. See category 20 Mortgages, topic 20.04 Personal Property Security.

Unconscionable Transactions.

See topic 3.11 Interest.

If parties to security agreement created in one province agree that goods will be kept in another province and goods are moved to other province before 30 days, security agreement will be governed by laws of other province.

Security interest in goods perfected under law of jurisdiction in which goods are situated at time security interest attaches but before goods are brought into Province continues perfected in Province if it is perfected in Province: (a) Not later than 60 days after goods are brought into Province; (b) not later than 15 days after day secured party has knowledge that goods have been brought into Province; or (c) prior to date that perfection ceases under law of jurisdiction in which goods were situated when security interest attached, whichever is earliest, but such security interest is subordinate to interest of buyer or lessee of goods who acquires his interest without knowledge of security interest and before it is perfected in Province. (Personal Property Security Act, c. P-7, § 5[2]). See category 20 Mortgages, topic 20.04 Personal Property Security.

Vendor's Remedy.

Vendor may enforce his interest in purchase-money security agreement in one, but not both, of two ways. If goods are surrendered by debtor to secured party with latter's consent, taken into custody and control of receiver or receiver-manager and disposed of, seized and disposed of or retained by secured party, then indebtedness of debtor under purchase money security agreement is extinguished. Alternatively, if vendor brings action on covenant to pay, and goods are seized under writ of execution and sold, then secured party's rights are limited to amount realized from such sale. Any attempted waiver or release protection offered by this legislation is against public policy and void. (Law of Property Act, c. L-7, § 53). These provisions do not apply where, after seizure, goods are destroyed or damaged to such extent that secured party's security is materially impaired either by willful act of debtor or his neglect or otherwise. (c. L-7, § 54).

See category 20 Mortgages, topic Personal Property Security for applicable rules after Oct. 1, 1990.

Consumer Credit Transactions.

Every credit grantor must provide written disclosure statement to borrower setting out information provided in regulations to borrower. (Fair Trading Act, c. F-2, §§ 62-65).

Bulk Sales.

See category 8 Debtor and Creditor, topic 8.10 Fraudulent Sales and Conveyances.

Door to Door Sales.

Direct Sales Cancellation Act, R.S.A. 1980, c. D-35, §§ 4, 6.1 was repealed and replaced by Fair Trading Act, c. F-2, effective Sept. 1, 1999. Subject to Direct Sales Cancellation and Exemption Regulation (A.R. 191/99) regulations, consumers have absolute right to cancel direct sales contract ten days after consumer receives written copy of contract. (c. F-2, § 27). In certain circumstances, cancellation period can be extended. (c. F-2, § 28). Direct sales contract is canceled by giving notice by personal service, registered mail, courier or telecopier or by any other method which consumer can provide evidence of cancellation date. (c. F-2, § 29).

Product Liability.

Where buyer makes known to seller purpose for which goods are required and relies on seller's or manufacturer's judgment or skill, there is implied condition of fitness for such purpose. If goods are purchased by description from seller or manufacturer who deals in goods of such description, there is implied condition that goods are of merchantable quality. There is no implied condition as regards defects if buyer examines goods. (Sale of Goods Act, c. S-2, § 16). Manufacturer's liability for defective goods, qua manufacturer, is governed by common law.

Unfair Trade Practices.

The Unfair Trade Practices Act, R.S.A. 1980, c. U-3 was repealed and replaced effective

Sept. 1, 1999 by Fair Trading Act, c. F-2. Unfair trade practices are prohibited and comprehensive set of options are available to consumers who are victims of unfair trade practices. (c. F-2, Part 2). Consumer is not liable for any goods or services under negative option. (c. F-2, § 22). Supply of goods through negative option practice is prohibited. (c. F-2, § 23). Competition Act (R.S.C. 1985, c. C-34, as am'd) purports to provide civil remedy as well as criminal and quasi-criminal remedies.

3.17 SECURITIES:

Licences.

Under Securities Act, c. S-4, no person may engage in trading of any securities or exchange contracts, acting as underwriter or acting as advisor, unless registered in accordance with Alberta securities law. (c. S-4, § 75).

Provincial and Foreign Companies.

Commission assumes extra provincial jurisdiction to extent permitted by foreign jurisdiction. (c. S-4, § 24).

Franchises.

See topic 3.08 Franchises.

3.18 STATUTE OF FRAUDS:

See topic 3.09 Frauds, Statute of.

3.19 WAREHOUSEMEN:

Grain elevators, etc., are regulated by Canada Grain Act, R.S.C. 1985, c. G-10.

Lien.

Where goods on which lien exists are deposited by any person entrusted with possession thereof, warehouseman must, within two months after deposit, give notice of his lien to owner or person who has security interest in goods registered under provisions of Personal Property Security Act. (Warehousemen's Lien Act, c. W-2, § 5).

Every warehouseman has a lien on goods deposited with them for storage whether deposited by owner of goods or by his authority or by any person entrusted with possession of goods by owner or by his authority. (c. W-2, § 3).

Warehouse Receipts.

A warehouse receipt is a document issued by a person who receives goods for storage for reward, stating that certain goods therein mentioned are deliverable to a person therein named or his assigns by endorsement. Effect of such an endorsement is an authority to receive possession. Endorsee should take prompt steps to receive possession or have warehouseman attorn to him. (Warehouse Receipts Act, c. W-1, §§ 3, 7).

Security for Loans.

Under provisions of the Bank Act, S.C. 1991, c. 46, money may be loaned on security of warehouse receipts, bills of lading, etc. provided certain conditions are met.

4 CITIZENSHIP

4.01 ALIENS:

Resident aliens are under practically no disability except as to right to vote in parliamentary elections. They have same exemption (see category 8 Debtor and Creditor, topic 8.08 Exemptions) and homestead (see category 8 Debtor and Creditor, topic 8.13 Homesteads) rights as citizens but are subject to special registration requirements (see category 21 Property, topic Real Property). Acquisitions by nonresidents are subject to restrictions in case of businesses (Investment Canada Act R.S.C. 1985 [1st Supp.], c. 28) and in case of rural land (Citizenship Act, R.S.C. 1985, c. C-29, § 35 and Agricultural and Recreational Land Ownership Act, c. A-9 and A.R. 160/79, as am’d).

Nonresident alien may own property and transfer it and deal with it same as resident alien, subject to above restrictions.

See category 21 Property, topic 21.01 Absentees.

5 CIVIL ACTIONS AND PROCEDURE

5.01 ACCORD AND SATISFACTION:

An accord may be defined as an agreement to accept in extinction of an obligation something different from or less than that which the person agreeing to accept it is entitled.

Part performance of an obligation, either before or after a breach thereof, when expressly accepted by the creditor in satisfaction or rendered in pursuance of an agreement for that purpose though without any new consideration is held to extinguish the obligation. (Judicature Act, c. J-2, § 13).

A right of action for breach of contract can be discharged by deed or parol agreement with consideration amounting to accord and satisfaction. Part performance is sufficient.

A negotiable note although for a less amount than the debt may be good satisfaction thereof if so taken.

5.02 ACTIONS:

Distinction between law and equity is preserved, but same courts administer both common law and equity and equity rules govern in case of conflict. (c. J-2, § 15).

Forms of Action.

Court allows parties greatest freedom in form of their action. As long as necessary facts are pleaded form makes little difference subject only to its being as clear and concise as possible. Amendments may be allowed by Court at any stage, even at trial providing other party is not greatly prejudiced or lawsuit unfairly delayed and then they might be allowed and other party recompensed with costs. (A.R.C. 132). Underlying principle is that parties should not be prevented from obtaining redress simply because of formality. Frivolous, vexatious or scandalous action will be struck out as will pleadings that disclose no cause of action. (A.R.C. 129).

Jurisdiction.

Court of Queen’s Bench has jurisdiction over most civil matters. (Court of Queen’s Bench Act, c. C-31). For many claims in debt not exceeding $25,000 and/or in damages not exceeding $25,000 (Parris v. Reber [1994], 22 Alta. L.R. [3d] 78 [Prov. Ct.] and A.R. 329/89, § 1.1). Small Claims Court is also available and parties are not generally represented by counsel. (Provincial Court Act, c. P-31).

Commencement.

Except in certain specified cases all actions in Court of Queen's Bench are brought by way of statement of claim, which is merely recital of facts alleged and claim for redress required. (A.R.C. 6, 104). Matrimonial causes other than divorce are included in this general rule. (A.R.C. 578). Claims against Crown or ministers or departments of Crown or government may now be commenced as of right in most cases. (Proceedings Against the Crown Act, c. P-25). In certain land cases and trust matters, and when seeking declaration settling priority between interests or charges relating to land, action is commenced by originating notice which is really notice of application to court for relief claimed. (A.R.C. 410). Application for judicial review of decision of administrative decision maker is also commenced by originating notice. (A.R.C. 753.03). Proceedings for relief offered by statutes, where no procedure is set out may often be obtained by ex parte application with affidavit evidence. (A.R.C. 394-5). Proceedings may be commenced by issue of petition where permitted by statute, there is no person against whom relief is sought, person against whom relief is sought is unknown or unascertained or there are no issues of fact. (A.R.C. 6[3]).

Parties.

Any person may be made defendant (A.R.C. 38[3]) by order of court. No person can be added as plaintiff without his consent. (A.R.C. 38). Where proper parties not joined judgment may be rendered saving their rights. (A.R.C. 40). All persons as to whom common questions of law or fact arise may be joined as defendants. (A.R.C. 46). Where action commenced in name of wrong plaintiff proper person may be substituted or added upon such terms as may be ordered by court. (A.R.C. 38[2]).

Joinder and Severance.

Plaintiff may join several causes of action arising out of one transaction or series of transactions (A.R.C. 32), but trustee in bankruptcy suing as such must obtain leave of court to join claim in any other capacity (A.R.C. 33). Where causes are improperly joined or cannot be finally disposed of in one action any cause may, by order, be tried separately. (A.R.C. 37).

Consolidation.

Actions involving common questions of law or fact where it is desirable, may be ordered tried consecutively, at same time, or consolidated. (A.R.C. 229).

Abatement.

Action does not abate because of death or insolvency of party if cause of action survives, nor because of devolution of estate pendente lite. Death of party after hearing of all evidence but before judgment does not cause abatement, whether or not cause of action is one which would survive. (A.R.C. 54, 55).

Limitation of.

See topic 5.14 Limitation of Actions.

Small Claims.

See category 6 Courts and Legislature, topic 6.01 Courts.

Stay of Proceedings.

Where defendant has paid money into court in satisfaction and plaintiff has accepted it, all further proceedings except as to enforcement are stayed. (A.R.C. 172).

Termination.

Before an action has been set down for trial plaintiff may at any time discontinue his action subject only to being liable to defendant for his costs. After action is set down for trial plaintiff can only discontinue with leave of court. Defendant may withdraw his opposition to action at any time, with leave of court, thereby allowing plaintiff's claim to succeed. (A.R.C. 225). Actions may terminate by non-prosecution. Where five years have expired from last step that materially advances action, court will dismiss action upon application of defendant. (A.R.C. 244.1[1]). If there has been any delay in prosecution, defendant can apply for dismissal or for directions from court to expedite matter. (A.R.C. 244[1]).

Direct Actions Against Insurer.

See category 23 Transportation, topic 23.02 Motor Vehicles, subhead Direct Actions.

See also topic 5.17 Practice.

5.03 APPEAL AND ERROR:

Appeals from decision of judge of Court of Queen's Bench are taken to Court of Appeal. (A.R.C. 505). Notice of appeal should be given within 20 days of entry and service of order or judgment appealed from, but time may be extended by order of court. (A.R.C. 506, 548). Further appeal may be taken from judgment of appellate division to Supreme Court of Canada at Ottawa but only with leave of that Court. (Supreme Court Act, R.S.C. 1985, c. S-26, § 37).

Leave to appeal to appellate division is necessary where amount in question is less than $25,000. (A.R.C. 505[4]).

Review.

Appeal from Court of Queen's Bench is by way of review only. Appeals from Provincial Court Civil Division are to Queen's Bench, and heard as appeal on record unless on application by party, Court of Queen's Bench orders appeal to be heard as trial de novo. (Provincial Court Act, c. P-31, § 51).

Stay.

An appeal does not per se operate as a stay of enforcement or of proceedings on judgment or order of trial court. (A.R.C. 508).

Bond.

No security for costs required unless special circumstances in appeals (A.R.C. 524) but is required in appeal to Supreme Court of Canada (R.S.C. 1985, c. S-26, § 60).

5.04 CERTIORARI:

Certiorari.

Proceedings are commenced by originating notice to be served on person from whose decision, act or omission relief is claimed, Attorney General and every person directly affected by proceedings (A.R.C. 753.09) and it is brought on for hearing before judge of Court of Queen's Bench. Common law provides that in absence of privative clause, certiorari will lie, in respect of court or tribunal where, inter alia, there is lack of or excess of jurisdiction, where there is error of fact on record, where there has been abuse of jurisdiction or where reasonable apprehension of bias can be shown. Writ of certiorari is not issued but order in nature of certiorari is, containing all necessary provisions. (A.R.C. 738).

Statutory right of appeal may bar certiorari unless exceptional circumstances. (Chad

Investments Ltd. v. Longson, Tammets & Denton Real Estate Ltd. et al., [1971], 5 W.W.R. 89 [Alta. S.C. (A.D.)]; see also Dalen v. Grande Prairie [County], 2003 ABQB 415, 332 A.R. 375).

5.05 CHARITABLE IMMUNITY:

See topic 5.07 Damages.

5.06 COSTS:

Governed by tariff fixed by court rules. Court has discretion, but successful party usually entitled to disbursements and costs based on such tariff. Security for costs may be required of nonresident plaintiff having no property in province, where action is brought by nominal plaintiff or on behalf of class. (A.R.C. 593). Security for costs may be in cash or by bond, application by defendant anytime after service of statement of claim. (A.R.C. 594).

When there has been delay in prosecution of action defendant may be awarded solicitor-client costs or interim costs, plaintiff may be denied costs or be required to post security for costs, and costs may be ordered payable personally by plaintiff's solicitor. (A.R.C. 244.4).

5.07 DAMAGES:

Common law generally prevails. See also category 13 Estates and Trusts, topic 13.04 Death.

Comparative Damages.

Where damage is caused by more than one person court may apportion degree of fault and assess damages accordingly. (Contributory Negligence Act, c. C-27).

Charitable Immunity.

Doctrine of charitable immunity is not recognized in Alberta law.

5.08 DECLARATORY JUDGMENTS:

See topic 5.13 Judgments.

5.09 DEPOSITIONS AND DISCOVERY:

Without the Province.

Where testimony of any person without limits of Alberta is required court may order issue of a commission for examination of such person. (A.R.C. 200 [1.1][5] and 270). Such examination must, unless otherwise ordered, be conducted in accordance with practice upon examination of witnesses at trial, so far as is applicable. (A.R.C. 270).

Party having carriage of commission must give notice prescribed by order of intention to despatch commission and order provides for notice of time and place to take examination. (A.R.C. 273). Any party may be represented by counsel at examination. Witness is examined on oath, affirmation, or otherwise in accordance with religion of witness. (A.R.C. 274). Unless otherwise directed, examination of witnesses shall be by oral questions and oral questions and answers thereto shall be reduced into writing and returned with order or commission. (A.R.C. 275). Interrogatories may be used. (A.R.C. 276).

Affidavits obtained abroad may be admitted in the discretion of the court, but are seldom admitted if the facts deposed to are in dispute.

Within the Province for Use Here.

Without court order, any adverse party to action, any officer of adverse corporate party and any person who has been employed by any adverse party to action within or without province whether permanently or temporarily can be examined for discovery before trial of any pending civil action. (A.R.C. 200, 204). Examination is on notice, and is like examination of witness at trial although broader in scope, and is transcribed and can be filed or put before court either during application or at trial. (A.R.C. 212, 214). Any enforcement debtor may be examined in aid of execution. (A.R.C. 371 and 372).

Within the Province for Use Elsewhere.

When it is made to appear to a judge that any foreign court or tribunal of competent jurisdiction has duly authorized by commission or otherwise the obtaining of testimony in relation to a matter pending the judge may order that the evidence of any witness within Alberta be taken before the person appointed. (Alberta Evidence Act, c. A-18, § 56).

De Bene Esse.

Depositions may be taken in any action de bene esse on order of court. (A.R.C. 270). Ordinarily depositions made to perpetuate testimony are not of very great value unless they come under category of confessions, admissions against interest, statements re pedigree, etc.

Compelling Attendance of Witnesses.

Provided witness has been properly served within jurisdiction, his attendance may be procured and his examination conducted in same manner as that of witness at trial. (A.R.C. 292, 293).

5.10 EQUITY:

See topic 5.02 Actions.

5.11 EVIDENCE:

See topic 5.09 Depositions and Discovery.

Witnesses.

All persons may testify except those of unsound mind or children not of sufficient age to understand the nature of an oath.

Children.

Where a child of tender years is offered as a witness and such child does not, in the opinion of the judge, understand the nature of an oath, its evidence may be received not on oath if, in the opinion of the judge, the child is possessed of sufficient intelligence to justify the receipt of the evidence and understands duty of speaking truth. Corroboration is necessary in such case. (Alberta Evidence Act, c. A-18, § 19).

Interest.

There is no disqualification by reason of previous conviction or interest. (c. A-18, § 3).

Affirmation.

Witnesses may affirm. (c. A-18, § 17).

Privileged Communications.

Communications between solicitors and clients are privileged, also certain state documents.

Communications between spouse or adult interdependent partner during their marriage or adult interdependent relationship are not compellable. (c. A-18, § 8).

Self-incrimination.

Witness is not excused from answering questions on ground that they may tend to incriminate him, but providing he claims privilege on that ground, while he may be compelled to give evidence to incriminate him, such evidence cannot be used against him in any prosecution under an Alberta Act except in prosecution for perjury or for giving of contrary evidence. (c. A-18, § 6). Under Canadian Charter of Rights and Freedoms such evidence cannot be used to incriminate that witness in any proceedings, except in prosecution for perjury or for giving of contradictory evidence. (Constitution Act, 1982, Part 1, § 13).

5.12 INJUNCTIONS:

Injunction order may be obtained in all cases in which it may appear to court just or convenient to make such order. (Judicature Act, c. J-2, § 13[2]). Order for preservation and inspection of property may be granted upon such terms as may appear just to preserve property or interest therein in status quo pending final determination of action. (A.R.C. 468). Except that no injunction before trial shall be granted ex parte to restrain any person from doing any act in connection with strike or lockout. (Labour Relations Code, c. L-1, § 92). Injunction order is not usually made where damages would be adequate remedy. (Scozzafava v. Prosperi, 2003 ABQB 248, [2003] 6 W.W.R. 351).

5.13 JUDGMENTS:

When an action is defended, judgment is given by the court in the usual way.

Judgment by Consent.

The defendant may consent to judgment against him. (A.R.C. 329).

Summary Judgment.

After a defense has been entered summary judgment may be obtained in certain cases where the plaintiff can show the defendant has no defense or that only genuine issue is as to amount, or question of law. If there is any possibility of his having defense court usually will not deprive him of it. Defendant can now also apply for summary judgment on basis that plaintiff's claim is without merit or that only genuine issue is to amount. (A.R.C. 159).

Declaratory Judgments.

Court has jurisdiction to give declaratory judgments. (Judicature Act, c. J-2, § 11).

Default Judgments.

After commencement of any action for debt, liquidated damage or recovery of goods or land if defendant does not enter defense within stipulated time, final judgment may be signed against him and executions issued. (A.R.C. 148, 149). In any other kind of action he may be "noted in default" and thereby prevented from entering defense. It is then necessary to have amount of judgment, etc., fixed by judge. (A.R.C. 142, 152). Plaintiff can have vacated its own default judgment to prevent any possible res judicata.

Life of Judgment.

Judgments are valid for ten years. They may be sued upon during that time in which case they are good for ten years again. Once judgment expires, all rights thereunder are lost. (Limitations Act, c. L-12, § 11, A.R.C. 331). See topic 5.14 Limitation of Actions.

Setting Aside Judgment.

Court may set aside or vary any judgment entered upon default of defense, or may permit defense to be filed by party noted in default. (A.R.C. 158).

Assignment.

Judgments may be assigned for value and the assignee has all the rights and privileges of the original plaintiff.

Following is per Alberta Court Forms as Satisfaction Piece No. 19.3:

19.3 SATISFACTION PIECE

IN THE COURT OF QUEEN'S BENCH OF ALBERTA JUDICIAL DISTRICT OF [**DISTRICT**]

BETWEEN

[Style of Cause]

SATISFACTION OF JUDGMENT PIECE

SATISFACTION OF THE JUDGMENT in the within action is hereby acknowledged on behalf of the Plaintiff, and the Plaintiff hereby consents to a Memorandum of Satisfaction being endorsed by the Clerk of this Honourable Court.

DATED at the [**City/Town**] of [**Place**], in the Province of Alberta, this [**Date**].

[Name of Firm]

Per: ____________________

Solicitors for the Plaintiff

[Print Name of Lawyer signing]

TO: Clerk of the Court

Foreign Judgments.

May be sued upon in this jurisdiction. They are considered to be simple contract debts or liquidated demands and if not disputed judgment may be entered thereon.

There is a Reciprocal Enforcement of Judgments Act, c. R-6, in force in this province by virtue of which judgment may be entered forthwith upon production of a certified copy of judgment obtained in another jurisdiction together with certain affidavits. This act is only in force at present time with regard to provinces of Saskatchewan, Ontario, Manitoba, British Columbia, North West Territories, Newfoundland, New Brunswick, Nova Scotia, Prince Edward Island, Yukon Territory, Nunavut, Commonwealth of Australia and U.S. States of Washington, Idaho and Montana.

Following is per A.R. 487/81, Reciprocal Enforcement of Judgments Act Form Regulation:

Reciprocal Enforcement of Judgments

(Section 2)

CERTIFICATE

CANADA

Province of ______________ (or as the case may be) _______________

To all to whom these Presents shall come _________________ GREETING:

It is hereby certified that, among the records enrolled in the court of __________ at ___________, before the Honourable ______________ a Justice (Judge) of the Court, in the Procedure Book there is record of an action, numbered as No. ____________

BETWEEN:

____

Plaintiff(s)

and

____

Defendant(s)

1 The writ of summons (statement of claim or as the case may be) was issued on the _______ day of ________ 20 ____ and proof was furnished to this court that it was served on the defendant by delivery of a copy thereof to him and leaving it with him and exhibiting the original thereof to him at the time of the service.

2 No defence was entered, and the judgment was allowed by (proof, default, or order)

____

or

2 A defence was entered and judgment was allowed at the trial (or as the case may be)

____

3 Judgment was entered on the _______ day of ___________20 _____.

4 Time for appeal has expired and no appeal is pending (or An appeal against the judgment was made and was dismissed by the Court of Appeal and the time for any further appeal has expired and no further appeal is pending.)

5 Further details if any.

6 Particulars:

Claim $

Costs to judgment $

Subsequent costs $

Interest $

+$

Paid on $

And the balance remaining due to the

judgment for debt, interest and

costs is the sum of $

All and singular which premises by the tenor of these presents we have commanded to be certified.

IN TESTIMONY WHEREOF we have caused the Seal of our Court at __________ to be hereunto affixed.

WITNESS, The Honourable __________ a Justice (Judge) of our Court at __________ this _______ day of _______ 20 _____

SEAL

A Justice (Judge) of the Court of

or

Clerk of the Court of

Reciprocity of judgments for U.K. of Great Britain and Northern Ireland comes under International Conventions Implementation Act. (c. I-6). For support orders, Interjurisdictional Support Orders Act, S.A. 2002, c. I-3.5, is in force with regards to the following reciprocating jurisdictions: Bailiwick of Jersey; Barbados; in Canada the Northwest Territories, Nunavut, Yukon Territory and the Provinces of British Columbia, Manitoba, New Brunswick, Newfoundland and Labrador, Nova Scotia, Ontario, Prince Edward Island, Quebec, and Saskatchewan; Commonwealth of Australia; Czech Republic; Federal Republic of Germany; Independent State of Papua New Guinea; Isle of Man; Kingdom of Norway; New Zealand; Republic of Austria; Republic of Poland; Republic of Singapore; Republic of South Africa; Republic of the Fiji Islands; Slovak Republic; United Kingdom of Great Britain and Northern Ireland (including England, Northern Ireland, Scotland and Wales); United States of America (including the fifty states, American Samoa, District of Columbia, Guam, Puerto Rico, United States Virgin Islands and any other jurisdiction of the United States participating in Title IV-D of the Social Security Act [U.S.A.]).

5.14 LIMITATION OF ACTIONS:

Note: Limitation of Actions Act has been repealed and replaced with Limitations Act, c. L-12.

Actions must be commenced within two years of when claim was discovered or ought to have been discovered or within ten years of claim arising, whichever is earlier. (c. L-12, § 3).

Application.

Limitations Act (c. L-12) came into force Mar. 1, 1999. If before Act came into force, claimant knew or ought to have known of claim and has not sought remedial order before earlier of time provided under repealed Limitation of Actions Act, or two years after coming into force of Limitations Act, defendant will have immunity from claim. (§ 2[2]). (Seidel v. Kerr, 2003 ABCA 267, [2004] 1 W.W.R. 53).

With limited exceptions and subject to specific limitation periods in other statutes, Act applies to all claims for remedial orders sought in Alberta courts or claims arising in Alberta for which remedial order is sought in Federal Court. (c. L-12, § 2[3]). Act does not apply where remedial order based on adverse possession of real property owned by Crown or where remedial order subject to limitation provision in any other enactment of Province. (c. L-12, § 2[4]).

Disability of Plaintiff.

Operation of limitation time periods are suspended during any period of time that claimant is person under disability. (c. L-12, § 5). Where claimant brings action against parent or guardian, or any person for cause of action based on conduct of sexual nature, limitation periods are suspended during time claimant is minor. (c. L-12 § 5.1, *Public Trustee General Regulation*, A.R. 241/2004).

Fraudulent Concealment.

Limitation period is suspended during any period of time where defendant fraudulently conceals occurrence of claimant's injury. (c. L-12, § 4).

Agreement, if in writing and signed by person adversely affected, can extend limitation period if agreement expressly provides for such extension. (c. L-12, § 7). Amendment has been passed (S.A. 2002, c. 17, § 4) which provides that any agreement, which purports to reduce applicable limitation period, is invalid. (§ 7[2]).

Acknowledgment and Part Payment.

Running of statute may be interrupted by part payment or written acknowledgment of sum due and unpaid regardless of whether or not promise to pay can be implied from it or whether or not it is accompanied by refusal to pay. In such cases statute begins to run anew from time to time of such acknowledgment or part payment. (c. L-12, §§ 8, 9).

Actions by Aboriginal People.

Action brought by aboriginal people against Crown based on breach of fiduciary duty will continue to be governed in accordance with repealed Limitation of Actions Act. (c. L-12, § 13).

Pleading.

In order to be available as defense statute of limitations must be pleaded. (A.R.C. 109).

See also category 23 Transportation, topic 23.02 Motor Vehicles, subhead Direct Actions.

5.15 PARTITION:

Proceedings for partition are by action or by Originating Notice in Court of Queen's Bench. If inconvenient to adjust rights by partition, sale will be directed. (Law of Property Act, c. L-7, Part 3).

5.16 PLEADING:

Pleadings in civil actions must be as brief as the nature of the case will admit. Every pleading must contain only plain and concise statement in summary form and in ordinary language of material facts on which party pleading relies for his claim or defense as case may be. Pleadings must not contain evidence. They should be divided into paragraphs and numbered consecutively. All dates, sums and numbers must be expressed in figures and not in words. (A.R.C. 104, 105).

Pleadings Required or Permitted.

The following pleadings are required or permitted in civil actions: Statement of claim; originating notice of petition; statement of defense; reply by plaintiff; reply by defendant; joinder of issue; demand for particulars; reply to demand for particulars; counterclaim; defense to counterclaim; reply to defense to counterclaim; third party notice; defense to third party notice. (A.R.C. 5, 66, 69, 93).

Setoffs and Counterclaims are allowed by our courts. (A.R.C. 93).

Writs and Appearances.

Writs of summons are not used to commence actions and appearances are not filed by defendants to action.

Demurrers.

Have been abolished but application may be made to court to dispose of any question of fact or law involved in case (A.R.C. 221[1]) or to strike out pleadings as disclosing no cause of action or defense (A.R.C. 129).

Amendments.

Our courts are very liberal in allowing amendments in actions, and Court may allow pleadings to be amended even up to time of trial in proper cases but usually on conditions as to costs. (A.R.C. 132, 133, 141).

Affidavits of Defence.

Where default judgment was properly obtained, in order to open up default judgment, court will almost always require defendant to file affidavit swearing to facts showing that defendant would have defense on merits at trial. To prevent vacation period for courts from being used in computation of time allowed for obtaining default judgment, and in default of defence being delivered, defendant may file “vacation affidavit” stating that defendant has good defense on merits and intends to defend. (A.R.C. 552, 158).

Statements of Defence.

Must be delivered within 15 days of time of receiving statement of claim unless judge otherwise directs. (A.R.C. 85[1]).

Particulars.

May be asked for at any time to enable party to plead. (A.R.C. 117).

Claims.

When action is to be commenced on any claim, full information with regard to the cause of complaint should be given to solicitor together with any documents or correspondence in the claimant’s possession. Actions on promissory notes, mortgages, agreements, etc., may be commenced upon production of the instrument together with a detailed statement of the amount owing thereunder. Actions for goods sold and delivered may be commenced upon production of statement (preferably in detail) of the account.

Small Claims.

See topic 5.17 Practice; category 6 Courts and Legislature, topic 6.01 Courts.

5.17 PRACTICE:

Practice is governed by rules of court. Where rules are silent, practice is governed by analogy to existing rules. (A.R.C. 4).

In civil actions statement of claim is in force for period of 12 months from date of issue. Statement of Claim can only be renewed once during this 12 month period for further period not exceeding three months. (A.R.C. 11).

Discovery.

Any party, past or present employee or officer of corporate party to action who appears to have some knowledge touching question in issue may be orally examined on oath or affirmation by adverse party without court order. During oral examination, person is required to answer only relevant and material questions. (A.R.C. 200).

Demand for Particulars.

Further and better statement of nature of claim, defence or particulars of any pleading may be ordered within time fixed or eight days. (A.R.C. 117). Any party may by notice in writing demand admission of facts which must be answered within 30 days of service of notice or they will be deemed admitted. If admission refused unreasonably and fact proved in court, party may be liable for costs of such proof. (A.R.C. 230).

Small Claims Procedure.

Provincial Judge has jurisdiction to try any claim for debt or for damages, including for breach, rescission or specific performance of contract, return of personal property or equitable relief provided value of claim does not exceed $25,000, as well as counterclaims within similar limits. (Provincial Court Act, c. P-31, § 9.6, A.R. 329/89, § 1.1). Provincial Judge can try any such matter within Province of Alberta, but action will usually be heard in judicial district where defendant resides or cause of action arose. Special procedure set out for these claims. (c. P-31, Part 4).

Summary Trial.

Any party, by notice of motion may apply to judge for judgment in summary trial procedure, either on issue, or generally. (A.R.C. 158.1). Defendant must reply at least seven days before hearing of summary trial specifying matters which it intends to reply upon. (A.R.C. 158.2). Summary trials are by judge alone. (A.R.C. 158.3).

If issues raised by notice of motion are not suitable for summary trial, or if summary trial will not assist efficient resolution of action, it will be dismissed. (A.R.C. 158.4). Evidence adduced at summary trials may include affidavits, answers to written interrogatories, evidence pursuant to examinations for discovery, evidence taken on examination pursuant to Rule 266 or 270, documents properly produced in action, admissions under Rule 230, and with leave of judge, oral evidence. (A.R.C. 158.5).

On hearing summary trial, judge may grant judgment in favor of any party, either on issue or generally. If judge is unable to find facts necessary to decide issues of fact or law or if judge is of opinion that it would be unjust to decide issue at summary trial, full trial may be ordered. (A.R.C. 158.6).

Judge who has heard summary trial may not preside at full trial of matter unless all parties consent. (A.R.C. 158.7).

Streamlined Procedure.

Any action commenced after Sept. 1, 1998 in which money claimed (not including interest and costs) is $75,000 or less or where both parties consent in writing or when court, by order, considers it appropriate, may proceed under streamlined procedure. (A.R.C. 659).

Within 30 days of service of statement of defense, each party must file and serve its affidavit of documents which need only include those records on which: party filing may rely; may assist case of any adverse party; and is directly relevant to issue in action. (A.R.C. 661[3]). Before filing and serving affidavit of documents party must endorse on it or attach to it list of persons who at relevant time might reasonably have some knowledge of matters directly relevant to issues in action. (A.R.C. 661[4]). Where practicable, party upon request shall supply to all parties opposite in interest true copies of producible documents listed in affidavit that are under their possession and control. (A.R.C. 661[2]).

Examinations for discovery of party or corporate officer are limited to total of six hours of actual examinations not including answering undertakings but including recesses or examination on answers to undertakings. (A.R.C. 662[1]). Any party entitled to examine another party for discovery may elect that examination be by written interrogatories (not to exceed 1,000 words) directed to that other person. (A.R.C. 662[5]).

Evidence of witness may be given at trial by affidavit together with any cross-examination on it and in such case, affidavit shall not be filed with court until cross-examination on it is completed or until cross-examination is waived. (A.R.C. 664). Affidavit must be served on every party opposite in interest at least 90 days before trial. (A.R.C. 664[3]). Party objecting to use of written affidavit has 15 days from service to serve Notice of Objection. (A.R.C. 664[4]).

At least seven days before commencement of trial each of parties shall file with Clerk and serve on parties short written statement of factual and legal theory of case of party filing it. (A.R.C. 666). Statement shall not be more than five pages long and should include brief list of major facts and law on which party relies. This streamlined procedure also allows for provisional selection of trial date at very early stage, and restricts right of appeal to only those judgments or orders finally determining all or part of substantive rights in issue in action. No other appeal lies. (A.R.C. 671).

Direct Actions Against Insurer.

See category 23 Transportation, topic 23.02 Motor Vehicles, subhead Direct Actions.

See also topics 5.02 Actions, Appeal and Error, Depositions and Discovery, Injunctions, Judgments, Pleading, Process; category 8 Debtor and Creditor, topics 8.03 Attachment, 8.07 Executions, 8.11 Garnishment.

Class Proceedings.

On application, party commencing or defending action can have it certified as class proceeding. Representative plaintiff is appointed to commence on behalf of other parties meeting class criteria. (Class Proceedings Act, S.A. 2003, c. C-16.5, §§ 21[1], [2], 3[1]). Non-class members can be certified as representative plaintiff only if no substantial injustice to class. (c. C-16.5, §§ 2[4], 3[2]). Sub-class can be certified within class.

Requirements of certification: pleadings disclose cause of action, identifiable class of two or more persons, claims raise common issue(s), class proceedings preferable for fair and efficient resolution of common issues, eligible representative plaintiff exists. (c. C-16.5, § 5[1]).

Staged Adjudication.

Once certified, issues common between class members and sub-classes are determined between class members and sub-classes are determined together. Individual unique issues determined separately, unless otherwise ordered.

Alberta residents meeting class criteria are automatically class members. Nonresidents must opt-in. (c. C-16.5, § 17[1]). Class members can opt-out where permitted by Act, by certification order of court. If certification order granted in favour of defendant, leave of court required. (c. C-16.5, § 17). Class members failing to opt-out bound by resolution of proceedings in relation to common issues, subject to appeal. (c. C-16.5, §§ 35, 36).

5.18 PROCESS:

Action is commenced by issue of statement of claim. (A.R.C. 6). Actions for claims in debt or damages for breach, rescission or specific performance of contract, return of personal property or equitable relief where value does not exceed $25,000 may be brought in Provincial Court and then are commenced by civil claim. (c. P-31, § 25).

In certain cases proceedings are commenced by petition or originating notices but general rules given herein apply to these. (A.R.C. 6[2][3]). See also topic 5.02 Actions, subhead Commencement.

Service of statement of claim must generally be personal. Orders to serve substitutionally or by advertisement, or otherwise, may be obtained in certain cases upon an affidavit as to facts. (A.R.C. 14, 22, 23).

Service Outside of Jurisdiction.

Order may be obtained allowing service of statement of claim, or concurrent statement of claim out of jurisdiction in certain prescribed cases. Application is supported by affidavit of plaintiff or his agent stating that in belief of deponent applicant has reasonable cause of action, showing in what place or country person to be served is likely to be and giving grounds for application; every order allowing such service shall limit time within which proceedings may be answered or opposed. (A.R.C. 30, 31).

Process is issued by the clerk of the court. (A.R.C. 7).

Who May Serve.

Any one of age may serve the same, although service is generally made through private process server.

Service on an individual is made by leaving with person true copy of original document to be served. (A.R.C. 15[1]).

Personal Service on Infant.

Property claims; infant must be served by service on guardian ad litem if appointed, or guardian of infant's estate. (A.R.C. 17[1]). If no guardian ad litem or of estate, serve public trustee who serves as guardian ad litem until otherwise ordered by court. (A.R.C. 17[2]). If action is for recovery of real or personal property in possession of infant, serve infant and adult. (A.R.C. 17[3]). All other actions serve infant as if adult, but court may order service to be effected upon any other person to protect infant's interests. (A.R.C. 18[1]). Documents to be personally served on infant should be served on infant's parents or guardian with whom infant resides.

Personal Service on Incompetent Person.

Need court order directing who to serve, whether found to be of unsound mind or not. (A.R.C. 19).

Personal Service on Partnership.

If firm has carried on business in jurisdiction and is not dissolved, sue in firm name and effect service by leaving documents with one or more partners or with person in management at firm's principal place of business in jurisdiction. If firm carried on business outside Alberta, or if already dissolved, serve individual partners. (A.R.C. 15[3]).

Personal Service on Association.

Effect personal service by leaving document with officer of association or by sending document by registered mail addressed to officer of association at address of officer (A.R.C. 353[2]) and see also subhead Service by Mail, infra.

Personal Service on Joint Stock Company.

See subhead Personal Service on Association, supra.

Personal Service on Foreign Corporation.

Where service outside jurisdiction is permitted, commencement documents can be served pursuant to Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters. Hague Convention provides: (a) Unless Court otherwise directs, service may be effected in accordance with domestic law of receiving jurisdiction; (b) certificate of service issued by central authority of receiving jurisdiction is sufficient proof of service; and (c) any judgment entered upon default of defence can only be set aside under Rule 158.

Personal Service Outside Province (Service Ex Juris).

Allows court to take jurisdiction over parties located outside Alberta. Make application with affidavit setting out: (a) That in deponent's belief applicant has prima facie cause of action, details of cause of action including evidence and that deponent has actual knowledge; (b) stating place/country person/corporation is to be served or likely to be found; and (c) grounds upon which application made, acceptable grounds listed in A.R.C. 30. Order must contain time limit for effecting service ex juris and for answer/opposition. (A.R.C. 31). Validity of service ex juris can be challenged without attorning to jurisdiction of Alberta court. (A.R.C. 27). Obtained ex parte, so subject to later challenge based on improper grounds or technical irregularity. If set aside and limitations not yet expired, can reapply for service ex juris, service matters are interlocutory so not res judicata. If limitations expired, must apply to extend life of commencing document. Obtaining service ex juris is subject to considerations of most convenient forum.

Service by Mail.

Service of any document possible by double registered mail provided post office receipt with served party's signature produced as exhibit to affidavit of service. (A.R.C. 22[1]). Documents served this way deemed served on date of receipt purporting to be signed by person to be served. (A.R.C. 22[3]).

Substituted Service.

Available on application where personal service required but appears to court to be impractical to effect (A.R.C. 23[1]), or where service effected but questionably i.e. person to be served refused to take document or slammed door on process server. Application requires supporting affidavit stating why personal service is impractical and proposing different manner of service likely in deponent's opinion to be effective. (A.R.C. 23[2]). Affidavit must contain sworn statement that documents will likely come to attention of person to be served by proposed method. Substitutional service orders obtained ex parte, so can be challenged later based on improper grounds or technical irregularity. If set aside and limitations not yet expired, can reapply for substitutional service, service matters are interlocutory so not res judicata. If limitations expired, must apply to extend life of commencing document. Since ex parte application, cannot get default judgment with substitutionally served process without attending at court for additional protection to opponent. (A.R.C. 23).

Service by Publication.

See subhead Substituted Service, supra.

Long Arm Statute.

See topic Personal Service Outside Province (Service Ex Juris), supra.

Proof of Service.

Via Affidavit of Service available as Form "A" to Alberta Rule of Court.

Nonresident Motorist.

See category 23 Transportation, topic 23.02 Motor Vehicles.

Service on corporation under either Companies Act or Business Corporations Act made by leaving it at or sending it by registered mail to registered office, or by serving any director, manager or officer. (c. C-21, § 308). Service on corporation under Business Corporations Act may also be effected by delivery to registered office or registered mail to registered office or post office box designated by corporation as its address for service by mail. (c. B-9, § 256). Foreign corporation doing business in Alberta must designate attorney on whom process against it may be served. (c. B-9, §§ 280, 288).

5.19 REPLEVIN:

In any action for recovery of any personal property, including property distrained for rent, one claiming that such property was unlawfully taken or is unlawfully detained, may after issue of statement of claim obtain order of replevin. (A.R.C. 427).

Proceedings.

If less than or equal to two months elapsed since cause of action, obtain order from clerk. (A.R.C. 428[a]). If more than two months elapsed, obtain order from court. (A.R.C. 428[b]). In either case, affidavit with description and value of property and stating that person claiming goods is rightful owner or entitled to possession, and that property was wrongfully/fraudulently taken.

Bond.

Civil enforcement agency will not act on replevin order until plaintiff provides clerk with bond or other security in favour of defendant and that is twice value of goods or such sum as may be prescribed except where order provides for payment of money into court or dispenses with furnishing of bond. (A.R.C. 432). Bond applied to defendant's damages, costs and expenses if plaintiff fails to recover judgment. (A.R.C. 433[1]).

Custody of Property.

Civil Enforcement Agency retains goods until ordered by court to return them to plaintiff but shall after 15 days redeliver goods to defendant unless plaintiff serves upon Civil Enforcement Agency order directing otherwise. (A.R.C. 434).

5.20 SEQUESTRATION:

Where judgment directs recovery of specific property other than land or money and specified property is not delivered according to writ of delivery that issues, in addition to holding party in civil contempt, judgment may be enforced by writ of sequestration. Where judgment is against corporation, it may be enforced by order holding one or more of its directors or officers in civil contempt or, with leave of court, by writ of sequestration against property of corporation or property of one or more of its directors or officers. (A.R.C. 364—366).

5.21 SERVICE:

See topic 5.18 Process.

5.22 STAY OF EXECUTION:

See topic 5.03 Appeal and Error; also category 8 Debtor and Creditor, topic 8.07 Executions.

Small Claims Courts.

Provincial Judge has jurisdiction to try any claim for debt or damages, including for breach, rescission or specific performance of contract, or equitable relief provide value of claim does not exceed $25,000, as well as counterclaims within similar limits. (c. P-31, § 9.2, 9.6, A.R. 329/89, § 1.1). Provincial Judge can try such matter within Province of Alberta, but action will usually be heard in judicial district where defendant resides or cause of action arose. Special procedure applies. (c. P-31, Part 4).

5.23 SUBMISSION OF CONTROVERSY:

Any bona fide controversy may be brought before the proper court and it will hear it and finally dispose of the same, subject only to appeal. If the parties can agree upon the facts, it will facilitate the disposition of the matter. If matter discloses no cause of action or defence, as case may be, or if it is scandalous, frivolous, vexatious, or may prejudice, embarrass or delay fair trial of action, or is otherwise abuse of process, court may strike out or amend any pleading and may order action stayed or dismissed or judgment entered. (A.R.C. 129).

5.24 VENUE:

Venue for Pleadings and Discoveries.

Rules set location for filing documents/conducting discoveries. Trial venue determined by place proposed by plaintiff in statement of claim, or location of land where action concerns possession of land, or as in rule. (A.R.C. 237).

Challenging Chosen Venue.

Venue for pleadings, discoveries and trial may be challenged where prejudice can be shown, based on location of parties, distance, need for witnesses to travel, jury bias, where applicable. (A.R.C. 12).

6 COURTS AND LEGISLATURE

6.01 COURTS:

Court of Queen's Bench consists of 63 judges, each of whom has jurisdiction throughout Province, and has original jurisdiction in all civil and criminal matters. (c. C-31 § 3[1]). Each judge travels throughout Province and sits alone or with jury to hear and determine cases. In addition, supernumerary judges may be appointed.

Court of Appeal, which is highest court of Province, consists of 13 judges. (c. C-30 § 3[1]). In addition, supernumerary judges may be appointed.

Surrogate Courts.

Have been amalgamated into Court of Queen's Bench. (c. C-31, § 2, c. 1.1).

Provincial Courts.

Province has single Provincial Court having extensive criminal jurisdiction and limited civil jurisdiction. (c. P-31, § 9.6). Justice Statutes Amendment Act has resulted in substantial changes to Provincial Court Act, including enhanced role for court, procedural and administrative changes, and enshrining of pretrial conferences and mediation. Court has jurisdiction over civil claims for debt, or damages including for breach, rescission, or specific performance of contract, return of personal property or equitable relief provided value of claim does not exceed $25,000. (A.R. 329/89, § 2). Current limit for civil claims at $25,000. (A.R. 329/89, § 1.1). Governor in Council may increase by regulation. Court has civil contempt powers to deal with breaches of Provincial Court Orders and Orders made by Justices of Peace. Civil proceedings are informal and parties generally represent themselves.

6.02 JUSTICES OF THE PEACE:

Justices of peace exercise limited criminal jurisdiction throughout province. (c. J-4).

6.03 LEGISLATURE:

The Alberta Act (1905) establishes legislature for province consisting of Lieutenant Governor and single House styled Legislative Assembly of Alberta. (§ 12). Legislative assembly has exclusive power to make laws in relation to matters of local and private nature and certain other matters enumerated in Constitution Act 1867. (§§ 92, 92A, 93, 95). Government may call sessions at any time.

6.04 REPORTS:

Important decisions of Courts of Province are covered by Western Weekly Reports, Alberta Law Reports (2nd and 3rd Series) and Alberta Reports. Alberta Law Reports were published until 1932 and then ceased publication until 1977 when Second Series came out. Dominion Law Reports cover all cases of note throughout Canada. Federal Court and Supreme Court of Canada decisions from Province are also found in Canada Federal Court Reports, Canada Supreme Court Reports, National Reporter and Federal Trial Reporter.

There is a Western edition of Canadian Encyclopedic digest.

Alberta Judgments Database on Quicklaw system contains full text of most written Alberta judgments from 1954 on.

6.05 STATUTES:

Most recent revision of provincial statutes occurred in 2000 and is cited as R.S.A. 2000. Annual volumes of amendments and new legislation are compiled and published. Amendments and revisions are also compiled in regularly updated loose-leaf version of revised statutes. (As to form of citation used herein see note at head of Digest.)

7 CRIMINAL LAW

7.01 CRIMINAL LAW:

Crimes and Criminal Procedure are governed by Criminal Code, R.S.C. 1985, c. C-46, Proceeds of Crime (Money Laundering) and Terrorist Financing Act, S.C. 2000, c. 17 and Youth Criminal Justice Act, S.C. 2002, c. 1.

See Canada Law Digest.

8 DEBTOR AND CREDITOR

8.01 ASSIGNMENTS:

Choses in Action.

Any chose in action for a debt may be assigned by writing. If assignment is absolute, not being by way of a charge only, and notice in writing has been given to debtor, assignee may bring action in his own name (c. J-2, § 20[1]); otherwise document may operate only as equitable assignment and original assignor must be added as party to action.

Registration.

Personal Property Security Act c. P-7 which came into force on Oct. 1, 1990 repealed Assignment of Book Debts Act and consequently references in this section to Assignment of Book Debts Act will no longer be valid after that date.

Personal Property Security Act encompasses what is presently known as “book debt”. In Personal Property Security Act book debt is referred to as “account”. “Account” means monetary obligation not evidenced by chattel paper, instrument or security, whether or not it has been earned by performance but does not include investment property. (§ 1[1][b]). Primary section under Personal Property Security Act that deals with “accounts” is § 41.

Assignment of Book Debts Act required that general Assignments of Book Debts be registered, but did not apply to Assignments of Accounts which are due from specified debtors or growing due under specified contracts. Priority between competing assignees was determined by first assignee to give notice of assignment to account debtor. Under Personal Property Security Act, Assignments of Accounts, whether general or specific, and whether absolute or by way of security, are brought within scope of Act. Priorities are determined by internal priority rules of Personal Property Security Act, and most priority competitions between assignees will be determined by first to register. § 4 of Personal Property Security Act excludes limited types of assignments from Act.

Rights of debtor in collateral may be transferred consensually by debtor despite prohibition on transfer in agreement between parties but rights of secured party are not to be prejudiced. (c. P-7, § 33). Assignee’s rights are subject to contract between assignor and debtor, and debtor may raise any defence or claim against assignee that could be raised against assignor.

It will still be possible to postpone assignment under Personal Property Security Act. (§ 40).

Registration of Assignment of Accounts is effected at Personal Property Security Registry. See category 20 Mortgages, topic 20.04 Personal Property Security.

8.02 ASSIGNMENTS FOR BENEFIT OF CREDITORS:

Provided the assignor has committed no act of bankruptcy, an assignment to a trustee to pay the debts of the assignor is valid. Bankruptcy, see Canada Law Digest.

Assignment of Wages.

Assignment of unearned portion of salary of public officer is void as against public policy, but rule does not extend to certain categories of public officers who in good faith and for valuable consideration, may assign wages they expect to earn under employment contracts. Traders Bank v. McKay (1909), 2 Alta L.R. 31 (Alta T.D.).

8.03 ATTACHMENT:

Claimant may apply to court for attachment order where claimant has commenced or is about to commence proceedings in Alberta or where proceedings commenced before foreign tribunal if award could be enforced in Alberta or defendant has exigible property in Alberta. (c. C-15, § 17[1]).

Grounds.

Court may grant attachment order if court is satisfied that there is reasonable likelihood claim against defendant will be established and there are reasonable grounds for believing that defendant is dealing with defendant's exigible property, or is likely to deal with that property for purpose outside defendant's reasonable and ordinary business and in manner that would likely seriously hinder claimant in enforcement of judgment against defendant. (c. C-15, § 17[2]).

Order of attachment is obtained from judge who can impose conditions on use of exigible property. Order shall not attach property that exceeds value of claim, shall cause as little inconvenience to defendant as possible, and shall not be granted unless claimant undertakes to pay any damages or indemnity that court may subsequently decide should be paid to defendant. Applications for attachment order can be made ex parte. (c. C-15, §§ 17 & 18).

Registration of attachment order takes place at Personal Property Registry or in case of land under Land Titles Act against certificate of title. (c. C-15, § 22).

Termination.

Attachment order terminates on dismissal or discontinuance of claimant's proceedings or 60 days after claimant enters judgment in its favour. (c. C-15, § 19[1]). Court may extend operation of attachment order if it appears just and equitable to do so. (c. C-15, § 19[2]). Any interested person may apply to court to vary or terminate attachment order. (c. C-15, § 17[8]).

Personal Property Security.

Under Personal Property Security Act, security interest attaches when value is given, debtor has rights in collateral or power to transfer rights in collateral to secured party and except for purpose of enforcing inter party's rights, it becomes enforceable against third parties. (c. P-7, § 12[1]). Debtor has rights in goods leased to him, hired by him or delivered to him under consignment, when he obtains possession of them pursuant to Lease Hiring Agreement or consignment. (c. P-7, § 12[2]). Debtor has no rights in crops until they become growing crops, young of animals until they are conceived, in minerals until extracted, or in timber until it is cut. (c. P-7, § 12[3]). Attachment of security interest in securities account is also attachment of security interest in security entitlement carried in securities account. (c. P-7, § 12[4]). Attachment of security interest in futures account is also attachment of security interest in futures contracts carried in futures account. (c. P-7, § 12[5]). Securities intermediary's security interest attaches when person buys asset through intermediary and must immediately pay purchase price to intermediary and intermediary credits asset to buyer's security account before buyer pays intermediary. (c. P-7, § 12.1[1]). Security interest in favour of person that delivers certificated security or other asset attaches, if security is in ordinary course of business transferred by delivery with necessary endorsement or assignment and delivered under agreement between persons in business of dealing with such assets, and agreement calls for delivery against payment. (c. P-7, § 12.1[3]).

Concept of attachment denotes time when security interest comes into existence. If security interest is not attached, creditor will have no right to exercise its default rights against collateral, nor will creditor have any right to collateral which can be asserted against other persons who claim property interest in collateral. Generally security interest will not attach until Security Agreement has been executed or secured party has taken possession of collateral or debtor has rights in property claimed as collateral and secured party has advanced money or given binding promise to do so. See category 20 Mortgages, topic 20.04 Personal Property Security.

8.04 BONDS:

The Guarantees Acknowledgment Act provides that bonds and guarantees, except bills of exchange, partnership agreements, and bonds given to Her Majesty or to any court or pursuant to any statute or guarantees given on sale of an interest in land or chattels, are invalid unless obligor appears before notary and acknowledges his execution thereof and signs statement or notarial certificate acknowledging obligor was aware of and understood contents of instrument. (c. G-11, § 3). Certificate must be attached to or noted upon instrument containing guarantee to which certificate relates. (c. G-11, § 4[2]). Act does not apply where guarantor is corporation. (c. G-11, § 1[a]).

8.05 CREDITORS' SUITS:

Where property cannot be reached under execution there is generally no manner in which a creditor can realize unless he has a lien on goods or lands. In latter case he is generally allowed to proceed against those goods or lands. The Civil Enforcement Act, c. C-15, consolidates enforcement of money judgments, seizures and eviction procedures within one Act. See also topics 8.07 Executions, 8.08 Exemptions.

8.06 DEBT ADJUSTMENT ACT:

See category 5 Civil Actions and Procedure, topic 5.02 Actions.

8.07 EXECUTIONS:

Note: Execution Creditors Act, c. E-14, and Seizures Act, c. S-11, repealed by Civil Enforcement Act, c. C-15, effective Jan. 1, 1996.

Exemptions.

See topic 8.08 Exemptions.

Time for Issuance.

Enforcement in respect of money judgment may be issued against personal property only after writ is registered in Personal Property Registry ("P.P.R.") (c. C-15, § 26[a]) and against land only after writ is registered in P.P.R. and against certificate of title under Land Titles Act, c. L-4 (c. C-15, § 26[b]).

Life of Execution.

Writ is in force only while judgment is in force, which is ten years unless judgment is renewed or action is brought on judgment within those ten years. Registration of writ in P.P.R. is for two years and may be renewed before that time. (c. C-15, §§ 27, 28). Registration of writ under Land Titles Act is in effect for duration of judgment. (c. C-15, § 29).

Stay.

Judge may stay enforcement of judgment, or remove or extend stay already granted at or after time of judgment. (A.R.C. 341[1]). Where Judge does so under C.E.A. order may be registered in P.P.R. and, until registered, order is ineffective against those who have no actual knowledge. (A.R.C. 34 1[2]).

Lien.

When registered at P.P.R., writ binds all of debtor's exigible personal property, including after-acquired. (c. C-15, § 33[2][a], 33[3]). When registered against certificate of title, writ binds exigible land described in certificate of title. (c. C-15, § 33[2][b]). Where person furnishes materials or services to goods bound by writ, he takes priority if materials and services are furnished in ordinary course of business and lien does not arise under enactment which provides otherwise. (c. C-15, § 40).

Levy and sale under C.E.A. must be made through private civil enforcement agencies. (c. C-15, § 9[1]). For prejudgment relief, Act allows sale of attached property only upon application to court and if likely to depreciate substantially or is expensive to maintain under attachment, or is prudent or necessary for any other reason. (c. C-15, § 21). For post-judgment relief, if no notice of objection is filed, or court authorizes sale, then agency proceeds with sale. (c. C-15, § 48[a], [b]). Person with right of distress, or enforcement creditor, against personal property subject to civil enforcement proceeding may advise agency (c. C-15, § 48.1) and must seek court order to seize property. (c. C-15, § 48.2). Debtor has 15 days to file objection and agency cannot sell property until permitted by court. (c. C-15, § 46). Agency can sell by any commercially reasonable method (§ 48[d]), but duty imposed to act in good faith and in commercially reasonable manner (c. C-15, § 2[g]). Notice of method of sale must be given to instructing creditor and debtor 15 days before sale. (§ 48[e]). Specific power provided to sell to enforcement creditor by private sale before any other attempt at sale. (§ 48[f]). Buyer obtains interest of enforcement debtor. Sale is without warranty of title except buyer takes free of any interest subordinate to writ. (c. C-15, § 48[j]). For sale of land, agency must serve 30 days notice of method of sale on debtor. (c. C-15, § 74[1]). If notice includes proposed minimum price, any person served may object to price within 30 days and court must approve sale. (§ 74[3]). If notice excludes minimum price, agency must serve terms of any sale on all parties who must object within 15 days for court to intervene. (§ 74[4]).

See category 20 Mortgages, topic 20.04 Personal Property Security.

Priorities.

Interest acquired in property after property bound by writ is subordinate to writ. (c. C-15, § 34). Security interest in personal property not registered or perfected at time property is bound by writ is subordinate to writ. (c. C-15, § 35). Purchase money security interests have priority over writs, provided security interest registered within 15 days of debtor taking possession of collateral or security interest attaching. (c. C-15, § 35[3]). Buyer/lessee of nonconsumer goods sold or leased in ordinary course of business of seller/lessor takes free of writ. (c. C-15, § 36[1]). Buyer/lessee of consumer goods takes free from writ if value given, goods bought/leased without knowledge of writ, and price of goods does not exceed $1,000. (c. C-15, § 36[2]). Where serial numbered goods are bound by writ, but not registered by serial number, buyer/lessee of consumer goods take free of interest as does buyer/lessee of equipment without knowledge of writ. (c. C-15, § 36[3]). Act provides special priority rules for fixtures and growing crops (§ 37), negotiable instruments (§ 38), and market securities (§ 39).

Claims of Third Parties.

Where claim is made by third party for personal property seized by agency, it must serve on agency written notice setting out claim and address for service. Agency must then give notice of third party claim to instructing creditor. Within 15 days, instructing creditor must give written notice to agency as to whether claim is admitted or disputed. (A.R.C. 457, 458). Where agency has served notice of claim and is satisfied no persons dispute claim, agency may release property from seizure. (A.R.C. 458[5]). Where reasonable grounds exist to believe debtor's exigible personal property is in possession of third party, agency may and, if instructed by creditor, must serve demand on third party requiring delivery of property to agency within 15 days. (c. C-15, § 44[1]). Third party must either deliver up property, advise agency of place where seizure can be effected, or advise agency that it need not comply with agency's demand because of its right against debtor to retain property or because it is without possession of property. (c. C-15, § 44[2]). Where demand is not complied with, third party must compensate enforcement creditors with related writ for any pecuniary loss suffered as result of noncompliance. (§ 44[4]). Where third party complies, agency must compensate for expenses reasonably incurred by third party in complying with demand. (§ 44[3]).

Redemption.

There is no provision for redemption of property sold under this Act.

Supplementary Proceedings.

Enforcement creditor may compel enforcement debtor to appear before court and given evidence under oath as to his property, earnings, expenses, etc. (A.R.C. 372). Judgment creditor unable to realize on enforcement because of fraud or attempts to liquidate assets may apply for appointment of receiver, to have necessary inquiries made as to property interest of debtor, or for order for sale of property. (A.R.C. 463-464).

8.08 EXEMPTIONS:

Note: Exemptions Act was repealed by Civil Enforcement Act, c. C-15, effective Jan. 1, 1996.

Following property is exempted from writ proceedings: food required by debtor and dependants during next 12 months, clothing less than $4,000, household furnishings and appliances less than $4,000, motor vehicle less than $5,000, medical and dental aids required by debtor and dependants, principal residence where debtor's equity is less than $40,000 (if debtor is co-owner of residence, exemption is reduced to amount proportionate to debtor's ownership interest), personal property of less than $10,000 used by debtor to earn income, income support payments, handicap benefits and for farmers, 160 acres and any personal property necessary for conduct of farming operations for next year. (c. C-15, § 88 and Civil Enforcement Regulations [A.R. 276/95], § 37).

Debts Against Which Exemptions Not Allowed.

Exemptions do not apply to debtors who are not individuals, to partnership property, writ proceedings on maintenance or alimony judgments, abandoned property, and money judgments arising out of act which debtor has been convicted under Criminal Code. (c. C-15, § 93).

Rights of Surviving Spouse and Children.

Where debtor dies, his exempted property remains exempted for period of time required for maintenance and support of debtor's dependants. (c. C-15, § 92).

If debtor owns more than one item of type of exempted property and total value of items exceeds maximum exemption, debtor or representative of debtor deemed may select items that will be exempted. (c. C-15, § 90).

See also topic 8.11 Garnishment.

Earnings.

Unless otherwise ordered by court, debtor's monthly minimum exemption is $800 plus $200 per dependent. (c. C-15, A.R. 276/95, § 39[2][a]). Actual exemption equals sum of minimum exemption plus half of amount by which net pay exceeds minimum exemption. (c. C-15, § 81[1][d]). Maximum possible exemption is $2,400 plus $200 per dependent. (c. C-15, A.R. 276/95, § 39[2][b]). Court will consider family responsibilities, personal circumstances, conduct of debtor in financial affairs, and earning of debtor's dependents. (c. C-15, A.R. 276/95, § 39[4]). See also topic 8.11 Garnishment.

8.09 FORECLOSURE:

See topic 8.16 Liens; category 20 Mortgages, topics 20.01 Chattel Mortgages, 20.03 Mortgages of Real Property.

8.10 FRAUDULENT SALES AND CONVEYANCES:

Portions of provincial legislation (c. F-24, § 3) have been held to be ultra vires because of conflict with exclusive federal jurisdiction over bankruptcy and insolvency ([1964], 50 W.W.R. 155). However, there is now some question as to this authority. ([1977] 2 W.W.R. 111).

Fraudulent Preferences Act.

Must now be construed subject to Bankruptcy and Insolvency Act. (c. F-24, § 12). Applicants can generally assert either act to set aside transactions. Fraudulent Preference Act does not apply to protected transactions: payment of money to creditor, transfer or property where value bears reasonable value relative to consideration received, sale in ordinary course of business to bona fide purchaser (c. F-24, § 6), security for pre-existing debt where advance made to debtor in bona fide belief that debtor will be able to stay in business and pay debts. (c. F-24, § 9[c]). To set aside protected transactions, use Bankruptcy and Insolvency Act. (R.S.C. 1985, c. B-3, § 95).

Remedies.

Any creditor may bring action in proper court to set aside any conveyance on ground of fraud. (c. F-24, § 10). Injunction order may be obtained to preserve property until action is disposed of. See also category 3 Business Regulation and Commerce, topic 3.11 Interest, subhead Unconscionable Transactions.

8.11 GARNISHMENT:

Civil Enforcement Act (c. C-15).

Reformed law relating to collection of unsecured debt. Act repealed garnishee rules of Rules of Court.

Attachment Order.

Claimant may apply to Court for attachment order. Attachment order may be granted where claimant has commenced or is about to commence legal proceedings or has commenced proceedings before foreign tribunal if judgment could be enforced in Alberta and defendant has exigible property in Alberta. Court may grant order if there is reasonable grounds to believe that claimant's claim against defendant will be established, and there are reasonable grounds for believing that defendant is dealing, or is likely to deal, with defendant's exigible property other than for purpose of meeting defendant's reasonable and ordinary business or living expenses and in manner that would likely seriously hinder claimant in enforcement of judgment against defendant. (c. C-15, § 17).

Joint Entitlements.

Act permits garnishment of joint entitlements. Basic concept is that joint entitlement is presumptively owned equally by joint owners and served upon service of garnishee summons. Debtor or creditor may then bring application for unequal apportionment of joint debt. (c. C-15, §§ 78[g], 82).

Effect of Garnishment.

Both current and future obligations can be garnisheed. Obligation that is evidenced by instrument is not attachable by garnishment. (§ 78). Continuing garnishee can require employer to pay Civil Enforcement Agency portion of debtor's wages. Continuing garnishee summons would normally be effective for one year from date on which it is issued; except with respect to deposit accounts in which garnishee is effective for 60 days from date of issue. (c. C-15, § 79).

Partnership.

Obligation to enforcement debtor by persons carrying on business as partnership within Alberta may be attached if garnishee summons is served on partnership within Alberta, regardless of fact that one or more members of partnership do not reside in Alberta. (c.C-15, § 78[f]).

Issuing of Garnishee Summons.

Creditor may require clerk to issue garnishee summons by filing with clerk affidavit in support of garnishee summons, and in case of prejudgment claimant, copy of attachment order authorizing clerk to grant garnishee summons. Garnishee summons shall not be set aside for irregularity unless in opinion of Court irregularity has prejudiced debtor or garnishee. (A.R.C. 472).

Duties of Garnishee.

Garnishee summons attaches garnished obligation when summons is served on garnishee. Money that is attached by garnishee summons must be paid into Court by garnishee. (c. C-15, § 78). With respect to nonemployment earnings, if garnishee disputes existence of obligation garnishee must within 15 days of being served with garnishee summons deliver to clerk, response setting out grounds for dispute. Garnishee who disputes existence of attachable obligation may pay money to clerk to be held by clerk pending determination of dispute. (A.R.C. 474).

With respect to employment earnings, within 15 days of service of garnishee summons on garnishee, garnishee must serve copy of summons if able on debtor and deliver to clerk written response stating: whether debtor is employed by garnishee; frequency with which employment earnings are paid to debtor; and whether debtor has been served with garnishee summons and, if not, why. (A.R.C. 476).

Earnings Exemption.

Court will consider family responsibilities, personal circumstances, conduct of debtor in financial affairs, and earnings of and for earnings of enforcement debtors dependants. (c. C-15, A.R. 276/95, § 39[4]). Court on application may modify minimum or maximum employment earnings exemption to which enforcement debtor is entitled. (c. C-15, § 81, A.R. 276/95, § 39).

Judgment.

Where garnishee does not comply with Act or fails to pay money into Court, Court may grant judgment against garnishee for amount of garnishee summons or lesser amount as Court deems proper. (c. C-15, § 84).

8.12 GUARANTEE:

See topic 8.04 Bonds.

8.13 HOMESTEADS:

Principal residence of enforcement debtor is exempt from writ proceedings, where enforcement debtor's equity does not exceed $40,000 or such amount proportionate to debtor's ownership in residence. (c. C-15, § 88[g]; A.R. 276/95, § 37[1][e]).

Conveyance or Encumbrance.

Married person may not sell or encumber his or her homestead without written consent of his or her spouse, who must be examined separately and apart from his or her spouse as to such consent: such consent being certified by proper officer. Consent of spouse must be contained in or annexed to instrument disposing of homestead. Judge may by order in certain cases dispense with such consent. (c. D-15).

A person has a life estate in the homestead property of his or her spouse unless that person voluntarily surrenders it. See category 21 Property, topic 21.06 Dower.

Form A

Consent of Spouse.

I,. .. .. being married to. .. .. do hereby give my consent to the disposition of our homestead, made in this (or the annexed) instrument, and I have executed this document for the purpose of giving up my life estate and other dower rights in the property given to me by The Dower Act to the extent necessary to give effect to the disposition.

..........(Signature of Spouse)

(Note: If this consent is being annexed to the instrument making the disposition, section 4(5) of the Act requires that the person signing this consent must also sign the instrument.)

Form B

Affidavit.— I, ____________________,

of____________________,

make oath and say:

1 I am the transferor (or mortgagor, lessor or encumbrancer, as the case may be) (or the agent acting under the power of attorney in my favour registered in the Land Titles Office on ________________ (date) as instrument number __________ granted by the transferor, mortgagor, or encumbrancer) named in the within (or annexed) instrument.

2 I am (or my principal) is not married.

or

Neither myself nor my spouse (or my principal nor my principal's spouse) have resided on the within mentioned land at any time since our (or their) marriage.

or

I am (or my principal is) married to _______________, being the person who executed the release of dower rights registered in the Land Titles Office on ___________ (date) as instrument number _________.

or

A judgment for damages was obtained against me by my spouse (or my principal by my principal's spouse) and registered in the Land Titles Office on _____________ (date) as instrument number _________.

SWORN BEFORE ME at ____________________)

in the Province of ________________________, on)

(date))

)

)

____)

A Commissioner, etc.

(or as the case may be)

____

NAME

Form C

Certificate of Acknowledgment by Spouse.

1. This document was acknowledged before me by. .. .. apart from her husband (his wife).

2. .. .. acknowledged to me that she (he):

(a) Is aware of the nature of the disposition (agreement);

(b) Is aware that The Dower Act gives her (him) a life estate in the homestead and the right to prevent disposition of the homestead by withholding consent;

(c) Consents to the disposition (agreement) for the purpose of giving up the life estate and other dower rights in the homestead given to her (him) by The Dower Act, to the extent necessary to give effect to the said disposition (agreement);

(d) Is executing the document freely and voluntarily without any compulsion on the part of her husband (his wife).

Dated at. .. .. in the Province of. .. .. this. .. .. day of. .. .. A.D. 20. .. ..

....

(Title officiating officer)

8.14 INSOLVENCY:

See Canada Law Digest, category Debtor and Creditor, topic Bankruptcy.

8.15 LEVY:

See topics 8.03 Attachment, 8.07 Executions.

8.16 LIENS:

Artisan.

Every person who has bestowed money, labour or skill upon any chattel in improving same is entitled to lien and to hold same in his possession, and if his lien is unpaid from time debtor/creditor relationship arose with respect to alteration or repair of property; for three months in case of motor vehicle, for six months, in case of any other property, may serve notice on debtor of amount of his indebtedness, of reasonable time and place for payment, and that in default of payment application will be made at fixed time and place for leave to sell goods. In cases of bailment, where chattel is not claimed by bailor at or before date specified in contract of bailment, bailee may serve notice on debtor of amount of indebtedness, of reasonable time and place for payment, and that in default of payment application will be made at fixed time and place for leave to sell goods. (c. P-19, § 10).

Solicitor.

See category 18 Legal Profession, topic 18.01 Attorneys and Counselors, subhead Lien.

Vendor of property has a lien charge upon such property unless he has waived his rights.

Lumbering.

Any person engaged in any employment in connection with logs or timber (other than lumber) has lien on logs or timber, or lumber made from same, in amount due for labour or services, etc. (c. W-14).

Warehousemen, wharfingers and bailees are entitled to liens. (cc. P-19, W-2).

Garageman has lien on motor vehicle or farm vehicle for storage, repairs, etc., if he has possession or if before surrendering possession he obtains written acknowledgment of indebtedness signed by person authorizing same. This lien does not depend on continued possession, but claim of lien must be registered with Personal Property Registry within 21 days after termination of storage or service, completion of repairs if garageman did not have possession, or when accessories were furnished. Lien is postponed to encumbrances on vehicle created in good faith and without express notice before claim of lien is registered. Lien expires unless civil enforcement agency seizes vehicle within six months of registering, or unless order extending time is obtained. If seized, lien holder must enforce his rights and remedies in accordance with provisions of Civil Enforcement Act. (c. G-2, § 6).

Registry system and necessary documents fall under Personal Property Security Act regime. See category 20 Mortgages, topic 20.04 Personal Property Security.

Lien on Crops.

Personal Property Security Act allows for registration of security interest in crops. This security interest is enforceable by seizure and removal of growing crops from land. Security interest is subordinate to interest of person who acquired interest in land when crops were growing, person with registered mortgage on land after crops became growing crops under certain conditions (foreclosure, advance), and creditor who registered instrument prior to registration of security interest in crops. See category 20 Mortgages, topic 20.04 Personal Property Security. (c. P-7, § 37).

Special Liens.

Certain special liens such as warehousemen's, woodmen's, livery stable keepers', etc., are governed by special statutes. In general they are realized upon by sale at public auction after the statutory period (usually one or two months) has elapsed. (cc. W-1, W-14, L-14).

Possessory Liens.

All liens not specifically legislated for are governed by the Possessory Liens Act. (c. P-19, § 14). See subhead Artisan, supra.

Builders' Lien.

Person who does work upon or supplies materials in respect to an improvement in or on land for owner, contractor or subcontractor has for price of work or materials a lien upon estate or interest of owner in land. Where work done or materials furnished in connection with recovery of minerals then lien attaches to all estates and interests in mineral concerned except fee simple of mines and minerals unless person holding fee simple expressly requested work or materials. (c. B-7, § 6).

Filing and Recording.

Person claiming a lien must register same in appropriate Land Titles Office within 45 days after completion or abandonment, or last furnishing of materials, services or labour, 90 days where involving oil or gas well or well site. (c. B-7, § 41).

Duration of Lien.

Lien ceases to exist unless action is commenced and certificate of lis pendens registered within 180 days from registration of lien. (c. B-7, § 43). Trial must be held within two years of registration of certificate of lis pendens, or interested person can apply to have lien discharged. (c. B-7, § 46).

Enforcement.

Lien enforced by issuing statement of claim. (c. B-7, § 49). On notice other lienholders must prove claim by affidavit or lose lien. (c. B-7, § 52). When pleadings close, pretrial application made. (c. B-7, § 53).

Mechanics' Liens.

See subhead Garageman, supra.

Lien on Minerals Held from the Crown.

Where lien attaches to estate or interest in minerals held directly from Crown in right of Alberta and estate or interest is less than fee simple estate and not registered under Land Titles Act statement of lien must be registered with Minister of Energy. (c. B-7, § 36[1]).

Redemption.

After property covered by lien has passed by sale or otherwise from debtor, he cannot redeem. Up to such time he may always redeem upon payment.

8.17 MECHANICS' LIENS:

See topic 8.16 Liens, subhead Garageman. See also category 20 Mortgages, topic 20.04 Personal Property Security, subhead Registration.

8.18 PLEDGES:

Security interest enforceable against third parties where collateral is not certificated security and in possession of secured party, certificated security delivered to secured party pursuant to debtor's security agreement, investment property in control of secured party, or debtor has signed security agreement with description of collateral (goods, chattel, paper, investment property, documents of title, instruments, money, intangibles) or statement that security interest is taken in all debtor's personal and after-acquired property. (c. P-7, §§ 10[1], 24).

8.19 RECEIVERS:

Appointment.

Interim receiver of property or interest therein may be appointed in bankruptcy for period between filing application for bankruptcy order and order being made. (R.S.C. 1985, c. B-3, § 46). Receiver may be appointed under Bankruptcy Act; other court appointments may be under various Provincial Acts for limited purposes. (cc. B-7, § 54; S-4, § 48; L-7, § 49; P-3, §§ 27, 76).

Receivers are appointed by Court of Queen's Bench or by instrument.

Powers.

Receivers exercise such powers as are given them by instrument, court order, or any combination thereof but usually general power of managing and operating business or property taken charge of.

8.20 REDEMPTION:

See topics 8.07 Executions, Liens; categories 20 Mortgages, topic Mortgages of Real Property; Taxation.

8.21 STAY OF EXECUTION:

See topic 8.07 Executions; category 5 Civil Actions and Procedure, topic 5.03 Appeal and Error.

8.22 SUPPLEMENTARY PROCEEDINGS:

See topic 8.07 Executions.

8.23 USURY:

See Canada Law Digest, category Business Regulation and Commerce, topic Interest.

9 DISPUTE RESOLUTION

9.01 ALTERNATIVE DISPUTE RESOLUTION:

Mandatory Dispute Resolution.

Pre-Trial Conferencing ("PTC").

In advance of trial, judge meets with disputants to assist in more quickly resolving issues between them. According to Court of Queen's Bench of Alberta Civil Practice Note "3", PTC must be held for: any trial set for three days or longer duration, all matters to be tried by civil jury, any case where party requests PTC, or if directed by Rules of Court or Court Order. PTC is primarily oriented towards trial preparation, but can lead to settlement of lawsuit. Judge may issue orders for: exchange of written briefs, costs, civil contempt, and mediation. Judge reviews points of agreement, notes if there are any further admissions, renders opinions on disputed issues when appropriate, and suggests varieties of settlement and extrajudicial procedures for resolution. PTC may be by telephone. Parties can agree to submit to binding PTC. In very long trial action, any case management direction given by Court becomes order of Court whether arising from application of party or from Court on its own motion. (A.R.C. Rule 219.1[1]).

Provincial Court—Civil Division.

At any time after dispute note is filed by defendant, Court or mediation coordinator may refer action for mediation; any party may also request mediation. (A.R. 271/97, § 2). All parties must attend; failure to attend may result in order for further mediation or striking out pleadings of non-attending party. Court may also order that action proceed to trial, costs or any other order appropriate in circumstances. (A.R. 271/97, §§ 5, 14). Parties must negotiate in good faith. (A.R. 271/97, § 9). All discussion at mediation and documents prepared for it are inadmissible in other Court proceedings. (A.R. 271/97, § 8). There are number of statutes that refer to mediation or arbitration. Following list describes common statutes, but is not exhaustive.

Disaster Services Act (Emergency Management Act).

If any dispute arises concerning amount of compensation payable under this Act, it shall go to arbitration and provisions of Arbitration Act apply. (c. D-13, § 25). Title of Act repealed and is now called Emergency Management Act, S.A. 2007, c. E-6.8, c. 12.

Fair Trading Act.

Director may provide any person who is involved in dispute respecting matter under this Act with information on dispute resolution processes, such as arbitration and mediation, and may establish dispute resolution processes that parties to dispute may choose to use. (c. F-2, § 142).

Financial Consumers Act.

Purpose of Act is to resolve disputes about named financial products efficiently and effectively. (c. F-13, § 1[1][d]). Parties must first attempt to resolve dispute over non-compliance with Act themselves. (c. F-13, § 22). Every agreement between consumers and suppliers, consumers and agents, consumers and financial planners about advice regarding named or other financial products must include provision for arbitration where Arbitration Act will apply unless consumer decides to start court proceedings. (c. F-13, § 23[1]—awaiting Proclamation). If no such arbitration clause exists, model arbitration clause is in force. (c. F-13, § 23[2]—awaiting Proclamation). Arbitrator must consider certain factors. (c. F-13, § 27[1]).

Human Rights, Citizenship and Multi-culturalism Act.

Provides statutory scheme under which Human Rights Commission shall endeavour to effect settlement of complaints of discrimination prohibited by Act. (c. H-14, § 21). Settlement of complaints to be effected through appointment of conciliator and/or investigator. Director has power to discontinue proceedings if Director thinks that complainant has refused to accept fair and reasonable settlement. (c. H-14, § 22[1][b] awaiting Proclamation).

Insurance Act.

Where contract (other than for hail insurance) provides for appraisal to determine specified matters, and in event of disagreement between insured and insurer, each shall appoint appraiser. If the two appraisers fail to resolve matter, they shall appoint umpire who will decide matter. (c. I-3, § 514 awaiting Proclamation).

International Commercial Arbitration Act.

Applies to international commercial arbitration agreements and awards. Based upon United Nations Commission on International Trade Law (UNCITRAL) and its set of uniform arbitration rules. (c. I-5, Schedule 2). Arbitration Act does not apply. (c. A-43, § 2).

Irrigation Districts Act.

Statutory scheme is provided for resolution of complaints with respect to rates assessments, seepage damage, and other matters arising under Act. (c. I-11).

Labour Relations Code.

Mediation and enhanced mediation is available during collective bargaining process. (c. L-1, Part 2, Div. 11).

Voluntary interest arbitration is available to parties in dispute. (c. L-1, Part 2, Div. 15). If there is no settlement within 20 days, arbitrator (one or three member) shall make binding award. (c. L-1, § 95[1]).

Compulsorily Interest Arbitration applies to firefighters who bargain collectively with municipalities, and employers and employees of hospitals and regional health authorities. (c. L-1, Part 2, Div. 16). Mediator may be requested by parties jointly or Minister. If there is no settlement after 14 days, matter shall be forwarded to compulsorily Arbitration Board. Arbitration Board may select method or combination of methods of arbitration (c. L-1, § 100) and must consider certain matters (c. L-1, § 101).

Minister may appoint Disputes Inquiry Board (c. L-1, Part 2, Div. 17) and may create Disputes Resolution Tribunal for purposes of arbitration (c. L-1, Part 2, Div. 20).

Every collective agreement falling within Act shall contain method for settlement of differences between parties bound by collective agreement. (c. L-1, § 135).

Minister shall refer items in dispute in construction industry labour relations to Disputes Resolution Tribunal if requested to do so by one or more of parties who have not entered into collective agreements, when 75% of sector has entered into collective agreements. Minister may on his own motion refer items in dispute to Construction Industry Disputes Resolution Tribunal. (c. L-1, § 189[1]).

Marketing of Agricultural Products Act.

Council may in respect of plan administered by Board, make regulations regarding arbitration for minimum prices, terms and conditions of agreements, and charges and expenses related to production or marketing of product. (c. M-4, § 33[1][b]).

Municipal Government Act.

Disagreement between owner, occupier or person with interest in land and municipality in respect of compensation arising from damages caused by closing of road by bylaw are determined by Land Compensation Board. (M-26, § 26[5]). If there is disagreement between owner/occupant of land in respect of amount of compensation owed as result of damages caused by temporary road or right of way, compensation is to be decided by Land Compensation Board. (M-26, § 26[5]). Complaints by person in respect of any assessment except linear property assessments, and tax rates are decided by assessment review board. (M-26, § 460). Complaints regarding linear property assessments are decided by Municipal Government Board. (M-26, § 488[1][a]). Owner of land entitled to compensation for injurious effect to owner's land if owner files claim within 60 days that notice of public work has been published in newspaper. (M-26, § 534[3][4]). If there is disagreement as to amount of compensation for injurious effect, amount may be determined by binding arbitration under Arbitration Act. If there is disagreement on amount of compensation for injurious effect after binding arbitration, Land Compensation Board must determine amount of compensation. (M-26, § 534[9][10]).

Oil and Gas Conservation Act.

When ethane is made available in accordance with order or direction under § 9.130 and agreement cannot be reached between operator of field ethane plant, and either operator of or purchaser of ethane from straddle plant as to price to be paid for ethane, parties must proceed to arbitration for purpose of settling dispute. (A.R. 151/71, § 9.170[3]).

Public Lands Act.

Minister may settle in any manner he considers best all disputes that arise between persons applying for same disposition of public land. (c. P-40, § 16[2]). Lieutenant Governor in Council may make regulations providing for one or more means of settling disputes in respect of any matter under regulations. (c. P-40, § 9[b.1]).

Public Service Employee Relations Act.

Dispute under collective bargaining agreement may be dealt with first by mediation and then by arbitration. (c. P-43, Part 6). Certain things may not be dealt with by arbitration. (c. P-43, § 30). Labour Relations Code applies, whereas Arbitration Act does not.

Surface Rights Act.

Surface Rights Board may hold hearing and settle dispute between owner or occupant under lease and owner or occupant under right of entry order, as to amount of compensation for certain damage, loss, or expense not in excess of $25,000. (c. S-24, § 30).

Water, Gas and Electric Companies Act.

If any company considers it necessary or proper to conduct any of its pipes, wires, or conductors or to carry any of its works through land of any person, and consent of that person cannot be obtained for that purpose, matter must proceed to arbitration under Arbitration Act to determine necessity of carrying on work and appropriate compensation, if it is performed. (c. W-4, § 29).

Water Act.

If persons are unable to resolve complaint or dispute with respect to matter under Act, it is first referred to Director who may appoint mediator if unable to settle issue. (c. W-3, §§ 93 and 94[1]).

Workers’ Compensation Act.

Statutory scheme for compensation for workers for earnings lost when they are disabled in course of their employment. Whether or not eligible disabled worker wishes to accept limited benefits available through Act, worker and his family are barred from taking legal action against any employer or worker who is within scope of Act. (c. W-15, § 23).

Voluntary Dispute Resolution.

General.

There are variety of alternative dispute resolution mechanisms and methods. More common ones are: mediation, arbitration, mediation-arbitration, judicial mini-trials, alternative measures (young offenders) and ombudsmen. Other, less common, DR options which are not provided for in any systematic way but are still available include: early neutral evaluation (third party), neutral expert fact-finding (complex, technical issues), private mini-trials (jury composed of executives), summary jury trials (jury composed of public), private judging (rent-a-judge) and circle sentencing (aboriginal bands).

Alberta Family and Social Services.

Custody and Mediation Program: Purpose is to provide expert opinion in certain actions where custody and/or access are in issue. First step is closed mediation, where information from mediation is privileged. If there is no settlement or closed mediation is inappropriate, second step is open assessment where communications are not confidential and are used by assessor to prepare Custody Access Report. Three conditions must be met: (i) Proceedings must be commenced or continued in Queen’s Bench or Surrogate Court of Alberta; (ii) both parties to proceedings must reside within boundaries of Province of Alberta; and (iii) both parties must agree to participate.

Arbitration.

See topic 9.02 Arbitration and Award. Arbitration Act which applies to arbitration conducted under arbitration agreement or authorized or required under enactment unless parties exclude it.

There are several types of arbitration. These include: first offer arbitration, revised offer arbitration, modified first offer arbitration, multiple offer selection, issue by issue arbitration.

Final Offer Arbitration (F.O.A.).

Arbitrator chooses settlement position of either party and nothing in between.

Modified F.O.A.

If arbitrator dislikes both offers, he can write his own proposal which both parties must accept as solution; otherwise matter returns to arbitrator for choice between original proposals.

Repeated Offer Arbitration.

If arbitrator considers both offers unreasonable, he can choose neither and require resubmissions.

Multiple Offer Selection.

Each side submits number (e.g.: three) of optional settlements from which arbitrator chooses best offer; arbitrator discloses which side he has chosen; opposing side then selects one of chosen side’s submitted options and this becomes actual award.

Better Business Bureau of Southern Alberta.

Better Business Bureau Dispute Settlement Centre (DSC) is not-for-profit organization which provides assistance with ADR. DSC handles wide range of disputes with exception of family and criminal matters and offers both mediation and arbitration.

Canadian Dispute Resolution Corporation.

Will mediate personal injury disputes.

Judicial Mini-Trial.

Judge presides and renders nonbinding opinion. Viva voce evidence may be heard. Information is confidential. Briefs must be filed. Clients must appear while lawyers are presenting arguments to judge. No costs are assessed. Same judge cannot preside over any subsequent court proceedings. Held either independently or as part of extended Pre-Trial Conference. Existing practice is for parties to approach Chief Justice or Associate Chief Justice to request mini-trial be held. Another method is for parties to request Pre-Trial judge schedule Court time to conduct mini-trial.

New Home Warranty Program.

Will provide conciliation, mediation, and arbitration between homeowners and builders.

Other Private DR Agencies.

Alberta Arbitration and Mediation Society, Alberta Family Mediation Society (post-divorce parenting arrangements, child custody and access, child support, spousal maintenance and property disputes), Calgary Community Mediation Service, Edmonton Community Mediation Program.

Provincial Court—Civil Division.

See topic Mandatory Dispute Resolution. Anytime after dispute note is filed by defendant, any party may request mediation. (A.R. 271/97, § 2).

Rule 403 Referees.

Referees include Masters in Chambers, Clerks of Court and persons appointed by Lieutenant Governor in Council and persons appointed by Court with consent of all parties. (A.R.C. 403).

Agriculture Financial Services Act.

When person applies to Agriculture Financial Service Corporation for insurance, Corporation may provide in its policy method of settling disputes arising out of adjustment of losses. (c. A-12, § 40[2][o]).

Employment Standards Code.

Director may settle or compromise any difference between any employer and employee and receive money on behalf of employee in settlement of difference. (c. E-9, § 94[1][b]). Director and, if parties agree, Registrar may appoint mediator to assist parties in settling their dispute. (c. E-9, § 73).

Farm Implement Act.

Any dispute between purchaser and dealer, distributor, or manufacturer may, at option of either party, be submitted to two arbitrators under Arbitration Act instead of being settled by action. (c. F-7, § 19). Inspector may, upon request of purchaser, inquire into and attempt to resolve any dispute between purchaser and dealer, distributor, or manufacturer regarding any obligation imposed on dealer, distributor or manufacturer by Farm Implement Act. (c. F-7, § 20[1]). Where request for disclosure is made as part of inspection, dealer, distributor, or manufacturer must disclose. (c. F-7, § 20[2]).

Freedom of Information and Protection of Privacy Act.

Commissioner may authorize mediator to investigate and try to settle any matter that is subject of request for review. (c. F-25, § 68). If matter is not settled under § 68 Commissioner shall conduct inquiry and decide all questions of fact or law arising (c. F-25, § 69[1]) unless in opinion of commissioner subject matter of request for review has been dealt with in order or investigation report under § 65 or circumstances warrant refusing to conduct inquiry. (c. F-25, § 70).

Hospitals Act.

At request of board of approved hospital, Minister may authorize mediation of any dispute that has arisen in course of administration or operation of hospital and may designate mediator, who shall report back to Minister. (c. H-12, § 27).

Mines and Minerals Act.

In order to settle any dispute, Minister may direct survey or resurvey be made. (c. M-17, § 26[1]). Inspector or investigator may help facilitate resolution of any matter, issue or dispute at request of any person with interest in land that is affected by exploration. (A.R. 284/2006, § 64).

Ombudsman Act.

Independent, non-partisan third party may investigate complaints of any decision, recommendation, act or omission of Minister or his Department, etc. He may issue nonbinding report and recommendation, as means of correcting organizational abuses and resolving internal disputes. Only available where no other adequate remedy (i.e. appeal) exists. (c. O-8, §§ 12, 13[1]). Sections 12(1) and 13(1) do not apply to professional corporation that is health authority. (c. O-8, c. 30, § 18).

Residential Tenancies Act.

Landlord and Tenants Advisory Board will receive complaints and seek to mediate disputes between landlords and tenants of residential properties. (c. R-17, § 59[2][b]). Landlord or tenant who has right to apply to court for remedy may instead apply to Dispute Resolution Service. (c. R-18, § 54.2). When said application has been filed, no court application may be made for remedy sought or any remedy to resolve related dispute. (c. R-17, § 54.3[3]).

Youth Justice Act.

Alternative measures to judicial proceedings may be used for certain alleged offenses where: youth consents, does not deny his participation in offence, and does not express wish to be dealt with by Youth Court. (c. Y-1, § 3). Reconciliation may involve: apology, personal service to victim, compensation if any monetary loss was involved, and/or community service.

9.02 ARBITRATION AND AWARD:

Contracts to Arbitrate Future Disputes.

Arbitration agreement need not be in writing. (c. A-43, § 5[1]). Agreement requiring or having effect of requiring matter in dispute to be arbitrated before dealt with by courts has same effect as arbitration agreement. (c. A-43, § 5[2]).

Rescission.

Arbitration agreement may be rescinded only in accordance with law of contract. (c. A-43, § 5[3]). Arbitration Act applies to arbitration conducted under arbitration agreement or authorized or required under enactment unless application of Act is excluded by law or by agreement between parties or by Part 2 of International Commercial Arbitration Act. (c. A-43, § 2[1], as am'd).

Form and Requisites of Submission.

Arbitration may be commenced in any way recognized by law. (c. A-43, § 23[1]).

Hearing.

Witnesses may be called and evidence taken as in court proceeding. (c. A-43, §§ 29, 30). Tribunal shall make decision in accordance with law and equity. (R.S.A. 2000, c. A-43, § 31).

Stay.

Court shall order stay of court proceedings on motion from either party where agreement contained arbitration clause unless clause defective in some way. If court refuses to stay proceedings, no arbitration shall commence, any ongoing arbitration shall discontinue, and anything done in connection with arbitration before court's order shall have no force or effect. (c. A-43, § 7).

Award and Enforcement Thereof.

Award binds parties, subject to permitted appeal or application to set aside. (c. A-43, § 37). Court may enforce tribunal order as if order made by court. (c. A-43, § 18[2]).

Judgment on Award.

Upon application, court shall give judgment unless 30 day appeal period not over, appeal pending or award has been set aside. (c. A-43, § 49[3]).

Appeal.

Award may be appealed to court if agreement so provides. (c. A-43, § 44[1]). Court may set aside award, or give directions to tribunal on grounds including invalidity of agreement to arbitrate; procedures improper, party treated manifestly improperly; subject matter may not be arbitrated. (c. A-43, § 45[1]).

Mandatory Arbitration.

See topic 9.01 Alternative Dispute Resolution, subhead Mandatory Dispute Resolution.

10 DOCUMENTS AND RECORDS

10.01 ACKNOWLEDGMENTS:

The form of acknowledgment before a notary public, in common use in the United States, is not sufficient in Alberta, except in the case of a wife who signs a document to bar her dower interest and a person acknowledging his guarantee. (cc. D-15, G-11). Instead of acknowledgment, formal affidavit must be taken by witness or witnesses to document, before proper officer, swearing to due execution of document. See also category 8 Debtor and Creditor, topic 8.04 Bonds, subhead The Guarantees Acknowledgment Act.

Officers Who May Take Affidavits.

See topic 10.02 Affidavits.

Requisite for Taking.

In all cases the officer must be satisfied as to the identity of the deponent.

Corporations.

No formal proof of execution by a corporate body is generally required where signed by proper officer or officers. (c. B-9, § 25[4]; c. C-21, § 309).

Married Men/Women.

Spouse signing release or conveyance of his/her dower must appear before proper officer, apart from his/her spouse and acknowledge his/her signature, that he/she understands document and that he/she is not acting under compulsion. (c. D-15, § 5[1]). For Form see category 8 Debtor and Creditor, topic 8.13 Homesteads.

Authentication.

Documents attested before notary public in Alberta and used in foreign jurisdiction may be authenticated by forwarding same to Alberta Justice, 9833-109 Street, Room 111, Edmonton, Alberta T5K 2E8, with fee of $10 per document and written request for authentication.

Documents attested before a notary public or similar official in a foreign jurisdiction are admissible as evidence in a provincial court if properly sealed and signed, with office shown below signature, without further proof of person's signature, official character or jurisdiction in place where document was completed. (c. A-18, § 47).

Alternative to Acknowledgment or Proof.

Person making affidavit or deposition who objects to taking oath may, if objection is based on conscientious scruples, religious belief or he does not regard oath as binding, make affirmation and declaration. (c. A-18, § 17[1]).

10.02 AFFIDAVITS:

General Requirements as to Administration.

Generally should be confined to statements of fact within knowledge of deponent save on interlocutory matters. (A.R.C. 305).

In matters in court, affidavit must: be titled in cause or manner or in intended action, be made in first person and contain full name, occupation and true abode of deponent and be signed by him and person before whom it was sworn. It must have name of deponent and date sworn stated at top of front page and backer. Every affidavit shall be divided into paragraphs numbered consecutively. (A.R.C. 298[1], 299, 304[1]).

General Requirements of Jurat.

Jurat must be signed by person who swore it and express date and place where sworn. (A.R.C. 299, 300). If sworn by more than one person, names of persons making affidavit must appear in jurat. (A.R.C. 301).

Use of Affidavit.

Affidavit evidence may be used in any state of proceeding and in any application in chambers. (A.R.C. 313).

By Whom Taken.

When sworn to in province it must be sworn to before a judge, clerk of court, or deputy clerk, notary public, justice of peace or commissioner for oaths (A.R.C. 309) and when sworn outside of province before: (a) Judge; (b) magistrate; (c) officer of court of justice; (d) commissioner for taking affidavits or other competent authority of like nature; (e) notary public; (f) head of city, town, village, township or other municipality; (g) officer of any of Her Majesty's diplomatic or consular services, including ambassador, envoy, minister, chargé d'affaires, counselor, secretary, attaché, consul-general, consul, vice-consul, pro-consul, consular agent, acting consul-general, acting-consul, acting vice-consul, and acting consular agent; (h) officer of Canadian diplomatic, consular or representative services, including, in addition to diplomatic and consular offices mentioned in clause (g), high commissioner, permanent delegate, acting high commissioner, acting permanent delegate, counsellor or secretary; or (i) Canadian Government Trade Commissioner or Assistant Canadian Government Trade Commissioner. (c. A-18, § 47).

Formalities.

Every person administering oaths must express date and place of so doing. (A.R.C. 300). All interlineations, alterations or erasures in jurat or in body of affidavit must be initialed by officer taking same. (A.R.C. 308).

Where properly marked exhibit referred to in but not annexed to affidavit, exhibit need not be filed and will be returned on disposal of motion. (A.R.C. 312).

Form of oath must be such as invokes Deity and binds deponent's conscience or it may be administered in such form or in such ceremonies as such person may declare to be binding. Where an oath has been duly administered and taken, fact that deponent had mental reservations or conditions or no religious belief does not affect validity of oath. (c. A-18, § 14[2]).

Statutory Declarations.

For certain purposes statutory declarations may be taken instead of affidavits. These are declarations similar in form to an affidavit which are given the force of an affidavit by statute. (c. A-18, § 17). Strictly speaking they should be used in every case except in the case of court actions where an affidavit is necessary. It is only necessary to declare or affirm the contents instead of swearing.

Authentication.

Any document purporting to have been signed and sworn (with seal attached in case of notary public, etc.) is admissible in evidence without further proof of the fact of seal and signature or official character of person administering oath. (c. A-18, § 47[3]).

Filing.

Affidavits upon which a notice of motion or petition is founded shall be filed before service of notice of motion or petition and served with notice of motion or petition. (A.R.C. 310).

Affidavit should commence as follows:

Form

I...... of the...... of...... in the...... of......,...... (occupation)...... make oath and say: (etc.).

The jurat ordinarily reads as follows:

"Sworn before me at the.... of.... in the.... of.... this...... day of.... A. D. 20........... (officer's signature)....... A Commissioner/Notary Public in and for the.......... of.........." etc.

In case of illiterate or blind person, officer administering oath must certify in jurat that (a) Affidavit was read in his presence to deponent; (b) deponent seemed to perfectly understand it; and (c) deponent made his signature or mark in his presence. (A.R.C. 302).

Commissioners for oaths and notaries public must print or stamp their names next to their signatures and, if appropriate, date upon which their commission or appointment expires. (c. C-20, § 12[1], as am'd; c. N-6, § 8[1], as am'd).

Form

Statutory Declaration.

Should be entitled “In the matter of......” and begin as follows:

I...... solemnly declare that:

After the contents of the declaration the following is inserted as the last clause thereof.

“And I make this solemn declaration conscientiously believing it to be true and knowing that it is of the same force and effect as if made under oath.”

The jurat reads as follows:

“Declared before me at........... of...... this...... day of...... 20..... etc. (c. A-18, § 18).

Alternative to Affidavit.

Person making affidavit or deposition who objects to taking oath may, if objection is based on conscientious scruples, religious belief or he does not regard oath as binding on his conscience, make affirmation and declaration. (c. A-18, § 17).

10.03 NOTARIES PUBLIC:

Qualification.

Notaries are appointed by Minister of Justice and Attorney General and every member of legislative assembly, house of commons or senate is ex officio notary. (c. N-6, §§ 2[1], 5). Barristers and Solicitors, students-at-law, judges and Masters in Chambers are notaries public. (c. N-6, §§ 3, 4).

Authentication.

See topic 10.01 Acknowledgments.

Term.

Every barrister and solicitor and student-at-law is notary unless suspended from Law Society of Alberta. Judges of Provincial, Queen’s Bench and Appeal Courts and Master In Chambers and political representatives are notaries by virtue of office. (c. N-6, §§ 3, 4, 5, 6). Commission of other notaries expires two years from Dec. 31 of year of appointment, and such notaries must write or stamp date of expiration of commission on every affidavit, etc. (c. N-6, §§ 7[1], 8[1]).

Name and Expiration of Commission.

Notaries must print or stamp their name and if appointed under § 2, date on which appointment expires, etc. on each affidavit attested by them. (c. N-6, § 8[1]).

Seal.

Every notary public signing as such must affix his official seal beside his signature, although seal is not necessary for documents used within the province. (c. N-6, § 6). This seal usually reads “. .. .. ., Notary Public, Province of Alberta” and is impressed.

Powers and Duties.

Every notary has and may exercise power of administering oaths, taking affidavits, affirmations, and declarations, drawing, passing and keeping and issuing all deeds and contracts, charter parties and other mercantile transactions in province, attesting all commercial instruments that may be brought before him for public protestation and otherwise of acting as usual in office of notary. (c. N-6, § 6[1]). However, appointment of notary public may be made with limited powers. (c. N-6, § 6[2]).

Fees.

There are no fixed fees for notarial acts.

Territorial Extent of Powers.

Authority of notary extends throughout the province.

Diplomatic Representatives.

No longer may act as notaries. (1958, c. 52).

10.04 RECORDS:

Registrar of Titles and Inspector of Land Titles Offices are responsible for administration of Land Titles Office.

Foreign Conveyances or Encumbrances.

Registrar shall decide whether any instrument or caveat is substantially in prescribed form and may reject any instrument or caveat that Registrar decides for any reason to be unfit for registration. (c. L-4, § 50).

Place of Recording.

Records of transfers, mortgages, liens, judgments, and writ of enforcement affecting lands should be filed in designated Land Titles Office. Former Northern and Southern Land Registration Districts have been abolished. (1996, c. 32, § 5).

Chattel mortgages, lien notes and other charges on personalty should be registered in Personal Property Registry.

See category 20 Mortgages, topic 20.04 Personal Property Security.

Requisites for Recording.

In recording any instrument both original and signed duplicate must be produced. In Land Titles Office original is retained and copy returned. In other cases original may be returned.

Effect of Record.

Fixes all parties with statutory notice which in nearly every case prevents bona fide parties from ranking above those already interested. Instruments may be given in evidence for any action affecting land. (c. L-4, § 200).

Torrens System.

Alberta has used Torrens System since 1887. Under this system, Alberta government is solely responsible for issuing land ownership rights.

Assurance Fund.

Any person who suffers damage by reason of mistake or omission or misfeasance in office of Registrar or who is deprived of land or encumbrance or of estate or interest in land or encumbrance by bringing it under Act, by registration of it in another’s name or by error, omission or misdescription in certificate of title when deprived person is barred from bringing action for recovery may bring action against Registrar for recovery of damages to be paid out of General Revenue Fund. Former Assurance Fund was abolished effective Mar. 31, 1994 by S.A. 1994, c. 31, § 5. (c. L-4, §§ 168, 180). Actions must be brought within six years, or in case of minors or persons under disability, within six years from date on which disability ended. (c. L-4, § 178).

Transfer of Decedent's Title.

Where real property is in name of a deceased, duly appointed executor or administrator obtains from court issuing probate or administration, a certified copy of grant. He then applies to have title of deceased registered in his name as executor or administrator. New title is issued by Land Titles Office and executor or administrator is then deemed owner. Title of executor to land deemed to have taken effect on death of deceased owner. (c. L-4, § 116). If infants have interest in estate's lands, any transfer requires consent of Public Trustee or court order. Transfer otherwise requires certificate of Public Trustee, court order or affidavit that no minors interested in estate. (c. L-4, § 120).

If real estate owned by nonresident, transmission requires some person be appointed by probate court to deal with estate. Original grant of probate or administration may be issued by Alberta court. If not done, grant, if issued within British Commonwealth, may be resealed and person to whom such grant issued then proceeds as above. Resealing requires security to be provided to cover value of property of deceased unless court dispenses with security. (c. A-2, § 29; c. L-4, § 116[3]).

Vital Statistics.

Records of births, change of sex, deaths, and marriages are kept by Registrar of Vital Statistics, but matters of birth, marriage and death may be registered at office in any city and many towns. (c. V-4, § 26). S.A. 2007, c. V-4.1 will repeal and supercede existing Act. Its current status is unproclaimed. To establish record where none exists, contact Vital Statistics, Box 2023, Edmonton, AB T5J 4W7. Copies of records may be obtained from any Alberta Registry Agent. Fee of $20, plus applicable service fee, charged for certificate of birth, marriage or death. (A.R. 322/2000, § 11).

Lis Pendens.

Person who has proceeded by way of action may file lis pendens at Land Titles Office. Such persons are liable for compensation to any person for damages if there did not exist reasonable cause to file lis pendens. (c. L-4, §§ 148, 149).

10.05 SEALS:

In order to create a specialty debt, it is necessary to contract under seal. Seal imports consideration; otherwise as in simple contracts, it is necessary to prove consideration. Words such as "signed, sealed and delivered" are not sufficient and will not suffice in place of seal.

The seal need be of no particular kind. Anything stuck opposite the signature as a seal or any make-shift such as writing "seal" or daubing ink, etc., will be considered as a seal if the parties so intend.

Corporate Seals.

Corporations incorporated under Alberta Business Corporations Act may adopt seal that contains name of corporation. Documents executed on behalf of or requiring authorization of corporation, if executed by directors or officers of corporation, are not invalid merely by lack of corporate seal. Corporation may issue shares under its corporate seal or facsimile of that seal. (c. B-9, § 25).

10.06 TORRENS ACT:

See topic 10.04 Records.

10.07 VITAL STATISTICS:

See topic 10.04 Records.

11 EMPLOYMENT

11.01 EMPLOYER AND EMPLOYEE:

See topic 11.02 Labour Relations.

11.02 LABOUR RELATIONS:

Rights and liabilities of employer and employee are regulated by common law supplemented by several provincial statutes.

The Employment Standards Code (c. E-9) regulates employment relationships, including records, hours, wages, vacations and holidays with pay and collection of entitlements. Administration of Act is in hands of Director who has recourse to officers to investigate matters under Act and to issue orders. Appeals are to umpires appointed under Act.

Master and Servants Act.

(c. M-7) applies to contracts or hire of personal service and provides summary machinery for dealing with servants guilty of misconduct and employers failing to pay wages promptly or improperly dismissing employees. It does not affect parties' ordinary civil rights. Act provides that contracts for more than one year must be in writing and signed by both parties. (c. M-7, § 2). Act applies in Alberta to contracts made outside of Alberta. (c. M-7, § 3).

Hours of Labour.

Regulated by The Employment Standards Code. (c. E-9). Subject to exceptions in Regulations regular working hours of any employee shall not exceed eight in a day nor 44 in a week. (c. E-9, § 21). Employer must allow 24 consecutive hours of rest each week or multiple of 24 hours for equivalent multiple of weeks up to four; otherwise overtime must be paid or time off given. (c. E-9, § 19).

Wages.

The Employment Standards Code provides minimum wages may be fixed by regulation (c. E-9, § 138) currently A.R. 14/1997.

Employer is obliged to pay wages owing to each employee within ten days after end of employment period. (c. E-9, § 8).

Act gives employee priority over other claims that are not secured for up to $7,500, and order of officer or umpire covering employee's claim when registered against property of employer becomes secured charge with same priority it would have if it were registered mortgage. (c. E-9, §§ 109-112). Employer is deemed to hold all wages, overtime pay, vacation pay and general holiday pay due to employee in trust for employee. (c. E-9, §§ 109-111).

Child Labour.

No person under 15 shall be employed without written consent of parent or guardian and approval of Director. No person shall during normal school hours employ child required by law to attend school. Child must be enrolled in off-campus education program. (c. E-9, § 65).

Maternity and Parental Leave.

Entitlement, length and notice requirements are dealt in accordance with c. E-9, Part 2, Div. 7.

Discrimination.

Employers, trade unions and occupational associations forbidden to discriminate because of race, religious beliefs, colour, gender, physical disability, mental disability, marital status, age, ancestry or place of origin, family status or source of income. (c. A-25.5, §§ 7[1] and 10). Prohibited ground for discrimination of “sexual orientation” was read into Act by Supreme Court of Canada in case of Vriend v. Alberta (1998) 1 S.C.R. 493.

Equal Pay.

Alberta Human Rights Act provides where employees of both sexes perform same or substantially similar work for employer, employer shall pay employee same rate of pay. (c. A-25.5, § 6).

Labour Unions.

The Labour Relations Code (c. L-1) regulates employment field, except managerial positions and professional members of medical, dental, architectural, engineering or legal professions qualified to practice in Alberta, with respect to certification of unions, collective agreements, mediation, arbitration, strikes and unfair labour practices. Act appoints Labour Relations Board to supervise certification of unions and conduct of strike votes, investigate and decide labour disputes, and impose penalties for breaches of Act.

Trade union may be certified as bargaining agent of unit upon showing majority support from members of unit and complying with certification provisions of Code. Certified bargaining agent has exclusive authority to bargain collectively on behalf of unit and to bind it by collective agreement. (c. L-1, Part 2, Division 5). Certification can be revoked upon application of employees in unit or Labour Relations Board’s own initiative where no person objects to such initiative. (c. L-1, Part 2, Division 8).

Act permits employer organizations in construction industry to bargain collectively on behalf of all employers in territory or trade jurisdiction in respect of whom trade union has right of collective bargaining, where employer organization claims to have majority of employers as members. Employer organization must apply to be registered in manner set forth in Code. (c. L-1, Part 3, Division 3).

Labour Disputes.

No employer or employer’s organization or its agent can interfere with formation, or administration of union nor can such persons contribute to its support in financial or any other way subject to exceptions contained in Act. Nor may employer exercise any form of restraint or pressure on his employee with regard to his union affairs. (c. L-1, §§ 148, 149).

Strike or lockout is illegal during term of collective agreement and up to 30 days after certification of bargaining agent. Legal strike or lock-out requires affirmative vote by majority. (c. L-1, Part 2, Division 13). During collective bargaining parties may request or Minister may require appointment of mediator. (c. L-1, Part 2, Division 11). Every collective agreement must provide provisions for settling differences. (c. L-1, Part 2, Division 22, § 135).

Miscellaneous Regulations.

General health and safety rules for occupations and work sites, licensing, fees and fines may be prescribed by regulation. (c. O-2, § 40). Officer has power to inspect for unhealthy or unsafe conditions and stop work if necessary on those sites. Officer under Occupational Health & Safety Act may inspect any work site. Director of Inspection may apply for restraining order where officer's powers are interfered with. (R.S.A. 2000, c. O-2, §§ 8, 9, 11).

Contravention of Safety Standards.

Employer is liable on summary conviction for contravention of safety standards to fine or imprisonment or both. (c. O-2, § 41).

Worker's Compensation Act.

(c. W-15) provides machinery whereby worker injured in course of his employment may secure compensation from "accident fund" accumulated and sustained by assessment of employers, in industries coming under provisions of this Act.

Act applies to all employers and workers in all industries except those exempted by regulation and may by order extend to persons fighting disasters or emergencies. (c. W-15, § 14).

Civil Enforcement Act.

(c. C-15) allows for registration of writ of enforcement to entitle Board to conduct civil enforcement proceedings as if it were enforcement creditor in addition to rights and remedies provided under Act.

Remedy Exclusive.

Provisions of Act are in lieu of all rights of action statutory or otherwise which a workman or his dependents may have been entitled to bring against his employer. (c. W-15, § 21).

Unemployment Compensation.

See Canada Law Digest.

11.03 WORKERS' COMPENSATION LAW:

See topic 11.02 Labour Relations.

12 ENVIRONMENT

12.01 ENVIRONMENTAL REGULATION:

General Supervision.

Minister of the Environment has broad supervisory powers and administers principally under Environmental Protection and Enhancement Act ("EPEA"). (c. E-12). This Act came into force Sept. 1, 1993. Environmental Appeals Board is established (c. E-12, § 90) whereby certain decisions by Director under EPEA may be appealed (c. E-12, § 91).

Release of Substances.

Release of substance into environment, done knowingly or otherwise, is prohibited in amount, concentration or level or at rate of release in excess of what is expressly prescribed by approval or regulation (c. E-12, § 108) or, where there is no approval or regulation, such as would cause significant adverse effect and was not authorized by approval (c. E-12, § 109).

Contaminated Sites.

Site may be designated as contaminated, where substance that may cause, is causing or has caused significant adverse effect is present. (c. E-12, § 125). Environmental protection order to clear-up site may be issued to any person responsible for contaminated site. (c. E-12, § 129). Language "person responsible for the contaminated site" is defined broadly and includes present and past owners of site. (c. E-12, § 107).

Enforcement.

Investigation must be carried out if two adult persons, ordinarily resident in Alberta, solemnly declare that they believe offence has been committed. (c. E-12, §§ 196-197). Investigator has broad powers to enter and inspect places and vehicles for purpose of administering EPEA without search warrant or order. (c. E-12, § 198). Investigator may obtain order for entry and inspection but may not enter private dwelling place without consent of occupant or search warrant or order. (c. E-12, § 199). Director may issue enforcement order to, among others, suspend or cancel approval or shut down any activity or thing either permanently or for specified period. (c. E-12, § 210). Power to suspend or cancel does not apply to violations of §§ 178, 179, 180, 181 or 182. (c. E-12, § 210).

Approval.

No person may commence or continue any activity designated by regulations as requiring approval if appropriate approval has not been obtained. (c. E-12, §§ 60, 61). "Activity" includes release of substances likely to have adverse effect, any industrial, manufacturing or processing operation, most energy undertakings, exploration, and any other undertaking or thing defined as activity in regulations. (c. E-12, § 1(a), Schedule of Activities).

Disclosure.

Information provided to Minister for purpose of obtaining approval must be disclosed to public. Other information may also be disclosed at Minister's discretion. Confidentiality may be requested. (c. E-12, § 35).

Penalties.

Failure to comply with numerous requirements of EPEA constitutes offence. Two levels of offence are created - "mens rea" offence and strict liability offence. If individual knowingly contravenes Act, maximum penalty is $100,000 fine or imprisonment for two years or both; for corporation maximum penalty is $1,000,000. Strict liability offence carries fine only - maximum of $50,000 for individuals and $500,000 for corporations. (c. E-12, § 228).

Emissions Control.

This area of law falls under EPEA and Climate Change and Emissions Management Act ("CCEMA"). (c. C-16.7). Enacted under CCEMA, Specified Gas Emitters Regulation ("SGER") came into force July 1, 2007. (A.R. 139/2007). SGER regulates generation of emission offsets, fund credits and emission performance credits. Emissions Trading Regulation ("ETR") was enacted pursuant to EPEA. (A.R. 33/2006). EPEA regulates trading and registration of emission offsets, fund credits and emission performance credits.

Environmental Impact Assessments.

Environmental assessment process is established, and any project may be required by Director to undergo process if it warrants further investigation. (c. E-12, §§ 41, 43). Process begins with initial review (c. E-12, § 44), and may continue with preparation of environmental impact assessment report (c. E-12, § 45). Minister may at any time require environmental impact assessment report if he or she considers it necessary. (c. E-12, § 47). Any environmental impact assessment report must be published and otherwise made available in accordance with regulations. (c. E-12, § 52).

Water Law.

Property in all water in Alberta is vested in Her Majesty in right of Alberta pursuant to Water Act. (c. W-3, § 3). Being key piece of legislation in this area of law, Water Act is to support and promote management and conservation of water in province and regulate its allocation and use. (c. W-3, § 2).

Wildlife and Endangered Species.

This area of law is governed by Wildlife Act. (c. W-10). Subject to enumerated exceptions in Wildlife Act, property in all live wildlife in Alberta is vested in Crown. (c. W-10, § 7). Wildlife Act governs establishment of and entitlements under licenses and permits (c. W-10, § 12) and sets forth rules for hunting and related activities.

Other matters covered by EPEA include beverage and container recycling (A.R. 101/97, 177/2008), conservation and reclamation (A.R. 115/93), lubricating oil material, recycling and management (A.R. 82/97, 155/2009), ozone depleting substances such as hydrocarbons (A.R. 181/00, 132/04), potable water (A.R. 277/03) and pesticides (A.R. 43/97, 315/2003 and A.R. 24/97, 271/2003), waste control (A.R. 192/96, 68/2008), recycling and management (A.R. 93/04, 193/2009), electronic designation (A.R. 94/04, 151/2007), and waste water and storm drainage (A.R. 120/93, 278/2003, A.R. 119/93, 315/2003). Most regulations in these areas came into force Sept. 1, 1993 and undergo review approximately every five years. EPEA also provides for "conservation easements" to protect or limit development on land for purpose of conservation. (c. E-12, § 22). Note that § 22 of EPEA will be repealed upon proclamation by Alberta Land Stewardship Act, assented to June 4, 2009. (c. A-268, § 76).

13 ESTATES AND TRUSTS

13.01 ADMINISTRATION:

It is function of Ombudsman under Ombudsman Act, to investigate administrative decisions and acts of officials of government and its agencies, either on his own motion or pursuant to complaint made. His authority is limited to cases where there is no other remedy open to aggrieved person. (c. O-8).

See topic 13.08 Executors and Administrators.

13.02 ADVANCEMENTS:

See topic 13.06 Descent and Distribution.

13.03 ALLOWANCES:

See topic 13.08 Executors and Administrators.

13.04 DEATH:

The Insurance Act sets out that when person is not heard of for seven years rebuttable presumption of death arises for purposes of life insurance. (c. I-3, § 593).

Survivorship Act.

General rule is that when two or more persons die under circumstances rendering it uncertain which survived other older is presumed to have died first. (c. S-28, § 1).

In case of a statute or instrument providing for disposition of property operative if designated person dies either before or at time of death of another, or in circumstances rendering it uncertain which of them died first, and designated person does die in those circumstances, then the case for which statute or instrument provides is deemed to have occurred. (c. S-28, § 2).

Similarly, where a will so designates, then, for purposes of probate the case for which will provides is deemed to have occurred. (c. S-28, § 3).

But in case of life insurance, where the insured and the beneficiary die under such circumstances, the beneficiary is presumed to have died first and the insurance money becomes part of the insured's estate, but only if no alternative disposition is provided in the contract or by declaration, and there is no other surviving beneficiary. If there are two or more such beneficiaries, they take in equal shares. (c. I-3, §§ 578, 599).

Action for Death.

Limitations Act came into force on Mar. 1, 1999 and applies to all actions commenced on or after Mar. 1, 1999, whether or not claim arose on or after Mar. 1, 1999. (c. L-12, § 2). In general, civil claim must be commenced within two years after date on which claimant first knew or ought to have known that injury giving rise to claim arose or ten years after claim arose. (L-12, § 3). Personal representative of deceased as successor owner of claim must bring action within earliest of: (a) Two years from time deceased owner first knew or ought to have known of conduct giving rise to claim if deceased acquired knowledge more than two years before death; or (b) two years after representative was appointed if he had knowledge of conduct giving rise to claim at time of appointment; or (c) two years after representative first acquired or ought to have acquired knowledge of conduct giving rise to claim if he acquired knowledge after appointment. (c. L-12, § 3). If there is no executor or administrator or if he does not bring action within one year then action may be brought by beneficiaries. (Fatal Accidents Act, c. F-8, § 3[2]). Action is for benefit of surviving spouse, adult interdependent partner, parent, child, brother or sister. Although there are no statutory limitations on amount of damages, sums ranging from $45,000 to $75,000 are prescribed for bereavement damages in Fatal Accidents Act. (c. F-8, § 8[2]). Right to bring civil proceeding, or civil proceeding commenced before death vested in or existing against person's estate respectively, this does not apply to prosecution for contravention of Act, regulation or by-law. (Survival of Actions Act, c. S-27, §§ 2, 3). Only those damages that result in actual financial loss to deceased or his estate are recoverable. (c. S-27, § 5[1]). Recovery of punitive or exemplary damages, damages for loss of expectation of life, pain and suffering, physical disfigurement or loss of amenities, and damages in relation to future earnings, including damages for loss of earning capacity, for causes of action arising after coming into force of this section are expressly excluded. (c. S-27, § 5[2]).

Adult Interdependent Partner (A.I.P.).

Defined in Adult Interdependent Relationship Act, c. A-4.5 as persons who have lived together in relationship of interdependence for continuous period of not less than three years who have children together or who have signed adult interdependent agreement. (c. A-4.5, § 3).

Death Certificate.

See category 10 Documents and Records, topic 10.04 Records, subhead Vital Statistics.

13.05 DECEDENTS' ESTATES:

See topics 13.06 Descent and Distribution, Executors and Administrators, Wills; category 8 Debtor and Creditor, topic 8.13 Homesteads.

13.06 DESCENT AND DISTRIBUTION:

Subject to rights of surviving spouse, or A.I.P., if any, real and personal property of person dying intestate descends and is distributed under Intestate Succession Act as follows, each class of which member is living taking to exclusion of subsequent classes: (1) Children and/or issue of deceased children per stirpes; (2) parents equally or all to surviving parent; (3)

brothers and sisters and/or children of deceased brothers and sisters per stirpes; (4) nephews and nieces in equal shares, no representations being admitted; (5) equally among the next of kin of equal degree of consanguinity to the intestate, no representations being admitted. (c. I-10, §§ 4-8). Under Dependants Relief Act dependent of deceased may apply to court to vary rules of distribution upon intestacy if there is not adequate support. (c. D-10.5, § 3). See also topic 13.08 Executors and Administrators.

Surviving Spouse or A.I.P.

Takes all if decedent left no issue. If decedent left surviving spouse or A.I.P. and issue, surviving spouse or A.I.P. takes all of estate if estate worth less than $40,000 and first $40,000 if estate worth more than $40,000. (c. I-10, § 3[1]). If decedent left one child, surviving spouse or A.I.P. receives one-half of value of estate in excess of $40,000. (c. I-10, § 3[2][a]). If decedent left more than one child, surviving spouse or A.I.P. receives one-third of value of estate in excess of $40,000. (c. I-10, § 3[2][b]). If decedent left surviving spouse and A.I.P., whichever last lived with decedent takes share to which spouse or A.I.P. entitled and other takes no share of estate. (c. I-10, § 3.1[1]). Person entitled to take part of decedent’s estate as A.I.P. may not take any further part of estate in another capacity. (c. I-10, §§ 2, 3, 3.2). Rights of surviving spouse are forfeited by living apart from intestate and living in adultery. (c. I-10, § 13).

Half Blood.

Whole and half blood share alike. (c. I-10, § 9).

Afterborn Children.

Children born within the period of gestation after intestate’s death take same as other children. (c. I-10, § 10).

Adopted Children.

See category 14 Family, topic 14.01 Adoption.

Illegitimates.

No distinction is made between children born within or outside marriage. (c. I-10, § 1[b]).

Advancements to children are taken into account in distribution pursuant to Intestate Succession Act. (c. I-10, § 11). Advancements are otherwise governed by common law rules, except as between spouses in action under Matrimonial Property Act. (c. M-8, § 36).

Escheat.

Prior to Sept. 1, 2008, Crown in right of Alberta is ultimate heir of every person dying intestate in fact as regards any property situate in Alberta and of every person domiciled in Alberta as regards movables or choses in action wheresoever situate pursuant to Ultimate Heir Act. (c. U-1, § 2). Ultimate Heir Act was repealed and superseded by Unclaimed Personal Property and Vested Property Act, which was proclaimed into force on Sept. 1, 2008. (c. U-1.5, § 76). See category 13, topic 13.14 Unclaimed Legacies.

13.07 ESTATES:

See categories 21 Property, topic Real Property; Taxation, topic Estate Tax.

13.08 EXECUTORS AND ADMINISTRATORS:

Jurisdiction and Venue.

Surrogate Court is now part of Court of Queen's Bench. (Court of Queen's Bench Act, c. C-31, § 2[1.1]).

Time for Application for Probate.

Executors under will of deceased person shall apply as soon as possible for probate of will to court in proper district. Unless court orders otherwise, no grant of probate or of administration with will annexed will be issued until seven days after death, and no other grant of administration will issue until 14 days after death under Administration of Estates Act. (c. A-2, § 3). Where no one has applied for grant, Public Trustee may apply for and obtain grant of administration 30 days after death of person who did not leave will or 120 days after death of person who did leave will. (c. P-44.1, § 15).

Preferences in Right to Administer.

Letters of administration are usually granted to surviving spouse, adult interdependent partner, or next of kin in order of proximity. (Surr. Ct. R. 11[2]). Preference must be given to applicant for grant of probate or administration with will annexed to personal representative named in will first, then residual beneficiary, then life tenant of residue of will, etc. (Surr. Ct. R. 11[1]).

Eligibility and Competency.

Nonresident or married woman may act as executor or administrator. If minor is sole executor, administration with will annexed will be granted to some other person court thinks fit; on minor becoming adult, he may be granted probate as sole executor. (c. A-2, § 22). If executor is incompetent or unwilling to act, administration of deceased's property may be granted according to rules of preferring administrators. (c. A-2, § 23).

Qualification.

Generally, no grant of probate or administration shall issue unless application has given with two sureties in double aggregate value of estate unless otherwise ordered by judge. (c. A-2, § 5). Bond is not required to be given on application for probate when applicant is executor under will and is resident in Alberta, or which at least one of executors is resident in Alberta. (c. A-2, § 5).

Public Administration.

See subhead Time for Application for Probate, supra.

Advertisement for Claims.

If personal representative publishes notice to claimants, he must do so in accordance with Rule 38 and may use Form NC 34. (Surr. Ct. R. 38). Notice to claimants must be published at least once if gross value of estate exceeds $100,000. (Surr. Ct. R. 38[3]). Notice to claimants must be published in newspaper where deceased lived or where bulk of deceased's property is situated. (Surr. Ct. R. 38[2]). Claimants must notify personal representative of claim within 30 days of publication of last notice. (Surr. Ct. R. 39[1]).

Proof of claims must be made in accordance with Rules. (c. A-2, § 40[1], Surr. Ct. R. 40[1]).

There is no prescribed form of proof of claim in connection with claims against a decedent, but the following is one in common use:

Form

NC 35

ESTATE NAME

____

DATE OF DEATH

____

DOCUMENT

Statutory declaration by creditors

and claimants

THE DECLARANT SWEARS UNDER OATH OR AFFIRMS THAT THE INFORMATION IN THIS STATUTORY DECLARATION IS WITHIN THE DECLARANT'S KNOWLEDGE AND IS TRUE. WHERE THE INFORMATION IS BASED ON ADVICE OR INFORMATION AND BELIEF, THIS IS STATED.

Declarant

1. The declarant's name and complete address is ________.
2. The declarant makes this claim as a ________.

Amount of Claim

3. The amount claimed against the estate is $ ________.

Details of Claim

4. This claim is based on ________.

Security for Debt (Creditors only)

5. The declarant holds the following security for this debt ________.
6. The security is owned by ________.
7. The declarant values the security at $ ________.
8. The deceased is ________ liable for this claim.

DECLARED BEFORE A COMMISSIONER FOR OATHS AT___________, ALBERTA ON ______________________________

____

Declarant

____

Commissioner's Name:

____

Appointment Expiry Date:

____

Notice to Sue.

Personal representative may contest claim in whole or in part, and must do so in accordance with Rules. (c. A-2, § 41, Surr. Ct. R. 42, 59, 95).

Payment of Claims.

Any claim which is allowed or is not disputed will be paid pari passu with other claims. (c. A-2, § 42).

Priorities.

All debts are paid pari passu except in case of lien on real or personal estate. (c. A-2, § 42).

Accounting.

Representatives must give accounting before court of administration of estate at regular intervals and pass their accounts when ordered by court, at instance of court or any application by person interested in estate, creditor or surety, before court. (c. A-2, § 45; Surr. Ct. R. 97).

Distribution.

After payment of debts, it is duty of administrator to distribute estate in accordance with law relating to devolution of estates. (See topic 13.06 Descent and Distribution.) In case of executor, or where property is left by will, it is duty of legal representative to carry out terms of will and in paying debts and administration costs, residuary estate is first resorted to, unless otherwise provided for in will.

There can be no distribution of estate until expiration of six months from date of issuance of probate or administration except where consent of all dependants is given or court order obtained. (c. D-10.5, § 17[1]). Reasonable advances to dependent beneficiaries can be made during delay period. (c. D-10.5, § 17[2]).

Allowances.

Upon application, judge may direct personal representatives to pay allowance or lump sum to deceased’s dependents, and may vary direction from time to time as circumstances require. (c. D-10.5, §§ 3, 5, 8).

Compensation.

Personal representatives are allowed fee by court having jurisdiction based on amount of work involved unless such fee is fixed by will. (c. A-2, § 61; Surr. Ct. R. Schedule #1, Part I Personal Representatives’ Compensation).

Ancillary Administration.

In the case of a nonresident leaving property in Alberta, ancillary probate or letters of administration may be taken out in this Province. Where nonresident is from Canadian Province or territory, British possession, colony or dependency or member of British Commonwealth, grant may be resealed. (c. A-2, § 29).

13.09 FIDUCIARIES:

See topics 13.08 Executors and Administrators, Trusts; category 14 Family, topic 14.05 Guardian and Ward.

13.10 INTESTACY:

See topic 13.06 Descent and Distribution.

13.11 PROOF OF CLAIMS:

See topic 13.08 Executors and Administrators; category 5 Civil Actions and Procedure, topic 5.16 Pleading.

13.12 TRUSTEE PROCESS:

See category 8 Debtor and Creditor, topic 8.11 Garnishment.

13.13 TRUSTS:

Common Law rules govern as to kinds of trusts recognized in this province, manner in which they are created, purposes for which they will be permitted and as to general rights, duties and liabilities of trustees and beneficiaries.

Investments.

Trustee may invest in any kind of property but must invest with view to obtaining reasonable return without undue risk, and must review investments at regular intervals to ensure investments still appropriate to circumstances of trust. (c. T-8, § 3).

Sales.

When income from trust property is insufficient to maintain or educate beneficiary, trustee with leave from court may seal trust property for maintenance and education of beneficiary. (c. T-8, §§ 36[1], 37[1]).

Public Trustee.

Under Public Trustee Act, may act: (a) As personal representative of deceased person; (b) as trustee of any trust or hold or administer property in any other fiduciary capacity; (c) to protect property or estate of minors and unborn persons; and (d) in any capacity in which Public Trustee is authorized to act by order of court or under statute. (c. P-44.1, § 5).

Securities In Name of Nominee.

While no notice of any trust expressed, implied, or constructive shall be entered on the share register and the company is not bound to see to execution of any trust (c. C-21, § 72) there is nothing to prevent fiduciary holding securities in name of nominee. Under Business Corporations Act, company is entitled to treat registered owner as person entitled to exercise all rights and powers, and is not required to inquire into performance of any duty owed to another by registered holder. (Business Corporations Act, c. B-9, § 50[3] & [4]).

Accumulations.

Common law rules apply except with regard to trusts of a plan established for purpose of providing pensions, retirement allowances, annuities or similar benefits for employees or their beneficiaries. Perpetuities Act (c. P-5) came into force July 1, 1973, and repealed common law rule; not retroactive.

Perpetuities.

See category 21 Property, topic 21.11 Perpetuities.

Pour Over Trusts.

See topic 13.14 Wills, subhead Bequests and Devises to Inter Vivos Trusts.

Variation of Trusts.

Subject to trust containing power to revoke or vary, no trust shall be terminated or revoked except with approval of Court of Queen’s Bench. (c. T-8, § 42).

13.14 WILLS:

In view of continued application of previous Wills Act in some cases, both Acts are discussed herein.

Under previous Wills Act any person of age of 21 or a soldier, sailor or other military or naval person of any age on active service, or seaman in course of a voyage, or a minor 19 years of age and married, who is of sound mind, can make a will. (R.S.A. 1955, c. 369, §§ 4, 6, 7).

Testamentary Disposition.

Under present Wills Act person of age of 18 or person under that age who at time of making will has, or has had spouse or adult interdependent partner, is member of component of Canadian Forces referred to in National Defence Act or is on active service under that Act, is mariner or seaman, and is of sound mind, can make will. (c. W-12, § 9). Further, person under 18, who has no spouse or adult interdependent partner, but who has children, may make valid will to extent that it is for benefit of children. (c. W-12, § 9).

Execution.

No will is valid unless it is in writing. (c. W-12, § 4). Except in case of holograph wills or wills of servicemen, will must be signed by testator at foot or end thereof or by some other person in his presence and by his direction. Such signature must be made or acknowledged by testator in presence of two or more witnesses present at same time and such witness must attest and subscribe will in presence of testator. No form of attestation is necessary. Executor may be witness. (c. W-12, §§ 5-8, 15).

Holographic Wills.

A will wholly in handwriting of testator and signed by him is valid. (c. W-12, § 7).

Noncupative Wills.

No provision.

Revocation.

Will may be revoked or altered by a later will or codicil in proper form, or revoked by either writing declaring intention to revoke or by destruction by testator or at his direction and in his presence where he has intention to revoke. (c. W-12, § 16). Marriage or entering into adult interdependent partner agreement, revokes will unless it states that it is made in contemplation of marriage or unless it is made in exercise of power of appointment. (c. W-12, §§ 17, 17.1).

Revival.

Will is revived if re-executed with required formalities or codicil shows intention to give effect to revoked will. (c. W-12, § 20).

Testamentary Gifts to Subscribing Witnesses.

A beneficiary, or spouse or adult interdependent partner of beneficiary, who is also witness to will cannot take any benefit thereunder unless will was sufficiently attested without his or her signature or required no attestation. But entire will is not invalidated by such attestation. (c. W-12, § 13).

Testamentary Guardians.

See category 14 Family, topic 14.05 Guardian and Ward.

Election.

Under Dower Act, spouse of married person receives certain rights in respect of "homestead" of married person in which spouse had no legal title. Homestead roughly equivalent to matrimonial home. Act does not extend to Adult Interdependent Partners. Disposition by will or devolution on intestacy subject to life estate in homestead in favour of spouse of deceased. (c. D-15, § 18).

If deceased owns more than one homestead, surviving spouse must elect in writing and in prescribed form which homestead subject to life estate. If no election after three months, executor or administrator may apply for court order designating which homestead subject to life estate. (c. D-15, § 19).

Children.

Where children deemed dependants under Dependant's Relief Act (c. D-10.5) and provisions of will or Intestate Succession Act, (c. I-10) as case may be deemed inadequate for their proper maintenance, court may order any adequate provision (c. D-10.5, § 3). Dependants may be children of deceased under age of 18 or over age of 18 and unable by reason of disability to earn living. Children include posthumous children and children born outside of marriage. (c. D-10.5, § 1[d]).

Probate.

See topic 13.08 Executors and Administrators.

Support of Dependents Not Adequately Provided For.

Any dependent of deceased (defined as spouse, adult interdependent partner, child under 18 years at time of testator's death, or any child who by reason of physical or mental disability is unable to earn livelihood) may apply to Court for relief if adequate provision for proper maintenance and support has not been made in will or under provisions of Intestate Succession Act (c. I-10). Court will make such order as seems just and equitable under circumstances. This order may take into account their separate estate, if any, and character or conduct of dependent. (c. D-10.5, § 3).

1960 Wills Act.

This Act cited as "The Wills Act", (c. W-12) repeals and replaces "The Wills Act", (R.S.A. 1955, c. 369), with revised Act based on Uniform Act recommended by Conference of Commissioners on Uniformity of Legislation in Canada. Act only applies to wills made on or after July 1, 1960, but wills re-executed or republished or revived by codicil shall be deemed to be made at time at which it was so re-executed, republished or revived. (c. W-12, § 2). See also head of this topic.

Foreign Will.

Generally, manner and formalities of making will, and its intrinsic validity and effect as regards interests in land are governed by law at place where land is situated, and as regards interest in movables by law of place where testator was domiciled at death. But as regards movables, a will is valid as to manner and formalities if made in accordance with law of place where made, or law of testator's domicile or domicile of origin. Change of domicile does not render will invalid as regards manner and formalities or alter its construction. (c. W-12, Part II). Act adopts convention providing uniform law on form of International Will and Uniform Law on the form of an International Will. (c. W-12, §§ 45, 46). Minister of Justice and Attorney General must establish system of registration or safekeeping of international wills. (c. W-12, § 49). Information in registration systems must not be released unless person requesting is testator or person authorized by testator. (c. W-12, § 52).

Self-proved Wills.

No provision.

Bequests and Devises to Inter Vivos Trusts.

No provision.

Unclaimed Legacies.

Where no one has applied for grant, Public Trustee may apply for and obtain grant of administration 30 days after death of person who did not leave will or 120 days after death of person who did leave will. (c. P-44.1, § 15). Where legacy is less than prescribed amount and no person has obtained grant of administration, Public Trustee, without obtaining grant, may take possession of deceased's property and dispose of it in any manner that Public Trustee considers appropriate. (c. 44.1, § 13). Prior to Sept. 1, 2008, Crown in Right of Alberta is ultimate heir of any person dying intestate in province with regard to any property situate in province or any movable property wherever situate, in event of failure of heirs or next-of-kin. (c. U-1, §§ 1, 2). Personal representative may transfer estate to Crown in Right of Alberta two years after death of intestate and claimant to estate may submit proof of his claim to Crown in Right of Alberta. Crown in Right of Alberta may admit or reject claim and if rejected claimant must bring action within six years from death of intestate, otherwise Crown in Right of Alberta is deemed to be sole heir of intestate. (c. U-1, §§ 4, 5, 6). Estate of intestate who dies after Sept. 1, 2008, or who died before Sept. 1, 2008 to extent that administration of estate has not been completed, is governed by Unclaimed Personal Property and Vested Property Act. (c. U-1.5, § 76). Personal representative must transfer unclaimed personal property of intestate wherever situated and land situated in Alberta to Minister two years after death of intestate. (c. U-1.5, § 33). Claimant must assert his claim to Minister, otherwise any right in relation to property, whether legal or equitable, is extinguished. (c. U-1.5, §§ 33, 48). Minister may admit or reject claim and if rejected claimant may, within 120 days of Minister's decision, serve Minister with written objection in required form. (c. U-1.5, § 48). Minister must issue final determination to claimant and claimant may appeal to Court of Queen's Bench within 30 days. (c. U-1.5, §§ 59, 60).

Lapse.

Real or personal property comprised in devise that fails because devisee dies in lifetime of testator or devise contrary to law included in residuary bequest unless contrary intention in will. (c. W-12, § 23).

Simultaneous Death.

See topic 13.04 Death, subhead Survivorship Act.

Testamentary Trusts.

See topic 13.13 Trusts.

Living Wills.

No legislation. Personal Directives Act, proclaimed into force in Dec. 1997, includes concept of “living will”. Act provides that any person 18 years of age who understands its nature and effects may make personal directive respecting any personal matter, including, but not limited to, health care. (c. P-6, § 3).

14 FAMILY

14.01 ADOPTION:

At common law it is doubtful that parents could contract to deprive themselves of custody and control of their children. Adoption is now controlled by statute.

Under old Child Welfare Act, now Child, Youth and Family Enhancement Act, proclaimed into force on Sept. 30, 2009, adult who maintains his usual residence in Alberta or maintained his usual residence in Alberta at time he received custody of child may petition Court for adoption order. (c. C-12, § 62[1]).

Consent Required.

Written consent required (unless dispensed with by court) of child if 12 years old or over (c. C-12, §§ 59[1]; 68[4]), and guardian. Consent executed in any province of Canada in form that is valid in that jurisdiction is deemed valid as if executed in form prescribed in Alberta. (c. C-12, § 59[3]). If person seeking adoption order is sole guardian of child, adoption order shall not be made without consent of person who was child’s guardian before petitioner became guardian. (c. C-12, § 59[2]).

Proceedings.

Minister may conduct investigation with respect to proposed adoption and may file report of investigation with Court. (c. C-12, § 66[1]). Petitioner and child (if 12 years old or over) entitled to be heard, personally or by counsel, at proceedings before judge. (c. C-12, § 68[2]).

Effect of Adoption.

For all purposes including inheritance, adopted child becomes child of adopting parents and ceases to be child of existing parents. However, this does not apply for purpose of law relating to incest and prohibited degrees of marriage. (c. C-12, § 72).

Aboriginal Adoption.

Cultural connection plan must be submitted with application for Private Guardianship. (c. C-12, § 52[1.3]). If private guardianship order is made appointing guardian of aboriginal child, that guardian shall take reasonable steps to ensure cultural connection plan is complied with (c. C-12, § 57.01[a]) and if aboriginal child is Indian, to take reasonable steps to exercise child’s rights as Indian (c. C-12, § 57.01[b][i]) and inform child of child’s status of Indian as soon as child is capable of understanding (c. C-12, § 57.01[b][ii]). Same requirements are present for adoption orders for aboriginal and Indian children (c. C-12, § 71.1).

Petition for adoption order of aboriginal child must include cultural connection plan (c. C-12, §§ 63[1][f]; 63[3][e]). Director shall involve person designated by counsel of band in planning services to child if child is resident on reserve (c. C-12, § 107[a][i]) or subject to temporary or permanent guardianship agreement or order, regardless of whether or not child resides on reserve (c. C-12, § 107[1][b]).

Foreign Adoption.

Adoption effected according to law of any other jurisdiction has same effect in Province as adoption under Alberta Act if for effect of adoption order in other jurisdiction is to create permanent parent-child relationship. (c. C-12, § 73).

Adoption of Adult Persons.

It is possible to adopt person over age of 18 years. (c. A-4).

14.02 ALIMONY:

See topic 14.04 Divorce.

14.03 DESERTION:

See topics 14.04 Divorce, 14.06 Husband and Wife.

14.04 DIVORCE:

Divorce Act, 1985, was proclaimed on June 1, 1986.

Grounds.

Either or both spouses may apply for divorce in court of competent jurisdiction. (R.S.C. 1985, c. 3, [2nd Supp.], § 8[1]).

Venue.

Court in province has jurisdiction if either spouse was ordinarily resident in province for at least one year immediately preceding commencement of proceedings. (R.S.C. 1985, c. 3, [2nd Supp.], § 3).

Proceedings.

By either husband or wife are begun by petition followed by judgment granting divorce which generally takes effect 31 days after judgment granting divorce is rendered. (R.S.C. 1985, c. 3, [2nd Supp.], § 12).

Spousal Support.

Court has jurisdiction to grant either temporary or permanent support to husband or wife, in either lump sum or periodic sums, if either former spouse is ordinarily resident in province at commencement of proceeding or both former spouses accept jurisdiction of court. Interim support is available pending determination of final order. Factors considered are condition, means, needs, other circumstances of each spouse, including length of cohabitation, functions performed and any agreements or orders relating to support but without regard to conduct. (R.S.C. 1985, c. 3, [2nd Supp.], § 4 [as am'd by S.C. 1993, c. 8, § 1] and § 15.2 [as am'd by S.C. 1997, c. 1, § 2]). Court has jurisdiction to vary amount or order discontinuance of support upon application by husband or wife if there has been change in condition, means, needs, or other circumstances of either spouse. (R.S.C. 1985, c. 3, [2nd Supp.], § 17). Order has legal effect throughout Canada (R.S.C. 1985, c. 3, [2nd Supp.], § 20[2]) and will be enforced on recipient's behalf by Director of Maintenance in accordance with Maintenance Enforcement Act, R.S.A. 2000 (c. M-1), unless recipient elects to enforce himself. Order may charge personal and real property of payor. (c. M-1, §§ 21, 22, 23).

Children.

Court may make custody order, either sole or joint or access order, either to spouse or to non-spouse, of either temporary or permanent nature, having regard only to best interests of child and giving effect to principle of encouraging parental contact. (R.S.C. 1985, c. 3, [2nd Supp.], § 16). Person other than spouse can only apply to vary or discontinue order with leave of court. (§

17[2]). Court making child support order shall do so in accordance with applicable Federal Child Support Guidelines. (§ 15.1[3]).

Division of Property.

Under Matrimonial Property Act, court may distribute all property owned jointly or separately by spouses (exempting initial market-value of property acquired by one spouse as gift from third party, as inheritance, before marriage, as tort award, as certain insurance proceeds) having regard to earning capacity, duration of marriage, and other relevant factors. (c. M-8, §§ 7, 8). There are residency rules (c. M-8, § 3) and exempt property rules (c. M-8, § 7). Application must be made within two years of either divorce or separation. (c. M-8, § 6).

Remarriage.

There is no legal restriction upon divorcees remarrying after judgment granting divorce takes effect 31 days later.

Judicial Separation.

Designation, "judicial separation", under old Domestic Relations Act (D-14) is superceded by "declaration of irreconcilability" under Family Law Act. (c. F-4.5, §§ 83, 108[4][a], 129). Declaration of irreconcilability may be obtained by one or both spouses, or by one or both adult interdependent partners, by declaring that there is no prospect of reconciliation. (c. F-4.5, § 83). Such declaration allows court to make order for spousal support. (c. F-4.5, § 57[2][a]). Declaration of irreconcilability allows spouse to make application for matrimonial property order. (c. M-8, §§ 4, 5).

Separation by Agreement.

Agreement to live apart will be enforced by our courts. If some provisions of contract are illegal they will be struck out and remainder enforced. No consideration other than mutual agreement to live apart is necessary.

Foreign Divorce.

Recognized where decree of divorce is granted by legally competent authority on basis of parties' domicile. Manner of enforcement of foreign maintenance and custody orders prescribed by statute. (cc. R-6 and M-1).

Note: Inter-jurisdictional Support Orders Act, S.A. 2002, c. 1-3.5 proclaimed into force Jan. 31, 2003 allows families to register or vary support order when payor and recipient reside in different jurisdictions.

Annulment of Marriage.

See topic 14.08 Marriage.

14.05 GUARDIAN AND WARD:

Mother and father are both guardians where: (a) Mother and father were married to each other at time of birth; (b) mother and father were married to each other and marriage terminated less than 300 days before birth; (c) mother and father married each other after birth; (d) mother and father cohabited with each other for 12 consecutive months within which time child was born; or (e) mother and father were each other's adult interdependent partner, at or after, time of birth. (Family Law Act, c. F-4.5, § 20[2]). Court may appoint or terminate guardians. (c. F-4.5, §§ 23, 25).

Presumption that male is biological father where: (a) Male was married to mother at time of birth; (b) male was married to mother and marriage terminated less than 300 days before birth; (c) male married mother after birth and acknowledges that he is father; (d) male cohabited with mother for 12 consecutive months during which time child was born and he acknowledges that he is father; (e) male cohabited with mother for 12 consecutive months and cohabitation ended less than 300 days before birth; (f) male is registered as father under Vital Statistics Act (c. V-4); or (g) male has been found to be father by any competent court in Canada (c. F-4.5, § 8[1]).

Guardian who is parent may by deed or by will appoint person to be guardian after his or her death. (c. F-4.5, § 22[1]).

Appointment by Court.

Where the court interferes with the guardianship of an infant or where an infant becomes subject of guardianship order of court in some other manner, court's chief consideration is best interests of infant. (c. C-12, § 2).

Insane Persons.

Court may appoint new guardian if none of child's guardians are able or willing to exercise guardianship in respect of child. (c. F-4.5, § 23[2]). Director under Child, Youth and Family Enhancement Act who is satisfied that child may be in need of intervention because guardian cannot be located, has died, or has become incapacitated, may appoint temporarily another person to care for child. (c. C-12, § 7[1]).

Foreign Guardians.

Adoption orders of any other jurisdiction have same effect as if made in Alberta, if effect of adoption order in other jurisdiction is to create permanent parent and child relationship. (c. C-12, § 73).

Public Trustee.

Where Public Trustee holds property for minor, Public Trustee may transfer amounts to guardian for benefit of minor. (c. P-44, § 18). Court may appoint Public Trustee to be minor's guardian ad litem. (Minor's Property Act, c. M-18.1, § 16).

14.06 HUSBAND AND WIFE:

Married persons are required to maintain their spouse, by providing necessities of life, and criminal implications may result if they fail to do so generally. (R.S.C. 1985, c. C-46, § 215).

Actions By or Against Married Women.

A married woman may in all cases sue or be sued without joining her husband to same extent as if she were unmarried. (c. M-6, § 1). Action may be brought against any married woman for all civil injuries, and damages may be recovered from her alone and her husband is not responsible therefore, unless he would be liable apart from fact of his being her husband. (c. M-6, § 6). Married man or woman has same civil remedies against his/her spouse for protection and security of his/her separate property as against other persons. (c. M-6, § 2).

Liability of Husband for Debts of Wife.

A husband may be held responsible for debts incurred by his wife either as his express or implied agent or in cases where wife would be held to be an agent of necessity, as where husband has deserted his wife, or in similar circumstances.

Business Dealings of Married Women.

A married woman may carry on business either solely or in partnership with any other person, and her husband will have no interest therein or liability.

Property Dealings of Married Women.

A married woman is capable of dealing in all classes of real and personal property as if she were unmarried. (c. M-6, § 3). All property acquired by or devolved upon married woman after Mar. 25, 1936, belongs to her as if she were unmarried and may be so disposed of. (c. M-6, § 5).

Right of Husband to Sue for Tort to Wife.

A husband has no right to sue in respect of a tort done to his wife except where and in so far as he has sustained any separate damage or injury. (c. M-6, § 4).

Community Property.

There is no community of property in Alberta at present. Under Matrimonial Property Act (c. M-8), upon divorce, separation or period of living separate and apart, Court of Queen's Bench may order distribution of property acquired after marriage having regard to earning capacity, duration of marriage, any agreement between parties and contributions of each spouse. Certain categories of acquired property are exempt from distribution: gifts, inheritances, certain appropriate court or insurance awards. (c. M-8, §§ 7, 8).

Antenuptial Contracts.

Agreement providing for status, ownership and division of matrimonial property may be entered into by two persons in contemplation of their marriage to each other but is unenforceable until after marriage. (c. M-8, § 37[1][2]). Such agreement is unenforceable by spouse if at time of agreement that spouse knew or had reason to believe marriage was void. (c. M-8, § 37[4]).

Agreement is enforceable if each spouse or person acknowledged in writing apart from other spouse or person, that they are: (i) Aware of nature/effect of agreement; (ii) aware of possible future claims to property he has under Act and intends to give up these claims to give effect to agreement; and (iii) executing agreement voluntarily. (c. M-8, § 38[1]). Acknowledgment shall be made before lawyer other than lawyer acting for other spouse or person. (c. M-8, § 38[2]).

Common Law Relationships.

Adult Interdependent Relationships Act, S.A. 2002, c. A-4.5, addresses legal needs of unmarried committed relationships. It came into force June 1, 2003 and amends several Alberta laws for people in unmarried relationships involving economic and emotional interdependency.

14.07 INFANTS:

18 is age of majority for both sexes. (c. A-6, § 1).

Contracts.

Infant not liable on his contract except for necessaries if reasonable price (Sale of Goods Act, c. S-2, § 4) or at 16 for life insurance (Insurance Act,c. I-3, § 586).

Property.

Court may make orders respecting real property of infant, and court may order certain settlements if to do so is in interest of minor. (c. M-18.1, § 2).

Custody, etc.

Court may make orders relating to guardianship, parenting, contact, or enforcement of time with child. (c. F-4.5, Part 2). Court will enforce extra-provincial custody orders, unless it can be shown that at time custody order was made this child did not have any real or substantial connection to Alberta. (c. E-14, § 2[1]).

Actions.

Infant sues or counterclaims by next friend and defends by guardian or guardian ad litem. (A.R.C. 58, 59).

Legitimacy.

Child whose parents intermarry after birth is legitimate, as is child of void marriage registered in substantial compliance with relevant law and believed by either of parties to be valid, or child of marriage void because of false presumption of death, or child of voidable marriage annulled by decree. Property interests vested prior to July 1, 1927, not affected. (c. L-10).

Child Youth and Family Enhancement Act.

Any person who has reasonable grounds to believe that child is in need of protective services shall report matter to Director. (c. C-12, § 4). Director may apply to court for Temporary or Permanent Guardianship Order if there are reasonable grounds to believe child's survival, security or development are endangered. (c. C-12, Part 1).

Wills.

See category 13 Estates and Trusts, topic 13.14 Wills.

Adoption.

See topic 14.01 Adoption.

14.08 MARRIAGE:

Federal Parliament has exclusive right to legislate with respect to capacity of persons to marry. Province has power to make laws relating to "solemnization of marriage". (1867 [U.K.] c. 3, §§ 91, 92).

Under Marriage Act, minimum age at which males and females may intermarry in this province is 16, unless a doctor certifies that a female under that age is pregnant or the mother of a living child. (c. M-5, § 17).

Consent Required.

Minors under 18 must obtain written consent of parents or guardian. The only exceptions are where the minor's parents are dead or mentally incompetent, and he has no guardian or minor was previously married. Court also has jurisdiction to dispense with consent of parents. (c. M-5, §§ 18-20).

Prerequisites.

No marriage may be solemnized in province unless a license has been issued, such license being valid for three months and any person who contravenes this provision is liable to penalties. (c. M-5, §§ 9, 26). There must be at least two adult witnesses and ceremony must be conducted in understandable language. (c. M-5, § 10).

Marriage Licence.

May be obtained from issuer of marriage licences in locality in which parties reside.

Parties are both required to appear before registrar and answer questions on oath touching matters of name, age, occupation, address, etc., and to swear that they are not aware of any impediment of kindred or alliance or other lawful hindrance to marriage. (c. M-5, § 14, A.R. 162/2000). Divorced person must submit certified copy of decree absolute or divorce judgment. (c. M-5, § 16).

No licence will be issued to a person who has obtained a decree of divorce or a declaration of nullity of marriage until 21st day from date of final decree or final declaration and until applicant has filed certificate from Clerk of Court of Queen's Bench that no appeal has been entered from final decree or declaration and that time for appeal has expired. This section does not apply to divorce, petition for which was filed after July 1, 1968. (c. M-5, § 15). If one or both of parties are or appear to be under 18 years of age they may be required to adduce other evidence of age or furnish consents of their parents, etc. (c. M-5, §§ 18-20). Penalties are provided for anyone who issues licence to person who is mentally handicapped or under influence of alcohol or drugs. (c. M-5, §§ 18-20, 27).

Ceremony.

No marriage is valid in this jurisdiction unless ceremony is performed by a person authorized by Director for province to perform such ceremonies. These persons are members of clergy and certain persons specially authorized by Director and known as Commissioners. (c. M-5, §§ 3, 4, 8). Ceremony follows form of particular religion of minister and ceremony is binding although not religion of parties and even though they believe in no religion. Ceremony must take place in presence of two adult witnesses. (c. M-5, § 10).

Irregular Marriages.

Where question arises as to inadvertent contravention of Marriage Act by person who solemnized marriage or issued marriage certificate, application can be made for order declaring marriage duly solemnized. (c. M-5, § 23).

Application can also be made for declaration of court that marriage of person under 18 is not valid. (c. M-5, § 22).

Common Law Marriages.

Performed within province are not recognized. As to legal recognition of out-of-province marriages, common law prevails, i.e., lex loci celebrationis governs formal validity of marriage.

Prohibited Marriages.

Express penalties are provided for anyone solemnizing a marriage involving an incompetent, i.e., mentally defective or intoxicated person. (c. M-5, § 27[4]). No person who has wife or husband living and has not secured valid divorce recognized by our courts may marry. (c. M-5, § 16). Married person who alleges that reasonable grounds exist for supposing that other party is dead may present petition to Court of Queen's Bench and court may make decree of presumption of death. (c. M-5, § 21).

Marriage (Prohibited Degrees) Act, S.C. 1990, c. 46 which repealed Marriage Act, R.S.C. 1985, c. M-2, came into force Dec. 18, 1991, subject to earlier enactment by province.

Pursuant to Marriage (Prohibited Degrees) Act, marriage by persons related by consanguinity, affinity or adoption are not prohibited or invalid when marrying each other by reason only of their relationship, except if they marry another person related lineally by consanguinity or adoption; as brother and sister by consanguinity, whether by whole blood or by half blood; or as brother and sister by adoption. (c. 46, § 2). This Act contains all of prohibitions in Canadian law against marriage by reason of parties being related. (c. 46, § 4).

Foreign Marriages.

Any form of marriage is recognized if valid according to law of country where contracted and of domicile of contracting parties. But this does not apply to polygamous marriages.

Annulment.

An annulment may be obtained on grounds of impotence, absence of consent, bigamy or failure to comply with statutory requirements, but unless statute by express word or clear intent renders a marriage void or voidable, marriage will not be set aside.

Our courts have jurisdiction to hear suit for nullity where matrimonial residence is within province. It is not necessary to prove domicile, but only that parties are living within province at time of action.

Record.

See category 10 Documents and Records, topic 10.04 Records, subhead Vital Statistics.

14.09 MARRIED WOMEN:

See topics 14.06 Husband and Wife, Marriage; categories 5 Civil Actions and Procedure, topic Evidence, subhead Witnesses; Debtor and Creditor, topic Homesteads; Documents and Records, topic Acknowledgments; Estates and Trusts, topics Executors and Administrators, Wills; Property, topic Dower.

15 HEALTH

15.01 FOOD, DRUGS AND COSMETICS:

Manufacturing, packaging, labeling, advertising and sale of food, drugs and cosmetics are governed by Food and Drugs Act. (R.S.C. 1985, c. F-27). Minister may designate any person to do inspections (R.S.C. 1985, c. F-27, § 22) or be analyst (R.S.C. 1985, c. F-27, § 28).

15.02 HEALTH INSURANCE BENEFITS:

Basic health services are provided to all residents of Alberta on nonprofit basis. Extended health care services are provided to residents 65 years of age or older, or those that are receiving widow’s pension, and their dependants. (c. A-20, § 3). Subject to certain exceptions, all residents are to pay amount of premium described in regulations. (c. H-6, § 3).

15.03 PUBLIC HEALTH:

No person shall operate private hospital. (c. H-1, § 1). Person may operate surgical facility for insured surgical services if facility is accredited to provide those services, operator of facility has agreement to provide those services with health authority that Minister has approved, and facility is designated by Minister as surgical facility (c. H-1, § 7) with such designation describing surgical services that facility is authorized to provide (c. H-1, § 11[2]). Individuals may not pay money for priority in receipt of insured medical services. (c. H-1, § 3).

Registration, reviews and discipline of physicians and surgeons are governed by Medical Profession Act. (c. M-11). Health Professions Act (c. H-7) governs dentists, optometrists, nurses and other health professionals. Health Information Act (c. H-5) governs level of access individuals have to their own health information (c. H-5, §§ 7, 11) as well as approved uses of health information (c. H-5, §§ 25-30) and disclosure restrictions with respect to health information (c. H-5, Part 5).

Persons over age of 18 who understand nature and effect of personal directive may make such directive authorizing agent to make health care decisions for them in event of incapacity. (c. P-6, § 3).

15.04 SMOKING REGULATION:

Smoking in Public Buildings.

Smoking prohibited in public place, workplace, or public vehicle. (Smoke-Free Places Act, c. S-9.5, § 3). Public place is all or any part of building structure or enclosed area to which members of public have access as of right. (c. S-9.5, § 1[f]).

Cities may enact bylaws prohibiting smoking in public places.

Advertising and Sales.

Tobacco products shall not be displayed to customer before purchase in any place where tobacco products are sold. (Tobacco Reduction Act, c. T-3.8, § 7.1). Tobacco products shall not be advertised or promoted in any place where tobacco products are sold or offered for sale. (c. T-3.8, § 7.2[1]). Tobacco products shall not be offered for sale in health facility, on campus of post-secondary institution, in pharmacy or retail store if pharmacy is located in retail store. (c. T-3.8, § 7.3).

16 INSURANCE

16.01 INSURANCE COMPANIES:

Supervision.

The Superintendent of Insurance has general supervision of insurance business within province. (c. I-3, § 792[3]).

Licence.

Every insurer doing business in province must take out provincial licence which will be issued only to certain classes of corporations, unincorporated Lloyd's associations, or societies. (c. I-3, § 18-19).

Real Estate.

Provincial companies licensed under Alberta Insurance Act may hold real property absolutely. (c. I-3, § 110[3][d]).

Investments.

Funds of insurance company must be invested in certain approved ways. (c. I-3, § 102).

Fire Insurance.

Under provisions of Alberta Insurance Act, every registered fire insurance company may insure and reinsure any property in which assured has an insurable interest against loss or damage by fire, lightning or explosion. (c. I-3, § 544).

No insurer may make a contract covering property outside limits of an incorporated city, town or village for a term exceeding 12 months without a written application signed by applicant or his agent. (c. I-3, § 546).

Act provides certain uniform or statutory conditions and no variation therefrom is binding on insured. (c. I-3, § 549). When loss under contract has, with consent of insurer, been made payable to person other than insured, insurer cannot cancel or alter policy to detriment of beneficiary without giving notice to them. (c. I-3, § 725).

Life Insurance.

Every life insurance company must register under Federal Act, which provides for deposit of securities with view to secure performance of every life insurance contract. Without registration company shall not transact business except as required to protect policy holders. (S.C. 1991, c. 47, § 52). Policies of life insurance are also governed by provisions of Alberta Insurance Act, which lays down definite rules as to contents of policy, statutory conditions, nondisclosure, misrepresentation, statements as to age, payment of premiums, when contract takes effect and assignments. (c. I-3, Part 5).

Other Insurances.

In provisions of Alberta Insurance Act certain regulations are made in reference to hail, accident, fidelity, guarantee, inland marine, inland transportation, sickness, casualty, automobile, against financial loss, burglary, etc.

Direct Actions Against Insurer.

There is limitation period to sue insurer for recovery of insurance money: one year after furnishing evidence/claim of loss to insurer, or six years after happening of event on which insurance money became payable, whichever period expires first. (c. I-3, § 590). See also category 23 Transportation, topic 23.02 Motor Vehicles, subhead Direct Actions.

16.02 SURETY AND GUARANTY COMPANIES:

No special legislation. See topic 16.01 Insurance Companies; category 3 Business Regulation and Commerce, topic 3.01 Banks and Banking.

17 INTELLECTUAL PROPERTY

17.01 TRADEMARKS AND TRADENAMES:

See Canada Law Digest.

Registration of Trade Names.

Individuals or partnerships which are engaged in business for trading, manufacturing, contracting or mining purposes and use business name or designation must file declaration in writing with Registrar of Corporations. (c. P-3, §§ 106-110).

17.02 TRADE SECRETS:

Protected by common law of provinces. Limited statutory protection—government institution shall not disclose trade secrets of third party. (R.S.C. 1985, c. A-1, § 20[1][a]).

18 LEGAL PROFESSION

18.01 ATTORNEYS AND COUNSELORS:

These terms are not commonly used in Canada, the terms used being barristers and solicitors, whose rights and duties are governed by Legal Profession Act. (c. L-8, § 102[1]).

Admission to Bar.

Is governed by regulations of Law Society of Alberta which is body corporate with continued succession. Detailed information may be obtained from Rules of Law Society of Alberta. Members of Bar are admitted as barristers and solicitors at same time.

Eligibility.

Executive Director shall enroll student-at-law who: (a) Is of good character and reputation; (b) is 18 years or older; (c) has articled; and (d) has passed bar admission course. (c. L-8, § 40[2]). Director shall enroll Canadian lawyer who: (a) Is of good character and reputation; (b) is enrolled as Barrister and Solicitor in any province or territory in Canada other than Alberta; and (c) has passed bar admission course. (c. L-8, § 41[1]). Where applicable, Executive Director and Credentials and Education Committee may require applicant to article or pass special examinations. (c. L-8, §§ 41[1], [2]).

Registration as Student At Law.

Executive Director shall approve application to become student-at-law if applicant proves that he or she is of good character and reputation, and has satisfied academic requirements. (c. L-8, § 40[1]). Academic requirements are Canadian common-law degree, or, upon evaluation, Canadian civil law degree or non-Canadian law degree. (Rules of the Law Society of Alberta, §§ 50[2], 50.2).

Educational Requirements.

See subhead Eligibility, supra.

Clerkship.

See subhead Eligibility, supra.

Status.

Barrister and solicitor is officer of Court of Queen’s Bench and all other courts of record in Alberta. (c. L-8, § 102). He is ex officio commissioner for oaths for province and is notary public. (c. C-20, § 2; c. N-6, § 3).

Rights.

A duly enrolled barrister and solicitor is entitled to practice in all Alberta courts and in Supreme Court and Federal Court of Canada.

Compensation.

Fees of barristers and solicitors are reasonable having regard to: (a) Nature of matter; (b) circumstances of person paying; (c) fund from which they are paid; (d) general conduct of proceedings; (e) skill involved; and (f) other circumstances. (A.R.C. 613). They may sue for fees due but no default judgment may be entered and no costs allowed without court order. (A.R.C. 626).

Lien.

A court may, on application, declare lawyer entitled to lien on property recovered or preserved by his efforts. (A.R.C. 625).

Misappropriation or Conversion.

A barrister and solicitor is not bonded, but there is a special assurance fund for relief of persons who have sustained pecuniary losses by reason of misappropriation or conversion by any member of Law Society of money entrusted to him in his professional capacity. (c. L-8, § 89).

Disbarment.

Is in control of Benchers, who are senior members of profession elected to office and who have absolute discretion, subject only to appeal to Court of Appeal of Alberta, to disbar members, or prescribe other penalties, for unprofessional conduct. (c. L-8, §§ 53-86).

Unauthorized Practice.

Only active members of Law Society may practice or act as barristers or solicitors, or act as barrister or as solicitor in any court of civil or criminal jurisdiction, commence, carry on or defend actions, or settle claims. This prohibition does not apply, inter alia, to public officers or notary publics acting in course of their duty; or to any person acting on his own behalf; or to any insurance adjuster acting under Insurance Act, or to any person who appears as agent for another when authorized to do so, or to student-at-law where he acts as counsel where permitted to do so and if under supervision of member. (c. L-8, § 106).

19 MINERAL, WATER AND FISHING RIGHTS

19.01 MINES AND MINERALS:

All mines and minerals and public lands in the province belong to Her Majesty in Right of Alberta, excepting those which have been alienated by grant or lease or otherwise. Where land is expropriated the Crown does not ordinarily obtain the mines and minerals. (c. M-17, § 15).

The Environmental Protection and Enhancement Act (c. E-12) may require conservation and reclamation of land used for mining, pipelines, exploration operations or refining. Land must be returned to its “equivalent capability”. (§ 146).

A typical land deed does not carry mines and minerals, although some which convey lands that were alienated by Crown in last century do carry mines and minerals. Gold and silver belong entirely to Her Majesty in Right of Alberta unless expressly alienated. (c. M-17, § 10). Sand and gravel belong to surface owner, as does clay and marl (c. L-7, §§ 57, 58), which do not include any of substances named to be minerals in Act (c. L-7, § 56).

Permits.

Permits and/or licences are required from Energy Resources Conservation Board to drill well to recover oil and gas, to develop coal mine or commence coal mining operations, or undertake similar operations. (c. O-6, §§ 10, 11). Surface entry may be gained by order of Surface Rights Board. (c. S-24, § 12).

Operation of Mines.

The Coal Conservation Act regulates working of all coal mines, mine sites and processing plants in Alberta, to persons employed there, and to all coal produced in Alberta. (c. C-17).

Oil and Gas.

In Alberta approximately 85% owned by Crown in right of Alberta. Mines and Minerals Act (c. M-17) and regulations prescribe manner of obtaining, from Crown, and terms and conditions of, leases of such substances. Primary term of leases granted after July 1, 1976 is generally five years which may be extended by production. (c. M-17, §§ 81-82). Gross overriding royalty payable to Crown varies according to whether oil or gas was discovered before or after Apr. 1, 1974. Courts have found overriding royalties to constitute interest in land. ([1999], 74 Alta. L.R. [3d] 219 [C.A.]). However, issue has not yet been definitively resolved. See 2003 ABQB 243 and (2002) 1 S.C.R. 146. Royalty on oil is calculated on sliding scale of production which increases as production increases. Royalties for both oil and natural gas are calculated in accordance with regulations.

Energy Resources Conservation Board regulates all drilling and production activity in Province, whether on Crown or freehold leases, including quantities of oil and gas which may periodically be produced from each well. (c. O-6). Board also regulates removal of gas or propane from Alberta (c. G-4) and National Energy Board at Calgary regulates export of oil and gas from Canada (R.S.C. 1985, c. N-7).

Pricing of natural gas produced in Alberta is no longer regulated by federal/provincial agreement. Deregulation occurred on Nov. 1, 1986. Pricing of gas set by gas contracts between seller and buyer. (c. N-1).

Alberta Petroleum Marketing Commission is exclusive agent for sale of Crown’s royalty share of crude oil at price that is in public interest of Alberta. (c. P-10, § 15).

Actions for commission owed on sale of oil and gas leases are not maintainable unless person bringing action is licensed as agent for real estate trade. ([1966], 54 W.W.R. 494 [Alta. C.A.]).

Mineral Tax.

Provision is made for annual tax on minerals to be levied by order of Minister, at rate to be determined therein for each mineral upon or under tract of land. (c. F-26, 2). Appeals of assessment under Freehold Mineral Rights Tax Act may be taken to appeal board. (c. F-26, §§ 4, 5).

Tax constitutes first charge upon mineral right which is subject to forfeiture to Crown for nonpayment. (c. F-26, §§ 14-16).

20 MORTGAGES

20.01 CHATTEL MORTGAGES:

Subject to certain exceptions, Personal Property Security Act applies to every transaction that, in substance, creates security interest, without regard to its form and without regard to person who has title to collateral, including chattel mortgages. (c. P-7, § 3). By virtue of Act, historic forms and concepts of security agreements, such as chattel mortgages, have been discarded in favour of single conceptual basis for all personal property security agreements.

Transitional.

Chattel mortgage validly registered in accordance with Bills of Sale Act prior to Oct. 1, 1990 shall generally be deemed to have been registered and perfected under Personal Property Security Act.(c. P-7, § 77[2]). See topic 20.04 Personal Property Security.

20.02 MORTGAGES OF PERSONAL PROPERTY:

See topics 20.01 Chattel Mortgages, 20.04 Personal Property Security.

20.03 MORTGAGES OF REAL PROPERTY:

Mortgage may be: (1) Common law mortgage, which is transfer of land by way of security; (2) equitable mortgage, which is most commonly created by deposit of title deeds; or (3) statutory mortgage, which is registered charge against lands in statutory form under Land Titles System. Latter form is usual. Mortgagor merely charges his land with debt and remains registered owner and in possession. (c. L-4, § 114).

Execution.

Statutory mortgage must be signed by mortgagor in presence of witness who must swear before proper officer to affidavit as to due execution of instrument. Mortgagor must swear to affidavit that he or she is not married, if such is case, or that lands concerned are not part of his or her homestead. (c. L-4, § 163). Otherwise spouse has dower interest and must sign consent thereto and then appear alone before proper officer and acknowledge that he or she understands nature of act and acts of his or her own free will. (c. D-15, §§ 4,5). This dower requirement is not necessary where property is held jointly (as tenants in common or joint tenants). (c. D-15, § 25[2]). No witness required where mortgage executed under corporate seal and countersigned by at least one officer of corporation. (c. L-4, § 161).

Recording.

Every mortgage to be binding on third persons acting bona fide must be registered against mortgagor’s title in Land Titles Office for district in which land is situated. If this is done and mortgaged land is transferred, covenant is implied between purchaser and mortgagee that purchaser will pay mortgage, and between purchaser and original mortgagor to indemnify latter. These covenants may be negatived in transfer. (c. L-4, §§ 57-59).

Recording Fees.

Are based on amount secured. There must also be paid assurance fund fee. See category 10 Documents and Records, topic 10.04 Records, subhead Assurance Fund. (c. L-4, § 164).

Acceleration on Default.

Most mortgages contain an acceleration clause by which whole amount becomes due immediately upon default being made in any payment.

Attornment Clauses.

Are void except for mortgages of business premises, and mortgages in favour of The Canadian Farm Loan Board or Farm Credit Corporation or mortgage secured under National Housing Act or its predecessor, or mortgage forms which have been approved by Lieutenant Governor in Council. (c. L-7, §§ 34-36).

Foreclosure and Redemption.

If principal and interest are not paid pursuant to terms of mortgage, then due foreclosure proceedings may be commenced in Court of Queen’s Bench. Usually no defence is filed, and order nisi/order for sale is granted giving mortgagee judgment and mortgagor redemption period of six months for urban lands and one year for farm (as specifically defined) lands. Statutory redemption periods are subject to reduction or extension in exceptional circumstances. (c. L-7, § 41). Unless mortgagor can make payment by that time or show circumstances which will entitle court to grant him further time to redeem, mortgaged lands are advertised for judicial sale. If sale is abortive, mortgagee may then apply for order for foreclosure, vesting title in his name.

Except in case of mortgage given by corporation or National Housing Act mortgages, rights under attornment clauses above, or unless Court directors otherwise, foreclosure is mortgagee’s only remedy and no action can be brought on personal covenant. (c. L-7, §§ 39, 40, 43).

Restrictions.

Mortgage granted to non-citizen of controlled land, which excludes Crown land, urban land and mines and minerals, may be prohibited, or rights granted thereunder may be restricted, by regulations under Citizenship Act (R.S.C. 1985, c. C-29, §§ 34-38). (c. A-9).

Remedies.

Remedy of mortgagee is limited to land itself and action on personal covenant in mortgage is precluded, except in cases of agreement for sale of land to corporation or of mortgages given by corporation or under National Housing Act. (See subhead Foreclosure and Redemption.) However, action on covenant may be pursued against individual who is transferee of land subject to mortgage given by corporation if individual does not use land as his residence or for farming. (c. L-7, § 47).

Enforcement.

Instrument being either: (a) Writ of enforcement; or (b) registerable instrument other than writ of enforcement that (i) charges generally property interest of person, or (ii) binds in same manner as writ of enforcement property interests of person; that will not charge or have any binding effect on any land in which debtor has interest unless memorandum of instrument has been endorsed on certificate of title for land. (c. L-4, § 122[1]).

Trust Deeds.

May be registered against lands by way of caveat, with same effect as ordinary mortgages. (c. L-4, §§ 128, 130, 135).

Transfer or Release.

A statutory mortgage may be transferred or assigned in whole or as to a certain interest therein. The assignment should be registered in order to protect holder. (c. L-4, § 109). Mortgage may be partially or wholly released and discharged in Land Titles Office as to part released.

When mortgage is paid it is released by mortgagee signing discharge thereof which must be properly witnessed and contain affidavit of execution. When this is presented to Land Titles Office, mortgage is cancelled. Where mortgage has been paid but not discharged judge in proper circumstances may order its discharge. (c. L-4, § 106).

Forms

The following is usual form of mortgage:

FORM 15

LAND TITLES ACT

(Section 102)

MORTGAGE

I, A.B., being registered owner of an estate (state nature of estate), subject to registered encumbrances, liens and interests, if any, in all that piece of land described as follows: (here describe land) in consideration of (here, set out the amount and particulars of the loan or indebtedness), covenant with E.F., the mortgagee, of (here insert the mortgagee's address):

That I will repay the sum lent to me (or the indebtedness) together with interest thereon as follows: (here set out covenants for repayment of principal and interest and special covenants, if any.)

And for better securing to the mortgagee the repayment in the manner set out above of the principal sum and interest (and other amounts hereby secured), I hereby mortgage to E.F. my estate and interest in the land described above.

In witness whereof, I have hereunto signed my name this date

SIGNED by the above named)

)

A.B. in the presence of)

)

(Signature of mortgagor)

(A.R. 480/81 Form 15; 538/82; 231/99; 251/2001)

Affidavit of execution is also required. For form, see category 21 Property, topic 21.04 Deeds subhead Forms, catchline Affidavit of Attestation of Instrument.

Discharge.

A mortgage may be discharged by the mortgagee executing the certificate of discharge in the following form:

FORM 7

LAND TITLES ACT

(Sections 36, 106)

RECEIPT OR DISCHARGE BY MORTGAGEE

OR ENCUMBRANCEE

(Not more than seven instruments may be included in this Form)

I,. .. .., (the mortgagee, encumbrancee or transferee as the case may be) do hereby acknowledge to have received all the money (or the sum of. .. .. dollars being part of the money) to become due under the mortgage (or encumbrance) made by. .. .. to. .. .. which mortgage (or encumbrance) was registered in the Land Titles Office as instrument number. .. .., that the mortgage (or encumbrance) has not been transferred, and that the same (or in the case of a partial discharge, the land legally described as (include legal description)) is wholly discharged (or discharged as to the sum of. .. .. dollars).

In witness whereof I have hereunto subscribed my name this (date).

SIGNED by the above named)

)

............)

)

in the presence of)

)

.............)

(Signature)

(A.R. 480/81 Form 7; 538/82; 231/99; 251/2001, 248/2006)

An affidavit of execution is also required. For form, see category 21 Property, topic 21.04 Deeds subhead Forms, catchline Affidavit of Attestation of Instrument.

FORM 18

LAND TITLES ACT

(Section 109)

Land Titles Act.

TRANSFER OF MORTGAGE, ENCUMBRANCE OR LEASE (Not more than seven instruments may be transferred under this Form).

I, C.D., the mortgagee (encumbrancee *or* lessee, *as the case may be*), in consideration of. .. .. dollars, this day paid to me by *X.Y.,* of. .. .. the receipt of which sum I do hereby acknowledge, hereby transfer to X.Y. (the mortgage, encumbrance or lease as the case may be, describe the instrument fully) together with all my rights, powers, title, and interest therein.

In witness whereof I have hereunto subscribed my name this (date)

Signed by the said

in the presence of)

C.D. (Transferor)

(AR 480/81 Form 18; 231/99; 251/2001, 248/2006).

Affidavit of execution is also required. For form, see category 21 Property, topic 21.04 Deeds, subhead Forms, catchline Affidavit of Attestation of Instrument.

Mortgage Brokers.

See category 3 Business Regulation and Commerce, topic 3.02 Brokers.

20.04 PERSONAL PROPERTY SECURITY:

Personal Property Security Act R.SA. 2000, c.P-7 (P.P.S.A.) is governing statue in Alberta for relationships arising from credit transactions in which security interest in personal property is given. Act modeled after Art. 9 of Uniform Commercial Code of United States. Scope of P.P.S.A. is limited exclusively to transactions that: (a) “In substance” create security interests, or (b) are deemed to create security interests, without regard to form or title. P.P.S.A. provides non-exhaustive list of transactions to be treated as creating security interests, including conditional sale, security lease, security consignment, and security trust. (§ 3[1]). Assignment of account, assignment of chattel paper, lease for term of more than one year, and commercial consignment deemed to fall within P.P.S.A. (§ 3[2]). P.P.S.A. also sets out list of transactions that are excluded from scope of Act, such as statutory liens, Bank Act security, and assignments of interests arising under insurance policies (§ 4).

Conflict of Laws.

Basic premise is that law of jurisdiction where collateral is situated when security interest attaches is applicable law for determining validity, perfection and effect of perfection or non-perfection of security interest in such collateral. For intangibles, property normally used in more than one jurisdiction and non-possessory security interests in securities, instruments, negotiable documents of title, money and chattel paper, law of jurisdiction where debtor is located when security interest attaches, governs. Debtor is deemed to be located at his place of business, at his chief executive office if he has more than one place of business and otherwise at his place of residence. For goods brought into Alberta, distinction is made between buyer in good faith of goods brought into province and all other persons. Security interest in collateral already perfected under law of place in which collateral situated when security interest attached and before being brought into Alberta continues perfected in Alberta as against buyer in good faith if perfected in Alberta prior to buyer's acquiring interest in goods and as against all other persons within 60 days after brought into province, or within 15 days after day secured party receives notice that goods have been brought into Alberta, or prior to day that perfection ceases under law of prior jurisdiction, whichever is earliest.

Transitional.

Assented to July 6, 1988 and effective Oct. 1, 1990 Personal Property Security Act repealed Assignment of Book Debts Act, Bills of Sale Act, Chattel Security Registries Act, Conditional Sales Act, Harvesting Liens Act, and amendments to Agriculture Relief Advances Act, Business Corporations Act, Co-operative Associations Act, Crop Liens Priorities Act, Employments Standards Code, Factors Act, Fuel Tax Act, Garagemen's Lien Act, Hotel Room Tax Act, Insurance Act, Interpretation Act, Land Titles Act, Law of Property Act, Livery Stable Keepers Act, Matrimonial Property Act, Mobile Home Sites Tenancies Act, Motor Vehicle Administration Act, Municipal Government Act, Partnership Act, Railway Act, Rural Utilities Act, Sale of Goods Act, Securities Act, Seizures Act, Threshers' Lien Act, Trust Companies Act, and Warehouseman's Lien Act.

Registration under any of repealed or amended Acts is deemed to be registration under Personal Property Security Act. Questions relating to priority between security interests validly created prior to Personal Property Security Act coming into force is determined by prior registration law, but priority between prior security interest and security interest validly created after proclamation shall be determined by Personal Property Security Act.

Registration is continued for unexpired portion of filing or registration period under prior law except for registrations under Business Corporations Act which expire on Oct. 1, 1993, unless they were renewed under new Act.

Effectiveness.

Security agreement is effective according to its terms. However, certain terms are prohibited or may be unenforceable. Acceleration clauses are only effective if secured party, in good faith, believes and has commercially reasonable grounds to believe that payment is not going to be made or that collateral is about to be placed in jeopardy. Where debtor reinstates security agreement, operation of any acceleration clause is ineffective.

Enforceability.

No security interest is enforceable against third party unless collateral is in possession of secured party or debtor has signed security agreement that contains description of collateral by item or kind, statement that security interest is taken in all of debtor's present and after acquired personal property, or statement that security interest is taken in all of debtor's present and after acquired property except specified items or kinds of personal property.

Attachment.

Security interest attaches when value is given, debtor has rights in collateral and, except for purpose of enforcing rights between parties, it becomes enforceable against third parties. Debtor has rights in goods purchased under agreement to sell when contract is made and he obtains possession of them, and in goods leased to him, hired by him or delivered to him under consignment, when he obtains possession of them pursuant to lease, hiring agreements or consignment. Debtor has no rights in crops until they become growing crops, young of animals until they are conceived, in oil, gas or other minerals until extracted, in timber until it is cut.

After-Acquired Property.

Security agreement may cover after-acquired property and security interest will attach without specific appropriation by debtor.

Future Advances.

Security agreement may secure future advances, which means advances whether or not made pursuant to obligation and includes reasonable costs incurred for protection, maintenance or repair of collateral. If advances are made while security interest is perfected, security interest has same priority with respect to future advances as it has with respect to first advance. Unless parties otherwise agree, obligations owing to debtor to make future advances is not binding on secured party if security interest does not have priority over writ of enforcement with respect to those future advances (P.P.S.A, c. P-7, § 14[2]), as when advances were not made before secured party acquires knowledge of writ (P.P.S.A, c. P-7, § 35[6]).

Perfection.

Security interest is perfected when it has attached and all steps required for perfection required under Act have been completed regardless of order of occurrence. (P.P.S.A., c. P-7, § 19). Three methods of perfection are: (a) Possession of collateral by secured party or on his behalf; (b) registration of financing statement in Personal Property Registry; and (c) automatic, although temporary, perfection by way of statutory grace periods.

Act also provides specific rules as to perfection with respect to proceeds of collateral. Security interest in collateral extends to proceeds and is perfected if financing statement filed which covered original collateral contains prescribed description, or if proceeds are of type which fall within description of original collateral, or are cash; then, registration perfects security interest in both collateral and in proceeds. Otherwise, security interest in proceeds becomes unperfected on expiry of 15 days after security interest attaches to proceeds unless otherwise perfected.

Purchase money security interest in collateral or its proceeds, other than intangibles or inventory, that is perfected within 15 days after debtor or another person at request of debtor obtains possession of collateral or in intangible or its proceeds that is perfected not less than 15 days after day security interest in intangibles attaches, has priority over any other security interest in same collateral given by same debtor. (P.P.S.A., c. P-7, § 34).

Purchase money security interest in inventory or its proceeds has priority over any other security interest in same collateral given by same debtor if purchase-money security interest in inventory is perfected at time debtor receives possession of it and purchase-money secured party serves notice on secured party who has registered financing statement covering same type of collateral. Exception with respect to sales in ordinary course of business and by virtue of fact that purchase-money security interest in proceeds of inventory does not have priority over prior perfected security interest in accounts receivable given for new value.

Purchaser of goods sold in ordinary course of business of seller takes free of any perfected or unperfected security interest therein given by or reserved against seller, whether or not purchaser knows of it, unless secured party proves that purchaser also knows that sale constitutes breach of security agreement.

Act provides special priority rules between secured and unsecured creditors, and with respect to fixtures, negotiable documents of title, money and securities, chattel paper, future advances, leases, crops, accessions and co-mingled goods.

Registration.

All registrations under Personal Property Security Act take place at Personal Property Registry. Central Registry and Vehicle Registry are continued as The Personal Property Registry.

Registration of charges on land, though governed by Law of Property Act, also takes place at Personal Property Registry. (Law of Property Act, c. L-7, § 64[1][d]).

Registration of financing statement is effective for length of time indicated in financing statement and may be renewed at any time before document to which it refers expires by registering financing change statement.

Where secured party assigns his interest or subordinates his interest to that of another person, financing change statement in prescribed form may be registered. Registration of such statement is mandatory where debtor transfers his interest in collateral or changes his name.

Search for registrations against name of debtor or against serial number where collateral required by regulation to be described by serial number (i.e., motor vehicles, mobile homes, trailers and airplanes, as defined in regulations); against registration number may be obtained, with results given in printed or verbal form.

Registration may be renewed by registering financing change statement at any time before registration expires, and, subject to regulations, period of time for which registration is effective is extended by renewal period indicated on financing change statement. (P.P.S.A., c. P-7, § 44[2]).

Time for Registration.

Financing statement may be registered at any time and may be registered before security agreement is made or before security interest attaches. It must be registered prior to expiry of any temporary perfection period (usually 15 days) to continue perfection uninterrupted, and with respect to purchase-money security interest, within 15 days of debtor obtaining possession of collateral.

Rights and Remedies Upon Default.

Part 5 contains code setting out rights, remedies, duties and obligations upon both secured party and debtor many of which, to extent that they give rights to debtor or impose obligation upon secured party, cannot be waived. However all such rights and remedies of secured parties are subject to consumer protection legislation.

21 PROPERTY

21.01 ABSENTEES:

Persons resident out of province are under no disability with regard to holding property, but acquisitions are restricted under Investment Canada Act, R.S.C. 1985, c. 28 (1st. Supp.) and

Agricultural and Recreational Land Ownership Act. (c. A-9). See also category 4 Citizenship, topic 4.01 Aliens.

Care of Property.

If resident of province is missing, Public Trustee may act as custodian of his property. He may mortgage, lease, sell or otherwise dispose of property upon order of a Queen's Bench judge, and has generally all powers of administrator of estate of deceased person. (S.A. 2004, c. P-44.1, §§ 8, 9).

Proceedings are commenced by petition to Court of Queen's Bench by any person interested or by next friend. Notice of every motion or application to court in respect of such person or his property must be served on Public Trustee. (Public Trustees Act, S.A. 2004, c. P-44.1). Does not apply to applications governed by Administration of Estates Act.

Process Agent.

Absentees are not required to appoint agents for service of process (A.R.C., A.R. 390/1968, R.30); however, absentee plaintiffs and parties entering appearances must provide address for service within 30 kilometres of courthouse where action or proceeding is commenced (A.R.C., A.R. 390/1968, R.5[1][b]).

Escheat.

The Crown in the right of Province is entitled to become possessed of bona vacantia quite independently of tenure. See categories 3 Business Regulation and Commerce, topic Banks and Banking, subhead Unclaimed Deposits; Estates and Trusts, topic Wills, subhead Unclaimed Legacies.

Unclaimed Personal Property.

Personal property presumed to be abandoned if it is unclaimed by apparent owner within applicable periods prescribed in regulations. (Unclaimed Personal Property and Vested Property Act,

c. U-1.5). Act applies to, unclaimed tangible personal property in Alberta, unclaimed intangible personal property, and vested property, including, without limitation, property of individuals, and several dissolved entities. Act does not apply to unclaimed property less than $250 (intangibles) or ($1000) tangibles, or to benefits payable pursuant to certain listed enactments. (§ 4). Act also sets out circumstances in which unclaimed property vest in Crown in Right of Alberta (Part 2). *(Note: Proclaimed in force Sept. 1, 2008.)*

21.02 ADVERSE POSSESSION:

Person who can show actual, open, continuous, peaceful and exclusive possession of lands for ten years may bar right of owner of a registered fee simple Torrens title therein. The Limitations Act does not apply where claimant seeks remedial order based on adverse possession of real property owned by Crown. One occupant may assign his rights in lands to another, and latter thereby takes benefit of period of adverse possession of former. (Limitations Act, c. L-12, §§ 2, 3; Land Titles Act, c. L-4, § 74).

21.03 CURTESY:

No tenancy by curtesy in Alberta. (Law of Property Act, c. L-7, § 4).

21.04 DEEDS:

Transfers may be of any interest not greater than that owned by the transferor, but the typical titles are fee simple ones from which the minerals have been reserved to the Crown. Land cannot be transferred in fee tail. (Law of Property Act, c. L-7, § 9). See topic Real Property for estates recognized.

Execution.

Land is conveyed by a “transfer.” Transfers, etc., shall be witnessed by person who can sign his name and for purposes of registration affidavit of execution must be attached or endorsed. As to who may take affidavit see category 10 Documents and Records, topic 10.02 Affidavits. No affidavit of execution is necessary in case of instrument executed by corporation under its corporate seal and no seal necessary if executed by one officer or director who has signature attested to and verifies by affidavit authority to execute instrument. (Land Titles Act, c. L-4, § 161). Every instrument affecting registered lands, other than copy of writ of enforcement, must disclose surname, one given name and municipal number and street address, if any, of each party to instrument. (Land Titles Act, c. L-4, § 45). See category 8 Debtor and Creditor, topic 8.13 Homesteads.

For circumstances in which spouse must join, see topic 21.06 Dower; also category 8 Debtor and Creditor, topic 8.13 Homesteads.

Recording.

Where different instruments affecting same estate have been registered they take priority according to serial number assigned on registration rather than date of execution unless question of fraud involved. (Land Titles Act, c. L-4, § 56). Registrar cannot register any transfer or transmission of any estate or interest in land without accompanying declaration under regulations under The Agricultural and Recreational Land Ownership Act (RSA 2000, c. A-9, Land Titles Act, c. L-4, § 28) and Citizenship Act (Canada) (R.S.C. 1985, c. C-29, § 35).

Fees for recording transfers of land or vesting orders are fixed according to value.

There must also be fees paid to assurance fund. (c. L-4, § 164). See category 10 Documents and Records, topic 10.04 Records.

Transfer by Attorney in Fact.

See category 2 Business Organizations, topic 2.01 Agency.

Forms

The following are the principal forms prescribed by the Land Titles Act:

Form 8 LAND TITLES ACT(Section 64)

Transfer of Land:

I, A.B., being registered owner of an estate (state the nature of estate) subject to registered encumbrances, liens and interests, if any, in all that piece of land described as follows: (here describe land) do hereby, in consideration of (here set out true consideration) transfer to E.F., all my estate and interest in that piece of land. (When a lesser estate describe such lesser estate).

In witness whereof I have hereunto subscribed my name this (insert date).

SIGNED by the above named)

A.B. in the presence of)

)

_____________________)

)

)

(A.R. 480/81 Form 8; 538/82; 231/99; 251/2001).

____

(Name)

Add Affidavit of Execution where necessary (see subhead Execution, supra). For form of affidavit see catchline Affidavit of Attestation of Instrument, infra.

For Homestead Property.

Insert consent of spouse before witness clause and add separate acknowledgment of spouse. (c. D-15, §§ 4, 5 & 6). For forms see category 8 Debtor and Creditor, topic 8.13 Homesteads.

Every transfer must have oaths or affidavits of value attached by transferor or transferee or their agents. (c. L-4, § 164).

Form 32

LAND TITLES ACT

(Section 164)

Affidavit re Value of Land:

I, A.B., of _____________, in the ______________ make oath and say:

1. I am (one of) the transferee (or agent of the transferee) named in the within or annexed transfer and I know the land therein described;

2. I know the circumstances of the transfer and true consideration paid by me is as follows:(Give full details: cash, assumption of mortgage, exchange or other consideration with cash value of same.)

3. The current value of the land, in my opinion, is $_________ ("land" includes buildings and all other improvements affixed to the land.)

SWORN BEFORE ME at______________)

in the _________________________________)

this ________ day of ____________, 20__)

)

)

____________________________________)

(Signature of Commissioner)

for Oaths or other officer))

____

[NAME]

(A.R. 480/81, Form 32; as repealed and replaced by A.R. 331/88, as am'd by A.R. 251/2001, as am'd by A.R. 326/2003).

FORM 31

LAND TITLES ACT

(Section 155 and 156)

Affidavit of Attestation of Instrument:

I, *A.B.*, of ____________, in the _____________ make oath and say:

1. I was personally present and did see ____________ who is known to me to be the person named in the within *(or annexed)* instrument, duly sign the instrument;

or

I was personally present and did see ____________ who, on the basis of the identification provided to me, I believe to be the person named in the within *(or annexed)* instrument, duly sign the instrument;

2. The instrument was signed at ___________, in the ____________ and I am the subscribing witness thereto;

3. I believe the person whose signature I witnessed is at least eighteen (18) years of age.

SWORN BEFORE ME at______________)

in the ________________________________)

this ________ day of ____________, 20__)

)

)

____________________________________)

(Signature of Commissioner)

for Oaths or other officer))

(A.R. 538/82, Form 31, as am’d by A.R. 251/2001).

____

[NAME]

Homestead or Dower Affidavit: see topic Homesteads.

FORM 26

LAND TITLES ACT

(Section 130)

CAVEAT FORBIDDING REGISTRATION

Caveat (forbidding registration): Take notice that I (insert name and address of Caveator) claim (specify the nature of the estate or interest claimed and the grounds on which the claim is founded) in the land described as follows: (here describe land) standing in the registrar in the name of. .. ..; and I forbid the registration of any person as transferee or owner of, or of any instrument affecting that estate or interest, unless the certificate of title is expressed to be subject to my claim.

I designate the following address as the place at which notices and proceedings relating hereto may be served:

....

....

In witness whereof I have hereunto subscribed my name this....... (insert date)

....

(Signature of the Caveator or his Agent)

(A.R. 538/82, Form 26; 538/82; 231/99)

FORM 27

LAND TITLES ACT

(Section 131)

Affidavit in Support of Caveat:

I, (the Caveator or his Agent), make oath and say (or solemnly declare) as follows:

1. I am the within named caveator (or agent for the caveator).

2. I believe that I have (or the caveator has) a good and valid claim on the land (mortgage or encumbrance), and I say that this caveat is not being filed for the purpose of delaying or embarrassing any person interested in or proposing to deal with it.

SWORN BEFORE ME at_____________)

in the ________________________________)

this ________ day of ____________, 20__)

)

)

_____________________________________)

(Signature of Commissioner)

for Oaths or other officer))

(A.R. 480/81, Form 27, as am'd by A.R. 231/99).

____

[NAME]

21.05 DEEDS OF TRUST:

See category 20 Mortgages, topic 20.03 Mortgages of Real Property.

21.06 DOWER:

All dower rights have been abolished (c. L-7, § 3) except with respect to homestead (c. D-15). Inter vivos rights of each spouse are equal. Rights of surviving spouses are equal. Survivor receives life estate in Real and Personal Property. (§§ 18, 23).

Forms under Dower Act.

See category 8 Debtor and Creditor, topic 8.13 Homesteads.

Release.

Release/Consent must be executed by spouse in prescribed written form (§ 4), and may be registered in Land Titles Office (§ 3[2][b]). Spouse may reinstate dower rights prior to registration of transfer. (§ 8).

Bar.

Spouses may apply to court to dispense with Consent requirements. (§ 10). Court may order disposition under Agricultural and Recreational Land Ownership Act and § 35 of the Citizenship Act (Canada). No Dower rights where spouse has partial interest with third party. (§ 25).

Election.

Survivor must elect one property to which dower rights will apply. (§ 19[1]). No election required by Dower Act as between dower rights and distributive share of deceased's estate. See category 13 Estates and Trusts, topic 13.14 Wills, subhead Election.

21.07 ESCHEAT:

See topic 21.01 Absentees, subhead Escheat; categories 3 Business Regulation and Commerce, topic Banks and Banking, subhead Unclaimed Deposits; Estates and Trusts, topics

Descent and Distribution, subhead Escheat, Wills, subhead Unclaimed Legacies.

21.08 LANDLORD AND TENANT:

The ordinary common law rules as to rights and liabilities of landlords and tenants prevail in this province, and are supplemented by Land Titles Act (c. L-4), Mobile Home Sites Tenancies Act (c. M-20), and Residential Tenancies Act (c. R-17.1). Doctrine of Interesse Termini is abolished. (c. L-7, § 66).

Uniform Commercial Code Art. 2A.

Not adopted.

Kinds of Tenancy.

See topic 21.14 Real Property.

Leases.

If more than three years should be in writing under seal, but may be enforced by tenant against landlord and vice versa if there have been acts of part performance, subject to provisions of Land Titles Act, whereby tenant may lose his right as against registered owner if lease is not in writing or lease is not registered. (c. L-4, § 95). Court of Queen's Bench of Alberta has power to relieve against forfeiture for breach of covenant in lease. (c. J-2, § 10). Where tenant executes residential tenancy agreement in writing landlord must deliver copy to tenant within 21 days of agreement being returned to landlord, otherwise tenant is entitled to withhold payment of rent until served. (c. R-17.1, § 17).

When tenant enters into residential tenancy agreement with landlord, landlord shall serve tenant with "notice of landlord" within seven days of tenant taking possession. (c. R-17.1, § 18[2]). Landlord must make inspection reports within one week after tenant moves into premises, deliver copy forthwith, and keep copy for three years after termination of tenancy (c. R-17.1, § 19[6][a]); if no inspection report as per Act, landlord cannot make deduction from security deposit for damages (c. R-17.1, §§ 19, 46[6]).

Security Deposit.

Landlord of residential premises cannot require security deposit exceeding one month's rent and is regulated as to what can be done with such and when and under what conditions it must be repaid to tenant. Landlord shall not require tenant to pay increase in security deposit. Landlord must place security deposits into interest bearing account and must pay interest annually to tenant, unless otherwise agreed. (c. R-17.1, §§ 43-47).

Rent.

Landlord must give notice of increase in rent in prescribed form. Minimum periods apply; for weekly tenancy—12 weeks, for monthly tenancy—three months, for any other periodic tenancy—at least 90 days. Non-compliance renders notice void, allows tenant to recover increase. (c. R-17.1, § 14). Tenant may apply to court for abatement of rent or order to pay rent into court if there is breach by landlord. (c. R-17.1, §§ 37-39).

Lien.

Landlord has common law lien on his tenant's goods for amount of rent owing. See category 21 Property, topic Distress.

Termination of Tenancy.

Weekly, monthly or yearly tenancy may be terminated on either party giving written notice, within prescribed period, signed by party or his agent, states premises concerned and date that tenancy is to terminate. If termination by landlord, must specify reasons for which tenancy is being terminated; landlord's notice is of no effect (c. R-17.1, § 6) unless termination is for one or more of prescribed reasons set out in Regulations (229/92) or under c. R-17.1 §§ 11 and 12. Landlord may terminate, using prescribed form, on 14 days notice for substantial breach and on 24 hours notice for significant damage or assault. (c. R-17.1 §§ 29, 30). Tenant of residential premises may not waive or release rights, benefits or protections provided to him under Act. Except in cases of absence or where service is governed by rules of practice of court, any notice, order or document shall be served personally, by registered or certified mail. Termination for non-payment of rent ineffective if arrears are paid prior to termination date.

Holding Over.

In absence of facts showing contrary intention, periodic tenancy is implied if tenant remains in possession after expiration of fixed term. (c. R-17.1, § 13).

Dispossession.

Landlord may recover possession of his premises in several ways. (See subhead Termination of Tenancy, supra.)

Proceedings for recovery where tenant refuses to vacate are commenced by way of originating notice accompanied by landlord's affidavit attesting to relevant facts asking for order for possession as set out in Act (c. R-17.1, §§ 50, 51) or through application to Residential Tenancies Dispute Resolution Services (c. R-17.1, §§ 54.1-54.8). Originating notice of motion may include claim for rent arrears, damages, for use and occupation after expiration or termination of tenancy, and in case of residential tenancy agreement, termination of tenancy by reason of substantial breach. On hearing matter judge or tenancy dispute officer may: (a) Give order for possession; (b) give judgment for damages; (c) give judgment for use and occupation by tenant holding over; (d) give order for costs; (e) direct trial of issue; (f) give order for termination of tenancy; or (g) dismiss application.

Proceedings in respect to arrears or compensation can continue even if tenant vacates on service of originating notice. (c. R-17.1, §§ 33[1]).

Distress.

Common law rules and statutes govern distress for rent although goods of strangers are not liable to distress, unless title is derived by purchase, gift, transfer of assignment from tenant or they have security interest in personal property other than Purchase Money Security Interest. The Civil Enforcement Act, (c. C-15, §§ 104) governs distress for rent. Property claimed by relative of tenant may be distrained, if such relative lives on premises as member of tenant's family. Interest of tenant in property held under conditional sale agreement is also distrainable. Exemptions to distress set out in Regulations (A.R. 276/95, § 38) and Act (c. C-15, §§ 88-93). No realization by distress allowed after assignment in bankruptcy, receiving order, or winding up order of company. (c. L-5, § 2). In bankruptcy landlord receives qualified priority for lesser of three months rent or value of distrainable property. (Bankruptcy and Insolvency Act, c. B-3, § 136[f] [Canada]).

Unless otherwise ordered by court, distress can only be made through civil enforcement bailiff. Tenant is given 15 days within which to file notice of objection, failing which goods may be sold by civil/enforcement agency. If notice of objection is filed goods cannot be removed or sold without order from Queen's Bench judge after notice to tenant. (c. C-15, §§ 9 and 45-48).

Personal Property Security Act does not apply to right of distress. (c. P-7, § 4). Under some circumstances Landlord may distrain and sue on covenant to pay. (Douglas Properties Ltd.

v. Old World Antiques etc. Ltd., [1980] 13, Alta. L.R. [2d] 376 [QB]).

If landlord elects to forfeit lease, he loses right of distress. (Cristall v. McKennan, 35 D.L.R. 452, [1917] 2 W.W.R. 1063).

Uniform Residential Landlord and Tenant Act.

Not adopted.

Exclude.

Oil and gas leases. (See category 19 Mineral, Water and Fishing Rights, topic 19.01 Mines and Minerals.)

21.09 LEASES:

See topic 21.08 Landlord and Tenant.

21.10 PARTITION:

Co-owner may apply to court by originating notice for order terminating co-ownership of interest in land. (c. L-7, § 15). Notwithstanding any agreement between co-owners of land, court may make order terminating co-ownership, if continuance of co-ownership will cause undue hardship to one or more of co-owners. (c. L-7, § 27).

Jurisdiction and Venue.

Applications are made to Court of Queen’s Bench.

Proceedings.

Co-owner applying for order must, at least ten days before, serve copy of originating notice on other co-owner and any party who has encumbrance registered against interest in land. (c. L-7, § 25).

Partition in Kind or Sale.

On hearing application court shall make order directing either physical division land, sale of all or part interest of land and distribution of proceeds, or sale of all or part of interest of one or more co-owners’ interests in land to other co-owners willing to purchase interest. (c. L-7, § 15).

21.11 PERPETUITIES:

Common law rule against perpetuities is in force except as provided by The Perpetuities Act. (c. P-5, § 2). Common law rule is, briefly, that every interest in property must, to be valid, vest, if at all, within life or lives in being and 21 years. Act creates presumption of validity until actual events establish incapability of vesting within period, in which case interest is void, subject to exceptions created. Act came into force July 1, 1973, and, except as provided, is not retroactive.

Accumulations.

See category 13 Estates and Trusts, topic 13.13 Trusts, subhead Accumulations.

21.12 PERSONAL PROPERTY:

Tenancy by entirety in personal property does not apply. However, Dower Act (c. D-15, § 23) creates similar arrangement for spouses.

21.13 POWERS OF ATTORNEY:

Governed by Powers of Attorney Act. (c. P-20).

Attorneys in Fact.

Attorney has authority to do anything on behalf of donor that donor may lawfully do by attorney. (c. P-20, § 7). Positive duty to act. (c. P-20, § 8).

Formalities.

Act sets out prescribed form and limits who may act as donor, attorney and witness to execution. Act recognizes powers of attorney properly executed under laws of another jurisdiction. (c. P-20, § 2).

Revocation.

Any interested person may apply to court by way of originating notice for order terminating enduring power of attorney. (c. P-20, § 11).

Uniform Durable Power of Attorney Act.

Not applicable.

Members of Armed Forces.

No special provisions.

Exclude.

Brokers; Factors; Insurance Agents; Insurance; Process Agents; Corporations; Insurance.

21.14 REAL PROPERTY:

Every type of estate is recognized in this province except estate in tail. (c. L-7, § 9). Unless specifically stated otherwise any transfer, etc., of land will convey the fee simple interest thereof or the greatest interest therein which the grantor has. Tenancy by entirety is not recognized as such, but considered joint tenancy. (c. L-7, Part 1). Doctrine of Interesse Termini is abolished. (c. L-7, § 66).

Rule in Shelley’s Case.

Incompatible with Torren’s system of land holding does not apply in Alberta.

Foreign Conveyances or Encumbrances.

Instruments that are executed in foreign jurisdiction and are of type that may be registered under Act (c. L-4) must be witnessed in prescribed manner (c. L-4, §§ 156-160). See also category 10 Documents and Records, topic 10.04 Records.

Sale of Subdivisions Outside Alberta.

See category 3 Business Regulation and Commerce, topic 3.02 Brokers.

Condominiums.

Condominium Property Act provides for condominium ownership of real property in Alberta. (c. C-22).

See also topics 21.03 Curtesy, Deeds, Dower, Landlord and Tenant; categories 5 Civil Actions and Procedure, topic Partition; Debtor and Creditor, topic Homesteads; Documents and

Records, topic Records; Family, topic Husband and Wife; Mortgages, topic Mortgages of Real Property.

21.15 TRUST DEEDS:

See category 20 Mortgages, topic 20.03 Mortgages of Real Property.

22 TAXATION

22.01 ADMINISTRATION:

There are taxes on real estate, mineral rights, wild lands, business tax, income tax, and other taxes imposed by Federal, Provincial, or Municipal governments. No exemptions for members of armed services except as discussed under topic Income Tax. Municipal Government Act (c. M-26) constitutes complete consolidation of legislation revision governing municipal corporations in Alberta. Taxation powers of municipalities are set forth in Part 10 of Act. Federal legislation is largest regime. Provinces each impose their own income and sales taxes in addition to federal income and sales tax. Canada Revenue Agency (CRA) supervises and administers Federal Tax Law. Tax and Revenue Administration (TRA), division of Alberta Revenue, administers Tax Law in Alberta.

Alberta is only jurisdiction without provincial sales tax. General provincial sales tax may only be imposed after referendum. (c. A-36).

Collection.

Taxes collected by CRA (R.S.C. 1985, c. 1 [5th Supp.], § 222) or Dept. of Finance. Each level of government has wide powers to collect arrears, including garnishment, foreclosure, seizure, charge on property, etc.

Payment.

Income tax deducted at source and remitted by employer each month. Sales tax and GST collected and remitted by vendors.

Penalties.

No federal or provincial penalty for failing to file personal tax return unless tax is payable. (R.S.C. 1985, c. 1 [5th Supp.], § 150[b][i]). Federal statute governs criminal penalties. (R.S.C. 1985, c. 1 [5th Supp. Part 15] and [R.S. 1985, c. C-46]).

22.02 ALCOHOL, BEVERAGES AND TOBACCO TAXES:

Alcoholic Beverages Taxes.

Federal statute applies. (Excise Act, 2001 [2002, c. 22]). No provincial tax, but Government controls all sales to distributors and charges flat fee mark-up. (c. G-1, § 77).

Cigarette Tax.

See subhead Tobacco Products Tax, infra.

Tobacco Products Tax.

Governed by Tobacco Tax Act (c. T-4) and Tobacco Tax Regulation. (273/1983). See also federal statute Excise Tax Act, 2001. (2002, c. 22).

22.03 BUSINESS TAXES:

Municipalities may impose business taxes upon persons operating business within municipality. Businesses are assessed for taxation purposes in accordance with certain prescribed criteria. Crown businesses and regional airports are exempt from taxation. (c. M-26, Part 10, Div. 3).

Enforcement.

Municipalities seeking to recover business tax arrears may issue distress warrant and seize goods of persons or businesses liable to pay such tax. Goods may also be seized from receivers, trustees in bankruptcy and liquidators of corporations. Seized goods must be auctioned not less than 60 days after seizure. Municipality becomes owner of any goods not sold at auction, whereupon it may sell such goods. Municipality may also bring action for tax arrears before seized goods are auctioned or become property of municipality. (c. M-26, Part 10, Div. 9).

Redemption.

Seized goods may be redeemed by any person upon payment of tax arrears at any time before municipality sells goods or takes ownership of them. (c. M-26, § 443).

Franchise Taxes.

See category 2 Business Organizations, topic 2.03 Corporations.

Goods and Services Tax.

Federal Tax applies to most goods and services purchased in Alberta. Rate of 7% introduced Jan. 1, 1991, reduced to 5% effective July 1, 2008. (Excise Tax Act, R.S. 1985, c. E-15).

22.04 CORPORATE TAXES:

Governed by both federal and provincial (c. A-15) tax regimes.

Stock Transfer Tax.

Repealed 1953.

See category 2 Business Organizations, topic 2.03 Corporations.

22.05 EMPLOYMENT TAXES:

Unemployment Compensation or Social Security Tax.

None imposed by province. As to Federal Tax, see Canada Law Digest.

Local Employment Tax.

None.

Exemptions and Credits.

None.

22.06 ENVIRONMENTAL TAX:

Hazardous Waste Tax.

None.

Mines, Minerals and Fisheries Tax.

Crown reserves right to collect royalties on minerals recovered under agreements. (Mines and Minerals Act, c. M-17, § 33).

Severance Taxes.

None.

Recycling Tax.

Provincial government may impose advance surcharges on designated materials for recycling purposes. (Environmental Protection and Enhancement Act, c. E-12, § 170) (A.R. 93/2004).

22.07 ESTATE TAX:

None.

22.08 GASOLINE AND SPECIAL FUEL TAXES:

Imposed by Fuel Tax Act (c. F-28, § 11[1][a]) and Fuel Tax Act Regulations. (Alta. Reg. 62/2007). Provincial Tax of 9¢/litre applies to fuel oils and most fuels consumed in Alberta.

22.09 GIFT TAX:

None. However, Federal Income Tax Act may treat gift from employer to employee as form of income. (R.S.C. 1985, c. 1 [5th Supp.], § 6[a]).

22.10 HOTEL AND RESTAURANT TAXES:

Imposed by Tourism Levy Act. (c. T-5.5).

22.11 INCOME TAX:

Liability for income tax is based on residence of individual or corporation. Canadian residents are taxed on worldwide income, nonresidents are taxed on Canadian source income. Foreign corporations are subject to branch tax under Income Tax Act (Canada) of 25% subject to reduction under applicable treaty provisions. Note that Alberta Income Tax Act (c. A-26) applies only to year 2000 and prior, while Alberta Personal Income Tax Act (c. A-30) applies to years 2001 and subsequent.

Personal.

For 1987 to 2000 taxation years, individual will pay general rate of 46.5%-44% of net federal tax payable (c. A-26, § 3.02) plus 8% surtax of basic tax payable in excess of $3,500 (c. A-26, § 3.03). Additionally, taxpayer pays flat tax on gross taxable income: 1% for 1987 taxation year, and 0.5% for 1988-2000 taxation years. (c. A-26, as am'd by c. A-30). For 2001 and subsequent taxation years, individuals will pay only flat tax of 10% on gross income. (c. A-30, §§ 4, 6[1]). All provincial references to gross income are based on Part I of Federal Act. Special rules apply to NHL players. (c. A-30, Part 1.1).

Corporate.

Provincial Act contains discrete method of calculating income. (Alberta Corporate Tax Act, c. A-15, Parts 2-4). Rate payable is set out in c. A-15, § 21 with special deductions allowed for small business and manufacturing/processing corporations. (c. A-15, Part 5, Div. 1). Financial corporations are subject to special rules. (c. A-15, Part 10).

See category 2 Business Organizations, topic 2.03 Corporations.

See Canadian Law Digest, category Taxation, topic Income Tax.

Exemptions.

See Federal Income Tax Act (R.S.C. 1985, c. 1 [5th Supp.], § 149) and Alberta Personal Income Tax Act (c. A-30, § 3[2]). See Federal Indian Act. (R.S. 1985, c. I-5).

22.12 INHERITANCE TAX:

None.

22.13 LOCAL AND MUNICIPAL TAXES:

See topic 22.14 Real and Personal Property Taxes.

22.14 REAL AND PERSONAL PROPERTY TAXES:

Assessment.

Land taxes are imposed by city, town, village, county, municipal district, improvement district or special area in which land is situate to raise revenue to be used towards payment of municipality's expenditures, transfers and requisitions. Property Tax by-law must be passed annually. (Municipal Government Act, c. M-26, § 353). Certain exemptions are available for prescribed taxpayers or types of property. (c. M-26, §§ 351, 361-364). Such taxes are calculated on basis of assessments prepared by municipality or other authority. (c. M-26, §§ 355, 356). Legislation contemplates tax agreements between certain specified parties and municipalities. Amended: 2007 (C.A. 36.25 § 82[17]) effective Jan. 1, 2008.

Review of Assessment.

Complaints regarding assessments, tax exemptions, and other enumerated matters (c. M-26, § 460[5]) may be brought before assessment review board (§ 454[1]) typically comprised of at least three members (c. M-26, § 454[2]). Decisions may, among other things, alter assessments, but not assessments that are fair and reasonable. (c. M-26, § 467).

Decisions of assessment board may be appealed (c. M-26, § 470) to three member panel of Municipal Government Board (c. M-26, § 487[1]). This panel is also empowered to decide on, among other things, annexations and subdivision decisions. (c. M-26, § 488[1]). Appeals must be made in writing no later than 30 days after assessment board's decision is sent to complainant. There is no appeal from decision of Municipal Government Board. (c. M-26, § 6).

Neither assessment review boards nor municipal government board panels are bound by rules of evidence or any other laws applicable to court proceedings and have power to determine admissibility, relevance and weight of any evidence. (c. M-26, §§ 461[1] and 496[11]).

Enforcement.

These taxes may be enforced by action, auction or forfeiture and disposal of lands. (c. M-26, Part 10, Div. 8). Taxes are deemed to be in arrears if not paid by Dec. 31 of year in which they are imposed. (c. M-26, § 326). Municipality must prepare, register with Registrar and post tax arrears list not later than Mar. 31 of each year, and persons liable to pay such tax in arrears must be notified that it has been prepared and registered. (c. M-26, § 412). Tax recovery notification must be endorsed on certificate of title for each parcel of land shown on tax arrears list. (c. M-26, § 413). Taxable improvements must not be removed from parcels after endorsement of tax recovery notification upon certificate of title to such parcels. After tax recovery notification has been endorsed upon certificate of title to parcel of land, before municipality disposes of parcel, any person may pay arrears of tax, upon which payment, notification must be removed. (c. M-26, § 415). Not later than Aug. 1 following receipt of tax arrears list, must notify owner of parcel, taxes for which are in arrears, any person with interest in such parcel, and any encumbrance that if arrears are not paid before Mar. 31 of following year, municipality will offer parcel for sale at public auction, and that municipality will assume ownership immediately after auction if parcel is not sold. Municipality is entitled to possession of parcel from date on which parcel is offered at public auction. Auction must be advertised, copy of which advertisement must be provided to persons with interest in land not less than four weeks prior to auction. (c. M-26, Part 10, Div. 8). Person who purchases parcel at public auction takes parcel free of all encumbrances, with certain statutory exceptions. Municipality becomes owner of parcel immediately following auction, if land is not sold at such auction and takes title free and clear of all but certain statutory encumbrances. (c. M-26, §§ 423, 424). Claims of municipality and Crown enjoy priority in distribution of proceeds of sale. Any surplus may be distributed in accordance with order of Court of Queen's Bench. (c. M-26, § 428).

Redemption.

After municipality assumes ownership of parcel, lands that are not sold or disposed of may be redeemed upon payment of all tax arrears and costs. (c. M-26, § 426). This redemption period ends 15 years following date of public auction. (§ 428.2).

22.15 SALES AND USE TAXES:

Sales Tax.

No provincial sales tax. Federal Excise Tax Act imposes 5% Goods and Services Tax. (R.S. 1985, c. E-15, Part 9 and Div. 2). Amended: (Bill C-28, S.C. 2007, c.35).

Use Tax.

None.

Exemptions.

See Federal Indian Act. (R.S. 1985, c. I-5, § 87). For rebates to nonresidents see Excise Tax Act. (R.S. 1985, c. E-5, Part 9. Div. 6)

22.16 STAMP AND SEAL TAXES:

None.

22.17 USE TAX:

See topic 22.15 Sales and Use Taxes.

23 TRANSPORTATION

23.01 AIRCRAFT:

See Canada Law Digest.

23.02 MOTOR VEHICLES:

Vehicle licence or validation marker required annually. One numbered plate must be displayed on rear of all vehicles except truck tractors which require one numbered plate displayed on front. Issued by Motor Vehicles Branch, Department of Solicitor General. Special provision for dealers' plates. Exemption for nonresidents for other than public vehicles for period not exceeding three months, provided displaying current license in accord with laws of place of residence and having financial responsibility card. (*Traffic Safety Act*, c. T-6, §§ 52, 53; Operator Licensing and Vehicle Control Regulation, A.R. 320/2002, 65-75).

Operator's Licence.

Application for operator's licence made to Registrar in form and content prescribed by Registrar. Licence subsists for five year period. Minimum age for operator's licence holders is 14 years. Person between ages of 14 and 16 years may apply for learner's operator's licence. Multiple classes of licences governed by regulation. (§§ 18-21). Learner's operator licence governed by regulation. (§§ 30-35). Person 16 or over is subject to probationary licence for at least two years. (A.R. 320/2002, §§ 7, 10, 11, 21, 29, 30-37). Exemption from licence granted nonresidents remaining in Alberta less than 90 days in 12 consecutive months, provided authorized by place of residence to operate motor vehicles. Exemption also granted to holder of international driver's licence who does not remain in Alberta for more than 12 months. (A.R. 320/2002, §§ 3, 4). Student is not required to have Alberta operator's licence if student is authorized to drive motor vehicle of same class by laws of jurisdiction where student ordinarily resides. (A.R. 320/2002, § 5). Exemptions also granted to members of armed forces. (A.R. 320/2002, § 6).

Titles and Sales.

Ownership in motor vehicles passes with change of possession unless otherwise provided, in which case conditional sales agreement must be registered. (See categories 3 Business Regulation and Commerce, topic Sales, and Mortgages, topic Personal Property Security.) Where ownership passes vehicle registration expires and number plates must be removed and retained in possession of registered owner, but person to whom number plates were issued may apply to Solicitor General to use plates on another vehicle to be registered in his name. Also, when ownership passes in case of certain public vehicles, new owner may apply to Solicitor General to have licence plates issued to former owner transferred to him. (A.R. 320/2002, §§ 85, 86, 88).

Liens.

All costs of seizure, detention, immobilization, removal and/or storage of vehicle under Act are lien on vehicle unless otherwise provided under Act. (c. T-6, § 63).

Garageman entitled to payment of sum for storage, repair or maintenance or price of accessories or parts furnished, has lien on motor vehicle or part thereof for sum entitled to. Garageman must retain possession of motor vehicle from person who authorized storage, repair or maintenance and obtain acknowledgment of indebtedness by requiring person or agent to sign invoice. Garageman must also file lien within 21 days of release of motor vehicle, repairs completed, if not in possession at time of repair, or, when accessories or parts were furnished. (*Garage Keepers' Lien Act*, c. G-2, §§ 2, 3).

Identification Marks.

Summary conviction offence to deface, or alter operator's licence or certificate of registration, permit or number plates or to sell or to have in one's possession motor vehicle or, part of motor vehicle, that does not have serial number or other similar identifying mark approved by Solicitor General. (c. T-6, §§ 61, 68, 124, 167[7]).

Operation prohibited by person under 16 (resident or nonresident) except child 14 or over who has learner's operator's licence, and is under supervision of holder of valid operator's licence, at least 18 years of age, sitting alongside and engaged in driving instruction. (A.R. 320/2002, §§ 28-35).

Size and Weight Limits.

Regulated by A.R. 304/2002, § 84 and regulations thereunder.

Equipment Required.

Regulated by c. T-6 and regulations thereunder. Person shall not occupy house trailer while it is being driven on highway. (A.R. 304/2002, § 84).

Seat belts are mandatory for all occupants of motor vehicles. Children under age six must be placed in child seating assembly. Failure to wear seat belt or to ensure passenger under age 16 wears seat belt may result in fines. (A.R. 122/2009, §§ 82[1]).

Lights Required.

Regulated by A.R. 322/2002, § 55.

Traffic Regulations.

Governed by c. T-6, A.R. 304/2002, and local by-laws. Criminal Code provides sanctions for impaired driving under §§ 253 and 254, R.S.C. 1985, c. C-46. Persons found guilty are disqualified from driving for at least one year. (c. T-6, § 83).

Accidents.

Where accident occurs, person in charge of motor vehicle must remain at or immediately return to scene of accident and shall render all reasonable assistance and shall produce in writing to anyone sustaining loss or injury, to any peace officer and any witness his name and address, number of his operator’s license, name and address of registered owner of vehicle, registration number of vehicle, and financial responsibility card. When car collides with unattended vehicle or wayside property, person in charge of moving vehicle must notify owner or person in charge of unattended vehicle or property and leave his name and address, number of his operator’s license and registration number of vehicle striking unattended vehicle or property. Where accident results in death or injury or damage to apparent extent of $1,000 or more, driver or, where incapacitated, another occupant or owner must submit written report to police. Where vehicle which shows evidence of having been involved in accident causing damage of $1,000 or more or having been struck by bullet is brought into garage for repairs, garage operator must not make repairs until police notified, and must also report vehicles unclaimed for 30 days or more to police. (c. T-6, §§ 69-71, 176, A.R. 320/2002, Part 5).

Liability of Owner.

Owner liable for negligence of person driving motor vehicle and living with and as member of family of owner as well as for negligence of person who is driving motor vehicle and who is in possession of it with consent of owner (see also category 2 Business Organizations, topic 2.01 Agency). Where person sustains loss or damage arising out of operation of motor vehicle upon highway and where that motor vehicle is operated in contravention of any provisions of Traffic Safety Act onus of proof in any civil action that loss or damage did not arise by reason of contravention of that Act is upon owner or driver. (c. T-6, §§ 185, 187). Amended: 2007 (c.45 § 13) not yet proclaimed.

Guests.

Legislation requiring gratuitous passenger to prove gross negligence of driver has been repealed.

Financial Responsibility.

Card required to be held by owner of motor vehicle. It is offence for operator, owner or person having care and control of vehicle to fail to produce financial responsibility card, unless vehicle registered outside Alberta or owned by Crown. It is offence to give financial responsibility card to person not entitled to have it and offence not to deliver card to Registrar for cancellation as required. (c. T-6, §§ 4, 54, 124, 167, as am'd: 2007, c. 45, § 11). Amended: 2007 (c.45 § 11) effective June 1, 2008.

Insurance.

Motor vehicles must be insured. Every contract of insurance issued or renewed with respect to vehicle must have minimum $200,000 liability resulting from bodily injury to or death of one or more persons and property coverage. (*Insurance Act*, c. I-3, § 627).

No-Fault Insurance.

Not adopted.

General Revenue Fund.

If person is injured or dies out of use of operation of motor vehicle in Alberta and names of owner and operator are unknown and unascertainable, or name of operator is unknown and unascertainable and owner may not be liable to action for damages for injury and death, injured person may bring action against Administrator. Nonresidents will not be compensated under this Act unless nonresident resided in jurisdiction where similar recourse is afforded to Alberta residents. No payment will be made out of General Revenue Fund for amount for loss or damage to property. (*Motor Vehicle Accident Claims Act*, c. M-22, § 10[2]). Limit for payment under General Revenue Fund arising out of one accident that occurs on or after June 1, 1997 is $200,000, excluding costs. Deductions will be made from this total amount for amounts recovered through other sources. (c. M-22, §§ 10[6], 11, 12, 13). Payment of hospital, medical, ambulance expenses and rehabilitation costs are limited under General Revenue Fund § 17.

Administrator of Motor Vehicle Accident Claims Act must be served with notice after any defendant is noted in default, and when served with this notice, he must also be served with copy of statement of claim and every subsequent pleading in action. (c. M-22, § 4).

Foreign Vehicles.

If all regulations of place of residence complied with, driver's license, valid financial responsibility card and license plates properly displayed, nonresident may drive touring vehicle in province for not more than three months. (A.R. 320/2002, §§ 48, 48.1).

Nonresident Operator.

Licensed in place of residence may operate vehicle registered in place of residence, or vehicle registered in Alberta. Not required to hold Alberta operator's license if in Alberta for less than 90 days in 12 months. Every operator must carry driver's license issued either by his own province or state or by Alberta government.

Action Against Nonresident.

Arising out of operation of car, may be commenced by service of process as in any ordinary action.

Direct Actions.

Persons having claim against insured must proceed to judgment against insured and then have insurance money applied towards his judgment, and may sue insurer to have insurance money so applied. Action must be on behalf of all persons having similar claims. Limitation of action against insurer of one year from final determination of action against insured, including appeals, if any. (*Insurance* Act,c. I-3, § 635).

Public Motor Vehicles.

Regulated by Federal Motor Vehicle Transport Act (R.S.C., 1985, c. 29 [3rd Supp.]) and associated regulations.

Aircraft.

See Canada Law Digest, category Transportation, topic Aircraft.

Gasoline Tax.

See category 22 Taxation, topic Gasoline and Special Fuels Taxes.

23.03 RAILROADS:

Governed by Federal Canada Transportation Act (R.S.C. 1985, c. 10) and Provincial Railway (Alberta) Act. (c. R-4).

See category 3 Business Regulation and Commerce, topic 3.03 Carriers.

BC

BRITISH COLUMBIA LAW DIGEST

—Scope —

Revised for 2010 edition by

DAVIS LLP, of Vancouver Bar.

(References, unless otherwise indicated, are to Revised Statutes of British Columbia 1996. Subsequent statutes are cited by year and statute number.)

Note: This revision incorporates legislation through August 7, 2009.

1 INTRODUCTION

1.01 GOVERNMENT AND LEGAL SYSTEM:

All political authority in Canada is divided between federal and provincial governments according to provisions of Constitution Act, 1867. Local municipalities are concern of provinces, and derive their authority from Acts of provincial legislation.

Province of British Columbia is one of ten provinces of Canada. For further discussion of Canadian Federal System, see category 1 Introduction, topic Government and Legal System in Canada Law Digest. A great many laws are promulgated by Canadian Federal Government and are not reflected in topics below.

Like all but one of provinces of Canada, British Columbia has common law legal system, with roots in English common law. For information on Courts and Legislature of British Columbia, see category 6 Courts and Legislature.

Legislature must hold session once every year, so 12 months does not intervene between last sitting of one session and first in next. (c. 66, §22).

1.02 HOLIDAYS:

Following are statutory holidays with pay in British Columbia: New Year's Day, Jan. 1; Good Friday; Victoria Day, 1st Mon. preceding May 25; Canada Day, July 1; British Columbia Day, 1st Mon. in Aug.; Labour Day, 1st Mon. in Sept.; Thanksgiving Day, 2d Mon. in Oct.; Remembrance Day, Nov. 11; Christmas Day, Dec. 25 and any other holiday prescribed by regulation. (Employment Standards Act, c. 113, §1).

See also Canada Law Digest and category Employment, topic Labour Relations.

1.03 OFFICE HOURS AND TIME ZONE:

British Columbia is in the Pacific Standard (GMT -08:00) time zone. Government office hours are from 8:30 a.m. to 4:30 p.m.

2 BUSINESS ORGANIZATIONS

2.01 AGENCY:

In general, and apart from statute, the law of agency is the same as in England and in the United States.

Powers of Mercantile Agent, (Sale of Goods Act, c. 410).

Sale or pledge by agent in possession with consent of owner when agent acts in ordinary course of business is valid and binding if purchaser acts in good faith without notice of agent's lack of authority. (§59[1]). Disposition of goods or documents of title by agent valid if person taking under disposition did not know of termination of agency. (§59[2]). Possession of documents of title to goods pursuant to possession of goods themselves deemed to be with consent of owner. (§59[3]). Consent of owner of goods presumed at all times in absence of evidence to contrary. (§59[4]). §59 does not apply to consignment to which Personal Property Security Act applies. (§58). See also category 3 Business Regulation and Commerce, topic 3.14 Factors.

Real Estate Agents or Manufactured Home Dealers.

Real Estate Services Act, 2004, S.B.C. 2004, c. 42 passed on May 13, 2004 and came into force by regulation. Repeals and replaces Real Estate Act, (c. 397) in regulating real estate services. Under new Act every person providing “trading services”, “property management services”, or “strata management services” must be licensed unless exempted by Regulations. (Reg. 506/2004, Part 2, §3[3]). Different levels and categories of licenses. (§5). Different rules for inoperative, suspended and cancelled licenses, and reinstatement thereof depending on level and category of licenses. (Part 2. Division 4). No action may be brought for payment of commissions to unlicensed agents. (§4). Real Estate Council oversees Act and has authority for licensing (Part 2) and disciplining licensees (Part 4). Administrative penalties may be imposed for contravening Council rules. (§56). Special Compensation Fund is established to compensate persons suffering losses due to misappropriation or fraud by licensees. (Part 5).

Insurance agents and salespersons must also be licensed, unless exempted by Regulations. (Financial Institutions Act, c. 141, §171).

Travel Agents.

Business Practices and Consumer Protection Act, S.B.C. 2004, c. 2, Part 9. No one may act, or hold themselves out, as travel agents unless licensed for that purpose or exempted by regulation from licensing requirements. (§143). Certain exemptions in Travel Industry Regulation. (Reg. 296/2004, §2). Qualifications in Reg. 296/2004, §3. Director may issue license and impose conditions; license not transferable. (§145). Director may refuse to issue or renew license; suspend or cancel license; or impose conditions on license if licensee fails to meet Act or regulation requirements or other conditions imposed on license. (§146). Director may only issue license for term of three years. (Reg. 296/2004, §6). Prohibited acts listed in Reg. 296/2004, §9. Licensee required to maintain records for account setting out all financial, commercial and corporate transactions (Reg. 296/2004, §11) and submit annual financial statement to director (Reg. 296/2004, §12). Must establish travel trust account. (Reg. 296/2004, §13). Licensee must provide security to director at time of licensing or within 90 days of end of calendar year. (Reg. 296/2004, §14). Compulsory payments to Travel Assurance Fund (Reg. 296/2004, §17). Both contributors and persons suffering loss as result of contributor may make claims against fund. (Reg. 296/2004, §18).

Inferior Courts.

Agents in certain rare cases and subject to discretion of judge may appear even if person is not practising lawyer provided: (a) Name is on Provincial list of voters; (b) person is not guilty of any gross misconduct; (c) there is not more than one member of Law Society in actual practice in municipality; (d) there is not more than one member of Law Society practicing in court with place of business within eight kilometers of place court sits. (Court Agent Act, c. 76).

2.02 ASSOCIATIONS:

(Society Act, c. 433).

Formation.

Societies may be incorporated under this Act for any lawful purpose or purposes such as national, patriotic, religious, philanthropic, charitable, provident, scientific, fraternal, benevolent, artistic, educational, social, professional, agricultural, sporting, or other useful purposes, but not for purposes of carrying on institution for minors, hospital, insurance provider (without consent of Financial Institutions Commission), or business trade or industry for profit or gain. (§2). Five or more persons may apply for incorporation of society by sending constitution and by-laws in duplicate to Registrar of Companies with list of first directors, notice of address of proposed society and prescribed fees. (§3).

Professional associations may be incorporated to promote any object of professional character, but cannot be incorporated for purpose of carrying on any trade, industry or business for profit and gain. (§2).

Liabilities.

No member of such society is liable in his individual capacity for debt of liability of society. (§5).

Rights and Powers.

There is no share capital (§8) and interest of member is not transferable except as may be provided in by-laws (§9).

Actions.

The society sues and may be sued, contracts in its own name and has right to seal. Incorporated society has all of powers and capacity of natural person. (§4).

Extra-Provincial Societies.

Extra-provincial society may apply for registration. Any extra-provincial society or agent thereof not registered is incapable of acquiring or holding any interest in land in B.C. or registering title to land or maintaining action upon any contract made in whole or in part in province. Registrar of Companies may require extra-provincial society (other than society authorized to carry on insurance business) to apply for registration. (§75).

Cooperative Association Act, (S.B.C. 1999, c. 28).

Any three or more persons, eligible organizations or both may, subject to approval of Registrar of Companies, form association for purpose of carrying on lawful business or activity on cooperative basis, by subscribing to memorandum and rules and filing them, with list of first directors, notice of registered office of association, statement outlining services to be provided to members, and required fees with Registrar of Companies who issues certificate of incorporation. (§§10-15). Capital consists of unlimited number of shares of such denominations as specified in memorandum and liability of members is limited. (§§48-55). Act sets out requirements as to admission, expulsion, dividends, surpluses, administration, directors, auditors, annual reports, dissolution, and the like. Cooperative may contract and sue or be sued in its own name. (§19). Cooperative Association Act contains separate part relating to housing cooperatives. (§§170-173).

2.03 CORPORATIONS:

Note: Business Corporations Act, S.B.C. 2002, c. 57 ("Act") came into effect on Mar. 29, 2004, and introduced significantly different regime governing B.C. corporations. Act contains numerous provisions to allow company incorporated under previous regime ("pre-existing company") to continue operating. Act in most circumstances recognizes pre-existing company's memoranda or articles as equivalent to company's notice of articles or articles under Act. However pre-existing companies are restricted from certain actions until completing transition requirements. All pre-existing companies are required by Mar. 29, 2006 to: (a) File with Registrar transition application including notice of articles; (b) alter articles to extent necessary to comply with Act; and (c) supplement information in company's central securities register as required. (§436[1]). Unlimited liability companies are permitted.

All section and part references in this Part are to S.B.C. 2002, c. 57 unless otherwise indicated. All Regulation references in this Part are to Reg. 65/2004 unless otherwise indicated.

Types of Companies.

Company is corporation formed under Business Corporations Act (S.B.C. 2002, c. 57) ("Act") or former Company Act (§1). Public company is either reporting issuer (or equivalent) as defined in Securities Act, (c. 418), has registered its securities under Securities Exchange Act of 1934 of U.S.A., or has, within meaning of Securities Act, any of its securities traded on or through or reported through, facilities of marketplace or reported through quotation and trade reporting system. (§1).

General Supervision.

Registrar of Companies or other duly authorized person is administrative officer under Act. Mailing Address: P.O. Box 9431, Stn Prov Govt, Victoria, B.C. V8W 9V3, (250) 387-7848, or visit http://www.bconline.gov.bc.ca.

Purposes.

Articles may, but need not, limit business which may be carried on. (§33).

Name.

Company must have one of "Limited", "Limitée", "Incorporated", "Incorporée", "Corporation", "Ltd.", "Ltée", "Inc.", or "Corp." as part of and at end of name. (§23). No company name may include "VCC" unless company registered under Small Business Venture Capital Act (c. 429), or "EVCC" unless company registered under Employee Investment Act (c. 112). Company name may be in English, French, both, or combination of two. (§25). Company may set in its notice of articles or articles designated translation of its name into any language for use outside Canada. (§25[3]). Registrar can reserve name for 56 days. (§22[2]). Registrar can, for good and valid reason, disapprove name. (§22[5]). Registrar may order name change, giving reasons, if it contravenes Act name requirements. (§28).

Term of Corporate Existence.

Subject to company complying with requirements of Act, its existence is perpetual. Extraprovincial company may transfer and continue as B.C. company and with approval of Registrar. (§302). Resident company may continue to other jurisdiction provided that corporate rights and liabilities continue. (§308). Company continuing under laws of other jurisdiction ceases to be company under Act. (§311[3]).

Incorporators.

One or more persons (natural or corporate) may form company. (§10[1]). Every company must have at least one director, and public company must have at least three directors. (§120). First directors must be designated in notice of articles. (§121). No directors need be resident in B.C. or Canada.

Proceedings for Incorporation.

Incorporation filings with Registrar must be done online at http://www.bconline.gov.bc.ca. Incorporators form company by entering into incorporation agreement, filing incorporation application with Registrar, and submitting appropriate fee. (§10[1]). Each incorporation agreement must include incorporator's name, signature, date, and number of shares subscribed. (§10[2]). Incorporation application must be in form prescribed by Registrar (see below) and include notice of articles (see below). (§10[3]). Individual preparing incorporation application must verify both incorporation agreement and incorporation application are properly signed, ensure application designates as incorporators all persons who signed articles and incorporation agreement, and file “completing party statement” portion of application. (§15). Incorporation effective on date of filing incorporation application unless otherwise specified. (§13).

Incorporation Application.—See end of this Digest.

Notice of Articles and Articles.

Notice of Articles must be in form prescribed by Registrar (see last part of incorporation application form at end of digest). (§11). Companies existing before new Act took effect have memoranda instead of notice of articles until they transition. Company articles must set out company name including translation to be used outside Canada, if any, corporate number, rules of conduct, restrictions on business or powers if any, and special rights or restrictions attached to any class or series of shares. (§12). If company does not adopt specific articles upon incorporation, then “default articles” are set out in Table 1 of Act. (§16). These may be altered by adopting specific articles following incorporation. (§§259, 261[3]). Articles must be mechanically or electronically produced, and must be divided into consecutively lettered or numbered paragraphs. (§12[1]).

Filing.

See supra, subhead Proceedings for Incorporation.

Fees.

Prescribed fees must be paid to Registrar. Payment is pre-condition to Registrar accepting any filing or taking any action under Act. (§431). Fees set in Schedule to Act:

Following fee schedule summarizes fees payable for services of Corporate Registry under Business Corporations Act.

For incorporation, amalgamation or restoration of a company	$350*
For incorporation of unlimited liability company,	$1,000*
For amalgamation that results in unlimited liability company,	$1,000*
For registration, amalgamation or restoration of an extraprovincial company	$350*
For conversion of a special Act corporation to a British Columbia company	$100*
For filing an annual report	$43.39*
For changing the name of a company or registering a change of name or assumed name of an extraprovincial company	$100*
For a certificate, certified record or certified copy of a record	$25*
For each search conducted through the B.C. OnLine information services using a person's own computer terminal	$7*
For each search conducted by government personnel,	$10*
For a copy of or extract from any record, for every page or part of a page.	$0.50*
For continuation into British Columbia, continuation out of British Columbia or amalgamation under Division 4 of Part 9	$350*
For continuation into British Columbia as unlimited liability company,	$1,000*
For pre-vetting of records to be filed with the registrar, when offered	$100*

For the search of a maximum of 3 names, including assumed names, on application for reservation of a name. [The fee will not be refunded if a name is not accepted.]	$30*
For filing a notice of alteration	$100*
For filing notice of alteration to become unlimited liability company,	$1,000*
For filing any record, other than a transition application or a post-restoration transition application, for which there is no other fee, the fee for each record	$20*
For a priority service when offered	$100*
For a future dated filing	$100*
For withdrawal of a future dated filing	$20*
For a transition package for a company, consisting of a certified copy of the company's memorandum, a certified copy of the company's articles and a transition guide	$40*

* In addition to fee marked by asterisk, further operator fee of $1.50, plus any G.S.T. applicable to operator fee, may be charged for any transaction done by electronic means from location outside government office or at government office by person who is not government employee. These fees do not include legal fees.

Certificate of Incorporation.

After incorporation, Registrar must issue certificate of incorporation and publish notice of incorporation on http://www.bconline.gov.bc.ca. (§13[3][c], Reg. 6).

Specially Limited Companies.

Note: Specially Limited Companies are abolished by Act and all such pre-existing companies must have completed transition by Mar. 29, 2006. (§436[1]).

Shares.

Company's authorized share structure (formerly called “capital”) may be any amount with one or more classes or series of shares either with or without par value or both. (§52[1]). Notice of articles must state share structure including maximum number of shares per series or class if any, and par value if any. (§53). Articles must set out special rights or restrictions attached to any shares. (§58). There must be no interference with special rights or restrictions without consent of affected shareholders by special resolution. (§61).

Liability of shareholders of company is limited to amount agreed to be paid to subscribe for shares. Shareholders have no personal liability for debts of company except shareholders of unlimited liability company. (§87). Shareholders of unlimited liability company are liable for debts of company upon liquidation or dissolution. (§51.3).

Registered Office and Records Office.

Company must have registered office and records office within province which may be at same place. (§34).

Alteration of Memorandum/Articles.

Prior to transitioning, company formed under previous Company Act (c. 62) may not alter memorandum or articles, subject to limited exceptions (§256[1]). All other companies may alter articles or notice of articles. After articles altered, Company must not issue articles unless articles include alterations or record of alteration is attached. (§262).

Special resolution required to alter articles or notice of articles unless otherwise specified by Act or by articles if Act does not specify. (§§257[2], 259[1]). Special resolution passes by 2/3 majority vote of shareholders, subject to articles which may specify that majority required to alter articles is not less than 2/3 and not greater than ¾ vote of shareholders. (§259[2]). Articles may specify that certain provisions of articles or restrictions on directors' actions not be altered except by exceptional resolution, which articles must define as greater than majority required to pass special resolution. (§§1, 264). Pre-existing companies retain ¾ special majority unless, after transitioning, they elect different special majority equal to 2/3, and up to ¾, votes.

Company may change name by resolution as provided in articles or otherwise by special resolution. (§263[1]). Translation may be changed or adopted by directors' resolution or ordinary resolution. (§263[2]). Change of Company name does not affect Company's rights or obligations including legal proceedings by or against it. (§263[8]).

Change of Capital.

Company may by resolution as provided in articles or otherwise by special resolution increase its authorized capital or subdivide and consolidate shares subject to shareholders' statutory rights. (§54[1]). However, subdivision or consolidation must not alter aggregate of par value of all affected par value shares. (§54[2]). Company may reduce capital if authorized by court order or special resolution. (§74).

Change of Character of Stock.

If company is incorporated with par value shares it may by resolution as provided in articles or special resolution change its unissued or fully paid issued shares with par value into shares without par value (§54[1][k]), or change all or any of its unissued shares without par value into shares with par value (§54[1][l]). Company must alter articles or notice of articles to reflect change. (§54[3]).

Powers.

Subject to restrictions in articles, company has powers and capabilities of natural person. (§§30, 33).

Company may give loan, guarantee, security provision or other financial assistance to any person for any purpose. (§195[2]). Financial assistance must be disclosed if: (a) To shareholder, director, officer or employee of company or affiliate; (b) to associate of any party in (a); or (c) to any person for purpose of purchasing shares of company or affiliate. (§195[3]). However, no disclosure necessary if assistance given (a) In ordinary course of business; (b) to person on account of expenditures incurred on behalf of company; (c) between wholly-owned subsidiary and parent company; (d) between companies wholly owned by same person; (e) to individual owning all company shares; or (f) to employees to purchase housing or shares of company or affiliate. (§195[4]). Do not need disclosure if requirement waived by court. (§195[5]). Disclosure must be via minutes of directors' meeting, consent resolution of directors, or written record deposited in company's records office. (§195[7]).

Directors and Officers.

Every company must have at least one director, and public company must have at least three directors. (§120). No directors need to be resident in B.C. or Canada. Company must keep register of directors including name, address, date each became director, date each former director ceased to be director, and office if any held by director including first and last date office held. (§126). Company must file with Registrar on prescribed form within 15 days any change in directors. (§127[1]). Upon filing, Registrar must if requested to do so provide company with certified copy of altered notice of articles if company has notice of articles or confirmation of change of directors. (§127[3]).

First directors must be designated in notice of articles. (§121). Succeeding directors must be elected or appointed in accordance with Act and articles. (§122[1]). Directors may appoint additional directors in accordance with articles and Act. (§122[2]). Individual must consent to be director. (§122[4][a]). Consent may be given in writing, by performing duties or realizing benefits of director, or in case of succeeding directors by being present at meeting and not refusing election or appointment when made. (§§122[4][b], 123). Individual director must be at least 18 years of age, mentally competent, not undischarged bankrupt and not convicted of offence related to fraud or business formation or management unless court orders otherwise, pardon granted, or more than five years have elapsed since fine imposed or sentence or probation concluded. (§124[2]). Director not required to hold company shares unless required by articles. (§125). Director who ceases to be qualified must promptly resign. (§124[3]).

Directors and officers have duty to: (a) Act honestly and in good faith with view to best interests of company; (b) exercise care, diligence and skill of reasonably prudent individual in comparable circumstances; and (c) act in accordance with Act, its Regulations, and company's articles. (§142[1]). Subject to certain defences in §154 and §157, directors are personally liable for company losses or damage if vote for or consent to resolutions that authorize certain company actions. (§154). Director who satisfies liability under §154 entitled to contribution (§156[1]). Subject to certain limitations which court may override, company may indemnify current or former directors or officers of company or certain related companies. (§§159-164).

Directors and senior officers must disclose material interest in company contract or transaction if it is material to company (disclosable interest), subject to certain exceptions pertaining to wholly owned subsidiaries and single shareholder companies. (§147). Unless court orders otherwise, directors or senior officers liable to account to company for any profit gained from disclosable interest. (§§148, 150[1]). Contract in respect of which disclosure is made under §148 may be approved by directors or by special resolution (§149[1]), in which case director or senior officer not liable to account for profits (§§148[2][c], [d]). Director with disclosable interest must not vote on directors' resolution but may vote shares on shareholders' resolution, if any, to approve contract or transaction. (§149[2]). Director or senior officer must disclose to directors any potential conflict arising from other office or property held. (§153). Disclosure must be evidenced in writing in form of consent resolution, minutes of meeting, or other record deposited at company's records office. (§§148[3], 153[b]).

Subject to articles, directors may appoint and remove officers; any individual including director may be officer; and one individual may hold two or more offices. (§141). Individual not qualified to be director may not be officer. (§141[3]). There are no mandatory offices.

Articles may transfer powers of directors to manage or supervise management of business and affairs of company to one or more other persons, but must expressly state such intention. (§137[1]). If directors' powers are transferred in this way, persons to whom powers are transferred have rights, powers, duties, and liabilities of directors in relation to, and to extent of, transfer, and directors are correspondingly relieved of same rights, powers, duties and liabilities. (§137[2]). To extent that articles transfer to another person any right, power, duty or liability that is given to, or imposed upon, directors, all references to directors in respect of that right, power, duty or liability are deemed to be references to that person. (§137[3]).

Shares and Shareholders.

Subject to Act and articles, company may issue shares at time and to persons determined by directors. (§62). Company may issue fractional shares. (§69[1]). Issue price for par value shares must be equal to or greater than par value. (§63[2]). Issue price for shares with no par value must be set in accordance with company's articles, but if articles are silent then by ordinary directors' resolution or by special resolution for pre-existing companies. (§63[1]). Directors may authorize reasonable discounts and commissions. (§67[1]). Share must not be issued until it is fully paid. (§64[2]). Share may be paid for by money, property, or past services performed. (§64[3][a]).

It is illegal to offer shares to public until there has been filed with and accepted by executive director prospectus in respect of offering. (Securities Act, c. 418, Part 9).

Share Certificates.

Every shareholder, unless shares of which shareholder is registered owner are uncertificated shares, is entitled, without charge, to share certificate or nontransferable written acknowledgment evidencing shares held by shareholder. (§107). Every share certificate issued by company shall state on its face: (a) Name of company and words indicating that it is British Columbia company; (b) name of person to whom certificate issued; (c) number and class of shares and that shares are without par value, or if with par value, par value thereof; (d) date of issue; (e) statement of restrictions upon transfer, if any; (f) certificate number. (§57[1]). If shares have any special rights or restrictions each certificate shall have attached thereto statement of same or statement referring to same and advising that copy of full text thereof may be obtained from registered or records office of company. (§§57[3]-[4]). Every certificate shall be signed manually by at least one officer, director, registrar, branch registrar, transfer agent or branch transfer agent of company. (§110[1]). Additional signatures may be mechanically reproduced. (§110[2]). §92 of Securities Transfer Act, S.B.C. 2007 c. 10 applies to lost or destroyed certificates. (§109).

Share Transfer.

Articles may restrict transfer. (§11[h]).

Despite company articles, personal or other legal representative or trustee in bankruptcy of shareholder can claim rights, privileges and obligations attached to shareholder's shares upon providing to company appropriate evidence of appointment or incumbency within meaning of §87 of Securities Transfer Act (S.B.C. 2007, c. 10). (§115). Specified documents which person can provide to company or transfer agent of company: (a) Declaration of transmission made by personal or legal representative or trustee in bankruptcy stating particulars of transmission; (b) share or security certificate if any and any assurances referred to in §87 of Securities Transfer Act required by company; (c) in case of death original or certified copy of will and grant of probate or letters of administration; (d) in case of bankruptcy copy of court order or assignment in bankruptcy and instrument appointing trustee in bankruptcy; (e) in any other case copy of court order if person was appointed by court or otherwise copy of record evidencing person's appointment within meaning of §87 of Securities Transfer Act. (§118).

Meetings.

Every general meeting must be held within province unless articles provide otherwise or, if articles do not prohibit, meeting location outside province approved in accordance with articles or if articles silent then by ordinary resolution, or approved in writing by Registrar prior to meeting being held. (§166). First company annual general meeting must be held within 18 months of date company recognized ("annual reference date") and subsequently once every calendar year and not more than 15 months after annual reference date in previous calendar year. (§182[1]). Shareholders entitled to vote at annual general meeting may by unanimous resolution agree to defer meeting to date later than required by §182[1], consent to all business required to be transacted in lieu of meeting, or waive holding of next or previous meeting altogether. (§182[2]). Registrar may extend time for holding annual general meeting if no unanimous resolution passed. (§182[4]).

Court may on its own motion or on application of company, director or shareholder order meeting of shareholders. (§186[1]).

Not less than 21 days written notice of any general meeting must be given but articles of company other than public company may reduce notice requirement to ten days. (§169, Reg. §3[1]).

Resolutions are either ordinary or special. Ordinary resolution is either resolution passed by shareholders in general meeting by simple majority or resolution which has been submitted to all shareholders who would have been entitled to vote thereon and which has been consented to in writing by such shareholders holding shares carrying in aggregate not less than special majority of votes entitled to be cast. (§1[1]). Special majority is number of votes required to pass special resolution, which may be defined by articles as not less than 2/3 and not more than ¾ of votes cast, but if articles are silent then 2/3 of votes cast or ¾ if company is pre-existing company within certain criteria. (§1[1]). Special resolution is either resolution passed by majority of not less than special majority of votes cast by such shareholders as vote either in person or by proxy at general meeting of company of which notice specifying intention of proposing resolution as special resolution has been given (unless notice waived) or resolution consented to in writing by all members of company who would have been entitled to vote thereon. (§1[1]). Resolution and meeting notice requirements currently are same. (Reg. §3).

Directors may participate in directors' meetings in person or if articles permit by telephone or other communications media. (§§82[6], 173[1], 177).

Voting.

Each share has one vote unless articles prescribe otherwise, except that subsidiary company cannot vote its shares in parent company incorporated in province and company cannot vote retained shares. (§173[1]).

Shareholder may vote in person or by proxy. (§173[1]). Shareholder may appoint any person as proxy-holder, who may act on shareholder's behalf at meeting of shareholders. (§1[1]). Form and content of proxy not defined except for certain pre-existing public companies prior to completing transition to new Act. (§433[1], Reg. 65/2004 Table 2 Part S3, §4.4). See also category 3 Business Regulation and Commerce, topic 3.24 Securities.

Solicitation of Proxies.

See category 3 Business Regulation and Commerce, topic 3.24 Securities.

Books, (§42).

Every company must keep at its records office its certificate of incorporation, articles and every resolution altering or replacing articles, signed incorporation agreement, register of directors. Company must also keep minutes of all proceedings of shareholders and directors meetings, copies of all documents filed with and certificates and orders issued by Registrar or Minister, copies of all audited financial statements of company and its subsidiaries, including auditors' reports and written representations from removed or resigned auditors; and where company is amalgamated company, copies of all documents described here relating to each of amalgamating companies.

In addition, every company must keep at its records office copy of each court order made under Act in respect of company; copy of each order made under Securities Act (c. 418); copy of any affidavit in respect of amalgamation or voluntary dissolution; copy of each consent to act as director and each written resignation of director; copy of report by any court-authorized inspector; copy of each consent resolution by shareholders; complete text of any resolution passed at shareholders' meeting or directors' meeting and related disclosure notices by directors in conflict of interest and written director's dissent if any; and if company resulted from amalgamation or continuation into British Columbia then records required by previous jurisdiction (§42[1]).

Every company must maintain central securities register at records office or other location in British Columbia. (§111). Central securities register must keep and maintain company's shareholder list including name and address of each person to whom shares have been issued or transferred, class and series of shares if applicable, and number of shares held by each person. (§111[1]). For shares issued or transferred after Mar. 29, 2004, additional information must be recorded in respect of shares' particulars which are not defined but likely include date and nature of transaction, number of shares, share class and series, share certificate number, share price, and name and address of recipient shareholder. (§111[1][b]).

Current director may inspect all company records without charge, as may, to extent articles permit, current shareholder or any other person. (§46[1]). Certain other persons may inspect records without charge in certain circumstances. (§46). Any person entitled to inspect records may request copy on payment of 50¢ per page. (§48[1], Reg. §14). Other persons may request copy of shareholder list for specified purposes upon payment of reasonable fee. (§49).

Reports and Returns.

Within two months after each anniversary date of incorporation, amalgamation or continuation in province, every company shall file annual report in prescribed form with Registrar as to last anniversary date. (§51). Incorrect information on corporate register may be changed only by Registrar and must be noted on record as correction. (§414).

Certain notices, statements and applications must also be filed with Registrar including resolutions changing registered or records offices, (§35) appointing receivers or managers (§106), altering memorandum/notice of articles (§257[4]) and articles, and dissolution (§316[1]) and liquidation (§321). Every company incorporated or registered in province shall also file notice of appointment of new directors and any change in number of directors within 15 days thereof. (§127).

Many filings must be done electronically at http://www.bconline.gov.bc.ca, including transition to new Act, incorporation application, alteration, amalgamation, continuation into B.C., annual reports for B.C. companies and extraprovincial companies, change of address, and change of directors. (Reg. §30[2]).

Taxation.

See category 24 Taxation.

Amalgamation.

Any two or more companies may amalgamate and continue as one company. (§269). Amalgamation application must be filed with Registrar and other requirements satisfied. (§275). Vertical and horizontal short-form amalgamations permitted in certain circumstances. (§§273-274). Amalgamation may be made with or without court approval. (§§276-277).

Dividends.

Unless articles provide otherwise, company may declare and pay dividends, whether out of profits, capital or otherwise, by issuing shares or warrants by way of dividend and in property, including money. (§70[1]). Company may declare or pay dividend unless reasonable grounds to believe that company insolvent or that payment of dividend would render company insolvent. (§70[2]). Directors who authorize company to declare or pay dividends in contravention of §70 are liable to company. (§154).

Shareholders Actions.

Shareholder can apply to court for relief from oppression. (§227). Shareholder or director can, with leave of court, bring or defend derivative action in name and on behalf of company. (§§232-233).

Dissolution.

Company may be dissolved by: (a) Request (§314); (b) Lieutenant-Governor in Council (§423); (c) Registrar by striking Company off Register for failing to comply with Act (§422); (d) voluntary liquidation (§§319-350); or (e) court-ordered liquidation (§324).

Foreign Corporations.

(Part 11). Subject to exceptions below, every extra-provincial company which carries on business in province must register within two months after commencing to carry on business in province. (§375[1]).

Extraprovincial company does not carry on business in British Columbia if it is bank, its only business in province is constructing and operating railway, or merely because it is limited partner in limited partnership carrying on business in province. (§375[3]).

Extraprovincial company does not have to register if its only business is operation of ships provided it does not maintain in province an office, warehouse or place of business under its control or that of a person on behalf of company (§375[4]), provided that every resident agent or representative of such company shall file with Registrar notice signed by him stating name, chief place of business of company outside province, particulars of his agency and any change of aforesaid (§375[5]). Part 11, including these registration requirements, does not apply to extraprovincial societies as defined in §1 of Society Act (c. 433, §75) except those operating under §§191 and 193 of Financial Institutions Act (c. 141).

Registration.

Extraprovincial company must file with Registrar prescribed Registration Statement including name, place and date of incorporation, incorporation number or other identifying designation from home jurisdiction, head office address whether or not in province, and name if any of attorney appointed for British Columbia. (§376, Form 33). Except for federal corporation, extraprovincial company must reserve name and if name contravenes Act or Regulations must reserve and register under assumed name. (§26). Registrar may also require proof of good standing in extraprovincial company's home jurisdiction. (§376[4]).

Process Agent.

Every extraprovincial company (unless head office is within province) must have attorney resident in province to accept service of process in all suits by or against company within province and to receive notices to company. (§§386, 388).

Limited Liability Companies.

Limited liability company is organization: (1) Created in jurisdiction other than British Columbia; (2) recognized as legal entity in jurisdiction in which it was created; (3) not corporation; and (4) not partnership, limited partnership or limited liability partnership. (§1[1]). Limited liability companies are considered extraprovincial companies and must register in British Columbia in same manner.

Unlimited Liability Companies

Unlimited liability company is company that has, in its notice of articles, following statement: ``The shareholders of this company are jointly and severally liable to satisfy the debts and liabilities of this company to the extent provided in section 51.3 of the Business Corporations Act.'' (§1,51.11). Face of each share certificate must have above statement. (§51.2). Unlimited liability company must have words ``Unlimited Liability Company'' or abbreviation ``ULC'' as part of and at end of its name. (§51.21).

Shareholders and former shareholders of unlimited liability company are jointly and severally liable: (a) If company liquidates, from commencement of company's liquidation to its dissolution, to contribute to assets of company for payment of unlimited liability company's debts and liabilities; and (b) whether or not company liquidates, after company's dissolution, for payment to company's creditors of unlimited liability company's debts and liabilities. (§51.3). Limited company may alter its notice of articles to become unlimited liability company. (§51.31, 51.4). Foreign unlimited liability corporations are defined in §51.2. Amalgamations are restricted, but can result in unlimited liability company or limited company. (§51.5-51.7). Continuation into British Columbia as unlimited liability company is permitted in certain situations (§51.8), but continuation of foreign unlimited liability corporation into British Columbia as limited company is prohibited (§51.9).

Reports and Returns.

Annual report in form prescribed must be filed for every extraprovincial company within two months after each anniversary date of its registration in British Columbia. (§380[1][a], Form 35).

Other filings with Registrar consist of changes in attorney, corporate name, address in or out of province, and any other change that renders information in corporate registry incorrect or incomplete including amalgamation. (§381[1], Part 11 generally.)

Penalties.

Every extraprovincial company which fails to register as required, is liable to penalty of $100 per day. (§428[3], Reg. §35).

2.04 FOREIGN CORPORATIONS:

See topic 2.03 Corporations.

2.05 JOINT STOCK COMPANIES:

See topic 2.03 Corporations.

2.06 LIMITED PARTNERSHIP:

See topic 2.07 Partnerships.

2.07 PARTNERSHIPS:

General partnerships, limited partnerships and proprietorships come within Partnership Act. (c. 348). Rules of equity and common law continue in force except where inconsistent with Act. (§91).

Formation.

Partnership is relation which subsists between persons carrying on business in common with view of profit. (§2). All persons associated in partnership for trading, manufacturing or mining purposes must cause to be filed with registrar, registration statement within three months after formation of firm. (§§81, 82). Also see subhead Limited Partnership, infra.

Name.

Registrar must not register partnership or proprietorship registration statement or limited partnership certificate that contains business name which he disapproves of, or in his opinion is likely to confuse or mislead, or is name by which corporation is incorporated, registered or continued in British Columbia, unless corporation consents in writing, or business name was used by applicant for registration before corporation first used its name. (§89). Also see subhead Limited Partnership, infra.

Rights and liabilities of partners inter se may be fixed or varied by agreement, but if not so agreed to are determined by Act. (§27). Partners are required to act in utmost fairness and good faith. Duties imposed by Act are in addition to any enactment or rule of law or equity. (§22). If no set term for duration of partnership has been agreed to, any partner may end partnership by giving notice to all other partners of intention to do so. (§29).

Rights and Liabilities of Partners as to Third Persons.

Partner is agent of partnership and other partners for purpose of business of partnership. Common law rules of agency generally apply as to authority of partner to bind firm. (§7). Every partner is jointly liable for all debts and obligations of firm incurred while he or she is partner. (§11).

Change in Membership.

Persons dealing with partnership are entitled to continue to treat all apparent members of old firm as still being members after change in membership until person has notice of change. Advertisement in B.C. Gazette is notice of change so advertised to persons who had no prior dealings with partnership. (§39). Also registration statement is to be filed with registrar for each change or alteration in membership of partnership. (§83).

Dissolution.

Act sets out circumstances where partnership will be dissolved subject to agreement. (§35). In certain other circumstances court must or may order dissolution regardless of agreement (§§36-38). Public Notice may be made of dissolution. (§40). Also one or more persons who composed firm may, in prescribed manner, submit to registrar for filing, notice advising registrar of dissolution. (§86).

Proprietorship.

Every person engaged in business for trading, manufacturing or mining purposes and who is not associated in partnership but uses some name or designation other than his own as his business name or uses some name indicating plurality of members in his business must file registration statement in prescribed form with registrar within three months from time name is first used. (§88).

Limited Partnership.

Part 3 sets out comprehensive provisions dealing with limited partnerships. Limited partnership comprising general and limited partners may be formed upon filing certificate with registrar complying with §51. Limited partnership in effect prior to Nov. 24, 1978, may be brought within Part 3 upon registration of such certificate, but otherwise shall continue to be governed by §§48-66 of Act in force on Mar. 28, 1978. (§79).

Name of limited partnership must end with words "Limited Partnership" in full or French language equivalent and generally may not include corporate name of limited partner. (§53). Limited partnership must maintain registered office within province, where certain records are to be maintained. (§54). Limited partnership formed in any other province or territory of Canada, State of U. S. A. or U. K. is eligible for registration in British Columbia. (§80 and Reg. 524/78, §1).

Limited Liability Partnership.

Part 6 sets out comprehensive provisions dealing with limited liability partnerships. Partners without limitation may apply to register partnership as limited liability partnership. (§96). Registration does not dissolve old partnership, and limited liability does not apply to obligations of partners arising before registration. (§§99, 106). Members of professional partnership must be authorized by Act to carry on practice through limited liability partnership. (§97). Partners are subject to same obligations to partnership as corporate directors to corporation, including personal liability for obligations of partnership. (§105). Unless registered as extraprovincial limited liability partnership in British Columbia, all partnerships from other jurisdictions carrying on business in B.C. will have same liability as general partnership. (§114). B.C. partners of extraprovincial limited liability partnerships can have no greater protection than partners of B.C. limited liability partnerships under new Act.

Actions.

Partnerships and proprietorships may sue or be sued in firm name. (Rules of Court, R. 7).

Forms.

See end of this Digest.

3 BUSINESS REGULATION AND COMMERCE

3.01 BANKS AND BANKING:

See generally Canada Law Digest.

Provincial Trust Companies.

One or more persons may apply to form trust company or insurance company by subscribing to memorandum, adopting articles specifying rules for company's conduct, and paying prescribed fee. In addition to other facts, plan must disclose first directors and senior officers of trust company, and proposed services to be offered to public. (Financial Institutions Act, c. 141, §§12, 18). Trust company shall not carry on business without applying for and receiving business authorization issued by Commission. (§59). Registered extraprovincial corporations may apply for Certificate of Continuation. (§23).

3.02 BILLS AND NOTES:

See Canada Law Digest.

3.03 BILLS OF LADING:

See topic 3.08 Carriers.

3.04 BILLS OF SALE:

See topic 3.23 Sales.

3.05 BLUE SKY LAW:

See topic 3.24 Securities.

3.06 BROKERS:

Licences.

Real Estate Services Act (S.B.C. 2004, c. 42, §146) repeals and replaces Real Estate Act (c. 397) effective Jan. 1, 2005 (Reg. 507/2004). Real estate agents must be licensed by Superintendent of Real Estate. (§3). Person who is not licensed shall not collect any commission or bring any action in respect thereof. (§4[1]). Unlicensed broker is liable to penalty of not more than $20,000 if corporation and not more than $10,000 if individual. (§49[2][d]).

Mortgage Brokers Act (c. 313) provides that persons, their employees, partners or directors who carry on business of lending money, directly, or indirectly, on security of real estate, whether money is his own or that of another person or who holds himself out as, or who by advertisement, notice, or sign indicates that he is mortgage broker, or person who carries on business of dealing with mortgages must register under Act (§3). See also category 21 Mortgages, topic 21.04 Mortgages of Real Property.

Insurance companies, savings institutions, British Columbia solicitors (if loan transaction is made in course of member's practice), liquidators, receivers, or trustees in bankruptcy, and government agents are exempted from registration requirements. (§11).

See also topic 3.24 Securities.

Bond.

Every real estate broker agent carrying on business may be required to furnish security or proof of financial responsibility.

See also topic 3.24 Securities.

3.07 BULK SALES:

See category 8 Debtor and Creditor, topic 8.10 Fraudulent Preferences and Conveyances.

3.08 CARRIERS:

Except for intra-provincial railways, which are subject to Provincial jurisdiction, all Canadian railways, water carriers and airlines are under control of Canadian Transport Commission and are regulated by Federal statutes and regulations. Intra-provincial trucking and railways are regulated by provincial statutes, regulations and authorities and by law. Federal jurisdiction over inter-provincial and international trucking has also been vested in Provincial authorities. Common carriers are bound, unless lawful excuse exists, to carry goods or persons who offer to pay tariff or fare. Rights and duties as between common carrier and those using its facilities are as set forth in contract of carriage including any provisions attached thereto by law.

Transportation of grain for export from Western Canada to Lakehead and West Coast ports is now governed by Canada Transportation Act, S.C. 1996, c. 10.

Intra-provincial pipelines are subject to Provincial jurisdiction while inter-provincial pipelines are subject to Federal jurisdiction.

Bills of lading of common carriers are governed by common law, subject to applicable statute law. Consignee named in bill of lading and every endorsee thereof to whom goods pass by reason of such consignment or endorsement is vested with all rights of action and is subject to all liabilities in respect of goods as if contract set out in bill of lading had been made with himself. This does not affect vendors right of stoppage in transit or right to claim freight against original shipper or owner. While transferable by endorsement, bills of lading are not negotiable unless in specific form. No endorsee can take better title than his endorsor had. See Bills of Lading Act, R.S.C. 1985 c. B-5. (§§1-4).

Lien.

At common law carrier is not obliged to deliver goods until freight is paid as he has lien for same.

3.09 COLLECTION AGENCIES:

See topic 3.19 Licences, Business and Professional.

3.10 CONDITIONAL SALES:

See topic 3.23 Sales.

3.11 CONSIGNMENTS:

See topic 3.14 Factors.

3.12 CONSUMER PROTECTION:

Commercial Appeals Commission Repeal Act, S.B.C. 203, c. 51 eliminated Commercial Appeal Commission and established Financial Services Tribunal. Tribunal provides consumer appeal process for several types of business-consumer relationships.

Business Practices and Consumer Protection Act, (S.B.C. 2004, c. 2).

Generally affords protections to buyers and their guarantors and borrowers in respect of consumer purchases and credit transactions. Act was effective as of July 4, 2004, with exception of certain provisions that will be brought into force by Regulation at later date. Part 2 Division 1 of Act regulates deceptive acts or practices defined as oral, written, visual, descriptive or other representations by supplier, or any conduct by supplier that has capability, tendency or effect of deceiving or misleading consumer or guarantor. (§4). Burden of proof on supplier. (§5[2]). Definition of supplier includes person soliciting, offering, advertising or promoting with respect to consumer transactions. (§1). Limited defence available for advertisers. (§6). Part 2 Division 2 of Act regulates unconscionable acts or practices. Burden of proof on supplier. (§9). Except mortgage loan, unconscionable act or practice makes transaction not binding on consumer or guarantor (distinct remedies for mortgage loans). (§10). Part 2 Division 3 of Act regulates unsolicited goods or services defined as including material change in continuing supply of goods or services. Burden on supplier. (§12[4]). Consumer has no legal obligation in respect of unsolicited goods or services unless and until consumer expressly acknowledges acceptance to supplier in writing. (§12[1]). Consumer who pays for unsolicited goods or services may give supplier written demand for refund within two years after first received goods or services if did not expressly accept. (§14). Part 3 of Act regulates rights of assignees of suppliers and guarantors respecting consumer credit. Part 4 of Act regulates consumer contracts including direct sales, future performance, time share, funeral and distance sales contracts. Consumer may cancel direct sales contract by written notice to supplier not later than ten days after date consumer receives copy of contract. (§21[1]). Period extended to one year in certain circumstances. (§21[2]). Further performance contract not binding on consumer where supplier gives or offers to give rebate or discount to consumer in consideration of consumer aiding in making sale to another person and such rebate is conditional. (§23[4]). Consumer may cancel future performance contract by notice within one year in certain circumstances. (§23[5]). Continuing service contract must not exceed two years (including supplier renewal rights). (§24[2]). Consumer's right to cancel continuing service contract by notice expires after ten days unless material change. (§25). Consumer may cancel time share contract within ten days by notice which is extended to one year in certain circumstances. (§26). Part 5 of Act, which came into force July 1, 2006, with exception of §§61(2)(a) and 91(1)(h), (Reg. 274/2004 as am'd by Reg. 520/2004 and 349/2005), regulates disclosure of costs of consumer credit sales including leases and credit agreements. Part 6 of Act regulates credit reporting including circumstances in which credit agency may provide credit information (§108), which are in relation to: extending credit, tenancy agreements, employment purposes, insurance underwriting, collecting debt, determining statutory eligibility or having direct commercial involvement with consumer, request of federal, provincial or municipal government, law enforcement agency, court order or to director appointed under Act. If user of information denies in whole or part application for credit, or increases costs, because of information from reporting agency, must deliver notice of denial or increase to consumer within 30 days. (§110). Reporting agency must, on written request, supply source of information within 60 days after delivery of notice. (§110[4]). Person may add explanation to any matter contained in information. (§111). No person shall knowingly supply false or misleading information to another person making report. (§112). Payday Loan Regulation to come into force on Nov. 1, 2009. Regulation requires all payday lenders to register and all locations of lenders to be licensed. Regulation limits the amount of interest payable on the principal of a loan to a maximum of 23% and limits default fees payable. Part 7 regulates manner in which collectors can collect debts. Prohibits collectors from engaging in unreasonable collections practices, including use of undue, excessive or unreasonable pressure on debtor or any member of debtor's family, household or employer and from publishing or threatening to publish debtor's failure to pay. (§114). Collector must not attempt to collect payment of debt from debtor until collector has notified debtor in writing (or made reasonable attempt to notify debtor in writing) and cannot initiate verbal communication until five days after. (§115). Unless court order, debtor's chattels cannot be removed except during permitted times and presence of debtor, spouse, agent or adult resident in house. (§122). Except in case of bailiff, prohibition on charging debtor collector agent's fees and disbursements. (§128). Part 8 regulates establishment and maintenance of compensation and consumer advancement funds. Part 9 regulates licences including those for bailiffs, collection agents, debt poolers, telemarketers, travel agents and travel wholesalers. Part 10 of Act contains extensive inspection and enforcement provisions. Part 13 of Act contains offences and penalties for contravention of Act. Individual who commits offence under Act is liable to fine of not more than $10,000 or to imprisonment for not more than 12 months or both. (§190[1]). Corporation which commits offence under Act is liable to fine of not more than $100,000. (§190[2]). Alternatively court may increase fine to three times estimation of amount of monetary benefits accruing as result of offence (§190[3]) and can also order compensation to consumer up to Small Claims Court limits (§192). Limitation period for offence under Act is two years after time when subject matter of proceedings arose. (§193).

3.13 CONTRACTS:

Common law principles apply, with some codification, e.g., Sale of Goods Act, c. 410, §73.

Frustrated Contract Act, c. 166 provides for settlement of losses and claims arising out of frustration of contract or contracts avoided under §11 of Sale of Goods Act, but does not apply to charter parties or contracts of carriage of goods by sea except time charter parties or charter parties by demise, contracts of insurance or contracts entered into before May 3, 1974. (§1). Act only applies to extent that contract, on its true construction, contains no provision for consequences of frustration or avoidance. (§2). Limitation period for claim under Act shall commence at time of frustration or avoidance. Time limitation period applicable to that of contract applies. (§9).

Consumer protection legislation modifies common law principles in consumer contracts. See topic 3.12 Consumer Protection, subhead Business Practices and Consumer Protection Act. (S.B.C. 2004, c. 2).

See also topic 3.23 Sales; categories 10 Documents and Records, topic Seals; Family, topic Infants.

3.14 FACTORS:

Sales.

Nature, rights, and obligations of mercantile agent are defined in Sale of Goods Act, c. 410, §59.

Good Faith of Purchaser.

Where mercantile agent is, with consent of owner, in possession of goods or documents of title to goods, any sale, pledge or other disposition of same made by him when acting in ordinary course of business of mercantile agent is valid if person taking under disposition acts in good faith and without notice of agent's lack of authority. (Sale of Goods Act). This does not apply to consignment to which Personal Property Security Act (c. 359) applies (§58).

3.15 FRANCHISES:

No special legislation.

3.16 FRAUDS, STATUTE OF:

Statute of Frauds, c. 393 has been repealed and replaced by §59 of Law and Equity Act, c. 253, provisions of which are as follows: Contract respecting land or disposition (defined term, excludes creation, assignment or renunciation of interest under trust, testamentary disposition; this provision does not apply to contract or grant of lease of land for three years or less or guarantee or indemnity arising by operation of law or imposed by statute) of land is not enforceable unless in writing or party to be charged has done act or acquiesced in act by other party that indicates existence of contract or disposition not inconsistent with that alleged (including payment or acceptance of deposit or part payment), or person alleging contract or disposition has, in reasonable reliance on it, so changed his position that inequitable result can be avoided only by enforcing contract or disposition. Where court decides alleged contract cannot be enforced it may order either or both of restitution of benefit received and compensation for money spent in reliance on gift or contract. Guarantee or indemnity is not enforceable unless in writing, signed by guarantor or indemnitor or agent or alleged guarantor or indemnitor has done act indicating that guarantee or indemnity consistent with that alleged has been made. Writing can be sufficient even if term is left out or wrongly stated.

3.17 INFORMATION TECHNOLOGY, INTERNET AND NEW MEDIA:

Federal law also applies to information technology, Internet and new media. See generally Canada Law Digest.

Consumer Protection.

See topic 3.12 Consumer Protection, subhead Business Practices and Consumer Protection Act. (S.B.C. 2004, c. 2).

Electronic Commerce.

See Canada Law Digest, category Business Regulation and Commerce, topic Information Technology, Internet and New Media, subhead Electronic Documents for Personal Information Protection and Electronic Documents Act.

Electronic Transactions Act, (S.B.C. 2001, c. 10) is mandatory Act applicable to matters within provincial jurisdiction, giving legal effect to information and records that are in electronic form (§3), excluding wills, trusts created by wills, powers of attorney, and documents creating or transferring interests in land and requiring registration to be effective against third parties or any other thing prescribed by regulation (§2[4]). Act only applies to negotiable instruments or documents of title in relation to carriage of goods. (§2[5], 19, 20). Provides for functional equivalency allowing electronic records and signatures to meet legal writing and signature requirements under law. (§§5, 11). Writing requirement is satisfied if information or record provided in electronic form and is accessible and retainable by other person in manner usable for subsequent reference. (§§6, 7). Person's consent to provide, receive, retain or record information in electronic form is required. Inferred consent by conduct acceptable. (§4). Act sets out requirements for provision and retention of originals, records, and copies. (§§8, 10, 12). Payments to provincial government accepted in electronic form in manner specified by Minister of Finance and Corporate Relations. (§14). Contract not invalid or unenforceable solely by reason that information or record in electronic form was used in creation. (§15[2]). Unless parties agree otherwise, offer or acceptance of offer may be expressed by means of information or record in electronic form, or by activity in electronic form. (§15[1]). Contracts can be formed by interaction with electronic agents. Provides safeguards to correct errors made when transacting with electronic agents. (§17). Provides guidance for when electronic information is considered by law to be sent and received. (§18). Applies to electronic activities for carriage of goods. (Part 4).

Regulation of Internet.

Falls under Federal jurisdiction. See Canada Law Digest.

See topic 3.12 Consumer Protection, subhead Business Practices and Consumer Protection Act. (S.B.C. 2004, c.2).

Sales.

See generally topic Sales.

Sale of Goods Act, (c. 410) applies to commercial transactions dealing with sale or lease of goods. With respect to Internet, consider, in particular, following provisions: contract for sale of specific goods is void if, without knowledge of seller, goods have perished when contract made (§10); if sale or lease of goods by description, implied condition that goods must correspond with description (§17[1]); if buyer makes known to seller particular purpose for which goods are required, so as to show that buyer relies on seller's skill or judgment and goods are of description that is in course of seller's or lessor's business to supply, implied condition exists that goods are reasonably fit for that purpose, unless sale is of specified article under patent or trade name (§18[a]). Implied condition exists that goods of merchantable quality if bought by description from seller who deals in goods of that description, but if buyer or lessee has examined goods there is no implied condition regarding defects that examination should have revealed. (§18[b]). Implied condition exists that goods durable for reasonable time. (§18[c]). Breach of condition gives rise to repudiation or damages; breach of warranty gives rise to damages. (§15[2]).

3.18 INTEREST:

See Canada Law Digest.

3.19 LICENCES, BUSINESS AND PROFESSIONAL:

Licences are required to be taken out for almost every business or occupation whether licensee resides in province or not. In municipalities, licence fees are payable to municipal treasurer; elsewhere to government agent of district. Municipalities may require licence fee from persons representing firms or houses not having permanent place of business in municipality and selling goods at retail within municipality, amount of which is fixed by respective municipalities. See Local Government Act, c. 323. See topic 3.06 Brokers.

Security Businesses.

Private Investigators and Security Agencies Act repealed and replaced by Security Services Act, S.B.C. 30 on September 1, 2008. Persons engaged in security business (i.e. alarm service, locksmith, security patrol) must be licensed and carry ID (s.1,2,8). To carry on a security business must hold a valid security business licence (s.11(2)). Fines for non-compliance, up to $5,000 for individuals and $50,000 for businesses. Registrar may impose any conditions on security business licence (s.16(2)), and may cancel or suspend licences (s.4,5,28).

Collection Agencies.

Person must not act or hold himself out as bailiff, collection agent, debt pooler, telemarketer, tow truck driver, travel agent or travel wholesaler unless licensed or exempt from licensing requirement. (Business Practices and Consumer Protection Act, S.B.C. 2004, c. 2, §143). Terms of application for and granting or refusing to grant licence (subject to appeal) are set out. (§§144, 145). Audits are mandatory and required records and books are open to inspection under Act. (§§149-151). Numerous specified unreasonable collection practices are prohibited and Act provides for prosecution and penalties for failure to comply. (Part 10 Division 4). Fees and charges are prescribed. (§179).

Act sets out, for reporting agencies, extensive regulations governing furnishing of information and keeping of records. (§§106-109). Penalties for failure to comply. (Part 10 Division 4, Part 14).

Employment Agencies.

Any person operating employment agency must be licensed under Employment Standards Act, c. 113, §12. Act prohibits charging of fees to persons seeking employment. (§10).

3.20 MONOPOLIES, RESTRAINT OF TRADE AND COMPETITION:

This is federal matter. See Canada Law Digest.

3.21 NEGOTIABLE INSTRUMENTS:

See Canada Law Digest, category Business Regulation and Commerce, topic Bills and Notes.

3.22 RESTRAINT OF TRADE:

See topic 3.20 Monopolies, 3.22 Restraint of Trade and Competition.

3.23 SALES:

Sale of Goods Act (c. 410) codifies many common law provisions.

Where there is contract for sale of specific goods, or where goods are subsequently appropriated to contract, seller, may by terms of contract or appropriation, reserve right of disposal of goods until certain conditions are fulfilled. (§24[1]). In such case, notwithstanding delivery of goods to buyer, or to carrier or other bailee for purpose of transmission to buyer, property in goods does not pass to buyer until conditions imposed by seller are fulfilled. (§24[2]). Where goods are shipped, and by bill of lading goods are deliverable to order of seller or seller's agent, seller is prima facie deemed to reserve right of disposal. (§24[3]). Where seller of goods draws on buyer for price, and transmits bill of exchange and bill of lading to buyer together, to secure acceptance or payment of bill of exchange, buyer is bound to return bill of lading if he does not honor bill of exchange, and if he wrongfully retains bill of lading property in goods does not pass to him. (§24[4] and [5]).

Terms contained in contract for lease of goods, retail sale of new goods or collateral or contemporaneous agreement or contracts, purporting to negative or diminish conditions or warranties under Act are severable from contract and void. (§20[2]).

Bills of Sale.

Where physical possession is taken by purchaser of any personal property there is no necessity for bill of sale. Where physical possession is not taken bill of sale is taken from vendor and may be registered as set out in Personal Property Security Act, c. 359.

There is no statutory form for bill of sale.

Product Liability.

Common Law principles apply, privity not required where negligent manufacture and no opportunity for inspection.

Conditional Sales in PPSA.

Conditional sales are regulated by Personal Property Security Act (c. 359) which is modelled on Article IX of Uniform Commercial Code. Subject to certain specific exclusions (§4), this Act is applicable to every transaction, without regard to its form and without regard to person who has title to collateral, that in substance creates security interest (§2[l]).

Effectiveness.

Subject to this and any other enactment, security agreement is effective according to its terms. (§9).

Enforceability.

Security interest only enforceable against third party if (a) collateral is (i) not certificated security and in possession of secured party, (ii) certificated security in registered form and delivered to secured party in accordance with security agreement, (iii) investment property and secured party has control in accordance with security agreement, or (b) signed security agreement contains (i) description of collateral by item or kind, or by reference to one or more categories of property, (ii) description of collateral that is security entitlement, securities account or futures account, (iii) statement of interest taken in all of debtor's present and after acquired personal property, or (iv) statement security interest taken in all of debtor's present and after acquired property except (A) specified items or kinds of personal property, or (B) one or more categories of property. (§10[1]).

Registration.

Personal Property Registry established. (§42). Registration of financing statements (§43), may relate to more than one security agreement (§43[5]). Financing statement can be registered before security agreement is made and before security interest attached. (§43[4]). As to duration, registration is normally effective for period of time indicated on financing statement by which registration is effected. (§44[1]). As to renewal, registration may be renewed by registering financing change statement at any time before registration expires, and period of time for which registration is effective shall be extended by renewal period indicated on financing change statement. (§44[2]). As to amendment, amendment to registration may be made by registering financing change statement at any time during period that registration is effective and amendment is effective from date financing change statement is registered to expiry of registration being amended. (§44[3]). Where registered security interest is transferred, financing change statement that discloses transfer may be registered. (§45[1]). If interest in part, but not all, of collateral is transferred, description of collateral must be included in financing change statement. (§45[2]).

Default.

On default, under security agreement, secured party has right to enforce security agreement by taking possession of collateral or any method permitted by law unless otherwise agreed. (§58 [2][a]). Where collateral is goods of kind that cannot be readily moved, secured party may seize or repossess collateral without removing it from debtor's premises in same manner by which sheriff may seize without removal, if secured party's interest is perfected by registration (§58[2][b]), and may dispose of collateral on debtor's premises without causing any greater inconvenience than is necessary to person in possession of premises (§58[2][c]), and if collateral is document of title, secured party may proceed as to document or goods covered by it, and if licence, secured party may seize licence (§58[2][d][e]). After two-thirds of contract price has been paid, seller cannot take possession of or seize consumer goods unless court order obtained. (§58[3][4]).

Note: Securities Transfer Act, S.B.C. 2007, c.10, which came into force July 1, 2007, made significant revisions to Personal Property Security Act (c. 359), including law applicable to investment property (§7.1), attachment of security interest in favour of securities intermediary (§12.1), enforcement of security interest against third party (§10[1]), perfection of directly and indirectly held securities (§§19.1, 19.2, 24.1), and rules governing conflicting interests in investment property (§35.1).

Bulk Sales.

See category 8 Debtor and Creditor, topic 8.10 Fraudulent Preferences and Conveyances.

Retail Credit Sales.

See topic 3.12 Consumer Protection.

Consumer Protection.

See topic 3.12 Consumer Protection.

Business Practices and Consumer Protection Act, (S.B.C. 2004, c. 2).

Defines deceptive (§4) and unconscionable (§8) acts or practices relating to consumer transactions and permits courts to restrain these practices (§172) and award damages to consumers suffering loss or damages as result thereof (§171). Establishes Director of Trade Practices to investigate consumer transactions, and who may initiate proceedings under act. (§175).

Mobile Homes.

See category 23 Property, topic Mobile Homes.

3.24 SECURITIES:

Securities Act (c. 418) regulates trading in securities and also deals with takeover bids, trading by insiders, proxies and proxy soliciting, disclosure, and self regulatory bodies and stock exchanges. In this topic “r” means “securities rules”, Reg. 194/97.

(Note: Securities Act, S.B.C. 2004, c. 43 [Bill 38—5th Session of 37th Parliament] proposes to repeal and replace Securities Act [c. 418]. Bill 38 received Royal Assent May 13, 2004. Bill 38 not yet in force.)

Trading in Securities.

Registration.

No person (which throughout includes individual, corporation, partnership, party, trust, fund, association, any other organized group of persons, and personal or other legal representative of person to whom context can apply according to law (§1[1]) shall trade in securities, act as underwriter, or advise others regarding trading in securities unless person is registered. (§34). Categories of registration are generally dealers, advisors and underwriters. Registrants are further classified within those categories, e.g., person registered as advisor must be classified as portfolio manager, investment counsel and/or securities advisor (r. 8). Executive director, being chief administrative officer of commission (§8) and in some cases delegate of executive director, has discretion in granting registration and may refuse where applicant or any of its officers or directors is not resident in B.C. on date of application (§35[2]). Registration may be subject to conditions imposed by executive director (§36) and expires Dec. 31 of year in which granted, unless earlier suspended or canceled (r. 67). Act grants certain exemptions from registration, e.g., registration as advisor is not required by insurer, savings institution, Business Development Bank of Canada or by certain professionals whose performance of services in this area is solely incidental to practice of their profession (§44); trade by executor or like person, authorized trustee, official receiver, receiver, sheriff, isolated trade not made by person whose usual business is trading in securities, certain kinds of trade by bank or trust company and other trades which involve specified vendors or purchasers (§45); person may trade in bonds, debentures, or other evidences of indebtedness of or guaranteed by government or certain others, certain negotiable promissory notes and other specified securities without being registered (§46). In addition, commission or executive director may, if not prejudicial to public interest, order that Part 5 does not apply to any trade in any particular security or by particular person. (§48).

Prospectus.

Unless exempted under Act or regulations, no person may distribute security unless preliminary prospectus and prospectus respecting that security have been filed with, and receipts obtained for them from, executive director. (§§61[1], 65). Generally, first trade is distribution. Preliminary prospectus and prospectus must be in required form (§61[2]), must provide full, true and plain disclosure of all material facts relating to securities issued, must contain specific statements and comply with such other filing requirements as are imposed in discretion of executive director (§§63, 64). In “waiting period”, interval between issue of executive director's receipt for preliminary prospectus and issue of receipt for prospectus, issuer is limited to specific communications, giving out preliminary prospectus, and soliciting expressions of interest. (§78). From date of issue of receipt for prospectus, only prospectus and any document filed with it or referred to in it or used in §78(2)(a) may be given out. (§82). Similar and additional exemptions to those for registration are granted in respect of filing prospectuses (§74[2][2]-[28]). Commission or executive director may, upon application of interested party or on his own motion, order exempt from one or more of requirements of Part 9 or regulations related to Part 9, person or class of persons and may also on application order that trade or class of trades is deemed to be distribution. (§76[1]). Act requires person registered to trade in security to deliver latest prospectus to intended purchaser before written confirmation of sale agreement or not later than midnight on second business day after entering agreement but agreement is not binding if dealer receives written notification from purchaser of his intention not to be bound not later than two business days after purchaser's receipt of latest prospectus. (§83). Onus of proving that time for giving notice has expired is on dealer from whom purchaser is purchasing security. (§83[8]).

Trading Generally.

Act has broad disclosure requirements and in particular requires continuous disclosure of any "material change" (§85). (*Note:* Securities Amendment Act, 2003, S.B.C. 2003, c. 24 proposes to repeal §85 and otherwise significantly alter disclosure requirements. Securities Amendment Act 2003 to come into force by regulation, provision repealing §85 not yet in force). With regard to financial disclosure, foreign companies carrying on business within B.C. are regulated in this area by Business Corporations Act, c. 57 (see topic Corporations). No person may attend at or telephone to any residence for purpose of trading any security. (§49). No person may represent, in order to effect trade, that he will resell, repurchase or refund purchase price of security, give any undertaking with regard to its future price, or that it will be listed on any stock exchange or quote security on any quotation and trade reporting system or make any statement that person knows, or ought reasonably to know, is misrepresentation or engage in unfair practice. (§50[1]). No person shall engage in any security transaction which creates misleading appearance of trading or is fraudulent (§57).

Take-Over Bids.

Act regulates take-over bids which are defined to mean offer to acquire security made by person other than issuer of security, and within prescribed class of offers to acquire. (§92). Regulations restrict making of take over bid and issuer bids. Act requires directors to determine whether to recommend acceptance or rejection of take over bid or whether not to make recommendation, and make recommendation or statement that no recommendation made. Individual directors and officers of issuer may recommend acceptance or rejection of take over bid subject to regulations. (§99). Compliance with take over bid requirements enforceable by commission and court. (§§114-115).

Insider Trading.

Act regulates insiders of and other persons having "special relationship" with all domestic companies and generally those foreign companies which either have filed prospectus with executive director (see subhead Trading in Securities, supra) or have their securities listed on any stock exchange wheresoever situate. Insider is any director or officer of issuer or of person that is itself insider or subsidiary of issuer, or person beneficially holding more than 10% of voting rights attached to issuer's outstanding voting securities. (§1). Officer includes all usual named officers of company and individuals designated as officer under bylaw of issuer or registrant, and individuals who performs functions similar to an office. (§1). Associate includes partner, trust or estate, spouse, or child of, or other relative having common residence with insider or issuer in which insider beneficially owns more than 10% of voting rights attached to all outstanding voting securities. (§1). Further, person is in special relationship if person is insider, affiliate or associate of: reporting issuer, or persons proposing to make takeover bid or specific business combinations. Persons who have acquired knowledge through business relationship of material fact, material change, or intention to make takeover bid or issuer bid, and persons who have acquired such knowledge from another person in special relationship are also in special relationship. (§3). Insiders are required to file initial report disclosing their beneficial ownership of any securities, such as shares, bonds, debentures, notes, of company within prescribed period of time after becoming insider (§87[2]), and thereafter within prescribed period of time after any change occurs, further report detailing such change (§87[5]). If person does not comply with these provisions, criminal or (§86 repealed, 2006-32-24) civil liability may arise (see subhead Miscellaneous, catchlines Enforcement and Liability, infra).

Proxy and Proxy Solicitation.

Act prescribes procedures for voting where proxies involved. (§118). That part of Act does not apply if reporting issuer complies with law in jurisdiction where incorporated and that law is substantially similar to requirements in this part. Also, commission may exempt, in whole or in part, person from these requirements if there is conflict or if to do so would not be prejudicial to public interest. (§119). Domestic companies are regulated in this area by Business Corporations Act, c. 57 (see category 2 Business Organizations, topic 2.03 Corporations). Act makes provisions for holding and issuing of mutual funds and for trading by mutual fund insiders. (§§121-130.1). (*Note:* Securities Amendment Act, 2003, S.B.C. 2003, c. 24 has repealed §117 [Reg. 232/06] to eliminate mandatory proxy solicitation requirements from securities legislation. However, mandatory proxy solicitation rules remain in various Business Corporations Acts [e.g. R.S.C. 1985, c. C-44, §149] and in securities regulatory policies.)

Miscellaneous.

Commission.—Act establishes commission known as British Columbia Securities Commission which is charged with administration of Act and may review decisions of executive director. (§§4, 165[2]).

Investigations and Audits.

Both commission and Minister may appoint person to make investigation (§§142, 147) and this person is given broad powers of investigation into affairs of any person and may on application to Supreme Court be granted: Power to enter premises, require production of records and property, and remove records and property for purposes of inspection, examination or analysis. (§143). Act also gives commission following powers: power to order any person having control of safekeeping of any funds or securities of person under investigation to refrain from dealing with such funds or securities in any way; power to register notice against land and mining claims which has same effect as registration of lis pendens (§151); and power to apply to judge of Supreme Court for appointment of receiver, receiver manager or trustee of property of person being investigated (§152). Commission may also appoint person to carry out audit of specified entities and institutions which may have to pay costs of audit. (§153).

Appeals.

Commission may review decisions of their own accord, and any person directly affected is entitled to hearing and review upon written application. (§165). Further, any person directly affected by decision of commission, other than decision under §§48 or 76, may appeal to Court of Appeal with leave. (§§165-167).

Enforcement.

Commission or executive director has power to order that individual comply with Act or Regulations, decision or bylaws, cease trading either generally or in specific securities, resign or be prohibited from acting as director or officer, or order that any or all of exemptions described in §§44-47, 74, 75, 98 or 99 do not apply to person where considered to be in public interest. (§161). Commission or executive director has power to order that specific person or all persons cease trading in specified security or exchange contract or in class of security where person has failed to make statutory filings without hearing. (§164). Act also provides for criminal penalty for trading under stated sections, liability for fine of not less than profit made and up to triple profit made or $3,000,000, or not more than three years imprisonment, or both. (§155[2], [5]). Further, upon application by commission, Supreme Court may make compliance order requested or any of wide selection of orders considered appropriate (§157) or commission may file decision with Supreme Court and on being filed, decision will have effect of judgment of Supreme Court (§163). Decision-maker presiding at hearing under Act may order person whose affairs are subject of hearing to pay costs incurred by or on behalf of commission in connection with hearing to those parties whose affairs are subject of hearing. (§174).

Liability.

Where prospectus contains misrepresentation, purchaser has right of action for damages or right of rescission against parties specified, including issuer, every underwriter in contractual relationship with issuer or selling security holder, every director of issuer at time prospectus filed, every person whose consent to disclosure of information in prospectus has been filed and other persons who signed prospectus. (§131). Where bid circular, notice, or other prescribed disclosure document contains misrepresentation, similar rights and liabilities arise. (§§132, 132.1). Where person in special relationship with issuer has knowledge of material fact or material change which has not been generally disclosed and makes use of that knowledge in buying or selling securities of issuer or in communicating material fact or material change, that person may be liable to compensate purchasers or sellers of securities (§136); person will not be liable if after reasonable investigation he reasonably believed material fact or material change had been generally disclosed (§136.2). These requirements also apply to persons proposing to make takeover bid, to become party to certain business combinations, or to acquire substantial portion of property of reporting issuer. (§57.2). Similar liability arises with respect to premature disclosure of material information. Where person in special relationship discloses intention to make take-over bid or issuer bid before it is generally disclosed, similar liability arises. (§136).

Local Policy Statements.

In many areas where executive director has broad discretionary powers, he issues from time to time statements referred to as blanket orders and rulings, which set out guidelines or framework within which he will either not exercise his discretion or do so favourably. These statements are of substantial assistance in complying with Act although they are not issued under any specific legislative authority.

Interjurisdictional Cooperation.

With exception of certain powers relating to administration of commission, commission may delegate or subdelegate powers or duties to extraprovincial securities commission, or may accept delegation or authorization from extraprovincial authority. (§167.2). Any person directly affected by power delegated to British Columbia authority is entitled to hearing and review upon written application. (§167.7). Any person directly affected by power of extraprovincial securities commission made under British Columbia authority may appeal to Court of Appeal with leave. (§167.8).

Securities Transfer Act (S.B.C. 2007, c. 10) came into force on July 1, 2007. Modeled on Ontario and Alberta statutes as well as Art. 8 of Uniform Commercial Code. Act reduces risk and uncertainty when taking security through indirect holding systems. Built on concept of perfection by “control” over “security entitlements”, Act has broad application through definitions of “security” and “purchase” (§1) and imports obligation of good faith on every contract that applies and every obligation under Act (§4).

3.25 STATUTE OF FRAUDS:

See topic 3.16 Frauds, Statute of.

3.26 WAREHOUSEMEN:

Common law rules regarding liability of bailee of this class still govern. Depositor is entitled to rely on skill and care of his bailee. Liability of bailee may be limited so as not to exceed fixed amount by terms of express contract between him and bailor, but this limitation will not relieve him if he is acting in violation of contract.

Bonded warehouses must be open to customs inspection and are subject to excise regulations.

Lien.

By Warehouse Lien Act, c. 480, every warehouseman may have lien on goods deposited with him for storage, for full amount of his charges. (§2). Written notice of lien shall be given to owner of goods and to persons holding security interest in goods registered at date goods were deposited, within two months after warehouseman has knowledge of persons owed notice, where goods are deposited not by owner or his authority, but by person entrusted with possession. (§3). This lien may be enforced by sale by public auction after due notice has been given of intention to sell. (§4) Surplus proceeds of sale are to be paid over to person entitled thereto together with statement of account. (§6).

Warehouse receipts may be either negotiable or nonnegotiable and are governed by Warehouse Receipt Act, c. 481. By §2(4) of this Act, warehouseman may not insert condition in receipt that impairs his obligation to exercise care and diligence in regard to goods or condition contrary to any provision of Act.

4 CITIZENSHIP

4.01 ALIENS:

See Canada Law Digest, category Citizenship, topic Aliens.

Property.

Property Law Act (c. 377) provides aliens have all rights of citizens as regards holding and disposing of real property. (§39).

5 CIVIL ACTIONS AND PROCEDURE

—Scope —

(Note: The Rules of Court, which govern civil actions and procedure in the Supreme Court of the province, will be repealed and replaced by the Supreme Court Civil Rules (Reg. 168/2009) effective July 1, 2010 with a revised fee schedule, available at http://www.ag.gov.bc.ca/justice-reform-initiatives/civil-project/new-civil-rules.htm.)

5.01 ACCORD AND SATISFACTION:

Accord may be defined as agreement to accept in extinction of obligation something different from that to which person agreeing to accept it is entitled. Common law doctrine, provides that acceptance of smaller sum of money at same time and place as is required by obligation does not satisfy debt. But debt may be satisfied by payment of smaller sum at earlier time or at different place than that called for. Common law has been superseded by legislative provisions dealing with part performance. Now, part performance of obligation either before or after breach of it, if expressly accepted by creditor in satisfaction or rendered in pursuance of agreement for that purpose, though without any new consideration, shall be held to extinguish obligation. (Law and Equity Act, c. 253, §43).

Negotiable note, although for lesser amount than debt, may be good satisfaction thereof if so taken.

Pleading.

Accord and satisfaction must be specifically pleaded.

5.02 ACTIONS:

Law and equity are conjointly administered.

Commencement.

Supreme Court is court of original jurisdiction. (Supreme Court Act, c. 443, §9). Actions or applications commenced by plaintiff or petitioner (party seeking relief) are by writ of summons or originating application (petition or requisition). (Rules of Court, R. 8, 10). In Small Claims Court, which is court of limited jurisdiction (Small Claims Act, [c. 430]), actions commenced by Notice of Claim. See topics 5.17 Pleading, Process, Depositions and Discovery; category 6 Courts and Legislature, topic Courts; and Canada Law Digest, category Courts and 6.03 Legislature, topic 6.01 Courts.

Conditions Precedent.

Local Government Act provides that in some damage claims notice is to be served on municipality within two months from date on which damage was sustained. (c. 323, §286). Certain municipalities have their own incorporating statutes containing conditions precedent and limitations.

Appearance and Defence.

Defendant resident in British Columbia wishing to contest action in Supreme Court, must enter appearance within seven days from service of originating process. (Rules of Court, R. 14). Where resident out of province, time limited for appearance is 21 days for person residing anywhere within Canada, 28 days for person residing in U.S., and 42 days for person residing elsewhere (unless shortened by judge on ex parte application). (R. 13[6]). Where defendant has entered Appearance, defendant shall file and deliver Statement of Defence and any Counterclaim to plaintiff within 14 days from later of time for Appearance or delivery of Statement of Claim. (R. 21[5]). Where plaintiff's claim is solely for recovery of debt or liquidated demand, and defendant has not filed Appearance or Statement of Defence within time allowed, plaintiff may enter final judgment for sum not exceeding that claimed plus interest and costs and may proceed with action against any other defendant. Plaintiff must file proof. Where claim is solely for unliquidated damages, plaintiff may enter judgment for damages to be assessed and costs and may proceed with action against any other defendant. (R. 17, 25). If defendant appears in any action, plaintiff may, notwithstanding appearance, apply to judge for final judgment, on proving claim by affidavit, and showing that deponent knows of no fact which would constitute defence to whole or part of plaintiff's claim, except as to amount; court may grant judgment, allow defendant to defend claim, grant costs or grant any other order it thinks just. Defendant may also apply for summary judgment on ground there is no merit in whole or part of plaintiff's claim, and, on verifying defendant's contention by affidavit, plaintiff's claim may be dismissed or court may grant any other order it thinks just. (R. 18). If statement of defence filed and triable issue disclosed, plaintiff or defendant may apply to court to have action decided by summary trial on affidavits. (R. 18A). See also topic 5.13 Judgments.

Parties.

All persons may be joined as plaintiffs in whom right to any relief claimed is alleged to exist, whether jointly, severally or in alternative. All persons may be joined as defendants, against whom right to any relief is alleged to exist, whether jointly, severally, or in alternative. Neither every plaintiff nor every defendant need be interested in whole relief claimed. (Rules of Court, R. 5). Court on application by any person may at any time add, substitute or strike out parties, subject to any limitation provisions. (R. 15[5]).

Partners may be sued or may sue in firm name (Rules of Court, R. 7[1]); service is effected upon firm by serving person who was partner at time cause of action arose or person at place of business of firm who appears to manage or control partnership business (R. 7[2]). Person carrying on business in name or style other than his own name may be sued in that name or style. (R. 7[10]).

Persons under disability must commence or defend proceedings by their Litigation Guardian. (R. 6[2]).

Trustees and executors may sue and be sued without joining persons interested in estate or trust and, unless court otherwise orders, on ground that trustees or personal representatives could not represent interest of that person, order granted or made in proceeding is binding on that person. (R. 5[17]).

Class Actions.

Where numerous persons have same interest in proceeding, proceeding may be commenced and, unless court otherwise orders, continued by or against one or more of them representing all. (Rules of Court, R. 5[11]). Court may on application of party appoint one or more defendants or another person to represent one or more of persons having same interest in proceeding. (R. 5[12]). British Columbia resident may commence proceeding in court on behalf of members of class after judge certifies proceeding as class proceeding. Defendant to two or more proceedings may apply to judge for order certifying proceeding as class proceeding. (Class Proceedings Act, c. 50, §§2, 3). Judge must certify proceeding as class proceeding if: pleadings disclose cause of action; there is identifiable class of two or more persons; claims of class members raise common issues; class proceeding would be preferable procedure for fair and efficient resolution of common issues; there is representative plaintiff who fairly and adequately represents interests of class on common issue; plaintiff's interests do not conflict with individual interests of other class members; and plaintiff has produced workable method of advancing proceeding on behalf of class and of notifying class members of proceeding. (§4). Court may permit one or more class members to participate in proceeding. (§15). Court may at any time stay any proceeding related to class proceeding. (§13). Members of class may opt in or opt out of class proceeding. (§16). Parties to class have same discovery rights as provided under Rules of Court. (§17). Judgment on common issues binds every member of class, but not parties who opt out of class proceeding in future proceeding. (§26). Court may make aggregate awards and may use several methods to ascertain proper allocation of award. (§§31-34). Class proceeding may be settled, discontinued, or abandoned only with approval of court and on terms court deems appropriate. (§35).

Expedited Actions.

Expedited Litigation Project Rule applies to actions: (a) with claims for only one or more of money, real property or personal property worth total of $100,000 or less, or (b) if parties consent, except for family law or class proceedings. (Rules of Court, R. 68[1-5]). Discovery process and experts are limited in Expedited Actions. (R. 68[33]). See topics 5.09 Depositions and Discovery, subhead Discovery; 5.11 Evidence, subhead Witnesses.

Intervention.

Intervention in action by person not party not permitted, subject to certain exceptions:

In probate actions any person interested in estate but not named in estate may, with leave of court, enter appearance and defend action. (Rules of Court, R. 62[4]).

Person registering or filing interest in mortgaged property subject to foreclosure proceedings after Certificate of Pending Litigation filed may enter appearance. (R. 50[4]).

Interpleader.

Where person is sued or expects to be sued in respect of property in possession or under his control or in respect of proceeds from disposition of property, or receives claim in respect of property or proceeds by or from two or more persons making adverse claims and applicant claims no beneficial interest in property, applicant may apply to court for relief by way of interpleader. (Rules of Court, R. 48). Application for interpleader relief may be made without notice, and court may deal with matter summarily or give directions for service. (R. 48[8, 9]).

Joinder of Causes of Action.

Person may join several claims in same proceeding. (Rules of Court, R. 5[1]). Court may subsequently order separate trials if actions cannot be conveniently tried together. (R. 5[6]).

Severance of Actions.

Where joinder of several claims or parties in proceeding may unduly complicate or delay trial or is inconvenient court may order separate trials or make such other order as it thinks just. (Rules of Court, R. 5[6]).

Consolidation.

Proceedings may be consolidated at any time by order of court, or may be ordered to be heard at same time or on same day. (Rules of Court, R. 5[8]).

Third Party Proceedings.

Provided in following instances: Where defendant entitled to contribution or indemnity, defendant entitled to relief or remedy relating to original subject matter of action and same as relief or remedy claimed by plaintiff, or any issue relating to original subject matter which is same as issue between plaintiff and defendant and should be determined between all parties. (Rules of Court, R. 22). Court may set aside third party notice. (R. 22[6]). Third party may enter appearance complying with R. 14 regarding appearance by defendant. (R. 22[7]). If third party wishes to dispute his liability to person issuing third party notice, he must file statement of defence within 14 days of later of time limited for appearance, and service of third party notice. (R. 22[8]). Defendant issuing third party notice has seven days to file and deliver Reply. Statement of defence not required where third party claim is solely for contribution or indemnity under Negligence Act, defendant has filed and delivered statement of defence to plaintiff's claim and defendant relies as against third party solely on facts plead as against plaintiff. (R. 22[9], [16]). Where third party has not filed appearance or statement of defence judgment in default available and court may order all or any of relief claimed in third party notice. (R. 22[10], [11], [12]). Third party who has entered appearance may file statement of defence to plaintiff's statement of claim raising any defence open to defendant. (R. 22[13]). Party affected by third party proceedings may apply to court for directions. (R. 22[17]). Court may impose terms to prevent prejudice or unnecessary delay that might otherwise be suffered because of third party procedure. (R. 22[18]).

Discontinuance.

Action may be discontinued in whole or in part by plaintiff at any time before action set down for trial, or thereafter with consent of all parties of record or by leave. (Rules of Court, R. 36[1], [2]). Defendant may withdraw defence or any part of it at any time. (R. 36[3]).

Stay of proceedings may be ordered by Supreme Court or judge thereof on good cause shown (Law and Equity Act, c. 253, §8; Rules of Court, R. 5[4], 19[24], 48[9][e], 54[9]) or by Court of Appeal (c. 77, §18).

Abatement.

Cause of action for tort does not abate on death of either party, but action may be continued or brought by or against executor or administrator of decedent or against personal representative. See Estate Administration Act, c. 122, §59(2) and (6) and Family Compensation Act, c. 126, §5. *Note:* Prior to Oct. 15, 1982 action had to be brought against executor or administrator not later than 12 months after date of death if limitation period had not expired at time of death. Amendment effective Oct. 15, 1982 permits action to be brought against executor or administrator within time otherwise limited for action. (Estate Administration Act, c. 122, §59[6]). CAVEAT: Amendment may have no retroactive effect. If cause of action arose and death occurred before Oct. 15, 1982, may be governed by pre-amendment provision.

Revival of action in which no step has been taken for one year is effected by giving other party 28 days notice. (Rules of Court, R. 3[4]). Notwithstanding this rule, defendant or respondent may apply to dismiss for want of prosecution without giving notice to proceed. (R. 3[5]).

Limitation of.

See topic 5.14 Limitation of Actions; c. 266; c. 323, §285.

Direct Actions Against Insurer.

See category 25 Transportation, topic 25.04 Motor Vehicles, subhead Direct Actions.

5.03 APPEAL AND ERROR:

See category 6 Courts and Legislature, topic 6.01 Courts.

5.04 CERTIORARI:

Judicial Review Procedure Act (c. 241) abolishes writ of certiorari and allows court to grant any relief that applicant would be entitled to under proceeding for relief in nature of certiorari (§§2, 12). Relief can be granted by Supreme Court which reviews proceedings of inferior court or body acting pursuant to statutory power. (§3). Application is taken by way of petition and grounds on which relief is available are absence or excess of jurisdiction (including abuse of discretion and breach of natural justice) and error of law. (§§2, 3).

5.05 CHARITABLE IMMUNITY:

See topic 5.07 Damages.

5.06 COSTS:

Costs in litigation are governed by tariffs prescribed by Rules of Court. General rule is that costs will follow event unless otherwise ordered by court and they may be either: (1) party and party costs, or (2) special costs. (Rules of Court, R. 57).

Review.

Solicitor may take appointment with Registrar to review his account 30 days after account has been delivered or sent by post and within one year of delivery. If solicitor delivers unreviewed account, which client feels is excessive, client may, before or within three months after payment and within one year of delivery of account, take appointment with Registrar to have account reviewed. Unless Registrar otherwise orders, if at least one-sixth of account is struck off on review, solicitor shall pay costs of review, but if less than one-sixth of account is struck off costs shall be paid by client. (Legal Profession Act, S.B.C. 1998, c. 9, §72). Reviewed solicitor's account is enforceable in same manner as judgment of Supreme Court if filed. (§76[3]).

Security for costs may be ordered in Supreme Court for costs of plaintiff or defendant in family law proceeding. (Rules of Court, R. 60[21]). Security for costs on appeal is set by justice of that court. (Court of Appeal Act, c. 77, §24).

Offers to Settle.

If party delivers offer to settle claim before July 1, 2008 and offer has not expired, been withdrawn or been accepted court may deprive a party of costs, award double costs, and/or award to the defendant the defendant's costs if offer made by defendant and judgement obtained by plaintiff not greater than offer. (Rules of Court R.37B[5])

If after July 1, 2008, party makes offer to settle claim in writing, delivers it to all parties of record, and includes prescribed sentence, court may consider offer when exercising its discretion in relation to costs and may deprive party of its costs incurred after offer to settle and/or award to party double its costs incurred after offer to settle. Fact that offer to settle has been made must not be disclosed to court or jury until all issues, other than costs, have been determined. (Rules of Court, R. 37B).

5.07 DAMAGES:

Common law generally prevails. Negligence Act (c. 333) applies to tortfeasors, and abrogates common law principle that plaintiff's contributory negligence bars recovery.

Charitable Immunity.

Charitable corporations responsible for all negligent actions under Society Act. (c. 433, §4[3]).

Sovereign Immunity.

Subject to some exceptions, Provincial Crown may be proceeded against as if it were person under Crown Proceedings Act. (c. 89, §2[c]).

See also topic 5.15 Negligence; categories 7 Criminal Law, topic Criminal Law; Estates and Trusts, topic Death, subhead Action for Death.

5.08 DECLARATORY JUDGMENTS:

See topic 5.13 Judgments.

5.09 DEPOSITIONS AND DISCOVERY:

Distinction is drawn between obtaining disclosures from opposite party to be used as evidence at trial, and obtaining evidence on oath of some other person prior to trial to be used at trial. Former process is called discovery, and is available to each party as of right. Latter procedure refers to taking of depositions and is available only by order of court or by consent.

Discovery.

Discovery from opposite party is available in six ways as set out below. If party fails to comply with any of these requirements for discovery, except admissions, court may dismiss proceeding or strike appearance or defence. Evidence obtained on discovery may be used against, but never for, party being examined.

Discovery and Inspection of Documents.

Party may require other party as of right to list and produce for inspection all documents not privileged which are or have been in latter's possession or control relating to any matter in question in action. Unless court otherwise orders, party may not put document in evidence or use it for purposes of examination or cross-examination if document has not been produced for inspection when demanded. (Rules of Court, R. 26). Rule 26 does not apply to Expedited Actions. Party in Expedited Action must deliver list of documents within 15 days after close of pleadings or within 15 days after action becomes Expedited Action. (R. 68[16]).

Examination for Discovery.

Party may examine any other party adverse in interest, or director, officer, employee, agent or external auditor, past or present, of such party, as of right. Examining party may select which representative of adverse party is to be examined, but adverse party may apply to court for order that examining party be required to examine some other representative. Party who has examined for discovery any party adverse in interest shall require leave of court to examine agent or employee of adverse party. Party who has examined employee or agent of other party requires leave of court to examine other party. Leave of court is required where party has examined director, officer, agent, employee, or external auditor of party and seeks to examine another director, officer, agent, employee or external auditor of that party. Examination is oral examination in nature of cross-examination and is taken on oath before court reporter. Person being examined must answer any questions within his knowledge or means of knowledge regarding any matter not privileged relating to matter in question in action and is also compellable to give names and addresses of all persons who might reasonably be expected to have knowledge relating to any matter in question in action. Rule applies to persons living outside British Columbia. (Rules of Court, R. 27). Parties to Expedited Action may not conduct Examination for Discovery unless parties to action consent or court orders otherwise. (R. 68[27]).

Pre-Trial Examination of Witness.

Where person other than party to action may have material evidence and refuses or neglects upon request to give responsive statement to applicant party, court may order that he be examined on oath prior to trial. Procedures for examination for discovery generally apply to such examination. Expert witness of party may only be examined under this rule if other party seeking to examine has been unable to obtain facts and opinions on subject by other means. (Rules of Court, R. 28). Rule 28 does not apply to Expedited Actions. (R. 68[23]).

Discovery by Interrogatories.

Party to action may serve on any other party or on director, officer, partner, agent, employee or external auditor of party, written interrogatories (in Form 22) relating to matter in question in action. Person to whom interrogatories are directed must deliver answer by affidavit within 21 days. Where person answers insufficiently, court may require further answer by affidavit or oral examination. (Rules of Court, R. 29). Rule 29 does not apply to Expedited Actions. (R. 68[23]).

Physical Examination.

Court may order person to submit to examination by medical practitioner or other qualified person when person's physical or mental condition is in issue. Court may also order production, inspection and preservation of any property. (Rules of Court, R. 30).

Admissions.

In proceeding in which statement of defence, answer or answer and counter petition has been filed, party may request any party to admit, for purposes of proceeding only, truth of fact or authenticity of document. If opposing party does not deny request within 14 days, facts or documents are deemed admitted. Party unreasonably refusing to make admissions on request may be penalized in costs. (Rules of Court, R. 31).

Depositions.

Depositions by contrast are available only by order of court (or by consent), and are designed to preserve evidence rather than to permit party to discover other party's case. Deposition evidence will normally be ordered only when it is either impossible or inconvenient for witness to be available at trial, either because of death, infirmity, sickness, absence from jurisdiction or expense. Deposition evidence may be ordered to be taken outside British Columbia but if person to be examined is unwilling to testify or if for any other reason assistance of foreign court is necessary, letter of request must be sent to foreign court through Under Secretary of State for External Affairs of Canada (or if evidence is to be taken in Canada, through Deputy Attorney-General for British Columbia). Deposition evidence must be recorded either by official court reporter, or on videotape or film. At trial, transcript, videotape or film of deposition may be given in evidence by any party and witness may also be called to testify viva voce. (Rules of Court, R. 38, 40).

5.10 EQUITY:

See topic 5.02 Actions.

5.11 EVIDENCE:

Common law rules of evidence as modified by Evidence Act (c. 124) and Rules of Court apply in all courts for matters within jurisdiction of British Columbia. For federal matters see Canada Law Digest. See also topic 5.09 Depositions and Discovery; category 10 Documents and Records, topic 10.02 Affidavits.

Apology Act (c.19)

Apology made by or on behalf of person in connection with matter does not imply admission of fault, does not constitute confirmation of cause of action, and is not to be considered in determination of liability. Evidence of such apology is not admissible as evidence of fault or liability. (§2).

Witnesses.

(See Evidence Act, c. 124.)

A person is not incompetent to give evidence by reason only of interest or crime. (§3). Persons charged with any offence or crime, and their husbands or wives, are competent witnesses. (§6). Parties to civil causes and their husbands or wives are both competent and compellable with certain exceptions. (§7).

Witness is not excused from giving evidence on ground of self-incrimination but may seek protection of Canada Evidence Act (R.S. 1985, c. C-5, §5), B.C. Evidence Act (c. 124, §4) or Canadian Charter of Rights and Freedoms (§13) against use of evidence in any other proceeding. Parties to Expedited Action must provide witness list and summaries of evidence within 90 days of close of pleadings, or 90 days after action becomes Expedited Action. (Rules of Court, R. 68[31]).

See also topic 5.09 Depositions and Discovery.

Privileged Communications.

Client cannot be compelled, and legal adviser will not be allowed without express consent of his client, to disclose oral or documentary communications passing between them in professional confidence. This rule is for protection of client and not of lawyer and is generally confined to cases of legal advisers.

Expert.

Written expert report is admissible at trial in Supreme Court without proof of signature of expert if copy is given to every party of record at least 60 days in advance. (Rule 40A[2]). Similarly, copy must be given to every party of record at least 60 days before expert may testify orally. (Rule 40A[3]). Party to Expedited Action may rely on only one expert witness unless second is required to respond to other party's expert. (R. 68[33]).

Pre-Trial Examination.

Court may order pre-trial examination of material non-party witness on oath if witness has refused voluntary statement. Court may order that examining party pay reasonable solicitor's costs of person being examined. (Rule 28[1]).

Husband and wife are not compellable to disclose any communications made by one to the other during marriage. Evidence Act (c. 124). (§8). But, notwithstanding any rule to contrary, husband or wife in any proceedings may give evidence that he or she did or did not have sexual intercourse with other party to marriage at any time. (§7[2]). See also category 7 Criminal Law, topic 7.02 Criminal Law, and Canada Evidence Act.

In actions against representatives of deceased persons, plaintiff's evidence may require corroboration by some other material evidence.

In actions by or against person of unsound mind, evidence of opposite or interested party must be corroborated by some other material evidence. (§9).

See category 10 Documents and Records, topic 10.02 Affidavits.

5.12 INJUNCTIONS:

General equity principles govern. (Law and Equity Act, c. 253, §39). Injunction may be granted by Supreme Court. (Rules of Court, R. 45). Used to provide temporary or permanent relief where destruction of property or other interference appears imminent on balance of convenience for parties.

Interlocutory injunction may be granted within hearing on temporary basis and may be made final or removed on final disposition of case. Applicant must show that it has serious question to be tried as to existence of right alleged and breach of that right; that without injunction it would suffer irreparable harm which could not be adequately compensated in damages; and that balance of convenience must favour grant of injunction. With leave of court, application for injunction may be made before commencement of proceeding. (R. 45[2]). In provincial labour disputes only Labour Relations Board may enjoin unless there is immediate danger of serious injury to person or actual obstruction or physical damage to property. (Labour Relations Code, c. 244, §§136, 137). See also category 11 Employment, topic 11.02 Labour Relations.

5.13 JUDGMENTS:

Order of court may be drawn up by any party, and, unless court otherwise directs, shall be approved by all parties who appeared or were represented at hearing at which order was made. Order need not be approved by party who has not consented to it and who did not appear or was not represented at trial or hearing. When necessary, terms of order are settled before Registrar, whose decision may be reviewed by court. Court may correct clerical error in any judgment. (Rules of Court, R. 41[24]). Judgment is to be dated as of day on which it was pronounced and takes effect on that day, unless court otherwise orders. Default judgments, and all orders of Registrar are dated and effective as of date signed by Registrar. (R. 41).

Default Judgments.

Judgment may be entered by plaintiff in default of appearance to writ if defendant does not file appearance within time set out in writ, which time limits are governed by Rules of Court. Plaintiff may enter judgment in default if defendant did file appearance but failed to file statement of defence and any counterclaim within 14 days from time limited for appearance or from delivery of statement of claim, whichever is later. Judgment in default is available to defendant with leave of court where plaintiffs fail to file and deliver statement of claim within 21 days after appearance. If defence answers only part of claim, plaintiff may enter judgment with respect to unanswered part with leave of court. Where claim is solely for liquidated amount, judgment may be entered for amount of claim, plus interest and costs. Where claim is for unliquidated damages, judgment may be entered for damages to be assessed and costs. In all cases, affidavit of service or delivery is required. Court has jurisdiction to set aside or vary any default judgment. Unless court otherwise orders, where there is counterclaim, plaintiff shall not issue execution on judgment obtained under Rule 25 until entire action has been disposed. (Rules of Court, R. 17, 20, 21, 25).

Summary Judgments.

Once appearance has been entered, plaintiff may apply to court for summary judgment for all or part of claim upon affidavit setting out facts verifying claim. Affidavit must also state that deponent knows of no fact which would constitute defence to claim, or part of claim, except as to amount. On hearing such application, court may grant or refuse relief requested or may make any other order it thinks just, including giving directions for hearing claim on affidavits at trial and ordering account. Summary judgment given against party who does not appear at hearing of application may be set aside or varied by court. Once appearance has been entered, defendant may, on ground there is no merit in whole or part of claim, apply for summary judgment on affidavit evidence setting out facts demonstrating that there is no merit, and stating that deponent knows of no facts which would substantiate claim. (Rules of Court, R. 18).

Summary Trials.

In action in which defence has been filed, either party may apply for judgment on issue or generally on affidavit, interrogatory or discovery evidence. Application for hearing must be heard at least 45 days before date set for trial and set in accordance with Rule 51A, unless otherwise ordered. Court may grant judgment for either party unless it is unable on all of evidence before it to find facts necessary to decide issues of fact or law, or is of opinion that it would be unjust to decide issues on application. Court may grant judgment on terms respecting execution and may award costs. Where court is unable to grant judgment it may order trial of proceeding generally or on issue and give directions to expedite trial. (Rules of Court, R. 18A).

Declaratory Judgments.

No proceeding is open to objection, on ground that merely declaratory order is sought. Court may make binding declarations of right, whether or not any consequential relief is or could be claimed. (Rules of Court, R. 5[22]).

Judgment on Admissions.

Party may apply at any stage of action for judgment on admissions of fact made by his opponent without waiting for determination of any other question between parties. (Rules of Court, R. 31[6]).

Consent Order.

Party may consent to judgment against him by signature of his solicitor or, if unrepresented, by his written consent or verbal consent before court or registrar. Term “judgment by confession” is not used in British Columbia. (Rules of Court, R. 41[15]).

Debtor may require judgment creditor to execute, file and deliver Acknowledgment of Payment in Form 50 as condition of paying money judgment. Judgment debtor may also make application for order certifying that judgment has been paid. (Rules of Court, R. 42[19] and [20]). Acknowledgment of Payment Form is as follows:

I acknowledge payment of $. . . . . in full (partial) satisfaction of the judgment dated the. . . . . . day of. . . . . ., 20. . . . .

Signed this. . . . . . day of. . . . . ., 20. . . . ., in the presence of

....

(Name)

....

(Address)

....

(Occupation)

Dated..........

....

Party receiving payment

Foreign Judgments.

Foreign judgment for payment of money which is obtained in reciprocating jurisdiction within meaning of Court Order Enforcement Act (c. 78, §29) may be enforced by applying within six years of date of judgment to have judgment registered. Registration must be denied if court is satisfied that foreign court acted without jurisdiction or judgment debtor did not submit to jurisdiction of court or would have good defence if action were brought on judgment or if for reasons of public policy cause of action would not be entertained by registering court. Actions on judgments not obtained in such reciprocating jurisdictions are governed by common law and create separate cause of action. Judgment in proceeding outside Canada for loss or injury that arises out of exposure to or use of asbestos mined in British Columbia must not be registered or enforced by court. Where person has cause of action under domestic laws of province for loss or injury that is suffered outside Canada and arises out of use of or exposure to asbestos mined in province, he may commence action under domestic laws of province. (c. 78, §40).

Interest on Judgments.

In causes of action arising after June 1, 1974, court ordering judgment shall add prejudgment interest as set out in Court Order Interest Act. (c. 79). Every judgment bears interest at annual rate of interest that is equal to prime lending rate of banker to government calculated for first six months of year at rate as of Jan. 1 and for last six months of year at rate as of July 1. (§7). See category 3 Business Regulation and Commerce, topic 3.18 Interest, under Canada Law Digest.

Enforcement.

Judgment may be enforced by delivering to sheriff for execution writ of seizure and sale (for payment of money), of sequestration (for payment into court), of possession (for recovery or delivery of possession of land), of delivery or sequestration (for recovery or delivery of property other than land or money) or by appointment of receiver. (Rules of Court, R. 42[1]-[5]). See generally category Debtor and Creditor, topic Executions. Judgment creditor may compel attendance of debtor or officer of corporate debtor, for oral examination under oath before court or registrar concerning means debtor has or may have of satisfying judgment. (Rules of Court, R. 42A). Judgment may also be registered in any Land Title Office in province, as lien and charge against lands of judgment debtor in that district. (Land Title Act, c. 250, §210). Other enforcement procedures include garnishment of debts due to judgment debtor. (c. 78). Despite any other enactment, any property contributed to and existing in registered plan at least 12 months before debt being enforced became due exempt from enforcement process (c.78, s.71.3)

Limitation Act, (c. 266).

Judgment obtained in British Columbia court for payment of money or return of personal property is valid for ten years unless within that period proceedings are brought on that judgment. Judgment may be renewed prior to expiration of current ten year limitation period. Judgment for possession of land or relating to enforcement of injunction may be enforced at any time. (s 3[4]). Judgment which has been registered in Land Title Office pursuant to Court Order Enforcement Act must be renewed every two years or statutory charge on judgment debtor's land will lapse. (c. 78, §91). Unexecuted writ of execution expires after one year unless renewed. (Rules of Court, R. 42[15]).

5.14 LIMITATION OF ACTIONS:

Limitation Act, c. 266.

One Year.

Personal injury torts under Motor Vehicle Act. (c. 318, §78).

Two Years.

Action for damages in respect of injury to person, excluding sexual assault of minor, or property including economic loss therefrom whether based on contract, tort or statutory duty; for trespass to property; for defamation; for false imprisonment; for malicious prosecution; for tort under Privacy Act (c. 373); for action under Family Compensation Act (c. 126); for seduction; action in tort under §27 of Engineers and Geoscientists Act (c. 116). (c. 266, §3[2]).

Ten Years.

Action against personal representative of deceased person for share of estate; against trustee in respect of any fraud or fraudulent breach of trust to which trustee was party or privy; against trustee for conversion of trust property to trustee's own use; to recover trust property or property into which trust property can be traced against trustee or other person; to recover money on account of wrongful distribution of trust property against person to whom property is distributed or successor; action on local judgment for payment of money or return of personal property. (c. 266, §3[3]).

No Limitation Period.

Action for possession of land where person entitled to possession has been dispossessed in circumstances amounting to trespass; for possession of land by life tenant or remainderman; on local judgment for possession of land; by debtor in possession of collateral to redeem that collateral; by secured party in possession of collateral to realize that collateral; by landlord to recover possession of land from tenant who is in default or overholding; action relating to enforcement of injunction or restraining order; action to enforce easement, restrictive covenant or profit a prendre; for declaration as to personal status; for declaration as to title of property by any person in possession of that property; for cause of action based on misconduct of sexual nature; where misconduct occurred while person was minor and for cause of action based on sexual assault. (c. 266, §3[4]).

Six Years.

Matters not specifically mentioned in Limitation Act (c. 266) or any other Act (c. 266, §3[5]).

Six year limitation period also applies to actions brought by secured party not in possession of collateral to realize on that collateral; by debtor not in possession of collateral to redeem that collateral; for damages for conversion or detention of goods; for recovery of goods wrongfully taken or detained; by tenant against landlord for possession of land, whether or not tenant was dispossessed in circumstances amounting to trespass; for possession of land by person who has right to enter for breach of condition subsequent, or right to possession arising under possibility of reverter of determinable estate. (c. 266, §3[6]).

Act applies to causes of action arising before July 1, 1975 but nothing in Act revives any action that was statute barred on July 1, 1975. If prior limitation longer than set out in Act and limitation in Act will expire on or before July 1, 1997 governing limitation period is shorter of two years from July 1, 1975 and previous limitation period. (§14). Prior limitations have no application in cases of sexual misconduct involving minor or sexual assault. (c. 266, §14[6]).

Foreign Causes of Action.

Where law of foreign jurisdiction applicable and limitation law of that jurisdiction classified as procedural court may apply B.C. limitation law or foreign limitation if more just result produced. (c. 266, §13[1]). Court must apply B.C. limitation law in cases of sexual misconduct involving minor or sexual assault. (c. 266, §13[2]).

Disability of Plaintiff.

If person under disability limitation period postponed and does not run until disability removed. Person is under disability if minor or unable to manage his affairs. If person under disability has guardian as defined in Act anyone that person may have action against can serve notice to proceed on Public Guardian and Trustee and time commences to run as if person ceased to be under disability on date notice delivered. (c. 266, §7, definition of guardian in §7[1]).

Postponement of Time.

In most circumstances running of time postponed until plaintiff knows identity of defendant and has sufficient knowledge of facts to be able to bring action. Onus of proving postponement lies on person claiming benefit of same. Statute should be examined to determine if cause of action is of kind that time is postponed. (c. 266, §6).

Acknowledgment.

If person against whom action lies confirms cause of action during limitation period but prior to its expiry, time prior to confirmation does not count in reckoning limitation period for person having benefit of confirmation. Confirmation must be in writing and signed by maker. (c. 266, §5).

Ultimate Limitation.

Subject to §3(4) (see subhead No Limitation Period, supra), and notwithstanding provisions dealing with disability, postponement and acknowledgment, no action to be brought 30 years from date right to do so arose, or in action against hospital, hospital employee or medical practitioner for negligence or malpractice, after six years. (c. 266, §8).

Wrongful Death.

Limitation period of two years for action for wrongful death under Family Compensation Act (c. 126). (Limitation Act, c. 266, §3[2][g]). One year limitation for application to Workers' Compensation Board for compensation under Criminal Injury Compensation Act, subject to extension by Board. (c. 85, §6).

Pleading.

No express statutory provision requiring pleading limitation defence, but defendant must plead any matter of fact or law that he alleges makes claim not maintainable. (Rules of Court, R.

19 [15]).

5.15 NEGLIGENCE:

Common law rules apply generally. Modified by Statute as to certain liabilities such as in Good Samaritan Act, c. 172, Motor Vehicle Act, c. 318, Negligence Act, c. 333 and Occupiers Liability Act, c. 337.

Contributory Negligence.

Negligence Act (c. 333) provides for apportionment of liability according to degree of fault. (§1). “Fault” is not limited to negligence, but includes intentional torts. May also include breach of contract. Unless court otherwise directs, costs follow degrees of liability. (c. 333, §3).

5.16 PARTITION:

Partition of Property Act. (c. 347). Action of partition in respect of lands lies in Supreme Court. All joint tenants, tenants in common, co-parceners, mortgagees or other creditors having liens and all other parties interested in lands may be compelled to partition or sell land, or part of it. (§2). Court may order partition or division of lands or order sale and division of proceeds among parties entitled, according to their respective interests. (§§2, 6 and 7). Interested parties may, with court approval, bid at such sales. (§10). Court has very wide discretion.

5.17 PLEADING:

Pleading is governed by Rules of Court, and is defined in Rules as including statement of claim, statement of defence, reply, counterclaim, statement of defence to counterclaim, third party notice and statement of defence to third party notice. (Rules of Court, R. 1).

Pleadings Generally, (Rules of Court, R. 19).

Pleadings must be brief statements of material facts alleged, but not evidence. (R. 19[1]). Alternative allegations permitted. (R. 19[8]). In pleadings after statement of claim, party shall plead specifically any matter of fact or law that allegedly makes claim or defence of opposite party not maintainable, or might take other party by surprise if not specifically pleaded, or raises issues of fact not arising out of preceding pleading. (R. 19[15]). Particulars of any matter set out in pleading may be requested in writing by any party and if not supplied, may be ordered by court. (R. 19[16], [17]). Any allegation of fact not denied is taken as admitted, except as against infant or mentally incompetent person. (R. 19[19]).

Statement of Claim.

Statement of claim may be endorsed upon writ of summons or may be delivered as separate document, but must be delivered within 21 days after appearance. Statement of claim must be dated and show relief sought and proposed place of trial. (R. 8, 20).

Statement of Defence and Counterclaim, (Rules of Court, R. 21).

Where appearance entered, statement of defence and counterclaim if any must be filed and delivered within 14 days after time limited for appearance, or from delivery of statement of claim, whichever is later. (R. 21[5]). While general denial permitted, statement of defence must deny specifically some matter of fact in action on bill of exchange, promissory note, cheque or money due under contract. (R. 21[2], [3]).

Third-Party Procedure.

Where party who is not plaintiff claims indemnity or contribution from third party, or any relief relating to original subject matter of action, or there is issue relating to any relief claimed in action or to original subject matter of action which is substantially same as issue between party and third party and should properly be determined in action, third party notice may be served on that person. Plaintiff should not be prejudiced by third party proceedings and court may set aside notice or impose terms to limit or avoid prejudice or unnecessary delay. (R. 22).

Reply.

Plaintiff may not file reply that is simple joinder of issue, and if no reply filed within seven days after delivery of statement of defence pleadings are closed and statement of fact in pleading last delivered shall be deemed to have been denied and put into issue. (R. 23).

Amendment.

Pleading may be amended by party once without leave before notice of trial has been delivered, and at any time by written consent of all parties or with leave of court. (R. 24).

Striking Out Pleading.

Court may order pleading to be struck out if it discloses no reasonable claim or defence, is unnecessary, scandalous, frivolous or vexatious, may prejudice, embarrass or delay fair trial or is otherwise abuse of process of court. (R. 19[24]).

Points of Law.

Party may raise any point of law in his pleadings, which then may be disposed of on application before trial, or at trial. (R. 19, 34).

Stated Case (R. 33A)

Stated case may be put before court where question arises in or as result of tribunal proceeding if enactment provides that reference be made by way of stated case.

Default of Pleading.

See topic 5.13 Judgments, subhead Default Judgments.

5.18 PRACTICE:

Practice is governed by Court Rules Act (c. 80), Supreme Court Act (c. 443) and Rules, Court of Appeal Act (c. 77) and Rules, Small Claims Act (c. 430), Provincial Court Act (c. 379), Criminal Appeal Rules and Adult Guardianship Act (c. 6).

See topics 5.02 Actions, Appeal and Error, Certiorari, Costs, Depositions and Discovery, Injunctions, Judgments, Pleading, Process, Evidence, subhead Witnesses; categories 6 Courts and Legislature, topic Courts; Debtor and Creditor, topics Attachment, Executions, Garnishment; Documents and Records, topic Affidavits; Transportation, topic Motor Vehicles.

Discovery.

See topic 5.09 Depositions and Discovery.

5.19 PROCESS:

Service of Writ or Petition.

On individual, must ordinarily be personal (Rules of Court, R. 11); where this is impractical substituted service, such as by publication or posting, may be ordered (R. 12). Service on corporation may be done by leaving copy with chief officer or agent of corporation, or with city or municipal clerk, or of any branch or agency of corporation in province, or according to Business Corporations Act, S.B.C. 2002, c. 57, or any Act relating to service of process (R. 11).

Service on infant according to Infants Act. (c. 223). Service on mentally incompetent person by personally serving committee or, if none, person with whom mentally incompetent person is residing, or person caring for mentally incompetent person, or person appointed by court, and Public Trustee. (R. 11). Where party is not served but files appearance or attends at trial or hearing, service is deemed as of that date. (R. 11).

Service on party outside province as of right in circumstances set out in §10 of Court Jurisdiction and Proceedings Transfer Act (R. 13[1]) or with leave of court otherwise (R. 13[3]).

Time of Service.

Service after 4 o'clock in afternoon is deemed effective on next day that is not holiday (R. 3[1]).

Times for Appearance.

Seven days for party served in B.C. When served outside B.C., 21 days if person resides anywhere within Canada, 28 days if resides in U.S. and 42 days if resides elsewhere. (R. 13[6]). Court may shorten time for appearance on application made without notice. (R. 13[6.1]).

Who May Serve.

Generally, process may be served by any person. There may be certain statutory provisions covering certain instances. It would appear that no person should serve process while acting in a judicial capacity.

Proof of Service.

Affidavit of service or delivery shall state when, where, how and by whom service or delivery effected. (R. 11[7]).

Nonresident Motorist.

See category 25 Transportation, topic 25.04 Motor Vehicles.

Protection of Public Participation Act.

Entire Act repealed by S.B.C. 2001, c. 32, §28 effective Aug. 16, 2001.

See also topic 5.18 Practice.

5.20 REPLEVIN:

In action for recovery of specific property, other than land, court may, where it considers just and on any terms as to security or otherwise it considers just, order person from whom recovery of property is claimed to surrender it to claimant pending outcome of action. (Law and Equity Act, c. 253, §57 and R. 46[4]).

5.21 SEQUESTRATION:

Sequestration is form of equitable execution. Rules of Court provide that order for payment of money into court and order for recovery or delivery of possession of any property other than land or money may be enforced by writ of sequestration. (R. 42[2], [4]). Writ of sequestration shall be issued, in case of order, only upon filing proof that order sought to be enforced has been served and has not been complied with and, in case of document issued under enactment, upon also filing document with court. (R. 42[12]). Writ of execution is defined to include writ of sequestration. (R. 1[8] and Court Order Enforcement Act, c. 78, §47). This form of execution is rarely used in British Columbia.

Instead of sequestration, court may make order for detention, custody or preservation of any property that is subject matter of proceeding or to which question may arise (except property contributed to and existing in registered plan at least 12 months before debt being enforced became due (c.78, s.71.3)), and, for purpose of enabling order under this rule to be carried out, court may authorize person to enter upon any land or building. (Rules of Court, R. 46[1]). See also category 8 Debtor and Creditor, topic 8.07 Executions.

5.22 SERVICE:

See topic 5.19 Process.

5.23 SUBMISSION OF CONTROVERSY:

Any bona fide dispute which court is capable of resolving can be brought before proper court, which will dispose of it subject only to appeal. Frivolous, vexatious or theoretical matters will not be heard by courts.

5.24 VENUE:

On most matters before Supreme Court plaintiff may initiate action in any part of province. Plaintiff chooses and sets out place of trial in Statement of Claim. (Rules of Court, R. 20[4]). This place may be changed by court or judge at instance of defendant or plaintiff on grounds of convenience or expense. Court can also order that trial be heard partly in one place and partly in another. (R. 39[7]).

6 COURTS AND LEGISLATURE

6.01 COURTS:

Following civil courts are established by legislature; of this province: (1) Supreme Court, c. 443; (2) Court of Appeal, c. 77; (3) Provincial Court, c. 379.

Small Claims Division.

See subhead Provincial Court, infra.

County Courts.

Effective July 1, 1990, County Court is merged with Supreme Court. All references to County Court in various provincial legislation are amended to Supreme Court.

The Supreme Court has jurisdiction over all actions, civil and criminal, arising in the province. Provision is made for attachment of debts due to judgment debtor by third persons, before or after judgment except wages prior to judgment (Court Order Enforcement Act, c. 78, §3, see also category 8 Debtor and Creditor, topic 8.11 Garnishment), for examination on oath and discovery by either party before trial; for examination of judgment debtor, after judgment, as to his property and assets, and for his commitment on same grounds as in similar applications in small claims division (Rules of Court, R. 42[23], 42[26], 42A, see category 8 Debtor and Creditor, topic 8.07 Executions; see subhead Provincial Court, infra), and for “summary judgment” on affidavit where either party can show that there is no merit to other's case. See category 5 Civil Actions and Procedure, topic 5.02 Actions.

The Supreme Court sits during whole year with exception of period between Fri. before Christmas Day and first working day after New Years Day. Certain matters may come before court during vacation periods without consent, and most interlocutory matters may come before court with consent of litigants.

Court of Appeal.

An appeal to Court of Appeal from Supreme Court must be brought and served within 30 days commencing on day after order appealed from is pronounced or within any other period specified by enactment. Interlocutory appeals require leave to appeal to be applied for within 30 days. Time starts to run on day after pronouncement. Cross appeals must be brought within 15 days after service of notice of appeal or notice granting leave to appeal.

Security for costs of appeal may be ordered. On appeal from money judgment appellant may be ordered to pay amount of judgment into court or post bond in lieu thereof.

In many cases an appeal lies from judgment of Court of Appeal to Supreme Court of Canada in Ottawa.

Executions may be stayed pending appeal on compliance with judgment or order appealed from or on security by bond or otherwise being put up to satisfaction of justice of Court of Appeal.

The hearing before Court of Appeal is on pleadings filed and evidence taken on trial in court below. Pleadings, exhibits and affidavits, and orders and judgments shall be bound in appeal books.

Family Division.

See subhead Provincial Court, infra.

Provincial Court.

Provincial Court Act (c. 379) establishes Judicial Council to consider proposals for improving judicial services, proposed appointments, complaints of judicial misbehaviour or neglect, etc. Provincial Court may rule on Young Offenders Act and interlocutory injunctions under Divorce Act or Family Relations Act. Act sets out responsibility for salaries of judges of courts, and appointment and jurisdiction of justices of the peace. Small Claims Act (c. 430) provides that jurisdiction of Small Claims Division of Provincial Court is limited to disputes where amount claimed is $25,000 or less excluding interest and costs and Provincial Court has no jurisdiction in claims for libel, slander or malicious prosecution.

Federal Court of Canada.

See Canada Law Digest, category Courts and Legislature, topic Courts.

6.02 JUSTICES OF THE PEACE:

Are appointed by provincial government. Justices may exercise all powers and jurisdiction of judge or court when specifically authorized in writing by chief judge.

6.03 LEGISLATURE:

(Constitution Act, c. 66; see also Election Act, c. 106).

Legislative Assembly consists of 79 members elected in manner provided for by Election Act. Electoral Districts Act (c.14), comes into force on dissolution of 38th Parliament scheduled for May 12, 2008. Act revises electoral district boundaries and provides for increase in number of electoral districts to 85. Member represents electoral district in which member was elected. (c. 66, §18).

There must be a session at least once every year, so that 12 months shall not intervene between last sitting of one session and first sitting in next. (c. 66, §22).

Public Officials and Government Employees Disclosure.

Financial Disclosure Act (c. 139) requires members of legislature, cabinet, mayors, aldermen, school trustees and certain public employees to disclose their holdings (§§2 to 5). Disclosure statements filed by provincial or municipal officials are made available to public. Disclosure statements made by provincial or municipal employees are not available to public unless employee is prosecuted for failing to make or file disclosure under Act. (§§6 to 11).

6.04 REPORTS:

Decisions of courts in province are covered for years 1867-1947 inclusive by British Columbia Reports and for years 1977 to present by British Columbia Law Reports; British Columbia cases are also reported (inter alia) in Western Weekly Reports, Dominion Law Reports, Canadian Bankruptcy Reports, Reports of Family Law, and other national reports. Summaries of all written decisions since 1972 are provided in British Columbia Decisions, Civil Cases, Criminal Conviction Cases and Criminal Sentence Cases. Most decisions are available through Quicklaw on-line database service. Decisions of many boards, commissions and tribunals are also available through Quicklaw in databases for relevant subject area.

6.05 STATUTES:

Last revision of provincial statutes is Revised Statutes of British Columbia, 1996. Statutes passed at most recent sittings of Legislature are published annually.

7 CRIMINAL LAW

7.01 BAIL:

See Canada Law Digest, category Criminal Law, topic Criminal Law, subhead Bail.

7.02 CRIMINAL LAW:

Offence Act, (c. 338).

Criminal Law is Federal matter; however, various Provincial statutes and municipal by-laws create “quasi-crimes” which are regulatory in nature. Procedure applicable to these “Provincial offences” is set out in Offence Act (c. 338) and, in general, is same as that for true criminal offences under Criminal Code of Canada. Act (c. 338) does not apply to by-laws designated under Local Government Bylaw Notice Enforcement Act (S.B.C. 2003, c. 60). (c. 338, §13[3]), except in specific circumstances. (As am'd by 2008-30-41, bill 33). Change comes into force on regulation. Rules of evidence applicable at true criminal trials are also applied to trials for most “Provincial offences”. See Canada Law Digest.

Criminal Injury Compensation Act, (c. 85).

Applies only to claims filed prior to June 30, 2002. Provides compensation (lump sum or periodic) in amounts set out in Act for victims injured or killed by specified crimes, in arresting offenders, preventing commission of crimes or assisting peace officers doing so. Application must be made within one year of injury or death to Workers' Compensation Board, which may extend time for application. (§6). Prosecution of accused is not required in order for victim to apply. (§8). Awards not available for pain and suffering. (§§2[4], [4.1]).

Crime Victim Assistance Act, (S.B.C. 2001, c. 38).

Replaces Criminal Injury Compensation Act for all claims filed after June 30, 2002; overall scheme is same, except that applications are made to Director of Crime Victim Assistance.

Local Government Bylaw Notice Enforcement Act, (S.B.C. 2003, c. 60).

Bylaws prescribed under this Act may only be dealt with by bylaw notice and may not be commenced by information under Offence Act (c. 338). (S.B.C. 2003, c. 60, §4[2]). Bylaw enforcement officer may complete and issue bylaw notice if prescribed bylaw contravened. (§4[3]). Bylaw notice must contain particulars of contravention, amount of penalty, method of payment and how bylaw notice may be disputed. (§4[4]). Penalty must not exceed $500. (§6[3]). Bylaw notice must not be issued more than six months after bylaw contravention occurred. (§5).

Proposed Legislative Changes.

Sex Offender Registry Act, (S.B.C. 2001, c. 21).

Establishes registry for law enforcement, crime prevention and public safety. Applies to offenders in British Columbia who are serving sex offence sentences, subject to conditional discharge for sex offence, subject to recognizance, found not criminally responsible because of mental disorder for sex offence, charged with sex offence, or found by court to be guilty of sex offence. (§5). Offender may have personal information removed from registry where acquittal has been entered, free pardon granted, stay of proceedings entered, or where no recognizance entered into. (§7). Offender must report to registry officer. (§15). *Note:* Not yet in force. In force on day named by regulation.

8 DEBTOR AND CREDITOR

8.01 ASSIGNMENTS:

Law and Equity Act, (c. 253).

Written assignment of debt or legal chose in action, of which written notice given to debtor, transfers legal title, subject to equities arising prior to notice of assignment. (c. 253, §36[1]). Assignee may sue in his own name. Debtor or person liable may interplead or pay money into court under and in conformity with provisions of Trustee Act (c. 464) if assignment disputed by assignor or other opposing claim made (c. 253, §36[2]).

Registration.

Personal Property Security Act (c. 359) requires, subject to exceptions, when there is transfer of account, transferee to register security interest in personal property registry if transferee wishes to take advantage of registry's priority system. This system governs rights and remedies of secured parties upon default of debtor. Registration generally perfects transferee's security interest and places it within priority system according to time of registration (see topic Personal Property Security).

8.02 ASSIGNMENTS FOR BENEFIT OF CREDITORS:

See Canada Law Digest, category Debtor and Creditor, topic Bankruptcy.

8.03 ATTACHMENT:

Court Order Enforcement Act, (c. 78).

Plaintiff, judgment creditor or person entitled to enforce judgment, may on ex parte application obtain order from judge or registrar that all debts, obligations and liabilities owing, payable or accruing from third person to defendant or judgment debtor be attached subject to certain exceptions with respect to debts due. (c. 78, §3). No attachment of wages permitted prior to judgment. (c. 78, §3[4]).

8.04 BANKRUPTCY:

See Canada Law Digest.

8.05 BONDS:

Bonding Act, (c. 30).

Bond is security of any kind given to ensure performance of obligation. Bond must be payable to Minister, who holds it in trust for persons who establish rights to recover on it. (§§1, 3, 5). Claim on bond must be brought within two years following end of period during which bond was required to be maintained. (§6). Minister will return bond once it is adequately replaced or limitation period for action against bond ends and Minister is satisfied no valid claim against bond exists. (§7).

8.06 CREDITORS' SUITS:

There is no express legislation covering this subject. However, law governing rights of secured creditors is, for most part, governed by Personal Property Security Act. (c. 359). See topic 8.07 Executions, subhead Priorities; category 21 Mortgages, topic 21.01 Chattel Mortgages.

Business Practices and Consumer Protection Act, (S.B.C. 2004, c. 2, Part 7).

Repealed and replaced Debt Collection Act. Regulates debt collection practices.

Court Order Enforcement Act, (c. 78).

Provides for garnishment, reciprocal enforcement of court orders, foreign judgment registration, and post judgment execution against real and personal property.

Creditor Assistance Act, (c. 83).

Allows execution creditors and other creditors to share rateably money collected by sheriff from debtor, provided creditors' writs or certificates were in hands of sheriff at time he levied money on execution against property of debtor or within one month from time notice of levy was recorded subject to retention for contested claims and costs of levying creditor. (§§2, 3).

Debt Collection Act, (c. 92).

Repealed by Business Practices and Consumer Protection Act, S.B.C. 2004, c. 2, §212.

Debtor Assistance Act, (c. 93).

Establishes Director of Debtor Assistance, with power to assist debtors in dealing with creditors. (c. 93, §§2, 5). Director may inquire into financial status of debtor who applies for assistance under Act or in respect of whom referral has been made by court. (c. 93, §6). Contempt order may be issued against anyone refusing cooperation. (§6.1).

Fraudulent Conveyance Act, (c. 163).

Provides that if made to delay, hinder or defraud creditors and others of their remedies, disposition of property, bond, proceeding or order is void and of no effect against person or person's assignee or personal representative whose rights and obligations by collusion, guile, malice or fraud are or might be disturbed, hindered, delayed or defrauded, despite pretence or other matter to contrary.

Fraudulent Preference Act, (c. 164).

Provides remedies to creditors of insolvent person who has disposed of property with intent to defeat, hinder, delay, prejudice or defraud creditors and to give one or more creditors preference over other creditors.

8.07 EXECUTIONS:

(Court Order Enforcement Act, c. 78).

Exemptions.

See topic 8.08 Exemptions.

Writs of Execution.

Include seizure and sale, sequestration, possession, delivery and any subsequent writ that issues to give effect to these writs, and also includes warrant or other process of execution issued out of any court in province having jurisdiction to grant and issue that process. (Supreme Court Rules, R. 1[8]).

Effect.

Except as otherwise provided, all goods, chattels and effects of judgment debtor are liable to seizure and sale under writ of execution against goods and chattels. (c. 78, §55).

Time.

Writs of seizure and sale may be issued immediately upon judgment. Writs of sequestration, possession or delivery may be issued upon proof that order has not been complied with. (Supreme Court Rules R. 42[12]).

Stay of Execution.

Supreme Court may issue stay, at or after time of making order, as it sees fit. (R. 42[21]). Court of Appeal may issue, after appeal or application for leave to appeal is brought, usually upon terms of security being given for debt and costs. (Court of Appeal Act, c. 77, §18).

Duration.

Writs, if unexecuted, continue in force for one year, but may be renewed for further year. (Supreme Court Rules, R. 42[15]). Judgments must be registered against interest in land held by judgment debtor (including mortgage, lease, ownership, etc.) to be enforceable against such interest and, once registered, bind interest for two years from time of registration and may be renewed. (Court Order Enforcement Act, c. 78, §§83, 88, 91).

Execution Against Land.

Judgment may be enforced against land by first registering judgment against interest in land and then applying to court to call on judgment debtor or trustee or other person having legal estate in land, to show why lands should not be sold to satisfy judgment. (c. 78, §§86, 92[1]). If court is satisfied that land in question should be sold to satisfy judgment order reference to Registrar of court will be made. Registrar of court confirms that judgment debtor has interest in land which can be sold and establishes what other interests are on title. (c. 78, §94). Report of Registrar is then referred back to court where order is then made that interest in land be sold. (c. 78, §96). When one month has elapsed after order for sale is made sheriff may put up land for sale. (c. 78, §100). Judgment debtor or mortgagee may bid on land. (c. 78, §103). Money realized from sale of land, after deducting sheriff's fees and incidental expenses, is paid into court and distributed by Registrar to persons to whom sheriff would under Creditor Assistance Act distribute money levied under writ of execution. (c. 78, §§106, 111). Judgment creditor taking proceedings has first claim on money realized for his costs, unless good reason is found to contrary. (c. 78, §94[3]).

Execution against goods is effected by placing in hands of sheriff, after judgment, writ of execution which is sheriff's authority for seizing sufficient of goods and chattels of judgment debtor to make up amount of judgment and costs, subject to right of debtor to exempt certain personal property within two days of seizure or notice of seizure, whichever is later. (c. 78, §§55, 73).

Redemption.

Goods seized under writ of execution can be redeemed by paying to sheriff amount due together with all costs. Redemption can be made at any time before sale. (c. 78, §59).

Priorities.

When sheriff levies money upon execution against property of debtor, he must forthwith enter in book kept in his office (open to public inspection free of charge) notice stating that such levy has been made, its amount and date of entry. Money must be distributed ratably among all execution creditors and other creditors whose writs or certificates were in sheriff's hands at time of levy, or who deliver their writs or certificates to sheriff within one month from entry of notice subject to retention for contested claims and costs of levying creditor. (Creditor Assistance Act, c. 83, §§2, 3).

All persons who are at time of seizure, or within one month before levy, in employ of execution debtor have priority claim to unpaid salary or wages not exceeding three months wages or salary, over claims of other creditors. They are entitled to their share, ratably with other creditors, for residue of their claims (if any). (c. 83, §36).

Proceedings in Aid of Execution or by Way of Subpoena to Debtor.

When judgment or order has been obtained for recovery or payment of money, and order remains unsatisfied, party entitled to enforce it may examine debtor in aid of execution (Rule 42A[1]) or may issue subpoena to debtor out of court registry in order to have examiner (court, master or designated registrar) examine debtor under oath as to his income and property, debts owing to and by debtor, disposal debtor has made of any property and means debtor has, or has had, or in future may have of satisfying judgment or order (Rule 42[23], 42[26]; Small Claims Rules, R. 12). Examiner may order payment by instalments, payment by fixed date, variation or rescission of previous order, payment to registrar, creditor or creditor's solicitor or fix costs payable by debtor without assessment. (Rule 42[33]). Examiner may order committal of debtor for default of payment if it be proved that judgment debtor unreasonably refused to pay amount ordered to be paid. (Rule 42[32]).

8.08 EXEMPTIONS:

Specific personal property prescribed by Court Order Enforcement Act (c. 78, §71), exempt from forced seizure or sale by any process of law or equity (save distress for rent or sale for taxes) except when stock in trade of debtor's business or when they are taken in satisfaction of debt contracted for or in respect of identical goods or chattels. Works of art or other objects of cultural or historical significance brought into province for temporary public exhibit and that are not offered for sale are exempt from seizure or sale under any process at law or in equity except execution on judgment respecting contract for transportation, warehousing or exhibition in province of work or object. (c. 78, §§70–79). Property contributed to and existing in registered plan at least 12 months before debt being enforced became due exempt from enforcement process. (c.78, s.71.3)

See also topic 8.11 Garnishment.

Homestead Exemption.

See topic 8.12 Homesteads.

8.09 FORECLOSURE:

See topic 8.15 Liens; category 21 Mortgages, topics 21.01 Chattel Mortgages, 21.04 Mortgages of Real Property.

8.10 FRAUDULENT PREFERENCES AND CONVEYANCES:

Conveyances.

Disposition of property, bond, proceeding or order made, to delay, hinder or defraud creditors and others of their just and lawful remedies is void. Act does not apply to disposition of property for good consideration and in good faith lawfully transferred to person not having, at time of transfer to him, notice or knowledge of collusion or fraud. (Fraudulent Conveyance Act, c. 163).

Preferences.

Voluntary or collusive agreement to judgment given by person who is insolvent or unable to pay his debts in full, or knows himself to be on eve of insolvency, with intent to defeat or delay his creditors or to give one or more creditors preference, is void against creditors of that person. (Fraudulent Preference Act, c. 164, §2).

Every disposition of property made by person who is insolvent or unable to pay his debts in full or knows that he is on eve of insolvency is, if made with intent to prejudice creditors, or to give any creditor preference, void as against injured creditor. (c. 164, §3). If action is taken to impeach transaction within 60 days after any document evidencing transaction is registered or, if not registered, within 60 days after date of transaction or where debtor makes assignment for benefit of his creditors within 60 days after disposition same consequence applies without proof of intent. (c. 164, §4). “Creditor” includes surety and endorser of promissory note or bill of exchange, beneficiary of trust or other person to whom liability is equitable only. (c. 164, §1).

Disposition is deemed to give preference if creditor is placed in position to realize greater portion of his claim than could be realized for unsecured creditors out of assets left available. (c. 164, §5). If person to whom disposition of property is made has disposed of or collected property, and that disposition is invalid against creditors, proceeds may be seized or recovered in action by person who would be entitled to do so if property had remained in possession or control of debtor. (c. 164, §7).

Judgment creditor may apply to Supreme Court calling upon debtor and transferee of land or any person who has acquired interest in land to show cause why land or part thereof should not be sold to realize amount of judgment or transfer set aside and property returned or otherwise dealt with and for order that he is entitled to register judgment against interest of debtor or another person's interest. (c. 164, §9).

Sales or transfers made in good faith and for reasonable consideration made to innocent parties may be valid in proper circumstances. (c. 164, §6).

Bankruptcy.

Every conveyance or transfer of property or charge thereon made, every payment made, every obligation incurred, and every judicial proceeding taken or suffered by any insolvent person in favor of any creditor or of any person in trust for any creditor with view to giving that creditor preference over other creditors, where it is made, incurred, taken or suffered within period beginning on day that is three months before date of initial bankruptcy event and ending on date insolvent person became bankrupt, both dates included, is deemed fraudulent and void as against trustee in bankruptcy. (Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3, §95). Where creditor is related to insolvent person, period is one year. (§96).

If any such conveyance, transfer, payment, obligation or judicial proceeding has effect of giving any creditor preference over other creditors, or over any one or more of them, it is presumed to have been made, incurred, taken, paid or suffered with such intent whether or not it was made voluntarily or under pressure and evidence of pressure is not admissible to support transaction. (§95). (See also Canada Law Digest.)

Bulk Sales.

Sale of Goods in Bulk Act repealed by “Law Reform Amendment Act, 1985” S.B.C. 1985-10-11.

8.11 GARNISHMENT:

Court Order Enforcement Act, (c. 78).

In all courts debts owing to defendant or judgment debtor by third persons may be attached by plaintiff in action or judgment creditor upon ex parte application, supported by affidavit, by himself or his solicitor, showing that action is pending, amount of debt, and that it is justly due and owing, or that judgment has been rendered and is still unsatisfied, and to what amount, and that any other person is indebted to defendant or judgment debtor and is within jurisdiction of court. (c. 78, §3). Where plaintiff's claim is for debt or liquidated demand, debts owing to defendant may be attached before, as well as after judgment, money attached being paid into court pending judgment in action.

There is no procedure in British Columbia analogous to trustee process except foregoing. However, party may apply to court for order compelling debtor to execute documents, contracts, or negotiable instruments debtor refuses or neglects to process. Law and Equity Act. (c. 253, §38).

Earnings.

In all courts 70% of any wages due by employer to employee is exempt from seizure or attachment and exemption shall not be less than $100 per month for person without dependents or pro rata for shorter period, and person with one or more dependents, $200 per month or pro rata for shorter period. This does not apply to debt contracted for board or lodging. No attachment of wages is permitted prior to judgment. (c. 78, §§4-6). Employers cannot dismiss, demote or terminate employment solely by reasons of garnishing orders issued against employee. (c. 78, §27).

Wages of any civil servant in employ of provincial government on wage or salary basis are liable to attachment like any other subject of Crown. In such case, all process required to be served on garnishee shall be served on Deputy Minister of Finance or if wages usually paid elsewhere, by serving on office through which salary or wages usually paid. (c. 78, §5.3-6). It is also possible to attach wages of Federal government employees. There are numerous debts not garnishable.

8.12 HOMESTEADS:

Preventing Conveyance by Spouse.

Spouse or person's spouse on person's behalf, may, by statutory declaration, accompanied by affidavit, make application to Registrar for entry on Register that homestead is subject to this Act. (Land [Spouse Protection] Act, c. 246, §2). Entry on register will prevent spouse holding title from disposing of such land to any other person during lifetime of husband or wife without written consent of said spouse. (c. 246, §3). Where spouses living apart at time of death of his/her spouse under circumstances disentitling alimony, no life estate to vest in surviving spouse, nor shall surviving spouse take any benefit under Act. (c. 246, §5). This Act ceases to apply on decree of dissolution or nullity of marriage. (c. 246, §6).

8.13 INSOLVENCY:

See Canada Law Digest, category Debtor and Creditor, topic Bankruptcy.

8.14 LEVY:

See topic 8.07 Executions.

8.15 LIENS:

Lien rights may be divided into three categories, Common Law, which is generally only possessory in nature, Equitable and Statutory. Common law liens may arise in three ways: by agreement; by trade usage or custom; or by operation of law. Examples of common law liens, subject to judicial decisions, are attorney's lien (see category 19 Legal Profession, topic 19.01 Attorneys and Counselors), banker's lien, stockbroker's lien, accountant's lien, etc. Personal Property Security Act (c. 359) provides that lien on goods that arises as result of provision, in ordinary course of business, of materials or services in respect of goods, has priority over perfected or unperfected security interest unless lien arises under enactment that gives priority to security interest. (§32). Equitable liens, which do not require possession, arise to secure performance of obligation or payment of debt and prevent unjust enrichment. Statutory liens are as follows:

Repairer's Lien.

There is possessory lien on chattels (Repairers Lien Act, c. 404) for money, skill or materials bestowed on chattels and in case of nonpayment within 90 days, chattels may be sold to satisfy lien after two weeks advertisement in newspaper (c. 404, §2). Special provisions exist for lien to continue on motor vehicles, boats and aircraft notwithstanding surrender of possession. (c. 404, §3[1]). Lien will cease after expiry of 21 days unless it is registered in Personal Property Security Registry. (c. 404, §3[2]). Lien expires 180 days from date of registration in Personal Property Registry, unless possession has been retaken or court orders extension and after that period (a) lien ceases to exist, and (b) registration of financing statement is no longer effective. (c. 404, §4[1]).

Builders' Liens, (Builders Lien Act, S.B.C. 1997, c. 45).

Worker, contractor or sub-contractor who does or causes to be done any work upon, or supplies materials for, improvement has lien for price of work or material, or both on interest of owner in improvement, improvement itself, land in, on or under improvement and material delivered to or placed on land. (§2).

Trust Funds.

Funds received by contractor or sub-contractor are trust funds in his hands for benefit of materialmen and workers among others. Until all of beneficiaries of fund are paid contractor or sub-contractor must not appropriate any part of that fund to that person's own use or to use not authorized by trust. (S.B.C. 1997, c. 45, §10).

Liens must be registered by filing claim of lien in land title office, in proper form (currently form 57). (S.B.C. 1997, c. 45, §15). If certificate of completion has been issued with respect to contract or subcontract, claims of lien of contractor or subcontractor and anyone claiming thereunder must be filed within 45 days of issue of certificate of completion. Any other claim or lien must be filed within 45 days after head contract has been completed, abandoned or terminated or, if there is no head contract, date on which improvement has been completed or abandoned. (S.B.C. 1997, c. 45, §20).

Action to enforce lien and certificate of pending litigation in land title office must be commenced within one year from filing of claim. (S.B.C. 1997, c. 45, §33).

Holdback.

Owners or persons primarily liable under contract must hold back greater of 10% of value of work or, 10% of amount of any payment made on account of contract or subcontract price (S.B.C. 1997, c. 45, §4), for 55 days from date certificate of completion was issued on contract or subcontract, or, if no certificate of completion was issued, date on which head contract or improvement was completed, abandoned or terminated and, subject to some exceptions, this amount may be paid out to discharge all liens after expiry of the 55 days (S.B.C. 1997, c. 45, §8).

Unpaid Wages Lien.

Employees entitled to wages for labour or services may apply for determination under Employment Standards Act (c. 113, §§74 and 87); unpaid wages so certified constitute lien, charge and secured debt in favour of director against all real and personal property of obligor in priority to all other claims or rights including those of Provincial Crown and any security interest under Personal Property Security Act (c. 359, §87) and save for money advanced under valid prior registered mortgage or debenture interests charging land prior to registration of claim for unpaid wages (c. 113, §87).

Woodworkers' Liens, (Woodworker Lien Act, c. 491).

Persons performing any labour or services in connection with logs or timber in province have lien thereon and on lumber manufactured therefrom for amount of wages due them, taking priority over all charges except Crown liens or third party tolls thereon. (c. 491, §§1, 2). Such lien must be filed within 30 days after last day such labour or services are performed. Subsequent action must be commenced in Supreme Court within 30 days after filing lien, or after expiry of period of credit. (c. 491, §§3-4). In specified circumstances when lien is imperilled by imminent removal of logs or timber from jurisdiction or loss of identifiability of logs and timber by cutting into lumber, writ of attachment may be issued and logs seized and held thereunder, pending judgment, unless security is given or amount claimed is paid into court; failing payment logs or timber may be sold to satisfy lien. (c. 491, §§9, 13, 20).

Lien on cattle fed or cared for by another. (Livestock Lien Act, c. 272, §2).

Tugboat worker's lien for services rendered in towage of logs or timber products. (Tugboat Worker Lien Act, c. 466, §4).

Warehouse Lien.

For goods deposited with him for storage. (Warehouse Lien Act, c. 480, §2). Notice must be given to owner and anyone who has registered financing statement under Personal Property Security Act and to person liable as debtor for the charges for which the lien exists (c. 359), before warehouseman can sell goods (Warehouse Lien Act, c. 480, §4).

Tax liens may be imposed under provincial taxation statutes.

Unpaid Seller's Lien.

Unpaid seller of goods in possession entitled to retain possession until payment notwithstanding he is bailee for buyer and goods not sold on credit, sold on credit, but terms of credit have expired, or buyer becomes insolvent. (Sale of Goods Act, c. 410, §44). Remedies for unpaid seller of goods on conditional sale are governed by Personal Property Security Act (c. 359) where transaction, in substance, creates security interest. Unpaid seller of goods on conditional sale may, in certain instances, seize or recover possession of goods or sue, except in case of consumer goods where debtor has paid two-thirds of sale price, in which case, seizure is not available. (c. 359, §58). See category 3 Business Regulation and Commerce, topic 3.23 Sales, subhead Conditional Sales in PPSA.

8.16 MECHANICS' LIENS:

See topic 8.15 Liens.

8.17 PLEDGES:

The law relating to pledges is in general governed by common law rules.

Pawnbrokers Act (c. 350) repealed 2002.

8.18 RECEIVERS:

When Appointment Proper.

Receiver or receiver-manager may be appointed under instrument or by court. (Law and Equity Act, c. 253). Court has power to appoint receiver in action to enforce floating charge debenture, foreclosure action, partnership action etc., on application of interested person under security agreement or in any other case where court is of opinion that property in question will be better conserved or administered by court than by litigants. Also, judgment creditor who has exhausted his legal remedies may apply for appointment of receiver by way of equitable execution.

Receiver of future earnings of judgment debtor will not be appointed.

Status, Duties and Powers.

Receiver-manager appointed under instrument is officer of corporation over whose assets appointment extends and not agent of person who appointed him, and he stands in fiduciary relationship to corporation. Receiver or receiver-manager appointed by court is officer of court and not of corporation and must act in accordance with directions of court; he cannot be sued in separate action in respect of acts done as receiver without leave first being obtained.

Bond.

Receiver is generally called upon to put up bond when he is appointed.

Compensation.

Receiver or receiver-manager is entitled to remuneration; frequently on time basis but ultimately on quantum meruit basis.

Effect of Receivership.

Appointment of receiver does not change owner's interest or title in property. Affairs of owner have simply been taken out of his hands and entrusted to receiver or receiver-manager.

Actions.

Receiver appointed in court should obtain leave before suing or he may be forced to pay costs himself.

8.19 REDEMPTION:

See topics 8.07 Executions, Liens; categories 21 Mortgages, topic Mortgages of Real Property; Taxation, topic Administration.

8.20 STAY OF EXECUTION:

See topic 8.07 Executions; category 6 Courts and Legislature, topic 6.01 Courts.

8.21 SUPPLEMENTARY PROCEEDINGS:

See topic 8.07 Executions.

8.22 USURY:

See Canada Law Digest, category Business Regulation and Commerce, topic Interest.

9 DISPUTE RESOLUTION

9.01 ALTERNATIVE DISPUTE RESOLUTION:

Mandatory Dispute Resolution.

Following Statutes contain provisions transferring certain disputes to alternative dispute resolution:

Bee Act, R.S.B.C. 1996, (c. 29).

Disputes pertaining to application for certificates of registration under Act shall be resolved by arbitration in accordance with Commercial Arbitration Act. (c. 55). Arbitrator may make recommendation to minister that is binding. (§5[3]).

British Columbia Railway Act, (c. 36).

(34[4]). If damage is claimed or property is sought to be taken by company under s. 34 or 36, then arbitration provisions of BCRA apply.

Labour Relations Code, (c. 244).

See category 11 Employment, topic 11.02 Labour Relations.

Land Act, (c. 245).

Disputes relating to price payable for land acquired by one owner from another through resurvey under Act may be resolved by binding arbitration, and Commercial Arbitration Act, (c. 55) (see subhead Voluntary Dispute Resolution, infra) shall apply. (§91).

Mineral Tenure Act, (c. 292).

If Chief Gold Commissioner appointed under Act is unable to settle disputes regarding occupation and use of land, Mediation and Arbitration Board under Petroleum and Natural Gas Act, (c. 361) has, on application by party to dispute, authority to settle issues in dispute. (s.10[4], 6[v]).

In arbitration involving conflict between rights acquired under Act and rights acquired under Land Act, Mediation and Arbitration Board must take into account which of rights was applied for first and, unless injustice would result, must give holder of those rights due priority in its consideration of dispute between parties. (§13[6]). If Minister responsible for administration under Park Act expropriates under §11 of Park Act (c. 344), he shall pay compensation, which shall be settled by arbitration if parties cannot agree. Arbitration shall take place before single arbitrator who has prescribed qualifications and is to be appointed by Minister. (S.B.C. 1998, c. 10, §1, ``17.1").

Mining Right of Way Act, (c. 294).

In default of agreement on compensation payable by recorded holder who wishes to use existing road and owner or operator of road, on application of one party, mediation and arbitration board has jurisdiction to settle issue and terms of settlement are binding on parties. (§6[4]).

Local Government Act, (c. 323).

Following disputes under Act shall be resolved by arbitration: (1) Disputes regarding regional growth strategies may be resolved by arbitration (§860, s.939[9]); (2) disputes regarding compensation for heritage designation where parties have failed to reach agreement (§969); and (3) disputes in relation to service withdrawal (§813.13).

Pension Benefits Standards Act, (c. 352).

Every pension plan must contain provision for final and conclusive settlement by arbitration or any other method for certain types of disputes arising under plan, as enumerated in §62 of Act. Specific requirements of such provision are set out specifically in Act, as well as particular mechanisms that may be followed for arbitrations.

Railway Act, (c. 395).

Disputes pertaining to compensation payable for land expropriated by railway company pursuant to Act shall be resolved by court. (§53).

Residential Tenancy Act, (S.B.C. 2002, c. 78).

Replaces c. 406. Landlord and tenant may resolve number of types of disputes by dispute resolution except as restricted by Act. (§58). Aspects of process set out in Part 5 of Act. Commercial Arbitration Act, (c. 55) (see subhead Voluntary Dispute Resolution, infra) does not apply.

Small Claims Court Rules, (Reg. 261/93, R. 7).

All actions commenced in Small Claims Court except for motor vehicle accident cases where only liability for property damage is in dispute, include mandatory Settlement Conference, which is set by Registrar. Settlement Conference must be attended by all parties to action, with or without counsel, and presiding judge may make any order at conference for just, speedy, and inexpensive resolution of claim, including order giving judgment in matter. Rule 7 stipulates certain instances where defendant does not have to attend. Rule 7.2 mandates mediation in some cases for claims up to $10,000. Rule 7.3, a party may initiate mediation for Claims between $10 000 and $25 000. Rule 7.4, Mediation of Claims for More Than $5 000 or for Damages for Personal Injury (Pilot Project—Robson Square Small Claims Registry). If no resolution under Mediation under Rule 7.3 or 7.4, claim must be set for trial conference under Rule 7.5 (Pilot Project—Robson Square Small Claims Registry). Rule 9.1, Simplified Trials for Claims up to $5 000 (Pilot Project—Robson Square and Richmond Small Claims Registries) and Rule 9.2, Summary Trial for Financial Debt (Pilot Project—Robson Square Small Claims Registry).

Vancouver Charter, (S.B.C. 1953, c. 55).

Compensation payable by council to property owner for removal or relocation of electrical works in course of exercise of council's powers relating to regulation, placement or maintenance of any electrical works, may be determined by arbitration pursuant to Commercial Arbitration Act (R.S.B.C. 1996, c. 55). (§314). Disputes regarding compensation for heritage designation may be determined by binding arbitration. (§595[4]). Arbitration available for damages arising upon withholding of permit pending adoption of bylaw. (§570[3]).

Water Act, (c. 483).

Claim against improvement district arising out of construction or maintenance of dike or out of diversion of water for reclamation or drainage of land in improvement district must be determined by arbitration pursuant to Commercial Arbitration Act, (c. 55). (§47).

Voluntary Dispute Resolution.

Various mechanisms and services for alternative resolution of disputes are offered in British Columbia.

British Columbia Arbitration and Mediation Institute.

Membership of almost 300 arbitrators and mediators with backgrounds in various professions and trades. Also offers training for members to help them become chartered arbitrators or chartered mediators. Institute offers public seminars, provides advice on alternative dispute resolution and recommends persons to arbitrate or mediate in various fields of dispute.

British Columbia International Commercial Arbitration Centre.

Centre provides professional mediators and arbitrators for any type of international and domestic commercial/business dispute. It also administers cases under different rules and procedures for international commercial arbitration, domestic arbitration and commercial mediation. Centre provides following services to Canadian and foreign governments and businesses and their legal counsel operating domestically and internationally: information and advice on alternative dispute resolution, procedural rules for arbitration, mediation and other dispute resolution methods and model contract clauses and administrative services.

Centre has developed Rules for International Commercial Arbitration and Conciliation Proceedings, which may be used by parties wishing to resolve their dispute in British Columbia, even if they do not wish to use Centre. These Rules are based upon 1976 UNCITRAL Arbitration Rules and 1980 UNCITRAL Conciliation Rules, although they are adapted to suit particular legislation in British Columbia governing International Arbitration, International Commercial Arbitration Act (see topic 9.02 Arbitration and Award).

Commercial Arbitration Act and International Commercial Arbitration Act.

See topic 9.02 Arbitration and Award.

Alternative Supreme Court Proceedings.

Supreme Court Rules, Reg. 221/90, as amended by Reg. 95/96, offer following procedures designed to expedite actions and facilitate settlement: (1) Summary Trial or “mini-trial” conducted upon affidavit evidence, evidence from examination for discovery, answer to interrogatories, and admissions under Rule 31. Judge may decide particular issues or case in its entirety, or make other orders to expedite proceedings. (R. 18A). (2) Special Case, where parties may, upon agreement, put any issue of fact or law to court to be decided. Court may also provide relief based upon its decision if parties consent. (R. 33). (3) Points of Law arising from pleadings may be put before court by requisition, either of its own accord, or by party consent. (R. 34). (4) Pretrial Conferences may be ordered by court or requested by parties. Solicitors or parties themselves must attend, and court must examine certain issues at pretrial conference, as set out in R. 35. These include simplifying issues, amendments and admissions, quantums, fixing dates, or any other issues that aid in disposition of case. Court may make many orders, including that parties attend mini-trial or settlement conference. Notice to mediate process under Law and Equity Act, c. 253, Reg. 4/2001 allows party to Supreme Court action to require other parties to attend mediation. Parties can go to trial if mediation fails. Application for exemption from requirement allowed. Pre-mediation conference held if action sufficiently complex, in mediator's opinion. Participants must complete fee declaration disclosing costs of mediation and payment. Unless otherwise expressly provided for, costs of mediation must be paid equally by participants. Mediation concluded when all issues resolved or terminated by mediator. (s.38).

9.02 ARBITRATION AND AWARD:

Commercial Arbitration Act, c. 55 applies to “arbitration agreements” (§2), including those in commercial agreements. “Arbitration agreement” is defined as written or oral term of agreement between two or more persons to submit present or future disputes between them to arbitration but does not include agreement to which International Commercial Arbitration Act, c. 233, applies. May be by any mode agreed upon by parties; otherwise single arbitrator. Where agreement provides for appointment for even number of arbitrators, arbitrators may appoint additional person to act as umpire. (§4). In case of failure to appoint arbitrator within seven days notice to do so, Supreme Court Judge must appoint one on application of party that serves notice. (§17[2]).

Powers of Arbitrators.

Arbitrators may order production of documents, admit evidence and information on oath, subpoena witnesses, make interim award, call witness on own motion, and make order for specific performance for contract for sale of goods.

Enforcement of Award.

Award may, with leave of Court, be enforced in same manner as judgment or order of Supreme Court. (s.29).

Award Final.

Award is final and binding on all parties to award. (§14).

Extent of Judicial Intervention.

Award may be set aside by Supreme Court or remitted to Arbitrator for reconsideration, if it has been improperly procured or there has been arbitral error. Arbitral error consists of one or more of following: (a) corrupt or fraudulent conduct; (b) bias; (c) exceeding arbitrator's powers; (d) failure to observe rules of natural justice. (§30). Party may appeal award to Supreme Court by consent of all parties or with leave of court. (§31). No arbitral proceeding, order, ruling or award can be questioned, reviewed or restrained except as provided for in Act. (§32).

International Arbitration.

International Commercial Arbitration Act, c. 233 applies to all international commercial arbitrations, subject to any agreement in force between Canada and any other state, and which applies in British Columbia. Arbitration is international if: (a) parties have at time of agreement places of business in different states; (b) any of following is outside state in which parties have place of business: (i) place of arbitration under agreement, (ii) place where substantial part of obligations to be performed, or (iii) place where subject of dispute is most closely connected; or (c) parties agree that subject of arbitration agreement relates to more than one state. Provinces and territories of Canada must be considered one state. (§1).

10 DOCUMENTS AND RECORDS

10.01 ACKNOWLEDGMENTS:

In British Columbia affidavits may be taken by Commissioners for Taking Affidavits for British Columbia. (Evidence Act, c. 124, §59). Commissioners for Taking Affidavits are: all practising lawyers as defined in Legal Profession Act (S.B.C. 1998, c. 9, §1[1]); notaries public; B.C. court judges; justices of peace; registrars; deputy registrars; district registrars; deputy district registrars of Supreme Court; local government corporate officers and their deputies (Community Charter, S.B.C. 2003, c. 26); secretary treasurers of board of school trustees; directeur général of francophone education authority; coroners; government agents; deputy government agents; other classes of employment prescribed by Attorney General (c. 124, §60); for purpose of exercising powers and performing duties of their office only, members of RCMP who are peace officers located in B.C.; designated provincial and municipal constables defined in Police Act, c. 367, and other officers defined in Police Act and designated by regulation (c. 124, §60.1); for purpose of Adoption Act, persons who have been delegated powers or duties by director of adoption, except administrators as defined in §1 of Act, (c. 124, §61[1][a]); and persons who have been delegated powers or duties by director or minister under Child, Family and Community Service Act, (c. 46), Employment and Assistance Act, (S.B.C. 2002, c. 40), Child Care Subsidy Act, (c. 26), Child Care BC Act, (S.B.C. 2001, c. 4), or Employment and Assistance for Persons with Disabilities Act, (S.B.C. 2002, c. 41). (c. 124, §61).

Outside British Columbia oaths, affidavits, affirmations or statutory declarations may be taken by any of following: notary public acting within territorial limits of notary's authority where certified under notary's hand and official seal; judge or other court officer authorized to administer oaths; mayor of any city, borough or town where certified under seal of city, borough, or town; officer of British, Commonwealth or Canadian diplomatic or consular services exercising officer's functions in any country other than Canada; Canadian Government Trade Commissioner or Assistant Trade Commissioner in any country other than Canada; or Commissioner authorized to take such affidavits by laws of British Columbia. (c. 124, §63).

Others: Commissioned officers of Canadian naval, military and air forces on active service inside or outside Canada and Agents General for British Columbia. (c. 124, §64).

Proof of Execution.

Where transferor signature is certified by officer, officer's signature constitutes certification that: (a) transferor appeared before officer and acknowledged that transferor is person named in instrument as transferor; and (b) signature witnessed by officer is signature of person who made acknowledgment. (Land Title Act, c. 250, §43).

Same model applies to execution of instruments by corporation or by individual or corporate attorney on behalf of individual or corporate principal. (§§43-46). Each change to authority of attorney under enduring power of attorney, or true copy of change certified under §51(4) of Land Title Act, must be filed with registrar. (§47.1). Officer certification covers circumstances where transferor cannot read English or sign name in English characters; officer's signature certifies that, in addition to (a) and (b) above, contents of instrument have been communicated and understood. (§47).

Officer certification is required in all cases except where Registrar considers it reasonable to accept affidavit of execution instead on being satisfied that (1) facts, and (2) testimony by affidavit of other person stating belief that signature in instrument is signature of named transferor, support such conclusion. (§49).

Forms.

(Reg. 53/90).

INDIVIDUAL TRANSFEROR

EXECUTION(S):

	Execution Date			
	Y	M	D	
Officer Signature(s)				Transferor(s) Signature(s)
	89	3	13	
“Ian Jack Smith” Ian Jack Smith 100 Burrard Street Vancouver, B.C.				“John Peter Doe” John Peter Doe

V6C 1A1
Solicitor

CORPORATE TRANSFEROR

EXECUTION(S):

Officer Signature(s)

"Jim Joe Brown"

Jim Joe Brown
2500 West Georgia Street
Vancouver, B.C.
V7C 2P4
Notary Public

Execution Date

Y	M	D
89	3	26

Transferor(s) Signature(s)

ABC Limited by its authorized signatory

"John Lee Doe"
John Lee Doe

EXECUTION BY INDIVIDUAL ATTORNEY

EXECUTION(S):

Officer Signature(s)

"Sue Mary Love"

Sue Mary Love
2727-1499 4th Avenue
Prince George, B.C.
V2C 4Y9
Solicitor

Execution Date

Y	M	D
89	3	13

Transferor(s) Signature(s)

JOHN LEE DOE by his Attorney JOHN JOE SMITH

"John Joe Smith"
D.F. 667801

EXECUTION BY CORPORATE ATTORNEY

EXECUTION(S):

Officer Signature(s)

"Jane Sue Brown"

Jane Sue Brown
1700-1250 2nd Avenue
Kamloops, B.C.
V9C 9Y5
Solicitor

Execution Date

Y	M	D
89	3	13

Transferor(s) Signature(s)

JOHN LEE DOE by his Attorney ABC LIMITED by its authorized signatory JOHN JOE SMITH

"John Joe Smith"
John Joe Smith

LACK OF CERTIFICATION

EXECUTION(S):

Officer Signature(s)

SEE AFFIDAVIT OF EXECUTION

Execution Date

Y	M	D
89	3	13

Transferor(s) Signature(s)

"John Charles Doe"
John Charles Doe

10.02 AFFIDAVITS:

Formal Requirements.

Affidavit must be expressed in first person, must show name, address and occupation of deponent, must be signed by deponent (or marked if deponent cannot sign), and must be divided into paragraphs numbered consecutively. If deponent is party or solicitor, agent, director, officer or employee of party, affidavit must so state. (Rules of Court, R. 51[2]). Affidavit, other than affidavit of service or of delivery, must be endorsed in top right-hand corner with: (a) Initials and surname of deponent; (b) in sequential number of affidavit by deponent in same proceeding; and (c) date on which affidavit made. (Rules of Court, R. 51[2.1]). All alterations in affidavit must be initialed by person before whom affidavit is sworn; if any alterations have not been initialed, leave of court must be obtained before affidavit is used. (Rules of Court, R. 51[9]). True reproductions of all documentary exhibits not exceeding five pages must be attached. Other exhibits need not be filed, but must be made available for use of court and for prior inspection of party. (Rules of Court, R. 51[8]). Affidavits filed in Supreme Court must include name of commissioner before whom affidavit is sworn.

Duty of Person Before Whom Affidavit Sworn.

Must sign jurat and identify any exhibits referred to in affidavit by signing certificate in form below. If deponent appears unable to read affidavit, jurat must be certified that affidavit was read to deponent who understood contents. If deponent appears not to understand English language, affidavit must be interpreted to deponent by competent interpreter and endorsement certified on affidavit in form below. (Rules of Court, R. 51[3], [5], [6], [7]).

Contents.

Statements made on information and belief may be included in affidavit in interlocutory application or when leave of court is obtained, provided source of information is given. All other affidavits may state only what deponent would be permitted to state in evidence at trial. (Rules of Court, R. 51[10]).

Persons Who Can Swear Affidavits.

In British Columbia.

See topic 10.01 Acknowledgments, subhead In British Columbia.

Outside British Columbia.

See topic 10.01 Acknowledgments, subhead Outside British Columbia.

Others.

See topic 10.01 Acknowledgments, subhead Others.

Use of Affidavits.

Affidavits are normally used to support or oppose interlocutory applications, but with leave of court obtained either before or at trial, party may present affidavit evidence to prove evidence in chief of witness at trial; party seeking to tender evidence by affidavit must furnish copy of affidavit to all parties of record at least 30 days before application of party, unless court orders otherwise; deponent is subject to cross-examination. (Rules of Court, R. 40[44], [45], [45.1]).

Affidavit should have heading setting out name of court, action number, registry where action was commenced and style of proceeding.

Following jurat clause may be used to witness affidavit sworn in U.S.:

Sworn before me. . . ., a notary public in and for. . . . County, in the State of. . . ., U. S. A., at the City of. . . . in the State of. . . ., this. . . . day of. . . ., 20. . . In testimony whereof have hereunto set my hand and affixed the seal of my office.

Notary Public in and for. . . . . .County, in the State of,. . . . . ., U. S. A.My Commission Expires. . . . . [date].

Exhibit Certificate (Rules of Court, R. 51[7]).

This is Exhibit. . . . referred to in the affidavit of. . . . made before me on. . . . [date].

....

Form 60 (Rule 51 (2) and (6))

[Style of Proceeding]

AFFIDAVIT

I, [*name, address, and occupation of deponent*], **MAKE OATH (OR SOLEMNLY AFFIRM) AND SAY THAT:**

1. . . .

2. . . .

3. . . .

SWORN (OR AFFIRMED) BEFORE)

ME in the [city etc.] of ____________)

in the Province of British Columbia)

on this ______ day of [month], [year].)

) ______________________

________________________________)

A commissioner for taking affidavitsfor British Columbia

ENDORSEMENT OF INTERPRETER

[where applicable]

I, *[name, address and occupation]*, certify that:

1. I have a knowledge of the English and “[INSERT LANGUAGE OF DEPONENT]” languages and I am competent to interpret from one to the other.

2. I am advised by the deponent and verily believe that the deponent understands the “[INSERT LANGUAGE OF DEPONENT]” language.

3. Before the affidavit on which this endorsement appears was made by the deponent I

correctly interpreted it for the deponent from the English language into the "[INSERT LANGUAGE OF DEPONENT]" language and the deponent appeared to fully understand the contents.

Dated____________________

____

Interpreter

Alternative to Affidavit.

No statutory provision.

10.03 COMMISSIONS TO TAKE TESTIMONY:

See category 5 Civil Actions and Procedure, topic 5.09 Depositions and Discovery.

10.04 NOTARIES PUBLIC:

(Notaries Act, c. 334).

Canadian citizen or permanent resident may apply to Supreme Court under applicable rules to be enrolled as notary public. (§5). Number of notaries is limited by district (§4) and applicants may be required to pass examination (§6). Lieutenant Governor in Council may appoint certain other persons notaries during pleasure. (§15). Members of Law Society of British Columbia are ex officio notaries public. (§16).

Powers and Duties.

Notary may: (a) Draw instruments relating to property which are intended, permitted or required to be registered, recorded or filed in registry or other public office, contracts, charter parties and other mercantile instruments in province; (b) draw and supervise execution of wills of following classes: (i) wills by which testator directs his estate to be distributed immediately on death, (ii) wills that provide that where beneficiaries named in will predecease testator there is gift over to alternative beneficiaries vesting immediately on death of testator, (iii) wills that provide for assets of deceased to vest in beneficiary or beneficiaries as members of class not later than date when beneficiary or beneficiaries or youngest of class attains majority; (c) attest or protest all commercial or other instruments brought before him for attestation or public protestation; (d) draw affidavits, affirmations or statutory declarations that may or are required to be administered, sworn, affirmed or made by law of province, another province of Canada, Canada or another country; (e) administer oaths; (e.1) act as a consultant under sections 9 (2) (a) (ii), 12 (1) (c), 26 (1) (c) (ii) and 29 (1.1) (b) of the *Representation Agreement Act* if the member qualifies as a member of a class of persons prescribed under section 42 (2) (a) of that Act, and (f) perform duties authorized by Act of Legislature. (§18).

Discipline.

§26 creates discipline committee and §20 provides for Special Fund for purpose of reimbursement of pecuniary loss sustained by reason of misappropriation or wrongful conversion by member in capacity as member. §21 provides for annual increase of Special Fund.

10.05 RECORDS:

Ownership of land must be registered in land title office in district in which land is situated. Registration is under Torrens system and, except inter partes, legal title is not acquired until actual registration. (Land Title Act, c. 250, §20). Charges take priority according to time of registration subject to contrary intention appearing from instrument. (§28). Judgments, pending litigation and caveats may be registered. (§§216, 217). All deeds are deposited in title office and retained there. Large majority of titles are now Torrens titles, although some older titles still remain under old system but on any transfer thereof are required to come in under new system.

Where person appears on title as registered owner, that is conclusive evidence, subject to certain exceptions, that title is as shown on register, and charge against land must be registered in order to constitute notice. (§§23 and 29 Land Title Act).

See also category 23 Property, topic 23.14 Real Property.

Vital Statistics.

Provision is made for registration of births, deaths, marriages and adoptions with Vital Statistics Registrars and in some cases with Chief Executive Officer, Victoria, British Columbia. Certificates generally are obtained from Chief Executive Officer. (c. 479). Services may be ordered online at http://www.vsigov.bc.ca/ecos/, by telephone at (888)876-1633 or (250)952-2557, or by mail.

Fee for each certificate issued is $27. Fee of $27 for search of records (each three-year period). Fee of $50 for certified photocopy of birth, death or marriage. Fee of $60 is charged when 24 hour search service is offered or requested. Courier costs are extra. General enquiries should be directed to Vital Statistics Agency in Victoria. Telephone: (250)952-2681. Fax: (250)952-2527. Mailing address: Vital Statistics Agency, P.O. Box 9657, Stn Prov Govt, Victoria, BC V8W 9P3. Internet address: http://www.vs.gov.bc.ca. In person during public office hours of 8:30 a.m. to 4:30 p.m., Mon. to Fri., at following locations: VICTORIA - 818 Fort Street, Telephone: (250)952-2681, Fax: (250)952-2527; VANCOUVER - 605 Robson Street, Room 250, Fax: (604)660-2645; KELOWNA - 1475 Ellis Street, Room 101, Fax: (250)712-7598.

See also category 21 Mortgages, topic 21.01 Chattel Mortgages.

10.06 SEALS:

Seals not generally necessary, but use advisable. Contract under seal may not need consideration. Corporation may by instrument in writing under its corporate seal, empower person, in respect of specified matter or purpose, as its attorney, to execute deeds or documents on its behalf. (Power of Attorney Act, c. 370, §6[1]).

10.07 VITAL STATISTICS:

See topic 10.05 Records.

11 EMPLOYMENT

11.01 EMPLOYER AND EMPLOYEE:

See topic 11.02 Labour Relations.

11.02 LABOUR RELATIONS:

Minister of Labour and Citizens' Services as general executive officer of Provincial Ministry of Labour and Citizens' Services has general jurisdiction over all labour matters. Employment Standards Act, c. 113, consolidates all labour standards legislation administered by Employment Standards Branch of Ministry of Labour and Citizens' Services, website: http://www.labour.gov.bc.ca/esb. Describes new changes and contains forms which can be downloaded. Labour Relations Code, (c. 244), establishes Labour Relations Board. Board has Chair, Vice Chairs, and equal number of employer and employee representatives. (§115[1]). Board is divided into two divisions, Mediation Division and Adjudication Division. (§116). Board has and must exercise exclusive jurisdiction to hear and determine application or complaint under

Code and to make order permitted. This includes exclusive jurisdiction in respect of matters under Code or Regulations, application for regulation, restraint or prohibition of person or group of persons from: ceasing or refusing to perform work or to remain in relationship of employment, picketing, striking or locking out, or communicating information or opinion in labour dispute by speech, writing or other means. (§136). Decisions or orders in respect of which Board has jurisdiction are not open to question or review in any court on any grounds (§138). Public service employees are subject to provisions of Public Service Labour Relations Act, c. 388.

Hours of Work.

Employer must pay overtime wages if employer requires or, directly or indirectly allows employees to work over eight hours a day or 40 hours a week, unless employee working under averaging agreement pursuant to c. 113, §40. Averaging agreements permit averaging of work over up to four weeks. (c. 113, §37). “Overtime wages” means wages employee is entitled to receive under §§37(4), (5), (6), or 40 of c. 113. Employer must ensure that employee working split shift completes shift within 12 hours of starting work. (c. 113, §33). Despite any agreement, employer must not require, or directly or indirectly allow employee to work excessive hours or hours detrimental to employee's health or safety. (c. 113, §39). Employer and employee may apply for variance of certain requirements. (c. 113, §72). Hours of work legislation is enforced by Employment Standards Branch.

Wages.

Minimum wages throughout province are prescribed by regulations. (c. 113, §16). Minimum wage is currently $8 per hour (Reg. 396/95, §15) with provision for training wage of $6 per hour for persons with no work experience prior to Nov. 15, 2001, and less than 500 hours since then (Reg. 307/2000, §2). Minimum wages for home support worker, resident caretaker and farm workers are different. Employer and employee may apply for variance of certain requirements. (c. 113, §72). Wages must be paid at least semimonthly to employees (except wages paid into employee's time bank or vacation pay). (c. 113, §17). Wages must not be withheld to cover employee's minimum wage in another period. Where wages are unpaid, employee may make written complaint to director of Employment Standards Branch. (c. 113, §74). Once determination is made requiring payment of wages, employee may commence another proceeding to recover them only if director has consented in writing or cancelled determination. (c. 113, §82). Unpaid wages constitute lien, charge and secured debt in favour of director. (c. 113, §87). Director may file determination, settlement agreement or order of tribunal in Supreme Court registry which is enforceable in same manner as judgment of Supreme Court in favour of director for recovery of debt. (c. 113, §91).

Holidays.

Employees are entitled to annual holiday of at least two weeks after 12 consecutive months of employment and three weeks after five continuous years of employment. (c. 113, §57). Certain days made statutory holidays. Amount to be paid as vacation pay set out in c. 113, §58. See category 1 Introduction, topic Holidays, and also Canada Law Digest, category 1 Introduction, topic 1.02 Holidays.

Child Employment.

Must not employ child under 15 without written consent of child's parent or guardian; or child under 12 without director's permission, and subject to conditions set forth by director. (c. 113, §§9, 127).

Pregnancy Leave.

Pregnant employee who requests leave is entitled to up to 17 consecutive weeks of unpaid leave beginning no earlier than 11 weeks before expected birth date and no later than actual birth date and ending no earlier than six weeks after actual birth date unless employee requests shorter period. Request for leave must be given in writing to employer at least four weeks before day employee proposes to begin leave and if required by employer, be accompanied by medical practitioner's certificate. (c. 113, §50). Employer must not, because of employee's pregnancy, terminate employment or change condition of employment without employee's written consent. (c. 113, §54). See subhead Discrimination, infra.

Parental Leave.

Employee, on written request given at least four weeks before employee proposes to begin leave, and if required by employer on production of medical practitioner's certificate or other evidence of his or her entitlement to leave (c. 113, §51[3]), is entitled to parental leave without pay for up to 35 consecutive weeks for birth mother who took leave under §50, or 37 consecutive weeks for birth mother who did not take leave under §50, or 37 consecutive weeks for birth father or for adopting parent. (c. 113, §51[1]). If child has physical, psychological or emotional condition requiring additional period of parental care, employee is entitled to up to additional five weeks of unpaid leave, beginning immediately after end of leave taken under subsection 1. (c. 113, §51[2]). Subject to §§50(3) or 51(2), employee's entitlement to leave is limited to 52 weeks. (c. 113, §51[4]).

Compassionate Care Leave.

Employer must allow employee to take up to eight weeks of unpaid leave to provide care and support to family member in situations where family member is gravely ill with significant risk of death within 26 weeks. Employee must provide employer with certificate of medical practitioner regarding health of family member as soon as practicable. “Family member” includes spouse, child, parent, guardian, sibling, grandchild or grandparent of employee, and any person who lives with employee as member of employee's immediate family. (c. 113, §52.1).

Trade unions are recognized as bargaining agents for purposes of collective bargaining certified by Labour Relations Board. Condition precedent to application for certification is demonstration of support by trade union of at least 45% of employees in that unit. (c. 244, §§18 and 19). If Board is satisfied that on date it receives application for certification not less than 45% of employees in that unit are members in good-standing of trade union, board must order that representation vote be taken among employees in that unit. If, after representation vote is taken, board is satisfied that majority of votes favour representation by trade union, and unit is appropriate for collective bargaining, board must certify that trade union as bargaining agent for unit. (c. 244, §§24, 25[2]). Board may refuse to certify in case of domination of union by employer (c. 244, §31[a]), or discrimination against person contrary to Human Rights Code, c. 210, §14 (c. 244, §31[b]). Certification cancellable, if in opinion of Board, trade union has ceased to be trade union, employer has ceased to be employer of employees in unit, or if at least ten months after certification 45% of employees apply and vote for decertification. (c. 244, §33).

Professional Unions.

Professionals may be represented by unions. (c. 244, §21).

Essential Services.

If dispute poses threat to health, safety or welfare of residents of British Columbia, then Minister of Labour may direct Board to designate as essential services those facilities, productions and services that Board considers necessary or essential to prevent such threat. (c. 244, §§72 and 73).

Labour Disputes.

Every collective agreement shall be deemed to contain provisions prohibiting strikes and lockouts during its term. (c. 244, §58). Strike and lockout votes are prohibited until collective bargaining has occurred and parties have failed to reach agreement. (c. 244, §59). Every collective agreement must contain provisions governing dismissal or discipline of employees bound by agreement and for final settlement during term thereof without work stoppage by arbitration or otherwise of all differences concerning interpretation, application, operational or alleged violation of agreement. If no provision is in agreement, Act prescribes provision for above purpose. (c, 244, §84). Appeal from arbitrator to Labour Relations Board on labour matters or allegations of denial of fair hearing and to Court of Appeal on other matters of general law. (c. 244, §§99-101). Picketing is lawful in support of lawful strike, or lockout at site of lawful strike or lockout where employees perform work under control or direction of employer and where work is integral and substantial part of employer's operation. Common site picketing is restricted to locations where struck or locking-out employer is performing work, supplying goods, or furnishing services for its own benefit which, except for lockout or strike, would be performed, supplied or furnished at employer's primary location, or ally is performing work, supplying goods, or furnishing services for benefit of strike or locking-out employer. Common site picketing requires permission of Board. (c. 244, §65). Statutory definition of picketing has been struck down by courts, and no new definition had been created at time of publication. During lockout or strike authorized by this Code employer must not use replacement workers whether paid or not. (c. 244, §68).

Discrimination as to any term or condition of employment, including wages or as to union membership is forbidden on grounds of race, colour, ancestry, place of origin, political belief, religion, marital status, family status, physical or mental disability, sex, sexual orientation or age (19 years or more) or because of conviction for criminal or summary conviction charge unrelated to employment. (Human Rights Code, c. 210, §§1, 13).

Employment Standards Act.

Employer must honour employee's written assignment of wages to trade union, charitable or other organization, pension plan, family maintenance order, or insurance company for medical or dental coverage. (c. 113, §22). Wage must be paid in Canadian currency. (c. 113, §20). Notice of termination or severance pay in lieu thereof must be given in most circumstances.

Financial Statements.

Trade union members are entitled to audited annual financial statements. (c. 244, §151).

Workers' Compensation Act, (c. 492).

Workers' Compensation Board has exclusive jurisdiction over all matters in field of compensation to employees or their dependents for personal injury (including industrial diseases) or death arising out of and in course of employment, in multitude of specified industries and in such other industries or occupations as may be determined by Board. (c. 492, §96). When any industry or occupation is brought under Act by determination of Board, it may be brought under on such terms and conditions as Board deems proper.

Part I of Act, which deals with compensation to workers and dependents applies to all employers, as employees, and all workers in British Columbia except employers or workers exempted by order of Board. (c. 492, §2).

In applicable industries, compensation is payable out of accident fund administered by Board for personal injury (including disablement or death caused by occupational disease) caused by accident arising out of and in course of employment, (c. 492, §5), and compensation is neither assignable nor attachable except for money advanced by way of financial or other social welfare assistance owing to province or to municipality, or for money owing to accident fund (c. 492, §15). In these industries if employer is grossly negligent and accident results he may be ordered to reimburse accident fund, to maximum of $46,684.83. (c. 492, §73). In other industries employer is liable for defective plant or premises, and for negligence of his servants, and knowledge of employee is not bar to recovery. Worker shall not by reason only of his continuing in employment of employer with knowledge of defect or negligence which caused his injury be deemed to have voluntarily incurred risk of injury. (c. 492, §103).

Generally, in regulated industries, employee injured in course of employment may not bring action for damages against employer or worker covered under Act; in actions outside scope of Act, employee may elect within three months or longer period which board allows between action or compensation. Where employee elects compensation, Board is subrogated to his right. (c. 492, §10). Where employee brings action Board must on request of court or party to action determine anything relevant to action within Board's competence. (c. 492, §11).

Accidents Happening Out of Province.

Where accident happens while worker is working elsewhere than in province, which would entitle him or his dependents to compensation under Act if it had happened in province, worker (or his dependents) is entitled to compensation under Act if place of business of employer is situate in province, residence and usual place of employment of worker are in province, employment is such that worker is required to work both in and out of province, and his employment out of province has immediately followed his employment by same employer within province and has lasted less than six months. (c. 492, §8).

Election as to Compensation.

Where by law of country or place in which injury or occupational disease happens worker (or his dependents) is entitled to compensation in respect of it, he is bound to elect whether he will claim compensation under law of that country or place or under Part I, and to give notice of such election within three months after injury or disablement from occupational disease or, if it results in death, within three months after death unless Board otherwise allows; and if such election is not made and notice given it is presumed that he has elected not to claim compensation under this Part. (c. 492, §9).

Interjurisdictional Agreements and arrangements with Canada or appropriate authorities of other provinces may be made by Board to provide for compensation, rehabilitation and health care to workers, administrative cooperation and assistance between jurisdictions or to avoid duplication of assessments on workers' earnings. (c. 492, §8.1).

Occupational Health and Safety.

Benefits all citizens of B.C. by promoting occupational health and safety and protecting workers and other persons at workplace from work-related risks to their health and safety. (c. 492, §107).

Scale of compensation varies according to degree of disability and other circumstances and is set down within statute. (c. 492, Part 1, §§17 to 35.2).

Limitation.

Claims for compensation must be brought within three months of occurrence of injury or disablement, or if brought by dependent, within three months after death, or any longer period that Board allows. (c. 492, §10).

Unemployment compensation is Federal matter.

11.03 TRADE UNIONS:

See topic 11.02 Labour Relations.

11.04 WORKERS' COMPENSATION LAW:

See topic 11.02 Labour Relations.

12 ENVIRONMENT

12.01 ENVIRONMENTAL REGULATION:

General Supervision.

Ministry of Environment administers matters relating to environment under Ministry of Environment Act. (c. 299). Ministry exercises supervisory role under Ecological Reserve Act (c. 103), Environmental Management Act (S.B.C. 2003, c. 53), Environmental Assessment Act (S.B.C. 2002, c. 43), Fish Protection Act (S.B.C. 1997, c. 21), Greenbelt Act (c. 176), Integrated Pest Management Act (S.B.C. 2003, c. 58), Water Act (c. 483), Water Protection Act (c. 484) and Wildlife Act (c. 488).

Green Energy/Greenhouse Gas Regulation

Administered primarily through Ministry of Environment (Climate Change Branch) and BC Climate Action Secretariat, which works with government ministries to coordinate climate action and ensure public sector becomes carbon neutral. BC government has passed climate-action legislation to define the BC approach to reducing GHG emissions and preparing for the new low-carbon future.

Carbon Tax Act, (S.B.C. 2008, c. 40)

Act in force as of July 1, 2008 with some excepted sections. Act imposes tax on purchase (§8), transfer (§9), import (§10), and use (§11) of fuel. Act also imposes tax on burning combustibles to produce energy. (§12). Special rules for calculation of tax on blends of mixtures apply. (§13). Act provides for collection of tax (Part 5), and creates offences and penalties for non-compliance (Part 11), subject to appeals process (Part 8).

Environmental Management Act, (S.B.C. 2003, c. 53).

(“Act”) gives Ministry overall responsibility for any matter relating to management, protection and enhancement of environment. (§5). Includes regulating storage, disposal and transportation of hazardous wastes, regulating spill prevention and reporting activities, regulating production of solid, liquid and biomedical waste management plans, designating sewage control areas, regulating contaminated site remediation activities, issuing pollution abatement orders, and operating appeal process. *Note:* Act repeals and replaces Waste Management Act (c. 482) (“WMA”).

Pollution Control.

Act prohibits discharge of sewage or other effluent to water, of waste on land, or of contaminants to air without permit or temporary approval issued by Director; any act contrary to Director's orders prohibited. No person may use or offer to sell or package product containers or disposable products contrary to Act or regulations without permit. (§11). Act authorizes property inspection and site investigation. Director may issue pollution abatement orders and pollution prevention orders. (§§81, 83). Minister may obtain restraining order from Supreme Court. (§114).

Enforcement.

By court action in summary proceedings for offences.

Penalties.

On conviction, fine not exceeding $1,000,000 or imprisonment for not more than six months or both, or if offence is of continuing nature, fine not exceeding maximum fine for that offence for each day offence is continued. (§120). Court may, in addition, impose fine equal to profit resulting from commission of offence. (§125). On conviction for intentionally damaging environment or showing reckless disregard for lives of others, fine not exceeding $3,000,000 or imprisonment for not more than three years or both. (§126). Time limit for laying information is three years after facts on which information is based first arose, or 18 months after date that facts on which information is based came to knowledge of Minister. (§124). Court may make order imposing creative sentence in addition to other punishment imposed. (§127). Minister or Director may suspend or cancel permits or approvals. (§18).

Permits and approvals issued by Director, subject to appeal by interested persons. Cradle-to-grave manifest/permit system for storage and transport of special wastes. Permit and approval not transferable without consent. (Part 2).

Regulations.

There are currently 42 regulations under Act affecting wide range of industries and activities. Among most significant regulations are Contaminated Sites Regulation (Reg. 375/96), which in conjunction with Part 4 of the Act, allocates responsibility for remediation of contaminated sites, and Hazardous Waste Regulation (Reg. 63/88), which identifies and regulates handling of hazardous substances.

Water Act, (c. 483).

Regulates use, storage and diversion of water.

Environment and Land Use Act, (c. 117).

Establishes Environment and Land Use Committee, to foster public concern and awareness of environment and ensure that consideration is given to environmental factors in land use and resource development. Provides that Governor in Council may make regulations respecting environment or land use.

Ecological Reserve Act, (c. 103).

Permits Lieutenant Governor in Council to establish reserves of Crown land for ecological purposes. Such reserves are unavailable for disposition, and their use, development or occupation may be restricted by regulation. In 2002, amended to allow Ministry to issue permits for use or occupation of ecological reserve for scientific or educational purposes.

Greenhouse Gas Reduction (Cap and Trade) Act, (S.B.C. 2008, c. 32)

Act to come into force by regulation. Once in force, Act creates system of managing greenhouse gas emissions by creating transferrable allowance units (§6) and emission reduction units (§8).

Greenhouse Gas Reduction (Emissions Standards) Statutes Amendment Act, (S.B.C. 2008, c. 20)

Act to come into force by regulation. Once in force, Act will require waste management facilities and coal-fired electricity generating facilities to reduce or capture greenhouse gas emissions. Provides forest licences to produce bioenergy.

Greenhouse Gas Reduction (Renewable and Low Carbon Fuel Requirements) Act, (S.B.C. 2008, c. 16)

Act to come into force by regulation. Once in force, Act will require fuel suppliers to comply with prescribed renewable fuel content levels.

Greenhouse Gas Reduction (Vehicle Emissions Standards) Act, (S.B.C. 2008, c. 21)

Act to come into force by regulation. Once in force, Act will require motor vehicle manufacturers to meet set greenhouse gas emission standards.

Greenhouse Gas Reduction Targets Act, (S.B.C. 2007, c. 42)

In force as of Jan. 1, 2008. Establishes greenhouse gas emission target of 33% below 2007 levels by 2020 (§§2 and 5) and sets reporting requirements (§§4, 7, 8).

Emission Offsets Regulation (B.C. Reg. 393/2008) Sets out requirements for GHG reductions and removals from projects or actions to be recognized as emission offsets for the purposes of fulfilling the BC government's commitment to a carbon-neutral public sector by 2010.

Integrated Pest Management Act, (S.B.C. 2003, c. 58).

Prohibits application, sale and use of pesticides except under terms and conditions of permits issued by Administrator under Act.

Utilities Commission Act (c. 473) requires large scale energy projects to obtain energy project certificates, which may require environmental impact review by Utilities Commission prior to issuance.

Water Protection Act, (c. 484).

Regulates removal, use and diversion of water sources in B.C. Working in conjunction with Water Act, requires licensed approval for any large scale water use.

Drinking Water Protection Act, (S.B.C. 2001, c. 9).

Establishes province-wide and system specific drinking water quality standards and provides for increased regulation of drinking water and water supply systems. Provides for implementation of drinking water protection plans. Penalties up to $200,000 fine or 12 months' imprisonment or both. (§45).

Environmental Assessment Act, (S.B.C. 2002, c. 43).

Requires environmental assessment certificates for “reviewable projects” if they have potential for significant adverse environmental, economic, social, heritage or health effects. Regulations define “reviewable project” (§5) and includes certain industrial, mine, energy, waste, food processing, transportation and other projects. (Reg. 370/2002). Minister may also specially designate any project as “reviewable”. (§6). Penalties up to $200,000 fine or 12 months' imprisonment or both. (§43).

Fish Protection Act, (S.B.C. 1997, c. 21).

Lists rivers to be protected from dam construction, designates by regulation “sensitive streams” to protect fish populations whose sustainability is at risk because of inadequate water flow or habitat degradation (s.6 and Reg. 89/2000), and provides for recovery plans for protected fish populations in sensitive streams. (s.7) To better support “fish life processes”, streamside protection and enhancement areas are protected from residential, commercial and industrial development. (Reg. 376/2004).

Greenbelt Act, (c. 176).

Protects land which Minister considers suitable for preservation as greenbelt land, and prevents exercise of powers under other enactments that would affect greenbelt land.

12.02 FORESTRY:

(Forest Act [c. 157]; Forest and Range Practices Act [S.B.C. 2002, c. 69]; Forest

Practices Code of British Columbia Act [c. 159]; Foresters Act [S.B.C. 2003, c. 19]; Forestry Revitalization Act [S.B.C. 2003, c. 17]; Private Managed Forest Land Act [S.B.C. 2003, c. 80]; Wildfire Act [S.B.C. 2004, c. 31]).

Tenures.

Forest Act ("Act") regulates tenures granted for harvesting timber on Crown land in province. Act sets out types of tenures, content of tenure and procedures for obtaining and renewing tenures. (§§5-75). Act also sets out grounds and procedures for deletion or reduction of harvesting rights (§§60-63.2); suspension and cancellation of harvesting rights (§§76-80); as well as applicant eligibility criteria (§81).

Timber Scaling and Marking.

Act regulates marking of timber with timber mark holder's mark and scaling of timber according to its quantity and quality. (§§82-102).

Payments to Crown.

Act regulates royalty and stumpage payments to Crown and annual rent payable for tree farm and other licences. (§§103-113).

Forest and Range Practices Act.

Forest and Range Practices Act ("FRPA") promises to maintain high environmental standards established under Forest Practices Code of British Columbia Act ("Code"), while streamlining planning process for forest and range management activities. This represents major shift in policy from prescription-based to results-based compliance and enforcement. FRPA came into force, along with ten regulations, on Jan. 31, 2004. Planning and operations initiated under Code have been grandparented. (§§186-213). Maximum penalty for contraventions of FRPA is $1,000,000 and/or three years imprisonment. (§87).

Forest Stewardship Plan, Site Plan and Woodlot Licence Plan.

This part of FRPA outlines new hierarchy of government plans, required contents of plans and processes for approval. (§3-20).

Forest Practices.

This part of FRPA outlines practices relating to general forestry, road building, forest health, and silviculture which must be followed to carry out goals and strategies contained in applicable Forest Stewardship Plan or Woodlot Licence Plan. (§§21-31).

Range.

This part of FRPA outlines required plans and schedules required to engage in range use on Crown Land. (§§32-45).

Protection of Resources.

This part of FRPA contains provisions relating to protection of forest and range resources from invasive plant life, unauthorized range use, unauthorized timber harvesting, tree spiking and recreational use. (§§46-58).

Compliance and Enforcement.

This part of FRPA regulates inspection and seizure of forest products and forfeiture of timber, chattels, or livestock. It sets out offences and vests expansive powers in Supreme Court to make compliance or enforcement orders. It preserves administrative review procedures established under Code, for appealing decisions taken by Ministry of Forests officials. Forest Appeals Commission is retained to hear appeals of officials' decisions. Forest Practices Board is retained to hear complaints, conduct audits, draft reports and make recommendations to complainant, allegedly offending party, and to government. (§§59-140).

Forest Practices Code of British Columbia Act, (c. 159).

Code has already been largely repealed and can now be completely repealed by regulation. Continuing provisions deal with Administrative Review and Appeals (§§130.1-141), and composition and powers of Forest Appeals Commission (§§194-197). Functions of Code are continued in modified forms under FRPA and Wildfire Act. Plans and operations begun under code have been grandparented under FRPA.

Foresters Act, (S.B.C. 2003, c. 19).

Regulates duties, objects and powers of association of Professional Foresters. (§§4, 5). Grants rights of title and practice to Registered Professional Foresters and rights of title to Registered Forest Technologists who are registered by association. (§§14, 19, 20).

Forestry Revitalization Act, (S.B.C. 2003, c. 17).

Reduces volume of timber harvesting rights under existing timber licenses by 20%. (§2). License holders will be compensated for their lost harvesting rights. (§6). “B.C. Forest Revitalization Trust” is established to mitigate effects felt by “any eligible person” as described in deed of trust. (§10). Harvesting rights appropriated by Crown are to be used to support new forest initiatives.

Private Managed Forest Land Act, (S.B.C. 2003, c. 80 [“PMFLA”]).

Establishes Private Managed Forest Land Council, which is charged with making regulations, resolutions and bylaws about forest practice standards to be applied on privately owned forest land under management commitment. (§§4-8, 12-16 and 43). To encourage owners of forest land to make management commitments, land to which such commitment applies is classified under Assessment Act (c. 20) as “managed forest land”. (§17). Regulations under PMFLA impose requirements for soil conservation, fish streams and water supply areas and reforestation (Reg. 336/2004, 372/2004, 182/2007), and empower Minister to establish critical wildlife habitat areas on private management forest land (Reg. 371/2004).

Wildfire Act, (S.B.C. 2004, c. 31).

Legislates responsibilities and obligations regarding wildfire prevention and control.

13 ESTATES AND TRUSTS

13.01 ADMINISTRATION:

See topic 13.09 Executors and Administrators.

13.02 ADVANCEMENTS:

See topic 13.07 Descent and Distribution.

13.03 ALLOWANCES:

See topic 13.09 Executors and Administrators.

13.04 CLAIMS:

See topic 13.09 Executors and Administrators; category 5 Civil Actions and Procedure, topic 5.17 Pleading.

13.05 DEATH:

Application may be made to court for presumption of death in case of a person absent and not heard of from a named day, and not known to be alive, where there is reason to presume death. (Survivorship and Presumption of Death Act, c. 444, §3).

Survivorship.

Where two or more persons die at same time, or in circumstances rendering it uncertain which of them survived other or others, such deaths shall for all purposes affecting title to property be presumed to have occurred in order of seniority, and accordingly younger shall be deemed to have survived older. (§2[1]). This provision is modified in accordance with Insurance Act (c. 226, §72), so that if person whose life is insured under life insurance policy dies in same disaster as beneficiary, or in circumstances rendering it uncertain which of them survived other, former shall be presumed to have survived latter (c. 444, §2[2]). This is further modified where provision is made in instrument for disposition of property in event of designated person predeceasing other person, dying at same time, or under circumstances rendering it uncertain which of them survived, then if that person dies as provided for in instrument death is deemed to have so occurred (§2[3]). There is similar provision where substituted personal representative is provided for in will. (§2[4]).

Action for Death.

Action may be maintained against any person causing death by wrongful act, neglect or default where, if death had not ensued, party injured would have been entitled to maintain action and recover damages. (Family Compensation Act, c. 126, §2). Action shall be for benefit of spouse or common law spouse, parent (includes grandparent and stepparent), and/or child (includes stepchild and person to whom deceased stood in loco parentis) (see §1 for definitions) of person whose death has been caused, and shall be brought by and in name of personal representative of deceased (§3[1]). Damages may be given proportioned to injury resulting from death to parties respectively for whose benefit action brought. (§3[2]). Damages not limited by any money paid or payable under any contract of assurance or insurance (§3[8]), and may include medical or hospital expenses and reasonable funeral expenses (§3[9]). If person causing wrong dies, action may proceed against his estate. (§5). See topic 13.09 Executors and Administrators, subhead Actions.

Death Certificate.

See category 10 Documents and Records, topic 10.05 Records, subhead Vital Statistics.

13.06 DECEDENTS' ESTATES:

See topics 13.07 Descent and Distribution, Executors and Administrators, Wills; category 8 Debtor and Creditor, topic 8.12 Homesteads.

13.07 DESCENT AND DISTRIBUTION:

Law of intestate succession (Estate Administration Act, c. 122, Part 10) applies to realty and personalty alike.

Subject to rights of surviving spouse, if any, entire estate is distributed as follows, each class taking to exclusion of subsequent classes: (1) to issue per stirpes; (2) to parents equally, or all to surviving parent; (3) to surviving brothers and sisters equally, or that share to children of deceased brothers and sisters but further representation must not be admitted; (4) to nephews and nieces in equal shares with no representation admitted; (5) to other next of kin of equal degree of consanguinity, but no representation admitted. (§§83-89).

Degrees of kindred are computed by counting from intestate up to nearest common ancestor and then down to relatives. (§90[1]).

Surviving Spouse.

Spouse includes common law spouse, defined as person who is united to another person by marriage that, although not legal marriage, is valid by common law, or person who has lived and cohabited with another person, for period of at least two years immediately before other person's death, in marriage-like relationship, including marriage-like relationship between persons of same gender. (§1).

Where intestate dies on or after Apr. 1, 1958 surviving spouse with no issue takes entire estate. Where intestate dies on or after Oct. 1, 1983 and leaves spouse and issue, surviving spouse takes household furnishings and life interest in family home plus whole estate up to $65,000; if net value of estate is more than $65,000, where spouse and one child, spouse takes $65,000, plus one-half of residue; where spouse and children, spouse takes $65,000, plus one-third of residue, deceased child leaving issue surviving being counted for purposes of determining share of surviving spouse. (§§83, 85). If two or more parties are entitled as spouse then they share estate in portions determined just by court. (§85.1).

Half Blood.

Kindred of half blood inherit equally with those of whole blood in same degree. (§90[2]).

Posthumous Heirs.

Descendants and relatives conceived before but born after death of intestate inherit as though born in intestate's lifetime and survived intestate. (§91).

Illegitimates.

As of Apr. 17, 1985 law recognizes no distinction between status of child born inside marriage and child born outside of marriage. (Law and Equity Act, c. 253, §61).

Separated Spouses.

Unless court otherwise orders, on intestacy surviving spouse not entitled if separated for not less than one year with intention of living separate and apart immediately before death of spouse and had not during that period lived together with intention of resuming cohabitation (must apply to court within six months of letters of administration issuing). (c. 122, §98).

Adopted Children.

See category 14 Family, topic Adoption.

Advancements to children of one dying wholly intestate are taken into account. If advancement is equal to or greater than child's share, such child and his descendants are excluded from any share in estate; if advancement not equal to child's share, such child and his descendants take only so much as will equalize shares and advancement. (c. 122, §92).

Escheat.

Where any person dies intestate leaving no lawful heirs, any interest of such person in real property situate in province escheats to Crown in right of province. Attorney General may make assignment to Crown of personal property in such situation. (Escheat Act, c. 120, §§1, 8).

Wages.

Up to three months wages owing or accrued to worker at time of death in industry within scope of Part I of Workers Compensation Act (c. 492) are payable to surviving spouse free of debts of deceased, and are not subject to administration on intestacy (c. 122, Part 13, §§121, 122). If two or more persons claim to be surviving spouse, then court may determine what portion of wages be paid to one or both. (§126).

See also topic 13.09 Executors and Administrators.

13.08 ESTATES:

See category 23 Property, topic 23.14 Real Property.

13.09 EXECUTORS AND ADMINISTRATORS:

(Estate Administration Act, c. 122).

Jurisdiction and Venue.

Supreme Court has exclusive jurisdiction in matters of probate and administration of estates.

Administrators.

Administration of intestate's estate may be granted to surviving spouse of deceased or one or more of next of kin or such other person court thinks fit. (§§6, 7). If deceased did not appoint executor willing or competent to take out letters probate, or executor appointed is resident outside B.C. at time of deceased's death, then Official Administrator may apply. (§40). Where infant (individual under 19 years) is sole executor, administration will be granted to guardian of infant until individual attains 19 years. (§12). Special administration of estate may be granted to creditor, spouse, next of kin, or legatee upon application to court if nonresident executor or administrator causes delay. (§11).

Official Administrator.

Public Guardian and Trustee may be appointed Official Administrator (§34) who may administer estates of persons who die intestate or who have not appointed executor in cases where there are no relatives of deceased within province who are willing or competent to take out letters probate (§40). Where all heirs, surviving spouse, and next of kin in province competent to take out letters of administration renounce or request appointment of administrator of estate, Official Administrator must make application for administration of estate. (§41).

Qualification.

Administrator must give bond for performance of trust together with one or more sureties. Bonds must be in penalty of double amount under which estate of deceased is sworn, unless court directs them to be reduced. (§16). Court may dispense with bond under certain conditions. (§17).

Prior to receiving grant of probate or letters of administration (or resealed grant) applicant must certify that applicant gave notice, with copy of will attached, if there is one: to each beneficiary under will; to any person who would be entitled to apply on intestacy or partial intestacy (regardless of whether there is intestacy or partial intestacy); to any person who would be entitled to apply under Wills Variation Act with respect to will; to common law spouse; to surviving spouse separated from deceased for not less than one year; to representative or committee if there is one, and to Public Guardian and Trustee where beneficiary or person entitled is or may be mentally disordered person; to Public Guardian and Trustee and guardian or parent where beneficiary or person entitled is or may be minor. (§112[1]). Following form is acceptable, with necessary changes (§112[7]):

Form

In the Estate of A.B., of the City of Victoria, in the Province of British Columbia, labourer, who died on the first day of. . . . ., 20. . . . .

Take Notice that the undersigned is applying for probate [or letters of administration] of the above estate in the Supreme Court of British Columbia at. . . . ., British Columbia

C.D.

Applicant,

1234 Blank Street,

Victoria, British Columbia

Address of Registrar:

Victoria, British Columbia

Notice to Public Guardian and Trustee must also contain list of names and last known addresses of beneficiaries or persons entitled and be accompanied by copies of all documents filed with court in respect of application for grant or resealing. (§112[8]).

Real Estate.

Where real estate is vested in person without a right in any other person to take by survivorship, then on death, notwithstanding any testamentary disposition, it devolves to and becomes vested in person's personal representatives as if it were chattel real vesting in them. (§77).

Claims.

Executor may pay or allow any debt or claim on any evidence executor thinks sufficient. (§65). If executor or administrator rejects or disputes claim, claimant must commence action in respect of claim within six months of receiving notice in writing of rejection or dispute of claim if debt or part of it is due at time of notice or within six months of time debt or part of it falls due, otherwise claim will be forever barred. (§66).

Actions.

An executor or administrator may continue or bring and maintain action for all loss or damage to person or property of deceased, except for libel or slander or loss or damage before Mar. 29, 1934, in same manner and with same rights and remedies as deceased would, if living. (§§59[1], [2]). Recovery must not extend to damages in respect of physical disfigurement, pain, suffering or death or in respect of possible earnings of deceased had he lived. (§59[3]). This right is subject to provisions of Workers Compensation Act (see category 11 Employment, topic 11.02 Labour Relations) but does not affect right of action under §103 of that Act or Family Compensation Act. (c. 126, §59[4]). (See topic 13.05 Death.) Executor may be awarded damages in respect of funeral costs. (c. 122, §59[5]).

Distribution of surplus of personal estate must not be made until one year after death of intestate; except where intestate has left dependent who is entitled to share in distribution of surplus, or where estate of intestate is being administered by Public Guardian and Trustee who is satisfied that distribution can be made without prejudicially affecting creditors' rights. (§74).

Insolvent Estates.

Where real and personal estate of decedent is not sufficient for payment in full of all deceased's debts and liabilities, executor or administrator shall distribute proceeds of insolvent estate, subject to rights of secured creditors, in accordance with statutory priorities. (§§100-108).

Allowances.

Where deceased was worker employed in industry within scope of Part 1 of Workers Compensation Act, his wages earned during three months prior to his death and owing or accrued to him are payable to surviving spouse free from all his debts. (§121).

When Administration Unnecessary.

Where estate does not exceed $25,000 in value, it is not necessary that Official Administrator be appointed by court. (§20[2]). In such case, Official Administrator or any person competent to take out administration, upon satisfying Registrar of court, by affidavit filed, that he is competent to take out administration and that value of estate does not exceed $25,000, has same power and authority to administer estate as if he had been appointed by order of court. (§20[3]).

Estates of Aliens.

Where foreign probate of will has been granted and grant cannot be resealed under provisions of Probate Recognition Act, c. 376, grant of administration may be made to attorney of personal representative appointed by foreign court or ancillary grant of probate or administration may be made to personal representative appointed by foreign court. (Rules of Court, R. 61[48]).

13.10 FIDUCIARIES:

See topics 13.09 Executors and Administrators, Trusts; category 14 Family, topic 14.05 Guardian and Ward.

13.11 GUARDIAN AND WARD:

See category 14 Family, topic 14.07 Infants.

Insane Persons.

Patients Property Act, c. 349, provides for court appointment on application by Attorney General or any other person, of official committee or individuals as committee of estate for person, who is incompetent by reason of mental infirmity. (§§1, 6). Committee has all rights, privileges and powers to deal with estate as individual would have if of full age and of sound and disposing mind, subject to such direction as court may order, e.g., committee to post security. (§§15, 16, 10[c]). Act also requires committee to pass accounts before Public Guardian and Trustee. (§10[d]). (CAVEAT: §67 of Adult Guardianship and Planning Statutes Amendment Act, 2007 [S.B.C., c. 34] repeals Patients Property Act, not yet in force).

13.12 INTESTACY:

See topic 13.07 Descent and Distribution.

13.13 PROOF OF CLAIMS:

See topic 13.09 Executors and Administrators; category 5 Civil Actions and Procedure, topic 5.02 Actions.

13.14 TRUSTS:

(Trustee Act, c. 464).

Writing Requirement.

Trusts need not be in writing. Instruments creating trusts affecting land should be properly acknowledged and registered in land registry office. Such registration is notice to all the world.

Interpretations.

Trusts are interpreted and administered in accordance with principles of equity as varied by “Trustee Act”, which is in effect reproduction of English “Trustee Act” of 1850, with its subsequent amendments.

Appointment of Trustee.

Public trustee may be appointed to act as trustee in instrument creating trust, by majority of beneficiaries who are of age of majority, or by court. (Public Guardian and Trustee Act, (c. 383, §6). Judicial trustees may be appointed by court upon application. (c. 464, §97).

Replacement of Trustee.

Where trustee is dead, remains out of province for more than 12 months, desires to be discharged, refuses or is unfit to act, or is incapable of acting, then person nominated to appoint new trustees, or if there is not such nomination any surviving or continuing trustees or their personal representatives may by writing appoint new trustee. (§27). Court may also make order appointing new trustee if it is expedient to do so. (§31).

Discharge.

Receipt in writing of trustee for money payable to him in exercise of trust is sufficient discharge and exonerates person so paying from seeing to application thereof. (§3). Trustees may compromise, compound, abandon, submit to arbitration or otherwise settle any debt, account or claim relating to trust and may enter agreements for this purpose without being responsible for loss occasioned by such acts done in good faith if no contrary intention expressed in trust instrument. (§9).

Trust Investments.

Trustee may invest in any form of property or security in which prudent investor might invest, including mutual fund, or common trust fund managed by trust company, provided that investment is not inconsistent with trust. (§15.1). However, trustee corporation must not invest in its own securities. (§17.1). Trustee may delegate such investment authority to agent as accords with prudent business practice, unless trust requires trustee to act personally. Trustee must determine investment objectives and exercise prudence in selecting agent, establishing limits of authority delegated, and in monitoring agent. If these requirements are met, trustee is not liable for actions of agent. (§15.5). Trustees may be relieved from liability for loss to trust provided trustee acted according to investment strategy that prudent investor would have adopted under comparable circumstances. (§15.3).

Trustees may be relieved from liability for breach of trust by court provided they have acted honestly and reasonably. (§96).

Release of Trustees.

Ordinarily speaking, there is no statutory provision for release of trustee, except in case where there are two or more trustees, in which event one of them may be discharged by express agreement under “Trustee Act”, executed by co-trustees, and by persons (if any) who are empowered to appoint trustees in respect of particular trust in question. (§28[1]). Assurances or things required for vesting trust property in continuing trustee alone must be executed or done.

(§28[2]).

Accumulations.

Under Perpetuity Act, c. 358 which came into force Jan. 1, 1979 and applies only to instruments taking effect after that date (except as provided), where property is disposed of in such manner that its income must wholly or in part be accumulated, power or direction to accumulate is valid if disposition of accumulated income is or may be valid but not otherwise. (§25). See category 23 Property, topic 23.12 Perpetuities.

Prior to its repeal by Perpetuity Act, Accumulations Act 1967, c. 2 provided that no disposition of any real or personal property shall direct income thereof to be accumulated for any longer period than one of: (a) life of grantor or settlor, or (b) 21 years from date of making inter vivos disposition, or (c) duration of minority of person living or en ventre sa mere at date of making of inter vivos disposition, or 21 years from death of grantor, settlor or testator, or duration of minority of any person living or en ventre sa mere at death of grantor, settlor or testator, or duration of minority of any person who under instrument directing accumulation would, for time-being, if of full age, be entitled to income directed to be accumulated.

Perpetuities.

See category 23 Property, topic 23.12 Perpetuities.

Trustee in War Service.

Trustee engaged in war service and intending to remain out of province for period exceeding one month may, by power of attorney, delegate to any person exercise of all his powers and discretions. Power of attorney is not effective until donor is out of British Columbia. (c. 464, §14).

Uniform Simplification of Fiduciary Security Transfers Act not applicable.

Testamentary Trusts.

Trusts may be created inter vivos or by will.

Variation of Trusts.

Supreme Court has jurisdiction to approve variations of trust in interests of beneficiaries and to sanction dealings with trust property. (Trust and Settlement Variation Act, c. 463, §1).

Pourover Trusts.

See topic 13.15 Wills, subhead Bequests and Devises to Inter Vivos Trusts.

13.15 WILLS:

(Wills Act, c. 489).

Every will speaks from date of testator's death (§20[2]), and must be duly proved in court having jurisdiction in probate (see category 6 Courts and Legislature, topic 6.01 Courts) before it can be registered in any land registry office.

Testamentary Capacity.

Person under age of 19 cannot make valid will unless such infant is or has been married or in active military service or mariner at sea. (§7).

Testamentary Disposition.

There is no restriction on right of competent person to dispose of property by will, except where will does not make adequate provision for testator's spouse, common-law spouse, or children, court may, on application therefor, order such provision as it deems adequate and equitable to be made out of estate. Such order is governed by provisions of Wills Variation Act, c. 490, as explained in subhead Wills Variation Act, infra.

Execution.

A will must be in writing and signed by testator, or by some other person in his presence and by his direction, and such signature must be made and acknowledged by testator in presence of at least two witnesses, present at same time, who must attest and subscribe in presence of testator. (c. 489, §§3-4). Will made in accordance with Wills Act is valid without other publication. (§9).

A will is not invalid on account of incompetency of attesting witness. (§10). Person is not incompetent as witness solely because person is executor. (§13).

Usual form of attestation clause is as follows:

Form

Signed by the testator in the presence of us, both present at the same time, who at his request and in his presence have subscribed our names as witnesses.

Alteration that is made in will must be executed in same way as will, or signed by testator and witnesses in margin or opposite or near to such alterations, or beneath memorandum subscribed to will, referring to such alteration. (§17).

Revocation.

Will is revoked by: destruction of will by testator or any other person acting in presence of testator and by his direction, with intention to revoke it; subsequent will or codicil or writing declaring intention to revoke and executed in same manner as will; marriage of testator, unless will declares that it is made in contemplation of marriage or in exercise of power of appointment according to which property appointed shall not in default of appointment pass to heir, executor or administrator of testator or persons entitled to estate of testator if he died intestate. (§§14-15).

Unless contrary intention appears in will, where after making will but before testator's death: (1) judicial separation has been ordered with respect to testator's marriage; (2) decree absolute of divorce has terminated testator's marriage; or (3) testator's marriage is found to be void or is nullity, will is to be construed as if testator's spouse (including person considered by testator to be his spouse) had predeceased testator. (§16). Whether or not notice of will has been filed, notice of revocation in prescribed form may be filed with Chief Executive Officer. (§33).

Registration.

Provision is made for optional registration of wills and for notice of location of wills to be filed with Chief Executive Officer. (§§32, 34).

Testamentary Gifts to Attesting Witnesses.

A gift to attesting witness or spouse of attesting witness is void, but does not otherwise affect will, or competency of witness to prove execution. Such gift will not be void, however, if will has been properly executed with at least required number of attesting witnesses who are not recipients of testamentary gifts under will. (§11).

Bequests and Devises to Inter Vivos Trusts.

No statutory provisions in this jurisdiction. Doctrine of incorporation by reference is recognized in province. Trust instrument should be in existence at date of testator's will.

Unclaimed Legacies.

See topic 13.07 Descent and Distribution.

Direction.

Trustee Act (c. 464, §86) provides that any executor or administrator may apply to judge of Supreme Court for opinion, advice or direction on questions respecting management or administration of trust property or assets of any testator or intestate. Acting upon opinion, advice or direction given, discharges trustee, executor or administrator, unless such opinion, advice or direction is obtained fraudulently. (§87).

Payment into Court.

Any trustee or majority of trustees having in their hands or under their control, money or securities belonging to trust, other than trust in favour of minor, may pay same into Supreme Court and receipt from appropriate court officer discharges trustee. (§40).

Application to Distribute Proceeds.

Any trustee, executor or administrator may apply to any judge of Supreme Court for order that he be at liberty to distribute proceeds of estate among parties entitled thereto having regard only to claims of such persons as have been ascertained to be entitled. However, this does not prejudice right of any creditor or claimant to follow proceeds into hands of person or persons who may have received them. (§39).

Lapses.

Unless contrary intention appears by will gifts to siblings, children or other issue, who have died, leaving issue at testator's death, do not lapse, but descend to such issue. (c. 489, §29). Unless contrary intention appears, gifts of specific property, whether real or personal, which fail to take effect because beneficiary predeceases testator, fall into residue of estate. (§21). Gift of residue that lapses passes on intestacy.

Foreign Wills.

Every will made outside of British Columbia but not in accordance with Wills Act is considered formally valid as regards movables if made in accordance with law in force at time of its making in place where: (a) will made; (b) testator domiciled when will made; or (c) testator had domicile of origin. (§40). Essential validity of will so far as it relates to interest in movables is governed by testator's domicile at time of death. Both essential and formal validity of will relating to immovables is governed by law of place where immovables situate. Ancillary letters probate may be obtained of will probated in foreign country on filing of copy of will and certified copy of probate.

Living Wills.

See Health Care (Consent) and Care Facility (Admission) Act, c. 181, §19(1)(b) and Representation Agreement Act, c. 405, §16(3).

Wills Variation Act, c. 490 provides that when testator has not made adequate provision for proper maintenance of surviving spouse and/or children, Supreme Court may, upon application, vary will accordingly. (§2). Application must be made within six months from issuance of probate in British Columbia. (§3). Spouse includes common-law spouse as defined in Estate Administration Act, c. 122.

Simultaneous Death.

See topic 13.05 Death, subhead Survivorship.

Testamentary Trusts.

See topic 13.14 Trusts.

14 FAMILY

14.01 ADOPTION: (c. 5).

Adoption of children (defined as unmarried person under 19 years) and in some cases adults is governed by Adoption Act. (c. 5).

Who May Place Child for Adoption.

Child may be placed for adoption by director of adoption, adoption agency, birth parent or other guardian of child by direct placement, or birth parent or other guardian related to child if child is placed with relative of child. (§4).

Who May Receive Child for Adoption.

Child may be placed for adoption with one adult or two adults jointly, provided that each prospective adoptive parent is resident of British Columbia. (§5).

Consent Required.

Generally, adoptions require consent of: (a) Child, if 12 years of age or over; (b) birth mother; (c) father; and (d) any person appointed as child's guardian. (§13[1]). For purpose of giving consent to adoption, child's father is anyone who: (a) Has acknowledged paternity by signing child's birth registration; (b) is or was child's guardian or joint guardian with birth mother; (c) has acknowledged paternity and has custody or access rights to child by court order or by agreement; (d) has acknowledged paternity, and has supported, maintained or cared for child, voluntarily or under court order; (e) has acknowledged paternity and is named by birth mother as child's father; or (f) is acknowledged by birth mother as father and is registered on birth fathers' registry as child's father. (§13[2]). If child is in continuing custody of director under Child, Family and Community Service Act, (c. 46), or director of adoption is child's guardian under Family Relations Act, (c. 128), only consents required are director's consent, and child's consent if 12 years of age or over (§13[3]). If child who has been adopted is to be adopted again, consent of person who became parent at time of previous adoption is required, instead of consent of person who ceased to have any parental rights and responsibilities at that time. (§13[4]). If child has been placed for adoption by extra-provincial agency and law of jurisdiction in which agency is located is that only consent of agency is required for child's adoption, then that consent, and child's consent if 12 years of age or over, are only consents required. (§13[5]). Consent to adoption of child in British Columbia by person resident in British Columbia must be in prescribed form and must be supported by prescribed documents. (§16[1]). Court may dispense with consent in certain instances such as if person whose consent is to be dispensed with has abandoned or deserted child, has not made reasonable efforts to meet their parental obligations to child, is not capable of caring for child or if court is satisfied that it is in child's best interest to do so, etc. (§17). Generally, person who consented to child's adoption may revoke consent before director of adoption or adoption agency places child for adoption, but only if revocation is in writing, and is received by director or adoption agency before child is placed with prospective adoptive parents by director or adoption agency responsible for child. (§18[1]). Birth mother may revoke her consent to adoption within 30 days of child's birth, even though child has been placed for adoption during that period, but only if revocation is in writing, and is received by any director or adoption agency before end of 30 days. (§19[1]). Director or adoption agency receiving revocation must provide revocation to director or adoption agency responsible for child. (§19[1.1]). Child may revoke consent to adoption at any time before adoption order is made. (§20). Consent given under law of another jurisdiction to adoption of child in British Columbia may be revoked in accordance with law of that jurisdiction. (§21). After child is placed for adoption, consent to child's adoption may only be revoked by court or in accordance with §§19, 20 or 21. Court may revoke consent if it is satisfied that it would be in child's best interests to do so. (§22).

Conditions Precedent.

Before direct placement, prospective adoptive parents must notify director of adoption or adoption agency of their intent to receive child in their home for adoption. (§8[1]). Generally, before placement by director or adoption agency, or as soon as possible after being notified of direct placement, director or adoption agency must: (a) Provide information about adoption and alternatives to adoption to birth parent or other guardian proposing to place child; (b) obtain as much information as possible about medical and social history of child's biological family and preserve information for child; (c) give prospective adoptive parents information about medical and social history of child's biological family; (d) prepare pre-placement assessment of prospective adoptive parents; (e) give copy of pre-placement assessment to prospective adoptive parents and to birth parents or other guardian of child; and (f) make sure that child, (i) if sufficiently mature, has been counselled about effects of adoption, and (ii) if 12 years of age or over, has been informed about right to consent to adoption. Before placement by director or adoption agency, director or adoption agency must also: (a) If birth parent or other guardian requesting placement wishes to select child's prospective adoptive parents, provide birth parent or other guardian with information about prospective adoptive parents who have been approved on basis of homestudy completed in accordance with regulations; (b) make reasonable efforts to obtain any consents required; and (c) make reasonable efforts to give notice of proposed adoption to (i) anyone who is named by birth mother as child's birth father if his consent is not required, and (ii) anyone who is registered in birth fathers' registry in respect of proposed adoption. Director or adoption agency may only place child for adoption with prospective adoptive parents who have been approved on basis of homestudy. (§§8, 6). Prospective adoptive parents may receive child by direct placement only if they have made reasonable efforts to obtain any consents required, and have made reasonable efforts to give notice of proposed adoption to anyone who is named by birth mother as child's birth father if his consent is not required, and anyone who is registered in birth fathers' registry in respect of proposed adoption. (§9). Court may dispense with notice of proposed adoption to birth father if it is in child's best interests to do so or circumstances justify dispensing with notice. (§11).

Name.

Court may change child's given names or family name in adoption order, but only with child's consent, if child is 12 years of age or over, or after considering child's view, if child is at least seven years of age and less than 12. Child's consent to change of name is not required if court has dispensed with child's consent to adoption. (§36).

Effect of Adoption.

When adoption order is made: (a) Child becomes child of adoptive parent; (b) adoptive parent becomes parent of child; and (c) birth parents cease to have any parental rights or obligations with respect to child, except birth parent who remains parent jointly with adoptive parent. (§37).

Adoptions Outside of British Columbia.

Adoption that has, under law of another province or other jurisdiction outside Canada, substantially same effect in that other jurisdiction as adoption under statute has same effect in British Columbia as adoption under statute. (§47).

Adoptions by Aboriginal Custom.

Court may recognize that adoption of person effected by custom of Indian band or aboriginal community has effect of adoption under statute. (§46).

14.02 COMMUNITY PROPERTY:

See topic 14.06 Husband and Wife.

14.03 DESERTION:

See topics 14.04 Divorce, 14.06 Husband and Wife.

14.04 DIVORCE:

Divorce Act, R.S.C., 1985, c. 3 (2d Supp.) has substantially changed law of divorce in Canada. Grounds for divorce are now: (a) Breakdown of marriage by reason of separation of at least one year, (b) adultery, or (c) mental or physical cruelty. (§8).

Divorce procedure in British Columbia is governed by Rule 60 of Rules of Court. Uncontested divorces do not require court appearance, and can be proceeded with by way of desk order. In obtaining divorce, where children are involved, British Columbia courts have strictly interpreted §11(1)(b), that impresses duty upon court to satisfy itself that reasonable arrangements have been made for support of any children of marriage prior to granting divorce order.

14.05 GUARDIAN AND WARD:

See topic 14.07 Infants.

Insane Persons.

Patients Property Act, c. 349, 1996 has been repealed by 2007-34-67, bill no. 29. Change comes into force on regulation. Patients Property Act, c. 349, provides for court appointment on application by Attorney General or any other person, of official committee or individuals as committee of estate for person, who is incompetent by reason of mental infirmity. (§§1, 6). Committee has all rights, privileges and powers to deal with estate as individual would have if of full age and of sound and disposing mind, subject to such direction as court may order, e.g., committee to post security. (§§15, 16, 10[c]). Act also requires committee to pass accounts before Public Guardian and Trustee. (§10[d]).

(*Note:* Patients Property Act is set to be repealed by Adult Guardianship and Planning Statutes Amendment Act, 2007 (Bill 29-2007), which has not come into force as of Aug. 2008.)

14.06 HUSBAND AND WIFE:

Family Relations Act, c. 128.

Spousal Capacity and Property.

Spouses have independent, separate and distinct legal personalities. There is no difference in law between married women and married men and married person has same legal capacity as unmarried person. Spouse may bring action in tort against other spouse. (Law and Equity Act, c. 253, §60).

Responsibility for Debts of Spouse.

After judicial separation or dissolution of marriage, each former spouse is considered unmarried person in respect of property, right to contract, and rights and obligations in civil proceedings. Under Family Relations Act, former spouses are not liable for other spouse's contracts, wrongful acts or omissions, or for costs incurred in proceeding, except where liability arose during marriage. Former spouse who is in arrears under alimony or support and maintenance order is, however, liable to third party who provides necessaries to child or other spouse who is beneficiary of order. (c. 128, §127).

Nonsupport.

One spouse may be required by court order to support other but spouses or former spouses are otherwise required to be self-sufficient in relation to one another. (§89).

Deferred Community Property System.

After separation agreement, declaration in Supreme Court that there is no reasonable prospect of reconciliation, order for dissolution of marriage or judicial separation, or order declaring marriage null and void, spouse is entitled to undivided one-half interest as tenant-in-common in all family assets. Family assets are any assets ordinarily used for family purpose and include one spouse's business where other spouse makes indirect contribution to it. Indirect contributions can include savings through performing household and child-rearing responsibilities. (§§56-59). Interest in family assets under this part is subject to: Order of Supreme Court, which has inherent jurisdiction to alter one-half interest if provisions for division of property between spouses would be unfair or if spouses execute marriage agreement or separation agreement. Supreme Court has jurisdiction to divide pension earned prior to marriage. (§65).

Effect of Marriage Agreements on Family Assets.

Spouses can contract out of community property system with marriage agreement or separation agreement but Court can modify agreement on basis of fairness. (§§65, 66). There are provisions for filing separation or marriage agreements relating to specific land in land title office. (§63).

Husband's/Wife's Protection in Conveyances.

See Land (Spouse Protection) Act. (c. 246, §3).

14.07 INFANTS:

(Infants Act, c. 223).

Age of majority is 19 for both sexes. (Age of Majority Act, c. 7, §1).

Contracts.

It is enacted that all contracts entered into by infants, other than contracts specified by enactment to be enforceable, affirmed on attaining majority, or performed, partially performed or not repudiated by him/her within one year after attaining majority, are not enforceable against infant. Contracts that are unenforceable against infant are enforceable by infant against adult party as if infant was adult at time contract was made. (§19). Infant or adult party to unenforceable contract may apply to court for relief and court shall consider all relevant circumstances in determining whether relief is appropriate. No relief will be granted against person who has acquired right to or interest in property where: that person is not party to contract and property has been transferred bona fide and for value to that person or to any of that person's predecessors in title who were not party to contract. Application may be made on behalf of infant to court or to Public Guardian and Trustee in order to be granted contractual capacity or to ratify specific contract. Guarantee of infant's contract is enforceable notwithstanding that contract is unenforceable against infant. Adult party who has entered into contract with infant may, within one year after that infant attains age of majority, request that person affirm or repudiate contract. (c. 223, Part 3).

Provision is made in certain instances, and in some cases with court approval, for guardians to enter into contracts on behalf of infants. (§40).

Actions.

Infants must sue and defend by their litigation guardian. (Rules of Court, R. 6[2]). In event of judgment in favour of infant, money may be paid into court or to Public Guardian and Trustee in trust for infant, and distributed to infant upon reaching age of majority, or as court may order. (c. 223, §43; R. 58).

Infants Act provides for consent of Public Guardian and Trustee to compromise of infant's action to recover unliquidated damages. (c. 223, §40).

Adoption.

See topic Adoption.

Liabilities.

Infants are not subject to any greater liability than person of full capacity. (§24). No liability of infant in tort if action in tort is related to contract that is unenforceable against infant. (§25).

Guardianship.

Where custody granted to someone other than father or mother, court may direct director under Child, Family and Community Service Act (c. 46) to be guardian of person of child or Public Guardian and Trustee to be guardian of child's estate. Any court order must be in best interest of child. Guardian over estate or person of child has same authority as testamentary guardian. Subject to guardianship agreement, both parents (while living together) are joint guardians unless a tribunal of competent jurisdiction otherwise orders. (c. 128, §§23-30). After death of either parent, surviving parent is sole guardian unless deceased parent shall have by deed or will, appointed some other person to act, after his or her death, as joint guardian with survivor. (c. 223, §50). Guardians of estate of child may be required to give security for proper discharge of their duty. (c. 128, §31). See also Law and Equity Act. (c. 253, §§52, 61).

Protection and Support.

Child, Family and Community Service Act, c. 46. If director considers child in need of protection, he may without warrant apprehend child. If person has reason to believe that child is in need of protection, he must forthwith report circumstances to director or person designated by director. Director, with court order, has right of entry to investigate complaints that child is in need of protection. Where Director or police officer has reason to believe child is in immediate physical danger or in need of protection, he may enter premises without warrant, using force if necessary, and apprehend child if he considers it necessary. Where child is apprehended Director has right to custody of child until child is returned to parent apparently entitled to custody, or order terminating Director's custody of child is made under Act. (c. 46, Part 3). Putative father of children may be subject to presumptions of paternity as part of proceeding for support and maintenance order for child. (c. 128, §§94, 95). See also topic 14.06 Husband and Wife.

Provisions of Hague Convention on child abduction have force of law in B.C., excepting Crown's responsibility for legal costs incurred in enforcing Convention. (Family Relations Act, c. 128, §55).

14.08 MARRIAGE:

Matters concerning formal marriage are governed by Marriage Act, c. 282.

Consent Required.

If contracting party is under 19 years of age, consent of parents, surviving parent, guardian, or Public Guardian and Trustee is necessary; unless, on petition to court, judge of Supreme Court gives declaration that proposed marriage of infant is proper. Lack of proper consent does not invalidate otherwise valid marriage. (§§28 and 30).

Licence.

Marriage licences are required. (c. 282, §15). Licences may be obtained from chief executive officer under Vital Statistics Act. (c. 479, §37). One of parties intending to marry must make affidavit in support of their application for marriage licence. (c. 282, §16). Recent Court of Appeal decision alters previous common law definition of marriage. Two persons of same gender may now marry.

Marriages may be solemnized at any time within three months after marriage licence is issued. (§§15, 16).

Reports of Marriage.

See category 10 Documents and Records, topic 10.05 Records, subhead Vital Statistics.

Civil Marriage.

A civil marriage may be performed by marriage commissioner if so desired. (§20).

Ceremonial Marriage.

Marriages may be solemnized by religious representative (person duly authorized to solemnize marriage according to rites and usages of religious body) registered under Marriage Act. (§§1, 7).

Common law marriages are now recognized for limited purposes. Family Relations Act, c. 128 defines spouse to include two people who, not being married, live together in marriage-like relationship for at least two years, including persons of same gender. (See §1 for definition.) Either may apply to court within one year of separation for order for custody of children, and maintenance of self and children. Common law spouses are not subject to community property system (see topic 14.06 Husband and Wife), unless they have entered into marriage or separation agreement, then Parts 5 and 6 of Family Relations Act apply to agreement. (c. 128, §120.1). Part 1 of Estate Administration Act, c. 122, defines common law spouse to mean either person united to another person by marriage valid at common law or person who has lived and cohabited with another, for period of at least two years immediately before other person's death in marriage-like relationship. Marriage-like relationship includes persons of same gender. (§1). See category 13 Estates and Trusts, topic 13.07 Descent and Distribution. Validity of out-of-province marriages determined by principles of common law. Formal validity of marriage determined by lex loci.

Law of England.

In all matters relating to mode of solemnizing marriages, or validity of them, and qualification of parties about to marry, and consent of guardians or parents, or any person whose consent is necessary to validity of marriage, law of England as it existed on Nov. 19, 1858 prevails, subject to Marriage Act and any Act of Canada in force in province. (c. 282, §6).

Foreign marriages which are valid according to law of country where contracted are recognized, unless bigamous or plural.

Annulment.

Inability to consummate a marriage renders it voidable only and not void. See topic 14.04 Divorce.

Where order has been granted under Survivorship and Presumption of Death Act (c. 444) (see category 13 Estates and Trusts, topic 13.05 Death) party may apply for and, upon fulfilling certain conditions, obtain marriage licence.

14.09 MARRIED WOMEN:

See topics 14.06 Husband and Wife, Marriage; categories 5 Civil Actions and Procedure, topic Evidence, subhead Witnesses; Debtor and Creditor, topic Homesteads; Documents and Records, topic Acknowledgments; Estates and Trusts, topics Executors and Administrators, Wills; Property, topic Dower.

15 HEALTH

15.01 HEALTH REGULATIONS:

Access to Abortion Services Act, (c. 1).

Restricts protest activities and prohibits harassment or filming of persons involved in use or provision of abortion services within “access zone”. (§3).

Adult Guardianship Act, (c. 6).

All adults entitled to live in manner chosen so long as no harm to others and capable of making decisions about such matters. (§2[a]). Presumption of capability. (§3). Support and assistance for abused and neglected adults. (Pt. 3). *Note:* 1996 Supplement contains §§4-43. Not yet in force. Describes appointment, powers, duties and liabilities of decision makers, guardians and monitors. Must act in best interests of adult (§4[8]), honestly, and in good faith (§28[1]). Must comply with adult's wishes, instructions or beliefs. (§29). To come into force on day named by regulation.

Chiropractors Act, (c. 48).

Repealed effective March 1, 2009 (BC Reg 420/2008). Now regulated under Health Professions Act and Chiropractors Regulation (Reg 414/2008). BC College of Chiropractors continued under the name ``College of Chiropractors of BC''

Community Care and Assisted Living Act, (S.B.C. 2002, c. 75).

Licensing for community care facilities that provide care to vulnerable, dependent people in child care, child/youth residential and adult residential settings. Establishes new registration process for “assisted living residences” that accommodate seniors and persons with disabilities. (Pt. 3). *Note:* §12, not yet in force, provides for regulation of private hospitals and public extended care facilities currently licensed under Hospital Act.

Continuing Care Act, (c. 70).

Regulation of continuing care, applies to health care services as prescribed by Lieutenant Governor in Council. (§3). Minister may make agreements to pay for care with continuing care operators who must comply with Act. (§4). Lieutenant Governor in Council may prescribe rate that operator charges. (§6).

Dentists Act, (c. 94).

Repealed effective April 3, 2009. Now regulated under Health Professions Act and

Dentists Regulation (Reg 415/2008). BC College of Dentists continued under the name ``College of Dental Surgeons of BC."

Emergency and Health Services Act, (c. 182).

Power and authority of Emergency and Health Services Commission to provide emergency health services and health services. (§5). Minister can enter into contract with other government to provide health services outside British Columbia. (§5.1). Licensing and disciplining (§6,7) of Emergency Medical Assistants. Board empowered to take extraordinary action to protect public during investigation of emergency medical assistant. (§8). *Note:* c. 182, §§6-9 to be repealed by Health Planning Statutes Amendment Act, 2002, S.B.C. 2002, c. 15, §3, not yet in force. To come into force on day named by regulation. (*Note:* Supplements Repeal Act, S.B.C. 2006, c. 33, §15 amends c. 182, §6 and creates c. 182, §8.1. Not yet in force. To be brought into force by regulation.)

Health Act, (c. 179).

Sections 1-8, 11-115 repealed effective March 31, 2009. Sections 9 and 10 to be repealed at a date to be fixed by regulation. Replaced by Public Health Act, 2008 (c. 28)

Public Health Act, 2008 (c. 28)

Minister may require a public body to make a public health plan, which must be approved by the Minister and published (§§3, 4). Health professionals, persons responsible for administering a hospital or laboratory, or prescribed persons must report identity or contact information of infected person or person in custody of infected person (§§9, 10). Persons must not willingly cause a health hazard, and persons engaged in regulated activity must take reasonable care to prevent and respond to health hazards (Part 3). Health officer has inspection powers and may stop a person or vehicle, enter a vehicle or place and inspect a vehicle or place for specified purposes, including determining if a person is an infected person (§§23, 24). Minister may quarantine a facility by order; medical health officer make certain orders in respect of infectious agents and hazardous agents; health officer may make orders in respect of health hazards (§§26 - 36). Health officer and provincial health officers have emergency powers (§§54 - 58). Duties and responsibilities of Minister, provincial health officer, medical health officers, environmental health officers and local governments (Part 6). Infectious agents, hazardous agents, health hazards and classes of health hazards may be prescribed by regulation; preventative measures; public toilets (Part 9).

Health and Social Services Delivery Improvement Act, (S.B.C. 2002, c. 2).

Applies to labour relations in health care sector. (§9). Provisions of collective agreements in violation of Act are void. (§10). *Note:* Act held unconstitutional by Supreme Court of Canada with effect as of June 8, 2008.

Health Authorities Act, (c. 180).

Provincial health ministry designates and delineates power and duties of regional health boards. Takes precedence over Labour Relations Code where health sector employees involved if conflict between the two acts. (§19.2). Appropriate bargaining units in health sector. (§19.4). Provisions of collective agreements in violation of Act are void (§10). *Note:* Act held unconstitutional by Supreme Court of Canada with effect as of June 8, 2009.

Health Care (Consent) and Care Facility (Admission) Act, (c. 181).

General rule that must not provide health care to adults without their consent. (§5). Defines consent. (§6). Every adult capable of giving or refusing consent may give, refuse and revoke consent and choose form of health care on any ground. (§4). Certain exceptions to consent requirements when adult incapable of giving consent. (§§11-15). Provisions for appointment (§16) and authority (§§17, 18) of temporary substitute decision maker when adult incapable. Temporary substitute decision maker must consult with adult to greatest extent possible and comply with any instructions or wishes expressed by adult when capable. (§19[1]). Must also act on basis of adult's known beliefs or values and in adult's best wishes. (§19[2]). (*Note:* Supplements Repeal Act, S.B.C. 2006, c. 33, §§11, 13 amend Act. Not yet in force. Describes admission to care facilities. [c. 181, §§20-26] and conditions for providing major health care without consent [c. 181, §14]. To be brought into force by regulation.)

Health Care Costs Recovery Act (S.B.C. 2008, c. 27)

Government may require people, whose negligence or wrongful conduct injures others, to pay or reimburse government for cost of victim's health care. (§8). Not yet in force. To be brought into force by regulation.

Health Professions Act, (c. 183).

Provides for designation (§§7-12.2) and regulation of health professions. Each health profession regulated by college. (§15). Colleges must act in public interest and establish and enforce appropriate requirements for registration of health professionals. (§16). Colleges may enact by-laws most of which must be filed with the Minister. (§19). Public access to information about registrants. (§22). Registrar must or may refuse access pursuant to regulations. Minister can appoint person to inquire into operation of professional college and issue directives. (§§18.1, 18.2). If bylaws of a college provide for assessment of registrant, the quality assurance committee may assess the professional performance of a registrant, and inspect the records, including patient records, of the registrant (§26.1). Mandatory quality assurance program requirement not yet in force. Colleges under Chiropractors Act, Dentists Act Medical Practitioners Act and Pharmacists, Pharmacy Operations and Drug Scheduling Act continued (§15.1). Chiropractors, physicians, dentists, optometrists now regulated by Act and applicable regulations.

Health Sector Partnerships Agreement Act, (S.B.C. 2003, c. 93).

Companion legislation to Health and Social Services Delivery Improvement Act. (S.B.C. 2003, c. 2). Extends similar protections to private sector partners of health-sector employers. Only applies to designated health facilities. (§2[b]).

Health Special Account Act, (c. 185).

Creates special account in general fund of consolidated revenue fund. Lottery funds used for health care spending. (§2).

Hearing Aid Act, (c. 186).

Duties and objects of Board of Hearing Aid Dealers and Consultants. Regulation and licensing of hearing aid dealers and consultants. (*Note:* c. 186 to be repealed by Health Planning Statutes Amendment Act, 2002, S.B.C. 2002, c. 15, §16, not yet in force. To come into force on April 1, 2010 (BC Reg 412/2008)

Hospital Act, (c. 200).

Establishes requirements and duties for operation of hospitals. (§§2, 4). Licensing and regulation of private hospitals. (Pt. 2). Powers of Minister regarding regulation of hospitals. (§§40, 42). Conditions applicable to hospitals receiving financial assistance. (§48). (*Note:* Community Care and Assisted Living Act, 2002, S.B.C. 2002, c. 75, §45 repeals Pt. 2 and brings regulation of private hospitals under Community Care and Assisted Living Act. Not yet in force. To be brought into force by regulation.)

Hospital District Act, (c. 202).

Incorporation of regional hospital districts. (§2). Purposes of regional hospital districts. (§20). Procedures for issuance of securities. (§37). *Note:* Final Agreement Consequential Amendments Act, 2007 c.36 and Maa nulth First Nations Final Agreement Act, 2007 (c. 43). will amend Act as a result of negotiation and settlement of Maa nulth First Nations Final Agreement. Not yet in force.. To come into force by regulation.

Hospital Insurance Act, (c. 204).

Establishes regime for providing hospital care benefits. "Resident" and "beneficiary" defined by Medicare Protection Act, c. 286. (§1). Only residents or dependants of resident eligible for benefits. (§3). Describes general hospital services provided under plan and services that are excluded. (§5). Hospitals reimbursed by government for services provided to beneficiaries. (§9). Billing beneficiary for insured services is offence. (§13).

Medical Practitioners Act, (c. 285).

Repealed effective June 1, 2009. Now regulated under Health Professions Act and Medical Practitioners Regulation (Reg 412/2008). College of Physicians and Surgeons of British Columbia is continued.

Medicare Protection Act, (c. 286).

Provides for access to necessary medical care based on need, not ability to pay. (§2). Duties and powers of Medical Services Commission. (§§3, 5). Criteria for eligibility as beneficiary (§7) and cost. (§8). Regulation and enrollment of practitioners and billing (§§13, 17, 18) and payment limits (§24). Approval of diagnostic facilities. (§33). Practitioner, owner of diagnostic facility or representative of professional corporation may appeal order to Supreme Court within 30 days. (§43). Medical Services Plan is administered consistent with values of public administration, comprehensiveness, universality, portability, accessibility, and sustainability. (§§5.1-5.7). (*Note:* Medicare Protection Amendment Act, 2003, S.B.C. 2003, c. 95 makes various amendments to billing practices. Most amendments not yet in force. To be brought into force by regulation.)

Mental Health Act, (c. 288).

Establishment of public (§2) and licensing of private (§5) mental health facilities and services. Director of Provincial facility has duty to ensure good care and proper detention of patients. (§8). Persons will not be admitted to Provincial mental health facilities if no suitable accommodation to treat patient or person is not person with mental disorder. (§18). Female patients must be accompanied by relative or female person for admittance. (§19). Patient detained entitled to hearing by review panel. (§25). (*Note:* Administrative Tribunals Act (S.B.C. 2004, c. 45, §§115-119) amends review panel procedures. Changes in force on Apr. 4, 2005.)

Optometrists Act, (c. 342).

Repealed effective March 1, 2009. Now regulated under Health Professions Act and Optometrists Regulation (Reg 33/2009). College of Optometrists of British Columbia is created by the Health Professions Act and applicable regulation. Patient Care Quality Review Board Act (S.B.C. 2008 c. 35)

Establishes process for members of public to lodge complaints about quality of health care services. (Part 2). Provides mechanism by which review of provision of health services by health authorities may be prompted by patients or Minister. (Part 3, Division 2). Not yet in force. To be brought into force by regulation.

Veterinary Drugs Act, (c. 363).

Person, other than a pharmacist or a veterinarian, must have a license to sell veterinary drugs or medicated feeds (§66). Effective April 1, 2009, pharmacists regulated under Health

Professions Act and Pharmacists Regulation (Reg 417/2008). College of Pharmacists of British Columbia is continued under the Health Professions Act and applicable regulation.

Podiatrists Act, (c. 366).

Duties, objects and powers of British Columbia Association of Podiatrists. (§§3, 11). Admission to practice of podiatry. (§6). (*Note:* Health Professions Amendment Act, 2003, S.B.C. 2003, c. 57, §58 repeals this Act and provides for regulation of podiatrists under Health Professions Act. Not yet in force. To be brought into force by regulation.)

Public Toilet Act, (c. 389).

Repealed effective March 31, 2009. Lieutenant Governor in Council may make regulations under Public Health Act in respect of public toilets.

Representation Agreement Act, (c. 405).

All adults entitled to arrange in advance how, when and by whom decisions about their health care will be made if they become incapable of making such decisions independently. (§2). May not make agreement if already incapable. (§4). Capability presumed. (§3). Describes types of decisions representatives can and cannot be authorized to make. (§§7, 9, 11). Different tests for incapability depending on type of decision being authorized. (§§8, 10). *Note:* Adult Guardianship and Planning Statutes Amendment Act, 2007 c.34 will amend types of decisions representatives can or cannot make. Not yet in force.. To come into force by regulation.

Venereal Disease Act, (c. 475).

Repealed effective March 31, 2009.

16 IMMIGRATION

See Citizenship

See category 4 Citizenship; also see Canada Law Digest, category 17 Immigration.

17 INSURANCE

17.01 INSURANCE COMPANIES:

Insurance Act, c. 226 except as provided, applies to every insurer that carries on any business of insurance in province and to every contract of insurance made or deemed made in province. (c. 226, §2). Marine insurance is regulated by Insurance (Marine) Act, c. 230. Automobile insurance is regulated by Insurance (Vehicle) Act, c. 231.

Insurance Corporation Act, c. 228 as amended by Insurance Corporation Amendment Act, S.B.C. 2003, c. 35, segregates compulsory and optional insurance coverage, and sets up provincial government operated corporation to engage in business of insurance and reinsurance in all its classes, including operation of plan of universal compulsory vehicle insurance. (§7). Act generally deals with establishing corporation, borrowing powers, right to contract, limitation period of actions against corporation (generally one year), surpluses, reporting, etc. Except as provided, provisions of Finance Institutions Act do not apply to corporation. (§39). Rates for compulsory coverage set by Utilities Commission. (§44). Optional vehicle insurance provided by both provincial corporation and private insurers. (c. 231).

Supervision of Insurance Act is by Superintendent of Financial Institutions. (c. 226, §24). Corporation must file annual report (s.24)

Carrying on Insurance Business.

No person shall carry on insurance business in province unless authorized. (Financial Institutions Act, c. 141, §75).

Insurance Agents, Insurance Salespersons, and Adjusters.

Subject to limited exceptions in c. 141, §171[3], insurance agents and salespersons (c. 141, §171) and adjusters (c. 141, §180) must be licensed. Agent's and salesperson's licences must be issued for one or more prescribed classes of insurance and state the class. (c. 141, §174). Application governed by rules of insurance council. (c. 141, §225.1).

Policies.

Special provisions concerning life, accident, and fire insurance are contained in Insurance Act. (c. 226). Superintendent of Financial Institutions may approve forms of application, policy, or endorsement in respect of vehicle insurance. (c. 231, §72).

Statutory Trust.

Preferred beneficiary designation has been repealed. Under policies of life insurance statutory trust is created by insured designating irrevocable beneficiary and insured cannot alter or revoke designation without consent. Insurance monies are not subject to control of insured or his creditors and are not part of his estate. Insured can also designate beneficiary generally and if he does so he can alter or revoke this designation without consent. (c. 226, §49).

Rebates on premium are prohibited. (c. 141, §79).

Discrimination.

Legislation prohibiting discriminative rates appealed.

Hospital Insurance.

Subject to Act, hospital charges of beneficiaries for general hospital services reimbursed by government. (Hospital Insurance Act, c. 204, §§9-14).

Insurance Premium Tax Act.

Taxpayer other than taxable insurer must pay to Minister of Finance 7% of B.C. premium paid or payable. (Insurance Premium Tax Act, c. 232, §4). Taxable insurer must pay government: tax of 2% of taxable insurer's net taxable premiums received or receivable under contracts of life insurance, accident and sickness insurance and insurance that indemnifies or compensates for loss of salary or wages; tax of 4.4% of taxable insurer's net taxable premiums received or receivable under contracts of property insurance and automobile insurance; and 4% of net taxable premiums received or receivable under all other contracts of insurance. (c. 232, §3).

Direct Action Against Insurer.

See category 25 Transportation, topic 25.04 Motor Vehicles, subhead Direct Actions.

Motor Vehicle Insurance.

See topic Motor Vehicles.

17.02 SURETY AND GUARANTY COMPANIES:

No special legislation.

18 INTELLECTUAL PROPERTY

18.01 TRADEMARKS AND TRADENAMES:

See Canada Law Digest.

19 LEGAL PROFESSION

19.01 ATTORNEYS AND COUNSELORS:

(S.B.C. 1998, c. 9).

Legal Profession Act.

Designation “counselor” or “counselor at law” is unknown in British Columbia. Legal profession in theory is divided into two branches, barristers and solicitors. Barristers appear in court only. Solicitors do not appear in court. Nearly all lawyers are both barristers and solicitors.

Jurisdiction Over Admission.

Law Society of British Columbia has jurisdiction over admission of individuals to legal profession.

Eligibility.

Applicants must be of good character and repute, have served as articled students to practicing barrister or solicitor, normally for nine months, and complete ten week training course and pass qualification examinations (which requirements may be waived for barristers or solicitors of other provinces of Canada, or reduced for active practitioners in other common law jurisdictions). (§§14-18; Law Society Rules §§2-32, 2-37, and 2-49).

Educational Requirements.

Graduates of any common law law school in Canada, Certificate of Qualification issued by Federation of Law Societies of Canada, or approval by Credentials Committee. (Law Society Rules §2-27).

Petition for Admission.

Applications for admission are made to Executive Director of Law Society. (Law Society Rules §§2-48 and 2-27).

Examination.

Examinations are conducted by Law Society, or Examiners appointed by them, at such time and place as are from time to time considered necessary.

Admission Without Qualification Examination.

Barristers or solicitors from other provinces may be admitted upon passing transfer examination which is jurisdiction-specific or upon certifying that they have reviewed and understand all material reasonably required by Executive Director. (Law Society Rules §§2-49, 2-49.2).

Unauthorized Practice.

Only members in good standing of Law Society of British Columbia shall engage in practice of law within province, subject to certain provisions allowing others to appear in certain inferior courts and subject to other provisions allowing barrister or solicitor from outside province to act as solicitor or appear as counsel in B.C. (§§15, 16).

Inter-Jurisdictional Practice.

Barrister or solicitor from reciprocating jurisdiction (as of Nov. 3, 2006: all ten Provinces and Territories of the Northwest Territories, the Yukon and Nunavut) may provide legal services without permit for maximum of 100 business days in calendar year. Barrister or solicitor from non-reciprocating jurisdiction may provide legal services without permit on not more than ten legal matters and for not more than 20 business days during any 12-month period. (Law Society Rules §§2-10.1, 2-10.3, 2-11).

Licences.

A certificate is issued annually by Executive Director of Law Society to all barristers and solicitors upon payment of dues. (§23[4]).

Privileges.

Common law rules apply.

Disabilities.

Common law rules apply.

Liabilities.

Common law rules apply.

Compensation.

A barrister or solicitor may contract with party for provision of legal services. Any provision in any such contract relieving barrister or solicitor of responsibility for negligence shall be void. Contingent fees are permitted, subject to certain conditions imposed by Law Society. Any bill for professional services may be reviewed upon application of member or party charged by registrar of Supreme Court. Application for review must be made within three months after payment, or 12 months after bill delivered or sent. (§§65-70).

Lien.

A solicitor has a lien for his fees on all property recovered or preserved by proceeding he prosecutes or defends, but may not sue his client for amount of his bill until after 30 days from its delivery. (§§69[5], 79).

Disbarment and Suspension.

Members of profession are liable to disbarment, discipline or suspension for professional misconduct or conduct unbecoming member of Law Society. Law Society has power to suspend and order retraining of incompetent members. Benchers may authorize members to carry on practice of law through limited liability partnerships. (§§36-40).

Professional Associations.

Members may carry on business of providing legal services to public through law corporation if permit to do so has been issued by Law Society. (§§81-84).

Special Fund.

A special fund is administered by Law Society for purpose of partially or fully reimbursing persons by whom pecuniary loss is sustained by reason of misappropriation or wrongful conversion by member of Law Society of money or other property entrusted or received in his or her professional capacity. (§31).

20 MINERAL, WATER AND FISHING RIGHTS

20.01 MINES AND MINERALS:

Mineral Tenure Act (c. 292).

“Free miner” is person who holds valid and subsisting free miner certificate. Person other than government, must be free miner to register claim or lease or to register exploration and development. (§7). Before exploring and developing, extracting minerals or placer minerals, locating, recording or acquiring mineral title, executing disposition of mineral title or performing work, person (including company) and his agent must be free miner. Individual applicant must be 18 years of age or older and ordinarily resident of Canada for not less than 183 days in each calendar year or authorized to work in Canada. (§8[2][a]). Corporate applicant must be incorporated or registered in province. Free miners certificate is valid from beginning of day on which it is stated to be issued until day expressed to expire and may be renewed. (§8[3][d] and [f]). Only free miner or agent may enter mineral lands to explore and locate except land occupied by building, curtilage of dwelling house, orchard land, land under cultivation, land lawfully occupied for mining purposes other than exploring and locating minerals or placer minerals, protected heritage property, or land in park. (§11). Recorded holder of mineral title or owner of Crown granted 2 post claim who is holder of mining exploration permit under Mines Act (c. 293), has received written approval of Chief Inspector of Mines and applies under Provincial Forest Use Regulation, Part 3 for special use permit must be issued that permit (§11.1). Recorded holder of claim holds chattel claim and is entitled to minerals or placer minerals, as case may be, that are held by government and situated vertically downward from and inside boundaries of claim. (§28). Recorded holder may hold claim until expiry date, and after that, in accordance with regulations, may hold claim from year to year by doing exploration and development and registering statement of exploration and development or by making payments instead of exploration and development, and by registering revised expiry date. (§29). If administration of Park Act (c. 344) causes expropriation of rights of registered holder or owner of Crown granted 2 post claim, compensation of equal value to be awarded. (§17.1). Mining leases issued for maximum term of 30 years to holders of mineral claims on application. (§42). Lessee entitled to renewal of mining lease for one or more further terms not exceeding 30 years each if he complies with Act, regulations and conditions of mining lease, subject to approval of chief gold commissioner. (§42[5]). Placer leases issued for maximum term of ten years on application. Placer lessee entitled to one or more renewal terms for maximum terms of ten years each on same conditions as for mining leases. (§45). Lease not impeachable except on ground of fraud. (§51). Regulations may be made to provide for: conveyance to recorded holder of Crown granted two post claim of minerals; staking and positioning of posts for purpose of locating claims, disposal of mineral titles that have reverted, escheated or been surrendered to or otherwise acquired by government; survey of land to be covered by placer lease; specifying survey methods for establishment of area of mining lease or placer lease and its boundaries, preparation of lease plan and setting of lease provisions, and providing for resolution of matters in dispute respecting lease applications and development activities; limiting number of placer claims and placer leases issued under former Acts that can be consolidated into one placer lease; revising expiry dates for mineral titles; prescribing time or times and quantities and conditions of minerals that bulk sample on claim may be taken; methods by which mineral rights are acquired; conditions in leases; establishing or setting fees for performing duties or providing services under Act, including setting rents, costs and payments; prescribing exploration, development and assessment activities; specifying method and reporting of exploration, development and assessment activities; specifying how and when particular exploration and development activities may be applied to claim; requiring maps, receipts, invoices and other records and evidence to be produced for purposes of applications and reports under Act; prescribing forms for purposes of Act; and, any other matter for which regulations are contemplated by Act. (§65).

Mines Act, (c. 293).

Regulates opening, operation and closing of mine, safety of mine, operation of equipment used in operation of mine, environmental working conditions of exploration and mining, plan for working mine, and reclamation of surface of land, and cultural heritage resources and water courses affected thereby.

Petroleum, Natural Gas, Oil and Gas.

Practically all petroleum and natural gas rights are vested in Crown which grants following interests, terms of which are set forth in Petroleum and Natural Gas Act, c. 361 and regulations thereunder. (Act has been repealed under 2008-36-150, bill no. 20. Change comes into force on regulation.) Oil and Gas Activities Act replaces Oil and Gas Commission Act on regulation and regulates oil and gas activities and pipelines in British Columbia.

Geophysical Licence.

Permission to conduct geophysical exploration on Crown land, issued for term prescribed by commission under Petroleum and Natural Gas Act. (§32). Holder of licence must obtain approval of Oil and Gas Commission for particular geophysical exploration projects. Geophysical licence is not transferable with limited exceptions. Work may be ordered stopped where environmental damage is anticipated. Commission may cancel geophysical licence for failure to comply with Act. Unless there is danger to person or property, commission must not cancel geophysical licence until commission has given holder at least 30 days' notice to rectify default. (c. 361, §§32-36).

Drilling Licence.

Right, via public tender, to drill on Crown Reserve (lands whose petroleum and natural gas rights are reserved to Crown) and thereby earn lease, as set out in Reg. 10/82.

Lease.

Grants exclusive right to produce both petroleum and natural gas from location of lease for period of ten years (five in certain cases); term may be extended annually upon application to director under prescribed conditions for up to three years on prescribed payment if on ten year lease; lease of spacing area accommodating well automatically continues subject to lessee giving undertaking to drill well within next year. (§§58, 61, 62).

Leases and exploration permits are each subject to issuance and renewal fees and work obligations specified by Reg. 378/82; and holder of lease not less than three years old can be forced to do development drilling or surrender. (§60).

Natural gas marketing has been deregulated by Natural Gas Price Act, c. 329, enabling producers to sell to anyone (although export must be authorized by province, and export price by National Energy Board). Petroleum and Natural Gas Act imposes royalties on petroleum and natural gas. (§73).

Coal Mining, Coal Act (S.B.C. 2004, c. 15).

Repeals and replaces Coal Act (c. 51). Recorded holder may enter, occupy and use coal land and prospect for, explore for, develop and produce coal. (§2[1]). Recorded holder must give notice to every owner of surface area to which recorded holder intends to carry out exploration and development, and is liable to pay compensation for damage or loss caused by recorded holder. (§3). Dispute resolution through Mediation and Arbitration Board under Petroleum and Natural Gas Act upon application by owner or recorded holder. (§3[3]). Disposition by recorded holder of licence or lease is void if it divides interest on basis of stratification, physical position or characteristics of coal under location. (§6[1]). Licensee has exclusive rights to explore for and develop coal on licence location. With approval, can mine and remove coal for testing to maximum of 100,000 tonnes. (§9[1]). Person must apply to Minister for licence, and Minister must issue licence or refund application fee. (§12). Licence is valid for one year, and if there is no violation of terms of Coal Act, Minister must extend for one year terms. (§13[2]). Minister must issue lease if application is made in accordance with form and manner specified by Minister. (§18). Lessee may explore for, develop and produce coal on location of lease. (§16[1]). Minister may give notice requiring compliance within time period, and if non-compliance continues, Minister may suspend recorded holder's operations, refuse to renew licence, or cancel licence or lease. (§25).

Mining Tax.

Mineral Tax Act, c. 291 provides that every operator of mine other than coal mine shall pay tax for each mine equal to aggregate of (a) amount by which 13% of net revenue exceeds aggregate of (i) balance of cumulative tax credit account, (ii) amount of imputed interest for current year; and (iii) 2% of net current proceeds of mine, and (b) 2% of net current proceeds of mine. (§2[1]). Certain deductions are provided for in §§2(2) and 2(3).

Net revenue, net current proceeds and cumulative tax credit account are all calculated by formula specified in Act.

Mineral Land Tax Act, (c. 290).

Owner of mineral land must pay each year tax at rate of $1.25 per hectare on acreage of 20,235 hectares or less on sliding scale up to $4.94 per hectare on more than 404,686 hectares. (§3). Every owner of mineral land situated within production area, must pay tax each year at rate of $4.94 for each hectare of owner's production area. (§4).

Royalties at various rates are imposed under Petroleum and Natural Gas Act Regulations as amended.

21 MORTGAGES

21.01 CHATTEL MORTGAGES:

Chattel Mortgage Act, (c. 48).

Repealed. Chattel mortgages previously registered under Chattel Mortgage Act are now deemed to be registered under Personal Property Security Act, c. 359. See topic 21.05 Personal Property Security.

Mobile Homes.

See category 23 Property, topic Mobile Homes.

21.02 COLLATERAL SECURITY:

See category 8 Debtor and Creditor, topic 8.17 Pledges.

21.03 MORTGAGES OF PERSONAL PROPERTY:

See topic 21.05 Personal Property Security.

21.04 MORTGAGES OF REAL PROPERTY:

Land Title Act, Part 14, Div. 5. (c. 250).

To preserve priority, mortgages should be registered in Land Title Office of that district where land is located. To be registrable mortgage must conform to Land Title Act, c. 250.

Mortgage must be in two parts. (c. 250, §225[2]). Part 1 sets out parties to mortgage, legal description of mortgaged land, signatures of mortgagor and witness (in accordance with Part 5) terms that, if contained in mortgage, are required by regulation to be included in Part 1 of mortgage, and other prescribed information. (c. 250, §225[3]). Part 2 of mortgage consists of all other terms of mortgage. (c. 250, §225[5]). These terms may be standard mortgage terms filed by person, other than director, at Land Title Office, prescribed standard mortgage terms filed by Lieutenant Governor in Council or terms expressly set out in Part 2 of mortgage. Part 1 must contain statement identifying particular form terms in Part 2 take. If Part 2 consists of set of standard mortgage terms prescribed by Lieutenant Governor-in-Council or filed by applicant, set may be modified and such modification must also be included in Part 1. (c. 250, §226). If mortgage consists of set of standard mortgage terms, mortgagee or his agent, at or before time mortgage is executed, must give copy of standard mortgage terms to mortgagor who must acknowledge that he has received same. (c, 250, §229).

Mortgage Brokers Act (c. 313) requires persons, their employees, partners or directors who come within statutory definition of mortgage broker to register with Registrar as broker. Act contains classes of persons exempt from registration. (c. 313, §11). Every mortgage broker acting in mortgage transaction in which broker, associate or related party may have direct or indirect interest must disclose such interest in written disclosure statement to borrower or lender in that transaction. (c. 313, §§17.3, 17.4). Act provides penalties for failure to register as well as failure to disclose conflict of interest (c. 313, §22), but failure to register, in itself, does not render any mortgage void, voidable, or unenforceable (c. 313, §13). See also category 3 Business Regulation and Commerce, topic 3.06 Brokers.

Foreclosure, (Rules of Court, R. 50).

Foreclosure of equity of redemption of mortgagor is effected by judgment or order obtained in action by mortgagee against mortgagor in Supreme Court of British Columbia. In such action first order obtained is called order nisi. It provides for taking of accounts between mortgagor and mortgagee and taxation of costs et cetera. Court may order that unless mortgagor, within certain redemption time, usually six months after date of registrar's certificate upon taking of accounts, pays into court or to mortgagee sum so found due, that he be absolutely foreclosed of all right in mortgaged lands, but that upon payment that mortgagee discharge mortgage. Final order is obtained on application to judge and mortgagor may make representations requesting further extension of time for redemption.

Redemption.

Mortgagor may redeem mortgaged property at any time before sale or final judgment of foreclosure.

Release of mortgage should identify mortgaged premises intended to be released, and must be acknowledged. Partial release must specify portion of land intended to be released. If mortgagee will not execute release, after mortgage has been paid in full, action will lie for declaration that mortgage is discharged and satisfied.

Trust Deeds.

Debentures and debenture stock are often secured by trust deed conveying property of company to trustees in favor of debenture holders, charging other property and containing number of ancillary provisions regulating respective rights of company and debenture holder.

Trust deeds must be registered in proper land title office if any real property is charged, in same manner as mortgages. In case of trust deed executed by corporation executed copy must be registered with Registrar of Companies. Trustee appointed under deed need not be resident within province. (Land Title Act, c. 250, §180).

Forms.

Land Title (Transfer Forms) Regulation sets out form by which mortgage, transfer, and discharge of mortgage must be filed.

21.05 PERSONAL PROPERTY SECURITY:

Personal Property Security Act, (c. 359) (“PPSA”).

PPSA repeals Chattel Mortgage Act, Sale of Goods on Condition Act and Book Accounts Assignment Act and integrates all secured personal property transactions under one statute.

PPSA applies to every transaction that in substance creates “security interest”, defined generally in §1 of Act as interest in collateral that secures payment or performance of obligation and as interest in certain other kinds of personal property that do not secure payment or performance of obligation. (§3). Security interests are usually created by security agreements signed by debtor. For security interest to be enforceable against third party, collateral must either be in possession of secured party or debtor must have signed security agreement. (§10). Chattel mortgage, to extent that it secures payment or performance of obligation, is within scope of PPSA. (§2).

Registration.

All transactions creating security interests in personal property, including chattel mortgages, may be registered in Personal Property Registry, centralized computerized registry created by PPSA. PPSA creates notice filing system. Rather than filing security agreement itself, secured parties may register financing statement setting out essential details of transaction. (§43). Collateral must be described in accordance with Act and Regulations. Security agreement should be retained by secured party who is required to provide copy of it to debtor or other persons set out in §18 on request.

There is no time limit for registering financing statement. Financing statements can be registered before security agreement is executed (§43), and can be effective for future financings to same debtor secured by same collateral. Registration fees may be payable. (§43).

Renewal.

Financing statements may be registered for any period of time under PPSA. Registration is effective for period indicated on financing statement from time assigned to it in office of registry and may be renewed by registering financing change statement before registration expires (§44), subject to certain exceptions (§35[7]).

Priorities.—Subject to certain exceptions (§§27-32, 34, 36, 39, and 77) methods for determining priorities under PPSA are set out in §35. Attachment (§§12, 13) and perfection (§19) are key concepts in determining priorities among secured and unsecured creditors under PPSA. Chattel mortgage like any other security interest may be perfected under PPSA by possession of collateral (§24), registration (§25) or temporarily (§§5, 7, 26, and 29[4]), and priority generally goes to first party to perfect its security interest.

Remedies.

Part 5 of PPSA deals with rights and remedies of both debtor and secured party in event of default under security agreement. Remedies available to secured party, subject to certain qualifications with respect to consumer goods, include right to seize and sell goods, upon giving proper notice (20 days) to debtor and other interested parties. (§59). Act provides debtor with rights of redemption and reinstatement (consumer goods only) with respect to security agreement. (§62).

If collateral under security agreement is taken in consumer goods, secured party may either seize or sue, but not both. (§67). However, unless secured party obtains court order, secured party cannot seize consumer goods if debtor has paid at least two-thirds of total amount of obligation secured. (§58).

Securities Transfer Act (S.B.A. 2007 c.10) came into force on July 1, 2007. Modeled on Ontario and Alberta statutes as well as Art. 8 of UCC. Act reduces risk and uncertainty when taking security through indirect holding systems. Built on concept of perfection by “control” over “security entitlements”, Act has broad application through definitions of “security” and “purchase” (§1) and imports obligation of good faith on every contract that applies and every obligation under Act (§4).

22 PRIVACY AND PERSONAL INFORMATION

22.01 PERSONAL INFORMATION:

Private Sector, (S.B.C. 2003, c. 63).

In B.C., collection, use and disclosure of personal information by private organizations is governed by Personal Information Protection Act, S.B.C. 2003, c. 63 (“PIPA”). In some cases, such as personal information being transferred outside of B.C., collection, use and disclosure of personal information by private organizations may be governed instead by federal Personal Information Protection and Electronic Documents Act, S.C. 2000, c. 5 (“PIPEDA”).

Who and What.

PIPA regulates collection, use and disclosure of personal information by all organizations (§§2, 3[1]), with few exceptions, including organizations covered under Freedom of Information and Protection of Privacy Act (c. 165) or PIPEDA (§3[2]). Personal information is broadly defined as information that can identify individual, with exception of contact or work product information. (§1). Personal information specifically includes employee personal information that is collected, used or disclosed solely for purposes reasonably required to establish, manage or terminate employment relationship. (§1).

General Compliance.

Organization covered by PIPA is legally responsible for all personal information under its control, including personal information not in its custody. (§4[2]). Organization must designate individual responsible for compliance with PIPA (§4[3]), and develop policies and practices to meet its obligations under PIPA and respond to complaints (§5). Information on such policies and practices must be made available on request. (§5[c]).

Consent.

Organization must obtain consent to collect, use or disclose personal information of individual, except as permitted otherwise by PIPA. (§6). Consent must relate to specific purpose that reasonable person would consider appropriate in circumstances. (§§10[1], 11, 14, 17). Consent is deemed if individual voluntarily provides personal information for purpose that would be considered obvious to reasonable person (§8[1]), or if organization notifies individual of its reasonable intent and individual fails to decline in reasonable time (§8[3]). Organization may collect, use or disclose personal information without consent in limited number of circumstances. (§§12, 13, 15, 16, 18, 20, 21, 22). Organization may collect, use or disclose employee personal information without consent if reasonable for purposes of establishing, managing or terminating employment relationship between organization and individual. (§§13[2], 16[2], 19[2]). In such case, organization must notify individual that it will be collecting employee personal information about individual and for what purposes before organization collects such information. (§§13[3], 16[3], 19[3]).

Access to Personal Information.

Individual has right to be given access to his or her personal information under control of organization, and to know how their information has been used and to whom it has been disclosed, with few exceptions. (§23). Individual also has right to request organization to correct errors or omissions in personal information of individual that is under control of organization. (§24). Organization must comply with such request (§28), no later than 30 days after receiving it, except in limited circumstances (§§29, 31).

Accuracy, Protection, and Retention of Personal Information.

Organization must make reasonable effort to ensure that personal information collected by, or on behalf of, organization is accurate and complete if such information will be used to make decision affecting individual or will be disclosed to another organization. (§33). Organization must make reasonable security efforts to protect personal information in its custody or under its control, appropriate to sensitivity of information. (§34). Personal information must be destroyed once purpose for which it was collected is no longer being served. (§35[2]). However, personal information used to make decision affecting individual must be retained for one year after decision to give individual opportunity to access it. (§35[1]).

Enforcement.

Information Privacy Commissioner may initiate investigations and audits to ensure compliance with PIPA and to respond to complaints. (§36). Commissioner may authorize organization to disregard individual's request for access to or correction of his or her personal information (§37), give directions necessary for maintenance of order at hearings (§38.1), appoint mediator to attempt to settle matter under review (§49), hold inquiry (§50), and issue binding orders (§52). Organization must comply with order within 30 days unless application for judicial review is sought. (§53). Failure to comply with certain orders may result in application by Commissioner for contempt proceedings. (§38.2). Offence committed under PIPA may result in fine up to $10,000 for individual and $100,000 for non-individual. (§56). If organization is convicted of offence under PIPA, individual may sue organization for actual harm suffered as result of organization's breach of PIPA. (§57).

Public Sector, (R.S.B.C. 1996, c. 165).

In B.C., collection, use and disclosure of personal information by public bodies is governed by Freedom of Information and Protection of Privacy Act, R.S.B.C. 1996, c. 165 (“FOIPPA”).

Who and What.

FOIPPA regulates collection, use and disclosure of records containing personal information that are in custody or under control of public body, with few exceptions. (§3). “Personal information” is broadly defined as recorded information about identifiable individual other than contact information. (Sch. 1). “Public body” means ministry of government of B.C., agency, board, commission, corporation, office or other body designated in, or added by regulation to, Sch. 2, or local public body, but does not include office of member or officer of Legislative Assembly or Court of Appeal, Supreme Court or Provincial Court. (Sch. 1). “Record” is broadly defined to include any recorded form of information. (Sch. 1).

Freedom of Information.

(Pt. 2 of FOIPPA). Member of public may apply for access to record in control or under custody of public body by making written request to relevant public body. (§5). Public body must make every reasonable effort to assist applicant (§6), and must respond to request no later than 30 days after receiving it, except in limited circumstances (§7). In responding, public body must inform applicant whether and how access must be granted or why access was denied. (§8). Public body must refuse to disclose information relating to cabinet and local public body confidences (§12), and may refuse to disclose information in certain other circumstances (§§13-23). If request for access relates to information that may be harmful to business interests of third party or harmful to personal privacy, public body must provide written notice to third party and allow 20 days for third party to consent or object to release of information. (§23). If third party does not respond, public body will make decision and provide third party with written notice thereof. (§24). However, public body must disclose to public information about risk of significant harm to environment or to health or safety of public or group of people, or disclosure of which is, for any other reason, clearly in public interest. (§25).

Protection of Privacy.

(Pt. 3 of FOIPPA). (a) Collection, Protection and Retention—Personal information may be collected if expressly authorized under Act, for law enforcement purposes, or if information relates directly and is necessary for operating program or activity of public body. (§26). Personal information must be collected directly from individual, except in limited circumstances, and individual must be informed of purpose for which information is being collected, subject to certain exceptions. (§27). Public body must make every reasonable effort to ensure that personal information under its custody or control is accurate and complete if such information will be used to make decision affecting individual. (§28). In such case, public body must retain personal information for one year after decision. (§31). Individual has right to request public body to correct errors or omissions in personal information of individual that is in custody or under control of body. (§29). Public body must protect personal information in its custody or under its control by making reasonable security arrangements against such risks as unauthorized access, collection, use, disclosure or disposal. (§30). Public body must ensure that such information is stored and assessed only in Canada, except as permitted under FOIPPA. (§30.1). If public body, employee of public body or employee or associate of service provider receives foreign demand for disclosure, has reason to believe request is for purpose of responding to foreign demand, or has reason to believe unauthorized disclosure of personal information has occurred in response to foreign demand for disclosure, such person must immediately notify minister responsible under FOIPPA. (§30.2). Employer of person who submits such notice must not dismiss, suspend, demote, discipline, harass, deny benefit or otherwise disadvantage such person. (§30.3). Employee, officer or director of public body, or employee or associate of service provider that is employed by public body, who has access, whether authorized or unauthorized, to personal information in custody or under control of public body, must not disclose such information except as authorized under FOIPPA. (§§30.4, 31.1). Service provider is defined as person retained under contract to perform services for public body (Sch. 1); (b) Use and Disclosure—Public body may only use personal information for use consistent with purpose for which it was obtained or if individual provides consent. (§32). Public body may disclose personal information only as permitted under FOIPPA. (§§33, 35, 36 and Reg. 323/93, §5). FOIPPA distinguishes between disclosures that may be made inside or outside of Canada (§33.1), and those that may only be made inside Canada (§33.2).

Enforcement.

Information Privacy Commissioner may initiate investigations and audits to ensure compliance with FOIPPA and to respond to complaints. (§42). Commissioner may authorize public body to disregard individual's request for access to records or correction of personal information (§43), give directions necessary for maintenance of order at hearings (§44.1), appoint mediator to attempt to settle matter under review (§55), hold inquiry (§56), and issue binding orders (§58). Public body must comply with order within 30 days unless application for judicial review is sought. (§59). Failure to comply with certain orders may result in application by Commissioner for contempt proceedings. (§44.2). No action lies against government or public body for disclosure of record, failure to disclose record, or failure to give required notice. (§73). General offence committed under FOIPPA may result in fine up to $5,000. (§74). Privacy protection offence may result in fine up to $2,000 for individuals, $25,000 for service providers, and $500,000 for corporations. (§74.1).

22.02 PRIVACY:

Privacy Act (c. 373) creates tort of invasion of privacy, actionable without proof of damage (§1[1]). In determining whether act or conduct of person is violation of another's privacy, consider nature, incidence and occasion of act or conduct and any domestic or other relationship between parties. (§1[4]). Privacy may be violated by eavesdropping or surveillance, whether or not accomplished by trespass. Certain acts or conduct are not invasion of privacy. (§2[2]). Act also created tort, actionable without proof of damage, when person uses name or portrait of another for purpose of advertising or promoting sale of, or other trading in, property or services, unless that person, or person entitled to consent on person's behalf, consents to use for that purpose. (§3). Death of person whose privacy infringed extinguishes action. (§5).

23 PROPERTY

23.01 ABSENTEES:

Non-Canadian citizens are under no disability with regard to acquiring and disposing of land viz. Canadian citizens. Person's property rights cannot be disturbed by reason only of citizenship of person from or through whom he derived title. (Property Law Act, c. 377, §39).

Care of Property.

Supreme Court, on application, may appoint curator of estate of missing person who owns or is interested in real or personal property within province where Judge satisfied that it is expedient to do so to deal with property and value of property for which curator is appointed does not exceed $7,500. (Estates of Missing Persons Act, c. 123, §§3, 12).

Official administrator must be appointed curator except where it is found to satisfaction of court that some other person would be more desirable by reason of personal or business relationship, or other sufficient circumstances. When appointing curator, court may impose terms as court thinks proper. (c. 123, §2).

Duties of Curator.

Curator has custody and management of absentee's estate as trustee for missing person, but cannot sell or mortgage any portion of estate where value of such portion or amount to be sold or raised by mortgage exceeds $100 in value, except with prior approval of Supreme Court. (c. 123, §§3, 4). Curator may dispose of money coming into curator's hands from missing person's property as directed by Supreme Court. (c. 123, §5). With approval of Supreme Court, curator may sue or be sued in respect of property of missing person. (c. 123, §6).

Process Agent.

Absentees are not required to appoint agents for service of process.

Appearance in Court.

Defendant may appear personally or by counsel or agent, but justice may require defendant to appear personally, and may, if he thinks fit, issue warrant, in Form 5, for arrest of defendant, and adjourn trial to await defendant's appearance. (Offence Act, c. 338, §57[2]).

Escheat.

See category 13 Estates and Trusts, topic 13.07 Descent and Distribution.

23.02 ADVERSE POSSESSION:

After registration of indefeasible title, no title adverse to or in derogation of title of registered owner shall be acquired by length of possession, but notwithstanding foregoing, first indefeasible title registered is void as against title of any person adversely in actual possession of and rightly entitled to land included in indefeasible title at time registration was applied for and who continues in possession. (Land Title Act, c. 250, §23[3] and [4]). All existing methods of obtaining rights in or over land by prescription are abolished and, without limiting that abolition, common law doctrine of prescription and doctrine of lost modern grant are abolished. (c. 250, §24).

23.03 CONVEYANCES:

See topic 23.05 Deeds.

23.04 CURTESY:

No husband is entitled to estate by curtesy in land of his deceased wife dying intestate. (Estate Administration Act, c. 122, §95[2]).

23.05 DEEDS:

Every transfer of estate in fee simple shall be in mandatory form (Form A) prescribed by Land Title Act (c. 250), unless (a) form of transfer is prescribed by another enactment or (b) in opinion of registrar, it would be proper to accept another form of transfer (c. 250, §185). Unless expressly excepted or qualified, every transfer of estate in fee simple for valuable consideration and in prescribed form shall be deemed to be made in pursuance of Land Transfer Form Act. (c. 252, Part 1). Where transfer is subject to mortgage there are certain covenants implied by §§21-24 of Property Law Act. (c. 377).

Execution.

If spouse has no registered interest in property he or she need not join in instrument unless land has been registered as homestead or entry has been made on title under Land (Spouse Protection) Act. (c. 246). See category 8 Debtor and Creditor, topic 8.12 Homesteads.

Execution of instruments requiring registration must be witnessed by officer who is defined as person before whom affidavit may be sworn under Evidence Act. (c. 124, §60). Signature by officer witnessing execution of instrument by individual is deemed certification of various matters. (Land Title Act, c. 250, §43). If execution of instrument is not witnessed by officer, registrar may permit proof of execution by affidavit. (c. 250, §49). Corporation shall execute instrument by its authorized signatory. (c. 250, §44). Instrument purporting to transfer, charge or otherwise deal with land need not be executed under seal. (Property Law Act, c. 377, §16).

See topic Real Property for types of estates.

Registration.

Except as against person making it, no instrument purporting to transfer, charge, deal with or affect land, or estate or interest in land, is operative to pass any estate or interest, at law or in equity, unless it is registered in compliance with Land Title Act. (c. 250, §20). Such instruments take effect only upon registration. (c. 250, §22). Priority of registration gives priority of title, irrespective of date of execution, subject to contrary intention appearing in instrument. (c. 250, §28). Even though instrument purporting to transfer fee simple estate is void, transferee who: (a) Is named in instrument, and (b) in good faith and for valuable consideration, purports to acquire estate, is deemed to have acquired estate on registration of instrument. (c. 250, §25.1). Subject to fraud in which they have participated, purchasers of registered real estate or interest therein are not affected by express, implied or constructive notice of any unregistered interest affecting same, save only interests which have pending registrations, are leasehold interests in possession for term not exceeding three years if there is actual occupation under lease agreement, or involve title of person in adverse possession under §23(4). (c. 250, §29[2]). Mere want of consideration will not invalidate registered, voluntary conveyance, if executed in good faith. (c. 250, §32).

Application to register transfer in fee simple requires: (i) Documents correctly executed and attested; (ii) completed Property Transfer Tax Return; (iii) appropriate fees.

Fees.

Standard fee for Form A transfer of freehold estate and registration is $71.90. State of Title Certificate is $13.85. Duplicate Certificate of Title is $54.50.

Property Transfer Tax.

Subject to certain exemptions, transfers of real property attract tax at 1% of first $200,000 of fair market value and 2% on remaining fair market value. Tax is payable by transferee and must be paid on registration of transfer in Land Title Office. (Property Transfer Tax Act, c. 378, §§2 and 3).

Goods and Services Tax.

Subject to certain important exceptions, real property transactions subject to G.S.T. in amount of 5%. Circumstances will dictate availability of tax credits and whether purchaser or vendor liable for payment of tax.

Powers of attorney to convey, etc., see topic 23.13 Powers of Attorney.

Prescribed Form of Transfer of An Estate in Fee Simple.

See end of Digest.

23.06 DEEDS OF TRUST:

See category 21 Mortgages, topic 21.04 Mortgages of Real Property.

23.07 DOWER:

Abolished. Estate Administration Act. (c. 122, §95[1]).

23.08 ESCHEAT:

See category 13 Estates and Trusts, topic 13.07 Descent and Distribution. See also category 13 Estates and Trusts, topic 13.15 Wills, subhead Unclaimed Legacies.

23.09 LANDLORD AND TENANT:

Residential.

Governed by Residential Tenancy Act (S.B.C. 2002, c. 78). Act does not apply to living accommodation: rented by cooperatives to their members; provided by educational institution to its students or employees; where tenant shares bathroom or kitchen facilities with owner; included with premises that are primarily occupied for business purposes and are rented under single agreement; occupied as vacation or travel accommodation; provided for emergency shelter or transitional housing; used for health care; in correctional institution; or rented under Tenancy Agreement that has term longer than 20 years tenancy agreements in which Manufactured Home Park Tenancy Act applies, and prescribed tenancy agreements, rental units, or residential property. (§4). Principles applicable are based on law of contract rather than traditional concepts of landlord and tenant. Tenant obtains security of tenure by operation of Act. Distress cannot be levied. (§26[3]). Landlords are prohibited from charging screening fees for applicants. (§15). Right of landlord to receive security deposit is restricted to one-half of one month's rent and to time Tenancy Agreement is entered into. (§§19-20). Landlord may decide whether to allow pets and to charge added damage deposit, to maximum of one-half of one month's rent, to cover damage that might be caused by pets. (§§18-20). Landlords are obligated to make premises reasonably suitable for occupation by reasonable tenant willing to rent it, regardless of condition at time of rental. (§32). Residential Tenancy Regulation contains statutory duties and prohibitions which are deemed terms in all tenancy agreements. Landlord and tenant must conduct joint inspections before tenant's move in and out. (§§23, 35). Exclusive grounds for ending tenancy agreement are set out in Act. (Part 4). Prescribed forms of notice of end of tenancy agreement by landlord must be used. (§52). Landlord is not entitled to forcibly eject tenant but director under Act may issue order for possession of residential premises. (§55). Part 3 governs rent increases, which are to be set by regulation with calculation formula tied to consumer price index.

Act administered by court and by dispute resolution procedure as set out in Act. (Part 5). Person who has contravened provision of (Residential Tenancy Act) or regulations or who has failed to comply with order of Director (of Residential Tenancy Branch) may be ordered to pay administrative penalty. (c. 78, §94.1). Amount of administrative penalty may not exceed $5,000. (§94.2). Act no longer applies to manufactured home sites or parks. See topic 23.11 Manufactured or Mobile Homes.

Human Rights Code (c. 210) prohibits discrimination in leasing space on grounds of race, colour, ancestry, place of origin, religion, marital status, family status, physical or mental disability, sex, sexual orientation or age (c. 210, §10).

Tenancy Statutes Amendment Act 2006 would extend Residential Tenancy Act to assisted living and supportive living tenancies. (S.B.C., c. 35, §80, not yet in force).

Commercial Leases.

Commercial Tenancy Act (c. 57) governs nonresidential leases. All leases for term exceeding three years should be in writing signed by lessor (Law and Equity Act, c. 253, §59), and must be registered in appropriate Land Title Office to have priority over subsequent registered interests. Instruments dealing with land or charge need not be under seal. (Property Law Act, c. 377, §16). Leases for three years or less should be registered, and must be first proved or acknowledged. (Land Title Act, c. 250, §29). Leases with term of 30 years or more remaining as at date of registration of transfer of lease are not subject to payment of property transfer tax. (Property Transfer Tax Act, c. 378, §14[4][o]). See category 24 Taxation, topic 24.11 Property Taxes, subhead Property Transfer Tax Act. See category 10 Documents and Records, topics 10.02 Affidavits, 10.01 Acknowledgments. Short form of lease (as well as of deed and mortgage) is provided by statute and may be used when suitable, though its use is not obligatory, nor always desirable. (Land Transfer Form Act, c. 252).

Rent may be recovered by action or by distress on goods and chattels of tenant. (Commercial Tenancy Act, c. 57, §§2 and 3).

Distress must be made within six months after determination of lease, and during continuance of landlord's title or interest, and during possession of tenant from whom arrears became due. (c. 57, §4).

Tenants refusing to give up possession after termination of lease are liable to forfeit double rent during subsequent occupancy (c. 57, §15); or judge of Supreme Court, on application of landlord, may order writ of possession to issue, under which tenant is ejected by sheriff. (c. 57, §21).

Subject to court's power to relieve against forfeiture, where rent is overdue for seven days, or tenant is guilty of breach of any covenant, term or condition of his tenancy, which under terms of tenancy gives landlord right of reentry, should tenant, on demand in writing, refuse to pay rent or quit possession, landlord may apply to Supreme Court for writ of possession, which will issue unless sufficient cause is shown against it by tenant. (c. 57, §25). If, however, such proceedings are taken only for nonpayment of rent, tenant is entitled to retain possession on payment of arrears and all costs. (c. 57, §26[3]).

Occupiers Liability Act, (c. 337).

Occupier of premises owes duty to take such care as in all circumstances is reasonable to see that any person and that person's property will be reasonably safe in using premises. Such duty relates to condition of premises, activities on premises or conduct of third parties on premises. Occupier, however, has no duty of care to person in respect of risks willingly assumed by person, other than duty not to create danger with intent to do harm to person or damage to property, or act with reckless disregard to safety of person or integrity of person's property. This lower duty of care applies where person trespassing, engaging in free recreational activity and occupier is not providing person with living accommodation on those premises, on agricultural premises, rural premises, recreational trails, or utility rights of way and corridors excluding structures located on them. (c. 337, §3). Occupier is not liable for negligence of independent contractor employed, where former exercised reasonable care in selecting and supervising, and where it was reasonable to engage independent contractor. (c. 337, §5). Landlord and sublandlord who is responsible for maintenance or repair of premises are bound as occupiers. (c. 337, §6).

If occupier is permitted by law to exclude, restrict, modify or extend his duty of care by express agreement, or by express stipulation or notice, occupier must take reasonable steps to bring that to attention of person affected. (c. 337, §4).

23.10 LEASES:

Personal Property Security Act (c. 359).—Act will apply to lease for term of more than one year notwithstanding that lease does not secure payment or performance of obligation. (§3).

See topic 23.09 Landlord and Tenant.

23.11 MANUFACTURED OR MOBILE HOMES:

Manufactured Home Act (S.B.C. 2003, c. 75) provides registry system for ownership of manufactured homes.

Registration of ownership of manufactured home mandatory before ownership transferred unless exemption applies. (§18). Upon transfer of ownership of manufactured home, notice of transfer may be registered. (§7[1]). Unless notice of transfer registered, instrument purporting to transfer property in manufactured home will not be effective to transfer property except as against person making instrument. (§7[7]). Subject to Land Title Act, (c. 250), Manufactured Home Act sets out requirements for registering ownership (§5) and transfer of ownership (§7) of manufactured home. Where error has been made in registration of instrument of transfer, Registrar may, on sufficient evidence, correct error. (§11).

Registration of Charges over Manufactured Homes.

In order to file charge against manufactured home, it is necessary to file financing statement in Personal Property Registry. General rule under Personal Property Security Act (c. 359), is that as between competing charges, priority is determined according to time of registration.

Moving Manufactured Home.

Manufactured home may not be moved unless ownership registered, transport permit obtained and manufactured home moved to location and in accordance with terms and conditions set out in transport permit. (S.B.C. 2003, §15).

All registrations and applications for transport permits and identifying decal to be placed upon manufactured home must be on prescribed forms, available from Manufactured Home Registry, 2nd Floor, 940 Blanshard Street, Victoria B.C. V8W 3E6 (tel. 250-356-8609).

Residential Tenancy.

Governed by Manufactured Home Park Tenancy Act (S.B.C. 2002, c. 77). Act does not apply to tenancy agreements where manufactured home site and manufactured home both rented to same tenant or to prescribed tenancy agreements for manufactured home sites or manufactured home parks. (§4). Manufactured Home Park Tenancy Regulation contains standard terms deemed terms of every tenancy agreement. (§12). Landlords are prohibited from charging screening fees for applicants (§15) and requiring or accepting security or pet deposit (§17). Landlords may prohibit or govern tenant's ability to keep pets. (§18). Landlords are obligated to maintain manufactured home parks and sites in reasonable state of repair. (§26). Exclusive grounds for ending tenancy agreement are set out in Act. (Part 5). Prescribed forms of notice of end of tenancy agreement by landlord must be used. (§45). Landlord is not entitled to forcibly eject tenant but director under Act may issue order for possession. (§48). Part 4 governs rent increases, which are to be set by regulation with calculation formula tied to consumer price index. Act administered by court and by dispute resolution procedure as set out in Act. (Part 6). Person who has contravened provision of Residential Tenancy Act or regulations or who has failed to comply with order of Director (of Residential Tenancy Branch) may be ordered to pay administrative penalty. (c. 78, §94.1). Amount of administrative penalty may not exceed $5,000. (§94.2).

23.12 PERPETUITIES:

Modern rule against perpetuities applies as amended by provisions of Perpetuity Act. (c. 358, §6).

Modern Rule Against Perpetuities.

Common law rule which may be summarized as follows: Every limitation of property must vest, if at all, within life or lives in being plus 21 years plus period of gestation.

Perpetuity Act, (c. 358).

Modifies modern rule by: (a) Permitting alternative fixed period not exceeding 80 years (§7); (b) introducing “wait-and-see” rule providing that no contingent interest is void merely because interest may vest beyond perpetuity period (§8); (c) contingent interest capable of vesting within or beyond perpetuity period presumed valid until actual events establish interest is incapable of vesting within perpetuity period, whereupon (subject to §§11 [reduction of age], 12 [exclusion of class members] or 13 [cy pres]) it becomes void (§9); (d) substituting lower age where gift is contingent on beneficiary attaining age greater than 21 and gift would be void as incapable of vesting within perpetuity period (§11).

Act applies only to instruments taking effect after Act came into force on Jan. 1, 1979, except as provided. (§2).

Options.

Perpetuity period is 80 years. (c. 358, §21).

Old Rule Against Perpetuities.

Prohibiting disposition, after life interest to unborn person, of interest in property to unborn child or other issue of unborn person. Sometimes called rule against double possibilities or rule in Whitby v. Mitchell is abolished. (c. 358, §6).

Accumulations Act, 1967.

Repealed with effect from Jan. 1, 1979 by Perpetuities Act. (S.B.C. 1975, c. 53, §24).

23.13 POWERS OF ATTORNEY:

Attorney's power deemed to continue after termination by revocation or operation of law if such unknown to attorney. Power of Attorney Act (c. 370) regularizes transactions of persons dealing with attorney even if power revoked provided neither person nor attorney know of revocation. Mental infirmity is dealt with by both Power of Attorney Act and Representation Agreement Act. (c. 405). Powers of attorney by which lands are to be affected must comply with following provisions of Land Title Act (c. 250) namely:

In every case in which any instrument produced for registration in Land Title Office has been executed by attorney under power of attorney, power of attorney with proof of execution, or copy thereof duly certified to be true copy by Registrar, or Registrar of Companies, in whose office original is filed, shall be filed in office of Registrar, and registration of instrument shall not be effected until power of attorney, or duly certified copy thereof, has been delivered to Registrar for filing. (c. 250, §51).

Provided that when power of attorney has been executed or filed or deposited in any province or country laws of which require that original power of attorney be filed or deposited with officer preparing same or with some other officer or court, copy of power of attorney accompanied by certificate or other evidence that original has been so filed or deposited according to law, and duly certified to be true copy by officer under his seal of office, or evidenced as such by seal of court, may be filed in lieu of original. (c. 250, §51).

Every person appointed attorney for execution of any instrument requiring to be registered under Land Title Act must be 19 years of age at time of his appointment, and proof of that fact must be made to Registrar at time of filing power of attorney. (c. 250, §51). Land title office also requires statutory declaration by attorney in prescribed form to effect that he had not at time of execution of instrument received any notice or information of revocation of power by death or otherwise. §56(1) of Land Title Act provides that for purpose of Act, power of attorney filed in Land Title Office is not valid after three years after date of its execution. This does not apply to power of attorney executed by corporation, power of attorney referred to in §8(1) of Power of Attorney Act (c. 307) that is filed under §51 of Land Title Act (c. 250), or to power of attorney which expressly excludes §56(1) of Land Title Act (§56).

23.14 REAL PROPERTY:

Torrens System created under Land Title Act. (c. 250). Note also Property Law Act. (c. 377). Real estate industry regulated under Real Estate Services Act, (S.B.C. 2004, c. 42) and Real Estate Development Marketing Act, (S.B.C. 2004, c. 41).

Joint tenancy, tenancy in common and leasehold interests are recognized. Tenancy in common is presumed unless intent to create joint tenancy is clearly shown. (Property Law Act, c. 377, §11[2]). Estates tails are abolished. (§10).

Rule in Shelley's Case.

Applicability not decided by courts.

Foreign Conveyances or Encumbrances.

If not executed according to Provincial laws may not be capable of registration, although may be valid inter partes.

Strata corporations are established under Strata Property Act. (S.B.C. 1998, c. 43). Common property, e.g., gardens, hallways, etc., is vested in strata corporation. Common property shall be held by owners as tenants in common in shares proportional to unit entitlement of their strata lots. Share in common property shall not be dealt with separately from strata lot of owner. (§66). Ownership of airspace parcels allowed for, may be dealt with in same manner as other land registered under Land Title Act. (c. 250, Part 9). Strata corporation is responsible for managing and maintaining common property and common assets of strata corporation for owner's benefit. (§3). Owners must contribute to strata corporation, subject to §100. (S.B.C. 1998, c. 43, §99).

Zoning.

Lands within municipal or civic boundaries are subject to by-laws of particular city or municipality. Copies of by-laws may be obtained by writing to appropriate governing body.

Province is also divided into “regional districts.” Any development of land within such district will require approval of regional district. Regional district may also have by-laws for area, even though it is in rural area. (Local Government Act, c. 323).

See also topics 23.05 Deeds, Landlord and Tenant, Mobile Homes; categories 5 Civil Actions and Procedure, topic Partition; Debtor and Creditor, topic Homesteads; Documents and Records, topic Records; Family, topic Husband and Wife; Mortgages, topics Chattel Mortgages, Mortgages of Real Property.

23.15 TRUST DEEDS:

See category 21 Mortgages, topic 21.04 Mortgages of Real Property.

24 TAXATION

24.01 ADMINISTRATION:

Province is restricted to direct taxation. It taxes, with certain exceptions, all income and personal property within province, and all real property within province outside of municipalities.

Municipalities derive revenue from imposition of taxes upon land and by collection of licence fees and business taxes. See category 3 Business Regulation and Commerce, topic 3.19 Licences, Business and Professional.

Real estate in unorganized territories coming under provincial government is liable for sale immediately when taxes are in default and owner has one year from date of sale in which to redeem by payment of arrears and interest.

Real estate within municipalities is governed by by-laws of each municipality which vary both with regard to when property is liable to be sold and for how long after sale property is open for redemption. However, all real estate situate within municipality may be redeemed by payment of taxes and interest within one year after sale. Assessment of property values in province provided by Assessment Act. (c. 20).

Penalties.

Generally every taxing or revenue statute has penalties for offences against provisions thereof by way of failing to file appropriate returns or failure to pay taxes due and payable. These offences vary with each statute. Penalty provisions usually provide for fine and imprisonment for nonpayment. Offence Act c. 338, §4 provides general penalty for offence of fine up to $2,000 and/or imprisonment for not more than six months.

24.02 BUSINESS TAXES:

Insurance Premium Tax Act.

Provincial tax on premium income of insurance companies licensed to conduct business in respect of persons resident and property situated in province. Rate of taxes, 2% for life insurance, sickness insurance, personal accident insurance, and insurance that indemnifies or compensates for loss of salary or wages, 4.4% for property and automobile insurance and 4% for all other insurance. Person who enters into insurance contract to insure property located in province with insurer not registered in B.C. must pay tax of 7% on premium. (c. 232, §§3-4).

24.03 EMPLOYMENT TAXES:

Social Security or Unemployment Compensation Tax.

None. (Federal only.)

24.04 ESTATE TAX:

Probate Fees.

Probate Fee Act, (c. 4). Probate fee rate in effect when grant of administration issued at rate of $6 for every $1,000 of estate value between $25,000 and $50,000 and $14 per $1,000 of estate value over $50,000. (§2). Probate fees payable for real and tangible personal property situated in B.C. at time of death, and, if deceased was ordinarily resident in B.C. immediately before death, intangible personal property wherever situated. See also Supreme Court Rules, Appendix C, Sch. 1 (Reg. 75/98).

24.05 GAMBLING AND ENTERTAINMENT TAXES:

Gaming Control Act.

Tax equal to 4.5% or 2.5% of amount deposited with operator at time of making bet, depending, respectively, on whether in triactor pool or not. (S.B.C. 2002, c. 14, §16).

24.06 GASOLINE AND SPECIAL FUELS TAXES:

Motor Fuel Tax Act.

Taxes payable by purchasers on gasoline, coloured fuel, marine diesel fuel, jet fuel, aviation fuel, natural gas, motive fuel, locomotive fuel and alternative motor fuel and a blend of alternative motor fuel. (c. 317, §§4-10.1).

24.07 HOTEL AND RESTAURANT TAXES:

Hotel Room Tax Act, (c. 207).

Outside resort areas, tax of 5% of the purchase price of accommodation. Within resort areas, tax = (5% x purchase price)—(applicable rate x purchase price) (s.2). In addition, tax of 3% for raising revenue of Tourism BC on purchase price of accommodation payable to government (s.3.1). Maximum tax that may be imposed under sections 2-3.1 is 10% of the purchase price of the accommodation (s.3(6)).

24.08 INCOME TAX:

Income Tax Act requires that income tax must be paid for each year by every individual who is resident of British Columbia on last day of taxation year or, who, not being resident in British Columbia on last day of taxation year, had income earned in taxation year in British Columbia as defined by Act. Also, income tax must be paid for each year by every corporation that maintained permanent establishment in British Columbia at any time in year. (c. 215, §2).

By agreement, all matters relating to administration and collection of provincial income tax are carried out by Federal government. One income tax return is made by taxpayer which return is sent to Federal government and indicates separate amounts of provincial and federal taxes.

Individual Income Tax.

Nonbusiness income of resident of Canada is taxable under Provincial Income Tax Act if individual resides in B.C. on last day of calendar year, or individual earns income in B.C. during taxation year. Nonbusiness income of nonresident of Canada is taxable under Provincial Income Tax Act if earned in B.C. Earned taxable income in B.C. for nonresidents of Canada is calculated using Federal Income Tax Act, R.S.C. 1985 (5th Supp), c. 1 definitions. Business income of both residents and nonresidents of Canada will be subject to tax under Provincial Income Tax Act to extent that income can be attributed to permanent establishment located in B.C. (c. 215, §4 and Income Tax Regulations, C.R.C., c. 945, §2603). Provincial tax payable is 5.06% of taxable income not exceeding $35,716, additional 7.7% is payable on any excess up to $71,433, additional 12.29% is payable on any excess up to $99,588, additional 14.7% is payable on any excess up to $99,588, and additional 14.7% is payable on any amount in excess of $99,588. (c. 215, §4.1[1]). (*Note:* Changes not in force, will come into force on Jan. 1, 2009.)

Corporations.

General rate of Provincial income tax on corporation taxable income is 11%. (§14). However, small business rate is calculated according to formula set out in §16. There is two year tax holiday for new small business. (§17).

Returns.

Federal Income Tax Act provisions apply to filing of returns for provincial income tax. (§29). (*Note:* Changes not in force, will come into force on Apr. 1, 2010.) Return for each taxation year must be filed: (a) in case of corporation within six months from date of end of fiscal year; (b) in case of individual on or before Apr. 30 in next year; (c) in case of person who had died without making return, by his legal representatives within six months from day of death; and (d) in case of estate or trust within 90 days from end of fiscal year.

Payment of Tax, Withholding.

Withholding provisions of Federal Income Tax Act apply to collection of provincial income tax. (§56). Employers must withhold portion of salary, wages or other remuneration of officers and employees, and remit it to Provincial Minister on account of payee's taxes for year. Same rule applies to payors in similar position, such as payors of pension benefits or payments of funds held in registered retirement income fund.

Company may be registered as “venture capital corporation”, business of which is restricted to making investments in British Columbia in small businesses substantially engaged in manufacturing and processing, research and development, tourism, agriculture, provision of export oriented services or other prescribed business activities. Small Business Venture Capital Act, c. 429, §20(3) provides for issue of tax credit certificates to shareholders of venture capital corporations entitling each to tax credit equal to 30% of amount invested. Income Tax Act, §21 provides for issue of venture capital tax credit certificates to individuals for deduction from tax payable to maximum of $60,000 each year. Corporations are not subject to $60,000 maximum.

Various provisions of Federal Income Tax Act apply mutatis mutandis in respect of payment of tax under Provincial Income Tax Act.

Objections to Assessments.

Taxpayer who objects to assessment under Provincial Income Tax Act may within 90 days from day of mailing of notice of assessment serve notice of objection in prescribed form in duplicate on Provincial Minister. (§41).

Appeals.

Taxpayer who has served notice of objection to assessment may appeal to Supreme Court of British Columbia to have assessment vacated or varied after either (a) Provincial Minister has confirmed assessment or reassessed, within 90 days of notice of confirmation or reassessment; or (b) 90 days have elapsed after service of notice of objection and Provincial Minister has not notified taxpayer that he has vacated or confirmed assessment or reassessed. (§42).

Capital Tax.

Tax is payable by corporations that are banks, trust companies and credit unions, if net paid up capital is equal to or above threshold amount of $10 million. (Corporation Capital Tax Act, c. 73, §3[1]). Generally, corporations other than banks, trust companies and credit unions are not subject to capital tax for fiscal years commencing after Sept. 1, 2002. Corporations that are banks, trust companies and credit unions with net paid up capital of less than $1 billion, or more than $1 billion and their head office is located in B.C., at end of applicable taxation year, pay 1% of their net B.C. paid up capital for that taxation year. In all other cases, such banks, trust companies and credit unions pay 3% of their net B.C. paid up capital for that taxation year. (§3[2]).

Returns.

Return for each taxation year must be filed within six months of end of fiscal year. Return must be accompanied by certified financial statement and all documents submitted with Canadian income tax return.

24.09 INHERITANCE TAX:

No succession duties are assessable with respect to deaths occurring after midnight, Jan. 24, 1977. See also Canada Law Digest, category Taxation, topic Income Tax, subhead Income Tax Act, catchline Capital Gains. See also Probate Fee Act (c. 4) and Supreme Court Rules, Appendix C, Schedule 1 (Reg. 75/98).

24.10 MINES, MINERALS AND FISHERIES TAXES:

Logging Tax Act.

Generally 10% of all income derived from logging operations broadly defined in province or 150% of credit under §127(1) Federal Income Tax Act, whichever is lesser. (c. 277, §2).

Mining Tax.

See category 20 Mineral, Water and Fishing Rights, topic 20.01 Mines and Minerals.

24.11 PROPERTY TAXES:

Home Owner Grant Act, (c. 194).

Provides annual provincial grant to reduce current year property tax of most resident home owners. Basic homeowner's grant is $570 for most homeowners. (§2[1]). [For] homeowners who are seniors; persons with disability; or recipients of war veterans, allowances will generally receive basic grant of $845. (§2[2]). Reduction of home-owner grant with respect to eligible residences, apartments, etc. of residential value exceeds the prescribed threshold amount. (§2[3] &Reg. 100/2002, §8).

Land Tax Deferment Act, (c. 249).

Minister of Finance may enter into agreements with owners of property who are 55 years of age or older, surviving spouses or persons with disability, whereby owner may defer payment of all of his real property taxes; eligible property means land used as owner's principal residence and which is area of land with improvements on it or manufactured home and area of land on which manufactured home is located if owned by same person.

Agreements are registered as charge on title in favour of government, having priority over all other charges in accordance with Act and if agreement in regard to manufactured home, Minister must register financing statement in Personal Property Registry (§7).

Agreement will terminate in event of sale of property and deferred tax is then payable together with interest at rate fixed by agreement or at 8% a year if no rate is set, but less any amount paid on account of tax. (§§4 & 8).

Owner may prepay deferred taxes at any time without notice or penalty, together with interest at rate fixed by agreement or by tendering payment together with interest compounded yearly the rate set under agreement or 8% if no rate is set. (§9).

Property Transfer Tax Act.

Property purchase tax is levied on fair market value of conveyances at rate of 1% on first $200,000 and 2% on balance. Exemptions are available. (c. 378, §3).

24.12 SALES AND USE TAXES:

Sales Tax.

See topic 24.13 Social Service Tax Act.

24.13 SOCIAL SERVICE TAX ACT:

Social Service Tax Act, (c. 431).

7% tax on: (a) specified services; (b) purchase price of all tangible personal property including certain fixtures purchased at retail sale in British Columbia; original purchase price of tangible personal property brought into British Columbia for purposes other than resale by any person residing, ordinarily resident or carrying on business in British Columbia; and (d) payments under leases of tangible personal property. Levies of 10% tax on purchase price of liquor. Variable tax rates between 7% and 10% for passenger vehicles depending on price. (§§6, 20, 40). Environmental levies for lead-acid batteries. (§67).

Exemptions from tax include sales or imports of certain food products for human consumption, equipment used directly in manufacturing, logging and exploration of minerals and petroleum products, turbine powered aircraft, goods and services in aquaculture industry, medicines, farm and fishing equipment, self-propelled vessels of more than 500 tons gross among others. (Part 3). Hazardous products including disposable diapers are taxable. (§68). Types of transactions exempt from tax include: (a) Sales of property between parent and subsidiary companies if tax has been previously paid on property and parent subsidiary relationship continues to exist for at least eight months after sale; (b) sales of property between person and corporation wholly owned or controlled by him providing that tax has been paid on property, assets are available to company on first day it commences business and transferor continues to wholly own and control corporation for at least eight months after transfer; (c) sales of property in British Columbia which provide for delivery to buyer outside of British Columbia.

Rateable reduction in tax on purchases of aircraft, trucks, etc., used in interprovincial trade, based on percentage of miles travelled in province to total miles. (§13). Persons selling goods at retail sales must collect tax but purchaser is still responsible to pay if they fail to do so. Proceedings for recovery of taxes may be commenced within seven years after date of the assessment or re-assessment of the amount claimed in the proceeding (§109). Refunds of less than $10 must not be made, and claim for a refund must be commenced within 4 years. Despite *Limitation Act*, an action for a refund must not be brought more than 4 years after the date on which the amount claimed was paid. If commissioner is satisfied there was no legal obligation to pay amount paid, or that amount collected was neither collected nor required, commissioner must refund the amount. (§§80, 82).

24.14 STAMP AND SEALS TAXES:

Stamp Tax.

No provincial stamp tax.

25 TRANSPORTATION

25.01 AIRCRAFT:

See Canada Law Digest, category Transportation, topic Aircraft.

25.02 AUTOMOBILES:

See topic 25.04 Motor Vehicles.

25.03 HIGHWAYS:

Transportation Act (S.B.C. 2004, c. 44) repeals and replaces Build B.C. Act (c. 40), Highway Act (c. 188) and Highway Scenic Improvement Act (c. 190). Replaces Ministry of Transportation and Highways Act (c. 311) and renames it Government Buildings Act. This Act sets out powers of minister and role of B.C. Transportation Financing Authority and regulates use and operation of highways.

25.04 MOTOR VEHICLES:

Motor Vehicle Act (c. 318).

General regulation of registrations and licences are under Superintendent of Motor Vehicles.

Vehicle Licence and Registration.

Shall register motor vehicle with Insurance Corporation of British Columbia, obtain licence and obtain owner's certificate before use or operation on highway. (§§3, 4). Exception: foreign motor vehicles subject to certain conditions. (§21).

Operator's Licence, (See §§23-28.).

Operator's licence of a class appropriate to age of driver and category of motor vehicle driven required and issued after tests, usually for five year periods. (§60). For suspension of licences see §§89-118. Licence must be carried while driving and produced to peace officer on demand. (§33). Operators subject to reexamination as to fitness and ability to drive. (§29). Minors over 16 and under 19 may, on application by parent or guardian, be licensed, but Superintendent may dispense with requirement for application. (§32). Tourists or new residents licensed in place of residence generally exempt for six months. (§34). Point system is in effect allowing suspension of licence under certain terms. See subhead Insurance, infra.

Members of Armed Forces.

Motor Vehicle Act provides exemptions from fees for certain disabled past or present members of armed forces. (§3[8]).

Sales.

Notice of transfer must be signed by seller and purchaser in prescribed form and transmitted within ten days of transfer to Insurance Corporation of British Columbia for registration. (§17). Registration of transfer will be refused unless transferee has paid all monies due under Act, Insurance (Vehicle) Act (c. 231, §38[3]) and Social Service Tax Act (c. 431) in respect to every vehicle owned by him. Registration is not proof of ownership. See category 21 Mortgages, topic 21.05 Personal Property Security.

Identification Marks.

Penalty for removal or obliteration of engine number or serial number without written permission of Insurance Corporation of British Columbia. Buying, selling, exchanging or dismantling vehicles without legible serial numbers prohibited. (§§58-59).

Operations prohibited by person whose licence is suspended or whose blood alcohol level exceeds 80 milligrams per 100 millilitres of blood. (§§95, 99, 100, 102, 224). See also criminal (federal) provisions which prohibit being in care and control of motor vehicle while over.08.

Street Racing.

Allows police officers to impound vehicles used in street racing. (§§241-248).

Size and Weight Limits.

Regulated by Motor Vehicle Act Regulations. (Reg. 26/58).

Lights Required.

Regulated by Motor Vehicle Act Regulations. (Reg. 26/58).

Equipment Required.

Regulated by Motor Vehicle Act Regulations. (Reg. 26/58).

Seat Belts.

With few exceptions, any motor vehicle sold or operated must be equipped with seat belts. Except in very limited circumstances, every person in motor vehicle must wear seat belt. (§220).

Pollution control devices required by regulation on vehicles manufactured after Jan. 1, 1971 (§§47 to 50).

Accidents.

Driver must remain or immediately return to scene, render reasonable assistance and produce in writing to other driver or those injured, and, on request, to peace officer or witness: name and address of driver and owner, licence number of vehicle, particulars of liability insurance or financial responsibility or such information as is requested. (§68).

Owner liable for penalties or fines under statutory regulations governing motor vehicles where vehicle driven by owner, lessee or another person with owner's or lessee's permission, and is liable for negligence of others who obtain possession of it with consent of owner or lessee (consent is deemed in case of family members living together). Lessors of vehicles similarly liable. (§§86 to 88). For lessors, maximum liability limited to at least $1 million. (c. 231, §82.1).

Gratuitous Passengers.

Legislation making owner or driver liable for death of, injury to or damage suffered by guest only in event of driver's gross negligence has been repealed. Standard of care now same for all.

Insurance or Proof of Financial Responsibility.

Under Insurance (Vehicle) Act (c. 231) all drivers must purchase driver's certificate each year. There is basic licence fee and additional premiums charged where driver has poor record. For vehicle coverage limits and accident benefits refer to Insurance (Vehicle) Act Regulations. (Reg. 447/83). For limits of coverage see Schedule 3 of regulations.

No person shall drive a motor vehicle unless insured under valid motor vehicle liability insurance policy or having required proof of financial responsibility. Motor vehicle liability insurance card or financial responsibility card must be carried when driving and produced to peace officer on request. (c. 318, §33).

Amount.

Regulated by regulations pursuant to Insurance (Vehicle) Act.

Reciprocity.

Where person is convicted of motor vehicle related Criminal Code offence or offence under state law of USA as set out in regulations, driver's licence is deemed to be suspended.

Certain states of U. S. and provinces of Canada have reciprocal arrangements with British Columbia for filing proof of financial responsibility, and issuance of motor vehicle liability insurance cards. (§22).

Insurance.

Possession of valid insurance or financial responsibility card is compulsory. Partial system of accident or “no fault” insurance is compulsory.

Under Insurance Act (c. 226), new accident benefit provisions for insured in motor vehicle liability policies call for prompt notice of accident to insured's own insurer. Statute and schedules should be checked in each instance.

Insurance (Vehicle) Act, (c. 231) empowers Insurance Corporation of British Columbia (see category 17 Insurance, topic 17.01 Insurance Companies) to engage in all aspects of motor vehicle insurance including universal compulsory automobile insurance plan. (§2). Act provides that all motor vehicles registered or licensed in province shall be insured under motor vehicle liability policy evidenced by driver's certificate (Reg. 447/83, §§42-50) or owner's certificate (Reg. 447/83, §§3-10). Minimum limits of coverage together with extended coverage and basic premiums together with extra premiums are set by regulations. Method of administration, claims, limitation of actions two years generally, one year for claims against Insurance Corporation of British Columbia directly with applicable notification periods (§17), uninsured motorist coverage (§20) and hit and run coverage (§24) subrogation (§84) are set out in Act.

Before or at time of applying for any class of license or motor vehicle permit, or use or registration of a transfer, applicant must apply for owner's certificate or drivers certificate and pay basic premium for that certificate. (s.33). Act also provides penalties, including suspension of vehicle permit or licence and suspension of driver's licence for failure to comply with Act. Act also provides that insurance coverage ceases on cancellation of permit or licence; e.g., suspension of driver's licence on conviction of impaired driving results in cancellation of driver's certificate evidencing motor vehicle insurance coverage. (§39).

Insurance (Vehicle) Act, provides for Insurance Corporation of British Columbia to indemnify innocent victims of uninsured or unidentified drivers and Insurance Corporation of British Columbia is then subrogated to rights of person paid and empowered to sue uninsured motorist for amount paid. (§20).

Underinsured motorist protection is available to allow injured insured to claim against Insurance Corporation of British Columbia up to insured's own policy limits. Rights may be enforced by arbitration rather than litigation. See §§148.1 to 148.4 of regulations. (Reg. 447/83).

Foreign vehicle coming within province must, within 30 days thereafter be registered with Insurance Corporation of British Columbia, or government agent, or authorized person who issues certificate unless used only for touring purposes in which case time limit is six months. (Motor Vehicle Act, c. 318, §21).

Actions Against Nonresidents.

No special provisions with respect to mode of commencement except where proof of financial responsibility has been furnished. See subhead Insurance or Proof of Financial Responsibility, supra.

Negligence.

See category 5 Civil Actions and Procedure, topic 5.15 Negligence.

Penalties.

Unless specified in relevant sections, penalties are governed by Offence Act (c. 338, §4), including fines up to $2,000 and six months imprisonment, or both. If person is convicted of offence specified in regulations, demerit points are registered against driver's licence. Upon examination of driver's driving record, Superintendent may suspend driver's licence. (See §93 of Motor Vehicle Act.) One year suspension of driver's licence is mandatory by superintendent for conviction of impaired driving.

Motor Vehicle Act (c. 318) provides complete code for driving and walking on public highways. Inter alia: Generally pedestrians have right of way in crosswalks (§179); drivers required to give signals as to turns, stops, or decreasing speed; mandatory use of seat belts; speed limits, generally 50 km/h (30 mph) in municipalities and 80 km/h (50 mph) on highways outside municipalities subject to Minister of Highways and Transportation erecting signs to increase or decrease rate of speed person may operate motor vehicle on that portion of highway (§146); also provision for school zones, playgrounds (§147), etc.; driving without due care and attention is an offence (§144).

Passenger Transportation Act (S.B.C. 2004, c. 39) establishes registry, board and licensing requirements for passenger-carrying vehicles, such as buses.

All Terrain Vehicles.

Prohibits operation of all terrain vehicles without certificate of registration. Provides rules for operation, necessary equipment, accident reporting and registration. Motor Vehicle (All Terrain) Act (c. 319).

Motor Dealers.

Motor Dealers Act (c. 316, §3) prohibits carrying on business as motor dealer without registration. Registrar of Motor Dealers may refuse to register, cancel, or suspend motor dealers for poor conduct or lack of financial responsibility subject to appeal to Commission. (§§5-7). Registrar has authority to make orders respecting dealing with assets and to apply for appointment of receiver. (§§27, 28).

Gasoline Tax.

See category 24 Taxation, topic 24.06 Gasoline and Special Fuels Taxes, subhead Motor Fuel Tax Act.

See also category 21 Mortgages, topic 21.01 Chattel Mortgages.

25.05 RAILROADS:

Railway Act (c. 395) governs intra-provincial railway companies.

See category 3 Business Regulation and Commerce, topic 3.08 Carriers.

MAN
MANITOBA LAW DIGEST

—Scope —

Revised for 2009 edition by

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(C.C.S.M. means Continuing Consolidation of the Statutes of Manitoba; R. S. M. means either Revised Statutes of Manitoba, (1970) or Re-Enacted Statutes of Manitoba (1987 or 1988); S. M. means Statutes of Manitoba; R. S. C. means Revised Statutes of Canada; S. C. means Statutes of Canada; W. W. R. means Western Weekly Reports; Q. B. means Queen's Bench.)

Note: Except where noted otherwise, this revision is as of Oct. 3, 2008.

1 INTRODUCTION

1.01 GOVERNMENT AND LEGAL SYSTEM:

All political authority in Canada is divided between federal and provincial governments according to provisions of Constitution Act, 1867. Local municipalities are concern of provinces, and derive their authority from Acts of provincial legislation.

Province of Manitoba is one of ten provinces of Canada. Legislative arm of Government of Manitoba consists of 57 members elected to represent people of Manitoba. Legislative Assembly may meet at any time from first Mon. in Feb. to Thurs. of second full week in June, except during week designated under Public Schools Act as spring break or vacation; and from first Mon. after Labour Day to Thurs. of first full week of Dec. Private Members' Hour is held from 10:00 a.m. to 12:00 noon Tues. and Thurs. For further discussion of Canadian Federal System, see category 1 Introduction, topic Government and Legal System in Canada Law Digest. Great many laws are promulgated by Canadian Federal Government and are not reflected in topics below.

Like all but one of Provinces of Canada, Manitoba has common law legal system, with roots in English common law. For information on Courts and Legislature of Manitoba, see category 6 Courts and Legislature.

1.02 HOLIDAYS:

See generally Canada Law Digest.

The Interpretation Act, C.C.S.M., c. 26 sets days that are holidays. Where last day for doing any act expires on day when place for doing so is not open during its regular hours of business, time limit is extended to include next day place is open.

Retail Business.

Certain establishments exempted from holiday closing law. (C.C.S.M. c. R120).

1.03 OFFICE HOURS AND TIME ZONE:

Manitoba is in the Central (GMT -06:00) time zone. Office hours are generally from 8:30 a.m. to 4:30 p.m.

2 BUSINESS ORGANIZATIONS

2.01 AGENCY:

Common law rules generally prevail.

A contract of agency may be created verbally or in writing, or may be inferred from a course of conduct. Unauthorized acts may be ratified by the principal, either expressly or by implication.

An agent may be dismissed and his authority revoked at any time, but if the revocation involves a breach of contract he has an action for damages against the principal. Except for power of attorney given for valuable consideration and expressly irrevocable, death of principal revokes agency.

2.02 ASSOCIATIONS:

Unincorporated associations are not partnerships in the sense that all members are bound by the acts of other members. An association as such has no power to sue or be sued, and property acquired must be held in the names of trustees chosen by the members.

Statutory provisions are made for cooperative corporations. (The Cooperatives Act, C.C.S.M. c. C223).

2.03 CORPORATIONS:

The Corporations Act (C.C.S.M. c. C225) applies to all corporations except: (a) Parts II, V and VI, Division I of Part X, Parts XIII to XIX and Parts XXI to XXVI do not apply to corporation created for government or municipal purpose or to corporations created under The Public Schools Act (C.C.S.M. c. P250) or The Health Services Act (C.C.S.M. c. H30); (b) bank incorporated under Act of Parliament of Canada; (c) cooperative corporation within The Cooperatives Act (C.C.S.M. c. C223) except to extent that The Cooperatives Act indicates provision of The Corporations Act applies; (d) credit union within The Credit Unions and Caisses Populaires Act (C.C.S.M. c. C301) except where The Credit Unions and Caisses Populaires Act indicates provision of The Corporations Act applies (C.C.S.M. c. C225, §3[2][b]); to The City of Winnipeg or to municipality that to which The Municipal Act (C.C.S.M. c. M225) applies.

General Supervision.

Director, Companies Office.

Name under which incorporation sought must include “Limited”, “Limitée”, “Incorporated”, “Incorporée”, or “Corporation” or abbreviation “Ltd.”, “Ltée.”, “Inc.” or “Corp.” as last word of name; may be number name; must not be similar to that of any body corporate, business or association; must not suggest any connection with Crown or member of Royal Family or government of Canada; unless permitted under Act must not include words “Loan” or “Trust”; must not be objectionable on any public grounds; must not be deceptively misdescriptive or otherwise prohibited by regulation; must be approved by Director. Proposed name stating nature of business may be submitted for approval. Upon application and payment of $40 name may be reserved for 90 days. Upon application and payment of $40, name may be reserved for 90 days.

Term of Corporate Existence.

May be perpetual. See subhead Dissolution, infra.

Incorporators.

One or more persons or corporations may incorporate corporation. Individual incorporators must be at least 18 years old and must not have status of bankrupt. No special requirement as to citizenship or residence. At least 25% of corporation's directors must be residents of Canada. If corporation's board is comprised of three or fewer directors, one must be resident of Canada.

Application.

Articles of incorporation must show name of corporation; place within Manitoba where registered office will be situate; classes and any maximum number of shares that corporation is authorized to issue; preferences or conditions attached to shares, any restrictions on transfer of shares, names in full and residence addresses of all first directors and incorporators, and any restrictions on business that corporation may carry on. Articles may set out any provision authorized by Act or by law to be set out in by-laws or unanimous shareholder agreement. First director who is not incorporator must sign consent to act as first director.

Filing of Application.

Filed in duplicate with Director, Companies Office.

Issue of Certificate of Incorporation.

If articles are in order and fees are paid, Director must issue certificate of incorporation. Notice thereof is published by Director in Manitoba Gazette. Date of incorporation is that of certificate of incorporation.

Incorporation Fee.

For corporation without share capital, $100; with share capital, $300. In addition there is tariff of fees for services under Act.

Registration.

Manitoba corporations are registered concurrently upon incorporation. Foreign corporations must be registered before carrying on business except federal corporations which must register within 30 days. Foreign corporations must file with Director application in prescribed form in duplicate, power of attorney in prescribed form and any other information Director may require. Fee payable on registration is $300. Reporting requirements are substantially same for foreign and domestic corporations.

Organization.

Incorporators need not be first shareholders or first directors. Any resolution signed by all directors or all shareholders at any time during corporation's existence is as valid as if passed at regular meeting of directors or shareholders. Special resolutions must be confirmed by 2/3 of votes at meeting of shareholders called for that purpose or by written consent of all shareholders entitled to vote at such meeting. By-laws are adopted by director resolution and confirmed by shareholder resolution at next meeting of shareholders.

Paid-In Capital Requirements.

Shares must not be issued until fully paid.

Amendment of Articles of Incorporation.

May be effected by delivering executed articles of amendment in duplicate to Director along with required fee. Fee is $150 for corporation with share capital, $300 to convert corporation without share capital into corporation with share capital, $50 for corporation without share capital. Amendments require authorization by special resolution (see subhead Organization, supra) and where share rights affected, shareholders entitled to vote separately as class. Shareholders who dissent are entitled to be paid fair value for their shares.

Increase or Decrease of Authorized Capital Stock.

May be effected by articles of amendment. On reduction of stated capital corporation must not be insolvent.

Shares.

Must be without par value. Unless articles otherwise provide each share entitles holder to vote and to share in distribution of assets upon dissolution. Allotment and issue of shares regulated by directors. Shares must not be issued until fully paid. There are provisions that restrict purchase by corporation of its shares.

Share Certificates.

Every shareholder is entitled to properly signed share certificate stating name of corporation, words to effect that corporation was incorporated under law of Province of Manitoba, shareholder's name, number and class of shares represented thereby and particulars of rights, privileges, restrictions and conditions of shares. Upon demand corporation shall furnish to shareholder full copy of text of share particulars.

Transfer of Stock.

Except as otherwise provided in Act, and Executions Act (R.S.M. 1987 c. E160), transfer or transmission of security is governed by The Securities Transfer Act (S.M. 2008, c. 14).

Stock Transfer Tax.

None.

Shareholders.

Elect directors and appoint auditors. Directors are responsible for general supervision of affairs of corporation. If shareholders are dissatisfied they may replace any director before expiration of term. Shareholders may inspect copies of articles, register of security holders and transfer register, and minutes of all shareholders' meetings. Shareholders holding 5% of issued voting shares may requisition meeting of shareholders and may requisition directors to circulate shareholders' resolution to be considered at next shareholders' meeting. Shareholder who dissents from resolution passed by majority to dispose of substantially all assets of corporation, delete share transfer restriction, amalgamate corporation or transfer corporation to another jurisdiction may require corporation to purchase his shares. If directors, corporation or affiliates take actions which unfairly disregard or oppress any shareholder, director, officer or creditor, court has broad discretion to rectify situation. If wrong is done to corporation such as where: (a) property or rights of corporation are being appropriated to majority, (b) breach of directors duty to act bona fide in interests of corporation has been condoned by majority, or (c) majority has enacted resolutions which discriminate so as to give majority advantage of which minority is deprived, and majority refuses to cause corporation to take action, derivative suit (class action) may be instituted with leave of court by any shareholder, director or officer, Director or any other person deemed proper by court.

Shareholders' Liability.

Shareholders not liable for corporate debts or obligations. On decrease of issued capital by articles of amendment each shareholder on such date may be individually liable to creditors of corporation for debts due on such date up to amount not exceeding amount of repayment to him. Notwithstanding dissolution of corporation, shareholders among whom its property has been distributed remain liable to its creditors up to amount received by them respectively but action to enforce such liability must be brought within two years of dissolution. Unanimous shareholder agreement imposes on parties liabilities of directors to extent agreement restricts powers of directors to manage.

Shareholders' Meetings.

Annual meetings must be held within 18 months after incorporation and subsequently not more than 15 months after previous annual meeting. Meetings must be held at any place within Manitoba provided in by-laws or if not provided as determined by directors or may be outside Manitoba if articles so provide or all shareholders entitled to vote so agree. Notice of time and place for holding general meetings must unless waived be given at least 21 days and not more than 50 days prior to meeting.

Voting.

Every shareholder is entitled to as many votes as he holds shares unless otherwise provided in articles and may vote by proxy. Nominee appointed by proxy need not be shareholder. Proxy only valid at meeting in respect of which given. Proxy may be revoked by instrument in writing deposited at registered office of company prior to day of meeting or with chairman of meeting on day of meeting. Where articles so provide cumulative voting for directors is permitted. Resolution signed by all shareholders entitled to vote at meeting is as valid as if passed at meeting.

Directors.

Corporation not offering its securities to public must have at least one director; public offering company must have at least three directors of whom at least two shall not be officers or employees of corporation or affiliate. Directors need not be shareholders. Generally, at least 25% of directors must be Canadian residents (if there are three or fewer directors, one must be Canadian resident). Directors must be individuals over 18 and not undischarged bankrupt. Directors may be elected for term of up to but not exceeding three years, in rotation or by staggered boards, otherwise election of directors must take place yearly and all directors then in office must retire but if otherwise qualified are eligible for reelection.

Vacancies in board may generally be filled by directors remaining in office provided there is quorum but if no quorum, vacancies must be filled by shareholders.

Directors appoint officers of corporation and may delegate powers to manage. Directors may appoint from their number managing director who is resident of Canada or committee with majority being residents of Canada and, with certain restrictions, may delegate any powers of directors to managing director or committee.

Directors' Meetings.

Business can only be transacted at directors' meeting at which quorum is present and at which at least 25% of those present are Canadian residents. Meetings may be held by electronic means. Any resolution signed at any time during corporation's existence by all directors is as valid as if passed at meeting. Unless articles or by-laws provide otherwise majority of directors constitutes quorum. Unless articles or by-laws otherwise provide directors may meet at any place and upon such notice as by-laws require.

Powers and Duties of Directors.

Subject to any unanimous shareholder agreement, directors of corporation shall exercise powers of corporation and shall direct management of business and affairs of corporation. Directors may make by-laws which are in force until next general meeting of shareholders when by-laws must be confirmed. By-laws continue in effect until repeal or amendment by directors and confirmation by shareholders.

Liabilities of Directors.

Where directors consent to shares of corporation being acquired by it for redemption, purchase or cancellation in contravention of Act or articles, directors are liable to corporation. Directors are jointly and severally liable to corporation for amount of any dividend improperly declared. Directors are jointly and severally liable to employees of company for all debts due while they are directors for services performed for corporation up to six months wages.

Powers of Corporation.

Subject to Act and articles corporation has capacity, rights, powers and privileges of natural person. By-law is not necessary to confer any particular power on corporation or directors. No doctrine of constructive notice and no act of corporation is invalid by reason only that it is contrary to articles or Act. There are restrictions on corporation holding shares in itself or parent corporation. Financial assistance by means of loan, guarantee or otherwise to shareholder, director, officer or employee or to any person in connection with purchase of corporation's shares is restricted where corporation would be insolvent after assistance was given. Unless contrary expressly so provided pre-incorporation contract entered into on behalf of proposed corporation personally binds person who enters into it. Upon incorporation corporation may adopt pre-incorporation contract and unless contract provides for joint and several liability person who entered into contract on behalf of corporation ceases to be bound by or entitled to contract. Party to pre-incorporation contract may apply to court for order fixing obligations under contract.

See also category 4 Citizenship, topic 4.01 Aliens.

Dividends.

May be paid in money, property or by issuing fully paid shares in corporation. No dividend can be declared when there are reasonable grounds for believing corporation is, or after payment would be, unable to pay liabilities, or realizable value of assets would be less than total liabilities and stated capital of all classes of shares.

Sales or Transfer of Corporate Assets.

Sale, lease or exchange of all or substantially all of its property must be authorized by shareholders who have right to dissent and receive fair value for shares.

Books and Records.

Every corporation must keep records containing following information: articles, by-laws and all amendments and copy of any unanimous shareholder agreement; minutes of meetings and resolutions of shareholders; directors' register setting out names, addresses and other occupations of all current and former directors and date upon which each became or ceased to be director; securities register showing for each class names and latest known address of each person who is or has been security holder, number of securities held by each holder and date and particulars of issue and transfer of each security; accounting records and minutes of meetings and resolutions of directors. Various rights of inspection given to shareholders, creditors and others subject in some cases to filing affidavit and payment of reasonable fee where copies furnished.

Reports.

Prospectus must be filed as required by The Securities Act (C.C.S.M. c. S50) upon sale of securities to public.

Annual return must be filed with Director not later than last day of month immediately following month of incorporation. Filing fee is $40 for corporations with share capital, $20 for corporations without share capital, $20 for amendments.

Annual financial statements must be laid before each annual meeting. Corporation which has made distribution to public must send each shareholder interim financial statement in prescribed form not less than 21 days before each annual meeting.

Corporation which has made distribution to public must file with Manitoba Securities Commission comparative financial statements and report of Auditor. (C.C.S.M. c. S50).

Shareholders of corporation which does not make distribution to public may resolve not to appoint auditor.

Corporate Bonds or Mortgages.

See category 20 Mortgages, topic 20.05 Personal Property Security.

Amalgamation.

Two or more Manitoba corporations may amalgamate by statutory procedure. They must enter into amalgamation agreement which is not effective until approved by shareholders of each corporation. Shareholders who dissent are entitled to receive fair value for shares if amalgamation approved.

Continuations.

Corporations incorporated in jurisdictions other than Manitoba, if authorized by laws of that jurisdiction, may on application to Director be continued as if incorporated in Manitoba.

Manitoba corporations if authorized by shareholders and it appears to Director that creditors or shareholders would not be prejudiced may apply to another jurisdiction to be continued as if incorporated under laws of that jurisdiction. Shareholders may dissent and are entitled to be paid fair value for shares upon continuation in another jurisdiction.

Dissolution.

Corporation may liquidate and dissolve by special resolution of shareholders of each class of shares issued whether or not holders are otherwise entitled to vote. Statement of intent to dissolve must be sent to Director in form Director requires and corporation must cease to do business except to extent necessary for liquidation. Director issues certificate of intent to dissolve and corporation must immediately notify each known creditor and publish notice in Manitoba Gazette and in newspaper in place where corporation has registered office and take reasonable steps to give notice in every jurisdiction where it carries on business. After discharging all obligations and other acts required to liquidate business and after proper notice has been given, remaining property is distributed to shareholders, according to respective rights. Articles of dissolution in prescribed form sent to Director and certificate of dissolution issues specifying date corporation ceases to exist.

Court may also order liquidation and dissolution of corporation on application by shareholder. Where corporation dissolved by court order liquidation and dissolution continues under supervision of court.

Director may dissolve corporation after giving 90 days notice: where corporation is two years in default in sending any notice or document to Director; where Director has reasonable cause to believe corporation is not carrying on business; where corporation is in default of sending to Director any fee.

Articles of dissolution may be filed in certain cases of voluntary dissolution as where corporation was never active and never issued shares or where it has no liabilities.

Insolvency and Receivers.

See category 8 Debtor and Creditor, topic 8.17 Receivers, and Canada Law Digest, category 8 Debtor and Creditor, topic Bankruptcy.

Close Corporations.

Act does not provide for private companies. Distinction between corporations which do and do not offer securities to public.

Foreign Corporations.

See subhead Registration, supra.

Taxation.

Corporations must pay income tax of 14.0% (effective Jan. 1, 2008 to June 30, 2008) and 13% (effective July 1, 2008 to Dec. 31, 2008) of taxable income earned in Manitoba in year.

(C.C.S.M. c. I10). Reduced rate of 2% is available in respect of active business income not exceeding $400,000 in 2008. By Federal-Provincial agreement Canada collects income tax on behalf of Manitoba. Insurance Corporations Tax Act (C.C.S.M., c. I50) makes every insurance company liable to tax of 2% of net amount of premiums payable under contracts of accident, life and sickness insurance and 3% under other contracts of insurance on business transacted in Manitoba. Corporation Capital Tax Act (C.C.S.M. c. C226) requires corporation with permanent establishment in province (for fiscal years beginning after Jan. 1, 2007) and paid-up capital of $10,000,000 or more to pay directly to province tax each fiscal year of 0.3% of taxable paid-up capital, if it does not exceed $10,000,000, or $30,000 plus 2.5% of taxable paid-up capital in excess of $10,000,000, if taxable paid-up capital exceeds $10,000,000 but does not exceed $11,000,000, or 0.5% of taxable paid-up capital, if it exceeds $11,000,000. Deduction available for capital used outside Manitoba (as defined in Regulations). Corporations can claim capital deduction equal to $5,000,000 if fiscal year begins before Jan. 2, 2007, or $10,000,000, if fiscal year begins after Jan. 1, 2007, with associated corporations sharing deduction. Tax on banks incorporated under Bank Act (Canada) or Quebec Savings Bank Act is 3% of taxable paid-up capital; tax on trust corporations and loan corporations is 3% of taxable paid-up capital. Deduction available for capital used outside Manitoba.

Manitoba Budget 2007 amendments will reduce corporate capital tax rates for fiscal years commencing after Jan. 1, 2008 for corporations with total paid-up capital over $21,000,000 to 0.4%, and for corporations with total paid-up capital between $10,000,000 and $20,000,000 to 0.2%.

Also see category 21 Property, topic 21.05 Deeds, subhead Land Transfer Tax.

Professional Corporations.

Most professions have association created by statute to govern affairs. Professional practice by corporation is permitted only if creating statute allows. (C.C.S.M. c. C225, §15[3]). The Professional Corporations (Various Acts Amendment) Act, S.M. 1999, c. 41 amends following Acts: The Certified General Accountants Act, C.C.S.M. c. C46, The Chartered Accountants Act, C.C.S.M. c. C70, The Dental Association Act, C.C.S.M. c. D30, The Law Society Act, C.C.S.M. c. L100 and The Corporations Act, C.C.S.M. c. C225, and provides for incorporation of certain professional corporations. Contact Manitoba counsel for further information.

2.04 FOREIGN CORPORATIONS:

See topic 2.03 Corporations.

2.05 JOINT STOCK COMPANIES:

See topic 2.03 Corporations.

2.06 LIMITED PARTNERSHIP:

See topic 2.07 Partnerships.

2.07 PARTNERSHIPS:

Law of Manitoba relating to partnership is codified by Partnership Act. (C.C.S.M. c. P30).

Partnership declarations must be registered under The Business Names Registration Act (see subhead The Business Names Registration Act [C.C.S.M. c. B110], infra).

Powers of Partners.

Any partner may bind or pledge the credit of the partnership for any debts incurred in the course of the partnership business.

Partnership Debts.

The assets of the individual members of the partnership may be rendered liable for partnership debts in case of deficiency of partnership assets.

On the principle of "holding out," a person not a partner may be liable as a partner to any one who has given credit to the partnership on the faith of such representation.

Limited Partnership.

General partners are jointly and severally liable, but limited partners are not liable for debts of partnership beyond amount they have respectively contributed to capital, or so long as they do not take active part in business of partnership. Where limited partner takes active part in business, he is liable as if he was general partner, to any person with whom he deals on behalf of partnership and who does not know that he is limited partner, for all debts of partnership. Persons forming limited partnership must register declaration under The Business Names Registration Act (see subhead The Business Names Registration Act [C.C.S.M. c. B110], infra) including names of all general and limited partners and amount of capital each limited partner has contributed.

Limited Liability Partnership.

Two or more persons may carry on business as limited liability partnership if they register under The Business Names Registration Act (see subhead The Business Names Registration Act [C.C.S.M. c. B110], infra) if (i) they carry on business in Manitoba only for purpose of practicing profession governed by Act of Legislature, (ii) such governing Act permits profession to be practiced in limited liability partnership, and (iii) governing body of such profession requires members of that profession to maintain minimum amount of liability insurance. Generally, partner of limited liability partnership is not individually liable for debts, obligations or liabilities of limited liability partnership or of another partner that arise from negligence, wrongful act or omission of another partner or employee of limited liability partnership.

The Business Names Registration Act (C.C.S.M. c. B110).

Every corporation, and, except for certain professions, every individual carrying on business under name other than its or his corporate name or surname, or in partnership, must register declaration within one month and this is published in Manitoba Gazette. Any changes must be registered and published.

3 BUSINESS REGULATION AND COMMERCE

3.01 BANKS AND BANKING:

See generally Canada Law Digest. Credit unions are Provincially controlled financial institutions governed by Credit Unions & Caisses Populaires Act (C.C.S.M. c. C301).

Trust and Loan Companies.

Part XXIV of The Corporations Act (C.C.S.M. c. 225) addresses trust and loan companies. Before trust company or loan company can commence business it must obtain business authorization from Director appointed by Minister of Consumer and Corporate Affairs.

Trust companies with business authorization and appointed by Court of Queen's Bench do not have to give security for due performance of their duties as executor, administrator, trustee, receiver, liquidator, assignee, guardian, substitute decision maker under The Vulnerable

Persons Living with a Mental Disability Act or committee. Trust company must not borrow money by issuing bonds or debentures.

3.02 BILLS AND NOTES:

See generally Canada Law Digest.

Lien Notes.

See category 8 Debtor and Creditor, topic 8.14 Liens.

3.03 BILLS OF LADING:

See topic 3.08 Carriers.

3.04 BILLS OF SALE:

See category 20 Mortgages, topic 20.01 Chattel Mortgages.

3.05 BLUE SKY LAW:

See topic 3.23 Securities.

3.06 BROKERS:

The term “broker” is generally applied to those dealing in real estate and securities. See topic 3.23 Securities.

The Real Estate Brokers Act (C.C.S.M. c. R20) provides that no person shall act as broker or salesman in real estate transactions unless duly registered, but except in relation to trade in certain properties outside Manitoba (C.C.S.M. c. R20, Pt. VI) this does not apply to lawyers entitled to practice law in Manitoba who are performing legal services on behalf of client, and certain others. Surety bonds must be filed for $10,000-$100,000 depending on size of broker unless real estate broker has filed with registrar valid certificate of membership in The Manitoba Real Estate Association Inc. Manitoba Securities Commission has powers of investigation.

The Mortgage Dealers Act (C.C.S.M. c. M210) with certain exceptions requires registration of mortgage brokers and mortgage dealers.

3.07 BULK SALES:

See category 8 Debtor and Creditor, topic 8.09 Fraudulent Sales and Conveyances.

3.08 CARRIERS:

Canadian railways have substantial flexibility to operate in competitive transportation environment but are regulated in certain respects by Canadian Transportation Agency under Canada Transportation Act, S.C. 1996, c. 10.

Some regulatory jurisdiction remains with Agency with respect to rates, conditions of carriage and common carrier obligations, but Canadian Railways can enter into confidential contracts with shippers. Transferring and discontinuing operation of railway lines does not require regulatory approval but Canada Transportation Act (S.C. 1996, c. 10) provides process. Regulatory approval is required for running rights and joint track usage. Shippers may apply to Agency for recourse under various shipper relief provisions contained in Act.

“Short-line” railways in Manitoba governed by The Provincial Railways Act. (C.C.S.M. c. R15). Motor Transport Board created under The Highway Traffic Act (C.C.S.M. c. H60) has authority over licencing, construction, discontinuance and limited regulatory powers over rates.

Airline operations have been deregulated as to points served, frequency of service and rates except for “designated area” in northern Canada.

Bills of Lading.

There is no requirement for uniform rail Bill of Lading. Terms and conditions of carriage including extent of carrier's liability may be negotiated and contained in confidential contract, failing which, in absence of specific order by Agency, carrier's liability is governed by Rail Liability Regulations.

Motor Vehicle Carriers.

See category 23 Transportation, topic 23.03 Motor Vehicles.

3.09 COLLECTION AGENCIES:

See topic 3.18 Licenses, Business and Professional.

3.10 CONDITIONAL SALES:

See category 20 Mortgages, topic 20.05 Personal Property Security.

3.11 CONSIGNMENTS:

See topic 3.14 Factors.

3.12 CONSUMER PROTECTION:

Area governed by The Consumer Protection Act (C.C.S.M. c. C200), The Business Practices Act (C.C.S.M. c. B120), and The Trade Practices Inquiry Act (C.C.S.M. c. T110).

The Consumer Protection Act provides that statutory warranties are implied on every sale of goods free and clear of encumbrances, unless otherwise disclosed, as well as reasonably fit for any purpose disclosed by purchaser. It sets out minimum disclosure requirements in transactions involving borrowing and credit generally. Right of prepayment on certain transactions so long as provided for in written contract. Contracts for prepaid services may be cancelled by buyer within seven days by serving notice by registered mail. Acceleration of debt on default valid, subject to certain limitations. Several collections practices are prohibited. Sales made elsewhere than in vendor's usual place of business may be cancelled within ten days by notice in writing. In certain circumstances, cancellation of sales may be made up to one year after entering into agreement. License required to offer payday loans. Limit upon credit charges regulated by the Public Utilities Board. Brokers may charge brokerage fee if they meet certain requirements. Brokerage fees may not be charged in advance of borrower receiving or having access to credit. Otherwise, brokerage fees generally acceptable so long as certain requirements are met. Consumers Bureau administers Act and receives complaints.

The Business Practices Act sets out specific unfair business practices and provides right of action in court by consumer. Unfair business practices include: (a) doing or failing to do anything which may reasonably deceive consumer; (b) making false claims to consumer; and (c) taking advantage of consumer if supplier should know consumer not able to protect own interests.

The Trade Practices Inquiry Act allows complaints to Minister of Consumer and Corporate Affairs by any four residents of Manitoba respecting misleading advertising and unfair or improper charging or dealings. Preliminary investigation by Minister. May recommend inquiry by appointed board who shall provide report; board may recommend price control, and Minister may prescribe regulations setting maximum price of article or product which is (i) essential to day to day activities of significant number of Manitobans, and (ii) distributed through system limiting competition, and (iii) no reasonable substitute easily available. Criminal penalties for contravention.

Plain Language Statute.

No plain language statute. See, however, The Business Practices Act (C.C.S.M. c. B120) and The Trade Practices Inquiry Act (C.C.S.M. c. T110), supra.

3.13 CONTRACTS:

Frustrated Contracts Act (C.C.S.M., c. F190).

Where contract frustrated and parties discharged, sums previously paid are recoverable and sums payable cease to be payable. Court given powers: (1) to allow expenses up to sums paid or payable; (2) to allow for valuable benefit conferred by one party on other or obligation assumed by one for benefit of other; (3) sever contract treating part as not frustrated and part frustrated. Act applies to all contracts governed by Manitoba law except charterparty (except time charterparty or charterparty by demise), contracts for carriage of goods by sea, insurance contracts, sales of specific goods which have perished either before contract or without seller's fault before risk passes to buyer.

Distributorships, Dealerships and Franchises.

No special rules apply.

3.14 FACTORS:

The Factors Act (C.C.S.M. c. F10) makes valid and binding any disposition of goods by mercantile agent in possession of goods and documents of title relating thereto with consent of owner, which consent may be presumed from possession. Such mercantile agent is deemed to be authorized to dispose of goods in ordinary course of business. If consent of owner has been revoked, disposition of goods by agent thereof to any one with notice of revocation is invalid.

A pledge of goods by a mercantile agent is valid unless given as security for an antecedent debt or without adequate consideration.

A transfer of the documents of title by endorsement or where permitted by delivery alone entitles the bearer to the goods.

3.15 FRANCHISES:

No special legislation.

3.16 FRAUDS, STATUTE OF:

Former English statute of frauds (29 Chas. II, c. 3) was in force in Manitoba until its repeal pursuant to The Act to Repeal the Statute of Frauds (C.C.S.M. c. F158), which Act provides that in action based upon acts done, contracts or agreements made or other claims which arose prior to Oct. 1, 1983, The Statute of Frauds and The Statute of Frauds Amendment Act may be pleaded.

3.17 INTEREST:

Judgments.

Quarterly pre- and post-judgment interest rate fixed by regulation. Prejudgment interest is paid on principal sum of liquidated claim from date cause of action arose to date of order and for unliquidated claim is paid from date successful party gave written notice of claim to date of order. Prejudgment interest on special damages is paid on such amount incurred by successful party in each six month period following date of notice of claim. No prejudgment interest on non-pecuniary damages, rather court makes allowance for lost opportunity to invest. Post-judgment interest payable from date judgment entered until satisfied. Court may depart from mechanics of act if unfair to either party. The Court of Queen's Bench Act (C.C.S.M. c. C280) fixes net discount rate of 3% to discount value of future damages.

See topic 3.12 Consumer Protection.

See also Canada Law Digest.

Unconscionable Transactions Relief Act (C.C.S.M. c. U20), provides for court to re-open and alter transaction involving money lent, including real property mortgage, where cost of loan is excessive or transaction is harsh or unconscionable. Except where prescribed acknowledgment from debtor is obtained by assignee, he is deemed to have full knowledge of transaction.

3.18 LICENSES, BUSINESS AND PROFESSIONAL:

License required by direct seller and some vendors under The Consumer Protection Act. (C.C.S.M., c. C200).

City of Winnipeg and various municipalities may license certain trades. This can include commercial travelers, transient traders, auctioneers, pawnbrokers, poolrooms, billposters and tobacco stores. By-laws of relevant municipality should be reviewed prior to commencing trade.

No person can operate individually or as agent amusement ride for profit or reward unless Minister is notified at least three days in advance of date, place and duration of ride. In addition, amusement ride must be reasonably safe. License is also needed to distribute films for public exhibition. (The Amusements Act, C.C.S.M., c. A70).

One must comply with certain criteria in order to practice professional engineering or professional geoscience whether permanently, temporarily or subject to restrictions. Criteria also exist for enrolling as engineer-in-training or geoscientist-in-training. (The Engineering and Geoscientific Professions Act, S.M. 1998, c. 55 - Cap. E120).

Licenses are required to conduct premises within province for sale of liquor. (The Liquor Control Act, C.C.S.M., c. L160).

The Wildlife Act (C.C.S.M., c. W130) provides that license may be needed for activities involving hunting, trapping or killing of, or commercial exploitation of, wild or furbearing animals. Fee for license depends on type of license required. Fees are set by member of Executive Council charged by Lieutenant Governor in Council.

The Fisheries Act, C.C.S.M., 1987, c. F90 provides when one needs license to fish in Manitoba waters. One cannot engage in fishing or fish farming or hold competitive fishing event without license or permit. Some exceptions exist for recreational fishing. License is needed to fish commercially. Fees for license depend on type of license required with amount set by member of Executive Council charged by Lieutenant Governor in Council.

License is required to operate daycare. (The Community Child Care Standards Act, C.C.S.M., c. C158).

One must be licensed as collection agent under The Consumer Protection Act (C.C.S.M., c. C200) to carry on business as collection agent. Employee of licensed collection agent does not need license to transact business on behalf of employer. However, employee must be registered under Act. Applicant for granting or renewal of license must file bond with director. Where collection agent is corporation and change occurs in directors or officers, collection agent must file with director documentary evidence that surety that bonded agent has been notified of change. Act prohibits several collection practices. There are specific rules with respect to records required to be kept by collection agents and trust accounts required to be kept with bank, trust company or credit union. Act also provides specific rules with respect to failure by collection agent to locate creditor once monies have been collected.

Note: Various Manitoba statutes govern licensing of professionals in Manitoba (including doctors, dentists, veterinarians, midwives, dental hygienists, lawyers, dietitians, optometrists, podiatrists, pharmacists, psychologists, etc.). Consult Manitoba counsel for particular requirements.

In order to operate private vocational institution person must apply to, and register with, director of private vocational institutions. (The Private Vocational Institutions Act, C.C.S.M. c. P137).

Registrar appointed under The Adult Learning Centres Act maintains register of registered adult learning centres and operators of registered adult learning centres. (C.C.S.M. c. A5).

3.19 MONOPOLIES, RESTRAINT OF TRADE AND COMPETITION:

See generally Canada Law Digest.

3.20 NEGOTIABLE INSTRUMENTS:

See Canada Law Digest, category Business Regulation and Commerce, topic Bills and Notes.

3.21 RESTRAINT OF TRADE:

See Canada Law Digest, category Business Regulation and Commerce, topic Monopolies, Restraint of Trade and Competition.

3.22 SALES:

Law relating to sale of goods has been codified under Sale of Goods Act (C.C.S.M. c. S10), which is substantially same as English Act and Uniform Sales Act formerly in force in many U.S. states.

Act also provides for vendor's lien, and, in cases of insolvency, for stoppage in transit.

Where goods are sold by sample, it is implied that the bulk shall correspond in quality with the sample; that the buyer shall have reasonable opportunity for comparing the bulk with the sample and that the goods shall be free from any defect rendering them unmerchantable, which would not be apparent on reasonable examination of the sample.

The Farm Machinery and Equipment Act (C.C.S.M. c. F40) makes provision protecting purchaser of new farm machinery and equipment of all types, and provides for statutory conditions of sale and creates Farm Machinery Board to investigate complaints, establish normal rental rates and recommend safety measures.

Contracts must be in writing in form as in schedule. (§11).

Prices must be listed by vendors with Board and these must be adhered to.

Repossession by vendor may be carried out with consent of purchaser or approval of Board. (§§24-25).

Bills of Sale.

See category 20 Mortgages, topic 20.01 Chattel Mortgages.

Product Liability.

Manufacturer or supplier of goods may be liable to consumer for negligence even where there is no privity of contract. (1932 A. C. 562).

Retail Credit Sales.

See topic 3.17 Interest; category 20 Mortgages, topic 20.05 Personal Property Security; and this topic subhead The Consumer Protection Act, infra.

The Consumer Protection Act (C.C.S.M. c. C200) governs form and substance of retail hire-purchases, conditional sales, consumer loans and direct sales. Act provides for licensing of direct sellers and collection agents, sets ten day "cooling off period" in case of sale away from seller's usual place of business. Act also regulates advertising of goods to be sold by time sale. Act provides for mediation of disputes between buyers and sellers and between lenders and borrowers as to terms of any transaction governed by Act. Act requires full disclosure of cost of borrowing in all cases of sales or loans on variable credit.

Trade Practices Inquiry Act (C. C. S. M. c. T110) provides mechanism to regulate price of essential products of limited availability. (See topic 3.12 Consumer Protection.)

The International Sale of Goods Act (C.C.S.M. c. S11) incorporates into Manitoba United Nations Convention on Contracts for the International Sale of Goods.

3.23 SECURITIES:

Trading in securities in Manitoba is regulated by The Securities Act. (C.C.S.M. c. S50).

Unless exempt, no person, firm or corporation may effect trade or perform any act in furtherance of trade in Manitoba of any securities in course of primary distribution to public unless preliminary and final prospectus has been filed with Manitoba Securities Commission. Full disclosure of financial position and all material facts relating to issuer of securities must be made in prospectus. Trades in commodities, commodity future contracts and commodity future options governed by The Commodity Futures Act, S.M. 1996, c. 73.

Supervision.

Securities Act and Commodity Futures Act administered by Manitoba Securities Commission, 500-400 St. Mary Avenue, Winnipeg, Manitoba R3C 4K5. Phone: (204) 945-2548. (§2).

Registration of Dealers.

Unless exempt, any person who trades, advises or effects acts in furtherance of trades in Manitoba must be registered with Manitoba Securities Commission and licensed to carry on business in province. Broker must furnish bond to satisfaction of Commission. Commission has power to suspend licenses for violations of certain provisions of Act. Persons trading in or advising in connection with trades in commodities, commodity future contracts or commodity future options must be registered under Commodity Futures Act. No person may carry on stock exchange or commodity futures exchange or clearing house in Manitoba without consent of

Manitoba Securities Commission.

Prevention of Fraud.

Manitoba Securities Commission has broad power of investigation under Securities Act and Commodity Futures Act. Breach of Securities Act can result in administrative penalty of up to $100,000 and/or summary conviction offence punishable by fine and/or imprisonment.

Compensation for Financial Loss.

Upon request of Director, Manitoba Securities Commission may order person breaching Securities Act to pay compensation to claimant for financial loss caused by such breach.

3.24 STATUTE OF FRAUDS:

See topic 3.16 Frauds, Statute of.

3.25 WAREHOUSEMEN:

The Warehouse Receipts Act (C.C.S.M. c. W30) defines warehouse receipt as acknowledgment in writing by warehouseman of receipt for storage of goods not his own. Warehouseman means any person who receives goods for storage for reward but does not include (a) express company within legislative authority of Parliament of Canada, (b) or railway company or (c) “manager” or “operator” of grain elevator as terms “manager” and “operator” are defined in The Canada Grain Act. The Warehouse Receipts Act provides for form of receipt, its negotiability by delivery and endorsement and rights of person to whom receipt is negotiated. Goods covered by non-negotiable receipt may be transferred by delivery of transfer in writing executed by holder, of which written notice must be given to warehouseman. Endorser of receipt is not guarantor.

Liens.

Warehousemen have a lien on the goods deposited with them for storage, whether deposited by the owner or with his authority, or by any person entrusted with the possession of the goods by owner or with his authority. Notice of lien must be provided within two months after warehouseman has knowledge of owner to owner and any secured party under any security agreement validly registered under Personal Property Security Act in respect of goods. Failure to provide notice will void lien as against party to whom notice was not provided. Subject to notice requirements, goods may be sold to realize amount of storage charges. (The Warehousemen's Liens Act, C.C.S.M. c. W20).

4 CITIZENSHIP

4.01 ALIENS:

See category 15 Immigration, topic 15.01 Aliens.

5 CIVIL ACTIONS AND PROCEDURE

5.01 ACCORD AND SATISFACTION:

To operate as a bar to an action an accord and satisfaction must be executed. By statute, obligations are satisfied by part performance without new consideration, when expressly accepted by creditor or where rendered pursuant to agreement for that purpose. (The Mercantile Law Amendment Act, C.C.S.M. c. M120, §6).

Pleading.

Must be specifically pleaded.

5.02 ACTIONS:

Provincial Judges Court.

Provincial Court Act (C.C.S.M. c. C275) provides for provincial judges court with both criminal and family divisions.

Queen's Bench.

Actions must be brought in Court of Queen's Bench, superior court of record with civil, family and criminal jurisdiction. First statute governing practice in Court of Queen's Bench operational on Oct. 1, 1895. Intention was to make practice as similar as possible to that of superior courts in England and Ontario under Judicature Acts. Separate administration of law and equity was abolished and it was provided that they should be administered concurrently but that in case of conflict, rules of equity should prevail. This rule applies to proceedings in all courts. On Mar. 1, 1989 new Court of Queen's Bench Act (C.C.S.M. c. C280) and new Rules were proclaimed.

Commencement of Actions.

Actions are commenced in the Court of Queen's Bench (Rule 14) by a statement of claim setting out the facts and the relief sought. Defendant, if served in Manitoba, must file statement of defence within 20 days from date of service; if served in any other part of Canada or U.S.A., within 40 days; if served elsewhere, within 60 days from date of service. If the plaintiff does not reside in Manitoba or has insufficient assets in Manitoba to pay costs, court may on motion by defendant make order for security for costs. Service of originating process may be made outside Manitoba in respect of: (a) Real or personal property in Manitoba, or perpetuation of testimony relating to such property; (b) administration of estate of deceased person concerning (i) real property in Manitoba, or (ii) personal property, where deceased person at time of death was resident in Manitoba; (c) interpretation, rectification, enforcement or setting aside of deed, will, contract, agreement or other instrument concerning, (i) real or personal property in Manitoba, or (ii) personal property of deceased person who, at time of death, was resident in Manitoba; (d) against trustee in respect of execution of trust contained in written instrument where assets of trust include real or personal property in Manitoba; (e) foreclosure, sale, payment, possession or redemption in respect of mortgage, charge or lien on real or personal property in Manitoba; (f) contract, where (i) contract was made in whole or in part in Manitoba, (ii) contract provides that it is to be governed by or interpreted in accordance with Manitoba law, (iii) parties to contract agreed that Manitoba courts are to have jurisdiction over legal proceedings, or (iv) breach of contract has been committed in Manitoba, even though breach was preceded or accompanied by breach outside Manitoba that rendered impossible performance of part of contract that ought to have been performed in Manitoba; (g) tort committed in Manitoba; (h) loss or damage sustained in Manitoba arising from any cause of action, wherever committed; (i) injunction ordering party to do, or refrain from doing, anything in Manitoba or affecting real or personal property in Manitoba; (j) in respect of claim founded on judgment; (k) in respect of claim authorized by statute to be made against person outside Manitoba by proceeding commenced in Manitoba; (l) person outside Manitoba who is necessary or proper party to proceeding properly brought against another person served in Manitoba; (m) person ordinarily resident or carrying on business in Manitoba; (n) counterclaim, crossclaim or third or subsequent party claim properly brought under rules; (o) by or on behalf of Crown or municipal corporation to recover money owing for taxes or other debts due to Crown or municipality; or (p) family proceeding within meaning of Queen's Bench Act (see Q.B. Rule 17).

Originating process for commencement of application is notice of application. Proceeding may be commenced by application where: (a) Authorized by rules; (b) statute authorizes application, appeal or motion to court and does not require commencement of action; (c) relief claimed is for (i) opinion, advice or direction of court on question affecting rights of person in respect of administration of estate of deceased persons or execution of trust, (ii) order directing executors, administrators or trustees to do or abstain from doing particular act in respect of estate or trust for which they are responsible, (iii) removal or replacement of one or more executors, administrators or trustees, or fixing of their compensation, (iv) determination of rights which depend upon interpretation of deed, will, agreement, contract or other instrument, or upon interpretation of statute, order in council, order, rule, regulation, by-law or resolution, (v) declaration of interest in or charge on land, including nature and extent of interest or charge or boundaries of land, or settling priority of interests or charges, or (vi) approval or arrangement or compromise or approval of purchase, sale, mortgage, lease or variation of trust; or (d) any matter where it is unlikely there will be any material facts in dispute. (See Q.B. Rule 14.)

See topics 5.15 Pleading, 5.16 Practice, 5.17 Process.

Claims under $50,000.

Actions commenced where relief sought is liquidated or unliquidated amount not exceeding $50,000 (exclusive of costs and interest) subject to expedited proceedings. Expedited proceeding may include limiting or restricting discovery and other interlocutory proceedings. (Q.B. Rule 20A).

Joinder.

Plaintiff may join all claims against opposite party in same proceeding. Court may order relief against joinder where it may unduly complicate or delay hearing or cause undue prejudice to party. (See Q.B. Rules 5.01 and 5.05.)

Parties.

Several persons may join as plaintiffs in same proceeding where represented by same lawyer and they assert claims for relief arising out of same transaction or common question of fact or law may arise, or their joinder would promote convenient administration of justice. Every person whose presence as party is necessary to enable court to adjudicate effectively and completely on issues must be joined as party. Proceedings are not defeated by misjoinder or nonjoinder of any party. Court may order to add, delete or substitute party or correct name of party on such terms as just at any stage of proceedings unless prejudice would result uncompensatable by costs or adjournment. (See Q.B. Rules 5.02-5.05.)

Class Actions.

One or more persons may bring or defend proceeding on behalf or for benefit of numerous persons having same interest. (See Q.B. Rule 12.)

Third Parties.

Defendant may commence third party claim against nonparty to action who is or may be liable to defendant for all or part of plaintiff's claim; is or may be liable to defendant for independent claim arising out of transaction involved in main action or related transaction or event or series thereof; or should be bound by determination of issue arising between plaintiff and defendant. Third party may defend against third party claim by delivering third party defence and, where appropriate, may defend against plaintiff's claim against defendant by delivering statement of defence to main action in which may raise any defence open to defendant. In defending main action, third party has same rights and obligations as defendant and is bound by any order or determination between plaintiff and defendant who made third party claim. (See Q.B. Rule 29.)

Stay of Proceedings.

See subhead Consolidation of Actions, infra.

Consolidation of Actions.

Where two or more proceedings are pending in which there is common question of fact or law or relief claimed arises out of same transaction or occurrence or series thereof, court may order (a) proceedings be consolidated, heard at same time or one immediately after other; (b) any one of proceedings be stayed until any other is determined; or (c) any one of proceedings be asserted by way of counterclaim in any other. (See Q.B. Rule 6.)

Abatement.

If by reason of death (when the cause of action survives or continues) or marriage, or by assignment or conveyance, any estate, interest or title devolves or is transferred, the action may be continued by or against the person to or on whom such estate or title has come or devolved.

Actions and causes of action in tort (except for defamation, malicious prosecution, false arrest, false imprisonment, or loss of care, guidance and companionship) in favour of or against any person do not abate on death but continue in favour of or against personal representative, except that exemplary damages and damages for loss of expectation of life are not recoverable in tort action brought by personal representative. (C.C.S.M. c. T160, §53).

Limitation of.

See topic 5.13 Limitation of Actions.

Small Claims.

Governed by Court of Queen's Bench Small Claims Practices Act. (C.C.S.M. c. C285). May file claim for: (a) amount not exceeding $10,000, which may include general damages of up to $2,000; or (b) assessment of liability for motor vehicle accident where vehicle of claimant not damaged. Claims commenced by filing simple, signed statement. Act excludes proceedings relating to: (a) ownership of real property; (b) interpretation of testamentary disposition; (c) administration of trust or estate; (d) family proceedings; (e) malicious prosecution, false imprisonment or defamation; or (f) wrongdoing by judges.

Direct Actions Against Insurer.

See category 23 Transportation, topic 23.03 Motor Vehicles, subhead Direct Actions.

5.03 APPEAL AND ERROR:

Court of Appeal.

Appeal lies from final judgment of Court of Appeal to Supreme Court of Canada with leave of latter and in certain other cases with leave of Court of Appeal. (R. S. C., c. S26).

Queen's Bench.

Every rule, order, verdict, judgment or decision rendered by Court of Queen's Bench except by consent of parties or on question of costs, but including order for costs made against lawyer acting in proceeding, which are in discretion of court, is appealable to Court of Appeal unless otherwise provided by statute. (C.C.S.M. c. C280).

Notice of appeal to the Court of Appeal does not operate as a stay of proceedings. Judge may order stay unconditionally or on terms. (Q.B. Rules 63.01[1], 63.02[3]).

Provincial Judges.

Decisions of Provincial Court (Family Division) are, with few exceptions, appealable to Court of Appeal, whose judgments may be appealed therefrom to Supreme Court of Canada with reasons and leave from each court accordingly.

5.04 CERTIORARI:

Jurisdiction.

The superior courts exercise jurisdiction in certiorari, and in criminal matters exercise power of quashing convictions even though right of appeal exists.

Statutory limitations have from time to time been passed to curtail operation of certiorari and number of provincial statutes creating offences purport to take away right. But if there is lack of jurisdiction or in cases of manifest fraud on part of prosecutor or improper conduct on part of provincial judge certiorari will still lie even though taken away by statute.

Grounds.

The most frequent ground for the issue of the writ is the lack of jurisdiction on the part of a magistrate or inferior court.

5.05 COSTS:

Costs are usually given to any party who makes a necessary motion and succeeds, but they are in discretion of judge in nearly all cases. (The Queen's Bench Act, C.C.S.M. c. C280. See also Q.B. Rules 57 and 58).

Security for costs may be ordered against any plaintiff resident outside of Manitoba without assets in the province sufficient to answer for costs, where there is past failure to pay costs, or where statute requires security for costs. (See topic 5.02 Actions.) Such plaintiff may move to have order for security set aside on satisfying court that he has assets in Manitoba, readily available on execution, in excess of amount of security required.

Security may be by bond in such sum as the court orders or by payment into court of one-half the amount of bond ordered. (See category 8 Debtor and Creditor, topic 8.04 Bonds.)

Tariffs.

Costs in Court of Queen's Bench and Court of Appeal are covered by tariffs.

5.06 DAMAGES:

Common law generally prevails. Statutory requirements must be met to plead damages. See also category 13 Estates and Trusts, topic 13.05 Death, subhead Action for Death.

Contributory negligence rules in force. (C.C.S.M. c. T90).

Doctrine of charitable immunity not recognized.

No-Fault Insurance.

See category 23 Transportation, topic 23.03 Motor Vehicles.

Sovereign Liability.

See The Proceedings Against the Crown Act. (C.C.S.M. c. P140).

5.07 DECLARATORY JUDGMENTS:

See topic 5.12 Judgments.

5.08 DEPOSITIONS AND DISCOVERY:

Oral examination to be held in Manitoba must be held before official examiner of Court of Queen's Bench or person agreed upon by parties. Party to proceeding or person who is to be examined on behalf of party shall be served with notice of examination. Person examined to swear or affirm. (See Q.B. Rules 31 and 34.)

Compelling Attendance.

Where person fails to attend at time and place specified in notice of examination, court may dismiss party's proceedings, make contempt order or make such order as just.

Outside Manitoba For Use Within Manitoba.

Courts may make order respecting where examination to take place, notice provisions, person before whom to take place or any other matter. Where court makes order for examination of party outside Manitoba, order shall, if moving party requests, provide for issue of commission and letter of request of foreign court to issue process necessary to compel person to be examined by Commissioner. Registrar shall issue letter or request and commission. Commissioner shall conduct examination by oral questions in accordance with Manitoba law unless order or foreign law require otherwise. Commissioner shall return commission to issuing registrar with original transcript and exhibits. Form of commission and letter of request are prescribed in rules. (See Q.B. Rule 34.)

Examinations Out of Court.

Party intending to introduce evidence of person at trial may, with leave of court or consent of parties, examine person on oath or affirmation before trial and may tender such testimony as evidence at trial. In granting leave, court will consider convenience of witness, possibility that witness will be unavailable for trial due to death, infirmity, sickness or being beyond jurisdiction of court at time of trial, expense and whether evidence ought to be given in person. Such person may be examined, cross-examined and re-examined in same manner as witness at trial. Any party at trial may use transcript, videotape or other recording of such examination as evidence of person, unless court rules otherwise. (See Q.B. Rule 36.) See subhead Outside Manitoba For Use Within Manitoba, supra.

Interrogatories.

Conducted by serving list of questions to be answered. Are permitted in addition or in substitution to oral examinations. (See Q.B. Rule 35.)

5.09 EQUITY:

See topic 5.02 Actions.

5.10 EVIDENCE:

Witnesses.

A person is not incompetent to give evidence by reason of interest or crime. Every person charged with an offense and the wife or husband of such person is a competent witness whether such person is charged solely or jointly with any other person. (The Manitoba Evidence Act, C.C.S.M. c. E150).

Persons under 14 years of age or persons whose mental capacity to give evidence is challenged shall be permitted to give evidence if, after inquiry by court, it is shown that person understands nature of oath or solemn affirmation and is able to communicate evidence. Person who does not understand nature of oath or solemn affirmation but who is able to communicate evidence may testify on promising to tell truth. (C.C.S.M. c. E150).

See also topic 5.08 Depositions and Discovery.

Privileged Communications.

Client (whether party or stranger) cannot be compelled, and legal adviser will not be allowed without express consent of his client, to disclose oral or documentary communications passing between them in professional confidence. This privilege does not extend to communications made to physicians or clergymen.

Husband and Wife.

Neither husband nor wife is compellable to disclose communications between spouses during marriage. (C.C.S.M. c. E150).

Self-incrimination.

No witness is excused from answering any question on ground that it may tend to incriminate him or establish his liability in civil proceeding or by reason of its tending to show he has been guilty of adultery, but no evidence so given may thereafter be received against him in any proceeding against him. (C.C.S.M. c. E150).

5.11 INJUNCTIONS:

Injunction may be procured in the Court of Queen's Bench, procedure being regulated by the rules of that court. (C.C.S.M. c. C280 and Q.B. Rule 14).

Interlocutory.

Court may grant restrictive or mandatory interlocutory injunction where it appears just or convenient to do so. (Q.B. Rule 40).

5.12 JUDGMENTS:

Where amount of judgment recovered in Court of Queen's Bench or Federal Court of Canada exceeds $40, certificate of judgment may be registered to form lien and charge in Land Titles Office against Certificates of Title registered in name of judgment debtor. Judgment creditor may proceed upon lien and charge, unless land is exempt under The Judgments Act (C.C.S.M. c. J10), and save for interval of one year. One year interval need not be observed in case of proceeding for sale of land against which judgment for alimony or maintenance is registered and that judgment is in default. Surplus proceeds of sale may be held or invested by court as security for future payments under judgment. Registration of judgment other than for alimony or maintenance may be totally or partially discharged by registration of instrument to that effect by any person entitled to discharge judgment. Registration of judgment for alimony or maintenance may be totally or partially discharged or postponed by court order. System of General Registry in Manitoba is no longer maintained as of Aug. 18, 1989 and all registrations therein lapse Aug. 20, 1989. (The Real Property Act, C.C.S.M. c. R30).

See category 8 Debtor and Creditor, topic 8.06 Executions.

Renewal.

Judgment remains in force for ten years without renewal, and may be renewed for a further term of ten years by action brought on the original judgment, but no action can be brought upon a judgment recovered on a previous judgment whether in this province or elsewhere.

(C.C.S.M. c. L.150).

No costs are allowed on reissuing judgment.

Declaratory Judgments.

An action or proceeding is not open to objection on the ground that it is for a declaratory judgment or order only and the court may make binding declarations of right whether or not any consequential relief is or could be claimed. (The Court of Queen's Bench Act, C.C.S.M. c. C280).

Foreign Judgments.

Judgments obtained elsewhere in Canada where there are reciprocal provisions may be registered in province within six years of date when judgment was given. Debtor must be notified of application for registration whenever he was not personally served with process in original action and did not appear, defend, or otherwise submit to jurisdiction of original court. Otherwise registration may be obtained and notice given to debtor within one month. (C.C.S.M. c. J20).

5.13 LIMITATION OF ACTIONS:

Time within which various actions may be brought is limited as follows:

Particular Limitations.

Specific causes of action may be subject to limitation by applicable statutes, as, e.g., two years for malpractice and negligence actions against doctors and physicians (C.C.S.M. c. M90), chiropractors (C.C.S.M. c. C100), naturopaths (C.C.S.M. c. N80); against crown, in respect of highways and drainage works, two years (C.C.S.M. c. P140); against public officials, two years (C.C.S.M. c. P230); against municipal corporations where claim is for return of money paid as taxes at municipality's demand, six months (C.C.S.M. cc. M225, S889); etc.

Statute Limitations.

Actions not limited by particular statute are governed by The Limitation of Actions Act (C.C.S.M. c. L150), under which actions must be brought within following periods after actions accrue:

Ten years: Actions on judgment or order for payment of money.

Six years: Actions for trespass or injury to real property; actions for recovery of money (except debt charged upon land) whether recoverable as debt or damages or otherwise, and whether recognizance, bond, covenant or other specialty, or on simple contract express or implied and action for account; actions for taking away, conversion or detention of chattels; action grounded on accident, mistake, or other equitable ground of relief not otherwise dealt with in Act, as well as any other action for which provision is not specifically made in Act.

Two years: Actions for penalties, damages, or sums of money in nature of penalties given by statute to person aggrieved; actions for defamation; actions for malicious prosecution, seduction, false imprisonment, trespass to person, assault, battery, wounding or other injuries to person; actions for trespass or injury to chattels; actions for violation of privacy of person; actions brought under and by virtue of Fatal Accidents Act.

One year: Actions for penalties imposed by statute brought by informer suing for himself alone or for Crown as well as himself.

No limitation: Legal actions for assault of sexual nature or where there has been intimate or dependent relationship between parties is not governed by any limitation period and may be commenced at any time.

Fraudulent Misrepresentation and Mistake.

Actions grounded on fraudulent misrepresentation, accident, mistake or other equitable ground: within six years of discovery of fraud or cause of action.

Any Other Action.

Where provision not specifically made in Act: within six years after cause of action arose.

Foreign Judgment.

The time within which action must be commenced on a foreign judgment is not settled in Manitoba. Such action must certainly be commenced within ten years and possibly within six years. It is uncertain to what extent limitation provisions available in the foreign jurisdiction may be pleaded in Manitoba. (The Court of Queen's Bench Act, C.C.S.M. c. C280). See topic 5.12 Judgments.

Special Limitations.

Where a statute provides a specific limitation for proceedings thereunder, such provision overrides the general limitations above set forth.

Disabilities of Plaintiff.

In all actions, any time period during which plaintiff is under disability, whether at time cause of action arose or subsequently, is not taken into account when calculating time period in which action must be brought, except that no action may be brought after 30 years after act or omission which gave rise to cause of action. However, if other party to action serves notice to proceed, time period in which person under disability must bring action commences to run as if he ceased to be under disability from date of notice.

Absence of Defendant.

If a person be out of the province at the time the cause of action against him arises within the province, the plaintiff may bring action within two years after the return of the defendant to the province, except in the case of penal action and actions for penalties.

Extension of Limitation Period.

Discretionary power to extend period if application made within 12 months of when applicant knew or ought to have known material facts. (C.C.S.M. c. L150).

Acknowledgment, New Promise or Part Payment.

Liability to an action for the recovery of money or on a judgment may be taken out of a statute where the debtor: (1) Promises his creditor in writing to pay such debt; (2) gives a written acknowledgment to his creditor; or (3) makes a part payment on account of the principal debt or interest thereon to his creditor. An action in such case may be brought within six years from such taking out of the statute.

5.14 PARTITION:

(The Law of Property Act, C.C.S.M. c. L90).

All joint tenants, tenants in common and any other person who has interest in land in Manitoba may bring action or may be compelled to make or suffer partition or sale of land or any part thereof. Applicant may proceed by statement of claim or notice of motion in Court of Queen's Bench where land is situate or where related proceedings have been, or may be, instituted. All parties interested in property must be served and brought before court, which will make partition order on ownership being shown.

Where such joint tenant or tenant in common is a married person or person who is common law partner, action for partition or sale of land may be brought by or against him or her, and partition, or sale thereof in lieu of partition when in opinion of court it cannot reasonably be partitioned, may be ordered by court without consent of any party to action, and without consent of his or her spouse or common law partner having been obtained as provided in The Homesteads Act. (C.C.S.M. c. H90).

See category 8 Debtor and Creditor, topic 8.11 Homesteads.

The proceedings may be referred to the master to settle the division or for the purposes of sale.

Sale of Property.

If the property is not capable of partition, an order for the sale of the property may be made, and property may be sold and proceeds divided amongst parties entitled.

5.15 PLEADING:

Pleadings are governed by Queen's Bench Rules, which are regulations made under Queen's Bench Act. (C.C.S.M. c. C280).

Pleadings Permitted.

Include statement of claim, statement of defence, reply, counterclaim, defence to counterclaim, reply to defence to counterclaim, crossclaim, defence to crossclaim, reply to defence to crossclaim, third party claim, defence to third party claim, reply to defence to third party claim, application, petition for divorce and answer.

Statement of Claim.

Generally, action commenced by plaintiff filing statement of claim any time within limitation period. Statement of claim must be served within six months after issue by court. (See Q.B. Rule 14.07.) Statement of claim must contain concise statement of material facts on which party relies and may include claim for relief and conclusion of law if supporting material facts. (See Q.B. Rule 25.)

Statement of Defence.

Shall admit all facts in opposite party's pleading not in dispute and shall plead all matters upon which party intends to rely to defeat claim of opposite party. (See Q.B. Rule 25.) See topic 5.02 Actions, subhead Commencement of Actions.

Counterclaim.

Defendant may assert, by way of counterclaim in main action, any right or claim he has against plaintiff, and counterclaim is to be included in same document as statement of defence and served within time prescribed for latter. (See Q.B. Rule 27.)

Reply is required (a) when party intends to prove different facts than pleaded in other party's defence and not included in statement of claim; and (b) when party intends to rely on any matter not previously raised which might, if not specifically pleaded take opposite party by surprise. Party must serve reply, if any, within ten days after service of statement of defence, but where other party counterclaims, plaintiff must deliver reply and defence to counterclaim within 20 days after service of defence and counterclaim. (See Q.B. Rule 25.)

Amended Pleadings.

Party may amend pleading without leave, before close of pleadings, if amendment does not cause addition, deletion or substitution of party, or on consent of all parties, or at any time to correct clerical errors, or with leave of court. On motion at any stage of action, court will grant leave to amend on such terms as are just, unless prejudice would result that could not be compensated for by costs or adjournments. Form of amendments and service of amended pleadings are prescribed. (See Q.B. Rule 26.)

Particulars.

Rules and contents of pleadings are generally prescribed. Where party demands particulars of allegation in opponent's pleading, and opponent fails to supply within ten days, court may order particulars to be delivered within specified time. (See Q.B. Rule 25.)

Service.

See topics 5.02 Actions, 5.17 Process.

Filing.

Originating process may be issued and filed by delivering or mailing original copy to centre in which proceedings are to be commenced, accompanied by prescribed fee. (Q.B. Rule 4.05[1]).

5.16 PRACTICE:

Practice at common law and in equity in the Court of Queen's Bench and in all other superior courts of record has been completely fused and is governed by the Queen's Bench Act. (C.C.S.M. c. C280).

Language.

Either French or English may be used by any person in any court or other adjudicative tribunal, and on any pleading or process in or issuing from any court or other adjudicative tribunal. Documents emanating from such bodies may be in either language. (The Manitoba Act 1870, 34-35 Vic. S. C. 1870, c. 28, §23).

Direct Actions Against Insurer.

See category 23 Transportation, topic 23.03 Motor Vehicles, subhead Direct Actions.

See also topics 5.02 Actions, Appeal and Error, Depositions and Discovery, Injunctions, Judgments, Pleading, Process; category 8 Debtor and Creditor, topics 8.03 Attachment, 8.06 Executions, 8.10 Garnishment.

5.17 PROCESS:

Commencement of Proceeding.

Queen's Bench Rules contemplate two types of civil proceedings: Actions and applications. Under Rules, every proceeding must be by action except where statute or Rules provide that proceeding may be brought by application. (See Q.B. Rule 14.)

General Requisites.

Most proceedings commenced in court having jurisdiction by issuance of statement of claim or notice of application. Form and contents of notice and statement are prescribed. (See Q.B. Rule 14.)

By Whom Issued.

All civil proceedings are commenced by issue of originating process by registrar of court in which proceeding is to be commenced, except where statute provides otherwise. Counterclaim that is against present parties to main action, and crossclaim, are commenced by filing and serving of pleading containing counterclaim or crossclaim, and pleading need not be issued. (See Q.B. Rule 14.)

Who May Serve.

Any person.

Personal Service on Individual.

By leaving copy of documents with individual. Original need not be produced.

Personal Service on Minor.

By leaving copy of document with minor and where minor resides with parent or other person having care or lawful custody of minor, by leaving another copy of document with that person, but where proceeding is in respect of minor's interest in estate or trust by leaving copy with guardian of minor's estate, or if no guardian appointed by leaving copy of document bearing minor's name and address with Public Trustee.

Personal Service on Incompetent.

Personal service on person who has been declared mentally incompetent or incapable of managing own affairs is effected by leaving copy of document with committee of person's estate, if one exists or, if not, with committee of person, or to substitute decision maker. Personal service on person who is mentally incompetent or incapable of managing own affairs, not so declared, is effected by leaving copy of document with person in whose care incompetent resides and incompetent himself unless attending physician is of opinion that leaving copy with incompetent would cause serious harm.

Personal Service on Partnership.

By service on one or more of partners, or on any person who appears to have control or management of partnership at principal place of business within Manitoba, or where partnership dissolved by leaving copy with every person sought to be made liable.

Personal Service on Domestic Corporation.

By service on officer, director or agent of corporation, or on person at place of business of corporation who appears to be in control or management of that place of business.

Personal Service on Foreign Corporation.

By service on any person having control or management at place of business of corporation within Manitoba.

Alternatives to Personal Service.

Number of alternatives to personal service available, including acceptance of service by lawyer (including by email), service by mail and service at individual's residence. (See Q.B. Rule 16.03.)

Substitutional Service.

If it is impractical to effect prompt service of originating process court may make order for substitutional service or dispense with service if it is necessary in interest of justice. Substituted service may include advertising, mailing or posting document.

Personal Service Outside of Manitoba.

See topic 5.02 Actions, subhead Commencement of Actions.

Proof of Service.

May be affidavit of person who served document.

Nonresident Motorist.

See category 23 Transportation, topic 23.03 Motor Vehicles.

5.18 REPLEVIN:

Where goods, chattels, or other personal property have been wrongfully distrained or wrongfully taken or detained, the owner may bring an action of replevin for their recovery and for damages. (The Queen's Bench Act, C.C.S.M. c. C280, §59; Q.B. Rules, §§44, 60).

Action is commenced in Court of Queen's Bench by statement of claim in same manner as other actions. Order for interim recovery of possession of personal property may then be obtained on motion ex parte. Affidavit in support of application must be filed, setting out facts of wrongful taking or detention, value and description of property and that claimant is owner or is lawfully entitled to possession. In disposing of motion, Court may order plaintiff to post security and order sheriff to take property from defendant and give it to plaintiff. Alternatively, Court may order defendant to post security and order that property remain in possession of defendant. Before sheriff executes order, he must ascertain that any security required by Court order has been given.

After replevin order has been executed, action proceeds like any other action. Where no defence is filed plaintiff may sign default judgment or may sign interlocutory judgment and proceed as in other cases.

5.19 SEQUESTRATION:

Order for delivery of possession of real and personal property now enforced by writ of possession and writ of delivery, respectively. Writ obtained by leave of court on motion without notice. Leave granted only where court satisfied all persons in actual possession of property received sufficient notice of proceeding in which order was obtained. (Q.B. Rule 60).

5.20 SERVICE:

See topic 5.17 Process.

5.21 SUBMISSION OF CONTROVERSY:

At any stage of an action, the parties thereto may agree on a special case and submit their rights to court on such statement, and court may give judgment as in other actions. (Q.B. Rule 22).

5.22 VENUE:

Unless otherwise provided by statute, actions in Court of Queen's Bench may be brought in any administrative or judicial centre. Defendant has right to have action transferred to centre nearest to place where cause of action arose, nearest to place where defendant resided at time action commenced, or nearest to place where defendant carried on business at time action commenced. (See Q.B. Rule 14.)

Change of venue may be ordered if necessary to fair trial or for convenience. (Q.B. Rule 47.02).

6 COURTS AND LEGISLATURE

6.01 COURTS:

The Court of Appeal has appellate jurisdiction of civil and criminal appeals from lower courts. (The Court of Appeal Act, C.C.S.M. c. C240). And see category 5 Civil Actions and Procedure, topic 5.03 Appeal and Error.

As to Court of Queen's Bench, Court of Queen's Bench Small Claims Division, and provincial judges courts, see category 5 Civil Actions and Procedure, topic 5.02 Actions.

Long Vacation.

Court of Queen's Bench is closed from July 1 until Sept. 1. During this period no trials are heard unless urgent; but offices of courts are open for transaction of routine business. Short vacation—usually two weeks, at Christmas. Actions may be commenced during vacation and urgent noncontentious motions disposed of.

6.02 JUSTICES OF THE PEACE:

These are appointed by the provincial government, and have local jurisdiction in criminal and civil matters under the Criminal Code and Q.B. Small Claims Practices Act, two sitting together having authority of magistrate. (The Provincial Court Act, C.C.S.M. c. C275, Part V).

6.03 LEGISLATURE:

The legislature meets at the call of the Premier. Either English or French may be used by any person in debates and both those languages must be used in records and journals. (The Manitoba Act 1870, 34-35 Vic. S. C. 1870, c. 28, §23).

See generally Canada Law Digest, category Introduction, topic Government and Legal System. (See also The Legislative Assembly Act, C.C.S.M. c. L110.)

6.04 REPORTS:

Decisions are reported in Western Weekly Reports, Dominion Law Reports, Manitoba Reports and others.

6.05 STATUTES:

In 1986 Supreme Court of Canada ruled that pursuant to The Manitoba Act 1870, 34-35 Vic. S.C. 1870, c. 28, §23 Statutes and Regulations of Manitoba were required to be passed in both French and English. Revised Statutes of Manitoba, 1970 and amendments passed in English only were granted temporary validity pending translation and re-enactment. Re-Enacted Statutes of Manitoba were passed in 1987 and 1988 containing French translation of Revised Statutes of Manitoba, 1970 and amendments thereto. C.C.S.M. is continually updated looseleaf service of Provincial Queen's Printer encompassing public statutes of Manitoba as amended. Residuary law is that of England on July 15, 1870.

7 CRIMINAL LAW

7.01 CRIMINAL LAW:

Criminal law and its procedure is regulated by statutes of Canada under constitution. Province only provides courts except for certain provincial penal enactments where province has in conjunction with other jurisdictions, imposed penalties. See Canada Law Digest.

8 DEBTOR AND CREDITOR

8.01 ASSIGNMENTS:

An equitable assignment of a chose in action requires that notice be given to the party liable.

Earnings.

Assignments of or orders for wages or salary to be earned in future, given in consideration of present loan, advance or payment, in order to be valid against employer, must be accepted in writing by him, except where such assignment is given for indebtedness for necessaries. No assignment made by either cohabiting spouse (man and woman who are married to each other and are cohabiting [C.C.S.M. c. L90, §32(4)]) of wages to be earned by spouse in future without written consent of other spouse. Advance or loan must exceed 95% of wages or salary assigned. (C.C.S.M. c. L90). Portion of wages assigned must not exceed garnishment exemptions. See topic 8.10 Garnishment.

Book Debts.

See category 20 Mortgages, topic 20.05 Personal Property Security.

8.02 ASSIGNMENTS FOR BENEFIT OF CREDITORS:

Such assignments are typically made under Bankruptcy and Insolvency Act.

See Canada Law Digest.

8.03 ATTACHMENT:

Defendant in action in which payment of money is claimed, is liable to have all real and personal property in which defendant has interest, except property which is exempt from seizure under execution, attached prior to judgment for payment of debts, or for satisfaction of legal costs of action through judicial order. (The Court of Queen's Bench Act, C.C.S.M. c. C280, §§60-62 and Q.B. Rule 46).

Grounds.

Attachment prior to judgment may be issued where, in action in which payment of money is claimed it is alleged that defendant: (1) resides outside Manitoba, or is corporation not registered under The Corporations Act; (2) hides or absconds within Manitoba with intent to avoid service of document; (3) is about to leave or has left Manitoba with intent to change residence, defraud creditor or avoid service of document; (4) is about to permanently remove or has permanently removed property out of Manitoba; or (5) has concealed, removed, assigned, transferred, conveyed, converted or otherwise disposed of property with intent to delay, defeat or defraud creditor, or is about to do so. (C.C.S.M. c. C280, §60[1]).

Affidavit for Attachment.

Judicial order directing attachment prior to judgment may be made upon affidavit of plaintiff stating facts and showing (a) good cause of action and one or more grounds of attachment, (b) amount of plaintiff's claim, and (c) defendant's present whereabouts. (Q.B. Rule 46.01[1]).

Writ or order is directed to sheriff in Q.B. to attach, seize, receive or hold defendant's personal property until judgment is obtained. Judge may also order attachment of defendant's real property and posting of security by plaintiff pending proof of claim. (Q.B. Rule 46.02[1]).

Lien.

Every order of attachment at and from delivery to sheriff binds personal property of party against whom same is issued. To bind lands prior to judgment certified copy of order must be obtained and duly registered in land titles office against title to lands of defendant. (C.C.S.M. c. C280, §60[3] and Q.B. Rule 46.12).

Priorities.

Post judgment, execution creditors share ratably in proceeds of property attached and sold. (C.C.S.M. c. C280, §60[2] and The Executions Act, C.C.S.M. c. E160, §5[1]).

8.04 BONDS:

Where prejudgment attaching order has been made, sheriff may restore some or all of property seized to defendant upon defendant posting security (cash or bond) for plaintiff's claim and costs for value of property attached. (Q.B. Rule 46.06).

8.05 CREDITORS' SUITS:

Judgment creditor may bring action on certificate of judgment which is registered in Land Titles office against debtor's land and have land sold to satisfy judgment; but no proceedings to realize on registered judgment can be commenced until after one year from date of registration. (C.C.S.M. c. J10).

8.06 EXECUTIONS:

Remedy Against Lands.

There are no writs of execution against lands, although interest of mortgagee and mortgagors' equity of redemption are subject to seizure and execution. Legal remedy is obtained by registering certificate of judgment in form prescribed or under seal of court in Land Titles Office of district in which lands of judgment debtor are situated. Such certificates are granted under all judgments exceeding $40 in amount, and, while in force, constitute lien and charge on lands of judgment debtor, which may be sold to satisfy judgment after one year from date of registration or in case of certificate granted under judgment for alimony or maintenance proceedings may be instituted and order for sale made at any time after registration and without waiting for expiry of period of one year. (C.C.S.M. c. J10).

Exemptions.

See topic 8.07 Exemptions.

Execution Against Goods.

Where order may be enforced by writ of seizure and sale, judgment creditor is entitled to issue of writ of seizure and sale on filing designated form and setting out date and amount of any payment received since order was made, amount owing and rate of post judgment interest. Judgment creditor must first obtain leave of court before writ of seizure and sale will issue if more than six years have elapsed since date order was made; enforcement of order is subject to term or condition; or change has taken place in identity of party entitled to enforce order. See Q.B. Rule 60.07. Delivery to sheriff of this writ finds all goods and chattels, or any interest in all goods and chattels, of judgment debtor within province.

Stay of Execution.

Stay of execution may be obtained if judgment debtor can show risk of harm resulting from immediate execution of judgment. This risk will be balanced against risk of harm resulting to judgment creditor if his right to execute judgment is postponed. Such stay may be granted or refused, or granted or refused on terms. Enforcement of summary judgment may also be stayed on such terms as are just, pursuant to Q.B. Rule 20.05(4).

Life and Renewal of Execution.

Writ of execution ceases to have force upon expiration of two years from date of issue or renewal, unless renewed before expiration of two years. (C.C.S.M. c. E160). Certificate of judgment remains on title until vacated or discharged. (C.C.S.M. c. J10).

Sale of Lands.

Where a judgment creditor has filed a certificate of judgment to be registered against the land of the judgment debtor, such land may be sold after one year to satisfy judgment by action commenced by judgment creditor for such purpose. Sale is carried on under supervision of court and land may be redeemed at any time until sold upon judgment debtor paying amount of judgment and costs to date.

Sale of Goods.

In the case of goods the amount of the judgment is realized by seizure by sheriff (in Queen's Bench) of judgment debtor's goods after execution has been issued. Sheriff after making seizure must sell goods by public auction duly advertised. After having made money under execution, sheriff must advertise such fact in Manitoba Gazette and hold money for 14 days (C.C.S.M. c. E160, §20[4]) and then proceed to distribute same rateably amongst those who have placed executions in his hands.

Redemption of Goods.

Goods seized may always be redeemed by the judgment debtor until sold, by paying to the sheriff amount of judgment and costs, including costs of such sheriff.

Priorities.

Wages for three months take priority over claims of execution creditors, followed by execution creditors who have delivered writs to enforce maintenance orders, recognizance orders, restitution orders or fine orders, followed by general execution creditors whose writs do not fall into above categories. Monies realized by sheriff are paid to execution creditors on pro rata basis, with costs of execution creditors being preferential to their actual claims.

Supplementary Proceedings.

Prior to enforcement of judgment, or if judgment debtor fails to pay or perform order, examination in aid of execution may be undertaken by judgment creditor before officer of court pursuant to Q.B. Rule 60.17. One such examination may be undertaken per year, where judgment creditor may inquire as to judgments debtor's income and property; any dispositions of property made before or after making of order; judgment debtor's past, present and future means, and any other matter relevant to enforcement of order. Veracity of judgment debtor's statements at this examination and his attendance at examination are enforced by contempt order.

Queen's Bench judges have power to order judgment debtor to make payment, monthly or otherwise, according to his means.

8.07 EXEMPTIONS:

Large number of enumerated articles of personal property, in some cases limited as to value, are exempt from seizure and sale under writs of execution or other process. (The Executions Act, C.C.S.M. c. E160).

See also topic 8.10 Garnishment.

Partnership firms cannot claim exemption for the several partners, but only one exemption for the firm. (C.C.S.M. c. E160).

When Exemptions Not Allowed.

No exemptions can be claimed on behalf of a debtor who is in the act of removing from the province, or is about to do so, or who has absconded, taking his family with him. (C.C.S.M. c. E160).

Wages.

See topic 8.10 Garnishment.

In case of death exemption rights pass to dependents. (C.C.S.M. c. E160).

Homestead Exemptions.

See topic 8.11 Homesteads.

8.08 FORECLOSURE:

See topic 8.14 Liens; category 20 Mortgages, topics 20.04 Mortgages of Real Property, 20.05 Personal Property Security.

8.09 FRAUDULENT SALES AND CONVEYANCES:

Conveyances, or other transfers, of real or personal property with intent to defeat, hinder, delay or defraud creditors or others are void as against such persons except for bona fide transfers for good consideration to persons without notice or knowledge of intent. (Fraudulent Conveyances Act [C.C.S.M. c. F160]).

8.10 GARNISHMENT:

Prejudgment.

Plaintiff in action for payment of debt or liquidated sum may garnish money in hands of third party except for unpaid wages (§11 of Garnishment Act, C.C.S.M. c. G20; see also The Queen's Bench Act, C.C.S.M. c. C280, §61) and application must be accompanied by affidavit stating: (a) Facts showing plaintiff has good cause of action against defendant for payment of debt or liquidated demand; (b) amount of plaintiff's claim, with allowances for all just credits, set-offs and counterclaims known to plaintiff; (c) name and address of each person to whom notice of garnishment is directed; (d) that plaintiff believes those persons are or will become indebted to defendant, and grounds for belief; and (e) such particulars of debts as known to plaintiff.

Court may impose such terms and conditions as it deems just, including requiring plaintiff to post security. (Q.B. Rule 46.14).

Post Judgment.

Judgment-creditor may apply for attachment of money in hands of third party (“garnishee”). Application may be ex parte. Application must be accompanied by affidavit stating: (a) That order for payment of money has been made and date of order; (b) amount payable including interest; (c) date and amount of any payments received; (d) name and address of each garnishee; (e) that creditor believes garnishee is, or will become indebted to debtor and grounds for belief; (f) such particulars of debt as known, including whether or not for wages; and (g) where person to whom notice of garnishment is to be directed is not in Manitoba, that debtor is entitled to sue that person in Manitoba to recover debt, and entitlement to sue in Manitoba. (Q.B. Rule 60.08[3]).

Exemptions from garnishment are: 70% of wages, but at least $350 per month if employer has dependent and debt is not under alimony or maintenance order or agreement; otherwise at least $250 per month. Court may vary or remove exemption in special case such as debt for lodging. In case of wages earned during period of less than a month, amount of exemption is proportionate to amount of time worked during month.

(See The Queen's Bench Act, [C.C.S.M. c. C280]; see also The Garnishment Act, C.C.S.M. c. G20, §§5, 6, 7, and 8.)

Public Employees.

Salaries of Federal Government employees may be garnished in accordance with The Garnishment, Attachment and Pension Diversion Act. (S.C. c. G2). Those of provincial employees have been made liable by statute. (C.C.S.M. c. G-2).

See also category 11 Employment, topic 11.02 Labour Relations.

8.11 HOMESTEADS:

“Homestead” means, (a) in case of residence in city, town or village occupied by owner and owner's spouse as their home, residence and land on which situated consisting of (i) not more than six lots or, if block is not subdivided into lots, one block, as shown on plan registered in land titles office, and (ii) not more than one acre, if land not described by registered plan; (b) in case of residence outside city, town or village occupied by owner and owner's spouse as their home, residence and land on which situated, consisting of not more than 320 acres or half section, subject to following conditions: (i) if land exceeds 320 acres in same section, 320 acres shall be comprised of quarter section on which residence situated, together with such other lands in that section as owner or owner's personal representative shall designate, (ii) if land in more than one section, river lot or parish lot, homestead shall be comprised of quarter section, river lot or parish lot on which residence is situated, together with other lands in that section or adjacent to or across road or highway from section, river lot or parish lot, but if land so described exceeds 320 acres owner or owner's personal representative shall designate 320 acres of land as homestead including quarter section, river lot or parish lot on which residence situated; (c) unit and common interest within meaning of The Condominium Act (C.C.S.M. c. C170), occupied by owner and owner's spouse as their home. (The Homesteads Act, C.C.S.M. c. H80).

Disposition without consent may be set aside if no further disposition to bona fide purchaser for value unless disposition in favour of owner's spouse, spouse released rights in homestead in prescribed form, or spouse has interest in homestead in addition to rights under Act. (C.C.S.M. c. H80).

When owner dies, surviving spouse entitled to life estate in homestead and any disposition in homestead by owner's Will is subject to this entitlement. (C.C.S.M. c. H80).

Upon proclamation of The Common-Law Partners' Property and Related Amendments Act (S.M. 2002, c. 48), homestead rights will be extended to persons in common-law relationship. Only one spouse or common-law partner at time may have homestead rights. Second or subsequent spouse or common-law partner may not acquire homestead rights unless (i) previous spouse or common-law partner has released his or her homestead rights (if any); or (ii) previous spouse or common-law partner has transferred his or her ownership interest in property (if any) to another person; or (iii) any claim of previous spouse or common-law partner under The Family Property Act (currently The Marital Property Act) for accounting or equalization of assets has been satisfied. (S.M. 2002, c. 48).

Waiver.

Spouse may, in writing in prescribed form and for valuable consideration, release rights under Act. (C.C.S.M. c. H80). Release made before person authorized to take affidavits and includes acknowledgment by owner's spouse, made apart from owner. Acknowledgment that spouse aware of right to life estate and right to prevent disposition of homestead, that spouse aware release gives up these rights, and that spouse executes release freely and voluntarily.

8.12 INSOLVENCY:

See Canada Law Digest, category Debtor and Creditor, topic Bankruptcy.

8.13 LEVY:

See topics 8.03 Attachment, 8.06 Executions.

8.14 LIENS:

Hotel and boarding house keepers have a lien on the goods and effects of guests, boarders or lodgers, and may detain the same and sell the same to enforce such lien. The lien is for the amount incurred by the person while a guest. (The Hotel Keepers Act, C.C.S.M. c. H150).

Employees have lien and charge on business assets of employer in amount of wages accruing due. Amount of wages due and payable by employer to employee not exceeding $2,500 constitutes first priority lien and charge on property and assets of employer in favour of employee except in some circumstances where property subject to real property mortgage or purchase money security interest. (The Employment Standards Code).

Warehousemen have a lien. See category 3 Business Regulation and Commerce, topic 3.25 Warehousemen.

Garage keepers have lien for repairs, painting, storing, or caring for motor vehicle or farm vehicle or any part, accessory or equipment pertaining thereto with priority over all lienholders or mortgagees. Lien remains in effect even when possession is surrendered if garage keeper (1) obtains acknowledgment of owner's indebtedness before surrendering possession and (2) registers claim of lien in Personal Property Registry before or within 15 days of surrendering possession. After surrender of possession but prior to registration, lien subject to good faith interests arising without express notice of lien; also subject to liens registered prior to date of services rendered. (The Garage Keepers Act, C.C.S.M. c. G10).

Threshers' Liens.

A thresher may assert a lien by declaring verbally or in writing or doing any act or using language indicating such intention upon a sufficient portion of any grain threshed to net to him the cost of the threshing, provided a set rate was agreed upon. The lien has priority against all other liens (including seed grain liens) and against the owner. The grain may be sold at expiration of five days after written notice to owner and within 60 days after assertion of right of retention, unless owner consents otherwise in writing. Thresher must account to owner within 15 days after sale.

Workmen and persons supplying fuel or repairs may claim against the farmer for money due them by the thresher up to ten days after the machine leaves. Interpleader provision is made for cases where the wages or threshing bill are in dispute. (Threshers' Lien Act [C.C.S.M.

c. T60]).

Builders' Liens.

The Builders' Liens Act (C.C.S.M. c. B91) provides for any person (except professional architects and engineers) who does work or provides services or supplies materials to be used in performance of contract or subcontract improving land, by virtue thereof, has right of lien for value of such work, services or material upon interest of owner in such land, building, structure, etc., unless owner is Provincial Crown, crown agency or municipality, in which case lien constitutes charge on amounts payable or required to be retained under Act, provided claim for such work, services or materials exceeds $300. Person primarily liable for payment under contract under which lien arises must, as work is done or services are provided or materials are supplied, deduct from any payments to be made by him, and retain for at least 40 days after notice of substantial performance or after completion or abandonment of contract or subcontract, 7.5% of value of work, services and materials actually done, provided or supplied. Sums received by or appropriated to contract by owners, or received by contractor or subcontractor on account of contract price constitute trust fund for benefit of subcontractors, workers, etc. Every agreement contrary to provisions of Act is void.

Registration.

Claims for lien must be registered in Land Titles Office of district in which subject land is situate, with affidavit of claimant verifying same, within 40 days of substantial performance, completion or abandonment of contract, or last supply of materials. Where Crown lands are involved, notice of claim for lien must be delivered to public officials identified in Act. Any person who registers or gives notice of claim for lien for amount grossly in excess of amount due to him or where he knows or ought to know that he does not have lien is liable to any person who suffers damage as result unless notice given or registration made, and amount calculated, in good faith and without negligence.

Actions.

Every registered claim for lien will expire unless action to enforce is commenced and pending litigation order is registered in appropriate Land Titles Office within two years after date of registration or within 30 days after notice from interested holder in property issues under §50. In general, provisions of Queen's Bench Act (C.C.S.M. c. C280) and Queen's Bench Rules apply to proceedings to enforce claims for builders' liens.

Actions for breach of trust must be commenced within 180 days of claimant first becoming aware of breach of trust.

Priorities.

Builders' liens have priority over all judgments, executions, assignments, attachments, garnishments and receiving orders, recovered, issued or made or registered in Land Titles Office after such lien arises, and over all payments or advances made on account of any conveyance or mortgage after registration of claim for such lien as provided by Act.

Redemption.

There is no right of redemption of property sold in the enforcement of the aforementioned liens.

Lien Notes.

See category 20 Mortgages, topic 20.05 Personal Property Security.

8.15 MECHANICS' LIENS:

See topic Builders' Liens.

8.16 PLEDGES:

Delivery and retention of possession are essential to a pledge, and if possession is surrendered, the lien which attaches to a pledge is lost. Person shall be deemed to be in possession of goods when they are in his actual custody or are held by any other person subject to his control or for him on his behalf. Pledgee is not responsible for safety of article pledged if he or she has exercised reasonable care and diligence in preserving collateral.

Pawnbrokers are licensed by most municipal corporations and are permitted by the local law to sell the pledges at the expiration of period of time. This time period varies between municipalities and may be extended if parties have agreed upon longer period for holding goods. Pawnbrokers must record and report all articles pledged and sold by them to local authority.

8.17 RECEIVERS:

Receivers may be appointed in any action, to receive the proceeds of any property of a litigant, either to preserve the property pending litigation or by way of equitable execution to satisfy a judgment. In cases other than receivers by way of equitable execution, no party, attorney or person interested in the action, may be appointed a receiver. Also governed by The Corporations Act (C.C.S.M. c. C225, Part VIII).

Powers.

Receivers may, for the purposes of preserving the property or collecting it, bring and defend actions, receive rents and profits, collect and compromise debts, and make such transfers respecting the property as the court may authorize. Receivers defined under Bankruptcy and Insolvency Act of Canada (Part XI). Act sets out responsibilities and powers of receivers.

8.18 REDEMPTION:

See topics 8.06 Executions, Liens; categories 20 Mortgages, topic Mortgages of Real Property; Taxation, topic Taxes.

8.19 STAY OF EXECUTION:

See topic 8.06 Executions; category 5 Civil Actions and Procedure, topic 5.03 Appeal and Error.

8.20 SUPPLEMENTARY PROCEEDINGS:

See topic 8.06 Executions.

8.21 USURY:

See Canada Law Digest, category Business Regulation and Commerce, topic Interest.

9 DISPUTE RESOLUTION

9.01 ALTERNATIVE DISPUTE RESOLUTION:

Mandatory (Alternative) Dispute Resolution.

Labour.

Minister may appoint mediator or conciliation board to facilitate collective bargaining.

(C.C.S.M. c. L10). Parties bound to meet and confer. Every collective agreement must have grievance arbitration provision. Where none is provided, deemed grievance arbitration clause. (C.C.S.M. c. L10). Conciliation and Mediation Services (industrial relations) provide (i) mediation and (ii) grievance conciliation; in Winnipeg (204) 945-3367.

Voluntary (Alternative) Dispute Resolution.

Family.

In family division judge or master may at any stage in proceedings refer issue to mediator. (C.C.S.M. c. C280). Family Conciliation provides mediation for custody and access matters; in Winnipeg (204) 945-7236.

Labour.

Where collective bargaining has commenced, parties may jointly request minister to appoint mediator. (C.C.S.M. c. L10). If grievance under existing collective agreement, minister may appoint mediator on joint application of parties. (C.C.S.M. c. L10).

Civil.

Q.B. Rule 20A designed to provide case management for matters under $50,000. Q.B. Rule Committee has drafted proposed rules to deal with matters over $50,000, excluding family and bankruptcy proceedings. Judicially Assisted Dispute Resolution process is available by consent of parties to civil proceedings upon request to Queen's Bench. Protection of court appointed and private mediators per Queen's Bench Act.

Arbitration.

See topic 9.02 Arbitration and Award. Under Arbitration Act, arbitrator may, with consent, use mediation, conciliation or similar techniques to encourage settlement. (C.C.S.M. c. A120).

Alternative Dispute Resolution Jurisdictional Bodies/Commissions.

See subhead Voluntary (Alternative) Dispute Resolution, catchlines Family, Labour, Civil, supra. See also subhead Mandatory (Alternative) Dispute Resolution, catchline Labour, supra.

Alternative Dispute Resolution Act.

None.

9.02 ARBITRATION AND AWARD:

Forms and Requisites of Submission.—Statute provides that parties may by consent arbitrate their differences out of court, and provision is made for court to appoint arbitrator if the parties have agreed to arbitrate, but the arbitrator has refused to act or is incapable of acting, or if a third arbitrator is required, and the parties cannot agree upon a person to arbitrate. Court may appoint arbitrator on application of any party to submission if arbitration agreement provides no procedure for appointing arbitral tribunal or if there has been failure to appoint. Court may remove arbitrator on application of party. Except in limited circumstances, court cannot intervene in matters governed by Act. (C.C.S.M. c. A120).

Judgment on Award.

Award is binding on parties unless varied or set aside by court. Award made in Manitoba or other place in Canada may be made judgment of Court of Queen's Bench. Award to be based in law or equity. Arbitrator can award specific performance, injunction and other equitable remedies.

Enforcement.

See subhead Judgment on Award.

Mandatory Arbitration.

Submission to arbitration is irrevocable except with leave of court. Legal proceedings dealing with matters before arbitration typically stayed, except in limited circumstances.

Powers of Arbitrators.

Arbitrator has statutory power to administer oaths. Arbitrator can compel attendance of witness. Arbitrator can rule on jurisdiction, questions of law and evidence. Can determine procedure in accordance with governing Act. Can order disclosure of evidence in any form, provided evidence could be compelled in court proceeding. Can appoint experts. Statutory conditions regulate arbitration unless contrary intention is shown by agreement to arbitrate or parties so agree, except with respect to certain matters provided by statute which cannot be varied or excluded.

Rescission.

Arbitration agreement may only be rescinded in accordance with law of contract. Party cannot revoke appointment of arbitrator; however, certain grounds of challenge are set out in statute.

Uniform Arbitration Act Adoption/Deviation.

Arbitration Act does not apply to arbitration subject to Part II of International Commercial Arbitration Act.

Jurisdictional Arbitration Acts.

Arbitration Act, C.C.S.M. c. A120.

Credentials of/Qualifications of/Standards for Arbitrators.

No formal requirements. Act requires arbitrator to be independent of parties and to act impartially.

9.03 MEDIATION:

Jurisdictional Mediation Acts.

None.

Credentials of/Qualifications of/Standards for Mediators.

No formal requirements.

10 DOCUMENTS AND RECORDS

10.01 ACKNOWLEDGMENTS:

Acknowledgments are not ordinarily essential to validity of documents but may be used. See subhead Forms, infra. (The Manitoba Evidence Act, C.C.S.M. c. E150).

The mere execution of the instrument is sufficient. Any required by statute to be registered, and in ordinary practice most instruments, are executed in the presence of a witness who takes an affidavit, attached to the instrument, of the due execution thereof in the presence of such witness before a commissioner authorized by the province to swear or affirm, or a notary or court officer given similar powers, that the witness was personally present and saw the instrument duly executed.

Foreign Documents.

Proof of documents outside of province may be by acknowledgment before notary public. See subhead Forms, infra.

Authentication of certificate of acknowledgment not required, whether taken in province or not.

Married Women.

Owner must have consent of spouse to dispose of homestead. Consent must be acknowledged by spouse apart from owner. (The Homesteads Act, C.C.S.M. c. 480).

Forms

Individual: In Witness Whereof I have hereunto set my hand and seal this. . . . . . day of. . . . . . A. D. 20. .

Signed, Sealed and Delivered in the presence of(Witness). } (Signature of Maker)

Corporation: In witness whereof. . . . . . has caused its corporate seal to be hereunto affixed duly attested by the hands of its proper officers in that behalf the day and year first above mentioned (or this. . . . . . day of. . . . . . A. D. 20. .).

(Seal).

(Signatures of signing officers

of Corporation).

Dated the. . . . . . day of. . . . . . A. D. 20. . .

....

(Signature).

Certificate as to acknowledgment of maker of instrument:

I hereby certify that, on the day of 20 .... who is personally known to me,

(insert full name of maker of instrument)

(or whose identity has been satisfactorily proved to me by the evidence of. . . . . who is personally

(name)

known to me), appeared before me and that he acknowledged to me that he is the person mentioned in the annexed instrument as the maker thereof and that he duly executed the instrument and that he is the person whose name is subscribed thereto as a party thereto; and that he knows the contents thereof and that he executed the instrument voluntarily and is of the full age of eighteen years.

In testimony whereof I have hereto set my hand and seal of office at. . . . .
in. . . . . this day of 20.

A Notary Public

in and for..........

....

(name of jurisdiction in which notary public is authorized to practise as such.)

(Note: Strike out each of the words in parentheses as are not required)

Certificate as to declaration of party to instrument, etc.:

I hereby certify that, on the day of 20 ,.......... who is personally known to me,

(full name of party declaring the facts)

(or whose identity has been satisfactorily proved to me by the evidence of. . . . . who is personally

(name)

known to me), appeared before me and certified and declared that the following matters are true:

(Here set out the facts that would otherwise be required to be proved by the affidavit or statutory declaration of the person so certifying and declaring.)

In testimony whereof I have hereto set my hand and seal of office at. . . . .
in. . . . . this day of 20 .

A Notary Public

in and for..........

....

(name of jurisdiction in which notary public is authorized to practise as such.)

(Note: Strike out each of the words in parentheses as are not required)

Alternative to Acknowledgment or Proof.

No statutory provision.

10.02 AFFIDAVITS:

Commissioners for oaths and affidavits within the province, or without the province for use therein, are appointed by the Lieutenant-Governor-in-Council. (The Manitoba Evidence Act, C.C.S.M. c. E150). Commissions expire two years from date of issue, but may be renewed on application to Provincial Secretary before or within one year after expiration.

Within the Province.

Affidavits may be taken within the province by: Commissioner for Oaths; Lieutenant-Governor; Clerk of Executive Council; Justice of the Peace or Police Magistrate; Judge; Master, Referee, Prothonotary, Clerk of the Crown and Pleas, or Registrar of Court of Queen's Bench, or the Deputy of any of them; District Registrar or Deputy District Registrar of Land Titles Office; practising Barrister or Attorney-at-Law; Notary Public; Mayor, Reeve, or Clerk of any Municipality, Resident Administrator of Local Government District, Secretary-Treasurer of School District, School Area or School Division; Post Master of Post Office; Sheriff or Deputy Sheriff of Judicial District; Member of Royal Canadian Mounted Police; practising Land Surveyor. (C.C.S.M. c. E150).

Without the Province.

Affidavits may be taken without province by any of following exercising his functions or having jurisdiction in place where affidavit is taken: Notary Public; Commissioner authorized to administer oaths for use in any court of justice in U.K., Channel Islands or Isle of Man; Judge; Magistrate; Officer of Court of Justice; Head of City, Town, Village, Township or Municipality; Officer of Her Majesty's Diplomatic or Consular Services, including Ambassador, Envoy, Minister, Chargé d'Affaires, Counsellor, Secretary, Attaché, Consul-General, Consul, Vice-Consul, Pro-Consul, Consular Agent, Acting Consul-General, Acting Consul, Acting Vice-Consul and Acting Consular Agent; Officer of Canadian Diplomatic Consular or Representative Services, including, in addition to aforementioned diplomatic and consular officers, High Commissioner, Acting Permanent Delegate, Counsellor and Secretary, Canadian Government Trade Commissioner, Assistant Canadian Government Trade Commissioner, or commissioner authorized by laws of Manitoba to take affidavits outside Manitoba. (The Manitoba Evidence Act, C.C.S.M. c. E150, ss.63[1][i] and [j]).

Statutory Declarations.

Statutory declarations in support of writings, deeds, or instruments or of the truth of any fact are provided for in the Evidence Act. (C.C.S.M. c. E150). They are not used in court. Statutory declarations have no force if made outside of Canada.

Forms

Affidavits for use in court are entitled:

In the Court of. . . . . .; and the style of cause is set out immediately below, e.g.,

In the Queen's Bench

Between

. . . ., Plaintiff,

and

. . . ., Defendant.

The jurat is in the following form:

```
Sworn before me in the (city, town,                              ..........
etc.)...     of.  .  .  .  .  . in the Province               (Signature
```

of . . . . on. . . . . . .
(date).........., . . . of deponent).
}

A Commissioner for Oaths, etc., or notary public (as the case may be).

Affidavits for other purposes are entitled:

Canada,Province of
Manitoba, To In the Matter of.........
Wit: }

If made in pursuance of a statute the name of the statute and the citation should also be given. Jurat as above.

Statutory declarations are headed the same as affidavits which are not to be used in court, but the following clause is added at the bottom of the declaration:

“And I make this solemn declaration conscientiously believing it to be true and knowing that it is of the same force and effect as if made under oath.”

The jurat is in the following form:

Declared before me
at......... the. . . . .
of. . . . . ., in the Province of Manitoba, (Signature
this . . . . . ., day of. . . . . ., of declarant).
20. . . }

A Commissioner for Oaths or a notary public (as the case may be).

Where deponent is incapable of reading affidavit or declaration, the form is as follows: Sworn (affirmed or declared) before me at the. . . . . . of. . . . . . in the. . . . . . of. . . . . ., this. . . . . . day of. . . . . ., 20. ., having first been read over and explained by me to the deponent (or declarant) who, being incapable of reading the contents of the affidavit or declaration, appeared to understand the same and (choose one)

(a) signed his/her signature in my presence; or

(b) made his/her mark in my presence; or

(c) verbally indicated his/her understanding of same.

Where deponent is incapable of writing name, the form is as follows: Sworn (affirmed or declared) before me at the. . . . . . of. . . . . ., in the. . . . . . of. . . . . ., this. . . . . . day of. . . . . ., 20. ., by the deponent (or declarant) who being incapable of writing his/her name (choose one)

(a) made his/her mark in my presence

(b) verbally indicated his/her understanding of the affidavit or declaration.

Where interpreter is used, the form is as follows: Sworn (affirmed or declared) before me at the. . . . . . of. . . . . ., in the. . . . . . of. . . . . ., this. . . . . . day of. . . . . ., 20. ., through the interpretation of. . . . . ., of the. . . . . . of. . . . . ., in the. . . . . .

of. . . . . ., the said. . . . . . having been first sworn truly and faithfully to interpret the contents of this affidavit (affirmation or declaration) to the deponent (or declarant), and truly and faithfully to interpret the oath about to be administered to him (or declaration about to be taken by him).

Affidavit of Execution of Documents:

Canada,Province of Manitoba, To Wit: } (If made outside of Manitoba for use in Manitoba, country, province or state to be substituted).

In the matter of. . . . . .

I (name, address and occupation of deponent), make oath and say:

1. That I was personally present and did see the within instrument (and duplicate thereof) duly signed, sealed and executed by. . . . . . of the parties thereto.

2. That the said instrument (and duplicate) was executed at. . . . . . .

3. That I know the said party and am satisfied that. . . . . . of the full age of eighteen years.

4. That I am a subscribing witness to the said instrument and duplicate.

Sworn before me at the. . . . . . of. . . . . ., in the. . . . . .
of . . . . ., this. . . . . . day of. . . . . ., A. D. 20. . . }

..........(Signature ofdeponent).

(Commissioner for Oaths or notary public as the case may be).

Alternative to Affidavit.

No statutory provision.

10.03 COMMISSIONS TO TAKE TESTIMONY:

See category 5 Civil Actions and Procedure, topic 5.08 Depositions and Discovery.

10.04 NOTARIES PUBLIC:

May be appointed by minister. Fee $140 with expiration, $225 without expiration and $70 for renewal. Unless appointee is barrister or solicitor, appointment expires two years from date of its issue and date of expiration must be stated connection with signature. Authority extends throughout province and includes administering oaths, attesting of commercial instruments for public protestation, giving of notarial certificates and performing all functions of Commissioner for Oaths. (The Manitoba Evidence Act, C.C.S.M. c. E150).

10.05 RECORDS:

All instruments except wills, sheriffs' deeds, and tax deeds affecting lands in Manitoba, whether there has been a crown grant or not, are deemed fraudulent and void against subsequent purchasers or mortgagees for valuable consideration without actual notice, unless registered in the proper office before the registering of the instrument under which such subsequent purchasers or mortgagees may claim. (The Registry Act, C.C.S.M. c. R50).

Place of Recording.

Land titles are recorded in the land titles offices of the several land registration districts. Financing statements in respect of chattel mortgages are filed in Personal Property Registry in Winnipeg. Letters of probate and administration are filed in Court of Queen's Bench of proper judicial centre and recorded with surrogate clerk at Winnipeg.

Torrens Act.

See category 21 Property, topic 21.05 Deeds.

Vital Statistics.

Records of births, deaths, adoptions, divorces, decrees of nullity of marriage and marriages are kept by Department of Health, Vital Statistics Branch, Winnipeg.

10.06 SEALS:

The common law distinction between sealed and unsealed documents still exists. A sealed document imports a valuable consideration. A wafer or a wax must be attached to the paper, except that in the case of corporations, courts or other bodies the impression of the official seal only upon the paper is sufficient. Document executed on behalf of corporation is not invalid merely because corporate seal not affixed.

10.07 TORRENS ACT:

See category 21 Property, topic 21.05 Deeds.

10.08 VITAL STATISTICS:

See topic 10.05 Records.

11 EMPLOYMENT

11.01 EMPLOYER AND EMPLOYEE:

See topic 11.02 Labour Relations.

11.02 LABOUR RELATIONS:

The Employment Standards Code (S.M. 1998, c. 29) deals with wages, hours of work and standards and conditions of employment. Prohibition against discharging employee because employer served with garnishing order. Also: Construction Industry Wages Act (C.C.S.M. c. C190) deals with wages, hours of work and standards for construction workers.

Contracts of service of apprentices must be in writing and must be registered by Director of Apprenticeship and Trades Qualifications. Agreement will generally be registered if it complies with regulations and provides for apprenticeship training required by Act. Apprentice must be at least 16 years old but must be at least 18 years old in some cases. Term is four years, except where longer or shorter term is prescribed by relevant trade regulation under The Apprenticeship and Trades Qualifications Act.

Wages.

See The Employment Standards Code. (S.M. 1998, c. 29).

Directors of corporations are personally, jointly and severally liable for six months unpaid wages of employees. (S.M. 1998 c. 24). See also category 8 Debtor and Creditor, topic 8.14 Liens, subhead Employees.

Assignment of wages, see category 8 Debtor and Creditor, topic 8.01 Assignments, subhead Earnings.

The Employment Standards Regulation fixes minimum wage for employees covered by Employment Standards Code. Board provided for by Employment Standards Code has wide powers of investigation in cases of complaint and every employer is required to keep register of certain details concerning all employees including their names, addresses and earnings.

The Employment Standards Code (S.M. 1998, c. 29) prevents discrimination between sexes in payment of wages for doing similar work, and provides for parental, adoption, maternity, bereavement, reservist, family and compassionate care leave.

The Employment Standards Code (S.M. 1998, c. 29) provides that every employer shall give annual vacation with pay to each of his employees who completes a year's service: two weeks after each of first four years and three weeks after each year thereafter..

The Pay Equity Act (C.C.S.M. c. P13) provides for movement toward equal pay for work of equal value for public sector employees.

Discrimination.

The Human Rights Code (C.C.S.M. c. H175) prevents discrimination by employers because of race, nationality, religion, colour, sex, age, marital status, ethnic or national origin, political beliefs, family status and physical or mental disability and extends prohibited grounds of discrimination to include sexual harassment, pregnancy, political or religious activity, sexual orientation and gender-determined characteristics and enables government to make affirmative action programs requirement for firms contracting with Province.

Labour Unions.

Union representing majority of employees in unit appropriate for collective bargaining may be certified bargaining agent by Manitoba Labour Board. See subhead Labour Disputes, infra.

Labour Disputes.

Manitoba Labour Board administers Labour Relations Act. (C.C.S.M. c. L10). Act sets forth in detail rights of employers and employees, including right of every employee to be member of trade union. Procedure is established for certification of bargaining representatives and negotiation of collective agreements. Every collective agreement must provide for compulsory deduction of union dues whether member of union or not. No strike or lock out while collective agreement in force. Technological change may entitle union to terminate collective agreement. Unfair labour practices are defined. Act provides for conciliation proceedings and also for appointment of mediation board or industrial inquiry commission, where investigation is required. Penalties are established for violation of Act.

Unemployment.

See Canada Law Digest.

Workers Compensation.

Workers Compensation Act (C.C.S.M. c. W200), provides for compensation to injured workers within jurisdiction of Act. Injured party may elect to bring claim for common law remedy against parties other than employer. Act sets out in detail consequences of bringing such action. Right to compensation under Act is in lieu of all rights and rights of actions against employer or Director of Corporation that employs injured party. Decisions of Board are final and not subject to review by courts. Act provides presumption that dominant cause of certain cancers and injuries to heart suffered by firefighters is employment.

11.03 WORKERS' COMPENSATION LAW:

See topic 11.02 Labour Relations.

12 ENVIRONMENT

12.01 ENVIRONMENTAL REGULATION:

General Supervision.

Department of Conservation with assistance of Manitoba Conservation Counsel and Clean Environment Commission established by The Environment Act. (C.C.S.M. c. E125). Also The Dangerous Goods Handling & Transportation Act (C.C.S.M. c. D12) and The Contaminated Sites Remediation Act (C.C.S.M. c. C205).

Prohibited Acts of Pollution.

Discharge or emission of any contaminant or waste products of any kind into air, water or soil without license. Order pursuant to The Clean Environment Act (S.M. 1972, c. F6) (repealed) considered license under new Act.

Enforcement.

Department may deny, withdraw, cancel or suspend license. Environment officer may enter, search and if offence in progress, seize without warrant. Normally, warrant required for seizure.

Penalties.

The Environment Act: For individual—first offence, fine up to $50,000, up to six months imprisonment or both; subsequent offence, fine up to $100,000, up to one year imprisonment or both. For corporation—first offence, fine up to $500,000; subsequent offence, fine up to $1,000,000. Also action to refrain from further offence, clean and restore, pay damage or restitution or additional fine up to monetary benefit received can be ordered plus revocation or suspension of all or some licences if unwilling to remedy. Each day is separate offence. (C.C.S.M. c. E125).

The Dangerous Goods Handling and Transportation Act (C.C.S.M. c. D12).

For individual: First offence, fine up to $50,000, up to six months imprisonment or both; subsequent offence, fine up to $100,000, up to one year imprisonment or both. For corporation: First offence, fine up to $500,000; second offence, fine up to $1,000,000. Each day is separate offence. Remedial action and restitution may be ordered. Possible revocation of license. Costs incurred become debt due to government by responsible party and is recoverable as such in court of competent jurisdiction.

The Contaminated Sites Remediation Act (C.C.S.M. c. C205).

Act provides system to: (a) identify and investigate sites and, where necessary, designate them as contaminated; (b) identify persons responsible for remediation of contaminated sites and, where appropriate, apportion responsibility among multiple parties; and (c) remediate contaminated sites. If party responsible for site investigation or remediation of contaminated site fails to comply with order or agreement, Manitoba Conservation may order work to be done. Costs incurred become debt due to government by responsible party.

Permits.

Licence required.

13 ESTATES AND TRUSTS

13.01 ADMINISTRATION:

See topic 13.09 Executors and Administrators.

13.02 ADVANCEMENTS:

See topic 13.07 Descent and Distribution.

13.03 ALLOWANCES:

See topic 13.09 Executors and Administrators.

13.04 CLAIMS:

See topic 13.09 Executors and Administrators; category 5 Civil Actions and Procedure, topic 5.15 Pleading.

13.05 DEATH:

Upon application to Court of Queen's Bench, order shall be granted declaring person presumed dead if person absent or not heard of by applicant or any other person, no reason to believe person alive and reasonable grounds for believing dead. (The Presumption of Death Act, C.C.S.M. c. P120).

A written certificate signed by a proper officer of Her Majesty's forces, stating that a named member of such forces is officially reported dead or was deemed to have died, is sufficient proof of death of such person. (The Manitoba Evidence Act, C.C.S.M. c. E150).

Order of Death.

Except in certain cases under will, and subject to certain provisions of The Insurance Act (C.C.S.M. c. I40), where two or more persons die at same time or under circumstances rendering it uncertain which died first, each, for purpose of disposing of his or her estate, will be deemed to have survived others. (The Survivorship Act, C.C.S.M. c. S250).

Survivorship.

Where two persons die at same time or in circumstances rendering it uncertain which survived, estate of each disposed of as if he had survived. Joint tenants who so die are deemed to have been tenants in common and above rule applies. Where life insured so dies, insurance money payable as if beneficiary predeceased life insured.

Action for Death.

Action for wrongful death is available to surviving wife, husband, common-law partner, support recipient, parents, children, brothers or sisters of deceased if reasonable anticipation of pecuniary benefit from continued existence of deceased can be established and if death is caused by wrongful act, neglect or default for which deceased would have been entitled to claim damages had death not occurred. Action must be commenced within two years after death of deceased. Damages are generally fixed with regard to reasonable expectation of pecuniary benefit on part of person suing, but may include damages for loss of care, guidance and companionship which might reasonably have been expected from deceased; damages are apportioned by judge who tries case. (The Fatal Accidents Act C.C.S.M. c. F50). See also category 5 Civil Actions and Procedure, topic 5.02 Actions, subhead Abatement.

13.06 DECEDENTS' ESTATES:

See topics 13.07 Descent and Distribution, Executors and Administrators, Wills; category 8 Debtor and Creditor, topic 8.11 Homesteads.

13.07 DESCENT AND DISTRIBUTION:

As of July 1, 1990, former intestate succession regime repealed and replaced by The Intestate Succession Act, C.C.S.M. c. I85, the Dependents Relief Act, C.C.S.M. c. D37, and The Wills Amendment Act, S.M. 1989-90, c. 44. Intestate Succession Act amended by The Common-Law Partner's Property Act and related amendments to Act (S.M. 2003, c. 48) to apply to common-law partners as well as spouses as of June 30, 2004.

All property undisposed of by will descends and is distributed as follows (The Intestate Succession Act): (a) If no issue, surviving spouse or common-law partner gets entire estate; (b) if spouse or common-law partner and common issue, entire estate goes to surviving spouse or common-law partner; (c) if surviving spouse or common-law partner and some issue which are not common, surviving spouse or common-law partner receives greater of $50,000 or 50% of estate and one-half of balance, remaining half of balance being divided equally among all of intestate's issue; (d) if no surviving spouse or common-law partner or issue, estate goes to intestate's parents; (e) if no surviving spouse, common-law partner, issue or parent, estate goes to issue of intestate's parents, failing them to issue of intestate's grandparents, or failing them to issue of intestate's great-grandparents; (f) otherwise estate escheats to Crown.

Surviving spouse or common-law partner may make application for accounting and equalization of assets. (The Family Property Act, C.C.S.M. c. F25). Equalization payment reduced by amount of entitlement of surviving spouse or common-law partner under The Intestate Succession Act. (The Homesteads, Marital Property Amendment and Consequential Amendments Act, S.M. 1992, c. 46).

Distribution at each generation is per capita, not per stirpes.

Posthumous Heirs.

Descendents and relatives of intestate, begotten before his death but born thereafter, inherit as though born in intestate's lifetime.

Adopted Children.

See category 14 Family, topic 14.01 Adoption, subhead Effect of Adoption.

Advancements.

Where in total intestacy intestate has, during lifetime, made advancement to any person, such advancement is included in determination of entire estate and treated as payment toward that person's ultimate share of estate. Onus of proving advancement rests with person asserting.

13.08 ESTATES:

See category 21 Property, topic 21.14 Real Property.

13.09 EXECUTORS AND ADMINISTRATORS:

There are two conditions precedent to the grant of probate or of administration, namely, property in this province and death of its owner. (The Court of Queen's Bench Surrogate Practice Act, C.C.S.M. c. C290, §22). These facts must be shown by affidavit of applicant. Grant dates back to death.

Eligibility.

Anyone not under legal disability may act as executor or administrator. Trust company may act, but original letters of administration will not be granted to nonresident of Manitoba.

Preferences in Right to Administer.

Next of kin of intestate, beginning with widow or common-law partner, have prior right to apply for administration of his estate.

Public Trustee of province will act, upon request, where persons interested in estates are unable to arrange for a resident administrator or for bonds.

Effect of Grant of Probate or Administration.

Grant of probate or administration by Court of Queen's Bench effectually protects persons making payments to or dealing with executor or administrator although there may have been defects in preliminaries prior to grant. (C.C.S.M. c. C290).

Renunciation of Probate.

Executors may renounce probate. (C.C.S.M. c. C290).

Bonds.

Security must be given by bond, in double value of estate, to satisfaction of judge, except where applicant is approved trust or guaranty company, Public Trustee, or executor resident of Canada and named in will. One surety required where estate exceeds $50,000, two sureties where estate exceeds $100,000. Judge may dispense with bond or sureties in certain cases. (C.C.S.M. c. C290).

Removal.

Under the Trustee Act, administrators or executors may, on sufficient cause being shown, be removed, and a judicial trustee appointed in their place, to act either with any remaining executor or administrator or as a sole judicial trustee. (The Trustee Act, C.C.S.M. c. T160).

Inventory.

An inventory of the property of the deceased is the first step to be taken by the legal representative. (C.C.S.M. c. C290, §24).

Notice to Creditors.

To avoid personal liability executor or administrator should insert notice in newspaper in district where deceased resided, calling upon all creditors to file their claim within period set by him, usually about four weeks. This notice must be published as well in Manitoba Gazette. (C.C.S.M. c. T160).

Presentation and Proof of Claims.

A claim against the estate is made by the creditor or his agent filing with the executor or administrator full particulars of the claim duly verified by a statutory declaration. (For form, see category 10 Documents and Records, topic 10.02 Affidavits.) If particulars are lengthy they may be made an exhibit to the declaration.

After notice has been published, the executor or administrator is entitled to distribute the estate without regard to a claim against the deceased which is not filed in time and of which he has no notice.

Contest of Claims.

In case the executor or administrator disputes any claim, he must notify creditor to that effect and give the creditor an opportunity of proving his claim by court procedure before a distribution of the estate can be had.

Compromises.

The executor or administrator is given power to settle and compromise with creditors of the deceased.

Sales.

In the course of administration the legal representative is authorized to sell real estate for the purposes of paying debts, and a conveyance of real estate sold to provide money for that purpose is good. The representative may also sell real estate for the purpose of distribution on receiving the court's approval.

Allowances.

There is no provision for allowances or exemptions to widows or children in priority to claims of creditors.

Distribution.

After payment of debts, it is the duty of an administrator to distribute the estate in accordance with the law relating to devolution of estates. (See topic 13.07 Descent and Distribution.) In case of executor, or where property is left by will, it is duty of legal representative to carry out terms of will and in paying debts and administration costs, residuary estate is first resorted to, unless otherwise provided for in will.

There can be no distribution of the estate until the debts of the estate are disposed of, and for that purpose the executor or administrator is given a period of one year.

See also supra, subhead Presentation and Proof of Claims.

Costs of Administration.

Funeral and testamentary expenses and succession duties are proper and necessary expenditures by the legal representative as part of his administration costs. Costs of administration including money properly paid out for that purpose, and fair allowance to legal representative either by consent of beneficiaries or to be fixed and allowed by court, are first charge on estate.

Executors de son Tort.

Executors de son tort may bind the estate by acts of executorship in the course of administration (2 Ellis & Blackburn, p. 630), but the act must have been in the course of administration and the executor must have been carrying on ostensibly as a general executor of the estate. (2 East, p. 500, Reprint).

Accounts.

Before executor or administrator is discharged from his office he must be released by residual beneficiary or he must pass his accounts before Queen's Bench judge and he must produce at hearing accounts and receipts and schedule showing amount paid to discharge debts of estate.

Ancillary probate or administration may be had by producing the foreign probate or administration or court certified copy or exemplification thereof (notarial copy is not sufficient) purporting to be under seal of court by which same has been granted, together with necessary affidavits of applicants for ancillary administration.

Resealing.

Probates or letters from following jurisdictions may be resealed in Manitoba: Other Canadian provinces or territories, Australia, India, Republic of Ireland, New Zealand, Pakistan, The United Kingdom, and the U.S. (C.C.S.M. c. C290, §50).

13.10 FIDUCIARIES:

See topics 13.09 Executors and Administrators, Trusts; category 14 Family, topic 14.06 Guardian and Ward.

13.11 INTESTACY:

See topic 13.07 Descent and Distribution.

13.12 PROOF OF CLAIMS:

See topic 13.09 Executors and Administrators; category 5 Civil Actions and Procedure, topic 5.15 Pleading.

13.13 TRUSTEE PROCESS:

See category 8 Debtor and Creditor, topic 8.10 Garnishment.

13.14 TRUSTS:

Powers and duties of trustee are defined by The Trustee Act (C.C.S.M. c. T160) which provides for vesting of estates in trustees and makes rules for their guidance in making investments of trust funds, etc., provides for trustee obtaining advice of court in doubtful matters, for their remuneration and for compelling an annual accounting by them. Trustee Act is codification of common law affecting trusts.

13.15 WILLS:

Will may be made by anyone who is over 18, or who is or has been married, or in certain cases, who is member of Armed Forces, provided he or she is of sound mind. (The Wills Act, C.C.S.M. c. W150).

A married woman may devise or bequeath by will, all separate property, real or personal, or any rights she may possess therein whether acquired before or after marriage.

Testamentary Disposition—Dependents' Maintenance.

The Dependents' Relief Act (C.C.S.M. c. D37) provides that where deceased has not made adequate provision for proper maintenance and support of dependent, court may order that adequate support be made out of deceased's estate. Possible dependents includes deceased's spouse or common-law partner, infant children and others substantially dependent on deceased at time of death. Application must be brought within six months of grant of probate. See topic 13.07 Descent and Distribution; category 8 Debtor and Creditor, topic 8.11 Homesteads.

Execution.

Will must be in writing, signed at the end thereof by the testator and witnessed by two witnesses who must sign at the request of the testator, in his presence and in the presence of each other.

Attestation.

No form of attestation mandated; following is generally used:

Form

Signed, Published and Declared by the Testator. . . . . . as and for his last Will and Testament in the presence of us both present at the same time who, at his request, and in his presence and in the presence of each other, have hereunto subscribed our names as witnesses.

Holographic Wills.

A will wholly written and signed by the testator himself, need not be in any particular form and need not be witnessed.

Nuncupative Wills.

Sailors, soldiers and airmen in actual service or in course of a voyage may make wills without the usual formalities.

Substantial Compliance.

Where document does not comply with formalities of execution required by The Wills Act, judge of Court of Queen's Bench may nevertheless order that it be fully effective as either will of deceased or as revocation, alteration or revival of will of deceased where he is satisfied that such was deceased's intention. (C.C.S.M. c. W150, §23).

Revocation.

Will is revoked by: (a) Marriage unless there is a declaration in will that it is made in contemplation of marriage, (b) later valid will, (c) later declaration of revocation which must be made in accordance with provisions governing making of will, or by (d) burning, tearing or otherwise destroying it with intention of revoking. There is no revocation by presumption of intention based on change in circumstances, except that where subsequent to making of will, testator's marriage is dissolved or declared void, testamentary dispositions or appointments to or of testator's spouse are deemed revoked unless contrary intention is evident in will.

Revival.

Will previously revoked may be revived only by a will or codicil made in accordance with Act showing an intention to revive former will. Mere revocation of subsequent will does not revive former.

Probate jurisdiction is in Court of Queen's Bench. (The Court of Queen's Bench Act, C.C.S.M. c. C280).

Testamentary Gifts to Subscribing Witnesses.

Will is not invalidated by fact that witness or husband or wife or common-law partner of witness is beneficiary under will, but gift to such person is void unless there are sufficient other attesting witnesses or unless no attestation is required or unless judge of Court of Queen's Bench, on application, is satisfied that neither such person nor his or her spouse or common-law partner exercised any improper or undue influence upon testator.

Bequests and Devises to Inter Vivos Trusts.

No statutory provision.

Testamentary Guardians.

See category 14 Family, topic 14.06 Guardian and Ward.

Contest.

A caveat may be filed in Office of Registrar or in office of Surrogate Clerk, any time after death requiring that nothing be done without notice to caveator. Caveat remains in force for 12 months. New caveat may be filed. Application may be made to vacate caveat. Application may be made for proof of will in solemn form or for revocation of letters probate. Court issues warning or citation to all parties and after appearances have been entered gives directions for trial of issue. Action is heard by Court of Queen's Bench.

Legacies.

Executor has one year in which to gather assets, pay debts, etc. Thereafter legatee may be entitled to interest.

Unclaimed Legacies.

See topic 13.07 Descent and Distribution.

Lapse.

Gift by will lapses where donee predeceases testator, except where donee is child or other issue or brother or sister of testator and such donee leaves issue surviving at time of death of testator. In that event gift does not lapse but goes to issue as if donee had died intestate and without surviving spouse or common-law partner.

Children of the testator, whether born before or after execution of the will, but not mentioned therein, have no right as to property disposed of by the will. But see subhead Testamentary Disposition—Dependents' Maintenance, supra.

Election between Part 4 of The Family Property Act and testamentary provision, see topic 13.07 Descent and Distribution.

Foreign Executed Wills.

Valid in so far as the manner and formalities of its making and so far as it relates to an interest in movables, if it is thus valid in place where: (a) Will was made, (b) testator was domiciled at time of making, (c) testator had habitual residence, or (d) testator was a national if one law governed wills of nationals. Intrinsic validity and effect are governed as to interest in movables by law of domicile of testator at time of death. As to interest in land law of succession governs manner and formalities of making of will and its intrinsic validity and effect.

Foreign Probated Wills.

Where probate or letters of administration have been granted elsewhere in Canada, U.K. or any part of British Commonwealth, such grant may be re-sealed in Manitoba on payment of fees, and shall then have like effect as if granted in Manitoba. Ancillary grants may issue upon petition, where probate or administration with will annexed has been granted by court of any other country. The foreign grant may be accepted as proof of death, of execution of will and that it is last will of testator.

International Wills.

Will is valid irrespective of place where made, location of assets, and nationality, domicile or residence if in form of international will.

Simultaneous Death.

See topic 13.05 Death, subhead Order of Death.

Testamentary Trusts.

See topic 13.14 Trusts.

Living Wills.

Person who has capacity to make health care decision may make health care directive expressing health care decision to be made if maker is incapacitated or unable to communicate. Person may appoint proxy to make health care decisions on maker's behalf. (The Health Care Directives Act, C.C.S.M. c. H27).

14 FAMILY

14.01 ADOPTION:

Adoption may be private or by way of application to Director or agency. If applicant is married person, spouse must either consent to adoption or join as co-applicant. (The Adoption Act, S.M. 1997, c. 47).

Consent Required.

If adoption is private, consent must be obtained from natural parent(s) or guardian(s) who have custody of child, or from mother where child is child of unmarried mother, and from child if 12 years of age or older. If child to be adopted is 12 years of age or older, and is unable to understand or give consent, judge may dispense with requirement. Father of child must be served with notice of proceeding. Judge may dispense with consent where person whose consent is required cannot be found or where it is in best interests of child. If adoption is through Director or agency, consent must be obtained from same. If child has been living with adopting parent(s) for two consecutive years or more, notice need be given to natural parents and to adoption agency in jurisdiction. Judge can direct substitutional service or dispense with service where parent cannot be found. If adoption is by spouse of natural parent, notice must be given to parent not party to application.

Conditions Precedent.

Application by other than natural or de facto parent(s) can be brought no earlier than 30 days and no later than six months after last consent required has been given. Person adopting must be older than adoptee.

Jurisdiction.

Adoption hearings are before judge of Court of Queen's Bench who may hear applications by any person resident in Manitoba.

Venue.

Application is heard in Court of Queen's Bench in any judicial centre.

Petition.

Forms of petition, notices, affidavits are supplied by Director of Child and Family Services.

Proceedings are held in camera before judge. An investigation is carried out by Director where adoption is through Director or an agency or where adoption is by de facto parent (where child has lived with adopting parent[s] for two or more years). Where application is by spouse of natural parent or of parent who has sole legal custody no investigation is conducted except on request by judge. No report required in case of previously single parent and spouse. Report of Director is considered along with any other evidence. Unless application is opposed, evidence by applicants is usually by affidavit.

Decree.

All orders of adoption are absolute.

Name.

Adopting parent(s) determines surname of child.

Effect of Adoption.

All rights, duties and obligations between child and his natural parents or his prior adoptive parents and guardians, including rights of inheritance, cease to exist under law. There is provision for registry in which information volunteered by natural and adoptive parents and adult adoptees can be recorded and made available to same. Relationship of child and adoptive parent(s) is for all lawful purposes as if child had been born of adoptive parent(s).

14.02 ALIMONY:

See topic 14.05 Divorce.

14.03 COMMUNITY PROPERTY:

System does not obtain in Manitoba.

14.04 DESERTION:

See topics 14.05 Divorce, 14.07 Husband and Wife.

14.05 DIVORCE:

The Court of Queen's Bench for Manitoba has jurisdiction in matters of divorce. An appeal lies to the Court of Appeal.

Grounds.

See Divorce Act, 1985 (S. C. 1986, c. 4), and Canada Law Digest.

Domicile.

See Divorce Act, 1985 (S. C. 1986, c. 4), and Canada Law Digest.

Procedure.

Q.B. Rule 70.

Support.

Provisions for corollary relief and support are in Divorce Act, 1985. (S. C. 1986, c. 4). Provision as to interim disbursements. (See Q.B. Rule 70 and The Marital Property Act, C.C.S.M. c. M45, §18.)

Remarriage.

There is no restriction in regard to either party's right to remarry after decree absolute has been obtained.

Grounds for Legal Separation.

Upon application to court, spouse is entitled to order of legal separation, without need for grounds. Order may include provision for maintenance payable by one spouse to other for support of spouse or child of marriage, non-entry of spouse's residence, nonmolestation, financial disclosure, exclusive occupancy of family residence and postponement of sale of family residence. Spouses have mutual obligation to contribute reasonably to each other's support, and to provide reasonably for support of their children under 18 years. Conduct of either spouse is not factor when order is made under Family Maintenance Act for support. (See The Family Maintenance Act, C.C.S.M. c. F20.)

Division of Property of Spouses.

Spouse may apply for accounting and division of family and commercial assets acquired during marriage. Presumption of equal sharing except where grossly unfair. Court may order transfer of asset, payment of monies and/or sale of assets to give effect to accounting and division. (See The Marital Property Act, C.C.S.M. c. M45.)

See also category 5 Civil Actions and Procedure, topic 5.14 Partition.

14.06 GUARDIAN AND WARD:

Court of Queen's Bench has jurisdiction over guardianship proceedings.

Selection of Guardian.

Court has power to appoint guardians of person of child. Court usually gives effect to testamentary appointment by parent, but in interest of child may refuse to do so and appoint some other person. On proper case being made out court may, on application by adult and upon proper notice to parent, guardian, or child if over 12 years of age appoint some suitable person to be guardian of such child. (The Child and Family Services Act, C.C.S.M. c. C80).

Guardianship of infant's estate granted by Court to parent(s) or other suitable person with consent of parent(s) on application and upon furnishing bond for due administration of estate or Public Trustee may be appointed without bonds. (The Infant's Estates Act, C.C.S.M. c. I35).

Powers and Duties.

Guardian or person of infant has care and control of infant and is responsible for maintenance, education and well-being of infant. (C.C.S.M. c. C80). Guardian of infant's estate entitled to control and management of property, appear in court proceedings and expend monies for benefit of infant where parent(s) unable to do so. (The Infants' Estates Act C.C.S.M. c. I35). (See topic 14.08 Infants, subhead Termination of Parental Rights.)

Real Estate.

Court has power to permit sale, mortgage, lease or other disposition of land if same is in best interests of infant. (C.C.S.M. c. I35).

Termination of Guardianship.

Guardians are removable for proper cause by Court of Queen's Bench. Guardian may resign with leave of court on terms court deems just. (C.C.S.M. c. I35).

Accounts.

Guardian must post bond and render true account of infant's property as established by Court.

Insane Persons.

Under The Mental Health Act (C.C.S.M. c. M110) Court of Queen's Bench may make orders for committing custody of persons of unsound mind and custody and management of their estates. Public Trustee is committee of estate of every mentally incompetent person who has no other committee and is also committee of person of mentally incompetent who has no other committee whenever appointed by Lieutenant-Governor-in-Council to act as such. (The Trustee Act, C.C.S.M. c. T160).

14.07 HUSBAND AND WIFE:

Contracts.

No restrictions apply.

Prenuptial contracts and/or marital agreements can make provisions of The Family Property Act, C.C.S.M. c. F25 inapplicable but cannot prevent equal division of pension benefits on marriage breakup under The Pension Benefits Act, C.C.S.M. c. P32 (although spouses can effect waiver of such division by signing pension benefits spousal agreement after having independent legal advice and reviewing statement of commuted value of pension in question) or oust court's discretion over child custody and access, or prevent application by child under The Dependents Relief Act. (C.C.S.M. c. D37).

Conveyance or Encumbrance of Property.

A married person may convey or mortgage real estate, except homestead, without consent of his or her spouse and without examination or acknowledgment. (The Married Women's Property Act, C.C.S.M. c. M70).

Husband and wife may transfer real property inter se without intervention or trustee.

Restraint upon anticipation by married woman is abolished.

Actions.

Spouse has same remedy for protection and security of property as if unmarried and may sue spouse for tort.

See also topic 14.05 Divorce.

14.08 INFANTS:

Infant is any person under full age of 18 years. The Age of Majority Act (C.C.S.M. c. A7) deems all references in Manitoba legislation to age 21 to mean age 18.

Contracts.

Infant over 16 years of age, who has no parent or guardian, or who does not reside with parent or guardian, may enter into an agreement to perform work or service, and is liable upon same and entitled to benefit thereof as if he were of legal age, save that Director of Child and Family Services may declare agreement void on evidence of injustice in case of infant under 18. Otherwise common law with regard to contracts entered into by infants prevails.

The Child and Family Services Act (C.C.S.M., c. C80) and The Family Maintenance Act (C.C.S.M., c. F20) make elaborate provisions for custody, treatment, training and general welfare of infants. And see The Child Custody Enforcement Act (C.C.S.M., c. C360) and Divorce Act, 1985 (S. C. 1986, c. 4).

Termination of Parental Rights.

The Child and Family Services Act (C.C.S.M., c. C80) authorizes Director of Child & Family Services, representative of agency authorized by Act or peace officer to apprehend child they believe is "in need of protection" as defined by Act. Terms and conditions of parental access are determined by judicial order or by agency. Parents can make application for hearing to consider varying access order. Parents can be ordered to pay maintenance.

Adoption.

See topic 14.01 Adoption.

See also topic 14.06 Guardian and Ward.

14.09 MARRIAGE:

Consent of Family Court Judge is necessary where either party is under 16, unless widow or widower or divorced. Where party between 16 and 18 consent may also be given by parent or guardian. (The Marriage Act, C.C.S.M. c. M50).

License must be obtained or banns published, and marriage must take place within three months from obtaining of license or publication.

Ceremonial Marriage.

Marriage may be solemnized only by person duly authorized. No person under 18 years may solemnize marriage. (C.C.S.M. c. M50).

Irregularities in solemnization do not void marriage, providing parties are not legally disqualified from marrying each other, and providing parties live together after solemnization as husband and wife for one year from date of marriage or until death of one party, whichever first occurs, validity of marriage is not questioned during that period and neither legally marries another person.

Prohibited Marriages.

A man may not marry his grandmother, mother, granddaughter, daughter or sister.

A woman may not marry her grandfather, father, grandson, son or brother.

Prohibited relationships include half-blood or adoption.

Any such form of marriage would be void and of no effect. (C.C.S.M. c. M50).

Common law marriages are not recognized, although, under certain statutes, including but not limited to The Common-Law Partners' Property and Related Amendments Act and The Family Maintenance Act, individuals living in common law relationship are given rights same as or similar to those legally married.

Annulment.

Expression used in Manitoba is declaration that valid marriage was not effected. Any marriage between persons within prohibited degrees of consanguinity or affinity or related by adoption or which is invalid for any reason may be so declared upon petition to Court of Queen's Bench. Residence in Manitoba confers jurisdiction. Decree in such case is made absolute in first instance. Where either party was under age of 18 at time of marriage and necessary consent of parent or guardian was not obtained, marriage can be validated by cohabitation for one year as man and wife following marriage or until death of one of parties and validity of marriage has not been questioned before expiry of one year and neither party contracts matrimony according to law before expiry of one year. (C.C.S.M. c. M50).

15 IMMIGRATION

15.01 ALIENS:

Property.

Ownership of farmland is restricted by The Farmlands Ownership Act. (C.C.S.M. c. F35). Nonresident individuals and corporations, other than family farm corporations, may not acquire any interest in farmland which exceeds 40 acres in aggregate. Act does not interfere with farmland held on date on which Act came into force, Sept. 26, 1984. There are no other laws restricting acquisition and holding of property by aliens.

Alien enemies have no privilege in courts, and are liable to be interned. See also Canada Law Digest.

16 INSURANCE

16.01 INSURANCE COMPANIES:

With exception of marine insurance (see The Marine Insurance Act, C.C.S.M. c. M40), all statutes relating to business of insurance in Manitoba are incorporated in Manitoba Insurance Act (C.C.S.M. c. I40). For general information contact Superintendent of Insurance, Legislative Building, Winnipeg, Manitoba.

Licenses.

Every insurer carrying on business in the province must be licensed and license must be renewed annually. Before a license is granted the applicant must file the following material: (1) Certificate of registration under The Corporations Act; (2) certified copy of articles of incorporation, including by-laws; (3) affidavit that insurer is still in existence and legally authorized to transact business under its charter; (4) certified copy of last balance sheet and auditor's report; (5) notice of place of head office, if not in province; (6) notice of place of head office or chief agency in province, if any; (7) statement showing amount of capital stock, number of shares subscribed and amount paid thereon; (8) certified copy of power of attorney to Canadian chief agent if any; (9) notice of appointment of chief agent or resident manager for province; (10) such other evidence as Superintendent of Insurance may require.

Every insurer, before receiving a license, must deposit with the Provincial Treasurer, securities as follows: Life Insurance, $50,000; other classes of insurance, $25,000 if doing business in Manitoba only or $50,000 if doing business both in and outside of Manitoba. Provision is made for reciprocal deposits where a similar provision is made in other provinces.

Contracts.

Part 3 of the Act sets forth the provisions relating to insurance contracts in the province.

Special classes of insurance are regulated by Insurance Act, as follows: Fire, by Part 4, including statutory conditions; Life, by Part 5, which also sets forth law relating to life insurance contracts in province and which corresponds to Uniform Life Act of other provinces; Accident and Sickness, by Part 6; Automobile, by Part 7; Livestock, by Part 8; Weather, by Part 9; Hail, by Part 10; Fraternal Societies, by Part 11; Part 12, repealed; Mutual Insurance Companies, by Part 13; Reciprocal and Inter-Insurance Exchanges, by Part 14. Marine insurance is regulated by a separate act. (The Marine Insurance Act C.C.S.M. c. M40).

Brokers and Adjusters.

Part 15 of the Insurance Act provides for the licensing and regulation of insurance brokers and adjusters.

Foreign Companies.

The rights of a licensed foreign company are the same as those of a company incorporated in the province.

Service of process in all actions against insurance companies where head office is located outside province may be made upon the Superintendent of Insurance and such service is binding upon foreign companies carrying on business in Manitoba.

Taxation.

See category 2 Business Organizations, topic 2.03 Corporations, subhead Taxation.

Direct Actions Against Insurer.

See category 23 Transportation, topic 23.03 Motor Vehicles, subhead Direct Actions.

No-Fault Insurance.

See category 23 Transportation, topic 23.03 Motor Vehicles.

16.02 SURETY AND GUARANTY COMPANIES:

See categories 2 Business Organizations, topic Corporations; Business Regulation and Commerce, topic Banks and Banking; Debtor and Creditor, topic Bonds.

17 INTELLECTUAL PROPERTY

17.01 TRADEMARKS AND TRADENAMES:

See Canada Law Digest. See also category 2 Business Organizations, topic 2.07 Partnerships.

18 LEGAL PROFESSION

18.01 ATTORNEYS AND COUNSELORS:

The Legal Profession Act (C.C.S.M. c. L107) regulates practice of barristers and solicitors in Manitoba. Two professions of barrister and solicitor are recognized, but all applicants for admission must qualify for both call to bar and admission as solicitor.

Law Society.

The affairs of the Society are regulated by benchers, consisting of elective benchers, ex-officio benchers, four appointed benchers who are not Law Society members, student bencher and Dean of Faculty of Law of University of Manitoba. Benchers regulate questions of admission to Society, conduct affairs of Society and exercise disciplinary control over members generally.

Eligibility.

For admission to Law Society as articling student candidate must be graduate of approved Canadian common law school within preceding six years, and produce evidence of good character and repute. Practising barristers, solicitors or advocates from other provinces of Canada may be admitted by filing formal application together with evidence of good standing, good character, that they have practiced law of foreign jurisdiction, submit to jurisdiction of society and promptly notify chief executive officer if they cease to be entitled to practice law in foreign jurisdiction, carry professional liability insurance and participate in insurance or reimbursement program, and pass such examinations on law and procedure in Manitoba as may be prescribed. See also subhead Examinations, infra.

Registration as Law Student.

Deadline for registration as student at Faculty of Law (University of Manitoba) is Nov. 1.

Educational Requirements.

Student entering first year law school must have completed at least two years of approved program at University of Manitoba or equivalent. Application forms are obtainable from University of Manitoba Faculty of Law. Enrollment is restricted at discretion of Faculty of Law.

Petition for Admission.

Forms are supplied by Director of Professional Legal Education of Law Society.

Examinations.

Law Society prescribes what examinations must be taken by practicing Barristers, Solicitors or Advocates from other jurisdictions. Law Society conducts examinations for articling students.

Clerkship.

Faculty of Law offers three year full time course of lectures leading to LL.B. degree. Law Society administers 12 month period of articling following. On completion of degree and articling, which includes bar admission course, candidates will be eligible to be called as Barristers and Solicitors.

Persons from non-Canadian jurisdictions must take courses and examinations as prescribed by National Committee on Accreditation in Ottawa before applying to article in Manitoba.

Licences.

Members must have current practicing certificate. Annual fee is set by governing body and must be paid together with an annual assessment to maintain reimbursement fund, as set by governing body, and an annual assessment for professional liability insurance under a Law Society program.

Privileges.

Usual.

Liabilities.

Usual.

Compensation.

Client who disputes account may have it taxed by court officer or if agrees with lawyer, arbitrated through Law Society. Contingency agreements are permitted, subject to requirements in The Legal Profession Act, and supervisory power of court to determine if such contract is fair and reasonable.

Lien.

Common law lien applies on papers, documents, certificates, etc.

Disbarment or Suspension.

Members may be disciplined, suspended or disbarred by Discipline Committee. Students may have their admission to Bar denied or deferred by Committee. Charges authorized by Complaints Investigation Committee for professional misconduct, conduct unbecoming or incompetence against member of Society.

Unauthorized practice may be enjoined under provisions of Legal Profession Act. Law corporation may practice law in Manitoba under its own name, or as partner of partnership, only through members who are authorized under this Act to practice law in Manitoba.

Professional Association.

Manitoba Bar Association is Voluntary, incorporated body. No statutory authorization for formation by lawyers other than Legal Profession Act. (C.C.S.M. c. L107).

19 MINERAL, WATER AND FISHING RIGHTS

19.01 MINES AND MINERALS:

The Oil and Gas Act (C.C.S.M. c. O34) governs development of oil and gas resources.

The Oil and Gas Conservation Board has authority to deal with matters regarding extraction of oil and gas and pooling and utilization agreements.

The Mines and Minerals Act.

(C.C.S.M. c. M162) regulates mineral exploration and mining including issuance of prospecting licences and quarry permits as well as manner claims may be staked, mineral leases obtained and minerals mined.

The Mining Claim Tax Act (C.C.S.M. c. M165) imposes tax on owner or lessee of certain mining claim. Amount set by regulation.

The Oil and Gas Production Tax Act (C.C.S.M. c. O37) provides for tax payable by holders of working interests in well producing oil or gas.

The Mining Tax Act (C.C.S.M. c. M195) imposes tax on profits from mineral processing establishments. It provides for tax holiday for new mines.

The Sand and Gravel Act (C.C.S.M. c. S15) governs ownership and acquisition of sand and gravel rights to land.

The Surface Rights Act (C.C.S.M. c. S235) provides procedure for acquisition and utilization of surface rights, payment of compensation therefor and restoration of land acquired in connection therewith; imposes tort liability.

The Mining and Metallurgy Compensation Act (C.C.S.M. c. M190) provides for limited liability for persons conducting mining related activities in certain districts. Where damage outside district due to operations within district, Act provides for damages by arbitration.

20 MORTGAGES

20.01 CHATTEL MORTGAGES:

See topic 20.05 Personal Property Security.

20.02 COLLATERAL SECURITY:

See category 8 Debtor and Creditor, topic 8.16 Pledges.

20.03 MORTGAGES OF PERSONAL PROPERTY:

See topic 20.05 Personal Property Security.

20.04 MORTGAGES OF REAL PROPERTY:

Real Property Act Mortgage.

Whenever any land under the Real Property Act is to be made security in favor of any mortgagee, the mortgagor must execute a memorandum of mortgage in form prescribed by statute, and if it is subject to any other mortgage or encumbrance the mortgage must so state. A mortgage under the Real Property Act does not operate as a transfer of the land charged, but only has effect as security. Mortgages may be transferred by form of transfer provided by statute.

Mortgages repayable over period of less than five years may restrict ability of mortgagors from prepaying amount of principal and interest in advance of scheduled date for repayment. Mortgages granted by individuals which are repayable over period greater than five years may be paid off with three months' interest bonus any time after five years have expired. (C.C.S.M. c. R30; see also C.C.S.M. c. M200).

Discharge of Mortgage.

Mortgages are discharged by instruments in writing by officers of mortgage and entitled to bind mortgage either under seal, or properly witnessed, with affidavit of witness that he is such; that he knows party executing, whom he knows is of full age of 18 years and that he saw instrument executed at place of execution. Instrument, duly executed, must be registered in Land Titles Office in which mortgage is registered. (See Form 12 at end of Digest.) Under Real Property Act, discharge will be endorsed on certificate of title.

Trust deeds are ordinarily used by corporations to secure bond issues. They are charged on real estate and registered in the form of a mortgage in the land titles office of the district in which the land is situated upon obtaining fiat from registrar general. Collateral other than real property should be registered with Personal Property Registry. (C.C.S.M. c. P35).

See topic 20.05 Personal Property Security.

Foreclosure.

If default is made in payment of principal, etc., and continues for one calendar month (or such longer time as may be set out in mortgage), mortgagee may give written notice to mortgagor and persons having interest in land subject to mortgage to pay money then due or to observe covenants or steps will be taken to remedy default. If default continues for one month from date of service, mortgagee may apply for order permitting him to sell land. If sale proves abortive and default continues for six months, mortgagee may apply to district registrar for order of foreclosure, and registrar appoints time within which redemption may be made, not less than one month from service of notice to redeem. (C.C.S.M. c. R30).

No proceedings against farm property without leave of court. (Family Farm Protection Act, C.C.S.M. c. F15).

Forms are provided by statute, but it is customary to add to statutory covenants, in both old system and new system mortgages, additional remedies and protection for mortgagee, and all large mortgage lenders and many large law offices have their own forms for this purpose. Statutory forms are as follows:

Forms

Statutory Mortgage: (See Form 11.3 at end of Digest.)

Transfer: (See Form 8.3 at end of Digest.)

Chattel Mortgages.

See topic 20.05 Personal Property Security.

20.05 PERSONAL PROPERTY SECURITY:

Application.

Manitoba PPSA was proclaimed in force effective Sept. 5, 2000, replacing PPSA that had been in force since 1978. Based on Model Western Canada PPSA used in creating current Personal Property Security Acts in force in British Columbia, Alberta, Saskatchewan and Maritime Provinces. New Manitoba PPSA applies to every security agreement without regard to its form, or to person who has title to collateral, that creates security interest, including chattel mortgages, conditional sales, fixed charges, floating charges, pledges, debentures, trust indentures, trust receipts, assignments, consignments, leases or transfers of chattel paper. PPSA also applies to assignments of accounts or chattel paper, commercial consignments and leases for term of more than one year, notwithstanding that such interests may not secure payment or performance of obligation. Historic forms and concepts of security agreements are discarded and single conceptual basis for all personal property security agreements is employed.

Conflict of Laws.

Basic premise is that law of jurisdiction where collateral is situated when security interest attaches is applicable law for determining validity, perfection and effect of perfection or non-perfection of security interest in such collateral. Basic premise does not apply to intangibles, property normally used in more than one jurisdiction and non-possessory security interests in securities, instruments, negotiable documents of title, money and chattel paper, and with those types of collateral PPSA indicates that governing law is to be law of jurisdiction where debtor located when security interest attaches. Debtor is deemed to be located at his place of business, at his executive office if he has more than one place of business and otherwise at his principal residence.

For goods brought into Manitoba, distinction is made between buyer in good faith of goods brought into province and all other persons. Security interest in collateral already perfected under law of place in which collateral situated when security interest attached and before being brought into Manitoba continues perfected in Manitoba as against buyer in good faith if perfected in Manitoba prior to buyer's acquiring interest in goods and as against all other persons if perfected within 60 days after brought into province, or within 15 days after day secured party receives notice that goods have been brought into Manitoba, or prior to day that perfection ceases under law of prior jurisdiction, whichever is earliest.

Provisions of PPSA shall not prevail if in conflict with any provision of The Consumer

Protection Act or The Farm Machinery and Equipment Act or any provision of any other Manitoba statute for protection of consumers.

Transitional.

Registration under old PPSA in effect until Sept. 5, 2000 is deemed to be registration under new Manitoba PPSA. Question as to priority between security interests validly created prior to new PPSA coming into force (Sept. 5, 2000) is determined by prior law, but priority between security interest created under old PPSA and security interest validly created after proclamation of new PPSA (Sept. 5, 2000) shall be determined by new PPSA provisions.

Effectiveness.

Security agreement is effective according to its terms. However, certain terms are prohibited or may be unenforceable. For instance, any prohibition against assignment of account or intangible or against sale in ordinary course of business will be unenforceable and acceleration clauses may become ineffective due to reinstatement rights set out in PPSA.

Enforceability.

No security interest is enforceable against third party unless collateral is in possession of secured party or debtor has signed security agreement that contains description of collateral by item or kind or statement indicating that security interest has been taken in all of debtor's present and after-acquired personal property or statement indicating that security interest is taken in all of debtor's present and after-acquired personal property except specified items or kinds of personal property.

Attachment.

Security interest attaches when value is given, debtor has rights in collateral, and, except for purpose of enforcing inter partes rights, it becomes enforceable against third parties. Debtor has rights in goods leased to him or delivered to him under consignment when he obtains possession of them pursuant to lease or consignment. Debtor has no rights in crops until they become growing crops, young of animals until they are conceived, in oil, gas or other minerals until extracted, in trees (other than crops) until severed.

After-acquired Property.

Security agreement may cover after-acquired property and security interest will attach without specific appropriation by debtor. Limitations exist as to ability of security interest to attach to after-acquired crops growing more than one year after security agreement is entered into, or to attach to after-acquired consumer goods.

Future Advances.

Security agreement can secure future advances whether or not advances are made pursuant to obligation in security agreement. If future advances are made while security interest is perfected, security interest generally has same priority with respect to future advances as it has with respect to first advance. Future advance will not take priority over interest of person or representative of creditors who causes collateral to be seized under legal process, sheriff who has seized, or judgment creditor entitled to share in proceeds of property seized under legal process unless advance made before interests of such persons arise, or before secured party receives notice of their interests, or pursuant to statutory requirement or legally binding obligation to person other than debtor, or to pay for reasonable cost and expense to protect, preserve, maintain or repair collateral.

Perfection and Priorities.

Security interest is perfected when it has attached and all steps required for perfection required under PPSA have been completed regardless of order of occurrence. The three methods of perfection are: (1) possession of collateral by secured party or person on his behalf; (2) registration of financing statement in Personal Property Registry; and (3) automatic, although temporary, perfection by way of statutory grace periods.

Perfected security interest in collateral automatically extends to proceeds so long as proceeds are identifiable or traceable.

As general rule, priorities among competing secured parties are determined by order of registration of financing statements if all secured parties are perfected by registration, or by order of perfection if secured party has perfected in some way other than registration, or by order of attachment if none of secured parties have perfected security interest. General rule is subject to many exceptions.

Purchase money security interest (“PMSI”) in collateral other than inventory that is perfected within 15 days after day debtor obtains possession of collateral or, if collateral is intangibles, within 15 days after security interest therein attaches, generally has priority over any other security interest in same collateral or its proceeds given by same debtor.

PMSI in collateral that is inventory generally has priority over any other security interest in same collateral given by same debtor if PMSI in inventory is perfected at time debtor receives possession of it and PMSI secured party has served notice to any other secured party who has registered financing statement covering same type of collateral. Exception with respect to sales in ordinary course of business and by virtue of fact that PMSI in proceeds of inventory does not have priority over perfected security interest in accounts receivable given for new value.

Purchaser or lessee of goods sold or leased in ordinary course of business of seller or lessor takes free of any perfected or unperfected security interest therein given by or reserved against seller or lessor, whether or not purchaser or lessee knows of it, unless secured party proves that purchaser or lessee also knows that sale or lease constitutes breach of security agreement.

PPSA provides special priority rules between secured and unsecured creditors, between PMSI secured parties in same collateral, and with respect to fixtures, crops, animals, accessions, commingled goods, accounts, instruments, negotiable documents of title, money, securities, chattel paper, future advances and to rights of payment under lease of real property.

Registration system created by old PPSA and known as Personal Property Registry (“PPR”) is continued under new PPSA. Registration is by notice filing and is effected by filing financing statement in prescribed form. Financing statement may be tendered for registration by personal delivery or by mailing to PPR, 276 Portage Avenue, Winnipeg, Manitoba, R3C OB6. New PPSA introduces ability to also search and register electronically over Internet (to register party must establish account with PPR and be issued password).

Registration of financing statement is effective for length of time indicated in financing statement. Filing fees will be based on chosen registration period. Financing statement registration can be renewed at any time before it expires by registering appropriate financing change statement extending registration period.

Financing statement may be registered at any time and may be registered before security agreement is made or before security interest attaches. It must be registered prior to expiry of any temporary perfection period (usually 15 days) to continue perfection uninterrupted, and with respect to PMSI in non-inventory collateral, within 15 days of debtor obtaining possession of collateral or, in case of intangibles, within 15 days of attachment of security interest in intangibles.

Where secured party assigns his interest or subordinates his interest to that of another person, financing change statement may be registered reflecting assignment or subordination. Registration of such financing change statement is mandatory where debtor transfers his interest in collateral or changes his name.

When dealing with collateral that is fixture or crops or right to payment under lease of real property, special additional registration should be made against affected real property in order to fully protect secured party's interest in such collateral.

Searches.

Search may be conducted at PPR for registrations against name of debtor or against serial number where collateral required by regulation to be described by serial number (defined in regulations, and includes motor vehicles, mobile homes, trailers, aircraft, tractors, combines, boats and outboard motors for boats), with results in PPR printed form, or on-line over Internet.

Rights and Remedies Upon Default.

Part 6 of PPSA contains code setting out rights, remedies, duties and obligations upon both secured party and debtor when there is default by debtor. Most of codified rights, remedies, duties and obligations, to extent that they give rights to debtor or impose obligations upon secured party, cannot be waived. Debtor has right to remedy defaults and reinstate security agreement. Debtor and other parties have right to redeem collateral from enforcing secured party. Most provisions of Part 6 apply to receivers.

21 PROPERTY

21.01 ABSENTEES:

There is no provincial statute with respect to absentees or their estates.

Money paid into Court of Queen's Bench, and remaining unclaimed for six years is paid over to Provincial Treasurer. Limitation of time for making claims is suspended in case of infant or person of unsound mind. (The Suitors' Moneys Act, C.C.S.M. c. S220).

Care of Property.

No provincial statute with respect to care of property of absentees.

Process Agent.

Absentee may authorize agent to accept service of process. Substitutional service of a process may be effected by judge's order.

Escheat.

See category 13 Estates and Trusts, topic 13.07 Descent and Distribution.

21.02 ADVERSE POSSESSION:

Adverse possession generally gives no title against registered owner of property under Real Property Act, however every certificate of title is void as against title of person adversely in actual occupation of, and rightly entitled to, land at time land was brought under New System and who continues in such occupation. (C.C.S.M. c. R30, §61). Under Law of Property Act (C.C.S.M. c. L90, §28) where survey shows that building encroaches upon adjoining land Court of Queen's Bench may: (a) Declare easement to be in existence for life of building, (b) vest title to owner of encroaching building, or (c) order portion of building encroaching to be removed. Real Property Act (C.C.S.M. c. R30) provides that land mentioned in certificate of title shall by implication and without special mention in certificate, unless contrary be expressly declared, be deemed to be subject to any right of way or other easement upon, over or in respect of land.

Easements.

Proof of uninterrupted use, when such use has been exercised for at least 20 years entitles court to hold that there existed agreement express or implied between predecessors in title and that easement has been established by prescription. (See 1964, 47 W. W. R. 113.)

21.03 CONVEYANCES:

See topic 21.05 Deeds.

21.04 CURTESY:

Curtesy has been abolished by statute, but see categories 8 Debtor and Creditor, topic Homesteads and Estates and Trusts, topic Descent and Distribution.

21.05 DEEDS:

There are two systems by which land is held, mortgaged, or conveyed, called the Old System and the New System.

See topic Real Property for estates recognized.

Old System.

Land held under Old System is regulated by Registry Act (C.C.S.M. c. R50) and is conveyed by means of deed, which usually contains covenants for further assurance on part of grantor and that grantor has done nothing to encumber land mentioned in deed. It is executed under seal in presence of witness who not only signs his name as witness but takes affidavit that he was present at its execution which is attached to or endorsed on deed.

If the grantor is unable to write, his mark is sufficient. His name is written at the foot of the deed and he makes his mark in the presence of two witnesses who subscribe their names opposite as witnesses.

Registration.

Deeds and instruments affecting land are registered in the proper registry office of the district where such land is situate. The registrar of the proper land registry offices abstracts the title to the land the instrument conveys and gives certificates of the abstract and registrations under seal when requisitioned and upon payment of the proper fees. Since priority of registration prevails it is important that deeds be registered to shut out innocent persons who might otherwise become interested in the land.

Fees payable under Old System for registration of deed of land or other instrument affecting title generally $40.

Transfer to New System.

Land under the Old System may be brought under the operation of the Real Property Act (New System) by application to the District Registrar of the Land Titles District in which the land is situated. (C.C.S.M. c. R50).

New System.

The system known as the Torrens or Australian system of land transfer was introduced in 1885. Land Titles Districts have been formed, each presided over by a District Registrar. All lands in each district may be brought under the Torrens System by making application in form prescribed by the statute and a certificate of title issues to the applicant or his directee upon satisfactory proof of his title.

The transfer under the Real Property Act is simply a memorandum in statutory form describing transferor; land; consideration, and transferee, accompanied by affidavit of transferor that he is registered owner, affidavit of subscribing witness similar to that in deeds, affidavit of transferee as to value of land together with all buildings and improvements thereon, affidavit of transferor, transferee, or agent as to whether or not land is farm land under The Farm Lands Ownership Act, and consent of spouse under The Homesteads Act if necessary. There must be endorsed on transfer address of transferee.

The District Registrar may refuse to register a transfer of an undivided fractional interest in the mines or minerals in, under or upon any parcel of land if that fractional interest is less than an undivided one-quarter interest thereof. The District Registrar may also refuse to register a transfer of an interest in mines or minerals if more than four persons are named therein as transferees.

Certificate of Title.

On registration of transfer in Land Titles Office a certificate of title (and duplicate, if requested) issues to transferee.

Every certificate of title, so long as it remains in force and uncancelled, is conclusive evidence at law and in equity as against Her Majesty and all persons whomsoever that the person named in such certificate is entitled to the land described therein for the estate or interest therein specified, subject to certain exceptions mentioned in statute. Any person aggrieved must look to assurance fund, which is created by each applicant for title paying small percentage of value of his property to province and which exists for protection of all Torrens titles.

Fees payable on registration of land transfer, $69, plus applicable land transfer tax. Duplicate certificate of title only issued on owner's request or at discretion of District Registrar. Where land subject to mortgage or encumbrance, duplicate certificate of title, if issued, must be deposited with District Registrar.

Land Transfer Tax.

Formula: Tax =.005 (FMV-$30,000) +.005 (FMV-$90,000) +.005 (FMV-$150,000) +0.005 × (FMV-$200,000). (The Tax Administration and Miscellaneous Taxes Act, C.C.S.M. c. T2, §112).

Caveat against a certificate of title may be lodged at any time by any person claiming an interest in the land covered by said certificate, forbidding the issue of a new certificate of title or other dealing with the land except subject to such caveat.

Short forms of deeds, leases and mortgages are provided by “The Short Forms Act” (C.C.S.M. c. S120) and “The Real Property Act” (C.C.S.M. c. R30).

Form

Old System Deed:

This Indenture, made (in duplicate) the. . . . . . day of. . . . . ., two thousand and. . . . . . . In pursuance of the Act Respecting Short Forms of Indentures between. . . . . . and. . . . . . witnesseth that in consideration of. . . . . . Dollars of lawful money of Canada, now paid by the said part. . . . of the second part to the said part. . . . of the first part (the receipt whereof is hereby acknowledged). . . . . . the said part. . . . of the first part do. . . . grant unto the said part. . . . of the second part. . . . . . heirs and assigns forever all and singular the lands following, that is to say:

....

To have and to hold unto the said part. . . . of the second part. . . . . . heirs and assigns to and for. . . . . . their sole and only use forever; subject nevertheless to the reservations, limitations, provisos and conditions expressed in the original grant thereof from the Crown.

The said part. . . . of the first part covenant. . . . with the said part. . . . of the second part that. . . . he. . . . ha. . . . the right to convey the said lands to the said part. . . . of the second part notwithstanding any act of the said part. . . . of the first part and that the said part. . . . of the second part shall have quiet possession of the said lands free from all encumbrances. And the said part. . . . of the first part covenant. . . . with the said part. . . . of the second part that. . . . . . will execute such further assurances of the said lands as may be requisite; and the said part. . . . of the first part covenant. . . . with the said part. . . . of the second part that. . . . . . ha. . . . done no act to encumber the said lands and the said part. . . . of the first part release. . . . to the said part. . . . of the second part all. . . . . . claims upon the said lands.

In Witness Whereof, the said parties have hereunto set their hands and seals.

(Signed, sealed and delivered

in the presence of)

(Add consent of spouse, if any, and acknowledgment thereof.)

New System Transfer:

See Form 8.3 at end of Digest.

See also categories 8 Debtor and Creditor, topic Homesteads; Family, topic Husband and Wife, subhead Conveyance or Encumbrance of Property.

21.06 DEEDS OF TRUST:

See category 20 Mortgages, topic 20.04 Mortgages of Real Property. See also category 20 Mortgages, topic 20.05 Personal Property Security.

21.07 DOWER:

See categories 8 Debtor and Creditor, topic Homesteads and Estates and Trusts, topic Descent and Distribution.

21.08 ESCHEAT:

See category 13 Estates and Trusts, topic 13.07 Descent and Distribution.

21.09 LANDLORD AND TENANT:

Residential tenancies and lifeleases are governed by The Residential Tenancies Act (see subhead Residential Premises, infra). Otherwise relations between landlord and tenant are governed by The Landlord and Tenant Act. (C.C.S.M. c. L70). Relationship of landlord and tenant may be created by agreement in writing or oral but if lease for more than three years, agreement must be in writing. In order to affect subsequent purchasers or mortgagees of land caveat must be registered unless lease is for period of less than three years and there is actual occupation of land by tenant.

Termination.

To terminate a lease other than residential tenancy, a week's notice for weekly tenancy and month's notice for monthly tenancy ending on last day of week or month is sufficient. See subhead Residential Premises, infra.

Holding Over.

Where a tenant holds over after the termination of his term and after notice in writing given for delivering possession thereof by his landlord, he must pay double the yearly value of the land so detained for the time he holds over.

Where a tenant gives notice of his intention to quit the premises at a time mentioned in such notice, and does not deliver up possession thereof at such time, he must from thenceforward pay to the landlord double the rent or sum which he should otherwise have paid, to be levied, sued for and recovered at the same time and in the same manner as the single rent.

Dispossession.

Where a tenant, after notice or demand made upon him in writing to go out of possession, wrongfully refuses or neglects to do so, the landlord may apply upon affidavit to a judge for a writ of possession.

Where a tenant fails to pay his rent within three days of the time agreed upon and wrongfully refuses or neglects upon demand made in writing to pay the rent or to deliver up the premises demised, the landlord may obtain a summons returnable before a judge of Court of Queen's Bench, who must make order for possession unless cause be shown to him by tenant why order should not be made.

Distress.

There are certain limitations on a landlord's right to distrain on the goods of a tenant. No distress may be made for more than three months' arrears of rent where the same is payable quarterly or more frequently or for more than the next preceding one year's rent where the same is payable less frequently than quarterly.

The right to distrain is limited to the goods on the premises of the tenant, or any one claiming by, through or under him by gift, purchase or otherwise, since the commencement of the term. The claim takes priority to any writ of execution or attachment. The Landlord and Tenant's Act specifies the goods and chattels which shall be exempt from seizure under any landlord's warrant of distress. A mortgagee under an attornment clause in a mortgage may only distrain on such goods and chattels of the mortgagor on the mortgaged premises as are not exempt from seizure under execution. The mortgagee may, by notice in writing, served upon the person occupying the land, where such person is not the tenant, require that person to pay to the mortgagee the rental value of the land or so much thereof as has not already been paid and to continue to pay the same from time to time as it falls due. Where a tenant fraudulently removes his goods and chattels to prevent the landlord from distraining the same for arrears of rent, the landlord may, within 30 days next ensuing, seize such goods and chattels wherever found and dispose of the same in the same manner as goods ordinarily distrained for rent. Distress is made under a landlord's warrant of distress and the goods and chattels seized must be appraised by two appraisers and thereafter may be sold for the best price obtainable. Any surplus remaining over and above the amount of rent distrained for and the cost of seizure is returned to the tenant.

Where tenant vacates premises, landlord may remove any personal property from premises and store same. If worth of property is less than cost of storage, landlord may dispose of same.

Residential Premises.

Governed by The Residential Tenancies Act. Form of lease for tenancies prescribed by regulations. Any term or condition which contravenes provisions of Act is null and void. Director of Residential Tenancies Branch investigates complaints of breaches of Act, hears applications for orders of possession, regulates rent increases, mediates disputes between landlord and tenant and issues orders. Orders appealable to Residential Tenancies Commission. Security deposit cannot exceed one-half month's rent and if landlord has no claim against deposit, landlord shall, within 14 days after date of termination of tenancy, return deposit to tenant, but has 28 days after date of termination of tenancy to notify tenant of claim and make application for claim.

Rental increases regulated under Act and tenants have right to hearing if increase exceeds regulations. Distress is abolished. Tenants may assign or sublet subject to landlord's consent which cannot be unreasonably withheld.

Notice of termination: from landlord in writing; from tenant in writing or orally but landlord can ask tenant to sign notice. Generally tenant has statutory right to continue occupancy and right of landlord to terminate is limited to specific circumstances prescribed by Act.

Statutory provisions of Act cannot be contracted out of or waived.

21.10 LEASES:

See topic 21.09 Landlord and Tenant.

21.11 PERPETUITIES:

Common law rule against perpetuities, and accumulations, were both abolished in 1983.

21.12 PERSONAL PROPERTY:

No tenancy by the entirety. The Personal Property Security Act. (C.C.S.M. c. P35).

21.13 POWERS OF ATTORNEY:

Power of attorney may be given by the registered owner of any land, estate or interest under the Torrens system authorizing any person to act for him in respect of a transfer or other dealing with the land. The power of attorney must be duly executed and attested and verified by affidavit and deposited with the district registrar, and it remains in force until revocation or notice of death is registered. The Powers of Attorney Act (C.C.S.M. c. P97) provides for powers of attorney enduring beyond mental infirmity of donor, powers of attorney that come into force at specified future date or on occurrence of specified contingency and irrevocable powers of attorney.

21.14 REAL PROPERTY:

Principal estates in real property recognized in this province are estate in fee simple, estate tail, life estate and leasehold estate. Estate granted to two or more persons is tenancy in common unless expressly declared to be joint tenancy. Every estate vested in executors or trustees is held by them in joint tenancy. Airspace parcels may be created by registered owner of land with consent of all other parties with claim or interest in land. (The Real Property Act, C.C.S.M. c. R30).

Condominiums.

Upon registration of declaration and condominium plan, land covered by plan and interests appurtenant to land described is governed by The Condominium Act and registrar must: (1) Issue certificate of title in name of condominium corporation thereby created; (2) issue separate certificate of title in name of each owner for each unit described; (3) keep index known as “Condominium Corporations Index”; (4) keep register known as “Condominium Register” of declarations, plans, by-laws, etc. (The Condominium Act, C.C.S.M. c. C170).

See also topics 21.05 Deeds, Landlord and Tenant; categories 5 Civil Actions and Procedure, topic Partition; Debtor and Creditor, topic Homesteads; Documents and Records, topic Records; Family, topic Husband and Wife; Mortgages, topic Mortgages of Real Property.

21.15 TRUST DEEDS:

See category 20 Mortgages, topic 20.04 Mortgages of Real Property.

22 TAXATION

22.01 ADMINISTRATION:

Revenue for cities and municipalities in province is derived largely from taxation of lands situate within respective city or municipality. Provincial government does not impose any tax on lands but derives its revenue largely from income tax, gasoline tax and mining tax in addition to many others.

Payment.

In municipalities, taxes are payable at par up to and including due date (last working day in Junein Winnipeg) of year for which levied. As a rule, a discount is allowed for payment. Penalty is added to taxes outstanding after due date.

Sales of Land.

Municipal Act (C.C.S.M. c. M225) provides that lands may be sold for taxes due and unpaid for more than one year and mandates lands be sold where taxes in arrears for five years. Notice of tax sale must be registered against title at least 120 days before auction. Municipality entitled to possession on mandatory posting of public notice at least 30 days before auction. Notice may be discharged from title by payment of tax arrears and costs before commencement of auction. On sale, purchaser is entitled to tax sale application and, unless tax sale has been challenged, district registrar must register transfer of land to purchaser on presentation of tax sale application by purchaser. Transfer of title extinguishes all other interests in property arising or existing before tax sale. Where proceeds of sale exceed tax arrears, municipality must notify all persons entitled to notice of tax sale. Such persons may apply to court within three years for order for payment of excess in whole or part. Additional excess may be paid into municipality's general revenue. Enquiries as to lands sold for taxes should be directed to treasurer of municipality in which lands are situated or to district registrar of Land Titles Office in district in which lands are situated.

Penalties.

As to land taxes, see subheads Payment and Sales of Land, supra. As to corporation, income, and estate taxes, see Canada Law Digest.

22.02 ALCOHOL, BEVERAGES AND TOBACCO TAXES:

Tobacco Tax Act.

(C.C.S.M. c. T80).

22.03 BUSINESS TAXES:

Franchise Taxes.

None.

22.04 CORPORATE TAXES:

See Business Organizations, topic Corporations, subhead Taxation.

The Corporation Capital Tax.

(C.C.S.M. c. C226).

The Insurance Corporation Tax Act.

(C.C.S.M. c. I50).

22.05 EMPLOYMENT TAXES:

Unemployment Compensation or Social Security Tax.

None.

Health and Post Secondary Education Tax Levy Act.

Employers taxed on remuneration paid each month to employees reporting to or paid through permanent establishment in Manitoba. No tax if remuneration paid is $1.25 million or less per year; if remuneration between $1.25 million and $2.5 million per year, tax for year is 4.3% of remuneration over $1.25 million; if remuneration exceeds $2.5 million per year, tax is 2.15% of total remuneration paid each month to employees. (C.C.S.M. c. H24).

22.06 GAMBLING AND ENTERTAINMENT TAXES:

Amusement Tax.

Municipalities have power to impose amusement tax. (C.C.S.M., c. M225).

Pari-Mutuel Levy Act.

(C.C.S.M. c. P12).

22.07 GASOLINE AND SPECIAL FUELS TAXES:

Gasoline Tax Act.

(C.C.S.M. c. G40).

Motive Fuel Tax Act.

(C.C.S.M. c. M220).

22.08 GIFT TAX:

None.

22.09 INCOME TAX:

Income Tax Act (Manitoba) (C.C.S.M. c. I10) levies income tax on individuals and corporations. By Federal-Provincial agreements, Canada collects this tax for and on behalf of Province. For individuals, basic tax for 2008 is calculated on taxable income using following income brackets: $0 to $30,544, rate is 10.9%; $30,545 to $66,000, rate is 12.75%; over $65,000, rate is 17.4%. For corporations, tax is 14.0% (effective Jan. 1, 2008 to June 30, 2008) and 13% (effective July 1, 2008 to Dec. 31, 2008) of corporation's taxable income earned in Manitoba. Small business rate of 2% in respect of active business income not exceeding $400,000 in 2008. Effective Jan. 1, 2009, individual rates will be: $0 to $31,000, rate will be 10.8%; $31,000 to $67,000, rate will be 12.75%; over $67,000, rate will be 17.4%. Effective Jan. 1, 2009, small business rate of 1% in respect of active business income not exceeding $400,000 in 2009. Effective July 1, 2009, for corporations, tax is 12% of corporation's taxable income earned in Manitoba. See category 2 Business Organizations, topic 2.03 Corporations, subhead Taxation. See also Canada Law Digest.

22.10 INHERITANCE TAX:

None.

22.11 MINES, MINERALS AND FISHERIES TAXES:

Mining Tax.

Mining Tax Act (C.C.S.M. c. M195) and Mining Claim Tax Act (C.C.S.M. c. M165). See also category 19 Mineral, Water and Fishing Rights, topic 19.01 Mines and Minerals.

Oil and Gas Production Tax.

C.C.S.M., c. O37.

22.12 SALES AND USE TAXES:

Sales Tax.

In addition to Federal sales tax (i.e. Goods and Services Tax) (for which see Canada Law Digest) 7% tax on sales is payable by consumers to retailers or other suppliers at time of sale of certain tangible personal property and certain services sold and delivered in Manitoba and by lessees to lessors of certain tangible personal property in Manitoba when rental payments due. Some goods and services are exempt. Nonresident vendors that advertise or solicit orders in Manitoba are required to register and collect tax on goods delivered into province. (The Retail Sales Tax Act, C.C.S.M. c. R130).

Sales of real estate subject to land transfer tax (see category 21 Property, topic 21.05 Deeds). Building materials and component parts such as lighting fixtures, cupboards and furnaces are taxable, whether for new construction or for adding to, or improving, house or similar structure on land. Labour charge for installation of machinery, equipment or apparatus, or system or component to land or building is taxable.

Retailers, storekeepers, suppliers of other services and other vendors are required to collect correct amount of tax at time of sale and remit to government monthly. Amounts so collected are deemed to be held in trust.

Effective July 1, 2004, 7% tax is imposed on certain services of lawyers, accountants, engineers and similar professionals.

Utilities Tax.

7% on purchase of electricity, telephone service, gas used as fuel and delivered by pipe, coal and steam or water for heating buildings. There are certain exemptions from this tax with respect to gas, coal, and electricity used to heat domestic dwellings and farm buildings. (C.C.S.M. c. T2, Regulation 74/88 and C.C.S.M. c. R130).

22.13 STAMP AND SEAL TAXES:

Stamp Tax.

None imposed by the province.

23 TRANSPORTATION

23.01 AIRCRAFT:

See Canada Law Digest, category Transportation, topic Aircraft.

23.02 AUTOMOBILES:

See topic 23.03 Motor Vehicles.

23.03 MOTOR VEHICLES:

Vehicle registration required annually. New resident must register within three months for remainder of year. The Off-Road Vehicles Act (C.C.S.M. c. O31) requires registration of off-road vehicles and imposes other requirements. Antique cars, trucks and motorcycles must be registered. Issued by Registrar of Motor Vehicles. Plates must be displayed on front and back of vehicle with validation sticker affixed in each year or portion thereof for which new plates are not issued. No exemptions for members of Armed Forces resident in Manitoba.

Operator's License.

Driver or chauffeur must be licensed, carry license on person and produce same when required. Offence to hold more than one driver's license. Operator's license issued for one-year period to expire at end of operator's month of birth. Driver's license not issued to anyone under 16. License issued to novices in stages. Chauffeur's license not issued to anyone under 18. Merit consideration for member of Armed Forces whose license expires while absent from Manitoba. Registrar may issue temporary license. (The Highway Traffic Act, C.C.S.M. c. H60).

Taxicabs.

See The Taxicab Act. (C.C.S.M. c. T10).

Suspension of license and registration may be automatic for failing to prove financial responsibility or for certain offences. License suspension is automatic on conviction for impaired driving or refusal to take breathalyzer test. First conviction: one year suspension. Second or subsequent conviction: five years suspension. For second or subsequent conviction, jail sentence is also automatic. Second conviction: minimum 14 days. Third or subsequent conviction: minimum 90 days. (S. C. 1985, c. 19). Prior to conviction shorter automatic suspensions imposed by peace officer where breath or blood analysis reveal blood-alcohol exceeding legal limit or where sample refused. License may also be suspended for failure to pay traffic or parking fines or for default of family maintenance obligations. (C.C.S.M. c. H60).

Driving with suspended or cancelled license automatically results in vehicle driven being impounded for 30 days. (C.C.S.M. c. H60). Automatic impoundment of vehicles involved in certain prostitution related offences, with forfeiture on conviction. Further penalty may be participation in motor vehicle ignition-interlock program.

Arrest or conviction for any of the above offenses in any other province of Canada or in the United States will have this effect on official notice thereof to the registrar.

Image capturing system may be used in order to enforce red light, speeding and railway crossing offences. Owner of vehicle may be prosecuted by offence notice without swearing of information. No person shall attempt to obstruct number plate to prevent accurate reading by image capturing system. (The Highway Traffic Amendment and Summary Convictions Amendment Act, S.M. 2002, c. 1).

Titles.

No requirement to obtain certificate or other evidence of title. Inspection certificate required for transfer of registration where vehicle is of age/class requiring periodic inspection in regulations.

Sales.

New vehicle registration must be taken out by new owner. Registrar may require proof of ownership before registering vehicle.

Liens.

Registration of security interest in motor vehicle may be effected in Personal Property Registry. See category 20 Mortgages, topic 20.05 Personal Property Security.

Identification Marks.

Minimum fine of $50 and maximum fine of $100 and suspension of licence up to six months for defacing, removing or altering manufacturer's serial number. (C.C.S.M. c. H60).

Operation Prohibited.

By person under 16 years. Operation of power-assisted bicycle prohibited to 14 years.

Size and Weight Limits.

Regulated by The Highway Traffic Act (C.C.S.M. c. H60) and regulations.

Seat belts must be worn by drivers and passengers. Failure to do so may be contributory negligence. ([1989] 60 Man. R. [2d] 287).

Helmets must be worn by anyone riding on motorcycle or power-assisted bicycle.

Equipment Required.

The Highway Traffic Act (C.C.S.M. c. H60) requires usual equipment for motor vehicles. Must be two separate means of applying brakes to at least two wheels on same axle. Motor vehicle having width, including load, in excess of 2.05 meters must carry four lighted clearance lamps, one colored green, on each side at front and one colored red on each side at rear. Except for motorcycles of model or make of year 1974 or earlier, and mopeds, automatic turn signal lights required on all motor vehicles. Motor vehicles of year 1968 or later must be equipped at time of sale with seat belts and of year 1971 or later must be equipped with windshield washer. (C.C.S.M. c. H60). Requirements for rear and side view mirror equipment. Windshield wipers required. Unlawful to operate TV set in front seat of motor vehicle travelling upon highway or drive motor vehicle so equipped upon highway. (C.C.S.M. c. H60).

Lights Required.

Regulated by The Highway Traffic Act. (C.C.S.M. c. H60).

Inspection.

Peace officer may stop and inspect any equipment on vehicle or bicycle on highway. Registrar may require any owner to present motor vehicle for inspection.

Traffic regulations are governed by The Highway Traffic Act and local by-laws.

Accidents.

Driver of motor vehicle involved in accident must stop and give in writing number of his driver's licence, registration no. of vehicle, name of insurer and no. of policy and if he is not registered owner, name and address of registered owner. If there is bodily injury or apparent damage over $1,000 report to local police must be made forthwith by driver or owner and further written report within seven days.

Liability.

Owner liable for negligence of anyone operating car with his consent. Onus on driver to prove not negligent where loss or damage sustained by person by reason of motor vehicle on highway, except in case of collision between motor vehicles or action brought by a passenger. Owner may be prosecuted for traffic offences committed with owner's vehicle.

Effective Mar. 1, 1994, no fault system established such that legal actions may no longer be commenced in Manitoba for damages arising from motor vehicle accident.

Guests.

There is no longer any requirement for guest passenger to prove gross negligence in action for damages against owner or operator of motor vehicle. (S.M. 1980, c. 19).

Proof of Financial Responsibility.

Where an owner or driver has failed to satisfy a judgment obtained against him in any Court in Canada or the United States of America within 30 days after rendition thereof, in an action arising out of the operation of a motor vehicle where the cause of action is bodily injury to or the death of another or property damage in excess of $1,000, his license and registration certificate (or in case of nonresident, his privilege of having or using his car within Province) may be suspended and once suspended may not be restored or renewed until he has satisfied judgment at least to extent of $200,000 thereof and furnished proof of financial responsibility.

Proof of financial responsibility must be in an amount of not less than $200,000 (exclusive of interest and costs), in one of following alternative forms: (a) Written certificate of duly authorized automobile insurance company; (b) bond of guarantee insurance or surety company; (c) certificate of Minister of Finance; (d) motor vehicle liability insurance card. (C.C.S.M. c. H60, §160).

After 36 months without accident or conviction and upon judgment being satisfied, person becomes exempt from requirement of proof of financial responsibility.

Insurance.

Must be obtained from Manitoba Public Insurance Corporation. (The Manitoba Public Insurance Corporation Act, C.C.S.M. c. P215). Coverage: all perils subject to deductible (generally $500 for private automobile); death benefits calculated based on deceased's income with minimum of $40,000 spousal benefit, and minimum of $19,000 for dependent other than spouse; permanent impairment benefits of not less than $500 and not more than $100,000. “No fault” concept applies to collision (subject to deductible) and death and accident benefits and damages for personal injury. Insurance certificate obtained upon registration of vehicle. Additional coverage may be obtained from government plan or private insurer. Claimant adviser office established to provide assistance to claimants. Some denial of benefits for offenders.

No-Fault Insurance.

See subhead Insurance, supra.

Foreign Vehicles.

Nonresident owners may operate vehicles in Manitoba without licencing or registration unless vehicle is used to transport merchandise, persons or property for compensation in which case vehicle must be licenced and registered as if owned by resident of Manitoba. Nonresidents, including corporations, carrying on business in province and using motor vehicle in Manitoba must have motor vehicle registered and licenced. Foreign vehicle may be detained by peace officer where offence committed or alleged until final disposition but motor vehicle may be released on satisfactory security. (C.C.S.M. c. H60).

Nonresident Operators.

Nonresident operator may drive motor vehicle in Manitoba without being licenced provided he has complied with law of his place of residence relating to licencing of drivers or chauffeurs and does not reside or carry on business in Manitoba for more than three consecutive months in any year. Recognition of foreign learner's permit where reciprocal agreement with foreign government. (C.C.S.M. c. H60).

Actions Against Nonresidents.

No special provision as to mode of commencement.

Motor Vehicle Carriers.

Motor Transport Board exercises supervision over motor carriers and operators of public service vehicles and commercial trucks and in order to operate a public service vehicle for transportation of persons or property application must be made to that Board for a certificate. Freight operations deregulated as to routes, tolls or charges, and schedules, but Board retains authority over such matters in relation to transportation of passengers, as well as to matters relating to safety of vehicle operation. (C.C.S.M. c. H60).

Every vehicle so licensed must be maintained in a safe and sanitary condition and subject at all times to inspection by the Board. Driver must be at least 18 years of age, of good moral character, and competent, and must hold a chauffeur's license and a driver of a passenger-carrying bus must hold a driver's license issued by Registrar of Motor Vehicles. (C.C.S.M. c. H60).

Shipper who is responsible for commission of offence by motor carrier may be independently prosecuted for that offence. Vicarious liability of shippers for actions of employees or agents. (Highway Traffic Amendment Act, S.M. 2002, c. 40).

Manitoba Trucking Productivity Improvement Fund established for rehabilitation and safety improvements. Fund is comprised of overweight and over-dimension fees, penalties under The Highway Traffic Act and private and public contributions. Fund managed by Minister.

Off-Road Vehicles.

Ownership, registration and operation of off-road vehicles including 3-wheelers and snowmobiles governed by Off-Road Vehicles Act. (C.C.S.M. c. 031).

Aircraft.

See Canada Law Digest, category Transportation, topic Aircraft.

Gasoline Tax.

See category 22 Taxation, topic 22.07 Gasoline and Special Fuels Taxes.

23.04 RAILROADS:

See category 3 Business Regulation and Commerce, topic 3.08 Carriers.

NB
NEW BRUNSWICK LAW DIGEST

—Scope —

Revised for 2009 edition by

CLARK DRUMMIE, Barristers and Solicitors, of Saint John and St. Stephen.

(References, unless otherwise indicated, are to Revised Statutes of New Brunswick, 1973. Later statutes are cited by year and chapter number. References to “R.” are to New Brunswick Rules of Court.)

Note: This revision includes all proclaimed and effective legislative changes up to and including June 18, 2008 of 2d session, of 56th legislature.

1 INTRODUCTION

1.01 GOVERNMENT AND LEGAL SYSTEM:

Canadian Charter of Rights and Freedoms, stipulates that Parliament of Canada and each Provincial Legislature must sit at least once each year. (§5—Canadian Charter of Rights and Freedoms).

1.02 HOLIDAYS:

Holidays.

Governing statute is c. I-13. “Holiday” includes Sundays, New Year's Day, Good Friday, Easter Monday, Christmas Day, Canada Day, Victoria Day, day appointed for celebration of birthday of Her Majesty, New Brunswick Day (1st Mon. in Aug.), Labor Day (1st Mon. in Sept.), and any day appointed by proclamation of Governor General or Lieutenant-Governor as public holiday, or which by any act of New Brunswick Legislature, or Parliament of Canada is declared to be public holiday within province and whenever holiday other than Sun. falls on Sun., expression “holiday” includes following day. (§38).

Days of Rest.

Governing statute is c. D-4.2. Lieutenant-Governor in Council recognized and declared that it is necessary to provide for days of rest from work and it is desirable, as much as is practicable, that such days of rest be uniform. (§2[a][b]). No person shall on weekly day of rest, rent or offer for rent, sell or offer for sale or purchase any service, goods, chattels or any real estate; carry on or transfer for gain any business of his ordinary calling or in connection with such calling; or do any work, business or labor for gain or employ or engage any other person to do so. (§4[1] a, b, c).

Any person may, on weekly day of rest, whether or not weekly day of rest is also prescribed day of rest, engage in activity that is prohibited under subsection (1) or (2) if person wishes to engage in that activity on weekly day of rest because he or she could not engage in that activity on one of other days of week due to dictates of person's conscience or religion. (§4[4]).

1.03 OFFICE HOURS AND TIME ZONE:

New Brunswick is in the Atlantic (GMT -04:00) time zone. Office hours are generally from 9 a.m. to 5 p.m.

2 BUSINESS ORGANIZATIONS

2.01 AGENCY:

Common law rules prevail.

2.02 ASSOCIATIONS:

There are no restrictions upon associations for any purpose not prohibited by law or contrary to good morals or public policy. Most associations intended to be more or less permanent (excepting some of those for social or recreational purposes) are incorporated under the Companies Act or under special acts.

Special provision is made for the incorporation of cooperative associations for various purposes. (c. C-22.1).

Unincorporated associations, the members of which carry on business in common with a view to profit, are partnerships.

Professional Corporations.

Business Corporations Act, c. B-9.1 holds that no corporation shall have capacity to practice profession except as expressly permitted by act governing that profession. (§13[3][d]). For example, Law Society Act allows for incorporation of law practices. (§37). Corporation may practise law. (§37[2]). Corporation shall not practise law unless it holds valid permit issued under this Part. (§37[7]).

2.03 CORPORATIONS:

Governing statutes are Companies Act C-13 and Business Corporations Act, 1981 c. B-9.1. After Jan. 1, 1982 no further applications for incorporation under Companies Act are accepted except under §16 or §18 which sections permit incorporation of company for such purposes as sporting, literary, charitable etc. However supplementary letters patent with respect to any body corporate referred in subsection 2(8) of Business Corporations Act may be issued after Dec. 31, 1983. (§1 Companies Act).

Companies incorporated under Companies Act could have been continued under Business Corporations Act by application at any time until Dec. 31, 1986 after which all such companies were deemed to be automatically continued. (§2 Business Corporations Act).

For matters relating to companies incorporated under Business Corporations Act or continued or deemed to be continued thereunder see subhead Business Corporations Act, infra.

Companies Act, c. C-13.

Non-Profit.

§§16 and 18 describe type of corporation which may be incorporated under Companies Act. Companies for charitable, philanthropic, temperance, religious, social, political, literary, educational, athletic or other like purposes may still apply to Minister of Justice for Letters Patent. (§18[1]). These are only types of corporations which may be incorporated under Companies Act.

Incorporation Process.

Incorporation under Companies Act is by Letters Patent. Application must be sent to Minister of Justice indicating reasons for which incorporation is sought and requesting any special provisions which should be included in Letters Patent. Application should also state names, addresses and callings of applicants. Application must be signed by each applicant and witnessed.

Fees.

There is $52 fee for name search and $10 fee for publication of Letters Patent in Royal Gazette. Annual filing fee for Provincially incorporated company is, where capital stock is:

$0—10,000	$25.00
$10,001—25,000	$50.00
$25,001—50,000	$75.00
$50,001—75,000	$100.00
$75,001—100,000	$125.00
$100,001—200,000	$150.00
$200,001—500,000	$200.00
exceeds $500,000	$200.00 plus additional fee of 10¢ for every $1,000 of capital above $500,000 to a maximum fee of $500.00.

Annual returns must be filed with Corporate and Trust Affairs, Department of Justice, P.O. Box 6000, Fredericton, New Brunswick, E3B 5H1. There is no annual filing fee.

Continuation.

Companies carrying on business may voluntarily continue under Business Corporations Act. Unless voluntarily continued, all such companies shall be deemed to have been continued on Jan. 1, 1987. (Business Corporations Act §2[1]).

Special Corporate Continuance Act S-12.01.

Non-Canadian corporations may apply for certificate authorizing corporation to continue under laws of New Brunswick on occurrence of emergency situation (§2[1]), which is defined in Act as occurrence or imminent threat of (1) war; (2) revolution; (3) invasion; (4) rioting or civil commotion; (5) expropriation; (6) change of laws of original state; (7) unlawful death of head of state (§1). Fee for applying is $5,000, nonrefundable. (§20[a][i]).

Corporation cannot be allowed to continue if laws of original jurisdiction expressly prohibit it. However, corporation will not be precluded from continuing only for reason that it has not complied with laws of original jurisdiction.

Business Corporations Act.

C. B-9.1.

Definition.

Corporation means body corporate continued under Business Corporations Act or incorporated under Act, or corporation to which Act applies. (§1[1]).

Application.

Act applies to every corporation incorporated or continued under Act; every body corporate with share capital incorporated under Special Act of Legislature; and every other body corporate with share capital incorporated under General or Special Act of Legislature and every extra provincial corporation doing business in province. (§2). Extra-provincial corporation is subject to part XVII only. (§2[6]).

Act excludes, unless otherwise expressly provided, corporations incorporated under Agricultural Associations Act, Co-Operative Associations Act, and Credit Unions Act. (§2[2]). Body corporate required to be licensed under Trust, Building and Loan Companies Licencing Act; or body corporate having capacity to accept deposits within meaning of Canada Deposit Insurance Corporation Act; to execute office of executor, administrator, guardian of minor's estate or committee of mentally incompetent person; to provide services of fiduciary nature commonly provided by trust company. (§2[8]). Act further excludes insurance companies.

Company under Companies Act may apply for continuation under Business Corporations Act except those companies under Companies Act which have been incorporated by virtue of §§16 or 18 of that Act or to which Part II of that Act applies. Body corporate with share capital and incorporated by Special Act of Legislature may also apply for continuation.

General Supervision.

Minister of Justice, and appointed Director of Business Corporations Act. (§184).

Name.

Word “Limited”, “Limitee”, “Incorporated”, “Incorporee”, or “Corporation” or abbreviation “Ltd.”, “Ltee.”, “Inc.”, or “Corp.” shall be last word of name of every corporation but corporation may use and may be legally designated by either full or abbreviated form. Director may exempt body corporate continued as corporation under this Act from above mentioned provisions. Either French and English, or French or English, may be used in name of corporation and any corporation may be so legally designated by any such form. Corporation may for use outside of Canada set out its name in its articles in any language and it may be used and legally designated by its name in any such language outside of Canada. Corporation shall set out its name in legible characters in all contracts, invoices, negotiable instruments and orders for goods or services issued or made by or on behalf of corporation. Corporation may have registered name under Partnerships and Business Names Registration Act, 1980, c. 39, and use that registered name for purposes of carrying on business. (§8). Director may reserve name for intended corporation or for corporation about to change its name, for 90 days. Corporation may have designating number as its name. (§9). It may not use name which is deceptively similar to name of another corporation, body corporate registered under Part 17 of Act, company under Companies Act or firm or person that has registered under Partnerships and Business Names Registration Act, limited partnership formed or continued under Limited Partnership Act, or extra-provincial partnership that has filed declaration under Limited Partnership Act. Company may use name that is deceptively similar if such corporation, body corporate, partnership, firm or person consents and, in case of corporation, company under Companies Act, partnership, other than extra-provincial partnership, firm or person, undertakes to change its name within six months of giving its consent. Cannot use name prohibited by regulation or deceptively misdescriptive, or that is reserved for another corporation or intended corporation. Director may order that corporation change its name if it contravenes any of regulations under Act concerning corporate name. Director may also revoke name of corporation and assign to it another name. (§10).

Powers of Corporation.

Corporation has capacity and subject to Act rights, powers and privileges of natural person subject to Act; as well as capacity to carry on its business, conduct its affairs and exercise its powers outside of New Brunswick. No corporation has capacity to accept deposits within meaning of Canada Deposit Insurance Corporation Act; to execute office of executor, administrator, guardian of minor's estate or committee of mentally incompetent person; to provide services of fiduciary nature normally provided by trust company; to carry on business of building society, trust company, loan company or insurance company, to carry on any business or activity if incorporation for purposes thereof is provided for in any other Act; or to practice profession except as expressly permitted by Act governing that profession. (§13[1], [2], [3]). Corporation shall not carry on any business which is restricted by its articles from carrying on nor shall it exercise any of its powers contrary to its articles. (§14[2]). No act of corporation including any transfer of property to or by corporation is invalid by reason only that transfer is contrary to its articles or Act. (§14[3]). There is no deemed corporate notice by virtue of fact that document has been filed by Director or is available for inspection at office of corporation. (§15). Corporation or guarantor of obligation of corporation may not assert against person dealing with corporation, or with any person who has acquired rights from corporation, that: (a) Articles, by-laws and any unanimous shareholder agreement have not been complied with, (b) persons named in most recent notice filed by Director are not directors of corporation, (c) place named in most recent notice filed by Director is not registered office of corporation, (d) person held out by corporation as director, officer or agent of corporation has not been duly appointed and has no authority to exercise powers and perform duties that are customary in business of corporation, (e) document issued by any director, officer or agent of corporation with actual or usual authority to issue document is not valid, (f) financial assistance referred to in Act or sale, lease or exchange of property referred to in Act was not authorized, except where person has or by virtue of his position with or relationship to corporation ought to have had knowledge of facts. (§16).

Incorporators.

One or more persons or corporations may incorporate by signing articles of incorporation complying with relevant sections in Act. Individuals who incorporate must have attained age of 19 years, be of sound mind, and not have status of bankrupt. (§3).

Articles of Incorporation.

Articles of Incorporation shall follow prescribed form and set out: Name of corporation, classes and maximum number of shares so authorized to be issued, as well as amount paid for each class, and also rights, privileges and restrictions which pertain to each class of shares or to each series of class of shares. Statement must be given as to par value of each class of shares or, statement that shares are without par value. Articles must also set out restrictions if any in transferring shares, number of directors as well as restrictions if any on businesses that corporation may carry on.

Articles may set out any provisions permitted by Act or by law to be set out in by-laws of corporation or unanimous shareholders agreement. Incorporator shall also send Director notice of location of registered office within New Brunswick as specified in its articles as well as notice of directors of corporation, who are to hold office from issue of certificate of incorporation until first meeting of shareholders, or until successors are elected.

Upon receipt of articles of incorporation Director issues certificate of incorporation which incorporation comes into existence on date shown on certificate. All forms are to be filed in duplicate and fees payable to Minister of Finance sent to Director, Corporate and Trust Affairs, Department of Justice, P.O. Box 6000, Fredericton, N.B. E3B 5H1. (§§4-6).

Incorporation Tax or Fee.

$260 plus $52 name search fee.

License to do Business.

Not required except for extra-provincial corporations. See catchline Foreign Corporations, infra.

Organization.

Organizational meeting must be held after issue of certificate of incorporation. At such meeting directors may make by-laws, adopt forms of share certificates, authorize issue of securities, appoint officers, appoint auditors and conduct such other business as may be pertinent to operation of corporation. However, Incorporators need not be first directors or shareholders. Directors shall then submit such by-laws at annual meeting to be called within 18 months after incorporation. (§§62, 85).

Paid in Capital Requirements.

Business can be commenced immediately on incorporation without subscription to shares or paying in of any part of its capital.

Amendment of Articles of Incorporation.

Corporation may change or remove any provision that is permitted by this Act to be set out in its articles. Such amendment is made by filing prescribed form in duplicate with Director setting out pertinent amendment. Upon filing appropriate form along with $110 fee Director issues certificate of amendment.

Such amendment may be made by special resolution of shareholders; if particular class or series of class of shares is affected in manner different from other shares of same class then that particular class or series shall vote separately on amendment. Corporation shall not reduce its stated capital if unable to pay its liabilities by so doing, or if value of corporation's assets would be less than amount of its liabilities. Creditor of corporation is entitled to apply to court for order compelling shareholder or other recipient to pay to corporation any financial benefit derived from corporation as consequence of reduction of capital contrary to Act.

Amendment becomes effective on date shown in certificate. Director may order corporation to restate its articles as amended, such restated articles supersede original articles of incorporation and all amendments. (§§113, 115, 116, 118, 119).

Increase or Decrease of Authorized Capital Stock.

May be effected by articles of amendment. (§113). Restricted to corporation in position of solvency before, as well as after reduction of its capital.

May be effected by court order requiring shareholder to pay any liability owing by shareholder to corporation or requiring corporation to pay shareholder any part of moneys paid by him for shares.

Corporation may also buy back shares issued by it with certain restrictions. (§§31, 32). Corporation may be ordered to buy back shares issued by it. (§166[3][g]).

Shares issued with or without par value. If only one class of shares is issued then those shares are equal in all respects. Preferred shares must have preference in some respect over some other class of shares. Shares shall not be issued until fully paid in money or in property or past services. Corporation must maintain separate stated capital account for each class and series of shares it issues, and add to appropriate stated capital account full amount and any consideration received for issue of shares. (§§22, 23, 25).

Share Warrants.

Corporation may if authorized by its articles issue share warrants. Nature of warrant is entitlement to shares therein specified. Warrant entitles bearer to have shares specified. Warrant entitles bearer to have shares specified therein transferred to him by delivery of warrant. (§51).

Share Certificates.

Shareholder is entitled to manually signed share certificate evidencing shares held by him. Such certificate must be signed by proper director or officer, and fee of not more than $3 may be charged by corporation. Certificate shall state on face thereof name of corporation, words “Incorporated under the laws of New Brunswick,” name of person to whom it was issued, and number and class of shares, and designation of any series that certificate represents and whether shares are with or without par value, and par value thereof if applicable. (§47).

Any restriction, lien, agreement or endorsement which pertains to shares evidenced by certificate is ineffective against transferee thereof unless clearly noted on share certificate or unless there is actual knowledge of restriction. (§47[8]).

Issuance of Shares.

Allotment and issue of shares is at discretion, and regulated by directors. If, however, corporation does not have its shares listed on prescribed stock exchange, directors are subject to regulations concerning equity shares (§27), articles or by-laws of corporation, or unanimous shareholder agreement. Shares shall be fully paid when issued. (§23).

Transfer of Shares.

Subject to any restrictions placed on transfer of shares by corporation, shareholder may transfer his shares by proper endorsement and delivery of share certificate. Corporation is not required to inquire into existence or observance or performance of any duty owed to third person by registered holder of any of its shares. Provisions are also made for executor, administrator or representative of estate to transfer shares of decreased, upon production of his representative capacity, to corporation, and subject to any applicable law relating to collection of taxes.

Corporation subject to special notice provisions, may treat registered holder of share as person exclusively entitled to vote, to receive notices, to receive any dividend or other payments, and to generally exercise all rights and powers of owner of share. (§§47-49).

Stock Transfer Tax.

None.

Shareholders.

May vote for directors of corporation, may remove any of such directors when seen fit, have authority to ratify by-laws and amendments to articles, as well as make proposals to make, amend or repeal by-law. (§§61, 64, 67). Proposal may also include nominations for election of directors, if such proposal is signed by one or more holders of shares representing at least 10% of shares or 10% of class of shares of corporations entitled to vote at meeting to which proposal is to be presented. Shareholder may apply to court for determination of any dispute concerning proposal made by shareholder. (§89).

Shareholders may also inspect records and register of corporation which include names of shareholders, articles and amended articles of corporation as well as by-laws and minutes of meetings. This is to be available at usual business hours of corporation and without charge. (§§19, 90).

Holders of not less than 10% of issued voting shares of corporation may requisition directors to call meeting of shareholders for purpose stated in requisition. (§96).

Shareholder can also apply to have court determine manner in which requisitioned meeting should take place. (§97). Upon application of shareholder, director or corporation, court may also determine any controversy with respect to election or appointment of director or auditor of corporation. (§98). Shareholders of certain class or series of shares may vote as separate class upon proposed sale, lease or exchange of all or substantially all property of corporation other than in ordinary course of business if sale, lease, or exchange would affect that class or series differently than another class of series. (§130).

Holder of shares of any class of corporation may dissent from proposal of corporation to amend its articles or to amalgamate with another corporation or to divest itself of its property, or to continue under laws of another jurisdiction. Such shareholder has right to be paid by corporation fair value of shares held by him in respect of which he dissents. (§131).

Shareholder may apply to court for leave to bring action in name and on behalf of corporation or any of its subsidiaries for purpose of prosecuting, defending or discontinuing action on behalf of body corporate. (§164). Shareholder, or other complainant by virtue of §163 of Act, may apply to court for determination that shareholder or other such complainant has been unfairly treated by corporation or that acts of corporation or any of its affiliates have been prejudicial to interests of shareholder. Shareholder may also request that court make order for dissolution of corporation in such circumstances by virtue of §144 of Act. (§166).

Holders of not less than 10% of issued shares of any class of corporation may apply to court for investigation of corporation or any of its affiliates. Court may order such investigation and make such order as it deems fit. (§§155, 156).

Shareholder's Liability.

Shareholders of corporation are not liable for any liability, act or default of corporation. (§44[1]). Shareholders who are party to unanimous shareholder agreement have all rights, powers and duties of director, can incur all liabilities of director of corporation to which agreement applies, to extent that agreement restricts powers of directors to manage corporation. (§99). Close corporation by-law pursuant to Companies Act shall be deemed unanimous shareholder agreement. (§99). Shareholder may also be liable to creditor of corporation for any liability of shareholder to corporation, that was extinguished or reduced contrary to Act; or shareholder may be forced to deliver or pay to corporation any money or property that was paid or distributed to shareholder as consequence of reduction of capital made contrary to Act. (§35). Such creditor has period of two years within which to commence action.

Corporation may provide through its articles or its by-laws, that corporation has lien on registered shares in name of shareholder, for debt of that shareholder to corporation. (§44[2]).

Shareholders' Meetings.

Annual meetings must be held within 18 months after incorporation and subsequently not more than 15 months after previous annual meetings. Directors may at any time call special meeting of shareholders. Court may extend time in which first or subsequent meeting may be held. Shareholders may also participate in meetings by way of telephone or other communication facilities, if by-law of corporation so provides or subject to consent of all shareholders entitled to vote. (§85).

Directors may fix record date for purpose of determining shareholders entitled to receive notice of meeting of shareholders. Record date shall not precede by more than 50 days or by less than 21 days date on which meeting is to be held. If no record date is fixed record date for determination of shareholders entitled to receive notice shall be at close of business on day immediately preceding day on which notice is given or if no notice is given on day on which meeting is held. (§86). Notice of annual meeting shall be sent not less than 21 days nor more than 50 days before meeting to each shareholder entitled to vote, to each director and to auditor if any. (§87). Failure to receive notice does not deprive shareholder of his right to vote.

Resolution in writing dealing with all matters required by Act to be dealt with at meeting of shareholders, and signed by all shareholders entitled to vote at meeting, satisfies requirements of Act relating to such meetings. (§95). Holders of not less than 10% of issued shares of corporation that carry right to vote at meeting sought to be held may requisition directors to call meeting of shareholders for purposes stated in requisition. (§96[1]).

Subject to articles, each share of corporation entitles holder to one vote, subject to articles of incorporation. (§93). Voting may be done by way of proxy. Body corporate holding shares in corporation holding shareholders meeting, may be represented by any individual authorized by resolution of directors of body corporate. (§93). Voting shall be done by show of hands unless by-laws otherwise provide. (§94[1]).

Voting Trust.

Shareholders may agree in writing to exercise their voting rights as provided by such agreement. (§99[1]).

Directors.

Subject to articles, by-laws and unanimous shareholder agreement, business of corporation shall be managed by one or more directors, other than corporation which has its shares listed on prescribed stock exchange, in which case there must be not less than three directors. Director of corporation not required to hold shares issued by corporation. (§63[2]). Restricted from being directors of corporation: Anyone under age of 19, anyone certified to be of unsound mind, another corporation or person not being individual, bankrupt or someone convicted of offence in connection with promotion, formation or management of corporation, or involving fraud. Each director ceases to hold office at close of first annual meeting of shareholders following his election. (§65). Shareholders entitled to vote for directors may do so by casting all their votes or such that they may have, for one director; or alternatively shareholders may distribute their votes among candidates in any manner. Each shareholder so entitled to vote at election of directors has right to cast number of votes equal to number of votes attached to shares held by him multiplied by number of directors to be elected. (§65).

Director of corporation ceases to hold office upon death, resignation, removal in accordance with §67 or if he becomes disqualified by virtue of §63(1). Shareholders may by ordinary resolution remove directors from office, except that where holders of any class or series of shares which have exclusive right attached to them to elect one or more directors, director so elected may only be removed by ordinary resolution at meeting of shareholders of that class. Vacancy created by removal of director may be filled at meeting of shareholders at which director is removed, or alternatively, vacancy may be filled by quorum of directors. (§§66, 67, 69).

Directors meetings shall be held at registered office within Province unless otherwise provided by by-laws and, unless otherwise provided in by-laws, notice of time and place of meeting of directors shall not be less than seven days before meeting. As with shareholders, directors may also participate in meeting of directors or of committee of directors by means of telephone or other communication facility permitting all persons participating to hear, if so provided by by-laws of corporation or, subject to by-laws, all directors of corporation consent. (§72).

Subject to articles or by-laws majority of number of directors required by articles constitute quorum of directors and may exercise all powers of directors. Resolution signed by all directors is as valid as if passed at meeting of directors. (§75).

Powers and Duties of Directors.

Directors are to manage affairs of corporation subject to articles, by-laws and unanimous shareholder agreements, if any. (§60). Directors may by resolution make, amend or repeal any by-laws that regulate business or affairs of corporation. However, directors must submit by-law or amendment or repeal of by-law to next shareholders meeting for ratification by ordinary resolution. Until such time by-law so made, amended or repealed is effective from date of resolution of directors until it is confirmed or rejected by shareholders. Directors may borrow money upon credit of corporation, issue, re-issue, sell or pledge debt obligations of corporation, give guarantee on behalf of corporation, mortgage, hypothecate, pledge or otherwise create security interest in all or any property as corporation. Directors may also by resolution delegate any or all of their powers listed in previous sentence to director, committee of directors or officer. (§61). Directors may appoint managing director or committee to which they may delegate all powers except those mentioned in §73(2). Directors are also responsible for determining place and time of meetings of directors and shareholders, determining record dates for purpose of shareholder meetings, and administering proposals submitted by shareholders.

Liabilities of Directors.

Acts of directors are valid notwithstanding any irregularity or defect in appointment. (§74). Directors are liable for issuing shares for consideration less than value of shares, and each director is so liable unless that director protests issuance of such shares. Directors are jointly and severally liable for actions contrary to Act and may be forced to contribute their share of judgment satisfied by another director. Directors are also jointly and severally liable, together with corporation, where corporation is taxpayer who fails to pay amount of any tax due and payable or where corporation is collector who fails to remit amount of any tax collected or received. (§23.1[1] Revenue Administration Act). Actions against directors must be brought within two years from date of resolution authorizing action complained of. (§76). Directors are also liable for profits made by virtue of contract in which director was interested, but did not disclose such interest. Court may on application, set aside such contract on such terms as it thinks fit. (§77[7], [8]).

Every director must fulfill his duties in good faith, and no director is relieved of liability for any act unless there is unanimous shareholder agreement. (§§79, 99). Unless there is registered dissent from actions of directors of corporation, all directors present at making of resolution are deemed to consent to such resolution. No director is liable if it is shown that he relied in good faith on financial statements of corporation represented to him by officer of corporation or in written report of auditor; or any report from lawyer, accountant, engineer, appraiser or other person whose profession lends credibility to statement made by him. (§80[3]).

Fact that managing director has been appointed by directors does not relieve directors from liability. (§73).

Officers.

Election of officers of corporation is prerogative of directors. Actions of officer of corporation are valid despite irregularity in his appointment. (§74). Directors may delegate full powers of management to officers of corporation. (§78).

Liability of Officers.

Officers must comply with Act and its regulations in good faith. (§79). Officers must also disclose any material interest which they might have in contract entered into by corporation, and are liable to account for profits made by virtue of such undisclosed interest. (§77). No provision in contract, articles, or by-laws or resolution of corporation relieves officer from any duty to act in accordance with Act, except by virtue of unanimous shareholder agreement.

Indemnification.

Corporation may indemnify directors and officers, as well as all persons who acted at request of corporation as director or officer of body corporate in which corporation held shares, against all costs, charges and expenses reasonably incurred by him in respect of any civil, criminal or administrative action or proceeding to which he is made party by reason of his position with corporation. Corporation may purchase indemnity insurance for benefit of directors and officers of corporation. (§81).

Principal Office.

See catchline Articles of Incorporation, supra. (§17).

Resident Agent.

See catchline Appointment of Attorney, infra. (§197).

General Powers of Corporations.

See catchline Powers of Corporation, supra. (§§13-16).

Dividends.

Corporation may pay dividend in money or property or by issuing fully paid shares of corporation. (§42). Corporation may declare or pay dividend unless there are reasonable grounds for believing that corporation is or would after payment be unable to pay its liabilities as they fall due, or realizable value of corporation's assets would be less than aggregate of its liabilities and stated capital of all classes. (§41).

Sale or Transfer of Corporate Assets.

Sale, lease or exchange of all or substantially all of property of corporation other than in ordinary course of business requires approval of shareholders in accordance with subsections 130(1), (3) to (7). Approval of shareholders of corporation of sale, lease or exchange, is not effective until holders of shares of each class or series of shares of corporation entitled to vote separately on sale, lease or exchange, have in each case by special resolution approved sale, lease or exchange. (§130[6]).

Books and Records.

Corporation shall prepare and maintain at its registered office or at any other place designated by directors, within Province of New Brunswick, following records: Copies of articles, by-laws and all amendments thereto, as well as copy of any unanimous shareholder agreement; minutes of all meetings and resolutions of shareholders; copies of all notices required to be sent to Director concerning directors of corporation by virtue of §64 or §71; share register; and names and addresses of all persons who are or have been directors of corporation with pertinent dates.

Corporation shall prepare and maintain adequate accounting records, and records containing minutes of meetings and resolutions of directors and any committees thereof. Such records shall be kept at registered office of corporation, and shall at reasonable times be open to inspection to directors, shareholders, their agents and legal representatives, as well as Director. (§18).

Reports.

Directors of corporation shall report to shareholders at every annual meeting concerning financial statements relating separately to period not greater than six months before annual meeting of shareholders, and period which began immediately after end of last completed financial year. Also, immediately preceding financial year, as well as report of auditor if any has been appointed and any further information respecting financial position of corporation and results of its operations required by articles, by-laws or any unanimous shareholder agreement. (§100[1]). Directors of corporation shall approve financial statements of corporation. (§102).

Corporation shall also file with Director notices of change in directors, as well as notice concerning change of registered office. (§§71, 17[4]). Corporation shall send to Director without notice annual return in prescribed form on or before last day of month following anniversary month of corporation, and Director shall file it. (§187[1]).

Annual filing fee: $60 regardless of stated capital of corporation.

Corporate Bonds or Mortgages.

Unless articles, by-laws or unanimous shareholder agreement otherwise provide articles of corporation shall be deemed to state that directors of corporation may, without authorization of shareholders, borrow money upon credit of corporation, issue, reissue, sell or pledge debt obligations of corporation, give guarantee on behalf of corporation to secure performance of obligation of any person, and mortgage, hypothecate, pledge or otherwise create security interest in all or any property of corporation owned or subsequently acquired, to secure any obligation of corporation. (§61[6]).

Merger and Consolidation.

Two or more corporations including holding or subsidiary corporations, may amalgamate and continue as one corporation. (§120). Each such corporation shall enter into agreement setting out terms and means of effecting amalgamation and, in particular, setting out provisions that are required to be included in articles of incorporation under §4, basis upon which and manner in which holders of issued shares of each amalgamating corporation are to receive securities, money, and securities of any body corporate other than amalgamated corporation, in amalgamation. Agreement shall also state manner of payment of money instead of issue of fractional shares of amalgamated corporation, and whether by-laws of amalgamated corporation are to be those of one of amalgamating corporations, and if not, copy of proposed by-laws, as well as such other details as may be necessary to perfect amalgamation and to provide for subsequent management and operation of corporation. (§121[1]). Directors of each amalgamating corporation shall submit such abovementioned agreement to shareholders of their respective corporations, and to holders of each class or series of such shares. (§122[1]).

After approval of amalgamation by each respective amalgamating corporation, articles of amalgamation in prescribed form shall be sent to Director together with documents required by §§17 and 64 pertaining to registered office in Province as well as names of directors of corporation. (§124). Articles of amalgamation shall have attached thereto statutory declaration of director or officer of each amalgamating corporation that establishes to satisfaction of Director that: There are reasonable grounds for believing that, each amalgamating corporation is and amalgamated corporation will be able to pay its liabilities as they become due and, realizable value of amalgamated corporation's assets will not be less than aggregate of its liabilities and stated capital of all classes and, there are reasonable grounds for believing that no creditor will be prejudiced, and adequate notice has been given to all known creditors of amalgamating corporations and that there are no objections. (§124[2]).

Articles of amalgamation sent to Director shall be in duplicate. (§186[2]).

Continuations.

Body corporate incorporated either in New Brunswick or in jurisdiction other than New Brunswick may, if authorized by laws of jurisdiction in which it is incorporated, apply to Director for certificate of continuance. Duplicate articles of continuation in prescribed form shall be sent to Director together with documents prescribed by §§17 and 64, pertaining to registered or head office of corporation within Province and names of directors of corporation.

Dissolution.

Corporation that has not issued any shares may be dissolved at any time by resolution of all directors. Corporation that has no property and no liabilities may be dissolved by special resolution of shareholders, or by special resolution of holders of each class of shares whether or not they are entitled to otherwise vote. Corporation that has property or liabilities or both, may be dissolved by special resolution of shareholders or by special resolution of holders of each class of shares whether or not they are otherwise entitled to vote, if by special resolution shareholders authorize directors to cause corporation to distribute any property and discharge any liabilities, and corporation has distributed any property and discharged liabilities before it sends articles of dissolution to Director. (§137[1], [2], [3]).

Articles of dissolution shall be sent to Director in duplicate upon receipt of which Director shall issue certificate of dissolution. Corporation ceases to exist on date in certificate of dissolution. (§137[6]).

Corporation may also be liquidated or dissolved by special resolution of shareholders ratifying proposal by directors. Such statement shall be sent to Director, upon which receipt Director shall issue certificate of intent to dissolve. Where issuance of certificate of intent to dissolve has been sent by Director to corporation, corporation shall cease to carry on business except to extent necessary for liquidation, but its corporate existence continues until Director issues certificate of dissolution.

After issue of certificate of intent, corporation shall cause notice to be sent or delivered to each known creditor of corporation, and forthwith publish notice thereof once a week for four consecutive weeks in newspaper in place where corporation has its registered office and take reasonable steps to give notice in each Province in Canada where corporation was carrying on business, proceed to collect its property or dispose of property not to be distributed to shareholders and to generally do all things required to liquidate its business, and after giving notices required and adequately providing for payment or discharge of all its obligations distribute its remaining property either in money or in kind among its shareholders according to their respective rights. (§138).

Director or any interested person may apply to court for order dissolving corporation if corporation has failed for two or more consecutive years to comply with requirements of Act with respect to holding annual meetings of shareholders, or contravened §14(2) or §§19, 101, or 103; or procured any certificate under Act by misrepresentation. (§140).

Above-mentioned sections deal specifically with corporations carrying on business within their specific powers as allowed by articles of incorporation, allowing directors, shareholders and creditors to examine records and books of company, supplying shareholders at annual meeting with financial statement of company, and abiding by Act and its regulations for any fundamental change to articles of corporation.

Insolvency and Receivers.

Law on insolvency is uniform throughout Canada and is governed by Bankruptcy and Insolvency Act. (R.S.C., c. B-3). See Canada Law Digest (category Debtor and Creditor, topic Bankruptcy).

Receiver appointed under instrument shall act in accordance with that instrument and any direction of court. Receiver may pay liabilities connected with property of corporation and realize on security interest of those on behalf of whom he is appointed. Receiver may also, if appointed receiver-manager of corporation, carry on any business of corporation to protect security interest of those on behalf of whom he is appointed. (§§52-57).

Receiver or receiver-manager shall immediately notify Director of his appointment or discharge, and forthwith file with Director notice designating office in New Brunswick where accounts of his administration shall be maintained; as well as take into custody and control property of corporation in accordance with court order or instrument under which he is appointed, open and maintain bank account in his name as receiver or receiver-manager of corporation, keep detailed accounts of all transactions carried on by him as receiver or receiver-manager, keep accounts of his administration that shall be available at office designated, prepare at least once in every six month period after date of his appointment, financial account of his administration, and file copy with Director within 60 days thereafter. Upon completion of his duties receiver shall also render final account of his administration, send copy of such report to Director, and send copy of final report to each director of corporation. (§59).

Close Corporations.

Right to transfer shares may be restricted if in application for incorporation or in articles of amendment.

Appraisal.

Dissenting shareholder who objects to fundamental change in corporation by virtue of §128(4)(d), that affects holder of shares; or if corporation resolves to amend its articles under §113 to alter restrictions on transfer of shares, or to amend its articles to add, change or remove any restrictions upon businesses carried on by corporation, or amend its articles under §113 to provide that meetings of shareholders may be held outside of New Brunswick, or amalgamate with another corporation or be continued under laws of another jurisdiction, or sell, lease or exchange all or substantially all of its property, has right to be paid by corporation fair value of shares held by him in respect of which he dissents, determined as of close of business on day before resolution is adopted or order is made. (§131).

Foreign Corporations.

Extra-provincial corporation shall apply to be registered under Act not later than 30 days after it commences to carry on business in New Brunswick. (§196[1]). Director may exempt extra-provincial corporation from operation of Act with exception of requirements for attorney for service, and filing of annual returns if he is satisfied that it does not carry on business for purpose of gain. (§194[3]). Part XVII does not apply to extra-provincial corporations required to be licensed as insurer under Insurance Act or to extra-provincial corporation to which Foreign Resident Corporations Act applies, licensed extra provincial company as defined in Loan and Trust Companies Act or to bank incorporated under laws of Canada or any other bank as defined in regulations. (§195).

Extra-provincial corporation shall apply for registration by sending to Director statement in duplicate in prescribed form, accompanied by appointment of individual who is resident in New

Brunswick as its attorney for service, prescribed fee which is $210 plus $30 for name search and such other material or information as Director may require. (§197).

Same rules apply to extra-provincial corporation as apply to provincially incorporated company concerning name of corporation. Extra-provincial corporation which is prohibited from carrying on business under its name within province, must register business name in accordance with Partnerships and Business Names Registration Act, c. P-13. (§199).

Director may cancel registration of extra-provincial corporation if: Corporation is in default for one year in sending to Director any fee, notice or document required, in opinion of Director, extra-provincial corporation ceases to carry on business in New Brunswick, extra-provincial corporation has sent notice to Director that it has ceased to carry on business within province, or that it wishes to cancel its registration, extra-provincial corporation has dissolved, extra-provincial corporation does not comply with directive of Director under §199(2) or if extra-provincial corporation has otherwise contravened Part 17 of Act. (§201).

Extra-provincial corporation shall set out its name or name under which it carries on business in province, in legible characters in all contracts, invoices, negotiable instruments and orders for goods or services issued or made by or on behalf of corporation. Whenever extra-provincial corporation which is required to register business name under Partnerships and Business Names Registration Act, sets out its corporate name in contracts, invoices, negotiable instruments or orders for goods or services, extra-provincial corporation shall set out as well in legible characters that business name. (§202).

If attorney of extra-provincial corporation dies or resigns or his appointment is revoked, extra-provincial corporation shall forthwith send to Director appointment in prescribed form for individual as its attorney for service and Director shall file appointment. (§203). Service of any process, notice or document in any civil, criminal or administrative action or proceeding shall be deemed to have been sufficiently made upon extra-provincial corporation if made upon attorney as shown in most recent notice on records of Director. (§204).

Registered extra-provincial corporation shall send to Director: Notice of any change in name of extra-provincial corporation resulting from amendment of its charter, notice of any change in address of its principal office in New Brunswick and its head office outside of New Brunswick, membership of its board of directors, board of management or other governing body, within one month after effective date of such. (§206). Registered extra-provincial corporation shall send to Director: Copy of any instrument effecting amalgamation of extra-provincial corporation with one or more other extra-provincial corporations, copy of amalgamation agreement, statement in prescribed form relating to amalgamated extra-provincial corporation and documents referred to in §197 pertaining to appointment of individual who is resident, acting as attorney for service for corporation, prescribed fee, and such other material or information as Director may require within one month after effective date. (§207).

If liquidation proceedings are commenced in respect of registered extra-provincial corporation extra-provincial corporation or, if liquidator is appointed, liquidator shall send to Director forthwith after commencement of those proceedings notice showing that proceedings have commenced and address of liquidator, if one is appointed, and shall send to Director forthwith after completion of those proceedings return relating to liquidation. (§208).

Registered extra-provincial corporation shall, in each year on or before last day of month following anniversary month, send to Director annual return in prescribed form or if corporation is incorporated under laws of Canada or province or territory of Canada, annual return required by laws of jurisdiction in which it was incorporated. Where extra-provincial corporation is continued under laws of any jurisdiction other than New Brunswick, Director shall be sent notice. (§§209, 209.1).

No act of extra-provincial corporation, including any transfer of property to or by extra-provincial corporation, is invalid by reason only that act or transfer is contrary to or not authorized by its charter or internal regulations or any law of jurisdiction in which it is incorporated, or by reason that extra-provincial corporation was not then registered. (§211). No person is affected by or shall be deemed to have notice or knowledge of contents of document concerning extra-provincial corporation by reason only that document has been filed with Director. (§212). Extra-provincial corporation while unregistered, is not capable of commencing or maintaining action or other proceeding in any court in New Brunswick in respect of any contract made in course of carrying on business in New Brunswick while it was unregistered or otherwise in violation of Part 17 of Act. However if corporation registers, after commencement of its action, then proceeding or action may be maintained as if corporation was registered before commencement of action or proceeding. This does not apply to extra-provincial corporation incorporated under laws of Canada. (§213).

Whether or not extra-provincial corporation has been prosecuted or convicted, any director or officer of extra-provincial corporation who knowingly authorizes, permits or acquiesces in failure of corporation to comply with Act commits offence and is liable on summary conviction to fine not exceeding $5,000 or to imprisonment for term not exceeding six months or to both, and in default of payment of fine is liable to imprisonment in accordance with Summary Convictions Act. Extra-provincial corporation which fails to comply with Part 17 of Act is also liable to summary conviction proceedings and to fine of not more than $5,000, and in default of such payment is liable to levy by distress and sale in accordance with §35 of Summary Convictions Act. (§214).

Appointment of Attorney.

When extra-provincial corporation applies for registration within province, statement must be accompanied by appointment of individual who is resident of New Brunswick or corporation incorporated or continued under Business Corporations Act, as its attorney for service, in prescribed form. (§197[2]).

Foreign Resident Corporations.

In time of war or other emergency, foreign corporation may apply to transfer its head office to New Brunswick and become resident there by filing with the Minister of Finance documents including copies of its charter, articles of incorporation or other similar documents, law or decree issued under law which defines terms of creation and legal existence of foreign corporation and copy of law or decree allowing it to its registered office, list of its officers and directors who are to act within New Brunswick, together with their authority and manner of appointment of their successors, address of its proposed registered office in New Brunswick and certificate authenticating same from Ambassador to Canada of country which created it. (Foreign Resident Corporations Act, c. F-19.1).

Corporation Tax.

Tax imposed by Province but collected by Government of Canada. (New Brunswick Income Tax Act c. I-2). See Canada Law Digest. (§§3-5).

Professional Corporations.

See topic 2.02 Associations, subhead Professional Corporations.

Unclaimed Dividends.

No provincial legislation.

Expropriation.

See category 21 Property, topic 21.14 Real Property, subhead Expropriation.

Claims Against Crown Corporations.

Two months written notice is required to be served on crown corporation stating name and address of plaintiff, cause of action and court in which action to be brought prior to commencement of action. (c. P-18, §15).

2.04 FOREIGN CORPORATIONS:

See topic 2.03 Corporations, subhead Business Corporations Act, catchline Foreign Corporations.

2.05 JOINT STOCK COMPANIES:

See topic 2.03 Corporations.

2.06 LIMITED PARTNERSHIP:

See topic 2.07 Partnerships.

2.07 PARTNERSHIPS:

Governing statutes are cc. P-4 and P-5.

Source of Law.

In 1890 common law principles were codified to a large extent in England by Partnership Act of that year. New Brunswick adopted this act verbatim in 1921 and it is now c. P-4. Any standard English textbook on the subject, Lindley for example, is a good reference book for interpretative purposes.

Scope of Act.

Part I deals with the nature of partnership; Part II to the relations of partners to persons dealing with them.

Registration.

Partners of every firm in business of trading, manufacturing and mining must, within two months of commencing business sign certificate of partnership on prescribed form stating names, occupations and residences of partners, firm name and principal place of business. Certificate must be filed with Registrar, Partnership and Business Names, P. O. Box 6000, Fredericton, N. B. E3B 5H1 and advertised in Royal Gazette. Registration must be renewed each five years. Changes in membership or firm name or partnership dissolution are to be filed on prescribed form within two months of happening. Firm name must not be identical or resemble name of other firm or corporation.

Fee for registration of business name is $100. Renewal fee is $50. Fee for registration of partnership is $100. (§12[1] of Reg. 81-35).

Dissolution.

Subject to an agreement between the partners, a partnership is dissolved: (a) By expiration of term fixed for continuance; (b) by termination of venture or undertaking which is sole purpose of partnership; (c) by any partner giving to the others notice of his intention to dissolve partnership entered into for undefined term. (§33).

A partnership may be dissolved by the death or bankruptcy of any partner. (§34).

A partnership is in every case dissolved by the happening of any event which makes it unlawful for the business of the firm to be carried on or for the members of the firm to carry it on in partnership. (§35).

On application by a partner the court may decree a dissolution of the partnership in certain cases in which the partnership is prevented from performing its proper functions. (§36).

On the dissolution of a partnership or retirement of a partner, any partner may publicly notify the same, and may require the other partner or partners to concur for that purpose in all necessary or proper acts, if any, which cannot be done without his or their concurrence. (§38).

After dissolution of partnership, the rights or obligations of partners to one another continue until business is wound up. (§39).

In settling accounts between partners after a dissolution of partnership if the losses or deficiencies go as far as to affect the individual assets, payment must be made by the partners individually in the proportion in which they were entitled to share profits. (§45).

Limited partnerships consist of general and limited partners, liability of limited partners being limited to amount of capital contributed. Prescribed declaration containing full details must be filed with registrar under Partnerships and Business Names Registration Act and copy of certificate must be published in Royal Gazette. (c. L-9.1).

3 BUSINESS REGULATION AND COMMERCE

3.01 BANKS AND BANKING:

See Canada Law Digest, category Business Regulation and Commerce, topic Banks and Banking.

Taxes.

See category 22 Taxation.

3.02 BILLS AND NOTES:

See Canada Law Digest.

3.03 BILLS OF LADING:

See topics 3.08 Carriers; 3.17 Factors.

3.04 BILLS OF SALE:

Interest of buyer under sale of goods without change of possession is “security interest” under c. P-7.1.

Note.

C. P-7.1, §76 repealed Bills of Sale Act. See category 20 Mortgages, topic 20.05 Personal Property Security.

3.05 BLUE SKY LAW:

See topic 3.26 Securities.

3.06 BROKERS:

See topic 3.26 Securities.

No regulations as to brokers except those dealing in securities (c. S-6) and real estate (c. R-1).

3.07 BULK SALES:

Bulk Sales Act (c. B-9) has been repealed by Act to Repeal the Bulk Sales Act. Assented to on June 30, 2004, this Act came into force on Aug. 1, 2004.

3.08 CARRIERS:

P-27 (Public Utilities Act was repealed). E-9.18 (Energy and Utilities Board Act) now governs this area of law. Board of Commissioners of Public Utilities has general supervision of public utilities, including any street railway or any plant or equipment for conveyance of telephone messages or for production, transmission, delivery or furnishing of heat, light, water, gas, or power to or for public, even though such utility is owned, operated, managed or controlled by a city or town. Board may investigate in such manner as it may determine any alleged act or omission by any public utility. (§1).

Bills of Lading.

No special regulations.

Motor Vehicle Carriers.

See category 23 Transportation, topic 23.03 Motor Vehicles.

3.09 COLLECTION AGENCIES:

See topic 3.20 Licenses, Business and Professional.

3.10 COMMERCIAL CODE:

Not adopted.

See topic 3.25 Sales; category 20 Mortgages, topic 20.01 Chattel Mortgages.

3.11 CONDITIONAL SALES:

Note. C. P-7.1, §77 repealed Conditional Sales Act. See category 20 Mortgages, topic 20.05 Personal Property Security.

3.12 CONSIGNMENTS:

See topic 3.17 Factors.

3.13 CONSUMER BUREAU ACT:

See topic 3.14 Consumer Protection.

3.14 CONSUMER PROTECTION:

Consumer Bureau Act.

(c. C-18). Repealed Dec. 19, 1996. (c. 64).

Cost of Credit Disclosure Act.

Governing statute is c. C-28.3. Act governs investigation of complaints regarding granting of credit or persons engaged in business as lenders, registration of lenders.

Unless otherwise exempted, only registered lenders may carry on business of extending credit or extend credit in connection with their business. (§6[1]).

Act prescribes form of disclosure statements and general disclosure requirements and rights of borrowers and lessees. (§§16, 17, 18). Lender's advertising for fixed credit, or open credit must comply with Act. (§§30, 39). Information must be provided such as interest rate, APR (annual percentage rate), and any other conditions imposed by regulations, depending upon particular type of credit being extended. Minister may investigate complaints regarding lender, lessor or credit broker. (§52). Anyone who violates provisions of Act or Regulations commits offence punishable by fine up to $2,500. (Schedule A).

Regulations govern collection activities of lenders and prohibits certain collection practices.

Direct Sellers Act.

(c. D-10). Minister of Justice administers Act which has as its objects: (a) Licensing of direct sellers; (b) providing right for buyer to rescind contract for purchase of object; (c) requiring that copy of any written contract for purchase of goods be delivered to buyer and requiring that seller deliver to buyer memorandum setting out seller's address for service within Province; (d) defining direct sellers; and (e) defining types of goods to which Act does not apply.

Unconscionable Transactions Relief Act.

(c. U-1). This Act permits court to investigate into all circumstances surrounding loan of money and if it finds that cost of loan is excessive and that transaction is harsh and unconscionable may grant relief to borrower.

Consumer Product Warranty and Liability Act.

(c. C-18.1).

Scope of Act.

Act applies to any consumer product supplied by someone who deals in consumer products of that kind, notwithstanding any other Act or agreement to contrary. (§2).

“Consumer product” is any tangible property (new or used) that is commonly used for personal, family or household purposes. (§1[1]).

Parties cannot exclude or restrict any warranty provided by Act except as per §§25 and 26. (§24). Generally, §§25 and 26 permit such restriction except as regards description, agreements which would otherwise be unfair or unreasonable and where liability for “consumer loss” is sought to be refuted or limited.

Act applies to consumer products supplied under: Contracts of sale (including conditional sales contracts); leases; contracts for services or for labour and materials (i.e. applies to product but not services or labour) (§1[1]—definition of “contracts for the sale or supply of a consumer product”).

Act applies, in addition, to other rights or remedies available in N.B., except to extent that rights or remedies available are expressly or impliedly contradicted by this Act. (§28).

Warranties.

When “seller” (defined in §1[1], widely enough to include anyone in chain from manufacturer to consumer) breaches warranty as provided by Act, then any person (regardless of privity) who suffers “consumer loss” is entitled to recover damages reasonably foreseeable at time of formation of contract.

Express warranties include: Any oral statements made by seller in relation to product, unless buyer does not rely on such or it would be unreasonable for him to do so; any such written statement, whether or not buyer relies thereon, unless it would be unreasonable for him to do so; any such statement (however made) to public, unless it would be unreasonable for buyer to rely thereon, whether or not he actually does. (§4[1]). (See also §4[2]; §4[4] with respect to when statement is deemed to be that of seller.) Parol evidence is admissible to prove existence of express warranty. (§5).

Contracts for sale or supply of consumer product are subject to implied warranties as to title, quality and fitness. (§8).

Seller is not normally responsible for any defects known to consumer before contract is made; any defect that examination ought to reveal if product is used product and consumer has had chance to examine it before entering contract; or any defect that reasonable examination of sample ought to reveal if sale is by sample. (§10[2]).

All of above warranties operate in favour of all buyers although remedies for breaches thereof differ depending on whether buyer is consumer or business buyer. Business buyer is left to remedies available under Sale of Goods Act and common law. Where seller breaches warranty, buyer must give him reasonable opportunity to rectify breach unless breach is major one or such would create significant inconvenience for buyer. (§14[1]). Damages are those reasonably foreseeable as resulting from breach. (§15). If buyer gives seller opportunity to rectify his breach and seller does not do so, buyer may reject product within reasonable time of discovering breach (and discovery of breach must ordinarily be within 60 days of delivery of product). (§16). Where buyer rejects product under §16, obligations under contract are released and may recover from seller payments made on price and damages for other loss suffered due to breach that was reasonably foreseeable at time of contract as liable to result from breach. Seller may deduct from refund on price or recover from buyer or both, equitable amount in circumstances for benefit, if any, buyer derived from use of product. Where, before rejection, product deteriorated to state beyond that attributable to reasonable wear and tear for time used by buyer or has been damaged by causes not attributable to seller's breach, seller may deduct from refund on price or recover from buyer or both amount for compensation for difference between value that it would have but for deterioration or damage. (§17).

Product Liability.

Supplier of consumer product that is unreasonably dangerous to person or property because of defect in design, etc., is liable to any person who suffers “consumer loss” (subject to jurisdictional questions considered in §27[1]) and liability does not depend on any contract or negligence. Seller is not liable for defects not present at time he supplies product or for those which he discloses to person whom he supplies (unless defect breaches Federal or Provincial health or safety standard). (§27).

Plain Language Legislation.

None in force.

3.15 CONTRACTS:

Common law rules apply except where modified by statute.

Capacity.

Married women under no incapacity to contract. (c. M-4).

For capacity of infants see topic Infants.

Acceptance.

In sale of goods buyer loses right to reject after acceptance or has done any act inconsistent with vendor's ownership except right provided by Consumer Product Warranty and Liability Act. See topic 3.14 Consumer Protection. (c. S-1).

Consideration.

See topic 3.14 Consumer Protection, subhead Unconscionable Transactions Relief Act.

See also Small Loans Act. (R.S.C. c. 251).

Distributorships, Dealerships and Franchises.

There are no special rules in relation to these types of business arrangements.

Terms and conditions of some contracts governed by statute as in Insurance Act (c. I-12); Cost of Credit Disclosure Act (c. C-28.3); Direct Sellers Act (c. D-10).

3.16 COST OF CREDIT DISCLOSURE ACT:

See topic 3.14 Consumer Protection, subhead Cost of Credit Disclosure Act.

3.17 FACTORS:

Governed by Factors and Agents Act (c. F-1). Mercantile agent (when acting in ordinary course of his business and with consent of owner), who is in possession of goods or document of title to goods, may sell, pledge or dispose of same. Pledge of document of title to goods shall be deemed to be pledge of goods. Where mercantile agent pledges goods as security for debt due from him to pledgee, latter acquires no further right to goods than could have been enforced by agent at time of pledge. Consideration necessary for validity of sale or pledge of goods may be either payment in cash, or delivery of other goods, or of a document of title to goods, or a negotiable security; but, where goods are so pledged by agent, pledgee acquires no right in the goods in excess of value of goods or security. Transfer of document of title may be by endorsement or delivery. Term “document of title” as used in this title, includes a bill of lading.

Where the owner of goods has given possession thereof to another person for the purpose of consignment or sale or has shipped the goods in the name of another person and the consignee of the goods has not had notice that such person is not the owner of the goods, the consignee has in respect of advances made to or for the use of such person the same lien on the goods as if such person were the owner of the goods and may transfer any such lien to another person. (§10[1]).

3.18 FRAUDS, STATUTE OF:

Governing statute is c. S-14. No action shall be brought to charge an executor or administrator upon any special promise to answer damages out of his own estate, or to charge any person upon any special promise to answer for the debt, default or miscarriage of another, or to charge any person upon any agreement made upon consideration of marriage, or upon any contract or sale of lands, or commission for the sale of real estate, or of any interest therein, or upon any agreement that is not to be performed within one year from the making thereof or upon an agreement for a commission for sale of real property, unless the agreement upon which such action is brought, or some memorandum or note thereof, is in writing and signed by the party to be charged therewith or some other person authorized by him.

3.19 INTEREST:

See Canada Law Digest.

Unconscionable Transactions.

See topic 3.14 Consumer Protection.

3.20 LICENSES, BUSINESS AND PROFESSIONAL:

Licenses are required for: auctioneers, (c. A-17); automobiles and automobile dealers, (c. M-17); loan and trust companies incorporated extra-provincially, (c. L-11.2); and brokers, (c. I-12); marriage, (c. M-3); pawnbrokers, (c. M-22); real estate agents or salesmen, (c. R.1); sale of gasoline, (c. G-3). (Note: this list is not all-inclusive.)

Hunting Licences.

Class I licence which authorizes nonresident 18 years of age or over to hunt deer, rabbit, migratory birds, cost $100.

See also topic 3.14 Consumer Protection, subheads Cost of Credit Disclosure Act; Direct Sellers Act.

Collection Agencies.

Governing Statute is c. C-8. Must be licensed and notice of license published in The Royal Gazette. Doing such business without license subject to penalty of not less than $50 nor more than $200. Employing unlicensed collection agency subject to penalty of not less than $10 nor more than $100. Foregoing does not apply to members of bar who carry on collection agencies in their own names, to insurance agents in respect of collection of premiums, nor to any chartered bank or its official servants or agents in respect of business of bank.

3.21 LOTTERIES:

Governing statute is c. L-13.1. Crown Corporation known as Lotteries Commission regulates lotteries in Province. Commission consists of Minister of Finance and two Deputy Ministers. May organize lotteries on behalf of government.

3.22 MONOPOLIES, RESTRAINT OF TRADE AND COMPETITION:

Provision is made for the investigation of combinations, monopolies, trusts and mergers by Competition Act. (R.S.C. 1985, c. C-34, am'd R.S.C. 1985, c. 19 [2nd. Supp.]). See also R.S.C. 1985, c. T-14, as to trade unions.

3.23 NEGOTIABLE INSTRUMENTS:

See Canada Law Digest, category Business Regulation and Commerce, topic Bills and Notes.

3.24 RESTRAINT OF TRADE:

See topic 3.22 Monopolies, 3.24 Restraint of Trade and Competition.

3.25 SALES:

Governing statute is Sale of Goods Act, c. S-1. Where document of title to goods has been lawfully transferred to person as buyer or owner of goods and that person transfers document to another person who takes it in good faith and for valuable consideration, latter transfer has same effect as transfer of bill of lading for defeating any vendor's lien or right of stoppage in transitu. (§44).

Bills of Sale.

See category 20 Mortgages, topic 20.05 Personal Property Security.

Conditional Sales.

See category 20 Mortgages, topic 20.05 Personal Property Security.

Bulk Sales.

See topic 3.07 Bulk Sales.

Product Liability.

Common law of negligence applies. Privity not required if manufacturer negligent and consumer suffers damage due to this negligence. See also topic 3.14 Consumer Protection, subhead Consumer Product Warranty and Liability Act.

Retail Credit Sales.

See topic 3.14 Consumer Protection.

Consumer Protection Legislation.

See topic 3.14 Consumer Protection.

Tobacco Sales.

Governing statute is Tobacco Sales Act, c. T-6.1. No person shall sell or offer for sale tobacco in designated place. (§6.1[1]). Designated place means (a) Pharmacy; (b) retail store if pharmacy is located within store or customers of pharmacy can pass into store directly or by use of corridor or area used exclusively to connect pharmacy within store; (c) any place prescribed by regulation. (§6.1[2]). No person shall sell or offer for sale tobacco in retail store by means of device that dispenses tobacco. (§6.3).

3.26 SECURITIES:

S-6 (Securities Fraud and Prevention Act) has been repealed. The Securities Act (S. 5-5) now governs this area of law.

Commission:

S. 3(1)—There is established a body corporate without share capital to be known as the New Brunswick Securities Commission.

S. 4—The Commission is responsible for the administration of this Act.

Registration:

Registration for trading required.

S. 45—Except where exempted under regulations, person shall not (a) trade in security or exchange contract, (b) act as advisor, (c) act as investment fund manager, or (d) act as underwriter, unless person is registered, in accordance with regulations, in category that regulators prescribe for activity.

Registration not required for designated employees.

S. 46—The Executive Director may, for the purposes of this Part, designate as non-trading any employee or class of employees of a registered dealer that does not usually trade in securities or exchange contracts, and an employee so designated or of a class so designated need not register under this Act or regulations.

S. 47—An application for registration or amendment to registration shall be made in accordance with the regulations.

Offenses:

S. 179(2)—A person who does any of the following commits an offence and is liable on conviction to a fine of not more than $1,000,000 or to imprisonment for a term of not more than five years less a day, or to both: (a) makes a statement in any information or material submitted, provided, produced, delivered or given to or filed with the Commission, the Executive Director, a compliance officer, an investigator or any person acting under the authority of the Commission or the Executive Director that is misleading or untrue or does not state a fact that is required to be stated or that is necessary to make the statement not misleading; (b) makes a statement in any information or material required to be submitted, provided, produced, delivered, given or filed under New Brunswick securities law that is misleading or untrue or does not state a fact that is required to be stated or that is necessary to make the statement not misleading.

Prohibition:

6(1)—No individual to whom this Part applies shall, whether directly or indirectly or through an associate, do any of the following: (a) purchase or trade in a security of an issuer with knowledge of a material fact or material change in respect of that issuer that the individual knows or ought reasonably to know has not been generally disclosed; (b) if the individual knows a fact about an issuer or of a change in the affairs of an issuer and that the fact or change is a material fact or material change in respect of the issuer, inform, other than in the necessary course of duty, another person of that material fact or material change before it has been generally disclosed; (c) purchase or trade in a security of an issuer when, in respect of any security held or issued by that issuer: (i) the filing of a prospectus, a preliminary prospectus or an amendment to a prospectus is being processed, (ii) 60 days have not elapsed since the date a receipt for a prospectus, a preliminary prospectus or an amendment to a prospectus was issued, (iii) an application is pending for a decision under the Act or the regulations under the Act by the Commission or the Executive Director, or (iv) 60 days have not elapsed since the date on which a decision was made under the Act or the regulations under the Act by the Commission or the Executive Director.

3.27 STATUTE OF FRAUDS:

See topic 3.18 Frauds, Statute of.

3.28 STORERS:

Governing statute is c. S-14.5. Every storer has lien on goods deposited with him for storage for amount of his charges for storage and preservation of goods and for money advanced, interest, transportation, labor, weighing, cooperage and other expenses in connection with such goods. (§2[2]). Lien may be enforced by sale at public auction after written notice to debtor, owner and to any person with security interest who has registered financing statement in Personal Property Registry.

Warehouse Receipts.

Governing statute is c. W-3. Banks may acquire and hold warehouse receipt as collateral security for payment of debt incurred in its favor, or as security for any liability incurred by it for any person, in course of its banking business and when so acquired it vests in bank all right and title of previous holder to such warehouse receipt and goods covered thereby or, if warehouse receipt is made directly in favor of bank, all right and title to goods mentioned therein of person from whom bank received such goods. It can only be taken by bank as security for liability contracted at time of acquisition of warehouse receipt or upon written promise to give bank such warehouse receipt, made when liability was incurred. Bank cannot purchase or discount warehouse receipt but can only take it as collateral security. If goods covered by warehouse receipt held by bank are manufactured while so covered products of such manufacturer are property of bank. Bank has claim for amount of its advances secured by warehouse receipt prior to that of unpaid vendor of goods covered by warehouse receipt. There is penalty of up to $500,000 or five years imprisonment for wilfully making false statement in warehouse receipt given to bank. (Bank Act, [1991, c. 46], §§984-985).

By c. W-3, "warehouse receipt" means acknowledgment in writing by warehouseman of receipt for storage of goods not his own. Receipt must contain following particulars: (a) Location of warehouse or other place where goods are stored; (b) name of person by whom or on whose behalf goods are deposited; (c) date of issue of receipt; (d) statement either: (i) that goods received will be delivered to holder thereof, or (ii) that goods will be delivered to bearer or to order of named person; (e) rate of storage charges; (f) description of goods or of packages containing them; (g) signature of warehouseman or his authorized agent; and (h) statement of amount of any advance made and of any liability incurred for which warehouseman claims lien. Where warehouseman omits from negotiable receipt any of above particulars he is liable for damages caused by omission, but no receipt may, by reason of omission, be deemed not to be warehouse receipt. Receipt, when delivered to owner or bailor of goods or mailed to him at his address last known to warehouseman, constitutes contract between owner or bailor and warehouseman; provided that owner or bailor may within 20 days after such delivery or mailing notify warehouseman in writing that he does not accept such contract and thereupon he must remove goods deposited subject to warehouseman's lien for charges and if such notice is not given said warehouse receipt so delivered or mailed constitutes contract. (§2). Words in negotiable receipt limiting its negotiability are void. New statute is long and comprehensive in its terms.

3.29 UNCONSCIONABLE TRANSACTIONS RELIEF ACT:

See topic 3.14 Consumer Protection.

4 CITIZENSHIP

4.01 ALIENS:

Property.

Aliens can take, hold, and sell real and personal property, with exception of ships, as if they were native-born citizens. When resident within province and served with process there, an alien may be sued in its courts; or if cause of action arises within province, though alien be not resident or served with process there, he may be sued in its courts. (c. P-19, §10[1]).

5 CIVIL ACTIONS AND PROCEDURE

5.01 ACCORD AND SATISFACTION:

Common law rules prevail. Neither acceptance of nor agreement to accept smaller sum of money in same medium at same time and place as is required by obligation, satisfies debt; but debt may be satisfied by payment of smaller sum in same medium at earlier time or at different place than that called for.

Compromise.

No statutory provisions.

Pleading.

No statutory provisions.

5.02 ACTIONS:

Governing statute is c. J-2, and Rules of Court of Queen's Bench enacted pursuant thereto and cited as Regulation 82-73.

Equity.

Concurrent administration of law and equity. In cases of conflict, rules of equity prevail. (§§26, 39).

Forms of Action.

There is but one form of civil action. (§1; R. 1.04).

Conditions Precedent.

Consent of Attorney General required before application may be made for injunction which would delay or prevent construction or operation of any manufacturing or industrial plant because discharge from such plant is injurious to some other interest. (§33).

In actions against Crown or Crown Corporation, two months previous notice in writing is required to be served on Attorney-General or on Crown Corporation stating name, address of plaintiff, cause of action, and in which court it is to be brought. (c. P-18, §15).

Commencement.

See topics 5.19 Process; 5.17 Pleading.

Parties.

Necessary and proper parties to action are plaintiff or applicant and defendant or respondent. (R. 5.02). Joinder of other parties is necessary when plaintiff or applicant claims relief to which other person is jointly entitled. Also everyone whose presence is necessary for effective and complete adjudication of matter must be joined unless ordered by court otherwise.

More than one person may be joined as plaintiff or applicant so long as there is only one solicitor; parties claim relief arising out of same transaction or occurrence; there exists common question of law or fact; or their presence in proceeding promotes convenient administration of justice. (R. 5.03[1]).

Persons may be joined as defendants or respondents where: Relief is claimed against them arising out of same transaction or occurrence; there exists common question of law or fact; there is no doubt about parties from whom plaintiff is entitled to relief; loss to plaintiff has been caused by more than one person; their presence is required for convenient administration of justice. (R. 5.03 [2]).

No proceeding is defeated by misjoinder or nonjoinder of persons, and court may grant leave to add, delete or substitute parties. (R. 5.04).

Parties who are minors, or who are declared to be mentally incompetent of managing their affairs must be represented by litigation guardian; persons whose estates are managed by virtue of Mental Health Act, are to be represented by committee; and person declared to be absentee under Presumption of Death Act is represented by committee. (R. 7.01).

Proceeding may be brought by or against executor, administrator or trustee as representing estate or trust of which he is personal representative or trustee and is representing persons beneficially interested without joining such persons as parties. (R. 10.01).

Court may appoint one or more persons to represent any persons, including unborn persons, unascertained persons or members of class of persons who cannot readily be ascertained, found or served, and who have present, future, contingent or unascertained interest in or may be affected by proceeding. (R. 11.01).

In proceeding by assignee of debt or other chose in action, assignor shall be joined as party unless assignment is absolute, and notice in writing has been given to person liable in respect of debt or chose in action. (R. 12.01).

Where assignor is necessary party and does not consent to be joined, he shall be made defendant or respondent unless court orders otherwise. (R. 12.02).

Where, at any stage of proceeding, interest or liability of party is transferred to another person, proceeding shall be stayed until clerk, upon application of party having carriage of proceeding, or some other interested party, orders continuation of proceeding. (R. 13.01).

Where there are numerous persons having same interest in one cause or matter, one or more of them may sue or be sued, or may be authorized by court to defend on behalf or for benefit of all persons so interested. (R. 14.01).

Person who is not party may apply to court by notice of motion for leave to intervene as added party, if such person shows that there exists legal interest in proceedings, person may be adversely affected by judgment in proceeding, or question of fact exists between that person and party to proceeding which is in common with question in issue in proceeding. (R. 15.02).

Court may give leave to person to intervene in proceeding as friend of court for purpose of rendering assistance to court by way of argument, and without becoming party to proceeding. (R. 15.03).

Class or Representative Actions.

See subhead Parties, supra.

Intervention.

See subhead Parties, supra.

Interpleader.

Person under liability for any debt, money, goods or chattels, in respect of which adverse claims have been made against him by two or more persons, may apply to court for relief by way of interpleader. (R. 43.01).

Sheriff may apply for relief by way of interpleader where any real or personal property has been taken, or is intended to be taken in execution of any process against another person, and where person who has claim respecting such property gives notice to sheriff of his claim which is disputed by any other execution creditor. (R. 43.02).

Third Party Practice.

Defendant may issue third party claim against person who is not party to action and who may be liable to him for all or part of claim of plaintiff, or for any other relief relating to subject matter of main action, or should be bound by determination of some issue arising between plaintiff and defendant. (R. 30.01).

Joinder of Causes of Action.

Court may order that two or more pending actions be consolidated or be tried at same time, or one immediately after other, or may order any of them to be stayed until after determination of other of them or asserted by way of counterclaim in any other of them or asserted by way of counterclaim in any other of them. (R. 6.01).

Splitting Causes of Action.

Court may order separate trials or hearings, or require one or more claims to be asserted, if at all, in another proceeding, if joined hearing would unduly complicate or delay trial, or prejudice party. (R. 5.05).

Severance of Actions.

Court may, before or after action is set down for trial, order that different issues be tried at different times. (R. 47.03).

Stay of Proceedings.

Court may stay proceedings to enforce judgment upon such terms as may be just if it is satisfied that events occurring after judgment or other special circumstances render it inexpedient to enforce judgment or judgment debtor is for any reason unable to pay money recoverable under judgment or for any other just cause. (R. 61.16).

Where action has been dismissed for want of prosecution, although not bar to subsequent action unless so provided in dismissal order, judge may stay subsequent action if costs of dismissed action have not been paid. (R. 26.04).

Unless otherwise ordered appeal does not operate as stay of execution or of proceedings under decision or order appealed from, nor does it invalidate any intermediate act or proceeding. Motion for stay of execution or stay of proceedings may be made before judge appealed from, Court of Appeal or judge of Court of Appeal. (R. 62.26).

Abatement and Revival.

Does not apply.

Limitation of.

See topic 5.15 Limitation of Actions.

Small Claims.

See category 6 Courts and Legislature, topic 6.01 Courts.

Termination of Actions.

Plaintiff or defendant may at any time before action is set down for trial, apply to court to determine point of law raised by pleading in action, and which determination may dispose of action; or to apply to strike out pleading which does not disclose reasonable cause of action or defence; or may apply for judgment of admission of fact in pleadings. Defendant may also apply at any time before trial to have action stayed or dismissed on grounds that court does not have jurisdiction; plaintiff does not have legal capacity to commence or continue action; or another action is pending in same or another jurisdiction between same parties and in respect of same claim (R. 23.01); or New Brunswick is not convenient forum for trial or hearing of proceeding.

Prohibited Actions.

Not applicable.

Administration.

See category 13 Estates and Trusts, topic 13.09 Executors and Administrators.

Direct Actions Against Insurer.

See category 23 Transportation, topic 23.03 Motor Vehicles, subhead Direct Actions.

Quick Ruling.

Parties to dispute may, any time before pleadings have been closed, including any time before commencement of judicial proceedings, apply to other party to dispute, in writing, for consent to have judge determine dispute upon such stated facts and issues to which parties agree.

Judge may refuse to hear dispute, or may hear it in any manner deemed fair. Decision shall be given at hearing or within 30 days thereafter in respect to whole or any part of dispute, and judge may as well assess damages and order costs.

Although party is not compelled to accept quick ruling (notice must be given of nonacceptance) if determination of issue at trial is same as quick ruling, or less advantageous to party refusing to accept quick ruling, then any costs to which that party is entitled shall be reduced by 50% and any costs ordered to be paid by that party shall be increased by 50%.

Decision of judge under this rule cannot be appealed, and judgment entered under this rule may be appealed only on procedural grounds. (R. 77.04-77.07). See also topics 5.03 Appeal and Error, Depositions and Discovery, Injunctions, Judgments, Pleading, Practice, Process, Venue; category 8 Debtor and Creditor, topics 8.03 Attachment, 8.06 Executions, 8.10 Garnishment.

5.03 APPEAL AND ERROR:

Governing statute is c. J-2 and Rules of Court enacted pursuant thereto. Court of Appeal has both civil and criminal jurisdiction. Either civil or criminal matters from Court of Queen's Bench may be appealed to Court of Appeal, and criminal matters from Provincial Court may also ultimately be appealed to Court of Appeal. (R. 62-64).

Supreme Court of Canada.

Appeal may be taken from Court of Appeal to Supreme Court of Canada with leave of either Provincial Appeal Court or Supreme Court of Canada.

See Canada Law Digest, categories Courts and Legislature, topic Courts, subhead Supreme Court of Canada; and Civil Actions and Procedure, topic Appeal and Error, subhead To Supreme Court of Canada.

Appeal Bond.

Not applicable.

Stay of Proceedings.

See topic 5.02 Actions, subhead Stay of Proceedings.

Extent of Review.

To both law and fact. (R. 62.21).

Character of Hearing.

Court has inherent jurisdiction to completely review matter before it. (R. 62.21).

Judgment of Order on Appeal.

Court of Appeal may draw inferences of fact, render any decision and make any order which ought to have been made, and may make such further or other order as case may require. (R. 62.21).

5.04 CERTIORARI:

Governing statute is c. J-2 and Rules of Court pursuant thereto. Rules of Court in force from time to time respecting judicial review not inconsistent with provision of Criminal Code, or any uniform Rules of Court made by Governor-in-Council under §482(5) of Criminal Code apply to proceedings with respect to mandamus, certiorari or prohibition in matters arising under Criminal Code.

Notwithstanding any Act, remedies formerly obtained by way of certiorari, mandamus, prohibition, quo warranto or notice of motion may now be obtained only on application for judicial review which, subject to any Act, must be commenced within three months from date of order, conviction, commitment, warrant, decision, award or refusal to act which is substance of complaint. (R. 69.03).

Jurisdiction.

Court of Queen's Bench and Court of Appeal, have authority to supervise decision of any tribunal exercising judicial function.

Grounds.

Judicial review of tribunal's decision will issue wherever tribunal has acted without jurisdiction or transgressed limits of jurisdiction. (R. 69.04).

Proceedings.

Proceedings are commenced by notice of application in accordance with R. 38.

5.05 CHARITABLE IMMUNITY:

See topic 5.07 Damages.

5.06 COSTS:

Security for Costs.

Plaintiff may be ordered to furnish security for costs if plaintiff is resident out of New Brunswick, costs to be paid by plaintiff in another action remain unpaid, plaintiff is nominal plaintiff, or association or corporation, and it appears that there may not be sufficient assets belonging to plaintiff in New Brunswick to pay costs if so ordered, or if defendant is entitled by statute to security for costs. (R. 58.01).

5.07 DAMAGES:

Contributory Negligence Act (c. C-19), provides that where damage or loss has been caused by fault of two or more persons, court shall determine degree in which each person was in fault. For particular circumstances see Act.

Person who has claim against Crown may enforce it as of right by proceedings against crown in accordance with Proceedings Against the Crown Act, c. P-18 in all cases in which: (a) Land, goods or money of person are in possession of Crown, (b) claim arises out of contract entered into by or on behalf of Crown, or (c) claim is based upon liability of Crown in tort to which it is subject by governing statute. (§3).

No action shall be brought against Crown unless two months previous notice in writing thereof has been served on Attorney-General, or on corporation in case of action to be brought against crown corporation, in which notice, name and residence of proposed plaintiff, cause of action, and court in which it is to be brought shall be explicity stated. (§15).

Service.

Document to be served on Crown shall be served by delivering copy to Attorney-General or Deputy Attorney-General or any barrister or solicitor employed in office of Attorney-General, or to solicitor designated for purpose by Attorney-General; and document to be served on crown corporation shall be served in same manner as upon ordinary corporation. (§12).

Costs are available as against Crown. (§14[1]).

Sovereign Immunity.

See Limitation of Actions Act, c. L-8. No special immunity for Crown; see Proceedings Against the Crown Act. (c. P-18).

Charitable immunity doctrine not recognized.

See category 13 Estates and Trusts, topic 13.05 Death, subhead Action for Death.

5.08 DECLARATORY JUDGMENTS:

See topic 5.14 Judgments.

5.09 DEPOSITIONS AND DISCOVERY:

By order of court or consent of parties, person may be examined on oath before trial for purposes of having his evidence available to tender at trial, and such witness may be examined, cross-examined and reexamined. Such examination shall be conducted according to R. 33.

Where order is made for examination of witness out of New Brunswick, order shall provide for issuance of commission authorizing taking of such evidence before commissioner, and if necessary issuance of letter of request to appropriate authority in jurisdiction where witness is to be found, requesting issuance of such process as may be necessary to compel witness to attend and submit to examination. (R. 53.01-53.03).

5.10 DIRECT SELLERS ACT:

See category 3 Business Regulation and Commerce, topic 3.14 Consumer Protection.

5.11 EQUITY:

See topic 5.02 Actions.

5.12 EVIDENCE:

Witnesses.

Governing statutes are R.S.C. c. E-10, and R.S.N.B., c. E-11.

Parties to actions, husbands and wives of parties, and persons interested in event of an action are competent witnesses.

Husband and wife are competent for or against each other on any issue in any action in court of divorce and matrimonial causes. In criminal cases, husband and wife are competent for or against each other, except as to confidential communications, but cannot be compelled, to testify.

Any witness may be compelled to answer questions designed to disclose his indebtedness, but may not be compelled to admit adultery.

Person charged with crime is competent, but cannot be compelled, to testify.

See also topic 5.09 Depositions and Discovery.

5.13 INJUNCTIONS:

Request for interlocutory injunction or mandatory order, or for extension thereof, may be made before commencement of proceedings by preliminary motion, and after commencement of proceedings by motion. Subject to c. J-2, §34, where motion is made without notice, injunction may be granted for period not exceeding ten days under certain circumstances. Court may extend injunction, but each extension shall be limited to period of 30 additional days. (R. 40.02[3]).

Where person claims monetary relief, court may grant interlocutory injunction to restrain any person from disposing of, or removing from New Brunswick, assets within New Brunswick of person against whom claim is made. In such circumstance, unless otherwise ordered, plaintiff or applicant is deemed to have undertaken to abide by any order as to damages arising therefrom. (R. 40.03,.04).

Procedure for injunction or mandatory order under R. 40 is set out in R. 37 which stipulate that notice of motion or preliminary motion and affidavits in support thereof shall be served on all parties to proceeding and on any persons who would be affected by order sought. Under certain circumstances court may make order without notice.

On motion or application evidence may be given by affidavit unless directed otherwise by Rules of Court or by order. Affidavit for use on application shall be confined to statements of fact within personal knowledge of deponent, but may contain statements as to his information and belief, if source of his information and his belief therein are specified in affidavit. (R. 39.01).

See category 12 Environment, topic 12.01 Environmental Regulation.

5.14 JUDGMENTS:

On hearing motion judge may endorse his disposition on notice of motion or direct successful party to prepare formal judgment for judge's signature. Order disposing of motion takes effect when it is signed. Successful party on motion shall file with clerk endorsed notice of motion or order signed by judge. (R. 60.01).

Where judgment is given at hearing or trial court reporter shall file transcript or copy of order or decision with clerk of judicial district in which proceeding was commenced, and judgment shall take effect from date on which order was given. Where judge gives written order or decision subsequent to hearing or trial, he shall file order or decision with clerk, and judgment shall take effect from date of filing. (R. 60.02).

Party to whom relief has been granted may prepare judgment and present it to clerk to be signed and entered, notwithstanding that costs have not been assessed.

Either before or after judgment party may apply on motion to court to amend or vary decision or judgment respectively. Party may apply on motion to vary judgment where there is clerical error or accidental slip in judgment, or where judgment does not conform to order or decision directing judgment, or if court has failed to specify time for compliance with judgment requiring person to do or abstain from doing act. (R. 60.03).

Clerk may file memorandum of satisfaction of judgment if it is signed by person entitled to benefit of judgment and signature and contents are proven by affidavit, or on motion made to clerk it is shown that notice of motion was served on person entitled to benefit of judgment and judgment has been satisfied. (R. 60.07).

Enforcement of Orders.

Order of court may be enforced in same way that judgment to same effect might be enforced. (R. 61.01).

Declaratory Judgments.

See topic 5.17 Pleading.

Foreign Judgments.

Foreign judgments may be sued on as such. Jurisdiction of foreign court is admitted only if defendant was ordinarily resident in country at commencement of action, or if defendant submitted to jurisdiction of foreign court. Foreign court has no jurisdiction if action involves title to land in New Brunswick or is for damages in respect to land in New Brunswick. If foreign court had jurisdiction, its judgment is conclusive as to any matter adjudicated in action. It is sufficient defense to action on foreign judgment that original court had no jurisdiction, that defendant was not served with process and did not appear, that judgment is not final, that it was obtained by fraud, is not for sum certain in money, is for payment of penalty under revenue laws of foreign country or is in respect to cause of action which for reasons of public policy would not have been entertained in New Brunswick, or that proceedings in which judgment was obtained were contrary to natural justice. (c. F-19, c. R-3; see 122 N.R. 81).

See also topic 5.15 Limitation of Actions.

5.15 LIMITATION OF ACTIONS:

Governing statute is c. L-8.

Personal.

No action or scire facias upon any judgment (including a foreign judgment), recognizance, bond or other specialty, shall be brought but within 20 years after the cause of action. An action for any sum of money given to any person aggrieved by any act or statute, or for any penalty, must be brought within two years after the cause of action. Actions for assault, battery, wounding, imprisonment, defamation, seduction, and damages arising out of the operation, care or control of a motor vehicle, must be begun within two years after the cause of action. Direct actions by insured against his fire insurer must be brought within one year of accident; actions against car insurer must be brought within two years. Actions grounded on fraud, accident or mistake, or other equitable ground of relief, must be brought within six years after discovery of the cause of action. (§§2-9). All other cases must be commenced within six years after the cause of action. See however, category Estates and Trusts, topic Death, subhead

Action for Death.

See also category 2 Business Organizations, topic 2.03 Corporations, subhead Business Corporations Act, catchline Liabilities of Directors.

Real.

No claim for lands or rent shall be made, or action brought by crown after a continuous adverse possession of 60 years. No person shall make an entry or bring an action to recover any land but within 20 years after the time at which the right to make such entry or bring such action shall have first accrued to such person or the person through whom he claims. When one or more of several persons entitled to any land as co-parceners, joint tenants, or tenants in common, shall have been in the possession or receipt of the entirety or more than his or their undivided share or shares of said land for his or their own benefit, such possession or receipt shall not be deemed to have been the possession or receipt of or by any other person or persons entitled to an interest in said lands.

5.16 PARTITION:

Proceedings to compel partition or sale of land or of estate or interest therein may be commenced by notice of application. (R. 67.01). In such proceeding court may decide all questions concerning title to lands, order that lands or any portion thereof be partitioned, or that such lands or portion thereof be sold and direct distribution of proceeds of such sale in accordance with interests and priorities of persons having interest in lands, and direct payment of costs from proceeds of sale of lands as may be appropriate. Court may also direct reference upon such terms including directions to sell, as may be necessary. (R. 67.02).

If party has needlessly commenced proceeding for partition, or has without sufficient reason refused to agree to partition, sale or other disposition of property, court may order party to pay all of costs of proceeding or larger proportion of costs than would normally be allowed against such party. Court may also deprive such party of all or part of costs to which he would otherwise be entitled. (R. 67.06[3]).

5.17 PLEADING:

Governing statute is c. J-2 and Rules of Court. In action, pleadings consist of statement of claim and statement of defence and may include reply; in counterclaim they consist of counterclaim and defence to counterclaim, and reply; in cross-claim they consist of cross-claim, defence to cross-claim, and reply; in third party claim they consist of third party claim, and third party defence, and may include reply. (R. 27.01).

If reply is not filed within time prescribed, pleadings are closed and every allegation of material fact made in previous pleading is deemed to be denied. (R. 27.07).

Pleadings shall be divided into numbered paragraphs and each allegation as far as practicable shall be contained in separate paragraph. (R. 27.02).

Every pleading shall be served on opposite party and upon every other person who is, at time of such service, party to action. Where pleading is originating process and is required to be served on party other than opposite party, personal service is not required. (R. 27.03).

Pleadings are deemed to be closed upon noting of default of defendant, upon service of reply, or when time for service has expired as prescribed by R. 16.08 for statement of claim and R. 20.01 for statement of defence. (R. 27.05).

Originating process (notice of action and statement of claim attached) shall contain names of parties and capacity in which they are made parties to proceeding, as well as principal place of residence of party commencing proceeding. (R. 16.06[3]). Upon receiving process and copy along with filing fee, clerk will assign to process court file number, and enface on original and copy number and date of issue. Original will be returned to plaintiff or applicant, or his solicitor and file copy retained by clerk. (R. 16.07). Notice of action with statement of claim attached shall be served, after being issued, within six months. Where action is commenced by issuing notice of action alone, both notice of action and statement of claim shall be served together within six months of issuing of notice of action. (R. 16.08).

Statement of Claim.

Every pleading shall contain concise statement of material facts on which party pleading relies for his claim or defence, but not evidence by which those facts are to be proved. Party may raise any point of law in his pleading. Conclusions of law may be pleaded provided that material facts supporting such conclusions are pleaded. Party need not plead facts presumed in law to be true, unless specifically denied by opposite party. As well, condition precedent to assertion of claim need not be pleaded unless specifically denied by opposite party.

No objection to pleading shall be taken on ground that only declaratory judgment or order is sought, and court may make binding declarations of right whether or not consequential relief is or could be claimed.

If general damages are claimed no amount shall be stated.

Party may plead any fact that has occurred since commencement of action and if fact occurs after filing and serving his pleading, he may apply to court for leave to file and serve amended pleading even if fact alleged may give rise to new claim or defence. Party whose cause of action or defence is founded upon Act, shall plead specific sections on which that party relies. (R. 27.06).

Party shall deny every allegation of fact in pleading of opposite party which is disputed and all other allegations of fact in pleading of opposite party shall be deemed to be admitted unless party pleading alleges that he has no knowledge thereof. However, mere denial of version of facts pleaded by opposite party is not sufficient, but party in defence or reply shall plead his own version of facts as well as every matter upon which it is intended to rely to defeat claim or defence of opposite party, and which if not specifically pleaded might take opposite party by surprise or raise new issue.

Where contract or agreement is alleged in pleading, bare denial of same by opposite party shall be construed only as denial of making of contract or agreement alleged, or of facts from which same may be implied by law. Denial of legality or validity of contract or agreement shall be specifically pleaded.

In action for damages amount shall be deemed to be in issue unless specifically admitted. (R. 27.07).

Reply and Defence to Counterclaim.

Reply need not be made, but if not filed and served within time prescribed there shall be implied joinder of issue. In counterclaim pleadings consist of counterclaim and defence to counterclaim. (R. 28.01).

Subsequent Pleadings.

Pleadings subsequent to reply shall not be filed and served except with consent in writing of opposite party, or by leave of court. (R. 27.01).

Demurrer.

No demurrer is allowed. Plaintiff or defendant however may at any time before action is set down for trial apply to court for determination prior to trial of any question of law raised by pleading where determination of that question may dispose of action, shorten trial or result in substantial saving of costs, or to strike out pleading which does not disclose reasonable cause of action or defence, or for judgment on admission of fact in pleadings, in examination of adverse party, or answer to request to admit facts. (R. 23.01).

Particulars for purpose of pleading, may be ordered when pleading in question is so vague or ambiguous that opposite party cannot reasonably be required to frame responsive pleading thereto. Where party who has been served with demand for better particulars fails to file such, court may order that particulars be filed and served within specified time. (R. 27.08).

Proof of Claims.

Originating process shall contain names of parties and capacity in which they are made parties to proceeding, as well as principal place of residence of party commencing proceeding. Unless provided otherwise by Act, all proceedings, except counterclaim against plaintiff only or cross-claim, shall be by issuing originating process.

See also topics 5.02 Actions, Appeal and Error, Practice, Process; category 8 Debtor and Creditor, topic 8.03 Attachment.

5.18 PRACTICE:

Governing statute is Judicature Act, c. J-2 and Rules of Court.

Discovery.

Every document which relates to matter in issue in action and which is or has been in possession, custody or control of party or which party believes to be in possession, custody or control of some person not party, shall be disclosed to other party if that other party serves notice requiring affidavit of documents, whether or not privilege is claimed in respect of that document. (R. 31.02; 31.03).

Party to action may examine for discovery, once without leave, any other party who is adverse in interest. (R. 32.02). Examination of plaintiff for discovery may only be initiated after examining party has filed and served statement of defence and if requested has filed affidavit of documents and served it on every other party. Examination of defendant for discovery may be initiated only after defendant has filed and served statement of defence and has filed affidavit of documents and served it on every other party, if requested; or if defendant has been noted in default. (R. 32.03).

Examination for discovery may take form of oral examination or at option of examining party examination by written questions and answers, but not to both forms of examination without consent of opposite party or by leave of court. (R. 32.04).

Court may grant leave to examine for discovery any person who has or is likely to have information relevant to material issue in action where such person was at relevant time employee, agent, partner or spouse of party or was officer, director or auditor of corporate party or is or was at relevant time officer, director or employee of corporation which was at such time subsidiary or affiliate of corporate party, or is potential witness including expert retained by party in preparation for contemplated or pending litigation, unless that party undertakes that he will not call expert as witness at trial, or is person under disability. (R. 32.10).

Direct Actions Against Insurer.

See category 16 Insurance, topic 16.01 Insurance Companies, subhead Direct Actions

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Against Insurer.

Request for Admission of Facts.

Either party may issue request. Party on whom Request to Admit Facts is served shall be deemed to admit such facts unless he serves Notice of Refusal within ten days. Court shall take into account refusal in exercising its discretion as to costs.

Small Claims.

See category 6 Courts and Legislature, topic 6.01 Courts.

See also topics 5.02 Actions, Appeal and Error, Depositions and Discovery, Injunctions, Judgments, Pleading, Process; category 8 Debtor and Creditor, topics 8.03 Attachment, 8.06 Executions, 8.10 Garnishment.

5.19 PROCESS:

Originating process shall be served personally unless provided otherwise by Act or Rules of Court, but need not be served on party who has filed and served defence. (R. 18.01). Personal service is effected by service on individual, other than person under disability, by leaving copy of document with him; or if municipality by leaving copy of document with mayor, deputy-mayor, clerk, assistant clerk, or with any solicitor for municipality; or on any other corporation by leaving copy of document with officer, director or agent of corporation or manager who appears to be in control of any office or other place where corporation carries on business in New Brunswick; or service may be effected on board or tribunal by leaving copy of document with secretary or officer or member. If person is out of New Brunswick but carries on business in New Brunswick, service may be effected by leaving copy of document with any person in province appointed as agent for service under Business Corporations Act or carrying on business for party in question in New Brunswick.

Crown in right of Province of New Brunswick is served in accordance with Proceedings Against the Crown Act; and Crown in right of Canada is served in accordance with Crown Liability Act. Attorney General may be served by leaving with him copy of document, or with lawyer employed in Department of Attorney General at Fredericton, N.B.

Minor is served by leaving copy of document with his parent, guardian or other adult with whom or in whose care he resides; if minor is of age of 16 years or over, he may be served personally. (R. 18.02).

Who May Serve.

Service may be effected by any person, and proven by affidavit of that person. Service by sheriff or deputy may be proven by certificate of service. In other cases where solicitor accepts service, admission or acceptance of service is sufficient proof thereof and need not be verified by affidavit. (R. 18.10).

Nonresident Motorists.

See category 23 Transportation, topic 23.03 Motor Vehicles, subhead Actions Against Nonresidents.

5.20 REPLEVIN:

Interim order for recovery of personal property may be obtained on motion by plaintiff supported by affidavit containing description and value of property, statement that plaintiff is owner or lawfully entitled to possession of property, statement that property was unlawfully taken from possession of plaintiff or is unlawfully detained therefrom, and facts of circumstances giving rise to unlawful taking or detention. Unless ordered otherwise notice of motion shall be served on defendant. (R. 44.01).

Court may order security from either plaintiff or defendant, order that property be placed in hands of plaintiff, or remain with defendant, or make such other order as may be just. (R. 44.03).

Where security is required to be paid, condition of security shall be that party providing it will return property to opposite party without delay and pay such damages incurred by opposite party, if ordered to do so by court. (R. 44.04).

5.21 SEQUESTRATION:

Judgments or orders generally speaking may be enforced by enforcement orders as follows: For payment of money, by order of seizure and sale; for recovery of possession of land, by order for possession of land; for delivery of personal property, by order for delivery of personal property; and for requiring of doing or abstaining from doing of any act, by contempt order. (R. 61.02).

5.22 SERVICE:

See topic 5.19 Process.

5.23 SUBMISSION OF CONTROVERSY:

Where parties to proceeding concur in stating, in form of stated case, one or more questions of law for opinion of court, party may apply to court for leave to set stated case down for hearing. This will be done only where court is satisfied that hearing will dispose of proceeding or facilitate determination of matters in issue. (R. 24.01).

5.24 VENUE:

Trial of action shall take place in judicial district where proceeding was commenced. However party may apply to court at any time to change place of trial and if so shall show that it would be more convenient to have action tried at place proposed, or that in interests of justice action ought to be tried at that place. (R. 45.02).

6 COURTS AND LEGISLATURE

6.01 COURTS:

Governing statute is c. J-2 unless otherwise stated.

Court of Appeal.

Court has appellant jurisdiction in both criminal and civil cases. (R. 62-64).

Court of Queen's Bench.

This Court consists of two divisions: Trial Division, and Family Division. All causes and matters are proceeded with in Trial Division. Family Division has jurisdiction vested in Trial Division. (§§9-11).

Small Claims.

Governing Statute is 1998, c. S-9.1. Action may be brought in Small Claims Court when debt or damages claimed do not exceed $6,000, and action does not involve title to, or interest in, land, entitlement of person under will, or libel, slander, breach of promise to marry, malicious arrest or prosecution, or false imprisonment. (§4). Hearings are conducted by Adjudicators who are appointed from members in good standing of Law Society of New Brunswick. (§17). At hearing, Adjudicator is not bound by rules of evidence. (§10). Procedure is designed to provide simple, expeditious, and informal manner to reduce costs and time. (§2).

Probate Court has power to take probate of wills and grant administration of estates and deal with all related matters. See category 13 Estates and Trusts, topic 13.09 Executors and Administrators.

Provincial Court has all powers, authority, criminal, and quasi-criminal jurisdiction vested in police magistrate or in two or more justices of peace sitting and acting together, under any law or statute of Province.

Judge shall have same protection and privileges as are conferred upon judges of The Court of Queen's Bench of New Brunswick, for any act done or omitted in execution of his or her duty. (c. P-21, §3.1).

Juvenile Courts.

See Youth Criminal Justice Act, Statutes Canada, 2002, c. 1, administered by Provincial Court (see c. P-21), powers to deal with crimes of young offenders, age 12 and over and under age 18. Children under age 12 immune from prosecution.

Ombudsman.

(c. O-5). Ombudsman may investigate administration by a department or agency or officer thereof of any law of New Brunswick, whereby any person is aggrieved or in opinion of Ombudsman may be aggrieved and may request department or agency to notify him within a specified time of steps it proposes to take to give effect to his recommendations and if any department or agency does not act upon recommendation of Ombudsman, refuses to act thereon, or acts in a manner unsatisfactory to Ombudsman, Ombudsman may send a copy of his report and recommendations to Lieutenant-Governor in Council and may thereafter make a report to Legislative Assembly.

6.02 LEGISLATURE:

Consists of Lieutenant Governor and one house, styled Legislative Assembly.

6.03 REPORTS:

Those recording Canadian cases include: Canada Supreme Court Reports, Canada Exchequer Court Reports, Canada Federal Court Reports, Canadian Criminal Cases, Canadian Railway Cases, Dominion Law Reports, Canadian Bankruptcy Reports, National Reporter, Labour Arbitration Cases, Insurance Law Reporter, Business Law Reports, Dominion Report Service, Reports on Family Law, Land Compensation Reports and in New Brunswick Maritime Province Reports (cited “M.P.R.”) and New Brunswick Reports (cited “N.B.R.”).

6.04 STATUTES:

Revised Statutes of New Brunswick, 1973, Private Statutes, and annual amendments and new legislation.

Uniform Acts.

No Uniform Acts are in force in Province.

7 CRIMINAL LAW

7.01 BAIL:

See topic 7.02 Criminal Law.

7.02 CRIMINAL LAW:

Governed by Canadian Criminal Code and c. P-22.1.

Bail is controlled by Canadian Criminal Code.

Compensation for Victims of Crime Act (c. C-14) repealed Mar. 31, 1996.

Custody and Detention of Young Persons Act, c. C-40. (see also Youth Criminal Justice Act, Statutes Canada, 2002, c. 1.) Young persons have rights and freedoms in their own right, including those stated in Canadian Charter of Rights and Freedoms, and in particular right to be heard in course of, and to participate in, processes that lead to decisions that affect them, and young persons should have special guarantees of their rights and freedoms. (§2[b]).

Lieutenant-Governor in Council may designate places or facilities of classes of places as places of secure custody, open custody or temporary detention. “Youth custodial facility” includes place of open custody, secure custody or temporary detention. (§1). Every young person who is detained in custody in youth custodial facility is (a) Subject to rules of conduct and discipline as set out in regulations, and (b) shall participate in programs provided under this Act and regulations. (§10).

Where person, who is under age of 16 and detained in youth custodial facility, requires medical treatment, and consent is refused or unobtainable from his parent or guardian, Minister may consent to treatment. (§12).

8 DEBTOR AND CREDITOR

8.01 ASSIGNMENTS:

Debts and Choses in Action.

By statute it is provided that any absolute assignment in writing under the hand of the assignor (not purporting to be by way of charge only) of any debt or other legal chose in action, of which express notice in writing shall have been given to the debtor shall be effectual in law (subject to prior equities) to pass and transfer the legal right from the date of such notice. If the debtor has notice that such assignment is disputed by the assignor, he is entitled to interplead the disputants. (c. J-2, §31).

Assignments of Wages.

Any assignment of wages or any portion thereof and used as security of a debt is invalid. (c. G-2, §31).

Book Debts.

C. P-7.1, §75 repealed Assignment of Book Debts Act. See category 20 Mortgages, topic 20.05 Personal Property Security.

Instruments Transferring Title.

Assignments of any mortgage or of any chattel real or of any lease required to be in writing must be by deed. No assignment of any trust shall be valid unless it be in writing, signed by the party assigning the same, or by his last will.

Worker's Compensation Act.

Unless with approval of Commission, no sum payable as compensation shall be capable of being assigned.

Notice.

Notice of assignment must be given to debtor before assignee may institute action.

8.02 ASSIGNMENTS FOR BENEFIT OF CREDITORS:

Governing statute is c. A-16. Statute does not allow for assignment for benefit of creditors. Law as to assignments is Bankruptcy and Insolvency Act. Statute does prevent preference in favor of one creditor.

8.03 ATTACHMENT:

Governing statute is c. A-2.

Actions in Which Allowed.

No attachment of property on commencement of any action. In obtaining judgment order for seizure and sale may issue. See topic 8.06 Executions.

Courts Which May Issue Order.

Court of Queen's Bench. (§1).

In Whose Favor Order May Issue.

Creditor. No restriction on nonresidents or foreign corporations.

Against Whom Order May Issue.

(1) Person indebted in a sum not less than $50 and departs from or conceals himself within Province with intent to defraud creditors; (2) person jointly or severally indebted not within Province during month next preceding application, and at time of contracting debt or at time fixed for payment thereof not resident in Province; (3) person jointly or severally indebted absent from Province for six months next preceding application and at time of contracting debt not resident in Province but became resident after contracting debt. (§4[1], §2).

Claims on Which Order May Issue.

Debt action and potential debt actions of not less than $50. Order may not issue on unmatured or contingent claims.

Grounds.

See subhead Against Whom Order May Issue, supra.

Proceedings to Obtain.

Order issued to sheriff on affidavit of creditor attesting to indebtedness and departure or concealment of debtor. Departure or concealment of debtor must be verified by affidavit of two witnesses. (§2).

Attachment Bond.

Not applicable.

Levy.

Sheriff can attach real and personal property. (§1).

Indemnity.

Sheriff indemnified out of estate of debtor or to pay costs of wrongful seizure. No action against sheriff unless erroneous taking malicious. (§5[2]).

Lien.

Not applicable.

Priorities.

Over all processes not actually executed. (§2).

Release of Property.

Debtor must satisfy creditors within time limits or pay to creditor amount awarded and costs. If debtor claims setoff, application may be made to judge to adjudicate dispute. (§§10, 11).

Sale.

If claim not satisfied within time limits sheriff may distribute proceeds of sale of property attached.

Third Party Claims.

All creditors entitled within time limits to file claims verified by affidavit with sheriff and to share in proceeds of sale of property of debtor. (§9[3]).

Vacation or Modification.

Not applicable.

8.04 BONDS:

Common law rules prevail. Bond of public officer taken in name of Queen. (c. I-13, §25).

Approved trust companies acting in fiduciary capacity not required to file special bonds in each matter.

8.05 CREDITORS' SUITS:

Common law rules prevail.

8.06 EXECUTIONS:

Governing statute is Memorials and Executions Act. (c. M-9 and R. 61).

Superior Courts.

Order of execution includes orders for seizure and sale, orders for possession of land and orders for delivery of personal property. Judgment for money may be enforced by order for seizure and sale. Judgment for payment of money into court may be enforced by order of seizure and sale. Judgment for recovery or delivery of possession of land may be enforced by issue of order for possession of land. Judgment for delivery of personal property, other than land or money, may be enforced by issue of order for delivery of personal property. Judgment requiring any person to do any act other than payment of money, or to abstain from doing anything may be enforced by contempt order.

Exemptions: Furniture, household furnishings and appliances reasonably necessary for debtor and his family; necessary and ordinary wearing apparel of debtor and his family; all necessary food and fuel for debtor and his family for three months; two horses and sets of harness, two cows, ten sheep, two hogs and 20 fowl, and food therefor for six months; any tools, implements and necessities used by debtor in practice of his trade, profession or occupation having cumulative market value of not more than $6,500, and one motor vehicle having market value of not more than $3,000 if required by debtor in course of or to retain employment or in course of and necessary to his trade, profession or occupation, but exemptions provided above do not apply to corporate debtor; seed grain and potatoes required for seedings and planting purposes to following quantities: 40 bushels of oats, ten bushels of barley, ten bushels of buckwheat, ten bushels of wheat and 35 barrels of potatoes; dogs, cats, and other domestic animals belonging to debtor; medical or health aids reasonably necessary to enable debtor or any member of his family to work or to sustain health. (§33).

Interest of annuitant under Government (Canada) Annuity Act is also exempt. (c. M-9, §33[2]).

Expiration.

If order is unexecuted it remains in force for two years, but may, before expiration, be renewed for two years, and so on from time to time.

Issuance.

It may issue at any time within six years from judgment, otherwise, application must be made to the court for leave.

Lien.

Order of seizure and sale, delivered to sheriff to be executed, binds personal property from time of actual levy. Real property is bound by memorial of judgment and is recorded in Registry Office for county in which such real property is situated.

Personal Property.

Includes goods and chattels, the equity of redemption in same (including leasehold interests in any lands) shares and dividends of a stockholder, mortgages, money, bank notes, checks, bills of exchange, promissory notes, etc.

Priority.

Creditors' Relief Act (c. C-33) provides that there shall be no priority among creditors by execution from Court of Queen's Bench. Where sheriff levies money on execution against property of debtor out of Court of Queen's Bench he must enter notice in his books stating that levy has been made, amount thereof, and money must be distributed ratably among all execution creditors and other creditors whose writs, or certificates, proved under oath, were in sheriff's hands at time of levy, or who shall deliver their writs or certificates to sheriff within one month from entry of notice; subject, however, to provisions as to retention of dividends in case of contested claims, and to payment of costs of creditors under whose writ amount was made. This does not apply to money received by sheriff from sale of property by him under interpleader order.

Stay of Execution.

Execution may be stayed by order of court or judge until such time as it or he thinks fit.

Supplementary Proceedings.

A judgment debtor may be examined as to his property and debts owing by and to him.

8.07 EXEMPTIONS:

See topics 8.10 Garnishment; 8.06 Executions, subhead Exemptions.

8.08 FORECLOSURE:

See topic 8.14 Liens; category 20 Mortgages, topics 20.05 Personal Property Security, 20.04 Mortgages of Real Property.

8.09 FRAUDULENT SALES AND CONVEYANCES:

Governing statute is c. A-16. Assignments or sales made or confessions of judgment given by any person in insolvent circumstances with intent to defeat or delay creditors, or to give one or more creditors preference over other creditors, are as against such creditor defeated or declared utterly void, and if any such transaction has effect of giving creditor preference it shall in respect of any proceeding brought within 60 days thereafter to set same aside or any assignment for general benefit of creditors made within 60 days, be presumed to be an unjust preference, whether same made voluntarily or under pressure—i. e., onus is upon debtor and preferred creditor.

Bulk Sales.

See category 3 Business Regulation and Commerce, topic 3.07 Bulk Sales.

8.10 GARNISHMENT:

Governing statute is c. G-2. Where amount unpaid on judgment of Court of Queen's Bench exceeds $80 and is not less than $40 exclusive of costs, any debt due to debtor may be garnished for satisfaction of judgment and collected from garnishee. Wages due judgment debtor for personal labour and services on hiring exempt from garnishment. (c. G-2). See also federal statute: Garnishment, Attachment and Pension Diversion Act, S.C., 1980-81-82-83, c. 100.

Also may obtain payment order for unpaid support orders in family matters. (§125[1]; Family Services Act, 1983, c. F-2.2).

Debt due from Crown is not subject to garnishment.

8.11 HOMESTEADS:

There is no homestead exemption.

8.12 INSOLVENCY:

Governing statute is c. A-16. Provincial legislation is practically superseded by Bankruptcy and Insolvency Act, R.S.C. c. B-3.

8.13 LEVY:

See topics 8.03 Attachment; 8.06 Executions.

8.14 LIENS:

Liens on Goods.

Person has lien on chattel on which he has expended money, labor or skill at request of owner. Wharfinger or gratuitous bailee has particular lien enforceable by sale of chattel, if claim is not paid after giving notice to owner, if whereabouts known. Jewellers including watchmakers have lien with power of sale. (c. L-6).

Mechanics' Liens.

Governing statute is c. M-6. Anyone who does any work or furnishes material to be used in improvement on land or buildings has lien. Liens are registered in registry office of county where lands affected are situated. They must be registered within 30 days or in some cases 60 days from completion of furnishing materials or labor. Liens for wages can also be registered in like manner. Proceedings to enforce liens must be by action in Court of Queen's Bench, undertaken within 90 days from registration of lien or expiry of period of credit. Action shall be deemed to be discontinued one year after it was commenced unless it has been set down for trial or application has been made to court for order continuing action. (§27).

Woodworker's Lien.

Given for work on logs or timber. Statement of claim must be filed within 30 days after last work or 20 days in case of stream driving. (c. W-12).

W-12 is changed from Woodsmen's Lien Act to “Woodworker Lien Act”.

Redemption.

No right of redemption exists under the various statutes authorizing lienholders to sell property subject to lien, but generally speaking, lienholder must deliver up property subject to lien to person entitled, on payment, at any time before actual sale, or on expiration of notice required by some statutes to be given of debt, interest and all costs, expenses of advertising, etc.

8.15 MECHANICS' LIENS:

See topic 8.14 Liens.

8.16 PLEDGES:

Common law rules prevail, except as to pawnbrokers who are regulated by c. M-22.

8.17 RECEIVERS:

Appointed by court when just and convenient. Court appointed receiver may be required to give security, and must give security duly to account for what he will receive. (R. 41). Some security instruments such as debentures, mortgages, trust deeds, etc., may provide for private appointment of receiver. Receiver appointed for business corporation must give notice of such appointment to Director of Corporations and make periodic reports to such Director, and publish notice in The Royal Gazette. Receiver must also comply with Part XI of Bankruptcy and Insolvency Act. See Canada Law Digest, category Debtor and Creditor, topic Bankruptcy.

8.18 REDEMPTION:

See topic 8.14 Liens; categories 20 Mortgages, topic Mortgages of Real Property; Taxation.

8.19 STAY OF EXECUTION:

See topic 8.06 Executions; category 5 Civil Actions and Procedure, topic 5.03 Appeal and Error.

8.20 SUPPLEMENTARY PROCEEDINGS:

See topic 8.06 Executions.

8.21 USURY:

See Canada Law Digest, category Business Regulation and Commerce, topic Interest.

9 DISPUTE RESOLUTION

9.01 ARBITRATION AND AWARD:

Governing statute is c. A-10.1.

Submission.

Written agreement to submit present or future differences to arbitration, whether arbitrator is named therein or not. Chapter applies also to every arbitration under any act as if arbitration were pursuant to submission. (§§1, 2[2]).

Number of Arbitrators.

If no other mode of preference is provided, it shall be to a single arbitrator; if reference is to two arbitrators, they may appoint an umpire at any time within period during which they have power to make an award. If reference is to three arbitrators, award of any two shall be final and binding. (§9).

Court Control.

Proceedings and arbitrators are subject to control by Court of Queen's Bench. Court may remit to arbitrators for consideration, and in event of misconduct by arbitrator or of award being improperly obtained, court may set aside award. (§45[5]).

A final award, not remitted or set aside, may be enforced upon an order from court in same manner as a judgment or decree of court. (§50[1]).

Questions of law can be submitted to Court of Appeal in form of stated case. (§49).

As a general rule awards are final and unappealable except upon errors of law or impropriety; they correspond in effect to a verdict by a jury. (§45[1]).

10 DOCUMENTS AND RECORDS

10.01 ACKNOWLEDGMENTS:

Governing statute is c. R-6 and c. L-1.1. Before registration of any instrument, its execution must be either acknowledged by person executing same or proved by oath of subscribing witness. (§44[1]). Under Land Titles Act certificate of execution is required from notary public or execution may be proved by affidavit of attesting witness. (§55).

Within Province.

Officers who may take an acknowledgment or proof by oath are a judge of Court of Queen's Bench; member or ex-member of Executive Council; registrar or deputy-registrar of deeds; notary public. Also in case of proof by oath, commissioner of oaths. (§44[1][a][c]).

Outside Province.

Officers who may take an acknowledgment are a notary public; mayor or chief magistrate of incorporated municipality; judge of Supreme Court of Judicature of Great Britain or Northern Ireland; Canadian Minister, Ambassador, Consul, Vice-Consul or Consular Agent; Canadian Government Trade Commissioner or Assistant, exercising his functions outside of Canada; judge or Lord of Session in Scotland; judge of court of supreme jurisdiction in any British dominion, colony, province or dependency; British Minister, Ambassador, Charge D'affaires, Consul, Vice-Consul, Acting Consul, Pro-Consul, or Consular Agent of Her Majesty, exercising functions in any foreign place; or Governor of any State. (§44[1][b]).

Officers who may take proof by oath are a commissioner of oaths; notary public; mayor or chief magistrate of any incorporated municipality; judge of Supreme Court of Judicature of Great Britain or Northern Ireland; judge or Lord of Session in Scotland; judge of a court of supreme jurisdiction in any British dominion, colony, province or dependency; or Governor of any State. (§44[1][d]).

Appointment of nonresident commissioner of oaths shall expire after five years from 31st day of Dec. in which appointment was made or renewed. (c. C-9, §9[2]).

Persons in or with Canadian Armed Forces.

No statutory provisions. See topic 10.02 Affidavits, same subhead.

General Requirements as to Taking.

Officer must have knowledge or proof of identity of person acknowledging or proving by oath.

No person who is a party to instrument may witness execution of instrument by another party, or take affidavit or acknowledgment of execution of instrument. (c. R-6, §36).

General Requirements of Certificate.

To be under seal of office, if any, of officer taking. (§44[1]).

Married Woman.

No special requirements.

Attorneys in Fact.

Not applicable.

Corporations.

No formal proof of execution required where corporate seal affixed thereto and attested to by proper officers. Unless instrument is to be recorded in which case affidavit of authorized officer must be attached stating that seal is seal of corporation and that signatures are those of authorized officers. (§43[2]).

Foreign Acknowledgments.

See subhead Outside Province, supra.

Effect of Acknowledgment.

Required before instrument can be registered. (§44[1]).

Proof by Subscribing Witness.

As indicated above, it can be a substitute for acknowledgment.

Authentication.

There is no requirement for authentication of certificate of acknowledgment taken within province. Handwriting and certificate of judge taking acknowledgment or proof by oath outside province must be authenticated under seal of notary public. (§44[1][b] & [d]). There are no other provisions requiring authentication of certificate of acknowledgment either within or without province. No fees are established for any authentication required by law of province or any other jurisdiction, such fees being determined in discretion of person authenticating.

Forms.

Acknowledgment for Individuals:

Notary Public: name __________

address __________

Jurisdiction: __________

Place of Residence of

Notary Public: __________

Person Who Executed

the Instrument1: name __________

Place of Execution: __________

Date of Execution: __________

I, the notary public, a Notary Public in and for the jurisdiction specified above and residing at the place of residence specified above, do hereby certify:

1. That the person who executed the attached instrument personally appeared before me;

2. That the person is known to me or the person's identity has been proved to my satisfaction;

3. That I explained to the person the contents of the attached instrument to the best of my professional abilities;

4. That, after receiving the explanation, the person executed the attached instrument voluntarily at the place and on the date specified above;

5. That the person acknowledged that he or she is of the age of majority;

6. That I have ascertained that the name by which the person is identified in the attached instrument is the person's name in accordance with the *Naming Conventions Regulation* under the *Land Titles Act;* and

7. That I have signed the attached instrument next to the signature of the person for whom this Certificate of Execution has been prepared, with my name printed legibly underneath my signature.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed my Notarial Seal.

Place: __________

Date: ___________

Notary Public: signature ___________

1Multiple instances are allowed.

Validating Acts.

Not applicable.

Alternative to Acknowledgment or Proof.

No statutory provision.

10.02 AFFIDAVITS:

Governing statute is Commissioners for Taking Affidavits, c. C-9.

Within Province.

All lawyers and other persons either appointed as commissioners of oaths or having similar power pursuant to legislation or by virtue of office may administer oaths required in affidavit, declaration, or affirmation. Particular legislation often designates who may administer oaths in certain matters. Person shall not be appointed under §2 (a) unless person (i) Is at least 19 years and (ii) Canadian citizen; (b) person not convicted of offence under Criminal Code (Canada) or criminal law outside Canada. (§2[2.1]).

Outside Province.

Commissioner of oaths for New Brunswick, notary public or commissioner of oaths may administer oaths required in an affidavit, declaration or affirmation. (§11). See topic 10.01 Acknowledgments, subhead Outside Province.

Persons in or with Canadian Armed Forces.

Commissioned officers in active service with rank of Major or higher in military forces may take oaths required in affidavits, declarations or affirmations to be used within province. (§12).

General Requirements as to Administration.

No statutory provisions.

General Requirements of Jurat.

Commissioner appointed pursuant to §2 must write date on which his appointment expires. (§5). Commissioners by virtue of office must write below their signature “Commissioner of Oaths being a (. . . . . nature of office. . . . .).” (§1[2]). Solicitors enrolled in Court of Queen's Bench must write below their signature “Commissioner of Oaths Being a Solicitor.” (§1[1]).

Use of Affidavit.

In Court of Queen's Bench or Probate Courts.

Form.

Form 53 A

CERTIFICATE OF COMMISSIONER

I, ..., hereby certify that the proper oaths were administered by me to the person recording the evidence, to the witness(es) the record of whose evidence is attached hereto and to any interpreter called upon by me to interpret any evidence, and that the said evidence was properly taken by me, and that the evidence was correctly transcribed.

. . . .

(signature of Commissioner)

DATED at . . . ., this . . . . day of . . . ., 20. . . . .

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Alternative to Affidavit.

Solemn declaration pursuant to §16 of Evidence Act c. E-11.

10.03 COMMISSIONS TO TAKE TESTIMONY:

See category 5 Civil Actions and Procedure, topic 5.09 Depositions and Discovery.

10.04 LAND TITLES ACT:

Provides for registration of title to land and provides statutory authority for guaranteed land title. (c. L-1.1).

10.05 NOTARIES PUBLIC:

Governing statute is c. N-9. Notaries public are officials appointed by Lieutenant-Governor-in-Council, under Great Seal of province. While in good standing with Law Society of N.B., all barristers and attorneys are notaries public. Other persons desirous of being appointed as notaries public, are subject to examination in regard to their qualifications for said office by Minister of Justice and no person may be appointed notary public without certificate from Minister of Justice that they have examined applicant, finds him or her qualified for office, and they must believe that notary public is needed for public convenience in place where such applicant resides and intends to carry on business.

A notary public has authority to draw and prepare any instrument relating to real estate, to attest all commercial instruments that may be brought before them for public protestation, to do any work or perform any acts ordinarily pertaining to their office, and to demand, receive and have all rights, profits and advantages, rightfully appertaining and belonging to said calling of notary public during pleasure, and during residence in this province. Every such notary may administer all oaths, affirmations or declarations required to be administered, sworn, affirmed, made or taken under and by virtue of any act of New Brunswick Legislature, or of Parliament of Canada or Great Britain or of legislature of any province or British colony or by laws of any foreign country, and to attest same under their hand and notarial seal.

The authority of a notary extends throughout the province. They are not required to append to their signature any statement as to date of expiration of their commission.

10.06 RECORDS:

Governing statute is c. R-6. All deeds or other documents affecting real estate must be registered at length in office of registrar of deeds for county in which lands lie. Deeds and other documents affecting lands take priority in order in which they are registered.

All instruments must have 1½ inch margin on top and left side and if both sides of paper are used, similar margin is required on right side of reverse side. Paper must be white measuring 8½ by 14 inches.

Torrens System.

See topic 10.08 Torrens Act.

Land Titles.

See topic 10.08 Torrens Act.

Transfer of Decedent's Title.

As all real property of a decedent, testate or intestate, vests in his executor or administrator (see category 13 Estates and Trusts, topic 13.09 Executors and Administrators), transfer of title to devisees or heirs at law ordinarily can be effected only by deed of personal representative, which should be recorded like any other deed. But special provision is made for cases where representative fails to execute such deed when it becomes his duty so to do.

Vital Statistics.

Births, deaths and marriages must be reported to sub-deputy registrar of vital statistics for area in which event occurred. Records thereof are kept in office of Registrar General. (Governing statute: Vital Statistics Act, c. V-3).

Fees: $10 for search of records and $25 for certified certificates of birth, marriage or death.

10.07 SEALS:

Common law rules prevail.

All orders, writs and decrees issuing from any court must have the official seal of such court affixed thereto. All certified copies of documents issued by officials having an official seal must have such seal affixed thereto. Letters L. S. may be legally substituted on copies only of original document.

Deed must have fixed or impressed upon it seal which has been expressly or impliedly acknowledged by party bound by deed to be his. No particular kind of seal need be used, but it is better that there be either impression or attachment of separate paper or substance.

Corporate Seals.

Power of attorney of a corporation must be under common seal of corporation if it empowers attorney to execute deeds on its behalf. Corporate seal is required for any documents which if executed by an individual would require a seal. Instrument signed by director, officer or agent of corporation is not invalid merely because seal is not affixed.

Effect of Seal.

Undertaking under seal may be enforced even though it is not supported by other consideration.

10.08 TORRENS ACT:

Nonexistent. See topic 10.04 Land Titles Act.

10.09 VITAL STATISTICS:

See topic 10.06 Records.

11 EMPLOYMENT

11.01 EMPLOYER AND EMPLOYEE:

See topic 11.02 Labour Relations.

11.02 LABOUR RELATIONS:

(See Employment Standards Act, c. E-7.2, Industrial Relations Act, c. I-4 and Labour and Employment Board Act, c. L-0.01.)

Common law as to master and servant generally prevails. Minister of Training and Employment Development is responsible for general administration of Act. Minister appoints Director from within civil service. Labour and Employment Board established to investigate complaints and conduct hearings as Director deems necessary or as requested in writing. As of Nov. 14, 1994 Labour and Employment Board replaced Employment Standards Tribunal, Industrial Relations Board, Pensions Tribunal and Public Service Labour Relations Board. (c. L-0.01, §24).

Dismissal.

Employer must give employee employed for more than six months and less than five years at least two weeks' written notice when dismissing without cause. In case of employee employed more than five years employer must give at least four weeks' written notice. In lieu of notice employer may pay wages equal to notice period. Common law rules still prevail. Act only sets out minimum requirements. (§§30, 31).

Hours of Work.

No limit on number of hours employee may work. Lt.-Gov. in Council prescribes maximum number of hours employer may require employee to work. Any employee working in excess of prescribed maximum hours must be paid one and one-half times minimum wage rate. (§§14, 16). No employee under 16 is to be employed in place of employment for more than six hours per day except with written authority of Director, in employment that is or is likely to be unwholesome or harmful to person's health, welfare or moral or physical development, for more than three hours on school day, on any day that would require employee to spend more than total of eight hours attending school and working, or between 10 p.m. and 6 a.m. (§39). Employee may refuse to work on Sun., if work in retail business or part of retail business that is exempted from Days of Rest Act. (§17.1[2]).

Terms.

Pregnant employee is to be permitted up to 11 weeks prior to delivery, to take total of 17 weeks of maternity leave. Upon reporting back to work employee must be permitted to resume working in position or equivalent she held before maternity leave with no decrease in pay or loss of seniority or benefits accrued up to commencement of leave. Upon request of employee who is natural parent of newborn or unborn child, or who is adopting child, employer shall grant leave of absence not exceeding 52 consecutive weeks. (§44.02[2]-[8]).

Wages.

Lt.-Gov. in Council makes minimum wage orders on advice of Minimum Wage Board. Priority given in respect of three months' wages over ordinary or general creditors where assignment made for benefit of creditors, where company as employer in process of winding-up, where employer deceased, or where employer execution debtor. Wage claims more than three months same as ordinary creditors. (c. W-1). When employment terminated all wages and salary owed to employee to be paid not later than next regular pay day and never beyond 21 days after last day of employment. (c. E-7.2). Employee vacation pay governed by c. E-7.2. (§§24-27). Paid vacation of lesser of two weeks or equal to one day per each calendar month employee worked or in some circumstances 4% of earnings.

No employer may pay employee of one sex at different rate of pay from that which he pays to employee of other sex for work that is performed in same establishment, is substantially same in nature, requires substantially same skill, effort and responsibility, and, is performed under similar working conditions, except where payment is made pursuant to seniority system, merit system, system that measures earnings by quantity or quality of production, or any other system or practice that is not otherwise unlawful. (§37.1). Subject to any pooling system, tips and gratuities (including surcharges paid in lieu of tip or gratuity) are property of employee to whom or for whom they are given and shall not be withheld by employer, notwithstanding any consent given by employee. (c. E-7.2, §13).

Employment Standards Act does impose minimum reporting wage. Employer shall pay non-bargaining employee for not less than three hours of work at minimum wage rate or for hours employee works at employee's regular wage rate, whichever is greater, if employee reports for their shift, has regular wage rate of less than twice minimum wage rate and is regularly employed for more than three consecutive hours in shift. (§16.1[1]).

Assignments.

See category 8 Debtor and Creditor, topic 8.01 Assignments, subhead Assignments of Wages.

Child Labour.

Young persons (under 16) may be prohibited from being employed by Director if he deems employment dangerous or injurious to their health or welfare. Young persons (under 14) may not be employed in specified excluded types of work without written authority of Director. (§§39, 40).

Industrial or occupational safety standards governed by c. O-0.2.

Labour Unions.

Governing statute is c. I-4 for labour relations outside of public sector. Trade unions legal entities capable of suing and being sued. Labour and Employment Board is empowered to certify unions as bargaining agents. Only certified unions have access to conciliation. Time limits introduced in collective bargaining.

Every person has right to join a trade union. Closed shop provisions in agreements allowed. Union cannot refuse membership to anyone who meets terms and conditions applied to other members. (c. H-11). Definition of employee includes professional groups including legal.

Labour Disputes.

Unfair labour practices detailed in c. I-4, §§3-10. Law deals with unfair practices relating to freedom of membership in trade unions and their formation. Provision is made for accreditation of employers organizations.

Where a collective agreement is in operation, no employer may declare lockout and no employee bound by agreement may strike except in accordance with Act.

Workers' Compensation Act.

Compensation for injuries to workers is regulated by Workers' Compensation Act (c. W-13) and Occupational Health and Safety Act (c. O-0.2), and is administered by Workplace Health, Safety and Compensation Commission consisting of those persons who from time to time comprise board of directors (c. W-14, §2).

All employers are classed and assessed according to the nature of the industry carried on. Act applies to employers or workers in or about any industry except: (1) Casual employees, (2) persons who play sports as their main source of income, (3) outworkers to whom materials are given to be finished in own home or other noncontrolled premises, (4) family of employer under 16 years and (5) domestic servants. “Industry” is defined to include any operation, undertaking or employment. (§2[3]).

Compensation is payable where the accident or death arises out of and in course of employment except if caused intentionally or wholly or principally due to intoxication or serious or wilful misconduct on part of worker and did not result in death or serious and permanent disability of worker. (§7).

Worker does not forfeit his right of action at common law or by statute against persons other than his employer. Worker may either claim compensation or bring action and if he does not recover by action as much as he would be entitled to under Act he may claim the difference as compensation. Commission on paying compensation is subrogated to rights of worker. (§10).

No compensation is payable unless application made within one year after occurrence of accident or in case of death within six months of time of death except that Commission may pay claim in any event if they decide to do so. (§16). Scale of compensation depends on average earnings and earning capacity calculated by regular remuneration worker was receiving at time of injury, as may appear to Commission best to represent actual loss of earnings, unless worker is under 21 years of age and it is established that under normal conditions his wages will probably increase, in which case increase is considered in arriving at his average earnings or earning capacity which it any case shall not exceed New Brunswick Industrial Aggregate Earnings per year. (§37).

Compensation is payable out of “The Accident Fund” which is created and maintained by annual assessment of the employers in each class rated on the annual payroll. Classification of the industry is at the discretion of the Commission.

Temporary industry may be required to give such security to the Commission as is deemed adequate. If any assessment not paid by employer when due interest at rate prescribed by regulation of Commission may be added and collected as part of such assessment. (§64).

By Part II of the Act if any injury is caused to worker by reason of defect in machinery, etc., or by neglect of employer or any person in his service, worker or his dependents is entitled to recover from employer damages sustained.

Contributory negligence on the part of the worker is not a bar to recovery, but is to be taken into account in assessing damages.

Where employer neglects or refuses to furnish any estimate or information as required is, in addition to any other penalty or liability to which he may be subject, required to pay to Commission full amount or capitalized value of compensation payable in respect of any accident to worker in his employ that happens during period of such default.

The Commission has jurisdiction to inquire into and determine all matters and questions of law and fact and its decision is final and conclusive except upon any question as to its jurisdiction or upon any questions of law, when appeal lies to Court of Appeal, after permission obtained from judge of Court of Queen's Bench. Commission has same powers as Court of Queen's Bench for compelling production of documents and attendance and examining of witnesses. (§§31, 32).

Smoke-free Places Act.

According to this Act, no person shall smoke in enclosed public place, in indoor workplace, in group living facility (for which there are exceptions), in public vehicle, in vehicle used in course of employment carrying two or more employees, or on school grounds. (§3).

Under certain exceptions, smoking is permitted in hotel rooms. (§5).

Nothing in this Act affects rights of Aboriginal people respecting traditional aboriginal, spiritual or cultural practices or ceremonies. (§2[2]).

This Act does not apply to penitentiaries, federally regulated airports, Canadian Forces bases or to any other place occupied by federal work or undertaking. (§2[3]).

This Act was proclaimed and came into force Oct. 1, 2004.

As direct result of this Act, §124.42(1) of Liquor Control Act has been amended. Following amendment of Liquor Control Act, Minister may without hearing and in accordance with regulations, cancel licence of class referred to in subsection 72.1(1) or suspend licence for period of time Minister considers appropriate if licensee has been convicted of offence under §7, subsection 8(1) or §9 of Smoke-free Places Act that took place within premises in respect of which licence was issued.

Unemployment Compensation.

See Canada Law Digest.

11.03 WORKERS' COMPENSATION LAW:

See topic 11.02 Labour Relations.

Smoke-free Places Act.

(c. S-9.5). According to this Act, no person shall smoke in enclosed public place, in indoor workplace, in group living facility (for which there are exceptions), in public vehicle, in vehicle used in course of employment carrying two or more employees, or on school grounds. (§3).

Under certain exceptions, smoking is permitted in hotel rooms. (§5).

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12 ENVIRONMENT

12.01 ENVIRONMENTAL REGULATION:

Generally.

Provisions.

Governing statute is Clean Environment Act, c. C-6. Lieutenant-Governor in Council has power to make regulations which prescribe what shall be contaminant or waste under Act. Lieutenant-Governor in Council may establish Regional Solid Waste Commission for region of province (§15.3[1]) for control, reduction, elimination or prevention of contamination or for management of solid waste and operation of solid waste collection and disposal facilities (§15.1[1][a]). Minister of the Environment may issue Ministerial Order to control or stop contamination of environment. (§5). Minister may designate inspectors for purposes of Act. (§23).

Prohibited Acts of Pollution.

No person shall release any contaminant or waste into environment if such act could (a) Affect quality or construction of environment, (b) endanger health, safety or comfort of person or animal life, (c) cause damage to property or plant life, (d) interfere with conduct of business or normal enjoyment of life or property unless that person is acting under and in compliance with authority or permission given under Act of Legislature. (§5.3).

Enforcement.

On reasonable and probable grounds that contaminant directly or indirectly affects environment, Minister or person designated by him may enter premises, and take all necessary action to control, reduce or eliminate pollution. (§5.01). Minister is liable for unnecessary damages caused by his actions.

Penalties.

Violation of Act or regulation, or noncompliance with Order issued under Act is offence punishable by summary conviction, (a) Individual, by fine of $500 to $50,000 and imprisonment on default of payment, (b) person other than individual, fine of $1,000 to $1,000,000. Fine is imposed for each day of violation. (§33).

Air Quality.

Provisions.

Governing statute is Clean Air Act, c. C-5.2. Purpose of Act and regulations: Support and promote protection, restoration, enhancement and wise use of environment in keeping with principles of controlling release of contaminants and ameliorating their impacts as essential part of maintaining ecosystem integrity, protection of human health and general well-being of society. Everyone should be responsible for consequences of their actions on environment.

Minister of Environment may designate as contaminant solid, liquid, gas, microorganism, odour, heat, cold, sound, vibration, radiation or combination of any of them, and establish maximum amounts, levels or concentration of contaminant or class of contaminant that may be released, alone or in combination with another contaminant or any other substance, into air, which maximum amounts, levels or concentrations may vary according to manner in which contaminant is released, according to area in which released, found or according to any other factor. (§7).

Advisory Committee.

Minister may appoint persons to intergovernmental committees, Air Resource Management Committees or other advisory committees to make recommendations to Minister regarding proposals, policies and programs, receive comments from public and develop methods to avoid and resolve conflicts and problems which concern air. (§14[1]).

Enforcement.

Where contaminant has been released into air Minister may enter upon any area, land, place or premises together with such persons, materials and equipment as considered necessary and take further action and use whatever force necessary to prevent, control, reduce or eliminate release of contaminant and ameliorate situation. (§18[1]). Designated inspectors are granted powers under Act to control, reduce or eliminate contamination. (§23).

Minister may make order requiring person to: (a) Control or reduce rate of release of any contaminant, (b) eliminate release of any contaminant into air permanently, for specified period or in circumstances set out in order, (c) alter manner of release of any contaminant, (d) alter procedures in control, reduction or elimination of release of contaminant, (e) install, replace or alter equipment or thing designed to control, reduce or eliminate release of contaminant, (f) conduct investigations, tests, prepare reports to submit to Minister or (g) implement clean-up, site rehabilitation of land, premises or personal property or other remedial action. (§17[1]).

Penalties.

Violations of Act, regulations or failure to comply with order or term or condition of registration commits offence and is liable on conviction: (a) Individual by fine of not less than $500 to $50,000 and (b) person other than individual, fine of not less than $1,000 to $1,000,000. For offenses continuing for more than one day, fine payable shall be product of fine imposed under §32(1) and number of days on which violation or failure continues.

Additional fine, where in opinion of judge, offence committed for financial advantage or to avoid financial burden of compliance in amount to ensure no financial advantage gained or such fine as appropriate in circumstances notwithstanding any maximum outlined under §§32(1), 33.

Water Quality.

Provisions.

Governing statute is Clean Water Act, c. C-6.1. Minister of Environment has authority to supervise discharging, emitting, leaving, depositing, or throwing any contaminant or waste into water. Control of all water in Province is vested, and is deemed to have been vested at all times, in Crown in right of New Brunswick. Lieutenant-Governor in Council may make regulations prescribing what shall be contaminant or waste under Act. (§9).

Advisory Committee.

Land and Water Advisory Committee is responsible for making recommendations to Minister of Environment concerning land and water use policies, and is also charged with reviewing content and operations of Act and its regulations. (§32).

Permits.

Persons planning project that diverts all or part of watercourse shall, before proceeding with project, obtain permit from Minister of Environment. Act requires well-drillers to file report with Minister. Well owners who have had their wells bored, drilled, dug or redrilled are required to have water sample tested for inorganic substances and microorganisms, and to give notice of test results to consumers of water. Every owner of public water system shall have water in public water supply system tested.

Enforcement.

Minister may issue Ministerial Order to control or reduce rate of discharge of contaminants or waste into water, or to stop such discharge either temporarily or permanently. Act confers upon Minister and his designates powers of search and seizure similar to those granted by Clean Environment Act. (§4).

Penalties.

Persons contravening Act may be found guilty on summary conviction. Maximum penalty for individual is fine of $500 to $50,000, or in default of payment, six months in jail. Maximum for corporate offender is $1,000 to $1,000,000 fine. For offences continuing for more than one day, fine payable shall be product of fine imposed under §25(1) and number of days on which violation continues. Notwithstanding maximum fines set out above, where offence was committed for financial advantage or to avoid financial burden of compliance, judge may impose any fine which is appropriate in circumstances.

Prohibited Acts of Pollution.

To be prescribed by regulation. Lt.-Gov. in Council may exempt any person from provisions of Act prohibiting discharge, emission, leaving, depositing or throwing contaminants or waste into air, into or upon soil or water where person authorized by any other Act or agreement prior to coming in force of this Act.

Enforcement.

Minister and other necessary persons may enter upon any land or premises using such force as Minister considers necessary to effect compliance with Ministerial order. Minister may designate any person as inspector for purposes of Act. Inspector may, at any reasonable time upon production of means of identification, for purposes of enforcing Act, enter any area, place or premises, except private dwelling where he reasonably believes any contaminant or waste is being released, and search. May inspect any installation, plant or machinery and test any process of production or manufacture he believes is producing or releasing contaminant or waste and take samples of such. May enter any area, place or premises other than private dwelling, inspect any installation, etc. to determine whether water has been, is being or will be, used or diverted contrary to Act. Minister may designate any person as analyst for purposes of Act. Certificate of analyst of his examination of sample submitted to him by inspector, stating result of examination is admissible in evidence in any prosecution and in absence of evidence to contrary is proof of statements contained without proof of signature or official character of person appearing to have signed.

Injunction.

Without leave of Attorney-General no injunction can be applied for which, if granted, would delay or prevent construction or operation of any manufacturing or industrial plant on ground that discharge from such plant injures some other interest. (Judicature Act, c. J-2, §33).

Endangered Species.

Governing statute is c. E-9.101. “Endangered Species” means any species or subspecies of fauna or flora threatened with imminent extinction or imminent extirpation throughout all or significant portion of its range and designated by regulation to be endangered. Lieutenant-Governor in Council may make regulations declaring any species or subspecies of fauna or flora to be endangered.

No person shall: (a) Possess member or any part of member of endangered species or regionally endangered species, (b) wilfully or knowingly kill or attempt to kill, injure, disturb or interfere with member or any part of member of endangered or regionally endangered species, (c) wilfully or knowingly destroy or attempt to destroy, disturb or interfere with nest, nest shelter or den of member of endangered species of fauna or regionally endangered species of fauna and (d) wilfully or knowingly destroy or attempt to destroy, disturb or interfere with critical habitat of member of endangered species or regionally endangered species. (§3).

Person who violates or fails to comply with either of these sections commits offence punishable under Provincial Offences Procedure Act. (§6).

In conjunction with Endangered Species Act is Protected Natural Areas Act, c. P-19.01. Purpose of act is to protect biological diversity of flora, fauna by protecting, conserving and managing lands that are representative of ecosystems within province that contain unique, endangered or unusual assemblages of flora or fauna, or contain ecosystems that have been altered by humans and offer opportunities for study of their recovery. (§3).

Government has established protected areas on Crown lands that are either Class 1 Protected Natural Area—all activities are prohibited, or Class 2 Protected NaturalArea—limited activities as outlined in act are permitted. (§§11, 12).

Upon reasonable and probable grounds that offence has been committed within Protected Natural Area forest service officer has power to search and seize any evidence. (§25). Fines range from $100 to $100,000 and/or term of imprisonment of not more than six months. (§30).

Fisheries.

Governing statute is c. F-14.1. Applies to all hunting and angling and rights of hunting and angling, and all matters relating thereto, in respect of which legislature has authority to legislate for purposes of this Act, but shall not authorize, lease, license or permit any interference with navigation of navigable waters. (§2).

Provisions.

Regulates artificial propagation of fish, fishing leases of crown waters, establishment of close seasons, and licensing. Salmon fishing prohibited except by means of fly fishing.

Licenses.

Available from provincial fishery or game warden offices or from most sporting goods stores. No nonresident shall fish for, take or kill any fish with rod and line in any Provincial waters without holding license to do so. Such nonresidents must be accompanied by guide licensed under Fish and Wildlife Act (c. F-14.1), unless authorized by Minister to angle without guide.

Penalties.

Fine depends upon offence and minimum and maximum amounts are set out in Schedule “A” to Act. Imprisonment for term of seven days to two months is mandatory for certain offences. (§104[2]). Illegally used fishing gear is subject to confiscation.

Inspection.

Conservation officers may inspect any firearm or ammunition in wildlife resort. (§11.1).

Arrest, Search and Seizure.

Conservation officer has power to search without warrant any place where he has reasonable and probable grounds to believe that there is evidence of offence under this Act, and where it would be impracticable to obtain warrant. (§21.2). Every conservation officer may seize any vehicle, aircraft or boat that he has reasonable and probable grounds to believe was knowingly used in commission of offence under this Act, or any vehicle, aircraft or boat in which he finds anything which leads him to believe offence under this Act has been committed. (§24). Every conservation officer may also, in discharge of his duties, enter upon and pass through private property without being liable for trespass. (§23).

Pesticides.

Governing statute is c. P-8. Regulates sale and application of pesticides within Province. Administered by eight to ten member Pesticides Advisory Board. Vendor's license is $150 if license authorizes operation of pesticide storage area. License without authorization is $50. Pesticide operator's license is $150. Both licenses are valid until first day of Jan. next following date of issue. (§§15, 32). If Board refuses to issue license, appeal this to Minister of Environment. Permit required to apply pesticide to any body of water.

"Pesticides" means any product, device, organism, substance or thing or combination of any products, devices, organisms, substances or things that intended to be or represented as, sold as or used as means for: (a) Directly or indirectly controlling, preventing, killing, destroying, mitigating, attracting or repelling any pest, or (b) altering growth, development or characteristics of any living plant that is not pest.

Penalties.

Breach of any provision is offence punishable on summary conviction to fine not exceeding $50,000 or to imprisonment of not more than one year.

13 ESTATES AND TRUSTS

13.01 ADMINISTRATION:

See topic 13.09 Executors and Administrators.

13.02 ADVANCEMENTS:

See topic 13.07 Descent and Distribution.

13.03 ALLOWANCES:

See topic 13.09 Executors and Administrators.

13.04 CLAIMS:

See topic 13.09 Executors and Administrators; category 5 Civil Actions and Procedure, topic 5.17 Pleading.

13.05 DEATH:

Governing statute is c. P-15.1, Presumption of Death Act. Court of Queen's Bench may order person absent and unheard of to be presumed dead for all purposes or for such purposes as are specified in order. (§2[1]). Where claim is made under insurance policy based on presumption of death of insured, insurer may apply to Court of Queen's Bench or judge thereof for declaration as to presumption of death.

Order made under this Act is not proof of death of person whose life is insured under policy of life insurance for purpose of claiming under that policy. (§5[2]).

Survivorship.

Governing statute is c. S-20. Where two or more persons die under circumstances rendering order of their deaths uncertain, it is presumed, for all purposes affecting title to property, that property is to be distributed on basis that its owner had survived co-decedent. If such persons are insured and beneficiary under life insurance policy and there is no substitute beneficiary, proceeds are paid to personal representative of insured.

Action for Death.

Caused by wrongful act, neglect or default may be brought by executor or administrator of decedent for benefit of decedent's wife, husband, parent, child, brother and sister or any of them. Expenses incurred or pecuniary loss sustained by decedent prior to death may also be recovered in such action. Court may apportion amount awarded among beneficiaries of action. Action must be commenced within two years after death. Governing statute is c. F-7, Fatal Accidents Act.

13.06 DECEDENTS' ESTATES:

See topics 13.07 Descent and Distribution; 13.09 Executors and Administrators; 13.15 Wills.

13.07 DESCENT AND DISTRIBUTION:

Governing statute is Devolution of Estates Act, c. D-9. Real and personal estate of decedent dying intestate, descends and is distributed as follows (c. D-9):

Entire estate, if there is no spouse, goes to following, each class of which there is a member living taking to exclusion of subsequent classes: (1) Issue, per stirpes; (2) father and mother equally or all to survivor; (3) brothers and sisters equally, issue of deceased brother or sister taking share to which parent would have been entitled if alive; (4) nephews and nieces equally, but no representation allowed among collaterals after children of brothers and sisters; (5) equally among next of kin of equal degree of consanguinity; in no case shall representation be made. (§§23, 25-28).

Degrees of kindred are computed by counting upward from the intestate to the nearest common ancestors and then downward to the relative. (§29).

Kindred of half blood inherit equally with those of whole blood in same degree.

Surviving Spouse.

If intestate dies leaving widow and one child, following shall go to widow: any interest of intestate in property that is marital property of intestate and widow; and one-half of residue of intestate's estate. If intestate dies leaving widow and children, following shall go to widow: any interest of intestate in property that is marital property of intestate and widow; and one-third of residue of intestate's estate. If child dies leaving issue and such issue is alive at date of intestate's death, widow shall take same share of estate as if child had been living at that date. If intestate dies leaving issue, his estate shall be distributed, subject to rights of widow, if any, per stirpes among such issue. If intestate dies leaving widow but no issue his estate shall go to his widow.

Afterborn Children and Relatives.

Descendants and other relatives of the decedent, begotten before his death but born thereafter, take as though born in his lifetime.

Illegitimates.

No longer relevant. “Child” is defined as off-spring of first generation, inside or outside of marriage.

Adopted Children.

See category 14 Family, topic 14.01 Adoption, subhead Effect of Adoption.

Advancements.

Reckoned as part of estate, and if advancement to child is equal to or greater than his share under intestate law, he takes no part of estate. If advancement is less than such share, child takes so much of estate as will, with advancement, equal share of each other child.

Election.

None.

Escheat.

If a person dies intestate and leaves no heirs or persons entitled to his real or personal property, it escheats to the Crown.

13.08 ESTATES:

See category 21 Property, topic 21.14 Real Property.

13.09 EXECUTORS AND ADMINISTRATORS:

Governing statute is Probate Court Act, c. P-17.1.

Jurisdiction and Venue.

Application for probate of estate of deceased person resident in Province at time of his death or for nonresident leaving property in Province may be presented in judicial district in which deceased was resident at time of his death or in which property of deceased is situated. Court has jurisdiction throughout Province. Grant is governed by principles of common law unless restricted by statute or rules. Court has same powers as Court of Queen's Bench of enforcing judgments etc. Practice and procedures of Queen's Bench apply except in contentious matters.

Preferences in Right to Administration.

Upon intestacy, or where executor named in will refuses to prove will, administration may be committed to spouse, to next-of-kin or to spouse of next-of-kin, of deceased as court considers proper. If more than one of next-of-kin who are in equal degrees of kindred to deceased claim administration, it may be committed to such one or more of them as court considers proper.

Eligibility and Competency.

Any resident or nonresident person having reached age of 19 years or any trust company authorized to do business in Province may be appointed as executor or administrator.

Qualification.

No oath required for executor or administrator. Security bond equal to stated value of estate is required before appointment of any resident or nonresident administrator and from any nonresident executor. Spouse of deceased is not required to file administration bond if estate is less than $50,000 and affidavit of debts is filed. Court may under special circumstances reduce amount of, revise conditions of, or dispense with, bond.

Issuance of Letters.

Letters probate of will and letters of administration have effect in all parts of Province and remain in force until revoked. Where minor is named as sole executor under will, administration with will annexed may be granted to guardian of minor or to such other person as court thinks fit until minor has attained age of majority at which time letters probate may be granted to minor. Person entitled to grant of letters of administration may, at discretion of court, take out limited letters. Notarial wills made in Quebec may be admitted to probate in Province.

Public Administrator.

Appointed by Lt.-Gov. in Council. May be contacted c/o Department of Justice, P.O. Box 6000, Fredericton, N. B., E3B 5H1. Application for administration of estate of deceased person who dies testate or intestate within Province leaving assets within Province and having no executor, spouse or next-of-kin within Province ready and competent to take out letters of administration. Public Administrator has power to administer estates of less than $3,000 without appointment by court. Public Administrator has authority to administer estate where only pension not exceeding $3,000 is payable. (§20).

Role of Public Administrator will be revoked by Public Trustees Act (c. P-26.5). Thereafter, estates which had previously been administered by Public Administrator will be administered by Public Trustee. This Act was assented to June 30, 2005, and will come into force on day to be fixed by proclamation.

Inventory and Appraisal.

Person applying for grant of letters probate of will or letters of administration shall before they are granted deliver to clerk statement verified by oath setting out total value of all property of deceased at time of his death. No statutory provision for appraisal. (§56).

General Powers and Duties.

Common law rules apply as enlarged upon by Executors and Trustees Act (c. E-13) and Trustees Act (c. T-15).

Notice of Appointment.

No statutory requirement.

Notice to Creditors.

No statutory requirement and not usual practice to advertise for creditors.

Presentation of Claims.

No debt to be paid until proven by affidavit presented to personal representative. No statutory form of proof of claim. Usual form of proof of claim is as follows:

Form

IN THE PROBATE COURT

OF NEW BRUNSWICK

JUDICIAL DISTRICT OF....

IN THE ESTATE OF...

I, , of in the County of , Province of , (state occupation), make oath and say:

1. That , late of (state occupation of deceased), was during his lifetime and his estate is now indebted to me, this deponent, in the sum of (state general nature of claim, whether for professional services or goods sold and delivered, etc.), performed or delivered, etc., by me to or for the said during his lifetime and at his request according to the statement of particulars of the said account hereunto annexed and marked “A”.

2. That I hold no security in respect of the said indebtedness.

SWORN TO AT...

in the County of...

and Province of...

this day of

A.D. 20

A COMMISSIONER OF OATHS

BEING A SOLICITOR

or My Commission Expires........,

or being a (insert description of office held.)

Approval or Rejection of Claims.

Personal representative if he wishes to contest claim, serves notice thereof on claimant who may then within 30 days apply to court for order allowing his claim and determining amount of it. Court shall hear parties and witnesses and make such order as it considers just. If claimant does not make such application his claim is barred.

Priorities.

In event of deficiency of assets to pay all estate debts and bequests, assets shall be applied in priority as follows: (a) Funeral expenses; (b) probate fees; (c) solicitor's costs; (d) wages given priority by Wage-Earners Protection Act (c. W-1); (e) liabilities incurred by personal representative in respect to administration of estate; and (f) commission allowed to personal representative. If there is still deficiency of assets, all creditors rank equally, but neither rights of Crown or any lien, mortgage nor other security existing during lifetime of deceased on any of his real or personal estate are prejudiced. (§64).

Sales.

All real and personal property devolves upon personal representative and, subject to Devolution of Estates Act (c. D-9), may be sold by personal representative pursuant to terms of will and Executors and Trustees Act (c. E-13). No statutory requirement regarding notice, time or place. Purchaser is not required to see to application of funds.

Actions by Representative.

Causes of action (except for adultery or seduction) vested in deceased survive for benefit of his estate. (c. S-18). Rights are in addition to and not in derogation of any rights conferred by Fatal Accidents Act. (c. F-7).

Actions against Representative.

Causes of action subsisting against deceased survive against his estate. (c. S-18).

Allowances.

None for support of widow and family pending administration.

Widow's Quarantine.

See category 14 Family, topic 14.07 Husband and Wife, subhead Marital Property Act.

Accounting.

Personal representative is not required to account to court other than by inventory of property unless at instance of some person interested in estate or by creditor of deceased. Personal representative may voluntarily pass his accounts in court. At passing of accounts, court has jurisdiction to make full inquiry in such manner as it sees fit. It may also at such time inquire into any complaint or claim of misconduct, neglect or default on part of personal representative occasioning loss to estate and may order personal representative to pay such sum as it considers proper and just. (§69).

Distribution.

Common law rules prevail.

Liabilities.

Liabilities of personal representatives are governed by common law and Trustees Act. (c. T-15).

Compensation of Representatives.

Governing statute is c. T-15. Allowed by court based upon fair and reasonable allowance for his care, pains and trouble, and his time expended in and about estate. There is no specific maximum or minimum fee. Will may specify amount of fee.

Resealing.

Where probate or administration has been granted by court of competent jurisdiction in United Kingdom, or in any province or territory of Canada, or in any country of Commonwealth or in any state or territory of U.S.A., such probate or administration may be resealed by court and has same force and effect as if it had been originally granted in Province. Letters of verification issued in Quebec are deemed to be probate for resealing in Province.

13.10 FIDUCIARIES:

See topics 13.09 Executors and Administrators, Trusts; category 14 Family, topic 14.06 Guardian and Ward.

13.11 INTESTACY:

See topic 13.07 Descent and Distribution.

13.12 PROOF OF CLAIMS:

See topic 13.09 Executors and Administrators; category 5 Civil Actions and Procedure, topic 5.17 Pleading.

13.13 TRUSTEE PROCESS:

See category 8 Debtor and Creditor, topic 8.10 Garnishment.

13.14 TRUSTS:

Common law rules govern subject to provisions of Trustees Act. (c. T-15).

Every declaration or creation of any trust in lands must be in writing signed by the party entitled to create the trust or by his last will, except in case of trusts arising by implication or construction of law.

A trustee cannot make a profit out of the trust estate or take advantage of his position for his own pecuniary profit. Powers and duties of trustee are regulated by terms of instrument creating trust. Trustee is obliged to comply with those terms so long as compliance is not impossible or illegal. (§2). Where trustee may be or is personally liable for breach of trust, but has acted honestly and reasonably, court may relieve trustee, either wholly or partly from personal liability. (§42).

Judge may allow remuneration and additional compensation in accordance with §38 of c. T-15 for continued administration of trust.

Investments.

No prohibited investments except that they must be those of a man or woman of prudence, discretion and intelligence.

13.15 WILLS:

Governing statute is c. W-9. Any competent person of age of 19 years or over may make valid will. Infant cannot make valid will unless he or she is married, is member of active Armed Forces or is seaman. Will may be amended by one or more codicils which, upon death, together with will constitute one instrument.

Execution.

A will must be in writing and signed at the end by the testator or by some one in his presence and by his direction; such signature must be made or acknowledged by the testator in the presence of two or more witnesses present at the same time and who must subscribe their names as witnesses in the presence of the testator and of each other. No particular form of attestation is necessary nor must the will be published to be valid. Alternatively, a testator may make a valid will wholly in his own handwriting and signed by him without witnesses. However, even if will has not been executed in compliance with formal requirements of act, as long as court is satisfied that document or writing embodies testamentary intentions of deceased, court may order that will is valid and fully effective as if it had been executed in compliance. (§35.1).

An executor is a competent witness, but any devise or legacy to a witness or to the husband or wife of a witness is void, although the execution of the will itself is good.

There is no restriction on gifts.

Nuncupative Wills.

A soldier in actual military service or a marine or seaman at sea may sign his will without witnesses. (§5[1]).

Revocation.

Every will except one in which there is declaration that will is made in contemplation of marriage or one made in exercise of a power of appointment, when estate thereby appointed would not, in default of such appointment, pass to testator's heirs, next of kin or representatives, is revoked by subsequent marriage of testator. Will may be revoked by a writing declaring an intention to revoke same or by testator or some one by his direction and in his presence burning, tearing or otherwise destroying same with intention of revoking it or by another valid will.

Probate.

Proceedings are held in probate court of Province in venue in which decedent was inhabitant at time of his death. Probate may be opposed by caveat and, after probate, will may be contested by proceedings in probate court, usually called “proof of will in solemn form.” See also topic 13.09 Executors and Administrators.

Self-Proved Wills.

No statutory provision.

Revival.

Can only be brought about by valid will or codicil that shows intention to give effect to will or part that was revoked. (§19).

Testamentary Gifts to Subscribing Witnesses.

Such gift is void if will is witnessed by beneficiary or spouse of beneficiary.

Lapse.

Will not occur if person is devised real property in estate tail and dies before or at time of testator's death and leaves issue who would have inherited under entail if that estate existed. If child or other issue, brother or sister of testator is devised or bequeathed interest in real or personal property and dies before testator's death leaving issue surviving testator, no lapse occurs. (§31, c. W-9).

Children.

Whether living when will is executed or born thereafter, may be disinherited by mere disposition of testator's property to others, without any other indication of intent to disinherit. See subhead Family Support, infra.

Foreign Executed Wills.

In respect of movables, will made out of New Brunswick is valid and admissible to probate if made in accord with law of place where testator domiciled at death, or law in force at time will made in place where will made, or testator's domicile of origin. Change of domicile after will made does not invalidate it. In respect of immovables, law of place where land situate governs formalities of making will.

Foreign Probated Wills.

Where probate has been granted by court of competent jurisdiction in U.K., or in any province or territory of Canada or in any other British possession or any State or Territory of U.S. such probate may be resealed by a probate court in Province. Where probate has been granted elsewhere by a court of competent jurisdiction, ancillary letters probate may be applied for in probate court in venue where New Brunswick assets situated.

Family Support.

Governing statute is c. P-22.3. Provides that testator's wife, husband or child may apply to judge of Court of Queen's Bench of New Brunswick for order that such provisions as he deems adequate be made out of estate of testator for proper maintenance and support of applicant or any other dependent of testator, where it is shown that testator did not make adequate provision for his dependents in his will, or, where testator dies intestate as to part of his estate, where operation of Devolution of Estates Act (c. D-9) would not properly provide for dependents. Judge may make order suspending in whole or in part administration of testator's estate. See also category 14 Family, topic 14.07 Husband and Wife, subhead Marital Property Act.

Simultaneous Death.

See topic 13.05 Death, subhead Survivorship.

Unclaimed Legacies.

(c. P-17.1, §27). Action for legacy or for distribution of residue shall not be entertained by court.

Marital Property.

(c. M-1.1). Permits surviving spouse to apply within four months of death of spouse to court for equal division of marital property.

Living Will.

No legislation.

International Will.

Governing statute is c. I-12.4. Nothing in Act detracts from or affects validity of will that is valid under provincial laws. "International will" is will that has been made in accordance with rules regarding international will set out in Annex to Convention.

All members of Law Society of New Brunswick, authorized to practise law in province are designated as persons authorized to act in connection with international wills.

Will shall be valid as regards form, irrespective of place where made, of location of assets and of nationality, domicile or residence of testator, if made in form of international will complying with provisions set out in Art. 2 to 5 in Annex of Uniform Law on Form of an International Will.

14 FAMILY

14.01 ADOPTION:

Governing statute is Family Services Act, c. F-2.2. Any adult, either alone, if unmarried, or jointly with his spouse, may adopt child; and where adopting child of his spouse, may do so without spouse joining in application. (§66).

Any person wishing to adopt child, whether specific child or not, may apply to Minister or to approved community social service agency. (§67[1]).

Any adult may be adopted where person adopting is older by reasonable number of years than person being adopted and reason for adoption is acceptable to court. (§65[2]).

Consent Required.

No adoption order shall be made without written consent of: (a) Person being adopted if having attained age of 12 years, (b) if person being adopted is under age of majority, parent of child or, Minister if guardianship of adopted person has been transferred to Minister. (§76[1]).

Where child to be adopted is ward, in custody or guardianship of representative of another government, state or other agency, consent of representative, person or agency is required and consent of parent is not required if it would not have been required if child were to be adopted in that Province or State. (§76[2]).

Court may waive consent required of person, except of person to be adopted, if court is satisfied that: (a) Person whose consent is to be waived: (i) has abandoned or deserted child, (ii) cannot be located, (iii) has been incapable of caring for child for period of time of sufficient duration to be detrimental to best interests of child, and remains incapable at time consent is waived, (iv) while liable to maintain child has persistently neglected or refused to do so or, (b) in best interests of child, consent should be waived. (§78[1]).

Where child is of age of 12 years or over and is unable to understand or give consent, child's consent may be waived by court. (§78[2]).

Conditions Precedent.

Court shall set time and place for hearing which shall be within five days after application was filed with court (§79[1]), except where application is made to waive consent of person required to give consent in which case hearing shall be delayed accordingly (§79[2]).

Where person, other than Minister applies for adoption order, no application shall be heard by court unless applicant has given written notice to Minister at least 30 days before hearing of his intention to apply for adoption order. (§79[3]).

Applicant shall give Minister notice of time and place set for hearing not later than ten days before hearing date. (§79[4]). Notice to Minister not required under §79[3]-[5] with respect to adoption of spouse's child. (§79[6]).

Court shall dispose of application within 30 days after it is made unless court is satisfied that exceptional circumstances require disposition of application be delayed. (§81[2]).

Proceedings.

Applicant presents application and supporting documents to judge of Court of Queen's Bench and in relation to Part III—Protection Services, Part IV—Child in Care and Part VII—Support Obligations, Custody and access application may be made to Provincial Court of New Brunswick and any judge thereof.

Court may make adoption order where requirements of this part have been complied with and court is satisfied: (a) As to truth of matters stated in application, (b) that adoption should take place, and where person under age of majority is to be adopted, as to (c) ability of prospective adopting parent to care for, educate child in proper manner; and (d) likelihood that adoption will provide child with security, permanent family relationship and continuity of care, court may make adoption order, if: (e) where Minister is applicant, 30 days have elapsed since child was placed for adoption, (f) where applicant has applied to adopt child of his spouse, either 30 days have elapsed since application was made, or, child has resided continuously with applicant for previous six months, or (g) in any other case, child has resided continuously with applicant for previous six months. (§83[1]).

All documents must be filed with Registrar in Fredericton upon completion of adoption order.

Effect of Adoption.

Legal relationship between child and adopting parent is same as between child and natural parent, including same rights of inheritance.

Releases natural parents, guardian or custodian from any legal rights or obligations to child, including any right of access that is not preserved by court. Child is similarly freed of rights or obligations to natural parent. Unless preserved in accordance with wishes of natural parent, adoption severs child's right to inherit from natural parent or kindred. Adoption does not affect child's cultural heritage, including aboriginal rights. (§85[2]).

Name.

Unless court orders otherwise, adoptee takes surname of adopting parent. Christian names may also be changed if court satisfied change is in best interests of child, and, where child's wishes can be ascertained, that change is being made with child's knowledge and agreement. Consent of child 12 years of age or over is required for changing any part of name of child. (§85[3][4][5]).

Adoption granted according to law of any other Province or State that is substantially similar in effect with law of New Brunswick has same force and effect as if granted in New Brunswick. (§88).

Intercountry Adoption.

1996, Bill 49 adopted: Convention on Protection of Children and Co-operation in respect of intercountry adoption.

Recognizing necessity to take measures to ensure that intercountry adoptions are made in best interests of child and with respect for his or her fundamental rights and to prevent abduction, sale of, or traffic in children.

Requirements for Intercountry Adoptions.

See cc. 2, 3 and 4 of Bill 49.

14.02 ALIMONY:

See topic 14.05 Divorce.

14.03 COMMUNITY PROPERTY:

Not applicable. See topic 14.07 Husband and Wife.

14.04 DESERTION:

See topics 14.05 Divorce; 14.07 Husband and Wife.

14.05 DIVORCE:

Governing statute is Divorce Act 1985, c. D-3.4, Statutes of Canada and R. 72 governs court procedure and forms.

Grounds for Absolute Divorce.

See Canada Law Digest, category Family, topic Divorce.

Grounds for Legal Separation.

Court of Queen's Bench has no jurisdiction to grant decree of judicial separation. Separation agreements in writing entered into by parties are enforceable and may provide for such matters as property division, custody and access to children, support obligations.

Citizenship Requirements.

None.

Residence Requirements.

See Canada Law Digest, category Family, topic Divorce.

Jurisdiction.

Court of Queen's Bench, Family Division.

Venue.

Unless ordered otherwise, trial shall take place in judicial district in which one of parties has been ordinarily resident for at least one year immediately preceding commencement of proceeding.

Process.

Petition to be sealed by Registrar of Court of Queen's Bench and to be served within six months of date on which it is filed. Judge may make order for substituted service. Service may be made outside of New Brunswick without leave of Court.

Pleading.

Answer to petition or counter-petition to be served and filed: (a) Within 20 days if petition served in New Brunswick; or (b) within 40 days if petition served elsewhere within Canada or U.S.A.; or (c) within 60 days in all other cases. (R. 20.01).

Judgment or Decree.

If no appeal has been instituted, divorce takes effect on 31st day after judgment granting divorce is given. (§12).

Temporary Alimony.

See Canada Law Digest, category Family, topic Divorce.

Allowance for Prosecution of Suit.

Application by way of Notice of Motion to be made to judge by either wife petitioner after service of petition or by wife respondent.

Permanent Alimony.

See Canada Law Digest, category Family, topic Divorce.

Division of Property of Spouses.

Divided pursuant to Marital Property Act. (1981, c. M-1.1). See topic 14.07 Husband and Wife.

Support.

See Canada Law Digest, category Family, topic Divorce, subhead Corollary Relief.

Support Enforcement Act (c. S-15.5) was assented to June 30, 2005 and will come into force on day fixed by proclamation.

Every support order made by court must be filed with Director of Support Enforcement. (§5). Director has duty to enforce support order that is filed with Director in manner Director considers appropriate. (§7). If payer defaults on any payments required under support order, Director may garnish debts, including wages or salary, benefits under disability, accident, or sickness plan, pension, annuity or deposit held by financial institution (§15), direct Registrar of Motor Vehicles to revoke payer's driver's license (§26), or report default to credit reporting agency (§27).

Court may order defaulting payer be imprisoned for maximum of 90 days, or pay fine of no more than $500. (§35). Upon application, court may order payer be arrested if it appears payer is going to leave province in order to evade or hinder enforcement of support order. (§36).

Corporation controlled solely by payer or payer's immediate family may be jointly and severally liable for payments required under support order. (§§28 and 29).

Custody of Children.

See Canada Law Digest, category Family, topic Divorce.

Remarriage.

No restriction after divorce.

Foreign Divorces.

Decrees granted by a court having jurisdiction in place of domicile of parties, or in place with which parties had real and substantial connection, for example place where marriage was performed, or by court having grounds substantially same as in Divorce Act will be recognized in New Brunswick.

Separation Agreements.

Recognized and enforced in civil courts to same extent as any private contract. See also topic 14.07 Husband and Wife.

Annulment of Marriage.

See topic 14.09 Marriage.

14.06 GUARDIAN AND WARD:

Governing statute is Guardianship of Children Act, c. G-8. Parents of child are joint guardians and may jointly appoint in writing another person to be guardian of their child. Parent who has displayed intention to abandon child, however, has no status as guardian.

With respect to the custody, etc., of an infant, the best interest of the infant is the controlling consideration.

Insane Persons.

Governing statute is Infirm Persons Act, c. I-8. Court of Queen's Bench has power to appoint committee of person and estate of mentally incompetent person and to empower such committee to do anything in relation to estate that mentally incompetent person could have done if he had remained competent.

Incompetent persons in psychiatric facility have their estates administered by Administrator of Estates subject to provisions of c. I-8. (Mental Health Act, c. M-10, §§35-58).

Mental incompetence of donor will not terminate authority conferred upon donee by previously created and properly executed power of attorney which expressly allows power to be exercised during such incompetence. (Property Act, c. P-19, §58.2).

14.07 HUSBAND AND WIFE:

Subject to Marital Property Act (c. M-1.1), real and personal property belonging to woman before or acquired by her after marriage vests in her, is owned by her as her own separate property, and is exempted from seizure or responsibility in any way for debts or liabilities of her husband. (Married Woman's Property Act, c. M-4).

Married Woman.

Capable of acquiring, holding and disposing by will, or otherwise, any real or personal property as her separate property, in same manner as if she were femme sole. She is capable of entering into and rendering herself liable in respect of, and to extent of her separate property on any contract, and of suing and being sued, in all respects as if she were femme sole, and her husband need not be joined with her as plaintiff or defendant or be made party to any action or other legal proceedings brought by or taken against her; any damages or costs recovered by her in any such proceedings are held to be her separate property, and any damages or costs recovered against her in any such proceedings are payable out of her separate property and not otherwise. (c. M-4).

Contracts.

Every contract entered into by a married woman otherwise than as agent: (a) Is deemed to be a contract entered into by her in respect to and to bind her separate property, whether she is or is not in fact possessed of or entitled to any separate property at the time she enters into such contract; (b) is held to bind all separate property which she may at that time or thereafter be possessed of or entitled to.

Earnings.

Every married woman is entitled to have and to hold as her separate property, and dispose of as such, wages, earnings and property acquired by her in any employment or business and in which her husband has no proprietary interest.

Curtesy.

Husband no longer has curtesy in respect of property acquired by his wife after Apr. 29, 1916.

Dower.

Repealed except where right to dower has vested in possession prior to Jan. 1, 1981.

Remedies for Protection of Separate Property.

She has in her own name against all persons, including her husband, the same remedies for such protection, as if such property belonged to her as femme sole; husband has against his wife same remedies for protection and security of his property as she has against him for hers; except as aforesaid no husband or wife is entitled to sue other for tort.

Marital Property Act (1981, c. M-1.1).—

Division of Marital Property and Debts.

Spouses have equal rights of possession in any property occupied as their family residence, subject to order of court pursuant to §23 or provisions of domestic contract. (§18[1]). Court may issue §23 order (i.e., order that regardless of ownership, one spouse shall have exclusive possession of matrimonial home) where such is in best interests of child or if other shelter would not be adequate in circumstances. (§23[3]). §23 order may be merely of temporary nature, pending disposition of another application under Act. (§23[2]). No spouse may dispose of any interest in marital home without consent or release of other spouse or court order. (§19[1]). Such disposition may be set aside as per §22 unless person holding interest acquired such for value, in good faith, and without notice that property was marital home. (§19[2]). Generally, affidavit of spouse not party to disposition, to effect that property is not marital home, deems acquirer of interest to be of good faith and without notice of fact that property is marital home. (§19[3]).

Spouse, or any person with interest in property, may apply to court and court may make order stating extent, if any, to which such property is comprised of marital home or authorizing disposition notwithstanding lack of consent of non-disposing spouse in certain circumstances. (§22).

Presumption of advancement is abolished insofar as it previously applied to ownership as between husband and wife. Instead, presumption of resulting trust is to apply. Where spouses own property as joint tenants, such is prima facie proof that each is intended to have one-half beneficial interest in property upon severance. Also, funds deposited in joint accounts are deemed to be in names of spouses as joint tenants. (§15[1]). §15, Subsection 1, applies notwithstanding that events giving rise to presumption occurred before coming into force of this section. (§15[2]).

Child care, household management, and financial provision are joint responsibilities of spouses and, subject to this Act, fulfillment of these responsibilities entitles each spouse to equal share of marital property and imposes on each spouse burden of equal share of marital debts. (§2). Where decree nisi of divorce is pronounced; marriage declared nullity; spouses apart or marriage broken down and no reasonable prospect of resumption of cohabitation or reconciliation; each spouse, upon application to court, is entitled to have marital property divided in equal shares. (§3[1]). Where marriage has been annulled, such application must be made within 60 days, subject to court's discretion as per §3(4), i.e., court may extend time where applicant not within time limit because of lack of knowledge of granting of divorce or declaration of nullity or for circumstances reasonably beyond his control. Similar limitation period applies where spouse has died. (§4[1][2][3]). Notwithstanding §2, §3, and §4, court may make division of marital property in unequal shares if it feels that equal division would be inequitable having regard to: Any agreement other than domestic contract, duration of periods of cohabitation and separation, and circumstances related to procurement and maintenance of property. (§7).

§4 permits surviving spouse to apply within four months of death of spouse to court for equal division of marital property.

Domestic Contracts.

Spouses (before marriage or while cohabiting) or man and woman not married but cohabiting, may enter into written agreement concerning their respective rights and obligations under marriage or upon separation, dissolution or annulment of marriage or upon death. Specifically, agreement may relate to ownership in or division of property, support obligations, or any other matter in settlement of their affairs except right to custody of, or access to, their children. (§§34 and 35).

Man and woman who cohabited and are living separate and apart or who are cohabiting and who agree to live separate and apart may enter into separation agreement in relation to all matters permissible by §§34 and 35, as well as right to custody of, and access to, their children. (§36). However, court may disregard provisions of this contract relating to custody or access if, in its opinion, it would be in best interests of child to do so. (§38[1]).

Domestic contracts are to be in writing and signed by parties to be bound and witnessed. (§37[1]).

Court may disregard any provision of domestic contract if such was made before coming into force of Marital Property Act and not made in contemplation thereof or if spouse challenging provisions entered into contract without having sought independent legal advice. (§41).

General.

Act applies notwithstanding that spouses were married, property in issue was acquired, or proceeding with respect to property rights was commenced but not determined, before Act came into force. (§43).

Community Property.

System does not apply.

Reciprocal Enforcement of Maintenance Order.

Repealed 2002, replaced with Interjurisdictional Support Orders Act, c. I-12.05. This act provides for registration and enforcement of support orders made outside of New Brunswick (§§17, 18, 19), and also provides for proposed claimant to begin proceedings in province that may result in support order being made in reciprocating jurisdiction (§5). §21 allows for variation of support orders made in province or in reciprocating jurisdiction.

14.08 INFANTS:

Age of majority is 19 years. (c. A-4). Rights and liabilities of infants under contract entered into by them during infancy rest upon common law rules which have not been materially affected by statute. Infant may sue in certain courts for wages due him in same manner as if he were of age. Under Insurance Act (c. I-12), except in respect of his rights as beneficiary, minor who has attained age of 16 years has capacity of person of age of 19 years: (a) To make enforceable contract; and (b) in respect of contract (§§163 & 201[1]). Beneficiary who has attained age of 18 years has capacity of person of age of 19 years to receive insurance money payable to him and to give discharge therefor. (§§164 & 201[2]).

Termination of Parental Rights.

Where security or development of child may be in danger Minister can place child under protective care. (Family Services Act c. F-2.2, §32[1]).

Adoption.

See topic 14.01 Adoption.

14.09 MARRIAGE:

Governing statute is c. M-3. There is no statutory age under which males or females cannot lawfully marry, therefore, English common law rule of 12 years for girls and 14 years for boys applies. Proper consents must be obtained for children under 18.

Consent Required.

When either party not having been previously married is under 18 years of age, consent of father and mother if both living and not living separate, or guardian is required. Such consent must be verified by affidavit of consenting party before a license is issued or banns allowed. (§19[1]).

Medical Examination.

No statutory provisions.

License and Banns.

Marriage is by license. Application for license by both parties is made to issuer of marriage licenses. Personal attendance of parties before issuer is excused only when undue hardship would occur if personal attendance was required. Application for license is by affidavit of each party stating in what city, town, village or parish it is intended that marriage is to be solemnized, and person before whom it is intended that marriage is to be solemnized; that he or she believes there is no affinity, consanguinity, prior marriage or other lawful cause or legal impediment to bar or hinder solemnization of marriage; age of deponent and that other contracting party is of full age of 18 years, or age of such contracting party if under age of 18 years, as case may be; facts necessary to enable issuer to judge whether or not required consent has been given in case of party under age of 18 years, or whether or not such consent is necessary; marital status of parties, being never previously married, previously married and divorced with date of final decree, judgment or order, marriage declared nullity with date of final decree or previously married and widowed with date of death of previous spouse; and such other or additional information as may be prescribed by Lieutenant-Governor in Council.

Ceremony.

May be performed by: Any person being resident in province, duly registered under this Act and charged with solemnization of ceremony of marriage by church or religious denomination. No marriage may be solemnized under authority of license unless marriage takes place within three months after day on which license was issued.

Rebuttable Presumption of Marriage.

Arises where man and woman have cohabited for such length of time and under such circumstances as to have acquired reputation of being man and wife. (43 N.B.R. 154).

Proxy Marriages.

Not authorized.

Marriages by Written Contract.

Not authorized.

Annulment.

Court of Queen's Bench may annul any marriage on grounds of impotence or frigidity or consanguinity within degrees prohibited by Act 32 Henry VIII. Such marriage is voidable upon application to court during lifetime of parties thereto but cannot be questioned after death of either party. As to decree, see topic 14.05 Divorce.

Record.

See category 10 Documents and Records, topic 10.06 Records, subhead Vital Statistics.

Common Law Marriages.

Common law rules apply. No special statutory provisions.

14.10 MARRIED WOMEN:

See topics 14.07 Husband and Wife, Marriage; categories 5 Civil Actions and Procedure, topic Evidence, subhead Witnesses; Documents and Records, topic Acknowledgments; Estates and Trusts, topics Executors and Administrators, Wills; Property, topics Deeds, Dower.

15 HEALTH

15.01 HEALTH REGULATIONS:

Medical Consent of Minors Act.

C. M-6.1 governs all medical procedures that deal with individuals who are under age of 16. For those who are 16 or older, law respecting age of majority applies in all respects. (§2). If person under age of 16, in opinion of qualified medical doctor or dentist, is capable of understanding nature and/or consequences of treatment and that such treatment is to be used in best interests of minor, their consent is effective as if he or she was of age of majority. (§3[1]). If parents are unavailable, consent is not required when minor is incapable of understanding nature and consequences of treatment or incapable of communicating consent and if legally qualified medical practitioner or dentist attending minor believes that treatment is necessary in emergency. (§3[2]). If parents refuse consent or consent is unattainable, any person may apply to judge of Court of Queen's Bench. (§4[1]).

Anatomy Act.

C. A-8 governs use of human body for research purposes at educational facilities and what procedures must be followed in order for school to get body from coroner's office. School receiving cadavers must follow certain procedures. (§7).

At any time, Minister may inspect (a) anatomy rooms of school, (b) methods used by school for preserving bodies, (c) register kept by school pursuant to §7, and (d) register, bonds, certificates, and other papers which come into possession of inspector. (§10).

15.02 HOSPITALS, REGIONAL HEALTH AUTHORITIES, ADMITTANCE:

Governing Legislation.

Hospital Act, c. H-6.1 and Regional Health Authorities Act, c. R-5.05, establish regions within province to manage, administer, and operate medical hospitals and deliver medical services (c. R-5.05, §2). Minister may give directions for purpose of implementing provincial health plan, providing guidelines, and coordinating programs of regional health authority with those of other regions and government. (§8). Regional health authority may provide health services only where there is need, services are included in plan approved by Minister, services are consistent with provincial health plan, and there are sufficient resources. (§31).

Admittance of patient to hospital can be refused if person's life is not endangered by refusal and if chief executive officer of hospital or senior administrative officer of hospital facility, based on medical advice, concludes that (a) person's condition does not require hospital services, (b) hospital or facility does not provide services required, (c) services of hospital or facility and condition of person are such that services required could be more effectively provided at later date, or (d) services required by person could be more effectively provided without admission. (§20[2]). Admittance may also be refused if person is not entitled to services under Hospital Services Act. (§20[3]).

No action may be brought against Province, Regional Health Authority, members of board of trustees, or any employee of hospital for damages for injuries due to negligence in admission or discharge of patient or for delivery of hospital services to patient except within two years after being discharged or receiving hospital services, or within one year after person bringing action knew or ought to have known facts upon which allegations are made, whichever is later. (§61, c. R-5.05).

Regional health authority must maintain adequate property insurance (§54), and adequate insurance coverage for protection of patients, staff, and visitors (§55). Province may assume responsibility for interest and risks respecting property and people, on such terms and conditions as it considers appropriate. (§§54, 55).

15.03 MENTAL HEALTH AND NURSING HOMES:

Infirm Persons.

C. I-8 deals with those persons who are mentally incapable of managing their own affairs and their estates. (§39[1]). Subject to Mental Health Act, court has full jurisdiction and authority over and in relation to persons and estates of mentally incompetent persons, including care and commitment to custody of mentally incompetent persons and their estates. (§3[1]). Powers of Attorney. (§§40-44).

Mental Health.

C. M-10 legislation applies to all psychiatric facilities in Province and deals with treatment of mental health patients and maintenance and administration of mental health facilities. Purpose of Act in relation to involuntary custody, detention, restraint, observation, examination, assessment, care and treatment are (a) to protect persons from dangerous behavior caused by mental disorder, (b) to provide treatment for persons suffering from mental disorder that is likely to result in dangerous behavior, (c) to provide when necessary treatment as is least restrictive and intrusive. (§1.1).

Admission to psychiatric facility can be refused if immediate needs in case of proposed patient are such that hospitalization is not urgent or necessary. (§6[1]). If there is refusal, reasons for said refusal are to be communicated immediately to physician who applied for admission. (§6[3]). Patients who are to be admitted by order of tribunal cannot be refused admittance. (§6[2]). Person ordered into custody under examination certificate must be informed by peace officer who is taking them into custody (a) reasons for detention and of person's right to retain and instruct counsel without delay, (b) tell person where they are being taken. (§7.1[5]). Psychiatrist will examine person detained in psychiatric facility under examination certificate as soon as reasonably possible. (§7.2).

Proper patient-advocate services shall be maintained by administrator of any psychiatric facility. (§7.6).

Consent for medical and/or psychiatric procedures to be performed on involuntary patient who is incompetent or who is not yet 16 years old can be given or refused on behalf of that patient by someone who is at least 16 years old, is apparently mentally competent to give or refuse consent, is available and willing to make decision, and fits into one of following categories: (a) Minister, in case of child under Family Services Act, (b) patient's guardian appointed by court of competent jurisdiction, (b.1) patient's attorney for personal care under Infirm Persons Act, (c) patient's spouse, (d) child of patient, (e) parent of patient or person who has lawful authority to stand in place of parent, (f) brother or sister of patient, (g) any other next of kin of patient, (h) patient advocate. Same applies for any medical treatment that is not routine clinical treatment or other psychiatric treatment. (§§8.6[1] & 8.6[2]).

If anyone believes that person is suffering from mental disorder and that they should be examined for their own best interests or interests of society generally, information or oath can be given to Provincial Court Judge and if he or she is satisfied that examination is necessary and person refuses to submit to medical exam, order for examination can be issued. (§9).

Person who is 16 or older and mentally competent is entitled to examine and copy clinical record of observation, examination, assessment, restraint, care and treatment of that person in psychiatric facility. (§16.1[1]).

Patients will be discharged from psychiatric facilities when they are no longer in need of observation, examination, assessment, restraint, care and treatment that is provided at facility. (§29[1]).

Estates of mental health patients. (§§35-58). Maintenance and property of mental health patients. (§§59-65).

Nursing Home Act.

C. N-11 establishes procedures and guidelines that must be followed for all nursing home operators in Province. License is required in order to establish, operate or maintain nursing home. (§3[2]). License shall be displayed at all times in conspicuous place within nursing home. (§5). Licenses can be revoked. (§7).

Trustee will be appointed for term of no more than 12 months and all property, powers, duties and liabilities of operation in relation to nursing home, including all bank accounts, safety deposit boxes or trust funds in name or control of operator, and also including any trusts controlled or administered by any person on behalf of operator in relation to nursing home or its residents if Minister has reasonable and probable grounds to believe that (a) nursing home is not functioning effectively, (b) operator of nursing home fails to meet requirements of Act or regulations, (c) operator of nursing home violates any provision of Act and regulations, (d) operator fails to comply with terms and conditions of his or her license, (e) license of nursing home was revoked or has not been renewed. (§10[1]).

Duties and responsibilities of nursing home operator outlined in §§13, 14.

Upon discharge of patient, operator must provide 15 days notice to resident being discharged and to his or her next of kin or legal representative except where operator has reasonable grounds to believe that immediate discharge to custody of another person is necessary for safety of resident or staff. (§17[1]).

Inspectors can enter nursing home at any reasonable time to inspect and ensure that provisions of Act and its regulations are being followed. (§25[3]).

15.04 PAYMENT FOR HEALTH SERVICES AND MEDICATIONS:

Prescription Drug Payment Act.

C. P-15.01 establishes program that provides for payment for furnishing of entitled beneficiaries in Province required for preventative, diagnostic or therapeutic purposes and such program may provide for furnishing of entitled services by means of premiums paid on behalf of beneficiaries for contract or plan of insurance. (§2[a]).

Person is not eligible to receive benefits under program if person has or is covered by contract or plan of insurance that Minister believes provides same benefits as program. (§2.01[1]). If person fails to pay premiums required or if person fails to provide required information to determine continuing eligibility under program, Minister may cancel or suspend benefits. (§2.2).

Those who (a) make false or misleading statement in application for payout with regards to being beneficiary or having eligibility, (b) issue receipt for cost of entitled services without providing them or in excess of amount actually paid for, (c) issue prescription for entitled service or dispenses entitled service knowing that service is to be used by person who is not beneficiary, or (d) obtain entitled service that is not for use of beneficiary commits offence. (§5[1]).

Medical Services Payment Act.

C. M-7 establishes medical service plan in Province that provides for payment for furnishing entitled services upon uniform terms and conditions to all beneficiaries in Province, without imposing waiting period in excess of three months before new residents are eligible for services, which is operated by Department of Health and Wellness. (§2[1]). Medical Services Payment Plan does not provide payment for (a) entitled services furnished in Province if these are provided by medical practitioner who is practicing outside provisions of this Act or regulations, (b) entitled services furnished in private hospital facility in Province, or (c) entitled services provided by oral or maxillofacial surgeon to patient other than in-patient or out-patient in hospital facility approved by jurisdiction in which hospital facility is located. (§2.01).

Inspectors may examine and audit books, accounts, reports and medical records maintained in offices of medical practitioners, oral and maxillofacial surgeons respecting persons who are receiving or who have received services and in respect of which services claims for payment have been submitted under medical services plan. (§8.1[1]). Inspector may, at any reasonable time, enter and inspect premises and remove books, accounts, reports and medical records. (§8.1[4]).

Provincial authority or person designated by him or her may, in accordance with regulators, authorize payment of fee to barrister and solicitor who makes claim on behalf of injured person and receives sum in respect of cost entitled services. (§10.1).

No person shall knowingly obtain or receive, or knowingly aid and abet another person to obtain or receive, entitled services that he or she is not entitled to receive. (§11.1[1], [2]).

15.05 PUBLIC HEALTH AND SAFETY:

General Health.

C. H-2 provides for general well-being and health of public at large, focusing on water quality, food quality, building safety, manufactured goods, and infectious diseases.

Minister appoints chief medical officer for province and district medical health officers for each district, who all must be duly qualified medical practitioners. (§8[1]). If required, any land or building may be used as temporary or permanent hospital facility. (§9).

In order to construct, establish, operate, or alter any system of waterworks or sewage disposal, certificate must be obtained from Minister. (§14[2]). If Minister is of opinion that quality of water of existing system of waterworks, sewers, or sewerage disposal is menace to public health, he or she may order such changes or additions to be made by municipality or person operating such systems within certain time. (§15[1]).

Minister, district health medical officer, inspector, or any other person authorized by medical officer may inspect (a) premises where upholstered or stuffed articles are constructed, manufactured, altered, renovated, repaired, renewed, covered, or recovered, (b) premises where materials for construction, manufacture, alteration, renovation, repair, renewal, covering or recovering of such articles are processed, (c) premises where such articles are offered for sale, (d) upholstered or stuffed articles, and for purposes of inspection may seize, detach and open any upholstered or stuffed article and remove part thereof and prohibit sale of any such article. (§16[2]).

Powers of medical health officers outlined. (§19[3]).

Factories employing more than ten persons require certificate from medical health officer or chief factory inspector. (§20[1]).

Any food that appears to inspector to be diseased, unsound, unwholesome, or unfit for food can be seized and destroyed or disposed of. (§21[2]).

Any building that is, in opinion of inspector, unfit for habitation by reason of lack of repair, inadequate plumbing, want of cleanliness, or existence therein of any condition that may endanger health of occupants of building or general public, may be closed. (§22[2]).

Where disease occurs which Minister believes may become epidemic and serious harm to public health, cost to suppress disease may be paid out of public money. (§24).

Public Health.

C. P-22.4 deals with anything that may be considered public health hazard and actions that can be taken to remedy problem. Where medical officer of health or public health inspector has reasonable and probable grounds to believe health hazard may exist in or on any premises, he or she shall investigate and take proper action. (§5). To ensure compliance with Act, medical officers or public health inspectors may do any of following (a) enter and have access to, through or over any premises, (b) make inspections, examinations, tests and inquiries, (c) make or require making of copies or extracts of documents or records related to examination, inspection, test, or inquiry, (d) take or require taking of samples related to examination, inspection, test or inquiry, (e) require production of any substance, thing, plant, or animal other than man for purpose of inspection, examination, test or inquiry, (f) make or cause to be made any necessary excavation for purposes of inspection, examination, test or inquiry, (g) require that any thing be dismantled, operated, used or set in motion under specified conditions for purpose of any inspection, examination, test or inquiry. (§43[1]).

License must be obtained and maintained to proper standards by those operating food premises. (§§12 & 13). Milk and cream must be pasteurized and sterilized in dairy plants licensed by Minister. (§17). Meat and poultry products must bear inspection legend of Agricultural Canada and come from animal slaughtered in abattoir licensed by Minister. (§§18 & 19).

Persons who operate public water supply system shall (a) monitor water supply for such substances and at such frequencies as may be necessary or as required by Minister, and report results of monitoring as required by Minister, and (b) promptly notify medical officer of health of any malfunctions or occurrences in public water supply system that may affect potability of water. (§21[2]).

License is required for any installation, construction, repair or replacement of sewage disposal systems. (§23[1]).

If public emergency exists, any land or building may be seized in order to respond to emergency and held for necessary period as Minister sees fit without consent of owner. (§26[1]).

Occupational Health and Safety.

C. O-0.2 applies to every place of employment subject to legislative jurisdiction of province. (§2[2]). It does not apply to employment in private home unless that work is carried on by, or contracted to, employer of persons employed at private home. (§3[1]). It deals with health and safety in workplace, outlining employee rights in workplace regarding health concerns and obligations of employers to maintain safe working environment. It also outlines procedures for medical examinations of employees. Employee can refuse to do any act at his or her place of employment where he or she has reasonable and probable grounds for believing that act is likely to endanger his/her health or safety or health or safety of any other employee. (§19). If employee has reported his or her concern to supervisor, committee, or officer, he or she can refuse to do any act until remedial action is taken by supervisor, committee, officer or employer to his or her satisfaction, or if they have been advised under Act to carry out their duties. (§21[1]). Where employee has refused to do act, employer shall not assign another employee to do act unless that employee has been advised of reasons for refusal to do act and made aware of his rights under this Act. (§21[2]).

For every biological, chemical or physical agent other than controlled product, employer must take all reasonable steps to ascertain from supplies or otherwise record (a) ingredients and their common name, (b) composition of properties thereof, (c) toxicological effects thereof, (d) effect of exposure by contact, inhalation, or ingestion, (e) protective measures used or to be used in respect thereof, (f) emergency measures used or to be used to deal with exposure in respect thereof, (g) effect of use, transport, storage and disposal thereof. (§42[2]).

If commissioner has reason to believe employee is or may be infected with occupational disease, medical examination can be conducted with consent of employee. Examination will be conducted during normal working hours and will be at employer's expense, and no deductions shall be made to wages or benefits for time lost by employee due to examination. (§46).

Radiological Health Protection.

C. R-0.1 governs who may prescribe radiation treatment and who is entitled to operate and use radiological equipment and with what restrictions. Radiological Health Protection Advisory Committee is appointed to advise Minister (a) generally with respect to radiological health protection and concerning re-installation and operation of radiation equipment, (b) promote educational and quality assurance programs aimed at minimizing harmful effects of radiation while maximizing its benefits, (c) respecting minimum age at which person may be employed as radiation worker in particular occupation, (d) respecting conditions under which female person at reproductive capacity may be employed as radiation worker, (e) hear appeals, (f) dealing with other such matters relating to radiological health protection as Minister may refer to it. (§16[6]).

Only medical practitioners, dentists, and chiropractors can prescribe radiation treatment. (§7). Owners of radiation equipment must (a) designate persons employed by owner as radiation workers, (b) ensure that radiation equipment is properly maintained and functions properly, (c) ensure that radiation equipment is properly installed, (d) assure responsibility for other such matters related to safe installation and operation of radiation equipment as may be required by regulations. (§8[1]). If there is accident involving radiation, owner of equipment will notify Director specifying (a) time, date and location of accident, (b) equipment involved in exposure conditions, (c) circumstances surrounding occurrence, (d) names of people involved, (e) action, if any, which will be or was taken to control, correct, or eliminate cause of accident. (§9).

Animal Diseases.

C. D-11.1 deals with dangers that diseases in animals may cause to public and how they are controlled. Inspector, if authorized by Minister, may enter into or upon any premises other than dwelling house and exercise any power or duty conferred or imposed on him or her with respect to prevention and control of disease. (§2). Any person who has animal suspected of carrying disease shall give inspector all reasonable assistance to enable inspector to carry out his or her duties and shall provide any information needed. (§4).

15.06 SERVICES:

Health Services.

C. H-3 establishes health service plan to provide services to people in need that (a) is subject in respect of its accounts and financial transactions to audit, (b) provides payments for furnishing of entitled services to beneficiaries in Province, and (c) may provide payment of amount in respect of costs of entitled services furnished to beneficiary while temporarily absent from Province. (§3).

Persons entitled to receive services under Act can bring actions for personal injury due to negligence or wrongful act of another to recover costs of services as if she or he were personally required to pay. (§5). No settlement, judgment, or release in action for personal injury is binding unless approved by Minister or person designated by him or her, has written approval. (§5).

Every person employed in administration of Act must not relate any information except (a) for purposes relating to administration of Act or as required by law, (b) to person providing service for any purpose relating to entitled services he or she has provided, (c) upon request or with written approval of person to whom matter relates. (§8).

It is offence for anyone who is receiving or providing services to willfully make false statement. (§9[3]).

Ambulance Services.

C. A-7.3 establishes ambulance services throughout Province. Such services are administered by Ambulance Services Advisory Committee. (§4[1]).

Ambulance attendants must be certified by Minister. (§11[4]). Those who operate ambulance must be licensed. (§14[6]). Except with written permission from Director, no one can use or permit ambulance to be used for purposes other than to transport patients and provide them with medical attention, or transport items for medical purposes. (§22).

Hospital Services.

C. H-9 provides for management and administration of hospital corporations. Minister is responsible, among other things, to ensure that balanced, integrated system of hospital facilities is developed in New Brunswick. (§4).

Mental Health Services.

C. M-10.2 governs all services rendered relating to mental health, and Minister is advised by Mental Health Services Advisory Committee which provides information to Minister relating to (a) need, supply and delivery of mental health services, (b) issues respecting mental health and mental health services referred to Committee by Minister or initiated by Committee, (c) matters relating to development and improvement of community-based support systems for persons suffering from mental disorders. (§4).

Minister may inspect and investigate any hospital corporation, institution, agency, or person who provides services under Act if Minister has reason to believe that services provided are of inadequate quality or dangerous, destructive, or damaging to those receiving services. (§3[1]). In investigation, Minister may (a) enter any premises from which hospital corporation, institution, agency or person provides service or keeps records relating to service (b) inspect records and documents of hospital corporation, institution, agency or person, and (c) interview employees at hospital corporation, institution, agency or person and recipients of service. (§3[2]).

15.07 SEXUAL HEALTH:

Governing Legislation.

C. V-2 deals with prevention of spreading venereal disease among general public and places responsibilities on both persons who believe they have or are suspected of having venereal disease and medical professionals. Those who believe they are infected with venereal disease must consult doctor. (§3). People diagnosed with venereal disease who refuse or fail to undergo treatment or notify their doctor they are receiving treatment by another medical professional commit offence. (§7[3]).

When Director, medical health officer, or public health nurse believes, or has reason to believe that person has venereal disease, person suspected of having disease may be ordered by notice in writing to undergo medical exam by medical doctor and receive from that doctor certificate declaring whether or not person has disease. (§10[1]). Same applies to those who are in custody, jail, or reformatories for committing offences. (§11). With children, all notices, directions and orders required or authorized by Act or regulations shall be given to father or mother. If parents are unavailable, then all notices, directions and orders go to person who has custody of child at time. If they fail to follow said notices, directions and orders, they are liable for penalties for noncompliance. (§13).

Authority must be granted from Minister in order to promote, sell, distribute, publish, or recommend treatment for alleviation or cure of venereal disease. To do so without authority is offence. (§18[1]). No pharmacist or other person, not being medical practitioner, shall prescribe or recommend to any person any drug, medicine or other substance to be used for care or alleviation of venereal disease, nor shall he or she supply, compound or issue any drug, medicine or appliance for treatment of such purposes except upon written prescription of medical practitioner. (§19).

16 INSURANCE

16.01 INSURANCE COMPANIES:

Governing statute is c. I-12. Inquiries may be directed to Superintendent of Insurance, Centennial Building, P.O. Box 6000, Fredericton, New Brunswick, E3B 5H1.

Marine Insurance is governed by separate Act. (c. M-1). As of Sept. 1, 2005 provincial Marine Insurance Act was repealed. Thereafter, marine insurance is governed by Federal Marine Insurance Act (Canada).

Licenses.

Every insurer carrying on business in province must be licensed and license must be renewed annually. Before a license is granted applicant must file following material: (1) Certified copy of its Act or charter of incorporation which shall include its regulations verified in manner satisfactory to Superintendent; (2) affidavit or statutory declaration that insurer is still in existence and legally authorized to transact business under its charter; (3) certified copy of its last balance sheet and auditor's report thereon; (4) notice of place where head office of insurer is situate, if without Province; (5) notice of place where chief agency or head office of insurer in Province is to be situate; (6) statement showing amount of capital of insurer and number of shares into which it is divided, number of shares subscribed and amount paid thereon; (7) certified copy of power of attorney to its Canadian chief agent, if any; (8) notice of appointment of chief agent or resident manager for Province; (9) statement in such form as is required by Superintendent of condition and affairs of insurer on 31st day of Dec. then last preceding or up to usual balancing day of insurer or as Superintendent requires; and (10) such other evidence as Superintendent requires. (§27[1]).

Every insurer, before receiving a license, must deposit with Provincial Treasurer, securities as follows: life insurance, $50,000; other classes of insurance, if doing business in New Brunswick only, $25,000; or if doing business both in and outside of New Brunswick, $50,000. Provision is made for reciprocal deposits where a similar provision is made in other provinces.

Claims.

§265.21(3) of Insurance Act was amended by Regulation 2003-20. There is now $2,500 limit for non-pecuniary loss of plaintiff for all minor personal injuries suffered.

Contracts.

Part 3 of Act sets forth provisions relating to insurance contracts in province.

Special Classes of Insurance.

Regulated by Insurance Act, as follows: Fire, by Part 4, including statutory conditions; life, by Part 5, which also sets forth law relating to life insurance contracts in province and which corresponds to Uniform Life Act of other provinces; accident and sickness, including statutory conditions, by Part 6; automobile, including statutory conditions, by Part 7; livestock, by Part 8; weather, by Part 9; fraternal societies, by Part 10; mutual benefit societies by Part 11; mutual insurance companies, by Part 12; reciprocal insurance, by Part 13; amalgamation, transfer and reinsurance, by Part 14. Marine insurance is governed by Federal Marine Insurance Act (Canada). (c. M-1).

Brokers and Adjusters.

Part 15 of Insurance Act provides for licensing and regulation of insurance brokers and adjusters.

Foreign Companies.

Rights of licensed foreign company are same as those of company incorporated in province.

Service of Process.

Actions against insurance companies situated outside province may be made by sending copy of notice or process to insurer by registered mail, postage prepaid, addressed to insurer at most recent address filed in Office of Superintendent. Service shall be deemed to have been received by insurer ten days after date of mailing.

Taxation.

See category 22 Taxation.

Direct Actions Against Insurer.

Where person incurs liability for injury or damage to person or property of another, and is insured against such liability but fails to satisfy judgment against him, person entitled to damages may recover by action against insurer amount of judgment up to face value of policy. (§104). For motor vehicle liability policies, see category 23 Transportation, topic 23.03 Motor Vehicles, subhead Direct Actions.

16.02 SURETY AND GUARANTY COMPANIES:

License may be granted by Superintendent of Insurance to carry on class of insurance described as guarantee insurance. (c. I-12, §23[1]).

Foreign Companies.

No prohibition. Must be licensed in same manner as domestic insurance company.

17 INTELLECTUAL PROPERTY

17.01 TRADEMARKS AND TRADENAMES:

See Canada Law Digest, category Intellectual Property, topic Trademarks and Designs.

Tradenames.

Every person, who is not associated in partnership with any other person but who uses his own name with the addition of “and company” or some other word or phrase indicating a plurality of members, must file a certificate of such with registrar under Partnership Business Names Registration Act. (c. P-5, §9[1]).

As to registration of partnership name, see category 2 Business Organizations, topic 2.07 Partnerships.

Fees.—Registration fee is $50 and publication fee is $10. See category 2 Business Organizations, topic 2.07 Partnerships, subhead Registration.

18 LEGAL PROFESSION

18.01 ATTORNEYS AND COUNSELORS:

Attorneys at law are styled “solicitors”; and equivalent of “counselor at law” is “barrister.” Solicitors and barristers are officers of Court of Appeal appointed by Court on recommendation of Council of Law Society.

Bar Admission.

Governing statute is Law Society Act, 1996, c. 89. Qualification for admission as barrister and solicitor, clerk must have served period or periods of articles aggregating not less than 44 weeks within period of three years from time Articles of Clerkship became effective. (§33[1]). Under Law Society Act, 1996, clerk is required to write Bar Examinations consisting of civil procedure and Statutes of New Brunswick.

Eligibility.

Applicants must be British subjects or permanent residents who have declared their intention to apply for Canadian citizenship. A barrister or solicitor must become a Canadian citizen within six years of filing declaration.

Registration as Student-at-Law.

Application for admission shall be filed with Executive Director on or before June 1st in year applicant enters Articles of Clerkship or no later than six weeks prior to commencement of block of bar admission course at which applicant proposes to attend. Council will consider application, upon approval if it finds applicant qualified and proper fees have been paid, admit applicant as student-at-law.

Student-at-law who has served period of articles in another province or territory of Canada may transfer credit for not more than six months according to formula that time spent articling in other jurisdiction will be credited as equal amount of time spent articling in New Brunswick, if period in other jurisdiction is in period immediately preceding or following articles in New Brunswick. For fuller particulars apply to Secretary, The Law Society of New Brunswick, Suite 206, 1133 Regent Street, Fredericton, N.B., E3B 3Z2.

Admission as a Solicitor and Barrister on Transfer.

Person admitted to practise law in another province or territory of Canada may apply for admission as barrister and solicitor if (a) He/she has been engaged in active practise in one or more of other provinces or territories immediately preceding application for admission, (b) is member in good standing authorized to practise law in last jurisdiction in which applicant practised prior to application and (c) passes bar examination.

If have not been engaged in active practise in that jurisdiction for at least three of the five years preceding application, may apply for admission as barrister and solicitor if have been student-at-law in good standing with Society for six months before admission. Council may waive all or part of requirement that applicant be student-at-law with Society for six months before admission. For fuller particulars apply to Secretary; The Law Society of New Brunswick.

Admission for Occasional Appearances.

Member of legal profession outside Province may be admitted to practice for occasional appearances for specified proceedings.

Status.

A barrister and solicitor is commissioner of oaths and notary public.

Privileges.

No barrister or solicitor shall have any privilege as such exempting him from jurisdiction of any court.

Disabilities.

There is no disability upon a barrister or solicitor to act as a surety.

Compensation.

A barrister or solicitor may sue for and recover his reasonable and lawful fees, costs, charges and disbursements. Any bill for fees, costs, charges or disbursements may be taxed before Registrar of Court of Queen's Bench. Contingency fees permitted if client otherwise unable to pay or reasonably foreseeable as unable to pay. (c. 32, 1978, §72.1). Local minimum tariffs are recognized for most matters.

Lien.

A barrister or solicitor has a possessory lien on all clients' papers for his fees and disbursements.

Disbarment or Suspension.

Council of Law Society may disbar or suspend from practice of law any barrister or solicitor or expel from society any student who has been guilty of professional misconduct. Such order may be appealed to Court of Appeal of New Brunswick.

Unauthorized Practice.

Persons not admitted to practice law and corporations, etc., may not perform work or services in matters pertaining to law, such as preparing instruments relating to property, petitions, contracts, affidavits, documents relating to incorporation or winding up of companies, etc., except that a justice of peace or notary public may prepare any instrument relating to real estate and a notary public may do any work ordinarily pertaining to his office. Persons violating these provisions may be liable on summary conviction to a fine not exceeding $5,000 or imprisonment for a term not exceeding one year.

Professional Associations.

Law Society of New Brunswick; Canadian Bar Association; Saint John Law Society; York-

Sunbury Barristers' Society; Moncton Area Lawyers' Association; l'Association du Barreau de Madawaska; Restigouche Barristers' Society; Northumberland Barristers Society; Gloucester Barristers' Society.

19 MINERAL, WATER AND FISHING RIGHTS

19.01 MINES AND MINERALS:

Governing statute is Mining Act, c. M-14.1. Minister of Natural Resources and Energy has general supervision over mining and mining lands in Province, and establishes mining commissioner who has exclusive jurisdiction to hear and determine all questions, disagreements, matters or claims arising out of application of Act and recorder who shall record all mineral claims and mining leases and all instruments affecting mineral claims and mining leases.

Prospecting Licences.

Any person who is 16 years of age or older, corporation or partnership may apply to recorder for prospecting licence in form prescribed by regulation.

Staking Mineral Claims.

Prospector may stake mineral claim in accordance with regulation.

Mining Leases.

Holder of recorded mineral claim may apply for and obtain mining lease subject to statutory terms and conditions.

Royalties.

Everyone who takes minerals under authority of mining lease shall pay royalties to Crown in accordance with regulations.

Mining Income Tax.

See category 22 Taxation, topic 22.08 Income Tax, subhead Mining Income Tax.

20 MORTGAGES

20.01 CHATTEL MORTGAGES:

See topic 20.05 Personal Property Security.

20.02 COLLATERAL SECURITY:

See category 8 Debtor and Creditor, topic 8.16 Pledges.

20.03 MORTGAGES OF PERSONAL PROPERTY:

See topic 20.05 Personal Property Security.

20.04 MORTGAGES OF REAL PROPERTY:

Common law rules govern.

Execution.

Mortgage must be under seal, executed and acknowledged as a deed.

Form.

Standard forms must be used. (c. S-12.2).

Recording.

Mortgages must be recorded in registration district wherein land is situate in order to be effective against third persons. Same provisions as apply to recording deeds apply to mortgages. See category 21 Property, topic 21.05 Deeds.

Recording Fees.

Recording fee is $30. Additional $10 for documents over 15 pages.

Release.

A mortgage is discharged by registration of a certificate signed by the mortgagee, his assignee or representative, stating that the mortgage has been paid, or by the mortgagee signing on the margin of the mortgage registered in the office of the registrar of deeds, and in the presence of the registrar, a receipt for the money due thereon.

Power of sale is procedure most commonly used. Sale under power of sale in mortgage or under Property Act may be used when default occurs. Only power of sale under Property Act permits mortgagee to buy in at sale for his own benefit. Notice of sale is required to be published.

Taxes.

No taxes payable on registration of mortgages.

Future Advances.

Mortgage may cover future advances; however, future advances are subject to any intervening registered charges, encumbrances or liens.

Trust deeds are universally used to secure bond issues. They provide for operation of the property by the mortgagor until default and realization and sale upon and after default.

Assignment.

Made by instrument of assignment executed by mortgagee. When mortgagor is entitled to redeem he may require mortgagee instead of reconveying to assign mortgage debt and convey mortgaged property to any third party. This does not apply if mortgagee is or has been in possession.

Chattel Mortgages.

See topic 20.05 Personal Property Security.

Debenture.

Standard form of debenture is required. (c. S-12.2).

20.05 PERSONAL PROPERTY SECURITY:

Governing statute is c. P-7.1. Applies to every transaction that in substance creates security interest, including chattel mortgage, conditional sale, floating charge, pledge, debenture, trust indenture or trust receipt, lease, assignment, consignment or transfer of chattel paper and additionally, to assignment of accounts, transfer of chattel paper, consignment, or lease for term of more than one year, notwithstanding that such interests may not secure payment or performance of obligation. (§3). It does not apply to (a) lien, charge or other interest given by rule of law or statute unless statute provides that this Act applies, (b) creation or transfer of interest or claim in or under contract of annuity or policy of insurance except transfer of right to money or other value payable under policy of insurance as indemnity or compensation for loss or damage to collateral, (c) creation or transfer of interest in present or future wages, salary, pay, commission or any other compensation for work or services, assignment or transfer of which is prohibited by any statute or rule of law, (d) transfer of unearned right to payment under contract to transferee who is to perform transferor's obligations under contract, (e) creation or transfer of interest in land including lease, (f) creation or transfer of interest in right to payment that arises in connection with interest in or lease of land other than interest in right to payment evidenced by security or instrument, (g) sale of accounts, chattel paper or goods as part of sale of business out of which they arose unless vendor remains in apparent control of business after sale, (h) transfer of accounts made solely to facilitate collection of accounts for transferor, (i) creation or transfer of right to damages in tort, (j) mortgage registered under Canada Shipping Act (Canada), (k) security agreement governed by Act of Parliament of Canada that deals with rights of parties to agreement or rights of third parties affected by security interest created by agreement governed by Part VIII of Bank Act (Canada). (§4). Single conceptual basis for all personal property security agreements is employed.

Conflict of Laws.

Law of jurisdiction where collateral is situated when security interest attaches is applicable law for determining validity, perfection of security interest in such collateral. (§5). For intangibles, property normally used in more than one jurisdiction and instruments, documents of title, money and chattel paper, law of jurisdiction where debtor is located governs. (§7[2]). Debtor is deemed to be located at his place of business, at his chief executive office if he has more than one place of business and otherwise at his place of residence. (§7[1]). For goods brought into New Brunswick, distinction is made between buyer in good faith of goods brought into province and all other persons. Security interest in collateral already perfected under law of place in which collateral situated when security interest attached and before being brought into New Brunswick continues perfected in New Brunswick as against buyer in good faith if perfected in New Brunswick prior to buyers acquiring interest in goods and as against all other persons within 60 days after brought into province, or within 15 days after day secured party receives notice that goods have been brought into New Brunswick, or prior to day that perfection ceases under law of prior jurisdiction, whichever is earliest. (§7[3]).

Transitional.

C. P-7.1 causes repeal of Assignment of Book Debts Act, Bills of Sale Act, Conditional Sales Act, Corporation Securities Registration Act, Forest Products Loans Act, and amendments to All-Terrain Vehicle Act, Assignments and Preferences Act, Creditors Relief Act, Employment Standards Act, Evidence Act, Factors and Agents Act, Innkeeper's Act, Insurance Act, Limitation of Actions Act, Marital Property Act, Real Property Tax Act, Registry Act, Sale of Goods Act, Statute of Frauds, and Warehouseman's Lien Act. (§§75-79; 1993, c. 36 and 1994, c. 50).

Registration under repealed or amended Acts is deemed to be registration under c. P-7.1. (§74[1]). Question as to priority between security interests validly created prior to coming into force is determined by prior registration law, but priority between prior security interest and security interest validly created after proclamation shall be determined by c. P-7.1.

Registration is continued for unexpired portion of filing or registration period under prior law except for registrations under Corporation Securities Registration Act and Forest Products Loans Act which expire on Apr. 18, 1998, unless they were renewed under c. P-7.1.

Effectiveness.

Security agreement is effective according to its terms. (§9). However, certain terms are prohibited or may be unenforceable. (§10). Security interest attaches, including floating charge, when value is given, debtor has rights in collateral, and except for enforcing inter party rights, it becomes enforceable against third parties. (§12). Security agreement may secure future advances. (§14). Acceleration clauses are only effective if secured party, in good faith, believes and has commercially reasonable grounds to believe that payment is not going to be made or that collateral is about to be placed in jeopardy. Where debtor reinstates security agreement, operation of any acceleration clause is ineffective. (§16).

Enforceability.

No security interest is enforceable against third party unless collateral is in possession of secured party or debtor has signed security agreement that contains description of collateral by item or kind, statement that security interest is taken in all of debtor's present and after acquired personal property, or statement that security interest is taken in all of debtor's present and after acquired personal property except specified items or kinds of personal property. (§10).

Attachment.

Security interest attaches when value is given, debtor has rights in collateral and, except for purpose of enforcing rights between parties, it becomes enforceable against third parties. Debtor has rights in goods purchased under agreement to sell when contract is made and obtains possession pursuant to lease, hiring agreements or consignment. Debtor has no rights in crops until growing crops, young of animals until conceived, in oil, gas or other minerals until extracted, in timber until cut. (§12).

After-acquired Property.

Security agreement may cover after-acquired property and security interest will attach without specific appropriation by debtor. (§13).

Future Advances.

Security agreement may secure future advances. If future advances are made while security interest is perfected, security interest has same priority with respect to future advances as it has with respect to first advance. Future advances will not take priority over interests of person who causes collateral to be seized under legal process, sheriff who has seized, trustee in bankruptcy or representative of creditors who have caused collateral to be seized under legal process, unless advance made before interests of such persons arise, or before secured party receives notice of their interests. Obligation of secured party to make future advances is not binding on creditor if collateral has been seized, attached, charged or made subject to equitable execution and secured party has knowledge of fact before making advances pursuant to obligation unless parties otherwise agree. (§14).

Perfection.

Security interest is perfected when it has attached and all steps required for perfection required under Act have been completed regardless of order of occurrence. (§19). Three methods of perfection are: possession of collateral by third party or on party's behalf (§24); registration of financing statement in Personal Property Registry (§25); and automatic, although temporary, perfection by way of statutory grace periods (§22).

Act also provides specific rules as to perfection with respect to proceeds of collateral. Security interest in collateral extends to proceeds and is perfected if financing statement filed which covered original collateral contains prescribed description, or if proceeds are of type which fall within description of original collateral, or are cash; then, registration perfects security interest in both collateral and in proceeds. Otherwise, security interest in proceeds perfected for only 15 days after debtor receives possession of them. (§28).

Purchase money security interest in collateral, other than intangibles or inventory, that is perfected within 15 days after debtor or third party at request of debtor obtains possession of collateral, whichever is earlier, or intangible, or its proceeds within 15 days after security interest therein attaches, has priority over any other security interest in same collateral given by same debtor. (§34[1]).

Purchase money security interest in collateral as original collateral has priority over purchase money security interest in same collateral as proceeds if perfected in case of inventory, where debtor or third party as request of debtor, obtains possession, whichever is earlier, and in case of collateral other than inventory, within 15 days after debtor or third party at request of debtor obtains possession, whichever is earlier. (§34[5]).

Purchase money security interest in inventory or its proceeds has priority over any other security in same collateral given by same debtor if purchase money security interest in inventory is perfected at time debtor receives possession of it and purchase money secured party serves notice on secured party who has registered financing statement covering same type of collateral. (§34[2]).

Buyer or lessee of goods sold or leased in ordinary course of business of seller takes free of any perfected or unperfected security interest therein given by or reserved against seller, whether or not purchaser knows of it, unless secured party proves that purchaser also knows that sale or lease constitutes breach of security agreement. (§30[2]).

Act provides special priority rules between secured and unsecured creditors and with respect to fixtures, negotiable documents of title, money and securities, chattel paper, future advances, leases, crops, accessions and commingled goods. (§§30-39). Most priority competitions will be determined by first to register. (§35).

Registration.—All registrations under c. P-7.1 take place by electronic filing in Personal Property Registry.

Registration of financing statement is effective for length of time indicated in financing statement and may be renewed at any time before expiry by registering financing change statement. (§44[2]).

What was known as “book debt” is referred to in c. P-7.1 as “account”—monetary obligation not evidenced by chattel paper, instrument or security, whether or not earned by performance. (c. P-7.1, §1).

Rights of debtor in collateral may be transferred consensually despite agreement between parties but rights of secured party not to be prejudiced. (§33). Assignee rights subject to contract between assignor and debtor and debtor may raise any defence or claim against assignee that could be raised against assignor. (§41).

Where secured party assigns his interest or subordinates his interest to another person, financing change statement may be registered. Registration of such statement is mandatory where debtor transfers his interest in collateral or changes his name. (§44).

Search for registrations against name of debtor or against serial number where collateral required by regulation to be described by serial number may be obtained, with results given in printed form. (§48).

Time for Registration.

Financing statement may be registered at any time and may be registered before security agreement is made or before security interest attaches. (§43). It must be registered prior to expiry of any temporary perfection period (usually 15 days) to continue perfection uninterrupted, and with respect to purchase money security interest, within 15 days of debtor obtaining possession of collateral. (§22).

Rights and Remedies Upon Default.

Part 5 contains code setting out rights, remedies, duties and obligations upon both secured party and debtor many of which, to extent that they give rights to debtor or impose obligation upon secured party, cannot be waived. However all such rights and remedies of secured parties are subject to consumer protection legislation. (§§55-64).

21 PROPERTY

21.01 ABSENTEES:

No specific legislation.

Nonresidents are under no disability with regard to their civil rights including holding of real and personal property. (c. P-19, §10[1]). See, however, as to aliens, category Citizenship, topic Aliens.

Property of absconding or absent debtors may be attached by civil process. (c. A-2, §2).

See also category 13 Estates and Trusts, topic 13.05 Death.

Care of Property.

No statutory provisions. See applicable municipal laws.

Process Agent.

Nonresident individuals are not required to appoint agents for service of process. Nonresident corporation doing business in Province must appoint attorney for service pursuant to §197 of Business Corporations Act. (1981, c. B-9.1).

Escheat and Bona Vacantia.

See category 13 Estates and Trusts, topics Descent and Distribution, subhead Escheat; Wills, subhead Unclaimed Legacies; and Canada Law Digest, category 3 Business Regulation and Commerce, topic 3.01 Banks and Banking, subhead Unclaimed Deposits.

21.02 ADVERSE POSSESSION:

Common law rules prevail.

Character of Possession.

Continuous, open, visible, exclusive and notorious possession not under a grant or lease and without any active adverse claim by true owner.

Duration of Possession.

Period of 20 years creates prescriptive right against any person except Crown which requires a period of 60 years.

Easements.

Governing statute is c. E-1. Easements by prescription become absolute after 40 years of uninterrupted enjoyment. After first 20 years enjoyment they cannot be defeated merely by showing they were first enjoyed at some time previous to the 20 years. (§2).

No easement to light or air can be acquired subsequent to 1875. (§8). No easement in respect of wire attached to or passing over land can be acquired by prescription. (§9).

Disabilities.

Unless claim is declared absolute and indefeasible, time during which a person against whom a prescriptive right is claimed is mentally incompetent, an infant or a tenant for life, or during which any action is pending, cannot be included in computation of periods. (§6).

21.03 CONVEYANCES:

See topic 21.05 Deeds.

21.04 CURTESY:

Abolished for property acquired by woman after Apr. 29, 1916. (Married Women's Property Act, c. M-4).

21.05 DEEDS:

Deeds must be in writing, signed, sealed, acknowledged or proved, and registered.

Deeds by corporations must be under the corporate seal attested by the proper officer and the seal, signature, and authority to execute verified by affidavit.

Deeds are recorded in extenso in books required kept by registrars of deeds in the various counties. Recording fees are, $30 for all instruments. Deeds must have 1½ inch margin on top and left side and if both sides of paper are used, similar margin is required on right side of reverse side. Paper must be white measuring 8½ by 14 inches.

See topic 21.14 Real Property.

Form of Deed.

Mandatory as prescribed by Standard Forms of Conveyance Act. (c. S-12.2). Words and directions which are underscored are not part of form and are inserted for guidance. Parts of form which are enclosed in brackets are optional. Directions printed in square brackets are not part of form.

Form of Deed

Form A13

Reg. 83-131 of Standard Forms of Conveyances Act

DEED

Standard Forms of Conveyances Act, S.N.B. 1980. c. S-12.2, s.2

The parties to this deed are:

[ADD ADDITIONAL PARTIES AS REQUIRED]

grantor, of address, occupation or other identification, the “grantor” and

grantee, of address, occupation or other identification, the “grantee”

(The recitals, affidavits, statutory declarations or other documents attached hereto as Schedule “D” form part of this Deed.)

The grantor conveys (in fee simple, or as the case may be) to the grantee (as joint tenants, or as the case may be) the parcel described in Schedule “A” attached hereto (together with a right-of-way, or as the case may be, as described in Schedule “A”) (and) (reserving unto the grantor a right-of-way, or as the case may be, as described in Schedule “A”).

(The grantor guarantees title.)

(Covenants and conditions to which this conveyance is subject are attached hereto as Schedule “C”).

(The spouse of the grantor joins in this instrument and consents to this disposition for the purpose of complying with Section 19 of the Marital Property Act.)

Dated on month, day, 19__.)

SIGNED, SEALED ANDDELIVERED)

in the presence of:)

____Grantor____ LS

Form of Quit Claim Deed

Form A13.1

QUIT CLAIM DEED

Standard Forms of Conveyances Act, S.N.B. 1980, c. S-12.2, s.2

The parties to this quit claim deed are:

[ADD ADDITIONAL PARTIES AS REQUIRED]

grantor, of address, occupation or other identification, the “grantor”

and

grantee, of address, occupation or other identification, the “grantee”

(The recitals, affidavits, statutory declarations or other documents attached hereto as Schedule “D” form part of this Quit Claim Deed.)

The grantor quits claim to the grantee (as joint tenants, or as the case may be) the parcel described in Schedule “A” attached hereto (together with a right-of-way, or as the case may be, as described in Schedule “A”) (and) (reserving unto the grantor a right-of-way, or as the case may be, as described in Schedule “A”).

(Covenants and conditions to which this conveyance is subject are attached hereto as

Schedule “C”.)

(The spouse of the grantor joins in this instrument and consents to this disposition for the purpose of complying with Section 19 of the Marital Property Act.)

Dated on month, day, 19__.)

SIGNED, SEALED ANDDELIVERED)

in the presence of:)

_____Grantor______ LS

(Acknowledgment. See category 10 Documents and Records, topic 10.01 Acknowledgments.)

Execution.

Deed of land comprising marital home must also be executed by spouse. See category 14 Family, topic 14.07 Husband and Wife.

Taxes.

See category 22 Taxation, topic Land Transfer Tax.

21.06 DEEDS OF TRUST:

See category 20 Mortgages, topic 20.04 Mortgages of Real Property.

21.07 DOWER:

Governing statute is c. D-13. Dower repealed except where right to dower has vested in possession before Jan. 1, 1981.

21.08 ESCHEAT:

See category 13 Estates and Trusts, topic 13.07 Descent and Distribution; also topic 13.15 Wills, subhead Unclaimed Legacies.

21.09 LANDLORD AND TENANT:

Governing statute is c. L-1, but does not include residential tenancies. See subhead Residential Tenancies, infra.

Form.

Standard forms must be used with respect to any lease intended to be registered in registry office. (c. S-12.2).

Landlord.

Has right of reentry if rent reserved or portion thereof, remains unpaid for 15 days after it is due, unless there is express agreement to contrary. (§8).

When a tenant's goods are seized under execution the person making the seizure must pay to the landlord the amount of rent in arrear not exceeding one year.

When lands are let requiring notice to quit, the notice must be as follows: For the year or half year, three months; for the quarter or month, one month; and for the week, one week.

Tenant willfully overholding is liable for double rent or yearly value of premises.

A landlord has the remedy of ejectment where a tenant refuses to deliver up possession of the premises after the expiration of his tenancy or after due notice to quit.

Leases exceeding the term of three years must be in writing and registered. (§19, c. R-6).

Leases or other agreements that have effect of requiring all or part of retail business to remain open on any such weekly day of rest is of no effect insofar as it applies to that weekly day of rest. (c. D-4.2, §7.11).

Rent may be increased on nonresidential property by amount equal to increase in annual taxes over those of preceding year and must be decreased by amount of any tax decrease notwithstanding any provisions contained in lease, license or permit to contrary. For leases, licenses or permits for nonresidential property executed before 1982 rent may be increased by amount equal to increase in annual taxes over amount of taxes paid in 1982. Landlord shall reduce rent by amount equal to any reduction in taxes from those paid in 1982. (§18).

Distress.

Arrears of rent may be distrained for during continuance of landlord's interest and tenant's possession or within six months after termination of lease. No distress may be made between 6 P. M. and 8 A. M., nor may more goods be taken than are necessary to satisfy rent in arrears and costs of distress; but there is no liability for excessive distress if excess is abandoned within seven days. Goods fraudulently or clandestinely removed to avoid distress may be followed and distrained within 30 days and for this purpose doors, locks or other fastenings may be broken or removed. If distress is levied on property of lodger under tenant, such lodger may serve on landlord written notice that tenant has no property or beneficial interest in such property and pay or tender to landlord amount due to tenant and if landlord thereafter proceeds with distress he is liable for illegal distress. Only interest of tenant in goods distrained may be sold.

Residential Tenancies.

Governing statute is c. R-10.2.

Application.

Act applies to all premises used for residential purposes except premises occupied for business purpose with living accommodation attached under single tenancy agreement and further excepts boarding houses and vacation homes.

Rentalsmen.

Appointed by province to administer Act. They will assist both landlords and tenants in such areas as: Education and advice regarding rights and responsibilities of each; mediation and settlement of disputes; and enforcement of rights and responsibilities. (§26).

Lease Form.

Standard form must be used and if not used, it is deemed to apply to tenancy. No part may be altered or deleted. Parties may agree to addition to lease if addition does not alter any right or duty as stated in Act or lease. (§9[1], [3]).

Basic Landlord Responsibilities.

These depend in part on agreement of parties and in part on duties prescribed by law. Standard form leaves it to parties to agree on such things as heat, furniture, electricity, parking, etc. Mandatory responsibilities include: (1) Delivery of premises in good state of repair and fit for habitation and maintenance in same condition; (2) comply with all health, safety, housing and building standards; and (3) keep all common areas in clean and safe condition. (§3[1]).

Basic Tenant Responsibilities.

Mandatory responsibilities include: (1) Ordinary cleanliness of premises; (2) repair damage caused by his wilful or negligent conduct; and (3) conduct himself in manner that will not cause disturbance or nuisance. (§4[1]).

Rent.

Residential Rent Review Act, c. R-10.11 expired Aug. 31, 1985. No statutory provisions regulating rent increases.

Security Deposits.

Lease may provide for security deposit of not more than one week's rent in case of tenancy from week to week and in all other tenancies of not more than one month's rent. Security is to provide for tenant's failure to pay rent or comply with his mandatory responsibilities. Security is held by rentalsman. (§8[1]-[3]).

Entry and Privacy.

Landlord cannot enter premises except: (1) When emergency exists or tenant has abandoned premises; (2) upon seven days notice when normal repairs or redecoration to be carried out; (3) upon 24 hours notice to show to prospective purchasers or mortgagees; and (4) without notice during last rental period and where lease so provides to show prospective tenant. (§16[1]-[4]). Locks may not be changed without mutual consent or authorization of rentalsman. (§18).

Assignment.

Tenant may assign except where lease prohibits. Where tenant assigns all his rights under lease assignee becomes new tenant for all purposes and assumes all lease obligations. Lease may prohibit assignment or require landlord's consent which he may not arbitrarily withhold. Landlord has option to terminate lease rather than consenting to assignment. (§13).

If landlord transfers his interest he must notify tenant and rentalsman within seven days.

Termination.

Lease for fixed term ends automatically at end of term. Periodic tenancies may be terminated by serving written notice of termination. All notices are effective for last day of periodic term and in case of year to year must be given at least three months prior; in case of month to month must be given at least one month prior; and in case of week to week must be given at least one week prior. Notice period may not be shortened by lease but can be longer if included in lease.

Remedies.

Where tenant is in breach of any obligation, other than payment of rent, landlord may serve notice on tenant stating complaint. Copy must go to rentalsman. If breach not rectified within seven days landlord may give notice to rentalsman who then conducts investigation. Rentalsman may require tenant to fulfill his obligations and if not rectified within time established by rentalsman, rentalsman may serve notice to vacate.

If tenant fails to pay rent on due date, landlord may serve notice on tenant and rentalsman requesting service of notice to quit. Rentalsman will investigate and if he finds rent has not been paid will serve notice to quit on tenant. Tenant may rectify his breach by payment to rentalsman within seven days of receipt of notice to quit. If he fails to pay rent second time and notice to quit is served, he cannot rectify breach.

Distress is abolished.

Landlord must mitigate his damages. (§11[4]).

If landlord is in breach of any of his obligations, tenant may service notice of complaint within seven days (or one day if breach constitutes or involves emergency). If not remedied, tenant may give notice to rentalsman who may conduct investigation. Rentalsman may require landlord to rectify breach and if not so done within time permitted, rentalsman may perform obligation and require future rent payments to be made to him until rentalsman's expenses have been reimbursed.

Services of Notices.

Notices may be delivered personally or sent by ordinary mail to tenant, landlord or rentalsman. Landlord of building containing three or more units and who does not live in building must post conspicuous notice within building or file with rentalsman setting out legal name of landlord or his agent and address for service.

21.10 LEASES:

See topic 21.09 Landlord and Tenant.

21.11 PERPETUITIES:

The rule which is commonly known as the rule against perpetuities forbids any disposition by which the absolute vesting of property is or may be postponed beyond the period of the life or lives of any number of persons living at the date of the disposition, and the further period of 21 years after the death of the survivor.

Under Property Act (c. P-19), no person may by deed, surrender, will or otherwise settle or dispose of any real or personal property so that rents, issues, profits or produce thereof shall be wholly or partially accumulated for longer than one of following periods: (1) Life of grantor or settlor; (2) twenty-one years from death of grantor, settlor or testator; (3) period of minority of any person living or in ventre sa mere at death of grantor or testator; (4) period of minority of any person who, under instrument directing accumulation, would, for time being, if of full age, be entitled to income, rents or profits directed to be accumulated. No accumulation for purchase of land may be directed for longer than period mentioned in (4) above.

In case of violation of the rule against accumulations, the rents, issues and profits go to the person who would have been entitled thereto if no accumulation had been directed.

The foregoing does not apply to accumulations for payment of debts of the grantor or raising portions for any child, etc.

21.12 PERSONAL PROPERTY:

Tenancy by entirety does not exist in either real or personal property law. (c. P-19, §19; c. M-4, §§2-3).

21.13 POWERS OF ATTORNEY:

Attorneys in Fact.

Appointed by power of attorney executed by any person able in his own right to do act for which appointment is made. Trustees and others in fiduciary capacity cannot delegate their authority or duties except by express power in their appointment, etc. Power of attorney should be under seal and witnessed; if it relates to any interest in land it should be acknowledged in same manner as deed and registered in same manner. Powers of attorney are revoked by death, unsoundness of mind or bankruptcy of donor of power except in cases where instrument creating it declares it to be irrevocable and power is given for valuable consideration in which cases, it is irrevocable and all acts under power done by donee at any time are valid.

There is no particular form but the purposes for which it is given and its duration should be set out clearly and the donee should be clearly designated.

21.14 REAL PROPERTY:

Governing statute is c. P-19. Estates tail are abolished and every estate which would hitherto have been adjudged a fee tail is adjudged a fee simple and if no valid remainder is limited thereon is a fee simple absolute and may be conveyed or devised by the tenant in tail or otherwise descends to his heirs as a fee simple. Otherwise all estates recognized at common law are recognized in New Brunswick. Every estate created, granted or devised to two or more persons in their own right is a tenancy in common unless expressly declared to be a joint tenancy, but every estate vested in trustees or executors as such is held by them in joint tenancy.

Rule In Shelley's Case.

Recognized.

Expropriation.

Governing statute is c. E-14. Interest in land may be taken for public or industrial purposes after procedures set out in Act have been fulfilled.

Condominiums.

Governing statute is c. C-16. Where land mentioned in description is affected by subdivision bylaw or regulation under c. C-12, description shall not be approved unless such land is certified by development officer appointed under c. C-12 as meeting requirements of c. C-12, §§47(3) and 77(8)(c).

Community Planning.

Governing statute is c. C-12. Province is divided into seven planning areas to which development officers are designated to administer and control subdividing of real property. Act and regulations govern only where municipal corporate body has not been established. Bylaws of such body govern in such areas.

Power of Attorney.

Governing statute is c. P-19. Authority conferred upon donee by Power of Attorney is not terminated where donor suffers from mental incompetence after creation of Power of Attorney, if Power of Attorney contains provision that expressly allows it to be exercised during such incompetence and is signed by donor, or signed in name of donor by another person in presence and at direction of donor and is witnessed by adult person other than donee (see §§58.1-58.7).

Air Space.

Governing statute is c. A-7.01. Air space constitutes land and may be dealt with as land.

See also topics 21.04 Curtesy, Deeds, Dower, Landlord and Tenant; categories 5 Civil Actions and Procedure, topic Partition; Debtor and Creditor, topic Homesteads; Family, topic Husband and Wife; Mortgages, topic Mortgages of Real Property.

21.15 RESIDENTIAL TENANCIES:

See topic 21.09 Landlord and Tenant, subhead Residential Tenancies.

21.16 TRUST DEEDS:

See category 20 Mortgages, topic 20.04 Mortgages of Real Property.

22 TAXATION

22.01 ADMINISTRATION:

Penalties.

Criminal.

See Canada Law Digest.

Failure to Pay Taxes.

Income tax: see Canada Law Digest. Sales taxes: Province has lien upon goods until paid and has lien upon assets used in business for taxes collected and not remitted. Real property taxes: Province may advertise and sell real property after due notice.

Failure to Pay Assessment.

See category 11 Employment, topic 11.02 Labour Relations, subhead Workers' Compensation Act.

22.02 ALCOHOL, BEVERAGES AND TOBACCO TAXES:

Tobacco Tax.

Governing statute is c. T-7. Is imposed by Province at retail sales in respect of consumption of tobacco.

22.03 BUSINESS TAXES:

Premium Tax.

Every insurance company shall pay to Minister of Finance for provincial purposes tax equal to: (a) 2% of gross premiums that become payable, under contracts of accident, life, and sickness insurance; and (b) 3% of gross premiums that become payable, under any other contract of insurance. No tax payable on premiums received in respect of contracts of marine insurance and contracts providing medical, dental or hospitalization benefits entered into by nonprofit company. (Premium Tax Act, c. P-15).

22.04 CORPORATE TAXES:

Corporation Tax.

Tax imposed by Province and collected by Federal Government. See also Canada Law Digest, category Taxation, topic Income Tax.

22.05 EMPLOYMENT TAXES:

Social Security/Unemployment Compensation Tax.

None imposed by Province. See Canada Law Digest.

22.06 GASOLINE AND SPECIAL FUELS TAXES:

Gasoline Tax.

Governing statute is Gasoline and Motive Fuel Tax Act, c. G-3. Rebates to person validly registered as farmer, fisherman or wood producer under Social Services and Education Tax Act, manufacturers for certain consumption in connection with their callings and certain other commercial users of fuel.

22.07 GIFT TAX:

None exigible if gift made after Dec. 31, 1973.

22.08 INCOME TAX:

Governing statute is N-6.001. Tax imposed by Province and collected by Federal Government. No municipal income tax. No special provisions for members of Armed Forces while residing in Province. While residing outside Canada, see Canada Law Digest, category Taxation, topic Income Tax.

Mining Income Tax.

Governing statute is c. M-14.1. See also Metallic Minerals Tax Act. (c. M-11.01). Tax payable is equal to 2% of net revenue after two years of operation and 16% of net profits in excess of $100,000 less credit equal to 25% of eligible exploration expenses and process research expenditures. (§2.1).

22.09 INHERITANCE TAX:

None exigible if death occurred after Dec. 31, 1973.

22.10 PROPERTY TAXES:

Real Property Taxable.

Minister of Finance administers assessment of real property; no taxation levied on personal property; Minister of Finance collects tax. (Real Property Tax Act, c. R-2).

Exemptions.

(1) Real property owned by church for use as residence for priests, ministers, rabbis, or commissioners and staff officers of Salvation Army and that portion of other real property owned by church or religious order and used solely for religious, educational or charitable purposes, including burying grounds and church halls from which only revenue for church purposes is derived; (2) real property of cemetery companies not organized, incorporated or operated for profit; (3) portion of real property owned and occupied by (i) literary and historical societies, or (ii)

institutions and associations formed and operated for advancement of science or art within Province; (4) real property occupied by agricultural society or agricultural fair association that is used solely for exhibition purposes; (5) that portion of real property occupied by rural voluntary fire associations; (6) land and building, or that portion of land and building, that is arena containing ice rink used for such sports as hockey and figure skating, but curling club is not exempt from taxation under this paragraph; (7) real property that is provincial park as defined under Parks Act in respect of which Minister of Natural Resources and Energy has entered into agreement with municipality under paragraph 3(2)(b) of Parks Act; (8) runways, paving and fencing on airport land, other than heliports, if airport land meets certification requirements under Aeronautics Act (Canada) and airport has operational runway made of asphalt or concrete that is at least 915 metres in length; (9) real property situated at fishing harbours prescribed by regulation, including land, buildings, water lots and wharfage used for operation of fishing harbour, but not including real property, or any portion of real property, that is used for purposes of processing or manufacturing or that is used for commercial purposes not vital to operation of fishing harbour such as hotels, restaurants and service centres; and, (10) real property owned by university funded under Maritime Provinces Higher Education Commission Act and listed in Schedule B, but not including real property or any portion of real property that director determines is used for commercial purposes in accordance with any criteria that may be prescribed by regulation. No exemptions for members of Armed Forces. (c. A-14).

Assessment.

Real property is assessed at real and true value except: (1) Freehold timberlands and farm woodlots; (2) property owned and occupied by charitable organization or nonprofit organization; and (3) property occupied by agricultural fair association, racing association or other group and that is used as horse racetrack. Real property includes land and buildings and machinery, etc. providing services to building; also includes trailers used as mobile homes and bunkhouses. Not included as real property are, inter alia: (1) Growing crops; (2) mines below surface of ground; (3) quarries, minerals, gas, etc.; (4) public parks; and (5) railway rights of way.

Business Assessment.

Governed by §§5-7, repealed, 1982, c. 7, §§3, 4.

Review of Assessment.

Any person who receives assessment and tax notice may refer any assessment to Executive Director of Assessment within 30 days after mailing of assessment and tax notice. Where assessment has been referred to Director, person making reference may appeal to Regional Assessment Review Board. (§§25-38 of c. A-14).

Rates of Tax.

Each year there shall be tax at rate of $1.50 on each $100 valuation of all real property, used as residence not occupied by owner. Farm woodlots are assessed at value that will realize 80¢ per hectare per year based on combined provincial and municipal rates. Annual rate for other real property is $2.25 on each $100 valuation. Municipal rate fixed by each municipality is payable on all real property. See also §5(4) of c. R-2; Residential Property Tax Relief Act, c. R-10.

Payment.

Real estate and local service taxes are payable to Minister of Finance and are due on date to be fixed by regulation. Municipality may collect tax imposed under paragraph 5(2)(a) and any penalties with respect to such tax in accordance with regulations if it notifies Minister on date fixed under subsection 87(2) of Municipalities Act in year that is two complete calendar years before first day of Jan. of year it wishes to collect such tax and penalties. If taxes or penalties are unpaid on date to be fixed by regulation penalty is imposed of 1.06% per month, compounded monthly or 13.5% per year. Taxes may be prepaid or paid in instalments.

Lien.

Due and unpaid taxes constitute lien on all real property with priority over every claim, lien, privilege or encumbrance of any person and does not require registration or filing to preserve it. There is no lien on personal property for real estate taxes. (§11[1]).

Sale.

Real property may be sold by Department of Municipal Affairs after notice and after Jan. 1 of year following year in which taxes were imposed. Time, place and terms of sale established by regulation.

Redemption.

Any person may redeem real property sold at tax sale within one year of such sale by paying: (1) 115% of sale price; (2) taxes and penalties remaining unpaid; (3) sums paid by purchaser at tax sale for insurance on property, repairs, taxes and necessary services less any rents received by such purchaser.

Land Transfer Tax.

Rate is ¼ of 1% of greater of actual consideration or assessed valuation and is payable at time of registration of deed.

22.11 SALES AND USE TAXES:

Sales Tax.

Governing statute is Harmonized Sales Tax Act, c. H-1.01. Provincial tax has been harmonized with Federal Goods and Services Tax under Comprehensive Integrated Tax Coordination Agreement. Provincial tax of 13% is imposed on all purchases of goods and services. Minister is responsible for administration of Act and may designate persons to act on his or her behalf.

22.12 STAMP AND SEAL TAXES:

Stamp Tax.

No provincial stamp tax imposed on stock transfers or other documents.

23 TRANSPORTATION

23.01 AIRCRAFT:

See Canada Law Digest, category Transportation, topic Aircraft.

23.02 AUTOMOBILES:

See topic 23.03 Motor Vehicles.

23.03 MOTOR VEHICLES:

Governing statute is c. M-17.

Vehicle License.

Required. Number plate must be displayed in front and rear. Leased vehicles must be registered in both owner's name and lessee's name. Vehicles that are non-repairable or rebuilt (§17.2) are to be registered as such.

Operator's License.

Required. Generally classes 4-9 are renewable every four years, unless medical requirement imposes early renewal at designated age, every two years, which applies to classes 1-4.

Graduated licensing program applies to all applications or first time applicants. Person who is at least 16 may apply to Registrar for learner's licence and Registrar may, after applicant has passed all parts of required examination other than road test, issue stage 1 learner's permit.

Learner's permit entitles holder to drive motor vehicle other than motorcycle upon public highway for two years.

Novice driver in stage 1 must be accompanied by licensed driver, no other person other than licensed driver shall be in motor vehicle and novice driver must not have consumed alcohol such that driver's blood exceeds zero milligrams of alcohol in one hundred millilitres of blood.

Novice driver is qualified to hold stage 2 learner's licence when he/she has held stage 1 licence without interruption for preceding four or more months, has successfully passed licensed drivers training course during previous two years and has passed required road test or has held stage 1 licence without interruption for preceding 12 months and has completed required road test and includes documentary proof thereof. (§84).

Any person under age of 18 who applies for licence must have signed written consent of either father or mother who has custody of applicant. If neither parent is alive and no one has custody, employer of applicant can provide written consent. Where neither parent is living and no guardian or employer exists any other responsible person may provide written consent. Signature providing consent must be witnessed by person not related to minor or person giving consent, nor have interest in whether or not minor obtains licence. (§86[1][2]). No person under age of 16 may be licensed. Members of Armed Forces do not have to be licensed while operating a motor vehicle in service of Army, Navy or Air Force of Canada, but otherwise they must obtain a license on taking up residence in province.

Bills of Sale and Liens.

See category 20 Mortgages, topic 20.05 Personal Property Security.

Operation Prohibited.

By person under age of 16 (except farm tractor or motor driven cycle) or intoxicated person.

Equipment Required.

Horn or other warning device capable of emitting sound audible under normal conditions for not less than 60 metres; two means of applying brakes; mirror providing unobstructed view of highway for not less than 60 metres in rear; muffler; windshield wiper; speedometer. Cut-out or similar device prohibited.

No person shall ride or operate bicycle on highway unless person is wearing bicycle helmet in accordance with regulations and chin strap of helmet is securely fastened under person's chin. (§177[3]).

Lights Required.

Two in front showing white lights visible a reasonable distance; one in rear throwing white light toward license number and red light directly back; turn indicator and braking indicator lights. Lights not required where vehicle not in motion or parked by side of highway where there is other sufficient artificial light. Spotlight permitted only on right side of vehicle and when so attached as at all times to throw its glare towards right side of road.

Motorcycle or bicycle must have white light or approved reflector visible a reasonable distance in front and red light or approved reflector in rear.

Required lights must be displayed at night time or when there is insufficient light. Lights must be dimmed at least 150 metres before meeting another vehicle or as soon as such vehicle is visible.

Motor vehicle may have not more than two fog lights in front, but such lights may be used only in conjunction with lower or passing beams of head lamps. (§219[2]).

Seat Belts.

Use of seat belts in motor vehicle in which seat belt assembly is provided for, is required except when operator is driving in reverse, holds certificate from medical practitioner certifying operator is unable to wear seat belt or is engaged in work which requires alighting and reentering motor vehicle at frequent intervals and when engaged in such work does not drive at speed in excess of 40 k.p.h. Operator responsible for ensuring passengers under 16 years of age wear seat belts. (§200.1). Maximum fine that may be imposed is $1,070. (c. P-22.1, §57).

Accidents.

In case of accident, operator must stop and give person injured or whose property is injured his name and address and registration number of vehicle. If accident results in personal injury, death or property damage to apparent extent of $400 or more, operator of vehicle, or any person therein at time if operator incapacitated shall immediately notify police of such accident and of his name and address and name and address of owner of car and must upon request of Registrar supply information for accident report. (§130).

Owner.

Liable for negligence of others operating vehicle with his consent. (§270).

Liability of Parent and Guardian.

Every parent and guardian is under legal duty to do everything reasonably within his power to prevent his child or ward from playing on highway, and every parent and guardian who fails so to do is guilty of offence. In prosecution of parent or guardian under this section if it is established that child or ward of such parent or guardian was playing on highway court may convict such parent or guardian unless such parent or guardian satisfies court that he did everything reasonably within his power to prevent his child or ward from playing on highway.

No parent or guardian of person who is under 16 years of age shall authorize or knowingly permit that person to ride on or operate bicycle on highway unless wearing helmet in accordance with §77(3)(4).

Financial Responsibility.

The driver's license and every owner's permit of any person who owns or is operating a motor vehicle at the time it becomes involved in an accident resulting in personal or property damage to others in excess of $400, or who is convicted of any one of certain offences involving the operation of a motor vehicle or forfeits bail after arrest on a charge for such an offence, will be suspended until proof of financial responsibility is furnished. The Minister may require proof of financial responsibility before issuing or renewing owner's permit or driver's license to a person under the age of 19 or over the age of 65. Such proof may be by liability insurance, bond or approved guaranty surety company, bond with approved personal sureties or deposit of money or securities in amount or value of $100,000. (Reg. 83-42, §83).

Unsatisfied Judgment Fund.

Applicable only to motor vehicle accidents which occurred prior to Mar. 1, 1990.

Inspections.

Motor vehicles must be safety inspected annually. (Reg. 83-185, §6[4]).

Lieutenant-Governor in Council may make regulations (a) Respecting width, height and length of vehicle or any combination or units of vehicles, (b) respecting dimensions within overall size of vehicles or any combination or units of vehicles, (c) respecting extension or overhang of mirrors, other devices or load relative to vehicle, (d) respecting combination of units of vehicles that may be coupled together, (e) respecting exemptions from or exceptions to provisions of regulations made under paragraphs (a) to (d). (§251.1).

Commercial Vehicle Safety requirements are listed in §265.1.

Insurance.

Recovery Capped for Minor Personal Injury.

For purposes of §265.21(3) of Insurance Act, c. I-12, maximum amount recoverable for non-pecuniary loss of minor personal injury as result of car accident is $2,500. (Reg. 2003-20, §4). Also see subhead Financial Responsibility, supra.

Insurance Required.

No person shall operate and no owner shall permit motor vehicle to be operated which is not covered by policy of insurance. Such policy must cover third party liability to minimum of $200,000 and accident benefits. (§17.1[1]; c. I-12, subsection 243[1]).

Foreign Vehicles and Operators.

A nonresident over the age of 16 years who has in his immediate possession a valid operator's or chauffeur's license issued to him in his own province or country may, without examination or license under the motor vehicle law of this province, drive any motor vehicle for 30 days after he first entered New Brunswick and may drive a motor vehicle registered in the province or country which issued his operator's or chauffeur's license during such period of time and under such conditions that such motor vehicle is exempt from registration in this province by any regulations made under The Motor Vehicle Act, but Registrar may at any time in his discretion cancel privileges granted to any nonresident. (§§46 and 80[2], c. M-17; §§25 and 26, Reg. 83-42).

No person shall have greater right of recovery resulting from negligent operation of motor vehicle in this Province than that person would have in jurisdiction in which he ordinarily resides and in no event any greater right of recovery than person resident in this Province would have in such other jurisdiction.

Actions Against Nonresidents.

No special provision with respect to commencement.

Direct Actions.

An action by an insured against his insurer may be commenced at any time after 60 days from filing of a proof of loss and within two years of arising of cause of action.

When a third party obtains a judgment against an insured and insured does not satisfy same, the third party may then bring an action against insurer for amount of judgment. Insurer has against third party all defences it has against insured over and above the minimum limits. See c. I-12, §250(13).

Suspension of Drivers' Licenses.

A conviction based on impaired driving, a breathalizer reading in excess of 80 milligrams of alcohol in 100 millilitres of blood, or a refusal to comply with breathalizer demand (where demand has been made because of reasonable and probable grounds to believe accused was impaired), will result in a suspension of driving privileges for a period of 12 months for first offence or 24 months for second or subsequent offence within three years of first offence. License may also be suspended for any conviction under Criminal Code involving use of motor vehicles or for accumulation of motor vehicle offences as listed in §297(2).

Motor-vehicle Carriers.

Governing statute is c. M-16. Members of Board of Commissioners of Public Utilities and others constitute Motor Carrier Board, which exercises jurisdiction over motor vehicle carriers, except as otherwise provided in Act.

The Board may grant licenses to operate public motor buses or trucks over specified routes and between specified points or generally throughout the province and, except as otherwise provided in the Act, no public motor bus or truck may be operated without a license and a licensed bus or truck may operate only as specified in the license and subject to the Act and regulations adopted thereunder. Licensed carrier may not abandon service without an order of the Board.

The Board has power to make regulations fixing schedules, rates, fares and charges of licensed motor carriers, prescribe forms, fix fees, require filing of returns, reports and other data and, generally, make regulations concerning motor carriers, public motor buses and public motor trucks.

Act does not apply to any motor vehicle while used or operated exclusively in: Transportation of school children, when maintenance of same is paid for by board of trustees or by province; carrying mails; carrying passengers to or from any train, ship or boat for trips not exceeding 25 kilometres one way; construction of any federal, provincial or municipal work; transportation of mail pursuant to contract with Canada Post Corporation; mineral ore, concentrates, potash or gypsum, coal, salt; bulk milk or cream; grain or any agricultural products in their green or raw form; livestock or poultry; animals used for racing or show purposes; fertilizer, including fertilizer components, peat moss, agricultural limestone; unprocessed forest products, including Christmas trees and related products; pit props; railroad ties; fuelwood, pulpwood, logs, poles, wood chips, bark, shavings, sawdust and hog fuel, but not including any product treated with preservative; horticultural products, including nursery stock, and incidental supplies when carried with such products; any products of sea except those which have been packaged for retail sale; snow, ice or water; buildings with exception of mobile homes, sectional homes and mini homes; any garbage or refuse except for industrial or hazardous waste; any commodity which is bona fide and exclusively property of owner of motor vehicle; or boats that are primarily used for commercial fishing purposes; while used solely: (1) To transport equipment permanently attached to vehicle, (2) to deliver petroleum products to ultimate user thereof, (3) as taxi cab, (4) as tow truck, or as tow-away vehicle. Before any license can be issued liability insurance policy must be filed with Board. (§6).

Aircraft.

See Canada Law Digest, category Transportation, topic Aircraft.

Gasoline Tax.

See category 22 Taxation, topic 22.06 Gasoline and Special Fuels Taxes, subhead Gasoline Tax.

Size and Weight Limits, Equipment Required, Lights Required.

Governing statute is c. M-17.

All-Terrain Vehicles.

Governing statute is c. A-7.11. Owner shall not drive or permit to be driven all-terrain vehicle unless it is registered and valid visible number plates are mounted on vehicle. (§3[1][a][b]). Snow vehicles must have motor vehicle liability insurance policy. (§3[1][c]). Every operator shall comply with any request made by peace officer. (§24[2]).

23.04 RAILROADS:

See category 3 Business Regulation and Commerce, topic 3.08 Carriers.

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NEWFOUNDLAND AND LABRADOR LAW DIGEST

—Scope —

Revised for 2010 edition by

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(Except where otherwise stated, references to ``Newfoundland'' and ``Province'' are to Province of Newfoundland and Labrador; “Court” or “Judge” are to Supreme Court Of Newfoundland and Labrador (Trial Division); references such as to J-4 and “A-2.1” are to chapters of Revised Statutes Of Newfoundland and Labrador, 1990 [in force 1 June 1992] as amended (RSNL), enacted before, on and after 1 June 1992; references to SNL followed by year are to annual volumes of Statutes of Newfoundland and Labrador as amended; references such as to CNLR 750/96 are to Consolidated Newfoundland and Labrador Regulations, publication of which began in 1996; references such as to NLR 222/93 are to Regulations either amending or replacing the CNLRs or previous NLRs or constituting new Regulations; and references to “Rule” are to Rules of The Supreme Court [of Newfoundland and Labrador] 1986.)

Note 1: This revision incorporates legislation (i.e., statutes, regulations, rules and practices) and cases through 18 Dec. 2009; consolidated texts of legislation are available at http://www.hoa.gov.nl.ca/hoa/sr/. More recent legislative developments, as well as fees charged by Newfoundland and Labrador, are available at same website and at: http://www.gs.gov.nl.ca/gs/oqp/.

Note 2: Newfoundland and Labrador legislation is not universally applicable in Province. Under Labrador Inuit Land Claims Agreement Act, L-3.1 (in force 1 Dec. 2005), treaty and land claims agreement (contemplated by Constitution Act, 1982, §§25 and 35) made among: (i) Inuit of Labrador (aboriginal people of Canada), represented by Labrador Inuit Association; (ii) Province; and (iii) Canada, provides for establishment, by Association, of government (nine constituencies including Canada constituency for Inuit residents outside Labrador), to be known as Nunatsiavut Government (Inuit Government), P.O. Box 70, Nain, Newfoundland and Labrador, A0P 1L0; telecopier: 1.709.922.2931. Generally speaking, Agreement authorizes establishment of Labrador Inuit Constitution as fundamental law of Inuit to extent consistent with Agreement within geographic area described by Agreement (Labrador Inuit Lands). Constitution provides for establishment, for Inuit on Labrador Inuit Lands, of Inuit Government, including legislative and executive institutions, and courts, as well as for establishment of local (i.e., municipal) government for each of Inuit Communities (Community Lands) within Labrador Inuit Lands. Authority under Constitution of Nunatsiavut Government, to enact Inuit laws in respect of matters set out in Agreement (e.g., sacred knowledge and sites; culture; government administration; alcoholic beverages; environmental protection; education; health; income support; social, family, youth, and children's services; solemnization of marriage; family relationships) and to recognize Inuit customary laws, includes jurisdiction to make laws and do other things as may be necessarily incidental to exercising authority under Constitution to enact laws (to be recorded in Registry of Laws). In event of conflict between Inuit Government law and law of Province or of Canada, Inuit Government law prevails to extent of conflict provided such law (i) within jurisdiction of Inuit Government to enact and (ii) congruent with Canadian Charter of Rights and Freedoms. Otherwise, laws of Province and of Canada (including Canadian Charter of Rights and Freedoms and other constitutional instruments of Canada) apply to Inuit, to Inuit Government, and to Labrador Inuit Lands, including Community Lands. No legislation has been enacted to date (15 Dec. 2009) by Nunatsiavut Government.

Negotiations are currently ongoing to achieve separate treaty and lands claims agreement, that will include constitution and legislative and executive institutions for Innu of Labrador (another aboriginal people of Canada).

1 INTRODUCTION

1.01 CULTURE:

See category 3 Business Regulation and Commerce, topic 3.23 Tourism.

1.02 GOVERNMENT AND LEGAL SYSTEM:

Province of Newfoundland and Labrador is constituent province of sovereign parliamentary state of Canada.

Newfoundland, on becoming Province of Canada on 31 Mar. 1949, geographically comprised Island of Newfoundland and part of Labrador (see: Report on: In the Matter of the Boundary between the Dominion of Canada and the Colony of Newfoundland in the Labrador Peninsula, Judicial Committee of Privy Council, London, 1 Mar. 1927; approved by His Majesty in His Privy Council, 22 Mar. 1927; and confirmed in Newfoundland Act [1949] 12 & 13 Geo. VI, c. 22 [U.K.], Schedule, Term 2). Name of Province was constitutionally changed from "Newfoundland" to "Newfoundland and Labrador" on 6 Dec. 2001 (Canada SI 2001-117, on authority of Constitution Act, 1982, §43). For marketing purposes, commencing 3 Oct. 2006, Province advertises itself as "Newfoundland Labrador."

Sittings of elected, 48-seat legislature—House of Assembly of Province of Newfoundland and Labrador (RSNL 1990, H-10)—are governed by custom: (i) In winter-spring, from second Mon. in Mar. to Fri. before Victoria Day weekend (usually third May weekend) with respite from end of sitting day on Maundy Thurs. to third Mon. after Easter; and (ii) in fall, for minimum of four weeks, adjourning not later than one week before Christmas. Government House Leader may, while House of Assembly is sitting, by motion (voted upon without debate), request extension of particular sitting. Particular sitting may commence earlier on notice being given by Speaker of the House, where Speaker, after consulting with Government, is satisfied public interest requires it. ("Practice Recommendations" Appendix to Standing Orders of Newfoundland and Labrador House of Assembly, approved 1999).

See also category 6 Courts and Legislature, topic 6.02 Legislature.

1.03 HOLIDAYS:

(L-2; Rule 3).

Following are nonobservance days for presentment of bills of exchange, promissory notes, or in calculation of time under Court procedure: Sun., Good Friday, Christmas, New Year's, Memorial ("Victoria"), Labour, Remembrance, or alternative day appointed by proclamation, any other day appointed by proclamation as public feast or thanksgiving day or other public holiday, and day following Christmas and New Year's days, when these days fall on Suns. (L-2; Rule 3).

See also Canada Law Digest.

1.04 OFFICE HOURS AND TIME ZONE:

Office hours are customarily from 8:30 a.m. or 9 a.m. to 4 p.m., 4:30 p.m., or 5 p.m.

Portion of Province of Newfoundland and Labrador consisting of: (i) Island of Newfoundland, (ii) offshore islands, and (iii) portion of area of Labrador constituting part of Province of Newfoundland and Labrador which is to south of point situated near Community of Cartwright (-03:30 GMT) is one-and-a-half hours 'ahead' of New York. Remainder of Province (that is to north of point situated south of Community of Cartwright (-04:00 UTC or GMT) in area of Labrador constituting part of Province of Newfoundland and Labrador) is in Atlantic Time Zone. (Island of Newfoundland: Standard Time Act, RSNL 1990, c. S-23; Labrador, south of point near Cartwright: by custom; Labrador, north of point south of Cartwright: by custom).

Island of Newfoundland and portion of Labrador constituting part of Newfoundland and Labrador, north to point south of Cartwright, whose time is -03:30 GMT shall, during part of each year when ``daylight time'' (second Sun. in Mar. to and including first Sat. in Nov.) is invoked—by regulation—be -02:30 GMT. (SNL 2006, c. 31). Portion of Labrador, constituting part of Province of Newfoundland and Labrador, north from point south of Cartwright whose time is -04:00 GMT shall, during same period, be -03:00 GMT (by custom).

2 BUSINESS ORGANIZATIONS

2.01 AGENCY:

Common law usually governs.

2.02 ASSOCIATIONS:

Common law usually governs.

2.03 CORPORATIONS:

(C-36; SNL 1997, B-12; S-13).

General Supervision.

Corporations Act, C-36, governs all corporations (often referred to as companies) except government and municipal corporations and agricultural cooperatives.

Incorporation.

One or more individuals or one or more bodies corporate, including nonresidents, may, by complying with requirements of Corporations Act, form incorporated companies. (§11).

Name or Designated Number of Corporation.

May not simulate that of another corporation and must be followed by either limited, limitee, incorporated, incorporee, corporation or abbreviation of any of those terms. (§17).

Term of Corporate Existence.

Term of corporation's existence is perpetual unless: (i) Corporation is removed from Province's Registry of Companies (situate at St. John's) by Director of Commercial Registrations (Registry of Companies, Commercial Registrations Division, P.O. Box 8700, Confederation Bldg., Ground Floor, East Block, St. John's, NL, A1B 4J6; telephone: 1.709.729.3317; telecopier: 1.709.729.0232; or http://www.gs.gov.nl.ca/cca/cr/corp-about.stm) for nonfiling of share list, in which event it is dissolved; or (ii) corporation wound up.

Escheat.

On dissolution of corporation, all its lands (chattels real), personal property (chattels personal) and rights (including privileges) situate in Province vest in Crown. Crown, if it sees fit, may convey to person or other entity to whom, (i) by reason of her (his)(its) dealings or relationship with dissolved corporation or (ii) by reason of any other circumstance, such lands, personal property and rights should be conveyed. (§357). (This provision applies to property and rights, in Province, of bodies corporate, whether or not incorporated or registered in Province, which are dissolved before as well as on and after 1 Jan. 1987. Property and rights of bodies corporate dissolved before 1 Jan. 1987 which, by then, have not come into ownership of another person are considered to have vested in Province on 1 Jan. 1987.)

Formerly comprised of separate Memorandum and Articles of Association documents, incorporation now requires Articles of Incorporation (and, if corporation chooses, separate by-laws).

Articles of Incorporation.

Articles are required to provide concise outline of corporation's corporate structure and must include following particulars: name of corporation; address of its registered head office; classes and any maximum number of authorized shares; rights, privileges, restrictions and conditions associated with each class of shares, including classes of shares issued in series; any restrictions placed on share transfer rights; minimum and maximum number of directors; and any restrictions placed on business of corporation. (§12).

Articles of Association required to be filed.

Filing of Articles.

Articles of incorporation must be filed with Director of Commercial Registrations (Registry of Companies, Commercial Registrations Division, P.O. Box 8700, Confederation Bldg., Ground Floor, East Block, St. John's, NL, A1B 4J6, telephone: 1.709.729.3317; telecopier:

1.709.729.0232; or http://www.gs.gov.nl.ca/cca/cr/corp-about.stm), together with registration fee and filing fee for each document filed. (§14).

Fees.

Payable to Director of Commercial Registrations on incorporation, irrespective of capital or number of shareholders.

Additionally, fees are payable to Director of Commercial Registrations for filing annual corporate return and for registration of any other document required or authorized to be registered, as set by schedule of prescribed fees (Corporations Act, C-36 as am'd: Schedule of Prescribed Fees: CNLR 750/96, §49; SNL 2004, c. 47, §39) which is not published by Province although is available from Registry of Companies, Commercial Registrations Division, P.O. Box 8700, Confederation Bldg., Ground Floor, East Block, St. John's, NL, A1B 4J6, telephone: 1.709.729.3317; telecopier: 1.709.729.0232, or http://www.gs.gov.nl.ca/cca/cr/corp-about.stm.

Certificate of Incorporation.

If incorporation documents (principally, Articles of Incorporation) are in order and fees paid, certificate is issued by Director of Commercial Registrations. (§393[2][b]). Notice is published in Newfoundland and Labrador Gazette (Office of Queen's Printer, Department of Government Services, Confederation Building, East Block, P.O. Box 8700, St. John's, NL, A1B 4J6; telephone: 1.709.729.3649; telecopier: 1.709.729.1900; http://www.gs.gov.nl.ca/gs/oqp/). Date of incorporation is date shown on certificate of incorporation. (§16).

Legible certificate of incorporation shall be kept in conspicuous place at registered office of company. (§35[1]).

Licence to do Business.

No licence, per se, required by corporation.

Amendment of Articles.

Articles of incorporation may be amended by special resolution which shall be filed with Director of Commercial Registrations. (§279). Cannot decrease capital if insolvent or if decrease would render corporation insolvent. (§67[3]). If articles are legally compliant and fees paid, certificate of amendment is issued by Director of Commercial Registrations. Certificate, and amended certificate, each effective from date of issuance. (§279).

Shares.

Corporate shares are without nominal or par value. Where only one class of shares exists, rights of holders of shares shall be equal in all respects, and include right to vote at meetings of shareholders. (§47). Articles may provide for more than one class of shares. Rights, privileges, restrictions and conditions attaching to shares of each class shall be set out in certificates of shares of that class.

Share Certificate.

Every shareholder is entitled to properly signed share certificate (§88) including name of corporation, shareholder's name, number and class of shares represented by certificate, and either statement of any preferences, rights, conditions or restrictions, or provision that such exist in particulars contained in full text obtainable from corporation on demand (§92).

Share Warrants.

Share warrant is any instrument entitling holder to purchase share(s) or debt obligation(s) of corporation. Warrants are treated as investment securities. (§121).

Issuance of Shares.

Allotment and issuance of shares is regulated by directors. Shares must not be issued until fully paid for (§23) and may not be issued at discount.

Annual Return.

Commencing Jan. 2006, companies required to file their annual returns prior to end of month in which its registration, amalgamation, or revival, whichever is latest, occurred. Companies that have not filed by end of their anniversary month will be placed in status of “Not in Good Standing” with Registry of Companies. Annual returns can be filed online at: http://cado.eservices.gov.nl.ca/Company/FileDocumentsOnline.aspx.

Share Transfer.

Shares can be transferred inter alia by endorsement, delivery, or entry of transfer being recorded on share register. There is no share transfer tax. (Part VI).

Shareholders.

They, inter alia, elect directors (§176) and appoint auditors (§265). If shareholders are dissatisfied with directors—who are responsible for general supervision of affairs of corporation (§171)—they may either replace board of directors at end of its term or remove any director before expiration of term and elect another to fill resulting vacancy (§179). Shareholders may inspect copies of articles of incorporation, share register, minutes of meetings and resolutions of shareholders. (§42). Shareholders holding at least 5% of issued voting shares may requisition meeting of shareholders. (§241). Any shareholder entitled to vote at meeting of shareholders may requisition directors to circulate shareholder's proposal to be considered at next shareholders' meeting. (§224). Any shareholder who is entitled to vote at annual meeting of shareholders may make proposal to amend articles. (§§224, 279). Any shareholder may apply to Court for order to call meeting of shareholders, or to review election or appointment (as case may be) of director(s) or auditor. (§§242, 243). If wrong is done to corporation, such as where majority of shareholders has allegedly acted to detriment of minority and refuses to cause corporation to take corrective action, any shareholder may (with leave of Court) institute derivative action. (§369).

Unanimous Shareholder's Agreement.

Otherwise lawful written agreement among all shareholders of corporation, or among all shareholders and person who is not shareholder, that restricts, in whole or in part, powers of directors to manage business and other affairs of corporation, is valid. (§245).

Shareholders' Liability.

Shareholders of corporation are not liable for default of corporation, except under §§67[4, 5], 245[3] or 355[4] as follows: (i) On decrease of stated capital by special resolution, each shareholder may be individually liable to creditors for amount equal to corporation liability that was reduced or extinguished or amount that was paid or distributed as result of decrease of capital (limitation period: two years) (§67[4, 5]); (ii) shareholder who is party to unanimous shareholder agreement incurs liabilities of directors to extent that agreement relieves directors of liability (§245[3]); (iii) notwithstanding dissolution of corporation, shareholders among whom corporation's property has been distributed are liable to corporation's creditors to extent of amount received by shareholders, respectively (limitation period: within two years of corporation's dissolution) (§355[4]).

Shareholders' Meetings.

Statutory shareholder's meeting must first be held within 18 months of incorporation and, afterwards, not more than 15 months after last preceding meeting. Corporation may at any time call special meeting of shareholders. Provisions for giving notice of such meetings, prescribed by Act, require compliance. (§221).

Voting.

Each share has one vote unless Articles of Incorporation otherwise provides. Voting at meeting is by show of hands unless ballot is demanded by shareholder or otherwise provided for in articles or by-laws. (§239). Pooling agreements reference voting of shares owned by two or more shareholders are permitted. (§244).

Directors.

Subject to unanimous shareholders' agreement so providing, directors of corporation direct management of business and other affairs of corporation. (§167). Majority of directors must be resident Canadians. (§174). Directors must be over 19 and not undischarged bankrupt or mental incompetent. (§172). Directors shall be elected by shareholders for term expiring not later than close of third annual meeting of shareholders following election. Not all directors need hold office for same term. (§175). Where meeting of shareholders fails to elect minimum number of directors, those directors who have been elected may exercise powers of directors provided there is quorum. (§175[7]). If no quorum, vacancies must be filled by calling special meeting of shareholders. (§181).

Directors' Meetings.

Unless articles of incorporation or by-laws otherwise provides, directors may meet at any place after required notice. Directors shall not transact business or undertake other affairs of corporation at meeting of directors unless 25% of directors present (including directors present by telephone or other communications facilities, with consent of other directors) are resident Canadians. (§§184, 188). Any resolution signed by all directors without meeting is as valid as if passed at meeting. (§191).

Powers and Duties of Directors.

Unless articles of incorporation, by-laws or unanimous shareholder's agreement provides otherwise, directors may, by resolution, make, amend or repeal any by-laws that regulate business or other affairs of corporation. (§170).

Liabilities of Directors.

Where directors consent to or vote for resolution authorizing purchase, redemption or other disposition of shares in contravention of Act or articles or by-laws of incorporation, directors are jointly and individually liable to corporation. (§193). Where directors consent to: purchase or redemption or other acquisition of shares, commission, payment of dividend, financial assistance, payment of indemnity, or payment to shareholder, contrary to Act, directors are jointly and individually liable to make restitution to corporation. (§193).

Delegation by Directors.

Directors may appoint from their number managing director, who must be resident Canadian, or managing committee of directors, and may delegate, to managing director or committee, powers of directors. (§189).

Officers.

Subject to articles of incorporation, by-laws or unanimous shareholder's agreement so providing, directors may designate officers of corporation, appoint officers, specify officer's duties and delegate to them powers to manage business and other affairs of corporation. One person can hold two or more offices. (§202).

Registered Office.

Corporation must have registered office at place in Province as specified in articles of incorporation. Notice of registered office in prescribed form shall be sent to Director of Commercial Registrations together with articles designating (or changing, within 15 days of change) place of registered office of corporation. (§§33, 34).

Powers.

Every corporation has power to conduct business in accordance with provisions of its articles of incorporation. In certain cases articles may be changed by special resolution of corporation but in such cases permission of Court also required. (§27). Provincial corporation shall not conduct banking business and requires special licence to conduct insurance business. (Part XXIII).

Books and Records.

Every corporation must prepare and maintain, either at registered office or another location, specified by directors, in Province, records containing (i) articles and by-laws, and all amendments to articles and by-laws, and copy of unanimous shareholder agreement; (ii) minutes of meetings and resolutions of shareholders; (iii) copies of all notices required by §175 (Notice of Directors, including term of office) or 183 (Notice of Change of Directors); (iv) securities register complying with §96; (v) adequate accounting records; (vi) records containing minutes of meetings and resolutions of directors and committees of directors. (§§36, 37).

Items (i) to (iv) must be open to inspection by shareholders and creditors of corporation, their agents and legal representatives, and by Registrar of Commercial Registrations. (§§36, 42).

Items (i) to (vi) must be open to inspection, at reasonable times, by directors. (§§36, 37).

Information from books and records which must be filed with Registrar of Commercial Registrations includes that specified in Forms 23 (Annual Return) (§408) and Form 6 (Notice of Directors). (§§175, 183).

Reports.

Corporation (RSNL 1990, C-36) must, at least 21 days before either annual shareholders' meeting, or signing of resolution under §240(1)(b) (resolution signed by shareholders, instead of meeting to approve resolution), send shareholders (a) comparative financial statements relating, separately, to (i) period that began on date corporation came into existence and ended not more than six months before annual meeting or, where corporation has completed financial year, period that began immediately after end of last completed financial year and ended not more than six months before annual meeting, and (ii) immediately preceding financial year; (b) report of auditor; and (c) further information respecting financial position of corporation and results of its operations required by articles, by-laws or unanimous shareholder agreement. (§§262 and 258[1]; subject to exceptions: §§258[2], 259).

Corporation which is ``reporting issuer'' (under Securities Act, SNL S-13, §2[1][oo]), in accordance with rules made by Superintendent of Securities under §144.1 (CNLR 805/96; as am.: NLR 87/01; SNL 2001, c. 42; NLR 14/06), must report to Superintendent having made (i) periodic disclosure about its business and affairs; (ii) disclosure of any material change; and (iii) other disclosure as required by rules (§76), subject to relieving provisions (§81).

Audits and Inspections.

Shareholders may resolve not to appoint auditors. (§266). Auditors, if appointed, must be provided with information, explanations, and access to records, documents, books and accounts necessary for financial statements' preparation, and must report annually to shareholders based on examination of what corporation provided. (§275). Investigation into business and management of corporation may be ordered by Court on application by shareholder or Director of Commercial Registrations. (§359).

Amalgamation.

Two or more corporations, including holding and subsidiary corporations, may amalgamate by statutory procedure. (§288). They must first enter into agreement prescribing terms and means of amalgamation, manner of carrying amalgamation into effect, and other details necessary to perfect amalgamation, and provide for subsequent management and operation of amalgamated corporation. (§289). This agreement is adopted when shareholders of each amalgamating corporation have approved of amalgamation by special resolution of each class or series of shareholders entitled to vote on it. (§290). New corporation comes into existence on date of certificate of amalgamation, with all property and rights of, and subject to all liabilities and obligations of, each of companies so amalgamated. (§294).

Continuations.

Extra-provincial (i.e., foreign) corporation incorporated otherwise than under law of Newfoundland and Labrador may apply to Director of Commercial Registrations under Corporations Act for continuance in Newfoundland and Labrador. (§295).

Foreign Corporations.

Every extra-provincial (i.e., foreign) corporation having gain for its object or part of its object, which carries on business in Province, must register under Corporations Act before commencing business. Application for registration must be made to Director of Commercial Registrations. Fees payable on registration are: $560.00 for corporations having capital divided into shares and for mutual insurance corporations pursuant to Part XXII; and $260.00 for corporations not having capital divided into shares, excluding mutual insurance corporations pursuant to Part XXIII. Such corporations may hold title to land. They are subject to federal income tax; although not subject to any other tax. Every extra-provincial corporation, except insurance companies, must file with Director of Commercial Registrations, not later than 31 Mar. in each year, annual return showing share dispositions of corporation, names and addresses of directors, and other information required by Act, accompanied by annual fee of $200 (subject to certain circumstances). (Corporations Act C-36, as am'd; Schedule of Prescribed Fees: CNLR 750/96, §49; SNL 2004, c. 47, §39).

Franchise Tax.

No annual franchise tax is imposed on corporations, except for franchise tax on personal holding corporations, in lieu of income tax.

Franchise tax on personal holding corporations (not published) is based on authorized capital at following rates: $50 for capitalizations up to and including $250,000; 10¢ per $1,000 in excess of $250,000 up to and including $1,000,000; 5¢ per $1,000 in excess of $1,000,000; maximum tax being $250. In addition, there is surtax of 50% of amount of franchise tax.

Electronic Filing.

Business documents may be electronically filed, as prescribed by regulations (none yet promulgated). Information thus filed may be used in compilation of unified database if Lieutenant-Governor in Council decides one should be established. (SNL 1997, B-12). See, however, category 10 Documents and Records, topic 10.05 Records, subhead Online Records Filings and Searches.

Forms.

Corporations Act and Securities Act forms are procurable from Director of Commercial Registrations, c/o Registry of Companies, P.O. Box 8700, St. John's, NL, Canada, A1B 4J6; telephone: 1.709.729.3317; telecopier: 1.709.729.0232, or http://www.gs.gov.nl.ca/cca/cr/.

2.04 FOREIGN CORPORATIONS:

See topic 2.03 Corporations.

2.05 LIMITED PARTNERSHIPS:

See topic 2.06 Partnerships.

2.06 PARTNERSHIPS:

(P-3; L-17).

Governed by Partnership Act, P-3, and Limited Partnership Act, L-17, as well as common law (including rules of equity) to extent—in respect of L-17—not inconsistent with provisions of Acts. (L-17, §31).

Limited Partnership Formation (L-17).

By compliance with Act (including signing, by all involved partners, of certificate (§44[3]) and recording in Registry of Companies: Director of Commercial Registrations, c/o Registry of Companies (P.O. Box 8700, St. John's, NL, Canada, A1B 4J6; telephone: 1.709.729.3317; telecopier: 1.709.729.0232), or http://www.gs.gov.nl.ca/cca/cr/. (L-17, §4).

Limited Partnership Name.

No restriction, so long as name does not conflict with name of any other limited partnership.

Rights and Liabilities of Limited Partners Inter Se (L–17).

Governed by agreement or inferred from course of dealing. Partners share in limited partnership assets in respect of their claims: (i) For capital, and (ii) for profits or compensation by way of income on their contributions, in proportion to amounts of their respective claims. (§13[1]). Where there are several limited partners, they may agree that one or more of them have priority over other limited partners as to: (i) Return of contributions, (ii) compensation by way of income, and (iii) other matters. (§13[2]). Existence and nature of agreement, respecting these matters, shall be stated in limited partnership certificate. Absent such statement, all limited partners stand on equal footing subject to entitlement to share in proportion to respective amounts of their claims. (§13).

Rights and Liabilities of Limited Partners Reference Third Parties (P-3).

Every partner is agent of firm and each partner's acts bind partnership in absence of notice to affected third party of partner's lack of authority. (§9). Every partner liable jointly for all wrongful acts or omissions. (§11).

Ex Juris Limited Partnership (L-17).

Partnership formed in jurisdictions, other than Province, designated by Lieutenant-Governor in Council, that is registered or otherwise formally recognized as limited partnership under laws of such other jurisdiction, may be registered as limited partnership on filing and recording in Registry of Limited Partnerships, maintained by Registrar of Commercial Registrations, of certificate which complies, or in Registrar's opinion substantially complies, with certificate requirements for limited partnership in Province. (§4[2], CNLR 782/96).

Dissolution of Partnerships (P-3).

If for fixed term, on expiration of term. If for single adventure, on termination of adventure. Where no fixed term, by notice from any partner (§32) or on death or insolvency of any partner (§33). Court may order dissolution on application of any partner: (i) In case of mental incompetence or other incapacity of, or misconduct of, or breach of partnership agreement by, any partner, or (ii) where operating at loss. (§35).

3 BUSINESS REGULATION AND COMMERCE

3.01 BANKS AND BANKING:

(T-9.1).

Governed by federal legislation: Constitution Act, 1867, as amended (formerly, until 17 Apr. 1982, known as British North America Act), S. 91 (head 15); see Canada Law Digest.

Trust Companies and Loan Companies.

Not permitted to carry on business in Province unless (i) holder of valid and existing licence under Trust and Loan Companies Act, S.C. 1991, c. 45; (ii) holder of valid insurance of its deposits through Canada Deposit Insurance Corporation (see R.S.C. 1985, c. C-3); and (iii) registered (Corporations Act §383) in Province's Registry of Companies, Director of Commercial Registrations, c/o Registry of Companies (P.O. Box 8700, St. John's, NL, Canada, A1B 4J6; telephone: 1.709.729.3317; telecopier: 1.709.729.0232), or http://www.gs.gov.nl.ca/cca/cr/.

Deposit Insurance.

Deposits, within meaning of Canada Deposit Insurance Corporation Act (R.S.C. 1985, c. C-3), shall not be accepted by trust or loan company unless company is insured under policy of deposit insurance issued by Corporation. (§11).

See also Canada Law Digest.

3.02 BILLS AND NOTES:

See Canada Law Digest.

3.03 BILLS OF LADING:

See topic 3.07 Carriers.

3.04 BILLS OF SALE:

See category 22 Mortgages, topic 22.01 Chattel Mortgages.

3.05 BROKERS:

(M-18).

Mortgage Brokers.

Must be registered with Registrar of Mortgage Brokers. Mortgage broker and mortgage lender must, 48 hours before lending, disclose to borrower actual amount to be advanced, amount of any bonus, legal fees and disbursements, and all other costs. (§8). Lender cannot recover in excess of amount so disclosed. Bonus amount cannot exceed amount set out in regulations. (CNLR 1006/96; NLR 58/97; SNL 2008, c. C-37.0001 §49, not yet in force; 2009, c. C-31.1, s. 111). Exemption provided for loans to corporation in excess of $25,000. (§11[4]).

Insurance Brokers.

See category 18 Insurance, topic 18.01 Insurance Companies.

Stock Brokers.

See topic 3.21 Securities.

Real Estate Agents.

See category 23 Property, topic 23.11 Real Property.

3.06 BULK SALES:

See category 8 Debtor and Creditor, topic 8.11 Fraudulent Sales and Conveyances.

3.07 CARRIERS:

(M-19).

Motor Carrier Act applies to all persons and corporations operating motor vehicle or trailer on highway for purpose of obtaining fee for transportation of persons and/or freight.

Exemptions.

Act does not apply to: (i) School bus operated by or under contract with school board; (ii) vehicle used to transport personal goods and chattels; (iii) municipal vehicle, other than ambulance, being operated by cities of St. John's, Corner Brook, or Mount Pearl, or town, community or region established under Municipalities Act, 1999 (M-24); (iv) vehicle exempted by regulations (CNLR 965/96; NLRs 162/95; 21/96; 36/97; 4/00; 91/01); (v) specific leased vehicles and (vi) freight forwarder (§3).

Certification.

Certificate is granted by Board of Commissioners of Public Utilities (Board) for transportation of passengers and parcel express; which certificate, unless cancelled, expires on last day of month one year following date on which certificate expressed to take effect, and may be renewed on application to Registrar of Motor Vehicles (Registrar) (Motor Registration Bldg., 149 Smallwood Drive, St. John's, NL, A1B 4J5; telephone: 1.709.729.2519; telecopier: 1.709.729.6955; http://www.gs.gov.nl.ca/gs/mr/). (§13).

Residency Requirement.

Certificate holder who does not maintain place of business in Province must designate agent in Province for purposes of Act and to accept service for and on behalf of certificate holder. (§15).

Performance.

Minister of Transportation and Works, Aboriginal Affairs shall maintain record on safety performance of all carriers and, on reregistration, assign carrier threshold level and safety rating of satisfactory or unsatisfactory as defined by regulations. (CNLR 965/96; NLRs 162/95, 21/96, 36/97, 4/00, 91/01).

Records.

Every carrier shall keep and maintain at its principal place of business records relating to every driver and commercial vehicle in its employ/operation. Every carrier which fails to furnish Board or Registrar with required records is subject to fine of not less than $500. (§31; CNLR 965/96 [Schedule]; NLRs 162/95; 21/96; 36/97; 4/00; 91/01).

Inspection.

May be conducted at any place of business of carrier during normal business hours for purpose of inspecting any records required to be kept under Act. (CNLR 965/96 as am'd by NLRs 162/95, 21/96, 36/97, 4/00, 91/01).

3.08 CONDITIONAL SALES:

See topics 3.09 Consumer Protection, 3.20 Sales.

3.09 CONSUMER PROTECTION:

(C-31.1; C-22; H-3; P-7.1; S-6).

Consumer protection is principally, governed, from 1 Dec. 2009, by Consumer Protection and Business Practices Act. (C-31.1).

Other consumer protection legislation includes provisions of (i) Collections Act; (ii) Highway Traffic Act (motor vehicle dealers); (iii) Personal Property Security Act; (iv) Sale of Goods Act; and (v) Tax Rebate Discounting Act (Canada).

Consumer Protection and Business Practices (C-31.1).

Act is administered by Director of Consumer Protection and Business Practices, who may appoint Assistant Director to act in absence or event of incapacity of Director. (§4). Director of Commercial Registrations, c/o Registry of Companies (P.O. Box 8700, St. John's, NL, Canada, A1B 4J6; telephone: 1.709.729.3317; telecopier: 1.709.729.0232), or http://www.gs.gov.nl.ca/cca/cr/.

Jurisdiction and responsibility of Director includes (a) Unfair Practices (Part III): (i) Unfair practices (Division 1) and (ii) Relief from unconscionable transactions (Division 2); (b) Unsolicited Goods and Services and Credit Cards (Part IV); (c) Consumer Contracts (Part V): (i) Direct sales contracts (Division 1) and (ii) Distant sales contracts (Division 2); (d) Credit Reports (Part VI); (e) Cost Of Consumer Credit Disclosure (Part VII): (i) [Generally]; (ii) Application (Division 1); (iii) Rights and obligations (Division 2); (iv) Fixed Credit (Division 3); (v) Open Credit (Division 4); (vi) Leases of goods (Division 5); (vii) Compliance; (viii) Regulations; (f) Licences (Part VIII); (g) Investigation And Enforcement (Part IX); (h) Regulations (Part X); (h) Appeals (Part XI); (i) Offence (Part XII).

Transitionally: (i) Credit agreements for fixed credit and leases that are entered into, renewed or amended on or after date of coming into force of Part VII of Act (1 Dec. 2009) are governed by that Part; (ii) credit agreements for open credit that are in existence or that are entered into, renewed or amended on or after date of coming into force of Part VII of Act (1 Dec. 2009) are also governed by that Part; and (iii) Mortgage Brokers Act credit agreements for fixed credit and leases entered into before date of coming into force of Part VII of Act (1 Dec. 2009) are also governed by that Part.

Act repealed (i) Consumer Protection Act; (ii) Consumer Reporting Agencies Act; (iii) Cost of Consumer Credit Disclosure Act; (iv) Direct Sellers Act; (v) Mortgage Brokers Act, §8; (vi) Mortgage Brokers Regulations (CNLR 1006/96), §4; (vii) Trade Practices Act; (viii) Unconscionable Transactions Relief Act, and (ix) Unsolicited Goods and Credit Cards Act.

Waiver or release by person of person's rights, benefits or protection under Act or its regulations is void; other than release made by person to settle dispute. (§3).

Collections (C-22).

Act governs collection agency, defined as being person who (i) collects debts for others; (ii) offers or undertakes to collect debts for others; (iii) solicits accounts for collection; (iv) collects debts owed to him or her under name which is different from name of creditor; (v) mails to debtors or offers or undertakes to mail to debtors, on behalf of creditor, collection letters; (vi) for consideration or hope or promise of consideration, enters into agreement under terms of which person agrees to pay to vendor amount in respect of goods or services sold or supplied by vendor to person other than collection agency; (vii) offers or undertakes to act for debtor in arrangements or negotiations with debtors' creditors; (viii) receives money periodically from debtor for distribution to his or her creditors; (ix) sells or offers for sale collection system, device or scheme intended to be used to collect debts, or (x) acts as independent court agent, collection agency includes person who takes assignment of debt due at date of assignment from specified debtor. (§2 [a.1]).

Act also governs collector, defined as being individual employed, appointed or authorized by collection agency registered under Act to solicit business or collect debts for collection agency or to deal with or trace debtors for collection agency and includes private bailiffs and independent court agents. (§2[b]).

Act is administered by Registrar of Collection Agencies and Collectors, and Deputy Registrar to act in absence or event of incapacity of Registrar. (§6). Contact: Divisional Director, Trade Practices Division, Department Of Government Services, 5 Mews Place, P.O. Box 8700, St. John's, NL, A1B 4J6, http://www.gs.gov.nl.ca/cca/tp/collection-agencies/.

Person shall not carry on business as collection agency in province unless he or she is registered. Applicant for registration as collection agency is entitled to be granted registration except where, (i) applicant's financial responsibility or record of past conduct is such that it would not be, in opinion of Registrar, in public interest for registration to be granted; (ii) applicant is corporation, its financial responsibility or record of past conduct of corporation or its officers or directors is such that it would not be, in opinion of Registrar, in public interest for registration to be granted; or (iii) applicant is or proposes to be in contravention of Act or its regulations. Person shall not publish statement or representation that he or she is registered under Act. (§12).

Act does not apply to (i) insurer or agent or employee of insurer or agent in respect of collection of insurance premiums; (ii) real estate broker or his or her employee, in respect of collection of money incidental to broker's business as real estate broker; (iii) person acting as officer of or under process or authority of court; (iv) person appointed under Act, in respect of collection of debts in performance of his or her duty; (v) bank to which Bank Act (Canada) applies, or employees of bank in regular course of their employment; (vi) loan company, trust company or finance company licensed under Loan Companies and Finance Companies Licensing Act, or which meets requirements of §3 of Trust and Loan Corporations Act or employees of company in regular course of their employment; (vii) isolated collection made by person whose usual business is not collecting debts for other persons; (viii) person exempted from application of Act or its regulations; (ix) barrister or solicitor in practice of his or her profession, or to articled clerk under direction of barrister or solicitor in practice, or (x) companies and collectors who engage in collecting their own accounts, but where Code of Practice is promulgated as part of regulations, companies and collectors who engage in collecting their own accounts shall conduct themselves in conformity with that code. (§3).

Act applies despite agreement or waiver to contrary. (§4).

Discounting Income Tax Refunds.

Person who in course of business acquires taxpayer's right to refund of various amounts, including income tax from federal government, must specify in writing terms of tax refund acquisition. No such acquisition is valid if actual consideration to taxpayer less than 85% of amount of refund of tax, where refund of tax is equal to or less than $300 or is less than $255 plus 95% of any amount by which refund of tax exceeds $300 (Tax Rebate Discounting Act, R.S.C. 1985, c. T-3).

Motor Vehicle Dealers (H-3).

Act applies to dealer (person who, as principal or agent, engages in business of buying, selling or exchanging new or second hand motor vehicles or trailers). (§2[o]).

Person shall not carry on business as dealer unless he or she is registered under this Act. Person shall apply to be registered as dealer in manner, and shall provide information, required by Registrar of Motor Vehicles (Registrar) (Motor Registration Bldg., 149 Smallwood Drive, St. John's, NL, A1B 4J5; telephone: 1.709.729.2519; telecopier: 1.709.729.6955; http://www.gs.gov.nl.ca/gs/mr/). Registrar shall register person who is in compliance with Act. Registration as dealer is not transferable. Dealer shall not carry on business in name other than name in which dealer is registered. Dealer's registration remains in effect until cancelled or revoked by Registrar. (§16.2).

Personal Property Security.

Governed by Personal Property Security Act (P-7.1) and CNLR 103/99; 107/99; contact Director of Commercial Registrations (telephone: 1.709.729.5724 or 1.709.729.0232; http://www.gs.gov.nl.ca/cca/cr/prop-about.stm).

Personal Property Security Act applies to every transaction that in substance creates security interest, without regard to its form, and without regard to person (natural person, partnership, limited partnership, corporation, association member, or government) who has title to collateral. (§4[1][a]). Interest includes security interest in chattel mortgage, conditional sale, fixed charge, floating charge, pledge, trust indenture, trust receipt, assignment, consignment, lease, trust, and transfer of chattel paper where instrument secures payment or performance of obligation. (§4[1][b]). Interest also includes security interest registered in relation to offshore area as defined in Hibernia Project Development Act (SC 1900, c. 41). (§4[1]).

Subject to §§5 and 56, Act applies to security interest in commercial consignment, lease for term of more than one year, transfer of account or chattel paper, and sale of goods without change of possession. (§4[2]).

(Under §5, Act does not, as general rule, apply to (i) lien, charge or other interest given by common law, or by statute unless statute provides that this Act applies; (ii) creation or transfer of interest to or claim in or under contract of annuity or policy of insurance except transfer of right to money or other value payable under policy of insurance as indemnity or compensation for loss of or damage to collateral; (iii) creation or transfer of interest in present or future wages, salary, pay, commission or other compensation for work or services whose assignment or transfer is prohibited by common law or statute; (iv) transfer of unearned right to payment under contract to transferee who is to perform transferor's contract obligations; creation or transfer of interest in land including lease; (v) creation or transfer of interest in right to payment arising in connection with interest in or lease of land other than interest in right to payment evidenced by security or instrument; (vi) sale of accounts, chattel paper or goods as part of sale of business out of which they arose unless vendor remains in apparent control of business after sale; (vii) transfer of accounts made solely to facilitate collection of accounts for transferor; (viii) creation or transfer of right to damages in tort; (ix) mortgage registered under Canada Shipping Act, 2001 [S.C. 2001, c. 26]; and (x) security agreement governed by Act of Parliament that deals with rights of parties to agreement or rights of third parties affected by security interest created by agreement, including security agreement governed by Part VIII of Bank Act [R.S.C. 1985, c. B-2].)

(Under §56, Part V—Default Rights And Remedies—Act does not apply to transaction referred to in §4[2], or transaction between pledgor and pawnbroker.)

Under Act, Part II provides for validity of security agreements and rights of parties; Part III provides for perfection and priorities; Part IV provides for registration; Part V provides for default rights and remedies.

Registrations under Act, and under any other Act that specifically provides, are made at electronic registry known as Personal Property Registry: http://www.acol.ca/Services/PPR/NF/menu.html. (Part IV, §43[1]).

Act binds Crown. (§3[6]).

Effective 13 Dec. 1999, Act repealed (i) Assignment of Book Debts Act, (ii) Bills of Sale Act, (iii) Conditional Sales Act, and (iv) Security Interest Registration Act (Parts I, II, III).

See also category 8 Debtor and Creditor.

Sale of Goods (S-6).

Sale of Goods Act largely replicates U.K. Act of same name.

International Sale of Goods Act (I-16) adopted as law of Province 1 May 1992.

Governs agreements to sell and agreements of sale (§2[c]) of goods.

Agreement of sale is contract by which seller transfers or agrees to transfer property in goods to buyer for money called price. There may be agreement of sale between one part owner and another. Agreement of sale may be absolute or conditional. Where under agreement of sale property in goods is transferred from seller to buyer, agreement is called sale but where transfer of property in goods is to take place at future time, or subject to condition to be fulfilled at later time, contract is called agreement to sell. Agreement to sell becomes sale when time elapses or conditions are fulfilled subject to which property in goods is to be transferred. (§3). Unless different intention appears in agreement, time is not of essence in interpretation of time provisions in agreement. (§12).

Capacity to buy and sell is regulated by general law concerning capacity to contract, and to transfer and acquire property. Where necessaries are sold and delivered to infant or minor, or to person who, because of mental incapacity or drunkenness, is incompetent to contract, he or she shall pay reasonable price for those necessaries. Necessaries mean goods suitable to condition in life of infant or minor or other person, and to his or her actual requirements at time of sale and delivery. (§4).

Goods include personal property other than things in action and money and includes natural products of land, industrial growing crops, and things attached to or forming part of land which are agreed to be severed before sale or under contract of sale. (§2[1][i]).

Goods are in ``deliverable state'' under Act if they are in such state that buyer would, under involved agreement, be bound to take delivery of them. (§2[4]).

Warranty reference goods means agreement with reference to goods which are subject of contract of sale, but collateral to main purpose of that contract, breach of which gives rise to claim for damages, but not to right to reject goods and treat contract as repudiated. (§2[1][o]).

Document of title to goods includes bill of lading, dock warrant, warehouse-keeper's certificate, and warrant or order for delivery of goods, and another document used in ordinary course of business as proof of possession or control of goods, or authorizing or purporting to authorize, either by endorsement or by delivery, possessor of document to transfer or receive goods represented by that document. (§2[1][f]).

Good faith is required in performance of transactions under Act; meaning performance which, in fact, is done honestly, whether or not performed negligently. (§2[2]).

Special provisions apply to goods of value greater than $50. (§6). Under §10(1), price in agreement of sale may be fixed by agreement, or may be left to be fixed in manner agreed upon in agreement or may be determined by course of dealing between parties. Where price is not determined under §10(1), buyer shall pay reasonable price. Reasonable price is question of fact, dependent on circumstances of particular case. (§10[3]).

Product Liability.

Common law usually governs.

Plain Language.

No legislation.

3.10 CONTRACTS:

(F-26).

Common law usually governs, as altered by statute.

See category 14 Family, topic 14.06 Infants, subhead Contracts.

Distributorships, Dealerships and Franchises.

See sub-category 3.12 Franchises.

Frustrated Contracts Act.

Where contract frustrated and parties discharged, sums previously paid are recoverable, and payable sums cease to be payable. However, Court authorized: (i) To allow expenses up to sums paid or payable; (ii) to allow for valuable benefit conferred by one party on other or obligation assumed by one for benefit of other; (iii) to sever contract, treating part as not frustrated and part frustrated. Act applies to all contracts governed by Province's legislation other than charterparty (except time charterparty or charterparty by demise), insurance contracts, sales of specific goods which have perished either before contract, or without seller's or buyer's fault, before risk passes under contract to buyer.

3.11 FACTORS:

Common law usually governs, as altered by statute.

3.12 FRANCHISES:

Franchise or right under franchise to own or operate public utility not to be transferred, assigned or leased, and contract reference or affecting franchise not to be valid or have effect unless assignment, transfer, lease, contract or agreement made under authority of statute or with approval of Board of Commissioners of Public Utilities. Board's approval of assignment, transfer, lease, contract or agreement shall not revive or validate lapsed or invalid franchise, or extend or add to powers or privileges in grant of franchise or waive franchise forfeiture. In fixing rate base for service provided by public utility which obtains or holds franchise from or under municipality or other public authority, Board shall exclude value of franchise other than money paid by franchise holder to municipality or other public authority as consideration for franchise. (P-58, §§49, 78).

3.13 FRAUDS, STATUTE OF:

U.K. Statute of Frauds in force (under “settled colony” doctrine).

3.14 INDUSTRY:

(E-16.1, §§23[8], 24).

Establishes Department of Innovation, Trade and Rural Development, and authorizes Minister to supervise, evaluate and direct development and promotion, generally, of growth in manufacturing, technical and service industries in Province.

Financial Assistance.

Minister is responsible for evaluating merits of applications to Province for financial assistance to establish or expand industries.

3.15 INTEREST:

See Canada Law Digest.

(R.S.C. 1985, c. I-15; J-2; J-4[71]).

Maximum Rate.

Subject to provisions of §317 of Criminal Code (R.S.C. 1985, c. C-46), no law prevents parties contracting to pay and to recover any rate of interest, if contracted to be paid under written instrument. Where, however, in proceeding, Court determines that interest charged is excessive, or that amount paid for expenses, inquiries, fines, bonuses, premiums or any other charge is excessive, or that transaction is harsh and unconscionable, Court may reopen transaction and take account between lender and person sued and give equitable relief.

Judgments.

(i) Generally.

As general rule, Judgment Interest Act (J-2) and Judgment Interest Regulations (CNLR 16/96) govern. Reg. 2 (authorized by Act) provides that prejudgment and post-judgment interest rate shall be established annually: (i) By taking average Bank of Canada rate for period of Oct. and Nov. of each year, rounded to next higher whole number where average Bank of Canada rate includes fraction, (ii) minus 1%. §6 and Reg. 4 provide that on 1 Dec. or as soon afterwards as possible, in each year, Minister of Justice shall determine following year's prejudgment and post-judgment interest rate, to be effective on 1 Jan. of that following year, and cause its publication in Newfoundland and Labrador Gazette.

(ii) Rate.

Effective 1 Jan. 2009, prejudgment and post-judgment interest rate is 2%. (NLR74/08). For interest rate effective 1 Jan. 2010, see http://www.gs.gov.nl.ca/gs/oqp/gazette/.

(iii) Judgment in Contract Action.

In action on contract, contract rate of interest applies.

Prejudgments.

See subhead Judgments, above.

Registrar's Consolidated Trust Funds.

All funds held by Registrar of Newfoundland and Labrador Supreme Court in Registrar's capacity as Registrar, estate administrator(rix), guardian (such as of estate of mentally disabled person: M-10), trustee (such as of children's property up to age 19: T-10), or receiver (such as under Rule 52), may be maintained by Registrar in one or more consolidated trust funds. (J-4, §71[1]). Interest payable on such funds is prescribed by Minister of Justice on recommendation of Registrar. (J-4, §71[2]-[4]). Current interest rate payable on consolidated trust funds set up by Registrar is 2% below average monthly prime lending rate of Bank of Montreal. (NLR 29/97).

3.16 LICENCES, BUSINESS AND PROFESSIONAL:

(C-17; D-24; F-21; P-37.1; L-20; S-8).

Licencing fees and/or taxes are levied on fire, marine, life and accident insurance companies; telegraph companies; trust companies; loan and investment companies; stockbrokers; transient dealers, auctioneers, junk dealers, peddlers and hawkers; plumbers, and real estate agents. Licencing fees and/or taxes are also levied on classes of business persons and businesses, such as commercial travelers; food, livestock, salvage yard vendors; laundries; salespersons; collection agencies.

Commercial Travellers.

Levied on commercial travellers not domiciled in Newfoundland and Labrador. Tax is $200 per annum. If commercial traveller commences business after June 30 in any year, s(he) is liable for half of this tax. Taxes payable by other commercial travellers vary from $5 to $500. (C-17).

Food Vendors.

Licences are required by food premises. (F-21, §5; CNLR 1022/96).

Livestock Sales, Salvage Yards, Laundries.

Licences are required for sale of livestock (L-20, §10); by persons dealing in salvage and operating salvage yards (S-8, §5), and by persons operating commercial laundries, laundromats and dry cleaning establishments. (P-37.1).

Salespersons.

Door-to-door vendors and persons who contact occupant(s) of house by telephone for purpose of selling or soliciting orders must register in accordance with Direct Sellers Act, D-24.

See also topic 3.01 Banks and Banking, topic 3.09 Consumer Protection, category Direct Sellers.

Collection Agencies.

See topic 3.09 Consumer Protection.

3.17 MONOPOLIES, RESTRAINT OF TRADE AND COMPETITION:

See Canada Law Digest: category Business Regulation and Commerce.

3.18 NEGOTIABLE INSTRUMENTS:

See Canada Law Digest: category Business Regulation and Commerce, topic Bills and

Notes.

3.19 RESTRAINT OF TRADE:

See Canada Law Digest: category Business Regulation and Commerce, topic Monopolies, Restraint of Trade and Competition.

3.20 SALES:

(B-11; I-16; SNL 1998, P-7.1; R-10; S-6).

Bulk Sales.

Bulk Sales Act (B-11) repealed 4 June 2008. (SNL 2008, c. 9)

Repeal of Bulk Sales Act, on 4 June 2008, also repealed (i) Gasoline Tax Act, §34; (ii) Mining and Mineral Rights Tax Act, §34; (iii) Retail Sales Act, §19, and (iv) Tobacco Tax Act, §37. These provisions, until repealed, required person, prior to disposition of specific property in bulk, to obtain tax clearance certificate in duplicate from Department of Finance; stating that all taxes collectable or payable by that person have been paid or that arrangements satisfactory to Finance had been made for taxes payment to Finance or for receipt, otherwise, by Finance, of payment of those taxes. Purchaser of involved property in bulk also responsible for obtaining from that person copy of Finance's tax certificate issued in duplicate to him or her; otherwise purchaser liable for (i) tax payable by that person on involved property disposed of in bulk, and (ii) for any tax collected and due to Finance by that other person but not remitted by him or her to Finance.

Statutory liens, however, continue to exist. Liens clearance certificate must be obtained from Finance to protect persons purchasing property in bulk from liens which, under Acts cited in previous paragraph, encumber entire assets of person disposing of specific property in bulk, who (i) was required to pay tax to Finance, or (ii) had collected but not remitted tax due to Finance.

Conditional Sales.

Formerly governed by C-28 which, effective 13 Dec. 1999, repealed and replaced with P-7.1: Personal Property Security Act and CNLR 103/99; 107/99; Director of Commercial Registrations, telephone: 1.709.729.5724 or 1.709.729.0232; http://www.gs.gov.nl.ca/cca/cr/.

See also topic 3.09 Consumer Protection, subhead Personal Property Security.

Conveyances of Personal Chattels.

If possession of chattels sold by grantor remains with grantor, conveyance must be registered in accordance with Registration of Deeds Act, R-10, within period of 30 days after execution or be void against subsequent purchaser for valuable consideration, or against attachment or execution upon chattels which has been registered before conveyance (R-10, §34), unless governed by P-7.1.

Consumer Protection.

See topic 3.09 Consumer Protection.

3.21 SECURITIES:

(S-13).

Registration of Brokers.

Person (§82[1][ee]) or company shall not: (a) Trade in security unless person or company is registered as dealer, or is registered as salesperson or as partner or as officer of registered dealer and is acting on behalf of dealer; (b) act as underwriter unless person or company is registered as underwriter; or (c) act as adviser unless: (i) Person or company is registered as adviser, or is registered as partner or as officer of registered adviser and is acting on behalf of adviser, and (ii) registration has been made in accordance with Act and regulations (CNLR 805/96; 87/01), and (iii) person or company has received written notice of registration from Director of Securities Commission, and (iv) where registration is subject to terms and conditions, person or company complies with terms and conditions.

Exempt Transactions.

Registration is not required for trade in security arising from sale; or isolated sale by administrator(trix), executor(trix), guardian, or like such; or where one party is bank. (§§35, 36). Application for registration must be in writing and accompanied by fee set by Minister of Justice. (§30). Application may be refused or cancelled or reduced to temporary registration. (§33[2]).

Fraudulent Acts.

Where, on statement made on oath or affirmation, it appears probable to Securities Commission that person or company has: (i) Contravened Act or regulation authorized by Act or (ii) committed offence under Criminal Code (R.S.C. 1985, C-46) in connection with trade in securities, Commission may, by order, appoint person to make investigation that Commission considers expedient for Act's administration (Part IV). Act further provides, in circumstances such as where investigation has been ordered, that Commission may order persons and companies, otherwise authorized under Act to trade, to curtail their activities in respects and to extent Commission directs.

Voidable Transactions.

Where any person (§2[1][ee]) or company officer, director or employee has contracted as broker with customer to buy and carry securities on margin and while contract is in force sells securities for account in which s(he) has any interest, if effect of sale of securities be to reduce their value, contract is voidable at option of customer, which option must be exercised by notice in writing. (§48).

Annual Return.

Broker must file, annually, financial statement, satisfactory to Securities Commission, of his(her) affairs as such. (Part XIV).

Enforcement.

Fine up to $1,000,000, imprisonment for term not exceeding two years, or both, for breaches of Act, may be imposed by Court. (§122).

Audit.

Minister of Justice may order auditing of any person (§2[1][ee]) or company operating under provisions of Act, and in consequence of such audit, order any necessary system improvement.

3.22 STATUTE OF FRAUDS:

See topic 3.13 Frauds, Statute of.

3.23 TOURISM:

(E-16.1, §§23[13], 24).

Establishes Department of Tourism, Culture and Recreation and authorizes Minister to supervise, control and direct matters relating to promotion, encouragement and development of cultural activities, historic resources and tourism in Province.

3.24 WAREHOUSEMEN:

(W-1; W-2).

Governed by Warehouse Receipts Act, W-1 and Warehouser's Lien Act, W-2.

Warehouse Receipts.

Must be in form prescribed by Warehousemen's Receipts Act. Such receipts are negotiable. (§14). Warehouseman is liable for loss of or injury to goods caused by his(her)(its) failure to exercise such care and diligence reference them as would be exercised by careful and vigilant owner of similar goods in custody of them in similar circumstances. (§14).

Warehouser's Liens.

Under Warehousemen's Lien Act, every warehouseman has lien on goods deposited with warehouseman for storage whether deposited by owner of goods or by that person's authority or by any person entrusted with possession of goods by owner or by owner's authority. (§3). In addition to all other remedies provided by law for enforcement of liens or for recovery of warehouseman's charges, warehouseman may, in manner provided by Act, sell by public auction any goods on which s(he) has lien for warehouseman's charges which have become due. (§5).

4 CITIZENSHIP

4.01 ALIENS:

(C-18.1; J-4; P-26; S-32; T-10).

See category 17 Immigration, topic 17.01 Aliens.

5 CIVIL ACTIONS AND PROCEDURE

5.01 ACCORD AND SATISFACTION:

Common law usually governs.

5.02 ACTIONS:

Governed largely by Judicature Act, J-4 and Rules of The Supreme Court, 1986 in Supreme Court, and Small Claims Act, S-16, Small Claim Regulations, NLR 69/04, and Small Claims Rules, NLR 52/97 in Provincial Court (maximum jurisdiction of Provincial Court $5,000 [NLR 69/04]).

Equity.

There is no distinction observed between legal and equitable proceedings.

Forms of Action.

(a) Statement of claim or (b) originating application or, in limited circumstances (e.g., application for estate probate or administration), (c) petition. Originating application rather than (customary) statement of claim is commonly employed to initiate action in certain matters such as involving construction of instrument, declaration of right, or trusts; being more expeditious procedure. Question to be determined thereby must be one of law, not fact. Parties sometimes agree on facts such as by agreed statement or affidavits when proceeding by originating application.

Condition Precedent To Action (Notice).

From 1 Apr. 1996, requirement of notice to municipalities (C-17, §314; M-23, §443) and to Crown (P-26, §21) before instituting any proceeding against either or both of them was repealed (SNL 1995, c. L-16.1).

Commencement.

See subhead Parties, below; topic Process.

Parties.

Any person having any interest in, or in any other way affected by, cause of action may commence action. Guardians, administrators(rixes) and executors(rixes), or trustees shall commence action in representative capacity. In case of guardians ad litem, evidence of guardianship shall be filed. In event of death or bankruptcy, previously commenced action (proceeding) survives by or against estate whose representative is joined, for which order of Court is required. (Rule 7.14).

Class Actions.

SNL 2001, C-18.1.

(i) Application to Certify Class Action.

One member, of class of persons, who resides in Province may commence action in Court on behalf of members of that class. Member who commences action shall apply to Judge of Court within time period prescribed in §3(3) for orders certifying action as class action and appointing action-commencing member as representative plaintiff. (§3[1, 2]). Judge of Court may certify person who is not member of class as representative plaintiff if necessary to avoid substantial injustice to class. (§3[4]). Person named as defendant in more than one action in Court may apply to Judge of Court for order certifying actions as class action and appointing person or other entity (as case may be) as representative plaintiff.

(ii) Limitation on Class Action.

Under §3(3), application for order certifying action as class action and appointing representative plaintiff shall be made: (a) By later of: 90 days after (i) day on which defence is served in action, and (ii) day on which time expires for filing a defence under Rules of The Supreme Court, 1986, where defence is not served; or (b) with leave from Judge of Court.

(iii) Grounds for Certifying Class Action.

Court shall certify action as class action where: (a) Pleadings disclose cause of action; (b) there is identifiable class of two or more persons; (c) claims of class members raise common issue, whether or not common issue is dominant issue; (d) class action is preferable procedure to resolve common issues of class; and (e) there is person who (i) is able to fairly and adequately represent interests of class, (ii) has produced plan for action that sets out workable method of advancing action on behalf of class and of notifying class members of action, and (iii) does not have interests that conflict with interests of other class members. (§5[1]).

In determining whether class action would be preferable procedure for fair and efficient resolution of common issues, Court may consider all relevant matters including whether (i) questions of fact or law common to members of class predominate over questions affecting individual members; (ii) significant number of members of class have valid interest in individually controlling prosecution of separate actions; (iii) class action would involve claims that are or have been subject to another action; (iv) other means of resolving claims are less practical or less efficient; and (v) administration of class action would create greater difficulties than those likely to be experienced if relief were sought by other means. (§5[2]).

Court shall not refuse to certify action as class action solely for one or more of following grounds: (i) Relief claimed includes damages requiring individual assessment after determination of common issues; (ii) relief claimed relates to separate contracts involving different class members; (iii) different remedies are sought for different class members; (iv) number of class members or identity of each class member not determined or may not be determined; or (v) class includes subclass whose members have claims that raise common issues not shared by class members. (§8).

(iv) Subclasses.

Where class includes subclass whose members have claims that raise common issues not shared by all class members so that, in Court's opinion, protection of interests of subclass members requires they be separately represented, Court may, in addition to representative plaintiff for class, appoint person to be representative plaintiff for each subclass. (§7[1]).

(v) Nonresidents Classes.

Class made up of persons resident in province and persons not resident in province shall be divided into resident and nonresident subclasses. (§7[2]).

Interpleader.

Where two or more persons claim chattels real or chattels personal seized by Sheriff or in custody or control of third party, relief by way of interpleader may be sought by originating application (inter partes) served on all claimants. On hearing application, Court will direct issue between claimants and may make any suitable order in its discretion as to disposition of chattels. (Rule 13).

Third Party Practice.

Where defendant claims against co-defendant or third party that either of them is liable to defendant for all or part of plaintiff's claim against defendant, defendant may, before filing defence or appearing on hearing of proceeding, issue and serve third party notice without leave of Court, and thereafter with leave. (Rule 12).

Joinder of Causes of Action.

Subject to circumstances: (i) Where joinder of causes of actions in action (proceeding) or parties in same proceeding may embarrass or delay trial or hearing of proceeding or is otherwise inconvenient or (ii) where counterclaim or third party proceeding ought to be disposed of by separate proceeding, party, whether suing in same capacity or different capacities, may join several causes of action in same proceeding. (Rule 7).

Consolidation of Causes of Action.

Subject to certain rules of procedure in Judicature Act and Rules, Court has power to consolidate, in same proceeding, different causes of actions against different defendants. (Rule 18).

Stay of Proceedings.

May be obtained, on motion, by order of Supreme Court, on showing cause, in exercise of Court's discretion. Where protection of interests of parties warrants, Court will order security for costs. (J-4, §95).

Abatement and Revival.

Survival of causes of action is governed by common law rules, as altered by statutes such as Survival of Actions Act, S-32 and Trustee Act, T-10 §22 (see category 13 Estates and Trusts, topic 13.05 Death). When cause of action survives death, if, by virtue of death (or assignment or conveyance), estate or interest affected by cause of action devolves (or is transferred), surviving cause of action may be instituted by or against person to whom estate has devolved (or been transferred). Order of court to do so is required.

Termination.

Any time before proceeding is entered for trial or before its hearing is commenced in chambers, plaintiff may discontinue proceeding or withdraw any part of proceeding resulting from cause of action against any defendant, or defendant may withdraw part or all of defence, without leave, by filing and serving notice of discontinuance or withdrawal on any other party concerned. After proceeding is entered for trial or its hearing commenced in chambers, plaintiff or defendant may discontinue or withdraw with leave of Court, and leave order may contain provisions as to costs and as to bringing of subsequent proceedings. Party discontinuing proceeding or withdrawing part or whole of proceeding, or defence to proceeding, must pay costs of any opposing party to date of discontinuance or withdrawal. Subject to terms of Court's leave order, prior discontinuance or withdrawal is not defence to subsequent proceeding founded on same, or substantially same, cause of action. (Rule 19).

Proceedings Against Crown.

Proceedings Against The Crown Act (P-26) governs. ``Her Majesty'' in right of Newfoundland (§10) may now sue or be sued more or less as any private citizen. From 1 Apr. 1996, requirement of notice on Crown before institution of proceedings against Crown (P-26, §21) repealed (SNL 1995, c. L-16.1).

Limitation of.

See topic 5.14 Limitation of Actions.

Direct Actions Against Insurer.

See category 25 Transportation, topic 25.03 Motor Vehicles, subhead Direct Actions.

5.03 APPEAL AND ERROR:

(S-16; J-4).

Lower Courts.

Generally, in all civil matters involving amounts not exceeding $5,000 (commenced and determined in Provincial Court sitting as Small Claims Court under Small Claims Act (S-16), conducted under Small Claims Rules: NLRs 52/97; 41/99; 7/00) there is right of appeal to Supreme Court (Trial Division) from decision of Provincial Court Judge provided appellant files and gives notice in writing within 30 days of appealed decision to other party. (S-16, §14).

In all provincial offence proceedings, person may appeal to Supreme Court (Trial Division) from conviction, sentence, or both in accordance with procedure prescribed by Criminal Code (R.S.C. 1985, c. C-46, Part XXVII) and thereafter, with leave, to Court of Appeal of Supreme Court and thereafter, with leave in most proceedings, to Supreme Court of Canada.

Supreme Court.

Decision of Judge of Supreme Court in civil action (proceeding) in Trial Division or in civil family matter in Trial Division or Unified Family Court may be reviewed on appeal before Court of

Appeal of the Supreme Court. (Rule 57). With leave, there is further appeal to Supreme Court of Canada. Leave also required to appeal to Court of Appeal from interlocutory decision of Judge of Supreme Court in civil action (proceeding) in Trial Division or Unified Family Court.

On date yet to be proclaimed (likely in 2010), SNL 2009, c. 16 will provide for Trial Division and Unified Family Court division of Newfoundland and Labrador Supreme Court to continue as Trial Division of Court, comprised of General Division and Family Division.

See topic 5.02 Actions, category Stay of Proceedings.

Nature of Hearing.

Appeal is by way of review although, with leave, additional evidence may be introduced. Extends to questions of fact, law, and mixed fact and law.

Extent of Review.

Trial judge's decision ``should not be interfered with absent error in principle, failure to consider all relevant factors, consideration of irrelevant factor or lack of factual support …" (per Cameron J.A. in Martin v. Martin [1998], 168 Nfld. & P.E.I. R. 181 [NLCA]).

5.04 CERTIORARI:

Certiorari is governed by Crown Practice Rules in Civil Matters. (R.54). Writ is seldom used. Rather, review of decisions of lower Court is, ordinarily, by way of appeal or stated case.

5.05 CHARITABLE IMMUNITY:

See topic 5.07 Damages.

5.06 COSTS:

Generally.

Costs are in discretion of Court or Judge of Supreme Court (Trial Division, Unified Family Court, or Court of Appeal, as case may be). (Rule 55).

On date yet to be proclaimed (likely in 2010), SNL 2009, c. 16 will provide for Trial Division and Unified Family Court division of Newfoundland and Labrador Supreme Court to continue as Trial Division of Court, comprised of General Division and Family Division.

Security for costs may be required from nonresidents who have insufficient property within Province to respond to costs (were costs to be ordered). Bond will be accepted. (Rule 21).

See also category 8 Debtor and Creditor, topic 8.05 Bonds.

Liability of Attorney.

Within discretion of Court or Judge to adjudge, in reliance on common law; subject to Rule 55.14(2).

5.07 DAMAGES:

(F-6; SNL 1995, L-16.1; C-33).

In respect of actions (proceedings) for damages generally (i.e., entitlement to and quantum of damages), common law usually governs, as altered by statute.

Advance payment of damages may be ordered by Supreme Court (NLR 1/06 [Rule 44A]).

Fatal Accidents Act.

Provides (F-6) that whenever death of person is caused by any wrongful act, neglect or default entitling any party to cause of action for damages, action (proceeding) for damages must be commenced within two years from date of death.

Party may include partner; being either of two persons who cohabitated in conjugal relationship outside marriage for at least two years or for at least one year where partners are, together, biological or adoptive parents. (SNL 2008, §8).

Limitations Act.

Limitation period (L-16.1) under Fatal Accidents Act (F-6) does not begin to run and, therefore, tolling does not commence or may be suspended after tolling commences against person until s(he) knows or, considering all relevant circumstances, ought to know that s(he) has cause of action. Burden of proving that limitation period has been postponed/suspended is on person so claiming. Nonetheless, subject to principal of confirmation, action must be commenced within ten years of triggering event(s) (except in case of person under disability in which event tolling of ten year limitation postponed/suspended while person under disability). (L-16.1, §§14, 15). Person under disability includes person under 18 years. (§15[5]). Limitation period may also be extended by operation of principal of confirmation. (§16). Notwithstanding postponement or suspension of limitation (i.e., of tolling) and notwithstanding operation of principal of confirmation, action shall not be brought after expiration of 30 years from date on which occurrence of event which gave rise to cause of action completed. (§22).

See also topic 5.14 Limitations of Actions.

Contributory Negligence.

Under Contributory Negligence Act, C-33, fault may be apportioned among two or more persons.

Charitable Immunity.

Not applicable in Newfoundland and Labrador.

5.08 DECLARATORY JUDGMENTS:

See topic 5.13 Judgments.

5.09 DEPOSITIONS AND DISCOVERY:

(E-16; SNL 1991, C-13).

Depositions.

Depositions are taken by affidavit before persons authorized to administer oaths in accordance with U.K. practice. They may be admissible in evidence in many proceedings commenced by originating application or involving interlocutory application, especially in family law proceedings. (Rule 56A.20). Otherwise, they are only admissible in evidence on proof that deponent is dead, out of jurisdiction, or unable to be present at trial because of sickness or other unavoidable reason. (Rule 47).

Witness.

See SNL 1991 c. 13, §6.1(b) for definition.

Compelling Attendance of Witnesses.

If witness is within Province s(he) may be compelled to attend when order (such as subpoena ad testificandum or subpoena duces tecum) for his (her) examination has been issued and served.

Examination of Witnesses Out of Court.

If witness is outside Province and commission has been issued, commission may be accompanied by letters rogatory addressed to court of foreign jurisdiction, where witness located, requesting aid in procuring evidence. (Rule 46).

Witnesses must be examined on oath, affirmation or otherwise in accordance with law of jurisdiction in which commission is executed. Examination will normally be based on oral questions which are reduced to writing in transcript of examination, but it may be conducted on written interrogatories. Oral examination usually takes place in presence of parties and/or their counsel, solicitors or agents (unless otherwise ordered). Witnesses are subject to cross-examination and reexamination. (Rule 46).

Subject to §6.1(6) of Evidence Act (E-16), witness to legal proceeding ("proceeding" defined by §6.1[1][a]), shall not be asked and shall not answer any question, or produce any documentation, in relation to evidence given previously before either: (i) Newfoundland and Labrador Perinatal Committee or (ii) quality assurance or peer review committee of "member" as defined under Health Care Association Act (formerly Hospital and Nursing Home Association Act). (H–8).

5.10 EQUITY:

See topic 5.02 Actions.

5.11 EVIDENCE:

(E-16).

Common law usually governs, as altered by statute; principally, Evidence Act, E-16, and Canada Evidence Act, RSC 1985, C-5.

Witnesses (Generally).

Common law usually governs.

Witnesses (Children).

As to competence of child to testify (not defined by statute), at common law: (i) Child of or over 14 years old is presumed competent to testify under oath or affirmation; (ii) child under 14 is competent to testify if court is satisfied child understands nature of (i.e., what it means to testify on) oath or affirmation and has ability to communicate evidence to court; (iii) if court is not satisfied child understands nature of oath or affirmation, but is satisfied that child has ability to communicate evidence to court, child may give unsworn evidence, provided child promises to tell truth and appears to understand what that means; (iv) where court is not satisfied child understands nature of oath or affirmation, does not have ability to communicate evidence to court, and does not understand meaning of telling truth, child is not competent to testify.

Child's evidence need not be corroborated. Court shall not instruct jury that it is unsafe to rely on child's uncorroborated evidence; provided, however, Court retains discretion to comment on child's evidence. (E-16, §§18; 18.1).

See also topic 5.09 Depositions and Discovery.

5.12 INJUNCTIONS:

(J-4).

Governed by Judicature Act, J-4.

Generally.

Injunctions are granted by Court or Judge of Court. Application is made on affidavit stating grounds on which injunction is claimed.

Interim Injunction.

If urgent, application may be ex parte.

Court will grant interim injunction where circumstances warrant immediate interference and on undertaking of applicant that if granted interim injunction proves wrongful any losses incurred thereby will be satisfied by applicant.

5.13 JUDGMENTS:

(J-4; SNL 1996, J-1.1; R-4).

Generally.

(i) Supreme Court.

Generally speaking, Judicature Act, J-4, common law, and practice as to judgments governs in Newfoundland and Labrador Supreme Court. Since 2 Sept. 1986 revision of Rules of The Supreme Court, “order” has largely replaced “judgment” in Province's judicature, although not in family law proceedings. (Rule 56A.24).

Except where otherwise specifically provided, judgment shall be obtained by motion for judgment. It may be interim or final depending on circumstances, such as necessity for assessment of damages (in which event judgment is interim, in sense it provides positive decision on liability, subject to damages assessment).

(ii) Provincial Court.

As to judgments under Small Claims Act (Provincial Court), S-16, see NLR 52/97.

Judgment Enforcement.

The Judgment Enforcement Act (SNL 1996, c. J-1.1; NLRs 102/99; 90/01) primarily provides for creditor enforcement of money judgment. Exigibility of money judgments, whose enforcement was previously provided for under various statutes, is, from 1 June 1997, largely facilitated under Act. (§3). There is provision for separation of binding of debtor's property (prejudgment attachment) (Part II) from specific enforcement procedures that allow creditor to realize (post-judgment) on bound property (Part III).

Supreme Court (Trial Division) is Court with general jurisdiction for purposes of Act. (§2[h]).

Act operates on principal of universal exigibility (i.e., all of debtor's property is subject to enforcement proceedings unless expressly exempted). Exemptions are enumerated in §§129-149. Creditor must determine extent of debtor's property available to satisfy judgment. (§§64-69). Regulation includes provision for examination of judgment debtor(s) in aid of enforcement. (NLR 102/99).

Act allows for coordination of enforcement of judgments. Therefore, Sheriff may receive all proceeds from enforcement actions and distribute them on pro rata basis to all creditors entitled to share. (§154).

As to judgments under Small Claims Act (Provincial Court), S-16, see §10, which provides for enforcement under Judgment Enforcement Act.

Judgment by Confession.

Common law procedures seldom used, judgment by confession include recognizance (acknowledgment on record of debt in event of any circumstance contemplated by recognizance) and cognovit (which is instrument signed by defendant in action already pending).

In practice, procedure employed is judgment by consent.

Judgment by Consent.

In practice, in any cause (proceeding) where defendant has appeared by solicitor, no order for entering judgment by consent shall be made by consent unless consent of defendant is given by his (her) solicitor. Where defendant has not appeared by solicitor, s(he) must attend in person in Court and give consent unless defendant's written consent, attested by solicitor, is given.

Rule 33.03 provides that when admission of truth of any fact or authenticity of any document is made by party by pleading or otherwise, in proceeding, any other party may apply to Court for entry of judgment or for such order as other party may be entitled to, based on admission, without waiting for determination of any other question between parties, in proceeding, and Court may allow entry of such judgment or make such order as it thinks just.

Declaratory Judgments.

Court may make binding declarations of rights whether or not any consequential relief is or could be claimed. (Rule 7.16).

Default Judgment.

Where no defence has been filed within required time and claim is for liquidated demand, final judgment may be entered on affidavit, proving claim, having been filed. In unliquidated matter judgment may be entered subject to further directions of Court or Master. In matters which originally could only have been brought before Court of Chancery, plaintiff must proceed as if defendant had appeared. (Rules 16, 17).

Foreign Judgments.

Judgments obtained in U.K. Supreme Court may be registered in Newfoundland and Labrador Supreme Court (Trial Division). (C-3). Permission to register judgments given in superior Courts of other countries, whether any of Her Majesty's Dominions or other foreign country, may be granted by Newfoundland and Labrador Supreme Court (Trial Division) where such foreign Superior Courts give substantial reciprocity of treatment to judgments of Supreme Court of Newfoundland and Labrador. Application to register foreign judgments must be made to Supreme Court (Trial Division) within six years from date of judgment, or, where there have been proceedings by way of appeal against judgment, within six years after date of last judgment given in those proceedings. (R-4).

Enforcement of foreign judgments is otherwise subject to same limitations as are judgments entered in Province. (SNL 1995, c. L-16.1, §6). Whether registered or not, foreign judgments may be used by way of defence or counterclaim between same parties in all

Newfoundland and Labrador proceedings founded on same cause of action.

Reciprocating states as of 1 Dec. 2009 are listed in CNLR 790/96; 18/99.

See category 8 Debtor and Creditor.

5.14 LIMITATION OF ACTIONS:

(L-16.1; S-32).

Generally.

Principal limitation of actions statute is Limitations Act, SNL 1995, c. L-16.1 (in force: 1 Apr. 1996).

Principal Limitation Periods.

Main limitation periods prescribed by Act are as follows:

(1) Following expiration of two years after date on which right to do so arose, action shall not be brought: (a) For damages in respect of injury to person or property (including economic loss arising from injury whether based on contract, tort or statutory duty); (b) for damages in respect of injury to person or property (including economic loss arising from negligent misrepresentation and professional negligence whether based on contract, tort, or statutory duty); (c) for trespass to property not contemplated by (a) above; (d) for defamation other than defamation (libel or slander) contemplated by Defamation Act, D-3, §17; (e) for false imprisonment; (f) for malicious prosecution; (g) for conspiracy to commit wrong referred to in (a), (b), (c), (d) or (e) above; (h) which is civil action to recover fine or other penalty and to recover fine or other penalty imposed by court or law; (i) under Fatal Accidents Act, F-6; or (j) under Privacy Act, P-22, §5.

(2) Following expiration of six years after date on which right to do so arose, action shall not be brought: (a) For damages for conversion or detention of goods; (b) to recover goods wrongfully taken or retained; (c) for tort committed against proponent which is not contemplated by (a) in above paragraph (1); (d) to enforce instrument under seal; (e) to enforce forfeiture of recognizance; (f) to enforce obligation arising from statute; (g) to enforce foreign judgment; (h) to recover debt; (i) by creditor not in possession of collateral, to realize on collateral; and (j) by debtor not in possession of collateral, to redeem collateral. (“Debtor” means person who owes payment or other performance of obligation which is secured; whether or not s(he) owns or has rights in collateral.) (§6).

(3) Following expiration of ten years after date on which right to do so arose, action shall not be brought: (a) On judgment of Court in Province for payment of money or recovery of personal property; (b) against personal representative of deceased person for share of estate; (c) against trustee for fraud or fraudulent breach of trust to which trustee was party or privy; (d) against trustee for conversion of trust property to trustee's own use; (e) to recover trust property or property into which trust property can be traced; (f) to recover money on account of wrongful distribution of trust property, against person to whom property is distributed, or successor of such person; or (g) to recover land (other than Crown lands under Lands Act, SNL 1991, c. 36). (§7).

(4) As general rule, action for which limiting provision is not included either (a) in above paragraphs (1) to (3) or (b) in another statute shall not be brought after expiration of six years after date on which cause of action arose. (§9).

Where person (or other legal entity) against whom action lies confirms cause of action, time elapsing before date of that confirmation shall not count, when calculating expiration date of limitation period, for person having benefit of confirmation against person bound by that confirmation. Confirmation must be given before expiration of limitation period for right of action (where that cause of action bound by limitation). Confirmation must be in writing and signed by person against whom cause of action lies or that person's agent. Extensive additional provisions as to confirmation prescribed by §16.

Where cause of action is for damages in which claim involves breach of duty of care founded in contract, tort, and/or statutory duty, and damages claimed involve personal injury or property damage (including economic loss, negligent misrepresentation, and/or professional negligence), cause of action is considered to arise and limitation period commences to run on date on which damage first occurs.

Furthermore, where cause of action involves (i) personal injury; (ii) property damage; (iii) professional negligence; (iv) relief from consequences of mistake; (v) Fatal Accidents Act, F-6; or (vi) non-fraudulent breach of trust, limitation period fixed by Act does not begin to toll against person until s(he) knows or, considering all circumstances of matter, ought to know that s(he) has cause of action (i.e., discoverability rule). (§14[1]).

Burden of proof that tolling of limitation period has been postponed or suspended, in any of these circumstances, is on person claiming benefit of postponement or suspension. Notwithstanding these circumstances as to postponement or suspension, any action these provisions contemplate shall not be taken after expiration of ten years from later of (i) date of act or omission on which action is based or (ii) date of last of series of acts or omissions or (iii) date of termination of course of conduct, where action is based on series of acts or omissions or continuing course of conduct.

Disabilities of Plaintiff.

Where at time of circumstances giving rise to action person is under disability, tolling of limitation period under Act is postponed so long as that person is under disability. (Person under disability means person, (i) under 19 years; or (ii) incapable of management of affairs because of disease or impairment of physical or mental condition; or (iii) [for purpose of action for misconduct of sexual nature other than action under §8(2) considered under subhead No Limitations, below] incapable of commencing action due to her (his) mental or physical condition resulting from that sexual misconduct.) (§§14, 15).

No Limitations.

§8(2), mentioned under subhead Disabilities of Plaintiff, above, is part of provision (§8) which lists causes of action not governed by limitation period.

That provision, in summary, provides as follows: §8(1): person or other legal entity not governed by limitation period can bring action at any time (i) relating to enforcement of injunction or restraining order; (ii) for declaration as to title to property by person in possession of that property; (iii) as mortgagor, to redeem chattels real or chattels personal in her(his) exclusive possession; (iv) as mortgagee, to foreclose or exercise power of sale with respect to chattels real or chattels personal in her(his) possession; (v) for declaration as to personal status; or (vi) to enforce easement, restrictive covenant, profit-a-prendre or other incorporeal hereditament (except action for damages for interference with or breach of that easement, restrictive covenant, profit-a-prendre or incorporeal hereditament); §8(2): where misconduct of sexual nature has been committed against person and that person was (i) under care or authority of or (ii) financially, emotionally, physically or otherwise dependent upon, or (iii) beneficiary of fiduciary relationship with, another person or organization or agency, there shall be no limitation period and action arising from that sexual misconduct may be brought at any time.

General Provisions.

Notwithstanding that time within which action may, under Act, be taken is extended by virtue of (i) confirmation or (ii) postponement or suspension, no action to which Act applies shall be brought after expiration of 30 years from date on which events giving rise to cause of action last occurred; provided, however, that this limitation does not apply to causes of action contemplated under §8(1) and §8(2), mentioned under subhead No Limitations, above.

Act also contains extensive provisions respecting trusts (§12); recovery of chattels real (Part III), and guarantees and sureties (Part IV).

Act applies to actions in Province to exclusion of laws of all other jurisdictions which (i) impose limitation periods for bringing actions or which (ii) in another manner prohibit or restrict bringing of actions because of lapse of time or delay.

Act applies to causes of action that arose before Act took effect on 1 Apr. 1996 as well as to causes of action that arise after Act took effect.

Nothing in Act revives cause of action in respect of which limitation period has expired before Act took effect.

Where cause of action that arose before Act took effect was not governed by limitation period or limitation period fixed by Act is shorter than limitation period that formerly governed cause of action that arose before Act took effect and, further, where limitation period fixed by Act expired before Act took effect or less than two years after Act took effect, applicable limitation period for such cause of action is shorter of following: (i) limitation period that formerly governed, or (ii) two years from 1 Apr. 1996 (date Act took effect).

Where action (proceeding) to which Act applies has been commenced, lapse of time limited for commencement is not bar to relief by means of filing (i) counterclaim, (ii) third party claim, (iii) claim in nature of set-off, (iv) addition of new party; but court may exercise judicial discretion to refuse such relief on grounds unrelated to lapse of time.

Application to amend pleading which commences action (proceeding) to which any Act applies, if made after expiration of limitation period for that proceeding, may be allowed (i) to change originating process, or (ii) to substitute or change plaintiff or defendant, provided amendment involves non-prejudicial error and arises out of facts in originating process. (§14).

Except as otherwise provided in Act, common law rules reference time at which proceeding arises continue to apply. Where, however, in damages proceeding, (i) claim is for breach of duty of care based on contract, tort or statutory duty and (ii) damages claimed are reference personal injury or property damage including economic loss, negligent misrepresentation, or professional negligence, proceeding is considered to arise and limitation period commences to toll on date when damage first occurs. (§13).

Act repeals considerable number of previously obtaining limitation periods including those under City of St. John's Act and other municipal legislation, under Fatal Accidents Act, under Highway Traffic Act, under Law Society Act, and under Proceedings Against the Crown Act.

Survival of Actions (S-32).

Actions and causes of action which are: (i) Vested in person who has died, or (ii) existing against person who has died, survive for benefit of or against his or her estate. Cause of action shall not be commenced under Act unless done within period permitted under Limitations Act (L-16.1), by executor(rix) or administrator(rix) or by person appointed to represent estate for purposes of action (§7).

See, however: Ryan vs. Moore, 2005 SCC 38, 16 June 2005.

Justices and Other Public Authorities.

See L-16.1.

5.15 PARTITION:

C-34, §49.

5.16 PLEADING:

Governed in Supreme Court largely by Judicature Act, Rules of The Supreme Court, 1986 and Newfoundland and Labrador Criminal Appeal Rules, and by and under Canada's Criminal Code. Governed in Provincial Court by various rules promulgated under Provincial Court Act and regulations, and by and under Criminal Code.

See topics 5.17 Practice and 5.18 Process.

5.17 PRACTICE:

Supreme Court.

In Supreme Court (Trial Division and its adjunct, Unified Family Court, and in Court of Appeal), civil practice (which includes formalized process requirements under rules of court) is governed by Judicature Act, J-4 and Rules of The Supreme Court, 1986, as well as practices not inconsistent with Act or Rules including Practice Notes (Rule 4.04)), and unpublished practice directives, issued by Court. These rules are largely same as in Province of Nova Scotia.

On date yet to be proclaimed (likely in 2010), SNL 2009, c. 16 will provide for Trial Division and Unified Family Court division of Newfoundland and Labrador Supreme Court to continue as Trial Division of Court, comprised of General Division and Family Division.

For Practice Notes, see: http://www.cba.org/newfoundland/main/pubs/practicenotes.aspx.

To extent civil trial practice involves family law, Rules 56A, 56B, and 56C of Rules of The Supreme Court, 1986 have particular application (NLR 12/03, in force from 1 Apr. 2003; 130/03, in force from 1 Dec. 2003), as well as unpublished practice directives.

To extent civil practice involves appeals, Rules 57 and 58 have particular application.

Court criminal trial practice is governed by Criminal Code and to extent not inconsistent with Code, by Judicature Act, Rules of The Supreme Court, 1986, court practices, and (in near future) criminal proceedings rules.

To extent criminal practice involves appeals, practice is governed by Canada's Criminal Code in both Trial Division and Court of Appeal; in Trial Division by The Criminal Appeal Rules of Supreme Court of Newfoundland And Labrador, Trial Division (SI/87-28, 21 Jan. 1987, Canada Gazette, Part II, vol. 121, no. 2), and in Court of Appeal by Supreme Court Of Newfoundland And Labrador—Court Of Appeal Criminal Appeal Rules (2002)(The NL Gazette, 28 June 2002, vol. 77, no. 26). To extent not inconsistent with Code and these Rules, Judicature Act, Rules of The Supreme Court, 1986, court practices and practice directives also apply.

See also Rules of Court, Annotated, 2009, by Honourable J. Derek Green, Chief Justice of Newfoundland and Labrador Supreme Court and Christopher P. Curran, NL Justice Department Senior Counsel (St. John's, NL: Law Society of Newfoundland and Labrador, 2009).

Provincial Court.

Practice in Provincial Court is governed by: (i) Provincial Court Act, 1991 (SNL 1991, c. 15); (ii) Provincial Offences Act (SNL 1995, P-31.1); (iii) in some types of proceedings, by special rules enacted by statute, regulations (e.g., Small Claims Regulations, NLR 69/04), and rules (e.g. Small Claims Rules: NLRs 52/97; 41/99; 7/00; 31/01; 51/03; 34/04; 105/05; 58/07; SNL 2001, c. 42, §45; Provincial Court Family Rules, 2007: NLR 28/07; SNL 2004, c. 36, §51; Rules of the Provincial Court of Newfoundland and Labrador in Criminal Proceedings: Canada Gazette, vol. 138, no. 21, 20 Oct. 2004); and Provincial Court Family Violence Protection Rules (52/06); and, generally, by unpublished practice directives.

See also topics 5.02 Actions, Appeal and Error, Depositions and Discovery; Injunctions, Judgments, Pleading, Process; category 8 Debtor and Creditor, topics 8.03 Attachment, 8.08 Executions, 8.12 Garnishment.

5.18 PROCESS:

Process is integral to practice in Newfoundland courts; and includes, in Supreme Court and Provincial Court, process formalized in rules cited above under topic Practice, and process articulated in Practice Notes (Rule 4.04) and unpublished practice directives.

In Trial Division of Supreme Court, process is governed particularly by Rules of The Supreme Court, 1986, including those cited below. (Note that in many respects, provisions in Rules 56A and 56B covering family law process in Trial Division and in Unified Family Court adjunct to Trial Division differ from those which govern civil process in Trial Division; see, e.g., Rule 56A.35[4].)

On date yet to be proclaimed (likely in 2010), SNL 2009, c. 16 will provide for Trial Division and Unified Family Court division of Newfoundland and Labrador Supreme Court to continue as Trial Division of Court, comprised of General Division and Family Division.

Commencement and Service of Proceeding.

Proceeding, usually called action, is commenced (Rule 5) in Supreme Court (Trial Division) by statement of claim (customarily) or originating application.

Service must be effected within 12 months after proceeding commenced, unless leave of Court or Judge granted to extend time.

Statement of claim or originating application setting forth succinctly factual grounds for, and relief particulars of, action must always be served on defendant personally or, with leave of Court or Judge, substitutionally.

In limited circumstances (e.g., application for letters of probate, administration, or administration cum testamento annexed—i.e., with will annexed—or guardianship of infants' estates), proceeding commenced by petition.

Who May Serve.

There is no special provision in Newfoundland and Labrador, except in divorce action (see category 14 Family, topic 14.03 Divorce, subhead Process).

Service on Persons Under Disability.

(i) Infants.

Where infant (usually person under 18 years and not mentally disabled, such as for purpose of proceedings contemplated by SNL 1995, c. L-16.1, §15) is defendant, service is sufficient if effected on father, mother, guardian or, if infant has no father, mother or guardian, on person with whom infant resides or person who cares for infant. (Rule 6.13).

(ii) Other Persons Under Disability.

Where person disabled, in sense of mental disablement (including persons under 18 years who are mentally disabled), service is sufficient if effected on guardian of estate of mentally disabled person or guardian ad litem of such person or, if there is no guardian, on person with whom mentally disabled person resides or in whose care mentally disabled person is. (Rule 6.13).

Service on Partnership.

Service shall be effected on any one or more partners where action taken against partners as firm.

Service on Municipal or Other Domestic Corporation.

Service on municipality shall be effected on Mayor or other authorized official. Service on other corporations shall be effected by serving at registered office of corporation or on responsible official there.

Service on Foreign Corporation.

If foreign corporation doing business in Newfoundland and Labrador is represented by agent in Province, service shall be effected by leaving process at agent's office.

Service by Mail or Publication.

On proof satisfactory to Court or Judge of impracticability of personal service of process, service shall be by registered post, by advertisement in newspapers, or otherwise, as Court or Judge may order.

Service Outside of the Jurisdiction.

Generally, absent defendant outside Canada cannot be sued, but Court may grant leave to issue statement of claim or originating application against defendant for service out of jurisdiction whenever: (i) whole subject matter of action is chattels real situate within jurisdiction; or (ii) any will, deed, act, or contract affecting chattels real within jurisdiction is sought to be construed; or (iii) any relief is sought against any person domiciled or against any person ordinarily resident within jurisdiction; or (iv) action is for administration of estate of person who died domiciled in Province or for any relief or remedy which might be obtained in such proceeding; (v) proceeding is for execution reference property, situated in Province, of trusts of written document which ought to be executed under law of Province and of which person to be served is trustee, or proceeding is for relief or remedy which might be obtained in such proceeding; (vi) proceeding is to enforce, rescind, resolve, annul, or otherwise affect contract or to recover damages or obtain other relief reference breach of contract made within Province, or made by or through agent trading or residing in Province on behalf of principal trading or residing outside Province, or which by its terms or by implication governed by Province's law, or in which parties to contract agree Province's courts shall have jurisdiction to entertain any action reference contract; (vii) proceeding is reference breach committed in Province of contract made in or outside Province, and irrespective of fact, if case, that contract breach was preceded or accompanied by breach committed outside Province which rendered impossible performance of so much of contract as ought to have been performed in Province; (viii) proceeding founded on tort committed in Province; (ix) in proceeding in which injunction sought ordering defendant to do or refrain from doing anything in Province (whether or not damages also claimed in respect of failure to do or doing of that thing); (x) person outside Province is necessary or proper party to proceeding properly brought against another person served in Province (xi) proceeding is by mortgage of property in Province and seeks sale of that property, foreclosure of mortgage, or delivery by mortgagor of possession of that property (but not order for payment of any monies due under mortgage); (xii) proceeding brought by mortgagor of property in Province which seeks redemption of mortgage, reconveyance of property, or delivery by mortgagee of possession of property (but not proceeding seeking to enter personal judgment); (xiii) proceeding founded on order of any court in Province; (xiv) proceeding is probate action otherwise engaging jurisdiction of court in Province; (xv) proceeding authorized to be commenced in Province.

Nonresident Motorist.

See category 25 Transportation, topic 25.03 Motor Vehicles.

5.19 REPLEVIN:

Action not applicable in Newfoundland and Labrador, except for recovery of chattels wrongfully distrained. (See L-15, §2[2][c].)

5.20 SEQUESTRATION:

(J-4, Pt. VII).

Jurisdiction.

Supreme Court of Newfoundland and Labrador may issue this writ.

During Litigation.

May be issued against party who is in contempt by reason of neglect or refusal to appear or answer or to obey order of Court.

See also Rule 53.

After Judgment or Order.

Directed to Sheriff, his deputies, sub-Sheriffs, and bailiffs, commanding them to enter lands and take rents and profits and seize goods of person against whom directed.

5.21 SERVICE:

See topic 5.18 Process.

5.22 SUBMISSION OF CONTROVERSY:

Forms of process to which submission of controversy may be made are: (i) Mediation; (ii) special case; (iii) summary trial; (iv) trial of particular questions or issues; and (v) arbitration.

Mediation.

Rules 37A; 56A.20(6) - (7).

Special Case.

Parties may state any question of law or fact in form of special case for adjudication by Court before trial or hearing. (Rule 37.01). Special case to be in prescribed form, including agreed statement of material facts which sets out or refers to documents necessary to enable Court to decide special case. (Rule 37.02). On hearing case, Court may draw from stated facts and documents any inference that may have been drawn had stated facts been proved at trial or hearing. (Rule 37.04). If parties agree in writing, Court may order specific relief to be granted or may enter judgment containing relief. (Rule 37.05).

Summary Trial.

At any time after defence has been filed and before proceeding has been placed on trial list, plaintiff or defendant may apply to Court (with supporting affidavit or other evidence) for summary trial seeking judgment on, or dismissal of all or part of, claim. On application for summary trial, each party must serve on every other party memorandum consisting of concise statement of facts and law relied on by each party and file it in Registry not later than 48 hours before day set for hearing. (Rule 17A).

Trial of Particular Questions or Issues.

Court may order any particular question or issue, whether of fact or law, or partly of fact and partly of law, and whether raised by pleadings or otherwise, to be tried before, at or after trial, and may give directions as to manner in which question or issue shall be stated. (Rule 40.04).

Arbitration.

(A-14).

Arbitrator is person who, under Act, or in arbitration agreement, hears and decides arbitration. Subject of arbitration is submission. Submission is: (i) Written agreement to submit present or future differences to arbitration, whether arbitrator is or is not named in agreement; (ii) direction in any Act that person appoint arbitrator or proceed to arbitration under Act, or (iii) judicial order with respect to arbitration under Act. Unless submission expresses contrary intention, submission is irrevocable, except by judicial leave.

5.23 VENUE:

Court may order change of venue within Newfoundland and Labrador: (i) In civil proceeding, on sufficient cause being shown (Rule 42.03), or (ii) in criminal proceeding, under Criminal Code (R.S.C. 1985, c. C-46, §599), by application under Rules of Provincial Court of Newfoundland and Labrador in Criminal Proceedings, Rule 9 or by application under Rules of Supreme Court, 1986.

6 COURTS AND LEGISLATURE

6.01 COURTS:

(J-4).

Supreme Court.

Supreme Court of Newfoundland and Labrador comprises: Court of Appeal consisting of Chief Justice and five appellate Judges, and supernumerary Judges, who sit only in St. John's; Trial Division consisting of Chief Justice of Trial Division and 20 puisne Judges sitting in St. John's, Grand Bank, Gander, Grand Falls, Corner Brook and Happy Valley/Goose Bay (and who periodically travel to conduct circuits elsewhere in Province), and supernumerary Judges; including Unified Family Court consisting of two Judges sitting at St. John's and elsewhere within portion of Island of Newfoundland over which Unified Family Court has territorial jurisdiction.

On date yet to be proclaimed (likely in 2010), SNL 2009, c. 16 will provide for Trial Division and Unified Family Court division of Newfoundland and Labrador Supreme Court to continue as Trial Division of Court, comprised of General Division and Family Division.

For purposes of Judges Act (R.S.C. 1985, J-1, §32) two additional offices of Judge were established in 1995 to be filled: (i) By persons who had occupied office of Chief Justice of Supreme Court of Newfoundland and Labrador (who is also Chief Justice of Court of Appeal) and (ii) by persons who had occupied office of Chief Justice of Trial Division of Supreme Court of Newfoundland and Labrador; in event either of such persons elects under Judges Act (J-1, §47.1) to vacate Chief Justiceship and perform duties of Judge of Court of Appeal or of Trial Division (as case may be).

Trial Division has Province-wide unlimited original jurisdiction in all matters (other than in matters or aspects of matters reserved to Provincial Court). Unified Family Court is territorially limited in its jurisdiction to portion of eastern part of Island of Newfoundland defined as judicial area and contiguous additional area called expanded service area (U-3, §2[1][a], [a.1]) and matters over which it has jurisdiction are specified in Unified Family Court Act, c. U-3 as amended by SNL 1997, c. 43, §2.

On date yet to be proclaimed (likely in 2010), SNL 2009, c. 16 will provide for Trial Division and Unified Family Court division of Newfoundland and Labrador Supreme Court to continue as Trial Division of Court, comprised of General Division and Family Division.

§22(1) of Judicature Act establishes six judicial centres, one of which is in St. John's, and other five of which are elsewhere in Newfoundland and Labrador: Grand Bank, Gander, Grand Falls, Corner Brook, and Happy Valley-Goose Bay. Act also provides that ``… judges of the Trial Division may sit and act anywhere in the province …'' to transact Court's business. §33(2) provides that ``… Rules may be made prescribing the times and locations for the sittings of the Court, or define the geographical boundaries of the judicial centres. The boundaries, such as they are, appear to have been established by convention and practice and have not been definitively stated.'' Jurisdiction of judicial centers of Court is not limited to particular geographic areas of Province. Each of judicial centres of Court has province-wide jurisdiction, see: Power vs. Atlantic Shopping Centres Ltd., (2004), 236 Nfld. & P.E.I.R. 8 (NLSC [TD]), Handrigan J.

Provincial Court.

Organized administratively into districts. (CNLR 1152/96). Every Provincial Court Judge of that Court has jurisdiction throughout Province. Provincial Court Judge: (i) May exercise all powers and perform all duties conferred or imposed on Provincial Court Judge by any of Acts of province's Legislature (i.e., House of Assembly) or of Parliament of Canada; (ii) subject to Youth Criminal Justice Act, S.C. 2002, c. 1 (in force: 4 Apr. 2003), has all power and authority now vested, under any Act of province's Legislature, in Provincial Court Judge, two justices of peace sitting together, or Youth Court or Judge of Youth Court; (iii) may exercise all powers and perform all duties conferred or imposed on Provincial Court Judge or one or more justices of peace under Acts of Parliament of Canada; and (iv) is, by virtue of office, justice of peace.

Provincial Court Judge shall be considered to have been specially authorized by terms of his (her) appointment to exercise jurisdiction conferred on Provincial Court Judge under Part XIX of Criminal Code (trial of criminal matter without jury) but this does not apply to any number of justices of peace.

Jurisdiction includes receiving, hearing and determining applications for emergency orders under Family Violence Protection Act (SNL 2005, c. F-3.1) and Rules (NL Reg. 52/06).

Liability provided for: (i) At common law and (ii) under Justices and Public Authorities Protection Act, RSNL 1990, c. J-7.

Justices of the Peace.

From 16 Dec. 2004, most authority previously exercised by Justices of the Peace, under Province’s legislation, was repealed. (SNL 2004, c. 36). By informal arrangement between Province and Royal Canadian Mounted Police (Canada’s police force), Justices of the Peace, from 16 Dec. 2004, have not been approached by R.C.M.P. serving in Province (under policing agreement between Province and Canada) to exercise much of authority that justices previously exercised in respect of federal legislation. Much of authority exercised by Justices of the Peace before 16 Dec. 2004 was also possessed by Provincial Court Judges; although in practice, justices, rather than judges, exercised that authority (e.g., issue of warrants of arrest, summonses, search warrants and, in many instances, judicial interim release, under legislation of Province or of Canada) until 16 Dec. 2004.

6.02 LEGISLATURE:

Consists of Province's House of Assembly (RSNL 1990, H-10) under provisions of Constitution Act, 1867 (formerly, until 17 Apr. 1982, known as British North America Act) as amended.

Election.

Members must be elected to House of Assembly on polling day for general election which shall be every four years on second Tues. in Oct. commencing Oct. 2007; and afterwards, on second Tues. in Oct. of every fourth calendar year following polling day of most recent previous general election. (SNL 2004, c. 44).

Sessions.

No statutory provision as to holding of regular or fixed sessions. Governed by custom.

See also category 1 Introduction.

6.03 REPORTS:

Reports of many decisions of Supreme Court and Provincial Court are published in Newfoundland & Prince Edward Island Reports and in Atlantic Provinces Reports by Maritime Law Book Ltd. (Box 302, Fredericton, New Brunswick, Canada, E3B 4Y9, telephone: 1.800.561.0220 [from anywhere in Canada or U.S.A. other than Alaska and Hawaii]; telecopier: 1.506.453.9525), and all such decisions are procurable from issuing court.

Reports of most decisions are available, online, from CanLii (http://www.canlii.org/); from Quicklaw (LexisNexis), telephone: 1.800.387.0899; and from Carswell Law Source (Thomson Canada Ltd.), telephone: 1.800.387.5164; Supreme Court (http://www.court.nl.ca/supreme/default.htm); and Provincial Court (http://www.court.nl.ca/provincial/default.htm).

Summaries of decisions from Courts comprising Newfoundland and Labrador Supreme Court available monthly, sometimes more frequently, from Newfoundland Case Digest, edited by F. Geoffrey Aylward, B.A. (Hons.), LL.B (1655 Topsail Road, Suite 200, Paradise NL, Canada A1L 1V1, telephone: 1.709.722.7000; telecopier: 1.709.726.1225).

6.04 STATUTES:

Following is statute law in force in Newfoundland and Labrador: (1) English legislation as at July 26, 1832, date immediately before establishment, on July 27, 1832, of first local legislature, under Representative Government (so far as such law was applicable to local conditions, which is question to be decided in each case by Newfoundland and Labrador Court); (2) in respect of period 27 July 1832 until British Parliament's Statute of Westminster in 1931 (1931 c. 4 [U.K.]) whereby status of Newfoundland and Labrador (colony since June 1824) became dominion: legislation enacted by British Parliament that expressed or necessarily implied intention to apply to Newfoundland and Labrador (such legislation being infrequently enacted to and including 1907 and, apparently, not since then), e.g. Merchant Shipping Act (U.K.); (3) statutes of Newfoundland and Labrador's self-government legislative bodies under Representative Government: 1 Jan. 1833 (when first local legislature under Representative Government—created effective from 27 July 1832—commenced sitting) to 1855 (except from 1841 to 1848 when Amalgamated Assembly governed), and Responsible Government: 1855 (first local legislature under Responsible Government commenced sitting 22 May 1855) to and including 15 Feb. 1934; (4) statutes of Newfoundland and Labrador legislature since Newfoundland joined Canada on 31 Mar. 1949 (Newfoundland and Labrador statutes up to and including 31 Dec. 1990 consolidated in Revised Statutes of Newfoundland and Labrador, 1990, in force from 1 June 1992, and Acts passed by legislature subsequent to 31 Dec. 1990, available from Queen's Printer [Confederation Building, East Block, P.O. Box 8700, St. John's, NL, A1B 4J6, telephone: 1.709.729.3649; telecopier: 1.709.729.1900; http://www.gs.gov.nl.ca/gs/oqp/] or see note on Digest's title page); (5) Canadian (federal) statutes as they are prorogated in relation to Newfoundland and Labrador.

(Note: Self-government was suspended and Newfoundland and Labrador was administered by six-member U.K.-appointed commission chaired by U.K.-appointed Governor of Newfoundland, from 16 Feb. 1934 to and including 30 Mar. 1949.)

7 CRIMINAL LAW

7.01 BAIL:

See Canada Law Digest, category Criminal Law, topic Criminal Law.

7.02 CRIMINAL LAW:

Criminal law, including criminal, and ``peace order and good government'', offences, is governed by legislation of Parliament of Canada.

Penal offences—in practise called provincial offences—as distinguished from federal criminal and ``peace order and good government'' offences, are created under legislation of Province. Penal offences procedurally governed principally by Provincial Offences Act. (P-31.1). Fines are provided for under legislation of Province creating provincial offences. Victim surcharges on fines for provincial offences—and federal criminal offences—are provided for by Victims of Crime Services Act. (V-5). Where person convicted of provincial offence and fine imposed, person shall, additionally, pay victim fine surcharge of 15% of fine imposed; except respecting: (i) Parking offence; (ii) offence under regulation or by-law of city (C-15, C-16, C-17) or of municipality other than city (M-24); or (iii) offence exempted by regulation (V-5, §11.1). Where person convicted of provincial offence establishes to court's satisfaction that imposing victim fine surcharge would result in undue hardship to person, court may exempt person from part or all of victim fine surcharge. (V-5, §11.1[2]).

See also Canada Law Digest.

See also category 3 Business Regulation and Commence, topic 3.09 Consumer Protection, subhead Personal Property Security.

8 DEBTOR AND CREDITOR

—Scope —

(P-7.1).

References to Assignment of Book Debts Act, Bills of Sale Act, Conditional Sales Act, or Registration of Deeds Act in provincial Act other than Personal Property Security Act, or in provincial regulation other than regulation under Personal Property Security Act, or in agreement or other writing that relates to security interest, are considered to be references to Personal Property Security Act or to corresponding provisions in Personal Property Security Act. (73.[1]).

References to bill of sale, chattel mortgage, conditional sales contract, fixed charge, floating charge, pledge or assignment of book debts or the like, or derivative of any of these terms, or to another agreement or transaction that creates or provides for security interest in Act other than Personal Property Security Act, or in regulation other than regulation under Personal Property Security Act, or in agreement or other writing, are considered to be references to corresponding kind of security agreement under Personal Property Security Act. (73.[2]).

8.01 ASSIGNMENTS:

(J-1.1; J-4; A-20; P-41; A-19; P-7.1).

Generally.

Any debt or thing in action may be assigned, provided assignment is absolute and in writing and express notice in writing is given debtor or other affected person. Such assignment transfers legal and equitable title.

Legislation providing for assignments includes Judgment Enforcement Act. (J-1.1, §§2[1][aa][ii], 37[1], 85[f], 168[1][b]).

Actions.

Action may be taken without joining assignor. (J-4, §103).

Filing.

There is no provision for recording of such assignment.

Assignment of Wages.

Generally, provided for by A.20; except that assignment of wages of civil servants is governed by Public Officials Garnishee Act. (P-41).

Assignment of Book Debts.

Effective 13 Dec. 1999, A-19 (which provided for assignment of book debts) repealed and replaced with SNL 1998, P-7.1: Personal Property Security Act and CNLRs 103/99; 107/99; contact Personal Property Registry, Commercial Registrations Division, Ground Floor, East Block, Confederation Building, P.O. Box 8700, St. John's, NL A1B 4J6, telephone: 1.709.729.5724; telecopier: 1.709.729.0232; http://www.acol.ca/Services/PPR/NF/menu.html.

8.02 ASSIGNMENTS FOR BENEFIT OF CREDITORS:

See Canada Law Digest, category Debtor and Creditor, topic Bankruptcy.

8.03 ATTACHMENT:

(J-1.1; P-7.1).

Generally.

Attachment is prejudgment remedy under Judgment Enforcement Act. (J-1.1)

Application.

Claimant may apply to Court (§2[1][h]) for attachment order (§2[1][d]) where: (a) Claimant has commenced or is about to commence proceeding in Province to establish claimant's claim(s);

or (b) claimant has commenced proceeding(s) before foreign tribunal to establish claim(s) if (i) judgment (§2[1][bb]) or award of foreign tribunal could be enforced in Province either by action or by proceeding(s) under enactment dealing with reciprocal enforcement of judgment awards (RSNL 1990, c. R-4), and (ii) defendant appears to have exigible (§2[1][t]) property (§2[1][rr]) in Province. (§27[1]).

On hearing attachment application Court may make attachment order if satisfied: (a) Serious issue obtains to be tried; and (b) reasonable grounds obtain for believing defendant is dealing with defendant's exigible property, or is likely to deal with that property, (i) otherwise than for purpose of meeting defendant's reasonable and ordinary business or living expenses, and (ii) in manner likely to seriously hinder claimant in enforcement of judgment if subsequently obtained against defendant. (§27[2]).

Scope.

Court may: (a) Direct that order applies (i) to all or specific exigible property, including chattels real (Part VII), of defendant, or (ii) to exigible property to be subsequently identified in writing by Sheriff; (b) prohibit dealing with defendant's exigible property; (c) impose conditions or restrictions on dealings with defendant's exigible property; (d) require defendant or person in possession or control of defendant's exigible property to deliver property to person identified in order; (e) authorize claimant to apply for issue of garnishee order (Part VIII); (f) appoint receiver (Part IX); and (g) include term, condition or provision that court considers necessary or desirable. (§28[1], [6]).

Conditions of order shall not be granted unless claimant undertakes to: (i) Prosecute involved proceeding(s) to judgment without delay; and (ii) pay damages or indemnity or contribution that Court may subsequently decide should be paid to defendant or third person. (§28[2]).

Where attachment order granted, Court may require claimant to give additional undertaking that Court considers necessary. (§28[2]). Further, attachment order shall be granted in manner to cause as little inconvenience to defendant as is consistent with achieving purpose of order granted. (§28[4]).

Amount of order shall be: (i) In amount Court considers appropriate; (ii) accompanied by two sufficient sureties or other sufficient security approved by Court; and (iii) in required form. Court may require bonding be provided by corporation registered under Insurance Adjusters, Agents and Brokers Act (I-9). (§28[3]).

Attachment order shall not attach property that exceeds amount or value that appears to Court to be necessary to meet claimant's proceeding claim, including interest and costs, and related notices of judgment (§2[1][jj]), unless Court of view limitation of amount or value would make operation of order unworkable or ineffective. (§28[5]).

Registration.

Notice of attachment order may be registered (§33[1]) and, if registered, notice is effective until attachment order terminates (§30) or one year after registration (whichever first occurs). Attachment notice may be renewed by fresh registration before expiry of previous registration. (§33[2]).

Security in form of bond or otherwise may be required from claimant, in respect of undertaking to prosecute proceeding without delay, pay damages or indemnity or contribution if ordered, or other undertaking ordered. (§28[2]). Security may be substituted for attached property if agreed or Court orders. (§31).

Notice.

When, and when not, required is provided for in §29. If attachment order made without notice, order must state date, not more than 30 days from date order granted, when order shall expire unless order extended on application with notice to defendant.

Variation.

Application may be made by interested party. (§27[7]).

Term.

Attachment order terminates: (i) On dismissal or discontinuation of claimant's proceeding(s); (ii) 60 days after day judgment entered in claimant's favour (§30[1]); or (iii) if application, to terminate, of interested person granted (§28[7]).

Sale.

J-1.1, §32.

Enforcement.

J-1.1, §35.

Priorities.

J-1.1, §34.

Inconsistent Actions.

J-1.1, §36.

Other Legislation.

Personal Property Security Act. (P-7.1).

8.04 BANKRUPTCY:

See Canada Law Digest.

8.05 BONDS:

(I-9).

In civil proceedings, Supreme Court will accept bond of any bonding company licenced by Minister of Finance to do business in Province.

See also J-4, §118; Rules 56.21-56.23.

In criminal proceedings, bonds—customarily referred to as recognizances—are governed by Canada's Criminal Code (especially Part XXV); by Court Practice Note of Court of Appeal (restricted to Court of Appeal): Informing And Processing Of Sureties Upon Judicial Interim Release Applications And Review Of Judicial Interim Release Applications (20 Dec. 2006, CAPN No. 2006-02 [Rule 4.04]; website: http://www.court.nl.ca/supreme/appeal/default.htm); and practice directive by Provincial Court, (since 2 Nov. 2006), which addresses bond surety issues before Judges of Court: http://www.court.nl.ca/provincial/faq.htm.

8.06 CONSTRUCTION LIENS:

See topic 8.15 Liens, subhead Mechanics' Lien Act.

8.07 CREDITORS' SUITS:

Common law usually governs, as altered by statute.

8.08 EXECUTIONS:

(J-1.1).

Application.

As general rule, all money judgments are enforced under Judgment Enforcement Act, J-1.1 (Act).

Where, however, another Act provides for enforcement of money judgment made under that other Act, this Act not applicable except to extent that other Act provides for enforcement of its money judgments as or in same manner as judgments enforced under this Act. Where no enforcement provision in another Act provides for money judgments, this Act applies. (§3[1]).

This Act applies to support orders within meaning of Support Orders Enforcement Act, 2006. (S-31.1).

This Act binds Crown. (§4[1]).

Amounts of money judgments are, for enforcement purposes, defined by §22: (i) amount of judgment stated in notice of judgment registered in Office of High Sheriff's registry; (ii) notice of judgment registration fees paid Sheriff; (iii) interest accruing under Judgment Interest Act; (iv) fees or expenses paid or payable by judgment creditor to Sheriff after notice of judgment registration; and (v) all other amounts to be added to judgment amount of which Sheriff has notice.

Enforcement Documents.

§23.

Registry.

Sheriff shall supervise registry for Province in Office of High Sheriff, 319 Duckworth Street, P.O. Box 5429, St. John’s, NL A1C 5W2 (telephone: 1.709.729.4646; fax: 1.709.729.2157; http://jer-remote.justice.gov.nl.ca/jer/jep/wstatic.w_which_one?as_which_one=IN) respecting, and providing system for enforcement of money judgments. (§5[1], 13, 14). Sheriff shall also maintain computer storage and retrieval system for maintenance of records of money judgment enforcement proceedings. (§18). This Act provides for public access, on payment of fee, to records of enforcement proceedings. (§19).

Notice of Registered Judgment.

Person having money judgment that is in force may register notice of judgment in Office of High Sheriff's registry https://jer-remote.justice.gov.nl.ca/forms/reg.pdf. (§38[1]). Creditor not having registered judgment notice shall not bind property of debtor, initiate enforcement proceeding, or share in distribution of monies realized through enforcement proceedings or otherwise received by Sheriff, under Part XI of Act. (§38[4]).

Notice of judgment effective only while money judgment upon which based is in force. (§39[1]).

Registration of notice of judgment occurs and is effective from time registration number, date and time assigned to judgment described in notice which is registered in Sheriff's registry. (§41[1]). Amendment of notice of judgment effective from time registered. (§42[1]).

Registration of notice of judgment does not, of itself, constitute notice or knowledge of existence of notice of judgment. (§43). Person is considered to have knowledge of notice of judgment if person has knowledge that particular property (i) is subject to notice of judgment, or (ii) subject to enforcement proceedings, or (iii) has been seized. (§47).

Property Bound.

Money judgment not binding or otherwise affecting debtor's property until registration of notice of judgment in Office of High Sheriff's registry. On registration, notice of judgment binds all debtor's property; including property acquired by debtor, after registration of notice of judgment respecting that debtor's property, from time debtor acquired post-registration property. (§46).

Person acquiring interest in chattels real takes that interest (i) free of, or (ii) in case of security interest in land, in priority to, notice of judgment that binds land, if instrument of acquisition is registered in Registry of Deeds of Province within ten days after registration of notice of judgment in Sheriff's registry. (§60).

Seizure and disposition of chattels personal in enforcement proceedings provided for in Part V.

As to security interests in chattels personal created before registration of notice of judgment, see §50.

Seizure and disposition (including sale) of chattels real in enforcement proceedings provided for in Part VII.

Special seizure mechanisms (for example, relating to cash) provided for in Part VI.

Garnishment provided for in Part VIII.

Receivers and special remedies provided for in Part IX.

When money received from enforcement proceedings respecting obligation (such as under money judgment) is distributed, person who does not assert claim to property from which money realized by those proceedings, before that money distributed may not trace or otherwise follow that money. (§63[1]).

Distributions.

Provided for in Part XI.

Exemptions.

Property in which debtor has interest, which is exempt from enforcement proceedings, specified in §§131, 132 (including portion of income: §§139-147). Determination of exempt property provided for in §138. As to survival of exemptions after debtor's death, see §137.

Disposition of property in which debtor has interest, exceeding exempted property, provided for in §133.

See topic 8.09 Exemptions.

Term of Judgment.

Money judgment, on which is based notice of judgment registration in Office of High Sheriff's registry, shall not be in force (i) if judgment has been satisfied; (ii) period for judgment enforcement has expired under Limitations Act (L-16.1) or another Act prescribing limitation period; or (iii) if and as provided for in judgment or order of court having jurisdiction reference involved judgment. (§40[2]). For purpose of determining whether money judgment in force, person searching Sheriff's registry shall rely on judgment date stated in notice of judgment registered in registry. (§40[4]).

Prejudgment Relief.

See topic 8.03 Attachment.

Directions.

As general rule, Court—Trial Division or Court of Appeal—may, on application, give directions on matter or issue arising out of money judgment enforcement proceedings. (§11). As to disputes, see Part XII. As to impeachable transactions, see Part XIII.

Sales by Court.

As to sales in mortgage proceedings, and generally, see Rule 26.

See also CNLRs 102/99, 90/01; Rule 51.

8.09 EXEMPTIONS:

(J-1.1).

Exempt from enforcement proceedings are, principally, certain income and certain property other than income.

As to income, see topic 8.08 Executions, subhead Exemptions.

As to property (other than exempt income) exemptions comprised of interest of debtor in: (i) Food required by debtor and his or her dependents during next 12 months; (ii) necessary clothing of debtor and his or her dependents of value not exceeding amount prescribed by regulations (CNLR 102/99; 90/01); (iii) household furnishings, utensils, equipment and appliances of value not exceeding amount prescribed by regulations (CNLR 102/99; NLR 90/01); (iv) one motor vehicle of value not exceeding amount prescribed by regulations (CNLR 102/99; NLR 90/01); (v) medical and dental aids required by debtor and his or her dependents; (vi) items of sentimental value to debtor of value not exceeding amount prescribed by regulations (CNLR 102/99; NLR 90/01); (vii) domesticated animals kept as pets and not used for business purpose; (viii) principal residence of debtor of value not exceeding amount prescribed by regulations (CNLR 102/99; NLR 90/01); (ix) personal property necessary for debtor to earn income; (x) pension plan except as provided for under Judgment Enforcement Act (J-1.1) or another Act; and (xi) other property provided for by regulations (CNLR 102/99; NLR 90/01; J-1.1, §131).

Also see topic 8.08 Executions, subhead Exemptions.

Homestead Exemption.

See topic 8.13 Homesteads.

8.10 FORECLOSURE:

See category 22 Mortgages, topic 22.04 Mortgages of Real Property.

8.11 FRAUDULENT SALES AND CONVEYANCES:

(F-24).

Every conveyance (defined: §2[a]) of chattels real (defined: §2[c]) or chattels personal (defined: §2[b]), and every bond, suit, judgment and execution at any time had or made with intent to defeat, hinder, delay, or defraud creditors or others, of their just and lawful actions, suits, debts, accounts, damages, penalties or forfeitures, is, under §3, void as against those persons and their assigns. §3 applies to any conveyance executed with intent set out in §3, notwithstanding conveyance executed for valuable consideration and with intent, as between parties to conveyance, of actually transferring, to and for benefit of transferee, interest expressed to be transferred under conveyance, unless protected under §4 by reason of good faith and want of notice or knowledge on purchaser's part. (§5). §3 does not, as provided for in §4, apply to estate or interest in chattels real or chattels personal conveyed for good consideration and in good faith to person not having, at time of conveyance to him(her), notice or knowledge of intent set out in §3.

8.12 GARNISHMENT:

(J-1.1; S-16).

In Provincial Court small claims proceedings, see S-16.

In most other proceedings, see J-1.1, Part VIII, and topic 8.09 Exemptions.

8.13 HOMESTEADS:

Not applicable in Newfoundland and Labrador.

8.14 INSOLVENCY:

See Canada Law Digest: category Debtor and Creditors, topic Bankruptcy.

8.15 LIENS:

(C-36; F-28; I-1; L-9; M-3; SNL 1991, c. 49; S-6).

Major statutory liens are mechanics', builders', suppliers' and workers' (M-3); corporations' (on shares) (C-36, §82); innkeepers' (I-1, §6); vendors' (on chattels) (S-6, §§42, 43, 44); by Crown (on timber and trees) (F-28, §§31, 69); by inactive solicitors (L-9, §67). Major common law liens are: auctioneers', bailees', carriers', solicitor's, and vendors' (on chattels real).

Enforcement.

General remedy for enforcement of liens is by retention of property subject to liens. Additionally, certain statutory powers of sale and other remedies obtain with respect to some liens. There is no right of redemption if lien satisfied by sale.

8.16 MECHANICS' LIENS:

Mechanics' Lien Act (M-3) applies to all contracts, to all subcontracts arising under those contracts, and to all services or materials supplied under those contracts and subcontracts. Where person who supplies services or materials to be used in making, constructing, erecting, fitting, altering, improving or repairing of chattels real, building, structure or works for owner, contractor, or subcontractor, that person, by doing that work or placing or providing those materials, has lien for price of those services or materials on estate or interest of owner of chattels real, building, structure or works and appurtenances to them, limited, however, in amount, to sum due to person entitled to lien and sum owing by owner (except, for example, where there is express contract to contrary). (§6). In all cases, person primarily liable on contract (i.e., to make payment) under and by virtue of which lien may arise shall, as work is done or materials are provided under contract, retain for period of 30 days after completion or abandonment of work done or to be done under contract, 10% of value of work and materials actually supplied. (§12). Lien of worker for wages has priority over other liens to extent of 30 days wages. (§16).

Every lien for which claim is not registered expires 30 days after occurrence of following events: (i) publication of notice of substantial performance of contract (SNL 1991, c. 49, §2[13.3]), (ii) completion or abandonment of contract or subcontract, or (iii) date on which claimant last supplied services or materials. (§22). Registration must be made against chattels real on which building or construction is done. Where lien has been registered, it ceases to continue to be valid unless proceeding is commenced to enforce it within 90 days following occurrence of earlier events set out above in this paragraph. (§24). Prior mortgage has priority only to extent of actual value of chattels real and premises at time first lien arose; value of which priority is to be ascertained by Judge. (§8).

8.17 PLEDGES:

Rights and duties of pledgor and pledgee are generally governed by common law, subject to special provisions of Bank Act, S.C. 1991, c. 46.

See Canada Law Digest.

8.18 RECEIVERS:

(C-36, Part VIII; Rule 52).

Equitable Execution.

Court has power to appoint receivers of property by way of equitable execution on same principles as those followed by U.K. Chancery Courts.

Receiver must give security unless otherwise ordered, and receiver's accounts may be referred to Master of Court for inquiry and report.

Registrar of Court is official receiver of corporations wound up by Court.

See also topic 8.08 Executions, subhead Seizure and Disposition.

8.19 SUPPLEMENTARY PROCEEDINGS:

See topic 8.08 Executions.

8.20 USURY:

See category 3 Business Regulation and Commerce, topic 3.15 Interest.

See also Canada Law Digest: category Business Regulation and Commerce, topic Interest.

9 DISPUTE RESOLUTION

9.01 ALTERNATIVE DISPUTE RESOLUTION:

(A-14; SNL 1998, C-12.1; C-13; D-10; F-2; I-15; L-1; P-42; T-3).

Mandatory (Alternative) Dispute Resolution.

Forms of mandatory dispute resolution include: case management, conciliation, conferences, and forms of special trial, such as summary, expedited or mini trials. (These processes are mandatory if judicially required.)

Case Management.

Governed in Supreme Court of Newfoundland and Labrador (Trial Division) by Rule 18A, and (Unified Family Court) by Rule 56A.21.

On date yet to be proclaimed (likely in 2010), SNL 2009, c. 16 will provide for Trial Division and Unified Family Court division of Newfoundland and Labrador Supreme Court to continue as Trial Division of Court, comprised of General Division and Family Division.

Conciliation.

Governed by Labour Relations Act, L-1 (§§79; 106-121); Public Service Collective Bargaining Act, P-42 (§17); and Teachers' Collective Bargaining Act, T-3 (§§13-14).

Conferences.

Settlement conferences are governed, in Supreme Court of Newfoundland and Labrador (Trial Division including Unified Family Court) by Rule 39.05(2); in Provincial Court family proceedings by NLR 28/07, Rule 11; in Provincial Court small claims proceedings by NLR 52/97, Rule 10. They are also provided for, in Supreme Court of Newfoundland and Labrador (Unified Family Court) and in Provincial Court, under Child, Youth and Family Services Act. (SNL 1998, c-12.1, §§13, 37).

On date yet to be proclaimed (likely in 2010), SNL 2009, c. 16 will provide for Trial Division and Unified Family Court division of Newfoundland and Labrador Supreme Court to continue as Trial Division of Court, comprised of General Division and Family Division.

Pretrial conferences are governed, in Supreme Court of Newfoundland and Labrador (Trial Division, including Unified Family Court) by Rules 39.01-39.04; in Provincial Court family proceedings, by NLR 28/07, Rule 11. They are also provided for, in Supreme Court of Newfoundland and Labrador (Unified Family Court) and in Provincial Court, under Child, Youth and Family Services Act. (SNL 1998, c-12.1, §§13, 37).

Special Trials.

In Supreme Court of Newfoundland and Labrador (Trial Division, including Unified Family Court) summary trials and expedited trials are governed by Rule 17A, and mini trials are governed by Rule 39.05(1).

On date yet to be proclaimed (likely in 2010), SNL 2009, c. 16 will provide for Trial Division and Unified Family Court division of Newfoundland and Labrador Supreme Court to continue as Trial Division of Court, comprised of General Division and Family Division.

Voluntary (Alternative) Dispute Resolution.

Offers to Settle.

In litigation, they are governed, in Supreme Court of Newfoundland and Labrador (Trial Division, including Unified Family Court) by Rule 20A; and in Provincial Court small claims proceedings, by NLR 52/97, Rule 14.

On date yet to be proclaimed (likely in 2010), SNL 2009, c. 16 will provide for Trial Division and Unified Family Court division of Newfoundland and Labrador Supreme Court to continue as Trial Division of Court, comprised of General Division and Family Division.

Others.

Whatever processes are agreed among parties (in litigation) or prospective parties; including aspects of what are otherwise specific mandatory and voluntary dispute resolution procedures mentioned above and, in addition, such processes as arbitration, family conference, mediation, and collaborative law processes. (SNL 1998, C-12.1, §37[1][a]).

See topic 9.02 Arbitration and Award.

Alternative Dispute Resolution Jurisdictional Bodies/Commissions.

None.

Alternative Dispute Resolution Acts.

None.

See also NLRs 52/97; 28/07; Rules 17A, 20A, 37A, 39.

9.02 ARBITRATION AND AWARD:

Forms and Requisites of Submission.

Parties may, by written agreement, submit any matter of differences, present or future, to arbitration. Arbitrations are governed by terms of submission. (A-14, §2).

Judgment on Award.

Award may be set aside by Court or Judge because of misconduct of arbitrator, or if award has been improperly procured. (A-14, §14).

Enforcement.

Award may, by leave of Court, be enforced in same manner as judgment or order. (A-14, §15).

Mandatory Arbitration.

None.

Powers of Arbitrators.

(i) Generally.

(i) To administer oaths; (ii) to state award in whole or in part in form of special case for opinion of Court; (iii) to correct clerical errors, unless submission expresses contrary intention. (A-14, §10).

(ii) Attendance of Witnesses.

Parties to submission may cause issue of subpoena ad testificandum or subpoena duces tecum. (A-14, §24).

(iii) Examination of Parties.

Parties to reference and parties claiming through them shall submit to be examined on oath or affirmation by arbitrators and must produce all books, deeds, accounts, writings, and like material which are required or called for by arbitrators.

(iv) Time for Making Award.

May be extended by Court. (A-14, §31).

Rescission.

(i) Generally.

Unless submission expresses contrary intention, submission is irrevocable, except by leave of Court, and has same effect as if it had been made order of Court. (A-14, §3).

(ii) Setting Aside.

Application to Court in respect of arbitration or award (A-14, §14[2]) may be made to Court within 60 days of receipt of that arbitration or award by any party entitled to set aside arbitration or award (§14[2]).

Uniform Arbitration Act Adoption/Deviation.

Foreign arbitral award may be recognized by Court. If such award recognized, is enforceable in same manner as judgment or order of Court. Model Law on International Commercial Arbitration (I-15, Sch. B) and Convention on the Recognition and Enforcement of Foreign Arbitral Awards (I-15, Sch. A) are adopted with amendments, as law of Newfoundland and Labrador.

Jurisdictional Arbitration Acts.

Governed by Arbitration Act, A-14 (§§2[d], 17, 19, 20, 25, 30); International Commercial Arbitration Act, I-15 (§6); Labour Relations Act, L-1 (§§86, 88-92); Public Service Collective Bargaining Act, P-42 (§§39-41); and Teachers' Collective Bargaining Act, T-3 (§§17, 21-25). (See also D-10, §6[xvi]; E-16.1, §§23[2]; 24.)

Credentials of/Qualifications of/Standards for Arbitrators.

None.

9.03 MEDIATION:

Jurisdictional Mediation Acts.

Mediation.

Governed by Children's Law Act, C-13 (§37); Family Law Act, F-2 (§4); Child, Youth and Family Services Act (SNL 1998, C-12.1, §§13, 37); Labour Relations Act, L-1 (§80); Public Service Collective Bargaining Act, P-42 (§18); and Rule 37A (not applicable, however, to family law proceedings in which mediation governed by Rule 56A.21[6]-[7]).

Credentials of/Qualifications of/Standards for Mediators.

None.

10 DOCUMENTS AND RECORDS

10.01 ACKNOWLEDGMENTS:

(R-10).

Subject to §17, instrument shall, before registration, be proved either: (i) By acknowledgment, under oath, by instrument-executing parties from whom interest passes, of execution of instrument; or (ii) by oath of signing witness to instrument, that parties to instrument, under which interest passes, executed instrument in his (her) presence. (§13).

Acknowledgment may be taken or oath administered by following officers:

Within Province: (i) Registrar of Deeds; (ii) Judge of Court of Appeal or of Trial Division (including Unified Family Court) of Supreme Court; (iii) officer appointed under R-10; (iv) commissioner of Supreme Court; (v) justice of the peace; (vi) notary public in and for Province under his (her) official seal; (vii) commissioner for oaths in and for Province. (§14).

On date yet to be proclaimed (likely in 2010), SNL 2009, c. 16 will provide for Trial Division and Unified Family Court division of Newfoundland and Labrador Supreme Court to continue as Trial Division of Court, comprised of General Division and Family Division.

Without Province: (i) Judge of Court of record under seal of that Court; (ii) mayor or Chief Provincial Court Judge of city or town, under seal of that city or town; (iii) notary public in and for jurisdiction without Province, under his (her) official seal; (iv) Canadian consul or vice-consul; (v) commissioner for Supreme Court of Newfoundland and Labrador; (vi) commissioner for oaths outside Province; (vii) commissioner for oaths appointed under law of jurisdiction in which acknowledgment is taken or oath is administered. (§15).

Under §17, notwithstanding §13 above (in introducing Acknowledgments), no further proof of execution of instrument is required (a) where instrument is executed (i) in Province in presence of person referred to in §14 above (Within Province); or (ii) outside Province in presence of person referred to in §15 above (Without Province); (b) where that person signs instrument as witness; and (c) sets out immediately after his (her) signature as witness capacity in which person signs and, where required by §14 or §15, above, attaches his (her) seal near signature; or (d) without complying with (c) above, signs certificate, endorsed on or attached to instrument, that instrument was executed in his (her) presence, and sets out immediately after signature on certificate capacity in which s(he) signs and, where required by §14 or §15, above, attaches his (her) seal near signature.

Authentication.

Authentication of certificate of acknowledgment is not required.

Proof.

Signature of any person from whom interest passes, if not duly acknowledged by him (her), must be proved by oath of subscribing witness, otherwise instrument may not be registered. Proof may be made before any officer authorized to take acknowledgment. (§16).

Forms.

No prescribed forms.

Alternatives to Acknowledgment or Proof.

No legislation.

10.02 AFFIDAVITS:

(E-16).

Affidavits, oaths, affirmations or statutory declarations may be made before any officer authorized to take acknowledgments (see topic 10.01 Acknowledgments). Authentication is not required. In addition to any such officer, they may be made before following authorized persons:

Within Province.

(i) Newfoundland and Labrador barristers, (ii) members of House of Assembly, (iii) mayors or chairpersons of municipalities.

Without Province.

(i) Out-of-province Supreme or Provincial Court Judge, other officer of Court or commissioner for taking affidavits, with office shown below signature; (ii) notary public in and for jurisdiction without Province under his (her) official seal; (iii) head of city, town, or other municipality under municipal seal; (iv) officer of Canadian diplomatic, consular or representative service, including High Commissioner and Trade Commissioner under his (her) seal or stamp of office, where any such person is authorized to do so in place where carried out.

Armed Services.

Within or without Province, by commissioned officer on active service in Canadian Forces with rank and unit shown below his (her) signature.

Use of Affidavit.

Affidavits, documents under oath, affirmations and statutory declarations, when admissible in legal proceedings, may in all cases be made before above-mentioned authorized persons.

Alternatives to Affidavit.

No legislation.

10.03 COMMISSIONS TO TAKE TESTIMONY:

See category 5 Civil Actions and Procedure, topic 5.09 Depositions and Discovery.

10.04 NOTARIES PUBLIC:

(N-5).

Appointed for life by Minister of Justice. Jurisdiction to function extends over Province. May witness document brought before him (her) and receive fees, subject to Law Society Act restrictions that prohibit notaries public from performing acts that constitute practise of law unless also members of Law Society. (§6).

10.05 RECORDS:

(C-36; E-16.1; J-1.1; R-10; V-6).

Registrable Instruments.

All deeds, decrees, judgments, conveyances, and other assurances, whereby any chattels real or tenements in Newfoundland and Labrador can be affected, may be registered. All bills of sale, conveyances and mortgages of chattels personal in Province, where actual possession of such chattels continues in grantor or mortgagor, should be and, in practice, were registered at Registry of Deeds. Although not compulsory, registration of all such foregoing instruments was means of protection against subsequent purchaser. More recently, in practice, not accepted for registration at Registry. (R-10).

Place of Registration.

Records of companies are kept in Registry of Companies; records of deeds in Registry of Deeds; records of Crown lands in Registry of Crown Lands; all under supervision of Director of

Commercial Registrations, Department of Government Services, and all located in St. John's (see E-16.1, §§23[3]; 24). Money judgments may be registered at Office of High Sheriff's Registry. (J-1.1, §18).

Requisites.

To be registered, deed must be proven either: (i) By acknowledgment of execution by any person from whom interest passes or (ii) by affidavit of witness to execution by any such person, made before authorized person. (§13). These requirements are not, however, necessary where persons specified in R-10, §14 (acknowledgment within Province) and §15 (acknowledgment outside Province) comply with R-10 §17 (manner of execution).

See also topic 10.01 Acknowledgments.

Recording Fees.

Respecting any document deposited for registration in Registry of Deeds $101 minimum fee is payable. Fee commensurate with value of property interests transferred (and, in any event, not less than $101) is payable in respect of mortgages, conveyances and transfers. $101 is charged on agreements, leases, and like instruments. (§39[1][a]). For particulars of recording (i.e., registration) fees, contact Registry of Deeds, Department of Government Services, Commercial Registration Division, Ground Floor, East Block, Confederation Building, P.O. Box 8700, St. John's, NL A1B 4J6, telephone: 1.709.729.3302; telecopier: 1.709.729.0232 or see http://www.gs.gov.nl.ca/cca/cr/deed-about.stm.

Online Records Filings and Searches.

Department of Government Services introduced online services for Registry of Deeds and Companies on 17 Jan. 2005. Known as Companies and Deeds Online (CADO) Internet System, it provides ability to file or request following documents online.

Corporations - File: if in good standing with Registry of Companies, or only in arrears in filing annual returns to maximum of last three years due, and if not having any outstanding issues or fees owing (a) Newfoundland companies with share capital may submit online: (i) Annual Return (Form 23) (10% reduced fee if filed online); (ii) Notice of Registered Office (Form 3); (iii) Notice of Directors (Form 6); (b) Newfoundland companies without share capital may submit online: (i) Annual Return (Form 29); (ii) Notice of Registered Office (Form 3); (iii) Notice of Directors (Form 6); (c) extra-provincial registrations with share capital may submit online: (i) Annual Return (Form 28); (ii) Notice of Change of Registered Office in Newfoundland (Form 33); and (d) extra-provincial registrations without share capital may submit online Notice of Change of Registered Office in Newfoundland (Form 33), provided, person submitting any such documents is authorized by director, officer or solicitor of company for which s(he) files documents.

Corporations - File: Corporate name reservations or re-reservation of current name reservation.

Corporations - File: Articles of incorporation for corporations with and without share capital (10% reduced fee if filed online).

Corporations - Obtain: (i) Summary corporate profile information; and (ii) certificate of good standing ($10) and, as CADO licensed user obtain (i) list of corporation documents filed; (ii) copies of corporation documents filed from June 2004 to date.

Deeds - File: none. (Online deeds registration capability, by law firms, anticipated by late 2010.)

Deeds - Obtain: (i) list of deeds registered under particular surnames from 1980 to date;

(ii) copies of deeds registered from 1982 to date; provided person seeking documents pays, via Visa or Mastercard, prescribed fee, except for CADO licensed users, who can perform unlimited Registry of Deeds searches to obtain documents (for annual license fee).

Mechanics Liens - File: none.

Mechanics Liens - Obtain: (i) list of claims of liens against real property for work done or to be done, or materials placed or provided or to be placed or provided on particular property; (ii) copies of claims of liens or any associated documents filed after Mar. 20, 2006 by viewing online, provided, person seeking to obtain or view documents pays, via Visa or Mastercard, prescribed fee, except for CADO licensed users who can perform unlimited Registry of Deeds searches (for annual license fee).

CADO (Registrar: Dean Doyle [doyled@gov.nl.ca]; https://cado.eservices.gov.nl.ca) is user-friendly service; constantly digitizing additional documents (e.g., deeds registered prior to 1982) which, eventually, will provide electronic service for all records of Registries of Deeds and Companies and other involved registries.

In limited circumstances, judgment claimant (Province or provincial agency) may electronically file judgments. (Rule 5A).

Effect of Recording.

Registration constitutes notice of involved instrument to all persons claiming any interest in chattels real subsequent to registration notwithstanding any defect in registration. (§8).

Transfer of Decedent's Title after probate or administration may be effected by assent or conveyance filed in usual manner after execution by executor(trix) or administrator(rix) (as case may be) and being proven in manner stated above (under subhead Requisites).

Vital Statistics.

Records of births, marriages, deaths, adoptions, and changes of name are kept in office of Registrar General at St. John's. Record of birth may be established by production of satisfactory evidence supported by affidavit and filed with Registrar General. (Contact: Vital Statistics Division, Government Service Centre, Department of Government Services, 5 Mews Place, P.O. Box 8700, St. John's, NL, A1B 4J6, telephone: 1.709.729.3308; telecopier: 1.709.729.0946; http://www.gs.gov.nl.ca/gs/vs/.)

10.06 SEALS:

Not necessary for validity of documents conveying property except in case of corporation.

10.07 TORRENS ACT:

Not adopted in Newfoundland and Labrador.

10.08 VITAL STATISTICS:

See topic 10.05 Records.

11 EMPLOYMENT

11.01 EMPLOYER AND EMPLOYEE:

See topic 11.03 Labour Relations.

11.02 HUMAN RIGHTS:

(H-14).

The Newfoundland and Labrador Human Rights Code provides for prevention of discrimination with respect to places to which public is customarily admitted, employment, and rates of pay (e.g., of female employees).

Director appointed by Lieutenant Governor in Council has, subject to Minister of Justice, wide powers to ensure that provisions of Act are adequately enforced.

Legislation or agreement now or afterward enacted or made, respectively, by which preference is given, or agreed to be given, to: (i) Workers whose place of residence or usual place of residence, or ordinary place of residence, is Province; and (ii) materials, equipment or other thing produced, originating, manufactured or distributed and serviced in Province, shall have full effect notwithstanding Act.

Nothing in Act shall be construed as (i) restricting effect of legislation or agreement now or afterward enacted or made, respectively; or (ii) preventing enactment of or making afterward legislation or agreement, respectively; giving preference provided for in previous paragraph. (§4[3]).

Code enjoins discrimination in employment. Employer, or person acting on behalf of employer, shall not refuse to employ or to continue to employ or to otherwise discriminate against person in regard to employment or term or condition of employment. Trade union shall not exclude person from full membership or expel or suspend or otherwise discriminate against one of its members or discriminate against person in regard to his or her employment by employer, because of: (i) That person's race, religion, religious creed, political opinion, colour or ethnic, national or social origin, sex, sexual orientation, marital status, physical disability or mental disability, or (ii) that person's age, if that person has reached age of 19 years. (§9[1], [3]).

Mandatory retirement at particular age prohibited, provided, employee capable of performing his(her) job after 65 (other than Provincial Court Judge, whose appointment expires at age 70 years). (§9).

See also, category Health, topic Smoking Regulation.

11.03 LABOUR RELATIONS:

(L-1; L-2; W-11; O-3).

Generally.

General law of master and servant, provided for by common law, governs, as altered by statute. Additionally, statutory requirements provide for employment standards, human rights, collective bargaining, occupational health and safety. (L-1, L-2, W-11, O-3).

Labour Relations Act (L-1).—Act provides legal framework for acquisition, and termination, of collective bargaining rights by trade unions; negotiation of collective agreements; resolution of industrial disputes; and prohibition of unfair labour practices.

Labour Unions.

Recognizes right of employees organizing to form or become part of labour union. Provision is made for incorporation, and protection of funds, of unions.

Apart from collective agreements, if union establishes that it represents majority of employees in unit it may apply to Labour Relations Board for certification as sole bargaining agent for that unit. Union must, when required, file with Province its constitution and list of officers. (§142).

Labour Disputes.

Provides for mediation and conciliation of industrial disputes. Makes provision for Conciliation Board and/or Industrial Inquiry Commission to inquire into, and make recommendations on, labour or industrial disputes referred to either of them. (§98).

Labour Relations Board.

Consists of chairperson and four other members, with equal number of members representing employees and employers. Is charged with administration of Act and exercises powers and performs duties imposed by Act. (§108).

Labour Condition Standards.

Labour Standards Act (L-2).—Provides for minimum standards of conditions of employment, including minimum wages.

Minimum Wages and Minimum Overtime Wages.

(i) Generally.

Minimum wage for all persons 16 and over is not less than $4.75 per hour prior to 1 Sept. 1996; not less than $5 per hour from 1 Sept. 1996 to and including 31 Mar. 1997; $5.25 per hour from 1 Apr. 1997 to and including 30 Sept. 1999; not less than $5.50 per hour from 1 Oct. 1999 to and including 30 Apr. 2002; not less than $5.75 per hour from 1 May 2002 to and including 31 Oct. 2002; not less than $6 per hour from 1 Nov. 2002 to and including 31 May 2005; not less than $6.25 per hour from 1 June 2005 to and including 31 Dec. 2005; not less than $6.50 per hour from 1 Jan. 2006 to and including 31 May 2006; not less than $6.75 per hour from 1 June 2006 to and including 31 Dec. 2006; not less than $7 per hour from 1 Jan. 2007 to 30 Sept. 2007; not less than $7.50 per hour from 1 Oct. 2007 to 31 Mar. 2008; not less than $8 per hour from 1 Apr. 2008; not less than $8.50 per hour from 1 Jan. 2009; not less than $9 from 1 July 2009; not less than $9.50 from 1 Jan. 2010; and not less than $10 from 1 July 2010. If employee works more than 44 hours per week (s)he must be paid overtime wages at rate of not less than $7.12 per hour prior to 1 Sept. 1996; $7.50 per hour from 1 Sept. 1996 to and including 31 Mar. 1997; $7.89 per hour from 1 Apr. 1997 to and including 30 Sept. 1999; not less than $8.25 per hour from 1 Oct. 1999 to and including 2 May 2002; not less than $8.63 per hour from 3 May 2002 to and including 31 Oct. 2002; not less than $9 per hour from 1 Nov. 2002 to and including 31 May 2005; not less than $9.38 per hour from 1 June 2005 to and including 31 Dec. 2005; not less than $9.75 per hour from 1 Jan. 2006 to and including 31 May 2006; not less than $10.13 per hour from 1 June 2006 to and including 31 Dec. 2006; not less than $10.50 per hour from 1 Jan. 2007 to 30 Sept. 2007; not less than $11.25 per hour from 1 Oct. 2007 to 31 Mar. 2008; not less than $12 per hour from 1 Apr. 2008. (CNLR 781/96; NLRs 77/96; 44/99; 24-02; 36/02; 38/03; 11/05; 59/07; 104/07; 73/08; 38/09).

Minimum rates of wages apply to employee whether s(he) is paid on basis of hourly rate of pay or on basis of fixed wage per week or month or for any part of month, and apply to assistant who is remunerated either wholly or in part on minimum wage basis. Province has certain powers to make orders respecting special minimum wages for handicapped employees (none made to date); and to authorize investigations to determine whether requirements of Act are being observed.

(ii) Overtime Wages (Other Than Minimum Overtime Wages).

Effective Apr. 1, 2003, overtime wages shall be paid at rate of not less than one and one half employee's regular rate of pay to those employees subject to collective agreement negotiated after Dec. 6, 2001. (As for overtime less than three hours, see NLR 214/93 §10.)

(iii) Child Labour.

Between hours of 9 P.M. and 8 A.M. no child under age of 16 may be employed. There is no provision as to wages.

(iv) Annual Vacation.

Employees who work 90% of regular working hours in any continuous 12 month period must be given, no later than ten months after 12 month period ends, annual vacation of at least two weeks. (§8). Crown and Crown agencies are bound by this requirement. Any person whose employment terminates before s(he) qualifies to receive paid vacation shall receive equivalent of vacation pay in proportion to time worked. In event of employment terminating after person qualifies for, but before being granted, paid vacation, employer must pay, in lieu of vacation, 4% of gross pay for period worked in that year. (§9).

However, there is provision for making orders declaring this Act inapplicable in respect to classes of employees specified in such orders.

(v) Notice of Termination of Employment.

Both employers and employees must give notice of termination of employment, extent of which varies with type of employment and means of payment. (§§52, 53). Prosecution for failure to provide notice requires consent of Province only. Penalties: fine (maximum $100) and, maybe, order that employer or employee make payment equivalent to employee's earnings during required notice period.

Health, Safety and Compensation.

Workplace Health, Safety and Compensation (W-11).—Workplace Health, Safety and Compensation Act (RSNL 1990, W-11, §2) provides for Workplace Health, Safety and Compensation Commission (resulting from merger of Worker's Compensation Commission (W-11) and Occupational Health and Safety Commission (0-3)) consisting of not less than seven nor more than 11 members appointed by Lieutenant Governor in Council (§4). This Commission administers accident fund from which is paid compensation, medical aid, outlays and other expenses to workers injured in course of their employment or to members of families of workers killed in course of employment. This fund is formed by contributions from employers who are classified by Board and required to pay annual assessment varying with different classes. (Part VIII). Worker seeking compensation from fund applies to Commission which administratively determines, or conducts hearing to receive evidence and decide on eligibility and if eligibility found further determines, amount to be paid worker and manner of payment. Act fully sets out numerous duties and wide powers of Board which is, for purposes of Act, judicial body. (Part IV).

Employment Insurance Compensation.

Under Employment Insurance Act (S.C. 1996, c. 23) any person employed in Canada in wage earning employment under contract of service is entitled to be insured for Employment Insurance benefits.

See also topic 11.02 Human Rights.

11.04 WORKER'S COMPENSATION LAW:

See topic 11.03 Labour Relations.

—Scope —

(E-14.2; W-4.01; O-3).

12.01 ENVIRONMENTAL REGULATION:

General Supervision.

Province supervises, controls and directs all matters relating to protection and enhancement of quality of natural and working environments.

Environment.

Under Environmental Protection Act (SNL 2002, E-14.2) Province supervises, controls and directs all matters relating to environmental education and research (under Pt. II of Act); release of substances (Pt. III); waste disposal and litter (Pt. IV); waste management (Pt. V); air quality management (Pt. VI); contaminated sites (Pt. VII); dangerous goods (Pt. VIII); pesticides (Pt. IX); environmental assessment (Pt. X); approvals of commencement or continuation of activities requiring approval under Act (under Pt. XI); and inspection and investigation (Pt. XII).

Under Environment Protection Act, following Regulations promulgated: Air Pollution Control Regulations, 2004, 39/04; Environmental Assessment Regulations, 2003, 54/03, 103/03; Gasoline Volatility Control Regulations, 2003, 62/03; Halocarbon Regulations, 41/05; Heating Oil Storage Tank System Regulations, 2003, 60/03, 103/03, 40/07; Pesticides Control Regulations, 2003, 57/03; Storage and Handling of Gasoline and Associated Products Regulations, 2003, 58/03, 40/04; Storage of PCB Wastes Regulations, 2003, 61/03; Used Oil Control Regulations, 82/02; Waste Diversion Regulations, 57/05; Waste Management Regulations, 2003, 59/03; and Waste Material Disposal Areas, CNLR 998/96, 73/97, 24/05. Several executive orders have also been issued.

Water.

Under Water Resources Act (SNL 2002, W-4.01) Province controls water rights (under Pt. I of Act); protection of water (Pt. II); well drilling (Pt. III); inspection (Pt. V); and security, leases and expropriation (Pt. VII).

Under Water Resources Act, following Regulations promulgated: Environmental Control Water and Sewage Regulations, 2003, 65/03; Water Power Rental Regulations, 2003, 64/03; and Well Drilling Regulations, 2003, 63/03. Numerous executive orders have also been issued.

Occupational Health and Safety.

Under Occupational Health And Safety Act (O-3), Province requires extensive disclosure of information respecting, and special training for workers exposed to, hazardous material.

Under Occupation Health and Safety Act, following Regulations promulgated: Asbestos Abatement Regulations, 1998, 111/98; Asbestos Exposure Code Regulations, CNLR 1144/96; Mines Safety of Workers Regulations, CNLR 1145/96, 60/06; Occupational Health and Safety Electrical and Fisheries Advisory Committees Regulations, CNLR 1164/96; Occupational Health and Safety First Aid Regulations, CNLR 1148/96, 45/06; Occupational Health and Safety Regulations, CNLR 1165/96, 100/98, 23/99, 53/00, 93/01, 23/02, 123/04, 71/05,110/05; and Workplace Hazardous Materials Information System Regulations, CNLR 1149/96, 72/05.

13 ESTATES AND TRUSTS

13.01 ADMINISTRATION:

See topic 13.08 Executors and Administrators.

13.02 ADVANCEMENTS:

See topic 13.07 Descent and Distribution.

13.03 ALLOWANCES:

See topic 13.08 Executors and Administrators.

13.04 CLAIMS:

See topic 13.08 Executors and Administrators.

13.05 DEATH:

(P-20; S-33; F-6).

Presumption of Death (P-20).—Proceeding for order declaring person to be presumed dead commenced by originating application (ex parte) to Court (to be substantively heard after procedural determination of whether and, if so, what notice is required). Court, if satisfied that: (i) Person has been absent and not heard of or from by applicant or, to knowledge of applicant, by any other person, since day specified; and (ii) applicant has no reason to believe that person is living; and (iii) reasonable grounds exist for supposing that person is dead, may make order that person is presumed to be dead for all purposes, or for such purposes only as are specified in order.

Survivorship (S-33).—Where two or more persons die at same time or in circumstances rendering it uncertain which survived, deaths are presumed to have occurred in order of seniority and accordingly younger is considered to have survived older. (§2[1]). Nonetheless, for purpose of disposition of property in will, what will provides (whether or not consistent with above) is considered to have occurred. (§2[2]; [3]). These provisions of S-33 are subject to L-14, §47 and A-2, §31.

Actions for Death (F-6).—Actions for death resulting from wrongful act, neglect or default of another may be brought by executor (rix) or administrator (rix) of decedent for benefit of wife, husband, children, grandchildren, parents, stepparents, grandparents or person(s) in loco parentis to decedent. If there be no executor(rix) or administrator(rix), or if executor(rix) or administrator(rix) does not bring action within six months after decedent's death, action may be brought by any or all of persons entitled to benefit of recovery in such action. Action must be commenced within two years after decedent's death (SNL 1995, L-16.1, §5[i]) (subject to provisions respecting limitations under category 5 Civil Actions and Procedure, topic 5.02 Actions). Judge or, where permitted by Jury Act, 1991 or other statute and so ordered, jury, may award such damages as deemed proper and apportion same among persons entitled to benefit of recovery.

Certificate.

See category 10 Documents and Records, topic 10.05 Records, subhead Vital Statistics.

13.06 DECEDENT'S ESTATES:

See topics 13.07 Descent and Distribution, 13.08 Executors and Administrators, 13.14 Wills.

13.07 DESCENT AND DISTRIBUTION:

(I-21; F-2; C-13).

Testate Succession.

See topic 13.14 Wills.

Intestate Succession.

Real and personal estate of intestate dying after June 14, 1951 descends and is distributed as follows (subject to surviving spouse's entitlement (if any) under Family Law Act, F-2):

Entire estate or, if decedent left surviving spouse, excess of estate over share of such spouse under Family Law Act and Intestate Succession Act (see subhead Surviving Spouse,below) goes to following, each class in which there is member alive taking subject to exclusion of subsequent classes: (i) Issue, per stirpes; (ii) father and mother equally or all to survivor; (iii) brothers and sisters equally, issue of deceased brother or sister taking share to which parent would have been entitled if alive (i.e., per stirpes); (iv) next of kin of equal degree and their representatives equally, but no representation allowed among collaterals after children of brothers and sisters.

Degrees of kindred are computed by counting upward from intestate to nearest common ancestors and then downward to nearest relative.

Half Blood.

Kindred of half blood inherit equally with those of whole blood.

Surviving Spouse.

Subject to surviving spouse's rights (if any) under Family Law Act, F-2, share of surviving spouse is as follows: if decedent left one child (surviving issue of one child sharing per stirpes)—one-half to surviving spouse; if decedent left more than one child (surviving issue of deceased child or children [as case may be] sharing per stirpes)—one-third to surviving spouse; if decedent left no issue, entire estate goes to surviving spouse. (§4).

Rights of surviving spouse to ownership or division of property under F-2 precede and are in addition to surviving spouse's rights, on intestacy or by will, resulting from death of his or her spouse. (F-2, §21[2]). On death of spouse, surviving spouse, although not estate of deceased spouse, may claim and exercise, respectively, (i) division rights. (F-2, §21[1][d], as judicially interpreted) and (ii) inheritance entitlement.

Afterborn Children and Relatives.

Descendants and other relatives of decedent, begotten before his (her) death but born afterwards, take as though born in his (her) lifetime. (§12).

Illegitimates.

General rules of intestacy govern. For all purposes of law of Province, person is child of his (her) natural parents, and his (her) status as their child is unaffected by whether s(he) is born inside or outside marriage. (C-13, §3[4]).

Adopted Children.

See category 14 Family, topic 14.01 Adoption.

Advancements.

They are reckoned as part of estate, and if advancement to child is equal to or greater than his(her) share under intestate law, s(he) takes no part of estate. If advancement is less than such share, child takes so much of estate as will, considered with advancement, equal share of each other child under intestate law.

13.08 EXECUTORS AND ADMINISTRATORS:

(J-4; T-10).

Jurisdiction.

Relating to all matters affecting letters of probate and letters of administration, jurisdiction is vested in Supreme Court. (J-4, §106).

Preferences.

Executor(trix) has primary obligation to apply for letters of probate. In event of renunciation, application for administration with will annexed shall be made. Where deceased died wholly intestate, priority of right to grant of administration shall, subject to discretion of Judge, be as follows: (i) Husband or wife; (ii) children; (iii) grandchildren or other issue of deceased taking per stirpes; (iv) father and mother; (v) brothers and sisters of whole or half blood, or issue of deceased brothers and sisters of whole or half blood, taking per stirpes; (vi) grandparents; (vii) uncles and aunts of whole or half blood, or issue of deceased uncles and aunts of whole or half blood, taking per stirpes; (viii) creditors; (ix) Crown.

Eligibility and Competency.

Nonresident (including foreign corporation) will not be appointed administrator(rix) of estate. Nonresident may be appointed executor(rix) if estate will not be prejudiced by so doing. (Rule 56).

Qualification.

Executor(trix) or administrator(trix) (as case may be) must furnish affidavit, when applying, that s(he) will satisfactorily and fully call in and administer estate and make such returns as by law required. (J-4, §118). In addition, administrator(trix) must furnish bond in amount double value of estate (unless Court exempts). (Rule 56).

Issue of Letters.

Application is made by petition to Court or one of Judges of Court, supported by affidavit, to which is annexed: (a) Proof of will; (b) will initialled on back of last page of will by (i) deponent to proof of will, (ii) witness to deponent to proof of will, (iii) person making petition, and (iv) person witnessing signature (in petition-verifying affidavit) of person making petition; (c) inventory of assets and liabilities; (d) bond in case of administration (unless Court exempts); (5) oath of administrator(trix) or executor(trix). (Rule 56). Provision is made for proof in solemn form by originating application to Supreme Court. (J-4, §108).

Removal.

Executor(trix) or administrator(trix) may be removed on same grounds as Court may remove trustee (T-10, §33), in which event Court may appoint some other proper person in his (her) place. (J-4, §§121, 123).

Special Kinds of Administration.

They consist of: (i) with will annexed, (ii) durante minoritate (J-4, §124), (iii) pendente lite

(J-4, §119), (iv) temporary, and (v) limited.

Public Administrator.

Public Trustee Act, P-46, not yet proclaimed in force, and repealed with substitution of Public Trustee Act 2009, SNL 2009, P-46.I, not yet proclaimed.

Registrar of Supreme Court, through office of Registrar's trustee, has certain substantial responsibilities (J-2, e.g., §§66, 67, 69, 71, 72, 73, 74). Contact: John W.H. Baird, Estates/Trust Administrator, Estates Division, Supreme Court of Newfoundland and Labrador, Suite 401, Viking Building, 136 Crosbie Rd., St. John's, NL, A1B 3K3, Tel: (709) 729-0850, Fax: (709) 729-3063.

General Powers and Duties.

(i) Powers and Duties.

Powers.—(i) Bring actions; (ii) obtain possession of papers; (iii) distrain; (iv) assign and make under-leases; (v) collect, realize and distribute estate.

Duties.—(i) Obtain probate, including appointment as executor(rix) (where deceased dies testate) or appointment as administrator(rix) (where deceased dies intestate, or dies testate without naming executor(rix) in his(her) will); (ii) make inventory; (iii) call in (i.e., realize) estate; (iv) pay debts; (v) pay legacies; (vi) distribute residue; (vii) account. (T-10).

(ii) Notice to Creditors.

When estate ready to distribute, in order to protect administrator(rix) or executor(rix), notice should be given to creditors, prescribing time (within estate's discretion; usually 30 clear days) within which claims may be made and established. (T-10, §24).

(iii) Presentation and Proof of Claims.

Proof by affidavit may be required but no special form is legislated. Time prescribed by estate may be extended by Court on application. If claims not made and established within time prescribed, or extended, estate may be distributed without regard to claims subsequently made. (J-4, §128).

(iv) Allowances and Widow's Quarantine.

No legislation.

(v) Time Allowed for Administration.

Executor(trix) or administrator(trix) has one year within which to administer estate. Actions against him/her during that period will, usually, be stayed.

(vi) Final Accounting.

Within year after issue of letters of probate or administration, executor(trix) or administrator(trix) must file with Court (unless exempted): (i) full inventory and valuation of value of estate at death; (ii) inventory, in detail, of estate received; (iii) statement of disbursements giving necessary details; and (iv) statement of remaining estate outstanding or undisposed of. (J-4, §129).

Compensation.

Trustees, as defined by governing Act, (T-10), including executors(trices) and administrators(rices), shall be allowed, over and above actual and necessary expenses, remuneration that may appear to Court or Judge to be adequate for their services, and Court or Judge may apportion remuneration among trustees that appears just, according to labour bestowed or responsibility incurred by them, respectively, regards estate. (T-10, §52; CNLR 972/96: Registrar's Compensation Rule, now Rule 59 of Rules of The Supreme Court, 1986).

Where provision is made by will for specific compensation to executor(trix) as trustee, or deed or other instrument creating trust provides for specific compensation to trustee, specified compensation shall be full satisfaction for his or her services instead of compensation prescribed in T-10, §52, unless executor(trix) or trustee by declaration signed by executor(trix) or trustee, filed in Court, renounces claim to such specific compensation.

Declaration shall be filed before probate or administration taken, or acceptance of office of trustee.

Total remuneration shall not exceed 1/20 of realized value of assets.

Where all assets have not been realized Court or Judge may either order further realization (then subject to remuneration) or allow remuneration in respect of unrealized part of assets, to sum less than 1/20 of value of assets.

In case of continuing trusts Court or Judge may allow person entitled to trust administration remuneration, annual care and management fee not exceeding 1/250 of average market value of assets under administration. (T-10, §52).

Average market value means monetary value arrived at by ascertaining market value of assets at beginning of period under consideration, adding ascertained market value of assets at end of that period, and dividing by two.

Where estate is less than $1,000 in value, Court or Judge may allow remuneration that it thinks adequate.

Notwithstanding other provisions of T-10, compensation of Registrar of Supreme Court, when acting as trustee, shall be governed by Rules. (T-10, §53; Rule 59).

13.09 FIDUCIARIES:

Governed by common law, as altered by statute (e.g., T-10).

See also topics 13.08 Executors and Administrators, Trusts; category 14 Family, topic 14.04 Guardian and Ward.

13.10 INTESTACY:

See topic 13.07 Descent and Distribution.

13.11 PROOF OF CLAIMS:

See topic 13.08 Executors and Administrators.

13.12 TRUSTEE PROCESS:

See category 8 Debtor and Creditor, topic 8.12 Garnishment.

13.13 TRUSTS:

Governed by common law, as altered by Trustee Act, T-10.

See also category 3 Business Regulation and Commerce, topic 3.01 Banks and

Banking.

13.14 WILLS:

(W-10).

Capacity.

No will made by person under age of 17 (§3) is valid. Married women may dispose of their property by will (historic common law prohibition on their doing so having been abrogated). Will made by mentally incompetent person is invalid and does not become valid by recovery of mental capacity after will made.

Testamentary Disposition.

There is no limitation on nature of disposition of testator's estate.

Execution.

Will must be in writing and signed by testator(trix) in presence of two witnesses, who shall sign as witnesses in presence of testator(trix) and in presence of each other. If testator(trix) is unable to write, will must be read to him(her) and so noted on will, and testator(trix) must make his (her) mark on will and making of mark must be acknowledged by both witnesses. (§2).

Witnesses.

Incompetence of witness is not, in and of itself, sufficient to invalidate will. (§6). Where beneficiary of will is also witness to that will, should only way of proving execution or validity of will be through admission of beneficiary as witness, then devise, bequest, legacy, estate, interest, gift or appointment in his (her) favour is void. If alternative exists to prove validity of will, benefit under will to beneficiary witness is not void. (§7). Executor(trix) of will may be admitted as witness, to prove execution of will or to prove its validity or invalidity. (§8).

Attestation Clause.

Suitable form would include following: “by the testator (trix) as and for his(her) Last Will And Testament in the presence of both of us who, in his(her) presence, at his(her) request, and in the presence of each other, have hereunto subscribed our names as witnesses.”

Holographic Wills.

Will wholly in handwriting of testator(trix) and signed by him (her), without presence of witnesses, is admitted to probate on proof of that person's handwriting.

Nuncupative Wills.

Declaration made by testator(trix) without writing is invalid excepting wills of sailors and soldiers made in certain circumstances.

Revocation.

Effected by: (i) Subsequent marriage (with certain exceptions); (ii) cancellation; (iii) subsequent will; (iv) express revocation. (§§9, 11).

Exceptions to revocation of will by subsequent marriage are where: (i) Will declares it was made in contemplation of subsequent marriage; or (ii) will made in exercise of power of appointment when property appointed would not, in default of appointment, pass to maker's executor(rix) or administrator(rix), or to person(s) entitled as maker's next of kin under Intestate Succession Act. (W-10, §9; I-21).

Revival.

Will is not revived by revocation of subsequent will. (§13).

Probate.

Jurisdiction is in Supreme Court. Five clear days Notice of Probate application must be posted in probate office in Registry of Court (Central Registry, St. John's and local registries in Grand Bank, Gander, Grand Falls, Corner Brook, and Happy Valley-Goose Bay). Application is as stated under topic 13.08 Executors and Administrators, subhead Issue of Letters.

Contest.

Application for probate may be contested by entry of caveat (e.g., on Notice of Probate application). (J-4, §112).

Legacies.

Time for payment is within one year of date of grant of probate (or appointment of administrator[rix]).

Lapse.

There is no provision against lapse of legacies.

Foreign Wills.

Provision is made for resealing of wills by way of petition to Supreme Court. (J-4, §132).

§132 of Judicature Act (J-4), respecting resealing by Court of foreign grants of probate and administration applies to probates from provinces of British Columbia, Alberta, Saskatchewan, Manitoba, Ontario, Quebec, New Brunswick, Nova Scotia, and Prince Edward Island, and to Northwest Territories and Yukon (CNLR 96/140).

International Wills.

Provided for under Wills Act, W-10, Part III which incorporates Convention Providing Uniform Law on the Form of International Will.

Immoveables and Movables.

Manner and formalities of making will and its intrinsic validity and effect, so far as it relates to interest in chattels real (i.e., immoveables), are governed by lex situs and so far as it relates to interest in movables (chattels personal) by lex domicili at time of death. In respect of such chattels real and movables, Wills Act (RSNL 1970, c. 401, Part II) applies to wills made from 1 July 1955 to 31 Dec. 1976; and Wills Act (RSNL 1990, W-10, Part II) applies to wills made from 1 Jan. 1977 (W-10, §29[2]).

Living Wills.

See: Advance Health Care Directives Act, SNL 1995, A-4.1; Enduring Powers of Attorney Act, RSNL 1990, E-11. (Term “living wills” not employed by legislation or in practice.)

Simultaneous Death.

See topic 13.05 Death, subhead Survivorship.

14 FAMILY

14.01 ADOPTION:

(A-2.1; C-13).

Governed by Adoption Act, A-2.1 (effective from 30 Apr. 2003) and Children's Law Act, C-13.

Private adoption prohibited.

Adoption agencies may be licenced. (NLRs 85/05, 86/05).

Definitions.

“Child” means person who is under age of 19. (§2[i]). “Minister” means Minister of Human Resources, Labour and Employment. (§2[g]).

Consent Required.

(§10). From: (i) Child, where 12 or more years old; (ii) birth mother; (iii) father; and, where applicable, person having custody of child.

For consent purposes: Father is person who (i) has acknowledged paternity by signing child's birth registration; (ii) does or did have custody or joint custody with birth mother; (iii) has acknowledged paternity and has custody or access rights to child by court order or agreement enforceable under Children's Law Act Part III or Family Law Act Part IV; (iv) has acknowledged paternity and has supported, maintained or cared for child voluntarily, or (v) has acknowledged paternity and is named by birth mother as child's father.

Where child in continuous custody of director-in-region of regional integrated health authority (NLR 18/05) under Child, Youth and Family Services Act, consents required from: (i) That director, and (ii) child, where 12 or more years old.

Where child who has been adopted is to be adopted again, consent of person who became parent by previous adoption is required, instead of person who ceased to have parental rights and responsibilities on granting of previous adoption order.

Where child from another jurisdiction to be placed for adoption in Province, laws of that other jurisdiction apply reference consents required for child's adoption placement.

Birth mother's consent to child's adoption, where required, not valid unless child more than seven days old when mother gives consent.

Where person whose consent required is deceased, that consent not required on proof being furnished of that person's death.

Consents may be revoked as provided for in §§14-18. Principally: person who has consented to child's adoption may, in writing, revoke consent provided written revocation is received by Director of Child, Youth and Family Services not more than 21 days after consent was given. (§14[1]).

Court may, on application, dispense with consent, having regard for factors in §13.

Consent by parent under age of 19 years is valid. (§11).

Applicants.

One adult alone or two adults jointly may apply to court (see below Jurisdiction and

Venue) in Province. Further, one adult may apply, to jointly become parent of child, with parent of child. (§20[1], [2]).

Condition Precedent.

Order of adoption shall not be made unless Director of Child, Youth and Family Services certifies: that child has resided with applicant(s) for at least six months immediately prior to date of application, under conditions which justify making of order; or that applicant is fit and proper person to have care and custody of child and that, for reasons set out in certificate, six month minimum period of residence is abridged or dispensed with. (§20[3]).

Appeals.

Decisions of Director of Child, Youth and Family Services may be appealed to Appeal Board (S-17.1), with further appeal of right to Judge of Trial Division or adjunct Unified Family Court of Supreme Court, and from either of those Courts to Court of Appeal.

On date yet to be proclaimed (likely in 2010), SNL 2009, c. 16 will provide for Trial Division and Unified Family Court division of Newfoundland and Labrador Supreme Court to continue as Trial Division of Court, comprised of General Division and Family Division.

Jurisdiction and Venue.

Court having jurisdiction to make adoption orders shall be Trial Division or adjunct Unified Family Court of Supreme Court or, at option of applicant(s), but subject to regulations (none promulgated), Provincial Court Judge within jurisdiction of whom either applicant or child lives at date of application for adoption order.

On date yet to be proclaimed (likely in 2010), SNL 2009, c. 16 will provide for Trial Division and Unified Family Court division of Newfoundland and Labrador Supreme Court to continue as Trial Division of Court, comprised of General Division and Family Division.

Proceedings.

Application shall be dealt with by Judge in chambers and may be heard in private.

For purpose of application and subject to regulations, Supreme Court (Trial Division or adjunct Unified Family Court) or Provincial Court may appoint person or body to act as guardian of child on hearing of application with duty of safeguarding interests of child before Court.

On date yet to be proclaimed (likely in 2010), SNL 2009, c. 16 will provide for Trial Division and Unified Family Court division of Newfoundland and Labrador Supreme Court to continue as Trial Division of Court, comprised of General Division and Family Division.

Required application documents are provided for by §22.

Order.

Judge may make adoption order where s(he) is satisfied of ability of applicant(s) to fulfill obligations and perform duties of parent(s) towards child, having regard to best interests of child. (§25).

Name and Birth Place.

Adopted child bears surname of adopting parent(s). Judge may give to adopted child any first name or names requested by applicant(s). Judge may also order that birth certificate of adopted child shall show some place of birth other than child's actual place of birth. (§26).

Interim Orders.

Judge may postpone determination of application and may make interim order giving custody of child to applicant(s) for period not exceeding two years by way of probationary period. (§25[2]).

Effect of Adoption.

Order of adoption: (i) Divests natural parent or custodian of adoptee child of all legal rights, (ii) makes adoptee child the child of adopting parent(s) and (iii) imposes on adopting parent(s) all legal obligations incidental to relation of parent and child. (§27). Adopted child inherits from adopting parent(s) same as natural child (C-13, §91). But adopted child loses his (her) right to inherit on intestacy from his (her) natural parents. (I-21, §2; and see Intestate Succession Act, Re [2007] 36 R.F.L. [6th] 57 [NLSC (TD), Dunn J.]).

Extra-Provincial Adoptions.

Part VI and Schedule to Act: Convention On Protection of Children And Co-operation In Respect of Intercountry Adoption.

Registry of Adopted Children.

Established at St. John's. Adoption order, together with all application documents, must be filed with Registrar General of Vital Statistics, responsible for Registry. (§31).

Records.

For pre-adoption records (which may be disclosed) and when attempting to make arrangements for contact with birth parents(s) or children, contact: Confidential Services Vital Statistics Division, Department Of Government Services, P.O. Box 8700, 5 Mews Place, St. John’s, NL A1B 4J6; telephone: 1.709.729.3308; fax: 1.709.729.0946; http://www.gs.gov.nl.ca/gs/vs/adoption-records.stm.

Confidentiality.

Registers, books and indices shall not be open to public inspection or search except as provided by §§45, 47-51, 53-57.

14.02 ALIMONY:

See topic 14.03 Divorce.

14.03 DIVORCE:

See Canada Law Digest.

Substantive law (including sole ground of ``marriage breakdown'': by proof of, e.g., separation for one year, adultery or physical or mental cruelty) governed by federal Divorce Act. (R.S.C. 1985, 2nd Supp., c. 3, as am'd).

Procedural law and forms largely prescribed by Family Law Proceedings rule, (Rule 56A; NLR 130/03, effective from 1 Dec. 2003) and some procedural provisions in federal Divorce Act.

Supreme Court has jurisdiction to hear application for dissolution of marriage. Ground for dissolution is same in all Provinces and Territories in Canada.

Process.

Procedure in divorce or corollary relief (parenting, child support, spousal support) proceeding governed and administered by Family Law Proceedings rule. (Rule 56A, NLR 130/03). Divorce action is commenced by issuing Originating Application for divorce. Marriage certificate must be filed prior to issuing of Originating Application, unless Application states that certificate cannot be produced. Where Originating Application contains claim for corollary relief consisting of support, financial statement (in particular form prescribed by Rule 56A) must be filed and served with Originating Application. Respondent spouse must deliver financial statement with Response (where Rule or Court so requires). Applicant may file Reply to Response. Applicant shall be served personally unless otherwise ordered by Judge. Originating Application must be served by someone other than Applicant. If known and named, third party alleged to have participated in adultery specie of marriage breakdown ground must also be served. (Rule 56A.42[3]).

Pleadings.

See subhead Process, and Rule 56A, NLR 130/03, above.

Judgment.

Where divorce is uncontested or undefended, and there are no children of marriage, or parenting and financial support are agreed, party may move, by administrative procedure conducted by Judge instead of by Court, involving trial, for divorce judgment (which takes effect 31st day after day on which Judge or Court authorizes divorce judgment, unless that time period abridged on grounds established to Judge or Court's satisfaction).

Divorce judgment will not be granted administratively until reasonable arrangements for child support have been established to Judge's or Court's satisfaction. If trial required, usually (in practice) preceded by pre-trial case management meeting, settlement conference and (occasionally) pre-trial conference. (NLR 130/03).

Interim Relief.

Application for interim corollary relief (financial support, parenting) and costs may be served at same time as, or any time after, Originating Application is served, by interim or interlocutory application. (Rule 56A, NLR 130/03).

Offers to Settle.

Any party may serve offer to settle any claim. Offer may be accepted before judgment or order.

Support; Custody of Children.

Generally, in divorce proceedings: governed by federal Divorce Act and generally described as corollary relief. Otherwise (such as where husband and wife separate but do not commence divorce proceeding) or have not formally been married, governed by Province's statute law—primarily, Family Law Act, F-2 and Children's Law Act, C-13—and by common law. Child maintenance is described under Divorce Act as financial support (aspect of corollary relief) and under Family Law Act, F-2, Pt. III as support.

Support.

Divorce Act (i) child financial support quantum is governed by mandatory Federal Child Support Guidelines and (ii) spousal support is advised by spousal support guidelines; both prescribed federally. (Although not mandatory, spousal support guidelines heavily relied upon.)

Family Law Act §37, (as amended), emphasizes obligation to provide child support under that Act in accordance with Province's child support guidelines. (SNL 1997, c. 33, §3 and

NLR 40/98; 45/01; 38/06; 50/07). Further, Family Law Act §37.1 gives priority to orders for child support over orders for support for dependents who are not children.

Support orders of reciprocating jurisdictions may be enforced in Newfoundland and Labrador. (Interjurisdictional Support Orders Act, SNL 2002, c. I-19.2, in force from 31 Mar. 2003). Support orders from Newfoundland and Labrador Courts under Divorce Act or Family Law Act will be enforced by Director of Support Enforcement, Support Enforcement Division, Department of Justice, 9th floor, Sir Richard Squires Building, P.O. Box 2006, Corner Brook, NL A2H 6J8 (telephone: 1.709.637.2608; http://www.justice.gov.nl.ca/just/department/branches/division/division_support_enforcement.html under Support Orders Enforcement Act, 2006, S-31.1, §3 unless Court orders, or recipient spouse elects, otherwise. Reciprocating states as of 31 Dec. 2008 are listed in SNL 2008 (orange pages, p. 1), and more recently at http://www.hoa.gov.nl.ca/hoa/sr/.

Family Orders and Agreements Enforcement Assistance Act (FOAEA), R.S.C. 1985, c. 4 [2d Supp.] facilitates process of tracing assets of support payors and whereabouts of individuals alleged to have abducted children, by allowing access to federal information banks, in respect of (federal) Divorce Act proceedings. FOAEA also employed in respect of (provincial) Family Law Act proceedings.

Custody.

Governing consideration under federal divorce, and provincial children's, law in making of custody orders is best interest of children.

Alimony.

Common law term (alimony) replaced, under Divorce Act, by “financial support” of spouses (form of corollary relief), and otherwise (such as where “husband and wife” (whether or not formally married) separate but do not commence divorce proceeding) replaced by “support” under Family Law Act, F-2, Pt. III.

Grounds for Legal Separation.

No legislation; common law governs.

Division of Property of Spouses.

Governed by Family Law Act, F-2 (especially Part II) and may involve division of matrimonial assets and debts, and compensation for business assets.

See also topic 14.05 Husband and Wife.

Separation Agreements.

Governed by Family Law Act, F-2, Part IV.

See also topic 14.05 Husband and Wife, subhead Domestic Contracts.

Foreign Divorces.

Governed by Divorce Act and common law. Foreign divorce is recognized in Province. Divorce Act bases for recognition: (i) If either former spouse was ordinarily resident in another country or subdivision which granted divorce on grounds of separation for at least one year immediately preceding commencement of proceeding for divorce, or, (ii) if after July 1, 1968, divorce granted under law of another country by tribunal or other authority having jurisdiction to do so on basis of wife's domicile determined as if she was unmarried and, if she was minor, as if she had attained age of majority. (Divorce Act, R.S.C. 1985 [2nd Supp.], c. 3, §22), in which events immaterial that foreign divorce was granted on grounds not recognized in Canada. For foreign divorce, domicile of wife, at common law, is that of her husband. Common law rules may also form basis for recognition to extent not abrogated by Divorce Act.

See Canada Law Digest, category Family, topic Divorce, subhead Jurisdiction.

14.04 GUARDIAN AND WARD:

(C-13; M-10; T-10).

Guardian.

Supreme Court has power to appoint guardian for estate of infant, on guardianship petition being presented. Selection of guardians is determined by same rules as those observed by U.K. Courts. Failing appointment of suitable near relative as guardian, Court generally appoints Registrar. (C-13, Part IV; T-10, §§26, 36).

Supreme Court Judge, on application, may appoint guardian for custody and management of estate of mentally disabled person with such powers as conferred by statute or as directed by Judge. (M-10, §3).

Qualification.

Guardian must post bond, with or without sureties (as Judge determines), payable for benefit of child (if warranted) in amount that Judge considers appropriate. (C-13, §63).

Disposition of Estate.

To dispose of estate of infant, application must be made to Judge and directions obtained for disposition. (C-13, §66).

Ward.

Term employed historically (although not currently) to describe children under 16 years old who, under Child, Youth and Family Services Act (SNL 1998, c. C-12.1), are removed from custodian(s) and ordered by court in Province to live in state care under supervision of Director of Child, Youth and Family Services. Current terms include “child in care.”

Child and Youth Advocate Act.

Act (SNL 2001, c. C-12.01) took effect 13 May 2002. Provides for Advocate, Officer of House of Assembly, who is obligated to ensure preservation and protection of interests and well-being of children, whether or not in state care, by best professional practices which are prompt, perceptive and proactive.

Functions of Act comprehensively described in 2006 Findings by Dr. Peter H. Markesteyn (Advocate's Delegate) and David C. Day, Q.C. (his counsel): http://www.lewisday.ca/reports.html.

14.05 HUSBAND AND WIFE:

(F-2; SNL 2005, c. F-3.1).

Status.

For all purposes of Province's laws, married person has legal personality that is independent, separate and distinct from that of her(his) spouse.

Spouses.

In addition to man and woman married to each other, spouses include persons married by voidable marriage that has not been voided, persons married in good faith by void marriage who have cohabited within previous year, and widow or widower. (§2[1][e]).

Matrimonial Homes.

Notwithstanding that matrimonial home is held (e.g., under deed) by one of spouses, each of spouses has one-half interest as statutory joint tenant in matrimonial home owned by either and occupied by both as their family residence, and has same right of use, possession and management as other of spouses. (If home held by both spouses [e.g., under deed] and occupied as their family residence, matrimonial home may be owned by spouses, presumptively, as joint tenants or, if specified, as tenants-in-common. Where more than one property qualifies as matrimonial home, spouses may, but are not required to, designate in writing that one of properties is to be their matrimonial home. Following registration of such designation at Registry of Deeds, any other qualifying properties cease to be matrimonial home. No spouse shall dispose of or mortgage any interest in matrimonial home without consent or release of other spouse or Court order. Affidavit of disposing spouse is proof that property is not matrimonial home unless there is actual or constructive notice to contrary. Each spouse is entitled to same right of notice and redemption before any claim may be realized against matrimonial home. Upon application of spouse, Court has broad powers to make orders with respect to disposition of spouse's interest in or possession of matrimonial home. Statutory joint tenancy (which applies unless, e.g., spouses expressly hold title to matrimonial home as tenants in common) creates right of survivorship in surviving spouse and operates to vest beneficial ownership in matrimonial home in surviving spouse without need for probate or administration of estate of deceased spouse; therefore, matrimonial home is not subject to division, on death, as matrimonial asset. (F-2, Part I). (Generally, statutory joint tenancy has same characteristics as common law joint tenancy, except, in certain circumstances, on death.)

One spouse may, by judicial order, be given exclusive possession of matrimonial home for life or fixed lesser period, with or without conditions, where other provision for shelter is not adequate in circumstances, or where in best interests of child. (§15[1]).

Further, where determined to be warranted under Family Violence Protection Act (SNL 2005, c. F-3.1), Provincial Court Judge may make emergency protection order which includes provision of exclusive occupation of residence to applicant (i.e., including spouse or former spouse or common law spouse) for defined period, regardless of ownership; and directing police officer to remove respondent to application from residence immediately or within specified time (F-3.1, §6).

Matrimonial and Business Assets.

Matrimonial assets and (although not expressly stated) matrimonial debts (F-2, Part II) may, upon application of either spouse, be divided equally or unequally notwithstanding, respectively, ownership of these assets, or obligations to third parties or each other, for these debts. Such application may be made: (i) By surviving spouse on death of his/her spouse (but not by estate of deceased spouse) within one year after death; (ii) by either of spouses in event of Originating Application for divorce being filed (and not later than two years after day marriage is terminated by divorce judgment); (iii) within six years after day on which spouses separate without there being reasonable prospect that they will resume cohabitation; or (iv) within two years after day marriage is terminated by judgment of nullity. (F-2, Part II, §21).

Where one spouse has contributed work, money or money's worth to acquisition, management or operation of business asset, Court may order, on application, that compensation (e.g., money sum or interest in business asset) be awarded to contributing spouse. (F-2, Part II).

Presumption of advancement is abolished as between spouses and replaced by presumption of resulting trust. (F-2, Part II).

Domestic Contracts.

(i) Man and woman may enter into marriage contract either before their marriage or during marriage while cohabiting in which they agree on respective rights and obligations, under marriage, on separation, on dissolution of marriage or on death of either spouse. (ii) Man and woman who are not married to one another may enter into cohabitation agreement in which they agree on their respective rights and obligations during cohabitation, on ceasing to cohabit, or on death of either or both of them. Cohabitation agreement may adopt some or all provisions of Family Law Act. Where parties to cohabitation agreement subsequently marry, their agreement is deemed to be marriage contract. (iii) Married persons who separate may enter into separation agreement in which they agree on respective rights and obligations on separation, on dissolution of marriage or on death of spouse. (F-2, Part IV).

To extent Family Law Act contemplates domestic contract being made by man and woman (e.g., marriage contracts under §62), Act must, since 21 Dec. 2004, be read in context of decision on that date of Green C.J. of NLSC [TD] in Pottle et al. v. Canada (Attorney General) and Newfoundland and Labrador (Attorney General), Court File No. 2004 01 T 3964, which concluded that historic common law expectation that marriage is between man and woman offends §15 of Canadian Charter of Rights and Freedoms and, therefore, altered common law to also contemplate marriage between two persons of same gender.

Marriage contract, cohabitation agreement or separation agreement may include agreement as to ownership or division of property (i.e., which respects or disregards none, some or all property provisions of Family Law Act), support obligations, and right to direct education of children. Except in separation agreements, domestic contracts may not include provision as to rights to custody of or access to children. All domestic contracts are void unless in writing, signed by parties and witnessed (except in circumstances contemplated by Picco v. Picco [1987] 66 Nfld. & P.E.I.R. 117 [U.F.C.], Russell J.). Man and woman may contract out of provisions of Family Law Act by marriage contract, cohabitation agreement (where Act adopted by prior cohabitation agreement) or separation agreement. (F-4, Part IV).

14.06 INFANTS:

Age.

Generally, under statute, age of majority is 19. (SNL 1971, No. 71 as am'd, which survives RSNL, 1990). At common law, age of majority is 21 years.

Exceptions include following: (i) Person is under disability (i.e., cannot commence legal proceeding without guardian ad litem) under Limitations Act (SNL 1995, L-16.1, §15[5]) while less than 18 years old; (ii) person may, from 17 years, make will. (W-10, §3); (iii) person, from 16 years, may consent to insurance being placed on his/her life (L-14, §9[3]); (iv) person, at 16 years, ceases to be subject, in most circumstances, to state care order (C-12.1, §2[1(d)]); (v) person may, as early as 16 years, hold driver's licence learner permit (RSNL 1990, H-3, §48); (vi) persons under 16 years (as young as 12 years) may consent to adoption (A-2.1); (vii) persons under 16 years may apply for judicial order for marriage license, and from 16 years may serve as witnesses to marriage (S-19, §§12, 18, 19).

See also subhead Contracts, below.

Contracts.

Infant (i.e., person under 19 years) may make valid contract for necessaries and, under Life Insurance Act (L-14), for life insurance (§9). Otherwise, as general rule, contracts made by infant are voidable.

This general rule is, however, subject to following from 1 Apr. 1996. Action shall not be maintained for purpose of charging person with respect to promise made on or after reaching age of 16 years up to but not including 19 years, to: (i) Pay debt or to (ii) ratify promise or simple contract, which s(he) contracted or made while under 16 years; unless promise or ratification is written and signed by that person on or after reaching 16. (L-16.1, §25).

Actions.

Infant (under 19 years) sues and is sued by guardian ad litem. (L-16.5, §15[5]).

Where, at time s(he) proposes to bring action, person is under disability, tolling of time with respect to limitation period under Limitations Act (L-16.1) is postponed as long as person is under disability. Person under disability includes person under 19 years (§18), unless otherwise provided by statute.

Parental Responsibility.

Parent is not liable for intentional tort (e.g., battery) of minor (i.e., person under 19 years) committed without parent's knowledge, participation or sanction, but may be liable for tort of negligence in making it possible for minor to cause injury. (Hanes v. Kennedy [1941] S.C.R. 384). In action against parent for damage to property or personal injury caused by fault or neglect of minor, onus of establishing that defendant parent exercised reasonable supervision and control is on that parent. (c. F-2, §77).

Termination of Parental Rights.

Governed by Child, Youth and Family Services Act, SNL 1998, C-12.1 (in force: 5 Jan. 2000). Where child is in need of protective intervention and in child's best interests to do so, Court may make temporary orders of supervision or continuous orders placing child in custody of director-in-region of Child, Youth and Family Services in either of Province's four regional integrated health authorities. (NLR 18/05).

For complete termination of parental rights see topic 14.01 Adoption, subhead Effect of Adoption.

14.07 MARRIAGE:

(S-19).

Solemnization of Marriage Act, S-19, governs. No residency requirement. Marriages may be solemnized by clergyman registered under Act or marriage commissioner authorized under Act or by Mayor of City of St. John's, City of Corner Brook, or City of Mount Pearl or by Provincial Court Judge. (§§3, 10). Ceremony must be performed in presence of two credible witnesses who are at least 16 years of age. Act sets out form of ceremony required, as minimum, to be followed. (§12).

Consent.

Written consent of parent or guardian must be had in circumstances such as where either party is 16 years or over but under 19 years, except where judicially dispensed with, or in case of person 18 to 19 years old who has been living apart from and without support of parent(s) or guardian(s) for at least three months immediately before marriage license application; person 16 to 19 years old whose parents are dead or residing outside province, who does not have guardian and is not subject to continuous care of director-in-region of regional integrated health authority. (§§18, 19). Otherwise (e.g., if person under 16 years), consent of parent or guardian not capable of facilitating marriage (subject to Judicial Order below).

Judicial Order.

Person under 16 years may obtain authority for licence by Supreme Court judicial order. Person 16 to 19 years in respect of whom consent unreasonably withheld, or consent cannot be given due to illness of person required to give consent, or consent-provider's identity uncertain, may obtain order dispensing with consent requirement.

Licence.

Ordinarily required to be obtained and delivered to solemnizer at least four days before solemnization of marriage can take place. No licence will be issued to person who is under 16 years old (without judicial order) or who is under influence of alcohol or drugs. Marriage licence is valid for 30 days after issuance unless issued for 60 day term. (§12). Every application for licence must be accompanied by affidavit in prescribed form. (§15).

Forms.

Marriage licence application forms are procurable from Vital Statistics Division, Department of Government Services, P.O. Box 8700, St. John's, NL, A1B 4J6, telephone: 1.709.729.3308; telecopier: 1.709.729.0946; http://www.gs.gov.nl.ca/gs/vs/marriage.stm.

Proxy Marriages.

Not recognized.

Common Law Marriages.

Not per se recognized as legal marriages; although persons living in common law relationship enjoy certain rights prescribed by provincial and federal statutes. Persons living common law may, by cohabitation agreement, adopt some or all provisions of Family Law Act. (F-2, Part IV).

Annulment.

Grounds for annulment of marriage are those grounds recognized at common law.

14.08 MARRIED WOMEN:

See topics 14.05 Husband and Wife, 14.07 Marriage.

14.09 SEPARATION:

See topic 14.03 Divorce.

15 FOREIGN TRADE AND COMMERCE

15.01 TRADE:

See category 3 Business Regulation and Commerce, topic 3.14 Industry.

16 HEALTH

16.01 FOOD, DRUGS AND COSMETICS:

(F-21).

To extent not federal responsibility, constitutionally, of Parliament of Canada (see, e.g.: Food and Drugs Act, R.S.C. 1985, c. F-27), subjects are provincially addressed, principally, by

Food and Drug Act, RSNL 1990, F-21 and Regulations made under that Act (Food Premises Regulations, CNLR 1022/96; 44/97; 60/99).

Aspects of food, drugs and cosmetics addressed include: examination of food; food offered as prizes; transportation of food; buildings containing food; sale of food, including unfit food; food sampling; examination of food handlers; animal slaughter; and testing, cooling, freezing, transportation, and storage of meat.

16.02 PUBLIC HEALTH INSURANCE:

(M-5.1).

Health insurance is addressed, principally, by Medical Care Insurance Act, 1999, SNL 1999, M-5.1. Act requires appropriate provincial minister (see: SNL 1995, E-16.1: Health and Community Services) to administer state-funded plan of medical care insurance for Province's residents. (§§4[1]; 10[1]). Every resident, other than dependant, shall, where required by regulations made under Act (CNLRs 20/96; 21/96; 22/98; NLRs 132/97; 69/03), register and re-register him/her self and their dependants (as required) (§5[1]) with Newfoundland and Labrador Medical Care Plan, P.O. Box 8700, 57 Margaret's Place, St. John's, NL, A1B 4J6; telephone: 1.800.563.1557; http://www.health.gov.nl.ca/mcp/.

16.03 NURSING:

(R-9; L-12.1).

Training, competency, licensure, discipline, and regulation otherwise, of persons serving in nursing professions are governed as follows: registered nurses and nurse practitioners, by Registered Nurses Act, 2008, SNL 2008, c. R-9.1; licenced practical nurses (sometimes referred to in practice as nursing assistants), by Licenced Practical Nurses Act, 2005, SNL 2005, L-12.1, and by Nurse Practitioner Regulations (65/98; 89/00; 41/02; 6/04; 68/05).

16.04 PUBLIC HEALTH:

(P-37.1; H-37.2).

Public health is addressed, principally, by Health and Community Services Act (formerly Public Health Act), SNL 1995, P-37.1, and Health and Community Services Resumption and Continuation Act, SNL 1999, H-37.2.

16.05 SMOKING REGULATION:

(S-16.2; O-3).

Tobacco smoking regulation is governed by Smoke-free Environment Act, 2005, SNL 2005, S-16.2, and Regulations made under that Act (NLR 54/05).

See also Tobacco Control Act, T-4.1; Tobacco Health Care Costs Recovery Act, T-4.2 (not yet proclaimed); Smoke-free Environment Regulations, 2005, NLR 54/05.

Application.

Person must not smoke in: (i) Workplace; (ii) place that is normally open to members of public; (iii) part of office building or other commercial establishment normally open to members of public; (iv) health care facility; (v) child care centre providing child care services licensed under Child Care Services Act (C-11.1); (vi) college, university, educational institution or school operated under College Act, 1996 (C-22.1), Memorial University Act (M-7), Private Training Institutions Act (P-25) or Schools Act, 1997 (S-12.2); (vii) food premises licensed under Food and Drug Act (F-21); (viii) premises licensed under Liquor Control Act (L-18); (ix) cinema or theatre;

(x) video arcade, bingo hall or pool hall; (xi) recreational facility where primary activity is physical recreation, bowling alley, fitness centre, gymnasium, pool or rink; (xii) multi-service centre, community centre or hall, arena, fire hall, church or church hall; (xiii) retail shop, boutique, market, store or shopping mall; (xiv) laundromat; (xv) ferry, ferry terminal, airport terminal, bus, bus station or shelter, taxi, taxi shelter, limousine or vehicle carrying passengers for hire; (xvi) motor vehicle that is an ambulance; (xvii) common area of hotel, motel, commercial building or multi-unit residential building, including corridor, lobby, stairwell, elevator, escalator, eating area, washroom or restroom; (xviii) office of government of Province, municipality, city, school board, health care authority or agency of any of them; (xix) provincial jail, prison, detention centre or reformatory; (xx) private club to which member or invited person has access; and (xxi) any other place prescribed by regulation. (§4[1]).

Notwithstanding (iv) above, operator of facility that: (i) Provides long-term care, including long-term care facility located within acute care facility (facility); or (ii) is psychiatric facility or unit, may allow smoking for residents of that facility in designated smoking room. (§4[2]).

Owner of public place (including person having responsibility for and control over activities of public place) shall ensure that person refrains from smoking in public place normally open to members of public for which that owner responsible. (§4[3]).

Exceptions.

Employer may, in accordance with regulations, designate one or more enclosed rooms under that employer's control as designated smoking rooms for employees. (§5[1]).

Operator (who owns or operates facility) may, in accordance with regulations, designate one or more enclosed rooms in facility that are under that operator's control as designated smoking rooms for residents of that facility. (§4[2]).

Employer or operator and person acting on behalf of either shall ensure that persons refrain from smoking in: (i) Workplace; or (ii) facility, under that employer's or operator's control other than in designated smoking room. Room that is normally used or occupied by non-smokers must not be made designated smoking room. (§5).

Employers, owners and operators must post and keep posted those signs that may be prescribed under regulations (NLR 54/05, §§4-5) prohibiting smoking in workplace, public place or facility referred to in §4(2). Employer or operator must post signs that identify designated smoking rooms in workplace or facility. (§6).

Inspection.

Minister responsible may appoint inspectors to inspect: (i) Public places; and (ii) facilities, to ensure compliance with Act.

Minister responsible for Occupational Health and Safety Act (O-3) may appoint inspectors to inspect workplaces to ensure compliance with Act.

Inspector: (a) May enter (i) workplace, (ii) public place, or (iii) facility other than private dwelling place, at reasonable time without warrant or notice; (b) may commence proceedings, which may be in form of ticket issued under Provincial Offences Act (P-31.1), in respect of violation of Act; (c) may require production of drawings, specifications or floor plans for workplace, public place or facility, other than private dwelling, and may inspect, examine and copy them; and (d) may make inquiries of person who is or was in workplace, public place or facility.

Person must not obstruct or interfere with inspector in execution of inspector's duties under Act.

Where inspector finds that operator, employer or owner of workplace, public place or facility is not complying with provision of Act or regulation made under Act inspector may order operator, employer or owner, or person whom inspector believes to be in charge, to comply with provision of Act, and may require order to be carried out immediately or within period of time inspector specifies. (§7-8).

Protection from Discrimination

Employer, person acting on behalf of employer or union shall not take discriminatory action against employee who has acted in accordance with, or has sought enforcement of Act (§9) by: (i) Dismissing or threatening to dismiss employee; (ii) disciplining, suspending or threatening to discipline or suspend employee; (iii) imposing penalty on employee; or (iv) intimidating or coercing employee.

Where discriminatory action occurs against employee because that employee has acted in accordance with or has sought enforcement of Act, that action shall, in absence of evidence to contrary, be considered discriminatory action.

Where employee alleges his or her employer has taken discriminatory action, employee may: (i) Where collective agreement is in force between union in which employee is member and employer, and collective agreement provides for use of grievance procedure where discrimination is alleged, follow that grievance procedure; or (ii) apply to Labour Relations Board for determination as to whether action is discriminatory.

Where employee alleges his or her union has taken discriminatory action against him or her, employee may apply to Labour Relations Board for determination as to whether action is discriminatory. Where Labour Relations Board makes finding that action is discriminatory, it shall order: (i) Reinstatement of employee to whom action was applied on same terms and conditions under which that employee was formerly employed; (ii) employer to pay or make up to employee his or her lost wages, salary and other benefits; (iii) reference to dismissal or disciplinary action against employee on employer's records be deleted; and (iv) reinstatement of employee to his or her trade union if employee has been expelled by union. Where order is made and is filed with Registrar of Supreme Court, that order enforceable as if it were judgment or order of Court.

Offence.

Person who contravenes Act or who fails to comply with order of inspector made under Act is guilty of offence and is liable on summary conviction, for person: (i) Who is not operator, employer or owner, to fine of not less than $50 and not more than $500; and (ii) who is operator, employer or owner, to fine of not less than $500 and not more than $5,000. (§10).

17 IMMIGRATION

17.01 ALIENS:

Aliens are under no disability as to holding chattels real (C-11) in Newfoundland and Labrador.

See also Canada Law Digest.

18 INSURANCE

18.01 INSURANCE COMPANIES:

Administration.

Act (I-10) administered by Superintendent of Insurance (Superintendent), c/o Insurance and Pension Division, Department of Government Services, P.O. Box 8700, St. John’s, NL A1B 4J6; telephone: 1.709.729.2595; telecopier: 1.709.729.3205; http://www.gs.gov.nl.ca/cca/ip/. (§3).

Application.

Act applies to insurer undertaking insurance contract in Province. Contract which, under Act, is considered to be made in Province, whether original contract or renewal of contract (except renewal of life insurance policy) is considered to be undertaking insurance contract in Province. Included are contracts undertaking accident, automobile, disability, double indemnity, endowment, fire, life, marine, motor vehicle liability, mutual, sick and funeral benefits, and sickness, insurance. (§§2, 4[1]).

Life insurer licensed under Act may, subject to its charter and subject to restrictions, and limitations and conditions, contained in its licence, issue annuities and endowments of all kinds and include in policy, in respect of same life insured, disability and double indemnity insurance. (§12).

Fire insurer licensed under Act may, subject to its charter and restrictions, and limitations and conditions, contained in its licence, insure or reinsure property in which insured has insurable interest, against loss or damage by fire, lightning or explosion, and may insure or reinsure same property against loss or damage from falling aircraft, earthquake, windstorm, tornado, hail, sprinkler leakage, riot, malicious damage, weather, water damage, smoke damage, civil commotion, and impact by vehicles and one or more perils falling within other classes of insurance prescribed by regulation. (§13).

Not considered to be insurers are: (i) Employees' mutual benefit societies; (ii) society, association or organization whose membership is limited to those engaged in, or who, when they become members, are engaged in, particular trade, calling or profession which, under authority of its charter, has assurance or benefit fund for benefit of own members exclusively; (iii) friendly societies; and (iv) other organizations prescribed by regulation. (§7).

Insurer incorporated under Province's law which carries on or solicits business in foreign jurisdiction without first being licensed under Act and without first being authorized to do so under foreign jurisdiction's laws is guilty of offence. (§8).

Act does not prevent licensed insurer which has lawfully effected contract in Province from reinsuring all or part of risk with insurer transacting business outside Province which is not licensed under Act. (§9).

Licensing.

Generally, see §§10-14.

Licences issued by Superintendent to insurers incorporated in Province.

Before carrying on business, insurer must obtain licence (§§6, 10, 20[1]), which expires 31 Mar. annually (§20[2]). Licence renewable annually. (§20[2]). Information to be filed with Superintendent to obtain licence, specified by §16.

Licence must not be issued to life insurer, unless it provides Superintendent satisfactory evidence that not less than $500,000 of its capital has in good faith been subscribed for shares allotted, and at least $250,000 of subscribed capital has been paid in cash. (§14[1][a]).

Licence must not be issued to insurer undertaking one or more classes of insurance, other than life insurance, except on proof as follows: (i) Where insurer undertaking insurance in Province only, that not less than $300,000 of its capital has in good faith been subscribed for and allotted, and at least $150,000 of its subscribed capital has in good faith been paid in, in cash; (ii) where insurer undertaking insurance elsewhere than in Province, that not less than $700,000 of its capital value has in good faith been subscribed for and allotted, and at least $400,000 of its subscribed capital has in good faith been paid in, in cash. (§14[1][b]).

Licence must not be issued to mutual insurance company, cash-mutual insurance company, or underwriter or syndicate of underwriters operating on plan known as Lloyd's, except on proof that net surplus of assets over all liabilities exceeds amount fixed for paid in capital of insurance companies referred to in immediately preceding paragraph, and that net surplus of assets over all liabilities together with contingent liabilities of members exceeds amount fixed for subscribed and allotted capital of those insurance companies for classes of insurance involved. (§14[2]).

After 17 Feb. 1986, licence must not be issued to life insurer, proposing to operate within or outside Province or both within and outside Province, except on proof, satisfactory to Superintendent, that not less than $3,000,000 of subscribed capital has been paid in, in cash. (§14[2][a]).

After 17 Feb. 1986, licence must not be issued to insurer proposing to undertake one or more classes of insurance, other than life insurance, except on proof, satisfactory to Superintendent, as follows: (i) Where insurer undertaking insurance in Province only, that at least $1,000,000 of its subscribed capital has been paid in, in cash; (ii) where insurer undertaking insurance elsewhere than in Province, that at least $3,000,000 of its subscribed capital has been paid in, in cash. (§14[2][b]).

After 17 Feb. 1968, licence must not be issued to mutual insurance company or cash-mutual insurance company, except on proof its net surplus of assets over all liabilities, together with contingent liabilities of its members, exceeds amount fixed for paid in capital of life and other insurance companies. (§14[2][c]).

After 17 Feb. 1986, licence shall not be issued to insurer (i.e., company incorporated in Province) undertaking one or more classes of insurance other than life insurance, except on proof satisfactory to Superintendent, that at least $3,000,000 of its subscribed capital has been paid in, in cash. (§14[2.1]).

Licensing provisions in this summary do not apply to purely mutual insurance company insuring only risks other than mercantile or manufacturing on premium note plan. (§14[3]).

Licence must not be issued to insurer for transaction of both fire and life insurance unless, inter alia, insurer maintains separate and distinct accounts, funds, and securities respecting its business of life insurance and those funds are available only for protection of holders of its policies of life insurance and are not liable for payment of claims arising from another class of insurance (i.e., other than life insurance, such as fire insurance) which insurer undertakes. (§14[8]).

Licence must not be issued to insurer incorporated in foreign jurisdiction except on proof of insurer's ability to provide for payment at maturity of all its contracts; provided that Superintendent may accept, as proof, fact insurer: (i) Is licensed by any other government in Canada; or (ii) has been issued order under Insurance Companies Act, S.C. 1991, c. 47, §§53(1); 574(1). (§14[9]).

Taxation.

Provincial Homogenized Sales Tax which had, historically, been charged on premiums paid by every assured and collected by insurer if it maintained office in Province, and otherwise, payable directly by assured to appropriate Minister of Province, (T-0.01, §5[1][b]) rescinded, effective 1 Jan. 2008.

Direct Action Against Insurer.

See category 25 Transportation, topic 25.03 Motor Vehicles, subhead Direct Actions.

Brokers (I-9).

All brokers, agents and adjusters must apply to Superintendent of Insurance (Superintendent) for licence as defined by §2(r) before commencing employment in or carrying on business in insurance industry in Province.

Superintendent may refuse to issue licence or may impose such restrictions, limitations or conditions as s(he) considers appropriate. (§6).

Although corporation may apply for licence under Act, all persons who act under corporation licence must be individually licenced. (§9).

Superintendent has power to revoke, suspend or cancel licence issued under Act if investigation establishes there has been contravention of Act or regulations. (§15). Appeal from decision of Superintendent is to Financial Services Appeal Board consisting of five persons appointed by Lieutenant Governor in Council. (F-9.1).

All licences shall be covered by policy of errors and omissions insurance. (§5). Amount of errors and omissions insurance shall be at least $1,000,000 and fidelity insurance in amount of at least $100,000 in respect of any one occurrence. (CNLR 989/96; NLR 56/97).

Licencee shall file annual statement of financial affairs of insurance business with Superintendent within three months after fiscal year end of licencee. (§33).

Licencee in contravention of Act as defined under §45 or regulations made under Act is guilty of offence. (§46). All prosecutions under Act shall be commenced within two years of discovery of alleged offence by Superintendent. (§47).

Financial Information.

Insurer incorporated in Province must file with Superintendent, annually and as otherwise required by Superintendent, financial report in form and verified in manner Superintendent prescribes. Insurer, other than insurer incorporated in Province, must file with Superintendent, annually and as otherwise required by Superintendent, financial report in form and verified in manner Superintendent prescribes; and include information from foreign jurisdiction, if available to Superintendent under information sharing agreement entered into by appropriate minister and foreign jurisdiction. Insurer, whether or not incorporated in Province, must reply promptly and explicitly to inquiry directed to insurer by Superintendent respecting transactions of insurer in Province. (§85).

See also CNLRs 989/96; 56/97.

18.02 SELECT TYPES OF INSURANCE:

Governed by common law, as altered by statute. (L-14, A-22).

Life Insurance.

Contract must be in writing (§6) and contain all material terms and conditions (§15). Statements as to age are uncontestable two years after policy has been in force, but provision is made for correcting of premiums where age is misstated. (§17). Contract of insurance is binding on delivery of policy and payment of first premium. (§11). Period of grace of 30 days is provided for payment of premiums. (§13).

Usual provisions as to insurable interest respecting life insurance apply. Where person whose life is insured is under 16 years, consent to insurance being placed on his/her life may be given by either parent or by person standing in place of either parent. (L-14, §9[3]).

Insurer is entitled to reasonable proof of particulars surrounding maturity of contract, ages of insured and beneficiaries, and right of beneficiaries, as such, to receive payment. (§35).

Application may be made to Supreme Court arising out of insufficiency of proof of such matters or to establish presumption of death. (§41; P-20). Thirty days notice of such application is condition precedent. (§40).

Action against insurer for recovery of insurance money must be commenced within one year after furnishing proof of maturity or six years after maturity of contract. (§38). Where order for presumption of death is made (P-20) Court may make order respecting payment of insurance money (§42).

Automobile Insurance

(i) Statutory Conditions.

See §8.

(ii) Minimum Liability.

Under A-22, contract evidenced by motor vehicle liability policy insures, in respect of accident, to minimum limit of $200,000, exclusive of interest and costs, against liability resulting from bodily injury to, or death of, one or more persons and loss of, or damage to, property. (§21[1]).

Contract shall be interpreted to mean that where, because of accident, liability results from bodily injury or death and from loss of, or damage to, property: (i) Claims against insured arising out of bodily injury or death have priority to extent of $180,000 over claims arising out of loss of, or damage to, property; and (ii) claims against insured arising out of loss of, or damage to, property have priority to extent of $20,000 over claims arising out of bodily injury or death. (§21[2]).

Insurer may, instead of specifying limits in policy for inclusive amounts, specify limit of liability of at least $200,000, exclusive of interest and costs, against liability resulting from bodily injury to, or death of, one or more persons, and limit of liability of at least $200,000, exclusive of interest and costs, against liability for loss of, or damage to, property. (§21[3]).

Motor vehicle liability policy issued in Province shall provide that, in case of liability arising out of ownership, use or operation of automobile in any province or territory of Canada, insurer shall be liable up to minimum limits prescribed for that province or territory where those limits higher than limits prescribed by policy issued in Province. (§22[1]).

(iii) Compensation Payments.

Insurer defending action for insured arising from bodily injury to, or death of, person, or loss of or damage to property, caused by automobile or use or operation of automobile, must attempt to settle claim as expeditiously as possible. If insurer admitting liability for part or all of claim, insurer must make payments to claimant pending determination of total amount of compensation; amounts of which shall be based on insurer's estimate of amount owing in respect of claim, having regard to information provided to insurer by claimant. (§26.3). See also NLR 1/06 (Rule 44A).

Court may order payment of compensation periodically. (§26.2).

Insurer not liable for damages for loss of income suffered in excess of net loss of income as defined by regulation, or for loss of earning capacity suffered in excess of net loss of earning capacity defined by regulation; in all actions, including those under Fatal Accidents Act (F-6, §26.4; NLR 81/04).

Damages to which claimant entitled for loss of income and loss of earning capacity shall be reduced by all payments in respect of incident that claimant receives or to which claimant entitled for loss of income or loss of earning capacity, under laws of province of another jurisdiction, or under income continuation benefit plan where, under law or plan, provider of benefit does not retain right of subrogation; except that damages shall not be reduced by payment claimant receives or to which claimant entitled, under Workplace Health, Safety and Compensation Act (W-11).

18.03 SURETY AND GUARANTY COMPANIES:

(S-13).

Guaranty and surety companies may do business in Newfoundland and Labrador under Securities Act, S-13.

19 INTELLECTUAL PROPERTY

19.01 TRADEMARKS AND TRADENAMES:

See Canada Law Digest.

20 LEGAL PROFESSION

20.01 ATTORNEYS AND COUNSELORS:

(L-9.1; The Law Society Rules (http://www.lawsociety.nf.ca/rules.asp); Law Society Guidelines on certain subjects).

Admission.

Benchers of The Law Society of Newfoundland and Labrador, 196-198 Water Street, P.O. Box 1028, St. John's, NL, A1C 5M3, telephone: 1.709.722.4740, telecopier: 1.709.722.8902 (http://www.lawsociety.nf.ca) control admission of persons to practice as barristers and solicitors in Province (L-9.1; The Law Society Rules). Admission requires fulfillment of educational and eligibility requirements.

Educational Requirements.

Determined by education committee of Society (§35), as governed by The Law Society Rules (§§6.1-6.15).

Eligibility Requirements.

Provided for by Act, espy. §§33, 34, and The Law Society Rules. (§§6.16-6.17).

Reciprocating Jurisdictions.

Barrister and solicitor from reciprocating Province with at least five years standing in previous seven years may be admitted to Newfoundland and Labrador Bar subject to certain circumstances. (§42). Law Society also permits appearance to barristers and solicitors from other Provinces and Territories without admission to Newfoundland and Labrador Bar under National Mobility Agreement, effective from 1 July 2003 (see The Law Society Rules, Part VIIA, and http://www.flsc.ca/en/pdf/mobility_agreement_aug02.pdf).

As to special admissions, see §39.

Rights and Obligations of Barristers and Solicitors.

Governed by Law Society Act. The Law Society Rules, and Law Society Guidelines on certain subjects.

Lien.

Inactive solicitor may have lien for his/her fees and disbursements on moneys and papers of client that are in solicitor's hands. (§67). Active solicitors may have lien under common law.

Disbarment.

Benchers may disbar or suspend any member found guilty of professional misconduct. (§§50, 63.9, 81[1]).

Professional Law Corporations.

One or more members of Law Society may, under Corporations Act (C-36), incorporate professional corporation engaged in practice of law, provided corporation is licensed by Executive Director under Law Society Act, 1999. (L-9.1). Professional law corporation shall not carry on business or activity other than: (i) Practice of law as authorized by its licence; and (ii) other activities incidental to law practice. However, professional law corporation not prohibited from investing its own funds in real property, other than for development purposes, or in stocks, mutual funds, debt organizations, insurance, term deposits, or similar investments. (Part III.1). As to liability of shareholders of professional law corporation, prohibition of voting agreements with nonmembers of Law Society, preservation of solicitor-client relationships, duty to maintain trust account, effect of discipline (including disbarment), liability for misconduct of professional corporation, and related matters, pertaining to law practice, see Part III.1.

See also The Law Society Rules, Part XI.

21 MINERAL, WATER AND FISHING RIGHTS

21.01 MINES AND MINERALS:

(M-12; M-14; SNL 1998, Q-1.1).

(i) Licence.

Mineral Act (M-12).—No person may search and prospect for minerals without first obtaining miner's licence for that purpose. (§20). In case s(he) discovers any deposit of mineral and desires to obtain title thereto, s(he) must first stake location by placing stake consisting of wooden post, not less than 1.2 metres above ground and not less than 8.75 centimetres in width and 3.75 centimetres in thickness, on vein or deposit of mineral discovered. (CNLR 1143/96).

(ii) Exclusive Right.

Subject to terms under which licence is issued, licencee has exclusive right to explore for minerals in, on or under area of land described in licence from date of issuing. (§23).

(iii) Limits.

Licence confers no right to remove minerals except for purpose of sampling, assaying and testing. (§23).

(iv) Imposts.

Mineral Holdings Impost Act (M-14).—Imposes tax per hectare (impost) for 1992 of $8; 1993, $9; 1994, $10; 1995, $11; 1996, $12. For each year after 1996, $12.50. Rentals paid for lands and amount expended on lands for exploration may be deducted from impost. Rights to mineral lands will be forfeited for nonpayment of impost. (§7; CNLR 1124/96).

Quarry Materials.

Quarry Materials Act, 1998, SNL 1998, Q-1.1, prohibits any person from excavating, digging for, removing or carrying away quarry material except in accordance with provisions of permit or lease issued or continued under Act. (§4). Exclusive exploration licence gives grantee exclusive right in designated area to remove quarry material but only for purpose of sampling, assaying and testing. (§6). Province may grant permit to remove quarry material for period not exceeding one year (§7) or grant lease of quarry materials for period not exceeding 20 years (§8). All permits and leases are subject to terms and conditions prescribed in CNLR 804/96 in addition to such other terms and conditions as are imposed by Province. Province may designate areas within Province which are exempt from issuance of exploration licences. (CNLR 804/96).

21.02 WATER RIGHTS:

See Water Resources Act, W-4.01; Energy Corporation of Newfoundland and Labrador Water Rights Act, E-11.02.

21.03 FISHING RIGHTS:

Governed by Statutes of Canada.

For bargaining rights of fishers and fish processors, see Fishing Industry Collective Bargaining Act, F-18.

22 MORTGAGES

22.01 CHATTEL MORTGAGES:

(P-7.1; J-4).

Effective 13 Dec. 1999, B-3 repealed and replaced with P-7.1: Personal Property Security Act and CNLR 103/99; 107/99; contact Director of Commercial Registrations, telephone: 1.709.729.5724; telecopier: 1.709.729.0232; http://www.gs.gov.nl.ca/cca/cr/prop-about.stm.

Foreclosure.

Chattel mortgage may be foreclosed in same manner as mortgage on chattels real, by originating application (inter partes) supported by affidavit on which order may issue. Governed by Judicature Act, J-4; Rules 5.02; 26.

Redemption.

Mortgagor has right to redeem at any time up to obtaining of order absolute.

See also category 3 Business Regulation and Commerce, topic 3.09 Consumer Protection.

22.02 COLLATERAL SECURITY:

See category 8 Debtor and Creditor, topic 8.17 Pledges.

22.03 MORTGAGES OF PERSONAL PROPERTY:

See topic 22.01 Chattel Mortgages.

22.04 MORTGAGES OF REAL PROPERTY (CHATTELS REAL):

(C-34).

Execution.

Mortgagor must sign and seal instrument before witness who, unless authorized by law to witness, must prove having witnessed by affidavit before person authorized to take affidavits, for purpose of registration.

Registration.

Not necessary for validity of mortgage as between parties but is necessary in order to secure priority and charge third persons with notice. Place of registration is Registry of Deeds (P.O. Box 8700, St. John's, NL, A1B 4J6; http://www.gs.gov.nl.ca/cca/cr/deed-about.stm). There is no time limit for registering mortgages of chattels real.

Registration Fee.

Based on value of money or other consideration (minimum fee: $101).

Future Advances.

Must be specifically provided for in instrument, and registration fees are increased accordingly.

Assignment.

Assignment subject to same requirements as conveyance (§2[b]).

Release.

May be for whole or part of mortgage security. Document of release must be registered to clear title.

Remedies of Mortgagee in Case of Default.

Mortgagee has four recourses on default of payment, all or any of which may be resorted to, namely: (i) Foreclose mortgage (§17, Rule 26); (ii) sell property under power of sale (§5, Rule 26); (iii) sue mortgagor on covenant to pay; (iv) appoint receiver. Mortgagee may pursue all remedies concurrently. Mortgagee has power, where mortgage money or interest is one month overdue, to sell mortgaged property. (§6).

Power of sale must be exercised strictly in accordance with its terms.

Redemption.

Mortgagor may redeem property at any time before final order for foreclosure or sale or before sale under power of sale.

Chattel Mortgages.

See topic 22.01 Chattel Mortgages.

23 PROPERTY

23.01 ABSENTEES:

Nonresidents are under no disability as to holding of realty (by statute [C-11] legally termed ``chattels real'') or chattels personal.

Nonresident plaintiff, if that plaintiff holds no assets within Province, or in other circumstances, can be required to give security for costs. (Rule 21).

23.02 ADVERSE POSSESSION:

(i) Duration of Possession.

At common law, adverse possession of realty for period of 20 years is capable of giving reasonably good title as between parties (see Wickham v. Wickham [No. 1], [1977], 17 Nfld. & P.E.I.R. 452 [Nfld. T.D.] N. Goodridge J.). Under Limitations Act (SNL 1995, L-16.1, §7[1][g]), however, following expiry of ten years, from 1 Apr. 1998, after right to do so arose, action to recover land statute-barred.

(ii) Character of Possession.

Possession must be open, notorious, exclusive and continuous, for 30 years, after 1 Apr. 1998.

(iii) Easements.

(SNL 1995, L-16.1, §§7[1][g]; 8[1][f]; Pt. III).

23.03 CONVEYANCES:

See topic 23.05 Deeds.

23.04 CURTESY:

Not applicable in Newfoundland and Labrador.

23.05 DEEDS:

(R-10).

All deeds, decrees, judgments and conveyances affecting chattels real in Province may be registered in Registry of Deeds at St. John's (Registry of Deeds, Commercial Registrations Division, Ground Floor, East Block, Confederation Building, P.O. Box 8700, St. John's, NL, A1B 4J6; telephone: 709.729.3302; telecopier: 709.729.0232; http://www.gs.gov.nl.ca/cca/cr/deed-about.stm). Deeds may be proven by oath or affirmation of subscribing witness or by acknowledgment under oath or affirmation of parties subscribing. Before deed can be registered, signature of every person from whom any estate passes must be proven (such as by signature being witnessed). Registration is not compulsory but is method of protection of purchaser against subsequent purchasers.

See topic 23.11 Real Property for estates recognized.

See also category 14 Family, topic 14.05 Husband and Wife.

Execution.

Signature is essential for validity of deed. Seal is necessary in some (e.g., corporation executions), and advisable in all, cases. Witness is not essential but is desirable to prove registration of deed as otherwise acknowledgment under oath or affirmation is required from vendor or transferor for registration purposes. Acknowledgment is not necessary for validity of deed.

23.06 DOWER:

Not recognized.

23.07 ESCHEAT:

See category 2 Business Organizations, topic 2.03 Corporations.

23.08 LANDLORD AND TENANT:

(R-14.1; L-10).

Common law applies to landlord and tenant relations, except as altered by Province's legislation, including Residential Tenancies Act, 2000, R-14.1.

Kinds of Tenancies.

Tenancy may be at will, at sufferance, for definite period, or as provided for by statute.

Leases.

Unless there has been such part performance as will, in equity, dispense with necessity of writing or memorandum, agreement providing for lease must be in writing and signed by party to be charged or party's lawfully authorized agent. While such writing need not be made at time of contract or contained in single document, it must be such as to satisfy requirements of Statute of Frauds (U.K. legislation that applies to Province under “settled colony” doctrine) and must state parties to agreement, premises to be demised and commencement and duration of term.

Residential Tenancies.

(i) Generally.

Where written residential lease entered into, landlord must provide free copy of lease to tenant or tenant may quit premises at any time after giving written notice. Landlord must in any case provide free copy of Residential Tenancies Act, 2000 to each tenant at commencement of tenancy; otherwise tenant is not liable for rent. (§5). See http://www.gs.gov.nl.ca/cca/tp/residential-tenancies/.

(ii) Requirement for Writing.

Under U.K. Statute of Frauds (applicable to Province under ``settled colony'' doctrine), all leases of lands, messages, tenements, hereditaments, etc., must be in writing and signed by parties or their agents lawfully authorized in writing, otherwise they have effect only of leases at will.

(iii) Statutory Conditions.

Now implied in every landlord-tenant relationship which cannot be waived include following: Landlord must keep premises fit for habitation, must mitigate damages where tenancy prematurely terminates, cannot lock or alter locks on premises in control of tenant. Tenant must keep premises clean and fit for habitation. Short of emergency, landlord cannot enter demised premises without tenant's written permission unless notice of lease termination, or advance notice of entry, first given. (§8).

Although rarely done, leases may be registered at Registry of Deeds.

(iv) Termination of Tenancy.

Must be by notice in writing involving time periods specified by Act. (§§17-23).

(v) Distress.

All goods on leased premises, except certain personal effects and implements of trade, may be distrained for arrears of rent. Security deposit limited to two weeks rent, on which landlord must pay interest. (J-4, §135).

(vi) Landlord and Tenant Proceedings.

Dealt with by Residential Tenancies Boards or by Provincial Court in summary manner (depending on nature of proceeding).

Building Leases.

Building Leases (L-10).—Every lease made on or after Aug. 2, 1921 of vacant land in St. John's on which lessee covenants to erect building is subject to condition that lessee or assignee is entitled to purchase, at any time during lease or extension, freehold in land on payment to lessor or to City of St. John's (as case may be) of sum equal to 20 times amount of annual rental payable under lease. (§3; SNL 1994, c. 27, §3).

Every lease made before Aug. 2, 1921 of vacant land in St. John's on which lessee has erected building is subject to conditions that: (i) where land is not occupied for commercial use, lessee is entitled to purchase freehold of land on payment to City of St. John's of sum equal to 40 times annual rent, (ii) where land is being occupied for commercial use, lessee is entitled to purchase freehold of land at its fair market value as if it were vacant land or obtain extension of lease at fair rental as if it were vacant. (§4; SNL 1994, c. 27, §4, SNL 1995, c. 32, §§3, 6).

See also category 11 Employment, topic 11.02 Human Rights.

23.09 LEASES:

See topic 23.08 Landlord and Tenant.

23.10 PERPETUITIES:

Common law usually governs (to extent not abrogated by Chattels Real Act, RSNL 1990, C-11).

23.11 REAL PROPERTY:

(C-11; SNL 1991, c. 36; R-2; C-29).

Chattels Real.

All lands, tenements and other hereditaments in Province which, by common law, are regarded as real estate, are held to be “chattels real” and go to executor or administrator of any person or persons dying seized or possessed of them, like other personal estate now passes to personal representatives, notwithstanding any law, usage or custom to contrary. (C-11). (See: Johnson, Trudi, “Defining Property for Inheritance: The Chattels Real Act of 1834” in: Essays In The History of Canadian Law [English, Christopher, ed.] [Toronto: University of Toronto Press, 2005], vol. IX, c. 7.)

Following estates in realty are recognized: freeholds (i.e., fee simple), leaseholds, life interests, joint tenancies and tenancies in common.

Abandoned Lands.

Includes realty granted, leased, or licenced under Part 1 of Lands Act (SNL 1991, c. 36; 1993, c. 53; 1996, c. R-10.1; 1996, c. 27; 2000, c.11; 2001, c. 20; 2001, c. 42; 2001, c. N-3; 2004, c. L-3, as am'd) or former Act respecting Crown realty (Crown Lands Acts, RSNL 1990, C-42, repealed), and realty (i.e., chattels real) unlawfully occupied that has, for at least 20 years, been unused and unoccupied by original grantee, lessee or licencee or person in unlawful occupation (§43). Minister may begin proceedings to revest abandoned realty in Crown where no person lawfully entitled to realty or interest in realty can be found in Province.

Real Estate Agents.

Real Estate Agents (R-2).—No action may be brought to recover commission unless agent is licenced and agreement is in writing, signed by party to be charged. (§33). Commission to be charged must be either agreed amount or percentage of sale price or rental. (§44). Every listing agreement must contain provision that it is to expire on specified date and copy must be given to party signing it. (§45).

Agents must annually obtain licence from Superintendent of Real Estate Agents and Salespersons (§6) and post bond (§19). Agents must maintain proper books and records and keep trust account for moneys received. (§28). Agents may not him(her)self purchase listed property without full disclosure to listing owner. (§41).

Condominiums.

Condominiums (C-29).—Division of properties into parts that are to be owned individually and parts that are to be owned in common, and their use and management, are provided for in Condominiums Act, which was comprehensively revised in Dec. 2009.

See also topics 23.05 Deeds, Landlord and Tenant; categories 5 Civil Actions and Procedure, topic Partition; 14 Family, topic Husband and Wife; 22 Mortgages, topic Mortgages of Real Property.

24 TAXATION

24.01 ADMINISTRATION:

Provincial taxation is limited by terms of Constitution Act, 1867, as amended (formerly, until 17 Apr. 1982, known as British North America Act), to direct taxation within Province.

Chief sources of provincial revenue are federal government equalization payments, subsidies and grants, licence fees from motor vehicle owners, gasoline tax, liquor and tobacco sales, gambling (video lottery terminals), and minor sums from various miscellaneous sources as well as retail sales tax to extent not replaced by Harmonized Sales Tax (see topic 24.09 Sales and Use Taxes, subhead Sales Tax).

24.02 EMPLOYMENT TAXES:

See topic 24.09 Sales and Use Taxes, subhead Sales Tax.

24.03 ESTATE TAX:

Succession Duties.

None.

Probate and Administration Fees.

However, fee payable on granting of Letters of Probate, Administration, or Resealing: (i) $60 on value of involved estate (usually stated in Inventory And Valuation filed with application for probate, administration or resealing) to and including $1,000; and $0.50 for each $100 of value of involved estate exceeding $1,000.

(Fee on each exemplication of Letters of Probate, Administration, or Resealing is $50.)

24.04 GASOLINE AND SPECIAL FUELS TAXES:

Gasoline Tax (G-1).—No person may offer or keep for sale or sell any gasoline save under and in accordance with authority conferred by provincial licence. Tax of $0.165 per litre ($0.150 per litre in Labrador portion of Province) is imposed on all grades of gasoline other than propane and leaded fuel grades of gasoline. On propane fuel grade of gasoline, tax of $0.07 per litre is imposed. On leaded gasoline, tax of $0.015 per litre is imposed. Gasoline used by aircraft and gasoline purchased in bulk for direct export from Province of Newfoundland and Labrador and so exported is subject to tax of 7/10 cent/litre. (§3). Gasoline for operation of sea-going vessels or boats (other than pleasure craft) subject to 3.5¢ per litre. Gasoline used by any person for operations which, under provisions of any legislation in force, are entitled to exemption from taxation or duty of customs on gasoline is not liable to tax. (§3).

24.05 GIFT TAX:

None.

24.06 INCOME TAX:

(T-0.01, I-1.1).

The Tax Rental Agreement between Canada and Province under which Province agreed not to impose income or corporation taxes expired on Dec. 31, 1961 and was not renewed. Province now imposes income tax and this is collected on its behalf by federal government. To and including 2000, provincial income tax largely based on “tax-on-tax” system (i.e., percentage of federal income tax). Therefore, provincial income tax was percentage (69% in 1999 and 62% in 2000) of tax payable under federal Income Tax Act plus percentage of provincial income tax (referred to as provincial surtax): in 1999–10% of provincial income tax in excess of $7,900; in 2000–6% of provincial income tax in excess of $250 and 10% of provincial income tax in excess of $7,050. Provincial income tax for 2001 and following years is based on “tax-on-income” system.

In 2008, after allowing for provincial basic tax credit of $7,484, provincial income tax is: 8.2% on taxable income to and including $29,590, $2,426 plus 13.3% on taxable income above $29,590 to and including $59,180; and $6,362 plus 16% on taxable income over $59,180. Effective 2008, no surtax is levied. (Surtax for 2007 was 4.5% on taxable income in excess of $7,102.) (SNL 1999, c. 21; SNL 2008, c. -20).

In 2009, after allowing for provincial basic tax credit of $7,484, provincial income tax is: 7.7% on taxable income to and including $29,590; $2,426 plus 12.8% on taxable income above $29,590 to and including $59,180; and $6,066 plus 15.5% on taxable income over $59,180.

See Canada Law Digest, category Taxation, topic Income Tax.

24.07 INHERITANCE TAX:

None.

24.08 LOCAL AND MUNICIPAL TAXES:

(C-17; C-16; C-15; M-24).

Municipal Taxation.

Under special Acts, City of St. John's (C-17), City of Mount Pearl (C-16) and City of Corner Brook (C-15), and some other incorporated municipalities under Municipalities Act, 1999 (M-24), are empowered to impose property and water taxes, business taxes, fuel oil and coal taxes, poll taxes and certain licence fees.

No exemptions for members of Canadian Armed Forces.

24.09 SALES AND USE TAXES:

(T-0.01; R-15).

Sales Tax.

Tax Agreement Act (Part III to be proclaimed) (SNL 1996, T-0.01) largely replaced retail sales tax (provincial) (RSNL 1990, R-15) and entirely replaced goods and services tax (G.S.T.) (federal) from 1 Apr. 1997. HST of 15% up to 1 July 2006; 14% from 1 July 2006 up to 1 Jan. 2008; and 13% from 1 Jan. 2008, is imposed on every sale of tangible personal property (including legal services, except in limited circumstances), subject to specified exemptions, purchased for consumption or use and not for retail, after 31 Mar. 1997. Specified exemptions (artifacts from Retail Sales Tax Act: RSNL 1990, R-15) are: (i) Where consumer acquires vehicle from person who is not registrant (as defined in Part IX of Excise Tax Act: R.S.C. 1985, E-15, as am'd), and (ii) where person enters into or maintains contract of insurance on which tax is imposed under Retail Sales Tax Act, RSNL 1990, R-15, §16. (SNL 1996, T-0.01, §5[1]).

24.10 STAMP AND SEAL TAXES:

None.

25 TRANSPORTATION

25.01 AIRCRAFT:

See Canada Law Digest.

25.02 AUTOMOBILES:

See topic 25.03 Motor Vehicles.

25.03 MOTOR VEHICLES:

(H-3; M-20; A-22).

Vehicle Licence.

Issued by Province and required annually. Although not provided for legislatively, number plates must be displayed at rear and must not be defaced or obliterated. (H-3 §§30, 31). See http://www.gs.gov.nl.ca/gs/mr/.

No exemption for members of Canadian Armed Forces.

Registration and licensing required of motorized snow vehicles and all terrain vehicles. (M-20).

Operator's Licence.

Novice driver's licence application may be made only for: (i) Class 5 novice driver's licence (motor vehicles with not more than two axles and other defined specifications: NLR 110/98, [2][e]); or (ii) class 6 driver's licence (motor cycle) (NLR 110/98, §3[2][f]). There are eight classes of driver's licence provided for by regulations made under M-20. (NLR 110/98, §3[2]).

Novice driver's licence, with limitations attached to it, valid for two years. Holder must complete requirements of level I and level II for class 5 or class 6 driver's licence. (NLR 110/98 §§3[5], [6]). Novice driver shall remain at level I for not fewer than 12 months, unless novice driver completes driver education program and passes driving road test, in which event period reduced to eight months. Novice driver then qualifies for Level II licence, with limitations attached to it. Novice driver shall remain at level II for not fewer than 12 months and shall be considered to hold class 5 driver's licence commencing 12 months after date on which level II driver's licence issued to him(her). (NLR 110/98, §§4-8).

Applicable to class 6, but not class 5, driver's licence is requirement that if person who holds class 5 driver's licence applies for class 6, level I novice driver's licence, that person remains at level I, for three months or, if that person has completed motorcycle driver's education program and passes motorcycle driver's driving road test, that person may then be issued class 6 driver's licence.

Novice operator's licence issued by Department of Transportation and Works, Aboriginal Affairs (Department), to persons 16 years and older who satisfy other legislative requirements for licence.

No exemption for members of Canadian Armed Forces.

Special regulations exist for chauffeurs (H-3), motorized snow vehicles, and all terrain vehicles. (M-20).

Identification Marks.

Licence may not be issued for vehicle where manufacturer's serial identification number or mark has been obliterated or defaced.

Sales.

No person may deal in motor vehicles or act as agent for sale of them unless licenced by Department. Dealer in second hand cars must report each sale to Department within six days after made.

Operation Prohibited.

By: (i) Person under 16 years of age or physically disabled, or if licence cancelled (H-3, §48); (ii) any person using hand-held cellular phone. (NLR 30/03; in force from 1 Apr. 2003).

Accidents.

Person in charge of car which is involved in accident must remain at scene, render all possible assistance, give to traffic officer and person sustaining damage, injury or loss number of vehicle licence, name and address of owner and of operator (if not owner) of vehicle, and show to them his(her) driver's licence. Report to police required, immediately, of accident involving damages over $1,000. Except in case of collision, there is presumption that damage by motor vehicle was due to negligence of operator. (H-3, §169).

Seatbelts.

With certain exceptions, use of seatbelts in vehicles driven on Province's highways, when vehicle equipped with seatbelts, is mandatory. (§178).

Liability of Owner.

Under Highway Traffic Act registered owner liable for damages caused by motor vehicle when driven by any person with his (her) consent. Where Act violated, vehicle owner liable for penalty except that when violation requires vehicle to be in motion, driver liable for penalty.

Guests.

Liability for injury to gratuitous passenger restricted to gross negligence or wanton misconduct.

Financial Responsibility.

See category 18 Insurance, topic 18.01 Insurance Companies.

Insurance.

All drivers must carry public liability insurance of at least $200,000. Formerly provided for by Judgment Recovery (Nfld.) Ltd. Act (RSNL 1990, J-3); repealed and supplanted by Act to amend Automobile Insurance Act (RSNL 1990, A-22) which took effect July 1, 1994.

Direct Actions.

Under Automobile Insurance Act (A-22) any person, on obtaining judgment against person insured under policy of automobile insurance, has direct cause of action against that person’s insurer for amount of judgment within required minimum policy limits, and costs.

Actions Against Nonresidents.

There are no special provisions with respect to such actions.

Automobile Dealers and Salesmen.

See category 3 Business Regulation and Commerce, topic 3.09 Consumer Protection.

Gasoline Tax.

See category 24 Taxation, topic Gasoline and Fuel Oil Tax.

Motorized Snow Vehicles and All Terrain Vehicles.

Includes requirement for sticker or other identifying marker, or dealer trailer permit under Act (M-20) and regulations (NLR 154/04).

NS
NOVA SCOTIA LAW DIGEST

—Scope —

Revised for 2010 edition by

McINNES COOPER, of Halifax.

(Citations unless otherwise noted refer to Revised Statutes of Nova Scotia, 1989. Reference to a “Rule” is to the Nova Scotia Civil Procedure Rules, which came into force Jan. 1, 2009. Citation “Judicature Act” is reference to R.S.N.S. 1989, c. 240. Nova Scotia Consolidated Statutes and Regulations on Internet at http://www.gov.ns.ca.)

Note: This revision incorporates legislation through Nov. 30, 2009.

1 INTRODUCTION

1.01 GOVERNMENT AND LEGAL SYSTEM:

Nova Scotia is province of Canada. For more information about Canadian federal system and Federal Government of Canada, see category 1 Introduction, topic Government and Legal System introduction to Federal Government at beginning of Canadian Law Digest. Many laws in effect in Nova Scotia are not reflected in Nova Scotia Law Digest because they are promulgated by Federal Government. See Canadian Law Digest for more information.

Common Law legal system in Nova Scotia is derived from English Common Law. For more information, see category 6 Courts and Legislature.

1.02 HOLIDAYS:

Legal holidays are: Sundays, New Year's Day, Good Friday, Victoria Day (3d Mon. in May), day appointed for celebration of birthday of reigning Sovereign, Canada Day (July 1st), 1st Mon. in Aug., Labour Day (1st Mon. in Sept.), Remembrance Day (Nov. 11th) (c. 396), Christmas Day, and any day appointed by proclamation of Governor-General or Lieutenant Governor. (c. 235, §7 as am'd by 1990, c. 31; 1995-1996, cc. 13, 21; 2002, c. 10). As to Federal holidays, see Canada Law Digest. Supreme Court of Canada has held that Federal Lord's Day Act is unconstitutional. Province has responded by enacting Retail Business Uniform Closing Day Act (c. 402 as am'd by 1993, c. 41; 2003 [2nd sess.], c. 7) which provides with many exceptions that retail business not to be carried on on uniform closing day which is defined to include Sun. Similar legislation in Ontario held by Supreme Court of Canada to be constitutionally valid. Sun. shopping permitted. (Reg. 188/2006).

Holiday Falling on Sunday.

If holiday falls on Sunday it is celebrated on Monday.

Legality of Transactions on Holiday.

In general, transactions are not invalidated because done on holiday.

1.03 OFFICE HOURS AND TIME ZONE:

Nova Scotia, New Brunswick, and Prince Edward Island are in Atlantic Standard (GMT -04:00) time zone. Newfoundland is in Newfoundland (GMT -03:30) time zone. Office hours are generally from 9 a.m. to 5 p.m. or from 8:30 a.m. to 4:30 p.m.

2 BUSINESS ORGANIZATIONS

2.01 AGENCY:

Common law rules govern, except in case of factors. See category 3 Business Regulation and Commerce, topic 3.15 Factors.

2.02 ASSOCIATIONS:

Associations and ordinary clubs and societies, athletic, political, etc., are usually unincorporated without shares of stock; associations of this kind have no legal entity, and cannot sue or be sued on contracts made in their name or on their behalf. Liability rests on person by whom or with whose authority order for goods or work was given. Ordinary principles of agency apply. No statute law.

A Society may be incorporated under the Societies Act to promote any benevolent, philanthropic, patriotic, religious, charitable, artistic, literary, educational, social, professional, recreational, sporting, or with any other useful object, but not for the purpose of trade, industry, or business. (c. 435, §3[1]).

Form.

Any five or more persons may incorporate by filing with the Registrar of Joint Stock Companies a memorandum of association and by-laws.

Rights and Powers.

Those necessary to attain objects.

Actions.

May sue or be sued in corporate name.

Resident Agent.

Society must appoint person resident in Province as agent for service. (c. 435 §7).

Dissolution.

By (1) provisions of Companies Winding Up Act (c. 435, §24) or (2) by special resolution (c. 435, §26).

Professional Association.

No statutory authorization.

Co-operative Associations.

See topic 2.03 Corporations.

Boat-Owner Fishermen.

May join in association to advance common interests including obtaining of collective benefits. (1996, c. 25, as am'd by 1999, c. 2; 2001, c. 6; 2005, c. 50 [s.1 not in force]; 2006, c. 31 [not in force]).

2.03 CORPORATIONS:

Nova Scotia corporations may be incorporated under Companies Act (c. 81 as am'd by 2007, cc. 9, 17, and 34; 2008, c. 4 [not in force]) or by special act of legislature.

General Supervision.

Registrar of Joint Stock Companies.

Incorporators; Purposes.

Any one or more persons associated for any lawful purposes, other than banking, loan, trust or insurance company, may form incorporated company with or without limited liability by subscribing names to memorandum of association and otherwise complying with regulations of

Companies Act (c. 81 as am'd by 2007, cc. 9, 17, and 34; 2008, c. 4).

Name.

No company may have any name identical with that of any subsisting company or so nearly resemble same as to be calculated to deceive. (c. 81, §16, as am'd by 2007, c. 34). Subject to c. 81, §16 company by special resolution can change its name with approval of Registrar. (c. 81, §18). Name must not contain words “Royal” or “Imperial” without consent of Governor-in-Council. (c. 81, §16[1]). Name in all its language forms may be used but must end with “Incorporated”, “Incorporee”, “Limited”, or “Limitee” (c. 81, §18). Abbreviated term may be used for business purposes.

Term of Corporate Existence.

Perpetual.

Memorandum of association, in case of company limited by shares, must state name of company; restrictions, if any, on objects and powers of company (c. 81, §10, as am'd by 2007, c. 34); that liability of members is limited; amount of share capital and division into shares; and total number of shares without nominal or par value which company proposes to issue. Memorandum must be signed by each subscriber in presence of at least one witness, who must attest signature. Subscriber must write opposite to his name number of shares he takes, his address and occupation. (c. 81, §10).

Incorporation by Guarantee.

While the above company is the kind usually incorporated in Nova Scotia, companies may be incorporated and limited by guarantee and may also have unlimited company without any limitation on liability.

The memorandum must be filed with the Registrar of Joint Stock Companies. (c. 81, §25).

Articles of Association.

Company may also file articles of association signed by the subscribers to the memorandum and filed with it. If this is not done, the set of articles known as “Table A” apply. The articles usually provide for conduct and calling of meetings of shareholders and directors, etc.—generally the internal management of the company.

Incorporation fees paid to Registrar of Joint Stock Companies: annual fee of $293.84 for company and incorporation tax of $1,030. (c. 81, §5 as am'd by 2007, c. 9; 2007, c. 34).

Filing Fees.

Change of name, $174.13; special resolution, no cost; order of court relating to any document, $59.86; certified copy of articles of association or amalgamation certificate, $21.77; certified copy of any other document or notice, $10; search of proposed company name, $57.95; $42.50 for name search of Atlantic Provinces data base; filing documents in support of amalgamation, $293.84; and filing documents in support of amalgamation of unlimited company, $1,000 and $239.42.

Licence to do business issued to N.S. company upon incorporation, and to extra-provincial company upon registration under Corporations Registration Act. Annual licensing fee for N.S. company is $103.39 and for extra-provincial company is $239.42; annual registration fee for extra-provincial insurance company, $293.84; and annual registration fee for extra-provincial financial institution, $467.97.

Paid-In Capital Requirements.

None.

Amendments.

Companies incorporated prior to Sept. 1, 1982 that have not previously altered memorandum pursuant to Act may alter provisions contained in memorandum to change into company with objects and powers of natural person. (c. 81, §19, as am'd by 2007, c. 34).

The articles on the other hand may generally be altered by special resolution of the shareholders.

Increase or Decrease of Authorized Capital Stock.

If articles authorize it, company may alter its memorandum so as to increase its share capital by issue of new shares; consolidate and divide its share capital into shares of larger amounts; convert its paid-up shares into stock and reconvert it into paid-up shares of any denomination, except in case of preferred shares; subdivide its shares into shares of smaller amounts; convert any of its unissued share capital into preference shares redeemable or purchasable by company; etc. This must be done by special resolution. (c. 81, §51, as am'd by 1990, c. 15; 2007, c. 34). Subject to confirmation of court (if authorized by its articles), company may by special resolution reduce its share capital. (c. 81, §57, as am'd by 2007, c. 34).

By-Laws.

See subhead Articles of Association, supra.

Stock.

Shares of any member are personal property, transferable in manner provided by articles of company. (c. 81, §32). On application of transfer of any share, company enters name of transferee in its register of members. (c. 81, §37).

Stock Certificates.

No statutory regulation of contents of common share certificates; preference share certificates must state terms and provisions of preference. (c. 81, §50[4], as am'd by 1990, c. 15; 2007, c. 34).

Issuance of Stock.

Stock may be issued for consideration other than cash or for less than par only on filing with Registrar contract stating consideration. (c. 81, §109, as am'd by 1998, c. 8).

Transfer of Stock.

A transfer of the share of a deceased member made by his personal representative is a valid transfer although the personal representative is not himself a member of the company. (c. 81, §38).

Uniform Securities Ownership By Minors Act and Uniform Simplification of Fiduciary Security Transfers Act not enacted.

Stock Transfer Tax.

None.

Debentures.

Every company has power to issue debentures secured by mortgage or otherwise. (c. 81, §26[4][m]).

Stockholders' rights and liabilities are determined by articles and common law rules. On winding up stockholders liable to extent of amount unpaid on shares. (c. 81, §135, as am'd by 2007, c. 34).

Meetings.

The company must hold a general meeting once a year. (c. 81, §83). On requisition of holders of at least one-tenth of issued paid-up capital, directors must convene special general meeting of company. (c. 81, §84). Calling of shareholders and directors meetings, notice required, times and places for holding same and procedure thereat are generally regulated by articles of association.

Voting.

The method of voting, use of proxies, etc., are also generally regulated by articles of association. Ordinarily proxies are permitted.

Voting trusts are governed by articles and common law.

Directors.

Minimum one, no maximum (c. 81, §93); no residence or citizenship restrictions; minimum one qualifying share (c. 81, §94[1]); term of office, method of election and filling vacancies, governed by articles of association, but bankrupt or person who has made authorized assignment cannot act as Director or Manager without order of discharge under Bankruptcy Act (c. 81, §96).

Directors' Meetings.

Time, place, quorum and notice governed by articles of association.

Powers and Duties of Directors.

Governed by articles of association and common law.

Liabilities of Directors and Officers.

Generally governed by common law; full indemnification possible. See category 12 Environment, topic 12.01 Environmental Regulation.

Officers.

President and secretary required.

Principal Office.

No restriction on location of head office, but company must have registered office in Province and file location with Registrar. (c. 81, §79).

Resident Agent.

Company must designate person resident in Province as agent for service. (c. 101, §9).

General Powers of Corporations.

All usual powers given (c. 81, §26[4]) and any specifically provided in memorandum. All companies incorporated after Sept. 1, 1982 has all powers and capacity of natural person.

Preexisting companies that have not previously altered memorandum pursuant to Act may alter provisions to convert into company with powers and capacity of natural person. (c. 81, §19, as am'd by 2007, c. 34).

Company may purchase its own shares if authorized by special resolution provided that thereafter it would still be able to meet liabilities and realizable value of assets would exceed liabilities plus paid up capital. Company may purchase its shares to eliminate fractional shares, settle debts or fulfill employee stock option if authorized by special resolution provided that thereafter it would still be able to meet liabilities and realizable value of assets would exceed liabilities and amount needed to redeem all shares with right to be paid prior to payment of those company seeking to purchase. Company may redeem preference shares without need of special resolution provided it would be able to meet liabilities and realizable value to assets would exceed liabilities and amount needed to redeem all shares with right to be paid prior to or ratably with those company seeking to purchase. (c. 81, §51, as am'd by 1990, c. 15, 2007, c. 34). Company may give financial assistance for purchase of its shares provided that thereafter it would still be able to meet liabilities, and realizable value of remaining assets would exceed liabilities plus paid-up capital. (c. 81, §51).

Dividends.

Common law applies.

Unclaimed Dividends.

No statutory provision.

Sale or Transfer of Corporate Assets.

75% majority of shareholder vote required.

Books and Records.

Register of shareholders (c. 81, §42), and other securities (c. 81, §111) must be kept at registered office; open to inspection by holders only, during usual business hours.

Reports.

Annual statement of resident agent showing names and addresses of directors and officers, and authorized and issued capital must be filed with Registrar. (c. 101, §10).

Corporate Bonds or Mortgages.

If impose fixed or floating charge on assets in Province must be filed with Registrar.

Winding Up.

Companies may be wound up under Companies Winding Up Act. (c. 82). This act provides for winding up where company has passed special resolution requiring company to be wound up or where company, though solvent as respects creditors, has passed extraordinary resolution that it cannot by reason of its liabilities continue its business, etc. (c. 82, §4). Court may also wind up company by order on application of company, contributory, shareholder, or member if it deems it just and equitable. (c. 82, §5). Court may declare that shareholder not party to application for winding up has option to purchase shares of shareholder applying for winding up at price fixed by court. (c. 82, §6). Liquidators are appointed; time is fixed for proving claims by order of court; property is realized on and disposed of, claims gotten in, and affairs all settled; liquidator prepares his account and lays it before meeting of members of company called for purpose, or liquidator may apply to court for order dissolving company. Order must be deposited or reported to provincial secretary within 30 days (c. 82, §67).

Amalgamation.

Upon amalgamation by any two companies the agreement of amalgamation will prescribe the terms and mode of carrying the amalgamation into effect. Upon adoption of the agreement by the two companies, application may be made to court for an order of approval. Dissident shareholders must be notified of time and place of application. The agreement and terms as approved by the court must be filed with Registrar who will issue a certificate of amalgamation. Amalgamated company has all rights and liabilities of the two companies. Memorandum is agreement of amalgamation. Articles may be those of one of amalgamating companies or may be ratified by three quarters of shareholders of amalgamated company. (c. 81, §134, as am'd by 2007, c. 34; 2008, c. 4). Amalgamation tax of $1,030 replaces fees in amalgamation of unlimited company. (c. 81, §5, as am'd by 2007, c. 9).

Private investment holding companies are regulated by c. 357, as am'd by 1990, c. 15; 1993, c. 36.

Co-operative associations are regulated by c. 98, as am'd by 2001, c. 41.

Close Corporations.

No statutory regulation.

Appraisal.

No statutory regulation.

Crown Corporations.

No Crown Corporation may incur any funded obligation without approval of Governor in Council. (c. 365, as am'd by 1992, c. 8; 1993, c. 37; 1994, c. 29; 1995, c. 2; 1996, c. 5; 1997, c. 3; 1998, cc. 5, 13; 1999 [2d sess.], c. 5; 2000, c. 4; 2002, c. 5; 2004, c. 3; 2005, cc. 6, 23).

Foreign Corporations.

A foreign corporation may do business in Nova Scotia on being granted a certificate of registration by the Registrar of Joint Stock Companies of Nova Scotia. Before such certificate will be issued, the foreign corporation must file with the registrar a statement verified under oath, by one of its principal officers showing: Its corporate name; when, where and under what special or general act it was incorporated; situation of its head office; the amount of its capital stock, the amount subscribed or issued, amount paid up (c. 101, §8), and like; nature of each kind of business it is empowered to carry on; what kind or kinds of business is or are intended to be carried on in Nova Scotia, and names of its directors and officers. (c. 101, §8). It may not carry on business in name identical to that of other registered corporations, partnerships or individuals without their permission. (c. 101, §6). Foreign corporation must appoint agent resident within province for service of process, etc. Statement showing agent's name and address must be filed with registrar. Agent must in Jan. in every year make and file with registrar statement showing: Names of directors and officers; amount of its nominal capital stock, amount subscribed or issued, amount paid up; amount of rest or reserve fund, and the like; name of recognized agent in Nova Scotia. Or, instead, it may file copy of annual statement filed in jurisdiction of incorporation provided that it contains same information. (c. 101, §10). It must file other statements upon written request from registrar. Upon registration annual registration fee (see infra, subhead Taxes and Fees) must be paid. Penalty for doing business in province without certificate, $50 per day.

A foreign corporation may take, hold, convey and transmit real property situated within the province. (c. 385, §2). See, however, category Property, topic Real Property, subhead Land Holdings Disclosure Act.

Continuance.

Foreign corporation may be continued as Nova Scotia corporation on application if no existing corporation and no public interest are prejudiced. Registrar may restrict objects of incoming corporation to conform with Nova Scotia requirements. Nova Scotia corporation may be continued under laws of foreign jurisdiction. (c. 81, §133, as am'd by 2007, c. 34).

Taxes and Fees.

Every corporation must pay Provincial tax of 16% on taxable income earned in Province for year. (c. 217, §5). Annual registration fees charged on all corporations doing business in province: domestic corporation fee $106.49; dominion or foreign corporation fee $246.60; and insurance corporation fee $302.66. Unlimited corporation incorporated under Companies Act pays annual registration tax of $1,030 in lieu of fee. (c. 101, §12, as am'd by 2002, c. 5; 2004, c. 3; 2007, c. 9).

See category 22 Taxation, topic 22.04 Corporate Taxes, subhead Corporation Capital Tax Act.

Professional Corporations.

No statutory authorization.

Deeds.

See category 21 Property, topic 21.05 Deeds.

See category 12 Environment, topic 12.01 Environmental Regulation.

2.04 CREDIT REPORTING AGENCIES:

See category 3 Business Regulation and Commerce, topic 3.23 Sales.

2.05 FOREIGN CORPORATIONS:

See topic 2.03 Corporations.

2.06 JOINT STOCK COMPANIES:

No statutory provisions. In this jurisdiction “Joint Stock Company” is obsolete term for normal business corporation. See topic 2.03 Corporations.

2.07 LIMITED PARTNERSHIP:

See topic 2.08 Partnerships.

2.08 PARTNERSHIPS:

The Partnership Act (c. 334, as am'd by 2002, c. 37; 2007, c. 17; 2008, c. 64) is very similar to English Partnership Act, and for most part is declaratory of common law. Partners may sue or be sued in firm name.

Partnerships and Business Names Registration Act (c. 335, as am'd by 1990, c. 15; 1993, c. 34; 1999, c. 4; 2002, c. 37; 2008, c. 65) applies to every partnership except one whose sole purpose is farming or fishing and also to person who is engaged in business or otherwise for purpose of gain and is not associated in partnership with other person, but uses as his style in connection therewith some name or designation other than his own name or if he uses words “and company” after his name or some other words indicating plurality of persons. Under this Act, every partnership must be registered with Registrar of Joint Stock Companies to carry on business in province. (c. 335, §3). Unregistered partnership cannot maintain suit or action in court in Nova Scotia in connection with contract made in whole or in part in Nova Scotia. (c. 335, §20).

Before certificate of registration is issued declaration signed by members must be filed with Registrar stating name and objects of firm, how long it has subsisted and names of members and their residence. Whenever any change or alteration takes place in its membership, name or style, new declaration must be filed and where name of partnership is changed new certificate will be issued. (c. 335, §9, as am'd by 2002, c. 37). Upon dissolution, any or all of members may sign declaration stating such dissolution. (c. 335, §10). Names of all persons composing partnership must be on all bill-heads and letterheads used by it. Every partnership must file statement appointing resident agent for service of process, writs, notices, etc. (c. 335, §18, as am'd by 1990, c. 15). If partnership merely takes orders for or buys or sells goods by travelers or correspondence, but has no traveler, agent or representative in Nova Scotia, or no office or warehouse in province, it is not deemed to be carrying on business under this act. (c. 335, §21). Penalty for carrying on partnership without certificate is $50 per day. (c. 335, §19).

Rights and liabilities of partners inter sese and as to third persons governed by common law.

Registration Fees.

Set by Governor in Council and published in Regulations. (c. 335, §17).

Limited Partnership.

Limited partnerships may be formed by two or more persons provided at least one is general partner whose liability is unlimited. Formation by registration of certificate with Registrar of Joint Stock Companies. Limited partners are liable only to extent of contribution. (c. 335, §8, as am'd by 1999, c. 4). Limited partnership registered elsewhere in Canada may be registered by filing with Registrar copy of partnership articles and certificate of original registration. (c. 335, §8, as am'd by 1999, c. 4).

Limited liability partnership is partnership of two or more persons practising profession governed by Act of Legislature permitting practice of profession as limited liability partnership and requiring maintenance of minimum amount of liability insurance. Nova Scotia limited liability partnership must have office in Nova Scotia. Partner not individually liable for liabilities of partnership or of other partners arising from negligence, wrongful act, omission, malpractice or misconduct except as provided in statute. (c. 334). Extra-provincial limited liability partnership consists of partners practising profession that partners in Nova Scotia limited liability partnership may practise and formed under laws of another jurisdiction and having status of limited liability partnership under laws of outside jurisdiction. (c. 334, s. 59). Nova Scotia partner of extra-provincial limited liability partnership has same individual liabilities as partner in Nova Scotia limited liability partnership for debts, obligations, and liabilities arising from partner's own negligence, wrongful act, omission, malpractice or misconduct. (c. 334, §66).

3 BUSINESS REGULATION AND COMMERCE

3.01 BANKS AND BANKING:

This matter is not within jurisdiction of the Provincial Legislature. Governed by the Bank Act. See Canada Law Digest, category Business Regulation and Commerce, topic Banks and Banking.

See category 22 Taxation, topic 22.04 Corporate Taxes, subhead Corporation Capital Tax Act.

3.02 BILLS AND NOTES:

Governed by Bills of Exchange Act. See Canada Law Digest, category Business Regulation and Commerce, topic Bills and Notes.

3.03 BILLS OF LADING:

See topic 3.08 Carriers.

3.04 BILLS OF SALE:

See topic 3.23 Sales; category 20 Mortgages, topic 20.01 Chattel Mortgages.

3.05 BLUE SKY LAW:

See topic 3.24 Securities.

3.06 BROKERS:

See topics 3.15 Factors, Licenses, Business and Professional, Securities; categories 16 Insurance, topic Insurance Companies; Mortgages, topic Mortgages of Real Property.

3.07 BULK SALES:

See category 8 Debtor and Creditor, topic 8.09 Fraudulent Sales and Conveyances.

3.08 CARRIERS:

Carriers are generally under supervision of Board of Commissioners of Public Utilities. Board consists of five commissioners appointed by Governor-in-Council. This board has general supervision of all public utilities and may make orders as to rates, tolls, dividends, etc., but cannot control rates of motor carriers.

Discrimination.

If any public utility gives any undue or unreasonable preference or advantage to any particular firm, person or corporation or subjects them to any unreasonable prejudice or disadvantage, it is deemed guilty of unjust discrimination, which by the act is made unlawful and penalties are provided. (c. 380, as am'd by 1992, cc. 8, 11, 37; 1997, c. 4; 2001, c. 35; 2005, c. 25).

Bills of Lading.

Consignee of goods named in bill of lading and indorsee of bill of lading has vested in him all rights of action and is subject to the same liabilities in respect to such goods as if the contract in the bill of lading had been made to himself. A bill of lading in the hands of a consignee or indorsee for value is conclusive evidence of the shipment as against the person signing the bill, notwithstanding that goods or part of them have not been shipped, unless the person receiving the same had actual notice that goods were not laden on board, or unless there is a stipulation in the bill to the contrary. Person signing same may exonerate himself by showing fraud by shipper or holder or some person under whom holder claims. (c. 38). Bill of lading may be in form of electronic document provided document created by method giving reliable assurance that rights or obligations created thereby can be identified. (2000, c. 26, §26[2]).

Lien.

Carrier has a lien for charges.

Motor Vehicle Carriers.

See category 23 Transportation, topic 23.03 Motor Vehicles.

Dangerous Goods.

See category 23 Transportation, topic 23.03 Motor Vehicles.

3.09 COLLECTION AGENCIES:

See topic 3.19 Licences, Business and Professional.

3.10 COMMERCIAL CODE:

Uniform Commercial Code not adopted.

3.11 CONDITIONAL SALES:

See topic 3.23 Sales.

3.12 CONSIGNMENTS:

See topic 3.15 Factors.

3.13 CONSUMER PROTECTION:

See topics 3.18 Interest, 3.23 Sales.

3.14 CONTRACTS:

Common law rules govern. Contracts may be in form of electronic document provided document created by method giving reliable assurance that rights and obligations created thereby can be identified. (2000, c. 26).

Distributorships, Dealerships and Franchises.

Common law rules govern.

Infants' Contracts.

See category 14 Family, topic 14.09 Infants.

3.15 FACTORS:

A mercantile agent in the customary course of his business as such agent has authority either to sell goods or to consign goods for the purpose of sale, or to buy goods, or to raise money on the security of goods.

Disposition, sale, etc., of goods by a mercantile agent acting in the ordinary course of his business, when in possession of goods or of the documents of title to goods with the consent of the owner, is as valid as if he were expressly authorized by the owner, provided the person taking acts in good faith and has no notice that the agent has no authority to make such disposition. If the agent had consent the disposition is valid in spite of the termination of the consent by the owner, provided that the person taking had not at the time notice that the consent had been terminated. Where a mercantile agent has obtained possession of any documents of title to goods by reason of his being or having been, with the consent of the owner, in possession of the goods or of any other documents of title to them, the consent of the owner to the possession of all the documents is presumed in the absence of evidence to the contrary. (c. 157, §3). §3 of Factors Act does not apply to consignment to which Personal Property Security Act applies. (1995-1996, c. 13; c. 157, §3A).

Pledges of goods by a mercantile agent as security for a debt due from pledgor to pledgee gives pledgee no further right to goods than could have been enforced by pledgor at time of pledge. (c. 157, §5). Where goods are pledged by mercantile agent in consideration of delivery or transfer of other goods or document of title to goods, or of negotiable security, pledgee acquires no right or interest in pledged goods in excess of value of goods, documents or security when so delivered or transferred in exchange. (c. 157, §6).

Redemption by Owner.

The owner of goods pledged by an agent may redeem the goods at any time before sale, on satisfying the claim for which the goods were pledged and paying the agent any money to which he is entitled by way of lien. The owner can recover from the pledgee any balance of money remaining in his hands as the produce of the sale of the goods after deducting the amount of his lien; and can recover from the buyer the price or any part thereof of goods sold by an agent to the buyer, subject to any right of setoff by the buyer against the agent. (c. 157, §11).

Consignments.

Where the owner has given possession of goods to another person for consignment or sale or has shipped goods in the name of another, and the consignee had no notice that such person is not the owner, the consignee in respect to advances made to or for the use of such person has the same lien on the goods as if such person were the owner, and may transfer the lien to another person. (c. 157, §8). Where documents of title to goods have been lawfully transferred to person as buyer or owner of goods, who then transfers it to another who takes them in good faith and for value, latter transfer defeats any vendor's lien previously existing. (c. 157, §9).

3.16 FRAUDS, STATUTE OF:

Interests in land not put in writing and signed by person making or conveying same or his agent authorized by writing, have force of lease or estate at will only, except leases not exceeding term of three years. (c. 442, §3). Interest in land can only be assigned, granted or surrendered by deed or note in writing signed by party or agent authorized by writing, or by act and operation of law. (c. 442, §4).

Contracts.

No action may be brought to charge any executor or administrator upon any special promise to answer damages out of his own estate, or to charge any person upon any special promise to answer for the debt, default or miscarriage of another person, or to charge any person upon any agreement made upon consideration of marriage, or upon any contract or sale of land or any interest therein, or upon any agreement that is not to be performed within a year from the making thereof, unless the promise, agreement, etc., or some memorandum thereof is in writing and signed by the party sought to be charged or by an agent authorized in writing. (c. 442, §7).

Contract for sale of goods of the value of $40 or over is not enforceable by action unless there is an acceptance and receipt by the buyer of part of them, or unless he gives something in earnest to bind the contract, or in part payment, or unless some note or memorandum in writing of the contract is made and signed by the party to be charged or his agent in that behalf. (c. 408, §7). Contracts may be in form of electronic document provided document created by method giving reliable assurance that rights and obligations created thereby can be identified. (2000, c. 26).

3.17 INFORMATION TECHNOLOGY, INTERNET AND NEW MEDIA:

Electronic Commerce Act permits information and documents created, transferred and stored electronically to have same legal effect as written documents if information and documents are accessible so as to be usable for subsequent reference and there exists reliable assurance as to integrity of information contained therein. Act does not apply to wills, codicils, trusts created by will or codicil, powers of attorney to extent that they relate to financial affairs or personal care of individual, documents creating or transferring interest in land and requiring registration to be effective against third parties, or negotiable instruments except those related to carriage of goods contracts. (2000, c. 26).

Electronic signature defined as information in electronic form created or adopted by person to sign electronic document. (2000, c. 26).

3.18 INTEREST:

Governed by “The Interest Act” (Canada) and “Money Lenders Act” (Canada). See Canada Law Digest, category Business Regulation and Commerce, topic Interest. Interest on Judgments Act stipulates that interest is to be paid from date of judgment until it is satisfied. (c. 233). Interest rate may be set by regulation. (c. 233, §2). Court may award interest from date cause of action arose to date of judgment. (c. 240, as am'd by 1989, c. 20; 1992, c. 16; 1996, c. 23; 1997 [2nd sess.], c. 5; 1998, c. 12; 2000, c. 28; 2003 [2nd sess.], c. 1; 2008, c. 60; 2009, c. 17 [not in force]).

Unconscionable Transactions Relief Act empowers court to reopen transaction in any proceeding in which amount due in respect of money lent is in question. Court may grant relief to debtor if having regard to all circumstances the cost of the loan is excessive and transaction is harsh and unconscionable. (c. 481).

Consumer Protection Act provides for appointment of Registrar of Credit to supervise granting of credit, conduct inquiries respecting methods of credit grantors, and disseminate information respecting credit granting facilities and practices. Every person who extends credit on sale of goods or services or on lending of money or discounting of income tax and government payments must be registered. (c. 92, as am'd by 1994, c. 16; 1998, cc. 4, 8; 2000, c. 34 [not in force]; 2000, c. 40; 2006, c. 25). Lender must give borrower statement showing amount to be charged for credit in terms of annual percentage rate and in dollars and cents. Lender must disclose on regular basis any changes in interest rate on variable rate loan. (c. 92, §17, as am'd by 1998, c. 8; 2000, c. 34 [not in force]). Amount of refinanced loan or cost of additional article purchased must be included in “cost of borrowing,” and in statement of actual cost given to borrower on completing credit transaction. (c. 92, §17, as am'd by 1998, c. 8; 2000, c. 34 [not in force]). Disclosure in dollars and cents in continuing or revolving accounts may be expressed in schedule of charges or outstanding balances. Misleading advertising is controlled. Discounters must disclose full cost of transaction in dollar terms and annual percentage 48 hours before transaction completed. (c. 92, as am'd by 1994, c. 16; 1998, cc. 4, 8; 2000, c. 34 [not in force]; 2001, c. 40; 2006, c. 25). Credit grantor limited to recovery of principal and cost of credit properly disclosed. (c. 92, as am'd by 1994, c. 16; 1998, cc. 4, 8; 2000, c. 34 [not in force]; 2001, c. 40). Lender or seller cannot discriminate against women borrowers or buyers. (c. 92, §10, as am'd by 2000, c. 34 [not in force]; 2001, c. 40; 2006, c. 25). Lender not to extend credit by advancement of money unless previous request made. Repayment of advancement contrary to Act not actionable. (c. 92, §24). No seller shall use negative-option strategy in delivery of service. Where negative-option strategy is used in delivery of service, no action lies for payment of any fee or purchase price for service. (c. 92, as am'd by 1994, c. 16; 1998, cc. 4, 8; 2000, c. 34 [not in force]; 2001, c. 40; 2006, c. 25). Registrar may issue permit authorizing payday loans from specified location. (2006, c. 25).

Credit Cards.

No action maintainable against recipient of unsolicited credit card unless written acceptance or use by recipient. (c. 92, §23, as am'd by 1994, c. 16).

3.19 LICENCES, BUSINESS AND PROFESSIONAL:

Special licences are issued under different statutes. Municipalities, cities and towns are also authorized to licence auctioneers, peddlers, markets, billiard rooms, etc.

See also category 19 Mineral, Water and Fishing Rights, topic 19.02 Mines and Minerals.

Collection Agencies.

Collection agencies and collectors must hold licence from Registrar of Credit. To obtain and keep licence every collector must represent licenced collection agency, and collector's licence cannot be transferred from one collection agency to another. Decision of Registrar can be appealed to courts within 30 days. Collection agencies must keep proper records. Collection methods are regulated. Any charges incurred in collection of debt are not recoverable from debtor. Statute does not apply to barristers. (c. 77, as am'd by 1998, c. 8 [§§3-15 not in force]; 2003 [2nd sess.], c. 3 [ss. 1-13 not in force]).

Real estate brokers must be licenced. (1996, c. 28, §4[1]). Qualifications and standards for obtaining licence set by Nova Scotia Real Estate Commission. (1996, c. 28, §8[1]). Real estate recovery fund created for purpose of paying, in whole or in part, any judgment obtained against licenced broker where judgment based on fraud or breach of trust in respect of trade in real estate. (1996, c. 28, §39).

3.20 MONOPOLIES, RESTRAINT OF TRADE AND COMPETITION:

Governed by Combines Investigation Act, Canadian Criminal Code and common law. See Canada Law Digest, category Business Regulation and Commerce, topic Monopolies, Restraint of Trade and Competition.

3.21 NEGOTIABLE INSTRUMENTS:

See topic 3.02 Bills and Notes.

3.22 RESTRAINT OF TRADE:

See topic 3.20 Monopolies, 3.22 Restraint of Trade and Competition.

3.23 SALES:

Regulated by Sale of Goods Act (c. 408, as am'd by 1995-96, c. 13), which is substantially same as English Act.

Bills of Sales.

Governed by Personal Property Security Act. (1995-96, c. 13, as am'd by 2003, c. 13; 2007, c. 9; 2008, c. 2; 2009, c. 26 [not in force]). Same provisions apply as in case of Chattel Mortgages (q.v.). May be in form of electronic document provided document created by method giving reliable assurance that rights or obligations created thereby can be identified. (2000, c. 26).

Products Liability.

Manufacturers or suppliers of defective goods may be liable to consumer for negligence where there is no privity of contract with consumer. Liability is based on the rule in Donoghue v. Stevenson, [1932] A. C. 562.

Conditional sales are governed by Personal Property Security Act. (1995-96, c. 13, as am'd by 2003, c. 13; 2007, c. 9; 2008, c. 2; 2009, c. 26 [not in force]).

Conditional sales of motor vehicles and other personal property designated by regulation to be registered in single, centralized, computerized electronic registry known as personal property registry. (1995-96, c. 13, §§43, 89). Notice of security interest, called financing statement, is registered in lieu of security document itself. (1995-96, c. 13, §44[1], as am'd by 2009, c. 26 [not in force]). Security interest is ineffective as against judgment creditors, trustees in bankruptcy and purchasers for value without notice until it has attached and is registered, or otherwise perfected. (1995-96, c. 13, §21). Unperfected security interest is subordinated to all perfected security interests in collateral, regardless of when they attached and regardless of when other creditors had knowledge of them. (1995-96, c. 13, §21). In general, only two methods of perfection are available to secured parties under Act—registration or taking possession of collateral. (1995-96, c. 13, §§25-26). Priority among perfected security interests is generally ranked according to order of registration or taking possession of collateral, regardless of order of attachment and regardless of when other creditors had knowledge of them. (1995-96, c. 13, §36, as am'd by 2003, c. 13; 2009, c. 26 [not in force]).

No limitation on type size in printed contracts. May be in form of electronic document provided document created by method giving reliable assurance that rights or obligations created thereby can be identified. (2000, c. 26).

Consumer sales are a contract of sale of goods or services including an agreement of sale as well as a sale and a conditional sale of goods made in ordinary course of business to a purchaser for use or consumption (excludes purchases for resale; purchases in course of purchaser's business; purchases by an association, partnership or corporation; or by a trustee in bankruptcy, receiver, liquidator or person acting under order of a court). Consumer sales are subject to relevant conditions and warranties implied under Sale of Goods Act plus implied conditions that goods, unless otherwise described, are of merchantable quality, new and unused, and durable for a reasonable period of time. Implied conditions or warranties cannot be excluded. Sales involving a rebate or discount contingent on subsequent assistance to seller in making other sales are not binding. (c. 92, §§26-27).

Retail Credit Sales.

No special restrictions, but closely regulated. See topic 3.18 Interest. In attempting to collect from debtor for debt incurred in purchase of consumer goods, consumer creditors may not overcharge, harass, call collect, abuse, mislead, threaten to contact employer or spouse or impersonate officer of law. (c. 91, as am'd by 2003 [2nd sess.], c. 3 [not in force]).

Direct Sales.

Direct selling includes selling or soliciting orders for goods or services other than by a merchant from a recognized retail store. Does not apply to food, drink, newspapers, or to goods or services regulated by federal or provincial statute, sold by Crown owned or controlled corporations or agencies, sold on behalf of a charitable organization, sold to a wholesaler or retailer for resale or for use in business. All direct sellers and salespersons must be licensed, renewable yearly (c. 129, §39 as am'd by 1998, c. 8; 1999, c. 8), and deliver bond. Direct salesperson can only act for direct seller specified in his permits and such permits are nontransferable. Contents of direct sales contracts are regulated and must include clause that cancellation can take place within ten days unless notice of such clause is later personally delivered to purchaser. If contract is written, statement of cancellation rights must be included in text. If no written contract, purchaser must be given notice of cancellation rights at time of purchase. Direct sales can also be cancelled if seller or salesperson not licensed, if goods or services not supplied within 90 days, or if seller or salesperson fails to comply with permit. No benefits can be offered buyer that are contingent on sale to another person. Any decision of Registrar can be appealed to county court judge within 30 days. (c. 129, §39). Act does not apply to direct sales contracts with business for goods and services to be used in business or to manufacturers or distributors of petroleum products. Direct sales contracts for less than $50 do not have to be in writing. (c. 129, §20 as am'd by 1999, c. 8). Direct sales contracts may be in form of electronic document provided that document created by method giving reliable assurance that rights or obligations created thereby can be identified. (2000, c. 26).

International Sales.

International Sale of Goods Act (1988, c. 13) adopts United Nations Convention on Contracts for International Sale of Goods. International Interests in Mobile Aircraft Equipment Act

(2004, c. 5 [not in force]) adopts Convention on International Interests in Mobile Equipment, which provides for constitution and effects of international interests in certain categories of mobile equipment and associated rights.

Credit Reporting Agencies (c. 93, as am'd by 1999, c. 4).—Credit bureaus must register and meet certain financial and ethical requirements. Director may suspend registration. Use of consumer information is limited to employment, credit, insurance and legal purposes or direct business need. Sources and types of information are restricted. Subject must have access to information on file. Procuring or preparing a consumer reports requires consent of or notice to subject.

Unsolicited Goods.

No right of action for payment. (c. 92, §23, as am'd by 1994, c. 16).

Credit Cards.

See topic 3.18 Interest.

Bulk Sales.

See category 8 Debtor and Creditor, topic 8.09 Fraudulent Sales and Conveyances.

3.24 SECURITIES:

Securities industry governed by Securities Act. (c. 418, as am'd by 1990, c. 15; 1996, c. 32; 2001, c. 18; 2001, c. 41; 2002, c. 39; 2003, c. 7; 2005, cc. 26, 27; 2006, c. 46 [§§1(g), 18-19, 32-33, 39-41, 54, 55 not in force]; 2007, c. 9; and 2008, c. 32 [ss. 1, 6-12, 14, 18 not in force]).

Supervision.

Responsibility for general administration of Act rests with Nova Scotia Securities Commission. Commission to formulate policies for regulation of securities industry in province and to hear and determine appeals from decisions of Registrar of Securities who will ordinarily make first level administrative decisions on matters of registration of persons and filings of prospectuses and other documents. (c. 418, §5).

Regulatory Powers of Supervising Authority.

See subhead Supervision, supra.

Securities to Which Act Applicable.

Broad definition of security to include among others document or instrument commonly known as security; document evidencing interest in capital assets, property, earnings or royalties of any person or company; document evidencing option or subscription in or to security; bond, debenture note or other evidence of indebtedness, share, stock unit, unit certificate, participation certificate, certificate of share or interest; agreement valued for purposes of conversion or surrender by reference to value of proportionate interest in specified portfolio of assets; subscription agreement; profit-sharing agreement or certificate; certificate of interest in petroleum and mineral lease, claim or royalty voting trust certificate; collateral trust certificate; income or annuity contract not issued by insurance company; investment contract; commodity futures contract or option. (c. 418, §2, as am'd by 1990, c. 15; 1996, c. 32; 2001, c. 41; 2002, c. 39; 2005, cc. 26, 27; and 2008, c. 32 [ss. 1, 6-12, 14, 18 not in force]).

Exempt Securities.

Subject to regulations, registration not required to trade in shares of credit union and certain securities in respect of which regulations provide that registration not required. (c. 418,

§41[2], as am'd by 1990, c. 15; 1996, c. 32; 2001, c. 41; 2006, c. 46).

Exempt Transactions.

Subject to regulations, registration required in respect of most categories of trades. (c. 418, §41[1], as am'd by 2001, c. 41; 2006, c. 46).

Registration of Securities.

Trading in securities is prohibited unless preliminary prospectus and prospectus have been filed with Registrar. (c. 418, §58, as am'd by 2006, c. 46). Prospectus must provide full disclosure of all material facts relating to securities issued. (c. 418, §61).

Registration of Dealers.

No one may trade in securities, act as underwriter, or act as advisor unless registered under Act. (c. 418, §31[1], as am'd by 2006, c. 46; 2008, c. 32 [ss. 1, 6-12, 14, 18 not in force]).

Advertisements.

Registrar has power to investigate use of advertisements and sales literature and may prohibit their use. (c. 418, §56, as am'd by 1990, c. 15).

Liabilities.

Act provides statutory private right of action for damages in situations in which there has been misrepresentation in prospectus. (c. 418, §137, as am'd by 1990, c. 15; 2005, c. 27; 2006, c. 46).

Tender Offers.

Extensive provisions in Act dealing with take-over bids especially c. 418, §§95-111, as am'd by 1990, c. 15; 1996, c. 32; 2001, c. 18; 2005, c. 27; 2006, c. 46).

3.25 STATUTE OF FRAUDS:

See topic 3.16 Frauds, Statute of.

3.26 WAREHOUSEMEN:

Under The Storage Warehouse Keepers Act (c. 447), keeper of storage warehouse includes proprietor, keeper or manager of warehouse, building, shed, storehouse, yard, wharf or other place for storage of goods, chattels and merchandise delivered to him as bailee for hire, whether he is engaged in other business or not. In addition to his ordinary lien, he has right to sell, at public auction, goods so stored with him, for storage charges in respect of such goods where payment of charges is in arrears, and goods have been in his charge or custody for three months without storage charges, rent or hire having been paid. (c. 447 §§3-4). He must advertise sale for at least one month before the sale by at least three insertions in newspaper in circulation in district where the goods are stored. Advertisement must contain notice of intended sale, short description of goods to be sold, and name of owner or depositor of goods. He must also send notice to last known address of owner or depositor of goods by prepaid registered letter, at least one month before sale. Any surplus after charges, costs and expenses are paid, must be paid to Accountant General of Nova Scotia. Warehouseman must verify by affidavit sale of goods, proceedings, advertisement, sending of notice, amount received, costs, charges, and surplus. (c. 447, §8).

Warehouse receipts are dealt with by Bank Act; Cold Storage Act; Customs Act; Excise Act; and Canada Grain Act which deals with grain elevators (see Canada Law Digest), as well as Warehouse Receipts Act (c. 498). Warehouse receipt issued by warehouseman and delivered to bailor or owner of goods constitutes contract. Warehouseman who omits from receipt particulars required by Act liable for damage caused by omission. (c. 498, §3).

4 CITIZENSHIP

4.01 ALIENS:

Aliens may take, hold, convey and transmit real property situate in Nova Scotia. (c. 385, §2). Aliens may take hold and dispose of personal property, except shares in British ships, in same manner as British subjects. This does not apply to alien enemies.

See category 21 Property, topic 21.14 Real Property, subhead Land Holdings Disclosure Act.

5 CIVIL ACTIONS AND PROCEDURE

5.01 ACCORD AND SATISFACTION:

Common law rules govern.

5.02 ACTIONS:

Equity and common law jurisdiction fused by Judicature Act 1972. (c. 240 as am'd by 1989, c. 20; 1992, c. 16; 1996, c. 23; 1997 [2nd sess.], c. 5; 1998, c. 12; 2000, c. 28, §55; 2003 [2nd sess.], c. 1; 2008, c. 60; 2009, c. 17 [not in force]).

See also category 13 Estates and Trusts, topic 13.05 Death, subhead Actions for Death.

Conditions Precedent.

Generally no actions permitted against units of provincial government unless two months notice of action is given to Attorney General. (c. 360, §18).

Persons with history of bringing vexatious actions to court may be subject to restraining order and prohibited from bringing further actions without leave of court. (c. 240, as am'd by 2009, c. 17 [not in force]).

Commencement.

See topic 5.20 Process.

Class Actions.

Permitted by Class Proceedings Act. (2007, c. 28).

Joinder and Splitting.

Plaintiff may unite several causes of action, but the court may order separate trials of any of such causes of action as cannot be conveniently tried together. (Rule 35.07).

Parties to an action are plaintiff and defendant. Trustees, executors and administrators may sue and be sued without joining persons beneficially interested. Cause or matter not defeated by misjoinder or nonjoinder of parties. Court may add or strike out or substitute names of parties.

Interpleader is governed by Civil Procedure Rule 76 and Judicature Act. (c. 240, as am'd by 1989, c. 20; 1992, c. 16; 1996, c. 23; 1997 [2nd sess.], c. 5; 1998, c. 12; 2000, c. 28, §55; 2003 [2nd sess.], c. 1; 2008, c. 60; 2009, c. 17 [not in force]).

Stay of Proceedings.

The Supreme Court of Nova Scotia, or any judge thereof, may direct a stay of proceedings in any action pending before it or him. (Rules 35.07, 35.11, 35.14, 79.22).

Termination.

Any time before a proceeding is entered for trial or its hearing is commenced in chambers plaintiff may discontinue proceeding or withdraw any cause of action against any defendant, or defendant may withdraw his defense or part thereof, without leave, by filing and serving a notice of discontinuance or withdrawal on any party concerned. After a proceeding is entered for trial or its hearing commenced, plaintiff or defendant may discontinue or withdraw with leave of court, and order may contain provisions as to costs or bringing of subsequent proceedings. Party discontinuing proceeding or withdrawing defense must pay costs of any opposing party to date of discontinuance or withdrawal. Subject to terms of court's order, prior discontinuance or withdrawal is not a defence to a subsequent proceeding for same, or substantially same cause of action. (Rule 9).

Abatement.

Death abates personal actions unless the estate is affected. Abatement does not result from marriage, death or bankruptcy of any of the parties if the cause of action survives or continues. Whether the cause of action survives or not the occurrence of such events between the verdict or finding of the issues of fact, and the judgment, does not abate the action. Party to whom interest passes or estate devolves may continue the action.

See also topic 5.16 Limitation of Actions; category 13 Estates and Trusts, topic 13.05 Death, subhead Survival of Actions.

Limitation of.

See topic 5.16 Limitation of Actions.

Direct Actions Against Insurer.

Direct action may be against liability insurer where tortfeasor is unable to satisfy judgment against him. (c. 231, §28[1]). See category 23 Transportation, topic 23.03 Motor Vehicles, subhead Direct Actions.

5.03 APPEAL AND ERROR:

Appeals from orders and judgments of justices of the peace, stipendiary magistrates, city and municipal courts are to Supreme Court judge. Appeals to Supreme Court judge also expressly given by statutes.

Appeals from judge of Supreme Court of Nova Scotia (Trial Division) are to Supreme Court of Nova Scotia (Appeal Division).

Appeals from Supreme Court of N.S. (Appeal Division) are to Supreme Court of Canada.

How Brought.

Appeals to Supreme Court of Nova Scotia (Appeal Division) are brought by notice of appeal (Rules 90.05-90.10); to Supreme Court of Canada by notice of motion where leave is required; if no leave is required, notice of appeal is given.

Time.

Notice of appeal to Supreme Court of Nova Scotia (Appeal Division) must be served within ten days from date of judgment on interlocutory order; within 30 days in case of appeal from judgment under Divorce Act or any other judgments. Court may extend time for appeals from tribunal authorized by enactment. If enactment prescribes how or when appeal should be brought, it will be observed. Appeals to Supreme Court of Canada must be brought within 60 days from date of decision. (July and August are not included in computation of this 60-day period).

Limitations on Right of Appeal.

No appeal as of right to Supreme Court of Canada unless found in some statute. All appeals subject to leave of S.C.C. or S.C.N.S. (A.D.). No appeal from discretionary orders except in equitable matters. Refusal to grant special leave may not be appealed. (R.S.C. 1985, c. S-26, as am'd).

Appeal bond is not required in an appeal to Supreme Court of Nova Scotia (Appeal Division) but is required in appeal to Supreme Court of Canada.

Stay of Proceedings.

Supreme Court of Nova Scotia (Trial Division and Appeal Division) may direct a stay of proceedings in any cause pending before it. Application is made upon motion. Filing of notice of appeal does not operate as a stay of proceedings under order appealed from, unless Appeal Division or a judge thereof, or court appealed from, so orders. (Rule 90.41).

Character of Hearing.

Appeals are by way of rehearing.

See also topic 5.19 Practice.

5.04 CERTIORARI:

Individual may seek judicial review by Supreme Court of decision made by government decision-making authority by filing notice for judicial review under Rule 7.05. Court may grant order within its jurisdiction to give effect to decision on judicial review, including order dismissing proceedings, setting aside decision under review, injunction, declaration, and order providing anything formerly provided by prerogative writ (certiorari, mandamus, prohibition). (Rule 7.11). Appeal may be brought under legislation providing for appeal by way of notice of appeal filed under Rule 7.19.

Grounds.

Writ is directed to judge of inferior court or officer, etc. Certiorari lies unless expressly taken away by statute; but where certiorari is expressly made available by statute it can only be granted subject to restrictions imposed by statute and upon grounds therein set out.

Certiorari lies where a court has acted without jurisdiction, as in case of defect of jurisdiction from the nature of the case, and where the tribunal has a direct interest and is thus biased, as in case of collusion, corruption, fraud, etc.

Proceedings.

Order of certiorari may be granted by court upon application by an originating notice.

Such notice must be served upon every person interested or likely to be affected by proceeding, and where certiorari is sought to quash a conviction, warrant or inquiry, such notice must also be served, at least seven days before return date upon Attorney General and person making conviction or order, issuing warrant, or holding inquiry. Originating notice must include endorsement requiring persons served to return to prothonotary all pertinent records. (Rules 7 and 64).

Time.

Notice for judicial review for an order in nature of certiorari must be filed and served within 25 days after decision, action or allegation of failure to act to which it relates. (Rules 7.05 and 64.03).

Special Statutes.

Many statutes contain provisions regarding certiorari in special cases; e.g., Summary Proceedings Act (c. 450, as am'd by 1994-95, c. 18; 1996, c. 23; 1999 [2d sess.], c. 8; 2000, c. 28; 2001, c. 5; 2002, c. 10; 2003, c. 4; 2004, c. 4; 2006, cc. 2, 10; 2007, c. 45; 2008, c. 4 [s. 23 not in force); Probate Act (2000, c. 31, §104). Certiorari is however governed largely by common law.

5.05 CHARITABLE IMMUNITY:

See topic 5.07 Damages.

5.06 COSTS:

Costs are fixed by Costs and Fees Act (c. 104, as am'd by 2004, c. 3) which allows fixing of fees by Regulation; party and party costs which are fixed by Party and Party Committee and are published in Royal Gazette (c. 104, §2, as am'd by 2001, c. 42) and may be taxed by judge of Supreme Court or by adjudicator of Small Claims Court (1999 [2d sess.], c. 8; 2000, c. 28, §98). Solicitors' bills are taxable by Adjudicator of Small Claims Court. Solicitor may bring proceeding for any costs due to him, but judgment shall not be entered on default, and no costs shall be allowed except upon order of court which may direct taxation of costs. Subject to appeal and terms of order under which taxation has been made, order given upon taxation is final and conclusive as to amounts mentioned against any person who received notice of taxation. (Rule 77.16). Contingent fee agreements permitted, but are subject to taxation and conditions in Rule 77. Costs of and incident to all proceedings in Supreme Court including administration of estates and trusts, are in discretion of court or judge. Costs generally follow event. Costs generally awarded to successful party. If cause is removed from inferior court, costs in court below follow event unless otherwise ordered. If solicitor by neglect causes delay, he must personally pay such costs as court awards.

Security for costs may be ordered where by law or practice a party has heretofore been entitled to obtain such security and also, where plaintiff resides out of province; where he is ordinarily out of province, though temporarily resident within province; where plaintiff has brought another action for same cause, which is pending in province or elsewhere; or where plaintiff has had costs awarded against him which have not been paid; where a proceeding is brought by a nominal plaintiff, or is frivolous and vexatious, and plaintiff does not have sufficient property in jurisdiction to pay costs, or is class action and plaintiff is instigated by others; by enactment; where plaintiff's address not properly given; or where defendant on an ex parte application obtains an order for security of costs. Judge may make such order for security of costs as just. Where security for costs ordered, proceeding is stayed upon service of order until security is given, and upon default, may be dismissed upon ex parte application.

5.07 DAMAGES:

Common law generally prevails. Court may set rate of interest for capitalized value of future damages. (c. 240, §41). Court may award prejudgment interest from date of cause of action to date of judgment. (c. 240, §41).

Comparative Negligence Rule.

Rule adopted. Defendant cannot rely on plaintiff's contributory negligence as complete defence, but court must apportion damages in proportion to degree of fault found against each party. (c. 95).

Charitable Immunity.

Doctrine of charitable immunity not recognised.

Sovereign Immunity.

Lawsuits are permitted against governmental units. Lawsuits governed by Proceedings Against the Crown Act (c. 360 as am'd by 1991, c. 16) or other specific enactment.

Contribution Among Tortfeasors.

Tortfeasors Act (c. 471) governs contribution between and among tortfeasors.

See also category 13 Estates and Trusts, topic 13.05 Death, subhead Actions for Death.

5.08 DECLARATORY JUDGMENTS:

See topic 5.15 Judgments.

5.09 DEPOSITIONS AND DISCOVERY:

Testimony in judicial proceedings is generally taken by oral examination, but any party may serve written interrogatories on an adverse party or adverse corporate party's designated manager after close of pleadings, or upon any person not a party any time after discovery of parties complete. If such person is a body corporate, partnership or association, designated manager appointed under Rule 14.14 shall answer interrogatories. (Rule 19.05). Leave of court not required. (Rule 19.01). In practice it is only in very simple cases that it is done by interrogatories; where case is complex it is advisable to proceed via examination for discovery. (Rule 18).

Commissions.

Any witness who is about to leave province, or is too ill to travel may be examined before a judge or commissioner. Such person may be examined without an order after five clear days notice of time and place of examination has been given person and all other parties.

Outside of Province for Use within Province.

Where a person to be examined resides outside jurisdiction and in a country with a government that allows a person to be examined before a person appointed by court, court may grant an order for examination in prescribed Form 56.04. Where a person resides in any other country, court may grant an order authorizing issue of a letter of request in Form 56.08 to judicial authorities of country to take, or have taken, evidence of person in that country.

Compelling Attendance of Witnesses.

If any person duly summoned by subpoena and paid or tendered witness fees as provided by Costs and Fees Act (c. 104, as am'd by 2004, c. 3) to attend for examination refuses to attend, or if, having attended, refuses to be sworn or to answer any lawful question, party requiring attendance of witness may apply to court or judge ex parte or on notice for order directing witness to attend or to be sworn, or to answer any question, or to produce any document. Refusal after this point subjects person to contempt of court charge. (Rule 18). Subpoena may be issued for service in another province of Canada if party issuing subpoena can satisfy judge of Supreme Court of Nova Scotia that witness's presence in Nova Scotia is necessary for due adjudication of proceedings and essential to due administration of justice. (1996, c. 1, §7).

Letters of Request.

In the case of letters of request, notice of motion is given to adverse party, and the application is supported by affidavit showing that request for commission evidence to be taken outside of province is in interests of justice. (Rule 56.08). The letters are forwarded by the court through the proper channels, e.g., to Secretary of State for external affairs, to foreign ambassador, etc.

Examination of Witnesses on Commission.

Where such orders for examination of witnesses are made, examination takes place in presence of counsel or agents of parties, and witnesses are subject to cross-examination and reexamination. Unless otherwise directed, witness is examined by oral questions, and answers are reduced to writing and returned with order or letter of request. Deposition is recorded by a reporter. Unless person examined so requests, deposition taken in shorthand need not be read over and signed by him, but must be certified and signed by reporter and examiner. Where deposition not taken down in shorthand, it shall be examined and signed by person examined and examiner, or if person examined refuses to do so, examiner certifies and signs it. Depositions or copies must be sent to prothonotary. Examiner may make a special report to court regarding examination, conduct or absence of persons thereat, and court will make an order accordingly. Where a person objects on an examination to answer any question put to him, or objection is taken to any such question, ground of objection and answer to question shall be set out in person's deposition. Court decides validity of objections. Deposition may be used in evidence on trial or hearing if party using it gives other party notice of his intention to do so at least two days prior to trial, rules of evidence are adhered to and it is used to contradict or impeach deponent's testimony as a witness, or where deponent is a party, for any purpose, or where deponent is dead, unable to attend trial, or out of jurisdiction.

5.10 EQUITY:

See topic 5.02 Actions.

5.11 EVIDENCE:

Witnesses.

All persons are competent to testify to give evidence in civil proceedings except lunatics, drunkards, infants and the like, in which case the incapacity is only co-extensive with the defect. If child understands duty to tell truth, his evidence may be admissible even if child does not understand nature of oath, but such evidence shall not determine issue unless corroborated. (c. 154, §63).

No person is incompetent as a witness by reason of conviction of crime or from interest. (c. 154, §44). On trial of any action matter or proceeding, parties thereto and their husbands and wives are competent and compellable to give evidence on behalf of either or any of parties. (c. 154, §45).

See also topic 5.09 Depositions and Discovery.

Privileged Communications.

All communications between solicitor and client of a confidential nature and written to the solicitor in his professional capacity for purpose of securing legal advice are privileged, whether or not litigation is contemplated or pending. When litigation is contemplated or pending, communications made between solicitors and third persons are privileged. Communications between a party and a stranger are privileged only if litigation is contemplated or pending, and, if the party is acting for the solicitor, i.e., to help the solicitor prepare his case. Communications between co-plaintiffs and co-defendants are not privileged as such. Privilege does not extend to documents publici juris. Documents relevant to fraud or illegality are never privileged. Client may waive privilege; solicitor cannot.

Witness excused from answering any question as to any proceedings before, or producing any reports or recommendations of, hospital research or peer review committees used in any study, research or program carried on by hospital or for purpose of education or improvement in medical or hospital care or practice. (c. 154, §60).

Husband and Wife.

Parties to an action instituted in consequence of adultery, and their husbands and wives, are competent but not compellable to give evidence; but husband or wife must not be asked, and is not bound to answer any question tending to show that he or she has been guilty of adultery unless he or she has already given evidence in the same action in disproof of his or her alleged adultery or unless permission to ask such question is given by the presiding judge. (c. 154, §46). Husband is not compellable to disclose any communication made to him by his wife during marriage; same applied to wife. (c. 154, §49).

Communications or Transactions With Persons Since Deceased.

In any action or proceeding by or against the heirs, executors, administrators or assigns of a deceased person, an opposite or interested party cannot obtain a verdict, judgment, award or decision therein on his own testimony or that of his wife or both of them, in respect to any dealing, transaction or agreement with the deceased, or in respect to any act, statement, acknowledgment or admission of the deceased unless such testimony is corroborated by other material evidence. (c. 154, §45).

Self-incrimination.

No witness is excused from answering any question upon the ground that it may tend to criminate him, or may tend to establish his liability to a civil proceeding; but if the witness objects to answer on either of those grounds, then although the witness is compelled to answer, the answer so given cannot be used or received in evidence against him in any criminal proceeding other than a prosecution for perjury in giving such evidence. (c. 154, §59).

5.12 FEES:

Supreme Court and Court of Appeal filing fees include: $190.45 to file originating notice; $87.06 to file defence; $57.68 to file interlocutory notice; $127.33 to file appeal; $255.75 to file notice of trial without jury; and $380.90 to file notice of trial with jury.

5.13 INJUNCTIONS:

Supreme Court (Trial Division) has jurisdiction to grant injunctions in all cases in which it appears to it to be just or convenient that such an order should be made. Writs of injunction can no longer be issued, injunctions are granted by order. Court may grant an injunction either before, at or after hearing of any cause or matter, to prevent any threatened or apprehended waste or trespass, whether person against whom it is sought is or is not in possession, and whether estates claimed by either or both parties are legal or equitable. No cause or proceeding at any time pending in Supreme Court can be restrained by injunction. (c. 240, as am'd by 1989, c. 20; 1992, c. 16; 1996, c. 23; 1997 [2nd sess.], c. 5; 1998, c. 12; 2000, c. 28, §55; 2003 [2nd sess.], c. 1; 2008, c. 60; 2009, c. 17 [not in force]).

Common law rules apply as to cases in which injunctions are granted and also as to prerequisites to the granting injunctions.

Temporary Injunction.

Any party may apply to court or judge for interlocutory or temporary injunction. Except in case of urgency when application for injunction may be made ex parte, application must be upon notice. In any cause or matter in which injunction has or might have been claimed, plaintiff may, before or after judgment, apply for injunction to restrain defendant from repetition of wrongful act or breach of contract complained of, or from committing any act of like kind, relating to same property or right. Interim or interlocutory injunctions cannot be granted to restrain normal farm or agricultural operations. (2000. c. 3).

See also category 11 Employment, topic 11.02 Labour Relations, subhead Labour Disputes.

5.14 JOINT TORTFEASORS:

See topic 5.15 Judgments, subhead Contribution.

5.15 JUDGMENTS:

Judgments may be interlocutory or final. A final judgment determines the principal matter in question. An interlocutory judgment or order is one which does not finally dispose of the rights of the parties. Judgment may be final for one purpose and interlocutory for another.

Contribution.

Tortfeasors Act (c. 471) governs contribution between and among tortfeasors.

Judgments by Confession.

Any defendant may confess judgment in an action. This may be done by filing with the prothonotary out of whose office the writ was issued, a signed statement that he cannot deny the action, and that he confesses that he is indebted to the plaintiff for the amount named therein. The prothonotary may then enter the judgment. It may also be done through the defendant's solicitor or agent by filing a warrant of authority to such agent, the agent may then sign the confession and file the same.

Admissions.

Any party may at any stage of a cause or matter, where admissions of fact have been made on pleadings, apply to court or a judge for such judgment as upon such admissions he is entitled to, without waiting for determination of any other question between parties. Court may give such judgment as it thinks fit.

Judgment Preliminary to Trial.

At any time prior to a trial or hearing, in limited circumstances, party may seek determination of question of law, and where in opinion of court, determination of such question or issue substantially disposes of whole proceeding, or any cause of action, ground of defence, counterclaim or reply, court may grant judgment or order as it thinks just. (Rule 12).

Striking out Pleadings.

Prothonotary or party may make motion to strike pleadings on basis that it amounts to abuse of process. (Rule 88.03).

Summary Judgment.

Judge may set aside statement of claim or statement of defence that discloses no cause of action or basis for defence or contest, makes claim based on cause of action within jurisdiction of another court, or is clearly unsustainable. Judge may set aside all or part of pleading. Motion for summary judgment on pleadings determined only on basis of pleadings. Judge hearing motion for summary judgment on evidence must grant judgment for amount to be determined if only issue is amount to be paid on claim. (Rule 13).

Declaratory Judgments.

No action or proceeding is open to objection on the ground that a merely declaratory judgment or order is sought, and the court may make binding declarations of right whether any consequential relief is or could be claimed or not. Declarations of right may be made on application by originating summons, to determine any question of construction arising under deeds, wills or other written instruments. The jurisdiction of the court to make such declarations is in effect only limited by its own judicial discretion, but it is carefully exercised, and the plaintiff must be entitled to relief.

Default Judgments.

(1) *In default of appearance:* Appearance is no longer used.

(2) *In default of pleading:* Prothonotary may grant default judgment if party against whom judgment is sought is notified of claim, time for filing defence has expired, no defence is filed, and judgment is for damages only. Motion for default judgment if no demand for notice was filed by party against whom judgment is sought is made by filing draft order for judgment, bill of costs and proof of notification. If demand for notice was filed or party seeking default judgment chooses to do so on notice, motion for default judgment made by making motion to prothonotary on notice in accordance with Rule 30. Judge may grant default judgment in any action on any claim if party against whom judgment is sought is notified in accordance with Rule 31, time for filing defence is expired, and no defence is filed. Terms of default judgment may be determined on basis that all pleadings in support of claim have been admitted. Judge may assess damages or grant any other remedy on default judgment. Judge may set aside default judgment issued by prothonotary or made on *ex parte* motion by judge. (Rule 8).

Record and Liens.

Every judgment is entered by the prothonotary in a book kept for the purpose, and is dated as of the day it was pronounced, and takes effect from that date. It may by special leave be ante-dated or post-dated. A judgment may be registered in the registry of deeds, and then binds and is a charge upon any land in the registration district of any person against whom it was recovered, whether acquired before or after its registration. (c. 392, §20, as am'd by 2001, c. 6). Registered judgment also binds interest in land of cestui que trust. (c. 409, §5). If registered and unsatisfied, it continues to be lien on land for 20 years, and for longer period if any payment was made on it.

Assignment.

An absolute written assignment by the assignor of any judgment, of which express notice in writing, is given to the debtor, transfers the legal right to such judgment to the assignee from the date of such notice, and the power to give a good discharge for the same without the concurrence of the assignor. (c. 240, §43 as am'd by 1992, c. 16).

Satisfaction.

If defendant pays amount owing under judgment, it is satisfied or discharged. A satisfaction piece should then be made out stating that it is satisfied; this must be signed by plaintiff or his personal representative or his solicitor or by any other person entitled to benefit thereof who attaches to satisfaction piece an affidavit establishing his entitlement, unless a judge on special circumstances dispenses with such authorization. Form of satisfaction piece is as follows:

Form

20. . . . S. C. No. . . . . . .

In the Supreme Court (Trial Division)

Between A. B. Plaintiff

and

C. D. Defendant

Satisfaction is acknowledged of the order entered by the [Plaintiff] [defendant] against the [plaintiff] [defendant] on the. . . . . . day of. . . . ., 20. . . ., for the sum of $. . . . . and costs of $. . . . . Dated at. . . . ., Nova Scotia, this. . . . . . day of. . . . ., 20. . . ..

(Sgd.). . . . .

Foreign judgments can be enforced only by action thereon. If no defense made in original action any defense which might have been made therein is available in an action on the judgment. A judgment in rem of a foreign court of competent jurisdiction is conclusive as to title in the absence of fraud. A foreign judgment in personam can only be upset by showing fraud or lack of jurisdiction. Reciprocal Enforcement of Judgments Act provides for enforcement by registration. Applies only to reciprocating states. Reciprocating states are United Kingdom and Northern Ireland, and all Provinces of Canada except Quebec. (cc. 52, 388, as am'd by 2002, c. 9). No U.S. states are reciprocating states. Judgment may be registered ex parte if debtor was personally served or submitted to jurisdiction in original proceeding. Other registrations require notice to debtor. No registration if original court lacked jurisdiction, fraud, public policy, appeal pending. Must register within six years of original judgment. Once registered has same effect as N.S. Judgment. (c. 388, §3). Canadian judgments may also be registered under Enforcement of Canadian Judgments and Decrees Act. (2001, c. 30, as am'd by 2005, c. 49).

Execution.

See category 8 Debtor and Creditor, topic 8.06 Executions.

Contribution.

A joint tortfeasor may recover contribution or indemnity after making a settlement with the injured party. (c. 471).

5.16 LIMITATION OF ACTIONS:

Actions must be brought within following times after cause of action arose:

One year: For assault, imprisonment, slander, menace, battery or wounding, assault based on sexual abuse, cause of action for which does not arise until victim becomes aware of injury or harm, and limitation period for which does not begin to run while victim is not reasonably capable of commencing proceeding because of physical, mental, or psychological condition arising from sexual abuse. (c. 258, §2, as am'd by 1993, c. 27).

Two years: For penalties, damages or sums of money given to parties aggrieved by any statute; for damages arising out of motor vehicle accidents (c. 258, §2, as am'd by 2003 [2nd sess.], c. 1); for damages for medical or dental negligence or malpractice (c. 258, §2).

Six years: Actions grounded upon contract, lending, award, or for money levied by execution; actions for direct injuries to real or personal property; for the taking away or conversion of property; libel, malicious prosecution and arrest, seduction, criminal conversation, and all actions which would have been brought as trespass on the case; arrears of dower or rent, actions of account; action on foreign judgment. (c. 258, §§2, 25-26).

Twenty years: For recovery of land; for rent upon an indenture of demise, upon a bond or other specialty, upon a judgment or recognizance; for recovery of money secured by mortgage, judgment or lien or otherwise charged or payable out of any land or rent or any legacy. (c. 258, §§2, 10, 23).

Special cases may be provided for in special statutes.

Time commences to run from the time the cause of action accrues. Cause of action in tort generally held to accrue at time plaintiff knew or should have known that he suffered damage or injury.

Disabilities.

Infants, persons of unsound mind, or persons out of province may bring action immediately disability is removed, and statute does not run against such person until such removal. Similarly statute does not run in their favor until removal of disability, and action can then be brought against them. (c. 258, §§4-5). Person under disability or person claiming through him is allowed ten years from termination of disability or death of such person to make entry or distress, or to bring action to recover land or rent; but in any case such entry, action, or etc., must be brought within 40 years from time when right first accrued; in the case of claim of rent by Crown, must be brought within 60 years. (c. 258, §§20-21).

Death.

By the Survival of Actions Act, c. 453, personal rights of action survive, and may be maintained by executors or administrators, if brought within six months after representation is taken out, and in any event, not later than two years after death.

Acknowledgment or promise in writing signed by the party chargeable deprives such party of the benefit of the statute in the case of an action grounded on simple contract; new acknowledgment or promise is also sufficient if in writing. If any acknowledgment has been made either by writing signed by the party liable by virtue of an indenture, or of any specialty or recognizance, or his agent, or by part payment or part satisfaction on account of any principal or interest being then due thereon, the person entitled may bring an action for the money remaining unpaid and so acknowledged to be due, at any time within 20 years after such acknowledgment, part payment or part satisfaction: if the party entitled or the party making the acknowledgment is at the time of making the same, under a disability, then within 20 years after the removal of the disability. Indorsement or memorandum of any payment written or made upon any promissory note, bill of exchange or other writing, by or on behalf of the party to whom such payment was made, is not sufficient proof of such payment so as to take the case out of the operation of the statute. (c. 258, §§8, 9).

Pleading.

Statute of limitations must be specially pleaded.

Relief.

In cases of limitation periods of less than ten years, except for mechanics liens limitations, court may grant relief from limitation period where equitable within four years from date of expiration of limitation period. (c. 258, §3).

5.17 PARTITION:

Any one or more persons holding land as joint tenants, coparceners, or tenants in common, may bring an action in the Supreme Court for its partition. (c. 333, §5). Such action may be maintained by person who has estate in possession but not by mere remainderman or reversioner. (c. 333, §6). Tenant for term of years, unless 20 years at least remain unexpired, cannot maintain such action against a free-hold tenant (c. 333, §8), but may against tenant for term of years.

Proceedings.

The action is brought in the ordinary way. The statement of claim must set forth the rights and titles, so far as known to the plaintiff, of all persons interested in the land who would be bound by the partition, whether they have an estate of inheritance, for life, years, in possession, remainder or reversion and whether vested or contingent. (c. 333, §9). If any parties are unknown, court may appoint one or more persons to represent them, and judgment or order is binding on such parties. (c. 333, §10). Person not named as party may be joined by leave of court. (c. 333, §13). Defendant in his defense may plead any matter tending to show that plaintiff ought not to have partition either wholly or partially. If defendant fails to appear or to deliver defense or if after trial it appears that partition should be made, court must make order for partition specifying persons entitled and their respective shares. (c. 333, §17). Then unless it appears to court that sale is necessary, it may appoint three commissioners to make partition. (c. 333, §18). Commissioners divide land and allot shares to the persons mentioned in order, designating shares by sufficient monuments. Report of commissioners is valid if two of them concur. (c. 333, §23).

Sale.

Where the land cannot be divided without prejudice to parties entitled, or where any party is because of infancy, insanity, or absence from the province, prevented from accepting such land, the court may order that the land be sold and the next proceeds be divided among the parties entitled. This order may be made in lieu of order appointing commission or after it. Every person interested and every incumbrancer must have at least two days notice of the application for sale; in case of infancy, insanity or absence from the province, court may order notice to be served on guardian or by publication. (c. 333, §28). Sheriff of county in which land lies, or auctioneer or person mentioned in order may make sale and execute deed; or court may make vesting order conveying land to purchaser, who thereby acquires all interest and title, of all persons interested in the land and of all encumbrancers. Where land is subject to dower or encumbrances, or where person entitled to share is unknown, infant, insane or absent from province, and was not personally served, proceeds of sale must be paid into court, or to such persons and according to such priorities, and amounts as court directs. Report of person making sale is subject to confirmation by court. (c. 333, §32).

5.18 PLEADING:

Governed by Judicature Act (c. 240, as am'd by 1989, c. 20; 1992, c. 16; 1996, c. 23; 1997 [2nd sess.], c. 5; 1998, c. 12; 2000, c. 28, §55; 2003 [2nd sess.], c. 1; 2008, c. 60; 2009, c. 17 [not in force]) and Rules of the Supreme Court (Nova Scotia Rules of Civil Procedure) which have force and effect of statute. Act and rules are modelled from English Act and Rules and are similar.

By its pleading, party must provide notice to other party of all claims, defences or grounds to be raised by party signing pleading. Pleading must inform other party of case to be met when preparing for and participating in trial or hearing. Material facts must be pleaded, but evidence proving material facts must not be pleaded. Party may plead point of law if material facts making it applicable are also pleaded. Description of person in pleadings must not contain more personal information than necessary to identify person and show person's relationship to claim or defence. Claims or defences may be pleaded in alternative, but facts supporting alternative claim or defence must be pleaded distinctly. Pleading referring to material document, such as contract, must identify document and concisely describe effect without quoting text, unless exact wording of text is material. Pleading alleging that notice was given must state when notice was given, identify person notified and concisely describe content of notice without quoting text, unless exact wording of text is material. Pleading must provide full particulars of claim alleging unconscionable conduct, such as fraud or fraudulent misrepresentation. Statement of claim must state remedy sought from court. (Rule 38).

Pleadings Required.

Action must be commenced by filing with prothonotary a notice of action with statement of claim attached. Defence must be filed within ten days of service or originating notice. Appearance is no longer used. A pleading subsequent to defence other than counterclaim, defence to counterclaim and third party proceedings, shall not be filed or served without written consent of parties or leave of court. Reply no longer required in most proceedings.

Statement of claim must be attached to and served with notice of action. Must set out to summary form material facts upon which party bases his claim; particulars of any damages, special or general, that are ascertained or capable of being calculated in terms of money, with these damages and amount thereof being claimed as special damages; particulars of any other general damages, but amount thereof need not be stated; any other specific relief or remedy being claimed, but costs need not be claimed.

Defence.

All allegations in statement of claim are deemed to be denied unless expressly admitted in defence. Party in his defence shall plead his version of facts where he intends to prove a different version than that relied upon by opposing party, specifically plead any matter, e.g., performance, release, payment, statute of limitation, fraud, or any fact showing illegality that might make claim of opposing party not maintainable, surprise opposing party or raise issues of fact not arising out of preceding pleadings. General denial is insufficient. Defence must be filed in prothonotary's office within ten days of service of originating notice with certified copy delivered or mailed to opposing party on day it is received from prothonotary.

Reply.

No longer required in most proceedings. See subhead Subsequent Pleadings, infra.

Subsequent Pleadings.

Rarely used. Can only be filed or served with consent of parties or leave of court. Unless court otherwise orders, pleadings are deemed closed upon filing and service of defence or defence to counterclaim, at which time all material statements of facts in pleading last delivered are deemed to have been denied and put in issue.

Set-off and Counterclaim.

Where a claim by a party to a sum of money, whether amount is ascertained or not, is relied on as a defence to whole or part of a claim made by an opposing party, it may be included in defence and set off against claim, whether or not it is also added as a counterclaim. Where defendant has a claim against plaintiff in any cause of action, he may, rather than bring a separate proceeding, counterclaim. Unless court otherwise orders, defendant must add counterclaim to his defence and file and serve it with defence. Plaintiff must serve and file his defence to counterclaim within ten days from service of defence and counterclaim on him. Unless otherwise ordered, defendant may join a person not yet a party with plaintiff as defendants to counterclaim by adding both names to title of proceedings and with respect to person not previously a party, filing and personally serving a notice of defence and counterclaim in prescribed form 4.08A on him within days from service of originating notice in original proceeding on defendant, or as court orders. Person served with notice of defence and counterclaim becomes a party to counterclaim from time of service, with same rights as any defendant. Counterclaim is separate proceeding and court may proceed with it notwithstanding that judgment is given for plaintiff in original proceeding or that original proceeding is stayed, discontinued or dismissed; pronounce final judgment on both original claim and counterclaim; give judgment for a balance in favour of one party; order counterclaim excluded or tried separately or make such order as is just. (Rule 4.08).

Demurrers.

No demurrer allowed. Party can raise point of law by his pleading, and on party's application or its own motion, court may determine question prior to trial or hearing or at or after trial. Pleadings may be struck out on ground that they disclose no reasonable cause of action or defence. False, frivolous, and vexatious pleadings may be set aside. These proceedings are in lieu of demurrer. (Rule 12, 13.03, 88.03).

Amendment.

Party may amend notice by which action is started, notice of defence, counterclaim, crossclaim, or third party notice if amendment is made no later than ten days after date pleadings close, unless other parties agree or judge permits otherwise. Party to proceeding other than action may amend notice by which proceeding is started or notice of contest, participation or contention, with agreement of parties affected by amendment or with permission of judge. Notice starting proceeding or third party notice may be amended to add party except where resultant amendment makes claim against new party where limitation period has expired, precluding claim. Notice may be amended to remove party from proceeding. Party who files document in response to document that is later amended may amend response document no more than ten days after responding party is notified of amendment. Judge may give permission to amend court document at any time if satisfied that material facts applicable to cause of action are pleaded and amendment merely identifies, or better describes, cause. (Rule 83).

Motion for Judgment.

No longer used. See topic 5.15 Judgments.

Particulars.

Where party pleading relies on any misrepresentation, fraud, breach of trust, wilful default, or undue influence, or alleges any condition of mind of a person including disorder, malice or fraudulent intent, and in all other cases in which particulars may be necessary beyond usual forms, particulars must be stated in pleading. Further and better statement of defense or further and better particulars of any matter stated in any pleading, may in all cases be ordered. Pleader must give sufficient particulars so opponent will not be surprised.

In forwarding claims to attorneys, Christian and surnames, and residences of proposed plaintiffs and defendants and itemized particulars of the claim should be given.

5.19 PRACTICE:

Common law system in force.

The rules of the Supreme Court govern practice in Supreme Court and Court of Appeal. These rules do not affect procedure or practice in criminal proceedings. Rules for proceedings for divorce or other matrimonial cause are outlined in Rule 57. Party may conduct his own case, otherwise must be conducted by barrister of Supreme Court of Nova Scotia. Articled clerks may conduct cases in smaller courts, but not in Supreme Court. Rules on Internet at http://www.courts.ns.ca.

Discovery.

Oral or written is permitted. (Rule 18). Rule 16 prescribes duties for preservation and production of relevant electronic information.

Demand for admission of facts is permitted. Effect of refusal considered in taxing costs. (Rule 20.03).

Direct Action Against Insurer.

Direct action may lie against liability insurer where tortfeasor is unable to satisfy judgment against him. (c. 231, §28[1]). See also category 23 Transportation, topic 23.03 Motor Vehicles, subhead Direct Actions.

Small Claims.

See category 6 Courts and Legislature, topic 6.01 Courts.

See also topics 5.02 Actions, Appeal and Error, Depositions and Discovery, Injunctions, Pleading, Process; category 8 Debtor and Creditor, topics 8.03 Attachment, 8.06 Executions, 8.10 Garnishment.

5.20 PROCESS:

Civil actions are commenced by filing in prothonotary's office a notice of action [prescribed form 4.02A]) with attached statement of claim, stating nature of claim or relief or remedy required. Notice of action must state whether action falls within Rule 57 for action for damages under $100,000. Plaintiff claiming only debt without interest may start action by filing notice of action for debt. (Rule 4.03). Plaintiff may bring application instead of action if rights asserted may erode before reaching trial, if evidence and witnesses can be ascertained quickly and if hearing length and content predictable. (Rule 6.02). Proceeding in which sole or principal question is one of law, or construction of an enactment, will or other document, in which there is unlikely to be any substantial dispute of fact, or which may be commenced by an application in chambers, motion, summons, petition or otherwise under an enactment is commenced by filing a notice of application in chambers in prescribed form 5.03 in a proceeding between parties, and by an ex parte application in Form 5.02 in an ex parte proceeding. Notice of action is signed by plaintiff or his solicitor, and must have endorsed thereon address of plaintiff or his solicitor. Prothonotary may issue concurrent originating notice, a true copy of original, at any time while original is valid, which unless renewed pursuant to court order, is for period of one year from date of issue. (Rule 4.04).

Service of notice is by personal service on each defendant by plaintiff or his agent, except on an ex parte application or where a rule otherwise provides. Ex parte application is served by filing notice and affidavit with prothonotary.

Who May Serve.

See subhead Service of Notice, supra.

Personal Service.

Effected on an individual by leaving a true copy of document with him. (Rule 31.03).

Service on Infant or Mentally Incompetent Person.

Service effected on child by leaving a true copy of document with his father, mother or guardian with whom child resides or person exercising care and control over child or person designated by judge. Service effected on person unable to manage own affairs by leaving true copy of document with guardian, litigation guardian or person designated by judge. (Rule 31.03).

Service on Corporation.

Unregistered corporation or any society or fellowship may be served by serving principal officer thereof or clerk or secretary. (Rule 31.03). Provincial corporation may also be served by leaving document at or mailing document to its registered office. (c. 81, §154). Any corporation whether domestic, dominion or foreign may be served by service on its registered agent resident within province. (Rule 31.03; c. 101, §9).

Service on Partnership.

If sued in partnership name, by leaving a true copy of document with principal officer, clerk, secretary or registered agent. (Rule 31.03; c. 335, §18 as am'd by 1990, c. 15).

Substituted Service.

If prompt personal service cannot be made, the court may order substituted service or a service by notice or by service on person who might be in contact with party or by mailing order and document to address where party might receive it. Application for substituted service must be supported by affidavit setting forth efforts to locate party. There cannot be substituted service where a personal service would not be legally possible. The effect of substituted service is that the judgment is regular and cannot be set aside unless defendant shows he actually received no knowledge of writ and he has a good defence on merits. (Rule 31.10).

Service by publication may be ordered by court where personal service cannot be effected. Same as substituted service.

Service out of the Province.

Notice of action may be served on party outside of Nova Scotia but in Canada without order for service outside jurisdiction. Party outside Canada may be notified without order for service outside jurisdiction, if person in state bound by Convention on Service Abroad of Judicial or Extrajudicial Documents in Civil or Commercial Matters. Person giving notice by personal service in any other state must make motion for order for service outside jurisdiction. (Rule 31.09).

After obtaining leave of court a copy of originating notice certified by prothonotary and a copy translated into language of country in which service is to be effected is sent by prothonotary to Under Secretary of State for External Affairs, with instructions that it be transmitted to government of country in which it is to be served with a request that service be effected and a return be made showing how service has been effected. Prior to transmission of documents to be served, plaintiff's solicitor provides money to answer fees in connection with service. Personal service not required if Nova Scotia rules do not require it, or if it is not practice in foreign country. Proof of service outside Canada or U.S. may be by affidavit or by official return of government official.

Service by Mail.

Document not requiring personal service may be served by leaving document or a copy at person's proper address, mailing it to that address, faxing it to person's proper fax number, or in such other manner as court may order. Service is deemed effective on second day following posting where delivery is local and otherwise on day document in ordinary course of post would be delivered. (Rule 31).

Proof of Service.

Service may be verified by affidavit of person serving, or written acceptance of service by party's solicitor or agent. (Rules31.05, 31.06).

Nonresident Motorist.

See category 23 Transportation, topic 23.03 Motor Vehicles, subhead Actions Against Nonresidents.

5.21 REPLEVIN:

Orders for replevin have been replaced by recovery orders. (Rule 43). Any party or intervenor in a proceeding may make motion to Prothonotary for order to recover possession of real or personal property that was unlawfully taken or detained from him by any other party, or is held by an officer or under any legal process issued in proceeding. Interlocutory order to recover possession of personal property is issued by prothonotary upon ex parte application, and an interlocutory order to recover possession of real property by court upon ex parte application. When it is sought to enforce an order for recovery of possession of property, a final recovery order may be obtained. (Rule 43.13).

Proceedings.

Before recovery order will be issued affidavit of party applying must be filed describing property, stating its value, that applicant is its owner or entitled to possession, that property was unlawfully taken or detained or is held under legal process, that applicant or his agent has made a demand for property which was refused, and that applicant was advised by his solicitor that he is entitled to recovery of possession of property. (Rule 43.03).

Bond.

Unless court otherwise orders, prothonotary before issuing order takes a bond from applicant in an amount equal to 1¼ times value of property with two sufficient sureties or recognized surety company. Conditions of bond are that applicant shall obtain without delay an order settling who is entitled to ownership or possession, return property if he fails to obtain such order and pay costs and damages awarded by court. Bond may be assigned by prothonotary to defendant. (Rule 43.04).

Order.

Recovery order in prescribed Form 43.05 instructs sheriff as to seizure procedure and requires him within 50 days of issuance to report to prothonotary on any action taken. Copy of order must be served upon person from who property is taken. Personal property not delivered on sheriff's demand, may be obtained by forced entry into a building. (Rule 43).

Repossession.

Defendant may retain possession on giving security, which may be assigned by prothonotary's endorsement thereon to party entitled.

Special Procedures.

Express provision is made for recovery of shares, bonds, debentures, and other interest in a body corporate. (Rule 43.09). Unique property obtained under recovery order may be ordered kept within jurisdiction. (Rule 43.11). Court may order sale of perishable property recovered. (Rule 43.11).

Final Recovery Order.

On final disposition of claim for recovered property, judge may issue order for possession of property, injunction directing one party to deliver property to another, declaration of property interests, or award damages. (Rule 43.13).

5.22 SEQUESTRATION:

Writ of sequestration replaced by contempt order issued under Rule 89. Contempt order cannot be used to enforce an order for payment of money unless order for family maintenance or support, or expressly provides that failure to pay is punishable as contempt (Rule 89.02), order for possession of real or personal property, or an order requiring person to do or abstain from doing an act. Court must grant party leave to make application for a contempt order; such application must be supported by affidavit describing applicant, person sought to be committed, and facts in support of grounds on which contempt order is sought. On its own motion or application court may order a person to appear to show cause why he should not be held in contempt. Contempt order may order imprisonment, fine and detention of property, and otherwise as deemed just. Contempt proceedings lie against bodies corporate and persons not parties. (Rule 89). See also category 8 Debtor and Creditor, topics 8.03 Attachment, 8.17 Receivers.

5.23 SERVICE:

See topic 5.20 Process.

5.24 SUBMISSION OF CONTROVERSY:

At any time prior to trial or hearing, in limited circumstances, party may seek determination of question of law and, where in opinion of court, determination of such question or issue subsequently disposes of whole proceeding, or any cause of action, ground of defence, counterclaim or reply, court may grant judgment or order as it thinks just. (Rule 12).

5.25 TORTFEASORS ACT:

See topic 5.15 Judgments, subhead Contribution.

5.26 VENUE:

Unless court otherwise orders, place of trial of a proceeding, or any question or issue arising therein shall be at place of trial named in notice by which proceeding is started, or motion is made. (Rule 47.03). Party may make motion to change place of trial or hearing. (Rule 47.04). All actions in which title to land is in issue shall be tried in county where lands lie. (c. 247, as am'd by 1996, c. 23).

Court Jurisdiction and Proceedings Transfer Act, 2003 [2nd sess.], c. 2 [not in force] defines territorial competence of Nova Scotia courts and authorizes transfer of proceedings to and from courts outside Nova Scotia where receiving court has territorial subject matter competence.

6 COURTS AND LEGISLATURE

6.01 COURTS:

Supreme Court of Nova Scotia exercises original jurisdiction in civil and criminal causes, including divorce, and Nova Scotia Court of Appeal exercises appellate jurisdiction in civil and criminal causes, including divorce. They are courts of common law and equity. No original jurisdiction in actions to recover debt or liquidated demand $25,000 or less (c. 240, as am'd by

1989, c. 20; 1992, c. 16; 1996, c. 23; 1997 [2nd sess.], c. 5; 1998, c. 12; 2000, c. 28, §55; 2003 [2nd sess.], c. 1).

The Court of Probate has jurisdiction: to grant probate of wills and letters of administration whether general or limited, of estates of deceased persons; to revoke or cancel such probate and letters; to effect and carry out judicial administration of estates of deceased persons through representatives, and to hear and determine all questions, matters and things necessary in relation thereto; and to appoint guardians, (2000, c. 31, §8). Jurisdiction of Supreme Court in these matters is not taken away. (2000, c. 31, §8).

The Divorce Court has jurisdiction over all matters relating to prohibited marriages and may declare any marriage null and void if proper grounds are proved. See category 14 Family, topic 14.05 Divorce.

Family Court Act provides for family courts in areas of Province prescribed by Governor-in-Council, having jurisdiction under Provincial Statutes and certain provisions of Criminal Code having family connotation. (c. 159, as am'd by 1992, c. 16 [§§13(2), 16 not in force]; 1994-95, c. 6; 1996, c. 23; 2000, c. 28 [§§19-22 not in force]). Amendments to abolish Family Court and replace with Supreme Court of Nova Scotia (Family Division) not yet in force. (2000, c. 28, §§19-22 [not in force]).

Provincial court judges may be appointed by Governor in Council and have jurisdiction throughout Province. Jurisdiction principally confined to criminal matters. (c. 238, as am'd by 1992, c. 16 [§24(1) not in force]; 1996, c. 31; 2000, c. 28 [not in force]; 2006, c. 43). Judge of provincial court in another province may be appointed to preside over Nova Scotia action if in public interest. (cc. 9, 238, as am'd by 2006, c. 43).

Small Claims Court has jurisdiction in respect of monetary claims up to $25,000 or claims for delivery of property valued at not more than $25,000, c. 430, as amended by 2002, c. 10; 2005, c. 58. No jurisdiction in respect of recovery of land, wills or intestacies, defamation or malicious prosecution, landlord and tenant disputes or claims for general damages in excess of $100. Action commenced by filing claim with court. Service may be personal or by registered mail. Procedure very informal. Evidence may be admitted by adjudicator or court even though not admissible in court except privileged matters. Order of Small Claims Court may be made order of Supreme Court and enforced as such. (c. 430, as am'd by 1992, c. 16; 1996, c. 23; 1999 [2d sess.], c. 8; 2000, c. 28; 2002, c. 10; 2005, cc. 8, 58; 2007, c. 10, c. 53 [not in force]; 2008, c. 4 [not in force]).

6.02 JUSTICES OF THE PEACE:

Presiding Justice of Peace is appointed by Governor-in-Council of province (c. 244, §2, as am'd by 1992, c. 16; 2000, c. 28; 2007, c. 18), who may also remove him or her (c. 244, §8, as am'd by 1992, c. 16; 2000, c. 28; 2007, c. 18). Staff Justices of Peace are appointed by Minister of Justice (c. 244, §2, as am'd by 1992, c. 16; 2000, c. 28; 2007, c. 18), who may also remove them. Justices of Peace are supervised by Chief Judge of Provincial Court. See topic 6.01 Courts.

6.03 LEGISLATURE:

The Legislature sits every year, generally in the spring of the year. No statutory requirement as to holding regular sessions at any fixed time. Special or extraordinary sessions may be called. There is no provision for the initiative or referendum. (c. 210 as am'd by 1990, c. 21; 1992, c. 21). Conflicts of interest of members governed by 1987, c. 86.

6.04 REPORTS:

Decisions of Supreme Court of Nova Scotia are reported in Nova Scotia Reports (N. S.

R.) Vols. 1-60 (1834-1929), Maritime Province Reports Vols. 1-53 (1920-1968), Nova Scotia Reports 1965-69 (5 vols.), and Nova Scotia Reports 2nd Series (NSR [2d]) (1970-. . . . . .); Young's Admiralty Decisions (1865-1881). Nova Scotia cases together with cases from other provinces in Dominion Law Reports (D. L. R.) Vols. 1-70 (1912-1923); 1923-1955 each year containing four volumes; Dominion Law Reports, Second Series (D. L. R. [2d]) Vols. 1-70 (1956-1968); Dominion Law Reports, Third Series (D. L. R. [3d]) Vols. 1-150 (1969-1984). Dominion Law Reports, Fourth Series (D.L.R. [4th]) Vols. 1-. . . . (1984-. . . .). Eastern Law Reports (E. L. R.) Vols. 1-14 (1906-1914) also contain Nova Scotia decisions. Canadian Bankruptcy Reports (C. B. R.) Vols. 1-38 and new series (C.B.R. N.S.) cols. 1-. . . . . ., also contain bankruptcy decisions of Supreme Court of Nova Scotia along with other provinces. Appeals to Supreme Court of Canada are reported in Vols. 1-64 of Supreme Court Reports (S. C. R.), and 1923-1972 Canada Law Reports reporting Supreme Court of Canada, Exchequer Court of Canada and Federal Court of Canada cases. Exchequer Reports of Nova Scotia cases are found in Vols. 1-21 Exchequer Reports of Canada (1878-1927). Reports of Family Law (R. F. L.) Vol. 1. . . .. . (1971) and Land Compensation Reports (LCR) Vol. 1 (1972) contain report of N.S. cases in these fields.

Decisions of Supreme Court of Nova Scotia also available on Internet on Lexis Nexis Quicklaw at http://www.quicklaw.com, on Westlaw ECarswell at http://www.ecarswell.com, Maritime Law Book at http://www.mlb.nb.ca, on Nova Scotia Barristers' Society website at http://www.nsbs.ns.ca, and on Canadian Legal Information Institute website at http://legalresearch.org/docs/CANLII.htm.

Digests.

Nova Scotia: Congdon's (1875-1888); Geldert's (1888-1907); Armstrong's (1888-1903); Graham's (1907-1929); digests of cases for all Canadian provinces are contained in Canadian Consolidated Ten Year Law Digest (1911-1929), four volumes, and 1945-1961, 17 volumes; All Canadian Digest (1910-1934 inclusive) and annual volumes thereafter; and Canadian Abridgement Vols. 1-35; Consolidation 1936-1955 and annual volumes from 1955 to present now replaced by Canadian Abridgement, 2d Edition.

6.05 STATUTES:

Latest official compilation is Revised Statutes of Nova Scotia, 1989. (R. S. N. S.). The laws passed by the Nova Scotia Legislature in each year are published annually and are called “The Statutes of Nova Scotia” for the particular year in which they were passed. The Dominion legislates on matters which are Dominion-wide in scope; provinces on matters of local nature. Regulations Act passed but only partly in force requires publication of regulations and provides for public access to all regulations. (c. 393, as am'd by 1996, c. 23; 1999 [2nd sess.], c. 8; 2002, c. 30; 2004, c. 46).

Revised Statutes of Nova Scotia and Regulations also available on Internet Government of Nova Scotia website at http://www.gov.ns.ca and on Canadian Legal Information Institute website at http://legalresearch.org/docs/CANLII.htm.

Uniform Acts.

No Uniform Acts are in force in Province.

7 CRIMINAL LAW

7.01 BAIL:

See topic 7.02 Criminal Law.

7.02 CRIMINAL LAW:

Criminal law and Procedure in Criminal matters is within the exclusive Legislative Authority of the Parliament of Canada (Constitution Act, 1867 §91 [27]). See Canada Law Digest, category Criminal Law, topic Criminal Law. Provincial legislature may however make laws within specifically named powers set out in §92 of Constitution Act, 1867 for purpose of preventing crime, and may impose punishment by fine, penalty or imprisonment for enforcing any law of province in relation to any matters coming within any of classes of subjects enumerated in that section.

Offences created by provincial laws are “summary offences”. (c. 450, as am'd by 1994-95, c. 18; 1996, c. 23; 1999 [2d sess.], c. 8; 2000, c. 28, §§95, 96; 2001, c. 5; 2002, c. 10; 2003, c. 4; 2004, c. 4; 2006, c. 2, c. 10; 2007, c. 45; 2008, c. 4 [not in force]). Police are not to be convicted of summary offences under Motor Vehicle Act or Hotel Registration Act if committed during investigation of drug offences. (c. 450, §5). Youth Justice Act, 2001, c. 38, as amended by 2002, c. 10; 2005, c. 32 governs prosecution procedures for persons under 18 years of age and provides for extrajudicial measures where appropriate and effective to deal with youth crime.

Everyone obliged to report material reasonably believed to be child pornography. (2008, c. 35 [not in force]).

Compensation.

Subject to certain limitations, compensation may be awarded to individual victims, or their dependants, of certain offences under Criminal Code up to lump sum of $30,000 or periodic payments of $1,000 per month. (c. 83, §29 as am'd by 1992, c. 36 [§7 not in force]; 2003, c. 7).

8 DEBTOR AND CREDITOR

8.01 ASSIGNMENTS:

Rights, debts or choses in action are assignable. Assignor may make absolute assignment of any debt or legal chose in action by writing under his hand.

Notice.

Express notice in writing of assignment must be given to debtor, trustee or person from whom assignor would have been entitled to claim debt or chose in action. (c. 240, as am'd by 1989, c. 20; 1992, c. 16; 1996, c. 23; 1997 [2nd sess.], c. 5; 1998, c. 12; 2000, c. 28; 2003 [2nd sess.], c. 1; 2008, c. 60; 2009, c. 17 [not in force]).

Assignment of book debts or bill of sale is governed by Personal Property Security Act (1995-96, c. 13, as am'd by 2003, c. 13; 2007, c. 9; 2008, c. 2; 2009, c. 26 [not in force]), and is registered in single, centralized, computerized, electronic registry known as personal property registry (1995-96, c. 13, §§43, 89). Notice of security interest, called financing statement, is registered in lieu of security document itself. (1995-96, c. 13, §44 [1], as am'd by 209, c. 26 [not in force]). Security interest is ineffective as against judgment creditors, trustees in bankruptcy and purchasers for value without notice until it has attached and is registered, or otherwise perfected. (1995-96, c. 13, §21). Unperfected security interest is subordinated to all perfected security interests in collateral, regardless of when they attached and regardless of when other creditors had knowledge of them. (1995-96, c. 13, §21). In general, only two methods of perfection are available to secured parties under Act—registration or taking possession of collateral. (1995-96, c. 13, §§25, 26). Priority among perfected security interests is generally ranked according to order of registration or taking of collateral, regardless of order of attachment and regardless of when other creditors had knowledge of them. (1995-96, c. 13, §36, as am'd by 2003, c. 13; 2009, c. 26 [not in force]).

Fees.

For registration of financing statement, $23.88 plus $8.34 for each year of registration up to total of $560.47 for registration for infinity; for each amendment to registration, $11.23; for each search of personal property registry, $7.64.

Effect of assignment of book debts, bills of sale, etc., is to transfer to assignee title to debt, chattels, etc., covered thereby but subject to equities and obligations between original parties.

8.02 ASSIGNMENTS FOR BENEFIT OF CREDITORS:

Authorized assignments may be made under the Bankruptcy Act. See Canada Law Digest. Nova Scotia Assignments and Preferences Act, c. 25 (as am'd by 1995-96, c. 13) has been held intra vires in so far as not in conflict with Bankruptcy Act. Under this act every assignment for general benefit of creditors not made to official assignee is void. (c. 25, §7). Notice of claim relating to assignment for general benefit of creditors must be registered in personal property registry. This act is seldom used.

8.03 ATTACHMENT:

Attachment order may be granted to attach any real or personal property of a defendant, including debts, rents, shares, bonds, currency, whether due or accruing due, in possession of any person, where defendant resides out of jurisdiction, is a corporation not registered under Corporations Registration Act, or is about to leave or has left jurisdiction with intent to change domicile, defraud his creditors, avoid service, or is about to or has removed property permanently out of jurisdiction, or is about to or has concealed, removed or assigned any property with intent to hinder or delay creditors.

Plaintiff at or after commencement of a proceeding and before judgment and as an incident of relief claimed, may apply by ex parte application for an attachment order which prothonotary will grant and issue unless court otherwise orders. Attachment order may be granted when proceeding is commenced for debt or demand not yet due, but judgment shall not be granted against a defendant until maturity of debt or demand.

Affidavit.

In support of attachment order, plaintiff or his agent must swear out affidavit stating facts giving rise to a good cause of action, amount claimed, including costs after allowance for credits, set-offs and counterclaims, and that solicitor, as named, advised that he is lawfully entitled to attach property.

Bond.

Unless court otherwise orders, prothonotary, before issuing attachment order, shall take a bond from plaintiff in an amount equal to 1¼ times value of claim as stated in affidavit, with two sufficient sureties, or other approved security. Conditions of bond are that plaintiff prosecute without delay, and when ordered by court sheriff shall return attached property or proceeds thereof if sold, and that plaintiff pay defendant damages and costs resulting from wrongful issue of attachment order, wrongful attachment, or if plaintiff fails to recover judgment.

Attachment Order.

Upon application by plaintiff, prothonotary, unless otherwise ordered, issues to sheriff an attachment order directing him within 90 days to attach, hold, evaluate, and otherwise deal with property as provided in order. Order provides full directions to sheriff, and is in standard form 49.04A.

Release of Property.

Defendant, owner, or person entitled to possession of attached property may retain or regain its possession before final judgment or sale under a court order, upon delivery to prothonotary or sheriff of a bond in standard form 49.06A in an amount equal to 1¼ times valuation of attached property, with two sureties, or other security as approved by prothonotary.

Sale.

If agent or debtor does not give security, court may order sale of perishable property, or any attached property which cannot be reasonably retained.

Conflicting Claims on Attachment.

Where there are several orders to attach same property, it is attached in sequence sheriff receives orders. Person not subject to attachment order, claiming an interest in property, or claiming wrongful attachment or issuance of order, may proceed by interpleader or recovery order.

8.04 BONDS:

In any case in which security is required by the practice of the court, the bond of an approved guarantee company (see category 16 Insurance, topic 16.02 Surety and Guarantee Companies) may be accepted without any affidavit of justification. Bond of any such guarantee company may be accepted as security given by public official and has same effect as if given by private individual. Notwithstanding provisions of any Nova Scotia Act regarding any society or corporation, bonds or policies of guarantee of any such guarantee company approved by Governor-in-Council may be accepted instead of or in addition to bond or security required by such act. (c. 451). No bond given under any statute or rule or order of court or judge for performance of any trust or duty of any kind or for accounting for moneys or property received or to be received will be approved by judge if it contains any provision or condition limiting or impairing the obligation thereof for failure to pay any renewal premium or any condition avoiding or impairing obligation thereof, other than performance of duty or obligation which it is given to secure.

Sureties other than approved guarantee companies may be required to give affidavit of justification showing they are worth or are owners of property of a certain amount depending on amount of the bond.

8.05 CREDITORS' SUITS:

Judgment creditor registers notice of judgment in personal property registry for maximum of 20 years, which binds judgment debtor's nonexempt exigible property at time of registration and after-acquired nonexempt property. (c. 112, §2A). If sheriff levies money upon execution against personal property of debtor where amount indorsed to levy is $100 or upwards, he must enter notice of such levy in book kept in his office. This is open to public. Money is then distributed ratably amongst all execution and other creditors whose writs or certificates were within sheriff's hands at time of levy or are delivered to him within one month from entry of notice. If further levy is made within the month, it is treated as if levied prior to entry. Creditor is not entitled to share in distribution unless he has established claim against debtor. (c. 112, as am'd by 1995-96, c. 13).

Jurisdiction.

Supreme court has jurisdiction. This act does not apply to lands. (c. 112 as am'd by 1995-96, c. 13). See also category 6 Courts and Legislature, topic 6.01 Courts, subhead Small Claims Court.

Proceedings.

Sheriff files certificate with prothonotary showing that proceedings have been had against debtor. (c. 112, as am'd by 1995-96, c. 13). Creditor files affidavit of claim with prothonotary, and serves duplicate on debtor together with notice of filing duplicate with prothonotary. If claim is not contested, prothonotary after ten days from service, upon application delivers to creditor certificate, in form provided, which must be delivered to sheriff; creditor is then deemed execution creditor. Certificates remain in force only one year unless renewed.

Contested Claims.

Debtor or interested creditor may contest claims. Debtor may file affidavit that he has good defense, and must serve copy on claimant. Contesting creditor may file affidavit that he has reason to believe debt claimed not in good faith due from debtor. Sheriff may continue to levy to meet certificates filed. Claimant may apply to judge for order allowing claim; unless he does so within eight days, he is deemed to have abandoned claim. Judge may try dispute in summary manner. These proceedings apply when debtor allows execution to remain unsatisfied until within two days of time fixed by sheriff for sale, or for 20 days after seizure. (c. 112, as am'd by 1995-96, c. 13).

8.06 EXECUTIONS:

Order.

Execution order has replaced writ of execution and orders for garnishee and equitable execution. Equitable execution may be effected by sheriff under execution order (Rule 79) or under receivership order (Rule 73). Sequestration of property and attachment of person have been replaced by contempt order. (Rule 89). Order is granted by prothonotary when a judgment creditor has filed an order for payment or recovery of money in a proceeding.

Issuance.

Prothonotary may grant and issue execution order before costs are taxed, and subsequently a further order to enforce payment of costs; where a party obtains an order for recovery of possession of any property, other than money, prothonotary may issue an execution order to enforce payment of any damages or costs or both, awarded under order. (Rule 79).

Execution order may be issued without leave of court except where six years have elapsed since date of order, a change has taken place in parties entitled or liable under order, goods sought to be received are in hands of a receiver, or where under order a person is entitled to relief subject to fulfillment of a condition which is alleged to have been fulfilled.

Power of Sheriff under Order.

Under execution order (Rule Form 79.17A), sheriff may seize, accept as receiver, hold and sell at public auction, any real or personal property, including any debt, rent, legacy, share, bond, debenture or other security, currency or wages due or accruing due, in possession of any person, and disburse proceeds as provided by law.

Any person not being a party to a cause or matter, who obtains an order, or in whose favor an order is made, may obtain execution order as if he were a party.

Sheriff may seize any bond, share, debenture, or other interest of judgment debtor in a body corporate by serving execution order upon body corporate. Order may require employer to pay to sheriff 15% of employee's gross wages, but net wages of employee supporting family may not be reduced below $450 per week, or those of any other employee below $330 per week. (Rule 79.08). Execution order may be issued and enforced against partnership or any partner.

No property shall be seized under execution order after 12 months have elapsed from its issuance, but this does not limit validity of anything previously done under order, or court's power to issue further order.

Full procedural instructions for sheriff's carrying out of order and compliance required are set out in Standard Form Execution Order, Form 79.17A.

Exemptions.

See topic 8.07 Exemptions.

Stay of Execution.

Execution may be stayed by order of court or judge until such time as it or he thinks fit.

Sale of Perishable Goods.

Perishable goods may be sold by order of court unless security is given for their value. Proceeds retained by sheriff or paid into court to respond the judgment.

Sale of Land.

Land of every judgment debtor may be sold under execution after judgment recorded in registry of deeds or land registration office in registration district in which land situated for one year. (c. 409, §4, as am'd by 2001, c. 6). Sheriff sells without appraisement on receipt of execution. Judgment creditor must cause five consecutive weekly insertions preceding day of sale to be put in newspaper published or circulated in county in which land is situated, containing description of land, that it is to be sold under execution, time and place of sale, at whose suit, name of sheriff, and also of solicitor of judgment creditor. Copies of advertisement must be posted in most public places in district, and mailed to each subsequent encumbrancer at least 20 days before day fixed for sale. Sheriff then sells land at public auction to highest bidder, and executes a deed to him or his nominee, conveying all interest of judgment debtor therein. Grantee under deed may apply to court out of which execution issued for summons calling on judgment debtor and every person in possession of land or any part thereof, deriving title by, through or under the judgment debtor, after registry of judgment, to show cause why writ of possession should not issue to put purchaser in possession. Judge may hear evidence and order writ of possession to issue. If possession not delivered up, sheriff must put purchaser in possession.

Redemption.

There is no right of redemption after an execution sale.

Supplementary Proceedings.

After judgment has been obtained and execution directed against the personal property of the debtor has failed to satisfy it, the judgment creditor may obtain an order for the examination of the debtor. If the judgment was obtained in the Supreme or probate court examination is held before commissioner of Supreme Court; if obtained in any municipal court examination is held before stipendiary magistrate or other officer appointed to preside; if in stipendiary magistrates court, he himself may examine debtor, and similarly in case of justice of peace. Order is obtained on affidavit of creditor, or his agent or solicitor, and must state judgment, date of its recovery, amount due thereon, name and residence of debtor. It must also state endeavor and failure to get satisfaction or to find personal property on which to levy, and belief that attempt to execute on personal property would prove ineffectual. Examiner orders appearance of debtor and if it appears to him on examination that debtor has sufficient income to pay part or all of debt, he may order payment by instalments. If debtor makes default in payment he may be arrested, after examination before special examiner. This is done by ex parte application to special examiner supported by affidavit of agent or solicitor, and if it appears to special examiner that debtor has refused or neglected to pay without reasonable excuse, he may order his arrest. Examiner after examination of debtor may require debtor to execute assignment of all his real and personal property (except such as is exempt from execution) to creditor in trust for payment due on judgment. If debtor refuses, examiner may order him to appear before special examiner and if he still refuses, this may be taken into consideration in fixing term of imprisonment. If it appears to special examiner that debt was fraudulently contracted, obtained under false pretences, or without reasonable expectation of being able to pay same, or that any fraudulent circumstances have occurred in connection with contracting of debt, or that debtor has made fraudulent disposition of property, he may commit debtor to jail for term not exceeding 12 months. Committal does not take effect until case reviewed by Supreme Court Judge. (c. 76, §§28, 32). Debtors may be fully examined touching matters of inquiry; witnesses may be subpoenaed, sworn, examined and cross-examined. (c. 76, §19).

Arrest to Compel Attendance for Examination.

If defendant is about to leave province after judgment, he can be arrested for purpose of compelling his attendance for examination under the Collection Act. (c. 76, §12). Creditor may obtain warrant for arrest in such case upon application to examiner supported by affidavit of himself or his solicitor setting forth: (1) Judgment and date of recovery; (2) amount due thereon; (3) deponent's belief that debtor is about to leave province, and without stating grounds for belief. Concurrent orders may be issued for arrest in different counties.

8.07 EXEMPTIONS:

Following articles are exempt from seizure under execution: Reasonably necessary wearing apparel, household furnishings and furniture for debtor and his family; all fuel and food reasonably necessary for ordinary use of family; all grain and other seeds and livestock reasonably necessary for domestic use of debtor and family; necessary medical and health aids; farm equipment, fishing nets, tools and other chattels used in debtor's chief occupation in value set by regulation; motor vehicle not to exceed in value $3,000 or amount set by regulation. (c. 240, as am'd by 1989, c. 20; 1992, c. 16; 1996, c. 23; 1997 [2nd sess.], c. 5; 1998, c. 12; 2000, c. 28; 2003 [2nd sess.], c. 1; 2008, c. 60; 2009, c. 17 [not in force]).

Earnings.

Wages of servant, laborer or workman exempt from attachment up to $330 per week for any other employee and $450 per week for employee supporting family. (Rule 79.08).

8.08 FORECLOSURE:

See topic 8.14 Liens; category 20 Mortgages, topics 20.01 Chattel Mortgages, 20.04 Mortgages of Real Property.

8.09 FRAUDULENT SALES AND CONVEYANCES:

By the Statute 13 Eliz. c. 5 it is provided that any alienation of real or personal property, made with the intention of delaying, hindering or defrauding creditors is void as against such creditors. But a bona fide purchaser for value who takes an estate or interest from the grantor without notice of the fraud, is protected as against the claims of the creditors, although the intention of the grantor was fraudulent. Such alienations can only be impeached by creditors, who may apply to court to have sale or conveyance set aside.

Conveyances in fraud of creditors are covered by the Bankruptcy Act. See Canada Law Digest, category Debtor and Creditor, topic Bankruptcy.

Bulk Sales.

Security interest governed by Personal Property Security Act (1995-96, c. 13, as am'd by 2003, c. 13; 2007, c. 9; 2008, c. 2; 2009, c. 26 [not in force]), and registered in single, centralized, computerized, electronic registry known as personal property registry (1995-96, c. 13, §§43, 89). Notice of security interest, called financing statement, is registered in lieu of security document itself. (1995-96, c. 13, §44[1], as am'd by 2009, c. 26 [not in force]). Security interest is ineffective as against judgment creditors, trustees in bankruptcy and purchasers for value without notice until it has attached and is registered, or otherwise perfected. (1995-96, c. 13, §21). Unperfected security interest is subordinated to all perfected security interests in collateral, regardless of when they attached and regardless of when other creditors had knowledge of them. (1995-96, c. 13, §21). In general, only two methods of perfection are available to secured parties under Act—registration or taking possession of collateral. (1995-96, c. 13, §§25, 26). Priority among perfected security interests is generally ranked according to order of registration or taking possession of collateral, regardless of order of attachment and regardless of when other creditors had knowledge of them. (1995-96, c. 13, §36), as am'd by 2003, c. 13; 2009, c. 26 [not in force]).

8.10 GARNISHMENT:

Order for garnishee has been replaced by execution order. (Rule 79). See topics 8.06 Executions, and 8.03 Attachment.

Wages.

15% of gross wages of employee may be garnisheed provided that when this payment would reduce employee's net wages to amount of $450 per week for person supporting family or $330 per week for any other person, then only difference by which payment of 15% exceeds these amounts, shall be paid to sheriff. (Rule 79.08). These provisions do not apply in cases of garnishee orders pursuant to Maintenance and Custody Act (c. 160, as am'd by 1990, c. 5; 1994-95, c. 6; 1997 [2nd sess.], c. 3; 1998, c. 12; 2000, c. 29); in which case amount is solely in discretion of Family Court.

8.11 HOMESTEADS:

No provisions.

See also categories 14 Family, topic Husband and Wife; Property, topics Adverse Possession, Curtesy, Deeds, Dower, Real Property.

8.12 INSOLVENCY:

This matter is regulated by Dominion legislation. See Canada Law Digest, category Debtor and Creditor, topic Bankruptcy. See also category 13 Estates and Trusts, topic 13.09 Executors and Administrators.

8.13 LEVY:

See topics 8.03 Attachment, 8.06 Executions.

8.14 LIENS:

Lien of solicitor for professional services on documents in his possession, lien of warehouseman on goods stored in his warehouse for storage in respect of such goods, innkeeper's lien, carrier's lien, possessory lien of shipwright for work done on ships, maritime liens, liens of vendor and purchaser of land, and other ordinary common law liens are recognized in Nova Scotia.

Artisan's Lien.

Every mechanic or other person who has bestowed money or skill and materials upon any chattel or thing in alteration and improvement in its properties or for purpose of imparting additional value to it, so as thereby to be entitled to lien on such chattel, has, while such lien exists, in addition to his other remedies, right to sell chattel by auction on giving one week's notice in newspaper published in county in which work was done, stating name of debtor, amount of debt, description of chattel, time and place of sale, name of auctioneer, and leaving notice at last known residence of owner in county. (c. 277, §45; repeal by 2001, c. 33 [not in force]; am'd by 2002, c. 19; 2004, c. 14; 2005, c. 8).

Woodmen's Lien.

Any person performing any labor or service in connection with any logs or timber within province has lien thereon for amount due for such labor. This is first lien on such logs or timber unless Crown has claim on same. (c. 507, §4). Lien claimant must, within 60 days after last day on which services were performed, file statement, verified by his oath, in office of clerk of county court where labor was performed or where timber drive terminated. (c. 507, §§6-8). Lien ceases unless action to enforce same brought within 30 days after filing of statement or expiration of period of credit. (c. 507, §10). Action to enforce lien must be brought in county court of county where labor was performed.

Liens on Ships.

In case of ships statutory lien exists in case of towage, mortgage, ownership, possession, building, equipping or repairing any ship, if ship or proceeds are under arrest of court when cause is instituted; of necessaries supplied to ship; and for damages to cargo imported into Canada, unless owner is domiciled in Canada. This is given in favor of persons who perform services, supply necessaries, etc.

Mechanics' Liens.

Act to Amend Mechanics' Lien Act (2004, c. 14). Title changed to Builders' Lien Act. New Act requires that any money received by owner of construction project for financing that project become basis of trust fund for contractors to protect contract funds from claims of creditors not part of construction project. Directors, officers or any person controlling corporate owner may be personally liable for failure of corporation to comply with trust provisions. Act binding on Provincial Crown but does not permit lien to attach to Crown property. Ships, vessels, moveable property eliminated from application of Builders' Lien Act. (2004, c. 14, §6).

Any person who performs any work or service upon or in respect of or places or furnishes any material to be used in making, constructing, fitting, altering, improving or repairing of any erection, building, railway, ship, land, wharf, bridge, vault, mine, excavation, sidewalk, drain, sewer, roadbed, way, etc., or appurtenances to any of them; for any owner, contractor or subcontractor, has by virtue thereof lien for price of such services or materials upon erection, etc., and land occupied thereby or enjoyed therewith. (c. 277, §6, as am'd by 2004, c. 14). Lien arises for services done pursuant to rental of equipment. (c. 277, §6, as am'd by 2004, c. 14). Lien attaches on interest of owner in property. (c. 277, §8). Lien is limited so as not to make owner liable for greater sum than sum payable by owner to contractor. (c. 277, §11). Person primarily liable on any contract under or by virtue of which lien may arise, must deduct from any payment made by him under contract, and retain for 60 days after contract is substantially performed, 10% (c. 277, §13, as am'd by 2004, c. 14; 2005, c. 8) of value of work, service or materials. Lien is charge on this amount, in favor of subcontractors whose liens are derived under persons to whom such moneys so required to be retained are respectively payable. (c. 277, §13, as am'd by 2004, c. 14; 2005, c. 8). With respect to amount so retained, mechanics and laborers have, to extent of 30 days wages, priority over all other liens derived through contractor or subcontractor by whom they are employed. (c. 277, §16, as am'd by 2004, c. 14). Employee deemed to hold mortgage on assets of employer for accrued vacation pay in priority to all other liens, charges or mortgages except liens for wages due. (c. 246, §36).

The lien claimant must register claim within 60 days after last work performed or last materials placed or furnished. Claim must state name and residence of claimant and owner of property proposed to be charged, and of person for whom work was done or materials supplied, and time when done; short description of work done or materials furnished; sum claimed; description of land or property to be charged. Claim must be verified by affidavit of claimant. If claim is not filed within 45 days, lien expires at end of that time, unless action is begun in meantime to realize claim, and certificate thereof is registered in registry office in which claim for lien might have been registered. (c. 277, §§19, 24-25, as am'd by 2004, c. 14). Taking security or extending time of payment does not waive lien unless agreement in writing by claimant to that effect. (c. 277, §30, as am'd by 2004, c. 14).

Lien for which claim is registered expires on expiration of 105 days after work completed or materials furnished, or after period of credit, unless in meantime action is begun to realize claim and certificate is registered. Lien may be discharged by receipt signed by claimant acknowledging payment, and verified by affidavit and registered. May also be discharged by order of court vacating lien. (c. 277, §26, as am'd by 2004, c. 14; 2005, c. 8).

Mechanics' liens are enforced by action to be brought and tried in Supreme Court of district in which land lies. (c. 277, §34, as am'd by 2004, c. 14). Action is begun by filing statement of claim above referred to in office of clerk of such court. Statement must be served within one month after filing unless time extended by court. Party then applies for appointment fixing day and place of trial, and must, at least eight clear days before day fixed, serve notice of trial upon solicitors of defendants who appear by solicitors, upon all registered lienholders and upon all other persons having any claim on lands who are not parties or who appear personally in action. Third party proceedings are permitted. (c. 277, §34, as am'd by 2004, c. 14). Service must be personal unless otherwise ordered. Judge then tries action and gives judgment. (c. 277, §35, as am'd by 2004, c. 14).

Public Works.

There is no requirement that a general contractor for public buildings or other public works shall give bond for faithful performance of the contract and payment of claims for labor and materials going into such buildings or other works.

Redemption.

There is no right of redemption of property sold in enforcement of the liens hereinbefore mentioned.

8.15 MECHANICS' LIENS:

See topic 8.14 Liens.

8.16 PLEDGES:

Only provincial statutory provisions are those contained in Factor's Act. (c. 157, as am'd by 1995-96, c. 13). Otherwise common law rules govern. Special provisions are contained in “The Bank Act.” See Canada Law Digest, category Business Regulation and Commerce, topic Banks and Banking.

8.17 RECEIVERS:

Receiver may be appointed by an interlocutory order of Supreme Court in all cases in which it appears to court to be just or convenient. (Rule 73). Motion may be made by any party to action. Where an order is made directing a receiver to be appointed, person so appointed, unless otherwise ordered, must first give security to account for what he shall receive as such receiver. Receiver is allowed to pay interim account out of proceeds of receivership unless proceeds required for administration of receivership. (Rule 73.09). Security and form thereof as judge directs. Receiver must make motion for order passing accounts upon completion of tasks for which receivership order granted. They must be verified by affidavit.

8.18 REDEMPTION:

See topics 8.06 Executions, Liens; categories 20 Mortgages, topic Mortgages of Real Property; Taxation.

8.19 STAY OF EXECUTION:

See topic 8.06 Executions; category 5 Civil Actions and Procedure, topic 5.03 Appeal and Error.

8.20 SUPPLEMENTARY PROCEEDINGS:

See topic 8.06 Executions.

8.21 USURY:

See Canada Law Digest, category Business Regulation and Commerce, topic Interest.

9 DISPUTE RESOLUTION

9.01 ARBITRATION AND AWARD:

Arbitrations are governed by the Arbitration Act (c. 19, as am'd by 1999, c. 5) and Commercial Arbitration Act (1999, c. 5). Arbitration Act provides for submissions to boards constituted in accordance with act and awards thereby which may be made rule of Supreme Court and which may be set aside for misconduct or because of undue influence. Controversy may be submitted by agreement to person or persons selected by parties. Commercial Arbitration Act provides that Arbitration Act applies to any arbitration commenced before Commercial Arbitration Act comes into force but that it will not apply to any arbitration commenced pursuant to Commercial Arbitration Act.

Contracts to Arbitrate Future Disputes.

Contracts may contain provisions for arbitration of any controversy arising thereunder.

Rescission.

Submission to arbitration, unless contrary intention is expressed, is irrevocable and cannot be rescinded except by leave of court or judge. (c. 19, §4). Agreement to submit to arbitration may be rescinded by mutual agreement of parties. If party to arbitration starts court proceeding in respect of issues under arbitration, court may stay proceeding on motion of another party. (1999, c. 5, §9).

Powers of Arbitrators.

Unless contrary intention is expressed, arbitrators acting under submission have power to administer oaths, or take affirmation of parties or witnesses, and to state award as to whole or part in form of special case for opinion of court. Arbitral tribunal may determine questions of law arising during arbitration and rule on its own jurisdiction to conduct arbitration. (1999, c. 5, §19).

Attendance of witnesses may be compelled by subpoena out of the Supreme Court. (c. 19, §11).

Examination of Parties.

The parties to a reference must submit to be examined on oath or affirmation by the arbitrators and must produce all books, deeds, accounts, writings, etc., which are required or called for by the arbitrators.

Award and Enforcement Thereof.

Unless a contrary intention is expressed, an award on a submission is final and binding on the parties and persons claiming under them. (c. 19, §5; 1999, c. 5, §48).

An award on a submission may by leave of the court or a judge be enforced in the same manner as a judgment or order to the same effect. (c. 19, §17; 1999, c. 5, §20).

Foreign arbitration awards enforceable pursuant to 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards. (c. 234).

Commercial Mediation Act (2005, c. 36 [not in force]) provides for use of mediation to resolve commercial disputes where no other statute applies.

10 DOCUMENTS AND RECORDS

10.01 ACKNOWLEDGMENTS:

Generally, any instrument may be proved by the acknowledgment under oath by the parties executing such instrument of the execution thereof, or by the oath of a subscribing witness to any such instrument that the parties thereto executed it in his presence. (c. 392, §31).

Acknowledgment may be taken by following officers:

Within the province: Judge of Supreme or county court; notary public; barrister; justice of the peace; commissioner of Supreme Court. (c. 392, §32, as am'd by 1992, c. 16).

Without the province: A commissioner appointed to take affidavits without the province for use in the courts of the province; a judge of any court of record; the mayor or recorder of any city or incorporated town; notary public; a minister, consul, vice-consul or consular agent of Her Majesty. (c. 392, §33).

General Requirements of Certificate.

The person taking an acknowledgment either within or without the province must sign a certificate, endorsed upon or attached to the instrument the execution of which is proof of such acknowledgment having been made. (c. 392, §32, as am'd by 1992, c. 16, §108).

Notary, consul or consular agent must affix seal of office to certificate.

British Acknowledgments.

Acknowledgments made in Great Britain or Ireland or any of Her Majesty's possessions with the forms of proof and authentication legal in those places have the same legal effect in Nova Scotia. (c. 154, §69).

Married Women.

No special form of acknowledgment is required (c. 271, §3), except where woman married prior to Mar. 11, 1898, conveys property acquired by her before that date, in which case the deed must have an acknowledgment, made by her in absence of her husband, that it is her free act and deed, and that she executed it freely and voluntarily without fear, threat or compulsion of, from or by her husband (c. 271, §3).

Effect of Acknowledgment.

Documents properly acknowledged are entitled to be recorded without further proof.

Authentication.

Not necessary if acknowledgment taken within province for use in province.

If required for use out of province, in Canada or U.S., authentication of capacity of notary public provided by Provincial Secretary or Deputy, fee $3; for use elsewhere authentication by Lieutenant Governor, fee $7.50.

Where acknowledgment taken outside province for use within province, no authentication of capacity of notary public is required. (c. 154, §67).

Form of Acknowledgment

Province of. . . . ., County of. . . . ., ss. I hereby certify that on the. . . .. day of. . . . ., 20. . . ., at. . . . . of. . . . .,. . . . ., Grantor, personally known to me, appeared before me, and having been by me duly sworn made oath and said that he is the person mentioned in the annexed instrument as the maker thereof, and that he signed, sealed and delivered the same.

....

(Official Signature).

Form of Proof by Witness

Province of. . . . ., County of. . . . . ss. On this. . . . . day of. . . . ., A. D. 20. . . ., before me, the subscriber, personally came and appeared. . . . . ., a subscribing witness to the foregoing indenture, who having been by me duly sworn made oath and said that. . . . . . the parties thereto signed, sealed and delivered the same in his presence.

....

(Official Signature.)

(Instruments usually proved by oath of witness as above rather than acknowledgment by party. This applies also to corporations.)

Alternative to Acknowledgment or Proof.

No statutory provision.

10.02 AFFIDAVITS:

May be sworn to: Within the province: before a judge, commissioner, barrister or member of Assembly. (c. 312, as am'd by 2005, c. 8). Chiefs of municipal police departments, Royal Canadian Mounted Police commissioned officers and Royal Canadian Mounted Police non-commissioned officers heading detachments may take affidavits. (c. 312, as am'd by 2005, c. 8). Without province: before judge of any court of record; Canadian or British consul, vice consul or consular agent; or notary public. (c. 154, §67).

An affidavit taken before a commissioner or barrister who is a party to the transaction or matter in respect of which it is to be used or who is employed by such party in connection with the transaction, is not evidence on behalf of the person or his employer in any proceedings relating to the transaction except with consent of all other parties to proceedings or on order of the judge or person presiding. (c. 312, §8).

General Requirements.

Affidavits must be entitled in cause in which they are intended to be used and must be entitled ``Affidavit''. When used on motion, may contain statements as to belief of deponent with sources and grounds thereof. When used on trial, may contain only such facts as deponent can prove of his own knowledge, unless leave granted. Time and place of swearing and person before whom sworn should be stated in jurat of affidavit. Name of person taking affidavit must be printed or typewritten below or adjacent to his signature. (c. 312, §14). Judge taking affidavit must affix seal of court of which he is member; consul, vice-consul, consular agent and notary public must affix seal of office. Affidavits must be in first person, contain full name, residence and occupation of deponent, be divided into paragraphs, numbered, and must be signed by deponent. If two or more deponents, names of each must be inserted in jurat, but if affidavit of all deponents is taken at one time by same officer it is sufficient to state that it was sworn by both (or all) of "above-named deponents." Where deponent is illiterate or blind, jurat should state that affidavit has been read to deponent and that he appeared to understand it and signed it in presence of officer taking affidavit. (Rule 39.08).

Interlineations, erasures and alterations must be initialled by officer taking affidavit.

Exhibits should be certified as being such and identified with affidavit.

Affidavits made out of province before proper officer of foreign jurisdiction have same validity, force and effect in Nova Scotia as if duly made in province and are admitted in evidence without proof of signature or seal or official character of such officer. (c. 154, §67).

Use of Affidavits.

Evidence may be given by affidavit upon any motion, petition or summons, but court may on application of party order attendance of deponent for cross-examination. Affidavits may be used by consent of parties in civil proceedings. May also be used in default actions in rem, and in references in admiralty actions, and in bankruptcy proceedings.

Form of Jurat

Sworn to at. . . . . in the county of. . . . . Province of. . . . .
this. . . . . day of. . . . . A.D. 20. . . . before me. . . . .

(Official Signature)

Alternative to Affidavit.

No statutory provision.

10.03 COMMISSIONS TO TAKE TESTIMONY:

See category 5 Civil Actions and Procedure, topic 5.09 Depositions and Discovery.

10.04 NOTARIES PUBLIC:

No bond required. Must affix notarial seal to every document sworn to before him. Provide own seal. Can draw, pass, keep and issue all contracts, charter parties and other mercantile transactions in the province; can attest all commercial instruments brought before them for public protestation, and have other usual notarial powers (c. 312, §3) anywhere in province. No act performed by barrister as notary public valid unless barrister is holder of commission as notary public, issued by Lieutenant Governor. (2004, c. 28, §13[4]). No lawyer under suspension shall act as notary public while suspended. No lawyer subject to disbarment shall continue to act as notary public. (2004, c. 28, §13[5][6]).

10.05 RECORDS:

Registration of Instruments.

Every instrument, conveyance or other document by which the title to land is changed or in any wise affected, and also every writ of attachment, certificate of judgment, lease for term exceeding three years, and vesting order should be registered in registry of deeds in district where land is situated. (c. 392, as am'd by 1992, c. 16; 1994-95, c. 7; 1995-96, c. 13; 2001, c. 6).

Upon transfer of any property in City of Halifax, City of Dartmouth, County of Halifax, or other municipality with bylaw to that effect, deed transfer tax is payable by purchaser within ten days of purchase. See category 22 Taxation. Failure to register makes instrument ineffective as against any person claiming for value and without notice under any subsequent instrument affecting title to same land. (c. 392, §20, as am'd by 2001, c. 6). This does not apply to wills, grant from Crown or report of partition commissioners.

Bills of sale, conditional sale agreements, chattel mortgages, hire and purchase agreements and assignment book debts must be registered by way of financing statement registered in personal property registry (1995-96, c. 13, as am'd by 2003, c. 13; 2007, c. 9; 2008, c. 2; 2009, c. 26 [not in force]), or are void against purchasers and creditors and, in case of assignment of book debts, against creditors of assignor and subsequent purchasers or mortgagees of such debts.

Foreign conveyances or encumbrances must conform to Nova Scotia law to be recorded, but improper certificate will not affect validity of document as between parties.

Torrens Act is not in force in Nova Scotia, but see category 21 Property, topic 21.14 Real Property, subhead Land Titles Act.

Transfer of Decedent's Title.

Where real estate in province is devised, probate (or, in proper case, ancillary probate) of will must be obtained and certified copy of will must then be registered in registry of deeds for district where real estate is situated. (2000, c. 31).

Where the owner of real property (whether resident or nonresident) dies intestate, no documents need be placed on record to show transfer of title to his heirs.

Vital Statistics.

Records of births, marriages, domestic partnerships and deaths are kept by duly appointed registrars for various districts throughout province. These are all forwarded to Registrar of Vital Statistics in Halifax. Fees: short form, $26.50, and long form, $32. (c. 494, as am'd by 1998, c. 8; 2000, c. 29; 2001, cc. 4, 5, 31, 45; 2003 [2d sess.]. c. 4; 2004, cc. 10, 48; 2005, c. 9; 2005, c. 42; 2006, c. 15).

10.06 SEALS:

Common law rules apply. Not necessary that any particular kind of seal be used provided that there be fixed or impressed something purporting to be a seal. Need not bear any indication that it is the particular seal of the person who affixes it; one person may use another's seal. Circular line enclosing the letters “L.S.” does not purport to be a seal.

Corporation Seal.

Company, as a general rule, may contract without a seal; need only affix seal in cases where individuals are required to use a seal. (c. 81, §101). Every company must have common seal, and must have its name engraved in legible characters thereon. (c. 81, §80).

10.07 TORRENS ACT:

Not adopted but see category 21 Property, topic 21.14 Real Property, subhead Land Titles Act.

10.08 VITAL STATISTICS:

See topic 10.05 Records.

11 EMPLOYMENT

11.01 EMPLOYER AND EMPLOYEE:

See topic 11.02 Labour Relations.

11.02 LABOUR RELATIONS:

Occupational Health and Safety Act (1996, c. 7, as am'd by 2000, c. 38 [not in force]; 2004, c. 6; 2007, c. 14; 2009, c. 24 [not in force]) which enacts comprehensive safety code at workplaces in Nova Scotia. Every "employer", "constructor", "supplier", "contractor", "owner", "architect", "engineer", "provider of occupational health and safety service" to workplace, "employee" and "self-employed person" is subject to duties respecting health and safety. Joint occupational health and safety committees must be established at workplaces where more than 20 persons regularly employed or where Minister of Labour and Manpower designates (1996, c. 7, §29, as am'd by 2007, c. 14). As of July 1, 1997 occupational health and safety programmes must be established at workplaces where more than 20 persons regularly employed or where regulations require. (1996, c. 7, §28). Employee permitted to refuse to do any act which may endanger his health or safety. (1996, c. 7, §43). Use of hazardous substances is regulated. Inspections and enforcement done by officers of Occupational Health and Safety Division of Department of Labour and Manpower. (1996, c. 7, §§47-57).

North American Labor Corporation Agreement Implementation Act (2008, c. 6) contains measures for implementing agreement with Mexico and United States to co-operate on labour issues and provide for effective enforcement of labour standards legislation.

Wages.

Labour Standards Code (c. 246, as am'd by 2001, c. 6; 2003 [2d sess.], c. 4; 2004, c. 6; 2005, c. 38; 2006, cc. 10, 13, 32; 2007, c. 11; 2009, c. 18) provides for establishment of minimum wage rates for all employees except farm labourers and domestic servants. Rates are set by Minimum Wage Board which may make exemptions. Employees subject to Code and required to work more than 48 hours a week must be paid 1.5 times employee's hourly rate for hours in excess of 48 hours.

Equal pay to men and women for equal work must be paid. (c. 337, as am'd by 1990, c. 41). Pay Equity Act (c. 337, as am'd by 1990, c. 41) establishes system to increase pay of employees in classes which are predominately female where determined that by reason of sex discrimination those employees paid less than should be. Act applies only to employees in public sector.

Labour Standards Code (c. 246 as am'd by 2001, c. 6; 2003 [2d sess.], cc. 4, 7; 2004, c. 6; 2005, c. 38; 2006, cc. 10, 13, 32; 2007, c. 11; 2009, c. 18 applies to all employees except teachers and as provided in regulations. Wages are to be paid at least semimonthly unless existing practice, collective agreement or order of director dictates otherwise. Employers must keep prescribed records of employee data for 12 months after termination of employment.

Director of Labour Standards must have access to all employees and employer's records. Employee deemed to hold mortgage on assets of employer for accrued vacation pay in priority to all other liens, charges or mortgages except liens for wages due.

Complaints.

Employees may complain personally or anonymously without reprisal from employers. Director can investigate and settle disputes; may refer unsettled complaints to Labour Standards Tribunal for final decision. Appeal from Tribunal to Supreme Court, on law and jurisdiction.

Hours of work may be set by Minister and Minimum Wage Board with some exceptions.

Maternity Leave.

No woman may be laid off due to pregnancy unless unable to fulfill duties. Mothers must take a week post-partem vacation without pay, unless certified fit to work by doctor. Employer must accept woman back with no loss of seniority or benefits.

Children.

Strict provisions concerning employment of children under 16.

Human Rights Act (c. 214 as am'd by 1991, c. 12; 2007, c. 11, c. 14, c. 41; 2008, c. 59).—Prohibits discrimination due to race, religion, creed, colour, ethnic or national origin, marital status, sex, sexual orientation, political belief, affiliation or activity, irrational fear of contacting illness or disease, age, or physical or mental disability in housing, employment and access to services and facilities. Provisions eliminating mandatory retirement not in force before July 1, 2009. (2007, c. 11). Prohibits discrimination in housing on basis that applicant for tenancy is recipient of income maintenance. (c. 214, §16 as am'd by 1991, c. 12). Establishes Human Rights Commission to oversee Act and Board of Inquiry which can issue orders. Order can be appealed to Appeal Division. Penalty for violating Act or order is fine not exceeding $500 for individuals or $1,000 otherwise.

Termination of Employment.

Notice required. Time varies with length of employment. Lump sum equal to wages payable in lieu of notice. 4% vacation pay must be paid on termination. Employee of ten years or more not to be discharged or suspended without just cause.

Labour Unions.

Trade Union Act (c. 475 as am'd by 2004, c. 47; 2005, c. 61; 2006, c. 48; 2008, c. 67; 2009, c. 29 [ss. 1-3 not in force]) legalizes formation of trade unions and collective bargaining and regulates relations between employers and employees, wage agreements, conciliation preceding strikes or lockouts, etc. Single bargaining unit is only appropriate bargaining unit where there are more than one interdependent manufacturing locations. Labour Relations Board has broad remedial powers regarding violations of Act. (c. 475, §§16-22, as am'd by 2005, c. 61; 2009, c. 29 [not in force]). Collective bargaining for teachers regulated by Teachers Collective Bargaining Act (c. 460, as am'd by 1995-1996, c. 1; 2000, c. 4; 2001, c. 20); for civil service employees, by Civil Service Collective Bargaining Act (c. 71; as am'd by 2009, c. 29 [ss. 4, 5 not in force]); for highway workers, by Highway Workers Collective Bargaining Act (1997, c. 1, as am'd by 2009, c. 29 [ss. 8, 9 not in force]). In addition to Trade Union Act, collective bargaining for certain healthcare professionals also regulated by Healthcare Services Continuation Act. (2001, c. 27 [§3(1)(a)(c)(d) not in force]).

Construction Unions.

Subject to special provisions including preventive mediation, rapid certification and binding arbitration. (c. 475, §§92-107, as am'd by 1994, c. 35; 2000, c. 4; 2005, c. 61).

Boat-Owner Fishermen.

See category 2 Business Organizations, topic 2.02 Associations.

Labour Disputes.

No ex parte injunction may be granted in labour dispute unless actual or apprehended breach of peace, injury to persons, severe damage to property or interruption of essential public service and reasonable attempt to notify union of application. (c. 240, as am'd by 1989, c. 20; 1992, c. 16; 1996, c. 23; 1997 [2nd sess.], c. 5; 1998, c. 12; 2000, c. 28, §55; 2003 [2nd sess.], c. 1; 2008, c. 60; 2009, c. 17 [not in force]).

Workers' Compensation Act.

(1994-95, c. 10, as am'd by 1999, c. 1; 2000, c. 4; 2001, c. 6; 2002, c. 5; 2002, c. 41; 2003, c. 5; 2005, c. 31). Part I of Act applies to employees and workers in and about any operations carried on in factory and also in or about enumerated list of about 150 industries which include hazardous or partly hazardous occupations. It may apply to independent contractors and volunteer firefighters, on application to Workers' Compensation Board. (1994-95, c. 10, §§4, 5). It may apply to firefighters and volunteer firefighters suffering from occupational diseases caused by exposure to fire scene hazards. (2003, c. 5). It may apply to students if so ordered by Governor in Council. (1994-95, c. 10, §6). If any personal injury occurs to worker by accident arising out of and in course of employment, compensation must be paid to him or his dependents, except where it is attributable solely to his own serious or wilful misconduct, unless injury results in death or serious and permanent disablement. (1994-95, c. 10, §10). Board may provide for medical aid to injured workers (1994-95, c. 10, §102), and employer may not take anything from worker either directly or indirectly for any sum which he may become liable to pay into Accident Fund. (1994-95, c. 10, §88).

Provisions of Part I of Act are in lieu of all rights and rights of action to which workman or his dependents are or may be entitled against employer concerning any accident in which compensation is payable or which arises in course of workman's employment in an industry under Part I at time of accident. (1994-95, c. 10, §§28-32, as am'd by 1999, c. 1). Compensation cannot be waived, and any agreement to that effect is void. Compensation is not assignable or liable to attachment. (1994-95, c. 10, §77). Maximum gross earnings upon which compensation can be made is $38,000 per year. (1994-95, c. 10, §41). Where death results from injury compensation consists of death benefit of at least $15,000 and survivor pension equal to 85% of worker's net average earnings before accident, both paid to surviving spouse, and dependant-child benefit of at least $196 a month for each child under 18 years or under 25 years if attending secondary or post-secondary education facility approved by Board. Dependant disabled child receives dependant-child benefits for as long as, in opinion of Board, worker might reasonably have expected to support child. Necessary burial expenses not over $4,000 are also covered. (1994-95, c. 10, §§60-68, as am'd by 1999, c. 1; 2002, c. 5). Where worker dies while receiving compensation, his dependants will receive three times monthly payment in compensation. (1994-95, c. 10, §60, as am'd by 1999, c. 1). Where worker dies while receiving compensation for permanent total disability, his dependents will receive nine times monthly payment in compensation. (1994-95, c. 10, §60, as am'd by 1999, c. 1).

Where permanent total disability results from injury compensation consists of permanent-impairment benefit and earnings-replacement benefit. Permanent-impairment benefit is calculated by multiplying 30% of 85% of worker's net average earnings (calculated pursuant to §§37-46, as am'd by 1999, c. 1) by percentage of impairment suffered by worker pursuant to impairment ratings schedule. (1994-95, c. 10, §34). Earnings-replacement benefit is calculated by subtracting amount of permanent-impairment benefit paid to worker from amount equal to 75% of worker's lost earnings for first 26 weeks and to 85% of worker's lost earnings thereafter. (1994-95, c. 10, §37, as am'd by 1999, c. 1). $38,000 a year is maximum for calculation of worker's gross annual income. (1994-95, c. 10, §41).

In computing compensation where recurrence of disability occurs more than one year after original accident, with subsequent return to work, Workers' Compensation Board may take into account increase in average earnings between accident and recurrence if that best represents worker's lost earnings. (1994, c. 10, §40).

Appeal from Workers' Compensation Board decision must be requested in writing within 30 days of being notified of Board's decision. (1994-95, c. 10, §196, as am'd by 1999, c. 1).

§§222 and 223 apply to industries to which Part I does not apply and to workers employed therein. They provide that worker suffering personal injury because of defect in condition or arrangement of machinery, plant, buildings or premises connected with or used in employer's business, or because of negligence of his employer or any person in employer's service acting within scope of his employment, has, or if death results from injury, his legal representatives and any person entitled in case of death has, an action against employer to recover damages sustained or damages as under Fatal Injuries Act as case may be. See category 13 Estates and Trusts, topic 13.05 Death. Same applies where execution of any work is being carried into effect under any contract, and injury is caused by contractor or subcontractor. Contractor or subcontractor is liable, but not so as to enable double damages to be recovered for same injury. Worker is not deemed to have voluntarily incurred risk of injury by reason only of his continuing in employment of employer with knowledge of defect or negligence which caused it. (1994-95, c. 10, §222). Worker is deemed not to have undertaken risk due to his fellow workers, and contributory negligence by worker does not bar recovery by him or by any person entitled to damages under Fatal Injuries Act, in action for recovery of damages for injury sustained by, or causing death of worker while in service of his employer, for which employer would otherwise have been liable. (1994-95, c. 10, §223). But contributory negligence is taken into account in assessing damages in such action. (1994-95, c. 10, §223).

Administration of the act is in hands of Workers' Compensation Board, which is body corporate and consists of not more than 11 members. Workers' Compensation website at http://www.wcb.ns.ca.

Unemployment Compensation.

See Canada Law Digest, category Employment, topic Labour Relations, subhead Employment Insurance Act.

11.03 WORKERS' COMPENSATION LAW:

See topic 11.02 Labour Relations.

12 ENVIRONMENT

12.01 ENVIRONMENTAL REGULATION:

Environment Act (1994-95, c. 1, as am'd by 1998, c. 18; 1999 [2d sess.], c. 12 [not in force]; 2001, c. 6; 2004, c. 3; 2006, c. 2; 2006, c. 30; 2008, c. 56 [not in force]) repeals Dangerous Goods and Hazardous Wastes Management Act (c. 118), Environmental Assessment Act (c. 149), Environmental Protection Act (c. 150), Environmental Trust Act (1990, c. 9), Gasoline and Fuel Oil Licensing Act (c. 184), Litter Abatement Act (1989, c. 8), Ozone Layer Protection Act (c. 331), Pest Control Products (Nova Scotia) Act (c. 341), Recycling Act (1989, c. 12), Salvage Yard Licensing Act (c. 410), Transboundary Pollution Act (1993, c. 15). Pursuant to Environment Act undertakings having environmental impacts (to be defined by regulation) will be subject to environmental assessment before work commences. (1994-95, c. 1, §§31-49, as am'd by 2006, c. 30). Act controls release of substances that have adverse effects on environment (1994-95, c. 1, §§67-74, as am'd by 2006, c. 30), specifically, hazardous wastes (1994-95, c. 1, §§75-78), pesticides (1994-95, c. 1, §§79-81), and petroleum products (1994-95, c. 1, §§82-84). Minister of Environment is empowered to set standards for degradability and recyclability (1994-95, c. 1, §100), and to regulate use of packaging in sale of products (1994-95, c. 1, §101, as am'd by 2006, c. 30). Act promotes stewardship principle that makes producer responsible for its product from point of manufacture to final disposal, and polluter-pay principle that confirms responsibility of polluter to take remedial action and to bear cost thereof. (1994-95, c. 1, as am'd by 1998, c. 18; 1999 [2d sess.], c. 12 [not in force]; 2001, c. 6; 2004, c. 3; 2006, cc. 2, 30; 2008, c. 56 [not in force]).

Pollution.

Pollution, meaning detrimental alteration of environment, may be forbidden outright or permitted under certain conditions. Control devices may be required. Permits may be altered or cancelled. (1994-95, c. 1, as am'd by 1998, c. 18; 1999 [2d sess.], c. 12 [not in force]; 2001, c. 6; 2004, c. 3; 2006, cc. 2, 30; 2008, c. 56 [not in force]). Check regulations.

Penalties.

Orders for elimination of pollution may be made at offender's expense as debt to Crown. (1994-95, c. 1, as am'd by 1998, c. 18; 1999 [2d sess.], c. 12 [not in force]; 2001, c. 6; 2004, c. 3; 2006, cc. 2, 30; 2008, c. 56 [not in force]). Corporate directors and officers who authorize offence under Environment Act are liable to be penalized even if corporation is not prosecuted for offence. (1994-95, c. 1, §165).

Environmental Goals and Sustainable Prosperity Act (2007, c. 7) sets objectives for: (1) Reduction of emissions from greenhouse gases and other pollutants; (2) management of water resources; (3) preventing loss of wetlands; (4) limiting solid waste disposal rates; (5) energy conservation standards for new construction; (6) ensuring sustainability of Province's natural capital in forestry, mining, parks and biodiversity. (2007, c. 7, §4). To meet goals, Province may enter into agreements with representatives of economic sector, other provincial governments and federal government. (2007, c. 7, §5).

Water Act (c. 500, as am'd by 1993, c. 19; 1994-95, c. 1) gives Environmental Control Council and Minister of Environment control of all water in province; industrial and commercial users require approval.

Health Act.

(c. 195, as am'd by 1992, c. 19; 2004, c. 4 [§113(2) not in force]). Sewage disposal system requires Departmental approval.

Beaches.

Beaches are for the benefit, education and enjoyment of Nova Scotians and designated beaches are protected against certain uses without compensation. (c. 32, as am'd by 1993, c. 9).

Beverage Containers.

Use and control of refillable beverage containers is regulated. (1994-95, c. 1, as am'd by 1999 [2d sess.], c. 12 [not in force]; 2001, c. 6; 2004, c. 3; 2006, cc. 2, 30; 2008, c. 56 [not in force]).

Energy and Mineral Resources.

Energy Board regulates environmental protection in development of energy and mineral resources. (c. 147, as am'd by 2000, c. 12; 2001, c. 15).

Crown Lands Act (c. 114) provides for regulation of lands owned or controlled by Crown.

Forests Act (c. 179, as am'd by 1992, c. 18; 1998, cc. 18, 29) provides for conservation and enhancement of forest resources.

Wildlife Act (c. 504, as am'd by 1990, c. 50; 1993, c. 9; 1995-96, cc. 8 and 25; 1998, c. 11; 2001, c. 46) provides for regulation of hunting and fishing and for management of wildlife and wildlife habitat.

Endangered Species Act (1998, c. 11) provides for designation, protection and conservation of species at risk in province, including habitat protection.

Farm Practices Act (2000, c. 3) restricts availability of action in nuisance in respect of farm and agricultural operations.

Wilderness Areas Protection Act (1998, c. 27, as am'd by 2005, c. 56; 2009, c. 30 [not in force]) provides for establishment, management, protection and use of land designated as wilderness areas.

Conservation Easements Act (2001, c. 28) permits eligible bodies to acquire by written agreement with land owner conservation easement to protect land containing ecologically significant features.

13 ESTATES AND TRUSTS

13.01 ADMINISTRATION:

See topic 13.09 Executors and Administrators.

13.02 ADVANCEMENTS:

See topic 13.07 Descent and Distribution.

13.03 ALLOWANCES:

See topic 13.09 Executors and Administrators.

13.04 CLAIMS:

See topic 13.09 Executors and Administrators; category 5 Civil Actions and Procedure, topic 5.18 Pleading.

13.05 DEATH:

Statutory presumption of death in certain circumstances. (c. 354). Court can make declaration of death where likely person dead and impossible to produce body. Presumption of Death Act prevails when conflict with Insurance Act, c. 231, §212 (where seven years must pass before death presumed).

See also category 5 Civil Actions and Procedure, topic 5.02 Actions, subhead Abatement.

Presumption of survivorship in case two or more persons die at the same time or in circumstances rendering it uncertain which survived is provided for by Survivorship Act. (c. 454).

But under Insurance Act where insured and beneficiary die in same disaster, beneficiary is presumed to have died first. (c. 231, §218).

Actions for Death.

Where death of person has been caused by wrongful act, neglect or default of another which would, if death had not ensued, have entitled person injured to maintain action and recover damages in respect thereto, wrongdoer is liable to action for damages even though death has been caused under such circumstances as amount to crime. (c. 163, §3, as am'd by 2000, c. 29, §§9-12). Damages may be both pecuniary and nonpecuniary and may include out-of-pocket expenses incurred for benefit of deceased, travel expenses incurred visiting deceased between time of injury and death, reasonable allowance for value of nursing or housekeeping services provided by claimant, and compensation for loss of guidance, care and companionship. (c. 163, §5, as am'd by 2000, c. 29, §11). Action is brought in name of executor or administrator of deceased person; but if there is no executor or administrator or if they have not brought action within six months after death of deceased, action may be brought in name or names of spouse, common law partner, parent or child of deceased or any of them (c. 163, §4, as am'd by 2000, c. 29, §10). Action must be for benefit of spouse, common law partner, any person whom deceased has demonstrated settled intention to treat as his child or parent (c. 163, §12), parent or child of deceased and must be brought within 12 months of death of deceased (c. 163, §10). Amount of damages is discretionary in court (juries though permissible are rarely used), and there is no statutory limitation of amount which may be awarded.

Upon registration of Domestic-Partnership Agreement pursuant to Vital Statistics Act (c. 494, as am'd by 1998, c. 8; 2000, c. 29; 2001, cc. 4, 5, 31, 45; 2003 [2d sess.], c. 4; 2004, cc. 10, 48; 2005, c. 9; 2005, c. 42; 2006, c. 15), domestic partners have, as between themselves and with respect to other persons, same rights and obligations pursuant to Matrimonial Property Act.

Certificate of Death.

See category 10 Documents and Records, topic 10.05 Records.

Survival of Actions.

Where a person dies after Oct. 1, 1954, all causes of action subsisting against or vested in him survive against or, as the case may be, for the benefit of his estate except for adultery and inducing a spouse to leave or remain apart from his or her spouse. (c. 453, §2). Where cause of action survives for benefit of estate of deceased person only damages that have resulted in actual pecuniary loss to estate are recoverable and in no case are damages recoverable for punitive and exemplary matters, loss of expectation of life and pain and suffering. (c. 453, §4). Proceedings are subject to Limitations Act. (c. 453, §5). Ordinary law respecting limitation of actions applies to actions arising after Apr. 1962. (c. 453, §5). Where there is no executor or administrator, court may appoint person to represent estate for purposes of action. (c. 453, §7). Rights conferred by c. 453 are in addition to and not in derogation of any rights conferred by The Fatal Injuries Act.

13.06 DECEDENTS' ESTATES:

See topics 13.07 Descent and Distribution, 13.09 Executors and Administrators, 13.15 Wills.

13.07 DESCENT AND DISTRIBUTION:

Real and personal property in excess of share of surviving spouse, or all property if there is no surviving spouse, descends and is distributed, in case of intestacy, as follows, each class of which a member is living taking to exclusion of subsequent classes: (1) Issue per stirpes; (2) parents equally, or all to survivor; (3) brothers and sisters equally, children of deceased brothers and sisters taking by representation; (4) nephews and nieces equally; (5) next of kin of equal degree except that those claiming through nearest ancestor take to exclusion of others of equal degree claiming through more remote ancestor. No representation among collaterals more remote than children of brothers and sisters. Degrees of kindred are computed according to civil law rules. (c. 236, as am'd by 1999 [2nd sess.], c. 8).

Share of Surviving Spouse.

Real and personal property are combined into one corpus; surviving spouse receives $50,000 or whole of estate if less than $50,000. In addition to $50,000, if one child, one-half residue; if two or more children, one-third residue; if no issue, estate goes to widow. (c. 236, as am'd by 1999 [2nd sess.], c. 8).

Upon registration of Domestic-Partnership Agreement pursuant to Vital Statistics Act (c. 494, as am'd by 1998, c. 8; 2000, c. 29; 2001, cc. 4, 5, 31, 45; 2003 [2nd sess.], c. 4; 2004, cc. 10, 48; 2005, c. 9; 2005, c. 42; 2006, c. 15), domestic partners have, as between themselves and with respect to other persons, same rights and obligations pursuant to Intestate Succession Act, c. 236.

Half blood inherit equally with the whole blood.

Adopted Children.

See category 14 Family, topic 14.01 Adoption.

Illegitimates.

Illegitimate child treated as if he were legitimate child of both his parents. (c. 236, §16; 1999 [2d sess.], c. 8).

Child of void marriage deemed to be legitimate child of parents if marriage celebrated at any time in accordance with law of place of celebration and believed by either parent to be valid marriage. (c. 160, §47).

Advancements.

Real or personal property given by an intestate as an advancement to any child or grandchild is considered as a portion of the estate of the intestate and is taken towards such child or grandchild's share. If the advancement exceeds his share he is excluded from any further portion but need not make any refund. If child or grandchild dies before the intestate, leaving issue, the advancement is considered as having been made directly to the representatives of such child or grandchild. Every gift or grant made by an intestate in his lifetime to a child or grandchild is deemed an advancement if so expressed in writing in the grant if charged in writing by the intestate, if acknowledged in writing by the child or grandchild, or if proved so to be evidence before a court or judge, but not otherwise. (c. 236, §13).

Election.

There is no right to dower in an intestacy.

Escheat.

If a person dies intestate and leaves no heirs or persons entitled to his lands, it escheats to the Crown. (c. 151, §2). Same rule applies to personal property.

See also topic 13.09 Executors and Administrators.

13.08 ESTATES:

See category 21 Property, topic 21.14 Real Property.

13.09 EXECUTORS AND ADMINISTRATORS:

Grant of Probate or administration made by court for probate district in which deceased resided at time of death; if resident out of province at time of his death, grant may be made by court of probate for any district in which decedent had property at time of his death, provided not granted previously by court. (2000, c. 31, §29 as am'd by 2001, c. 5; 2002, c. 5).

Preferences in Right to Administer.

Probate is granted to the executors named in the will. Administration of the estate of an intestate is granted to one or more of the following persons, who are entitled in the order following: (1) Spouse and children of intestate residing in Province; (2) residents of Province entitled to share in distribution of estate under Intestate Succession Act or as adult residuary beneficiaries; (3) Public Trustee; (4) nonresidents of Province entitled to share in distribution of estate under Intestate Succession Act or as adult residuary beneficiaries; (5) creditor or person having cause of action against estate. Where more than one person entitled to administration, court may grant administration to one or more such persons. (2000, c. 31, §32).

Upon registration of Domestic-Partnership Agreement pursuant to Vital Statistics Act (c. 494, as am'd by 1998, c. 8; 2000, c. 29; 2001, cc. 4, 5, 31, 45; 2003 [2nd sess.], c. 4; 2004, cc. 10, 48; 2005, c. 9; 2005, c. 42; 2006, c. 15), domestic partners have, as between themselves and with respect to other persons, same rights and obligations pursuant to Probate Act.

Eligibility and Competency.

Generally, any person other than infant or person of unsound mind may act as executor or administrator. (2002, c. 8). See category 14 Family, topic 14.07 Guardian and Ward. Married woman, alien, corporation sole, or nonresident may act. Corporation aggregate may act if it has such power conferred on it by charter or statute under which it is incorporated.

Qualifications.

Except where provided by law or by will, every administrator and nonresident executor shall give registrar security as prescribed. Court may dispense with security where personal representative is sole beneficiary. No security necessary where Public Trustee or trust company appointed. (2000, c. 31, §40).

Removal.

The court may remove personal representative where court satisfied removal in best interests of persons interested in estate. Factors include failure by personal representative to comply with court order, failure to administer or settle estate, wasting estate, mental incompetence, criminal conviction, and departure from Province without intention to return. (2000, c. 31, §61).

Special Kinds of Administration.

If executor refuses to act, or if no executor is named in will, court grants administration with will annexed to person or persons entitled to administration if deceased had died intestate. (2000, c. 31, §22). When executor or administrator is out of province, court may appoint any person entitled to grant of administration under §32 of Probate Act (2000, c. 31), to be administrator for limited time, or until administration is revoked on return of any person entitled. (2000, c. 31, §23). Pending any action or contestation touching validity of will of decedent, or for obtaining, recalling or revoking any probate or administration, court may appoint any person entitled to grant of administration under §32 of Probate Act (2000, c. 31) as administrator of property of deceased. (2000, c. 31, §24). Administrators in these three kinds of administration are subject to immediate control of court and act under its direction. (2000, c. 31, §27). Where there is danger to any part of estate because some of it is perishable or of precarious nature, and persons entitled have not applied for administration and there is likely to be delay, court may, on application, issue grant to person it thinks fit. (2000, c. 31, §21). Where grant made by authority outside Province, or true copy certified under seal of authority, filed with court and security provided, Registrar may issue grant with respect to estate. (2000, c. 31, §37, as am'd by 2001, c. 5).

Inventory.

Every executor or administrator must within three months after grant of probate or letters of administration, or such extended time as the court allows, exhibit and file in the court a full and true inventory in prescribed form of deceased's assets. (2000, c. 31, §57). If any comes to his possession or knowledge after filing such inventory he must file further inventory.

Notice to Creditors.

Before payment of debts or distribution of estate, executor or administrator must advertise in the Royal Gazette for six months, calling on all persons who have any demands upon estate to file claim within six months from date of advertisement. (2000, c. 31, §63).

Presentation of Claims.

Filing claim is deemed to be bringing action to prevent operation of statute of limitations. (2000, c. 31, §65). Claim must be filed in prescribed form within six months from date of advertisement for claims in Royal Gazette. (2000, c. 31, §63). If no claim filed in six-month period, personal representative may pay debts and distribute assets. No action shall lie against personal representative. (2000, c. 31, §63). No claim shall be filed after court issues order settling estate.

Payment of Claims.

Every executor or administrator at expiration of 12 months from date of probate or letters of administration must pay all legal claims and must distribute estate as directed by will or by statutes. (2000, c. 31, §70, as am'd by 2001, c. 5).

Sales, Etc.

Personal representative may, subject to provisions of Probate Act, dispose of and otherwise deal with real property subject to rights, equities and obligations as if real property were vested in person representative. (2000, c. 31, §47, as am'd by 2001, c. 5).

Personal representative may sell real property to pay debts and to distribute estate. No sale of real property for purpose of distribution only is valid with respect to any person beneficially interested unless that person concurs in sale. (2000, c. 31, §50, as am'd by 2001, c. 5). Personal representative may lease property for up to one year, or longer with approval of court, or mortgage property to pay property taxes or debts. (2000, c. 31, §52).

Actions.

Filing of copy of claim of creditor with registrar of probate, is equivalent to bringing action to prevent operation of any statute of limitations. (2000, c. 31, §65).

Accounts.

Every personal representative shall pay all legal and just claims at expiration of 12 months from date of grant, or such extended time as court allows. (2000, c. 31, §70, as am'd by 2001, c. 5). Personal representative shall give court accounting of administration of estate within 18 months from date of grant, or such extended time as court allows. (2000, c. 31, §69). On passing of accounts of personal representative, court may make full inquiry concerning all of deceased's property, and administration and disbursement thereof, and inquire into complaints regarding conduct of personal representative. (2000, c. 31, §71).

Court may appoint accountant to review accounts if they are complex. (2000, c. 31, §74). On passing of accounts, court may order accounts passed, personal representative discharged, security released, and distribution of remaining undistributed estate. (2000, c. 31, §72).

Commissions.

In settlement of any estate, executors or administrators may be allowed a commission not exceeding 5% on the amount received by them over and above all necessary expenses. The court may apportion the commission among the executors or administrators as appears just according to labor bestowed or responsibility incurred. (2000, c. 31, §76). Specific compensation provided in will, unless renounced, will bar commission (2000, c. 31, §77).

Insolvent Estates.

The court, in its discretion, upon application of executor or administrator supported by his affidavit that he believes the estate is insolvent, may make an order declaring the estate to be insolvent. If any proceedings against executor or administrator for any cause accruing against deceased, he may apply to court for stay of proceedings upon the production of a copy of such an order. Judge may order stay or such other order as justice requires. In settlement of insolvent estates, assets of estate shall be distributed: (1) to full payment of reasonable funeral expenses, including headstone; (2) to payment of probate taxes and court fees; (3) to payment of personal representative's commission and legal fees; (4) to payment of reasonable medical expenses incurred during last 30 days of deceased's life; (5) to payment of all other debts. (2000, c. 31, §83). This does not affect mortgage debt or security interest in personal property under Personal Property Security Act or interest of spouse in matrimonial home or registered judgment. (2000, c. 31, §84).

Small Estates.

Public trustee will administer certain small estates. (c. 379, as am'd by 1999 [2nd sess.], c. 8; 2001, c. 6; 2002, c. 8; 2005, cc. 8, 42; 2008, c. 4, c. 8 [ss. 41, 42 not in force]; 2009, c. 28 [s. 2 not in force]).

Foreign Executors and Administrators.

Where grant made by authority outside Province, or true copy certified under seal of authority, filed with court and security provided, Registrar may issue grant with respect to estate. (2000, c. 31, §37, as am'd by 2001, c. 5).

13.10 FIDUCIARIES:

See topics 13.09 Executors and Administrators, Trusts; category 14 Family, topic 14.07 Guardian and Ward.

13.11 INTESTACY:

See topic 13.07 Descent and Distribution.

13.12 PROOF OF CLAIMS:

See topic 13.09 Executors and Administrators; category 5 Civil Actions and Procedure, topic 5.18 Pleading.

Quieting Titles Act.

See category 21 Property, topic 21.14 Real Property.

13.13 TRUSTEE PROCESS:

See category 8 Debtor and Creditor, topic 8.10 Garnishment.

13.14 TRUSTS:

The kinds of trusts recognized, the manner of creation, and the purposes for which permitted, and the general rights, duties, and liabilities of trustees and beneficiaries are governed by common law.

The Trustee Act (c. 479 as am'd by 1992, c. 8; 1994-95, c. 19; 2002, c. 10; 2007, c. 17 [not in force]) provides for: Investments in which trustee may invest trust funds unless expressly forbidden by instrument (if any) creating trust; appointment of new trustees; retirement of trustee; powers of court to appoint new trustees and vest property in them; payment into court by trustees of trust money or securities; etc. Trustees are entitled to fair and reasonable remuneration for their care, pains, trouble and time expended in and about estate; judge of Supreme Court may on application to him settle amount, and apportion same where there are several trustees. This does not apply where remuneration is fixed by instrument creating trust. (c. 479, §62). If it appears to court that trustee is or may be liable for any breach of trust, but has acted honestly and reasonably, and ought fairly to be excused for breach, and for omitting to obtain directions of court in matter in which he committed breach, it may relieve trustee either wholly or partly from personal liability for same. (c. 479, §64).

Trust companies approved by the Governor-in-Council may be appointed by the court to execute the office of trustee, executor, administrator, receiver, assignee or guardian of an infant or lunatic; but no company which has issued or has authority to issue debentures can be so approved. Any person having authority may by deed, will or other instrument appoint such a company to execute any such office. (c. 479, §68, as am'd by 2007, c. 17 [not in force]). Such company may be appointed sole trustee where otherwise it might be necessary to appoint more than one; may also be appointed trustee jointly with any person. It need not give security for due performance of its duty unless otherwise ordered. (c. 479, §72). Governor-in-Council may revoke its approval. Company has same liability and powers as private person. (c. 479, §74).

Trusts in Land.

Declaration or creation of trust in land is not valid unless in writing, signed by the person entitled to create or declare the trust, or by his last will. This does not apply to trust in land arising or resulting by implication or construction of law, or which may be transferred or extinguished by act or operation of law. (c. 442, §5).

Grant or Assignment of Trust.

No grant or assignment of any trust is valid unless it is in writing, signed by the person granting or assigning the same or by his last will. (c. 442, §5).

Variation of Trusts Act (c. 486) provides that Supreme Court may approve variation in trusts on behalf of beneficiaries incapable of assenting or who have contingent interests.

Public Trustee Act (c. 379, as am'd by 1999 [2d sess.], c. 8; 2001, c. 6; 2002, c. 8; 2005, cc. 8, 42; and 2008, cc. 4, 8; 2009, c. 28 [s. 2 not in force]).—Public trustee may be appointed trustee or guardian under several acts and may have himself appointed under some acts, generally where private parties refuse or are unable to act in public interest.

International Trusts Act (2005, c. 41) adopts provisions of International Convention on Law applicable to trusts and on their recognition.

Accumulations.

See category 21 Property, topic 21.11 Perpetuities.

Perpetuities.

See category 21 Property, topic 21.11 Perpetuities.

13.15 WILLS:

Any person who has attained age of majority, or who is under age of majority but who is or has formerly been married (c. 505, §4), and who is of sound mind, may dispose of, by will, any real or personal property to which he or she is entitled at time of his death, and which if not so disposed of would devolve upon his or her heirs at law or representatives (c. 505, §3).

Formalities of Execution.

The will must be in writing signed by the testator, or by some other person in his presence and by his direction, at the end or foot thereof. The signature must be made or acknowledged by the testator in the presence of two or more witnesses present at the same time; such witnesses must attest and subscribe the will in the presence of the testator, but no form of attestation is necessary. (c. 505, §5). No appointment made by will is valid unless executed in accordance with proper testamentary formalities. (c. 505, §8, as am'd by 2006, c. 49).

Witnesses.

No will is invalid on account of incompetency of witnesses to prove its execution. Devise or bequest to an attesting witness or to his or her wife or husband is void, unless there are two other competent witnesses. Creditors, their wives or husbands and executors are competent. (c. 505, §§11, 13).

Holograph wills not recognized.

Living Wills.

No legislation.

Nuncupative Wills.

Soldier in active service or any mariner or seaman at sea may dispose of his personal property without formal requisites; this may be by oral will before witnesses. Will of any such person disposing of real estate, who dies after May 17th, 1919, is valid even though he was under 19 (c. 505, §9, as am'd by 2006, c. 49) when he made will, or even though form was not form required by law (c. 505, §9, as am'd by 2006, c. 49). Publication is not necessary.

Alterations.

Cancellation by drawing lines through any part of a will, obliterations, interlineations or other alterations made in a will after execution, are invalid unless signature of testator and witnesses is made in the margin opposite or near to such alteration. (c. 505, §20).

Revocation.

Will may be revoked: By another will or codicil duly executed; by a writing declaring an intention to revoke it, and executed in the manner in which a will must be executed; by burning, tearing or otherwise destroying the same by the testator, or by some person in his presence and by his direction, with the intention of revoking it; and by marriage of the testator except in the following cases: (a) Where it is declared in the will that it is made in contemplation of marriage; (b) where the husband or wife elects to take under the will by an instrument in writing signed by him or her within one year after the testator's death and filed in the court of probate; (c) where the will is made in exercise of a power of appointment, and the property thereby appointed would not in default thereof pass to the heir, executor, or administrator or the person entitled as next of kin. A will is not revoked or the construction thereof altered by reason of any subsequent change of domicile of the testator. (c. 505, §§16-19, as am'd by 2006, c. 49).

Revival.

A revoked will can be revived only by the re-execution or by codicil showing an intention to revive the will. (c. 505, §21).

Probate Jurisdiction.

Probate may be granted by the court of probate for the district in which the testator had at the time of his death his fixed place of abode or in which he had property at the time of his death. As to probate proceedings see topic 13.09 Executors and Administrators.

Self-proved Wills.

No provision.

Lapses.

A devise or bequest to the testator's child does not lapse if the child dies within the lifetime of the testator leaving issue alive at testator's death, unless there is a contrary provision in the will.

Payment of Legacies.

Executors do not have to pay legacies until accounts are passed and distribution ordered by the court.

Unclaimed Legacies.

Court may order executor to distribute unclaimed legacy if legatee not heard from for ten years and believed dead. (2000, c. 31, §81). See also topic 13.07 Descent and Distribution, subhead Escheat.

Dependents inadequately provided for can apply for an order for proper maintenance and support. (c. 465, §3). Amount awarded, if any, is in discretion of judge. Application must be made within six months from grant of probate or of administration with will annexed, but judge may allow an application to be made at any time as to any portion of estate remaining undistributed. (c. 465, §14).

Upon registration of Domestic-Partnership Agreement pursuant to Vital Statistics Act (c. 494, as am'd by 1998, c. 8; 2000, c. 29; 2001, cc. 4, 5, 31, 45; 2003 [2d sess.], c. 4; 2004, cc. 10, 48; 2005, c. 9; 2005, c. 42; 2006, c. 15), domestic partners have, as between themselves and with respect to other persons, same rights and obligations pursuant to Testator's Maintenance and Custody Act, c. 465.

Foreign Wills.

Wills made out of the province, regardless of the domicile of the testator at the time of making or at the time of his death, will, as regards personal property, be held to be well executed for the purpose of being admitted to probate in Nova Scotia, if made according to the forms required, by either: (a) The law of this province; (b) the law of the place where made; (c) the law of the place where testator was domiciled when it was made; or (d) the law then in force in the place where he had his domicile or origin. (c. 505, §15, as am'd by 2006, c. 49).

The following form of attestation clause is generally used but is not necessary.

Form

Signed, published and declared by the said testator as and for his last will and testament in the presence of us, both present at the same time, who at his request and in his presence and in the presence of each other have subscribed our names as witnesses the day and year last above written.

International Wills.

Convention Providing Uniform Law on Form of International Will adopted in International Wills Act S.N.S. 2000, c. 7. Effective after Convention in force and six months after Federal Government Convention extends to provinces.

Simultaneous Death.

See topic 13.05 Death, subhead Presumption of Survivorship.

14 FAMILY

14.01 ADOPTION:

Children and Family Services Act (1990, c. 5 [§73 not in force], as am'd by 1996, c. 3; 1996, c. 10 [§11 not in force]; 2005, c. 15; and 2008, c. 12) came into force Sept. 3, 1991.

Any person of age of majority may adopt anyone younger than himself or herself. (1990, c. 5, §72).

Consent Required.

Order will not be made except on written consent, of adoptee if over 12 years of age, of spouse if married, of parent or parents if under age of majority. When adoptee given up pursuant to voluntary agreement, child placing agency may give required consent. When adoptee is child in care, Children's Aid Society or Minister may give required consent. (1990, c. 5, §74). In proper cases court may dispense with any required consent (1990, c. 5, §75), but notice must be given to person whose consent is to be dispensed with (1990, c. 5, §75).

Conditions Precedent.

Where adoptee under 16 years of age, adoptee must have resided with petitioner no less than six months; notice must be given to Minister of Social Services at least six months prior to application, or at least one month where one of applicants for adoption is birth parent; notice of hearing and copies of all supporting material to application must be filed with Minister at least one month prior to application. Minister may shorten or dispense with foregoing requirements. If adoptee is child in care of agency, adoption notice must wait for decision of appeals from committal of child to agency. (1990, c. 5, §76, as am'd by 1996, c. 10, §14; 2005, c. 15). Payment in consideration of placing child for adoption or procuring child is illegal. (1990, c. 5, §69). The Convention on Protection of Children and Cooperation in Respect of Intercountry Adoption will be in force in province on proclamation of Intercountry Adoption Act. (1998, c. 15).

Jurisdiction.

Court has jurisdiction on basis of residence of applicant, or of proposed adoptee, or domicile of either in Province, or birth of adoptee in Province. (1990, c. 5, §72).

Venue.

If applicant resident, application must be to Family Court of applicant's residence. If applicant not resident in Province, application must be to County Court of district of adoptee's residence. If both applicant and adoptee not resident but domiciled in Province, application to any Family Court. If adoptee born in Province application may be to Family Court of district where born. (1990, c. 5, §72).

Petition.

Application must if possible identify adoptee by birth registration number, as evidenced by birth certificate, rather than by name. (1990, c. 5, §77, as am'd by 2005, c. 15).

Proceedings.

Application and hearing in Chambers; only persons permitted by judge may be present. If adoptee under 16 Minister may make recommendation and/or appear at hearing to assist judge or any party. (1990, c. 5, §77, as am'd by 2005, c. 15).

Decree.

Court must make order granting application if satisfied of ages and identities of parties, that necessary consents obtained or dispensed with, and that adoption proper. (1990, c. 5, §78, as am'd by 2005, c. 15).

Name.

Unless otherwise ordered, adoptee takes surname of adopter. Court may order such change of name as applicant requests. (1990, c. 5, §78, as am'd by 2005, c. 15).

Effect of Adoption.

Adoptee is placed in same position for all purposes as if natural child of adopting parent. Except as to incest and consanguinity for marriage purposes, all legal relationship with natural parents or kindred ceases. (1990, c. 5, §80). See topic 14.09 Infants, subhead Termination of Parental Rights.

Setting Aside Adoption.

Person aggrieved by adoption order may appeal to Supreme Court (Appeal Division). If order made without notice, person aggrieved may apply within one year of date of order to Family Court making order to set order aside; on showing consent obtained by fraud, duress, oppressive or unfair means, court may set aside, and restore adoptee to custody of proper person. (1990, c. 5, §83).

Registration.

With Registrar General under Vital Statistics Act. (c. 494, §13).

14.02 ALIMONY:

See topic 14.05 Divorce.

14.03 COMMUNITY PROPERTY:

System does not obtain.

14.04 DESERTION:

See topic 14.05 Divorce.

14.05 DIVORCE:

Governed by Divorce Act (Canada) (Stat. Can. 1986, c. 4). See Canada Law Digest, category Family, topic Divorce.

No provincial statutory provision for divorce a mensa et thoro.

Annulment of Marriage.

See topic 14.10 Marriage.

Support.

Claimant resident in Nova Scotia may apply to court for transmission of application for support order as against respondent residing in reciprocating jurisdiction. (2002, c. 9).

14.06 DOMESTIC VIOLENCE:

Domestic Violence Intervention Act (2001, c. 29, as am'd by 2002, c. 30) permits application to designate Justice of the Peace for emergency protection order to protect victim of domestic violence.

14.07 GUARDIAN AND WARD:

Jurisdiction with respect to guardianship of minors and of incompetent persons in Supreme Court. (2002, c. 8, as am'd by 2002, c. 30).

Appointment.

Court may appoint father, mother, person standing in loco parentis or public trustee of infant to be guardian of its estate. (2002, c. 8, §3). Supreme Court may appoint parent of child or another person as guardian of property of child. (2002, c. 8, §3). Guardian of property of child is subject to Trustee Act. (2002, c. 8, §9). Where no guardian of property of child appointed, and where child is entitled to receive money as benefit under life insurance policy, as death benefit, as benefit under will or intestacy, and executor or administrator not empowered to act as trustee of child's share, money will be paid to Public Trustee. (2002, c. 8, §14, as am'd by 2002, c. 30). Person having care and custody of child may appoint by will or written instrument in presence of two witnesses one or more guardians of child. (2002, c. 8, §19). Person(s) having care and custody of child may appoint guardian by written instruction or will until child reaches age of majority or marries. (2002, c. 8, §19). Guardian must consent to appointment. (2002, c. 8, §19). Surviving parent of infant is guardian unless court of probate otherwise determines. If person having care and custody of child dies, any other person having care and custody of that child is guardian of person of child unless court orders otherwise. (2002, c. 8, §19). If father or mother does not appoint guardian, or if guardian appointed dies or refuses to act, court of probate may appoint one. Where no guardian appointed for estate of infant who has or is entitled to property, Public Trustee will be guardian. (2002, c. 8, §14). Supreme Court may appoint or remove guardian. (2002, c. 8, §19).

Eligibility.

Any person of sound mind and of legal age can be a guardian. An infant or partnership cannot be appointed guardian. A nonresident may be appointed, but such appointments are not favoured. The court will not generally appoint as sole guardian a married man or woman or solicitor of any of parties concerned.

Bond.

Guardian of property of child shall enter into bond, with or without surety, as court may require. Court may make order dispensing with bond. (2002, c. 8, §6).

Powers.

Guardian of property of child responsible for care and management of child's property and may appear in court to defend or prosecute action affecting child's property. (2002, c. 8, §7). Guardian of property of child is subject to Trustee Act. (2002, c. 8, §9).

Accounts.

On application, court may require guardian of property of child to submit accounts regarding administration of property to court, which may examine and pass accounts. This also applies to final passing of accounts after child has reached age of majority. (2002, c. 8, §10).

Removal.

Court may remove guardian. (2002, c. 8, §§13, 19).

Supreme Court (Trial Division) has jurisdiction to appoint and remove guardians and to pass accounts of guardians. (2002, c. 8, as am'd by 2002, c. 30).

Insane Persons.

Guardian for an insane person may be appointed under provisions of Incompetent Persons Act. (c. 218, as am'd by 2007, c. 17 and Rule 36). On death of incompetent guardian settles with legal representatives of incompetent.

14.08 HUSBAND AND WIFE:

Subject to Matrimonial Property Act (see infra, subhead Matrimonial Property Act), married woman can acquire, hold, and dispose of any real or personal property, as her separate property in same manner as if she were feme sole. (c. 272, §4).

Custody of Children.

See topic 14.09 Infants.

General Rights of Wife.

She can enter into any contract and make herself liable upon the same, to the extent of her separate property, and may sue and be sued in contract, tort or otherwise, in all respects as if a feme sole. Her husband need not be joined in any proceeding brought by or against her. Damages or costs recovered by her are her separate property, against her, are payable out of her separate property only. (c. 272, §13).

Liabilities of Wife.

After marriage, the wife continues to be liable to the extent of her separate property for all ante-nuptial debts, contracts and torts, and she may be sued in respect of such liability, and her separate property is liable therefor, and as between her and her husband, it is primarily liable therefor unless there is a contract between them to the contrary. (c. 272, §19).

Liabilities of Husband.

The husband is only liable for his wife's ante-nuptial contracts and wrongs to the extent of the property of the wife which he has acquired or become entitled to, from or through her. (c. 272, §20). Husband and wife may be sued jointly for her antenuptial contracts or wrongs, but if husband is not liable he gets judgment for costs of his defence. (c. 272, §21). Husband is not merely because of marital relationship, liable for wife's torts committed after marriage. (c. 272, §22).

Husband's interest in wife's realty by virtue of their marriage is not during her life or the life of any of the children subject to his debts. (c. 272, §26).

Conveyances.

A married woman may convey any real property in which she has an interest without her husband joining in the deed or expressing his concurrence by a separate instrument and without any necessity for her to acknowledge that her deed is her free act and deed and was executed freely and voluntarily, without threat, fear or compulsion of, from or by her husband. (c. 271, §3). This does not apply to conveyance by woman married before Mar. 11, 1898, of property acquired by her before that date, as to which former requirements of joinder or consent of husband and special acknowledgment apply. (c. 271, §3).

Wife must join in husband's deed, in order to release dower, unless she is of unsound mind or has been living apart from her husband for two years or more under circumstances which would preclude her getting alimony.

Transfer of property between spouses by way of deed is exempt from land transfer tax. (c. 121, §4, as am'd by 1990, c. 10; 1994, c. 9).

Actions.

The wife may sue in her own name with respect to her separate property. Husband and wife have the same civil remedies against each other, as though unmarried. (c. 272, §18).

Matrimonial Property Act (c. 275, as am'd by 1995-96, c. 13).—Regardless of ownership, spouses are equally entitled to possession of matrimonial home. (c. 275, §6). Neither spouse may dispose of any interest in matrimonial home without consent of other. (c. 275, §8). Both spouses are entitled to notice of proceeding to realize security of matrimonial home and have right to redeem. (c. 275, §9).

In event of divorce, annulment, separation or death of spouse, spouse may apply for fair division of matrimonial assets. Equal division is deemed fair unless proved otherwise. Spouse's rights under this Act on death of other spouse are in addition to other rights arising on death. (c. 275, §12). Division of assets will be governed by law of place of last common residence. Ownership of real property is governed by law where situate. (c. 275, §22).

Upon registration of Domestic-Partnership Agreement pursuant to Vital Statistics Act (c. 494, as am'd by 1998, c. 8; 2000, c. 29; 2001, cc. 4, 5, 31, 45; 2003 [2d sess.], c. 4; 2004, cc. 10, 48; 2005, cc. 9, 42; 2006, c. 15), domestic partners have, as between themselves and with respect to other persons, same rights and obligations pursuant to Matrimonial Property Act.

Antenuptial contracts and contracts entered into during marriage are valid, if signed and witnessed by both parties, to determine rights and obligations during marriage or upon separation or divorce. (c. 275, §§23-24). Minor with capacity to marry has capacity to enter into such contract but it must be approved by court either before or after contract entered into. (c. 275, §25). Court may disregard terms which are not in best interests of child (c. 275, §26) and may vary unconscionable, unduly harsh or fraudulent terms (c. 275, §29). On division of property contract not conclusive except where contract entered into before Act came into force. (c. 275, §§5, 13).

Desertion and Nonsupport.

Failure by spouse or common law partner to provide necessaries to his spouse or common law partner is offence under Criminal Code of Canada. Adult whose spouse, or child under 19 whose father or mother fails without sufficient cause to provide reasonable maintenance, may obtain maintenance order against such spouse or parent for periodic payment. Amount in discretion of court. (c. 160, §§3, 3A, 4, 9, 10, as am'd by 1997 [2nd sess.], c. 3; 2000, c. 29, §§2-8).

Spouse or common law partner, who has not married someone else or remarried or lived with someone else as husband and wife, or parent or child may apply to Family Court for maintenance. Maintenance will be based on means and needs, but may be reduced if spouse or common law partner entitled to maintenance persistently engages in course of conduct that constitutes repudiation of marriage relationship or unreasonably prolongs his or her maintenance requirements. Separation agreements may be varied if not in best interests of any party. Maintenance orders may provide for periodic or lump sum payments or for security and they may be varied on change of circumstances. (c. 160, as am'd by 1990, c. 5; 1994-95, c. 6; 1997 [2d sess.], c. 3; 1998, c. 12; 2000, c. 29, §§2-8). Maintenance orders of jurisdictions according similar treatment to like orders obtained in Nova Scotia may be enforced in Nova Scotia. (1994-95, c. 6, as am'd by 1995-96, c. 28; 1998, cc. 12, 30; 2002, c. 9; 2004, c. 40; 2005, c. 53; 2006, c. 33; and 2007, c. 43).

Upon registration of Domestic-Partnership Agreement pursuant to Vital Statistics Act (c. 494, as am'd by 1998, c. 8; 2000, c. 29; 2001, cc. 4, 5, 31, 45; 2003 [2d sess.], c. 4; 2004, cc. 10, 48; 2005, cc. 9, 42; 2006, c. 15), domestic partners have, as between themselves and with respect to other persons, same rights and obligations pursuant to Maintenance and Custody Act.

Community property system does not obtain.

14.09 INFANTS:

Nineteen is age of majority for each sex. (c. 4, §2).

Contractual disabilities of infants are governed by common law rules.

Ratification by any person after attaining 19, of any debt contracted during infancy or of any promise or simple contract made during infancy must be in writing and signed by the party to be charged or his duly authorized agent, otherwise no action can be brought thereon. (c. 442, §9).

Actions.

Infants may sue and defend by their litigation guardian. Infant cannot enter an appearance except by his litigation guardian; no order for appointment of litigation guardian necessary, but solicitor applying to enter such appearance must make and file affidavit that suggested litigation guardian is fit and proper person to be such guardian and before person's name is used as litigation guardian there must be filed with prothonotary his written consent to be litigation guardian, or where he has been appointed guardian or litigation guardian by court, true copy of order appointing him. Litigation guardian of person under disability must act by solicitor. (Rule 6). Every infant served with petition, notice of motion, or summons, must appear on hearing thereof by litigation guardian in all cases where appointment of special guardian not provided for.

Custody of Children.

Court, upon application, shall enforce and may make such orders as it considers necessary to give effect to custody order made by tribunal in reciprocating state. Reciprocating state is as declared by Governor in Council for purposes of Act. (c. 387). Hague Convention on Civil Aspects of International Child Abduction adopted, save that Crown is not bound to pay costs of its participation. (c. 67, §4).

Disposal of Property.

An infant entitled to any leasehold or freehold estate, may by his guardian petition court or judge for an order to let, sell, mortgage or otherwise dispose of such property. Such letting, sale, etc., must be made by guardian or person appointed by court or judge. Where person under disability is an infant over age of 16 years, his consent to sale, etc., verified by solicitor's affidavit, must be filed. Court may order investment, disposal and application of proceeds and of increase and interest arising therefrom for benefit of infant. (Rules 36, 71).

The person appointed by the court must file a bond to Her Majesty, to be approved by the court or judge with such sureties and containing a condition for fulfillment of the directions contained in the order and such other conditions as ordered. No such letting or disposal can be made contrary to any last will or conveyance by which such property or interest was devised or conveyed to the infant unless necessary for the support and maintenance of infant. Any conveyance made by guardian, etc., under such an order has the same effect as if made by the infant and as if he were 19 years of age. Conveyance must refer to the order and the disposal; and the person making the sale must file a report thereof with the prothonotary of the county where lands situated. (Rule 74).

Children and Family Services Act (1990, c. 5 [§73 not in force], as am'd by 1996, c. 3; 1996, c. 10 [§11 not in force]; 2005, c. 15; 2008, c. 12) came into force Sept. 3, 1991. Supreme Court has broad jurisdiction to make orders under various applications, including adoption (1990, c. 5, §§75-84, as am'd by 1996, cc. 3, 10, §14; 2005, c. 15), care and custody (1990, c. 5, §§32-49, as am'd by 1996, c. 10, §§5-8; 2005, c. 15), and child maintenance (c. 160, §§9-12, as am'd by 1997 [2d sess.], c. 3). Parent or guardian may voluntarily agree to place child with agency. (1990, c. 5, §§17, 18). Court may place child with agency if “child in need of protection”. (1990, c. 5, §42). Child abuse register kept by Minister of Social Services. (1990, c. 5, §63). Act creates offence for failure to provide information respecting child abuse and to cause or contribute to child being in need of protection. (1990, c. 5, §§23, 24, as am'd by 1996, c. 10, §§2,3). Welfare of child paramount consideration in all actions. (1990, c. 5, §3).

Termination of Parental Rights.

Child in need of protection may be taken into care by agent of Minister of Social Services or peace officer. Child welfare agency has care and custody of child until court otherwise orders. Child in care may, following procedures stated in Act, be placed for adoption. Upon adoption child ceases to be child of person who was parent before adoption order.

Adoption.

See topic 14.01 Adoption.

14.10 MARRIAGE:

Marriage by persons under 16 years prohibited except where judge of Family or Juvenile Court finds expedient and in interests of parties. (c. 436, §21).

Consent Required.

If either party to an intended marriage (not being a widow or widower or divorcee) is under 19 (c. 436, §20) consent of both parents, if living, where one has not been assigned custody or is otherwise incompetent or surviving parent where one is dead, or if both dead, of guardian, must be obtained before license is issued (c. 436, §20). If father and mother dead or out of province, and no guardian appointed, license may be issued without such consent. (c. 436; §20). Consent of Director of Child Welfare or of Children's Aid Society substituted for consent of father, mother or guardian of ward of Director or Society. Judge of Supreme Court or family court may dispense with consent. (c. 436, §20).

Banns or Licence.

Marriage is valid if solemnized by person authorized and licence has been obtained for solemnization. (c. 436, §15).

Proceedings for Licence.

To obtain licence person must make affidavit containing full names of parties, residents, whether bachelor, widow, etc., occupation of applicant and that person making affidavit believes there is no lawful cause or legal impediment to bar or hinder solemnization of marriage, ages of parties, and if any party under 19 (c. 436, §17, as am'd by 1999, c. 4), facts necessary to enable issuer to determine whether or not consent has been duly given, or whether necessary; if consent in writing it must be annexed to affidavit; divorcee must attach copy of decree absolute (c. 436, §17, as am'd by 1999, c. 4). Affidavit may be made before issuer, notary public, justice of the peace or commissioner. Licences are issued by deputy issuers of marriage licences, appointed by Governor-in-Council. Fee is as determined by Governor in Council by regulation. (c. 436, §18).

Ceremony may be performed by a minister or clergyman of a church or religious denomination or by a commissioner or staff officer of Salvation Army in Canada, male or female, and resident in Nova Scotia, recognized as duly ordained or appointed according to rites and ceremonies of church denomination or society to which he belongs, provided he or she is registered as authorized to solemnize marriage in accordance with Solemnization of Marriage Act. Marriage solemnized according to rites and customs of Religious Society of Friends or of Baha'i Faith (c. 436, §§5, 12, 13) is valid. Judge of family court is authorized to solemnize marriage. (c. 436, §4, as am'd by 1992, c. 16; 1996, c. 23). Marriage must be solemnized in presence of at least two witnesses each of whom are at least 16 years of age. (c. 436, §22).

Reports of Marriages.

Every person solemnizing marriage must make written record of it in form prescribed; this must be signed by each of parties to marriage, by person officiating, and by at least two witnesses; he must within 48 hours deliver or forward this by registered mail to issuer of marriage licences who in turn must on Saturday of every week forward same to Registrar in Halifax. (c. 436, §§25-28).

Record.

See category 10 Documents and Records, topic 10.05 Records, subhead Vital Statistics.

Common law marriage recognized under provisions of Maintenance and Custody Act (c. 160, as am'd by 1990, c. 5; 1994-95, c. 6; 1997 [2d sess.], c. 3; 1998, c. 12; 2000, c. 29, §§2-8).

Prohibited Marriages.

Parties are prohibited from marrying because of prior marriage, want of age, idiocy and the like. Marriage contracted while any such impediment exists is void. Relationship within the prohibited degrees is a bar to intermarriage.

Annulment.

The Court for Divorce and Matrimonial Causes may annul any marriage on the grounds of impotence or kindred within the degrees prohibited by 32 Henry 8, c. 38. Such a marriage is voidable upon application to court during life of parties, but cannot be questioned after the death of either. The court has jurisdiction to entertain a suit for nullity, where the marriage was celebrated in Nova Scotia; where the respondent is resident in Nova Scotia not on a visit as a traveler and not having taken up residence for the purposes of the suit; or where the parties to the marriage are domiciled in the province. Issue of an annulled marriage are illegitimate.

Foreign Marriages.

Marriage of foreigners is valid if according to the law of their domicile; provided it was a voluntary union of one man and one woman for life to the exclusion of all others and is not regarded as incestuous by the general consent of Christendom. Where one or both of parties is a British subject, marriage in a foreign country usually recognized as valid in Nova Scotia if celebrated according to form required in such foreign country if there is no lack of capacity of the parties to marry according to the law of their domicil, and if parties not prohibited from marrying by English law because of consanguinity, affinity or a previous marriage.

Domestic Partnership is relationship between two persons who have filed Domestic-Partnership Agreement pursuant to Vital Statistics Act. (c. 494 as am'd by 1998, c. 8; 2000, c. 29; 2001, cc. 4, 5, 31, 45 [2d sess.], c. 4; 2004, cc. 10, 48; 2005, cc. 9, 42; 2006, c. 15). Upon registration, domestic partners have same rights and obligations as spouses pursuant to various statutes.

14.11 MARRIED WOMEN:

See topics 14.07 Guardian and Ward, Husband and Wife, Marriage; categories 5 Civil Actions and Procedure, topic Evidence, subhead Witnesses; Documents and Records, topic Acknowledgments; Estates and Trusts, topics Executors and Administrators, Wills; Property, topic Dower.

15 HEALTH

15.01 CHIROPRACTORS:

Qualifications, registration and discipline of chiropractors governed by Chiropractic Act. (1999, c. 4, as am'd by 2008, c. 3).

15.02 DENTISTS:

Qualifications, registration and discipline of dentists, dental hygienists and dental assistants governed by Dental Act. (1992, c. 3 as am'd by 2007, c. 29; 2008, c. 3).

15.03 DOCTORS:

Qualifications, registration and discipline of medical doctors governed by Medical Society Act. (1995-96, c. 12).

15.04 HEALTH CARE:

All residents of province are insured on uniform terms and conditions in respect of medical services to extent of tariffs in M.S.I. plan. (c. 197 as am'd by 1992, c. 20; 2002, c. 5, §22, 23 and 24-26). Prohibitions on privatization of certain medical services in order to maintain single health care delivery system.

15.05 HEALTH PROTECTION ACT:

Chief Medical Officer to develop plans for surveillance of communicable, notifiable, and dangerous diseases and to develop plan to disseminate information necessary for proper response to all necessary persons. (2004, c. 4 [§113(2) not in force]). Chief Medical Officer may order any person owning or occupying premises or any organization, corporation or municipality to control disease vectors in manner prescribed in regulations. (2004, c. 4, §14).

15.06 ILLEGAL DRUGS:

Any person aware of information leading to belief that health or safety of child is at risk from production, manufacture, growth or use of illegal drugs must notify authorities. (2006, c. 5 [not in force]).

15.07 COUNSELLING THERAPISTS:

Qualifications, registration and discipline of counselling therapists governed by

Counselling Therapists Act. (2008, c. 37 [not in force]).

15.08 DIETICIANS:

Qualifications, registration and discipline of dieticians governed by *Dieticians Act.* (2009, c. 2 [not enforced]).

15.09 LICENSED PRACTICAL NURSES:

Qualifications, registration and discipline of licensed practical nurses governed by Licensed Practical Nurses Act. (2001, c. 7, as am'd by 2006, c. 17).

15.10 MIDWIVES:

Qualification, registration and discipline of midwives governed by Midwifery Act. (2006, c. 18, as am'd by 2008, c. 3).

15.11 NATUROPATHS:

Qualifications, registration and discipline of naturopaths governed by Naturopathic Doctors Act. (2008, c. 5).

15.12 OPTOMETRISTS:

Qualifications, registration and discipline of optometrists governed by Optometry Act. (2005, c. 43, as am'd by 2008, c. 3).

15.13 PARAMEDICS:

Qualifications, registration and discipline of paramedics governed by Paramedics Act. (2005, c. 10 [not in force], as am'd by 2008, c. 3).

15.14 PHARMACISTS:

Qualifications, licensing and discipline of pharmacists governed by Pharmacy Act. (c. 343, as am'd by 2001, c. 36; 2008, c. 3).

15.15 PHYSIOTHERAPISTS:

Qualifications, licensing and discipline of physiotherapists governed by Physiotherapy Act. (1998, c. 22, as am'd by 2008, c. 3 [not in force]).

15.16 PSYCHOLOGISTS:

Qualifications, registration and discipline of psychologists governed by Psychologists Act. (2000, c. 32, as am'd by 2008, c. 3).

15.17 REGISTERED NURSES:

Qualifications, registration and discipline of registered nurses governed by Registered Nurses Act. (2001, c. 10, as am'd by 2006, c. 21).

15.18 RESPIRATORY THERAPISTS:

Qualification, registration and discipline of respiratory therapists governed by Respiratory Therapists Act. (2007, c. 13).

15.19 PERSONAL DIRECTIVES ACT (2008, c. 8 [not in force]):

Person with capacity may set out in writing instructions regarding health care or delegate to another authority to make decisions regarding person's healthcare.

SMOKING:

With limited exceptions, smoking prohibited in public buildings such as government buildings, schools, galleries, recreation centres, prisons, and in commercial buildings such as restaurants, lounges, theatres, and in motor vehicle in presence of person under age of 19. (2002, c. 12, §§5-10, as am'd by 2002, c. 30; 2005, c. 59; 2007, c. 54). Offence for minor to possess tobacco. (2002, c. 12, §11, as am'd by 2005, c. 59). Municipal by-laws regulate smoking in public buildings and workplaces. Unlawful to sell tobacco products to minors. (1993, c. 14, as am'd by 1992, c. 12; 2006, c. 47). Use of promotional material using tobacco brand name or trademark regulated. (1993, c. 14, as am'd by 1992, c. 12; 2006, c. 47). Provincial government has statutory cause of action against tobacco product manufacturers to recover cost of health care benefits caused or contributed to by tobacco-related wrong. (2005, c. 46 [not in force]).

16 INSURANCE

16.01 INSURANCE COMPANIES:

Supervised by Superintendent of Insurance.

Regulated by Insurance Act. (c. 231, as am'd by 1992, c. 20; 1995-96, c. 20; 1998, c. 8; 2000, c. 29, §§2-8; 2002, c. 5; 2003, c. 11; 2003 [2nd sess.], c. 1).

Nova Scotia Insurance Review Board acts as regulatory body for automobile insurance. (c. 231, §16, as am'd by 2003 [2nd sess.], c. 1).

Insurance adjusters must be licensed. Superintendent may make regulations respecting qualification and classification; courses of study; examinations, records to be kept by them, their charges. (c. 231, §42).

Insurance companies may be incorporated by special act of the provincial legislature. No insurance company not so incorporated may carry on any part of its business in Nova Scotia unless licensed under the Canadian and British Insurance Companies Act (Canada) or Foreign Insurance Companies Act (Canada). See Canada Law Digest, category Insurance, topic Insurance Companies as to requirements of said acts.

Every automobile insurer must maintain complete files regarding each such claim in province. (c. 231, §107, as am'd by 2003 [2nd sess.], c. 1).

Increases in automobile insurance premiums regulated by Insurance Act (c. 231, as am'd by 1992, c. 20; 1995-96, c. 20; 1998, c. 8; 2000, c. 29; 2002, c. 5; 2003, c. 11; 2003 [2nd sess.], c. 1) and regulations. Regulations prescribe grounds for refusing to issue, renew, refuse or terminate automobile insurance contract or coverage. (2003, c. 11, §3).

Insurance brokers must obtain a certificate from Superintendent of Insurance and can act only for company or companies named in certificate and for kinds of insurance specified therein. (c. 231, §38).

Taxation.

Every insurance company having an office or place of business in province must pay tax of 3% of gross premiums on life insurance, accident insurance and sickness insurance and 4% of gross premiums on other insurance (c. 232, §3; 2008, c. 2, §25 [not in force]) calculated on gross premium revenue.

Crop & Livestock Insurance Act establishes scheme of crop and livestock insurance. (c. 113, as am'd by 2004, c. 24).

Direct Actions Against Insurer.

See category 23 Transportation, topic 23.03 Motor Vehicles, subhead Direct Actions.

16.02 SURETY AND GUARANTEE COMPANIES:

These are under the regulation and supervision of the Governor-in-Council.

Bonds or Policies.

When any public officer is required to give security for the performance of his duty or of any obligation undertaken towards the Crown, the bond or policy of any guarantee company may be accepted as such security upon such terms as are determined by the Governor-in-Council. Same provisions apply to this security as if given by individual. (c. 451, §3). Bonds or policies of guarantee of any guarantee company may be taken by judge for due performance of any duty instead of or in substitution for any existing securities of surety or sureties, if judge sees fit to accept such bond or policy and approves of conditions and terms thereof. (c. 451, §5). Bonds or policies of guarantee of any guarantee company may be taken instead of or in substitution for existing securities whereupon existing securities must be delivered up to be canceled. Bonds of surety and guarantee companies of reputable standing and credit may be approved for court proceedings, administration, guardianship, trusts, etc.

Foreign companies may do business in the province, upon taking out certificate and paying taxes.

17 INTELLECTUAL PROPERTY

17.01 TRADEMARKS AND TRADENAMES:

Governed by Trademark and Design Act. See Canada Law Digest.

See also category 2 Business Organizations, topic 2.08 Partnerships, subhead Partnerships and Business Names Registration Act.

18 LEGAL PROFESSION

18.01 ATTORNEYS AND COUNSELORS:

Attorneys and counselors are known as barristers and solicitors in Nova Scotia. Every solicitor is also a barrister.

Eligibility.

Person seeking to be admitted to bar must comply with requirements as prescribed by Nova Scotia Barristers Society, including educational and good character. (2004, c. 28, §5[8]).

Registration as law student not required.

Educational Requirements and Clerkship.

Before admission as a barrister an articled clerk must serve under articles of clerkship with one or more practising solicitors for 12 months after receiving degree in law.

Examination.

Applicant must pass examinations required by Bar Society or present certificate of exemption therefrom.

Admission.

Successful applicant is admitted on motion by a member of the Council of the Bar Society (usually the president) made before Judge of Supreme Court (Trial Division).

Admission Pro Hac Vice.

Necessary to have local counsel associated. Barristers of other Canadian provinces may appear without local counsel in certain motor carrier matters. (c. 292, §11, as am'd by 1992, c. 23; 1994, c. 23).

Licences.

No barrister may practise without holding annual certificate which is in force. Fee for such certificate is as Council of the Bar Society from time to time prescribes, and every such certificate expires on June 30 in each year.

Rights and Powers.

Barristers are entitled to practise in all courts in Nova Scotia and in Supreme Court of Canada and in Federal Court of Canada. Every practising barrister may have one clerk articled to him. Barrister may act as surety. Barristers become notaries upon obtaining, without cost, commission from Lieutenant Governor. (2004, c. 28, §13[1][2]).

Solicitors may administer oaths to subscribing witnesses to deeds, relative to the execution of the same.

Lien.

Solicitor has a lien on documents in his possession for charges for his professional services.

Suspension and Disbarment.

Barrister and solicitor may be suspended for nonpayment of annual fees, and cannot practise during suspension. Barristers are liable to be disbarred, fined or suspended for misconduct. (2004, c. 28, §45). Where barrister suspended from practice or disbarred, Nova Scotia Barristers Society's Complaints Investigation Committee or hearing panel may, by resolution, order appointment of receiver to conduct or wind down barrister's practice. (2004, c. 28, §51). Barristers Society may apply to Supreme Court for order appointing custodian to take custody of barrister's property, conserve or dispose of property or manage or wind up barrister's practice. (2004, c. 28, §53).

Unauthorized Practice.

No corporation may practise law except law corporation holding valid permit. (2004, c. 28, §§2[w], 16[4], 20). No person not member of Bar may practise except articled clerks to limited extent under supervision of barrister (2004, c. 28, §16[2]), law students in authorized legal aid or clinical law program (2004, c. 28, §16[2]), and barristers of foreign jurisdictions approved by Bar Society Council (2004, c. 28, §16[2]).

Summary conviction and fine not exceeding $10,000 for first offence. Summary conviction and fine not exceeding $25,000 for subsequent offence, or imprisonment for up to six months, or both. (2004, c. 28, §17[1]).

Professional Association.

No statutory authorization for formation by lawyers.

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19 MINERAL, WATER AND FISHING RIGHTS

19.01 FISHING RIGHTS:

Aquaculture licences and leases administered by Minister of Fisheries and Aquaculture. (1996, c. 25, as am'd by 2006, c. 31 [not in force]).

19.02 MINES AND MINERALS:

Mines and minerals are regulated generally by Mineral Resources Act (1990, c. 18, as am'd by 1992, c. 37; 1994, c. 36; 1995-96, c. 8; 1999 [2d sess.], c. 12; 2001, c. 6) and Coal Mines Regulation Act (c. 73 repeal by 1996, c. 7, §86, as am'd by 2001, c. 31) and Metalliferous Mines and Quarries Regulation Act (c. 284 [repeal by 1996, c. 7, §87], as am'd by 2001, c. 6, Undersea Coal Mines Regulation Act (2007, c. 14); but some earlier statutes are still in force.

Mineral Resources Act reserves to Crown all minerals except limestone, gypsum and building materials in every grant of Crown land.

Operation of Mines.

Minister of Mines and Energy has general supervision over mines in Nova Scotia. Minister can grant special license allowing entry upon mineral lands and determine amount of compensation to be paid owner. Can also direct upon petition that certain lands shall vest in lessee and fix compensation or submit it to arbitration. Licensing, leasing and royalties are regulated. (1990, c. 18, as am'd by 1992, c. 37; 1994, c. 36; 1995-96, c. 8; 1999 [2d sess.], c. 12; 2001, c. 6).

Uranium mining prohibited in Nova Scotia. (2009, c. 6).

Petroleum and natural gas are vested in Crown. Exploration and production rights are regulated by Petroleum Resources Act. (c. 342, as am'd by 2000, c. 12). Offshore areas are regulated by Canada-Nova Scotia Offshore Petroleum Resources Accord Implementation (Nova Scotia) Act (1987, c. 3, as am'd by 1988, c. 56; 1992, c. 12; 1993, c. 16; 2004, c. 14), Offshore Petroleum Resources Act (1987, c. 8 [not in force], as am'd by 1992, c. 12; 2001, c. 5 [§10 not in force]) and Offshore Petroleum Royalty Act (1987, c. 9) which provide for joint federal-provincial administration of offshore areas defined in Acts. Administration parallels federal Canada-Nova Scotia Offshore Petroleum Resources Accord Implementation Act (Canada) and is to be carried out under Canada-Nova Scotia Offshore Petroleum Board. Construction of oil or gas pipelines solely within Province are regulated by Energy Board pursuant to Pipeline Act (c. 345, as am'd by 2009, c. 27 [not in force]) and Nova Scotia Utility and Review Board pursuant to Gas Distribution Act (1997, c. 4, as am'd by 2002, c. 18; 2005, c. 25). No petroleum resources produced in Nova Scotia shall be removed from province without petroleum resources removal permit. (1999, c. 7, as am'd by 1999 [2d sess.], c. 12; 2003, c. 13).

Energy Resources Conservation Act (c. 147, as am'd by 2000, c. 12; 2001, c. 15), Minister designates Executive Council to regulate conservation, safe development and efficient production of energy and mineral resources, and to appraise markets. Conservation, safe development and efficient production of energy resources in offshore areas to be regulated by Oil and Gas Operations (Nova Scotia) Act (1987, c. 10 [not in force] as am'd by 1992, c. 12; 2001, c. 5 [not in force]).

Safeguarding of Employees.

Unless chief inspector in writing otherwise approves, safety lamps shall be used in every mine to which Coal Mines Regulation Act applies. (c. 73, §86 [repeal by 1996, c. 7, §86], as am'd by 2001, c. 31). Single gauze safety lamps prohibited. Mine must be equipped with apparatus for testing safety lamps. (c. 73, §86 [repeal by 1996, c. 7, §86]). Mine managers and overmen when underground must carry locked flame safety lamp. (c. 73, §34 [repeal by 1996, c. 7, §86]). No explosive other than “permitted explosive” can be used for blowing coal or blasting in any mine unless permission is given by chief inspector and deputy inspector of district where mine situated. (c. 73, §68 [repeal by 1996, c. 7, §86]). Suitable apparatus to prevent accidents must be provided at every slope, underground plane and incline. Tops of shafts must be fenced and inspected; tops and entrances of workings, ventilating or pumping shafts must be fenced; safety appliances must be attached to cages. Roof and sides of every traveling road must be made secure, and must be of adequate height and width. (c. 73, §74 [repeal by 1996, c. 7, §86]). There are also similar provisions in Metalliferous Mines and Quarries Regulation Act, e.g., professional engineer must be engaged in supervision of mines of certain sizes and depths. (c. 284 [repeal by 1996, c. 7, §86], as am'd by 2001, c. 6).

Bituminous Shale Conservation Act (1974, c. 2 [not in force]).—Reserves to Crown in every grant of Crown lands made after Apr., 1910, all bituminous shale found in land. Provides licensing scheme for any one engaged in development, mining, production, or other dealing with bituminous shale.

Environment Act (1994-95, c. I, §83). No wholesaler or retailer shall store or sell gasoline or fuel oil without approval issued pursuant to Environment Act. (1994-95, c. 1, §83).

Gas Distribution Act (1997, c. 4, as am'd by 2002, c. 18; 2005, c. 25).—N.S. Utility and Review Board may grant franchises to construct and operate gas delivery system to public in defined geographic area. Board regulates rates, tolls and fees (1997, c. 4, §21, as am'd by 2002, c. 18) and marketing of gas (1997, c. 4, §41, as am'd by 2002, c. 18).

Petroleum Products Allocation Act (1974, c. 8 [not in force]) provides that when Governor in Council is of opinion that actual or anticipated shortage of petroleum markets likely to have adverse effect on Province exists, Governor in Council may declare that such shortage exists and implement mandatory allocation program in respect of petroleum to assure sufficient supply of any or all petroleum products in various parts of Nova Scotia.

Common law rules govern as to general provisions.

Petroleum Products Pricing Act (2005, c. 11) provides for price regulation for gasoline, diesel oil and furnace oil. Regulations may set maximum and minimum wholesale price, maximum retail price and/or maximum and minimum mark-ups.

Underground Hydrocarbons Storage Act (2001, c. 37).—Minister responsible for N.S. Petroleum Directorate may issue hydrocarbon storage area licence in geological formations occurring naturally or otherwise after applicant has obtained written approval from Minister of Natural Resources. Licence expires after one year and may be renewed total of four times. (2001, c. 37, §10). No storage reservoir may be developed, constructed or operated without hydrocarbon storage area licence. (2001, c. 37, §7). Minister may grant licence holder surface rights permit to enter upon and work third party land. (2001, c. 37, §13). Licence holder may be required to provide financial or other security in form and amount acceptable to Minister for activities under licence. (2001, c. 37, §14). Minister may grant hydrocarbon storage area lease where satisfied by licence holder that storage area covered by licence may be suitable for storage of hydrocarbons. (2001, c. 37, §16). Lessee requiring third party land or interest in land for storage area or purpose connected therewith may apply to Minister for order vesting property right claimed in lessee. (2001, c. 37, §17). Minister regulates safety. (2001, c. 34, §§24, 33).

19.03 WATER:

Water Resources Protection Act (2000, c. 10) prohibits removal of water from portion of Atlantic Drainage Basin located in province, except for certain limited purposes.

20 MORTGAGES

20.01 CHATTEL MORTGAGES:

Common law rules govern as to general nature, incidents, effect and requisites.

Registration.

Chattel mortgages are governed by Personal Property Security Act (1995-96, c. 13, as am'd by 2003, c. 13; 2007, c. 9; 2008, c. 2; 2009, c. 26 [not in force]), and are registered in single, centralized, computerized, electronic registry known as personal property registry. (1995-96, c. 13, §§43, 89). Notice of security interest, called financing statement, is registered in lieu of security document itself. (1995-96, c. 13, §44[1], as am'd by 2009, c. 26 [not in force]). Security interest is ineffective as against judgment creditors, trustees in bankruptcy and purchasers for value without notice until it has attached and is registered, or otherwise perfected. (1995-96, c. 13, §21). Unperfected security interest is subordinated to all perfected security interests in collateral, regardless of when they attached and regardless of when other creditors had knowledge of them. (1995-96, c. 13, §21). In general, only two methods of perfection are available to secured parties under Act—registration or taking possession of collateral. (1995-96, c. 13, §§25, 26). Priority among perfected security interests is generally ranked according to order of registration or taking possession of collateral, regardless of order of attachment and regardless of when other creditors had knowledge of them. (1995-96, c. 13, §36, as am'd by 2003, c. 13; 2009, c. 26 [not in force]).

Renewal.

Registration is effective for period of time specified in financing statement. (1995-96, c. 13, §45[1]). Registration may be renewed by registering financing change statement any time before registration expires. (1995-96, c. 13, §45[2]).

Fees for registering financing statement, $23.88 plus $8.34 for each year of registration to maximum of $560.47 for registration for infinity; for each amendment to registration, $11.23; for each search of personal property registry, $7.64.

Assignment.

Bills of sale are assignable. Assignment may, but need not, be registered in personal property registry if security interest has been perfected. (1995-96, c. 13, §46[1]). Assignment of unperfected security interest should be registered. (1995-96, c. 13, §46[3]). Assignee takes subject to equities between original parties and to obligations of assignor. (c. 92, §25).

Release or Satisfaction.

Bill of sale may be discharged in whole or in part by registration in office in which it is registered of a certificate of discharge signed by grantee, his executors, administrators or assigns, and accompanied by an affidavit of attesting witness as to execution; but no certificate of discharge by an assignee can be registered until the assignment has been registered in that district.

In the case of chattels situate partly in one and partly in another district or districts registration of discharge may be effected by filing a duplicate or other original of the certificate of discharge and affidavit of execution in office of proper officer in each of the registration districts; or by filing such certificate and affidavit in one registration district and a certificate of entry of the discharge, signed by the registrar of deeds of that district in the registry office of each other district.

Foreclosure.

On default, grantee may foreclose or sell chattels comprised in bill of sale to realize the amount of the debt, interest and costs. Some bills of sale contain a provision empowering grantee in such event to sell by public auction or private sale.

Sale by Mortgagee.

Sale rather than foreclosure is remedy usually employed. Grantee may invoke the assistance of the court in foreclosure and sale, or may proceed on his own responsibility.

Order for Deficiency.

In court action an order against the grantor for any deficiency may be obtained, a right which may be lost if the grantee proceeds without court action.

Redemption of chattels may be effected at any time before foreclosure or sale by payment of debt, interest and costs.

Form.

There is no statutory or general form.

20.02 COLLATERAL SECURITY:

See category 8 Debtor and Creditor, topic 8.16 Pledges.

20.03 MORTGAGES OF PERSONAL PROPERTY:

See topic 20.01 Chattel Mortgages.

20.04 MORTGAGES OF REAL PROPERTY:

Execution.

Mortgage must be in writing, signed, sealed and delivered; should be witnessed, one witness sufficient; takes effect upon delivery.

Recording.

As between parties need not be recorded; but must be recorded in registration district wherein land is situate in order to be effective against other persons. Same provisions as apply to recording deeds (see category 21 Property, topic 21.05 Deeds) apply to mortgages.

Fees.

$79.57 per document. $11.43 per certified copy and $1.07 per page of certified copy.

If a mortgage is executed under a power of attorney, such power, or a deed confirming it, must be registered. (c. 392, §24).

Trust deeds are used in Nova Scotia chiefly by corporations; property is mortgaged to trustee (usually a trust company) as security for bond issue of the corporation.

Assignment.

Mortgages may be assigned. Assignment should also be recorded in registry of deeds, as same provisions apply to it as to mortgages, with respect to subsequent instruments affecting title to the same land. Requirements as to execution, same as mortgage.

Satisfaction and Release.

When mortgage is satisfied or paid, a release should be filed in the registry of deeds. Part of the lands may be released by written instrument.

Foreclosure and Sale.

Mortgagee begins action in ordinary way by originating notice and statement of claim. If mortgagor contests action, it is proceeded with like any other action; if he defaults mortgagee proceeds to judgment by default. (Rule 8.04). Mortgagee applies to court or judge for order for foreclosure and sale. Mortgagor in default may apply for discontinuance of foreclosure on condition that arrears and expenses be paid by certain date. If mortgagor fails to meet condition, then foreclosure procedure continues. (c. 240, §42, as am'd by 1992, c. 16). Thirty days notice of sale together with copy of foreclosure order is served on all subsequent encumbrancers and on any other person on whom court directs; notice is also posted in county and published in some county newspaper for at least three insertions before date of sale, or as directed by court. Premises are then sold by sheriff at public auction and sold to highest bidder. Sheriff makes deed of land to purchaser. Order is then taken out confirming sheriff's report of sale. All proceedings are in Supreme Court.

Deficiency Judgment.

If proceeds of sale are insufficient to pay what is found to be due to plaintiff, he may have a deficiency judgment when mortgagor is the defendant and such relief has been claimed.

Redemption.

The mortgagor can redeem the mortgaged premises at any time up to the time of the order confirming the sale upon payment of principal, interest and costs.

Brokers and Lenders.

Mortgage Brokers and Lenders Registration Act. (c. 291, as am'd by 1998, c. 8 [§59 not in force]; 1999, c. 4; 2000, c. 34 [§§9-24 not in force]). Must be registered annually with Registrar of Mortgage Brokers. Presumption that person is broker if in one year he lends on security of five or more mortgages or four amounting to $30,000 or more. Every mortgage must state if it can be prepaid and if it can mortgage must state terms of prepayment. If mortgage is silent is may be prepaid without penalty at any time. (c. 291, §23, as am'd by 2000, c. 34 [§§9-24 not in force]). Governor-in-Council may make regulations relating to registration, records kept, returns to be made by brokers, information given by brokers, cooling-off periods, exemptions of persons or transactions, etc.

Matrimonial Property Act (c. 275, as am'd by 1995-96, c. 13) gives spouse to whom Act allows possession of matrimonial home same right to redeem equity of redemption and same right to notice as other spouse (c. 275, §9).

Conveyancing Act (c. 97, as am'd by 2001, c. 6; 2005, c. 8) authorizes short forms of mortgage, assignment and release, now in general use as follows:

Forms

Mortgage: This Indenture made this. . . . . day of. . . .. in the year of Our Lord One Thousand Nine Hundred and. . . . . between.. . . . of. . . . . hereinafter called the “Mortgagor” of the One Part and. . . . . of. . . . . hereinafter called the “Mortgagee” of the Other Part.

Witnesseth that the said Mortgagor for and in consideration of the sum of. . . . . of lawful money of Canada, to the said Mortgagor in hand well and truly paid by the said Mortgagee at or before the sealing and delivery of These Presents (the receipt whereof is hereby acknowledged), hath granted, bargained, sold, aliened, enfeoffed, released, remised, conveyed and confirmed and by These Presents doth grant, bargain, sell, alien, enfeoff, release, remise, convey and confirm unto the said Mortgagee,. . . . . and assigns

(description)

Together with the buildings, easements, tenements, hereditaments and appurtenances to the same belonging or in anywise appertaining, and the reversion and reversions, remainder and remainders, rents, issues and profits thereof, and all the estate, right, title, interest, claim, property and demand, both at law and in equity of the said Mortgagor of, in, to or out of the same.

To have and to hold the said above granted and described lands and premises, with the appurtenances, and every part thereof, unto and to use of the said Mortgagee. . . . . and assigns forever. And it is hereby agreed and declared that the word “Mortgagor” and the word “Mortgagee,” wherever used herein, shall, unless the context otherwise requires, be deemed to and shall include the heirs, executors, administrators, successors and assigns of each of them, and, if there is more than one Mortgagor or Mortgagee named, shall be deemed to and shall include each of such Mortgagors or Mortgagees, as the case may be, their several heirs, executors, administrators, successors and assigns, severally as well as jointly, and any Mortgagee, his executors, administrators, successors or assigns may exercise any of the powers herein conferred upon the Mortgagee. The said words, and all words depending thereon or relating thereto, shall also be deemed to and shall include the feminine and neuter as well as the masculine gender.

The amount of principal money advanced on this mortgage is the sum paid to the said Mortgagor as aforesaid and the rate of interest chargeable thereon is. . . . . per centum per annum calculated. . . . . not in advance.

Provided always that if the said Mortgagor do well and truly pay unto the said Mortgagee the full amount of principal money advanced as aforesaid in lawful money of Canada with interest thereon at the rate aforesaid as well after as before maturity and calculated. . . . . not in advance. . . . .

Then these presents shall be void.

Mortgagor hereby convenants, promises, and agrees to and with the said Mortgagee as follows:

(1) That the said Mortgagor shall and will well and truly pay unto the said Mortgagee the full amount of the principal money advanced as aforesaid in lawful money of Canada with interest thereon in the manner after the rate and at the times mentioned in the foregoing proviso;

(2) That the said Mortgagor shall and will pay the said Mortgagee interest at the rate aforesaid on any instalment of interest in arrears from the date that the said instalment shall become due to the date of the payment thereof, the said interest to be compounded on every date when interest is payable hereunder;

(3) That after breach of the foregoing proviso, or in case of the breach or non-performance of any of the covenants or agreements herein contained on the part of the said Mortgagor to be observed or performed, it shall be lawful for the said Mortgagee peacefully and quietly to enter into, hold and enjoy the said granted land and premises, without hindrance or disturbance of, from or by any person or persons lawfully claiming the same or any part thereof;

(4) That the said Mortgagor hath a good, sure, perfect and indefeasible estate of inheritance in fee simple in the said land and premises, and hath good right, full power and lawful

authority to grant and convey the same in manner and form aforesaid, according to the true intent and meaning thereof; and will at any time execute or cause to be executed such further and other acts, conveyances and assurances in the law for the better assuring to the said Mortgagee of the lands and premises above described, in manner as above conveyed or mentioned and intended so to be;

(5) That the said Mortgagor the said land and premises unto the said Mortgagee against the lawful claims and demands of all persons, whatsoever, shall and will by These Presents Warrant and Forever Defend;

(6) That until payment shall be made to the said Mortgagee of the principal sum and interest hereby secured the said Mortgagor will keep without intermission insured against casualties by fire the buildings on the said granted lands and premises for a sum not less than the total amount of principal money advanced on this and any other mortgage or mortgages in some good fire insurance office to be selected by and in the name and for the benefit of the said Mortgagee and will deposit with the said Mortgagee all policies and receipts for renewal premiums of such insurance; and that the said Mortgagee may require any insurance on the said buildings to be cancelled and new insurance effected in a company to be approved by “the Mortgagee”; and that in default thereof the said Mortgagee shall and may effect renew and continue such insurance and charge all payments made for or in respect thereof with interest after the rate aforesaid upon the said mortgaged lands and premises or at the said Mortgagee's option may either add all sums of money paid by the said Mortgagee on account thereof to the principal money hereby secured with interest after the rate aforesaid from the time or times when said sums of money are respectively paid, or sue and recover the same from time to time from the said Mortgagor;

(7) That if there shall be any loss by fire, either before or after default shall have been made in payment of the moneys hereby secured or in the doing or keeping or non-observance of any of the covenants or agreements herein contained the said Mortgagee may, at the Mortgagee's option, apply the insurance moneys either towards rebuilding or repairing the property destroyed or in or towards payment of the moneys hereby secured or partly the one and partly the other.

(8) That the said Mortgagor shall and will well and truly pay all taxes, rates, levies, liens, duties, charges, assessments and impositions of every kind and nature whatsoever, which during the kind and nature whatsoever, which during the continuance of this Mortgage shall at any time be rated, taxed, assessed or imposed on or in respect of the said lands and premises or any part thereof, at the times and in the manner required for the payment of such taxes, rates, levies, liens, duties, charges, assessments and impositions; and produce to the said Mortgagee the receipt for the payment of the same and that in default thereof the said Mortgagee may pay and discharge the same or any of them and charge all payments made in respect thereof with interest after the rate aforesaid upon the said mortgaged lands and premises, or at the Mortgagee's option may either add all sum or sums of money paid by the Mortgagee on account thereof to the principal money hereby secured with interest at the rate aforesaid from the time or times the said sum and sums of money are respectively paid, or sue and recover the same from the said Mortgagor.

(9) That the taking of a judgment or judgments on any of the covenants herein contained shall not operate as a merger of the said covenants or affect the right of the said Mortgagee to interest at the rate and times herein provided.

(10) That in case the said Mortgagee shall satisfy any charge or encumbrance on the said lands and premises, the amount paid shall be payable forthwith with interest at the rate aforesaid and become a lien and charge on the said lands and premises and be added to the principal sum due under this Mortgage, and in default of payment the principal sum hereby

secured shall immediately become payable; and in the event of the money hereby advanced, or any part thereof, being applied to the payment of any charge or encumbrance the said Mortgagee shall stand in the possession of and be entitled to all the equities and securities of the person or persons so paid.

(11) That in default of payment of any portion of the money hereby secured or the interest thereon at the times and in the manner set forth, or in default of payment of any taxes, liens or charges that may be charged upon the said property, or in case the buildings herein comprised are not kept in good tenantable condition, or in case any waste is permitted on the said lands and premises, or in case the said Mortgagor makes any default hereunder at any time in any of the covenants or agreements herein contained, the whole principal money and interest hereby secured shall at the option of the said Mortgagee immediately become due and payable.

(12) That the amount of principal money advanced on this Mortgage together with any outstanding interest thereon may be repaid by the said Mortgagor at any time after the expiration of one year from the date hereof without notice and without bonus.

In witness whereof the said Mortgagor has duly executed these presents the day and year first above written.

Signed, Sealed and Delivered

in the presence of }

. . . .

Assignment: By this Assignment of Mortgage made the. . . . . day of. . . . . 20. . . . . . AB hereinafter called the “Assignor” of the one part assigns and conveys to CD hereinafter called the “Assignee” of the second part

In consideration of One Dollar ($1.00) of lawful money of Canada:

1. The mortgage dated. . . . . and recorded in the Registry of Deeds Office at. . . . . as document No. . . . . . for the year. . . . . and made between EF of the one part and AB of the other part to secure repayment of the sum of. . . . . of lawful money of Canada.

2. The land described in the mortgage, but subject to the terms contained in the mortgage.

3. The full benefit of all powers and of all covenants and provisoes contained in the mortgage and also the full power and authority to use the name of the Assignor for enforcement of the performance of the covenants and other matters and things contained in the mortgage.

The Assignor covenants with the Assignee that 1. The mortgage hereby assigned is good and valid security and that the principal sum of. . . . . together with interest at the rate of. . . . . per centum per annum from the. . . . . day of. . . . . is now owing and unpaid.

2. The Assignor has not done or permitted any act, matter or thing whereby the mortgage has been released or discharged either partly or entirely.

3. The Assignor will, but at the cost of the Assignee, do and perform every act necessary to enforce the full performance of the covenants and other matters contained in the mortgage.

In witness whereof the Assignor has properly executed this assignment the day and year first above written.

Signed, sealed and delivered

in the presence of: }

AB (L.S.)

Release: By this Release of Mortgage made this. . . . . day of. . . . . A. D. 20. . . ..

. . . . . . hereinafter called the "Releasor" releases to. . . . . hereinafter called the "Releasee" all the lands mortgaged by a Mortgage made between. . . . . as Mortgagor and the Releasor as Mortgagee which is dated the. . . . . day of. . . . . ., A.D. 20. . . . and registered in the Registry of Deeds at. . . . .,. . . . . in Book. . . . . at page. . . . . the Releasee claiming to be entitled to the equity of redemption in said mortgaged lands and releases also to the Releasee the benefits of the covenants in the mortgage and any bond or security given collateral thereto.

This Release is in consideration of One Dollar ($1.00) and the payment of all amounts of principal and interest secured by the mortgage.

In witness whereof the Releasor ha. . . . duly executed these presents the day and year first above written.

SIGNED, SEALED AND DE-

LIVERED in the presence of

....

(Witness) }

. . . .(L.S.)

Chattel Mortgages.

See topic 20.01 Chattel Mortgages.

21 PROPERTY

21.01 ABSENTEES:

An absent plaintiff if resident outside of province, may be required to pay money into court. Property of absconding or absent debtors may be attached by civil process in Supreme or county court. If beneficiary under will or administration absent from province, not heard from for ten years, court may order distribution as if absentee were dead.

Process Agent.

Person absent from province may appoint solicitor to act as agent for service of process.

Attachment Against Absentee.

See category 8 Debtor and Creditor, topic 8.03 Attachment.

Escheat.

See topic 21.08 Escheat.

21.02 ADVERSE POSSESSION:

Duration of Possession.

Title may be acquired by adverse possession of real estate for 20 years (for 25 years adverse possession as against infants, lunatics or persons absent from province and 40 years as against Crown in right of N.S.). (2001, c. 6, as am'd by 2004, c. 38; 2006, c. 15; 2008, c. 19). No adverse possession as against Crown in right of Canada unless acquired prior to 1951. Pursuant to Land Registration Act (2001, c. 6, §74, as am'd by 2004, c. 38; 2006, c. 15), interest acquired by adverse possession before date land is first registered under Act absolutely void as against registered land owner ten years after land first registered unless court order or registered owner confirms interest.

Character of Possession.

Possession must be open, adverse, notorious, exclusive and continuous.

Easements may be acquired by prescription in 20 years. (c. 258, §32, as am'd by 2001, c. 6). Conservation easement for purpose of protecting land containing ecologically significant features may be acquired by eligible body by written agreement. (2001, c. 28).

21.03 CONVEYANCES:

See topic 21.05 Deeds.

21.04 CURTESY:

If issue of the marriage born alive, the surviving husband has life estate in real property of which wife died seised.

Curtesy is abolished. (c. 275, §33).

Bar.

The wife may bar her husband's curtesy by will or by deeding or otherwise disposing of her real property. (c. 272, §4) Husband's curtesy may be barred by divorce, if judge so orders.

Release.

Husband may release claim to curtesy by executing a written instrument to that effect.

21.05 DEEDS:

Deeds must be in writing, signed, sealed and delivered. They should be witnessed; one witness is sufficient. A deed takes effect from the time of its delivery.

Proof of Execution.

Before registration a deed must be proved by the acknowledgment under oath by the parties executing the deed of its execution, or by oath of a subscribing witness. See category 10 Documents and Records, topic 10.01 Acknowledgments; also category 14 Family, topic Husband and Wife, subhead Conveyances.

Registration is not compulsory, but is necessary to preserve priority as against any person claiming for valuable consideration and without notice under any subsequent instrument affecting title to the same land, and first recorded. (c. 392, §18). Land Registration Act will provide for establishment of land registration districts and land parcel registration, which shall include following information: parcel identification number; civic address and lot number; general location of parcel; description of parcel; indirect or direct access to parcel; name and mailing address of owner in fee simple; instrument most recently conveying fee simple interest; nonresidential owners; full text of all recorded interests; names and mailing addresses of holders of recorded interests; full text of any servitude benefiting or encumbering parcel. (2001, c. 6, as am'd by 2004, c. 38; 2006, c. 15; and 2008, c. 19). Where Land Registration Act applies, electronic submission of information and documents has same effect as registration of original documents. (2001, c. 6 [§§21(4), 31(4), 39, 119(3) not in force], as am'd by 2004, c. 3; 2006, c. 15; and 2008, c. 19).

Recording fee for recording a deed $81.08. (c. 104, Sch.pt. 9).

Power of Attorney.

If a deed is executed under a power of attorney, the power of attorney or a deed subsequently confirming it must be registered. (c. 392, §24).

Conveyancing Act (c. 97 as am'd by 2001, c. 6; 2005, c. 8) authorizes short form of deed, now in general use as follows:

Form of Warranty Deed

This Conveyance made this. . . . . . day of. . . . . ., A.D., 20. . .. .

Between A.B. of. . . . . . in the county of. . . . . . province of. . . . . . hereinafter called the “Grantor” of the One Part

and C.D. of. . . . . . in the county of. . . . . . province of. . . .. . . hereinafter called the “Grantee” of the Other Part

Witnesseth, that in consideration of. . . . . . Dollar of lawful money of Canada, and other good and valuable consideration to the Grantor in hand well and truly paid by the Grantee, at or before the ensealing and delivery of these presents, the receipt whereof is hereby acknowledged, the Grantor hereby conveys and grants to the Grantee

All (description)..........

The Grantor covenants with the Grantee that the Grantee shall have quiet enjoyment of the lands, that the said Grantor has a good title in fee simple to the lands and the right to convey them as hereby conveyed, that they are free from encumbrances and that the said Grantor will procure such further assurances as may be reasonably required.

In witness whereof the Grantor has duly executed these presents the day and year first above written.

SIGNED, SEALED ANDDELIVERED

in the presence of }

A.B. (L.S.)

(Acknowledgment or proof by witness)

A quit claim deed is practically same as a warranty deed, except that warranties are omitted, and recitals of why quit claim deed is given are usually inserted before granting clause.

Deeds by executors, trustees, etc., are usually made without the covenants in the above form, but contain a covenant by the trustees that they have not done any act to encumber the lands.

Deed Transfer Tax.

See category 22 Taxation, topic 22.13 Property Taxes, subhead Real Estate Conveyance Tax.

21.06 DEEDS OF TRUST:

See category 20 Mortgages, topic 20.04 Mortgages of Real Property.

21.07 DOWER:

Note.

Dower is abolished by 1980, c. 9, §33 in force Oct. 1, 1980. When husband died before this date right to dower still applies. Following summarizes applicable law:

Widow is entitled to life estate in one-third of the real estate of which the husband was seised at and after their marriage in which she did not bar dower during his lifetime. Dower extends to equitable estates and rights of entry but not to joint estates or wild land. In case of intestacy widow takes according to provisions of Intestate Succession Act.

Bar and Release.

Dower may be barred by uncondoned adultery or divorce. Wife may release her dower by executing a written instrument to that effect. A bar of dower contained in any mortgage or other instrument intended as security only does not operate to bar such dower to a greater extent than is necessary to give full effect to the rights of the mortgagee or grantee under such instrument.

Election between dower and testamentary provision, see category 13 Estates and Trusts, topic 13.15 Wills.

21.08 ESCHEAT:

See Escheats Act, c. 151 as am'd by 2001, c. 6. See also category 13 Estates and Trusts, topic 13.07 Descent and Distribution, subhead Escheat.

21.09 LANDLORD AND TENANT:

Common law rules govern general rights and liabilities arising out of relationship of landlord and tenant, but see subheads Residential Tenancies Act and Rent Review Act, infra.

Kinds of Tenancies.

Tenancies may be at will, at sufferance, from year to year, for a term of years, for a life or lives, or weekly or monthly.

Leases for more than three years must be in writing signed by the lessor or they will have the force of estates at will only. (c. 442, §3). In Halifax, lease for term longer than 21 years is subject to deed transfer tax. (1972, c. 71). See also category 22 Taxation, topic 22.13 Property Taxes, subhead Real Estate Conveyance Tax.

Recording.

Leases for over three years must be recorded in the registry of deeds for that district or they will be ineffective as against a person claiming under any subsequent instrument duly registered. (c. 392, §25). Such leases must be proved by acknowledgment of executing parties under oath or by oath of subscribing witness. (c. 392, §31).

Distress.

Landlord may distrain for rent due under the lease upon goods or chattels upon the demised premises, but the following goods are exempt from distress: (1) goods brought into any building used as a market bona fide for the purpose of sale, by any person, not being property in which the tenant has any interest; (2) all articles or goods in possession of tenant under a duly filed agreement for hire, lease, or conditional sale excepting the tenant's interest therein; (3) articles exempt from execution (see category 8 Debtor and Creditor, topic 8.07 Exemptions). (c. 464, §9). Where goods are distrained, if tenant or owner of them does not within five days after distress and notice thereof duly served on him, replevy same, landlord may have goods appraised. After appraisal, and five days' notice of sale by handbills in conspicuous places in locality, landlord may sell such goods for best price he can get, and apply proceeds in payment of rent due and expenses incurred; any balance goes to owner of goods. (c. 464, §§3-4). Goods fraudulently removed by the tenant to avoid distress may be seized by landlord within 21 days of such removal, and he may dispose of them as if they had been distrained upon premises, unless sold bona fide for value before seizure. (c. 464, §13). He may distrain on good fraudulently conveyed away and locked up or otherwise secured to prevent distress. In such cases he must call to his assistance constable for city, town or county, in which goods suspected to be so placed or kept, who must help him. They can, in daytime, break open and enter into such place and take such goods. (c. 464, §14). Tenant or person interested in goods may, before sale, commence proceeding for declaration that person other than tenant has interest in goods and judge may stay sale pending determination of interest in goods. (c. 464, §4).

Notice to quit, in tenancies from year to year, must be given at least three months before the expiration of any such lease; from month to month, at least one month before the expiration of any such month; if from week to week at least one week before the expiration of any such week. (c. 464, §18).

Holding Over.

Upon determination of tenancy, landlord, without any demand on tenant, may make complaint to magistrate having jurisdiction where land lies. Magistrate may issue summons directed to tenant stating time and place at which complaint will be heard and determined; true copy of summons and complaint must be served on tenant at least five days before day of hearing. Magistrate, on hearing parties, makes order or dismisses complaint. If tenant does not appear, magistrate upon proof of service of summons and complaint may issue order for possession. Appeal lies to Supreme Court. (c. 329, §10, as am'd by 1992, c. 16).

Residential Tenancies Act (c. 401, as am'd by 1992, c. 31 [ss. 2, 3, 4(a), 5(2), 6, 7, 8(2)(3), 11-13 not in force]; 1993, c. 40 [§8(1) not in force]; 1994, c. 32; 1997, c. 7; 2002, cc. 10, 30; 2008, c. 66 [not in force]) applies when landlord-tenant relationship exists in respect of “residential premises,” meaning places occupied as residences by individuals, including mobile homes and mobile home parks (c. 401, as am'd by 1992, c. 31 [ss. 2, 3, 4(a), 5(2), 6. 7, 8(2)(3), 11-13 not in force]; 1993, c. 40 [§8(1) not in force]; 1994, c. 32; 1997, c. 7; 2002, cc. 10, 30). Agreement to pay or payment of rent creates landlord-tenant relationship. When Act applies, Overholding Tenants Act and Tenancies and Distress for Rent Act do not apply.

Provisions: (a) Landlord must provide tenant with copy of Act and with respect to written tenancy agreements signed copy of standard form of lease, as prescribed by regulation, within ten days of occupancy or execution. Landlord is entitled to acknowledgment of compliance from tenant; noncompliance allows tenant to vacate within three months without penalty. Standard form of lease is deemed to have been signed by both landlord and tenant whenever oral or written agreement or renewal is entered into otherwise than by signature of Standard Form of Lease (c. 401, §7, as am'd by 1992, c. 31, §3 [not in force]; 1993, c. 40; 1997, c. 7); (b) statutory conditions respecting repair and condition of premises, subletting, mitigation of damages on abandonment or termination, entry by landlord, provision of essential services, conduct of tenant, interest on late payment of rent and doorlocks are deemed to be in all leases; (c) notice to quit periods required, with variation if rent is in arrears, for tenant of less than five years; tenant with five consecutive years or more tenancy on or after May 18, 1984 may not be given notice to quit unless one of several statutory exceptions applies. Where tenant's interest is foreclosed or extinguished, tenant may remain in possession until earlier of: (i) expiration of three months from receipt of notice to quit, or (ii) date on which tenancy agreement terminates according to its own terms (c. 401, §8); (d) three months' notice in writing required before rent increase; only one rent increase per 12 month period permitted; (e) “security deposits” defined as money paid in addition to rent must be held in trust by landlord and be deposited accordingly or invested in authorized securities (c. 401, §12, as am'd by 1992, c. 31 §6 [not in force]; 1993, c. 40, §11; 1997, c. 7); limited to one-half monthly rent and use is restricted; (f) order to comply may be granted by magistrate on complaint. Provision made for enforcing orders; (g) Residential Tenancies Board established with powers, including rent review; (h) Act has restricted application to public housing; (i) landlord may not hold or dispose of tenant's personal property. Interest is to be paid on security deposit. Unlawful for person to stipulate for or accept application fee. (c. 401, §12, as am'd by 1992, c. 31, §6 [not in force]; 1993, c. 40, §11; 1997, c. 7). Landlord or tenant may apply to Director of Residential Tenancies with respect to disputes. Director of Residential Tenancies is exclusive authority, at first instance, to investigate and mediate settlement.

Discrimination.

See category 11 Employment, topic 11.02 Labour Relations, subhead Human Rights Act.

Rent Review Act (c. 398). Rents of most residential premises controlled. Administered by Rent Review Commission. Provisions: (a) Landlord must give three months notice of rental increase to tenant and provide Commission with copy of such notice; (b) if increase in excess of limits established by Act (generally 6%) increase is reviewed by Residential Tenancy Officer in light of previous increases in respect of that tenancy, return on investment and effect on landlord's financial position. Officer has power to approve increase, order lessened increase and make consequential orders to pay against landlord and tenant; (c) landlord or tenant may appeal decision to Commission or Commission may review on own initiative; court review limited to questions of law; (d) exemptions include hotels, rooming houses, institutions such as colleges and hospitals, and new residential premises.

Rental Property Conversion Act (c. 399, as am'd by 2007, c. 52) provides that notice must be given to tenants and Director of Landlord and Tenant Relations of proposal to convert rental property into other use. First offer to tenant to occupy property in converted form must be given. Regulations may prevent conversion of rental property.

Safer Communities and Neighbourhoods Act (2006, c. 6) permits Director of Public Safety in receipt of complaint about activity on rental property interfering with peaceful enjoyment of neighbourhood properties to apply to court for community safety order requiring all persons to vacate rental property, terminating lease, closing rental property for use and occupation for maximum of 90 days, or making order of possession in favour of property owner.

21.10 LEASES:

See topic 21.09 Landlord and Tenant.

21.11 PERPETUITIES:

No statute. Common law rules apply.

21.12 PERSONAL PROPERTY:

Tenancy by the entirety does not exist.

Special Places Protection Act R.S.N.S. 1989, c. 438, as am'd by 1990, c. 45; 1994-95, c. 17; 2004, c. 6; 2005, c. 28 provides for recovery of “historical objects” from designated protected sites. Requires report to Director of N. S. Museum of recovery of such object. If recovery is reported, object may be acquired by Province and compensation paid. If not reported, object may be seized. Act does not apply to treasure trove.

21.13 POWERS OF ATTORNEY:

Durable Power of Attorney.

Powers of Attorney Act (c. 352) provides that power of attorney signed by donor and witnessed by person other than attorney or spouse of attorney expressly stating that it may be exercised during legal incapacity is valid and effectual and is not terminated by reason only of legal incapacity of donor. Conduct of attorney subject to control by judge of Trial Division of Supreme Court.

21.14 REAL PROPERTY:

All estates tail are abolished. Otherwise all estates recognized at common law are recognized in Nova Scotia. Every estate granted to two or more persons in their own right is a tenancy in common unless expressly declared to be in joint tenancy; but every estate vested in trustees or executors as such is held by them in joint tenancy. No tenancy by entirety. (c. 385, §5).

Rule in Shelley's Case is recognized.

Foreign conveyances or encumbrances must conform to Nova Scotia law to be valid.

Condominiums.

Permitted, subject to c. 85, as am'd by 1996, c. 33; 1998, c. 28; 1999, c. 5; 2001, c. 6; 2006, c. 16; 2009, c. 10 (not in force). Conversion of rental property to condominiums must be preceded by three months notice to tenants and Director of Landlord and Tenant Relations. Regulations may determine prerequisites for, or prohibit, such conversion. (c. 399).

Housing Co-operatives.

Permitted by c. 98 as am'd by 2001, c. 41.

Quieting Titles Act.

Persons claiming a property right in land may commence an action where land lies for a certificate of title or may join any other claim in which title to or right to possession of land is in issue. (c. 382 as am'd by 2001, c. 6).

Vendors and Purchasers Act.

Regulates rights and obligations of vendor and purchaser subject to conditions in contract. Contracts are deemed to provide that vendor will deliver to purchaser a copy of metes and bounds description of land. Purchaser's objections to title must be made within 30 days from date of delivery of description and vendor has 30 days to remove any objection to title; if not done, vendor may cancel contract if purchaser is unwilling to waive objection. Taxes, insurance, rents and interest adjusted as of date of closing. Vendor prepares deed at his expense; purchaser bears expense of registration of deed and mortgage, if any. (c. 487). Money received in respect of contract for residential unit not yet ready for occupancy, and title of which not yet transferred to purchaser, must be placed in real estate agent's or lawyer's trust account. (2008, c. 40 [not in force]).

Land Holdings Disclosure Act (c. 248, as am'd by 1998, c. 18; 2001, c. 6).—Nonresidents and nonresident corporations which are not licensed to carry on business in Province, required to file with Registrar under Act, particulars of holdings of interests (otherwise than as security) in undeveloped land in Province located outside borders of town or city. Failure to comply is offence but does not affect validity of title.

See also topics 21.04 Curtesy, Deeds, Dower, Landlord and Tenant; categories 5 Civil Actions and Procedure, topic Partition; Debtor and Creditor, topic Homesteads; Environment, topic Environmental Regulation; Family, topic Husband and Wife; Mortgages, topic Mortgages of Real Property.

Land Registration Act (2001, c. 6 as am'd by 2002, c. 19; 2003, c. 7; 2004, c. 38; 2006, c. 15).—Provides for land registration districts and land parcel registration.

Heritage Property Act (c. 199, as am'd by 1991, c. 10; 1998, c. 18).—Exterior appearance of property registered provincial or municipal as heritage property may not be altered without approval of Governor in Council or municipality.

Special Places Protection Act (c. 438, as am'd by 1990, c. 45; 1994-95, c. 17; 2004, c. 6; 2005, c. 28) provides for designation of protected archeological, historical and ecological sites. Protected sites may not be altered without permit.

Protection of Property Act (c. 363, as am'd by 2001, c. 12) provides for penalties for those who trespass on property of others. Restitution may be ordered to compensate owners of damaged property.

Rental Property Conversion Act.

See topic 21.09 Landlord and Tenant.

Agricultural Marshland Conservation Act (2000, c. 22, as am'd by 2001, c. 6; 2004, c. 38; 2009, c. 7 [not in force]).—Executive committee of marsh body set up pursuant to Act may enter upon land within boundaries of marshland section to construct, repair or maintain works without owner's permission.

21.15 TRUST DEEDS:

See category 20 Mortgages, topic 20.04 Mortgages of Real Property.

21.16 VENDORS AND PURCHASERS ACT:

See topic 21.14 Real Property.

22 TAXATION

22.01 ADMINISTRATION:

The right of the province to tax is restricted by §92 of Constitution Act, 1867 to “direct taxation within the province.” Provincial revenue is derived from income tax, mining royalties, federal equalization payments and licence fees. Province imposes income tax under authority of Income Tax Act. (c. 217, as am'd by 2007, cc. 1, 9; 2008, c. 2; 2009, c. 5 [ss. 12, 15 not in force]). Dominion Government revenue is derived chiefly from customs and excise and income tax. Dominion Government may raise money by any mode or system of taxation. Municipal

Corporations tax real and personal property on assessed valuation and may also licence occupations, trades, etc.

Assessments.

Assessment Act (c. 23, as am'd by 1992, c. 11; 1993, c. 11; 2000, c. 9 [§§2(a)(c)(f), 6, 7 not in force]; 2001, c. 6; 2004, cc. 24, 27; 2005, c. 9; 2006, c. 15, c. 19, s. 53 [not in force], c. 24; 2007, c. 9; and 2008, c. 11, c. 36, c. 48 [not in force]; 2009, c. 8 [not in force]) provides that occupier of service station, restaurant, hotel, motel, campground, trailer park and car dealer liable for business occupancy assessment equal to 25% of assessed value. Banks, credit unions, loan, investment, insurance or trust companies, investment and mortgage brokers, collection agencies and other financial institutions liable for 75% of assessed value. Occupiers of other commercial properties subject to assessment of 50% of assessed value. Tax apportioned for seasonal, new and terminating business. (c. 23, §11, as am'd by 2002, c. 15; 2005, c. 9). Council may by by-law set tax on commercial property of nonprofit community, charitable, fraternal, educational, religious, cultural or sporting organization at lower assessment (minimum is residential assessment). (c. 23, §5, as am'd by 1993, c. 11; 2000, c. 9; 2009, c. 8 [not in force]). Property greater than three acres may be assessed at $5 per acre. Property liable to 20% tax upon changing to other than farm land use. All farm land owned by resident and used for agricultural purposes and forest property owned by resident and used for forestry purposes exempt from tax. (2000, c. 9). Farm buildings and residences taxed at residential rate. Tax of 20% of value of farm and forest land upon changing use other than to forest or farm land. (c. 23, §§46, 47, as am'd by 2000, c. 9). Forest property used for forestry purposes and classed as resource property taxed at rate of 25¢ per acre, and 40¢ per acre if classed as commercial property. (c. 23, §47, as am'd by 2000, c. 9).

School rates are governed by Education Act. (1995-96, c. 1, §76). Each municipality pays school board minimum municipal contribution determined by Minister of Education and contribution toward school board's estimated expenditures (1995-96, c. 1, §73) unless there is in place agreement between municipality and regional school board approved pursuant to §27 of former Education Act (c. 136) or agreement between municipality and regional school board pursuant to 1995-96, c. 1, §76(2).

Assessors annually send to each person form to be filled out and signed by him or her which must be returned within 30 days after receipt. (c. 23, §20-21, as am'd by 2006, c. 15). Assessors must set down assessment roll containing location, description, classification and assessed value of lands and name and address of owner. (c. 23, §25, as am'd by 2005, c. 9). Property of nonresident is assessed as such and so designated. Assessment may be in name of person appearing on record of Registry of Deeds. (c. 23, §38, as am'd by 2001, c. 6). Occupier of commercial property liable to business occupancy assessment. (c. 23, §11, as am'd by 2005, c. 9). Property is assessed at actual cash value which is amount assessor thinks it would realize in cash if offered at auction. (c. 23, §42). Benefit of easements assessed to dominate tenement. No reduction in assessment due to encumbrances on title. Assessment rolls must be completed by Dec. 31 and assessors must attach signed certificate in prescribed form and send to municipal or town clerk. On completion of assessment, assessor gives notice showing classification and amount of assessment by personally serving person liable, by mailing notice post prepaid to place of business or residence, or by posting notice in conspicuous place on assessed property.

Appeals from valuation, classification or assessment may be brought by property owner, ratepayer, occupier, town or municipal clerk, or any person having interest in property. (c. 23, §62). Notice of appeal must be filed within 21 days after notice of assessment. (c. 23, §63). Appeal is to regional assessment appeal court. Assessor may review and adjust assessment when appeal taken. (c. 23, §68, as am'd by 2000, c. 9). Appellant upon giving notice may proceed with appeal if adjustment not satisfactory. Decision of assessment appeal court may be appealed to N.S. Utility and Review Board. (c. 23, §85, as am'd by 1992, c. 11; 2000, c. 9).

Penalties.

Assessment Act (c. 23, as am'd by 1992, c. 11; 1993, c. 11; 2000, c. 9 [§§2(a)(c)(f), 6, 7 not in force]; 2001, c. 6, 2004, cc. 24, 27; 2005, c. 9; 2006, c. 15, c. 19, s. 53 not in force], c. 24; 2007, c. 9; 2008, c. 11, c. 36, c. 48 [not in force]; 2009, c. 8 [not in force]).—Any person who knowingly makes false statement is liable to fine or imprisonment and loss of right to appeal. (c. 23, §23 as am'd by 2005, c. 9). Failure to give notice of commencement of business to clerk of district, makes person liable to maximum penalty of $500 or in default to imprisonment for three months. (c. 23, §14). If any person fails to pay rates or taxes imposed, his goods may be distrained and sold or in default thereof, debtor may be imprisoned. (c. 23, §§109-112).

Income Tax Act (c. 217 as am'd by 2007, cc. 1, 9; 2008, c. 2; 2009, c. 5 [ss. 12, 15 not in force]).—Every person who fails to make return as required by c. 217, §93 of Act is liable to penalty equal to aggregate of 5% of unpaid tax when return was required to be filed and sum of 1% of unpaid tax times number of months, to maximum of 12, that return was not filed after it should have been. (c. 217, §59). Failure to make return under c. 217, §93 makes person liable to penalty of $1,000 to $25,000. If information required is not given on prescribed form person is liable to maximum penalty of $100. (c. 217, §60). Any person who knowingly or by gross negligence makes statement resulting in failure to pay full tax is liable to penalty of greater of $100 or 50% of amount by which tax payable as calculated in statement is less than tax payable for year. (c. 217, §60). Person who wilfully attempts to evade payment of tax for failing to file return as required by c. 217, §60 is liable to penalty of 50% of tax sought to be evaded. (c. 217, §46, as am'd by 1993, c. 26, §18; 2000, c. 4). Burden of proof on Minister of Finance. Minister of Finance and Economics may issue warrant to Sheriff of county where taxpayer's property is located for tax, interest, and penalty which will have effect of Writ of Execution of Supreme Court. (c. 217, §83). Provincial Treasurer may garnishee any payment to be made to taxpayer liable to make payment under Act. (c. 217, §88). Goods and chattels of person failing to make payment can be seized and sold at public auction. (c. 217, §84). Any person who fails to deduct or withhold tax from amount payable to resident under §88 is liable to penalty of 10% of amount he should have deducted—in any other case, whole amount that should have been deducted plus interest at rate prescribed for purposes of §227(8) of Federal Act. For failure to remit amount deducted or withheld penalty is 10% of amount or $10 whichever is greater, in addition to amount itself, together with interest prescribed for purpose of §227(8) of Federal Act. Every person who fails to comply with regulations made under §117(1) of Federal Act or §92 of this Act is liable to penalty of $10 a day up to $2,500. Failure to file return is offence and taxpayer is liable to fine of not less than $1,000 and not more than $25,000. (§93). Failure to deduct or withhold tax, keep proper records or to comply with c. 217, §§88, 89 make person liable to fine of not less than $1,000 nor more than $25,000, or both fine and imprisonment for term not exceeding 12 months. (c. 217, §92). Penalty for tax evasion is fine of not less than 50% nor more than 200% of amount of tax that was sought to be evaded, or both fine and imprisonment not exceeding two years. (c. 217, §60, as am'd by 2000, c. 4).

Health Services Tax Act.

(Revenue Act, 1995-96, c. 17 [§§94, 95 not in force], as am'd by 1996, cc. 5, 21, 31; 1997, c. 3; 1998, c. 3; 1999 [2d sess.], c. 5; 2001, cc. 3, 6, 48; 2002, c. 5; 2003, c. 4; 2004, c. 3; 2006, c. 2 [not in force]).—Where person fails to make return or remittance under Act, Commissioner may estimate tax collected by taxpayer and taxpayer must pay that amount. (Revenue Act, 1995-96, c. 17, §57). Commissioner may apply for injunction against vendor found guilty of offence under Act who continues to sell property taxable under Act. (Revenue Act, 1995-96, c. 17, §73). Commissioner may assess penalty of 5-100% of amount due plus interest against any person failing to remit tax within required time. (Revenue Act, 1995-96, c. 17, §75).

Gasoline and Diesel Oil Tax.

(Revenue Act, 1995-96, c. 17 [§§94, 95 not in force], as am'd by 2001, c. 6; 2003, c. 4; 2005, c. 6; 2006, c. 2 [ss. 48-51, 54-56 not in force]; 2007, c. 9). Any person violating Part I of

Revenue Act or regulation is liable in case of corporation to penalty not exceeding $10,000 and in case of person not corporation to penalty not exceeding $1,000 or in default to imprisonment not exceeding six months. (1995-96, c. 17, §87, as am'd by 2006, c. 2 [not in force]). Licences issued under Gasoline and Fuel Line Licensing Act or under Motor Vehicle Act must be suspended for period not exceeding one year.

Tobacco Tax.

(Revenue Act, 1995-96, c. 17 [§§94, 95 not in force], as am'd by 2001, c. 6; 2003, c. 4; 2005, c. 6; 2006, c. 2 [ss. 48-51, 54-56 not in force]; 2007, c. 9). Any person violating Part III of Revenue Act or regulation is liable, on summary conviction, to fine of $250-50,000 plus fine in amount of three times tax that would have been due plus amount of tax owing, including arrears, penalties and interest, and, in default of payment, to imprisonment for up to one year. (1995-96, c. 17, §89). Any tobacco manufacturer of wholesaler violating this Part of Revenue Act or regulation is liable, on summary conviction, to fine of $5,000-100,000 plus amount of tax owing, including arrears, penalties, and interest, and, in default of payment, imprisonment for up to two years. (1995-96, c. 17, §89).

22.02 ALCOHOL, BEVERAGES AND TOBACCO TAXES:

Tobacco Tax.

Revenue Act, 1995-96, c. 17, §34, as am'd by 1996, c. 21; 1997, c. 3; 1998, c. 13; 1999 [2nd sess.], c. 5; 2001, cc. 3, 48; 2002, c. 5; 2004, c. 3 imposes tax on tobacco products at rate of 1552/100¢ per cigarette, 140/100¢ per gram of fine cut tobacco, 1552/100¢ per tobacco stick, 56% of manufacturer's or importer's suggested retail selling price of cigars, and 652/100¢ per gram of tobacco in any other form.

22.03 BUSINESS TAXES:

Franchise Taxes.

See category 2 Business Organizations, topic 2.03 Corporations.

22.04 CORPORATE TAXES:

Corporation Capital Tax Act (c. 99, as am'd by 1990, c. 10; 1992, c. 15; 1993, c. 17; 2004, c. 3; 2006, c. 2) imposes tax on capital, surpluses, reserves and retained earnings of banks, and trust and loan companies allocated to Nova Scotia by regulation.

22.05 EMPLOYMENT TAXES:

Social Security or Unemployment Compensation Tax.

No provincial tax.

Unemployment Compensation Tax.

See Canada Law Digest, category Taxation, topic Employment Taxes, subhead Unemployment Compensation Tax.

22.06 ESTATE TAX:

See Canada Law Digest.

Succession Duty (1972, c. 17) repealed by 1974, c. 30 as of Mar. 31, 1974.

22.07 GASOLINE AND SPECIAL FUELS TAXES:

Gasoline and Diesel Oil Tax.

Revenue Act, 1995-96, c. 17, §6 as am'd by 1996, c. 5 imposes tax on purchaser and consumer of gasoline, diesel oil and propane fuel at rate of 13½¢ per litre of gasoline, 14 4/10¢ per litre of diesel oil and 7¢ per litre of propane fuel.

Natural Gas Distribution Municipal Taxation.

(2004, c. 27) provides for taxation of natural gas distribution system and allocation of taxes among municipalities.

22.08 GIFT TAX:

Gift Tax Act (1972, c. 9) repealed by 1974, c. 28, as of Mar. 31, 1974. Deed of property by gift exempt from land transfer tax. Municipal Government Act (1998, c. 18, §109, as am'd by 2000, c. 9).

22.09 INCOME TAX:

Income Tax Act (c. 217 as am'd by 2007, c. 9; 2008, c. 2; 2009, c. 5 [ss. 12, 15 not in force]).

Income Taxed-Individuals.

Every individual must pay 57.5% of total amount of tax payable under Income Tax Act (Canada) on: (a) Taxable income if resident within Province on last day of taxation year; (b) taxable income earned within Province if nonresident on last day of taxation year but earned income in taxation year in province. In addition, 8.79% payable on taxable income up to $29,500; $2,601 plus 14.95% on taxable income up to $59,180; or $7,025 plus 16.67% on taxable income exceeding $59,180; or $12,662 plus 17.5% on taxable income exceeding $93,000. (c. 217, §4[5]). Tax credits established for first time eligible homebuyers. (c. 217, §36, as am'd by 2007, c. 9; 2009, c. 5 [s. 15 not in force]).

Income Taxed-Corporations.

No tax payable on taxable income of corporations carrying on business in offshore until legislature otherwise determines. (c. 217, §58). Governor-in-Council may make regulations for carrying out efficient administration of Act. Every corporation must pay Provincial tax of 16% on taxable income earned in Province for year. (2000, c. 4, §40). Corporation eligible for small business deduction under Income Tax Act (Canada) pays lower percentage provincial tax on amount eligible for small business deduction and 16% on remainder. (c. 217, §5).

Members of Armed Forces.

No special provision.

Gypsum Mining Income Tax.

Imposes tax on mining operation income. (c. 190 as am'd by 2001, c. 6; 2008, c. 2, §§5-6 [not in force]).

22.10 INHERITANCE TAX:

See topic 22.06 Estate Tax, subhead Succession Duty.

22.11 MOTOR VEHICLE TAXES:

Motor Vehicle Carriers.

See category 23 Transportation, topic 23.03 Motor Vehicles, subhead Motor Vehicle Carriers.

22.12 PROBATE TAX:

Probate Act (2000, c. 31, §87, as am'd by 2007, c. 9) provides that, upon grant of letters probate or administration of estate of deceased person, tax is payable by estate to registrar of court making grant: $77 on estates not exceeding $10,000; $193.61 on estates over $10,000 but under $25,000; $322.31 on estates over $25,000 but under $50,000; $902.03 on estates over $50,000 but under $100,000; $902.03 on estates over $100,000 plus additional $15.23 for every $1,000 or fraction thereof in excess of $100,000; $3,094.26 on estates over $250,000; $3,833.76 on estates over $300,000; $6,791.76 on estates over $500,000; $14,186.76 on estates over $1,000,000; $21,581.76 on estates over $1,500,000; $28,976.76 on estates over $2,000,000.

22.13 PROPERTY TAXES:

Taxable Property.

Under Assessment Act (c. 23, as am'd by 1990, cc. 19, 24; 1992, c. 11; 1993, c. 11; 1996, c. 5; 1998, cc. 4, 13, 18; 2000, cc. 4, 9 [§§2(a)(c)(f), 6, 7 not in force], 28; 2001, cc. 3, 6, 14; 2004, cc. 10, 24, 27; 2005, c. 9; 2006, c. 15, c. 19, s. 53 [not in force], c. 24; 2007, c. 9; and 2008, c. 11, c. 36, c. 48 [not in force]; 2009, c. 8 [not in force]), all real property, including mines, minerals, oil and gas; manufacturing equipment assessed on or before Dec. 1, 1988 (c. 23, §2, as am'd by 2000, c. 9 [§§2(a)(c)(f), 6, 7 not in force]; 2002, c. 15; 2007, c. 9; 2008, c. 36); mobile homes and floating structures used for residential and commercial purposes; and residential and commercial occupancy subject to certain exemptions is liable to taxation. Under Pipeline Valuation Act (1985, c. 4 [not in force]) pipelines for transportation and transmission of hydrocarbons constitute taxable property under Assessment Act.

Exemptions are: (a) all property vested in Crown or any person for Imperial, Federal or Provincial purposes; (b) churches and church property not making income in excess of $100 per year; (c) nonprofit community cemeteries; (d) educational institutions except property used mainly for noneducational purposes; (e) public property; (h) property, occupied or unoccupied, for city, town or municipal purposes except where used to furnish electricity, water or power to public; (i) buildings and land containing firefighting equipment; (k) property belonging to infant, if his total income in preceding year was $2,000; (l) property of agricultural society not used for commercial or industrial purposes; (n) property of Royal Canadian Legion and Army, Airforce and Navy Veterans; (o) property of Boy Scouts; (p) property of Girl Guides (c. 23, §5, as am'd by 1993, c. 11); (t) hospitals; (u) property used for village commissioners; (v) property specially exempt by active legislature. Also exempt: farm land used for agricultural purposes (c. 23, §46, as am'd by 1990, c. 19; 1996, c. 5); members of armed forces living on bases exempt from tax on real and personal property not outside base (c. 23, §8); machinery and apparatus installed after Dec. 1, 1988 (c. 23, §43, as am'd by 1990, c. 24; 1996, c. 5); conservation property (2008, c. 36).

Real Estate Conveyance Tax.

On every deed conveying real property situate wholly or partly within boundaries of City of Halifax, County of Halifax, City of Dartmouth, or municipality having bylaw to that effect, tax is imposed and levied on value of real property conveyed or transferred by deed. In case of Halifax lease for term longer than 21 years is subject to deed transfer tax. (Municipal Government Act, 1998, c. 18, as am'd by 2000, cc. 9, 28; 2001, cc. 6, 14, 35; 2002, cc. 6, 10, 36; 2003, c. 9; 2004, cc. 4, 7, 38, 44; 2005, cc. 9, 22, 55). See also category 21 Property, topic 21.09 Landlord and Tenant. If property is situate partly within and partly without boundaries of City, County, or municipality, tax is prorated. Rates: Halifax Regional Municipality, Cape Breton Regional Municipality, Municipality of County of Annapolis, Municipality of East Hants, Municipality of County of Inverness, Municipality of District of Shelburne, Town s of Annapolis Royal, Windsor, Wolfville, Lockeport, Shelburne, 1.5%; Town of Digby, 1.25%; Municipality of West Hants, Municipality District of Digby, Municipality District of Guysborough, Counties of Antigonish and Yarmouth, and Towns of, Bridgewater, Lunenburg, Chester, Mahone Bay, Stewiacke, 1%; Municipality District of St. Mary's, 0.75%; Towns of Truro, Amherst and Municipalities of Colchester, Clare, Digby, Richmond East, Shelburne, and Queens,.5%.

Tax is payable by grantee at time of transfer, and immediately after transfer grantee, solicitor or agent, must file with respective Collector affidavit of transfer, in triplicate, setting forth true, complete and actual value thereof, names of parties, location of real property and such other information as required, and at same time pay tax to Collector. Before deed can be recorded, certificate by Collector stating tax paid or no tax payable must be attached.

If not paid, tax, with penalty and interest, constitutes lien on property. Lien attaches when tax due and continues until discharged by payment.

Exemptions.

Generally, no tax is payable in respect of deed that merely confirms, corrects, modifies or supplements deed previously given, if there is no actual consideration paid or payable. No tax payable on real property transferred between parent company and wholly owned subsidiary. No tax payable on transfer of property between spouses or transfer by way of gift. (Municipal Government Act, 1998, c. 18, §109, as am'd by 2000, c. 9).

Lien.

Taxes under Assessment Act constitute first lien on property upon which they are imposed. (c. 23, §134; 1998, c. 18, as am'd by 2000, cc. 9, 28; 2001, cc. 6, 14, 35; 2002, cc. 6, 10, 36; 2003, c. 9; 2004, cc. 4, 7, 38, 44; 2005, cc. 9, 22, 55). School rates on real property constitute lien on such property. Lien attaches on date upon which rolls are prepared or rate book approved. Taxes after such time constitute lien upon such property from time they were rated. (c. 23, §§134, 135, as am'd by 1990, c. 19).

Tax Sales.

At any time after Dec. 31, municipal or town treasurer may upon application supported by affidavit showing that he has fully complied with all requirements with respect to land sought to be sold for taxes, showing amount of arrears, unpaid interest, expenses and years in which such lands were rated, obtain warrant, from warden or mayor directed to such treasurer, for sale of land. (c. 23, §143). Treasurer on receipt of warrant, levies upon and advertises land for sale at public auction at public place in municipality or town. Notice of sale must be published for at least 30 days before sale, in daily or weekly newspaper in municipality or town by one insertion each week. (c. 23, §144). Treasurer sells land at time and place mentioned in notice, deducts amount of rates, taxes, interest and expenses, also any school rates due to secretary of trustees of that school district, and any balance is paid as directed by Supreme Court judge on summary application. (c. 23, §§149, 150). Treasurer, within ten days after sale, gives certificate to purchaser stating land sold, description, and price, and that deed will be given to purchaser at expiration of one year and payment of fee set by by-law unless redeemed before such time. (c. 23, §154). If lands not redeemed within one year treasurer on demand of purchaser, his assigns or other legal representatives, at any time thereafter and upon payment of fee set by by-law, must cause deed of land to be made to purchaser in prescribed form and signed by warden or mayor, and treasurer, and under seal of municipality or town. (c. 23, §§157-162).

Land Assessed to “Owner Unknown”.

Assessor to advise province before any tax sale of “owner unknown land”. If province pays taxes land vests in it. Province to advertise such vesting and claimants have one year from vesting date to prove ownership. If claimant does so and pays taxes and expenses, vesting in province ceases. Claimants also have right for up to ten years to apply to Supreme Court for compensation or (if land still vested in province) conveyance. (c. 23, §140).

Redemption.

Taxpayer, his heirs, executors, administrators or assigns may redeem land at any time within year upon payment to clerk of amount of purchase money with interest at 10% from date of sale (plus amount to cover arrears of taxes if sale price insufficient) and expenses of sale. Clerk then gives him certificate of discharge in prescribed form, vesting in him right, title and interest which he had before sale, subject to lien of purchaser at sale for money which he spent or expenses which he properly incurred in protecting land or rights therein conferred by certificate of sale. Clerk then pays purchase money and interest he receives on redemption to purchaser, who then ceases to have any claim to and except lien above referred to. (c. 23, §§157-162, as am'd by 1990, c. 19; 1998, c. 18).

22.14 SALES AND USE TAXES:

Sales Tax.

Every purchaser must pay tax at rate of 14% of purchase price at time of purchasing any goods or services, including motor vehicles, boats, vessels and aircraft. Books, books on tape and certain equipment purchased for use by disabled persons are taxed at rate of 7/15 of normal sales tax rate. Operation of Part II of Revenue Act (1995-96, c. 17 [§§94, 95 not in force], as am'd by 2001, c. 6; 2003, c. 4; 2005, c. 6; 2006, c. 2 [§§57, 58 not in force]; 2007, c. 9) has been suspended by Regulations made pursuant to Sales Tax Act (1996, c. 31 [Part II not in force], as am'd by 2006, c. 2; 2007, c. 9 [§38 not in force]).

22.15 STAMP AND SEAL TAX:

Stamp Tax.

See Canada Law Digest.

22.16 UTILITIES TAX:

Oil Refineries and Liquified Natural Gas Plants.

Notwithstanding provincial statutes permitting municipalities to tax property, municipal taxes on oil refineries and liquified natural gas plants set by province under Oil Refineries and L.N.G. Plants Municipal Taxation Act. (2004, c. 8, as am'd by 2007, c. 48).

22.17 WIND TURBINE TAX:

Wind Turbine Facilities Municipal Taxation Act imposes municipal tax on wind turbines. Land on which wind turbine located taxable pursuant to Assessment Act (2006, c. 22, §4).

23 TRANSPORTATION

23.01 AIRCRAFT:

See Canada Law Digest, category Transportation, topic Aircraft.

23.02 AUTOMOBILES:

See topic 23.03 Motor Vehicles.

23.03 MOTOR VEHICLES:

Vehicle permit required annually. Number plates issued by Department of Transportation must be displayed at rear of vehicle, except camper, farm truck, commercial trucks, which must display number plates at front and rear. (c. 293, as am'd by 2007, c. 9; 2008, cc. 61, 62; 2009, cc. 20, 21 [not in force], c. 20 [§§1-7, 10, 11 not in force], c. 45 [ss. 1(a), 2, 3, 14-16, 26 not in force]; 2008, c. 2, c. 21 [§§3-7 not in force]). No exemption for members of Armed Forces.

Drivers licence required; must be renewed every three years. (c. 293, §64). Different classes of drivers licences prescribed by regulations. (c. 293, §66, as am'd by 2007, c. 20 [§§1-7, 10, 11 not in force]). Chauffeur must have special licence and wear badge assigned by department. Drivers licence must be specially endorsed for motorcycle operation. (c. 293, §76). For operator's license must be 16 (c. 293, §67) and for passenger-carrying vehicle for hire, 19 (c. 293, §69). No exemption for members of Armed Forces.

Titles and Sales.

Any transfers must be notified to department, and transferee may operate vehicle for 30 days before applying for registration of vehicle provided valid plates assigned to transferee are displayed (c. 293, §23). If owner transfers registered vehicle, he must endorse name and address of transferee and date of transfer on certificate of registration issued in respect of such vehicle, and must forward same, with vehicle permit, to Department of Transportation. (c. 293, §43). New vehicles sold by dealers must comply with Motor Vehicle Safety Act (Canada). (S.C. 1993, c. 16).

Restrictions on Operation.

Persons under 16, insane persons, persons suffering from or afflicted with physical or mental disability or disease so as to prevent exercise of reasonable control over motor vehicle while operating it, persons who cannot understand highway signs in English language. Persons whose licences have been revoked for driving while impaired may apply for restoration after expiration of periods from six months to five years after revocation subject to such conditions and requirements as Registrar of Motor Vehicles deems necessary. Where driver's licence revoked indefinitely, no application may be made to restore licence for ten years. (c. 293, §67, as am'd by 2008, c. 21). Exception allowed operation of farm tractor on highways by minor 14 years or over. (c. 293, §67). Doctors, psychologists and optometrists can report patients with mental or physical infirmities making them unsafe drivers. Information may be referred by Registrar to Medical Advisory Committee appointed by Minister of Transportation for opinion on ability of person to drive. (c. 293, §279).

Summary Offence Tickets.

May be issued for summary conviction offences under Motor Vehicle Act (c. 293, as am'd by 2007, c. 9, c. 20 [§§1-7, 10, 11 not in force]; 2007, c. 45 [ss. 1(a), 2, 3, 14-16, 26 not in force]; 2008, c. 2; 2008, c. 21 [§§3-7 not in force], c. 61, c. 62; 2009, cc. 20, 21 [not in force]) along with others. Procedure under Summary Proceedings Act (c. 450, as am'd by 1994-95, c. 18; 1996, c. 23; 1999 [2d sess.], c. 8; 2000, c. 28; 2001, c. 5; 2002, c. 10; 2003, c. 4; 2004, c. 4; 2006, cc. 2, 10; 2007, c. 45; 2008, c. 4 [s. 23 not in force]) allows payment of minimum penalty out of court in lieu of appearance (c. 450, §8 as am'd by 1993, c. 45; 1994-95, c. 18; 1999 [2d sess.], c. 8; 2000, c. 4; 2001, c. 5; 2006, c. 2; 2008, c. 4 [not in force]). Accused who fails to make payment or appear will be convicted and receive minimum penalty. (c. 450, §8 as am'd by 1993, c. 45; 1994-95, c. 18; 1999 [2d sess.], c. 8; 2000, c. 4; 2001, c. 5; 2006, c. 2; and 2008, c.4 [not in force]).

Licence Suspension.

Point system based on convictions supplements various causes of suspension of licences (c. 293, §282, as am'd by 2007, c. 45; 2008, c. 2), including failure to pay sales tax on vehicle (c. 293, §17) where there is accident and no insurance (c. 293, §230) and failure to pay fines for offences in relation to motor vehicles (c. 293, §269). Police officer who suspects driver of drunk driving may seize driver's licence immediately and issue temporary licence valid for seven days, after which time order for suspension of driver's licence becomes effective. (c. 293, §279A).

Size and Weight Limits.

Regulated by c. 293, §§189-191.

Equipment Required.

Regulated by c. 293, §§174-201, as am'd by 2007, c. 20 [§§10, 11 not in force]; 2008, c. 62). Seat belts must be worn if available by driver and all passengers over age 16. Passengers, under 16, for which child restraint system is prescribed, must be secured in such system while vehicle is being operated; otherwise passengers under 16 must be secured in seat belt if available. Exemptions for: (a) Persons of certain size, build, physical characteristics; (b) medical reasons; (c) peace officer on duty; (d) fireman on duty; (e) taxicab drivers and passengers; (f) public transit bus drivers; (g) medical attendant in ambulance with patient; (h) persons required by job to leave and enter vehicle frequently. (c. 293, §175).

Lights Required.

Regulated by c. 293, §§174-180, as am'd by 2008, c. 62.

Vehicle Seizure and Forfeiture.

Municipalities permitted to enact by-laws providing for seizure and forfeiture of motor vehicles involved in commission of prostitution offence. (c. 293, as am'd by 2007, c. 9, c. 20 [§§1-7, 10, 11 not in force], c. 45 [ss. 1(a), 2, 3, 14-16, 26 not in force]; 2008, c. 2 [not in force]; and 2008, c. 21 [§§3-7 not in force], c. 61, c. 62; 2009, cc. 20, 21 [not in force]). After three convictions pursuant to Motor Vehicle Act, driver's vehicle may be seized. (cc. 274, 293).

Accidents.

Operator involved in accident resulting in injuries or death to any person, or property damage to an apparent extent of $200 or more must report same within 24 hours to Department of Transportation, or to nearest detachment of Royal Canadian Mounted Police, or to Chief of Police or police officer if accident occurred in city or town. (c. 293, §98, as am'd by 1994-95, c. 12). Also has duty to stop, give assistance, show licence, etc.

Total of nonpecuniary damage recoverable for all minor injuries suffered in accidents after Oct. 31, 2003 not to exceed $2,500. (N.S. Reg. 182/2003, as am'd by N.S. Reg. 196/2003). Onus on injured person to prove injury not minor.

Damages for loss of income and loss of earning capacity arising from injury or death caused by automobile accident to be reduced by all collateral payments received by or available to injured person if no right of subrogation and by amounts of income tax, employment insurance, union or professional dues, and pension contributions that would have been paid by injured person. (c. 231, as am'd by 1992, c. 20; 1995-96, c. 20; 1998, c. 8; 2000, c. 29; 2002, c. 5; 2003, c. 11; 2003 [2nd sess.], c. 1 and N.S. Regs. 182/2003 and 196/2003).

Owner's Liability.

Operator is presumed to be servant of owner acting within scope of his authority and family car doctrine is established. Burden of proving that accident was not entirely due to negligence or improper conduct of operator is on owner or operator, except in case of collision with another motor vehicle and action brought by owner or operator, and except as to guests. (c. 293, §248).

Guests.

Liability for injury to gratuitous passengers is determined according to common law rules of negligence. (Requirement of gross negligence removed by 1983, c. 37.)

Attachment against a motor vehicle may be issued at or after the commencement of an action for injury, loss or damage sustained through negligent operation of such vehicle; but must be issued within 90 days from the day on which such injury, loss or damage was sustained. (c. 293, §250).

The vehicle must be released where defendant is the owner and deposits with the sheriff a certificate under the hand of the Registrar that proof of financial responsibility has been filed by such owner as required by the Motor Vehicle Act or, in case such proof has not been filed or defendant is not the owner, where there is filed with the sheriff a bond in favor of the plaintiff, executed by two sureties satisfactory to the sheriff or by an approved surety company, conditioned for payment of all damages and costs. (c. 293, §253).

Proof of Financial Responsibility.

Driver's licence and every owner's permit of any person who owns or is operating motor vehicle at time it becomes involved in accident resulting in personal or property damage to others in apparent excess of $200, or who is convicted of any one of certain offences involving operation of motor vehicle or forfeits bail after arrest on charge for such offence, will be suspended until proof of financial responsibility is furnished. (c. 293, §205). Must maintain proof of financial responsibility or face resuspension. (c. 293, §205). Minister may require proof of financial responsibility before issuing or renewing owner's permit or driver's licence to any person. Proof of financial responsibility must be to extent of at least $500,000 inclusive for personal injury or death or property damage. Such proof may be by liability insurance, bond of approved guaranty surety company, bond with approved personal sureties or deposits of money or securities. (c. 293, §§234, 236, as am'd by 2003 [2nd sess.], c. 1). Where proof of financial responsibility is required it must be maintained for period of three years, or such longer period as directed by Minister. (c. 293, §244). Minimum liability insurance is $500,000. (c. 293, §235).

Insurance.

It is offence not to have liability coverage. (c. 293, §230). See subhead Proof of Financial Responsibility, supra. Nova Scotia Insurance Review Board acts as regulatory body for automobile insurance. (c. 231, §16).

Judgment Recovery (N.S.) Limited.

A person who obtains a judgment in an action for damages for bodily injury, death or in excess of $200 for property damage occasioned by or arising out of the ownership, maintenance, operation or use of a motor vehicle within Nova Scotia, may, upon assigning the judgment to Judgment Recovery (N.S.) Limited, receive from it an amount up to a maximum inclusive payment of $200,000 inclusive of interest, plus costs, for personal injury, death or property damage. (c. 293, §213 as am'd by 1995-96, c. 20). In hit-and-run case, action may be brought against Registrar where vehicle involved was stolen vehicle and identity of driver cannot be established. (c. 293, §256). No money from fund will be paid to nonresident, unless such person resides in jurisdiction which affords similar relief to Nova Scotian residents. (c. 293, §213). Repayment to fund may be made in instalments. (c. 293, §225).

Foreign Vehicles.

A passenger motor vehicle owned by a person who does not reside or carry on business in Nova Scotia is exempt from registration for 90 days from the date on which it was first operated in Nova Scotia in any registration year, but there can be only one such exemption in the 12 months following such date. A passenger motor vehicle owned by a nonresident and operated within Nova Scotia for the transportation of persons or property for compensation is exempt from registration for 30 days from the date on which it was first operated in Nova Scotia in any registration year, provided no persons or goods are taken on within Nova Scotia, but there can only be one such exemption in the 12 months following such date. A passenger motor vehicle registered in another province of Canada, owned by a nonresident and operated within Nova Scotia for the purpose of providing transportation for commercial travellers or other persons temporarily engaged in business in Nova Scotia and having no fixed place of abode while temporarily in Nova Scotia, may be operated without registration for 30 consecutive days on obtaining from the Registrar a special permit and payment of such fees as the Minister may determine. A commercial motor vehicle owned by a nonresident is exempt from registration for 24 hours from the time it first entered Nova Scotia in any registration year, and the Registrar or any motor vehicle inspector or member of the Royal Canadian Mounted Police may issue a special permit to the driver of such vehicle granting a further exemption of six days under such conditions as may be stated on such special permit. A bus owned by a nonresident is exempt from registration, provided all the passengers brought into the province are taken out of the province in the bus and no passengers are taken on in the province unless the operator is in possession of a special permit issued by the Registrar setting forth the conditions under which such bus may operate without registration in Nova Scotia.

The above exemptions apply only to motor vehicles duly registered in the province or state in which the owner resides, and all requirements of that province or state in regard to the display of number plates and the carrying of permit, registration certificate or registration card must be complied with while the vehicle is operated in Nova Scotia. The exemptions do not apply to any motor vehicle owned by a person residing or carrying on business in any province or state which does not grant substantially similar privileges to vehicles registered in Nova Scotia and where such province or state grants a lesser privilege in respect to the operating period or the style of vehicle affected the exemptions are diminished accordingly.

Motor vehicles registered in New Brunswick are entitled to the following exemptions from registration: Passenger motor vehicles, provided the owner does not reside in Nova Scotia; commercial motor vehicles, provided they do not take on any good, wares or merchandise in Nova Scotia to be discharged in Nova Scotia; busses and passenger motor vehicles carrying passengers for compensation, under the conditions stated in a permit issued by the department. This exemption does not apply where any passenger is taken on in Nova Scotia to be set down in Nova Scotia. (c. 293, §25, Regs.).

Nonresident operators, if at least 16 years old and duly licensed in state or province of residence, where examination is required, may operate vehicle exempt from registration without examination or license for 90 days. (c. 293, §65, as am'd by 2008, c. 61; 2009, c. 22).

Actions Against Nonresidents.

No special provisions as to commencement.

Direct Actions.

Injured person can bring action against insurer upon recovery of judgment against insured. (c. 231, §133). See also category 5 Civil Actions and Procedure, topic 5.02 Actions, subhead Direct Actions Against Insurer.

Motor vehicle carriers governed by c. 292 (as am'd by 1978-79, c. 28 [not in force]; 1990, c. 35; 1992, c. 23; 1994, c. 23). Act is administered by Board of Commissioners of Public Utilities. Act does not apply to: Motor carrier with not more than three freight vehicles of which not more than one may be motor vehicle or combination motor vehicle and trailer having more than two axles; vehicles governed by Public Utilities Act; public passenger vehicles from another province or U.S.A. carrying tourists under contracts made outside province, provided all passengers brought into province are taken out; and taxis. Certain other exemptions, acts and regulations also govern licence requirements, based on need, quality of service, etc., weight restrictions, insurance, bills of lading and contracts, bonding, construction, maintenance and operation of vehicles, driver requirements, etc. Motor carriers must maintain certain insurance requirements. Every motor carrier must pay seat-mile tax to cities and towns in which operated at rate fixed by town resolution, but not exceeding 1/15th of 1¢ per unit of seating capacity for every mile travelled within such town.

The minister may make reciprocal agreements with other provinces concerning registration and licensing of commercial motor vehicles and other related matters.

Moratorium on new bus licences imposed. (c. 200).

Transportation of dangerous goods, as defined in Regulations, prohibited unless prescribed safety standards are complied with, as set out in Regulations. (c. 119). Local authority and provincial traffic authority may designate routes and time for transportation of dangerous goods or prohibit carriage of dangerous goods on designated highways. (c. 293, §191).

Aircraft.

See Canada Law Digest, category Transportation, topic Aircraft.

Gasoline Tax.

See category 22 Taxation, topic 22.07 Gasoline and Special Fuels Taxes, subhead Gasoline and Diesel Oil Tax.

Snow vehicles regulated by c. 323, as am'd by 2002, c. 5.

Off-highway Vehicles.

Comprehensive regime governing use of all types of off-highway vehicles such as snow vehicles, all-terrain vehicles and motorcycles enacted by c. 323 (as am'd by 2002, c. 5; 2005, c. 56 [§10 not in force]). Persons on scooters, inline skates, roller skates or skate boards not permitted on roadway except while crossing on crosswalk. (c. 293, §172).

See also categories 16 Insurance, topic Insurance Companies; Mineral, Water and Fishing Rights, topic Mines and Minerals.

23.04 RAILROADS:

See category 3 Business Regulation and Commerce, topic 3.08 Carriers.

ONT
ONTARIO LAW DIGEST

—Scope —

Revised for 2010 edition by

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(Citations, unless otherwise indicated, refer to chapters [c.] of the Revised Statutes of Ontario, 1990 as am'd. Annual Statutes of Ontario are cited by year and chapter number. Regulations made under authority of Revised Statutes of Ontario or Statutes of Ontario are cited R.R.O. 1990 followed by the number, and O. Reg. followed by regulation number and year. R.S.C. indicates Revised Statutes of Canada, 1985. R.P. indicates Rules of Civil Procedure, R.R.O. 1990, Reg. 194 as am'd. Reference to court means Ontario Court [General Division] unless otherwise specified.)

1 INTRODUCTION

1.01 GOVERNMENT AND LEGAL SYSTEM:

1st Session of 39th Ontario Legislature began on Nov. 29, 2007. No specified dates for sessions to end; dates for beginning and end of sessions announced in course of session.

1.02 HOLIDAYS:

See Canada Law Digest.

Sunday.

No document may be served and no order executed on Sun., except with leave of court. (Courts of Justice Act, c. C.43, §124).

Holiday.

Where time for doing act expires on holiday, act may be done on next day that is not holiday. (R.P. 3.01[1][c]). Where time limited for act expires on holiday, time extended to next day not holiday. Holiday: Sun. (c. I.11).

Retail Businesses.

Certain establishments exempted from Sun. closing law. (c. R.30). (i.e. where religion of owner requires store to be closed on another day of week).

1.03 OFFICE HOURS AND TIME ZONE:

Ontario is in the Eastern (GMT -05:00) time zone. Office hours are generally from 9 a.m. to 5 p.m.

2 BUSINESS ORGANIZATIONS

2.01 AGENCY:

Common law rules generally apply.

2.02 ASSOCIATIONS:

Generally speaking, an unincorporated association is not a legal entity and cannot sue or be sued by its society name. See topics 2.03 Corporations; 2.07 Partnerships. There are various Acts as to specific trade and professional associations. See also category 11 Employment, topic 11.02 Labour Relations.

2.03 CORPORATIONS:

In Ontario, corporations with provincial objects may be created by Special Act of Provincial Legislature, but general legislation of Province regulating incorporation of commercial companies is Business Corporations Act. (c. B.16). Business Corporations Act will generally apply to all corporations incorporated under special or general Act of Legislature of Ontario, other than: (i) corporation within meaning of Loan and Trust Corporations Act, (ii) company within meaning of Corporations Act which has objects in whole or in part of social nature, (iii) corporation to which Co-operative Corporations Act applies, (iv) corporation that is insurer within meaning of Corporations Act, (v) corporation to which Credit Unions and Caisses Populaires Act applies, and (vi) non-share capital companies incorporated under Corporations Act. (§2). Corporations are either offering or non-offering or small business development corporations.

For non-Ontario incorporated corporations doing business in Ontario, see subhead Foreign and Extra-Provincial Corporations, infra; for non-Ontario corporations making take-over bids to Ontario residents or which are listed on Toronto Stock Exchange or which have distributed equity securities pursuant to an Ontario qualified prospectus since Apr. 30, 1967, see category 3 Business Regulation and Commerce, topic 3.25 Securities, subheads Take-Over Bids, Insider Trading, catchline Insider Liability, Proxy Solicitations, and Continuous Disclosure. This topic, except for subheads Foreign and Extra-Provincial Corporations and Taxation, deals solely with Ontario-incorporated corporations.

Small business development corporations are corporations registered under Small Business Development Corporations Act, (c. S.12). This Act is to be repealed on day to be named by proclamation. Small business development corporations must comply with provisions of Business Corporations Act, have never previously carried on business, have equity shares without par value that may be issued for aggregate consideration not more than $10,000,000 if corporation offering equity shares to public and not more than $5,000,000 in case of corporation not offering its equity shares to public, have objects only to assist in development of small businesses by providing capital through acquisition and holding of securities or providing business and managerial expertise to small businesses and have equity capital of at least $25,000. (c. S.12, §4). Eligible investments for small business development corporations are prescribed in Act. Holder of equity shares in small business development corporations may apply to Minister for grant equal to 25% of money paid by applicant for equity shares issued to applicant. Small business development corporations are largely exempt from payment of capital tax imposed by Part III of Corporations Tax Act. (c. C.40).

General Supervision.

Ministry of Government and Consumer Services.

Name.

Word “Limited”, “Limitée”, “Incorporated”, “Incorporée” or “Corporation” or corresponding abbreviations “Ltd.”, “Ltée”, “Inc.” or “Corp.” shall be part of corporation name. (§10). Every corporation assigned corporation number and where no name specified will be assigned number name consisting of corporation number followed by word “Ontario”. (§8). Corporation shall not be incorporated with name containing word or expression prohibited by regulations, or name that is similar to name of known body corporate, trust, association, partnership, sole proprietorship, or individual or known name under which any of same identifies itself, if use of that name is likely to deceive, except as provided by regulation. (§9). Corporate name shall not be too general, only descriptive of quality, function or other characteristics of goods or services, primarily name or surname of individual who is living or has died within 30 years preceding date of filing articles, primarily geographic name, or primarily combination of punctuation marks. (§11, R.R.O. 62). Certain words or expressions are prohibited on public grounds or because they are expressly prohibited by regulation. (§§13-15, R.R.O. 62). Words connoting connection with government or agency thereof or professional association or that business is one of financial intermediary or stock exchange require consent of appropriate body. Words connoting connection with political party or leader thereof where objects political are prohibited. (§16, R.R.O. 62). Name shall not exceed 120 characters in length. Submitted articles must be accompanied by original Ontario weighted computer printed search report for proposed name from NUANS automated name search system maintained by Consumer and Corporate Affairs Canada and any consents required by Act or regulation. (§§18, 21, R.R.O. 62). If not incorporated or if carrying on business in name other than that in articles, cannot use “Limited”, “Incorporated” or “Corporation” or abbreviations thereof. (§11).

Business name other than corporate name must be registered. See subhead Reports, infra.

Term of Corporate Existence.

May be perpetual. See subhead Dissolution, infra.

Incorporators.

One or more persons or corporations may incorporate a corporation. Personal incorporators must be at least 18 years old and must not have been found under Substitute Decisions Act, 1992 or under Mental Health Act to be incapable of managing property or must not have been found to be incapable by Court in Canada or elsewhere or have status of bankrupt. (§4). There is no special requirement as to citizenship or residence.

Application.

Articles of incorporation must be in prescribed form and must set out name of corporation; address of registered office; minimum and maximum number of directors; names in full and residential addresses of all first directors and whether resident Canadian; restrictions on business or powers of corporation; classes and any maximum number of shares corporation is authorized to issue; rights, privileges, restrictions and conditions attaching to each class of shares; restrictions on issue, transfer or ownership of shares; and names and addresses in full of incorporators. (§5). Articles may set out any provision authorized by Act to be set out in articles or that could be subject of by-law. First director who is not incorporator, and first director who is incorporator of corporation whose articles are filed electronically, must sign consent to act as first director.

Filing of Application.

Filed in duplicate with Minister of Government and Consumer Services. (§§6, 273).

Issue of Certificate of Incorporation.

If application is in order and fees are paid articles of incorporation issue automatically. Date of incorporation is that of certificate of incorporation. (§273).

Incorporation Fee.

$360 for all corporations. Lower fee of $300 applies where articles are electronically filed. (§271.1[2]).

License to Do Business.

Ontario incorporated corporations require no such license. For other corporations, see subhead Foreign and Extra-Provincial Corporations, infra.

Organization.

Incorporators need not be first shareholders or first directors. Organization may be completed without any meetings being held because any by-law or resolution signed by all directors or all shareholders at any time during a corporation’s existence is as valid as if passed at regular meeting of directors or shareholders. (§§104 and 129). Special resolutions must be passed by 2/3 of votes cast at meeting of shareholders called for that purpose or by written consent of all shareholders entitled to vote at such meeting or their attorneys authorized in writing. (§1).

Paid-in Capital Requirements.

Business can be commenced immediately on incorporation. No condition precedent such as subscription and paying up of any part of its capital is imposed.

Amendment of articles of incorporation may be effected by delivering executed articles of amendment in duplicate to Minister along with required fee. (§171). Cannot change name or decrease capital if insolvent or decrease would render it insolvent. For all amendments fee is $150. (§271.1[2]). Amendments require authorization by special resolution. (§§168, 170). Amendments may also be effected by arrangement. (§182). If articles of amendment are in order and fees paid certificate of amendment is issued and amendment is effective upon date of such issuance. (§172).

Increase or decrease of authorized capital stock may be effected by articles of amendment. On a reduction of capital it must be shown that corporation is not insolvent and it may be necessary to show that no creditors object. (§§34, 171). There are restricted provisions for purchase by corporation of its own shares. (§§30-31). See also subhead Powers of Corporation, infra.

Shares.

Shares of corporation shall be without par value. Where only one class of shares exists, rights of holders thereof shall be equal in all respects and include right to vote at all meetings of shareholders. (§22). Preference shares may have any of preferences familiar to modern finance such as preferences as regards to dividends and repayment of capital on dissolution or winding up, right to elect stated proportion of board of directors, etc.

Warrants are dealt with as corporate securities. (§§53-67). Warrant is any instrument issued by corporation as evidence of conversion privileges or options or rights to acquire securities of corporation.

Share Certificates.

Share may be represented by share certificate or may be uncertificated security. (§54). There shall be stated on face of each certificate name of corporation, words to effect that corporation was incorporated under law of Province of Ontario, or is subject to Ontario Business Corporations Act, shareholder’s name, number and class of shares represented thereby and any preferences, rights, conditions or restrictions or that such preferences, etc. exist and that copy of full text thereof obtainable from corporation on demand (§56). Where articles restrict issue, transfer or ownership of shares for certain purposes set out under Act, restriction of reference to it must be noted conspicuously on every share certificate subject to restriction. (§56).

Issuance of Shares.

Allotment and issue of shares is regulated by directors. Shares must not be issued until fully paid. (§23).

Transfer of Shares.

Except as otherwise provided, transfer of shares is governed by Securities Transfer Act, 2006. (S.O. 2006, c. 8). For background information on Act, see topic Personal Property Security, subhead Securities Transfer Act, 2006. Part IV of Act pertains to transfer of certificated and uncertificated securities. (§§68-85). Upon delivery of security to purchaser who gives value, obtains control of security and does not have notice of any adverse claim to security, purchaser acquires security free of any adverse claim. (§70). Duty to issuer to register transfer is imposed if transfer reflects certain criteria. (§86). On death of shareholder, capital gains tax is levied on deemed disposition under Canada Income Tax Act. (See Canada Law Digest.) Unless authorized by articles, corporations must not impose restrictions on transfer of shares. (§42).

Stock Transfer Tax.

None.

Shareholders

Shareholders elect directors (§119) and appoint auditors (§149). Directors are responsible for general supervision of affairs of corporation. (§115). If shareholders are dissatisfied they may replace board of directors at end of their term or remove any director before expiration of term and elect another to fill vacancy. (§122). Shareholders may inspect copies of articles, register of security holders, transfer register and minutes of all shareholders' meetings. (§145). Shareholders holding at least 5% of issued voting shares may requisition meeting of shareholders (§105) and any shareholder entitled to vote at meeting of shareholders may requisition directors to circulate shareholder's proposal to be considered at next shareholders' meeting (§99). Any shareholder who is entitled to vote at annual meeting of shareholders may make proposal to amend articles. (§§99, 169). Shareholder may apply to court for order directing corporation or officers or directors to comply with any provisions of Act, articles or by-laws of corporation. (§253). If wrong is done to corporation such as where: (a) property or rights of corporation are being appropriated to majority, (b) breach of directors' duty to act bona fide in interests of corporation has been condoned by majority, or (c) majority has enacted resolutions which discriminate so as to give majority advantage of which minority is deprived, and majority refuses to cause corporation to take action, derivative action may be instituted with leave of court by any shareholder. (§246).

Unanimous Shareholder Agreement.

Written agreement among all shareholders of corporation and with or without other persons may restrict in whole or in part powers of directors to manage or supervise management of business and affairs of corporation. (§108).

Shareholders' Liability.

Shareholders not liable for corporate debts or obligations. (§92). On decrease of issued capital by articles of amendment each shareholder on such date may be individually liable to creditors of corporation for debts due on such date up to amount not exceeding amount of repayment to such shareholder. (§34). Notwithstanding dissolution of corporation, shareholders among whom its property has been distributed remain liable to its creditors up to amount received by them respectively. (§243).

Shareholders' Meetings.

Annual meetings must be held within 18 months after incorporation and subsequently not more than 15 months after previous annual meeting unless corporation has only one shareholder and necessary action is taken in writing in time. (§94). General meetings may be called either by directors or by holders of 5% or more of issued voting shares. (§105). Notice of time and place for holding general meetings must, unless otherwise provided, be given at least ten days prior to meeting of non-offering corporation, and 21 days prior to that of offering corporation, and in either case not more than 50 days prior to meeting. (§96). See also subhead Organization supra.

Voting.

Each share of corporation entitles holder to one vote unless otherwise provided, and shareholder may vote by proxy. (§§102, 110). Nominee appointed by proxy need not be shareholder. Proxy ceases to be valid one year from its date. Form and contents of proxy are prescribed. Proxy may be revoked by instrument in writing, or by transmitting by telephonic or electronic means revocation that is signed by electronic signature if it meets prescribed standard of reliability, deposited either at registered office of company at any time up to and including last business day preceding day of meeting or with chair of meeting on day of meeting. (§110). For proxy solicitation requirements see category 3 Business Regulation and Commerce, topic 3.25 Securities, subhead Proxy Solicitations.

Where articles or by-laws so provide cumulative voting for directors is permitted. (§120).

In connection with shareholders' meetings offering corporations must comply with timing provisions of National Instrument 54-101, put out by Canadian Securities Regulators.

Voting Trust.

Agreement by a shareholder to vote in particular manner is legal and trustee may vote shares registered in trustee's name in accordance with such an agreement. (§108).

Appraisal.

Generally, if corporation resolves to (i) amend its articles to add, remove or change restrictions on issue, transfer or ownership of shares, (ii) amend its articles to add, remove or change any restriction on business or powers of corporation, (iii) amalgamate with another corporation, (iv) be continued under laws of another jurisdiction, or (v) sell, lease or exchange substantially all of its property, holder of shares of any class or series entitled to vote on resolution may dissent. Shareholder who dissents and complies with statutory requirements is entitled, when action approved by resolution from which shareholder dissents becomes effective, to be paid by corporation fair value of shares held by such shareholder determined as of close of business on day before resolution was adopted. (§185).

Compulsory Acquisitions.

Person who has made issuer bid or take-over bid (offer made to security holders which, taken together with securities currently owned by offeror, its affiliates and associates, will carry, in aggregate, 10% or more of voting rights attached to voting securities of offeree corporation) and who acquires, within 120 days of date of bid, not less than 90% of securities of any class of securities to which bid relates, other than securities held at date of bid by or on behalf of offeror or affiliate or associate of offeror, is entitled, upon complying with Act, to acquire securities held by dissenting offerees. (§188). Where 90% or more of class of securities of corporation, other than debt obligations, are acquired by or on behalf of person, and person's affiliates and associates, then holder of any securities of that class not counted for purpose of calculating such percentage is entitled in accordance with Act to require corporation to acquire holder's securities of that class at their fair value. (§189).

Oppression remedy is available to all existing and former registered or beneficial holders of security of corporation or any of its affiliates, existing or former directors or officers of corporation or any of its affiliates, any other person who, in discretion of court, is considered proper person to make such application and, in case of offering corporation, Ontario Securities Commission. Where, upon application by any of parties listed above, court is satisfied that in respect of corporation or any of its affiliates, (a) any act or omission of corporation or any of its affiliates effects or threatens to effect result; (b) business or affairs of corporation or any of its affiliates are, have been or are threatened to be carried on or conducted in manner; or (c) powers of directors of corporation or any of its affiliates are, have been or are threatened to be exercised in manner, that is oppressive or unfairly prejudicial to or that unfairly disregards interests of any security holder, creditors, director or officer of corporation, court may make order to rectify matters complained of. (§248).

Directors.

Corporation not offering its securities to public must have at least one director. Offering corporations must have at least three directors of whom at least one-third shall not be officers or employees of corporation or of affiliate of corporation. (§115). Directors need not be shareholders. At least 25% of directors must be resident Canadians. (§118). Directors must be over 18 and not undischarged bankrupt and must not have been found under Substitute Decisions Act, 1992 or under Mental Health Act to be incapable of managing property or to be incapable by court in Canada or elsewhere. (§118). Directors may be elected for term of up to but not exceeding three years. Terms of directors need not coincide. (§119). At end of term director must retire but if otherwise qualified is eligible for reelection.

Vacancies in board may generally be filled by appointment by directors remaining in office provided there is quorum but if there is no quorum in office, vacancies must be filled by shareholders. (§124). Directors may designate, specify duties, delegate duties to and be appointed to any office of corporation. (§133).

Directors' Meetings.

Business can only be transacted at a directors' meeting at which a quorum is present. (§126). Meetings may be held over conference telephone with consent of all directors of corporation. (§126). Any by-law or resolution signed at any time during corporation's existence by all directors is as valid as if passed at meeting. (§129). Unless articles or by-laws provide otherwise majority of directors constitutes quorum but quorum must never be less than greater of 2/5 of board or minimum number of directors. (§126). All meetings must be held where registered office of company is situated unless otherwise authorized by by-laws; unless articles or by-laws otherwise provide majority of meetings in any year must be held in Canada. (§126). See subhead Delegation by Directors, infra.

Powers and Duties of Directors.

Unless articles, by-laws or unanimous shareholder agreement otherwise provide, directors may, by resolution, make, amend or repeal any by-laws that regulate business or affairs of corporation. (§116). Such by-laws unless confirmed in meantime or at general meeting, have force only until next annual meeting of corporation. (§116).

Liabilities of Directors.

Where directors consent to shares of corporation being acquired by it for redemption, purchase or cancellation in contravention of Act or articles, directors are jointly and severally liable to corporation. (§130). Directors who consent to dividend improperly declared are jointly and severally liable to corporation for amount of such dividend. (§130). Directors who consent to certain payments to shareholders or to payments of indemnity in contravention of Act are jointly and severally liable to corporation for any such amounts distributed. (§130). Directors are jointly and severally liable to employees of company for all debts due while they are directors for services performed for corporation up to six months wages plus vacation pay accrued for up to 12 months. (§131).

See subhead Liabilities of Officers, infra.

Officers.

Subject to articles, by-laws or any unanimous shareholder agreement, directors may designate offices of corporation, appoint officers, specify their duties and delegate to them powers to manage business and affairs of corporation. One person may hold two or more offices. (§133).

Liabilities of Officers.

By-laws may provide that current and former directors or officers may be indemnified against any liability and expenses incurred in respect of civil, criminal, administrative, investigative or other proceedings in which individual is involved because of their association with corporation. If such individual was not judged by court or other competent authority to have committed any fault or omitted to do anything that individual ought to have done and fulfils other requirements of Act, corporation shall not indemnify such directors or officers in respect of all expenses reasonably incurred in respect of such actions. (§136).

Insider Trading.

Directors, officers, persons employed or retained by corporation, persons who beneficially own more than 10% of voting securities of corporation, certain tippees and other insiders of both offering and non-offering corporations under Business Corporations Act will have insider liability to third persons and corporation if, in connection with transaction in security of corporation or any of its affiliates, they make use of any specific confidential information for their own benefit or advantage that, if generally known, might reasonably be expected to affect materially value of security. (§138).

Delegation by Directors.

Subject to articles or by-laws, directors of corporation may appoint from their number managing director or committee of directors and delegate to such managing director or committee any of powers of directors within prescribed limits. (§127).

Principal Office.

Corporation must have registered office in Ontario at location specified in its articles or by directors' or special resolution, as applicable. Its location may be changed to another municipality by special resolution or to another address within same municipality by directors' resolution. (§14). Notice of change of address must be filed within 15 days of special resolution or directors' resolution. (Corporations Information Act, c. C.39, §4).

Powers of Corporation.

Corporation has capacity and rights, powers and privileges of natural person. (§15). No act of corporation including transfer of property to or by corporation is invalid by reason only that act is contrary to its articles, by-laws, unanimous shareholder agreement or Business Corporations Act. (§17). In general, subsidiary corporation may not hold shares in parent. (§28). Pre-incorporation contract will be binding on either corporation for whose benefit it was intended or person who entered into contract on behalf of corporation (contractor) before its incorporation; corporation may obtain benefit of and become liable under such contract by adopting it in which event contractor ceases to have any rights or obligations under contract. Person with whom contractor enters pre-incorporation contract may apply for court order apportioning liability between contractor and corporation whether or not pre-incorporation contract is adopted by corporation. (§21).

Dividends may be paid in cash or property. (§38). No dividend or bonus can be declared or paid if there are reasonable grounds for believing that corporation is, or after payment, unable to pay liabilities as they become due or realizable value of corporation's assets would be less than aggregate of liabilities and stated capital unless they acted honestly and in good faith with view to best interests of corporation. (§38).

Sale or Transfer of Corporate Assets.

Sale, lease, exchange or disposition of all or substantially all of property of corporation requires approval by special resolution. See subhead Organization, supra. (§184).

Books and Records.

Every corporation must keep books containing following information: copies of all articles, by-laws and special by-laws, resolutions and special resolutions, names, addresses, names, addresses, etc. of all directors, securities register and record of share transfers. Every corporation must also keep book of accounts containing following information: receipts and expenditures, sales and purchases, assets and liabilities and all other transactions affecting financing position of corporation. Books must also be kept containing minutes of all proceedings and votes of shareholders and of board of directors. (§140). Registers of security holders and transfers must be kept at registered office unless directors otherwise resolve. Branch registrars and transfer agents may be appointed. Various rights of inspection are given to shareholders, creditors and others subject in some cases to filing an affidavit. (§§141-146).

Reports.

Prospectuses must be filed as required by Securities Act (c. S.5), upon sale of securities in Province.

Initial notice containing prescribed information must be filed with Minister within 60 days of incorporation, amalgamation, continuation or establishing office or carrying on any business activity in Ontario. Notices of change for every change relating to information in initial notice except change of name of Ontario corporation or retirement and subsequent re-election of director, must be filed within 15 days of change. There is no fee for filing initial notice and notices of change. Duplicates of initial notice and notices of change must be kept available for examination at principal office in Ontario. (Corporations Information Act, c. C.39, §§2, 4 and 5). Section 4 is to be repealed on day to be named by proclamation. Corporations in default of filings are not capable of maintaining proceedings in Ontario except with leave of court. (c. C.39, §18).

If corporation is to carry on business in Ontario in name other than corporate name, name must first be registered with Minister. Registration is effective for five years and can be further renewed. Generally, corporations must set out corporate and registered name in all contracts, invoices, negotiable instruments and orders. (Business Names Act, c. B.17). Corporations in default of registration are not capable of maintaining proceedings in Ontario except with leave of court and potentially liable to maximum fine of $25,000. (c. B.17, §§7, 10).

Financial statements as prescribed by Securities Act must be laid before each annual meeting if offering corporation. If non-offering corporation, annual financial statements and auditor’s report, if any, to be mailed to shareholders at least ten days before annual meeting. (§154). If offering corporation, annual financial statements and auditor’s report to be mailed to shareholders at least 21 days before annual meeting. (§154). Such offering company must also mail detailed quarterly financial statements to shareholders. (c. S.5, §77). Annual and quarterly financial statements must be filed by offering corporation with Ontario Securities Commission (O.S.C.) concurrently with mailing to shareholders within set time periods. (c. S.5, §§77-79).

National Instrument 54-101 also governs timing of mailings of financial statements for above shareholders’ meetings of offering corporations. For insider trading reports, see category 3 Business Regulation and Commerce, topic 3.25 Securities, subhead Insider Trading and catchline Insider Liability.

For take-over bid circulars and directors circulars and filing requirements therefor, see topic Securities, subhead Take-Over Bids.

For proxy solicitation information circulars, see category 3 Business Regulation and Commerce, topic 3.25 Securities, subhead Proxy Solicitations. Certified copies of circulars and copies of proxies must be filed with O.S.C. (National Instrument 51-102, §9.3).

For Ontario tax returns, see subhead Taxation—(a) Provincial Tax, infra.

Penalties are provided for cases of default in making any of above reports or returns. See also subhead Dissolution, infra.

Returns must also be made under Corporations Returns Act (R.S.C., c. C.43) and federal Income Tax Act. See Canada Law Digest, categories 2 Business Organizations, topic 2.03 Corporations; Taxation, topic Taxes.

Audits and Inspections.

Corporation is exempt from requirements regarding appointment and duties of auditor and annual audit requirements if such corporation is not offering corporation and its shareholders so consent. (§148). Auditors are entitled to right of access at all times to books, accounts and vouchers of corporation and to such additional information as they may require. They must report annually to shareholders on accounts examined. Court may appoint inspector to investigate affairs and management of corporation on application by shareholder or by O.S.C. if offering corporation. (§161).

Corporate Bonds or Mortgages.

Unless articles or by-laws or unanimous shareholder agreement otherwise provide, articles of corporation shall be deemed to state that directors of corporation may, without authorization of shareholders, borrow money upon credit of corporation, issue, reissue, sell or pledge debt obligations of corporation and mortgage, hypothecate and pledge any property of corporation. (§184).

Corporate Securities Registration.

Corporations Securities Registration Act repealed. See category 20 Mortgages, topic 20.05 Personal Property Security.

Amalgamation.

Two or more Ontario corporations may amalgamate by statutory procedure. (§174). They must first enter into agreement prescribing terms and conditions of amalgamation, mode of carrying it into effect and such other details as may be necessary to perfect amalgamation and provide for subsequent management. (§175). This agreement is not effective until approved by special resolutions of each of amalgamating corporations. (§176). Executed articles of amalgamation must be delivered in duplicate to Minister. (§178). Fee is $330. (§271.1[2]). New corporation comes into existence on date of certificate of amalgamation with all its property, rights, privileges, and franchises and subject to all liabilities, contracts, disabilities and debts of each of companies so amalgamated. (§179).

Continuations.

Corporation incorporated in jurisdiction other than Ontario may, if it appears to Minister to be thereunto authorized by laws of such jurisdiction, file articles of continuance in duplicate continuing it as if it had been incorporated in Ontario. (§180). Fee is $330. (§271.1[2]).

Transfer of Ontario Corporations.

Corporation incorporated in Ontario may, if authorized by special resolution, Minister and laws of other jurisdiction, apply to that jurisdiction for certificate of continuance as corporation incorporated under laws of that jurisdiction if such jurisdiction has laws containing certain specified provisions. (§181). Fee is $330. (§271.1[2]).

Dissolution.

Corporation may be wound up voluntarily where special resolution requiring it to be wound up is passed at general meeting. (§193). Notice of such resolution must be filed within ten days with Minister and published in Ontario Gazette within 20 days. When winding up commences, company must cease to carry on its undertaking except so far as is necessary for winding up, and some transfers of shares or alterations in status of shareholders are void. (§198). Liquidator must apply property of company in satisfaction of its liabilities pari passu and distribute assets. All costs and expenses of liquidation are payable out of assets in priority to all other claims. Liquidators may be empowered to enter into arrangements with creditors. When winding up is complete, liquidator must make report at general meeting and within ten days file notice with Minister. (§205). Corporation is ipso facto dissolved three months after filing of such notice.

Corporation may also be wound up by order of court. (§§207-218). Winding up order may be made on application of corporation or shareholder, or where corporation is being wound up voluntarily, of liquidator or person liable to contribute to property of corporation upon winding up, or creditor with claim of $2,500 or more. Proceedings are same as for voluntary winding up except that all proceedings are subject to order and direction of court.

Corporation may dissolve voluntarily by delivering articles of dissolution to Minister. Where corporation has been active, dissolution must be authorized by shareholders. (§237). Where corporation has not commenced business and has not issued any shares, dissolution may be authorized by incorporators. (§237[c]). In both cases, debts must have been satisfied, property must have been distributed, and there must be no court proceedings pending. (§238). Dissolution becomes effective on issue of certificate by Minister. (§239). No fee is payable.

Corporation may be dissolved by Minister where sufficient cause is shown. (§240).

Corporation may also be dissolved by Minister for failure to comply with Ontario tax legislation or for failure to file financial statements as required by securities legislation or for failure to comply with filing requirements under Corporations Information Act. (c. C.39). Interested persons can apply to Minister for revival of corporation. (§241).

Insolvency and Receivers.

See category 8 Debtor and Creditor, topic 8.17 Receivers, and Canada Law Digest, category 8 Debtor and Creditor, topic 8.02 Bankruptcy.

Distribution of Assets Without Winding Up.

No specific provision.

Close Corporations.

Act does not provide for private companies. Distinction between corporations which do and do not offer their securities to public. (§1[6]).

Loan corporation may be incorporated subject to provisions of Loan and Trust Corporations Act. (c. L.25).

Foreign and Extra-Provincial Corporations.

The Extra-Provincial Corporations Act (c. E.27) provides for three classes of extra-provincial corporations: Class 1—corporations incorporated or continued by or under authority of Act of legislature of province of Canada; Class 2—corporations incorporated or continued by or under authority of Act of Parliament of Canada or of legislature of territory of Canada; and Class 3—corporations incorporated or continued under laws of jurisdiction outside of Canada (c. E.27, §2). Extra-provincial corporation within class 1 or 2 may carry on any of its business in Ontario without obtaining licence under Act. (c. E.27, §4[1]). No extra-provincial corporation within class 3 shall carry on any of its business in Ontario without licence under Act (licence fee—$330; c. E.27,

§24.1[2]) and no person acting as representative for or agent for any class 3 extra-provincial corporation shall carry on any of its business in Ontario unless corporation has licence under Act. (c. E.27, §4[2]). Extra-provincial corporation does not carry on its business in Ontario by reason only that it takes orders for or buys or sells goods, or offers or sells services, by use of travellers or through advertising or correspondence. (c. E.27, §1[3]). Extra-provincial corporation may make application for licence to Director appointed by Minister of Government Services. (c. E.27, §5[1]). Director may make licence subject to restrictions on business of corporation and to such other limitations or conditions as are specified in licence. (c. E.27, §5[5]). Every person who, without reasonable cause contravenes Act or regulations or condition of licence is liable to fine of not more than $2,000 or if such person is corporation to fine of not more than $25,000. (c. E.27, §20).

Reporting requirements and taxation of corporate income are substantially same as for domestic companies. See subheads Reports, supra; and Taxation—(a) Provincial Income Tax, infra.

Appointment of attorney for purpose of service of process on corporation is required for every extra-provincial corporation within Class 3 that carries on its business in Ontario. (c. E.27, §19).

Taxation—(a) Provincial Tax.

The Corporations Tax Act (c. C.40) levies provincial income, capital and other special taxes on corporations. Corporations are also subject to federal income tax under federal Income Tax Act. See Canada Law Digest, category 23 Taxation, topic 23.07 Income Tax.

Provincial Income Tax.

Tax imposed on all corporations wherever incorporated that (a) have permanent establishment in Ontario, (b) receive royalty for or have income from sale or rental of real property, timber resource property or timber limit in Ontario, or (c) disposed of taxable Canadian property, as defined in Income Tax Act (Canada), situated in Ontario. For 2009, basic tax rate for corporation is 14%, calculated on its taxable income earned or deemed to be earned in Ontario. Effective corporate tax rate for corporation's eligible Canadian profits from manufacturing and processing, mining, farming, logging or fishing carried on in Canada is 12%. Small business rate on first $500,000 per year of active business income of Canadian-controlled private corporations (CCPC) effectively reduced rate to 5.5%, but is "clawed back" by 4.25% surtax on taxable income of CCPC from $500,000 to $1,500,000.

"Permanent establishment" includes branches, mines, oil wells, farms, timberlands, factories, workshops, warehouses, offices, agencies and other fixed places of business. Where corporation carries on business through employee or agent who has general authority to contract for corporation, or has stock of merchandise owned by corporation from which employee or agent regularly fills orders which employee or agent receives, such employee or agent is deemed to operate permanent establishment of corporation. Where corporation, otherwise having permanent establishment in Canada owns land in province or territory of Canada, such land is permanent establishment. Nonresident corporation which produced, grew, mined, created, manufactured, fabricated, improved, packed, preserved or constructed, in whole or in part, anything in Canada whether or not corporation exported that thing without selling it prior to exportation is deemed to have maintained permanent establishment where it did any of those things. Use of substantial machinery or equipment in particular place constitutes permanent establishment. Corporation with no fixed place of business has permanent establishment in principal place where its business is conducted. Insurance corporation is deemed to have permanent establishment in each jurisdiction in which it is registered or licensed to do business. Where corporation does not otherwise have permanent establishment in Canada it has permanent establishment in place designated in its charter or by-laws as being its head office or registered office. If liability of corporation is determined under federal Income Tax Act with reference to tax treaty, convention

or agreement with another country, corporation does not have permanent establishment in Ontario if it does not have permanent establishment for purposes of that tax treaty or convention. (c. C.40, §4).

Taxable income of corporation for fiscal year is its income for that year earned (or deemed to be earned) in Ontario, minus permitted deductions. Generally, provisions of federal Income Tax Act relating to determination of taxable income of corporations are incorporated by reference, subject to application of specific rules in Corporations Tax Act. See Canada Law Digest, category 23 Taxation, topic 23.07 Income Tax.

Capital tax imposed on corporations incorporated in Canada and having permanent establishment in Ontario and, in certain circumstances, on corporations incorporated outside Canada. Generally, corporation pays capital tax in amount equal to 0.225% of amount, if any, by which corporation’s taxable paid-up capital (including taxable paid-up capital of “affiliated” corporations that have permanent establishment in Canada) exceeds $15,000,000.

Corporation’s paid-up capital includes: paid-up capital of capital stock of corporation; earned capital and other surpluses; certain types of reserves as well as all liabilities other than corporation’s current accounts payable. Corporation’s taxable paid-up capital is essentially corporation’s paid-up capital less specified deductions such as certain investments in other corporations. Special rules apply to financial institutions.

Exemption from income tax is granted to certain types of corporations, primarily governmental and nonprofit organizations (including charities), labour organizations, pension corporations, certain insurers and housing corporations, and certain manufacturing and resource companies.

Returns.

Corporation must deliver a return to Minister of Finance within six months of end of its taxation year.

Payments.

Tax must be paid in monthly installments. If estimated tax payable less than $2,000, may be paid in full by end of second month of next taxation year. There are provisions for interest and penalties in respect of late payment of taxes, payment of installments and filing of returns.

Liens.

Taxes, interest and penalties constitute lien and charge against real property or any interest therein, or against personal property, of corporation upon registration in proper registry office of notice claiming such lien.

Objections and Appeals.

A corporation may object to Minister of Finance within 180 days from day of mailing of notice of assessment, with a right to appeal to Superior Court of Justice. Notice of appeal must be served within 90 days from day of mailing of confirmation of assessment or reassessment. Minister may extend time for objection upon application made within one year after mailing date and may extend time for appeal upon application made within 90 days after confirmation of assessment or reassessment.

Offences.

For failing to file return; for false statements, for destroying records and for evading compliance.

Corporate Minimum Tax.

Corporations with gross revenues in excess of $10 million or total assets in excess of $5 million (associated corporations being grouped for this purpose) are required to pay corporate minimum tax (CMT) to extent it exceeds corporate income tax otherwise payable. Starting point for calculation of base on which this tax is imposed is net income after extraordinary items but before tax, as shown on financial statements. This is reduced by various amounts including: inter-corporate dividends (to extent deductible under federal Income Tax Act); gains on tax-deferred rollovers; and losses carried forward from up to ten prior years. If corporation operates outside Ontario, portion of resulting “CMT base” will be allocated to Ontario by formula. CMT rate of 4% will be applied to Ontario CMT base to determine gross CMT. Credits will then be allowed for regular corporate income tax for year and certain foreign tax credits, to arrive at net CMT. Net CMT payable may be carried forward up to ten years and applied as credit against regular corporate income tax. Investment corporations, mortgage investment corporations, mutual fund corporations, nonresident owned investment corporations, communal organizations, deposit insurance corporations and income tax exempt corporations are exempt from minimum tax.

Employer Health Tax.

Employer Health Tax Act (c. E.11) requires all employers with permanent establishment in Ontario who have employees who report for work at permanent establishment of employer in Ontario or have employees who do not report for work at permanent establishment of employer but are paid from Ontario permanent establishment to remit applicable percentage of annual gross employee wages, salary and other remuneration (.98% of total up to and includes $200,000; graduated rates where total exceeds $200,000 but less than $400,000; 1.95% of total over $400,000). Private sector employers are exempt up to first $400,000 of remuneration, subject to rules for associated employers. Remittances required monthly if total annual payroll in Ontario exceeds $600,000, and by Mar. 15 if $600,000 or less.

Taxation—(b) Federal Income Tax.

See Canada Law Digest, category 23 Taxation, topic 23.07 Income Tax.

Taxation—(c) Corporate Property.

See category 22 Taxation, topic Property Taxes; see also category 21 Property, topic 21.05 Deeds, subhead Taxes.

Taxation—(d) Corporate Stock.

None.

Taxation—(e) Franchise Tax.

No annual tax on right to do business in Ontario.

Professional corporations may not be incorporated if profession is regulated by a separate Act unless that Act permits incorporation. In 2001, right to incorporate was extended to all regulated professionals.

See also category 3 Business Regulation and Commerce, topic 3.25 Securities.

2.04 FOREIGN CORPORATIONS:

See topic 2.03 Corporations; categories 16 Insurance, topic Insurance Companies; Mineral, Water and Fishing Rights, topic Mines and Minerals.

2.05 JOINT STOCK COMPANIES:

There are no joint stock companies distinct from partnerships and incorporated companies, though provision is made for limited partnerships. (c. L.16). See topic 2.07 Partnerships.

2.06 LIMITED PARTNERSHIP:

See topic 2.07 Partnerships.

2.07 PARTNERSHIPS:

The law relating to partnership is in part codified in Partnerships Act (c. P.5) which is similar to English Act. Limited partnerships are dealt with in Limited Partnerships Act, (c. L.16) and registration of partnerships is dealt with in separate statute (Business Names Act, c. B.17).

Name.

Persons associated in partnership must not carry on business before registering. (c. B.17, §2). Form is provided for such registration and required information includes names and addresses of partners, name of partnership, date of birth of partners under 18 years of age, etc. If partner is corporation, name, Ontario corporation number, if any, and address for service must be set out. (O. Reg. 121/91, §2).

Penalties provided for failure to file registration or amended registration or for making false statement in such registration. Failure to register precludes partnership from maintaining proceeding in Province without first seeking leave of court. Contravention, without reasonable cause also carries fines. (c. B.17, §§7, 10).

Change in Partnership.

Amended registration must be filed within 15 days after change in initial registration. (c. B.17, §4).

Cancellation of registration also effected by filing Form. (c. B.17, §4).

Fee.

Filing fee for registration of name is $60 in electronic format and $80 in person or mailed. (O. Reg. 121/91).

Renewal.

Registrations expire five years after filing; new declarations must then be filed. (c. B.17, §4).

Limited partnerships, in which liability of one or more partners is limited to amount of capital contributed, may be formed. (Limited Partnerships Act, c. L.16). Such partnership is formed when declaration is filed with Registrar appointed under Business Names Act and need only be signed by general partner. Declarations expire five years after date of filing unless declarations are cancelled by filing declaration of dissolution or replaced by filing new declaration before that date. General partner must maintain current record of limited partners at principal place of business. Restrictions are placed on withdrawal of capital by and interest paid to limited partners and also on limited partner's ability to be involved in business of partnership. Special provisions apply to extra-provincial limited partnerships.

3 BUSINESS REGULATION AND COMMERCE

3.01 BANKS AND BANKING:

Subject to exclusive federal jurisdiction under Constitution Act, 1867. (§91, head 15). See Canada Law Digest.

Deposit Insurance.

Deposit Insurance Corporation of Ontario incorporated by act of Ontario Legislature (Credit Unions and Caisses Popularies Act, 1994, S.O. 1994, c. 11) for purpose of providing insurance on deposits by public with credit union. Every credit union incorporated in Ontario is member. (§249). All deposits up to $100,000 per person per credit union are insured except those not payable in Canada or in Canadian currency. (§270 and O. Reg. 78/95, §4). Annual premiums are payable by credit union and are calculated at rate determined by reference to credit union's risk rating. (O. Reg. 78/95, §9).

3.02 BILLS AND NOTES:

See Canada Law Digest.

3.03 BILLS OF LADING:

See topic 3.08 Carriers.

3.04 BILLS OF SALE:

See topic 3.24 Sales.

3.05 BLUE SKY LAW:

See topic 3.25 Securities.

3.06 BROKERS:

Statutes and amendments thereto regulate activities and licensing of real estate and business brokers (Real Estate and Business Brokers Act, 2002, S.O. 2002, c.30, Sch. C), insurance brokers (c. R.19) (see category 16 Insurance, topic 16.01 Insurance Companies, subhead Brokers), loan brokers (Payday Loans Act, 2008, S.O. 2008, c. 9), stock brokers (c. S.5) (see topic 3.25 Securities), mortgage brokers (Mortgage Brokerages, Lenders and Administrators Act, 2006, S.O. 2006, c. 29) and motor vehicle dealers (c. M.42) (Motor Vehicle Dealers Act, 2002, S.O. 2002, c. 30, Sch. B, will come into force Jan. 1, 2010) (see category 23 Transportation, topic 23.03 Motor Vehicles).

Real Estate Brokers.

Licensing of real estate and business brokers is governed by special statute. (S.O. 2002, c. 30, Sch. C). Amount and form of bonds to be furnished by brokers and salesmen and amount of fees payable upon registration or renewal of registration are governed by regulations issued by Lieutenant-Governor in Council. (S.O. 2002, c. 30, Sch. C, §51). Registrar has power to order investigations of applicants and registrants. (§19). Registrar of real estate and business brokers must give registrant opportunity to hearing before License Appeal Tribunal may suspend or revoke his or her registration. (§14). Appeal from decision of Tribunal lies to Divisional Court. (S.O. 1999, c. 12, Sch. G, §11). No commission may be charged unless certain requirements are met. No commission shall be charged or collected unless agreement is in writing and signed by party to be charged, or broker has obtained offer in writing that is accepted. Broker may also charge commission if, having been authorized in writing to list property, (i) shows property to purchaser; or (ii) introduces purchaser to vendor for purpose of discussing proposed sale, purchase, exchange or leasing (O. Reg. 567/05, §23), and person bringing action was at time of rendering services registered or exempt from registration (§9). Commission must be either agreed amount or percentage of sale price or rental. (§36). Every listing agreement must contain provision that it is to expire on specified date (O. Reg. 580/05, §11) and copy of agreement must be delivered to person signing it immediately after execution (O. Reg. 580/05, §12).

3.07 BULK SALES:

The Bulk Sales Act (c. B-14) is intended to protect creditors by preventing person, company, or partnership from disposing of assets in bulk, without paying creditors. Unless purchaser of assets takes steps to ensure that vendor complies with Act, risk is that purchase may be voided and purchaser will be required to account to creditors of seller. Act applies to every sale of stock in bulk (which includes goods, wares, chattels, merchandise or fixtures) outside of ordinary course of vendor's business. (§1). Some sales in bulk are exempt, including sales by executor, administrator of estate, secured creditor and trustee in bankruptcy. (§2). Court may order sale exempt if sale is of benefit to seller and does not impair seller's ability to pay creditors. (§3[1]).

See category 8 Debtor and Creditor, topic 8.09 Fraudulent Sales and Conveyances.

3.08 CARRIERS:

All railways are common carriers. Railways operating beyond the boundaries of the province are subject to the jurisdiction of Canadian Transportation Agency. (S.C. 1996, c. 10 and R.S.C., c. 32 [4th Supp.]). See Canada Law Digest.

Bills of Lading.

Consignee named in bill of lading and every endorsee thereof to whom the property passes is vested with all rights of action and is subject to all liabilities in respect to the goods as if the contract named in the bill of lading had been made with himself. (c. M.10, §7, R.S.C., c. B-5). This does not affect vendor's right of stoppage in transit or right to claim freight against original shipper or owner. Although transferable by endorsement, bills of lading are not negotiable. No endorsee can take better title than had his endorser. (c. M.10, §8; R.S.C., c. B-5).

Lien.

Carriers have common law possessory lien on goods for freight, storage, demurrage and terminal charges and expenses necessary for preservation of goods carried, and statutory right to sell on nonpayment of such charges.

Motor Vehicle Carriers.

See category 23 Transportation, topic 23.03 Motor Vehicles.

3.09 COLLECTION AGENCIES:

See category 21 Property, topic 21.12 Powers of Attorney.

3.10 COMMERCIAL CODE:

See category 20 Mortgages, topic 20.05 Personal Property Security.

3.11 CONDITIONAL SALES:

See category 20 Mortgages, topic 20.05 Personal Property Security.

3.12 CONSIGNMENTS:

See topic 3.15 Factors.

3.13 CONSUMER PROTECTION:

Consumer Protection Act, 2002 (S.O. 2002, c. C-30, Sched. A) is intended to protect consumers under certain types of contracts for sale of goods or services. Consumer Protection Act, 2002 replaced Consumer Protection Act, c. C-31, on July 30, 2005. Following summary reflects Consumer Protection Act, 2002, as amended.

Consumer means individual acting for personal, family or household purposes and does not include person who is acting for business purposes. (§1).

Consumer Transaction means act or instance of conducting business or other dealings with consumer, including consumer agreement. Consumer agreement means agreement between supplier and consumer in which supplier agrees to supply goods or services for payment. (§1).

Application.

Act applies to all consumer transactions if consumer, or person engaging in transaction with consumer, is located in Ontario when transaction takes place, except: consumer transactions regulated under Securities Act (c. S.5); financial services related to investment products or income securities; financial products or services regulated under Insurance Act (c. I.8), Credit Unions and Caisses Popularies Act, 1994 (S.O. 1994, c. 11), Mortgage Brokerages, Lenders and Adminstrators Act, 2006 (S.O. 2006, c. 29) or Loan and Trust Corporations Act (c. L.25); consumer transactions regulated under Commodity Futures Act (c. C.20); prescribed professional services regulated under Ontario statute; consumer transactions respecting real property other than time share agreements; and consumer transactions regulated under Residential Tenancies Act, 2006 (S.O. 2006, c. 17). (§§2.1 and 2.2).

No Waiver.

Substantive and procedural rights under Act apply despite agreement or waiver to contrary. (§7[1]).

Class Proceedings.

Consumer may commence proceeding under Class Proceedings Act, 1992, S.O. 1992, c. 6, in respect of dispute arising from consumer agreement, or may become member of class in such proceeding, despite provision of consumer or related agreement purporting to prevent such commencement/involvement. (§8[1]).

Deemed Warranties.

Supplier deemed to warrant reasonably acceptable quality of services. (§9[1]). Implied conditions and warranties applicable to sale of goods under Sale of Goods Act, c. S.1, deemed to apply to goods leased, traded or supplied under consumer agreement. (§9[2]). Provisions of consumer agreement purporting to negate or vary implied or deemed conditions or warranties are void. (§9[3]).

Estimates.

If consumer agreement includes estimate, supplier shall not charge amount exceeding estimate by more than 10%. (§10[1]).

Interpretation of Ambiguities.

Ambiguity in consumer agreement provided to consumer, or of information disclosed under Act, shall be interpreted for benefit of consumer. (§11).

Unsolicited Goods.

No supplier shall demand payment for unsolicited goods or services, despite use, receipt, misuse, loss, damage or theft. (§13[2]). If material change made to goods or services received on ongoing basis, they are deemed to be unsolicited from time of change unless supplier establishes consumer consent. (§13[4]).

Internet Gaming.

No person shall advertise Internet gaming site that is operated contrary to Criminal Code (Canada). (§13.1). No person, other than Internet service provider, shall arrange for or otherwise facilitate advertising prohibited under subsection (1) on behalf of another person. (§13.1[2]). "Advertise" includes providing by print, publication, broadcast, telecommunication, website, or entering into sponsorship relationship for purpose of promoting use of Internet gaming. (§13.1[4]).

Unfair Practices.

False, misleading or deceptive representation, unconscionable representation, or use of custody or control of consumer's goods to pressure consumer into renegotiating terms of consumer transaction is unfair practice. (§§14[1], 15[1], 16). Consumer may rescind agreement entered into after or during unfair practice. (§18).

Specific Consumer Agreements.

Every time-share agreement and every consumer agreement for loan brokering or credit repair, and prescribed future performance agreements, personal development services agreements and direct agreements shall be in writing, delivered to consumer and made in accordance with prescribed requirements. (§§27, 49, 22, 30, 42). Prescribed requirements including specific statements regarding consumer's cancellation rights are set out in O. Reg. 17/05.

Internet Agreements.

Before consumer enters into Internet agreement, supplier shall disclose prescribed information (§38[1]) and provide consumer with direct opportunity to accept, decline, or correct errors in agreement. (§38[2]). Written copy of agreement must be delivered to consumer within specified time period. Consumer may cancel agreement for seven days after receipt of written agreement if supplier did not comply with disclosure documents. (§40).

Sectors Where Advance Fee Prohibited.

Loan brokers and credit repairers shall not require or accept payment or security for payment directly or indirectly from or on behalf of consumer unless and until consumer receives credit or loan of money, or material improvement to consumer report, credit information, file, personal information, credit record, credit history or credit rating. (§§50[1][a], [b]).

Motor Vehicle Repairs.

No repairer shall charge consumer for work or repairs unless estimate meeting prescribed requirements has been given to consumer first (§56[1]), except if consumer declines offer of estimate and specifically authorizes maximum amount, and cost charged does not exceed authorized maximum amount (§56[2]). No repairer shall charge for unauthorized work or repairs. (§58[1]). Repairer shall not charge amount for work or repairs exceeding estimate by more than 10%. (§58[2]). Every repairer of vehicle shall be deemed to warrant all new or reconditioned parts installed and labour required for installation for minimum of 90 days or 5,000 kilometers, whichever comes first. (§63[1]).

Credit Agreements.

Does not apply to payday loan agreement as defined in Payday Loans Act, 2008. (S.O. 2008, c. 9). Lender shall deliver initial disclosure statement for credit agreement to borrower at or before entry into agreement disclosing prescribed information. (§79[1]). Consumer who has charged to credit card account all or any part of payment in respect of cancelled consumer agreement of agreement may request credit card issuer to cancel or reverse charge and any associated interest or other charges. (§§99[1], [2]). Request must be in writing and given within prescribed period. (§99[4]). Credit card issuer shall acknowledge consumer's request and cancel or reverse charges, or conduct investigation and send written notice to consumer explaining why consumer not entitled to cancellation or refund. (§99[5]).

Leases.

Lessor shall deliver disclosure agreement with prescribed information before lessee enters into lease or makes any payment in connection with lease. (§89).

Penalties.

Person convicted of offence under Act is liable to fine of not more than $50,000 or imprisonment for term of not more than two years less a day, or both. Corporation convicted of offence under Act is liable to fine of not more than $250,000. (§116[5]). Court may, in addition to any other penalty, order person convicted to pay compensation or make restitution. (§117).

Other statutes may contain additional consumer protection provisions. See also: Cemeteries Act (Revised) (c. C.4); (Cemeteries Act is subject to repeal on day to be named by Proclamation, S.O. 2002, c. 33, §§114, 154); Credit Unions and Caisses Populaires Act, 1994 (S.O. 1994, c. 11); Electricity Act, 1998 (S.O. 1998, c. 15); Freedom of Information and Protection of Privacy Act (c. F.31); Payday Loans Act, 2008 (S.O. 2008, c. 9); and Real Estate and Business Brokers Act, 2002 (S.O. 2002, c. 30, Sched. C).

Consumer Reporting.

The Consumer Reporting Act (c. C.33) imposes obligations upon consumer reporting agencies and other persons in connection with applications received from consumer. Consumer is defined as natural person but does not include person engaging in transaction, other than relating to employment, in course of carrying on business, trade or profession. Obligations imposed are with respect to applications received from consumer for: (1) extension of credit to or purchase or collection of debt of consumer; (2) entering into or renewal of tenancy agreement; (3) for employment purposes; (4) underwriting of insurance involving consumer; (5) direct business need in connection with business or credit transaction involving consumer, or (6) updating information in consumer report previously given for one of reasons mentioned above. (§8[1]).

Act prohibits any person from knowingly furnishing any information respecting consumer from files of consumer reporting agency except for one of foregoing purposes or in response to court order, order under Act or in accordance with written instructions of consumer to whom information relates. (§8[2]).

All persons (1) when requested by a consumer in writing or personally to do so must inform him whether or not a report respecting him has been or is to be referred to in connection with any specified transaction or matter in which such person is engaged, and, if so, of name and address of consumer reporting agency supplying report; (2) must notify consumer in writing of intention to obtain from consumer reporting agency consumer report (i) containing personal information (which is defined as information other than credit information about consumer's character, reputation, health, physical or personal characteristics or mode of living or about any other matter concerning consumer) or (ii) in considering extending credit to consumer who has not applied for such credit at time such report is requested; such notice must be given before report is requested, and if requested by consumer to do so, person must supply him name and address of consumer reporting agency supplying report; (3) proposing to extend credit to consumer, must notify consumer of intention to obtain from consumer reporting agency report containing only credit information which is defined as information about consumer as to name, age, occupation, place of residence, previous places of residence, marital status, spouse's name and age, number of dependants, particulars of education or professional qualifications, places of employment, previous places of employment, estimated income, paying habits, outstanding debt obligations, cost of living obligations and assets; such notice must be given to consumer at time of application for credit in writing or orally if application is oral; (4) extending credit to consumer persons are prohibited from divulging to other credit grantors or to consumer reporting agencies any personal information except with consent of consumer or on his referral unless person notifies consumer in writing at time of application for credit of intention to do so; (5) denying a benefit to consumer or increasing a charge to consumer either wholly or partly because of information received from consumer reporting agency or anyone else must notify consumer of fact, and consumer is entitled to request person within 60 days thereafter to inform him of nature and source of information or if information is furnished by consumer reporting agency of name and address of such agency. (§10).

No person shall supply list of names and criteria to consumer reporting agency to determine which names meet those criteria, or in any other way obtain information about consumer from consumer reporting agency (except in compliance with [(3)] in paragraph above), without first informing each person named on list that information is being requested. Consumer reporting agencies have reciprocal restrictions. (§11).

At request of consumer, consumer reporting agency shall give to consumer copy of following information: (a) nature and substance of all information in its files pertaining to consumer; (b) sources of credit information; (c) names and addresses of every person on whose behalf file has been assessed; (d) names of recipients of any consumer report relating to consumer furnished within (i) one year if report contained personal information, and (ii) six months if report contained credit information; and (e) copies of any such written reports. Copy of information given to consumer must be in writing and easily readable and information must be in understandable language. (§12).

Consumer Identity.

Consumer may require consumer reporting agency to include, in consumer's file, alert warning persons to verify identity of any person purporting to be consumer. (§12.1[1]). Consumer who requires consumer reporting agency to include alert in consumer's file shall provide, for inclusion in alert, telephone number or other method, prescribed by regulations, of contacting consumer to verify identity of any person purporting to be consumer. (§12.1[2]). Consumer reporting agency shall include alert in consumer's file as soon as practicable after being required to do so under subsection (1). (§12.1[3]). Consumer reporting agency may require fee to be paid before including alert in consumer's file, or amending or removing alert. (§12.1[10]).

Unfair Practices.

Business Practices Act, (c. B.18), was repealed on July 30, 2005.

Plain Language.

No "plain language" statute enacted.

Search Warrant.

Justice of peace may issue warrant, if he or she is satisfied on information under oath that there is reasonable ground for believing that: (a) Person has contravened or is contravening this Act or regulations or has committed offence under law of any jurisdiction that is relevant to person's fitness for registration under this Act; and (b) there is, (i) in any building, dwelling, receptacle or place anything relating to contravention of this Act or regulations or to person's fitness for registration, or (ii) information or evidence relating to contravention of this Act or regulations or person's fitness for registration that may be obtained through use of investigative technique or procedure or doing of anything described in warrant. (§18[1]).

3.14 CONTRACTS:

Distributorships, Dealerships and Franchises.

Ontario has no legislation or special rules governing formation and termination of these types of business arrangements other than Arthur Wishart Act (Franchise Disclosure), 2000, S.O. 2000, c. 3. See topic 3.16 Franchises. Common law of contract will be applied, for example, to require reasonable notice of termination where not expressly limited by contract.

Frustrated Contracts.

Under Frustrated Contracts Act (c. F.34), where contract frustrated and parties discharged, sums previously paid are recoverable and sums payable cease to be payable. Court given powers: (1) to allow expenses up to sums paid or payable; (2) to allow for valuable benefit conferred by one party on other or obligation assumed by one for benefit of other; (3) sever contract treating part as not frustrated and part frustrated. Act applies to all contracts governed by Ontario law except charterparty (except time charterparty or charterparty by demise), contracts for carriage of goods by sea, insurance contracts, sales of specific goods which have perished either before contract or without seller's fault before risk passes to buyer.

See topics 3.17 Frauds, Statute of, Sales; categories 10 Documents and Records, topic Seals; Family, topic Infants.

3.15 FACTORS:

Factors are governed by the Factors Act. (c. F.1). Sale or pledge in ordinary course of business by mercantile agent who is in possession of goods with owner's consent; is valid if made to person acting in good faith who has no notice that agent is without authority to make such sale or pledge.

The consignee acquires no property in the goods consigned but the title remains in the consignor till the goods are sold to a purchaser. The consignee has a lien on the goods for his charges only, and failure to account for goods in excess of the amount of same renders him criminally liable. He may sue in his own name for the purchase price.

3.16 FRANCHISES:

Currently, Ontario has no equivalent to American Uniform Franchise and Business Opportunities Act. In Ontario, law of franchises is mainly matter of contract between parties. See topic 3.14 Contracts.

However, Arthur Wishart Act (Franchise Disclosure), 2000, S.O. 2000, c. 3, provides for certain rights and obligations of franchisees and franchisors.

Fair Dealing.

Every franchise agreement imposes on each party duty of fair dealing in its performance and enforcement. (§3).

Association.

Franchisee may associate with other franchisees and may form or join organization of franchisees. (§4[1]).

Disclosure.

Franchisor shall provide prospective franchisee with disclosure document and prospective franchisee shall receive disclosure document not less than 14 days before earlier of: (i) signing by prospective franchisee of franchise agreement or any other agreement relating to franchise; and (ii) payment of any consideration by or on behalf of prospective franchisee to franchisor or franchisor's associate relating to franchise. (§5[1]). Contents of disclosure document are prescribed by §5(2) and by Regulations. Exceptions to disclosure requirements are provided in §5(7) and in Regulations.

Rescission.

Franchisee may rescind franchise agreement without penalty or obligation, no later than 60 days after receiving disclosure document, if franchisor failed to provide disclosure document or statement of material change within time required by §5 or if contents of disclosure document did not meet requirements of §5. (§6[1]). Franchisee may rescind franchise agreement, without penalty or obligation, no later than two years after entering into franchise agreement if franchisor never provided disclosure document. (§6[2]).

Damages.

If franchisee suffers loss because of misrepresentation contained in disclosure document or in statement of material change or as result of franchisor's failure to comply in any way with §5, franchisee has right of action for damages against: (i) franchisor; (ii) franchisor's agent; (iii) franchisor's broker; (iv) franchisor's associate; and (v) every person who signed disclosure document or statement of material change. (§7[1]).

3.17 FRAUDS, STATUTE OF:

Contracts.

Unless the agreement or some memorandum or note thereof is in writing, signed by the party to be charged, or one lawfully authorized by such party, no action shall be brought to charge any person upon: (a) promise of executor or administrator to answer for damages out of his or her own estate; (b) promise to answer for debt, default or miscarriage of another; or (c) any contract for sale of lands or interest therein. (Statute of Frauds, c. S.19, §4).

Any contracts for sale of lands or interest therein, not in form required by c. S.19 are unenforceable. Equitable doctrine of part performance may be set up against defence under c. S.19. No action shall be maintained to charge person based on promise to pay debt contracted during infancy or ratification thereof unless promise or ratification is in writing and signed by party to be charged. (§7). No action shall be brought to charge person relating to representation concerning character, conduct, credit, etc., of another made with intent that such other person may thereby obtain credit, money or goods unless representation is in writing and signed by party to be charged therewith. (§8).

Sale of Goods.

It is no longer legal requirement that contract for sale of goods be in writing.

Real Property.

All estates, interests of freehold, term of years and all uncertain interests in real property must be granted, assigned or surrendered by deed or note in writing signed by grantor, assignor or person surrendering, or authorized agent. Leases (except where term does not exceed three years and rent amounts to at least two-thirds of improved value), and certain other interests (c. C.34, §9) are void if not by deed (c. S.19, §§1-3). Declarations or creations of trusts of lands, or assignment or surrender thereof, except trusts created, transferred or extinguished by operation of law must be in writing. (§§9-11). Electronic document that creates, transfers or disposes of estate or interest in land is not required to be in writing and signed by parties. (§21).

3.18 INFORMATION TECHNOLOGY, INTERNET AND NEW MEDIA:

For copyright, patent and trademark matters, see Canada Law Digest. For personal information protection, see Canada Law Digest. For Internet agreements, see topic 3.13 Consumer Protection.

Electronic Commerce Act, 2000, (S.O. 2000, c. 17) based on Uniform Law Conference of Canada's Uniform Electronic Commerce Act. Gives electronic documents same legal effect as written documents if certain "functional equivalency" conditions met (§§5-13). Addresses use of electronic signatures (§§1, 11, 17), electronic communications and public bodies (§§14-18), and formation of contracts electronically (§§19-22). Also contains rules pertaining to carriage of goods (§23).

Evidence Act (c. E.23) amended in 1999 to introduce provisions relating to electronic evidence. Amendments allow courts to consider "electronic records" (§34.1), but do not explicitly address electronic signatures.

3.19 INTEREST:

See Canada Law Digest, category 3 Business Regulation and Commerce, topic 3.06 Interest.

Where court finds cost of money lent excessive in all the circumstances, and transaction harsh and unconscionable, it may reopen transaction and take account between creditor, debtor; or reopen any account taken and relieve debtor from payment of any sum exceeding fair one; or order repayment of such excess; or set aside in whole or part or revise or alter security given or loan agreement or where creditor has parted with security, order indemnity of debtor. Cost of loan means whole cost and includes interest, bonus, commission, etc. except express necessary disbursements. Powers exercisable in action by creditor or debtor, or on application by debtor to Superior Court of Justice. (c. U.2).

3.20 LICENSES, BUSINESS AND PROFESSIONAL:

Professions.

Licensing of most professions is carried out by self-regulating bodies under authority of provincial legislation: accountants (S.O. 2004, c. 8); architects (c. A.26); dentists (S.O. 1991, c. 24); doctors (S.O. 1991, c. 30); lawyers (c. L.8); nurses (S.O. 1991, c. 32); optometrists (S.O. 1991, c. 35); pharmacists (S.O. 1991, c. 36); professional engineers (c. P.28); psychologists (S.O. 1991, c. 38).

Businesses and Trades.

Licensing of most trades is codified under Trades Qualification and Apprenticeship Act (c. T.17) and Apprenticeship and Certification Act, 1998 (S.O. 1998, c. 22). Licensing of most businesses and trades, where applicable, is carried out directly by provincial or municipal public officials.

Provincial: Bailiffs (c. B.2); carpenters (c. T.17); collection agencies (c. C.14); electricians (c. T.17); dealers in livestock and livestock products (c. L.20); insurance brokers (c. R.19); insurance companies (c. I.8) (also under federal jurisdiction); loan and trust companies (c. L.25); mortgage brokers (S.O. 2006, c. 29); motor vehicle dealers (c. M.42); pawnbrokers (c. P.6); plumbers (c. T.17); private investigators and security guards (S.O. 2005, c. 34); sale of liquor (c. L.19). See also topic 3.06 Brokers.

Municipal: Licensing requirements vary by municipality and may include many common commercial activities including: amusement places; billiard parlours; bowling alleys; carnivals; cigarettes; circuses; gas stations and garages; hairdressing shops; massage parlours; movie theatres; parking lots; public baths; public halls; restaurants; retail stores.

Federal Undertakings.

Licensing of certain commercial activities is carried out by federal public officials including aeronautics; banking; insurance (also under provincial jurisdiction); railways; shipping; telecommunications. See Canada Law Digest, category 3 Business Regulation and Commerce, topic 3.07 Licenses, Business and Professional.

Collection Agencies.

Must be registered. Payment of fee and posting of bond prescribed in regulations required on registration. Statutory provisions and regulations govern information to be filed on application for registration, books and records to be kept, banking, collection methods, returns to be made, etc. (c. C.14; Reg. 74).

Real Estate Agents.

See Real Estate and Business Brokers Act, 2002, S.O. 2002, c. 30, Sched. C.

Insurance Agents.

See category 16 Insurance, topic 16.01 Insurance Companies, subhead Agents.

Securities Agents.

See topic 3.25 Securities, subhead Registration of Dealers, Advisers, etc.

3.21 MONOPOLIES, RESTRAINT OF TRADE AND COMPETITION:

See Canada Law Digest.

3.22 NEGOTIABLE INSTRUMENTS:

See Canada Law Digest, category 3 Business Regulation and Commerce, topic 3.02 Bills and Notes.

3.23 RESTRAINT OF TRADE:

See Canada Law Digest, category 3 Business Regulation and Commerce, topic 3.08 Monopolies, Restraint of Trade and Competition.

3.24 SALES:

Law relating to sale of goods is codified in Sale of Goods Act (c. S.1) which follows English Act.

Conditions and Warranties.

Following conditions are implied: that seller has right to sell the goods, that goods sold by description will correspond with description or if sold by sample will correspond with sample, and in certain circumstances that they will be reasonably fit for purpose for which they are to be used and of merchantable quality. There is an implied warranty that buyer will have and enjoy quiet possession and that goods will be free of any undeclared charge or encumbrance in favour of a third party. (c. S.1, §§13-16). Implied conditions and warranties can be excluded by contract except in consumer sales. See topic 3.13 Consumer Protection.

Delivery.

Prima facie delivery is the seller's responsibility, the place of delivery is his place of business and he must bear the expense of putting the goods in a deliverable state. (c. S.1, §§26-28).

Transfer of title of specific or ascertained goods takes place when the parties intend it to. (c. S.1, §18). When no intention is expressed, statutory rules apply for ascertaining intention of parties. Generally speaking, property passes when contract of sale is concluded provided that it is not subject to conditions and goods are in deliverable state. Prima facie risk passes to buyer when title passes. (c. S.1, §21).

Stoppage in Transitu.

If the buyer becomes insolvent the unpaid seller has the right of stopping the goods in transitu and after recovering possession may retain them until payment or tender of the price. The right may be exercised by taking actual possession of goods or by giving notice to carrier or bailee who must then redeliver goods according to directions of seller and seller is responsible for expense of such re-delivery. (c. S.1, §§42-44).

Remedies of Seller.

If property has passed the seller may sue for the price. If the buyer refuses to accept the goods the seller may sue for nonacceptance; the measure of damages is the estimated loss directly or naturally resulting in ordinary course of events, which generally will be difference between market and contract price. (c. S.1, §§47-48).

Remedies of Buyer.

The buyer may sue for damages for nondelivery, with the same measure of damages as applies in the case of a seller's action. Specific performance may be ordered if the court thinks fit. (c. S.1, §§49-52).

Bills of Sale.

Bills of Sale Act repealed.

If price of goods is in excess of $50, and buyer is person who purchases goods for consumption (excluding [1] persons who buy in course of carrying on business, e.g., buying for purposes of resale in ordinary course of trade or for use in further production of goods and services, [2] associations of individuals, [3] partnerships, and [4] corporations), agreement must meet additional requirements imposed by Consumer Protection Act, 2002. (S.O. 2002, c. 30, Sched. A). See topic 3.13 Consumer Protection.

Product Liability.

Manufacturer or supplier of defective goods may be liable to consumers for negligence where there is no privity of contract with the consumers. Liability is based on the rule in Donoghue v. Stevenson, [1932] A.C. 562.

United Nations Convention on Contracts for the International Sale of Goods.

Applicable to contracts of sale of goods between parties whose places of business are in different states if (a) those states have adopted Convention, or (b) rules of private international law lead to application of law of state that has adopted Convention, unless parties expressly agree otherwise. (S.C. 1991, c. 13; c. I.10).

Contracts of Sale.

See topic 3.17 Frauds, Statute of.

Conditional Sales.

See category 20 Mortgages, topic 20.05 Personal Property Security.

Consumer Protection.

See topic 3.13 Consumer Protection.

Retail Credit Sales.

See topic 3.13 Consumer Protection.

Bulk Sales.

See category 8 Debtor and Creditor, topic 8.09 Fraudulent Sales and Conveyances.

Sales of Motor Vehicles.

See category 23 Transportation, topic 23.03 Motor Vehicles.

3.25 SECURITIES:

Law relating to issue and trade of securities in Ontario, registration of investment advisers, securities dealers, underwriters, take-over bids made to shareholders in Ontario, insider trading, proxy solicitations, and financial and other disclosure by publicly traded corporations is governed by Securities Act, (c. S.5). Law relating to financial disclosure by federally incorporated issuers is also governed by Canada Business Corporations Act, R.S.C. c. C-44. (See Canada Law Digest, category 2 Business Organizations, topic 2.03 Corporations.) Law relating to proxy solicitation by Ontario public corporation is also governed by Business Corporations Act (c. B.16), as is financial disclosure of Ontario corporation which is not “reporting issuer”. Reporting issuer is Securities Act term meaning issuer that has issued voting securities on or after first day of May, 1967 in respect of which prospectus has been filed and receipt obtained or in respect of which securities exchange take-over bid circular has been filed; that has filed prospectus and receipt issued for it; that has filed securities exchange take-over bid circular before Dec. 14, 1999; whose securities have been at any time since Sept. 15, 1979 listed and posted for trading on any stock exchange in Ontario recognized by Ontario Securities Commission (O.S.C.); is governed by Business Corporations Act and is offering its securities to public within meaning of Business Corporations Act; that is amalgamated, merged or continued company where one of prior companies has been reporting issuer for at least 12 months; that is designated reporting issuer in order made under §1(11).

Enforcement of securities legislation is responsibility of O.S.C. Executive Director is appointed to act as chief administrative officer of O.S.C. All powers and duties of O.S.C. except those of certain administrative proceedings and reviews and investigation of offences may be assigned to Executive Director, or to another Director of O.S.C. (§6). Decisions of Director may be reviewed by O.S.C. at request of affected person (§8) and appeal lies from most O.S.C. decisions to Divisional Court (§9).

Regulatory Powers of O.S.C.

Subject to approval by Minister of Finance, O.S.C. has authority to make rules that have force of regulations. (§143). O.S.C. also may issue policy statements as guidelines that do not have force of laws. (§143.8). See also subheads Distribution of Securities to Public; and Registration of Dealers, Advisers, etc., infra.

Investigation by O.S.C.

O.S.C. may appoint one or more persons to carry on such investigations as it deems expedient for due administration of Ontario securities law or regulation of capital markets in Ontario or to assist in due administration of securities laws or regulation of capital markets in another jurisdiction. (§11). Any person so appointed is given same power to summon and enforce attendance of witnesses, and compel them to give evidence under oath and to produce documents and things as is vested in Superior Court of Justice in trial of civil actions. Person giving evidence at such investigation may be represented by counsel and may claim any privilege to which person or company is entitled. Investigator may apply to judge of Ontario Court of Justice for order authorizing investigator or other person to enter any building or place and search for and seize specified items. (§13).

Distribution of Securities to Public.

Securities Act contemplates closed system. Under this system every distribution of security to general investing public, including resales, requires filing of prospectus, unless specific statutory or rule-based exemption (see catchline Prerequisites to Sales or Offerings, infra) is available. Resale exemptions may be available where securities have been held for certain periods of time, and issuer has been reporting issuer for specified period of time, no unusual efforts have been made to prepare market and no extraordinary commission or consideration is paid. (National Instrument 45-102). Similarly, all trades in securities must be made by entity (e.g. registered dealer) registered under Securities Act to trade in securities, unless specific statutory exemption from registration requirements is available. (§25). Similar exemptions are available on resale of securities. (National Instrument 45-102). See subhead Registration of Dealers, Advisers, etc., infra.

Prerequisites to Sales or Offerings.

No “distribution to the public” of any security is permitted until there has been filed with O.S.C. both “preliminary prospectus” and “prospectus” in respect of offering and receipts therefor have been issued by Director. (§53). “Distribution” of security includes trades in securities of issuer not previously issued; re-issue of such securities that have been redeemed or purchased by or donated to that issuer; trades in previously issued securities by person or company or combination of persons or companies holding sufficient number to affect materially control of issuer, provided that holding in excess of 20% of outstanding voting securities of issuer deemed, in absence of evidence to contrary, to affect materially control of issuer; trade in securities previously acquired pursuant to prospectus exemption (such as resale by underwriter or private placement investor) unless that trade is also exempt, meets certain conditions and hold periods or ruling obtained that such trade would not be prejudicial to public interest; and any trade that is distribution under regulations. (§§1, 72 and 74). Distributions that are exempt from prospectus requirements include following trades (National Instrument 45-106, National Instrument 45-102 and O.S.C. Rule 45-501); trade by issuer in right granted by issuer to purchase security of own issue to security holder of issuer; trade by issuer or trustee, custodian or administrator acting for issuer to security holder of issuer if trade permitted by reinvestment plan of issuer; trade in security if purchaser purchases as principal and is accredited investor; trade in security of private issuer to specified person purchasing as principal; trade in security to person who purchases as principal and who is founder, control person or family; trade by issuer in security of own issue to affiliate of issuer purchasing as principal; trade in security to person purchasing as principal and acquisition cost to purchaser is not less than $150,000 in cash; trade in security in connection with amalgamation, merger, reorganization or arrangement under statutory procedure, dissolution or winding-up of issuer; trade by issuer in security of own issue to person as consideration for assets of person if assets have fair market value not less than $150,000; trade by reporting issuer in security of own issuer to creditor to settle bona fide debt of reporting issuer; trade in security to issuer of security; trade in security in connection with take-over bid or issuer bid; trade by security holder outside local jurisdiction to person in local jurisdiction if trade would have been in connection with take-over-bid or issuer bid; trade in security of investment fund’s own issue to security holder of investment fund if trade permitted by reinvestment plan of investment fund;

trade by investment fund in security of own issue to security holder of investment fund if security holder initially acquired securities of investment fund for not less than $150,000 in cash; trade in security of investment fund if investment fund: (i) Has no more than 50 beneficial security holders, (ii) does not seek to borrow money from public, (iii) does not distribute securities to public, (iv) does not pay or give remuneration for investment management or administration advice in respect of trades, and (v) for purpose of financing operations requires contributions from security holders in proportion to value of securities held; trade by issuer in security of own issue or trade by control person of issuer in security of issuer with employee, executive officer or consultant of issuer, related entity of issuer or permitted assign; trade in security of issuer by current or former employee, executive officer, director or consultant of issuer or related entity of issuer or permitted assign to employee, executive officer, director or consultant of issuer or related entity of issuer or permitted assign; trade in security of issuer acquired by employee, executive officer, director or consultant under plan of issuer if trade is between person who is employee, executive officer, director or consultant of issuer or related entity of issuer and permitted assign; acquisition by issuer of security of own issue acquired by employee, executive officer, director or consultant if purpose of acquisition by issuer is to fulfill withholding tax obligations or provide payment of exercise price of stock option, acquisition made in accordance with terms of plan, aggregate number of securities acquired by issuer within 12 months does not exceed 5% of outstanding securities of class or series at beginning of period; trade by issuer in security of own issue if isolated trade; trade by issuer in security of own issue to security holder of issuer as dividend or distribution; trade in security of issuer to lender, pledge, mortgagee or other encumbrance from holdings of control person of issuer for purpose of giving collateral of bona fide debt of control person; trade in security between person and purchaser acting as underwriter or between or among persons acting as underwriters; trade in debt security of or guaranteed by specified entities; trade in negotiable promissory note or commercial paper maturing not more than one year from date of issue; trade in mortgage on real property in jurisdiction by person registered or licensed under mortgage brokerage legislation in jurisdiction; trade in security evidencing indebtedness secured by or under security agreement provided for under personal property security legislation; trade by issuer that is organized exclusively for educational, benevolent, fraternal, charitable, religious or recreational purposes and not for profit in security of own issue; trade in variable insurance contract by insurance company; trade in security between individual or associate of individual and RRSP or RRIF; trade in evidence of deposit issued by Schedule III bank or association governed by Cooperative Credit Associations Act (Canada); trade by issuer in security of own issue to security holder in accordance with terms and conditions of security previously issued by issuer.

Prospectus Requirements.

Prospectus (including preliminary prospectus) must contain full, true and plain disclosure of all material facts relating to securities issued or proposed to be distributed and must set forth information prescribed by Securities Act, and Regulations thereto. (§56). Where material adverse change occurs after receipt obtained for preliminary prospectus or after receipt obtained for prospectus but prior to completion of distribution amendment must be filed to preliminary prospectus or prospectus within ten days after change occurs. (§57). Chief executive officer, chief financial officer, and on behalf of board of directors, any two directors of issuer, other than foregoing, and any promoter of issuer must certify prospectus constitutes full, true and plain disclosure of all material facts relating to securities offered by prospectus. (§58). Underwriters must certify that to best of their knowledge, information and belief, prospectus constitutes full, true and plain disclosure of all material facts relating to securities offered by prospectus. (§59). Where company has only three directors, two of whom are chief executive officer and chief financial officer, certificate may be signed by all directors of company. (§58). Audited financial statements required by Securities Act must accompany and form part of prospectus. Preliminary prospectus may exclude auditors report, information on price to underwriter and offering price to public. (§54). Qualifying issuers (electronic filer under National Instrument 13-101; reporting issuer in at least one Canadian jurisdiction; all periodic and timely disclosure documents filed; issuer has current annual financial statements and annual information form; equity securities listed and posted for trading on TSX, Tier 1 or Tier 2 of TSX Venture Exchange or Canadian Trading and Quotation System Inc.) may distribute pursuant to short form prospectus which incorporates by reference information contained in "annual information form" filed by such senior issuers and continuous disclosure filings. (National Instrument 44-101). Such issuers may also make continuous or delayed offerings of debt or equity under short form prospectus legended as shelf offering prospectus. Maximum quantity of securities which may be qualified under shelf prospectus is amount of securities issuer or selling security holder reasonably expects to sell within 25 months of date of filing prospectus. Shelf prospectus also incorporates by reference prospectus supplement (which is not reviewed) relating to each tranche. (National Instrument 44-102). U.S. issuers may distribute securities, including debt or preferred shares with approved rating or rights immediately exercisable for such securities, by prospectus under Multijurisdictional Disclosure System (MJDS) (National Instrument 71-101) provided distribution complies with U.S. law where, in case of debt, preferred shares or rights exercisable therefor, (i) issuer has securities registered pursuant to Securities Exchange Act of 1934 ("1934 Act") or files reports under 1934 Act; (ii) issuer filed with Securities and Exchange Commission material required under 1934 Act for 12 months preceding filing of prospectus; (iii) issuer not investment company under Investment Company Act of 1940; (iv) issuer not commodity pool issuer; and (v) securities must be either: (a) not convertible; or (b) if convertible, only convertible one year after issue into securities with public float of U.S. $75,000,000. In case of equity securities, U.S. issuer must satisfy requirements (i)-(iv) and have minimum public float of U.S. $75,000,000. (National Instrument 71-101).

Renewal.

If distribution is in progress 12 months, new prospectus and receipt therefor must be obtained from Director within 20 days from expiration of 12 month period from date of preliminary prospectus or previous prospectus in order to continue distribution. (§62). For shelf offering prospectus there must be filed new preliminary prospectus prior to expiration of 25 month term of prospectus, and receipt must be obtained by expiration date, in order to continue distribution. (National Instrument 44-102).

Waiting Period.

Director issues receipt for preliminary prospectus immediately upon filing.Prescribed waiting period is period of time between issuance of receipt for preliminary prospectus and issuance or receipt for final prospectus. During waiting period it is permissible to advertise security, in limited manner, distribute preliminary prospectus, and solicit expressions of interest. (§65). Record of distribution of preliminary prospectus must be kept. (§67).

Final Receipt.

Issuing of receipt for prospectus is in discretion of Director. O.S.C. has adopted selective review system for prospectuses and certain other documents. Under selective review system, incoming documents are subjected to initial screening process that applies both objective and subjective selection criteria. Documents are then selected for full review, issue oriented review or no review. Securities Act, §61(2) sets out list of items resulting in non-issue of receipt.

Cease Trading Order.

Where it appears to O.S.C., after filing prospectus and issuing receipt therefor, that any circumstance set out in §61(2) exists, O.S.C. may order distribution of securities to cease. (§70).

Delivery of Prospectus.

It is mandatory for dealer to deliver prospectus to purchaser. No agreement for purchase of securities during distribution is binding on purchaser until midnight of second business day after receipt by purchaser of prospectus. (§71).

Rescission and Civil Liability.

Purchaser of security during period of distribution has right of damages for misrepresentation (including by omission) contained in prospectus, without regard to whether purchaser relied on misrepresentation; selling security holder on whose behalf distribution is made; each underwriter required to sign certificate by §59; every director of issuer at time prospectus or amendment to prospectus was filed; every person or company whose consent was filed under regulations but only with respect to reports, opinions or statements that have been made by them; and every person or company who signed prospectus or amendment other than persons listed above. Such persons are liable jointly and severally. (§130). Parties other than issuer or selling security holder have available due diligence defence, and underwriters not liable for more than total public offering price of underwritten portion. (§130[3] and [6]). Alternatively, purchaser has right to rescind purchase.

Limitation Periods.

No action may be commenced to enforce right of action, in case of rescission, 180 days after date of transaction giving rise to cause of action or, in any other case, earlier of 180 days after plaintiff first had knowledge of facts giving rise to cause of action or three years after date of transaction giving rise to cause of action. (§138). Except as otherwise provided, proceeding cannot be commenced later than six years from date of occurrence of last event on which proceeding is based. (§129.1).

Penalties.

Noncompliance is offence punishable by fine of not more than $5,000,000 and/or five years less a day in prison. Directors and officers who authorize, permit or acquiesce in commission of offence by company also may be punishable by fine of not more than $5,000,000 and/or five years less a day in prison. (§122).

Securities Affected.

“Security” includes any document, instrument or writing commonly known as security; any document constituting evidence of title to or interest in capital, assets, property, profits, earnings or royalties of any person or company or association of legatees or heirs; any document constituting evidence of option, subscription or other interest in or to security; any bond, debenture, note, or other evidence of indebtedness, share, stock, unit, unit certificate, participation certificate, certificate of share or interest, pre-organization certificate or subscription, other than contract of insurance issued by insurance company or evidence of deposit issued by Canadian bank, credit union, or loan or trust corporation; any agreement under which interest of purchaser is valued for purposes of conversion or surrender by reference to value of proportionate interest in specified portfolio of assets, except certain contracts issued by Canadian insurance companies; any agreement providing that money received will be repaid or treated as subscription to shares, stock, units or interests at option of recipient or of any person or company; any certificate of share or interest in trust, estate or association; any profit-sharing agreement or certificate; any certificate of interest in oil, natural gas or mining lease, claim or royalty voting trust certificate; any oil or natural gas royalties or leases or fractional or other interest therein; any collateral trust certificate; any income or annuity contract not issued by insurance company; any investment contract; any document constituting evidence of interest in scholarship or educational plan or trust; and any commodity futures contract or commodity futures option that is not traded on commodity futures exchange registered with or recognized by Commission under Commodity Futures Act (c. C.20) or form of which is not accepted by Director (§1[1]).

Registration of Offerers.

See subhead Registration of Dealers, Advisers, etc., infra.

Registration of Securities.

Securities per se are not registered. However, prospectus must be filed for any distribution of securities (unless exemption is available) and annual information form kept current for reporting issuers except venture issuers. Securities remaining unsold at expiration of essentially two-year term of shelf offering prospectus must be qualified under new prospectus prior to being sold. See subhead Distribution of Securities to Public, catchlines Prerequisites to Sales or Offerings and Prospectus Requirements, supra.

Registration of Underwriters.

See subhead Registration of Dealers, Advisers, etc., infra.

Registration of Dealers, Advisers, etc.

Generally, no person or company may trade in security or act as underwriter unless registered as dealer or as salesperson, partner or officer of registered dealer. No person may act as adviser unless registered as adviser. (§25). Registration as adviser is not required by financial intermediary regulated by federal Office of Superintendent of Financial Institutions if acting as advisor in accordance with legislation of Parliament of Canada governing financial intermediary or Schedule III bank if acting as advisor in accordance with Bank Act (Canada). (National Instrument 45-501). Underwriter does not include Canadian bank with respect to certain securities and banking transactions. (§1[1]). Registration is not required in case of trades and securities specified in National Instrument 31-103 and local exemptions for Ontario specified in CSA Staff Notice 45-304, Notice of Local Exemptions Related to National Instrument 45-106 Prospectus and Registration Exemptions. However, regulations under Securities Act provide for “universal registration” which requires registration by market intermediaries in respect of many trades specified in §35(1). Definition of market intermediary is broad and includes any person or company engaged in the business of selling securities (R.R.O. 1015, §204). Registration is also not required for sales by reporting issuers under direct purchase plans. (O.S.C. Rule 32-501).

Security Holder.

Registration is not required for trade in security by person or company acting through agent who is registered dealer. (National Instrument 45-106).

Registration.

Effective Sept. 28, 2009, new registration regime will apply to all participants in securities-related financial services industry in Canada. Firms must register in one or more of eight categories of registration indicated under National Instrument 31-103.Registration must be made in accordance with Securities Act and regulations. All registered firms must electronically submit certain registration information, including: registration for individual; notice of termination; change or surrender of individual categories; and business locations other than head office, and registration fees using National Registration Database. (National Instruments 31-103 and 33-109). Director may impose terms and conditions on registration or may restrict registration, including duration of registration and may restrict registration to trades in certain securities. (§27[3]). Applicant must state address for service in Ontario in application. (§33). O.S.C. will permit nonresident adviser to register as adviser in Ontario if adviser complies in all respects with regulatory requirements applicable to advisers and satisfies O.S.C. that appropriate level of proficiency is met. O.S.C. permits conditional exemption from registration for U.S. broker-dealers and agents. (National Instrument 35-101). O.S.C. also will permit nonresident advisers to obtain adviser registration to advise certain sophisticated clients including banks, loan, trust or insurance companies, federal or provincial government of Canada, pension funds having assets of at least $100 million, registered charities having assets of at least $5 million, high net worth individuals or certain mutual funds. (O.S.C. Rule 35-502). Termination of employment of salesperson operates as suspension of registration. (§29). Registered firm must, within five business days of termination of employment, partner or agency relationship with registered individual, notify O.S.C. of termination by submitting Form 33-109F5 in accordance with National Instrument 31-102, National Registration Database. (National Instrument 33-109).

Take-Over Bids.

Take-over bid is defined in Part XX of Securities Act as offer to acquire voting or equity securities made to security holders in Ontario, where, together with offeror's securities, such securities constitute in aggregate 20% or more of outstanding securities of that class at date of offer. (§89[1]). Subject to regulations, take-over bid is exempted from Part XX if: bid is made through facilities of approved stock exchange; bid is for not more than 5% of outstanding securities of class and acquisitions do not aggregate more than 5% of securities within 12 months and price paid does not exceed market price at date acquired; bid is offer by private agreement with five or fewer security holders at price not exceeding 115% of market price; number of security holders in Canada subject to bid is less than 10% of outstanding securities of class of securities subject to bid, offeror reasonably believes that security holders hold less than 10% of outstanding securities subject to bid, published market on which greatest dollar value of trading over preceding 12 months is outside Canada; number of holders in Ontario subject to bid is less than 50, securities held constitute less than 2% of outstanding securities of class, security holders in Ontario are entitled to participate in bid on terms at least as favourable as is those applicable to general body of security holders of same class; or bid is exempt by regulations. (§100.6). O.S.C. may exempt any person or company from Part XX if not prejudicial to public interest. (§104[2]). Every offeror that acquires ownership of, or power to control or direct, or securities convertible into, voting or equity securities of any class of reporting issuer that, together with offeror's securities of that class constitutes 10% or more of outstanding securities, and any additional acquisitions of 2% or more of such securities, must issue press release forthwith containing information prescribed by National Instrument 62-103, The Early Warning System and Related Take-over Bid and Insider Reporting Issuers and file report containing same information as news release within two business days. (§102.1). Take-over bids for securities of U.S. issuers may be made under Multijurisdictional Disclosure System (MJDS) provided they comply with U.S. law where: (i) Issuer whose securities are subject of take-over bid is U.S. issuer; (ii) issuer is not registered or required to be registered as investment company under U.S. law; (iii) issuer is not commodity pool issuer; (iv) bid is subject to U.S. law; (v) bid made to all security holders in Canada on same terms and conditions as in U.S.; and (vi) less than 40% of securities subject to bid are held in Canada. Material provided to U.S. security holders must also be provided to holders in Canada. Material must disclose bid made in accordance with U.S. law. (National Instrument 71-101).

Issuer Bid.

Issuer bid is defined in Part XX of Securities Act as offer to security holders in Ontario by issuer to acquire or redeem any securities of issuer, other than nonconvertible debt securities. (§89[1]). Issuer bid is exempted from Part XX of Act if: securities are purchased, redeemed or otherwise acquired in accordance with terms attaching thereto; purchase, redemption or acquisition required by instrument creating securities or by statute under which issuer incorporated; securities carry right of owner to require issuer to redeem or repurchase securities and are acquired through exercise of such right; securities acquired from current or former employee of issuer or issuer's affiliate, and if there is published market for securities, price paid does not exceed market price at date acquired and aggregate number of acquisitions does not aggregate more than 5% of class within 12 month period; issuer bid is made through approved stock exchange; issuer publishes notice in form prescribed by regulation and purchases securities in normal course in open market through stock exchange, if aggregate acquisitions in any 12 month period does not exceed 5% of securities of class sought; issuer is not reporting issuer; number of security holders is not more than 50 exclusive of employees and former employees of issuer or issuer's affiliate; number of holders in Canada subject to bid is less than 50, securities held constitute less than 10% of outstanding securities of class, offeror reasonably believes security holders in Canada hold less than 10% of outstanding securities of class subject to bid, published market on which greatest dollar value of trading during preceding 12 months is outside Canada, and all bid material is sent to security holders in Ontario; or bid is exempt by regulations. (§101[7]).

Unless exempt, take-over bid or issuer bid circular must accompany any such bid. (§94.2). For exempt take-over bid made through facilities of approved stock exchange, bid must be for cash only within period specified in Part 6, Toronto Stock Exchange Company Manual.

Directors' circular of directors of offeree company must be sent to each offeree within 15 days of take-over bid. Recommendation to accept or reject take-over bid and reasons therefor or statement unable to make or not making recommendation and if no recommendation made, reasons therefor, must be sent at least seven days before expiry of bid. (§95).

Time Periods.

Period for deposit of securities must be minimum of 35 days. Securities deposited may not be taken up and paid for by offeror until expiration of 35 days from date of bid and offeree may withdraw securities at any time where securities have not been taken up by offeror; at any time before expiration of ten days from date of notice of change or variation; if securities have not been paid for by offeror within three business days after having been taken up. If bid is for less than all of class of securities sought and where greater number were deposited, offeror must take up securities pro rata. (§97.2). Variation of bid may extend time period. (§94.4).

Filing.

Securities Act requires take-over bid material to be filed with O.S.C. (§94.2[3]).

Penalties.

Every person or company who makes misrepresentation in take-over or issuer bid circular or contravenes Securities Act is liable to fine of not more than $5,000,000 and/or imprisonment for five years less a day. (§122).

Rescission and Civil Liability.

Where take-over or issuer bid circular or any notice of change or variation in respect thereof contains misrepresentation, security holder may, without regard to whether security holder relied on misrepresentation, elect to exercise right of action for rescission or damages against offeror or damages against every director of offeror at time circular signed; every person or company whose consent was filed under regulations but only with respect to reports, opinions or statements made by them; and each person who signed certificate in circular or notice other than person listed above and such persons are liable jointly and severally. (§131[1] and [8]). Similar right also exists against directors who sign directors' circular or notice of change in respect thereof containing misrepresentation. (§131[2]). Parties other than offeror have available due diligence defence and where securities offered by offeror, persons not liable for damages that do not represent depreciation in value of security offered because of misrepresentation. (§131[6] and [9]). See subhead Distribution of Securities to Public, catchline Limitation Periods, supra. Securities Act also provides secondary market investors with right of action against issuer of securities, directors, responsible senior officers, influential persons (includes control person, promoter, insider and investment fund manager) and experts (includes accountants, actuaries, appraisers, auditors, engineers, financial analysts, geologists and lawyers). Right of action allows secondary market investors to seek compensation for damages suffered at time when issuer had made and not corrected untrue statement of material fact or failed to make required timely disclosure of material changes to its business for disclosure made in other documents (including annual reports, financial statements, press releases, management's discussion and analysis). (Part XXIII.1).

Proxy Solicitations.

Solicitations of proxies by management of reporting issuers is mandatory, if notice of shareholders meeting is given, or intended to be given. (§85). This also applies to Ontario corporation "offering its securities to the public". (Business Corporations Act, c. B.16, §111). Form of proxy must be sent to security holders, whose address in books of reporting issuer is in Ontario, and to nonregistered holders pursuant to National Instrument 54-101. Form of proxy is prescribed for Ontario corporations and must state meeting at which it is to be used; on whose behalf it is solicited, provide designated blank space for date, provide space to name nominee of shareholder's choice and provide "for and against" ballot. Form of proxy for reporting issuer is prescribed by Part 9 of National Instrument 51-102. (National Instrument 51-102).

Information circular, contents of which must set out information prescribed by Form 51-102F5 must accompany proxy solicitation (§86[1]). Information circular not required if, among other things, solicitation, otherwise than by management, is for proxies of not more than 15 security holders (§86[2]). Companies may apply for exemption from all or some of requirements. (§88[2]). Information circular must be filed with O.S.C. (§81).

Insider Trading.

Reporting.

(Part XXI, Securities Act). Person or company who becomes insider of reporting issuer, other than mutual fund, must file report within ten days of becoming insider. (§107[1]). Person or company who has filed or is required to file insider report must report any changes of direct or indirect beneficial ownership of securities within ten days in which change takes place. Special provisions apply to mutual funds and management companies. (§§110-121). System for Electronic Disclosure by Insiders (SEDI) requires insiders to electronically file insider reports and issuers to electronically file certain information using SEDI web site. Public may search for and access public information filed on SEDI using same web site. (National Instrument 55-102). O.S.C. summarizes insider reports and posts weekly summary on O.S.C. website. (§120). O.S.C. may make order exempting person or company from requirements of Part XXI. (§121[2]). Also see statutory exemptions for certain types of insiders or events. (National Instrument 55-101).

"Insider" means: every director or officer of reporting issuer; every director or officer of person or company that is itself insider or subsidiary of reporting issuer; person or company that has (i) Beneficial ownership or control or direction over more than 10% of voting securities of reporting issuer, or (ii) combination of beneficial ownership of and control or direction over, directly or indirectly, more than 10% of voting securities of reporting issuer; reporting issuer that has purchased, redeemed, or otherwise acquired its securities, for so long as it holds any of its securities; person or company designated as insider in order made by O.S.C.; person or company in class of person or companies designated as insiders if persons or companies would reasonably be expected to have, in ordinary course, access to material information about issuer. (§1[1]). Subject to exemptive relief (National Instrument 55-101), "officer" means chair or vice-chair of board of directors, chief executive officer, chief operating officer, chief financial officer, president, vice-president, secretary, assistant secretary, treasurer, assistant treasurer or general manager of company; individual designated as officer under by-law or similar authority of issuer; individual who performs similar functions. (§1[1]). Company is deemed affiliate of another company if one is subsidiary of other or both are subsidiaries of same company or each is controlled by same person or company. Company is deemed controlled by another if other holds more than 50% of votes for election of directors, and votes are entitled, if exercised, to elect majority of board of directors. Company is deemed subsidiary of another if controlled by other, or others controlled by that other, or is subsidiary of company that is that other's subsidiary. Person is deemed to own securities beneficially owned by company controlled by person or by affiliate of such company and company is deemed to beneficially own securities beneficially owned by its affiliates. (§1[2]-[6]).

Extent of Disclosures.

Insider must disclose any direct or indirect beneficial ownership, control or direction over securities of reporting issuer as required under regulations in prescribed form.

Insider Liability.

Every “person or company in special relationship with reporting issuer” who sells or purchases securities with knowledge of, or who informs another person or company of, “material fact” or “material change” not generally disclosed is liable to compensate purchaser or vendor for damages. (§134). “Person or company in special relationship with a reporting issuer” means (a) person or company that is insider, affiliate or associate of (i) reporting issuer, (ii) person or company making take-over bid for securities of reporting issuer, (iii) person proposing to become party to reorganization, amalgamation, merger or arrangement or similar business combination with reporting issuer or to acquire substantial portion of its property; (b) person or company engaged in or proposing to engage in business activity with reporting issuer or person or company in (a) (ii) or (iii); (c) person is director, officer or employee of reporting issuer or of person or company in (a) (ii) or (iii) or (b); (d) person or company that learned of material fact or change regarding reporting issuer while person or company described in (a), (b) or (c); (e) person or company that learned of material fact or change regarding reporting issuer from person or company that was itself in special relationship with reporting issuer who knew or ought reasonably to have known other person or company was in such relationship. (§76[5]). Insider must also account to reporting issuer for any benefit or advantage received. (§134[4]). Such trading or informing is also offence subject to minimum fine equal to profit made or loss avoided and maximum fine equal to greater of $5,000,000 and triple profit made or loss avoided and imprisonment for term of not more than five years less a day. (§122[4]).

Continuous Disclosure.

Every reporting issuer must file annual and quarterly financial statements with O.S.C. (or in case of investment funds, annual and semi-annual financial statements), and concurrently send copies to all security holders resident in Ontario, and to unregistered security holders as prescribed in National Instrument 54-101. (National Instrument 51-102 and National Instrument 81-106). Provisions for exemption from filing requirements. (§80 and National Instrument 51-102). Every reporting issuer must file management’s discussion and analysis as prescribed by Form 51-102F1 relating to its annual and quarterly financial statements. (National Instrument 51-102). Reporting issuers that are not venture issuers must file annual information form as prescribed by Form 51-102F2. (National Instrument 51-102). Annual information form requirements for investment funds contained in National Instrument 81-106, part 9, where “material change” or “material fact” occurs in affairs of reporting issuer press release disclosing nature of change must be issued and filed with O.S.C. immediately, and report of such material change shall be filed with O.S.C. within ten days of date on which change occurs. (§75[1] and [2] and National Instrument 51-102). Where such disclosure unduly detrimental to interests of reporting issuer or disclosure to be confirmed by directors of reporting issuer and no use made of knowledge in dealings with securities, reporting issuer may file report marked “confidential” with written reasons for nondisclosure. (§75[3] and National Instrument 51-102). No person or company in special relationship with reporting issuer may buy or sell its securities with knowledge of “material fact” or “material change” not disclosed, or inform another of such undisclosed fact or change until generally disclosed. (§76). See O.S.C. Policy 33-601 for guidelines of trading procedures. See subhead Insider Trading, catchline Insider Liability, supra. Any material information concerning affairs of issuer also must be disclosed immediately through news media. (National Instrument 51-201, Disclosure Standards).

3.26 STATUTE OF FRAUDS:

See topic 3.17 Frauds, Statute of.

3.27 WAREHOUSEMEN:

The business of warehousemen as bailees for reward is regulated by rules of common law as amended by statutes. A warehouseman is liable for loss of or injury to goods caused by his failure to exercise such care and diligence in regard to them as a careful and vigilant owner of similar goods would exercise in the custody of them in similar circumstances. (c. W.3).

Warehouse Receipts.

A warehouse receipt is an acknowledgment in writing by a warehouseman of the receipt for storage of goods not his own. The form of the receipt, the conditions of its negotiability, and other matters relating to it are governed by The Warehouse Receipts Act (c. W.3) and by The Mercantile Law Amendment Act (c. M.10).

Liens.

Person who receives article for storage or storage and repair has lien against article for amount equal to amount agreed upon for storage or storage and repair or where no such amount has been agreed upon, fair value of storage or storage and repair including all lawful claims for money advanced, interest on money advanced, insurance, transportation, labour, weighing, packing and other expenses incurred in relation to storage or storage and repair of article. Storer may retain possession of article until amount is paid. In addition to other remedies provided at law, lien claimant may sell by public or private sale provided he observes statutory provisions governing such sales. (c. R.25).

4 CITIZENSHIP

4.01 ALIENS:

Aliens are under no disability as to holding real property in Ontario. (c. A.18). But see Canada Law Digest, category 4 Citizenship, topic 4.01 Aliens.

5 CIVIL ACTIONS AND PROCEDURE

—Scope —

Please be advised new rules of practice are intended to come into force in Ontario on Jan. 1, 2010. Significant upcoming changes have been noted in this section.

5.01 ACCORD AND SATISFACTION:

Part performance of an obligation before or after breach, when expressly accepted by the creditor in satisfaction or rendered pursuant to an agreement for that purpose, though without new consideration, extinguishes the obligation. (Mercantile Law Amendment Act, c. M.10, §16). Defence of accord and satisfaction must be pleaded. (R.P. 25.07[4]).

In other respects common law rules govern.

5.02 ACTIONS:

Civil proceedings generally commenced by way of action, with prescribed exceptions for divorce petitions and applications.

Language.

In certain designated counties of Ontario, upon application of party who speaks French language, order may be made that court hearing be before judge and/or jury who speak both French and English. Hearing may be all or partly in French and evidence given in French will be recorded and transcribed in French. (Courts of Justice Act, c. C.43, §126[1]).

Equity.

Rules of law and equity are concurrently administered in same courts. In cases of conflict or variance rules of equity prevail. Only Court of Appeal and Superior Court of Justice, exclusive of Small Claims Court, may grant equitable relief unless otherwise provided. (Courts of Justice Act, c. C.43, §96).

Commencement.

See topic 5.18 Process.

Conditions Precedent.

Several statutes require notice to be given before action can be brought. For example: (1) notice of contest against proposed scheme of distribution to execution creditors of moneys in hands of sheriff within ten days (Creditors' Relief Act, c. C.45, §32[5]); (2) notice of election to determine date when compensation to be assessed for lands expropriated within 30 days, and notice of injurious affection within one year (Expropriations Act, c. E.26, §§10[1], [2] and 22[1]); (3) notice of failure of Department of Highways to keep highway in repair within ten days of injury (Public Transportation and Highway Improvement Act, c. P.50, §33[4]); (4) notice of libel against a newspaper within six weeks (Libel and Slander Act, c. L.12, §5[1]); (5) notice of amount due and owing for maintenance of patient in mental hospital quarter-yearly (Mental Hospitals Act, c. M.8, §20[1]); (6) notice of certain proceedings against Crown at least 60 days before commencement of action (Proceedings Against the Crown Act, c. P.27, §7); (7) notice of demand against certain public authorities at least six days before commencement of action (Public Authorities Protection Act, c. P.38, §6); (8) notice of damage by public utility within one month after expiration of calendar year in which injury was occasioned (Public Utilities Act, c. P.52, §56[6]); (9) notice of election under Workplace Safety and Insurance Act, 1997 within three months and notice of accident as soon as practicable after it happens and claim must be made within six months after accident or after worker learns he suffers from disease (S.O. 1997, c. 16, Sched. A, §§22[1] and 20[3]); (10) notice of damage in respect of carriage by air within three days of receipt of luggage and within seven days of receipt of goods, or, in case of delay, within 14 days after luggage or goods placed at person's disposal (Carriage by Air Act, R.S.C. 1985, c. C.26); (11) notice of claim for damages for personal injury caused by snow and ice on municipal sidewalk to be served on municipal clerk within ten days of injury. Failure to give notice not bar to action in case of death of injured person as result of injury. (Municipal Act, S.O. 2001, c. 25, §44[10] and [11]).

Parties.

Action must be prosecuted by real party in interest, but executor, administrator or trustee may, subject to certain exceptions, sue or be sued without joining beneficiaries. (R.P. 9.01). Assignee of debt or other chose in action must join assignor as party in proceeding unless assignment is absolute and debtor has received written notice of assignment. (R.P. 5.03[3]). Two or more persons represented by same lawyer may join as plaintiffs in same proceeding if they claim relief arising out of same transaction or event, if common question of law or fact may arise in proceeding, or if their joinder may promote convenient administration of justice. (R.P. 5.02[1]). Class Proceedings Act, S.O. 1992, c. 6, legislation allowing for Court certification of class proceedings and dealing with other procedural and substantive matters associated with class proceedings. Persons may be joined as defendants if plaintiff claims relief against them arising out of same transaction or event, if common question of law or fact may arise in proceeding, if there is doubt as to whom plaintiff is entitled to relief from, if plaintiff suffers damage or loss caused by more than one person and there is doubt as to from whom, and for what amount, plaintiff is entitled to relief, or if their joinder may promote convenient administration of justice. (R.P. 5.02[2]). Where there are numerous persons having same interest, one or more may bring or defend proceeding or may be authorized by court to do so on behalf of all. (S.O. 1992, c. 6, §2[1], R.P. 12.07). Generally, every person whose presence is necessary to enable court to adjudicate completely and effectively on issues shall be joined as party to proceedings, and court may order addition, deletion or substitution of any person as party, at any stage in proceeding, on such terms as are just. (R.P. 5.03, 5.04). No person shall be added as plaintiff or applicant without filing of consent. (R.P. 5.04[3]). Where person is required to be joined as necessary party and person will not consent to being joined as plaintiff or applicant, then person shall be made defendant or respondent. (R.P. 5.03[5]).

Interpleader.

Relief by way of interpleader may be granted where two or more persons make adverse claims in respect of personal property, including debt, against person who claims no beneficial interest in property, other than lien for costs, fees or expenses, and is willing to deposit property with court or dispose of it as court directs. (R.P. 43.02). Similar relief may be granted to sheriff in respect of both real and personal property or proceeds thereof taken or intended to be taken by sheriff in execution of any enforcement process if sheriff has received claim in respect of that property. (R.P. 60.13).

Third Party Practice.

(1) Defendant may commence third party claim against any person who is not party to action and who is or may be liable to defendant for all or part of plaintiff’s claim; is or may be liable to defendant for independent claim arising out of transaction or event or series thereof involved in main action or related transaction or event or series thereof; or should be bound by determination of issue arising between plaintiff and defendant. (R.P. 29.01). Third party may defend against third party claim by delivering third party defence (R.P. 29.03) or, where appropriate, third party may defend against plaintiff’s claim against defendant by delivering statement of defence to main action, in which he/she may raise any defence open to defendant. In defending main action, third party has same rights and obligations as defendant and is bound by any order or determination between plaintiff and defendant who made third party claim (R.P. 29.05); (2) statutory right of contribution or indemnity under Negligence Act is enforced by cross claim against codefendant or by commencing third party claim against nonparty. (c. N.1, §5). No special procedure necessary for persons already parties; (3) see also Insurance Act (c. I.8, §258[14] regarding motor vehicles and insurers denying coverage).

Joinder of Causes of Action.

A plaintiff may unite in the same action several causes of action, but if causes of action so joined cannot be conveniently disposed of in one action, or may cause undue prejudice to a party, court may direct that they be tried separately or excluded. (R.P. 5.01, 5.05).

Consolidation of Actions.

Actions may be consolidated by order of the Court. (R.P. 6.01).

Stay of Proceedings may be obtained on court’s own initiative or on motion by any person, whether or not party, in proper case on application to court where action pending. (c. C.43, §106; R.P. 21.01[3]).

Abatement and Revival.

Survival of causes of action is governed by common law rules modified by providing for two year limitation from death of deceased for action for torts or injuries except for libel and slander (Trustee Act, c. T.23, §38) (see category 13 Estates and Trusts, topic 13.10 Estate Trustees). If by reason of death when cause of action survives, or by assignment or conveyance estate or interest devolves or is transferred, pending action may be continued by or against person to whom estate has come. Order to continue is necessary. (R.P. 11.01-11.03).

Termination of Actions.

Actions may be terminated by judgment, order or discontinuance. Discontinuance is not a defence to any subsequent action, unless order giving leave to discontinue or consent filed by parties provides otherwise. (R.P. 23.04).

Summary Procedure.

See topic 5.13 Judgments.

Limitation of.

See topic 5.14 Limitation of Actions.

Administration.

See category 13 Estates and Trusts, topic 13.10 Estate Trustees.

Direct Actions.

See category 23 Transportation, topic 23.03 Motor Vehicles, subhead Direct Actions.

Proceedings against the Crown are regulated by c. P.27.

5.03 APPEAL AND ERROR:

Court of Appeal for Ontario.

Appeal lies to Court of Appeal from: (i) final order of judge of Superior Court of Justice except final orders for single payment of not more than $25,000, exclusive of costs, final order for periodic payments that would amount to not more than $25,000, exclusive of costs, in 12 months, or final order dismissing claims of not more than $25,000 exclusive of costs or claims in respect of which judge indicates amount awarded would not have been more than $25,000, exclusive of costs; (ii) order of Divisional Court of Superior Court of Justice on question that is not question of fact alone, with leave; and (iii) certificate of assessment of costs issued in proceeding in Court of Appeal. (c. C.43, §6).

Divisional Court of Superior Court of Justice.

Appeal lies to Divisional Court from: (i) final order of judge of Superior Court of Justice except those described in Court of Appeal (above); (ii) interlocutory order of judge of Superior Court of Justice, with leave, and (iii) final order of Master. (c. C.43, §19).

Superior Court of Justice.

Appeal lies to judge of Superior Court of Justice from interlocutory order of Master and Certificate of Assessment of Costs issued in proceeding in Superior Court of Justice. (c. C.43, §17).

Procedure.

Law relating to procedure on appeal from both final and interlocutory orders is governed by Rules of Civil Procedure. (R.P. 61-63).

Supreme Court of Canada.

Appeal may be taken to Supreme Court of Canada at Ottawa (subject to leave to appeal being granted) where Court is of opinion that any question involved by reason of its national and public importance or importance of any issue of law or any issue of mixed law and fact is one that ought to be decided by Supreme Court and in certain other cases by special leave. (Supreme Court Act, R.S.C., c. S-26, §§35-40).

Stay of execution pending appeal, see category 8 Debtor and Creditor, topic 8.07 Executions.

5.04 CERTIORARI:

Relief formerly given by prerogative writs of mandamus, prohibition and certiorari, applications in nature thereof and applications for declarations or injunctions in relation to exercise, refusal to exercise or proposed or purported exercise of statutory power now generally available through single procedure of Application for Judicial Review. (Judicial Review Procedure Act, c. J.1).

Jurisdiction.

Generally Divisional Court but judge of Superior Court of Justice with leave of judge thereof in urgent cases. (c. C.43, §6).

Grounds.

Generally as before, but certiorari extended to any decision in exercise of “statutory power of decision” (c. C.43, §2[2]) and court may ignore technical irregularities (c. C.43, §3).

Proceedings.

By notice of application (R.P. 68.01) setting out grounds and nature of relief sought (c. C.43, §9). Notice must be given to attorney general (c. C.43, §9[4]) and decision maker must on notice file record of proceedings in which decision was made (c. C.43, §10).

Review.

As previously, court may set aside decision (c. C.43, §2) and make interim orders (c. C.43, §4).

5.05 CHARITABLE IMMUNITY:

See topic 5.07 Damages.

5.06 COSTS:

Costs as between party and party in litigation generally follow the event. Award of costs is discretionary and award or refusal will not be lightly interfered with. (c. C.43, §131).

Range of costs awarded is generally fixed by statutory tariff which allows assessment officer discretionary jurisdiction with regard to certain items as circumstances of case require.

Defendant may after appearance make payment into court in satisfaction; if plaintiff does not recover more at trial, judge should, unless there is cogent reason, order plaintiff to pay costs incurred after payment into court.

Costs as between lawyer and his or her client are not fixed by statute but, in default of special agreement, may be assessed by assessment officer at instance of lawyer or client. Fees are fixed having regard to work done, results achieved and skill employed, in accordance with well established practice.

Where plaintiff makes offer to settle at least seven days before commencement of trial, and offer is not withdrawn or accepted by defendant, and plaintiff obtains judgment as favourable as or more favourable than offer to settle, plaintiff is entitled to substantial indemnity costs from date of delivery of offer to settle and partial indemnity costs to date of offer to settle. (R.P. 49.10). Where defendant makes offer to settle at least seven days before commencement of trial and offer is not withdrawn or accepted by plaintiff, and plaintiff obtains judgment as favourable as or less favourable than offer to settle, plaintiff is entitled to partial indemnity costs to date offer served and defendant is entitled to partial indemnity costs from date of delivery of offer to settle. (R.P. 49.10).

Security for costs may be ordered, on motion by defendant, i.e. plaintiff will be required to post security in sum equal or proportional to defendant's estimated cost of defending action, where: Plaintiff is ordinarily resident outside Ontario or has another proceeding for same relief pending in Ontario or elsewhere; plaintiff is corporation or nominal plaintiff or there is good reason to believe that action is frivolous and vexatious, and it is reasonable to believe that plaintiff has insufficient assets in Ontario to pay costs of defendant; or where defendant holds unsatisfied order for costs against plaintiff in any proceeding or is entitled by statute to security for costs. (R.P. 56.01). Motion for security for costs available only after defendant has delivered defence, and must be made on notice to plaintiff and every defendant who has delivered defence or notice of intent to defend. (R.P. 56.03). Amount and form of security and time for payment into court are determined by court. (R.P. 56.04). Proceedings, except appeal from order itself, are stayed until security has been given, unless otherwise ordered by court. (R.P. 56.05). Upon default in giving security, action against defendant who obtained order may be dismissed. (R.P. 56.06). Amount of security may be increased or decreased at any time on motion. (R.P. 56.07). Judge of appellate court, on motion of respondent, can make order for security for costs of appeal in certain circumstances. (R.P. 61.06).

Liability of Lawyer.

Lawyer may be ordered to personally pay costs of his client or any other party to action in certain circumstances (R.P. 57.07), but this occurs rarely.

5.07 DAMAGES:

Common law rules generally prevail. Defendant cannot rely on plaintiff's contributory negligence as complete defence in action, but court must apportion damages in proportion to degree of negligence found against each party. (c. N.1, §3). Personal representatives of deceased may claim damages suffered by deceased before death to his person or property. (c. T.23, §38[1]). If person is injured or killed by fault or neglect of another where person is or would have been entitled to recover damages, spouse (as defined in Part III Family Law Act), same sex partners (as defined in Part III Family Law Act), children, grandchildren, parents, grandparents, brothers and sisters of person are entitled to maintain action and to recover their pecuniary loss including expenses incurred for benefit of person injured or killed, funeral expenses, travelling expenses incurred in visiting person during treatment or recovery, claimant's allowance for providing person with nursing, housekeeping or other services, and amount to compensate for loss of care, guidance and companionship. (c. F.3, §61). Proceeding shall not be commenced in respect of claim after second anniversary of day on which claim was discovered. (Limitations Act, 2002, S.O. 2002, c. 24, Sched. B, §4). See topic 5.14 Limitation of Actions. In assessing damages any insurance payable for injury must not be considered. (§63). Doctrine of charitable immunity is not part of law of Ontario. Lavere v. Smith's Falls Public Hospital, 35 O.L.R. 98. Court may give guidance to jury and parties may make submissions to jury on amount of damages. (c. C.43, §118).

Sovereign Immunity.

No legislation.

See category 23 Transportation, topic Motor Vehicles, subhead No-Fault Insurance and category 13 Estates and Trusts, topic 13.05 Death, subhead Action for Death.

5.08 DECLARATORY JUDGMENTS:

See topic 5.13 Judgments.

5.09 DEPOSITIONS AND DISCOVERY:

Unless Rules of Civil Procedure provide otherwise, witnesses at trial must be examined orally in court and such examination may consist of direct examination, cross-examination and reexamination. (R.P. 53.01[1]). At or before trial, court may make order allowing evidence of witness or proof of particular fact or document to be given by affidavit, unless adverse party reasonably requires attendance of deponent for cross-examination. (R.P. 53.02[1]).

Examinations Out of Court.

Party intending to introduce evidence of person at trial may, with leave of court or consent of parties, examine person on oath or affirmation before trial and may tender such testimony as evidence at trial. In granting leave, court will consider convenience of witness, possibility that witness will be unavailable for trial due to death, infirmity, sickness or being beyond jurisdiction of court at time of trial, expense of bringing witness to trial and whether witness ought to give evidence in person. (R.P. 36.01). Such witness may be examined, cross-examined and reexamined in same manner as witness at trial. (R.P. 36.02). Where court makes order for examination of witness outside Ontario, order shall, if moving party so requests, provide for issue of commission and letter of request enabling assistance of foreign court to be sought to compel attendance of witness. (R.P. 36.03). Any party at trial may use transcript, videotape or other recording of such examination as evidence of that witness, unless court rules otherwise. (R.P. 36.04[2]). Procedures for examination are prescribed by rules. (R.P. 34).

Compelling Attendance of Witnesses.

Party requiring attendance of person in Ontario as witness at trial may personally serve person with summons to witness, which compels person to attend at trial and may also require person to produce at trial documents or such other evidence as specified in summons. (R.P. 53.04). As to compelling attendance of witnesses outside Ontario in Ontario proceedings, see subhead Examinations Out of Court, supra, and R.P. 34.07.

Interprovincial Summonses Act.

Court shall receive and adopt as Order of the Ontario Court summons issued in another province, subject to certain conditions. (c. I.12, §2).

Letters Rogatory.

Court may order letters of request to issue in aid of commission where assistance of foreign court is necessary to compel attendance of witness. (R.P. 34.07). Court may render similar assistance to foreign court where in pending action in such court obtaining of evidence of witness in Ontario has been authorized. Order may be made in proper court in Ontario compelling attendance of witness for examination before appointed person upon payment of conduct money, expenses, etc. (c. E.23, §60).

5.10 EQUITY:

See topic 5.02 Actions.

5.11 EVIDENCE:

Witnesses.

In civil actions no person is incompetent to give evidence by reason of being interested as party or otherwise or by reason of conviction of crime. (c. E.23, §§6, 7). This heading applies to civil actions and other proceedings within jurisdiction of provincial legislature. Criminal actions are governed by Canada Evidence Act, R.S.C., c. C-5. See also topic 5.09 Depositions and Discovery.

Privileged Communications.

Generally, common law rules apply as to privileged communications, but certain statutory privileges exist with reference to documents in official possession of governmental departments, and with reference to information required by law to be disclosed to administrative officials.

Husband and Wife.

Husbands and wives of parties to action are competent and compellable to give evidence on behalf of any parties, but no husband or wife may be compelled to disclose any communication made by one to other during marriage. (c. E.23, §§8, 11). Husband or wife may in any action give evidence that he or she did or did not have sexual intercourse with other spouse at any time or within any period before or during marriage. (§8[2]). In proceedings instituted in consequence of adultery no party or spouse of any party is bound to answer any question tending to show that he or she is guilty of adultery unless such witness has already given evidence in same action in disproof of his or her alleged adultery. (§10).

Communications or Transactions with Persons Since Deceased or Incompetent.

In actions by or against the representatives of a deceased person in respect of any matter occurring before the death of the deceased and in actions by or against mentally incompetent persons, etc., an opposite or interested party may not obtain a verdict or judgment upon his or her own evidence unless it be corroborated by some other material evidence. (c. E.23, §§13, 14).

Self-incrimination.

A witness is not excused from answering any question upon the ground that the answer may tend to incriminate or establish liability to civil proceeding. But if witness objects to answer such question and is compelled to do so, answer may not be used against witness in any other civil proceeding. Witness who testifies in any proceeding has right not to have any incriminating evidence used to incriminate witness in any other proceeding, except prosecution for perjury or for giving contradictory evidence, and it is not necessary for witness to object to obtain such protection. (c. E.23, §9; R.S.C. 1985, c. E-5, §5).

Compelling Attendance.

See topic 5.09 Depositions and Discovery.

5.12 INJUNCTIONS:

An injunction may be granted where it appears to court to be just or convenient that such order should be made, and any such order may be made upon such terms and conditions as court may deem just. It is provided as extraordinary remedy granted only where no other remedy would prevent irreparable harm. Special provisions exist in respect of labour disputes. (c. C.43, §§101, 102).

Jurisdiction.

Injunctions may be granted by Superior Court of Justice provided action or subject matter of dispute is within jurisdiction, monetary or otherwise, of court. (§101).

Interim Injunction.

An interim injunction pendente lite may be granted. Such an injunction is only granted on undertaking of applicant to pay any damages suffered which in opinion of court he ought to pay. Interim injunction in labour dispute shall not be for period longer than four days. (§102[5]; R.P. 40).

5.13 JUDGMENTS:

Orders include judgments, and may be interlocutory or final. Prejudgment interest is recoverable at bank rate prevailing at end of first day of last month of quarter prior to that in which proceeding was commenced except where prejudgment interest is claimed at rate as prescribed by some other right, e.g. by contract. Post-judgment interest is chargeable on all judgments and costs at bank rate prevailing at end of first day of last month of quarter preceding that in which order is given, plus 1%. Judicial discretion to disallow prejudgment and post-judgment interest, to alter rate and to alter period for which interest is payable. (c. C.43, §§127-130).

Judgment by Confession.

There is no judgment by confession in Ontario.

Judgment on consent may be entered in all cases except matrimonial cases and cases involving parties under disability in which court approval is required. (R.P. 7.08).

Default Judgments.

Plaintiff, upon filing prescribed documents, may require registrar to note defendant in default where defendant fails to deliver statement of defence within prescribed time, or has statement of defence struck out without leave to deliver another or, with leave, fails to deliver another within prescribed time. (R.P. 19.01). Defendant noted in default is deemed to admit all allegations of fact in statement of claim, may not deliver defence except with leave of court or consent of plaintiff, and generally is disentitled to further notice in proceedings. (R.P. 19.02). Having noted defendant in default, plaintiff may obtain judgment as follows: (1) where claim is for debt or liquidated demand, for recovery of land or chattels or for foreclosure, sale or redemption of mortgage, by having registrar sign default judgment (R.P. 19.04); (2) where registrar has not signed default judgment or where claim is for unliquidated damages, by moving for judgment (R.P. 19.05); and (3) where motion for judgment refused, by proceeding to trial (R.P. 19.06). Same rules apply with necessary modifications to counterclaims, crossclaims, and third party claims. (R.P. 19.09).

Summary Judgment.

After delivery of statement of defence, either party may move, with supporting affidavit material or other evidence, for summary judgment on all or part of claim. (R.P. 20.01). Contents of factum and affidavit to be served on other party are prescribed. (R.P. 20.02, 20.03). Each party entitled to cross-examine upon any affidavit of opposing party after delivery of own evidence. (R.P. 39.02). Where satisfied there is no genuine issue for trial with respect to claim or defence or where parties agree to have all or part of claim determined by summary judgment and court is satisfied that it is appropriate to grant summary judgment, court shall grant summary judgment; where only issue is question of law, court may decide question and grant judgment accordingly; and where only issue is amount to which plaintiff entitled, court may order trial of that issue or grant judgment with reference. (R.P. 20.04). Where summary judgment refused or granted only in part, court may nevertheless specify what facts are not in dispute, define issues to be tried, and order speedy trial. (R.P. 20.05). Cost sanction imposed for improper use of this procedure. (R.P. 20.06). Procedure also applies to counterclaims, crossclaims and third party claims. (R.P. 20.09).

Jan. 1, 2010 amendments to rules of practice will expand court's powers on motion for summary judgment. Amendments will permit judge to weigh evidence, evaluate credibility of deponent and draw any reasonable inference from evidence. New mini-trial power permits judge to order hearing of oral evidence on motion for summary judgment where interests of justice require brief trial to dispose of summary judgment motion. New summary judgment rules will confer permissive authority on court to impose substantial indemnity costs.

Declaratory judgments may be obtained in appropriate cases.

Lien.

Judgment is not ordinarily a lien on land. See category 8 Debtor and Creditor, topic 8.07 Executions. Judgment may affect subsequent purchaser with notice of it or if execution registered against land.

Satisfaction.

Party may acknowledge satisfaction of order in document signed by party before witness, and document may be filed and entered in court office where order entered. (R.P. 59.07).

Foreign Judgments.

Foreign judgments may be sued on in this province where according to rules laid down by Ontario courts, foreign court had jurisdiction in matter.

Foreign judgments, being treated by case law as simple contract debts, must be sued upon within two years from date of discovery of claim. (S.O. 2002, Sched. B, §4). However, limitation periods imposed by reciprocal enforcement of judgments legislation are listed in Schedule to the Limitations Act, 2002 and thus will continue in force. For proceedings pursuant to such legislation, limitation is six years from date of judgment. (c. R.5 and c. R.6).

Statutory provision is made for reciprocal enforcement in Ontario, subject to certain restrictions, of judgments of courts of reciprocating states provided judgment creditor applies to Superior Court of Justice at any time within six years after date of judgment to have judgment registered in that court. “Judgment” means judgment or order of court in any civil proceedings whereby any sum of money is payable and includes award in proceedings on arbitration if award is enforceable in same manner as judgment in that jurisdiction. All provinces and territories within Canada are reciprocating jurisdictions except for Quebec. (c. R.5).

Statutory provision is made for reciprocal recognition and enforcement of judgments in civil and commercial matters between Canada and United Kingdom. Ontario designated as province to which convention extends. (c. R.6).

Statutory provision is also made for recognition and enforcement of commercial arbitration awards; see category 9 Dispute Resolution, topic 9.02 Arbitration and Award.

Judgment Notes.

See Canada Law Digest, category 3 Business Regulation and Commerce, topic 3.02 Bills and Notes.

5.14 LIMITATION OF ACTIONS:

As of Jan. 1, 2004, Limitations Act, 2002 (S.O. 2002, c. 24, Sched. B) became law and has substantially changed law of limitations in Ontario. Limitations Act, 2002 replaced Parts II and III of Limitations Act, 1990. (c. L.15). Provisions of Part I of Limitations Act, 1990 were preserved as Real Property Limitations Act.

Limitations Act, 2002.

Causes of action that arose after Jan. 1, 2004, and undiscovered claims related to events that arose prior to Jan. 1, 2004 and not statute barred as of Dec. 31, 2003 are governed by Limitations Act, 2002.

Provides for basic two-year limitation period commencing from discovery of claim. Discovery defined as occurring on day on which person with claim knows or ought to have known that injury, loss or damage had occurred; identity of person who caused injury, loss or damage, and having regard to nature of injury, loss or damage, that legal proceeding would be appropriate means to remedy it. (§5). Two-year discoverability rule applies to all claims unless explicitly excluded.

Preserves number of special shorter limitation periods, which are listed in schedule to Limitations Act, 2002. Examples include claims for libel under §6 of Libel and Slander Act, c. L.6, proceedings by and against estate under subsection 38(3) of Trustee Act.

Certain types of claims have no limitation period, such as concealed fraud and latent environmental claims.

Provides for ultimate limitation period of 15 years after date act or omissions took place, regardless of discoverability. (§15).

Limitation periods established by Limitations Act, 2002 for certain actions may be suspended, extended, varied or excluded by agreement. (§22).

Real Property Limitations Act (c. L.15).—This act provides for various limitation periods for actions involving real property.

Pleading.

Any statutory limitation should be pleaded specifically. (R.P. 25.07[4]).

Foreign Causes of Action.

Action must be commenced within applicable limitation period. However, if Ontario courts characterize limitations legislation of jurisdiction of proper law as being substantive rather than procedural, action must also be within that time period as well. (Traders Finance v. Casselman, [1960] S.C.R. 242).

5.15 PARTITION:

Any one or more of several joint tenants or tenants in common and other parties interested in any land in the Province may apply to Superior Court of Justice for partition or sale of property. (c. P.4, §3; R.P. 66). Where joint tenants are spouses, see category 14 Family, topic Husband and Wife, subhead Status.

Proceedings.

Application is by originating notice served on one or more of persons entitled to a share in common property. All parties must be served personally unless a court order dispenses with personal service. Court must proceed in least expensive and most expeditious manner for partition or sale, adding of parties, ascertainment of rights of various persons interested and taxation and payment of costs.

Persons Under Disability.

Notice must be given to Children's Lawyer where infants are interested and mentally incompetent person must be served personally unless otherwise ordered. Application for partition may be made on behalf of infant by his guardian or next friend with sanction of judge to be first obtained upon notice to Children's Lawyer.

Sale may be ordered by the court when it is considered to be more advantageous to the parties interested than partition.

Condominiums.

See category 21 Property, topic 21.13 Real Property.

5.16 PLEADING:

Pleadings are governed by Rules of Civil Procedure, which are regulations made under Courts of Justice Act and common law. (c. C.43).

Statement of Claim.

Generally, action is commenced by plaintiff having court issue statement of claim any time within limitation period. (R.P. 14.03[1]). If insufficient time to prepare statement of claim, plaintiff may issue notice of action and must then file statement of claim within 30 days. (R.P. 14.03[2], [3]). Statement of claim must be served, together with notice of action where applicable, within six months after issuance of notice of action. Where notice of action not required, statement of claim must be served within six months of date of issuance of claim. (R.P. 14.08).

Statement of Defence.

Defendant must deliver statement of defence within 20 days after service of statement of claim if served in Ontario, within 40 days if served elsewhere in Canada or U.S., or 60 days if served anywhere else. (R.P. 18.01). Alternatively, defendant may deliver notice of intent to defend within prescribed time, thereby gaining additional ten days to file statement of defence. (R.P. 18.02). In defence, defendant must admit every allegation of fact in statement of claim that defendant does not dispute, and all allegations of fact not denied in defence, except as to question of damages, shall be deemed to be admitted unless defendant pleads no knowledge in respect of that fact. (R.P. 25.07).

Counterclaim.

Defendant may assert, by way of counterclaim in main action, any right or claim he or she has against plaintiff, and counterclaim is to be included in same document as statement of defence and served at same time. (R.P. 27.01-27.04).

Reply.

Plaintiff must deliver reply, if any, within ten days after service of statement of defence, but where defendant counterclaims, plaintiff must deliver reply and defence to counterclaim within 20 days after service of defence and counterclaim. (R.P. 25.04[3]). Reply to defence to counterclaim, if any, must be delivered within ten days after service of defence to counterclaim. (R.P. 27.06). Pleadings are closed when plaintiff has delivered reply to every defence or time therefor has expired, and every defendant in default in delivering defence is noted in default. (R.P. 25.05). Defendant may crossclaim against co-defendant who is or may be liable to defendant for all of plaintiff's claim, is or may be liable to defendant for independent claim arising out of situation giving rise to main action or related situation or who should be bound by determination of issue between plaintiff and defendant. (R.P. 28.01[1]). Crossclaim to be included in same document as statement of defence and to be delivered within time allowed for delivery of statement of defence unless Court orders otherwise. (R.P. 28.02 and 28.03).

Third Party Claim.

Defendant may commence third party claim against nonparty in circumstances where crossclaim could be issued if nonparty already co-defendant. Rules respecting defence to third party claim and reply to defence to third party claim substantially same as for defence and reply in main action. Where appropriate, third party may defend plaintiff's claim against defendant in main action by delivering statement of defence in main action raising any defence that would be open to defendant in main action. (R.P. 29).

Amended Pleadings.

Party may amend pleading without leave, before close of pleadings, if amendment does not cause addition, deletion or substitution of party, or on consent of all parties, or with leave of court. (R.P. 26.02). On motion at any stage of action, court shall grant leave to amend on such terms as are just, unless prejudice would result that could not be compensated for by costs or adjournment. (R.P. 26.01). Form of amendments and service of amended pleadings are prescribed. (R.P. 26.03-26.06).

Particulars.

Rules for and contents of pleadings are generally prescribed. (R.P. 25.06-25.09). Where party demands particulars of allegation in opponent's pleading, and opponent fails to supply within seven days, court may order particulars to be delivered within specified time. (R.P. 25.10).

Service.

Notice of action, statement of claim, counterclaim against person not already party to main action or other originating process must be served personally or by prescribed alternative to personal service. (R.P. 16.01). Any other document may be served on lawyer of record for party by mailing copy to lawyer's office, leaving copy with lawyer or employee in his office, by telephone facsimile transmission or as otherwise prescribed. (R.P. 16.01; 16.05).

Filing.

Every pleading must be filed, marked on the face with the date of filing, the title of the action, the description of the pleading and the name, address and telephone number and registration number of lawyer filing same. (R.P. 4.02).

Foreign Claims.

In giving instructions to institute proceedings in the Province, the full names and places of residence of the proposed plaintiffs and defendants should be given, together with complete details of the claim, including all requisite dates and figures.

5.17 PRACTICE:

Most of law relating to practice is contained in Courts of Justice Act, (c. C.43), and in Rules of Civil Procedure, which are regulations made under that Act.

Case Management.

In effort to speed up litigation process, case management has been introduced in Ottawa and other parts of Ontario. (R.P. 77). All actions in Toronto, commenced after Dec. 31, 2004, are subject to Rule 78 which is alternative case-management process giving greater responsibility to parties, but actions in Toronto can still proceed under Rule 77 on consent of all parties.

Once new rules of practice come into force on Jan. 1, 2010, separate case management rules (current R.P. 77 and 78) will be removed. Single case management rule, Rule 77, will apply to proceedings in Ottawa, Toronto and Essex that have been assigned to case management by court order. Detailed criteria to be applied by court in considering whether to assign proceeding for case management will be set out.

See also category 9 Dispute Resolution, topic 9.01 Alternative Dispute Resolution.

Commercial List.

To facilitate hearing specified eligible commercial law litigation matters in Toronto, unique commercial list was established. There are special rules to expedite hearing and determination of these matters. It is still only available in Toronto.

Simplified Procedure.

Generally, all claims $50,000 or less, exclusive of interest and costs are governed by Simplified Procedure in attempt to expedite such claims. No oral discovery but provisions for summary judgment and summary trial. (R.P. 76.02, 76.04, 76.07, 76.12).

New rules of practice will increase monetary jurisdiction of Rule 76 to $100,000 and each party will be permitted to engage in up to two hours of oral examination for discovery.

Small Claims Court.

Small Claims Court has jurisdiction over all actions where amount claimed (or value of property) does not exceed $10,000 exclusive of interest and costs. (c. C.43, §23, O. Reg. 626/00, O. Reg. 258/98). On Jan. 1, 2010, maximum amount of claim in Small Claims Court will be increased to $25,000.

Discovery.

Generally, examination for discovery may be by oral examination or, at option of examining party, by written questions and answers, but examining party not entitled to subject person to both forms without leave. (R.P. 31.02). Procedures for both oral and written examinations are prescribed. (R.P. 34, 35). Party is entitled to examine for discovery any party adverse in interest once, or more than once with consent or leave, and party may examine individuals on behalf of corporation, partnership, sole proprietorship, person under disability, assignee, trustee in bankruptcy, or nominal party. (R.P. 31.03). Generally, party being examined must answer, to best of person’s knowledge, information and belief, any proper question relating to matter in issue or matter made discoverable by Rules. (R.P. 31.06). Where party, or person examined on party’s behalf, refuses to answer proper question, and has failed to furnish information in writing at least 60 days before trial, party may not introduce that information at trial, except with leave of trial judge. (R.P. 31.07). Discovery of nonparties generally unavailable but court may grant leave to examine any nonparty who there is reason to believe has information relevant to material issue, other than expert engaged by or on behalf of party in preparation for litigation. (R.P. 31.10). At trial, party may read into evidence as part of party’s own case any evidence given on examination for discovery of adverse party or person examined on behalf or in place of, or in addition to, adverse party, if that evidence is otherwise admissible unless trial judge orders otherwise. (R.P. 31.11). Procedure available for examining person residing outside Ontario. (R.P. 34.07).

Other forms of discovery include discovery of documents, documents in electronic form (R.P. 30), inspection of property (R.P. 32), and medical examination of any party whose physical or mental condition is in question in proceeding (R.P. 33). Discovery against Crown regulated by c. P.27, §8. In proceedings against Crown rules of court in which proceedings are pending as to discovery and inspection of documents and examination for discovery apply in same manner as if Crown were corporation, except that Crown may refuse to produce documents or answer questions on ground that production or answer would be injurious to public interest.

Request for Admission of Facts.

At any time, party may serve request to admit on any other party, requesting admission, for purposes of proceeding only, truth of fact or authenticity of document. Party has 20 days after service to respond to request or is deemed to admit. (R.P. 51.03). Cost consequences may flow from denial of or failure to admit anything that should have been admitted. (R.P. 51.04, 57.01). See also topic Pleading concerning deemed admissions of allegations not denied in statement of defence.

Direct Actions Against Insurer.

See category 23 Transportation, topic 23.03 Motor Vehicles, subhead Direct Actions.

See also topics 5.02 Actions, Appeal and Error, Depositions and Discovery, Injunctions, Judgments, Pleading, Process; categories 8 Debtor and Creditor, topics Attachment, Executions, Garnishment; Dispute Resolution, topic Alternative Dispute Resolution.

5.18 PROCESS:

Commencement of Proceeding.

Rules of Civil Procedure contemplate two types of civil proceedings: Actions and applications. Generally, application is summary proceeding in which judge is asked to determine questions of law where there are no material facts in dispute. Under Rules, every proceeding must be by action except where statute or Rules (R.P. 14.02) provide that proceeding may be brought by application.

General Requisites.

Most proceedings commenced in court having jurisdiction by issuance of statement of claim, notice of application, or by notice of action. Form and content of notice and pleadings are prescribed. (R.P. 14).

By Whom Issued.

All civil proceedings are commenced by issuance of originating process by registrar of court in which proceeding is to be commenced. Counterclaim that is only against present parties to main action, and crossclaim, are commenced by delivery of pleading containing counterclaim or crossclaim, and need not be issued. (R.P. 14.01[2]). Originating process is issued by registrar's act of dating, signing and sealing pleading with court seal and assigning to it court file number. (R.P. 14.07).

Case Management.

Process in case managed actions is different and strictly controlled. (R.P. 77).

Who May Serve.

Service may be effected by any literate person.

Personal service on individual is effected by delivering to and leaving with the person to be served a true copy of the process to be served. The original need not be produced. (R.P. 16.02[2]).

Personal service on minor is effected by leaving copy of document with litigation guardian or minor, and where minor resides with parent or other person having care or lawful custody of minor, by leaving another copy of document with that person, but where proceeding is in respect of minor's interest in estate or trust, minor shall be served by leaving copy of document bearing minor's name and address with Children's Lawyer. (R.P. 16.02[j]).

Personal Service on Incompetent.

Personal service on person who has been declared mentally incompetent or incapable of managing own affairs is effected by leaving copy of document with guardian or attorney acting under validated power of attorney for personal care with authority to act in proceeding. Where no guardian or attorney under validated power of attorney for personal care, by leaving copy with attorney under power of attorney to act in proceeding and with person. If neither guardian nor attorney with authority to act in proceeding, copy of document bearing person's name and address to be left with Public Guardian and Trustee and person.

Personal service on partnership is effected by service on one or more of the partners or at the principal place within the Province of the business of the partnership, on any person having the control or management of the partnership business there.

Personal service on domestic corporation is effected by service on an officer or agent of corporation, or with person at any place of business of corporation who appears to be in control or management of that place of business.

Personal service on foreign corporations is effected by service on any person having the control or management of the business of the corporation within Province.

Personal Service Outside Province.

Service of originating process or other document outside Ontario in state that is contracting state to Convention on Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters (the Hague, 1965) to be served in manner provided for in convention. Otherwise service of originating process or other documents to be made in manner set out in Rules of Civil Procedure or in manner provided by law in jurisdiction where service to be made if service in such manner could reasonably be expected to come to notice of person to be served. Under Rules of Civil Procedure, party to action or proceeding may, without court order, be served out of Ontario where action or proceeding consists of claim for or in respect of real or personal property in Ontario or administration of estate of deceased person in respect of real property in Ontario; where action is in respect of personal property in Ontario or administration of personal property in Ontario of deceased person who at time of death was resident in Ontario; where will affecting real or personal property in Ontario or personal property of deceased person who at time of death was resident in Ontario is sought to construed; where action is against trustees in respect of execution of trusts of property within Ontario; where action is upon mortgage, charge or lien on property within Ontario; where action is founded on breach of contract or tort committed within Ontario; where parties to contract have agreed that courts of Ontario are to have jurisdiction; where damages are sustained in Ontario arising from tort or breach of contract committed elsewhere; where any relief is sought against any person ordinarily resident or carrying on business in Ontario; where person to be served is necessarily or properly party to action properly brought against another person duly served within Ontario; where action is founded on judgment; where by statute claim may be made by action commenced in Ontario; and, where claim is for contribution, indemnity or other relief over in respect of any claim made against defendant in action commenced in Ontario. (R.P. 17.02). Party to action or proceeding may be served outside of Ontario with leave of court for circumstances falling outside of R.P. 17.02. (R.P. 17.03).

Party who has been served out of Ontario, may, before delivering defence, notice of intent to defend or notice of appearance, apply for order setting aside service or, in alternative, for order staying proceedings. (R.P. 17.06).

Nonresident Motorist.

See category 23 Transportation, topic 23.03 Motor Vehicles, subhead Action Against Nonresident.

Substituted service by advertisement or otherwise may be ordered when the person to be served is evading service. (R.P. 16).

Proof of service by manner set out in Rules of Civil Procedure, by law of jurisdiction where service is made or in accordance with Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters (The Hague, 1965). Generally service proven by affidavit of person making service setting out date and manner of service, person served, identifying document served and address where service made.

5.19 REPLEVIN:

Where goods, chattels, deeds, bonds, debentures, promissory notes, bills of exchange, books of account, papers, writings, valuable securities or other personal property or effects have been wrongfully distrained or wrongfully taken or detained, owner or person lawfully entitled to possession of property may bring action requesting interim order for recovery of personal property and for damages. (c. C.43, §104).

Proceedings.

Action is commenced like any other action and, after statement of claim is issued, interim order for recovery of personal property may be obtained on motion, in urgent cases ex parte. Such motions must be accompanied by supporting affidavits. Court may grant interim order for recovery of personal property: (1) subject to posting of security by plaintiff in amount twice the value of property, or any amount in its discretion; and (2) directing sheriff to take property, detain it or deliver it to plaintiff. Alternatively, court may order defendant to post security and direct that property remain in possession of defendant. Security may be by bond. (R.P. 44).

Repossession.

The defendant may apply to the court to discharge, vary or modify the order or to stay proceedings, or for any other relief with respect to the return, safety or sale of the property. (R.P. 44.05).

Execution of Order.

Order of recovery is executed by sheriff who must: (1) ascertain that security is given before executing order; (2) serve defendant with order when property recovered or soon thereafter; and (3) report to plaintiff after attempt to enforce or within ten days of service of order on defendant. (R.P. 44.07).

Judgment.

After recovery order has been executed or denied, action proceeds like any other action and security secures any judgment which defendant or plaintiff may recover.

Small Claims Court Cases.

Where value of goods detained does not exceed $10,000, replevin suit may be brought in small claims court. As of Jan. 1, 2010, replevin suit may be brought in Small Claims Court, where value of goods determined does not exceed $25,000.

5.20 SEQUESTRATION:

Property may be taken into legal custody to preserve it during litigation or to compel compliance with a judgment or order.

During Litigation.

Court may make interim order for custody or preservation of any property in question in proceeding or relevant to issue therein, and for that purpose may authorize entry on or into any property in possession of either party or nonparty. Where property is perishable or likely to deteriorate or for other reasons ought to be sold, court may order sale. Where right to specific fund is in question, court may order funds paid into court or posting of security therefor. (R.P. 45.01[1], [2], 45.02).

After Judgment or Order.

Writ of sequestration, directing sheriff to take possession, and hold property, of person against whom order has been made, and to collect and hold any income from that property until person complies with order, may be issued only with leave of court, which is to be obtained on motion. Court may grant leave only where satisfied that other enforcement measures are likely to be ineffective, and may order that writ be enforced against all or part of person's real and personal property. (R.P. 60.09). Where corporation is in contempt of order, judge may grant leave to issue writ of sequestration against any officer or director of corporation. (R.P. 60.11[6]).

5.21 SERVICE:

See topic 5.18 Process.

5.22 SUBMISSION OF CONTROVERSY:

Special Case.

Where parties to proceeding concur in stating question of law in form of special case, any party may move before judge to have special case determined, which judge may hear and determine, if satisfied that determination of such question may dispose of all or part of proceeding, substantially shorten hearing, or result in substantial cost savings. (R.P. 22.01). Special case to be in prescribed form, including agreed statements of material facts and relief sought. (R.P. 22.04). On hearing case, court may draw any reasonable inferences from facts and may, on determination of question of law, make order or grant judgment accordingly. (R.P. 22.05).

Determination of Issue Before Trial.

Either party may move before judge before trial for determination of any question of law raised by pleading where outcome may dispose of all or part of action, substantially shorten trial, or result in substantial costs saving. Either party may move before judge to strike pleading as disclosing no cause of action or defence. No evidence is admissible on such motions generally, but parties are required to deliver factums containing concise statements of facts and law to be relied on. (R.P. 21.01-R.P. 21.03).

Construction of Contract.

Where the rights of the parties depend upon the construction of any contract or agreement or where it is unlikely there will be any material facts in dispute, such rights may be determined upon notice of application. Contract or agreement may be construed before there has been breach thereof. (R.P. 14.05[3]).

5.23 VENUE:

In statement of claim, plaintiff must name as place of trial place where court normally sits in county in which plaintiff proposes that action be tried, but where statute requires trial in particular county, plaintiff must name as place of trial place where court normally sits in that county. (R.P. 46.01). Trial is held at place named in statement of claim unless court makes order changing venue. (R.P. 46.01).

Change of Venue.

Where plaintiff named venue other than that required by statute, court will order, on motion by any party, that trial be held at place required. In addition, court may order, on motion by any party, that trial be held at place other than that named in statement of claim if satisfied that transfer is desirable in interests of justice, or that it is likely that fair trial cannot be held at place named by plaintiff. (R.P. 13.1.02 and 46.03). Where party moves to change venue, prior agreement as to place of hearing is not binding, but may be considered by court. (c. C.43, §114).

6 COURTS AND LEGISLATURE

6.01 COURTS:

Court of civil and criminal jurisdiction is Court of Ontario which is comprised of two divisions: Superior Court of Justice and Ontario Court of Justice. Superior Court of Justice has unlimited monetary jurisdiction and sits in each of eight judicial regions of province. Divisional Court is branch of Superior Court of Justice having appellate jurisdiction in certain instances. See category 5 Civil Actions and Procedure, topic 5.03 Appeal and Error. Small Claims Court is also branch of Superior Court of Justice with monetary jurisdiction of $10,000. Branch of Superior Court of Justice known as The Family Court has jurisdiction only in limited areas of province. (c. C.43, §21.1[4]). Ontario Court of Justice combines former jurisdictions of Criminal Division and Family Division of Provincial Court as well as Provincial Offences Court. General appellate court remains Court of Appeal for Ontario. See category 5 Civil Actions and Procedure, topic 5.03 Appeal and Error.

As a result of reorganization of Ontario court system there are changes in names of various courts. Throughout Ontario Law Digest, references to Ontario Court (General Division), Supreme or High Court, District Court, Surrogate Court and Small Claims Court are now to Superior Court of Justice.

Appellate Courts.

See category 5 Civil Actions and Procedure, topic 5.03 Appeal and Error.

6.02 JUSTICES OF THE PEACE:

(c. J.4).

Justices of the peace perform certain judicial functions, particularly under Criminal Code and Provincial Offences Act. Their jurisdiction includes power to issue summonses and arrest warrants, to conduct certain bail hearings and to preside at trials of persons charged with provincial offenses.

Appointment and Removal.

Justices of the peace are appointed by provincial government following recommendations by Justices of the Peace Appointments Advisory Committee. They can be removed from office only by executive order based on evidence of incapacity or failure to perform duties; such order can be made only if Review Council, having conducted inquiry, recommends removal. (§8). Review Council monitors appointment and conduct of justices of peace (§§9-11).

Powers and Jurisdiction.

All judges are justices of peace. (c. J.4, §5). Justices of peace have jurisdiction throughout Ontario. (§17[1]). They perform duties and exercise powers conferred upon them by federal or provincial statute.

6.03 LEGISLATURE:

Province is divided into electoral districts with each district electing one member to sit in Legislative Assembly.

6.04 REPORTS:

Decisions of the superior courts of the Province are reported by authorized reporters who are appointed by the Law Society. Until 1901, there were three series of authorized reports: The Ontario Appeal Reports containing decisions of The Court of Appeal, Ontario Reports and The Ontario Practice Reports containing decisions of the high court. In 1901, The Ontario Law Reports series was commenced containing decisions of all superior courts. In 1931, it was succeeded by The Ontario Reports series.

The most important Ontario reports are as follows: Upper Canada Queens Bench (U.C.Q.B.) 1844-1882; Upper Canada Common Pleas (U.C.C.P.) 1850-1882; Grant's Chancery Reports (Gr.) 1849-1882; Ontario Reports (O.R.) 1882-1900; Ontario Appeal Reports (A.R.) 1876-1900; Practice Reports (P.R.) 1850-1900; Ontario Law Reports (O.L.R.) 1901-1931; Ontario Weekly Reporter (O.W.R.) 1902-1915; Ontario Weekly Notes (O.W.N.) 1909-1962; Ontario Reports (O.R.) 1931-1973; Ontario Reports 2nd Series (O.R. [2d]) 1974-1990; Ontario Reports 3rd Series (O.R. [3d]) 1991. . . .

6.05 STATUTES:

Latest revision is Revised Statutes of Ontario, 1990. Subsequent acts are in annual Statutes of Ontario. Regulations made under authority of statutes are consolidated in Revised Regulations of Ontario 1990, with amendments published in Ontario Gazette.

7 CRIMINAL LAW

7.01 CRIMINAL LAW:

Criminal law is within exclusive federal competence. (See Canada Law Digest, topic 7.01 Criminal Law.) Provinces can enact quasi-criminal offences. Statutes include: Highway Traffic Act, c. H.8; Smoke-Free Ontario Act, 1994, S.O. 1994, c. 10 (formerly Tobacco Control Act, 1994, S.O. 1994, c. 10); Liquor Licence Act, c. L.10. Provincial Offences Act, c. P.33 governs prosecutions for provincial offences. Canadian Charter of Rights and Freedoms applies to provincial offences. (See Canada Law Digest, topic 7.01 Criminal Law.)

Various laws assist victims of criminal offences. Compensation of Victims of Crime Act, c. C.24, provides for compensation to victims of violent crime or their dependants. Victims Bill of Rights, 1995, S.O. 1995, c. 6, contains general principles on treatment of victims. Remedies for Organized Crime and Other Unlawful Activities Act, 2001, S.O. 2001, c. 28 provides civil remedies to persons suffering losses as result of unlawful activities.

8 DEBTOR AND CREDITOR

8.01 ASSIGNMENTS:

Any absolute assignment in writing signed by the assignor, not purporting to be by way of charge only, of any debt or other legal chose in action of which express notice in writing has been given to debtor or trustee, transfers legal right to such debt or chose in action from date of such notice together with all legal and other remedies, and power to give good discharge, subject to all equities entitled to priority. (c. C.34, §53). Equitable assignments are also valid and enforceable in accordance with principles of equity.

Actions.

Assignee of debt or other chose in action may, if assignment is absolute and debtor has received written notice, sue in his own name. Assignee of debt or other chose in action which is not absolute and/or of which debtor has not received notice must join assignor. (R.P. 5.03[3], c. C.34, §53).

Assignment of Accounts.

See category 20 Mortgages, topic 20.05 Personal Property Security.

Assignment of Wages.

Any assignment by debtor of any part of his wages to secure payment of debt, except assignment to credit union to which Credit Unions and Caisses Populaires Act applies is invalid. Generally, debtor may assign up to but not exceeding 20% of his wages to such credit union. (c. W.1, §7).

8.02 ASSIGNMENTS FOR BENEFIT OF CREDITORS:

See Canada Law Digest, category 8 Debtor and Creditor, topic 8.02 Bankruptcy.

8.03 ATTACHMENT:

Where a resident person has departed from the Province with intent to defraud his creditors or to avoid being arrested or served with process, and was, at time of departure, possessed of real or personal property not exempt from seizure, creditor may in a pending action, on application to judge of Superior Court of Justice, on affidavits showing these facts, obtain order for attachment of all debtor's property not exempt from seizure. (c. A.2, §§2, 3).

Attachment Bond.

No bond is required from creditor unless, at his request, livestock or perishable goods which have been attached are sold by sheriff (c. A.2, §8), or action is taken by sheriff against persons paying debts to debtor after notice of attachment (c. A.2, §14).

Levy.

Attachment is levied by actual seizure of the lands and tangible personalty of debtor, by giving notice to persons owing debts to debtor or holding property on behalf of debtor, and by notifying corporations in which debtor owns shares.

Release of Property.

The debtor may obtain the release of the property attached by filing sufficient bond in double the appraised value that he will pay into court on order the value of the goods or so much thereof as will satisfy all claims. (c. A.2, §12).

Sale.

Property attached, including debts, may be sold under order of the court. Livestock, perishable goods or other property attached which cannot be safely or conveniently taken care of may be sold by sheriff at auction on request of creditor provided security in double appraised value is given.

Attachment to Benefit of all Creditors.

Creditor who attaches debt is deemed to do so for benefit of all creditors. (c. C.45, §3).

Third Party Claims.

Other creditors if they place attachments in sheriff's hands within two months share pari passu with attaching creditor. (c. C.45, §5).

8.04 BONDS:

The security to be given in civil proceedings where interim order for recovery of personal property is made must either be bond of insurer licensed under Insurance Act to write surety and fidelity insurance or personal bond with sureties who must be approved by court. (R.P. 44.04). As to security for costs, court has discretion. (R.P. 56.04).

8.05 CONSTRUCTION LIENS:

See topic 8.14 Liens.

8.06 CREDITORS' SUITS:

Action may be brought by any creditor against debtor or debtor's estate unless debtor is bankrupt. To expedite proceedings creditor may move for summary judgment (see category 5 Civil Actions and Procedure, topic 5.13 Judgments, subhead Summary Judgment). Where claim has value of $50,000 or less there are cost consequences for not proceeding under applicable rules or in appropriate court.

See category 5 Civil Actions and Procedure, topics 5.13 Judgments, 5.14 Limitation of Actions, 5.16 Pleading, 5.17 Practice, 5.18 Process.

8.07 EXECUTIONS:

Judgments or orders for payment or recovery of money or for recovery of personal property may be enforced by writs of seizure or sale, garnishment, writ of sequestration or appointment of receiver. Order requiring person to do any act, other than payment of money, or to abstain from doing any act, may be enforced by contempt proceedings. (R.P. 60).

Kinds of Execution.

Execution may be obtained by writs of seizure and sale, possession, delivery, attachment or sequestration, by appointment of receiver, by warrants of committal or by garnishee or replevin orders.

Exemptions.

See topic 8.08 Exemptions.

Time for Issuance.

Execution may be issued without leave at any time within six years from date of judgment, but leave is required after six years has elapsed or if enforcement of order is subject to fulfillment of term or condition. (R.P. 60.07[1-2]). It may be renewed before its expiration six years from issuance for further period of six years (R.P. 60.07[6]–[19]) and succeeding renewals in like time may extend force of judgment even after 20 years.

Stay.

On delivery of notice of appeal from any order, final or interlocutory, until disposition of appeal, any provision for payment of money (except provision that awards support or enforces support order) is stayed. (R.P. 63.01). Any order, including exceptions above, may be stayed by order of court whose decision is to be appealed, subject to expiry, or by order of judge of appeal court. (R.P. 63.02). Generally, where order is stayed, no steps may be taken under order or for its enforcement, but stay does not prevent issue or filing of writ of execution. (R.P. 63.03).

Lien.

Lands of defendant are bound from moment of delivery of writ of execution to sheriff of county or district in which lands are situated, or, in case of lands under Land Titles system, upon filing in appropriate land titles office and satisfying proper master of titles that name of execution debtor and name of registered owner as it appears in records of land titles office represent same person. Personal property except as to bills of sale, chattel mortgages, is bound only as against persons with actual notice that writ of execution has been delivered to sheriff and is unexecuted. (c. E.24, §9).

Levy.

Execution issued to enforce any judgment affects real and personal property of defendant in county or union of counties or district over which sheriff to whom it is directed has authority. Included with lands of the defendant subject to seizure are lands held in trust for him and any interest of his in lands held in joint tenancy.

Priorities among execution creditors have been abolished. Exception is support or maintenance order, which has priority over other judgment debts. Priority is limited (i) if order is for periodic payments to amount of arrears owing under order at time of seizure or attachment; or (ii) if order is for lump sum payment, to amount of lump sum. (c. C.45, §4).

Claims of Third Persons.

Creditors Relief Act (c. C.45) abolishes priority among creditors with judgments; proceeds of any execution distributed rateably among creditors who have filed executions with Sheriff; there is similar procedure for garnishments affecting Small Claims Court judgments.

Sale.

Real and personal property of debtor may be sold by sheriff to satisfy judgment. Where personal property is seized under writ of seizure and sale, sheriff must, upon request of debtor, deliver inventory of property seized before, or within reasonable time after, removal from premises. Personal property not to be sold unless notice of time and place of sale is mailed to both creditor and debtor at least ten days before sale and is published in local newspaper. No sale of land may be held until six months after filing of writ with sheriff, and until 30 days notice of sale has been given to debtor, creditor and public. (R.P. 60.07[14]–[23]).

Supplementary proceedings are available for purpose of working out relief which should flow from a judgment or order which has already been given or granted. The judgment debtor may be examined once a year (unless court orders otherwise) as to estate and effects of debtor, and as to property and means he had when debt or liability was incurred, and as to property or means he still has of discharging judgment, and as to disposal he has made of any property since contracting debt or incurring liability, and as to any and what debts are owing to him; and if it is ascertained that judgment debtor has fraudulently disposed of any of his property for purpose of defeating his creditors, transfer or conveyance of such property may be set aside and property itself made exigible in execution. So also any debts which may be owing to debtor may be garnisheed. Where difficulty arises concerning enforcement of order, court may permit such examination of person other than debtor who may have knowledge of matters set out above.

If judgment debtor, upon his examination discloses that his property has been concealed or made away with to defeat claim, he may be liable to committal if contempt order is made against him. (R.P. 60.18).

Equitable Execution.

Provision is made for the appointment of a receiver after judgment by way of equitable execution.

8.08 EXEMPTIONS:

Following chattels are exempt from seizure under any writ issued out of any court and claims of creditors after death: (1) Necessary and ordinary wearing apparel of debtor and his or her family not exceeding prescribed amount, or it no amount is prescribed, $5,000 in value; (2) household furniture, utensils, equipment, food and fuel that are contained in and form part of permanent home of debtor not exceeding prescribed amount, or if no amount is prescribed, $10,000 in value; (3) in case of debtor not engaged solely in tillage of soil or farming, tools and instruments and other chattels ordinarily used by debtor in debtor's business, profession or calling not exceeding prescribed amount, or if no amount is prescribed, $10,000 in value; (4) in case of person engaged solely in tillage of soil or farming, live stock, fowl, bees, books, tools and implements and other chattels ordinarily used by debtor in debtor's business or calling not exceeding prescribed amount, or if no amount is prescribed, $25,000 in value; (5) in case of person engaged solely in tillage of soil or farming, sufficient seed to seed all person's land under cultivation, not exceeding 100 acres, as selected by debtor, and 14 bushels of potatoes, and, where seizure is made between first day of Oct. and 30th day of Apr., such food and bedding as are necessary to feed and bed live stock and fowl that are exempt under this section until 30th day of Apr. next following; (6) motor vehicle not exceeding prescribed amount or, if no amount is prescribed, $5,000 in value. Above exemptions are not available to corporate debtors. (c. E.24, §§2, 7).

Debts Against Which Exemptions Not Allowed.

No article, except beds, bedding, and necessary wearing apparel, is exempt from seizure in satisfaction of a debt contracted for purchase of such article. (c. E.24, §7). Only exemptions for tools, instruments and chattels used by debtor in ordinary course of business apply in respect of debt for maintenance of spouse or child. (§7).

Earnings.

Except for purposes of support order (c. W.1, §7), 80% of wages are exempt from seizure or attachment, provided that judge upon hearing of matter may reduce or increase percentage of exemption. Payments from insurance or indemnity scheme that are intended to replace income lost because of disability are deemed to be wages governed by this exemption. Debtor may apply to judge for release of garnishment. (c. W.1, §7). Only valid wage assignment is to credit union for portion of wages not exempt. (c. W.1, §7). See topic 8.01 Assignments, subhead Assignment of Wages.

Homestead Exemption.

See topic 8.11 Homesteads.

8.09 FRAUDULENT SALES AND CONVEYANCES:

Every conveyance of real or personal property made with or without consideration with intent to defeat or delay creditors is void against creditors or others, and their assigns except where person to whom such property is conveyed took bona fide upon good consideration without notice or knowledge of the intent. Every conveyance of real property with intent to defraud purchaser is deemed void only against purchaser, assigns or those claiming under him. Exception: a conveyance bona fide upon good consideration. (c. F.29). Such transactions, unless expressly exempt under Assignments and Preferences Act (c. A-33, §5) made by person when insolvent or unable to pay person's debts in full or when person knows they are on eve of insolvency, made with intent to give unjust preference to creditor over other creditors, are void (c. A-33, §4).

Creditors' remedies are by way of action to set aside conveyance, or, if debtor in bankruptcy, by motion in bankruptcy court by trustee in bankruptcy.

Bulk Sales.

In a “sale in bulk,” defined as “a sale of stock in bulk out of the usual course of business or trade of the seller,” (§1) statutory requirements protect trade creditors of seller, except where sale in bulk is by executor, administrator, committee of estate of incompetent person, secured creditor, receiver, trustee or public official under judicial process (§2). Sale in bulk is voidable at suit of creditor or trustee in bankruptcy of seller unless buyer complied with Act. If sale set aside buyer personally liable for value of stock in bulk. Before sale, buyer must obtain from seller statutory declaration giving names and addresses of all creditors. Before obtaining such declaration, buyer may pay seller sum not exceeding 10% of purchase price which is subject to statutory trust. When declaration is obtained sale may then be carried through if claims of all secured trade creditors and unsecured trade creditors each do not exceed $2,500, or if all such creditors have been paid in full, or if adequate provision has been made for payment upon completion of sale to all such creditors who have not submitted waivers. “Creditors” here only includes those of whom buyer has notice. Otherwise, proceeds of sale must be delivered by buyer to trustee, consent to sale obtained from 60% of unsecured creditors with claims of $50 or more and affidavit produced by seller stating that all creditors have received copy of sale contract, list of trade creditors, and statement of affairs. Bankruptcy and Insolvency Act governs priority of distribution of proceeds by trustee. Within five days after completion of sale, buyer’s affidavit together with copies of all documents must be filed at Superior Court of Justice with local registrar where stock located at time of sale. No actions can be taken to void sale after six months from date of this filing. Seller may apply to judge to exempt sale from Act where it is advantageous to seller and it will not impair his ability to pay creditors. Statute prescribes forms for seller’s statement of creditors, waiver, consent and statement of affairs. (c. B.14). Every person purchasing stock through sale in bulk must obtain from vendor duplicate copy of certificate furnished under §6(1) of Retail Sales Tax Act. (c. R.31).

8.10 GARNISHMENT:

Judgment creditors may enforce order for payment or recovery of money by garnishment of debts payable by other persons to debtor. Creditor must file requisition for garnishment, copy of order, any other evidence establishing amount awarded and creditor’s entitlement, and prescribed affidavit evidence relating to amount owing to creditor and names and addresses of those persons who are or will become indebted to debtor. Upon filing, registrar issues notices of garnishment which must be served on debtor and each garnishee by ordinary mail or by personal service or alternative thereto.

Once served garnishee is liable to pay to sheriff all such debts, up to amount shown in notice, within ten days or later of time of service or time debt becomes payable. Garnishment applies to debts payable within six years after service of notice. Payment to sheriff discharges debt. If garnishee makes payment to any other person garnishee remains liable to pay debt in accordance with notice. Garnishee may dispute garnishment by filing garnishee statement with court and serving it on creditor and debtor within ten days after service of notice. (R.P. 60.08). Where garnishee receives garnishment notice and debt is owed to judgment debtor and another person(s), garnishee pays sheriff one-half indebtedness or greater or lesser amount specified in order made at garnishment hearing. (R.P. 60.08[1.1]).

Eighty percent of debtor’s wages are exempt from garnishment, except exemption is reduced to 50% for order for support or maintenance. (c. W.1, §7). See topic 8.08 Exemptions, subhead Earnings. Where in personal account other than joint account, funds of debtor in bank account may be attached either by way of garnishment or by writ of seizure and sale directed to sheriff in district in which account located.

8.11 HOMESTEADS:

There is no exemption of real property from execution on the ground that it is a homestead.

8.12 INSOLVENCY:

See Canada Law Digest, category 8 Debtor and Creditor, topic 8.02 Bankruptcy.

8.13 LEVY:

See topics 8.03 Attachment, 8.07 Executions.

8.14 LIENS:

Major statutory liens are: Builders', suppliers' and workers' (c. C.30); corporations' on shares (c. B.16); innkeepers' (c. I.7); vendor's (chattels) (c. S.1); and forestry workers' lien for wages (c. F.28).

Major common law liens are: Auctioneers', bailees', carriers', solicitors', and vendors' lien (land).

Enforcement.

The general remedy for enforcement of liens is by retention of the property subject thereto; but there are certain statutory powers of sale and remedies with respect to some liens. There is no right of redemption after a sale.

Construction Lien Act (c. C.30).

Act applies to all contracts and subcontracts for supply of labour or materials to be used in any alteration, addition or repair to, or any construction, erection or installation on any land, building or structure, including demolition or removal (referred to herein as "improvement"). Person who supplies services or materials to improvement has lien on interest of owner in amount of lesser of amount earned but unpaid under claimant's contract or subcontract, and claimant's pro rata share of holdbacks required to be maintained by contractual payer of claimant's defaulting contractual payer's. Act defines "owner" to include any person with interest in improved premises at whose request (broadly speaking) supply was made, and includes tenant. Said holdbacks are equal to 10% of value of services and materials supplied under each contract or subcontract under which lien may arise ("statutory holdback") plus amount of any lien for which payer has received written notice from claimant, from time to time ("notice holdback"), which must be deducted from any payments to be made by payer and retained until liens which may be claimed against said holdbacks expire, have been satisfied, discharged, or vacated upon posting of security.

Except where preserved as described below, lien for services or materials supplied under contract (between claimant and owner of improved premises) or subcontract (between claimant and any other person supplying improvement) expires 45 days after: (i) in case of contract, completion or abandonment of contract; (ii) in case of subcontract, date on which claimant last supplies services or materials to improvement pursuant to subcontract, or on which said subcontract is certified as complete in accordance with terms of Act; (iii) in either case, date of publication of certificate of substantial performance called for in contract in respect of improvement to which claimant supplied, but where contract calls for certification of substantial performance, said holdbacks must only be retained in respect of labour and materials supplied prior to date that substantial performance is actually certified, and separate holdback, statutory holdback and notice holdback must be retained in respect of remaining services or materials actually supplied. Lien may be preserved by registering claim for lien in prescribed form prior to expiry in proper land registry office. Preserved lien must be perfected within 45 days after deadline for its preservation. Preserved lien may be perfected by issuing and registering certificate of action issued from Ontario Court (General Division) in applicable land registry office. Where lien is in respect of improvement to land of which Crown is owner, or of public street or right-of-way owned by municipality, or of railway right of way, lien may be preserved by giving copy thereof to owner in manner specified in Act prior to expiry, and it may be perfected by commencing action to enforce lien as above, but without requirement of obtaining or registering certificate of action. Lien may be vacated by posting of security with Court as described in Act (§44), including security for costs. Perfected lien expires immediately after second anniversary of commencement of action that perfected lien, unless, on or before that anniversary, any lien action in which lien may be enforced (including any lien extant, whether or not vacated, in respect of same lands) is set down, or order is made for trial thereof. (§37[1]).

Owner is trustee, and contractor is beneficiary of trust fund made up of following: all amounts received by owner other than Crown or municipality, that are to be used in financing of improvement; all amounts certified as payable under contract, or unpaid value of substantially performed portion of contract, which is in owner's hands or later comes into owner's hands; and net sale proceeds of improved premises. Contractor or subcontractor ("trade trustee") is trustee of all amounts owing to or received by trade trustee, on account of contract or subcontract price of services or materials supplied by trade trustee to improvement; beneficiaries of said trust fund are all persons who have supplied services or materials to improvement pursuant to subcontract with trade trustee. Trustee under Act is not allowed to appropriate or convert to its own use or to any use inconsistent with trust any portion thereof unless and until all beneficiaries of trust have been paid in full. Directors, officers and other persons controlling relevant activities of trustee, who assent to or acquiesce in actions that they know or ought to know amount to breach of trust, are liable for damages for breach.

Subject to certain exceptions stated below, liens arising from improvement have priority over mortgages affecting owner's interest in premises. Mortgage registered prior to time first lien in respect of improvement arises has priority in respect of liens arising from improvement, to extent of lesser of actual value of premises at time when first lien arose and amount advanced prior to that time. In addition, mortgage advance which is made after first lien arises, but prior to receipt of written notice thereof, or preservation or perfection thereof, or subsequent to time that all such liens have been discharged or vacated, takes priority over all liens in respect of improvement. Where mortgage is registered after first lien arises in respect of improvement, or where mortgage is taken for purpose of financing making of improvement, liens arising from improvement have priority over said mortgage at least to extent of any deficiency in holdbacks required to be retained by owner under Act, and where, prior to making of any advance, mortgagee has received written notice of lien in respect of improvement, or where such lien has been preserved or perfected and not discharged or vacated, said advance and all subsequent advances lose priority to all liens arising from improvement. Lien arises when claimant commences supplying services or materials, not when its lien is preserved.

Repair and Storage Liens Act (c. R.25).

Act sets out rights of repairer or storer to claim lien against article (defined as item of tangible personal property, other than fixture) which has been repaired or stored. Repair includes altering, restoring or improving article and transporting for purpose of making repair. Storer is person who receives any article for storage, repair or both in understanding that he will be paid, while repairer is one who repairs on understanding he will be paid. Repairer or storer has lien for amount which customer agreed to pay for services, or for fair value of service where no amount agreed upon. Repairer or storer can retain article until paid and further, Act creates nonpossessory lien rights which permit repairer or storer to retain lien rights even where article restored to customer.

Possessory lien rights permit claimant, after 60 days, to dispose of article in accordance with Act's redemption and sale provisions. Rights of possessory lien claimant have priority over all other interests in article, including any nonpossessory lien claimant. Nonpossessory lien claimants must register financing statement in Personal Property Security Act registration system to ensure lien enforceable against third parties.

Act provides procedure for distributing proceeds of any sale in accordance with specified priorities.

Carrier's Lien.

See category 3 Business Regulation and Commerce, topic 3.08 Carriers.

Execution Lien.

See topic 8.07 Executions.

Judgment Lien.

See category 5 Civil Actions and Procedure, topic 5.13 Judgments.

Solicitor's Lien.

See category 18 Legal Profession, topic Attorneys and Counselors.

Tax Liens.

See category 22 Taxation.

8.15 MECHANICS' LIENS:

See topic 8.14 Liens.

8.16 PLEDGES:

The rights and duties of pledgor and pledgee are generally governed by common law.

Pawnbrokers are subject to special legislation. (Pawnbrokers Act, c. P.6). No person may carry on trade of pawnbroker without license obtained from municipality where that person is to carry on such trade. License fee is $60 or such sum set by municipality and $2,000 security for due observation of Act must be given. If pledge is destroyed or damaged by fire or other defined peril pawnbroker is nevertheless liable to pay value of pledge after deducting sum lent, interest and charges on application within time in which pledge is redeemable. Pledge becomes absolute property of pawnbroker unless: (a) where sum lent is $15 or less, it is redeemed within one year; (b) where sum lent is more than $15 and not more than $30 and pledge has been in pawn for more than a year, it is redeemed within 15 days after notice by mail to pawner; (c) where sum lent is more than $30 and pledge has been in pawn for more than a year, it is redeemed within 15 days after notice by publication in newspaper, which notice may be published 15 days after notice mailed to pawner. No pawnbroker may deal with person who appears to be under 18 years of age. Share pledges now governed by Securities Transfer Act, 2006. See topic Personal Property Security, subhead Securities Transfer Act.

8.17 RECEIVERS:

Receiver may be appointed by interlocutory order of Court (Courts of Justice Act, c. C.43, §101 and Rules of Civil Procedure, R.R.O., Reg. 194), under Statute (i.e. Business Corporations Act, c. B-16, §248[3][b]; Construction Lien Act. c. C-30, §68[2][a]; Mining Tax Act, c. M-15, §19), or privately in accordance with mortgages, security agreements or trust deeds. In Superior Court of Justice, receiver or receiver and manager may be appointed by interlocutory order where it appears just and convenient. Order appointing receiver shall name person appointed, specify amount and terms of security, if any, to be furnished by receiver for proper performance of his duties, state whether receiver is also appointed as manager and, if necessary, define scope of his or her managerial powers and contain such directions and impose such terms as are just. (§41.03). Receiver may obtain directions at any time on motion to judge. (§41.05). Receiver may be discharged only by order of judge. (§41.06).

Proceedings.

A receiver may be appointed by interlocutory order of the court, such order to be made either unconditionally or upon such terms and conditions as the court may deem just.

Equitable Execution.

Receivers may be appointed by way of equitable execution as a means of enforcing judgments and reaching property not capable of being seized under an execution.

See Canada Law Digest, category 8 Debtor and Creditor, topic 8.02 Bankruptcy, subheads Receivers; Secured Creditors.

8.18 STAY OF EXECUTION:

See topic 8.07 Executions.

8.19 USURY:

See Canada Law Digest, category 3 Business Regulation and Commerce, topic 3.06 Interest; also category 3 Business Regulation and Commerce, topic Interest, of this Digest.

9 DISPUTE RESOLUTION

9.01 ALTERNATIVE DISPUTE RESOLUTION:

Court-based.

Mandatory nonbinding mediation required for most actions commenced in most significant Ontario cities. Mediation available privately for fee before retired judges and senior counsel with agreement of parties.

9.02 ARBITRATION AND AWARD:

At any time or, by prior agreement, parties may agree to submit disputes to arbitration by private arbitrator pursuant to Arbitration Act, S.O. 1991, c. 17. Where one or more of parties is not resident of Ontario, International Commercial Arbitration Act, c. I.9 which adopts UNCITRAL Model Law on International Commercial Arbitration, will apply. Binding resolution achieved by relying on one of these Acts. Parties bound by Acts including procedure except so far as Act permits variation by agreement. Awards final, but, if made pursuant to Arbitration Act (domestic arbitration), appealable with leave on questions of law or fact and law to Superior Court of Justice subject to contrary agreement. Awards enforceable in same manner as court judgment provided order of Superior Court of Justice is obtained. Nonbinding dispute resolution such as mediation or pretrial available subject to agreement of parties.

Consumer Protection Act, 2002, S.O. 2002, c. 30, Sch. A, prohibits agreements in consumer context from referring disputes to arbitration. Similarly, Arthur Wishart Act (Franchise Disclosure), 2000, S.O. 2000, c. 3, prohibits parties to franchise agreement from referring disputes arising thereunder to arbitration.

Powers of Arbitrators.

Arbitrator has power to rule on questions of his own jurisdiction, administer oaths to parties and witnesses; to request determination of question of law by Superior Court of Justice; and to correct any clerical error in award. (c. C.17, §§17, 29, 44).

Enforcement of Award.

Award may, by way of application to Superior Court of Justice, be enforced in same manner as court judgment. (c. C.17, §50).

Enforcement of Foreign Arbitral Award.

Foreign arbitral award may be recognized by way of application to Superior Court of Justice. If recognized, award is enforceable in same manner as judgment or order of court. UNCITRAL Model Law on International Commercial Arbitration adopted, with amendments, as law of Ontario.

10 DOCUMENTS AND RECORDS

10.01 ACKNOWLEDGMENTS:

There is no provision in Ontario for the acknowledgment of instruments before a notary.

10.02 AFFIDAVITS:

Affidavits may be sworn or affirmed before following officers:

Within the Province: Members of Assembly, barristers and solicitors, provincial judges and justices of peace are ex officio commissioners. Clerk, deputy clerk, and treasurer of every municipality is ex officio commissioner for that municipality and in case of municipality which is not county, metropolitan or regional municipality for county, regional or metropolitan municipality in which his municipality is situate. Head of every municipal council, reeve of every town, every deputy reeve and every controller and alderman of municipality and certain administrative officials in municipalities having population of 100,000 are ex officio commissioners within their respective counties, districts or regional and metropolitan municipalities. (c. C.17, §1, as am'd by S.O. 2002, c. 18, Sched. A, §§3[1], 21[3]). Power to take affidavits may be conferred on certain officers of Canadian and Ontario governments in connection with official duties; on secretary, treasurer, or principal branch officers of corporations and cooperative corporations in connection with corporate affairs; and on certain other persons in connection with court matters. (c. C.17). Such commissions may be limited in time or area.

Outside the Province: A notary public, a commissioner for taking affidavits, an officer of Her Majesty's diplomatic or consular services, an officer of the Canadian diplomatic, consular or representative services, a Canadian trade commissioner, a mayor or chief magistrate of a municipality, a judge of a court of record, a magistrate, an officer of a court of justice, a commissioner authorized to take affidavits in Ontario and, in other provinces of Canada and in the United Kingdom, certain other officials. The official taking affidavits for use in Ontario should sign name, state his or her office below signature and affix official seal, or seal of municipality, consulate, court, etc., if any. (c. E.23, §45).

Armed Services.

Affidavits may be sworn to within or without the province before a commissioned officer on full time service in the Canadian Forces. Rank and unit must be stated below signature.

Authentication.

The signature and official seal of an officer taking affidavits out of Ontario need not be further authenticated in order to be admitted in evidence. The signature and official seal of an officer taking affidavits within Ontario may be authenticated by Provincial Secretary, or in certain cases by clerk of county or district court where the officer resides.

General Requirements.

Every affidavit must be sworn or affirmed by deponent in presence of officer taking affidavit, who must satisfy self of genuineness of signature of deponent, and who must administer oath in manner required by law before signing jurat. Oath may be administered to any person while holding copy of Old or New Testament without requirement to kiss same, or in such other manner and form and with such ceremonies as may be declared to be binding. Where person objects to swearing affidavit on conscientious grounds or for reasons of religious belief, affirmation or declaration is of same effect as oath. (c. E.23, §17). Affidavits must be confined to statement of facts within personal knowledge of deponent or to other evidence that deponent could give if testifying as witness in court (R.P. 4.06[2]) but, in certain cases, may include deponent's information and belief if source thereof and fact of belief is specified in affidavit (R.P. 39.01[4], [5]).

Use of Affidavit.

Use of affidavits is generally confined to judicial proceedings but may be required elsewhere by statute. Affidavit evidence may, in certain cases, be used in action. Its general use is confined to motions and applications.

Alterations, etc.

Every alteration, interlineation or erasure in body of affidavit or in jurat must be authenticated by initials of person taking same (R.P. 4.06[9]) by placing tick-mark on either side of alteration, etc., and putting initials in margin. Alterations, etc., in body of affidavit should also be initialled by deponent.

Form

The affidavit should have a heading containing the name of the court and the title of proceedings. Affidavits must be drawn up in the first person stating the name of the deponent in full, residence and occupation, and must be signed by the deponent. The officer taking the affidavit must indicate the date when officer's commission expires, unless appointment is for life, and must affix seal if any. Officer should type or legibly print his or her name beneath signature. Where exhibit is referred to in affidavit it must be marked by person taking affidavit; where the exhibit is referred to as being attached to affidavit it must be so attached and where practical where the exhibit is a document it must be served with the affidavit. (R.P. 4.06[3]).

Jurat.

The jurat is as follows: Sworn before me at the. .. . . . of. . . . . in the. . . . . of. . . . . ., on. . . . . Where there are two or more deponents of affidavit there must be separate jurat for each deponent unless all deponents make affidavit before same person at the same time with one jurat containing the words "Sworn (or affirmed) by the above-named deponents". (R.P. 4.06[4]).

10.03 COMMISSIONS TO TAKE TESTIMONY:

See category 5 Civil Actions and Procedure, topic 5.09 Depositions and Discovery.

10.04 NOTARIES PUBLIC:

(c. N.6).

Appointment.

Appointed by provincial Attorney General or by public servant to whom AG has delegated specific power of appointment. Applicants for appointment who are not barristers and solicitors are subject to examination as to qualifications by judge or other specially appointed examiner.

Bond.

No bond is required.

Powers.

A notary has the power of drawing, passing, keeping and issuing all deeds and contracts, charter-parties and other mercantile transactions in the Province, of attesting all commercial instruments, taking affidavits and otherwise of acting as is usual in the office of notary.

Territorial Extent of Powers.

A person other than a barrister or solicitor who is appointed a notary public may be limited by commission as to territory in which he/she may act. Otherwise notary may act anywhere in Province.

Commission of every notary public, other than a barrister or solicitor, expires after three years. Commissions are renewable for successive three year terms. Notaries with limited commissions must indicate under their signatures date upon which their commissions expire and territory in which they may act.

Seal on Affidavits.

When notary public administers an oath or takes an affidavit or declaration, it is not necessary to validity of such oath, affidavit or declaration that notary affix his or her seal thereto, but it is customary to do so. See also topic 10.02 Affidavits.

10.05 RECORDS:

Land registrars of various divisions have charge of records for land under both Registry Act (c. R.20, dealt with below) and Land Titles Act (c. L.5, see subhead Land Titles or Torrens System, infra). As to records of personal property, see categories 2 Business Organizations, topic Corporations, subhead Corporate Securities Registration; Business Regulation and Commerce, topic Sales, subhead Bills of Sale; Debtor and Creditor, topic Assignments; Mortgages, topics Chattel Mortgage, Personal Property Security.

Registerable Instruments.

In general, all instruments affecting land may be registered including: Crown grants, deeds, conveyances, mortgages, assignments of mortgages, certificates of discharge of mortgages, assurances, leases, releases, discharges, powers of attorney, agreements for sale or purchase of land, wills, probates of wills, grants of administration, cautions or renewals thereof, municipal by-laws, certificates of proceedings in any court, judgments or orders of foreclosure, certificates of payment of taxes, sheriffs' and treasurers' deeds of land sold, contract in writing, bankruptcy and insolvency orders, plans of survey or subdivision of land. With limited exceptions, it is offence to alter registration. (§101). Documents may be submitted electronically.

Place of Recording.

Registered instruments are recorded in appropriate Land Registry Office located within registry divisions established by regulation. (R.R.O. 996, §2 and O. Reg. 427/99, §1). Registration of physical documents will eventually be replaced by electronic registration.

Requisites of Registration.

Instruments must generally describe land in manner that conforms to Act and regulations.

Effect of Registration.

An instrument affecting land is void as against any subsequent purchaser or mortgagee for value without actual notice, unless it has been registered before the registration of the instrument under which the subsequent purchaser or mortgagee claims. Exceptions are leases in possession for seven years or less and certain municipal by-laws. (R.20, §70). Registration constitutes notice to all persons claiming any interest in land subsequent to registration, provided instrument is recorded in abstract index for that land. (R.20, §74). Priority of registration prevails unless before registration there has been actual notice of prior instrument by person claiming under prior registration.

Land Titles or Torrens System.

A system of land titles has been set up in Province under Land Titles Act (c. L.5) which exists concurrently with system under Registry Act in all districts and some counties or other areas and may be extended to other areas by regulations made by Minister. Once land has been brought under land titles system, provisions of Registry Act no longer govern it. (L.5, §52). Act establishes clear title to land by declaring under guarantee of indemnity that it is vested in named person. Entries in Land Titles Register are binding when signed by Land Registrar and accuracy of entries is guaranteed by Land Titles Assurance Fund. Land Titles Act sets out exceptions to title guarantee which include taxes, easements, leases in possession for three years or less, dower, expropriation, statutory liens (including liens for corporations and retail sales taxes), municipal by-laws and invalidity by reason of Planning Act (see category 21 Property, topic 21.05 Deeds, subhead Operation and Effect). Land Titles Assurance Fund indemnifies certain persons wrongfully deprived of land. (§57[4]).

Certification of Titles to Land.

Owner of land or any person claiming estate in fee simple may apply to have title to any land under registry system investigated and certified. (c. C.6, §4). Upon registration of Certificate of Title, certificate is deemed conclusive evidence that owner has absolute title subject to exceptions set forth in certificate. (§14).

Application under §4(1) shall be deemed to be action for recovery of land within meaning of Real Property Limitations Act. (c. L.15).

Land Titles Assurance Fund is available to persons who may be wrongfully deprived of land or some estate or interest therein by reason of land being brought under The Land Titles Act (c. L.5, Part V, §§54-59) or being certified within six years of certification under *Certification of Titles Act*. (c. C.6, §§1, 15, 16, 18[7]).

Vital Statistics.

Records of births, marriages, deaths, divorces, adoptions and changes of name are kept in Office of Registrar-General. Father and mother may register their child's surname as being either parent's surname or former surname, or both their surnames connected by hyphen. (c. V.4, §10). Birth records may be altered to reflect result of transsexual surgery. (c. V.4, §36). Still births shall be registered. (§9.1). Adopted person may apply to Registrar General for adoption information if available. (§48.1). Disclosure of information may be requested or denied by adopted child or parent. (§48.4).

Forms.

Under Land Registration Reform Act (c. L.4, §3) and R.R.O. 688, document shall not be registered under Registry Act or Land Titles Act unless they are in one of prescribed forms, or attached to Document General (Form 4).

10.06 SEALS:

Certain transactions must be by deed rather than written or oral agreement. Deed may be used for other transactions. Generally, deed must bear seal of person executing it. However, courts will treat writing as deed if it was intended to be sealed. Usually, attached wafer of printed impression is used. Person is bound by agreement in deed even though he received no consideration for agreement. Deeds are mainly required for real property transactions, but seals are no longer required for transfer, mortgage or discharge of mortgage. (c. L.4, §13).

Corporate Seals.

Corporations formerly had to have corporate seal capable of making impression on paper, but this is no longer required.

10.07 TORRENS ACT:

See topic 10.05 Records; category 21 Property, topic 21.05 Deeds.

10.08 VITAL STATISTICS:

See topic 10.05 Records.

11 EMPLOYMENT

11.01 EMPLOYER AND EMPLOYEE:

See topic 11.02 Labour Relations.

11.02 LABOUR RELATIONS:

Relationship of employer and employee is governed by common law rules relating to employment contract. There are extensive statutory regulations including minimum employment standards, human rights, pay equity, collective bargaining, and health and safety legislation. (cc. E.14, L.2, E.12, O.1, W.11, H.19, P.8, H.4, P.7).

Labour Relations Act, 1995 (S.O. 1995, c. 1, Sched. A).

Act provides legal framework for acquisition and termination of collective bargaining rights by trade unions, negotiation of collective agreements, resolution of industrial disputes and prohibition of unfair labour practices. Certification process is provided to govern acquisition of bargaining rights by trade unions. Conciliation and mediation procedures are provided to assist in negotiation of collective agreements between employers and trade unions once bargaining rights have been secured by trade union. Act also provides for first agreement interest arbitration.

During term of collective agreement, grievances must be resolved by binding third party arbitration and not through resort to strikes/lockouts. There are successor rights provisions that cause flow-through of bargaining rights upon sale of business. Intermingling of employees from previous business with employees from purchased business may result in redefinition of bargaining unit by Board. Employers who operate through more than one legal entity may be found to be one employer for purposes of Act to maintain bargaining rights over employees engaged in same economic activity under common direction and control.

Ontario Labour Relations Board has developed large body of case law through its administrative decisions under legislation. Board has major role in development of labour relations policy in Ontario.

Employment Equity Act, S.O. 1993, c. 35.

Note: Repealed on Dec. 14, 1995.

Employment Standards Act, 2000 (S.O. 2000, c. 41).

Act provides for certain minimum standards of employment. Employee cannot waive his or her rights under Act. If employee feels these rights have been denied, employee, if he or she is not covered by collective agreement, may make complaint to Ministry of Labour under Act with respect to wages owing, rights under successor employer, benefit plan entitlement, or termination and severance pay entitlement. Act bars employee from commencing such complaint while concurrently commencing civil action. Employees who are covered by collective agreement must pursue complaints through grievance procedure that is set out in collective agreement. (c. 41, §§99-101).

Hours of Work.

General rule under Act is that no worker shall work more than eight hours a day or 48 hours in a week, subject to certain exceptions. Employers and employees may agree to work in excess of daily limits to maximum of 13 hours in day. Weekly limit may be exceeded if employee agrees and employer has received approval from Director of Employment Standards. Excess hours agreement will only be valid if employer has provided information sheet on hours of work published by Director, and employee specifically consents to it in writing. Agreement between employer and employee is revocable by either party upon notice to other. Excess hours agreement is irrevocable if it was (i) made at time of employee’s hiring; and (ii) approved by director, unless both employer and employee agree to its revocation. (c. 41, §§17-21).

Public Holidays.

Subject to certain exceptions, employees are entitled to nine public holidays with pay: New Year’s Day, Family Day, Good Friday, Victoria Day, Canada Day, Labour Day, Thanksgiving Day, Christmas Day, and Boxing Day. Employees who qualify are entitled to take holiday days off work and be paid public holiday pay or they can agree, in writing, to work on that holiday and be paid: (i) public holiday pay plus premium rate of pay for hours worked on public holiday; or (ii) their regular rate for hours worked on holiday plus they will receive another day off with public holiday pay. Employees qualify for public holiday entitlement unless they, without reasonable cause: (a) fail to work all of their regularly scheduled days of work before or after public holiday; or (b) fail to work their entire shift on public holiday if they agreed or were required to work that day. If employee does not meet either criteria, he or she is entitled to be paid premium pay for every hour he or she worked on holiday. Employees qualifying for public holiday entitlement can be full-time, part-time, permanent on contract or students. It does not matter how recently they were hired or how many days they worked prior to public holiday. Special rules apply to employers in certain industries that require employees to work on public holidays. (c. 41, §§24-32).

Overtime Pay.

Employees are entitled to overtime pay at rate of one and one-half times their regular rate of pay after working 44 hours in a week. With written employee consent and approval from Director, employers can average hours of work over period of two or more weeks for purpose of determining entitlement to overtime pay. In averaging scenario, overtime pay would not be payable to employee unless average work week exceeds 44 hours. Act provides that overtime averaging agreements must contain expiry date. Averaging agreement can be renewed, replaced or revoked, provided employer and employee both agree in writing. Act further provides that employee, if employer agrees, may take paid time off in lieu of being paid overtime. Employee would be entitled to one and one-half hours of paid time off for each hour of overtime worked. (c. 41, §22).

Vacation Pay.

Employee is entitled to two weeks vacation after each completed 12 month period of employment and is also entitled to vacation pay equal to 4% of wages earned during 12 month period for which vacation is given. Employee may elect not to take vacation, provided employer agrees and Director of Employment Standards approves of election. Even if employee does not take vacation, he or she must still be paid vacation pay. Where employee's employment is terminated, and entitlement to vacation pay has accrued, employer shall pay vacation pay that is accrued to employee. (c. 41, §§33-41).

Pregnancy and Parental Leave.

Pregnant employee is entitled to at least 17 weeks of unpaid pregnancy leave provided she has been employed with employer for at least 13 weeks preceding estimated date of delivery. Leave may be commenced up to 17 weeks before estimated date of delivery. Employee who is entitled to pregnancy leave is required to give her employer two weeks notice, in writing, of date leave is to begin, and if requested by employer, medical certificate estimating date of delivery. If employee does not give specific date of end of pregnancy leave, it will be deemed that she wishes to take maximum leave. (c. 41, §§46-47).

Employee who is parent and has been employed with his or her employer for at least 13 weeks before birth of child or at least 13 weeks before child came into parents custody, care and control for first time is entitled to unpaid parental leave. "Parent" is man or woman who is birth parent of child, adoptive parent of child, stepparent of child, or is in long-lasting relationship with parent of child who intends to treat child as his or her own. Under Act, parent is entitled to: (i) unpaid parental leave of up to 35 weeks if employee also took pregnancy leave; or (ii) unpaid parental leave of up to 37 weeks if employee did not take pregnancy leave. For employee who has taken pregnancy leave, parental leave commences when her pregnancy leaves ends. For other new parents, parental leave must commence no later than 52 weeks after child is born or first comes into parents' custody, care and control. Employee who is entitled to parental leave is required to give employer two weeks written notice prior to commencement of leave. If he or she does not specify when leave will end, it will be assumed that he or she wishes to take maximum leave. (c. 41, §§48-49).

Employee who is entitled to take pregnancy or parental leave cannot be terminated or laid off, disciplined or suspended because he or she is so entitled, or has, in fact, applied for or taken such leave. Seniority for all purposes continues to accrue during pregnancy and parental leaves and, following leave, employee must be reinstated to same position, if it still exists, or to comparable one if it does not. Upon reinstatement, employee must be paid at rate paid when leave commenced or, if it is higher, at rate employee would be earning if he or she had worked through leave. Employer must continue to make employer contributions to pension, life insurance, accidental death, extended health and dental plans unless employee has advised employer, in writing, that he or she does not wish to continue to make employee contributions (if any) to such plan while employee is on pregnancy or parental leave. Employer is not required to pay wages to employee while he or she is on pregnancy or parental leave.

Family Medical Leave.

Employee may take up to eight weeks of unpaid, job-protected leave within 26-week period to provide care to specified family members who are terminally ill. Health practitioner must confirm that family member has serious medical condition and has significant risk of dying within 26-week period. If two or more employees qualify to take family medical leave, eight weeks' leave of absence must be shared.

Employee must inform employer in writing that he or she will be taking family medical leave before leave begins, or as soon as possible thereafter. Family medical leave must be taken in periods of entire weeks. If employee's family member dies before full eight weeks of family medical leave is taken, family medical leave will end on last day of week in which family member dies. If family member is still critically ill at end of 26-week period, employee is entitled to another eight weeks of job-protected leave, provided that new medical certificate is obtained.

During family medical leave, employees earn seniority and credit for length of service and length of employment, just as if they had stayed at work. While employee is on family medical leave, employer must continue to pay its share of premiums for any benefit plans that were offered before leave. Note however that Act does not require employers to provide all employees on family medical leave with access to disability benefits. It simply provides that employee on family medical leave cannot be excluded, if employees on other types of leaves are not excluded. (c. 15, §49.1).

Personal Emergency Leave.

Employee who works for employer that regularly employs at least 50 employees are entitled to take up to ten days of unpaid, job-protected leave each calendar year due to personal illness, injury or medical emergency, and death, illness or medical emergency of specified family members. Employee may be required to provide employer with reasonable evidence that he or she is eligible for personal emergency leave.

Employee must inform employer before starting leave that he or she will be taking leave before leave begins, or as soon as possible thereafter. Notice does not have to be given in writing. Ten days of personal emergency leave do not have to be taken consecutively.

During personal emergency leave, employees earn seniority and credit for length of service, and length of employment, just as if they had stayed at work. While employee is on personal emergency leave, employer must continue to pay its share of premiums for any benefit plans that were offered before leave. (§50).

Reservist Leave.

Military Reservist employee who has worked for employer for six consecutive months and who is deployed to international operation, operation within Canada or will be assisting with emergency, is entitled to unpaid leave for time necessary to engage in operation for which employee is deployed. Reservist leave is only available to reservists who were deployed on operations on or after Dec. 3, 2007.

In case of operation outside Canada, leave includes pre and post deployment activities.

Employee must provide employer with reasonable written notice of days on which he or she will begin and end leave. Employer may postpone employees return for up to two weeks by providing employee with pay. (§50.2)

Organ Donor Leave.

Employee who has worked for employer for 13 weeks is entitled to leave of absence without pay for purpose of organ donation. Leave applies to employees who are donating all or part of kidney, liver, lung, pancreas or small bowel.

Employee is entitled to leave for prescribed period, or if no period is prescribed, up to 13 weeks. Leave commences on day that surgery to donate organ takes place, or may begin at earlier time as specified in medical certificate. Employee is entitled to extend leave for additional 13 weeks if medical certificate confirms that employee is unable to perform their regular duties.

Employee must provide minimum of two weeks' written notice before starting leave, or as soon as possible after commencing leave.

During organ donor leave, employees earn seniority and credit for length of service, and length of employment, just as if they had stayed at work. (§49.2)

Declared Emergency Leave.

Employee is entitled to unpaid leave of absence if employee will not be performing regular duties of his or her position if “emergency” is declared by provincial government due to dangers caused by natural disasters, accidents, acts of terrorism, disease or health risk.

Declared emergency leave will last until emergency is terminated, or until applicable government order expires, whichever occurs first.

During declared emergency leave, employees earn seniority and credit for length of service, and length of employment, just as if they had stayed at work. (§50.1).

Equal Pay for Equal Work.

Employer must not differentiate between male and female employees by paying employees of one sex less for substantially same kind of work in same establishment, performance of which requires substantially same skill, effort and responsibility and which is performed under similar working conditions, except where such payment is made pursuant to seniority system, merit system, system that measures earnings by quantity or quality of production, or differential based on any factor other than sex. (c. 41, §42).

Notice of Termination.

Act provides that employer is required to give notice of termination of between one to eight weeks depending on length of employee’s service. Employer cannot terminate employee’s employment if any part of reason for termination is based on employee exercising his or her rights under Act. Termination is defined as having occurred under Act in following circumstances: (i) when employer dismisses employee or otherwise refuses or is unable to continue employing him or her; (ii) when employer constructively dismisses employee and employee resigns in response to constructive dismissal within reasonable period; and (iii) when employer lays employee off for period longer than temporary lay-off. Notice of termination must be given, in writing, addressed to employee whose employment is being terminated. During statutory notice period, employer must: (a) not reduce employee’s wage rate or alter any other term or condition of employment; (b) continue to pay employee wages to which he or she is entitled to receive, which can be no less than his or her regular wages for regular work week; and (c) continue to maintain employee’s benefit plans. Act now expressly provides that employer may terminate employee using combination of notice of termination and pay in lieu thereof or payment in lieu of entire amount provided that employee is given lump sum payment equal to amount that he or she would have received had notice of termination been given. These statutory rules establish minimum standards. Courts frequently award substantially higher amounts for termination without adequate notice based on various factors including age, service, experience, expertise, likelihood of finding alternative employment, and character of employment. (c. 41, §§54-62).

Severance pay is designed to compensate employee for loss of seniority and job related benefits as well as to recognize his or her long service. Employee is entitled to receive severance pay if he or she has been employed by employer for five years or more when his or her employment is severed and (i) employer’s payroll is $2.5 million or more; or (ii) severance occurs as result of permanent discontinuance of all or part of employer business and employee is one of at least 50 employees who have had their employment relationship severed within six month period. Employer is deemed to have severed employment of employee under Act if: (a) employer dismisses employee or refuses to continue employing employee; (b) employer constructively dismisses employee and employee resigns from his or her employment in response within reasonable period; (c) employer lays employee off for 35 weeks or more in period of 52 consecutive weeks; (d) employer lays employee off because of permanent discontinuance of all employer’s business at establishment; or (e) employer gives employee notice of termination, employee gives employer written notice at least two weeks before resigning and resignation takes effect during statutory notice period. Despite foregoing, there are numerous exemptions in which employees are not entitled to receive severance pay. (c. 41, §§63-66).

Payments on Termination.

Any monies to which employee is entitled upon termination, other than pay in lieu of notice of termination and severance pay, must be paid by employer to employee not later than latter of seven days after employment ends and day that would have been employee's next pay day. (c. 41, §11).

Director's Liability.

Workers whose employers are insolvent, have gone bankrupt, abandoned business or have failed to pay wages or other monies, will be able to recover for unpaid wages, vacation pay, holiday pay and overtime wages from directors of employers. Employer is primarily responsible for unpaid wages but proceedings may, nonetheless, be commenced against directors. Employees must file claim for compensation with Employment Standards Branch of the Ontario Ministry of Labour. (c. 41, §§79-83).

Human Rights Code (c. H.19).

Code provides that every person has right to equal treatment with respect to employment without discrimination because of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, age, record of offences, marital status, family status, sexual orientation or disability. (c. H.19, §5). Effective June 30, 2008, Ontario Human Rights Tribunal became responsible for administering Code and receiving and adjudicating complaints. (c. H.19, §32-45.10). Human Rights Commission is now restricted to largely educational role. (Human Rights Code Amendment Act, 2006, S.O. 2006, c. 30).

Harassment.

Code forbids harassment of employees by employer or anyone acting on employer's behalf, or by co-worker, on grounds of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, age, record of offences, marital status, family status or disability. Harassment is defined as course of vexatious comment or conduct that is known or ought reasonably to be known to be unwelcome. (c. H.19, §§5, 7).

Sexual Harassment.

Employees have right to freedom from harassment in workplace because of sex. Every employee has right to be free from unwelcome sexual advance made by person in position to grant or deny benefit or advancement to another where person making advance knows or ought reasonably to know that it is unwelcome. Employees also have right to be free from reprisal or threat of reprisal for rejection of sexual solicitation or advance where reprisal is made or threatened by person in position to grant or deny benefit or advancement. (c. H.19, §7).

Disability.

Discrimination because of disability is prohibited in all areas protected by Code. Except where disability renders person incapable of performing essential duties of job, employer cannot discriminate because that person has, or used to have, disability. Under Code, disability includes any degree of physical disability, infirmity, malformation or disfigurement that is caused by bodily injury, birth defect or illness; condition of mental impairment or developmental disability; learning disability or not being able to function in one or more of processes involved in understanding or using symbols or spoken language; mental disorder; or injury or disability for which benefits were claimed or received under Workplace Safety and Insurance Act, 1997. (S.O. 1997, c. 16). It is not contravention of Code to discriminate against person if disability, which cannot be accommodated by employer without undue hardship, renders person unable to perform essential duties of job. (c. H.19, §17).

Employment Advertising.

Employment advertising may not directly or indirectly classify or indicate qualifications on basis of any of prohibited grounds of discrimination. (c. H.19, §23).

Application Forms.

Under Code, right to equal treatment with respect to employment is infringed where employment application forms are used, or written or oral inquiries are made of applicant, that directly or indirectly classify or indicate qualifications on basis of any prohibited grounds. (c. H.19, §23).

Employment Interviews.

Code permits greater latitude on employment interviews than on application forms. It is permissible to ask questions concerning prohibited ground of discrimination at interview, provided Code permits discrimination on that ground. (c. H.19, §23).

Retirement.

Code prohibits discrimination based on age for purposes of employment for persons 65 or older. Employers cannot require workers to retire at age 65. (c. H.19, §10).

Occupational Health and Safety Act (c. O.1).

Act is designed to protect workers against health and safety hazards in workplace. Act requires creation of health and safety committees in all workplaces with 20 or more employees. It provides for regular compulsory inspection of workplace by employee representative and entitles employees to refuse work where their health and safety is in danger. Act regulates identification and manner of use of hazardous substances. It also provides for investigative and enforcement powers and procedures. Act requires company directors and officers to take all reasonable care to ensure company complies with Act and Regulations, orders and requirements of inspectors and orders of Minister.

Pension Benefits Act (c. P.8).

Every employer who establishes pension plan must register plan with Pension Commission of Ontario and maintain plan’s qualifications for registration while it is in force. In addition, plan must be approved under Income Tax Act of Canada. Financial Services Commission administers Act and its regulations.

Pay Equity Act (c. P.7).

Act is designed to redress systemic gender discrimination in compensation for work performed by employees in female job classes. All employers in public sector and private sector firms with 100 employees or more are required to develop, post and implement one or more pay equity plans. Private sector firms with ten to 99 employees can choose to develop and post plans but they are not required to do so under Act. However, they are still required to achieve pay equity and may be subject to complaints from their employees if they do not. In unionized workplace, bargaining agent and employer are required to jointly negotiate pay equity plan. Maximum of 1% of establishment’s previous year’s payroll must be set aside to upgrade compensation of certain female employees each year until pay equity is achieved. Pay Equity Commission provides information to employees on job-evaluation schemes, offers approval for implementation of schemes and investigates inequities.

Workplace Safety and Insurance Act, 1997 (S.O. 1997, c. 16, Sched. A).

Awarding of benefits under insurance plan to injured workers falls into jurisdiction of Workplace Safety and Insurance Board. Personal injury by accident arising out of, and in course of employment is covered under insurance plan, unless attributable solely to serious and willful misconduct of worker (except injuries resulting in death or serious disablement). Industrial disease due to nature of employment is covered regardless of earning capacity. Common law remedies of injured party still exist, but if action is brought at law in respect of injury to worker, upon application of any party to action, Board has jurisdiction to determine whether same is maintainable, or whether injured party is only entitled to insurance benefits from Board, and, if so, may order action forever stayed. Benefits are in form of monthly payments or whatever Board may decide. Amount is based on 85% of difference between: worker's net average earnings before injury and net average earnings that he or she can earn after injury. Amount is payable by Board out of insurance fund formed by annual assessment on employers.

Employer Health Tax (c. E.11).

Each employer in Province of Ontario is required to pay Employer Health Tax (EHT) based on annual payroll. EHT is applied as follows: rate of 1.95% of payroll for employers with annual payrolls over $400,000; rate of.98% for employers with annual payrolls of $200,000 and under; and graduated rates for employers with $200,001 to $400,000 in annual payroll. Employers paying over $600,000 in remuneration annually to employees are required to make monthly installment payments. Employers paying under $600,000 in remuneration annually to employees are not required to make installment payments. (§3[2][a]). Self-employed individuals are required to pay tax at different rate, and certain limits apply. Other employers are to make quarterly installment payments.

Unemployment Compensation.

See Canada Law Digest, category 23 Taxation, topic 23.03 Employment Taxes, subhead Unemployment Compensation Tax.

11.03 WORKERS' COMPENSATION LAW:

See topic 11.02 Labour Relations, subhead Workplace Safety and Insurance Act, 1997.

12 ENVIRONMENT

12.01 ENVIRONMENTAL REGULATION:

General Supervision.

Extensive regulation by Ministry of the Environment ("MOE") under Environmental Protection Act, c. E.19 and regulations in relation to discharges and spills, waste management, motors and motor vehicles, ozone-depleting substances, PCBs and Brownfields redevelopment. Waste management also regulated by R.R.O. 347. R.R.O. 347 includes "derived from" rule, requiring materials remaining after treatment of hazardous wastes to be listed as hazardous waste. Toxicity Leachate Procedure also adopted. O. Reg. 127/01 requires mandatory tracking and public reporting of certain air pollutants. O. Reg. 419/05 regulates air quality. O. Reg. 359/09 requires Renewable Energy Approvals for prescribed renewable energy projects.

Water pollution is regulated by Ontario Water Resources Act, c. O.40. Water Taking Regulation (O. Reg. 387/04) under Ontario Water Resources Act sets out criteria Director must consider when evaluating application to take water and imposes some reporting requirements. Regulation also divides Ontario into three water basins and forbids transfer of water out of basin, except for small quantities. Safe Drinking Water Act, 2002, S.O. 2002, c. 32, and regulations set out new testing requirements for most public and large, private drinking water systems requiring regular and frequent water samples, including binding testing requirements for microbiological characteristics, chlorine residuals, volatile organic compounds, inorganic chemicals, nitrates, and pesticides. Clean Water Act, 2006, S.O. 2006, c. 22, focuses on protecting existing and future sources of drinking water in Ontario. Pesticides are regulated by Pesticides Act, c. P.11.

Framework for governing renewable energy projects set out in Green Energy Act, 2009. (S.O. 2009, c. 12, Sched. A). Dangers to public health in general regulated by Ministry of Health and Long-Term Care pursuant to Health Protection and Promotion Act, c. H.7. Occupational Health and Safety Act, c. O.1 requires extensive disclosure of information and special training for workers exposed to hazardous materials. Environmental Assessment Act, c. E.18, for public and designated private undertakings. Greenbelt Act, 2005, S.O. 2005, c. 1, provides legislative framework for Greenbelt Plan which restricts urban development in environmentally sensitive and agricultural lands in Greater Golden Horseshoe area. Technical Standards and Safety Act, 2000 regulates hydrocarbon fuels, including storage tank provisions. Other legislative sources of regulation: Environmental Bill of Rights, S.O. 1993, c. 28; Mining Act, c. M.14 (and Mine Rehabilitation Code of Ontario under O. Reg. 240/00); Aggregate Resources Act, c. A.8; Dangerous Goods Transportation Act, c. D.1; other legislation: Waste Management Act, 1992, S.O. 1992, c. 1; Planning Act, c. P.13; Waste Diversion Act, 2002, S.O. 2002, c. 6; Endangered Species Act, 2007, S.O. 2007, c. 6; Lake Simcoe Protection Act, 2008 (S.O. 2008, c. 23); Conservation Authorities Act (c. C.27); Conservation Land Act (c. C. 28); Niagara Escarpment Plan and Development Act (c. N.2); Nutrient Management Act (S.O. 2002, c. 4). Provincial Parks and Conservation Reserves Act, 2006, S.O. 2006, c. 12, protects system of provincial parks and conservation reserves. Pursuant to Environmental Review Tribunal Act, 2000, Environmental Review Tribunal has applications and appeals under number of statutes.

Prohibited Acts of Pollution.

Very broad definition of “adverse effect” in relation to discharges and spills into natural environment, including impairment of environmental quality, adverse effects on health or safety, or property damage. Deposit of waste and use of waste management systems. Discharges in excess of amounts prescribed by regulation also prohibited. Regulations cover all types of pollution. Common law doctrines (nuisance, negligence, strict liability, riparian rights) still apply.

Penalties.

Extensive penalties: fines up to $50,000 on first conviction for each day on which offence occurs; corporations may be subject to fines up to $250,000 per day on first conviction; greater maximum fines for specific offences. Individuals may be subject to prison terms for certain offences. Environmental Protection Act and Ontario Water Resources Act allow Director to impose environmental penalties on certain regulated persons. (O. Reg. 222/07).

Liability.

Most offences subject to defence of due diligence. Corporate directors and officers subject to personal duty of reasonable care to prevent corporation from causing or permitting environmental damage. Statutory civil cause of action for spills. Substantial cleanup liabilities for current and previous owners and occupiers of real estate. (Environmental Protection Act, c. E.19).

Enforcement.

Where pollutant is spilled, Minister may make order requiring doing of everything practicable to prevent, eliminate and ameliorate adverse effects, and to restore natural environment. Broad range of administrative orders may be issued by MOE Director. Extensive powers of investigation.

Permits and Approvals.

Permits required for waste management systems and waste disposal sites, sewage systems, sources of contaminant emission, renewable energy projects, and development of land on former waste disposal sites. Restructuring of MOE approvals process in 1998; some activities which formerly required Certificate of Approval now exempt. (Approval Exemption Regulations: O.

Reg. 524/98 and O. Reg. 525/98; Renewable Energy Projects, O. Reg. 359/09).

Other Initiatives.

Emissions caps for electricity sector; emissions reduction trading system.

13 ESTATES AND TRUSTS

13.01 ADMINISTRATION:

See topic 13.10 Estate Trustees.

13.02 ADVANCEMENTS:

See topic 13.07 Descent and Distribution.

13.03 ALLOWANCES:

See topic 13.10 Estate Trustees.

13.04 CLAIMS:

See topic 13.10 Estate Trustees; category 5 Civil Actions and Procedure, topic 5.16 Pleading.

13.05 DEATH:

A person who is absent and unheard from for seven years is presumed to be dead. Where a claim is made under a life insurance policy, based on the presumption of death from absence, the insurer may make summary application to the Court for a declaration as to such presumption. (c. I.8, §209). Where spouse is missing and unheard from for seven years, and reasonable inquiries have been made, married person may apply to judge for declaration that spouse is dead to enable applicant to obtain licence to marry. Such declaration has no other effect. (c. M.3, §9).

Survivorship.

Where two persons die at same time or in circumstances rendering it uncertain which survived, estate of each disposed of as if he or she had survived other. Joint tenants who so die, are deemed to have been tenants in common and above rule applies. But where life insured so dies insurance money payable as if beneficiary predeceased life insured.

Action for Death.

(a) Where person is killed by fault or neglect of another under circumstances that would have entitled person to recover damages if not killed, spouse, same-sex partner (as defined in Part III of Family Law Act), children, grandchildren, parents, grandparents, brothers and sisters of person may recover their pecuniary loss resulting from death, from person from whom person killed would have been entitled to recover. (c. F.3, §61). Damages may include reasonable funeral expenses and other expenses reasonably incurred for benefit of person killed and compensation for loss of guidance, care and companionship. (§61). Action must be commenced within two years after cause of action arose. (Limitations Act, 2002, S.O. 2002, c. 24, Sched. B). Person liable may pay into court sum to be apportioned by court among plaintiffs entitled to recover. (§62). In assessing damages court is not to consider any insurance payable on death. (b) Deceased's right of action in tort (except libel and slander) maintainable by personal representatives or administrator ad litem appointed by judge for benefit of estate within one year of death. No damages for death or loss of expectation of life. (c. T.23, §38).

Gifts of Human Tissue.

See topic 13.10 Estate Trustees, subhead Human Tissue Gift Act.

Certificate.

See category 10 Documents and Records, topic 10.05 Records, subhead Vital Statistics.

13.06 DECEDENTS' ESTATES:

See topics 13.07 Descent and Distribution, 13.10 Estate Trustees, 13.17 Wills.

13.07 DESCENT AND DISTRIBUTION:

Succession Law Reform Act (c. S.26) determines devolution of real and personal property of intestate and testate decedent, subject to spouse's entitlement under Family Law Act (c. F.3, §5), rights of surviving owners of joint property and rights of named beneficiaries under Insurance Act (c. I.8, §§190-196). See topic 13.10 Estate Trustees, subhead Dependants' Allowances; category 14 Family, topics 14.05 Divorce, Husband and Wife.

Death of Man or Woman.

There is no difference in devolution based on sex but see definition of spouse in subhead Intestate Succession, infra.

Family Law Act, Election.

Surviving spouse can elect Family Law Act entitlement to estate of deceased or to take under will or to receive intestate entitlement. (c. F.3, §§5, 6). If spouse elects Family Law Act entitlement: deemed revocation of gifts to spouse in will and deemed revocation of appointment as estate trustee unless will provides otherwise; deemed disclaimer of intestate entitlement (c. S.26), and life insurance policies owned by deceased on deceased's life and group insurance and lump sum pension or similar plan amounts to spouse as designated beneficiary credited against Family Law Act entitlement and excess is claim of estate unless designation to contrary. Election and application must be within six months after death (with some rights to extend time) or else deemed election for will or for intestate share. (c. F.3, §6). (See topics 13.10 Estate Trustees, 13.17 Wills.)

Testate Succession.

See topic 13.17 Wills.

Intestate Succession.

Spouses' intestate entitlement is all of estate if no surviving issue of deceased. (c. S.26, §44). Otherwise spouse receives $200,000 (O. Reg. 54/95) and share of residue: 1/3 to spouse and 2/3 equally to children or deceased's more remote issue of nearest degree in which there are surviving issue, with share of any predeceased child or issue in that degree receiving such deceased's share in similar manner (not necessarily per stirpital distribution); if only one child, ½ to spouse and ½ to child or issue (similar distribution to 2/3 above). If no spouse, children or their issue take all (similar distribution to 2/3 above). If no spouse or issue, estate goes to (in order): Surviving parent(s); surviving brothers and sisters, if any, (children of deceased brother or sister taking parent's share without representation); if no surviving brother or sister, equally to surviving nieces and nephews without representation; next of kin of equal degree without representation. Next of kin determined according to §47. If no next of kin, whole estate escheats to Crown, in right of Ontario. Spouse receives preferential treatment even if deceased leaves infant children of former marriage. (§§45, 46, 47). See category 14 Family, topics 14.05 Divorce, Husband and Wife.

Spouse.

For intestacy is someone married to, or good faith party to void or voidable marriage with, person of opposite sex and can include party to some polygamous marriages. (c. S.26, §1). In wills, spouse is person intended by testator. Definition of “spouse” now includes same-sex partners. (Spousal Relationship Statute Law Amendment Act, 2005, S.O. 2005, c. 5).

Half Blood.

On intestacy next of kin of half blood take equally with those of whole blood (c. S.26, §47) (note: is some question as to application to classes who take in priority to next of kin). Under wills, gifts to class of persons generally includes those of half blood as well as whole blood, subject always to intent of testator.

Posthumous Children.

On intestacy, children, other descendants and relatives of deceased conceived before and born alive after his death inherit as though born in his lifetime and had survived him. (c. S.26, §47). In wills, gift to children includes those conceived before but born after death of testator, subject always to intent of testator.

Illegitimate Children.

Relationships whether by blood or marriage include relationships by births or traced through births outside marriage (c. S.26, §1), subject to contrary intention in will.

Adopted Children.

Treated as natural child and all relationships, whether to family before adoption or to new family, determined accordingly. Applies on intestacy and under will whenever made, subject to contrary intention in will and with some exceptions for interests vested prior to adoption or before Nov. 1, 1985. (c. C.11, §§158-159).

Advancements.

On intestacy, advancements of real or personal property to child, expressed or acknowledged as such in writing, are reckoned as part of parent’s estate for purposes of distribution. (Estates Administration Act [c. E.22, §25]). Generally similar principle respecting gifts made after will, including where testator in loco parentis, but subject to intention of testator.

Presumption of advancement no longer presumed for gratuitous inter vivos transfer to adult child whether dependant or independent (including funds placed in jointly held bank account). Rebuttable presumption of resulting trust created instead. (Pecore v. Pecore, [2007] 1 SCR 795).

Election.

Family Law Act Election: See subhead Family Law Act, Election, supra. Curtesy: Abolished for deaths on or after Mar. 31, 1978. (c. S.26, §§48, 49).

Escheat and Bona Vacantia.

Where person dies in whole or part intestate without lawful heirs, person’s real and personal property passing on intestacy vested in Crown in right of Province. (c. E.20, §1 and c. S.26, §47). Person with legal or moral claim may sometimes obtain transfer of property. (c. E.20, §3).

Where person dies in Ontario intestate, leaving no known next of kin in Ontario or where next of kin are minors and no near relative in Ontario willing and able to apply for grant, or to nominate person to apply for grant, Public Guardian and Trustee may obtain appointment as estate trustee for benefit of Her Majesty or such persons as may ultimately appear entitled thereto. (c. C.47, §2). Moneys obtained by Public Guardian and Trustee from such estates and unclaimed for ten years must be paid into Consolidated Revenue Fund. (§11). Any person claiming such moneys may apply to Superior Court of Justice, and upon proving title thereto is entitled to receive same with interest. (c. C.47, §§11, 12). See also topic 13.10 Estate Trustees.

See Note on Public Guardian and Trustee under topic Estate Trustees, subhead Accounts.

13.08 ELECTION:

See topics 13.07 Descent and Distribution, 13.17 Wills.

13.09 ESTATES:

See category 21 Property, topic 21.13 Real Property.

13.10 ESTATE TRUSTEES:

Note: Terminology in Rules of Practice changed Jan. 1, 1995. For example, now reference to estate trustee and certificate of appointment of estate trustee with or without will, rather than to executor or administrator, letters probate or administration, and application procedure substantially amended. (O. Reg. 484/94, 740/94, 69/95, 377/95). But seems terminology in some legislation not changed. In comments in this digest generally terminology in Rules of Practice used.

Estate matters are within jurisdictions of Superior Court of Justice.

Applications for certificate appointing estate trustee with or without will made to district or county office of Superior Court of Justice where deceased had fixed place of abode at death or, if deceased had no fixed place of abode in Ontario at death, to county or district office of such Court where deceased had property at time of death. In other cases application may be made to any district or county office of Superior Court of Justice. (c. E.21, §7). Notice must be given to all beneficiaries including charities and contingent beneficiaries. (R.P. 74.04, 74.05).

Preferences in Right to Appointment.

Where person dies intestate or estate trustee named refuses to prove will, court may appoint opposite sex or same-sex spouse (whether or not married or same-sex partner) or some one or more of next of kin or both. (c. E.21, §29). (But see topic 13.07 Descent and Distribution, subhead Spouse, Note on definition of spouse.) In above and other circumstances, persons entitled to appointment may nominate, and court in special circumstances may appoint, another person or trust company to administer any part or whole of property: e.g. creditor of estate. Where several persons are of same degree of entitlement, or if there are persons with prior entitlement, renunciations by those not applying required or order to them to refuse or accept appointment. Consents of beneficiaries wherever resident having majority interest in estate required. (R.P. 74.05). But probably subject to discretion of court. (c. E.21, §29). (See topic 13.07 Descent and Distribution, subhead Intestate Succession.)

Where infant is sole estate trustee, appointment will be granted to guardian of infant or to such person as court may think fit until infant comes of age. (§26).

Competency.

Appointment of estate trustee with will may be granted to individual outside Ontario named estate trustee in will. If not resident in Commonwealth bond is usually required. (§6). Otherwise appointment as estate trustee will not be granted to persons outside Ontario except in certain cases of resealing (§5) (see subhead Resealing, infra). Corporation not both registered trust company and approved cannot obtain grant. (c. L.25, §175[2]).

Sex and marital status do not affect right to appointment except as they relate to definition of spouse. (See topic 13.07 Descent and Distribution, subhead Spouse, Note on definition of spouse.)

Oath to be taken by estate trustees requires them faithfully to administer property of deceased and to render account of administration when lawfully required. (c. E.21, §39).

Bond.

Appointment of estate trustee granted to estate trustee named in will without bond unless resident outside Commonwealth. (c. E.21, §6). On appointment of estate trustee on intestacy or of estate trustee not named in will bond usually required (§35) but bond may be dispensed with (§37). Some exceptions to requiring bond are: on intestacy where applicant spouse and net value of estate is less than $200,000, and affidavit setting forth debts of estate is filed (§36); or registered trust company (c. L.25, §175[4]). If estate trustees are sole beneficiaries or all beneficiaries are sui juris and consent, usually order waiving bond obtainable if affidavit that all known debts paid or sometimes with undertaking to pay same upon realization of assets. Amount of bond and sureties: double value of estate and more than one bond may be required, amount of each as judge decides, or amount may be reduced (c. E.21, §37); individual sureties give bond for amounts aggregating penalty of bond (R.P. 74.11), usually two individual sureties and each gives bond for value of estate; if value under $100,000, one individual surety; if guarantee company bond, usually one surety for value of estate. Security for succeeding trustee based on value of unadministered estate.

Removal.

Jurisdiction vested in Superior Court of Justice; grounds for estate trustee same as for other trustee. (c. T.23, §37). Other provisions of Trustee Act may permit appointment of replacements or successors in some circumstances. Provisions of will respecting removal may be applicable.

Special Kinds of Estate Trustees.

Estate trustee with will where estate trustee not one appointed in will (c. E.21, §29); succeeding estate trustee with or without will (R.P. 74.06 and 74.07) including where estate trustee added where right to apply reserved; to call in property of deceased; estate trustee during absence of person entitled to appointment (§14), during minority of person appointed estate trustee by testator (§26), or during litigation with or without will (§28; R.P. 74.10), may be appointed in appropriate circumstances. Appointment without will may be limited to personal property (§31) or appointment with or without will may be limited to part of deceased's estate (§32).

Resealing.

Where estate trustee has been appointed by court of competent jurisdiction in U.K., or in any province or territory of Canada, or in any British possession, such appointment (even if estate trustee not resident in Ontario [§5]) may be resealed at local office of Superior Court of Justice and has same force and effect as if it had been originally granted in Ontario. (§52; R.P. 74.08). Bond required in same circumstances as if original appointment based on value of assets over which jurisdiction is sought in Ontario unless sufficient security given to Court of original grant. (§52[3]; R.P. 74.11). (See subhead Bond, supra.) Appointment of estate trustee of notarial will made in Quebec may be made in Ontario. (§15). Letters of verification issued in Quebec are deemed certificate of appointment of estate trustee for resealing in Ontario (§52).

Ancillary Appointments.

Where estate trustee with will appointed by any other court of competent jurisdiction ancillary appointment with will may be obtained in Ontario, probably in county or district where decedent had assets. (R.P. 74.09). No ancillary appointment with no will obtainable: original appointment in Ontario required unless resealing available. (See subhead Resealing, supra.) (See R.P. 74.05 for requirement of renunciations and consents.) Bond required in same circumstances as for original grant but based on value of assets over which ancillary estate trustee seeks jurisdiction in Ontario (R.P. 74.11)(see subhead Bond, supra).

Inventory.

Statement of value required on application for appointment as estate trustee must set forth total value of property affected by grant (§32[3]), verified by oath of applicant. Certain property including joint property passing by survivorship, insurance payable directly to beneficiary and realty outside Ontario may be excluded. Real estate is valued net of encumbrances—see application forms. Amounts payable to named beneficiaries of pensions and some other "plans" (within meaning ascribed by c. S.26, §50) ordinarily excluded.

Taxes.

Estate Administration Tax Act, 1998, S.O. 1998, c. 34, imposes tax on estate of deceased person payable to Ontario upon issuance of estate certificate. Tax is payable by estate representative in his, her or its representative capacity. Amount of tax payable is: $5 for each $1,000 or part thereof of first $50,000 of value of estate (estate exempt from tax where value of estate does not exceed $1,000); and $15 for each $1,000 or part thereof by which value of estate exceeds $50,000. Multiple wills have been judicially accepted as legitimate means of reducing amount of tax owed. (Granovsky v. Ontario [1998], 156 D.L.R. [4th] 557).

General Powers and Duties.

With some exceptions, common law rules as to administration of personalty govern. (c. E.22, §§3-5, 7). There are also several special provisions governing realty. (§§9, 15, 16, 17). Powers can also be provided by will. Most property of deceased vests in estate trustee (§2) but some exceptions for jointly held property, proceeds of insurance where named beneficiary and some difference in treatment of certain plans where named beneficiary: may sometimes be dealt with without involving estate trustee, although some uncertainty as to whether such plans may be collected by estate trustee to satisfy creditors. See also subhead Distribution infra as to vesting of realty in beneficiary after three years. See c. T.23 as to some other powers and duties.

Notice to Creditors.

Estate trustees should consider advertising for creditors for their own protection. (c. T.23, §53). See also c. E.22, §26 respecting no distribution on intestacy within one year and repayment in certain circumstances, subject to advertising provisions. (c. T.23, §53). Advertisement usually published three times in newspaper where deceased resided and/or carried on business usually leaving one month from first appearance date before date when ad states distribution will take place with regard only to claims then known to executor/administrator is considered sufficient. (See also subhead Distribution, infra.)

Proof of Claims.

Claims against estates of deceased persons are usually given by submitting to personal representative particulars of claim and any documentation supporting claim verified by statutory declaration within time limited by advertisement.

For notice of claim following form might be used (see subhead Enforcement of Claims, infra, and form of claim under c. E.21, §47 and also subhead Approval or Rejection of Claims, infra, when claim under c. E.21, §44 or 45 contested):

Form

Canada

Province of. . . .

In the Estate of..........

And in the Claim of..........

I,. . . . . ., of the City of. . . . . ., in the State/Province of. . . . . ., (Occupation), do solemnly declare that

1. I am the above-named claimant (or as the case may be).

2. (Name of deceased) late of, etc., (occupation), was at the time of his death and his estate still is indebted to me in respect of (nature of claim) in the sum of $. . . . . . .

3. The following are the particulars:. . . . . .

4. I hold no security for the said debt, nor have I received any satisfaction therefor save and except the following:. . . . . .

And I make this solemn Declaration conscientiously believing it to be true, and knowing that it is of the same force and effect as if made under oath, and by virtue of the "Canada Evidence Act."

. . . .

Declared before me at the. . . . of. . . . .

in the. . . . of. . . . this. . . . day of

. . . ., A. D. 20. . . .

. . . . A Notary Public.

Claims against estates which are being wound up under the direction of the court, or by a trustee, for the benefit of creditors, may usually be proved by affidavit evidence, unless the claims are contested, and any claims which are contested will have to be proved by oral evidence in court or by evidence taken under commission. The form of affidavit is similar to the above form. There are special forms and procedures for claims if estate being administered by trustee in bankruptcy. See also payment of debts, evidence of debts, settling claims and procedure where deficiency of assets, including valuation of security. (c. T.23, §§48-59).

Approval or Rejection of Claims.

For certain claims estate trustee wishing to contest claim, may serve notice thereof on claimant, who may then apply to judge of Superior Court of Justice for order allowing claim and determining amount of it. Parties and their witnesses are heard and claim is dealt with by court. (c. E.21, §§44, 45, R.P. 75.08). Other claims may have to be dealt with in same manner as if claim not against estate.

Enforcement of Claims.

Certain claims against estates of deceased persons may be enforced by action against estate trustee. (c. T.23, §§38, 39; c. F.3, §§61, 62, 63). *Note:* can be special limitation periods; also special limitation periods where notice of claim giving full particulars of claim verified by affidavit filed with estate trustee. (c. E.21, §47). If no estate trustee appointed, may apply to Court for appointment of litigation administrator. (R.P. 9.02). Creditor may also obtain appointment as estate trustee. All creditors, other than secured, rank pari passu. (c. T.23, §50). Some preference may be given for funeral and testamentary expenses. May be some differences if estate is administered by trustee in bankruptcy.

Dependants' Allowances.

Where deceased, whether testate or intestate, has not made adequate provision for proper support of dependants, application may be made to Superior Court of Justice (c. S.26, §58) for order charging estate with payment of such support. Application must be made within six months after issue of certificate of appointment of estate trustee, or later if court considers proper against any part of estate that remains undistributed. (§61). Court may take into account certain property not part of estate and impose charge on it for payments to dependants. (§72). Support may be by lump sum, periodic payments or certain other means. Court may make interim order and vary orders. (§§64, 65).

Spouses' Right of Possession.

Occupying spouse has right to possession of matrimonial home rent free for 60 days after death of spouse who had interest in matrimonial home. (c. F.3, §26). Where matrimonial home held by deceased spouse and third party (i.e. not surviving spouse), severance of joint tenancy immediately before death of deceased spouse ensures possessory rights of surviving spouse can be given effect. (c. F.3, §26[1]). Surviving spouse (legal or common law per statutory definition) or same-sex partner (c. S.26, §1) who has not been adequately provided for by deceased spouse or partner and is dependant may make application described under subhead Dependants' Allowances, supra.

Accounts.

Of estate trustees filed and passed before judge of Superior Court of Justice in office which granted certificate of appointment on notice to all parties interested. Where no objections to accounts filed and no request made by any party for increased costs, no hearing is required. Where infants are interested and in some circumstances where incapable persons have interest, notice of passing must be given to Children's Lawyer. Where charities or certain incapable persons have interest, Public Guardian and Trustee must be served. (c. E.21, §49). Accounts must contain specified information and are filed with local registrar and are open for inspection by interested parties. (R.P. 74.16 to 74.18). Persons interested in property of deceased may require accounting in Court by estate trustee with or without will. (c. E.21, §§48, 50, R.P. 74.15[1][h]). If beneficiaries all adults and otherwise fully capacitated, accounts may be approved by them and estate trustee released without passing accounts in court.

Note: Effective Apr., 1995 Public Trustee became Public Guardian and Trustee and Official Guardian became Children's Lawyer.

Distribution.

If a claim is not presented within the time limited in advertisement, estate trustee may distribute estate without being personally liable for debts of which he had no knowledge, but any right of creditor to follow assets is not prejudiced. (c. T.23, §53). Real estate is subject to deceased's debts (c. E.22, §2), but purchaser in good faith, for value, without notice from estate trustee under express power of sale in will is free of debts. In other cases, purchaser in good faith, for value, without notice is usually free of debts, whether real estate validly sold by estate trustee (§19) or beneficiary (§§21 and 23). However, if estate trustee transferred real estate to beneficiary within three years after death, purchaser from beneficiary in that period not free of debts until three years have passed, and then only if no creditor has in that period registered pending action or caution. (§17[8]). Exception: purchaser will be free if judge allows transfer within the three years. (§21). Purchaser not free of debts may have claim against beneficiary or estate trustee. (§17[8]). If purchaser free of debts, creditor may have claim against same persons. (§§20 and 23). Real estate automatically vests in beneficiaries three years after death (§9), but no automatic vesting if will gives real estate to estate trustee or gives express or implied power of sale over real estate to estate trustee. Estate trustee can register caution to prevent vesting or may withdraw it. (§§9 and 11).

Personal property, other than money, having value of over $5,000, or any bequest of money cannot be distributed to foreign beneficiary in designated country without court order. (c. E.22, §20). No country yet designated.

Upon death of spouse there may be valuation of net family property. If value of net family property of deceased spouse exceeds that of surviving spouse, surviving spouse is entitled to half of difference. (c. F.3, §§4, 5). See topic 13.07 Descent and Distribution, subhead Family Law Act, 13.08 Election. Entitlement of surviving spouse has priority over all gifts under will (except for value of consideration given) or entitlement on intestacy or dependant's allowance order except for deceased's child. (§6). No distribution of estate allowed for six months from date of deceased spouse's death or at any time after receipt of notice of application under Part I of Family Law Act, unless with written consent of spouse or court authorizes distribution. (§6).

Compensation.

No specified legal rate of compensation for estate trustees. Entitled to fair and reasonable allowance in discretion of court for efforts, subject to express provisions in will, if any. Same as for trustee. See topic 13.16 Trusts, subhead Compensation.

Public Guardian and Trustee is corporation sole under that name with perpetual succession and official seal, and may sue and be sued under above name. (c. P.51, §1). See topic 13.07 Descent and Distribution, subhead Escheat and Bona Vacantia re Public Guardian and Trustee administering estates. Public Guardian and Trustee may become guardian of incapable person (S.O. 1992, c. 30), may represent mentally incapable persons and charities in certain circumstances (e.g. see subhead Accounts, supra, and c. E.22, §17), and may administer any charitable or public trust (c. P.51, §12). With his or her consent in writing, Public Guardian and Trustee may be appointed trustee of any will or settlement or other instrument creating trust. (§7).

Trillium Gift of Life Network Act. (c. H.20).

Consents are required for inter vivos gifts for transplants and postmortem gifts for transplants and other uses. Consent may be given on death in some circumstances by spouse or other family members or person lawfully in possession of body. Sale of tissue prohibited and any such dealing invalid. (c. H.20, §10).

13.11 EXECUTORS AND ADMINISTRATORS:

See topic 13.10 Estate Trustees.

13.12 FIDUCIARIES:

See topics 13.10 Estate Trustees, Trusts; category 14 Family, topic 14.06 Guardian and Ward.

13.13 INTESTACY:

See topic 13.07 Descent and Distribution.

13.14 PROOF OF CLAIMS:

See topic 13.10 Estate Trustees; category 5 Civil Actions and Procedure, topic 5.16 Pleading.

13.15 TRUSTEE PROCESS:

See category 8 Debtor and Creditor, topic 8.10 Garnishment.

13.16 TRUSTS:

Trusts are interpreted and administered in accordance with the principles of equity as varied by the Trustee Act. (c. T.23).

Kinds.

Express trusts for any legitimate purpose including testamentary trusts and trusts arising by implication of law including resulting and constructive trusts. Trusts also arise under statutes; sometimes special statutory provisions apply to them.

Variation.

Generally, if all interested persons ascertained and with legal capacity, on their consent; and with consent of court, only to be given for benefit to all parties shown, for minors, other persons incapable or unborn or for persons, ascertained or not, with certain possible future interests. (c. V.1). Provisions for amendment in trust document may apply. Rule in Saunders & Vautier, (1841) 49 E.R. 282, applies generally to possible early wind-up of trust where all possible beneficiaries adult and otherwise fully capacitated. Case law should be carefully considered before proceeding.

Removal of Trustee.

The court may remove trustees or appoint substitute or new trustees. (c. T.23, §5). Limited provisions for other removal, replacement and appointment of trustees, for personal representatives of last deceased or sole trustee to act or for such trustee to appoint replacement by will. (§§2, 3, 4, 6). Provisions of instrument creating trust may provide for same.

General powers and duties of trustees usually defined by instrument creating trust, but equitable doctrines applicable to supplement or qualify these powers and duties. Also, trustees have by statute (c. T.23) some powers or extended powers, including powers respecting sale, renewing leases, mortgaging, investment. Trustees may apply to court in summary manner for opinion, advice or direction of court on administration of trust, interpretation of trust instrument, determination of rights of beneficiaries and certain other matters. (§60; R.P. 14.05[3]).

Liabilities of Trustee.

A trustee is liable for damages if he fails to carry out terms of trust or is negligent. Court may relieve trustee from personal liability for technical breaches of trust other than improper investments. (c. T.23, §35). Provisions for exoneration or indemnity of trustees in trust instrument may apply.

Investments.

Trust funds may be invested in the types of property permitted in trust instrument, failing which, according to “prudent investor” rule set out in Trustee Act. (c. T.23, §§26 and 27).

Accounting.

By estate trustees: see topic 13.10 Estate Trustees, subhead Accounts. Other trustees file and pass accounts in office of Superior Court of Justice of county or district where trustee resident or part of trust estate situate. (c. T.23, §23). For procedure on passing of accounts, see R.P. 74.16, 74.17, 74.18. Action for accounting may be brought against trustee.

Compensation.

Where compensation not fixed by the trust instrument, it may be fixed by judge of Superior Court of Justice upon passing of accounts or otherwise. Amount such as is allowed by judge as fair and reasonable. (c. T.23, §§23, 61). Certain percentages of amounts of receipts and disbursements and of value of property for management fees usually allowed. Trustee may take reimbursement out of trust for expenses reasonably incurred administering trust. Beneficiaries, if all adult and otherwise fully capacitated, may agree to compensation. Taking compensation without such consent of beneficiaries or Court approval improper in most circumstances.

13.17 WILLS:

Capacity.

Persons under 18 years cannot make valid will, except certain members of Canadian Forces, sailors in certain circumstances, or persons who have been or are married or who are contemplating marriage, but will must name person testator intends to marry and is invalid if marriage does not take place (c. S.26, §8). Persons lacking requisite mental capacity cannot make valid will. Sex and, except for persons under 18, marital status irrelevant.

Testamentary Disposition.

Every person may by will dispose of all real and personal estate which without will would devolve upon his heirs, executors or administrators. This is subject to some limitations: where adequate provision for dependant not made court may make order therefor against estate; Family Law Act entitlement of spouse (c. F.3, §5), (see topics 13.07 Descent and Distribution; 13.10 Estate Trustees, subhead Distribution); rights of surviving owners of jointly owned property and rights of beneficiaries under unrevoked or irrevocable designations noted below. Person may designate beneficiary: under certain plans providing benefits, including profit sharing and pension plans, for employees and some other persons or of some (usually tax sheltered) individual retirement or savings plans, in will or in signed document as permitted (c. S.26, §§50, 51); or of proceeds of life or accident insurance (c. I.8, §§190, 313). Some designations, e.g. of life or accident insurance, protect proceeds from creditors. Limited creditor protection accorded to proceeds of certain noninsurance retirement or savings plans payable to named beneficiary. (§§196, 317) Provisions for gifts of human tissue are contained in c. H.20. (See topic 13.10 Estate Trustees, subhead Trillium Gift of Life Network Act.)

Execution.

Will must be in writing, signed at foot or end by testator or by some other person in presence and by direction of testator. Signature must be made or acknowledged by testator in presence of two or more witnesses present at same time, and such witnesses must subscribe will in presence of testator and each other. (c. S.26, §4). No seal is required. Certain armed forces members on active duty or sailor in certain circumstances may make will by writing signed by or at direction of that person and no witness required. (§5).

Attestation Clause.

While no form of attestation is necessary the following form is customarily used.

Form

Signed by the testator, (Name), as his last Will, in the presence of us, both present at the same time, who at his request, in his presence and in the presence of each other have hereunto subscribed our names as witnesses.

Living Wills.

Provision often included in personal care power of attorney (see category 21 Property, topic 21.12 Powers of Attorney) and generally bind attorney or other person with authority to make medical decision for grantor; in emergency such provision may directly bind health-care provider, see Substitute Decisions Act, 1992, S.O. 1992, c. 30, in effect Apr. 3, 1995 and Health Care Consent Act, 1996, S.O. 1996, c. 2, in effect Mar. 28, 1996, is uncertain. Also, see Malette v. Shulman (1990), 72 O.R. (2d) 417.

Holograph Wills.

Any testator may make valid will wholly by own handwriting and signature without witness or further formality. (c. S.26, §6).

Appointment of Estate Trustee of Holograph Will.—Applicant must submit affidavit attesting that entire will, including signature, in handwriting of deceased. (R.P. 74.04).

(*Note*: See reference to change in terminology at beginning of topic Estate Trustees.)

Revocation.

Will may be revoked by subsequent valid will, by writing declaring intention to revoke, executed in manner required for valid will; or by burning, tearing or otherwise destroying same by testator or person in presence and by direction of testator, with intent to revoke. (c. S.26, §15). Will also revoked by marriage of testator except: where will declares it made in contemplation of such marriage; where spouse of testator elects to take under will by writing filed within one year after death in office of Estate Registrar for Ontario; or where will made in exercise of power of appointment and property appointed would not in default of appointment pass to testator's personal representatives. (§16). Will not revoked by presumption of intention on ground of changed circumstances except: if testator after making will becomes divorced or marriage declared nullity, will construed as if former spouse predeceased testator, subject to contrary intent in will. (§17).

Revival.

No revoked will revived except by re-execution or duly executed will or codicil showing intent to revive. Subject to contrary intention, revival of will wholly revoked does not extend to part revoked prior to revocation of whole. (c. S.26, §19). Will deemed to be made at time revived. (§21).

Testamentary Gifts to Subscribing Witnesses.

Beneficiary or spouse of beneficiary under will is competent witness and may sign will on behalf of testator, but gifts or appointments (except direction to pay debts) to that witness, person signing or such spouse or to any person claiming under any of them are invalid unless court finds no exercise of improper or undue influence on testator by such witness, person signing or spouse. If more than two witnesses and at least two not beneficiaries or their spouses, or if no attestation required, no such forfeiture of gifts. (c. S.26, §12). Both executor and creditor whose debt is charged on property by will or their spouses are competent witnesses. (§§13, 14). Direction or charge for payment of debts specifically excepted from gifts that are invalid. No similar specific exception for any provision for gift or compensation to executor.

Certificate of Appointment.

Jurisdiction to appoint estate trustee with will lies in Superior Court of Justice. Application to be filed in its office in county or district in which deceased had at time of death fixed place of abode. If deceased had no fixed place of abode in or resided out of Ontario at death application may be made in such Court's office in any county or district in which deceased had property at death. In other cases application may be filed in such Court's office in any county or district. (c. E.21, §7). Usual application for appointment as estate trustee with will on affidavit evidence with notice to all parties entitled to share in estate but without appearance. Forms provided. (R.P. 74.04). Estate trustee or person with financial interest may apply for formal proof. (R.P. 75.01). Lost or destroyed will may be proved on affidavit evidence without appearance or as Court directs. (R.P. 75.02). (See also topic 13.10 Estate Trustees.)

Notice of Proceeding.

Person with financial interest can receive notice of commencement of proceeding in estate until certificate appointing estate trustee issued. (R.P. 74.03).

Contest.

Proceedings to contest application for appointment as estate trustee with will commenced by filing notice of objection with Estate Registrar for Ontario or local registrar of Superior Court of Justice for county or district. (c. E.21, §21; R.P. 75.03). For application to revoke appointment of estate trustee with will or order to return certificate of appointment to Court, see c. E.21, §§23, 24 and R.P. 75.04, 75.05. Grounds for contesting appointment or to revoke appointment of estate trustee can include, as applicable, lack of testamentary capacity; undue influence; invalid execution; discovery of subsequent will or codicil; appointment made without jurisdiction, in irregular manner, or to person not lawfully entitled; or certain other grounds.

Self-proved Wills.

No provision.

Legacies.

If no direction on time of payment in will, with few exceptions, legacy payable within year of death of testator. If not paid by that time, legacy bears interest. Case law unsettled as to interest rate (in absence of rate stipulated in will).

Unclaimed Legacies.

Money in hands of estate trustee on final passing of accounts of estate, which belongs to person whose address unknown, or who is minor or mentally incapable person, must be paid into court to credit of person entitled or to Public Guardian and Trustee if guardian of such person's property. Money paid into court subject to order of court. (c. T.23, §36). See category 21 Property, topic 21.01 Absentees, subhead Escheat and Bona Vacantia.

Lapse or Ademption of Legacies and Devises.

Generally, any devise of realty or bequest of personalty fails if beneficiary dies before testator, subject to contrary intention in will. Some exceptions: Unless contrary intention by will, if such beneficiary is child, grandchild, brother or sister of testator, and beneficiary leaves issue or spouse surviving testator, gift takes effect as if made to persons who would receive beneficiary's estate if dies intestate immediately after testator, without debts (such persons include beneficiary's spouse, except no $200,000 preferential share for spouse). (c. S.26, §31); if gift is to class or is joint gift, lapse is avoided. (See Dodge [Litigation Guardian of] v. Dodge Estate [1993], 15 O.R. [3d] 422 on contrary intention in will.) Generally, if property devised or bequeathed does not belong to deceased at death, gift fails. Exceptions to this general rule of ademption include statutory exceptions: if testator conveys or deals with property by contract or otherwise, or if property destroyed or damaged or expropriated, or receives mortgage or other security interest on sale of property, beneficiary of property entitled to testator's rights and interest under contract, proceeds of insurance or expropriation or to mortgage or other security interest. (§20). Equitable tracing may save otherwise deemed gift. And where guardian of property disposes of property under Substitute Decisions Act, 1992, S.O. 1992, c. 30, beneficiary of that property acquires interest in proceeds subject to contrary intention in will. (S.O. 1992, c. 30, §36). Guardian also subject to restrictions on disposition of property that is subject of specific testamentary gift. (§35.1). Unless contrary intention in will, any devise or bequest which fails by death of beneficiary before testator or by being disclaimed or contrary to law or otherwise incapable of taking effect is included in any gift of residue (§23) and gift of all or any portion of residue which fails passes as on intestacy, subject to some exception in favour of appointed executor. (§33).

Children.

Will need not show affirmatively intention to disinherit children or their issue, whether living when will executed or born later. Gifts to children and some others may be saved from lapse if donee predeceases testator (see subhead Lapse or Ademption of Legacies and Devises, supra) and children may be able to obtain support under Succession Law Reform Act. (c. S.26, §58). (See topic 13.10 Estate Trustees, subhead Dependants' Allowances.) For meaning of children or issue, see topic 13.07 Descent and Distribution, subheads Adopted Children, Illegitimate Children.

Election.

See topic 13.07 Descent and Distribution, subheads Family Law Act, 13.08 Election, and Election on abolition of curtesy and dower.

Foreign Executed Wills.

In respect of moveables or land, will made anywhere is as to manner and formalities valid and admissible on application for appointment of estate trustee if made in accord with law where will made, where testator was then domiciled, where testator then had habitual residence or where testator was national if one law for wills there. (c. S.26, §37). Reference also to laws of situs of land and domicile at death of testator respecting moveables as regards essential validity and effect and also as to manner and formalities. (§36). Also some special situation provisions. (§37[2]). Will executed in accordance with Hague Convention on International Wills is valid as to form. (§42, Convention Schedule, Art. 1).

Foreign Certificates of Appointment of Estate Trustee.

Where appointment of estate trustee with will made by Court of competent jurisdiction in U.K., or any province or territory of Canada or any other British possession, certificate may be resealed by Superior Court of Justice. (c. E.21, §52; R.P. 74.08). Where appointment with will made elsewhere by Court of competent jurisdiction, ancillary appointment of estate trustee may be applied for to Superior Court of Justice in county or district where Ontario assets situate. (§7; R.P. 74.09).

See also topic 13.10 Estate Trustees.

Simultaneous Death.

See topic 13.05 Death, subhead Survivorship.

Testamentary Trusts.

See topic 13.16 Trusts.

14 FAMILY

14.01 ADOPTION:

Adoption is governed by Child and Family Services Act, c. C.11, Part VII. Court may make order for adoption of child resident in Ontario by person resident in Ontario. (§146). Court may make order for adoption if order is in child's best interests, upon application of parent of child, relative of child, or spouse of child's parent. Application may only be made by one individual or jointly by two individuals who are spouses of each other. Court will make order for adoption on application of minor only in special circumstances. (§147). Factors to be considered in determining best interests of child include physical, mental and emotional needs of child, child's cultural and religious background, child's relationship by blood or through adoption order, importance of continuity in child's care, child's wishes if ascertained, effect upon child of delay in disposition of case, and any other relevant circumstances. (§136).

Consents Required.

Spouse of adopter must consent in writing unless it is in best interests of child to dispense with consent. Written consent of every person who is parent or has lawful custody must be obtained after child is seven days old. (§137). Such consent may be cancelled in writing within 21 days or withdrawn later if court satisfied it is in child's best interest, but application to withdraw consent may not be made once child placed for adoption and remaining in that person's care. (§139). Consent of child if age seven is required unless court finds it inappropriate. If child is married, spouse must consent. Consent of Director (defined term in Act) is required only for Crown wards. Each person whose consent is required must be given opportunity to obtain legal advice and counseling before giving consent. Court may dispense with consent of any person other than that of child over seven or Director when it is in child's best interests to do so. (§138). Once notice has been given to person concerned, court must be satisfied that every person consenting understands nature and effect of adopting order. No notice of proposed adoption is given to any person who has consented or whose consent was dispensed with by court or who is parent of Crown ward unless requested by such person.

Conditions Precedent.

Child must have been placed for adoption by adoption agency or licensee, unless applicant is child's relative, parent or spouse of child's parent. (§141). Once child is placed, access orders are terminated. (§143). Where child is under 16, or is 16 years of age or more but has not withdrawn from parental control, Director, pursuant to home study report made by local Children's Aid Society or another approved person, shall file statement in writing that child has resided for six months or more with applicant, dealing with adjustment of child in home, recommending whether or not adoption order should be made, that applicant is to knowledge of Director proper person to have care and custody of adoptee and recommending that period of residence be dispensed with and order for adoption be made. (§149). If Director recommends that adoption order not be made, copy of statement shall be filed with court and served on applicant at least 30 days before hearing. (§149[4]). No report and statement are necessary where application is made by child's relative or spouse of child's parents, unless court so directs. (§149[6]). Offence to give or receive or agree to give or receive direct or indirect payments or reward in consideration of adoption. (§175).

Jurisdiction and Venue.

Family Court in County or District where applicant or child resides, may make adoption order, unless court satisfied preponderance of convenience favours change of venue. (§150). Hearings are held in camera. (§151). Court may appoint litigation guardian if necessary to protect legal interests of child under 18 years of age.

Decree.

Adoption orders are not subject to judicial review but order granting or refusing adoption, and orders dispensing with consent, may be appealed. (§156). Court may postpone application and make interim custody order for one year. (§154). All consents required for adoption order must be filed for interim custody unless dispensed with by court. Where applicant who is given interim custody order subsequently takes up residence outside Ontario, court may make adoption order if Director makes recommendation in favour of order. (§154).

Name.

Court, upon application of adopting parent(s) may order change in adoptee's surname to that surname person would have been given if born to applicant(s). It may also change given name as adopting parent(s) desire. Child age 12 or more must consent to any name change. (§153).

Effects of Adoption.

For all purposes, adoptee becomes child of adopter, adopter becomes parent of adoptee, adoptee ceases to be child of person who was his parent before adoption order was made and that person ceases to be parent of adoptee as if adoptee had been born in wedlock to adopter. Access or visitation by person who was parent before adoption order is prohibited by §160 and case law. Relationship of all persons including kindred of adopter and person who was parent before adoption are determined accordingly. Wills are interpreted accordingly. Adoption does not remove persons from relationships in consanguinity with respect to laws of incest and marriage. (§158).

Confidentiality.

Adoption information must remain confidential unless necessary for maintenance or updating information or authorized by Act. (§165). Adopted person 18 or older may apply for adoption information. Birth parent may apply for information when adopted person has attained 19 years. (c. C.5, §4). Identifying information may not be disclosed if adopted person or birth parent register disclosure veto. (c. C.5, §4).

14.02 ALIMONY:

See topics 14.05 Divorce, 14.10 Spouses.

14.03 COMMUNITY PROPERTY:

System does not exist in Ontario but Family Law Act (c. F.3) provides for adjustment on death or separation of value of property acquired after marriage allowing for certain deductions and exclusions.

14.04 DESERTION:

See topic 14.10 Spouses.

14.05 DIVORCE:

Divorce throughout all Provinces is governed by Divorce Act, R.S.C. 1985 (2nd Supp.), c. 3. See Canada Law Digest, category 14 Family, topic 14.01 Divorce. Procedure in divorce or corollary relief action governed and administered by Family Law Rules.

Process.

Divorce action is commenced by issuing application. (Rule 8, Family Law Rules). Where application contains claim for support or division of property, or claim for exclusive possession of matrimonial home and its contents, financial statement in form specified must be filed and served with application, and respondent spouse must deliver financial statement with answer. (Rule 13, Family Law Rules). Application may, in addition to personal service, be served by mail with acknowledgment of receipt card or by acceptance of service by solicitor. (Rule 6, Family Law Rules).

Pleadings in divorce action consist of application, answer and reply, if any (Rules 8 & 9, Family Law Rules), as well as financial statements from both parties whether or not action is contested, in form prescribed by Rule 13, Family Law Rules, which may be waived by both parties in certain circumstances. Respondent wishing to oppose claim made in application must deliver answer within prescribed time. (Rule 10, Family Law Rules). Respondent claiming any relief against petitioner, other than dismissal of action and costs, may make such claim in answer. (Rule 10, Family Law Rules).

Interim Relief for Support, Custody and Disbursements.

Notice of motion for temporary relief may be brought but only after case conference dealing with substantive issue in case has been completed except in case of urgency. (Rule 14, Family Law Rules).

Maintenance, Custody of Children, etc.

Maintenance orders of reciprocating jurisdictions may be enforced in Ontario. (Interjurisdictional Support Orders Act, 2002, S.O. 2002, c. 13 and Family Responsibility and Support Arrears Enforcement Act, 1996 as am'd). “Support Deduction Order” made at same time as any support order, and may be sent to payer's employer who must deduct. Support or maintenance orders from Ontario courts will be enforced by Director of Family Responsibility Office pursuant to Family Responsibility and Support Arrears Enforcement Act, unless both payor and recipient spouse withdraw order. Family Orders and Agreements Enforcement Assistance Act, S.C. 1993, c. 8, facilitates process of tracing individuals alleged to have abducted child by allowing access to federal information banks. Governing consideration in custody orders is best interests of children. See topic 14.06 Guardian and Ward, subhead Custody of Infants. Child support determined in accordance with Child Support Guidelines, in force May 1, 1997, which make payments from higher income earning spouse to other spouse non-tax deductible. Quantum of support is determined using table which is solely based on payor's income; table amount of child support was updated effective May 1, 2006.

Separation Agreements.

(Ontario) Superior Court of Justice has no jurisdiction to grant decree of judicial separation. Family Law Act provides for domestic contracts, which include paternity agreement, family arbitration agreement, separation agreements, marriage contracts and cohabitation agreements. (c. F.3, §51). Two persons who cohabited and are living apart may enter into separation agreement. Agreement, if in writing, signed by parties and witnessed, may provide for ownership in or division of property, support obligations, right to direct education and moral training of children, right to custody of and access to children, and any other matter in settlement of parties' affairs. (§54). Written marriage contracts entered into before or during marriage may, upon dissolution of marriage, govern same matters except custody or access to children and possession of matrimonial home. (§52). Court may always disregard provisions governing children when children's best interests are not met. (§56). Contracts may also be disregarded by court if provision is unreasonable in regard to child support guidelines. (§56). Clauses in such agreements making any rights contingent on party remaining chaste are unenforceable, but subsection does not negate contingency upon marriage or cohabitation with another. (§56). See also topic 14.10 Spouses, subhead Domestic Contracts.

Remarriage.

Domestic contracts may provide that rights of parties are contingent upon no remarriage or cohabitation. (c. F.3, §56). Otherwise there are no restrictions on remarriage of divorced persons. But see topic 14.08 Marriage, subhead Licence, Banns or Special Permit.

Foreign Divorces.

A foreign divorce is recognized in the Province if either former spouse was ordinarily resident in that country or subdivision which granted divorce for at least one year immediately preceding commencement of proceedings for divorce, or, if after July 1, 1968, if pursuant to law of another country by tribunal or other authority having jurisdiction to do so on basis of wife's domicile determined as if she was unmarried, and if she was minor, as if she had attained age of majority. (Divorce Act, R.S.C. [2nd Supp.], c.3, §22). It is immaterial that foreign divorce was granted on grounds not recognized in Province. For foreign divorce domicil of wife is that of her husband. See Canada Law Digest, category 14 Family, topic 14.01 Divorce, subhead Jurisdiction.

Annulment of Marriage.

See topic 14.08 Marriage.

14.06 GUARDIAN AND WARD:

Ontario Court of Justice (Family), Family Court or (Ontario) Superior Court of Justice may make order for custody of or access to child and may, on application by parent of child or any other person, appoint guardian of property of child. (c. C.12, Part III).

Bond.

The guardian is required to give a bond payable to minor in the amount and with such sureties as court may direct except where parent of child is appointed and Court is of opinion that bond is not required. (c. C.12, §55).

Powers and Duties.

Unless otherwise limited, the guardian has authority to act for and on behalf of the infant and has charge and management of his estate, real and personal, and the custody of his person and the care of his education.

Accounts.

Guardian may be required to account, or may voluntarily pass accounts, in respect of care and management of property of child (c. C.12, §52) and is required to transfer all of child's property to child when child attains age of 18 years (c. C.12, §53).

Management of Assets of Ward.

The guardian may apply to Superior Court of Justice for opinion, advice or direction of court on any question respecting management of assets of his ward and in acting upon such opinion, advice or order will be deemed to have discharged his duty as guardian. (c. T.23, §60).

Termination of Guardianship.

Testamentary guardians and guardians appointed by a court may be removed by (Ontario) Superior Court of Justice for same causes for which trustees are removable and such guardian may by leave of court resign his office. (c. C.12, §57).

Custody of Infants.

Custody, access and guardianship dealt with under Children's Law Reform Act. (c. C.12, Part III). Order regarding custody of child and right of either parent to access to child, made on basis of best interests of child. Court may appoint person who has technical or professional skill to assess needs of such child. (§30). Court may also order support of child by parent pursuant to Family Law Act. (c. F.3, §33). Family Responsibility and Support Arrears Enforcement Act, 1996 provides for appointment of Director of Family Responsibility office capable of enforcing Ontario orders, as well as orders made in other jurisdictions, on behalf of dependents. Act requires "income source" (defined term) of "payee" (defined term) to deduct amount of support obligation from payee's income to maximum of 50% of net amount owed to payee by income source, and forward to Director on ongoing basis until Order terminates, is varied, or withdrawn from Director. Quantum of child support is to be determined in accordance with Federal Child Support Guidelines, in force May 1, 1997 or similar Provincial Guidelines. Father and mother of child are equally entitled to custody of child. (c. C.12, §20). Where parents of child are separated and child lives with one of them with consent, implied consent, or acquiescence of other of them, right to exercise incidents of custody, but not entitlement to access, are suspended until separation agreement or order provides otherwise. (§20[4]).

Neglected and Abused Children.

Judge of Family Court of Superior Court of Justice or Ontario Court of Justice may, upon finding child to be in need of protection, order psychological or social assessment made of child and parent; child returned to parent or other person subject to supervision by Children's Aid Society; child made ward of Children's Aid Society for period not exceeding 24 months; child made ward of Crown until wardship is terminated or expires. Parent or child if age 12 may, after six months, apply for termination; Children's Aid Society having care of child, foster parent, parent or child may apply for court review. Every wardship terminates when child marries or attains age 18 but Crown wards may be provided for until 21 if student or incapacitated. Such judge may also make order regarding access to any child and order for payment by parent or estate where child is committed to care or another person or society. Every person with reasonable grounds to suspect in course of professional or official duties that child has suffered abuse from person with charge of child required to report it to society. (Child and Family Services Act, c. C.11, Part III).

Children's Lawyer in Toronto is guardian of property of all infants in Province not having a guardian appointed by court.

Mentally Incapable Persons.

Substitute Decisions Act, 1992, S.O. 1992, c. 30, came into force on Apr. 3, 1995, with three companion pieces of legislation: Consent to Treatment Act, 1992, Advocacy Act, 1992 and Consent and Capacity Statute Law Amendment Act, 1992. Mental Incompetency Act was repealed as were committeeship provisions of Mental Health Act. (Ontario) Superior Court of Justice may upon application, where it is satisfied beyond reasonable doubt, declare person mentally incapable and appoint guardian of property, guardian of person, or both, and implement scheme for management of estate, i.e. management or guardianship plan. In order to appoint guardian of property, court must find that person is incapable of managing property and that, as result, it is necessary for decisions to be made on his or her behalf by person who is authorized to do so. (§25[1]). In order for court to appoint guardian of person, court must find that person is incapable of personal care, i.e. person is not able to understand information that is relevant to making decision concerning health care, nutrition, shelter, clothing, hygiene or safety, or is not able to appreciate reasonably foreseeable consequences of decision or lack of decision. (§45). Powers and duties of guardian are provided by statute and guardian is required to act in accordance with plan approved by court.

14.07 INFANTS:

Age of majority is 18 for both sexes. However, minimum age for purchasing, obtaining or consuming liquor is 19. (c. L.19, §30). See also topics 14.08 Marriage, subhead Consent Required; category 13 Estates and Trusts, topic 13.17 Wills.

Contractual disabilities of infants are governed by common law rules. See, however, subhead Ratification of Contracts, infra.

Ratification of Contracts.

No action may be maintained to charge a person upon a promise made after full age to pay any debt contracted during infancy or upon any ratification after full age of any promise or simple contract made during infancy unless the promise or ratification is in writing signed by the party to be charged or his duly authorized agent. (c. S.19, §7).

Actions.

Any proceeding involving minor must be commenced, continued or defended by litigation guardian. (R.P. 7.01[a]). Qualifications for and duties of litigation guardian are prescribed. (R.P. 7.02-7.09). Actions between parent and child are permitted. Actions for prenatal injuries are permitted. Money payable to infant may be paid into court. (c. T.23, §36).

Parental Responsibility.

Parent is not liable for tort of child committed without parent's knowledge, participation, or sanction, but may be liable for negligence in making it possible for child to cause injury. (Thibodeau v. Cheff, [1911] 24 O.L.R. 214 [C.A.]; Kennedy v. Hanes, aff'd [1941] S.C.R. 384).

Where child takes, damages or destroys property, owner or person entitled to possession of property may bring action in Small Claims Court against parent of child to recover damages, not in excess of monetary jurisdiction of Small Claims Court for loss of or damage to property suffered as result of activity of child and for economic loss suffered as consequence of that loss or damage.

Parent is liable for damages unless parent satisfies court that he or she was exercising reasonable supervision and made reasonable efforts to prevent or discourage child from engaging in kind of activity that resulted in loss or damage, or that activity that caused loss or damage was not intentional.

Parental Responsibility Act, 2000, S.O. 2000, c. 4, §2.

Factors taken into consideration under this section are age of child, prior conduct of child, potential danger of activity, physical or mental capacity of child, any psychological or mental disorder of child, quality of supervision, whether parent has sought to improve his or her parenting skills, whether parent has sought professional assistance for child.

Court can receive evidence that child has been found guilty of offence under Young Offenders Act (Canada) but court file is to be sealed. (§3). Court can take into account any amount ordered by court as restitution or paid voluntarily as restitution. (§5). If found liable, payment can be ordered to be made in full on fixed date or paid in installments. (§7).

Maintenance.

Every parent has obligation to provide support, in accordance with need, to unmarried child who is minor or is enrolled in full time program of education, to extent parent is capable of doing so, unless child age 16 or over and has withdrawn from parental control. (c. F.3, §31).

Adoption.

See topic 14.01 Adoption.

Legitimacy.

For all purposes of law of Ontario, person is child of natural parents and status as their child is independent of whether child born within or outside marriage. Distinction at common law between status of children born in wedlock and born out of wedlock abolished, and relationship of parent and child and kindred relationships flowing therefrom determined for purposes of common law accordingly. (c. C.12, §1[4]). Unless contrary intention appears, reference in instruments and legislation to persons described in terms of blood relationship or marriage to another construed to refer to person who comes within description by reason of relationship of parent and child as determined above. (§2).

Custody.

Where order is made for custody of or access to child court may order supervision of custody or access and may make order restraining person from harassing applicant or child. (c. C.12, §§34, 35). Court may also make orders where there are probable grounds to believe person proposes to remove child from Ontario contrary to court order (§37), and where person is unlawfully withholding child from person in whose favour order has been made for custody or access to child (§36). Courts generally do recognize extra-provincial orders for custody of or access to child or may in certain circumstances supersede extra-provincial order. (§41). See also topic 14.06 Guardian and Ward, subhead Custody of Infants.

14.08 MARRIAGE:

Governed in Ontario by Marriage Act. (c. M.3).

Consent Required.

Consent in writing of both parents is required before marriage license may be issued to minor who is of age of 16 or more, except where one of parents is dead or both parents are living apart, in which case consent may be given by parent having actual or legal custody of minor. Prescribed form of consent. (c. M.3, §5).

License, Banns or Special Permit.

Marriage licenses which remain valid for three months may be issued for fee by office of Minister of Consumer and Business Services and by clerk of every city, town, or village. (c. M.3, §§3 and 11). Alternatively, marriage may be solemnized under authority of publication of banns or in certain cases under authority of special permit. (§§9, 17). When one party to intended marriage applies for license, he or she must personally make affidavit stating amongst other things, that there is no lawful cause or legal impediment to prevent marriage and must produce to issuer official copy of registration of birth of other party to marriage or deposit affidavit by such other party or member of his or her family stating age, date and place of birth of such other party. Where both parties to intended marriage attend before issuer it is sufficient if each of them makes required affidavit. No medical examination required. No marriage may be solemnized earlier than third day after date of license or fifth day after banns published. Issuance of marriage licenses has recently been extended to same-sex couples for marriages in Ontario. Civil Marriage Act, S.C. 2005, c. 33, extends marriage to include same-sex unions. Licenses to marry and marriage ceremonies involving same-sex couples are legal in Ontario.

Where previous marriage of applicant has been dissolved or annulled in Canada, no license will be issued unless certified copy of final decree or judgment deposited. Where dissolved or annulled outside Canada, written authorization of Minister is required before license will be issued. (c. M.3, §8). See also category 13 Estates and Trusts, topic 13.05 Death.

Ceremonial Marriage.

Marriages may be solemnized by duly appointed ministers and clergymen of every denomination, if they are residents of Ontario and have been registered by Minister as authorized to solemnize marriage. Civil Marriage Act provides protection to religious groups who refuse to perform marriages that are not in accordance with their religious beliefs (such as same-sex unions). Judge or justice of peace may solemnize marriages in their chambers or offices between hours of nine o’clock in morning and five o’clock in afternoon. Fee is payable.

Records of Marriages.

Every issuer of marriage licenses must keep record of licenses which he has issued and any person may have search made of any license issued within three preceding months.

Common Law Marriages.

Marriages by cohabitation and repute are not formally recognized in Ontario but where two persons have cohabited continuously for not less than three years, or have cohabited in relationship of some permanence and are natural or adoptive parents of child, they are considered spouses for purposes of support obligations. (c. F.3, §29). Common law marriages, if constituted in jurisdictions which recognize them, may be regarded as formally valid in Ontario. (Forbes v. Forbes, 20 O.W.R. 924).

Proxy marriages are not authorized.

Marriages by written contract are not authorized.

Prohibited Marriages.

Civil Marriage Act prohibits marriage between person and another person if they are related lineally, or as brother or sister or half-brother or half-sister, including by adoption. (§13).

14.09 MARRIED PERSONS:

See topics 14.10 Spouses, Marriage; categories 5 Civil Actions and Procedure, topic Evidence, subhead Witnesses; Estates and Trusts, topics Estate Trustees, Wills; Property, topic Dower.

14.10 SPOUSES:

Status.

For all purposes of Ontario law, married person has legal personality that is independent, separate and distinct from that of his/her spouse. Married person has legal capacity for all purposes as if unmarried, and has right of action in tort against spouse. (c. F.3). Civil Marriage Act, S.C. 2005, c. 33, extends definition of marriage for civil purposes to lawful union of two persons to exclusion of all others. Marriage that is actually or potentially polygamous is valid for purposes of Family Law Act if celebrated in jurisdiction where it is valid. (§1).

Family Law Act provides for deferred community of property system. During marriage, net family property owned by spouse with title. Net family property defined as “value of all property, except property which is excluded that a spouse owns on the valuation date (see below), after deducting the spouse’s debts and other liabilities, and the value of property, other than a matrimonial home, that the spouse owned on the date of the marriage, after deducting the spouse’s debts and other liabilities, calculated as of the date of the marriage”. Each spouse makes separate calculation. Property means any interest, present or future, vested or contingent, in real or personal property and includes property over which, whether alone or in conjunction with another person, there is power of appointment exercisable in favour of himself or herself, property disposed of by spouse but over which spouse has power to revoke disposition or disposal of property, and in case of spouse’s right under pension plan that has vested, spouse’s interest in plan including contributions made by other persons. Excluded from net family property calculations are: (1) property, other than matrimonial home, that was acquired by gift or inheritance from third person after date of marriage; (2) income from such gifts or inheritances if donor or testator has expressly excluded it from donee’s net family property; (3) damages or right to damages for personal injuries, nervous shock, mental distress, or loss of guidance, care and companionship, or settlement representing those damages; (4) proceeds of life insurance policies; (5) property other than matrimonial home, into which property referred to in paragraphs 1 to 4 can be traced; (6) any property excluded by domestic contract between spouses. Onus of proving deduction or exclusion from net family property is on party claiming same. (c. F.3, §4). All net family property of spouses is valued on earlier of following valuation dates: (1) decree nisi of divorce is pronounced; (2) marriage is declared nullity; (3) spouses have separated with no prospect of resumed cohabitation; (4) death of spouse; (5) spouses cohabiting but serious danger one spouse may improvidently deplete net family property. (c. 4, §4). Upon valuation date, spouse whose net family property is lesser of two net family properties is entitled to one half of difference between them. (c. 4, §5). Court has discretion to vary equalization of net family property if equalization would be unconscionable given: (1) One spouse's failure to disclose to other spouse debts and liabilities existing at date of marriage; (2) one spouse incurred debts recklessly or in bad faith thereby reducing net family property; (3) part of value of net family property consists of gifts from other spouse; (4) spouse's intentional or reckless depletion of net family property; (5) amount spouse would receive is disproportionately large in relation to period of cohabitation less than five years; (6) one spouse has incurred disproportionately larger amount of debts and liabilities than other spouse for support of family; (7) written agreement between spouses that is not domestic contract; or (8) any other circumstance relating to acquisition, disposition, preservation, maintenance or improvement of property. (§5).

Spouses have equal rights of possession of matrimonial home regardless of who holds title, as against each other. (c. F.3, §19). Matrimonial home is property in which person has interest and is, or if spouses are separated, was at time of separation ordinarily occupied by person and spouse as family residence. (§18). Court can make order for exclusive possession of matrimonial home taking into account, among other things, best interests of children affected, financial position of both spouses, availability of other suitable and affordable accommodation and any written agreement between parties. (§24). Property can be designated by registered instrument as matrimonial home by one spouse or both spouses. If only one spouse registers designation, any other property qualifying as matrimonial home remains matrimonial home. If both spouses register designation, any other undesignated matrimonial home ceases to be matrimonial home. (§20). No spouse may dispose of or encumber any interest in matrimonial home without consent or release of other spouse or court order. (§21). Statement by person making disposition or encumbrance, or by person's attorney based on personal knowledge, that person is not spouse or that property is not matrimonial home is sufficient proof of such unless person to whom disposition or encumbrance is made has notice to contrary. (§21). Spouse with right to possession of matrimonial home has right to redeem or to relief against encumbrances and is entitled to notice respecting claim and its enforcement or realization. (§22).

Issues of ownership of property between husband and wife (see reference to Civil Marriage Act, supra) are governed by rule of resulting trust except that property taken in name of spouses as joint tenants is prima facie proof of intent that each spouse has one-half beneficial interest on severance, and money on deposit in bank or similar financial institution in name of both spouses is deemed to be held by them as joint tenants. (c. F.3, §14). Common law rules govern with respect to constructive trust. (Rawluk v. Rawluk [1990], 23 R.F.L. [3d] 337 [S.C.C.]).

Support Obligations.

Every spouse has obligation to provide support for self and other spouse, in accordance with need, to extent that he or she is capable of doing so. (c. F.3, §30). For support purposes, definition of spouse includes unmarried persons who have cohabited continuously for three years or more or are in relationship of some permanence and are natural or adoptive parents of child. (§29). Spouse, dependent, or social welfare agency making payments to spouse may apply to court for support order against other spouse. Support order should recognize both spouses' contribution to relationship and economic consequences of relationship on spouse, share economic burden of child support equitably, assist spouse or same-sex partner receiving support to become able to contribute to own support and relieve financial hardship not relieved by equalization of net family property and orders regarding matrimonial home. Factors court considers in awarding support are set out. (§33). Conduct of either spouse has no effect on obligation to support, but conduct of spouse so unconscionable as to constitute obvious and gross repudiation of relationship may be considered by court in fixing amount of support. (§33). Court may make support order for periodic payments or lump sum (§34), may vary support order (§37), may index support order (§34), may order employer of party to application for support to provide court written return showing party's remuneration (§42), and may imprison or fine spouse absconding from support order (§§43, 49). While cohabiting spouse may pledge credit of self and other spouse jointly for necessaries except where express withdrawal of authority by other spouse. (§45). See also topic 14.05 Divorce, subhead Maintenance, Custody of Children, etc.

Domestic Contracts.

Family Law Act provides for domestic contracts which are paternity agreements, family arbitration agreements, separation agreements, marriage contracts and cohabitation agreements. (c. F.3, §51). Domestic contracts must be written, signed by both parties and witnessed. (§55). Any agreement affecting children is subject to court determination of best interests of children. (§56). Provisions requiring party to remain chaste are void. Domestic contracts may be set aside as unconscionable if one party failed to disclose significant assets, debts or other liabilities to other when contract entered, if one party did not understand nature and consequences of contract, or otherwise in accordance with common law. (§56). Provisions for support in domestic contract or paternity agreement may be set aside by court if it results in unconscionable circumstances, if person receiving or waiving support qualifies for public assistance, or if there is default in provision of support under agreement. (§33). Two persons who are not spouses may enter into paternity agreement for payment of expenses of child's prenatal care and birth, support of child, or funeral expenses of child or mother. (§59). Party to domestic contract may file it with court and court may enforce it. (§35).

Marriage Contracts.

Two persons may enter marriage contract before or during their marriage agreeing on their respective rights and obligations under marriage, or on separation, annulment or dissolution of marriage, or upon death, including ownership of property, support obligations, education and moral training of children and any other matter in settlement of their affairs except custody or access to children. No such agreement may alter rights of equal possession in matrimonial home. (c. F.3, §52). See also topic 14.05 Divorce, subhead Separation Agreements.

Cohabitation Agreements.

Two persons who are cohabiting or intend to cohabit and who are not married to each other, may enter into agreement in which they agree on their respective rights and obligations during cohabitation, or on ceasing to cohabit or on death, regarding same matters as marriage contracts. (c. F.3, §53).

Antenuptial or Prenuptial Contracts.

Marriage contracts or cohabitation agreements made in contemplation of marriage are synonymous terms for antenuptial or prenuptial contracts and latter are governed by statutory provisions of former.

Actions.

Each spouse has like right of action in tort against other as if not married. (c. F.3, §64).

See also topics: Marriage, Infants, subhead Maintenance; categories Civil Actions and Procedure, topic Damages; category Estates and Trusts, topic Death, subhead Action for Death.

15 HEALTH

15.01 COMMUNITY SERVICES:

Under Long Term Care Act, 1994 (S.O. 1994, c. 26), agencies which provide community services such as homemaking, meal services, care giver support services, home maintenance, repair services, adult day programs, nursing services, etc. must be approved by Minister of Health and Long Term Care to receive funding from Ministry (§5). These agencies must enter into service accountability agreement to receive funding from local health integration network (Local Health System Integration Act, 2006, S.O. 2006, c. 4, §§19, 20[1]). Agency designated as multi-service agency by Minister of Health and Long Term Care must provide mandatory services set out in Act. (§§10 and 11).

Minister of Health and Long Term Care may revoke or suspend approval of agency and designation of multi-service agency. (§§50 and 52).

Minister of Health and Long-Term Care may designate some agencies as Community Care Access Corporations. (Community Care Access Corporations Act, 2001, S.O. 2001, c. 33, §2). These agencies are governed by Community Care Access Corporations Act, 2001. Members of Board of Directors of these corporations are appointed by Lieutenant Governor in Council. Corporations listed in Schedule to the Community Care Access Corporations Act are also bound by same provisions in Act prior to their designation. (§15).

Eligibility criteria for various services is set out in regulation. (O. Reg. 386/99). Agencies must establish process for reviewing complaints pertaining to provision of community service as well as decisions that persons are not eligible to receive particular community service. (Long Term Care Act, 1994, §39). Decision of agency may be appealed by Health Services Appeal and Review Board. (§40).

15.02 CONSENT TO TREATMENT:

Health Care Consent Act, 1996 (S.O. 1996, c. 2) sets out comprehensive code for provision of consent to treatment. Health practitioner may not administer treatment unless he/she is of opinion that person is capable with respect to treatment and person has given consent or in instances where person is incapable, consent is given by person's substitute decision maker in accordance with Act. (§10). Consent must be "informed" as defined in Act. (§11).

Act sets out list and ranking of persons who may act as substitute decision makers. (§20). One of these individuals may be attorney for personal care appointed under Substitute Decisions Act, 1992. (S.O. 1992, c. 30). Under Substitute Decisions Act, person can appoint attorney to make decision for personal care. Personal care includes health care (including giving consent under Health Care Consent Act) nutrition, shelter, clothing, hygiene or safety. Power of attorney only becomes effective when donor loses capacity to make decisions with respect to one or more aspects of personal care or when attorney has reason to believe donor lacks capacity to make decision (although power of attorney may require lack of capacity to be proved) and then only for that decision. (§49). Registration by donor while fully capable may be prerequisite to exercise of some powers, e.g. authorized use of force. (§50). Act sets out certain duties of attorney and attorney may apply to court for directions. (§§66-68). Provisions for assessment of donor by assessors qualified under Act. (§§20.1, 49-51 and 78). Detailed provisions in Act for giving or revoking personal care power of attorney and conduct, resignation (§52) of attorney and termination of power (§53).

Health Care Consent Act sets out requirements to be met by substitute decision makers. (§20). Substitute decision makers may also consent to admission to hospital for purpose of treatment. (§24).

Treatment may not be provided to person found incapable if health practitioner is informed that person intends to apply to Consent and Capacity Board for review of incapacity finding. (§18). This provision does not apply in emergency as defined in Act. (§§18[4] and 25). In consenting or refusing to consent to treatment on person's behalf, substitute decision maker must follow wishes expressed by person when person was capable and at least 16 years of age. Health practitioner or substitute decision maker may apply to Consent and Capacity Board to obtain permission for substitute decision maker to consent to treatment despite wish. (§36). Application may also be brought to Consent and Capacity Board with respect to applicability of wish. (§35). Where no such wishes are known, substitute decision maker must act in person's best interests. (§21[1]). Act sets out factors substitute decision maker must consider in determining person's best interests. (§21[2]). Where substitute decision maker is not following requirements of Act, health practitioner may apply to Consent and Capacity Board. (§37).

In specific emergency circumstances identified in Act, treatment may be provided to incapable person without obtaining consent of person's substitute decision maker. (§§24-28). Health practitioner must not, however, administer treatment, if he or she has reasonable grounds to believe that person, while capable and at least 16 years of age, expressed wish applicable to circumstances to refuse treatment. (§26).

Applications may be brought to Consent and Capacity Board by person for review of incapacity finding (§32), to appoint representative to act as substitute decision maker (§33) and to review consent to admission to treatment facility (§34). Applications may also be brought by substitute decision maker to depart from person's wishes. (§36). Health practitioner and substitute decision maker may bring applications for directions regarding person's previous wish with respect to treatment. (§35).

Act also contains provisions for consent to admission to facilities governed by Charitable Institutions Act, Homes for the Aged and Rest Homes Act, or Nursing Homes Act as well as facilities to be prescribed by regulation. (§§38-54). Act also contains provisions providing that consent to personal assistance services may be made on incapable person's behalf by substitute decision maker. (§§55-69). Personal assistance service is defined as service to assist with any routine activity of living. (§2).

Chase McEachern Act (Heart Defibrillator Civil Liability), 2007 (S.O. 2007, c. 10, Sch. N) establishes protection from civil liability for good faith emergency use of, and good faith provision of, automated external medical heart monitors and defibrillators in certain circumstances.

15.03 HEALTH FACILITIES:

Integration of Provincial Health System.

Local Health System Integration Act, 2006, S.O. 2006, c. 4 came into force on Mar. 28, 2006 with purpose of integrating provincial health care system. (§1). Establishes 14 local health integration networks ("LHINs"), each representing distinct geographic region in province. (§3). Objects of LHINs are to plan, fund, and integrate local health system to achieve purposes of Act. (§5). Minister may provide funding to LHIN on terms and conditions that Minister considers appropriate. (§17). Minister and each LHIN are required to enter into accountability agreement which shall include performance goals and objectives, requirements for reporting on performance, and plan for spending funding that LHIN receives. (§18). Act amends term "accountability agreement" in Commitment to the Future of Medicare Act, 2004 (referring to agreement between health service provider and Minister) to provide that agreements are now with LHIN and are called "service accountability agreements".

LHINs may provide funding to health service provider in respect of services health service provider provides in and for geographic area of network. (§19). Such funding shall be on terms and conditions determined by LHIN, but must be consistent with any terms and conditions imposed by Minister on LHIN funding, and LHINs accountability agreement with Minister. (§19). Any health service provider that receives funding from LHIN must enter service accountability agreement with LHIN. (§20[1]). Health service providers include institutions and facilities that provide health care, including public hospitals, private hospitals, certain psychiatric facilities, approved charitable homes for aged under Charitable Institutions Act, licensees under Nursing Homes Act, municipalities or boards of management maintaining home for aged under Homes for the Aged and Rest Home Act, community care access centres, provider of community services approved under Long-Term Care Act, community health centres, and community mental health and addiction services. (§2). These providers will be defined by reference to Long-Term Care Homes Act, 2007, S.O. 2007, c. 8, which is not yet in force. Act amends definition of "health resource provider" in Commitment to Future of Medicare Act to conform to definition of health service provider in Local Health System Integration Act. Physicians and independent health facilities are not included in definition of health service provider.

Act amends number of other Acts to reflect relationship between LHINs and health service providers. (§§43-54). Provisions which make such amendments will come into force on staggered basis upon proclamation.

Psychiatric Facility.

Psychiatric facilities are governed by Mental Health Act, c. M.7. These are defined as facilities for observation, care and treatment of persons suffering from mental disorder and designated as psychiatric facilities by Minister of Health and Long Term Care. (§§1 and 80.2).

Person in need of observation, care and treatment provided in psychiatric facility may be admitted as informal or voluntary patient upon recommendation of physician. (§12). Act also contains provisions for involuntary commitment of person. In certain circumstances set out in Act, physician may make application for psychiatric assessment of person. (§15). This application is sufficient authority to take person into custody to bring him/her to psychiatric facility where he/she can be detained for no more than 72 hours. (§15[5]). Physician must promptly give person written notice of application. Notice must state reasons for detention and indicate that person has right to retain and instruct counsel without delay. (§38.1). In circumstances set out in Act, Justice of Peace may make order for examination by physician. (§16). Police officer may also take person into custody in certain circumstances to bring this person for examination by physician. (§17). After observing and examining person pursuant to application for psychiatric assessment, physician must admit person as involuntary patient if criteria in Act are met. (§20). Physician who completes certificate of involuntary admission may not be same physician who completed application for psychiatric assessment. (§20[2]).

Physician who completes certificate of involuntary admission must give to patient written notice providing reasons for detention and advise that patient is entitled to hearing before Consent and Capacity Board and that patient has right to retain and instruct counsel without delay. Physician must also promptly notify rights advisor. (§38). Rights advisor must meet with patient, explain to him or her significance of certificate and right to have it reviewed by Consent and Capacity Board. (§38).

Involuntary patient may apply to Consent and Capacity Board to inquire into whether patient meets criteria for detention as involuntary patient of psychiatric facility. (§39).

Physician may also issue community treatment order if criteria in Act are met. (§33.1). This is subject to consent of person or his/her substitute decision maker if person is incapable. (§33.1). Community treatment order provides person who suffers from serious mental disorder with community based treatment plan. (§33.1). Community treatment order may be terminated in circumstances set out in Act. (§§33.2 and 33.3).

Obtaining of consent for treatment in psychiatric facility is governed by Health Care Consent Act, 1996 (see topic 15.02 Consent to Treatment). Mental Health Act specifically provides, however, that psychosurgery shall not be administered to involuntary patient, incapable patient or person who is remanded or detained in psychiatric facility pursuant to Criminal Code.

(Mental Health Act, §49).

Coroners Act, R.S.O. 1990, c. C.37, §10(4.7) makes inquests mandatory where person dies while being restrained if detained in psychiatric facility, in hospital under mental disorder provisions of Criminal Code, or while committed or admitted to secure treatment program under Child and Family Services Act.

Mental Hospitals Administered by Government.

Mental Hospitals Act applies to institutions designated in regulation. (Mental Hospitals Act, c. M.8, §2; R.R.O. 744, §1). Administration of these institutions is vested in Ministry of Health and Long Term Care. (§6). Most of these institutions are also designated as psychiatric facilities under Mental Health Act.

Public Hospitals.

Public hospitals are governed by Public Hospitals Act, c. P.40. Incorporation of hospital or amalgamation of two or more hospitals is subject to approval of Minister of Health and Long Term Care. (Public Hospitals Act, §4).

Public Hospitals Act prescribes procedural requirements with respect to physicians' application for appointment or reappointment to hospital. (Public Hospitals Act, §§37-39). Hospital decisions pertaining to appointment and reappointment of physicians and privileges may be appealed to Health Professions Appeal and Review Board. (§41). Decisions of Board may be appealed to Divisional Court. (§43).

Where appointment or reappointment is rejected or privileges are restricted or cancelled by reason of incompetence, negligence or misconduct or where physician resigns from hospital during course of investigation into his/her competence, negligence or conduct, report must be forwarded by hospital to College of Physicians and Surgeons of Ontario. (§33).

"Critical incident" is defined as unintended event occurring when patient receives treatment in hospital resulting in death or serious disability, injury or harm, which is not primarily due to his/her underlying condition or known risk inherent in treatment. (R.R.O. 965, §1[1]). Hospital boards are required to ensure system of disclosing every critical incident as soon as practicable. Disclosure is to be made to affected patient, lawful substitute decision maker, or estate trustee or administrator, depending on circumstances. (§2[4]). Must include material facts, consequences for patient as they become known, and actions taken and recommended to address consequences for patient. (§2[5]). Subject to Quality of Care Information Protection Act (S.O. 2004, c. 3, Sch.B), Board must ensure system for disclosing, where appropriate, to same person(s) systemic steps, if any, taken to reduce risk of similar critical incidents. (§2[6]). Disclosure must be noted in medical record. (§3).

Private Hospitals.

House in which four or more patients are or may be admitted for treatment, with few exceptions, is defined as private hospital and may only be operated under licence issued under Private Hospitals Act (c. P.24) prior to Oct. 29, 1973, or renewal of such licence. Hospitals governed by Public Hospitals Act are excluded from definition of private hospital. (§1). Licence is renewable annually in accordance with regulations. (§7). In certain circumstances, licence may be revoked by Minister of Health and Long Term Care. (§12). Licencee is entitled to hearing before Health Services Appeal and Review Board in event that Minister proposes to revoke licence, refuses to renew it or consents to transfer of licence. (§13).

Long Term Care Facilities.

Nursing homes may only be operated under licence issued by Director appointed by

Minister of Health and Long Term Care. (Nursing Homes Act, c. N-7). Decision of Director to revoke or refuse to issue or renew licence may be appealed to Health Services Appeal and Review Board. (§15). Decision may not be appealed, however, where Minister of Health and Long Term Care advises Director in writing that licence is not in public interest. (§5[2]). Act sets out matters which may be considered by Minister in determining whether granting of licence is in public interest. (§5[4]).

Licenced nursing home must enter into service agreement with Government of Ontario and receives funding from Ministry of Health and Long Term Care. (§20.13). Licensed nursing home will be required to enter into service accountability agreement with LHIN instead of Ministry in future.

Person may not be admitted to nursing home unless admission is authorized by placement co-ordinator designated by Minister of Health and Long Term Care. (§20.1). Admission eligibility criteria are set out in Regulation. (R.R.O. 832, §§129-133.1).

Person may only be admitted if he or she consents to admission or where person is incapable, consent is provided by person's substitute decision maker in accordance with Health Care Consent Act. (§20.1[13] and Health Care Consent Act, §40).

Decision of placement co-ordinator to effect that applicant is not eligible for admission to nursing home may be reviewed by Health Services Appeal and Review Board. (§20.5). Decision of Board may be appealed to Divisional Court. (§20.8).

Act contains residents' bill of rights which must be abided by nursing home licencee. (§2). Licencee must also assist residents in establishing Resident's Council if requested by at least three residents or their substitute decision makers. (§29).

Licencee may not demand or accept payment from resident on his/her behalf which is in excess of amount specified in regulation or in service agreement to which licencee is party. (§21).

Charitable institutions which provide residential, shelter, specialized or group care may be approved by Minister of Health and Long Term Care if institution is home for aged or alternatively by Minister of Community and Social Services under Charitable Institutions Act, c. C.9, §2. This Act does not apply to hospitals or facilities governed by either Child and Family Services Act, or Homes for the Aged and Rest Homes Act.

Payments may be made by Government to approved institution under Charitable Institutions Act. (§9). No payment may be made, however, unless institution enters into service agreement with Government of Ontario. (§9).

Approval may be suspended or revoked by Minister. Except in instances where institution consented to revocation or suspension, Minister shall cause hearing to be held by person appointed by Minister to determine whether approval should be suspended or revoked. (§11).

Payments from or on behalf of resident of charitable institution may not exceed amount set in regulation or in service agreement. (§9.3).

Admissions to charitable institution is subject to authorization of placement co-ordinator designated by Minister. (§9.6). Admission eligibility criteria are set out in regulation. (R.R.O. 69, §§60-64.1). Admission may only be made on consent of person to be admitted or his/her substitute decision maker in instances where person is incapable. (§9.6; Health Care Consent Act, §40).

Decision of placement co-ordinator regarding eligibility of applicant for admission to charitable institution may be reviewed by Health Services Appeal and Review Board. (§9.10). Decision of Board may be appealed to Divisional Court. (§9.13).

Approved charitable home for aged must abide by resident's bill of rights set out in legislation. (§3.1).

Institution operating approved charitable home for aged must assist in establishment of Resident's Council if requested to do so by at least three residents or their substitute decision makers. (§9.19).

Nursing Homes Act, Charitable Institutions Act, and Homes for Aged and Rest Homes Act will be repealed and replaced by Long-Term Care Homes Act, 2007, S.O. 2007, c. 8, when it is proclaimed in force. Generally arrangements will remain as set out above, and transition provisions replace licences given under these Acts. Resident's Council must be established under new regime.

Municipal Homes.

Most municipalities must establish and maintain home for aged which is governed under Homes for the Aged and Rest Homes Act. (c. H-13, §3). Such municipalities must contribute to establishment and maintenance of home for aged if by-law authorizing such home had been adopted by majority of municipalities in territorial district. (§6).

These homes are funded by Minister of Health and Long Term Care and municipalities. (§§24-29). Funding by Minister is subject to municipality having entered into service agreement pursuant to Act. (§28).

Admission to home is subject to authorization of placement co-ordinator designated by Minister of Health and Long Term Care. (§18). Person may only be admitted with his/her consent or consent of his/her substitute decision maker when person is incapable. (§18[13]; Health Care Consent Act, §40).

Admission eligibility criteria set out in regulation. (R.R.O. 637, §8). Decision of placement co-ordinator regarding person's eligibility for admission may be reviewed by Health Services Appeal and Review Board. (§19). Decision of Board may be appealed to Divisional Court. (§19.4).

There can be no payments by resident or on his/her behalf for accommodation, care, services, programs or goods, in excess of amounts prescribed in regulations or in service agreement. (§30.1).

Municipality and Board of Management of home must abide by residents' bill of rights set out in legislation. (§1.1).

Municipality must assist residents in establishing Residents' Council when requested by at least three residents or their substitute decision makers. (§30.6).

Care homes are defined in Residential Tenancies Act, 2006 as residential complexes occupied or intended to be occupied by persons for purpose of receiving care services. Care services are listed in Act and in Regulation. (Residential Tenancies Act, 2006, S.O. 2006, c. 17, §2; O. Reg. 516/06, §2). Subject to certain exceptions, Residential Tenancies Act applies to care homes. Act, however, does not apply to homes governed by Public Hospitals Act, Private Hospitals Act, Mental Hospitals Act, Homes for the Aged and Rest Homes Act, Nursing Homes Act, Ministry of Correctional Services Act, Charitable Institutions Act, Child and Family Services

Act, or some accommodations referred to in Developmental Services Act, R.R.O. 272, Schedule 1. See also category 21 Property, topic 21.09 Landlord and Tenant.

Homes for Aged and Rest Homes Act will be repealed and replaced by Long-Term Care Homes Act, 2007, S.O. 2007, c. 8, when it is proclaimed in force. Southern municipalities and northern municipalities larger than 15,000 people will be required to establish homes. Minister may provide funding for homes, subject to conditions.

Homes for Special Care.

Some homes for care of persons requiring nursing in residential or sheltered care are licenced under Homes for Special Care Act. (c. H.12). Subject to certain exceptions, these are also governed by Residential Tenancies Act, 2006. (S.O. 2006, c. 17, §6).

Home for Residential Accommodation of Persons with Mental Impairment.

Group homes providing residential accommodations to persons with mental impairment associated with limitations in adaptive behaviour are governed by Developmental Services Act. (c. D.11). Subject to certain exceptions, these homes are also governed by Residential Tenancies Act, 2006. (§6).

Independent Health Facilities.

Facility where health services are provided and facility fees are charged is governed by Independent Health Facilities Act, c. I.3. Facility fee is fee in respect of service or operating costs that support insured service (as defined under Health Insurance Act) provided by physician or practitioner or is fee in respect of service designated by Minister of Health and Long Term Care. (§1). Public and private hospitals, psychiatric facilities, licenced nursing homes and homes licenced under Homes for Special Care Act are exempted from application of Act. (R.R.O. 649, §§1 and 2).

Services provided by chiropodists, chiropractors, dentists, optometrists, osteopaths, physiotherapists, podiatrists, laboratories or specimen collection centres licenced under Laboratory and Specimen Collection Centre Licencing Act are also exempted from application of Act. (R.R.O. 649, §§4 and 5). No person is to operate independent health facility except under authority of licence issued under Act. (Independent Health Facilities Act, §3).

15.04 HEALTH INFORMATION:

Personal Health Information Protection Act, 2004 (S.O. 2004, c. 3, Sched. A) (“Act”) is concerned with collection, maintenance and protection of health information, which it defines as information which relates to past, present or future provision of health care to individual. Pursuant to Health Information Custodians in the Province of Ontario Exemption Order, SOR/2005-399, any health information custodian to which Personal Health Information Protection Act applies is exempt from application of Part 1 of Personal Information Protection and Electronic Documents Act in respect of collection, use and disclosure of personal information that occurs in Province of Ontario. However, Personal Information Protection and Electronic Documents Act will continue to apply to collection, use and disclosure of personal health information outside province, in course of commercial activity.

Act defines “health information custodian” (“HIC”) and imposes obligations on them with respect to collection, use and disclosure of health information. Act also mandates that HIC provide patients access to their records under §52, subject to certain exceptions. Individual may request correction to their health record from HIC if information contained in record is incomplete or inaccurate for purposes for which it is used under §55.

HIC may provide information contained in record to agent for permitted use of information under §37. This is not considered to be disclosure, and certain conditions apply. Under §15 of Act, HIC may appoint contact person to act as their own agent and facilitate compliance with Act, respond to public inquiries and individual requests for access to or correction of health records, and receive complaints of any alleged contraventions of Act or its regulations. Complaints of contravention of Act may also be brought to appointed Commissioner, who may initiate review, effect settlement for any alleged contravention or authorize mediator to do same under §56.

Consent is required for collection, use and disclosure of health information. Under §21, capacity is required for individual to give valid consent. Consent must be knowledgeably given and go to purpose of collection, use or disclosure of information. (§18[6]). If individual is incapable of valid consent, substitute decision maker will be appointed. (§23). Consent may be withdrawn after it has been given. (§19).

Collection of health care information without consent of individual from other sources is permitted under §36 if information is considered to be reasonably necessary for providing health care and it is not reasonably possible to collect information from patient which is reasonably accurate or in timely manner. Further, under §38, disclosure of personal health information to another health care provider may be permitted without consent if it is considered reasonably necessary for provision of health care and patient's consent may not be obtained in timely manner, except where patient has given express instructions not to make such disclosure (only instructions given to hospital after Oct. 31, 2005 are binding).

In §§40-43 various situations in which HIC may disclose personal health information without consent are established, for example, to law enforcement authorities (§43), for proceedings (§41), or if they believe on reasonable grounds that disclosure is necessary for purpose of eliminating or reducing significant risk of serious bodily harm to person or group of persons (§40).

Quality of Care Information Protection Act, 2004 (S.O. 2004, c. 3, Sched. B) protects quality of care information reported or solicited for specifically designated Quality of Care Committees ("the Committee") from being disclosed. Quality of care information means information that is collected by or for designated Committee for sole or primary purpose of assisting Committee in carrying out its functions, or relates solely or primarily to activity that Committee carries on as part of its functions. It does not include information contained in health record which is maintained for purpose of providing health care to individual, information maintained in record in accordance with law, or facts contained in record of incident involving provision of health care to individual, except to extent that facts are fully recorded as part of health record itself. (§1).

Quality of care information can only be used or disclosed beyond scope of Committee, for purpose of improving or maintaining quality of care or reducing any significant risks to individuals or groups of persons. (§4[4]). Disclosures to improve quality of care can be of systemic or individual nature.

Significantly, §5 of Act provides protection to Ontario health care providers against being forced to provide quality of care information or evidence in context of litigation.

15.05 HEALTH INSURANCE:

Ontario Health Insurance Plan (OHIP) pays for insured health services provided to insured persons. Regulation under Health Insurance Act lists services which are insured. (R.R.O. 552).

Residents of Ontario are entitled to become insured upon application to OHIP. (Health Insurance Act, c. H.6, §11). To meet "residency" requirement, person, subject to certain exceptions, must make Ontario his or her permanent and principal home and be in Ontario at least 153 days in any given 12 month period. (R.R.O. 552, §1.2). In addition, person must be Canadian citizen or meet other requirements prescribed in regulation. (§1.1).

Commitment to the Future of Medicare Act, 2004 (S.O. 2004, c. 5) recognizes central importance to Ontario society of transparent, accountable public health care system and supports existing prohibition of two-tiered health care system. Part I establishes Ontario Health Quality Council, whose function is to monitor and report to people of Ontario on state of publicly funded health care system. (§4). Part II prohibits physicians and named practitioners from charging or accepting payments for insured service they have rendered to insured person, subject to certain exceptions. (§10). Similarly, Part II prohibits preferential access to individuals for payment. (§17). Part III is concerned with accountability and sets up framework to ensure accountability and transparency in public health care.

15.06 HEALTH PROFESSIONS:

Regulated Health Professions Act, 1991 (S.O. 1991, c. 18) lists controlled acts which may only be performed by licenced professionals if these acts are authorized under their governing statute (§27). Act sets out exceptions. These are rendering of first aid or temporary assistance in emergency, treatment of member of person's household and assistance of person with routine activity of living in certain circumstances. (§29). Regulation also exempts certain activities. (O. Reg. 107/96, §§2-13). Act permits delegation of controlled act. However, this must be in accordance with applicable regulations. (Regulated Health Professions Act, 1991, §28).

Governing statutes for various regulated health professions are listed below.

Audiologists and Speech Language Therapists

Audiology and Speech-Language Pathology Act, 1991

Chiropodists

Chiropody Act, 1991

Chiropractors

Chiropractic Act, 1991

Dental Hygienists

Dental Hygiene Act, 1991

Dental Technologists

Dental Technology Act, 1991

Dentists

Dentistry Act, 1991

Denturists

Denturism Act, 1991

Dietician

Dietetics Act, 1991

Homeopaths

Homeopathy Act, 2007 (some sections in force, others awaiting proclamation)

Kinesiologists

Kinesiology Act, 2007 (some sections in force, others awaiting proclamation)

Massage Therapists

Massage Therapy Act, 1991

Laboratory Technicians

Medical Laboratory Technology Act, 1991

Physicians

Medicine Act, 1991

Midwives

Midwifery Act, 1991

Naturopathic doctors

Naturopathy Act, 2007 (some sections in force, others awaiting proclamation)

Nurses

Nursing Act, 1991

Occupational Therapists

Occupational Therapy Act, 1991

Opticians

Opticianry Act, 1991

Optometrists

Optometry Act, 1991

Pharmacists

Pharmacy Act, 1991Drug and Pharmacies Regulation Act, c. H.4

Physiotherapists

Physiotherapy Act, 1991

Psychologists

Psychology Act, 1991

Respiratory Therapists

Respiratory Therapy Act, 1991

Traditional Chinese Medicine

Practitioners & Acupuncturists

Traditional Chinese Medicine Act, 2006

Practice of psychotherapy will be governed by Psychotherapy Act, 2007. Physicians, nurses, occupational therapists and psychologists are permitted to perform psychotherapy (under certain conditions). (Health System Improvements Act, 2007, S.O. 2007, c. 10, Sch. R, some sections in force, others awaiting proclamation).

Increasing Access to Qualified Health Professionals for Ontarians Act, 2008, S.O. 2008, c. 18, amends Regulated Health Professions Act and directs that it is duty of college to work in consultation with Minister to ensure that people of Ontario have access to adequate numbers of qualified, skilled and competent regulated health professionals.

Regulated Health Professions Act contains procedural code applicable to licencing bodies of regulated health professions. It sets out function and duties of various statutory committees. These are: Executive Committee; Registration Committee; Complaints Committee; Discipline Committee; Fitness to Practice Committee; Quality Assurance Committee; and Patient Relations Committee. (RHPA, Schedule 2, §10).

Decisions of Complaints Committee and Registration Committee may be reviewed by Health Professions Appeal and Review Board. (RHPA, Schedule 2, §§21, 29). Decisions of Discipline Committee and Fitness to Practice Committee and Health Professions Appeal and Review Board may be appealed to Divisional Court. (RHPA, Schedule 2, §70).

Member of regulated health profession must file report with appropriate College if in course of practicing his/her profession, member has reasonable grounds to believe that another member of same or different College has sexually abused patient. (RHPA, Schedule 2, §§85.1-85.4). Act also imposes certain reporting obligations on employers and institutions which grant privileges to health professionals and persons who are in association or partnership with health professionals. (RHPA, §85.5). On or before June 4, 2009, Inquiries, Complaints and Reports Committee (and panels of Committee) will be able to refer College members without notice to Discipline Committee or suspend certificate of examination if it believes member is incapacitated or conduct may harm patients. (Health System Improvements Act, 2007, S.O. 2007, c. 10, Sch. M).

Exceptions to confidentiality rule allow College to confirm whether investigating member, if there is compelling public interest in disclosure. (RHPA, §36[1][g]). On or before June 4, 2009, Colleges will be required to maintain register with notation of every matter referred to Discipline Committee by Inquiries, Complaints and Reports Committee, until matter has been resolved, and to include result (with synopsis of decision) of every disciplinary and incapacity proceeding, unless panel makes no finding with regard to proceeding. (Health System Improvements Act, 2007, S.O. 2007, c. 10, Sch. M).

Drugless Practitioners Act, c. D.18 applies to any person who treats by manipulation, adjustment, manual or electrotherapy or by any similar method. (§1). This Act does not apply to profession which is governed by another statute. (§10). Person may not practice or hold himself/herself out as practitioner within meaning of this Act unless person is registered by Board of Directors appointed by Lieutenant Governor in Council. (§§3 and 8). These practitioners are governed by Board of Directors of Drugless Therapy. (R.R.O. 278). Drugless Practitioners may not use terms “drugless practitioner” as occupational designation but may describe themselves according to classification in which they are registered. (R.R.O. 278, §32). Drugless Practitioners Act and R.R.O. 278 will be repealed and revoked on proclamation. (Health System Improvements Act, 2007, S.O. 2007, c. 10, Sch. P).

15.07 LABORATORIES AND SPECIMEN COLLECTION CENTRES:

Only licenced laboratories under Laboratory and Specimen Collection Centre Licencing Act, c. L.1, may perform examinations of human specimen with exception of procedures prescribed by regulations which may be carried out by legally qualified medical practitioners for purpose of diagnosis and treatment of their patients. (§§5 and 9). Collection centres where specimens are taken or collected from human body must also be licenced under Act. (§§5 and 9). Licence may not be issued if Minister of Health directs that it is not in public interest to issue licence. (§9[5-6]). Matters which may be considered by Minister in determining what is in public interest are listed in Act. (§9[7]). Licence may be refused, revoked or suspended in circumstances set out in Act. (§9[8-17]). Decisions pertaining to licences are subject to review by Health Services Appeal and Review Board. (§11).

15.08 ORGAN DONATION:

Subject to exceptions, Trillium Gift of Life Network Act, c. H.20, prohibits any person from selling or buying human tissue. (§10).

Post-mortem and inter vivos gifts of human tissue, with exception of bone marrow, spermatozoa, ovum, embryo, foetus, blood or blood constituents, is governed by Trillium Gift of Life Network Act, c. H.20. Act provides that capable person over age of 16 may consent, in writing, to use of his or her body after death for therapeutic purposes, medical education or scientific research. (§4). Where person has died or is incapable, his/her consent may be provided by persons identified in statute. (§5).

Capable person who is at least 16 years of age may consent, in writing, to removal and use of his or her tissue for transplant. (§3).

Act establishes Trillium Gift of Life Network whose objective is to support donation of tissue for transplant activities in Province of Ontario. (§8.7). Designated facilities required to notify Network when patient has died or death is imminent. Network can direct facility to contact patient or their substitute to seek consent to removal of tissue for transplant purposes. (§8.1).

15.09 PUBLIC HEALTH:

Health Protection and Promotion Act (c. H.7) contains reporting obligations with respect to communicable and reportable diseases. Reportable and communicable diseases are listed in Regulations. (O. Reg. 558/91 and 559/91). Physicians, chiropractors, dentists, nurses, pharmacists, optometrists, and drugless practitioners (governed under Drugless Practitioners Act, c. D.18) (such as naturopaths and osteopaths) must report to medical officer of health that person is or may be infected with agent of communicable disease if he or she forms that opinion while providing professional services to person. (HPPA, §26).

Physician who signs medical certificate of death has obligation to report to medical officer of health if reportable disease was contributing cause of death. (HPPA, §30). Physician or registered nurse in extended class must report name and residence address of patient under his/her care if patient refuses or neglects to continue treatment for communicable disease in manner and degree that is satisfactory to physician. (HPPA, §34).

Administrator of hospital must report to medical officer of health if entry in its records states that patient has or may have reportable disease or is or may be infected with agent of communicable disease. (HPPA, §27).

Long term care institutions, private hospitals governed by Private Hospitals Act, mental hospitals governed by Mental Hospitals Act and day nurseries governed by Day Nurseries Act have obligation to report to medical officer of health if entry in their records in respect of person lodged in institution states that person is or may be infected with agent of communicable disease or has or may have reportable disease. (HPPA, §27).

Principal of school also has obligation to report to medical officer of health if he/she forms opinion that pupil in school has or may have communicable disease. (HPPA, §28). Owners of laboratories also have obligation to report to medical officer of health positive laboratory findings in respect of reportable diseases. (HPPA, §29).

Medical officers of health and Chief Medical Officer of Health (CMOH) granted broad powers to make orders to eliminate or reduce risk of communicable disease (Health System Improvements Act, 2007, S.O. 2007, c. 10, Sch. F). Where medical officer of health is of opinion that communicable disease may have been acquired through exposure at health facility, and health facility has not been reported, medical officer of health may report opinion and basis thereof to facility, and make orders for actions facility must take to decrease or eliminate risk of any probable outbreak. (HPPA, §29.2). CMOH may investigate risks to health, take actions it considers appropriate, apply to Superior Court of Justice for court order for appropriate action. (§§77.1–77.2). Minister of Health, when CMOH certifies that there is outbreak or immediate risk of one and premises are needed as temporary isolation facility, may require occupier of any premises to deliver possession to be used as such facility. (§77.4). Minister may make order authorizing procurement, acquisition and seizure of any medications or supplies needed if CMOH certifies necessary. (§77.5). CMOH may also make order for production of any information, issue directives to health care providers and/or entities, and may collect specimens under appropriate circumstances. (§§77.6–77.8).

Mandatory Blood Testing Act, 2006 (S.O. 2006, c. 26) allows person to apply to medical officer of health to have blood sample of another person analysed if applicant came into contact with bodily substance of other person as crime victim, or in course of providing emergency health care services or emergency first aid, or if they are in prescribed class of persons carrying out their duties (O. Reg. 449/07, §3). (§2). Act outlines application process and empowers Consent and Capacity Board, after holding hearing, to order taking of blood sample for analysis. (§3[3]). O. Reg. 449/07 details prescribed classes of people who can apply, requirements of application (including required applicant and physician reports), and processes that must be followed for taking and analyzing blood samples and reporting results.

Mandatory Gunshot Wounds Reporting Act, S.O. 2005, c. 9, imposes obligation on public hospitals to report to police when they treat person for gunshot wound. (§2). Hospital is required to report that person is being treated for gunshot wound at facility, person’s name (if known), and location of facility. (§2). Report must be made orally as soon as it is practicable to do so without interfering with patient’s treatment or disrupting activities of facility. Act provides protection against liability for damages in negligence for facility and its staff or agents that report gunshot wound, if it is done in good faith and with intent of fulfilling statutory obligation. (§4). Act allows for Regulations to be passed extending reporting obligation to other designated facilities. (§5). Ontario Agency for Health Protection and Promotion established to provide scientific and technical advice and support, and carry out research and planning, to improve health of Ontarians. (HSIA, 2007, Sch.K).

15.10 X-RAY EQUIPMENT:

No person may install x-ray equipment, unless installation is approved by Director of X-ray Safety appointed by Minister of Health and Long Term Care. (Healing Arts Radiation Protection Act, c. H.2, §3). Information pertaining to x-ray equipment and owner must be registered with Director. (§4).

Persons operating x-ray equipment must have qualifications and meet requirements set out in regulations. (§5). Licensed physicians, dentists, chiropodists, chiropractors, osteopaths, medical radiation technologists and dental hygienists are deemed to meet qualifications prescribed by regulations. (§5[2]). Standards for x-ray equipment are set in regulation. (X-ray Safety Code Regulation, R.R.O. 543).

X-ray machine may not be operated for irradiation on humans unless it is prescribed by licensed physicians, chiropodists, dentists, chiropractors, or osteopaths. (HARPA, §6). X-rays of chest, ribs, arms, wrists, hands, legs, ankles, or feet or mammogram may also be prescribed by nurse who holds extended Certificate of Registration issued by College of Nurses of Ontario. (HARPA, §6[2]). See also Canada Law Digest, category 16 Health, topic 16.04 Radiation Devices.

16 INSURANCE

16.01 INSURANCE COMPANIES:

Insurance companies may be incorporated under Corporations Act (c. C.38, Part V), but all insurers, wherever incorporated or established, undertaking insurance or carrying on business in Ontario are governed as well by Insurance Act (Ontario) (c. I.8) which includes specific provisions regulating insurance contracts, fire, life, automobile, accident and sickness, fraternal societies, reciprocal insurance exchanges, agents, brokers and adjusters and licensing thereof, rates and rating bureaus and unfair and deceptive practices, and also includes provisions applicable to insurers concerning licensing, capital requirements, deposits, investments and amalgamations and transfers. Marine insurance is regulated by Marine Insurance Act. (c. M.2). Ministry of Finance through Financial Services Commission of Ontario has general supervision of business of insurance within Province with Commission offices located at 5160 Yonge Street, Box 85, North York, Ontario M2N 6L9. Commission, comprising Chair, two Vice-Chairs, Director of Arbitrations and Superintendent of Financial Services has mandate to enhance consumer confidence and public trust in industry, and provides regulatory services and makes recommendations to Minister of Finance. Ontario Health Insurance Plan is continued by Health Insurance Act. (c. H.6). All residents of Province are entitled to become insured persons upon application.

Licenses.

Every insurer undertaking insurance in Ontario, or carrying on business in Ontario, shall obtain license from Superintendent under Insurance Act. (c. I.8).

Brokers.

No person can act as insurance broker unless person is registered broker under Registered Insurance Brokers Act. (c. R.19). Act establishes qualification and registration committee, complaints committee and discipline committee. Where discipline committee finds member guilty of misconduct or incompetence, it may suspend or revoke certificate of member, impose fines or impose other disciplinary measures. Decisions of discipline committee or qualification and registration committee are subject to appeal to Divisional Court. (c. R.19).

Agents.

No person can act as agent or adjuster unless licensed under Insurance Act. (c. I.8, Part XIV).

Investments.

See c. I.8, Part XVII.

Rebates on premiums are unfair or deceptive acts or practices (O. Reg. 7/00) and are prohibited (c. I.8).

Premium Tax.

Insurance companies are liable to tax of 2% calculated on gross premiums payable under contracts of accident insurance, life insurance and sickness insurance and 3% calculated on gross premiums payable under any other contract of insurance in respect of business transacted in Ontario during taxation year, after deducting cash value of dividends credited to policyholders and premiums returned. (Corporations Tax Act, c. C.40, §74). In addition, tax of one-half of 1% is payable on premiums received for property insurance after certain deductions. Life insurance corporations may have to pay additional tax. If another jurisdiction imposes higher taxes on Ontario-based insurers than on local insurers, Province may require insurers from such jurisdictions to pay additional taxes. (c. C.40).

Annual statements must be filed with Superintendent on or before last day of Feb. (Apr. 15 for reinsurers).

Foreign insurance companies may obtain licence to carry on business in Ontario under Insurance Act. (c. I.8). Foreign insurer must satisfy Superintendent that it can meet policy obligations and must appoint resident chief agent to receive service of process, etc. Regulation of foreign insurers is similar to that of domestic insurers.

Direct Actions Against Insurer.

See category 23 Transportation, topic 23.03 Motor Vehicles, subhead Direct Actions.

No-Fault Insurance.

See category 23 Transportation, topic 23.03 Motor Vehicles, subhead No-Fault Insurance.

See Canada Law Digest, category 18 Insurance, topic 18.01 Insurance Companies.

16.02 SURETY AND GUARANTY COMPANIES:

Surety and guaranty companies are subject to the laws applicable to insurance companies generally. Such surety and guaranty companies must be licensed under Insurance Act to write surety and fidelity insurance.

17 INTELLECTUAL PROPERTY

17.01 TRADEMARKS AND TRADENAMES:

See, generally, Canada Law Digest.

As to registration of partnership or person doing business under a name other than his own, see category 2 Business Organizations, topic 2.07 Partnerships.

18 LEGAL PROFESSION

18.01 ATTORNEYS AND COUNSELLORS:

Except where otherwise provided by law, no person other than licensee of Law Society of Upper Canada may practise law ("practise as a barrister or solicitor") or provide legal services (i.e. paralegal) in Ontario. Every lawyer in Ontario is both barrister and solicitor: the two professions are amalgamated. Requirements to be licensed are defined in Law Society Act and its by-laws. Authority to license rests with benchers of Law Society who are elected by and from licensees every four years.

Educational Requirements.

Unless already qualified to practise law in another Canadian jurisdiction, every applicant for licensing by Law Society must successfully complete Society's Bar Admission Course. Entry to Bar Admission Course requires either (1) graduation from accredited Canadian law school, or (2) law degree from foreign jurisdiction plus such courses in Canadian law as may be specified in each case by Federation of Law Societies of Canada. Bar Admission Course consists of ten months under articles of clerkship served with practising lawyer, and participation in Society's examinations.

Transfer from Other Canadian Jurisdictions.

Applicants who are Canadian citizens or permanent residents and who are qualified to practise law in another Canadian jurisdiction, may be licensed by Law Society upon meeting certain requirements including examination.

Licensing for Occasional Practice of Law.

Upon application to Law Society, person may be licensed to practice law in Ontario on occasional basis, if applicant meets requirements, subject to any terms and conditions as Law Society considers appropriate. Such permission remains in effect for one year.

Temporary Members.

Lawyers from outside Ontario may at request of Attorney General, be admitted to practise in Ontario for specified period, as temporary licensees, but such practice may only be in employ of Attorney General or as Crown Attorney.

Rights and Obligations of lawyers are governed by Law Society Act (c. L.8), Barristers Act (c. B.3) and Solicitors Act (c. S.15).

Professional Discipline.

Benchers of Law Society may disbar, suspend, reprimand, fine or impose other penalties on any licensee whom they find guilty of professional misconduct or of conduct unbecoming barrister and solicitor. Benchers may suspend or limit practice rights of licensee found to be incapacitated or failing to meet standards of professional competence and may require compliance with remedial orders as condition for continuing to practise.

Errors and Omissions Insurance.

All lawyers engaging in private practice of law in Ontario are required to be covered under Law Society's professional liability insurance policy, for which they must pay annual premium levy. (Law Society By-Law 6).

Lien.

Solicitor has general lien for fees and disbursements on client moneys and papers under solicitor's control.

Incorporation.

Subject to conditions in by-laws, licensee of Law Society, or two or more licensees practising law as individuals or as partnership may establish professional corporation for purpose of practising law. Professional corporation may also be established by one or more persons licensed to provide legal services and one or more persons licensed to practice law. All shareholders must be licensees of Law Society. Incorporation does not limit professional liability of shareholders.

Limited Liability Partnerships.

Lawyers may form limited liability partnership for purpose of practising law.

Contingent Fees.

Lawyer in Ontario may enter into contingent fee agreement with client except in criminal, quasi-criminal and family law cases.

Paralegals.

Paralegals, and other persons who provide legal services in Ontario, must be licensed and are regulated by Law Society.

19 MINERAL, WATER AND FISHING RIGHTS

19.01 MINES AND MINERALS:

Ministry of Northern Development and Mines and Ministry of Natural Resources of Ontario have general supervision over mining and mining lands in province, and maintain inspectors to enforce requirements of Mining Act (c. M.14) made thereunder with respect to mining operations and health and safety of employees.

Aggregate Resources Act, (c. A.8) governs licensing and operation of pits and quarries, including rehabilitation and abandonment. Inspector has power to issue orders directing compliance with provisions of Act and regulations that are being contravened and, where pit or quarry is being operated without license, such order may require that operations cease. (§63).

Prospector’s License.

No person or company may prospect for minerals upon Crown lands or land of which mining rights are in the Crown without a prospector’s license. (§18). Licenses are valid for five years. (§19[2]).

Prospecting.

The Mining Act stipulates requirements as to proper staking of claims, recording of staked claims, recording of required work on claims and acquisition of mineral and/or surface rights by patent, lease or license of occupation. Patented property and leaseholds are administered under land titles and land registry systems. See category 10 Documents and Records, topic 10.05 Records.

Operation and Inspection of Mines, and Safeguarding of Employees.

Mining and Lands Commissioner, recorder or inspector may inspect, or order inspection of claim at any time with or without notice to holder of claim to ascertain compliance. (§75). *Occupational Health and Safety Act*, c. O.1, §§29(2), 53, 54 and corresponding regulations establish provisions for safeguarding employees. See category 11 Employment, topic 11.02 Labour Relations.

Voluntary Rehabilitation.

Detailed provisions governing rehabilitation of mine hazard on Crown land or other prescribed land are set out in Mining Act. (§§139.2 to 139.5).

Development and Environmental Protection.

Part VII of Mining Act governs matters of development and environmental protection. Advanced exploration (as defined) requires prior written notice to Director of Mine Rehabilitation. (§140). Public notice may be required and certified closure plan is required. (§140). Closure plan includes requirement of financial assurance by proponent of plan. (§145). Proponent of closure plan must forthwith notify Director of Mine Rehabilitation if expansion or alteration of project is planned; ownership, occupancy, management or control of project has changed; or of any other material change which could affect adequacy of closure plan. (§144). See also Industrial and Mining Lands Compensation Act. (c. I.5). Also see category 12 Environment, topic 12.01 Environmental Regulation.

Refining of Metals.

All lands, claims or mining rights leased, patented or otherwise disposed of under any Act or any authority are subject to condition that all ores or minerals raised or removed therefrom be treated and refined in Canada so as to yield refined metal or other product suitable for direct use in arts without further treatment. In case of default, Lieutenant-Governor in Council may declare lease, patent or other form of title to be void whereupon said lands revert to and become vested in Her Majesty, freed and discharged of any interest or claim of any other person or persons whomsoever. Lieutenant-Governor in Council may exempt any lands from operation of this provision for such time as he or she may deem proper. (Mining Act, c. M.14, §91).

Royalty on Diamonds.

Every operator of diamond mine must, for each fiscal year of operation, pay to Crown amount of royalty determined under §154.2, subject to authority of Lieutenant-Governor in Council (§176[2.1.1]).

Mineral Exploration.

Where person or corporation, who is resident of Ontario, proposes to carry out program of mineral exploration in Ontario, he or she may apply to have program designated under Ontario Mineral Exploration Program Act. (c. O.27). Upon application by person, Minister may designate project of exploration in Ontario for incentive program for specified period of time. (§3).

Foreign mining companies desiring to operate in Ontario must obtain an Ontario license for that purpose. License not required for ownership of mining properties. See category 2 Business Organizations, topic 2.03 Corporations, subhead Foreign and Extra-Provincial Corporations.

Oil and Gas.

Oil, Gas and Salt Resources Act, c. P.12, gives Minister of Natural Resources authority for regulating petroleum resources. O. Reg. 263/02 under Mining Act governs leases for production of petroleum and natural gas from Crown lands. License is required to explore (§§2-9), produce (§§10-15) and store (§§16-22) oil and gas. Ontario Energy Board Act, S.O. 1998, c. 15, Sch. B, governs administration of provincial electricity and gas industries and was amended to include regulatory framework for implementing Smart Metering initiative in Ontario. (§28.3). See also Gas and Oil Leases Act (c. G.3) for termination of leases for default; Technical Standards and Safety Act, 2000, S.O. 2000, c. 16 as to handling of fuels; Gasoline Tax Act (c. G.5) (including re: imports and exports) and Fuel Tax Act (c. F.35).

Taxation.

Mining Tax Act (c. M.15) imposes tax on annual profits at rate of 10% of amount by which operator's profit, as calculated by given formula for given year, exceeds amounts outlined in Act. Minister may deem companies associated and combine their respective profits. Mining Act (c. M.14) imposes annual acreage tax at rates prescribed by regulation. Act imposes annual acreage taxes on all lands and mining rights in territory without municipal organization held under patent granted by Crown. See also provisions contained in Income Tax Act (R.S.C., c. 1 [5th Supp]). See Canada Law Digest, category 20 Mineral, Water and Fishing Rights, topic 20.01 Mines and Minerals.

20 MORTGAGES

20.01 CHATTEL MORTGAGES:

See topic 20.05 Personal Property Security.

20.02 COLLATERAL SECURITY:

See category 8 Debtor and Creditor, topic 8.16 Pledges. Also see topic 20.05 Personal Property Security.

20.03 MORTGAGES OF PERSONAL PROPERTY:

See topic 20.05 Personal Property Security.

20.04 MORTGAGES OF REAL PROPERTY:

In general, common law rules govern and are supplemented by statutes. (Land Titles Act, c. L.5, Mortgages Act, c. M.40, Registry Act, c. R.20, Land Registration Reform Act, c. L.4, Family Law Act, c. F.3). Under Land Registration Reform Act, c. L.4, term "mortgage" replaced by term "charge" and common law concept of conveyance of fee simple to mortgagee is abolished. Charges in statutory form deemed to include covenants listed in c. L.4 (§7). Standard charge terms may be incorporated in charge by reference (§§8, 9). Affidavits required under Family Law Act may be replaced by statements contained in body of transfer and statements may be made by attorney with personal knowledge. (c. F.3, §§21[3] and [4]). Spouse must consent to charge on property occupied as family residence (matrimonial home). (c. F.3, §21[1]). See category 14 Family, topic Husband and Wife, subhead Status.

Execution.

Charges in statutory form effective without seals. (c. L.4, §13). Copy of mortgage must be delivered by mail by mortgagee to mortgagor or agent within 30 days after execution. (c. M.40, §4).

Recording.

Necessity for, and validity without, see category 10 Documents and Records, topic 10.05 Records. **Trust deeds** are ordinarily used to secure issues of bonds or debentures. They must be registered in same manner as ordinary mortgages to charge lands and filed with Ministry of Consumer and Commercial Relations under Personal Property Security Act (c. P.10) to charge tangible or intangible personal property.

Future Advances.

Mortgage may secure future advances but see category 10 Documents and Records, topic 10.05 Records.

Priorities.

Common law rules modified by recording statutes. See category 10 Documents and Records, topic 10.05 Records.

Assignment.

Charge may be assigned by attaching executed assignment (Registry Act) or transfer (Land Titles Act).

Discharge or Satisfaction.

Registered charge is discharged by registration of discharge in prescribed form by chargee, his assignee or representative entitled to money. Discharge must include registration date and number of charge and all assignments or other documents relating to charge. Execution of discharge is same as for transfer or charge.

An executor or administrator of the mortgagee may discharge any mortgage upon payment of the debt. (R.20, §56[1], c. M.40, §11). It is not necessary for spouse of mortgagee to join in discharge of any mortgage.

Instead of the statutory discharge, a release and reconveyance may be given. Bond mortgage may be discharged by cessation in prescribed form. (L.5, §93[8]).

Release of Part of Property.

Release takes same form as discharge except that lands to be released are specifically described.

Foreclosure and Sale.

Every mortgage contains either an express or implied power of sale which is inserted therein by statutory provisions. (c. M.40, §24). Upon default of payment, mortgagee may realize, either by sale, under such power of sale, or by proceedings for foreclosure and sale in Superior Court of Justice, or in district courts if sum claimed to be due does not exceed $15,000.

Mortgage provides for exercise of power of sale on default without notice to mortgagor or subsequent encumbrances. However, notice must be given in all proceedings under powers of sale, unless and to extent only that notice is ordered and dispensed with by judge under §39. Notice may only be given after at least 15 days default (§§26[2] and 32), and sale shall not be made for at least 35 days after notice (§32). Where power of sale is implied, sale shall not be made for at least 45 days after notice. (§26[1]). Manner of giving notice is prescribed. (§33). These provisions do not apply to bond mortgages or debentures. (§41).

The mortgagee may recover personal judgment on the covenant contained in the mortgage. (§20[2]). In case lands are sold pursuant to power of sale in mortgage, or pursuant to judgment in action for foreclosure and sale, and there is deficiency, deficiency may be recovered on such personal judgment.

Where default under the mortgage accelerates payment of principal and interest, relief from sale or action by the mortgagee will be given upon the mortgagor remedying the default, excluding payment of monies not payable by reason only of lapse of time. (§23).

Redemption.

Every mortgagor, after default in payment of his mortgage, may redeem the mortgaged property at any time before his right is barred under the Limitations Act, 2002, where the mortgagee is in possession, or under a final order of sale, or final order of foreclosure made by the court, or before the lands are sold under power of sale contained in the mortgage, on payment of the amount due, with interest and costs.

A mortgage for more than five years, except one given by corporation, may be redeemed at any time after five years on payment of principal and interest to date of payment and on three months further interest in lieu of notice. (c. M.40, §18).

Charge.

Charges under both Registry Act and Land Titles Act shall be in Form 2. (R.R.O. 688).

Discharge.

Discharges under both Registry Act and Land Titles Act shall be in Form 3. (R.R.O. 688).

Assignment.

Under Registry Act there is no statutory form.

Chattel Mortgages.

See topic 20.01 Chattel Mortgages.

20.05 PERSONAL PROPERTY SECURITY:

Personal Property Security Act (c. P.10) modeled on Article IX of Uniform Commercial Code. It applies to every transaction without regard to its form and without regard to person who has title to collateral, that in substance creates security interest, including chattel mortgage, conditional sale, equipment trust, debenture, floating charge, pledge, trust indenture or trust receipt, assignment (including assignment of accounts or chattel paper), lease or consignment that secures payment or performance of obligation, every assignment of accounts or chattel paper that does not secure payment or performance of obligation, and lease of goods under lease for term of more than one year even though lease may not secure payment or performance of obligation. (§2). Rules governing property rights that exist whenever securities are bought, sold or used as collateral are set out in Securities Transfer Act, 2006, which came into force on Jan. 1, 2007. See subhead Securities Transfer Act, 2006 below. Major exceptions are for some statutory liens and deemed trusts and for creation or assignment of interest in real property other than fixtures or assignment of right to payment under mortgage, charge or lease where assignment does not convey or transfer assignor's interest in real property. (§4).

Conflict of Laws.

Applicable law is generally determined by jurisdiction where collateral is situated at time security interest attaches. Security interest in collateral already perfected under law of place in which collateral was when security interest attached and before being brought into Ontario, continues perfected in Ontario, if financing statement is registered before goods are brought into Ontario or if perfected in Ontario by earliest of (i) 60 days from entry, (ii) 15 days after secured party receives notice of entry, or (iii) date on which perfection ceases under law of other jurisdiction. Security interest that has ceased to be perfected may thereafter be perfected in Ontario, but is only effective from date of perfection. Security interest not perfected under law of place in which collateral was when security interest attached and before being brought into Ontario, may be perfected under Act, in which case perfection dates from time of perfection in Ontario. (§5). Validity, perfection, effect of perfection or non-perfection and priority of (a) security interest in intangible or goods of certain type that are normally used in more than one jurisdiction and (b) of non-possessory security interest in security, instrument, negotiable document of title, money and chattel paper, shall be governed by law of jurisdiction where debtor is located at time security interest attaches. Debtor is deemed to be located at debtor's place of business if there is one, at chief executive office if there is more than one place of business and otherwise at debtor's principal place of residence. (§7). Special "conflict of laws" rules apply where Securities Transfer Act, 2006 applies.

Effectiveness.

Except as otherwise provided, security agreement is generally effective according to its terms between parties and against third parties. (§9).

Enforceability.

Security interest is not enforceable against third party unless it has attached. (§11).

Attachment.

Security interest attaches when, (a) secured party or person on behalf of secured party other than debtor or debtor's agent obtains possession of collateral or when debtor signs security agreement that identifies collateral, (b) value is given, and (c) debtor has rights in collateral, unless parties have agreed to postpone time for attachment. Debtor has no rights in crops until they become growing crops, fish until they are caught, young of animals until they are conceived, minerals or hydrocarbons until they are extracted, or timber until it is cut. (§11).

After Acquired Property.

Security agreement may cover after acquired property. (§12).

Future Advances.

Security agreement may secure future advances. (§13).

Care of Collateral.

Secured party shall use reasonable care in custody and preservation of collateral in its possession, and, unless otherwise agreed, in case of instrument or chattel paper, reasonable care includes taking necessary steps to preserve rights against prior parties. Secured party is liable for any loss or damage caused by failure to meet this obligation, but does not lose security interest. Within certain limits secured party may use collateral but is liable for any loss or damage by its use of collateral otherwise than within such limits and is subject to being restrained. (§17).

Statement of Account.

Debtor, judgment creditor or person having interest in collateral, by notice in writing, may require secured party to furnish statement in writing of amount of indebtedness and terms of payment as of date specified; statement in writing approving or correcting as of date specified statement of collateral or part thereof as specified in list; statement in writing approving or correcting as of date specified statement of amount of indebtedness and terms of payment thereof; true copy of security agreement; or sufficient information as to location of security agreement or true copy so as to enable inspection. Secured party to answer notice within 15 days of receipt and secured party liable for loss or damage caused by failure to do so or for incomplete or incorrect answer. Where person receiving notice no longer has interest in collateral, he shall, within 15 days of his receipt of notice, disclose name and address of latest successor in interest known to him. (§18).

Perfection.

Security interest is perfected when it has attached and all steps required for perfection required under any provision of Act have been completed regardless of order of occurrence. (§19). Possession of collateral by secured party or on his behalf by person other than debtor or debtor's agent perfects security interest in chattel paper, goods, instruments, securities, negotiable documents of title and money but only while it is actually held as collateral. (§22). Registration perfects security interest in any type of collateral. (§23). Where collateral gives rise to proceeds, security interest therein continues as to collateral, unless secured party expressly or impliedly authorized dealing with collateral free of security interest, and extends to proceeds.

(§25). If goods are identified in contract of sale, buyer of goods from seller who sells goods in ordinary course of business takes them free from any security interest therein given by seller, even though it is perfected and buyer knows of it unless buyer also knew that sale constituted breach of security agreement. If goods are identified in contract of lease, lessee of goods from lessor who leases goods in ordinary course of business holds goods to extent of lessee's rights under lease, free from any security interest therein given by lessor even though it is perfected and lessee knows of it, unless lessee also knew that lease constituted breach of security agreement. Purchaser of chattel paper who takes possession of it in ordinary course of business has, to extent that purchaser gives new value, priority over any security interest in it that was perfected by registration if purchaser did not know at time of taking possession that chattel paper was subject to security interest or that has attached to proceeds of inventory whatever extent of purchaser's knowledge. (§28).

Priorities.

In general, following priority rules apply to security interests in same collateral. Where priority is to be determined between security interests perfected by registration, priority shall be determined by order of registration regardless of order of perfection. Where priority is to be determined between security interest perfected by registration and security interest perfected otherwise than by registration, (i) security interest perfected by registration has priority over other security interest if registration occurred before perfection of other security interest, and (ii) security interest perfected otherwise than by registration has priority over other security interest if security interest perfected otherwise than by registration was perfected before registration of financing statement related to other security interest. Where priority is to be determined between security interests perfected otherwise than by registration priority shall be determined by order of perfection. Where priority is to be determined between unperfected security interests, priority shall be determined by order of attachment. (§30). Purchase-money security interest is security interest taken or reserved in collateral to secure payment of all or part of its price, security interest taken by person who gives value for purpose of enabling debtor to acquire rights in or to collateral to extent that value is applied to acquire rights or interest of lessor of goods under lease for term of more than one year. Purchase-money security interest in inventory or its proceeds has priority over any other security interest in same collateral given by same debtor if (a) purchase-money security interest was perfected at earlier of time debtor or third parties at request of debtor obtained possession of inventory; (b) before debtor receives possession of inventory, purchase-money secured party gives notice in writing to every other secured party who has, before date of registration by purchase-money secured party, registered financing statement that describes collateral as, or as including, items or types of inventory which are same as items or types of inventory subject to purchase-money security interest, inventory or accounts; and (c) notice referred to states that person giving it has or expects to acquire purchase-money security interest in inventory of debtor describing such inventory by item or type. Purchase-money security interest in collateral or its proceeds other than inventory or its proceeds has priority over any other security interest in same collateral given by same debtor if purchase-money security interest (a) in case of collateral other than intangible was perfected before or within ten days after earlier of debtor or third party at request of debtor obtained possession of collateral or (b) in case of intangible was perfected before or within ten days after attachment of purchase-money security interest in intangible. Where more than one purchase-money security interest is given priority, purchase-money security interest of seller has priority over any other purchase-money security interest given by same debtor. (§33). Subsequent purchaser for value of interest in real property or creditor with prior encumbrance of record on real property to extent that he makes subsequent advances has priority to security interest in goods that attached to goods that are or become fixtures if subsequent purchase or subsequent advance under prior encumbrance of record is made or contracted for without knowledge of security interest and before notice of it is registered in proper land registry office. Otherwise security interest in goods that attached before goods became fixture has priority as to fixture over claim of any person who has interest in real property and also security interest in goods that attached after goods became fixture has priority as to fixture over claim of any person who subsequently acquired interest in real property, but not over any person who had registered interest in real property at time security interest in goods attached and who has not consented in writing to security interest or disclaimed interest in fixture. (§34). Security interest in right to payment under lease of real property, to which Act applies, is subordinate to interest of person who acquires for value lessor's interest in lease or real property thereby demised if interest, or notice thereof, of person is registered in proper land registry office before interest, or notice thereof, of secured party is registered in proper land registry office. Security interest in right to payment under mortgage or charge of real property, to which Act applies, is subordinate to interest of person who acquires for value mortgagee's or chargee's interest in mortgage or charge if interest is registered in proper land registry office before notice of security interest is registered in proper land registry office. (§36). Secured party may subordinate his security interest to any other security interest and such subordination is effective according to its terms. (§38).

Registration.

Registration system, including central office, is maintained for purposes of Act and any other Act that provides for registration in registration system. Central office located at City of Toronto. (§41). Registration is effected by filing financing statement in required format by direct electronic transmission to registration system's database. Financing statement may be tendered for registration only by person who is, or is member of class of persons, authorized by registrar. (§46). Except where collateral is consumer goods, financing statement may be registered before or after security agreement signed, and one financing statement may perfect one or more security interests created or provided for in one or more security agreements between parties. (§45). Except where collateral includes consumer goods, financing statement may be registered for perpetual period or for such period of years as is set out in financing statement. (§51). Registration may be renewed. (§52). Assignments of security interests may be registered. (§47). Where financing statement or financing change statement is registered secured party to deliver copy of verification statement to debtor within 30 days. $500 fine payable to debtor for failure to do so. (§46). Certificate setting out whether there are registrations affecting debtor in registration system can be obtained. (§43). Notice of security interest may be registered in required form in proper land registry office where collateral is or includes fixtures or goods that may become fixtures or crops, or minerals or hydrocarbons to be extracted, or timber to be cut or security interest is security interest in right to payment under lease, mortgage or charge of real property to which Act applies. (§54).

Default.

Upon default under security agreement (a) secured party has, unless otherwise agreed, right to take possession of collateral by any method permitted by law, (b) if collateral is equipment and security interest has been perfected by registration, secured party may, in reasonable manner, render such equipment unusable without removal thereof from debtor's premises and (c) secured party may dispose of collateral on debtor's premises. If collateral in which secured party has security interest under security agreement, other than purchase-money security interest or possessing security interest, would be exempt under Execution Act from seizure under writ, such collateral is exempt from foregoing rights of secured party upon default under security agreement. (§62). Proceeds of disposition are to be applied consecutively to: (i) reasonable expenses of secured party, including cost of insurance and payment of taxes and other charges incurred in retaking, holding, repairing, processing, and preparing for disposition and disposing of collateral and, to extent provided for in security agreement, any other reasonable expenses incurred by secured party and (ii) satisfaction of obligations secured by security interest of party making disposition. (§63). Secured party shall account for and pay over any surplus consecutively to (i) any person who has security interest in collateral that is subordinate to that of secured party and whose interest was perfected by possession, continuance of which was prevented by secured party who took possession of collateral or was, immediately before disposition, perfected by registration, (ii) any other person with interest in surplus who has delivered written notice to secured party of interest before distribution of proceeds and (iii) debtor or any other person who is known by secured party to be owner of collateral. Where there is question as to who is entitled to surplus, secured party may pay surplus into Superior Court of Justice and surplus shall not be paid out except upon application to court. (§64). Unless collateral is perishable, secured party believes on reasonable grounds that collateral will decline speedily in value, collateral is of type customarily sold on recognized market, cost of care and storage of collateral is disproportionately large relative to its value, Superior Court of Justice on application made without notice is satisfied that notice of disposition is not required, after default every person entitled to receive notice of disposition consents in writing to immediate disposition, or receiver and manager disposes of collateral in course of debtor's business, secured party shall give not less than 15 days' notice in writing (containing brief description of collateral, amount required to satisfy obligation secured, amount of applicable expenses in realizing on collateral or reasonable estimate thereof, statement that upon receipt of payment payer will be credited with any rebates or allowances to which debtor is entitled by law or under agreement, statement that upon payment of amounts due any person entitled to notice may redeem collateral, statement that unless amounts due are paid collateral will be disposed of and debtor may be liable for any deficiency, and date, time and place of any public sale or date after which any private disposition of collateral is to be made), to debtor who owes payment or performance of obligation secured, every person who is known by secured party before date notice is served on debtor to be owner of collateral or obligor who may owe payment or performance of obligation secured including any person who is contingently liable as guarantor or otherwise of obligation secured, every person who has security interest in collateral and whose security interest was perfected by possession continuance of which was prevented by secured party who has taken possession of collateral or is perfected by registration before date notice is served on debtor, and every person with interest in collateral who has delivered written notice to secured party of interest in collateral before date that notice is served on debtor. (§63). Notice may be served personally or delivered by prepaid courier or sent by registered mail, facsimile or by electronic transmission. (§68). Where collateral is disposed of as provided, disposition discharges security interest of secured party making disposition and, if disposition is made to buyer who buys in good faith for value discharges any subordinate security interest and terminates debtor's interest in collateral. Special rules govern collateral which is consumer goods. (§65). Where conflict exists, Consumer Protection Act, 2002 prevails (see category 3 Business Regulation and Commerce, topic 3.13 Consumer Protection). (§73). Application may be made to Superior Court of Justice to ensure compliance with Act or to recover compensation for any loss or damage suffered because of failure to discharge duties or obligations imposed by Act. (§67).

Securities Transfer Act, 2006.

Securities Transfer Act, 2006 (S.O. 2006, c. 8) ("STA") was intended to be one of first steps in establishing uniformity in transfer and pledging of securities across Canada, with similar legislation to be introduced in each of Provinces of Canada. STA, together with amendments to Personal Property Security Act (Ontario) ("PPSA") and Business Corporations Act (Ontario), effect changes to security interest regime, particularly where shares or securities are held by borrower through financial intermediary, such as securities dealer or broker.

STA introduces new concept of "control", and while registration under PPSA can still perfect security interests in shares and securities, "control" is preferable because secured party with "control" will have priority over secured party who has perfected by registration. Generally, priority among secured parties will be determined as follows: (i) Security interests perfected by control will rank in priority over security interests perfected only by registration or simple delivery; (ii) where two or more security interests are perfected by control, priority is determined chronologically in order that control is obtained; and (iii) intermediary has priority in security entitlements it maintains over security interests of other secured parties.

Method for obtaining "control" under STA depends on whether securities are held directly by pledgor as owner, or held indirectly by pledgor (e.g. held by financial intermediary, such as broker, and whether such securities are certificated or uncertificated). For certificated securities, existing security interest regime remains largely unchanged; however, in case of directly held uncertificated securities lender will need to obtain “control” over affected securities by having same transferred into its name or by entering into control agreement with issuer of such securities in order to obtain highest-ranking security interest it can achieve. In case of indirectly held securities (“security entitlements”), lender may obtain “control” by becoming entitlement holder (e.g., by becoming noted on records of financial intermediary as security entitlement holder), or by entering into control agreement with financial intermediary (or having third party take “control” of security entitlement on lender’s behalf using one of foregoing methods).

STA and PPSA also contain new “conflict of laws” rules for determining where security interests must be perfected. Perfection by registration is still governed by location of debtor; however, jurisdiction governing perfection by control depends on form of collateral. PPSA provides that if security interest was perfected prior to Jan. 1, 2007, such security interest will continue to be perfected if prior method of perfection is sufficient to perfect security interest under new rules and, if not, STA provides four-month transitional period from Jan. 1, 2007 to ensure that previously perfected security interests remain perfected under new regime.

21 PROPERTY

21.01 ABSENTEES:

Superior Court of Justice may declare person absentee who, having had his usual place of domicile in Ontario, has disappeared, whose whereabouts are unknown, and as to whom there is no knowledge whether he or she is alive or dead. Application for order may be made by Attorney General; any one or more of next of kin of alleged absentee; spouse of absentee; common law spouse of absentee; creditor or any other person. (c. A.3, §2). If person ceases to be absentee Court may make order so declaring and vacating previous order except as to acts done respecting his estate while such order was in force (c. A.3). See also category 13 Estates and Trusts, topic 13.05 Death.

Property of Foreign Absentees.

Where a person having an interest in land in Ontario, and having his usual place of residence or domicile out of Ontario has been declared to be an absentee by a court of competent jurisdiction, Superior Court of Justice, upon being satisfied that person has disappeared, that there is no knowledge of his whereabouts, or whether he is alive or dead, may appoint committee with such authority to manage, sell or otherwise deal with absentee’s interest in such land as in opinion of court is in best interests of his or her family. (c. A.3, §8).

Care of Property.

Court may make an order for the custody, due care and management of the property of an absentee and a committee may be appointed with same powers and duties as guardian of property under Substitute Decisions Act, S.O. 1992, c. 30, §31.

Moneys held on passing of final accounts belonging to a person whose address is unknown must be paid by the personal representative, guardian, or trustee into Superior Court of Justice to credit of person entitled to it, to be dealt with according to order of Court. (c. T.23, §36).

Process Agent.

None required by nonresidents.

Escheat and Bona Vacantia.

There is no general statute dealing with disposition of unclaimed property. Any item of tangible personal property, other than fixtures left for repair or storage, where article unclaimed and unpaid for, may be sold or disposed of in certain circumstances to satisfy repairer or storer's lien. (c. R.25, §§3[3], 4[7], 14[5]). As to property of person dying intestate without lawful heirs, and property forfeited to Crown for any cause, see category 13 Estates and Trusts, topic 13.07 Descent and Distribution, subhead Escheat and Bona Vacantia. See also category 13 Estates and Trusts, topic Wills, subhead Unclaimed Legacies; and Canada Law Digest, category 3 Business Regulation and Commerce, topic 3.01 Banks and Banking, subhead Unclaimed Deposits.

21.02 ADVERSE POSSESSION:

The general rule is that actual, constant, open, visible and notorious possession for ten years by any person or his predecessors in title by himself or by his tenants or lessees, claiming fee simple to the exclusion of the owner, gives good title. (c. L.15). Where claim of adverse possession is against Crown, limitation period is 60 years. (c. L.15, §3). Person claiming title by adverse possession may apply to have his title certified. (c. C.6, §4[2]). No length of possession, however, can defeat title registered under The Land Titles Act after first registration. (c. L.5, §51). Accordingly, adverse possession is only available in regards to lands in registry system.

Unimproved Land.

In certain cases of land which is not cultivated or improved, the period is either ten years from the date on which the owner had knowledge of the adverse possession, or 20 years from the date of taking such possession, whichever is shorter. (c. L.15, §5[4]).

Easements.

In order to obtain an easement by prescription, land must have been enjoyed without interruption for 20 years. Right to easement, once gained, cannot be extinguished by prescription. (c. L.15, §31). No prescriptive right to light or air or in respect of wires or cables can be acquired. (c. L.15, §§33, 35). Planning and Conservation Land Statute Law Amendment Act, 2006 (S.O. 2006, c. 23) amended Land Titles Act, c. L.5, to exempt conservation easements and covenants from various technical restrictions that apply to easements and covenants in general.

Disabilities.

Special rules apply where the person against whom title is asserted, was under one of the following disabilities at the time the right of action accrued: infancy, mental deficiency, incompetency, unsoundness of mind. (c. L.15, §§36-39).

21.03 CONVEYANCES:

See topic 21.05 Deeds.

21.04 CURTESY:

Curtesy abolished, effective Mar. 31, 1978.

21.05 DEEDS:

Under Land Registration Reform Act (c. L.4) term "deed" is no longer applicable. Term "transfer" is used to cover all conveyances of freehold and leasehold lands. (c. L.4, §1). Transfers required for real property (c. C.34, §§3, 9, 10) and most leases. See topic 21.09 Landlord and Tenant. No consideration necessary. Legislation relating to records impose formal requirements. See category 10 Documents and Records, topic 10.05 Records. Affidavits under Family Law Act may be replaced by statements contained in body of transfer. (c. L.4). Statements may be made by attorney with personal knowledge. (c. F.3, §21[4]). Spouse must consent to transfer of matrimonial home. (c. F.3, §21[1]). See category 14 Family, topic Husband and Wife, subhead Status.

Execution.

Generally, common law requirements as to signing, sealing and delivery apply, as modified by statute. Transfers and charges in statutory form are effective without seals. (c. L.4, §13). See topic 21.13 Real Property; category 14 Family, topic Husband and Wife, subhead Status.

Recording.

See particular recording requirements under category Documents and Records, topic Records.

Operation and Effect.

No words of limitation are necessary (c. C.34, §5) and conveyance passes all estate, right interest, claim and demand (§5). It also passes ancillary rights. (§15). Covenants as to title deemed to be included in transfer if they are in prescribed form. (c. L.4, §5). Planning Act (c. P.13, §50[5]) prohibits any transaction dealing with less than whole of lot on plan of subdivision and any transaction in which grantor retains any abutting lands, unless transaction fits within Act's exceptions. It prohibits subdivision of land by will as way of avoiding subdivision control requirements and applies where testator dies on or after July 26, 1990. (c. P.13, §50.1).

Taxes.

Land Transfer Tax Act (c. L.6), payable on purchase of land in Ontario. See subhead Land Transfer Tax under category Taxation, topic Property Taxes.

Retail Sales Tax.

Payable on valuation of chattels and items of tangible personal property passing with conveyance, unless otherwise exempted under statute. See category 22 Taxation, topic 22.14 Sales and Use Taxes, subhead Sales Tax.

Transfer.

Transfers under both Registry Act and Land Titles Act shall be in Form 1. (R.R.O. 688). See category 10 Documents and Records, topic 10.05 Records.

Special Requirements for Particular Parties.

Corporations may execute instrument by signature of authorized person along with either corporation's seal affixed thereto, or person's statement that he or she has authority to bind corporation. Natural persons must be described by surname and by first given name in full, followed by another given name, if any, in full. Attorney's requirement for registration of power of attorney and instrument must refer to registration number and date. It must also state, to best of attorney's knowledge and belief, that power of attorney is still in full force and effect and that principal was at least 18 years of age when power of attorney executed.

Condominiums.

See topic 21.13 Real Property.

21.06 DEEDS OF TRUST:

See category 20 Mortgages, topic 20.04 Mortgages of Real Property.

21.07 DOWER:

Dower abolished effective Mar. 31, 1978. (Family Law Reform Act, S.O. 1978, c. 2, §70).

21.08 ESCHEAT:

See topic 21.01 Absentees; category 13 Estates and Trusts, topic 13.07 Descent and Distribution.

21.09 LANDLORD AND TENANT:

Residential Tenancies Act, 2006 (S.O. 2006, c. 17) applies to residential tenancies while commercial landlord and tenant law is governed by Commercial Tenancies Act. (c. L.7).

In general, common law rules govern, as supplemented by Residential Tenancies Act, 2006 (S.O. 2006, c. 17) and Human Rights Code (c. H.19) prohibits discrimination. Conversion of rental housing to other uses restricted by Residential Tenancies Act, 2006. Minister sets guidelines for rent increases each year and guidelines may not be exceeded unless there is agreement between landlord and tenant, or approved application to Landlord and Tenant Board. (§120[2]).

Leases.

A lease for a period of three years or more must be by deed or note in writing. (c. S.19, §§2, 3). If it is in writing but not sealed, it may nevertheless be enforceable as agreement for lease. If it is not in writing and tenant enters and pays rent annually, it becomes tenancy from year to year.

Registration.

Lease need not be registered if it is less than seven years in duration under Registry Act (R.20, §70[2]), or three years, under Land Titles Act (c. L.5, §44[1]4). For effect of non-registration in other cases, see category 10 Documents and Records, topic 10.05 Records.

Termination.

Common law rules apply except as to residential tenancies.

Relief Against Forfeiture.

Courts have power to relieve against forfeiture for breach of any covenant in lease and may grant such relief as it thinks fit on such terms as to payment of rent, costs, expenses, damages, compensation, penalty or injunction to restrain future breaches as deemed just. (c. L.7, §20). Prior to court granting such relief, tenant must be given notice and opportunity to remedy breach first (c. L.7, §19).

Insolvent Tenant.

The right of the landlord to collect rent upon the insolvency of a tenant is restricted to arrears of rent due during the three months immediately preceding the receiving order or assignment into bankruptcy and rent for the three months following, and any additional current rents while the assignee retains possession. (c. L.7, §38[1]). Any payment to be made to the landlord in respect of accelerated rent must be credited against the amount payable by the assignee for the period of his occupation. (c. L.7, §38[1]). Landlord may not terminate lease of insolvent person by reason only that insolvent person is insolvent, or notice of intention or proposal has been filed, or that insolvent person has not paid rent. (Bankruptcy and Insolvency Act, R.S.C., B-3, §65.1). Insolvent commercial tenant may disclaim lease on 30 days notice, subject to landlord's right to challenge such disclaimer. Upon disclaimer by tenant, landlord is entitled to amounts set out in §65.2.

Dispossession.

Where a tenant over-holds after expiry of his lease, or where for any other reason an existing lease may be terminated, landlord or tenant (if applicable) may make summary application to Superior Court of Justice judge for writ of possession. (c. L.7, §74). Over-holding tenant may be liable for double amount of normal rent. (c. L.7, §§58, 59).

Distress.

Common law as modified by c. L.7 applies.

Residential Tenancies.

Tenant's obligations cease unless executed copy of lease is delivered to tenant within 21 days after execution by tenant (S.O. 2006, c. 17, §12[2]). In addition, security deposits in excess of one month's rent are prohibited (§106[2]); interest is payable by landlord on security deposits (§106[6]); distress of tenant's property is prohibited (§40); doctrine of frustration applies (§19); common law rules with respect to material breach of covenant applies (§17); right to assign tenancy with approval of landlord is protected (§95); landlord has statutory obligation to maintain and repair (§20); other tenant protections exist as well as special provisions as to notices to quit tenancy and rules as to services of notices (§§48-51). Person who becomes mortgagee in possession of residential premises is deemed to be landlord and is subject to tenancy agreement and Residential Tenancies Act, 2006. (c. M.40, §47). However, mortgagee in possession of single family home or other residential premises may obtain possession where it enters into binding agreement or agreement of purchase and sale and purchaser requires premises for purposes of his or her own occupation. (Mortgages Act, c. M.40, §53). Procedures have been established to control rent on residential premises.

Condominiums.

See topic 21.13 Real Property.

21.10 LEASES:

See topic 21.09 Landlord and Tenant.

21.11 PERPETUITIES:

Perpetuities.

Future interest in property is void from outset if it is incapable of vesting within perpetuity period. Perpetuity period is based on lives of particular persons relevant to interest and living when interest is created, plus 21 additional years. However, even if interest would be void because it may possibly vest beyond period, Perpetuities Act (c. P.9, §4) may remain valid if it in fact vests within "wait and see" period. These rules may apply whenever interest in property vests on event which may or may not happen.

Accumulations.

The Accumulations Act (c. A.5) provides that direction to accumulate income from property is void as far as period of accumulation goes beyond certain periods (generally not more than 21 years).

Mortmain.

Formerly, law of mortmain prevented corporation from holding land without license or statutory power. Law of mortmain no longer applies, but some corporations still need extra-provincial licenses to hold land in Ontario.

21.12 POWERS OF ATTORNEY:

General Powers of Attorney.

Powers of Attorney Act, c. P.20 (substantially repealed by S.O. 1992, c. 32) permits general powers of attorney for property and gives some protection where good faith action taken without notice of revocation, termination or invalidity of power.

Continuing Power of Attorney for Property.

Continues in effect after donor mentally incapable if donor expresses intention that it may be exercised during donor's incapacity to manage property or if it states it is continuing power of attorney. Donor may give attorney power to do anything donor can do when fully capable except make will. Governed by Substitute Decisions Act, 1992, S.O. 1992, c. 30, which sets out detailed provisions for giving or revoking such power of attorney and conduct, resignation (§11), replacement of attorney and termination (§12) of power of attorney. Some protection for actions in good faith without knowledge after termination or invalidity of power. (§13). Act gives attorney several powers where donor incapable, e.g. to provide for donor's dependants, gift or lend from donor's estate. (§37). Donor may by power of attorney restrict or deny most such powers. Power can be effective immediately or upon specific date or happening of event. (§7[7]). Attorney must be at least 18. (§5). May appoint more than one attorney. May appoint substitute attorneys. (§§7, 11).

Execution/Revocation of Continuing Power of Attorney and Capacity to Give.

Must be in writing signed before two witnesses. Certain people cannot be witnesses. Some judicial power to validate improperly witnessed powers. (§10). Donor must be at least 18 when attorney intends to exercise power of attorney. Kind of capacity required to give continuing power of attorney outlined in Act and not necessarily same as capacity to manage property. (§§8, 9). Power revocable while donor has similar level of capacity. (§8[2]). Revocation must be by writing executed in same way as continuing power of attorney. (§12[2]).

Compensation and Passing of Accounts.

Act provides for voluntary and required passing of accounts of attorneys acting under continuing power of attorney or statutory guardianship. (§42). Attorney for property may receive compensation as provided by regulation (or in power of attorney). (§§40, 90, O. Reg. 26/95).

Statutory Guardian.

Public Guardian and Trustee can become statutory guardian of person who is incapable, where donor certified in psychiatric facility replacing attorney under continuing power of attorney. (§15). Named attorney can terminate statutory guardianship of Public Guardian and Trustee if power of attorney given prior to certificate's issuance and governs all property of incapable person (§16.1) or apply to replace Public Guardian and Trustee as statutory guardian if power of attorney given prior to certificate's issuance but does not govern all property of incapable person (§17): on refusal of Public Guardian and Trustee to issue certificate of appointment of statutory guardian to named attorney, procedure available for court application (S.O. 1992, c. 30, §18). On application to replace Public Guardian and Trustee, security from attorney may be required by Public Guardian and Trustee subject to waiver by court. (§17). Act provides when statutory guardianship terminated. (§§16.1, 20 and 20.3).

Statutory Guardian Where No Continuing Power of Attorney and Court Appointed Guardians of Property.

Substitute Decisions Act, 1992, also provides for appointment of statutory guardian of incapable person where no continuing power of attorney. If Public Guardian and Trustee is statutory guardian, incapable persons' spouse, partner, certain relatives or trust company may apply to Public Guardian and Trustee to replace him or her. (§§15 and 17).

Court may appoint guardian of property whether or not there is continuing power of attorney. (§22). Some restrictions on who may be appointed. (§24).

Personal Care Power of Attorney.

Attorney can be appointed to make decisions for personal care. See categories 15 Health, topic Consent to Treatment; Estates and Trusts, topic Wills, subhead Living Wills.

Execution/Revocation of Personal Care Power of Attorney and Capacity to Give.

Must be in writing signed before two witnesses. Certain persons cannot be witnesses. Some judicial power to validate improperly witnessed power. (§48). Donor must be at least 16 when attorney intends to exercise power of attorney. (§43). Kind of capacity person requires to give personal care power outlined in Act (§47) and may differ from capacity for personal care. Power revocable if donor has similar level of capacity (§47) and if revocation in writing executed as required to give power (§53). See also §50(5) for use of force provisions.

Records of Attorney and Compensation.

Obligations of personal care attorney to maintain records and compensation for personal care attorney as prescribed by regulation. (§§66 and 90 and O. Reg. 99/96).

Court Appointed Guardians of Person.

Court may appoint guardian of person whether or not person has given personal care power of attorney. (§55). Some restrictions on who may be appointed. (§57).

Land Registry.

No instrument affecting land purporting to be signed or executed by person by attorney may be registered unless at or before time of registration original power of attorney or copy thereof certified for registration is itself registered in same registry office. (c. R.20, §46; c. L.5, §70; R.R.O. 1990, Reg. 690, §41).

21.13 REAL PROPERTY:

The types of estates recognized in Ontario include estates in fee simple, for life, pour autre vie, for years, at will, at sufferance, by entireties, tenancy in common and joint tenancy. Estates in fee tail can no longer be created. Limitations in conveyance or will that before May 27, 1956 would have created estate tail, is construed as estate in fee simple. (c. C.34, §4). Estate granted to two or more persons is tenancy in common unless expressly declared to be joint tenancy, but every estate vested in executors or trustees is held by them in joint tenancy. (§13). A body corporate can hold real or personal property in joint tenancy like an individual.

Warranties.

Ontario New Home Warranties Plan Act (c. O.31) applies to all new homes or condominiums sold in Ontario after Jan. 1, 1977. There is implied warranty for one year for minor defects but warranties regarding major structural defects continue for up to seven years depending upon date in which new home was constructed. Statute administered by nonprofit corporation which must establish warranty fund or purchase insurance to be used to compensate owners whose homes are defective. Disputes between vendors and purchasers are resolved by arbitration. (c. O.31, §17[4]). All vendors and builders must register under statute. (c. O.31, §6).

Condominiums.

Condominium Act, 1998 (S.O. 1998, c. 19) provides legal framework by which property may be divided into parts that are to be owned individually (except for Common Elements Condominiums) and parts that are to be owned in common. There are five types of condominiums (§6): (i) Standard - consists of units owned individually by “Owners” and common elements owned in common. (ii) Leasehold - similar to Standard, but owners are co-tenants pursuant to ground lease of 40-99 years, as opposed to fee simple owners. Owners have leasehold interest in their unit and share leasehold interest in common elements. (iii) Vacant Land - units are not part of building or structure, and are on one level only. Land is effectively subdivided into units and common elements. (iv) Common Elements - contains no units, only common elements. Owners of common interest in common elements must be freehold owners of “tied land” that is not part of condominium, but is in same land registry division. Interest in condominium runs with interest in tied land. (v) Phased - Standard condominium to be constructed and registered in phases. Initial registration must include servient lands owned by declarant. All phases must be registered within ten years.

Condominium corporations may amalgamate to form single condominium corporation. (Part VII). Prescribed information must be registered in appropriate registry division creating corporation whose members are owners of individual units (either freehold or leasehold) or owners of tied land. (§§2, 3, 5). Provisions regarding governing of corporate business are determined by board of directors and confirmed by owners. (Part IV). Provisions include accommodation of telecommunications easements. (§22). Corporation must maintain insurance for both units and common elements, but not improvements to units. (§99). Owners must contribute to common expenses of property, part of which must be put in reserve fund for major repairs and replacements (§§84, 93). Reserve Fund Study must be conducted and updated periodically, and plan for future funding must be implemented by board of directors. (§94). Unless otherwise provided, corporation is to maintain common elements and owners are to maintain units, but corporation must repair common elements and units after damage (§§89, 90, 91). Condominium may be terminated in variety of circumstances; all require consent of 80% of owners and in some cases mortgagees. (Part VIII). Condominium may also be terminated upon expropriation. (§126). Protection of original purchasers provided for by requirement of performance audit of common elements which may give rise to ONHWP claims (§44); implied covenants in agreements of purchase and sale (§78); prescribed duties of original owner of property (§§79-82); and mandatory disclosure of information prior to binding agreement, for which declarant is partly accountable (§§72, 74, 75). O. Regs. 48/01, 49/01, 50/01, 51/01, 52/01 also apply.

Trespass.

Trespass to Property Act (c. T.21) makes it offence to enter premises or engage in activity on premises without occupier’s express permission (§2). Persons committing offence under this Act are subject to arrest (§9) and may be fined up to $2,000. Convicting judge is required to make award of damages not in excess of $1,000 to compensate person who has suffered loss caused by convicted person if prosecutor requests and person suffering loss consents. (§12). If award is not made, person suffering damage may claim damages in civil courts.

Occupiers’ Liability.

The Occupiers’ Liability Act, c. O.2 determines standard of care owed by occupiers of premises and does not relieve occupier from higher liability or higher standard raised by virtue of any statute or rule of law imposing special liabilities or standards of care on particular classes of people. (§9). Neither rights or liabilities of persons are affected in respect of causes of action arising before Sept. 8, 1980. (§11).

Occupier of premises owes duty to take such care as in all circumstances of case is reasonable, to see that persons and property brought on premises are reasonably safe while on premises. (§3). Duty of care may be modified by contract and landlord owes same duty of care as occupier. (§§5[2], 8). Duty may be modified with respect to persons who are willing to assume risks, with respect to persons who enter with intention of committing criminal acts, and with respect to certain classes of property. (§4). **Rule in Shelley's Case** is recognized and applies to both wills and deeds and to the creation of both legal and equitable interests.

See also topics 21.04 Curtesy, Deeds, Dower, Landlord and Tenant; categories 5 Civil Actions and Procedure, topic Partition; Debtor and Creditor, topic Homesteads; Documents and Records, topic Records; Family, topic Husband and Wife; Mortgages, topic Mortgages of Real Property.

21.14 TRUST DEEDS:

See category 20 Mortgages, topic 20.04 Mortgages of Real Property.

22 TAXATION

22.01 ADMINISTRATION:

The Minister of Finance has general supervision of administration of all provincial tax laws. Most public moneys must be paid to credit of Minister of Finance of Ontario.

Exemptions—Armed Forces.

Unless otherwise specified, members of armed forces enjoy no exemptions from taxation.

Development Charges Act, 1997 (S.O. 1997, c. 27) establishes statutory scheme for imposition of municipal lot levies on new development and is in essence form of taxation. Provides for "front-ending agreements" between municipalities and landowners for installing services, under which landowners who are not parties can be required, as condition of any development of lands within benefiting area, to pay proportionate share of costs.

Penalties.

See topics detailing particular taxes.

22.02 ALCOHOL, BEVERAGES AND TOBACCO TAXES:

Tobacco Tax.

Tobacco Tax Act, c. T.10, imposes tax on consumers of cigarettes and cigars.

22.03 BUSINESS TAXES:

Commercial Concentration Levy.

Now repealed.

22.04 CORPORATE TAXES:

Corporation Tax.

See category 2 Business Organizations, topic 2.03 Corporations, subhead Taxation—(a) Provincial Tax, catchline Taxable Income.

22.05 EMPLOYMENT TAXES:

Social Security Tax.

No social security or unemployment compensation tax is imposed by the Province of Ontario. See Canada Law Digest, category 23 Taxation, topic 23.03 Employment Taxes, subhead Unemployment Compensation Tax.

22.06 ESTATE ADMINISTRATION TAX:

See category 13 Estates and Trusts, topic 13.10 Estate Trustees, subhead Taxes.

22.07 ESTATE TAX:

Estate tax is levied in form of income tax on deemed dispositions at death under federal Income Tax Act. See Canada Law Digest, category 23 Taxation, topic 23.04 Estate Tax.

22.08 GASOLINE AND SPECIAL FUELS TAXES:

Gasoline Tax.

Gasoline Tax Act, c. G.5, imposes tax on purchasers of gasoline, aviation fuel, leaded gasoline, and propane.

Fuel Tax.

Fuel Tax Act, c. F.35, imposes tax on purchasers of clear fuel.

22.09 GIFT TAX:

None.

22.10 INCOME TAX:

Individuals.

Income Tax Act, c. I-2, imposes income tax on individuals who are resident in Ontario on last day of taxation year. That Act also imposes income tax on nonresident individuals who had earned income in Ontario in taxation year.

Beginning with 2000 taxation year, Ontario adopted “tax on income” approach to calculating tax payable under Income Tax Act (Ontario). Prior to that time, individual’s Ontario income tax was generally calculated by applying Ontario tax rate to his/her basic federal tax. Ontario now uses its own tax brackets and rates so that Ontario income tax is calculated on taxable income and not on basic federal tax. Ontario’s highest effective tax rate for individuals is approximately 11.16%. Ontario residents also pay Ontario Health Premium tax based on their taxable income and imposed at graduating rates on taxable income over $20,000. Maximum annual health premium tax paid by Ontario residents is $900.

Federal government collects taxes payable under Income Tax Act (Ontario) and makes payments to Ontario in respect of taxes collected. Ontario residents file combined federal and Ontario returns with federal government, and remit their Ontario taxes to federal government.

Corporations.

See category 2 Business Organizations, topic 2.03 Corporations, subhead Taxation—(a) Provincial Tax, catchline Provincial Income Tax.

22.11 INHERITANCE TAX:

For death occurring after Apr. 10, 1979 no inheritance tax on property passing on death.

22.12 MINES, MINERALS AND FISHERIES TAXES:

Mines and Natural Gas Tax.

See category 19 Mineral, Water and Fishing Rights, topic 19.01 Mines and Minerals.

22.13 PROPERTY TAXES:

Assessment of property in Ontario is governed by Assessment Act, c. A.31, and regulations made thereunder. Assessments are based on “current value” of property. “Current value” is defined in that Act as “the amount of money the fee simple, if unencumbered, would realize if sold at arm’s length by a willing seller to a willing buyer”. For certain types of properties, Assessment Act stipulates that assessed values shall be determined on basis of something other than current market value, for example pipelines are assessed in accordance with regulated rates.

Taxation of property in Ontario is governed by Municipal Act, 2001, S.O. 2001, c. 25 and Education Act, c. E.2, and regulations made thereunder. Properties located in territories without municipal organization are taxed in accordance with Provincial Land Tax Act, c. P.32.

Property taxes are calculated by multiplying assessment of property by local tax rate. Property tax rate in municipality has two components: (i) municipal tax rate that is established by local municipality—in two-tiered municipality, this rate will also contain component that is established by upper-tier municipality; (ii) education tax rate that is established by Province.

Property tax revenues that are generated by municipal tax rate are retained by municipalities and are used to fund local services (such as police and fire protection, garbage removal, snow removal, and road maintenance). Property tax revenues that are generated by education tax rate are collected by municipalities and remitted quarterly to local school boards to fund education.

Land Transfer Tax.

Land Transfer Tax Act (c. L.6) generally imposes tax on persons who tender for registration in Ontario a conveyance and on persons who acquire of beneficial interest in land in Ontario. Land transfer tax is calculated as follows: 0.5% of value of consideration for conveyance/disposition of beneficial interest in land up to and including $55,000; 1% of value of consideration which exceeds $55,000 up to and including $250,000; 1.5% of value of consideration which exceeds $250,000; and 2% of amount by which value of consideration exceeds $400,000 for land that contains at least one and not more than two single-family residences.

First time purchasers of newly constructed homes may be eligible for refund of land transfer tax to certain maximum. No tax is payable on leases of no more than 50 years. Certain intercorporate dispositions may ultimately result in cancellation of tax and other transfers are exempt.

22.14 SALES AND USE TAXES:

Sales Tax.

Retail Sales Tax Act, c. R.31 imposes 8% sales tax on purchasers of tangible personal property and certain services. Tangible personal property includes personal property that can be seen, weighed, measured, felt or touched, and includes computer programs. Taxable services taxed at 8% include telecommunication services, transient accommodation, labor to install or maintain tangible personal property and computer programs after July 19, 2002, and contracts for service, maintenance or warranty of tangible personal property and computer programs after July 19, 2002. Act also imposes: 10% or 12% tax on purchasers of liquor, beer, or wine depending on where product is purchased; 10% tax on purchasers of admissions to places of amusement where price exceeds $4; 5% tax on purchasers of transient accommodation; and tax on insurance. Purchasers of certain classes of tangible personal property are exempt such as purchasers of certain food products, custom computer software, children's clothing, and books. Purchasers of tangible personal property sold for resale are also exempt. Persons who sell or license tangible personal property in ordinary course of business in Ontario must obtain vendor permit.

22.15 STAMP AND SEAL TAXES:

Stamp Tax.

See category 2 Business Organizations, topic 2.03 Corporations, subhead Stock Transfer Tax. There are no other stamp taxes.

22.16 TOBACCO TAXES:

Tobacco Tax.

Tobacco Tax Act, c. T.10, imposes tax included into price of tobacco consumed in Ontario. Tobacco tax is equal to 12.35 cents for each cigarette or gram of tobacco and 56.6% of taxable price of cigars purchased by consumers in Ontario.

23 TRANSPORTATION

23.01 AIRCRAFT:

See Canada Law Digest, category 24 Transportation, topic 24.01 Aircraft.

23.02 AUTOMOBILES:

See topic 23.03 Motor Vehicles.

23.03 MOTOR VEHICLES:

Registrar of Motor Vehicles, acting under instructions of Minister of Transportation has general supervision over all matters relating to highway traffic within Ontario. (c. H.8, §3).

Vehicle licence is required annually. No registration fee is payable for military, governmental or diplomatic vehicles in Ontario. Number plates must be attached on the front and back of every motor vehicle in a conspicuous position and on the back of every trailer. New residents are exempt from registration and plate requirements for 30 days if complied with requirements of former jurisdiction. See subheads Proof of Financial Responsibility and Insurance; Foreign Vehicle. Motorized snow vehicles must be registered and owners must obtain permits. (c. M.44).

Driver's licence required. Licence issued on anniversary of birth date of driver; duration of licence, three years unless issued to probationary driver. Members of Armed Forces driving military vehicles on duty do not require licence. Person under 16 years old may not be licenced. Licences must be carried when driving and produced on demand. No owner of motor vehicle shall operate motor vehicle or cause or permit motor vehicle to be operated on highway unless motor vehicle is insured under contract of automobile insurance. Classes of licences governed by regulation. See subhead Nonresident Operator, infra.

Instruction permits available, limited in time. Driving instructors must be licensed and are governed by regulations under Act.

Titles and Sales.

Notice must be given on prescribed form by forwarding same to Ministry of Transportation by both vendor and purchaser within six days of sale. Safety standards certificate must be obtained or vendor may forward to Ministry required notice together with current number plates and vehicle licence. (c. H.8, §60).

Liens.

See category 20 Mortgages, topic 20.05 Personal Property Security.

Identification Marks.

It is an offence to deface or remove manufacturer's vehicle identification number or other identification mark from motor vehicle or knowingly to deal with or possess a motor vehicle on which this has been altered. (c. H.8, §60).

Restrictions on Operation.

May not be operated by person without driver's licence, by person under age of 16 or by intoxicated or disqualified person or for any illicit trade or transportation. Statutory regulations are in force governing weight of vehicles varying in accordance with type of vehicle, width of tire and season of year. Regulated by c. H.8 and Regulations thereunder. Certain prescribed vehicles will be prohibited from operating on highway unless displaying vehicle inspection sticker. Regulations may be made with respect to types of vehicles requiring sticker, procedures relating to use or issue of stickers, and intervals of inspection. Regulations may also be made prescribing that specified classes of vehicles have covered loads if travelling on certain types of highways. No person shall transport any dangerous goods in vehicle on highway unless all prescribed safety requirements are complied with and vehicle and all containers and packaging comply with prescribed safety standards and marks. Exception exists if under direction of Minister of National Defence for Canada or permit has been obtained. (c. D.1, §2).

Equipment Required.

Regulated by c. H.8 and Regulations thereunder.

Lights Required.

Regulated by c. H.8, §62 and Regulations thereunder.

Inspection.

No regular inspection required but spot-checks and certificates thereof are authorized. It is offence to refuse to submit vehicle for examination on request. Licence plates of vehicle found in dangerous or unsafe condition may be seized until remedied. (c. H.8, §82). Driver or owner of motor vehicle may, by notice in writing, be required to submit motor vehicle for testing for emission standards. (c. E.19 and regulations thereunder). Restrictions are placed on form and manner in which safety standard certificates are issued. Dump trucks registered in another jurisdiction will not be issued permit or number plates unless they have safety standard certificate. (c. H.8). Inspector may stop and inspect vehicle and its load if he believes dangerous goods are being transported. (c. D.1, §10).

Traffic regulated by stop signs and 3-phase lights, slow signs, flashing amber (slow and proceed) and flashing red (stop and proceed) lights and stop and yield-right-of-way signs, pedestrian cross-walks marked "X". Passing on right permitted under certain limited conditions.

Right turns permitted at stop signs and red lights after stopping.

Impounding.

Where vehicle is driven by intoxicated person or by person whose permit or licence has been suspended or revoked, and in certain other cases, vehicle may be impounded for three months, unless vehicle is not owned or is held under lease that has less than three months to run by person convicted and person convicted is not principal driver. Court has discretion not to impound if order would cause hardship to another person with interest in vehicle. (c. H.8, §220). See category 12 Environment, topic 12.01 Environmental Regulation, subhead Enforcement.

Accidents.

Person in charge must stop, give assistance if necessary, give in writing his name and address and that of owner and number of permit if demanded. (c. H.8, §200). If accident results in personal injuries or if apparent damage to property exceeds $1000, person in charge of vehicle must report accident to nearest police officer. (c. H.8, §199; R.R.O. 596, §11). Must also report damage to property on highway such as poles, lights, signs and sod. (c. H.8, §201).

Seatbelts.

With certain exceptions, use of seatbelts in vehicles driven on highways when vehicle equipped with seatbelts is mandatory. Driver of vehicle commits offence if he drives vehicle on highway without requiring child under 16 to wear seatbelt. Passengers in vehicle driven on highway who are 16 years of age or over commit offence if they fail to use seatbelt. (c. H.8, §106).

Motorcycles.

When on highway, motorcycle must carry lighted white lamp on front and lighted red lamp on rear. (c. H.8, §62). Drivers and passengers must wear helmets when motorcycle in operation. (c. H.8, §104).

Liability of Owner and Driver.

Owner is liable for loss or damage to any person by reason of negligence in operation of the vehicle unless it was, at the time, in possession of person other than owner or his chauffeur without his consent. If vehicle leased, consent of lessee is deemed consent of owner. (c. H.8, §192).

There is statutory onus on owner and driver to disprove negligence when loss or damage is sustained by any person (pedestrian) by reason of motor vehicle on highway. This does not apply in cases of collision between motor vehicles (including streetcars), or to action brought by passenger in motor vehicle. (c. H.8, §193).

After June 22, 1990 and before Jan. 1, 1994 neither owner or operator of automobile are liable in action in Ontario for loss or damages from bodily injury arising out of use or operation of automobile, operated in Canada or U.S. unless injured person has died or has sustained: (a) permanent serious disfigurement; or (b) permanent serious impairment of important bodily function caused by continuing injury which is physical in nature. (c. I.8, §266).

This “threshold” prohibition of right to sue applies to all persons, commencing action in Ontario, no matter where they are resident or domiciled.

After Jan. 1, 1994 and before Nov. 1, 1996, neither owner nor operator of automobile are liable in action in Ontario for pecuniary loss or damage from bodily injury arising out of use or operation of automobile operated in Canada or U.S.

Owner or operator of automobile will only be liable for non-pecuniary loss or damages from bodily injury arising out of use or operation of automobile in event that injured person has died or has sustained: (a) serious disfigurement or (b) serious impairment of important physical, mental or psychological function. (c. I.8, §267.1).

Non-pecuniary damages awarded for bodily injury arising out of motor vehicle accidents occurring after Jan. 1, 1994 and before Nov. 1, 1996 are subject to deductible of $10,000. Deductible is to be adjusted from year to year. (c. I.8, §267.1).

Damages awarded for non-pecuniary loss under Family Law Act for motor vehicle accidents occurring after Jan. 1, 1994 and before Nov. 1, 1996 are subject to deductible of $5,000. Deductible is to be adjusted from year to year. (c. I.8, §267.1).

After Nov. 1, 1996, neither owner nor operator of automobile are liable in action in Ontario for non-pecuniary loss or damages for bodily injury arising out of use or operation of automobile unless injured person has died or has sustained (a) permanent serious disfigurement; or (b) permanent serious impairment of important physical, mental or psychological function. (c. I.8, §267.5[5]). Employers who are vicariously negligent for actions of employee drivers are not entitled to protection of no fault insurance legislation (Vollick v. Sheard). After Oct. 1, 2003, those vicariously liable for negligence of protected defendant are not liable for any amount greater than amount of damages for which protected defendant is liable. (c. I.8, §267.5[10.1]).

Non-pecuniary damages awarded for bodily injury arising out of motor vehicle accidents occurring after Nov. 1, 1996 and before Oct. 1, 2003 are subject to deductible of $15,000. Deductible is to be adjusted from year to year. (c. I.8, §267.5[7]). Non-pecuniary damages awarded for bodily injury arising out of motor vehicle accidents occurring on or after Oct. 1, 2003 are subject to deductible of $30,000 (O. Reg. 312/03) except where non-pecuniary damages exceed $100,000 in which case deductible is inapplicable. (c. I.8, §267.5[8]).

Damages awarded for non-pecuniary loss under Family Law Act for motor vehicle accidents occurring after Nov. 1, 1996 and before Oct. 1, 2003 are subject to deductible of $7,500. Deductible is to be adjusted from year to year. (c. I.8, §267.5[7]). Damages awarded for non-pecuniary loss under Family Law Act for motor vehicle accidents occurring on or after Oct. 1, 2003 are subject to deductible of $15,000 (O. Reg. 312/03) except where non-pecuniary damages exceed $50,000 in which case deductible is inapplicable. (c. I.8, §267.5[8.1]).

After Nov. 1, 1996, neither owner nor operator of automobile are liable in action in Ontario for (a) damages for income loss suffered in seven days after accident; (b) damages for income loss suffered more than seven days after incident and before trial in excess of 80% of net income loss and (c) damages for loss of earning capacity suffered after incident and before trial in excess of 80% of net loss of earning capacity.

For accidents on or after Jan. 1, 2004, limitation period for bringing claim is two years after day on which claim was discovered. Limitation period does not run as against parties under disability such as minors and mental incompetents until person is freed of disability. (Murphy v. Welsh). Limitation period may also be extended in case where it is not discovered until some time after fact that injuries are permanent and serious. (Peixeiro v. Haberman). For accidents on or after Jan. 1, 2004, limitation period for bringing claim is two years after day on which claim was discovered. Limitation period does not run as against persons under age of 18 years or against those persons incapable of commencing claim due to physical, mental or psychological condition and who is not represented by litigation guardian with respect to claim. (S.O. 2002, c. 24, §§4-6).

Driver is liable, owner not liable for penalties for moving violations of Act such as speeding, careless driving, etc.

Guests.

Statute section limiting liability of owner to guests repealed.

Proof of Financial Responsibility and Insurance.

Act to provide for temporary automobile insurance entitled Compulsory Automobile Insurance Act, c. C.25. Every owner of motor vehicle who operates, or causes or permits operation of motor vehicle not insured under contract of insurance, is liable to fine of not less than $5,000 and not more than $25,000 on first offence and on subsequent conviction to fine of not less than $10,000 and not more than $50,000. In addition his driver's license may be suspended for up to one year.

Operator of motor vehicle shall have motor vehicle proof of insurance that motor vehicle, or operator is insured under contract of insurance at all times. Agent, within meaning of Insurance Act, shall provide to owner of motor vehicle, who is resident in Ontario, application for automobile insurance, when requested to do so.

Facility Association of insurers is established to provide plan of operation for providing contract of automobile insurance to owners and licenced drivers of motor vehicles who would be unable to obtain such insurance, but for plan.

Contract of insurance that has been in effect for more than 60 days can be terminated only for specified reasons, such as nonpayment of premium, or misrepresentation by insured in application for insurance.

No-Fault Insurance.

From Jan. 1, 1972, every automobile policy issued in Ontario must provide no-fault accident benefits in a statutory form as Schedule B to policy.

Benefits payable were substantially increased as result of S.O. 1990, c. 2 and O. Reg. 273/90. Benefits payable were further increased as result of S.O. 1993, c. 10. Benefits were reduced as result of S.O. 1996, c. 21.

Benefits are payable to any occupant of automobile in respect of accidents in Ontario and to named insured, his or her spouse and any dependent relatives while occupant of any other automobile, or involved in any automobile accident, or who is not involved in accident but who suffers physical, psychological or mental injury to close relatives.

Benefits before Jan. 1, 1994 include: Weekly indemnity benefits for loss of income of up to $600 per week; weekly indemnity benefits of $185 per week for persons without income e.g. students, homemakers; death benefits of $25,000 in event of death of insured or spouse, and $10,000 per dependent; funeral expenses up to $3,000; supplementary medical and rehabilitation benefits not covered by O.H.I.P., up to $500,000 per person; ongoing care benefits, up to $500,000 per person, to maximum of $3,000 per month.

Benefits after Jan. 1, 1994 and before Nov. 1, 1996 include: Income replacement benefits equal to 90% of net weekly income from employment; education disability benefits equal to one half of average industrial wage; caregiver benefits worth $250 per week for first person in care of insured person plus $50 per week for every additional person; other disability benefits worth $185 for persons who do not fit within other categories; death benefits equal to deceased net weekly income from employment multiplied by 187.2 or $50,000 payable to surviving spouse and $10,000 to dependants and former spouses; supplementary medical and rehabilitation benefits not covered by OHIP to maximum of $1,000,000 per accident.

Benefits after Nov. 1, 1996 include: Income replacement benefits for loss of income of up to $400 per week unless optional coverage is purchased; nonearner benefits of $185 per week for persons without income payable if disability more than six months post-accident; death benefits of $25,000 in event of death of insured or spouse ($50,000 as of Oct. 1, 2003) and $10,000 per dependent ($20,000 as of Oct. 1, 2003); funeral expenses of up to $6,000 ($8,000 as of Oct. 1, 2003); supplementary medical and rehabilitation benefits not covered by O.H.I.P. up to $100,000 for non-catastrophic injuries and $1,000,000 for catastrophic injuries; attendant care benefits of $72,000 for non-catastrophic injuries to maximum of $3,000 per month and $1,000,000 per person for catastrophic injuries to maximum of $6,000 per month.

Enforcement Proceedings.

Notice of claim within 30 days; complete application within 120 days; thereafter mediation of disputes is compulsory. If mediation fails insured can elect to arbitrate or bring action in Court. Action must be commenced within two years after insurer's refusal to pay.

All benefits paid or available for accidents occurring before Jan. 1, 1994 reduce any claim person may have in tort against wrongdoer.

Benefits paid for accidents occurring after Jan. 1, 1994 and before Nov. 1, 1996 are not deductible in tort action against wrongdoer. Benefits paid or available before trial for accidents in respect of loss of income or loss of earning capacity before trial for accidents occurring after Nov. 1, 1996 are deductible from claims for loss of income and loss of earning capacity (c. I.8, §267.8[1]); benefits paid or available in respect of expenses for health care before trial are deductible from claims for expenses which have been incurred or will be incurred for health care. (c. I.8, §267.8[4]).

Motor Vehicle Accident Claims Fund.

A fund from which claims arising out of certain automobile accidents may be paid has been established by statute. Claims may be made where alleged personal or property damage caused by uninsured motor vehicle, or motor vehicle insured by insolvent or recalcitrant insurer, in certain cases where judgment obtained for personal or property damage and judgment debtor unable to satisfy judgment, or where identity of vehicle or driver, or both, causing personal injury cannot be established. (c. M.41, §§4 and 7). Payments are limited to $200,000 exclusive of costs, for all damage to persons or property arising out of one accident, occurring after Mar. 1, 1981. (c. M.41, §23). No interest is payable out of Fund. (c. M.41, §24[8]). Where accident has been caused by a vehicle or driver whose identity cannot be established, an action may be brought against Superintendent of Insurance, and payment of damages made from Fund. Person resident outside Ontario may claim from Fund only where his own jurisdiction has similar legislation available to Ontario residents. (c. M.41, §25).

Direct Actions.

Third party liability actions for property damage against owner or driver of Ontario insured automobiles are prohibited. Instead, Ontario insured motorists have recourse against their own insurers for property damage, and fault principles apply to such claims.

Non-Ontario insured motorists have tort right to recovery for property damage against at fault motorist.

Direct actions against automobile insurers are permitted for no-fault benefits and for claims arising from uninsured or unidentified vehicles, and for claims arising from inadequately insured motorists, pursuant to S.E.F. 44.

Foreign Vehicle.

Owner who is at least 16 years old and resides in foreign country is exempt from necessity of obtaining licence plates and permit to operate in Ontario for three months in year if jurisdiction of residence grants similar privileges to residents of Ontario but certain vehicles owned by nonresidents must be registered if operated in Ontario for more than 30 days in a calendar year. (c. H.8, §15). Owner residing in another province of Canada and not carrying on business in Ontario is exempt for six consecutive months if he has complied with requirements of his province of residence and such province grants similar privileges to Ontario residents. (c. H.8, §15).

Nonresident operator who is at least 16 years old and has complied with licencing law of home state or province may operate without Ontario licence if: (a) he is resident of foreign country and does not reside in Ontario for more than three months in any one year, (b) he is resident of another province of Canada and has complied with law of province in which he resides regarding drivers of motor vehicles, or (c) he is holder of valid International Driver's Permit. Upon becoming resident he is exempt from licencing requirements for 30 days if he has complied with laws of jurisdiction in which he previously resided. (c. H.8, §34).

Action against nonresident operating or responsible for operation of motor vehicle in Ontario, arising out of accident in Ontario, may be commenced by service of process on the Registrar of Motor Vehicles, who is constituted agent of such nonresident for such purpose and who forwards the process to the defendant in accordance with statutory provisions. A bond in the sum of $200 must be left with the Registrar to reimburse defendant his expenses should plaintiff not succeed in the action. (c. H.8, §194).

Motor Vehicle Carriers.

Commercial vehicles are governed by Highway Traffic Act (c. H.8) instead of Truck Transportation Act (c. T.22) which was repealed as of Jan. 1, 2006. Commercial motor vehicle means motor vehicle that has permanent attached trunk on delivery body, and includes number of vehicles including ambulances, buses and tractors used for hauling purposes on highways. Safety based CVOR system is operating certificate required for trucking companies based in Ontario. Every driver of commercial motor vehicle must carry CVOR certificate issued to operator of vehicle, fleet limitation certificate when applicable, and if it is leased vehicle, lease meeting necessary requirements. Public Vehicles Act (c. P.54) applies to all motor vehicles operated on highway by, for or on behalf of any person for transportation for compensation of passengers, or passengers and express freight that might be carried in passenger vehicle. Exemptions include taxicabs, motor vehicle transporting less than ten people where taking of passengers is not reason for trip and motor vehicles operated solely within limits of municipality. Both Acts supervised by Ministry of Transportation. Municipalities also have supervisory functions.

Under Public Vehicles Act, the Highway Transport Board's certificate of public necessity and convenience must be obtained before an operating licence will be issued. Board and Ministry in operating licences may prescribe terms of licences.

Sale of Motor Vehicles.

No dealer shall sell new motor vehicle that does not conform to standards required under Canada Motor Vehicle Safety Act or that does not bear National Safety Mark. (c. H.8, §105).

No person may carry on business as a motor vehicle dealer nor act as a salesman of a motor vehicle dealer unless registered under The Motor Vehicle Dealers Act. (c. M.42, §3). As of Jan. 1, 2010, governing Act will be Motor Vehicle Dealers Act, 2002. (S.O. 2002, c. 30, Sched. B). Every dealer in used motor vehicles must give to purchaser, on delivery of vehicle, safety standards certificate issued on inspection completed not more than 30 days before delivery. (c. H.8).

Gasoline and Diesel Fuel Taxes.

See category 22 Taxation, topic 22.08 Gasoline and Special Fuels Taxes.

Off-road Vehicles.

Provisions dealing with issuance of permits to drive off-road vehicles e.g. motorcycles, farm equipment. (c. O.4).

23.04 RAILROADS:

See category 3 Business Regulation and Commerce, topic 3.08 Carriers.

PEI
PRINCE EDWARD ISLAND LAW DIGEST

—Scope —

Revised for 2009 edition by

CAMPBELL LEA, of Charlottetown.

(Statute citations, unless otherwise indicated, refer to 1988 Revised Statutes of Prince Edward Island.)

1 INTRODUCTION

1.01 HOLIDAYS:

See Canada Law Digest.

1.02 OFFICE HOURS AND TIME ZONE:

Prince Edward Island is in the Atlantic (GMT -04:00) time zone. Office hours are generally from 8 a.m. to 5 p.m.

2 BUSINESS ORGANIZATIONS

2.01 AGENCY:

Common law rules govern.

Agents for parties abroad who are sued here as absent debtors may be summoned and made to disclose the property of their principals.

2.02 ASSOCIATIONS:

There are no restrictions upon associations for any purpose not prohibited by law or contrary to good morals or public policy. Most associations intended to be more or less permanent (excepting some of those for social or recreational purposes) are incorporated under The Companies Act or under special acts for particular societies or types of businesses such as rural creameries, rural fairs, horse racing associations, etc.

Special provision is made for incorporation of cooperative associations for various purposes.

Incorporated associations, members of which carry on business in common with a view to profit are partnerships.

Professional Associations (i.e., regulation by statute of entire profession) include lawyers, doctors, dentists, architects, nurses, land surveyors, engineers, pharmacists, dietitians, occupational therapists, optometrists, agrologists, physiotherapists, social workers, etc.

A Society may be incorporated under provisions of Part II of The Companies Act which provides for incorporation of a company without share capital for purpose of carrying on in Prince Edward Island, without pecuniary gain to its members, objects of a patriotic, religious, philanthropic, charitable, scientific, artistic, social, professional or sporting character, or the like.

See topic 2.03 Corporations; also topic 2.05 Partnerships.

2.03 CORPORATIONS:

Act governing incorporations generally is Companies Act. Company may be incorporated by statute, or by issue of letters patent under Companies Act.

General Supervision.

Director of Corporations, P.O. Box 2000, Charlottetown, Prince Edward Island, Canada, CIA 7N8.

Purposes.

Company may be incorporated for any business or nonprofit purpose.

Name must be cleared through Director of Corporations.

Term of Corporate Existence.

Perpetual.

Incorporators.

At least one incorporator is required. There are no restrictions on residency or citizenship of incorporators.

Certificate or Articles of Incorporation.

Application for issuance of letters patent must be prepared in duplicate, addressed to Minister of Justice and delivered to Director of Corporations. Application must include: (1) Name, address, occupation of incorporators, (2) company name, (3) whether company is private or public, (4) specific restrictions on share transfers where desired, (5) purposes of incorporation, (6) address of registered office in Prince Edward Island, (7) amount of authorized capital and its division in classes of shares (no minimum is required).

Incorporation Tax or Fee.

Fee is $265. Renewal is $30.

Paid in Capital Requirements.

None.

Amendment of Certificate or Articles.

Supplementary letters patent must be applied for if additional purposes or objects are required. Fee for application is $265. Amendments to letters patent must be approved by resolution passed by vote of at least two-thirds in value of total shareholders at special general meeting called for purpose.

Increase or decrease of authorized capital stock requires passing of by-law sanctioned by vote of not less than two-thirds in value of shareholders at general meeting called for considering same and confirmation by supplementary letters patent.

Shareholders' Liabilities.

None beyond payment of shares.

Shareholders' Meetings.

Annual meetings required held at some place in province and at such time as letters patent or by-laws prescribe, at which meetings directors are elected.

Directors.

Private Corporation requires minimum of one director, no maximum; public corporation requires minimum of three directors, no maximum. Unless letters patent otherwise provide, director not required to hold shares. Directors elected annually at general meeting of shareholders. Number of directors may be increased or decreased by by-law sanctioned by vote of not less than two-thirds in value of shareholders at general meeting called for considering same and filed with Director of Corporations.

Books and Records.

Must be kept at head office; may be inspected by any shareholder or creditor during reasonable business hours.

Reservation of Corporate Name.

Company incorporated in any Province of Canada, on payment of $265 fee to Director of Corporations, may register name of that company, and, on such registration, no other company may be incorporated by that name in Province.

Annual Statement.

Every provincially incorporated company is required to file with Director of Corporations annual statement together with fee, such statement to contain names and addresses of directors, officers, shareholders, authorized capital, shareholder holdings per class of share.

Transfer of Stock.

No share of stock is transferable until all previous calls thereon have been fully paid and the directors of a company may decline to register any transfer of shares belonging to any member who is indebted to the company. All transfers of stock with the date and other particulars of such transfer and the date of the entry thereof must be registered in a book to be kept by the company. The transfer of a share of a deceased member may be made by his personal representatives.

Corporation Securities Registration.

For corporation securities registered after Apr. 27, 1998, see category 21 Mortgages, topic 21.04 Personal Property Security. In order to be valid as against creditors and as against subsequent bona fide purchasers or mortgagees, it is necessary that mortgage or charge, whether specific or floating, of chattels in Province, created by corporation, and that assignment of book debts, whether by way of specific or floating charge, made by corporation engaged in trade or business in Province to secure bonds, debentures or debenture stock, be registered with Director of Corporations within 30 days from its execution, accompanied by proof of execution and affidavit of bona fides. When so registered, it need not be filed as bill of sale nor as assignment of book debts under laws relating to those securities. No renewal of security is required.

Close Corporations.

See subheads Certificate or Articles of Incorporation; and Directors, supra.

Foreign corporations may acquire and hold real estate, without restriction as to either original acquisition or length of time of holding provided they can otherwise hold real property in Province. See category 22 Property, topic 22.12 Real Property, subhead Ownership.

Every foreign corporation carrying on business in this province having gain for its purpose or object must, subject to penalty on default, before beginning business in this province, transmit to Director of Corporations statement showing: (a) Corporate name of company; (b) how incorporated; (c) place of company's head office; (d) nature of each kind of business company is empowered to carry on and what kind or kinds of business are carried on in Prince Edward Island; Such company must also transmit to Director of Corporations of each year statement showing all changes during preceding year.

All foreign corporations doing business in Province are subject to license fee (minimum $200; maximum $2,000). License fee depends on type of business carried on.

Trust and loan companies must deposit insurance with Canada Deposit Insurance Corporation, or with Province to an amount approved by Director of Corporations as reserve for protection of depositors and investment certificate holders.

Foreign Resident Corporations Act.

Foreign corporation, company organized under laws of jurisdiction other than Prince Edward Island and which has determined to protect its interests in time of war or other emergency as defined by Act to transfer its registered office to Prince Edward Island, may apply to Minister of Justice to operate within Prince Edward Island as foreign resident corporation provided original jurisdiction does not expressly prohibit such transfer. Upon receipt of proper certificate from Minister company, may operate from this jurisdiction.

Non-profit corporation excludes any person other than existing universities from being known as university or granting academic degrees. See also topic 2.02 Associations.

Professional Corporations.

Generally permitted, but special statutory authorization for optometrists (Optometry Act, Cap. O-6), pharmaceutical chemists (Pharmacy Act, Cap. P-6), and agrologists (Agrologists Act, Cap. A-10). See, however, topic Associations; category Legal Profession, topic Attorneys and Counselors.

Deeds.

See category 22 Property, topic 22.05 Deeds.

Model Non-Profit Corporation Act not adopted.

Taxation.

See category 23 Taxation, topics 23.04 Corporate Taxes, subhead Corporate Stock Tax; 23.12 Income Tax.

Extra-Provincial Corporations.

Corporations incorporated or continued otherwise than by or under Act of Legislature of Prince Edward Island must register under Extra-provincial Corporations Registration Act before or within 30 days after it commences business in province. This does not apply to insurers, brokers, or Canadian corporation that maintains its head office and its chief place of business in province. Registration is for one year period.

Fees include: $1,500 for registration of financial institution; $2,000 for registration of oil and gas company; $200 for all other registrations (annually); and $50 for certificate of good standing.

2.04 JOINT STOCK COMPANIES:

See topic 2.03 Corporations.

Professional Associations.

See topics 2.02 Associations; 2.03 Corporations.

2.05 PARTNERSHIPS:

Partnership must be registered with office of Director of Corporations. Failure to register guilty of offence subject to fine not less than $100 or more than $500 or in default to imprisonment for not more than 30 days. Any individual doing business under joint or firm name must also register name with Director of Corporations in same manner as partnership and subject to same penalty. Partnership and business name registered by filing prescribed statutory declaration with filing fee of $65.

General law of partnership governed by English common law and Partnership Act, Cap. P-1.

Limited partnership can be formed under Limited Partnership Act, Cap. L-13. Limited partnership (LP) may carry on any business unlimited partnership does. LP formed upon filing prescribed declaration with Registrar. Declaration expires after five years but expiration does not dissolve partnership. Any contribution by limited partner must be money or property; not services. Limited partner's liability limited to contribution stated in declaration unless he takes part in control of business over/above rights granted by Act. Retirement, death or incompetence of general partner or dissolution of corporate general partner dissolves LP unless business is continued by remaining general partners pursuant to right to do so in partnership agreement and all partners consent. Such partnership formed elsewhere in Canada may be registered here and partner thereof maintains same degree of limited liability as before in accordance with law of province limiting liability.

3 BUSINESS REGULATION AND COMMERCE

3.01 BANKS AND BANKING:

The Parliament of Canada has exclusive legislative jurisdiction on the subject of banks and banking. See Canada Law Digest.

As to trust and loan companies, see category 2 Business Organizations, topic 2.03 Corporations, subhead Foreign Corporations, catchline Trust and Loan Companies.

3.02 BILLS AND NOTES:

See Canada Law Digest.

3.03 BILLS OF LADING:

See topic 3.08 Carriers.

3.04 BILLS OF SALE:

See topic 3.21 Sales and category 21 Mortgages, topic 21.01 Chattel Mortgages.

3.05 BLUE SKY LAW:

See topic 3.22 Securities.

3.06 BROKERS:

As to information to be filed by stockbrokers before selling securities, see topic 3.22 Securities.

As to business license taxes on brokers, see category 23 Taxation, topic 23.04 Corporate Taxes, subhead Corporation License Taxes.

See category 22 Property, topic 22.12 Real Property, subhead Real Estate Agents.

3.07 BULK SALES:

See category 8 Debtor and Creditor, topic 8.10 Fraudulent Sales and Conveyances.

3.08 CARRIERS:

A bill of lading representing goods to have been shipped on board a vessel or train is, when held by a consignee or endorsee for valuable consideration, evidence of the shipment as against the master or other person signing it, although the goods may not actually have been shipped, unless the holder of the bill of lading, when he received it, had actual notice that the goods were not in fact put on board, or unless the bill of lading contains a stipulation to the contrary. The master or person signing the bill of lading may, however, exonerate himself by showing that the misrepresentation was caused without any default on his part and wholly by the fault of the shipper or holder of some person through whom the holder claims.

As to business taxes on carriers, see category 23 Taxation, topic 23.02 Business Taxes.

Motor Vehicle Carriers.

See category 24 Transportation, topic 24.03 Motor Vehicles.

3.09 COMMERCIAL CODE:

No uniform commercial code has been adopted.

3.10 CONDITIONAL SALES:

See topic 3.21 Sales.

3.11 CONSIGNMENTS:

See topic 3.14 Factors and category 21 Mortgages, topic 21.04 Personal Property Security.

3.12 CONSUMER PROTECTION:

See topic 3.21 Sales, subhead Consumer Protection Legislation.

3.13 CONTRACTS:

Common law rules govern.

Distributorships, Dealerships and Franchises.

No special rules or legislation applicable to formation or termination of these types of business arrangements. Common law applies.

Infants' Contracts.

See category 14 Family, topic 14.05 Infants. Common law rules apply.

3.14 FACTORS:

Where a mercantile agent, in the ordinary course of his business, sells, pledges or assigns goods in his possession as such agent, such sale, pledge or assignment is as valid as though expressly authorized by the owner of the goods. The owner of the goods may, however, recover from the buyer the agreed price or any part thereof, subject to any right of set-off on the part of the buyer against the agent.

3.15 FRANCHISES:

Franchisee may rescind agreements without repercussions no later than 60 days after receiving disclosure or if franchisor did not provide disclosure or notice of material change within required time period. If no disclosure is made, franchisee can rescind agreement no later than two years.

Provisions in franchise agreements which restrict applications of Prince Edward Island law (jurisdiction, forum, and venue) are void. See Franchises Act, R.S.P.E.I. Cap. F-14.1.

3.16 FRAUDS, STATUTE OF:

Contract for sale of any goods of the value of $30 or upward is not enforceable unless buyer accepts part of the goods sold and actually receives the same or gives something in earnest to bind the contract or in part payment or unless some note or memorandum in writing of the contract is made and signed by the party to be charged or his agent in that behalf.

To convey freeholds a deed is required; as, also for all leases upwards of three years.

Contracts of executors or administrators to answer damages out of their own estate, contracts to answer for the debt or default of another, contracts concerning land or any interest therein, contracts not to be performed within a year, contracts in consideration of marriage, and ratification to take debt out of statute of limitations, must all be in writing and signed by party to be charged.

The modifications of the Statute of Frauds effected in England by Lord Tenterden's Act (9 George IV, c. 14), and by the English Mercantile Law Amendment Act, 1856, have been adopted by provincial enactment. Consideration need not be stated in written memorandum of promise to answer for debt, default or miscarriage of another person.

3.17 INFORMATION TECHNOLOGY, INTERNET AND NEW MEDIA:

Computer programs are copyright protected under federal laws.

E-commerce.

No particular license is required for provision of e-commerce services. E-commerce is not specifically regulated under provincial laws except for Electronic Commerce Act (2001 Cap. 31) and Electronic Evidence Act (2001 Cap. 32). Electronic Commerce Act ensures that electronic communications have legal effect and Electronic Evidence Act permits use of electronically created documents as evidence.

3.18 INTEREST:

Open accounts do not carry interest, unless an agreement to pay interest can be proved. Bills, notes and cheques carry interest at 5% per annum, unless otherwise specified in document itself.

Judgment and Prejudgment.

Person entitled to order for payment of money is entitled to claim and have included in order award of interest at prejudgment interest rate, calculated from date cause of action arose to date of order. Rate of interest on damages for non-pecuniary loss in action for personal injury is discount rate determined by Rules of Court. If order includes amount for past pecuniary loss, interest calculated on total past pecuniary loss at end of each six-month period and at date of order. Interest not awarded (a) on exemplary or punitive damages; (b) on interest accruing under statute; (c) on award of costs in proceeding; (d) on that part of order that represents pecuniary loss arising after date of order and that is identified by finding of court; (e) with respect to amount of any advance payment that has been made towards settlement of claim, for period after advance payment has been made; (f) where order is made on consent, except by consent of debtor; or (g) where interest payable by right other than under statute. Court may, where just disallow interest, allow interest at rate higher or lower than prescribed or allow interest for period other than prescribed. Court will take into account (a) changes in market interest rate; (b) circumstances of case; (c) fact that advance payment was made; (d) circumstances of medical disclosure by plaintiff; (e) amount claimed and amount recovered in proceeding; (f) conduct of any party that tended to shorten or lengthen unnecessarily duration of proceeding; and (g) any other relevant consideration.

3.19 LICENSES, BUSINESS AND PROFESSIONAL:

Licenses are required for various occupations, but there are no restrictions on commercial travellers soliciting orders for goods from wholesale trade.

See category 22 Property, topic 22.12 Real Property, subhead Real Estate Agents.

See also category 23 Taxation, topic 23.04 Corporate Taxes, subhead Corporation License Taxes.

Auctioneers' charges or commissions, when not a matter of contract, are governed by the rule of quantum meruit. Auctioneers must be licensed before conducting auction.

Collection Agencies.

No person shall within Province engage in or advertise himself as engaged in business of a collector of debts due, or alleged to be due, to any other person or in any way hold himself out as so engaged, without obtaining license from Registrar of Collection Agencies. Business of collector of debts includes business of purchasing or taking of assignments of debts. Collecting agency must deposit collections in trust accounts in chartered banks, keep proper accounts and without any notice must, within seven days after end of month in which it has collected any money, account to person entitled for money received. Lieutenant-Governor-in-Council may from time to time make regulations for carrying out of provisions of this statute. Act does not apply to barristers, sheriffs, banks, trust companies or credit unions. License to be obtained annually and applicants for original license must provide a bond prescribed by Act. (Collection Agencies Act, Cap. C-11).

3.20 NEGOTIABLE INSTRUMENTS:

See Canada Law Digest, category Business Regulation and Commerce, topic Bills and Notes.

3.21 SALES:

The Sale of Goods Act of the province is substantially the same as the English Sale of Goods Act 1893. See England Law Digest.

Seller's Lien.

Unpaid seller, while in possession of goods sold, has lien on them where sale was made without any stipulation as to credit, term of credit has expired or buyer has become insolvent.

Contracts of Sale.

No statutory limitation exists as to type size in printed contracts. May be made in writing, orally or both. Seal is not required. Capacity to buy and sell regulated by general law concerning capacity to contract except with regards to sale of necessaries to infants, minors, or persons with mental incapacities.

Bills of Sale.

Bills of sale are not required. See category 21 Mortgages, topic 21.01 Chattel Mortgages.

Conditional Sales.

Note: For conditional sales contracts made before Apr. 27, 1998, following applies. For contracts after see category 21 Mortgages, topic 21.04 Personal Property Security. Where possession of property is delivered to buyer thereof, any agreement that title shall remain in seller is void as against subsequent bona fide purchasers or mortgagees from buyer without notice, creditors of buyer without notice and any assignee or trustee in insolvency or bankruptcy of buyer unless such agreement is in writing, describing property and stating amount unpaid and conditions of hiring, signed by buyer or his agent prior to, at time of or within ten days after delivery of property and such writing, or true copy thereof, is filed, within 20 days after signing thereof, with prothonotary of registration district where buyer resides or, if buyer is nonresident, where property was delivered. If buyer resides in one district and property was delivered in another, filing in both districts is necessary. If property is removed from district where delivered or property subject to conditional sale agreement made outside of province is brought into province, agreement or copy thereof must be filed in district into which property is removed within 20 days after seller has knowledge of such removal.

If seller retakes possession, he must retain the property for 20 days, during which time purchaser may redeem by paying balance of purchase price and costs. If there is no redemption within such time, seller may sell the property at private sale or public auction, at any time thereafter. Notice of sale must be given to the buyer, or person guaranteeing payment, personally or by registered mail, and may be given during the 20 days allowed for redemption. If price exceeds $30 and seller intends to look to buyer, or person guaranteeing payment, for any deficiency on a resale, the notice must contain: (a) A description of the property; (b) an itemized statement of balance of price and costs; (c) a demand that amount stated be paid not less than five days from personal delivery of notice or not less than seven days from mailing of notice; (d) a statement that unless such payment is made the property will be sold at private sale or advertised and sold at public auction.

No statutory limitation as to type size in Conditional Sales Contracts.

Retail Credit Sales.

No special restrictions. Rates of interest are governed by Interest Act (Canada).

Bulk Sales.

No legislation. Former legislation governing bulk sales repealed. See also category 8 Debtor and Creditor, topic 8.10 Fraudulent Sales and Conveyances.

Consumer Protection Legislation.

Business Practices Act.

(Cap. B-7). Director of Consumer Services administers act which has as its primary objective protection of consumer from false, misleading, or deceptive consumer representations are set out in Act. Person who is ordered to cease unfair practice by Director, is entitled to hearing by Minister. Any party to proceedings before Minister may appeal from his decision or order to Supreme Court in accordance with rules of court.

Unconscionable Transactions Relief Act.

(Cap. U-2). This Act permits court to investigate into all circumstances surrounding loan of money and if it finds that cost of loan is excessive and that transaction is harsh and unconscionable may grant relief to borrower.

Consumer Protection Act.

(Cap. C-19). Consumer loan, credit or borrowing agreements must be approved by Ministry of Community Affairs. Agreements not in compliance with Act cannot be sued upon.

Consumer Reporting Act.

(Cap. C-20). Consumer reporting agency and personal information investigator must be licensed.

Direct Sellers Act.

(Cap. D-11). Direct selling means selling, offering for sale or soliciting of orders for sale of goods or services by: (1) Going from house to house, (2) telephone, (3) mail. Direct sellers must be licensed. Direct sale may be rescinded by purchaser by notice to seller within ten days of purchase where seller is licensed. Direct sale is also cancelled where (i) goods/services not supplied within 30 days of contract, (ii) vendor/salesman breaches term of license; or (iii) vendor/salesman is not licensed; and purchaser serves written notice of cancellation within one year of contract. Act does not apply to direct sales contracts.

Plain Language.

No “Plain Language” statute.

Energy-Efficient Appliances.

Designated appliances must meet prescribed efficiency standards. No person may offer for sale, sell or lease new designated appliances that do not meet efficiency standards.

Farm Machinery Dealers/Vendors Act applies to farm dealership agreement between retail dealer and vendor (manufacturer/supplier) of farm equipment/parts. Dealership agreement may only be terminated by consent or by vendor for cause and pursuant to court order. Cause (§6) means: (a) dealer has made assignment or petitioned into bankruptcy; (b) dealer's farm machinery or substantial part is being liquidated and liquidation materially affects contractual relationship; (c) dealer has defaulted under security agreement between dealer and vendor or guarantee of dealer's financial obligations to vendor has been revoked or discontinued; (d) dealer has failed to operate in normal course of business for 14 consecutive days or abandoned dealership; (e) dealer pleaded or found guilty of offence affecting contractual relationship; (f) dealer failed to substantially comply with essential and reasonable requirements of dealership agreement, if requirements are not different from requirements imposed on other similarly situated dealers. Cause does not include (§7): (a) change in executive management or ownership of dealer, unless change detrimental to representation or reputation of vendor's products; (b) dealer refused to purchase or accept delivery of farm machinery or service from vendor unless farm machinery or service would normally be purchased by similarly situated dealers as essential part of operation of dealer or for repair of farm machinery commonly sold by dealer; (c) vendor desires further market penetration, while recognizing that vendor may require dealer to achieve, in comparison with other similarly situated dealers, reasonable sales performance level of vendor's product; (d) dealer is carrying on business as dealer or agent for another vendor or selling or servicing product of another vendor. Mandatory mediation at request of either party prior to termination of agreement. (§8). §4 states that no vendor shall: (a) directly or indirectly discriminate in prices charged for farm machinery or like grade and quality to similarly situated dealers; (b) impose substantially different contractual requirements on similarly situated dealers; (c) discriminate against or penalize dealer for carrying on business as dealer or agent for another vendor or selling or servicing product of another vendor. On contravention of §4, vendor liable to fine up to $150,000 and $10,000 a day for continuing offence.

International Sale of Goods Act makes applicable “United Nations Convention on Contracts for the International Sale of Goods”.

3.22 SECURITIES:

Securities Act, Cap. S-3.1 governs all matters of trading in securities. Trading and securities are broadly defined. No person may trade in security, except exempted securities, without being registered as broker or salesman. Registration is made on prescribed forms and requires placement of bond. No trading by registered brokers is permitted without filing prospectus unless prospectus filing is exempted by Act. Superintendent administers Act and has power to exempt trades from broker registration and prospectus filing and power to investigate any actions of broker or person trading in securities.

Regulatory Powers of Supervising Authority.

Sale of securities within Province is subject to provisions of statute referred to above.

3.23 STATUTE OF FRAUDS:

See topic 3.16 Frauds, Statute of.

3.24 WAREHOUSEMEN:

Warehouseman has a lien for his charges on goods deposited for storage and, on nonpayment of charges, may sell goods at public auction, after notice. Where deposit was not made by owner of goods or by his authority, but was made by a person entrusted with possession of the goods, notice of the lien must be given to owner or grantee of goods within two months after the deposit.

4 CITIZENSHIP

4.01 ALIENS:

See category 16 Immigration, topic 16.01 Aliens.

5 CIVIL ACTIONS AND PROCEDURE

5.01 ACCORD AND SATISFACTION:

This is a defence whether the cause of action arises out of contract or tort, but must be specifically pleaded. It is a good equitable answer to an action for a specialty debt, but as against joint creditors it is only a defence against the creditor who was a party to the accord and satisfaction. An accord and satisfaction releasing one of two joint debtors without any reservation of rights against the other may be successfully pleaded by the latter. Payment of a lesser sum in satisfaction of a greater cannot be a satisfaction for the whole, but where the cause of action is for an unascertained sum or a disputed debt, an agreement to accept a sum certain in satisfaction, smaller than the amount claimed, would be binding. The promise or performance of something different from, not being merely a part of, what would have been due under the obligation discharged by the accord and satisfaction, is binding. An agreement by a number of creditors with the debtor that each will accept a composition in satisfaction of his debt will be effective to discharge their several debts. Payment of a smaller sum by a negotiable instrument will be effective if the bill or note is actually given as satisfaction and accepted as such.

5.02 ACTIONS:

Actions are commenced by filing notice of action or statement of claim.

Direct Actions Against Insurer.

See category 24 Transportation, topic 24.03 Motor Vehicles, subhead Direct Actions.

See also topics 5.13 Limitation of Actions, Pleading, Practice, Process; category 6 Courts and Legislature, topic 6.01 Courts.

5.03 APPEAL AND ERROR:

Appeal lies to Supreme Court from judgment or order of Provincial Judge, except where otherwise expressly provided. Notice of appeal to Supreme Court must be filed and served within seven days of judgment. Judgment, order or decision of judge of Supreme Court, sitting in chambers or in court (with or without a jury), is appealable to Supreme Court Appeal Division. Notice of appeal to Supreme Court Appeal Division must be filed and served within 15 days of judgment.

Appeal from any official act, decision, decree or order of the probate court may be taken to Supreme Court within ten days, on giving notice and $100 security for costs of appeal.

Appeal from final judgment of highest court of final resort in the province goes to Supreme Court of Canada.

5.04 CERTIORARI:

In civil cases where appeal to Supreme Court lies, certiorari will be granted only for special cause shown on affidavit and must be applied for within 30 days after making of the judgment, order or other proceeding in the court below. No certiorari is allowed where an appeal has been taken. Certiorari now deemed to be application for judicial review under Supreme Court Act, Cap. S-10.

5.05 CHARITABLE IMMUNITY:

See topic 5.07 Damages.

5.06 COSTS:

P.E.I. Rules of court amended so that costs now awarded as partial indemnity or substantial indemnity costs rather than party-party or solicitor-client.

Partial indemnity costs in litigation generally follow event. Their award is, however, discretionary and award or refusal will not lightly be interfered with. (Supreme Court Act, §§53, 55).

Range of costs awarded is fixed by statutory tariff which allows assessment officer discretionary jurisdiction with regard to certain items as circumstances of case require.

Defendant may after appearance make payment into court in satisfaction; if plaintiff does not recover more at trial, judge should, unless there is a cogent reason, order plaintiff to pay costs after payment.

Substantial indemnity costs are not fixed by statute but, in default of special agreement, may be assessed by assessment officer. Fees are fixed having regard to work done, result achieved and skill employed, in accordance with well established practice.

Where plaintiff makes offer to settle at least seven days before commencement of trial, and offer is not withdrawn or accepted by defendant, and plaintiff obtains judgment as favourable as or more favourable than offer to settle, plaintiff is entitled to substantial indemnity costs from date of delivery of order to settle. (R. 49.10). Where defendant makes offer to settle at least seven days before commencement of trial and offer is not withdrawn or accepted by plaintiff, and plaintiff obtains judgment as favourable or less favourable than offer to settle, defendant is entitled to partial indemnity costs from date of delivery of offer to settle. (R. 49.10).

Security of costs may be ordered, on motion by defendant, i.e. plaintiff will be required to post security in sum equal or proportional to defendant's estimated cost of defending action, where: Plaintiff is ordinarily resident outside P.E.I. or has another proceeding for same relief pending in P.E.I.; plaintiff is corporation or nominal plaintiff or there is good reason to believe that action is frivolous and vexatious, and it is reasonable to believe that plaintiff has insufficient assets in P.E.I. to pay costs of defendant; or where defendant holds unsatisfied order for costs against plaintiff in any proceeding or is entitled by statute to security for costs. (R. 56.01). Motion for security for costs available only after defendant has delivered defence, and must be made on notice to plaintiff and every defendant who has delivered defence or notice of intent to defend. (R. 56.03). Amount and form of security and time for payment into court are determined by court. (R. 56.04). Proceedings, except appeal from order itself, are stayed until security has been given, unless otherwise ordered by court. (R. 56.05). Upon default in giving security, action against defendant who obtained order may be dismissed. (R. 56.06). Amount of security may be increased or decreased at any time. (R. 56.07). Judge of appellate court, on motion of respondent, can make order for security for costs of appeal in certain circumstances. (R. 61.15).

Liability of Solicitor.

Solicitor may be ordered to personally pay costs of his client or any other party to action in certain circumstances (R. 57.06), but this occurs relatively rarely.

5.07 DAMAGES:

Common law generally prevails. Contributory negligence governed by Contributory Negligence Act. Some limitations on damages may apply, refer to Insurance Act.

Charitable Immunity.

Liability of charities for damages is governed by common law and is not abrogated by statute.

Sovereign Immunity.

Crown immunity abrogated by Crown Proceedings Act (effective July 1, 1973). Crown liable in tort for: (a) Tort committed by officers or agents, (b) breach of employer-related duties to servants and agents, (c) breach of duties attaching to ownership or possession of property, (d) breach of statute, regulation or by-law.

Law relating to indemnity and contribution enforceable by/against Crown.

In suit against Crown for injunction or specific performance court may not so grant but will grant order declaratory of rights.

Act does not authorize proceedings in rem against Crown nor seizure, attachment, detention or sale of Crown property.

In proceedings against Crown, trial without jury.

For limitation of actions and notice requirements, see topic 5.13 Limitation of Actions, subhead Proceedings Against Crown.

Volunteers Liability Act.

S.P.E.I. 1994. Volunteers who render emergency assistance to person or provide assistance to protect endangered property are not liable for injury/death to person or damage to property in absence of gross negligence.

See also category 13 Estates and Trusts, topic 13.03 Death, subhead Action for Death.

5.08 DEPOSITIONS AND DISCOVERY:

Evidence of witnesses unable to attend trial may be taken by commissioners, under order of court, on application of any party. To perpetuate testimony, a suit may be brought in Supreme Court, and evidence taken and enrolled.

Witness Outside of Province.

Witnesses absent from province may be examined under a commission issued for the purpose, and depositions of such witnesses may be given in evidence at the trial upon terms of the order and subject to proper objections.

Compelling Attendance and Testimony of Witnesses.

Witnesses within the province, unless ill or infirm or unable to travel, may be compelled to attend court and give viva voce evidence at the trial upon being served with a subpoena. If the witness is ill or infirm or unable to travel or is about to leave the province, an order may be obtained requiring the witness' evidence to be given before a judge or commissioner, and permitting the deposition so given to be put in evidence at the trial. Witnesses absent from the province may be examined under a commission issued for the purpose, and depositions of such witnesses may be given in evidence at the trial upon the terms of the order and subject to proper objections.

Examination on discovery of a party litigant or of any witness may be ordered before trial; and a party or witness who has made an affidavit to be used in an action may be subpoenaed to attend for cross-examination upon such affidavit.

5.09 EQUITY:

See topic 5.02 Actions.

5.10 EVIDENCE:

Witnesses.

All persons are competent as witnesses. Husband and wife may give evidence for or against each other. Communications between husband and wife during marriage privileged.

See also topic 5.08 Depositions and Discovery.

5.11 INJUNCTIONS:

Supreme Court may grant injunction by interlocutory order, or provisional or perpetual injunction.

5.12 JUDGMENTS:

Judgments in Supreme Court bind real estate of party on minute of judgment being filed in office of registrar.

Judgment Notes.

These have no legal existence in this province.

Satisfaction.

Sufficient that party acknowledging sign before prothonotary or practicing attorney attending at plaintiff's request. If signed abroad signature must be acknowledged before a person authorized by the law of this province to take affidavits.

Canadian Judgments.

By Canadian Judgments (Enforcement) Act, S.P.E.I. 1994 final judgments of court or tribunal of another Canadian jurisdiction may be registered by paying fee and filing with Supreme Court certified copy of court/tribunal judgment. Registered judgment, subject to statutory exceptions, may be enforced to same extent as local judgment.

Foreign Judgments.

Are not conclusive proof of debt; correctness of same may be disputed, and defendant may inquire into, contest and dispute all or any of the facts upon which said judgment is founded, or validity of cause of action in the suit in which such judgment was given.

Canada-United Kingdom Judgments Recognition Act S.P.E.I. 1988, c. C-1 governs U.K. judgments.

5.13 LIMITATION OF ACTIONS:

Governed by Statute of Limitations.

Actions must be brought within following periods after respective causes of action accrue.

Actions grounded on fraudulent misrepresentation, accident, mistake, or any equitable ground of relief not specifically dealt with, within six years from discovery of cause of action.

Actions for penalties imposed by any statutes brought by any informer suing for himself alone or for Crown as well as for himself, or by any person authorized to sue for same, not being person aggrieved, within one year after cause of action arose.

Actions for penalties, damages or sums of money in nature of penalties given by statute to Crown or person aggrieved, or partly to one and partly to other, within two years after cause of action arose.

Action to recover money on any bond, recognizance or specialty may be brought within 20 years after the cause of action accrued.

On all contracts not under seal suit must be begun within six years after cause of action accrued. Action on a judgment or order for the payment of money must be brought within ten years after cause of action arose. Action to recover possession of land must be brought within 20 years after right accrued, except when claimant is under disability of infancy, coverture, lunacy or absence beyond seas, when six years are allowed from ceasing of such disability, but whole time not to exceed 30 years. Special limitation periods in actions against insurer by insured under Insurance Act.

Torts.

Actions for trespass to person, assault, battery, wounding or other injury to person, whether arising from unlawful act or from negligence, within two years after cause of action arose. Actions for libel, slander, false imprisonment, and malicious prosecution must be brought within two years.

Proceedings Against Crown.

Protection of Statute of Limitations extends to Crown. Crown further protected by Crown Proceedings Act (CPA) as follows:

(1) No action shall be brought against Crown to enforce claim for damages caused by accident arising from condition of highway including sidewalk, or from presence of nuisance on highway or sidewalk, unless: (a) Notice in writing of accident indicating place where it occurred and cause thereof is given to Deputy Minister of Transportation and Public Works within 90 days of happening thereof and (b) action is brought within two years after date of accident.

(2) No action shall be brought against Crown to enforce claim for damages sustained in respect of drainage works unless it is brought within two years after date on which damages sustained. Where death results from accident mentioned in (1), want of notice is not bar to action; and in all other cases want or insufficiency of notice is not bar to action, if court considers that there was reasonable excuse for want or insufficiency.

(3) No person may avail himself: (a) Of any set-off or counterclaim in proceedings by Crown for recovery of taxes, duties, or penalties; or (b) in proceedings of any other nature by Crown, of any set-off or counterclaim arising out of right or claim to repayment in respect of taxes, duties or penalties.

(4) No proceedings shall be brought against Crown under Act in respect of any act or omission, transaction, matter or thing arising, occurring or existing before July 1, 1973.

No proceedings shall be commenced against Crown under CPA unless 90 days notice served on Crown with details of facts supporting claim.

See also topic 5.07 Damages, subhead Sovereign Immunity.

5.14 PARTITION:

Partition proceedings in this province are now brought in Supreme Court and general law and practice is same as courts in England exercising equitable jurisdiction. Court has power to order a sale when circumstances of case would make a sale more beneficial to parties than a partition among them, and court will order sale on application of any of parties interested in property to extent of one-half. All sales are made under direction of court, and proceeds paid into court, and subsequently divided among parties in proportion to their interests in property.

The compulsory partition of lands among joint tenants, tenants in common and coparceners may also be effected by suit brought in the Supreme Court by way of petition.

Personal representatives of an intestate may, with concurrence of persons beneficially interested, partition the estate among the heirs.

5.15 PLEADING:

Pleadings are governed by Rules of Civil Procedure, which are regulations made under Supreme Court Act.

Statement of Claim.

Action is commenced by plaintiff filing statement of claim any time within limitation period. (R. 14.03). If insufficient time to prepare statement of claim, plaintiff may issue notice of action and must then file statement within 30 days. Statement of claim must be served, together with notice of action where applicable, within six months after issue of statement or notice. (R. 14.08).

Statement of Defence.

Defendant must deliver statement of defence within 20 days after service of statement of claim if served in P.E.I., or 40 days if served elsewhere in Canada or U.S.A. or 60 days where served elsewhere. Defendant may deliver notice of intent to defend within prescribed time, thereby gaining additional ten days to file statement of defence. (R. 18.02). In defence, party must admit every allegation of fact in opposite party's pleading that party does not dispute, and all allegations of fact not denied in defence, except as to question of damages, shall be deemed to be admitted unless party pleads no knowledge in respect of that fact. (R. 25.07).

Counterclaim.

Defendant may assert by way of counterclaim, any right or claim he has against plaintiff, and counterclaim is to be included in same document as statement of defence and served within time prescribed for latter. (R. 27.01-27.04).

Reply.

Plaintiff must deliver reply, if any, within ten days after service of statement of defence, but where defendant counterclaims, plaintiff must deliver reply and defence to counterclaim within 20 days after service of defence and counterclaim. (R. 25.04). Reply to defence to counterclaim, if any, must be delivered within ten days after service of defence to counterclaim. (R. 27.06). Pleadings are closed when plaintiff has delivered reply to every defence or time therefor expires, and every defendant in default in delivering defence is noted in default. (R. 25.05).

Amended Pleadings.

Party may amend pleading without leave, before close of pleadings, if amendment does not cause addition, deletion or substitution of party, or on consent of all parties, or with leave of court. (R. 26.02). On motion at any stage of action, court will grant leave to amend to such terms as are just, unless prejudice would result that could not be compensated for by costs or adjournment. (R. 26.01). Form of amendments and service of amended pleadings are prescribed. (R. 26.03-26.06).

Particulars.

Rules and contents of pleadings are generally prescribed. (R. 25.06-25.09). Where party demands particulars of allegation in opponent's pleading, and opponent fails to supply within seven days, court may order particulars to be delivered within specified time. (R. 25.10).

Service.

Notice of action, statement of claim, counterclaim against person not already party to main action or other originating process must be served personally or by prescribed alternative to personal service. (R. 16.01). Any other document may be served on solicitor of record for party by mailing copy to solicitor's office, leaving copy with solicitor or employee in his office or by telephone or as otherwise prescribed. (R. 16.01-16.05).

Filing.

Every pleading must be filed, marked on face with date of filing, title of action, description of pleading and name and address of solicitor filing same. (R. 4.05).

5.16 PRACTICE:

Most of law relating to practice is contained in Supreme Court Act and in Rules of Civil Procedure which are regulations made under that Act.

Discovery.

Generally, examination for discovery may be oral examination or, at option of examining party, by written questions and answers, but examining party not entitled to subject person to both forms without leave. (R. 31.02). Procedures for both oral and written examinations are prescribed. (R. 34, 35). Party is entitled to examine for discovery any party adverse in interest once, or more than once with leave, and party may examine individuals on behalf of corporation, partnership, sole proprietorship, person under disability, assignee, trustee in bankruptcy, or nominal party. (R. 31.03). Generally, party being examined must answer, to best of his knowledge, information and belief, any proper question relating to matter in issue or matter made discoverable by Rules. (R. 31.06). Where party, or person examined on his behalf, refuses to answer proper question, and has failed to furnish information in writing within ten days after trial date is set, party may not introduce that information at trial, except with leave. (R. 31.07). Court may grant leave to examine any nonparty who there is reason to believe has information relevant to material issue, other than expert engaged by or on behalf of party in preparation for litigation. (R. 31.10). At trial, party may read into evidence any evidence given on examination for discovery of adverse party or person examined on behalf or in place of, or in addition to, adverse party, unless trial judge orders otherwise, if that evidence is otherwise admissible. (R. 31.11). Procedure available for examining person residing outside P.E.I. (R. 34.07).

Other forms of discovery include discovery of documents (R. 30), inspection of property in certain proceedings (R. 32), and medical examination of any party whose physical or mental condition is in question in proceeding (R. 33).

Request for Admission of Facts.

In defence, party must admit every allegation of fact in opposite party's pleading that party does not dispute, and all allegations of fact not denied in defence, except as to quantum of damages, shall be deemed to be admitted unless party pleads no knowledge in respect of that fact. (R. 25.07). At any time, party may serve request to admit on any other party, requesting admission for purposes of proceeding only, truth of fact or authenticity of document. Party has 20 days after service to respond to request or is deemed to admit. Cost consequences may flow from denial of or failure to admit anything that should have been admitted. (R. 51, 57.01).

Direct Actions Against Insurer.

See category 24 Transportation, topic 24.03 Motor Vehicles, subhead Direct Actions.

See also topics 5.03 Appeal and Error, Depositions and Discovery, Injunctions, Judgments, Pleading, Process; category 8 Debtor and Creditor, topics 8.03 Attachment, 8.07 Executions, 8.11 Garnishment.

5.17 PROCESS:

Commencement of Proceeding.

Rules of Civil Procedure contemplate two types of civil proceedings: actions and applications. Generally, application is summary proceeding in which judge is asked to determine questions of law where there are no material facts in dispute. Under Rules, every proceeding must be by action except where statute or Rules (R. 14.05) provide that proceeding may be brought by application. Examples of proceedings commenced by application are where executor or trustee asks court for directions or where determination of rights depends on court's interpretation of will, contract, deed or other instrument.

General Requisites.

Most proceedings commenced in court having jurisdiction by issuance of statement of claim, notice of application, or by notice of action followed by such statement. Form and contents of notice and statement are prescribed. (R. 14). See topic 5.15 Pleading.

By Whom Issued.

All civil proceedings are commenced by issuance of originating process by registrar of court in which proceeding is to be commenced, except where statute provides otherwise. Counterclaim or counterpetition that is only against present parties to main action, and crossclaim, are commenced by delivery of pleading containing counterclaim, counterpetition or crossclaim, and pleading need not be issued. (R. 14.01). Originating process is issued by registrar's act of dating, signing and sealing it with seal of court and assigning to it court file number. (R. 14.07).

Who May Serve.

Service may be effected by any literate person.

Personal service on minor is effected by leaving copy of document with minor if over 12, and where minor resides with parent or other person having care or lawful custody of minor, by leaving another copy of document with that person, but where proceeding is in respect of minor's interest in estate or trust, minor shall be served by leaving copy of document bearing minor's name and address with Public Trustee and leaving another copy with person. (R.16.02).

Personal Service on Incompetent.

Personal service on person who has been declared mentally incompetent or incapable of managing his affairs is effected by leaving copy of document with committee of person's estate, if one exists or, if not, with committee of person. Personal service on person who is mentally incompetent or incapable of managing his affairs, not so declared, is effected by leaving copy of document bearing person's name and address with Official Trustee and leaving another copy with person.

Personal service on partnership is effected by service on one or more of partners or at principal place within Province of business of partnership, on any person having control or management of partnership business there.

Personal service on domestic corporation is effected by service on officer or agent or corporation, or with person at any place of business of corporation who appears to be in control or management of that place of business.

Personal service on foreign corporation is effected by service on any person having control or management of business of corporation within Province.

Personal Service Outside Province.

Under Rules, party to action or proceeding may be served out of P.E.I. where action or proceeding consists of claim for or in respect of real or personal property in P.E.I. or administration of estate of deceased person in respect of real property in P.E.I.; where action is in respect of personal property in P.E.I. or administration of personal property in P.E.I. of deceased person who at time of death was domiciled in P.E.I.; where will affecting real or personal property in P.E.I. or personal property of deceased person who at time of death was domiciled in P.E.I. is sought to be construed; where action is against trustees in respect of execution of trusts of property within P.E.I.; where action is upon mortgage, charge or lien on property within P.E.I.; where action is founded on breach of contract or tort committed within P.E.I.; where parties to contract have agreed that courts of P.E.I. are to have jurisdiction; where damages are sustained in P.E.I. arising from tort or breach of contract committed elsewhere; where injunction in respect of things done in P.E.I. is sought; where action is matrimonial cause, or action to declare marriage void, or claim is for custody, maintenance or access to infant; where any relief is sought against any person domiciled or ordinarily resident in P.E.I.; where person to be served is necessarily or properly party to action is founded on judgment; where by statute claim indemnity or other relief over in respect of any claim made against defendant in action commenced in P.E.I. (R. 17.02). Party to action or proceeding may be served outside of P.E.I. with leave of court for circumstances falling outside of R. 17.02.

Substituted service by advertisement or otherwise may be ordered when person to be served is evading service.

Proof of service may be by affidavit which must state date on which document was served and endorsed by person serving it.

5.18 REPLEVIN:

Orders for Replevin have been replaced by Recovery Orders. (Rule 44). Any party or intervenor in proceeding may apply for interlocutory order to recover possession of property that was unlawfully taken or is unlawfully detained from him by any other party, or is held by officer under any legal process issued in proceeding. This action may be maintained in Supreme Court.

Before recovery order is issued, prothonotary shall take from plaintiff bond with sureties in amount equal to two times value of property sought to be recovered. Bond is assignable to defendant on request.

5.19 SERVICE:

See topic 5.17 Process.

5.20 SUBMISSION OF CONTROVERSY:

No statutory provision.

5.21 VENUE:

County where cause of action arose or where some of parties reside. May be changed by judge on application.

6 COURTS AND LEGISLATURE

6.01 COURTS:

Supreme Court has original and appellate jurisdiction in all matters and may give equitable relief.

Provincial Court exercises jurisdiction over offences under Criminal Code, Federal and Provincial Statutes.

Youth Justice Court is authorized by federal Youth Criminal Justice Act and implemented under provincial Youth Justice Act, Cap. Y-3. Provincial Act applies to young persons aged 12 years or older but less than 18 years. Judges under Act have same powers as Provincial Court Judge.

6.02 JUSTICES OF THE PEACE:

Justices of the peace issue warrants, issue emergency protection orders, and accept pleas for provincial and municipal offences. However, minister making appointment may limit jurisdiction to enforcement of municipal law.

6.03 LEGISLATURE:

Legislature holds its regular sessions in Province House in Charlottetown.

Legislature is composed of Lieutenant-Governor and Legislative Assembly of 27 members, session being held at least once in every year, so that 12 months shall not intervene between last sitting in one session and first sitting in next. Ordinarily session is called in Mar. and Nov., but special sessions may be called at any time. Assembly may be summoned and called from time to time by Lieutenant-Governor by instrument under Great Seal of Province.

Distribution of legislative powers between provincial Legislature and Parliament of Canada is specifically set out in British North America Act 1867. See Canada Law Digest, category Introduction, topic Government and Legal System.

6.04 REPORTS:

Reports of decisions of courts of province are published in Newfoundland & Prince Edward Island Reports, P.E.I. Reports and Dominion Law Reports.

6.05 STATUTES:

Revised Statutes (1988) comprise approximately 300 Acts.

Uniform Acts: International Chamber of Commerce Commercial Arbitration Act, Probate Act, Convention on International Sale of Goods Act, Transboundary Pollution (Reciprocal Access) Act.

7 CRIMINAL LAW

7.01 CRIMINAL LAW:

No provincial criminal law. See Canada Law Digest.

8 DEBTOR AND CREDITOR

8.01 ASSIGNMENTS:

An absolute assignment by writing under the hand of the assignor, not purporting to be by way of charge only, of a debt or other legal chose in action, of which express notice in writing is given to the debtor, transfers the legal right to such debt or chose in action and all legal and other remedies for the same and the power to give a good discharge for the same without concurrence of the assignor.

Note: For assignments of book debts made before Apr. 27, 1998, following applies. For assignments made after see category 21 Mortgages, topic 21.04 Personal Property Security.

Assignment of book debts made by a person or corporation engaged in trade or business is void against existing and subsequent creditors of assignor, unless in writing and registered within thirty days of its execution with an affidavit by attesting witness as to its execution by assignor, identifying the assignment and stating date of execution, and with an affidavit by assignee or his agent that assignment was executed in good faith and for valuable consideration and not for mere purpose of protecting the book debts against assignor's creditors or preventing them from recovering claims against assignor.

Affidavit on renewal must be made and registered within five years of registration of assignment; otherwise assignment will thereafter be void as against creditors, and as against subsequent purchasers whose assignments have been registered or are valid without registration. Affidavit on renewal must be made by assignee or by one of assignees, or by his or their agent, and must state that assignment is valid and subsisting, and is not being kept in force for any fraudulent purpose or to defeat, delay or prejudice assignor's creditors. Affidavit must be filed within 30 days of its making.

Similar affidavits on renewal must be registered within five years after registration of last preceding affidavit, if validity of assignment is to be preserved as against such creditors or purchasers.

Requirement of registration does not apply to an assignment of book debts made by a corporation engaged in a trade or business within the province, contained in a trust deed or other instrument of the corporation or of any other corporation to secure bonds, debentures or debenture stock nor to such bonds, debentures or debenture stock, nor to an assignment of book debts then due from specified debtors, or growing due under specified contracts, nor to an assignment of book debts included in the transfer of a business made bona fide and for value, nor to an assignment of book debts in any authorized assignment under the Bankruptcy and Insolvency Act.

See also category 2 Business Organizations, topic 2.03 Corporations.

8.02 ASSIGNMENTS FOR BENEFIT OF CREDITORS:

Assignments for benefit of creditors are governed by the Bankruptcy and Insolvency Act of Canada. See Canada Law Digest.

8.03 ATTACHMENT:

Property of a resident debtor, except debts due to him (as to which see topic 8.11 Garnishment), cannot be seized until after judgment.

Absent Debtors.

The property of an absent debtor may be attached on an affidavit of debt, setting out the fact and that the debtor is an absent or absconding debtor from the province.

Summons may be served on agent or person in possession of property of defendant which binds property in his hands.

Lien.

Writ does not bind defendant's lands as against purchasers, mortgagees or other encumbrancers unless certificate of pending litigation is issued by Supreme Court and certificate registered in proper land registry office identifying lands to be affected.

Collection of Debts.

Sheriff is empowered to collect all debts due to defendant to abide event of suit.

Rehearing.

Defendant may obtain rehearing any time within three years.

Pre-execution Security.

Plaintiff, before he has execution, must give security to repay judgment and costs in case it should be reversed on rehearing.

Time of Trial.

Absent debtor suits cannot be brought on for trial until three months after issue of writ.

Sale.

Goods must be appraised before sale. Perishable property may be ordered to be sold unless security for its value is given within eight days after attachment.

8.04 BANKRUPTCY:

See Canada Law Digest.

8.05 BONDS:

Security for the performance of duties pertaining to office of administrator, guardian, committee, receiver, curator, trustee, municipal or public officer or other fiduciary, is frequently given by bond with personal sureties, but may be given by the bond of a surety company qualified to act as surety or guarantor and holding certificate from Director of Corporations setting forth such qualification and authority to do business.

8.06 CREDITORS' SUITS:

There is no general statute authorizing creditors' suits for general discovery and in aid of common law execution, but a creditor may file a bill in equity for administration of a deceased debtor's estate. See also topics 8.07 Executions, subhead Supplementary Proceedings; 8.10 Fraudulent Sales and Conveyances.

8.07 EXECUTIONS:

Execution may issue on judgment of the Supreme Court as soon as the money or costs are payable. It remains in force for one year but may be renewed from time to time. It is a lien on defendant's goods and chattels from time of its delivery to sheriff.

Exemptions.

See topic 8.08 Exemptions.

Time for Issuance.

In the Supreme Court execution may issue at any time within ten years without affidavit;

after ten years, or when any change has taken place by death or otherwise in the parties entitled or liable to execution, the party entitled to execution may apply for leave to issue execution or to amend any execution already issued.

Property situated on leased premises may not be taken under execution unless, before removal of the property, the party at whose instance execution was issued pays to the landlord all arrears of rent, not exceeding one year in the case of rental terms of less than one year, and rent for two years in all other cases. Rent so paid may be added to amount of execution.

Sales.

Lands may be seized and advertised for sale by sheriff and after two months' notice may be sold to the highest bidder. The sale will be confirmed absolutely on application to the court. Eight days' notice of sale of chattels is given by sheriff.

Stays.

The court or judge may at or after time of giving judgment stay execution until such time as it or he thinks fit.

Supplementary Proceedings.

Upon plaintiff's affidavit setting out that his judgment stands unsatisfied a judge will issue an order for the examination of defendant. Third persons can also be subpoenaed as witnesses. Defendant must disclose all his property and assets. If he conceals same or refuses to answer he may be committed to jail.

8.08 EXEMPTIONS:

The following articles only are exempt from seizure under execution: Necessary wearing apparel, beds and bedding of debtor and his family; household furniture, utensils, equipment, food and fuel contained in permanent home of debtor not exceeding $2,000; for non-farmer debtor, tools, instruments and chattles used by debtor in business, trade or calling not exceeding $2,000; for farmer debtor, livestock, fowl, agricultural machinery and equipment used by debtor in operation not exceeding $5,000 and sufficient seed to cultivate 100 acres; motor vehicle owned by debtor not exceeding $3,000.

If debtor is married person, a widow or widower supporting one or more children under 16 years of age or unable from physical or mental disability to support themselves, not less than $10 per week of his or her wages is exempt from garnishment, value of board and wages supplied to debtor by employer being considered as part of wages paid.

Designation of Beneficiaries Under Benefits Plans Act.

Where designation under prescribed pension plans is spouse, child, grandchild or parent of participant, assets, rights and interests in plan are exempt from execution and seizure.

See also topic 8.11 Garnishment.

8.09 FORECLOSURE:

See category 21 Mortgages, topic 21.03 Mortgages of Real Property.

8.10 FRAUDULENT SALES AND CONVEYANCES:

Any transfer of property, gift, conveyance, assignment, delivery over or payment of goods, chattels or effects, bills, bonds, notes, shares, dividends, premiums or any other property real or personal made by a person in insolvent circumstances or unable to pay his debts in full or who knows that he is on the eve of insolvency, with intent to defeat or delay the claims of creditors or a particular creditor, are void as against the creditor or creditors injured, delayed or prejudiced, whether made voluntarily or under pressure.

Bulk Sales.

Legislation relating to sales in bulk repealed. Common law applicable to fraudulent transfers or transfers made by insolvent persons applies. Sale in bulk is any sale, transfer, conveyance, barter or exchange of stock out of usual course of business or sale etc. of substantially entire stock.

8.11 GARNISHMENT:

A garnishee order may be obtained in Supreme Court, either before or after judgment, on affidavit of debt, and disclosing some money due and owing to debtor.

Exemptions.

There shall be exempt from garnishment on wages due or accruing due, to any debtor for his personal labour and service, sums in such amounts and for such purposes as shall be more particularly set forth in regulations approved by Lieutenant-Governor-in-Council, provided always that total exemptions hereunder shall in no case be less than amount which debtor would receive under provisions of Welfare Assistance Act of Province, and regulations approved pursuant thereto. (1972, c. 18). Awards for personal torts may not be garnished, Garnishee Act S.P.E.I. 1988, c. G-3.

Future Accruing Wages.

If a debtor is in receipt of a regular salary or wages, a judge may make an order for attachment of future accruing wages after making statutory exemptions and for payment into court of such wages and salary as and when same become due.

8.12 HOMESTEADS:

No homestead law in the province.

See categories 14 Family, topic Husband and Wife; Property, topics Curtesy, Deeds, Dower, and Real Property.

8.13 INSOLVENCY:

Subject to Canadian Bankruptcy and Insolvency Act (see Canada Law Digest).

8.14 LEVY:

See topics 8.03 Attachment, 8.07 Executions.

8.15 LIENS:

The general law of liens is in accordance with the common law of England and the statutes dealing with particular cases.

Garage Keepers' Lien.

Garage Keepers' Lien Act provides that a garage keeper shall have a lien on every motor vehicle left with him for services rendered upon it by garage keeper. Garage keeper may detain motor vehicle and right of detention has priority over and is not subject to any lien, lien note, chattel mortgage, bill of sale or other charge or encumbrances upon or in receipt of motor vehicle existing at time of detention and garage keeper may sell vehicle by public auction in accordance with terms of Statute.

Mechanics' Liens.

A person who does or causes to be done any work upon or in respect of any improvement to land, or furnishes any material to be used in an improvement to land, for an owner or for a person having an interest in land, or for a contractor or sub-contractor, has a lien for wages or for the price of the work or material, upon the estate or interest of the owner of the land so improved, but the lien does not make the owner liable for a greater sum than the amount he may owe the contractor. Liens must be registered in the registry office of the county within which the land is situated within 60 days from the performance of the work or services or the furnishing of the last material the price of which is claimed for. If no action to enforce the lien is commenced within 30 days the lienholder may then be required to commence an action within 30 days to enforce the lien, otherwise the lien ceases. The lien may be enforced by action brought in the Supreme Court. To meet any such lien, the owner liable on a contract where a lien may arise must deduct and retain, for 60 days after the completion of the work, 20% of the value of the work and material, but if the value of the work and material exceeds $15,000 the amount to be deducted and retained is 15%. Provincial Crown lands can be liened.

A lien has priority over judgments, executions and other legal proceedings recovered or issued after the lien arises as well as over claims under conveyances, mortgages and other charges and agreements for sale of the land, whether registered or unregistered, which are made by the owner after the lien arises, but a mortgage or conveyance registered after a lien for material arises but before the registration of the lien, has priority over the lien to the extent of payments or advances made in good faith before the person making the payments or advances has knowledge of the lien. Securities registered before the lien arises have certain limited priorities over the lienholder.

8.16 MECHANICS' LIENS:

See topic 8.15 Liens.

8.17 PLEDGES:

Common law rules apply. See also category 21 Mortgages, topic 21.04 Personal Property Security.

8.18 RECEIVERS:

Appointed according to usage and practice of courts of equity.

In cases of insolvent companies, or corporations ordered to be wound up under the Winding Up Act, a liquidator is appointed.

There are also provisions for appointment under Legal Profession Act, Licensing Act, Personal Property Security Act and Supreme Court Act.

8.19 STAY OF EXECUTION:

See topic 8.07 Executions.

8.20 SUPPLEMENTARY PROCEEDINGS:

See topic 8.07 Executions.

8.21 USURY:

See Canada Law Digest, category Business Regulation and Commerce, topic Interest.

9 DISPUTE RESOLUTION

9.01 ALTERNATIVE DISPUTE RESOLUTION:

Mandatory Dispute Resolution.

None.

Voluntary Dispute Resolution.

For any matter falling under Family Law Act (pre-divorce issues of support, custody and property division) court on parties mutual consent appoints mutually selected mediator. Mediator confers with parties and children and prepares and files full or limited report as required by parties. Full report includes anything said by parties and anything mediator considers relevant. Limited report gives only conclusion of agreements reached or that no agreement was reached. No evidence of anything said or of any admission/communication made during mediation is admissible in proceeding if limited report requested except with parties' consent. Parties pay mediators' fees and expenses.

9.02 ARBITRATION AND AWARD:

A submission of, or written agreement to submit, present or future differences to arbitration, whether or not an arbitrator is named therein, is, unless a contrary intention is expressed therein, irrevocable, except by leave of the court or a judge, and has same effect as if made an order of court. On default in appointing an arbitrator or umpire the court has power to appoint. The court may stay proceedings if party to submission, or person claiming through or under him, commences an action against any other party to submission in respect of a matter agreed to be referred. An award may, by leave of the court or a judge, be enforced in same manner as a judgment or order to same effect.

9.03 MEDIATION:

There are no jurisdictional mediation acts. There are no legal standards for mediators. Mediators qualify by participating in courses for mediators.

10 DOCUMENTS AND RECORDS

10.01 ACKNOWLEDGMENTS:

Documents affecting title of land must, before registration in land registry office, be proved for registry.

Execution Within the Province.

If executed within the province this may be done either by personal acknowledgment of the party executing the document or by oath of a subscribing witness, taken before the registrar or a commissioner appointed to take such proof.

All notaries are attorneys, and appointed for life. Minister of Justice authenticates appointment.

Execution Without the Province.

If executed without the province proof may be given in like manner before the mayor of a city, borough or town corporate, certified under the common seal of the city, borough or town corporate, or before any British ambassador, envoy, minister, chargé d'affaires or secretary of embassy or legation exercising his functions in any foreign country, any British consul-general, consul, vice-consul, acting consul, pro-consul, or consular agent exercising his functions in any foreign place, or before a judge of a court of record within the British Empire, or before a notary public, certified under his official seal, or before a commissioner authorized by the laws of this province to take, in such place, affidavits in and for any of the courts of record of the province, or acknowledgments or proof of the execution of deeds or mortgages for registry in the province.

Alternative to Acknowledgment or Proof.

No statutory provisions authorizing statement in lieu of acknowledgment or proof.

10.02 AFFIDAVITS:

Affidavits to be used in legal proceedings must be entitled in the court and in the cause or matter in which they are sworn or in which they are to be used. Deponent's full name, address and occupation should be set out.

Affidavits made within the province must be sworn before a commissioner of the court in which they are to be used or before commissioned officer of Canadian Forces on full-time service.

Affidavits Made Without the Province.

Oaths, affidavits, affirmations or statutory declarations administered, sworn, affirmed or made in any other province or territory of Canada or any country other than Canada before: (a) Judge, magistrate or officer of court of justice or commissioner authorized to administer oaths in courts of justice of province, territory or country; (b) commissioner appointed under §6 Affidavits Act; (c) officer of Her Majesty's diplomatic or consular services exercising functions in country other than Canada, including ambassador, envoy, minister, charge d'affairs, counsellor, secretary, attache, consul general, consul, vice consul, proconsul, consular agent, acting consul general, acting consul, acting vice consul and acting consular agent; (d) officer of Canadian diplomatic and consular service exercising functions in country other than Canada, including, in addition to diplomatic and consular officers mentioned in clause (c), high commissioner, permanent delegate, acting high commissioner, acting permanent delegate, counsellor and secretary; (e) Canadian government trade commissioner and assistant Canadian government trade commissioner while exercising functions in country other than Canada; (f) notary public acting within territorial limits of his authority, and certified under his hand and official seal; (g) commissioner authorized by laws of province to take affidavits are as valid and effectual, and are of same force and effect, for all purposes as if oath, affidavit, affirmation or statutory declaration had been administered, sworn, affirmed or made in province before commissioner for taking affidavits or other competent authority of same nature; or (h) commissioned officer of Canadian Forces on full-time service.

Absence of Official Seal.

If affidavit be sworn without the province before a person not having an official seal, signature of such person must be attested under the hand and official seal of some other person authorized as above to take such affidavit.

Authentication not required in province. Clerk of court authenticates for use in other provinces.

Erasures and interlineations in affidavit or jurat should be initialed by official taking the oath, who should also identify and initial any documents annexed which are referred to in the affidavit.

Jurat should contain date and place and county wherein sworn, and when sworn by more than one deponent their names should appear in the jurat, e.g.:

Form

The above-named deponents, A. B. and C. D. were severally sworn at . . . . . . in the County of . . . . . . on the . . . . . . day of . . . . . ., 20. . . ., before me, C. C., a commissioner (etc., as the case may be).

Solemn declarations in attestation of execution of any writing, deed or instrument, or of truth of any fact, or of any account rendered in writing may be made in following form:

Form

I, A. B., do solemnly declare that (state fact or facts declared to), and I make this solemn declaration conscientiously believing it to be true, and knowing that it is of the same force and effect as if made under oath, and by virtue of The Canada Evidence Act. (Signature).

Declared before me at . . . . . . this . . . . . . day of . . . . . ., A.D. 20. . . . (Signature of officer).

Alternative to Affidavit.

No statute allowing statement in lieu of swearing before notary or proper officer.

10.03 COMMISSIONS TO TAKE TESTIMONY:

See category 5 Civil Actions and Procedure, topic 5.08 Depositions and Discovery.

10.04 NOTARIES PUBLIC:

Appointed for life or during good behavior by Lieutenant Governor in Council. Jurisdiction extends throughout province. No bond required. Usual for them to use seal.

10.05 RECORDS:

Deeds and other documents affecting title to land should be registered in duplicate in office of registrar of deeds; otherwise they may be void as against subsequent purchasers or incumbrancers whose conveyances or incumbrances are registered. Bills of sale and chattel mortgages may be filed with prothonotary or deputy prothonotary in county in which grantor or mortgagor resides.

Torrens system of land registration not adopted.

Vital Statistics.

Records of births, deaths and marriages are filed with Registrar General.

Fees for obtaining certificates of birth, etc., are $25-$35, obtainable at office of Department of Health and Social Services.

10.06 SEALS:

All deeds must be under seal. Mark or scroll not sufficient.

10.07 VITAL STATISTICS:

See topic 10.05 Records.

11 EMPLOYMENT

11.01 EMPLOYER AND EMPLOYEE:

See topic 11.02 Labour Relations.

11.02 LABOUR RELATIONS:

Rights of employer and employee are as at common law except as varied by statute. Labour relations are governed by Labour Act, Cap. L-1 which among other things, legalizes formation of trade unions and collective bargaining and regulates relations between employers and employees, wage agreements, conciliation and mediation preceding strikes, lockouts, unfair labour practices, employment standards, including minimum wages for men and women, vacation pay, etc.

Employment Standards Act (Cap. E-6.2).

Act provides for certain minimum standards of employment.

Occupational Health and Safety Act (Cap. O-1.01) provides for regulation and enforcement of occupational health and safety standards for workplaces within provincial jurisdiction.

Exempt Employees or Provisions.

Except for provisions relating to payment and protection of payment, Act does not apply to commission salespersons and farm labourers. Minimum wage and hours of work provisions do not apply to persons employed for sole purpose of caring for children, handicapped or aged persons and employees of nonprofit organizations who live at facility operated by organization. Act does not apply to employees covered by collective agreement except provisions relating to parental, maternity and adoption leave, to sexual harassment and to payment and protection of pay, payroll records and notice of prosecution.

Hours of Work.

Standard work week is 48 hours. Employment Standards Board may approve longer week.

Paid Holidays.

Subject to certain exceptions, employees are entitled to six holidays with pay: New Year's Day, Good Friday, Canada Day, Labour Day, Remembrance Day and Christmas Day. If paid holiday falls on nonworking day employer shall grant employee holiday with pay on either working day immediately following holiday or day immediately following employee's vacation or grant employee another day agreed upon by employee and employer before date of next annual vacation of employee. Where employee is required to work on paid holiday employer shall pay employee at rate at least equal to one and one-half times employee's regular rate for time worked on that day in addition to one days pay at employee's regular rate or pay that employee regular rate of wages for time worked on that day and grant employee holiday with pay on another day agreed to between employer and employee before date of next annual vacation of employee.

Overtime Pay.

After 48 hours or such other standard week as approved by Board, employee must be paid at rate of one and one-half times regular rate.

Vacation Pay.

After one year of service employee is entitled to two weeks vacation with pay. Employee is entitled to vacation pay of 4% of total wages for year or time in service. Every employer is deemed to hold vacation pay in trust for employee and amount of vacation pay is charge upon assets and estate of employer and has priority over claims of all other persons.

Minimum Wage.

Board with government approval by regulation fixes minimum wage of employees and may exempt certain employees from minimum wage provisions.

Parental, Maternity and Adoption Leave.

Female employee is entitled to maternity leave for period not exceeding 17 weeks commencing 11 weeks immediately preceding estimated date of birth, if employee has been employed at least 20 weeks. Maternity leave is without pay. Employee entitled to such leave is required to give four weeks notice with medical certificate estimating date of delivery. Parental leave taken by either parent after birth for 35 weeks. Parental leave and maternity leave together may not be more than 52 weeks. Adoption leave may be taken by either or both parents for total of 52 weeks. Employer granting leave must permit employee to resume work in position occupied by employee at time leave commenced or if position no longer exists in comparable position but not less than at same wages and benefits employee would have received if employee had not been granted leave and in either case with no loss of seniority or pension benefits.

Bereavement Leave.

Employer shall grant employee leave of absence without pay up to three consecutive calendar days on death of member of employee's immediate family or one day, if deceased person was member of extended family of employee.

Family Leave.

Having been employed continuously for six months or more, employees may request leave of absence without pay for up to three days during 12 calendar month period for health and care of immediate or extended family member.

Compassionate Care Leave.

Employer shall grant unpaid leave of absence of up to eight weeks to provide care and support to family member if employee provides copy of certificate issued by qualified medical practitioner stating that family member of employee has serious medical condition carrying with it significant risk of death within 26 weeks.

Sexual Harassment.

Every employee is entitled to employment free from sexual harassment meaning conduct, comments, gesture or contact of sexual nature that is likely to cause offence or humiliation to employee or that might on reasonable grounds be perceived by employee as placing condition of sexual nature on employment or on any opportunity for training or promotion. Every employer is required to have policy statement concerning sexual harassment. Employee's right of redress for violation of provision is through Human Rights Act.

Notice of Termination.

Unless employee has not been employed continuously for at least six months or employer has just cause, employer is required to give written notice of termination ranging from two to eight weeks depending on length of employee's service. Only after written notice has been given and time of notice has expired can employee be terminated. Notice of termination is not required if employee is required to be discharged or laid-off for reasons beyond control of employer or because of labour disputes, weather conditions or actions of any governmental authority that directly affects operations of employer. Statutory rules set out minimum standards and courts frequently award substantially higher amounts for termination without adequate notice based on various factors such as age, service, experience, expertise, likelihood of finding alternative employment and character of employment.

Unpaid Pay.

Unpaid pay set out in Determination made by inspector under Act constitutes lien, charge and secured debt in favour of inspector against all real and personal property of employer and has priority over all liens, judgments, charges or other claims or rights of any person and has priority over any assignment, mortgage, debenture, contract, accounts receivables, insurance claim whether made or created before or after date wages were earned or became due.

Worker's Compensation Act.

Cap. W-7.1 applicable to workers, but not to farm labourers or domestic or menial servants, or others exempted by Regulation, provision is made for compensation in respect of accidents and industrial diseases, fatal or non-fatal, occurring in course of their employment. Employers are required to contribute towards fund to be administered as system of state insurance by Worker's Compensation Board appointed by Provincial Government. Payroll assessments are made upon employers and Provincial Government also contributes to fund. Scale of compensation varies according to nature of injury and wages of worker. Claims for compensation under Act may not be assigned and are not subject to attachment.

Injured worker's dependants are entitled to make claim for and receive compensation under Worker's Compensation Act, at discretion of Board.

11.03 WORKERS' COMPENSATION LAW:

See topic 11.02 Labour Relations.

12 ENVIRONMENT

12.01 ENVIRONMENTAL REGULATION:

Environmental Protection Act, Cap. E-9 governs protection of environment. Purpose of Act is to manage, protect and enhance environment.

Pesticides Control Act, Cap. P-4 governs sale, distribution and use of pesticide.

Wildlife Conservation Act, Cap. W-4.1 regulates protection, management and conservation of wildlife and wildlife habitat in province.

General Supervision.

Minister of Environment designated by Lieutenant-Governor-in-Council.

Function.

Minister of Environment may take such action as he considers necessary in order to manage, protect or enhance environment including (a) investigating and inquiring into any activity or situation that causes, appears to be cause of, or may cause contamination of environments; (b) coordinating work and efforts of public departments, boards, commissions, agencies and interest groups in Province respecting management of environment; (c) preparing and publishing policies, strategies, objectives and standards; (d) planning, designing, constructing, operating and maintaining works and undertakings; (e) exercising exclusive control over quality, use, protection or alteration of surface, ground and shore waters and all beaches, sand dunes and wetlands and allocating use of water; (f) entering into agreements; (g) delegating any of his functions under Act or Regulations; (h) performing such other functions as may be assigned to him by Lieutenant Governor in Council.

Environmental Impact Assessment.

No person shall initiate any undertaking unless person has filed written proposal with Department of Environment and obtains from Minister written approval to proceed with undertaking. “Undertaking” is broadly defined as any construction, industry, operation or other project which in any way significantly or detrimentally effects environment. Temporary legislation prohibits Minister from issuing authorization in respect “Construction and Demolition disposal sites”. “Construction and Demolition disposal site” is defined as site used for disposal of construction and demolition debris.

Contaminated Site Registry established for province with public access to information in accordance with associated regulations in Environmental Protection Act.

Watercourses.

No person without permit from Minister may alter watercourse, wetland, or any part thereof or water flow therein unless person holds licence issued under regulations and alteration is type permitted by regulations.

Bulk Water Removal.

No person may drill, extract, take, use, remove or withdraw groundwater or water from basin, watercourse for transfer outside province, subject to certain exceptions. §12.1 of Environmental Protection Act.

Sand Dune and Beaches.

No person without written permission of Minister may operate motor vehicle on beach or sand dune, carry out any activity that will or may interfere with natural supply or movement of sand to or within beach or sand dune or alter, remove or destroy natural stabilizing features, including vegetation, of beach or sand dune. §22 of Environmental Protection Act.

Penalties.

For natural person, minimum $200 maximum $10,000 or 90 days imprisonment, or both; for corporation, minimum $1,000 maximum $50,000 per day of noncompliance. Officer, director or agent of corporation may be personally liable for offences of corporation if directed, authorized, assented to, acquiesced in, or participated in unlawful activity. §32 of Environmental Protection Act.

13 ESTATES AND TRUSTS

13.01 ADMINISTRATION:

See topic 13.06 Executors and Administrators.

13.02 ADVANCEMENTS:

See topic 13.05 Descent and Distribution.

13.03 DEATH:

A person who has not been heard of for seven years by those who, if he had been alive, would be likely to have heard of him, and as to whom such inquiries and searches as circumstances suggest have been made, is presumed to be dead. (See Insurance Act, §158 and Marriage Act, §21.) Where person disappears in circumstances leading to belief that he has died by reason of disaster, accident, murder, or suicide, any person interested may apply at any time for order of presumption of death. (Probate Act, §38[2]). See also category 22 Property, topic 22.01. Absentees.

Survivorship.

Where two or more persons die in circumstances rendering it uncertain who died first, the usual presumption is that the younger survived the older. If testator's will provides for circumstances wherein beneficiary dies at same time or it is uncertain who died first, then will shall take effect in manner of circumstances provided for through it.

Action for Death.

Where death of a person has been caused by the wrongful act, neglect or default of another, action for damages may be brought against the wrongdoer. Subject to certain exceptions, action must be in name of executor or administrator of decedent. Action is for benefit of dependents as defined in Fatal Accidents Act, Cap. F-5 and damages are proportioned to injury to such persons by reason of death. Reasonable funeral expenses of decedent may be awarded. Insurance moneys may not be considered in assessing damages. Compensation for loss of guidance, care, companionship available.

13.04 DECEDENTS' ESTATES:

See topics 13.05 Descent and Distribution, 13.06 Executors and Administrators, 13.11 Wills.

13.05 DESCENT AND DISTRIBUTION:

In the distribution of the estates of persons who died intestate on or after Mar. 17, 1944, the following rules apply to realty and personalty alike.

The estate in excess of the share of the widow or surviving husband (as to which see subhead Surviving Spouse, infra), or the entire estate if there be no surviving spouse, descends and is distributed as follows: each class of which a member is living taking to the exclusion of subsequent classes; (1) children and/or descendants of deceased children per stirpes; (2) parents equally or all to surviving parent; (3) brothers and sisters equally, children of a deceased brother or sister taking the share to which their parent would be entitled if living, provided that where the only persons entitled are children of deceased brothers and sisters they take per capita; (4) nephews and nieces; (5) next of kin of equal degree of consanguinity to the intestate.

Kindred of the half blood inherit equally with those of the whole blood of same degree for purposes of distribution of estates or intestates.

Surviving spouse takes as follows: (a) one-half if decedent left only one child or only issue of one deceased child; (b) one-third if decedent left more than one child, one child and issue of one or more deceased children, or issue of two or more deceased children. If an intestate dies leaving a widow but no issue, his estate shall go to his widow.

If at the time of the death of a husband or wife the other spouse is living apart and in adultery, the survivor takes no part of the estate of the deceased spouse.

Illegitimate children and their issue inherit from the mother and as representative of the mother, as though legitimate. The estate of an illegitimate child dying intestate, without spouse or issue, goes to the mother if living, otherwise to other children of the same mother or their representatives.

The estate of an illegitimate child dying intestate leaving no issue, goes, subject to the right of his widow, to his mother if living, and if she is dead, then equally to the other children of the same mother; and if any child is dead, the children of the deceased child take the share as if the parent were living. If the only persons entitled are children of the deceased children of the mother, they take per capita; but if the mother is dead and there are no other children of the same mother or children of a deceased child or children of the same mother, the whole estate goes to his widow.

Adopted Children.

See category 14 Family, topic 14.01 Adoption.

Advancements.

If any child has any estate by settlement from the decedent or has received advancements from the decedent during his lifetime, the value of such estate or advancement must be deducted from such child's share of the personalty. The same rule applies to settlements or portions received during decedent's lifetime, which must be deducted from the child's share of the realty. (Probate Act, §42)

Escheat.

Where the intestate left no heirs, his property escheats to the province. (Escheats Act, §1[1]).

13.06 EXECUTORS AND ADMINISTRATORS:

The sole jurisdiction for granting letters probate or letters of administration is vested in Supreme Court Trial Division, Estates Section. (Probate Act, §2).

Preferences and Right to Administer.

In case of intestacy preference is given to applicants for administration in following order: (1) Husband or wife; (2) next of kin; (3) creditors. Creditors are not appointed without first citing next of kin and their refusal. (Probate Act, §46).

Eligibility and Competency.

A married woman or an infant may be appointed executor, and a married woman may act as administrator, but the court would refuse to appoint an infant as administrator. There is nothing to prevent a nonresident or foreign corporation from acting as either executor or administrator but absence from the jurisdiction would doubtless prevent the court from appointing a foreign corporation as administrator.

Qualification.

No bond is required from an executor on his appointment as executor but an oath of office is required. An administrator is required to give a bond with sureties, usually in double the value of the estate, and is required to take an oath of office.

Issuance of Letters.

These are issued by the court after filing an inventory. (Probate Act, §48).

Removal.

Probate may be issued in common form in the first instance but the executor may afterward be cited by the next-of-kin to prove the will per testes or in solemn form. If upon such citation the executor does not prove the will, the probate may be revoked. The court has also power to remove an administrator on sufficient grounds shown for the revocation for instance, if he is acting in an irregular manner.

Special Kinds of Administration.

Administration may be temporary; limited; de bonis non; cum testamento annexo; ad colligendum; ad litem; and ancillary.

Interim Administrator.

Pending litigation about the validity of a will, granting or revocation of probate or grant of administration, an interim administrator may be appointed with limited powers.

Public Administrators.

Where the decedent left no known relatives living within the Province, or a known relative living elsewhere who cannot readily be communicated with, the court may grant administration upon application without previous advertisement to public trustee for the use of Her Majesty, or for the use of such persons as may ultimately appear to be entitled to the use of the estate. No security is required from the Attorney-General upon his appointment. After a year, the decedent's land may be sold upon authorization of the Lieutenant-Governor-in-Council. If the husband, widow, next-of-kin or heir of the decedent should claim administration, or if a will of the decedent is proved, letters of administration or letters of probate will be granted accordingly, and the Attorney-General in such case, must surrender his letters and file an account under oath. Upon application for the purpose, a court may direct an inquiry as to whether or not Her Majesty is entitled to any portion of the estate, as on an escheat.

Inventory and Appraisal.

A sworn inventory must be filed before letters of probate or administration are granted. The actual market values at the time of the death must be given, but no other appraisal is necessary, the sworn statement of the applicant for letters of administration being accepted. A notice of the granting of probate must be served upon each beneficiary within a month from the granting of probate or administration.

General Powers and Duties.

The real property of the deceased devolves at his death upon and becomes vested in his personal representatives who hold the property as trustees for the persons by law beneficially entitled thereto. If eight months expire from the date of the letters of probate or administration without the personal representative having conveyed the property to the persons beneficially entitled, an application may be made to the court to have a conveyance ordered and in default for a vesting order. The personal representative may convey the real property to the persons beneficially entitled and may make the conveyance either subject to a charge for the payment of any money the personal representative is liable to pay or without such charge.

As to the decedent's property other than real estate, the personal representative has an absolute power of disposal.

Notice of Appointment.

See subhead Inventory and Appraisal, supra.

Notice to Creditors.

A notice to creditors to present claims is required to be inserted in the Royal Gazette within a month from the granting of probate or administration. If the estate is under $800 the notice should be inserted for a month, in other cases for three months. By this notice all persons having any demands on the estate are to have their demands duly attested within six months from the date of the advertisement.

Presentation of Claims.

Creditors of the estate, who fail to present a claim to the personal representative before the passing of the accounts by the court and the making of a final decree for distribution, are barred from enforcing or collecting their claim.

Proof of Claims.

No specific form required. (The affidavit may be made by the creditor or by an agent of the creditor who swears to a knowledge of the facts.)

Approval or Rejection of Claims.

Upon making a final decree for distribution and passing the accounts, the Judge has a discretion to preserve the rights of a creditor or claimant whose claim may not have been admitted or proceeded with to judgment. The personal representative may require a creditor to commence an action and proceed to trial. If the creditor fails to commence the action within three months from the giving of notice, he shall be barred.

Payment of Claims.

If, after the publication for six months in the Gazette of a notice of a personal representative to creditors requiring them to present claims duly attested, the personal representative applies the assets to the payment of debts of which he had notice, and a creditor afterwards brings an action for a demand against the estate, it shall be a good defense to the action that the assets have been so applied before the personal representative had notice from the creditor.

Priorities.

No preference may be given in payment of any debt over any other debt of same class whether by specialty or simple contract, legal or equitable, nor shall debt due and payable be entitled to preference over debt not due. If assets are insufficient to pay all debts in full, payment must be made in following order: (a) mortgages on real or personal property and liens including judgment and execution liens as against property on which they severally attach; (b) funeral expenses in amount not exceeding $1,500; (c) expenses of administration or probate, including any allowance to personal representative; (d) medical and nursing expenses of last illness but not exceeding last one month's such expenses; (e) all other debts pari passu including balance of funeral expenses and balance of medical and nursing expenses (if any).

Sales of real property for purpose of distribution only are not valid as respects any person beneficially interested unless he concurs therein or unless where adult beneficiary declines to concur, or where under will there are contingent interest or interests not yet vested, or where persons who may be beneficiaries are not yet ascertained, application may be made to Supreme Court for authority to make sale. Personal representative may sell real property for purpose of paying debts.

Before granting of letters probate or of administration verified inventory of assets, with market values and information as to names, addresses and relationship to deceased of beneficiaries, must be filed.

Accounts of executors and administrators may be allowed and passed by the probate court any time after six months from the grant of letters, after giving due notice to creditors.

Compensation.

Executors and administrators may be allowed a commission not exceeding 5% of estate.

Letters of ancillary probate or administration may be granted where probate or administration has been granted by a court of competent jurisdiction in the United Kingdom or in any province of Canada, or in any other British province, the applicant in such case to give security or produce satisfactory evidence that security was given in the court of original jurisdiction covering assets within the province.

Distribution if Abroad.

There is no special provision for disposition of funds payable to a distributee to whom it is not feasible or permissible to make payment for some reason, such as residence abroad.

See also topic 13.11 Wills.

13.07 FIDUCIARIES:

See topics 13.06 Executors and Administrators, Trusts; category 14 Family, topic 14.03 Guardian and Ward.

13.08 INTESTACY:

See topic 13.05 Descent and Distribution.

13.09 TRUSTEE PROCESS:

See category 8 Debtor and Creditor, topic 8.11 Garnishment.

13.10 TRUSTS:

The law of trusts is based on the general equity jurisprudence of England. All declarations or creations of trusts of any lands and all grants or assignments of any trusts must be manifested by some writing signed by the party declaring or assigning the same or by his last will. Trusts arising or resulting by implication or construction of law, or transferred or extinguished by an act or operation of law need not be in writing.

International Trusts Act makes applicable Hague “Convention on the Law Applicable to Trusts and on Their Recognition”.

Variation of Trusts Act (Cap. V-1) provides that Supreme Court may approve variation in trusts on behalf of beneficiaries incapable of assenting or who may have contingent interests.

13.11 WILLS:

With the exception stated infra as to nuncupative wills, a person under the age of 18 cannot make a valid will. Married woman may dispose of her property by will.

Living Wills.

See Consent to Treatment and Health Care Directives Act, Cap. C-17.2.

Execution.

Will must be in writing and signed at end by testator or some person in his presence and by his direction. Must be acknowledged or made in presence of two witnesses who must attest will in presence of testator.

Holographic Wills.

Document in testator's handwriting and signed by him may be admitted to probate if Supreme Court satisfied document intended to constitute will and testamentary intentions.

Nuncupative Will.

Soldier in actual military service, or seaman or mariner at sea may dispose of personal property by nuncupative will, even though under the age of 18.

Devise to attesting witness or his or her wife or husband void, but witness may prove will.

Revocation.

Will is revoked by marriage, by another will or codicil duly executed by some writing declaring an intention to revoke the same and executed in same manner as a will or by destruction of the same by the testator or some person in his presence or direction with the intention of revoking the same.

Probate.

The executors must prove and file will in the court within 30 days after death of the testator, under heavy penalties.

Self-Proved Wills.

No statutory provision prohibiting same. Wills have been admitted to probate on strength of testators' acknowledgment and affidavit of witness which were executed prior to testator's death.

Dependants inadequately provided for can apply for an order for proper maintenance and support. Amount awarded, if any, is in discretion of court. Application must be made within six months from grant of letters probate or letters of administration. (Dependants of a Deceased Person Relief Act, Cap. D-7).

Lapse.

Where there is a devise or bequest to a child or other issue of testator and the devisee or legatee dies before the testator, leaving issue who survive the testator, such issue of the devisee or legatee take as though the devisee or legatee had survived testator and died after testator's death, unless the will shows a contrary intent.

Unclaimed Legacies.

Escheats Act, Cap. E-10 allows Crown to revest property in persons legally or morally entitled thereto where same has escheated to Crown.

Simultaneous Death.

See topic 13.03 Death, subhead Survivorship.

International Wills.

Province has adopted Unidroit Convention Providing a Uniform Law on Form of an International Will in Probate Act, Cap. P-21, Part VII.

14 FAMILY

14.01 ADOPTION:

Any person 18 years of age may apply to adopt younger person. Joint application for adoption is only permitted for married couples. Competent person over 18 years may be adopted.

Consent Required.

No order for adoption shall be made without consent within year preceding hearing of (a) child, if 12 years of age or more, or if court believes it appropriate in any other case; (b) mother of child unless guardianship has been legally transferred from her permanently or, if temporarily, with her clear knowledge that adoption was purpose or likely to occur; (c) father of child, if (i) he is married to mother, (ii) he is registered as father in accordance with Vital Statistics Act or corresponding legislation of another jurisdiction, or (iii) his paternity has been legally established under Child Status Act or corresponding legislation of another jurisdiction, unless guardianship has been legally transferred from him permanently or, if temporarily, with his clear knowledge that adoption was purpose or likely to occur; (d) legal guardian; and (e) Director of Child Welfare, if (i) there is no other person entitled to give or withhold consent, or (ii) applicant resides out-of-province.

Form of consent may be prescribed by regulations or court. Consent must state that it is freely and voluntarily given and effects of consent and adoption have been fully explained and understood. For valid consent person to be adopted must be at least 14 days old at time of execution of consent. Consent may be effectively withdrawn within 14 days of giving it by written statement to person to whom it was given and Director.

Court may dispense with consent (except consent of child where required and Director) where satisfied that (a) person does not have clear entitlement to give consent; (b) person cannot competently make decision to consent; (c) person does not wish to exercise entitlement to consent; (d) person has not demonstrated responsibility or clear intention to contribute to care and well-being of child; (e) person cannot be contacted, despite reasonable efforts; or (f) best interests of child should override entitlement to consent.

Placement.

No one may place child for adoption except Director of Child Welfare, agency approved by Director and person holding license/permit. No one may receive child except from foregoing. Person placing child must comply with standards prescribed by regulations. No child may be placed out-of-province except with permission of Director. Director must be notified of all placements with particulars. Person placing child must provide summary of nonidentifying information on child's background. Parents (birth and adoptive) may arrange for continuing contact but only if recorded in formal written agreement, reached after parties have had independent legal advice and copy deposited with Director. During period between placement and adoption order custody is with receiving persons. It is offence to receive payment or reward for procuring or assisting in procuring placement.

Director may enter into agreement in prescribed form with parent of child transferring to Director all of rights and obligations of parent as custodian and guardian of child for period specified in agreement. This temporary agreement may only last for three months and parent retains his or her right to give or withhold his or her consent to adoption of child.

Director may also enter into agreement for permanent custody and guardianship of child. All rights and obligations of parent with respect to child are extinguished and Director has all rights to custody and guardianship of child, including right to give or withhold consent to adoption of child. Parent of child may terminate this agreement within 14 days after parent signed agreement.

Conditions Precedent.

Adopted person must have been placed with applicant at least three months before application unless authorized by Director, agency or court or applicant is stepparent.

Jurisdiction.

Supreme Court Trial Division makes adoption order. Court must hear application at least three months after application submitted.

Application For Adoption.

Subject to court order, application must include (a)(i) birth certificate, or (ii) where required to keep surname or parentage of child secret, then (A) number of birth registration, given name, sex, date and place of birth, and (B) sealed and not disclosed to applicant, certified copy of or extract from birth record, permitting identification of surname or parentage; (b) marriage certificate for joint applicants; (c) decrees of divorce where either applicant or parent divorced; (d) agreement or court order regarding custody or guardianship of child; (e) information about applicant, including name, age, marital status and relationship to child; (f) description of placement circumstances and length of time in placement; (g) consents required; (h) agreement about continuing contact; (i) statement by Director that all applicable replacement requirements set by Act and regulations appear to have been met; (j) such other information or documentation as may be prescribed by Regulations or required by court.

Director of Child Welfare.

Administers Adoption Act S.P.E.I. 1992 Cap-1. Exercises standards/control to protect rights of those involved in placements/adoptions. Provides authorizations, permissions and consents required by Act. Assists applicants, appears and may be heard on court applications. Prepares pre-hearing study where required.

Proceedings.

Hearing is in private. Persons having interest are entitled to be heard. Court must inquire into child's capacity to understand application and consider child's views.

Decree.

Court issues Adoption Order.

Name.

Where child's previous identity or parentage has been kept secret, adoption order may not show previous name but rather child's given name followed by number or code referring to child's birth registration. Adoption order shall show surname child is to have. Child must consent to surname if over 12 and subject to consultation by court if under 12.

Effect of Adoption.

Notwithstanding hereditary, social, emotional and other forms of relationships, adoption order has effect as follows: (a) for all purposes of law, adopted child becomes child of adopting parent and adopting parent becomes parent of adopted child; (b) for all purposes of law, adopted person ceases to be child of person who was parent prior to adoption order, except that parent who is spouse of adopting parent continues to be parent; (c) previous relationships to other relatives prior to adoption cease and new relationships have effect on date of adoption order in accordance with relationships of adopting parent. In will, conveyance or other such document whether make of will or document is alive, reference to person or group or class of persons described in terms of relationship by blood or marriage to another person is deemed to refer to or include person who comes within description as result of adoption, unless contrary is expressed. Adoption order does not affect interest in property that has vested before order made.

Records.

Adopted Children Register kept by Director of Child Welfare records adoptions. Records and documents of Director, agency or court re: placement/adoption are confidential and kept secure. Information may not be disclosed except where Act provides or court orders. Director, agency or Director of Vital Statistics may allow access or disclosure of information for purposes of genealogical/historical research if all parties to adoption have been deceased for at least 20 years and there is no reason to believe that access or disclosure will be harmful to other living persons.

Disclosure Nonidentifying Information.

Agency, person who places child, Director of Child Welfare or court may provide to any party to placement/adoption information concerning background of child adopted, except in case where secrecy is kept under Act, any information which would establish child's previous identity or parentage. Director, agency or person who placed child or court may provide to health professional health-related information concerning child for purposes of child's care.

Disclosure Identifying Information-Reunion.

Director of Child Welfare shall keep reciprocal Search Register for purpose of matching and assisting persons who have significant relationships affected by adoption and valid reason to seek information or make connection. Adult shall apply as regulations prescribe or Director requires naming person sought. If there is match Director shall (a) inform each party of match; (b) attempt to ensure that adoptive parent informed; (c) provide for exchange of current nonidentifying information; (d) determine whether there is mutual agreement to proceed further. If there is mutual agreement, Director shall provide further information, including identity and if jointly wanted facilitate meeting of parties. If either party requests discontinuance of process, Director shall not proceed. If Director considers provision of information or contact between parties is likely to reveal identity of birth parent against their probable wishes, Director shall obtain approval of birth parent before proceeding. Notwithstanding foregoing if Director believes that approval of birth parent insignificant to action on request or not feasible to obtain, Director may decide to act on match.

Adult adopted person seeking identity of or identifying information concerning or to make contact with birth parent or sibling of that person, shall make request to Director/agency. Director/agency shall attempt to ensure adoptive parents are consulted concerning search. Director/agency shall search records pertaining to placement/adoption and ascertain requested information and make contact on confidential basis with person about whom request made. If person contacted gives permission, Director/agency shall release to person making request identity or information requested and if person making request wishes contact, arrange contact between parties. If Director/agency cannot contact person about whom request made, of if person is found to be incompetent to give permission, Director/agency may, considering wishes of person making request and probable wishes or interests of person sought, and reasons therefor, decide on whether to provide requested information. If person about whom request was made deceased, Director/agency shall provide person making request with requested information unless reason to believe that significant harm would result. Director/agency may refuse to disclose identifying information or facilitate reunion if determined that it is not feasible to do or that it would be likely to have harmful results for persons involved in placement/adoption. Where person about whom request was made is contacted but unwilling to have identifying information released or contact arranged with person making request, Director/agency shall not proceed.

Adopted person who is minor, with written consent of parent or guardian of minor, or parent or guardian with written consent of minor, may apply if Director or agency believes that result is significant to health or well-being of adopted person. If person fails to obtain consent required that person may apply and application may be acted upon if Director determines that consent cannot practically be obtained or unreasonably withheld and adopted person would suffer seriously harmful consequences if action not taken.

Intercountry Adoption (Hague Convention) Act.

Convention in effect since July 14, 1994, S.P.E.I. 1994, c. 28.

14.02 DIVORCE:

See Canada Law Digest. Procedure regulated by Rules of Supreme Court. Grounds for divorce governed by Laws of Canada.

Apart from grounds for divorce stated in Canada Law Digest, there may be a decree of judicial separation or divorce from bed and board under authority of Provincial Statute (5th William IV) and amendments thereto in so far as that statute was not repealed by Dominion Act. There may also be a decree of nullity which is not covered by Dominion legislation.

See topic Husband and Wife for division of spousal property.

14.03 GUARDIAN AND WARD:

Provision is made for appointment of guardians for infants in proper cases.

A parent or next of kin may assign all rights of guardianship over infants, to be binding on them until 18 years of age. Committees and managers or orphans' homes or other charitable institutions having care of orphans may transfer all rights of guardianship over any orphans under their care, and transferee is bound to fulfill all duties imposed by laws on a parent or guardian.

14.04 HUSBAND AND WIFE:

Status.

For all purposes of law, married person has legal personality that is independent, separate and distinct from that of spouse. Married person has legal capacity for all purposes as if unmarried, and has right of action in tort against spouse. Spouse defined by Family Law Act, Cap. F-3, as either man and woman who are married to each other or have entered into void or voidable marriage in good faith on part of person asserting right. Marriage that is actually or potentially polygamous is valid for Act purposes if celebrated in jurisdiction where it is valid.

Act provides for deferred community of property system. During marriage, net family property owned by spouse with title. Net family property defined as value of all property, including income from property, that spouse owns on valuation date (see below), after deducting spouse's debts/disabilities on valuation date, value of property spouse owned on marriage date less spouse's debts/liabilities on marriage and value of following property acquired by spouse after marriage and owned by spouse on valuation date: (1) property acquired by gift or inheritance from third person; (2) damages or right to damages for personal injuries, nervous shock, mental distress, or loss of guidance, care and companionship, or settlement representing those damages; (3) proceeds of contract of life, accident or sickness insurance policies; (4) property into which property referred to in (1) to (3) can be traced; (5) any property excluded by domestic contract between spouses. Onus of proving deduction from net family property is on party claiming it. Each spouse makes separate calculation. Property means any interest, present or future, vested or contingent, in real or personal property and includes property over which, whether alone or in conjunction with another person, there is power of appointment exercisable in favour of himself or herself, property disposed of by spouse but over which spouse has power to revoke disposition or disposal of property, and pension benefits whether vested or not. All net family property of spouses is valued on earliest of following valuation dates: (1) date of separation; (2) date divorce granted; (3) date marriage declared nullity; (4) date spouse commenced action for improvident depletion of property which is subsequently granted. Upon valuation date, spouse whose net family property is lesser of two net family properties is entitled to one half of difference between them. Court has discretion to vary equalization of net family property if equalization would be inequitable because of substantial change after valuation date in value of property included as net family or if equalization would be unconscionable given: (1) one spouse's failure to disclose to other spouse debts and liabilities existing at date of marriage; (2) one spouse incurred debts recklessly or in bad faith thereby reducing net family property; (3) part of value of net family property consists of gifts from other spouse; (4) spouse's intentional or reckless depletion of net family property; (5) amount spouse would receive is disproportionately large in relation to period of cohabitation less than five years; (6) one spouse has incurred disproportionately larger amount of debts and liabilities than other spouse for support of family; (7) written agreement between spouses that is not domestic contract; or (8) any other circumstance relating to acquisition, disposition, preservation, maintenance, improvement, deterioration, destruction, division or transfer of property.

Spouses have equal rights of possession of family home regardless of who holds title, as against each other. Family home is property in which person has interest and is, or if spouses are separated, was at time of separation ordinarily occupied by person and spouse as family residence. Court can make order for exclusive possession of family home taking into account, among other things, best interests of children affected, financial position of both spouses, availability of other suitable and affordable accommodation, any written agreement between parties and violence committed against one spouse. Property can be designated by registered instrument as family home by one spouse or both spouses. If only one spouse registers designation, any other property qualifying as family home remains family home. If both spouses register designation, any other undesignated family home ceases to be family home. No spouse may dispose of or encumber any interest in family home without consent or release of other spouses or court order. Affidavit by person making disposition or encumbrances, or by person's attorney based on personal knowledge, that person is not spouse or that property is not family home is sufficient proof of such unless person to whom disposition or encumbrance is made has notice to contrary. Spouse with right to possession of family home has right to redeem or to relief against encumbrancers and is entitled to notice respecting claim and its enforcement or realization.

Issues of ownership of property between husband and wife are governed by rule of resulting trust except that property taken in name of spouses as joint tenants is prima facie proof of intent that each spouse has one-half beneficial interest on severance, and money on deposit in bank or similar financial institution in name of both spouses is deemed to be held by them as joint tenants. Spouse not entitled to equitable remedy, including constructive trust, with respect to property owned by his or her spouse as restitution for contribution to acquisition, maintenance, preservation or improvement of property. Spouse not entitled to equitable remedy, including resulting trust, with respect to property owned by his or her spouse based on common or presumed intention of spouses regarding his or her contribution to acquisition, maintenance, preservation or improvement of property.

Support Obligations.

Every spouse or common law partner has obligation to provide support for self and other spouse or common law partner, in accordance with need, to extent that he or she is capable of doing so. For support purposes, “spouse” means either man or woman who: (i) Are married to each other; or (ii) have entered into marriage that is voidable or void, in good faith on part of person asserting right under this Act; “common law partner” means either of two persons who have cohabited outside marriage: (i) Continuously for period of not less than three years; or (ii) in relationship of some permanence, if they are natural or adoptive parents of child. Spouse, common law partner, dependent, or social welfare agency making payments to spouse or common law partner may apply to court for support order against other spouse or common law partner. Support order for spouse or common law partner should: (a) Recognize any economic advantages or disadvantages to spouses arising from relationship or its breakdown; (b) apportion between spouses or common law partners any financial consequences arising from care of child of relationship over and above obligation apportioned between spouses or common law partners; (c) relieve any economic hardship of spouses or common law partners arising from breakdown of relationship; and (d) promote economic self sufficiency of each spouse or common law partner within reasonable amount of time. Support order for child should: (a) Recognize that parents have joint financial obligation to maintain child; and (b) apportion that obligation between parents according to abilities to contribute to performance of obligations. Factors court considers in awarding support are set out. Conduct of either spouse or common law partner has no effect on obligation to support. Court may make support order for periodic payments or lump sum, vary support order and index support order. Support order binding on estate. While cohabiting spouse or common law partner may pledge credit of self and other spouse or common law partner jointly for necessaries except where express withdrawal of authority by other spouse or common law partner.

Interjurisdictional Support Orders Act (Cap. I-4.2) provides that support claims or support variation claims may be made in province resulting in support order being made in reciprocating jurisdiction or may be made from reciprocating jurisdiction resulting in support order being made in province. Statute also allows for registration and enforcement of extra-provincial and foreign support orders.

Domestic Contracts.

Family Law Act provides for domestic contracts which are parental agreements, separation agreements, marriage contracts, cohabitation agreements and domestic contracts. Domestic contracts (marriage contract, separation agreement or cohabitation agreement) must be written, signed by both parties and witnessed. Any agreement affecting children is subject to court determination of best interests of children. Provisions requiring party to remain chaste are void. Domestic contracts may be set aside as unconscionable if one party failed to disclose significant assets, debts or other liabilities to other when contract entered, if one party did not understand nature or consequences of contract, or otherwise in accordance with law of contract. Party to domestic contract may file it with court and court may enforce it.

Marriage Contracts.

Husband and wife may enter marriage contract before or during their marriage agreeing on their respective rights and obligations under marriage, or on separation, annulment or dissolution of marriage, or upon death, including ownership in or division of property, support obligations, education and moral training of child and any other matter in settlement of their affairs except custody or access to children. No such agreement may alter rights of equal possession in family home.

Cohabitation Agreement.

Man and woman who are cohabiting or intend to cohabit and who are not married to each other, may enter into agreement in which they agree on their respective rights and obligations during cohabitation, or on ceasing to cohabit or on death, regarding same matters as marriage contracts. Cohabitation agreement deemed to be marriage contract upon marriage of parties to cohabitation agreement.

Parental Agreements.

Man and woman who are not spouses may agree on payment of expenses of child's prenatal care and birth, support of child or funeral expense of child or mother. Agreement may be incorporated in court order and enforced.

Actions.

Each spouse has like right of action in tort against other as if not married.

See also categories 9 Dispute Resolution, topic Alternative Dispute Resolution; Estates and Trusts, topic Death, subhead Action for Death.

14.05 INFANTS:

Age of majority is 18. (Age of Majority Act, Cap. A-8). No statutory exceptions to age of majority.

All persons under 18 are incapable of making valid contracts or conveyances. But their marriage contract and their contract to pay for necessaries purchased is good. On coming of age may ratify a contract previously entered into.

Questions relating to custody of infants are determined by Supreme Court. By statute, father and mother of infant are joint guardians and are equally entitled to custody, control and education of infant. Custody Jurisdiction and Enforcement Act allows for greater recognition and easier enforcement of extra-provincial custody orders.

Adoption.

See topic 14.01 Adoption.

Termination of Parental Rights.

By Family and Child Services Act, Cap. F-2 state may intervene in family relations, apprehend child and through court order sever parent/child relationship forever where level of care of child falls below standards acceptable by members of society.

Tobacco Sales to Minors.

No person shall sell to, or purchase for use of, minor (under 19 for this purpose), tobacco. Fines for offenders range from $2,000 to $10,000 to loss of vendor's license.

14.06 MARRIAGE:

Marriage of a person under 16 years of age is forbidden except in case of a female who is either pregnant or mother of a living child, and consent of parents or guardian is obtained. If either of applicants under age of 18 years, license will not be issued unless consent of parents or guardian of such applicant is obtained. In certain circumstances, consent may be dispensed with by order of Supreme Court Judge.

Consent Required.

Consents required are stated above; consent is evidenced by writing in form of affidavit of consenting parent or guardian. Such affidavit is filed with licencing officer.

Medical Examination.

Not required.

License.

Marriage licenses are issued by a person appointed by Lieutenant-Governor in Council, known as an “Issuer.” Both parties must apply for license and must appear in person before licencing officer; in case of divorced applicant, license will not be issued until 14 days after date of final decree, and applicant must furnish certificate that no appeal has been taken against final decree or that where there is an appeal, it has been disposed of; in ordinary cases, there is a waiting period of five days from filing of all necessary affidavits and certificates, and date of issue of marriage certificate.

Waiting Period.

None.

Ceremonial Marriage.

No person is authorized to solemnize marriage except Supreme Court judge, prothonotary or deputy prothonotary of Supreme Court, marriage commissioner, or "registered clergyman." Director of Vital Statistics maintains record showing name and religious affiliation of every registered clergyman. Marriage may not be solemnized except under authority of marriage license, and within three months of date of license, and in presence of parties and at least two credible adult witnesses.

Report of Marriages.

Every issuer of marriage licenses must keep a record of licenses which he has issued and any persons may have a search made of any license issued. Record of marriages is kept in Department of Vital Statistics.

Record.

See category 10 Documents and Records, topic 10.05 Records.

Common law marriages are recognized for certain purposes, but not for division of family property. Common law marriage exists where man and woman are cohabiting for period of not less than three years, or in relationship of some permanence if they are natural or adoptive parents of child.

Common Law Partners.

See topic 14.04 Husband and Wife, subhead Support Obligations.

Proxy marriages are not authorized.

Marriages by written contract not authorized.

Prohibited Marriages.

Marriages between persons who are insane, or mentally ill, are prohibited. Pursuant to Regulations published under authority of Marriage Act (Cap. M-3), following are degrees of affinity and consanguinity which, under statutes in that behalf, bar lawful solemnization of marriage: Man may not marry his: grandmother, grandfather's wife, wife's grandmother, aunt, uncle's wife, wife's aunt, mother, stepmother, wife's mother, daughter, wife's daughter, son's wife, sister, granddaughter, grandson's wife, wife's granddaughter, niece, nephew's wife, wife's niece or brother's wife; woman may not marry her: grandfather, grandmother's husband, husband's grandfather, uncle, aunt's husband, husband's uncle, father, stepfather, husband's father, son, husband's son, daughter's husband, brother, grandson, granddaughter's husband, husband's grandson, nephew, niece's husband, husband's nephew or husband's brother.

Relationships set forth include all such relationships whether by whole or half blood, and whether legitimate or illegitimate.

However, by Revised Statutes of Canada, 1985, M-5, §2, it is enacted that "A marriage is not invalid merely because the woman is a sister of a deceased wife of the man, or a daughter of a sister or brother of a deceased wife of the man."

Also, by Revised Statutes of Canada, 1985, M-5, §3, it is enacted that "A marriage is not invalid merely because the man is a brother of a deceased husband of the woman or a son of a brother or sister of a deceased husband of the woman."

Prohibited marriages are void. Children of prohibited marriages are illegitimate.

Foreign Marriages.

Any form of marriage is recognized if valid according to domicile of parties and jurisdiction where ceremony was performed.

Annulment.

Supreme Court may annul a marriage on grounds of impotence or kindred within degrees prohibited by statute. Such marriage is voidable upon application to court during life of parties, but cannot be questioned after death of either.

14.07 MARRIED WOMEN:

See topics 14.04 Husband and Wife, Marriage; categories 5 Civil Actions and Procedure, topic Evidence, subhead Witnesses; Documents and Records, topic Acknowledgments; Property, topic Dower.

15 HEALTH

15.01 DRUGS AND COSMETICS:

Manufacturing, packaging, labeling, possession and sale of drugs is regulated by federal statutes.

15.02 PUBLIC HEALTH:

Adult Protection Act (Cap. A-5) permits governmental authorities to intervene to protect adult unable to protect himself against neglect or abuse that could cause serious harm.

Consent to Treatment and Health Care Directives Act, (S.P.E.I. 1996, Cap. C-17.2) allows appointment of proxy to make health care decisions on behalf of another pursuant to written health care directive subject to certain statutory exceptions.

Mental Health Act (Cap. M-6.1) provides for involuntary commitment and treatment of persons suffering from mental disorder.

Public Trustee Act (Cap. P-32.2) allows for appointment of Public Trustee or other person to administer property of incompetent person.

Health and Community Services Reorganization Act, (Cap. H-1.2) provides for delivery of health and community services.

Social Assistance Act, Cap. S-4.3 provides for monetary assistance to those who qualify.

Public Health Act, (Cap. P-30) is enforced by Chief Health Officer overseeing issues including Quarantine Orders, Products for Human Consumption, Communicable Diseases, Emergency Disaster Relief, Emergency Medical Services, Health Hazards from Buildings, Water Treatment and Inspection and Licencing of Commercial Establishments.

Pharmaceutical Information Act, (Cap. P-5.2) authorizes creation of provincial pharmacy network and database known as Pharmaceutical Information Program. Statute section authorizing associated regulations awaiting proclamation to come into force.

Child Protection Act (Cap. C-5.1) permits governmental authorities to intervene to protect children from harm due to abuse and neglect.

Community Care Facilities and Nursing Homes Act (Cap. C-13) establishes corporate board tasked to ensure provision in facilities of accommodation, care services and nursing services are safe, of good quality and appropriate to needs of residents.

Community Hospital Authorities Act (Cap. C-13.1) allows for creation of community hospital boards tasked with planning, organization, management, and delivery of health services for listed community hospitals.

Drug Cost Assistance Act (Cap. D-14) provides for establishment of drug cost assistance plan for purpose of assisting eligible persons in meeting cost of necessary benefits.

Health Services Act (Cap. H-1.5) outlines discretionary powers of Minister with respect to governing administration of health services.

Hospitals Act (Cap. H-10.1) provides for creation of regulations and bylaws with respect to administration of hospitals.

15.03 SMOKING REGULATIONS:

Smoke Free Places Act, (Cap. S-4.2) regulates smoking in “public places” and “workplaces” as defined by Act. Limited exceptions for designated smoking areas with associated duties of compliance imposed upon owners and employers. Statutory enforcement by provincial inspectors. Smoking prohibited in all federal buildings.

See also Tobacco Sales and Access Act (Cap. T-3.1).

16 IMMIGRATION

16.01 ALIENS:

Aliens may hold, transmit by descent or convey real and personal property, subject to same limitations set forth under category Property, topic Real Property, subhead Ownership. They are not eligible for public office.

17 INSURANCE

17.01 INSURANCE COMPANIES:

Regulated by Insurance Act, Cap. I-4.

Supervision by Superintendent of Insurance, Office of the Attorney General.

Rates for automobile insurance regulated by Island Regulatory & Appeals Commission (IRAC) under Insurance Act.

Annual statements filed with Superintendent of Insurance.

Discrimination prohibited by regulations made pursuant to Insurance Act.

Regulation of agents and brokers is covered under Insurance Act. Potential insurance agents must pass provincial examination; upon passing, applicant must apply for certificate of authority under Insurance Act which includes sponsorship by insurance company licensed under Insurance Act and payment of licensing fee of $200.

Insurance companies are subject to general corporation law and to certain license fees. (See category 23 Taxation, topic 23.04 Corporate Taxes, subhead Corporation License Taxes.) Special provisions are made by Insurance Act with respect to life, accident, fire and other insurance.

Direct Actions Against Insurer.

See category 24 Transportation, topic 24.03 Motor Vehicles, subhead Direct Actions.

Plain Language.

See category 3 Business Regulation and Commerce, topic 3.21 Sales, subhead Consumer Protection Legislation.

17.02 SURETY AND GUARANTY COMPANIES:

Surety and guaranty companies are allowed to sign the bonds of public and municipal officials and surety bonds required from their servants by corporations, banks, etc., and also to be taken as surety on bonds required by the courts to be filed in various cases, provided they are authorized under the law of the province or state where incorporated.

They must comply with the laws of this province respecting corporations, and must have a paid up capital of at least $250,000, and good available assets exceeding their liabilities, and a premium reserve at the rate of 50% of the current annual premium on outstanding bonds. They must file with Director of Corporations application to do business, and each year file statement under oath of their paid up capital with full particulars, and amount of annual premiums and of outstanding obligations. They must appoint attorney here upon whom process may be served. Upon complying with these requirements Director of Corporations will issue certificate permitting company to do business for ensuing year. There is license fee of $200 per year.

18 INTELLECTUAL PROPERTY

18.01 PATENTS:

See Canada Law Digest.

18.02 TRADEMARKS AND TRADENAMES:

See category 2 Business Organizations, topic 2.05 Partnerships, and Canada Law Digest.

Tradenames.

Every person engaged in business not associated in partnership with another person who uses as his business style some name or designation other than his own name or who in such business uses his own name with addition of “and Company” or some other word or phrase indicating a plurality of members shall cause to be filed statutory declaration of fact in writing signed by such person. Declaration must contain name, surname and residence of person and name, style or firm name under which he carries on or intends to carry on business. Declaration filed in Office of Director of Corporations; filing fee $50.

19 LEGAL PROFESSION

19.01 ATTORNEYS AND COUNSELORS:

Attorneys and counselors are known as barristers and solicitors in Prince Edward Island. Every solicitor is also a barrister. Legal profession is governed by Legal Profession Act (Cap. L-6.1).

Eligibility.

Person seeking to be admitted to bar must comply with requirements as prescribed by Law Society of Prince Edward Island.

Barristers or solicitors from other jurisdictions, who are members of governing body of legal profession of another province or territory in Canada, may apply for admission if they hold common law degree from Canadian law school or its equivalent, are Canadian citizens or permanent residents of Canada and of age of 18 years, have been examined by Board of Examiners, have passed in-province component of Bar examinations, have filed prescribed certificates, have completed prescribed forms and paid required fees.

Barristers or solicitors from jurisdictions party to National Mobility Agreement must fulfill all of requirements for admission or transfer from another Canadian jurisdiction as set out above except they need not pass transfer examinations nor in-province component of Bar Admission Course. To qualify for admission, applicant pursuant to National Mobility Agreement must certify that he or she is familiar with PEI law.

Regulations of Law Society of Prince Edward Island further provide for eligibility requirements for individuals holding law degrees obtained in British Commonwealth (other than Canada), any state in U.S.A., or holding Canadian Civil law degree. (Reg. 17).

Registration as law student not required (except as hereinafter stated).

Educational Requirements and Clerkship.

Applicant for admission must hold degree in law from law school recognized by Society, must serve term of articles under practicing barrister qualified to engage articled clerk of no less than 12 months and must complete prescribed bar admissions course. Barrister and solicitor who has been in active practice in another Province of Canada (except Quebec) for at least three years of previous ten years, must serve term of articles of six months. Barrister and solicitor from other provinces who has been in active practice for at least five years of previous seven years, may be approved for admission if successfully examined in statutes, procedures and practices of Prince Edward Island law. Further details available from Secretary of Law Society of Prince Edward Island in Charlottetown.

Licenses.

No barrister may practice without holding an annual certificate which is in force. Fee for such certificate is as Council of the Law Society from time to time prescribes, and every such certificate expires on last day of June of each year.

Rights and Powers.

Barristers are entitled to practice in all courts in Prince Edward Island and in Supreme Court of Canada. Barristers become notaries upon obtaining, without cost, a commission from Lieutenant-Governor.

Solicitors are empowered to take acknowledgments of deeds.

Occasional Appearances.

Subject to compliance with regulations barrister/solicitor of another Canadian jurisdiction may act or appear as attorney in a matter.

Lien.

Solicitor has lien on documents in his possession for charges for his professional services. Lien extends to property recovered or preserved as result of proceeding.

Suspension and Disbarment.

Barrister and solicitor may be suspended for nonpayment of annual fees, and cannot practice during suspension. Barristers are liable to be struck off rolls or suspended for misconduct.

Unauthorized Practice.

No corporation may practice law. Fine not exceeding $20,000 for violation by corporation and not exceeding $2,000 for violation by nonmember. No person not member of bar may practice.

Professional Association.

There is no statutory authorization for formation of Professional Associations by lawyers, except that Law Society of Prince Edward Island which governs conduct of its own members.

20 MINERAL, WATER AND FISHING RIGHTS

20.01 MINES AND MINERALS:

There are no mines in this province, but provisions are made by statute for granting of licenses to search for oil and natural gas and granting of leases subject to royalty. Provisions are also made by statute governing minerals other than oil and natural gas. (Oil and Natural Gas Act, Cap. O-5).

21 MORTGAGES

21.01 CHATTEL MORTGAGES:

See topic 21.04 Personal Property Security.

21.02 COLLATERAL SECURITY:

See category 21 Mortgages, topic 21.04 Personal Property Security.

21.03 MORTGAGES OF REAL PROPERTY:

Mortgages must be signed, sealed and delivered, as deeds. May be released as to part of mortgaged property by mortgagee executing deed of release to which the mortgagor is also a party. Restriction placed on ability to encumber matrimonial home. See category 14 Family, topic 14.04 Husband and Wife.

When the mortgage money is wholly paid, all that is necessary is for the mortgagee to sign a certificate of satisfaction in the form provided by statute.

The usual mode of foreclosure is by sale under power contained in mortgage after giving notice for time and in manner specified in mortgage.

21.04 PERSONAL PROPERTY SECURITY:

Secured transactions are governed by Personal Property Security Act (Cap. P-3.1). Historic forms and concepts of security agreements are discarded and single conceptual basis for all personal property security agreements is employed. Prior registrations under Assignment of Book Debts Act, Bills of Sale Act, Conditional Sales Act, Corporation Securities Registration Act expired Apr. 27, 2001 unless continued under PPSA prior to that date.

PPSA applies to every transaction without regard to its form and without regard to person who has title to collateral, that in substance creates security interest, including chattel mortgage, conditional sale, floating charge, pledge, debenture, trust indenture or trust receipt, lease, assignment, consignment or transfer of chattel paper, and, additionally, to assignment of accounts, transfer of chattel paper, consignment, or lease for term of more than one year, notwithstanding that such interests may not secure payment or performance of obligation. PPSA does not apply to statutory or nonconsensual liens, security interests governed by Federal statutes such as Bank Act §§427 and 428 and Shipping Act, creation or transfer of interest or claim in or under any contract of annuity or policy of insurance that is not indemnity or compensation for loss or damage to collateral, creation or transfer of interests in land, assignments for general benefit of creditors pursuant to Federal statute relating to insolvency, creation or transfers of interests in rights to payment under interests in land, creation or transfer of interests in present or future compensation for labour or personal services, creation or transfer of interests in tort damages. PPSA also applies to “corporation securities”.

Conflict of Laws.

Basic premise is that law of jurisdiction where collateral is situated when security interest attaches is applicable law for determining validity, perfection and effect of perfection or nonperfection of security interest in such collateral. For intangibles, property normally used in more than one jurisdiction and non-possessory security interests in securities, instruments, negotiable documents of title, money and chattel paper, law of jurisdiction where debtor is located when security interest attaches, governs. Debtor is deemed to be located at place of business, at chief executive office if debtor has more than one place of business and otherwise at place of residence. For goods brought into Prince Edward Island, distinction is made between buyer in good faith of goods brought into province and all other persons. Security interest in collateral already perfected under law of place in which collateral situated when security interest attached and before being brought into Prince Edward Island continues perfected in Prince Edward Island as against buyer in good faith if perfected in Prince Edward Island prior to buyer's acquiring interest in goods and as against all other persons within 60 days after brought into province, or within 15 days after day secured party has knowledge that goods have been brought into Prince Edward Island, or prior to day that perfection ceases under law of prior jurisdiction, whichever is earliest.

Transitional.

Registration under repealed or amended Acts is deemed to be registration under PPSA. Question as to priority between security interests validly created prior to coming into force is determined by prior registration law, but priority between prior security interest and security interest validly created after proclamation shall be determined by PPSA.

Effectiveness.

Security agreement is effective according to its terms. However, certain terms are prohibited or may be unenforceable. Acceleration clauses are only effective if secured party, in good faith, believes and has commercially reasonable grounds to believe that payment is not going to be made or that collateral is about to be placed in jeopardy.

Enforceability.

No security interest is enforceable against third party unless collateral is in possession of secured party or debtor has signed security agreement that contains description of collateral by item or kind, or by reference to one or more of specific seven defined terms comprising personal property under Act, or statement that security interest is taken in all of debtor's present and after acquired personal property, or statement that security interest is taken in all of debtor's present and after acquired property except specified items or kinds of personal property.

Attachment.

Security interest attaches when value is given, debtor has rights in collateral and, except for purpose of enforcing rights between parties, it becomes enforceable against third parties. Debtor has rights in goods purchased under agreement to sell when contract is made and he obtains possession of them, and in goods leased to him, hired by him or delivered to him under consignment, when he obtains possession of them pursuant to lease, hiring agreements or consignment. Debtor has no rights in crops until they become growing crops, young of animals until they are conceived, in oil, gas or other minerals until extracted, in timber until it is cut.

After-acquired Property.

Security agreement may cover after-acquired property and security interest will attach without specific appropriation by debtor.

Future Advances.

Security agreement may secure future advances, which means advances whether or not made pursuant to obligation and includes reasonable costs incurred for protection, maintenance or repair of collateral. If advances are made while security interest is perfected, security interest has same priority with respect to future advances as it has with respect to first advance.

Perfection.

Security interest is perfected when it has attached and all steps required for perfection required under Act have been completed regardless of order of occurrence. Three methods of perfection are: possession of collateral by secured party or on his behalf; registration of financing statement in Personal Property Registry; and temporary perfection in accordance with certain rules.

PPSA also provides specific rules as to perfection with respect to proceeds of collateral. Security interest in collateral extends to proceeds and is perfected if financing statement filed which covered original collateral contains prescribed description, or if proceeds are of type which fall within description of original collateral, or are cash; then, registration perfects security interest in both collateral and in proceeds. Otherwise, security interest in proceeds perfected for only 15 days after debtor receives possession of them.

Purchase money security interest in intangible that is perfected within 15 days after security interest therein attaches, has priority over any other security interest in same collateral given by same debtor.

Purchase money security interest in collateral or its proceeds, other than intangibles or inventory, that is perfected within 15 days after debtor or another person at request of debtor obtains possession of collateral, or its proceeds, has priority over any other security interest in same collateral given by same debtor.

Purchase money security interest in inventory or its proceeds has priority over any other security interest in same collateral given by same debtor if purchase-money security interest in inventory is perfected at time debtor receives possession of it and purchase-money secured party serves notice on secured party who has registered financing statement covering same type of collateral. Exception with respect to sales in ordinary course of business and by virtue of fact that purchase-money security interest in proceeds of inventory does not have priority over prior perfected security interest in accounts receivable given for new value.

Purchaser of goods sold in ordinary course of business of seller takes free of any perfected or unperfected security interest therein given by or reserved against seller, whether or not purchaser knows of it, unless secured party proves that purchaser also knows that sale constitutes breach of security agreement.

Registration.

All registrations under PPSA take place at Personal Property Registry.

Registration of financing statement is effective for length of time indicated in financing statement and may be renewed at any time before document to which it refers expires by registering financing change statement.

Where secured party assigns his interest or subordinates his interest to that of another person, financing change statement in prescribed form may be registered. Registration of such statement is mandatory where debtor transfers his interest in collateral or changes his name.

Search for registrations against name of debtor or against serial number where collateral required by regulation to be described by serial number (i.e. motor vehicles, mobile homes, trailers and airplanes, as defined in regulations) may be obtained, with results given in printed or verbal form.

Time for Registration.

Financing statement may be registered at any time and may be registered before security agreement is made or before security interest attaches. It must be registered prior to expiry of any temporary perfection period (usually 15 days) to continue perfection uninterrupted, and with respect to purchase-money security interest, within 15 days of debtor obtaining possession of collateral.

Rights and Remedies Upon Default.

Part V contains code setting out rights, remedies, duties and obligations upon both secured party and debtor many of which, to extent that they give rights to debtor or impose obligation upon secured party, cannot be waived.

22 PROPERTY

22.01 ABSENTEES:

There is no general statute respecting absentees or care of their property, but a judge may order payment and distribution of moneys in court to the credit of a person absent from the province and whose address or place of residence is unknown and who has not been heard of for seven years. Payment and distribution may be made to the persons who would be entitled to the personal property if the absentee has died intestate at time of application for distribution. See also category 13 Estates and Trusts, topic 13.03 Death.

22.02 ADVERSE POSSESSION:

Twenty years adverse possession bars recovery of land unless person entitled is under disability such as infancy, etc., or absent from the province, in which case action must be commenced within six years after disability removed.

Possession must be open, notorious, exclusive and continuous.

Title to easements (e.g., ways, light, air, lateral support, etc.) may be acquired by continuous and uninterrupted use and enjoyment for such period and under such circumstances as will result in implication of a lost grant.

22.03 CONVEYANCES:

See topic 22.05 Deeds.

22.04 CURTESY:

Curtesy is abolished, effective Dec. 31, 1978.

22.05 DEEDS:

Deeds of conveyance of real property are effective to pass the legal estate only when executed under seal. No more than one witness to execution of deed is necessary, unless deed is executed in pursuance of a power of appointment specially directing more than one witness to be necessary. Under Family Law Act, spouse must consent to transfer of property occupied as family residence (matrimonial home). (Family Law Act, Cap. F-2.1, §22). See category 14 Family, topic 14.04 Husband and Wife, subhead Status.

Recording required to give valid notice to third parties.

Forms: Short form of indenture, mortgage and lease. Specified under Real Property Act, R.S.P.E.I. 1988 Cap. R-3.

Registration.

To be effective against subsequent grantees or incumbrancers for valuable consideration without notice, deed must be registered in duplicate in office of registrar of deeds in county in which land is situated. Execution of deed must be proved before registry by acknowledgment of grantor or by oath of a witness before proper officer. See category 10 Documents and Records, topic 10.01 Acknowledgments.

Powers of attorney authorizing another to convey land must describe land to be conveyed with certainty.

Recording Fees.

Cost of registration of documents is as follows: (a) deeds and mortgages from $75 to $450 depending on consideration for transfer/mortgage; (b) satisfaction of mortgage $25; (c) any other documents $75.

22.06 DEEDS OF TRUST:

See categories 2 Business Organizations, topic Corporations; Mortgages, topics Chattel Mortgages, Mortgages of Real Property.

22.07 DOWER:

Dower is abolished effective Dec. 31, 1978, except in respect of right to dower that has vested before Dec. 31, 1978.

22.08 ESCHEAT:

See category 13 Estates and Trusts, topic 13.05 Descent and Distribution.

22.09 LANDLORD AND TENANT:

A lease for three years or less need not be under seal, or even in writing. A lease for more than three years is void at law unless made by deed under seal, although it may be effective as an agreement for a lease. A lease must be recorded or registered in order to protect lessee's interest against subsequent purchasers or mortgagees from lessor.

Tenant's assignee for creditors, or tenant company's liquidator in winding-up proceedings, may elect to retain leased premises for unexpired term of lease, or on payment of rent then due may assign lease if proposed assignee is approved by a judge of the Supreme Court.

For residential rental property increases of rent by landlord are governed by Rental of Residential Property Act, Cap. R-13.1.

Distress for Rent.

Arrears of rent for which distress may be made are limited to six years. The right of distress against goods and chattels which are claimed by a person other than the tenant by virtue of an execution against the tenant or by virtue of a purchase, gift, transfer or assignment from the tenant, whether absolute, in trust, by way of mortgage or otherwise, is limited to the rental due for one year in the case of rental terms of less than one year, and to the rental due for two years in all other cases.

Certain articles are exempt from distress.

Where the tenant makes an assignment for benefit of creditors or becomes bankrupt, or where a tenant corporation is being wound up under Winding-up Act, landlord's right to distrain or to continue distress proceedings ceases, but in distribution of tenant's property landlord has priority as to arrears or rent due at time of assignment or commencement of bankruptcy or winding-up proceedings equal to three terms or times of payment, if payments are due weekly, monthly or quarterly, or one year's rent if times of payment are more than three months apart, with costs of proceedings, if commenced.

Remedy of distress is abolished for residential tenancies.

Termination of Tenancy.

As regards residential tenancies, landlord-tenant relationship is one of contract and common law rules respecting effect of breach of material covenant and frustration, given statutory confirmation, apply. Tenant may terminate rental agreement by serving lessor Notice of Termination as prescribed by Rental of Residential Property Act, Cap. R-13.1. Notice for fixed terms is 60 days before expiry of term. For month to month and week to week, notice must be served on or before due date for rent payment. Landlord may not terminate rental agreement other than for cause as set out in Act. Cause includes nonpayment of rent; breach of statutory condition incorporated in rental agreement; damages to rental property; where lessor in good faith seeks to have possession of premises for himself or to convert premises for other than residential use; etc.

As regards commercial tenancies, subject to express agreement to contrary (in which case common law rules apply), landlord or tenant can statutorily terminate weekly, monthly and yearly tenancy, upon giving week's, month's and three months' notice respectively; six months' notice required in cases of agricultural land leased on yearly basis.

22.10 PERPETUITIES:

Period during which existence of a future estate or interest in any hereditament, right, profit, easement or other property, real or personal, may be suspended, and during which rents, revenues, profits or income thereof may be allowed to accumulate, in whole or in part, may extend to, but must not exceed, the life of a person or of the survivor of several persons born or en ventre sa mere at the time of the creation of the future estate or interest and ascertained for that purpose by the instrument creating the same, and 60 years, to be computed from the dropping of such life or lives and ascertained for that purpose by such instrument. Time of death of testator is deemed to be time of creation of estate or interest created by will, and time of execution of instrument creating power is deemed to be time of creation of estate or interest created by execution of a power not tantamount to absolute ownership.

22.11 POWERS OF ATTORNEY:

Attorneys in Fact.

Attorneys may be given power to do on behalf of donor anything donor can lawfully do. Power affecting real property must specify property and power registered in registry office. Power may be exercised during legal incapacity (save death) of donor if power so provides; execution of such power must be witnessed. Powers of Attorney Act (Cap. P-16) applies.

22.12 REAL PROPERTY:

All estates tail are abolished. Otherwise all estates recognized at common law are recognized in Prince Edward Island. Every estate granted to two or more persons in their own right is a joint tenancy unless expressly declared to be a tenancy in common; and every estate vested in trustees or executors as such is held by them in joint tenancy. No tenancy by the entirety.

Ownership.

By Lands Protection Act, Cap. L-5 nonresident person or corporation cannot acquire aggregate land holding (includes any interest whatsoever in real property except any parcel less than one acre situate in city or town existing on May 1, 1995 and except interest acquired by bank, financial institution or trust company in ordinary course of business as security for debt/obligation) in excess of five acres or having shore frontage in excess of 165 feet unless Lieutenant Governor in Council's permission is first given.

No person or corporation shall acquire aggregate land holding in excess of 1,000 and 3,000 acres respectively. Natural person's land holding includes land holdings of person's minor children and land holdings of corporation in which person or his minor children hold more than 5% issued and voting shares. Where person/corporation has aggregate land holding in violation of Act, Minister may by order require (a) reduction of land holding, (b) application for permit, (c) evidence of no violation. Failure to comply with order may result in Court Order (a) declaring null and void any document by which land holding is in violation of Act, (b) for sale of said land, (c) cancelling of registry record, (d) to return consideration for acquisition, (e) for possession of land, (f) to pay costs. Fines may be imposed up to $250,000 and two years jail for violation. Officer, director or agent of corporate violator who directed, authorized, assented to, acquiesced in or participated in offence, liable to same punishment.

By said Act, any person exceeding limit must by June 1, 1996 submit land holding disclosure statement to Island Regulatory and Appeals Commission and apply for permit to hold excessive land holding. Permit may allow excessive land holding subject to divestiture schedule for excess and other conditions.

Quieting Titles Act.

Persons claiming a property right in land may commence an application where land lies for a certificate of title or may join any other claim in which title to or right to possession of land is in issue.

Real Estate Agents.

No person shall within Province engage in or advertise himself as engaged in business of trading in real estate as an agent unless he holds a license under The Real Estate Trading Act. Business of trading in real estate includes: (1) Disposition or acquisition of or transaction in real estate by sale, purchase, agreement for sale, exchange, option, lease, rental or otherwise; (2) any offer or attempt to list real estate for purpose of any such disposition, acquisition or transaction; and, (3) any act, advertisement, conduct or negotiation, directly or indirectly, in furtherance of any such disposition, acquisition, transaction, offer or attempt.

Salesmen acting for real estate agents must also be licensed. Real estate agents must maintain permanent office in Province satisfactory to Registrar. Licenses are granted by Registrar upon application. Real estate agents must keep proper books and accounts at permanent office or any other place authorized by Registrar in writing. Real estate agents must maintain trust accounts in Province for every person from whom trust monies are received and must also maintain trust account in chartered bank, credit union or loan company in which all trust monies must be deposited. Act does not apply to any person acting under any statute of Canada or of Province, person acting under order of any court, administrator of estate or trustee selling under terms of will, marriage settlement or deed of trust, bank, loan trust or insurance company, person not ordinarily trading in real estate, or barrister of Supreme Court. Licenses are obtained annually and applicants for original license must provide bond in form prescribed by Act. Lieutenant-Governor-in-Council may from time to time make regulations for carrying out of provisions of this statute. Persons failing to comply with provisions of Act are guilty of offence and liable to fine not exceeding $1,000 for first offence and $2,000 for each subsequent offence.

Condominiums.

Permitted, Condominium Act, Cap. C-16.

See also topics 22.04 Curtesy, Deeds, Dower, Landlord and Tenant; categories 5 Civil Actions and Procedure, topic Partition; Documents and Records, topic Records; Family, topic Husband and Wife; Mortgages, topic Mortgages of Real Property.

23 TAXATION

23.01 ALCOHOL, BEVERAGES AND TOBACCO TAXES:

Alcoholic Beverages Tax.

Provincial health tax of 25%, goods and services tax of 5% and provincial sales tax of 10% is levied on retail prices of all intoxicating liquor sold by retail vendors.

Cigarette Tax.

Tax is imposed on price to consumer on all tobacco sold within Province. Every consumer of tobacco purchased at retail sale in Province must pay at following rates: (a) 19.95¢ per cigarette; (b) 71.6% of retail price of each cigar; (c) 16.01¢ on every gram or part thereof of tobacco, other than cigarettes or cigars, where mass of tobacco is expressed on package or container in metric measure; and (d) 19.95¢ per tobacco stick. (Tobacco Tax Act).

23.02 BUSINESS TAXES:

Provider Tax.

None.

23.03 CONTROLLED DANGEROUS SUBSTANCES TAX:

Marijuana and Controlled Substance Tax.

These drugs are under federal jurisdiction.

23.04 CORPORATE TAXES:

Corporate Stock Tax.

Financial corporation (bank, trust company, loan company) having permanent establishment in P.E.I. pays capital tax on paid-up capital allocated to province. Rate assessed at 3% if financial corporation's fiscal year ended Mar. 31, 2004 and 5% if financial year ended after same date. Note transition dates in Act.

Corporation License Taxes.

There is imposed upon following corporations and persons following license fees which must be paid annually to Provincial Treasurer: Accident insurance companies, guarantee insurance companies, accident and guarantee insurance companies, fees set by regulation; banks, finance companies, loan companies or trust companies, $1,200 corporations operating chain store, branch chain wholesale store, branch chain theatre, $600; light and telephone companies, $600; oil and gas companies based on litres; all other nonresident corporations, $200. Licensing fees are payable annually on date license first issued.

23.05 EMPLOYMENT TAXES:

Unemployment Compensation Tax.

None.

23.06 ENVIRONMENTAL TAXES:

See Environment Tax Act, Cap. E-8.3.

Tax of $4 per tire imposed on new tires excluding bicycle tires, motorized wheelchairs or other similar motorized device.

Pollution Abatement Authority Tax.

None.

23.07 ESTATE TAX:

None.

23.08 GAMBLING AND ENTERTAINMENT TAXES:

Amusement Tax.

Tax is collected on admission to places of amusement, amount being between 1¢ and 50¢.

Race Tracks.

8% tax is eligible on win, place and show wagering and 15% on feature wagering. Winnings are nontaxable.

23.09 GASOLINE AND SPECIAL FUELS TAXES:

Gasoline Tax.

Tax payable is equal to sum of 7.1¢ and 10.7% of average wholesale price of gasoline per litre. Average wholesale price of gasoline shall be set bi-weekly and is calculated as sum of base price as set by Island Regulatory and Appeals Commission, tax levied under Part III of Excise Tax Act and Gasoline Tax Act.

Propane Tax.

Tax of 17¢ per litre is payable.

Diesel Oil Tax.

Tax payable is equal to sum of 11.5¢ and 10.7% of average wholesale price of diesel oil per litre. Average wholesale price of diesel oil shall be set by Minister on last day of each month and is calculated as sum of base price as set by Island Regulatory and Appeals Commission, tax levied under Part III of Excise Tax Act, and tax on 11.5¢ per litre.

Motor Carrier Fuels Tax.

None.

23.10 GENERATION SKIPPING TAX:

None.

23.11 GIFT TAX:

None.

23.12 INCOME TAX:

By agreement with Dominion of Canada, personal and corporation income taxes are imposed by provinces and collected by Government of Canada. Province imposes income tax. Rate of this tax for individuals is 9.8 - 16.7%. Rate for corporations is 17.4 - 37% of income earned within Province. By agreement, Dominion is given right to collect this tax at same time tax under Federal Act is collected, and for administration purposes, one return is used.

23.13 INHERITANCE TAX:

None.

23.14 MINES, MINERALS AND FISHERIES TAXES:

Coal Severance Tax.

None.

23.15 PROPERTY TAXES:

(Real Property Assessment Act, Cap. R-4; Real Property Tax Act, Cap. R-5 and Real Property Transfer Tax Act, Cap. R-5.1). Provincial Department of Finance administers assessment of real property and collection of taxes thereon; no taxation levied on personal property; business property subject to taxation.

Exemptions.

Real property of (1) churches used for church purposes only, (2) nonprofit cemeteries, (3) public squares and parks, (4) Crown and Crown corporations and agencies, except within municipality and then only subject to municipal tax thereon, (5) purification systems buildings and equipment, (6) University of Prince Edward Island and Holland College, (7) Province or municipality for purpose of public institution of learning and education.

Assessment.

Real property is assessed at real and true market value except for farm property. Not included as real property are: (1) growing and unharvested crops, (2) mines below surface of ground, (3) land used as public right-of-way.

Business Assessment.

Business property is assessed on percentage of real property assessment fixed by Lieutenant-Governor-in-Council.

Review of assessment made first by Minister and then may be referred to Island Regulatory and Appeals Commission.

Rates of Tax.

Uniform rate of $1.50 per $100 assessed valuation is levied and payable by owner of real property. Local municipal levy to be determined annually is also payable by owner and occupier of real property and business property. Resident of P.E.I. entitled to tax credit from 50¢ per $100 of assessment.

Payment.

Real estate, business and municipal taxes are payable to Minister of Finance and are due on date to be fixed by regulation. If taxes unpaid on due date compound interest is payable per month. Taxes may be prepaid by instalment.

Lien.

Taxes and interest thereon constitute first lien on all real property and does not require registration or filing to preserve it.

Sale.

Real property may be sold by Minister of Finance after notice where taxes in arrears. Time, place and terms of sale established by regulations. Deed in fee simple to real property issued upon sale and property may not be redeemed by prior owner after tax sale.

Real Estate Conveyance Tax.

None, but see category 22 Property, topic 22.05 Deeds, subhead Recording Fees.

23.16 SALES AND USE TAXES:

Provincial Sales Tax of 10% of fair value of goods sold at retail is imposed. There are many exceptions, including food, gasoline, agricultural goods as defined by Minister, commercial fishing equipment, agricultural feeds, seeds, fertilizers, etc., newspapers when purchased by subscription for delivery by mail, clothing and footwear, and books, compact discs and audio cassettes that are published, produced or recorded for educational, cultural or literary purposes and contain no advertising are exempt but this does not include magazines, periodicals, directories, price lists, time tables, rate books, catalogues, periodic reports, albums, books for writing or drawing on, or any books of same general class, or any music or movie compact discs or any other media of same general class. There is no tax on sales under 26¢. This tax is in addition to Federal Goods and Services Tax of 6%.

Use Tax.

None.

23.17 STAMP AND SEAL TAXES:

Stamp Tax.

None.

24 TRANSPORTATION

24.01 AIRCRAFT:

See Canada Law Digest.

24.02 AUTOMOBILES:

See topic 24.03 Motor Vehicles.

24.03 MOTOR VEHICLES:

Note: Law relating to motor vehicles, their registration, licensing, operation, rules of traffic, etc., is codified in Highway Traffic Act, Cap. H-5.

Vehicle license and trailer license required annually. Number plate must be displayed on back of motor vehicle, trailer, semi-trailer, pole-trailer and on front of trailer tractor. (Highway Traffic Act, §§20, 21, 22, 23, 24).

Operator's license issued by Registrar of Motor Vehicles, required every third year before last day of anniversary month of licensee's month of birth. Minimum age of operator's license holders is 16 years, except farm tractors for which minimum age is 14 years. Drivers who have obtained their license less than one year prior may not carry any more than three passengers. Minimum age for chauffeur's license is 18 years. No exemption for members of Armed Forces. Off-highway motor vehicles require registration under Off-Highway Vehicle Act.

Titles, Sales and Liens.

Title to or interest in vehicle must be registered with Registrar of Motor Vehicles, who must be notified of sales and transfers. Lien must be filed in Personal Property Registry. See category 21 Mortgages, topic 21.04 Personal Property Security.

Identification Marks.

Must not alter or remove serial numbers or other identification marks of maker or knowingly deal with or possess car so altered.

Operation Prohibited.

By a person under age of 16 (resident or nonresident) unless operating a farm tractor: by a chauffeur, by a driver of a vehicle weighing over 2½ tons, unless over the age of 18 years; by intoxicated persons; by person suffering from disease or physical disability likely to render his operation of vehicle dangerous.

Size and Weight Limits.

Regulated by Highway Traffic Act, §§216-221 and under Roads Act of Prince Edward Island, Cap. R-15.

Equipment Required.

Horn audible for 200 feet; adequate brakes; rear view mirror. Cutouts prohibited.

Seat-Belt Legislation.

Children under age of 16 years must be restrained by prescribed child restraint system in private passenger vehicles. Driver and passengers must wear seat belt except if person: Is unable for medical reasons to wear seat belt and holds medical certificate; is fireman on fire-fighting vehicle; is medical attendant in ambulance; is driver of registered commercial vehicle.

Former exceptions repealed by 1994, c. 25, §10.

Lights Required.

Two in front showing white light only, visible from not less than five hundred feet and such as to render a person clearly discernible at a distance of 150 meters, and lamp at back casting red light only, clearly visible for like distance in rear of vehicle. Additional approved clearance lamps or reflectors required on left side of vehicles wider than 2 meters. Trailer to carry reflector or red light. (Highway Traffic Act, §§96-115).

Accidents.

In case of personal injury, or property damage over $1,000, or if vehicle involved in accident remains stationary on highway, person in charge of vehicle who is directly or indirectly party to accident, must forthwith report accident to member of Royal Canadian Mounted Police or nearest municipal police member nearest to scene of accident and as soon as possible furnish written report to such police, setting forth all material facts, number of driver's license, and registration numbers of all motor vehicles involved. Supplementary reports may be required by police.

Attachment against a motor vehicle may be issued before or after commencement of an action for injury, loss or damage sustained through negligent operation of such vehicle. Such vehicle may be released upon owner depositing security to answer such damages.

Owner liable for negligence unless vehicle at time of accident in possession of some person other than the owner or his agent without owner's consent. Any member of family of owner living with him deemed to be agent or servant of owner.

Guests.

Ordinary rules of negligence apply.

Insurance.

Motor vehicle must be insured motor vehicle under Highway Traffic Act before Registrar of Motor Vehicles shall license same. Must be insured for minimum of $200,000 public liability and property damage. Motor vehicle insurance may be liability insurance, bond of approved guaranty surety company for payment of at least $200,000.

Judgment Recovery (P.E.I.) Limited.

Person who obtains judgment in action for damages for bodily injury, death or in excess of $200 for property damage occasioned by or arising out of ownership, maintenance, operation or use of motor vehicle within Prince Edward Island which occurred after Jan. 1, 1965, may, upon assigning judgment to Judgment Recovery (P.E.I.) Limited, receive from it amounts up to $200,000, exclusive of interest and costs for loss or damage resulting from bodily injury to or death of one or more persons and damage to property, and where in any one accident loss or damage results from bodily injury or death and loss or damage to property, any claims arising out of bodily injury or death shall have priority over claims arising out of damage to property to an amount of $190,000, and any claims arising out of damage to property shall have priority over claims arising out of bodily injury or death to an amount of $10,000, plus one-half solicitor's taxed costs. No money will be paid from fund to nonresident, unless such person resides in jurisdiction which affords similar relief to Prince Edward Island residents. Repayment to fund may be made in installments.

Foreign vehicle registered in home state or province and displaying license plates required by laws of home state or province may operate without license or registration for current year, except that where foreign vehicle is used for transportation of merchandise or of persons or property for compensation regular fee must be paid regardless of registration elsewhere. Nonresidents, including foreign corporations, must register motor vehicle or trailer if used in carrying on business in the province.

Nonresident operator licensed in home state or province may operate vehicle registered in home state or province for private use but not any other vehicle without domestic license.

Actions Against Nonresidents.

No special provisions as to mode of commencement.

Direct Actions.

Under Insurance Act, Cap. I-4 statutory conditions are implied in all contracts of motor vehicle insurance providing no-fault benefits for loss of wages (max. $140 per week), medical expenses (max. $25,000) and funeral expenses for injury or death of person injured in motor vehicle accident. Person injured or estate of deceased person has direct action against insurer of vehicle causing damage or vehicle in which injured person was passenger. To claim in excess of no-fault benefits against insurer of person at fault for motor vehicle accident, injured person must first obtain judgment against person at fault before suing insurer.

Motor Vehicle Carriers.

Highway Safety Division must issue operating authority to applicant upon filing of application and prescribed fee.

Gasoline Tax.

See category 23 Taxation, topic 23.09 Gasoline and Special Fuels Taxes.

Garage Keepers' Lien.

See category 8 Debtor and Creditor, topic 8.15 Liens.

25 TREATIES AND CONVENTIONS

25.01 TREATIES:

See also Canada-United Kingdom Judgments Recognition Act, Cap. C-1.

QC
QUEBEC LAW DIGEST

—Scope —

Revised for 2010 edition by

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(C.C. indicates Civil Code of Lower Canada; C.C.Q. indicates new Civil Code of Quebec (see category 6 Courts and Legislature, topic 6.04 Statutes); C.F.L. indicates Charter of the French Language; C.P. indicates Code of Civil Procedure; C.P.A. indicates Consumer Protection Act; Q.S.A. indicates Quebec Securities Act; R.S.Q. indicates Revised Statutes of Quebec; S.Q., followed by year, indicates annual statute of Quebec; R.R.Q. indicates Revised Regulations of Quebec 1981; O.C.Q., followed by number and date, indicates Order of the Lieutenant-Governor in Council. Citations refer to articles of codes and to chapters and sections of statutes. See category 6 Courts and Legislature, topic 6.04 Statutes.)

Note: This revision covers Acts of 2009 adopted and approved by Parliament of Quebec up to Chapter 37; through June 19, 2009.

1 INTRODUCTION

1.01 GOVERNMENT AND LEGAL SYSTEM:

Legislature has term of not more than five years, beginning from receipt by Secretary General of list of candidates declared elected after general election, transmitted by chief electoral officer. Legislature may include one or several sessions. Assembly is convoked, prorogued and dissolved by Lieutenant-Governor who may dissolve assembly before expiry of five years following Government's advice or may prorogue sessions following same. (Election Act, R.S.Q. c. E-3.3, §380; An Act respecting National Assembly, R.S.Q. c. A-23.1, §§5, 6).

Assembly shall meet for opening of new legislature on day appointed for this purpose in proclamation that summons it. During legislature assembly shall ordinarily meet from 2d Tues. in Feb. for 16 weeks during ordinary hours of meeting followed by two weeks during extended hours of meeting; and from 3d Tues. in Sept. for ten weeks during ordinary hours of meeting followed by two weeks during extended hours of meeting. Whenever assembly stands adjourned it may at any time, not being period, day, or hour at which it may ordinarily meet, meet for extraordinary sittings upon request by Prime Minister. (Standing Orders of National Assembly, §§18, 19, 19.1, 23).

See Canada Law Digest, category 1 Introduction, topic 1.02 Government and Legal System, subhead Provincial Governments.

Legislature and Courts.

Legislative bills printed, published, passed and assented to in both French and English; regulations and other similar acts to which §133 Constitution Act, 1867 applies shall be passed, printed and published in both French and English; both versions of said texts to be equally authoritative. French version of regulation or other similar act to which §133 Constitution Act, 1867 does not apply prevails over English version if discrepancy exists. Either language to be used by any person in, or pleading in, or process issuing from, any court of Quebec. All judgments and decisions rendered by courts or quasi-judicial bodies shall be translated into French or English at request of parties, at cost of civil administration. (Charter French Language, R.S.Q. c. C-11, §§7-9).

Civil Administration.

Special provisions regulate mandatory use of French in government, government departments and other agencies of civil administration. (§§14-29.1). Official language used for written communication between civil administration and other governments or legal persons established in Quebec. (§§16-17). Use of French mandatory for written communication between government, government departments and other agencies of civil administration. (§18). Contracts entered into by civil administration and related sub-contracts must be drawn up in French except when administration enters into contracts with parties outside of province. (§21).

Semi-public Agencies.

Public utility firms, professional corporations and their members must make services available in French. Notices, communications and printed matters intended for public must be in French. (§30). Communications with "Legal Persons" and civil administration must be in French. (§31). Professional orders must use French for communication with general membership. However, they may respond in language of their interlocutor when he is member. (§32). Charter provides other mandatory uses of French for such semi-public agencies. (§§33, 35-40).

Labor Relations.

Employer's written communications to staff must be in French as well as offers of employment or promotions. (§41). Collective agreements must be in French. (§43). Arbitration awards shall be translated into French or English at parties' request and expense. (§44). Dismissals, lay-offs, demotions or transfers for sole reason of being exclusively French speaking or insufficient knowledge of language other than French is prohibited. (§45). Other provisions govern cases where requirement of knowledge of other language permitted and provide specific remedies for breaches of above requirements and prohibitions. (§§46-50).

Commerce and Business.

Inscriptions on products, containers, wrappings, documents, objects or cards supplied with product including directives for use and warranties must be in French but may be accompanied by translation in other language but not more prominently displayed than French. (§51). Catalogues, brochures, folders, commercial directories and similar publications must be drawn up in French. (§52). All computer software, including game software and operating systems, must be available in French, unless no French version exists. (§52.1). Contracts predetermined by one party, contracts containing printed standard clauses and related documents must be drawn up in French but may be drawn up in another language at express wish of parties. (§55). Application forms for employment, order forms, invoices, receipts and releases must be drawn up in French. (§57). Save for certain exceptions, public signs and posters and commercial advertising must be in French. They may be in French and another language provided that French has much greater visual impact (defined by regulations). Firm name may be accompanied with version in another language than French, provided French version is as prominent. (§68). To obtain legal personality firm names must be in French. (§64). Companies to be incorporated must have French name. Family names, place names, expressions formed of artificial combination of letters, syllables and figures and expressions taken from other languages may appear in firm name. (§67). Enterprise employing 100 or more must form francization committee of at least six persons. Functions and responsibilities set out in Act. (§§136-138). Enterprise employing 50 or more for at least six months must register with Office within six months of period's end. (§139). Within 12 months of date on which certificate of registration is issued, firm shall transmit analysis of its linguistic situation to Office. Francization certificate only issued if use of French generalized at all levels. If not, enterprise must adopt francization programme. (§140). Goals of francization programme set out in Act. (§141). Office may suspend or revoke certificate if use of French is no longer generalized at all levels of firm. (§147).

Education.

Except where otherwise allowed by Act, language of instruction in kindergarten, elementary and secondary schools will be in French (§72) except for: (1) child whose father or mother is Canadian citizen and received elementary instruction in English in Canada, provided that instruction constitutes major part of elementary instruction received in Canada; (2) child whose father or mother is Canadian citizen and has received or is receiving elementary or secondary instruction in English in Canada, and brothers and sisters of that child, provided that instruction constitutes major part of instruction received by child in Canada; (3) child whose father and mother are not Canadian citizens, but whose father or mother received elementary instruction in English in Quebec, provided that instruction constitutes major part of elementary instruction received in Quebec; (4) child who, in his last year in school in Quebec before 26 Aug. 1977, was receiving instruction in English in public kindergarten class or in elementary or secondary school, and brothers and sisters of that child; (5) child whose father or mother was residing in Quebec on 26 Aug. 1977 and had received elementary instruction in English outside Quebec, provided that instruction constitutes major part of elementary instruction received outside Quebec. (§73). Children staying in Quebec temporarily may receive instruction in English at parent(s)'s request. (§85). Any decision made by review committee, concerning child's eligibility for instruction in English may be contested within 60 days, before Administrative Tribunal of Quebec. (§83.4).

Miscellaneous.

Where Act does not require use of French only, French and another language may be used together. (§89). Various bodies set up for purposes of Act such as Office de la langue française, Commission de Toponymie. (§§122-128, 157-165.10). Comité d'officialisation linguistique and Comité de suivi de la situation linguistique. (§§165.11-165.14). Office shall make inspections & inquiries for purpose of Act. (§§166-177). Fines and penalties provided for breach of Act. (§§205-208.2).

1.02 HOLIDAYS:

Following are holidays and non-juridical days in Province of Quebec: Sundays; 1st of Jan.; 2d of Jan.; Good Friday; Easter Mon.; 24th of June; 1st of July, Canada Day, or 2d of July when 1st is Sun.; first Mon. of Sept., Labor Day; 2d Mon. of Oct.; 25th of Dec.; 26th of Dec.; day fixed by proclamation of Governor-General for celebration of birthday of Sovereign; any other day fixed by proclamation of Government as public holiday or as day of thanksgiving. Sat. only considered non-juridical for purposes of computing delays. (C.P. 6, 8).

1.03 LANGUAGE:

General.

By Charter of French Language (R.S.Q. c. C-11) French declared official language of Quebec. (§1). Charter sets out certain fundamental language rights. Office Québécois de la Langue Française is charged with ensuring compliance with Act. (§§157-198).

1.04 OFFICE HOURS AND TIME ZONE:

Quebec is in the Eastern time zone and in GMT -05:00 Universal Time Zone. Office hours are generally from 8 a.m. to 5 p.m.

2 BUSINESS ORGANIZATIONS

2.01 AGENCY:

The contract of agency, known in Quebec as "mandate", may be either special for particular business or general for all business of mandator (principal). When general it includes only acts of simple administration. Power to perform other acts is conferred only by express mandate except where, in case of mandate given in anticipation of mandator's incapacity, that mandate confers full administration. (C.C.Q. 2135). Agent (mandatary) cannot go beyond authority given or implied by mandate and cannot, if employed to buy or sell thing, be buyer or seller on his own account, unless principal (mandator) authorizes it or is aware of his quality as contracting party. (C.C.Q. 2130, 2135, 2136, 2147).

Obligations of Agent.

Agent is bound to fulfill mandate which he has accepted and must act with prudence and diligence in performing it. (C.C.Q. 2138). He is obliged, upon termination of mandate, to do whatever is necessary consequence of his acts and to complete business which cannot be deferred without risk of loss. (C.C.Q. 2182).

Sub-agency.

Agent is answerable for person whom he substitutes in execution of mandate when he is not empowered to do so and if principal suffers injury as result, he may repudiate acts of substitute. (C.C.Q. 2141, 2161).

Joint Agency.

When several agents appointed together for same business, mandate has effect only if accepted by all. They are solidarily liable for performance of their obligations. (C.C.Q. 2144).

Liability of Agent.

Agent acting in name of principal and within bounds of mandate not personally liable to third persons with whom he contracts. Agent who acts in own name is liable to third persons without prejudice to rights of latter against principal. He is also liable toward third persons when he exceeds powers of mandate unless has given party with whom he contracts sufficient communication of mandate or unless principal has ratified acts performed by agent. (C.C.Q. 2157, 2158).

Liability of Principal.

With regards to third persons, principal is bound by all acts performed by agent within limits of his mandate, unless under agreement or by virtue of usage, agent alone is liable. Principal also responsible for acts ratified by himself, expressly or tacitly, that exceed powers of mandate. (C.C.Q. 2160). Principal liable to third persons who, in good faith, contract with person that is not his agent under mistaken belief that he is if principal has allowed such belief. (C.C.Q. 2163).

Obligations of Principal.

Principal bound to discharge agent for all obligations contracted by him towards third persons within limits of mandate and to reimburse expenses and charges which agent has incurred in execution of his mandate. (C.C.Q. 2150, 2152). Agent is entitled to deduct what principal owes him by reason of mandate from sums he is required to remit. He may also retain what was entrusted to him by principal for performance of mandate until payment of sums due to him. (C.C.Q. 2185). If mandate given by several persons, their obligations towards agent are solidary. (C.C.Q. 2156).

Revocation.

Agency may be revoked, but principal will still be bound towards third persons who have not been notified of revocation. (C.C.Q. 2181). Appointment of new agent for same business is equivalent to revocation of first appointment from day on which first agent has been notified of this new appointment. (C.C.Q. 2180). Death, institution of protective supervision in certain circumstances or bankruptcy of either principal or agent, unless mandate given under gratuitous title in anticipation of incapacity of person who gave mandate, terminates mandate. (C.C.Q. 2175).

2.02 ASSOCIATIONS:

Certain associations may be incorporated, notably: cooperative agricultural associations (R.S.Q. c. C-67.2); dairy associations (R.S.Q. c. S-23); musical associations, recreational, social, educational and amusement clubs (R.S.Q. c. C-23); benefit societies (R.S.Q. c. S-31). Incorporation is achieved by recording articles of association for authorized purposes, or by special act of Legislature. Number of members necessary to form association varies according to its category. After being legally formed, association has most rights and obligations of ordinary incorporated company, but will usually be exempt from taxation.

Associations registered or dissolved in accordance with provisions of Act respecting legal publicity of sole proprietorships, partnerships and legal persons. (R.S.Q. c. P-45). In number of instances, notices and reports must be filed with government department regulating business or activities carried on by association.

Enterprise.

Carrying on organized economic activity, whether or not commercial in nature, consisting of producing, administering or alienating property, or providing service, constitutes carrying on of enterprise. (C.C.Q. 1525). See category 21 Mortgages, topic 21.03 Mortgages of Personal Property, subhead Movable Hypothecs, catchline Movable Hypothecs Without Delivery.

Formation.

By written or verbal contract whereby parties agree to pursue common goal other than making of pecuniary profit. (C.C.Q. 2186, 2267). Created upon formation of contract if no other date indicated therein. (C.C.Q. 2187). Obligation of registration in certain circumstances. (R.S.Q. c. P-45, §2).

Contract governs object, function, management and other terms and conditions. Contract presumed to provide for admission of members other than founders. Failing special rules, directors elected from association members. (C.C.Q. 2268-2269).

Actions.

Directors are mandataries of association—powers are conferred by contract, by law, or by mandate. They may sue or be sued to assert association's rights. (C.C.Q. 2270, 2271). Association may also sue and be sued in own name. (C.P. 60, 115).

Rights and Powers.

All members entitled to participate in collective decisions, which are taken by majority vote of members unless otherwise stipulated in contract. Member has right to consult all books of association. Member can withdraw or be excluded from association. (C.C.Q. 2272, 2276).

Liabilities.

Where property of association insufficient, directors and administrating members solidarily or jointly liable for obligations resulting from decisions they approved, whether or not incurred by enterprise of association. Liability of non-administrating member limited to promised contributions to association. (C.C.Q. 2274, 2275).

Dissolution.

When contract of association terminated, liquidator named by directors or court. After debts paid, remaining property devolves as per contractual rules; failing rules, members share equally. Notwithstanding any stipulation to contrary, any property derived from third persons devolves to association, legal person or trust sharing objectives similar to association; if this is not possible, property goes to State. (C.C.Q. 2278, 2279).

See also topics 2.03 Corporations, Partnerships; category 1 Introduction, topic 1.03 Language.

2.03 CORPORATIONS:

The Quebec Companies Act (R.S.Q. c. C-38—“Act”) applies to all companies incorporated in province except railway, telephone, telegraph, banking, loan, insurance and trust companies. Provincial corporations are constituted by articles or, in exceptional cases, letters patent.

General Supervision.

Minister of Finance is responsible for administration of Act while Enterprise Registrar is responsible for carrying out administration. (§1 of Act).

Purposes.

Provincial corporations (except railway, telephone, telegraph, banking, loan, insurance and trust companies) may be incorporated by articles issued in virtue of Act. As of Apr. 1, 1990, Letters Patent are no longer granted under Part 1 and as of Sept. 1, 1990, Supplementary Letters Patent are only granted in special circumstances.

Name.

Regulations govern corporate names available to companies incorporated under Parts I and IA and corporations incorporated under Part III; generally, proposed name must not be that of any other known company, incorporated or unincorporated, unless with consent of latter, or any name liable to lead to confusion with another person, partnership or group in Quebec or otherwise objectionable. Corporate name must end in either “ltée”, “inc.”, “s.a.” or include word “compagnie” or “société par actions” and must be French name which may be accompanied with version in another language. (§9.1 of Act). Family names, place names, expressions formed by artificial combination of letters, syllables or figures and expressions taken from other language may appear in firm names subject to government regulations. Companies may use another name other than their corporate name except on certain specified documents. See category 1 Introduction, topic 1.03 Language. Corporate name may be reserved under various circumstances upon application and payment of fee.

Term of Corporate Existence.

Perpetual, subject to filing of reports. See subhead Reports.

Incorporators.

Articles of incorporation under Part IA must be signed by one or more persons who are not less than 18 years of age. They need not be either Canadian citizens or residents, but they must not be civilly incapacitated, undischarged bankrupt or liquidating legal person. (§123.10 of Act).

Application for Incorporation.

Incorporation under Part IA may be made by one or more incorporators filing two copies of articles with Enterprise Registrar. (§123.11 of Act). Articles must set out company name, judicial district of head office in Quebec, details of authorized capital, restrictions if any on activities or transfer of shares and number or maximum and minimum number of directors. Articles must be filed with notices of head office address and first directors, all in duplicate. (§123.12 of Act).

Legislative charters may also be procured from Legislature by special Acts for all purposes within powers of Provincial Legislature. Once incorporated, such special corporations are governed, for all matters not covered by their act of incorporation, by Part II of Act. (§124 of Act).

Federal and provincial charters carry same rights in province.

Fees payable for Part IA companies are as follows upon issuance of: (1) Certificate of constitution as legal person, $300; (2) certificate of amalgamation, $482; (3) certificate of continuance, $197; (4) certificate of amendment, $140. For application of name reservation or reservation of version of name, for search and preparation of research report, $37. Fee for change of name, $212. Other fees include: (1) Fee for certifying true copy of document, $28.69; (2) fee for attesting company has/has not been dissolved, $19.56; (3) fee for handling of document, $5. (Regulation respecting fees to be paid under Part 1A of Companies Act, R.Q. c. C-38, r. 2.)

When incorporation is obtained by special Act, costs are usually much higher and vary according to circumstances.

Powers.

Provincial companies legally incorporated can carry on business outside of the Province of Quebec and in foreign jurisdictions. (R.S.Q. c. P-16).

Amendment of Charter.

Under Part I companies can modify their letters patent only by way of continuance under Part IA. Under Part IA articles may be amended by filing articles of amendment with Enterprise Registrar.

Increase or Decrease of Authorized Capital Stock.

By-laws increasing or decreasing the authorized capital stock require approval of at least two-thirds in value of shares represented at special general meeting and articles of amendment in case of Part IA company. (§123.65 of Act). In case of Part I company, directors of company are required to adopt by-law prior to continuing under Part IA.

By-laws.

Under Part I directors may make by-laws providing for: (a) Shares of more than one class and for preferred or special rights, conditions or limitations attaching to each class of shares; and (b) conversion of shares of any class into shares of another class. (§146 of Act). Such by-laws require approval of at least two-thirds in value of shares represented at special general meeting. (§123.65 of Act). Directors of Part I company may adopt by-law to continue under Part IA. (§123.132 of Act). Such by-law requires approval of at least two-thirds in value of shares represented at special general meeting. (§123.133 of Act). Then, company can make amendments to constituting act. However, company may not make any amendment that affects rights, conditions, privileges or restrictions attached to issued shares without obtaining consent of all shareholders concerned by amendment, whether or not they are eligible to vote. (§123.134 of Act). Under Part IA all amendments to articles must be by by-law, approved by at least two-thirds of votes cast by shareholders at special general meeting. (§155 of Act).

Directors may make by-laws for following purposes: allotment of stock, calls and payment, registration of stock certificates, transfer of stock, forfeiture of stock for nonpayment; declaration and payment of dividends; number of directors, term of service, qualification and remuneration; appointment, functions, duties and removal of all agents, officers and employees, their remuneration, and security to be given by them; holding of annual meetings, calling of meetings, regular and special, of board of directors and of company, quorum, proxies; delegation of powers; penalties and forfeitures; conduct in all other particulars of affairs of company. Amendments to such by-laws may be adopted by directors, but such by-laws and amendments (except those concerning agents, officers and servants) have effect only until next annual meeting of company, unless confirmed in meantime at special general meeting. (§185 of Act).

Stock.

Company may issue common stock with or without par value, but under Part I only stock having priority as to capital or redeemable must have par value. (§§13, 123.39 of Act).

Stock certificates evidencing stockholders' ownership of stock in company may be issued under corporate seal duly attested by proper signing officers, usually President or Vice-President and Secretary.

Whole text of preferred or special rights, conditions and limitations attaching to preferred shares must be part of every certificate for such shares, unless summary is inscribed thereon with statement that text thereof will be furnished free of cost on demand. (§48 of Act).

Share warrants may be authorized by charter with respect to fully paid-up shares. (§54 of Act).

Issuance of Stock.

Shares with par value shall not be issued as fully paid, save for consideration payable in cash to total par value of shares so issued, or for consideration payable in property or services which directors determine by resolution to be fair equivalent of cash to total par value of shares so issued. (§45 of Act). Unless letters patent, articles or by-laws of company provide to contrary, shares without par value may be issued for such consideration, payable in cash, property or services, as may be fixed by directors; and all shares so issued shall be deemed fully paid upon receipt by company of consideration for their issue. (§13[5] of Act).

Transfer of Stock.

Provisions regulating companies incorporated in Quebec regarding stock transfers are practically identical with those regulating companies incorporated by federal charter, that is to say, briefly:

No share can be transferred until all previous calls thereon have been paid; nor can any share be transferred, until it has been fully paid-up, without consent of directors of company. (§72 of Act).

Except as regards rights of parties inter se, no transfer will be complete, unless made by sale under execution or by order of court, until it has been entered in register of transfers. (§71[1] of Act).

In case, however, of stock of any company listed and dealt with on recognized exchange, by means of scrip, usual endorsement and delivery will constitute valid transfer, except for purpose of voting at meetings of company. (§71[2] of Act).

Stock Transfer Tax.

Stock transfer tax repealed effective Apr. 19, 1972. (S.Q. 1972, c. 27).

Shareholders.

They elect directors, appoint auditors, consider approval of by-laws, vote at general meetings personally or by proxy, receive payment of dividends when declared and payable, appoint liquidators in case of voluntary winding up and receive annual financial statements. Upon dissolution surplus is distributed among shareholders. (§88 of Act).

Shareholders' Liabilities.

Their liability is limited to any unpaid balance on their shares.

Shareholders' Meetings.

Annual meeting of the company must be held in Quebec but annual meeting of company that has not made distribution to public of its securities may be held outside Quebec if its charter provides for it, or, failing provision in charter to that effect, if all shareholders entitled to attend meeting consent thereto. (§98 of Act). Unless otherwise provided by letters patent, articles or by-laws, ten days notice of any general meeting must be given to each shareholder by registered letter, and in two newspapers (one in English and one in French) at place where company has its head office. (§97 of Act).

At annual meeting, balance sheet, statement of income and expenditures and auditors' report thereon are submitted; directors are elected for ensuing year; and auditors are appointed. Shareholders of Part IA companies may by unanimous resolution in certain cases decide not to appoint auditors. (§98 of Act).

Shareholders holding one-tenth of subscribed shares of company may, by written requisition, call special meetings of company for transaction of any business specified in notice convening meeting. (§99 of Act).

Voting.

Shareholders may be represented by proxy at general or special meeting. Proxy need not be shareholder. Proxy is revocable. Subject to letters patent, articles or by-laws, every shareholder is entitled to one vote per share, but one cannot vote if he is in arrears in respect of any call. For Part IA companies written resolution signed by all shareholders able to vote has same effect as if passed at shareholders' meeting. (§§102-103 of Act).

Directors.

Under Part I affairs of company must be managed by board of not less than three directors. They need not be either Canadian citizens or residents. (§83 of Act). No person shall be elected or appointed director of company unless he or any other company of which he is officer or director is shareholder and, if by-laws of company so provide, unless he owns shares of company absolutely in his own right or in right of such other company to required amount and provided that he is not in arrears in respect of any calls thereon. Any person holding shares of company in capacity of testamentary executor, tutor, curator or trustee may also be elected or appointed director. In absence of any special provision, minimum qualification is one share. (§86 of Act). Under Part IA company may have only one director if it has not issued securities to public; directors need not be shareholders. However, where company has made public distribution of securities, board must be composed of at least three directors. (§123.72 of Act). Notice of any change of directors must be given as soon as change occurs by filing declaration to that effect under Act respecting legal publicity of sole proprietorships, partnerships and legal persons. (R.S.Q. c. P-45).

Directors are elected at general meeting of shareholders for such term not exceeding two years as set by letters patent, articles or by-laws. In absence of such other provisions, directors are elected annually by ballot. Retiring directors are reeligible and they continue in office until their successors are elected. Any vacancy may be filled, for remainder of term, by directors. (§88-89 of Act).

Directors elect from among themselves president and secretary and, if they see fit, chairman of meetings and one or more vice-presidents and may also appoint all other officers.

Directors' Meetings.

Calling of directors' meetings, their place and quorum required are determined either by letters patent, articles or by-laws. Directors may agree to hold meetings by verbal means of communication such as telephone. Written resolutions signed by all directors have same effect as if passed at actual meeting. (§§89.2-89.3 of Act).

Powers and Duties of Directors.

Directors administer all affairs of company. They may make or cause to be made in its name any kind of contract which it may lawfully enter into. They may make by-laws for purposes already indicated. See subhead By-laws, supra. They issue stock of company, declare dividends, appoint, supervise and remove agents and officers of company. They cause proper books to be kept by secretary. See subhead Books and Returns, infra. They cause returns and notices required by law to be prepared and filed or published. They approve financial statements to be submitted to annual meetings. They take steps for calling of annual meetings and special meetings of shareholders. For Part IA companies shareholders by unanimous written agreement may restrict powers of directors.

They may submit to shareholders resolution to voluntarily wind up company and in case of such winding up, directors may pass by-laws for distributing surplus assets among shareholders. Generally, it is duty of directors to protect interests of company. (§123.91).

Liabilities of Directors.

Directors are solidarily liable if (1) they declare and pay any dividend when company is insolvent or which impairs capital; (2) they make loans to any shareholder. Directors of Part IA companies solidarily liable in cases of reduction of capital, redemption of shares and granting of financial assistance to designated persons in breach of specified tests set forth in Act.

Directors are solidarily liable to company's employees for wages, not exceeding six months, for services performed while they were directors, provided (1) company is sued within one year after wages became due and writ of execution is returned unsatisfied in whole or in part, or (2) during such delay, winding-up order is made against company or it becomes bankrupt and claim for such wages is filed in its bankruptcy. (§§96, 123.58, 123.64, 123.69, 123.71).

Liabilities of Directors and Officers.

Director or officer is liable for damages, and also subject to penalty of $100 for each offense, if he refuses to exhibit books which must be kept by company (see subhead Books and Returns, infra), or knowingly makes or assists in making any untrue entry or fails to make any proper entry in such books. (§108 of Act).

General penalty of not more than $200 is enforced against directors or officers who fail to comply with any provisions of Quebec Companies Act. (§123 of Act).

Directors, officers or attorneys of companies who order, authorize or advise commission of offence under Act respecting legal publicity of sole proprietorships, partnerships and legal persons (R.S.Q. c. P-45) are guilty of offence and liable to fine of not less than $200 and not more than $2,000. Fines doubled for subsequent offenses. (§107 R.S.Q. c. P-45).

Head Office.

Company is obliged to have head office in Quebec; it is its legal domicile. Notice of address of all establishments and designation of principal office and of any change therein must be given by filing declaration to that effect in accordance with Act respecting the legal publicity of sole proprietorships, partnerships and legal persons. (§10 R.S.Q. c. P-45).

Resident Agent.

Under Act respecting legal publicity of sole proprietorships, partnerships and legal persons (R.S.Q. c. P-45), companies or partnerships doing business in Quebec without domicile or establishment in Quebec, unless exempted by regulation and subject to providing certain information, must designate attorney residing in Quebec. See subhead Reports, infra. (§4 R.S.Q. c. P-45).

General Powers of Company.

Part I sets forth powers of company. Rights which company may exercise, besides those specially conferred by its charter, or by general laws applicable to its particular kind, are all those which are necessary to attain object of its creation; thus it may acquire, alienate and possess property, sue and be sued, contract, incur obligations and bind others in its favor. Under Part IA company has full enjoyment of civil rights.

Dividends.

Under Part I no dividend may be declared which would impair capital of company; annual dividend may however be supplemented or paid entirely out of reserve fund. (§79 of Act). Under Part IA declaration and payment of dividends is subject to meeting solvency tests. Directors may declare stock dividends. (§81 of Act).

Mining companies or companies whose assets consist of goods consumed when used, may declare and pay a dividend out of the funds derived from such use. Such companies may pay dividends in species or in kind. Amounts due for calls may be deducted from the dividends of a shareholder. (§7 of Act).

Sale or Transfer of Corporate Assets.

Directors have power to authorize sale of any corporate assets without obtaining approval of shareholders.

Books and Returns.

Company must ensure that book or books are kept at its offices containing copy of charter and by-laws of company, names of shareholders, address and calling of each, number of shares of stock held by each shareholder, amounts paid in and remaining unpaid on such stock and names, addresses and calling of directors and dates on which each became or ceased to be such director and also book called ``register of transfers'' containing particulars of every transfer of stock of company. (§197-202 of Act). Books must also be kept showing: (a) receipts and disbursements and matters to which they relate; (b) financial transactions; (c) credits and liabilities. Minute books for meetings of shareholders and of directors and under Part I register of mortgages must also be kept. (§200 of Act). Such books are to be open for inspection during ordinary business hours at head office of company and are subject to inspection by shareholders and creditors of company and judgment creditors of shareholders, who may take extracts therefrom. (§199 of Act).

Reports.

Under Act respecting legal publicity of sole proprietorships, partnerships and legal persons (R.S.Q. c. P-45) main provisions of which came into force on Jan. 1, 1994, every company constituted under laws of Quebec and every company not constituted under laws of Quebec if domiciled in Quebec or carrying on activity in Quebec or possessing immovable real right, other than prior claim or hypothec, in Province of Quebec must register declaration of registration in register created under said Act.

Companies and partnerships constituted in virtue of laws other than those of Quebec who commence carrying on activity in Quebec in 1994 and Quebec companies and partnerships which come into existence in 1994 must file declaration of registration under said Act. In case of companies incorporated under laws of Quebec after Jan. 1, 1994 Enterprise Registrar will deposit company's constituting documents in register automatically. Quebec companies in existence prior to said Act and companies constituted under laws other than those of Quebec carrying on activity in Quebec prior to new legislation had until Jan. 1, 1995 to file declaration of registration. (§520 R.S.Q. c. P-45). All companies, partnerships and individuals subject to Act must file annual declaration for purposes of updating information contained in declaration of registration originally filed beginning with year following year of registration. (§§24, 26 R.S.Q. c. P-45). In addition to annual declarations all companies, partnerships and individuals subject to Act are required to file amending declaration as certain changes of information occur. Failing to file declarations could result in dissolution. (§527 R.S.Q. c. P-45). This new Act replaces Companies and Partnerships Declaration Act and Companies Information Act and repeals Extra-Provincial Companies Act. As to other returns required, see Canada Law Digest, category 2 Business Organizations, topic 2.03 Corporations.

Merger and Consolidation.

Under Part IA, subject to solvency tests two or more Part I or Part IA companies may amalgamate by agreement. Agreement must prescribe terms of amalgamation, name of new company, names of future directors, manner of converting capital of old companies into that of new. Agreement is approved by by-law, all shares are voting shares for purposes of adopting by-law, class and series votes may be required and articles of amalgamation and notices of address of head office and directors must be filed with Enterprise Registrar in duplicate. Corporation under its new name possesses all property, rights, privileges and franchises of companies so amalgamated and it is subject to all their liabilities, contracts, disabilities and duties. (§§18, 123-124 of Act).

Part I and Part IA companies may amalgamate subject to meeting specified solvency test. Simplified procedure applies for amalgamation between company and its subsidiary and between subsidiaries of same company. (§§123.129-123.130 of Act).

Continuation.

Companies governed by Part I with certain exceptions may continue themselves under Part IA by by-law enacted by directors and ratified by two-thirds of votes cast at special general meeting of shareholders. (§123.133 of Act). Upon applying for continuation corporation may change its name, reduce its issued share capital and otherwise modify its charter subject to certain limitations. If rights attaching to issued shares are affected, all shareholders including those not otherwise carrying voting rights must consent. (§123.134 of Act).

Dissolution.

Company constituted under laws of Quebec may be struck from register created under Act respecting legal publicity of sole proprietorships, partnerships and legal persons (R.S.Q. c. P-45) by order of Enterprise Registrar for failing to file annual declaration for two consecutive years. Striking entails dissolution of company. Copy of Enterprise Registrar order is sent to registrant. (§527 R.S.Q. c. P-45).

Company may be dissolved voluntarily if company proves to satisfaction of Enterprise Registrar: (1) That it has no debts or obligations; (2) that it has parted with its property, divided its assets rateably amongst its shareholders and has no debts or liabilities; (3) that its debts and obligations have been provided for or protected or that creditors consent; and (4) that it has given notice of application for dissolution under Act respecting legal publicity of sole proprietorships, partnerships and legal persons (R.S.Q. c. P-45), and in newspaper published at or as near to place of company head office. Notwithstanding dissolution of company, directors, at that time, remain solidarily liable for debts of company except in case of good faith. (§28 of Act).

Insolvency and Receivers.

See Canada Law Digest, categories 2 Business Organizations, topic 2.03 Corporations; 8 Debtor and Creditor, topic 8.02 Bankruptcy.

Closed Corporations.

Act does not provide for private companies; this is governed by securities legislation. Distinction between corporations which do and do not offer their securities to public.

Appraisal.

No statutory provisions.

Corporation Taxes.

Taxation Act (R.S.Q. c. I-3) imposes following taxes on corporations:

(1) Tax on Paid-up Capital.

See category 23 Taxation, topic 23.10 Income Tax, subhead Corporation, catchline Tax on Capital.

(2) Tax on Profits.

See category 23 Taxation, topic 23.10 Income Tax, subhead Corporation.

See categories 1 Introduction, topic Language; Taxation, topic Corporate Taxes.

2.04 FOREIGN CORPORATIONS:

See topic 2.03 Corporations, subhead Resident Agent.

2.05 JOINT STOCK COMPANIES:

Joint stock companies are formed either under the authority of a charter, or of act of legislature, and are governed by their charter and Part II of Companies Act. See topic 2.03 Corporations.

2.06 LIMITED PARTNERSHIP:

See topic 2.07 Partnerships.

2.07 PARTNERSHIPS:

Formation.

Commercial partnerships may be general, limited, limited liability or undeclared. (C.C.Q. 2188; Professional Code, R.S.Q. c. C-26, §§187.11-187.20). Limited partnerships must consist of one or more general partners and one or more special partners. Special partners make contributions to common stock by money or other property. (C.C.Q. 2236). Partnerships are formed in accordance with C.C.Q. 2186 and must be registered under Act respecting legal publicity of sole proprietorships, partnerships and legal persons. (R.S.Q. c. P-45). Registrar may ex officio strike off registration of registrant having failed to file two consecutive annual declarations. Striking off of registration of legal person constituted in Quebec entails its dissolution. (R.S.Q. c. P-45, §50). Limited and general partnerships share many attributes of legal persons. See topic 2.03 Corporations.

Undeclared partnerships may arise from written or verbal contract or overt act indicating intent to form undeclared partnership. (C.C.Q. 2250). Each partner contracts in own name and is alone liable towards third parties, unless he acts in quality of partner, with knowledge of third party. (C.C.Q. 2253). Partners are solidarily liable for debts contracted for use or operation of common enterprise and cannot limit their liability toward third parties. (C.C.Q. 2254).

Limited liability partnerships are available for partnerships of certain professionals. (Professional Code, R.S.Q. c. C-26, §§187.11-187.20).

Rights and Liabilities of Partners as to Third Persons.

In general partnerships, partners are jointly liable for obligations contracted by partnership in respect of third parties, but solidarily liable if obligations were contracted for service or operation of enterprise of partnership. (C.C.Q. 2221). Where property of partnership is insufficient, general partners are solidarily liable on their personal property in respect of third persons to full extent of partnership's obligations. (C.C.Q. 2246). Special partners are liable only to amount they agreed to contribute but if name of special partner appears in firm name he is liable as general partner unless status as special partner clearly indicated. (C.C.Q. 2247). Only general partners authorized to administer business of partnership. But if special partner is acting like general partner, this special partner is liable in same manner as general partner for obligations of partnership resulting from such acts. (C.C.Q. 2244).

While partner liable for debts in limited liability partnership, he is not personally liable for obligations of partnership or of any other professional arising from fault on part of other professional or other professional's servant or mandatary in course of their professional activities within partnership. (Professional Code, R.S.Q. c. C-26, §187.14).

Partnership Declaration.

Within 60 days of its formation, every general and limited partnership must file declaration with Inspector General of Financial Institutions stating: (1) Its name and any other business name it uses, (2) its legal form, (3) its domicile, (4) its object, (5) its establishments in Quebec, (6) two main sectors in which it does business, (7) number of its employees in Quebec, (8) its termination date (if it has one), (9) name and domicile of all partners, (10) indication that no other person is member of partnership. Declarations must be filed annually and updated regularly. Any change to content of declaration of partnership shall be set forth in amending declaration. (R.S.Q. c. P-45, §§9-11, 26s, C.C.Q. 2190, 2194). Declaration of limited partnership shall additionally: (1) Distinguish general from special partners, (2) name special partner who is greatest contributor, (3) state that it is limited partnership, (4) entry indicating that liability of some or all of partners is limited. (R.S.Q. c. P-45, §11, C.C.Q. 2190, 2239). Partnership formed on date when contract of partnership signed, unless other date stipulated therein. (C.C.Q. 2187).

Partnership Name.

No partnership, either local or foreign, may be registered if its name is not in conformity with Charter of French Language, includes prohibited expression, is immoral or offensive, falsely suggests nonprofit status, is same as that of partnership previously registered or is liable to mislead third persons in whatever manner. (R.S.Q. c. P-45, §13). Firm name must be French, may be accompanied by English version. Family names, place names, expressions formed by artificial combination of letters, syllables or figures and expressions taken from other language may appear in firm names subject to regulations of Government. (Charter of French Language, R.S.Q. c. C-11, §§63, 67-68). See category 1 Introduction, topic 1.03 Language. General partnership's name must include words ``société en nom collectif' (``General Partnership'' in English) or ``S.E.N.C.'' (``G.P.'' in English). If general partnership has limited liability, its name must include ``société en nom collectif á  responsabilité limitée'' (``General partnership with limited liability'' in English) or ``S.E.N.C.R.L.'' (``L.L.P.'' in English); limited partnership's name must include words ``société en Commandite'' (``Limited Partnership'' in English) or ``S.E.C.'' (``L.P.'' in English). (Regulation respecting application of Act respecting legal publicity of sole proprietorships, partnerships and legal persons, R.S.Q. c. P-45, r.1, §1; Professional Code, R.S.Q. c. C-26, §187.13).

Foreign partnerships and unincorporated firms may do business in province without special license, but are subject to registration requirements. If not domiciled or do not have establishment in Quebec, must designate attorney residing in Quebec (unless otherwise exempt). (R.S.Q. c. P-45, §4).

Dissolution.

Upon dissolution of general or limited partnership, property must be liquidated. (C.C.Q. 358-364; 2235). Involves filing notice of dissolution and naming liquidator, and filing notice of closure. Liquidator pays debts and divides assets between partners in proportion to their rights. (C.C.Q. 361).

3 BUSINESS REGULATION AND COMMERCE

3.01 BANKS AND BANKING:

See Canada Law Digest.

3.02 BILLS AND NOTES:

See topic 3.11 Consumer Protection. See also Canada Law Digest.

3.03 BILLS OF SALE:

See topic 3.22 Sales.

3.04 BLUE SKY LAW:

See topic 3.23 Securities.

3.05 BROKERS:

Agent and Principal.

See category 2 Business Organizations, topic 2.01 Agency.

Factors.

See category 2 Business Organizations, topic 2.01 Agency.

Insurance Brokers.

See category 17 Insurance, topic 17.01 Insurance Companies.

Real Estate Brokers.

No person shall act as broker or real estate agent unless he holds certificate. (Real Estate Brokerage Act R.S.Q. c. C-73.1, §3). Act governs issuing of said certificates and contents of brokerage contracts.

Investment Brokers.

See topic 3.23 Securities, subhead Registration of Dealers and Advisers.

3.06 BULK SALES:

See category 8 Debtor and Creditor, topic 8.10 Fraudulent Sales and Conveyances.

3.07 CARRIERS:

Jurisdiction.

Modes of transportation extending beyond province generally fall within federal jurisdiction and are governed by federal statutes and regulations of Canadian Transportation Agency.

In broad terms, all carriage within province, by land or air, must conform with essential provisions of Quebec law as contained in C.C.Q. 2030-2058.

Number of special provincial statutes may also apply, such as Quebec Railway Act (R.S.Q. c. C-14.1), and Act Respecting Owners, Operators, and Drivers of Heavy Vehicles (R.S.Q. c. P-30.3), Transport Act (R.S.Q. c. T-12), and various regulations of Commission des transports.

Supreme Court of Canada has held that carriage of goods and persons by water is governed by Canadian Maritime Law. Principal statutes in this area are Canada Shipping Act, Marine Liability Act, Marine Insurance Act, and Canada Marine Act. Canadian Maritime Law is federal law and is uniform throughout Canada. It encompasses common law of tort, contract and bailment, as well as many rules and principles derived from civil law. Generally, there is no referential incorporation of provincial substantive law.

Categories of Carriers.

Carriage is either gratuitous or for consideration. Gratuitous carrier is obliged to exercise prudence and diligence and is not governed by rules in C.C.Q. (C.C.Q. 2032). Other carriers are liable unless they prove superior force, inherent defect or natural shrinkage of cargo or fault of shipper or state of health or fault of passenger. (C.C.Q. 2037-2038, 2049).

Carriage is either successive, effected by several carriers in succession using same means of transportation, or combined, in which several carriers use different means of transportation. (C.C.Q. 2031). Sub-carriers are deemed to be party to original contract and payment to one of carriers will discharge shipper. (C.C.Q. 2035).

Carrier of persons is not liable for loss of documents, money or other property of great value unless he agreed to carriage after nature or value was declared. He is not liable for hand luggage or other effects remaining in passenger's possession unless fault is proven. (C.C.Q. 2038). Similar rules for carrier of goods. (C.C.Q. 2053).

Carriage of cargo by water is governed by federal Statutes and International Conventions including Canada Shipping Act, Marine Liability Act, and Hague-Visby Rules.

Shipping Documents.

Documents concerning shipping of goods shall be kept in vehicle used for transportation of those goods and shipping documents shall contain minimum provisions according to provincial regulations. (Regulation respecting requirements applicable to shipping documents, leasing contracts and contracts for services, c. T-12, R.6.001).

Liability for Delay.

Carriers are liable unless they prove superior force. (C.C.Q. 2034). Regulation respecting requirements for bills of lading, c. T-12, R.5.1, C.C.Q. 2041-2045).

Limitations of Liability.

Carrier may not exclude or limit liability except as authorized by law. (C.C.Q. 2034). When so entitled, limitation by truck is $4.41 per kilo of total weight of shipments unless shipper has declared higher value on front of bill of lading. (Regulation respecting requirements for bills of lading, R.S.Q., c. T-12, r.5.1, §10). Liability of water carriers is limited in accordance with Hague-Visby Rules and liability of water carriers of persons, by Marine Liability Act. Liability for personal injury may not be limited by contract. (C.C.Q. 1474).

Lien.

Carriers may exercise possessory lien until freight and other charges are paid. Carrier who accepts shipment C.O.D. and does not demand payment has no claim against shipper. (C.C.Q. 2057-2058). See Canada Law Digest, category 24 Transportation, topic 24.03 Shipping, subheads Maritime Liens, Statutory Liens, Admiralty Law.

Rights of Action.

Actions to enforce personal rights generally carry three-year time bar. (C.C.Q. 2925). However no action is admissible against carrier unless notice in writing was given within 60 days of delivery, or if cargo was not delivered, within nine months from shipment. Law suit within those time frames satisfies notice requirement. (C.C.Q. 2050).

Motor Vehicle Carriers.

For special provisions see category 24 Transportation, topic 24.03 Motor Vehicles.

3.08 COLLECTION AGENCIES:

See topic 3.18 Licenses, Business and Professional.

3.09 COMMERCIAL CODE:

Uniform Commercial Code not applicable.

3.10 CONDITIONAL SALES:

See topic 3.22 Sales.

3.11 CONSUMER PROTECTION:

Governed by certain C.C.Q. provisions, Consumer Protection Act (R.S.Q. c. P-40.1) (C.P.A.), and regulations thereunder. Latter governs contracts for goods and services entered into between consumer and merchant in course of his business including contracts of credit as well as particular contracts and business practices. (C.P.A. 2). Consumer is defined as natural person, except for merchant who obtains goods and services for purposes of his business. (C.P.A. 1).

Contracts Which Must Be Evidenced in Writing.

Consumer contracts entered into by itinerant merchant, contracts of credit, contracts which include conventional option to purchase goods leased, contracts of lease with guaranteed residual value, contracts of sale of used automobiles and used motorcycles, contracts of service involving sequential performance and those between consumer and physical fitness studio must be evidenced in writing. (C.P.A. 23). Following applies to all such contracts: no offer, promise or agreement prior to contract is binding on consumer unless confirmed in contract entered into in accordance with C.P.A. Contract must be legibly drawn up in duplicate. Must be in French, unless parties expressly agree otherwise. Merchant must sign written contract and give sufficient delay to consumer to examine it. (C.P.A. 24-27). Complete upon signature of both parties. Merchant bound by signature of his representative. Consumer bound upon receipt of signed duplicate of contract. (C.P.A. 30-33). Certain contracts of credit in electronic, rather than paper form, are permitted between consumer and certain types of financial institutions under certain circumstances. See also topic 3.12 Contracts.

Prohibition of Arbitration Clause.

Any stipulation that obliges consumer to refer dispute to arbitration, that restricts consumer’s right to go before court, in particular by prohibiting consumer from bringing class action, or that deprives consumer of right to be member of group bringing class action is prohibited. (C.P.A. 11.1).

Abusive and External Clauses.

Consumer may demand nullity of clause or reduction of obligations where clause is excessive and unreasonably detrimental to consumer. In consumer contract, external clause is null if, at time of formation of contract, it was not expressly brought to consumer's attention. (C.C.Q. 1435-1437).

Warranty.

Merchant must warrant that goods sold are unencumbered, fit for intended purpose, durable for reasonable period and must also warrant against latent defects. (C.P.A. 36-38; C.C.Q. 1726). Form of warranty is prescribed. Merchant bound by warranty as advertised. (C.P.A. 43). Goods and services must conform to advertised description, merchant bound by description. (C.P.A. 41). Warranty generally transferable to subsequent purchaser. (C.P.A. 53-54).

C.P.A. also regulates merchants who offer or conclude contracts of additional warranty. (C.P.A. 321[d], Title III.2).

Recourse against merchant or manufacturer for latent defects and against manufacturer, wholesaler, retailer, distributor or supplier, by consumer or third parties, for safety defects. (C.C.Q. 1468; C.P.A. 53).

Amounts in Trust.

Merchant required to place in trust account moneys received pending his performance of contract. (C.P.A. Title III). Office de la protection du consommateur may make exemptions from trust account requirement.

Particular Contracts.

Particular contracts governed by C.P.A. include contracts for: long-term lease of goods (C.P.A. 150.1-150.32); sale, repair and long-term lease of used automobiles and motorcycles (C.P.A. 151-181); repair of household appliances (C.P.A. 182-187); and service involving sequential performance. (C.P.A. 188-196). These latter sections govern all service contracts involving sequential performance, except for contracts made by merchant operating physical fitness studio, and those contracts object of which is: to obtain instruction, training or assistance for purpose of developing, maintaining or improving health, appearance, skills, qualities, knowledge or intellectual, physical or moral faculties of person; and to assist person in establishing, maintaining or developing personal or social relations. (C.P.A. 189). Special provisions govern contracts entered into with physical fitness studios. (C.P.A. 197-205).

Itinerant merchant is one who personally or by representative, elsewhere than at his address, solicits particular consumer for purpose of making contract or makes contract with consumer. (C.P.A. 55). Contracts with itinerant merchants must be in writing, contain certain compulsory clauses, and duplicate must be furnished to consumer. (C.P.A. 58). Consumer may cancel contract within ten days of receipt of duplicate. (C.P.A. 59).

Contracts of credit include contracts for loan of money, contracts extending variable credit and other contracts involving credit. (C.P.A. 66). Contracts of credit, except for loan of money payable on demand, must be evidenced in writing and contain certain compulsory clauses. (C.P.A. 80). Certain contracts of credit are permitted in electronic, rather than paper form between consumer and certain types of financial institutions. C.P.A. contains provisions with respect to: statements of account to be furnished to consumer; method of computing credit charges and credit rate; and advertising of credit. Contracts for loan of money and contracts involving credit may be cancelled by consumer within two days of receipt of duplicate contract.

No merchant may refuse to enter into contract with consumer on pretext that latter refuses to subscribe, through him, to insurance policy. (C.P.A. 111).

Contract extending variable credit is contract by which credit is extended in advance by merchant to consumer who may avail himself of it, in whole or in part, from time to time, in accordance with terms and conditions of contract, and includes what are commonly called credit cards, credit accounts, budget accounts, revolving credit accounts, marginal credit and credit openings. (C.P.A. 118).

Provision in contract which requires consumer in default to pay all or part of balance of his debt before maturity is clause of forfeiture of benefit of term. Clause takes effect 30 days after receipt of written notice and statement of account from merchant. After 30 days, balance becomes payable unless upon motion by consumer, court changes terms and conditions of payment or authorizes consumer to return goods to merchant and thus extinguish obligation. (C.P.A. 104-110).

Distance contracts are entered into without merchant and consumer being in one another’s presence and are preceded by offer by merchant to enter into such contract. Merchant is deemed to have made offer if his proposal includes all essential elements of contract. (C.P.A. 54.1). Consumer must be provided express opportunity to accept or decline offer and to correct any errors before distance contract is entered into. (C.P.A. 54.5). Merchant who enters distance contract may not collect partial or full payment from consumer before performing merchant’s principal obligation unless chargeback mechanism is in place. (C.P.A. 54.3). Distance contract must be in writing and contain certain prescribed information. (C.P.A. 54.6). Consumer can, by sending notice, cancel contract within seven days after receiving copy or anytime before performance of merchant's principal obligation in limited number of circumstances. (C.P.A. 54.8, 54.9). Merchant must refund all sums paid by consumer within 15 days following cancellation of contract. (C.P.A. 54.13). If merchant defaults on his obligation to refund consumer, consumer may, within 60 days of default, request his credit card issuer to make chargeback requested. (C.P.A. 54.14).

Permits must be held by itinerant merchants, merchants making contracts for loan of money or operating physical fitness studio or offering or making contracts of additional warranty. (C.P.A. 321). Application for permit made in form and with accompanying documents is prescribed by regulations. (C.P.A. 323). Permits are valid for two years. (C.P.A. 335).

Prohibited business practices include various forms of false advertising and misrepresentation of goods and services, pyramid sales, alteration of automobile odometer, and use of commercial advertising directed at persons under 13 years of age. (C.P.A. 215). Unless exempt by regulation, sales prices must be clearly and legibly marked on goods or wrappings. (C.P.A. 223). Specific regulatory regime in place for electronic price scanning.

Advertising regarding terms and conditions of credit or of long-term lease of goods is prohibited unless information prescribed by Act and regulations is disclosed. (C.P.A. 247-247.1).

Office de la Protection du Consommateur is set up to supervise application of C.P.A., receive consumer complaints, and educate public. (C.P.A. 292).

Plain Language.

No statute in force.

Personal Information.

Act respecting protection of personal information in private sector (R.S.Q. c. P-39.1) (A.P.P.I.) governs collection, use and communication of personal information, and provides for confidentiality of personal information acquired through operation of enterprise. (A.P.P.I. 1). Consumers must generally be given valid opportunity to refuse that personal information be used or conveyed to third parties for purposes of commercial or philanthropic prospection, such as compilation of mailing list. (A.P.P.I. 23). See categories 2 Business Organizations, topic Associations, subhead Enterprise; and Employment, topic Human Rights, subhead Reputation and Privacy.

3.12 CONTRACTS:

General.

Contracts are generally regulated by C.C.Q., which states that parties must act in good faith when contract is formed, performed and extinguished. (C.C.Q. 1375). Good faith is always presumed, unless law expressly requires that it be proved. (C.C.Q. 2805). Contracts are formed by sole exchange of consent between parties having that capacity to contract. (C.C.Q. 1385). Charter of French Language (R.S.Q. c. C-11) provides that contracts pre-determined by one party, contracts containing printed standard clauses, and printed order forms, invoices and receipts must be drawn up in French unless one of parties expressly requests to have it drawn up in another language (C.F.L. 55-57; C.P.A. 26). Subject to certain exceptions, contracts and related subcontracts formed in Quebec by public administration must be drawn up in French. (C.F.L. 21). Failure to respect this requirement of C.F.L. may result in fines.

Requisites.

Parties must be legally capable of contracting. (C.C.Q. 1398, 1409). Consent must be given in free and enlightened manner. (C.C.Q. 1399). There must be prestation that forms object of contract, and there must be lawful cause or consideration. (C.C.Q. 1385).

Form.

Contract need not have any specific form unless parties require or law requires contract to have specific form—e.g. conditional sales contracts and certain consumer contracts. (C.C.Q. 1385, C.P.A. 23). See also topic 3.11 Consumer Protection.

Nullity.

Contracts may be annulled as result of error, lesion or fear. (C.C.Q. 1399). Inexcusable error is not cause of annulment. (C.C.Q. 1400). Error induced by fraud at any moment in formation of contract vitiates consent. (C.C.Q. 1401). Except in specific circumstances provided by law, such as consumer contracts (C.P.A. 7), lesion is cause of nullity available only to minors and persons of full age under protective supervision (C.C.Q. 1405). C.C.Q. defines certain types of contracts, such as consumer contracts and contracts of adhesion. (C.C.Q. 1378). C.C.Q. specifies that contracts of adhesion contain certain essential clauses that cannot be freely negotiated by adhering party. (C.C.Q. 1436). Contracts are interpreted in favour of consumer or adhering party, in case of contract of adhesion. (C.C.Q. 1432). External, illegible or incomprehensible clauses may be annulled. Abusive clauses may be annulled or reduced where these clauses are contained in consumer contract or contract of adhesion. (C.C.Q. 1437). Clause that is null or deemed unwritten does not render contract invalid in other respects, unless it is apparent that contract may be considered as indivisible whole. (C.C.Q. 1438). See also topic 3.11 Consumer Protection.

Interpretation.

When terms or clauses of contract or intentions of parties are unclear, interpretation is based on contract as whole and not on literal meaning of its terms. C.C.Q. also sets out certain rules of interpretation. (C.C.Q. 1425-1432). See also topic 3.11 Consumer Protection.

Effects of Contract.

Generally, contracts produce their effects only with respect to contracting parties. (C.C.Q. 1440-1443). Parties may bind only themselves. Party may promise in his own name that third party will undertake to perform obligation. (C.C.Q. 1444-1450). However, only contracting party will be liable for third party's failure to perform. Contract binds parties not only as to what they have expressed therein, but also as to what is incident to it according to its nature, and in conformity with usage, equity and law. (C.C.Q. 1434).

Effect of Obligations in Contract.

§§1497-1670 contain specific provisions regulating effects of various types of obligations such as obligations with term (C.C.Q. 1508-1517), alternative obligations (C.C.Q. 1545-1551), divisible obligations (C.C.Q. 1519, 1522 and 1625), penal clauses (C.C.Q. 1622-1625), payment (C.C.Q. 1553-1589) and subrogation (C.C.Q. 1651-1659).

Specifically Regulated Contracts.

C.C.Q. and Consumer Protection Act also contain provisions regarding certain specific contracts, such as sale (C.C.Q. 1708-1805), lease and hire (C.C.Q. 1851-2000), enterprise or services (C.C.Q. 2098-2129), mandate (C.C.Q. 2130-2185) and loan (C.C.Q. 2312-2332). See appropriate category and topic.

Equity in Contracts.

C.C.Q. does not set out any specific provisions allowing for relief and/or modification of contractual relations on basis of equity. However, certain provisions attribute discretionary power to courts. Court may pronounce nullity of contract, order reduction of obligation arising from contract, or reduce monetary obligations under loan of money if, having regard to risk and to all circumstances, one of parties has suffered lesion. (C.C.Q. 2332). Court may also annul renunciation by notarial act of spouse's partition of family patrimony. (C.C.Q. 424). Acquittance, transaction or statement obtained by debtor from creditor in connection with bodily or moral injury that debtor has suffered within 30 days of act that caused injury is without effect. (C.C.Q. 1609). Small claims may be decided on basis of principles of equity. See category on Courts and Legislature, topic Courts, subhead Court of Quebec, catchline Small Claims.

Distributorships, Dealerships and Franchises.

There is no specific legislation governing these actors. However, they are bound by warranties of quality. (C.C.Q. 1730). They are equally liable to repair injury caused by reason of safety defect. (C.C.Q. 1468). Issues of intellectual property, being of federal jurisdiction, are mainly regulated by federal law. However, C.C.Q. touches on some matters relating to intellectual property. It is possible to grant or receive security interests (conventional or hypothec) on intellectual property such as patents and trademarks. (C.C.Q. 2684). "Rights of intellectual or industrial property" are defined as form of moveable property, and such rights may be alienated separately from revenues they produce. (C.C.Q. 458, 909). Owner of intellectual property right is expressly allowed to sue for damages resulting from wrongful disclosure of trade secrets. Damages can be awarded as compensation for costs of acquiring, perfecting and using trade secret. Also, lost profits can be compensated for through payment of royalties. (C.C.Q. 1612). Person having disclosed information may free himself from his liability by proving that considerations or general interest prevailed over keeping of trade secret. (C.C.Q. 1472). Trademark licences cannot be indefinitely long, and they are limited to 100 years. (C.C.Q. 1880). See category 2 Business Organizations, topic 2.01 Agency.

See category 1 Introduction, topic 1.03 Language.

3.13 FACTORS:

See categories 2 Business Organizations, topic Agency; Debtor and Creditor, topic Assignments; Mortgages, topic Mortgages of Personal Property.

3.14 FRANCHISES:

No special legislation.

3.15 FRAUDS, STATUTE OF:

There is no real equivalent to Statute of Frauds. General rule is that all evidence of any fact relevant to dispute is admissible and may be presented by any means. (C.C.Q. 2857). Proof of juridical act set forth in writing or content of writing is made by production of original or copy which may legally replace it. However, where party acting in good faith and with dispatch is unable to produce original of writing or copy which legally replaces it, proof may be made by any other means. In case of technology-based documents, functions of original are fulfilled by document meeting requirement of §12 of "An Act to Establish a Legal Framework for Information Technology" (R.S.Q. c. C-1.1) and functions of copy replacing original are fulfilled by certified copy of document meeting requirement of §16 of that Act. (C.C.Q. 2860).

Proof of juridical act permitted by testimony in cases where value in dispute is less than $1,500 except: (1) If there is commencement of proof, such as admission or writing of adverse party, his testimony or production of material thing, or (2) if proof is being made against person of juridical act carried out by him in ordinary course of business of enterprise. In such cases, testimonial proof can be made regardless of value in dispute. (C.C.Q. 2862).

3.16 INFORMATION TECHNOLOGY, INTERNET AND NEW MEDIA:

E-Commerce.

Governed by Consumer Protection Act, R.S.Q., c. P-40.1 ("C.P.A."), Act to Establish Legal Framework for Information Technology, R.S.Q., c. C-1.1 ("LFIT Act"), and C.C.Q.

Jurisdiction.

Distance contracts involving consumer residing in Quebec are deemed to be entered into at consumer's address. (C.P.A. 54.2). Election of domicile clause may not be set up against consumer, except if made by notarial act. (C.P.A. 22.1). Choice of applicable law cannot deprive consumer of protection under C.P.A. if formation of contract was preceded by special offer on advertisement in Quebec and consumer entered contract from Quebec residence. (C.C.Q. 3117).

See topic 3.11 Consumer Protection.

Proof of Technology-Based Document.

LFIT Act provides for legal security of documentary communications, functional equivalence and legal value of documents regardless of medium used, and interchangeability of media. Document, for purposes of LFIT Act, consists of information inscribed onto medium. This information is delimited and structured, according to medium used, by tangible or logical features and intelligible in form of words, sounds or images. (LFIT Act 3). LFIT Act states that, except where document is required by law to be in specific medium or technology, any medium or technology may be used, provided medium or technology chosen is in compliance with legal rules, in particular those contained in C.C.Q. (see C.C.Q. 2837; LFIT Act 2). There is one exception to this rule: merchant will not be able to perform its obligation to hand over copy of signed contract to consumer by sending it through electronic channels, in case of contracts entered into by itinerant merchants, contracts of credit with exception of contracts for loan of money payable on demand, contracts for long-term lease of goods which include conventional option to purchase goods leased, contracts of lease with guaranteed residual value, contracts of sale and long-term contracts of lease of used automobiles and used motorcycles, contracts of service involving sequential performance including contracts with merchants operating physical fitness studio, and contracts of sale accessory to principal contracts because C.P.A. specifically requires that contracts be drawn up in paper form in such cases. (C.P.A. 23 - 33; LFIT Act 74). Technology-based documents may be used for same purposes and shall have same legal value as paper documents if they contain same information, if integrity of each document is ensured and if each document complies with applicable legal rules. (LFIT Act 9). To be equivalent, integrity of document drawn up in medium based on information technology must be ensured (see C.C.Q. 2838; LFIT Act 5). Integrity is ensured if it is possible to verify that information it contains has not been altered and has been maintained in its entirety, and that medium used provides stability and required perennity to information (see C.C.Q. 2839; LFIT Act 6). However, document in technology-based medium that does not allow its integrity to be confirmed may be admissible as testimonial evidence or real evidence and serve as commencement of proof as per C.C.Q. 2865 depending on circumstances. (LFIT Act 5). LFIT also sets principles underlying responsibilities of various service providers acting as intermediaries on communication networks. Generally, service providers are not required to actively monitor information communicated or contained in documents or to identify circumstances where documents are used for illicit activities. (LFIT Act 27). However, service providers may not take measures to prevent person responsible for access to documents from exercising his functions, regarding confidentiality in particular, or to prevent competent authorities from exercising their functions, with respect to public security or prevention, detection, proof and prosecution of offences.

Personal Information.

See category 3 Business Regulation and Commerce, topic 3.11 Consumer Protection, subhead Personal Information; and category 11 Employment, topic Human Rights, subhead Reputation and Privacy.

3.17 INTEREST:

Maximum Rate.

It has to be executed on annual basis if loan is not guaranteed by real property. (R.S.C. c. I-15).

Legal rate is 5% per annum. (R.S.C. c. I-15). Interest over 60% per annum is illegal.

(R.S.C. c. G-46).

Judgments.

Legal rate in absence of agreement to contrary, to which may be added indemnity equivalent to difference between such rate and rate fixed by regulation under §28 of Act respecting Ministère du Revenu. (C.C.Q. 1619; R.S.Q. c. M-31). Interest runs from default. (C.C.Q. 1617, 1618). In case of loan of sum of money, court may nullify contract, order reduction of obligations arising from contract or revise terms and conditions if it finds that, having regards to circumstances, one of parties has suffered lesion. (C.C.Q. 2332).

3.18 LICENSES, BUSINESS AND PROFESSIONAL:

Certain businesses required to be licensed. Fees paid to province and/or municipality concerned. Amount of such fees fixed by special laws, and varies according to type of business.

Collection Agencies.

Act Respecting Collection of Certain Debts (R.S.Q. c. R-2.2) regulates activity of collection of debts including activities of collection agents who must hold permit issued by Consumer Protection Office established under Consumer Protection Act (R.S.Q. c. P-40.1). Application for permits must be accompanied by requisite security in amount and form prescribed by regulation; ranges from $10,000 to $25,000. See category 11 Employment, topic 11.02 Human Rights, subhead Reputation and Privacy.

3.19 MONOPOLIES, RESTRAINT OF TRADE AND COMPETITION:

See Canada Law Digest.

3.20 NEGOTIABLE INSTRUMENTS:

See Canada Law Digest, category 3 Business Regulation and Commerce, topic 3.02 Bills and Notes.

3.21 RESTRAINT OF TRADE:

See Canada Law Digest, category 3 Business Regulation and Commerce, topic 3.08 Monopolies, Restraint of Trade and Competition.

3.22 SALES:

The contract of sale is formed by exchange of consent between parties. (C.C.Q. 1385). Contract of sale is extinguished when seller fulfills his obligation to deliver property by putting buyer in possession of property (C.C.Q. 1717) and transfers ownership of property to buyer (C.C.Q. 1708, 1719). When property determined only as to kind is sold, transfer of ownerships is not complete until property is certain and determinate and buyer has been notified. (C.C.Q. 1453).

A promise of sale with delivery and actual possession is equivalent to sale unless intention of parties to contrary is expressed. Any amount paid on occasion of promise of sale is presumed to be deposit on price unless otherwise stipulated in contract. (C.C.Q. 1710-1711).

Sale of Another's Property.

Sale of property by person other than owner or than person charged with its sale or authorized to sell it may be declared null. Sale may not be declared null, however, if seller becomes owner of property. (C.C.Q. 1713). True owner may apply for annulment of sale and revendicate property sold from buyer unless sale was made under judicial authority or unless buyer can acquire property by means of acquisitive prescription by possessing property for three years running from dispossession of owner. (C.C.Q. 1714, 2919). If movable property is sold in ordinary course of business of enterprise, owner is bound to reimburse buyer in good faith for price he has paid. (C.C.Q. 1714). Buyer as well may apply for annulment of sale; he may not do so, however, where owner himself is not entitled to revendicate property. (C.C.Q. 1715). See category 2 Business Organizations, topic 2.02 Associations, subhead Enterprise.

Warranty by Seller.

Every contract of sale carries with it warranty of quality where seller warrants buyer that property is free of latent defects (C.C.Q. 1726) as well as warranty of ownership by which seller warrants buyer that property is free and clear of all rights except those declared at time of sale (C.C.Q. 1732). Such warranties may be specifically excluded by agreement except for warranty against seller's personal fault. (C.C.Q. 1732).

Sale of Incorporeals.

Assignment of debts and rights of action against third parties may be perfected between seller and buyer (C.C.Q. 1637), but buyer cannot set up sale against debtor and third persons until debtor has acquiesced in it or received copy or pertinent extract of act of sale or any other evidence of sale which may be set up against seller (C.C.Q. 1641). Where debtor cannot be found in Quebec, sale may be set up upon publication of notice in newspaper of locality of last known address of debtor or, if he carries on enterprise, in locality where principal establishment is situated. (C.C.Q. 1641). Sale of universality of claims may be set up against debtors and third persons by registration, provided that other formalities whereby sale may be set up against debtors who have not acquiesced in sale have been accomplished. (C.C.Q. 1642). For rules governing Assignment of Claims see C.C.Q. 1637-1650. Every transfer of hypothecary claim must be registered in registry office in which title creating debt has been registered. (C.C.Q. 3003). See category 8 Debtor and Creditor, topic 8.01 Assignments.

Sale of Rights of Succession.

Person who sells rights of succession without specifying in detail property affected warrants only his quality as heir. (C.C.Q. 1779).

Every person who is not heir but to whom another heir transferred his right in succession may be excluded from partition, either by all co-heirs or by one of them on being reimbursed value of right at time of redemption and his disbursements for costs related to transfer. (C.C.Q. 848).

No one can accept or renounce succession of living person or make any stipulation with respect thereto. (C.C.Q. 631).

Sale of Litigious Rights.

When litigious rights are sold, person from whom it is claimed is wholly discharged by paying to buyer price, costs related to sale and interest on price computed from day buyer paid it. (C.C.Q. 1784).

Sale of Residential Immovables.

Sale of residential immovable is particular contract defined as sale of residential immovable to natural person for own occupation. Obligatory preliminary contract with option to withdraw promise to buy, and containing information regarding price and execution. Special rules for immovables under divided co-ownership or forming part of development. Purchaser may demand nullity of sale not preceded by preliminary contract upon demonstration of serious prejudice suffered. (C.C.Q. 1785-1794).

A right of redemption stipulated by the seller entitles him, after giving buyer, and any subsequent acquirer if right of redemption has been published required notice of his intention, to take back property free of any charges which buyer may have laid upon it provided seller's right of redemption, if it required publication, was published in due time and in accordance with rules regarding publication of rights. Right of redemption of property acquired for service or carrying on of enterprise may not be set up against third persons unless it is published. Buyer may retain possession of property until seller has satisfied all these obligations. Right of redemption cannot be stipulated for term exceeding five years. (C.C.Q. 1750-1756).

Instalment Sales.

Goods may be sold on condition that property does not pass until goods are paid for. Reservation of ownership of property acquired for service or carrying on of enterprise must be published to be opposable to third persons. (C.C.Q. 1745). Instalment sales contracts need not meet special requirements save for contracts between merchant and consumer which are subject to following provisions of Consumer Protection Act. (R.S.Q. c. P-40.1).

When seller repossesses property sold because buyer defaulted, notice must be sent to buyer who may remedy such default during such delay (20 days for movable property, 30 if sale to consumer, and 60 days for immovable). (C.C.Q. 1749, 2758). If buyer has paid one half of total sale price of thing sold, seller must obtain court permission to repossess goods sold to defaulting consumer. (C.P.A. 142). See topic 3.11 Consumer Protection.

Bills of Sale.

A bill of sale will not avail against third parties or against seizing creditors, provided the goods be not actually transferred, or provided they are not represented by a warehouse receipt which is transferred.

Sale of Enterprise.

Specific provisions pertaining to sale of enterprise (bulk sales) in C.C.Q. were revoked in 2002. (C.C.Q. 1767-1778). See category 8 Debtor and Creditor, topic 8.10 Fraudulent Sales and Conveyances.

Product Liability.

See subhead Warranty by Seller, supra.

Retail Credit Sales.

See subhead Instalment Sales, supra.

Consumer Protection.

See topic 3.11 Consumer Protection.

See category 1 Introduction, topic 1.03 Language.

3.23 SECURITIES:

Law relating to issue and sale of securities in Quebec, registration of investment advisers, securities dealers, underwriters, take-over bids made to shareholders in Quebec, insider trading, proxy solicitation and financial and other disclosure by publicly traded corporations is governed by Securities Act. (R.S.Q., c. V-1.1, as am'd [up to and including S.Q. 2008, c. 47] ["Q.S.A."]). Note: Act respecting Agence nationale d'encadrement du secteur financier, S.Q. 2002, c. 45, now entitled Act respecting Autorité des marchés financiers (``A.M.F. Act'') provided for creation of Agence nationale de l'encadrement du secteur financier, since renamed Autorité des marchés financiers (``A.M.F.'') which on Feb. 1, 2004 replaced and assumed jurisdiction of Commission des valeurs mobiliéres du Québec (trans: Quebec Securities Commission) (``Q.S.C.'') and several other financial sector regulators. In addition, A.M.F. Act created new administrative tribunal, Bureau de décision et de révision en valeurs mobiliéres (``B.D.R.V.M.''), which exercises decision making power formerly vested in Q.S.C., but not vested in A.M.F. upon its creation. A.M.F., in contrast to Q.S.C., is not commission but rather agency. Executive power lies with president and director general, supported by board of directors, superintendents and Conseil consultatif de régie interne (management advisory board). Council is composed of seven members, including chair, appointed by government. Law relating to take-over bids made to shareholders in Quebec, insider trading, proxy solicitation and financial disclosure by federally incorporated issuers is also governed by Canada Business Corporations Act, R.S.C. c. C-44, as am'd. (See Canada Law Digest, category 2 Business Organizations, topic 2.03 Corporations.) Law relating to proxy solicitation and financial disclosure by Quebec incorporated companies is also governed by Companies Act, R.S.Q., c. C-38. Reporting issuer (see definition §68 Q.S.A.) is Securities Act term meaning issuer in respect of which prospectus has been filed and receipt obtained; securities exchange take-over bid circular has been filed; securities have been at any time since Apr. 6, 1983 listed on stock exchange in Quebec; or, securities have been exchanged for those of another issuer in connection with merger or reorganization involving at least one reporting issuer. Reporting issuer may also be determined by regulation or be designated by A.M.F. in accordance with criteria determined by regulation.

Administration of securities legislation is responsibility of A.M.F. Most powers of A.M.F. may be delegated to one of its members or member of its personnel. Decisions of staff may be reviewed by A.M.F. at request of affected person and appeal lies from A.M.F. decisions to Court of Quebec, whose decision can be appealed to Court of Appeal with leave.

On Sept. 14, 2005, A.M.F. and other Canadian Securities Authorities implemented National Instrument 45-106 with objective of consolidating and harmonizing most of exemptions contained in various provincial and territorial statutes, regulations and rules. Adoption in Quebec of Regulation 45-106 respecting prospectus and registration exemptions (c. V-1.1, r.0.1.001) ("Regulation 45-106"), results in sweeping changes to rules governing private placements in Quebec. Substantially all of Securities Act sections dealing with prospectus and registration exemptions are repealed and replaced by those of Regulation 45-106.

Regulatory Oversight Function of A.M.F.

A.M.F. has policy-making power in exercise of its function to (a) promote efficiency in securities market; (b) protect investors against unfair, improper or fraudulent practices; (c) regulate information that must be disclosed to security holders and public in respect of persons engaged in distribution of securities and of securities issued by these persons; (d) to define framework for activities of professionals of securities market and organizations responsible for operation of stock market. A.M.F. may also delegate its powers and review any decision made by delegation. See also subheads Distribution of Securities to Public, and Registration of Dealers and Advisers, infra.

Discretionary Powers of A.M.F. and B.D.R.V.M.

A.M.F. may exempt person from requirements of Securities Act or regulations where it considers exemption not to be detrimental to protection of investors and B.D.R.V.M. may deny benefit of exemption contained in Securities Act or regulations where it considers it necessary to do so to protect investors.

Enforcement Powers.

Prior to Feb. 1, 2004 all enforcement powers under Securities Act were vested in one body, Q.S.C.—now, A.M.F. and B.D.R.V.M. exercise enforcement powers. A.M.F. has broad powers of investigation and has been granted power to disclose personal information of person who has committed offence under Q.S.A. without consent of person concerned (see §§237 to 248

Q.S.A. and §297ff. Q.S.A.). In course of investigation, A.M.F. has power to issue freeze orders, compel production of documents, conduct examinations under oath, and has all powers of judge of Superior Court for purposes of carrying out investigation, save power to order imprisonment. A.M.F. has broad powers relating to enforcement and application of Securities Act, although it lacks decision-making power in certain key areas—which are powers given to B.D.R.V.M. A.M.F. may take any steps required to ensure compliance with Securities Act, among others: (a) Apply to judge of Superior Court for injunction (§268 Q.S.A.); (b) intervene in civil actions relating to Securities Act or regulations (§269 Q.S.A.); (c) apply to Courts for declaratory order (§269.2 Q.S.A.); (d) institute penal proceedings sanctionable by fines to maximum of Cdn $5,000,000 or four times profit realized from violation or half sums invested, whichever is greater (§204, 204.1 Q.S.A.); (e) institute proceeding for offences sanctionable by imprisonment for term of up to five years (§208.1 Q.S.A.).

B.D.R.V.M. may exercise following powers, formerly exercised by Q.S.C., at request of A.M.F., or any other interested person: (a) Revocation, suspension or restriction of dealer or adviser registered under Q.S.A.; (b) ``prescribe a course of action'' with respect to any exchange, clearing house or regulation service provider authorized to carry on activities in Québec; (c) issue freeze orders; (d) recommend to Minister of Finance that provisional administrator be appointed for person or company, or issuance of winding-up order; (e) deny exemption contained in Q.S.A. where it considers such measure necessary to protect investors; (f) issue cease trade orders; (g) order persons to cease carrying on business as advisor; (h) prohibit or restrict solicitation activities in respect of security; (i) reprimand registrant or self-regulatory organization; (j) impose administrative penalties, order repayment of investigation costs or prohibit individual from acting as director or senior executive of issuer; (k) upon request by A.M.F. take any measures conducive to ensuring compliance with Q.S.A. Additionally, B.D.R.V.M. has power to review decision made by A.M.F. or self-regulatory organization, although it may not substitute its own views of public interest for those of A.M.F.

Applicability (§1 Q.S.A.).

Subject to exceptions set forth therein, Securities Act applies to: (a) Any security recognized as such in trade, more particularly, share, bond, capital stock of entity constituted as legal person, subscription right or warrant; (b) instrument, other than bond, evidencing loan of money; (c) deposit of money, except deposit received by Government of Quebec, Government of Canada, or one of their departments or agencies; (d) share in investment club; (e) investment contract; (f) option or other non-traded derivative whose value is derived from, referenced to or based on value or market price of security, granted as compensation or as payment for good or service; and (g) any other form of investment determined by regulation.

Distribution of Securities to Public.

Under closed system contemplated by Securities Act, every distribution of security to public requires filing of prospectus, unless specific statutory exemption is available; and every distribution of security acquired pursuant to prospectus exemption to public requires filing of prospectus unless specific exemption is available. When reselling securities acquired pursuant to exemption from prospectus requirement, exemptions may be available where securities have been held for certain periods of time, issuer is and has been for such periods reporting issuer, and no extraordinary commission or consideration is paid to person or company in respect of trade, no unusual effort has been made to prepare market or to create demand for securities being distributed. Conditions that must be satisfied in order for these exemptions to apply can now be found under Regulation 45-102 respecting resale of securities, c. V-1.1, r.0.3.1. Similarly, all trades in securities must be made by entity registered under Securities Act to trade in securities, unless specific statutory exemption from registration requirements is available. See subhead Registration of Dealers and Advisers, infra.

Prerequisites to Sales or Offerings.

No “distribution” of any security is permitted until “prospectus” in respect of offering has been filed with A.M.F. and receipt therefor obtained from A.M.F. “Distribution” (see definition §5 Q.S.A.) includes endeavour to obtain, or obtaining, by issuer, of subscribers or acquirers of its securities and endeavour to obtain, or obtaining, by subscriber or purchaser of securities acquired pursuant to prospectus exemption, of purchasers for such securities without benefit of final exemption from prospectus. “Distribution” also includes endeavour to obtain, or obtaining, of purchasers for securities acquired from company whose constituting documents provide for restrictions on free transfer of shares, prohibit distribution of securities to public and limits number of shareholders to 50, by subscriber or purchaser of such securities.

Exempt Securities.

No prospectus is required for distribution of following securities: (a) Debt securities issued or guaranteed by Government of Canada or any Canadian province or territory; (b) debt security issued or guaranteed by certain municipal, hospital and educational bodies in specific circumstances; and (c) promissory note payable in one year or less and evidencing, if distributed to natural person, debt for sum of $50,000 or more. (§41 Q.S.A.). However, Act to amend Securities Act and other legislative provisions (2004 c. 37) repealed other exemptions (§§44 to 63 Q.S.A.) that can now be found under Regulation 45-106.

Exempt Distributions.

Every person intending to make, from Quebec, distribution of securities to persons established outside Quebec is required to prepare prospectus and obtain receipt therefore from A.M.F. (§12 Q.S.A.). It may nonetheless rely on one of statutory exemptions under Regulation 45-106. Amended and Restated Regulation 45-106 has been restructured so that prospectus exemptions are in Part 2 and registration exemptions are in Part 3 of said Regulation. Prospectus exemptions are categorized into five different groups of exemptions: Capital Raising; Transaction; Investment Fund; Employee, Executive officer, Director and Consultant; and Miscellaneous. Registration exemptions also follow such categorization and are nearly identical to prospectus exemptions described hereinafter. However, registration exemptions in Part 3 of Regulation 45-106 will no longer be available after Mar. 27, 2010 - i.e. six months after Sept. 29, 2009, date on which Regulation 31-103 came into force and one will thereafter have to rely on registration exemptions found in Regulation 31-103. See subhead Registration of Dealers and Advisers, infra.

Capital Raising Exemptions.

Prospectus exemption is provided for distribution in security to purchaser who's accredited investor. (§2.3 Regulation 45-106). ``Accredited investor'' (see definition §1.1 Regulation 45-106) includes notably following: (a) Canadian financial institution, or Schedule III bank; (b) Business Development Bank of Canada; (c) securities dealer or adviser registered under securities legislation of jurisdiction of Canada and individual registered or formerly registered under securities legislation of jurisdiction of Canada as representative of such dealer or adviser; (d) Government of Canada or jurisdiction of Canada, or any crown corporation, agency or wholly owned entity of Government of Canada or of jurisdiction of Canada; (e) municipality, public board or commission in Canada, metropolitan community, school board, Comité de gestion de la taxe scolaire de l'Île de Montréal or inter-municipal management board in Quebec; (f) any national, federal, state, provincial, territorial or municipal government of or in any foreign jurisdiction, or any agency of that government; (g) pension fund that is regulated by Office of the Superintendent of Financial Institutions or pension commission or similar regulatory authority of jurisdiction of Canada; (h) individual who, either alone or with spouse, owns directly or indirectly financial assets of at least Cdn $1,000,000 or has net assets of at least Cdn $5,000,000; (i) individual whose net income exceeded Cdn $200,000 or whose net income combined with that of spouse exceeded Cdn $300,000, in each of two last calendar years and who, in either case, reasonably expects to exceed that net income level in current calendar year; (j) person, other than individual or investment fund, that has net assets of at least Cdn $5,000,000; (k) some investment funds; (l) trust company or trust corporation registered or authorized to carry on business under Trust and Loan Companies Act, 1991, c. 45, or under comparable legislation in jurisdiction of Canada or foreign jurisdiction; (m) person that is recognized or designated by securities regulatory authority as accredited investor. Other exemptions under Capital Raising apply in respect of following distributions: (i) Distribution by issuer of right granted by issuer to purchase security of its own issue to security holder, if certain conditions are satisfied (Rights offering—§2.1 Regulation 45-106); (ii) distribution in security of issuer's own issue to security holder of issuer if said distribution is permitted by plan of issuer and dividends or other distributions payable in respect of issuer's securities are applied to that purchase (Reinvestment plan—§2.2 Regulation 45-106); (iii) distribution in security of private issuer to person who purchases security as principal and is, for instance, director, officer, employee, founder or control person of issuer, spouse, relative, close personal friend or close business associate of these persons, accredited investor or person that is not of public. Private issuer is defined as issuer that is not reporting issuer or investment fund and whose securities, other than nonconvertible debt securities, are subject to restrictions on transfer and are beneficially owned, directly or indirectly, by not more than 50 persons, not including employees or former employees (Private issuer—§2.4 Regulation 45-106); (iv) distribution in security to person who purchases security as principal and who is, for instance, director, executive officer, control person of issuer or founder of issuer, or spouse, relative, close personal friend or close business associate of these persons (family, friends and business associates—§2.5 Regulation 45-106); (v) distribution by issuer in security of its own issue to affiliate of issuer that is purchasing as principal (affiliates—§2.8 Regulation 45-106); (vi) distribution by issuer in security of its own issue to purchaser who is eligible investor or who subscribes for securities in amount not exceeding Cdn $10,000, and who has signed risk acknowledgment and received offering memorandum (offering memorandum - §2.9 Regulation 45-106). ``Eligible investor'' (see definition §1.1 Regulation 45-106) includes, among others, person whose net assets alone or with spouse, in case of individual, exceed Cdn $400,000, whose net income exceeded Cdn $75,000 (or with spouse, exceeded Cdn $125,000) for last two years and who reasonably expects to exceed that income level in current calendar year or accredited investor; (vii) distribution in security that has acquisition cost of not less than Cdn $150,000 paid in cash at time of distribution (minimum amount investment—§2.10 Regulation 45-106).

Transaction Exemptions.

Prospectus requirements do not apply in respect of following distributions: (a) Distribution of security in connection with amalgamation, merger, reorganization or arrangement that is under statutory procedure or that is described in information circular made pursuant to Regulation 51-102 respecting continuous disclosure obligation (c. V-1.1 r.0.1.03) (business combination and reorganization—§2.11 Regulation 45-106); (b) distribution by issuer in security of its own issue as consideration for assets having fair value of not less than Cdn $150,000 (asset acquisition—§2.12 Regulation 45-106) or (c) as consideration for acquisition of petroleum, natural gas or mining properties or any interest in them (petroleum, natural gas and mining properties—§2.13 Regulation 45-106); (d) distribution by issuer in security of its own issue to creditor to settle debt (securities for debt—§2.14 Regulation 45-106); (e) issuer acquisition or redemption (§2.15 Regulation 45-106); (f) take-over bid and issuer bid even if security holder is outside local jurisdiction (§§2.16-2.17 Regulation 45-106).

Investment Fund Exemptions.

Prospectus requirements do not apply in respect of following distributions: (a) Distribution in security of investment fund's own issue to security holder of investment fund if said distribution is approved by plan of investment fund and dividends or other distributions payable in respect of investment fund's securities are applied to that purchase (investment fund reinvestment—§2.18 Regulation 45-106). It is important to note that no sales charge is payable on such distribution; (b) additional investment in investment fund by existing security holder if, among others, said security holder initially acquired securities of investment fund for acquisition cost of not less than Cdn $150,000 paid in cash (additional investment—§2.19 Regulation 45-106); (c) distribution in security of investment fund that has no more than 50 beneficial security holders, does not distribute or has never distributed its securities, including debt securities, to public, does not pay any remuneration to members except normal brokerage fees, and all of whose members are required to make contributions, in proportion to their shares, for financing of its operation (private investment—§2.20 Regulation 45-106); (d) distribution in security of investment fund administered by trust company or trust corporation (private investment fund—loan and trust pools—§2.21 Regulation 45-106).

Employee, Executive officer, Director and Consultant Exemptions.

Prospectus requirements do not apply in respect of distribution by issuer or by control person of issuer in security of issuer or in option to acquire security of issuer with employee, executive officer, director or consultant of issuer or of related entity of issuer. Unlike old regime new exemption does not require filing of notice and offering notice or prior consent of A.M.F. This exemption is also available, under certain conditions, to unlisted issuers. (§2.25 Regulation 45-106).

Miscellaneous Exemptions.

Prospectus requirements do not apply in respect of following distributions: (a) Isolated distribution by issuer (§2.30 Regulation 45-106); (b) distribution between person and purchaser acting as underwriter (§2.33 Regulation 45-106); (c) distribution in debt security of or guaranteed by government of Canada, of jurisdiction of Canada, certain foreign jurisdictions or by Canadian financial institution (§2.34 Regulation 45-106); (d) distribution in mortgage on real property (§2.36 Regulation 45-106); (e) distribution by not-for-profit issuer of its own issue (§2.38 Regulation 45-106); (f) distribution in certain variable insurance contracts (§2.39 Regulation 45-106); (g) distribution between individual and RRSP or RRIF that is established for or by individual or under which individual is beneficiary (§2.40 Regulation 45-106).

Prospectus Requirements (Content of Prospectus—§13 Q.S.A.).—Prospectus (including preliminary prospectus) must provide full, true and plain disclosure of all material facts relating to securities issued and must contain information and certificates prescribed by regulation. Where material change occurs prior to completion of distribution, amendment to prospectus must be filed. Chief executive officer, chief financial officer, and two directors authorized for that purpose and, where applicable, promoter or his agent, when A.M.F. so authorizes, must certify prospectus constitutes full, true and plain disclosure of all material facts relating to securities offered by prospectus. Underwriters must certify that to the best of their knowledge, prospectus constitutes full, true and plain disclosure of all material facts relating to securities offered by prospectus. If issuer has only three directors, two of whom are CEO and CFO of issuer, all directors of issuer must sign certificate. Audited financial statements required by Securities Act must accompany and form part of prospectus. Preliminary prospectus may exclude auditor's report, information on price, number of securities being distributed and specifics concerning plan of distribution. Provision is made for filing simplified (short form) prospectus by qualified reporting issuers and ``shelf'' prospectus for reporting issuers considering distribution in several tranches and terms of which may vary. A.M.F. has adopted Regulations 44-101 and 44-102 (for which, see Ontario Law Digest, category Business Regulation and Commerce, topic Securities, subhead Distribution of Securities to Public, catchline Prospectus Requirement) to permit such offerings on uniform basis. A.M.F. has adopted Regulation 71-101—Multijurisdictional Disclosure System (for which, see ibid.).) as well as Regulation 11-102 and Policy Statement 11-203 with respect to passport regime for prospectus requirements. In respect of Mutual Funds, A.M.F. has adopted Regulation 81-101 which sets out required prospectus content.

Renewal.

If distribution is in progress 12 months, new prospectus and receipt therefor must be obtained from A.M.F. within 20 days from expiration of 12 month period from date of receipt relating to previous prospectus in order to continue distribution except for shelf prospectus which is generally effective for 25 months.

Waiting Period.

A.M.F. issues receipt for preliminary prospectus (two days waiting period for short form prospectus) immediately upon filing. Minimum ten day waiting period before receipt for prospectus may be issued. From time receipt for preliminary prospectus is obtained and until receipt for prospectus in its final version is obtained, it is permissible to advertise security in limited manner, distribute preliminary prospectus, and solicit expressions of interest. Record of distribution of preliminary prospectus must be kept.

Final Receipt.

Issuing of receipt for prospectus is in discretion of A.M.F. Securities Act, §15 sets out list of grounds for nonissue of receipt.

Cease Trading Order.

B.D.R.V.M. may order person to cease any activity in respect of transaction in securities.

Delivery of Prospectus.

It is mandatory for dealer to deliver prospectus and any amendment thereto to purchaser no later than second working day after subscription. No agreement for purchase or subscription of securities during distribution is binding on purchaser or subscriber until two days after receipt by purchaser or subscriber of prospectus, as purchaser or subscriber may unilaterally rescind said agreement within same delay.

Rescission and Civil Liability.

Purchaser or subscriber of security during period of distribution has right of damages for misrepresentation including by omission contained in prospectus, on which there is deemed reliance against: (a) Issuer, (b) selling security holder on whose behalf distribution is made, (c) underwriter, (d) officers and directors of issuer (at time prospectus or amendment to prospectus was filed), and (e) expert whose consent was filed under regulations but in latter case only with respect to misrepresentation in opinions made by such expert. Parties other than issuer or selling security holder have available due diligence defence. Additionally, purchaser has right to rescind purchase or have price revised.

Prescription Periods.

Action for rescission or price revision is prescribed by lapse of three years from date of transaction, and action for damages is prescribed by lapse of three years from knowledge of facts giving rise to action; however in cases of misrepresentation, action is prescribed five years from filing of prospectus or take-over bid or issuer bid with A.M.F.

Penalties and Imprisonment.

Noncompliance is offence punishable by fines or administrative penalties of not more than Cdn $5,000,000. Senior executives and employees who authorize or permit commission of offence by company are liable to same penalties.

Registration of Dealers and Advisers.

No person may act as dealer, adviser or investment fund manager unless person is registered as such. National Instrument 31-103 Registration Requirements and Exemption (in Quebec, Regulation 31-103 Respecting Registration Requirements and Exemptions) (collectively ``NI 31-103'') seeks to harmonize, streamline and modernize registration regime across Canada for those who provide advice and trading services in Canadian capital markets. This new instrument provides for vast majority of rules pertaining to registration and exemptions. Under new regime, dealer and adviser registration will depend on concept of ``business trigger'', that is, whether firm or individual is ``in the business of'' (i) trading in securities as principal or agent; whereupon registration as ``dealer'' will be necessary or (ii) advising others about acquiring or disposing of securities; whereupon registration as ``adviser'' will be necessary.

In Quebec, on June 17, 2009, Bill 8 was assented resulting in Act to Amend Securities Act and other legislative provisions (L.Q. 2009 c. 25) that contains proposed legislative amendments to Quebec's securities legislation which are necessary to allow implementation of NI 31-103.

Firms which were registered as dealers or advisers generally continue to be registered in same category. New categories for firm are exempt market dealer (``EMD'') and investment fund manager. Categories of registration for dealers will be: investment dealer, mutual fund dealer, scholarship plan dealer and EMD whereas advisers will be registered as portfolio managers. All categories of registration have to meet registration requirements on proficiency, capital, insurance, record-keeping and compliance and will be subject to fit and proper and conduct rules once they have become registrants. As stated above, NI 31-103 requires firms acting as investment fund manager in Canada to register in new category of investment fund manager. This registration requirement applies to managers of all investment funds managed in Canadian jurisdiction, whether distributed via prospectus or pursuant to prospectus exemptions. Registration will be required in jurisdiction in which investment fund manager has its head office, with investment fund managers without head office in Canada being exempt from registration for two-year period. EMDs will be able to trade in securities of any security pursuant to applicable prospectus exemptions, including prospectus-qualified securities where trade is made in reliance on prospectus exemption. This means that EMDs may trade for their clients in securities of any investment fund (prospectus-qualified or not) provided that prospectus exemption is available in respect of that trade. However, EMDs will not, therefore, be able to act as underwriters in respect of prospectus-qualified securities, even where they are only trading in those securities pursuant to applicable exemptions.

In Quebec, NI 31-103 also has significant consequences on registrants subject to Act respecting Distribution of Financial Products and Services (Distribution Act) such as mutual fund dealers, scholarship plan dealers and investment contract firms, and their representative since they are now transitioned over to be governed by Q.S.A. and NI 31-103.

NI 31-103 provides for certain registration exemptions for specific circumstances including ``mobility'' registration exemption which could be available to those registrants who wish to continue to deal with or advise clients with whom they have pre-existing relationship and who move to another Canadian province or territory.

Take-Over Bids.

Although take-over bids fall within general purview of §110 ff. Q.S.A., reference needs to be made to Regulation 62-10.—Take-Over Bids and Issuer Bids, which mirrors regime applicable in all Canadian provinces, with exception of Ontario, while providing updated and more detailed framework for take-over and issuer bids. Take-over bid is defined in Regulation 62-104 as offer to acquire securities made to at least one security holder in Quebec, where, together with offeror's securities, such securities constitute 20% or more of class of voting securities. As more thoroughly drawn-out in §4.1-4.5 Regulation 62-104, take-over bid is exempted from general requirements provided for in Part 2 Regulation 62-104 if: (a) Bid is made through approved stock exchange and bid is not for more than 5% of outstanding securities of class and acquisitions do not aggregate more than 5% of securities within 12 month period and price paid does not exceed price fixed by regulation; (b) bid is offered by private agreement with five or fewer security holders at price that may vary by not over 15% from market price; (c) offeree issuer is not reporting issuer, organized market does not exist for issuer's securities and number of security holders is not more than 50, excluding employees and former employees of issuer or issuer's affiliate; or (d) number of holders resident in Quebec subject to bid is less than 50, securities held in Quebec constitute less than 2% of securities of class sought, bid is made in compliance with laws of jurisdiction recognized by A.M.F., all bid material is sent to security holders in Quebec and to A.M.F. and, offer to Quebec holders is made on some conditions as other holders. A.M.F. may exempt any person from Part 2 if not detrimental to protection of investors. In addition, every offeror whose interest in voting securities of any class of reporting issuer that increases to 10% or more, must issue press release in form prescribed by regulation forthwith and file report disclosing intention and other prescribed information within two business days.

Issuer Bid.

Defined in Regulation 62-104 as offer by issuer to acquire or redeem any securities of issuer, other than nonconvertible debt securities. Issuer bid is exempted from general requirements set out in Part 2 Regulation 62-104 if: (a) securities are acquired in accordance with terms in writing at time of issue; (b) issuer publishes notice of intention containing prescribed information and purchases securities, if aggregate acquisitions in any 12 month period do not exceed 5% of securities of class sought; (c) securities are purchased from current or former employees, executive officers, directors or consultants of issuer or affiliate of issuer and where securities traded on organized market, consideration offered does not exceed average market price established (in regulation) and securities acquired by issuer over 12 month period do not exceed 5% of securities of class sought at beginning of 12-month period; or (d) number of holders resident in Quebec subject to bid is less than 50, securities held in Quebec constitute less than 2% of securities of class sought, bid is made in compliance with laws of jurisdiction recognized by A.M.F., all bid material is sent to security holders in Quebec and to A.M.F. and, offer to Quebec holders is made on some conditions as other holders. A.M.F. may exempt any person from Part 2 if not detrimental to protection of investors.

Circular.

Bid may be initiated by newspaper advertisement on conditions set down in Regulation 62-104. . Subsequently take-over bid and circular must be filed with A.M.F. and sent to offeree company and holders of class of securities sought within prescribed delays. Offeree company directors' circular must be sent to each holder of securities of class sought within 15 days of bid which must include either substantiated recommendation to accept or reject bid or reasons for not making any recommendation.

Time Periods.

Period for deposit of securities must be minimum of 35 days from date of bid. Securities deposited may not be taken up and paid for by offeror until expiration of 35 day period and holder of securities may withdraw such securities before offeror has taken up securities. If bid is for less than all of class of securities sought and where greater number were deposited, offeror must take up securities pro rata.

Filing.

Securities Act requires bid material to be filed with A.M.F.

Penalties.

Every person or company who makes misrepresentation in bid circular or or in general course of take-over or issuer bid is liable to fine, damages, or administrative penalty of not more than Cdn $5,000,000, four times profit realized by such contravention or half sums invested, which ever is greater. Contravention can be punished by imprisonment not exceeding five years less one day.

Rescission and Civil Liability.

Where bid circular or any notice of change in respect thereof contains misrepresentation, every holder is deemed to have relied on such misrepresentation and may elect to rescind transfer or have price revised. Holder may also claim damages from offeror, its officers and directors at time circular signed and from expert whose opinions, containing misrepresentation, appeared in circular with his consent. Similar right also exists against directors or officer of offeree who signed directors' circular or notice of change containing misrepresentation. Parties other than offeror have available due diligence defence. See subhead Distribution of Securities to Public, catchline Prescription Periods, supra.

Proxy Solicitations and Information Circulars.

Management must, prior to or simultaneously with giving notice of meeting, send to security holders (whose address in books of reporting issuer is in Quebec, and to nonregistered holders pursuant to Regulation 54-101) form of proxy for use at meeting. Person or company, however, soliciting proxies from such holders of reporting issuer must send information circular with notice to each security holder whose proxy is solicited if acting by or on behalf of management. If acting for any other solicitation, person or company must only send information circular.

Corporate Governance Disclosure.

Pursuant to Regulation 58-101, all issuers, but those exempted by Regulation, are required to, while soliciting proxies from security holder of issuer for purpose of electing directors to Board of Directors, include in its Management Information Circular, corporate governance disclosure as set out by form prescribed by Regulation.

Exemptions from Sending Information Circular.

Where person or company is beneficial owner of securities, total number of security holders, whose proxies are solicited by those other than management, is not more than 15, then Information Circular is not required. Companies may also apply for exemption from all or some of requirements. Information Circular must be filed with A.M.F.

Form of proxy for reporting issuer is prescribed by Regulation 51-102. Quebec Companies Act governing Quebec incorporated companies also contains requirements for form of proxy.

Insider Trading.

Reporting.

Person who becomes insider of reporting issuer must report his control over securities within ten days, and must also report any changes in his control over securities within ten days of such change. Special provisions apply to mutual funds. A.M.F. may make order exempting person or company from insider reporting requirements.

As set out in §89 Q.S.A., insider or “insider of reporting issuer” means: (a) Every director or officer of issuer; (b) every director or officer of subsidiary of issuer; (c) person that exercises control over more than 10% of voting rights attached to all outstanding voting securities of issuer other than securities underwritten in course of distribution; (d) issuer that holds any of its securities; or (e) person prescribed by regulation or designated as insider by AMF. Company is deemed affiliate of another company if one is subsidiary of other or both are subsidiaries of same company or each is controlled by same person. Person owning securities entitling such person to elect majority of board of directors has control of company. Company is subsidiary of another if controlled by it, or by companies controlled by it, or is subsidiary of company that is that other company's subsidiary. Person who owns securities or has direction over them exercises control securities, and person who can exercise voting rights over securities not owned by such person is deemed to exercise control over securities. AMF has adopted National Instrument 55-101 regarding nationally harmonized insider reporting exemptions.

Extent of Disclosures.

Insider must disclose such insider's control over securities of reporting issuer as required under regulations in prescribed form.

Insider Liability.

No insider of reporting issuer having “privileged information” relating to securities of issuer may trade in such securities or disclose such information. These prohibitions also apply to: (a) affiliates of reporting issuer, (b) mutual fund managers, (c) persons who acquire such information in course of business or professional activities, (d) recipients of privileged information from persons subject to foregoing prohibitions or who are aware they have privileged information and, (e) associates of reporting issuer, of insider of reporting issuer or of any of foregoing. “Privileged information” is defined as undisclosed information that could affect decision of reasonable investor. Person who carries out prohibited trade liable to compensate other party. Such person must also account to reporting issuer for any benefit or advantage received. Such trading or informing is also offence subject to maximum penalty of Cdn $5,000,000 or four times the profit, whichever is greater and also subject to imprisonment.

Continuous Disclosure.

Every reporting issuer must file annual and quarterly financial statements with A.M.F. (or in case of mutual funds, annual and interim financial statements), and concurrently send copies to all security holders resident in Quebec, and to unregistered security holders as prescribed in Regulation 54-101. Regulation 51-102 respecting continuous disclosure requirements for non-investment funds calls for filing of annual and interim financial statements, including Management Discussion and Analysis, Annual Information Form, Material Change Report and Business Acquisition Report. Where disclosure is in relation to Investment Fund, however, required disclosure procedure is subject to Regulation 81-106 which stipulates that it must file annual and interim financial statements, including Statement of Net Assets, Annual Management Report of Fund Performance, Quarterly Portfolio Disclosure, Annual Information Form and Material Change Report. Where “material change” occurs in affairs of reporting issuer, press release disclosing nature of change must be issued and filed with A.M.F. forthwith. Where such disclosure seriously prejudicial to interest of reporting issuer and no use of knowledge of material change was used in dealings with securities, no press release need be prepared until such circumstances have ceased. Any material information concerning affairs of issuer also must be disclosed immediately through news media. (Regulation 51-20.—Timely Disclosure).

Certification of Disclosure.

Regulation 52-109 requires certification of disclosure in issuers annual and interim filings, in form prescribed by Regulation and signed by CEO and CFO. Some exemptions include foreign issuers, certain exchangeability security issuers, credit report issuers and investment funds.

Audit Committees.

Regulation 52-110 respecting audit committees requires every issuer to have audit committee with participation of independent and financially literate directors of issuer. External auditor must report directly to audit committee. Every issuer must include in its Annual Information Form disclosure required by form prescribed by this Regulation with required information set out.

3.24 STATUTE OF FRAUDS:

See topic 3.15 Frauds, Statute of.

3.25 WAREHOUSEMEN:

Some must be licensed under various federal provisions. The general principles of civil law regarding liability for loss or damage of deposited goods apply. (C.C.Q. 2280ff). In particular, depositary must act with prudence and diligence in safekeeping property deposited (C.C.Q. 2283) and restore it to depositor on demand (C.C.Q. 2285).

4 CITIZENSHIP

4.01 ALIENS:

See category 16 Immigration and see Canada Law Digest.

Aliens may acquire and transmit by gratuitous or onerous title as well as by succession or by will any property in the Province and may sue and be sued in courts of Province. (C.C.Q. 3134).

4.02 IMMIGRATION:

See category 16 Immigration, topic 16.01 Immigration.

5 CIVIL ACTIONS AND PROCEDURE

5.01 ACCORD AND SATISFACTION:

By contract known as transaction, parties may terminate lawsuit already begun, prevent future litigation or settle difficulties arising in execution of judgment, by means of concessions or reservations made by one or both of them. Transaction has, between parties, authority of final judgment but except for error of law, it may be annulled for same causes as contracts generally. Transaction is not subject to compulsory execution until it is homologated. (C.C.Q. 2631s.).

Dation en paiement (giving in payment) is contract by which debtor transfers ownership of property to his creditor who is willing to take it in place and payment of sum of money or some other property due to him. (C.C.Q. 1799). It is subject to rules pertaining to contracts of sale and makes party giving it liable to same warranties as seller. (C.C.Q. 1800).

5.02 ACTIONS:

There has never been any distinction between law and equity in Quebec; civil action is purely and simply judicial prosecution of legal civil right.

Commencement.

Except for actions and applications pertaining to contempt of court, habeas corpus, non-contentious matters and recovery of small claims that are governed by their own special rules, action is instituted by means of motion to institute proceedings setting out date of presentation, prepared and signed by plaintiff or his attorney. Ordinarily, defendant has ten days from date of service to appear. (C.P. 110s.). Certain actions against cities or municipalities are subject to prior notice being given before instituting action.

Parties.

Any inhabitant of Quebec may be sued in its courts for fulfillment of obligations contracted by him at home or abroad. (C.C.Q. 3134). Subject to ordinary rules of jurisdiction (C.P. 68s.), aliens, although not resident in Quebec, may be sued in its courts for fulfillment of obligations contracted by them even in foreign countries. Correlative right of appearing as plaintiffs is conferred upon nonresidents. (C.P. 57, 58).

Whoever brings action at law, whether for enforcement of right which is not recognized or is jeopardized or denied, or to obtain judgment upon existence of legal situation must have sufficient interest therein and free exercise of his rights. Person who does not have free exercise of his rights must be represented, assisted or authorized, in manner provided by laws of jurisdiction which govern his status and capacity or by Code of Civil Procedure. Irregularity resulting from failure to be so represented, assisted or authorized, can be remedied retroactively at any stage of case, even in appeal. (C.P. 55s.).

Class Actions.

When several persons have common interest in dispute, any one of them may appear in judicial proceedings on behalf of them all, if he holds their mandate. (C.P. 59). Any group of persons associated for pursuit of common purpose which does not possess civil personality and is not partnership within meaning of civil code may defend action at law taken against it and may also, if it is association of employees within meaning of labor code, institute legal proceedings. (C.P. 60).

Book Nine of Code of Civil Procedure (Arts. 999-1051) provides that class action may be brought in any matter and Superior Court has exclusive jurisdiction. Bringing of class action requires authorization of court obtained on motion. Applicant must, inter alia, show “prima facie” cause of action and establish that persons on whose account he wishes to act have in common identical, similar or related questions of law or fact to submit and court must ascertain that person to whom it ascribes status of representative is in position to represent members of group adequately. Judgment on motion describes members of group, identifies questions to be dealt with collectively. Appeal lies only from denial of motion. Notice to members is published and includes delay for members to advise they wish to be excluded from group. Action must be brought within three months of authorization. Decision binding on members of group who do not opt out of class action within prescribed delay. All parties have full rights to appeal judgment deciding merits of class action; that appeal is brought before Court of Appeal.

Act also creates “Fonds d'aide aux recours collectifs” fund to ensure financing of class actions. Contains rules for granting of assistance, rights and obligations of fund and recipients, right of appeal from refusal to grant assistance to Court of Quebec.

Intervention.

There are two types of intervention, voluntary and forced.

Voluntary intervention occurs when any person having legal interest in action between other parties or whose presence is necessary to authorize, assist or represent incapable party, may intervene therein at any time before judgment, by means of declaration served on all parties. Voluntary intervention is termed aggressive when third party asks for acknowledgment of right against other parties; it is termed conservatory when third party wishes to represent or to assist one of parties in his action. (C.P. 208s.).

Forced intervention occurs when party to action impleads third party whose presence is necessary to permit complete solution of action, or against whom he claims to exercise recourse in warranty. This intervention is effected by service of motion to institute proceedings on third party, together with copy of principal demand. (C.P. 216s.).

Joinder of Causes of Action.

Several causes of action may be joined in same suit, provided they are not incompatible or contradictory, that they seek condemnations of like nature, that their joinder is not prohibited by some express provision, and that they are susceptible of same mode of trial. (C.P. 66).

Two or more persons whose claims have same juridical basis or raise same points of law and facts may also join in same suit. (C.P. 67).

Splitting Causes of Action.

See subhead Joinder of Causes of Action, supra.

Splitting of Action.

Court may on application split action in any matter at any stage of proceeding. (C.P. 273.1).

Consolidation of Actions.

Two or more actions between same parties, in which questions at issue are substantially same, or for matters which might properly be combined in one action, may be consolidated by order of judge upon such terms as are deemed proper. (C.P. 270). Court may also order several actions between different parties to be tried at same time and decided on same evidence, or evidence in one action to be used as evidence in another. (C.P. 271).

Stay of Proceedings.

Defendant may obtain temporary stay of suit by dilatory exception on various grounds, e.g., when he wishes to implead third party against whom he claims to have recourse in warranty or when writ or declaration is affected by irregularity prejudicial to his interest. (C.P. 168). Nonresident plaintiff must give security for costs of his suit if required to do so by defendant. (C.P. 65). Defendant may also apply to judge or clerk to delay contestation of action until security for costs has been given. (C.P. 152).

Abatement.

Where case is not ready for judgment, trial not having been completed, all proceedings subsequent to notice given of death or change of status or cessation of functions of parties are null; suit is suspended until its continuance by those interested, or until latter have been called in to continue. But where case is ready for judgment, it cannot be delayed. (C.P. 254s.).

Revival.

Continuance of suit is effected by serving on all parties an appearance and an affidavit containing reasons therefor. Right to continue suit may be contested within delay of ten days from date of appearance. (C.P. 258).

Termination.

Actions may terminate by discontinuance, known as desistment, by plaintiff at any time before judgment (C.P. 262) or by acquiescence, known as confession, to demand by defendant (C.P. 457); by transaction (C.C.Q. 2631).

Limitation of.

See topic 5.15 Limitation of Actions.

Small Claims.

See category 6 Courts and Legislature, topic 6.01 Courts, subhead Court of Quebec, catchline Small Claims.

Direct Actions Against Insurer.

See category 24 Transportation, topic 24.03 Motor Vehicles, subhead Direct Actions Against Insurer.

5.03 APPEAL AND ERROR:

Appeals Proper.

Appeal without leave to Court of Appeal lies from: (1) Any final judgment of Superior Court or Court of Quebec in which value of object in dispute is at least $50,000; (2) any final judgment of Court of Quebec where that Court has exclusive jurisdiction under any Act other than Code of Civil Procedure; (3) any final judgment rendered in matters of contempt of court when no other recourse exists; (4) any judgment or order rendered in matter of adoption; (5) any judgment rendered in matters concerning confinement in institutions or psychiatric assessment; (6) various orders rendered regarding register of civil status, tutorships, declaratory judgments of death and protective supervision. (C.P. 26).

Appeal with leave of judge of Court of Appeal, when matter at issue is one that should be submitted to Court of Appeal, where judge believes matter at issue is question of principle, new issue or question of law that has given rise to conflicting judicial precedents lies in following cases: (1) Judgment or order or noncontentious matters; (2) judgment ruling on motion to quash seizure before judgment; (3) judgment or order rendered in matters concerning execution; (4) judgment rendered pursuant to superintending and reforming power of Superior Court; or (5) from any final judgment of Superior Court or Court of Quebec. (C.P. 26). For discussion of superintending and reforming power of Superior Court, see topic 5.04 Certiorari, subhead Evocation. Special rules govern appeal of interlocutory judgments. (C.P. 29, 511). Appeal of judgment from Court of Appeal can be made, with leave, to Supreme Court of Canada.

Security on Appeal.

No security for appeal is generally required. However, judge of Court of Appeal may, upon motion, when appeal appears dilatory, or for some other special reason, order appellant to furnish security for costs of appeal and amount of condemnation, within fixed delay and under penalty of dismissal of appeal. (C.P. 497, 501).

Remedies Against Judgments of All Courts.

Besides appeals proper, two following remedies may be available:

1. *Revocation of Judgment.*—If party was prevented from filing his defence by surprise, fraud, or any other reason considered sufficient, and was condemned by default to appear or plead, or when no other useful recourse is available against judgment, it may request that judgment be revoked. Revocation of judgment is sought by motion stating both grounds for revocation and defence to action. Motion must be served upon all parties concerned and filed within 15 days from day when remedy became available. Nevertheless, if not more than six months have elapsed since judgment, court may upon motion, relieve party from consequences of his default. (C.P. 482s.).

2. *Opposition by Third Persons.*—Every person whose interests are affected by judgment rendered in suit in which neither he nor his representatives were summoned, may, by motion to court which rendered it, demand that it be revoked insofar as it prejudices his rights. (C.P. 489).

Remedies Against Proceedings and Judgments of Inferior Courts.

See topic 5.04 Certiorari, subhead Evocation.

5.04 CERTIORARI:

There is no writ of certiorari in civil matters. However, remedy known as evocation lies against proceedings and judgments of inferior courts.

Evocation.

When there is want or excess of jurisdiction, Superior Court may evoke before judgment a case pending before court subject to its superintending and reforming power, or revise judgment already rendered. Similarly, evocation lies if judgment of lower court seized with proceeding is not susceptible of appeal and when enactment upon which proceedings have been based or judgment rendered is null or of no effect, or when proceedings are affected by some gross irregularity and there is reason to believe that justice has not or will not be done, or when there has been violation of law or abuse of authority amounting to fraud and of such nature as to cause flagrant injustice. (C.P. 846). See topic 5.03 Appeal and Error, subhead Remedies Against Judgments of All Courts.

5.05 CHARITABLE IMMUNITY:

See topic 5.12 Immunity.

5.06 COSTS:

Losing party must pay all costs unless for special reasons court reduces or compensates them or orders otherwise. (C.P. 477). Fee part of costs are set out in fixed tariff. Costs bear interest from date of judgment granting them. (C.P. 481).

Security for Costs.

Nonresident plaintiffs must give security for costs, if required to do so by defendant. (C.P. 65). Amount required varies according to amount involved in suit.

5.07 DAMAGES:

Negligence.

No statutory rule of comparative negligence. Even when partly at fault, plaintiff may recover damages at civil law in proportion to degree of defendant's fault.

Performance by Equivalence.

Creditor is entitled to damages for bodily, moral or material injury which is immediate and direct consequence of debtor's default. (C.C.Q. 1607). Loss sustained by holder of trade secret includes investment expenses incurred for its acquisition, perfection and use; profit of which he is deprived may be compensated for through payment of royalties. (C.C.Q. 1612). In contractual matters debtor is liable only for damages that were foreseen or foreseeable at time obligation was contracted, where failure to perform obligation does not proceed from intentional or gross fault on his part; even then, damages include only what is immediate and direct consequence of nonperformance. (C.C.Q. 1613). Damages owed to creditor for bodily injury he sustains are measured as to future aspects of injury according to discount rates set by regulation of government, from time such rates are set. (C.C.Q. 1614). Damages which result from delay in performance of obligation to pay sum of money consists of interest at agreed rate or, in absence of any agreement, at legal rate. Creditor is entitled to damages from date of default without having to prove that he has sustained any injury. Creditor may stipulate, however, that he will be entitled to additional damages, provided he justifies them. (C.C.Q. 1617). Where awarding of punitive damages is provided for by law, amount of such damages may not exceed what is sufficient to fulfill their preventive purpose. Punitive damages are assessed in light of all appropriate circumstances, in particular gravity of debtor's fault, his patrimonial situation, extent of reparation for which he is already liable to creditor and, where such is case, fact that payment of damages is wholly or partially assumed by third person. (C.C.Q. 1621).

Specific Performance.

Creditor may demand debtor be forced to make specific performance of obligation in cases which admit it. (C.C.Q. 1601).

Charitable Immunity.

Person assisting another or disposing free of charge of property for benefit of another exempt from liability for injury, unless injury due to intentional or gross fault. (C.C.Q. 1471).

No-Fault Insurance.

See category 24 Transportation, topic 24.03 Motor Vehicles, subhead No-Fault Insurance.

Sovereign Immunity.

Crown can generally be held liable for its actions. See category 7 Criminal Law, topic Offences and Quasi-offences.

5.08 DECLARATORY JUDGMENTS:

Declaratory judgments may be requested by any person who has interest in having determined his rights, powers or obligations under contract, will, or any other written instrument, statute, order in council, or resolution or by-law of municipal corporation. Application is made by way of motion setting forth matter in dispute and interest of applicant in obtaining decision. It must be served on all interested parties at least 30 days before presentation. (C.P. 453-454).

See category 1 Introduction, topic 1.03 Language.

5.09 DEPOSITIONS AND DISCOVERY:

When proof and hearing are necessary, and defendant has not appeared, witnesses may be heard out of court; but if defendant has appeared, witnesses can only be heard out of court with permission of court or consent of parties and provided all parties are present or duly summoned. However, in applications for separation from bed and board, marriage annulment or for divorce, evidence of plaintiff must be given before court. (C.P. 196, 404).

Outside of Province for Use within Province.

See infra, subhead Rogatory Commission.

Evidence Taken in Quebec to be Used Outside Quebec.

Upon petition to Superior Court, if Court outside Quebec, before which any civil or commercial case is pending, desires to obtain evidence of witness domiciled in Quebec, such witness may be ordered to be examined under oath and may be forced to produce any document in his possession, such examination to be held before person mentioned in such order. (R.S.Q. c. P-27).

Rogatory Commission.

Court may, upon application of any party, appoint commissioner to receive testimony of any person residing outside province or in place too far distant from place where case is pending and to report thereon. Any party may be represented at examination and commissioner may put, and must allow parties to put, any questions relevant to case. (C.P. 426s.).

Compelling Attendance of Witnesses.

Witnesses domiciled in Province of Quebec are summoned at diligence of parties, by writ of subpoena issued by judge, clerk or lawyer, copy of which is served upon them at least ten days before date fixed for appearance. In cases of urgency judge can reduce delay for service but not for less than 24 hours before time fixed for appearance. Loss of time indemnity and travel, meal and overnight accommodation allowances prescribed by government regulation have to be advanced to witness. If witness is residing in province of Ontario and there is no action for same cause pending between parties in Province of Ontario, judge or clerk may issue writ of subpoena for such witness. (C.P. 282).

See topic 5.11 Evidence, subhead Witnesses.

5.10 EQUITY:

See topic 5.02 Actions.

5.11 EVIDENCE:

Witnesses.

All persons are competent to testify except those who, because of physical or mental condition, are not in fit state to report facts of which they have knowledge. Any person competent to testify may be compelled to do so. Before testifying, witness must take oath in form of solemn affirmation to tell truth, whole truth and nothing but truth. Testimony of witness is not disallowed by reason of his relationship to interested party. Witness may testify in French or English or with assistance of interpreter.

Spouses cannot be compelled to testify against each other. (C.P. 307).

One witness is sufficient to prove a fact. (C.C.Q. 2844).

5.12 IMMUNITY:

Witness cannot refuse to answer for reason that his reply might tend to incriminate him; but if he objects on that ground, his reply cannot be used against him in any penal proceeding instituted under any law of Quebec. (C.P. 309).

5.13 INJUNCTIONS:

Injunction may be demanded by way of action and granted by Superior Court, or judge thereof, enjoining person, his officers, agents, or employees, not to do or to cease doing, or, in certain cases to perform particular act or operation. At commencement of or during suit, interlocutory injunction may be granted when it is considered to be necessary in order to avoid serious or irreparable injury to applicant, or factual or legal situation is of such nature as to render final judgment ineffectual. Application for interlocutory injunction is made by written motion, supported by detailed affidavit affirming truth of facts alleged and served upon opposite party with notice of presentation. In cases of urgency, judge may grant application provisionally before it has been served, for maximum period of ten days. Application for interlocutory injunction may not be presented at beginning of proceedings unless motion to institute proceedings has been filed in office of court. If application is granted, motion to institute proceedings must be attached to order and be served with it unless judge allows motion to institute proceedings not to be served. Application may be presented without motion to institute proceedings if motion to institute proceedings could not be filed in due time. In such case, if application is granted, order may be served without motion to institute proceedings. However, motion to institute proceedings must be served within time fixed by judge. Unless judge otherwise decides for good reason, party demanding interlocutory injunction must give satisfactory security for loss or damage to which opposite party may be subject.

Any person who knowingly contravenes terms of injunction may be condemned to fine not exceeding $50,000, with or without imprisonment for term not exceeding one year, without prejudice to opposite party's claim for damages. (C.P. 761).

5.14 JUDGMENTS:

Judgments by Acquiescence.

At any stage of proceedings, defendant may file in office of court acquiescence in all or part of any demand, except in most family matters. If acquiescence is not for whole demand and is refused by plaintiff, case proceeds but if refusal is unjustified, court cost is limited as if acquiescence had been accepted. (C.P. 457, 460).

Judgments on Pleadings.

Court cannot adjudicate beyond conclusions in pleadings. (C.P. 468).

Default Judgments.

If defendant fails to file at court appearance within ten days of service of motion to institute proceedings, case may be inscribed for judgment, notice of inscription must be given in case of default to plead. (C.P. 192, 193). Party may be relieved of default at any time before judgment is entered. (C.P. 151, 185). It takes from one day to six months depending on district in which action is taken and on nature of suit to obtain judgment if action not contested.

Offer of Judgment.

See subhead Judgments by Acquiescence, supra.

Actions.

Judgments are good for and can be executed any time within ten years. Rights resulting from judgment are prescribed after ten years if not exercised and cannot be revived. (C.C.Q. 2924).

Hypothec.

Every creditor in whose favour judgment awarding sum of money has been rendered by Court having jurisdiction in Quebec may acquire legal hypothec on movable or immovable property of his debtor (C.C.Q. 2724[4], 2730) even if there is appeal filed against judgment.

Liens.

Registration of judgment against immovable or movable property operates as hypothecary claim thereon in creditor's favor. (C.C.Q. 2724).

Declaratory Judgments.

See topic 5.08 Declaratory Judgments.

Foreign Judgments.

Decisions rendered outside of Quebec are recognized by Quebec authorities and are declared enforceable except (1) when authority of country where decision was rendered had no jurisdiction; (2) decision is subject to ordinary remedy or is not final or enforceable where it was rendered; (3) decision was rendered in violation of fundamental procedural principles; (4) identical dispute between same parties is pending in Quebec; (5) outcome of foreign decision is manifestly against public order as understood in international relations; (6) decision enforces obligations arising from taxation laws of foreign country. (C.C.Q. 3155).

Payment of Maintenance.

Judgments rendered in another province of Canada, and in some states in U.S., ordering payment of maintenance, may be executed in Quebec provided they conform to rules of public order of this province, especially those relating to marriage. Certified copy of judgment, along with depositions or stenographic transcript of testimony, is transmitted to Attorney-General who in turn transmits same to prothonotary of Superior Court of district where defendant has his residence. Defendant may file opposition to execution on ground that judgment is incompatible with rules of public order of Province or state and in such case judgment becomes executory only after confirmation, upon petition, by Superior Court of district. Court may either confirm, modify or quash extra-provincial judgment. There is appeal from this judgment. Judgment of maintenance obtained in Quebec against person not domiciled there may be transmitted by Attorney-General to Department of Justice of province or state where debtor has his domicile to be executed according to laws of that province. (R.S.Q. c. E-19).

See also category 1 Introduction, topic 1.03 Language, subhead Legislature and Courts.

5.15 LIMITATION OF ACTIONS:

Prescription is governed by law applicable to merits of dispute. (C.C.Q. 3131).

Thirty Days.

Application to review decision denying access to personal information (Act respecting access to documents held by public bodies and protection of personal information, R.S.Q. c. A-2.1, §§135, 149).

Three Months.

Following actions are prescribed by three months: (1) Action in libel against newspaper for article published must be instituted within three months following publication of such article, if alleged victim is aware of article (Press Act, R.S.Q. c. P-19, §2); (2) various actions concerning sale of defective goods to consumers (Consumer Protection Act, R.S.Q. c. P-40.1, §275).

Six Months.

Following actions are prescribed by six months: (1) Claim for financial contribution from deceased's succession by creditor of support. (C.C.Q. 684); (2) rights and recourses arising out of collective bargaining agreement (Labour Code, R.S.Q. c. C-27, §71); (3) action in civil liability based on industrial accident (Act Respecting Industrial Accidents and Occupational Diseases, R.S.Q. c. A-3.001, §443); Recourse pursuant to Health Insurance Act (Health Insurance Act, R.S.Q. c. A-29, §38); (4) action against municipality (Cities and Towns Act, R.S.Q. c. C-19, §586); (5) labour relations action based on arbitral award in construction industry (Act respecting labour relations, vocational training and manpower management in construction industry, R.S.Q. c. R-20, §111).

One Year.

Following actions are prescribed by one year: (1) For slander or libel, reckoning from day that it came to be known by party aggrieved; however, action against newspaper for article published must be instituted within three months following publication of such article or knowledge of such publication provided, in latter case, that action be instituted within one year from publication of article. (Press Act, R.S.Q. c. P-19, §2); (2) contracts entered into by debtors in fraud of creditors cannot be set aside at suit of latter, unless action is brought within a year from discovery of injury resulting from fraud (C.C.Q. 1635); (3) applications by surviving spouse for compensation for his contribution to enrichment of patrimony of deceased spouse (C.C.Q. 2928-2929); (4) action to retain or obtain possession of immovable may be brought only within one year from disturbance or dispossession (C.C.Q. 2923); (5) action by creditor who sustains damage due to change to marriage contract to obtain declaration that change may not be set up against them (C.C.Q. 438); action by presumed father to contest presumption of paternity (C.C.Q. 531); (6) action arising out of collective agreement decrees (Act respecting collective agreement decrees, R.S.Q. c. D-2, §28); (7) various actions concerning sale of goods to consumers (Consumer Protection Act, R.S.Q. c. P-40.1, §274).

Three Years.

Unless provided otherwise, action to enforce personal right or movable right is prescribed by three years. (C.C.Q. 2925). Where right of action arises from moral, corporal or material damage appearing progressively or tardily, period runs from day damage first appeared. (C.C.Q. 2926).

Following actions are also prescribed by three years: (1) Action for arrears of municipal taxes, save if there is special statute (Act Respecting Municipal Taxation R.S.Q. c. F-2.1, §251); (2) action for nullity of marriage (C.C.Q. 380); (3) action by heirs of deceased child to claim his status (C.C.Q. 536); (4) action for recovery of contributions by users lodged in private or public facility (Act Respecting Health Services and Social Services, R.S.Q. c. S-4.2, §520).

Five Years.

Following actions are prescribed by five years: Actions against architects, engineers and contractors for work they directed or supervised and against subcontractors for work they performed. (C.C.Q. 2118).

Ten Years.

Actions to enforce immovable real rights are prescribed by ten years. (C.C.Q. 2923). All rights and actions which are not otherwise regulated by law are also prescribed by ten years. (C.C.Q. 2922). See topic 5.14 Judgments.

5.16 PLEADING:

General Procedure.

Defendant must appear either in person or by attorney within ten days from date of service of suit. (C.P. 119, 149). All actions, applications or motions to institute proceedings are presentable before court on date indicated in notice enclosed in proceedings which date may not be less than 30 days from date of service. Depending on nature of claim, parties on date of presentation will agree on preliminary motions, out-of-court examination of witnesses, filing of pleas, filing of expert reports, etc. In case of dispute, court will dispose of requests made by parties. (C.P. 151.6). Actions and applications contested in writing must be complete and ready for trial within 180 days from date of service of action. (C.P. 110.1 which delay may be extended by court upon request).

Form.

In their written pleadings, parties state facts that they intend to invoke and conclusions which they seek. Such statement must be frank, precise and brief; it shall be divided into paragraphs numbered consecutively, each paragraph referring so far as possible to one essential fact. (C.P. 76).

Every fact of such nature as to take opposite party by surprise if not alleged, or to raise issue not arising from pleadings already filed, must be expressly pleaded. (C.P. 77).

Except when otherwise provided, silence of party in respect of fact alleged by opposite party must not be interpreted as admission of truth of such fact. (C.P. 86).

Party may allege in his defence or answer any material facts, even those which have arisen since institution of action, and may take any conclusions necessary to defeat ground set up by opposite party. (C.P. 183).

Counter Claim or Set-Off.

Defendant may in pleading constitute himself cross-plaintiff to urge against plaintiff any claim arising from same source as principal demand or from related source. Court remains seized of cross-demand irrespective of outcome of principal demand. (C.P. 172).

Inscription for Hearing.

If defence is in writing, as soon as issue is joined, either party may inscribe case for proof and hearing. Before case may be put on roll, plaintiff must produce declaration attesting that: examination and documents to be produced as proof have been disclosed to other party, all incidental proceedings have been tried, all expert reports have been disclosed to other party and enclosing list of witnesses. This declaration is served upon defendant, who must produce similar declaration within 30 days of reception of plaintiff's declaration. Clerk sends notice of trial to parties at least 30 days and not more than 60 days prior. (C.P. 278). Chief Justice may determine cases in which pretrial conference to be held to determine questions of fact and questions of law to be argued. (Rules of Practice, Superior Court §20).

Amendments.

Motions to institute proceedings, defence and other pleadings may be amended with or without leave of judge according to rules of Code of Civil Procedure and Rules of Practice. (C.P. 199s.).

Party may amend in order to modify, correct or complete allegations or conclusions of original pleading, to invoke facts which have occurred during suit, or to assert right accrued since service of action and connected with right originally claimed. (C.P. 202).

Proof of Claims.

Actions for sum of money in which defendant has failed to appear or plead, and founded upon authentic deed or private writing, verbal agreement to pay specific sum of money, or detailed account for services rendered or goods sold and delivered, may be proved by affidavit.

All other actions must be inscribed for proof and hearing before court. In cases where defendant is in default to appear, witnesses may be heard out of court. When defendant has appeared, witnesses can only be heard out of court with permission of court or consent of parties. (C.P. 192s.).

In all cases where oral evidence is permitted, proof may be adduced by one witness; subject, however, to rule of Code of Civil Procedure regarding testimony of child. Testimony given by party, on his own behalf or at instance of another party, may serve as commencement of proof against him. (C.C.Q. 2865).

See category 1 Introduction, topic 1.03 Language.

5.17 PRACTICE:

General.

Practice in civil matters is governed by Code of Civil Procedure and by rules of practice established by specific courts and districts. See topics 5.02 Actions, Appeal and Error, Depositions and Discovery, Injunctions, Judgments, Pleading, Process; category 8 Debtor and Creditor, topics 8.03 Attachment, 8.07 Executions, 8.11 Garnishment.

Discovery.

Defendant before filing defence may summon plaintiff or his agent, employee or officer and other persons in specified cases for examination on discovery. Examination may relate to all facts relating to issues between parties and allows defendant to obtain communication of any document relating thereto. After defence filed, any party may summon any other party or his agent, employee or officer and other persons in specified cases for examination on all facts relating to issues between parties or to give communication and allow copy to be made of any document. Examining party may file all or part of deposition into Court record. (C.P. 397, 398, 398.1). No examination on discovery is permitted where amount or value of property claimed is less than $25,000. (C.P. 396.1).

Demand for Admission of Facts.

After defence filed party may, by notice in writing, call upon other party to admit genuineness or correctness of any document, plan, photograph or other material thing. Admission is deemed made unless within ten days or other delay fixed by judge, other party serves solemnly affirmed statement denying or setting out reasons why he cannot admit. Unjustified refusal to admit may result in condemnation to consequent costs. (C.P. 403).

Direct Actions Against Insurer.

See category 24 Transportation, topic 24.03 Motor Vehicles, subhead Direct Actions Against Insurer.

Small Claims.

See category 6 Courts and Legislature, topic 6.01 Courts, subhead Court of Quebec, catchline Small Claims.

5.18 PROCESS:

Service of motion to institute proceedings is effected by serving defendant personally, or by leaving copy at his domicile with reasonable person residing therein. (C.P. 123). In case of commercial firms it is sufficient to leave copy at their usual place of business, and with corporations to leave copy with any one of their officers at their place of business. (C.P. 129, 130).

If circumstances so require judge or clerk may authorize different mode of service such as by mail or public notice. (C.P. 138). Unless judge decides otherwise public notice is by way of order published only once; publication in newspaper, designated by judge or clerk, circulated in locality of last known address of defendant or, if no newspaper circulated in that locality, in locality where he is required to appear.

If circumstances so require, judge may order publication, in French, by other appropriate means, in particular by letter, or by advertisement on radio or television.

Service by one publication is complete and is deemed to have taken place on date of such publication; in other cases, service is complete only when all prescribed publications have been made, but deemed to have been made on date of first publication. (C.P. 139).

Long Arm Statute.

No specific provisions respecting service outside Canada but such may be made by notices in local newspapers or by mail, upon order of Court. (C.P. 138s.). Service upon party domiciled or residing in another province may be made by any person of legal age, who must make certificate of service. (C.P. 137).

Who May Serve.

Service is made by sheriff or bailiff. (C.P. 120). Where there is no sheriff or bailiff in District, service may be made by any person of legal age there residing. (C.P. 122).

Nonresident Motorist.

See category 24 Transportation, topic 24.03 Motor Vehicles.

5.19 REPLEVIN:

In Quebec, called seizure before judgment, where plaintiff has right to revendicate. Used to claim possession of movable property withheld by defendant. Writ issued upon written requisition supported by affidavit affirming existence of property, debt where applicable and right to possession of and other facts giving rise to seizure and, if based on information, indicating sources thereof. (C.P. 734[1], 735).

Unpaid vendor's right to revendicate is subject to four conditions: Sale must not have been made with term and buyer must be in default; thing must still be entire and in same condition; thing must not have passed into hands of third person who has paid for it or of hypothecary creditor who has obtained surrender thereof; it must be exercised within 30 days after delivery. Where buyer is in default to pay price and property meets conditions prescribed for resolution of sale, seizure of property by third person is no hindrance to rights of seller. (C.C.Q. 1741). Possessor in good faith of movable property acquires ownership of it by three years running from dispossession of owner. (C.C.Q. 2919).

Defendant may prevent removal of property or have same returned after its seizure by giving seizing officer sufficient security equal to amount claimed or to market value of property. (C.P. 739).

5.20 SEQUESTRATION:

Court may order sequestration of movable or immovable when protection of rights of party so requires. May be ordered by trial judge when case in appeal. (C.P. 742).

A sequestrator is bound to apply to safekeeping of things seized care of prudent administrator. He is in general subject to duties and obligations imposed upon guardians in seizures under execution. (C.P. 745).

Conventional Sequestration.

Sequestration may also take place by agreement when two or more persons deposit thing in dispute in hands of third person who obliges himself to restore it once issue is decided to person to whom it may be adjudged. (C.C.Q. 2305). This person may be elected by parties or, in case of disagreement, by court. (C.C.Q. 2307).

5.21 SERVICE:

See topic 5.18 Process.

5.22 SUBMISSION OF CONTROVERSY:

Persons who are at variance upon question of law but in agreement as to facts, may submit matter for decision of court on filing joint factum containing statement of question of law, facts which gave rise to it, and conclusions of each party. Decision rendered by court has same force and effect as judgment in ordinary action. (C.P. 448s.).

5.23 TORTS:

See category 7 Criminal Law, topic Offences and Quasi-Offences.

5.24 VENUE:

In personal actions, action may be instituted against defendant before court: (1) Of his domicile, real or elected; (2) of his ordinary residence, or of place where his property is situated, or of place where action is personally served upon him, when defendant is not domiciled in province but resides or possesses property therein; (3) of place where whole cause of action has arisen, or, if it concerns suit for libel publication in newspaper, of district where plaintiff resides if newspaper is circulated therein; (4) of place where contract was made. (C.P. 68).

In real or mixed actions, proceeding may be instituted before court of defendant domicile or of district where property in dispute is situated. (C.P. 73).

If there are several defendants in personal or mixed action residing in different districts they may all be brought before court of district in which any one of them may be summoned, but in case of real action, must be court of place where object of dispute situated. (C.P. 75).

Application for additional damages for bodily injury that could not be determined at time of judgment must be presented in district where principal action was heard. (C.P. 71.1).

Action based upon contract of insurance taken against insurer may be instituted before court of domicile of insured; in case of insurance of property, it also may be instituted before court of place where loss occurred. (C.P. 69).

In personal matters, plaintiff who has joined several causes of action which did not all arise in same district may bring action before any court with jurisdiction over any one of them. (C.P. 72).

In matters of succession, action is instituted before court of place where succession devolved if it opened in Québec; otherwise, before that of place where property is located, or of domicile of defendant or any defendant. Judicial proceedings in which liquidator is interested may be instituted before court of his domicile. (C.P. 74).

Applications in most family cases are before court of common domicile of parties or, failing such domicile, that of either party. Oppositions to marriage, applications for certain dispensations regarding age or intellect for marriage are taken where marriage to be solemnized or domicile of minor or person of full age under tutorship. Adoption cases taken before court of domicile of child or of plaintiff, or if adopters consent, where director of youth protection last in charge of child exercises his function. (C.P. 70). If parties no longer live in district where judgment rendered, review of accessory measures may be brought before domicile of either party. (C.P. 70.1).

Applications respecting integrity, emancipation, tutorship to minors or protective supervision of persons of full age are taken before court of domicile or residence of minor or of person of full age. Application concerning integrity of person kept by institution governed by Acts respecting health services and social services may be taken before court of place in which person is kept. (C.P. 70.2).

In exceptional cases, court may, at any stage of proceedings, order trial be held or application relating to execution of judgment be heard in another district. (C.P. 75.0.1).

Contract Provisions.

Parties may by agreements fix a venue but this would not deprive courts from exercising jurisdiction they would otherwise have.

6 COURTS AND LEGISLATURE

6.01 COURTS:

Courts which have jurisdiction in civil matters in province are as follows (R.S.Q. c. T-16; C.P. 22s.).

Superior Court has original jurisdiction in all matters except those exclusively under jurisdiction of Court of Quebec and Federal Court of Canada (C.P. 31).

Court of Quebec, has jurisdiction in all suits for amounts less than $70,000 except suits for alimentary allowances and those reserved for Federal Court, and ultimate jurisdiction, to exclusion of Superior Court and irrespective of amount claimed, in suits for municipal and school taxes and to annul or set aside valuation roll of immovables taxable for municipal or school purposes.

Small Claims.

Natural or legal person with no more than five employees at all times during the 12-month period preceding application with claim which does not exceed $7,000 due by debtor residing or having place of business in Quebec including any motion for dissolution, rescission or cancellation of contract where value of contract does not exceed $7,000, can recover same before Court of Quebec, Small Claims Division, through simplified procedure not involving pleadings where judge assists each party to ensure respect for law and equity. Advocates are not allowed to act in that capacity in such claims except in certain cases involving complex question of law. (C.P. 953s.).

Court of Quebec, Youth Division.

Exclusive jurisdiction in matters respecting youth and adoption. (C.P. 36.1).

Federal Court of Canada has exclusive jurisdiction in matters specifically assigned to it by federal statutes and concurrent jurisdiction with Superior Court in other special matters within powers of Federal Parliament such as infringements of patents, maritime claims, etc. See Canada Law Digest, category 6 Courts and Legislature, topic 6.02 Courts.

Other Tribunals.

In addition, there are other inferior courts of local jurisdiction such as Municipal Court (R.S.Q. c. C-72) and various administrative tribunals, over which Superior Court has superintending and reforming power (C.P. 33).

There are no courts of equity in Quebec.

Appeal Courts.

Appeals in civil matters are heard by Court of Appeal (C.P. 25) sitting in appeal and finally by Supreme Court of Canada. See category 5 Civil Actions and Procedure, topic 5.03 Appeal and Error.

See category 1 Introduction, topic 1.03 Language, subhead Legislature and Courts.

6.02 LEGISLATURE:

Powers conferred on Legislature of Quebec exercised by Parliament of Quebec, which is composed of National Assembly and Lieutenant-Governor. Legislature has term of not more than five years and sessions to occur at least once in every year.

See Canada Law Digest, category 1 Introduction, topic 1.02 Government and Legal System.

6.03 REPORTS:

Numerous judicial decisions in Quebec reported by Société Québécoise d'Information Juridique (SOQUIJ), provincial Crown Corporation, in: Recueils de jurisprudence du Québec (R.J.Q.); Jurisprudence Express (J.E.); Recueil de droit de la famille (R.D.F.); Recueil de droit immobilier (R.D.I.); Recueil en responsabilité et assurance (R.R.A.); Recueil de droit fiscal québécois (R.F.Q.); Jurisprudence Logement (J.L.); Décisions de la Commission des lésions professionnelles; Recueil de jurisprudence en droit du travail (R.D.T.). SOQUIJ provides access to numerous online legal databases (http://www.azimut.soquij.qc.ca) as do Répertoire Électronique de jurisprudence du Barreau (REJB) (http://dcl.cabinet.editionsyvonblais.com) and Canadian Legal Information Institute (CanLII) (http://www.canlii.org). Most recent decisions rendered by Court of Appeal, Superior Court and Court of Quebec are available online (http://www.jugements.qc.ca).

6.04 STATUTES:

Civil and Commercial Law of Quebec is governed by Civil Code of Quebec, which replaced Civil Code of Lower Canada on Jan. 1, 1994. For convenience of reference in digest, provisions of Civil Code of Lower Canada are cited C.C. and Civil Code of Quebec are cited C.C.Q.

Practice and procedure in civil matters are governed by Code of Civil Procedure (cited C.P.). Small letter “s.” after citation is first letter of French word “suivants” (in English: “and following”). French and English texts of statutes of Quebec are equally authoritative.

Exclusive right to legislate on certain subjects is vested in Parliament of Canada. Only laws uniformly applicable to all provinces are those passed by that Parliament. See Canada Law Digest, category 1 Introduction, topic 1.02 Government and Legal System.

7 CRIMINAL LAW

7.01 BAIL:

See category 8 Debtor and Creditor, topic 8.05 Bonds.

7.02 CIVIL LIABILITY:

Every person endowed with reason has duty to abide by rules of conduct which lie upon him, according to circumstances, usage or law, so as not to cause injury to another. (C.C.Q. 1457). He is responsible for any injury he causes to another and is liable to reparation for bodily, moral or material injury which victim proves he has suffered. Degree of prudence, skill and care required depends on circumstances of case. Person cannot exclude or limit liability for bodily or moral injury. (C.C.Q. 1474). Contributory negligence is not bar to recovery but damages may be reduced in proportion to respective share of responsibility. (C.C.Q. 1478).

Person is also responsible for act or fault of another person under his control or thing under his care. (C.C.Q. 1459-1465). Manufacturer of product is liable for safety defect in its product and same rule applies to person who distributes product under his name as well as to wholesaler and retailer. (C.C.Q. 1468). Person is not liable for damages caused by superior force unless he has undertaken to make reparation for it. (C.C.Q. 1470). Accidents resulting in death of victim give right of action to any person who can prove direct damages caused by death.

7.03 CRIMINAL LAW:

See Canada Law Digest, category 7 Criminal Law, topic 7.01 Criminal Law. See also category 11 Employment, topic 11.03 Labor Relations, subhead Workmen's Compensation.

8 DEBTOR AND CREDITOR

8.01 ASSIGNMENTS:

Principles governing sales also govern assignments. See category 3 Business Regulation and Commerce, topic 3.22 Sales, subheads Sale of Incorporeals, Sale of Rights of Succession, Sale of Litigious Rights.

Instrument Transferring Title.

No particular form is required for assignment except where property is transferred by way of gift, then transfer must be by published authentic (notarial) act, except for gifts of movables where consent of parties is accompanied by delivery and immediate possession. (C.C.Q. 1824).

Assignments for Benefit of Creditors.

See Canada Law Digest, category 8 Debtor and Creditor, topic 8.02 Bankruptcy, subhead Acts of Bankruptcy.

Filing, Recording and Notification.

Assignments of immovables must be filed and recorded at law registry where immovable property is situated. (C.C.Q. 2938). Assignment of claim is perfected against debtors and third parties as soon as debtor has acquiesced in or received evidence of deed of assignment or upon publication of notice thereof in newspaper if debtor not found in Quebec. (C.C.Q. 1641). Same formalities apply to assignment of universality of claims which must also be registered in Register of personal and movable real rights. (C.C.Q. 1642). However, assignment of claim secured by hypothec must be published at appropriate land registry office if hypothec securing claim is immovable hypothec or in Register of personal and movable real rights if hypothec securing claim is movable hypothec. Certified statement of registration must be furnished to debtor, together with application for registration in case of registration in land register and, if such application is in form of summary, accompanying document. If these formalities are not observed, subrogation or assignment may not be set up against subsequent assignee who has observed them. (C.C.Q. 3003). See categories 22 Property, topic Deeds; Transportation, topic Motor Vehicles, subhead Title and Sales.

Effect.

Assignments have same effect as sales. Assignments can't be used as security. Where claims need to be used as security, creditor must obtain from its debtor movable hypothec on claims. See categories 3 Business Regulation and Commerce, topic Sales; Mortgages, topic Mortgages of Personal Property, subhead Movable Hypothecs, catchline Hypothecs on Claims.

8.02 ASSIGNMENTS FOR BENEFIT OF CREDITORS:

See Canada Law Digest, category 8 Debtor and Creditor, topic 8.02 Bankruptcy, subhead Acts of Bankruptcy.

8.03 ATTACHMENT:

Writ may be issued before judgment upon authorization of judge, to attach property of debtor, if there is reason to fear that without this remedy recovery of his debt may be put in jeopardy. (C.P. 733). Creditor may without such authorization attach movable property which he has right to revendicate (for example, in his capacity as owner, pledgee, depository, usufructuary, institute, substitute or unpaid vendor); motor vehicle which has caused him damage; movable property upon price of which he is entitled to be collocated by preference and which is being used to jeopardize his prior claim; and movable property which provision of law permits him to seize to conserve his rights. (C.P. 734). Spouse in suit in nullity of marriage, payment of compensatory allowance, separation of property or bed and board or divorce may also seize before judgment his own movables and, with leave, property of his spouse in which he would be entitled to share if matrimonial regime dissolved. (C.P. 734.0.1).

Levy in all above cases is made by bailiff. Writs are issued upon written application supported by affidavit indicating facts giving rise to seizure, and served upon defendant. (C.P. 735). If motion to institute proceedings is not served on defendant with writ of seizure it must be filed in court within five days from service, with copy for defendant. (C.P. 740).

Lien.

Attachment binds on attached goods from time of levy but does not in itself constitute prior claim or lien.

8.04 BANKRUPTCY:

See Canada Law Digest.

8.05 BONDS:

Surety and/or bail may be given by one or more solvent bondsmen/sureties, in civil or criminal matters. Bondsmen must have sufficient property in Quebec to answer obligation and must be domiciled in Canada. (C.C.Q. 2337).

The bondsmen or sureties are liable only upon the default of the debtor. (C.C.Q. 2346).

Conventional or legal surety enjoys benefit of discussion unless renounced to expressly in advance. (C.C.Q. 2347).

Where several persons become bondsmen or sureties of same debtor for same debt, each of them is liable for whole debt, but may invoke benefit of division if not renounced to expressly in advance. (C.C.Q. 2349).

At demand of bondsman or surety, creditor is bound to provide him with any useful information respecting content and terms and conditions of principal obligation and progress made in its performance. (C.C.Q. 2345). Bondsman or surety may not renounce in advance right to be provided with information or benefit of subrogation. (C.C.Q. 2355).

Suretyship is terminated by death of bondsman or surety notwithstanding any contrary provision. (C.C.Q. 2361). It can also be terminated by surety himself, so long as debt has not become exigible, after period of three years if bond or suretyship is contracted with view to covering future or indeterminate debts, or for indeterminate period, except for judicial suretyship case, by giving prior and sufficient notice to debtor, creditor and other sureties (C.C.Q. 2362). Bond or suretyship that is attached to performance of special duties is terminated upon cessation of duties. (C.C.Q. 2363).

Where, as result of act of creditor, surety can no longer be usefully subrogated to his rights, surety is discharged to extent of prejudice he has suffered. (C.C.Q. 2365).

Where creditor voluntarily accepts property in payment of principal debt, surety is discharged even if creditor is subsequently evicted. (C.C.Q. 2366).

Upon termination of bond or suretyship, surety remains liable for debts existing at that time, even if those debts are subject to condition or term. (C.C.Q. 2364).

8.06 CREDITORS' SUITS:

If creditor's claim is certain, liquid and exigible, he may exercise rights and actions of debtor where debtor refuses or neglects to exercise them to prejudice of creditor. Creditor may not exercise rights strictly personal to debtor, such as right to damages for libel, slander, or personal injuries. (C.C.Q. 1627). This recourse is called Oblique action.

It is not necessary for claim to be liquid and exigible at time action is instituted, but it is necessary that it be so at time judgment is rendered. (C.C.Q. 1628).

Person against whom oblique action is brought may set up against creditor all defenses he could have set up against his own creditor. (C.C.Q. 1629).

Note that property recovered by creditor in name of debtor falls into patrimony of debtor and benefits all his creditors. (C.C.Q. 1630).

8.07 EXECUTIONS:

Creditor may seize and sell movable property of his debtor which is in possession of latter, that is in his own possession and that is in possession of third parties who consent thereto. He may, in all cases, seize by garnishment in hands of third party sums and effects due or belonging to debtor. He may also seize in execution immovable property in possession of debtor. (C.P. 569).

Real Actions.

When party condemned to deliver or surrender property, movable or immovable, fails to do so within prescribed delay, plaintiff may be placed in possession in virtue of writ ordering that defendant be expelled or that property be taken from him, as case may be. (C.P. 565).

Personal Actions.

Judgments containing condemnation must be executed by bailiff, sheriff or sheriff's officer. Unless specifically otherwise provided any sheriff or bailiff may execute writ anywhere in Quebec. (C.P. 554). Movable property must first be exhausted before real estate can be sold. (C.P. 572).

Exemptions.

See topic 8.08 Exemptions.

Stay of execution is granted until expiry of delays for appeal. (C.P. 568). Saving cases where provisional execution is ordered, and where so provided by law, appeal regularly brought suspends execution of judgment. (C.P. 497).

In case of opposition to seizure by debtor or by third party having right to revendicate, execution is stayed until such time as opposition is disposed of. (C.P. 596, 597, 599, 673). Bankruptcy also operates stay of execution unless otherwise ordered by court.

Levy.

Seizure of property subject to execution is made by competent officer in case of movables or sheriff in case of immovables. (C.P. 580, 660).

Liens.

Execution per se does not create a lien on proceeds of sale except as to law costs.

Sale under execution cannot take place, in case of movables, until ten days after publication of notice in local newspapers. (C.P. 594). Real estate cannot be sold until 30 days after publication of notice in Quebec Official Gazette and in local newspapers. (C.P. 670, 671).

Effect of Sheriff's Sale.

Property is discharged from all real rights not mentioned in conditions of sale, with only few exceptions. (C.P. 696).

Redemption.

Real estate sold under execution is not subject to redemption.

Supplementary Proceedings.

By summons, judgment debtor may be ordered to appear to be examined as to all property he possesses or has possessed since incurring of obligation which was basis of judgment, as to his sources of revenue and may be ordered by summons to produce books or documents. (C.P. 543, 544).

Execution by garnishment is allowed. See topic 8.11 Garnishment.

8.08 EXEMPTIONS:

Following are exempt from seizure: Consecrated vessels and objects used for religious worship; family papers and portraits, medals and other decorations; property declared by donor or testator to be exempt from seizure, which may however be seized by creditors posterior to gift or to opening of legacy with permission of judge and to extent that he determines; alimentary allowances and alimony; books of account, titles of debt and other papers in possession of debtor, except currency, bonds, debentures, promissory notes, and other instruments payable to order or to bearer; contingent emoluments and fees due to ecclesiastics and ministers of religion and income of their clerical endowment; pensions granted to employees out of retiring or pension funds, as well as instalments paid or to be paid to form such funds; some disability benefits and some reimbursement of expenses under contracts of accident and sickness insurance; salaries and wages to extent of 70% of excess of following unseizable portion: $180 per week plus $30 per week for each dependent in excess of two if debtor is supporting his or her spouse, has dependent child or is main support of relative; or $120 per week in all other cases; reimbursement of expenses and periodic disability benefits under contract of accident and sickness insurance; property of person that he requires to compensate for handicap. In calculating salaries and wages, account must be taken of any remuneration in money, kind or services, paid for services rendered under contract of employment, of enterprise, for services or of mandate, excepting: contributions of employer to pension, insurance or social welfare funds; value of food and lodging supplied or paid for by employer on occasion of travelling while carrying out work; passes given by transportation undertaking to its employees. It is to be noted that subsection 553[12] provides that anything declared unseizable by law (other than Code of Civil Procedure) is also exempt. In case of alimentary debt, 50% of pensions, salaries or wages are seizable. (C.P. 553).

Debtor may select and withdraw from seizure certain categories of articles including household furniture, utensils and other things of general use to value of $6,000 as well as food and fuel required by him and his family and instruments of work needed for personal exercise of his professional activity. (C.P. 552).

8.09 FORECLOSURE:

See topic 8.15 Liens; category 21 Mortgages, topic 21.03 Mortgages of Personal Property, subhead Hypothecs Generally.

8.10 FRAUDULENT SALES AND CONVEYANCES:

Any conveyance which is shown to be simulated can be set aside by any interested party.

Creditor who suffers prejudice through juridical act of his debtor in fraud of his rights, particularly act designed to render debtor insolvent or to prefer another creditor, may obtain declaration that act may not be set up against him. (C.C.Q. 1631).

Presumptions of Fraud.

A gratuitous contract or payment made for performance of such contract is deemed to be made with fraudulent intent, even if contracting party or creditor was unaware of facts, where debtor was or became insolvent at time of making it. (C.C.Q. 1633).

An onerous contract or payment made for performance of such contract made by debtor to person who knows him to be insolvent or knows that debtor thereby becomes insolvent, is deemed to be made with fraudulent intent. (C.C.Q. 1632).

Limitation of Actions.

Action is forfeited unless brought within one year from day on which creditor obtained knowledge of injury resulting from act which is attacked or, in case of bankruptcy, from date of appointment of trustee. (C.C.Q. 1635).

Bankruptcy.

Additional special rules are contained in federal bankruptcy statutes. See Canada Law Digest, category 8 Debtor and Creditor, topic 8.02 Bankruptcy.

Unconscionable Transaction.

See category 3 Business Regulation and Commerce, topic 3.11 Consumer Protection.

8.11 GARNISHMENT:

Execution on sums and effects due or belonging to debtor in the hands of third party, known as garnishee, is effected by service thereon and on judgment debtor or writ of seizure by garnishment which orders garnishee to appear on day and at hour fixed to declare under oath what sums of money he owes to debtor or will have to pay him and what movable property he has in his possession belonging to him, and not to dispossess himself thereof. (C.P. 625). Garnishee's declaration may be made before day mentioned in writ by giving notice to judgment debtor and to seizing creditor. (C.P. 628). When corporation, partnership or group of persons associated for pursuit of common purpose in province but without civil personality is garnishee, declaration must be made by person so authorized by general or special power of attorney. (C.P. 629).

Garnishee's declaration may be contested and garnishee who fails to make declaration may be condemned personally to pay seizing creditor's claim. Upon payment of costs incurred by his default, garnishee may obtain leave to make his declaration at any time. (C.P. 634).

Adverse Claims.

In case of several seizures by different unsecured creditors in hands of same garnishee, each seizure has preference over subsequent seizures according to date of service on garnishee, unless debtor's insolvency is alleged, in which case all creditors are collocated pro rata. (C.P. 578, 640). In cases of seizure of salaries or wages, any creditor may file sworn claim so long as garnishment remains binding. (C.P. 643).

Voluntary Deposit by Debtor.

No creditor may garnish salary or wages of his debtor, who, having produced in Court of Quebec, declaration under oath containing designation of his employer, amount and date of his remuneration, his family responsibilities, list of his creditors with their addresses and nature and amount of their claims, thereafter deposits regularly seizable portion of his remuneration (see topic 8.08 Exemptions) within five days following each payment. Compliance with these requirements also protects debtor against seizure of furniture in his residence, except in exercise of prior claim or right of recovery revendication. (C.P. 652, 653).

8.12 HOMESTEADS:

No homestead exemption.

8.13 INSOLVENCY:

See Canada Law Digest, category 8 Debtor and Creditor, topic 8.02 Bankruptcy.

8.14 LEVY:

See topics 8.03 Attachment, 8.07 Executions.

8.15 LIENS:

Innkeeper is entitled to lien on effects and baggage brought into hotel by guests for cost of lodging and services rendered. (C.C.Q. 2302). If amount remains unpaid for 90 days, effects may be sold after notice of same length of time is given to person who remitted effect to holder. (C.C.Q. 944, 2303). Mechanics and others who hold property for repairs or for service have lien on articles taken for price of services performed except personal documents and effects with no market value. (C.C.Q. 1592). In admiralty and maritime, statutory liens exist in usual cases. See category 3 Business Regulation and Commerce, topic 3.07 Carriers, subhead Lien.

Mechanics' Liens.

Civil law equivalent of mechanic's lien is right of retention.

Creditor who has detention of movable property belonging to debtor with his consent has right to retain it pending full payment of his claim against debtor, if claim is exigible and is directly related to property under detention. (C.C.Q. 1592).

Right of retention may be set up against anyone. Involuntary dispossession does not extinguish right of retention; party exercising right may revendicate property, subject to rules on prescription. (C.C.Q. 1593). Person retaining property also has benefit of priority on sales price in case of seizure and sale of movable property by third party. (C.C.Q. 2651[3]).

Attachment Lien.

See topic 8.03 Attachment.

Attorney's Lien.

See category 19 Legal Profession, topic 19.01 Attorneys and Counselors.

Collateral Security Lien.

See topic 8.17 Pledges.

Judgment Lien.

See category 5 Civil Actions and Procedure, topic 5.14 Judgments.

Liens on Exempt Property.

See topic 8.08 Exemptions.

Real Estate Mortgage Lien.

See category 21 Mortgages, topic 21.03 Mortgages of Personal Property, subhead Legal Hypothecs.

Tax Lien.

See category 23 Taxation, topic 23.14 Property Taxes, subhead Lien.

Enforcement.

Liens are enforced by means of ordinary motion to institute proceedings except that of innkeeper who can sell property without judicial intervention.

No right of redemption exists with regard to property sold under lien.

8.16 MECHANICS' LIENS:

See topic 8.15 Liens.

8.17 PLEDGES:

Pledge is form of movable hypothec, otherwise called movable hypothec with delivery. (C.C.Q. 2665[2]).

For general rules regarding hypothecs see category 21 Mortgages, topic 21.03 Mortgages of Personal Property, subheads Hypothecs Generally and Ranking of Hypothecary Rights Generally.

Movable hypothec with delivery is granted by physical delivery of property or title to creditor, or, in case property is already held by creditor, by his continuous physical holding of it with grantor's consent. Movable hypothec with delivery considered published so long as creditor continues to hold hypothecated property or title thereto. (C.C.Q. 2703). Holding considered continuous even when there are temporary interruptions such as where property or title is handed over to grantor or to third person for evaluation, repair, transformation or improvement. (C.C.Q. 2704). Continuous holding secures creditor's claim. (C.C.Q. 2702-2705).

Movable hypothec granted with delivery may also be published by registration at later date, provided publication is not interrupted. (C.C.Q. 2707). If property is held by third person, detention by this person has same effect as publication, though only from time third person receives evidence in writing of hypothec. (C.C.Q. 2705). Where title is negotiable by endorsement and delivery, or delivery alone, its remittance to creditor takes place by endorsement and delivery, or delivery alone. (C.C.Q. 2709). Rights in virtue of pledge rank according to time at which property or title was delivered to creditor, subject to exceptions. (C.C.Q. 2644-2802, 2934-3075.1).

Special rules govern certain pledges taken by banks as security for loans. See Canada Law Digest, category 3 Business Regulation and Commerce, topic 3.01 Banks and Banking.

8.18 RECEIVERS:

See Canada Law Digest, category 8 Debtor and Creditor, topic 8.02 Bankruptcy.

8.19 REDEMPTION:

See topic 8.07 Executions; categories 3 Business Regulation and Commerce, topic Sales; Taxation, topic Property Taxes, subhead Redemption.

8.20 STAY OF EXECUTION:

See topic 8.07 Executions.

8.21 SUPPLEMENTARY PROCEEDINGS:

See topic 8.07 Executions.

8.22 USURY:

See Canada Law Digest, category 3 Business Regulation and Commerce, topic 3.06 Interest, subhead Criminal Code.

9 DISPUTE RESOLUTION

9.01 ALTERNATIVE DISPUTE RESOLUTION:

No special legislation.

Mandatory Dispute Resolution.

None.

Voluntary Dispute Resolution.

At any stage of civil proceeding, parties may request settlement conference. Such conference is presided by judge and is held in private at no cost to parties. It does not suspend proceeding but timetable may be modified. (C.P. 151.14-151.23). Parties to action before small claims court may seek mediation of dispute. Also available in family matters. Commercial contracts may specify arbitration clause. See topic 9.02 Arbitration and Award; category 6 Courts and Legislature, topic 6.01 Courts, subhead Court of Quebec.

9.02 ARBITRATION AND AWARD:

C.P. 940 to 951.2 apply to all arbitrations in which parties have not stipulated contrary, except for articles which are peremptory.

Where action is brought regarding dispute in matters in which parties have arbitration agreement, court must refer them to arbitration on application of either of them unless case is inscribed on roll or it finds agreement null. (C.P. 940.1). Judge or court may grant provisional measures before or during arbitration proceedings on motion of one of parties. (C.P. 940.4).

Each party appoints arbitrator, these appoint third. (C.P. 941). Order of arbitration proceedings in C.P. 944-944.11. Arbitrators determine procedure. Party intending to submit to arbitration must notify other party of his/her intention specifying matter in dispute. Witnesses summoned in accordance with C.P. 280-283. Arbitrators administer oaths, receive solemn affirmations.

Award must be made in writing by majority of arbitrators. (C.P. 945.2). Copies of award remitted to each party immediately. Execution of award against condemned party made under authority of competent court upon motion for homologation. (C.P. 946-946.6).

Generally, court cannot refuse homologation except on proof that: one of parties not qualified to enter arbitration agreement; arbitration agreement invalid under law elected by parties or under laws of Quebec; party against whom award invoked not given proper notice of appointment of arbitrator or arbitration proceedings or otherwise unable to present his case; award deals with dispute not contemplated by or within arbitration agreement or contains decisions on matters outside agreement; mode of appointment of arbitrators or applicable arbitration procedure not observed. (C.P. 946.4). Court cannot enquire into merits of dispute. (C.P. 946.2). Award may be annulled for reasons set out above.

Certain matters, at request of parties, may be referred by court to practising advocates or retired judges. (C.P. 382-394).

Mandatory Arbitration.

See categories 11 Employment, topic Labor Relations, subhead Collective Agreements; Introduction, topic Language, subhead Labor Relations.

10 DOCUMENTS AND RECORDS

10.01 ACKNOWLEDGMENTS:

When affidavit is requested to be signed by witness, Courts of Justice Act (R.S.Q. c. T-16) states that it may be taken by following officers.

Within the Province.

Persons appointed by Minister of Justice as Commissioners for Oaths for a particular district (§214); clerks of court of justice or their deputies; mayors, councillors and clerks or secretary-treasurers of every municipality; pastors or ministers of religion authorized to solemnize marriages in any territory not erected into municipality; practising Quebec advocates and notaries; justices of peace; Secretary General, associate secretaries general and associate secretaries of National Assembly and any commissioned officer of Canadian Armed Forces who holds rank of major or equivalent or higher rank for any person enrolled in Canadian Armed Forces. (§219).

Without the Province.

Persons residing outside of Quebec appointed by Minister of Justice as Commissioners for Oaths (§215); before head of post, delegate or delegate general of Quebec; notaries public under their hand and official seal; mayors or chief magistrates of any city, town or borough under seal of such city, town or borough; judges of superior court in any province of Canada, or in any other British territory; any consul, vice-consul, temporary consul, pro-consul or consular agent of Canada or of Her Majesty Sovereign of U.K., Canada and Her other Realms and Territories, and Head of Commonwealth; any commissioned officer of Canadian Armed Forces who holds rank of major or equivalent or higher rank for any person enrolled in Canadian Armed Forces. (§220).

Commissioner for Oaths.

Commissioners for Oaths for particular judicial district or for Province of Quebec are appointed for term of three years. Persons administering oaths in capacities similar to Commissioners for Oaths retain their powers while holding their office or while practising their profession, as case may be. (Regulation respecting Commissioner for Oaths, R.S.Q. c. T-16, r.4.3).

Effect.

Instrument acknowledged or proved according to law may be read in evidence and used in any court of province. See topic 10.05 Records; category 22 Property, topic 22.05 Deeds. Any affidavit taken by Commissioner for Oaths has same force as if taken in open court. (R.S.Q. c. T-16, §218).

Alternative to Acknowledgment or Proof.

No statutory provision.

Authentication.

See topic 10.04 Notaries.

Fees.

Customary fee for certificate of Chambres des notaires authenticating signature of notary of province, $25 per document.

Forms must be divided into paragraphs numbered consecutively, and be in first person. Names, occupation and exact address of deponent must be inserted. Date and place where it was sworn must be inserted. The following may be used:

Forms

I, ..., (occupation) residing at No. . . . . Street, in the City of . . . . . ., in the State of . . . . . ., do solemnly declare; I was present and did see . . . . . . of . . . . . . to me personally known to be the person described in and who executed the within (deed, power of attorney, etc.), sign and execute the same. The signature . . . . . . is in the handwriting of the said . . . . . . and was subscribed to the within . . . . in my presence and in that of the other subscribing witness. All the facts alleged in the present affidavit are true.

And I have signed at . . . . . . this . . . . . . day of . . . . . . 20 . . . . .

Solemnly declared before me at . . . . . . this . . . . . . day of . . . . . . 20 . . . . .
(Signature, title and seal (if required) of officer administering oath).

10.02 AFFIDAVITS:

Before Whom Taken.

Affidavit taken outside Province of Quebec must be made before an agent-general or delegate-general of Quebec; before notary public under his hand and official seal; before mayor or chief magistrate of any city, town or borough under seal of such city, town or borough; before judge of a superior court in any province of Canada, or in any British territory; before any consul, vice-consul, temporary consul, pro-consul or consular agent of Canada or of Her Majesty Sovereign of U.K., Canada and Her other Realms and Territories, and Head of Commonwealth; any commissioned officer of Canadian Armed Forces who holds rank of major or equivalent or higher rank for any person enrolled in Canadian Armed Forces; or before Commissioner for Oaths appointed by Minister of Justice to receive oaths for use in Courts of Quebec. (R.S.Q. c. T-16, §220).

Form.

There is no prescribed form required for affidavit, but it should be divided into paragraphs, numbered consecutively, and so far as possible only one principal statement should be contained in each paragraph. Name, occupation, and exact address of deponent should be mentioned. Date when and place where it was sworn must be inserted. (C.C.P. 91). Following form may be used:

Form

—I, William Penn, engineer, residing at No. . . . . street, in the . . . . city of Philadelphia, in the State of Pennsylvania, one of the United States of America, being duly sworn do depose and say:

1. (Here set forth the facts as clearly as possible).

And I have signed at Philadelphia, PA, U.S.A., this . . . . . day of . . . . ., A. D. 20 . . . . .

Sworn to before me at Philadelphia, PA, U.S.A., this . . . . . day of . . . . ., A. D. 20 . . . .(Signature, title and seal (if required) of officer administering oath).

Alternative to Affidavit.

See topic 10.01 Acknowledgments.

10.03 COMMISSIONS TO TAKE TESTIMONY:

See category 5 Civil Actions and Procedure, topic 5.09 Depositions and Discovery, subhead Rogatory Commission.

10.04 NOTARIES:

Notaries are public officers who take part in administration of justice. Notary is legal advisor whose chief duty it is to draw up and execute acts and contracts to which parties desire to give character of authenticity. Such acts make proof of facts attested by notary, assure date thereof, and originals are preserved in office of notary. (Notaries Act, R.S.Q. c. N-3, §§10, 35).

Notaries are represented and governed by Chambre des Notaires du Québec, body politic, possessing full power to make and amend rules and regulations for due management of all matters regarding profession subject to Professional Code which also contains provisions for disciplining members of order. (R.S.Q. cc. C-26, N-3).

No advocate can be notary (Art. 55 of Code of Ethics of Notaries, R.S.Q. c. N-3, R.0.2). Notaries are appointed for life, subject to good behavior. Their jurisdiction extends throughout province and even outside of province in certain cases.

Copy of notarial act, certified by notary to be true copy, is authentic and proves its conformity to original and replaces it. (C.C.Q. 2815, 2820). For use outside of Quebec, signature of notary is authenticated by Chambre des Notaires du Québec.

Fees.

See topic 10.01 Acknowledgments.

10.05 RECORDS:

Rights published by registration in register of personal and movable real rights or land register. (C.C.Q. 2969). Province is divided into registration divisions, each having office where register is kept for registration of rights affecting immovable property. Publication of rights concerning immovable is made in land register of registry office of division in which immovable is situated. (C.C.Q. 2970[1]). As soon as cadastre or official plan of any territory comes into force in order to affect immovable therein, deed must describe immovable by its official number on cadastral plan. (C.C.Q. 3033[1]).

Personal and movable real rights published in register of personal and movable real rights. One central register kept for entire province. (C.C.Q. 2970[2]).

Registerable Deeds.

Acquisition, creation, recognition, modification, transmission or extinction of immovable real right requires publication. Renunciation of succession, legacy, community of property, partition of value of acquests or of family patrimony, and judgment annulling renunciation, also require publication. (C.C.Q. 2938). Marriage contract and modification to marriage contract, donation of immovable and hypothec have to be registered in order to be valid. Restrictions on right to alienate, other than purely personal restrictions, and clauses of resolution, resiliation or eventual extinction of any right which shall or may be published, and any transfer or transmission of such rights themselves shall or may be published. (C.C.Q. 2939).

Personal rights and movable real rights require publication to extent prescribed or expressly authorized by law. Modification or extinction of published right shall also be published. (C.C.Q. 2938[3]).

Requisites for Registration.

Applications for registration in register of personal and movable real rights must be in required form and identify holders and grantors of rights, state nature of rights, describe property concerned and mention any other fact relevant to registration as prescribed by law or by regulation. (C.C.Q. 2981[2]). Application for registration in land register is made by presenting deed itself or authentic extract of act, by presenting summary of act or, where law so provides, by means of notice. (C.C.Q. 2982[2] and 2999.1; S.Q. 1992, c. 57, §155). Special rules determine which method should be used and form thereof. Notaries and attorneys executing or drafting deeds requiring registration of rights in land register must certify having verified identity, quality and capacity of parties, that deed is valid as to its form and that document represents will expressed by parties. (C.C.Q. 2988, 2991). Registration of rights under lease on immovables may also be obtained by other modes, i.e. presenting notice to land registrar. (C.C.Q. 2999.1). Title registered in appropriate register is considered to be validly published. (S.Q. 1992, c. 57, §155). No certification required for register of personal and movable real rights. (C.C.Q. 2995).

As with all conveyance deeds of immovables, every transfer by legal or testamentary succession of immovable must be registered in land register by registration of declaration made by notarial act en minute. (C.C.Q. 2998). Declaration sets forth name and last domiciliary address, date and place of birth and of death, nationality and civil status, and matrimonial or civil union regime, if any, of deceased. (C.C.Q. 2999[1]). It also sets forth whether succession is legal or testamentary, quality of declarant as heir, legatee by particular title or married or civil union spouse, degree of relationship between each of heirs and deceased, any renunciations, description of property and of persons concerned, and right of each in property. (C.C.Q. 2999[2]).

Effect of Publication.

Publication of rights allows them to be set up against third persons, establishes their rank and, where law so provides, gives them effect. (C.C.Q. 2941[1]). Publication of any real right affecting immovable which has been subject of plan under Cadastre Act (R.S.Q. c. C-1) shall be renewed within two years after corresponding file is opened (S.Q. 1992, c. 57, §153).

Registration of right in register of personal and movable real rights or land register carries simple presumption of existence of that right. (C.C.Q. 2944). Publication does not interrupt prescription. (C.C.Q. 2957). See category 22 Property, topic 22.02 Adverse Possession.

Publication Charges.

Schedule of charges are obtainable from registry offices.

Publication Taxes.

See categories 22 Property, topic Real Property; Taxation, topic Property Taxes, subhead Land Transfer Duties.

Vital Statistics.

Registrar of civil status is sole officer of civil status and is responsible for drawing up and altering acts of birth, marriage or civil union and death (C.C.Q. 103, 107), for keeping and custody of register of civil status and for providing access to it (C.C.Q. 103). Notice of every contract of marriage shall be entered in register of personal and movable real rights at requisition of receiving notary. (C.C.Q. 442).

10.06 SEALS:

Except for certain corporate documents, it is not necessary for validity of a document that seals be affixed. Juridical acts made outside Quebec are valid if executed in form prescribed by law applicable to content of act, by law of place where property which is object of act is situated when act executed, or by law of domicile of one of parties when act executed in accordance with rule locus regit actum. (C.C.Q. 137, 3109).

10.07 TORRENS ACT:

See topic 10.05 Records.

10.08 VITAL STATISTICS:

See topic 10.05 Records, subhead Vital Statistics.

11 EMPLOYMENT

11.01 EMPLOYER AND EMPLOYEE:

See topic 11.03 Labor Relations.

11.02 HUMAN RIGHTS:

By act entitled Charter of Human Rights and Freedoms (R.S.Q. c. C-12) basic human rights and freedoms are given statutory recognition. Charter also recognizes certain political, judicial, economic and social rights and sets out a number of prohibited acts related to violations of said rights and freedoms. Rights and freedoms set forth in Charter are guaranteed equally to women and men. (§50.1).

Basic human rights and freedoms, political and judicial rights including prohibitions related thereto are stated to prevail over provisions of any subsequent act inconsistent therewith unless subsequent act expressly states that it applies despite Charter. (§52). Charter binds Crown in matters under legislative authority of Quebec. (§54).

It is unlawful for employer to refuse to hire, or to discriminate against or discharge individual on basis of race, age, colour, religion, ethnic or national origin, social condition, sex, sexual orientation, pregnancy, handicap, language, political convictions or civil status, nor may he require information on these matters in connection with hiring of employee. (§§10 and 16). Discriminatory behaviour is also forbidden from association of employers, association of employees or professional order. (§17). Distinction, exclusion or preference based on aptitudes required for employment is deemed nondiscriminatory. (§20).

Charter also provides that employer must pay equal salary for equivalent work unless difference in salary depends on criteria such as experience, seniority, years of service, merit, productivity or overtime, common to all personnel. (§19). Pay equity plan established in accordance with Pay Equity Act (R.S.Q. E-12.001) is deemed not to discriminate on basis of gender.

It is unlawful for employer to dismiss, refuse to hire or otherwise penalize person in his employment owing to mere fact that he was convicted of penal or criminal offence, if offence was in no way connected with employment or if person has obtained pardon for offence. (§18.2).

Right to fair and reasonable conditions of employment, with regard for health, safety and physical well-being of workers, is also recognised by Charter. (§46).

Commission named “Commission des droits de la personne” established to receive complaints and generally assist in promotion, understanding and acceptance of Charter. Penalties are provided for contravention of certain prohibitions and right to obtain cessation of interference with rights or freedoms as well as compensation for resulting prejudice, including exemplary damages, given statutory recognition. (§49).

Affirmative action programmes upon recommendation of Commission statutorily recognized and regulated covering equality in employment, educational services available to public, health and public services. (§§86-92).

For Canadian Charter of Rights and Freedoms enacted by Constitution Act, 1982 see Canada Law Digest.

Reputation and Privacy.

C.C.Q. prohibits invasion of person's privacy or reputation. (C.C.Q. §§35-41). These provisions are completed by Act respecting the protection of personal information in the private sector (R.S.Q. c. P-39.1), which applies to all private enterprises which, directly or indirectly, gather, hold, use or convey personal information to third parties.

Person collecting personal information for purpose of establishing file on another person can collect only information necessary to attain object of file. (§5). Information must be collected from person concerned unless person concerned consents to collection from third persons, or if authorized by law. (§6). Consent to communication or use of personal information must, in order to be valid, be manifest, free, enlightened, given for specific purposes, and given only for time needed to achieve such purposes. (§14).

Persons operating enterprises are required to ensure that any personal information on others that they hold or use remains confidential and that any file held on others is up to date and accurate when used to make decision in relation to person concerned. (§§10-11). Employee on whom personal information is requested has right to be informed of object of file, of use which will be made of information, of categories of persons who will have access to file, of place where file will be kept and of rights of access and rectification. (§8).

Finally, Act also establishes specific rules pertaining to agents who establish files on other persons on commercial basis and prepare and communicate credit reports to third persons. Such agents required to register with Commission and make their activities known to public by means of notices published periodically in press. (§§70-79). Act prescribes penal sanctions. (§§91-93). Act has precedence over subsequent Act which is contrary thereto, unless latter Act provides express derogation. (§94).

11.03 LABOR RELATIONS:

Contract of Employment.

C.C.Q. governs “Contract of employment” (C.C.Q. 2085 to 2097), whereby person/employee, undertakes for limited period to do work for remuneration, according to instructions and under direction or control of another person/employer (C.C.Q. 2085). Contract of employment is for fixed or indeterminate term. (C.C.Q. 2086).

C.C.Q. also provides essential obligations of employee and employer to each other during contract of employment. (C.C.Q. 2087-2088). Employee is bound to act faithfully and honestly and not to use any confidential information he may obtain in carrying on or in course of his work. These obligations continue for reasonable time after cessation of contract, and permanently where information concerns reputation and private life of another person. (C.C.Q. 2088). Parties may stipulate in writing that even after termination of contract, employee may neither compete with employer nor participate in enterprise which would compete with employer. Stipulation must be limited as to time, place and type of employment, to whatever is necessary for protection of legitimate interest of employer. (C.C.Q. 2089). Stipulation of noncompetition cannot be invoked by employer who has resiliated contract of employment without serious reason or if employer has given employee serious reason for resiliating contract. (C.C.Q. 2095).

C.C.Q. also provides how contract of employment for indeterminate term is tacitly renewed (C.C.Q. 2090) or terminated by giving reasonable notice (C.C.Q. 2091). One of parties may unilaterally resiliate contract of employment without prior notice but only for serious reason. (C.C.Q. 2094). Where insufficient notice of termination is given or where manner of resiliation is abusive, employee may not renounce his right to obtain compensation. (C.C.Q. 2092).

Contract of employment is not terminated by alienation of enterprise or any change in its legal structure by way of amalgamation or otherwise and is binding on successor of employer. (C.C.Q. 2097).

Labor Code (R.S.Q. c. C-27), is principal statute concerning labor relations. It protects right of association (§§3-20), provides for certification of labor unions (§§21-50), establishes certain rules, procedures and delays for negotiation of collective agreements (§§52-73), establishes labor court to decide on disputes arising out of interpretation or application of Labor Code, and provides rules for arbitration of grievance (c. IV). Labor Court has jurisdiction in appeal from decisions of labor commissioners and in first instance on any penal proceedings under Labor Code. Labor Relations Commission is responsible for ensuring diligent and efficient application of provisions of Labour Code. (§§112-137.11.1).

Other legislation covers minimum wage and vacations, hours of work, disputes between public services and their employees, and discrimination in employment, collective bargaining in construction industry and extension of principal terms of collective agreement in given trade to all employees in that trade in given area.

Labor Unions.

Every employee has right to belong to association of employees of his choice and to participate in activities and management thereof. (§3). Any association of employees comprising absolute majority of employees of employer is entitled to be certified and may apply for certification by petition. (§§21-22). Labor Relations Officer appointed under Labor Code ascertains representative character of petitioning association and its right to be certified. (§137.48). Where more than one union is seeking certification, labor commissioner may certify union with most votes after one or several ballots, even if such union does not have absolute majority of votes. (§37.1). Starting with certification and as long as same not revoked, employer bound to deduct from salary of employees covered by certification amount equal to dues fixed by union and remit same monthly to union. (§47). Labor Code also provides that alienation of enterprise, in whole or in part, must not invalidate certification or collective agreement. New employer is bound by certification or collective agreement. However, in case of transfer of part of operation of undertaking, where transfer does not entail transfer of most of elements that characterize part of undertaking involved, new employer is not bound by certification or collective agreement. (§§45, 45.2, 45.3).

Employer is prohibited from hindering, dominating or financing formation or activities or any association of employees and from participating therein. (§12). Also, employer cannot refuse to employ person because that person exercises right arising from Labor Code nor try to compel employee to cease exercising such rights. (§14).

Collective Agreements.

Employer and union must negotiate in good faith. (§53). Conciliation services may be requested by either party from Minister of Labor who may also designate appoint conciliator without request. (§§54-57). If no collective agreement concluded, right to strike or lock-out acquired 90 days after notice to other party of demand to commence negotiations or if no notice given, 90 days after certification or expiry of last collective agreement. Unless both parties decide to submit matter to arbitrator. (§58). Special rules govern negotiations and right to strike in public and para-public sectors. (§§111.0.1-111.20). Conseil des services essentiels (Council of Essential Services) must further awareness of parties in respect of maintenance of essential services during strike. (§111.0.11). Council can, subject to government approval, establish rules that must be observed by parties in reaching agreement or establishing list. (§111.0.12). Collective agreements must be for minimum one year and, in case of first collective agreement, for maximum three years. (§65). Grievances (disagreement respecting interpretation or application of collective agreement) must be submitted to arbitration which is binding on parties and not subject to appeal. (§§74-93).

Anti-discrimination.

See topic 11.02 Human Rights.

Penal or Criminal Offence.

See subhead Occupational Health and Safety Act, infra; topic Human Rights.

Workmen's Compensation.

Act Respecting Industrial Accidents and Occupational Diseases (R.S.Q., c. A-3.001) provides compensation for injuries resulting from industrial accident or occupational disease. Compensation includes provisions for necessary care for consolidation of injury, physical, social and vocational rehabilitation of worker, payment of income replacement indemnities, compensation for bodily injury, and death benefits. (§1).

Act is public order. However, any agreement or order may provide more favorably for worker than Act does. (§4). Act applies to every worker who has industrial accident in Quebec or contracts occupational disease in Quebec whose employer, when accident happens or disease contracted, has establishment in Quebec. (§7). Act also applies, under certain conditions, to worker, domiciled in Province, when industrial accident or occupational disease contracted outside Province. (§8). Act does not apply to cases where injury or disease arises solely as result of gross and willful negligence of worker who is victim unless it ends in his death or causes severe permanent physical or mental impairment. (§27).

Worker is defined as physical person who does work for remuneration under contract of hire of personal services or of apprenticeship and includes under certain conditions, independent operators, students, volunteers, and persons given employment by government, such as persons detained in house of detention. (§§9-17). Independent operators, domestic, employers and directors of companies may register under Act to be entitled to benefits if suffer employment injury. (§§18-24). Special rights for construction workers. (§§247-251).

Employment injury means injury resulting from industrial accident or occupational disease. Industrial accident means sudden and unforeseen event, attributable to any cause, which happens to person, arising out of or in course of his work and resulting in employment injury. Occupational disease is disease contracted from work or in course of work and characteristic of that work or directly related to risks peculiar to that work. (§2). Special provisions apply to occupational lung diseases. (§§226-233).

Worker who suffers employment injury is entitled to income replacement indemnity equal to 90% of net income worker derives annually from employment, if becomes unable to carry on employment by reason of injury. Is entitled to indemnity until he returns to employment or similar work or until he refuses without valid reason to do so. (§§44-82).

Act also provides for compensation for bodily injury proportional to permanent physical or mental impairment calculated according to factors set out in Schedule to Act. (c. III, division II). Indemnity is paid in form of pension every two weeks. (§125).

Death of worker entitles spouse to lump sum indemnity of not less than $94,569 determined with reference to gross annual income of worker and factor set out in Schedule to Act. Spouse includes person who lives with worker in de facto union, whether person is of opposite or same sex. (§2). Spouse also receives 55% of income replacement indemnity which worker entitled to at death, paid monthly for period established according to age of spouse. Special indemnity of $1,000 also paid to spouse or failing same to dependents in equal shares. If no dependents father and mother of worker entitled to $3,000 indemnity each. Children of worker entitled to $250 monthly and if attending school full time to lump sum of $9,000. Children of worker who has no spouse at time of death but has minor child of full age over half of whose needs were provided for by worker or child full age under 25 years of age attending educational institution on full time basis are entitled to lump sum indemnity. (§101.1). Special provisions if beneficiary invalid at time of worker's death. Other indemnities include up to $4,599 for funeral expenses and cost of transportation of body. (§§92-111).

Worker who has suffered employment injury has right to rehabilitation, either physical, social or professional depending on worker's needs. Physical rehabilitation includes treatment deemed necessary by physician. Social rehabilitation programs include implementation of means to provide worker with residence and vehicle adapted to residual capacity. Vocational rehabilitation programs include assistance in finding employment and payment of subsidies to employer to favor employment of workers who have sustained permanent physical or mental impairment. (§§145-178).

Worker who has suffered employment injury is entitled to medical aid required by his condition resulting from injury. Act imposes duty on employer to immediately give first aid to worker who suffers employment injury in establishment. (§§188-198.1).

No employer may dismiss, suspend or transfer worker or impose any sanctions because he has suffered employment injury or exercised any rights conferred upon him by Act. (§32). Any sanction imposed within six months of date of which worker has suffered employment injury gives rise to presumption sanction was imposed because of employment injury. (§255). Burden then on employer to prove sanction was imposed for another good and sufficient reason. (§255). Complaints under this rule must be filed within 30 days of knowledge. (§253).

Act is administered by Commission de la santé et de la sécurité du travail (known as C.S.S.T.). C.S.S.T. pays out indemnities to workers and collects from employers sums required for administration of Act. C.S.S.T. assesses annually every employer according to type of economic activity carried on in their establishment. (§§304 & 304.1). Employers must pay assessment before 21st day of month following month of mailing of notice of assessment. (§315). Certain employers operating interprovincial or international railway transport or shipping firms are personally liable for payment of benefits awarded by C.S.S.T. (§332).

C.S.S.T. has exclusive jurisdiction to decide any matter or question contemplated in Act and to reconsider decision it has rendered (§349), if decision has not been subject of decision by review office, in order to correct error (§365). Decision of C.S.S.T. has immediate effect notwithstanding application for review unless decision awards compensation for bodily injury or lump sum death benefit. (§361). Person objecting to decision may apply to C.S.S.T. for review. After giving parties opportunity to present observations, C.S.S.T. shall make decision on basis of record; it may confirm, quash or amend initial decision or order and, if appropriate, make decision or order that should, in its opinion, have been made initially. Within 45 days of being notified of this decision, person who believes he has been wronged may contest it to board known as "Commission des Lésions Professionnelles" (C.L.P.). (§§358-384).

Worker's rights vested without regard to personal liability, no worker or beneficiary may institute civil liability action against employer as result of employment injury or death. (§§438-439). Beneficiary can not bring civil liability action against employer other than worker's employer or against worker or mandatory of employer except in limited circumstances. (§441).

Worker can exercise rights even if employer does not fulfill obligations. (§26). In case of transfer of establishment new employer assumes obligations of old employer towards worker and Commission. (§34).

In case of accident worker must notify superior immediately and medical certificate given to employer. Employer notifies Commission in prescribed form attaching medical certificate. Claim must be filed with Commission within six months of injury or death. (§§265-280).

Act provides transitional provisions relating to claims and obligations under old Workmen's Compensation Act. (§552).

Province through Commission pays victims of certain criminal offences compensations provided by Act for persons killed or injured in course of their work. (R.S.Q. c. I-6).

Act Respecting Occupational Health and Safety.

(R.S.Q. c. S-2.1). Object of Act is to eliminate dangers to health, safety and physical well-being of workers. (§2). Act declared to be of public order. (§4). Act established Commission de la santé et de la sécurité du travail to prepare, propose and implement policies respecting workers' health and safety. Commission empowered to carry out inquiries and inspections of work sites. (c. IX). Act provides offences and penalties. (§§234-246).

Act establishes general principle that worker is entitled to proper working conditions defined in Act. Worker may refuse to work when he has reasonable grounds for believing performance of work would endanger his health, safety or well-being or expose another to similar danger. Worker not entitled to refuse to work where his refusal would endanger another person, or where conditions complained of are ordinary conditions in his kind of work. Worker may in certain circumstances request protective reassignment. Act also provides for reassignment of pregnant worker. If reassignment not made immediately, pregnant worker may stop working until reassignment or until date of delivery. Worker placed under obligation to cooperate in all respects with object of Act. (§§9-49).

Act obliges employer to take necessary measures to protect health and ensure safety and physical well-being of worker. Employer also has obligation to provide individual protective health and safety device. Employer entitled to counselling services to assist in carrying out that obligation. (§§50-57). Person who retains services of worker for purposes of his establishment must fulfill obligations imposed by Act. (§51.1). If required by regulation, employer must supervise prevention program in its establishment. (§§58-61). Act provides for worker participation in health and safety committees (when more than 20 workers are employed and enterprise is designated by regulation). (§§68-86). Safety representative may be appointed. (§§87-97). Construction sites governed by special provisions. (c. XI).

Act provides for involvement of community health services in preparation and implementation of health programs. (§§68-86). (c. XI).

Act provides comprehensive transitional provisions relating to other statutes and regulations (see subhead Workmen's Compensation, supra). (§§328-333).

Criminal Code establishes legal duty for all persons directing work to take reasonable steps to ensure safety of workers and public. (R.S.C. 1985, c. C-46, §217.1). Existence of such legal duty facilitates application of offence of criminal negligence, which is predicated, in part, on existence of legal duty.

Criminal Code can also make corporations criminally liable for actions or omissions of directors, partners, employees, members, agents or contractors of corporation with respect to workplace injuries. (§§2, 22.1-22.2).

Labor Standards.

Regulated by Act respecting Labor Standards. (R.S.Q. c. N-1.1).

Labor Standards Act establishes Commission to supervise implementation and application of labor standards. “Employee” defined to include domestics. (§1). Commission may hear and determine employee's complaint, and may exercise claim on behalf of employee. Commission may also conduct its own inquiry and may enter employer's establishment to examine registers, books and other documents. (§§4-39, 108-109).

Labor Standards Act regulates payment of wages, hours of work, statutory holidays and nonworking days with pay, annual leave with pay, rest periods and miscellaneous leaves, including maternity and parental, prior notice of termination and work certificate upon termination. (§§40-97). Employee credited with two years of uninterrupted service in same enterprise who believes that he has been dismissed without good and sufficient cause may present complaint to Commission. If it finds that employee has not been dismissed for good and sufficient cause, Commission may render any fair and reasonable decision including reinstatement of employee. (§§124-131).

Employee may not be dismissed by reason of exercise of rights under Act or because inquiry is being conducted by Commission into establishment of employer, by reason of having given information or evidence to Commission relating to application of labor standards, on ground of seizure by garnishment of employee wages, on ground that employee is pregnant, for purpose of evading application of Act, on ground that employee refused to work beyond regular hours due to child care requirement or on ground that he has reached or passed age or number of years of service at which he should retire. (§§122-123). Also, no employer may dismiss employee who has three months of uninterrupted service on ground that he was absent by reason of illness for period not exceeding 26 weeks in preceding 12 months. (§79.1). Act provides offences and penalties. (c. VIII or §§139-147).

Act contains recourse against psychological harassment. (§§123.6-123.16). Psychological harassment is any vexatious behavior in form of repeated and hostile or unwanted conduct, verbal comments, actions or gestures, that affects employee's dignity or psychological or physical integrity and that results in harmful work environment for employee. Single serious incidence of such behaviour that has casting harmful effect may also constitute psychological harassment. (§§81.18-81.20).

Pay Equity.

Regulated by Pay Equity Act. (R.S.Q. c. E-12.001).

Act provides redress for differences due to systematic gender discrimination suffered by persons who occupy positions in predominantly female job classes. Act provides for assessment within enterprise, except if there are no predominantly male job classes in enterprise. (§1). Act applies to every employer with overall average of ten or more employees; employer with less than ten employees remains subject to §19 of Quebec Charter of Human Rights and Freedoms. (R.S.Q. c. C-12). Act establishes Commission to oversee establishment of pay equity. (§77).

Unemployment Compensation.

Governed by Federal legislation.

See category 1 Introduction, topic 1.03 Language, subhead Labor Relations.

11.04 WORKERS' COMPENSATION LAW:

See topic 11.03 Labor Relations.

12 ENVIRONMENT

12.01 ENVIRONMENTAL LEGISLATION:

Environment Quality Act (R.S.Q. c. Q-2).

Environment Quality Act ("EQA") adopted in 1972, constitutes main piece of legislation regulating protection of environment in Quebec. Terms "environment" and "contaminant" are broadly defined and as such, EQA applies to most industrial activities over entire territory of Quebec. (§1).

General Prohibition.

EQA contains three general prohibitions with respect to release into environment of contaminant: (a) in greater quantity or concentration than that provided for by regulation; (b) of which presence in environment is prohibited by regulation; or (c) of which is likely to affect life, health, safety, welfare or comfort of human beings, or to cause damage to or otherwise impair quality of soil, vegetation, wildlife or property. (§20). These prohibitions apply not only to everyone who, in fact, releases such substance into environment, but also to any person allowing this release.

Reporting Requirements.

EQA imposes duty upon every person responsible for accidental presence of contaminants in environment in contravention of law, to advise, without delay, Minister of the Sustainable Development, Environment and Parks ("Minister"). (§21).

Certificates of Authorization and Permits Required.

EQA imposes general obligations to obtain Certificates of Authorization from Minister when someone wishes to erect or alter structure, undertake to operate industry, carry on activity, use industrial process, increase production of any goods or services or install any equipment or apparatus, if it is likely that this will result in emission of contaminants into environment or change quality of environment. Moreover, Certificate of Authorization is required whenever activity is planned to be done in water course or lake, notwithstanding extent of potential impact on environment of said activity or in order to establish or modify waste disposal facility. (§22). These obligations, however, do not apply to facility which existed prior to Dec. 1972, unless it has modified its process or increased its production since that date. Transfer of Certificate of Authorization requires authorization of Minister which can be granted upon any conditions deemed necessary. (§24). On application of holder of several Certificates of Authorization relating to same works or establishment, Minister may combine Certificates of Authorization into single Certificate, referred to as Administrative Certificate. (§24.1). Specific permits and authorizations are also required notably for (i) establishment of any water works or water purification appliances (§44), (ii) installation of equipment that prevents or reduces issuance of contaminants into atmosphere (§48) and (iii) operation of elimination or treatment facility of hazardous materials, or storage for treatment purposes and use for energy generation purposes of such materials (§70.9).

Environmental Impact Assessment.

In addition to aforementioned environmental permits and certificates, EQA provides that no person may undertake constructions, works, activities or operations specifically prescribed by regulation without following environmental impact assessment and review procedure and obtaining Certificate of Authorization from Government. (§31.1). In order to do so, every person must file written notice and environmental impact assessment statement to Minister describing general nature and foreseeable impacts of intended project. (§31.2). Such assessment shall be prepared pursuant to established criteria and may lead to public hearings aiming to publicly discuss environmental impacts of project. (§31.3). Upon receipt of report containing recommendations of Minister and, if applicable, of Board of Public Hearings on Environment, concerning assessment, Government may then issue, with or without modifications and conditions, requested Certificate of Authorization, or refuse its issuance. (§31.5). Being subject to environmental impact assessment and review procedure and obtaining governmental Certificate of Authorization does not exempt holder from requesting and obtaining aforementioned ministerial Certificate of Authorization. (§31.1).

Depollution Attestation.

It is forbidden for operators of prescribed industrial establishments to release any contaminant if Minister has refused to issue Depollution Attestation which set out contaminant levels relating to industrial production, methods and equipment required to minimize contaminant levels. (§31.10). Indeed, issuance of such Depollution Attestations, may include corrective or decontamination program which authorizes its holder to release, for limited period of time, contaminants into environment up to specific levels, which would be less stringent than applicable standards. To this day, only establishments that manufacture pulp intended for sale or paper products and establishments primarily engaged in mining, non-metallic mineral product manufacturing and primary metal manufacturing are subject to this obligation.

Land Characterization and Rehabilitation.

Minister has wide powers to issue orders and take action with respect to characterization and rehabilitation of contaminated sites. EQA provides that where it appears to Minister that contaminants are present in soil, in groundwater or in surface water in concentration exceeding limit values prescribed by regulation or, should there be no such limit values prescribed, that contaminants are likely to adversely affect environment, he may order any person or municipality to furnish him with rehabilitation plan together with implementation schedule. (§31.43). In similar manner, where Minister has reason to believe that such contaminants may be present on site, it may order aforementioned persons or municipalities to perform characterization study. (§31.49). Such orders can be issued against whoever is responsible for that contamination, or, whoever has or has had custody after Mar. 1, 2003 of contaminated site. However, they may not be made against person that has or has had custody of site if: (a) This person was unaware of presence of contaminants on site despite appropriate verifications were made to that effect, or (b) although aware of presence of contaminants, this person acted in conformity with its legal duties of care and diligence, or (c) it is established that presence of contaminants on site results from outside migration from source attributable to third person. (§31.43). Regulation prescribes concentrations of contaminants beyond which site is considered as being contaminated, such concentrations depending on nature of site's use (industrial and commercial or residential). To be approved by Minister rehabilitation plan must provide that: (i) Either no contaminants exceeding these concentrations will be left on site, either following removal or treatment, or (ii) that their presence does not pose threat pursuant to toxicological and ecotoxicological risk assessment submitted with proposed plan study. (§31.45). EQA also imposes obligation to perform site characterization study and required restoration upon ceasing to carry on prescribed activity or prior to changing use of land where such prescribed activities were taking place. (§31.53). Regulation lists sectors of industrial or commercial activities that are subject to these obligations.

Obligation to have rehabilitation plan approved by Minister also applies to any person undertaking voluntary rehabilitation of site should contaminants exceeding limit values remain on site. (§31.57).

Where characterization study done as result of EQA provisions reveals presence of contaminants in concentration exceeding said regulatory limit values, person or municipality who had study performed shall apply for registration in land register of notice of contamination. (§31.58). In same manner, if rehabilitation plan approved by Minister provides for land use restrictions, person having submitted plan shall apply for registration in land register of notice of use restriction. (§31.47). These restrictions will apply to any future user and owner of subjected site. Municipalities have obligation on basis of aforementioned notices registered to perform and maintain list of contaminated sites situated on their territories. (§31.68).

If person or municipality fails to perform characterization study, transmit land rehabilitation plan, carry out land rehabilitation, furnish additional information or fails to apply for registration in land register, Minister may take any measures necessary to remedy default and recover from person or municipality in default direct and indirect costs incurred. (§31.62).

Ordering Powers.

In addition to aforementioned restoration orders, Minister has broad ordering powers with respect to protection of environment. Notably, EQA empowers Minister, when he ascertains presence in environment of contaminants in contravention of EQA, to order whoever is responsible for source of contamination to cease finally or temporarily or to limit, according to conditions prescribed by him, discharge of such contaminant. (§25). Minister may also order offender to use any class or type of apparatus he indicates to abate or eliminate emission of contaminants in environment. (§27). In urgent matters, Minister may also order any owner or person having had custody or control of contaminants to collect or to remove any contaminants discharged into environment, accidentally or in contravention of laws and regulations and to take necessary steps to clean contaminated soil, underground water or surface water, in order to prevent any further spreading of contamination. (§114.1).

Remediation Powers.

Minister may, under certain conditions, take all necessary measures to clean, collect or contain contaminants that have been or are likely to be released into environment, only if “he considers such measures necessary to avert or diminish the risk of damage to public or private property, human beings, wildlife, vegetation or the general environment”. (§115.1). Minister may then claim direct and indirect costs related to such measures of decontamination from any person or municipality who has custody or control of such contaminants and from any person or municipality responsible for depositing such contaminants.

Fines and Penalties.

For individuals, EQA provides for fines generally not exceeding $20,000 for first offence and $40,000 for second or subsequent conviction, or up to one year imprisonment, or both. For corporations, EQA provides for fines generally not exceeding $250,000 for first offences and $1,000,000 for second or subsequent conviction. (§§106-109.1). These fines apply for each day during which offence continues. (§110). Every director or officer of corporation who, by means of order or authorization or through his advice or encouragement, leads corporation not to comply to Ministerial order or to emit contaminants in environment in contravention with EQA is personally liable to fines not exceeding $20,000 for first offence and to fines not exceeding $40,000 for a second or subsequent conviction or up to one year imprisonment. (§109.3). Other costs may sometimes be imposed on person convicted of offence under EQA, for example, additional fines of amounts equal to profits derived from infraction (§109.1.2), reimbursement of costs related to issuance of order (§114.3) or costs undertaken by Minister in event of default by person to comply with order (§113).

Other Acts.

Other provincial legislation or municipal regulation protect environment. Municipal corporations are empowered to enact by-laws regulating discharge of effluent in sewer systems and control of nuisances. On territory of Communauté métropolitaine de Montréal, latter has exclusive jurisdiction over emission of contaminants into atmosphere and has adopted by-laws that are more stringent than provincial regulation on matter. In addition, following matters are subject to specific provincial legislation: use of petroleum products, including above and underground storage tanks (Act Respecting Petroleum Products and Equipment, R.S.Q. c. P-29.1), preservation of waterways and water quality (Watercourses Act, R.S.Q. c. R-13; Act Respecting the Société Québécoise d'Assainissement des Eaux, R.S.Q., c. S-18.2.1), use of pesticides (Pesticides Act, R.S.Q. c. P-9.3), use of forest and wildlife conservation (Act Respecting Threatened or Vulnerable Species, R.S.Q. c. E-12.01; Forest Act, R.S.Q. c. F-4.1; Act Respecting the Conservation and Development of Wildlife, R.S.Q. c. C-61.1; Tree Protection Act, R.S.Q. c. P-37; Natural Heritage Conservation Act, R.S.Q. c. C-61.01) and quality of work environment (Act Respecting Occupational Health and Safety, R.S.Q. c. S-2.1).

13 ESTATES AND TRUSTS

13.01 ADMINISTRATION OF PROPERTY OF OTHERS:

Any person charged with administration of property or patrimony that is not his own assumes office of administrator of property of others. Rules governing administrators of property of others apply to every administration unless another form of administration applies under law, constituting act, or due to circumstances. (C.C.Q. 1299). Curators, tutors, trustees and liquidators are all administrators of property of others. Administrator entitled to remuneration unless administration gratuitous. (C.C.Q. 1300). Administrative expenses are borne by beneficiary or trust patrimony. (C.C.Q. 1367).

Types of Administration.

Administration is either simple or full. Simple administrators are required to maintain and preserve property for use for which it was ordinarily destined. (C.C.Q. 1301). Full administrators are expected to preserve property and make it productive, increase patrimony or appropriate it to purpose in interest of beneficiary or of trust. (C.C.Q. 1306). Tutors to minors and liquidators have simple administration of property of others. (C.C.Q. 208, 802). Curators to protected persons of full age and trustees have full administration of property of others, except Public Curator, who has simple administration. (C.C.Q. 282, 1278, 262).

Administrator charged with simple administration is bound to collect fruits and revenues and pay debts of property under his administration and exercise rights pertaining to property, such as voting, conversion or redemption rights attached to securities. He must continue use or operation of property which produces fruits and revenues without changing its destination, unless he is authorized to make changes by beneficiary or by court. He must invest sums of money under his administration in accordance with rules governing presumed sound investments. See subhead Investments, infra. He may also change any investment made before he took office or that he has made himself. With authorization of beneficiary or of court, simple administrator may alienate or mortgage property if necessary to pay debts, maintain use for which property is ordinarily destined, or preserve its value. He may alienate without authorization any property that is perishable or likely to depreciate rapidly. (C.C.Q. 1301s.).

Administrator charged with full administration may alienate property, charge it with real right or change its destination in order to perform his obligations. He may perform any other necessary or useful act, including any form of investment. (C.C.Q. 1307). Curators, however, must make presumed sound investments. (C.C.Q. 282). In full administration, there is implicit recognition of even-hand rule. (C.C.Q. 1317, 1340).

Rules of Administration.

Administrator must comply with obligations imposed by law and by constituting act, and must act within powers conferred on him. He is not liable for loss of property resulting from superior force or from its age, perishable nature or normal and authorized use. He must act prudently, diligently, honestly and faithfully, in best interests of beneficiary or of object pursued. He cannot act in his own interests or place himself in conflict of interest. If administrator is beneficiary, he must exercise his powers in common interest. He must declare any potential conflict of interest he has in enterprise without delay. During his administration no administrator may become party to contract affecting administered property or acquire other than by succession any right in property or against beneficiary, unless authorized to do so by beneficiary or court. Administrator must not mingle administered property with his own property. He cannot use for his benefit property he administers or information obtained by reason of his administration without authorization from beneficiary, from law or from constituting act. He may not dispose of administered property gratuitously, unless it is in very nature of his administration to do so, except for property of little value disposed of in interest of beneficiary or of object pursued. No administrator may, except for value, renounce any right belonging to beneficiary or forming part of patrimony administered. (C.C.Q. 1308s.).

Accounts.

Administrator must establish revenue and capital accounts. Revenue account generally debited for insurance premiums, cost of minor repairs and other administrative expenses, half of remuneration of administrator and his reasonable expenses, taxes payable on administered property, costs paid to safeguard rights of beneficiary of fruits and revenues and half costs of judicial rendering of account, amortization of property, except property used by beneficiary for personal purposes. (C.C.Q. 1346).

Capital account generally debited for expenditures not debited from revenues, including expenses pertaining to capital investment, alienation of property and safeguard of rights of capital beneficiary or right of ownership. Taxes on gains and amounts attributable to capital are generally debited from capital account. (C.C.Q. 1347).

Summary account is prepared and given to beneficiary at least once a year. (C.C.Q. 1351). This annual account must be sufficiently detailed to allow for verification of its accuracy. (C.C.Q. 1352). Administrator must allow beneficiary to examine books relating to administration at all times. (C.C.Q. 1354).

Beneficiary of fruits and revenues entitled to net income of administered property from date determined in act giving rise to administration or from beginning of administration or death which gave rise to it. (C.C.Q. 1348). Fruits and revenues payable periodically are counted day by day. (C.C.Q. 1349).

At end of administration, final account must be rendered. (C.C.Q. 1363). See subhead End of Administration, infra.

Inventory.

Administrator not bound to make inventory unless so required by law, by act, or by court order. Administrator who is bound to make inventory must enumerate all administered property. Inventory includes: description and value of immovables and movables, description of currency and other securities, listing of valuable documents, statement of liabilities, and recapitulation of assets and liabilities. Where inventory contains personal effects of holder or deceased, general description of items less than $100 each is sufficient. (C.C.Q. 1324s.).

Inventory made by notarial act en minute, or by private writing before two witnesses. (C.C.Q. 1327). Administrator must furnish copy of inventory to person who entrusted him with administration and all other known interested persons. Where required by law, he must publish inventory in Register of personal and movable real rights and in newspaper. See topic 13.10 Executors and Administrators of Estates, subhead Inventory. Any interested person may contest inventory or demand that new inventory be prepared. (C.C.Q. 1330).

Investments.

Presumed sound investments include: (a) Ownership of immovable property; (b) bonds or other evidence of indebtedness issued by prescribed governments or corporations; (c) debts of company secured by first-ranking hypothec on immovable property, approved securities or equipment; (d) debts secured by hypothec on immovable in Quebec, if payment guaranteed by prescribed governments, if amount of debt not more than 75% of value of immovable; (e) fully paid preferred shares issued by company whose common shares are presumed sound investments or which, during last five financial years, has distributed stipulated dividend on all its preferred shares; (f) common shares issued by company that for three years has been meeting timely disclosure requirements defined in Quebec Securities Act; (g) securities of investment fund or of private trust, provided that 60% of its portfolio consists of presumed sound investments and fund complies with Quebec Securities Act. (C.C.Q. 1339).

Administrator decides on investments, working toward diversified portfolio producing both fixed income and variable revenues. He may not acquire more than 5% of shares of same company nor acquire shares, bonds or other evidences of indebtedness of legal person or limited partnership which has failed to pay prescribed dividends on its shares or interest on its bonds or other securities, nor grant loan to that legal person or partnership. Administrator may deposit sums of money with bank, savings or credit union or other financial institution, if deposit is repayable on demand or 30 days' notice, or for longer term if repayment is fully guaranteed by Régie de l'assurance-dépôts du Québec or if he receives court authorization. (C.C.Q. 1340, 1341).

Liability.

Administrator may sue and be sued in respect of anything connected with his administration. He may also intervene in any action respecting administered property. (C.C.Q. 1316). Joint administrators are solidarily liable, unless duties have been divided by law, act or court order. (C.C.Q. 1334).

Where administrator binds himself, within limits of his own powers, in name of beneficiary or trust patrimony, he is not personally liable towards third persons with whom he contracts. He is liable to them if he binds himself in his own name, subject to any rights they have against beneficiary or trust patrimony. Where administrator exceeds his powers, he is liable towards third persons with whom he contracts unless these persons were sufficiently aware of fact or unless beneficiary tacitly or expressly ratified obligations contracted. (C.C.Q. 1319, 1320). Administrator who exercises alone powers that he is required to exercise jointly with another person exceeds his powers. He does not exceed them if he exercises them more advantageously than required. (C.C.Q. 1321).

Beneficiary or trust patrimony is liable for damage caused by fault of administrator to extent of any benefit beneficiary or trust patrimony derived from act. (C.C.Q. 1322). Where person fully capable of exercising his civil rights has given reason to believe that another person was administrator of property, he is liable towards third persons who in good faith have contracted with that other person, as though property had been under his administration. (C.C.Q. 1323).

Administrator acting in accordance with provisions relating to sound investments is presumed to act prudently. Administrator who makes unauthorized investment is, by that very fact and without further proof, liable for loss resulting from it. (C.C.Q. 1343). See subhead Investments, supra.

Administrator not bound to take out insurance or furnish other security unless so required by law, act or court order. (C.C.Q. 1324). He may insure property entrusted to him against ordinary risks at expense of beneficiary or trust. He may also take out insurance guaranteeing performance of his obligations. If administration is gratuitous, such insurance is at expense of beneficiary or trust. (C.C.Q. 1331).

Administrator may delegate duties only for specific acts, not for general administration but general administration or discretionary power may be delegated to co-administrators. He is accountable for person selected by him if, among other things, he was not authorized to make selection. If he was so authorized, he is accountable only for care with which he selected person and gave him instructions. (C.C.Q. 1337).

Obligations contracted by administrator unaware that his administration has terminated are valid and bind beneficiary or trust, as do obligations contracted with third persons who were unaware that administration had terminated. (C.C.Q. 1362).

End of Administration.

Duties of administrator terminate upon his death, resignation, replacement, bankruptcy or placement under protective supervision. Administration also terminated by extinction of right of beneficiary in administered property, by expiry or fulfilment of stipulated term or condition, or by achievement of object of administration or disappearance of its cause. Administrator may resign upon written notice to beneficiary, any co-administrators, any supervisory person or body designated by law or failing these, Public Curator. Beneficiary who has entrusted administration of his property to another may replace his administrator, particularly by exercising right to require that property be returned to him on demand. Any interested person may apply to replace administrator who fails to fulfil his obligations. (C.C.Q. 1355s.). Resignation or replacement binds beneficiary or trust to pay administrator his expenses and any remuneration he has earned. (C.C.Q. 1367).

Final account must be rendered in sufficient detail to allow verification. (C.C.Q. 1363). Administrator owes interest on balance of property administered from closing of final account or from formal notice to produce it. (C.C.Q. 1368). Administrator must deliver over administered property, and all that he has received in performance of his duties. Administrative expenses, including those related to account and delivery of property, are borne by beneficiary or trust patrimony. (C.C.Q. 1365, 1366, 1367). Where there are several beneficiaries, their obligation toward administrator is solidary. (C.C.Q. 1370).

13.02 ADVANCEMENTS:

See topic 13.07 Descent and Distribution, subhead Advancements.

13.03 ALLOWANCES:

See topic 13.10 Executors and Administrators of Estates.

13.04 CLAIMS:

See topic 13.10 Executors and Administrators of Estates; category 5 Civil Actions and Procedure, topic 5.16 Pleading.

13.05 DEATH:

After seven years have elapsed, absentee is reputed to be dead from date of disappearance or latest intelligence received. (C.C.Q. 85). Succession opens by death. (C.C.Q. 613). Successor is entitled to have heirship recognized at any time within ten years from opening of succession or from day right arises. (C.C.Q. 626). Even before lapse of this period, tutor (if one is designated) may administer property of absentee. (C.C.Q. 86s.). See category 22 Property, topic 22.01 Absentees.

Survivorship.

Where persons die and it is impossible to determine who survived other, they are deemed to have died at same time if at least one of them is called to succession of other. Succession of each devolves to persons who would have received in their place. (C.C.Q. 616).

Action for Death.

Subject to three-year prescription period for actions to enforce personal rights. (C.C.Q. 2925). Obligation exists to indemnify dependents of workman under Industrial Accidents and Occupational Diseases Act (R.S.Q., c. A-3.001), where amount of indemnity is fixed but is owing independently of any fault on part of employer. See category 11 Employment, topic 11.03 Labor Relations, subhead Workmen's Compensation.

Declaratory judgment of death may be obtained on application of any interested person seven years after disappearance. Declaratory judgment of death is obtainable before that time where death presumed certain and (1) death occurred in Quebec or (2) death is of person domiciled in Quebec. Date of death is either date occurring on expiry of seven years since disappearance or earlier date if death can be determined. Registration of Declaratory Judgment of Death in Register of Civil Status equivalent to Act of Death issued by Registrar. (C.C.Q. 92s.).

Certificate.

Acts of death are authentic acts of civil status. (C.C.Q. 107). Registrar of civil status may also issue certificates or attestations. (C.C.Q. 146). See category 10 Documents and Records, topic 10.05 Records, subhead Vital Statistics. Attestations of death may be obtained, in applicable cases, from physicians or two peace officers who transmit copy of attestation to person who is required to declare death. Declaration of death made to registrar of civil status. (C.C.Q. 122s.).

Anatomical Gifts.

Person over 14 years may, for medical or scientific purposes, give his body, organs or tissue. In absence of knowledge of wishes of deceased, physician may remove part of remains, with consent of person who can give consent to care or who could have given it. Consent not necessary when two physicians attest in writing impossibility of obtaining it in due time, urgency of operation and serious hope of saving human life or appreciably improving its quality. Death of donor must be ascertained by two physicians not participating in removal or transplantation before removal of parts. (C.C.Q. 42s.).

13.06 DECEDENTS' ESTATES:

See topics 13.07 Descent and Distribution, 13.10 Executors and Administrators of Estates, 13.16 Wills.

13.07 DESCENT AND DISTRIBUTION:

When there is no will, the succession passes to the lawful heirs in the order established by Civil Code of Quebec; in default of such heirs it devolves to State. (C.C.Q. 653). As there is freedom of testamentary disposition in Quebec (see topic 13.16 Wills), it must be clearly noted that following conditions and rules are applicable only in case of intestacy.

Lawful Heirs.

These are surviving spouse, descendants of deceased, and ascendants and collateral relations in order and according to Rules of Intestacy hereinafter laid down. (C.C.Q. 666s.). Spouse includes legally married spouse or civil union spouse. (C.C.Q. 653).

Children and Descendants.

No distinction between legitimate and illegitimate children. Rights of children depend on whether filiation is established. Filiation is proven by act of birth, uninterrupted possession of status, presumption or acknowledgment and may be contested or disavowed. (C.C.Q. 523s.).

Ascendants comprise privileged ascendants, who are the father and mother of deceased, and ordinary ascendants, being all others. (C.C.Q. 670).

Collaterals comprise privileged collaterals, who are the brothers and sisters and nephews and nieces in the first degree, and ordinary collaterals, being all other relatives. (C.C.Q. 670).

Adopted Children.

See category 14 Family, topic 14.01 Adoption.

Rules of Intestacy.

If the deceased leaves:

1. Descendants and spouse: two-thirds of estate devolves to descendants (sharing equally) and one-third to spouse. (C.C.Q. 666).

2. Descendants but no spouse: descendants take entire succession. (C.C.Q. 667).

3. Spouse but no descendants: spouse takes all if there are no privileged ascendants and no privileged collaterals. (C.C.Q. 671).

4. Spouse, privileged relatives, no descendants: spouse takes two-thirds, privileged ascendants one-third; if only privileged collaterals, spouse takes two-thirds and privileged collaterals one-third. (C.C.Q. 672, 673).

5. Privileged relatives only: privileged ascendants take one-half, privileged collaterals other half. Where there are no privileged ascendants, privileged collaterals inherit entire succession and vice-versa. (C.C.Q. 674).

6. Ordinary relatives: These will succeed only in default of spouse, descendants,

privileged ascendants or collaterals. (C.C.Q. 677). Succession devolves equally between paternal and maternal lines. If there are no relatives in one line, relatives in other line inherit entire succession. (C.C.Q. 679, 682). Certain particular rules must also be observed between them.

Acceptance of Succession.

Succession devolving to unemancipated minor, to protected person of full age under tutorship or curatorship or absent person is deemed to be accepted, except where it is renounced by representative of successor with authorization of tutorship or curatorship council. Succession devolving to emancipated minor or person of full age requiring assistance, is deemed accepted by successor himself, assisted by his tutor or adviser. In no case is successor liable for payment of debts of succession amounting to more than value of property he receives. (C.C.Q. 638).

Rights of State.

Relatives beyond eighth degree do not inherit. (C.C.Q. 683). In default of spouse and descendants or relatives within heritable degree in both paternal and maternal lines, State succeeds. (C.C.Q. 696). See topic 13.16 Wills, subhead Unclaimed Legacies.

Legal Seisin.

Heirs, whether legal or testamentary, are seised of patrimony of deceased upon his death. If heirs comply with rules of liquidation, they are not liable to greater extent than value of property they receive, and retain right to demand payment of their claims. They are seized also of rights of action of deceased against any person for breach of his personality rights. (C.C.Q. 625).

Representation.

In intestate succession, it takes place without limit in direct line descending. It is allowed whether children of deceased compete with descendants of represented child, or whether, if all children of deceased are dead or unworthy, descendants of these children happen to be in equal or unequal degrees of relationship. (C.C.Q. 661). It does not take place in favor of ascendants with nearest in each line excluding more distant. (C.C.Q. 662). In collateral line, representation takes place in favor of nieces and nephews of deceased, whether or not they compete with their parents, and in favor of other descendants of brothers and sisters of deceased in other degrees, whether they are in equal or unequal degrees of relationship to each other. (C.C.Q. 663). No person who has renounced succession may be represented, but person whose succession has been renounced may be represented. Partition is effected by roots. If one root has several branches, subdivision also made by roots in each branch, and members of same branch share among themselves by heads. (C.C.Q. 664, 665). In testamentary succession, it takes place in same manner and in favour of same persons as in intestate succession provided that testamentary disposition made on or after Jan. 1, 1994, and that it is legacy which is universal or by general title which benefits all descendants or collaterals of testator who would have been called to his intestate succession and testator did not expressly exclude representation. (C.C.Q. 749; 1992 c. 57, §41).

Advancements.

These are known as returns. With view to partition, each co-heir must return to mass only what he has received from deceased by gifts or by will under express obligation to return it. Successor who renounces succession has no obligation to make any return. (C.C.Q. 867). Person who represents another must return what person represented would have had to return, in addition to what he is bound to return in his own right. Return is due even if person who represents other has renounced succession of person represented. (C.C.Q. 868). Return is made only to succession of donor or testator. It is due only from one co-heir to another, not to particular legatees or creditors. (C.C.Q. 869). Return is made by taking less, not in kind unless so elected by heir and property not charged with real right. (C.C.Q. 870). Value of property returned is reduced by increase in its value resulting from personal initiative and disbursements of person returning it, or increased by decrease in value due to actions of person returning it. (C.C.Q. 874).

Alimentary Support.

Creditors of support include married or civil union spouses and relatives in first degree. (C.C.Q. 585). All creditors of support, including heirs or legatees, and those who did not exercise right to support before date of death, may claim financial contribution from succession within six months of death. Right does not exist in favor of person unworthy of inheriting. (C.C.Q. 684).

Claim by surviving spouse or child may not exceed difference between one-half of share he could have claimed had succession devolved according to law and what he received from succession. Former spouses of deceased in receipt of support at time of death may claim equivalent of 12 months' support. Claims of other creditors of support are equal to value of six months' support. In two latter cases, amount must not exceed 10% of value of succession. (C.C.Q. 688).

Compensatory Allowance.

Surviving spouse, whether married or in civil union, may apply for allowance as compensation for his contribution in goods and services to patrimony of deceased spouse, payable as agreed between parties or as determined by court. (C.C.Q. 427; C.P. 827.1). Application must be brought within one year of death. (C.C.Q. 2928).

See category 14 Family, topic 14.10 Husband and Wife and Civil Union Spouses, subhead Family Patrimony.

13.08 ELECTION:

See topic 13.16 Wills, subhead Election.

13.09 ESTATES:

See category 22 Property, topic 22.13 Real Property.

13.10 EXECUTORS AND ADMINISTRATORS OF ESTATES:

Appointment.

Executors are known as liquidators. Any person designated by testator as administrator of property of another, executor or liquidator is governed by rules on liquidators. (C.C.Q. 786). Designation of liquidator is published in Register of personal and movable real rights. (C.C.Q. 777). Testator may designate one or several liquidators and determine mode of their replacement; otherwise, office of liquidator devolves to heirs who, by majority vote, may designate liquidator and mode of replacement. (C.C.Q. 786, 785). Failing agreement, or if it is impossible to replace liquidator, court may designate one. (C.C.Q. 788). When there are several liquidators, they act together unless exempted by will, or in absence of will, by heirs. (C.C.Q. 787). Liquidators are charged with simple administration. See topic 13.01 Administration of Property of Others.

Eligibility and Competency.

Any person fully capable of exercising his civil rights, or any legal person authorized by law to administer property of others, may be liquidator. Nonresident may act as liquidator.

In case no liquidators are appointed and all known successors have renounced or do not claim estate within six months after death, Public Curator is seized of property in same manner as heir. Seisin vests for ten years. Public Curator acts as liquidator and renders account to Minister of Finance at end of liquidation. After account, Public Curator administers succession for ten years from date of opening or until heir presents himself or petition of inheritance decided. (C.C.Q. 697s.).

Replacement.

Any interested person may apply to court for replacement of liquidator who is unable to assume responsibilities or who neglects duties and obligations. (C.C.Q. 791).

Inventory.

Liquidator must make inventory of succession, in manner of administrator of property of others. Must publish notice of closure of inventory identifying deceased and indicating place where inventory may be consulted by interested persons. Notice of closure published in Register of personal and movable real rights as well as in local newspaper. Liquidator informs heirs, successors, legatees and creditors of registration of notice of closure and of place where inventory may be consulted. These persons may contest inventory. Liquidator may be exempted from making inventory and publishing notice of closure, but only with consent of all heirs and successors. Heirs and successors become liable for debts of succession in excess of value of property they take if (1) they consent to exemption from making inventory, (2) if they neglect making of inventory for 60 days after expiration of six month period for deliberation, or (3) they mingle succession's property with their personal property before inventory, unless such property was already mingled. (C.C.Q. 794s.). See topic 13.01 Administration of Property of Others, subhead Inventory.

Seisin and Powers.

Testator is at liberty to define, extend or limit duties and powers of his liquidator. (C.C.Q. 778). Liquidator has seisin of property and may claim possession of it against heirs and legatees. (C.C.Q. 777).

If liquidation exceeds one year, liquidator shall, at end of first year and at least once a year thereafter, render annual account of management to heirs, creditors and legatees who have not been paid. (C.C.Q. 806).

Form for Proof of Claim.

See subhead Claims, infra.

Claims.

Creditors' claims against debtor's succession are not affected by debtor's death nor are they barred by creditors' failure to exercise same within any specified delay, except that they become extinguished by expiration of delay of prescription applicable to any such claim in same way as if debtor were still alive. When estate has been accepted, claims may be brought against liquidators or heirs in usual manner. Form for proof of claim may be that of ordinary affidavit. See category 10 Documents and Records, topic 10.02 Affidavits.

Creditors may, if liquidator unknown or cannot be found within reasonable period of time, sue heirs or legatees collectively without mentioning their names or residences. Process may be served at last domicile which deceased had in province. If same is not in Quebec, is closed or is no longer occupied by any member of deceased's family, service may be made upon one of heirs or legatees by particular title. Service on liquidator is made at his domicile, residence or business office, or, if outside Quebec or unknown, on one of heirs. (C.P. 116, 133).

When succession opens outside province, any immovable action relating to his estate may be taken against heirs collectively who have not registered declaration of transmission by succession of such property, and in such case heirs and legatees may be served upon authorization by public notice, in district in which immovable in dispute is situated. (C.P. 116, 133, C.C.Q. 2998). All obligations contracted by deceased continue in existence after his death except those which on account of their nature have become impossible of performance due to his decease.

Payment of Debts.

Liquidator pays debts by realizing property of succession to extent necessary. He may alone sell movables which are perishable or expensive to preserve; he may sell other property with consent of heirs or court. (C.C.Q. 804).

Acceptance or Renunciation of Succession.

Acceptance by heirs is express or tacit, and may also result from law. Acceptance is express when successor formally assumes title or quality of heir. It is tacit where successor performs act that necessarily implies his intention of accepting. (C.C.Q. 637). Successor who renounces can accept for ten years from day right arose if it has not been accepted by another person. (C.C.Q. 649). Renunciation is express and is made by notarial act or by recorded judicial declaration. (C.C.Q. 646). Renunciation is presumed if successor unaware or has not made it known for ten years from day right arose. (C.C.Q. 650).

Investments.

Unless will otherwise provides, liquidator is charged with simple administration and may only invest moneys held by him in presumed sound investments. See topic 13.01 Administration of Property of Others, subhead Investments.

Distribution.

Before distributing property under his control, every assignee or other person, with exception of trustee in bankruptcy, who winds up, administers or controls property, business, succession, income or commercial activities of another, must give notice of intention to distribute to Minister of Revenue of Quebec. Minister advises of duties, interest, and penalties exigible or which will so become within 12 months under any fiscal law. Distribution cannot be made until certificate received from Minister establishing that no amount is exigible, that sureties for payment accepted or that no creditor has priority of rank over Crown. Distribution made without obtaining said certificate renders person making distribution personally liable up to amount of property he has distributed. In case of succession, property up to value of $12,000 can be distributed prior to giving notice to Minister. (R.S.Q. c. M-31, §14). Legal representative must also obtain certificate from Minister of National Revenue before distribution. (R.S.C. 1985, c. 1 [5th Supp.]).

Insolvent Estates.

Where succession not manifestly solvent, liquidator may not pay debts of succession or legacies until expiry of 60 days from registration of notice of closure of inventory or from exemption of making inventory. Liquidator may pay ordinary public utility bills and debts in urgent need of payment if required. (C.C.Q. 810).

If property of succession insufficient, liquidator may not pay any debt or legacy by particular title before drawing up statement thereof, giving notice to interested persons and homologating payment proposal in court. In accordance with proposal, liquidator first pays hypothecary or preferred creditors; next other creditors, except for creditors of support; next creditors of support; finally, legatees by particular title. Liquidator may alienate property bequeathed as legacies by particular title if necessary to pay creditors. If property insufficient to pay legatees by particular title, liquidator, in accordance with proposal, first pays those having preference under will and then legatees of individual property. (C.C.Q. 811s.).

Remuneration.

Liquidator is entitled to reimbursement of expenses, and to remuneration if he is not heir. If heir, he may be remunerated if will so provides or heirs so agree. Remuneration is fixed by testator, heirs, or court where there is disagreement. (C.C.Q. 789). Liquidator not bound to take insurance or furnish security unless testator or majority of heirs demand it, or upon court order. (C.C.Q. 790).

Small Estates.

No simplified procedures are available for administration of small estates.

Foreign Liquidators and Administrators.

Any person who, under law of foreign country, is empowered to represent person who died or made his will there and left property in province, may be party in that capacity to proceedings before any court of Quebec. (C.P. 58).

Anatomical Gifts.

See topic 13.05 Death, subhead Anatomical Gifts.

13.11 FIDUCIARIES:

See topics 13.10 Executors and Administrators of Estates, subhead Investments; 13.15 Trusts.

13.12 INTESTACY:

See topic 13.07 Descent and Distribution.

13.13 PROOF OF CLAIMS:

See topic 13.10 Executors and Administrators of Estates; category 5 Civil Actions and Procedure, topic 5.16 Pleading.

13.14 SUBSTITUTION:

Substitution permits donor or testator to pass property on to more than one rank of beneficiaries. First beneficiary or institute, receives property with obligation of delivering it to subsequent beneficiary or substitute, after certain time. (C.C.Q. 1218, 1219). There can be at most two ranks of beneficiaries exclusive of initial institute. Accretion between co-institutes upon death of one of them, where it is stipulated that his share passes to surviving institutes, is not considered to be made to subsequent rank. (C.C.Q. 1221).

Substitution is established by gift or by will. It must be evidenced in writing and published in registry office. (C.C.Q. 1218). Opening of substitution takes place at death of institute unless earlier time fixed by grantor. Where institute is legal person, substitution may not open more than 30 years after gift or opening of succession, or after date legal person's right arises. Where it is stipulated that share of institute passes, on his death, to surviving institutes of same rank, opening of substitution takes place on death of last institute, unless prejudicial to substitute who would have received but for stipulation. Only person having required qualities to receive by gift or by will at time substitution opens may be substitute. Where there are several substitutes of same rank, only one need have required qualities to receive to protect right of all other substitutes to receive. (C.C.Q. 1240s.).

Obligations and Rights of Institute.

Until substitution opens, institute is owner of substituted property which forms within his personal patrimony separate patrimony intended for substitute. (C.C.Q. 1223). During this time, institute may exercise all rights of ownership, including alienation, hypothecation and leasing of property. Rights of acquirer, creditor or lessee are unaffected by substitute's rights at opening of substitution. (C.C.Q. 1229).

Within two months after gift or legacy, institute, in manner of administrator of property of others, must make inventory of property at his own expense, after convening substitute. Where institute refuses or fails to make inventory, substitute may do so at expense of institute, after convening institute and other interested persons. On each anniversary of date of inventory, institute must inform substitute of any change in general mass of property and of re-investments of any proceeds from alienation. (C.C.Q. 1224, 1236, 1231).

In administering property, institute must act with prudence and diligence in view of rights of substitute. Institute must maintain and preserve property. He pays all charges and debts due before substitution opens and collects claims, gives acquittance therefore and exercises all judicial recourses relating to property. He must insure property against ordinary risks unless premium is too high in relation to risks. Any proceeds of alienation must be reinvested in accordance with provisions relating to presumed sound investments. See topic 13.01 Administration of Property of Others. If constituting act of substitution provides therefore, institute may dispose of substituted property gratuitously or not reinvest it. He has no right to bequeath property. Institute may, before substitution opens, renounce his rights in favor of substitute and deliver substituted property to him in anticipation. (C.C.Q. 1225s.).

Institute must take out insurance or furnish security to guarantee performance of his obligations if required by act creating substitution or by court order. If institute fails to perform obligations or endangers rights of substitute, court may deprive him of fruits and revenues, require him to restore capital, declare his rights forfeited in favor of substitute or appoint sequestrator. (C.C.Q. 1237, 1238).

Opening of Substitution.

Rules on successions, particularly those relating to right of option or to testamentary dispositions, apply to substitution from time it opens, whether created by gift or will. (C.C.Q. 1222). See topic 13.10 Executors and Administrators of Estates.

Substitute is seized of ownership of property upon opening of substitution. Institute must render account to substitute and deliver to him substituted property, whatever has been acquired through reinvestment of said property, or value of property at time of its alienation. Institute liable for any loss caused by his fault or not resulting from normal use. Where substitution affects only residue of property, institute delivers only property remaining and price still due on alienated property. (C.C.Q. 1243s.).

Institute is entitled to reimbursement, with interest accrued from opening, of capital debts and expenses generally debited from capital incurred by reason of substitution. Institute is also entitled to reimbursement, in proportion to duration of his right, of expenses generally debited from revenues for any object that exceeds duration, and for any useful disbursements made, subject to rules applicable to possessors in good faith. (C.C.Q. 1247, 1248).

Opening of substitution revives claims and debts that existed between institute and grantor and terminates confusion, in person of institute, of qualities of creditor and debtor, except in respect of interest accrued until opening. Institute may retain substituted property until payment of what is due to him. Institute's heirs have same rights and obligations as institute. They must continue anything that necessarily follows from acts performed by institute or that cannot be deferred without risk of loss. (C.C.Q. 1249s.).

Lapse of Substitution.

Lapse of testamentary substitution with regard to institute does not give rise to representation and benefits his co-institutes or, in absence of co-institutes, substitute. Lapse of testamentary substitution with regard to substitute benefits his co-substitutes, if any; otherwise, it benefits institute. Donor may revoke substitution with regard to substitute, as long as it has not been accepted by substitute. In respect of donor, substitute is deemed to have accepted where he is child of institute or where one of co-substitutes has accepted substitution. Revocation of substitution with regard to institute benefits any co-institute; otherwise it benefits substitute; revocation with regard to substitute benefits any co-substitute; otherwise, it benefits institute. Grantor may reserve for himself prerogative of determining share of substitutes or confer that prerogative on institute. Exercise of prerogative by donor does not constitute revocation of substitution even if in effect it completely excludes substitute from benefit of substitution. (C.C.Q. 1252s.).

13.15 TRUSTS:

Creation.

Trust results from transfer of property from patrimony of settlor to that of trust created by him for particular purpose and which trustee undertakes to hold and administer. Trust is established by contract, onerously or gratuitously, by will or by operation of law. Where authorized, it may be established by judgment. (C.C.Q. 1260, 1262). It is constituted upon acceptance of trustee. (C.C.Q. 1264). If object of trust by onerous title is to secure performance of obligation, trustee shall, in case of default by settlor, follow rules applicable to exercise of hypothecary rights and trust must be published to have effect against third persons. (C.C.Q. 1263). See category 21 Mortgages, topic 21.03 Mortgages of Personal Property, subhead Hypothecs Generally.

Kinds.

Trusts are constituted for personal, private or social utility purposes. Provided it is designated as trust, trust may be identified by name of grantor, trustee or beneficiary, or, in case of trust constituted for purposes of private or social utility, by name which reflects its object. (C.C.Q. 1266).

Personal trust is constituted gratuitously for purpose of securing benefit for determinate or determinable person. (C.C.Q. 1267). If constituted for benefit of several persons successively, it may not include more than two ranks of beneficiaries of fruits and revenues exclusive of beneficiary of capital; it is without effect in respect of any subsequent ranks it might contemplate. Accretions of fruits and revenues between co-beneficiaries of same rank are subject to rules of substitution relating to accretions between co-institutes of same rank. (C.C.Q. 1271). See topic 13.14 Substitution. Right of beneficiaries of first rank opens not later than 100 years after trust is constituted, even if longer term is stipulated. Right of beneficiaries of subsequent ranks may open later but solely for benefit of those beneficiaries who have required quality to receive at expiry of 100 years after creation of trust. In no case may legal person be beneficiary for period exceeding 100 years, even if longer term is stipulated. (C.C.Q. 1272). Administration of trust is subject to supervision of settlor or his heirs, and of beneficiary, even future beneficiary. Rights of beneficiary, if he is not yet conceived, are exercised by person who, designated by settlor as curator, accepts office, or, failing him, by person appointed by court or by interested person. Public Curator may be designated to act. (C.C.Q. 1287, 1289).

Private trust is trust created to erect, maintain, or preserve thing or to use property appropriated to specific use, for indirect benefit of person or in his memory, or for some other private purpose. Trust constituted by onerous title, particularly one created to allow making of profit by means of investments, provisions for retirement or procuring another benefit for settlor or persons he designates or members of partnership, company or association, or employees or shareholders, is also private trust. (C.C.Q. 1268, 1269).

Social trust is trust constituted for purpose of general interest, such as cultural, educational, philanthropic, religious or scientific purpose. It does not have making of profit or operation of enterprise as its main object. (C.C.Q. 1270).

Private or social trust may be perpetual. (C.C.Q. 1273). In cases provided for by law, private or social trust may be subject to supervision of persons or bodies designated by law, although no such person or body has yet been designated. Where such is case, trustee must file with person or body statement indicating nature, object and term of trusts and name and address of trustee, must allow trust records to be examined and must furnish any account on request. (C.C.Q. 1287, 1288).

Beneficiaries.

Only person having qualities to receive by gift or will at time his right opens may be beneficiary of trust constituted gratuitously. Where there are several beneficiaries of same rank, it is sufficient that one of them have such qualities to preserve right of others if they avail themselves of it. (C.C.Q. 1279). For limitations on beneficiaries of personal trusts, see subhead Kinds, supra.

Appointment of Trustee.

Any natural person having full exercise of his civil rights, and any legal person authorized by law, may act as trustee. (C.C.Q. 1274). Settlor or beneficiary may be trustee but shall act jointly with trustee who is neither settlor or beneficiary. (C.C.Q. 1275). Settlor may appoint one or several trustees or provide mode of their appointment or replacement. (C.C.Q. 1276). Court may appoint trustee where settlor has failed to do so or where it is impossible to appoint or replace trustee. (C.C.Q. 1277).

General Powers and Duties of Trustees.

Trustee must preserve property and make it productive, increase patrimony or appropriate it to purpose, where interest of beneficiary or pursuit of purpose of trust requires it. (C.C.Q. 1306). Trustee has control and exclusive administration of trust patrimony, and titles relating to property are drawn up in his name; he has exercise of all rights pertaining to patrimony and may take any proper measure to secure its appropriation. Trustee acts as administrator of property of others charged with full administration. (C.C.Q. 1278). See topic 13.01 Administration of Property of Others.

Unless administration of trust is gratuitous according to law, act or circumstances, administrator is entitled to remuneration fixed in act, by usage or by law, or to remuneration established according to value of services rendered. (C.C.Q. 1300).

Investments.

To fulfil duties trustee may perform any necessary or useful act, including any form of investment. (C.C.Q. 1307). See also topic 13.01 Administration of Property of Others, subhead Rules of Administration.

Powers and Liabilities of Trustees.

Where trustee binds himself, within limits of his powers, in name of beneficiary or trust patrimony, he is not personally liable towards third parties with whom he contracts. He is liable towards them if he binds himself in his own name, subject to their rights against beneficiary or trust patrimony. (C.C.Q. 1319).

Settlor, beneficiary or any interested persons may take action against trustee to compel him to perform his obligations or perform any act necessary for trust, or impugn acts performed by trustee in fraud of trust patrimony or rights of beneficiary. (C.C.Q. 1290).

When there are several trustees, the majority may act, saving a stipulation to contrary in act or in law. (C.C.Q. 1332).

Upon death of trustee or his being placed under protective supervision, liquidator of his succession or his tutor or curator must give notice of death or protective supervision to beneficiary and any co-administrators or in case of private or social trusts, to person or body designated by law to supervise administration, and do all that is immediately necessary to prevent loss; he must render account and deliver property over to those entitled to it. (C.C.Q. 1361).

Distribution.

See topic 13.10 Executors and Administrators of Estates, subhead Distribution.

Removal of Trustees.

Any interested person may apply for replacement of trustee who is unable to discharge his duties or does not fulfil obligations. (C.C.Q. 1360).

Securities in Name of Nominee.

Titles relating to property of trust are drawn up in trustee's name. He has exercise of all rights pertaining to patrimony and may take any proper measure to secure its appropriation. (C.C.Q. 1278).

Uniform Simplification of Fiduciary Security Transfers Act.

No such statute in this province.

Accumulations.

No rule against accumulations. While trust is in effect, beneficiary has right to require, according to constituting act, either provision of benefit granted to him or payment of both fruits and revenues and capital or of only one of these. (C.C.Q. 1284).

Perpetuities.

Private or social trust may be perpetual. (C.C.Q. 1273). Personal trust limited to two ranks of beneficiaries of fruits and revenues and one rank of capital beneficiaries whose quality to receive comes into existence within 100 years of creation of trust. Legal person cannot be beneficiary for more than 100 years. (C.C.Q. 1271, 1272).

Pour Over Trusts.

See topic 13.16 Wills, subhead Bequests and Devises to Inter Vivos Trusts.

Amendment and Termination of Trusts.

Where trust has ceased to meet first intent of settlor, court may terminate trust or, in case of social trust, substitute another closely related purpose for original purpose. If trust continues to meet settlor's intent but changes would allow more faithful compliance therewith, court may amend provisions of constituting act. (C.C.Q. 1294).

Termination of Trusts.

Trust is terminated by renunciation or lapse of right of all beneficiaries, both of capital and of fruits and revenues. Trust is also terminated by expiry of term or fulfilment of condition, by attainment of purpose of trust or by impossibility of attainment as confirmed by court. At termination, trustee delivers over property to those entitled to it. Where there is no beneficiary, property devolves to settlor or his heirs. Property of social trust that terminates by impossibility of fulfilment devolves to trust, to legal person or to group of persons devoted to similar purpose as designated by court on recommendation of trustee and advice of any person or body designated by law to supervise trust. (C.C.Q. 1296s.).

Foundations.

Foundation is appropriation of property for socially beneficial purpose. Its main object cannot be making of profit or operation of enterprise. Foundations consist either of autonomous patrimony, in which case they are governed by provisions on social trusts (see subhead Kinds, supra) or of patrimony of legal person, in which case they are governed by laws applicable to legal persons of same kind. Foundation created by trust is established by gift or by will in accordance with rules governing those acts. Unless otherwise provided for in constituting act of trust foundation, initial property of trust foundation or any property substituted therefor or added thereto shall be preserved and allow for fulfilment of purpose, either by distribution only of those revenues that derive therefrom or by use that does not appreciably alter substance of initial property. (C.C.Q. 1256s.).

13.16 WILLS:

Testamentary Capacity.

Capacity of testator is considered relative to time will is made. Minor may not dispose of property by will, except articles of little value. Persons of full age under curatorship may not make will. Person of full age provided with advisor may make will without assistance. Will made by person of full age under tutorship may be confirmed by court according to circumstances and nature of dispositions. Tutor, curator or adviser may not make will on behalf of person whom he represents, either alone or jointly with person. (C.C.Q. 707-711).

Forms.

Only forms of wills are: (1) Notarial, made in presence of notary, en minute, and witness, or in certain cases notary, en minute, and two witnesses, (2) holograph, written entirely by testator and signed by him without use of any mechanical device, (3) in presence of two witnesses of full age, written by testator or third person, signed at end by testator and witnesses; testator and witnesses must also sign or initial all pages of will. (C.C.Q. 712s.). Notarial will makes complete proof (C.C.Q. 2814[6]); holograph and witnessed will must be probated (C.C.Q. 772).

Witnesses.

Any person of full age may witness notarial will, except employee of attesting notary who is not himself notary. (C.C.Q. 725).

Testamentary Gifts to Subscribing Witnesses, Etc.

Legacies made in favor of receiving notary or to spouse or relative in first degree of such notary are void, but do not affect other provisions of will. (C.C.Q. 759). Legacies to witnesses, even supernumeraries, are null, but do not affect other dispositions of will. Same applies to liquidator or administrator of property designated by will if such person acts as witness, to extent legacy exceeds his remuneration. (C.C.Q. 760).

Bequests and Devises to Inter Vivos Trusts.

Any person may increase trust patrimony by transferring property to it by contract or by will in conformity with rules applicable to constitution of trust. (C.C.Q. 1293). See topic 13.15 Trusts, subhead Creation. Trustee may receive legacy intended for trust or legacy to be used to accomplish objective of trust. (C.C.Q. 618).

Revocation.

It is either express or tacit. Tacit: (1) Legacy to spouse before divorce or dissolution of civil union or nullity of marriage or civil union is revoked unless testator stipulates against this presumption in will. Revocation of legacy entails revocation of spouse as liquidator of succession. (2) bequest of property revoked if property alienated during testator's life. Express: (1) made by subsequent will expressly declaring change in intention. (2) by means of deliberate destruction, tearing or erasure of holograph will, or of that made in presence of witnesses, deliberately effected by testator, with intention of revoking it, or by reason of destruction of will becoming known to him, and failure to replace it. If owing to circumstances unforeseeable at time of acceptance of legacy, execution of charge becomes impossible or too burdensome for heir or legatee by particular title, court may revoke or change it. (C.C.Q. 763s.).

Following persons are unworthy of inheriting by operation of law: (1) Persons convicted of making attempt on life of deceased, (2) persons deprived of parental authority over child while child is exempted from obligation of support in respect of child's succession. Persons may be declared unworthy of inheriting if (1) they were guilty of cruelty or seriously reprehensible behavior towards deceased, (2) they concealed or destroyed in bad faith will of deceased, (3) they hindered writing, amendment, or revocation of deceased's will. Heir is not declared unworthy if deceased knew of his unworthiness and made bequest anyway. Any successor may, within one year of opening of succession or becoming aware of unworthiness of heir, apply to court to have heir declared unworthy if not already by operation of law. Spouse in good faith inherits if marriage or civil union declared null after death. (C.C.Q. 620s.).

Probate.

Wills in notarial form do not require probate. Probating of other two forms of wills is done on application to Superior Court in district where testator had his domicile, or, if had no domicile in Quebec, before court of district in which he dies or left property. Supported in case of witnessed will by affidavit of one of subscribing witnesses or, if neither of them is available, affidavit of one or more other persons who knew testator and can identify his signature and, in case of holograph will, by affidavit of one or more persons who are familiar with testator's handwriting and can swear that will was wholly written and signed by him. (C.P. 887). Application to probate may also be presented to notary. (C.P. 863.4, 887.1).

Self-proved Wills.

Notarial wills are self-proved and require no probate. For probate of wills made before witnesses and holograph wills, affidavit of witness or other person normally sufficient for probate and can be executed at same time as will or while testator is alive. Affiant need not testify in person before court unless probate contested by interested person.

Contest.

Notwithstanding probate, will may be afterward contested by action by any interested person who did not oppose application for probate or who, having opposed it, raises grounds which he was not in position to urge. (C.P. 891). No person having acknowledged will may thereafter contest its validity. (C.C.Q. 773).

Unclaimed Legacies.

Where deceased leaves no spouse or relatives within degrees of succession, or where all successors have renounced or where no successor is known or claims succession within six months of death, State is seized in same manner as heir of property situated in Quebec. Any testamentary disposition which renders this right nugatory without otherwise providing for devolution of property is without effect. (C.C.Q. 696, 697).

Lapses.

Legacies lapse when testator survives legatee or when legatee refuses legacy, is unworthy or dies before fulfilment of suspensive condition of purely personal nature. Legacies also lapse if thing bequeathed perished totally during testator's lifetime or before opening of legacy made under suspensive condition. If loss of property occurred at death of testator or opening of bequest or subsequently, insurance indemnity substituted for property. Legacy made to liquidator as remuneration lapses if he refuses office. (C.C.Q. 750s.).

Election.

The distribution of the estate of the deceased is unalterably governed by the terms of will, subject to claims for partition of family patrimony, compensatory allowance and support. See topic 13.07 Descent and Distribution, subheads Alimentary Support and Compensatory Allowance; also category 14 Family, topic 14.10 Husband and Wife and Civil Union Spouses, subhead Family Patrimony. Legatees have no right of election between testamentary provision and dower or distribution under intestate law.

Children.

Depending on whether alive when will is executed or born thereafter, have no rights in estate except such as are given them by will. They may be disinherited by mere implication arising from failure to mention them subject to survival of obligation of support. See topic 13.07 Descent and Distribution, subhead Alimentary Support.

Foreign Wills.

Wills executed outside limits of Province of Quebec are valid if made according to forms required by law of place where they were executed. Wills may also be made in form prescribed by law of domicile or nationality of testator. Foreign executors and trustees may exercise their functions in this province under such wills and may appear in judicial proceedings before any court in province. (C.C.Q. 3109; C.P. 58).

Simultaneous Death.

See topic 13.05 Death, subhead Survivorship.

Living Wills.

Provided for by rules governing mandate by person given in anticipation of incapacity to care for himself or to administer his property.

Mandate must be made by notarial act en minute or in presence of two witnesses. If given in presence of witnesses, mandate must be written by mandator or by third person. Witnesses must have no interest in act and be in position to ascertain whether mandator is capable of acting. Mandator: (1) Declares nature of act but need not disclose its contents, (2) signs act or recognizes his signature, (3) may also have third person sign writing for him in his presence and according to his instructions. Witnesses then sign mandate. (C.C.Q. 2166s.).

Performance of mandate is subordinate to incapacity and to homologation by court, at mandatary's request. (C.C.Q. 2166). Application to homologate mandate may also be presented to notary. (C.P. 863.4, 884.7). Acts performed before homologation may be annulled or resulting obligations reduced, on mere proof that mandator's incapacity was notorious or known to other party at time acts were entered into. (C.C.Q. 2170).

Where scope of mandate in doubt, mandatary interprets it according to rules respecting tutorship to persons of full age. (C.C.Q. 2168). See category 14 Family, topic 14.09 Guardian and Ward. Mandatary cannot renounce mandate unless he has previously provided for his replacement or applied for institution of protective supervision. (C.C.Q. 2174).

Mandate ends when court ascertains that mandator is again capable, when mandator revokes mandate, when mandatary renounces mandate, or when either party dies. (C.C.Q. 2172, 2175). If mandate is not faithfully performed, any interested person may apply to court for revocation of mandate and institution of protective supervision. (C.C.Q. 2177).

14 FAMILY

14.01 ADOPTION:

Adopters.

Any person of full age may adopt child alone or jointly with another. (C.C.Q. 546). Adopter must be at least 18 years older than adoptee unless adoptee is child of spouse of adopter or unless court dispenses with this requirement. (C.C.Q. 547).

Adoption by Same-Sex Parents.

Where different rights and obligations are assigned by law to father and mother, parent biologically related to child has rights and obligations assigned to mother in case of female couple and those assigned to father in case of male couple. Adoptive parent has rights and obligations assigned by law to other parent. If neither parent is biologically related, then rights and obligations determined in adoption judgment. (C.C.Q. 578.1).

Adoptees.

Person of full age may be adopted only by person who acted in loco parentis when he was minor unless court dispenses with this requirement. (C.C.Q. 545). No minor child may be adopted without consent of father and mother or tutor unless judicially declared eligible. (C.C.Q. 544). Following may be judicially declared eligible: (1) Child over three months if no paternal or maternal filiation established; (2) child whose care, maintenance or education not taken in hand by mother, father or tutor for at least six months; (3) child whose parents have been deprived of parental authority if child has no tutor; (4) child who has no parents or tutor. Motion for eligibility may only be made by ascendant of child, collateral relative to third degree, spouse of such ascendant or relative, child himself if 14 years, or director of youth protection. (C.C.Q. 559-560).

Consent Required.

Consent of adoptee if ten years of age or older is required unless impossible to express will; if adoptee under 14 years of age refuses to give consent court may defer adoption or grant adoption notwithstanding refusal (C.C.Q. 549); refusal to consent by child of 14 is bar to adoption (C.C.Q. 550). Adoption must take place with consent of parents unless deprived of parental authority or unless filiation with child is not established, in which case, consent of tutor is needed, if there be one. (C.C.Q. 551, 552, 553). Consent may be withdrawn within 30 days from its date. (C.C.Q. 557). Consents must be in writing before two witnesses. (C.C.Q. 548). In case of adoption of child domiciled outside Quebec, rules respecting consent to adoption and eligibility for adoption are those provided by law of his domicile. Effects of adoption are subject to law of domicile of adopter. (C.C.Q. 3092).

Conditions Precedent.

No placement for adoption without court order and not until 30 days after consent to adoption. Unless court decides otherwise, no adoption granted unless child has lived with adopter for six months before adoption order granted. (C.C.Q. 566s.).

Jurisdiction.

Court of Quebec, Youth Division. (C.P. 36.1).

Venue.

District of domicile of child or plaintiff or, if adopters consent, district where director of youth protection last to have charge of adoptee exercises his functions. (C.P. 70[3]).

Effects of Adoption.

From judgment granting adoption: (a) Court assigns adoptee given names and surname chosen by adopter unless adoptee or adopter request keeping original names (C.C.Q. 576); (b) adoption confers on adoptee filiation which replaces his original filiation and creates same rights and obligations as filiation by blood; (c) effects of preceding filiation cease except regarding parent if adoption by spouse of such parent; (d) tutor loses rights and duties except to render account (C.C.Q. 577s.). Judicial and administrative files of adoption confidential. Adoptee of full age or at least 14 years of age may have access to find his parents if they previously consented thereto, similarly for parents if adoptee consented once of full age. (C.C.Q. 582, 583).

Application.

Application for placement presented by adopter and, unless case of special consent, by director of youth protection. If child not domiciled in Quebec, application by adopter and person or agency legally qualified to act as intermediary in adoption. If child ten years or older, must receive notice of application. If mother, father or tutor gave consent to adoption during year preceding adoption, must receive notice from director of youth protection. Joint application if proposed adoption by two persons. (C.P. 825s.; Youth Protection Act, R.S.Q. c. P-34.1, §§72.2, 72.3).

Decree.

Clerk of Court that has rendered judgment of adoption gives notice of judgment to Registrar of civil status. (C.C.Q. 129).

Setting Aside Adoption.

Appeal to Court of Appeal from any judgment or order rendered in matter of adoption and, with leave, from interlocutory judgment of Youth Court in matter of adoption. (C.P. 26[4], 29).

14.02 ALIMONY:

See topic 14.08 Divorce.

14.03 CIVIL UNION:

General Principle.

Commitment by two persons, whether male or female, 18 years and over, to live together and uphold rights and obligations that derive from that status. Civil union can only be contracted if both persons are free from any previous bond of marriage or civil union and are in relation to each other, neither ascendant nor descendant or brother nor sister. (C.C.Q. 521.1).

Solemnization.

Civil union contracted openly before officiant competent to solemnize marriages, in presence of two witnesses. No minister of religion may be compelled to solemnize civil union to which there is impediment according to minister's religion. (C.C.Q. 521.2). See topic 14.12 Marriage, subhead Ceremonial Marriage. Solemnization of civil unions subject to same rules, with necessary modifications, as solemnization of marriages, including rules relating to prior publication. (C.C.Q. 521.3). See topic 14.12 Marriage, subhead Publication of Banns.

Annulment.

Any interested person may apply to have any civil union not contracted in accordance with C.C.Q. declared null. No action lies after lapse of three years from solemnization, except where public order concerned. (C.C.Q. 521.10). Nullity of civil union has same effects as nullity of marriage. (C.C.Q. 521.11). See topic 14.12 Marriage, subhead Annulment.

Civil Effects of Civil Union.

Effects of civil union as regards direction of family, exercise of paternal authority, contribution towards expenses, family residence, family patrimony and compensatory allowance are same as effects of marriage, with necessary modifications. (C.C.Q. 521.6). Civil union regimes and civil union contracts are subject to same rules as matrimonial regimes and marriage contracts with necessary modifications. (C.C.Q. 521.8). See topic 14.10 Husband and Wife and Civil Union Spouses.

14.04 COMMUNITY PROPERTY:

See topic 14.10 Husband and Wife and Civil Union Spouses.

14.05 DESERTION:

See topic 14.10 Husband and Wife and Civil Union Spouses.

14.06 DISSOLUTION OF CIVIL UNION:

General Principle.

Civil union dissolved by death, court judgment or notarized joint declaration where spouses' will to live together is irretrievably undermined. (C.C.Q. 521.12). Spouses may consent by joint declaration to dissolve civil union provided they settle all consequences of dissolution in agreement and provided that they have no minor or dependent children. Declaration and agreement must be notarial acts. Agreement recorded in notarized transaction contract. (C.C.Q. 521.13, 521.17). From date of execution before notary, joint declaration dissolving civil union and transaction contract, have same effect as judgment dissolving civil union. (C.C.Q. 521.16). In absence of joint declaration dissolving civil union or where interests of common children at stake, dissolution of civil union must be pronounced by court. Court ascertains if spouses' will to live together is irretrievably undermined, fosters conciliation and sees to interests of children and protection of their rights. During proceeding, court may determine provisional measures as in case of separation from bed and board. Upon or after pronouncing dissolution, court may order one of spouses to pay support to other, decide as to custody, maintenance and education of children. (C.C.Q. 521.17). Dissolution of civil union does not deprive children of advantages secured to them by law or civil union contract. Rights and obligations of parents towards children unaffected by dissolution of civil union. (C.C.Q. 521.18). Dissolution of civil union entails dissolution of civil union regime. (C.C.Q. 521.19).

14.07 DISSOLUTION OF MARRIAGE:

See topic 14.08 Divorce.

14.08 DIVORCE:

Superior Court of Province of Quebec has jurisdiction in matters of divorce in virtue of provisions of federal Divorce Act (R.S.C., 1985, c. 3 [2nd supp.], §§2, 3) as proclaimed by Lieutenant-Governor in Council of Quebec. Civil Code of Quebec contains articles dealing with provisional measures for family residence and interim support. (C.C.Q. 500, 502, 503). For grounds and procedure, see Canada Law Digest, category 14 Family, topic 14.01 Divorce.

Temporary Alimony.

See Canada Law Digest, category 14 Family, topic 14.01 Divorce, subhead Corollary Relief.

Permanent Alimony.

See Canada Law Digest, category 14 Family, topic 14.01 Divorce, subhead Corollary Relief.

Allowance for Support of and Custody of Children.

See Canada Law Digest, category 14 Family, topic 14.01 Divorce, subheads Corollary Relief, Enforcement.

Recovery of Support Payments.

Powers of collector of support payments are conferred on Minister of Revenue in virtue of Act to Facilitate the Payment of Support. (R.S.Q. c. P-2.2, §§77, 97). Minister of Revenue may acquire or alienate any property of debtor in order to recover amount owed. (§52). Court may order person to furnish creditor with information on place of residence or work of debtor. (C.P. 546.1). Arrears of support prescribed after three years. (C.C.Q. 2925).

Joint Property.

If divorced parties hold property in community, under partnership of acquests or as joint owners, community or partnership is dissolved by divorce, and either party may demand partition of the joint property (C.C.Q. 845, 1030).

Division of Property of Spouses.

Division of property depends on family patrimony and marital regime governing spouses at date of dissolution of marriage. For details see topic 14.10 Husband and Wife and Civil Union Spouses.

Foreign Decrees.

Generally divorces granted in foreign countries recognized and enforceable by Québec authorities if granted in accordance with federal Divorce Act. (R.S.C., 1985, c. 3 [2nd supp. §22]). (C.C.Q. 3155, 3167).

Separation as to Bed and Board.

See topic 14.10 Husband and Wife and Civil Union Spouses, subhead Separation as to Bed and Board.

Annulment of Marriage.

See topic 14.12 Marriage, subhead Annulment.

14.09 GUARDIAN AND WARD:

Supervision of Minors.

Tutors.

Tutorship is legal or dative. Legal tutorship is conferred from law. Dative tutorship is conferred by parents or by court. (C.C.Q. 178). Parents are as of right tutors to their minor children until they are of full age and emancipated. (C.C.Q. 192). Father or mother, whether their filiation with child is by blood, adoption, or assisted procreation, may appoint tutor by will, mandate or declaration filed with Public Curator. Right to appoint tutor belongs exclusively to last surviving parent or last parent able to exercise tutorship. Unless designation is contested, tutor appointed assumes office without judicial confirmation. (C.C.Q. 200, 201, 202). Otherwise, tutorship is conferred by Court, on advice of tutorship council unless it is applied for by director of youth protection. (C.C.Q. 205). Generally, tutorship council is composed of three persons designated by meeting of relatives, persons connected by marriage or civil union or friends. (C.C.Q. 222).

Eligibility and Competency.

Tutorship is personal office open to every natural person capable of fully exercising his civil rights and who is able to assume such office. (C.C.Q. 179).

Duties.

Tutor acts as administrator entrusted with simple administration of property of minor. (C.C.Q. 208). See category 13 Estates and Trusts, topic 13.01 Administration of Property of Others.

Within 60 days of institution of tutorship, tutor shall make inventory of property to be administered. (C.C.Q. 240). Tutor is bound to invest sums of money under his administration in accordance with rules relating to presumed sound investments. (C.C.Q. 1304).

He cannot renounce or accept successions which have fallen to the minor without the authorization of tutorship council. (C.C.Q. 638). See category 13 Estates and Trusts, topic 13.07 Descent and Distribution, subhead Acceptance of Succession.

Actions belonging to minor are brought in name of tutor, although in certain circumstances minor may with authorization of court institute action alone. (C.C.Q. 159).

At end of tutorship tutor is bound to render account of his administration to minor who is of age. (C.C.Q. 247).

Before contracting substantial loan in relation to patrimony of minor, offering property as security, alienating important piece of family property, immovable or enterprise, or demanding definitive partition of immovables held in co-ownership, tutor shall obtain authorization of tutorship council or, if property or security is worth more than $25,000, of Court, which seeks advice of tutorship council. (C.C.Q. 213).

Emancipation.

Court after obtaining advice of tutor and, where applicable, of tutorship council, may emancipate minor. (C.C.Q. 168). Tutor is accountable for his administration to emancipated minor; he continues, however, to assist him gratuitously. (C.C.Q. 169).

Foreign Guardians.

If minor or protected person of full age is domiciled outside Quebec but possesses property in Quebec or has rights to be exercised and law of domicile does not provide for him to have representative, tutor or curator may be appointed to represent him in all cases where tutor or curator may represent minor or protected person of full age under laws of Quebec. (C.C.Q. 3085).

Protective Supervision of Persons of Full Age.

Protective supervision of person of full age is established in his interest to ensure protection of his person, administration of his patrimony and exercise of his civil rights. (C.C.Q. 256).

Appointment.

May be sought at initiative of person requiring protection or someone close to such person, or at initiative of director general of health or social services establishment, through Court in jurisdiction which person requiring protection had domicile or residence. Procedure to institute protective supervision can be done by notaries. Mandatary designated by person or Public Curator may also apply for institution of protective supervision. (C.C.Q. 268-270). Judgments establishing protective supervision reviewable any time. (C.C.Q. 277).

Powers and Duties.

Tutor or curator must be appointed to represent, or advisor to assist, person of full age unable to care for himself or to administer his property by reason of illness, deficiency or debility due to age impairing mental faculties or physical ability to express will. (C.C.Q. 258).

Tutor or curator so appointed responsible for custody and maintenance and moral and material well-being of person of full age. Resulting duties to be discharged with consideration for protected person's condition, needs, faculties and other aspects of person's situation. (C.C.Q. 260).

Advisors.

Court-appointed to person of full age, generally and habitually able to care for himself and administer property, but requiring for certain acts or certain time, assistance or advice regarding administration of property. (C.C.Q. 291). Advisor does not have administration of property. (C.C.Q. 292).

Tutors.

Court-appointed to person of full age where established that person's incapacity to care for himself or administer his property is partial or temporary and requires that he be represented in exercise of his civil rights. (C.C.Q. 285). Tutor has simple administration of property, exercised in same manner as tutor to minor, unless Court decides otherwise. (C.C.Q. 286).

See category 13 Estates and Trusts, topic 13.01 Administration of Property of Others.

Curators.

Appointed to person of full age where established that incapacity to care for himself and to administer his property is total or permanent and requires that he be represented in exercise of his civil rights. (C.C.Q. 281). Curator has full administration of property exercised according to rules of administration of property of others except that he may only make investments that are presumed sound. (C.C.Q. 282).

Termination.

By judgment of release; death of protected person or upon expiry of period for contesting report attesting cessation of inability. (C.C.Q. 295).

Investments.

See category 13 Estates and Trusts, topic 13.01 Administration of Property of Others, subheads Types of Administration and Investments.

Public Curator.

Appointed by government. (Public Curator Act, R.S.Q., c. C-81, §1). Supervises administration of private tutorships and curatorships. Assumes provisional simple administration of certain properties and assumes tutorship to property of minors and tutorship or curatorship to persons of full age not already provided with such. Public curator does not have custody of protected person of full age when he serves as tutor or curator, unless Court entrusts to him where no other person can assume role. Under most circumstances, public curator may do what is necessary for simple administration of property without judicial authorization. (Public Curator Act, R.S.Q., c. C-81, §12).

Termination.

Administration ceases upon appointment of (or return of absentee, existing) private tutor or curator; when liquidator or heirs of person represented by Public Curator accept duties or succession following death of person represented, or upon cessation of need for protective supervision. (Public Curator Act, R.S.Q., c. C-81, §40).

See categories 13 Estates and Trusts, topic Administration of Property of Others; Wills, subhead Unclaimed Legacies; Property, topic Powers of Attorney.

Power of Attorney.

See category 22 Property, topic 22.12 Powers of Attorney.

14.10 HUSBAND AND WIFE AND CIVIL UNION SPOUSES:

Act respecting matrimonial regimes (S.Q. 1969, c. 77) changed relationships between husband and wife, same sex partners, property rights, capacity of wife, basic marital regime and immutability of matrimonial regime. This law became effective on July 1, 1970.

Rights and Duties of Spouses.

Husband and wife (married spouses) and civil union spouses mutually owe each other respect, fidelity, succour and assistance. (C.C.Q. 392, 521.6). Married or civil union spouses must live together but may have separate domiciles without prejudice to that rule. (C.C.Q. 82). Each spouse retains own surname and given names and exercises civil rights under these names. (C.C.Q. 393). Persons married before Apr. 2, 1981 have option of using surname of spouse. (Act to establish new Civil Code and to reform family law, S.Q. 1980, c. 39, §79). Spouses contribute towards expenses of marriage or civil union in proportion to their respective means. Each spouse may make contribution by their activities within home. (C.C.Q. 396).

Residence.

Married or civil union spouses choose family residence together. (C.C.Q. 395). Neither spouse may alienate or encumber residence without consent of other. Similar provision for household furniture. (C.C.Q. 401). If residence is leased, spouse who is lessee may not sublet or transfer or terminate lease without consent of other. (C.C.Q. 403). Declaration of residence may be published. (C.C.Q. 407).

Family Patrimony.

Rules pertaining to family patrimony apply to couples married after July 1, 1989. Rules also apply to couples married before Dec. 31, 1990 unless they have expressed their will to be exempted. (R.S.Q. 1989, c. 55). Operates in addition to matrimonial or civil union régime to favor economic equality between spouses.

Marriage or civil union establishes family patrimony of certain property of spouses regardless of which of them holds right of ownership. (C.C.Q. 414). Composed of principal residence and secondary residence of family or rights conferring such uses and household furniture used to furnish same; vehicle used for family travel and benefits accrued during marriage or civil union under various retirement plans. Payment of contributions into pension plan entails accrual of benefits under pension plan; as does accumulation of service recognized for purposes of pension plan. Excludes property devolved to spouse by succession, legacy or gift before or during marriage or civil union. (C.C.Q. 415).

In event of separation as to bed and board or dissolution or annulment of marriage or civil union, value of family patrimony divided equally between spouses or between surviving spouse and heirs. (C.C.Q. 416). May be complied with by giving in payment or by payment of money. (C.C.Q. 419). Court may order compensatory payment where property alienated to detriment of spouse prior to need for partition. (C.C.Q. 421).

Spouses cannot, by way of marriage contract, civil union contract or otherwise, renounce rights in family patrimony (C.C.Q. 423, 521.6); but spouse may renounce such rights by notarial deed, from death of spouse or from judgment of divorce, dissolution of civil union, separation or nullity of marriage or civil union. Renunciation must be registered in Register of personal and movable real rights. Failing registration within one year of right to partition, renouncing spouse deemed to have accepted. (C.C.Q. 423). Action for annulment of renunciation of family patrimony or partition of acquests must be commenced within three years from act. (C.C.Q. 2925).

Spousal Allowance.

Court, in declaring separation, divorce, dissolution of civil union or annulment may order either spouse to pay to other, as compensation for latter's contribution, in property or services, to enrichment of patrimony of former, allowance based on consideration of advantages of matrimonial régime and of marriage contract. Award may include right in family residence, household furniture or retirement benefits. Same applies in case of death, based on advantages of succession to surviving spouse. (C.C.Q. 427, 429, 521.17). See category 13 Estates and Trusts, topic 13.07 Descent and Distribution, subhead Compensatory Allowance.

Antenuptial Contracts.

Basic marital or civil union regime is partnership of acquests (replacing prior basic regime of community of property). (C.C.Q. 432, 521.8). However, spouses may by notarial marriage or civil union contract entered into prior to marriage modify basic regime or establish another regime such as community of movables and acquests or separation of property. (C.C.Q. 431-437). Spouses may also during marriage or civil union modify or change their marital or civil union regime by marriage contract provided rights of family and creditors are not prejudiced. (C.C.Q. 438). Notice of every marriage contract or civil union or their modifications must be published in Register of personal and movable real rights. (C.C.Q. 441, 442).

Partnership of Acquests.

Spouses married on or after July 1, 1970 or in civil union who have not entered into special agreement by marriage or in civil union contract are subject to regime of partnership of acquests. (C.C.Q. 432).

Acquests falling into partnership consist of all properties not declared by law to be private property and in particular: (1) Proceeds of spouse's work during marriage or civil union; (2) all fruits and revenues which fall due or are received during marriage. (C.C.Q. 449).

Following are private property of each spouse: (1) Property owned or possessed on day of marriage or civil union; (2) property acquired during marriage by succession or gift, fruits and revenues therefrom if testator or donor so provided; (3) property acquired in replacement of private property; (4) clothing, personal papers, wedding ring, decorations and diplomas; (5) rights or benefits devolving to spouse as subrogated holder or specified beneficiary under retirement plan or other annuity or insurance; (6) instruments required for spouse's occupation. (C.C.Q. 450).

In partnership of acquests each spouse has administration, enjoyment and free disposal of his private property and acquests but cannot, without consent of other spouse, dispose of acquests by gratuitous title inter vivos with exception of small sums and customary presents. (C.C.Q. 461, 462). All property is presumed to constitute acquest, unless it is established to be private property. Property with respect to which neither spouse can establish exclusive ownership is deemed to be acquest held in undivided co-ownership. (C.C.Q. 459-460). This does not limit right to name third person beneficiary of annuities, retirement pensions or life insurance policies. (C.C.Q. 463).

Partnership of acquests is dissolved by death of one of spouses, by conventional change of matrimonial regime, by judgment pronouncing divorce, dissolution of civil union, separation from bed and board or separation of property or nullity of marriage or civil union and by absence of one of spouses after a certain period. (C.C.Q. 465, 521.19).

Community of Property.

Spouses married before July 1, 1970 in legal community of property or those who before Apr. 2, 1981 were governed by community regime, legal or contractual, are now governed by rules concerning community of movables and acquests or terms of their marriage contract. Regime of community of movables and acquests otherwise abolished. (S.Q. 1980, c. 39, §66).

Community of movables and acquests consists of: (1) All movable property which spouses possess at time of marriage and also all which they acquire afterwards except property coming to them by gift or legacy under terms of which it is excluded from community; (2) proceeds of work of spouses during marriage, subject to provisions relating to reserved property; (3) all fruits and revenues arising from private property if they fall due or are received during marriage; (4) immovable property they acquire during marriage. (See Art. 1272 of pre-1980 Civil Code of Lower Canada, hereinafter “C.C.”.)

Husband alone administers property of community, but he cannot sell or mortgage any immovable property of community without concurrence of wife. He cannot dispose by gift any property of community except small sums of money and customary gifts without concurrence of his wife. This does not limit his right to name third party beneficiary of annuities, retirement pensions or life insurance policies. Husband may nevertheless without concurrence of his wife sell or pledge any movable property of community other than business or household furniture in use by family. (C.C. 1292).

Proceeds of personal work of wife common as to movables and acquests, savings therefrom, movables or immovables she acquires by investing them are reserved to her administration and she has enjoyment of free disposal of them. She cannot alienate them by gratuitous title, nor alienate or hypothecate immovables, nor alienate or pledge stock in trade and household furniture in use by family without husband's concurrence. (C.C. 1425[a]).

Community is dissolved for same reasons as partnership of acquests.

Wife may carry on trade or calling without her husband's consent. However, if she is common as to property and carries on trade despite husband's opposition, she does not bind community beyond amount of benefit community derived from such trade or calling. Wife common as to property who carries on trade or calling with husband's consent obligates community for all that relates to such trade or calling. (C.C. 1291a).

After dissolution by death of partnership of acquests or community of movables and acquests and in absence of any will to contrary, surviving spouse has enjoyment of acquests or of property of community coming to children from deceased spouse; usufruct lasts as to each child until he reaches age of 18 years old or until he is emancipated. (C.C. 1426).

Separation as to Property.

Spouses may by simple declaration in marriage or civil union contract retain exclusive rights of administration, enjoyment and disposal of their property. Property over which neither spouse is able to establish exclusive right of ownership is presumed held by both in undivided ownership, one-half by each. (C.C.Q. 485-487, 521.8).

Disability of Married Women.

Spouses have identical rights and obligations in marriage or civil union. Powers may be limited by marriage regime. (C.C.Q. 392, 444).

Separate Property.

Compensation received by spouse after marriage or civil union as damages for moral or corporal injury as well as right to such compensation are private property of spouse. (C.C.Q. 454). See subheads Partnership of Acquests; Community of Property, supra.

Contracts.

Husband and wife and civil union spouses have full capacity to contract with each other and confer benefits inter vivos upon each other during marriage or civil union. Wife is no longer prohibited from binding herself for her husband with respect to her personal property.

Actions.

See subhead Disability of Married Women, supra.

Agency.

Each spouse may give other mandate to represent him or her in exercise of acts related to moral and material direction of family. Each spouse may bind other for current needs of family if not separated from bed and board. (C.C.Q. 397-398).

See category 22 Property, topic 22.12 Powers of Attorney.

Desertion and Non-Support.

In separation action based on desertion or other grounds, either spouse may demand alimentary pension and/or lump sum payment. Children entitled to maintenance from parents according to their needs and means of parents. Regarding support owed to child by his parents, basic parental contribution, as determined pursuant to rules for determination of child support payments accepted under Code of Civil Procedure, is presumed to meet needs of child and to be in proportion to means of parent. Basic parental contribution may be increased with regards to certain expenses. (C.C.Q. 587.1). This obligation is reciprocal. In all cases amount of maintenance fixed by court unless parties agree. (C.C.Q. 585s.).

Community Property.

See subheads Partnership of Acquests; Community of Property, supra.

Separation as to Bed and Board.

Note: This section applies only to married spouses. Application for separation as to bed and board may be granted by court of district of common domicile or, if no common domicile, domicile of either married spouse. (C.P. 70). It is granted when will to live together is gravely undermined. (C.C.Q. 493). Court may grant it without disclosure of grounds if draft separation agreement is submitted and court considers it sufficiently preserves interests of spouses and children. (C.C.Q. 495). Judgment releases obligation to live together and carries with it separation of property but does not dissolve marriage. In pronouncing separation, court may order either spouse to pay support to other. (C.C.Q. 511). Separation as to bed and board produces same effect towards children as divorce. (C.C.Q. 513, 514).

See also category 13 Estates and Trusts, topic 13.14 Substitution.

14.11 INFANTS:

Age of majority is 18. (C.C.Q. 153).

Filiation by Blood.

Paternal and maternal filiation determined by act of birth, uninterrupted possession of status, presumption of paternity or voluntary acknowledgment. (C.C.Q. 523, 525, 526).

Filiation by Adoption.

Adoption confers on adopted person filiation which replaces original filiation and creates same rights and obligations as filiation by blood. (C.C.Q. 577, 578). See topic 14.01 Adoption, subhead Effects of Adoption.

Filiation of Children Born of Assisted Procreation.

Parental project involving assisted procreation exists when person alone decides or spouses by mutual consent decide, in order to have child, to resort to genetic material of person who is not party to parental project. (C.C.Q. 538). Filiation of child born of assisted procreation is established by act of birth, uninterrupted possession of status or by presumption. Filiation of children born of assisted procreation creates same rights and obligations as filiation by blood. (C.C.Q. 538.1, 538.3). Contribution of genetic material for purposes of third-party parental project does not create any bond of filiation between contributor and child born of parental project. However, if genetic material contributed by sexual intercourse, bond of filiation may be established, in year following birth, between contributor and child. During this period, spouse of woman who gave birth to child may not invoke possession of status consistent with act of birth to oppose application for establishment of filiation. (C.C.Q. 538.2). Person who, after consenting to parental project outside marriage or civil union, fails to declare bond of filiation with child born of that project in register of civil status, is liable towards child and child's mother. (C.C.Q. 540). Any agreement whereby woman agrees to procreate or carry child for another person is null. (C.C.Q. 541).

Same-Sex Parents.

Where parents are of same sex, they are designated as mothers and fathers of child, as case may be. (C.C.Q. 115). Where different rights and obligations are assigned by law to father and mother, parent biologically related to child has rights and obligations assigned to mother in case of female couple and those assigned to father in case of male couple. Adoptive parent has rights and obligations assigned by law to other parent. If neither parent is biologically related, then rights and obligations determined in adoption judgment. (C.C.Q. 578.1). If both parents are women, rights and obligations assigned by law to father, insofar as they differ from mother's, are assigned to mother who did not give birth to child. (C.C.Q. 539.1).

Incapacity of Minors.

Act performed alone by minor or his tutor without authorization of tutorship council may not be annulled or obligations reduced unless minor suffers damage. (C.C.Q. 163). Minor may, within limits imposed by his age and power of discernment, enter into contracts alone to meet his ordinary and usual needs. Minor 14 years of age or over is deemed to be of full age for all acts pertaining to his employment or to practice of his craft or profession. In judicial matters minors generally represented by tutor. (C.C.Q. 155s.). Minor, of age 14 and above, can alone consent to medical care required by state of his health. (C.C.Q. 14).

Emancipated Minor.

Minor can obtain simple emancipation if 16 years of age by filing declaration to that effect with Public Curator or with approval of tutorship council or tutor. (C.C.Q. 167-168). Emancipation enables him to perform all acts of simple administration provided minor does not notably reduce his capital. (C.C.Q. 172).

Full emancipation is obtained by marriage and enables minor to exercise his civil rights as if he were of full age. (C.C.Q. 175-176).

Support of Minor.

Father and mother must maintain their children. (C.C.Q. 599). Basic parental contribution, as provided under Code of Civil Procedure, is presumed to meet needs of child. (C.C.Q. 587.1; C.P. 825.8). This contribution is prescribed by regulations and is determined on basis of parents' disposable income and number of children, basic parental contribution, as well as production of evidentiary documents. Spouses contribute to expenses of marriage or civil union in proportion to their respective means which contribution may be made by activity within home. (C.C.Q. 396, 521.6).

Parental Responsibility.

Father and mother exercise parental authority together except in cases where Code otherwise provides. (C.C.Q. 394, 600). Person having parental authority is responsible for damage caused by child subject to such authority. Responsibility attaches unless person with parental authority can prove that he or she did not commit any fault with regard to custody, supervision or education of child. (C.C.Q. 1459).

Termination of Parental Rights.

Youth Protection Act (R.S.Q. c. P-34.1) requires that Director of Youth Protection be appointed for each institution operating child and youth protection center (Youth Protection Act, §31). Director has power to intervene between child and parents in order to prevent situations threatening security or development of child such as where child is abandoned, neglected, subjected to psychological ill-treatment or sexual or physical abuse, or if child has serious behavioural disturbances. (Youth Protection Act, §38).

Director may, where urgent measures necessary, immediately remove child from environment and entrust child to appropriate centre or person. (Youth Protection Act, §46). Measures applied without need of parental consent for 48 hours. Longer periods may require court permission. (Youth Protection Act, §47).

Youth Criminal Justice Act (S.C. 2002, c. 1) governs arrest, detention, trial, and sentencing of minors in criminal matters. Youth justice court established under Act may dispense with consent of parents normally required in order for youth to be assessed for medical, psychological, or psychiatric report if court has reasonable grounds to believe young person may be suffering from physical or mental illness or disorder, psychological disorder, emotional disturbance, learning disability or mental disability or where young person is alleged to have committed serious violent offence. (Youth Criminal Justice Act, §34).

Courts may for grave reason and in interest of child, limit or terminate parental authority. (C.C.Q. 606).

14.12 MARRIAGE:

Consent Required.

Where either party is under age of 18, consent of person having parental authority or tutor is necessary. (C.C.Q. 373).

Publication of banns is a prerequisite, except where a dispensation is obtained from competent authority; publication is by posting of notice 20 days prior to marriage. No publication is required if intended spouses are already in civil union. (C.C.Q. 368s.).

Ceremonial Marriage.

May be solemnized by every clerk or deputy clerk of Superior Court designated by Minister of Justice for such purpose, notary and other person designated by Minister of Justice such as mayors, members of municipal or borough councils and municipal officers, or minister of religion so authorized by both his religious society and Minister responsible for civil status. (C.C.Q. 366).

Marriages by written contract are not recognized. As to antenuptial marriage contracts see topic 14.10 Husband and Wife and Civil Union Spouses, subhead Antenuptial Contracts.

Common law marriages within or outside province are not recognized under Quebec law. However, some special legislation may confer social benefits for common law spouses.

Foreign Marriages.

Validity of marriage governed by law of place of its solemnization or by law of country of domicile or of nationality of one of spouses. (C.C.Q. 3088).

Prohibited Marriages.

Officiant may not solemnize marriage if either spouse is under 16 years of age, already married or already in civil union except in case of civil union between same spouses or in relation to other ascendant, descendant, brother or sister. (C.C.Q. 373).

Annulment.

Any interested person may apply to have any marriage not solemnized in accordance with C.C.Q. declared null. No action lies after lapse of three years from solemnization, except where public order is concerned. (C.C.Q. 380).

Application for nullity made by declaration. If defendant is absent he may be summoned by notice in newspaper. Court, ex officio or on application, may order demand to be served on Attorney General of Quebec who may then intervene. (C.P. 97, 813.4, 821).

Marriage, although declared null, produces civil effects with regard to husband and wife if contracted in good faith. If good faith exists on part of one of parties only, marriage produces civil effects in favor of such party alone. Nullity does not deprive children of advantages secured to them by law or by marriage contract and rights and duties of fathers and mothers towards their children are unaffected by nullity. (C.C.Q. 381s.).

14.13 MARRIED WOMEN:

See topics 14.10 Husband and Wife and Civil Union Spouses, Marriage; categories 5 Civil Actions and Procedure, topic Evidence, subhead Witnesses; Property, topic Dower.

15 HEALTH

15.01 CONFINEMENT IN INSTITUTION:

General Principle.

Art. 26 C.C.Q. specifically provides that no person may be confined in health or social services institution for psychiatric assessment, or following psychiatric assessment concluding that confinement is necessary, without his consent or without authorization by law or court. Where court has serious reasons to believe that person is danger to himself or to others owing to his mental state (Act respecting protection of persons whose mental state presents danger to themselves or to others, R.S.Q. c. P-38.001; Art. 27 C.C.Q.), it may, on application of physician or interested person and notwithstanding absence of consent, order that he must be confined temporarily in health or social services institution. Such application must be supported by two psychiatric assessments, first being performed within 24 hours after person is taken in charge by institution, and second within 96 hours, after person is taken in charge, both reports concluding to necessity of confinement. (Art. 28 C.C.Q.). Even if both reports conclude to necessity of confinement, court may not authorize confinement unless court itself has serious reasons to believe that person is dangerous and that person's confinement is necessary, whatever evidence may be otherwise presented to court and even in absence of any contrary medical opinion. (Art. 30 C.C.Q.). Judgment authorizing confinement must set duration of confinement. Person under confinement must be released as soon as confinement is no longer justified, even if set period has not elapsed (Art. 30.1 C.C.Q.) (see also R.S.Q. c. P-38.001).

15.02 CONSENT TO CARE:

General Principle.

Art. 11 C.C.Q. provides that no person may be made to undergo care of any nature, whether for examination, specimen taking, removal of tissue, treatment or any other act, except with his consent. Should person be incapable of giving or refusing his consent to care, person authorized by law or by mandate given in anticipation of his incapacity (governed by Arts. 2166-2174 C.C.Q.) may do so in his place. In that event, person giving consent to or refusing care for another person is bound to act in sole interest of that person, taking into account, as far as possible, any wishes latter may have expressed. Moreover, that person shall ensure that care is beneficial notwithstanding gravity and permanence of certain of its effects, that it is advisable in circumstances and that risks incurred are not disproportionate to anticipated benefits.

Emergency.

Consent to medical care is not required in case of emergency if life of person is in danger or his integrity is threatened and his consent cannot be obtained in due time. (Art. 13 C.C.Q.).

Consent of Minors.

In Quebec, principles relating to consent of minors are found in Arts. 14-18 C.C.Q. Code makes distinction between medical care which is “required by the state of health of a minor”, and care not required by state of minor's health. General principle provides that consent to care required by state of health of minor is given by person having parental authority or tutor. However, minor 14 years of age or over may give his consent alone to such care. Should his condition require that he remain in health or social services establishment for over 12 hours, person having parental authority or tutor shall be informed of that fact. Minor 14 years of age or over may also, on his own, give his consent to care not required by state of his health. However, consent of person having parental authority or tutor is required if care entails serious risks for health of minor and may cause him grave and permanent effects. Authorization of court is necessary to cause minor 14 years of age or over to undergo care he refuses (e.g. Jehovah's Witness), except in case of emergency if his life is in danger or his integrity threatened, in which case consent of person having parental authority or tutor is sufficient.

Transplant.

Person of full age who is capable of giving his consent may alienate part of his body inter vivos, provided that risk incurred is not disproportionate to benefit that may reasonably be anticipated. However, minor or person of full age who is incapable of giving his consent may, with consent of person having parental authority, mandatary, tutor or curator and with authorization of court, alienates part of his body only if that part is capable of regeneration and provided that no serious risk to his health results. (Art. 19 C.C.Q.). Alienation by person of part or product of his body shall be gratuitous. (Art. 25 C.C.Q.).

Experimentation.

(Art. 21 C.C.Q.). Person of full age who is capable of giving his consent may submit to experiment provided that risk incurred is not disproportionate to benefit that can reasonably be anticipated. However, minor or person of full age who is incapable of giving consent may not be submitted to experiment if experiment involves serious risk to his health or, where he understands nature and consequences of experiment, if he objects. Moreover, minor or person of full age who is incapable of giving consent may be submitted to experiment only if, where person is only subject of experiment, it has potential to produce benefit to person's health or only if, in case of experiment on group, it has potential to produce results capable of conferring benefit to other persons in same age category or having same disease or handicap. Such experiment must be part of research project approved and monitored by ethics committee. Competent ethics committees are formed by Minister of Health and Social Services or designated by that minister among existing research ethics committees. Care considered by ethics committee to be innovative care required by state of health of person concerned does not constitute experiment. Experiment may not give rights to any financial reward other than payment of indemnity as compensation for loss and inconvenience suffered. (Art. 25 C.C.Q.).

Use of Body Parts for Research.

Part of body, whether organ, tissue or other substance, removed from person as part of care he receives may, with his consent or that of person qualified to give consent for him, be used for purpose of research. (Art. 22 C.C.Q.). Such alienation by person of part or product of his body shall be gratuitous. (Art. 25 C.C.Q.).

Transplantation and Deceased Person.

Part of body of deceased person may be removed in absence of knowledge or presumed knowledge of wishes of deceased, with consent of person who could give consent to care or could have given it. However, consent is not required where two physicians attest in writing to impossibility of obtaining it in due time, urgency of operation and serious hope of saving a human life or of improving its quality to appreciable degree. (Art. 44 C.C.Q.).

15.03 LEGAL LIABILITY OF DOCTORS AND HOSPITALS:

Conditions of Liability.

Conditions of liability of health practitioners are based on general provisions of civil liability contemplated in Arts. 1457 and 1458 C.C.Q. To be successful, negligence action must meet three requirements: defendant must not have acted as normally prudent and diligent health professional; plaintiff must suffer injury or loss; and defendant's conduct must have been actual cause of plaintiff's injury.

Hospital Liability.

Hospital may be held liable to patient for any negligence committed by its employees in performance of their duties. (Art. 1463 C.C.Q.). Furthermore, hospitals may be vicariously liable for negligence of doctors employed as house staff, such as residents and interns. However, physicians with hospital privileges are not considered employees of hospital. They are considered independent practitioners who are granted privilege of using hospital's facilities, personnel and equipment to treat their patients. Accordingly, hospital will not be vicariously liable for their negligence. (Hôpital de l'Enfant Jésus v. Irène Camden-Bourgault, C.A., Quebec, 200-09-000914-967, Apr. 2, 2001, Honourable Justices Forget, Pidgeon and Rochon).

15.04 PUBLIC HEALTH:

Organization of Health Care Services.

Act respecting health services and social services (R.S.Q., c. S-4.2) provides for material organization and distribution of health care services throughout Province and sets out rights and obligations of its users. Namely, it establishes functioning of institutions which render health care services in Province of Quebec. It defines relationship of hospitals with local authorities that have been established to monitor care provided in their local health and social services network. It also defines role of central authorities in relation of regional boards. More importantly, it sets out scope of rights of users and corresponding duties of various care providers.

Universal Insurance Program.

Most medical services are publicly accessible to every resident of Quebec. Indeed, Health Insurance Act (R.S.Q., c. A-29) provides that all medically required services rendered by physicians are covered by governmental health insurance board.

Health Care Records.

According to Act respecting health services and social services (R.S.Q., c. S-4.2), medical record of user is confidential and no person may have access to it except with authorization of user or person qualified to give authorization on his behalf or on order of court. However, professional may examine user's record for purposes of study, teaching or research, with authorization of director of professional services granted in accordance with criteria established in §125 of Act Respecting Access to Documents Held by Public Bodies and the Protection of Personal Information. (R.S.Q., c. A-2.1). In that regard, see also Parent v. Maziade, J.E. 98-1281 (C.A.).

15.05 RELATED REGULATIONS:

Biomedical Waste.

Human anatomical waste consisting of body parts or organs (but excluding teeth, hair, nails, blood and biological liquids) and non-anatomical waste consisting of any of following: sharp or breakable object having been in contact with blood or with biological liquid or tissue and having been used in medical, dental or veterinary care or in medical biology laboratory or veterinary biology laboratory, or such object used in thanatopraxy (performance of embalming); biological tissue, cell culture, microbial culture, or material in contact with such tissue or culture, used in medical biology laboratory or veterinary biology laboratory; live vaccine; blood container or material that has been saturated with blood and used in medical care, in medical biology laboratory or in thanatopraxy, are all subject to Regulation respecting biomedical waste. (c. Q-2, r.3.001, §1). Act provides that anatomical biomedical waste shall be treated by incineration while non-anatomical biomedical waste shall be treated by disinfection or incineration. (§§5-6). Act further provides for all conditions of treatment, disposal and storage of such waste.

16 IMMIGRATION

16.01 IMMIGRATION:

Pursuant to series of Federal-Provincial agreements on the subject, jurisdiction over selection of immigrants seeking to reside in Quebec, with certain exceptions, lies with Province. In order to attain landed status, applicants must obtain “Certificate of Selection” from Province. Province alone is responsible for establishing applicable selection criteria.

Except in cases where alien has been granted Company Work Permit by Federal government on grounds that employment of person will not have adverse affect on employment opportunities for Canadian citizens or permanent residents in Canada, applicants for Work Permit must first obtain “Certificate of Acceptance” (“CAQ”) issued by Province. CAQ's are also required for most aliens seeking to obtain study permit in order to study in Quebec as well as for aliens seeking medical treatment at Quebec hospital.

17 INSURANCE

17.01 INSURANCE COMPANIES:

Regulated by Act respecting insurance (R.S.Q. c. A-32), by C.C.Q. 2389-2628, and also by federal legislation. See Canada Law Digest, category 18 Insurance, topic 18.01 Insurance Companies.

Supervision.

Inspector General of Financial Institutions is responsible for supervision of insurance business.

Annual Statements.

Before Mar. 1 of each year insurer must prepare and file with Inspector General statements of operations for preceding year.

Policies.

Form and content of insurance policies are regulated generally by C.C.Q. 2389-2628, and as consumer contracts or contracts of adhesion by C.C.Q. 1435, 1436-1437. See category 3 Business Regulation and Commerce, topic 3.12 Contracts, subhead Nullity.

Agents, Brokers and Claims Adjusters.

Regulated by and licensed under Act respecting distribution of financial products and services. (S.Q. 1998, c. 37).

Process Agents.

Insurer not having head office in province must designate chief representative in province when applying for license. Chief representative must under power of attorney be authorized to act as process agent.

Investments.

Title IV, Chapter III of Act Respecting Insurance governs investments, assets and reserves of insurers.

Foreign Insurance Companies.

May be licensed by Inspector General subject to certain specified requirements. See also special statutory provisions governing foreign insurance companies, Canada Law Digest, category 18 Insurance, topic 18.01 Insurance Companies, subhead Foreign Insurance Companies.

License Requirements.

Every corporation applying for license must provide Superintendent of Insurance of Canada with plan of its operations in province of Quebec. Every corporation incorporated under any laws other than laws of province of Quebec (foreign companies) and applying for license must: (1) Provide Superintendent with copy of its charter and certificate of any security deposited with authority of place of incorporation, (2) furnish copy of last inspection report and of statement of its affairs that are required to be filed at end of fiscal year with authority of place of incorporation.

Taxation.

Governed by Taxation Act. See category 2 Business Organizations, topic 2.03 Corporations, subhead Corporation Taxes, and category 23 Taxation, topics Corporate Taxes, Sales and Use Taxes, subhead Sales and Services Tax.

Direct Action Against Insurer.

Injured third person may bring action directly against insured, insurer or both. (C.C.Q. 2501). See category 24 Transportation, topic 24.03 Motor Vehicles, subhead Direct Actions Against Insurer.

No-Fault Insurance.

See category 24 Transportation, topic 24.03 Motor Vehicles, subhead No-Fault Insurance.

17.02 SURETY AND GUARANTY COMPANIES:

Such companies must be licensed and registered under An Act Respecting Insurance (R.S.Q. c. A-32) and are usually required to make deposit with Minister of Finance of Province. Foreign companies must also be licensed under Insurance Companies Act (Statutes of Canada, 1991, c. 47) and obtain permission (order) from Superintendent of Financial Institutions under Insurance Companies Act. See Canada Law Digest, category 18 Insurance, topic 18.01 Insurance Companies.

Any company may act as surety in judicial proceedings, provided it has sufficient property in Quebec and it has its domicile in Canada. (C.C.Q. 2337).

18 INTELLECTUAL PROPERTY

18.01 TRADEMARKS AND TRADENAMES:

As to trademarks see Canada Law Digest, category 19 Intellectual Property, topic 19.03 Trademarks and Designs.

Tradenames.

Registrants may not declare or use tradename in Quebec which does not conform to Charter of French language (R.S.Q. c. C-11) or which may lead to confusion with similar name(s) already in use or mislead third persons in any way. Person in business alone who uses tradename or designation other than his own personal name (first and last names), and partnership or corporation carrying on business under tradename in addition to its legal designation, must register said tradename(s) or designation pursuant to Act respecting legal publicity of sole proprietorships, partnerships and legal persons. (R.S.Q. c. P-45). See category 2 Business Organizations, topic 2.03 Corporations, subhead Reports.

See category 1 Introduction, topic 1.03 Language, subhead Commerce and Business.

19 LEGAL PROFESSION

19.01 ATTORNEYS AND COUNSELORS:

Under name of “Barreau du Québec,” advocates, barristers, legal counsel, attorneys and solicitors of province, generally called “advocates,” form professional corporation governed by rules and regulations of Act respecting Barreau du Québec (R.S.Q. c. B-1) and Professional Code (R.S.Q. c. C-26).

Requirements for admission to Bar School of Province of Quebec are: (a) Duly complete admission form and file required documents; (b) degree recognized by Government pursuant to §184 of Professional Code (R.S.Q., c. C-26); (c) declared admissible by verification committee of Bar School; (d) pay admission fees. (By-law respecting professional training of advocates c. B-1, r.7.3, §5).

Bar cannot issue permit except to persons whose knowledge of French is appropriate to practice of profession. Person is deemed to have appropriate knowledge if: (a) Has received at least three years full time secondary or post-secondary instruction in French; (b) has passed fourth or fifth year secondary level examinations in French as first language; or (c) from and after school year 1985-86, he obtains secondary school certificate in Quebec. (Charter of French language R.S.Q. c. C-11, §35). Restrictive permit valid for maximum one year can be issued to persons from outside of Quebec who are otherwise qualified. (§37).

Requirements in Special Cases.

Special requirements affect attorneys from other provinces who seek admission to Bar as practising advocates and lesser requirements govern admission of such attorneys as solicitors. They are precluded from exercising certain prerogatives of practising advocates. Professors in law faculties subject to special provisions concerning admission to Bar as solicitors. (R.S.Q. c. B-1, §§55, 56).

Disabilities.

Advocates cannot be notaries (R.S.Q. c. C-26, §32), nor can they become bondsmen or other legal sureties. They cannot purchase litigious rights (C.C.Q. §1783) but can work for contingency (R.S.Q. B-1, §128).

Lien.

See category 2 Business Organizations, topic 2.01 Agency, subhead Obligations of Principal.

Taxed costs in suit or action are fixed by law and regulations. (Tariff of judicial fees of advocates, R.S.Q. c. B-1, r.13).

Legal Aid.

Persons having insufficient means to obtain legal counsel or to exercise rights before courts or other tribunals are provided with gratuitous services of advocates and notaries. (Legal Aid Act, R.S.Q. c. A-14).

20 MINERAL, WATER AND FISHING RIGHTS

20.01 FISH AND GAME:

Persons are required to hold licence in order to hunt, trap or fish in province. (Act respecting the conservation and development of wildlife, R.S.Q. c. C-61.1). Fees for licence established by regulation. (Arts. 54, 54.1). Government may grant lease of exclusive hunting, trapping or fishing rights on all or part of Crown lands. (Art. 86). Rental and other terms and conditions of lease determined by regulation. Seasons for fishing certain species of fish and possession limits and for hunting set by regulation. (Art. 128.18). Penalties provided for contravention of Act and regulations. (Arts. 172-177). Act also governs outfitting operations for practice of fishing, hunting or trapping activities. (Arts. 78.1-78.7).

For further particulars apply directly to Ministry of Environment and Wildlife.

20.02 MINES AND MINERALS:

Granting of mining rights pertaining to mineral substances and underground reservoirs in public domain are governed by Mining Act which is administered by Minister of Natural Resources. (Arts. 3-4; R.S.Q. c. M-13.1).

Quebec Mining Companies Act, R.S.Q. c. C-47, contains provisions for incorporation and administration of companies operating mines and privileges granted to companies incorporated for purpose of operating mines. (Arts. 1-2).

Operation of Mines.

See category 11 Employment, topic 11.03 Labor Relations, subhead Occupational Health and Safety Act.

Safeguarding of Employees.

See category 11 Employment, topic 11.03 Labor Relations, subhead Occupational Health and Safety Act.

Inspection of Mines.

See category 11 Employment, topic 11.03 Labor Relations, subhead Occupational Health and Safety Act.

Oil and Gas.

See subhead Petroleum and Natural Gas, infra.

Petroleum and Natural Gas.

Exploration for and production of petroleum and natural gas can be done only under exploration and operating licences granted by Minister of Natural Resources. In certain circumstances special licences required for exploration and development of other mineral substances. (R.S.Q. c. M-13.1).

Duties.

Mining Duties Act imposes duties on annual profits of operators of mines less certain deductions. (R.S.Q. c. D-15).

Taxes.

See subhead Duties, supra.

21 MORTGAGES

21.01 CHATTEL MORTGAGES:

See topic 21.03 Mortgages of Personal Property.

21.02 COLLATERAL SECURITY:

See category 8 Debtor and Creditor, topic 8.17 Pledges.

21.03 MORTGAGES OF PERSONAL PROPERTY:

Hypothecs Generally.

In Province of Quebec, general regime for security on movable and immovable property is known as ``hypothec regime''. There are rules of law that determine whether property falls under movable or immovable category. (C.C.Q. 899-907). Generally, movable property is charged by way of movable hypothec and immovable property is charged by way of immovable hypothec. By exception, hypothecs on present and future rents produced by immovable property and on indemnities paid under insurance contracts covering these rents are considered immovable hypothecs, even though such rents and indemnities are themselves movable. (C.C.Q. 2695). Pledge is form of movable hypothec. (C.C.Q. 2665).

There are some general rules which apply to all hypothecs, whether they are movable or immovable, whether they are on present or future property, whether they are on specified property or on universality of property. However, different rules affect to greater or lesser extents different types of hypothecs on different types of property. Certain features are common to all hypothecs, such as following: (1) Hypothec can be given to secure any obligation. (C.C.Q. 2687). It is accessory right and therefore survives only as long as obligation whose performance it secures continues to exist. (C.C.Q. 2661). (2) Property charged by hypothec can be one or more specified properties or all property included in universality of assets. (C.C.Q. 2666). (3) Amount of hypothec must be stated in hypothecary documents. (C.C.Q. 2689). This stated amount is not necessarily related to amount of debt, but it establishes amount up to which creditor can claim against hypothecated property as secured creditor. (4) All hypothecs must be published in order to be opposable to third parties. (C.C.Q. 2663). Publication refers to requirements which must be respected in order that hypothec become effective as against third parties. Publication also establishes rank of creditors' rights. (C.C.Q. 2941). Generally, earlier ranking creditors take priority over later ranking creditors when exercising hypothecary rights. (C.C.Q. 2750). (See subhead Ranking of Hypothecary Rights Generally, infra.) Immovable hypothecs and movable hypothecs (other than pledges) are published by registration in appropriate government register. See category 10 Documents and Records, topic 10.05 Records. Pledges are published by delivery and holding of property pledged. In addition to personal recourses and provisional measures provided in Civil Code of Procedure, hypothecary creditors have only four hypothecary recourses available to them for enforcement and realization of their hypothecs, namely: taking possession for purposes of administration, taking in payment, sale by creditor or sale by judicial authority. (C.C.Q. 2748). Recourses of taking possession for purposes of administration and of sale by creditor are only available on property of enterprise. Before creditor may exercise its hypothecary recourses, appropriate prior notice must be served and registered. (C.C.Q. 2757). Notice period is 20 days for movables, 60 days for immovables, ten days in case of taking of possession for purposes of administration and 30 days in case of notice relating to movable property charged with hypothec constituted by act accessory to consumer contracts. (C.C.Q. 2758[2]).

Ranking of Hypothecary Rights Generally.

As a rule, rights rank according to date, hour and minute of their registration in appropriate register. (C.C.Q. 2945). Rights in virtue of pledge rank according to time at which property or title is delivered to creditor. Hypothec affecting universality of immovables ranks in respect of each immovable only from time of registration of hypothec against each specific immovable in appropriate register. (C.C.Q. 2949). Hypothec affecting universality of movables ranks in respect of each movable in universality from due registration of hypothec in appropriate register. (C.C.Q. 2950). Registration of notice of crystallization determines rank of floating hypothec. (C.C.Q. 2955). (See subhead Floating Hypothecs, infra.) There are many detailed rules as to ranking or preservation of hypothecs in particular circumstances such as vendors' hypothecs, hypothecs on future property, hypothecs on property that is transformed, hypothecs on property which changes in nature, hypothecs on property represented by bill of lading or other negotiable instrument or on claims, or hypothecs on property subsequently sold. Further, there are transitional rules applicable to security taken prior to Jan. 1, 1994.

Movable Hypothecs.

Movable hypothec can be created with or without delivery of property hypothecated. Movable hypothec with delivery is also called pledge. (C.C.Q. 2665).

Movable Hypothecs With Delivery.

See category 8 Debtor and Creditor, topic 8.17 Pledges.

Movable Hypothecs Without Delivery.

Generally, these may only be given by persons carrying on enterprise and by certain corporations which are not carrying on enterprise. Persons carrying on enterprise may only hypothecate enterprise property. Otherwise, natural persons may only grant movable hypothec without delivery or road vehicles or other movable property determined by regulation. Special rules govern movable hypothecs without delivery accessory to consumer contracts. (C.C.Q. 2683). Movable hypothec without delivery must, on pain of absolute nullity, be granted in writing. (C.C.Q. 2696). Hypothec securing payment of bonds or other titles of indebtedness issued by trustee, limited partnership or legal person authorized to do so shall, on pain of absolute nullity, be granted by notarial deed in favor of person holding power of attorney of creditors. (C.C.Q. 2692). See category 2 Business Organizations, topic 2.02 Associations, subhead Enterprise.

Movable hypothec without delivery must be published in public register kept for that purpose, called Register of personal and movable real rights. (C.C.Q. 2934). Publication is effected by registering application for registration which must contain sufficient description of hypothecated property or, if universality is hypothecated, nature of universality. (C.C.Q. 2697). For purposes of registration specific government form must be completed (Form “RH”). In this form following information must be set out in prescribed manner: names and addresses of parties, date and place of birth of individual who is party to hypothec, complete description of property hypothecated, amount of hypothec, date on which registration ceases to have effect (no later than ten years) and date and place security document was signed. Only those rights which are set out in application and entered into register are published. Electronic registration is available.

Generally, so long as hypothec continues to subsist, registration has effect until date it ceases to have effect as indicated in application, which cannot be more than ten years after registration. Registration can be renewed prior to expiry. Other or further registrations may be required to preserve rights against hypothecated property. (C.C.Q. 2798).

Hypothecs on Claims.

Hypothec on claim or claims is form of movable hypothec; it charges one or more receivables. There are special rules which apply to these hypothecs. Hypothec on claim will rank against other hypothecs on same claim from date it is registered, however it is not opposable against debtor of hypothecated claim unless that person has been individually served with appropriate notice of hypothec. (C.C.Q. 2710). If claim is itself secured by hypothec, there are further requirements as to registration of hypothec service of notice. (C.C.Q. 2712).

By law, hypothecary creditor has right to collect claims hypothecated, even prior to default, and to apply them to his debt. However, hypothecary creditor can in deed of hypothec authorize person who granted hypothec to continue to collect claims until such time as creditor withdraws such authority by giving and registering appropriate notice to this effect. (C.C.Q. 2743-2747).

Movable Hypothecs with Delivery on Certain Securities or Security Entitlements.

Movable hypothec constituted by securities intermediary on securities or security entitlements considered published when constituted, without registration. (C.C.Q. 2701.1).

In case of securities and security entitlements, hypothec with delivery may be constituted and set up against third persons by creditor obtaining control of securities or security entitlements. (C.C.Q. 2714.1). When creditor obtains control, hypothec ranks ahead of any other movable hypothec on same securities or security entitlements. (C.C.Q. 2714.2).

Movable hypothec with delivery granted in favour of securities intermediary on security entitlements to financial asset ranks ahead of any other hypothec on security entitlements. (C.C.Q. 2714.3). Movable hypothec with delivery on securities represented by certificate in registered form, even if creditor does not have control of it, ranks ahead of any movable hypothec without delivery on same securities. (C.C.Q. 2714.4). Certificates representing securities do not have to be negotiable for hypothecary delivery to be validly effected through physical delivery and holding of certificates. (C.C.Q. 2717.7).

Except of securities represented by certificate, natural person not carrying on enterprise may grant hypothec with delivery only on those securities or security entitlements that person may encumber with movable hypothec without delivery. (C.C.Q. 2714.5). Unless otherwise agreed, creditor holding movable hypothec with delivery on securities or security entitlements may alienate them or grant movable hypothec on them in favour of third person. (C.C.Q. 2714.6).

Floating Hypothecs.

Hypothec is floating hypothec when some of its effects are suspended until, after default, creditor provokes its crystallization by serving notice of default and crystallization on debtor or grantor and registering notice. Registration of this notice determines rank of floating hypothec for most purposes. Only person or trustee who carries on enterprise may grant floating hypothec on property of enterprise. This type of hypothec can charge both immovable and movable property. Floating character of hypothec must be expressly stipulated in act. Property affected by hypothec is determined at time of crystallization. However, if property includes universality, hypothec also charges properties acquired by grantor after crystallization. There are other specific rules relating to floating hypothecs. (C.C.Q. 2715-2723).

Legal Hypothecs.

Legal hypothec is not granted by contract by debtor to creditor, but rather it arises by law in respect of certain types of claims against property, with rank established by law. (C.C.Q. 2724).

There are four kinds of claims which give rise to legal hypothecs in Province of Quebec: (a) Claims of State for sums due under fiscal laws, and certain other claims of State or of legal persons established in public interest, under specific provision of law; these can affect movable or immovable property and take effect from their registration; (b) claims under judgment; these can affect movable or immovable property and take effect from registration; (c) claims of persons having taken part in construction or renovation of immovable; these may affect immovable in question only to extent of added value; they have to be registered within certain delays to preserve legal hypothec, however they may rank above other hypothecs registered prior to registration of legal hypothec; and (d) claim of syndicate of co-owners for payment of common expenses and contributions to contingency fund; these can affect only fraction of co-owner in default and have effect only from registration. (C.C.Q. 2644-2802, 2934-3075.1).

Legal hypothec in favour of persons having taken part in construction or renovation of immovable is extinguished on failure to publish action against owner of immovable or to register prior notice of exercise of hypothecary right within six months after end of work. (C.C.Q. 2727). Persons having participated in construction or renovation of immovable who did not contract directly with owner have lien under same conditions for value of their work after notification in writing to owner of immovable of contract with builder, but workman is not bound to declare his contract with builder. (C.C.Q. 2728).

21.04 MORTGAGES OF REAL PROPERTY:

For general rules regarding hypothecs see topic 21.03 Mortgages of Personal Property, subheads Hypothecs Generally and Ranking of Hypothecary Rights Generally.

Hypothecs on immovable property, as well as hypothecs on present and future rents produced by immovable and hypothecs on indemnities paid under insurance contracts covering rents, are immovable hypothecs. (C.C.Q. 2695).

Requisites of Instrument.

All immovable hypothecs in Province of Quebec must be granted by deed in notarial form “en minute” (C.C.Q. 2693) and executed before Quebec notary. In addition, in order that rights created be registrable, there are further requirements as to form, content and certification. Rules which govern form of document include size and weight of paper. With respect to content, application for registration in land register must contain all of particulars prescribed by law, but no more than those which are prescribed. Content requirements vary depending on rights created by deed but generally deed and application for registration must contain following information, all in prescribed manner: date of deed and place it was signed, nature of summarized document, identity of holders and grantors of rights registered, description of property concerned and signature of person requesting registration. (C.C.Q. 2694, 2981; Regulation Respecting Land Registration).

Registration.

In order to be valid, immovable hypothecs must be registered in land register of registry office in land registration division in which immovable is situated. (C.C.Q. 2695, 2941, 2970). There are three ways in which immovable hypothec can be registered: by presenting deed itself or by presenting notarial extract of deed, in each case if they contain only prescribed information, or by means of summary which sets out particulars prescribed by regulation. Application must be in prescribed form, including requirements as to size and weight of paper and presentation of text. If registration is made by way of summary, applicant must also present notarial certified copy of deed itself, extract of deed or any document summarized in extract or summary for conservation and consultation and summary must be accompanied by certificate of notary, and must state that summary is accurate. (C.C.Q. 2985, 2992). Regardless of which means of registration is used, application may only contain information prescribed by law. Only those rights set out in application and entered into register are published. (C.C.Q. 2644-2802, 2934-3075.1).

22 PROPERTY

22.01 ABSENTEES:

Definition.

Those having domicile in Quebec, who've ceased to appear without advising anyone and of whom it is unknown whether they are still alive. (C.C.Q. 84). Absentee is presumed to be alive for seven years following his disappearance unless proof of his death is made before then. (C.C.Q. 85). See category 13 Estates and Trusts, topic 13.05 Death.

Care of Property.

If necessary to provide for administration of property of absentee, tutor may be appointed by court on advice of tutorship council. (C.C.Q. 86, 87). Court fixes amounts for expenses of marriage or civil union, for maintenance of family or for payment of obligation of support. (C.C.Q. 88).

Succession to Property.

Spouse or tutor may, after one year of absence, apply to court for liquidation of patrimonial rights of spouses. Tutor shall obtain court authorization to accept/renounce partition of acquests of spouse of absentee or otherwise decide on other rights of absentee. (C.C.Q. 89). Tutorship to absentee terminates upon return of absentee, appointment by absentee of administrator, by declaratory judgment of death or upon proof of death. (C.C.Q. 90). Declaratory judgment of death may be pronounced seven years after disappearance or before that time where death is certain although it is impossible to draw up attestation of death. (C.C.Q. 92).

Absentee presumed to be alive may inherit. (C.C.Q. 617).

Escheat.

See category 13 Estates and Trusts, topic 13.07 Descent and Distribution, subhead Irregular Successions; also category Estates and 13.15 Trusts, topic 13.16 Wills, subhead Unclaimed Legacies.

22.02 ADVERSE POSSESSION:

Both movables and immovables may be subject to adverse possession, called acquisitive prescription in Quebec.

Character of Possession.

Possession is exercise of real right by person having detention of property with intention of acting as holder of that right. (C.C.Q. 921). Possession must be peaceful, continuous, public and unequivocal to produce effects in law. (C.C.Q. 922). Person who detains on behalf of another or with acknowledgment of superior domain over property, as does, for example, lessee, is presumed to continue to detain it in that quality unless nature of his possession is formally changed on basis of unequivocal facts. (C.C.Q. 923, 2914) Possessor is presumed to hold real right he is exercising. Person contesting that presumption has burden of proving his own right and, as case may be, that possessor has no title, defective title, or defective possession. (C.C.Q. 928).

Duration of Possession.

Possession vests possessor with real right he is exercising if he complies with rules on prescription. (C.C.Q. 930).

Possessor in good faith of movable property acquires ownership in three years, running from dispossession of owner. Until expiry of that period, owner may revendicate movable property, unless it has been acquired under judicial authority. (C.C.Q. 2919).

Person who has for ten years possessed immovable as its owner may acquire ownership of it only upon judicial demand. (C.C.Q. 2918).

Easements.

Rights of servitude (easements) cannot be established by possession alone but are extinguished by nonuse during ten years. (C.C.Q. 1181, 1191[5]).

Disabilities.

For above purposes prescription does not run against unborn persons or minors or person of full age under curatorship or tutorship. (C.C.Q. 2905). Married or civil union spouses cannot prescribe against each other during cohabitation. (C.C.Q. 2906).

Things Imprescriptible.

Generally, property of State cannot be appropriated by prescription. (C.C.Q. 916).

22.03 CONVEYANCES:

See topic 22.05 Deeds.

22.04 CURTESY:

Unknown to Quebec law.

22.05 DEEDS:

Executed Within the Province.

Acts may be either in authentic or notarial form, or in private writing. An act “en minute” is act that notary must deposit and preserve in his notarial records and from which authentic copies or extracts may be issued. (Notaries Act, R.S.Q. c. N-3, §35).

Authentic Act.

Act signed by all parties makes proof against all persons of juridical act which it sets forth and declarations of parties which directly relate to act. (C.C.Q. 2818, 2819). Executed by all parties before practising notary. (C.C.Q. 2813, 2814). See category 10 Documents and Records, topic 10.04 Notaries. Such act cannot be contradicted and set aside as false, in whole or in part, except upon improbation. (C.C.Q. 2821). As general rule, notarial instrument received before one notary is authentic if signed by all parties, and no witnesses are required; if party is unable to sign, it is necessary that his declaration of consent be given before witness who signs. (C.C.Q. 2819). Notarial will is signed before notary in presence of one witness or in certain cases, two witnesses. (C.C.Q. 716). It must be signed before notary and two witnesses if testator cannot sign. (C.C.Q. 719). See category 13 Estates and Trusts, topic 13.16 Wills.

Certain acts must be in notarial form, including: (1) renunciation to succession except if made by judicial declaration which is recorded (C.C.Q. 646); (2) donations inter vivos, except gifts of movables accompanied by delivery and immediate possession (C.C.Q. 1824); (3) marriage contracts and civil union contracts (C.C.Q. 440, 521.8) and modifications to marriage contracts (C.C.Q. 438); (4) immovable hypothecs (C.C.Q. 2693); (5) declaration of co-ownership (C.C.Q. 1059); (6) declaration and agreement for dissolution of civil union by joint declaration, if civil union spouses have no minor or dependent children (C.C.Q. 521.13, 521.17).

Original of authentic act remains of record in office of notary and constitutes part of his repertory as public officer. Copies attested by notary are issued as required and are also considered authentic. (C.C.Q. 2815). Notarial act transferring immovable property must be certified by notary who received it in order to permit its registration in land register. By certifying document, notary attests that he has verified identity, quality and capacity of parties, and that document represents will of parties. (C.C.Q. 2988). See category 10 Documents and Records, topic 10.05 Records.

Power of attorney under private writing made outside Quebec makes proof against all persons where it is certified by competent public officer who has verified identity and signature of mandator. (C.C.Q. 2823).

Though majority of acts do not require notarial form, notarial instrument is desirable for obtention of true copies for registration or recording purposes and for ease of proof it provides. Notarial instruments are also desirable when important transactions are involved, especially in connection with immovables or real rights.

Private Writings.

Acts which by law need not be in notarial form may be validly drawn in any form which expresses intention of parties. No other formality is required other than signature of parties. (C.C.Q. 2826s.). Act under private signature transferring immovable must be attested by notary or advocate and must respect certain formalities in order to permit its registration. (C.C.Q. 2991, 2981s.). See category 10 Documents and Records, topic 10.05 Records.

Acts executed outside Province are valid as to form if executed in accordance with law of place where it is made. It is also valid if it is made in accordance with content of act, by law of place where property which is object of act is situated when it is made or by law of domicile of one of parties when deed is made. (C.C.Q. 3109).

Act may be made outside Quebec before Quebec notary if it concerns real right the object of which is situated in Quebec or if one of parties is domiciled in Quebec. (C.C.Q. 3110).

See category 1 Introduction, topic 1.03 Language.

22.06 DEEDS OF TRUST:

See category 21 Mortgages, topic 21.03 Mortgages of Personal Property, subhead Movable Hypothecs, catchline Movable Hypothecs Without Delivery.

22.07 DOWER:

Legal or customary dower no longer applicable to marriages entered into after July 1, 1970. Legal and conventional dower established before July 1, 1970 remain subject to former provisions of Civil Code and consist of usufruct for wife and ownership for children of one-half of immovables which belong to husband at time of marriage and of one-half of those which accrue to him during marriage from his father, mother and other ascendants unless marriage contract provides otherwise. (S.Q. 1969, c. 77, former text of C.C. 1426-1435).

22.08 ESCHEAT:

See category 13 Estates and Trusts, topic 13.07 Descent and Distribution, subhead Irregular Successions; also category Estates and 13.15 Trusts, topic 13.16 Wills, subhead Unclaimed Legacies.

22.09 LANDLORD AND TENANT:

C.C.Q. contains rules applicable to all leases (C.C.Q. 1851-1891) and special provisions governing leases of dwellings (C.C.Q. 1892-2000).

Principal obligations of landlord are to: (1) Deliver leased property in good state of repair in all respects; (2) give peaceable enjoyment of property throughout term of lease; (3) warrant tenant that property may be used for purpose for which it was leased; (4) maintain property for that purpose throughout term of lease. (C.C.Q. 1854). Principal obligations of tenant are to: (1) Pay rent; (2) use property with prudence and diligence; (3) upon termination of lease, surrender property in condition in which he received it, except for changes resulting from aging or fair wear and tear or superior force. (C.C.Q. 1855, 1890). Tenant cannot disturb normal enjoyment of other tenants. (C.C.Q. 1860).

Form.

No special form set by law for lease which need not be in writing except for leases of dwelling which require that lease or writing be made on form imposed by Régie du logement. (C.C.Q. 1895). See also subhead Lease of Dwellings, infra for special mandatory clauses.

Security Deposits.

No prohibition except for leases of dwellings where security deposit prohibited. (C.C.Q. 1904).

Registration.

Lease of movable property may be registered in register of personal and movable real rights. (C.C.Q. 1852, 2970[2]). Lease of immovables, including commercial leases, may be registered in land register. (C.C.Q. 1852, 2970[1], 2999.1). Registration in land registry office against immovable affected by lease results in tenant being better protected against resiliation of lease as result of change in ownership of immovable. (C.C.Q. 1887). For registration purposes, which may be by deposit, by summary or by presenting notice thereof to land register (accuracy of content of such notice to be verified by notary or advocate), lease must be in writing and must meet special registration requirements. See category 10 Documents and Records, topic 10.05 Records.

Rent.

Not controlled by law except in certain cases applicable only to leases of dwellings. See subhead Lease of Dwellings, infra. Tenant may demand reduction of rent if landlord fails to execute his obligations. (C.C.Q. 1863). If landlord does not make repairs to which he is bound tenant may apply to tribunal to obtain permission to withhold from rent amount of expenses incurred to carry out authorized work. (C.C.Q. 1867). Where lessee has attempted to inform lessor, or has informed but lessor has not acted in due course, lessee may undertake repair and incur expenses, even without authorization of Court, provided repair is urgent and necessary to ensure preservation or enjoyment of leased property. Lessor may intervene, however, to complete work. Lessee is entitled to reimbursement of reasonable expenses incurred for that purpose; he may withhold amount of such expenses from his rent. (C.C.Q. 1868).

Lien of Landlord.

Effective Jan. 1, 1994 privilege of landlord on tenant's movable effects in leased premises was abolished.

Termination.

Lease for fixed term terminates of right at expiry of term. (C.C.Q. 1877). Lease for indeterminate term may be resiliated by either party on one month or one week notice if rent payable by month or week and if rent is payable according to another term notice must be equal to such term or if more than three months within three months. (C.C.Q. 1877, 1882). For lease of movable property, notice is ten days. (C.C.Q. 1882). Lease is not resiliated by death of either party. (C.C.Q. 1884). Voluntary or forced alienation of property affected by lease or extinction of landlord's title does not terminate lease. Lease with indeterminate term not registered may be cancelled upon new owner giving required notice. (C.C.Q. 1886-1887). In case of lease of immovable with fixed term and if more than 12 months remain from date of alienation or extinction of title, lease may be resiliated by new landlord upon expiry of 12 months by giving tenant six months written notice unless lease is registered at registry office before deed of alienation or act by which title is extinguished was registered. (C.C.Q. 1887). Expropriation of thing leased results in resiliation of lease or reduction of rent in case of partial expropriation. (C.C.Q. 1888).

Holding Over.

Lease is tacitly renewed on same conditions for one year or for same term if it was originally less than one year where after expiry of lease with fixed term, tenant continues to occupy premises for more than ten days without opposition by landlord. Renewed lease is also subject to renewal. (C.C.Q. 1879).

Dispossession.

Landlord may obtain eviction of tenant who continues to occupy premises after expiry of lease or after date agreed upon during term of lease. For movable property, landlord may, upon termination of lease, obtain handing over of property. (C.C.Q. 1889).

Sublease or Assignment.

Tenant cannot sublet all or part of leased property or assign lease without consent of landlord who cannot refuse without serious reason. If landlord refuses, he is bound to inform tenant of reasons for refusal within 15 days after receiving tenant's request, otherwise, he is deemed to have consented. (C.C.Q. 1870-1871). Assignment of lease releases former tenant of his obligations, unless, where lease is not lease of dwelling, parties agree otherwise. (C.C.Q. 1873).

Lease of Dwellings.

Special rules apply to dwellings. Dwelling is defined to include mobile home placed on chassis or land intended for emplacement of mobile home and, except in certain instances, a room. (C.C.Q. 1892). Landlord must deliver dwelling in good livable condition and thereafter maintain that condition. (C.C.Q. 1910-1911). Tenant must keep dwelling in clean condition. (C.C.Q. 1911). Landlord and tenant must comply with other specified obligations. If landlord fails to fulfil his obligations, tenant has following recourses: deposit rent at tribunal upon notice of ten days or withhold rent with authorization of tribunal, demand specific performance (where possible), damages, reduction of rent or cancellation of lease if serious prejudice. If tenant fails to fulfil his obligation, landlord may demand: specific performance (where possible), damages, cancellation of lease if serious prejudice to landlord or other tenants. (C.C.Q. 1863, 1907).

Extension.

Lease for fixed term of 12 or more months extended as of right for one term of 12 months and if for less than 12 months extension of right for same term as original term. (C.C.Q. 1941). Parties may agree to different extension term. (C.C.Q. 1941). Landlord wishing to avoid extension or to increase rent or change other conditions must give notice in writing within stipulated delays. (C.C.Q. 1942-1944). Tenant who objects to modification proposed by landlord or wishes to avoid extension must give similar notice. (C.C.Q. 1945, 1948). Where tenant objects to modification, landlord may apply to court within one month of receiving notice of objection, for fixing of rent or ruling on other modification of lease; otherwise lease renewed on same conditions. (C.C.Q. 1947). Alienation of immovable within which leased dwelling located does not affect rights and obligations of tenant. (C.C.Q. 1937). Spouse of tenant or person who has been living with tenant for at least six months, being concubinary or blood relative of tenant or person connected to tenant by marriage, is entitled to maintain occupancy if he continues to occupy dwelling after cessation of cohabitation and gives notice to landlord within delay of two months after cessation. Person living with tenant at time of death may have benefit of lease if he notifies landlord within two months after death. (C.C.Q. 1938). Except when person living with tenant has given said notice to landlord, heirs or liquidator of deceased tenant may cancel lease on three months notice given within six months of death. (C.C.Q. 1938-1939). Landlord may avoid extension if tenant has sublet dwelling for more than 12 consecutive months by notifying tenant and subtenant. (C.C.Q. 1944).

Resiliation.

Landlord may demand resiliation of lease for nonpayment of rent for more than three weeks or when tenant frequently delays payment of rent such as to cause serious prejudice. (C.C.Q. 1971). Tenant may obtain resiliation of lease if dwelling is unfit for habitation. (C.C.Q. 1913 to 1917 and 1975). Tenant may resiliate his lease if he is moving into dwelling in designated low rental housing or if tenant is no longer able to occupy his dwelling because of handicap or, in case of elderly person, if he is admitted permanently to residential and long term care centre. (C.C.Q. 1974). If tenant leaves dwelling before expiry of lease taking his movable effects, lease is cancelled of right, save damages. (C.C.Q. 1975).

Prohibitions.

In leases of dwellings: exacting payment of rent in advance for more than first payment period (C.C.Q. 1904); clause forfeiting term for payment of rent (C.C.Q. 1905); requesting cheque or other postdated instruments for payment of rent (C.C.Q. 1904); in lease for fixed term of 12 months or less clause providing for adjustment of rent during term; in lease for fixed term of more than 12 months clause providing for adjustment of rent during first 12 months of lease or more than once during each 12 month period (C.C.Q. 1906); clause exonerating or limiting liability of landlord, clause rendering tenant liable for damages caused without his fault (C.C.Q. 1900); clauses providing for penalty which exceeds damage actually sustained by landlord or imposing obligation on lessee which is unreasonable in circumstances (C.C.Q. 1901); clause providing for altering rights of tenant by reason of increase in number of occupants, unless size of dwelling warrants it; clause limiting right of tenant to purchase goods or to obtain services from persons of his choice and on such terms and conditions as he sees fit (C.C.Q. 1900); changing of locks to premises without consent of other party (C.C.Q. 1934); stipulation whereby tenant acknowledges dwelling is in good habitable condition (C.C.Q. 1910); leasing dwelling declared unfit for habitation by competent authority (C.C.Q. 1913); refusing to make lease with or maintain person in his or her rights solely because person is pregnant or has children, unless refusal justified by limited space of dwelling (C.C.Q. 1899); clause limiting right of tenant of land used for installation of mobile home to alienate or lease his mobile home (C.C.Q. 1998).

Lease.

Landlord must, before making lease, give tenant copy of rules he has established which then are deemed to form part of lease. (C.C.Q. 1057, 1894). Within ten days of making of lease, landlord must give tenant copy of written lease or, if lease is oral, writing indicating name and address of landlord, name of tenant, rent and address of leased property and reproducing mandatory particulars prescribed by regulation, in form indicated therein. (C.C.Q. 1895). Lease, mandatory writing and rules must be drawn up in French but may be in another language if parties so choose. (C.C.Q. 1897).

Rental Control.

Régie du logement created by R.S.Q. c. R-8.1 has jurisdiction in matters respecting lease of dwellings when amount of application does not exceed jurisdiction of Court of Quebec (Act respecting Régie du logement, R.S.Q. c. R-8.1, §28[1]; see topic Courts, subhead Court of Quebec). Régie empowered to fix or revise rent, rule on changes to lease and to control certain acts in respect of dwelling which would have effect of evicting lessee, namely: retaking of possession by landlord for himself or relative, division or changing of destination of immovable, demolition, alienation of immovable situated in housing complex and registration of declaration of co-ownership. (§§33-51; C.C.Q. 1957-1959). Certain categories of buildings, including newly erected buildings of less than five years are exempt from application of provisions respecting extension of lease and increase and fixing of rent. (C.C.Q. 1955).

See category 1 Introduction, topic 1.03 Language.

22.10 LEASES:

See topic 22.09 Landlord and Tenant.

22.11 PERPETUITIES:

See category 13 Estates and Trusts, topics 13.14 Substitution and 13.15 Trusts.

22.12 POWERS OF ATTORNEY:

Power of Attorney.

Mandate in anticipation of one's incapacity to take care of himself or to administer his property may be given to mandatary but must be made by means of notarial act en minute or in presence of witnesses. Performance of mandate is subordinate to occurrence of person's inability and acknowledgment of mandate by court. (C.C.Q. 2166). If mandate is inadequate to ensure care of person or administration of his property, form of protective supervision may be required. (C.C.Q. 2169). If supervision is assumed by public curator, then mandatary may be designated as private tutor or curator. Mandate may be revoked on application to court once court ascertains that mandator has again become capable. (C.C.Q. 2172). See category 14 Family, topic 14.09 Guardian and Ward, subhead Protective Supervision of Persons of Full Age.

22.13 REAL PROPERTY:

Emphyteusis (C.C.Q. 1119, 1195-1211).—Right established by contract or will which grants person full benefit and enjoyment of immovable owned by another, for certain time, provided that he does not endanger its existence and undertakes to make constructions, works or plantations thereon that durably increase its value. (C.C.Q. 1119, 1195).

Immovable may be conveyed by emphyteusis for term not less than ten and not more than 100 years. (C.C.Q. 1197). Emphyteutic lessee has all rights in immovable that are attached to quality of owner, subject to certain restrictions contained in C.C.Q. and act constituting said emphyteusis. Emphyteutic lessee is liable for partial loss of immovable and all real property charges affecting it. (C.C.Q. 1200, 1202, 1205).

Servitudes (C.C.Q. 1119, 1177-1194).—Servitude is charge imposed on immovable, servient land, in favor of another immovable, dominant land, belonging to different owner. Under charge, owner of servient land is required to tolerate certain acts of use by owner of dominant land or himself abstain from exercising certain rights inherent in ownership. Servitude extends to all that is necessary for its exercise. Servitudes remain attached to immovable through changes of ownership of servient or dominant land, subject to publication of rights. (C.C.Q. 1119, 1177, 1182). Servitude is established by contract, by will, by destination of proprietor or by effect of law. It cannot be established without title, and possession, even immemorial, is insufficient for that purpose. (C.C.Q. 1181). Servitude by destination of proprietor is evidenced in writing by owner of land who, in contemplation of its future parcelling, immediately establishes nature, scope and situation of servitude on one part of land in favor of other parts. (C.C.Q. 1183). Servitudes are extinguished by non-user for ten years and other causes. Prescription runs even where dominant land or servient land undergoes change as to render exercise of servitude impossible. (C.C.Q. 1191-1194).

Foreign Conveyances.

If no law is designated by parties, sale is governed by law of country where it is situated. (C.C.Q. 3114). Deed of sale may be made outside Quebec before Quebec notary if it pertains to real right object of which is situated in Quebec or if one of parties is domiciled in Quebec. (C.C.Q. 3110).

Condominiums.

Governed by provisions of C.C.Q. entitled: Divided Co-ownership of Immovables. (C.C.Q. 1038 to 1109).

See also topics 22.05 Deeds, Landlord and Tenant; categories 5 Civil Actions and Procedure, topic Partition; Documents and Records, topic Records; Family, topic Husband and Wife; Mortgages, topics Mortgages of Personal Property, Mortgages of Real Property.

Superficies.

Governed by provisions of C.C.Q. 1009, 1011, 1110-1118, constitutes special mode of ownership. It is ownership of constructions, works or plantations situated on immovable belonging to another person, owner of subsoil. (C.C.Q. 1009, 1011).

Undivided Co-ownership.

Constitutes form of ownership which is not accompanied with physical division of property (C.C.Q. 1010) governed by provisions of C.C.Q. entitled: undivided co-ownership (C.C.Q. 1012-1037). Indivision arises from contract, succession or judgment or by operation of law. (C.C.Q. 1012). Shares of undivided co-owners are presumed equal. (C.C.Q. 1015[1]). Indivision by agreement in respect of immovable must be published if it is to be set up against third persons. (C.C.Q. 1014). Each undivided co-owner may make use of undivided property provided he does not affect its destination or rights of other co-owners. (C.C.Q. 1016). Undivided co-owners of property administer it jointly. (C.C.Q. 1025). Partition may be demanded at any time, unless postponed by agreement, will, judgment or operation of law or unless it has become impossible because property appropriated to durable purpose. (C.C.Q. 1030).

Preservation of Agricultural Land and Activities.

By Act Respecting the Preservation of Agricultural Land and Agricultural Activities (R.S.Q. c. P-41.1), certain limitations on use of specified lands enacted to secure lasting territorial basis for practice of agriculture and to promote preservation and development of agricultural activities and enterprises in agricultural zones (§1.1 of Act). Act provides for creation of “Commission de protection du territoire agricole du Québec” to secure preservation of agricultural land of Quebec and to commission certain functions outlined in Act. (§3 of Act). Any interested person may contest decision of Commission before Administrative Tribunal of Quebec within 30 days of notification of decision or order. (§21.1 of Act).

Designation of agricultural region by decree: (1) Government may, by decree, identify any part of territory of Quebec as designated agricultural region. (§22 of Act).

(2) Notice of passing of decree is published in Gazette officielle du Québec and in newspaper circulated in designated agricultural region. Notice shall include list of local municipalities contemplated in designated agricultural region decree. Notice may be accompanied by summary plan of territory concerned. (§23 of Act). Certified copies of notice and summary plan are filed with Commission and, for purposes of registration with Registry Office. (§24 of Act).

(3) Once decree in force, and except in cases determined in regulation adopted by government under §80, no person may, in designated agricultural region, use lot for any purpose other than agriculture without authorization of Commission. (§26). Therefore, except in cases

determined in regulation under §80, no person may, without Commission's authorization, effect subdivision in designated agricultural region. (§28).

Agricultural zone plan is established by agreement between Commission and local municipality. (§47). Failing agreement, Commission shall prepare agricultural zone plan of municipal territory. (§48). Commission shall submit plan to government for approval. If agricultural zone plan is approved by government, decree approving it becomes effective on date fixed in decree. (§50).

Act contains provisions for submission to have lot included in or excluded from agricultural zone to municipal corporation and Commission. (§50).

Rights and hypothecs created or resulting from any deed contravening §§26 to 29, 55 and 70 of Act may be cancelled by order of Superior Court. (§82). Judgment declaring nullity of deed will also order, where applicable, that lot be restored to its former condition. (§83).

Fines for offences referred to in Act in respect of area of land of less than one hectare are between $500 and $6,000 for first offence and $1,000 and $12,000 for subsequent offences; corporations are liable to fines between $1,000 and $36,000 for first offence and $2,000 and $72,000 for subsequent offences. (§90.1).

Fines for offences referred to in §§26, 27 or 70 in respect of designated agricultural region are, for first offence, at least $5,000 for first hectare of land and not more than additional $15,000 for each additional hectare or fraction of hectare. For subsequent offences not less than $15,000 and not more than $25,000 for each hectare or fraction of hectare. (§90).

Lands situated in agricultural zone used for nonagricultural purposes when Act became applicable to it may continue to be used for such purposes with authorization of Commission. (§97).

Farm Lands.

By Act Respecting Acquisition of Farm Land by Nonresidents (R.S.Q., c. A-4.1), nonresidents of Québec require authorization of Commission de protection du territoire agricole du Québec to acquire directly or indirectly farm land. Act defines farm land as land used for agricultural purposes having area not less than four hectares consisting of one lot or several contiguous lots or several lots which would be contiguous if not separated by public road. (§1). Natural person is resident in Quebec if he has lived in Quebec at least 366 days in 24 months preceding acquisition of farm land. (§2). Special rules govern residence of legal persons and individuals occupying designated functions. (§3). Act applies to part of Quebec territory situated South of 50th Parallel of North Latitude. (§5). Certain other exceptions apply. (§6). Authorization obtained by application to said Commission. (§§12, 21). Commission is responsible for overseeing application of Act respecting acquisition of farm land by nonresidents. (§34). Before rendering unfavourable decision, it shall notify applicant in writing as prescribed by §5 of Act Respecting Administrative Justice (R.S.Q., c. J-3) and allow interested person at least ten days to present observation. (§14).

Commission may issue order enjoining person to cease contravention of Act or conditions of order or of authorization to acquire farm land and failing compliance with such order, Attorney General or Commission may obtain order from Superior Court. (§§25, 26). Acquisitions of farm land contravening certain provisions of Act are null. (§27). Fines ranging from $200 to $5,000 for natural persons and from $600 to $30,000 for legal persons may be imposed for contravention of certain provisions of Act. Contravention of other sections of Act result in fines of at least 10% of value of farm land acquired for natural persons and at least 20% for legal persons. (§31).

22.14 TRUST DEEDS:

See category 21 Mortgages, topic 21.03 Mortgages of Personal Property, subhead Movable Hypothecs, catchline Movable Hypothecs Without Delivery.

23 TAXATION

23.01 ADMINISTRATION:

Most provincial taxes are payable to Minister of Revenue. Other taxing authorities within Province, such as municipalities and school corporations, attend to their own collections.

Taxable Property.

Province taxes property, which may be movable or immovable and of any description, provided it is within Province and imposition of tax is direct. Under Constitution, Provinces have powers of direct taxation only, within their boundaries and for Provincial purposes.

School and Municipal Taxes.

Municipalities may impose property taxes (Cities and Towns Act, R.S.Q., c. C-19, Municipal Code of Quebec, R.S.Q., c. C-27.1 and Act Respecting Municipal Taxation, R.S.Q., c. F-2.1) on all immovables situated within municipality. School boards may levy school taxes for payment of expenses not covered by government grants and subsidies. School taxes are imposed on every taxable immovable located in territory of school board. (Education Act, R.S.Q., c. I-13.3). See topic 23.14 Property Taxes.

Assessment.

School commissioners and trustees empowered to levy taxes on taxable immovables in school municipality for payment of expenses not covered by government grants and subsidies. Rate of school assessments is uniform upon all taxable property in school municipality and assessment based on standardised assessment of taxable property. (Education Act, R.S.Q., c. I-13.3).

Protest.

Person may complain to municipal entity that evaluates demands to contest improper entry of property on roll; to contest correctness, existence or absence of entry exempt from tax; to demand uniting of several immovables into single unit of assessment, or division of unit of assessment into several units. (Act Respecting Municipal Taxation, R.S.Q., c. F-2.1). Person may also complain to Administrative Tribunal of Quebec where evaluator proposes modification of roll, where evaluator informs person that he does not have any propositions to offer him or where delay for conclusion of agreement has expired.

Income Tax.

Assessment.

Minister of Revenue has powers of assessment. (Act Respecting the Ministère du Revenu, R.S.Q., c. M-31). Minister examines each return and assesses any tax payable and notifies taxpayer.

Protest of Taxes.

Taxpayers may file objections to assessments with Minister of Revenue within 90 days of mailing of assessment and not more than one year after expiry of that time (this period may be extended if taxpayer was physically unable to act). For 1991 and subsequent taxation years, individual taxpayers and testamentary trusts may file objections in year following expiry of delay to file their income tax return or within 90 days of mailing of assessment, whichever is latest.

Revision and Appeal.

Taxpayers may appeal from Minister of Revenue's decision on objections to assessments to Quebec Court. Quebec Court's decision may be appealed at Court of Appeal of Quebec. In certain circumstances, individual may bring summary appeal before Small Claims Division of Quebec Court.

Exemptions.

See topics 23.14 Property Taxes and 23.10 Income Tax, subhead Corporation, catchline Tax on Capital.

Penalties.

Following penalties may be imposed for violation of certain taxing statutes, more particularly:

Taxation Act.

Person who fails to file income tax return when required is liable to penalty of $25 for each day during which failure continues, up to maximum of $2,500. Person who fails to provide required information on prescribed form is liable to penalty of $100. If taxpayer in circumstances equivalent to gross negligence makes statement or omission in document required to be filed which results in lesser assessments than would otherwise be case, taxpayer is subject to penalty of 25% of difference. Every person who wilfully evades or attempts to evade payment, collection or remittance of amount prescribed by fiscal law incurs penalty of 50% of amount of such payment, collection or remittance. Every person who wilfully makes statement or omission which results in lesser payment of taxes is subject to penalty of 50% of difference. Every person who, willfully or in circumstances equivalent to gross negligence, fails to pay, deduct, withhold, collect or remit duty imposed under fiscal law and who, in relation to that duty, fails to file return or report, is subject to penalty equal to 50% of duty. Every person who makes false return or allows deceptive entries to be made in material records, or wilfully in any manner evades compliance with fiscal law; in any manner knowing or not being entitled thereto obtains or attempts to obtain refund under fiscal law or destroys, alters, mutilates or otherwise disposes of registers, books of account or other documents of person subject to fiscal law; makes or assents to or acquiesces in making of false deceptive entries, or omits or assents to or acquiesces in omission to enter material particular in records or supporting documents of person subject to fiscal law or conspires with person to commit such offences is guilty of offence and is liable to fine of not less than $1,000 nor more than $25,000 and/or imprisonment for maximum of two years. If additional tax is payable, fine must be at least equal to amount of taxes that should have been payable plus 25% of such amount but not exceeding double amount. (Act Respecting the Ministère du Revenu, R.S.Q., c. M-31).

Succession Duty Act.

Provisions of Act imposing penalties repealed for all successions opening after May 27, 1986.

Tobacco Tax.

Penalty provisions of Act Respecting the Minister of Revenue (R.S.Q., c. M-31) apply to matters contemplated by any fiscal law.

Inter-Province Cooperation.

Penalty provisions of Act Respecting the Minister of Revenue (R.S.Q., c. M-31) apply to matters contemplated by any fiscal law.

23.02 ALCOHOL, BEVERAGES AND TOBACCO TAXES:

Alcoholic Beverage Taxes.

Imposed by Act Respecting Offences Relating to Alcoholic Beverages which applies to alcoholic beverages sold for consumption elsewhere than in establishment (R.S.Q., c. I-8.1), Act Respecting Liquor Permits (R.S.Q., c. P-9.1) and Act Respecting the Société des Alcohols du Québec (R.S.Q., c. S-13). Alcoholic beverages are: alcohol, spirits, wine, cider and beer and every liquid or solid containing no more than 0.5% of ethyl alcohol by volume that can be consumed by human beings. (Act Respecting Offences Relating to Alcoholic Beverages, R.S.Q., c. I-8.1). Régie des permis d'alcool du Québec may set amounts of costs and duties payable under Act Respecting Liquor Permits (R.S.Q., c. P-9.1) by regulation.

Tobacco Tax.

Imposition of this tax is governed by Tobacco Tax Act (R.S.Q., c. I-2) and administered by Minister of Revenue. Tax is imposed directly on consumer of tobacco. Applies to all persons who purchase tobacco outside of Quebec for consumption in Quebec. Every person who sells tobacco at whatever level must have registration certificate or permit. Different rates of tobacco consumer tax are provided for in Tobacco Tax Act. (R.S.Q., c. I-2). Every person who buys tobacco without paying tax is liable, in addition to payment of tax and costs, to fine of between $300 and $7,500.

23.03 BUSINESS TAXES:

See topic 23.14 Property Taxes.

23.04 CORPORATE TAXES:

Corporate Stock Tax.

See category 2 Business Organizations, topic 2.03 Corporations, subhead Stock Transfer Tax.

Corporation Taxes.

Corporations doing business within Province must pay Provincial taxes on paid-up capital and also on profits. See topic 23.10 Income Tax, subhead Corporation, catchline Tax on Capital.

Corporation License Taxes.

Imposed by Licenses Act (R.S.Q., c. L-3) and other acts (Act Respecting Lotteries, Publicity Contests and Amusement Machines, R.S.Q., c. L-6; Act Respecting Tourist Accommodation Establishments, R.S.Q., c. E-14.2; An Act Respecting the Sale and Distribution of Beer and Soft Drinks in Non-Returnable Containers, R.S.Q., c. V-5.001; Real Estate Brokerage Act, R.S.Q., c. C-73.1; and Cinema Act, R.S.Q., c. C-18.1).

23.05 EMPLOYMENT TAXES:

Unemployment Compensation Tax.

See Canada Law Digest, category 23 Taxation, topic 23.03 Employment Taxes, subhead Unemployment Compensation Tax.

23.06 ESTATE TAX:

No statutory provisions.

23.07 GAMBLING AND ENTERTAINMENT TAXES:

Race Tracks.

Every person who places bet at horse race held at race track in or outside Québec shall pay to Minister of Revenue tax equal to amount obtained after applying calculation provided for in Licences Act. (R.S.Q., c. L-3).

23.08 GASOLINE AND SPECIAL FUELS TAXES:

Imposed by Fuel Tax Act (R.S.Q., c. T-1) and administered by Minister of Revenue. Tax imposed on gasoline, noncoloured fuel oil (diesel), aviation fuel and coloured fuel oil for locomotives. Tax must be paid by every purchaser at following rates: 15.2¢ per litre on gasoline, 16.2¢ per litre on fuel oil, 3¢ per litre on aviation and locomotive fuel.

23.09 GIFT TAX:

Provisions of Taxation Act levying tax on gifts repealed May 27, 1986 for gifts made after Apr. 23, 1985.

23.10 INCOME TAX:

Income tax is imposed on individuals and corporations by Taxation Act. (R.S.Q., c. I-3).

Returns.

Individuals must file return on or before Apr. 30 of each year and corporations must file within six months of end of their fiscal year. Employees earning salaries, wages or other remuneration from office or employment are subject to withholding by employer as prescribed by regulations; balance, if any, is payable on Apr. 30 following taxation year.

Payment.

Certain individuals must make quarterly payments on 15th day of Mar., June, Sept. and Dec. on estimated income and pay balance on Apr. 30 following. Corporations pay tax monthly on last day of month according to provisions set out in Taxation Act.

Individual.

Income tax is levied on income earned in Province during year by: (1) Individuals resident in Province on last day of taxation year, (2) individuals deemed resident in Province and (3) individuals not resident in Canada at any time in taxation year but who carried on business in Province, were employed in Province or disposed of taxable Quebec property during taxation year or previous taxation year. Taxable income for resident individuals is income from all sources in Canada or elsewhere plus net taxable capital gains less allowable deductions. For nonresident individuals carrying on business in Province, taxable income is profits of business calculated according to regulations. Nonresident individuals employed in Province pay tax on income reasonably attributable to their employment or office in Province. For nonresidents disposing of taxable Quebec property, see subhead Capital Gains, infra.

See Canada Law Digest, category 23 Taxation, topic 23.07 Income Tax Act, for rules governing computation of taxable income, amounts included and excluded, and various deductions which in most cases are same as under Taxation Act.

Tax on taxable income of individuals is graduated and for year 2009 ranges from 16% on income equal to or less than $38,385, to 20% on income over $38,386 but not exceeding $76,770, and 24% on income over $76,771.

Special rules govern income of farmers, fishermen, professionals, prospectors and trusts.

Corporation.

Taxable income from business or property is corporation's profits therefrom. If corporation carrying on business in Province also carries on business outside of Province, tax is payable in proportion of profits earned in Province, in relation to its profits earned within and outside Province, calculated according to regulations. Subject to detailed provisions in Taxation Act, basic corporate tax rate is 16.25%. Small business tax rate on active business income is 8%. For 2009, corporate tax rate applicable to active income is 11.9%. See Canada Law Digest, category 23 Taxation, topic 23.07 Income Tax for rules governing computation of income and deductions allowed which, in most cases, are same under Taxation Act. Special rules govern insurance corporations and savings and credit unions.

Tax on Capital.

Tax is imposed on paid-up capital of corporations with establishments in Quebec. Generally, paid-up capital is computed by reference to corporation's paid-up capital, retained earnings and other sources of capital, with reduction granted to corporations which carry on business both within and outside Province. Tax is equal to 0.49% of corporation's paid-up capital (minimum $250) for corporations other than mining corporations, insurance corporations and banks, loan corporations, trust corporations, etc. Note: Applicable rate of tax on capital will be gradually reduced from 0.36% to 0.24% starting Jan. 1, 2009 and to 0.12% starting Jan. 1, 2010. Tax on capital will be completely eliminated on Jan. 1, 2011.

Exemptions and Credit for Foreign Taxes.

For exemptions, see Canada Law Digest, category 23 Taxation, topic 23.07 Income Tax Act. Resident taxpayers who have paid to foreign countries or political subdivisions thereof income tax of same nature as provided under Part I of Taxation Act may deduct from tax otherwise payable amount established in accordance with regulations.

Capital gains were not taxed prior to Dec. 31, 1971. From Dec. 31, 1971 to 1988, one-half of capital gains for year less one-half of capital losses from disposition of property became taxable as income. Rate went up to 2/3 for 1988 and 1989 taxation years and again to ¾ for taxation years beginning in 1990. As of Jan. 1, 2000, rate is 66%. For years beginning in 2001, rate returned to 50%. Gains are excess of proceeds of disposition over cost or deemed cost adjusted in accordance with Taxation Act and regulations. Dispositions of property include: Transactions or events entitling taxpayers to proceeds of disposition of property; redemption or cancellation of share, bill of exchange, promise of sale, debt or interest therein; conversion of share pursuant to amalgamation; expiry of option on property; and transfer of property to trust or from trust to beneficiary. Excluded are: Transfers for purpose of securing debt and release of such transfer; issue by corporation of bonds, debentures of bills of exchange or making by it of hypothec or mortgage; and issue by corporation of shares of its capital stock and other transactions provided by regulations.

Special rules govern deemed realizations when Quebec taxpayers abandon Canadian resident status and deemed acquisitions when taxpayers assume Canadian resident status in Quebec.

23.11 INHERITANCE TAX:

Succession Duties Act (R.S.Q., c. D-16) was replaced by Succession Duty Act (R.S.Q., c. D-13.2) passed on Dec. 22, 1978. Act applies to successions opening after Apr. 18, 1978. Provisions of Act levying duties repealed for successions opening after Apr. 23, 1985. Succession Duty Act was entirely repealed for successions opening after May 27, 1986.

23.12 MOTOR CARRIER FUELS TAX:

See topic 23.08 Gasoline and Special Fuels Taxes.

23.13 MOTOR VEHICLE TAXES:

Motor Vehicle Usage Tax.

Imposed by Highway Safety Code. (R.S.Q., c. C-24.2). Motor vehicle registration fees are imposed on all motor vehicles adapted for transportation on public highways of Quebec. License or permit fees are imposed on any person who drives such vehicle on public highways of Quebec, except if exempted. Fees for registration of road vehicle as well as for licences are provided for by regulation.

23.14 PROPERTY TAXES:

Taxable Situs.

Taxes imposed on all immovable property situated within municipality, and business assessment imposed on rental value of place of business (business taxes).

Valuation of immovable property for taxation by such local public corporation is determined in accordance with An Act Respecting Municipal Taxation (R.S.Q., c. F-2.1) by assessors duly appointed.

Business Taxes.

Every local municipality, with exception of Northern Cree or Maskapi Villages, may, by by-law, impose business tax on any person entered on its roll of rental value carrying on, for pecuniary gain or not, economic or administrative activity in matters of finance, trade industry or services, calling, art, profession or any other activity constituting means of profit, gain or livelihood, except employment or charge. Tax is imposed for each place of business where such person carries on such activity. Tax shall be imposed, according to roll, on occupant of each place of business on basis of its rental value, at rate fixed in by-law. (An Act Respecting Municipal Taxation, R.S.Q., c. F-2.1).

Exemptions.

Crown lands, municipal property, immovables of foreign government, property belonging to fabriques (religious group that administers property of church) or religious institutions, churches, cemeteries, charitable institutions, hospitals and reception centres, schools and universities, private educational institutions, and other exemptions provided in Cities and Towns Act. (R.S.Q., c. C-19).

Local Tax Rates.

Fixed by municipalities, within terms of their respective charters or incorporating acts, or in conformity with Cities and Towns Act (R.S.Q., c. C-19), Municipal Code of Quebec (R.S.Q., c. C-27.1), or Education Act (R.S.Q., c. I-13.3) as case may be.

Assessment.

See subhead Local Tax Rates, supra.

Review of Assessment.

For complaints concerning roll, application review must be filed before May 1 following coming into force of roll. In specific cases, person having filed application for review may bring before Tribunal proceeding having same object as application. Procedural rules are provided in Municipal Taxation Act. (R.S.Q., c. F-2.1).

Payment.

Demand for payment of taxes is transmitted to every person entered on roll within 60 days following day on which notice of deposit of roll was given. Payment must be made within 30 days following mailing of such demand for payment. (Municipal Code of Quebec, R.S.Q., c. C-27.1, Cities and Towns Act, R.S.Q., c. C-19).

Collection.

Municipal taxes imposed on land may be collected from tenant, occupant or other possessor of land as well as from owner, or from any subsequent acquirer of land, even where such tenant, occupant, possessor or acquirer is not entered on valuation roll. In case of any tax imposed on any firm or partnership, in respect of business of such firm or partnership, such tax may be claimed and recovered in full from any member. (Cities and Towns Act, R.S.Q., c. C-19).

Prior Claims.

Municipal taxes are prior claims with respect to immovable properties.

Land Transfer Duties.

Municipalities must, under law, levy duty on transfer of immovables at rate of 0.5% on portion of consideration (or of municipal valuation if higher) which does not exceed $50,000, 1% on portion of consideration which exceeds $50,000 up to $250,000 and 1.5% on excess. Transfer includes lease of immovable if for more than 40 years. Transferee is liable for duties which are payable upon registration of deed of transfer. Special rules govern transfers of immovables situated in more than one municipality. Certain transfers are exempt: Farm lands, transfers to lending institutions to secure payment of debt or to extinguish debt secured by immovable and certain other transfers. (An Act Respecting Duties on Transfers of Immovables, R.S.Q., c. D-15.1). (See also category 22 Property, topic 22.13 Real Property.) Land transfer duties were also imposed on transfer of land to nonresident. (Land Transfer Duties Act, R.S.Q., c. D-17). Land Transfers Duties Act does not apply to land transferred after May 9, 1996.

Redemption.

Owner of any immovable sold for municipal or other local assessments may, within two years after date of adjudication, redeem same, by reimbursing to secretary-treasurer of regional county municipality in whose territory such immovable is situated, amount laid out for purchase of such immovable, including cost of certificate of purchase and notice to registrar, with interest at 10% per annum, every fraction of year being reckoned as year. (Municipal Code of Quebec, R.S.Q., c. C-27.1).

School Taxes.

May be levied by school board. Tax is imposed on every taxable immovable situated in territory of school board. School tax rate of school board is same for all taxable immovables. School taxes are payable by owner of taxable immovable. (Education Act, R.S.Q., c. I-13.3). See topic 23.01 Administration, subhead School and Municipal Taxes.

Real Estate Conveyance Tax.

See subhead Land Transfer Duties, supra; also category Property, topic Real Property.

23.15 SALES AND USE TAXES:

Sales and Services Tax.

The Retail Sales Tax Act (S.Q., 1990, c. 60) was replaced by An Act Respecting the Quebec Sales Tax (R.S.Q., c. T-0.1) to reflect Federal Goods and Services Tax (G.S.T.) (Part IX of Excise Tax Act R.S.C. 1985, c. E-15), by increasing scope of taxable goods to include most of those subject to G.S.T., with one notable exception being books. As result of this increase in scope, rate of Quebec Sales Tax (Q.S.T.) was lowered from 9% to 8%, and again to 6.5%. Commencing Jan. 1, 1998, rate was raised to 7.5%. Furthermore, starting on July 1, 1992, most services, incorporeal movable property (e.g. royalties) and commercial and new residential immovables are taxable at rate of 7.5%. Q.S.T. legislation is harmonized with Federal G.S.T. legislation, subject to certain adjustments. For example, financial services are zero-rated as opposed to exempt under Federal G.S.T. Q.S.T. of 7.5% of purchase price is exigible at time of making purchase defined in Act to include other forms of transfer or lease at retail in Province of property. No person, including contractors, manufacturers, importers and wholesalers carrying on business in Province, may sell any movable property in Province at retail, unless he has obtained registration certificate under Q.S.T. legislation and unless such certificate is in force at time of sale. Person who has neither residence nor place of business in Province cannot institute or continue any proceedings in Province for recovery of debt arising from sale or delivery of property to person who resides or carries on business therein, unless he holds registration certificate under said legislation. Sales tax of 9% (5% in case of automobile insurance) exigible on payment of premiums for insurance for life, health or physical integrity of persons and risks in Province but not exigible on premiums for individuals' life, accident and sickness insurance. (R.S.Q., c. T-0.1). Refund of first $2,000 of Q.S.T. is now available on purchase of prescribed new hybrid vehicle.

Exemptions.

Some supplies are exempt from application of An Act Respecting the Quebec Sales Tax (R.S.Q., c. T-0.1), such as certain immovables, health care service, educational service, child and personal care service, legal aid service, etc. (c. III of Title I of Quebec Sales Tax [R.S.Q., c. T-0.1]).

23.16 STAMP AND SEAL TAXES:

Stamp Tax.

The Stamp Act (R.S.Q., c. T-10) was repealed by S.Q. 1991, c. 20. Obligation to pay: (1) Fees relating to registration of document or performance of service in registry office and (2) court costs and court office fees is now found in An Act Respecting Registry Offices (R.S.Q., c. B-9) and Courts of Justice Act (R.S.Q., c. T-16) respectively.

24 TRANSPORTATION

24.01 AIRCRAFT:

See Canada Law Digest, category 24 Transportation, topic 24.01 Aircraft.

24.02 AUTOMOBILES:

See topic 24.03 Motor Vehicles.

24.03 MOTOR VEHICLES:

Vehicle License.

Owner must register vehicle (unless exempted under Highway Safety Code, R.S.Q. c. C-24.2, §6) in accordance with formalities determined by Société de l'assurance automobile du Québec ("Société") and upon payment of prescribed fees. Société may refuse to register vehicle where government regulations are not met. Registration is valid for period determined by regulations. Registration certificate must contain all information required by regulations and be signed by its holder. Registration plate is also issued bearing assigned registration number and must be attached at rear of vehicle. (§30). Registration of vehicle requires proof of minimum insurance for public liability. See subhead Financial Responsibility, infra.

Drivers' permits are issued upon payment of prescribed fees in accordance with formalities, terms and conditions established by Société. (§§60.1, 61, 64). Proficiency and medical or optometric examinations may be required by Société. (§73). Permits valid for period determined by regulations. Drivers' permits issued outside Quebec recognized only for 90 days after holder settles in Quebec. (§8).

Every person driving or having care or control of vehicle must produce, if requested by police, registration certificate, driver's permit and certificate of insurance required by Automobile Insurance Act. (§102). They must inform Société of any change of address within 30 days of such change. (§95).

Title and Sales.

When ownership of vehicle is transferred, owner must apply to Société for transfer by remitting license plate and endorsed certificate. (§40). Purchaser must then apply for new registration. (§41). When there is exchange between parties each owner must remit endorsed certificate and apply for new registration. Where vehicle is transferred to dealer and new vehicle is being purchased, transferor retains license plate but must apply to Société for certificate corresponding to new vehicle. (§43). If no new vehicle is being purchased, transferor must remit license plate to Société and endorse certificate to dealer. (§42).

Liens.

Any sums due to Crown under Highway Safety Code (R.S.Q., c. C-24.2) constitute preferred debt upon motor vehicles. (§209.22).

Identification Marks.

It is offence to deface, alter, make illegible, replace or remove identification number of vehicle or bicycle. No alterations to chassis, body or other mechanism likely to affect stability of braking or change type of motor vehicle, or alterations not meeting requirements of Motor Vehicle Safety Act (S.C. 1993, c. 16) are allowed without prior authorization of Société. (§§211, 241).

Operation Prohibited.

No person may drive motor vehicle on public highway unless person holds valid driver's license of appropriate category and class designated by regulations or learner's license. (§65). Person holding learner's license must be accompanied by person holding valid driver's license for at least two years (except for motorcycle and moped). (§99). Intoxicated or drugged person may not operate car or have charge of car stopped on highway. Occupants may not drink alcohol inside vehicle on highways, roads, and places where public traffic is permitted. (§443). It is prohibited to use hand-held device which includes telephone function while driving. Hands-free devices are permitted. (§439.1).

Equipment.

Required on public highways: Tires conforming to standards prescribed by regulations;

horns in good working order; at least one brake system sufficiently powerful to stop vehicle in emergency; exhaust system in conformity with noise level regulations; mudguards; two rear view mirrors; odometer and speedometer; safety glass windows and windshield; windshield wipers and any other accessories or equipment prescribed by regulations. (§§251, 254, 258, 261, 262, 264, 268, 270, 272). Radar warning devices are prohibited. No vehicle registered in Quebec may be operated between Dec. 15 and Mar. 15 unless it is equipped with four winter tires. (§440.1).

Seat Belts.

Driver and passengers in front and back seats of passenger vehicle must wear seat belts subject to certain exceptions. (§396).

Lights Required.

Two white headlights, two amber or white parking lights on front, two red parking lights at rear, two red reflectors at rear, two red stop lights at rear, two amber or white turn-signal lights on front, two red or amber turn-signal lights at rear, one amber side marker lamp and one amber side reflector on each side, one red side marker lamp and one red side reflector on each side, white back-up light at rear, white light illuminating rear registration plate. (§215). Cars manufactured after Jan. 1, 1987 must have third red stop light at rear. (§221). Front lights must enable driver to discern person, object at 150 m. (§235). All lights must be visible at distance of not less than 150 m. (§237).

Speed limits as follows: (a) Autoroutes: 60 km/h minimum, 100 km/h maximum; (b) hard surface public highways: 90 km/h maximum; (c) gravel highways: 70 km/h maximum; (d) cities, towns, villages, when children enter or leave school: 50 km/h maximum (certain areas [i.e. school zones] are at 30 km/h maximum). Minister of Transport may fix different speed limits. (§328).

Traffic Regulations.

On two way roadway, driver of vehicle must signal intention to pass and may pass only after ascertaining that he may do so without risk to vehicle being passed. No lane hopping is permitted. On two lane road every vehicle must drive in right hand lane except to pass. Cannot pass vehicle on right. Must comply with all traffic control devices. Must not pass vehicle using lane reserved for ongoing traffic on curve, on crest or at crest of grade if visibility insufficient, or at intersection. Before turning, changing lane, making u-turns or returning to road from shoulder or parking area, must signal intention by means of turning signals. If not equipped with turning signals, must signal manually as follows: Left turn, extend arm horizontally; right turn, extend forearm upwards; stops or slowing down, extend forearm downwards. (§§320, 339, 345, 346, 372, 373).

Accidents.

Driver must stop and give name and address of owner, driver, driver's license number, certificate of insurance and license plate number to police or to person having sustained loss. Driver must remain at scene of accident and give necessary assistance to any person injured. (§168, 170).

Owner liable for any violation of Highway Safety Code committed with vehicle unless he proves that at time of accident, vehicle was in possession of third party without his consent. Person who leases vehicle for more than one year is considered owner.

Guests.

There is no statute restricting liability for injury to guest.

Insurance.

See subhead Financial Responsibility, infra.

Financial Responsibility.

Under Automobile Insurance Act (R.S.Q. c. A-25) owner of automobile must, subject to certain exceptions, have minimum of $50,000 liability insurance for property damages and protection against pecuniary damages for any civil liability they may incur by reason of accidents occurring in Canada or U.S. (§§85, 87).

Liability insurance contract must also protect insured owner against pecuniary consequences of any liability he may incur while driving automobile of third person.

Indemnity fund is also set up under Act.

Persons having obtained final judgment for property damages (and bodily injuries in certain cases) resulting from automobile accident with which compensation they are unsatisfied, may, within one year make claim to have judgment satisfied by funds up to $50,000 per accident for bodily injury and $10,000 for property damage. If more than one claim results from same accident, claimants share prorata. (§§142-143).

Foreign vehicle validly registered by law of place of residence or place of business is exempt from registration in Quebec for six months from date of arrival in Quebec. (§19).

Bicycles.

Motorized bicycles or three-wheel vehicles having piston displacement of not over 50 c.c., and mass of 60 kg. or under and automatic transmission are deemed to be mopeds. In general, bicycles may not be used on public highways where maximum speed is more than 50 km/h. Driver of moped or motorcycle must keep white headlight on at all times. Every person riding moped, motorcycle or sidecar must wear protective helmet which meets requirements of regulations. No person may drink alcoholic beverages while riding bicycle. (§§482, 484, 489, 491).

No-Fault Insurance.

Victims of bodily injuries resulting from automobile accidents are indemnified by Automobile Insurance Board on no-fault basis. (Automobile Insurance Act, R.S.Q. c. A-25, §5). Subject to certain exceptions, all rights, recourses and rights of action in respect of bodily injuries resulting from automobile accidents are replaced by indemnities under Automobile Insurance Act, Act respecting industrial accidents and occupational diseases, Crime Victims Compensation Act, or Act to promote good citizenship.

Indemnification is available to all victims of automobile accidents occurring in Quebec whether or not resident of Quebec. Indemnification is available to Quebec resident whether accident occurred in or outside Quebec. If automobile is registered in Quebec and is involved in accident in Quebec, owner, driver and passengers are deemed residents of Quebec. Nonresident victims are compensated to extent they are not responsible for accident. Right to indemnification is prescribed three years from date of accident, manifestation of injury or death, subject to extension by Société.

Indemnities are: (i) Income replacement indemnities in cases of incapacity to continue employment, quantum established in accordance with provisions of Act, (ii) death benefits in favor of spouse and dependents and based on percentage of income replacement indemnity, (iii) indemnification for particular injuries by way of lump sum plus medical expenses.

Board decides on right and quantum of indemnity. Appeal from decisions of Board or of its officers lies with social affairs division of Administrative Tribunal of Quebec.

Compensation for Property Damage.

Recourse of owner of vehicle for damages to vehicle can only be exercised against his insurer to extent that direct compensation agreement is established by Groupement des assureurs automobiles, comprised of representatives of authorized insurers. If owner is not satisfied with settlement made in accordance with said agreement, he may sue insurer before civil courts. Insurer has no right of subrogation against insured or against person whose liability is covered by insurance contract except when insurer pays indemnity which it was not bound to pay under insurance contract. Except as stated above victims of property damage caused by automobiles are compensated in accordance with ordinary rules of law subject to presumptions of liability mentioned under subhead Owner Liable, supra.

Pedestrians.

Must comply with pedestrian lights or, if there are none, traffic lights. (§444).

Nonresident operators are exempt from registration in Quebec for period of six months from their arrival if: (1) Vehicle is registered as required by law of main place of residence or business establishment of its owner, (2) vehicle carries valid registration plate of that place of residence, (3) driver furnishes proof of registration upon request by relevant authorities. (§19).

Foreign students and trainees staying in Quebec are exempt from registration for duration of their studies or training if: (1) Vehicle is registered as required by law of main place of residence of its owner or place where he established residence, (2) vehicle carries valid registration plate of that place of residence, (3) student or trainee furnishes proof of that registration upon request of relevant authorities, (4) other place of residence grants reciprocal rights to Quebec drivers who are students or trainees. (§20).

Outsized vehicles, loads must hold special permit. No person may drive on public highway vehicle carrying load which is not solidly attached, secured and covered so as not to intervene with driver's vision and so as not to detach itself from vehicle. Special permits required for carrying loads in excess of width of vehicle, or in excess of length of vehicle by more than one metre in front or two metres in rear. (§§463, 471, 473).

Actions Against Nonresidents.

There is no special provision with respect to commencement of such actions.

Direct Actions Against Insurer.

Subject to amount and conditions of insured's contract of insurance, insurer is responsible directly to third parties, but insurer cannot be sued by third parties until they have obtained against insured final judgment which is enforceable. (§89).

Motor Vehicle Carriers.

Under Transport Act (R.S.Q. c. T-12) and regulations thereunder and under Highway Safety Code, public vehicles, in addition to registration, must obtain travel permit annually. Special provisions govern chauffeurs, operation and equipment of buses and transportation of hazardous substances and permits re: transport brokerage.

Aircraft.

See Canada Law Digest, category 24 Transportation, topic 24.01 Aircraft.

Gasoline Tax.

See category 23 Taxation, topic 23.08 Gasoline and Special Fuels Taxes.

24.04 RAILROADS:

See category 3 Business Regulation and Commerce, topic 3.07 Carriers.

SAS
SASKATCHEWAN LAW DIGEST

—Scope —

Revised for 2009 edition by

MacPHERSON LESLIE & TYERMAN LLP of Regina and Saskatoon.

(R.S. indicates Revised Statutes of Saskatchewan 1978; Annual Statutes of Saskatchewan are cited by year and chapter number; R.C. indicates Rules of Court of Saskatchewan 1961; R.R.S. indicates Revised Regulations of Saskatchewan; R.S.C. indicates Revised Statutes of Canada 1985.)

Note: This revision covers laws assented to and proclaimed in force by Lieutenant Governor up to 1 August 2008.

1 INTRODUCTION

1.01 GOVERNMENT AND LEGAL SYSTEM:

Saskatchewan is a province of Canada. Many laws are promulgated by the Federal Government and are not reflected in the topics below. See Canada Law Digest for references to federal law topics covered.

Legislative Assembly must sit at least once in every 12 months (2007, c. L-11.3, § 7). Second session of 26th Legislature prorogued on 21 October 2009.

Like all provinces of Canada except Quebec, Saskatchewan has common law system rooted in English common law. For information on courts and legislatures of Saskatchewan, see category “Courts and Legislature”.

In many Provincial Acts, province gives powers to appointed boards and tribunals to regulate application of such Acts. Decisions by such bodies are subject to review by courts.

Municipalities.

Province is divided into cities, towns, villages, resort villages, rural municipalities, hamlets, northern municipalities, northern villages and northern hamlets. Rural municipalities, restructured municipalities, towns, villages, resort villages and hamlets are governed by The Municipalities Act (2005, c. M-36.1). Northern municipalities, northern villages and northern hamlets fall under The Northern Municipalities Act (1983, c. N-5.1). All cities are governed by The Cities Act (2002, c. C-11.1).

Within these Acts, provincial government has granted power to these elected local governments to deal with limited matters related to bylaws, licencing and taxation.

1.02 HOLIDAYS:

Following are public holidays: New Year’s Day (Jan. 1), Family Day (3rd Monday in Feb.), Good Friday, Victoria Day (3rd Monday in May), Canada Day (July 1), Saskatchewan Day

(1st Monday in Aug.), Labour Day (1st Monday in Sept.), Thanksgiving Day (2nd Monday in Oct.), Remembrance Day (Nov. 11) and Christmas Day (Dec. 25) (The Labour Standards Act [R.S., c. L-1] § 38). If a holiday other than Remembrance Day falls on Sunday, following Monday is holiday.

See category 11 Employment, topic 11.02 Labour Relations.

See also Canada Law Digest.

1.03 OFFICE HOURS AND TIME ZONE:

Saskatchewan is in the Central Standard (GMT—06:00) time zone and does not observe Daylight Saving Time. Office hours are generally from 9 a.m. to 5 p.m.

2 BUSINESS ORGANISATIONS

2.01 AGENCY:

Common law applies.

2.02 ASSOCIATIONS:

The organisation of unincorporated associations is not regulated by statute.

Unincorporated associations may sue and be sued in the names of some members, on behalf of all members (R.C. 70).

2.03 CORPORATIONS:

The Business Corporations Act (R.S., c. B-10), modelled upon Canada Business Corporations Act, has governed since 1977.

Formation.

One or more persons can incorporate corporation by signing and delivering articles of incorporation to Director of Corporations, Corporations Branch, 2nd Floor, 1871 Smith Street, Regina, SK, S4P 4W5. Articles of incorporation must set out name of corporation, classes and any maximum number of shares corporation authorised to issue, any restriction on right to transfer shares, number of directors and any restriction on businesses corporation may carry on (R.S., c. B-10, § 6).

Fee for certificate of incorporation is $250 ($200, if filed electronically), payable to Minister of Finance (The Business Corporations Regulations [R.R.S., c. B-10, Reg. 1] § 41).

Name.

Words “Limited”, “Limitée”, “Incorporated”, “Incorporée”, “Corporation” or abbreviations thereof must be part of name of every corporation (R.S., c. B-10, § 10). Director has discretion to refuse any objectionable name. No name should be similar to name of another corporation or registered trade mark, or suggest connection with Crown or federal or provincial governments or political party. Names that are too general, contain words that connote cooperative venture, or mislead as to nature of business of corporation are objectionable (R.S., c. B-10, §§ 293–294). Where name has not yet been cleared with Director, it is possible to incorporate by designating number assigned by Director.

Powers.

Corporation generally has capacity and powers of natural person. No requirement of reciting objects.

Directors.

Only one director is needed, except that distributing corporation (one that distributes securities to public) must have at least three directors (R.S., c. B-10, § 97). No requirements of fixed number of directors, except if articles provide for cumulative voting (R.S., c. B-10, § 102). May set minimum and maximum number of directors (R.S., c. B-10, § 107).

At least 25% of directors must be resident Canadians. But if corporation has fewer than four directors, at least one director must be resident Canadian. No requirement that directors hold shares issued by corporation, unless articles so require (R.S., c. B-10, § 100). Subject to bylaws, quorum for directors' meeting is a majority of the number of directors or minimum number of directors required by the articles, of which 25% must be resident Canadians (R.S., c. B-10, § 109).

Directors are chosen by ordinary resolution of shareholders. If there is no expressly stated term, a director ceases to hold office at close of first annual meeting following his or her election. Generally, directors may be removed by ordinary resolution at special shareholders meeting.

Liabilities of Directors and Officers.

Must act honestly and in good faith with a view to best interests of corporation and exercise care, diligence and skill of a reasonably prudent person (R.S., c. B-10, § 117). Directors who consent to prohibited corporate actions, such as payment of prohibited commissions, prohibited dividends, prohibited financial assistance or prohibited shareholder payments, must indemnify corporation for any loss suffered thereby. Directors liable to employees for all debts to employees for services during term of directorship (R.S., c. B-10, § 114). Directors are liable for unremitted revenue taxes of corporation, subject to due diligence defence (The Revenue and Financial Services Act [1983, c. R-22.01] § 48.1).

Stockholders (Shareholders) Rights.

Holders of not less than 5% of voting shares may require directors to call meeting of shareholders for particular purposes (R.S., c. B-10, § 137). Fundamental changes to corporation require special resolution of shareholders (i.e. 2/3 of votes cast). Shareholder may dissent if corporation resolves to amend articles to vary restrictions on shares or vary restrictions upon business of corporation, amalgamate, continue or dispose of substantially all of its property. Dissenting shareholder, if action from which he or she dissents is approved, entitled to be paid fair market value for shares. Shareholders may apply to court to have corporation investigated.

Shareholders may apply for leave to commence action in corporation's or any subsidiary's name (R.S., c. B-10, § 232). Shareholders can also apply for court relief against oppressive treatment from corporation or those responsible for the conduct of its business or affairs (R.S., c. B-10, § 234).

Through unanimous agreement, shareholders or one shareholder can take over certain management powers of directors. Shareholders thereby accept corresponding duties and possible liabilities (R.S., c. B-10, § 140).

Stock.

Shares must be without par value (R.S., c. B-10, § 24). Corporation may have unlimited share capital; therefore, no requirement of authorised share capital and maximum consideration.

Corporation required to maintain separate stated-capital account for each class and series of shares issued (R.S., c. B-10, § 26). Corporation may reduce its stated capital for any purpose unless reduction would result in insolvency or realisable value of its assets would be less than aggregate of its liabilities (R.S., c. B-10, § 36).

Meetings.

Upon incorporation, meeting of directors must be held for appointment of officers, auditor and for making bylaws (R.S., c. B-10, § 99). Directors must call annual shareholder meetings within 18 months of formation and subsequently within 15 months of last preceding annual meeting (R.S., c. B-10, § 127). Notice of shareholders meeting must be sent to all directors and shareholders within 21 and 50 days before meeting (R.S., c. B-10, § 128).

Records.

Corporation must maintain, at its registered office in Saskatchewan or at any other designated place in Saskatchewan, records containing articles, bylaws, amendments, minutes of meetings and shareholders resolutions (R.S., c. B-10, § 20). Shareholders and creditors of corporation can examine records during usual business hours (R.S., c. B-10, § 21).

Amalgamations.

Two or more corporations may amalgamate. With exceptions for holding and subsidiary corporations, amalgamation agreement must be entered into and approved by special resolution (2/3 majority) of shareholders (R.S., c. B-10, §§ 175–178).

Dissolution.

Director or interested parties can apply to court for dissolution of corporation in following circumstances: failure to restore name of corporation to Register within two years after having been struck off; failure for two or more consecutive years to hold annual shareholders meetings; or failure to forward financial statements to shareholders (R.S., c. B-10, § 206). At annual meetings, directors and voting shareholders can propose voluntary liquidation and dissolution of corporation. Corporations can also liquidate and dissolve by special resolution of shareholders (R.S., c. B-10, § 204).

Cooperative associations may be formed by six or more persons or by amalgamation of two or more cooperative associations for any cooperative business, with some exceptions. Capital may be limited or unlimited and divided into shares or without share capital. Each member has one vote and cannot vote by proxy. Cooperative organisations must be operated on cooperative basis, which includes carrying on business for primary benefit of members, using surplus to provide services for members, business development and payment to members in proportion to their patronage (The Co-operatives Act 1996 [1996, c. C-37.3]).

Credit Unions.

Twenty-five or more residents in province may incorporate as credit union to receive savings from and make loans to its members and with other general powers. Privilege of joining credit union is extended to another credit union, cooperative association, municipal body, labour organisation or fraternal society and other organisations where no part of income goes to personal benefit of member (The Credit Union Act 1998 [1998, c. C-45.2]).

Foreign Companies.

Every extra-provincial company carrying on business in Saskatchewan must be registered (R.S., c. B-10, § 262).

Information to Be Filed.

Every extra-provincial company must, before registration, file with the registrar a certified copy of its charter and bylaws, the petition and statutory declarations in stated form and a duly executed power of attorney, under its common seal, empowering some person, named therein and residing in a city, town or village in Saskatchewan, to act as its attorney for the purpose of receiving service of process in all suits and proceedings against the company in Saskatchewan and of receiving all lawful notices (R.S., c. B-10, § 268).

Fee for registration of extra-provincial corporation is $250 (The Business Corporations Regulations [R.R.S., c. B-10, Reg. 1] § 41).

Annual returns to be filed in prescribed form with $50 fee (The Business Corporations Regulations [RRS, c. B-10, Reg. 1] § 40). In case of a change in address of head office, attorney or directors, corporation must send notice of changes within 15 days to Director. If corporation changes name or amalgamates, it must send copy of amended articles within 30 days to Director (R.S., c. B-10, §§ 270–271).

Property Rights.

See category 4 Citizenship, topic 4.01 Aliens.

For Dominion companies, banks, etc., see Canada Law Digest.

Crown Corporations.

Provincial government has established Crown Investments Corporation of Saskatchewan as holding company for Crown corporations. It performs supervisory and coordinating functions for all Crown corporations. Provincial government by Order-in-Council may create Crown corporation to operate any industrial, commercial, financial or public utility enterprise on behalf of Province. Crown corporation has power to borrow money and make loans and advances to Crown Investments Corporation of Saskatchewan. Crown corporations may sue and be sued in contract or in tort (The Crown Corporations Act 1993 [1993, c. C-50.101]).

Taxation.

See category 22 Taxation, topic 22.02 Corporate Taxes, subhead Corporation Capital Tax.

Non-Profit Corporations are governed by The Non-Profit Corporations Act 1995 (1995, c. N-4.2) modelled on The Business Corporations Act. Corporations are deemed to be charitable corporations (and therefore subject to some special rules under Act), if they solicit donations or other gifts, receive government grants or property in excess of 10% of income during any fiscal year and if they are registered as charities under Income Tax Act (Canada). See category 3 Business Regulation and Commerce, topic 3.20 Licences, Business and Professional, subhead Fund-raising businesses.

Other corporations are membership corporations which are incorporated for benefit of their members.

Any profit or property must be used by non-profit corporations to further charitable or membership activities (1995, c. N-4.2, § 30).

Trade Names or Styles.

Pursuant to § 4, The Business Names Registration Act (R.S., c. B-11), every person (including corporations, limited partnerships, partnerships, joint ventures or Indian Band) carrying on business under business name, must be registered under Act. Registrar can reject registration of certain objectionable or confusing names. Records are kept by Director of Corporations.

2.04 FOREIGN CORPORATIONS:

See topic 2.03 Corporations.

2.05 JOINT STOCK COMPANIES:

See topic 2.03 Corporations.

2.06 LIMITED PARTNERSHIP:

See topic 2.07 Partnerships.

2.07 PARTNERSHIPS:

All persons associated in partnership that carries on business under business name are required to cause that name to be registered under The Business Names Registration Act (R.S., c. B-11). Partnership is required to file in office of Corporations Branch declaration signed by all of partners containing names and residences of every partner and name or style of firm under which they carry on or intend to carry on business, nature and date of commencement of business and that there are no other members of partnership. Similarly, declaration must be filed upon dissolution of partnership (R.S., c. B-11, §§ 6–8).

Partnerships can be sometimes varied by agreement, but generally, partners owe each other fiduciary duty to act in utmost good faith. Each partner is agent of firm and will bind firm. All obligations of firm are obligations of partners who were members at time obligations arose (The Partnership Act [R.S., c. P-3]).

Subject to agreement between partners, death, bankruptcy or authorised assignment under Bankruptcy Act (Canada) of any partner automatically dissolves partnership.

Limited Liability Partnerships.

Part IV establishes limited liability partnerships consisting of partners carrying on business in professions regulated by any Saskatchewan statute, unless governing body prohibits practice as limited liability partnership. Innocent partners of limited liability partnership are protected from personal liability for all debts, obligations or liabilities of firm, with specified exceptions. Partner’s interest in partnership property remains subject to such claims. Limited liability partnership is created by certificate issued by Director of Corporations. Extra-provincial limited liability partnership of eligible profession may also register.

Limited partnerships operate such that limited partners’ liability is limited to investment contribution. General partner assumes remaining liability, unless limited partner has acted in control of business of limited partnership (R.S., c. P-3, § 64). General partner owes fiduciary duty to limited partners. Corporations can act as general partners.

Limited partnership is formed when business name is registered with Director of Corporations, Corporations Branch, 2nd Floor, 1871 Smith Street, Regina, SK, S4P 4W5. Declaration signed by all partners containing business name, nature of business and name and places of residence and other matters must be filed with application for registration (The Business Names Registration Act [R.S., c. B-11]).

Non-exclusive list of deemed business activities: having listed phone number; agent or representative or office or warehouse in Saskatchewan; or owning land in Saskatchewan. No extra-provincial limited partnership may carry on business in Saskatchewan, unless registered under The Business Names Registrations Act (R.S., c. P-3, § 75.1). Unless registered, firm cannot bring or maintain action pertaining to business within Saskatchewan (R.S., c. P-3, § 75.3). Once registered, limited partnership can commence actions regarding matters occurring prior to

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registration (R.S., c. P-3, § 75.3). Laws of jurisdiction pursuant to which extra-provincial limited partnership is formed govern its formation, internal affairs and limited liability of limited partners (R.S., c. P-3, § 75.2).

2.08 PROFESSIONAL CORPORATIONS:

One or more members of designated professional associations may incorporate corporation, pursuant to The Business Corporations Act, to carry on business of providing professional services in name of corporation. In addition to incorporation pursuant to The Business Corporations Act, permit from governing association is required. Words “Professional Corporation” or “Prof. Corp.” or “P.C.” (§ 4) must be part of name and name must appropriately depict professional services provided by corporation. Only member of association may own voting shares and there are restrictions on ownership of nonvoting shares. All directors must be members. Member’s liability to persons receiving services from member is not affected by incorporation, and member remains subject to profession’s governing legislation and bylaws (The Professional Corporations Act [2001, c. P-27.1]).

3 BUSINESS REGULATION AND COMMERCE

3.01 BANKS AND BANKING:

See Canada Law Digest.

3.02 BILLS AND NOTES:

See Canada Law Digest.

3.03 BILLS OF LADING:

See topic 3.08 Carriers.

3.04 BILLS OF SALE:

See topic 3.25 Sales.

3.05 BLUE SKY LAW:

See topic 3.26 Securities.

3.06 BROKERS:

The Real Estate Act (1995, c. R-1.3) provides legislative framework for regulation of real estate salespersons and brokerages. All brokerages, brokers, branch managers and salespersons must be registered with Saskatchewan Real Estate Commission.

The current Mortgage Brokers Act (R.S., c. M-21) provides legislative framework for regulation of mortgage brokers who carry on business of lending money on security of land or of dealing in mortgages. Per recent announcement, The Mortgage Brokerages and Mortgage Administrators Act (the “New Act”) will be implemented on 1 October 2010. The current legislation will be repealed effective 30 September 2010.

Brokers must be registered pursuant to The Securities Act 1988 (1988-89, c. S-42.2), and are subject to audit and investigation by Saskatchewan Financial Services Commission Securities Division, as well as other controls on their activities (1988-89, c. S-42.2, § 20[1]). Insurance brokers must be licenced pursuant to The Saskatchewan Insurance Act (R.S., c. S-26), and must give bond in cities and in towns. See also topic 3.26 Securities.

3.07 BULK SALES:

See category 8 Debtor and Creditor, topic 8.12 Fraudulent Sales and Conveyances.

3.08 CARRIERS:

Generally, railways and carriers are under the jurisdiction of Canadian Transport Commission. Purely provincial railways are governed by Saskatchewan law as governed by The Railway Act (1989-90, c. R-1.2). Dominion pipelines and provincial pipelines extending beyond province are also governed by Dominion statute and by regulation of National Energy Board at Ottawa. Purely provincial pipelines are governed by Saskatchewan law as contained in The Pipelines Act 1998 (1998, c. P-12.1).

Liens.

Carrier has lien on goods for freight, storage demurrage and terminal charges and expenses necessary for preservation of goods. Provision is made for sale of goods on non-payment of charges.

Motor Vehicle Carriers.

See category 23 Transportation, topic 23.03 Motor Vehicles.

3.09 COLLECTION AGENCIES:

See topic 3.20 Licences, Business and Professional.

3.10 COMMERCIAL LIENS:

The Commercial Liens Act (2001, c. C-15.1) repealed The Garage Keepers Act, The Mechanics Lien Act, The Warehousemen's Lien Act and The Hotel Keepers Act.

Person has lien on goods for services that he or she has provided in relation to those goods if, at time request was made or services were provided, services were requested by person: (a) with interest in goods; (b) in possession of goods; or (c) legally entitled to possession of goods.

Lien secures amount that person who requested services agreed to pay for services or if no amount is agreed on, then lien secures fair value of services provided. Lien attaches to goods on commencement of services giving rise to lien and secures fair value of services provided. Lien remains enforceable only where goods are in possession of lien claimant or where goods are returned by person requesting services has authorised services or acknowledged obligation to pay for services giving rise to lien in signed writing that includes description of goods that are subject to lien. Lien pursuant to this Act can be perfected by maintaining possession of goods or by registering financing statement in Personal Property Registry. Priority of lien in those circumstances will be determined by date of registration, although lien claimant is provided grace period for registration of 15 days after returning control of goods to person requesting services.

Generally, this Act provides for summary process before Court of Queen's Bench for parties that do not agree with amount or nature of claimed lien. It also largely adopts enforcement procedures of The Personal Property Security Act (1993, c. P-6.2).

3.11 CONDITIONAL SALES:

See category 20 Mortgages, topic 20.04 Personal Property Security.

3.12 CONSIGNMENTS:

See topic 3.16 Factors.

3.13 CONSUMER AFFAIRS:

See topic 3.25 Sales.

3.14 CONSUMER PROTECTION:

Under The Consumer Protection Act (1996, c. C-30.1), promise, representation, affirmation of fact or expression of opinion that can reasonably be interpreted by consumers as promise relating to quality, condition, performance or efficacy, made verbally, in writing or through advertising deemed express warranty if it would usually induce reasonable consumer to buy product whether or not consumer actually relies on it (§ 45).

There are new rules regarding prepaid purchase cards. These provisions require that prepaid purchase cards (including gift cards) not have expiry date and that no additional fees be charged by seller of such cards. Any part of agreement that claims to waive protection of Act is deemed null and void. Government also granted investigatory powers related to prepaid cards such that they can request documents from seller and investigate claims.

Following types of contracts are regulated under Act: Future Performance Contracts—contracts where delivery of goods or services or payment for goods or services is not completely made when parties enter into contract; Personal Development Services Contracts—contracts for services related to health, fitness, dieting, modelling, talent, martial arts, sports, dancing or similar activities and other prescribed services for which payment in advance is required; Travel Club Contracts—contracts where consumer, through membership in travel club, acquires right to discounts or other benefits on purchase of transportation, accommodation or other services related to travel; Remote Contracts—contracts where consumer and supplier are not present together (e.g. distance contracts concluded by phone, fax or mail).

Statutory warranties in retail sales include that: retailer has right to sell products; product is free from encumbrances; product corresponds with description or sample (if sale by description or sample); product is of acceptable quality; product is fit for purpose if consumer makes known to seller any particular purpose for which product being bought; and product and its components are reasonably durable and spare parts and repair facilities are reasonably available for reasonable length of time after sale. All above warranties, except retailer’s right to sell, also deemed given by manufacturer (§§ 48, 50).

If seller is in breach of warranty, seller must make good breach free of charge if breach is remedial. If breach is substantial, consumer has option to have breach remedied by seller or reject product and recover purchase price. There can be no contracting out of Act (§ 32). Parol evidence admissible in consumer action to establish express warranty even if it modifies written contract (§ 37).

Notwithstanding lack of privity, consumer has action against manufacturer, who is deemed to have given same statutory warranties as seller. Lack of privity also no bar for subsequent buyers or giftees in relation to both statutory warranties and unfair practices (1996, c. C-30.1, §§ 8, 41).

Act also prescribes number of activities as constituting “unfair practices” by suppliers and provides Director with power to take remedial action on behalf of vulnerable consumers. Unfair practices are characterised by supplier taking advantage of consumer’s lack of understanding of transaction (1996, c. C-30.1, § 5).

No “Plain Language” statute.

See topic 3.25 Sales.

3.15 CONTRACTS:

Distributorships, Dealerships and Franchises.

No special legislation.

3.16 FACTORS:

(The Factors Act [R.S., c. F-1]).

Where mercantile agent is, with consent of owner, in possession of goods or of documents of title to goods, any sale, pledge or other disposition of goods made by him or her to any person in good faith when acting in ordinary course of business of mercantile agent is as valid as if he or she were expressly authorised by owner of goods to make same, and where person having sold goods continues in possession of goods or documents of title thereto, delivery or transfer by that person, or by mercantile agent acting for him or her, of goods or documents of title under any sale, etc. to any person receiving same in good faith and without notice of previous sale is of same effect as if person making delivery or transfer were expressly authorised by owner of goods to make sale (The Factors Act [R.S., c. F-1, §§ 3, 10]). This does not apply to consignments covered by The Personal Property Security Act 1993, but it applies to sellers remaining in possession of goods and any mercantile agent acting on behalf of such seller. Registration of buyer's interest under The Personal Property Security Act 1993 prevents seller in possession from passing good title (§ 6.1). See also topic 3.06 Brokers.

Liens.

If owner gives possession of goods to another person for sale or on consignment, or has shipped goods, in name of another person and consignee is unaware that the person is not owner of goods, consignee has same lien on goods as if person were owner and may transfer lien to another person (The Factors Act, R.S., c. F-1, § 8).

Consignments.

Where the owner of goods delivers to another for consignment or sale or has shipped in the name of another, the consignee, not having had notice of the real owner's interest, has a lien upon the goods to the extent of any advances made to the nominal consignor and may transfer such lien (§ 8).

Agricultural Machinery.

Special Act deals with sale or lease of agricultural machinery, particularly large implements, and provides for filing of list of implements with full particulars thereof and prices and repairs with Minister of Agriculture, with forms of contract. This applies only to manufacturers, distributors and dealers (The Agricultural Implements Act [R.S., c. A-10]).

3.17 FRAUDS, STATUTE OF:

The Imperial Statute of Fraud is in force in Saskatchewan. Fourth section is as follows:

> "No action shall be brought whereby to charge any executor or administrator upon any special promise to answer damages out of his own estate; or whereby to charge the defendant upon any special promise to answer for the debt, default, or miscarriage of another person; or to charge any person upon any agreement made in consideration of marriage; or upon any contract or sale of lands, tenements or hereditaments, or any interest in or concerning them; or upon any agreement that is not to be performed within the space of one year from the making thereof; unless the agreement upon which action shall be brought, or some memorandum, or note thereof, shall be in writing and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorized."

Sales of Goods.

The 17th section is practically reenacted in The Sale of Goods Act (R.S., c. S-1). See topic 3.25 Sales.

3.18 INFORMATION TECHNOLOGY, INTERNET AND NEW MEDIA:

For copyright, patent and trade mark matters, see Canada Law Digest.

For personal information protection, see Canada Law Digest.

For electronic documents legislation applicable to federal laws, see Canada Law Digest, category Business Regulation and Commerce, topic Information Technology, Internet and New Media, subhead Electronic Documents.

The Electronic Information and Documents Act 2000 (2000, c. E-7.22) (“EIDA”) is electronic documents and information legislation applicable to laws of province of Saskatchewan (subject to certain exceptions). EIDA is largely based on Uniform Electronic Commerce Act model legislation endorsed by Uniform Law Conference of Canada.

EIDA sets out certain “functional equivalency” rules intended to give electronic documents and information same legal standing as paper-based documents under provincial laws. EIDA also addresses certain laws relevant to e-commerce. These include provisions dealing with validity of electronic signatures, formation of contracts electronically, use of “electronic agents” in electronic transactions and presumptive rules respecting sending and receiving of electronic documents.

EIDA also contains “functional equivalency” rules related to carriage of goods and provisions respecting electronic filing of information with Government of Saskatchewan.

The Evidence Act (2006, c. E-11.2) §§ 54–57 address certain evidentiary issues related to electronic documents and information. These sections address authentication of electronic records and application of Best Evidence Rule in context of electronic documents.

3.19 INTEREST:

Interest is governed by Federal Law (see Canada Law Digest) but ordinarily is matter of contract. Under The Unconscionable Transactions Relief Act (R.S., c. U-1, § 3), debtor is entitled to ask court to reopen or set aside transaction in which, having regard to circumstances at time loan was made, cost of loan was excessive or transaction was harsh and unconscionable.

The Cost of Credit Disclosure Act 2002 (2002, c. C-41.01, § 7), requires lenders to provide debtor with clear statement in writing showing particulars of cost of borrowing.

Judgments.

The Pre-judgment Interest Act (1984-85-86, c. P-22.2) permits interest before judgment on certain causes of action arising after 1 January 1986.

3.20 LICENCES, BUSINESS AND PROFESSIONAL:

Various persons are required to obtain licences, such as peddlers, petty chapmen and various other classes of persons under municipal regulation. Auctioneers, liquor vendors, operators of gaming establishments, electrical contractors and journeymen, agricultural implement dealers, collection agents, dairy manufacturers, motor dealers, ophthalmic dispensers, embalmers, seed cleaners and plumbing contractors are some trades or callings that are required to be licenced, and in many cases bonded, under statutes governing each such trade. As to insurance, investment, real estate and mortgage brokers, see topic 3.06 Brokers.

In most cases, direct (door-to-door) sellers are required to obtain both provincial and municipal licences (The Direct Sellers Act [R.S., c. D-28]).

Any business that depends upon training others in any activity or skill for fee must be licenced under The Sale of Training Courses Act (R.S., c. S-3). The Consumer Protection Amendment Act 2006 (2006, c. 15), now in force, repeals The Sale of Training Courses Act will be repealed.

Direct Sellers.

Persons going from door to door offering goods for sale or soliciting orders are required to be licenced. Registrar has power to grant, suspend or cancel licences. Licence is valid for period of one year. Persons may be required to post bond (The Direct Sellers Act [R.S., c. D-28] §§ 4, 5, 16, 19). See topic 3.25 Sales.

Credit reporting agencies must be licenced under The Credit Reporting Act (2004, c. C-43.2). Licence is valid for one year; unless renewed or cancelled, it expires on date stated on licence. Registrar has broad power of issuance and suspension. Credit reporting agency cannot divulge contents of file or furnish credit report to anyone other than to person requiring information to make decision on consumer’s application for credit, insurance, employment or tenancy, any agency of government or police officer or consumer who is subject of credit report (§§ 16–18). Certain items cannot be contained in credit report: bankruptcy which occurred more than six years prior to making of report unless person was bankrupt more than once (§ 18); information regarding writs issued more than 12 months prior to making of credit report if status of present action is not ascertained; information regarding writs, judgments or debts which are statute-barred; and any other information more than six years old unless voluntarily given by consumer. Credit reporting agency must take reasonable steps to ensure accuracy of its information. Credit reporting agency must, upon request of consumer, disclose nature and substance of all information in his or her file respecting consumer, but it need not disclose source of investigative information.

Collection agencies must be licenced by province and bonded (The Collection Agents Act [R.S., c. C-15]).

Fund-raising businesses soliciting contributions, for remuneration, on behalf of Income Tax Act (Canada) “registered charity” must obtain licence under, and comply with, The Charitable Fund-raising Businesses Act (2002, c. C-6.2).

Real Estate.

Brokerages, brokers and salespersons must be registered by Real Estate Commission and brokers and salespersons must complete prescribed educational requirements and be bonded (The Real Estate Act [1995, c. R-1.3]).

3.21 LIQUOR AND GAMING:

Sale, manufacture and importation of liquor is controlled entirely by Province, which operates liquor stores and grants licences for various types of outlets. Minors are not admitted to any of these outlets. There are statutory restrictions as to where liquor may be consumed (The Alcohol and Gaming Regulation Act 1997 [1997, c. A-18.011]). The Alcohol and Gaming Regulation Act 1997 also governs operation of lotteries, horse racing and gaming establishments.

3.22 MONOPOLIES, RESTRAINT OF TRADE AND COMPETITION:

See Canada Law Digest.

3.23 NEGOTIABLE INSTRUMENTS:

See Canada Law Digest, category Business Regulation and Commerce, topic Bills and Notes.

3.24 RESTRAINT OF TRADE:

See Canada Law Digest, category Business Regulation and Commerce, topic Monopolies, Restraint of Trade and Competition.

3.25 SALES:

The law relating to the sale of goods is codified in The Sale of Goods Act under which contracts for purchase of goods require part acceptance, part payment or writing to be enforceable by action. All other contracts are governed by common law as modified by statute (R.S., c. S-1, §§ 6, 58).

Bills of sale no longer required to be registered but interest of purchaser must be registered pursuant to The Personal Property Security Act 1993 (1993, c. P-6.2) to prevent vendor left in possession of goods from conveying clear title to third parties.

Product Liability.

See topic 3.14 Consumer Protection.

Retail Credit Sales.

Every lender of money or seller of goods or services on credit must provide to borrower or purchaser clear statement in writing showing actual sum borrowed or cash price, plus official fees and insurance fees, amount of down-payment or trade-in, if any, cash difference, cost of borrowing expressed in cash and as annual percentage; in default, cost of borrowing is not recoverable from buyer as borrower. Similar disclosure must be made in advertisements (The Cost of Credit Disclosure Act 2002 [2002, c. C-41.01] § 7).

Credit Cards.

Recipients of unsolicited credit cards or goods have no legal obligation to sender unless recipient expressly acknowledges in writing his or her intention to accept them (The Consumer Protection Act [1996, c. C-30.1]).

Conditional Sales.

See category 20 Mortgages, topic 20.04 Personal Property Security.

Sales of Farm Implements.

Every contract made by manufacturer or dealer for sale or lease of any new farm implement or machine (except to persons carrying on “implement business”) is governed by The Agricultural Implements Act (R.S., c. A-10, §§ 3, 4). Sales contract must be in writing (R.S., c. A-10, § 35). Act sets various statutory warranties regarding fitness, durability and repair obligations (R.S., c. A-10, § 36). Dealers and distributors must provide emergency parts and services within 72 hours for breakdowns, during season of use, for ten-year period after purchase (R.S., c. A-10, § 33). For losses due to breach of warranty or delay in repairs, purchaser may sue in court or seek award by tribunal out of statutory fund. Dealer is required to furnish to government lists of implements and parts carried and prices (R.S., c. A-10, § 29).

In case of repossession, provision is made for arbitration to fix value should vendor and purchaser disagree. Certain restrictions are imposed on vendor’s right to repossess. Implement dealer who assigns security interest remains agent of financial institution (assignee) for purpose of receiving payment from buyer until notice of assignment given to buyer. Notice to be sent separately from security agreement. If financial institution accepts payment from dealer, dealer is agent until financial institution sends new notice to buyer (R.S., c. A-10, § 43.1).

Consumer Affairs.

Department of Consumer and Commercial Affairs has general supervision of all consumer and commercial affairs. It can enter into inquiries as to consumer and commercial affairs legislation in Canada and make recommendations for changes in Saskatchewan's consumer and commercial affairs legislation. It can investigate complaints respecting contraventions of consumer and commercial affairs legislation or respecting practices which are contrary to interests of consumers. Minister may, where in his or her opinion it is in public interest, order person to cease using particular form of advertisement which is in contravention of The Cost of Credit Disclosure Act 2002, using particular form of contract in selling of goods or services and selling or distributing any goods in any business undertaking. Such order expires within five days after its making. Minister can apply to Court of Queen's Bench to have order extended past five days (The Consumer and Commercial Affairs Act [R.S., c. C-29.2] §§ 5, 8).

Bulk Sales.

See category 8 Debtor and Creditor, topic 8.12 Fraudulent Sales and Conveyances.

Closing-Out Sales.

Where municipality has passed general bylaw to that effect, no closing-out sale (e.g. bankruptcy, insolvency, assignee's, trustee's, executor's, jobber's, fire, smoke, water, etc.) can be advertised or conducted unless licenced by inspector to whom is furnished full particulars showing details and bona fides of sale (§ 5). Period of sale must be not less than 30 days, nor more than 90 days and only one licence can be issued to any one person in period of 12 months. Only regular stock-in-trade can be sold at such sale (The Closing-out Sales Act [R.S., c. C-13] §§ 9, 11).

Door-to-Door Sales.

Where sale is made at person's home, by direct seller, buyer has ten days within which to rescind contract, or if goods are not delivered within 120 days, he or she can rescind. Buyer is entitled to true copy of sales contract at time of execution (The Direct Sellers Act [R.S., c. D-28]). See topic 3.20 Licences, Business and Professional.

Pawned Property.

The Pawned Property (Recording) Act (2003, c. P-4.2) requires pawnbrokers, once municipality has implemented system, to obtain and record pawning property and property being pawned before goods are accepted and transaction can be completed (§ 7).

3.26 SECURITIES:

Supervision.

Powers under The Securities Act 1988 (in this section referred to as "Act") are exercised by the Saskatchewan Financial Services Commission (SFSC) (The Securities Act 1988 [1988-89, c. S-42.2] § 2[1][e]).

Securities to Which Act Applies.

Term "security" has broad definition covering many types of documents other than those ordinarily known as securities (§ 2[1][ss]). It includes oil and gas leases such that mineral lease brokers buying and selling oil and gas leases must register under Act.

Dealer Registration Requirement.

No person or company shall act as a dealer, underwriter, adviser or investment fund manager unless such person or company is registered under Act (§ 27) or unless exemption from dealer registration requirement is available. SFSC has wide discretion in deciding whether application for registration should be granted, restricted or denied (§ 28).

Prospectus Requirement.

No person or company shall make “distribution” (distribution includes any trade in security of issuer that has not been previously issued) to public of security unless preliminary prospectus and final prospectus have been filed with SFSC and receipts for both documents have been obtained from SFSC (§ 58) or unless exemption from prospectus requirement is available.

Exemptions in Saskatchewan from dealer registration requirement, prospectus requirement or both are provided under National Instrument 45-106—Prospectus and Registration Exemptions, which has been adopted by Canadian Securities Administrators, organisation made up of Canadian securities regulators, which includes SFSC.

Takeover Bids.

Any offer to acquire securities or solicitation of an offer to sell securities of class from any person or company in Saskatchewan that will give offeror or solicitor 20% or more of outstanding securities of that class at date of offer or solicitation is a takeover bid (§ 98[1][j]). If no exemptions are available under § 102 and discretionary exemption is unavailable, then takeover bid circular in required form must be distributed to all holders of securities of that class (§ 104[2]).

Misrepresentations.

Act provides for civil liability in certain circumstances for misrepresentations made in prospectus (§ 137), misrepresentations made in advertisement disseminated in connection with trade in security (§ 138.1), verbal misrepresentations made to prospective purchaser of security (§ 138.2) and misrepresentations made in takeover bid circular (§ 139).

The Personal Property Security Act 1993 (1993, c. P-6.2) provides for registration of debentures, trust deeds and the like. See category 20 Mortgages, topic 20.04 Personal Property Security.

Transfers.

The Securities Transfer Act (2007, c. S-42.3) is commercial property transfer legislation that governs transfer and holding of interests in securities; it does not govern securities regulatory law that deals with registration, prospectus and disclosure requirements and other matters relating to securities markets more generally. The Securities Transfer Act clarifies what constitutes ownership in context of book-based holding system. It also modifies requirements governing perfection of security interest in security (whether security is that of public issuer or private company, corporate or non-corporate).

3.27 STATUTE OF FRAUDS:

See topic 3.17 Frauds, Statute of.

3.28 TRANSIENT TRADERS:

See topic 3.20 Licences, Business and Professional.

3.29 WAREHOUSEMEN:

Grain elevators, etc. are regulated by Canada Grain Act. See topic 3.10 Commercial

Liens.

4 CITIZENSHIP

4.01 ALIENS:

See category 15 Immigration, topic 15.01 Aliens.

4.02 CIVIL RIGHTS:

Saskatchewan "Bill of Rights" guarantees to every person right to freedom of conscience and religion, freedom of expression and association, as well as freedom from arbitrary arrest or detention (The Saskatchewan Human Rights Code [1979, c. S-24.1], §§ 4–8). Bill also guarantees right to vote for Legislative Assembly at least every five years. Person whose rights have been violated can file complaint potentially resulting in order by Saskatchewan Human Rights Tribunal that victim be compensated up to $10,000 for injury to feelings, as well as compensation for any other losses that have resulted from denial of right. Denial of these rights can also result in summary conviction offence, with maximum fine of $2,000 for first offence and $3,000 for subsequent offences (§ 35).

Under The Ombudsman and Children's Advocate Act (R.S., c. O-4), ombudsman has power to investigate acts or omissions of government or government agent, in matter of administration, which harm persons in their personal capacity. Ombudsman may undertake investigation, upon written complaint or by own motion (§ 12). Ombudsman cannot investigate any legislative, executive or judicial decisions (§ 15). Ombudsman has broad powers to conduct hearings, issue summons and require disclosure of documents.

Children's Advocate has broad powers to investigate matters concerning children receiving government services and public education. Failure to comply with lawful order of ombudsman or Children's Advocate is summary offence with maximum fine of $500 and maximum imprisonment of three months (§ 32).

The Victims of Domestic Violence Act (1994, c. V-6.02) provides victim of domestic violence with right to apply to court for relief including compensation, exclusive possession or use of residence or other property and restraining orders.

5 CIVIL ACTIONS AND PROCEDURE

5.01 ACCORD AND SATISFACTION:

The part performance of an obligation, either before or after a breach thereof when expressly accepted by the creditor in satisfaction or rendered in pursuance of an agreement for that purpose, though without any new consideration, will extinguish the obligation (The Queen's Bench Act 1998 [1998, c. Q-1.01] § 64).

5.02 ACTIONS:

Equity.

There is concurrent administration of law and equity. In cases of conflict, rules of equity prevail (1998, c. Q-1.01, § 52).

Forms of Action.

There is only one form of civil action, formal distinctions between actions at law and suits in equity having been abolished.

Conditions Precedent.

In actions against cities, towns or villages for damages arising out of non-repair of highways, notice of claim must be given within 30 days and action brought within one year. (See, e.g., The Municipalities Act [2005, c. M-36.1] § 344.) In certain other cases, action must be commenced within statutory period.

Commencement.

Except as noted otherwise, all actions are commenced by issue of statement of claim (R.C. 13). Following applications may be commenced by originating notice: construction of documents; appointment of new trustee; vesting order; applications by executors or others interested in estates for determination of many questions involving the estate (R.C. 452). See topics 5.16 Pleading; 5.18 Process.

Joinder and Severance.

The plaintiff may join in the same action several causes of action, and actions may be consolidated in the discretion of the court. Separate trials may be ordered by the court should it appear more convenient. An action for the recovery of land may not have any other joined with it unless by leave or it is of a similar nature. Motion for judgment on pleadings may be made and judgment may be entered for amount admitted due and trial proceed as to balance. On setoff, judgment may be entered for any amount so allowed and cause continued as to remainder. On payment into court of any money admitted to be due by defendant, plaintiff may accept it as satisfaction in full or in part and continue as to remainder.

Parties.

Plaintiff may join in same action several defendants, when claims arise out of same transaction or occurrence; when common question of fact or law exists; or when convenient, in discretion of court. Action will not be defeated for misjoinder or non-joinder of person. Court may, at any stage, order joinder of person who ought to be joined or whose presence is necessary. Persons claiming interest in action may apply to be added (R.C. 37, 38, 39).

Class Actions.

The Class Actions Act (2001, c. C-12.01) allows commencement of action by one person, referred to as “representative plaintiff”, on behalf of that person and others who have similar rights of action, against one or more defendants. Representative plaintiff must be Saskatchewan resident (2001, c. C-12.01, § 4). If court determines that Saskatchewan is appropriate venue, court can certify action as multi-jurisdictional class action binding nonresidents unless they opt out of the action.

Before action can be constituted as class action, it must be certified as such by court. However, if criteria set out in The Class Actions Act are met, court is required to certify action as class action (2001, c. C-12.01, § 6). Before action can be certified as class action, court must be satisfied that: (a) Statement of Claim discloses cause of action; (b) there is identifiable class (that is to say, there are other persons in same situation as representative plaintiff); (c) claims of class members raise common issues, whether or not common issues predominate over issues affecting class members; (d) class action would be preferable procedure for resolution of common issues; (e) there is person willing to be appointed as representative plaintiff who: (i) would fairly and adequately represent interests of class, (ii) has produced plan for class action that sets out workable method of advancing action on behalf of class and of notifying class members of action and (iii) does not have, on common issues, interest that is in conflict with interests of other class members.

If it is preferable for class members that action be certified as multi-jurisdictional class action, then court may certify it as such. Once certified as multi-jurisdictional class action, court can: (a) divide class into resident and nonresident subclasses; (b) appoint separate representative plaintiff for each subclass; and (c) specify manner and time within which members of each subclass may opt out of action.

Defendant faced with two or more similar claims may seek to certify actions as class action (2001, c. C-12.01, § 5).

Once class action has been certified, class members may opt out of action in manner and within time period specified in certification order (2001, c. C-12.01, § 18). Judgment on common issues certified by court bind all class members who have not opted out of action (2001, c. C-12.01, § 28).

Once certified as class action, conduct of action, including discontinuance or settlement, is under direct supervision of management judge (2001, c. C-12.01, §§ 14, 38). Parties to class action have same discovery rights as in any other action (2001, c. C-12.01, § 19).

Once all common issues have been determined, if there are individual issues that need to be decided in order to determine liability, court may determine those issues in further hearings presided over by judge who determined common issues or by another judge of court; appoint one or more persons (including expert) to conduct inquiry; or, with consent of parties, direct that remaining issues be determined in any other manner (2001, c. C-12.01, § 29).

The Class Actions Act is purely procedural, that is, it does not give rise to new rights to sue. Defendant to class action has all defences that would be available to it if defendant was sued by one person alone.

Appearance.

Defendant who intends to defend shall serve and file statement of defence. Ordinary time for service and filing of statement of defence is 20 days; if out of Saskatchewan but within Canada or U.S., 30 days; if elsewhere, 40 days (R.C. 100).

Third-Party Practice.

Defendant may claim against third party when third party may be liable for part of plaintiff's claim; may be liable for other relief; or should be bound by determination of issue (R.C. 107).

Interpleader available when applicant claims no interest in subject matter of dispute and is willing to transfer subject matter to court (R.C. 411).

Stay of Proceedings.

The court has power to stay either generally or so far as may be necessary for the purposes of justice. A stay may be granted where the action is frivolous or vexatious; if the costs of a former action in which the cause of action was substantially the same have not been paid (R.C. 199); pending decision of point of law; where partner plaintiffs do not comply with demand for names and places of residence of persons constituting firm; where solicitor whose name is endorsed on statement of claim declares that it was not issued by him or her.

Abatement will not be caused by marriage, death or insolvency of any of the parties. Between verdict and judgment, it does not result in a stay of proceedings whether cause of action survives or not. Where defendants are liable jointly, only the cause of action survives against surviving defendants, if any, and personal representative of deceased defendant cannot be added.

Limitation of.

See topic 5.14 Limitation of Actions.

Direct Actions Against Insurer.

See category 23 Transportation, topic 23.03 Motor Vehicles, subhead Direct Actions.

Actions Respecting Land.

An action for foreclosure of a mortgage or cancellation of an agreement for sale respecting land cannot be commenced without leave of Court of Queen's Bench, on special application therefor, unless mortgagor is corporation which has waived necessity of application (The Land Contract [Actions] Act [R.S., c. L-3, § 3]). Application for appointment for hearing of application for leave must be preceded by 30 clear days written notice to Provincial Mediation Board of intention to do so. Fifteen days notice of appointment must be given to mortgagor or purchaser. Judge has wide discretion on application for leave. Application is pursuant to The Land Contract (Actions) Act. Mortgages given after 1 October 1975 to secure loan under Federal Business Development Bank Act are exempt from above provisions. Corporate body which is mortgagee or purchaser under agreement for sale of land may contract out of above mentioned provisions (§ 7).

Actions for foreclosure of mortgage or cancellation of agreement for sale for farm land or proceedings to execute against farm land under writ of execution are governed by separate Act, The Saskatchewan Farm Security Act (1988-89, c. S-17.1). Notices must be served on debtor farmer under Act (and generally under Federal Acts, Bankruptcy and Insolvency Act [R.S.C. 1985, c. B-3], Farm Debt Mediation Act [S.C. 1997, c. 21]). Mediation process administered by Farm Land Security Board then proceeds. Upon report by Board to court, plaintiff must seek leave of court to proceed with action or execution.

See categories 8 Debtor and Creditor, topic 8.19 Moratorium; 20 Mortgages, topic 20.03 Mortgages, subhead Foreclosure.

Provincial Mediation Board Act (R.S., c. P-33) established Provincial Mediation Board, which on written request of debtor or creditor, endeavours to bring about amicable arrangement. Under § 7, Board has wide powers to modify sales of real property under The Tax Enforcement Act (R.S., c. T-2).

5.03 APPEAL AND ERROR:

Appeals from Court of Queen's Bench are to Court of Appeal. Notice of appeal from interlocutory orders must be given within 15 days; in other cases, within 30 days. Procedure of Court of Appeal is governed by Court of Appeal Rules. Appeal lies from Court of Appeal to Supreme Court of Canada in Ottawa, with the grant of leave. Any such appeal is limited to review. In Court of Appeal, standard of review in relation to questions of fact is palpable and overriding error. Standard of review in relation to most questions of law is correctness.

Appeals from summary conviction offences (both Criminal Code and quasi-criminal offences) are heard in Court of Queen's Bench. Appeals from indictable offences are taken in Court of Appeal. (See Canada Law Digest.)

Leave to Appeal.

Except for interlocutory orders, appeals are as of right; leave is not generally required except in appeals to Supreme Court of Canada. In latter case, leave will only be given if question involved is one of public importance or amount involved is large and decision doubtful.

Generally, leave to appeal interlocutory orders is required, except for matters involving following: liberty of individual; custody of minor; injunctions; receivers; matrimonial decree nisi (The Court of Appeal Act 2000 [2000, c. C-42.1] § 8; Supreme Court of Judicature Act 1873, as amended, 1894).

Stay of Proceedings.

Execution of judgments or orders for mandamus, injunctions and alimony or maintenance for child or spouse are not stayed on appeal unless stay ordered by Judge. Executions are stayed in all other cases unless ordered otherwise by Judge of Court of Appeal.

Appeal Bond.

No bond is required except on appeal to Supreme Court of Canada but otherwise security for costs of an appeal may be ordered on ground of appellant's poverty and that his or her appeal is unlikely to succeed.

5.04 CERTIORARI:

Order in nature of certiorari issues out of Court of Queen's Bench or Court of Appeal (R.C. 664). Application must be made without undue delay. Application for certiorari is directed to judge or other officer of inferior court of record, or to persons or bodies who are by statute or charter entrusted with judicial functions out of ordinary course of legal procedure, but within general scope of common law. Grounds and extent of inquiry are generally as at common law. Application for certiorari may be made available or be taken away by statute. Generally certiorari does not lie as substitute for appeal.

Applicant must give security for costs, unless court orders otherwise.

5.05 CHARITABLE IMMUNITY:

See topic 5.07 Damages.

5.06 COSTS:

Costs of court proceedings are set out in tariff under Rules of Court. Unless otherwise specified in statute or regulation, awards and amounts of costs are ultimately at court's discretion (R.C. 545). Successful party in motion or action usually gets costs (R.C. 552, 553). Generally, no costs awardable in class actions (2001, c. C-12.01). Unless otherwise specified in statute or regulation, court has discretion to order security for costs against any party, including party resident in Saskatchewan (R.C. 537), on application of any party (R.C. 541). If court finds that lawyer's misconduct caused waste or improper incurring of costs, then, after giving such lawyer opportunity to be heard, court is free to order lawyer to indemnify own client for costs awarded against client, or order lawyer to pay costs directly (R.C. 550).

5.07 DAMAGES:

Common law generally prevails. In damages for negligence, The Contributory Negligence Act (R.S., c. C-31) applies. Doctrine of charitable immunity is not recognised in Saskatchewan.

Where contract does not contain provisions for consequences of frustration and contract is frustrated, parties are relieved from their accrued obligations, liable for consequential losses, entitled to restitution of benefits and may have lost expenses apportioned (The Frustrated Contracts Act [1994, c. F-22.2] §§ 3–6).

Privacy.

Violation of privacy of another person is tort actionable without proof of damage (The Privacy Act [R.S., c. P-24]).

Sovereign Immunity.

Statutes do not apply to Crown, including damages for statutory breach, unless explicitly provided for (The Interpretation Act 1995 [1995, c. I-11.2] § 14). However, many statutes contain specific provision that Crown is not immune.

See also category 13 Estates and Trusts, topic 13.05 Death, subhead Actions for Death.

5.08 DECLARATORY JUDGMENTS:

See topic 5.13 Judgments.

5.09 DEPOSITIONS AND DISCOVERY:

For Use Within Province.

Depositions under oath called “examinations for discovery” are available as of right in Court of Queen’s Bench actions against adverse parties (except proceedings under simplified procedure) (R.C. Pt. 21). Examination for discovery of corporation is through examination of proper officer of corporation (R.C. 223). Examination for discovery of servant of corporation also available, but such testimony does not bind corporation. With that exception, examination for discovery testimony may be used in evidence at trial against examined party. Generally, there is no right to depose witnesses.

See topic 5.17 Practice, subhead Simplified Procedure.

Outside of Province for Use Within Province.

Depositions in any cause or matter pending in court may be taken out of province under commission. Application for same is made on motion before judge in chambers. Court may make any order for examination upon oath before any person at any place, of any witness or person and may empower any party to give such deposition in evidence therein, on such terms as court may direct (R.C. 289). Copy of pleadings or copy of documents necessary to inform examiner so appointed of questions at issue shall be furnished to him or her (R.C. 291). Examination takes place in presence of parties and their solicitors or agents or such of them as may think fit to attend. Witnesses are subject to cross-examination and reexamination (R.C. 292). Depositions may be taken in shorthand by commissioner, official court reporter or duly sworn shorthand writer, or in longhand in presence of examiner, and signed either by witness or examiner. If witness refuses to attend at examination or to be sworn or to answer any lawful question, court may issue warrant for immediate arrest of witness, to be brought before court or examiner (R.C. 296). In addition, court may order witness to pay any costs occasioned by his or her refusal (R.C. 297). When examination has been concluded, original deposition authenticated by signature of examiner shall be transmitted by him or her to local registrar of court, and shall be filed by him or her (R.C. 298). Depositions, taken in accordance with Rules, may be given in evidence at trial without proof of signature of person taking examination (R.C. 300).

To Perpetuate Testimony.

Any person claiming any property, interest or office in the future may commence proceedings to perpetuate material evidence and have such evidence taken under the direction of the court and filed with the court (R.C. 390).

Compelling Attendance of Witnesses.

Witness within province is required to attend examination, without order. Order enforcing attendance may be obtained on application to court. If notice of examination is by way of subpoena, failure to attend can result in order for arrest and deliverance for examination (R.C. 296).

Commission or Letters Rogatory.

Upon application to judge in chambers by person duly authorised by foreign tribunal showing that such tribunal desires to obtain testimony of any person within jurisdiction respecting any civil, commercial or criminal matter, order may be obtained giving effect to such request (The Evidence Act [2006, c. E-11.2], § 65).

5.10 EQUITY:

See topics 5.02 Actions; 5.17 Practice.

5.11 EVIDENCE:

Governed by The Evidence Act (2006, c. E-11.2). Provisions generally similar to Canada Evidence Act. (See Canada Law Digest, category Civil Actions and Procedure, topic Evidence.)

Witnesses.

Children under 14 or person whose mental capacity is challenged may testify under oath or solemn affirmation if court determines that person understands nature of oath or solemn affirmation and is able to communicate evidence. Where such person does not understand nature of oath or solemn affirmation but can communicate evidence, they may testify on promising to tell truth. Where such person does not understand nature of oath or solemn affirmation and is not able to communicate evidence, they cannot testify (§ 12). There is no disqualification by reason of interest or criminality. No witness shall be excused from answering any question on ground that his or her answer may tend to criminate him or her or establish civil liability. Where witness objects to answer on ground that his or her answer may tend to criminate him or her or establish civil liability, although he or she is compelled to answer, answer may not be used against him or her in other civil proceedings (§ 9). Answer also may not be used against witness in criminal proceeding, pursuant to authority of § 13 of The Canadian Charter of Rights and Freedoms.

Communications between solicitors and clients, certain state documents and communications between husband and wife are privileged (2006, c. E-11.2, § 7).

See also topic 5.09 Depositions and Discovery.

5.12 INJUNCTIONS:

An injunction order may be obtained in the Court of Queen’s Bench to prevent disposal of property, or the doing of any Act, in all cases in which it may appear to court just or convenient to make such order.

An interim injunction may be granted on such terms as may appear just to preserve the property or other matter in status quo, pending a final determination of the action.

An injunction order is not made where damages could be adequate remedy.

Bonds may be ordered. Usually the party applying, by his or her solicitor, undertakes to the court to abide by any order as to damages the court may make should the court thereafter be of the opinion that the defendant has sustained any by reason of the order.

5.13 JUDGMENTS:

A judgment, even if not proceeded on, is enforceable for ten years (R.C. 358). See also category 8 Debtor and Creditor, topic 8.09 Executions.

Canadian Judgments.

Most Canadian judgments can be registered with Court of Queen's Bench and enforced as if issued by that court (The Enforcement of Canadian Judgments Act 2002 [2002, c. E-9.1001]).

Declaratory Judgments.

No proceeding is open to objection on the ground that a merely declaratory judgment or order is sought thereby, and the court may make binding declarations of right whether or not any consequential relief is or can be claimed (The Queen's Bench Act 1998 [1998, c. Q-1.01] § 11).

Default Judgments.

When defendant does not file defence within time limits, plaintiff may note for default. When plaintiff's claim is for debt or liquidated demand, court may enter final judgment. In other cases, plaintiff may apply to court for judgment on ex parte basis (R.C. 113–127).

Liens.

In itself a judgment, generally, does not create any lien. An execution or some proceeding in the nature thereof must be taken to enforce the judgment.

Foreign Judgments.

Foreign judgments may be sued on as such. Jurisdiction of foreign court is admitted only if defendant was ordinarily resident in the country at commencement of the action, or was carrying on business when judgment was obtained, if judgment was obtained in Canada, or if the defendant submitted to the jurisdiction of the foreign court. The foreign court has no jurisdiction if the action involves title to land in Saskatchewan or is for damages in respect to land in Saskatchewan. If the foreign court had jurisdiction, its judgment is conclusive as to any matter adjudicated in the action. It is a sufficient defence to an action on a foreign judgment that the original court had no jurisdiction, that defendant was not served with process and did not appear, that the judgment is not final, that it was obtained by fraud, that it is not for a sum certain in money, that it is for payment of a penalty under the revenue laws of the foreign country or that it is in respect to a cause of action which for reasons of public policy would not have been entertained in Saskatchewan, or that the proceedings in which the judgment was obtained were contrary to natural justice. Foreign judgment can be enforced in Saskatchewan only within period provided by law of state of origin, or within ten years after day on which foreign judgment becomes enforceable in that state, whichever is earlier (The Enforcement of Foreign Judgments Act [2005, c. E-9.121]).

5.14 LIMITATION OF ACTIONS:

Primary legislation governing limitation period was The Limitations of Actions Act (R.S., c. L-15), which was repealed on 1 May 2005. As of 1 May 2005, The Limitations Act (2004, c. L-16.1) became law and has substantially and significantly changed law of limitations in Saskatchewan. In addition to repealing The Limitations of Actions Act, The Limitations Act made number of consequential amendments to existing Saskatchewan statutes that have established limitation period for specific proceedings in court. In most circumstances, The Limitations Act provides for standard two-year limitation period, with ultimate 15-year limitation period on most such proceedings. Act also establishes discoverability principles regarding determination of when person knew or ought to have known of existence of act or omission resulting in potential claim against another.

There is basic limitation period of two years for most types of claims. Two-year period begins to run on day on which claim is discovered (§ 5).

There is presumption that claim is discovered on date of act or omission, unless proven otherwise (§ 6).

No proceeding may be commenced after expiry of stipulated ultimate limitation period from date of act or omission, whether or not act or omission has been discovered: action for conversion of property, two years; act or omission causing or contributing to death, two years; action to enforce judgment or order of court, ten years; all other actions, 15 years (§§ 7–7.1).

Motor Vehicle Accidents.

See category 23 Transportation, topic 23.03 Motor Vehicles.

Claim against or on behalf of deceased person's estate may be brought within time for bringing of action (The Limitations Act [2004, c. L-16.1]).

Interruption of Statutory Period.

Written promise to pay or acknowledgement of debt to the creditor, or part payment on account by the debtor or his or her agent, interrupts the running of the statute and the period begins to run anew from time of such promise, acknowledgement or payment (The Limitations Act [2004, c. L-16.1] § 11).

Pleading.

Statute of limitations must be specially pleaded.

5.15 PARTITION:

Real Property.

Actions for partition may be brought only in Court of Queen's Bench. Court may either order partition or if partition is not proper remedy, then sale under court supervision (R.C. 428).

Personal Property.

When an equal division of goods and chattels cannot be made in kind among those entitled thereto, the court may direct the same sold and distribute the proceeds (R.C. 427–430).

5.16 PLEADING:

Every pleading must contain a statement in a summary form of the material facts on which the party relies for his or her claim or defence, as the case may be (R.C. 139).

As a rule, there are not more than two pleadings in any action, a statement of claim by the plaintiff and a statement of defence by the defendant. A defendant may set up a counterclaim, which is in the nature of a cross action and to this the plaintiff must deliver a special reply stating his or her answer to the counterclaim (R.C. 105).

Amendments of pleadings may be allowed at any stage of the action, by the court, on such terms as may be just, for the purpose of determining the real questions in controversy. Plaintiff may amend once without leave before replying or time therefor gone (R.C. 166).

Time Requirements.

Statement of claim expires after six months, unless served or renewed (R.C. 16).

Defendant must usually file and serve statement of defence within 20 days. See topic 5.02 Actions, Parties, for exceptions. Time for filing may be extended by court (R.C. 100). (See topic 5.02 Actions, subhead Appearance.)

5.17 PRACTICE:

Most of the law relating to practice is contained in The Queen's Bench Act 1998 (1998, c. Q-1.01) and in rules of court which have force of statute. Except as so modified, practice is governed by rules of common law. Law and equity are administered by court and in all cases of variance, rules of equity prevail.

Discovery.

Adverse parties have right to examinations for discovery in Court of Queen's Bench actions (except proceedings under simplified procedure) (R.C. Pt. 21). Examination for discovery of corporation is through examination of proper officer of corporation. Examination for discovery of servant of corporation also available, but such testimony does not bind corporation. With that exception, examination for discovery testimony may be used in evidence at trial against examined party.

Right to discover and inspect documents of adverse parties (R.C. Pt. 20). Parties must serve statement as to documents within ten days after statement of defence is filed (R.C. 212). All broadly relevant documents must be disclosed and produced, except for privileged documents which need only be disclosed.

Demand for Admission of Facts.

Any party may by notice before trial call upon any other party to admit any specific fact. Costs of proving unadmitted facts are awarded against party unreasonably refusing to admit (R.C. 244).

Direct Actions Against Insurer.

See category 23 Transportation, topic 23.03 Motor Vehicles, subhead Direct Actions.

Summary Judgments.

For claims of debt or liquidated demand, plaintiff may apply to court for leave to enter final judgment. Plaintiff must establish that there is no defence on merits (R.C. 129–135).

Simplified Procedure.

For claims for $50,000 or less (exclusive of interest and costs) or for property with fair market value of $50,000 or less, simplified procedure under Part 40 of Rules of Court applies. This procedure does not include: statement as to documents; examination for discovery; pretrial conference; or direct viva voce evidence at trial. Instead, following procedures apply: affidavit of documents and witnesses, and presentation of direct evidence by affidavit. Simplified Procedure does not apply to family law proceedings, class actions or The Builders' Lien Act (R.C. 477).

Small Claims.

See category 6 Courts and Legislature, topic 6.01 Courts, subhead Judges of Provincial Court.

Jury.

Criminal cases: the number is 12, and they must be unanimous. Juries may be demanded only in Queen's Bench cases. Party demanding jury must advance its costs. Civil Cases: number is six, five may reach verdict (The Jury Act 1998 [1998, c. J-4.2] § 16). Civil juries may be demanded as of right in actions for libel, slander, malicious harassment, malicious prosecution or false imprisonment and where claim amount exceeds $10,000. Party demanding jury will pay jury costs whether or not successful in action, except in aforesaid actions and in personal injury action for claimed damages in excess of $10,000 whereby trial judge has discretion to make appropriate order as to jury costs (§ 18). Criminal Cases: Act will apply to criminal jury trials except where inconsistent with Criminal Code (see Canada Law Digest).

See also topics 5.02 Actions, 5.02 Appeal and Error, 5.09 Depositions and Discovery, 5.12 Injunctions, 5.13 Judgments, 5.16 Pleading, 5.18 Process; category 8 Debtor and Creditor, topics 8.01 Absconding Debtors, 8.09 Executions, 8.13 Garnishment.

5.18 PROCESS:

Service of court process is to be personal, by leaving copy of document with person served, unless otherwise specified (R.C. 19). Court has discretion to validate or set aside service (R.C. 18). Deemed personal service if prescribed Acknowledgement of Service is filed (R.C. 19, 20). Service other than personally is permissible if specified in statute, regulation, rules or court order; if address for service filed, then service of most court process can be by courier, mail, fax or electronic transmission (R.C. 21).

If service by courier, then copy of document left at address for service with adult person who appears to be agent, employee, representative or household member of person to be served; or else, left in mail receptacle of residential or business address, latter only during office hours (R.C. 21). If service by mail, then copy of document placed in envelope and mailed to address for service (R.C. 21). If service by fax, then faxed to number in address for service, with prescribed cover page (R.C. 21).

If service on corporation registered under statute, then service in accordance with such statute; if statute silent, then by leaving copy of document with officer, agent, director, liquidator or representative at place of business (R.C. 22).

Subject to express statute or regulation, service on sole proprietorship, partnership and unincorporated association is on sole proprietor, partner, or officer, respectively or on person at principal place of business who appears to have control and management of sole proprietorship, partnership and association (R.C. 23).

If person transacts in Saskatchewan on behalf of corporation or entity with principal place of business outside Saskatchewan, then such person in Saskatchewan is deemed agent for service until other address for service is filed (R.C. 24).

Subject to express statute or regulation, service on minor is on minor and parent, guardian, legal custodian or adult with whom minor resides (R.C. 25). If dependent adult, then on such adult and such adult’s personal or property decision maker or according to court order (R.C. 25).

For almost all court process, service on person represented by lawyer is on such lawyer (R.C. 26).

If regular service not feasible, then ex parte application for substituted service (R.C. 27).

If service outside Saskatchewan, then: same manner as in Saskatchewan, unless local law incompatible with Saskatchewan Rules (burden of proof of incompatibility on person served); manner in local law; or prescribed Hague Convention procedure (R.C. 28). Same options with respect to proof of such service (R.C. 33).

Proof of service is by filing prescribed Acknowledgement of Service (R.C. 31) or by prescribed Affidavit for Service (R.C. 32).

5.19 PRODUCT LIABILITY:

See category 3 Business Regulation and Commerce, topic 3.14 Consumer Protection.

5.20 REPLEVIN:

The plaintiff in any action for the recovery of any personal property, claiming that such property was unlawfully taken or is unlawfully detained, may, after the issue of statement of claim, obtain writ of replevin. Application must be supported by affidavit of plaintiff or his or her duly authorised agent, stating judicial district in which goods are, giving description of goods and value, and stating that person claiming goods is rightful owner or entitled to possession thereof; that property was taken under colour of distress damage feasant or for rent, if such is case, or time and particulars of wrongful or fraudulent taking out of his or her possession, and such facts as show that plaintiff is entitled to goods. He or she must also furnish to sheriff bond equal to value of goods. Sheriff retains goods till ordered by court to return them to plaintiff, except that in all cases but cases of distress, defendant can retain possession upon giving bond (R.C. 406–408).

5.21 SEQUESTRATION:

If any judgment or order against corporation is wilfully disobeyed, plaintiff may obtain writ of sequestration against its property. If person is taken into custody under writ of attachment without obeying judgment, upon sheriff's return to that effect, opposite party is entitled to writ of sequestration against estate and effects of disobedient person. If person refusing or neglecting to obey judgment cannot be found and therefore cannot be committed for contempt, writ of sequestration may issue without writ of attachment having first been issued. Writ of sequestration deprives person from enjoyment of and income from his or her property, until contempt cleared (R.C. 375–377).

5.22 SERVICE:

See topic 5.18 Process.

5.23 SUBMISSION OF CONTROVERSY:

No statutory provisions.

5.24 VENUE:

Except in cases covered by special provisions, venue is within the jurisdiction where the cause of action arose or the defendant resides. Plaintiff may commence action in any Judicial Centre, but defendant may request transfer to proper venue (The Queen's Bench Act 1998 [1998, c. Q-1.01] § 22). By contract, the venue may be anywhere within the province. Court may order change of venue to ensure fair trial or to suit balance of convenience.

The Court Jurisdiction and Proceedings Transfer Act (1997, c. C-41.1) allows Court of Queen's Bench to transfer and accept transfers of proceedings (§ 12). Court is deemed to be proper jurisdiction if: person is plaintiff in another claim to which proceeding in question is counterclaim; person submits to court's jurisdiction; there is agreement between plaintiff and person that court is appropriate jurisdiction; person is ordinarily resident in Saskatchewan at time of commencement of proceedings; or there is real and substantial connection between Saskatchewan and facts on which proceeding is based (§ 4).

6 COURTS AND LEGISLATURE

6.01 COURTS:

Court of Appeal has no original jurisdiction except in contempt, mandamus, certiorari, prohibition, quo warranto and habeas corpus. It has appellate jurisdiction by appeal from Court of Queen's Bench in both civil and criminal matters. Court consists of Chief Justice and six judges. Any three judges make quorum at any sitting. Decision of all three judges or majority of them is decision of court. Court sits at both Regina and Saskatoon at such times as may be fixed by court (The Court of Appeal Act 2000 [2000, c. C-42.1]). See category 5 Civil Actions and Procedure, topic 5.03 Appeal and Error.

Court of Queen's Bench has jurisdiction in all cases, except where excluded by statute. Judges sit on rotating basis at each judicial centre. Court of Queen's Bench has jurisdiction in family law matters including serious criminal matters, civil law matters and wills and estates. It also hears appeal from summary conviction proceedings, small claims trials and Rentalsman hearings. Court consists of Chief Justice and 31 full-time judges (The Queen's Bench Act 1998 [1998, c. Q-1.01]).

Judges of Provincial Court adjudicate claims brought under The Small Claims Act 1997 (1997, c. S-50.11), which provides expeditious procedure to try claims for debt, damages, recovery of goods or personal property, specific performance and some insurance matters, up to maximum amount or value of $20,000. Provincial Court also has jurisdiction over selected indictable criminal offences and over summary conviction criminal offences (Criminal Code [R.S.C. c. 27]).

6.02 JUSTICES OF THE PEACE:

Justices of the Peace are appointed by provincial government to provide frontline services to police and Crown prosecutors, issuing arrest and search warrants and determining if release of arrested offender is necessary. Some Justices of the Peace preside in court and hear trials. Justice of the Peace cannot perform marriage ceremony unless he or she is also marriage commissioner (The Justices of the Peace Act 1988 [1988-89, c. J-5.1]).

6.03 LEGISLATURE:

One elected body of representatives, called the Legislature of Saskatchewan, which must have at least one session per year (The Legislative Assembly and Executive Council Act 2007 [2007, L-11.3] § 7). Legislative Assembly consists of 58 members elected in manner provided for by The Election Act 1996 (1996, c. E-6.01). Members represent constituencies, as set out in The Representation Act 2002 (2002, c. R-20.4), in which member was elected.

6.04 REPORTS:

Official reports are Saskatchewan Law Reports, now discontinued. Private publications are: Western Weekly Reports, Saskatchewan Reports and Dominion Law Reports. Electronic reporting service: LexisNexis, Quicklaw and Westlaw *e* CARSWELL.

6.05 STATUTES:

Last revision of provincial statutes is Revised Statutes of Saskatchewan 1978. Subsequent statutes are annual sessions laws. Unofficial consolidated versions of all statutes are found at Queen's Printer website (www.qp.gov.sk.ca) for free.

7 CRIMINAL LAW

7.01 BAIL:

See topic 7.02 Criminal Law.

7.02 CRIMINAL LAW:

Criminal Law is within jurisdiction of federal parliament as set out in Criminal Code and other related Acts. (See Canada Law Digest.) However, various provincial statutes and municipal bylaws have created regulatory or “quasi-criminal” offences which are governed by provincial Summary Offences Procedure Act 1990 (1990-91, c. S-63.1). These “provincial” offences generally follow same procedure and rules of evidence applicable to summary conviction offences in Criminal Code.

8 DEBTOR AND CREDITOR

8.01 ABSCONDING DEBTORS:

Under The Absconding Debtors Act (R.S., c. A-2), it is permissible to attach debtor’s property after commencement of suit in which claim is over $50 (§ 3). Grounds for attachment are that defendant: (1) is about to abscond or has absconded leaving personal property liable to seizure; (2) has tried to remove such property out of province or to dispose of same to defraud creditors or plaintiff; (3) keeps concealed to avoid process; and (4) debt or damages would be lost without attachment.

Act provides for commencement of proceedings by writ, method of seizure by sheriff, return of property upon giving security, length of time property to be held and procedure for quashing writ by judge on affidavit that plaintiff had no grounds for same. This act is intended only to protect creditors’ interests in debtor’s property until such time as action is properly concluded; so after attachment, action must continue in normal way.

8.02 ASSIGNMENTS:

Pursuant to The Choses in Action Act (R.S., c. C-11), any chose in action, including bona fide insurance policies, may be assigned, provided notice is given to debtor. Assignee or beneficial owner may sue thereon subject to rights of defendant acquired before notice. Assignee of lender is subject to same liabilities as assignor, limited to balance owing on contract at time of assignment. Assignment of wages or any portion thereof made to secure debt is invalid except where made to credit union organised by employees of employer to whom assignment is directed (The Assignment of Wages Act [R.S., c. A-30]).

Assignment of accounts and most assignments for security purposes are within The Personal Property Security Act 1993 (1993, c. P-6.2) and its system of registration and priorities. See category 20 Mortgages, topic 20.04 Personal Property Security.

8.03 ASSIGNMENTS FOR BENEFIT OF CREDITORS:

See Canada Law Digest, category Debtor and Creditor, topic Bankruptcy.

8.04 ATTACHMENT:

See topics 8.01 Absconding Debtors; 8.13 Garnishment.

8.05 BANKRUPTCY:

See Canada Law Digest.

8.06 BONDS:

Bonds given as security costs in legal proceedings are payable to party entitled to security, unless court directs otherwise (R.C. 542[3]). Pursuant to The Administration of Estates Act (1998, c. A-4.1), bonds are given to local registrar of court (§ 20). The Guarantee Companies Securities Act (R.S., c. G-9) permits guarantee company licenced under The Saskatchewan

Insurance Act (R.S., c. S-26, § 81) to grant guarantees, bonds, policies or contracts for surety and fidelity of employed persons, in legal proceedings or for other similar purposes. Where security by bond with sureties is required, bond, policy or guarantee contract of guarantee company may be substituted. Bonds can be enforced only by suit in usual way.

8.07 CREDITORS' SUITS:

See topic 8.12 Fraudulent Sales and Conveyances.

8.08 CROP PAYMENTS ACT:

In case of lease, agreement for sale or mortgage where payment is to be by share of crop not exceeding 50%, such payment has priority over everything except security interest for money supplied to purchase seed grain and right vests as soon as crop is sown (The Crop Payments Act [R.S., c. C-48]). See also The Saskatchewan Farm Security Act (1988-89, c. S-17.1) for exceptions.

8.09 EXECUTIONS:

Execution on judgment may issue at any time while judgment is in force, and is good for ten years after which an alias writ may issue. Executions against land expire ten years after date of judgment (The Executions Act [R.S., c. E-12] § 26). Executions against farm land is governed by The Saskatchewan Farm Security Act (1988-89, c. S-17.1). (See category 5 Civil Actions and Procedure, topic 5.02 Actions, subhead Actions Respecting Land.)

Exemptions.

See topic 8.10 Exemptions.

Lien.

Execution against goods binds goods from date of delivery to sheriff, subject to rights of bona fide purchaser from debtor, who, without notice of execution, obtains and continues in actual possession.

Where execution against goods has been issued, judgment creditor may issue execution against lands at any time provided at least $100 remains unpaid.

Execution against lands binds all lands of debtor in province where writ is directed from time of registering writ in writ registry (The Executions Act [R.S., c. E-12] § 2.2).

Stays.

Execution may be stayed on motion to judge, showing special grounds, on such terms as judge may impose. See topic 8.19 Moratorium.

Levy and Sale.

All sales of property seized under execution are by public auction, after advertisement and notice. There is no right of redemption from execution sales. Immediately after he or she receives execution, sheriff makes seizure of sufficient goods of debtor to satisfy debt.

Should there not be sufficient goods, lands, although meanwhile subject to execution, may not be sold thereunder until at least expiration of one year from time of receipt of execution by sheriff and only then with leave of Court of Queen's Bench.

Priorities.

Creditor at whose instance and under whose execution seizure was made has priority for costs of his or her action, but otherwise proceeds of sheriff's sale are divided ratably between all execution creditors having executions in sheriff's hands within two months of time of sheriff's levy, except where amount is realised from sale of article for purchase price of which judgment was obtained or is upon judgment for alimony under separation agreement or for wages (The Creditors' Relief Act [R.S., c. C-46] §§ 3–11, 16). Execution creditors take priority over unperfected security interest holders and good faith purchasers for value (The Executions Act [R.S., c. E-12] § 2.2). (See category 20 Mortgages, topic 20.04 Personal Property Security.)

Supplementary Proceedings.

If execution is returned unsatisfied, debtor may be examined as to property or means he or she had when debt incurred, what disposition made thereof and what means he or she has for satisfying judgment.

8.10 EXEMPTIONS:

Specified real and personal property of execution debtors is exempt from seizure (The Exemptions Act [R.S., c. E-14] § 2). The Saskatchewan Farm Security Act (1988-89, c. S-17.1), Part V governs exemptions for farmers and their families. Exemption legislation includes exemptions for clothing, furniture, food, books and equipment for occupation, motor vehicle and homestead. Exemptions may be limited as to value or amount.

Substitution.

A debtor who does not possess articles specifically exempted is not entitled to hold money or other property exempt in lieu thereof.

Debts Against Which Exemptions Not Available.

There is no exemption where the claim is for board and lodging or hospital expenses or is upon judgment for maintenance or under separation agreement (The Enforcement of Maintenance Orders Act 1997 [1997, c. E-9.21] § 44; The Exemptions Act, § 8.1; The Saskatchewan Farm Security Act, § 74).

Subject to certain exceptions, no property is exempt from seizure under execution judgment for purchase price thereof (The Exemptions Act, § 5; The Saskatchewan Farm Security Act, § 70).

Loss of Exemption.

There are no exemptions where the debtor absconds leaving no family behind (The Absconding Debtors Act [R.S., c. A-2] § 3; The Exemptions Act, § 8; The Saskatchewan Farm Security Act, § 73).

Death of Debtor.

Exemption extends to the debtor's family on his or her death (The Exemptions Act, § 6; The Saskatchewan Farm Security Act, § 71).

Wages.

No debt due or accruing due to mechanic, worker, labourer, servant, clerk or employee, for wages or salary, is liable to attachment or garnishment except to extent of excess thereof over $500 plus $100 for each dependant he or she supports. Above has reference to monthly earnings, and if less than a month, it must be computed on proportional basis (The Attachment of Debts Act [R.S., c. A-32] § 22). See also topic 8.13 Garnishment.

Registered Retirement Plan Exemption.

Certain retirement plans registered under Income Tax Act (Canada) are exempt (The Registered Plan [Retirement Income] Exemption Act [2002, c. R-13.01]). This does not extend to payments out of such plans (§ 4), nor as against enforcement of maintenance orders (§ 3).

Homestead Exemption.

See topic 8.14 Homesteads.

8.11 FORECLOSURE:

See topics 8.17 Liens, 8.19 Moratorium; category 20 Mortgages, topics 20.01 Chattel Mortgages, 20.03 Mortgages.

8.12 FRAUDULENT SALES AND CONVEYANCES:

Pursuant to The Fraudulent Preferences Act (R.S., c. F-21), any creditor may bring action to set aside any conveyance made in fraud of creditors or having effect of giving preference. Certain transactions are deemed preferential regardless of innocent intent of debtor and regardless of pressure exerted by any creditor. In case of gift conveyance, etc. of any property which is in law invalid against creditors where such property has been sold or disposed of by transferee, money or other proceeds may be followed and transferee held liable for value thereof.

8.13 GARNISHMENT:

(The Attachment of Debts Act [R.S., c. A-32]).

Where a debt is on a judgment, or is for a liquidated amount, money owing to the debtor, except for wages, may be garnished either before or after judgment upon an affidavit being filed, of the creditor or his or her agent, or solicitor, who can swear to the indebtedness of the debtor and also that, to the best of his or her information and belief, the proposed garnishee is indebted to the debtor. The garnishee may pay the money into court (§ 3).

Money due for wages cannot be attached or garnished before judgment, except that by virtue of special order of court, which may be obtained ex parte. Wages due or payable within five days after service may be attached (§§ 5, 9).

Wages of members of provincial public service and of provincial Crown Corporation employees may be attached (§ 6).

Employers may not discharge employee by reason only of fact that garnishee proceedings are taken against him or her (The Labour Standards Act [R.S., c. L-1, § 81]).

Exemption of wages or salary, see topic 8.10 Exemptions.

8.14 HOMESTEADS:

The Homesteads Act 1989 (1989-90, c. H-5.1) protects spouses, including common law and same-sex spouses, who are not registered owners of their homesteads. Homestead personally occupied to extent of 65 hectares (160 acres), or house and buildings occupied by debtor with lot or lots on which situated to value of $32,000, is exempt from seizure and sale under execution except under judgment for purchase price thereof. Exemption extends to debtor’s family on his or her death. Exemption does not apply to farmers (The Exemptions Act, §§ 1.2, 2, 6; The Saskatchewan Farm Security Act, Pt. V).

Alienation or Encumbrance.

(The Homesteads Act 1989). Every transfer, agreement for sale, lease, mortgage or other instrument intended to convey or transfer interest in homestead (defined as property that is or has been occupied by both spouses as family home at any time during their marriage) to any person other than non-owning spouse of owning spouse must be accompanied by consent of non-owning spouse together with certificate of independent legal advice (§§ 5, 7). Consent may be dispensed with by court (§ 11). Every instrument not so executed must be accompanied by affidavit of each signator of disposition swearing that subject land is not his or her homestead or he or she has no spouse or his or her spouse is registered owner of subject land and co-signator of disposition (§ 8). Non-owning spouse may register interest to protect his or her homestead rights in Land Titles Registry (§ 14).

8.15 INSOLVENCY:

See Canada Law Digest, category Debtor and Creditor, topic Bankruptcy. Orderly payment of debts procedure, Part 10 of Bankruptcy and Insolvency Act (R.S.C. 1985, c. B-3), is in force in Saskatchewan and administered by Provincial Mediation Board.

8.16 LEVY:

See topics 8.04 Attachment, 8.09 Executions.

8.17 LIENS:

There are many statutory liens, including liens for threshers, builders, woodsmen, animal keepers, veterinarians, solicitors, unpaid sellers and for corporation’s lien on shares of shareholders (The Threshers’ Lien Act [R.S., c. T-13]; The Woodmen’s Lien Act [R.S., c. W-16]; The Animal Products Act [R.S., c. A-20.2]; The Veterinarians Act 1987 [1986-87-88, c. V-5.1]; The Legal Profession Act 1990 [1990-91, c. L-10.1] § 66; The Sale of Goods Act [R.S., c. S-1] §§ 40–42; The Business Corporations Act [R.S., c. B-10] § 43). Other liens include liens on crops, tax liens, liens on improvements to property, Crown liens on forest products and liens by cooperatives on members’ interest (The Tax Enforcement Act [R.S., c. T-2]; The Improvements Under Mistake of Title Act [R.S., c. I-1]; The Forest Resources Management Act [1996, c. F-19.1] § 23; The Co-operatives Act 1996 [1996, c. C-37.3] § 45). See category 3 Business Regulation and Commerce, topic 3.10 Commercial Liens.

Vendor of real or personal property has a lien upon such property for unpaid purchase money unless he or she has waived his or her rights.

Builders’ Liens.

All sums received by contractor or subcontractor on account of contract price constitute trust fund and contractor or subcontractor shall not appropriate funds to his or her own use until all workers and all persons who have supplied materials or services are paid (§ 7). All sums received by owner to be used in financing constitute trust fund in hands of owner (§ 6). Every person for whose benefit trust is created has lien upon trust fund for value of work done. Every lien is charge upon amount directed to be retained in favour of lien holders. Contractor or subcontractor shall distribute money from time to time among persons for whose benefit trust is created on pro rata basis. Persons primarily liable under contract shall, as work is done, retain for statutory period 10% of value of work done (§ 34). Every owner, contractor or subcontractor is deemed to have notice of lien upon trust fund in his or her hands. Persons who do work or provide services for improvement have lien against estate or interest of owner in land occupied by improvement (§ 22). Lien under this Act has priority over all judgments, executions, attachments and receiving orders made after lien arises. Lien of labourer for 40 days wages has priority over any other lien. Lien can be assigned by instrument in writing. Claim for lien on land can be registered at Information Services Corporation (ISC) Land Titles Registry. Lien relating to mines or minerals can be filed with Saskatchewan Industry and Resources (§ 51). Lien must generally be registered within 40 days of completion of work (§ 49). Where there is dispute over trust fund, work to be done, services rendered or amount due, person can apply to Court of Queen’s Bench to settle dispute in summary way. Action shall be brought within one year after contract is completed or abandoned (The Builders' Lien Act [1984-85-86, c. B-7.1] § 19).

Public Works.

Crown now bound by builders' lien procedure as set out above, except that no lien may be registered against Crown property at Land Titles Registry. Instead, lien claim notices should be served on appropriate Crown agency, thus preserving builders' lien on trust fund created by 10% holdback of value of work done (§ 26).

Enforcement.

The general remedy for enforcement of liens is by sale of the property subject thereto; but there are certain statutory remedies with respect to some liens. There is no right of redemption from lien sales (§§ 96, 78).

See also topic 8.08 Crop Payments Act.

8.18 MECHANICS' LIENS:

See topic 8.17 Liens. See category 3 Business Regulation and Commerce, topic 3.10 Commercial Liens.

8.19 MORATORIUM:

The Saskatchewan Farm Security Act (1988-89, c. S-17.1) places severe restrictions on enforcing security against farmers, farmland and farm machinery.

There is moratorium on all foreclosure actions on farmland. With respect to mortgages executed prior to coming into force of Act on homestead, court must adjourn any foreclosure application for three years where farmer has been making sincere and reasonable effort to make payments (§ 17). With respect to other farmland, mortgagee may apply to court for order exempting application of Act. Farmland Security Board and farmer must be given notice. Board must prepare report, and mortgagee must prove, inter alia, that mortgagor has no reasonable possibility of meeting his or her obligations under mortgage or that he or she is not making reasonable and sincere effort to meet obligations (§§ 18, 13). Farmland Security Board will meet with mortgagee and mortgagor prior to exemption application being heard by court and prepare and submit report to court respecting mortgagor's reasonable possibility of meeting his or her obligations (§ 12). If mortgagee does not participate in mediation in good faith, farmer may request court-supervised mandatory mediation. If mortgagee does not negotiate in good faith, mortgagee's application may be adjourned for further period and mortgagee may have costs awarded against it. Where mortgagee obtains final order of foreclosure, farmer is entitled to right of first refusal to repurchase land (§ 27). These provisions of Act also extend to sale of farmland pursuant to writ of execution (§ 21). Operation of final order of foreclosure, insofar as it effects homestead, is stayed for as long as homestead continues to be such (§§ 44, 26).

Personal guarantees and acknowledgements relating to obligations incurred by farmer must be executed before lawyer or notary public who issues certificate in prescribed form indicating that guarantor understands same (§ 31).

Secured party intending to take possession of farm implement must serve notice, and farmer in response thereto may apply for hearing by court (§§ 48, 50). Court may make any order it considers just. No seizure may be made until after notice is served, at risk of draconian penalties. Notice must also be given after repossession and farmer may apply for hearing after such repossession (§ 57). Secured party must keep implement for at least 40 days (§ 59).

8.20 PLEDGES:

Pledge is deposit of personal property as security for certain sum and is governed by The Personal Property Security Act 1993 (1993, c. P-6.2) and is valid without registration. Distinctions between pledge and mortgage of personal property are:

(1) That in former, title is retained by pledger, while in latter it passes to mortgagee.

(2) That delivery of possession of property to pledgee is absolutely essential to pledge being valid between parties. Such delivery is not necessary to validity of mortgage. Property delivered to pledgee to secure debt may be sold by latter and good title passes.

8.21 RECEIVERS:

Receiver may be appointed by court order (The Queen's Bench Act 1998 [1998, c. Q-1.01] § 65[1]) or by instrument. Powers, duties and obligations of receivers come from instrument or court order under which appointment is made. Relevant statutory provisions in The Business Corporations Act (R.S., c. B-10), The Personal Property Security Act 1993 (1993, c. P-6.2) and Bankruptcy and Insolvency Act (R.S.C. 1985, c. B-3).

Receivers may be appointed before judgment in a proper case upon application of either party when he or she establishes an apparent right to property or on the winding up of a partnership or where it is necessary to preserve property in its original condition; also in mortgage actions or vendor and purchaser actions.

Section 76 of The Queen's Bench Act 1998 makes provisions in The Personal Property Security Act 1993 governing receivers applicable to both instruments and court-appointed receivers.

Bonds.

Where an order is made appointing a receiver, in almost all cases, the person appointed must first give security to be approved by the court or a judge.

8.22 REDEMPTION:

See topics 8.09 Executions, 8.17 Liens; category 20 Mortgages, topic 20.03 Mortgages.

8.23 STAY OF EXECUTION:

See topic 8.09 Executions; category 5 Civil Actions and Procedure, topic 5.03 Appeal and Error.

8.24 SUPPLEMENTARY PROCEEDINGS:

See topic 8.09 Executions.

8.25 USURY:

See Canada Law Digest, category Business Regulation and Commerce, topic Interest.

9 DISPUTE RESOLUTION

9.01 ALTERNATIVE DISPUTE RESOLUTION:

General.

The Queen's Bench Act 1998 (1998, c. Q-1.01) provides for mediation as aspect of civil proceedings in Court of Queen's Bench for both family and non-family matters in designated judicial centres. Number of other statutes provide for mediation of claims or disputes arising in respect to particular subject matter governed by statute.

Mandatory Mediation.

At close of pleadings in non-family proceedings, action cannot proceed without parties attending mediation session. Mediator will meet with each party individually to discuss dispute and meet with parties jointly to discuss mediation process and its appropriateness for resolution of dispute. After mediation session, parties may continue with mediation or any party may discontinue mediation and continue with legal proceeding (1998, c. Q-1.01).

The Saskatchewan Farm Security Act (1988-89, c. S-17.1) requires mediation upon commencement of any action in court with respect to farmland by mortgagee for foreclosure, sale or possession of farmland or related relief before action may proceed. If mortgagee fails to participate in mediation process in good faith, court may supervise mediation.

Voluntary Mediation.

Claimants for Personal Injury Benefits in automobile accidents may request mediation of claim of benefits upon refusal of claim under The Automobile Accident Insurance Act (R.S., c. A-35, § 190).

Employee may request Director of Labour Standards to negotiate and settle any difference between employee and employer or corporate director (The Labour Standards Act [R.S., c. L-1]).

In application pursuant to The Children’s Law Act 1997 (1997, c. C-8.2) pertaining to custody and access of children, court may appoint person to mediate matters at issue between parties. Mediators are chosen with consent of parties. Any time after first mediation session, either party may terminate mediation at which time matter will proceed to court.

Upon application of claimant and respondent, court may appoint mediator to resolve applications for support which arise pursuant to claim under The Family Maintenance Act 1997 (1997, c. F-6.2, § 15).

In application pursuant to The Family Maintenance Act 1997 (1997, c. F-6.2), court may appoint person to mediate any matter that is dealt with in application and that is at issue between parties.

Owner or occupant of surface land who filed complaint with Surface Rights Arbitration Board concerning operations of person and/or company that has acquired right to mineral thereunder may request that complaint be referred to mediation. Further, where there is matter in dispute pending determination by Surface Rights Arbitration Board, board and owner of surface land may request to have matter referred to mediation (The Surface Rights Acquisition and Compensation Act [R.S., c. S-65]).

Also see topic 9.02 Arbitration and Award.

9.02 ARBITRATION AND AWARD:

The Arbitration Act 1992 (1992, c. A-24.1) sets default rules for regulating conduct of arbitrators and hearings other than those governed by The International Commercial Arbitration Act (1988-89, c. I-10.2).

Any controversy may be submitted to arbitration by agreement of parties. Arbitration agreement may be rescinded only in accordance with law of contract.

The Model Law on International Commercial Arbitration applies to international commercial arbitration agreements and awards (1988-89, c. I-10.2).

An award, by leave of the court, may be enforced in the same manner as a judgment. The award may be attacked for misconduct of the arbitrators or where the arbitration or award has been improperly procured.

Pursuant to The Enforcement of Foreign Arbitral Awards Act 1996 (1996, c. E-9.12), foreign commercial arbitration awards are enforceable in accordance with Convention on the Recognition and Enforcement of Foreign Arbitral Awards.

Pursuant to The Trade Union Act (R.S., c. T-17), all disputes arising from collective bargaining agreement are referred to arbitration upon exhaustion of any grievance process provided by such agreement (§ 25). Labour disputes and grievances conducted under The Trade Union Act are not subject to The Arbitration Act 1992.

Arbitration agreements may be entered into as at common law (1992, c. A-24.1).

10 DOCUMENTS AND RECORDS

10.01 ACKNOWLEDGEMENTS:

Apart from spouse's acknowledgement pursuant to The Homesteads Act 1989 (1989-90, c. H-5.1) (see category 8 Debtor and Creditor, topic 8.14 Homesteads) and execution of guarantee governed by The Saskatchewan Farm Security Act (1988-89, c. S-17.1), there is no provision in Saskatchewan for acknowledgement of instruments before notary. Instead, witness to execution of documents must take formal affidavit, before proper officer, swearing to due execution of document.

Corporations.

Documents executed by corporations to which corporate seal is affixed need not be witnessed and no proof of execution is required.

Officers Who May Take Affidavits.

See topic 10.02 Affidavits.

Fees for Taking.

No set fees are prescribed.

General Requirements as to Taking.

Officer taking must be satisfied as to identity of deponent.

Forms.

Form of Affidavit of Execution in general use is that prescribed by The Land Titles Act 2000 (2000, c. L-5.1) for transfers of land. Available at Information Services Corporation website http://www.isc.ca. (See category 21 Property, topic 21.13 Real Property, subhead Forms.)

Alternative to Acknowledgement or Proof.

No statutory provision.

10.02 AFFIDAVITS:

An affidavit may be made:

Within province before judge, local registrar or deputy local registrar, notary public, justice of the peace or commissioner for taking affidavits. Member of Legislative Assembly may take affidavit anywhere (R.C. 320).

In a jurisdiction other than Saskatchewan, before: a commissioner for oaths without Saskatchewan appointed pursuant to The Commissioners for Oaths Act; a notary public; a commissioner or other official authorised by the laws of the other jurisdiction to administer oaths; a judge, a magistrate, a justice of the peace or an officer of a court of justice; the mayor or other head of a municipal or regional government; an officer of any of the Canadian diplomatic or consular services, including ambassadors, high commissioners, permanent delegates, envoys, ministers, chargés d'affaires, counsellors, secretaries, attachés, consuls-general, consuls, vice-consuls, pro-consuls and consular agents; a Canadian Government Trade Commissioner or an Assistant Canadian Government Trade Commissioner; an officer of the Canadian Forces; or an officer of any of Her Majesty's diplomatic or consular services, including ambassadors, high commissioners, permanent delegates, envoys, ministers, chargés d'affaires, counsellors, secretaries, attachés, consuls-general, consuls, vice-consuls, pro-consuls and consular agents.

Before a Military Officer.

Every person holding commission as officer in Her Majesty's permanent naval, military or air forces, if he or she holds rank of lieutenant in naval forces or captain in military forces or flight lieutenant in air forces, or higher rank, may, either within or without Saskatchewan, administer oaths to take and receive affidavits, declarations and affirmations by members of any of said forces for use in Saskatchewan (The Commissioners for Oaths Act [R.S., c. C-16] § 10[1]).

General Requirements as to Administration.

Officer taking must be satisfied as to identity of deponent, and must administer an oath, form of which invokes the Deity or otherwise binds deponent's conscience.

General Requirements.

In matters in court affidavit must be entitled in cause or matter in which it is sworn, be made in first person and divided into paragraphs numbered consecutively and contain description and true place of abode of deponent and be signed by him or her (R.C. 318, 322). Every person administering oath must express time and place of so doing. All interlineations or alterations in jurat or in body of affidavit must be initialled by officer before whom sworn. Documents referred to in affidavit must be referred to as exhibits and not as annexed and must be signed by officer.

General Requirements of Jurat.

Every person administering oaths must express time and place in jurat (R.C. 321). A commissioner must write or stamp below his or her signature on each jurat completed by him or her: "A Commissioner for Oaths in and for Saskatchewan", and date on which his or her appointment expires, unless he or she is a Saskatchewan solicitor, in which case, he or she must insert the phrase "being a solicitor". A notary public must affix his or her notarial seal to his or her signature in each case and, unless the notary public is a Saskatchewan solicitor, he or she must also insert date on which his or her commission expires.

Use.

Affidavits are used only in court proceedings or where authorised by statute. Otherwise, where required, statutory declaration is necessary. See Canada Law Digest, category Documents and Records, topic Affidavits.

Form

Affidavits.

Style of cause, giving court, name of parties, etc.

I, A. B., of the.... of...., in the Province of...., (occupation), make oath and say:

(1) That......

Sworn before me at the....................... of..... in the Province of.... (Signature of Affiant) this.... day of.... 20..

(Signature of Officer)

Alternative to Affidavit.

No statutory provision.

10.03 COMMISSIONS TO TAKE TESTIMONY:

See category 5 Civil Actions and Procedure, topic 5.09 Depositions and Discovery.

10.04 NOTARIES PUBLIC:

Minister of Justice may appoint any Canadian or British subject of 18 years of age residing within province as notary public. All duly enrolled solicitors in Saskatchewan are notaries public.

Powers.

Notary may draw, pass, keep and issue all deeds and contracts, charter parties and other mercantile documents in province and attest to commercial instruments. Notary may act officially anywhere in province (The Notaries Public Act [R.S., c. N-8] § 3).

Fees.

Two hundred dollars application fee. Saskatchewan provincial government employees are exempt from any fees.

Appointment.

Notary holds office at pleasure of Lieutenant Governor in council and, unless revoked, holds office five years from appointment date. Notary whose commission expires must show date of expiration on every affidavit, declaration or certificate taken or given by Notary and notarial seal should be impressed with same (The Notaries Public Act [R.S., c. N-8]).

Commissioners for oaths are appointed by Minister of Justice with power to take affidavits, declarations and affirmations either within or without Saskatchewan according to their appointment. Appointments are valid until five years from last day of month which appointment was made and date of expiry of commission must appear on document taken except in case of Saskatchewan solicitors in good standing who have authority as long as they are such. Solicitor merely adds, after his or her name, “Being a Solicitor.” Fees to become commissioner for oaths are $100. Police pay only $10 and Saskatchewan provincial government employees are exempt from any fees (The Commissioners for Oaths Act [R.S., c. C-16]).

10.05 RECORDS:

Statutory provision is made for the recording and registration of security interests, lien notes, crop liens, hire receipts, minerals (including oil and gas) interest in Crown and freehold lands, certificates of partnership, trade names, etc. Effect of recording, generally, is to give notice and preserve prior rights.

Only certain documents affecting land can be registered. See category 21 Property, topic 21.13 Real Property.

Vital Statistics.

Records of births, stillbirths, adoptions, deaths, marriages and dissolutions of marriages are currently kept by Minister of Public Health, Regina. As of October 2008, they will be kept by Information Services Corporation (http://www.isc.ca). Until change, certificates for birth, marriage and death obtainable from Vital Statistics, Saskatchewan Health, 100-1942 Hamilton Street, Regina, SK, S4P 4W2. Fee: $25 each certificate.

Statistics.

Director of Statistics, plans, promotes and develops integrated social and economic statistics relating to province and government. It collects, compiles, analyses, abstracts and publishes statistical information relating to commercial, industrial, financial, social, economic and general activity and condition of province and persons in province (The Statistics Act [R.S., c. S-58]).

10.06 SEALS:

Pursuant to The Business Corporations Act (R.S., c. B-10), agreements executed on behalf of corporation are not invalid merely because corporate seal is not affixed.

In order to create a specialty debt, it is necessary to contract under seal which imports a consideration; otherwise, in simple contracts, consideration must be proved.

10.07 TORRENS SYSTEM:

See category 21 Property, topic 21.13 Real Property.

10.08 VITAL STATISTICS:

See topic 10.05 Records.

11 EMPLOYMENT

11.01 EMPLOYER AND EMPLOYEE:

See topic 11.02 Labour Relations.

11.02 LABOUR RELATIONS:

Employment relationships in non-unionised workplace are governed by common law rules relating to employment contracts and by statutory regulations.

The Labour Standards Act (R.S., c. L-1) provides that persons who perform entirely managerial services may be defined as employees respecting employee wages and recovery, annual holidays and female labour, but not respecting hours of work and minimum wage. (See subheads Priority of Wages, Recovery of Wages, Annual Holidays and Maternity Leave, *below.*) Persons employed in farming, ranching or market gardening are exempt from Act.

Wages.

The Labour Standards Act (R.S., c. L-1) sets up Minimum Wage Board which makes orders fixing minimum wages and maximum hours of work. Current minimum wage is $9.25 per hour (1 May 2009).

Priority of Wages.

The Labour Standards Act (R.S., c. L-1) grants priority to employees' wage claims not exceeding three months' wages as against rights of Crown, assignee of monies due or accruing due on specific contracts, assignee of book debts, assignee for general benefit of creditors, trustee under Bankruptcy Act, liquidator of company under winding-up legislation and any other person claiming against employer. Employee has security interest in wages due from employer (R.S., c. L-1).

Recovery of Wages.

Employer deemed to hold all wages accruing due to employee in trust for employee; such amount is charge on assets of employer or his or her estate and has priority over all other claims with some exceptions. Where employer has not held wages in trust and employer's assets insufficient to pay in full trust monies owing, employees shall share assets on pro rata basis. Employer cannot setoff cost of merchandise purchased by employee in any action against him or her for payment of wages (R.S., c. L-1).

Where Employee Has Not Been Paid.

(1) Employee may lay a charge for non-payment of wages before a Magistrate, who may discharge employee from his or her contract and order employer to pay wages not exceeding $500 and costs, including solicitor's fee. The Wages Recovery Act (R.S., c. W-1) payment may be enforced by distress and sale of chattels not exempt from seizure under execution. Appeal lies to Queen's Bench Court and trial de novo takes place. Court's decision is final, certiorari does not lie. Time limit one year (R.S., c. W-1).

(2) The Labour Standards Act (R.S., c. L-1) empowers Director of Labour Standards, where he or she apprehends that employer has failed or may fail to pay wages, to issue wage assessment against employer or corporate director for amount of wages due. Employer or employee has 21 days to appeal wage assessment to adjudicator, 21 days to appeal adjudicator on legal point to court and 30 days to appeal court on legal point to appeal court. If wage assessment is not appealed or upheld on appeal, director may issue certificate of wages and director's fees which are owing, which may be entered as judgment against employer or corporate director. Director may negotiate and settle any difference between employer and employee. Act further provides that corporate director's liability to employees is joint and several for up to six months' wages.

Hours of Work.

No employer can require any employee, to whom The Labour Standards Act (R.S., c. L-1) applies, to work more than eight hours a day or 40 hours a week (32 hours in weeks in which holidays occur) without payment at overtime rates for excess (with some exceptions), nor can employer require more than 16 hours in 24-hour period or 40 hours in any week without employee's consent. Exceptions made for agricultural employees, domestic servants, janitors and caretakers in residential blocks, members of employer's family, foremen and business managers. Certain circumstances are provided under which employees may be required to work for ten hours in single day or for more than eight hours per day for ongoing period.

For employees employed 20 hours or more per week, rest period of one day in every seven days must be granted. Two consecutive days off, one of which is to be Sunday, must be granted in establishments with more than ten employees.

Maternity Leave, Parental Leave, Adoption Leave, Bereavement Leave, Compassionate Care and Sick Leave.

Entitlement, length and notice requirements are dealt in accordance with The Labour Standards Act (R.S., c. L-1, §§ 23–29.3).

Discrimination.

Every person has right to employment or to engage in occupation, to own or occupy property, to have access to services and facilities, to join professional and trade organisations and to education, without discrimination on basis of race or perceived race, creed, religion, colour, sex including pregnancy, sexual orientation, age, family status, marital status, disability, nationality, ancestry, place of origin or receipt of public assistance. Signs, symbols and other representations promoting discrimination and denial of these rights also are prohibited (The Saskatchewan Human Rights Code [1979, c. S-24.1], §§ 9–19). Person whose rights have been violated can file complaint which can result in order by Saskatchewan Human Rights Tribunal that victim be compensated up to $10,000 for injury to feelings, as well as for any wages and other losses that may result from discrimination. Denial of these rights can also result in summary conviction offence, with maximum fine of $2,000 for first offence and $3,000 for subsequent offences (§ 35).

Trade Unions.

Employees and/or dependent contractors may form or join trade union and bargain collectively with their employer. Members of trade union may bargain through their officers, and any agreement with employer to contrary is void. Once trade union and employer have entered into collective bargaining agreement, terms thereof may only be varied by further agreement between parties. It is offence to intimidate any person in order to coerce person to join or refrain from joining trade union (R.S., c. T-17).

All disputes arising from collective bargaining agreement are referred to arbitration (see category 9 Dispute Resolution, topic 9.02 Arbitration and Award).

Employer who proposes to introduce technological change which is likely to affect terms, conditions or tenure of employment of a significant number of employees shall give notice of technological change to trade union representing employees and to Minister. Notice must be at least 90 days. Trade union may, within 30 days from receipt of notice, give notice to commence collective bargaining for purpose of revising agreement relating to terms, conditions or tenure of employment or relating to provisions to assist employees adjust to effects of technological change. Employer or trade union may, within 45 days of notice of technological change, request Minister to appoint conciliator to assist parties in collective bargaining. If trade union gives notice, employer must not introduce technological change unless employer receives order from Labour Relations Board relieving employer from collective bargaining with union, or until he or she reaches agreement with trade union (R.S., c. T-17, § 43).

Strikes and lockouts during term of collective bargaining agreement are prohibited. No strike may commence subsequent to strike vote without giving employer 48 hours notice and notifying Minister. No employer may lock out employees unless union is given 48 hours notice and Minister notified. Where strike is continued for 30 days, union, employer or employees representing 25% of bargaining unit can apply to Labour Board for vote among striking employees to determine whether majority are in favour of accepting employer's final offer and returning to work. Only one vote per strike. Employer cannot withdraw offer after acceptance by vote. At conclusion of strike or lockout, employees are to be reinstated.

The Trade Union Act is administered by Labour Relations Board whose orders are final and conclusive with no right of appeal and can be attacked only by judicial review. The Act is very wide and powers granted to Board are very extensive. Court is bound absolutely by findings of Board and is required to make all necessary orders to see that every person complies with Board order. If employer discharges employee and union alleges unfair labour practice, onus is on employer to rebut such presumption. Board may appeal from any decision of any court affecting Board's orders. If employer is convicted, he or she is liable to penalty of $50 per day if individual or $250 per day if corporation, while default continues (§ 15[2]).

The Labour Relations Board may direct vote of employees by secret ballot to ascertain what union shall have right to bargain for them with employers.

Upon request of certified union, specified union security clause must be included in any collective agreement, and must be complied with by employer even if no collective agreement is in force, under which all union members must maintain membership as condition of employment and all new employees must, within 30 days of hiring, apply for and maintain membership as condition of employment.

Annual Holidays.

Employee is entitled after each year of his or her employment with any one employer to annual holiday of three weeks with pay during first ten years, and of four weeks with pay thereafter (R.S., c. L-1).

Actions.

Workers who are injured in course of their employment have no right of action against employer or worker with respect to that injury. Nor does employer or any dependent of worker. In situations which fall outside scope of The Workers' Compensation Act 1979, employee's estate may pursue action for damages against person who would have been liable if death had not ensued. Damages may be awarded for, among other things, medical and hospital expenses and loss of earnings for benefit of immediate relatives (The Fatal Accidents Act [R.S., c. F-11]).

Occupational Health and Safety.

The Occupational Health and Safety Act 1993 requires promotion and maintenance of physical, mental and social well-being of workers; prevention among workers of ill health caused by working conditions; protection of workers in employment from factors adverse to their health; placing and maintenance of workers in working environments that are adapted to their individual physiological and psychological conditions; and promotion and maintenance of working environment that is free of harassment (1993, c. O-1.1).

Workers' Compensation.

The Workers' Compensation Act 1979 (1979, c. W-17.1) applies to all employers and workers engaged in, about or in connection with any industry in Saskatchewan except persons whose employment is of casual nature and who are employed other than for purposes of employer's trade or business; outworkers; household servants employed in private home by resident; industry of farming or ranching; school teachers; and industries exempted by The Workers' Compensation Act Exclusion Regulations (R.R.S., c. W-17.1 Reg 2). Where worker who has contributed to fund suffers injury, he or she is entitled to compensation (1979, c. W-17.1, § 28).

Unemployment insurance (Employment insurance) is a matter of Dominion legislation.

11.03 WORKERS' COMPENSATION LAW:

See topic 11.02 Labour Relations.

12 ENVIRONMENT

12.01 ENVIRONMENTAL REGULATION:

Administration of The Environmental Management and Protection Act 2002 (2002, c. E-10.21) assigned to Department of Saskatchewan Environment, 3211 Albert Street, Regina, SK, S4S 5W6 (www.se.gov.sk.ca). Act provides for enactment of Regulations for very broad range of activities which may adversely affect environment.

Prohibitions, Enforcement and Penalties.

Unless unauthorised, no person is allowed to discharge substance in concentration, which has adverse effect on environment, of substance possibly causing adverse effect (§ 4). Person allowing unauthorised discharge has duty to report unauthorised discharge to Minister (§ 5), and duty to take reasonable measures to minimise or mitigate such discharge (§ 7). Minister can investigate discharge (§ 8) and issue environmental protection order or emergency environmental protection order re discharge (§ 9). Minister has power to designate site of discharge as "contaminated site" (§ 11). Person responsible for such discharge must prepare remedial action plan for contaminated site for Minister's approval (§ 14). Civil liability for loss or damage to any person from discharge (§ 15). Cost of Minister's investigation is recoverable from person responsible for discharge (§ 15).

Prohibitions and restrictions on production and use of halocarbons (Part V).

If any activity possibly causing adverse effect to environment or human health, then Minister can issue environmental protection order (§ 47), requiring person to investigate, monitor, contain, remove, destroy substance or minimise, remedy, or mitigate effects of substance or cease activity. Before issue or amendment of order, Minister must give written notice of intention, which gives 30 days to person to whom order addressed opportunity to make written submissions re intended order (§ 49). Minister not required to give oral hearing, but required to produce written decision (§ 49). If Minister has to carry out terms of order or remedy activity, then cost is recoverable from non-compliant person (§ 51) like any judgment (§ 53).

If immediate and significant adverse effect, then Minister can issue 15-day emergency environmental protection order (§ 46). If immediate action in public interest or addressee of order unavailable, then Minister can remedy activity without issuing order (§ 52).

Appeal of environmental protection order to Court of Queen's Bench within 30 days of order (§ 54), but appeal does not usually stay order (§ 55).

Minister can apply to court for final order to enjoin contravention (§ 62). Any Saskatchewan resident over 18 can apply to Minister for investigation of alleged offence (§ 63). For enforcement, Minister can appoint environment officers (§ 65), who have powers of peace officer (§ 67), to inspect place without warrant, on reasonable belief of activity to which Act applies (§ 69), to search vehicles (§ 71) and to seize items (§ 70).

Criminal liability of fine up to $1,000,000 or three years' imprisonment for contravention (§ 74), with personal liability of corporation's director, officer or agent acquiescing in corporation's contravention. Vicarious criminal liability of person for contravention of employee, helper and agent (§ 75).

Permits.

Mandatory permit for construction, alteration, operation of waterworks or sewage works (§ 21). Mandatory permit for discharge into water of substance possibly causing adverse effect; mandatory permit for construction, alteration and operation of industrial effluent works (§ 35). Mandatory permit to alter bed, bank or boundary of watercourse or waterbody (§ 36).

Administrative penalty against permit-holder for contravention (§ 77).

Other Environmental Legislation.

The Clean Air Act (1986-87-88, c. C-12.1) prohibits operation of potential sources of air contaminants without permit; enforcement and penalties similar to those under Environmental Management and Protection Act 2002. The Litter Control Act (R.S., c. L-22) prohibits abandonment of wastes on land; provides for penalties from $500 to $5,000 and imprisonment of up to two months. The Pest Control Products (Saskatchewan) Act (R.S., c. P-8) regulates pesticide use. The Public Health Act 1994 (1994, c. P-37.1) empowers local authority to prevent public access to land where health hazard is present. For regulation of use of provincial parkland, protected areas and provincial Crown land, see The Parks Act (1986, c. P-1.1) and The Provincial Lands Act (R.S., P-31).

Environmental Assessment.

The Environmental Assessment Act (1979-80, c. E-10.1) provides that no person shall proceed with development until he or she has received ministerial approval. “Development” is defined as any project, operation or activity or any expansion thereof which is likely to have effect on any unique, rare or endangered feature of environment, cause emission of any pollutant, cause widespread public concern because of potential environmental changes, involve new technology that is concerned with resource utilisation and that may induce significant environmental change, that substantially utilises any provincial resource so as to preempt use of that resource for any other purpose or that will have significant impact on environment. Proponent of development must conduct environmental impact assessment and submit it for approval to Minister (§ 9). However, proponent may conduct feasibility study, including research and exploration, prior to obtaining approval to proceed with development (§ 8).

Act sets out assessment and review procedure in which proponent of development must participate. Minister shall make public all statements he or she receives and may require Public Information Hearing to be held or appoint person to conduct inquiry prior to reaching decision with regard to development. Developments may only proceed in accordance with terms of ministerial approval, if granted. Minister has power to conduct investigation where terms and conditions of approval are not being complied with or any person proceeds with unauthorised development. Person is liable to any other person who suffers loss, damage or injury as result of development.

13 ESTATES AND TRUSTS

13.01 ADMINISTRATION:

See topic 13.09 Executors and Administrators.

13.02 ADVANCEMENTS:

See topic 13.07 Descent and Distribution.

13.03 ALLOWANCES:

See topics 13.09 Executors and Administrators, subhead Dependents’ Relief Act; 13.15 Wills.

13.04 CLAIMS:

See topic 13.09 Executors and Administrators; category 5 Civil Actions and Procedure, topic 5.16 Pleading.

13.05 DEATH:

Common law presumption of death after seven years absence.

Survivorship.

The Survivorship Act 1993 (1993, c. S-67.1) provides that when two or more persons die at same time, or within period of five days, property of each person is to be disposed of as if that person survived other persons, except where such persons hold title to property jointly, title to property is deemed to have been held as tenants-in-common in equal shares unless contrary intention appears in written agreement between such persons. Where two or more persons die in circumstances rendering it uncertain who died first, these deaths are presumed to occur at same time. However, insured under life insurance policy is presumed to survive beneficiary, and wills that dispose of property or appoint executor to be operative in event of such circumstances, case for which will provides is deemed to have occurred (1993, c. S-67.1).

Actions for death may be maintained by personal representative or child or spouse or parent of decedent. Action must be brought within two years after death. Damages are apportioned among those who have suffered financial loss by the death. There is statutory limit of amount recoverable (The Fatal Accidents Act [R.S., c. F-11]).

Survival of Actions.

Decedent’s cause of action survives death for benefit of estate. Causes of action against decedent survives against estate. Only pecuniary loss is available in these cases.

Death Certificate.

See category 10 Documents and Records, topic 10.05 Records, subhead Vital Statistics.

The Human Tissue Gift Act regulates inter-vivos and post-mortem disposition of human tissue. All transplants or dispositions of body, organs or other human tissue, except as otherwise provided in statute, are prohibited. Death is defined according to medical practice (R.S., c. H-15).

See also topic 13.15 Wills, subhead Living Wills; category 14 Family, topic 14.09 Marriage, subheads Common Law Spousal Relationships and Presumption of Death of Absent Spouse.

13.06 DECEDENTS’ ESTATES:

See topics 13.07 Descent and Distribution, 13.09 Executors and Administrators, 13.15 Wills; category 8 Debtor and Creditor, topic 8.14 Homesteads.

13.07 DESCENT AND DISTRIBUTION:

Pursuant to The Intestate Succession Act 1996 (1996, c. I-13.1).

In case of intestacy, the entire estate, real and personal, or the excess over the share of the surviving spouse, if any, descends and is distributed as follows, each class of which a member is living taking to exclusion of all subsequent classes: (1) children and issue of deceased children, per stirpes; (2) parents equally or all to surviving parent; (3) brothers and sisters equally, children of deceased brothers or sisters taking share to which their parents, if living, would be entitled; (4) if no brother or sister survive, nephews and nieces in equal shares; and (5) next of kin of equal degree. No representation among collaterals further removed than children of brothers and sisters.

Act is subject to The Dependants’ Relief Act 1996 (1996, c. D-25.01). Decedent’s spouse and minor or disabled children may apply for maintenance to be paid from estate and effect priority of distribution scheme.

Surviving Spouse.

Share of surviving spouse is entire estate of decedent up to net value of $100,000, and, of residue over that sum, as follows: entire residue if decedent left no issue; one-half of residue if decedent left only one child or only issue of one deceased child; one-third of residue where decedent left spouse and children (§ 6).

Surviving spouse who has left decedent and is living in adultery at the time of decedent's death takes no share in the estate.

Half Blood.

Kindred of the half blood inherit equally with those of the whole blood of same degree (§ 13).

Posthumous Heirs.

Descendants and relatives conceived before decedent's death but born thereafter is taken as though born in his or her lifetime (§ 14).

Adopted Children.

See category 14 Family, topic 14.01 Adoption.

Advancements of real or personal property to a child are reckoned as part of the estate of the parent for purposes of distribution.

Escheat.

In default of heirs, all property escheats to the Crown (The Escheats Act [R.S., c. E-11]).

13.08 ESTATES:

See category 21 Property, topic 21.13 Real Property.

13.09 EXECUTORS AND ADMINISTRATORS:

* Note that amounts mentioned under this section are currently valid but upon proclamation of The Administration of Estates Amendment Act 2008 (S.S. c.2), they are subject to change by regulation.

The authority of a personal representative to administer property situated in the province can only be granted by Court of Queen's Bench. Matters relating to powers and authority of trustees and executors and administration of estates are found in The Trustee Act (R.S., c. T-23) and The Administration of Estates Act 1998 (R.S., c. A-4.1).

For estates under $10,000, Registrar of Court of Queen's Bench can grant letters of administration or letters probate to those entitled to seek letters (see subheads Eligibility and Competency; Preferences in Right to Administer).

With intestacies, where no named executor or executor unable to fulfill duties, judge may appoint appropriate person to administer estate pursuant to The Administration of Estates Act (1998, c. A-4.1, § 17).

Jurisdiction and Venue.

Petition for letters probate or letters of administration may be made to court at any judicial centre, if deceased had estate or effects in Saskatchewan.

Eligibility and Competency.

Nonresident may petition. Although infant may be appointed, he or she cannot act until 18 years of age. Nonresident executor is usually granted probate as matter of course. Letters of administration can be granted to nonresident petitioner but usual practice is to have resident apply under power of attorney from nonresident entitled to administration.

Preferences in Right to Administer.

Priority to apply for letters probate and administration when deceased left will is as follows: Executors, trust beneficiaries, life beneficiaries, ultimate residuary beneficiaries, personal representatives of beneficiaries, other beneficiaries and creditors, contingent beneficiaries and Crown. For intestacies, spouse, children, grandchildren, parents, siblings, nephews and nieces, next of kin, creditors and Crown. No letters of administration will be granted to person unless all those with greater priority have renounced their right to administration. If no application for letters is made within 30 days of death, Public Guardian and Trustee can apply for letters of administration which will be revoked if proper person applies later (1998, c. A-4.1).

Special Kinds of Administration.

Temporary administration powers granted to persons where minor is sole executor in will or next of kin usually resident in Saskatchewan is currently out of province (§ 15). When next of kin returns and minor becomes of age, temporary administration powers cease. In action respecting validity of will, Court may appoint administrator with no powers to distribute property. If estate contains no real property and personal property less than $5,000, judge may order person without granting any letters to pay remainder of estate after debts and funeral expenses to entitled persons (1998, c. A-4.1, § 9).

Official Administrator.

Public official, usually Public Guardian and Trustee for Saskatchewan (upon proclamation of The Administration of Estates Amendment Act 2008 [S.S. c. 2], Public Guardian and Trustee for Saskatchewan will be official administrator); powers, duty and authority provided by The Queen's Bench Act 1998 (1998, c. Q-1.01) and The Public Guardian and Trustee Act (1983, c. P-36.3). On notice, such official administrator will take possession of neglected property of deceased and may apply for administration of estate if no application for probate or administration is made within 30 days of death of deceased. Appointment of official administrator, so made, may be revoked in discretion of judge and appointment given to individual ordinarily entitled to apply for same.

Bonds.

No bond is required for probate. Petitioner for letters of administration must furnish bond to value of estate, if by guaranty company, or double value of estate, if a private bond. Private sureties must justify. Court may dispense with bonds if estate has no debts, value of estate is less than $5,000, administrator is sole beneficiary or beneficiaries consent (The Administration of Estates Act 1998, c. A-4.1, § 20).

Claims.

Claim of creditor against estate must be brought to attention of executor or administrator (1998, c. A-4.1, § 34). Executor or administrator advertises for creditors in locality where deceased lived and general practice is to prove claims by statutory declaration certifying as to claim, citing nature thereof and what, if any, security is held and placing value on such security. This procedure is not necessary for estates with value less than $5,000.

If the creditor holds any security for his or her claim or part thereof, he or she should give full particulars of the same, and if the security is on the estate of the deceased, a specified value should be placed thereon, and the creditor ranks as a general creditor only for the excess.

After due advertising for creditors, the executor may distribute the assets having regard only to claims of which he or she then has notice. However, unpaid secured creditors may still realise by following assets into hands of beneficiaries receiving same. If creditor holds any security for his or her claim or part thereof, he or she should give full particulars of same, and if security is on estate of deceased, specified value should be placed thereon, and creditor ranks as general creditor only for excess. See category 5 Civil Actions and Procedure, topic 5.14 Limitation of Actions.

If there is no charge on land sold by executor or administrator, buyer takes clear of any claims against estate pursuant to The Devolution of Real Property Act (R.S., c. D-27). Executor or administrator can give notice to creditor under The Trustee Act (R.S., c. T-23) if estate disputes creditor's claim. Creditor has six months to commence action against estate on debt due, or three months after debt falls due.

Priorities.

Secured claims do not lose status once debtor dies (1998, c. A-4.1; R.S., c. T-23). Funeral and testamentary expenses are preferred claims once secured claims are dealt with. Deficiency in estate assets to pay remaining creditors results in creditors being paid pari passu (R.S., c. T-23).

Sale of Estate Assets.

No consent of beneficiaries to sale of real or personal property is necessary if sale is made for purpose of paying debts of the estate (R.S., c. A-4.1). If infants interested in estate, no sale of real property is valid unless consent of Public Guardian and Trustee or court order approving sale is obtained (R.S., c. A-4.1). If real property sale is for distribution of proceeds amongst beneficiaries, must obtain their consent or can apply for court approval in case of no consent. Wills with implied powers to sell empower executors or administrators to exercise power to sell (R.S., c. A-4.1). (See also category 21 Property, topic 21.13 Real Property, subhead Title of Deceased Owner.)

Rights and Liabilities of Executors and Administrators.

In addition to directions in will, and in case of intestacy, they may borrow money to pay estate or income taxes, execute and convey contract of real estate entered into by decedent before death, distrain on lands where rent in arrears to deceased lessor or mortgage real property to pay off debts (R.S., c. A-4.1).

Estate may be sued by former partner or joint contractor of deceased even if other partners or joint contractors are alive (R.S., c. A-4.1). Action on lease, if lease paid off on money accrued, due or claimed and monies set aside for future fund and lease assigned, administrator or executor can distribute estate assets without being personally liable for subsequent claim under lease.

Accounts.

Full accounts must be filed within two years of granting letters probate or administration, or at time administration ends, discharge from estate is desired or administrator wants to reduce or substitute security provided (R.C. 737). May be discharged without passing accounts if all beneficiaries consent and all estate debts are paid (The Administration of Estates Act [1998, c. A-4.1]; [R.C. 744]).

The Dependants' Relief Act 1996 (1996, c. D-25.01) gives to wife, husband, certain different-sex and same-sex common law spouses or dependent child of decedent, whether testate or intestate, domiciled in Saskatchewan right to apply, within six months after grant of probate of will or letters of administration, to Court of Queen's Bench (Family Law Division) for order making reasonable provision for applicant's maintenance. Court, if of opinion that decedent has not made reasonable provision for dependent, may make order in such manner as it deems sufficient to provide reasonable maintenance including establishment of trust fund. Wide discretionary power is given to court which takes into consideration all circumstances of estate and relations of parties; no dependent may contract himself or herself out of statute.

No executor or administrator shall distribute assets of an estate within six months from grant of probate or administration without consent of all beneficiaries or without court order so as to allow dependents sufficient time to make application (1996, c. D-25.01).

Compensation to executor or administrator is in discretion of court, usually 5% or less, on amount realised. Sometimes, an annual fee is allowed where estate runs a number of years.

Ancillary Administration.

A nonresident executor or administrator, whose appointment has been confirmed in a foreign jurisdiction, will be appointed as a matter of course by the Saskatchewan courts on application for the resealing of the foreign letters probate or administration. Foreign administrator must give security only to extent that foreign security does not cover Saskatchewan assets (1998, c. A-4.1). Same effect is given to resealing as to original grant of letters. See topic 13.15 Wills.

13.10 FIDUCIARIES:

See topics 13.09 Executors and Administrators, 13.14 Trusts; category 14 Family, topic 14.06 Guardian and Ward.

13.11 INTESTACY:

See topic 13.07 Descent and Distribution.

13.12 PROOF OF CLAIMS:

See topic 13.09 Executors and Administrators; category 5 Civil Actions and Procedure, topic 5.16 Pleading.

13.13 TRUSTEE PROCESS:

See category 8 Debtor and Creditor, topic 8.13 Garnishment.

13.14 TRUSTS:

Rules of equity and common law rules generally govern creation and kinds of trusts and appointment, eligibility, competency, qualification and removal of trustees. All declarations of trust are required by statute of frauds to be in writing subject to rules of equity relating to resulting trusts.

The Trust and Loan Corporations Act 1997 (1997, c. T-22.2) governs registration and operation of such bodies in Province.

The Trustee Act (R.S., c. T-23) authorises investment of trust property on prudent investor standard (unless trust says otherwise), regulates sales of and provides for vesting orders relating to title to property and generally sets forth powers and duties, rights and liabilities of trustees, executors and administrators.

The Trusts Convention Implementation Act (1994, c. T-23.1, § 5) specifies law applicable to trusts and governs their recognition.

Kinds.

Implied or resulting trusts are recognised. Express trusts may be inter vivos or testamentary. Common law also recognises constructive trusts.

Creation.

Express trust created through declaration of intention by settlor in form of trust agreement. Resulting trust arises when trust property is not used in entirety during life of trust. Remedial constructive trusts address unjust enrichment of defendant at expense of plaintiff where monetary or personal award insufficient to compensate loss incurred by beneficiary, direct and substantial connection between plaintiff and property exists, plaintiff has reasonable expectation of interest in property and no juridical reason exists not to grant constructive trust. Good conscience constructive trust applies where defendant's breach of fiduciary duty to plaintiff has not resulted in compensable loss but where defendant will incur damages as result of breach itself.

Appointment of Trustee.

Appointment may be by trust agreement or by Court in event that trustee retires or requires replacement because of insolvency, death or criminal conviction (R.S., c. T-23, § 15).

General Powers.

Trustee is obligated to invest on behalf of beneficiaries, pursuant to trust agreement and common law standards meeting fiduciary duty. Trustees are under duty to convert trust property into approved investments except in case of inter vivos trusts. They cannot delegate authority (R.S., c. T-23, § 3).

Investments.

Trustee must invest as per reasonably prudent investor. Trusts may obtain investment advice from investment professional; so long as advice sought and reviewed prudently by trustee, he or she will not be liable for losses incurred by trust as result of taking such advice.

Compensation.

Trustees may be compensated in accordance with The Trustee Act (R.S., c. T-23).

Gift to Minors.

Adult beneficiaries cannot collapse trust.

Perpetuities.

Non-charitable purpose trusts can exist only for 21 years and can be used to support limited range of topics.

13.15 WILLS:

Any person of the age of 18, or any married infant, if of sound mind, can make a will (The Wills Act 1996 [1996, c. W-14.1]).

Testamentary Disposition.

The testator has complete power of disposition over estate; however, dispositions which exclude testator's spouse and dependant children will be subject to claims under The Dependants' Relief Act 1996 (1996, c. D-25.01).

Execution.

No will is valid unless it is in writing; will of soldier or sailor on active service must be put into writing by someone but requires no further formalities. It must be signed by testator or by some other person in his or her presence and by his or her direction and must be apparent on face of will that testator intended to create will. Such signature must be made or acknowledged by testator in presence of two or more witnesses, present at same time, and such witnesses must attest and subscribe will in presence of testator. Executor may be witness (The Wills Act 1996 [1996, c. W-14.1] § 7).

Attestation Clause.

Two witnesses as are present at the time the testator makes or acknowledges his or her signature must attest and subscribe the will in the presence of the testator, but no form of attestation is necessary. The following is used in practice:

Form

Signed, published and declared by the said testator, (name), as and for his/her last will and testament, in the presence of us, both present at the same time, who at his/her request, in his/her presence and in the presence of each other, has hereunto subscribed our names as witnesses.

Nuncupative Wills.

Nuncupative wills are abolished except as regards member of armed forces or sailor in course of voyage.

Holograph will, wholly in handwriting of testator and signed by him or her, may be made without any further formality, or any requirement as to the presence of, or attestation or signature by, any witness.

Testamentary Gifts to Subscribing Witnesses.

Except in the case of a charge for the payment of a debt, a testamentary gift to a witness, or the husband or wife of a witness, is void; however, gift may be validated if it is proven within six months that such person did not exercise any improper or undue influence on testator.

Probating.

Executors may apply for probate to Court of Queen’s Bench at any judicial centre if deceased left estate or effects within Saskatchewan.

If the subscribing witnesses are dead or if no affidavit can be obtained from any of them, due execution of the will may be shown by proof of the handwriting and signatures of the witnesses or testator or from those present at the execution of the will but who did not sign as witnesses.

Self-Proved Wills.

No provision.

Living Wills.

The Health Care Directives and Substitute Health Care Decision Makers Act (1997, H-0.001) provides for party with capacity to appoint substitute or proxy decision maker to carry out wishes regarding health care and treatment options when party is no longer of capacity. Such delegated decision may include discontinuance of treatment.

Unclaimed legacies lapse and fall into residue, ultimately to escheat to Province if no heirs or next of kin (R.S., c. E-11).

Lapse.

Unless a contrary intention is expressed in the will, a bequest to a child or other issue or brother or sister of testator does not lapse on death of legatee in testator's lifetime, if legatee leaves spouse or issue living at testator's death, but bequest takes effect in all respects as if legatee had died intestate, without debts, immediately after death of testator, except that surviving spouse is not entitled to usual preferential share of $100,000.

Revocation.

A will is revoked by subsequent marriage of the testator unless it was made in contemplation of marriage. (*Note:* The Wills Amendment Act, proclaimed in force 8 October 1982. Effect: Where marriage of testator is terminated by decree absolute, divorce or nullity, devise or bequest to spouse or appointment of spouse as executor or trustee or general power of appointment conferred on spouse in will is revoked.) Otherwise no will or codicil may be revoked except by another will or codicil executed in manner required for will or by some writing declaring intention to revoke same and execute in manner in which will is required to be executed, or by burning, tearing or otherwise destroying same by testator, or by some person in his or her presence and by his or her direction, with intention of revoking same.

Foreign will is well-executed as regards personal property for purpose of probate here if it is made according to form required, by either: (1) the law of this province; (2) the law of the place where the testator was domiciled when the will was made; or (3) the law of the place where the will was made; or (4) by the law then in force in that part of Her Majesty's Dominions where the testator had his or her domicile of origin.

Wills executed outside of Saskatchewan must, as regards real property in Saskatchewan, be executed according to the form required by the law of this province.

Resealing of Foreign Grants.

Application is made to Court of Queen's Bench at any judicial centre.

Simultaneous Death.

When two persons die at same time, property of each person goes to other person as if that person had survived other (1993, c. S-67.1). (See topic 13.05 Death, subhead Survivorship.)

International Will.

Will made in accordance with rules as set out in "Convention Providing a Uniform Law on The Form of an International Will". Convention between Governments of Canada and U.S. effective date: six months after day on which Government of Canada submits to U.S. Government, declaration that Convention extends to Saskatchewan. Provides for safekeeping and registration of international wills (The Wills Amendment Act, proclaimed in force 8 October 1982).

14 FAMILY

14.01 ADOPTION:

Married adults jointly, unmarried adult, step parent, or any other person that court may allow, having regard to best interest of child, may apply to Court of Queen's Bench to adopt child less than 18 years old who has never been married. Applicant must be resident of Saskatchewan, unless court waives this requirement (The Adoption Act 1998 [1998, c. A-5.2]).

Consent Required.

Where applicable, following persons must consent to adoption: birth mother; birth father; in case of Crown ward, appropriate Minister; where guardianship vested in agency, agency; where no birth parent alive, guardian; and child being adopted, if over 12 years old. Court may dispense with requirement of consent. Consent of birth mother, birth father or guardian must be accompanied by affidavit of execution, certificate of independent legal advice and certificate of counselling.

Conditions Precedent.

Consent to adoption or transfer of guardianship may not be given until child is at least three days old (1998, c. A-5.2).

Jurisdiction.

Applicant for adoption may apply to Court of Queen's Bench in any judicial centre in province.

Application for order of adoption to be heard by judge in chambers without presence of public. Application and required materials must be served on director 30 days prior to filing application in court. Court may interview child, require presence of applicant or any other person or direct formal hearing be held.

Every application must contain statement of fees, expenses and disbursements paid in connection with adoption (1998, c. A-5.2).

No person may give or receive any payment for any purpose related to adoption (1998, c. A-5.2, § 33).

Proceedings.

Where Court directs formal hearing, it shall provide directions concerning persons served with notice of hearing and procedure for hearing.

Name.

Surname of adoptive parent becomes generally surname of child, unless court orders otherwise. Court may also change given name if so requested. For child of 12 years or more, court will not change name without child's consent.

Legal Effect.

For all purposes, including rights to succession of property, if adoption order, then adopted child is child of adoptive parent as if born to that parent, and adoptive parent is parent of adoptive child as if had been birth parent. For all purposes, including rights to succession of property, if adoption order, then adopted child ceases to be child of birth parents, and birth parents cease to be parents of adopted child, except that adoptive child of parent adopting spouse's child continues to be that spouse's child. However, property vested in child before adoption continues to be vested in that child. Testamentary disposition that would have benefited adopted child, but for adoption, continues as valid disposition to adopted child if testator's ascertainable intention was to benefit such child individually or as class member.

Setting Aside Adoption.

Issued adoption order is final and irrevocable, subject to subsequent adoption orders. Adoption order is not issued for 30 days after being made, so as to allow for appeal to Court of Appeal.

See topics 14.05 Divorce and Other Matrimonial Causes, 14.07 Husband and Wife.

14.02 ALIMONY:

See topics 14.05 Divorce and Other Matrimonial Causes; 14.07 Husband and Wife.

14.03 COMMUNITY PROPERTY:

System does not apply in Saskatchewan.

See topic 14.07 Husband and Wife, subhead Matrimonial Property.

14.04 DESERTION:

See topics 14.05 Divorce and Other Matrimonial Causes; 14.07 Husband and Wife.

14.05 DIVORCE AND OTHER MATRIMONIAL CAUSES:

Governed by Federal Divorce Act. See Canada Law Digest.

Grounds for Divorce or Judicial Separation.

Adultery, intolerable physical or mental cruelty or intentionally living separate and apart for one year constitute grounds for grant of divorce judgment or judicial separation (The Queen's Bench Act 1998 [1998, c. Q-1.01]).

Residence Requirements.

Court has jurisdiction to hear action for judicial separation, if either spouse ordinarily resident in Saskatchewan for one year immediately preceding commencement of action (1998, c. Q-1.01).

Annulment of Marriage.

See topic 14.09 Marriage.

Jurisdiction.

Family Law Division of Court of Queen's Bench has jurisdiction to hear and determine family law proceedings (1998, c. Q-1.01). Application may be made to Provincial Court of Saskatchewan, pursuant to The Family Maintenance Act 1997 (1997, c. F-6.2).

Pleadings.

Petitions for judicial separation or other matrimonial causes are set out in Part XII of The Queen's Bench Act 1998 (1998, c. Q-1.01).

Presumption of Death.

See topic 14.09 Marriage.

Family Maintenance.

Court may order person to pay maintenance for spouse and/or children on interim and permanent basis. Court may also order restraining person from wasting assets that would impair claim under The Family Maintenance Act 1997 (1997, c. F-6.2). Court has authority under The Enforcement of Maintenance Orders Act 1997 (1997, c. E-9.21) to enforce maintenance orders made within Saskatchewan or another jurisdiction. Maintenance orders may be assigned to Crown agency which assumes responsibility for enforcement.

Matrimonial Property.

See topic 14.07 Husband and Wife, subhead Matrimonial Property.

Custody of Children.

Pursuant to The Children's Law Act 1997 (1997, c. C-8.2), presumption is that parents have joint custody of children. Presumption may be displaced by court order or agreement of parties (§ 3).

Remarriage.

If previously married, must provide evidence that director may require of dissolution or annulment until entitled to be remarried (The Marriage Act 1995 [1995, c. M-4.1] § 17).

Interspousal Contracts.

Interspousal Contract entered into pursuant to The Family Property Act 1997 (1997, c. F-6.3) that deals with possession, status, ownership or distribution of family property is binding provided contract is in writing, signed and witnessed, regardless of whether or not there is consideration. Each party must sign acknowledgement as to nature and effect of agreement before own lawyer, and lawyer signs certificate as to execution by party (1997, c. F-6.3, § 38).

14.06 GUARDIAN AND WARD:

Parents are joint custodians of infant child and joint guardians of infant child's property with equal powers and duties. Where parents did not cohabit after child's birth, parent with whom child resides is sole custodian. On death of either parent, survivor is custodian and guardian subject to agreement between parents authorising deceased parent to appoint custodian of child and guardian of child's property. If no agreement between parents to contrary, surviving parent can appoint custodian of child and guardian of property to take effect on death of surviving parent. When granting custody of child, court is to consider only best interests of child and, where court considers appropriate, wishes of child. Nonresident can be custodian of child or guardian of property. Custodian of child or guardian of property may be changed or removed by court for cause (The Children's Law Act 1997 [1997, c. C-8.2]).

Investments.

The Trustee Act (R.S., c. T-23). See category 13 Estates and Trusts, topic 13.14 Trusts.

Accounts.

Guardian of property of child must have accounts passed by court.

Insane Persons.

Interested person or designated corporation can apply to Court of Queen's Bench to become personal or property guardian, or both, with respect to adult (The Adult Guardianship and Co-decision-making Act [2000, c. A-5.3]).

See topic 14.08 Infants.

14.07 HUSBAND AND WIFE:

Antenuptial Contracts.

Where spouses have entered into interspousal contract that deals with possession, status, ownership, etc. of family property, including future family property, and contract is in writing, signed and properly witnessed, it is binding despite lack of valuable consideration. Each party must sign acknowledgement as to nature and effect of agreement before own lawyer, and lawyer signs certificate as to execution by party. Contract may provide for distribution at time of separation and may be made in contemplation of marriage. Any provision of contract that is void or voidable is severable (1997, c. F-6.3, § 38).

Separate Property.

Spouses have certain rights in homestead. (See category 8 Debtor and Creditor, topic 8.14 Homesteads.) Subject to certain equitable considerations, spouses may have claims to equal distribution of family property and family home. (See subhead Family Property, *below*.)

Carrying on Business by Married Woman.

Married woman may carry on business either solely or in partnership with any other person and her husband will have no interest therein or liability therefor.

Liability of Husband for Debts Incurred by Wife.

Husband may be held responsible for debts incurred by his wife either as his express or implied agent or in cases where wife would be held to be agent of necessity, as where husband has deserted his wife or in similar circumstances.

Liability of Husband for Torts of Wife.

Husband is not, merely by reason of marriage relation, liable for wife's torts, and cannot be joined in action against wife for her torts.

Actions.

Married woman may in all cases sue or be sued without joining her husband to same extent as if she were unmarried. Action may be brought against any married woman for all civil injuries and damages be recovered from her alone, and her husband is not responsible therefor unless he would be liable apart from fact of his being her husband.

Maintenance.

By statute, court may make order directing person to pay maintenance to spouse or children. Absent special circumstances, amount of maintenance is fixed by regulatory guidelines (1997, c. F-6.2). Payment of maintenance arrears is enforceable by garnishment, seizure and sale and imprisonment (1997, c. E-9.21).

Foreign Maintenance Orders.

There can be reciprocal enforcement of maintenance orders: Saskatchewan orders can be made enforceable elsewhere, and orders made elsewhere can be made enforceable in Saskatchewan (Inter-jurisdictional Support Orders Act [2002, c. I-10.03]).

Community property system does not exist in Saskatchewan. See, however, subhead Family Property, *below*.

Family property means real or personal property and is, subject to exceptions, exemptions and equitable consideration set forth in Act, to be distributed equally by court upon application by spouse. Court distributions are subject to certain exemptions, equitable considerations and to interspousal contract in writing dealing with distribution of family property including future claims. Court may make order for exclusive possession of family home (1997, c. F-6.3).

14.08 INFANTS:

Usual rules of common law apply to contracts of infants. They become of age at 18, regardless of sex or marriage. Legal drinking age is 19.

Public Guardian and Trustee is official guardian of infants for province whose consent is required in most matters concerning infants' estates (The Public Guardian and Trustee Act [1983, c. P-36.3]). Infants sue as plaintiffs by their next friends and in like manner defend by their guardians. Guardian ad litem may for this purpose be appointed by court.

Court of Queen's Bench (Family Law Division) has control of custody of infants and may deal with same in actions for divorce or alimony or on special application. Welfare of infant is determining factor (The Children's Law Act 1997 [1997, c. C-8.2]).

See also topic 14.06 Guardian and Ward.

14.09 MARRIAGE:

Solemnisation of marriage in Province may be performed by clergy and marriage commissioners registered under The Marriage Act 1995 (1995, c. M-4.1, § 3).

Consent Required.

Under-18 minors not previously married must have written consent of parents or judge's order, unless marriage was consummated or parties have cohabitated after ceremony. Statutory declaration must be made by parties separately before issuer of licence, negativing consanguinity and need of parental consent. Licence shall become effective day after the day statutory declaration filed. In exceptional circumstances, licence may become effective on day statutory declaration filed.

Licence must be obtained from marriage licence issuer and marriage must take place within three months of issuance of licence.

Previously married parties must submit proof to clergy, who is to solemnise marriage, and to issuer of licence that marriage was properly dissolved or annulled. Proof must consist of court certified copy of decree dissolving or annulling previous marriage with proof that time for appeal from such decree has expired. If previous spouse of party is deceased, then proof of death of that spouse must be submitted by way of death certificate or affidavit of some person knowing facts.

Medical Examination.

There is no requirement for medical examination, but may be ordered by court (§ 34).

Ceremonial Marriage.

Person solemnising marriage may do so according to rites of his or her church but not until above prerequisites have been fulfilled. Person solemnising marriage must duly register same and furnish each party with marriage certificate. Two adult credible witnesses are required at every marriage. Issuer of marriage licence may not solemnise marriage. Marriage may not be solemnised between 10 p.m. and 6 a.m. or if either party is under influence of alcohol or drugs or has specified communicable disease. Civil marriage may be performed by marriage commissioner in his or her office in accordance with statutory form and manner.

Reports of Marriages/Records.

See category 10 Documents and Records, topic 10.05 Records, subhead Vital Statistics.

Common Law Spousal Relationships.

For most provincial statutory purposes, common law spousal relationships whether same-sex or different-sex are equivalent to spousal relationships by marriage. Most provincial statutes include within definition of “spouse” person cohabitating in “spousal relationship for more than two years”. At present, commencement of such “cohabitation” must be ascertained case-by-case using common law. This issue has not yet been settled and rapid development of law in this area is expected in next few years.

Prohibited Marriages.

Marriages are not allowed between parties where statutory degree of consanguinity exists (§ 17).

Annulment of Marriage.

Jurisdiction to annul marriages is in Court of Queen’s Bench (Family Law Division). It will assume jurisdiction where husband is domiciled in Saskatchewan at commencement of action or if marriage was celebrated in Province and one of parties is resident there. Residence alone as basis of jurisdiction in annulment is uncertain. Annulment may be granted: (1) where parties are within forbidden degrees of consanguinity; (2) for bigamy or impotence; or (3) where form of marriage is gone through between persons either of whom is under age of 18 without consent required by The Marriage Act, and marriage has not been consummated (before or after ceremony), and parties have not since ceremony cohabited as husband and wife and plaintiff is person who was under age of 18 at time of marriage.

Presumption of Death of Absent Spouse.

Queen’s Bench Court (Family Law Division) may grant leave to petitioner to presume his or her spouse to be dead and to remarry upon producing evidence that for more than seven years spouse has been continually absent and petitioner has made reasonable inquiries and has no reason to believe that other party has been living within that time. Marriage following such presumption is, however, invalid if missing spouse turns up.

14.10 MARRIED WOMEN:

See topics 14.07 Husband and Wife, 14.09 Marriage; categories 5 Civil Actions and Procedure, topic 15.11 Evidence, subhead Witnesses; 8 Debtor and Creditor, topic 8.14 Homesteads; 13 Estates and Trusts, topics 13.09 Executors and Administrators, 13.05 Wills; 21 Property, topics 21.05 Deeds, 21.07 Dower.

15 IMMIGRATION

15.01 ALIENS:

Personal Property.

Same rights generally to acquisition, transmittal and disposition as Canadian citizens but subject to restrictions in case of businesses (Investment Canada Act, R.S.C., c. 28 [1st Supp.]) and certain dispositions may be subject to withholding tax (Income Tax Act, R.S.C., c. 1, [5th Supp.]). See Canada Law Digest.

Real Property.

Nonresident persons, except those who were resident during any five years and acquired land during that period, cannot have aggregate farmland holding with assessed municipal-tax value of over $15,000, excluding assessment for buildings and improvements (The Saskatchewan Farm Security Act [1988-89, c. S-17.1] § 77). “Resident person” means individual residing in Canada for at least 183 days in any year or Canadian citizen (§ 76). Exemptions for farmland holdings acquired before applicable restrictions came into force. Nonresident persons with excess farmland holdings have five years to reduce to allowed amount.

Further restriction to 160 acres for farmland holdings after 15 September 1977 (§ 79). Further restriction to ten acres for farmland holdings after 6 May 1980 (§ 80).

Exemptions for acquisitions by inheritance (§ 82) and for relatives of resident persons (§ 83). In general, possibility of applying to Farm Land Security Board for exemption (§ 91).

"Canadian-owned entity" means entity, whose shares are not listed on exchange, and is entirely owned by "resident persons" (§ 76). No non-Canadian-owned entity can have more than ten acres of aggregate farmland holdings without Board's consent (§ 84). Special rules for trust companies (§ 84). Canadian-owned entity that becomes non-Canadian-owned entity has one year to dispose of excess farmland holdings, unless Board allows more time (§§ 85, 87). Non-Canadian-owned entity can have up to 320 acres if majority of its issued voting shares are held by Saskatchewan residents or agricultural corporations similarly held (§ 85.1).

No nonresident person or non-Canadian-owned entity can have interest in limited partnership having farmland holding, unless Board consents (§ 86).

Nonresident person or non-Canadian-owned entity can have excess farmland holding acquired by realisation on security for only two years from acquisition, unless Board allows more time (§ 88).

No person can acquire farmland holdings on behalf of nonresident person or non-Canadian-owned entity, if direct acquisition would have been prohibited (§ 89).

Board can order disclosure of farmland holdings from any person, other than individual, having more than ten acres (§ 90).

Board has power to investigate (§ 95) and to apply to court for voiding of non-compliant transaction (§ 94). Criminal liability for non-compliance extends to directors, officers and agents of non-complying corporation (§ 93).

16 INSURANCE

16.01 INSURANCE COMPANIES:

Regulated by.

The Saskatchewan Insurance Act (R.S., c. S-26).

Supervision by.

Superintendent of Insurance has general supervision of business of insurance within Saskatchewan (§ 3).

Agents and Brokers.

Agent must have valid licence under The Saskatchewan Insurance Act (§ 416). No agent shall engage in insurance brokerage business unless specifically authorised by licence to engage in that business (§ 419). Applications for licence are made to Superintendent of Insurance (§ 420).

Fire Insurance.

The Saskatchewan Insurance Act sets statutory conditions deemed to be part of every contract and no variation of any statutory condition is binding on insured (§ 128). Limitation of liability clause in policy not binding on insured unless printed or stamped in red ink or in bold type on face of policy (§ 129). Contracts cannot be terminated by insurer without giving to insured 15 days' notice of termination by registered mail, or five days' written notice of termination personally delivered. Insured can terminate contract at any time on request (§ 128).

Life Insurance.

Governed by provisions of The Saskatchewan Insurance Act (§§ 133–185). Beneficiary may enforce rights under policy as they exist at maturity of policy (§ 157). Minor of 16 may effect life insurance as if he or she were of age (§ 164).

Other Insurances.

Certain statutory provisions are made in reference to hail, accident, sickness, livestock and motor vehicle insurance.

Automobile Accident Insurance.

Governed by provisions of The Automobile Accident Insurance Act (R.S., c. A-35). On registration of motor vehicle and upon issuance of operator's licence, applicant automatically given certain insurance coverage under Saskatchewan Government Insurance Plan. No-fault scheme covers personal injury, collision, property damage, fire and theft. Enhanced coverage can be purchased. Residents have choice of no-fault coverage or right of civil action. See also category 23 Transportation, topic 23.03 Motor Vehicles, subhead Insurance.

Municipal Hail Insurance as governed by The Municipal Hail Insurance Act (R.S., c. M-29) is provided by association consisting of representatives from municipalities which have joined association. Provides for levy by way of taxes on all lands in municipality except when owner has withdrawn land (§ 26). Rates fixed by board of directors of association (§ 23).

Tax on Income from Insurance Premiums.

Two percent tax imposed respecting gross premiums related to life, accident and sickness insurance that is receivable before 1 April 2000 and 3% tax on and after 1 April 2000 by every insurance company transacting business in Saskatchewan (The Insurance Premiums Tax Act [R.S., c. I-10] § 4). Further 1% tax imposed on income from motor vehicle insurance gross premiums receivable by company during each year (The Motor Vehicle Insurance Premiums Tax Act [R.S., c. M-23] § 5).

Direct Actions Against Insurer.

See category 23 Transportation, topic 23.03 Motor Vehicles, subhead Direct Actions.

16.02 SURETY AND GUARANTY COMPANIES:

Surety and guaranty companies are required to become registered in province. Every company becoming registered is required to appoint resident attorney for service of process.

17 INTELLECTUAL PROPERTY

17.01 TRADEMARKS AND TRADENAMES:

See Canada Law Digest.

18 LEGAL PROFESSION

18.01 ATTORNEYS AND COUNSELLORS:

These terms are not commonly used in Canada, terms used being barrister and solicitor, or lawyer whose rights and duties are, apart from custom, governed by The Legal Profession Act 1990 (1990-91, c. L-10.1). Barrister, solicitor or lawyer is officer of court and fees are subject to review by court. Apart from custom, lawyer's conduct is regulated by The Legal Profession Act 1990 (1990-91, c. L-10.1).

Admission to Bar.

Applicant must be permanent resident of Canada or Canadian citizen and must have conformed to rules of Law Society of Saskatchewan respecting articling and legal education. Student who is permanent resident of Canada or Canadian citizen may apply to Law Society of Saskatchewan to be admitted as student-at-law if student has conformed to rules of Law Society of Saskatchewan respecting articling and legal education. Lawyer-member of another governing body of legal profession in Canada who applies as lawyer in Saskatchewan and fulfills the requirements set out in the Rules of the Law Society of Saskatchewan can be admitted to Bar.

Inquiries regarding conditions of admission to bar or relating to professional conduct should be directed to Secretary, Law Society of Saskatchewan, 1100-2002 Victoria Avenue, Regina, SK, S4P 0R7 (http://www.lawsociety.sk.ca).

Disabilities.

Practitioner is exempt from jury duty and is prohibited from acting as surety on administration bonds.

Liens.

Solicitor is entitled to apply to court for lien or charge against any personal property not in solicitor's possession that is recovered as result of solicitor's services for proper fees and expenses in relation to legal proceedings, including counsel fees. Solicitor has lien or charge against client's property in solicitor's possession (1990-91, c. L-10.1, § 66).

Compensation.

Client can have solicitor's bill assessed on application to registrar of court.

Disbarment or Suspension.

Barrister or solicitor may be suspended or disbarred from practice if engaged in conduct that warrants such penalties.

Unauthorised Practice.

No person, other than barrister or solicitor with subsisting certificate shall practise law in Saskatchewan.

Professional Association.

Barristers and solicitors are members of Law Society of Saskatchewan which is continued as corporation.

The Legal Aid Act (1983, c. L-9.1) provides for legal aid representation in certain civil and criminal matters.

19 MINERAL, WATER AND FISHING RIGHTS

19.01 FISHERIES:

Fisheries are governed by The Fisheries Act (Saskatchewan) 1994 (1994, c. F-16.1). Province controls fishing industry and requires licence for every fisherman, fish dealer, processing or packing plant or exporter, and restricts purchase except from licenced dealer. Property in all wild fish is vested in Crown; persons only acquire property therein by obtaining possession pursuant to licence.

19.02 MINES AND MINERALS:

See Canada Law Digest. Actual operation of coal and other mines is governed by The Occupational Health and Safety Act 1993 (1993, c. O-1.1) and The Mines Regulations 2003 (R.R.S., c. O-1.1, Reg 2) passed whereby stringent provision is made to ensure that any area of mine is maintained and carried on in manner that does not endanger health or safety of any employee who works therein.

Mineral rights are divided into two classifications: (a) those owned by individuals; and (b) those owned by Province. Reason for two classifications is that prior to year 1890, Crown Government grants of land to individuals and corporations included mineral rights, whereas after that date mineral rights were reserved to Crown. Majority of mineral rights are owned by Crown in right of Province, with individually owned mineral rights being scattered throughout settled portion of Province. Mineral rights which are individually owned are real property and may be dealt with as set forth under category Property, topic Real Property. Minerals owned by Province are administered by Saskatchewan Ministry of Energy and Resources, which also regulates all mining and drilling of oil and gas wells (The Crown Minerals Act [1984-85-86, c. C-50.2] and The Oil and Gas Conservation Act [R.S., c. O-2]). Dispositions of Crown minerals are subject to The Mineral Dispositions Regulations 1986 (SR/86), which also provide for Crown royalties and detailed royalty schemes for uranium and graphite. Subsurface minerals such as potash and coal are subject of separate topical regulations under The Mineral Resources Act 1985 (1984-85-86, c. M-16.1).

Some minerals are owned by Government of Canada, for example, Indian lands, and are administered by various agencies of that Government.

Mineral Tax.

The Mineral Taxation Act 1983 (1983-84, M-17.1) imposes tax on production or sale or other disposition of minerals referred to in schedules to Act. In addition, subject to certain exceptions, every owner of mineral rights is liable to pay each year tax in amount of $960 for each section of aggregate area of all mineral rights owned by him or her that year plus pro rata share of any mineral rights owned by him or her that are not full nominal section (§ 11).

Petroleum and Natural Gas.

Tax.

Pursuant to The Freehold Oil and Gas Production Tax Act (1982-83, c. F-22.1), taxes are paid by holders of working interests on freehold oil and gas produced. Tax payable is proportionate to working interest and is collected and remitted by operator of well (§ 6). Tax is likewise payable by holder of working interest in crude oil recovered (§ 32.11).

Money held for remittance to Crown is held by operator in trust (§ 7). Failure by operator to deduct as required makes him or her personally liable for amount of tax. As well, operator is to advise Crown as soon as possible when well is producing (§ 11).

Crown has certain powers to enforce Act, including right to access premises to review records, to apply to Queen’s Bench Judge for injunction where payment of future tax endangered or to obtain order for production of records or, in case of default, to collect taxes, interest and penalty by distraining. Tax and interest owed constitute first lien on entire interest of person liable to pay (§ 19).

Act provides for exemptions from payment of tax for owners of producing tracts where aggregate of their interest does not exceed two nominal sections (§ 28). Also exempt is oil and gas produced from lands vested in Crown and administered by Federal Government for purposes of Canada, including lands on Indian Reserves.

Offences include failure to make return required by Act or to complete information with fines ranging from $10 to $50 per day (§ 15). Knowingly failing to complete any information or to deliver return may result in fine of not less than $1,000 and not more than $10,000 and/or imprisonment of up to six months. Wilful attempt to evade taxes may amount to fine of not less than 25%, nor more than double amount of taxes sought, and/or six months imprisonment. Penalty for contravention of Act not otherwise provided for shall not be less than $100, nor more than $5,000, and/or not more than six months imprisonment (§ 18).

19.03 WATER:

The Saskatchewan Watershed Authority, continued as corporation pursuant to The Saskatchewan Watershed Authority Act 2005, manages, administers, develops, controls and protects water, watersheds and related land resources; promotes economical and efficient use, distribution and conservation of water and related land resources; maintains and enhances quality and availability of water, watersheds and related land resources for domestic, agricultural, industrial, recreational and other purposes (The Saskatchewan Watershed Authority Act 2005 [2005, c. S-35.03] § 5).

20 MORTGAGES

20.01 CHATTEL MORTGAGES:

See topic 20.04 Personal Property Security.

20.02 COLLATERAL SECURITY:

See category 8 Debtor and Creditor, topic 8.20 Pledges.

20.03 MORTGAGES:

Mortgage may be registered under The Land Titles Act 2000 (2000, c. L-5.1, §§ 123–137) and will take priority according to time of registration. “The Land Titles Act 2000” mortgage does not operate as transfer of title but only as security (§ 123). Common law mortgage may still be affected by transfer of title to mortgagee, but is rarely done.

When land is transferred, subject to mortgage, covenant is implied between transferee and transferor, that former will indemnify latter.

When mortgage provides for share of crops to be delivered, mortgagee takes such share in priority to mortgagor or any person claiming through him or her.

Mortgage money overdue may be paid at any time before final order of foreclosure. Mortgagee cannot add to mortgage debt life insurance premiums due on collateral policy, nor hail insurance premiums without written consent in year.

Person who carries on business of dealing in mortgages or lends money on security of land or interest in land must be licenced. Exceptions amongst others: chartered banks, credit unions and federal and provincial Crown corporations (The Mortgage Brokers Act [R.S., c. M-21] § 3). Per recent announcement, The Mortgage Brokerages and Mortgage Administrators Act (the

“New Act”) will be implemented on 1 October 2010. The current legislation, The Mortgage Brokers Act (the “Current Act”), will be repealed effective 30 September 2010.

Following is statutory requirements of mortgage: Mortgage must contain accurate statement of estate or interest intended to be mortgaged and description of land for which title has issued and pursuant to which estate or interest is held or description that otherwise identifies land (2000, c. L-5.1, § 129). The Land Titles Regulations 2001 (R.R.S., c. L-5.1, Reg 1, § 111) contain short form covenants that may be used in mortgage (2000, c. L-5.1, § 130).

Registration Fees.

Pricing is currently based on “fee-for-service” model that reflects amount of work required. Title or abstract transfer: $0 to $500—free, $501 to $8,400—$25, $8,401 and greater—0.3% of value of title or abstract; title transmission: $0 to $500—free, $501 to $8,400—$12.50, $8,401 and greater—0.15% of value of title or abstract; title transfer to surviving joint tenant: $0 to $500—free, $501 and greater—$12.50; alternate authority set up per title or interest $60; interest registration, amendment or assignment for interest $50. Registration of mortgage—$150 for first four titles, interests or shares affected, plus $50 per additional title, interest or share affected. (Complete LAND system fee schedule is available at http://www.isc.ca.)

Distress.

Where mortgage provides that mortgagee may distrain for payments in arrears, such distress may take place in usual way as under The Distress Act (R.S. 1978, c. D-31, § 8), provided mortgage was given to lender and not vender. Exemptions from seizure under execution are good as against mortgagee distraining.

Foreclosure.

The Limitation of Civil Rights Act (R.S., c. L-16) may restrict creditor to realisation of security to recover his or her arrears and prevent any suit against debtor on personal covenant (§ 2). See also categories 3 Business Regulation and Commerce, topic 3.25 Sales; 8 Debtor and Creditor, topic 8.20 Pledges. Court has wide discretionary powers in actions on mortgages and agreements for sale of land (§ 4). Only action under mortgage in default is against land itself and not on personal covenant or under power of extrajudicial sale. Before commencing foreclosure action, leave must be obtained from Queen’s Bench judge (R.S., c. L-16, § 23; The Land Titles Act 2000 [2000, c. L-5.1] § 132). After such leave granted, the mortgagee may take proceedings in ordinary way by issue of Writ of Summons and proceed to obtain order nisi and final order of foreclosure resulting in title vesting in mortgagee or vendor. See also categories 5 Civil Actions and Procedure, topic 5.02 Actions; 8 Debtor and Creditor, topic 8.19 Moratorium.

Deficiency and Personal Liability.

Taking of final order for foreclosure of mortgage on land operates in full satisfaction of debt secured by mortgage. Exception available regarding corporate mortgagors; corporations able to waive statutory protection against suit on personal covenant by written agreement (R.S., c. L-16, § 40).

Redemption.

Every mortgagor in default may redeem by payment of arrears and costs until final order of foreclosure or sale issues. Even after final order has gone he or she may still redeem should mortgaged property not have been alienated by mortgagee and providing delay is satisfactorily explained.

Agricultural Considerations.

For restrictions on foreclosures of farm land, see category 8 Debtor and Creditor, topic

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8.19 Moratorium, for discussion of The Saskatchewan Farm Security Act.

Right of mortgagee or vendor of land or of crop-share lease or collateral to mortgage or agreement for sale is limited to one-third of crop (The Crop Payments Act [R.S., c. C-48] § 6).

Discharge of Mortgage.

Mortgage may be discharged by mortgagee executing application for interest discharge form available at Information Services Corporation (ISC) or certificate signed by judge (The Land Titles Act 2000 [2000, c. L-5.1] § 64).

Affidavit of execution is also required. For form, see category 21 Property, topic 21.13 Real Property. Discharge of mortgage must be submitted to Registrar at Information Services Corporation website at http://www.isc.ca.

There is also provision for obtaining judge’s order directing discharge where mortgagee is absent from province or mortgage has been lost or other unusual occurrence of similar nature (The Land Titles Act 2000 [2000, c. L-5.1] § 133).

Trust Deeds.

Under The Land Titles Act 2000, no certificate of title may have endorsed thereon any notice of any trust, and registered owner is considered absolute owner, subject to registered encumbrances, subsisting leases, taxes, etc. (§ 35). If land is to be transferred to person upon trust, land is transferred in usual way and cestui que trust may protect his or her interest by registering miscellaneous interest. Trust mortgages are registered in usual way, terms of trust being set out therein. If such trust mortgage covers chattels or book debts, registration thereof in Land Titles Registry is not sufficient and mortgagee will have to protect himself or herself by registration under personal property security legislation.

Chattel Mortgages.

See topic 20.04 Personal Property Security.

See also category 8 Debtor and Creditor, topic 8.19 Moratorium.

20.04 PERSONAL PROPERTY SECURITY:

The Personal Property Security Act 1993 (1993, c. P-6.2) applies to every transaction that in substance creates a security interest, including chattel mortgage, conditional sale, floating charge, pledge, debenture, trust indenture or trust receipt, lease, assignment, consignment or transfer of chattel paper and to assignment of accounts, transfer of chattel paper, consignment or lease for term of more than one year, notwithstanding that such interests may not secure payment or performance of obligation (§ 3). Historic forms and concepts of security agreements are discarded and single conceptual basis for all personal property security agreements is employed. Saskatchewan statute also applies to “corporation securities”.

Conflict of Laws.

Basic premise is that law of jurisdiction where collateral is situated when security interest attaches is applicable law for determining validity, perfection and effect of perfection or non-perfection of security interest in such collateral (§ 5). For intangibles, property normally used in more than one jurisdiction and non-possessory security interests in securities, instruments, negotiable documents of title, money and chattel paper, law of jurisdiction where debtor is located when security interest attaches governs (§ 7). Debtor is deemed to be located at his or her place of business, at his or her chief executive office if he or she has more than one place of business and otherwise at his or her place of residence (§ 7).

Security interest in collateral already perfected under law of another jurisdiction continues perfected in Saskatchewan as against buyer in good faith if perfected in Saskatchewan prior to buyer's acquiring interest in goods and as against all other persons within 60 days after brought into province or within 15 days after day secured party acquires knowledge that goods have been brought into Saskatchewan or prior to day that perfection ceases under law of prior jurisdiction, whichever is earliest (§ 5).

Transitional.

Proclamation on 1 May 1981 of The Personal Property Security Act caused repeal of The Assignment of Book Debts, The Bills of Sale Act, The Conditional Sales Act and The Corporation Securities Registration Act and amendments to The Agricultural Implements Act, The Creditors' Relief Act, The Distress Act, The Executions Act, The Exemptions Act, The Garage Keepers Act, The Sale of Goods Act and The Limitations of Civil Rights Act.

Registration under repealed or amended Acts is deemed to be registration under The Personal Property Security Act. Question as to priority between security interests validly created prior to coming into force is determined by prior registration law, but priority between prior security interest and security interest validly created after proclamation shall be determined by The Personal Property Security Act (§ 74).

Registration is continued for unexpired portion of filing or registration period under prior law except for registrations under The Assignment of Book Debts Act and The Bills of Sale Act which expired on 1 May 1984, unless they were renewed under new Act.

Effectiveness.

Security agreement is effective according to its terms (§ 9). However, certain terms are prohibited or may be unenforceable. Following are examples: any prohibition against assignment of account unenforceable against third parties (§ 41[9]); and redemption provisions in Act operate exclusive of acceleration clauses (§ 62).

A security interest in collateral ceases to be valid if payment or performance of obligation is also secured by security created pursuant to Bank Act (Canada) (§ 9[2]).

Enforceability.

No security interest is enforceable against third party unless collateral is in possession of secured party or debtor has signed security agreement that contains description of collateral which enables type or kind of collateral taken under security agreement to be distinguished from types or kinds of collateral which are not collateral under security agreement, and, in case of security interest taken in all of debtor's present and after-acquired property, statement indicating that security interest has been taken in all of debtor's present and after-acquired property is sufficient (§ 10).

Attachment.

Security interest attaches when value is given, debtors have rights in collateral, and except for purpose of enforcing rights between parties to security agreement, it becomes enforceable against third parties. Debtors have rights in goods purchased under agreement to sell when they obtain possession of the goods pursuant to sales contract, and in goods leased to them, hired by them or delivered to them under consignment, when they obtain possession of the goods pursuant to lease, hiring agreement or consignment. Debtors have no rights in crops until they become growing crops, young of animals until they are conceived, in oil, gas or other minerals until extracted and in timber until it is cut (§ 12).

After-Acquired Property.

Security agreement may cover after-acquired property and security interest will attach without specific appropriation by debtor (§ 13).

Future Advances.

Security agreement may secure future advances whether or not advances are made pursuant to obligation in security agreement (§ 14). If future advances are made while security interest is perfected, security interest has same priority with respect to future advances as it has with respect to first advance. Future advance will not take priority over interests of person who causes collateral to be seized under legal process, sheriff who has seized, trustee in bankruptcy or representative of creditors who has caused collateral to be seized under legal process, unless advance made before interests of such persons arise, or before secured party receives notice of their interests (§ 35).

Perfection.

Security interest is perfected when it has attached and all steps required for perfection required under Act have been completed regardless of order of occurrence (§ 19). Three methods of perfection are: possession of collateral by secured party or on his or her behalf (§ 24); registration of financing statement in Personal Property Registry (§ 25); and automatic, although temporary, perfection by way of statutory grace periods (§ 26).

Act also provides specific rules as to perfection with respect to proceeds of collateral. Security interest in collateral extends to proceeds and is perfected if financing statement filed which covered original collateral contains prescribed description or if proceeds are of type which fall within description of original collateral or are cash, then registration perfects security interest in both collateral and in proceeds. Otherwise security interest in proceeds perfected for only 15 days after debtor receives possession of them (§ 28).

Purchase-money security interest in collateral or its proceeds, other than intangibles or inventory, that is perfected within 15 days after day debtor obtains possession of collateral, or in intangibles or its proceeds, within 15 days after security interest therein attaches, has priority over any other security interest in same collateral or its proceeds given by same debtor (§ 34).

Purchase-money security interest in inventory or its proceeds has priority over any other security interest in same collateral given by same debtor if purchase-money security interest in inventory is perfected at time debtor receives possession of it and purchase-money secured party serves notice on secured party who has registered financing statement covering same type of collateral (§ 34). Such notice covers collateral of which debtor receives possession in two-year period following notice. Exception with respect to sales in ordinary course of business and by virtue of fact that purchase-money security interest in proceeds of inventory does not have priority over perfected security interest in accounts receivable given for new value (§ 31).

Purchaser of goods sold in ordinary course of business of seller takes free of any perfected or unperfected security interest therein given by or reserved against seller, whether or not purchaser knows of it, unless secured party proves that purchaser also knows that sale constitutes breach of security agreement (§ 30).

Act provides special priority rules between secured and unsecured creditors, and with respect to fixtures, negotiable documents of title, money and securities, chattel paper and future advances (§§ 35, 36).

Registration.

Registration system to be known as Personal Property Registry is established. Registration is by notice filing and is effected by filing financing statement in prescribed form. Financing statement or financing change statement may be tendered for registration by mail or online at www.isc.ca.

Registration of financing statement is effective for length of time indicated in financing statement and may be renewed at any time before document to which it refers expires by registering financing change statement (§ 44).

Where secured party assigns his or her interest or subordinates his or her interest to that of another person, financing change statement in prescribed form may be registered (§ 46). Registration of such statement is mandatory where debtor transfers his or her interest in collateral or changes his or her name.

Search for registrations against name of debtor or against serial number where collateral required by regulation to be described by serial number (i.e. motor vehicles, mobile homes, trailers and airplanes, as defined in regulations) may be obtained, with results given in printed or verbal form (§ 48).

Time for Registration.

Financing statement may be registered at any time and may be registered before security agreement is made or before security interest attaches (§ 43). It must be registered prior to expiry of any temporary perfection period (usually 15 days) to continue perfection uninterrupted, and with respect to purchase-money security interest, within 15 days of debtor obtaining possession of collateral.

Rights and Remedies Upon Default.

Part V contains code setting out rights, remedies, duties and obligations upon both secured party and debtor, many of which, to extent that they give rights to debtor or impose obligations upon secured party, cannot be waived. However, all such rights and remedies of secured party are subject to consumer protection legislation.

21 PROPERTY

21.01 ABSENTEES:

Nonresidents have, generally, the same civil and property rights as residents.

Relatives or other interested persons may apply to the Court of Queen’s Bench for an order declaring someone a missing person and appointing a property guardian (The Missing Persons and Presumption of Death Act [S.S. 2009, c. M-20.01]).

In certain cases nonresidents claiming an interest in land are required to name agents within the province for service of statutory notices.

See also category 5 Civil Actions and Procedure, topic 5.06 Costs.

Escheat.

If person dies intestate with no heirs, Attorney General can commence action for all property in name of Her Majesty in Right of Saskatchewan (The Escheats Act [R.S., c. E-11]). Property can be returned to person entitled if claim is made within six years of death (The Court Officials Act 1984 [1984-85-86, c. C-43.1]).

Unclaimed Bank Deposits.

See Canada Law Digest.

21.02 ADVERSE POSSESSION:

No title to real estate can be acquired by adverse possession since 1913 where the land is under the Land Titles system, which is almost universally the case (The Land Titles Act 2000 [2000, c. L-5.1]).

Easements can only be acquired by express grant or statutory authority, but not by prescription (2000, c. L-5.1).

21.03 CONVEYANCES:

See topic 21.05 Deeds.

21.04 CURTESY:

No tenancy by curtesy (The Intestate Succession Act 1996 [1996, c. I-13.1]).

21.05 DEEDS:

The ordinary common law rules as to deeds apply, the seal being the essential thing but this does not extend to documents under The Land Titles Act 2000 (2000, c. L-5.1).

Execution.

For circumstances in which spouse must join, see category 8 Debtor and Creditor, topic 8.14 Homesteads, subhead Alienation or Encumbrance; also topic 21.13 Real Property, subhead Forms.

For deeds and documents relating to real property, see topic 21.13 Real Property.

21.06 DEEDS OF TRUST:

See category 20 Mortgages, topic 20.03 Mortgages.

21.07 DOWER:

There is no dower (The Intestate Succession Act 1996 [1996, c. I-13.1]).

21.08 ESCHEAT:

See topic 21.01 Absentees; category 13 Estates and Trusts, topics 13.07 Descent and Distribution, 13.15 Wills.

21.09 LANDLORD AND TENANT:

Residential leases and tenancies are governed by The Residential Tenancies Act 2006 (2006, c. R-22.0001). Every written or oral tenancy agreement is deemed to contain statutory conditions prescribed in Act. Act also establishes Office of Residential Tenancies which administers Act and adjudicates disputes between landlords and tenants. Nonresidential leases and tenancies are governed by The Landlord and Tenant Act (R.S., c. L-6).

The Land Titles Act 2000 requires land leases for terms beyond three years to be registered.

Both The Landlord and Tenant Act and The Residential Tenancies Act 2006 allow oral or written leases.

If residential lease is in writing, tenants must receive original copy within 20 days of execution otherwise lease obligations are suspended until receipt. Provisions of The Residential

Tenancies Act 2006 cannot be contracted out of and landlord cannot include in lease or receive statements from tenant that premise is in satisfactory condition before tenant enters into possession.

Under The Landlord and Tenant Act, every lease has implied term of reentry and repossession upon two months of unpaid rent or two months of continuing default of lease provision.

See also topic 21.13 Real Property.

Termination of Tenancy.

Under The Residential Tenancies Act 2006, to terminate a tenancy, either party must sign or have agent sign written notice of termination that identifies premises and states date of tenancy termination. Notice shall not be given later than last day of weekly tenancy to be effective on last day of immediately following week. With monthly tenancies, notice no later than last day of month to be effective on last day of following month. For yearly tenancies, notice cannot be given later than 60th day before last day of any year of tenancy.

Landlord can immediately terminate if tenant uses premises for illegal or noxious purposes. If tenant has received seven days written notice for contravening standards of ordinary cleanliness and continues to contravene, landlord can immediately terminate.

The Landlord and Tenant Act provides that, for weekly and monthly tenancies, notice of one week or one month respectively is sufficient to terminate lease.

Holding Over.

Respecting The Landlord and Tenant Act, tenant overholding after notice to quit is given to or by him or her is liable to proceedings in Court of Queen's Bench to place landlord in possession. Such proceedings must be brought by notice of motion. Provincial Mediation Board can make order prohibiting proceedings for possession.

Distress.

Landlord's right of distress on goods of his or her tenant abolished with respect to renting of residential premises under The Residential Tenancies Act 2006 (2006, c. R-22.0001). Respecting other leases covered by The Landlord and Tenant Act (R.S., c. L-6), landlord's right of distress is fixed by statute and is about same as that of execution creditor. See category 8 Debtor and Creditor, topic 8.09 Executions.

Distress Must be Reasonable.

Generally only goods on premises in respect of which rent is being distrained for can be seized, except for goods fraudulently removed from such premises to thwart landlord. No distress on goods not belonging to tenant. Goods subject to purchase-money security interest cannot be subject to distraint. Act specifically allows for distraint on standing crops, stored grain and livestock. Landlord must give notice to tenant where distrained goods are being held within one week of placing them there. Within five days of giving notice, landlord can sell goods with any surplus beyond arrears going to tenant. Unpaid employees of tenant have $500 lien on sale of distrained goods (R.S., c. L-6).

Dispossession.

Respecting residential premises, application for order of possession may be made to Office of Residential Tenancies. Appointment for hearing will be granted which must be served on tenant and any other parties as directed by Office of Residential Tenancies. Appeals may be made to the Court of Queen's Bench on a question of law or jurisdiction (2006, c. R-22.0001).

Unless otherwise agreed in lease by parties, after two months of unpaid rent or two months of continuing default of express or implied covenant under lease, landlord gains right to reenter and repossess. Tenant can apply to Court of Queen's Bench for relief from reentry (R.S., c. L-6). Under The Land Titles Act 2000, lawful reentry and recovery of possession of leased land by lessor or lessor's assignee, by legal proceeding, terminates lease.

Security Deposits.

Only The Residential Tenancies Act 2006 deals with security deposits. Deposit cannot exceed one month's rent or, in case of weekly tenancy, one week's rent. Landlord must hold security deposit in trust for tenant and must pay interest to tenant from date of receipt to tenant's termination based on Chartered Bank Administered Interest Rate for previous year when security deposit is returned (R.R.S., c. R-22.0001; Reg. 1).

Liens.

Under The Landlord and Tenant Act, landlord has lien on goods on premises of leased lands if rent in arrears and other execution creditors have obtained judgment on goods. If arrears are less than one year, creditor can pay amount owing to landlord and take goods. If arrears over one year, creditor only has to pay one year's rent to take goods (R.S., c. L-6).

Partition.

Common law approach is that all joint tenants, tenants in common, partners, mortgagees and creditors with liens may be compelled to suffer partition of land. If division is impossible, sale may be ordered. Personal representative with consent of beneficiaries may partition real property of estate among beneficiaries (The Administration of Estates Act, S.S. 1998, c. A-4.1). Court-appointed guardian of dependant adult has authority to partition estate and give proceeds of sale of partition portion to dependant adult (The Adult Guardianship and Co-decision-making Act [2000, c. A-5.3]). Court has power in matrimonial property distribution to order partition of family property (The Family Property Act [1997, c. F-6.3]).

Perpetuities.

Common law rule in force. No interest is good unless it vests not later than 21 years after some life in being at creation of interest. Rule will be abolished upon Trustee Act 2008 coming into force (Bill 52, 2nd Sess., 26th Leg, Saskatchewan, 2008).

See also category 8 Debtor and Creditor, topic 8.08 Crop Payments Act.

21.10 LEASES:

See topic 21.09 Landlord and Tenant.

21.11 PERPETUITIES:

Common law rule in force. Rule will be abolished upon Trustee Act 2008 coming into force (Bill 52, 2nd Sess., 26th Leg, Saskatchewan, 2008).

21.12 POWER OF ATTORNEY:

Statutory treatment limited; common law to apply in absence. Generally, authority of Power of Attorney is strictly limited to what was expressly granted and to what is necessary to accomplish objective of grant.

Power over Personal Affairs.

The Powers of Attorney Act 2002 grants attorney power over grantor's personal affairs as well as property and financial affairs. Grantor may explicitly exclude such powers if desired (2002, c. P-20.3).

Revocation.

Act allows for power of attorney that is not terminated by grantor’s subsequent lack of capacity (The Powers of Attorney Act 2002 [2002, c. P-20.3] § 3). Such enduring power of attorney must be signed and witnessed in accordance with Act (§§ 11, 12). Action of attorney under any power of attorney is valid and binding in favour of person dealing with attorney, if such person does not know of termination of power of attorney, grantor’s or attorney’s lack of capacity, or non-apparent defect in execution of power of attorney (§ 21). In any of these circumstances, attorney not liable to grantor for action under power of attorney if attorney did not know of such circumstance and could not have discovered it with reasonable care (§ 21).

Formalities.

Prior to registration, every extra-provincial corporation shall execute and file with Director of Business Corporations, Power of Attorney that names resident of Saskatchewan (The Business Corporations Act [R.S., c. B-10]). Every extra-provincial limited partnership shall execute and file with Director of Business Corporations Power of Attorney that names resident of Saskatchewan before its business name will be registered (The Business Names Registration Act [R.S., c. B-11]).

21.13 REAL PROPERTY:

The Torrens system of land registration is in effect in this province. Matters relating to title to land, registration of documents pertaining to land, etc. are provided for by The Land Titles Act 2000 (2000, c. L-5.1). All documents pertaining to land must be filed in land registry maintained by Information Services Corporation (ISC).

Ownership.

Registered owner of land is regarded as absolute owner. Ownership by two or more parties is regarded as tenancy in common, but joint tenancy is recognised if duly created. When land is transferred to man and his wife, transferees take according to tenor of transfer and do not take by entireties unless it is so expressed in transfer. Ownership of land may or may not include mines and minerals. See category 19 Mineral, Water and Fishing Rights, topic 19.02 Mines and Minerals.

Foreign Ownership.

See category 4 Citizenship, topic 4.01 Aliens.

Registration.

Interests in land in form or of nature not statutorily created may be protected by registration of miscellaneous interest which may contain short statement of interest claimed setting forth description of land with respect to which interest is claimed or attach copy of instrument creating interest. Registration of such interest protects interest of interest-holder against all subsequent dealings with land.

Priorities of Interests.

Where different instruments affecting same estate have been registered, they take priority according to time of registration in land title registry and not according to date of execution.

Transfers of Land.

Each parcel of land is represented by title issued by and kept in land registry. Land covered by title or portion thereof is conveyed by registered owner executing “transfer” authorisation in proper form. Owner must sign transfer and witness must also sign and complete affidavit of execution. (See below and see category 10 Documents and Records, topic 10.02 Affidavits, for persons who can take affidavit, oath.) Corporations must execute transfer by signatures of authorised officers under corporate seal and no affidavit of execution required or execution may be completed by affidavit of execution and affidavit verifying corporate signing authority. Where there are two or more transferees and they are to take as joint tenants, then transfer must so state, otherwise title will issue to them as tenants in common. After transfer is executed, it must be delivered to Information Services Corporation (ISC), which then registers the transfer, cancels old title and issues new title to transferee.

Title of deceased owner can only be dealt with by authorised personal representative. (See category 13 Estates and Trusts, topic 13.09 Executors and Administrators.) Application must be made to Information Services Corporation (ISC) for transmission into name of personal representative. Application must be accompanied by original and certified copy of letters probate or administration (resealed in Saskatchewan, if originals granted outside Saskatchewan). New title is then issued in name of executor or administrator as such executor or administrator. He or she may then deal with land as owner in fee simple subject to certain restrictions: for example, if infant has interest in estate, executor or administrator must obtain consent of official guardian of infant or public trustee to make further disposition of lands. Where no infant has interest in estate, executor or administrator must obtain from public trustee, certificate to that effect.

Forms prescribed by The Land Titles Act 2000 for transfers of land are available at Information Services Corporation website at http://www.isc.ca.

Forms

Affidavit as to Marital Status and Homestead

Where land is not homestead, or if both spouses are the registered owners of the homestead, transfer must be accompanied by transferor’s affidavit as follows (The Homesteads Forms Regulations [R.R.S., c. H-5.1, Reg 1] Form D). The definition of spouse has been expanded to include common law relationships over two years and same-sex common law relationships over two years.

AFFIDAVIT

I,.... of...., make oath and say that:

1. I am the/a transferor (lessor, mortgagor or as the case may be) or.... (state capacity in which person acts on behalf of the owner, e.g. agent acting under power of attorney).

2. My spouse and I (or The transferor, lessor, mortgagor or as the case may be and his or her spouse) have not occupied the land described in this disposition as our (or their) homestead at any time during our (or their) spousal relationship.

-or-

2. I have (or The transferor, lessor, mortgagor or as the case may be has) no spouse.

-or-

2. My spouse (or The spouse of the transferor, lessor, mortgagor or as the case may be) is a registered owner of the land that is the subject matter of this disposition and a co-signator of

this disposition.

-or-

2. My spouse and I (or The transferor, lessor, mortgagor or as the case may be and his or her spouse) have entered into an interspousal agreement pursuant to *The Family Property Act* in which my spouse (or his or her spouse) has specifically released all his or her homestead rights in the land that is the subject matter of this disposition.

-or-

2. An order has been made by the Court of Queen's Bench pursuant to *The Family Property Act* declaring that my spouse (or the spouse of the transferor, lessor, mortgagor or as the case may be) has no homestead rights in the land that is the subject matter of this disposition and (the order has not been appealed and the time for appealing has expired) or (all appeals from the order have been disposed of or discontinued).

-or-

2. My spouse (or The spouse or the transferor, lessor or mortgagor or as the case may be) is the transferee (or lessee, mortgagee or as the case may be) named in this disposition.

Sworn before me at..........)

in the Province of..........)

this.... day of..........)

20..........)

....

Consent of Non-Owning Spouse

Where land is transferor's homestead and only one spouse is the registered owner, transfer must be accompanied by consent signed by non-owning spouse and certificate signed by practicing solicitor. *The Homesteads Forms Regulations (R.R.S., c. H-5.1, Reg 1, Form A.)*

I,..............., non-owning spouse of..............., consent to the above/attached disposition. I declare that I have signed this consent for the purpose of relinquishing all my homestead rights in the property described in the above/attached disposition in favour of..................... to the extent necessary to give effect to this............. (type of document).

....

Signature of Non-owning Spouse

Certificate of Acknowledgement, The Homestead Forms Regulations (R.R.S., c. H-5.1, Reg 1, Form B)

I,..............,.............. (indicate capacity), certify that I have examined.............., non-owning spouse of.............., the owning spouse, in the above/attached.............. (type of document) separate and apart from the owning spouse. The non-owning spouse acknowledged to me that he or she:

(a) signed the consent to the disposition of his or her own free will and consent and without any compulsion on the part of the owning spouse; and

(b) understands his or her rights in the homestead.

I further certify that I have not, nor has my employer, partner or clerk, prepared the above/attached............. (type of document) and that I am not, nor is my employer, partner or clerk, otherwise interested in the transaction involved.

....

Signature

Affidavit of Execution

This form is available at Information Services Corporation website at www.ISC-online.ca.

Recovery of Possession of Land.

Where person not overholding tenant refuses or fails to cease using or occupying land wrongfully or without lawful authority, person entitled to possession may apply on affidavit to judge of Court of Queen's Bench of district where land is situated for possession, and right thereto is summarily disposed of, and any order made is duly enforced. Appeal lies to Court of Appeal (The Recovery of Possession of Land Act [R.S., c. R-7]).

Condominiums are permitted in Saskatchewan, and requirements with respect thereto are set out in The Condominium Property Act 1993 (1993, c. C-26.1).

See also topics 21.04 Curtesy, 21.05 Deeds, 21.07 Dower, 21.09 Landlord and Tenant; categories 5 Civil Actions and Procedure, topic 5.15 Partition; 8 Debtor and Creditor, topic 8.14 Homesteads; 14 Family, topic 14.07 Husband and Wife; 20 Mortgages, topic 20.03 Mortgages.

21.14 TRUST DEEDS:

See category 20 Mortgages, topic 20.03 Mortgages.

22 TAXATION

22.01 ADMINISTRATION:

Exemptions from Property Tax.

Following are generally exempt from property tax: Crown property; places of public worship; non-commercial cemeteries; public libraries; non-profit schools and many other non-profit organisations. (See, e.g., The Municipalities Act [2005, c. M-36.1, § 292].)

Education Tax.

Local Board of Education has taxing authority pursuant to The Education Act 1995 (1995, c. E-0.2). Uniform tax is levied upon taxable property contained in school division. Proceeds of tax to be sufficient to defray all operating costs of school division to extent those costs are borne by Board of Education for monies other than grants and other miscellaneous revenues. If Board of Education assumes duties of office during year in which school division is established, tax rate in effect on date school division is established is to be tax rate for fiscal year.

Local Taxes.

Local municipal authorities are given right to impose taxation and to make assessments and arrange for collections. Land and building valuations must be at fair value (The Municipalities Act [2005, c. M-36.1]; The Cities Act [2002, c. C-11.1]; The Northern Municipalities Act [R.S., c. N-5.1]).

Tax Enforcement.

Land is no longer offered for sale to realise arrears of taxes, but eventually passes to municipality in default of payment of taxes (The Tax Enforcement Act [R.S., c. T-2]). When whole or any portion of taxes on land is unpaid after 31 December of year in which rate was struck, treasurer prepares list and publishes same in local newspaper with notification that unless arrears and costs are paid, treasurer will, at expiration of 60 days, proceed to register tax lien. Tax lien is registered in Information Services Corporation (ISC) and after expiration of six months from date of filing tax lien, municipality may apply for title to any parcel of land affected. Upon receipt of application for title, treasurer must send out notices to parties interested and after expiration of six months from date of service of last notice, required to be served registrar, failing redemption and on request of municipality, issues certificate of title to municipality if municipality obtains copy of Provincial Mediation Board Consent (The Provincial Mediation Board Act [R.S., c. P-33]). Owner may redeem at any time before title is lost.

Penalties.

Following penalties may be imposed upon persons for default under Saskatchewan taxation statutes:

Property Taxes.

Local municipal authorities are given right to impose penalties on property tax arrears and are given broad powers to collect property taxes and arrears. Property taxes are lien on land and are collectable by action or distress in priority to all other claims, liens and encumbrances except those of Crown (The Municipalities Act [2005, c. M-36.1]; The Cities Act [2002, c. C-11.1]; The Northern Municipalities Act [R.S., c. N-5.11]).

Income Tax.

Apart from penalties imposed by Dominion legislation (see Canada Law Digest), in Saskatchewan, where collection agreement is in effect, Minister may refrain from levying or may reduce penalty provided for failure to file return; failure to report and false statements; and instalments. In event of failure to file return, person is subject to fine from $1,000 to $25,000 and imprisonment for up to one year (The Income Tax Act 2000 [2000, c. I-2.01]).

Corporation Capital Tax.

For failure to file returns, understating value of amount taxable or overstating deductions, liable for unpaid taxes, interest at prescribed rate on amount unpaid and additional penalties (The Revenue and Financial Services Act [1983, c. R-22.01]). Offences for contravention of Act can attract additional fines from $1,000 to $5,000. Officers, directors, employees or agents of corporation may be subject to same fines plus imprisonment for up to three months (The Revenue and Financial Services Act [1983, c. R-22.01]).

Sales Tax.

Vendor failing to forward tax collected is liable for payment of unforwarded tax, interest at prescribed rate on unpaid amount and additional penalties of 10% of amount retained to maximum of $500. Additional penalty if vendor audited. If vendor fails to make required returns, government may estimate amount of tax collected by him or her and unaccounted for, and may require such amount to be paid over by vendor. Any violation of Act, including providing false returns, may result in fine from $1,000 to $5,000 and imprisonment of up to three months (The Revenue and Financial Services Act [1983, c. R-22.01]).

Mineral Tax.

The Mineral Taxation Act 1983 (1983-84, c. M-17.1) provides that taxes payable under it for first charge on all mineral rights owned by taxpayer and in case of mineral production tax, on interest of taxpayer in any mineral and mineral rights. Government may seize and sell estate to which first charge attaches to cover taxes.

22.02 CORPORATE TAXES:

Corporation Capital Tax.

Collected under authority of The Corporation Capital Tax Act. Taxable paid-up capital, exceeding $10,000,000, of corporations resident in Saskatchewan, other than credit unions, co-operatives, family farm corporations, insurance corporations and corporations exempt from income tax federally. Additional exemption of up to $10,000,000 is available for fiscal years beginning on or after 1 January 2005. Amount of exemption is based upon proportion of total salaries and wages that are paid by taxable operation and its associated corporations. Paid-up capital generally includes retained earnings, capital stock and long-term debt. As result of 1 April 2006 Saskatchewan Budget, corporate capital tax rate was reduced effective 1 July 2006 and will be eliminated by 1 July 2008 (The Corporation Capital Tax Act [1979-80, c. C-38.1]).

Capital tax is calculated on balance sheet values as at fiscal year end and return must be filed within six months after corporation’s fiscal year end. Corporations that have capital tax liability of more than $4,800 per year must file monthly instalments.

22.03 EMPLOYMENT TAXES:

Unemployment Compensation or Social Security Tax.

None imposed by this province.

22.04 ESTATE TAX:

None currently imposed by this province. However, where Letters Probate or Letters of Administration must be applied for, probate fees will be chargeable on sworn value of estate (The Administration of Estates Act [1998, c. A-4.1]).

22.05 GASOLINE AND SPECIAL FUELS TAXES:

Fuel Tax.

Collected under authority of The Fuel Tax Act 2000, it imposes tax on persons importing or purchasing fuel at rate of 15¢ per litre on clear gasoline and diesel fuels, 1.5¢ per litre on aviation fuels, 15¢ per litre for railways and 9¢ per litre on propane. Saskatchewan farmers and individual primary producers are exempt from tax on commercial purchases from bulk fuel dealers. All heating fuels are exempt (The Fuel Tax Act 2000 [2000, c. F-23.21]).

Petroleum and Natural Gas Tax.

See category 19 Mineral, Water and Fishing Rights, topic 19.02 Mines and Minerals.

22.06 HEALTH TAX:

Hospitalisation Tax.

None.

Medical Care Insurance Tax.

None.

22.07 INCOME TAX:

Provincial tax is determined by applying provincial tax rates directly to taxable income and then deducting provincial tax credits which parallel existing federal credits. See also Federal Income Tax Act (see Canada Law Digest). 2009 tax rates on taxable income: 11% on first $40,113; 13% on next $74,497; 15% on any remainder. 2009 tax credit amounts: basis personal amount—$13,269; spousal/equivalent amount—$13,269; dependent child amount—$4,915; senior supplement—$1,146; age amount—$4,340; disability amount—$8,395; disability supplement—$8,395; caregiver amount—$8,395; medical expense tax credit—3% of net income to $2,011. By agreement, Dominion collects this tax at time tax under Federal Act is collected, and then pays over to Province. For administration purposes, one return is used. Members of armed forces and veterans are not, by virtue of this Act alone, exempt from taxation (The Income Tax Act 2000 [2000, c. I-2.01]).

22.08 INHERITANCE TAX:

None imposed by this province.

22.09 MINES, MINERALS AND FISHERIES TAXES:

Mineral Tax.

See category 19 Mineral, Water and Fishing Rights, topic 19.02 Mines and Minerals.

22.10 SALES AND USE TAXES:

Sales Tax.

In addition to Goods and Services Tax (see Canada Law Digest), there is provincial sales tax of 5% imposed on retail purchases within province of tangible personal property (The Provincial Sales Tax Act [R.S., c. P-34.1] [*Note:* The Chapter number and Title R.S.S. 1978, c. E-3 were changed by 2000, c. 41]).

Exemptions.

Tax is not imposed on farm machinery, implements and commodities, including gasoline; drugs, medicines and medical appliances; chemicals (except oil field chemicals); water; food and drink (apart from liquor); books, magazines and periodicals; newspapers; children’s clothing and footwear and medical and monitoring devices; and other specified items (c. P-34.1).

Tobacco Tax.

Collected under authority of The Tobacco Tax Act 1998 by imposing direct tax on all tobacco products consumed in Saskatchewan at 18.3¢ tax per cigarette or tobacco stick; 95% of retail price to maximum of $5 per cigar; other tobacco taxed at 18.3¢ per gram (The Tobacco Tax Act 1998 [1998, c. T-15.001]).

Liquor Consumption Tax collected under authority of The Liquor Consumption Tax Act is 10% tax on total selling price of beer, wine and spirits (The Liquor Consumption Tax Act [1979, c. L-19.1]). Businesses selling liquor in Saskatchewan that are required to be licenced under The Alcohol and Gaming Regulation Act must be licenced under The Liquor Consumption Act for sale of liquor.

Insurance Premiums Tax.

Collected under authority of The Insurance Premiums Tax Act by imposing tax on insurance companies carrying on business in Saskatchewan (The Insurance Premiums Tax Act [R.S., c. I-10]).

Fire Prevention Tax.

Collected under authority of The Fire Prevention Act 1992 by imposing tax on insurance companies for all fire insurance premiums (The Fire Prevention Act 1992 [1992, c. F-15.001]).

Motor Vehicle Insurance Premiums Tax.

Collected under authority of The Motor Vehicle Insurance Premiums Tax Act by imposing tax on insurance companies for all motor vehicle insurance premiums (The Motor Vehicle Insurance Premiums Tax Act [R.S., c. M-23]).

22.11 STAMP AND SEAL TAXES:

Stamp Tax.

No provincial stamp tax. For Dominion stamp taxes, see Canada Law Digest.

23 TRANSPORTATION

23.01 AIRCRAFT:

See Canada Law Digest.

23.02 AUTOMOBILES:

See topic 23.03 Motor Vehicles.

23.03 MOTOR VEHICLES:

Vehicle Licence.

No person residing in Saskatchewan for more than 180 days shall permit his or her vehicle to be operated in Saskatchewan unless such vehicle is registered with Highway Traffic Board, which shall issue certificate of registration. Licence plates are issued at same time and must be displayed on rear of vehicle when it is in use. Registration renewed annually and annual validation stickers applied to original plates. Licence plates can be used for five-year period (The Traffic Safety Act [2004, c. T-18.1]).

Snowmobiles unless operated on private property must be registered with Highway Traffic Board. Following provisions apply to snowmobiles by provisions of The Snowmobile Act (R.S., c. S-52) except where stated.

Operator’s Licence.

No person residing in Saskatchewan for more than 180 days shall drive vehicle in Saskatchewan unless he or she holds subsisting instructor’s, learner’s or operator’s licence, issued to him or her by Highway Traffic Board. Said licence is required annually. Applicants for instructor’s licence must be 18 years and applicants for other licences must be 16 years (The

Traffic Safety Act [2004, c. T-18.1]). No exemptions for members of Armed Forces, except general exemption that above provisions do not apply to person while operating motor vehicle in service of Government of Canada.

Operator of snowmobile must be at least 16 years old and properly licenced by board, or at least 12 years old and accompanied on snowmobile by person holding valid snowmobile licence. Operator's licence under The Traffic Safety Act deemed to be proper licence under The Snowmobile Act (R.S., c. S-52) and provisions of The Traffic Safety Act (2004, c. T-18.1) respecting registration and licencing, financial responsibility and enforcement apply mutatis mutandis.

Titles, Sales and Liens.

Five per cent provincial sales tax must be remitted on sale of new or used vehicles. Lien on or interest in vehicle must be recorded in Personal Property Registry, Regina. Dealers in motor vehicles must be licenced and bonded (The Motor Dealers Act [R.S., c. M-22]). See also category 3 Business Regulation and Commerce, topic 3.25 Sales.

Operation Prohibited.

By unlicenced or intoxicated person. Overweight or over-dimension vehicles operable only with permit (The Highways and Transportation Act 1997 [1997, c. H-3.01]).

Equipment Required.

Adequate brakes, suitable horn, exhaust-pipe, muffler, rear-view mirror and shatter-proof windshield. To be prescribed for snowmobiles by regulation (R.S., c. S-52).

Lights Required.

Two in front, of equal power, enabling operator to see any substantial object at 100 metres on high beam and 30 metres on low beam. Dimming or deflecting beams necessary when passing other vehicles at night. One light in rear showing red visible for distance of 200 metres and throwing white light on number plate. Where load overhangs any vehicle, red light by night and red flag by day required. Where vehicle extra wide, four clearance lamps or reflector necessary, one amber on each side at front, red on rear. Vehicle other than motor must carry white light or reflector in front and red light in rear visible at distance of 200 metres. Motor vehicles must have adequate signal and brake lights. To be prescribed for snowmobiles by regulation (R.S., c. S-52).

Seatbelts.

If seatbelt assembly is available, it must be used by operator and all passengers while motor vehicle is operated on public highway (The Traffic Safety Act [2004, c. T-18.1, § 248]).

Accidents.

If motor vehicle accident involves personal injury, intoxicated driver, unidentified vehicle or consequent towing of vehicle from accident scene, then operators of vehicles involved must report accident to peace officer (The Traffic Safety Act [2004, c. T-18.1] § 253). Otherwise, operators of vehicles involved must exchange information including name, address, driver's licence number, vehicle registration number and insurance particulars.

Actions as result of death or damages caused by motor vehicle (2004, c. T-18.1, § 257) or snowmobile (R.S., c. S-52, § 33) must be commenced within two years after date of accident (The Limitations Act [2004, c. L-16.1] § 5).

Onus of Proof.

Where damage or injury occurs by reason of accident involving motor vehicle or snowmobile, unless such damage or injury sustained by passenger or by collision with another motor vehicle or snowmobile, onus of proof that damage or injury did not solely arise by negligence of owner or operator of motor vehicle or snowmobile is on owner or operator of motor vehicle or snowmobile.

No-fault benefit plan for loss arising from bodily injury or death (The Automobile Accident Insurance Act [R.S., c. A-35]). See subhead Insurance.

Contributory Negligence.

Where damage results from negligence of two or more, and where defendant is unable to pay damages as assessed by court, share of insolvent defendant must be reallocated, on pro rata basis, to other defendants. Where plaintiff's own conduct has been found to contribute to own injury or loss, plaintiff must also share, on pro rata basis, in effect of shortfall created by unfunded liability of insolvent defendant. Inability of defendant to pay amount assessed against it will result in contributory negligent plaintiff receiving less, in proportion to liability initially assessed by court (R.S., c. C-31).

Liability for damage from negligence extends to owner as well as operator unless car was stolen or wrongfully taken from owner. Action for such damage must be commenced within two years.

Guests.

No limitation.

Government Insurance.

See category 16 Insurance, topic 16.01 Insurance Companies.

Financial Responsibility.

Motor vehicles or snowmobiles involved in accidents resulting in personal injury or property damage exceeding $500 are impounded until evidence of financial responsibility is produced (2004, c. T-18.1, § 158).

See also subhead Insurance, *below*.

Insurance.

Owners and operators of vehicles and snowmobiles must comply with The Automobile Accident Insurance Act (R.S., c. A-35) before licence will be issued to them (R.S., c. S-52). Under that Act, Saskatchewan motorist is covered for loss arising out of bodily injury to, or death of, others by no-fault benefit plan. Saskatchewan motorist is also covered for liability for damages to property and certain economic losses of others, up to limit of $200,000 regardless of number of claims arising from any one accident. Coverage does not extend to injuries to insured or insured's spouse, children, parents, brothers, sisters or gratuitous guests (if spouse or child of insured), unless these two categories of guest risk are specifically included in policy (R.S., c. A-35). See also category 16 Insurance, topic 16.01 Insurance Companies, subhead Automobile Accident Insurance.

Nonresidents.

Nonresident may use his or her motor vehicle or trailer for touring purposes unconnected with business for 90 days in any year, if he or she has complied with laws of his or her place of residence and carries its certificate and number plates.

Nonresident Chauffeur.

No special exemptions.

Actions Against Nonresidents.

No special provisions as to commencement.

Direct Actions.

Injured person cannot commence direct action against Saskatchewan insurer, unless hit-and-run accident where identity of vehicle cannot be ascertained (The Automobile Accident Insurance Act [R.S., c. A-35] § 51) or accident where person causing injury is Saskatchewan no-fault beneficiary (§ 51.1).

Motor Vehicle Carriers.

Highway Traffic Board has power to make regulations governing security to be furnished by all carriers, nature of merchandise carried, routes, car capacity, maximum weights permitted, rates, schedules, tickets, uniform bill of lading, etc. No person can operate a public service vehicle on a public highway without a permit, and without furnishing security covering injury to passengers or property and payment of all funds payable. The ordinary liability of a common carrier attaches. Proper books of account open to inspection by the Board must be kept. Provision is made to secure the safety, health and convenience of passengers and safety of baggage and freight (The Traffic Safety Act [2004, c. T-18.1]).

Aircraft.

See Canada Law Digest, category Transportation, topic Aircraft.

Gasoline Tax.

See category 22 Taxation, topic 22.05 Gasoline and Special Fuels Taxes.

23.04 RAILROADS:

Governed by Federal Canada Transportation Act (c. 10) and provincial railways are governed by The Railway Act (1989-90, c. R-1.2).

See category 3 Business Regulation and Commerce, topic 3.08 Carriers.

SELECTED INTERNATIONAL CONVENTIONS

—Scope —

Annotations provided in consultation with the U.S. Department of State. Current information on the status of these conventions is always available from the Office of Treaty Affairs of the Office of the Legal Adviser, Department of State, Washington, D. C. 20520 (www.state.gov/s/l/treaty).

Note: This Revision includes information as of 7/1/09.

CONVENTION OF THE SERVICE ABROAD OF JUDICIAL AND EXTRAJUDICIAL DOCUMENTS IN CIVIL OR COMMERCIAL MATTERS

The States signatory to the present Convention,

Desiring to create appropriate means to ensure that judicial and extrajudicial documents to be served abroad shall be brought to the notice of the addressee in sufficient time,

Desiring to improve the organisation of mutual judicial assistance for that purpose by simplifying and expediting the procedure,

Have resolved to conclude a Convention to this effect and have agreed upon the following provisions:

Article 1

The present Convention shall apply in all cases, in civil or commercial matters, where there is occasion to transmit a judicial or extrajudicial document for service abroad.

This Convention shall not apply where the address of the person to be served with the document is not known.

CHAPTER I —JUDICIAL DOCUMENTS

Article 2

Each contracting State shall designate a Central Authority which will undertake to receive requests for service coming from other contracting States and to proceed in conformity with the provisions of articles 3 to 6.

Each State shall organise the Central Authority in conformity with its own law.

Article 3

The authority or judicial officer competent under the law of the State in which the documents originate shall forward to the Central Authority of the State addressed a request conforming to the model annexed to the present Convention, without any requirement of legalisation or other equivalent formality.

The document to be served or a copy thereof shall be annexed to the request. The request and the document shall both be furnished in duplicate.

Article 4

If the Central Authority considers that the request does not comply with the provisions of the present Convention it shall promptly inform the applicant and specify its objections to the request.

Article 5

The Central Authority of the State addressed shall itself serve the document or shall arrange to have it served by an appropriate agency, either—

(a) by a method prescribed by its internal law for the service of documents in domestic actions upon persons who are within its territory, or

(b) by a particular method requested by the applicant, unless such a method is incompatible with the law of the State addressed.

Subject to sub-paragraph (b) of the first paragraph of this article, the document may always be served by delivery to an addressee who accepts it voluntarily.

If the document is to be served under the first paragraph above, the Central Authority may require the document to be written in, or translated into, the official language or one of the official languages of the State addressed.

That part of the request, in the form attached to the present Convention, which contains a summary of the document to be served, shall be served with the document.

Article 6

The Central Authority of the State addressed or any authority which it may have designated for that purpose, shall complete a certificate in the form of the model annexed to the present Convention.

The certificate shall state that the document has been served and shall include the method, the place and the date of service and the person to whom the document was delivered. If the document has not been served, the certificate shall set out the reasons which have prevented service.

The applicant may require that a certificate not completed by a Central Authority or by a judicial authority shall be countersigned by one of these authorities.

The certificate shall be forwarded directly to the applicant.

Article 7

The standard terms in the model annexed to the present Convention shall in all cases be written either in French or in English. They may also be written in the official language, or in one of the official languages, of the State in which the documents originate.

The corresponding blanks shall be completed either in the language of the State addressed or in French or in English.

Article 8

Each contracting State shall be free to effect service of judicial documents upon persons abroad, without application of any compulsion, directly through its diplomatic or consular agents.

Any State may declare that it is opposed to such service within its territory, unless the document is to be served upon a national of the State in which the documents originate.

Article 9

Each contracting State shall be free, in addition, to use consular channels to forward documents, for the purpose of service, to those authorities of another contracting State which are designated by the latter for this purpose.

Each contracting State may, if exceptional circumstances so require, use diplomatic channels for the same purpose.

Article 10

Provided the State of destination does not object, the present Convention shall not interfere with—

(a) the freedom to send judicial documents, by postal channels, directly to persons abroad,

(b) the freedom of judicial officers, officials or other competent persons of the State of origin to effect service of judicial documents directly through the judicial officers, officials or other competent persons of the State of destination,

(c) the freedom of any person interested in a judicial proceeding to effect service of judicial documents directly through the judicial officers, officials or other competent persons of the State of destination.

Article 11

The present Convention shall not prevent two or more contracting States from agreeing to permit, for the purpose of service of judicial documents, channels of transmission other than those provided for in the preceding articles and, in particular, direct communication between their respective authorities.

Article 12

The service of judicial documents coming from a contracting State shall not give rise to any payment or reimbursement of taxes or costs for the services rendered by the State addressed.

The applicant shall pay or reimburse the costs occasioned by—

(a) the employment of a judicial officer or of a person competent under the law of the State of destination,

(b) the use of a particular method of service.

Article 13

Where a request for service complies with the terms of the present Convention, the State addressed may refuse to comply therewith only if it deems that compliance would infringe its sovereignty or security.

It may not refuse to comply solely on the ground that, under its internal law, it claims exclusive jurisdiction over the subject-matter of the action or that its internal law would not permit the action upon which the application is based.

The Central Authority shall, in case of refusal, promptly inform the applicant and state the reasons for the refusal.

Article 14

Difficulties which may arise in connection with the transmission of judicial documents for service shall be settled through diplomatic channels.

Article 15

Where a writ of summons or an equivalent document had to be transmitted abroad for the purpose of service, under the provisions of the present Convention, and the defendant has not appeared, judgment shall not be given until it is established that—

(a) the document was served by a method prescribed by the internal law of the State addressed for the service of documents in domestic actions upon persons who are within its territory, or

(b) the document was actually delivered to the defendant or to his residence by another method provided for by this Convention,

and that in either of these cases the service or the delivery was effected in sufficient time to enable the defendant to defend.

Each contracting State shall be free to declare that the judge, notwithstanding the provisions of the first paragraph of this article, may give judgment even if no certificate of service or delivery has been received, if all the following conditions are fulfilled—

(a) the document was transmitted by one of the methods provided for in this Convention,

(b) a period of time of not less than six months, considered adequate by the judge in the particular case, has elapsed since the date of the transmission of the document,

(c) no certificate of any kind has been received, even though every reasonable effort has been made to obtain it through the competent authorities of the State addressed.

Notwithstanding the provisions of the preceding paragraphs the judge may order, in case of urgency, any provisional or protective measures.

Article 16

When a writ of summons or an equivalent document had to be transmitted abroad for the purpose of service, under the provisions of the present Convention, and a judgment has been entered against a defendant who has not appeared, the judge shall have the power to relieve the defendant from the effects of the expiration of the time for appeal from the judgment if the following conditions are fulfilled—

(a) the defendant, without any fault on his part, did not have knowledge of the document in sufficient time to defend, or knowledge of the judgment in sufficient time to appeal, and

(b) the defendant has disclosed a *prima facie* defence to the action on the merits.

An application for relief may be filed only within a reasonable time after the defendant has knowledge of the judgment.

Each contracting State may declare that the application will not be entertained if it is filed after the expiration of a time to be stated in the declaration, but which shall in no case be less than one year following the date of the judgment.

This article shall not apply to judgments concerning status or capacity of persons.

CHAPTER II —EXTRAJUDICIAL DOCUMENTS

Article 17

Extrajudicial documents emanating from authorities and judicial officers of a contracting State may be transmitted for the purpose of service in another contracting State by the methods and under the provisions of the present Convention.

CHAPTER III —GENERAL CLAUSES

Article 18

Each contracting State may designate other authorities in addition to the Central Authority and shall determine the extent of their competence.

The applicant shall, however, in all cases, have the right to address a request directly to the Central Authority.

Federal States shall be free to designate more than one Central Authority.

Article 19

To the extent that the internal law of a contracting State permits methods of transmission, other than those provided for in the preceding articles, of documents coming from abroad, for service within its territory, the present Convention shall not affect such provisions.

Article 20

The present Convention shall not prevent an agreement between any two or more contracting States to dispense with—

(a) the necessity for duplicate copies of transmitted documents as required by the second paragraph of article 3,

(b) the language requirements of the third paragraph of article 5 and article 7,

(c) the provisions of the fourth paragraph of article 5,

(d) the provisions of the second paragraph of article 12.

Article 21

Each contracting State shall, at the time of the deposit of its instrument of ratification or accession, or at a later date, inform the Ministry of Foreign Affairs of the Netherlands of the following—

(a) the designation of authorities, pursuant to articles 2 and 18,

(b) the designation of the authority competent to complete the certificate pursuant to article 6,

(c) the designation of the authority competent to receive documents transmitted by consular channels, pursuant to article 9.

Each contracting State shall similarly inform the Ministry, where appropriate, of—

(a) opposition to the use of methods of transmission pursuant to articles 8 and 10,

(b) declarations pursuant to the second paragraph of article 15 and the third paragraph of article 16,

(c) all modifications of the above designations, oppositions and declarations.

Article 22

Where Parties to the present Convention are also Parties to one or both of the Conventions on civil procedure signed at The Hague on 17th July 1905,[1] and on 1st March 1954,[2] this Convention shall replace as between them articles 1 to 7 of the earlier Conventions.

Endnotes

Article 23

The present Convention shall not affect the application of article 23 of the Convention on civil procedure signed at The Hague on 17th July 1905, or of article 24 of the Convention on civil procedure signed at The Hague on 1st March 1954.

These articles shall, however, apply only if methods of communication, identical to those provided for in these Conventions, are used.

Article 24

Supplementary agreements between parties to the Conventions of 1905 and 1954 shall be considered as equally applicable to the present Convention, unless the Parties have otherwise agreed.

Article 25

Without prejudice to the provisions of articles 22 and 24, the present Convention shall not derogate from Conventions containing provisions on the matters governed by this Convention to which the contracting States are, or shall become, Parties.

Article 26

The present Convention shall be open for signature by the States represented at the Tenth Session of the Hague Conference on Private International Law.

It shall be ratified, and the instruments of ratification shall be deposited with the Ministry of Foreign Affairs of the Netherlands.

Article 27

The present Convention shall enter into force on the sixtieth day after the deposit of the third instrument of ratification referred to in the second paragraph of article 26.

The Convention shall enter into force for each signatory State which ratifies subsequently on the sixtieth day after the deposit of its instrument of ratification.

Article 28

Any State not represented at the Tenth Session of the Hague Conference on Private International Law may accede to the present Convention after it has entered into force in accordance with the first paragraph of article 27. The instrument of accession shall be deposited with the Ministry of Foreign Affairs of the Netherlands.

The Convention shall enter into force for such a State in the absence of any objection from a State, which has ratified the Convention before such deposit, notified to the Ministry of Foreign Affairs of the Netherlands within a period of six months after the date on which the said Ministry has notified it of such accession.

In the absence of any such objection, the Convention shall enter into force for the acceding State on the first day of the month following the expiration of the last of the periods referred to in the preceding paragraph.

Article 29

Botswana 2a

Any State may, at the time of signature, ratification or accession, declare that the present Convention shall extend to all the territories for the international relations of which it is responsible, or to one or more of them. Such a declaration shall take effect on the date of entry into force of the Convention for the State concerned.

At any time thereafter, such extensions shall be notified to the Ministry of Foreign Affairs of the Netherlands.

The Convention shall enter into force for the territories mentioned in such an extension on the sixtieth day after the notification referred to in the preceding paragraph.

Article 30

The present Convention shall remain in force for five years from the date of its entry into force in accordance with the first paragraph of article 27, even for States which have ratified it or acceded to it subsequently.

If there has been no denunciation, it shall be renewed tacitly every five years.

Any denunciation shall be notified to the Ministry of Foreign Affairs of the Netherlands at least six months before the end of the five year period.

It may be limited to certain of the territories to which the Convention applies.

The denunciation shall have effect only as regards the State which has notified it. The Convention shall remain in force for the other contracting States.

Article 31

The Ministry of Foreign Affairs of the Netherlands shall give notice to the States referred to in article 26, and to the States which have acceded in accordance with article 28, of the following—

(a) the signatures and ratifications referred to in article 26;

(b) the date on which the present Convention enters into force in accordance with the first paragraph of article 27;

(c) the accessions referred to in article 28 and the dates on which they take effect;

(d) the extensions referred to in article 29 and the dates on which they take effect;

(e) the designations, oppositions and declarations referred to in article 21;

(f) the denunciations referred to in the third paragraph of article 30.

IN WITNESS WHEREOF the undersigned, being duly authorised thereto, have signed the present Convention.

DONE at The Hague, on the 15th day of November, 1965, in the English and French languages, both texts being equally authentic, in a single copy which shall be deposited in the archives of the Government of the Netherlands, and of which a certified copy shall be sent, through the diplomatic channel, to each of The States represented at the Tenth Session of the Hague Conference on Private International Law.

[Signatures omitted. Annex containing Forms printed at pp. 9, 10.]

Convention on the service abroad of judicial and extrajudicial documents in civil or commercial matters. Done at The Hague November 15, 1965; entered into force for the United States February 10, 1969. 20 UST 361; TIAS 6638; 658 UNTS 163. States which are parties:

- Albania 1
- Antigua and Barbuda 1a
- Argentina 1b
- Bahamas 1c
- Barbados 1d
- Belarus 1e
- Belgium 2
  Bosnia and Herzegovina 2a
- Botswana 2b
- Bulgaria 2c
- Canada 3
  China 3a
- Croatia 3b
- Cyprus 3c
- Czech Republic 3d

- Denmark 4
- Egypt 5
- Estonia 5a
- Finland 6
- France 7
- Federal Republic of Germany 7a
- Greece 7b
- Hungary 7c
- Iceland 7d
- India 7e
- Ireland 7f
- Israel 8
- Italy 8a
- Japan 8b
- Korea 8c
- Kuwait 9

- Latvia 9a
- Lithuania 9b
- Luxembourg 9c
- Malawi 9d
- Mexico 10
- Monaco 10a
- Netherlands 10b
- Norway 10c
- Pakistan 10d
- Poland 11
- Portugal 11a
- Romania 11b
- Russian Federation 11c
- Saint Vincent and the Grenadines 11d
- San Marino 11e

- Seychelles 11f
- Slovak Republic 11g
- Slovenia 11h
- Spain 11i
- Sri Lanka 11j
- Sweden 12
- Switzerland 12a
- The former Yugoslav Republic of Macedonia 12b
- Turkey 13
- Ukraine 13a
- United Kingdom 14
- United States 15
- Venezuela 16

Endnotes

Endnotes

CONVENTION ON THE RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL

AWARDS

Article I

1. This Convention shall apply to the recognition and enforcement of arbitral awards made in the territory of a State other than the State where the recognition and enforcement of such awards are sought, and arising out of differences between persons, whether physical or legal. It shall also apply to arbitral awards not considered as domestic awards in the State where their recognition and enforcement are sought.

2. The term ``arbitral awards'' shall include not only awards made by arbitrators appointed for each case but also those made by permanent arbitral bodies to which the parties have submitted.

3. When signing, ratifying or acceding to this Convention, or notifying extension under article X hereof, any State may on the basis of reciprocity declare that it will apply the Convention to the recognition and enforcement of awards made only in the territory of another Contracting State. It may also declare that it will apply the Convention only to differences arising out of legal relationships, whether contractual or not, which are considered as commercial under the national law of the State making such declaration.

Article II

1. Each Contracting State shall recognize an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration.

2. The term ``agreement in writing'' shall include an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams.

3. The court of a Contracting State, when seized of an action in a matter in respect to which the parties have made an agreement within the meaning of this article, shall, at the request of one of the parties, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed.

Article III

Each Contracting State shall recognize arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon, under the conditions laid down in the following articles. There shall not be imposed substantially more onerous conditions or higher fees or charges on the recognition or enforcement of arbitral awards to which this Convention applies than are imposed on the recognition or enforcement of domestic arbitral awards.

Article IV

1. To obtain the recognition and enforcement mentioned in the preceding article, the party applying for recognition and enforcement shall, at the time of the application, supply:

(*a*) The duly authenticated original award or a duly certified copy thereof;

(*b*) The original agreement referred to in article II or a duly certified copy thereof.

2. If the said award or agreement is not made in an official language of the country in which the award is relied upon, the party applying for recognition and enforcement of the award shall produce a translation of these documents into such language. The translation shall be certified by an official or sworn translator or by a diplomatic or consular agent.

Article V

1. Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that:

(*a*) The parties to the agreement referred to in article II were, under the law applicable to them, under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made; or

(*b*) The party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case; or

(*c*) The award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be recognized and enforced; or

(*d*) The composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place; or

(*e*) The award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made.

2. Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement in sought finds that:

(*a*) The subject matter of the difference is not capable of settlement by arbitration under the law of that country; or

(*b*) The recognition or enforcement of the award would be contrary to the public policy of that country.

Article VI

If an application for the setting aside or suspension of the award has been made to a competent authority referred to in article V(1)(e), the authority before which the award is sought to be relied upon may, if it considers it proper, adjourn the decision on the enforcement of the award and may also, on the application of the party claiming enforcement of the award, order the other party to give suitable security.

Article VII

1. The provisions of the present Convention shall not affect the validity of multilateral or bilateral agreements concerning the recognition and enforcement of arbitral awards entered into by the Contracting States nor deprive any interest party of any right he may have to avail himself of an arbitral award in the manner and to the extent allowed by the law or the treaties of the country where such award is sought to be relied upon.

2. The Geneva Protocol on Arbitration Clauses of 1923 and the Geneva Convention on the Execution of Foreign Arbitral Awards of 1927 1 shall cease to have effect between Contracting States on their becoming bound and to the extent that they become bound, by this Convention.

Endnotes

Endnotes

Article VIII

1. This Convention shall be open until 31 December 1958 for signature on behalf of any Member of the United Nations and also on behalf of any other State which is or hereafter becomes a member of any specialized agency of the United Nations, or which is or hereafter becomes a party to the Statute of the International Court of Justice, 2 or any other State to which an invitation has been addressed by the General Assembly of the United Nations.

Endnotes

2. This Convention shall be ratified and the instrument of ratification shall be deposited with the Secretary-General of the United Nations.

Endnotes

Article IX

1. This Convention shall be open for accession to all States referred to in article VIII.

2. Accession shall be effected by the deposit of an instrument of accession with the Secretary-General of the United Nations.

Article X

1. Any State may, at the time of signature, ratification or accession, declare that this Convention shall extend to all or any of the territories for the international relations of which it is responsible. Such a declaration shall take effect when the Convention enters into force for the State concerned.

2. At any time thereafter any such extension shall be made by notification addressed to the Secretary-General of the United Nations and shall take effect as from the ninetieth day after the day of receipt by the Secretary-General of the United Nations of this notification, or as from the date of entry into force of the Convention for the State concerned, whichever is the later.

3. With respect to those territories to which this Convention is not extended at the time of signature, ratification or accession, each State concerned shall consider the possibility of taking the necessary steps in order to extend the application of this Convention to such territories, subject, where necessary for constitutional reasons, to the consent of the Governments of such territories.

Article XI

In the case of a federal or non-unitary State the following provisions shall apply:

(*a*) With respect to those articles of this Convention that come within the legislative jurisdiction of the federal authority, the obligations of the federal Government shall to the extent be the same as those of Contracting States which are not federal States;

(*b*) With respect to those articles of this Convention that come within the legislative jurisdiction of constituent states of provinces which are not, under the constitutional system of the federation, bound to take legislative action, the federal Government shall bring such articles with a favourable recommendation to the notice of the appropriate authorities of constituent states or provinces at the earliest possible moment;

(*c*) A federal State Party to this Convention shall, at the request of any other Contracting State transmitted through the Secretary-General of the United Nations, supply a statement of the law and practice of the federation and its constituent units in regard to any particular provision of this Convention, showing the extent to which effect has been given to that provision by legislative or other action.

Article XII

1. This Convention shall come into force on the ninetieth day following the date of deposit of the third instrument of ratification or accession.

2. For each State ratifying or acceding to this Convention after the deposit of the third instrument of ratification or accession, this Convention shall enter into force on the ninetieth day after deposit by such State of its instrument of ratification or accession.

Article XIII

1. Any Contracting State may denounce this Convention by a written notification to the Secretary-General of the United Nations. Denunciation shall take effect one year after the date of receipt of the notification by the Secretary-General.

2. Any State which has made a declaration or notification under article X may, at any time thereafter, by notification to the Secretary-General of the United Nations, declare that this Convention shall cease to extend to the territory concerned one year after the date of the receipt of the notification by the Secretary-General.

3. This Convention shall continue to be applicable to arbitral awards in respect of which recognition or enforcement proceedings have been instituted before the denunciation takes effect.

Article XIV

A Contracting State shall not be entitled to avail itself of the present Convention against other Contracting States except to the extent that it is itself bound to apply the Convention.

Article XV

The Secretary-General of the United Nations shall notify the States contemplated in article VIII of the following:

(*a*) Signatures and ratifications in accordance with article VIII;

(*b*) Accessions in accordance with article IX;

(*c*) Declarations and notifications under articles I, X and XI;

(*d*) The date upon which this Convention enters into force in accordance with article XII;

(*e*) Denunciations and notifications in accordance with article XIII.

Article XVI

1. This Convention, of which the Chinese, English, French, Russian and Spanish texts shall be equally authentic, shall be deposited in the archives of the United Nations.

2. The Secretary-General of the United Nations shall transmit a certified copy of this Convention to the States contemplated in article VIII.

Convention on the Recognition and Enforcement of Foreign Arbitral Awards. Done at New York June 10, 1958; entered into force for the United States December 29, 1970, subject to declarations.

21 UST 2517: TIAS 6997; 330 UNTS 3.

Implementing Legislation Pub. L. 91-368, 84 Stat 692, 9 USC 201–208

States which are parties:

Afghanistan 1
Albania
Algeria 1a
Antigua and Barbuda 1b
Argentina 1c
Armenia 1d
Australia 1e
Austria 1f
Azerbaijan
Bahamas Former Yugoslav Republic of
ahrain 1g
Bangladesh
Barbados 1h

Belarus 1i
Belgium 2
Benin Marshall Island
Bolivia
Bosnia and Herzegovina 2a
Botswana 2b
Brazil
Brunei 2c
Bulgaria 3
Burkina Faso
Cambodia
Cameroon
Canada 4
Central African
Republic 5
Chile
China 5a
ColombiaCook Island Oman
Costa Rica
Cote d'Ivoire
Croatia
Cuba 5b
Cyprus 5c
Czech Republic 6
Dahomey
Denmark 7
Djibouti
Dominica
Dominican Republic Rwanda
Ecuador 8
Egypt
El Salvador
Estonia
Finland
France 9
Gabon
Georgia
Germany 10
Ghana
Greece 10a
Guatemala 10b
Guinea
Haiti
Holy See 10c
Honduras
Hungary 11
Iceland
India 12
Indonesia 12a
Iran 12b
Ireland 12c
Israel United Arab Emirates
Italy
Jamaica 12d
Japan 13

Jordan 13a
Kazakstan
Kenya 13b
Korea, Republic of 14
Kuwait 14a
Kyrgyzstan
Laos
Latvia
Lebanon 14b
Lesotho
Liberia
Lithuania 14c
Luxembourg 14d
Macedonia
Madagascar 14e
Malaysia 15
Mali
Malta 15a
Mauritania
Mauritius 15b
Mexico
Moldova, Republic of 15c
Monaco 15d
Mongolia 15e
Montenegro 15f
Morocco 15g
Mozambique 16
Nepal 16a
Netherlands 17
New Zealand 17a
Nicaragua
Niger
Nigeria 18
Norway 19
Pakistan 19a
Panama
Paraguay
Peru
Philippines 20
Poland 21
Portugal 21a
Qatar
Romania 21b
Russian Federation 22
Saint Vincent and
the Grenadines 22a
San Marino
Saudi Arabia 22b
Senegal
Serbia 22c
Singapore 22d
Slovakia 22e
Slovenia
South Africa
Spain

Sri Lanka (Ceylon)
Sweden
Switzerland 23
Syrian Arab Rep
Tanzania 24
Thailand
Trinidad and Tobago 25
Tunisia 25a
Turkey 26
Uganda 26a
Ukraine 27
United Kingdom 28
United States 29
Uruguay
Uzbekistan
Venezuela 29a
Vietnam 29b
Zambia
Zimbabwe

Endnotes

CONVENTION ON THE TAKING OF EVIDENCE ABROAD IN CIVIL OR COMMERCIAL MATTERS

The States signatory to the present Convention,

Desiring to facilitate the transmission and execution of Letters of Request and to further the accommodation of the different methods which they use for this purpose.

Desiring to improve mutual judicial co-operation in civil or commercial matters,

Have resolved to conclude a Convention to this effect and have agreed upon the following provisions—

CHAPTER I —LETTERS OF REQUEST

Article 1

In civil or commercial matters a judicial authority of a Contracting State may, in accordance with the provisions of the law of that State, request the competent authority of another Contracting State, by means of a Letter of Request, to obtain evidence, or to perform some other judicial act.

A Letter shall not be used to obtain evidence which is not intended for use in judicial proceedings, commenced or contemplated.

The expression `other judicial act' does not cover the service of judicial documents or the issuance of any process by which judgments or orders are executed or enforced, or orders for provisional or protective measures.

Article 2

A Contracting State shall designate a Central Authority which will undertake to receive Letters of Request coming from a judicial authority of another Contracting State and to transmit them to the authority competent to execute them. Each State shall organize the Central Authority in accordance with its own law.

Letters shall be sent to the Central Authority of the State of execution without being transmitted through any other authority of that State.

Article 3

A Letter of Request shall specify—

(a) the authority requesting its execution and the authority requested to execute it, if known to the requesting authority;

(b) the names and addresses of the parties to the proceedings and their representatives, if any;

(c) the nature of the proceedings for which the evidence is required, giving all necessary information in regard thereto;

(d) the evidence to be obtained or other judicial act to be performed.

Where appropriate, the Letter shall specify, inter alia—

(e) the names and addresses of the persons to be examined;

(f) the questions to be put to the persons to be examined or a statement of the subject-matter about which they are to be examined;

(g) the documents or other property, real or personal, to be inspected;

(h) any requirement that the evidence is to be given on oath or affirmation, and any special form to be used;

(i) any special method or procedure to be followed under Article 9.

A Letter may also mention any information necessary for the application of Article 11.

No legalization or other like formality may be required.

Article 4

A Letter of Request shall be in the language of the authority requested to execute it or be accompanied by a translation into that language.

Nevertheless, a Contracting State shall accept a Letter in either English or French, or a translation into one of these languages, unless it has made the reservation authorized by Article 33.

A Contracting State which has more than one official language and cannot, for reasons of internal law, accept Letters in one of these languages for the whole of its territory, shall, by declaration, specify the language in which the Letter or translation thereof shall be expressed for execution in the specified parts of its territory. In case of failure to comply with this declaration, without justifiable excuse, the costs of translation into the required language shall be borne by the State of origin.

A Contracting State may, by declaration, specify the language or languages other than those referred to in the preceding paragraphs, in which a Letter may be sent to its Central Authority.

Any translation accompanying a Letter shall be certified as correct, either by a diplomatic officer or consular agent or by a sworn translator or by any other person so authorized in either State.

Article 5

If the Central Authority considers that the request does not comply with the provisions of the present Convention, it shall promptly inform the authority of the State of origin which transmitted the Letter of Request, specifying the objections to the Letter.

Article 6

If the authority to whom a Letter of Request has been transmitted is not competent to execute it, the Letter shall be sent forthwith to the authority in the same State which is competent to execute it in accordance with the provisions of its own law.

Article 7

The requesting authority shall, if it so desires, be informed of the time when, and the place where, the proceedings will take place, in order that the parties concerned, and their representatives, if any, may be present. This information shall be sent directly to the parties or their representatives when the authority of the State of origin so requests.

Article 8

A Contracting State may declare that members of the judicial personnel of the requesting authority of another Contracting State may be present at the execution of a Letter of Request. Prior authorization by the competent authority designated by the declaring State may be required.

Article 9

The judicial authority which executes a Letter of Request shall apply its own law as to the methods and procedures to be followed.

However, it will follow a request of the requesting authority that a special method or procedure be followed, unless this is incompatible with the internal law of the State of execution or is impossible of performance by reason of its internal practice and procedure or by reason of practical difficulties.

A Letter of Request shall be executed expeditiously.

Article 10

In executing a Letter of Request the requested authority shall apply the appropriate measures of compulsion in the instances and to the same extent as are provided by its internal law for the execution of orders issued by the authorities of its own country or of requests made by parties in internal proceedings.

Article 11

In the execution of a Letter of Request the person concerned may refuse to give evidence in so far as he has a privilege or duty to refuse to give the evidence—

(a) under the law of the State of execution; or

(b) under the law of the State of origin, and the privilege or duty has been specified in the Letter, or, at the instance of the requested authority, has been otherwise confirmed to that authority by the requesting authority.

A Contracting State may declare that, in addition, it will respect privileges and duties existing under the law of States other than the State of origin and the State of execution, to the extent specified in that declaration.

Article 12

The execution of a Letter of Request may be refused only to the extent that—

(a) in the State of execution the execution of the Letter does not fall within the functions of the judiciary; or

(b) the State addressed considers that its sovereignty or security would be prejudiced thereby.

Execution may not be refused solely on the ground that under its internal law the State of execution claims exclusive jurisdiction over the subject-matter of the action or that its internal law would not admit a right of action on it.

Article 13

The documents establishing the execution of the Letter of Request shall be sent by the requested authority to the requesting authority by the same channel which was used by the latter.

In every instance where the Letter is not executed in whole or in part, the requesting authority shall be informed immediately through the same channel and advised of the reasons.

Article 14

The execution of the Letter of Request shall not give rise to any reimbursement of taxes or costs of any nature.

Nevertheless, the State of execution has the right to require the State of origin to reimburse the fees paid to experts and interpreters and the costs occasioned by the use of a special procedure requested by the State of origin under Article 9, paragraph 2.

The requested authority whose law obliges the parties themselves to secure evidence, and which is not able itself to execute the Letter, may, after having obtained the consent of the requesting authority, appoint a suitable person to do so. When seeking this consent the requested authority shall indicate the approximate costs which would result from this procedure. If the requesting authority gives its consent it shall reimburse any costs incurred; without such consent the requesting authority shall not be liable for the costs.

CHAPTER II —TAKING OF EVIDENCE BY DIPLOMATIC OFFICERS, CONSULAR AGENTS AND COMMISSIONERS

Article 15

In a civil or commercial matter, a diplomatic officer or consular agent of a Contracting State may, in the territory of another Contracting State and within the area where he exercises his functions, take the evidence without compulsion of nationals of a State which he represents in aid of proceedings commenced in the courts of a State which he represents.

A Contracting State may declare that evidence may be taken by a diplomatic officer or consular agent only if permission to that effect is given upon application made by him or on his behalf to the appropriate authority designated by the declaring State.

Article 16

A diplomatic officer or consular agent of a Contracting State may, in the territory of another Contracting State and within the area where he exercises his functions, also take the evidence, without compulsion, of nationals of the State in which he exercises his functions or of a third State, in aid of proceedings commenced in the courts of a State which he represents, if—

(a) a competent authority designated by the State in which he exercises his functions has given its permission either generally or in the particular case, and

(b) he complies with the conditions which the competent authority has specified in the permission.

A Contracting State may declare that evidence may be taken under this Article without its prior permission.

Article 17

In a civil or commercial matter, a person duly appointed as a commissioner for the purpose may, without compulsion, take evidence in the territory of a Contracting State in aid of proceedings commenced in the courts of another Contracting State if—

(a) a competent authority designated by the State where the evidence is to be taken has given its permission either generally or in the particular case; and

(b) he complies with the conditions which the competent authority has specified in the permission.

A Contracting State may declare that evidence may be taken under this Article without its prior permission.

Article 18

A Contracting State may declare that a diplomatic officer, consular agent or commissioner authorized to take evidence under Articles 15, 16 or 17, may apply to the competent authority designated by the declaring State for appropriate assistance to obtain the evidence by compulsion. The declaration may contain such conditions as the declaring State may see fit to impose.

If the authority grants the application it shall apply any measures of compulsion which are appropriate and are prescribed by its law for use in internal proceedings.

Article 19

The competent authority, in giving the permission referred to in Articles 15, 16 or 17, or in granting the application referred to in Article 18, may lay down such conditions as it deems fit, *inter alia,* as to the time and place of the taking of the evidence. Similarly it may require that it be given reasonable advance notice of the time, date and place of the taking of the evidence; in such a case a representative of the authority shall be entitled to be present at the taking of the evidence.

Article 20

In the taking of evidence under any Article of this Chapter persons concerned may be legally represented.

Article 21

Where a diplomatic officer, consular agent or commissioner is authorized under Articles 15, 16 or 17 to take evidence—

(a) he may take all kinds of evidence which are not incompatible with the law of the State where the evidence is taken or contrary to any permission granted pursuant to the above Articles, and shall have power within such limits to administer an oath or take an affirmation;

(b) a request to a person to appear or to give evidence shall unless the recipient is a national of the State where the action is pending, be drawn up in the language of the place where the evidence is taken or be accompanied by a translation into such language;

(c) the request shall inform the person that he may be legally represented and, in any State that has not filed a declaration under Article 18, shall also inform him that he is not compelled to appear or to give evidence;

(d) the evidence may be taken in the manner provided by the law applicable to the court in which the action is pending provided that such manner is not forbidden by the law of the State where the evidence is taken;

(e) a person requested to give evidence may invoke the privileges and duties to refuse to give the evidence contained in Article 11.

Article 22

The fact that an attempt to take evidence under the procedure laid down in this Chapter has failed, owing to the refusal of a person to give evidence, shall not prevent an application being subsequently made to take the evidence in accordance with Chapter I.

CHAPTER III —GENERAL CLAUSES

Article 23

A Contracting State may at the time of signature, ratification or accession, declare that it will not execute Letters of Request issued for the purpose of obtaining pre-trial discovery of documents as known in Common Law countries.

Article 24

A Contracting State may designate other authorities in addition to the Central Authority and shall determine the extent of their competence. However, Letters of Request may in all cases be sent to the Central Authority.

Federal States shall be free to designate more than one Central Authority.

Article 25

A Contracting State which has more than one legal system may designate the authorities of one of such systems, which shall have exclusive competence to execute Letters of Request pursuant to this Convention.

Article 26

A Contracting State, if required to do so because of constitutional limitations, may request the reimbursement by the State of origin of fees and costs, in connection with the execution of Letters of Request, for the service of process necessary to compel the appearance of a person to give evidence, the costs of attendance of such persons, and the cost of any transcript of the evidence.

Where a State has made a request pursuant to the above paragraph, any other Contracting State may request from that State the reimbursement of similar fees and costs.

Article 27

The provisions of the present Convention shall not prevent a Contracting State from—

(a) declaring that Letters of Request may be transmitted to its judicial authorities through channels other than those provided for in Article 2;

(b) permitting, by internal law or practice, any act provided for in this Convention to be performed upon less restrictive conditions;

(c) permitting, by internal law or practice, methods of taking evidence other than those provided for in this Convention.

Article 28

The present Convention shall not prevent an agreement between any two or more Contracting States to derogate from—

(a) the provisions of Article 2 with respect to methods of transmitting Letters of Request;

(b) the provisions of Article 4 with respect to the languages which may be used;

(c) the provisions of Article 8 with respect to the presence of judicial personnel at the execution of Letters;

(d) the provisions of Article 11 with respect to the privileges and duties of witnesses to refuse to give evidence;

(e) the provisions of Article 13 with respect to the methods of returning executed Letters to the requesting authority;

(f) the provisions of Article 14 with respect to fees and costs;

(g) the provisions of Chapter II.

Article 29

Between Parties to the present Convention who are also Parties to one or both of the Conventions on Civil Procedure signed at the Hague on the 17th of July 1905[1] and the 1st of March 1954,[2] this Convention shall replace Articles 8–16 of the earlier Conventions.

Article 30

The present Convention shall not affect the application of Article 23 of the Convention of 1905, or of Article 24 of the Convention of 1954.

Article 31

Supplementary Agreements between Parties to the Conventions of 1905 and 1954 shall be considered as equally applicable to the present Convention unless the Parties have otherwise agreed.

Article 32

Without prejudice to the provisions of Articles 29 and 31, the present Convention shall not derogate from conventions containing provisions on the matters covered by this Convention to which the Contracting States are, or shall become Parties.

Article 33

A State may, at the time of signature, ratification or accession exclude, in whole or in part, the application of the provisions of paragraph 2 of Article 4 and of Chapter II. No other reservation shall be permitted.

Each Contracting State may at any time withdraw a reservation it has made; the reservation shall cease to have effect on the sixtieth day after notification of the withdrawal.

When a State has made a reservation, any other State affected thereby may apply the same rule against the reserving State.

Article 34

A State may at any time withdraw or modify a declaration.

Article 35

A Contracting State shall, at the time of the deposit of its instrument of ratification or accession, or at a later date, inform the Ministry of Foreign Affairs of the Netherlands of the designation of authorities, pursuant to Articles 2, 8, 24 and 25.

A Contracting State shall likewise inform the Ministry, where appropriate, of the following —

(a) the designation of the authorities to whom notice must be given, whose permission may be required, and whose assistance may be invoked in the taking of evidence by diplomatic officers and consular agents, pursuant to Articles 15, 16 and 18 respectively;

(b) the designation of the authorities whose permission may be required in the taking of evidence by commissioners pursuant to Article 17 and of those who may grant the assistance provided for in Article 18;

(c) declarations pursuant to Articles 4, 8, 11, 15, 16, 17, 18, 23 and 27;

(d) any withdrawal or modification of the above designations and declarations;

(e) the withdrawal of any reservation.

Article 36

Any difficulties which may arise between Contracting States in connection with the operation of this Convention shall be settled through diplomatic channels.

Article 37

The present Convention shall be open for signature by the States represented at the Eleventh Session of the Hague Conference on Private International Law.

It shall be ratified, and the instruments of ratification shall be deposited with the Ministry of Foreign Affairs of the Netherlands.

Article 38

The present Convention shall enter into force on the sixtieth day after the deposit of the third instrument of ratification referred to in the second paragraph of Article 37.

The Convention shall enter into force for each signatory State which ratifies subsequently on the sixtieth day after the deposit of its instrument of ratification.

Article 39

Any State not represented at the Eleventh Session of the Hague Conference on Private International Law which is a Member of this Conference or of the United Nations or of a specialized agency of that Organization, or a Party to the Statute of the International Court of Justice[1] may accede to the present Convention after it has entered into force in accordance with the first paragraph of Article 38.

The instrument of accession shall be deposited with the Ministry of Foreign Affairs of the Netherlands.

The Convention shall enter into force for a State acceding to it on the sixtieth day after the deposit of its instrument of accession.

The accession will have effect only as regards the relations between the acceding State and such Contracting States as will have declared their acceptance of the accession. Such declaration shall be deposited at the Ministry of Foreign Affairs of the Netherlands; this Ministry shall forward, through diplomatic channels, a certified copy to each of the Contracting States.

The Convention will enter into force as between the acceding State and the State that has declared its acceptance of the accession on the sixtieth day after the deposit of the declaration of acceptance.

Article 40

Any State may, at the time of signature, ratification or accession, declare that the present Convention shall extend to all the territories for the international relations of which it is responsible, or to one or more of them. Such a declaration shall take effect on the date of entry into force of the Convention for the State concerned.

At any time thereafter, such extensions shall be notified to the Ministry of Foreign Affairs of the Netherlands.

The Convention shall enter into force for the territories mentioned in such an extension on the sixtieth day after the notification indicated in the preceding paragraph.

Article 41

The present Convention shall remain in force for five years from the date of its entry into force in accordance with the first paragraph of Article 38, even for States which have ratified it or acceded to it subsequently.

If there has been no denunciation, it shall be renewed tacitly every five years.

Any denunciation shall be notified to the Ministry of Foreign Affairs of the Netherlands at least six months before the end of the five year period.

It may be limited to certain of the territories to which the Convention applies.

The denunciation shall have effect only as regards the State which has notified it. The Convention shall remain in force for the other Contracting States.

Article 42

The Ministry of Foreign Affairs of the Netherlands shall give notice to the States referred to in Article 37, and to the States which have acceded in accordance with Article 39, of the following—

(a) the signatures and ratifications referred to in Article 37;

(b) the date on which the present Convention enters into force in accordance with the first paragraph of Article 38;

(c) the accessions referred to in Article 39 and the dates on which they take effect;

(d) the extensions referred to in Article 40 and the dates on which they take effect;

(e) the designations, reservations and declarations referred to in Articles 33 and 35;

(f) the denunciations referred to in the third paragraph of Article 41.

IN WITNESS WHEREOF the undersigned, being duly authorized thereto, have signed the present Convention.

DONE at The Hague, on the 18th day of March 1970, in the English and French languages, both texts being equally authentic, in a single copy which shall be deposited in the archives of the Government of the Netherlands, and of which a certified copy shall be sent, through the diplomatic channel, to each of the States represented at the Eleventh Session of the Hague Conference [Signatures omitted.]

Convention on the taking of evidence abroad in civil or commercial matters. Done at The Hague March 18, 1970; entered into force for the United States October 7, 1972.

TIAS 7444; 23 UST 2555; 847 UNTS 231

States which are parties:

Argentina 1
Australia 1a
Barbados 1b
Belarus 1c
Bosnia & Herzegovina 1d
Bulgaria 1e
China 1f
Cyprus 1g
Czech Republic 1h
Denmark 1i
Estonia 1j
Finland 1k
France 1l
Federal Republic of Germany 2
Greece 2a
Hungary 2b
Iceland 2c
India 2d
Israel 2e
Italy 2f
Kuwait 2g
Latvia 2h
Liechtenstein 2i
Lithuania 2j
Luxemburg 2k
Mexico 2l
Monaco 2m
Netherlands 2n
Norway 2o
Poland 3
Portugal 3a
Romania 3b
Russian Federation 3c
Seychelles 3d
Singapore 3e
Slovak Republic 3f
Slovenia 3g
South Africa 3h
Spain 3i
Sri Lanka 3j
Sweden 3k
Switzerland 3l
The former Yugoslavic Republic og Macedonia 3m
Turkey 4
Ukraine 4a
United Kingdom 4b
United States 4c
Venezuela 5

Endnotes

Endnotes

CONVENTION ABOLISHING THE REQUIREMENT OF LEGALISATION FOR FOREIGN PUBLIC DOCUMENTS

The States signatory to the present Convention,

Desiring to abolish the requirement of diplomatic or consular legalisation for foreign public documents,

Have resolved to conclude a Convention to this effect and have agreed upon the following provisions:

Article 1

The present Convention shall apply to public documents which have been executed in the territory of one contracting State and which have to be produced in the territory of another contracting State.

For the purposes of the present Convention, the following are deemed to be public documents:

(a) Documents emanating from an authority or an official connected with the courts or tribunals of the State, including those emanating from a public prosecutor, a clerk of a court or a process server (``huissier de justice'');

(b) Administrative documents;

(c) Notarial acts;

(d) Official certificates which are placed on documents signed by persons in their private capacity, such as official certificates recording the registration of a document or the fact that it was in existence on a certain date and official and notarial authentications of signatures.

However, the present Convention shall not apply:

(a) To documents executed by diplomatic or consular agents;

(b) To administrative documents dealing directly with commercial or customs operations.

Article 2

Each contracting State shall exempt from legalisation documents to which the present Convention applies and which have to be produced in its territory. For the purposes of the present

Convention, legalisation means only the formality by which the diplomatic or consular agents of the country in which the document has to be produced certify the authenticity of the signature, the capacity in which the person signing the document has acted and, where appropriate, the identity of the seal or stamp which it bears.

Article 3

The only formality that may be required in order to certify the authenticity of the signature, the capacity in which the person signing the document has acted and, where appropriate, the identity of the seal or stamp which it bears, is the addition of the certificate described in Article 4, issued by the competent authority of the State from which the document emanates.

However, the formality mentioned in the preceding paragraph cannot be required when either the laws, regulations, or practice in force in the State where the document is produced or an agreement between two or more contracting States have abolished or simplified it, or exempt the document itself from legalisation.

Article 4

The certificate referred to in the first paragraph of Article 3 shall be placed on the document itself or on an ``allonge''; it shall be in the form of the model annexed to the present Convention.

It may, however, be drawn up in the official language of the authority which issues it. The standard terms appearing therein may be in a second language also. The title ``Apostille (Convention de La Haye du 5 octobre 1961)'' shall be in the French language.

Article 5

The certificate shall be issued at the request of the person who has signed the document or of any bearer.

When properly filled in, it will certify the authenticity of the signature, the capacity in which the person signing the document has acted and, where appropriate, the identity of the seal or stamp which the document bears.

The signature, seal and stamp on the certificate are exempt from all certification.

Article 6

Each contracting State shall designate by reference to their official function, the authorities who are competent to issue the certificate referred to in the first paragraph of Article 3.

It shall give notice of such designation to the Ministry of Foreign Affairs of the Netherlands at the time it deposits its instrument of ratification or of accession or its declaration of extension. It shall also give notice of any change in the designated authorities.

Article 7

Each of the authorities designated in accordance with Article 6 shall keep a register or card index in which it shall record the certificates issued, specifying:

(a) The number and date of the certificate,

(b) The name of the person signing the public document and the capacity in which he has acted, or in the case of unsigned documents, the name of the authority which has affixed the seal or stamp.

At the request of any interested person, the authority which has issued the certificate shall verify whether the particulars in the certificate correspond with those in the register or card index.

Article 8

When a treaty, convention or agreement between two or more contracting States contains provisions which subject the certification of a signature, seal or stamp to certain formalities, the present Convention will only override such provisions if those formalities are more rigorous than the formality referred to in Articles 3 and 4.

Article 9

Each contracting State shall take the necessary steps to prevent the performance of legalisations by its diplomatic or consular agents in cases where the present Convention provides for exemption.

Article 10

The present Convention shall be open for signature by the States represented at the Ninth session of the Hague Conference on Private International Law and Iceland, Ireland, Liechtenstein and Turkey.

It shall be ratified, and the instruments of ratification shall be deposited with the Ministry of Foreign Affairs of the Netherlands.

Article 11

The present Convention shall enter into force on the sixtieth day after the deposit of the third instrument of ratification referred to in the second paragraph of Article 10.

The Convention shall enter into force for each signatory State which ratifies subsequently on the sixtieth day after the deposit of its instrument of ratification.

Article 12

Any State not referred to in Article 10 may accede to the present Convention after it has entered into force in accordance with the first paragraph of Article 11. The instrument of accession shall be deposited with the Ministry of Foreign Affairs of the Netherlands.

Such accession shall have effect only as regards the relations between the acceding State and those contracting States which have not raised an objection to its accession in the six months after the receipt of the notification referred to in sub-paragraph d) of Article 15. Any such objection shall be notified to the Ministry of Foreign Affairs of the Netherlands.

The Convention shall enter into force as between the acceding State and the States which have raised no objection to its accession on the sixtieth day after the expiry of the period of six months mentioned in the preceding paragraph.

Article 13

Any State may, at the time of signature, ratification or accession, declare that the present Convention shall extend to all the territories for the international relations of which it is responsible, or to one or more of them. Such a declaration shall take effect on the date of entry into force of the Convention for the State concerned.

At any time thereafter, such extension shall be notified to the Ministry of Foreign Affairs of the Netherlands.

When the declaration of extension is made by a State which has signed and ratified, the Convention shall enter into force for the territories concerned in accordance with Article 11. When the declaration of extension is made by a State which has acceded, the Convention shall enter into force for the territories concerned in accordance with Article 12.

Article 14

The present Convention shall remain in force for five years from the date of its entry into force in accordance with the first paragraph of Article 11, even for States which have ratified it or acceded to it subsequently.

If there has been no denunciation, the Convention shall be renewed tacitly every five years.

Any denunciation shall be notified to the Ministry of Foreign Affairs of the Netherlands at least six months before the end of the five year period.

It may be limited to certain of the territories to which the Convention applies.

The denunciation will only have effect as regards the State which has notified it. The Convention shall remain in force for the other contracting States.

Article 15

The Ministry of Foreign Affairs of the Netherlands shall give notice to the States referred to in Article 10, and to the States which have acceded in accordance with Article 12, of the following:

(a) The notifications referred to in the second paragraph of Article 6;

(b) The signatures and ratifications referred to in Article 10;

(c) The date on which the present Convention enters into force in accordance with the first paragraph of Article 11;

(d) The accessions and objections referred to in Article 12 and the date on which such accessions take effect;

(e) The extensions referred to in Article 13 and the date on which they take effect;

(f) The denunciations referred to in the third paragraph of Article 14.

In witness whereof the undersigned, being duly authorised thereto, have signed the present Convention.

Done at The Hague the 5th October 1961, in French and in English, the French text prevailing in case of divergence between the two texts, in a single copy which shall be deposited in the archives of the Government of the Netherlands, and of which a certified copy shall be sent, through the diplomatic channel, to each of the States represented at the Ninth session of the Hague Conference on Private International Law and also to Iceland, Ireland, Liechtenstein and Turkey.

[Signatures omitted.]

ANNEX TO THE CONVENTION

Model of certificate

The certificate will be in the form of a square
with sides at least 9 centimetres long

APOSTILLE
(Convention de La Haye du 5 octobre 1961)

1. Country: ....

This public document

2. has been signed by ....

3. acting in the capacity of ....

4. bears the seal/stamp of ....
....

Certified

5. at .... 6. the ....

7. by ....

8. N° ....

9. Seal/stamp:

10. Signature:
....

Convention abolishing the requirement of legalization for foreign public documents, with annex. Done at The Hague October 5, 1961; entered into force for the United States October 15, 1981. (TIAS 10072; 527 UNTS 189).

Parties to the Convention

In addition to the United States, the following are parties to the Convention:

Contracting State	**Territories to which Extended**
Albania 1	
Andorra 1a	
Antigua and Barbuda 1b	
Argentina 1c	
Armenia 1d	
Australia 2	All the territories for the international relations of which it is responsible
Austria 2a	
Azerbaijan 2b	
Bahamas 2c	
Barbados 3	
Belarus 4	
Belgium 4a	
Belize 5	
Bosnia-Herzegovina 5a	
Botswana 5b	
Brunei 5c	
Bulgaria 5d	
Cape Verde 5e	
China, Hong Kong Special Administrative Region only 5f	
Macau, Special Administrative Region only	
Colombia 6	
Cook Islands 6a	
Croatia 6b	
Cyprus 6c	
Czech Republic 6d	
Denmark 6e	
Dominica 6f	
Dominica Republic 7	
Ecuador 7a	
El Salvador 7b	
Estonia 7c	
Fiji 7d	
Finland 8	
France	Entire territory of the French Republic Anglo-French Condominium of the New Hebrides (Vanuatu)* 8a
Georgia 8b	
Germany, Federal Republic of 9	
Greece 9a	
Grenada 9b	
Honduras 9c	
Hungary 9d	
Iceland 9e	
India 9f	
Ireland 9g	
Israel 10	
Italy 10a	
Japan 10b	
Korea, Republic of 10c	
Kazakhstan 10c	

- Latvia 11
- Lesotho 11a
- Liberia 12
- Liechtenstein 12a
- Lithuania 12b
- Luxembourg 12c
- Macedonia, former Yugoslav Republic of 13
- Malawi 13a
- Malta 13b
- Marshall Islands 14
- Mauritius 14a
- Mexico 14b
- Moldova, Republic of 14c
- Monaco 14d
- Mongolia 14e
- Montenegro 14f
- Namibia 14g
- Netherlands 15
  - the Kingdom in Europe
- Netherlands Antilles and Aruba 15
- New Zealand 15a
- Niue 15b
- Norway 15c
- Panama 15d
- Poland 15e
- Portugal
  - Angola*
  - Mozambique*
  - and other overseas departments 15f
- Romania 15g
- Russian Federation 16
- Samoa 16a
- San Marino 16b
- Sao Tome and Principe 16c
- Serbia 16d
- Seychelles 16e
- Slovakia 16f
- Slovenia 16g
- South Africa 16h
- Spain 16i
- St. Kitts & Nevis 16j
- Saint Lucia 16k
- Saint Vincent & the Grenadines 16l
- Suriname 16m
- Swaziland 16n
- Sweden 16o
- Switzerland 16p
- Tonga 16q
- Trinidad & Tobago 16r
- Turkey 16s
- Ukraine 16t
- United Kingdom of Great Britain and Northern Ireland 17
  - Anguilla
  - the Bailiwick of Guernsey
  - Bermuda
  - British Antarctic Territory
  - British Guiana (Guyana)*
  - British Solomon Islands Protectorate (Solomon Islands)*
  - Cayman Islands
  - Dominica*
  - Falkland Islands
  - Gibraltar
  - Gilbert and Ellice Islands (Kiribati/ Tuvalu)*
  - the Isle of Man

	Jersey Montserrat New Hebrides (Vanuatu)* St. Helena Southern Rhodesia (Zimbabwe)* Turks and Caicos Islands British Virgin Islands
United States 17a	Those territories for the foreign relations of which the United States is responsible
Vanuatu 17b	
Venezuela 17c	

* Now independent and no confirmation issued by the newly independent country that the Convention is deemed to apply.

Endnotes

UNITED NATIONS CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS

THE STATES PARTIES TO THIS CONVENTION,

BEARING IN MIND the broad objectives in the resolutions adopted by the sixth special session of the General Assembly of the United Nations on the establishment of a New International Economic Order,

CONSIDERING that the development of international trade on the basis of equality and mutual benefit is an important element in promoting friendly relations among States,

BEING OF THE OPINION that the adoption of uniform rules which govern contracts for the international sale of goods and take into account the different social, economic and legal systems would contribute to the removal of legal barriers in international trade and promote the development of international trade,

HAVE AGREED as follows:

PART I SPHERE OF APPLICATION AND GENERAL PROVISIONS

Chapter I SPHERE OF APPLICATION

Article 1

(1) This Convention applies to contracts of sale of goods between parties whose places of business are in different States:

(a) when the States are Contracting States; or

(b) when the rules of private international law lead to the application of the law of a Contracting State.

(2) The fact that the parties have their places of business in different States is to be disregarded whenever this fact does not appear either from the contract or from any dealings between, or from information disclosed by, the parties at any time before or at the conclusion of the contract.

(3) Neither the nationality of the parties nor the civil or commercial character of the parties or of the contract is to be taken into consideration in determining the application of this Convention.

Article 2

This Convention does not apply to sales:

(a) of goods bought for personal, family or household use, unless the seller, at any time before or at the conclusion of the contract, neither knew nor ought to have known that the goods were bought for any such use;

(b) by auction;

(c) on execution or otherwise by authority of law;

(d) of stocks, shares, investment securities, negotiable instruments or money;

(e) of ships, vessels, hovercraft or aircraft;

(f) of electricity.

Article 3

(1) Contracts for the supply of goods to be manufactured or produced are to be considered sales unless the party who orders the goods undertakes to supply a substantial part of the materials necessary for such manufacture or production.

(2) This Convention does not apply to contracts in which the preponderant part of the obligations of the party who furnishes the goods consists in the supply of labour or other services.

Article 4

This Convention governs only the formation of the contract of sale and the rights and obligations of the seller and the buyer arising from such a contract. In particular, except as otherwise expressly provided in this Convention, it is not concerned with:

(a) the validity of the contract or of any of its provisions or of any usage;

(b) the effect which the contract may have on the property in the goods sold.

Article 5

This Convention does not apply to the liability of the seller for death or personal injury caused by the goods to any person.

Article 6

The parties may exclude the application of this Convention or, subject to article 12, derogate from or vary the effect of any of its provisions.

Chapter II GENERAL PROVISIONS

Article 7

(1) In the interpretation of this Convention, regard is to be had to its international character and to the need to promote uniformity in its application and the observance of good faith in international trade.

(2) Questions concerning matters governed by this Convention which are not expressly settled in it are to be settled in conformity with the general principles on which it is based or, in the absence of such principles, in conformity with the law applicable by virtue of the rules of private international law.

Article 8

(1) For the purposes of this Convention statements made by and other conduct of a party are to be interpreted according to his intent where the other party knew or could not have been unaware what that intent was.

(2) If the preceding paragraph is not applicable, statements made by and other conduct of a party are to be interpreted according to the understanding that a reasonable person of the same kind as the other party would have had in the same circumstances.

(3) In determining the intent of a party or the understanding a reasonable person would have had, due consideration is to be given to all relevant circumstances of the case including the negotiations, any practices which the parties have established between themselves, usages and any subsequent conduct of the parties.

Article 9

(1) The parties are bound by any usage to which they have agreed and by any practices which they have established between themselves.

(2) The parties are considered, unless otherwise agreed, to have impliedly made applicable to their contract or its formation a usage of which the parties knew or ought to have known and which in international trade is widely known to, and regularly observed by, parties to contracts of the type involved in the particular trade concerned.

Article 10

For the purposes of this Convention:

(a) if a party has more than one place of business, the place of business is that which has the closest relationship to the contract and its performance, having regard to the circumstances known to or contemplated by the parties at any time before or at the conclusion of the contract;

(b) if a party does not have a place of business, reference is to be made to his habitual residence.

Article 11

A contract of sale need not be concluded in or evidence by writing and is not subject to any other requirement as to form. It may be proved by any means, including witnesses.

Article 12

Any provision of article 11, article 29 or Part II of this Convention that allows a contract of sale or its modification or termination by agreement or any offer, acceptance or other indication of intention to be made in any form other than in writing does not apply where any party has his place of business in a Contracting State which has made a declaration under article 96 of this Convention. The parties may not derogate from or vary the effect of this article.

Article 13

For the purposes of this Convention ``writing'' includes telegram and telex.

PART II FORMATION OF THE CONTRACT

Article 14

(1) A proposal for concluding a contract addressed to one or more specific persons constitutes an offer if it is sufficiently definite and indicates the intention of the offeror to be bound in case of acceptance. A proposal is sufficiently definite if it indicates the goods and expressly or implicitly fixes or makes provision for determining the quantity and the price.

(2) A proposal other than one addressed to one or more specific persons is to be considered merely as an invitation to make offers, unless the contrary is clearly indicated by the person making the proposal.

Article 15

(1) An offer becomes effective when it reaches the offeree.

(2) An offer, even if it is irrevocable, may be withdrawn if the withdrawal reaches the offeree before or at the same time as the offer.

Article 16

(1) Until a contract is concluded an offer may be revoked if the revocation reaches the offeree before he has dispatched an acceptance.

(2) However, an offer cannot be revoked:

(a) if it indicates, whether by stating a fixed time for acceptance or otherwise, that it is irrevocable; or

(b) if it was reasonable for the offeree to rely on the offer as being irrevocable and the offeree has acted in reliance on the offer.

Article 17

An offer, even if it is irrevocable, is terminated when a rejection reaches the offeror.

Article 18

(1) A statement made by or other conduct of the offeree indicating assent to an offer is an acceptance. Silence or inactivity does not in itself amount to acceptance.

(2) An acceptance of an offer becomes effective at the moment the indication of assent reaches the offeror. An acceptance is not effective if the indication of assent does not reach the offeror within the time he has fixed or, if no time is fixed, within a reasonable time, due account being taken of the circumstances of the transaction, including the rapidity of the means of communication employed by the offeror. An oral offer must be accepted immediately unless the circumstances indicate otherwise.

(3) However, if, by virtue of the offer or as a result of practices which the parties have established between themselves or of usage, the offeree may indicate assent by performing an act, such as one relating to the dispatch of the goods or payment of the price, without notice to the

offeror, the acceptance is effective at the moment the act is performed, provided that the act is performed within the period of time laid down in the preceding paragraph.

Article 19

(1) A reply to an offer which purports to be an acceptance but contains additions, limitations or other modifications is a rejection of the offer and constitutes a counter-offer.

(2) However, a reply to an offer which purports to be an acceptance but contains additional or different terms which do not materially alter the terms of the offer constitutes an acceptance, unless the offeror, without undue delay, objects orally to the discrepancy or dispatches a notice to that effect. If he does not so object, the terms of the contract are the terms of the offer with the modifications contained in the acceptance.

(3) Additional or different terms relating, among other things, to the price, payment, quality and quantity of the goods, place and time of delivery, extent of one party's liability to the other or the settlement of disputes are considered to alter the terms of the offer materially.

Article 20

(1) A period of time for acceptance fixed by the offeror in a telegram or a letter begins to run from the moment the telegram is handed in for dispatch or from the date shown on the letter or, if no such date is shown, from the date shown on the envelope. A period of time for acceptance fixed by the offeror by telephone, telex or other means of instantaneous communication, begins to run from the moment that the offer reaches the offeree.

(2) Official holidays or non-business days occurring during the period for acceptance are included in calculating the period. However, if a notice of acceptance cannot be delivered at the address of the offeror on the last day of the period because that day falls on an official holiday or a non-business day at the place of business of the offeror, the period is extended until the first business day which follows.

Article 21

(1) A late acceptance is nevertheless effective as an acceptance if without delay the offeror orally so informs the offeree or dispatches a notice to that effect.

(2) If a letter or other writing containing a late acceptance shows that it has been sent in such circumstances that if its transmission had been normal it would have reached the offeror in due time, the late acceptance is

effective as an acceptance unless, without delay, the offeror orally informs the offeree that he considers his offer as having lapsed or dispatches a notice to that effect.

Article 22

An acceptance may be withdrawn if the withdrawal reaches the offeror before or at the same time as the acceptance would have become effective.

Article 23

A contract is concluded at the moment when an acceptance of an offer becomes effective in accordance with the provisions of this Convention.

Article 24

For the purposes of this Part of the Convention, an offer, declaration of acceptance or any other indication of intention ``reaches'' the addressee when it is made orally to him or delivered by any other means to him personally, to his place of business or mailing address or, if he does not have a place of business or mailing address, to his habitual residence.

PART III SALE OF GOODS

Chapter I GENERAL PROVISIONS

Article 25

A breach of contract committed by one of the parties is fundamental if it results in such detriment to the other party as substantially to deprive him of what he is entitled to expect under the contract, unless the party in breach did not foresee and a reasonable person of the same kind in the same circumstances would not have foreseen such a result.

Article 26

A declaration of avoidance of the contract is effective only if made by notice to the other party.

Article 27

Unless otherwise expressly provided in this Part of the Convention, if any notice, request or other communication is given or made by a party in accordance with this Part and by means appropriate in the circumstances, a delay or error in the transmission of the communication or its failure to arrive does not deprive that party of the right to rely on the communication.

Article 28

If, in accordance with the provisions of this Convention, one party is entitled to require performance of any obligation by the other party, a court is not bound to enter a judgement for specific performance unless the court would do so under its own law in respect of similar contracts of sale not governed by this Convention.

Article 29

(1) A contract may be modified or terminated by the mere agreement of the

parties.

(2) A contract in writing which contains a provision requiring any modification or termination by agreement to be in writing may not be otherwise modified or terminated by agreement. However, a party may be precluded by his conduct from asserting such a provision to the extent that the other party has relied on that conduct.

Chapter II OBLIGATIONS OF THE SELLER

Article 30

The seller must deliver the goods, hand over any documents relating to them and transfer the property in the goods, as required by the contract and this Convention.

Section I. *Delivery of the goods and handing over of documents.*

Article 31

If the seller is not bound to deliver the goods at any other particular place, his obligation to deliver consists:

(a) if the contract of sale involves carriage of the goods—in handing the goods over to the first carrier for transmission to the buyer;

(b) if, in cases not within the preceding subparagraph, the contract relates to specific goods, or unidentified goods to be drawn from a specific stock or to be manufactured or produced, and at the time of the conclusion of the contract the parties knew that the goods were at, or were to be manufactured or produced at, a particular place—in placing the goods at the buyer's disposal at that place;

(c) in other cases—in placing the goods at the buyer's disposal at the place where the seller had his place of business at the time of the conclusion of the contract.

Article 32

(1) If the seller, in accordance with the contract or this Convention, hands the goods over to a carrier and if the goods are not clearly identified to the contract by markings on the goods, by shipping documents or otherwise, the seller must give the buyer notice of the consignment specifying the goods.

(2) If the seller is bound to arrange for carriage of the goods, he must make such contracts as are necessary for carriage to the place fixed by means of transportation appropriate in the circumstances and according to the usual terms for such

transportation.

(3) If the seller is not bound to effect insurance in respect of the carriage of the goods, he must, at the buyer's request, provide him with all available information necessary to enable him to effect such insurance.

Article 33

The seller must deliver the goods:

(a) if a date is fixed by or determinable from the contract, on that date;

(b) if a period of time is fixed by or determinable from the contract, at any time within that period unless circumstances indicate that the buyer is to choose a date; or

(c) in any other case, within a reasonable time after the conclusion of the contract.

Article 34

If the seller is bound to hand over documents relating to the goods, he must hand them over at the time and place and in the form required by the contract. If the seller has handed over documents before that time, he may, up to that time, cure any lack of conformity in the documents, if the exercise of this right does not cause the buyer unreasonable inconvenience or unreasonable expense. However, the buyer retains any right to claim damages as provided for in this Convention.

Section II. *Conformity of the goods and third party claims*

Article 35

(1) The seller must deliver goods which are of the quantity, quality and description required by the contract and which are contained or packaged in the manner required by the contract.

(2) Except where the parties have agreed otherwise, the goods do not conform with the contract unless they:

(a) are fit for the purposes for which goods of the same description would ordinarily be used;

(b) are fit for any particular purpose expressly or impliedly made known to the seller at the time of the conclusion of the contract, except where the circumstances show that the buyer did not rely, or that it was unreasonable for him to rely, on the seller's skill and judgement;

(c) possess the qualities of goods which the seller has held out to the buyer as a sample or model;

(d) are contained or packaged in the manner usual for such goods or, where there is no such manner, in a manner adequate to preserve and protect the goods.

(3) The seller is not liable under subparagraphs (a) to (d) of the preceding paragraph for any lack of conformity of the goods if at the time of the conclusion of the contract the buyer knew or could not have been unaware of such lack of conformity.

Article 36

(1) The seller is liable in accordance with the contract and this Convention for any lack of conformity which exists at the time when the risk passes to the buyer, even though the lack of conformity becomes apparent only after that time.

(2) The seller is also liable for any lack of conformity which occurs after the time indicated in the preceding paragraph and which is due to a breach of any of his obligations, including a breach of any guarantee that for a period of time the goods will remain fit for their ordinary purpose or for some particular purpose or will retain specified qualities or characteristics.

Article 37

If the seller has delivered goods before the date for delivery, he may, up to that date, deliver any missing part or make up any deficiency in the quantity of the goods delivered, or deliver goods in replacement of any non-conforming goods delivered or remedy any lack of conformity in the goods delivered, provided that the exercise of this right does not cause the buyer unreasonable inconvenience or unreasonable expense. However, the buyer retains any right to claim damages as provided for in this Convention.

Article 38

(1) The buyer must examine the goods, or cause them to be examined, within as short a period as is practicable in the circumstances.

(2) If the contract involves carriage of the goods, examination may be deferred until after the goods have arrived at their destination.

(3) If the goods are redirected in transit or redispatched by the buyer without a reasonable opportunity for examination by him and at the time of the conclusion of the contract the seller knew or ought to have known of the possibility of such redirection or redispatch, examination may be deferred until after the goods have arrived at the new destination.

Article 39

(1) The buyer loses the right to rely on a lack of conformity of the goods if he does not give notice to the seller specifying the nature of the lack of conformity within a reasonable time after he has discovered it or ought to have discovered it.

(2) In any event, the buyer loses the right to rely on a lack of conformity of the goods if he does not give the seller notice thereof at the latest within a period of two years from the date on which the goods were actually handed over to the buyer, unless this time-limit is inconsistent with a contractual period of guarantee.

Article 40

The seller is not entitled to rely on the provisions of articles 38 and 39 if the lack of conformity relates to facts of which he knew or could not have been unaware and which he did not disclose to the buyer.

Article 41

The seller must deliver goods which are free from any right or claim of a third party, unless the buyer agreed to take the goods subject to that right or claim. However, if such right or claim is based on industrial property or other intellectual property, the seller's obligation is governed by article 42.

Article 42

(1) The seller must deliver goods which are free from any right or claim of a third party based on industrial property or other intellectual property, of which at the time of the conclusion of the contract the seller knew or could not have been unaware, provided that the right or claim is based on industrial property or other intellectual property:

(a) under the law of the State where the goods will be resold or otherwise used, if it was contemplated by the parties at the time of the conclusion of the contract that the goods would be resold or otherwise used in that State; or

(b) in any other case, under the law of the State where the buyer has his place of business.

(2) The obligation of the seller under the preceding paragraph does not extend to cases where:

(a) at the time of the conclusion of the contract the buyer knew or could not have been unaware of the right or claim; or

(b) the right or claim results from the seller's compliance with technical drawings, designs, formulae or other such specifications furnished by the buyer.

Article 43

(1) The buyer loses the right to rely on the provisions of article 41 or article 42 if he does not give notice to the seller specifying the nature of the right or claim of the third party within a reasonable time after he has become aware or ought to have become aware of the right or claim.

(2) The seller is not entitled to rely on the provisions of the preceding paragraph if he knew of the right or claim of the third party and the nature of it.

Article 44

Notwithstanding the provisions of paragraph (1) of article 39 and paragraph (1) of article 43, the buyer may reduce the price in accordance with article 50 or claim damages, except for loss of profit, if he has a reasonable excuse for his failure to give the required notice.

Section III. *Remedies for breach of contract by the seller*

Article 45

(1) If the seller fails to perform any of his obligations under the contract or this Convention, the buyer may:

(a) exercise the rights provided in articles 46 to 52;

(b) claim damages as provided in articles 74 to 77.

(2) The buyer is not deprived of any right he may have to claim damages by exercising his right to other remedies.

(3) No period of grace may be granted to the seller by a court or arbitral tribunal when the buyer resorts to a remedy for breach of contract.

Article 46

(1) The buyer may require performance by the seller of his obligations unless the buyer has resorted to a remedy which is inconsistent with this requirement.

(2) If the goods do not conform with the contract, the buyer may require delivery of substitute goods only if the lack of conformity constitutes a fundamental breach of contract and a request for substitute goods is made either in conjunction with notice given under article 39 or within a reasonable time thereafter.

(3) If the goods do not conform with the contract, the buyer may require the seller to remedy the lack of conformity by repair, unless this is unreasonable having regard to all the circumstances. A request for repair must be made either in conjunction with notice given under article 39 or within a reasonable time thereafter.

Article 47

(1) The buyer may fix an additional period of time of reasonable length for performance by the seller of his obligations.

(2) Unless the buyer has received notice from the seller that he will not perform within the period so fixed, the buyer may not, during that period, resort to any remedy for breach of contract. However, the buyer is not deprived thereby of any right he may have to claim damages for delay in performance.

Article 48

(1) Subject to article 49, the seller may, even after the date for delivery, remedy at his own expense any failure to perform his obligations, if he can do so without unreasonable delay and without causing the buyer unreasonable inconvenience or uncertainty of reimbursement by the seller of expenses advanced by the buyer. However, the buyer retains any right to claim damages as provided for in this Convention.

(2) If the seller requests the buyer to make known whether he will accept performance and the buyer does not comply with the request within a reasonable time, the seller may perform within the time indicated in his request. The buyer may not, during that

period of time, resort to any remedy which is inconsistent with performance by the seller.

(3) A notice by the seller that he will perform within a specified period of time is assumed to include a request, under the preceding paragraph, that the buyer make known his decision.

(4) A request or notice by the seller under paragraph (2) or (3) of this article is not effective unless received by the buyer.

Article 49

(1) The buyer may declare the contract avoided:

(a) if the failure by the seller to perform any of his obligations under the contract or this Convention amounts to a fundamental breach of contract; or

(b) in case of non-delivery, if the seller does not deliver the goods within the additional period of time fixed by the buyer in accordance with paragraph (1) of article 47 or declares that he will not deliver within the period so fixed.

(2) However, in cases where the seller has delivered the goods, the buyer loses the right to declare the contract avoided unless he does so:

(a) in respect of late delivery, within a reasonable time after he has become aware that delivery has been made;

(b) in respect of any breach other than late delivery, within a reasonable time:

(i) after he knew or ought to have known of the breach;

(ii) after the expiration of any additional period of time fixed by the buyer in accordance with paragraph (1) of article 47, or after the seller has declared that he will not perform his obligations within such an additional period; or

(iii) after the expiration of any additional period of time indicated by the seller in accordance with paragraph (3) of article 48, or after the buyer has declared that he will not accept performance.

Article 50

If the goods do not conform with the contract and whether or not the price has already been paid, the buyer may reduce the price in the same proportion as the value that the goods actually delivered had at the time of the delivery bears to the value that conforming goods would have had at that time. However, if the seller remedies any failure to perform his obligations in accordance with article 37 or article 48 or if the buyer refuses to accept performance by the seller in accordance with those articles, the buyer may not reduce the price.

Article 51

(1) If the seller delivers only a part of the goods or if only a part of the goods delivered is in conformity with the contract, articles 46 to 50 apply in respect of the part which is missing or which does not conform.

(2) The buyer may declare the contract avoided in its entirety only if the failure to make delivery completely or in conformity with the contract amounts to a fundamental breach of contract.

Article 52

(1) If the seller delivers the goods before the date fixed, the buyer may take delivery or refuse to take delivery.

(2) If the seller delivers a quantity of goods greater than that provided for in the contract, the buyer may take delivery or refuse to take delivery of the excess quantity. If the buyer takes delivery of all or part of the excess quantity, he must pay for it at the contract rate.

Chapter III OBLIGATIONS OF THE BUYER

Article 53

The buyer must pay the price for the goods and take delivery of them as required by the contract and this Convention.

Section I. *Payment of the price*

Article 54

The buyer's obligation to pay the price includes taking such steps and complying with such formalities as may be required under the contract or any laws and regulations to enable payment to be made.

Article 55

Where a contract has been validly concluded but does not expressly or implicitly fix or make provision for determining the price, the parties are considered, in the absence of any indication to the contrary, to have impliedly made reference to the price generally charged at the time of the conclusion of the contract for such goods sold under comparable circumstances in the trade concerned.

Article 56

If the price is fixed according to the weight of the goods, in case of doubt it is to be determined by the net weight.

Article 57

(1) If the buyer is not bound to pay the price at any other particular place, he must pay it to the seller:

- (a) at the seller's place of business; or
- (b) if the payment is to be made against the handing over of the goods or of documents, at the place where the handing over takes place.

(2) The seller must bear any increase in the expenses incidental to payment which is caused by a change in his place of business subsequent to the conclusion of the contract.

Article 58

(1) If the buyer is not bound to pay the price at any other specific time, he must pay it when the seller places either the goods or documents controlling their disposition at the buyer's disposal in accordance with the contract and this Convention. The seller may make such payment a condition for handing over the goods or documents.

(2) If the contract involves carriage of the goods, the seller may dispatch the goods on terms whereby the goods, or documents controlling their disposition, will not be handed over to the buyer except against payment of the price.

(3) The buyer is not bound to pay the price until he has had an opportunity to examine the goods, unless the procedures for delivery or payment agreed upon by the parties are inconsistent with his having such an opportunity.

Article 59

The buyer must pay the price on the date fixed by or determinable from the contract and this Convention without the need for any request or compliance with any formality on the part of the seller.

Section II. *Taking delivery*

Article 60

The buyer's obligation to take delivery consists:

(a) in doing all the acts which could reasonably be expected of him in order to enable the seller to make delivery; and

(b) in taking over the goods.

Section III. *Remedies for breach of contract by the buyer*

Article 61

(1) If the buyer fails to perform any of his obligations under the contract or this Convention, the seller may:

(a) exercise the rights provided in articles 62 to 65;

(b) claim damages as provided in articles 74 to 77.

(2) The seller is not deprived of any right he may have to claim damages by exercising his right to other remedies.

(3) No period of grace may be granted to the buyer by a court or arbitral tribunal when the seller resorts to a remedy for breach of contract.

Article 62

The seller may require the buyer to pay the price, take delivery or perform his other obligations, unless the seller has resorted to a remedy which is inconsistent with this requirement.

Article 63

(1) The seller may fix an additional period of time of reasonable length for performance by the buyer of his obligations.

(2) Unless the seller has received notice from the buyer that he will not perform within the period so fixed, the seller may not, during that period, resort to any remedy for breach of contract. However, the seller is not deprived thereby of any right he may have to claim damages for delay in performance.

Article 64

(1) The seller may declare the contract avoided:

(a) if the failure by the buyer to perform any of his obligations under the contract or this Convention amounts to a fundamental breach of contract; or

(b) if the buyer does not, within the additional period of time fixed by the seller in accordance with paragraph (1) of article 63, perform his obligation to pay the price or take delivery of the goods, or if he declares that he will not do so within the period so fixed.

(2) However, in cases where the buyer has paid the price, the seller loses the right to declare the contract avoided unless he does so:

(a) in respect of late performance by the buyer, before the seller has become aware that performance has been rendered; or

(b) in respect of any breach other than late performance by the buyer, within a reasonable time:

(i) after the seller knew or ought to have known of the breach; or

(ii) after the expiration of any additional period of time fixed by the seller in accordance with paragraph (1) of article 63, or after the buyer has declared that he will not perform his obligations within such an additional period.

Article 65

(1) If under the contract the buyer is to specify the form, measurement or other features of the goods and he fails to make such specification either on the date agreed upon or within a reasonable time after receipt of a request from the seller, the seller may, without prejudice to any other rights he may have, make the specification himself in accordance with the requirements of the buyer that may be known to him.

(2) If the seller makes the specification himself, he must inform the buyer of the details thereof and must fix a reasonable time within which the buyer may make a different specification. If, after receipt of such a communication, the buyer fails to do so within the time so fixed, the specification made by the seller is binding.

Chapter IV PASSING OF RISK

Article 66

Loss of or damage to the goods after the risk has passed to the buyer does not discharge him from his obligation to pay the price, unless the loss or damage is due to an act or omission of the seller.

Article 67

(1) If the contract of sale involves carriage of the goods and the seller is not bound to hand them over at a particular place, the risk passes to the buyer when the goods are handed over to the first carrier for transmission to the buyer in accordance with the contract of sale. If the seller is bound to hand the goods over to a carrier at a particular place, the risk does not pass to the buyer until the goods are handed over to the carrier at that place. The fact that the seller is authorized to retain documents controlling the disposition of the goods does not affect the passage of the risk.

(2) Nevertheless, the risk does not pass to the buyer until the goods are clearly identified to the contract, whether by markings on the goods, by shipping documents, by notice given to the buyer or otherwise.

Article 68

The risk in respect of goods sold in transit passes to the buyer from the time of the conclusion of the contract. However, if the circumstances so indicate, the risk is assumed by the buyer from the time the goods were handed over to the carrier who issued the documents embodying the contract of carriage. Nevertheless, if at the time of the conclusion of the contract of sale the seller knew or ought to have known that the goods had been lost or damaged and did not disclose this to the buyer, the loss or damage is at the risk of the seller.

Article 69

(1) In cases not within articles 67 and 68, the risk passes to the buyer when he takes over the goods or, if he does not do so in due time, from the time when the goods are placed at his disposal and he commits a breach of contract by failing to take delivery.

(2) However, if the buyer is bound to take over the goods at a place other than a place of business of the seller, the risk passes when delivery is due and the buyer is aware of the fact that the goods are placed at his disposal at that place.

(3) If the contract relates to goods not then identified, the goods are considered not to be placed at the disposal of the buyer until they are clearly identified to the contract.

Article 70

If the seller has committed a fundamental breach of contract, articles 67, 68 and 69 do not impair the remedies available to the buyer on account of the breach.

Chapter V PROVISIONS COMMON TO THE OBLIGATIONS OF THE SELLER AND OF THE BUYER

Section I. *Anticipatory breach and instalment contracts*

Article 71

(1) A party may suspend the performance of his obligations if, after the conclusion of the contract, it becomes apparent that the other party will not perform a substantial part of his obligations as a result of:

(a) a serious deficiency in his ability to perform or in his creditworthiness; or

(b) his conduct in preparing to perform or in performing the contract.

(2) If the seller has already dispatched the goods before the grounds described in the preceding paragraph become evident, he may prevent the handing over of the goods to the buyer even though the buyer holds a document which entitles him to obtain them. The present paragraph relates only to the rights in the goods as between the buyer and the seller.

(3) A party suspending performance, whether before or after dispatch of the goods, must immediately give notice of the suspension to the other party and must continue with

performance if the other party provides adequate assurance of his performance.

Article 72

(1) If prior to the date for performance of the contract it is clear that one of the parties will commit a fundamental breach of contract, the other party may declare the contract avoided.

(2) If time allows, the party intending to declare the contract avoided must give reasonable notice to the other party in order to permit him to provide adequate assurance of his performance.

(3) The requirements of the preceding paragraph do not apply if the other party has declared that he will not perform his obligations.

Article 73

(1) In the case of a contract for delivery of goods by instalments, if the failure of one party to perform any of his obligations in respect of any instalment constitutes a fundamental breach of contract with respect to that instalment, the other party may declare the contract avoided with respect to that instalment.

(2) If one party's failure to perform any of his obligations in respect of any instalment gives the other party good grounds to conclude that a fundamental breach of contract will occur with respect to future instalments, he may declare the contract avoided for the future, provided that he does so within a reasonable time.

(3) A buyer who declares the contract avoided in respect of any delivery may, at the same time, declare it avoided in respect of deliveries already made or of future deliveries if, by reason of their interdependence, those deliveries could not be used for the purpose contemplated by the parties at the time of the conclusion of the contract.

Section II. *Damages*

Article 74

Damages for breach of contract by one party consist of a sum equal to the loss, including loss of profit, suffered by the other party as a consequence of the breach. Such damages may not exceed the loss which the party in breach foresaw or ought to have foreseen at the time of the conclusion of the contract, in the light of the facts and matters of which he then knew or ought to have known, as a possible consequence of the breach of contract.

Article 75

If the contract is avoided and if, in a reasonable manner and within a reasonable time after avoidance, the buyer has bought goods in replacement or the seller has resold the goods, the party claiming damages may recover the difference between the contract price and the price in the substitute transaction as well as any further damages recoverable under article 74.

Article 76

(1) If the contract is avoided and there is a current price for the goods, the party claiming damages may, if he has not made a purchase or resale under article 75, recover the difference between the price fixed by the contract and the current price at the time of avoidance as well as any further damages recoverable under article 74. If, however, the party claiming damages has avoided the contract after taking over the goods, the current price at the time of such taking over shall be applied instead of the current price at the time of avoidance.

(2) For the purposes of the preceding paragraph, the current price is the price prevailing at the place where delivery of the goods should have been made or, if there is no current price at that place, the price at such other place as serves as a reasonable substitute, making due allowance for differences in the cost of transporting the goods.

Article 77

A party who relies on a breach of contract must take such measures as are reasonable in the circumstances to mitigate the loss, including loss of profit, resulting from the breach. If he fails to take such measures, the party in breach may claim a reduction in the damages in the amount by which the loss should have been mitigated.

Section III. *Interest*

Article 78

If a party fails to pay the price or any other sum that is in arrears, the other party is entitled to interest on it, without prejudice to any claim for damages recoverable under article 74.

Section IV. *Exemptions*

Article 79

(1) A party is not liable for a failure to perform any of his obligations if he proves that the failure was due to an impediment beyond his control and that he could not reasonably be expected to have taken the impediment into account at the time of the conclusion of the contract or to have avoided or overcome it, or its consequences.

(2) If the party's failure is due to the failure by a third person whom he has engaged to perform the whole or a part of the contract, that party is

exempt from liability only if:

(a) he is exempt under the preceding paragraph; and

(b) the person whom he has so engaged would be so exempt if the provisions of that paragraph were applied to him.

(3) The exemption provided by this article has effect for the period during which the impediment exists.

(4) The party who fails to perform must give notice to the other party of the impediment and its effect on his ability to perform. If the notice is not received by the other party within a reasonable time after the party who fails to perform knew or ought to have known of the impediment, he is liable for damages resulting from such non-receipt.

(5) Nothing in this article prevents either party from exercising any right other than to claim damages under this Convention.

Article 80

A party may not rely on a failure of the other party to perform, to the extent that such failure was caused by the first party's act or omission.

Section V. *Effects of avoidance*

Article 81

(1) Avoidance of the contract releases both parties from their obligations under it, subject to any damages which may be due. Avoidance does not affect any provision of the contract for the settlement of disputes or any other provision of the contract governing the rights and obligations of the parties consequent upon the avoidance of the contract.

(2) A party who has performed the contract either wholly or in part may claim restitution from the other party of whatever the first party has supplied or paid under the contract. If both parties are bound to make restitution, they must do so concurrently.

Article 82

(1) The buyer loses the right to declare the contract avoided or to require the seller to deliver substitute goods if it is impossible for him to make restitution of the goods substantially in the condition in which he received them.

(2) the preceding paragraph does not apply:

(a) if the impossibility of making restitution of the goods or of making restitution of the goods substantially in the condition in which the buyer received them is not due to his act or omission;

(b) if the goods or part of the goods have perished or deteriorated as a result of the examination provided for in article 38; or

(c) if the goods or part of the goods have been sold in the normal course of business or have been consumed or transformed by the buyer in the course of normal use before he discovered or ought to have discovered the lack of conformity.

Article 83

A buyer who has lost the right to declare the contract avoided or to require the seller to deliver substitute goods in accordance with article 82 retains all other remedies under the contract and this Convention.

Article 84

(1) If the seller is bound to refund the price, he must also pay interest on it, from the date on which the price was paid.

(2) The buyer must account to the seller for all benefits which he has derived from the goods or part of them:

(a) if he must make restitution of the goods or part of them; or

(b) if it is impossible for him to make restitution of all or part of the goods or to make restitution of all or part of the goods substantially in the condition in which he received them, but he has nevertheless declared the contract avoided or required the seller to deliver substitute goods.

Section VI. *Preservation of the goods*

Article 85

If the buyer is in delay in taking delivery of the goods or, where payment of the price and delivery of the goods are to be made concurrently, if he fails to pay the price, and the seller is either in possession of the goods or otherwise able to control their disposition, the seller must take such steps as are reasonable in the circumstances to preserve them. He is entitled to retain them until he has been reimbursed his reasonable expenses by the buyer.

Article 86

(1) If the buyer has received the goods and intends to exercise any right under the contract or this Convention to reject them, he must take such steps to preserve them as are reasonable in the circumstances. He is entitled to retain them until he has been reimbursed his reasonable expenses by the seller.

(2) If goods dispatched to the buyer have been placed at his disposal at their destination and he exercises the right to reject them, he must take possession of them on behalf of the seller, provided that this can be done without payment of the price and without unreasonable inconvenience or unreasonable expense. This provision does not apply if the seller or a person authorized to take charge of the goods on his behalf is present at the destination. If the buyer takes possession of the goods under this paragraph, his rights and obligations are governed by the preceding paragraph.

Article 87

A party who is bound to take steps to preserve the goods may deposit them in a warehouse of a third person at the expense of the other party provided that the expense incurred is not unreasonable.

Article 88

(1) A party who is bound to preserve the goods in accordance with article 85 or 86 may sell them by any appropriate means if there has been an unreasonable delay by the other party in taking possession of the goods or in taking them back or in paying the price or the cost of preservation, provided that reasonable notice of the intention to sell has been given to the other party.

(2) If the goods are subject to rapid deterioration or their preservation would involve unreasonable expense, a party who is bound to preserve the goods in accordance with article 85 or 86 must take reasonable measures to sell them. To the extent possible he must give notice to the other party of his intention to sell.

(3) A party selling the goods has the right to retain out of the proceeds of sale an amount equal to the reasonable expenses of preserving the goods and of selling them. He must account to the other party for the balance.

PART IV FINAL PROVISIONS

Article 89

The Secretary-General of the United Nations is hereby designated as the depositary for this Convention.

Article 90

This Convention does not prevail over any international agreement which has already been or may be entered into and which contains provisions concerning the matters governed by this Convention, provided that the parties have their places of business in States parties to such agreement.

Article 91

(1) This Convention is open for signature at the concluding meeting of the United Nations Conference on Contracts for the International Sale of Goods and will remain open for signature by all States at the Headquarters of the United Nations, New York until 30 September 1981.

(2) This Convention is subject to ratification, acceptance or approval by the signatory States.

(3) This Convention is open for accession by all States which are not signatory States as from the date it is open for signature.

(4) Instruments of ratification, acceptance, approval and accession are to be deposited with the Secretary-General of the United Nations.

Article 92

(1) A Contracting State may declare at the time of signature, ratification, acceptance, approval or accession that it will not be bound by Part II of this Convention or that it will not be bound by Part III of this Convention.

(2) A Contracting State which makes a declaration in accordance with the preceding paragraph in respect of Part II or Part III of this Convention is not to be considered a Contracting State within paragraph (1) of article 1 of this Convention in respect of matters governed by the Part to which the declaration applies.

Article 93

(1) If a Contracting State has two or more territorial units in which, according to its constitution, different systems of law are applicable in relation to the matters dealt with in this Convention, it may, at the time of signature, ratification, acceptance, approval or accession, declare that this Convention is to extend to all its territorial units or only to one or more of them, and may amend its declaration by submitting another declaration at any time.

(2) These declarations are to be notified to the depositary and are to state expressly the territorial units to which the Convention extends.

(3) If, by virtue of a declaration under this article, this Convention extends to one or more but not all of the territorial units of a Contracting State, and if the place of business of a party is located in that State, this place of business, for the purposes of this Convention, is considered not to be in a Contracting State, unless it is in a territorial unit to which the Convention extends.

(4) If a Contracting State makes no declaration under paragraph (1) of this article, the Convention is to extend to all territorial units of that State.

Article 94

(1) Two or more Contracting States which have the same or closely related legal rules on matters governed by this Convention may at any time declare that the Convention is not to apply to contracts of sale or to their formation where the parties have their places of business in those States. Such declarations may be made jointly or by reciprocal unilateral declarations.

(2) A Contracting State which has the same or closely related legal rules on matters governed by this Convention as one or more non-Contracting States may at any time declare that the Convention is not to apply to contracts of sale or to their formation where the parties have their places of business in those States.

(3) If a State which is the object of a declaration under the preceding paragraph subsequently becomes a Contracting State, the declaration made will, as from the date on which the Convention enters into force in respect of the new Contracting State, have the effect of a declaration made under paragraph (1), provided that the new Contracting State joins in such declaration or makes a reciprocal unilateral declaration.

Article 95

Any State may declare at the time of the deposit of its instrument of ratification, acceptance, approval or accession that it will not be bound by subparagraph (1)(b) of article 1 of this Convention.

Article 96

A Contracting State whose legislation requires contracts of sale to be concluded in or evidenced by writing may at any time make a declaration in accordance with article 12 that any provision of article 11, article 29, or Part II of this Convention, that allows a contract of sale or its modification or termination by agreement or any offer, acceptance, or other indication of intention to be made in any form other than in writing, does not apply where any party has his place of business in that State.

Article 97

(1) Declarations made under this Convention at the time of signature are subject to confirmation under ratification, acceptance or approval.

(2) Declarations and confirmations of declarations are to be in writing and be formally notified to the depositary.

(3) A declaration takes effect simultaneously with the entry into force of this Convention in respect of the State concerned. However, a declaration of which the depositary receives formal notification after such entry into force takes effect on the first day of the month following the expiration of six months after the date of its receipt by the depositary. Reciprocal unilateral declarations under article 94 take effect on the first day of the month following the expiration of six months after the receipt of the latest declaration by the depositary.

(4) Any State which makes a declaration under this Convention may withdraw it at any time by a formal notification in writing addressed to the depositary. Such withdrawal is to take effect on the first day of the month following the expiration of six months after the date of the receipt of the notification by the depositary.

(5) A withdrawal of a declaration made under article 94 renders inoperative, as from the date on which the withdrawal takes effect, any reciprocal declaration made by another State under that article.

Article 98

No reservations are permitted except those expressly authorized in this Convention.

Article 99

(1) This Convention enters into force, subject to the provisions of paragraph (6) of this article, on the first day of the month following the expiration of twelve months after the date of deposit of the tenth instrument of ratification, acceptance, approval or accession, including an instrument which contains a declaration made under article 92.

(2) When a State ratifies, accepts, approves or accedes to this Convention after the deposit of the tenth instrument of ratification, acceptance, approval or accession, this Convention, with the exception of the Part excluded, enters into force in respect of that State, subject to the provisions of paragraph (6) of this article, on the first day of the month following the expiration of twelve months after the date of the deposit of its instrument of ratification, acceptance, approval or accession.

(3) A State which ratifies, accepts, approves or accedes to this Convention and is a party to either or both the Convention relating to a Uniform Law on the Formation of Contracts for the International Sale of Goods done at The Hague on 1 July 1964 (1964 Hague Formation Convention) and the Convention relating to a Uniform Law on the International Sale of Goods done at The Hague on 1 July 1964 (1964 Hague Sales Convention) shall at the same time denounce, as the case may be, either or both the 1964 Hague Sales Convention and the 1964 Hague Formation Convention by notifying the Government of the Netherlands to that effect.

(4) A State party to the 1964 Hague Sales Convention which ratifies, accepts, approves or accedes to the present Convention and declares or has declared under article 92 that it will not be bound by Part II of this Convention shall at the time of ratification, acceptance, approval or accession denounce the 1964 Hague Sales Convention by notifying the Government of the Netherlands to that effect.

(5) A State party to the 1964 Hague Formation Convention which ratifies, accepts, approves or accedes to the present Convention and declares or has declared under article 92 that it will not be bound by Part III of this Convention shall at the time of ratification, acceptance, approval or accession denounce the 1964 Hague Formation Convention by notifying the Government of the Netherlands to that effect.

(6) For the purpose of this article, ratifications, acceptances, approvals and accessions in respect of this Convention by States parties to the 1964 Hague Formation Convention or to the 1964 Hague Sales Convention shall not be effective until such denunciations as may be required on the part of those States in respect of the latter two Conventions have themselves become effective. The depositary of this Convention shall consult with the Government of the Netherlands, as the depositary of the 1964 Conventions, so as to ensure necessary co-ordination in this respect.

Article 100

(1) This Convention applies to the formation of the contract only when the proposal for concluding the contract is made on or after the date when the Convention enters into force in respect of the Contracting States referred to in subparagraph (1)(a) or the Contracting State referred to in subparagraph (1)(b) of article 1.

(2) This Convention applies only to contracts concluded on or after the date when the Convention enters into force in respect of the Contracting States referred to in subparagraph (1)(a) or the Contracting State referred to in subparagraph (1)(b) of article 1.

Article 101

(1) A Contracting State may denounce this Convention, or Part II or Part III of the Convention, by a formal notification in writing addressed to the depositary.

(2) The denunciation takes effect on the first day of the month following the expiration of twelve months after the notification is received by the depositary. Where a longer period for the denunciation to take effect is specified in the notification, the denunciation takes effect upon the expiration of such longer period after the notification is received by the depositary.

DONE at Vienna, this day of eleventh day of April*, one thousand nine hundred and eighty, in a single original, of which the Arabic, Chinese, English, French, Russian and

Spanish texts are equally authentic.

IN WITNESS WHEREOF the undersigned plenipotentiaries, being duly authorized by their respective Governments, have signed this Convention. [Signatures omitted]

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* Editor's note: Thus in U.N.-certified text.

United Nations convention on contracts for the international sale of goods. Done at Vienna April 11, 1980; entry into force for the United States January 1, 1988.

States which are parties:

Albania 1
Argentina 1a
Armenia 1b
Australia 2
Austria
Belarus 3
Belgium
Bosnia and Herzegovina
Bulgaria
Burundi
Canada 3a
Chile 4
China 5
Colombia
Croatia
Cuba
Cyprus
Czech Republic 6
Denmark 7
Ecuador
Egypt
El Salvador
Estonia 7a
Finland 8
France
Gabon
Georgia
Germany, Federal Republic of 9
Greece
Guinea
Honduras
Hungary 9a
Iceland 9b
Iraq
Israel
Italy
Japan
Korea, Republic of

Kyrgyzstan
Latvia 10
Lebanon 10a
Lesotho
Liberia
Lithuania 10b
Luxembourg 10c
Mauritania
Mexico
Moldova, Republic of
Mongolia
Montenegro
Netherlands 10d
New Zealand 10e
Norway 10f
Paraguay
Peru
Poland
Romania
Russian Federation 11
Saint Vincent and the Grenadines 11a
Serbia 11b
Singapore 11c
Slovakia 11d
Slovenia
Spain
Sweden 12
Switzerland
Syrian Arab Republic
The former Yugoslav Republic of Macedonia
Uganda
Ukraine 13
United States 14
Uruguay
Uzbekistan
Zambia

Endnotes

Endnotes

Endnotes

CONVENTION ON THE LIMITATION PERIOD IN THE INTERNATIONAL SALE OF GOODS AS AMENDED BY THE PROTOCOL AMENDING THE CONVENTION ON THE LIMITATION PERIOD IN THE INTERNATIONAL SALE OF GOODS

PREAMBLE

The States Parties to the present Convention,

Considering that international trade is an important factor in the promotion of friendly relations amongst States,

Believing that the adoption of uniform rules governing the limitation period in the international sale of goods would facilitate the development of world trade,

Have agreed as follows:

PART I. SUBSTANTIVE PROVISIONS

SPHERE OF APPLICATION

Article 1

1. This Convention shall determine when claims of a buyer and a seller against each other arising from a contract of international sale of goods or relating to its breach, termination or invalidity can no longer be exercised by reason of the expiration of a period of time. Such a period of time is hereinafter referred to as ``the limitation period''.

2. This Convention shall not affect a particular time-limit within which one party is required, as a condition for the acquisition or exercise of his claim, to give notice to the other party or perform any act other than the institution of legal proceedings.

3. In this Convention:

(a) ``buyer'', ``seller'' and ``party'' mean persons who buy or sell, or agree to buy or sell, goods, and the successors to and assigns of their rights or obligations under the contract of sale;

(b) ``creditor'' means a party who asserts a claim, whether or not such a claim is for a sum of money;

(c) ``debtor'' means a party against whom a creditor asserts a claim;

(d) ``breach of contract'' means the failure of a party to perform the contract or any performance not in conformity with the contract;

(e) ``legal proceedings'' includes judicial, arbitral and administrative proceedings;

(f) ``person'' includes corporation, company, partnership, association or entity, whether private or public, which can sue or be sued;

(g) ``writing'' includes telegram and telex;

(h) ``year'' means a year according to the Gregorian calendar.

Article 2

For the purposes of this Convention:

(a) a contract of sale of goods shall be considered international if, at the time of the conclusion of the contract, the buyer and the seller have their places of business in different States;

(b) the fact that the parties have their places of business in different States shall be disregarded whenever this fact does not appear either from the contract or from any dealings between, or from information disclosed by, the parties at any time before or at the conclusion of the contract;

(c) where a party to a contract of sale of goods has places of business in more than one State, the place of business shall be that which has the closest relationship to the contract and its performance, having regard to the circumstances known to or contemplated by the parties at the time of the conclusion of the contract;

(d) where a party does not have a place of business, reference shall be made to his habitual residence;

(e) neither the nationality of the parties nor the civil or commercial character of the parties or of the contract shall be taken into consideration.

Article 3 *

1. This Convention shall apply only

(a) if, at the time of the conclusion of the contract, the places of business of the parties to a contract of international sale of goods are in Contracting States; or

(b) if the rules of private international law make the law of a Contracting State applicable to the contract of sale.

2. This Convention shall not apply when the parties have expressly excluded its

application.

Endnotes

*Article 4 **

This Convention shall not apply to sales:

(a) of goods bought for personal, family or household use, unless the seller, at any time before or at the conclusion of the contract, neither knew nor ought to have known that the goods were bought for any such use;

(b) by auction;

(c) on execution or otherwise by authority of law;

(d) of stocks, shares, investment securities, negotiable instruments or money;

(e) of ships, vessels, hovercraft or aircraft;

(f) of electricity.

Endnotes

Article 5

This Convention shall not apply to claims based upon:

(a) death of, or personal injury to, any person;

(b) nuclear damage caused by the goods sold;

(c) a lien, mortgage or other security interest in property;

(d) a judgement or award made in legal proceedings;

(e) a document on which direct enforcement or execution can be obtained in accordance with the law of the place where such enforcement or execution is sought;

(f) a bill of exchange, cheque or promissory note.

Article 6

1. This Convention shall not apply to contracts in which the preponderant part of the obligations of the seller consists in the supply of labour or other services.

2. Contracts for the supply of goods to be manufactured or produced shall be considered to be sales, unless the party who orders the goods undertakes to supply a substantial part of the materials necessary for such manufacture or production.

Article 7

In the interpretation and application of the provisions of this Convention, regard shall be had to its international character and to the need to promote uniformity.

Endnotes

THE DURATION AND COMMENCEMENT OF THE LIMITATION PERIOD

Article 8

The limitation period shall be four years.

Article 9

1. Subject to the provisions of articles 10, 11 and 12 the limitation period shall commence on the date of which the claim accrues.

2. The commencement of the limitation period shall not be postponed by:

(a) a requirement that the party be given a notice as described in paragraph 2 of article 1, or

(b) a provision in an arbitration agreement that no right shall arise until an arbitration award has been made.

Article 10

1. A claim arising from a breach of contract shall accrue on the date on which such breach occurs.

2. A claim arising from a defect or other lack of conformity shall accrue on the date on which the goods are actually handed over to, or their tender is refused by, the buyer.

3. A claim based on fraud committed before or at the time of the conclusion of the contract or during its performance shall accrue on the date on which the fraud was or reasonably could have been discovered.

Article 11

If the seller has given an express undertaking relating to the goods which is stated to have effect for a certain period of time, whether expressed in terms of a specific period of time or otherwise, the limitation period in respect of any claim arising from the undertaking shall commence on the date on which the buyer notifies the seller of the fact on which the claim is based, but not later than on the date of the expiration of the period of the undertaking.

Article 12

1. If, in circumstances provided for by the law applicable to the contract, one party is entitled to declare the contract terminated before the time for performance is due, and exercises this right, the limitation period in respect of a claim based on any such circumstances shall commence on the date on which the declaration is made to the other party. If the contract is not declared to be terminated before performance becomes due, the limitation period shall commence on the date on which performance is due.

2. The limitation period in respect of a claim arising out of a breach by one party of a contract for the delivery of or payment for goods by instalments shall, in relation to each separate instalment, commence on the date on which the particular breach occurs. If, under the law applicable to the contract, one party is entitled to declare the contract terminated by reason of such breach, and exercises this right, the limitation period in respect of all relevant instalments shall commence on the date on which the declaration is made to the other party.

CESSATION AND EXTENSION OF THE LIMITATION PERIOD

Article 13

The limitation period shall cease to run when the creditor performs any act which, under the law of the court where the proceedings are instituted, is recognized as commencing judicial proceedings against the debtor or as asserting his claim in such proceedings already instituted against the debtor, for the purpose of obtaining satisfaction or recognition of his claim.

Article 14

1. Where the parties have agreed to submit to arbitration, the limitation period shall cease to run when either party commences arbitral proceedings in the manner provided for in the arbitration agreement or by the law applicable to such proceedings.

2. In the absence of any such provision, arbitral proceedings shall be deemed to commence on the date on which a request that the claim in dispute be referred to arbitration is delivered at the habitual residence or place of business of the other party or, if he has no such residence or place of business, then at his last known residence or place of business.

Article 15

In any legal proceedings other than those mentioned in articles 13 and 14, including legal proceedings commenced upon the occurrence of:

(a) the death or incapacity of the debtor,

(b) the bankruptcy or any state of insolvency affecting the whole of the property of the debtor, or

(c) the dissolution or liquidation of a corporation, company, partnership, association or entity when it is the debtor,

the limitation period shall cease to run when the creditor asserts his claim in such proceedings for the purpose of obtaining satisfaction or recognition of the claim, subject to the law governing the proceedings.

Article 16

For the purposes of articles 13, 14 and 15, any act performed by way of counterclaim shall be deemed to have been performed on the same date as the act performed in relation to the claim against which the counterclaim is raised, provided that both the claim and the counterclaim relate to the same contract or to several contracts concluded in the course of the same transaction.

Article 17

1. Where a claim has been asserted in legal proceedings within the limitation period in accordance with article 13, 14, 15 or 16, but such legal proceedings have ended without a decision binding on the merits of the claim, the limitation period shall be deemed to have continued to run.

2. If, at the time such legal proceedings ended, the limitation period has expired or has less than one year to run, the creditor shall be entitled to a period of one year from the date on which the legal proceedings ended.

Article 18

1. Where legal proceedings have been commenced against one debtor, the limitation period prescribed in this Convention shall cease to run against any other party jointly and severally liable with the debtor, provided that the creditor informs such party in writing within that period that the proceedings

have been commenced.

2. Where legal proceedings have been commenced by a subpurchaser against the buyer, the limitation period prescribed in this Convention shall cease to run in relation to the buyer's claim over against the seller, if the buyer informs the seller in writing within that period that the proceedings have been commenced.

3. Where the legal proceedings referred to in paragraphs 1 and 2 of this article have ended, the limitation period in respect of the claim of the creditor or the buyer against the party jointly and severally liable or against the seller shall be deemed not to have ceased running by virtue of paragraphs 1 and 2 of this article, but the creditor or the buyer shall be entitled to an additional year from the date on which the legal proceedings ended, if at that time the limitation period had expired or had less than one year to run.

Article 19

Where the creditor performs, in the State in which the debtor has his place of business and before the expiration of the limitation period, any act, other than the acts described in articles 13, 14, 15 and 16, which under the law of that State has the effect of recommencing a limitation period, a new limitation period of four years shall commence on the date prescribed by that law.

Article 20

1. Where the debtor, before the expiration of the limitation period, acknowledges in writing his obligation to the creditor, a new limitation period of four years shall commence to run from the date of such acknowledgement.

2. Payment of interest or partial performance of an obligation by the debtor shall have the same effect as an acknowledgement under paragraph 1 of this article if it can reasonably be inferred from such payment or performance that the debtor acknowledges that obligation.

Article 21

Where, as a result of a circumstance which is beyond the control of the creditor and which he could neither avoid nor overcome, the creditor has been prevented from causing the limitation period to cease to run, the limitation period shall be extended so as not to expire before the expiration of one year from the date on which the relevant circumstance ceased to exist.

MODIFICATION OF THE LIMITATION PERIOD BY THE PARTIES

Article 22

1. The limitation period cannot be modified or affected by any declaration or agreement between the parties, except in the cases provided for in paragraph 2 of this article.

2. The debtor may at any time during the running of the limitation period extend the period by a declaration in writing to the creditor. This declaration may be renewed.

3. The provisions of this article shall not affect the validity of a clause in the contract of sale which stipulates that arbitral proceedings shall be commenced within a shorter period of limitation than that prescribed by this Convention, provided that such clause is valid under the law applicable to the contract of sale.

GENERAL LIMIT OF THE LIMITATION PERIOD

Article 23

Notwithstanding the provisions of this Convention, a limitation period shall in any event expire not later than ten years from the date on which it commenced to run under articles 9, 10, 11 and 12 of this Convention.

CONSEQUENCES OF THE EXPIRATION OF THE LIMITATION PERIOD

Article 24

Expiration of the limitation period shall be taken into consideration in any legal proceedings only if invoked by a party to such proceedings.

Article 25

1. Subject to the provisions of paragraph 2 of this article and of article 24, no claim shall be recognized or enforced in any legal proceedings commenced after the expiration of the limitation period.

2. Notwithstanding the expiration of the limitation period, one party may rely on his claim as a defence or for the purpose of set-off against a claim asserted by the other party, provided that in the latter case this may only be done:

(a) if both claims relate to the same contract or to several contracts concluded in the course of the same transaction; or

(b) if the claims could have been set-off at any time before the expiration of the limitation period.

Article 26

Where the debtor performs his obligation after the expiration of the limitation period, he shall not on that ground be entitled in any way to claim restitution even if he did not know at the time when he performed his obligation that the limitation period had expired.

Article 27

The expiration of the limitation period with respect to a principal debt shall have the same effect with respect to an obligation to pay interest on that debt.

CALCULATION OF THE PERIOD

Article 28

1. The limitation period shall be calculated in such a way that it shall expire at the end of the day which corresponds to the date on which the period commenced to run. If there is no such corresponding date, the period shall expire at the end of the last day of the last month of the limitation period.

2. The limitation period shall be calculated by reference to the date of the place where the legal proceedings are instituted.

Article 29

Where the last day of the limitation period falls on an official holiday or other *dies non juridicus* precluding the appropriate legal action in the jurisdiction where the creditor institutes legal proceedings or asserts a claim as envisaged in article 13, 14 or 15, the limitation period shall be extended so as not to expire until the end of the first day following that official holiday or *dies non juridicus* on which such proceedings could be instituted or on which such a claim could be asserted in that jurisdiction.

INTERNATIONAL EFFECT

Article 30

The acts and circumstances referred to in articles 13 through 19 which have taken place in one Contracting State shall have effect for the purposes of this Convention in another Contracting State, provided that the creditor has taken all reasonable steps to ensure that the debtor is informed of the relevant act or circumstances as soon as possible.

Endnotes

PART II. IMPLEMENTATION

Article 31

1. If a Contracting State has two or more territorial units in which, according to its constitution, different systems of law are applicable in relation to the matters dealt with in this Convention, it may, at the time of signature, ratification or accession, declare that this Convention shall extend to all its territorial units or only to one or more of them, and may amend its declaration by submitting another declaration at any time.

2. These declarations shall be notified to the Secretary-General of the United Nations and shall state expressly the territorial units to which the Convention applies.

3. If a Contracting State described in paragraph 1 of this article makes no declaration at the time of signature, ratification or accession, the Convention shall have effect within all territorial units of that State.

* 4. If, by virtue of a declaration under this article, this Convention extends to one or more but not all of the territorial units of a Contracting State, and if the place of business of a party to a contract is located in that State, this place of business shall, for the purposes of this Convention, be considered not to be in a Contracting State, unless it is in a territorial unit to which the Convention extends.

Endnotes

Endnotes

Article 32

Where in this Convention reference is made to the law of a State in which different systems of law apply, such reference shall be construed to mean the law of the particular legal system concerned.

Article 33

Each Contracting State shall apply the provisions of this Convention to contracts concluded on or after the date of the entry into force of this Convention.

Endnotes

PART III. DECLARATIONS AND RESERVATIONS

Article 34 *

1. Two or more Contracting States which have the same or closely related legal rules on matters governed by this Convention may at any time declare that the Convention shall not apply to contracts of international sale of goods where the parties have their places of business in those States. Such declarations may be made jointly or by reciprocal unilateral declarations.

Endnotes

Article 35

A Contracting State may declare, at the time of the deposit of its instrument of ratification or accession, that it will not apply the provision of this Convention to actions for annulment of the contract.

Article 36

Any State may declare, at the time of the deposit of its instrument of ratification or accession, that it shall not be compelled to apply the provisions of article 24 of this Convention.

Article 36 bis **(Article XII of the Protocol)**

Any State may declare at the time of the deposit of its instrument of accession or its notification under article 43 bis that it will not be bound by the amendments to article 3 made by article I of the 1980 Protocol * . A declaration made under this article shall be in writing and be formally notified to the depositary.

Endnotes

Article 37 *

This Convention shall not prevail over any international agreement which has already been or may be entered into and which contains provisions concerning the matters governed by this Convention, provided that the seller and buyer have their places of business in States parties to such agreement.

Endnotes

Article 38

1. A Contracting State which is a party to an existing convention relating to the international sale of goods may declare, at the time of the deposit of its instrument of ratification or accession, that it will apply to this Convention exclusively to contracts of international sale of goods as defined in such existing convention.

2. Such declaration shall cease to be effective on the first day of the month following the expiration of twelve months after a new convention on the international sale of goods, concluded under the auspices of the United Nations, shall have entered into force.

Article 39

No reservation other than those made in accordance with articles 34, 35, 36, 36 bis and 38 shall be permitted.

Article 40

1. Declarations made under this Convention shall be addressed to the Secretary-General of the United Nations and shall take effect simultaneously with the entry of this Convention into force in respect of the State concerned, except declarations made thereafter. The latter declarations shall take effect on the first

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day of the month following the expiration of six months after the date of their receipt by the Secretary-General of the United Nations. *Reciprocal unilateral declarations under article 34 shall take effect on the first day of the month following the expiration of six months after the receipt of the latest declaration by the Secretary-General of the United Nations. *

Endnotes

2. Any State which has made a declaration under this Convention may withdraw it at any time by a notification addressed to the Secretary-General of the United Nations. Such withdrawal shall take effect on the first day of the month following the expiration of six months after the date of the receipt of the notification by the Secretary-General of the United Nations. In the case of a declaration made under article 34 of this Convention, such withdrawal shall also render inoperative, as from the date on which the withdrawal takes effect, any reciprocal declaration made by another State under that article.

Endnotes

Endnotes

PART IV. FINAL CLAUSES

Article 41

This Convention * shall be open until 31 December 1975 for signature by all States at the Headquarters of the United Nations.

Endnotes

Article 42

This Convention * is subject to ratification. The instruments of ratification shall be deposited with the Secretary-General of the United Nations.

Endnotes

Article 43

This Convention * shall remain open for accession by any State. The instruments of accession shall be deposited with the Secretary-General of the United Nations.

Endnotes

***Article 43 bis* (Article X of the Protocol)**

If a State ratifies or accedes to the 1974 Limitation Convention after the entry into force of the 1980 Protocol, the ratification or accession shall also constitute a ratification of or an accession to the Convention as amended by the 1980 Protocol if the State notifies the depositary accordingly.

***Article 43 ter* (Article VIII (2) of the Protocol)**

Accession to the 1980 Protocol by any State which is not a Contracting Party to the 1974 Limitation Convention shall have the effect of accession to that Convention as amended by the Protocol, subject to the provisions of article 44 bis.

Article 44

1. This Convention shall enter into force on the first day of the month following the expiration of six months after the date of the deposit of the tenth instrument of ratification or accession.

2. For each State ratifying or acceding to this Convention after the deposit of the tenth instrument of ratification or accession, this Convention shall enter into force on the first day of the month following the expiration of six months after the date of the deposit of its instrument of ratification or accession.

***Article 44 bis* (Article XI of the Protocol)**

Any State which becomes a Contracting Party to the 1974 Limitation Convention, as amended by the 1980 Protocol, shall, unless it notifies the depositary to the contrary, be considered to be also a Contracting Party to the Convention, unamended, in relation to any Contracting Party to the Convention not yet a Contracting Party to the 1980 Protocol.

Article 45

1. Any Contracting State may denounce this Convention by notifying the Secretary-General of the United Nations to that effect.

2. The denunciation shall take effect on the first day of the month following the expiration of twelve months after receipt of the notification by the Secretary-General of the United Nations.

***Article 45 bis* (Article XIII (3) of the Protocol)**

Any Contracting State in respect of which the 1980 Protocol ceases to have effect by the application of paragraphs (1) and (2) * of article XIII of the 1980 Protocol shall remain a Contracting Party to the 1974 Limitation Convention, unamended, unless it denounces the unamended Convention in accordance with article 45 of that Convention.

Endnotes

Article 46

The original of this Convention, of which the Chinese, English, French, Russian and Spanish texts are equally authentic, shall be deposited with the Secretary-General of the United Nations.

Convention on the limitation period in the international sale of goods done at New York June 4, 1974, as amended by the Protocol amending the Convention on the limitation period in the international sale of goods done at Vienna April 11, 1980; entered into force for the United States December 1, 1994. States which are parties:

Argentina
Belarus
Belgium
Cuba
Czech Republic*
Egypt
Guinea
Hungary
Liberia
Mexico
Moldova
Paraguay
Poland
Romania
Slovakia*
Slovenia
Uganda
United States*
Uruguay
Zambia

States which are parties only to the 1974 Convention:

[Ed. note—The provisions of the original 1974 Convention will apply as between the United States and these states.]

Bosnia and Herzegovina

Burundi

Dominican Republic

Ghana

Montenegro

Norway 1

Serbia 2

Ukraine

* Pursuant to article XII of the Protocol (article 36 *bis* of the Convention), this State has declared it will not be bound by article I of the Protocol. Thus, it is bound by article 3 as originally adopted in the 1974 Convention (see note at article 3 *ante*).

Endnotes

Endnotes

CONVENTION ON THE CIVIL ASPECTS OF INTERNATIONAL CHILD ABDUCTION

The States signatory to the present Convention.

Firmly convinced that the interests of children are of paramount importance in matters relating to their custody.

Desiring to protect children internationally from the harmful effects of their wrongful removal or retention and to establish procedures to ensure their prompt return to the State of their habitual residence, as well as to secure protection for rights of access.

Have resolved to conclude a Convention to this effect, and have agreed upon the following provisions—

CHAPTER I SCOPE OF THE CONVENTION

Article 1

The objects of the present Convention are—

a to secure the prompt return of children wrongfully removed to or retained in any Contracting State; and

b to ensure that rights of custody and of access under the law of one Contracting State are effectively respected in the other Contracting States.

Article 2

Contracting States shall take all appropriate measures to secure within their territories the implementation of the objects of the Convention. For this purpose they shall use the most expeditious procedures available.

Article 3

The removal or the retention of a child is to be considered wrongful where—

a it is in breach of rights of custody attributed to a person, an institution or any other body, either jointly or alone, under the law of the State in which the child was habitually resident immediately before the removal or retention; and

b at the time of removal or retention those rights were actually exercised, either jointly or alone, or would have been so exercised but for the removal or retention.

The rights of custody mentioned in sub-paragraph *a* above, may arise in particular by operation of law or by reason of a judicial or administrative decision, or by reason of an agreement having legal effect under the law of that State.

Article 4

The Convention shall apply to any child who was habitually resident in a Contracting State immediately before any breach of custody or access rights. The Convention shall cease to apply when the child attains the age of 16 years.

Article 5

For the purposes of this Convention—

a `rights of custody' shall include rights relating to the care of the person of the child and, in particular, the right to determine the child's place of residence;

b `rights of access' shall include the right to take a child for a limited period of time to a place other than the child's habitual residence.

CHAPTER II CENTRAL AUTHORITIES

Article 6

A Contracting State shall designate a Central Authority to discharge the duties which are imposed by the Convention upon such authorities.

Federal States, States with more than one system of law or States having autonomous territorial organizations shall be free to appoint more than one Central Authority and to specify the territorial extent of their powers. Where a State has appointed more than one Central Authority, it shall designate the Central Authority to which applications may be addressed for transmission to the appropriate Central Authority within that State.

Article 7

Central Authorities shall co-operate with each other and promote co-operation amongst the competent authorities in their respective States to secure the prompt return of children and to achieve the other objects of this Convention.

In particular, either directly or through any intermediary, they shall take all appropriate measures—

a to discover the whereabouts of a child who has been wrongfully removed or retained;

b to prevent further harm to the child or prejudice to interested parties by taking or causing to be taken provisional measures;

c to secure the voluntary return of the child or to bring about an amicable resolution of the issues;

d to exchange, where desirable, information relating to the social background of the child;

e to provide information of a general character as to the law of their State in connection with the application of the Convention;

f to initiate or facilitate the institution of judicial or administrative proceedings with a view to obtaining the return of the child and, in a proper case, to make arrangements for organizing or securing the effective exercise of rights of access;

g where the circumstances so require, to provide or facilitate the provision of legal aid and advice, including the participation of legal counsel and advisers;

h to provide such administrative arrangements as may be necessary and appropriate to secure the safe return of the child;

i to keep each other informed with respect to the operation of this Convention and, as far as possible, to eliminate any obstacles to its application.

CHAPTER III RETURN OF CHILDREN

Article 8

Any person, institution or other body claiming that a child has been removed or retained in breach of custody rights may apply either to the Central Authority of the child's habitual residence or to the Central Authority of any other Contracting State for assistance in securing the return of the child.

The application shall contain—

a information concerning the identity of the applicant, of the child and of the person alleged to have removed or retained the child;

b where available, the date of birth of the child;

c the grounds on which the applicant's claim for return of the child is based;

d all available information relating to the whereabouts of the child and the identity of the person with whom the child is presumed to be. The application may be accompanied or supplemented by—

e an authenticated copy of any relevant decision or agreement;

f a certificate or an affidavit emanating from a Central Authority, or other competent authority of the State of the child's habitual residence, or from a qualified person, concerning the relevant law of that State;

g any other relevant document.

Article 9

If the Central Authority which receives an application referred to in Article 8 has reason to believe that the child is in another Contracting State, it shall directly and without delay transmit the application to the Central Authority of that Contracting State and inform the requesting Central Authority, or the applicant, as the case may be.

Article 10

The Central Authority of the State where the child is shall take or cause to be taken all appropriate measures in order to obtain the voluntary return of the child.

Article 11

The judicial or administrative authorities of Contracting States shall act expeditiously in proceedings for the return of children.

If the judicial or administrative authority concerned has not reached a decision within six weeks from the date of commencement of the proceedings, the applicant or the Central Authority of the requested State, on its own initiative or if asked by the Central Authority of the requesting State, shall have the right to request a statement of the reasons for the delay. If a reply is received by the Central Authority of the requested State, that Authority shall transmit the reply to the Central Authority of the requesting State, or to the applicant, as the case may be.

Article 12

Where a child has been wrongfully removed or retained in terms of Article 3 and, at the date of the commencement of the proceedings before the judicial or administrative authority of the Contracting State where the child is, a period of less than one year has elapsed from the date of the wrongful removal or retention, the authority concerned shall order the return of the child forthwith.

The judicial or administrative authority, even where the proceedings have been commenced after the expiration of the period of one year referred to in the preceding paragraph, shall also order the return of the child, unless is demonstrated that the child is now settled in its new environment.

Where the judicial or administrative authority in the requested State has reason to believe that the child has been taken to another State, it may stay the proceedings or dismiss the application for the return of the child.

Article 13

Notwithstanding the provisions of the preceding Article, the judicial or administrative authority of the requested State is not bound to order the return of the child if the person, institution or other body which opposes its return establishes that—

a the person, institution or other body having the care of the person of the child was not actually exercising the custody rights at the time of removal or retention, or had consented to or subsequently acquiesced in the removal or retention; or

b there is a grave risk that his or her return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation.

The judicial or administrative authority may also refuse to order the return of the child if it finds that the child objects to being returned and has attained an age and degree of maturity at which it is appropriate to take account of its views.

In considering the circumstances referred to in this Article, the judicial and administrative authorities shall take into account the information relating to the social background of the child provided by the Central Authority or other competent authority of the child's habitual residence.

Article 14

In ascertaining whether there has been a wrongful removal or retention within the meaning of Article 3, the judicial or administrative authorities of the requested State may take notice directly of the law of, and of judicial or administrative decisions, formally recognized or not in the State of the habitual residence of the child, without recourse to the specific procedures for the proof of that law or for the recognition of foreign decisions which would otherwise be applicable.

Article 15

The judicial or administrative authorities of a Contracting State may, prior to the making of an order for the return of the child, request that the applicant obtain from the authorities of the State of the habitual residence of the child a decision or other determination that the removal or retention was wrongful within the meaning of Article 3 of the Convention, where such a decision or determination may be obtained in that State. The Central Authorities of the Contracting States shall so far as practicable assist applicants to obtain such a decision or determination.

Article 16

After receiving notice of a wrongful removal or retention of a child in the sense of Article 3, the judicial or administrative authorities of the Contracting State to which the child has been removed or in which it has been retained shall not decide on the merits of rights of custody until it has been determined that the child is not to be returned under this Convention or unless an application under this Convention is not lodged within a reasonable time following receipt of the notice.

Article 17

The sole fact that a decision relating to custody has been given in or is entitled to recognition in the requested State shall not be a ground for refusing to return a child under this Convention, but the judicial or administrative authorities of the requested State may take account of the reasons for that decision in applying this Convention.

Article 18

The provisions of this Chapter do not limit the power of a judicial or administrative authority to order the return of the child at any time.

Article 19

A decision under this Convention concerning the return of the child shall not be taken to be a determination on the merits of any custody issue.

Article 20

The return of the child under the provisions of Article 12 may be refused if this would not be permitted by the fundamental principles of the requested State relating to the protection of human rights and fundamental freedoms.

CHAPTER IV RIGHTS OF ACCESS

Article 21

An application to make arrangements for organizing or securing the effective exercise of rights of access may be presented to the Central Authorities of the Contracting States in the same way as an application for the return of a child.

The Central Authorities are bound by the obligations of co-operation which are set forth in Article 7 to promote the peaceful enjoyment of access rights and the fulfilment of any conditions to which the exercise of those rights may be subject. The Central Authorities shall take steps to remove, as far as possible, all obstacles to the exercise of such rights.

The Central Authorities, either directly or through intermediaries, may initiate or assist in the institution of proceedings with a view to organizing or protecting these rights and securing respect for the conditions to which the exercise of these rights may be subject.

CHAPTER V GENERAL PROVISIONS

Article 22

No security, bond or deposit, however described, shall be required to guarantee the payment of costs and expenses in the judicial or administrative proceedings falling within the scope of this Convention.

Article 23

No legalization or similar formality may be required in the context of this Convention.

Article 24

Any application, communication or other document sent to the Central Authority of the requested State shall be in the original language, and shall be accompanied by a translation into the official language or one of the official languages of the requested State or, where that is not feasible, a translation into French or English.

However, a Contracting State may, by making a reservation in accordance with Article 42, object to the use of either French or English, but not both, in any application, communication or other document sent to its Central Authority.

Article 25

Nationals of the Contracting States and persons who are habitually resident within those States shall be entitled in matters concerned with the application of this Convention to legal aid and advice in any other Contracting State on the same conditions as if they themselves were nationals of and habitually resident in that State.

Article 26

Each Central Authority shall bear its own costs in applying this Convention.

Central Authorities and other public services of Contracting States shall not impose any charges in relation to applications submitted under this Convention. In particular, they may not require any payment from the applicant towards the costs and expenses of the proceedings or, where applicable, those arising from the participation of legal counsel or advisers. However, they may require the payment of the expenses incurred or to be incurred in implementing the return of the child.

However, a Contracting State may, by making a reservation in accordance with Article 42, declare that it shall not be bound to assume any costs referred to in the preceding paragraph resulting from the participation of legal counsel or advisers or from court proceedings, except insofar as those costs may be covered by its system of legal aid and advice.

Upon ordering the return of a child or issuing an order concerning rights of access under this Convention, the judicial or administrative authorities may, where appropriate, direct the person who removed or retained the child, or who prevented the exercise of rights of access, to pay necessary expenses incurred by or on behalf of the applicant, including travel expenses, any costs incurred or payments made for locating the child, the costs of legal representation of the applicant, and those of returning the child.

Article 27

When it is manifest that the requirements of this Convention are not fulfilled or that the application is otherwise not well founded, a Central Authority is not bound to accept the application. In that case, the Central Authority shall forthwith inform the applicant or the Central Authority through which the application was submitted, as the case may be, of its reasons.

Article 28

A Central Authority may require that the application be accompanied by a written authorization empowering it to act on behalf of the applicant, or to designate a representative so to act.

Article 29

This Convention shall not preclude any person, institution or body who claims that there has been a breach of custody or access rights within the meaning of Article 3 or 21 from applying directly to the judicial or administrative authorities of a Contracting State, whether or not under the provisions of this Convention.

Article 30

Any application submitted to the Central Authorities or directly to the judicial or administrative authorities of a Contracting State in accordance with the terms of this Convention, together with documents and any other information appended thereto or provided by a Central Authority, shall be admissible in the courts or administrative authorities of the Contracting States.

Article 31

In relation to a State which in matters of custody of children has two or more systems of law applicable in different territorial units—

a any reference to habitual residence in that State shall be construed as referring to habitual residence in a territorial unit of that State;

b any reference to the law of the State of habitual residence shall be construed as referring to the law of the territorial unit in that State where the child habitually resides.

Article 32

In relation to a State which in matters of custody of children has two or more systems of law applicable to different categories of persons, any reference to the law of that State shall be construed as referring to the legal system specified by the law of that State.

Article 33

A State within which different territorial units have their own rules of law in respect of custody of children shall not be bound to apply this Convention where a State with a unified system of law would not be bound to do so.

Article 34

This Convention shall take priority in matters within its scope over the *Convention of 5 October 1961 concerning the powers of authorities and the law applicable in respect of the protection of minors,* as between Parties to both Conventions. Otherwise the present Convention shall not restrict the application of an international instrument in force between the State of origin and the State addressed or other law of the State addressed for the purposes of obtaining the return of a child who has been wrongfully removed or retained or of organizing access rights.

Article 35

This Convention shall apply as between Contracting States only to wrongful removals or retentions occurring after its entry into force in those States.

Where a declaration has been made under Article 39 or 40, the reference in the preceding paragraph to a Contracting State shall be taken to refer to the territorial unit or units in relation to which this Convention applies.

Article 36

Nothing in this Convention shall prevent two or more Contracting States, in order to limit the restrictions to which the return of the child may be subject, from agreeing among themselves to derogate from any provisions of this Convention which may imply such a restriction.

CHAPTER VI FINAL CLAUSES

Article 37

The Convention shall be open for signature by the States which were Members of the Hague Conference on Private International Law at the time of its Fourteenth Session.

It shall be ratified, accepted or approved and the instruments of ratification, acceptance or approval shall be deposited with the Ministry of Foreign Affairs of the Kingdom of the Netherlands.

Article 38

Any other State may accede to the Convention.

The instrument of accession shall be deposited with the Ministry of Foreign Affairs of the Kingdom of the Netherlands.

The Convention shall enter into force for a State acceding to it on the first day of the third calendar month after the deposit of its instrument of accession.

The accession will have effect only as regards the relations between the acceding State and such Contracting States as will have declared their acceptance of the accession. Such a declaration will also have to be made by any Member State ratifying, accepting or approving the Convention after an accession. Such declaration shall be deposited at the Ministry of Foreign Affairs of the Kingdom of the Netherlands; this Ministry shall forward, through diplomatic channels, a certified copy to each of the Contracting States.

The Convention will enter into force as between the acceding State and the State that has declared its acceptance of the accession on the first day of the third calendar month after the deposit of the declaration of acceptance.

Article 39

Any State may, at the time of signature, ratification, acceptance, approval or accession, declare that the Convention shall extend to all the territories for the international relations of which it is responsible, or to one or more of them. Such a declaration shall take effect at the time the Convention enters into force for that State.

Such declaration, as well as any subsequent extension, shall be notified to the Ministry of Foreign Affairs of the Kingdom of the Netherlands.

Article 40

If a Contracting State has two or more territorial units in which different systems of law are applicable in relation to matters dealt with in this Convention, it may at the time of signature, ratification, acceptance, approval or accession declare that this Convention shall extend to all its territorial units or only to one or more of them and may modify this declaration by submitting another declaration at any time.

Any such declaration shall be notified to the Ministry of Foreign Affairs of the Kingdom of the Netherlands and shall state expressly the territorial units to which the Convention applies.

Article 41

Where a Contracting State has a system of government under which executive, judicial and legislative powers are distributed between central and other authorities within that State, its signature or ratification, acceptance or approval of, or accession to this Convention, or its making of any declaration in terms of Article 40 shall carry no implication as to the internal distribution of powers within that State.

Article 42

Any State may, not later than the time of ratification, acceptance, approval or accession, or at the time of making a declaration in terms of Article 39 or 40, make one or both of the reservations provided for in Article 24 and Article 26, third paragraph. No other reservation shall be permitted.

Any State may at any time withdraw a reservation it has made. The withdrawal shall be notified to the Ministry of Foreign Affairs of the Kingdom of the Netherlands.

The reservation shall cease to have effect on the first day of the third calendar month after the notification referred to in the preceding paragraph.

Article 43

The Convention shall enter into force on the first day of the third calendar month after the deposit of the third instrument of ratification, acceptance, approval or accession referred to in Articles 37 and 38.

Thereafter the Convention shall enter into force—

1 for each State ratifying, accepting, approving or acceding to it subsequently, on the first day of the third calendar month after the deposit of its instrument of ratification, acceptance, approval or accession;

2 for any territory or territorial unit to which the Convention has been extended in conformity with Article 39 or 40, on the first day of the third calendar month after the notification referred to in that Article.

Article 44

The Convention shall remain in force for five years from the date of its entry into force in accordance with the first paragraph of Article 43 even for States which subsequently have ratified, accepted, approved it or acceded to it. If there has been no denunciation, it shall be renewed tacitly every five years.

Any denunciation shall be notified to the Ministry of Foreign Affairs of the Kingdom of the Netherlands at least six months before the expiry of the five year period. It may be limited to certain of the territories or territorial units to which the Convention applies.

The denunciation shall have effect only as regards the State which has notified it. The Convention shall remain in force for the other Contracting States.

Article 45

The Ministry of Foreign Affairs of the Kingdom of the Netherlands shall notify the States Members of the Conference, and the States which have acceded in accordance with Article 38, of the following—

1 the signatures and ratifications, acceptances and approvals referred to in Article 37;

2 the accessions referred to in Article 38;

3 the date on which the Convention enters into force in accordance with Article 43;

4 the extensions referred to in Article 39;

5 the declarations referred to in Articles 38 and 40;

6 the reservations referred to in Article 24 and Article 26, third paragraph, and the withdrawals referred to in Article 42;

7 the denunciations referred to in Article 44.

IN WITNESS WHEREOF the undersigned, being duly authorized thereto, have signed this Convention.

DONE at The Hague, on the 25th day of October 1980 in the English and French languages, both texts being equally authentic, in a single copy which shall be deposited in the archives of the Government of the Kingdom of the Netherlands, and of which a certified copy shall be sent, through diplomatic channels, to each of the States Members of the Hague Conference on Private International Law at the date of its Fourteenth Session.

[Signatures omitted.]

Convention on the civil aspects of international child abduction. Done at The Hague October 25, 1980; entered into force for the United States July 1, 1988. States which are parties:

Albania 1
Argentina 1a
Armenia 1b
Australia 1c
Austria 1d
Bahamas 1e
Belarus 1f
Belgium 1g
Belize 1h
Bosnia and Herzegovina 1i
Brazil 1j
Bulgaria 1k

Burkina Faso 1l
Canada 2
Chile 2a
China, Hong Kong Special Administrative Region only 2b
Macau Special Administrative Region Only
Colombia 2c
Costa Rica 2d
Croatia 2e
Cyprus 2f
Czech Republic 2g
Denmark 2h
Dominican Republic 2i
Ecuador 2j
El Salvador 2k
Estonia 2l
Fiji 2m
Finland 2n
France 3
Georgia 3a
Germany, Fed. Rep. 3b
Greece 3c
Guatemala 3d
Honduras 3e
Hungary 4
Iceland 4a
Ireland 4b
Israel 4c
Italy 4d
Latvia 4e
Lithuania 4f
Luxembourg 5
Macedonia, Former Yugoslav Republic of 5a
Malta 5b
Mauritius 5c
Mexico 5d
Moldova, Republic of 5e
Monaco 5f
Netherlands 6
New Zealand 6a
Nicaragua 6b
Norway 6c
Panama 6d
Paraguay 6e
Peru 6f
Poland 6g
Portugal 6h
Romania 7
St. Kitts & Nevis 7a
San Marino 7b
Serbia 7c
Seychelles 7d
Slovakia 7e
Slovenia 7f
South Africa 7g
Spain 7h

Sri Lanka 8
Sweden 8a
Switzerland 8b
Thailand 8c
Trinidad & Tobago 8d
Turkey 9
Turkmenistan 9a
Ukraine 9b
United Kingdom 10
United States 10a
Uruguay 10b
Uzbekistan 11
Venezuela 11a
Zimbabwe 12

Endnotes

Endnotes

INTER-AMERICAN CONVENTION ON LETTERS ROGATORY

The Governments of the Member States of the Organization of American States, desirous of concluding a convention on letters rogatory, have agreed as follows:

I. USE OF TERMS

Article 1

For the purposes of this Convention the terms ``exhortos'' and ``cartas rogatorias'' are synonymous in the Spanish text. The terms ``letters rogatory'', ``commissions rogatoires'', and ``cartas rogatórias'' used in the English, French and Portuguese texts, respectively, cover both ``exhortos'' and ``cartas rogatorias''.

II. SCOPE OF THE CONVENTION

Article 2

This Convention shall apply to letters rogatory, issued in conjunction with proceedings in civil and commercial matters held before the appropriate judicial or other adjudicatory authority of one of the States Parties to this Convention, that have as their purpose:

a. The performance of procedural acts of a merely formal nature, such as service of process, summonses or subpoenas abroad;

b. The taking of evidence and the obtaining of information abroad, unless a reservation is made in this respect.

Article 3

This Convention shall not apply to letters rogatory relating to procedural acts other than those specified in the preceding article; and in particular it shall not apply to acts involving measures of compulsion.

III. TRANSMISSION OF LETTERS ROGATORY

Article 4

Letters rogatory may be transmitted to the authority to which they are addressed by the interested parties, through judicial channels, diplomatic or consular agents, or the Central Authority of the State of origin or of the State of destination, as the case may be.

Each State Party shall inform the General Secretariat of the Organization of American States of the Central Authority competent to receive and distribute letters rogatory.

IV. REQUIREMENTS FOR EXECUTION

Article 5

Letters rogatory shall be executed in the States Parties provided they meet the following requirements:

a. The letter rogatory is legalized, except as provided for in Articles 6 and 7 of this Convention. The letter rogatory shall be presumed to be duly legalized in the State of origin when legalized by the competent consular or diplomatic agent;

b. The letter rogatory and the appended documentation are duly translated into the official language of the State of destination.

Article 6

Whenever letters rogatory are transmitted through consular or diplomatic channels or through the Central Authority, legalization shall not be required.

Article 7

Courts in border areas of the States Parties may directly execute the letters rogatory contemplated in this Convention and such letters shall not require legalization.

Article 8

Letters rogatory shall be accompanied by the following documents to be delivered to the person on whom process, summons or subpoena is being served:

a. An authenticated copy of the complaint with its supporting documents, and of other exhibits or rulings that serve as the basis for the measure requested;

b. Written information identifying the judicial or other adjudicatory authority issuing the letter, indicating the time-limits allowed the person affected to act upon the request, and warning of the consequences of failure to do so;

c. Where appropriate, information on the existence and address of the court-appointed defense counsel or of competent legal-aid societies in the State of origin.

Article 9

Execution of letters rogatory shall not imply ultimate recognition of the jurisdiction of the judicial or other adjudicatory authority issuing the letter rogatory or a commitment to recognize the validity of the judgment it may render or to execute it.

V. EXECUTION

Article 10

Letters rogatory shall be executed in accordance with the laws and procedural rules of the State of destination.

At the request of the judicial or other adjudicatory authority issuing the letter rogatory, the authority of the State of destination may execute the letter through a special procedure, or accept the observance of additional formalities in performing the act requested, provided this procedure or the observance of those formalities is not contrary to the law of the State of destination.

Article 11

The authority of the State of destination shall have jurisdiction to determine any issue arising as a result of the execution of the measure requested in the letter rogatory.

Should such authority find that it lacks jurisdiction to execute the letter rogatory, it shall *ex officio* forward the documents and antecedents of the case to the authority of the State which has jurisdiction.

Article 12

The costs and other expenses involved in the processing and execution of letters rogatory shall be borne by the interested parties.

The State of destination may, in its discretion, execute a letter rogatory that does not indicate the person to be held responsible for costs and other expenses when incurred. The identity of the person empowered to represent the applicant for legal purposes may be indicated in the letter rogatory or in the documents relating to its execution.

The effects of a declaration *in forma pauperis* shall be regulated by the law of the State of destination.

Article 13

Consular or diplomatic agents of the States Parties to this Convention may perform the acts referred to in Article 2 in the State in which they are accredited, provided the performance of such acts is not contrary to the laws of that State. In so doing, they shall not perform any acts involving measures of compulsion.

VI. GENERAL PROVISIONS

Article 14

States Parties belonging to economic integration systems may agree directly between themselves upon special methods and procedures more expeditious than those provided for in this Convention. These agreements may be extended to include other States in the manner in which the parties may agree.

Article 15

This Convention shall not limit any provisions regarding letters rogatory in bilateral or multilateral agreements that may have been signed or may be signed in the future by the States Parties or preclude the continuation of more favorable practices in this regard that may be followed by these States.

Article 16

The States Parties to this Convention may declare that its provisions cover the execution of letters rogatory in criminal, labor, and ``contentious-administrative'' cases, as well as in arbitrations and other matters within the jurisdiction of special courts. Such declarations shall be transmitted to the General Secretariat of the Organization of American States.

Article 17

The State of destination may refuse to execute a letter rogatory that is manifestly contrary to its public policy (``ordre public'').

Article 18

The States Parties shall inform the General Secretariat of the Organization of American States of the requirements stipulated in their laws for the legalization and the translation of letters rogatory.

VII. FINAL PROVISIONS

Article 19

This Convention shall be open for signature by the Member States of the Organization of American States.

Article 20

This Convention is subject to ratification. The instruments of ratification shall be deposited with the General Secretariat of the Organization of American States.

Article 21

This Convention shall remain open for accession by any other State. The instrument of accession shall be deposited with the General Secretariat of the Organization of American States.

Article 22

This Convention shall enter into force on the thirtieth day following the date of deposit of the second instrument of ratification.

For each state ratifying or acceding to the Convention after the deposit of the second instrument of ratification, the Convention shall enter into force on the thirtieth day after deposit by such State of its instrument of ratification or accession.

Article 23

If a State Party has two or more territorial units in which different systems of law apply in relation to the matters dealt with in this Convention, it may, at the time of signature, ratification or accession, declare that this Convention shall extend to all its territorial units or only to one or more of them.

Such declaration may be modified by subsequent declarations, which shall expressly indicate the territorial unit or units to which the Convention applies. Such subsequent declarations shall be transmitted to the General Secretariat of the Organization of American States, and shall become effective thirty days after the date of their receipt.

Article 24

This Convention shall remain in force indefinitely, but any of the States Parties may denounce it. The instrument of denunciation shall be deposited with the General Secretariat of the Organization of American States. After one year from the date of deposit of the instrument of denunciation, the Convention shall no longer be in effect for the denouncing State, but shall remain in effect for the other States Parties.

Article 25

The original instrument of this Convention, the English, French, Portuguese and Spanish texts of which are equally authentic, shall be deposited with the General Secretariat of the Organization of American States. The Secretariat shall notify the Member States of the Organization of American States and the States that have acceded to the Convention of the signatures, deposits of instruments of ratification, accession, and denunciation as well as of reservations, if any. It shall also transmit the information mentioned in the second paragraph of Article 4 and in Article 18 and the declarations referred to in Articles 16 and 23 of this Convention.

IN WITNESS WHEREOF the undersigned Plenipotentiaries, being duly authorized thereto by their respective Governments, have signed this Convention.

DONE AT PANAMA CITY, Republic of Panama, this thirtieth day of January one thousand nine hundred and seventy-five.

[Signatures omitted]

Inter-American Convention on Letters Rogatory.

Done at Panama January 30, 1975; entered into force for the United States August 27, 1988.

States which are parties:

Argentina*
Bolivia
Brazil*
Chile 1a *

Colombia*
Costa Rica
Ecuador 2 *
El Salvador 3 *
Guatemala 4 *
Honduras
Mexico 5 *
Panama 5a *
Paraguay*
Peru*
Spain 6
United States 7
Uruguay 8 *
Venezuela 9 *

* The United States has a treaty relationship only with those countries, which are a party to the Convention and the Additional Protocol.

[1] (Provided information in accordance with Article 4)

Appointed the Ministry of Justice of the Brasil as the Central Authority competent to receive and distribute letters rogatory in reference to the articles provided for in the Convention.

Endnotes

Endnotes

ADDITIONAL PROTOCOL TO THE INTER-AMERICAN CONVENTION ON LETTERS ROGATORY

The Governments of the Member States of the Organization of American States, desirous of strengthening and facilitating international cooperation in judicial procedures as provided for in the Inter-American Convention on Letters Rogatory, done in Panama on January 30, 1975, have agreed as follows:

I. SCOPE OF PROTOCOL

Article 1

This Protocol shall apply only to those procedural acts set forth in Article 2(a) of the Inter-American Convention on Letters Rogatory, hereinafter referred to as ``the Convention''. For the purposes of this Protocol, such acts shall be understood to mean procedural acts (pleadings, motions, orders, and subpoenas) that are served and requests for information that are made by a judicial or other adjudicatory authority of a State Party to a judicial or administrative authority of another State Party and are transmitted by a letter rogatory from the Central Authority of the State of origin to the Central Authority of the State of destination.

II. CENTRAL AUTHORITY

Article 2

Each State Party shall designate a central authority that shall perform the functions assigned to it in the Convention and in this Protocol. At the time of deposit of their instruments of ratification or accession to this Protocol, the States Parties shall communicate the designations to the General Secretariat of the Organization of American States, which shall distribute to the States Parties to the Convention a list containing the designations received. The Central Authority designated by a State Party in accordance with Article 4 of the Convention may be changed at any time. The State Party shall inform the above-mentioned Secretariat of such change as promptly as possible.

III. PREPARATION OF LETTERS ROGATORY

Article 3

Letters rogatory shall be prepared on forms that are printed in the four official languages of the Organization of American States or in the languages of the State of origin and of the State of destination and conform to Form A contained in the Annex to this Protocol.

Letters regatory shall be accompanied by the following:

a. Copy of the complaint or pleading that initiated the action in which the letter rogatory was issued, as well as a translation thereof into the language of the State of destination;

b. Untranslated copy of the documents attached to the complaint or pleading;

c. Untranslated copy of any rulings ordering issuance of the letter rogatory;

d. Form conforming to Form B annexed to this Protocol and containing essential information for the person to be served or the authority to receive the documents; and

e. Certificate conforming to Form C annexed to this Protocol on which the Central Authority of the State of destination shall attest to execution or non-execution of the letter rogatory.

The copies shall be regarded as authenticated for the purposes of Article 8 (a) of the Convention if they bear the seal of the judicial or other adjudicatory authority that issued the letter rogatory.

A copy of the letter rogatory together with Form B and the copies referred to in items a, b, and c of this Article shall be delivered to the person notified or to the authority to which the request is addressed. One of the copies of the letter rogatory and the documents attached to it shall remain in the possession of the State of destination; the untranslated original, the certificate of execution and the documents attached to them shall be returned to the Central Authority of the State of origin through appropriate channels.

If a State Party has more than one official language, it shall, at the time of signature, ratification or accession to this Protocol, declare which language or languages shall be considered official for the purposes of the Convention and of this Protocol. If a State Party comprises territorial units that have different official languages, it shall, at the time of signature, ratification or accession to this Protocol, declare which language or languages in each territorial unit shall be considered official for the purposes of the Convention and of this Protocol. The General Secretariat of the Organization of American States shall distribute to the States Parties to this Protocol the information contained in such declarations.

IV. TRANSMISSION AND PROCESSING OF LETTERS ROGATORY

Article 4

Upon receipt of a letter rogatory from the Central Authority in another State Party, the Central Authority in the State of destination shall transmit the letter rogatory to the appropriate judicial or administrative authority for processing in accordance with the applicable local law.

Upon execution of the letter rogatory, the judicial or administrative authority or authorities that processed it shall attest to the execution thereof in the manner prescribed in their local law, and shall transmit it with the relevant documents to the Central Authority. The Central Authority of the State Party of destination shall certify execution of the letter rogatory to the Central Authority of the State Party of origin on a form conforming to Form C of the Annex, which shall not require legalization. In addition, the Central Authority of the State of destination shall return the letter rogatory and attached documents to the Central Authority of the State of origin for delivery to the judicial or other adjudicatory authority that issued it.

V. COSTS AND EXPENSES

Article 5

The processing of letters rogatory by the Central Authority of the State Party of destination and its judicial or administrative authorities shall be free of charge. However, this State Party may seek payment by parties requesting execution of letters rogatory for those services which, in accordance with its local law, are required to be paid for directly by those parties.

The party requesting the execution of a letter rogatory shall, at its election, either select and indicate in the letter rogatory the person who is responsible in the State of destination for the cost of such services or, alternatively, shall attach to the letter rogatory a check for the fixed amount that is specified in Article 6 of this Protocol for its processing by the State of destination and will cover the cost of such services or a document proving that such amount has been transferred by some other means to the Central Authority of the State of destination.

The fact that the cost of such services ultimately exceeds the fixed amount shall not delay or prevent the processing or execution of the letter rogatory by the Central Authority or the judicial or administrative authorities of the State of destination. Should the cost exceed that amount, the Central Authority of the State of destination may, when returning the executed letter rogatory, seek payment of the outstanding amount due from the party requesting execution of the letter rogatory.

Article 6

At the time of deposit of its instrument of ratification or accession to this Protocol with the General Secretariat of the Organization of American States, each State Party shall attach a schedule of the services and the costs and other expenses that, in accordance with its local law, shall be paid directly by the party requesting execution of the letter rogatory. In addition, each State Party shall specify in the above-mentioned schedule the single amount which it considers will reasonably cover the cost of such services, regardless of the number or nature thereof. This amount shall be paid when the person requesting execution of the letter rogatory has not designated a person responsible for the payment of such services in the State of destination but has decided to pay for them directly in the manner provided for in Article 5 of this Protocol.

The General Secretariat of the Organization of American States shall distribute the information received to the States Parties to this Protocol. A State Party may at any time notify the General Secretariat of the Organization of American States of changes in the above-mentioned schedules, which shall be communicated by the General Secretariat to the other States Parties to this Protocol.

Article 7

States Parties may declare in the schedules mentioned in the foregoing articles that, provided there is reciprocity, they will not charge parties requesting execution of letters rogatory for the services necessary for executing them, or will accept in complete satisfaction of the cost of such services either the single fixed amount specified in Article 6 or another specified amount.

Article 8

This Protocol shall be open for signature and subject to ratification or accession by those Member States of the Organization of American States that have signed, ratified, or acceded to the Inter-American Convention on Letters Rogatory signed in Panama on January 30, 1975.

This Protocol shall remain open for accession by any other State that accedes or has acceded to the Inter-American Convention on Letters Rogatory, under the conditions set forth in this article.

The instruments of ratification and accession shall be deposited with the General Secretariat of the Organization of American States.

Article 9

This Protocol shall enter into force on the thirtieth day following the date on which two States Parties to the Convention have deposited their instruments of ratification or accession to this Protocol.

For each State ratifying or acceding to the Protocol after its entry into force, the Protocol shall enter into force on the thirtieth day following deposit by such State of its instrument of ratification or accession, provided that such State is a Party to the Convention.

Article 10

If a State Party has two or more territorial units in which different systems of law apply in relation to matters dealt with in this Protocol, it may, at the time of signature, ratification or accession, declare that this Protocol shall extend to all its territorial units or only to one or more of them.

Such declaration may be modified by subsequent declarations that shall expressly indicate the territorial unit or units to which this Protocol applies. Such subsequent declarations shall be transmitted to the General Secretariat of the Organization of American States, and shall become effective thirty days after the date of their receipt.

Article 11

This Protocol shall remain in force indefinitely, but any of the States Parties may denounce it. The instrument of denunciation shall be deposited with the General Secretariat of the Organization of American States. After one year from the date of deposit of the instrument of denunciation, the Protocol shall no longer be in effect for the denouncing State, but shall remain in effect for the other States Parties.

Article 12

The original instrument of this Protocol and its Annex (Forms A, B and C), the English, French, Portuguese and Spanish texts of which are equally authentic, shall be deposited with the General Secretariat of the Organization of American States, which will forward an authenticated copy of the text to the Secretariat of the United Nations for registration and publication in accordance with Article 102 of its Charter. The General Secretariat of the Organization of American States shall notify the Member States of that Organization and the States that have acceded to the Protocol of the signatures, deposits of instruments of ratification, accession and denunciation, as well as of reservations, if any. It shall also transmit to them the information mentioned in Article 2, the last paragraph of Article 3, and Article 6 and the declarations referred to in Article 10 of this Protocol.

IN WITNESS WHEREOF the undersigned Plenipotentiaries, being duly authorized thereto by their respective Governments, have signed this Protocol.

DONE AT MONTEVIDEO, Republic of Uruguay, this eighth day of May, one thousand nine hundred and seventy-nine.

[Signatures omitted]

ANNEX TO THE ADDITIONAL PROTOCOL TO THE INTER-AMERICAN CONVENTION ON LETTERS ROGATORY

FORM A LETTER ROGATORY 1

1

REQUESTING JUDICIAL OR OTHER

ADJUDICATORY AUTHORITY

Name

Address

2

CASE:

DOCKET No.:

3

CENTRAL AUTHORITY OF THE

STATE OF ORIGIN

Name

Address

4

CENTRAL AUTHORITY OF THE

STATE OF DESTINATION

Name

Address

5

REQUESTING PARTY

Name

Address

6

COUNSEL TO THE REQUESTING PARTY

Name

Address

PERSON DESIGNATED TO ACT IN CONNECTION WITH THE LETTER ROGATORY

Name

Address

Is this person responsible for costs and expenses?

YES NO

* If not, check in the amount of ___________________ is attached

* Or proof of payment is attached

* Delete if inapplicable

The Central Authority signing this letter rogatory has the honor to transmit to you in triplicate the documents listed below and, in conformity with the Protocol to the Inter-American Convention on Letters Rogatory:

*A. requests their prompt service on:

____
____
____

The undersigned authority requests that service be carried out in the following manner:

*(1). In accordance with the special procedure or additional formalities that are described below, as provided for in the second paragraph of Article 10 of the above-mentioned Convention; or

____
____
____
____

*(2). By service personally on the identified addressee or, in the case of a legal entity, on its authorized agent; or

*(3). If the person or the authorized agent of the entity to be served is not found, service shall be made in accordance with the law of the State of destination.

*B. Requests the delivery of the documents listed below to the following judicial or administrative authority:

Authority______________________

____
____

*C. Requests the Central Authority of the State of destination to return to the Central Authority of the state of origin one copy of the documents listed below and attached to this letter rogatory, and an executed Certificate on the attached Form C.

Done at ____________________ this _____________________ date of ____________________, 19_____.

____

Signature and stamp of the judicial or
other adjudicatory authority of the State
of origin

____

Signature and stamp of the Central
Authority of the State of origin

Title or other identification of each document to be delivered:

____
____

(Attach additional pages, if necessary.)

____

* Delete if inapplicable.

ANNEX TO THE ADDITIONAL PROTOCOL TO THE INTER-AMERICAN CONVENTION ON LETTERS ROGATORY

FORM B ESSENTIAL INFORMATION FOR THE ADDRESSEE 1

To (Name and address of the person being served)
____
____

You are hereby informed that (Brief statement of nature of service) ________________________
____
____

A copy of the letter rogatory that gives rise to the service or delivery of these documents is attached to this document. This copy also contains essential information for you. Also attached are copies of the complaint or pleading initiating the action in which the letter rogatory was issued, of the documents attached to the complaint or pleading, and of any rulings that ordered the issuance of the letter rogatory.

ADDITIONAL INFORMATION

I *

FOR SERVICE

A. The document being served on you (original or copy) concerns the following:

____

____

B. The remedies sought or the amount in dispute is as follows:

____

____

C. By this service, you are requested:

____

____

D. * In case of service on you as a defendant you can answer the complaint before the judicial or other adjudicatory authority specified in Form A, Box 1 (State place, date and hour):

____

____

* You are being summoned to appear as: ______________________

____

* If some other action is being requested of the person served, please describe:

____

____

____

____

____

* Delete if inapplicable.

E. If you fail to comply, the consequences might be: ______________________

____

____

____

F. You are hereby informed that a defense counsel appointed by the Court or the following legal aid societies are available to you at the place where the proceeding is pending.

Name:______________________

Address: ______________________

____

The documents listed in Part III are being furnished to you so that you may better understand and defend your interests.

II*

FOR INFORMATION FROM JUDICIAL OR ADMINISTRATIVE AUTHORITY

To: ____________________
____
____

(Name and address of the judicial or administrative authority)

You are respectfully requested to furnish the undersigned authority with the following information:
____
____
____
____

The documents listed in Part III are being furnished to you to facilitate your reply.
____

* Delete if inapplicable.

III

LIST OF ATTACHED DOCUMENTS

____
____
____
____
____
____
____
____

(Attach additional pages if necessary.)

Done at ____________________ this ____________________ day of ____________________, 19_____

____

Signature and stamp of the judicial or
other adjudicatory authority of the State
of origin

____

Signature and stamp of the Central
Authority of the State of Origin

ANNEX TO THE ADDITIONAL PROTOCOL TO THE INTER-AMERICAN CONVENTION ON LETTERS ROGATORY

FORM C CERTIFICATE OF EXECUTION 1

To: ___________________
____
____

(Name and address of judicial or other adjudicatory authority that issued the letter rogatory)

In conformity with the Additional Protocol to the Inter-American Convention on Letters Rogatory, signed at Montevideo on May 8, 1979, and in accordance with the attached original letter rogatory, the undersigned Central Authority has the honor to certify the following:

*A. That one copy of the documents attached to this Certificate has been served or delivered as follows:

Date:______________________

At (Address)______________________

By one of the following methods authorized by the Convention.

*(1) In accordance with the special procedure or additional formalities that are described below, as provided for in the second paragraph of Article 10 of the above-mentioned Convention, or

____
____
____

*(2) By service personally on the identified addressee or, in the case of a legal entity, on its authorized agent, or

*(3) If the person or the authorized agent of the entity to be served was not found, in accordance with the law of the State of destination: (Specify method used)

____
____
____
____

*B. That the documents referred to in the letter rogatory have been delivered to:

Identity of person ___________________
____
____

Relationship to the addressee ___________________

(family, business or other)

____

*C. That the documents attached to the Certificate have not been served or delivered for the following reason(s):

____
____
____
____

*D. In conformity with the Protocol, the party requesting execution of the letter rogatory is requested to pay the outstanding balance of costs in the amount indicated in the attached statement.

Done at ___________________ the ___________________ day of ___________________ 19_____

____

Signature and stamp of Central Authority of the State of destination

Where appropriate, attach originals or copies of any additional documents proving service or delivery, and identify them.

* Delete if inapplicable.

Additional Protocol to the Inter-American Convention on Letters Rogatory, with Annex. Done at Montevideo May 8, 1979; entered into force for the United States August 27, 1988. States which are parties:

Argentina*
Brazil*
Chile*
Colombia*
Ecuador 1 *
El Salvador 1a *
Guatemala*
Mexico 2 *
Panama 2a *
Paraguay*
Peru*
United States 3
Uruguay 4 *
Venezuela*

* The United States has a treaty relationship only with those countries which are a party to the Convention and the Additional Protocol

Endnotes

Endnotes

INTER-AMERICAN CONVENTION ON INTERNATIONAL COMMERCIAL ARBITRATION

The Governments of the Member States of the Organization of American States, desirous of concluding a convention on international commercial arbitration, have agreed as follows:

Article 1

An agreement in which the parties undertake to submit to arbitral decision any differences that may arise or have arisen between them with respect to a commercial transaction is valid. The agreement shall be set forth in an instrument signed by the parties, or in the form of an exchange of letters, telegrams, or telex communications.

Article 2

Arbitrators shall be appointed in the manner agreed upon by the parties. Their appointment may be delegated to a third party, whether a natural or juridical person.

Arbitrators may be nationals or foreigners.

Article 3

In the absence of an express agreement between the parties, the arbitration shall be conducted in accordance with the rules of procedure of the Inter-American Commercial Arbitration Commission.

Article 4

An arbitral decision or award that is not appealable under the applicable law or procedural rules shall have the force of a final judicial judgment. Its execution or recognition may be ordered in the same manner as that of decisions handed down by national or foreign ordinary courts, in accordance with the procedural laws of the country where it is to be executed and the provisions of international treaties.

Article 5

1. The recognition and execution of the decision may be refused, at the request of the party against which it is made, only if such party is able to prove to the competent authority of the State in which recognition and execution are requested:

a. That the parties to the agreement were subject to some incapacity under the applicable law or that the agreement is not valid under the law to which the parties have submitted it, or, if such law is not specified, under the law of the State in which the decision was made; or

b. That the party against which the arbitral decision has been made was not duly notified of the appointment of the arbitrator or of the arbitration procedure to be followed, or was unable, for any other reason, to present his defense; or

c. That the decision concerns a dispute not envisaged in the agreement between the parties to submit to arbitration; nevertheless, if the provisions of the decision that refer to issues submitted to arbitration can be separated from those not submitted to arbitration, the former may be recognized and executed; or

d. That the constitution of the arbitral tribunal or the arbitration procedure has not been carried out in accordance with the terms of the agreement signed by the parties or, in the absence of such agreement, that the constitution of the arbitral tribunal or the arbitration procedure has not been carried out in accordance with the law of the State where the arbitration took place; or

e. That the decision is not yet binding on the parties or has been annulled or suspended by a competent authority of the State in which, or according to the law of which, the decision has been made.

2. The recognition and execution of an arbitral decision may also be refused if the competent authority of the State in which the recognition and execution is requested finds:

a. That the subject of the dispute cannot be settled by arbitration under the law of that State; or

b. That the recognition or execution of the decision would be contrary to the public policy (``ordre public'') of that State.

Article 6

If the competent authority mentioned in Article 5.1.e has been requested to annul or suspend the arbitral decision, the authority before which such decision is invoked may, if it deems it appropriate, postpone a decision on the execution of the arbitral decision and, at the request of the party requesting execution, may also instruct the other party to provide appropriate guaranties.

Article 7

This Convention shall be open for signature by the Member States of the Organization of American States.

Article 8

This Convention is subject to ratification. The instruments of ratification shall be deposited with the General Secretariat of the Organization of American States.

Article 9

This Convention shall remain open for accession by any other State. The instruments of accession shall be deposited with the General Secretariat of the Organization of American States.

Article 10

This Convention shall enter into force on the thirtieth day following the date of deposit of the second instrument of ratification.

For each State ratifying or acceding to the Convention after the deposit of the second instrument of ratification, the Convention shall enter into force on the thirtieth day after deposit by such State of its instrument of ratification or accession.

Article 11

If a State Party has two or more territorial units in which different systems of law apply in relation to the matters dealt with in this Convention, it may, at the time of signature, ratification or accession, declare that this Convention shall extend to all its territorial units or only to one or more of them.

Such declaration may be modified by subsequent declarations, which shall expressly indicate the territorial unit or units to which the Convention applies. Such subsequent declarations shall be transmitted to the General Secretariat of the Organization of American States, and shall become effective thirty days after the date of their receipt.

Article 12

This Convention shall remain in force indefinitely, but any of the States Parties may denounce it. The instrument of denunciation shall be deposited with the General Secretariat of the Organization of American States. After one year from the date of deposit of the instrument of denunciation, the Convention shall no longer be in effect for the denouncing State, but shall remain in effect for the other States Parties.

Article 13

The original instrument of this Convention, the English, French, Portuguese and Spanish texts of which are equally authentic, shall be deposited with the General Secretariat of the Organization of American States. The Secretariat shall notify the Member States of the Organization of American States and the States that have acceded to the Convention of the signatures, deposits of instruments of ratification, accession, and denunciation as well as of reservations, if any. It shall also transmit the declarations referred to in Article 11 of this Convention.

IN WITNESS WHEREOF the undersigned Plenipotentiaries, being duly authorized thereto by their respective Governments, have signed this Convention.

DONE AT PANAMA CITY, Republic of Panama, this thirtieth day of January one thousand nine hundred and seventy-five.

[Signatures omitted]

Inter-American Convention on International Commercial Arbitration. Done at Panama City January 30, 1975; entered into force for the United States October 27, 1990.

States which are parties:

Argentina

Bolivia

Brazil

Chile

Colombia

Costa Rica

Dominican Republic

Ecuador

El Salvador

Guatemala

Honduras

Mexico

Nicaragua

Panama

Paraguay

Peru

United States 1

Uruguay

Venezuela

Endnotes

Endnotes

1 99 BFSP 990.

2 286 UNTS 265.

2a Bosnia and Herzegovina—Central Authority

Address: The Ministry of Justice of Bosnia and Herzegovina.

1 Albania—Central Authority & practical information

Central Authority(ies):

the Department responsible for the international judicial cooperation at the Ministry of Justice.

Address: Bulevardi ``Zogu I''
TIRANA
Albania

Telephone: +355 (4) 22 59 388

General website: http://www.justice.gov.al

- Convention of 15 November 1965 on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters [14]

Competent Authority (Art. 6, 18)

The Courts which have requested judicial and extrajudicial documents for the purpose of this Convention.

Competent Authority (Art. 9)

the Department responsible for the consular issues, at the Ministry of Foreign Affairs.

Convention of 15 November 1965 on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters[14].

1a *Notification in conformity with Article 31 of the Convention*

By note of 1 May 1985, received at the Ministry of Foreign Affairs of the Kingdom of the Netherlands on 17 May 1985, the Government of Antigua and Barbuda informed the Ministry of Foreign Affairs it does consider itself bound by the abovementioned Convention, declared applicable to Antigua by the Government of the United Kingdom of Great Britain and Northern Ireland on 20 May 1970.

Notification in conformity with Article 31, letter e, of the Convention

The Government of Antigua and Barbuda informed the Ministry of Foreign Affairs of the Kingdom of the Netherlands by Note of 2 May 1986 that as the authority referred to in Article 21 has been designated:

The Registrar—Eastern Caribbean Supreme Court.

Notification in conformity with Article 31, letter e, of the Convention

Rectification of the Notifications *Judicial and Extrajudicial Documents Nos. 2 and 3/1987* of 14 July 1987 and 28 August 1987.

The competent authorities under Article 21 of the above-mentioned Convention, designated by the Government of Antigua and Barbuda, are:

a) The Governor-General, Antigua and Barbuda;

b) The Registrar of the High Court of Antigua and Barbuda, St. John's, Antigua.

1b Argentina made the following declarations:

``…

1-To Article 5, third paragraph: ``The ARGENTINE REPUBLIC shall not accept documents to be served or transmitted unless they are accompanied by a translation into the Spanish language.''

2-To Article 21, first paragraph, a): ``The Argentine Government designates the Ministry of Foreign Affairs, International Trade and Worship as the Central Authority.''

3-To Article 21, second paragraph, a): ``The ARGENTINE REPUBLIC opposes to the use of methods of transmission pursuant to Article 10.''

4-To Article 21, second paragraph b): ``The Argentine Government accepts declarations pursuant to second paragraph of Article 15 and third paragraph of Article 16.''

5-The ARGENTINE REPUBLIC rejects the claimed extension of application of the Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters, adopted at The Hague on November 14, 1965, to the Malvinas, South Georgias and South Sandwich Islands as notified on May 20, 1970 by the UNITED KINGDOM OF GREAT BRITAIN AND NORTHERN IRELAND to the KINGDOM OF THE NETHERLANDS as Depositary of the Convention under the ``Falkland Islands and dependencies'' inaccurate denomination. Therefore, the ARGENTINE REPUBLIC similarly rejects the designation of the ``Registrar of the Supreme Court'' in the Malvinas Islands as application authority of this Convention which was made on that same opportunity, as well as any other act derived or that may be derived from this claimed territorial extension.

The General Assembly of the United Nations has recognized the existence of a dispute on the Malvinas, South Georgias and South Sandwich Islands sovereignty and has urged the ARGENTINE REPUBLIC and the UNITED KINGDOM OF GREAT BRITAIN AND NORTHERN IRELAND to hold negotiations in order to find, as soon as possible, a peaceful and definite solution to such dispute, with United Nations Secretary General's good offices mediation, who shall inform the General Assembly about the progress made (Resolutions 2065 (XX), 3160 (XXVIII), 31/49, 37/9, 38/12, 39/6, 40/21, 41/40, 42/19 and 43/25). The Special Committee on Decolonization having equally declared, has annually adopted a resolution which proclaims that to put an end to this colonial situation the negotiations must be resumed in order to peacefully and definitely solve this sovereignty dispute. The last of these resolutions was adopted on July 1, 1999.

The ARGENTINE REPUBLIC reaffirms its sovereignty on the Malvinas, South Georgias and South Sandwich Islands and its maritime surrounding areas which are an integral part of its national territory.''

N.B.: In accordance with Article 28, paragraph 2, the Convention will enter into force for Argentina in the absence of any objection from a State which has ratified the Convention before 2 February 2001 within a six months' period which, for practical reasons, will run from 15 May to 15 November 2001.

The Hague, 18 November 1987

1c The Commonwealth of the Bahamas deposited its instrument of accession to the above-mentioned Convention with the Ministry of Foreign Affairs of the Kingdom of the Netherlands on 17 June 1997 in accordance with Article 28, paragraph 1.

The said accession became perfect on 1 January 1998.

The provisions of the Convention will enter into force for the Commonwealth of the Bahamas on 1 February 1998 in accordance with Article 28, paragraph 3.

In accordance with Articles 2 and 18 of the Convention, the *Commonwealth of the Bahamas* has designated as Central Authority:

the ``Honourable Attorney General''.

1d With the following declaration:

``The Government of Barbados has designated the Registrar of the Supreme Court of Barbados as the Central Authority for the purposes of Articles 2 and 18, in accordance with the provisions of Article 21 of the Convention.''

1e *Notification in conformity with Article 31, paragraph c, of the Convention*

The Republic of Belarus deposited its instrument of accession to the above-mentioned Convention with the Ministry of Foreign Affairs of the Kingdom of the Netherlands on 6 June 1997 in accordance with Article 28, paragraph 1.

The said accession became perfect on 1 January 1998.

The provisions of the Convention will enter into force for the Republic of Belarus on 1 February 1998 in accordance with Article 28, paragraph 3.

In accordance with Article 2 of the Convention the Republic of Belarus has designated the Ministry of Justice of the Republic of Belarus (220084 Minsk, ul.Kollektornaya, 10; tel. 00 375 172 208 687/ 208 829; fax 209 684) as the Central Authority.

2 With the following declaration:

1. In conformity with the first paragraph of Article 2 of the Convention, the Ministry of Justice, Administration de la Législation, Place Poelaert, 4, 1.000 Brussels is designated as the Central Authority;

2. The Ministry of Justice is also designated as the competent authority to receive documents forwarded by the channels provided for in the first paragraph of Article 9 of the Convention;

3. The Belgian Government is opposed to use being made within its territory of the freedom to effect service provided for in the first paragraph of Article 8;

4. The Belgian Government declares that it will avail itself of the provision contained in the second paragraph of Article 15;

5. In conformity with the third paragraph of Article 16, the Belgian Government declares that the applications mentioned in the second paragraph of Article 16 will not be entertained if they are filed after the expiration of a period of one year following the date of the judgment;

6. The Belgian Government believes it should draw attention to the fact that any request for the service of documents made under sections a) or b) of the first paragraph of Article 5 requires the agency of a process-server (huissier de justice) and that the resulting costs should be reimbursed in conformity with Article 12 of the Convention.

2a Bosnia and Herzegovina—Central Authority

Address: The Ministry of Justice of Bosnia and Herzegovina.

2b With the following declaration:

``1. Pursuant to the first paragraph of Article 2 of the Convention the Minister of State in the

Office of the President of the Republic of Botswana has been designated the Central Authority to receive requests for service from other contracting states.

2. The Registrar of the High Court of Botswana is designated as the authority competent to complete the certificate in the form of the Model annexed to the Convention pursuant to the first paragraph of Article 6.

3. In accordance with the provisions of Article 9 of the Convention the Minister of State in the Office of the President is designated as the receiver of process sent through Consular channels.

4. It is declared that the Government of Botswana objects to the method of service referred to in sub-paragraphs (b) and (c) of Article 10.

5. It is declared that a judge of the High Court of Botswana may give judgment if all the conditions specified in paragraph 2 of Article 15 are fulfilled."

All documents forwarded for service must be in duplicate and written in or translated into the English language.

2c Bulgaria made the following declarations:

``*Declaration on Article 5, paragraph 3*

The Republic of Bulgaria requires the document, which is to be served, to be written in or accompanied by a translation into the Bulgarian language.

Declaration on Articles 2 and 18

The Republic of Bulgaria designates the Ministry of Justice and European Legal Integration as Central Authority. The same authority is competent to receive the documents forwarded under Article 9, paragraph 1.

Declaration on Article 6, paragraphs 1 and 2

The Republic of Bulgaria designates the district courts as authorities which are competent to complete the certificate.

Declaration on Article 8, paragraph 2

The Republic of Bulgaria declares that within Bulgarian territory foreign diplomatic and consular agents may effect service of judicial and extrajudicial documents only upon nationals of the State which they represent.

Declaration on Article 10

The Republic of Bulgaria objects to the use of the channels of transmission for service mentioned in Article 10 of the Convention.

Declaration on Article 15, paragraph 2

The judge gives judgment provided that all certificates under Article 15, paragraph 2, are available.

Declaration on Article 16, paragraph 3

The Republic of Bulgaria will not accept applications for relief concerning judgments under paragraph 1 of this article after the expiration of one year following the date of the judgment."

3 *Notification in conformity with Article 31, paragraph c, of the Convention*

Canada deposited its instrument of accession to the above-mentioned Convention with the Ministry of Foreign Affairs of the Kingdom of the Netherlands on 26 September 1988 in accordance with Article 28, paragraph 1.

The said accession became perfect on 10 April 1989.

In accordance with Article 28, paragraph 3, the provisions of the Convention entered into force for Canada on 1 May 1989.

A copy of a document transmitted by Canada and containing the designations and declarations referred to in Article 21 of the Convention is attached to this Notification.

CANADA

A. Transmission and execution of requests for service

1. Central Authority

(Article 2 and Article 18, paragraph 3)

comment: To save time, requests should be forwarded directly to the Central Authority of the province or territory concerned. They may, however, also be forwarded to the Federal Central Authority which will transmit them to the relevant Central Authority.

Province/ Territory	*Name*	*Address*	*Telephone/fax:*
Alberta	Sheriff of Alberta (Civil Enforcement)	Main Floor Law Court Building North 1A Sir Winston Churchill Square Edmonton, Alberta Canada T5J 0R2	T (780) 422-2481 F (780) 422-3011
British Columbia	Ministry of the Attorney General for British Columbia Order in Counsel Administration Office	Room 208A Parliament Building 553 Superior Street Victoria, British Columbia Canada V8V IX4	T (250) 387-0725 F (250) 387-4349
Manitoba	Attorney-General of Manitoba a/s ``Director—Civil	Woodsworth Building 7th Floor	T (204) 945-2832 F (204) 948-2041

	Legal Services''	405 Broadway Winnipeg, Manitoba Canada, R3C 3L6	
New Brunswick	Attorney-General of New Brunswick care of Director of Legal Services	P.O. Box 6000 670 King Street Centennial Building Fredericton, New Brunswick Canada, E3B 5H1	T (506) 453-2222 F (506) 453-3275
Newfoundland	Department of Justice	P.O. Box 8700 4 floor, East Block Confederation Building St. John's Newfoundland Canada A1B 4J6	T (709) 729-5942 F (709) 729-2129
Nova Scotia	Attorney General of Nova Scotia Legal Services Division	5151 Terminal Road 4th floor P.O. Box 7 Halifax, Nova Scotia Canada B3J 2L6	T (902) 424-4024 F (902) 424-1730
Ontario	Ministry of the Attorney General	Courts Administration Ontario Court (Provincial Division) Court House 393 Main Street Haileybury, Ontario Canada P0J 1K0	T (705) 672-3395
Prince Edward Island	Attorney General of Prince Edward Island Office of the Deputy Minister	P.O. Box 2000 Charlottetown, Prince Edward Island Canada C1A 7N8	T (902) 368-4594 F (902) 368-4563
Quebec	Minister of Justice of Quebec Att. Law Services	1200 route de l'Eglise 2nd floor Ste-Foy, Quebec Canada G1V 4M1	T (418) 643-1436 F (418) 646-1696
Saskatchewan	Minister of Justice for Saskatchewan Att. of Director of Sheriff Services	Court House 2425 Victoria Avenue Regina, Saskatchewan Canada F4P 3V7	T (306) 787-0472 F (306) 780-6990
Yukon	Director of Court Services	Department of Justice Box 2703 Whitehorse, Yukon Canada Y1A 2C6	T (867) 667-5942 F (867) 393-6212
Northwest Territories	Deputy Minister of Justice Government of the Northwest Territories	P.O. Box 1320 Yellowknife, Northwest Territories Canada X1A 2L9	T (867) 920-6197 F (867) 873-0307
Nunavut	Clerk of the Nunavut Court of Justice Court Services Division	Box 297 Iqaluit, Nunavut Canada X0A 0H0	T (867) 975-6100 F (867) 975-6150
Federal	United Nations Criminal and Treaty Law Division	125 Sussex Drive Ottawa, Ontario Canada K1A 0G2	T (613) 995-1050 F (613) 992-2467 e-mail: JLA.extott@extott07.x400.gc.ca

Payment of Service Costs

The payment of Service Costs should be made to:*

* List as per 28 September 2000

Alberta	Provincial Treasurer of Alberta
British Columbia	Minister of Finance of British Columbia
Prince Edward Island	Provincial Treasurer of Prince Edward Island
Manitoba	Minister of Finance of Manitoba
New Brunswick	Minister of Finance of New Brunswick
Nova Scotia	Minister of Finance of Nova Scotia
Ontario	Treasurer of Ontario
Quebec	``Ministre des Finances du Québec''
Saskatchewan	Department of Justice of Saskatchewan—Sheriff Services
Newfoundland	Newfoundland Exchequer Account
Yukon	Territorial Treasurer of the Government of Yukon
Northwest Territories	Government of the Northwest Territories
Nunavut	Government of Nunavut

2. Methods of service employed by the Central Authority (Article 5)

2.1 Formal service (Article 5, paragraph 1, sub-paragraph a)

In Canada, service will be effected according to the methods of service prescribed by the laws in force in each province and territory.

The normal procedure that will be used by central authorities in Canada is personal service made by a sheriff or deputy sheriff or a *huissier* in Quebec, on an individual or on a corporation by handing a copy of the document to the defendant in person, wherever he may be, or to the President, Chairman or other Chief Officer of a corporation at the place of business.

Service may also be effected by leaving a copy of the document with a person of a reasonable age at the defendant's domicile or residence.

Where service is made on a corporation, provincial laws usually provide for service on a director or senior officer of the corporation or, in some cases, on a registered agent or on a responsible person at the registered office of the corporation.

2.2 Informal delivery (Article 5, paragraph 2)

The practice of informal delivery (``par simple remise") of judicial or extra-judicial documents is not known in Canada.

2.3 Service by a particular method (Article 5, paragraph 1, sub-paragraph b)

In Alberta, New Brunswick and Ontario, service will be made by certified mail at the option of the requesting party. In Ontario, the Central Authority will serve by any form of mail, at the option of the requesting party.

2.4 Translation requirements (Article 5, paragraph 3)

For both Formal service and Service by a particular method, translation requirements will depend on the province or territory concerned.

For Alberta, British Columbia, Newfoundland, Nova Scotia, Prince Edward Island, Saskatchewan, all documents must be written in or translated into English.

For Ontario, Manitoba, and the Northwest Territories, all documents must be written in or translated into English or French.

For New Brunswick and the Yukon, all documents must be written in or translated into English or French. The Central Authority of New Brunswick or the Yukon may reserve the right to require documents to be translated into English or French depending on the language understood by the addressee.

For Quebec, translation will be required in all cases where the recipient does not understand the language in which the document is written. All documents which commence actions must be translated. Summary translation of all other documents is acceptable if the recipient agrees. Translation is to be done into the French language; however, the Quebec central authority may, upon request, allow a translation in English at the condition that the recipient understands this language.

Costs (Article 12, paragraph 2, sub-paragraph a)

Costs for execution of service will be of $50.-Can.

3. Authority competent to complete the certificate of service (Article 6)

In addition to the Central Authorities, the sheriffs, deputy-sheriffs, sub-sheriffs, clerk of the court or his/her deputy for the judicial district (except in Manitoba where there are no judicial districts) in which the person is to be served or the *huissiers* (only in Quebec) are competent to complete the certificate of service.

B. Forwarding of requests for service to the Central Authority of another Contracting State

Forwarding Authorities (Article 3)

Requests for service to Central Authorities of other States may be transmitted by:

— The Attorney General for Canada

— The Attorneys General or the Ministry of Attorney General or Minister of Justice of a province or a territory—as the case may be.

- Clerks of the courts and their deputies for a judicial or a court district

- The members of the law societies of all provinces and territories

- The member of the Board of Notaries of the Province of Quebec (for non-litigious matters only).

- Local registrars

- The huissiers and sheriffs

- The prothonotaries and deputy prothonotaries

- The ``Percepteur des pensions alimentaires'' in Québec

CANADA

I
Transmission through consular or diplomatic channels (Articles 8 and 9)

A
Acceptance

On accession, Canada has not declared that it objects to service by consular or diplomatic channels on its territory.

Receiving authority (Article 9, paragraph 1)

The Central Authorities in Canada designated in accordance with Articles 2 and 18 of the *Convention* are competent to receive requests for service transmitted by a foreign consul within Canada.

B
Forwarding to the Contracting States

Canada does not object to service by consular channels of Canadian documents abroad providing that the recipient accepts this method of service.

II

Transmission through postal channels (Article 10, sub-paragraph a)

A
Acceptance

Canada does not object to service by postal channels.

B
Forwarding to other contracting States

Canadian law allows the use of postal channels to serve Canadian documents to persons abroad.

III
Service through judicial officers, notably ``huissiers'', etc. of the requested State (Article 10, sub-paragraphs b) and c))

On accession, Canada has not declared to object to methods of service of Article 10, sub-paragraphs b) and c).

IV
Other direct channels (Article 11); special agreements (Articles 24 and 25)

Canada is party to bilateral conventions on civil procedure with the following States:

Austria	Canada Treaty Series, 1935, n° 16
Belgium	Canada Treaty Series, 1928, n° 16
Czechoslovakia	Canada Treaty Series, 1928, n° 17
Denmark	Canada Treaty Series, 1936, n° 4
Finland	Canada Treaty Series, 1936, n° 5
France	Canada Treaty Series, 1928, n° 15
Germany	Canada Treaty Series, 1935, n° 11
Greece	Canada Treaty Series, 1938, n° 11
Hungary	Canada Treaty Series, 1939, n° 6
Iraq	Canada Treaty Series, 1938, n° 12
Italy	Canada Treaty Series, 1938, n° 14
Netherlands	Canada Treaty Series, 1936, n° 2
Norway	Canada Treaty Series, 1935, n° 15

Poland	Canada Treaty Series, 1935, n° 18
Portugal	Canada Treaty Series, 1935, n° 17
Spain	Canada Treaty Series, 1935, n° 12
Sweden	Canada Treaty Series, 1935, n° 13
Turkey	Canada Treaty Series, 1935, n° 19
Yugoslavia	Canada Treaty Series, 1939, n° 4

CANADA

GUARANTEES UNDER THE CONVENTION

Declarations made pursuant to Articles 15, paragraph 1 or 16, paragraph 3.

1. *Stays of entry* (Article 15, paragraph 2)

Canada declares that the judges may give judgment under the conditions stated in Article 15 of the Convention.

2. *Relief from expiration of the period of time for appeal* (Article 16, paragraph 3)

Canada declares that an application filed under Article 16 of the Convention will not be entertained if it is filed after the expiration of one year following the date of the judgment, except in exceptional cases determined by the rules of the Court seized of the matter.

3a The People's Republic of China deposited its instrument of accession with the Ministry of Foreign Affairs of the Kingdom of the Netherlands on May 6, 1991, in accordance with Article 28, paragraph 1, of the Convention.

The instrument of accession contains the following declarations:

``*1. to designate according to Article 2 and Article 9 of the Convention the Ministry of Justice of the People's Republic of China as the Central Authority and the authority competent to receive documents transmitted by foreign States through consular channels.*

The communication address is:

Bureau of International Judicial Assistance
Ministry of Justice
10, Chaoyangmen Nandajie
Chaoyang District
Beijing

P.C. 100020
People's Republic of China

2. to declare according to the second paragraph of Article 8 that the means of service stipulated in the first paragraph of that Article may be used within the territory of the People's Republic of China only when the document is to be served upon a national of the State in which the documents originate.

3. to oppose the service of documents in the territory of the People's Republic of China by the methods provided by Article 10 of the Convention.

4. to declare in accordance with the second paragraph of Article 15 of the Convention that if all the conditions provided in that paragraph are fulfilled, the judge, notwithstanding the provisions of the first paragraph of that Article, may give judgment even if no certificate of service or delivery has been received.

5. to declare in accordance with the third paragraph of Article 16 of the Convention that the application for relief from the effects of the expiration of the time for appeal shall not be entertained except that it is filed within one year following the date of the judgment."

By Note dated 4 March 1998, the Embassy of the People's Republic of China in The Hague informed the Permanent Bureau of the following declarations:

``1. The Ministry of Justice of the People's Republic of China is the sole Central Authority designated by the People's Republic of China in accordance with Article 2 of the Convention.

2. Under Article 18 of the Convention, the People's Republic of China designates the Chief Secretary for Administration of the Hong Kong Special Administrative Region Government as the ``other authority", the address of which is the following:

Chief Secretary for Administration
Hong Kong Special Administrative Region Government
12/F, West Wing, Central Government Office
11 Lee House Street, Central, Hong Kong

3. Under Article 6 and Article 9 of the Convention, the People's Republic of China designates the Registrar of the High Court of the Hong Kong Special Administrative Region as the authority for treatment of issues referred to in the said articles. The address of this Registrar of the High Court is the following:

Registrar
High Court
Hong Kong Special Administrative Region
38 Queensway, Hong Kong."

CHINA, Hong Kong Special Administrative Region Only

By notification dated June 10, 1997, to the Ministry of Foreign Affairs of the Kingdom of The Netherlands, the People's Republic of China communicated the following information concerning Hong Kong:

THE EMBASSY OF THE PEOPLE'S REPUBLIC OF CHINA

IN THE KINGDOM OF THE NETHERLANDS

No. He Wai Fa(97)-52

(Translation)

The Hague, June 10, 1997

Your Excellency,

In accordance with the Joint Declaration of the Government of the People's Republic of China and the Government of the United Kingdom of Great Britain and Northern Ireland on the Question of Hong Kong signed on 19 December 1984, the People's Republic of China will resume the exercise of sovereignty over Hong Kong with effect from 1 July 1997. Hong Kong will, with effect from that date, become a Special Administrative Region of the People's Republic of China and will enjoy a high degree of autonomy, except in foreign and defence affairs which are the responsibilities of the Central People's Government of the People's Republic of China.

In this connection, I am instructed by the Minister of Foreign Affairs of the People's Republic of China to make the following notification:

The Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil and Commercial Matters done on 15 November 1965 (hereinafter referred to as the ``Convention''), by which the Government of the Kingdom of the Netherlands is designated as the depository, to which the Government of the People's Republic of China deposited its instrument of accession on 3 May 1991, will apply to the Hong Kong Special Administrative Region with effect from 1 July 1997. The Government of the People's Republic of China also makes the following declarations:

1. In accordance with Paragraph 2 of Article 8 of the Convention, it declares that the means of service referred to in Paragraph 1 of this Article may be used within the Hong Kong Special Administrative Region only when the document is to be served upon a national of the state in which the document originates.

2. In accordance with Article 18 of the Convention, it designates the Administrative Secretary of the Government of the Hong Kong Special Administrative Region as the Other Authority in the Hong Kong Special Administrative Region.

3. It designates the Registrar of the High Court of the Hong Kong Special Administrative Region as the authority for the purpose of Article 6 and 9 of the Convention.

4. With reference to the provisions of Sub-paragraphs (b) and (c) of Article 10 of the Convention, documents for service through official channels will be accepted in the Hong Kong Special Administrative Region only by the Central Authority or Other Authority designated, and only from judicial, consular or diplomatic officers of other Contracting States.

The Government of the People's Republic of China will assume responsibility for the international rights and obligations arising from the application of the Convention to the Hong Kong Special Administrative Region.

It would be appreciated if the contents of this Note could be placed formally on record and *brought to the attention of the other Parties to the Convention.*

I avail myself of this opportunity to renew to Your Excellency the assurance of my highest consideration.

The States which ratified the Convention were notified of the accession by the Dutch Government on 17 May 1991. Since none of these States raised an objection to the accession within the period of six months specified in Article 28, paragraph 2, the said accession became perfect on 1 December 1991.

The provisions of the Convention entered into force for the People's Republic of China on 1 January 1992 in accordance with Article 28, paragraph 3.

CHINA, Macau Special Administrative Region Only

The Ambassador of Portugal at The Hague informed the Minister for Foreign Affairs of the Kingdom of the Netherlands by letter of 26 November 1999 of the following:

``Upon instructions from my Government and referring to the Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters concluded at The Hague on 15 November 1965 (hereinafter referred to as the Convention) which currently applies to Macau, I have the honour to inform Your Excellency of the following: In accordance with the Joint Declaration of the Government of the Portuguese Republic and of the Government of the People's Republic of China on the question of Macau, signed in Beijing on 13 April 1987, the Government of the Portuguese Republic will remain internationally responsible for Macau until 19 December 1999, the People's Republic of China resuming from that date the exercise of sovereignty over Macau, with effect from 20 December 1999. From 20 December 1999 the Portuguese Republic will cease to be responsible for the international rights and obligations arising from the application of the Convention in Macau, (…)"

The Ambassador of the People's Republic of China at The Hague informed the Minister for Foreign Affairs by letter of 10 December 1999 of the following:

Translation

``In accordance with the Joint Declaration of the Government of the People's Republic of China and the Government of the Republic of Portugal on the Question of Macau signed on 13 April 1987, the Government of the People's Republic of China will resume the exercise of sovereignty over Macau with effect from 20 December 1999. Macao will from that date become a Special Administrative Region of the People's Republic of China and will enjoy a high degree of autonomy, except in foreign and defence affairs which are the responsibilities of the Central People's Government of the People's Republic of China.

In this connection, I am instructed by the Minister of Foreign Affairs of the People's Republic of China to inform Your Excellency of the following:

The Convention on the service abroad of judicial and extrajudicial documents in civil or commercial matters, concluded at The Hague on 15 November 1965 (hereinafter referred to as the Convention), to which the Government of the People's Republic of China deposited the instrument of accession on 3 May 1991, shall apply to the Macau Special Administrative Region with effect from 20 December 1999. The Government of the People's Republic of China also wishes to make the following declaration:

1. In accordance with Articles 6 and 9 of the Convention, it designates the Procurate, the Primary

Courts, the Intermediate Courts and the Court of Final Appeal of the Macau Special Administrative Region as the Central Authorities in the Macau Special Administrative Region.

2. In accordance with the second paragraph of Article 8 of the Convention, it declares that the means of service stipulated in the first paragraph of that article may be used within the Macau Special Administrative Region only when the document is to be served upon a national of the State in which the document originates.

3. In accordance with the second paragraph of Article 15 of the Convention, it declares that if all the conditions provided in that paragraph are fulfilled, the judge of the Macau Special Administrative Region, notwithstanding the provisions of the first paragraph of that article, may give judgment even if no certificate of service or delivery has been received.

4. In accordance with the third paragraph of Article 16 of the Convention, it declares that in the Macau Special Administrative Region, the application for relief from the effects of the expiration of the time for appeal shall not be entertained except that it is filed within one year following the date of the judgment. The Government of the People's Republic of China shall assume the responsibility for the international rights and obligations arising from the application of the Convention to the Macau Special Administrative Region. (… .)".

The Embassy of the People's Republic of China at The Hague informed the Minister for Foreign Affairs of the Netherlands by letter of 1 November 2000 of an amendment of paragraph 1 of the declaration contained in the Note of 10 December 1999. Paragraph 1 which read as follows:

``1. In accordance with article 6 and 9 of the Convention, it designates the Procurate, the Primary Courts, the Intermediate Courts and the Courts of Final Appeal of the Macau Special Administrative Region as the Central Authorities in the Macau Special Administrative Region."

has been amended as follows:

``In accordance with Article 18 of the Convention, it designates the Procuratorate of the Macau Special Administrative Region as the Other Authority in the Macau Special Administrative Region, which will undertake to receive and transmit Requests for Services coming from other Contracting States.

In accordance with Article 6 of the Convention, it designates the Court Clerks and Assistant Court Clerks from the Court of Final Appeal of the Macau Special Administrative Region as the authority competent to complete a certificate referred to in this Article.

In accordance with Article 9 of the Convention, it designates the Court Clerks and Assistant Court Clerks from the Court of Final Appeal of the Macau Special Administrative Region as the authority competent to receive Requests for Service forwarded by other Contracting States through consular channels.

The address of the Procuratorate of the Macau Special Administrative Region is:

Alameda Dr. Carlos d'Assumpcao

Macau SAR of the People's Republic of China Chief Executive Administrative Building

NAPE

Macau"

Furthermore, the Government of the People's Republic of China made the following supplementary declaration:

``In accordance with paragraph 3 of Article 5 of the Convention, it declares that documents to be served in the Macau Special Administrative Region under the first paragraph of Article 5 shall be written in either Chinese or Portuguese, or be accompanied by a translation in either Chinese or Portuguese".

3b

Croatia—Central Authority	
Address	The Republic of Croatia declares that the Ministry of Justice of the Republic of Croatia is the Central Authority for receiving requests for the service of judicial documents coming from other Contracting States.
Conventions	• Convention of 15 November 1965 on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters [14]
Croatia—Competent Authority (Art. 6)	
Address	The Republic of Croatia declares that municipal courts according to residence, abode, and headquarters of the addressee of documents are competent for the completion of the certificate of reception of documents.
Conventions	• Convention of 15 November 1965 on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters [14]
Croatia—Competent Authority (Art. 9)	
Address	The Republic of Croatia declares that the documents served in accordance with Article 9 of the Convention are forwarded to the Ministry of Justice of the Republic of Croatia for the purpose of service to parties.
Conventions	• Convention of 15 November 1965 on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters [14]

Accession

According to Article 28, second paragraph, the Convention will enter into force for Croatia in the absence of any objection from a State which has ratified the Convention before such deposit, notified to the Ministry of Foreign Affairs of the Kingdom of the Netherlands within a period of six months after the date on which the said Ministry had notified it of such accession.

For practical reasons this six months' period will in this case run from 1 April 2006 to 1 October 2006.

Reservations Declarations

Articles: 5,6,8,9,10,15,16

Declaration in accordance with Article 5 of the Convention:

The Republic of Croatia declares that documents served pursuant to Article 5, paragraph 1, should be accompanied by a translation into the Croatian language.

Declaration in accordance with Article 6 of the Convention:

The Republic of Croatia declares that municipal courts according to residence, abode, and headquarters of the addressee of documents are competent for the completion of the certificate of reception of documents.

Declaration in accordance with Article 8 of the Convention:

The Republic of Croatia declares that it is opposed to direct service of judicial documents upon persons within its territory through foreign diplomatic or consular agents, unless the document is to be served upon a national of the State in which the document originates.

Declaration in accordance with Article 9 of the Convention:

The Republic of Croatia declares that the documents served in accordance with Article 9 of the Convention are forwarded to the Ministry of Justice of the Republic of Croatia for the purpose of service to parties.

Declaration in accordance with Article 10 of the Convention:

The Republic of Croatia declares that it is opposed to the mode of service specified in Article 10 of the Convention.

Declaration in accordance with Article 15 of the Convention:

The Republic of Croatia declares that Croatian courts may give a judgement if all the conditions set out in paragraph 2 of Article 15 of the Convention are fulfilled.

Declaration in accordance with Article 16 of the Convention:

The Republic of Croatia declares that applications for relief set out in Article 16 of the Convention will not be entertained if they are filed after the expiration of a period of one year following the date on which the judgement was given.

3c *Notification in conformity with Article 31, paragraph c, of the Convention*

The Republic of Cyprus deposited its instrument of accession with the Ministry of Foreign Affairs of the Kingdom of the Netherlands on 26 October 1982 in accordance with Article 28, paragraph 1, of the Convention.

In accordance with Article 28, paragraph 3, the provisions of the Convention entered into force for the Republic of Cyprus on 1 June 1983.

Referring to the accession of Cyprus to the above-mentioned Convention the Embassy of Turkey at The Hague addressed a Note dated 6 April 1983 to the Ministry of Foreign Affairs of the Kingdom of the Netherlands. [See note 13.]

Notification in conformity with Article 31, paragraph e, of the Convention

In conformity with Article 21 of the Convention the Government of Cyprus informed the Ministry of Foreign Affairs of the Kingdom of the Netherlands by Note dated 5 January 1984 of the designation of the following authorities and made the following declarations:

``(a) *Article 2:*

Designation of Central Authority which will undertake to receive requests for service:—Permanent Secretary, Ministry of Justice and Public Order*.

(b) *Article 6:*

Designation of the authority competent to complete the certificate of Service:—Ministry of Justice.

(c) *Article 9:*

Designation of the authority competent to receive documents transmitted by Consular Channels: —Ministry of Justice.

(d) *Articles 8 and 10:*

No opposition to the methods of transmission of documents provided by these articles.

(e) *Article 15:*

Declaration that judgement may be given if all conditions laid down in paragraph 2 are fulfilled.

(f) *Article 16:*

Declaration pursuant to paragraph 3 that the application will not be entertained if it is filed after the expiration of one year from the date of the judgement.

(g) *Article 18:*

Designation of other authorities in addition to the Central Authorities.

The Courts of the Republic. Competence:

Service of documents through their Registries.".

* New title of the Ministry of Justice of the Republic of Cyprus.

3d *Notification in conformity with Article 31, paragraphs c and e, of the Convention*

By notification dated January 28, 1993 the Czech Republic communicated the following: ``In accordance with the valid principles of international law and to the extent defined by it, the Czech Republic, as a successor state created as a result of the division of the Czech and Slovak Federal Republic, considers itself bound, as of January 1, 1993, i.e. the date of the division of the Czechoslovak federation, by multilateral international treaties to which the Czech and Slovak Federal Republic was a party on that date, including reservations and declarations to their provisions made earlier by Czechoslovakia", which are as follows:

Translation

—in accordance with Article 8 of the Convention, within the territory of the Socialist Republic of Czechoslovakia judicial documents may not be served directly through the diplomatic or consular agents of another contracting State unless the document is to be served upon a national of the State in which the documents originate;

—in accordance with Article 10 of the Convention, within the territory of the Socialist Republic of Czechoslovakia judicial documents may not be served by another contracting State through postal channels nor through the judicial officers, officials or other competent persons;

—in accordance with Article 15, paragraph 2 of the Convention, Czechoslovakian judges may give judgement even if the conditions pursuant to Article 15, paragraph 1, have not been fulfilled;

—the provisions of Article 29 of the Convention concerning the extension of the Convention to territories for the international relations of which the contracting States are responsible are at variance with the Declaration of the United Nations General Assembly on the Granting of Independence to Colonial Countries and Peoples of 14 December 1960, and for this reason the Socialist Republic of Czechoslovakia does not consider itself to be bound by these provisions.

A copy of the original text of the declaration is attached.

By Note dated 31 March 1982 and received at the Ministry of Foreign Affairs on 1 April 1982, the Embassy of the Czechoslovak Socialist Republic communicated the following with regard to the above-cited declaration concerning Article 29 of the Convention:

``This declaration cannot be considered a reserve in view of the fact that it does not follow other purposes than a similar declaration made at the ratification of the Convention on the Taking of Evidence Aboard in Civil or Commercial Matters, though a different formulation was used.

By this declaration the Czechoslovak Socialist Republic expresses its disagreement of principle with the status of colonies and other dependent territories which is in contradiction with the Declaration of the United Nations General Assembly on the Granting of Independence to Colonial Countries and Peoples of December 14, 1960.

The Czechoslovak Socialist Republic, however, has no intention to exclude the application of the Convention on the relations with the territories on which the use of the Convention has been extended in accordance with its Art. 29.".

The States which have ratified the Convention were notified by the Netherlands Government of the accession on 26 October 1981. Since none of these States raised an objection to the accession within the period of six months specified in Article 28, paragraph 2, the said accession became perfect on 9 May 1982.

The provisions of the Convention will enter into force for the Czechoslovak Socialist Republic on 1 June 1982.

The Czechoslovak Government has designated the following authorities as the authorities referred to in Articles 2, 6 and 9 of the Convention;

competent for the Czech Socialist Republic:

Ministerstvo spravedlnosti Ceské socialistické republiky/Ministry of Justice of the Czech Republic 128 10 Praha 2, Vysehradská 16;

competent for the Slovak Socialist Republic:

Ministerstvo spravodlivosti Slovenskej socialistickej republiky/Ministry of Justice of the Slovak Republic 883 11 Bratislava, Suvorovova 12.

4 With the following declarations:

re Art. 2 and 18

The Ministry of Justice is designated as the Central Authority.

re Art. 6

The Danish court of law that has asked for the service to be made is designated as competent to complete the certificate in accordance with Article 6.

re Art. 9

The local judge of first instance—though, as regards the court of first instance at Copenhagen and the court of first instance of the city and of the canton of Arhus, the president of the court—is designated as competent to receive documents forwarded through consular channels in accordance with Art. 9.

re Art. 10

Denmark is unable to recognize the method of effecting service set out in Art. 10, para. c.

re Art. 15

Denmark avails itself of the power, provided for in Art. 15, second paragraph, to declare that the judge may give judgment in a matter even if the provisions of Art. 15, first paragraph, are not fulfilled.

re Art. 16

Denmark avails itself of the power, provided for in Art. 16, third paragraph, to declare that an application will not be entertained if it is made after the expiration of a period of one year following the date of judgment. The question of the re-hearing of a matter in which a person has been judged by default shall be decided in accordance with the rules of the code of procedure, Art. 373 and Art. 374, cf. Art. 434. According to these rules, any person against whom judgment is given by default in an action, in first instance may apply for a re-hearing of the matter if he can prove that the default cannot be imputed to him. The application for a re-hearing should be filed as soon as possible and may not be submitted after the expiration of a period of one year following the date of judgment.

5 With a declaration that the signing of the Agreement ``does not mean in any way a recognition of Israel'' by the Arab Republic of Egypt and that ``no treaty relation will arise between'' the two countries.

The Arab Republic of Egypt also declared that it ``opposes the use of the methods of transmitting abroad the judicial and extrajudicial documents according to Articles 8 and 10 of the Convention.''

In conformity with article 21 of the Convention the Arab Republic of Egypt has designated the Ministry of Justice as the central authority as provided for in Articles 2 and 18.

First paragraph of declaration withdrawn effective Jan. 25, 1980.

5a *Notification in conformity with Article 31, paragraph c, of the Convention*

The Republic of Estonia deposited its instrument of accession to the above-mentioned Convention with the Ministry of Foreign Affairs of the Kingdom of the Netherlands on 2 February 1996, in accordance with Article 28, paragraph 1, of the Convention.

The Convention entered into force for Estonia 1 October 1996.

The instrument of accession of the Republic of Estonia contains the following declarations:

``1) the Republic of Estonia is against the way of forwarding referred to in point c of Article 10;

2) on the basis of Article 15 the judge may give judgment under the said conditions;

3) on the basis of paragraph 3 of Article 16 for a period of three years;''

In accordance with the terms of Article 28, paragraph 1, of the Convention any State not represented at the Tenth Session of the Hague Conference on Private International Law may accede to the present Convention after it has entered into force in accordance with the first paragraph of Article 27 (viz: 10 February 1969).

In accordance with Article 28, paragraph 2, the Convention shall enter into force for such a State in the absence of any objection from a State, which has ratified the Convention (at present:

Belgium, Denmark, Egypt, Germany, Finland, France, Greece, Ireland, Israel, Japan, the Kingdom of the Netherlands, Luxemburg, Norway, Portugal, Spain, Sweden, Switzerland, Turkey, the United Kingdom of Great Britain and Northern Ireland and the United States of America) before such deposit, notified to the Ministry of Foreign Affairs of the Kingdom of the Netherlands within a period of six months after the date on which the said Ministry has notified it of such accession. For practical reasons this six months' period will in this case run from 15 March 1996 to 15 September 1996.

In accordance with Article 2, the Republic of Estonia designated as Central Authority the Estonian Ministry of Justice.

6 With the following declarations:

``1. The Ministry of Justice has been designated Central Authority, pursuant to the first paragraph of article 2 of the Convention.

2. The Central Authority (The Ministry of Justice) is acting as the authority presupposed in art. 9 of the Convention.

3. Finnish authorities are not obliged to assist in serving documents transmitted by using any of the methods referred to in sub-paragraphs (b) and (c) of art. 10 of the Convention.''

(Ministry of Justice was substituted for Ministry of Foreign Affairs as Central Authority by Note dated 31 March 1982, effective 1 June 1982.)

7 With the following declarations:

``1. In conformity with Articles 2 and 18 of the Convention, the Ministry of Justice, Civil Division of International Judicial Assistance (Ministàere de la Justice, Service Civil de l'Entraide judiciaire internationale), 13 Place Vendôme, Paris (1er), is designated as the Central Authority to the exclusion of all other authorities.

2. The authority competent to complete the certificate referred to in Article 6 is the Public Prosecutor of the Republic (Procureur de la République) in whose district the addressee of the document to be served resides.

3. The Public Prosecutor of the Republic (Procureur de la République) is likewise authorized to receive documents forwarded through consular channels in accordance with Article 9.

4. The Government of the French Republic declares that it is opposed, as has been provided for in Article 8, to the direct service, through diplomatic and consular agents of the contracting States, of documents upon persons who are not nationals of those States.

5. The Government of the French Republic declares that the provisions of the second paragraph of Article 15 have its approval. It furthermore declares, with reference to Article 16, paragraph 3, that an application for relief from the effects of the expiration of the time for appeal from a judgment will not be entertained if it is filed more than twelve months following the date of the judgment.''

7a On October 3, 1990 the German Democratic Republic acceded to the Federal Republic of Germany.

With the following declarations:

``(1) Requests for service shall be addressed to the Central Authority of the Land where the request is to be complied with. The Central Authority pursuant to Article 2 and paragraph 3 of Article 18 of the Convention shall be for

Baden-Württemberg	Präsident des Amtsgerichts Freiburg Holzmarkt 2 79098 Freiburg tel.: +49 (761) 205-0 fax: +49 (761) 205-1800
Bavaria	Präsidentin des Oberlandesgerichts München Prielmayerstrasse 5 80097 München tel.: +49 (89) 5597-1 fax: +49 (89) 5597-3575
Berlin	Senatsverwaltung für Justiz von Berlin Salzburger Strasse 21-25 10825 Berlin tel.: +49 (30) 9013-0 fax: +49 (30) 9013-2000
Brandenburg	Ministerium der Justiz und für Bundes-und Europaangelegenheiten des Landes Brandenburg Heinrich-Mann-Allee 107 14460 Potsdam tel.: +49 (331) 866-0 fax: +49 (331) 866-3080 / 3081
Bremen	Der Präsident des Landsgerichts Domsheide 16 28195 Bremen tel.: +49 (421) 361-4253 fax: +49 (421) 361-6713
Hamburg	Präsident des Amtsgerichts Hamburg Sievekingplatz 1 20335 Hamburg tel.: +49 (40) 42843-0 fax: +49 (40) 42843-4318 / 4319
Hessen	Hessisches Ministerium der Justiz und für Europaangelegenheiten Luisenstrasse 13 65185 Wiesbaden tel.: +49 (611) 32-0 fax: +49 (611) 32-2763
Lower Saxony	Niedersächisches Ministerium der Justiz und für Europaangelegenheiten Am Waterlooplatz 1 30169 Hannover tel.: +49 (511) 120-0 fax: +49 (511) 120-5170 / 5181
Mecklenburg-Western Pomerania	Justizministerium des Landes Mecklenburg-Vorpommern Demmlerplatz 14 19053 Schwerin tel.: +49 (385) 588-0 fax: +49 (385) 588-3453
Northrhine-Westphalia	Präsident des Oberlandesgerichts Düsseldorf Cecilienallee 3 40474 Düsseldorf tel.: +49 (211) 4971-0 fax: +49 (211) 4971-548
Rhineland-Palatinate	Ministerium der Justiz des Landes Rheinland-Pfalz Ernst-Ludwig-Strasse 3 55116 Mainz tel.: +49 (6131) 16-0 fax: +49 (6131) 16-4887
Saarland	Ministerium der Justiz des Saarlandes Zähringerstrasse 12 66119 Saarbrücken tel.: +49 (681) 501-00 fax: +49 (681) 501-5855
Saxony	Präsident des Oberlandesgerichts Dresden Postfach 12 07 32 01008 Dresden

Saxony-Anhalt	Ministerium für Justiz des Landes Sachsen-Anhalt Wilhelm-Höpfner-Ring 6 39116 Magdeburg tel.: +49 (391) 567-01 fax: +49 (391) 567-4226
Schleswig-Holstein	Ministerium für Justiz, Bundes-und Europaangelegenheiten des Landes Schleswig-Holstein Lorentzendamm 35 24103 Kiel tel.: +49 (431) 988-0 fax: +49 (431) 988-3870
Thuringia	Thüringer Ministerium für Justiz und Europaangelegenheiten Alfred-Hess-Strasse 8 99094 Erfurt tel.: +49 (361) 37-95200 fax: +49 (361) 37-95155

The Central Authorities are empowered to have requests for service complied with directly by postal channels if the conditions for service in accordance with paragraph 1(a) of Article 5 of the Convention have been fulfilled. In that case the competent Central Authority will hand over the document to the postal authorities for service. In all other cases the local court (Amtsgericht) in whose district the documents are to be served shall be competent to comply with requests for service. Service shall be effected by the registry of the local court. Formal service (paragraph 1 of Article 5 of the Convention) shall be permissible only if the document to be served is written in, or translated into, the German language.

(2) The Central Authority shall complete the certificate (paragraphs 1 and 2 of Article 6 of the Convention) if it has itself arranged for the request for service to be complied with directly by postal channels; in all other cases this shall be done by the registry of the local court.

(3) The Central Authority of the Land where the documents are to be served and the authorities competent under Section 1 of the Act of 18th December 1958 implementing the Convention on Civil Procedure, signed at The Hague on 1st March 1954, to receive requests from consuls of foreign States, shall be competent to receive requests for service transmitted by a foreign consul within the Federal Republic of Germany (paragraph 1 of Article 9 of the Convention). Under that Act the president of the regional court (Landgericht) in whose district the documents are to be served shall be competent; in his place the president of the local court shall be competent if the request for service is to be complied with in the district of the local court which is subject to his administrative supervision.

(4) In accordance with paragraph 2(a) of Article 21 of the Convention, the Government of the Federal Republic of Germany objects to the use of methods of transmission pursuant to Articles 8 and 10. Service through diplomatic or consular agents (Article 8 of the Convention) is therefore only permissible if the document is to be served upon a national of the State sending the document. Service pursuant to Article 10 of the Convention shall not be effected." At the time of the deposit of its instrument of ratification the Federal Republic of Germany declared that the said Convention shall also apply to Land Berlin with effect from the date on which it enters into force for the Federal Republic of Germany.

By a Note dated November 19, 1992 addressed to the Ministry of Foreign Affairs of the Kingdom of the Netherlands, the Government of the Federal Republic of Germany made in conformity with Article 21, second paragraph, letter b, of the above-mentioned Convention the following declaration:

1. Notwithstanding the provisions of the first paragraph of Article 15, a German judge may give judgement even if no certificate of service or delivery has been received, if all the following *conditions are fulfilled:*

—the document was transmitted by one of the methods provided for in this Convention,

—a period of time of not less than six months, considered adequate by the judge in the particular case, has elapsed since the date of the transmission of the document,

—no certificate of any kind has been received, even though every reasonable effort has been made to obtain it through the competent authorities of the State addressed.

2. An application for relief in accordance with Article 16 will not be entertained if it is filed after the expiration of one year following the termination of the time-limit which has not been observed."

7b *Notification in conformity with Article 31 of the Convention*

In accordance with Article 26 of the Convention the Ambassador of Greece at The Hague signed on 20 July 1983 for the Hellenic Republic the above-mentioned Convention as follows:

P. ECONOMOU 20 juillet 1983

and deposited on the same date the instrument of ratification by the Hellenic Republic of the Convention.

In conformity with its Article 27, paragraph 2, the Convention entered into force for the Hellenic Republic on 18 September 1983.

The Greek Government designated the Department of Administrative and Judicial Affairs of the Ministry of Foreign Affairs of the Hellenic Republic as the Central Authority pursuant to Article 2 of the Convention.

By a Note dated 23 November 1989 addressed to the Ministry of Foreign Affairs of the Kingdom of the Netherlands, the Government of

the Hellenic Republic

made in conformity with Article 15, second paragraph, and Article 21, second paragraph, of the above-mentioned Convention the following declaration:

Translation

The judges of the Hellenic Republic may give judgment if all the conditions in Article 15, paragraph 2, letters *(a), (b)* and *(c), of the Convention are fulfilled even if no certificate of service or delivery has been received.*

By Note dated 13 July 1999, the Embassy of Greece informed the depositary in conformity with Article 5, paragraph 3, of the Convention of the following declaration:

``Greece declares that formal service will be effected only if the document to be served is written in, or translated into, Greek."

By Note dated 21 April 2000, the Embassy of Greece informed the depositary in conformity with Article 21 of the Convention of the following objections:

``Greece is opposed to the method of service provided in Article 8, unless the document to be served is addressed to a citizen of the requesting State.

Greece is opposed to the method of services provided in Article 10."

7c Accession for Hungary

N.B.: According to Article 28, second paragraph, the Convention will enter into force for Hungary in the absence of any objection from a State which has ratified the Convention before such deposit, notified to the Ministry of Foreign Affairs of the Kingdom of the Netherlands within a period of six months after the date on which the said Ministry had notified it of such accession. For practical reasons this six months' period will in this case run from 1 September 2004 to 1 March 2005.

Declarations

Articles: 2,5,6,8,9,10,15,16

To Article 2

In the Republic of Hungary the Ministry of Justice is designated as the Central Authority in accordance with Article 2 of the Convention.

To Article 5

The service methods prescribed in Paragraph 1 of Article 5 of the Convention shall only be applied in the Republic of Hungary in case the document to be served is accompanied by an official translation into the Hungarian language.

To Article 6

The certificate of service prescribed in Article 6 of the Convention is completed in the Republic of Hungary by the court that has performed such service.

To Article 8

The Republic of Hungary objects to the direct service of documents by foreign diplomatic or consular agents on the territory of the Republic of Hungary unless the addressee is a national of the sending state of the diplomatic or consular agent.

To Article 9

In accordance with Article 9 of the Convention in the Republic of Hungary the Ministry of Justice receives the documents to be served sent through consular channels.

To Article 10

The Republic of Hungary objects to the use of the service methods prescribed in Article 10 of the Convention.

To Article 15

The Republic of Hungary declares that the Hungarian courts may give judgement if all the conditions set out in Paragraph 2 of Article 15 of the Convention are fulfilled.

To Article 16

The Republic of Hungary declares that applications for relief set out in Article 16 of the Convention will not be entertained if it is filed more than one year after the date of judgement.

7d Iceland—Accession

According to Article 28, second paragraph, the Convention will enter into force for Iceland in the absence of any objection from a State which has ratified the Convention before the deposit of the instrument of accession, notified to the Ministry of Foreign Affairs of the Kingdom of the Netherlands within a period of six months after the date on which the said Ministry had notified it of such accession.

For practical reasons this six months' period will in this case run from 1 December 2008 to 1 June 2009.

In the absence of any objections the Convention will, in accordance with its Article 28, third paragraph, enter into force for Iceland on 1 July 2009.

Central Authority & practical information

Ministry of Justice and Ecclesiastical Affairs

	Contact details:
Address:	Ministry of Justice and Ecclesiastical Affairs Skuggasundi 150 Reykjavik Iceland
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General website:	http://eng.domsmalaraduneyti.is/ministry/
Contact person:	
Languages spoken by staff:	English

Declarations Reservations

Articles: 10,15,16

Iceland objects to the use of such methods of service of documents on its territory as mentioned in paragraphs (b) and (c) of Article 10 of the Convention.

Iceland declares that a judge, notwithstanding the provisions of paragraph 1 of Article 15, may give judgment even if no certificate of service or delivery has been received, if all the conditions provided for in paragraph 2 of Article 15 have been fulfilled.

In accordance with Article 16, paragraph 3, of the Convention, Iceland declares that an application for relief will not be entertained if it is filed after the expiration of a period of one year following the date of the judgment.

7e India—Central Authority & Practical Information

	Contact details:
Address:	The Ministry of Law and Justice Department of Legal Affairs 4th Floor, A-Wing, Shastri Bhavan, 110 001 New Delhi India
Telephone:	+ 91 (11) 23387557, 23384777, 23384617
Fax:	+ 91 (11) 23384241, 23387259, 23382733
General website:	http://lawmin.nic.in/
Contact person:	Mr V. Ravindran Tel.: +91 (11) 2338 7543
Translation requirements (Art. 5(3)):	All requests for service of documents should be in English language or accompanied by an English translation

Declarations Reservations

Articles: 10,15,16

All requests for service of documents should be in English language or accompanied by an English translation;

The service of judicial documents through diplomatic or consular channels will be limited to the nationals of the State in which the documents originate;

India is opposed to the methods of service provided in Article 10;

In terms of Article 15, Indian courts may give judgment if all conditions specified in the second paragraph of that Article are fulfilled; and

For purposes of Article 16, an application for relief will not be entertained if filed after the expiration of one year following the date of the judgment.

7f *Notification in conformity with Article 31*

Ireland deposited, in accordance with Article 26, paragraph 2, of the above-mentioned Convention, its instrument of ratification with the Ministry of Foreign Affairs of the Kingdom of the Netherlands on 5 April 1994.

The instrument of ratification contains the following declarations:

``Article 3

The authority or judicial officer competent under the laws of Ireland for the purpose of Article 3 of the Convention are the Central Authority, a practising Solicitor, a Country Registrar or a District Court Clerk.

Article 15

Pursuant to the Second paragraph of Article 15 a Judge in Ireland may give judgment even if no certificate of service or delivery has been received, if the conditions set out in the second part of Article 15 of the Convention are fulfilled.

and the following objections:

Article 10

In accordance with the provision in Article 10 of the Convention the Government of Ireland objects to

(i) the freedom under Article 10(b) of judicial officers, officials or other competent persons of the State of origin to effect service in Ireland of judicial documents directly to judicial officers, officials or other competent persons and

(ii) the freedom under Article 10(c) of any person interested in a judicial proceeding to effect service in Ireland of judicial documents directly through judicial officers, officials or other competent persons

but this is not intended to preclude any person in another contracting State who is interested in a judicial proceeding (including his lawyer) from effecting service in Ireland directly through a solicitor in Ireland."

The Master of the High Court is designated as the Central Authority for Ireland in accordance with Article 2 and shall be the appropriate authority for completion of certificates in the form of the model annexed to the Convention.

The Convention entered into force for Ireland on 4 June 1994.

8 With the following declarations and reservations:

``a) The Central Authority in Israel within the meaning of Articles 2, 6 and 18 of the Convention is: The Director of Courts, Directorate of Courts, Russian Compound, Jerusalem;

b) The State of Israel, in its quality as State of destination, will, in what concerns Article 10, paragraphs b) and c), of the Convention, effect the service of judicial documents only through the Directorate of Courts, and only where an application for such service emanates from a judicial authority or from the diplomatic or consular representation of a Contracting State;

c) An application to relieve a defendant from the effects of the expiration of the time of appeal from a judgment within the meaning of Article 16 of the Convention will be entertained only if filed within one year from the date of the judgment in question."

8a *Notification in conformity with Article 31, paragraph a and e of the Convention*

In accordance with Article 26, paragraph 2, the Italian Republic deposited its instrument of ratification of the Convention with the Ministry of Foreign Affairs of the Kingdom of the Netherlands on 25 November 1981.

On the occasion of the deposit of the instrument of ratification the Italian Government notified of the following:

Translation

``a) pursuant to Articles 2 and 18, ``l'Ufficio unico degli ufficiali giudiziari presso la corte d'appello di Roma" (the registry of the court of appeal in Rome) is designated as the Central Authority for the purpose of Article 5;

b) ``gli uffici unici degli ufficiali giudiziari costituiti presso le corti di appello e i tribunali e gli ufficiali giudiziari addetti alle preture" (the registries of the courts of appeal and other courts, and the bailiffs appointed to the courts of first instance) are competent to issue the certificate pursuant to Article 6;

c) ``gli uffici unici degli ufficiali giudiziari presso le corti di appello e i tribunali e gli ufficiali giudiziari addetti alle preture'' (the registries of the courts of appeal and other courts, and the bailiffs appointed to the courts of first instance) are competent to receive for the purpose of service, documents forwarded by consular or diplomatic authorities pursuant to Article 9;

d) the costs proceeding from each request for service in accordance with Article 5, first paragraph, under a and b, which requires the employment of a bailiff, have to be paid in advance in the size of 6,000 lire, except adjustment at the time of restitution of the notified document.

However, the costs in relation to the notified document pursuant to Article 12, paragraph 2, of the Convention, can be paid after the restitution in a way specifically fixed by the bailiff.

The Italian State shall not require any advance or repayment of costs for service of documents requested by the Contracting States in so far as those States for their parts shall not require the payment or repayment of costs for documents originated from Italy.''.

In accordance with Article 27, paragraph 2, the Convention entered into force for the Italian Republic on 24 January 1982.

8b With the following declarations and reservations:

``(1) The Minister for Foreign Affairs is designated as the Central Authority which receives requests for service from other contracting States, pursuant to the first paragraph of Article 2.

(2) The District Court which has rendered judicial aid with respect to the service is designated as the authority competent to complete the certificate in the form of the model annexed to the Convention, pursuant to the first paragraph of Article 6.

(3) The Minister for Foreign Affairs is designated as the authority competent to receive documents transmitted through consular channels, pursuant to the first paragraph of Article 9.

(4) It is declared that the Government of Japan objects to the use of the methods of service referred to in subparagraphs (b) and (c) of Article 10.

(5) It is declared that Japanese courts may give judgment if all the conditions specified in the second paragraph of Article 15 are fulfilled.''

8c The Republic of Korea made the following declarations:

``1. Pursuant to Article 8, the Republic of Korea objects to service of judicial documents directly through diplomatic or consular agents upon persons in its territory, unless the document is to be served upon a national of the State in which the documents originate.

2. Pursuant to Article 10, the Republic of Korea objects to the following:

a) the freedom to send judicial documents, by postal channels, directly to persons abroad,

b) the freedom of judicial officers, officials or other competent persons of the State of origin to effect service of judicial documents directly through the judicial officials or other competent persons of the State of destination, *c)* the freedom of any person interested in a judicial proceeding to effect service of judicial documents directly through the judicial officers, officials or other competent persons of the State of destination.

3. Pursuant to Article 15, paragraph 2, the judge of the Republic of Korea may give judgment even if no certificate of service or delivery has been received if all the following conditions are fulfilled:

a) the document was transmitted by one of the methods provided for in this Convention,

b) a period of time of not less than six months, considered adequate by the judge in the particular case, has elapsed since the date of the transmission of the document,

c) no certificate of any kind has been received, even though every reasonable effort has been made to obtain it through the competent authorities of the State addressed.

Designation pursuant to Articles 2 and 6

1. Central Authority

Ministry of Court Administration

Att.: Director of International Affairs

967, Seocho-dong, Seocho-gu

SEOUL 137-750

Republic of Korea

2. Authority competent to complete the certificate of service

In addition to the Central Authority, the clerk of the court for the judicial district in which the person is to be served."

The Convention entered into force for the Republic of Korea 1 August 2000.

9 **N.B.:** In accordance with its Article 28, paragraph 2, the Convention will enter into force for the State of Kuwait on 1 December 2002 in the absence of any objection from a State which has ratified the Convention before 8 May 2002, within a period of six months after the date on which the Ministry has notified the accession. For practical reasons this six months' period will run from 21 May 2002 to 21 November 2002.

In accordance with Articles 2 and 18 of the Convention, the ``Department of International Relations at the Ministry of Justice of the State of Kuwait'' has been designated as Central Authority.

9a Latvia—Central Authority & practical information

Central Authority(ies):

Ministry of Justice

Contact details:

Address:	Ministry of Justice Brivibas blvd. 36 Riga, LV-1536 Latvia
Telephone:	+371 6716 2669 +371 6716 2671
Fax:	+371 6721 0823 +371 6728 5575
E-mail:	tm.kanceleja@tm.gov.lv
General website:	http://www.tm.gov.lv/en/
Contact person:	Ms Liene Jenca
Languages spoken by staff:	English, Russian, Latvian
Forwarding authorities (Art. 3(1)):	Ministry of Justice
Methods of service (Art. 5(1)(2)):	According to the code of civil procedure, in all cases the local court (court of first instance) in whose district the documents are to be served shall be competent to comply with requests for service. For more information on methods of service, see European Judicial Network in Civil and Commercial Matters—Service of Documents—Latvia.
Art. 8(2):	No opposition
Art. 10(a):	No opposition
Art. 10(b):	No opposition
Art. 10(c):	No opposition
Art. 15(2):	No declaration of applicability
Art. 16(3):	No declaration of applicability
Derogatory channels (bilateral or multilateral agreements or internal law permitting other transmission channels) (Arts. 11, 19, 24 and 25) Disclaimer: Information may not be complete or fully updated—please contact the relevant authorities to verify this information.	To consult bilateral and multilateral treaties to which Latvia is a party, see: multilateral agreements—Ministry of Foreign Affairs bilateral agreements—Ministry of Foreign Affairs Council Regulation (EC) No 1348/2000 on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters (Brussels, 29 May 2000) (European Judicial Atlas—Service of Documents).
Useful links:	international judicial cooperation—Ministry of Justice

Latvia—Competent Authority (Art. 9)

Ministry of Justice

Brivibas blvd 36

RIGA, LV—1536

Latvia

tel.: +371 6716 2669 / +371 6716 2671

fax: +371 6721 0823 / +371 6728 5575

website: http://www.tm.gov.lv/en/

languages of communication: English, Russian, Latvian

contact person: Ms Liene Jenca

Latvia—Competent Authority (Art. 6)

In accordance with paragraph 1 of Article 6 of the Convention the Authority of the Republic of Latvia designated to complete a certificate in the form of the model, annexed to the Convention, is the respective district (city) court competent for service of documents under the Civil Procedure Law of the Republic of Latvia.

Latvia—Forwarding authority (Art. 3)

In accordance with Article 3 of the Convention the Ministry of Justice of the Republic of Latvia is the competent authority to forward a request for service of documents to the foreign Central Authority.

9b ``…

And whereas it is provided in Article 2 of the said Convention, the Republic of Lithuania designates the Ministry of Justice of the Republic of Lithuania as a Central Authority to receive requests for service coming from other Contracting States;

And whereas it is provided in Article 8 of the said Convention, the Republic of Lithuania declares that it opposes to the ways of service of documents provided in this Article, unless the documents are to be served upon a national of the State in which the documents originate;

And whereas it is provided in Article 10 of the said Convention, the Republic of Lithuania declares that it is opposed to the ways of service of documents provided in this Article;

And whereas it is provided in paragraph 2 of Article 15 of the said Convention, the Republic of Lithuania declares that the judge of the Republic of Lithuania may give judgment even if no certificate of service or delivery has been received, if all conditions of paragraph 2 of Article 15 are fulfilled;

And whereas it is provided in paragraph 2 of Article 16 of the said Convention, the Republic of Lithuania declares that an application for relief will not be entertained if it is filed after the expiration of one year following the date of the final judgement; …".

9c With the following declarations:

``1. The Public Prosecutor at the Superior Court of Justice has been designated as the Central Authority within the meaning of Article 2 of the Convention. He is also competent to receive the documents forwarded through the channels referred to in Article 9, para. 1, of the Convention.

2. In accordance with Article 8, the Luxembourg Government is opposed to diplomatic and consular agents directly serving within its territory judicial documents on persons other than nationals of their own country.

(3. In accordance with Article 10, the Luxembourg Government is opposed to judicial documents being sent through postal channels to persons residing within its territory.*

* Luxembourg communicated the withdrawal of this declaration by a Note dated 2 June 1978).

4. When foreign judicial documents are served, in connection with Articles 5(a) and 10(b) and (c), through the intermediary of a Luxembourg official, they must be drawn up in French or German or accompanied by a translation into one of those languages.

5. The Luxembourg Government declares that notwithstanding the provisions of Article 15, para. 1, of the Convention, its judges can enter judgment if the conditions set out in para. 2 of the said Article are fulfilled.

6. In accordance with Article 16, para. 3, of the Convention, the Luxembourg Government declares that the applications referred to in para. 2 of the said Article will not be entertained if they are filed after the expiration of a period of one year following the date of the judgment."

9d In conformity with Article 21 of the Convention the Government of Malawi has designated the Registrar of the High Court of Malawi (P.O. Box 30244, Chichiri, Blantyre 3, Malawi) as the Central Authority as provided for in Articles 2 and 18.

With a declaration designating the Registrar of the High Court of Malawi, P.O. Box 30244, Chichiri, Blantyre 3, Malawi, as the Central Authority referred to in Article 2.

10 The instrument of accession of Mexico contains the following declarations:

Courtesy translation

I. In relation to Article 2, the Government of Mexico designates the General Direction of Legal Affairs of the Ministry of Foreign Affairs (la Dirección General de Asuntos Jurídicos de la Secretaría de Relaciones Exteriores) as the Central Authority to receive requests for service of judicial and extrajudicial documents coming from other Contracting States and which will in turn forward them to the competent judicial authority for its compliance.

II. In relation to Article 5, when the judicial and extrajudicial documents to be served in Mexican territory are written in a language other than Spanish, they must be accompanied by the corresponding translation.

III. In relation to Article 6, the judicial authority responsible of the matter will also be responsible for issuing the certificate concerning the service of the document, according to the model. The Central Authority will only validate the certificate.

IV. In relation to Article 8, the Contracting States shall not be able to effect service of judicial documents directly through its diplomatic or consular agencies in Mexican territory, unless the document is to be served upon a national of the State in which the documents originate and provided that such a procedure does not contravene public law or violate individual guarantees.

V. In relation to Article 10, the United Mexican States are opposed to the direct service of documents through diplomatic or consular agents to persons in Mexican territory according to the procedures described in sub-paragraphs *a), b),* and *c)*, unless the judicial authority exceptionally grants the simplification different from the national regulations and provided that such a procedure does not contravene public law or violate individual guarantees. The request must contain the description of the formalities whose application is required to effect service of the document.

VI. In relation to the first paragraph of Article 12, the costs occasioned by serving judicial or extrajudicial documents will be covered by the applicant, unless the State in which the documents originate does not demand payment for those services from Mexico.

VII. In relation to Article 15, second paragraph, the Government of Mexico does not recognise the faculty of the judicial authority to give judgment when the defendant has not appeared and there is no communication establishing that the document was served, or that documents originating outside the country were indeed delivered, according to sub-paragraphs *a)* and *b)* of the first paragraph.

VIII. In relation to Article 16, third paragraph, the Government of Mexico declares that such an application will not be admitted if it is filed later than a year following the date of the decision, or a longer period which the judge may deem reasonable.

The Government of Mexico will understand that, in cases in which sentence has been passed without the defendant having been duly summoned, the nullity of the proceedings will be established under the provisions of the applicable legislation.

By a Note dated 7 May 2001, the Embassy of Mexico at The Hague informed the depositary of the following:

``(…) besides English and French, request forms addressed to the Mexican Central Authority should be filed in Spanish, according to Article 7 of the Convention."

10a Monaco—Central Authority & practical information

Direction des Services judiciaires

Address:	Direction des Services judiciaires Palais de Justice 5, rue Colonel Bellando de Castro MC—98000 MONACO
Telephone:	+377 98 98 88 11
Fax:	+377 98 98 85 89

Forwarding authorities (Art. 3(1)): JL'huissier de Justice qui, pour les significations d'actes aux personnes qui n'habitent pas dans la Principauté, remet l'acte au parquet du procureur général, lequel le fait suivre à la Direction des Services Judiciaires.

Methods of service (Art. 5(1)(2)): Les articles 136 à 183 du Code de procédure civile prévoient la signification.

Notification formelle (art. 5(1)(a))

Notification formelle: à la demande d'une partie, ou d'office, il est possible de faire signifier l'acte par voie de signification, accomplie par un huissier de justice. Dans cas, lorsqu'un acte est reçu de l'étranger, la Direction des services judiciaires le transmet au Parquet Général qui en saisi un huissier.

En pratique, il n'est recouru à la voie de signification par un huissier de justice, qu'en cas de demande expresse du requérant.

Da manière générale, dans la pratique, la *simple remise* (art. 5(2)) est utilisée.

Dans le cas de la notification par voie de simple remise (mode principal), l'acte est transmis au Parquet Général. Il est ensuite remis au destinataire par les soins d'un agent de la Sûreté Publique, requis à cette fin par le Parquet. Cette notification est faite sans frais

Translation requirements (Art. 5(3)): En dehors des exigences de l'article 7 de la Convention et dans la mesure où les indications du formulaire permettent d'obtenir les renseignements suffisants sur la nature et l'objet de l'acte, la Principauté de Monaco n'a pas d'exigence particulière pour ce qui concerne les traductions des actes.

En revanche, au cas par cas, des demandes d'éclaircissement pourront être demandées à la partie requérante

Costs relating to execution of the request for service (Art. 12): Aucun frais pour les services de l'Etat, aucune taxe ne sont perçus à l'occasion d'une notification internationale en provenance d'un Etat contractant.

Simple remise (art. 5(2))

Dans les cas d'une simple remise de l'acte, dans la mesure où celle-ci est assurée par les services de la Sûreté Publique, la notification est gratuite pour le requérant.

Time for execution of request: A Monaco, les délais d'exécution d'une demande de notification par remise et la remise effective excèdent rarement un mois.

Judicial officers, officials or other competent persons (Art. 10(b)): *Huissiers de Justice :*

Mme Marie-Thérèse ESCAUT-MARQUET
O. de l'Ordre de Saint-Charles
29, boulevard des Moulins
(Téléphone : +377 93.30.74.03)

Mme Claire NOTARI
``L'Héraclès'' 17
boulevard Albert Ier
(Téléphone : +377 97.97.09.09)

Derogatory channels (bilateral or multilateral agreements or internal law permitting other transmission channels) (Arts. 11, 19, 24 and 25): La Convention franco-monégasque du 2 décembre 1949 relative à l'aide mutuelle judiciaire et l'Échange de notes des 24 août/28 septembre 1961 entre la Suisse et Monaco concernant le règlement des questions relatives à la notification des actes judiciaires et extrajudiciaires en matière civile et commerciale sont maintenus.

Competent Authority (Art. 6, 9)

la Direction des Services judiciaires
Palais de Justice
5, rue Colonel Bellando de Castro
MC—98000 MONACO
Tel.: +377 98 98 88 11
Fax: +377 98 98 85 89

Declarations

Articles: 8,10,15,16

Translation

1. The Principality of Monaco declares, as provided in article 8, that it is opposed to the service of judicial documents directly through the diplomatic or consular agents of the contracting States upon persons who are not nationals of these States.

2. The Principality of Monaco declares that it objects to the exercise of the freedom described in article 10, paragraph 1 (a).

3. The Principality of Monaco declares that it approves the dispositions laid down in article 15,

paragraph 2.

4. With regard to article 16, paragraph 3, the Principality of Monaco declares that an application to relieve a defendant who has not appeared from the effects of the expiration of the time for appeal will no longer be entertained if it is filed more than twelve months after the date of the judgment.

10b With the following declarations:

``1. The Public Prosecutor at the District Court of The Hague is designated for the Netherlands as the Central Authority referred to in Article 2 of the Convention.

The office of the Public prosecutor is situated at Juliana van Stolberglaan 2-4, The Hague.

2. Pursuant to Article 18, paragraph 1, of the Convention, the Public Prosecutor at a District Court other than that of The Hague is likewise competent to receive requests and serve documents in accordance with Articles 3 to 6 of the Convention within the area of jurisdiction of such other Court.

3. The Public Prosecutor at the District Court in the area of jurisdiction where service of the document has been requested is competent to complete a certificate as referred to under Article 6 of the Convention.

4. The Public Prosecutor at the District Court in the area of jurisdiction where service of the document is requested has been designated for the Netherlands as the authority referred to in Article 9, paragraph 1, of the Convention which is competent to serve documents forwarded through consular channels.

5. Notwithstanding the provisions of Article 15, paragraph 1, of the Convention, the Netherlands Court may give judgment, even if no certificate of service or delivery has been received, if all the following conditions are fulfilled:

a) the document was transmitted by one of the methods provided for in this Convention;

b) a period of time of not less than six months, considered adequate by the judge in the particular case, has elapsed since the date of the transmission of the document;

c) no certificate, either of service or of delivery, has been received even though every reasonable effort has been made to obtain it through the competent authorities.

6. An application for relief from the effects of the expiration of the time for appeal as provided for in Article 16 is only admissible, if it is submitted within a year, to be calculated from the date on which the judgment is given.''

* By letter dated 13 November 2002, the Permanent Bureau of the Hague Conference was informed of the new contact details of the Central Authority:

De Officier van Justitie
Postbus 20302
2500 EH THE HAGUE

In accordance with Article 27, paragraph 2, the Convention shall enter into force for the Kingdom of the Netherlands (for the Kingdom in Europe) on January 2, 1976.

In accordance with Article 29, paragraph 2, the Kingdom of the Netherlands declared on 28 May 1986 that the above-mentioned Convention shall extend to Aruba.

In conformity with Article 29, paragraph 3, the Convention will enter into force for Aruba on 27 July 1986.

Notification in conformity with Article 31, letter e, of the Convention

The competent authority* designated by Aruba is:

Procurator General
L.G. Smith Boulevard 42-44
Oranjestad, Aruba
tel.: (297) 834-387 / 829-132
fax: (297) 838-891

* modification notified to the depositary by the Cabinet of the Minister Plenipotentiary of Aruba at The Hague, by letter of 1 November 2000.

as the authority for Aruba referred to in Article 21 of the Convention.

10c With the following declarations:

``1. In accordance with Article 2, the Ministry of Justice, Oslo/Dep, is designated as the Central Authority.

2. In accordance with Article 6, the County or Town Court in whose district the document has been served is designated for the purpose of completing the certificate in the form annexed to the Convention.

3. In accordance with Article 9 first paragraph, the County or Town Court in whose district the person to be served is a resident or is staying, is designated as receiver of documents forwarded through consular channels.

4. The Government of Norway is opposed to the use of such methods of service or transmission of documents on its territory as mentioned in Articles 8 and 10 of the Convention.

5. Norwegian courts may give judgment when all the conditions specified in the second paragraph of Article 15 are fulfilled.

6. In accordance with the third paragraph of Article 16, applications for relief according to Article 16 will not be entertained if they are delivered to the competent Norwegian authorities after the expiration of three years following the date of the judgment.''

10d *Notification in conformity with Article 31, paragraph c, of the Convention*

Pakistan deposited its instrument of accession to the above-mentioned Convention with the Ministry of Foreign Affairs of the Kingdom of the Netherlands on 7 December 1988 in accordance with Article 28, paragraph 1.

The provisions of the Convention entered into force for Pakistan on 1 August 1989 in accordance with Article 28, paragraph 3.

The Permanent Bureau of the Hague Conference on private international law presents its compliments to the Diplomatic Missions of the Member States and to the National Organs and has the honour to inform them that, by a Note dated 1 February 1990, the Government of

Pakistan

informed the Ministry of Foreign Affairs of the Kingdom of the Netherlands of the designation of authorities, in conformity with Article 21 of the above-mentioned convention, and made declarations. The text of the communication is as follows:

``*the Government of Pakistan has designated the Solicitor, Ministry of Law and Justice to the Government of Pakistan in Islamabad, as the central authority, for receiving requests for service coming from other Contracting States and Registrars of Lahore High Court Lahore, Peshawar High Court Peshawar, Baluchistan High Court Quetta, and the High Court of Sind, Karachi, `other authorities' in addition to the Central Authority, within their respective territorial jurisdictions.*

The certificate prescribed by Article 6 of the Convention if not completed by a judicial authority shall be completed or countersigned by the Registrars of the High Courts.

For the purposes of Article 8 of the Convention it is hereby declared that the Government of Pakistan is opposed to service of Judicial Documents upon persons, other than nationals of the requesting States, residing in Pakistan, directly through the Diplomatic and Consular agents of the requesting States. However, it has no objection to such service by postal channels directly to the persons concerned [*Article 10(a)*] *or directly through the judicial officers of Pakistan in terms of Article 10(b) of the Convention if such service is recognised by the law of the requesting State.*

In terms of the second paragraph of Article 15 of the Convention, it is hereby declared that notwithstanding the provision of the first paragraph there-of the judge may give judgement even if no certificate of service or delivery has been received, if the following conditions are fulfilled:—

a) the document was transmitted by one of the methods provided for in the Convention;

b) the period of time of not less than 6 months, considered adequate by the Judge in the particular case, has elapsed since the date of transmission of the document; and

c) no certificate of any kind has been received even though every reasonable effort has been made to obtain it through the competent authorities of the State addressed.

As regards Article 16, paragraph 3, of the Convention it is hereby declared that in case of ex-parte decisions, an application for setting it aside will not be entertained if it is filed after the expiration of the period of limitation prescribed by law of Pakistan.''

11 *Notification in conformity with Article 31, paragraph c, of the Convention*

The Republic of *Poland* deposited with the Ministry of Foreign Affairs of the Kingdom of the Netherlands its instrument of accession to the above-mentioned Convention on 13 February 1996, in accordance with Article 28, paragraph 1, of the Convention.

The instrument of accession of the Republic of Poland contains a declaration the text of which is attached and the translation of which is as follows:

Translation

—The Republic of Poland has decided to join the Convention, declaring that it is opposed to the modes of service specified in Articles 8 and 10 within its territory;

The instrument of accession was accompanied by a declaration the text of which is also attached and the translation of which is as follows:

In compliance with Article 21, the following actions are undertaken:

Article 2, Paragraph 1—the Central Authority designated to receive requests for service coming from another contracting State shall be the Ministry of Justice.

Article 18—other authorities (in addition to the Central Authority) designated to received requests for service are Presidents of the voivodship courts.

Article 6—the authority designated to complete a certificate of service in the Republic of Poland shall be the court that has performed such service.

Article 9, Paragraph 1—the authorities designated for that purpose shall be the voivodship courts.

Articles 8 and 10—the Republic of Poland declares that it is opposed to the modes of service specified in Articles 8 and 10 within its territory.

11a *Declaration of Portugal.*—Legal Affairs Department of Ministry of Justice has been designated as Central Authority, in accordance with Art. 2, paragraph 1, of Convention. Justice Department officials: court clerks (escrivaes) and process-servers (officiais de diligencias) have been designated as persons competent to prepare certificate referred to in Article 6 of Convention. In accordance with Art. 8, paragraph 2, of Convention, the Portuguese government grants diplomatic and consular agents power to serve documents on their own nationals only. Portuguese government declares that, notwithstanding provisions of first paragraph of Art. 15 of Convention its judges may give judgment if conditions listed in paragraph 2 of said Art. are fulfilled. In accordance with Art. 16, paragraph 3 of Convention, Portuguese government states that applications referred to in Art. 16, paragraph 2, will not be considered if they are made after expiration of a period of one year from date of judgment.

By note dated 9 February 1999, Portugal extended the Convention in accordance with Article 29, paragraph 2, to Macau. In accordance with Article 29, paragraph 3, the Convention entered into force for Macau on 12 April 1999.

See supra, under CHINA, Macau Special Administrative Region.

[On 7 October 1999, Portugal communicated the following to the depositary:

``1. In accordance with Article 18 of the Convention, the Ministério Público de Macau is designated as the competent authority in Macau to receive requests for service coming from other Contracting States and to proceed in conformity with the provisions of Articles 3 to 6.

The address of the Ministério Público de Macau is as follows:

Ministério Público de Macau

Praceta 25 de Abril

Macau

Phone: 326736

Fax: 326747

2. Court clerks (escrivaes de direito) and deputy court clerks (escrivaes adjuntos) from the Supreme Court of Justice (Tribunal Superior de Justiça) of Macau are entitled to complete in Macau the certificate provided for [in] Articles 6 and 9 of the Convention.

3. In accordance with the provisions of the second paragraph of Article 8 of the Convention, Portugal reiterates that it recognizes to the diplomatic or consular agents the right to forward documents, for the purpose of service, exclusively to the nationals of the State in which the documents originate.

4. The Ministério Público de Macau is also designated as the competent authority in Macau to receive documents forwarded through consular channels, in accordance with Article 9 of the Convention.

5. Portugal declares that the judges of the courts of Macau, notwithstanding the provisions of the first paragraph of Article 15 of the Convention, may give judgment on whether the conditions referred to in the second paragraph of the same article are fulfilled.

6. In accordance with the third paragraph of Article 16 of the Convention, Portugal declares that the applications referred to in the second paragraph of Article 16 will not be entertained if they are filed after the expiration of one year following the date of the judgment.'']

11b Romania—Central Authority

Address: Ministry of Justice

Romania—competent authority (Art. 6)

In accordance with Article 6, paragraph 1, of the Convention, the law court is the competent authority designated to complete the certificate in the form of the model annexed to the Convention.

Declarations

Articles: 8,16

(…)

3. In accordance with Article 8, paragraph 2, of the Convention, Romania declares that the foreign diplomatic and consular agents can effect service of judicial or extrajudicial documents within the territory of Romania, exclusively upon nationals of the state they represent.

4. In accordance with Article 16, paragraph 3, of the Convention, Romania shall not entertain the application pursuant to Article 16, paragraph 2, if these are filed after the expiration of a period of one year following the date of the judgment."

11c **N.B.:** In accordance with Article 28, paragraph 2, the Convention will enter into force for the Russian Federation **in the absence of any objection from a State which has ratified the Convention before 1 May 2001** within a six months' period which, for practical reasons, will run from 15 May to 15 November 2001. The Convention entered into force for the Russian Federation December 1, 2001.

11d Saint Vincent and Grenadines Succession

By a Note received at the Ministry of Foreign Affairs of the Kingdom of the Netherlands on 6 January 2005, the Government of Saint Vincent and the Grenadines informed the Ministry of Foreign Affairs that it does consider itself bound by the Convention, which had been declared applicable to Saint Vincent by the Government of the United Kingdom of Great Britain and Northern Ireland on 20 May 1970. The date of entry into force is the date of independence of this State.

Declarations

Articles: 5,10,15

The Government of Saint Vincent and the Grenadines declares that it is opposed to the channels of transmission provided for in Article 10*(b)* and *(c)* of the Convention.

The Government of Saint Vincent and the Grenadines declares that the provisions of the second paragraph of Article 15 of the Convention shall apply to Saint Vincent and the Grenadines.

The Central Authority will require all documents forwarded to it for service under the provisions of the Convention to be in duplicate and, pursuant to the third paragraph of Article 5 of the Convention, will require the documents to be written in, or translated into, the English language.

Saint Vincent and the Grenadines—Central Authority

In accordance with article 18 of the Convention the Registrar of the High Court of Justice in Kingstown (…) is designated as the authority competent to receive requests for service in accordance with article 2 of the Convention.

Saint Vincent and the Grenadines—Competent Authority (Art. 6)

The authority competent under article 6 of the Convention to complete the Certificate of Service is the Registrar of the High Court of Justice in Kingstown.

Saint Vincent and the Grenadines—Competent Authority (Art. 9)

In accordance with the provisions of Article 9 of the Convention the Central Authority shall receive process sent through consular channels.

With the following declarations:

Articles: 5,10,15

The Government of Saint Vincent and the Grenadines declares that it is opposed to the channels of transmission provided for in Article 10*(b)* and *(c)* of the Convention.

The Government of Saint Vincent and the Grenadines declares that the provisions of the second paragraph of Article 15 of the Convention shall apply to Saint Vincent and the Grenadines.

The Central Authority will require all documents forwarded to it for service under the provisions of the Convention to be in duplicate and, pursuant to the third paragraph of Article 5 of the Convention, will require the documents to be written in, or translated into, the English language.

11e With the following declarations:

``1. In conformity with Article 21, first paragraph, letter a), the Republic of San Marino designates the Secretariat of State for Foreign Affairs (Palazzo Begni—Contrada Omerelli, 31—47890 SAN MARINO) as the competent Central Authority pursuant to Articles 2 and 18, without prejudice to the provisions contained in bilateral agreements authorising direct relations with the San Marino judicial authority.

2. In conformity with Article 21, first paragraph, letter b), the Republic of San Marino designates the Civil and Criminal Court as the competent authority pursuant to Article 6.

3. In conformity with Article 21, first paragraph, letter c), the Republic of San Marino designates the Secretariat of State for Foreign Affairs as the competent authority pursuant to Article 9.

4. In conformity with Article 21, second paragraph, letter a), the Republic of San Marino declares its opposition to the use of methods of transmission pursuant to Articles 8 and 10.

5. In conformity with Article 21, second paragraph, letter b), the Republic of San Marino declares pursuant to the second paragraph of Article 15, that its judges, notwithstanding the provisions of the first paragraph of said Article, may give judgment even if no certificate of service or delivery has been received, if all the conditions referred to in letters a), b) and c) are fulfilled."

N.B.: In accordance with Article 28, second paragraph, the Convention shall enter into force for San Marino in the absence of any objection from a State, which has ratified the Convention before such deposit, notified to the Ministry of Foreign Affairs of the Netherlands within a period of six months after the date on which the said Ministry has notified it of such accession. For practical reasons, this six months' period in this case will run from 25 April 2002 to 25 October 2002.

11f *Notification in conformity with Article 31, paragraph e of the Convention*

By Note dated 4 June 1981 and received at The Ministry of Foreign Affairs of the Kingdom of the Netherlands on 14 July 1981 the Republic of Seychelles informed the Ministry in accordance with Article 21 of the Convention of the following:

``*Article 2*

The Central Authority designated is:

The Registrar
Supreme Court,
Victoria,
Mahé,
Republic of Seychelles.

Article 8

The Government of the Republic of Seychelles declares that it is opposed to service by a contracting state of judicial documents upon persons abroad, without application of any compulsion, directly through the diplomatic or consular agents of that contracting state unless the document is to be served upon a national of the state in which the documents originate.

Article 10

The Government of the Republic of Seychelles declares that it objects to paragraph (b) and (c) of this Article, is so far as they permit service of judicial documents through officials or persons *other than* judicial officers.

Article 15

The Government of the Republic of Seychelles declares that notwithstanding the provisions of the first paragraph of this Article, the judge may give judgement even if no certificate of service or delivery has been received, if all the following conditions are fulfilled.

a) the document was transmitted by one of the methods provided for in this Convention,

b) a period of time of not less than six months, considered adequate by the judge in the particular case, has elapsed since the date of the transmission of the document,

c) no certificate of any kind has been received, even though every reasonable effort has been made to obtain it through the competent authorities of the State addressed.

Article 16

The Government of the Republic of Seychelles declares that it will not entertain an application for relief if filed later than one year following the date of the judgement."

11g By notification dated March 15, 1993 the Slovak Republic communicated the following: ``In accordance with relevant principles and norms of international law and to extent defined by it, the Slovak Republic, as a successor State, born from the division of the Czech and Slovak Federal Republic, considers itself bound, as of January 1, 1993, i.e. the date of the division of the Czechoslovak Federation, by multilateral international treaties to which the Czech and Slovak Federal Republic was a party at that date, including reservations and declarations in respect of provisions made earlier by Czechoslovakia, as well as objections by Czechoslovakia in respect of reservations made by other treaty parties", which are as follows: [Same declarations and reservations, *mutatis mutandis,* under Czech Republic, see footnote 3c].

The Permanent Bureau of the Hague Conference on private international law presents its compliments to the Diplomatic Missions of the Member States and to the National Organs and has the honour to inform them that, in accordance with Articles 2, 6 and 9 of the Convention, the *Slovak Republic* has designated the following Central Authority:

``*Ministerstvo spravodlivosti Slovenskej republiky*
Zupné námestie 13, 813 11 Bratislava
Slovak Republic
fax: (00427) 5316035".

11h Slovenia has designated as Central Authority:

the Ministry of Justice of the Republic of Slovenia

Zupanciceva 3
1000 LJUBLJANA
tél.: +386 1 478 5244
fax: +386 1 426 1050.

11i The Permanent Bureau of the Hague Conference on private international law presents its compliments to the Diplomatic Missions of the Member States and to the National Organs and has the honour to inform them that, by instrument deposited on 4 June 1987 with the Ministry of Foreign Affairs of the Kingdom of the Netherlands,

Spain

ratified the above-mentioned Convention.

In accordance with Article 27, paragraph 2, the Convention will enter into force for *Spain* on *3 August 1987.*

The instrument of ratification contains the following declarations:

``1) The Spanish State declares that its judges, notwithstanding the provisions of Article 15, may give judgment even if no certificate of service or delivery of documents has been received, if all the conditions enumerated in the said Article 15, paragraph 2, are fulfilled.

2) The Spanish State declares that the time of expiration, referred to in Article 16, is sixteen months from the date of the judgment.

3) The Spanish State designates as the Central Authority to issue the certificates in the form of the model annexed to the Convention:

Secretaría General Técnica,
Ministerio de Justicia,
San Bernardo, 62,
28071 MADRID.'' (Translation)

The Ministry of Foreign Affairs of the Kingdom of the Netherlands, depositary of the Convention on the service abroad of judicial and extrajudicial documents in civil or commercial matters of 15 November 1965, has the honour to inform the Member States of the Hague Conference on Private International Law and the States having acceded to the above-mentioned Convention that by Note dated 26 August 1997 the Embassy of Spain at The Hague informed the Depositary of the following declaration:

``Españna no reconoce, para la aplicación del presente Convenio, como autoridad al Tribunal Supremo de Gibraltar, y en consecuencia, cualquier documentación intervenida por dicho organo se considerará como nula y no existente.''

11j The instrument of accession of Sri Lanka contains the following declarations:

``a) In terms of Article 2, the Secretary/Ministry of Justice and Constitutional Affairs is designated the Central Authority.

b) The authority competent to act upon a Letter of Request pursuant to Article 6 would be the Secretary, Ministry of Justice and Constitutional Affairs/Registrar of the Court of Appeal.

c) For purposes of Article 7, the documents should be in the English language.

d) For purposes of Article 8, the service of judicial documents through diplomatic or consular channels should be limited only in respect of the nationals of the State in which the documents originate.

e) Secretary/Ministry of Foreign Affairs would be the competent authority to receive documents transmitted by consular channels, pursuant to Article 9.

f) For purposes of Article 10, Sri Lanka has no objection to the procedure set out in paragraph (b) thereof. However it does not agree to the procedure set out in paragraphs (a) and (c).

g) In terms of Article 15, Sri Lanka wishes to declare that the Judge may proceed to give judgement even if no certificate of service or delivery has been received, provided the conditions set out in Article 15 are fulfilled."

* On 14 February 2003, the Permanent Bureau was informed of the following contact details for the Central Authority:

Secretary, Ministry of Justice
Ministry of Justice, Law Reform and National Integration
P.O. Box 555
Superior Courts Complex
Hulftsdorp
COLOMBO 12
Sri Lanka
e-mail: secmoj@sri.lanka.net

12 With the following declarations:

``a) The Ministry for Foreign Affairs* has been designated Central Authority.

* By Note dated 6 November 2000 the Minister for Foreign Affairs of Sweden informed the Depositary as follows:

``As from 1 October 2000 the Central Authority, meaning the receiving authority, competent authority and transmitting authority, concerning [this Convention] has been changed from the Ministry for Foreign Affairs to the Ministry of Justice."

The address of the Ministry of Justice is as follows:

Ministry of Justice
Division for Criminal Cases and International Judicial Co-operation
Central Authority
S-103 33 Stockholm
Sweden
tel.: +46 (8) 405 4500 (secretariat)
fax: +46 (8) 405 4676

b) The Central Authority (the Ministry for Foreign Affairs) has been designated to receive documents transmitted through consular channels, pursuant to art. 9.

c) Swedish authorities are not obliged to assist in serving documents transmitted by using any of the methods referred to in sub-paragraphs (b) and (c) of art. 10.

By virtue of the third paragraph of art. 5 of the Convention the Central Authority requires that any document to be served under the first paragraph of the same article must be written in or translated into Swedish."

12a The Permanent Bureau of the Hague Conference on private international law presents its compliments to the Diplomatic Missions of the Member States and to the National Organs and has the honour to inform them that, by instrument deposited on 2 November 1994 with the Ministry of Foreign Affairs of the Kingdom of the Netherlands,

ratified the above-mentioned Convention.

In accordance with Article 27, paragraph 2, the Convention will enter into force for *Switzerland* on *1 January 1995.*

The instrument of ratification contains the following reservations and declarations:

Translation:

``Re Article 1

1. With regard to Article 1, Switzerland takes the view that the Convention applies exclusively to the Contracting States. In particular, it believes that documents which are effectively addressed to a person resident abroad cannot be served on a legal entity who is not authorized to receive them in the country in which they were drawn up without derogating from Articles 1 and 15, first paragraph, of the Convention.

Re Articles 2 and 18

2. In accordance with Article 21, first paragraph (a), Switzerland designates the cantonal authorities listed in the annex as Central Authorities as referred to in Articles 2 and 18 of the Convention. Requests for the service of documents may also be addressed to the Federal Justice and Police Department in Bern, which will forward them to the appropriate Central Authority.

Re Article 5, third paragraph

3. Switzerland declares that in cases where the addressee does not voluntarily accept a document, it cannot officially be served on him or her in accordance with Article 5, first paragraph, unless it is in the language of the authority address, *i.e.* in German, French or Italian, or accompanied by a translation into one of these languages, depending on the part of Switzerland in which the document is to be served (*cf.* annex).

Re Article 6

4. In accordance with Article 21, first paragraph (b), Switzerland designates the competent cantonal court or the cantonal Central Authority as the body responsible for completing the certificate referred to in Article 6.

Re Articles 8 and 10

5. In accordance with Article 21, second paragraph (a), Switzerland declares that it is opposed to the use in its territory of the methods of transmission provided for in Articles 8 and 10.

Re Article 9

6. In accordance with Article 21, first paragraph (c), Switzerland designates the cantonal Central Authorities as the authorities competent to receive documents transmitted by consular channels pursuant to Article 9 of the Convention''.

The list of Central Authorities for the Cantons is attached.

Cantonal Central Authorities (list up to date as per 13 February 2003)

A list of the Central Cantonal Authorities, including their address and phone/fax numbers, can be consulted online at the following address: http://www.ofj.admin.ch/rhf/d/service/recht/Kantonale-Zentralbehoerden.pdf

To determine the Central Authority competent by reason of its location, the database of the Swiss localities and Courts can be consulted online at the following address: http://www.elorge.admin.ch.

12b The former Yugoslav Republic of Macedonia Accession

According to Article 28, second paragraph, the Convention will enter into force for the former Yugoslav Republic of Macedonia in the absence of any objection from a State which has ratified the Convention before the deposit of the instrument of accession, notified to the Ministry of Foreign Affairs of the Kingdom of the Netherlands within a period of six months after the date on which the said Ministry had notified it of such accession.

For practical reasons this six months' period will in this case run from 1 February 2009 to 1 August 2009.

In the absence of any objections the Convention will, in accordance with its Article 28, third paragraph, enter into force for the former Yugoslav Republic of Macedonia on 1 September 2009.

the former Yugoslav Republic of Macedonia—Central Authority (Art. 2)

The Republic of Macedonia declares that the Ministry of Justice of the Republic of Macedonia is designated as the Central Authority referred to in Article 2 of the Convention to receive the requests for service of juridicial documents coming from other Contracting Parties and to proceed them.

Declarations Reservations

Articles: 5,6,8,9,10,15,16,21

The Republic of Macedonia declares that all documents which are served pursuant to Article 5, paragraph 1, of the Convention should be written in or translated into, the Macedonian language according to the Article 7 of the Constitution of the Republic of Macedonia dated 17 November 1991.

In accordance with Article 6 of the Convention, the Republic of Macedonia declares that the courts of first instance in the Republic of Macedonia shall be competent to complete the certificate in the form of the model annexed to this Convention.

In accordance with Article 15 of the Convention, the Republic of Macedonia declares that courts in the Republic of Macedonia may give judgment if all the conditions set out in paragraph 2 of Article 15 of the Convention are fulfilled.

In accordance with Article 16, paragraph 3, of the Convention the Republic of Macedonia declares that an application for relief set out in Article 16 of the Convention will not be entertained if it is filed after the expiration of a period of one year following the date when the judgement was given.

In accordance with paragraph 2(a) of Article 21 of the Convention, the Republic of Macedonia objects to the use of methods of service pursuant to Article 8 and 10.

In accordance with Article 8, paragraph 2, of the Convention, within the territory of the Republic of Macedonia judicial documents may not be served directly through the diplomatic or consular agents of another Contracting State unless the document is to be served upon a national of the State in which the documents originate.

The Republic of Macedonia objects to the use of the service methods prescribed in Article 10 of the Convention.

The Republic of Macedonia declares that the documents served in accordance with Article 9 of the Convention are forwarded to the Ministry of Justice of the Republic of Macedonia for the purpose of service to the parties.

13 With the following declaration:

``1. Pursuant to Article 2, paragraph 1 of the Convention, the Directorate General of Civil Affairs of the Ministry of Justice (Adalet Bakanligi Hukuk Isleri Genel Müdürlügü, Ankara) is designated as the Central Authority.

2. The Directorate General of Civil Affairs of the Ministry of Justice is also competent to complete certificates as referred to in Article 6 of the Convention.

3. The Directorate General of Civil Affairs is also designated as the authority competent to receive documents forwarded through the channels specified in Article 9, paragraph 1 of the Convention.

4. Pursuant to Article 8 of the Convention, the Government of the Republic of Turkey acknowledges the freedom of diplomatic and consular agents to serve judicial documents upon their own nationals only.

5. The Government of the Republic of Turkey declares that it is opposed to the use of the methods of serving judicial documents listed in Article 10 of the Convention.

6. The Government of the Republic of Turkey declares that its judges, notwithstanding the provisions of the first paragraph of Article 15, may give judgment if all the conditions set out in the second paragraph of the said Article are fulfilled.

7. Pursuant to Article 16, paragraph 3, the Government of the Republic of Turkey declares that applications for relief as referred to in Article 16, paragraph 2, will not be entertained if they are filed after the expiration of a period of one year following the date of the judgment."

Embassy of the Republic of Turkey [at The Hague]

No. 18313/328-78

The Embassy of Turkey presents its compliments to the Ministry of Foreign Affairs, the depositary of the Convention on the service abroad of judicial and extrajudicial documents in civil or commercial matters, and has the honor to inform it of the text of the declaration of the Turkish Government regarding the accession to the aforementioned Convention by the Greek Cypriot Government:

Quote:

The Republic of Turkey, although not exercising its right of opposition as set forth in Article 28(2) of the Convention, declares that it does not consider itself bound to apply the provisions of the Convention with respect to the Greek Cypriot Government which, in constitutional terms, is not authorized to represent the ``Republic of Cyprus" as a whole.

The Embassy of Turkey avails itself of this opportunity to renew to the Ministry of Foreign Affairs the assurances of its highest consideration.

The Hague, April 6, 1983

[Initialed]

[Official stamp]

13a

UKRAINE **(accession)** **15 November 2001**
1 February 2001

The instrument of accession of Ukraine contains the following declarations and reservations:

``1) on Article 2 of the Convention: the Ministry of Justice of Ukraine is the Central Authority of Ukraine;

2) on Article 6 of the Convention: the Ministry of Justice of Ukraine and its territorial departments of justice are competent to complete the certificate of service;

3) on Article 8 of the Convention: service of judicial documents through diplomatic or consular agents of another State within the territory of Ukraine may be effected only upon nationals of the State in which the documents originate;

4) on Article 9 of the Convention: the Ministry of Justice of Ukraine is the authority competent to receive documents transmitted by consular channels or, if exceptional circumstances so require, by diplomatic channels;

5) on Article 10 of the Convention: Ukraine will not use methods of transmission of judicial documents provided for in Article 10 of the Convention;

6) on Article 15 of the Convention: if all the conditions provided for in the second paragraph of Article 15 of the Convention are fulfilled, the judge, notwithstanding the provisions of the first paragraph of Article 15 of the Convention, may give judgment even if no certificate of service or delivery has been received;

7) on Article 16 of the Convention: application for relief will not be entertained in Ukraine if it is filed after the expiration of one year following the date of the judgment."

N.B.: In accordance with Article 28, paragraph 2, the Convention will enter into force for Ukraine **in the absence of any objection from a State which has ratified the Convention before 1 February 2001** within a six months' period which, for practical reasons, will run from 15 May to 15 November 2001.

14 With the following declarations:

``*(a)* In accordance with the provisions of Articles 2 and 18 of the Convention, Her Majesty's Principal Secretary of State for Foreign Affairs is designated as the Central Authority; and the Senior Master of the Supreme Court, Royal Courts of Justice, Strand, London W.C.2, the Crown Agent for Scotland*, Lord Advocate's Department, Crown Office, 9 Parliament Square, Edinburgh 1, and the Registrar of the Supreme Court**, Royal Courts of Justice, Belfast 1, are designated as additional authorities for England and Wales, Scotland and Northern Ireland respectively.

* By a Note of 21 March 2000, the British Government notified that, with effect from 1 April 2000, the designated authority for Scotland will be: ``The Scottish Executive Justice Department, Civil Justice & International Division, Second Floor West, Saint Andrews House, Regent Road, Edinburgh EH1 3DG, tel.: +44.131.244.4826/9, fax: +44.131.244.4848.

** By a Note of 10 June 1980 the British Government notified that instead of the Registrar of the Supreme Court of Northern Ireland, designated in 1967 as the additional authority for Northern Ireland in conformity with Article 18 of the Convention, the Master (Queen's Bench and Appeals) is designated as the said additional authority. The address of the Master (Queen's Bench and Appeals) is Royal Courts of Justice, Belfast 1.)

(b) The authorities competent under Article 6 of the Convention to complete the Certificate of Service are the authorities designated under Articles 2 and 18.

(c) In accordance with the provisions of Article 9 of the Convention, the United Kingdom designates as receivers of process through consular channels the same authorities as those designated under Articles 2 and 18.

(d) With reference to the provisions of paragraphs (b) and (c) of Article 10 of the Convention, documents for service through official channels will be accepted in the United Kingdom only by the central or additional authorities and only from judicial, consular or diplomatic officers of other Contracting States.

(e) The United Kingdom declares its acceptance of the provisions of the second paragraph of Article 15 of the Convention.

(f) In accordance with the provisions of the third paragraph of Article 16 of the Convention, the United Kingdom declares, in relation to Scotland only, that applications for setting aside judgments on the grounds that the defendant did not have knowledge of the proceedings in sufficient time to defend the action will not be entertained if filed more than one year after the date of judgment.

The authorities designated by the United Kingdom will require all documents forwarded to them for service under the provisions of the Convention to be in duplicate and, pursuant to the third paragraph of Article 5 of the Convention, will require the documents to be written in, or translated into, the English language.

A notification under the second and third paragraphs of Article 29 regarding the extension of the Convention to the territories for the international relations of which the United Kingdom is responsible will be addressed to the Royal Netherlands Government in due course."

Extensions

The extension of the application of the Convention to the following territories was notified by the Government of the United Kingdom of Great Britain and Northern Ireland:

Hong Kong[1]	20 May 1970 *(the Convention entered into force for these territories on 19 July 1970)*
*Antigua[2]	
Bermuda [2]	
** British Honduras[2]	
** British Solomon Islands Protectorate[2]	
British Virgin Islands[2]	
Cayman Islands[2]	
** Central and Southern Line Islands[2]	
Falkland Islands and Dependencies[2]	
** Fiji[2]	
Gibraltar[2]	
** Gilbert and Ellice Islands Colony[2]	
Guernsey[2]	
Isle of Man[2]	
Jersey[2]	

Montserrat2)	
Pitcairn2)	
St. Helena and Dependencies2)	
** St. Lucia[2]	
** St. Vincent2)	
* Seychelles2)	
Turks and Caicos Islands2)	
Anguilla3)	3 August 1982 *(entry into force 2 October 1982)*
** St. Christopher and Nevis4)	2 March 1983 *(entry into force 1 May 1983)*

* This country achieved independence and acceded to the Convention (see *infra* under other States).

** This country achieved independence. No declaration has been made on the continuation in force of the Convention.

Date of independence: British Honduras became Belize (21 September 1981); British Solomon Islands became Solomon Islands (7 July 1978); Central and Southern Line Island became Kiribati (12 July 1979); Fiji (10 October 1970); Gilbert and Ellice Islands became respectively Kiribati (12 July 1979) and Tuvalu (1 October 1978); Saint Lucia (22 February 1979); Saint Vincent became Saint Vincent and the Grenadines (27 October 1979); St. Christopher and Nevis became St. Kitts and Nevis (19 September 1983).

1) With the following declarations:

``*(a)* In accordance with Article 18 of the Convention the Colonial Secretary of Hong Kong* is designated as the Authority competent to receive requests for service in accordance with Article 2 of the Convention.

* ``The Colonial Secretary of Hong Kong'' has been re-designated as ``the Chief Secretary of Hong Kong'' (May 1984).

(b) The authority competent under Article 6 of the Convention to complete the Certificate of Service is the Registrar of the Supreme Court of Hong Kong.

(c) In accordance with the provisions of Article 9 of the Convention the Registrar of the Supreme Court of Hong Kong is designated as the receiver of process sent through consular channels.

(d) With reference to the provisions of paragraphs *(b)* and *(c)* of Article 10 of the Convention, documents sent for service through official channels will be accepted in Hong Kong only by the central or additional authority and only from judicial, consular or diplomatic officers of other Contracting States.

(e) The acceptance by the United Kingdom of the provisions of the second paragraph of Article 15 of the Convention shall equally apply to Hong Kong.

The authorities designated above will require all documents forwarded to them for service under the provisions of the Convention to be in duplicate and, pursuant to the third paragraph of Article 5 of the Convention, will require the documents to be written in, or translated into, the English language.''

On *1 July 1997*, the Government of the United Kingdom of Great Britain and Northern Ireland *restored Hong Kong to the People's Republic of China.* See supra, under ``CHINA, Hong Kong Special Administrative Region''.

(2) ``(a) In accordance with Article 18 of the Convention the authority shown against the name of each territory in the Annex (hereinafter severally called ``the designated authority'') is designated as the authority in that territory competent to receive requests for service in accordance with Article 2 of the Convention.

(b) The authority in each territory competent under Article 6 of the Convention to complete the Certificate of Service is the designated authority.

(c) In accordance with the provisions of Article 9 of the Convention, the designated Authority shall receive process sent through consular channels.

(d) With reference to the provisions of paragraphs (b) and (c) of Article 10 of the Convention, documents sent for service through official channels will be accepted in a territory listed in the Annex by the designated authority and only from judicial, consular or diplomatic officers of other Contracting States.

(e) The acceptance by the United Kingdom of the provisions of the second paragraph of Article 15 of the Convention shall equally apply to the territories named in the Annex.

The authorities designated in the Annex will require all documents forwarded to them for service under the provisions of the Convention to be in duplicate and, pursuant to the third paragraph of Article 5 of the Convention, will require the documents to be written in, or translated into, the English language.''

ANNEX

Antigua	—
Bermuda	The Registrar of the Supreme Court, Bermuda.
British Honduras	The Supreme Court Registry, British Honduras.
British Solomon Islands	The Registrar of the High Court, Honiara, British Solomon Islands Protectorate.
British Virgin Islands	The Registrar of the Supreme Court, British Virgin Islands.*
Cayman Islands	The Clerk of the Courts, Grand Cayman, Cayman Islands**
Central and Southern Line Islands	The Registrar of the High Court, Honiara, British Solomon Islands Protectorate.
Falkland Islands and Dependencies	The Registrar of the Supreme Court, Stanley, Falkland Islands.
Fiji	The Registrar of the Supreme Court, Fiji.
Gibraltar	The Registrar of the Supreme Court, Gibraltar***
Gilbert and Ellice Islands	The Registrar of the High Court, Colony.
Guernsey	The Bailiff, Bailiff's Office, Royal Court House, Guernsey, Channel Islands.
Isle of Man	The First Deemster and Clerk of the Rolls, Rolls Office, Douglas, Isle of Man.
Jersey	The Attorney General, Jersey, Channel Islands.
Montserrat	The Registrar of the High Court, Montserrat.
Pitcairn	The Governor and Commander-in-Chief, Pitcairn.
St.Helena and Dependencies	The Supreme Court, St.Helena.
St.Lucia	The Registrar of the High Court of Justice, St.Lucia.
St. Vincent	The Registrar of the Supreme Court, St. Vincent.
Seychelles	—
Turks and Caicos Islands	The Registrar of the Supreme Court, Turks and Caicos Islands.*

*Modified on 30 July 1982.

**Modified on 1 March 1990.

***By Note dated 26 August 1997, the Embassy of Spain at The Hague informed the depositary of the following declaration:

``Espa[Delta equal to]na no reconoce, para la aplicación del presente Convenio, como autoridad al Tribunal Supremo de Gibraltar, y en consecuencia, cualquier documentación intervenida por dicho organo se considerará como nula y no existente.''

By Note dated 28 October 1997, the British Embassy at The Hague informed the depositary of the following:

``Her Britannic Majesty's Embassy present their compliments to the Ministry of Foreign Affairs of the Kingdom of the Netherlands as depositary of the Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters done at The Hague on 15 November 1965 (hereinafter referred to as the `Convention'), and have the honour to refer to the Ministry's Note No 5/1997 of 1 September 1997 communicating the recent declaration by Spain to the effect that it does not recognise the Supreme Court of Gibraltar as an authority for the purposes of the Convention.

Under Article 18 of the Convention a Contracting State may designate `other authorities in addition to the Central Authority and shall determine the extent of their competence'. The Registrar of the Supreme Court of Gibraltar was designated as such authority for Gibraltar by the United Kingdom in 1970.

The Kingdom of Spain ratified the Convention in 1987, and has made no previous objection to the United Kingdom's pre-existing designation of the Supreme Court of Gibraltar. In such circumstances, the United Kingdom is of the view that Spain may not object legitimately to this designation now. Thus the Supreme Court of Gibraltar remains the United Kingdom's designated authority for Gibraltar for the purposes of the Convention.

Her Britannic Majesty's Embassy avail themselves of this opportunity to renew to the Ministry of Foreign Affairs of the Kingdom of the Netherlands the assurances of their highest consideration.''

Extension to Anguilla.—

Notification in conformity with Article 31, paragraphs d and e, of the Convention

In accordance with Article 29, paragraph 2, of the Convention the Ambassador of the United Kingdom of Great Britain and Northern Ireland at The Hague notified the Minister of Foreign Affairs of the Kingdom of the Netherlands, by a Letter dated 30 July 1982 and received on 3

August 1982, the extension of the Convention to Anguilla.

In accordance with Article 29, paragraph 3, the Convention will enter into force for Anguilla on 28 September 1982.

The extension was accompanied by the following declarations:

(a) in accordance with Article 18 of the Convention the Registrar of the Supreme Court of Anguilla (hereinafter called the designated authority) is designated as the authority competent to receive requests for service in accordance with Article 2 of the Convention.

(b) the authority competent under Article 6 of the Convention to complete the Certificate of Service is the designated authority.

(c) in accordance with the provisions of Article 9 of the Convention the designated authority shall receive process sent through consular channels.

(d) with reference to the provisions of paragraphs (b) and (c) of Article 10 of the Convention, documents sent for service through official channels will be accepted by the designated authority and only from judicial, consular or diplomatic officers of other contracting states.

(e) the acceptance by the United Kingdom of the provisions of the second paragraph of Article 15 of the Convention shall apply to Anguilla.

The designated authority will require all documents forwarded to it for service under the provisions of the Convention to be in duplicate and, pursuant to the third paragraph of Article 5 of the Convention, will require the documents to be written in, or translated into, the English language.

Extension to the Associated State of Saint Christopher and Nevis.

Notification in conformity with Article 31, paragraphs d and e, of the Convention

In accordance with Article 29, paragraph 2, of the Convention the Ambassador of the United Kingdom of Great Britain and Northern Ireland at The Hague notified the Minister of Foreign Affairs of the Kingdom of the Netherlands by Letter dated 1 March 1983 and received on 2 March 1983 of the extension of the Convention to the Associated State of Saint Christopher and Nevis.

In accordance with Article 29, paragraph 3, the Convention will enter into force for Saint Christopher and Nevis on 1 May 1983.

The Letter contains the following declarations:

``a) in accordance with Article 18 of the Convention the Registrar of the West Indies Associated State Supreme Court, Saint Christopher and Nevis circuit (hereinafter called the designated authority) is designated as the authority competent to receive requests for service in accordance with Article 2 of the Convention;

b) the authority competent under Article 6 of the Convention to complete the Certificate of Service is the designated authority;

c) in accordance with the provisions of Article 9 of the Convention the designated authority shall receive process sent through consular channels;

d) with reference to the provisions of paragraphs (b) and (c) of Article 10 of the Convention, documents sent for service through official channels will be accepted by the designated authority and only from judicial, consular or diplomatic officers of other contracting states;

e) the acceptance by the United Kingdom of the provisions of the second paragraph of Article 15 of the Convention shall apply to Saint Christopher and Nevis.

The designated authority will require all documents forwarded to it for service under the provisions of the Convention to be in duplicate and, pursuant to the third paragraph of Article 5 of the Convention, will require the documents to be written in, or translated into, the English language."

Her Britannic Majesty's Embassy present their compliments to the Ministry of Foreign Affairs of the Kingdom of the Netherlands as depositary of the Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters done at The Hague on 15 November 1965 (hereinafter referred to as the `Convention'), and have the honour to refer to the Ministry's Note No 5/1997 of 1 September 1997 communicating the recent declaration by Spain to the effect that it does not recognise the Supreme Court of Gibraltar as an authority for the purposes of the Convention.

Under Article 18 of the Convention a Contracting State may designate `other authorities in addition to the Central Authority and shall determine the extent of their competence'. The Registrar of the Supreme Court of Gibraltar was designated as such authority for Gibraltar by the United Kingdom in 1970.

The Kingdom of Spain ratified the Convention in 1987, and has made no previous objection to the United Kingdom's pre-existing designation of the Supreme Court of Gibraltar. In such circumstances, the United Kingdom is of the view that Spain may not object legitimately to this designation now. Thus the Supreme Court of Gibraltar remains the United Kingdom's designated authority for Gibraltar for the purposes of the Convention.

Her Britannic Majesty's Embassy avail themselves of this opportunity to renew to the Ministry of Foreign Affairs of the Kingdom of the Netherlands the assurances of their highest consideration.

See supra, under CHINA, Hong Kong Special Administrative Region

United States.—

15 With the following declarations:

``1. In accordance with Article 2, the United States Department of Justice is designated as the Central Authority to receive requests for service from other Contracting States and to proceed in conformity with Articles 3 to 6.

Central Authority:

By communication dated 1 October 2002, the Department of Justice of the United States of America informed the Permanent Bureau that it was finalising an award to a private process server company to assume the duties of the United States Central Authority pursuant to Article 2 of the 1965 Hague Service Convention. On 24 October 2002, the Permanent Bureau brought this communication to the attention of all the Member States of the Hague Conference and the non-Member States Parties to the Convention.

By communication dated 15 April 2003, the Department of Justice of the United States of America informed the Permanent Bureau that the bidding procedure had been completed and that the contract had been awarded to Process Forwarding International of Seattle, Washington, USA (see the contact details below). This contract will become effective on 1 June 2003, for a five-year period. (The contract also encompasses service of process pursuant to the Inter-American Convention on Letters Rogatory and Letters Rogatory from non-Convention States.)

The Department of Justice of the United States of America emphasises that this procedure has not led to the formal designation of a new Central Authority, but rather to the outsourcing of the activities conducted by the Central Authority, which formally remains the Department of Justice.

Process Forwarding International is the only private process service company authorised to act on behalf of the United States Central Authority, in accordance with Articles 2–6 of the Convention, to receive requests for service from other Contracting States, proceed to serve the documents, and complete the certificate in the form annexed to the Convention. Process Forwarding International is responsible for the geographical coverage of its tasks in the following areas: the United States, Guam, American Samoa, Puerto Rico, U.S. Virgin Islands, and Northern Mariana. Process Forwarding International is required to ensure that all personnel are properly trained and experienced in the handling of process serving. Pursuant to the contract, there will be a fully functional office in the United States to perform all necessary work.

Personal service will be the preferred method used on all requests. In addition, Process Forwarding International is required to complete service of documents and the certificate for return to the foreign applicant within six weeks of receipt of the request.

If Central Authorities of the Contracting States are solicited by other private process server companies, they should be aware that Process Forwarding International is the only company authorised to perform the duties of the U.S. Central Authority under the contract awarded by the Department of Justice.

Requests for service to be forwarded as of 1 June 2003 should be transmitted to Process Forwarding International (see the contact details below). Requests received by the U.S. Central Authority during the thirty days prior to the effective date of the new arrangement will be forwarded to Process Forwarding International for service free of charge. All pending requests for service received prior to the effective date will continue to be processed by the United States Department of Justice.

The contact details for the private process server company and the payment schedule for the five-year contract period, including methods of payment, are as follows:

Process Forwarding International
910 5th Avenue
Seattle, WA 98104
USA
Phone: +1 (206) 521 2979
Fax: +1 (206) 224 3410
E-mail: info@hagueservice.net
Website: http://www.hagueservice.net

Service Fees: Payment must be in U.S. currency and paid in advance

Year	**Description**	**Fees US $**
2003	Personal Service or Service by Mail (Hague Convention)	$89
2003	Personal Service or Service by	$89

	Mail (Letters Rogatory, non-convention)	
2004	Personal Service or Service by Mail (Hague Convention)	$91
2004	Personal Service or Service by Mail (Letters Rogatory, non-convention)	$91
2005	Personal Service or Service by Mail (Hague Convention)	$93
2005	Personal Service or Service by Mail (Letters Rogatory, non-convention)	$93
2006-2007	Personal Service or Service by Mail (Hague Convention)	$95
2006-2007	Personal Service or Service by Mail (Letters Rogatory, non-convention)	$95

Payment Options: VISA/MasterCard & most international credit cards, Bank Transfers, International money orders & Government issued checks. All service requests unaccompanied by proper payment in the manner indicated above will be returned without processing.

2. In accordance with the second paragraph of Article 15, it is declared that the judge may, notwithstanding the provisions of the first paragraph of Article 15, give judgment even if no certificate of service or delivery has been received, if all the conditions specified in subdivisions (a), (b) and (c) of the second paragraph of Article 15 are fulfilled.

3. In accordance with the third paragraph of Article 16, it is declared that an application under Article 16 will not be entertained if it is filed (a) after the expiration of the period within which the same may be filed under the procedural regulations of the court in which the judgment has been entered, or (b) after the expiration of one year following the date of the judgment, whichever is later.

4. In accordance with Article 29, it is declared that the Convention shall extend to all the States of the United States, the District of Columbia, Guam, Puerto Rico, and the Virgin Islands.

5. By a Note dated 22 April 1970 the Embassy of the United States of America informed the Netherlands Ministry of Foreign Affairs as follows:

``Under Article 2 of the Convention, each State is required to designate a Central Authority to receive requests for service of documents coming from other countries. Although this Central Authority always is to be available, its use is not compulsory and there is provision (Articles 8 through 11) for service through channels outside the Central Authority, including service by diplomatic or consular officers. These provisions are optional, however, and, since consular officers of the United States are prohibited by regulation from serving legal process or appointing other persons to do so, the United States will not avail itself of these provisions of the Convention. It is anticipated that courts in the United States will be advised by the Department of Justice of the possibility of sending requests for service of legal process directly to the Central Authority of the country concerned.

Extension

On 31 March 1994, the Government of the United States of America declared that the Convention shall also be extended to the *Commonwealth of the Northern Mariana Islands* (entry into force *30 May 1994*).

The authorities currently designated by the Government of the United States of America to perform certain functions under the Treaty shall also be the authorities designated to perform those functions for the Commonwealth of the Northern Mariana Islands.

The authorities currently designated by the Government of the United States of America to perform certain functions under the Treaty shall also be the authorities designated to perform those functions for the Commonwealth of the Northern Mariana Islands.

The Convention will enter into force for the Commonwealth of the Northern Mariana Islands on 30 May 1994."

16 The Permanent Bureau of the Hague Conference on private international law presents its compliments to the Diplomatic Missions of the Member States and to the National Organs and has the honour to inform them that, by instrument deposited on 29 October 1993 with the Ministry of Foreign Affairs of the Kingdom of the Netherlands,

the Republic of Venezuela

acceded to the above-mentioned Convention.

The instrument of accession contains the following declarations:

Translation

1.-With regard to Article 5, paragraph 3:

``The Republic of Venezuela declares that notices and documents and other items annexed to the notices will be accepted only when they are properly translated into the Spanish language".

2.-With regard to Article 8:

``The Republic of Venezuela does not agree to the exercise of the faculty provided for in the first paragraph of this Article within its territory, in respect of other persons who are not nationals of the country of origin".

3.-With regard to Article 10 (a):

``The Republic of Venezuela does not agree to the transmission of documents through postal channels''.

4.-With regard to Article 15 (a), (b) and (c):

``The Republic of Venezuela declares that `Venezuelan judges shall be empowered to decide when the conditions contained in sections (a), (b) and (c) of this Article are fulfilled, even though they have not received any communication evidencing either the notice or transfer, or delivery of the document' ''.

5.-With regard to Article 16:

``The Republic of Venezuela declares that the request allowed by the third paragraph of this Article shall not be admissible if it is made after the expiration of the period specified in Venezuelan law''.

In accordance with Article 28, paragraph 3, the Convention entered into force for the *Republic of Venezuela* on *1 July 1994*.

Notification in conformity with Article 31

The Ministry of Foreign Affairs of the Kingdom of the Netherlands, depositary of the Convention on the service abroad of judicial and extrajudicial documents in civil or commercial matters of 15 November 1965, has the honour to inform the Member States of the Hague Conference on Private International and the States having acceded to the Convention that in accordance with Article 2 Venezuela has designated the ``Ministry of Foreign Affairs'' as the Central Authority.

Service of Documents Convention

ANNEX TO THE CONVENTION

*Forms**

REQUEST

FOR SERVICE ABROAD OF JUDICIAL OR EXTRAJUDICIAL DOCUMENTS

Convention on the service abroad of judicial and extrajudicial documents in civil or commercial matters, signed at
The Hague, November 15, 1965.

Identity and address of the applicantAddress of receiving authority

The undersigned applicant has the honour to transmit—in duplicate—the documents listed below and, in conformity with article 5 of the above-mentioned Convention, requests prompt service of one copy thereof on the addressee, i.e., (identity and address) ....
....

(a) in accordance with the provisions of sub-paragraph (a) of the first paragraph of article 5 of the Convention *

(b) in accordance with the following particular method (sub-paragraph (b) of the first paragraph of article 5) *: ....
....
....

(c) by delivery to the addressee, if he accepts it voluntarily (second paragraph of article 5) *.

The authority is requested to return or to have returned to the applicant a copy of the documents —and of the annexes *—with a certificate as provided on the reverse side.

List of documents

....
....
....
....
....
....
....
....
....

* Delete if inappropriate.

Done at ...., the ....

Signature and/or stamp.

Reverse of the request

CERTIFICATE

The undersigned authority has the honour to certify, in conformity with article 6 of the Convention,

1) that the document has been served *

—the (date) ....

—at (place, street, number) ....
....

—in one of the following methods authorised by article 5—

(a) in accordance with the provisions of sub-paragraph (a) of the first paragraph of article 5 of the Convention *.

(b) in accordance with the following particular method *: ....
....

(c) by delivery to the addressee, who accepted it voluntarily *.

The documents referred to in the request have been delivered to:

—(identity and description of person) ....
....

—relationship to the addressee (family, business or other) ....
....

2) that the document has not been served, by reason of the following facts *:
....
....
....

In conformity with the second paragraph of article 12 of the Convention, the applicant is requested to pay or reimburse the expenses detailed in the attached statement *.

Annexes

Documents returned: ....
....
....

In appropriate cases, documents establishing the service: ....
....
....

* Delete if inappropriate.

Done at ...., the ....

Signature and/or stamp.

---

* These forms may be obtained from the Offices of United States Marshals.

SUMMARY OF THE DOCUMENT TO BE SERVED

Convention on the service abroad of judicial and extrajudicial documents in civil or commercial matters, signed at The Hague, the 15th of November 1965.
(article 5, fourth paragraph)

Name and address of the requesting authority: ....
....
....

Particulars of the parties *:
....
....
....

*JUDICIAL DOCUMENT ***

Nature and purpose of the document: ....
....
....

Nature and purpose of the proceedings and, where appropriate, the amount in dispute: ....
....
....

Date and place for entering appearance **: ....
....

Court which has given judgment **: ....
....

Date of judgment **: ....

Time limits stated in the document **: ....
....

*EXTRAJUDICIAL DOCUMENT ***

Nature and purpose of the document: ....
....
....

Time limits stated in the document **: ....
....
....

* If appropriate, identity and address of the person interested in the transmission of the document.

** Delete if inappropriate.

Endnotes

1 99 BFSP 990.

2 286 UNTS 265.

2a Bosnia and Herzegovina—Central Authority

Address: The Ministry of Justice of Bosnia and Herzegovina.

1 Albania—Central Authority & practical information

Central Authority(ies):

the Department responsible for the international judicial cooperation at the Ministry of Justice.

Address: Bulevardi ``Zogu I''
TIRANA
Albania

Telephone: +355 (4) 22 59 388

General website: http://www.justice.gov.al

- Convention of 15 November 1965 on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters [14]

Competent Authority (Art. 6, 18)

The Courts which have requested judicial and extrajudicial documents for the purpose of this Convention.

Competent Authority (Art. 9)

the Department responsible for the consular issues, at the Ministry of Foreign Affairs.

Convention of 15 November 1965 on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters[14].

1a *Notification in conformity with Article 31 of the Convention*

By note of 1 May 1985, received at the Ministry of Foreign Affairs of the Kingdom of the

Netherlands on 17 May 1985, the Government of Antigua and Barbuda informed the Ministry of Foreign Affairs it does consider itself bound by the abovementioned Convention, declared applicable to Antigua by the Government of the United Kingdom of Great Britain and Northern Ireland on 20 May 1970.

Notification in conformity with Article 31, letter e, of the Convention

The Government of Antigua and Barbuda informed the Ministry of Foreign Affairs of the Kingdom of the Netherlands by Note of 2 May 1986 that as the authority referred to in Article 21 has been designated:

The Registrar—Eastern Caribbean Supreme Court.

Notification in conformity with Article 31, letter e, of the Convention

Rectification of the Notifications *Judicial and Extrajudicial Documents Nos. 2 and 3/1987* of 14 July 1987 and 28 August 1987.

The competent authorities under Article 21 of the above-mentioned Convention, designated by the Government of Antigua and Barbuda, are:

a) The Governor-General, Antigua and Barbuda;

b) The Registrar of the High Court of Antigua and Barbuda, St. John's, Antigua.

1b Argentina made the following declarations:

``…

1-To Article 5, third paragraph: ``The ARGENTINE REPUBLIC shall not accept documents to be served or transmitted unless they are accompanied by a translation into the Spanish language."

2-To Article 21, first paragraph, a): ``The Argentine Government designates the Ministry of Foreign Affairs, International Trade and Worship as the Central Authority."

3-To Article 21, second paragraph, a): ``The ARGENTINE REPUBLIC opposes to the use of methods of transmission pursuant to Article 10."

4-To Article 21, second paragraph b): ``The Argentine Government accepts declarations pursuant to second paragraph of Article 15 and third paragraph of Article 16."

5-The ARGENTINE REPUBLIC rejects the claimed extension of application of the Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters, adopted at The Hague on November 14, 1965, to the Malvinas, South Georgias and South Sandwich Islands as notified on May 20, 1970 by the UNITED KINGDOM OF GREAT BRITAIN

AND NORTHERN IRELAND to the KINGDOM OF THE NETHERLANDS as Depositary of the Convention under the ``Falkland Islands and dependencies'' inaccurate denomination. Therefore, the ARGENTINE REPUBLIC similarly rejects the designation of the ``Registrar of the Supreme Court'' in the Malvinas Islands as application authority of this Convention which was made on that same opportunity, as well as any other act derived or that may be derived from this claimed territorial extension.

The General Assembly of the United Nations has recognized the existence of a dispute on the Malvinas, South Georgias and South Sandwich Islands sovereignty and has urged the ARGENTINE REPUBLIC and the UNITED KINGDOM OF GREAT BRITAIN AND NORTHERN IRELAND to hold negotiations in order to find, as soon as possible, a peaceful and definite solution to such dispute, with United Nations Secretary General's good offices mediation, who shall inform the General Assembly about the progress made (Resolutions 2065 (XX), 3160 (XXVIII), 31/49, 37/9, 38/12, 39/6, 40/21, 41/40, 42/19 and 43/25). The Special Committee on Decolonization having equally declared, has annually adopted a resolution which proclaims that to put an end to this colonial situation the negotiations must be resumed in order to peacefully and definitely solve this sovereignty dispute. The last of these resolutions was adopted on July 1, 1999.

The ARGENTINE REPUBLIC reaffirms its sovereignty on the Malvinas, South Georgias and South Sandwich Islands and its maritime surrounding areas which are an integral part of its national territory.''

N.B.: In accordance with Article 28, paragraph 2, the Convention will enter into force for Argentina in the absence of any objection from a State which has ratified the Convention before 2 February 2001 within a six months' period which, for practical reasons, will run from 15 May to 15 November 2001.

The Hague, 18 November 1987

1c The Commonwealth of the Bahamas deposited its instrument of accession to the above-mentioned Convention with the Ministry of Foreign Affairs of the Kingdom of the Netherlands on 17 June 1997 in accordance with Article 28, paragraph 1.

The said accession became perfect on 1 January 1998.

The provisions of the Convention will enter into force for the Commonwealth of the Bahamas on 1 February 1998 in accordance with Article 28, paragraph 3.

In accordance with Articles 2 and 18 of the Convention, the *Commonwealth of the Bahamas* has designated as Central Authority:

the ``Honourable Attorney General''.

1d With the following declaration:

``The Government of Barbados has designated the Registrar of the Supreme Court of Barbados as the Central Authority for the purposes of Articles 2 and 18, in accordance with the provisions of Article 21 of the Convention.''

1e *Notification in conformity with Article 31, paragraph c, of the Convention*

The Republic of Belarus deposited its instrument of accession to the above-mentioned Convention with the Ministry of Foreign Affairs of the Kingdom of the Netherlands on 6 June 1997 in accordance with Article 28, paragraph 1.

The said accession became perfect on 1 January 1998.

The provisions of the Convention will enter into force for the Republic of Belarus on 1 February 1998 in accordance with Article 28, paragraph 3.

In accordance with Article 2 of the Convention the Republic of Belarus has designated the Ministry of Justice of the Republic of Belarus (220084 Minsk, ul.Kollektornaya, 10; tel. 00 375 172 208 687/ 208 829; fax 209 684) as the Central Authority.

2 With the following declaration:

1. In conformity with the first paragraph of Article 2 of the Convention, the Ministry of Justice, Administration de la Législation, Place Poelaert, 4, 1.000 Brussels is designated as the Central Authority;

2. The Ministry of Justice is also designated as the competent authority to receive documents forwarded by the channels provided for in the first paragraph of Article 9 of the Convention;

3. The Belgian Government is opposed to use being made within its territory of the freedom to effect service provided for in the first paragraph of Article 8;

4. The Belgian Government declares that it will avail itself of the provision contained in the second paragraph of Article 15;

5. In conformity with the third paragraph of Article 16, the Belgian Government declares that the applications mentioned in the second paragraph of Article 16 will not be entertained if they are filed after the expiration of a period of one year following the date of the judgment;

6. The Belgian Government believes it should draw attention to the fact that any request for the service of documents made under sections a) or b) of the first paragraph of Article 5 requires the agency of a process-server (huissier de justice) and that the resulting costs should be reimbursed in conformity with Article 12 of the Convention.

2a Bosnia and Herzegovina—Central Authority

Address: The Ministry of Justice of Bosnia and Herzegovina.

2b With the following declaration:

``1. Pursuant to the first paragraph of Article 2 of the Convention the Minister of State in the Office of the President of the Republic of Botswana has been designated the Central Authority to receive requests for service from other contracting states.

2. The Registrar of the High Court of Botswana is designated as the authority competent to complete the certificate in the form of the Model annexed to the Convention pursuant to the first paragraph of Article 6.

3. In accordance with the provisions of Article 9 of the Convention the Minister of State in the Office of the President is designated as the receiver of process sent through Consular channels.

4. It is declared that the Government of Botswana objects to the method of service referred to in sub-paragraphs (b) and (c) of Article 10.

5. It is declared that a judge of the High Court of Botswana may give judgment if all the conditions specified in paragraph 2 of Article 15 are fulfilled.''

All documents forwarded for service must be in duplicate and written in or translated into the English language.

2c Bulgaria made the following declarations:

``*Declaration on Article 5, paragraph 3*

The Republic of Bulgaria requires the document, which is to be served, to be written in or accompanied by a translation into the Bulgarian language.

Declaration on Articles 2 and 18

The Republic of Bulgaria designates the Ministry of Justice and European Legal Integration as Central Authority. The same authority is competent to receive the documents forwarded under Article 9, paragraph 1.

Declaration on Article 6, paragraphs 1 and 2

The Republic of Bulgaria designates the district courts as authorities which are competent to complete the certificate.

Declaration on Article 8, paragraph 2

The Republic of Bulgaria declares that within Bulgarian territory foreign diplomatic and consular agents may effect service of judicial and extrajudicial documents only upon nationals of the State which they represent.

Declaration on Article 10

The Republic of Bulgaria objects to the use of the channels of transmission for service mentioned in Article 10 of the Convention.

Declaration on Article 15, paragraph 2

The judge gives judgment provided that all certificates under Article 15, paragraph 2, are available.

Declaration on Article 16, paragraph 3

The Republic of Bulgaria will not accept applications for relief concerning judgments under paragraph 1 of this article after the expiration of one year following the date of the judgment."

3 *Notification in conformity with Article 31, paragraph c, of the Convention*

Canada deposited its instrument of accession to the above-mentioned Convention with the Ministry of Foreign Affairs of the Kingdom of the Netherlands on 26 September 1988 in accordance with Article 28, paragraph 1.

The said accession became perfect on 10 April 1989.

In accordance with Article 28, paragraph 3, the provisions of the Convention entered into force for Canada on 1 May 1989.

A copy of a document transmitted by Canada and containing the designations and declarations referred to in Article 21 of the Convention is attached to this Notification.

CANADA

A. Transmission and execution of requests for service

1. Central Authority

(Article 2 and Article 18, paragraph 3)

comment: To save time, requests should be forwarded directly to the Central Authority of the province or territory concerned. They may, however, also be forwarded to the Federal Central Authority which will transmit them to the relevant Central Authority.

Province/ Territory	*Name*	*Address*	*Telephone/fax:*
Alberta	Sheriff of Alberta (Civil Enforcement)	Main Floor Law Court Building North 1A Sir Winston Churchill Square Edmonton, Alberta Canada T5J 0R2	T (780) 422-2481 F (780) 422-3011
British Columbia	Ministry of the Attorney General for British Columbia Order in Counsel Administration Office	Room 208A Parliament Building 553 Superior Street Victoria, British Columbia Canada V8V IX4	T (250) 387-0725 F (250) 387-4349
Manitoba	Attorney-General of Manitoba	Woodsworth Building	T (204) 945-2832 F (204) 948-2041

	a/s ``Director—Civil Legal Services''	7th Floor 405 Broadway Winnipeg, Manitoba Canada, R3C 3L6	
New Brunswick	Attorney-General of New Brunswick care of Director of Legal Services	P.O. Box 6000 670 King Street Centennial Building Fredericton, New Brunswick Canada, E3B 5H1	T (506) 453-2222 F (506) 453-3275
Newfoundland	Department of Justice	P.O. Box 8700 4 floor, East Block Confederation Building St. John's Newfoundland Canada A1B 4J6	T (709) 729-5942 F (709) 729-2129
Nova Scotia	Attorney General of Nova Scotia Legal Services Division	5151 Terminal Road 4th floor P.O. Box 7 Halifax, Nova Scotia Canada B3J 2L6	T (902) 424-4024 F (902) 424-1730
Ontario	Ministry of the Attorney General	Courts Administration Ontario Court (Provincial Division) Court House 393 Main Street Haileybury, Ontario Canada P0J 1K0	T (705) 672-3395
Prince Edward Island	Attorney General of Prince Edward Island Office of the Deputy Minister	P.O. Box 2000 Charlottetown, Prince Edward Island Canada C1A 7N8	T (902) 368-4594 F (902) 368-4563
Quebec	Minister of Justice of Quebec Att. Law Services	1200 route de l'Eglise 2nd floor Ste-Foy, Quebec Canada G1V 4M1	T (418) 643-1436 F (418) 646-1696
Saskatchewan	Minister of Justice for Saskatchewan Att. of Director of Sheriff Services	Court House 2425 Victoria Avenue Regina, Saskatchewan Canada F4P 3V7	T (306) 787-0472 F (306) 780-6990
Yukon	Director of Court Services	Department of Justice Box 2703 Whitehorse, Yukon Canada Y1A 2C6	T (867) 667-5942 F (867) 393-6212
Northwest Territories	Deputy Minister of Justice Government of the Northwest Territories	P.O. Box 1320 Yellowknife, Northwest Territories Canada X1A 2L9	T (867) 920-6197 F (867) 873-0307
Nunavut	Clerk of the Nunavut Court of Justice Court Services Division	Box 297 Iqaluit, Nunavut Canada X0A 0H0	T (867) 975-6100 F (867) 975-6150
Federal	United Nations Criminal and Treaty Law Division	125 Sussex Drive Ottawa, Ontario Canada K1A 0G2	T (613) 995-1050 F (613) 992-2467 e-mail: JLA.extott@extott07.x400.gc.ca

Payment of Service Costs

The payment of Service Costs should be made to:*

* List as per 28 September 2000

Alberta	Provincial Treasurer of Alberta
British Columbia	Minister of Finance of British Columbia
Prince Edward Island	Provincial Treasurer of Prince Edward Island
Manitoba	Minister of Finance of Manitoba
New Brunswick	Minister of Finance of New Brunswick
Nova Scotia	Minister of Finance of Nova Scotia
Ontario	Treasurer of Ontario
Quebec	``Ministre des Finances du Québec''
Saskatchewan	Department of Justice of Saskatchewan—Sheriff Services
Newfoundland	Newfoundland Exchequer Account
Yukon	Territorial Treasurer of the Government of Yukon
Northwest Territories	Government of the Northwest Territories
Nunavut	Government of Nunavut

2. Methods of service employed by the Central Authority (Article 5)

2.1 Formal service (Article 5, paragraph 1, sub-paragraph a)

In Canada, service will be effected according to the methods of service prescribed by the laws in force in each province and territory.

The normal procedure that will be used by central authorities in Canada is personal service made by a sheriff or deputy sheriff or a *huissier* in Quebec, on an individual or on a corporation by handing a copy of the document to the defendant in person, wherever he may be, or to the President, Chairman or other Chief Officer of a corporation at the place of business.

Service may also be effected by leaving a copy of the document with a person of a reasonable age at the defendant's domicile or residence.

Where service is made on a corporation, provincial laws usually provide for service on a director or senior officer of the corporation or, in some cases, on a registered agent or on a responsible person at the registered office of the corporation.

2.2 Informal delivery (Article 5, paragraph 2)

The practice of informal delivery (``par simple remise'') of judicial or extra-judicial documents is not known in Canada.

2.3 Service by a particular method (Article 5, paragraph 1, sub-paragraph b)

In Alberta, New Brunswick and Ontario, service will be made by certified mail at the option of the requesting party. In Ontario, the Central Authority will serve by any form of mail, at the option of the requesting party.

2.4 Translation requirements (Article 5, paragraph 3)

For both Formal service and Service by a particular method, translation requirements will depend on the province or territory concerned.

For Alberta, British Columbia, Newfoundland, Nova Scotia, Prince Edward Island, Saskatchewan, all documents must be written in or translated into English.

For Ontario, Manitoba, and the Northwest Territories, all documents must be written in or translated into English or French.

For New Brunswick and the Yukon, all documents must be written in or translated into English or French. The Central Authority of New Brunswick or the Yukon may reserve the right to require documents to be translated into English or French depending on the language understood by the addressee.

For Quebec, translation will be required in all cases where the recipient does not understand the language in which the document is written. All documents which commence actions must be translated. Summary translation of all other documents is acceptable if the recipient agrees. Translation is to be done into the French language; however, the Quebec central authority may, upon request, allow a translation in English at the condition that the recipient understands this language.

Costs (Article 12, paragraph 2, sub-paragraph a)

Costs for execution of service will be of $50.-Can.

3. Authority competent to complete the certificate of service (Article 6)

In addition to the Central Authorities, the sheriffs, deputy-sheriffs, sub-sheriffs, clerk of the court or his/her deputy for the judicial district (except in Manitoba where there are no judicial districts) in which the person is to be served or the *huissiers* (only in Quebec) are competent to complete the certificate of service.

B. Forwarding of requests for service to the Central Authority of another Contracting State

Forwarding Authorities (Article 3)

Requests for service to Central Authorities of other States may be transmitted by:

— The Attorney General for Canada

— The Attorneys General or the Ministry of Attorney General or Minister of Justice of a province or a territory—as the case may be.

- Clerks of the courts and their deputies for a judicial or a court district

- The members of the law societies of all provinces and territories

- The member of the Board of Notaries of the Province of Quebec (for non-litigious matters only).

- Local registrars

- The huissiers and sheriffs

- The prothonotaries and deputy prothonotaries

- The ``Percepteur des pensions alimentaires'' in Québec

CANADA

I
Transmission through consular or diplomatic channels (Articles 8 and 9)

A
Acceptance

On accession, Canada has not declared that it objects to service by consular or diplomatic channels on its territory.

Receiving authority (Article 9, paragraph 1)

The Central Authorities in Canada designated in accordance with Articles 2 and 18 of the *Convention* are competent to receive requests for service transmitted by a foreign consul within Canada.

B
Forwarding to the Contracting States

Canada does not object to service by consular channels of Canadian documents abroad providing that the recipient accepts this method of service.

II

Transmission through postal channels (Article 10, sub-paragraph a)

A
Acceptance

Canada does not object to service by postal channels.

B
Forwarding to other contracting States

Canadian law allows the use of postal channels to serve Canadian documents to persons abroad.

III
Service through judicial officers, notably ``huissiers", etc. of the requested State (Article 10, sub-paragraphs b) and c))

On accession, Canada has not declared to object to methods of service of Article 10, sub-paragraphs b) and c).

IV
Other direct channels (Article 11); special agreements (Articles 24 and 25)

Canada is party to bilateral conventions on civil procedure with the following States:

Austria	Canada Treaty Series, 1935, n° 16
Belgium	Canada Treaty Series, 1928, n° 16
Czechoslovakia	Canada Treaty Series, 1928, n° 17
Denmark	Canada Treaty Series, 1936, n° 4
Finland	Canada Treaty Series, 1936, n° 5
France	Canada Treaty Series, 1928, n° 15
Germany	Canada Treaty Series, 1935, n° 11
Greece	Canada Treaty Series, 1938, n° 11
Hungary	Canada Treaty Series, 1939, n° 6
Iraq	Canada Treaty Series, 1938, n° 12
Italy	Canada Treaty Series, 1938, n° 14
Netherlands	Canada Treaty Series, 1936, n° 2
Norway	Canada Treaty Series, 1935, n° 15

Poland	Canada Treaty Series, 1935, n° 18
Portugal	Canada Treaty Series, 1935, n° 17
Spain	Canada Treaty Series, 1935, n° 12
Sweden	Canada Treaty Series, 1935, n° 13
Turkey	Canada Treaty Series, 1935, n° 19
Yugoslavia	Canada Treaty Series, 1939, n° 4

CANADA

GUARANTEES UNDER THE CONVENTION

Declarations made pursuant to Articles 15, paragraph 1 or 16, paragraph 3.

1. *Stays of entry* (Article 15, paragraph 2)

Canada declares that the judges may give judgment under the conditions stated in Article 15 of the Convention.

2. *Relief from expiration of the period of time for appeal* (Article 16, paragraph 3)

Canada declares that an application filed under Article 16 of the Convention will not be entertained if it is filed after the expiration of one year following the date of the judgment, except in exceptional cases determined by the rules of the Court seized of the matter.

3a The People's Republic of China deposited its instrument of accession with the Ministry of Foreign Affairs of the Kingdom of the Netherlands on May 6, 1991, in accordance with Article 28, paragraph 1, of the Convention.

The instrument of accession contains the following declarations:

``*1. to designate according to Article 2 and Article 9 of the Convention the Ministry of Justice of the People's Republic of China as the Central Authority and the authority competent to receive documents transmitted by foreign States through consular channels.*

The communication address is:

Bureau of International Judicial Assistance
Ministry of Justice
10, Chaoyangmen Nandajie
Chaoyang District
Beijing

P.C. 100020
People's Republic of China

2. to declare according to the second paragraph of Article 8 that the means of service stipulated in the first paragraph of that Article may be used within the territory of the People's Republic of China only when the document is to be served upon a national of the State in which the documents originate.

3. to oppose the service of documents in the territory of the People's Republic of China by the methods provided by Article 10 of the Convention.

4. to declare in accordance with the second paragraph of Article 15 of the Convention that if all the conditions provided in that paragraph are fulfilled, the judge, notwithstanding the provisions of the first paragraph of that Article, may give judgment even if no certificate of service or delivery has been received.

5. to declare in accordance with the third paragraph of Article 16 of the Convention that the application for relief from the effects of the expiration of the time for appeal shall not be entertained except that it is filed within one year following the date of the judgment."

By Note dated 4 March 1998, the Embassy of the People's Republic of China in The Hague informed the Permanent Bureau of the following declarations:

``1. The Ministry of Justice of the People's Republic of China is the sole Central Authority designated by the People's Republic of China in accordance with Article 2 of the Convention.

2. Under Article 18 of the Convention, the People's Republic of China designates the Chief Secretary for Administration of the Hong Kong Special Administrative Region Government as the ``other authority", the address of which is the following:

Chief Secretary for Administration
Hong Kong Special Administrative Region Government
12/F, West Wing, Central Government Office
11 Lee House Street, Central, Hong Kong

3. Under Article 6 and Article 9 of the Convention, the People's Republic of China designates the Registrar of the High Court of the Hong Kong Special Administrative Region as the authority for treatment of issues referred to in the said articles. The address of this Registrar of the High Court is the following:

Registrar
High Court
Hong Kong Special Administrative Region
38 Queensway, Hong Kong."

CHINA, Hong Kong Special Administrative Region Only

By notification dated June 10, 1997, to the Ministry of Foreign Affairs of the Kingdom of The Netherlands, the People's Republic of China communicated the following information concerning Hong Kong:

THE EMBASSY OF THE PEOPLE'S REPUBLIC OF CHINA

IN THE KINGDOM OF THE NETHERLANDS

No. He Wai Fa(97)-52

(Translation)

The Hague, June 10, 1997

Your Excellency,

In accordance with the Joint Declaration of the Government of the People's Republic of China and the Government of the United Kingdom of Great Britain and Northern Ireland on the Question of Hong Kong signed on 19 December 1984, the People's Republic of China will resume the exercise of sovereignty over Hong Kong with effect from 1 July 1997. Hong Kong will, with effect from that date, become a Special Administrative Region of the People's Republic of China and will enjoy a high degree of autonomy, except in foreign and defence affairs which are the responsibilities of the Central People's Government of the People's Republic of China.

In this connection, I am instructed by the Minister of Foreign Affairs of the People's Republic of China to make the following notification:

The Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil and Commercial Matters done on 15 November 1965 (hereinafter referred to as the ``Convention''), by which the Government of the Kingdom of the Netherlands is designated as the depository, to which the Government of the People's Republic of China deposited its instrument of accession on 3 May 1991, will apply to the Hong Kong Special Administrative Region with effect from 1 July 1997. The Government of the People's Republic of China also makes the following declarations:

1. In accordance with Paragraph 2 of Article 8 of the Convention, it declares that the means of service referred to in Paragraph 1 of this Article may be used within the Hong Kong Special Administrative Region only when the document is to be served upon a national of the state in which the document originates.

2. In accordance with Article 18 of the Convention, it designates the Administrative Secretary of the Government of the Hong Kong Special Administrative Region as the Other Authority in the Hong Kong Special Administrative Region.

3. It designates the Registrar of the High Court of the Hong Kong Special Administrative Region as the authority for the purpose of Article 6 and 9 of the Convention.

4. With reference to the provisions of Sub-paragraphs (b) and (c) of Article 10 of the Convention, documents for service through official channels will be accepted in the Hong Kong Special Administrative Region only by the Central Authority or Other Authority designated, and only from judicial, consular or diplomatic officers of other Contracting States.

The Government of the People's Republic of China will assume responsibility for the international rights and obligations arising from the application of the Convention to the Hong Kong Special Administrative Region.

It would be appreciated if the contents of this Note could be placed formally on record and *brought to the attention of the other Parties to the Convention.*

I avail myself of this opportunity to renew to Your Excellency the assurance of my highest consideration.

The States which ratified the Convention were notified of the accession by the Dutch Government on 17 May 1991. Since none of these States raised an objection to the accession within the period of six months specified in Article 28, paragraph 2, the said accession became perfect on 1 December 1991.

The provisions of the Convention entered into force for the People's Republic of China on 1 January 1992 in accordance with Article 28, paragraph 3.

CHINA, Macau Special Administrative Region Only

The Ambassador of Portugal at The Hague informed the Minister for Foreign Affairs of the Kingdom of the Netherlands by letter of 26 November 1999 of the following:

``Upon instructions from my Government and referring to the Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters concluded at The Hague on 15 November 1965 (hereinafter referred to as the Convention) which currently applies to Macau, I have the honour to inform Your Excellency of the following: In accordance with the Joint Declaration of the Government of the Portuguese Republic and of the Government of the People's Republic of China on the question of Macau, signed in Beijing on 13 April 1987, the Government of the Portuguese Republic will remain internationally responsible for Macau until 19 December 1999, the People's Republic of China resuming from that date the exercise of sovereignty over Macau, with effect from 20 December 1999. From 20 December 1999 the Portuguese Republic will cease to be responsible for the international rights and obligations arising from the application of the Convention in Macau, (…)''

The Ambassador of the People's Republic of China at The Hague informed the Minister for Foreign Affairs by letter of 10 December 1999 of the following:

Translation

``In accordance with the Joint Declaration of the Government of the People's Republic of China and the Government of the Republic of Portugal on the Question of Macau signed on 13 April 1987, the Government of the People's Republic of China will resume the exercise of sovereignty over Macau with effect from 20 December 1999. Macao will from that date become a Special Administrative Region of the People's Republic of China and will enjoy a high degree of autonomy, except in foreign and defence affairs which are the responsibilities of the Central People's Government of the People's Republic of China.

In this connection, I am instructed by the Minister of Foreign Affairs of the People's Republic of China to inform Your Excellency of the following:

The Convention on the service abroad of judicial and extrajudicial documents in civil or commercial matters, concluded at The Hague on 15 November 1965 (hereinafter referred to as the Convention), to which the Government of the People's Republic of China deposited the instrument of accession on 3 May 1991, shall apply to the Macau Special Administrative Region with effect from 20 December 1999. The Government of the People's Republic of China also wishes to make the following declaration:

1. In accordance with Articles 6 and 9 of the Convention, it designates the Procurate, the Primary

Courts, the Intermediate Courts and the Court of Final Appeal of the Macau Special Administrative Region as the Central Authorities in the Macau Special Administrative Region.

2. In accordance with the second paragraph of Article 8 of the Convention, it declares that the means of service stipulated in the first paragraph of that article may be used within the Macau Special Administrative Region only when the document is to be served upon a national of the State in which the document originates.

3. In accordance with the second paragraph of Article 15 of the Convention, it declares that if all the conditions provided in that paragraph are fulfilled, the judge of the Macau Special Administrative Region, notwithstanding the provisions of the first paragraph of that article, may give judgment even if no certificate of service or delivery has been received.

4. In accordance with the third paragraph of Article 16 of the Convention, it declares that in the Macau Special Administrative Region, the application for relief from the effects of the expiration of the time for appeal shall not be entertained except that it is filed within one year following the date of the judgment. The Government of the People's Republic of China shall assume the responsibility for the international rights and obligations arising from the application of the Convention to the Macau Special Administrative Region. (… .)".

The Embassy of the People's Republic of China at The Hague informed the Minister for Foreign Affairs of the Netherlands by letter of 1 November 2000 of an amendment of paragraph 1 of the declaration contained in the Note of 10 December 1999. Paragraph 1 which read as follows:

``1. In accordance with article 6 and 9 of the Convention, it designates the Procurate, the Primary Courts, the Intermediate Courts and the Courts of Final Appeal of the Macau Special Administrative Region as the Central Authorities in the Macau Special Administrative Region."

has been amended as follows:

``In accordance with Article 18 of the Convention, it designates the Procuratorate of the Macau Special Administrative Region as the Other Authority in the Macau Special Administrative Region, which will undertake to receive and transmit Requests for Services coming from other Contracting States.

In accordance with Article 6 of the Convention, it designates the Court Clerks and Assistant Court Clerks from the Court of Final Appeal of the Macau Special Administrative Region as the authority competent to complete a certificate referred to in this Article.

In accordance with Article 9 of the Convention, it designates the Court Clerks and Assistant Court Clerks from the Court of Final Appeal of the Macau Special Administrative Region as the authority competent to receive Requests for Service forwarded by other Contracting States through consular channels.

The address of the Procuratorate of the Macau Special Administrative Region is:

Alameda Dr. Carlos d'Assumpcao

Macau SAR of the People's Republic of China Chief Executive Administrative Building

NAPE

Macau"

Furthermore, the Government of the People's Republic of China made the following supplementary declaration:

``In accordance with paragraph 3 of Article 5 of the Convention, it declares that documents to be served in the Macau Special Administrative Region under the first paragraph of Article 5 shall be written in either Chinese or Portuguese, or be accompanied by a translation in either Chinese or Portuguese".

3b

Croatia—Central Authority	
Address	The Republic of Croatia declares that the Ministry of Justice of the Republic of Croatia is the Central Authority for receiving requests for the service of judicial documents coming from other Contracting States.
Conventions	• Convention of 15 November 1965 on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters [14]
Croatia—Competent Authority (Art. 6)	
Address	The Republic of Croatia declares that municipal courts according to residence, abode, and headquarters of the addressee of documents are competent for the completion of the certificate of reception of documents.
Conventions	• Convention of 15 November 1965 on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters [14]
Croatia—Competent Authority (Art. 9)	
Address	The Republic of Croatia declares that the documents served in accordance with Article 9 of the Convention are forwarded to the Ministry of Justice of the Republic of Croatia for the purpose of service to parties.
Conventions	• Convention of 15 November 1965 on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters [14]

Accession

According to Article 28, second paragraph, the Convention will enter into force for Croatia in the absence of any objection from a State which has ratified the Convention before such deposit, notified to the Ministry of Foreign Affairs of the Kingdom of the Netherlands within a period of six months after the date on which the said Ministry had notified it of such accession.

For practical reasons this six months' period will in this case run from 1 April 2006 to 1 October 2006.

Reservations Declarations

Articles: 5,6,8,9,10,15,16

Declaration in accordance with Article 5 of the Convention:

The Republic of Croatia declares that documents served pursuant to Article 5, paragraph 1, should be accompanied by a translation into the Croatian language.

Declaration in accordance with Article 6 of the Convention:

The Republic of Croatia declares that municipal courts according to residence, abode, and headquarters of the addressee of documents are competent for the completion of the certificate of reception of documents.

Declaration in accordance with Article 8 of the Convention:

The Republic of Croatia declares that it is opposed to direct service of judicial documents upon persons within its territory through foreign diplomatic or consular agents, unless the document is to be served upon a national of the State in which the document originates.

Declaration in accordance with Article 9 of the Convention:

The Republic of Croatia declares that the documents served in accordance with Article 9 of the Convention are forwarded to the Ministry of Justice of the Republic of Croatia for the purpose of service to parties.

Declaration in accordance with Article 10 of the Convention:

The Republic of Croatia declares that it is opposed to the mode of service specified in Article 10 of the Convention.

Declaration in accordance with Article 15 of the Convention:

The Republic of Croatia declares that Croatian courts may give a judgement if all the conditions set out in paragraph 2 of Article 15 of the Convention are fulfilled.

Declaration in accordance with Article 16 of the Convention:

The Republic of Croatia declares that applications for relief set out in Article 16 of the Convention will not be entertained if they are filed after the expiration of a period of one year following the date on which the judgement was given.

3c *Notification in conformity with Article 31, paragraph c, of the Convention*

The Republic of Cyprus deposited its instrument of accession with the Ministry of Foreign Affairs of the Kingdom of the Netherlands on 26 October 1982 in accordance with Article 28, paragraph 1, of the Convention.

In accordance with Article 28, paragraph 3, the provisions of the Convention entered into force for the Republic of Cyprus on 1 June 1983.

Referring to the accession of Cyprus to the above-mentioned Convention the Embassy of Turkey at The Hague addressed a Note dated 6 April 1983 to the Ministry of Foreign Affairs of the Kingdom of the Netherlands. [See note 13.]

Notification in conformity with Article 31, paragraph e, of the Convention

In conformity with Article 21 of the Convention the Government of Cyprus informed the Ministry of Foreign Affairs of the Kingdom of the Netherlands by Note dated 5 January 1984 of the designation of the following authorities and made the following declarations:

``(a) *Article 2:*

Designation of Central Authority which will undertake to receive requests for service:—Permanent Secretary, Ministry of Justice and Public Order*.

(b) *Article 6:*

Designation of the authority competent to complete the certificate of Service:—Ministry of Justice.

(c) *Article 9:*

Designation of the authority competent to receive documents transmitted by Consular Channels:—Ministry of Justice.

(d) *Articles 8 and 10:*

No opposition to the methods of transmission of documents provided by these articles.

(e) *Article 15:*

Declaration that judgement may be given if all conditions laid down in paragraph 2 are fulfilled.

(f) *Article 16:*

Declaration pursuant to paragraph 3 that the application will not be entertained if it is filed after the expiration of one year from the date of the judgement.

(g) *Article 18:*

Designation of other authorities in addition to the Central Authorities.

The Courts of the Republic. Competence:

Service of documents through their Registries.".

* New title of the Ministry of Justice of the Republic of Cyprus.

3d *Notification in conformity with Article 31, paragraphs c and e, of the Convention*

By notification dated January 28, 1993 the Czech Republic communicated the following: ``In accordance with the valid principles of international law and to the extent defined by it, the Czech Republic, as a successor state created as a result of the division of the Czech and Slovak Federal Republic, considers itself bound, as of January 1, 1993, i.e. the date of the division of the Czechoslovak federation, by multilateral international treaties to which the Czech and Slovak Federal Republic was a party on that date, including reservations and declarations to their provisions made earlier by Czechoslovakia", which are as follows:

Translation

—in accordance with Article 8 of the Convention, within the territory of the Socialist Republic of Czechoslovakia judicial documents may not be served directly through the diplomatic or consular agents of another contracting State unless the document is to be served upon a national of the State in which the documents originate;

—in accordance with Article 10 of the Convention, within the territory of the Socialist Republic of Czechoslovakia judicial documents may not be served by another contracting State through postal channels nor through the judicial officers, officials or other competent persons;

—in accordance with Article 15, paragraph 2 of the Convention, Czechoslovakian judges may give judgement even if the conditions pursuant to Article 15, paragraph 1, have not been fulfilled;

—the provisions of Article 29 of the Convention concerning the extension of the Convention to territories for the international relations of which the contracting States are responsible are at variance with the Declaration of the United Nations General Assembly on the Granting of Independence to Colonial Countries and Peoples of 14 December 1960, and for this reason the Socialist Republic of Czechoslovakia does not consider itself to be bound by these provisions.

A copy of the original text of the declaration is attached.

By Note dated 31 March 1982 and received at the Ministry of Foreign Affairs on 1 April 1982, the Embassy of the Czechoslovak Socialist Republic communicated the following with regard to the above-cited declaration concerning Article 29 of the Convention:

``This declaration cannot be considered a reserve in view of the fact that it does not follow other purposes than a similar declaration made at the ratification of the Convention on the Taking of Evidence Aboard in Civil or Commercial Matters, though a different formulation was used.

By this declaration the Czechoslovak Socialist Republic expresses its disagreement of principle with the status of colonies and other dependent territories which is in contradiction with the Declaration of the United Nations General Assembly on the Granting of Independence to Colonial Countries and Peoples of December 14, 1960.

The Czechoslovak Socialist Republic, however, has no intention to exclude the application of the Convention on the relations with the territories on which the use of the Convention has been extended in accordance with its Art. 29.".

The States which have ratified the Convention were notified by the Netherlands Government of the accession on 26 October 1981. Since none of these States raised an objection to the accession within the period of six months specified in Article 28, paragraph 2, the said accession became perfect on 9 May 1982.

The provisions of the Convention will enter into force for the Czechoslovak Socialist Republic on 1 June 1982.

The Czechoslovak Government has designated the following authorities as the authorities referred to in Articles 2, 6 and 9 of the Convention;

competent for the Czech Socialist Republic:

Ministerstvo spravedlnosti Ceské socialistické republiky/Ministry of Justice of the Czech Republic 128 10 Praha 2, Vysehradská 16;

competent for the Slovak Socialist Republic:

Ministerstvo spravodlivosti Slovenskej socialistickej republiky/Ministry of Justice of the Slovak Republic 883 11 Bratislava, Suvorovova 12.

4 With the following declarations:

re Art. 2 and 18

The Ministry of Justice is designated as the Central Authority.

re Art. 6

The Danish court of law that has asked for the service to be made is designated as competent to complete the certificate in accordance with Article 6.

re Art. 9

The local judge of first instance—though, as regards the court of first instance at Copenhagen and the court of first instance of the city and of the canton of Arhus, the president of the court—is designated as competent to receive documents forwarded through consular channels in accordance with Art. 9.

re Art. 10

Denmark is unable to recognize the method of effecting service set out in Art. 10, para. c.

re Art. 15

Denmark avails itself of the power, provided for in Art. 15, second paragraph, to declare that the judge may give judgment in a matter even if the provisions of Art. 15, first paragraph, are not fulfilled.

re Art. 16

Denmark avails itself of the power, provided for in Art. 16, third paragraph, to declare that an application will not be entertained if it is made after the expiration of a period of one year following the date of judgment. The question of the re-hearing of a matter in which a person has been judged by default shall be decided in accordance with the rules of the code of procedure, Art. 373 and Art. 374, cf. Art. 434. According to these rules, any person against whom judgment is given by default in an action, in first instance may apply for a re-hearing of the matter if he can prove that the default cannot be imputed to him. The application for a re-hearing should be filed as soon as possible and may not be submitted after the expiration of a period of one year following the date of judgment.

5 With a declaration that the signing of the Agreement ``does not mean in any way a recognition of Israel'' by the Arab Republic of Egypt and that ``no treaty relation will arise between'' the two countries.

The Arab Republic of Egypt also declared that it ``opposes the use of the methods of transmitting abroad the judicial and extrajudicial documents according to Articles 8 and 10 of the Convention.''

In conformity with article 21 of the Convention the Arab Republic of Egypt has designated the Ministry of Justice as the central authority as provided for in Articles 2 and 18.

First paragraph of declaration withdrawn effective Jan. 25, 1980.

5a *Notification in conformity with Article 31, paragraph c, of the Convention*

The Republic of Estonia deposited its instrument of accession to the above-mentioned Convention with the Ministry of Foreign Affairs of the Kingdom of the Netherlands on 2 February 1996, in accordance with Article 28, paragraph 1, of the Convention.

The Convention entered into force for Estonia 1 October 1996.

The instrument of accession of the Republic of Estonia contains the following declarations:

``1) the Republic of Estonia is against the way of forwarding referred to in point c of Article 10;

2) on the basis of Article 15 the judge may give judgment under the said conditions;

3) on the basis of paragraph 3 of Article 16 for a period of three years;''

In accordance with the terms of Article 28, paragraph 1, of the Convention any State not represented at the Tenth Session of the Hague Conference on Private International Law may accede to the present Convention after it has entered into force in accordance with the first paragraph of Article 27 (viz: 10 February 1969).

In accordance with Article 28, paragraph 2, the Convention shall enter into force for such a State in the absence of any objection from a State, which has ratified the Convention (at present:

Belgium, Denmark, Egypt, Germany, Finland, France, Greece, Ireland, Israel, Japan, the Kingdom of the Netherlands, Luxemburg, Norway, Portugal, Spain, Sweden, Switzerland, Turkey, the United Kingdom of Great Britain and Northern Ireland and the United States of America) before such deposit, notified to the Ministry of Foreign Affairs of the Kingdom of the Netherlands within a period of six months after the date on which the said Ministry has notified it of such accession. For practical reasons this six months' period will in this case run from 15 March 1996 to 15 September 1996.

In accordance with Article 2, the Republic of Estonia designated as Central Authority the Estonian Ministry of Justice.

6 With the following declarations:

``1. The Ministry of Justice has been designated Central Authority, pursuant to the first paragraph of article 2 of the Convention.

2. The Central Authority (The Ministry of Justice) is acting as the authority presupposed in art. 9 of the Convention.

3. Finnish authorities are not obliged to assist in serving documents transmitted by using any of the methods referred to in sub-paragraphs (b) and (c) of art. 10 of the Convention.''

(Ministry of Justice was substituted for Ministry of Foreign Affairs as Central Authority by Note dated 31 March 1982, effective 1 June 1982.)

7 With the following declarations:

``1. In conformity with Articles 2 and 18 of the Convention, the Ministry of Justice, Civil Division of International Judicial Assistance (Ministàere de la Justice, Service Civil de l'Entraide judiciaire internationale), 13 Place Vendôme, Paris (1er), is designated as the Central Authority to the exclusion of all other authorities.

2. The authority competent to complete the certificate referred to in Article 6 is the Public Prosecutor of the Republic (Procureur de la République) in whose district the addressee of the document to be served resides.

3. The Public Prosecutor of the Republic (Procureur de la République) is likewise authorized to receive documents forwarded through consular channels in accordance with Article 9.

4. The Government of the French Republic declares that it is opposed, as has been provided for in Article 8, to the direct service, through diplomatic and consular agents of the contracting States, of documents upon persons who are not nationals of those States.

5. The Government of the French Republic declares that the provisions of the second paragraph of Article 15 have its approval. It furthermore declares, with reference to Article 16, paragraph 3, that an application for relief from the effects of the expiration of the time for appeal from a judgment will not be entertained if it is filed more than twelve months following the date of the judgment.''

7a On October 3, 1990 the German Democratic Republic acceded to the Federal Republic of Germany.

With the following declarations:

``(1) Requests for service shall be addressed to the Central Authority of the Land where the request is to be complied with. The Central Authority pursuant to Article 2 and paragraph 3 of Article 18 of the Convention shall be for

Baden-Württemberg	Präsident des Amtsgerichts Freiburg Holzmarkt 2 79098 Freiburg tel.: +49 (761) 205-0 fax: +49 (761) 205-1800
Bavaria	Präsidentin des Oberlandesgerichts München Prielmayerstrasse 5 80097 München tel.: +49 (89) 5597-1 fax: +49 (89) 5597-3575
Berlin	Senatsverwaltung für Justiz von Berlin Salzburger Strasse 21-25 10825 Berlin tel.: +49 (30) 9013-0 fax: +49 (30) 9013-2000
Brandenburg	Ministerium der Justiz und für Bundes-und Europaangelegenheiten des Landes Brandenburg Heinrich-Mann-Allee 107 14460 Potsdam tel.: +49 (331) 866-0 fax: +49 (331) 866-3080 / 3081
Bremen	Der Präsident des Landsgerichts Domsheide 16 28195 Bremen tel.: +49 (421) 361-4253 fax: +49 (421) 361-6713
Hamburg	Präsident des Amtsgerichts Hamburg Sievekingplatz 1 20335 Hamburg tel.: +49 (40) 42843-0 fax: +49 (40) 42843-4318 / 4319
Hessen	Hessisches Ministerium der Justiz und für Europaangelegenheiten Luisenstrasse 13 65185 Wiesbaden tel.: +49 (611) 32-0 fax: +49 (611) 32-2763
Lower Saxony	Niedersächisches Ministerium der Justiz und für Europaangelegenheiten Am Waterlooplatz 1 30169 Hannover tel.: +49 (511) 120-0 fax: +49 (511) 120-5170 / 5181
Mecklenburg-Western Pomerania	Justizministerium des Landes Mecklenburg-Vorpommern Demmlerplatz 14 19053 Schwerin tel.: +49 (385) 588-0 fax: +49 (385) 588-3453
Northrhine-Westphalia	Präsident des Oberlandesgerichts Düsseldorf Cecilienallee 3 40474 Düsseldorf tel.: +49 (211) 4971-0 fax: +49 (211) 4971-548
Rhineland-Palatinate	Ministerium der Justiz des Landes Rheinland-Pfalz Ernst-Ludwig-Strasse 3 55116 Mainz tel.: +49 (6131) 16-0 fax: +49 (6131) 16-4887
Saarland	Ministerium der Justiz des Saarlandes Zähringerstrasse 12 66119 Saarbrücken tel.: +49 (681) 501-00 fax: +49 (681) 501-5855
Saxony	Präsident des Oberlandesgerichts Dresden Postfach 12 07 32 01008 Dresden

Saxony-Anhalt	Ministerium für Justiz des Landes Sachsen-Anhalt Wilhelm-Höpfner-Ring 6 39116 Magdeburg tel.: +49 (391) 567-01 fax: +49 (391) 567-4226
Schleswig-Holstein	Ministerium für Justiz, Bundes-und Europaangelegenheiten des Landes Schleswig-Holstein Lorentzendamm 35 24103 Kiel tel.: +49 (431) 988-0 fax: +49 (431) 988-3870
Thuringia	Thüringer Ministerium für Justiz und Europaangelegenheiten Alfred-Hess-Strasse 8 99094 Erfurt tel.: +49 (361) 37-95200 fax: +49 (361) 37-95155

The Central Authorities are empowered to have requests for service complied with directly by postal channels if the conditions for service in accordance with paragraph 1(a) of Article 5 of the Convention have been fulfilled. In that case the competent Central Authority will hand over the document to the postal authorities for service. In all other cases the local court (Amtsgericht) in whose district the documents are to be served shall be competent to comply with requests for service. Service shall be effected by the registry of the local court. Formal service (paragraph 1 of Article 5 of the Convention) shall be permissible only if the document to be served is written in, or translated into, the German language.

(2) The Central Authority shall complete the certificate (paragraphs 1 and 2 of Article 6 of the Convention) if it has itself arranged for the request for service to be complied with directly by postal channels; in all other cases this shall be done by the registry of the local court.

(3) The Central Authority of the Land where the documents are to be served and the authorities competent under Section 1 of the Act of 18th December 1958 implementing the Convention on Civil Procedure, signed at The Hague on 1st March 1954, to receive requests from consuls of foreign States, shall be competent to receive requests for service transmitted by a foreign consul within the Federal Republic of Germany (paragraph 1 of Article 9 of the Convention). Under that Act the president of the regional court (Landgericht) in whose district the documents are to be served shall be competent; in his place the president of the local court shall be competent if the request for service is to be complied with in the district of the local court which is subject to his administrative supervision.

(4) In accordance with paragraph 2(a) of Article 21 of the Convention, the Government of the Federal Republic of Germany objects to the use of methods of transmission pursuant to Articles 8 and 10. Service through diplomatic or consular agents (Article 8 of the Convention) is therefore only permissible if the document is to be served upon a national of the State sending the document. Service pursuant to Article 10 of the Convention shall not be effected." At the time of the deposit of its instrument of ratification the Federal Republic of Germany declared that the said Convention shall also apply to Land Berlin with effect from the date on which it enters into force for the Federal Republic of Germany.

By a Note dated November 19, 1992 addressed to the Ministry of Foreign Affairs of the Kingdom of the Netherlands, the Government of the Federal Republic of Germany made in conformity with Article 21, second paragraph, letter b, of the above-mentioned Convention the following declaration:

1. Notwithstanding the provisions of the first paragraph of Article 15, a German judge may give judgement even if no certificate of service or delivery has been received, if all the following *conditions are fulfilled:*

—the document was transmitted by one of the methods provided for in this Convention,

—a period of time of not less than six months, considered adequate by the judge in the particular case, has elapsed since the date of the transmission of the document,

—no certificate of any kind has been received, even though every reasonable effort has been made to obtain it through the competent authorities of the State addressed.

2. An application for relief in accordance with Article 16 will not be entertained if it is filed after the expiration of one year following the termination of the time-limit which has not been observed."

7b *Notification in conformity with Article 31 of the Convention*

In accordance with Article 26 of the Convention the Ambassador of Greece at The Hague signed on 20 July 1983 for the Hellenic Republic the above-mentioned Convention as follows:

P. ECONOMOU 20 juillet 1983

and deposited on the same date the instrument of ratification by the Hellenic Republic of the Convention.

In conformity with its Article 27, paragraph 2, the Convention entered into force for the Hellenic Republic on 18 September 1983.

The Greek Government designated the Department of Administrative and Judicial Affairs of the Ministry of Foreign Affairs of the Hellenic Republic as the Central Authority pursuant to Article 2 of the Convention.

By a Note dated 23 November 1989 addressed to the Ministry of Foreign Affairs of the Kingdom of the Netherlands, the Government of

the Hellenic Republic

made in conformity with Article 15, second paragraph, and Article 21, second paragraph, of the above-mentioned Convention the following declaration:

Translation

The judges of the Hellenic Republic may give judgment if all the conditions in Article 15, paragraph 2, letters *(a), (b)* and *(c), of the Convention are fulfilled even if no certificate of service or delivery has been received.*

By Note dated 13 July 1999, the Embassy of Greece informed the depositary in conformity with Article 5, paragraph 3, of the Convention of the following declaration:

``Greece declares that formal service will be effected only if the document to be served is written in, or translated into, Greek."

By Note dated 21 April 2000, the Embassy of Greece informed the depositary in conformity with Article 21 of the Convention of the following objections:

``Greece is opposed to the method of service provided in Article 8, unless the document to be served is addressed to a citizen of the requesting State.

Greece is opposed to the method of services provided in Article 10."

7c Accession for Hungary

N.B.: According to Article 28, second paragraph, the Convention will enter into force for Hungary in the absence of any objection from a State which has ratified the Convention before such deposit, notified to the Ministry of Foreign Affairs of the Kingdom of the Netherlands within a period of six months after the date on which the said Ministry had notified it of such accession. For practical reasons this six months' period will in this case run from 1 September 2004 to 1 March 2005.

Declarations

Articles: 2,5,6,8,9,10,15,16

To Article 2

In the Republic of Hungary the Ministry of Justice is designated as the Central Authority in accordance with Article 2 of the Convention.

To Article 5

The service methods prescribed in Paragraph 1 of Article 5 of the Convention shall only be applied in the Republic of Hungary in case the document to be served is accompanied by an official translation into the Hungarian language.

To Article 6

The certificate of service prescribed in Article 6 of the Convention is completed in the Republic of Hungary by the court that has performed such service.

To Article 8

The Republic of Hungary objects to the direct service of documents by foreign diplomatic or consular agents on the territory of the Republic of Hungary unless the addressee is a national of the sending state of the diplomatic or consular agent.

To Article 9

In accordance with Article 9 of the Convention in the Republic of Hungary the Ministry of Justice receives the documents to be served sent through consular channels.

To Article 10

The Republic of Hungary objects to the use of the service methods prescribed in Article 10 of the Convention.

To Article 15

The Republic of Hungary declares that the Hungarian courts may give judgement if all the conditions set out in Paragraph 2 of Article 15 of the Convention are fulfilled.

To Article 16

The Republic of Hungary declares that applications for relief set out in Article 16 of the Convention will not be entertained if it is filed more than one year after the date of judgement.

7d Iceland—Accession

According to Article 28, second paragraph, the Convention will enter into force for Iceland in the absence of any objection from a State which has ratified the Convention before the deposit of the instrument of accession, notified to the Ministry of Foreign Affairs of the Kingdom of the Netherlands within a period of six months after the date on which the said Ministry had notified it of such accession.

For practical reasons this six months' period will in this case run from 1 December 2008 to 1 June 2009.

In the absence of any objections the Convention will, in accordance with its Article 28, third paragraph, enter into force for Iceland on 1 July 2009.

Central Authority & practical information

Ministry of Justice and Ecclesiastical Affairs

	Contact details:
Address:	Ministry of Justice and Ecclesiastical Affairs Skuggasundi 150 Reykjavik Iceland
Telephone:	+354 545 9000
Fax:	+354 552 7340
E-mail:	postur@dkm.stjr.is
General website:	http://eng.domsmalaraduneyti.is/ministry/
Contact person:	
Languages spoken by staff:	English

Declarations Reservations

Articles: 10,15,16

Iceland objects to the use of such methods of service of documents on its territory as mentioned in paragraphs (b) and (c) of Article 10 of the Convention.

Iceland declares that a judge, notwithstanding the provisions of paragraph 1 of Article 15, may give judgment even if no certificate of service or delivery has been received, if all the conditions provided for in paragraph 2 of Article 15 have been fulfilled.

In accordance with Article 16, paragraph 3, of the Convention, Iceland declares that an application for relief will not be entertained if it is filed after the expiration of a period of one year following the date of the judgment.

7e India—Central Authority & Practical Information

	Contact details:
Address:	The Ministry of Law and Justice Department of Legal Affairs 4th Floor, A-Wing, Shastri Bhavan, 110 001 New Delhi India
Telephone:	+ 91 (11) 23387557, 23384777, 23384617
Fax:	+ 91 (11) 23384241, 23387259, 23382733
General website:	http://lawmin.nic.in/
Contact person:	Mr V. Ravindran Tel.: +91 (11) 2338 7543
Translation requirements (Art. 5(3)):	All requests for service of documents should be in English language or accompanied by an English translation

Declarations Reservations

Articles: 10,15,16

All requests for service of documents should be in English language or accompanied by an English translation;

The service of judicial documents through diplomatic or consular channels will be limited to the nationals of the State in which the documents originate;

India is opposed to the methods of service provided in Article 10;

In terms of Article 15, Indian courts may give judgment if all conditions specified in the second paragraph of that Article are fulfilled; and

For purposes of Article 16, an application for relief will not be entertained if filed after the expiration of one year following the date of the judgment.

7f *Notification in conformity with Article 31*

Ireland deposited, in accordance with Article 26, paragraph 2, of the above-mentioned Convention, its instrument of ratification with the Ministry of Foreign Affairs of the Kingdom of the Netherlands on 5 April 1994.

The instrument of ratification contains the following declarations:

``Article 3

The authority or judicial officer competent under the laws of Ireland for the purpose of Article 3 of the Convention are the Central Authority, a practising Solicitor, a Country Registrar or a District Court Clerk.

Article 15

Pursuant to the Second paragraph of Article 15 a Judge in Ireland may give judgment even if no certificate of service or delivery has been received, if the conditions set out in the second part of Article 15 of the Convention are fulfilled.

and the following objections:

Article 10

In accordance with the provision in Article 10 of the Convention the Government of Ireland objects to

(i) the freedom under Article 10(b) of judicial officers, officials or other competent persons of the State of origin to effect service in Ireland of judicial documents directly to judicial officers, officials or other competent persons and

(ii) the freedom under Article 10(c) of any person interested in a judicial proceeding to effect service in Ireland of judicial documents directly through judicial officers, officials or other competent persons

but this is not intended to preclude any person in another contracting State who is interested in a judicial proceeding (including his lawyer) from effecting service in Ireland directly through a solicitor in Ireland.''

The Master of the High Court is designated as the Central Authority for Ireland in accordance with Article 2 and shall be the appropriate authority for completion of certificates in the form of the model annexed to the Convention.

The Convention entered into force for Ireland on 4 June 1994.

8 With the following declarations and reservations:

``a) The Central Authority in Israel within the meaning of Articles 2, 6 and 18 of the Convention is: The Director of Courts, Directorate of Courts, Russian Compound, Jerusalem;

b) The State of Israel, in its quality as State of destination, will, in what concerns Article 10, paragraphs b) and c), of the Convention, effect the service of judicial documents only through the Directorate of Courts, and only where an application for such service emanates from a judicial authority or from the diplomatic or consular representation of a Contracting State;

c) An application to relieve a defendant from the effects of the expiration of the time of appeal from a judgment within the meaning of Article 16 of the Convention will be entertained only if filed within one year from the date of the judgment in question.''

8a *Notification in conformity with Article 31, paragraph a and e of the Convention*

In accordance with Article 26, paragraph 2, the Italian Republic deposited its instrument of ratification of the Convention with the Ministry of Foreign Affairs of the Kingdom of the Netherlands on 25 November 1981.

On the occasion of the deposit of the instrument of ratification the Italian Government notified of the following:

Translation

``a) pursuant to Articles 2 and 18, ``l'Ufficio unico degli ufficiali giudiziari presso la corte d'appello di Roma'' (the registry of the court of appeal in Rome) is designated as the Central Authority for the purpose of Article 5;

b) ``gli uffici unici degli ufficiali giudiziari costituiti presso le corti di appello e i tribunali e gli ufficiali giudiziari addetti alle preture'' (the registries of the courts of appeal and other courts, and the bailiffs appointed to the courts of first instance) are competent to issue the certificate pursuant to Article 6;

c) ``gli uffici unici degli ufficiali giudiziari presso le corti di appello e i tribunali e gli ufficiali giudiziari addetti alle preture'' (the registries of the courts of appeal and other courts, and the bailiffs appointed to the courts of first instance) are competent to receive for the purpose of service, documents forwarded by consular or diplomatic authorities pursuant to Article 9;

d) the costs proceeding from each request for service in accordance with Article 5, first paragraph, under a and b, which requires the employment of a bailiff, have to be paid in advance in the size of 6,000 lire, except adjustment at the time of restitution of the notified document.

However, the costs in relation to the notified document pursuant to Article 12, paragraph 2, of the Convention, can be paid after the restitution in a way specifically fixed by the bailiff.

The Italian State shall not require any advance or repayment of costs for service of documents requested by the Contracting States in so far as those States for their parts shall not require the payment or repayment of costs for documents originated from Italy.''.

In accordance with Article 27, paragraph 2, the Convention entered into force for the Italian Republic on 24 January 1982.

8b With the following declarations and reservations:

``(1) The Minister for Foreign Affairs is designated as the Central Authority which receives requests for service from other contracting States, pursuant to the first paragraph of Article 2.

(2) The District Court which has rendered judicial aid with respect to the service is designated as the authority competent to complete the certificate in the form of the model annexed to the Convention, pursuant to the first paragraph of Article 6.

(3) The Minister for Foreign Affairs is designated as the authority competent to receive documents transmitted through consular channels, pursuant to the first paragraph of Article 9.

(4) It is declared that the Government of Japan objects to the use of the methods of service referred to in subparagraphs (b) and (c) of Article 10.

(5) It is declared that Japanese courts may give judgment if all the conditions specified in the second paragraph of Article 15 are fulfilled.''

8c The Republic of Korea made the following declarations:

``1. Pursuant to Article 8, the Republic of Korea objects to service of judicial documents directly through diplomatic or consular agents upon persons in its territory, unless the document is to be served upon a national of the State in which the documents originate.

2. Pursuant to Article 10, the Republic of Korea objects to the following:

a) the freedom to send judicial documents, by postal channels, directly to persons abroad,

b) the freedom of judicial officers, officials or other competent persons of the State of origin to effect service of judicial documents directly through the judicial officials or other competent persons of the State of destination, *c)* the freedom of any person interested in a judicial proceeding to effect service of judicial documents directly through the judicial officers, officials or other competent persons of the State of destination.

3. Pursuant to Article 15, paragraph 2, the judge of the Republic of Korea may give judgment even if no certificate of service or delivery has been received if all the following conditions are fulfilled:

a) the document was transmitted by one of the methods provided for in this Convention,

b) a period of time of not less than six months, considered adequate by the judge in the particular case, has elapsed since the date of the transmission of the document,

c) no certificate of any kind has been received, even though every reasonable effort has been made to obtain it through the competent authorities of the State addressed.

Designation pursuant to Articles 2 and 6

1. Central Authority

Ministry of Court Administration

Att.: Director of International Affairs

967, Seocho-dong, Seocho-gu

SEOUL 137-750

Republic of Korea

2. Authority competent to complete the certificate of service

In addition to the Central Authority, the clerk of the court for the judicial district in which the person is to be served."

The Convention entered into force for the Republic of Korea 1 August 2000.

9 **N.B.:** In accordance with its Article 28, paragraph 2, the Convention will enter into force for the State of Kuwait on 1 December 2002 in the absence of any objection from a State which has ratified the Convention before 8 May 2002, within a period of six months after the date on which the Ministry has notified the accession. For practical reasons this six months' period will run from 21 May 2002 to 21 November 2002.

In accordance with Articles 2 and 18 of the Convention, the ``Department of International Relations at the Ministry of Justice of the State of Kuwait'' has been designated as Central Authority.

9a Latvia—Central Authority & practical information

Central Authority(ies):

Ministry of Justice

Contact details:

Address:	Ministry of Justice Brivibas blvd. 36 Riga, LV-1536 Latvia
Telephone:	+371 6716 2669 +371 6716 2671
Fax:	+371 6721 0823 +371 6728 5575
E-mail:	tm.kanceleja@tm.gov.lv
General website:	http://www.tm.gov.lv/en/
Contact person:	Ms Liene Jenca
Languages spoken by staff:	English, Russian, Latvian
Forwarding authorities (Art. 3(1)):	Ministry of Justice
Methods of service (Art. 5(1)(2)):	According to the code of civil procedure, in all cases the local court (court of first instance) in whose district the documents are to be served shall be competent to comply with requests for service. For more information on methods of service, see European Judicial Network in Civil and Commercial Matters—Service of Documents—Latvia.
Art. 8(2):	No opposition
Art. 10(a):	No opposition
Art. 10(b):	No opposition
Art. 10(c):	No opposition
Art. 15(2):	No declaration of applicability
Art. 16(3):	No declaration of applicability
Derogatory channels (bilateral or multilateral agreements or internal law permitting other transmission channels) (Arts. 11, 19, 24 and 25) Disclaimer: Information may not be complete or fully updated—please contact the relevant authorities to verify this information.	To consult bilateral and multilateral treaties to which Latvia is a party, see: multilateral agreements—Ministry of Foreign Affairs bilateral agreements—Ministry of Foreign Affairs Council Regulation (EC) No 1348/2000 on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters (Brussels, 29 May 2000) (European Judicial Atlas—Service of Documents).
Useful links:	international judicial cooperation—Ministry of Justice

Latvia—Competent Authority (Art. 9)

Ministry of Justice

Brivibas blvd 36

RIGA, LV—1536

Latvia

tel.: +371 6716 2669 / +371 6716 2671

fax: +371 6721 0823 / +371 6728 5575

website: http://www.tm.gov.lv/en/

languages of communication: English, Russian, Latvian

contact person: Ms Liene Jenca

Latvia—Competent Authority (Art. 6)

In accordance with paragraph 1 of Article 6 of the Convention the Authority of the Republic of Latvia designated to complete a certificate in the form of the model, annexed to the Convention, is the respective district (city) court competent for service of documents under the Civil Procedure Law of the Republic of Latvia.

Latvia—Forwarding authority (Art. 3)

In accordance with Article 3 of the Convention the Ministry of Justice of the Republic of Latvia is the competent authority to forward a request for service of documents to the foreign Central Authority.

9b ``…

And whereas it is provided in Article 2 of the said Convention, the Republic of Lithuania designates the Ministry of Justice of the Republic of Lithuania as a Central Authority to receive requests for service coming from other Contracting States;

And whereas it is provided in Article 8 of the said Convention, the Republic of Lithuania declares that it opposes to the ways of service of documents provided in this Article, unless the documents are to be served upon a national of the State in which the documents originate;

And whereas it is provided in Article 10 of the said Convention, the Republic of Lithuania declares that it is opposed to the ways of service of documents provided in this Article;

And whereas it is provided in paragraph 2 of Article 15 of the said Convention, the Republic of Lithuania declares that the judge of the Republic of Lithuania may give judgment even if no certificate of service or delivery has been received, if all conditions of paragraph 2 of Article 15 are fulfilled;

And whereas it is provided in paragraph 2 of Article 16 of the said Convention, the Republic of Lithuania declares that an application for relief will not be entertained if it is filed after the expiration of one year following the date of the final judgement; …''.

9c With the following declarations:

``1. The Public Prosecutor at the Superior Court of Justice has been designated as the Central Authority within the meaning of Article 2 of the Convention. He is also competent to receive the documents forwarded through the channels referred to in Article 9, para. 1, of the Convention.

2. In accordance with Article 8, the Luxembourg Government is opposed to diplomatic and consular agents directly serving within its territory judicial documents on persons other than nationals of their own country.

(3. In accordance with Article 10, the Luxembourg Government is opposed to judicial documents being sent through postal channels to persons residing within its territory.*

* Luxembourg communicated the withdrawal of this declaration by a Note dated 2 June 1978).

4. When foreign judicial documents are served, in connection with Articles 5(a) and 10(b) and (c), through the intermediary of a Luxembourg official, they must be drawn up in French or German or accompanied by a translation into one of those languages.

5. The Luxembourg Government declares that notwithstanding the provisions of Article 15, para. 1, of the Convention, its judges can enter judgment if the conditions set out in para. 2 of the said Article are fulfilled.

6. In accordance with Article 16, para. 3, of the Convention, the Luxembourg Government declares that the applications referred to in para. 2 of the said Article will not be entertained if they are filed after the expiration of a period of one year following the date of the judgment."

9d In conformity with Article 21 of the Convention the Government of Malawi has designated the Registrar of the High Court of Malawi (P.O. Box 30244, Chichiri, Blantyre 3, Malawi) as the Central Authority as provided for in Articles 2 and 18.

With a declaration designating the Registrar of the High Court of Malawi, P.O. Box 30244, Chichiri, Blantyre 3, Malawi, as the Central Authority referred to in Article 2.

10 The instrument of accession of Mexico contains the following declarations:

Courtesy translation

I. In relation to Article 2, the Government of Mexico designates the General Direction of Legal Affairs of the Ministry of Foreign Affairs (la Dirección General de Asuntos Jurídicos de la Secretaría de Relaciones Exteriores) as the Central Authority to receive requests for service of judicial and extrajudicial documents coming from other Contracting States and which will in turn forward them to the competent judicial authority for its compliance.

II. In relation to Article 5, when the judicial and extrajudicial documents to be served in Mexican territory are written in a language other than Spanish, they must be accompanied by the corresponding translation.

III. In relation to Article 6, the judicial authority responsible of the matter will also be responsible for issuing the certificate concerning the service of the document, according to the model. The Central Authority will only validate the certificate.

IV. In relation to Article 8, the Contracting States shall not be able to effect service of judicial documents directly through its diplomatic or consular agencies in Mexican territory, unless the document is to be served upon a national of the State in which the documents originate and provided that such a procedure does not contravene public law or violate individual guarantees.

V. In relation to Article 10, the United Mexican States are opposed to the direct service of documents through diplomatic or consular agents to persons in Mexican territory according to the procedures described in sub-paragraphs *a), b),* and *c)*, unless the judicial authority exceptionally grants the simplification different from the national regulations and provided that such a procedure does not contravene public law or violate individual guarantees. The request must contain the description of the formalities whose application is required to effect service of the document.

VI. In relation to the first paragraph of Article 12, the costs occasioned by serving judicial or extrajudicial documents will be covered by the applicant, unless the State in which the documents originate does not demand payment for those services from Mexico.

VII. In relation to Article 15, second paragraph, the Government of Mexico does not recognise the faculty of the judicial authority to give judgment when the defendant has not appeared and there is no communication establishing that the document was served, or that documents originating outside the country were indeed delivered, according to sub-paragraphs *a)* and *b)* of the first paragraph.

VIII. In relation to Article 16, third paragraph, the Government of Mexico declares that such an application will not be admitted if it is filed later than a year following the date of the decision, or a longer period which the judge may deem reasonable.

The Government of Mexico will understand that, in cases in which sentence has been passed without the defendant having been duly summoned, the nullity of the proceedings will be established under the provisions of the applicable legislation.

By a Note dated 7 May 2001, the Embassy of Mexico at The Hague informed the depositary of the following:

``(…) besides English and French, request forms addressed to the Mexican Central Authority should be filed in Spanish, according to Article 7 of the Convention."

10a Monaco—Central Authority & practical information

Direction des Services judiciaires

Address:	Direction des Services judiciaires Palais de Justice 5, rue Colonel Bellando de Castro MC—98000 MONACO
Telephone:	+377 98 98 88 11
Fax:	+377 98 98 85 89

Forwarding authorities (Art. 3(1)): JL'huissier de Justice qui, pour les significations d'actes aux personnes qui n'habitent pas dans la Principauté, remet l'acte au parquet du procureur général, lequel le fait suivre à la Direction des Services Judiciaires.

Methods of service (Art. 5(1)(2)): Les articles 136 à 183 du Code de procédure civile prévoient la signification.

Notification formelle (art. 5(1)(a))

Notification formelle: à la demande d'une partie, ou d'office, il est possible de faire signifier l'acte par voie de signification, accomplie par un huissier de justice. Dans cas, lorsqu'un acte est reçu de l'étranger, la Direction des services judiciaires le transmet au Parquet Général qui en saisi un huissier.

En pratique, il n'est recouru à la voie de signification par un huissier de justice, qu'en cas de demande expresse du requérant.

Da manière générale, dans la pratique, la *simple remise* (art. 5(2)) est utilisée.

Dans le cas de la notification par voie de simple remise (mode principal), l'acte est transmis au Parquet Général. Il est ensuite remis au destinataire par les soins d'un agent de la Sûreté Publique, requis à cette fin par le Parquet. Cette notification est faite sans frais

Translation requirements (Art. 5(3)): En dehors des exigences de l'article 7 de la Convention et dans la mesure où les indications du formulaire permettent d'obtenir les renseignements suffisants sur la nature et l'objet de l'acte, la Principauté de Monaco n'a pas d'exigence particulière pour ce qui concerne les traductions des actes.

En revanche, au cas par cas, des demandes d'éclaircissement pourront être demandées à la partie requérante

Costs relating to execution of the request for service (Art. 12): Aucun frais pour les services de l'Etat, aucune taxe ne sont perçus à l'occasion d'une notification internationale en provenance d'un Etat contractant.

Simple remise (art. 5(2))

Dans les cas d'une simple remise de l'acte, dans la mesure où celle-ci est assurée par les services de la Sûreté Publique, la notification est gratuite pour le requérant.

Time for execution of request: A Monaco, les délais d'exécution d'une demande de notification par remise et la remise effective excèdent rarement un mois.

Judicial officers, officials or other competent persons (Art. 10(b)): *Huissiers de Justice :*

Mme Marie-Thérèse ESCAUT-MARQUET
O. de l'Ordre de Saint-Charles
29, boulevard des Moulins
(Téléphone : +377 93.30.74.03)

Mme Claire NOTARI
``L'Héraclès'' 17
boulevard Albert Ier
(Téléphone : +377 97.97.09.09)

Derogatory channels (bilateral or multilateral agreements or internal law permitting other transmission channels) (Arts. 11, 19, 24 and 25): La Convention franco-monégasque du 2 décembre 1949 relative à l'aide mutuelle judiciaire et l'Échange de notes des 24 août/28 septembre 1961 entre la Suisse et Monaco concernant le règlement des questions relatives à la notification des actes judiciaires et extrajudiciaires en matière civile et commerciale sont maintenus.

Competent Authority (Art. 6, 9)

la Direction des Services judiciaires
Palais de Justice
5, rue Colonel Bellando de Castro
MC—98000 MONACO
Tel.: +377 98 98 88 11
Fax: +377 98 98 85 89

Declarations

Articles: 8,10,15,16

Translation

1. The Principality of Monaco declares, as provided in article 8, that it is opposed to the service of judicial documents directly through the diplomatic or consular agents of the contracting States upon persons who are not nationals of these States.

2. The Principality of Monaco declares that it objects to the exercise of the freedom described in article 10, paragraph 1 (a).

3. The Principality of Monaco declares that it approves the dispositions laid down in article 15,

paragraph 2.

4. With regard to article 16, paragraph 3, the Principality of Monaco declares that an application to relieve a defendant who has not appeared from the effects of the expiration of the time for appeal will no longer be entertained if it is filed more than twelve months after the date of the judgment.

10b With the following declarations:

``1. The Public Prosecutor at the District Court of The Hague is designated for the Netherlands as the Central Authority referred to in Article 2 of the Convention.

The office of the Public prosecutor is situated at Juliana van Stolberglaan 2-4, The Hague.

2. Pursuant to Article 18, paragraph 1, of the Convention, the Public Prosecutor at a District Court other than that of The Hague is likewise competent to receive requests and serve documents in accordance with Articles 3 to 6 of the Convention within the area of jurisdiction of such other Court.

3. The Public Prosecutor at the District Court in the area of jurisdiction where service of the document has been requested is competent to complete a certificate as referred to under Article 6 of the Convention.

4. The Public Prosecutor at the District Court in the area of jurisdiction where service of the document is requested has been designated for the Netherlands as the authority referred to in Article 9, paragraph 1, of the Convention which is competent to serve documents forwarded through consular channels.

5. Notwithstanding the provisions of Article 15, paragraph 1, of the Convention, the Netherlands Court may give judgment, even if no certificate of service or delivery has been received, if all the following conditions are fulfilled:

a) the document was transmitted by one of the methods provided for in this Convention;

b) a period of time of not less than six months, considered adequate by the judge in the particular case, has elapsed since the date of the transmission of the document;

c) no certificate, either of service or of delivery, has been received even though every reasonable effort has been made to obtain it through the competent authorities.

6. An application for relief from the effects of the expiration of the time for appeal as provided for in Article 16 is only admissible, if it is submitted within a year, to be calculated from the date on which the judgment is given.''

* By letter dated 13 November 2002, the Permanent Bureau of the Hague Conference was informed of the new contact details of the Central Authority:

De Officier van Justitie
Postbus 20302
2500 EH THE HAGUE

In accordance with Article 27, paragraph 2, the Convention shall enter into force for the Kingdom of the Netherlands (for the Kingdom in Europe) on January 2, 1976.

In accordance with Article 29, paragraph 2, the Kingdom of the Netherlands declared on 28 May 1986 that the above-mentioned Convention shall extend to Aruba.

In conformity with Article 29, paragraph 3, the Convention will enter into force for Aruba on 27 July 1986.

Notification in conformity with Article 31, letter e, of the Convention

The competent authority* designated by Aruba is:

Procurator General
L.G. Smith Boulevard 42-44
Oranjestad, Aruba
tel.: (297) 834-387 / 829-132
fax: (297) 838-891

* modification notified to the depositary by the Cabinet of the Minister Plenipotentiary of Aruba at The Hague, by letter of 1 November 2000.

as the authority for Aruba referred to in Article 21 of the Convention.

10c With the following declarations:

``1. In accordance with Article 2, the Ministry of Justice, Oslo/Dep, is designated as the Central Authority.

2. In accordance with Article 6, the County or Town Court in whose district the document has been served is designated for the purpose of completing the certificate in the form annexed to the Convention.

3. In accordance with Article 9 first paragraph, the County or Town Court in whose district the person to be served is a resident or is staying, is designated as receiver of documents forwarded through consular channels.

4. The Government of Norway is opposed to the use of such methods of service or transmission of documents on its territory as mentioned in Articles 8 and 10 of the Convention.

5. Norwegian courts may give judgment when all the conditions specified in the second paragraph of Article 15 are fulfilled.

6. In accordance with the third paragraph of Article 16, applications for relief according to Article 16 will not be entertained if they are delivered to the competent Norwegian authorities after the expiration of three years following the date of the judgment.''

10d *Notification in conformity with Article 31, paragraph c, of the Convention*

Pakistan deposited its instrument of accession to the above-mentioned Convention with the Ministry of Foreign Affairs of the Kingdom of the Netherlands on 7 December 1988 in accordance with Article 28, paragraph 1.

The provisions of the Convention entered into force for Pakistan on 1 August 1989 in accordance with Article 28, paragraph 3.

The Permanent Bureau of the Hague Conference on private international law presents its compliments to the Diplomatic Missions of the Member States and to the National Organs and has the honour to inform them that, by a Note dated 1 February 1990, the Government of

Pakistan

informed the Ministry of Foreign Affairs of the Kingdom of the Netherlands of the designation of authorities, in conformity with Article 21 of the above-mentioned convention, and made declarations. The text of the communication is as follows:

``*the Government of Pakistan has designated the Solicitor, Ministry of Law and Justice to the Government of Pakistan in Islamabad, as the central authority, for receiving requests for service coming from other Contracting States and Registrars of Lahore High Court Lahore, Peshawar High Court Peshawar, Baluchistan High Court Quetta, and the High Court of Sind, Karachi, `other authorities' in addition to the Central Authority, within their respective territorial jurisdictions.*

The certificate prescribed by Article 6 of the Convention if not completed by a judicial authority shall be completed or countersigned by the Registrars of the High Courts.

For the purposes of Article 8 of the Convention it is hereby declared that the Government of Pakistan is opposed to service of Judicial Documents upon persons, other than nationals of the requesting States, residing in Pakistan, directly through the Diplomatic and Consular agents of the requesting States. However, it has no objection to such service by postal channels directly to the persons concerned [*Article 10(a)*] *or directly through the judicial officers of Pakistan in terms of Article 10(b) of the Convention if such service is recognised by the law of the requesting State.*

In terms of the second paragraph of Article 15 of the Convention, it is hereby declared that notwithstanding the provision of the first paragraph there-of the judge may give judgement even if no certificate of service or delivery has been received, if the following conditions are fulfilled:—

a) the document was transmitted by one of the methods provided for in the Convention;

b) the period of time of not less than 6 months, considered adequate by the Judge in the particular case, has elapsed since the date of transmission of the document; and

c) no certificate of any kind has been received even though every reasonable effort has been made to obtain it through the competent authorities of the State addressed.

As regards Article 16, paragraph 3, of the Convention it is hereby declared that in case of ex-parte decisions, an application for setting it aside will not be entertained if it is filed after the expiration of the period of limitation prescribed by law of Pakistan.''

11 *Notification in conformity with Article 31, paragraph c, of the Convention*

The Republic of *Poland* deposited with the Ministry of Foreign Affairs of the Kingdom of the Netherlands its instrument of accession to the above-mentioned Convention on 13 February 1996, in accordance with Article 28, paragraph 1, of the Convention.

The instrument of accession of the Republic of Poland contains a declaration the text of which is attached and the translation of which is as follows:

Translation

—The Republic of Poland has decided to join the Convention, declaring that it is opposed to the modes of service specified in Articles 8 and 10 within its territory;

The instrument of accession was accompanied by a declaration the text of which is also attached and the translation of which is as follows:

In compliance with Article 21, the following actions are undertaken:

Article 2, Paragraph 1—the Central Authority designated to receive requests for service coming from another contracting State shall be the Ministry of Justice.

Article 18—other authorities (in addition to the Central Authority) designated to received requests for service are Presidents of the voivodship courts.

Article 6—the authority designated to complete a certificate of service in the Republic of Poland shall be the court that has performed such service.

Article 9, Paragraph 1—the authorities designated for that purpose shall be the voivodship courts.

Articles 8 and 10—the Republic of Poland declares that it is opposed to the modes of service specified in Articles 8 and 10 within its territory.

11a *Declaration of Portugal.*—Legal Affairs Department of Ministry of Justice has been designated as Central Authority, in accordance with Art. 2, paragraph 1, of Convention. Justice Department officials: court clerks (escrivaes) and process-servers (officiais de diligencias) have been designated as persons competent to prepare certificate referred to in Article 6 of Convention. In accordance with Art. 8, paragraph 2, of Convention, the Portuguese government grants diplomatic and consular agents power to serve documents on their own nationals only. Portuguese government declares that, notwithstanding provisions of first paragraph of Art. 15 of Convention its judges may give judgment if conditions listed in paragraph 2 of said Art. are fulfilled. In accordance with Art. 16, paragraph 3 of Convention, Portuguese government states that applications referred to in Art. 16, paragraph 2, will not be considered if they are made after expiration of a period of one year from date of judgment.

By note dated 9 February 1999, Portugal extended the Convention in accordance with Article 29, paragraph 2, to Macau. In accordance with Article 29, paragraph 3, the Convention entered into force for Macau on 12 April 1999.

See supra, under CHINA, Macau Special Administrative Region.

[On 7 October 1999, Portugal communicated the following to the depositary:

``1. In accordance with Article 18 of the Convention, the Ministério Público de Macau is designated as the competent authority in Macau to receive requests for service coming from other Contracting States and to proceed in conformity with the provisions of Articles 3 to 6.

The address of the Ministério Público de Macau is as follows:

Ministério Público de Macau

Praceta 25 de Abril

Macau

Phone: 326736

Fax: 326747

2. Court clerks (escrivaes de direito) and deputy court clerks (escrivaes adjuntos) from the Supreme Court of Justice (Tribunal Superior de Justiça) of Macau are entitled to complete in Macau the certificate provided for [in] Articles 6 and 9 of the Convention.

3. In accordance with the provisions of the second paragraph of Article 8 of the Convention, Portugal reiterates that it recognizes to the diplomatic or consular agents the right to forward documents, for the purpose of service, exclusively to the nationals of the State in which the documents originate.

4. The Ministério Público de Macau is also designated as the competent authority in Macau to receive documents forwarded through consular channels, in accordance with Article 9 of the Convention.

5. Portugal declares that the judges of the courts of Macau, notwithstanding the provisions of the first paragraph of Article 15 of the Convention, may give judgment on whether the conditions referred to in the second paragraph of the same article are fulfilled.

6. In accordance with the third paragraph of Article 16 of the Convention, Portugal declares that the applications referred to in the second paragraph of Article 16 will not be entertained if they are filed after the expiration of one year following the date of the judgment.'']

11b Romania—Central Authority

Address: Ministry of Justice

Romania—competent authority (Art. 6)

In accordance with Article 6, paragraph 1, of the Convention, the law court is the competent authority designated to complete the certificate in the form of the model annexed to the Convention.

Declarations

Articles: 8,16

(…)

3. In accordance with Article 8, paragraph 2, of the Convention, Romania declares that the foreign diplomatic and consular agents can effect service of judicial or extrajudicial documents within the territory of Romania, exclusively upon nationals of the state they represent.

4. In accordance with Article 16, paragraph 3, of the Convention, Romania shall not entertain the application pursuant to Article 16, paragraph 2, if these are filed after the expiration of a period of one year following the date of the judgment."

11c **N.B.:** In accordance with Article 28, paragraph 2, the Convention will enter into force for the Russian Federation **in the absence of any objection from a State which has ratified the Convention before 1 May 2001** within a six months' period which, for practical reasons, will run from 15 May to 15 November 2001. The Convention entered into force for the Russian Federation December 1, 2001.

11d Saint Vincent and Grenadines Succession

By a Note received at the Ministry of Foreign Affairs of the Kingdom of the Netherlands on 6 January 2005, the Government of Saint Vincent and the Grenadines informed the Ministry of Foreign Affairs that it does consider itself bound by the Convention, which had been declared applicable to Saint Vincent by the Government of the United Kingdom of Great Britain and Northern Ireland on 20 May 1970. The date of entry into force is the date of independence of this State.

Declarations

Articles: 5,10,15

The Government of Saint Vincent and the Grenadines declares that it is opposed to the channels of transmission provided for in Article 10*(b)* and *(c)* of the Convention.

The Government of Saint Vincent and the Grenadines declares that the provisions of the second paragraph of Article 15 of the Convention shall apply to Saint Vincent and the Grenadines.

The Central Authority will require all documents forwarded to it for service under the provisions of the Convention to be in duplicate and, pursuant to the third paragraph of Article 5 of the Convention, will require the documents to be written in, or translated into, the English language.

Saint Vincent and the Grenadines—Central Authority

In accordance with article 18 of the Convention the Registrar of the High Court of Justice in Kingstown (…) is designated as the authority competent to receive requests for service in accordance with article 2 of the Convention.

Saint Vincent and the Grenadines—Competent Authority (Art. 6)

The authority competent under article 6 of the Convention to complete the Certificate of Service is the Registrar of the High Court of Justice in Kingstown.

Saint Vincent and the Grenadines—Competent Authority (Art. 9)

In accordance with the provisions of Article 9 of the Convention the Central Authority shall receive process sent through consular channels.

With the following declarations:

Articles: 5,10,15

The Government of Saint Vincent and the Grenadines declares that it is opposed to the channels of transmission provided for in Article 10*(b)* and *(c)* of the Convention.

The Government of Saint Vincent and the Grenadines declares that the provisions of the second paragraph of Article 15 of the Convention shall apply to Saint Vincent and the Grenadines.

The Central Authority will require all documents forwarded to it for service under the provisions of the Convention to be in duplicate and, pursuant to the third paragraph of Article 5 of the Convention, will require the documents to be written in, or translated into, the English language.

11e With the following declarations:

``1. In conformity with Article 21, first paragraph, letter a), the Republic of San Marino designates the Secretariat of State for Foreign Affairs (Palazzo Begni—Contrada Omerelli, 31—47890 SAN MARINO) as the competent Central Authority pursuant to Articles 2 and 18, without prejudice to the provisions contained in bilateral agreements authorising direct relations with the San Marino judicial authority.

2. In conformity with Article 21, first paragraph, letter b), the Republic of San Marino designates the Civil and Criminal Court as the competent authority pursuant to Article 6.

3. In conformity with Article 21, first paragraph, letter c), the Republic of San Marino designates the Secretariat of State for Foreign Affairs as the competent authority pursuant to Article 9.

4. In conformity with Article 21, second paragraph, letter a), the Republic of San Marino declares its opposition to the use of methods of transmission pursuant to Articles 8 and 10.

5. In conformity with Article 21, second paragraph, letter b), the Republic of San Marino declares pursuant to the second paragraph of Article 15, that its judges, notwithstanding the provisions of the first paragraph of said Article, may give judgment even if no certificate of service or delivery has been received, if all the conditions referred to in letters a), b) and c) are fulfilled."

N.B.: In accordance with Article 28, second paragraph, the Convention shall enter into force for San Marino in the absence of any objection from a State, which has ratified the Convention before such deposit, notified to the Ministry of Foreign Affairs of the Netherlands within a period of six months after the date on which the said Ministry has notified it of such accession. For practical reasons, this six months' period in this case will run from 25 April 2002 to 25 October 2002.

11f *Notification in conformity with Article 31, paragraph e of the Convention*

By Note dated 4 June 1981 and received at The Ministry of Foreign Affairs of the Kingdom of the Netherlands on 14 July 1981 the Republic of Seychelles informed the Ministry in accordance with Article 21 of the Convention of the following:

``Article 2

The Central Authority designated is:

The Registrar
Supreme Court,
Victoria,
Mahé,
Republic of Seychelles.

Article 8

The Government of the Republic of Seychelles declares that it is opposed to service by a contracting state of judicial documents upon persons abroad, without application of any compulsion, directly through the diplomatic or consular agents of that contracting state unless the document is to be served upon a national of the state in which the documents originate.

Article 10

The Government of the Republic of Seychelles declares that it objects to paragraph (b) and (c) of this Article, is so far as they permit service of judicial documents through officials or persons *other than* judicial officers.

Article 15

The Government of the Republic of Seychelles declares that notwithstanding the provisions of the first paragraph of this Article, the judge may give judgement even if no certificate of service or delivery has been received, if all the following conditions are fulfilled.

a) the document was transmitted by one of the methods provided for in this Convention,

b) a period of time of not less than six months, considered adequate by the judge in the particular case, has elapsed since the date of the transmission of the document,

c) no certificate of any kind has been received, even though every reasonable effort has been made to obtain it through the competent authorities of the State addressed.

Article 16

The Government of the Republic of Seychelles declares that it will not entertain an application for relief if filed later than one year following the date of the judgement."

11g By notification dated March 15, 1993 the Slovak Republic communicated the following: ``In accordance with relevant principles and norms of international law and to extent defined by it, the Slovak Republic, as a successor State, born from the division of the Czech and Slovak Federal Republic, considers itself bound, as of January 1, 1993, i.e. the date of the division of the Czechoslovak Federation, by multilateral international treaties to which the Czech and Slovak Federal Republic was a party at that date, including reservations and declarations in respect of provisions made earlier by Czechoslovakia, as well as objections by Czechoslovakia in respect of reservations made by other treaty parties", which are as follows: [Same declarations and reservations, *mutatis mutandis,* under Czech Republic, see footnote 3c].

The Permanent Bureau of the Hague Conference on private international law presents its compliments to the Diplomatic Missions of the Member States and to the National Organs and has the honour to inform them that, in accordance with Articles 2, 6 and 9 of the Convention, the *Slovak Republic* has designated the following Central Authority:

``*Ministerstvo spravodlivosti Slovenskej republiky*
Zupné námestie 13, 813 11 Bratislava
Slovak Republic
fax: (00427) 5316035".

11h Slovenia has designated as Central Authority:

the Ministry of Justice of the Republic of Slovenia

Zupanciceva 3
1000 LJUBLJANA
tél.: +386 1 478 5244
fax: +386 1 426 1050.

11i The Permanent Bureau of the Hague Conference on private international law presents its compliments to the Diplomatic Missions of the Member States and to the National Organs and has the honour to inform them that, by instrument deposited on 4 June 1987 with the Ministry of Foreign Affairs of the Kingdom of the Netherlands,

Spain

ratified the above-mentioned Convention.

In accordance with Article 27, paragraph 2, the Convention will enter into force for *Spain* on *3 August 1987.*

The instrument of ratification contains the following declarations:

``1) The Spanish State declares that its judges, notwithstanding the provisions of Article 15, may give judgment even if no certificate of service or delivery of documents has been received, if all the conditions enumerated in the said Article 15, paragraph 2, are fulfilled.

2) The Spanish State declares that the time of expiration, referred to in Article 16, is sixteen months from the date of the judgment.

3) The Spanish State designates as the Central Authority to issue the certificates in the form of the model annexed to the Convention:

Secretaría General Técnica,
Ministerio de Justicia,
San Bernardo, 62,
28071 MADRID.'' (Translation)

The Ministry of Foreign Affairs of the Kingdom of the Netherlands, depositary of the Convention on the service abroad of judicial and extrajudicial documents in civil or commercial matters of 15 November 1965, has the honour to inform the Member States of the Hague Conference on Private International Law and the States having acceded to the above-mentioned Convention that by Note dated 26 August 1997 the Embassy of Spain at The Hague informed the Depositary of the following declaration:

``Españna no reconoce, para la aplicación del presente Convenio, como autoridad al Tribunal Supremo de Gibraltar, y en consecuencia, cualquier documentación intervenida por dicho organo se considerará como nula y no existente.''

11j The instrument of accession of Sri Lanka contains the following declarations:

``a) In terms of Article 2, the Secretary/Ministry of Justice and Constitutional Affairs is designated the Central Authority.

b) The authority competent to act upon a Letter of Request pursuant to Article 6 would be the Secretary, Ministry of Justice and Constitutional Affairs/Registrar of the Court of Appeal.

c) For purposes of Article 7, the documents should be in the English language.

d) For purposes of Article 8, the service of judicial documents through diplomatic or consular channels should be limited only in respect of the nationals of the State in which the documents originate.

e) Secretary/Ministry of Foreign Affairs would be the competent authority to receive documents transmitted by consular channels, pursuant to Article 9.

f) For purposes of Article 10, Sri Lanka has no objection to the procedure set out in paragraph (b) thereof. However it does not agree to the procedure set out in paragraphs (a) and (c).

g) In terms of Article 15, Sri Lanka wishes to declare that the Judge may proceed to give judgement even if no certificate of service or delivery has been received, provided the conditions set out in Article 15 are fulfilled."

* On 14 February 2003, the Permanent Bureau was informed of the following contact details for the Central Authority:

Secretary, Ministry of Justice
Ministry of Justice, Law Reform and National Integration
P.O. Box 555
Superior Courts Complex
Hulftsdorp
COLOMBO 12
Sri Lanka
e-mail: secmoj@sri.lanka.net

12 With the following declarations:

``a) The Ministry for Foreign Affairs* has been designated Central Authority.

* By Note dated 6 November 2000 the Minister for Foreign Affairs of Sweden informed the Depositary as follows:

``As from 1 October 2000 the Central Authority, meaning the receiving authority, competent authority and transmitting authority, concerning [this Convention] has been changed from the Ministry for Foreign Affairs to the Ministry of Justice."

The address of the Ministry of Justice is as follows:

Ministry of Justice
Division for Criminal Cases and International Judicial Co-operation
Central Authority
S-103 33 Stockholm
Sweden
tel.: +46 (8) 405 4500 (secretariat)
fax: +46 (8) 405 4676

b) The Central Authority (the Ministry for Foreign Affairs) has been designated to receive documents transmitted through consular channels, pursuant to art. 9.

c) Swedish authorities are not obliged to assist in serving documents transmitted by using any of the methods referred to in sub-paragraphs (b) and (c) of art. 10.

By virtue of the third paragraph of art. 5 of the Convention the Central Authority requires that any document to be served under the first paragraph of the same article must be written in or translated into Swedish."

12a The Permanent Bureau of the Hague Conference on private international law presents its compliments to the Diplomatic Missions of the Member States and to the National Organs and has the honour to inform them that, by instrument deposited on 2 November 1994 with the Ministry of Foreign Affairs of the Kingdom of the Netherlands,

ratified the above-mentioned Convention.

In accordance with Article 27, paragraph 2, the Convention will enter into force for *Switzerland* on *1 January 1995.*

The instrument of ratification contains the following reservations and declarations:

Translation:

``Re Article 1

1. With regard to Article 1, Switzerland takes the view that the Convention applies exclusively to the Contracting States. In particular, it believes that documents which are effectively addressed to a person resident abroad cannot be served on a legal entity who is not authorized to receive them in the country in which they were drawn up without derogating from Articles 1 and 15, first paragraph, of the Convention.

Re Articles 2 and 18

2. In accordance with Article 21, first paragraph (a), Switzerland designates the cantonal authorities listed in the annex as Central Authorities as referred to in Articles 2 and 18 of the Convention. Requests for the service of documents may also be addressed to the Federal Justice and Police Department in Bern, which will forward them to the appropriate Central Authority.

Re Article 5, third paragraph

3. Switzerland declares that in cases where the addressee does not voluntarily accept a document, it cannot officially be served on him or her in accordance with Article 5, first paragraph, unless it is in the language of the authority address, *i.e.* in German, French or Italian, or accompanied by a translation into one of these languages, depending on the part of Switzerland in which the document is to be served (*cf.* annex).

Re Article 6

4. In accordance with Article 21, first paragraph (b), Switzerland designates the competent cantonal court or the cantonal Central Authority as the body responsible for completing the certificate referred to in Article 6.

Re Articles 8 and 10

5. In accordance with Article 21, second paragraph (a), Switzerland declares that it is opposed to the use in its territory of the methods of transmission provided for in Articles 8 and 10.

Re Article 9

6. In accordance with Article 21, first paragraph (c), Switzerland designates the cantonal Central Authorities as the authorities competent to receive documents transmitted by consular channels pursuant to Article 9 of the Convention''.

The list of Central Authorities for the Cantons is attached.

Cantonal Central Authorities (list up to date as per 13 February 2003)

A list of the Central Cantonal Authorities, including their address and phone/fax numbers, can be consulted online at the following address: http://www.ofj.admin.ch/rhf/d/service/recht/Kantonale-Zentralbehoerden.pdf

To determine the Central Authority competent by reason of its location, the database of the Swiss localities and Courts can be consulted online at the following address: http://www.elorge.admin.ch.

12b The former Yugoslav Republic of Macedonia Accession

According to Article 28, second paragraph, the Convention will enter into force for the former Yugoslav Republic of Macedonia in the absence of any objection from a State which has ratified the Convention before the deposit of the instrument of accession, notified to the Ministry of Foreign Affairs of the Kingdom of the Netherlands within a period of six months after the date on which the said Ministry had notified it of such accession.

For practical reasons this six months' period will in this case run from 1 February 2009 to 1 August 2009.

In the absence of any objections the Convention will, in accordance with its Article 28, third paragraph, enter into force for the former Yugoslav Republic of Macedonia on 1 September 2009.

the former Yugoslav Republic of Macedonia—Central Authority (Art. 2)

The Republic of Macedonia declares that the Ministry of Justice of the Republic of Macedonia is designated as the Central Authority referred to in Article 2 of the Convention to receive the requests for service of juridicial documents coming from other Contracting Parties and to proceed them.

Declarations Reservations

Articles: 5,6,8,9,10,15,16,21

The Republic of Macedonia declares that all documents which are served pursuant to Article 5, paragraph 1, of the Convention should be written in or translated into, the Macedonian language according to the Article 7 of the Constitution of the Republic of Macedonia dated 17 November 1991.

In accordance with Article 6 of the Convention, the Republic of Macedonia declares that the courts of first instance in the Republic of Macedonia shall be competent to complete the certificate in the form of the model annexed to this Convention.

In accordance with Article 15 of the Convention, the Republic of Macedonia declares that courts in the Republic of Macedonia may give judgment if all the conditions set out in paragraph 2 of Article 15 of the Convention are fulfilled.

In accordance with Article 16, paragraph 3, of the Convention the Republic of Macedonia declares that an application for relief set out in Article 16 of the Convention will not be entertained if it is filed after the expiration of a period of one year following the date when the judgement was given.

In accordance with paragraph 2(a) of Article 21 of the Convention, the Republic of Macedonia objects to the use of methods of service pursuant to Article 8 and 10.

In accordance with Article 8, paragraph 2, of the Convention, within the territory of the Republic of Macedonia judicial documents may not be served directly through the diplomatic or consular agents of another Contracting State unless the document is to be served upon a national of the State in which the documents originate.

The Republic of Macedonia objects to the use of the service methods prescribed in Article 10 of the Convention.

The Republic of Macedonia declares that the documents served in accordance with Article 9 of the Convention are forwarded to the Ministry of Justice of the Republic of Macedonia for the purpose of service to the parties.

13 With the following declaration:

``1. Pursuant to Article 2, paragraph 1 of the Convention, the Directorate General of Civil Affairs of the Ministry of Justice (Adalet Bakanligi Hukuk Isleri Genel Müdürlügü, Ankara) is designated as the Central Authority.

2. The Directorate General of Civil Affairs of the Ministry of Justice is also competent to complete certificates as referred to in Article 6 of the Convention.

3. The Directorate General of Civil Affairs is also designated as the authority competent to receive documents forwarded through the channels specified in Article 9, paragraph 1 of the Convention.

4. Pursuant to Article 8 of the Convention, the Government of the Republic of Turkey acknowledges the freedom of diplomatic and consular agents to serve judicial documents upon their own nationals only.

5. The Government of the Republic of Turkey declares that it is opposed to the use of the methods of serving judicial documents listed in Article 10 of the Convention.

6. The Government of the Republic of Turkey declares that its judges, notwithstanding the provisions of the first paragraph of Article 15, may give judgment if all the conditions set out in the second paragraph of the said Article are fulfilled.

7. Pursuant to Article 16, paragraph 3, the Government of the Republic of Turkey declares that applications for relief as referred to in Article 16, paragraph 2, will not be entertained if they are filed after the expiration of a period of one year following the date of the judgment."

Embassy of the Republic of Turkey [at The Hague]

No. 18313/328-78

The Embassy of Turkey presents its compliments to the Ministry of Foreign Affairs, the depositary of the Convention on the service abroad of judicial and extrajudicial documents in civil or commercial matters, and has the honor to inform it of the text of the declaration of the Turkish Government regarding the accession to the aforementioned Convention by the Greek Cypriot Government:

Quote:

The Republic of Turkey, although not exercising its right of opposition as set forth in Article 28(2) of the Convention, declares that it does not consider itself bound to apply the provisions of the Convention with respect to the Greek Cypriot Government which, in constitutional terms, is not authorized to represent the ``Republic of Cyprus" as a whole.

The Embassy of Turkey avails itself of this opportunity to renew to the Ministry of Foreign Affairs the assurances of its highest consideration.

The Hague, April 6, 1983

[Initialed]

[Official stamp]

13a

UKRAINE **(accession)** **15 November 2001**
1 February 2001

The instrument of accession of Ukraine contains the following declarations and reservations:

``1) on Article 2 of the Convention: the Ministry of Justice of Ukraine is the Central Authority of Ukraine;

2) on Article 6 of the Convention: the Ministry of Justice of Ukraine and its territorial departments of justice are competent to complete the certificate of service;

3) on Article 8 of the Convention: service of judicial documents through diplomatic or consular agents of another State within the territory of Ukraine may be effected only upon nationals of the State in which the documents originate;

4) on Article 9 of the Convention: the Ministry of Justice of Ukraine is the authority competent to receive documents transmitted by consular channels or, if exceptional circumstances so require, by diplomatic channels;

5) on Article 10 of the Convention: Ukraine will not use methods of transmission of judicial documents provided for in Article 10 of the Convention;

6) on Article 15 of the Convention: if all the conditions provided for in the second paragraph of Article 15 of the Convention are fulfilled, the judge, notwithstanding the provisions of the first paragraph of Article 15 of the Convention, may give judgment even if no certificate of service or delivery has been received;

7) on Article 16 of the Convention: application for relief will not be entertained in Ukraine if it is filed after the expiration of one year following the date of the judgment."

N.B.: In accordance with Article 28, paragraph 2, the Convention will enter into force for Ukraine **in the absence of any objection from a State which has ratified the Convention before 1 February 2001** within a six months' period which, for practical reasons, will run from 15 May to 15 November 2001.

14 With the following declarations:

``*(a)* In accordance with the provisions of Articles 2 and 18 of the Convention, Her Majesty's Principal Secretary of State for Foreign Affairs is designated as the Central Authority; and the Senior Master of the Supreme Court, Royal Courts of Justice, Strand, London W.C.2, the Crown Agent for Scotland*, Lord Advocate's Department, Crown Office, 9 Parliament Square, Edinburgh 1, and the Registrar of the Supreme Court**, Royal Courts of Justice, Belfast 1, are designated as additional authorities for England and Wales, Scotland and Northern Ireland respectively.

* By a Note of 21 March 2000, the British Government notified that, with effect from 1 April 2000, the designated authority for Scotland will be: ``The Scottish Executive Justice Department, Civil Justice & International Division, Second Floor West, Saint Andrews House, Regent Road, Edinburgh EH1 3DG, tel.: +44.131.244.4826/9, fax: +44.131.244.4848.

** By a Note of 10 June 1980 the British Government notified that instead of the Registrar of the Supreme Court of Northern Ireland, designated in 1967 as the additional authority for Northern Ireland in conformity with Article 18 of the Convention, the Master (Queen's Bench and Appeals) is designated as the said additional authority. The address of the Master (Queen's Bench and Appeals) is Royal Courts of Justice, Belfast 1.)

(b) The authorities competent under Article 6 of the Convention to complete the Certificate of Service are the authorities designated under Articles 2 and 18.

(c) In accordance with the provisions of Article 9 of the Convention, the United Kingdom designates as receivers of process through consular channels the same authorities as those designated under Articles 2 and 18.

(d) With reference to the provisions of paragraphs (b) and (c) of Article 10 of the Convention, documents for service through official channels will be accepted in the United Kingdom only by the central or additional authorities and only from judicial, consular or diplomatic officers of other Contracting States.

(e) The United Kingdom declares its acceptance of the provisions of the second paragraph of Article 15 of the Convention.

(f) In accordance with the provisions of the third paragraph of Article 16 of the Convention, the United Kingdom declares, in relation to Scotland only, that applications for setting aside judgments on the grounds that the defendant did not have knowledge of the proceedings in sufficient time to defend the action will not be entertained if filed more than one year after the date of judgment.

The authorities designated by the United Kingdom will require all documents forwarded to them for service under the provisions of the Convention to be in duplicate and, pursuant to the third paragraph of Article 5 of the Convention, will require the documents to be written in, or translated into, the English language.

A notification under the second and third paragraphs of Article 29 regarding the extension of the Convention to the territories for the international relations of which the United Kingdom is responsible will be addressed to the Royal Netherlands Government in due course."

Extensions

The extension of the application of the Convention to the following territories was notified by the Government of the United Kingdom of Great Britain and Northern Ireland:

Hong Kong1)
*Antigua2)
Bermuda 2)
** British Honduras2)
** British Solomon Islands
Protectorate2)
British Virgin Islands2)
Cayman Islands2)
** Central and Southern Line Islands2)
Falkland Islands and Dependencies2)
** Fiji2)
Gibraltar2)
** Gilbert and Ellice Islands Colony2)
Guernsey2)
Isle of Man2)
Jersey2)

20 May 1970 *(the Convention entered into force for these territories on 19 July 1970)*

Montserrat2)	
Pitcairn2)	
St. Helena and Dependencies2)	
** St. Lucia[2]	
** St. Vincent2)	
* Seychelles2)	
Turks and Caicos Islands2)	
Anguilla3)	3 August 1982 *(entry into force 2 October 1982)*
** St. Christopher and Nevis4)	2 March 1983 *(entry into force 1 May 1983)*

* This country achieved independence and acceded to the Convention (see *infra* under other States).

** This country achieved independence. No declaration has been made on the continuation in force of the Convention.

Date of independence: British Honduras became Belize (21 September 1981); British Solomon Islands became Solomon Islands (7 July 1978); Central and Southern Line Island became Kiribati (12 July 1979); Fiji (10 October 1970); Gilbert and Ellice Islands became respectively Kiribati (12 July 1979) and Tuvalu (1 October 1978); Saint Lucia (22 February 1979); Saint Vincent became Saint Vincent and the Grenadines (27 October 1979); St. Christopher and Nevis became St. Kitts and Nevis (19 September 1983).

1) With the following declarations:

``*(a)* In accordance with Article 18 of the Convention the Colonial Secretary of Hong Kong* is designated as the Authority competent to receive requests for service in accordance with Article 2 of the Convention.

* ``The Colonial Secretary of Hong Kong'' has been re-designated as ``the Chief Secretary of Hong Kong'' (May 1984).

(b) The authority competent under Article 6 of the Convention to complete the Certificate of Service is the Registrar of the Supreme Court of Hong Kong.

(c) In accordance with the provisions of Article 9 of the Convention the Registrar of the Supreme Court of Hong Kong is designated as the receiver of process sent through consular channels.

(d) With reference to the provisions of paragraphs *(b)* and *(c)* of Article 10 of the Convention, documents sent for service through official channels will be accepted in Hong Kong only by the central or additional authority and only from judicial, consular or diplomatic officers of other Contracting States.

(e) The acceptance by the United Kingdom of the provisions of the second paragraph of Article 15 of the Convention shall equally apply to Hong Kong.

The authorities designated above will require all documents forwarded to them for service under the provisions of the Convention to be in duplicate and, pursuant to the third paragraph of Article 5 of the Convention, will require the documents to be written in, or translated into, the English language.''

On *1 July 1997*, the Government of the United Kingdom of Great Britain and Northern Ireland *restored Hong Kong to the People's Republic of China.* See supra, under ``CHINA, Hong Kong Special Administrative Region''.

(2) ``(a) In accordance with Article 18 of the Convention the authority shown against the name of each territory in the Annex (hereinafter severally called ``the designated authority'') is designated as the authority in that territory competent to receive requests for service in accordance with Article 2 of the Convention.

(b) The authority in each territory competent under Article 6 of the Convention to complete the Certificate of Service is the designated authority.

(c) In accordance with the provisions of Article 9 of the Convention, the designated Authority shall receive process sent through consular channels.

(d) With reference to the provisions of paragraphs (b) and (c) of Article 10 of the Convention, documents sent for service through official channels will be accepted in a territory listed in the Annex by the designated authority and only from judicial, consular or diplomatic officers of other Contracting States.

(e) The acceptance by the United Kingdom of the provisions of the second paragraph of Article 15 of the Convention shall equally apply to the territories named in the Annex.

The authorities designated in the Annex will require all documents forwarded to them for service under the provisions of the Convention to be in duplicate and, pursuant to the third paragraph of Article 5 of the Convention, will require the documents to be written in, or translated into, the English language.''

ANNEX

Antigua	—
Bermuda	The Registrar of the Supreme Court, Bermuda.
British Honduras	The Supreme Court Registry, British Honduras.
British Solomon Islands	The Registrar of the High Court, Honiara, British Solomon Islands Protectorate.
British Virgin Islands	The Registrar of the Supreme Court, British Virgin Islands.*
Cayman Islands	The Clerk of the Courts, Grand Cayman, Cayman Islands**
Central and Southern Line Islands	The Registrar of the High Court, Honiara, British Solomon Islands Protectorate.
Falkland Islands and Dependencies	The Registrar of the Supreme Court, Stanley, Falkland Islands.
Fiji	The Registrar of the Supreme Court, Fiji.
Gibraltar	The Registrar of the Supreme Court, Gibraltar***
Gilbert and Ellice Islands	The Registrar of the High Court, Colony.
Guernsey	The Bailiff, Bailiff's Office, Royal Court House, Guernsey, Channel Islands.
Isle of Man	The First Deemster and Clerk of the Rolls, Rolls Office, Douglas, Isle of Man.
Jersey	The Attorney General, Jersey, Channel Islands.
Montserrat	The Registrar of the High Court, Montserrat.
Pitcairn	The Governor and Commander-in-Chief, Pitcairn.
St.Helena and Dependencies	The Supreme Court, St.Helena.
St.Lucia	The Registrar of the High Court of Justice, St.Lucia.
St. Vincent	The Registrar of the Supreme Court, St. Vincent.
Seychelles	—
Turks and Caicos Islands	The Registrar of the Supreme Court, Turks and Caicos Islands.*

*Modified on 30 July 1982.

**Modified on 1 March 1990.

***By Note dated 26 August 1997, the Embassy of Spain at The Hague informed the depositary of the following declaration:

``Espa[Delta equal to]na no reconoce, para la aplicación del presente Convenio, como autoridad al Tribunal Supremo de Gibraltar, y en consecuencia, cualquier documentación intervenida por dicho organo se considerará como nula y no existente.''

By Note dated 28 October 1997, the British Embassy at The Hague informed the depositary of the following:

``Her Britannic Majesty's Embassy present their compliments to the Ministry of Foreign Affairs of the Kingdom of the Netherlands as depositary of the Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters done at The Hague on 15 November 1965 (hereinafter referred to as the `Convention'), and have the honour to refer to the Ministry's Note No 5/1997 of 1 September 1997 communicating the recent declaration by Spain to the effect that it does not recognise the Supreme Court of Gibraltar as an authority for the purposes of the Convention.

Under Article 18 of the Convention a Contracting State may designate `other authorities in addition to the Central Authority and shall determine the extent of their competence'. The Registrar of the Supreme Court of Gibraltar was designated as such authority for Gibraltar by the United Kingdom in 1970.

The Kingdom of Spain ratified the Convention in 1987, and has made no previous objection to the United Kingdom's pre-existing designation of the Supreme Court of Gibraltar. In such circumstances, the United Kingdom is of the view that Spain may not object legitimately to this designation now. Thus the Supreme Court of Gibraltar remains the United Kingdom's designated authority for Gibraltar for the purposes of the Convention.

Her Britannic Majesty's Embassy avail themselves of this opportunity to renew to the Ministry of Foreign Affairs of the Kingdom of the Netherlands the assurances of their highest consideration.''

Extension to Anguilla.—

Notification in conformity with Article 31, paragraphs d and e, of the Convention

In accordance with Article 29, paragraph 2, of the Convention the Ambassador of the United Kingdom of Great Britain and Northern Ireland at The Hague notified the Minister of Foreign Affairs of the Kingdom of the Netherlands, by a Letter dated 30 July 1982 and received on 3

August 1982, the extension of the Convention to Anguilla.

In accordance with Article 29, paragraph 3, the Convention will enter into force for Anguilla on 28 September 1982.

The extension was accompanied by the following declarations:

(a) in accordance with Article 18 of the Convention the Registrar of the Supreme Court of Anguilla (hereinafter called the designated authority) is designated as the authority competent to receive requests for service in accordance with Article 2 of the Convention.

(b) the authority competent under Article 6 of the Convention to complete the Certificate of Service is the designated authority.

(c) in accordance with the provisions of Article 9 of the Convention the designated authority shall receive process sent through consular channels.

(d) with reference to the provisions of paragraphs (b) and (c) of Article 10 of the Convention, documents sent for service through official channels will be accepted by the designated authority and only from judicial, consular or diplomatic officers of other contracting states.

(e) the acceptance by the United Kingdom of the provisions of the second paragraph of Article 15 of the Convention shall apply to Anguilla.

The designated authority will require all documents forwarded to it for service under the provisions of the Convention to be in duplicate and, pursuant to the third paragraph of Article 5 of the Convention, will require the documents to be written in, or translated into, the English language.

Extension to the Associated State of Saint Christopher and Nevis.

Notification in conformity with Article 31, paragraphs d and e, of the Convention

In accordance with Article 29, paragraph 2, of the Convention the Ambassador of the United Kingdom of Great Britain and Northern Ireland at The Hague notified the Minister of Foreign Affairs of the Kingdom of the Netherlands by Letter dated 1 March 1983 and received on 2 March 1983 of the extension of the Convention to the Associated State of Saint Christopher and Nevis.

In accordance with Article 29, paragraph 3, the Convention will enter into force for Saint Christopher and Nevis on 1 May 1983.

The Letter contains the following declarations:

``a) in accordance with Article 18 of the Convention the Registrar of the West Indies Associated State Supreme Court, Saint Christopher and Nevis circuit (hereinafter called the designated authority) is designated as the authority competent to receive requests for service in accordance with Article 2 of the Convention;

b) the authority competent under Article 6 of the Convention to complete the Certificate of Service is the designated authority;

c) in accordance with the provisions of Article 9 of the Convention the designated authority shall receive process sent through consular channels;

d) with reference to the provisions of paragraphs (b) and (c) of Article 10 of the Convention, documents sent for service through official channels will be accepted by the designated authority and only from judicial, consular or diplomatic officers of other contracting states;

e) the acceptance by the United Kingdom of the provisions of the second paragraph of Article 15 of the Convention shall apply to Saint Christopher and Nevis.

The designated authority will require all documents forwarded to it for service under the provisions of the Convention to be in duplicate and, pursuant to the third paragraph of Article 5 of the Convention, will require the documents to be written in, or translated into, the English language."

Her Britannic Majesty's Embassy present their compliments to the Ministry of Foreign Affairs of the Kingdom of the Netherlands as depositary of the Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters done at The Hague on 15 November 1965 (hereinafter referred to as the `Convention'), and have the honour to refer to the Ministry's Note No 5/1997 of 1 September 1997 communicating the recent declaration by Spain to the effect that it does not recognise the Supreme Court of Gibraltar as an authority for the purposes of the Convention.

Under Article 18 of the Convention a Contracting State may designate `other authorities in addition to the Central Authority and shall determine the extent of their competence'. The Registrar of the Supreme Court of Gibraltar was designated as such authority for Gibraltar by the United Kingdom in 1970.

The Kingdom of Spain ratified the Convention in 1987, and has made no previous objection to the United Kingdom's pre-existing designation of the Supreme Court of Gibraltar. In such circumstances, the United Kingdom is of the view that Spain may not object legitimately to this designation now. Thus the Supreme Court of Gibraltar remains the United Kingdom's designated authority for Gibraltar for the purposes of the Convention.

Her Britannic Majesty's Embassy avail themselves of this opportunity to renew to the Ministry of Foreign Affairs of the Kingdom of the Netherlands the assurances of their highest consideration.

See supra, under CHINA, Hong Kong Special Administrative Region

United States.—

15 With the following declarations:

``1. In accordance with Article 2, the United States Department of Justice is designated as the Central Authority to receive requests for service from other Contracting States and to proceed in conformity with Articles 3 to 6.

Central Authority:

By communication dated 1 October 2002, the Department of Justice of the United States of America informed the Permanent Bureau that it was finalising an award to a private process server company to assume the duties of the United States Central Authority pursuant to Article 2 of the 1965 Hague Service Convention. On 24 October 2002, the Permanent Bureau brought this communication to the attention of all the Member States of the Hague Conference and the non-Member States Parties to the Convention.

By communication dated 15 April 2003, the Department of Justice of the United States of America informed the Permanent Bureau that the bidding procedure had been completed and that the contract had been awarded to Process Forwarding International of Seattle, Washington, USA (see the contact details below). This contract will become effective on 1 June 2003, for a five-year period. (The contract also encompasses service of process pursuant to the Inter-American Convention on Letters Rogatory and Letters Rogatory from non-Convention States.)

The Department of Justice of the United States of America emphasises that this procedure has not led to the formal designation of a new Central Authority, but rather to the outsourcing of the activities conducted by the Central Authority, which formally remains the Department of Justice.

Process Forwarding International is the only private process service company authorised to act on behalf of the United States Central Authority, in accordance with Articles 2–6 of the Convention, to receive requests for service from other Contracting States, proceed to serve the documents, and complete the certificate in the form annexed to the Convention. Process Forwarding International is responsible for the geographical coverage of its tasks in the following areas: the United States, Guam, American Samoa, Puerto Rico, U.S. Virgin Islands, and Northern Mariana. Process Forwarding International is required to ensure that all personnel are properly trained and experienced in the handling of process serving. Pursuant to the contract, there will be a fully functional office in the United States to perform all necessary work.

Personal service will be the preferred method used on all requests. In addition, Process Forwarding International is required to complete service of documents and the certificate for return to the foreign applicant within six weeks of receipt of the request.

If Central Authorities of the Contracting States are solicited by other private process server companies, they should be aware that Process Forwarding International is the only company authorised to perform the duties of the U.S. Central Authority under the contract awarded by the Department of Justice.

Requests for service to be forwarded as of 1 June 2003 should be transmitted to Process Forwarding International (see the contact details below). Requests received by the U.S. Central Authority during the thirty days prior to the effective date of the new arrangement will be forwarded to Process Forwarding International for service free of charge. All pending requests for service received prior to the effective date will continue to be processed by the United States Department of Justice.

The contact details for the private process server company and the payment schedule for the five-year contract period, including methods of payment, are as follows:

Process Forwarding International
910 5th Avenue
Seattle, WA 98104
USA
Phone: +1 (206) 521 2979
Fax: +1 (206) 224 3410
E-mail: info@hagueservice.net
Website: http://www.hagueservice.net

Service Fees: Payment must be in U.S. currency and paid in advance

Year	Description	Fees US $
2003	Personal Service or Service by Mail (Hague Convention)	$89
2003	Personal Service or Service by	$89

	Mail (Letters Rogatory, non-convention)	
2004	Personal Service or Service by Mail (Hague Convention)	$91
2004	Personal Service or Service by Mail (Letters Rogatory, non-convention)	$91
2005	Personal Service or Service by Mail (Hague Convention)	$93
2005	Personal Service or Service by Mail (Letters Rogatory, non-convention)	$93
2006-2007	Personal Service or Service by Mail (Hague Convention)	$95
2006-2007	Personal Service or Service by Mail (Letters Rogatory, non-convention)	$95

Payment Options: VISA/MasterCard & most international credit cards, Bank Transfers, International money orders & Government issued checks. All service requests unaccompanied by proper payment in the manner indicated above will be returned without processing.

2. In accordance with the second paragraph of Article 15, it is declared that the judge may, notwithstanding the provisions of the first paragraph of Article 15, give judgment even if no certificate of service or delivery has been received, if all the conditions specified in subdivisions (a), (b) and (c) of the second paragraph of Article 15 are fulfilled.

3. In accordance with the third paragraph of Article 16, it is declared that an application under Article 16 will not be entertained if it is filed (a) after the expiration of the period within which the same may be filed under the procedural regulations of the court in which the judgment has been entered, or (b) after the expiration of one year following the date of the judgment, whichever is later.

4. In accordance with Article 29, it is declared that the Convention shall extend to all the States of the United States, the District of Columbia, Guam, Puerto Rico, and the Virgin Islands.

5. By a Note dated 22 April 1970 the Embassy of the United States of America informed the Netherlands Ministry of Foreign Affairs as follows:

``Under Article 2 of the Convention, each State is required to designate a Central Authority to receive requests for service of documents coming from other countries. Although this Central Authority always is to be available, its use is not compulsory and there is provision (Articles 8 through 11) for service through channels outside the Central Authority, including service by diplomatic or consular officers. These provisions are optional, however, and, since consular officers of the United States are prohibited by regulation from serving legal process or appointing other persons to do so, the United States will not avail itself of these provisions of the Convention. It is anticipated that courts in the United States will be advised by the Department of Justice of the possibility of sending requests for service of legal process directly to the Central Authority of the country concerned.

Extension

On 31 March 1994, the Government of the United States of America declared that the Convention shall also be extended to the *Commonwealth of the Northern Mariana Islands* (entry into force *30 May 1994*).

The authorities currently designated by the Government of the United States of America to perform certain functions under the Treaty shall also be the authorities designated to perform those functions for the Commonwealth of the Northern Mariana Islands.

The authorities currently designated by the Government of the United States of America to perform certain functions under the Treaty shall also be the authorities designated to perform those functions for the Commonwealth of the Northern Mariana Islands.

The Convention will enter into force for the Commonwealth of the Northern Mariana Islands on 30 May 1994."

16 The Permanent Bureau of the Hague Conference on private international law presents its compliments to the Diplomatic Missions of the Member States and to the National Organs and has the honour to inform them that, by instrument deposited on 29 October 1993 with the Ministry of Foreign Affairs of the Kingdom of the Netherlands,

the Republic of Venezuela

acceded to the above-mentioned Convention.

The instrument of accession contains the following declarations:

Translation

1.-With regard to Article 5, paragraph 3:

``The Republic of Venezuela declares that notices and documents and other items annexed to the notices will be accepted only when they are properly translated into the Spanish language''.

2.-With regard to Article 8:

``The Republic of Venezuela does not agree to the exercise of the faculty provided for in the first paragraph of this Article within its territory, in respect of other persons who are not nationals of the country of origin''.

3.-With regard to Article 10 (a):

``The Republic of Venezuela does not agree to the transmission of documents through postal channels''.

4.-With regard to Article 15 (a), (b) and (c):

``The Republic of Venezuela declares that `Venezuelan judges shall be empowered to decide when the conditions contained in sections (a), (b) and (c) of this Article are fulfilled, even though they have not received any communication evidencing either the notice or transfer, or delivery of the document' ''.

5.-With regard to Article 16:

``The Republic of Venezuela declares that the request allowed by the third paragraph of this Article shall not be admissible if it is made after the expiration of the period specified in Venezuelan law''.

In accordance with Article 28, paragraph 3, the Convention entered into force for the *Republic of Venezuela* on *1 July 1994*.

Notification in conformity with Article 31

The Ministry of Foreign Affairs of the Kingdom of the Netherlands, depositary of the Convention on the service abroad of judicial and extrajudicial documents in civil or commercial matters of 15 November 1965, has the honour to inform the Member States of the Hague Conference on Private International and the States having acceded to the Convention that in accordance with Article 2 Venezuela has designated the ``Ministry of Foreign Affairs'' as the Central Authority.

Service of Documents Convention

ANNEX TO THE CONVENTION

*Forms**

REQUEST

FOR SERVICE ABROAD OF JUDICIAL OR EXTRAJUDICIAL DOCUMENTS

Convention on the service abroad of judicial and extrajudicial documents in civil or commercial matters, signed at
The Hague, November 15, 1965.

Identity and address of the applicantAddress of receiving authority

The undersigned applicant has the honour to transmit—in duplicate—the documents listed below and, in conformity with article 5 of the above-mentioned Convention, requests prompt service of one copy thereof on the addressee, i.e., (identity and address) ....
....

(a) in accordance with the provisions of sub-paragraph (a) of the first paragraph of article 5 of the Convention *

(b) in accordance with the following particular method (sub-paragraph (b) of the first paragraph of article 5) *: ....
....
....

(c) by delivery to the addressee, if he accepts it voluntarily (second paragraph of article 5) *.

The authority is requested to return or to have returned to the applicant a copy of the documents —and of the annexes *—with a certificate as provided on the reverse side.

List of documents

....
....
....
....
....
....
....
....
....

* Delete if inappropriate.

Done at ...., the ....

Signature and/or stamp.

Reverse of the request

CERTIFICATE

The undersigned authority has the honour to certify, in conformity with article 6 of the Convention,

1) that the document has been served *

—the (date) ....

—at (place, street, number) ....
....

—in one of the following methods authorised by article 5—

(a) in accordance with the provisions of sub-paragraph (a) of the first paragraph of article 5 of the Convention *.

(b) in accordance with the following particular method *: ....
....

(c) by delivery to the addressee, who accepted it voluntarily *.

The documents referred to in the request have been delivered to:

—(identity and description of person) ....
....

—relationship to the addressee (family, business or other) ....
....

2) that the document has not been served, by reason of the following facts *:
....
....
....

In conformity with the second paragraph of article 12 of the Convention, the applicant is requested to pay or reimburse the expenses detailed in the attached statement *.

Annexes

Documents returned: ....
....
....

In appropriate cases, documents establishing the service: ....
....
....

* Delete if inappropriate.

Done at ...., the ....

Signature and/or stamp.

---

* These forms may be obtained from the Offices of United States Marshals.

SUMMARY OF THE DOCUMENT TO BE SERVED

Convention on the service abroad of judicial and extrajudicial documents in civil or commercial matters, signed at The Hague, the 15th of November 1965.
(article 5, fourth paragraph)

Name and address of the requesting authority: ....
....
....

Particulars of the parties *:
....
....
....

JUDICIAL DOCUMENT **

Nature and purpose of the document: ....
....
....

Nature and purpose of the proceedings and, where appropriate, the amount in dispute: ....
....
....

Date and place for entering appearance **: ....
....

Court which has given judgment **: ....
....

Date of judgment **: ....

Time limits stated in the document **: ....
....

EXTRAJUDICIAL DOCUMENT **

Nature and purpose of the document: ....
....
....

Time limits stated in the document **: ....
....
....

* If appropriate, identity and address of the person interested in the transmission of the document.

** Delete if inappropriate.

Endnotes

1 27 LNTS 157; 92 LNTS 301.

Endnotes

1 27 LNTS 157; 92 LNTS 301.

Endnotes

2 TS 993; 59 Stat. 1055.

Endnotes

2 TS 993; 59 Stat. 1055.

1 On 30 November 2004, an instrument of accession was deposited by the Government of Afghanistan.

Declaration:

``Afghanistan will apply the Convention only to: (i) recognition and enforcement of awards made in the territory of another Contracting State; and (ii) differences arising out of legal relationships whether contractual or not which are considered as commercial under the national law of Afghanistan."

1a On February 7, 1989, an instrument of accession was deposited with the Secretary General of the United Nations by Algeria.

Referring to the possibility offered by article I, paragraph 3, of the Convention, the People's Democratic Republic of Algeria declares that it will apply the Convention, on the basis of reciprocity, to the recognition and enforcements of arbitral awards made only in the territory of another Contracting State and only where such awards have been made with respect to differences arising out of legal relationships, whether contractual or not, which are considered as commercial under Algerian law.

In accordance with Article XII (2), the Convention will enter into force for Algeria on May 8, 1989.

1b On February 2, 1989, an instrument of accession was deposited with the Secretary General of the United Nations by Antigua and Barbuda.

``In accordance with Article I, the Government of Antigua and Barbuda declares that it will apply the Convention on the basis of reciprocity only to the recognition and enforcement of awards made in the territory of another contracting state.

The Government of Antigua and Barbuda also declares that it will apply the Convention only to differences arising out of legal relationships, whether contractual or not, which are considered as commercial under the laws of Antigua and Barbuda."

In accordance with Article XII (2), the Convention will enter into force for Antigua and Barbuda on May 3, 1989.

1c On 14 March 1989, the instrument of ratification by the Government of Argentina of the above-mentioned Convention was deposited with the Secretary-General.

The instrument of ratification contains the following declaration:

On the basis of reciprocity, the Republic of Argentina will apply the Convention only to the recognition and enforcement of foreign arbitral awards made in the territory of another Contracting State. It will also apply the Convention only to differences arising out of legal relationships, whether contractual or not, which are considered as commercial under its national law.

The Convention will be interpreted in accordance with the principles and clauses of the National Constitution in force or those resulting from modification made by virtue of the Constitution.

In accordance with Article XII (2), the Convention will enter into force for Argentina on 12 June 1989, i.e. the ninetieth day after the date of the deposit of its instrument.

``If another Contracting Party extends the application of the Convention to territories which fall within the sovereignty of the Argentine Republic, the rights of the Argentine Republic shall in no way be affected by that extension."

1d Declarations:

``1. The Republic of Armenia will apply the Convention only to recognition and enforcement of awards made in the territory of another Contracting State.

2. The Republic of Armenia will apply the Convention only to differences arising out of legal relationships, whether contractual or not, which are considered as commercial under the laws of the Republic of Armenia."

1e With the following declaration in accordance with the provisions of article X (1):

``… the Convention shall extend to all the external Territories for the international relations of which it"—Australia—``is responsible other than Papua New Guinea."

1f Subject to the following reservations and declarations:

The Republic of Austria will apply the Convention, in accordance with the first sentence of article I(3) thereof, only to the recognition and enforcement of arbitral awards made in the territory of another Contracting State.

In a communication received on 25 February 1988, the Government of Austria notified the Secretary-General of its decision to withdraw the following reservation, made upon accession to the above-mentioned Convention:

(Translation) (Original: German)

The Republic of Austria will apply the Convention, in accordance with the first sentence of article I (3), thereof, only to the recognition and enforcement of arbitral awards made in the territory of another Contracting State.

The said withdrawal took effect on 25 February 1988, the date of receipt of the notification.

12 May 1988

1g On 6 April 1988, the instrument of accession by the Government of Bahrain to the above-mentioned Convention was deposited with the Secretary-General.

The instrument of accession contains the following declarations:

(Original: English)

``1. The accession by the State of Bahrain to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958 shall in no way constitute recognition of Israel or be a cause for the establishment of any relations of any kind therewith.

2. In accordance with Article 1 (3) of the Convention, the State of Bahrain will apply the Convention, on the basis of reciprocity, to the recognition and enforcement of only those awards made in the territory of another Contracting State party to the Convention.

3. In accordance with Article 1 (3) of the Convention, the State of Bahrain will apply the Convention only to differences arising out of legal relationships, whether contractual or not, which are considered as commercial under the national law of the State of Bahrain."

In accordance with Article XII (2), the Convention will enter into force for Bahrain on 5 July 1988, i.e. the ninetieth day after the date of the deposit of its instrument.

1h On March 16, 1993, the instrument of accession by the Government of Barbados to the above-mentioned Convention was deposited with the Secretary-General.

The instrument of accession contains the following declarations:

(Original: English)

``(i) In accordance with Article 1(3) of the Convention, the Government of Barbados declares that it will apply the Convention on the basis of reciprocity to the recognition and enforcement of awards made only in the territory of another Contracting State.

(ii) The Government of Barbados will also apply the Convention only to differences arising out of legal relationships, whether contractual or not which are considered as commercial under the laws of Barbados."

In accordance with paragraph 2 of its article XII, the Convention will enter into force for Barbados on the ninetieth day after the date of deposit of the instrument, i.e., on 14 June 1993.

26 May 1988

1i [Belarus] will apply the provisions of this Convention in respect to arbitral awards made in the territories of non-contracting States only to the extent to which they grant reciprocal treatment.

2 (Translation) In accordance with article I, paragraph 3, the Government of the Kingdom of Belgium declares that it will apply the Convention to the recognition and enforcement of arbitral awards made only in the territory of a Contracting State.

2a DECLARATION:

``The Convention will be applied to the Republic of Bosnia and Herzegovina only relating [to] those arbitral awards that have been brought after entering into force of the Convention.

The Republic of Bosnia and Herzegovina will apply the Convention, on the basis of reciprocity, to the recognition and enforcement of only those awards made in the territory of another Contracting State.

The Republic of Bosnia and Herzegovina will apply the Convention only to differences arising out of legal relationships, whether contractual or not, which are considered as commercial under the national law of the Republic of Bosnia and Herzegovina."

2b ``The Republic of Botswana will apply the Convention only to differences arising out of legal relationship, whether contractual or not, which are considered commercial under Botswana law.

The Republic of Botswana will apply the Convention to the Recognition and Enforcement of Awards made in the territory of another Contracting State."

2c The Secretary-General of the United Nations, acting in his capacity as depositary, communicates the following:

On 25 July 1996, the instrument of accession by the Government of Brunei Darussalam to the above Convention was deposited with the Secretary-General.

The instrument of accession contains the following declaration:

(Original: English)

``… Brunei Darussalam will on the basis of reciprocity apply the said Convention to the recognition and enforcement of only those awards which are made in the territory of another Contracting State."

In accordance with its article XII (2), the Convention will enter into force for Brunei Darussalam on the ninetieth day after the date of deposit of the instrument, i.e. on 23 October 1996.

3 Bulgaria will apply the Convention to recognition and enforcement of awards made in the territory of a contracting State. With regard to awards made in the territory of non-contracting States, it will apply the Convention only to the extent to which these States grant reciprocal treatment … .

4 (Dictated): The Government of Canada declares with respect to the Province of Alberta, that it will apply the Convention only to the recognition and enforcement of awards made in the territory of another Contracting State. The Government of Canada declares that it will apply the Convention only to differences arising out of legal relationships whether contractual or not which are considered as commercial under the National Law of Canada.

On 20 May 1987, the Secretary-General received from the Government of Canada, in respect of the above declaration, the following revised declaration:

(Original: English and French)

``The Government of Canada declares, with respect to the Province of Saskatchewan, that it will apply the Convention only to the recognition and enforcement of awards made in the territory of another Contracting State.

The Government of Canada declares that it will apply the Convention only to differences arising out of legal relationships, whether contractual or not, which are considered as commercial under the laws of Canada, except in the case of the Province of Quebec where the law does not provide for such limitation."

In light of the depositary practice followed in similar cases, the Secretary-General proposes to receive the declaration in question for deposit in the absence of any objection on the part of any of the Contracting Parties, either to the deposit itself or to the procedure envisaged, within a period of 90 days from the date of the present depositary notification. In the absence of any such objection, the said declaration will take effect upon the expiration of the above-stipulated 90-day period, and will then replace the previous declaration.

22 July 1987

The Secretary-General of the United Nations, acting in his capacity as depositary, and referring to depositary notification C.N.111.1987.TREATIES-3 of 22 July 1987 concerning the declaration made by the Government of Canada communicates the following:

In the absence of any objection on the part of any of the Contracting Parties, either to the declaration or to the procedure applied, within 90 days from the date of the above-mentioned depositary notification, the said declaration is deemed to have been accepted.

The declaration took effect on 20 October 1987, i.e. upon the expiration of the above-mentioned 90-day period, and has accordingly replaced the previous declaration made upon accession.

The Secretary-General of the United Nations, acting in his capacity as depositary, and referring to depositary notification C.N.111.1987.TREATIES-3 of 22 July 1987 concerning the declaration made by the Government of Canada, communicates the following:

In a communication received on 25 November 1988, the Government of Canada notified the Secretary-General of its decision to withdraw the following part of its revised declaration deposited on 20 May 1987:

(Original: English and French)

``The Government of Canada declares, with respect to the Province of Saskatchewan, that it will apply the Convention only to the recognition and enforcement of awards made in the territory of another Contracting State."

The said withdrawal took effect on 25 November 1988, the date of receipt of the notification.

24 November 1987

5 …the Central African Republic declares that it will apply the Convention on the basis of reciprocity, to the recognition and enforcement of awards made only in the territory of another contracting State; it further declares that it will apply the Convention only to differences arising out of legal relationships, whether contractual or not, which are considered as commercial under its national law.

5a The Secretary-General of the United Nations, acting in his capacity as depositary, communicates the following:

``On 22 January 1987, the instrument of accession by the Government of China to the above-mentioned Convention was deposited with the Secretary-General.

The instrument of accession contains the following declaration made in accordance with paragraph 3 of article I of the Convention:

(Courtesy translation) (Original: Chinese)

1. The People's Republic of China will apply the Convention, only on the basis of reciprocity, to the recognition and enforcement of arbitral awards made in the territory of another Contracting State;

2. The People's Republic of China will apply the Convention only to differences arising out of legal relationships, whether contractual or not, which are considered as commercial under the national law of the People's Republic of China.

In accordance with article XII (2), the Convention will enter into force for China on 22 April 1987, i.e. the ninetieth day after the deposit of its instrument."

On 6 June 1997, the Government of China notified the Secretary-General of the following:

(Courtesy translation) (Original: Chinese)

In accordance with the Declaration of the Government of the People's Republic of China and the United Kingdom of Great Britain and Northern Ireland on the Question of Hong Kong signed on 19 December 1984, the People's Republic of China will resume the exercise of sovereignty over Hong Kong with effect from 1 July 1997. Hong Kong will, with effect from that date, become a Special Administrative Region of the People's Republic of China and will enjoy a high degree of autonomy, except in foreign and defence affairs which are the responsibility of the Central People's Government of the People's Republic of China.

The (above Convention), to which the Government of the People's Republic of China acceded on 22 January 1987, will apply to the Hong Kong Special Administrative Region with effect from 1 July 1997. The Government of the People's Republic of China also makes the following declaration: The Convention will be applied in the Hong Kong Special Administrative Region only to the recognition and enforcement of awards made in the territory of another Contracting State.

The Government of the People's Republic of China will assume responsibility for the international rights and obligations arising from the application of the Convention to the Hong Kong Special Administrative Region.

* See also note under 21a Portugal concerning Macau.

5b *Declaration of Cuba.*—Republic of Cuba will apply Convention to recognition and enforcement of arbitral awards made in territory of another contracting State. With respect to arbitral awards made by other noncontracting States, it will apply Convention only in so far as those States grant reciprocal treatment as established by mutual agreement between parties. Moreover, it will apply Convention only to differences arising out of legal relationships, whether contractual or not, which are considered as commercial under Cuban legislation.

5c *With the following declaration:* ``The Republic of Cyprus will apply the Convention, on the basis of reciprocity, to the recognition and enforcement of awards made only in the territory of another Contracting State; furthermore it will apply the Convention only to differences arising out of legal relationships, whether contractual or not, which are considered as commercial under its national law."

6 ``[Czech Republic] will apply the Convention to recognition and enforcement of awards made in the territory of another contracting State. With regard to awards made in the territory of non-contracting States it will apply the Convention only to the extent to which these States grant reciprocal treatment."

7 ``… the Government of Denmark has withdrawn its reservation pursuant to Article X, paragraph 1 of the Convention with respect to the applicability of the Convention to the Faroe

Islands and Greenland with effect from 1 January, 1976."

In accordance with the terms of article I, paragraph 3, [the Convention] shall have effect only as regards the recognition and enforcement of arbitral awards made by another Contracting State and [it] shall be valid only with respect to commercial relationships.

8 Ecuador, on the basis of reciprocity, will apply the Convention to the recognition and enforcement of arbitral awards made in the territory of another contracting State only if such awards have been made with respect to differences arising out of legal relationships which are regarded as commercial under Ecuadorean law.

9 (1) Referring to the possibility offered by paragraph 3 of Article I of the Convention, France declares that it will apply the Convention on the basis of reciprocity, to the recognition and enforcement of awards made only in the territory of another contracting State; (2) Referring to paragraphs 1 and 2 of Article X of the Convention, France declares that this Convention will extend to all the territories of the French Republic.

In a communication received on 27 November 1989, the Government of France notified the Secretary-General of its decision to withdraw the following declaration, made upon ratification of the said Convention:

(Translation) (Original: French)

France declares that it will apply the Convention only to differences arising out of legal relationships, whether contractual or not, which are considered as commercial under its national law.

The said withdrawal took effect on 27 November 1989, the date of receipt of the notification.

10 On October 3, 1990 the German Democratic Republic acceded to the Federal Republic of Germany. ``With respect to paragraph 1 of article I, and in accordance with paragraph 3 of article I of the Convention, the Federal Republic of Germany will apply the Convention only to the recognition and enforcement of awards made in the territory of another Contracting State."

10a By communication received by the U.N. Secretary-General on Apr. 18, 1980 the Government of Greece stated that upon accession it had been the intention to formulate the following declaration included in the enactment approving the Convention:

(Translation) The present Convention is approved on condition of the two limitations set forth in article 1(3) of the Convention.

10b The Secretary-General of the United Nations, acting in his capacity as depositary, communicates the following:

On 21 March 1984, the instrument of accession by the Government of Guatemala to the above-mentioned Convention was deposited with the Secretary-General.

The instrument of accession contains the following declaration made in accordance with paragraph 3 of article I of the Convention:

(Translation) (Original: Spanish)

On the basis of reciprocity, the Republic of Guatemala will apply the above Convention to the recognition and enforcement of arbitral awards made only in the territory of another contracting State; and will apply it only to differences arising out of legal relationships, whether contractual or not, which are considered as commercial under its national law.

In accordance with article XII (2), the Convention will enter into force for Guatemala on 19 June 1984, i.e., on the ninetieth day after the deposit of its instrument.

10c The instrument of accession contains a declaration pursuant to article 1, paragraph 3, to the effect that the State of Vactican City will apply the said Convention on the basis of reciprocity, in one hand, to the recognition and enforcement of awards made only in the territory of another Contracting State, and on the other hand, only to differences arising out of legal relationships, whether contractual or not, which are considered as commercial under Vactican law.

11 ``… the Hungarian People's Republic shall apply the Convention to the recognition and enforcement of such awards only as have been made in the territory of one of the other Contracting States and are dealing with differences arising in respect of a legal relationship considered by the Hungarian law as a commercial relationship.''

12 ``In accordance with Article I of the Convention, the Government of India declare that they will apply the Convention to the recognition and enforcement of awards made only in the territory of a State, party to this Convention. They further declare that they will apply the Convention only to differences arising out of legal relationships, whether contractual or not, which are considered as commercial under the Law of India.''

12a The Secretary-General of the United Nations, acting in his capacity as depositary of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, done at New York on 10 June 1958, communicates the following:

On 7 October 1981, the instrument of accession by the Government of Indonesia to the above-mentioned Convention was deposited with the Secretary-General.

The instrument of accession contains the following declaration:

``Pursuant to the provision of article I (3) of the Convention, the Government of the Republic of Indonesia declares that it will apply the Convention on the basis of reciprocity, to the recognition and enforcement of awards made only in the territory of another Contracting State, and that it will apply the Convention only to differences arising out of legal relationships, whether contractual or not, which are considered as commercial under the Indonesian Law''.

In accordance with its article XII (2), the Convention will enter into force for Indonesia on the ninetieth day after the deposit of its instrument of accession, that is to say, on 5 January 1982.

12b DECLARATIONS:

``(a) In accordance with article 1 (3) of the Convention, the Islamic Republic of Iran will apply the Convention only to differences arising out of legal relationships, whether contractual or not, which are considered as commercial under the national law of the Islamic Republic of Iran;

(b) In accordance with article 1 (3) of the Convention, the Islamic Republic of Iran will apply the Convention, on the basis of reciprocity, to the recognition and enforcement of only those awards made in the territory of another Contracting State Party to the Convention.''

12c *With the following declaration:* ``In accordance with article I (3) of the said Convention the Government of Ireland declares that it will apply the Convention to the recognition and enforcement of arbitral awards made only in the territory of another Contracting State.''

12d RESERVATION:

``The Government of Jamaica, on the basis of Reciprocity, will apply the Convention to the recognition and enforcement of awards made only in the territory of another Contracting State, in accordance with article 1 (3).

The Government of Jamaica further declares that the Convention will only be applied to differences arising out of legal relationships, whether contractual or not, which are considered to be commercial under the national laws of Jamaica in accordance with article 1 (3) of the Convention.''

13 ``… it will apply the Convention to the recognition and enforcement of awards made only in the territory of another Contracting State.''

13a The instrument of ratification contains a reservation to the effect that

(translation) [the Government of Jordan] shall not be bound by any awards which are made by Israel or to which an Israeli is a party.

In accordance with its article XII (2), the Convention will enter into force for Jordan on the ninetieth day after the deposit of its instrument of ratification, that is to say, on 13 February 1980, subject to the legal effects which each Party might wish to draw from the above-mentioned reservation as regards the application of the said Convention.

13b On February 10, 1989, an instrument of accession was deposited with the Secretary-General of the United Nations by Kenya.

``In accordance with Article I (3) of the said Convention the Government of Kenya declares that it will apply the Convention to the recognition and enforcement of arbitral awards made only in the territory of another contracting state.''

In accordance with Article XII (2), the Convention will enter into force for Kenya on May 11, 1989.

14 ``By virtue of paragraph 3 of Article 1 of the present Convention, the Government of the Republic of Korea declares that it will apply the Convention to the recognition and enforcement of arbitral awards made only in the territory of another Contracting State. It further declares that it will apply the Convention only to differences arising out of legal relationships, whether contractual or not, which are considered as commercial under its national law.''

14a The instrument of accession contains the following declaration under article 1 of the Convention:

(Translation) The State of Kuwait will apply the Convention to the recognition and enforcement of awards made only in the territory of another Contracting State.

The instrument of accession is accompanied by an understanding which reads as follows:

(Translation) It is understood that the accession of the State of Kuwait to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, done at New York, on the 10th of June 1958, does not mean in any way recognition of Israel or entering with it into relations governed by the Convention thereto acceded by the State of Kuwait.

14b DECLARATION:

``The Government of Lebanon declares that it will apply the Convention, on the basis of reciprocity, to the recognition and enforcement of awards made only in the territory of another

Contracting State.

14c DECLARATION:

``[The Republic of Lithuania] will apply the provisions of the said Convention to the recognition of arbitral awards made in the territories of the Non-Contracting States, only on the basis of reciprocity."

14d On 9 September 1983, the instrument of ratification by the Government of Luxembourg of the above-mentioned Convention was deposited with the Secretary-General.

In a note accompanying the said instrument, the Government of Luxembourg made the following declaration:

(Translation) (Original: French)

The Convention is applied on the basis of reciprocity to the recognition and enforcement of only those arbitral awards made in the territory of another Contracting State.

In accordance with article XII(2), the Convention will enter into force for Luxembourg on 8 December 1983, i.e., on the ninetieth day after the deposit of its instrument.

14e [Madagascar] will apply the Convention on the basis of reciprocity, to the recognition and enforcement of awards made only in the territory of another Contracting State; it further declares that it will apply the Convention only to differences arising out of legal relationships, whether contractual or not, which are considered as commercial under its national law.

15 *Accession by Malaysia*—

The Secretary-General of the United Nations, acting in his capacity as depositary, communicates the following:

On 5 November 1985, the instrument of accession by the Government of Malaysia to the above-mentioned Convention was deposited with the Secretary-General.

The instrument of accession contains the following declaration made in accordance with paragraph 3 of article I of the Convention:

(Original: English)

``…the government of Malaysia, in accordance with the provision of Article 1(3) of the Convention, declares that it will apply the Convention on the basis of reciprocity, to the recognition and enforcement of awards made only in the territory of another Contracting State. Malaysia further declares that it will apply the Convention only to differences arising out of legal relationships, whether contractual or not, which are considered as commercial under Malaysian law."

In accordance with article XII (2), the Convention will enter into force for Malaysia on 3 February 1986, i.e., on the ninetieth day after the deposit of its instrument.

15a ``1. In accordance with the relevant provisions of the Convention, Malta will apply the Convention only to the recognition and enforcement of awards made in the territory of another Contracting State.

2. The Convention only applies in regard to Malta with respect to arbitration agreements

concluded after the date of Malta's accession to the Convention."

15b On 19 June 1996, the instrument of accession by the Government of Mauritius to the above Convention was deposited with the Secretary-General.

The instrument of accession contains the following declarations:

(Original: English)

``In accordance with paragraph 3 of Article 1 of the Convention, the Republic of Mauritius declares that it will, on the basis of reciprocity, apply the Convention only to the recognition and enforcement of awards made in the territory of another Contracting State.

Referring to paragraphs 1 and 2 of Article X of the Convention, the Republic of Mauritius declares that this Convention will extend to all the territories forming part of the Republic of Mauritius."

In accordance with its article XII (2), the Convention will enter into force for Mauritius on the ninetieth day after the date of deposit of the instrument, i.e. on 17 September 1996.

15c DECLARATION:

``The Convention will be applied to the Republic of Moldova only relating to those arbitral awards that have been brought after entering into force of the Convention.

The Convention will be applied to the Republic of Moldova, on the basis of reciprocity, only relating to those awards made in the territory of another Contracting State."

15d The instrument of ratification contains the following declarations:

(Translation) (Original: French)

Referring to the possibility offered by article I(3) of the Convention, the Principality of Monaco will apply the Convention, on the basis of reciprocity, to the recognition of and enforcement of awards made only in the territory of another contracting State; furthermore, it will apply the Convention only to differences arising out of legal relationship, whether contractual or not, which are considered as commercial under its national law.

In accordance with article XII(2), the Convention will enter into force for Monaco on the ninetieth day after the deposit of its instrument of ratification, that is to say, on 31 August 1982.

15e DECLARATION:

``1. Mongolia will apply the Convention, on the basis of reciprocity, to the recognition and enforcement of arbitral awards made only in the territory of another Contracting State.

2. Mongolia will apply the Convention only to differences arising out of legal relationships, whether contractual or not, which are considered as commercial under the national law of Mongolia."

15f Montenegro makes the declaration that the Convention will apply based on footnotes (a), (b), and (f). The Convention will apply only (a) in recognition and enforcement of awards made in the territory of another contracting State; (b) to the differences arising out of legal relationships, whether contractual or not, that are considered commercial under the national law; and (f) to those arbitral awards which were adopted after the entry into effect of the Convention of 3 June 2006.

15g The Government of His Majesty the King of Morocco will only apply the Convention to the recognition and enforcement of awards made only in the territory of another contracting State.

16 RESERVATION:

``The Republic of Mozambique reserves itself the right to enforce the provisions of the said Convention on the basis of reciprocity, where the arbitral awards have been pronounced in the territory of another Contracting State.''

16a The Secretary-General of the United Nations, acting in his capacity as depositary, communicates the following:

On 4 March 1998, the instrument of accession to the above Convention by the Government of Nepal was deposited with the Secretary-General.

The instrument of accession by the Government of Nepal was accompanied by the following declaration:

(Original: English)

``Pursuant to Article 1.3 of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, done at New York in 1958. His Majesty's Government of Nepal declares that the Kingdom of Nepal will apply the Convention, on the basis of reciprocity, to the recognition and enforcement of awards made only in the territory of another contracting state. His Majesty's Government further declares that the Kingdom of Nepal will apply the Convention only to the differences arising out of legal relationship, whether contractual or not, which are considered as commercial under the law of the Kingdom of Nepal.''

In accordance with its article XII (2), the Convention will enter into force for Nepal on the ninetieth day after the date of deposit of the instrument, i.e. on 2 June 1998.

17 [Instrument of ratification stipulates that the Convention is ratified for the Kingdom in Europe, Surinam and the Netherlands Antilles.] ``Referring to paragraph 3 of article I of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, the Government of the Kingdom declares that it will apply the Convention to the recognition and enforcement of awards made only in the territory of another Contracting State.''

Statement of Dec. 24, 1985:

``The island of Aruba, which is at present still part of the Netherlands Antilles, will obtain internal autonomy as a country within the Kingdom of the Netherlands as of 1 January 1986. Consequently the Kingdom will from then on no longer consist of two countries, namely the Netherlands (the Kingdom in Europe) and the Netherlands Antilles (situated in the Caribbean region) but will consist of three countries, namely the said two countries and the country Aruba.

As the change (sic) being made on 1 January 1986 concern a shift only in the internal constitutional relations within the Kingdom of the Netherlands, and as the Kingdom as such will remain subject under international law with which treaties are concluded, the said changes will have no consequences in international law regarding to treaties concluded by the Kingdom which already apply to the Netherlands Antilles, including Aruba. These treaties will remain in force for Aruba in its new capacity of country within the Kingdom. Therefore these treaties will as of 1 January 1986, as concerns the Kingdom of the Netherlands, apply to the Netherlands Antilles (without Aruba) <u>and</u> Aruba.

Consequently the treaties referred to in the annex, to which the Kingdom of the Netherlands is a Party and which apply to the Netherlands Antilles, will as of January 1986 as concerns the Kingdom of the Netherlands apply to the Netherlands Antilles and Aruba."

17a The instrument of accession contains the following declarations:

(Original: English)

``In accordance with paragraph 3 of article 1 of the Convention, the Government of New Zealand declares that it will apply the Convention, on the basis of reciprocity, to the recognition and enforcement of awards made only in the territory of another Contracting State."

``Accession to the Convention by the Government of New Zealand shall not extend for the time being, pursuant to article X of the Convention, to the Cook Islands and Niue."

In accordance with article XII(2), the Convention will enter into force for New Zealand on 6 April 1983, i.e., on the ninetieth day after the deposit of its instrument of accession.

18 ``In accordance with paragraph 3 of article I of the Convention, the Federal Military Government of the Federal Republic of Nigeria declares that it will apply the Convention on the basis of reciprocity to the recognition and enforcement of awards made only in the territory of a State party to this Convention and to differences arising out of legal relationships, whether contractual or not, which are considered as commercial under the Laws of the Federal Republic of Nigeria."

19 ``1. We will apply the Convention only to the recognition and enforcement of awards made in the territory of one of the Contracting States.

``2. We will not apply the Convention to differences where the subject matter of the proceedings is immovable property situated in Norway, or a right in or to such property."

19a On 14 July 2005, an instrument of accession was deposited by the Government of Pakistan.

Declaration:

``The Islamic Republic of Pakistan will apply the Convention to the recognition and enforcement of awards made only in the territory of [a] Contracting State."

20 ``… the Philippines, on the basis of reciprocity, will apply the Convention to the recognition and enforcement of awards made only in the territory of another Contracting State and only to differences arising out of legal relationships, whether contractual or not, which are considered as commercial under the national law of the State making such declaration."

21 ``With reservations as mentioned in Article I, par. 3."

21a DECLARATION:

Within the scope of the principle of reciprocity, Portugal will restrict the application of the Convention to arbitral awards pronounced in the territory of a State bound by the said Convention.

On 12 November 1999, the Government of Portugal informed the Secretary-General that the Convention will apply to Macau.

Subsequently, the Secretary-General received, on 9 December 1999, from the Government of

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Portugal, the following communication:

``*In accordance with the Joint Declaration of the Government of the Portuguese Republic and the Government of the People's Republic of China on the Question of Macau signed on 13 April 1987, the Portuguese Republic will continue to have international responsibility for Macau until 19 December 1999 and from that date onwards the People's Republic of China will resume the exercise of sovereignty over Macau with effect from 20 December 1999.*

From 20 December 1999 onwards the Portuguese Republic will cease to be responsible for the international rights and obligations arising from the application of the Convention to Macau."

21b The Romanian People's Republic will apply the Convention only to differences arising out of legal relationships, whether contractual or not, which are considered as commercial under its legislation.

The Romanian People's Republic will apply the Convention to the recognition and enforcement of awards made in the territory of another Contracting State. As regards awards made in the territory of certain non-contracting States, the Romanian People's Republic will apply the Convention only on the basis of reciprocity established by joint agreement between the parties.

22 [The Russian Federation] will apply the provisions of this Convention in respect to arbitral awards made in the territories of noncontracting States only to the extent to which they grant reciprocal treatment.

22a ``In accordance with article 1 of [the] Convention, the Government of Saint Vincent and the Grenadines declares that they will apply the Convention to the recognition and enforcement of awards made only in the territory of another Contracting State. They further declare that they will apply the Convention only to differences arising out of legal relationships, whether contractual or not, which are considered as commercial under the laws of Saint Vincent and the Grenadines."

22b On 19 April 1994, the instrument of accession by the Government of Saudi Arabia to the above-mentioned Convention was deposited with the Secretary-General.

The instrument of accession contains the following declaration:

(Translation) (Original: Arabic)

``On the basis of reciprocity, the Kingdom declares that it shall restrict the application of the Convention to the recognition and enforcement of arbitral awards made in the territory of a Contracting State."

In accordance with paragraph 2 of its article XII, the Convention will enter into force for Saudi Arabia on the ninetieth day after the date of deposit of the instrument, i.e. on 18 July 1994.

22c Formerly Serbia and Montenegro. Montenegro declared its independence on June 3, 2006. As of September 1, 2006, Montenegro had not notified the depositary with regard to its treaty status with respect to this Convention.

Confirmed upon succession:

RESERVATION:

``1. The Convention is applied in regard to the Federal Republic of Yugoslavia only to those arbitral awards which were adopted after the coming of the Convention into effect.

``2. The Federal Republic of Yugoslavia will apply the Convention on a reciprocal basis only to those arbitral awards which were adopted on the territory of the other State Party to the Convention.

``3. Federal Republic of Yugoslavia will apply the Convention [only] with respect to the disputes arising from the legal relations, contractual and non-contractual, which, according to its national legislation are considered as economic.''

In a latter declaration dated 28 June 1982, the Government of Yugoslavia had specified that:

``the first reservation only constituted an affirmation of the legal principle of retroactivity and that the third reservation being essentially in accordance with article I (3) of the Convention, the word ``only'' was therefore to be added to the original text and note taken that the word `economic' had been used therein as a synonym for `commercial'.''

22d The Secretary-General of the United Nations, acting in his capacity as depositary, communicates the following:

On 21 August 1986, the instrument of accession by the Government of Singapore to the above-mentioned Convention was deposited with the Secretary-General.

The instrument of accession contains the following declaration made in accordance with paragraph 3 of article I of the Convention:

(Original: English)

``The Republic of Singapore will on the basis of reciprocity apply the said Convention to the recognition and enforcement of only those awards which are made in the territory of another Contracting State.''

In accordance with article XII (2), the Convention will enter into force for Singapore on 19 November 1986, i.e. the ninetieth day after the deposit of its instrument.

22e ``[Slovakia] will apply the Convention to recognition and enforcement of awards made in the territory of another contracting State. With regard to awards made in the territory of non-contracting States it will apply the Convention only to the extent to which these States grant reciprocal treatment.''

23 On April 29, 1993, the Government of Switzerland notified the Secretary-General its decision to withdraw the declaration it had made upon ratification, on June 1, 1965, which reads as follows: Referring to the possibility offered by paragraph 3 of article I, Switzerland will apply the Convention to the recognition and enforcement of awards made only in the territory of another Contracting State.

24 [Tanzania] ``will apply the Convention, in accordance with the first sentence of articles I(3) thereof, only to the recognition and enforcement of awards made in the territory of another Contracting State.''

25 ``In accordance with Article I of the Convention, the Government of Trinidad and Tobago declares that it will apply the Convention to the recognition and enforcement of awards made only in the territory of another Contracting State. The Government of Trinidad and Tobago further declares that it will apply the Convention only to differences arising out of legal relationships, whether contracted or not, which are considered as commercial under the Law of Trinidad and Tobago.''

25a ``… with the reservations provided for in article I, paragraph 3, of the Convention, that is to say, the Tunisian State will apply the Convention to the recognition and enforcement of awards made only in the territory of another Contracting State and only to differences arising out of legal relationships, whether contractual or not, which are considered as commercial under Tunisian law."

26 On 2 July 1992, the instrument of accession by the Government of Turkey to the above-mentioned Convention was deposited with the Secretary-General.

The said instrument contains the following declaration:

(Original: Turkish and English)

``In accordance with the Article I paragraph 3 of the Convention, the Republic of Turkey declares that it will apply the Convention, on the basis of reciprocity, to the recognition and enforcement of awards made only in the territory of another contracting State. It further declares that it will apply the Convention only to differences arising out of legal relationships, whether contractual or not, which are considered as commercial under its national law".

In accordance with its article XII (2), the Convention entered into force for Turkey on the ninetieth day after the date of deposit of the instrument, i.e. on 30 September 1992.

26a On 12 February 1992, the instrument of accession by the Government of Uganda to the above-mentioned Convention was deposited with the Secretary-General.

Upon accession, the Government of Uganda made the following declaration with respect to article 1 of the Convention:

(Original: English)

``The Republic of Uganda will only apply the Convention to recognition and enforcement of awards made in the territory of another Contracting State."

In accordance with paragraph 2 of its article XII, the Convention will enter into force for Uganda on the ninetieth day after the date of deposit of the instrument, i.e. on 12 May 1992.

27 [Ukraine] will apply the provisions of this Convention, as regards arbitral awards made in the territory of States not parties to the Convention, only on the basis of reciprocity.

28 In a communication accompanying the instrument of accession, the Government of the United Kingdom declared that in accordance with article X of the Convention the latter shall extend to Gibraltar, for the international relations of which the Government of the United Kingdom is responsible. (Extended to Hong Kong, effective Apr. 21, 1977, and to the Isle of Man, effective May 23, 1979.)

Extended to Bermuda, effective Feb. 12, 1980, with the following declaration:

``… The Government of Bermuda will apply the Convention, in accordance with article I, paragraph 3 thereof, only to the recognition and enforcement of awards made in the territory of another Contracting State."

In a communication received on May 5, 1980, the Government of the United Kingdom of Great Britain and Northern Ireland notified the Secretary-General that its instrument of accession to the said Convention (letter C.N.261.1975-TREATIES-8 of Oct. 1, 1975) should have specified that the United Kingdom would apply the Convention only to the recognition and enforcement of awards made in the territory of another Contracting State and that this declaration should also have been made on behalf of Gibraltar, Hong Kong and the Isle of Man to which the Convention had been subsequently extended (letters C.N.27.1977.TREATIES-1 of Feb. 25, 1977 and C.N.39.1979.TREATIES-1 of Mar. 12, 1979).

Extended to Belize and the Cayman Islands, effective February 24, 1981, with the following declaration:

``… The Government of the Cayman Islands and the Government of Belize will apply the Convention, in accordance with article I, paragraph 3 thereof, only to the recognition and enforcement of awards made in the territory of another Contracting State.''

Extended to Guernsey, effective July 18, 1985, with the following declaration:

``[…] the Convention will be applied in respect of Guernsey, in accordance with Article I, paragraph 3 thereof, only to the recognition and enforcement of awards made in the territory of another Contracting State.''

29 ``The United States of America will apply the Convention, on the basis of reciprocity, to the recognition and enforcement of only those awards made in the territory of another Contracting State.''

``The United States of America will apply the Convention only to differences arising out of legal relationships, whether contractual or not, which are considered as commercial under the national law of the United States.''

The Convention applies to all of the territories for the international relations of which the United States of America is responsible.

29a DECLARATIONS:

(a) The Republic of Venezuela will apply the Convention only to the recognition and enforcement of foreign arbitral awards made in the territory of another Contracting State.

(b) The Republic of Venezuela will apply the present Convention only to differences arising out of legal relationships, whether contractual or not, which are considered as commercial under its national law.

29b DECLARATIONS:

1. [The Socialist Republic of Viet Nam] considers the Convention to be applicable to the recognition and enforcement of arbitral awards made only in the territory of another Contracting State. With respect to arbitral awards made in the territories of non-contracting States, it will apply the Convention on the basis of reciprocity.

2. The Convention will be applied only to differences arising out of legal relationships which are considered as commercial under the laws of Viet Nam.

3. Interpretation of the Convention before the Vietnamese Courts or competent authorities should be made in accordance with the Constitution and the law of Viet Nam.

Ed. Note—The U.S. view is that the Socialist Federal Republic of Yugoslavia has dissolved and no successor state represents its continuation.

Endnotes

1 *Notification pursuant to Article 42 of the Convention*

In conformity with Article 39, paragraph 2, the instrument of accession by the Argentine Republic to the above-mentioned Convention was deposited with the Ministry of Foreign Affairs of the Kingdom of the Netherlands on 8 May 1987.

The instrument of accession of the Argentine Republic contains the following reservation, referred to in Article 33, first paragraph, of the Convention:

``La República Argentina excluye totalmente la applicación de las disposiciones del párrafo 2° del artículo *4* °, así como las del capítulo II."

(Translation)

The Argentine Republic totally excludes the application of the provisions of paragraph 2 of Article *4*, as well as those of Chapter II.;

and the following declaration regarding Article 23 of the Convention:

``La República Argentina no cumplirá los exhortos que tengan por objeto un procedimiento conocido en los Estados del ``Common Law", por el nombre de ``pre-trial discovery of documents (exhibicion de documentos antes del juicio)."

(Translation)

The Argentine Republic will not execute Letters of Request issued for the purpose of obtaining pre-trial discovery of documents as known in the Common Law Countries.

Furthermore, the instrument contains the declaration annexed to this notification.

In accordance with paragraph 3 of Article 39, the Convention will enter into force for the Argentine Republic on 7 July 1987.

According to Article 39, paragraph 4 of the Convention, the accession will have effect only as regards the relations between the Argentine Republic and such Contracting States as will have declared their acceptance of the accession. Such declarations shall be deposited at the Ministry of Foreign Affairs of the Kingdom of the Netherlands.

The Hague 20, May 1987

``The Argentine Republic excludes the extension of the application of the Convention on the taking of evidence abroad in civil or commercial matters, adopted at The Hague on March 18, 1970, to the Malvinas, South Georgia, and South Sandwich Islands, which was notified by the

United Kingdom of Great Britain and Northern Ireland to the Ministry of Foreign Affairs of the Kingdom of the Netherlands on November 23, 1979, and reaffirms its rights of sovereignty over the Malvinas, South Georgia and South Sandwich Islands, which form an integral part of its national territory."

The General Assembly of the United Nations has adopted resolutions 2065 (XX), 3160 (XXVIII), 31/49, 37/9, 38/12, 39/6, 40/21 and 41/40 in which the existence of a dispute of sovereignty is recognized in reference to the Malvinas Islands, and it urges the Argentine Republic and the United Kingdom of Great Britain and Northern Ireland to maintain negotiations with the purpose of finding a peaceful and definitive solution to the dispute as soon as possible, with the good offices of the Secretary General of the United Nations, who will inform the General Assembly of the progress that has been accomplished.

In like manner, ``the Argentine Republic excludes the June 19, 1986 approval formulated by the United Kingdom of Great Britain and Northern Ireland for the Malvinas, South Georgia and South Sandwich Islands with respect to the accession of the Principality of Monaco to the aforementioned Convention." (Translation provided by the Division of Language Services, Department of State)

In accordance with Article 35 of the Convention the Government of the Argentine Republic designated the following competent authority:

Ministerio de Relaciones Exteriores y Culto

Reconquista 1088

Buenos Aires.

In accordance with Article 39 the Convention will enter into force between Argentina and

the *United States of America .... January 30, 1988*

Finland .... 6 April 1990

Sweden .... 20 November 1987

Israel .... 23 November 1987

Denmark .... 7 December 1987

France .... 11 January 1988

Norway .... 18 January 1988

United Kingdom of Great Britain and

Northern Ireland .... 11 April 1988

also for Anguilla, the Cayman

Islands, the Falklands,

Gibraltar, Guernsey, Hong Kong,*

the Isle of Man, South Georgia

and South Sandwich Islands and

the Sovereign Base Areas of

Akrotiri and Dhekelia in the

islands of Cyprus

Czechoslovakia .... 11 April 1988

Federal Republic of Germany .... 21 June 1988

Jersey .... 9 September 1988

Spain .... 28 August 1994

Switzerland .... 13 January 1995

Australia .... 21 July 1997

Estonia .... 21 September 1997

Latvia .... 21 September 1997

Poland .... 21 September 1997

Venezuela .... 21 September 1997

Singapore .... 6 February 1999

the *People's Republic of China .... 6 March 2000*

South Africa .... 6 March 2000

Portugal .... 8 June 2001

Bulgaria .... 21 September 2001

Lithuania .... 21 September 2001

Slovenia .... 21 September 2001

Sri Lanka .... 21 September 2001

Belarus .... 28 October 2002

Russian Federation .... 28 October 2002

Ukraine .... 28 October 2002

* See *infra,* under ``CHINA, Hong Kong Special Administrative Region''.

On 11 April 1988 the Argentine Republic made the following declaration:

``With respect to the acceptance by the United Kingdom of Great Britain and Northern Ireland of the adhesion of the Argentine Republic to the Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters, declared by Note dated February 12, 1988, the Argentine Government rejects the pretended acceptance of said Convention formulated for the Malvinas Islands, South Georgias Islands and South Sandwich Islands and reaffirms the sovereignty of the Argentine Republic over said islands, that are an integral part of the national territory."

The Government of the United Kingdom of Great Britain and Northern Ireland referring to the above declaration communicated the following on 6 July 1988:

``The Government of the United Kingdom of Great Britain and Northern Ireland have no doubt as to the United Kingdom's sovereignty over the Falkland Islands or South Georgia and the South Sandwich Islands and are fully entitled to include those territories within the scope of application of international agreements to which they are a party. The United Kingdom, therefore, cannot accept the Argentine declaration which purports to question the right of the United Kingdom to extend the Convention to the Falkland Islands or South Georgia and the South Sandwich Islands; nor can it accept that the Government of the Argentine Republic has any right in this regard."

1a *Notification pursuant to Article 42 of the Convention.*— In conformity with Article 39, paragraph 2, the instrument of accession by Australia to the above-mentioned Convention was deposited with the Ministry of Foreign Affairs of the Kingdom of the Netherlands on 23 October 1992.

The instrument of accession of Australia contains the following reservation and declarations:

Pursuant to Article 33, it excludes the operation of paragraph 2 of Article 4.

The Government of Australia hereby declares, for and on behalf of Australia, that:

—pursuant to Article 2, the Secretary to the Attorney-General's Department of the Commonwealth of Australia will be its Central Authority;

—pursuant to Article 8, members of the judicial personnel of the requesting authority of another Contracting State may be present at the execution of a Letter of Request, subject to prior authorisation by the judicial executing the Letter of Request;

—pursuant to Article 15, evidence may be taken by a diplomatic officer or consular agent only if permission to that effect is given upon application to the Secretary of the Attorney-General's Department of the Commonwealth of Australia;

—pursuant to Article 16, the Secretary to the Attorney-General's Department of the Commonwealth of Australia will be its competent authority for the purposes of that Article and is empowered to specify conditions with respect to any permission given under that Article; and

—pursuant to Article 23, it will not execute Letters of Request issued for the purpose of obtaining pre-trial discovery of documents as known in Common Law Countries.

—pursuant to Article 24, it designates the Registrars of the State and Territory Supreme Courts as additional authorities.

—pursuant to Article 40, the Convention extends to all the territories for the international relations of which it is responsible.

In accordance with paragraph 3 of Article 39, the Convention will enter into force for Australia on 22 December 1992.

According to Article 39, paragraph 4, of the Convention the accession will have effect only as regards the relations between Australia and such Contracting States as will have declared their acceptance of the accession. Such declarations shall be deposited at the Ministry of Foreign Affairs of the Kingdom of the Netherlands.

In accordance with Article 39 the Convention will enter into force between Australia and

the *United States of America* .... *22 August 1993*

France .... *27 March 1993*

Denmark .... *12 April 1993*

the *United Kingdom of Great Britain and* .... *20 April 1993*

Northern Ireland (also for the *Bailiwick*
of Guernsey, the *Bailiwick of Jersey,*
the *Isle of Man, Anguilla, Cayman Islands,*
*Falkland Islands, Gibraltar, Hong Kong** and
South Georgia and the *South Sandwich Islands)*

Cyprus .... *19 June 1993*

the *Federal Republic of Germany* .... *3 July 1993*

Luxembourg .... *9 February 1993* the *Kingdom of the Netherlands .... 14 February 1993*

(for the Kingdom in Europe)

Aruba .... 19 July 1993

Finland .... 23 July 1993

Sweden .... 1 March 1994

Norway .... 18 June 1994

Spain .... 28 August 1994

Italy .... 16 January 1996

Slovak Republic .... 20 May 1996

Czech Republic .... 31 May 1997

Argentina .... 21 July 1997

Singapore .... 25 July 1997

Mexico .... 26 July 1997

Barbados .... 21 October 1997

South Africa .... 17 January 1998

Bulgaria .... 7 May 2001

Portugal .... 8 June 2001

Lithuania .... 11 September 2001

Slovenia .... 11 September 2001

Sri Lanka .... 11 September 2001

Ukraine .... 11 March 2002

Russian Federation .... 11 March 2002

Belarus .... 21 July 2002

* See *infra,* under ``CHINA, Hong Kong Special Administrative Region''.

1b *Notification in conformity with Article 42, sub e, of the Convention.*—By a Letter of 2 September 1982, received at The Ministry of Foreign Affairs of the Kingdom of the Netherlands on 29 September 1982, Barbados informed the Depositary in accordance with Article 35 of the abovementioned Convention of the following: ``… . for the purpose of the said Convention, the Central Authority is the Registrar of the Supreme Court of Barbados.''

In accordance with Article 39 the Convention will enter into force between Barbados and

Spain .... 28 August 1994

Switzerland .... 13 January 1995

the *Kingdom of the Netherlands (for the Kingdom in Europe) .... 20 June 1981*

(for Aruba) .... 27 July 1986

the *United States of America .... 20 June 1981*

Luxembourg .... 4 August 1981

Israel .... 19 September 1981

the *United Kingdom of Great Britain and .... 21 September 1981*

Northern Ireland (also for the
Cayman Islands, the Falkland Islands and
Dependencies, Gibraltar, Hong Kong, the*
Isle of Man and the Sovereign Base Areas of
Akrotiri and Dhekelia in the Island of Cyprus)

Czechoslovakia .... 6 October 1981

Finland .... 9 October 1981

Sweden .... 29 November 1981

France .... 27 December 1981

Denmark .... 8 February 1982

the *Federal Republic of Germany .... 5 April 1982*

Italy .... 24 April 1983

Portugal .... 17 February 1984

Norway .... 15 December 1986

Spain .... 28 August 1994

Switzerland .... 13 January 1995

Australia .... 21 October 1997

Singapore .... 6 February 1999

*See *supra,* under ``CHINA, Hong Kong Special Administrative Region''.

1c

BELARUS (accession) 6 October 2001
7 August
2001

The Republic of Belarus made the following reservation and declarations:

``…

The Republic of Belarus excludes, in whole, the application of the provisions of the paragraph 2 of the Article 4 of the Convention."

and declarations:

``1. In accordance with the Article 8 of the Convention the Republic of Belarus declares that the members of the judicial personnel of another Contracting State may be present at the execution of a letter of Request in civil or commercial matters with prior authorisation by the competent authorities of the Republic of Belarus.

The Republic of Belarus designates the Supreme Court of the Republic of Belarus and the Supreme Economic Court of the Republic of Belarus in accordance with their competence as the authorities for the purposes of this Article of the Convention.

2. In accordance with Articles 16 and 17 of the Convention of the Republic of Belarus declares that a diplomatic officer or consular agent and a person duly appointed as a commissioner may take the evidence in the territory of the Republic of Belarus in civil and commercial matters without compulsion with prior permission by the competent authorities and on the conditions which competent authorities have specified.

The Republic of Belarus designates the Supreme Court of the Republic of Belarus and the Supreme Economic Court of the Republic of Belarus in accordance with their competence as the authorities for the purposes of this Article of the Convention.

3. In accordance with Article 18 of the Convention the Republic of Belarus declares that a diplomatic officer or consular agent and commissioner authorized to take evidence under Articles 15, 16 or 17 may apply to the competent authority of the Republic of Belarus for appropriate assistance to obtain the evidence in civil and commercial matters by compulsion.

The Republic of Belarus designates the Supreme Court of the Republic of Belarus and the Supreme Economic Court of the Republic of Belarus in accordance with their competence as the authorities for the purposes of this Article of the Convention."

In accordance with Article 39 the Convention will enter into force between Belarus and

Switzerland .... 12 March 2002

Germany .... 7 April 2002

United States of America .... 26 April 2002

United Kingdom of Great Britain and .... 21 May 2002

Northern Ireland (also for the Dependent

Territories of Anguilla, the Cayman Islands,
the Falkland Islands, Gibraltar, the Sovereign
Base Areas of Cyprus, the Isle of Man, and
the Bailiwicks of Guernsey and Jersey)

Sweden .... 15 July 2002

Australia .... 21 July 2002

Israel .... 28 July 2002

Norway .... 29 July 2002

Portugal .... 2 August 2002

Argentina .... 28 October 2002

Finland .... 4 February 2003

Spain .... 15 February 2003

Poland .... 18 February 2003

Denmark .... 12 April 2003.

1d ***Bosnia and Herzegovina***

Acceptances of accessions

Convention of 18 March 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters

Accession accepted by	**Date of acceptance**	**Entry into force**
Poland	22-VIII-2008	21-X-2008
Luxembourg	10-IX-2008	9-XI-2008
Israel	23-X-2008	22-XII-2008
Bulgaria	27-X-2008	26-XII-2008
Greece	12-XII-2008	10-II-2009
Monaco	5-I-2009	6-III-2009
Latvia	16-I-2009	17-III-2009
Sweden	21-I-2009	22-III-2009
Slovakia	22-I-2009	23-III-2009

China, People's Republic of	26-I-2009	27-III-2009
Norway	20-II-2009	21-IV-2009
Denmark	20-V-2009	19-VII-2009

Entry into force between Bosnia and Herzegovina and	**Entry into force**
Poland	21-X-2008
Luxembourg	9-XI-2008
Israel	22-XII-2008
Bulgaria	26-XII-2008
Greece	10-II-2009
Monaco	6-III-2009
Latvia	17-III-2009
Sweden	22-III-2009
Slovakia	23-III-2009
China, People's Republic of	27-III-2009
Norway	21-IV-2009
Denmark	19-VII-2009

China, People's Republic of—Entry into force

(including Hong Kong SAR & Macao SAR)

Bosnia and Herzegovina—Central Authority (Art. 2)

The Ministry of Justice of Bosnia and Herzegovina.

1e The Republic of Bulgaria made the following reservation and declarations:

``Reservation on Article 33

The Republic of Bulgaria excludes the application within its territory of the provisions of:

—Article 4, paragraph 2;

—Articles 16, 17, 18 and 19 of Chapter II of the Convention.

Declaration on Articles 2 and 8

The Republic of Bulgaria designates as Central Authority the Ministry of Justice and European Legal Integration, which is also the competent authority under Article 8.

Declaration on Article 8

Representatives of the judicial authority of the requesting State may be present at the execution of Letters of Request after prior consent of the competent Bulgarian authority.

Declaration on Article 11, paragraph 2

The judge who executes a Letter of Request is competent to recognise the privileges and duties to refuse to give evidence existing under the law of a third State provided that the Letter of Request contains information about the privileges and duties to refuse to give evidence under the law of that third State necessary to the application of Article 11, paragraph 2.

Declaration on Article 23

The Republic of Bulgaria declares that it will not execute Letters of Request issued for the purpose of obtaining pre-trial discovery of documents as known in common law countries."

In accordance with Article 39 the Convention will enter into force between Bulgaria and

Slovakia .... 29 September 2000

Germany .... 30 April 2001

United Kingdom of Great Britain and .... 6 May 2001

Northern Ireland

Australia .... 7 May 2001

Spain .... 13 August 2001

Argentina .... 21 September 2001

Lithuania .... 3 November 2001

Estonia .... 12 February 2002

Switzerland .... 12 March 2002

United States of America .... 26 April 2002

Sweden .... 15 July 2002

Israel .... 28 July 2002

Norway .... 29 July 2002

Finland .... 4 February 2003

Poland .... 18 February 2003

Denmark .... 25 April 2003.

1f The Permanent Bureau of the Hague Conference on private international law presents its compliments to the Diplomatic Missions of the Member States and to the National Organs and has the honour to inform them that, by instrument deposited on 8 December 1997 with the Ministry of Foreign Affairs of the Kingdom of the Netherlands,

the People's Republic of China

acceded to the above-mentioned Convention.

The instrument of accession contains the following declarations and reservation:

Translation

``1. in accordance with Article 2 of the Convention, the Ministry of Justice of the People's Republic of China has been designated as the Central Authority which will undertake to receive Letters of Request coming from a judicial authority of another Contracting State and to transmit them to the authority competent to execute them;

2. in accordance with Article 23 of the Convention concerning the Letters of Request issued for the purpose of obtaining pre-trial discovery of documents as known in Common Law countries, only the request for obtaining discovery of the documents clearly enumerated in the Letters of Request and of direct and close connection with the subject matter of the litigation will be executed;

3. in accordance with Article 33 of the Convention, the provisions of Chapter II of the Convention except for Article 15 will not be applicable"

The Central Authority designated by the People's Republic of China in accordance with Article 2 is as follows:

``*Bureau of International Judicial Assistance*

Ministry of Justice of the People's Republic of China
10, Chaoyangmen Nandajie, Chaoyang District
Beijing, 100020
China".

The accession will have no effect on the notification and the accompanied declarations contained in the Note of the Embassy of the People's Republic of China No He Wai Fa (97)-53 dated on 10 June, 1997 concerning the application of the Convention in the Hong Kong Special Administrative Region of the People's Republic of China (see circular letter A No 35 / ON No 39 dated 25 July 1997).

In accordance with Article 39, paragraph 3, the Convention will enter into force for the *People's Republic of China* on *6 February 1998*.

According to Article 39, paragraph 4, of the Convention the accession will have effect only as regards the relations between the People's Republic of China and such Contracting States as will have declared their acceptance of the accession. Such declaration shall be deposited with the Ministry of Foreign Affairs of the Kingdom of the Netherlands.

In accordance with its Article 39 the Convention will enter into force between China and

the *Kingdom of the Netherlands (for the .... 7 April 1998*

Kingdom in Europe and Aruba)

Luxembourg .... 11 April 1998

the *Czech Republic .... 28 April 1998*

Israel .... 12 May 1998

Poland .... 5 June 1998

Finland .... 23 June 1998

Germany .... *6 July 1998*

Italy .... *16 August 1998*

the *United States of America* .... *23 August 1998*

the *Slovak Republic* .... *4 September 1998*

France .... *7 March 1999*

Denmark .... *5 September 1999*

Spain .... *18 September 1999*

Australia .... *18 September 1999*

Norway .... *22 October 1999*

Argentina .... *6 March 2000*

Estonia ....*12 February 2002*

Switzerland .... *12 March 2002*

Sweden .... *15 July 2002*

CHINA, Hong Kong Special Administrative Region Only

By notification dated June 10, 1997, to the Ministry of Foreign Affairs of The Kingdom of The Netherlands, the People's Republic of China communicated the following information concerning Hong Kong:

THE EMBASSY OF THE PEOPLE'S REPUBLIC OF CHINA
IN THE KINGDOM OF THE NETHERLANDS

No. He Wai Fa (97)-53

(Translation)

The Hague, June 10, 1997

Your Excellency,

In accordance with the Joint Declaration of the Government of the People's Republic of China and the Government of the United Kingdom of Great Britain and Northern Ireland on the Question of Hong Kong signed on 19 December 1984 (hereinafter referred to as the ``Joint Declaration"), the People's Republic of China will resume the exercise of sovereignty over Hong Kong with effect from 1 July 1997. Hong Kong will, with effect from that date, become a Special

Administrative Region of the People's Republic of China and will enjoy a high degree of autonomy, except in foreign and defence affairs which are the responsibilities of the Central People's Government of the People's Republic of China.

It is provided both in Section XI of Annex I to the Joint Declaration, ``Elaboration by the Government of the People's Republic of China of its Basic Policies Regarding Hong Kong'', and Article 153 of the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China, which was adopted on 4 April 1990 by the National People's Congress of the People's Republic of China, that international agreements to which the People's Republic of China is not a party but which are implemented in Hong Kong may continue to be implemented in the Hong Kong Special Administrative Region.

In accordance with the above provisions, I am instructed by the Minister of Foreign Affairs of the People's Republic of China to make the following notification:

The Convention on Taking of Evidence Abroad in Civil or Commercial Matters done at the Hague on 18 March 1970 (hereinafter referred to as the ``Convention''), by which the Government of the Kingdom of the Netherlands is designated as the depository, which applies to Hong Kong at present, will continue to apply to the Hong Kong Special Administrative Region with effect from 1 July 1997. The Government of the People's Republic of China also makes the following declarations:

1. With reference to the provisions of Article 16 of the Convention, the diplomatic officer or consular agent of the other Contracting State will not be permitted to take the evidence of nationals of the People's Republic of China or of a third State in the Hong Kong Special Administrative Region.

2. It declares, in accordance with Article 23 of the Convention, the Hong Kong Special Administrative Region will not execute the ``Letters of Request issued for the purpose of obtaining pre-trial discovery of documents''. The ``Letters of Request issued for the purpose of obtaining pre-trial discovery of documents'' for the purposes of the foregoing Declaration include any Letter of Request which requires a person:

1) to state what documents relevant to the proceedings to which the Letter of Request relates are, or have been, in his possession, custody or power; or

2) to produce any documents other than particular documents specified in the Letter of Request as being documents appearing to the requested Court to be, or to be likely to be, in his possession, custody or power.

3. In accordance with Article 24 of the Convention, it designates the Registrar of the High Court of the Hong Kong Special Administrative Region as an Other Authority competent to receive Letters of Request for execution in the Hong Kong Special Administrative Region; in accordance with Article 17 of the Convention, it designates the Administrative Secretary of the Government of the Hong Kong Special Administrative Region as the competent authority for the Hong Kong Special Administrative Region.

4. In accordance with Article 4 and 33 of the Convention, the Hong Kong Special Administrative Region will not accept a Letter of Request in the French Language.

Within the above ambit, responsibility for the international rights and obligations of a party to the Convention will be assumed by the Government of the People's Republic of China.

It would be appreciated if the contents of this Note could be placed formally on record and brought to the attention of the other Parties to the Convention.

I avail myself of this opportunity to renew to Your Excellency the assurances of my highest consideration.

CHINA, Macau Special Administrative Region Only

The Ambassador of Portugal at The Hague informed the Minister for Foreign Affairs of the Kingdom of the Netherlands by letter of 16 December 1999 of the following:

``Upon instructions from my Government and referring to the Convention on the Taking of Evidence Abroad in Civil or Commercial Matters concluded at The Hague on 18 March 1970 (hereinafter referred to as the Convention) which currently applies to Macau, I have the honour to inform Your Excellency of the following:

In accordance with the Joint Declaration of the Government of the Portuguese Republic and of the Government of the People's Republic of China on the question of Macau, signed in Beijing on 13 April 1987, the Government of the Portuguese Republic will remain internationally responsible for Macau until 19 December 1999, the People's Republic of China resuming from that date the exercise of sovereignty over Macau, with effect from 20 December 1999. From 20 December 1999 the Portuguese Republic will cease to be responsible for the international rights and obligations arising from the application of the Convention in Macau.

(…)"

The Ambassador of the People's Republic of China at The Hague informed the Minister for Foreign Affairs by letter of 16 December 1999 of the following:

<u>Translation</u>

``In accordance with the Joint Declaration of the Government of the People's Republic of China and the Government of the Republic of Portugal on the Question of Macau signed on 13 April 1987, the Government of the People's Republic of China will resume the exercise of sovereignty over Macau with effect from 20 December 1999. Macau will from that date become a Special Administrative Region of the People's Republic of China and will enjoy a high degree of autonomy, except in foreign and defence affairs which are the responsibilities of the Central People's Government of the People's Republic of China.

In this connection, I am instructed by the Minister of Foreign Affairs of the People's Republic of China to inform Your Excellency of the following:

The Convention on the Taking of Evidence Abroad in Civil or Commercial Matters, concluded at The Hague on 18 March 1970 (hereinafter referred to as the Convention), to which the Government of the People's Republic of China deposited the instrument of accession on 8 December 1997, shall apply to the Macau Special Administrative Region with effect from 20 December 1999. The Government of the People's Republic of China also wishes to make the following declaration:

1. In accordance with Article 2 of the Convention, it designates the Procurate of the Macau Special Administrative Region as the Central Authorities in the Macau Special Administrative Region.

2. In accordance with Article 23 of the Convention, it declares that the Macau Special Administrative Region will not execute Letters of Request issued for the purpose of obtaining pre-trial discovery of documents known in common law countries.

3. In accordance with Article 33 of the Convention, it declares that the provisions of Chapter II of the Convention except for Article 15 will not be applicable in the Macau Special Administrative Region; paragraph 2 of Article 4 of the Convention will not be applicable in the Macau Special Administrative Region.

The Government of the People's Republic of China shall assume the responsibility for the international rights and obligations arising from the application of the Convention to the Macau Special Administrative Region.

(…)".

The Embassy of the People's Republic of China at The Hague informed the Minister for Foreign Affairs of the Netherlands by letter of 1 November 2000 of the following amendments with respect to the contents of the above Note of 16 December 1999:

Translation

``1. The reference in the above-mentioned Note that ``in accordance with Article 2 of the Convention, it designates the Procurate of the Macau Special Administrative Region as the Central Authority in the Macau Special Administrative Region" shall be amended as follows: ``In accordance with Article 24 of the Convention, it designates the Procuratorate of the Macau Special Administrative Region as the Other Authority in the Macau Special Administrative Region, which will undertake to receive Letters of Request coming from a judicial authority of another Contracting State and to transmit them to the authority competent to execute them.

The address of the Procuratorate of the Macau Special Administrative Region is:

Alameda Dr. Carlos d'Assumpcao

Macau SAR of the People's Republic of China 7th Floor, Dynasty Plaza Building
NAPE
Macau"

2. The Government of the People's Republic of China also wishes to make the following supplementary declaration:

``In accordance with paragraph 3 of Article 4 of the Convention, it declares that the Macau Special Administrative Region will only accept Letters of Request in either Chinese or Portuguese, or those accompanied by a translation in either Chinese or Portuguese".

(…)".

By Note dated 5 July 2002, the Embassy of the People's Republic of China at The Hague informed the Minister for Foreign Affairs of the Netherlands of the following amendments with respect to the application of the Convention in the Macau Special Administrative Region:

``(…)

With regard to the Procuratorate of the Macau Special Administrative Region referred to in (…) the Taking of Evidence Convention, the address of which has amended as **7th Floor, Dynasty Plaza Building, Alameda Dr. Carlos D'Assumpcao, NAPE, Macau."**

1g Notification in conformity with Article 42, sub e, of the Convention.—After having designated the Central Authority on 3 May 1984 (see Notification No. 2/1984) the Government of Cyprus informed the Ministry of Foreign Affairs of the Kingdom of the Netherlands of the following on 15

May 1984:

``The Republic of Cyprus makes the following declarations:

1. Under Article 2 the Ministry of Justice is designated as the Competent Authority.

2. Under Article 16 the Ministry of Justice is designated as the Competent Authority.

3. Under Article 17 the Ministry of Justice is designated as the Competent Authority.

4. In accordance with Article 18 the Republic of Cyprus declares that a diplomatic officer, consular agent or commissioner authorised to take evidence under Articles 15, 16 or 17 may apply to the Competent Authority for appropriate assistance to obtain such evidence by compulsion as prescribed by the law for internal proceedings, provided that the requesting Contracting State has made a declaration affording reciprocal facilities under Article 18.

Under Article 18 the Supreme Court is designated as the Competent Authority.

5. In accordance with Article 23, the Government of the Republic of Cyprus declares that the Republic of Cyprus will not execute Letters of Request issued for the purpose of obtaining pre-trial discovery of documents. The Government of the Republic of Cyprus further declares that the Republic of Cyprus understands `Letters of Request issued for the purpose of obtaining pre-trial discovery of documents' for the purposes of the foregoing declaration as including any Letter of Request which requires a person:

a. to state what documents relevant to the proceedings to which the Letter of Request relates are, or have been, in his possession, custody or power; or

b. to produce any documents other than particular documents specified in the Letter of Request as being documents appearing to the requested court to be, or likely to be, in his possession, custody or power.

The Republic of Cyprus makes the following reservations:

1. In accordance with Article 8 the Republic of Cyprus declares that members of the judicial personnel of the requesting authority may be present at the execution of a Letter of Request.

2. In accordance with the provisions of article 33 the Republic of Cyprus will not accept a Letter of Request in French.''

According to the depositary the declaration under 5 and the reservation under 2 should have been made at the time of accession. The States which have declared to accept Cyprus' accession to the Convention, namely: the Federal Republic of Germany, Finland, France, Israel, Italy, the Kingdom of the Netherlands, Luxembourg, Portugal, the United Kingdom of Great Britain and Northern Ireland, Sweden and Czechoslovakia, are requested to inform the Ministry of Foreign Affairs of the Kingdom of the Netherlands whether they accept the declaration and the reservation concerned.

In accordance with Article 39 the Convention entered into force between Cyprus and

the Kingdom of the Netherlands (for the .... 29 April 1983

Kingdom in Europe)

(for Aruba) .... 27 July 1986

Finland .... 13 May 1983

France .... 13 May 1983

Israel .... 21 May 1983

Sweden ....13 June 1983

the *Federal Republic of Germany .... 27 June 1983*

Czechoslovakia .... 6 August 1983

Luxembourg .... 9 August 1983

Italy .... 13 August 1983

the *United Kingdom of Great Britain and .... 18 October 1983*

Northern Ireland (also for the Cayman Islands, the Falkland Islands and Dependencies, Gibraltar, Hong Kong, the Isle of Man and the Sovereign Base Areas of Akrotiri and Dhekelia in the Island of Cyprus*

Portugal .... 17 February 1984

Denmark .... 11 February 1986

Norway .... 15 December 1986

the *United States of America .... 30 January 1988*

Argentina .... 18 January 1993

Mexico .... 18 January 1993

Monaco .... 18 January 1993

Australia .... 19 June 1993

Venezuela .... 29 April 1994

Spain .... 10 July 1994

Switzerland .... 13 January 1995

Latvia .... 16 March 1997

Poland .... 16 March 1997

Estonia .... 16 March 1997

Singapore .... 6 February 1999

*See *supra,* under ``CHINA, Hong Kong Special Administrative Region''.

1h By notification dated January 28, 1993 the Czech Republic communicated the following: ``In accordance with the valid principles of international law and to the extent defined by it, the Czech Republic, as a successor state created as a result of the division of the Czech and Slovak Federal Republic, considers itself bound, as of January 1, 1993, i.e. the date of the division of the Czechoslovak federation, by multilateral international treaties to which the Czech and Slovak Federal Republic was a party on that date, including reservations and declarations to their provisions made earlier by Czechoslovakia'', which are as follow:

(Translation)

``The Socialist Republic of Czechoslovakia declares, with reference to Article 16 of the Convention on the taking of evidence abroad in civil or commercial matters, concluded at The Hague on 18 March 1970, that evidence may be taken in accordance with Chapter II without its prior permission provided the principal of reciprocity is applied.

The Socialist Republic of Czechoslovakia also declares, in connection with Article 18 of the said Convention, that a diplomatic officer, consular agent or commissioner authorized to take evidence under Articles 15, 16 and 17, may request the competent Czechoslovak court or the Czechoslovak state notary to carry out procedural action and that such a diplomatic officer, consular agent or commissioner will transmit the dossier to that court or notary through the intermediary of the Minister of Justice of the Czech Socialist Republic in Prague or the Minister of Justice of the Slovak Socialist Republic in Bratislava, provided the principal of reciprocity is applied.

The Socialist Republic of Czechoslovakia wishes to state, in connection with Article 40 of the Convention according to all states the right to declare that the convention shall be applicable to all territories for the international relations of which it is responsible, that keeping certain countries in a state of dependence is in its opinion contrary to the spirit and objectives of the United Nations Declaration of 14 December 1960 on the granting of independence to colonial countries and peoples, which declares the necessity for a speedy and unconditional end to colonialism in all its forms.''.

By notification contained in Note dated May 28, 1978, the Minister of Justice of the Czech Socialist Republic and the Minister of Justice of the Slovak Socialist Republic have been designated as central authorities in accordance with Articles 2 and 24 of the Convention.

1i With the following reservations:

``1) Availing itself of the provisions laid down in Article 33, the Danish Government hereby declares, in accordance with Article 4, that Denmark will not accept Letters of Request which are sent in French.

2) Availing itself of the provisions laid down in Article 33, the Danish Government hereby declares, in accordance with Article 17, that Denmark will not accept the taking of evidence by commissioners.''

And with the following declarations in accordance with Article 35:

``Article 2

The Ministry of Justice is hereby designated as Central Authority.

Article 4

Letters of Request may be sent in Norwegian and Swedish, and Denmark accepts no obligation to return evidence taken in other languages than Danish.

Article 8

Members of the judicial personnel of the requesting authority of another contracting State may be present at the execution of a Letter of Request if they have obtained prior authorization from the competent Danish authority.

Article 15

A diplomatic officer or consular agent may take evidence if he has been authorized to do so by the Ministry of Justice.

Article 16

The Ministry of Justice will issue authorizations to take evidence.

Article 23

Letters of Requests issued for the purpose of obtaining pre-trial discovery of documents may not be executed in Denmark.

Article 27 a

As has been the case hitherto, Letters of Request may be transmitted directly to the competent Danish court by the consular agents of foreign States.''

Additional declaration of July 23, 1980:

``The declaration made by the Kingdom of Denmark in accordance with article 23 concerning `Letters of Request issued for the purpose of obtaining pre-trial discovery of documents' shall apply to any Letter of Request which requires a person:

a) to state what documents relevant to the proceedings to which the Letter of Request relates are, or have been, in his possession, other than particular documents specified in the Letter of Request;

or

b) to produce any documents other than particular documents which are specified in the Letter of Request, and which are likely to be in his possession.''

1j The Permanent Bureau of the Hague Conference on private international law presents its compliments to the Diplomatic Missions of the Member States and to the National Organs and has the honour to inform them that, by instrument deposited on

2 February 1996 with the Ministry of Foreign Affairs of the Kingdom of the Netherlands.

the Republic of Estonia

acceded to the above-mentioned Convention.

The instrument of accession contains the following declarations:

``1) on the basis of Article 8 the judges of the pursuing state have the right to participate in the process operation subject to the preceding consent of the Ministry of Justice of the Republic of Estonia;

2) on the basis of Article 11, a person may refuse to participate in the taking of evidence or process operation, in case he has the right or commitment to it in accordance with the laws of his home-state;

3) on the basis of Article 23 the Republic of Estonia fulfills a requisition where the producing of the documents or its copy is requested if it corresponds to the following requirements:

a) process has been launched;

b) documents have been reasonably identified according to the dates, the contents or other information;

c) circumstances have been indicated giving ground to presume that the documents are in the property, possession of the person or known to him."

According to Articles 16 and 17 of the Convention the competent authority designated to give its permission is the *Ministry of Justice of the Republic of Estonia.*

In accordance with Article 39 the Convention entered into force between Estonia and

Luxembourg	18 June 1996
Denmark	22 June 1996
Slovak Republic	25 June 1996
Israel	30 June 1996
Germany	2 July 1996
Italy	6 July 1996
Finland	5 August 1996
Netherlands (for the Kingdom in Europe and Aruba)	16 August 1996
Poland	14 September 1996
United Kingdom .... (Dependent Territories Anguilla, Cayman Islands, Channel Islands, Sovereign Base Areas of Cyprus, Falkland Islands, Gibraltar, Hong Kong*, Isle of Man)	21 February 1997
Cyprus	16 March 1997
Sweden	13 April 1997
Singapore	4 May 1997
Spain	25 May 1997
United States	11 November 1997
Argentina	21 September 1997
the Czech Republic	13 January 1998
Switzerland	11 July 1998
Portugal	8 June 2001
Bulgaria	12 February 2002
People's Republic of China	12 February 2002
Poland	12 February 2002
Slovenia	12 February 2002
Sri Lanka	12 February 2002
Lithuania	12 February 2002
South Africa	12 February 2002
Ukraine	12 February 2002
Russian Federation	12 February 2002

*See *supra,* under ``CHINA, Hong Kong Special Administrative Region''.

1k With the following reservation and declaration:

Reservation:

``In conformity with Article 33, Finland enters a reservation to paragraph 2 of Article 4 to the effect that Letters of Request in the English or French languages will not be accepted.''

Declaration:

``1. In Finland the Ministry of Justice (as of 6/1/82) shall be the Central Authority referred to in Article 2.

2. Swedish is the second official language of Finland. Finland will therefore in accordance with paragraph 1 of Article 4 accept Letters of Request in the Swedish language. The answer shall be given in the Swedish language if in connection with the Letter of Request this has been specifically requested.

3. A member of the judicial personnel of the requesting authority may in accordance with Article 8 be present at the execution of a Letter of Request, provided that the Finnish Ministry of Justice has given its consent.

4. The evidence referred to in Articles 16 and 17 of the Convention may be taken without the prior permission of the Finnish authorities.

5. Finland is not going to execute Letters of Request referred to in Article 23 issued for the purpose of obtaining pre-trial discovery of documents as known in Common Law countries.''

Notification in conformity with Article 42, paragraph e, of the Convention

By note dated 11 December 1980 and received at the Ministry of Foreign Affairs of the Kingdom of the Netherlands on 12 December 1980 the Government of Finland informed the Ministry of the withdrawal in part of the reservation to Article 4, paragraph 2, of the above-mentioned Convention made at the time of ratification and declared that it hereafter accepts the Letters of Request done in or translated into the English language. In accordance with Article 35, sub c, the Government of Finland made the following declaration:

``By accepting Letters of Request in English, the Republic of Finland does not undertake to execute the request, or transmit the evidence thus obtained in the English language; nor to have translated the documents which establish the execution of the Letter of Request.''.

Furthermore the Government of Finland modified the declaration concerning Article 23 of the above-mentioned Convention made at the time of ratification. The modified declaration is worded as follows:

``The declaration made by the Republic of Finland in accordance with Article 23 concerning ``Letters of Request issued for the purpose of obtaining pre-trial discovery of documents'' shall apply only to Letters of Request which require a person:

a) to state what documents relevant to the proceedings to which the Letter of Request relates are, or have been, in his possession, custody or power;

b) to produce any documents other than particular documents specified in the Letter of Request, which are likely to be in his possession, custody or power."

1I With the following declarations:

With respect to the first paragraph of Article 40 of the Convention, France declares that the Convention shall apply to all the Territory of the French Republic.

In conformity with the provisions of Article 33, the French Government declares:

That, in application of the second paragraph of Article 4, it will execute only Letters in French or accompanied by a translation in French.

That, in application of Article 23, it will not execute Letters of Request issued for the purpose of obtaining pre-trial discovery of documents as known in Common Law countries;

In conformity with the provisions of Article 2, the Ministry of Justice, Civil Division of International Judicial Assistance, 13 Place Vendôme, Paris (1er), is designated as the Central Authority to the exclusion of any other authority.

In conformity with the provisions of Article 16, the Ministry of Justice, Civil Division of International Judicial Assistance, 13 Place Vendôme, Paris (1er), is designated as the competent authority to give permission to diplomatic officers or consular agents of a Contracting State to take the evidence, without compulsion, of persons other than nationals of that State in aid of proceedings commenced in the courts of a State which they represent.

That permission, which shall be given for each specific case and shall be accompanied by special conditions when appropriate, shall be granted under the following general conditions:

1. Evidence shall be taken only within the confines of the Embassies or Consulates;

2. The date and time of taking the evidence shall be notified in due time to the Civil Division of International Judicial Assistance so that it may have the opportunity to be represented at the proceedings;

3. Evidence shall be taken in premises accessible to the public:

4. Persons requested to give evidence shall be served with an official instrument in French or accompanied by a translation into French, and that instrument shall mention:

a. That evidence is being taken in conformity with the provisions of The Hague Convention of March 18, 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters and relates to legal proceedings pending before a jurisdiction specifically designated by a Contracting State;

b. That appearance is voluntary and failure to appear will not give rise to criminal proceedings in the State of origin;

c. That the parties to the trial are consenting or, if not, the grounds of their objections;

d. That in the taking of evidence the person concerned may be legally represented;

e. That a person requested to give evidence may invoke a privilege or duty to refuse to give evidence.

A copy of these requests shall be transmitted to the Ministry of Justice.

5. The Civil Division of International Judicial Assistance shall be kept informed of any difficulty.

In conformity with the provisions of Article 17, the Ministry of Justice, Civil Division of International Judicial Assistance, 13 Place Vendôme, Paris (1er), is appointed as the competent authority to give permission to persons duly appointed as commissioners to proceed, without compulsion, to take any evidence in aid of proceedings commenced in the courts of a Contracting State.

This permission, which shall be given for each specific case and shall be accompanied by special conditions when appropriate, shall be granted under the following general conditions:

1. Evidence shall be taken only within the Embassy confines;

2. The date and time of taking the evidence shall be notified in due time to the Civil Division of International Judicial Assistance so that it may have the opportunity to be represented at the proceedings;

3. Evidence shall be taken in premises accessible to the public;

4. Persons requested to give evidence shall be served with an official instrument in French or accompanied by a translation in French, and that instrument shall mention:

a. That evidence is being taken in conformity with the provisions of The Hague Convention of March 18, 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters and relates to legal proceedings pending before a jurisdiction specifically designated by a Contracting State;

b. That appearance is voluntary and failure to appear will not give rise to criminal proceedings in the State of origin;

c. That the parties to the trial are consenting and, if not, the grounds of their objections;

d. That in the taking of evidence the person concerned may be legally represented;

e. That a person requested to give evidence may invoke the privilege and duty to refuse to give evidence.

A copy of these requests shall be transmitted to the Ministry of Justice.

5. The Civil Division of International Judicial Assistance shall be kept informed of any difficulty.

The request for permission transmitted by the requesting authority to the Ministry of Justice shall specify:

1. The motives that led to choosing this method of taking evidence of preference to that of a Letter of Request, considering the judiciary costs incurred;

2. The criteria for appointing commissioners when the person appointed does not reside in France.

The French Government declares that, in application of the provisions of Article 8, members of the judicial personnel of the requesting authority of a Contracting State may be present at the execution of a Letter of Request.

The Permanent Bureau of the Hague Conference on private international law presents its compliments to the Diplomatic Missions of the Member States and to the National Organs and has the honour to inform them that, by a letter received at the Ministry of Foreign Affairs of the Kingdom of the Netherlands on 19 January 1987, in accordance with Article 34 of the Convention, *France* has modified its declaration regarding Article 23 as follows:

The declaration made by the French Republic in accordance with Article 23 relating to Letters of Request issued for the purpose of obtaining pre-trial discovery of documents does not apply when the requested documents are enumerated limitatively in the Letter of Request and have a direct and precise link with the object of the procedure. (Translation)

The Permanent Bureau avails itself of this opportunity to renew to the Diplomatic Missions of the Member States and to the National Organs an assurance of its highest consideration and esteem.

2 ``A. The Government of the Federal Republic of Germany makes the following declarations in accordance with paragraph 1 of Article 33 of the Convention of 18th March 1970:

The Federal Republic of Germany makes the reservation provided for in the first sentence of paragraph 1 of Article 33 of the Convention excluding the application of the provisions of paragraph 2 of Article 4 of the Convention. Letters of Request to be executed under Chapter 1 of the Convention must, in accordance with paragraphs 1 and 5 of Article 4 of the Convention, be in the German language or be accompanied by a translation into that language.

The Federal Republic of Germany declares in accordance with the option provided for in the first sentence of paragraph 1 of Article 33 of the Convention to make a reservation excluding the application of the provisions of Chapter II of the Convention that the taking of evidence by diplomatic officers or consular agents is not permissible in its territory if German nationals are involved.

B. The Government of the Federal Republic of Germany makes the following declarations pursuant to Article 35 of the Convention of 18th of March 1970:

(1) The authority competent to execute a Letter of Request shall be the local court (Amtsgericht) in whose district the official act is to be performed.

Letters of Request shall be addressed to the Central Authority of the Land in which the respective request is to be executed. The Central Authority* pursuant to Article 2 and paragraph 2 of Article 24 of the Convention shall be for:

**List revised, April 2001*

Baden-Württemberg	Präsident des Amtsgerichts Freiburg Holzmarkt 2 79098 FREIBURG tel.: +49 (761) 205-0 fax: +49 (761) 205-1800
Bavaria	Präsidentin des Oberlandesgerichts München Prielmayerstrasse 5 80097 München tel.: +49 (89) 5597-1 fax: +49 (89) 5597-3575
Berlin	Senatsverwaltung für Justiz von Berlin Salzburger Strasse 21–25 10825 Berlin tel.: +49 (30) 9013-0 fax: +49 (30) 9013-2000
Brandenburg	Ministerium der Justiz und für Bundes-und Europaangelegenheiten des Landes Brandenburg Heinrich-Mann-Allee 107

	14460 Potsdam tel.: +49 (331) 866-0 fax: +49 (331) 866-3080 / 3081
Bremen	Der Präsident des Landsgerichts Domsheide 16 28195 Bremen tel.: +49 (421) 361-4253 fax: +49 (421) 361-6713
Hamburg	Präsident des Amtsgerichts Hamburg Sievekingplatz 1 20335 Hamburg tel.: +49 (40) 42843-0 fax: +49 (40) 42843-4318 / 4319
Hessen	Hessisches Ministerium der Justiz und für Europaangelegenheiten Luisenstrasse 13 65185 Wiesbaden tel.: +49 (611) 32-0 fax: +49 (611) 32-2763
Lower Saxony	Niedersächisches Ministerium der Justiz und für Europaangelegenheiten Am Waterlooplatz 1 30169 Hannover tel.: +49 (511) 120-0 fax: +49 (511) 120-5170 / 5181
Mecklenburg-Western Pomerania	Justizministerium des Landes Mecklenburg-Vorpommern Demmlerplatz 14 19053 Schwerin tel.: +49 (385) 588-0 fax: +49 (385) 588-3453
Northrhine-Westphalia	Präsident des Oberlandesgerichts Düsseldorf Cecilienallee 3 40474 Düsseldorf tel.: +49 (211) 4971-0 fax: +49 (211) 4971-548
Rhineland-Palatinate	Ministerium der Justiz des Landes Rheinland-Pfalz Ernst-Ludwig-Strasse 3 55116 Mainz tel.: +49 (6131) 16-0 fax: +49 (6131) 16-4887
Saarland	Ministerium der Justiz des Saarlandes Zähringerstrasse 12 66119 Saarbrücken tel.: +49 (681) 501-00 fax: +49 (681) 501-5855
Saxony	Präsident des Oberlandesgerichts Dresden (as per 1 January 2000) Postfach 12 07 32 01008 Dresden
Saxony-Anhalt	Ministerium für Justiz des Landes Sachsen-Anhalt Wilhelm-Höpfner-Ring 6 39116 Magdeburg tel.: +49 (391) 567-01 fax: +49 (391) 567-4226
Schleswig-Holstein	Ministerium für Justiz, Bundes-und Europaangelegenheiten des Landes Schleswig-Holstein Lorentzendamm 35 24103 Kiel tel.: +49 (431) 988-0 fax: +49 (431) 988-3870
Thuringia	Thüringer Ministerium für Justiz und Europaangelegenheiten Alfred-Hess-Strasse 8 99094 Erfurt tel.: +49 (361) 37-95200 fax: +49 (361) 37-95155

(2) Pursuant to Article 8 of the Convention, the Government of the Federal Republic of Germany declares that members of the requesting court of another Contracting State may be present at the execution of a Letter of Request by the local court if prior authorization has been given by the Central Authority of the Land where the request is to be executed.

(3) The taking of evidence by diplomatic officers or consular agents pursuant to paragraph 1 of Article 16 of the Convention which involves nationals of a third State or stateless persons shall be subject to permission from the Central Authority of the Land where the evidence is to be taken. Pursuant to paragraph 2 of Article 16 of the Convention, permission shall not be required if the national of the third State is also a national of the State of the requesting court.

(4) A commissioner of the requesting court may not take evidence pursuant to Article 17 of the Convention unless the Central Authority of the Land where the evidence is to be taken has given its permission. Such permission may be made subject to conditions. The local court in whose district official acts would have to be performed by virtue of a Letter of Request in the same matter shall be entitled to control the preparation and the actual taking of the evidence. Under the second sentence of Article 19 of the Convention, a member of the court may be present at the taking of the evidence.

(5) The Federal Republic of Germany declares in pursuance of Article 23 of the Convention that it will not, in its territory, execute Letters of Request issued for the purpose of obtaining pre-trial discovery of documents as known in Common Law countries."

2a **Greece—Central Authority**

Address—the Ministry of Justice

Department of International Judicial Cooperation in Civil Cases

Mesogeion 96

TK 11527, ATHENS

tel.: +30.210.776-7312 / 776-7322 / 776-7321

fax: +30.210.776-7499

Head of Department: Mrs. A. Eleftheriadou

Languages of communication: English and Greek

(The effective date of the above information is *19 July 2005*)

Reservations Declarations

Articles: 4,8,15,16,17,23,35

1. (…)

2. Without prejudice to article 33 Greece declares that, in terms of the provision of article 4, para. 2 of the Convention, letters of request must be submitted in Greek or accompanied by a translation into Greek.

3. In terms of articles 8 and 35, para. 2c of the Convention, judicial personnel of the requesting authority of another Contracting State may be present at the execution of a request for judicial assistance, provided such attendance has been authorized in advance by the Central Authority of Greece.

4. In terms of article 18, Greece declares that it shall provide the necessary assistance for the execution of evidentiary proceedings as referred to in articles 15, 16, and 17 provided such execution shall be carried out in accordance with the Greek law.

5. Greece declares that, in terms of the provision of article 23 of the Convention, it shall not execute judicial assistance requests for pretrial discovery of documents.

2b **Hungary—Central Authority (Art. 2)**

Address—the Ministry of Justice

Reservations Declarations

Articles: 2,4,8,15,16,17,18,23

(Declarations)

``To Article 2

In the Republic of Hungary the Ministry of Justice is designated as the Central Authority in accordance with Article 2 of the Convention.

To Article 8

Members of the judicial personnel of the requesting authority may be present at the execution of a Letter of Request executed by the requested court, subject to prior permission by the Hungarian Central Authority.

To Article 15

In accordance with Article 15 of the Convention the diplomatic officer or consular agent of a Contracting State may in the territory of the Republic of Hungary take the evidence in aid of proceedings commenced in the courts of a state which he represents without prior permission of the Hungarian authorities provided that the person affected is exclusively national of the sending state of the diplomatic officer or consular agent. Taking of evidence shall not involve applying or holding out of the prospect of compulsion or disadvantageous legal consequences.

To Article 17

In the Republic of Hungary the Central Authority is entitled to give the permission set out in Paragraph 2 of Article 17 of the Convention.

To Article 23

The Hungarian authorities will not execute Letters of Request issued for the purpose of obtaining pre-trial discovery of documents."

(Reservations)

``To Paragraph 2 of Article 4

The Republic of Hungary excludes the application of Paragraph 2 of Article 4 of the Convention.

To Article 16

The Republic of Hungary excludes the application of Article 16 of the Convention.

To Article 18

The Hungarian authorities do not give assistance to the taking of evidence of the diplomatic officer or consular agent in accordance with Article 15 of the Convention or the commissioner in accordance with Article 17 of the Convention by applying measures of compulsion."

Convention of 18 March 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters

Accession accepted by	**Date of acceptance**	**Entry into force**
Israel	10-IX-2004	9-XI-2004
Netherlands	6-X-2004	5-XII-2004

Entry into force between Hungary and	**Entry into force**
Israel	9-XI-2004
Netherlands	5-XII-2004

2c Iceland

Acceptances of accessions

Convention of 18 March 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters

Accession accepted by	**Date of acceptance**	**Entry into force**
Bulgaria	29-I-2009	30-III-2009
Luxembourg	11-II-2009	12-IV-2009
Latvia	18-II-2009	19-IV-2009
Israel	24-II-2009	25-IV-2009
Sweden	10-III-2009	9-V-2009
Slovakia	22-IV-2009	21-VI-2009
Monaco	6-V-2009	5-VII-2009
Denmark	20-V-2009	19-VII-2009
Finland	9-VI-2009	8-VIII-2009

Entry into force between Iceland and	**Entry into force**
Bulgaria	30-III-2009
Luxembourg	12-IV-2009
Latvia	19-IV-2009
Israel	25-IV-2009
Sweden	9-V-2009
Slovakia	21-VI-2009
Monaco	5-VII-2009
Denmark	19-VII-2009

Finland	8-VIII-2009

Iceland—Central Authority (Art. 2)

In accordance with Article 2, paragraph 1, of the Convention, Iceland designates the Ministry of Justice and Ecclesiastical Affairs as the Central Authority which will undertake to receive Letters of Request coming from a judicial authority of another Contracting State and to transmit them to the authority competent to execute them.

Declarations Reservations

Articles: 4,8,15,23

In accordance with Article 33, paragraph 1, of the Convention, Iceland excludes the application of paragraph 2 of Article 4 of the Convention to the effect that Letters of Request in the French language or translations into that language will not be accepted.

Iceland declares, in accordance with Article 8 of the Convention, that members of the judicial personnel of the requesting authority of another Contracting State may be present at the execution of a Letter of Request if prior permission has been granted by the Ministry of Justice and Ecclesiastical Affairs.

In accordance with Article 15, paragraph 2, of the Convention, Iceland declares that evidence may be taken by a diplomatic officer or consular agent only if permission to that effect has been given by the Ministry of Justice and Ecclesiastical Affairs upon application made by him or on his behalf.

In accordance with Article 23, Iceland declares that it will not execute Letters of Request issued for the purpose of obtaining pre-trial discovery of documents as known in Common Law countries.

2d ***India***

Acceptances of accessions

Convention of 18 March 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters

Accession accepted by	**Date of acceptance**	**Entry into force**
Argentina	23-V-2007	22-VII-2007
Finland	24-V-2007	23-VII-2007

Latvia	3-VII-2007	1-IX-2007
United States of America	18-VII-2007	16-IX-2007
Germany	21-VIII-2007	20-X-2007
Czech Republic	11-X-2007	10-XII-2007
Spain	31-I-2008	31-III-2008
Slovakia	19-VI-2008	18-VIII-2008
Australia	12-VIII-2008	11-X-2008
Poland	8-IX-2008	7-XI-2008
Netherlands	30-IX-2008	29-XI-2008
Bulgaria	27-X-2008	26-XII-2008
Monaco	5-I-2009	6-III-2009
Sweden	21-I-2009	22-III-2009
Norway	20-II-2009	21-IV-2009
Denmark	20-V-2009	19-VII-2009

Entry into force between India and	**Entry into force**
Argentina	22-VII-2007
Finland	23-VII-2007
Latvia	1-IX-2007
United States of America	16-IX-2007
Germany	20-X-2007
Czech Republic	10-XII-2007
Spain	31-III-2008
Slovakia	18-VIII-2008
Australia	11-X-2008
Poland	7-XI-2008
Netherlands	29-XI-2008
Bulgaria	26-XII-2008
Monaco	6-III-2009
Sweden	22-III-2009
Norway	21-IV-2009
Denmark	19-VII-2009

India—Central Authority (Art. 2, 16, 17)

The Ministry of Law and Justice
and the High Courts in all States and Union Territories within India

India—competent authority (Art. 18)

The District Court within whose territory the evidence is to be taken.

India—competent authority (Art. 8)
the Central Authority and the concerned court

Declarations

Articles: 4,8,16,17,18,23

All requests under the Convention shall be in the English language, or accompanied with an English translation.

Subject to prior authorization of the Central Authority and the concerned court, members of the judicial personnel of the requesting Contracting Party may be present at the execution of a letter of request.

Evidence by diplomatic officers or consular agents of Indian nationals or nationals of a third State under Article 16 of the Convention can be taken with the prior permission of the Central Authority.

In accordance with Article 18, a diplomatic or consular officer or a commissioner authorized under Article 15, 16 and 17 may apply for appropriate assistance to obtain the evidence by compulsion to the District Court within whose territory the evidence is to be taken.

The Republic of India will not execute Letters of Request issued in pursuance of Article 23 of the Convention for the purpose of obtaining pre-trial discovery of documents, which requires a person to produce any documents other than particular documents specified in the Letter of Request, which are likely to be in his possession, custody or power.

2e *Notification in conformity with Article 42, paragraph e, of the Convention*

In accordance with Article 35 of the Convention Israel notified by a Note dated April 17, 1980 and received at the Ministry of Foreign Affairs of the Kingdom of the Netherlands on April 25, 1980, that the Central Authority designated by the State of Israel in accordance with Article 2 of the above-mentioned Convention, is the Director of Courts, 19 Jaffa Road, Jerusalem.

The Director of the Courts is also the authority designated pursuant to Articles 16 and 17 to give the permission specified in those Articles.

In accordance with Article 8, Israel declares that the members of the judicial personnel of the requesting authority may be present at the execution of a Letter of Request without prior authorization.

2f *Notification in conformity with Article 42, sub a and e, of the Convention*

The Italian Republic deposited its instrument of ratification of the above-mentioned Convention with the Ministry of Foreign Affairs of the Kingdom of the Netherlands on 22 June 1982, in accordance with Article 37, paragraph 2, of the Convention.

In accordance with Article 38, paragraph 2, the Convention will enter into force for Italy on 21 August 1982.

At the time of the deposit of the instrument of ratification the Italian Government notified the Ministry of Foreign Affairs of the following:

Translation

(1) The Italian Government declares, in accordance with Article 8, that members of the judicial personnel of the requesting authority of another Contracting State may be present at the execution of a Letter of Request, subject to prior authorization by the competent authority designated by the Italian State under (4) paragraph 2 below.

(2) The Italian Government declares, in accordance with Article 18, that a diplomatic officer, consular agent or commissioner who is taking evidence under Article 15, 16 or 17, may apply to Authority designated by the Italian State under (4) paragraph 2 below, for appropriate assistance to obtain the evidence by compulsion.

(3) The Italian Government declares, in accordance with Article 23, that it will not execute Letters of Request issued for the purpose of obtaining pre-trial discovery of documents as known in Common Law countries.

(4) In accordance with Article 35 the Italian Government designates the Ministry of Foreign Affairs pursuant to Article 2 as the Central Authority which will undertake to receive Letters of Request coming from a judicial authority of another Contracting State and to transmit them to the authority competent to execute them.

In accordance with the abovementioned Article the Italian Government designates the Court of Appeal within whose jurisdiction proceedings are to take place as the authority competent to:

—authorize foreign judicial personnel to be present at the execution of a Letter of Request, pursuant to Article 8;

—authorize foreign diplomatic officers, consular agents or commissioners to take evidence under Article 16 or 17;

—grant the judicial assistance provided for in Article 18.

2g The ``Department of International Relations at the Ministry of Justice of the State of Kuwait'' has been designated as Central Authority.

Entry into force between Kuwait and

the Czech Republic	25 October 2002
Norway	29 November 2002
Poland	18 February 2003
Denmark	12 April 2003

2h In accordance with Article 2 the following Central Authority has been designated by Latvia:

Ministry of Justice

Brivibas Boulevard 34

LV-1536, Riga

Tel: 282607

Fax: 285575

In accordance with Article 39, paragraph 5, the Convention will enter into force between Latvia and

Luxembourg	15 July 1995
Finland	21 August 1995
United Kingdom of Great Britain and Northern Ireland	12 September 1995
Germany	11 November 1995
Italy	16 January 1996
Australia	20 January 1996
Norway	27 January 1996
Israel	27 February 1996
Slovak Republic	20 May 1996
Denmark	22 June 1996
Netherlands (for the Kingdom in Europe and Aruba)	16 August 1996
United States	11 November 1996
Singapore	4 May 1997
Spain	25 May 1997
Argentina	21 September 1997
South Africa	19 October 1997
the Czech Republic	13 January 1998
Switzerland	11 July 1998
France	7 March 1999
Portugal	8 June 2001

2i ***Liechtenstein***

Acceptances of accessions

Convention of 18 March 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters

Accession accepted by	**Date of acceptance**	**Entry into force**
Monaco	5-I-2009	6-III-2009
Bulgaria	29-I-2009	30-III-2009
Luxembourg	11-II-2009	12-IV-2009
Latvia	18-II-2009	19-IV-2009
Israel	20-II-2009	21-IV-2009
United States of America	26-II-2009	27-IV-2009
Sweden	10-III-2009	9-V-2009
Denmark	20-V-2009	19-VII-2009
Finland	9-VI-2009	8-VIII-2009

Entry into force between Liechtenstein and	**Entry into force**
Monaco	6-III-2009
Bulgaria	30-III-2009
Luxembourg	12-IV-2009

Latvia	19-IV-2009
Israel	21-IV-2009
United States of America	27-IV-2009
Sweden	9-V-2009
Denmark	19-VII-2009
Finland	8-VIII-2009

Liechtenstein—Central Authority (Art. 2)

Pursuant to Article 35 (1) of the Convention, the Principality of Liechtenstein notifies as Central Authority referred to in Article 2 of the Convention:

Fürstliches Landgericht (Court of Justice)

Spaniagass 1

9490 Vaduz

Principality of Liechtenstein

Declarations

Articles: 4,8,11,15–18,23

Declaration concerning Article 4 of the Convention:

Pursuant to Articles 33 and 35 of the Convention, the Principality of Liechtenstein declares that, with reference to Article 4 (2) and (3) of the Convention, Letters of Request and their annexes must be in German or accompanied by a translation into German. The confirmation of the execution of the request will be in German.

Declaration concerning Article 8 of the Convention:

Pursuant to Article 35 (2) of the Convention, the Principality of Liechtenstein declares that members of the judicial personnel of the requesting authorities who are part of the proceedings of a Contracting State may be present at the execution of a Letter of Request, if they have received prior authorization by the authorities that are competent for the execution.

Declaration concerning Article 11 of the Convention:

Pursuant to Article 11 of the Convention, the Principality of Liechtenstein recognizes the privileges and duties of the person concerned to refuse to give evidence in so far as the person has these privileges and duties under the law of his State of origin.

Declaration concerning Articles 15, 16 and 17 of the Convention:

Pursuant to Article 35 of the Convention, the Principality of Liechtenstein declares that the taking of evidence as referred to in Articles 15, 16 and 17 of the Convention is subject to prior permission by the Government of the Principality of Liechtenstein.

Declaration concerning Article 18 of the Convention:

The Principality of Liechtenstein does not grant any assistance by measures of compulsion to diplomatic officers or consular agents acting under Articles 15, 16 and 17 of the Convention.

Declaration concerning Article 23 of the Convention:

Pursuant to Article 23 of the Convention, the Principality of Liechtenstein declares that Letters of Request issued for the purpose of obtaining pre-trial discovery of documents will not be executed.

2j Under the following declarations:

``…And whereas it is provided in paragraph 1 of Article 2 of the Convention, the Republic of Lithuania designates the Ministry of Justice of the Republic of Lithuania as a Central Authority to receive a Letter of Request coming from a judicial authority of another Contracting State;

And whereas it is provided in paragraph 4 of Article 4 of the Convention, the Republic of Lithuania declares that it will accept a Letter of Request submitted only in the Lithuanian, English, French or Russian languages, or, where a Letter of Request is made in none of those languages, a Letter of Request and supporting documents shall be accompanied by a translation into Lithuanian, English, French or Russian languages;

And whereas it is provided in Article 8 of the Convention, the Republic of Lithuania declares that members of the judicial personnel of the requesting authority of another Contracting State may be present at the execution of a Letter of Request only under the prior permission of the Ministry of Justice of the Republic of Lithuania;

And whereas it is provided in Article 16 of the Convention, the Republic of Lithuania declares that a diplomatic officer or consular agent of a Contracting State may take evidence, without compulsion, of citizens of the Republic of Lithuania under the Law on Citizenship of the Republic of Lithuania, only under the prior permission of the Ministry of Justice of the Republic of Lithuania.

The permission to take evidence issued by the Ministry of Justice of the Republic of Lithuania shall indicate that:

(a) evidence shall be taken by a diplomatic officer or consular agent only within the premises of the embassy or consular institution of the State which he/she represents;

(b) the Ministry of Justice of the Republic of Lithuania shall be informed about the time and place of the taking of evidence;

(c) evidence shall be taken in the Lithuanian or another language understandable to the person giving evidence or taking of evidence and shall be accompanied by a translation into the Lithuanian or another language understandable for such person;

(d) the document concerning the taking of evidence written in the language understandable to the person giving evidence shall be signed by this person. The copy of such document shall be forwarded to the Ministry of Justice of the Republic of Lithuania;

And whereas it is provided in Article 17 of the Convention, the Republic of Lithuania declares that a person duly appointed as a commissioner for this purpose, may, without compulsion, take evidence in the territory of the Republic of Lithuania from the person which is a citizen of the Republic of Lithuania under the Law on Citizenship of the Republic of Lithuania, if the Ministry of Justice of the Republic of Lithuania has given its prior written permission. The permission issued by the Ministry of Justice of the Republic of Lithuania shall indicate that:

(a) the Ministry of Justice of the Republic of Lithuania shall be informed about the time and place of the taking of evidence;

(b) the evidence shall be taken in the Lithuanian or another language understandable to the person giving evidence or taking of evidence shall be accompanied by a translation into the Lithuanian or another language understandable for such person;

(c) the document concerning the taking of evidence written in the language understandable to the person giving evidence shall be signed by this person. The copy of such document shall be forwarded to the Ministry of Justice of the Republic of Lithuania;

And whereas it is provided in Article 23 of the Convention, the Republic of Lithuania declares that it will not execute a Letter of Request issued for the purpose of obtaining pre-trial discovery of documents …"

In accordance with Article 39 the Convention entered into force between Lithuania and

Luxembourg	21 April 2001
Slovakia	8 May 2001
Denmark	21 July 2001
Australia	11 September 2001
Germany	11 September 2001
Argentina	21 September 2001
Bulgaria	3 November 2001
Estonia	12 February 2002

Switzerland	12 March 2002
United States of America	26 April 2002
Spain	25 May 2002
Sweden	15 July 2002
Israel	28 July 2002
Norway	29 July 2002
Poland	18 February 2003

2k *Notification in accordance with Article 42, sub a and e, of the Convention*

In accordance with Article 37, paragraph 2, Luxemburg deposited on 26 July 1977 its instrument of ratification of the Convention with the Ministry of Foreign Affairs of the Kingdom of the Netherlands.

In conformity with Article 38, paragraph 2, the Convention shall enter into force for Luxemburg on 24 September 1977.

On the occasion of the deposit of the said instrument of ratification the Government of Luxemburg made the following declarations and reservations (translation):

``—In accordance with Article 2 the Parquet Général is designated as the Central Authority.

—In pursuance of Article 4, paragraph 4, Letters of Request in German shall also be accepted.

—In pursuance of Article 23, Letters of Request issued for the purpose of obtaining pre-trial discovery of documents as know in Common Law countries shall not be executed.

—In accordance with the provisions of Article 16, the Parquet Général is designated as the authority competent to authorise the diplomatic officers or consular agents of a Contracting State to take, without compulsion, the evidence of persons other than the nationals of the State in aid of proceedings commenced in the courts of the State which they represent.

This authorisation, which is given in each specific case and to which specific conditions, where appropriate, are attached, is granted under the following general conditions:

1—The evidence shall be taken only within the precincts of an Embassy or Consultate.

2—The Parquet Général shall be given reasonable advance notice of the time, date and place of the taking of evidence so that it can, if it wishes, be represented.

3—A request to a person to appear shall, in accordance with the regulations, be in the form of an official document in French or German or accompanied by an (sic) translation into one of these languages stating:

a) that the evidence is to be taken in accordance with the provisions of the Convention on the taking of evidence abroad in civil or commercial matters concluded at The Hague on 18 March

1970, and in the framework of a judicial procedure followed in a jurisdiction designated by a Contracting State;

b) that the appearance is voluntary and that no prosecution in the requesting State will result from failure to appear;

c) that the parties to the action, where appropriate, consent to the taking of the evidence or are opposed to it for reasons to be given;

d) that the person requested to appear may be legally represented;

e) that the person requested to appear may invoke a privilege or a duty to refuse to give evidence.

—In accordance with the provisions of Article 17, the Parquet Général is designated as the authority competent to authorise persons designated in accordance with the regulations as commissioners to take evidence, without compulsion, in aid of proceedings commenced in the courts of another Contracting State.

This authorisation, which is given in the particular case and to which specific conditions, where appropriate, are attached, is granted under the following general conditions:

1—The Parquet Général shall be given reasonable advance notice of the time, date and place of the taking of evidence so that it can, if it wishes, be represented.

2—A request to a person to appear shall, in accordance with the regulations, be in the form of an official document in French or German or accompanied by a translation into one of these languages stating;

a) that the evidence is to be taken in accordance with the provisions of the Convention on the taking of evidence abroad in civil or commercial matters concluded at The Hague on 18 March 1970, and in the framework of a judicial procedure followed in a jurisdiction designated by a Contracting State;

b) that the appearance is voluntary and that no prosecution in the requesting State will result from failure to appear;

c) that the parties to the action, where appropriate, consent to the taking of the evidence or are opposed to it for reasons to be given;

d) that the person requested to appear may be legally represented;

e) that the person requested to appear may invoke a privilege or a duty to refuse to give evidence.

—In pursuance of Article 8, members of the judicial personnel of the requesting authority of a Contracting State may be present at the execution of a Letter of Request."

2I In conformity with Article 39, paragraph 2, the instrument of accession by the United Mexican States to the above-mentioned Convention was deposited with the Ministry of Foreign Affairs of the Kingdom of the Netherlands on 27 July 1989.

The instrument of accession of the United Mexican States contains the declarations and reservations the text of which together with a translation in English is annexed to this notification.

In accordance with paragraph 3 of Article 39, the Convention will enter into force for the United Mexican States on 25 September 1989.

According to Article 39, paragraph 4, of the Convention the accession will have effect only as regards the relations between the United Mexican States and such Contracting States as will have declared their acceptance of the accession. Such declarations shall be deposited at the Ministry of Foreign Affairs of the Kingdom of the Netherlands.

Unofficial translation

A) TRANSMISSION AND EXECUTION OF LETTERS OF REQUEST

Entry into force between Hungary and	**Entry into force**
1.	*Central Authority (Article 2)*
Name:	Secretaría de Relaciones Exteriores, Dirección General de Asuntos Jurídicos.
Address:	Ricardo Flores Magón No. 1
Telephone:	782-34-40
Telex:	01762090

2. *Language requirements (Article 4)*

2.1 The United Mexican States does hereby make a special reservation related to the provisions of paragraph 2 of Article 4, and declares in accordance with paragraph 4 of the same Article, that letters of request sent to its Central Authority or judicial authorities shall be written in the spanish language or shall otherwise be accompanied by a translation into said language.

B) TAKING OF EVIDENCE ABROAD BY DIPLOMATIC OFFICERS, CONSULAR AGENTS AND COMMISSIONS (CHAPTER II)

3. The United Mexican States makes a special and complete reservation concerning the provisions contained in Articles 17 and 18 of this Chapter in relation to the ``commissioners'' and the use of measures to compulsion by diplomatic officers and consular agents.

C) FORMULATION OF PRE-TRIAL DISCOVERY OF DOCUMENTS

4. With reference to Article 23 of the Convention, the United Mexican States declares that according to Mexican law, it shall only be able to comply with letters of request issued for the purpose of obtaining the production and transcription of documents when the following requirements are met:

a) that the judicial proceeding has been commenced;

b) that the documents are reasonably identifiable as to date, subject and other relevant information and that the request specifies those facts and circumstances that lead the requesting party to reasonable believe that the requested documents are known to the person from whom they are requested or that they are in his possession or under his control or custody;

c) that the direct relationship between the evidence or information sought and the pending proceeding be identified.

D) OTHER TRANSMISSION CHANNEL TO THE JUDICIAL AUTHORITIES DIFFERENT FROM THOSE PROVIDED FOR IN ARTICLE 2

5. In regard to Article 27, paragraph a) of the Convention, the United Mexican States does hereby declare that the letters of request may be transmitted to its judicial authorities not only through the Central Authority but also through diplomatic or consular channels or through judicial channels (directly sent from the foreign court to the Mexican Court), providing that in the latter case all requirements relating to legalization of signatures are fulfilled.

6. In regard to Article 32 of the Convention, the United Mexican States informs that it is a State Party to the Interamerican Convention on the Taking of Evidence Abroad, signed in Panama on January the thirtieth, nineteen hundred and seventy-five, as well as to its Additional Protocol signed in La Paz, Bolivia, on May the twenty-fourth, nineteen hundred and eighty-four.

In accordance with Article 39 the Convention will enter into force between the United Mexican States and

Norway	20 November 1989
Israel	17 December 1989
the United States of America	24 December 1989
Argentina	25 December 1989
Finland	16 January 1990
Denmark	22 January 1990
the United Kingdom of Great Britain and Northern Ireland (also for Anguilla, the Cayman Islands, the Falkland Islands, Gibraltar, Guernsey, Hong Kong*, the Isle of Man, Jersey, South Georgia and the South Sandwich Islands and the Sovereign Base Areas of Akrotiri and Dhekelia in the Island of Cyprus)	16 March 1990
the Federal Republic of Germany	23 March 1990
Czechoslovakia	2 April 1990
the Kingdom of the Netherlands (for the Kingdom in Europe)	16 April 1990
Sweden	17 April 1990
Aruba	18 May 1991
Portugal	14 October 1991
Spain	29 June 1994
Switzerland	13 January 1995
Italy	25 May 1996
France	29 June 1998
Singapore	6 February 1999
Luxembourg	30 June 2003

*See *supra,* under ``CHINA, Hong Kong Special Administrative Region''.

2m *Notification in conformity with Article 42, sub c and e, of the Convention*

In accordance with Article 39, paragraph 2, the Principality of Monaco deposited its instrument of accession to the above-mentioned Convention with the Ministry of Foreign Affairs of the Kingdom of the Netherlands on 17 January 1986, with the following declarations and reservations:

Translation

1. In accordance with article 2, the Directorate of Judicial Services, MC 98025 MONACO CEDEX, is designated as the Central Authority.

2. Under article 4, paragraph 2, only Letters of Request drawn up in French or accompanied by a translation in that language shall be accepted.

3. Under article 23, Letters of Request issued for the purpose of obtaining pre-trial discovery of documents shall not be executed.

4. In accordance with articles 16 and 17, the Directorate of Judicial Services is designated as a competent authority for the purpose of authorising, as appropriate:

—the consular authorities of a Contracting State to take the evidence without compulsion of persons other than nationals of that State and in aid of proceedings commenced in a court of the State which they represent, or

—persons duly designated as commissioners to take evidence without compulsion in aid of proceedings commenced in a court of the Contracting State.

Such authorisation, which shall be granted for each particular case and may contain specific conditions, shall be subject to the following general conditions:

a) evidence shall be taken solely on the premises of consulates when the latter are situated within the Principality, and in other cases in the Palais de Justice of Monaco;

b) the Directorate of Judicial Services shall be informed of the date and time of the taking of the evidence in time to permit the Directorate to be represented, and, if necessary, to provide courtroom accommodation at the Palais de Justice of Monaco;

c) the persons concerned in the taking of evidence shall be duly summoned by an official document drawn up in French or accompanied by a translation in that language; this document shall indicate:

—that the taking of the evidence in question is being conducted in accordance with the provisions of the Hague Convention of 18 March 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters, and that the procedure constitutes part of legal proceedings pursued under the specially designated jurisdiction of a Contracting State;

—that appearance is voluntary and non-appearance would not entail legal proceedings in the requesting State;

—that the person concerned in the taking of evidence may be represented by a lawyer of defense counsel;

—that the parties in the proceedings, should they be instituted, give their consent, and if not the document shall state the reason for their opposition;

—that the person concerned in the taking of evidence may apply to be exempted or barred from testifying.

A copy of the summonses shall be sent to the Directorate of Judicial Services, which is also to be kept informed of any difficulties.

Pursuant to Article 39, paragraph 3, the Convention will enter into force for the Principality of Monaco on 18 March 1986.

The accession will have effect only as regards the relations between Monaco and such Contracting States as will have declared their acceptance of the accession.

Notification pursuant to Article 42 of the Convention

In accordance with Article 39 the Convention will enter into force between Monaco and

the *Kingdom of the Netherlands (for the .... 14 July 1986*

Kingdom in Europe)

(for Aruba) .... 27 July 1986

the *Federal Republic of Germany .... 12 August 1986*

the *United Kingdom of Great Britain and .... 18 August 1986*

Northern Ireland (also for the Cayman Islands, the Falklands, Gibraltar, Guernsey Hong Kong, the Isle of Man, South Georgia, the South Sandwich Islands and the Sovereign Base Areas of Akrotiri and Dhekelia in the Island of Cyprus)*

Finland .... 22 September 1986

Italy .... 22 September 1986

Norway .... 15 December 1986

Czechoslovakia .... 30 December 1986

Sweden .... 18 January 1987

Denmark .... 23 January 1987

Israel .... 31 March 1987

France .... 3 January 1988

the *United States of America .... 30 January 1988*

Portugal .... 14 October 1991

Cyprus .... 18 January 1993

Spain .... 28 August 1994

Switzerland .... 13 January 1995

Singapore .... 6 February 1999

Luxembourg .... 30 June 2003

*See *supra,* under ``CHINA, Hong Kong Special Administrative Region''.

2n *Notification in conformity with Article 42, sub a and e, of the Convention.*

``The Kingdom of the Netherlands deposited on 8 April 1981, in accordance with Article 37, paragraph 2, of the Convention its instrument of ratification for the Kingdom in Europe of the above-mentioned Convention.

Upon the deposit of the instrument of ratification the Government of the Kingdom of the Netherlands has made the following declaration:

Translation

In the Netherlands the Convention shall be applied as follows:

Article 2

The Public Prosecutor at The Hague district Court is designated as the Central Authority.

Article 4

Letters of Request will be accepted in Dutch, German, English or French, or if they are accompanied by a translation into one of these languages.

The Netherlands does not undertake to translate documents for the execution of a Letter of Request.

Article 8

Members of the judicial personnel of another Contracting State may be present at the execution of a Letter of Request provided that the court which is responsible for execution authorises this and provided that any conditions which the court may impose are respected.

Article 11

Only the court which is responsible for executing the Letter of Request shall be competent to decide whether any person concerned by the execution has a privilege or duty to refuse to give evidence under the law of a State other than the State or origin; no such privilege or duty exists under Dutch law.

Article 14

Fees paid to experts and interpreters and costs occasioned by the use of a special procedure requested by the State of origin under Article 9, paragraph 2 of the Convention shall be borne by the State or origin.

Article 16

In the Netherlands, no prior permission is required for the taking of evidence as provided for in Article 16.

Article 17

The permission referred to in Article 17 must be requested from the President of the District Court in the area in which evidence is to be taken. If evidence is to be taken from witnesses or experts, the area in question will be that in which the witnesses or experts, or the majority of them reside. If the President gives permission, he may impose any conditions which he considers necessary to ensure that the evidence is taken in proper manner. He may decide that the evidence should be taken at the court, under the supervision of a judge designated by him. Permission will only be granted if the following conditions are met:

a) the witness or expert concerned must have been duly summoned; the summons must be in Dutch or must be accompanied by a Dutch translation and must contain;

—the facts of the case and a summary of the proceedings in connection with which the evidence is to be taken, and details of the court which has requested the evidence;

—a statement to the effect that there is no obligation for the witness or expert to appear, and that if he refuses to appear, to take an oath, to give his word of honour or to give evidence, he will not incur any penalty or measure of any kind, either in the Netherlands or in the State where the proceedings have been instituted;

—a statement to the effect that the person concerned may be legally represented;

—a statement to the effect that in so far as the person concerned has a privilege or duty to refuse to give evidence, he may do so;

—a statement to the effect that the commissioner will reimburse expenses incurred by the witness or expert in connection with his appearance to give evidence.

b) A copy of the summons must be forwarded to the President.

c) The request for permission must state the reasons why the taking of evidence has been entrusted to a commissioner and it must state the commissioner's official status unless he is a lawyer competent to practise in the Netherlands.

d) The costs of taking the evidence, i.e. the expenses of the witnesses, experts or interpreters, must be reimbursed in full.

Article 23

The Netherlands will not execute Letters of Request issued for the purpose of obtaining pre-trial discovery of documents as known in Common Law countries.

For the purposes of Article 23 of the Convention, ``Letters of Request issued for the purpose of obtaining pre-trial discovery of documents as known in Common Law countries'', which the Netherlands will not execute, are defined by the Government of the Kingdom of the Netherlands as being any Letters of Request which require a person:

a. to state which of the documents which are of relevance to the proceedings to which the Letter of Request relates have been in his possession, custody or power; or

b. to produce any document other than particular documents specified in the Letter of Request as being documents which the court which is conducting the proceedings believes to be in his possession, custody or power.

Article 26

The Netherlands will request that any State of origin which has made a request pursuant to paragraph 1 of Article 26 should reimburse the fees and costs to which this paragraph refers.

* By letter dated 13 November 2002, the Permanent Bureau of the Hague Conference was

informed of the new contact details of the Central Authority:

De Officier van Justitie
Postbus 20302
2500 EH THE HAGUE

In accordance with Article 38, paragraph 2, the Convention will enter into force for the Kingdom of the Netherlands (the Kingdom in Europe) on 7 June 1981."

In accordance with Article 40, paragraph 2, the Kingdom of the Netherlands declared on 28 May 1986 that the Convention shall extend to Aruba.

In conformity with Article 40, paragraph 3, the Convention will enter into force for Aruba on 27 July 1986.

The Permanent Bureau of the Hague Conference on private international law presents its compliments to the Diplomatic Missions of the Member States and to the National Organs and has the honour to inform them that, in accordance with Article 2 of the above-mentioned Convention, the

Kingdom of the Netherlands

has designated the ``*Procureur-Generaal in Aruba van het Gemeenschappelijk Hof van Justitie van de Nederlandse Antillen en Aruba"* (the Attorney-General in Aruba of the joint Court of Justice of the Netherlands Antilles and of Aruba) as Central Authority for *Aruba.*

The Convention is being applied in Aruba subject to the same declarations as made upon ratification of the Convention on 8 April 1981 by the Kingdom of the Netherlands for the Kingdom in Europe. In addition, in conformity with Article 4, paragraphs 3 and 4, Aruba will not accept Letters of Request in French, unless accompanied by a translation into Dutch, English or Spanish.

The Permanent Bureau avails itself of this opportunity to renew to the Diplomatic Missions of the Members States and to the National Organs an assurance of its highest consideration and esteem.

2o With the following reservation:

``In conformity with article 33, Norway enters a reservation to paragraph 2 of article 4 to the effect that Letters of Request in the French language will not be accepted."

And with the following declarations:

``I. The Royal Ministry of Justice and Police is designated as the Central Authority with reference to article 2 and as the Competent Authority with reference to articles 15, 16 and 17.

II. With reference to article 4, paragraph 3, the Kingdom of Norway declares that letters in the Danish or Swedish languages can be sent to the Central Authority.

III. By accepting Letters of Request in another language than the Norwegian, the Kingdom of Norway does not undertake to execute the request, or transmit the evidence thus obtained in this other language; nor to have translated the documents which establish the execution of the Letter of Request.

IV. By virtue of article 15, evidence can be taken by diplomatic officers or consular agents only if, upon application, prior permission to that effect has been granted.

V. By virtue of article 23, the Kingdom of Norway declares that it will not execute Letters of Request issued for the purpose of obtaining pre-trial discovery of documents as known in Common Law countries.''

The declaration made by the Kingdom of Norway in accordance with article 23 concerning ``Letters of Request issued for the purpose of obtaining pre-trial discovery of documents'' shall apply only to Letters of Request which require a person

a) to state what documents relevant to the proceedings to which the Letter of Request relates, are, or have been, in his possession, other than particular documents specified in the Letter of Request; or

b) to produce any documents other than particular documents which are specified in the Letter of Request, and which are likely to be in his possession.

3 The Permanent Bureau of the Hague Conference on private international law presents its compliments to the Diplomatic Missions of the Member States and to the National Organs and has the honour to inform them that, by instrument deposited on 13 February 1996 with the Ministry of Foreign Affairs of the Kingdom of the Netherlands,

the Republic of Poland

acceded to the above-mentioned Convention.

The instrument of accession contains a reservation, the text of which is attached.

<u>Translation</u>

Articles 23 et 33 will not be applicable within the territory of the Republic of Poland.

The instrument of accession was accompanied by the following declarations and reservations, the text of which is also attached.

<u>Translation</u>

Declarations

Article 2, Paragraph 1—the Central Authority designated to receive requests for service coming from another Contracting State shall be the Ministry of Justice.

Article 8—the Authority designated to complete a certificate of service in the republic of Poland shall be the Ministry of Justice.

Article 24 and Article 27, sub-paragraph a—other authorities (in addition to the Central Authority) designated to receive requests for service shall be the voivodship courts.

Reservations

Article 23—the Republic of Poland declares, that it will not execute Letters of Request issued for the purpose of obtaining ``pre-trial discovery of documents'' as known in common law countries.

Article 33—the Republic of Poland excludes the application on its territory:

—the provisions of Article 4, paragraph 2,

—the provisions of Chapter II, excluding provisions of Article 15.

In accordance with paragraph 3 of Article 39, the Convention will enter into force for the *Republic of Poland* on *13 April 1996*.

According to Article 39, paragraph 4, of the Convention the accession will have effect only as regards the relations between the Republic of Poland and such Contracting States as will have declared their acceptance of the accession. Such declarations shall be deposited with the Ministry of Foreign Affairs of the Kingdom of the Netherlands.

In accordance with Article 39, paragraph 5, the Convention will enter into force between Poland and

Luxembourg .... 2 June 1996

Denmark .... 22 June 1996

Slovak Republic .... 25 June 1996

Israel .... 30 June 1996

Finland .... 5 August 1996

Netherlands (for the Kingdom in Europe and Aruba) .... 16 August 1996

Germany .... 14 September 1996

United States .... 11 November 1996

Norway .... 20 December 1996

Australia .... 10 January 1997

the *United Kingdom of Great Britain* and *.................. 21 February 1997*

Northern Ireland (also for the *Dependent*
Territories of Anguilla, the *Cayman Islands,*
the *Channel Islands,* the *Sovereign Base*
Areas of Cyprus, the *Falkland Islands,*
*Gibraltar, Hong Kong** and the *Isle of Man)*

Cyprus ....16 March 1997

Sweden .... 13 April 1997

Singapore .... 4 May 1997

Spain .... 25 May 1997

Mexico .... 26 July 1997

the *Czech Republic .... 13 January 1998*

South Africa .... 10 February 1998

the *People's Republic of China .... 5 June 1998*

Switzerland .... 11 July 1998

Portugal .... 8 June 2001

Estonia .... 12 February 2002

Belarus .... 18 February 2003

Bulgaria .... 18 February 2003

Kuwait .... 18 February 2003

Lithuania .... 18 February 2003

Russian Federation ....18 February 2003

Slovenia .... 18 February 2003

Sri Lanka .... 18 February 2003

Ukraine .... 18 February 2003

France .... 5 April 2003

*See *supra,* under ``CHINA, Hong Kong Special Administrative Region''.

3a With the following reservations and declarations:

(Translation)

``a) In accordance with Article 33 of the Convention, the Portuguese State makes the following reservations:

1. exclusion of the application of paragraph 2 of Article 4;

2. exclusion of the application of Chapter II, with the exception of Article 15.

b) In accordance with Articles 15 and 23 of the Convention, the Portuguese State makes the following declarations:

1. The Portuguese State declares that the evidence as referred to in Article 15, can only be taken if permission to that effect is given by the appropriate authority designated by it upon application made by the diplomatic or consular agent;

2. The Portuguese State declares that it will not execute Letters of Request issued for the purpose of obtaining pre-trial discovery of documents as known in Common Law Countries.

c) With regard to Articles 2 and 15 of the Convention, the competent Portuguese authority will be the Director-General of the Judiciary Department (``Direccào-Geral dos Serviços Judiciários'') of the Ministry of Justice.''.

Extension*

In accordance with Article 40, second paragraph, Portugal extended the Convention to *Macau* on 15 October 1999, with the following declarations:

``a) In conformity with the provisions of Article 4 of the Convention, only Letters of Request in Portuguese, Chinese and English shall be accepted in Macau;

b) With the exception of Article 15, Chapter II of the Convention shall not be applicable in the territory of Macau;

c) In conformity with the provisions of Article 15 of the Convention, the Republic of Portugal declares that evidence referred to in that same article may not be taken in Macau if permission to that effect has not been given by an appropriate authority, to be designated by the appropriate bodies of the territory, upon application made by a diplomatic officer or consular agent;

d) In conformity with the provisions of Article 23 of the Convention, the Republic of Portugal declares that the Letters of Request issued for the purpose of obtaining pre-trial discovery of documents as known in common law countries will not be executed in Macau.''

Entry into force for *Macau** on *14 December 1999.*

***See *supra,* under CHINA, Macau Special Administrative Region.**

3b Romania—Central Authority (Art. 2)

Address—Ministry of Justice

With the following Reservations and Declarations

Articles: 8,16,17,18,19,21,23

``A. Declarations

1. (…)

2. In accordance with Article 8 of the Convention, the members of the judicial personnel of the requesting authority may be present at the execution of a Letter of Request, after prior information of the competent central authority.

3. In accordance with Article 23 of the Convention, Romania declares that it will execute Letters of Request issued for the purpose of obtaining pre-trial discovery of documents as known in Common Law countries, to the extent that this expression refers to providing evidence (inquest in futurum).

B. Reservation

In accordance with Article 33, paragraph 1, of the Convention, Romania will not apply the provisions of Articles 16, 17 and 18 of Chapter II of the Convention. Romania declares that Articles 19 and 21 will not be applicable, in as far as that they refer to Articles 16, 17 and 18, to which the reservation was made."

Convention of 18 March 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters

Accession accepted by	**Date of acceptance**	**Entry into force**
Czech Republic	11-III-2004	10-V-2004
Netherlands	31-X-2003	30-XII-2003
Denmark	31-X-2003	30-XII-2003
United States of America	17-II-2004	17-IV-2004
Bulgaria	2-III-2004	1-V-2004
Slovak Republic	9-III-2004	8-V-2004
Norway	16-VI-2004	15-VIII-2004
Germany	14-VI-2004	13-VIII-2004
Latvia	28-VII-2004	26-IX-2004

Entry into force between Romania and	**Entry into force**
Czech Republic	10-V-2004
Netherlands	30-XII-2003
Denmark	30-XII-2003
United States of America	17-IV-2004
Bulgaria	1-V-2004
Slovak Republic	8-V-2004
Norway	15-VIII-2004
Germany	13-VIII-2004
Latvia	26-IX-2004

3c In accordance with Article 39, paragraph 5, the Convention will enter into force between the Russian Federation and

Luxembourg .... *20 October 2001*

the *Czech Republic* .... *3 November 2001*

Denmark .... *21 December 2001*

the *United Kingdom of Great Britain and* .... *19 January 2002*

Northern Ireland (accepted also for Anguilla, the Cayman Islands, the Falkland Islands, Gibraltar, the Sovereign Base Areas in Cyprus, the Isle of Man, and the Bailiwicks of Guernsey and Jersey)

Estonia .... 12 February 2002

Australia .... 11 March 2002

Switzerland .... 12 March 2002

Sweden .... 15 July 2002

Israel .... 28 July 2002

Portugal ....2 August 2002

Spain .... 4 August 2002

Argentina .... 28 October 2002

Norway .... 29 November 2002

Poland .... 18 February 2003.

3d Declarations

Articles: 23

``(…) that it wishes to declare, in accordance with article 35 clause c) and pursuant to article 23, first paragraph of the Convention, that the Republic of Seychelles will not execute Letters of Request issued for the purpose of obtaining pre-trial discovery of documents as known in Common Law countries."

Accession accepted by	**Date of acceptance**	**Entry into force**
Slovak Republic	19-III-2004	18-V-2004
Denmark	10-III-2004	9-V-2004
United States of America	11-III-2004	10-V-2004
Israel	22-IV-2004	21-VI-2004
Netherlands	25-III-2004	24-V-2004
Norway	16-VI-2004	15-VIII-2004
Czech Republic	21-VII-2004	19-IX-2004
Latvia	28-VII-2004	26-IX-2004

Entry into force between Seychelles and	**Entry into force**
Slovak Republic	18-V-2004
Denmark	9-V-2004
United States of America	10-V-2004
Israel	21-VI-2004
Netherlands	24-V-2004
Norway	15-VIII-2004
Czech Republic	19-IX-2004
Latvia	26-IX-2004

3e In accordance with Article 39, paragraph 3, the Convention shall enter into force for the Republic of Singapore on December 26, 1978.

Notification in accordance with Convention Article 42(c) and (e):

On October 27, 1978, the Ministry of Foreign Affairs of the Kingdom of the Netherlands received the instrument of accession of the Republic of Singapore to the Convention on the Taking of Evidence Abroad in Civil and Commercial Matters in accordance with Article 39, Paragraph 2, of the aforesaid Convention.

At the time of its accession the Government of the Republic of Singapore made the following reservations:

``(i) The entire Chapter II of the Convention is not applicable to the Republic of Singapore; and

``(ii) With regard to Article 4, paragraph 2, the Republic of Singapore will not accept a Letter of Request in a language other than English, since this language is the one used by the judicial personnel in Singapore.''

In accordance with Article 23 the Government of the Republic of Singapore has declared that the Republic of Singapore will not execute Letters of Request issued for the purpose of obtaining pre-trial discovery of documents as known in Common Law countries.

The Government of the Republic of Singapore has further declared that it understands ``Letters of Request issued for the purpose of obtaining pre-trial discovery of documents'' for the purposes of the foregoing declaration as including any Letter of Request which requires a person:

(a) to state what documents relevant to the proceedings to which the Letter of Request relates are, or have been, in his possession, custody or power; or

(b) to produce any documents other than particular documents specified in the Letter of Request as being documents appearing to the requested court to be, or likely to be, in his possession, custody or power. It is also understood that the reference to civil or commercial actions in the Convention does not include tax matters for the Republic of Singapore.

In accordance with Article 39, paragraph 3, the Convention shall enter into force for the Republic of Singapore on December 26, 1978.

The accession shall be effective only for relations between the Republic of Singapore and contracting States that declare that they accept this accession.

Notification in conformity with Article 42, paragraph e, of the Convention:

In accordance with Article 35 of the Convention Singapore notified the Ministry of Foreign Affairs of the Kingdom of the Netherlands by a Note dated August 4, 1979, that the Central Authority which will undertake to receive Letters of Request referred to in Article 2 of the Convention, is the Registrar of the Supreme Court.

In accordance with Article 39, paragraph 5, the Convention will enter into force between Singapore and

Spain .... 28 August 1994

Switzerland .... 13 January 1995

United States .... 24 October 1995

Sweden .... 10 April 1979

the *United Kingdom of Great Britain and .... 13 May 1979*

Northern Ireland (also for Gibraltar and Hong Kong)*

Norway .... 20 May 1979

Czechoslovakia .... 3 June 1979

Denmark .... 6 August 1979

Luxembourg .... 3 December 1979

France .... 27 December 1979

Finland .... 12 January 1980

the *Kingdom of the Netherlands (for the .... 20 June 1981*
Kingdom in Europe)

(for Aruba) .... 27 July 1986

the *Federal Republic of Germany .... 13 September 1981*

Israel .... 19 September 1981

Italy .... 24 April 1993

Portugal .... 17 February 1984

Spain .... 28 August 1994

Switzerland .... 13 January 1995

Latvia .... 4 May 1997

Poland .... 4 May 1997

Estonia .... 4 May 1997

Australia .... 25 July 1997

Barbados .... 6 February 1999

Cyprus .... 6 February 1999

Monaco .... 6 February 1999

Argentina .... 6 February 1999

Mexico .... 6 February 1999

Venezuela .... 6 February 1999

*See *supra,* under ``CHINA, Hong Kong Special Administrative Region''.

3f By notification dated March 15, 1993 the Slovak Republic communicated the following: ``In accordance with relevant principles and norms of international law and to extent defined by it, the Slovak Republic, as a successor State, born from the division of the Czech and Slovak Federal Republic, considers itself bound, as of January 1, 1993, i.e. the date of the division of the Czechoslovak Federation, by multilateral international treaties to which the Czech and Slovak Federal Republic was a party at that date, including reservations and declarations in respect of provisions made earlier by Czechoslovakia, as well as objections by Czechoslovakia in respect of reservations made by other treaty parties'', which are as follows: [Same declarations and reservations, *mutatis mutandis*, under Czech Republic, see footnote [1d]].

The Slovak Republic has designated in accordance with Articles 2 and 8 [of the Convention] the following Central Authority:

Ministerstvo spravodlivosti Slovenskej republiky
Zupne namestie 13, 813 11 Bratislava
Slovak Republic
fax: +421 (2) 5935 3604

3g Designation of the Central Authority in accordance with Article 2, paragraph 1:

Ministry of Justice of the Republic of Slovenia
Zupanciceva 3
1000 LJUBLJANA
tel.: +386 (1) 478.5244
fax: +386 (1) 426.1050
e-mail: ana.bucar@gov.si

In accordance with Article 39 the Convention entered into force between Slovenia and

Luxembourg .... 21 April 2001

Slovakia .... 8 May 2001

Denmark ....21 July 2001

Australia .... 11 September 2001

Germany .... 11 September 2001

Argentina .... 21 September 2001

Estonia .... 12 February 2002

Switzerland .... 12 March 2002

United States of America .... 26 April 2002

Spain .... 25 May 2002

Sweden .... 15 July 2002

Israel .... 28 July 2002

Norway .... 29 July 2002

Poland .... 18 February 2003.

3h The Permanent Bureau of the Hague Conference on private international law presents its compliments to the Diplomatic Missions of the Member States and to the National Organs and has the honour to inform them that, by instrument deposited on 8 July 1997 with the Ministry of Foreign Affairs of the Kingdom of the Netherlands,

the Republic of South Africa

acceded to the above-mentioned Convention.

The instrument of accession contains the following reservations, designation of authorities and declarations:

``*1. Reservations*

That the Republic of South Africa excludes the following in terms of Article 33 of the Convention, namely—

(a) the application of the provision of paragraph 2 of Article 4 of the Convention, which provides that a Letter of Request shall be accepted in French; and

(b) the application of the provisions of Articles 15 and 16 of Chapter II of the Convention.

2. Designation of authorities

That the Republic of South Africa designates—

(a) the Director General of the Department of Justice as Central Authority in terms of Article 2 of the Convention and as the competent authority referred to in Article 8 of the Convention; and

(b) the division of the High Court of South Africa that has jurisdiction as the competent authority referred to in Articles 17 and 18 of the Convention.

3. Declarations

That the Republic of South Africa makes the following declarations under the Convention:

(a) For the purposes of paragraph 4 of Article 4 of the Convention, a Letter of Request, if not in English, may also be sent to the Central Authority in any of the following languages: Sepedi, Sesotho, Setswana, siSwati, Tshivenda, Xitsonga, Afrikaans, isiNdebele, isiXhosa and isiZulu.

(b) Members of the judicial personnel of the requesting authority of another Contracting State

may, after authorisation by the competent authority referred to in Article 8 of the Convention, be present at the execution of a Letter of Request as contemplated in that article.

(c) Evidence may not be taken in terms of Article 17 of the Convention without the prior permission of the competent authority referred to in that Article.

(d) A commissioner authorised to take evidence under Article 17 of the Convention may, in terms of Article 18 of the Convention, apply to the competent authority referred to in that Article to obtain the evidence by compulsion, subject to the measures of compulsion which are appropriate and prescribed by South African law for use in internal proceedings.

(e) Letters of Request issued for the purpose of obtaining pre-trial discovery of documents as known in Common Law countries, will not be executed as provided for in Article 23."

In accordance with the terms of Article 39, paragraph 3, the Convention will enter into force for the *Republic of South Africa* on *6 September 1997.*

According to Article 39, paragraph 4, of the Convention the accession will have effect only as regards the relations between the Republic of South Africa and such Contracting States as will have declared their acceptance of the accession. Such declaration shall be deposited with the Ministry of Foreign Affairs of the Kingdom of the Netherlands.

In accordance with Article 39, paragraph 5, the Convention entered into force between South Africa and:

the *United States of America .... November 1, 1997*

the *Kingdom of the Netherlands*

(for the Kingdom in Europe and Aruba) .... October 24, 1997

Latvia .... 19 October 1997

the *Kingdom of the Netherlands (for the .... 24 October 1997*

Kingdom in Europe and Aruba)

Israel .... 9 November 1997

Finland .... 28 November 1997

the *Slovak Republic .... 13 December 1997*

Germany .... 12 January 1998

the *Czech Republic .... 13 January 1998*

Australia .... 17 January 1998

Sweden .... 24 January 1998

Poland .... 10 February 1998

the *United Kingdom of Great Britain and .... 8 March 1998*

Northern Ireland (also for the *Dependent*
Territories of Anguilla, the *Cayman Islands,*
the *Channel Islands,* the *Sovereign Base*
Areas of Cyprus, the *Falkland Islands,*
Gibraltar and the *Isle of Man)*

Portugal .... 7 July 1998

Switzerland .... 11 July 1998

China, Hong Kong Special Administrative .... 24 November 1998

Region only

France .... 7 March 1999

Denmark .... 5 September 1999

Norway .... 22 October 1999

Spain .... 17 January 2000

Argentina .... 6 March 2000

Estonia .... 12 February 2002

United States of America .... 26 April 2002.

3i Spain has informed the Ministry of Foreign Affairs of the Kingdom of the Netherlands of a change in the designation of the Central Authority designated in accordance with Article 2, paragraph 1, of the Convention. The Central Authority shall be:

``el Ministerio de Relaciones Exteriores".

Notification pursuant to Article 42 of the Convention

In accordance with Article 37, paragraph 2, of the above-mentioned Convention Spain deposited its instrument of ratification with the Ministry of Foreign Affairs of the Kingdom of the Netherlands on 22 May 1987.

The instrument of ratification contains the following reservation:

``De conformidad con el artículo 33 en relacíon con el artículo 4.º, párrafo 2, Espana no aceptará comisiones rogatorias que no estén redactadas en espa[Delta equal to]nol o acompa[Delta equal to]nadas de una traducción.

Translation

In accordance with Article 33 in relation with Article 4, paragraph 2, Spain will not accept Letters of Request which are not drawn up in Spanish or accompanied by a translation.

``a) La Autoridad Central espa[Delta equal to]nola a que se refiere el artículo 2 será:

Secretaría General Técnica del Ministerio de Justicia
Calle San Bernardo 62
28071 MADRID*

b) Previa autorización del Ministerio de Justicia espaonol, un Juez del Estado requirente podrá intervenir en el cumplimiento de una comisíon rogatoria, de conformidad con el artículo 8.

c) De conformidad con los artículos 16 y 17, la prueba podrá ser practicada, sin necesidad de autorización previa de la Autoridad espa[Delta equal to]nola, en los locales de la Representacíon diplomática o consular del Estado requirente.

d) A tenor del artículo 23, Espa[Delta equal to]na no acepta las comisiones rogatorias derivadas del procedimiento ``pre-trial discovery of documents'' conocido en los países del ``Common Law''.''.

Translation

(a) The Spanish Central Authority referred to in Article 2 will be:

Secretaría General Técnica del Ministerio de Justicia
Calle San Bernardo 62
28071 MADRID

* Modification communicated by the Embassy of Spain to the Depositary by Note dated 8 March 1999.

b) With prior authorization of the Spanish Ministry of Justice, a Judge of the requesting State may intervene in the execution of a Letter of Request, in accordance with Article 8.

c) In accordance with Articles 16 and 17, the evidence may be taken, without prior permission of the Spanish Authority, in the premises of the diplomatic or consular representation of the requesting State.

d) Pursuant to Article 23 Spain does not accept Letters of Request derived from the ``pre-trial discovery of documents'' procedure known in Common Law countries.

The Convention will enter into force for Spain on 21 July 1987.

3j Under the following declaration and reservations:

``(i) In terms of Article 2, Secretary/Ministry of Justice and Constitutional Affairs is designated the Central Authority.

(ii) For purposes of Article 4 of the Convention, the letter of request should be in the English language or if in French, accompanied by an English translation.

(iii) For purposes of Article 8 of the Convention, the prior authorisation of the Competent Authority designated under Article 2 would be required.

(iv) The Government of Sri Lanka further declares in terms of Article 23 of the Convention, that it will not execute Letters of Request issued for the purpose of obtaining pre-trial discovery of documents.

(v) The Government of Sri Lanka, in terms of Article 33, excludes in whole, the application of the provisions of Chapter II of the Convention."

In accordance with Article 39 the Convention entered into force between Sri Lanka and

Luxembourg .... 21 April 2001

Slovakia .... 8 May 2001

Denmark .... 21 July 2001

Australia .... 11 September 2001

Germany .... 11 September 2001

Argentina .... 21 September 2001

Estonia .... 12 February 2002

Switzerland .... 12 March 2002

United States of America .... 26 April 2002

Spain ....25 May 2002

Sweden .... 15 July 2002

Israel .... 28 July 2002

Norway .... 29 July 2002

Poland .... 18 February 2003.

3k With the following declarations:

(Translation)

—That, in pursuance of Article 4, para. 4, Letters of Request in the Danish and Norwegian languages will be accepted;

—That, in pursuance of Article 8, members of the judicial personnel of the requesting authority of another Contracting State may be present at the execution of a Letter of Request without prior authorisation;

—That, in pursuance of Article 15, para. 2, a diplomatic officer or consular agent may only take evidence if permission to do so has been granted by the competent Swedish authority;

—That, in pursuance of Article 23, Letters of Request issued for the purpose of obtaining pre-trial discovery of documents as known in Common Law countries will not be executed;

—That documents provided by Sweden which establish that a Letter of Request has been executed will be in the Swedish language only.

Additional declaration of July 11, 1980:

``The Swedish Government understands `Letters of Request issued for the purpose of pre-trial discovery of documents' for the purposes of the foregoing Declaration as including any Letter of Request which requires a person:

a) to state what documents relevant to the proceedings to which the Letter of Request relates are, or have been, in his possession, custody or power; or

b) to produce any documents other than particular documents specified in the Letter of Request, which are likely to be in his possession, custody or power."

By Note dated 6 November 2000 the Minister for Foreign Affairs of Sweden informed the Depositary as follows:

``As from 1 October 2000 the Central Authority, meaning the receiving authority, competent authority and transmitting authority, concerning [this Convention] has been changed from the Ministry for Foreign Affairs to the Ministry of Justice."

The address of the Ministry of Justice is as follows:

Ministry of Justice
Division for Criminal Cases and International Judicial Co-operation
Central Authority
S-103 33 Stockholm
Sweden
tel.: +46 (8) 405 4500 (secretariat)
fax: +46 (8) 405 4676.

3I *Notification pursuant to Article 42 of the Convention*

In accordance with Article 37, paragraph 2, of the above-mentioned Convention *Switzerland* deposited its instrument of ratification with the Ministry of Foreign Affairs of the Kingdom of the Netherlands on 2 November 1994.

The instrument of ratification contains the following reservation and declarations:

<u>Translation</u>

``Re Article 1

1. With regard to Article 1, Switzerland takes the view that the Convention applies exclusively to the Contracting States. Moreover, regarding the conclusions of the Special Commission which met in The Hague in April 1989, Switzerland believes that, whatever the opinion of the Contracting States on the exclusive application of the Convention, priority should in any event be given to the procedures provided for in the Convention regarding requests for the taking of evidence abroad.

Re Articles 2 and 24

2. In accordance with Article 35, first paragraph, Switzerland designates the cantonal authorities listed in the annex as Central Authorities as referred to in Articles 2 and 24 of the Convention. Requests for the taking of evidence or the execution of any other judicial act may also be addressed to the Federal Justice and Police Department in Bern, which will forward them to the appropriate Central Authority.

Re Article 4, second and third paragraphs

3. In accordance with Articles 33 and 35, Switzerland declares, with regard to Article 4, second and third paragraphs, that Letters of Request and any accompanying documents must be in the language of the authority requested to execute them, *i.e.* in German, French or Italian, or accompanied by a translation into one of these languages, depending on the part of Switzerland in which the documents are to be executed. The documents confirming execution will be drawn up in the official language of the requested authority (*cf.* annex).

Re Article 8

4. In accordance with Article 35, second paragraph, Switzerland declares, with regard to Article 8, that members of the judicial personnel of the requesting authority of another Contracting State may be present at the execution of a Letter of Request provided they have obtained prior authorization from the executing authority.

Re Articles 15, 16 and 17

5. In accordance with Article 35, Switzerland declares that evidence may be taken according to Articles 15, 16 and 17 subject to prior authorization by the Federal Justice and Police Department. A request for authorization must be addressed to the Central Authority in the canton where the evidence is to be taken.

Re Article 23

6. In accordance with Article 23, Switzerland declares that Letters of Request issued for the purpose of obtaining pre-trial discovery of documents will not be executed if:

a. the request has no direct and necessary link with the proceedings in question; or

b. a person is required to indicate what documents relating to the case are or were in his/her possession or keeping or at his/her disposal; or

c. a person is required to produce documents other than those mentioned in the request for legal assistance, which are probably in his/her possession or keeping or at his/her disposal; or

d. interests worthy of protection of the concerned persons are endangered".

The list of Central Authorities for the Cantons is attached.

Cantonal Central Authorities (list up to date as per 13 February 2003)

A list of the Central Cantonal Authorities, including their address and phone/fax numbers, can be consulted online at the following address: http://www.ofj.admin.ch/rhf/d/service/recht/Kantonale-Zentralbehoerden.pdf

To determine the Central Authority competent by reason of its location, the database of the Swiss localities and Courts can be consulted online at the following address: http://www.elorge.admin.ch.

3m The former Yugoslavic Republic of Macedonia

Declarations

Articles: 4,8,23

With regard to Article 4, paragraph 3, of the Convention, the Republic of Macedonia declares that

Letters of Request and their annexes which are to be executed under this Convention must be written in the Macedonian language or be accompanied by a translation into the Macedonian language in accordance with the Article 7 of the Constitution of the Republic of Macedonia dated 17 November 1991.

The Government of the Republic of Macedonia declares, in accordance with Article 8, that members of the judicial personnel of the requesting authority of another Contracting State may be present at the execution of a Letter of Request, provided they have obtained prior authorization from courts of first instance of the Republic of Macedonia.

In accordance with Article 23 of the Convention, the Republic of Macedonia declares that it will not execute Letters of Request issued for the purpose of obtaining pre-trial discovery of documents as known in Common Law countries.

4 Turkey made the following reservations and declaration:

1. Reservations

In accordance with Article 33 of the Convention, the Republic of Turkey excludes the application on its territory of the provisions of Article 4, paragraph 2, and of the provisions of Chapter II.

2. Declaration

In terms of Article 35 of the Convention, the Republic of Turkey declares that it will not execute letters of request issued for the purpose of obtaining pre-trial discovery of documents as known in common law countries, as provided for in Article 23.

By Note dated 1 May 2002, the Embassy of Turkey at The Hague informed the depositary of the following:

``(…) has the honour to inform the Ministry of the following reservation and declarations which are to replace the previous reservations and declaration made by Turkey with regard to the Convention on the Taking of Evidence Abroad in Civil or Commercial Matters.

Reservation and Declarations:

In accordance with Article 33 of the Convention on the Taking of Evidence Abroad in Civil or Commercial Matters, the Republic of Turkey reserves its rights not to implement the provisions of Article 4, paragraph 2, on its territory. Letters of request which are to be executed under Chapter I of the Convention, shall be in Turkish or be accompanied by a Turkish translation in compliance with Article 4, paragraphs 1 and 5.

In accordance with Article 35 of the Convention, the Republic of Turkey declares that:

—the Ministry of Justice has been designated as the competent authority empowered to grant permission envisaged in Articles 16 and 17, and

—It will not execute letters of request issued for the purpose of obtaining pre-trial discovery of documents as known in common law countries, as provided for in Article 23.

(…)''.

4a Ukraine made the following reservations and declarations:

—in accordance with Article 2 of the Convention, the Ministry of Justice of Ukraine is the Central

Authority of Ukraine;

—in accordance with Article 4 of the Convention, letters of request to be executed under Chapter 1 of the Convention must be in the Ukrainian language or be accompanied by a translation into the Ukrainian language;

—in accordance with Article 8 of the Convention, members of the judicial personnel of the requesting authority of another Contracting Party may be present at the execution of a letter of request, if the possibility of such presence is confirmed by the consent of the Ministry of Justice of Ukraine;

—in accordance with Article 23 of the Convention, Ukraine will not execute letters of request issued for the purpose of obtaining pre-trial discovery of documents as known in common law countries.

In accordance with Article 33 of the Convention, Ukraine makes the following reservations:

—Ukraine excludes, in whole, the application of the provisions of paragraph 2 of Article 4 of the Convention;

—Ukraine excludes the application within its territory of the provisions of Chapter II of the Convention, except for Articles 15, 20, 21 and 22.

In accordance with Article 39 the Convention entered into force between Ukraine and

Denmark .... *21 July 2001*

Mexico ....*22 July 2001*

Luxembourg .... *29 July 2001*

Bulgaria .... *12 August 2001*

Israel .... *14 August 2001*

Italy .... *18 August 2001*

Slovenia .... *3 September 2001*

the *United Kingdom of Great Britain and* ....*19 October 2001*

Northern Ireland (also for the *Dependent Territories of Anguilla,* the *Cayman Islands,* the *Falkland Islands, Gibraltar,* the *Sovereign Base Areas of Cyprus,* the *Isle of Man,* and the *Bailiwicks of Guernsey and Jersey)*

Germany ....*13 November 2001*

Australia ....*11 March 2002*

Switzerland ....*12 March 2002*

United States of America ....*26 April 2002*

Spain ....25 May 2002

Sweden ....15 July 2002

Norway ....29 July 2002

Argentina ....2 October 2002

Poland ....18 February 2003.

4b *Notification in conformity with Article 42, under a and e, of the Convention:*

In accordance with Article 37, paragraph 2, the United Kingdom of Great Britain and Northern Ireland deposited on July 16, 1976 its instrument of ratification with the Ministry of Foreign Affairs of the Netherlands.

In conformity with Article 38, paragraph 2, the Convention shall enter into force for the United Kingdom on September 14, 1976.

The instrument of ratification mentioned above, contains the following reservation:

``… . in accordance with the provisions of Article 33 the United Kingdom will not accept a Letter of Request in French.''

On the occasion of the deposit of the said instrument of ratification the Government of the United Kingdom of Great Britain and Northern Ireland made the following declarations:

``1. In accordance with Article 8 Her Majesty's Government declare that members of the judicial personnel of the requesting authority may be present at the execution of a Letter of Request.

2. In accordance with Article 18 Her Majesty's Government declare that a diplomatic officer, consular agent or commissioner authorised to take evidence under Articles 15, 16 and 17 may apply to the competent authority designated hereinbefore for appropriate assistance to obtain such evidence by compulsion provided that the Contracting State whose diplomatic officer, consular agent or commissioner makes the application has made a declaration affording reciprocal facilities under Article 18.

3. In accordance with Article 23 Her Majesty's Government declare that the United Kingdom will not execute Letters of Request issued for the purpose of obtaining pre-trial discovery of documents. Her Majesty's Government further declare that Her Majesty's Government understand ``Letters of Request issued for the purpose of obtaining pre-trial discovery of documents'' for the purposes of the foregoing Declaration as including any Letter of Request which requires a person:—

a. to state what documents relevant to the proceedings to which the Letter of Request relates are, or have been, in his possession, custody, or power; or

b. to produce any documents other than particular documents specified in the Letter of Request as being documents appearing to the requested court to be, or to be likely to be, in his possession, custody or powers.

4. In accordance with Article 27 Her Majesty's Government declare that by the law and practice of the United Kingdom the prior permission referred to in Articles 16 and 17 is not required in respect of diplomatic officers, consular agents or commissioners of a Contracting State which

does not require permission to be obtained for the purposes of taking evidence under Articles 16 and 17."

In accordance with Article 35 of the Convention, the Government of the United Kingdom made the following designations:

1. Under Article 2: the Foreign and Commonwealth Office.

2. Under Article 16: the Foreign and Commonwealth Office.

3. Under Article 17: the Foreign and Commonwealth Office.

4. Under Article 18: the Senior Master of the Supreme Court (Queen's Bench Division) for England and Wales; the Crown Agent for Scotland, for Scotland; the Master (Queen's Bench and Appeals). The address of the Master (Queen's Bench and Appeals) is Royal Courts of Justice, Belfast 1.

5. Under Article 24: the Senior Master of the Supreme Court (Queen's Bench Division) in England and Wales; * By a Note of 21 March 2000, the British Government notified that, with effect from 1 April 2000, the designated authority for Scotland will be: ``The Scottish Executive Justice Department, Civil Justice & International Division, Second Floor West, Saint Andrews House, Regent Road, Edinburgh EH1 3DG, tel.: +44.131.244.4826/9, fax: +44.131.244.4848". The address of the Master (Queen's Bench and Appeals) is Royal Courts of Justice, Belfast 1.

Extension to Gibraltar.—

In accordance with Article 40, Paragraph 3, the Convention shall enter into force for Gibraltar on January 20, 1979.

The extension declaration contains the following reservation: ``In accordance with the provisions of Article 4 and Article 33 of the Convention, Gibraltar will not accept a Letter of Request in French."

In accordance with Article 35 of the Convention the following designations have been made;

``(a) Under Articles 16 and 17 of the Convention, the Deputy Governor is designated as the competent authority for Gibraltar;

``(b) Under Article 18 of the Convention, the Registrar of the Supreme Court of Gibraltar is designated as the competent authority;

``(c) Under Article 24 of the Convention, the Deputy Governor is designated as an additional authority competent to receive Letters of Request for execution in Gibraltar."

[For declarations see the original note.]

Notification in conformity with article 42, sub d and e, of the Convention

By a letter dated November 20, 1978, and received at the Ministry of Foreign Affairs of the Kingdom of the Netherlands on November 21, 1978, the Ambassador of the United Kingdom of Great Britain and Northern Ireland at The Hague, referring to the deposit on July 16, 1976 of the instrument of ratification of the above-mentioned Convention by the United Kingdom of Great Britain and Northern Ireland, declared in accordance with article 40 that the Convention shall extend to Gibraltar. The Convention shall enter into force for Gibraltar on January 20, 1979.

The declaration of extension contains the following reservation:

``… . in accordance with the provisions of Article 4 and Article 33 of the Convention, Gibraltar will not accept a Letter of Request in French.''

In accordance with Article 35 of the Convention the following designations have been made:

a) under Articles 16 and 17 of the Convention the Deputy governor is designated as the competent authority for Gibraltar;

b) under Article 18 of the Convention, the Registrar of the Supreme Court of Gibraltar is designated as the competent authority;

c) under Article 24 of the Convention, the Deputy Governor is designated as an additional authority competent to receive Letters of Request for execution in Gibraltar, and the following declarations:

1. In accordance with Article 8, members of the judicial personnel of the requesting authority may be present at the execution of a Letter of Request in Gibraltar.

2. In accordance with Article 18, a diplomatic officer, consular agent or commissioner authorised to take evidence under Articles 15, 16 and 17 of the Convention may apply to the competent authority in Gibraltar designated hereinbefore for appropriate assistance to obtain such evidence by compulsion provided that the Contracting State whose diplomatic officer, consular agent or commissioner makes the application has made a declaration affording reciprocal facilities under Article 18.

3. In accordance with Article 23, Gibraltar will not execute Letters of Request issued for the purpose of obtaining pre-trial discovery of documents. The Government of Gibraltar understands ``Letters of Request issued for the purpose of obtaining pre-trial discovery of documents'' for the purposes of the foregoing Declaration as including any Letter of Request which requires a person:

a) to state what documents relevant to the proceedings to which the Letter of Request relates are, or have been, in his possession, custody or power; or

b) to produce any documents other than particular documents specified in the Letter of Request as being documents appearing to the requested court to be, or likely to be, in his possession, custody or power.

4. In accordance with Article 27, by the law and practice of Gibraltar the prior permission referred to in Articles 16 and 17 of the Convention is not required in respect of diplomatic officers, consular agents or commissioners of a Contracting State which does not require permission to be obtained for the purposes of taking evidence under Articles 16 or 17.

Extension to Sovereign Base Areas of Akrotiri and Dhekalia in the Island of Cyprus.—

``The Convention shall enter into force for the Sovereign Base Areas of Akrotiri and Dhekelia in the Island of Cyprus on August 24, 1979.

The declaration of extension contains the following reservation:

``… in accordance with the provisions of Article 4 and Article 33 of the Convention, the Sovereign

Base Areas will not accept a Letter of Request in French.".

In accordance with Article 35 of the Convention the following designations have been made:

a) under Articles 16 and 17 of the Convention the Chief Officer, Sovereign Base Areas, is designated as the competent authority for the Sovereign Base Areas;

b) under Article 18 of the Convention, the Senior Registrar of the Judge's Court of the Sovereign Base Areas of Akrotiri and Dhekelia is designated as the competent authority;

c) under Article 24 of the Convention, the Senior Registrar of the Judge's Court of the Sovereign Base Areas of Akrotiri and Dhekelia is designated as an additional authority competent to receive Letters of Request for execution in the Sovereign Base Areas.

and the following declarations:

1. In accordance with Article 8, members of the judicial personnel of the requesting authority may be present at the execution of a Letter of Request in the Sovereign Base Areas.

2. In accordance with Article 18, a diplomatic officer, consular agent or commissioner authorised to take evidence under Article 15, 16 and 17 of the Convention may apply to the competent authority in the Sovereign Base Areas designated hereinbefore for appropriate assistance to obtain such evidence by compulsion provided that the Contracting State whose diplomatic officer, consular agent or commissioner makes the application has made a declaration affording reciprocal facilities under Article 18.

3. In accordance with Article 23, the Sovereign Base Areas will not execute Letters of Request issued for the purpose of obtaining pre-trial discovery of documents. The Administration of the Sovereign Base Areas understands ``Letters of Request issued for the purpose of obtaining pre-trial discovery of documents'' for the purposes of the foregoing Declaration as including any Letter of Request which requires a person:

a) to state what documents relevant to the proceedings to which the Letter of Request relates are, or have been, in his possession, custody or power; or

b) to produce any documents other than particular documents specified in the Letter of Request as being documents appearing to the requested court to be, or likely to be, in his possession, custody or power.

4. In accordance with Article 27, by the law and practice of the Sovereign Base Areas the prior permission referred to in Articles 16 and 17 of the Convention is not required in respect of diplomatic officers, consular agents or commissioners of a Contracting State which does not require permission to be obtained for the purposes of taking evidence under Articles 16 or 17."

Extension to Falkland Islands and Dependencies.—

Notification in conformity with Article 42, sub d and e, of the Convention

By a letter dated November 23, 1979, and received at the Ministry of Foreign Affairs of the Kingdom of the Netherlands on November 26, 1979, the Ambassador of the United Kingdom of Great Britain and Northern Ireland at The Hague, referring to the deposit on July 16, 1976 of the instrument of ratification of the above-mentioned Convention by the United Kingdom of Great Britain and Northern Ireland, declared in accordance with Article 40 that the Convention shall extend to the Falkland Islands and Dependencies.

The Convention shall enter into force for the Falkland Islands and Dependencies on January 25, 1980.

The declaration of extension contains the following reservation:

``… . in accordance with the provisions of Article 4 and Article 33 of the Convention, the Falkland Islands and Dependencies will not accept a Letter of Request in French.'' In accordance with Article 35 of the Convention the following designations have been made:

a) under Articles 16, 17 and 18 of the Convention the Judge of the Supreme Court of the Falkland Islands, is designated as the competent authority for the Falkland Islands and Dependencies;

b) under Article 24 of the Convention, the Governor of the Falkland Islands and its dependencies is designated as an additional authority competent to receive Letters of Request for execution in the Falkland Islands and Dependencies.

and the following declarations:

1. In accordance with Article 8, members of the judicial personnel of the requesting authority may be present at the execution of a Letter of Request in the Falkland Islands and Dependencies.

2. In accordance with Article 18, a diplomatic officer, consular agent or commissioner authorised to take evidence under Article 15, 16, and 17 of the Convention may apply to the competent authority in the Falkland Islands and Dependencies designated hereinbefore for appropriate assistance to obtain such evidence by compulsion provided that the Contracting State whose diplomatic officer, consular agent or commissioner makes the application has made a declaration affording reciprocal facilities under Article 18.

3. In accordance with Article 23, the Falkland Islands and Dependencies will not execute Letters of Request issued for the purpose of obtaining pre-trial discovery of documents.

The Governor of the Falkland Islands and its dependencies understands ``Letters of Request issued for the purposes of obtaining pre-trial discovery of documents'' for the purposes of the foregoing declaration as including any Letter of Request which requires a person:

a) to state what documents relevant to the proceedings to which the Letter of Request relates are, or have been, in his possession, custody or power; or

b) to produce any documents other than particular documents specified in the Letter of Request as being documents appearing to the requested court to be, or likely to be, in his possession, custody or power.

4. In accordance with Article 27, by the law and practice of the Falkland Islands and Dependencies the prior permission referred to in Articles 16 and 17 of the Convention is not required in respect of diplomatic officers, consular agents or commissioners of a Contracting State which does not require permission to be obtained for the purposes of taking evidence under Articles 16 or 17.

Extension to Isle of Man.—

Notification is conformity with article 42, sub d and e, of the Convention

By a letter dated April 16, 1980, and received at the Ministry of Foreign Affairs of the Kingdom of the Netherlands on April 16, 1980, the Ambassador of the United Kingdom of Great Britain and Northern Ireland at The Hague, referring to the deposit on July 16, 1976 of the instrument of ratification of the above-mentioned Convention by the United Kingdom of Great Britain and Northern Ireland, declared in accordance with article 40 that the Convention shall extend to the Isle of Man.

The Convention shall enter into force for the Isle of Man on June 15, 1980.

The declaration of extension contains the following reservation:

``… . in accordance with the provisions of Article 4 and Article 33 of the Convention, the Isle of Man will not accept a Letter of Request in French.''

In accordance with Article 35 of the Convention the following designations have been made:

a) under Articles 16, 17 and 18 of the Convention Her Majesty's First Deemster and Clerk of the Rolls is designated as the competent authority for the Isle of Man;

b) under Article 24 of the Convention, Her Majesty's First Deemster and Clerk of the Rolls is designated as an additional authority competent to receive Letters of Request for execution in the Isle of Man.

and the following declarations:

1. In accordance with Article 8, members of the judicial personnel of the requesting authority may be present at the execution of a Letter of Request in the Isle of Man.

2. In accordance with Article 18, a diplomatic officer, consular agent or commissioner authorised to take evidence under Article 15, 16 and 17 of the Convention may apply to the competent authority in the Isle of Man designated hereinbefore for appropriate assistance to obtain such evidence by compulsion provided that the Contracting State whose diplomatic officer, consul-ar agent or commissioner makes the application has made a declaration affording reciprocal facilities under Article 18.

3. In accordance with Article 23, the Isle of Man will not execute Letters of Request issued for the purpose of obtaining pre-trial discovery of documents.

The Government of the Isle of Man understands ``Letters of Request issued for the purpose of obtaining pre-trial discovery of documents'' for the purposes of the foregoing declaration as including any Letter of Request which requires a person:

a) to state what documents relevant to the proceedings to which the Letter of Request relates are, or have been, in his possession, custody or power; or

b) to produce any documents other than particular documents specified in the Letter of Request as being documents appearing to the requested court to be, or likely to be, in his possession, custody or power.

4. In accordance with Article 27, by the law and practice of the Isle of Man the prior permission referred to in Articles 16 and 17 of the Convention is not required in respect of diplomatic officers, consular agents or commissioners of a Contracting State which does not require permission to be obtained for the purposes of taking evidence under Articles 16 or 17.

Extension to Cayman Islands.—

Notification in conformity with Article 42, sub d and e, of the Convention

By letter dated 16 September 1980 and received at the Ministry of Foreign Affairs of the Kingdom of the Netherlands on that same date, the Ambassador of the United Kingdom of Great Britain and Northern Ireland at The Hague referring to the deposit on 16 July 1976 of the instrument of ratification of the above-mentioned Convention by the United Kingdom of Great Britain and Northern Ireland declared in accordance with Article 40 that the Convention shall extend to the Cayman Islands.

The Convention will enter into force for the Cayman Islands on 15 November 1980.

The declaration of extension contains the following reservation:

``… in accordance with the provisions of Article 4 and Article 33 of the Convention, … the Cayman Islands will not accept a Letter of Request in French''.

In accordance with Article 35 of the Convention the following designations have been made:

a) Under Articles 16 and 17 of the Convention, the Attorney General is designated as the competent authority for the Cayman Islands;

b) Under Article 18 of the Convention, the Clerk of the Grand Court is designated as the competent authority;

c) Under Article 24 of the Convention, His Excellency the Governor is designated as an additional authority competent to receive Letters of Request for execution in the Cayman Islands.

and the following declarations:

1. In accordance with Article 8, members of the judicial personnel of the requesting authority may be present at the execution of a Letter of Request in the Cayman Islands.

2. In accordance with Article 18, a diplomatic officer, consular agent or commissioner authorised to take evidence under Article 15, 16 and 17 of the Convention may apply to the competent authority in the Cayman Islands designated hereinbefore for appropriate assistance to obtain such evidence by compulsion provided that the Contracting State whose diplomatic officer, consular agent or commissioner makes the application has made a declaration affording reciprocal facilities under Article 18.

3. In accordance with Article 23, the Cayman Islands will not execute Letters of Request issued for the purpose of obtaining pre-trial discovery of documents. The Government of the Cayman Islands understand ``Letters of Request issued for the purpose of obtaining pre-trial discovery of documents'' for the purposes of the foregoing declaration as including any Letter of Request which requires a person:

a) to state what documents relevant to the proceedings to which the Letter of Request relates are, or have been, in his possession, custody or power; or

b) to produce any documents other than particular documents specified in the Letter of Request as being documents appearing to the requested court to be, or likely to be, in his possession, custody or power.

4. In accordance with Article 27, by the law and practice of the Cayman Islands the prior permission referred to in Article 16 and 17 of the Convention is not required in respect of diplomatic officers, consular agents or commissioners of a Contracting State which does not require permission to be obtained for the purposes of taking evidence under Articles 16 or 17.

Extension to Guernsey.—

Notification in accordance with Article 42, sub d and e, of the Convention

With reference to the deposit of its instrument of ratification of the above-mentioned Convention on 16 July 1985 the Government of the United Kingdom of Great Britain and Northern Ireland declared by letter of 13 November 1985 which was received by the Ministry of Foreign Affairs of the Kingdom of the Netherlands on 19 November 1985, in accordance with Article 40, second paragraph, that the Convention shall extend to Guernsey.

In accordance with Article 35 the Government of the United Kingdom furthermore declared that:

``(a) under Articles 8 and 25 of the Convention, the Bailiff, Deputy Bailiff, any Jurat of the Royal Court of Guernsey, the Chairman or a Jurat of the Court of Alderney and the Seneschal (or Deputy) of the Court of the Seneschal of Sark are designated as the competent authorities for Guernsey;

(b) under Article 23 of the Convention, Guernsey will not execute Letters of Request issued for the purpose of obtaining pre-trial discovery of documents.''.

In accordance with Article 40, third paragraph, the Convention will enter into force for Guernsey on 18 January 1986.

Extension to Anguilla.—

Notification pursuant to Article 42, paragraph c, d and e, of the Convention

In accordance with Article 40, paragraph 2, the Kingdom of Great Britain and Northern Ireland declared, by a Letter dated 1 July 1986, received at the Ministry of Foreign Affairs on 3 July 1986, that the present Convention shall extend to Anguilla.

In accordance with Article 35, of the Convention, the following designations have been made:

``a. Under Articles 16, 17 and 18 of the Convention the Registrar of the East Caribbean Supreme Court is designated as the competent authority for Anguilla.

b. Under Article 24 of the Convention, the Governor of Anguilla is designated as an additional authority competent to receive Letters of Request for execution in Anguilla.''

and the following declarations:

``.................. in accordance with the provisions of Articles 4 and 33 of the Convention, Anguilla will not accept a Letter of Request in French.

In accordance with Article 8, members of the juridical personnel of the requesting authority may be present at the execution of a Letter of Request in Anguilla.

In accordance with Article 18, a diplomatic officer, consular agent or commissioner authorized to take evidence under Articles 15, 16 and 17 of the Convention may apply to the competent authority in Anguilla designated above for appropriate assistance to obtain such evidence by compulsion provided that the contracting State whose diplomatic officer, consular agent or commissioner makes (sic) the application has made a declaration affording reciprocal facilities under Article 18.

In accordance with Article 23, Anguilla will not execute Letters of Request issued for the purpose of obtaining pre-trial discovery of documents. Anguilla understands ``Letters of Request issued for the purpose of obtaining pre-trial discovery of documents'' for the purposes of the foregoing declaration as including any Letter of Request which requires a person:

i. to state what documents relevant to the proceedings to which the Letter of Request relates are, or have been, in his possession, custody or power; or

ii. to produce any documents other than particular documents specified in the Letter of Request as being documents appearing to the requested court to be, or likely to be, in his possession, custody or power.

In accordance with Article 27, by the law and practice of Anguilla the prior permission referred to in Articles 16 and 17 of the Convention is not required in respect of diplomatic officers, consular agents or commissioners of a Contracting State which does not require permission to be obtained for the purposes of taking evidence under Articles 16 or 17.''

In accordance with Article 40, the Convention entered into force for Anguilla on 1 September 1986.

By a letter dated 29 December 1986, and received at the Ministry of Foreign Affairs of the Kingdom of the Netherlands on 6 January 1987, the United Kingdom of Great Britain and Northern Ireland declared in accordance with Article 40 that the Convention shall extend to Jersey.

Entry into force for *Jersey* on *7 March 1987.*

The declaration of extension contains the following designations:

``*(a)* under Articles 16, 17 and 18 of the Convention the Royal Court is designated as the competent authority for Jersey;

(b) under Articles 24 and 25 of the Convention, the Royal Court is designated as an additional authority competent to receive Letters of Request for execution in Jersey.'';

and the following declarations:

``1. In accordance with Article 8, members of the judicial personnel of the requesting authority may be present at the execution of a Letter of Request in Jersey only with the prior authorisation of the Royal Court.

2. In accordance with Article 18, a diplomatic officer, consular agent or commissioner authorized to take evidence under Articles 15, 16 and 17 of the Convention may apply to the competent authority in Jersey designated hereinbefore for appropriate assistance to obtain such evidence by compulsion provided that the Contracting State whose diplomatic officer, consular agent or commissioner makes the application has made a declaration affording reciprocal facilities under Article 18.

3. In accordance with Article 23, Jersey will not execute Letters of Request issued for the purpose of obtaining pre-trial discovery of documents.

The Government of Jersey understands ``Letters of Request issued for the purpose of obtaining pre-trial discovery of documents'' for the purposes of the foregoing declaration as including any Letter of Request which requires a person:

(i) to state what documents relevant to the proceedings to which the Letter of Request relates are,

or have been, in his possession, custody or power; or

(ii) to produce any documents other than particular documents specified in the Letter of Request as being documents appearing to the requested court to be or likely to be, in his possession, custody or power."

N.B. By a Note dated 9 February 1995 and received on 21 February 1995, the Embassy of the United Kingdom of Great Britain and Northern Ireland informed the Ministry of Foreign Affairs of the Kingdom of the Netherlands that, unless otherwise stated, in future the acceptance by the United Kingdom of the accession of any State to the Convention shall also be acceptance in respect of all the territories for the international relations of which the United Kingdom is responsible and to which the application of the Convention has been extended.

4c With the following designations and declarations:

The United States Department of Justice, Washington, D.C., 20530, is designated as the Central Authority referred to in Article 2 of the Convention.

Under paragraph 2 of Article 4 of the United States has agreed to accept a Letter of Request in or translated into French. The United States wishes to point out that owing to the necessity of translating such documents into English it will take the Central Authority longer to comply with a Letter of Request in or translated into French than with a similar request received in English.

In accordance with paragraph 3 of Article 4 the United States declares that it will also accept Letters of Request in Spanish for execution in the Commonwealth of Puerto Rico.

In accordance with Article 8 the United States declares that subject to prior authorization members of the judicial personnel of the requesting authority of another Contracting State may be present at the execution of a Letter of Request. The Department of Justice is the competent authority for the purposes of this Article.

The United States declares that evidence may be taken in the United States under Articles 16 and 17 without its prior permission.

In accordance with Article 18 the United States declares that a diplomatic or consular officer or a commissioner authorized to take evidence under Articles 15, 16 or 17 may apply for appropriate assistance to obtain the evidence by compulsion. The competent authority for the purposes of Article 18 is the United States district court of the district in which a person resides or is found. Such court may order him to give his testimony or statement or to produce a document or thing for use in a proceeding in a foreign tribunal. The order may direct that the testimony or statement be given, or the document or other thing be produced, before a person appointed by the court.

In accordance with Article 40 the United States declares that the Convention shall extend to Guam, Puerto Rico and the Virgin Islands.

In accordance with the provisions of Article 39 of the Convention, the United States declared its acceptance of the accessions by Argentina, Australia, Barbados, China, Cyprus, Estonia, Latvia, Mexico, Monaco, Poland, Singapore, and Venezuela.

5 In accordance with Article 2 [of the Convention] Venezuela designated the following Central Authority: el ministerio de Relaciones Exteriores.

In accordance with Article 39, paragraph 5, the Convention will enter into force between Venezuela and

Cyprus ....29 April 1994

*United Kingdom of Great Britain and Northern Ireland ....15 August 1994**

Sweden ....3 September 1994

Germany ....21 October 1994

Denmark ....27 November 1994

Spain ....6 February 1995

Finland ....11 March 1995

the *United States of America ....24 October 1995*

Italy ....16 January 1996

Australia ....20 January 1996

Israel ....19 March 1996

Slovakia ....20 May 1996

Mexico ....26 July 1997

Argentina ....21 September 1997

the *Czech Republic ....13 January 1998*

Switzerland ....11 July 1998

Singapore ....6 February 1999

Portugal ....8 June 2001

* The Permanent Bureau of the Hague Conference on private international law presents its compliments to the Diplomatic Missions of the Member States and to the National Organs and has the honour to inform them that, by a Note dated 9 February 1995 and received on 21 February 1995, the Embassy of the United Kingdom of Great Britain and Northern Ireland informed the Ministry of Foreign Affairs of the Kingdom of the Netherlands that the acceptance of Venezuela's accession to the Convention, set out in the Embassy's Note of 14 June 1994 (see L.c. A No 51/L.c. ON No 47 dated 26 July 1994) was also in respect of the territories for the international relations of which the United Kingdom is responsible and to which the application of the Convention has been extended.

The Embassy also informed that, unless otherwise stated, in future the acceptance by the United Kingdom of the accession of any State to the Convention shall also be acceptance in respect of all the territories for the international relations of which the United Kingdom is responsible and to which the application of the Convention has been extended.

[5] The Permanent Bureau of the Hague Conference on private international law presents its compliments to the Diplomatic Missions of the Member States and to the National Organs and has the honour to inform them that, by instrument deposited on 1 November 1993 with the Ministry of Foreign Affairs of the Kingdom of the Netherlands,

acceded to the above-mentioned Convention.

The instrument of accession contains the following reservations and declaration:

Translation

1.—With regard to Article 4, paragraph 2:

``The Republic of Venezuela will accept Letters of Request and documents and other items annexed thereto only when these are properly translated into the Spanish language''.

2.—With regard to Chapter II:

``The Republic of Venezuela will not allow commissioners as provided for in Chapter II of this Convention to act in obtaining evidence''.

3.—With regard to Article 23:

``The Republic of Venezuela declares that it will only execute Letters of Request dealing with the procedure known in *Common Law* countries as *pre-trial discovery of documents* when the following conditions apply:

a) that proceedings have been instituted;

b) that the documents requested to be exhibited or transcribed shall be reasonably identified as regards their date, contents or other relevant information;

c) that any facts or circumstances giving the plaintiff reasonable cause to believe that the documents asked for are known to the person requested to produce them so that they are or were in the possession or under the control or in the custody of that person, shall be specified;

d) that the connection between the evidence or information sought and the pending litigation be made quite clear''.

In accordance with Article 39, paragraph 3, the Convention will enter into force for *Venezuela* on *31 December 1993*.

According to Article 39, paragraph 4, of the Convention the accession will have effect only as regards the relations between *Venezuela* and such *Contracting States* as will have declared their acceptance of the accession. Such declarations shall be deposited at the Ministry of Foreign Affairs of the Kingdom of the Netherlands.

MODEL FOR LETTERS OR REQUEST RECOMMENDED FOR USE IN APPLYING THE HAGUE CONVENTION OF 18 MARCH 1970 ON THE TAKING OF EVIDENCE ABROAD IN CIVIL OR COMMERCIAL MATTERS

REQUEST FOR INTERNATIONAL JUDICIAL ASSISTANCE PURSUANT TO THE HAGUE CONVENTION OF 18 MARCH 1970 ON THE TAKING OF EVIDENCE IN CIVIL OR COMMERCIAL MATTERS

N.B. Under the first paragraph of article 4, the Letter of Request shall be in the language of the authority requested to execute it or be accompanied by a translation into that language. However, the provisions of the second and third paragraphs may permit use of other languages.

In order to avoid confusion, please spell out the name of the month in each date.

I *(Items to be included in all Letters of Request.)*

1 Sender

—*(identity and address)*—

____

____

2 Central Authority of the Requested State

—*(identity and address)*—

____

____

3 Person to whom the executed request is to be returned

—*(identity and address)*—

____

____

II *(Items to be included in all Letters of Request.)*

4 In conformity with article 3 of the Convention, the undersigned applicant has the honour to submit the following request:

5 *a* Requesting judicial authority (article 3, *a*)

—*(identity and address)*—

____

____

b To the competent authority of (article 3, *a*)

—*(the requested State)*—

____

____

6 Names and addresses of the parties and their representatives (article 3, *b*)

a Plaintiff

____

____

b Defendant

c Other parties

7 Nature and purpose of the proceedings and summary of the facts (article 3, *c*)

8 Evidence to be obtained or other judicial act to be performed (article 3, *d*)

III *(Items to be completed where applicable.)*

9 Identity and address of any person to be examined (article 3, *e*)

10 Questions to be put to the persons to be examined or statement of the subject-matter about which they are to be examined (article 3, *f*)

—(or see attached list)—

11 Documents or other property to be inspected (article 3, *g*)

—(specify whether it is to be produced, copied, valued, etc.)—

12 Any requirement that the evidence be given on oath or affirmation and any special form to be used (article 3, *h*)

—(In the event that the evidence cannot be taken in the manner requested, specify whether it is to be taken in such manner as provided by local law for the formal taking of evidence.)—

13 Special methods or procedure to be followed (articles 3, *i*) and 9)

14 Request for notification of the time and place for the execution of the Request and identity and address of any person to be notified (article 7)

15 Request for attendance of participation of judicial personnel of the requesting authority at the execution of the Letter of Request

16 Specification of privilege or duty to refuse to give evidence under the law of the State of origin (article 11, *b*)

17 The fees and costs incurred which are reimbursable under the second paragraph of article 14 or under article 26 of the Convention will be borne by

—(*identity and address*)—

IV (*Items to be included in all Letters of Request.*)

18 Date of request

19 Signature and seal of the requesting authority

Endnotes

1 *Notification pursuant to Article 42 of the Convention*

In conformity with Article 39, paragraph 2, the instrument of accession by the Argentine Republic to the above-mentioned Convention was deposited with the Ministry of Foreign Affairs of the Kingdom of the Netherlands on 8 May 1987.

The instrument of accession of the Argentine Republic contains the following reservation, referred to in Article 33, first paragraph, of the Convention:

``La República Argentina excluye totalmente la applicación de las disposiciones del párrafo 2° del artículo *4* ^{o}, así como las del capítulo II.''

(Translation)

The Argentine Republic totally excludes the application of the provisions of paragraph 2 of Article *4*, as well as those of Chapter II.;

and the following declaration regarding Article 23 of the Convention:

``La República Argentina no cumplirá los exhortos que tengan por objeto un procedimiento conocido en los Estados del ``Common Law'', por el nombre de ``pre-trial discovery of documents (exhibicion de documentos antes del juicio).''

(Translation)

The Argentine Republic will not execute Letters of Request issued for the purpose of obtaining pre-trial discovery of documents as known in the Common Law Countries.

Furthermore, the instrument contains the declaration annexed to this notification.

In accordance with paragraph 3 of Article 39, the Convention will enter into force for the Argentine Republic on 7 July 1987.

According to Article 39, paragraph 4 of the Convention, the accession will have effect only as regards the relations between the Argentine Republic and such Contracting States as will have declared their acceptance of the accession. Such declarations shall be deposited at the Ministry of Foreign Affairs of the Kingdom of the Netherlands.

The Hague 20, May 1987

``The Argentine Republic excludes the extension of the application of the Convention on the taking of evidence abroad in civil or commercial matters, adopted at The Hague on March 18, 1970, to the Malvinas, South Georgia, and South Sandwich Islands, which was notified by the United Kingdom of Great Britain and Northern Ireland to the Ministry of Foreign Affairs of the Kingdom of the Netherlands on November 23, 1979, and reaffirms its rights of sovereignty over the Malvinas, South Georgia and South Sandwich Islands, which form an integral part of its national territory."

The General Assembly of the United Nations has adopted resolutions 2065 (XX), 3160 (XXVIII), 31/49, 37/9, 38/12, 39/6, 40/21 and 41/40 in which the existence of a dispute of sovereignty is recognized in reference to the Malvinas Islands, and it urges the Argentine Republic and the United Kingdom of Great Britain and Northern Ireland to maintain negotiations with the purpose of finding a peaceful and definitive solution to the dispute as soon as possible, with the good offices of the Secretary General of the United Nations, who will inform the General Assembly of the progress that has been accomplished.

In like manner, ``the Argentine Republic excludes the June 19, 1986 approval formulated by the United Kingdom of Great Britain and Northern Ireland for the Malvinas, South Georgia and South Sandwich Islands with respect to the accession of the Principality of Monaco to the aforementioned Convention." (Translation provided by the Division of Language Services, Department of State)

In accordance with Article 35 of the Convention the Government of the Argentine Republic designated the following competent authority:

Ministerio de Relaciones Exteriores y Culto

Reconquista 1088

Buenos Aires.

In accordance with Article 39 the Convention will enter into force between Argentina and

the *United States of America .... January 30, 1988*

Finland .... 6 April 1990

Sweden .... 20 November 1987

Israel .... 23 November 1987

Denmark .... 7 December 1987

France .... 11 January 1988

Norway .... 18 January 1988

United Kingdom of Great Britain and

Northern Ireland .... 11 April 1988

also for Anguilla, the Cayman

Islands, the Falklands,

Gibraltar, Guernsey, Hong Kong,*

the Isle of Man, South Georgia

and South Sandwich Islands and

the Sovereign Base Areas of

Akrotiri and Dhekelia in the

islands of Cyprus

Czechoslovakia .... 11 April 1988

Federal Republic of Germany .... 21 June 1988

Jersey .... 9 September 1988

Spain .... 28 August 1994

Switzerland .... 13 January 1995

Australia .... 21 July 1997

Estonia .... 21 September 1997

Latvia .... 21 September 1997

Poland .... 21 September 1997

Venezuela .... 21 September 1997

Singapore .... 6 February 1999

the *People's Republic of China .... 6 March 2000*

South Africa .... 6 March 2000

Portugal .... 8 June 2001

Bulgaria .... 21 September 2001

Lithuania .... 21 September 2001

Slovenia .... 21 September 2001

Sri Lanka .... 21 September 2001

Belarus .... 28 October 2002

Russian Federation .... 28 October 2002

Ukraine .... 28 October 2002

* See *infra,* under ``CHINA, Hong Kong Special Administrative Region''.

On 11 April 1988 the Argentine Republic made the following declaration:

``With respect to the acceptance by the United Kingdom of Great Britain and Northern Ireland of the adhesion of the Argentine Republic to the Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters, declared by Note dated February 12, 1988, the Argentine Government rejects the pretended acceptance of said Convention formulated for the Malvinas Islands, South Georgias Islands and South Sandwich Islands and reaffirms the sovereignty of the Argentine Republic over said islands, that are an integral part of the national territory.''

The Government of the United Kingdom of Great Britain and Northern Ireland referring to the above declaration communicated the following on 6 July 1988:

``The Government of the United Kingdom of Great Britain and Northern Ireland have no doubt as to the United Kingdom's sovereignty over the Falkland Islands or South Georgia and the South Sandwich Islands and are fully entitled to include those territories within the scope of application of international agreements to which they are a party. The United Kingdom, therefore, cannot accept the Argentine declaration which purports to question the right of the United Kingdom to extend the Convention to the Falkland Islands or South Georgia and the South Sandwich Islands; nor can it accept that the Government of the Argentine Republic has any right in this regard.''

1a *Notification pursuant to Article 42 of the Convention.*— In conformity with Article 39, paragraph 2, the instrument of accession by Australia to the above-mentioned Convention was deposited with the Ministry of Foreign Affairs of the Kingdom of the Netherlands on 23 October 1992.

The instrument of accession of Australia contains the following reservation and declarations:

Pursuant to Article 33, it excludes the operation of paragraph 2 of Article 4.

The Government of Australia hereby declares, for and on behalf of Australia, that:

—pursuant to Article 2, the Secretary to the Attorney-General's Department of the Commonwealth of Australia will be its Central Authority;

—pursuant to Article 8, members of the judicial personnel of the requesting authority of another Contracting State may be present at the execution of a Letter of Request, subject to prior authorisation by the judicial executing the Letter of Request;

—pursuant to Article 15, evidence may be taken by a diplomatic officer or consular agent only if permission to that effect is given upon application to the Secretary of the Attorney-General's Department of the Commonwealth of Australia;

—pursuant to Article 16, the Secretary to the Attorney-General's Department of the Commonwealth of Australia will be its competent authority for the purposes of that Article and is empowered to specify conditions with respect to any permission given under that Article; and

—pursuant to Article 23, it will not execute Letters of Request issued for the purpose of obtaining pre-trial discovery of documents as known in Common Law Countries.

—pursuant to Article 24, it designates the Registrars of the State and Territory Supreme Courts as additional authorities.

—pursuant to Article 40, the Convention extends to all the territories for the international relations of which it is responsible.

In accordance with paragraph 3 of Article 39, the Convention will enter into force for Australia on 22 December 1992.

According to Article 39, paragraph 4, of the Convention the accession will have effect only as regards the relations between Australia and such Contracting States as will have declared their acceptance of the accession. Such declarations shall be deposited at the Ministry of Foreign Affairs of the Kingdom of the Netherlands.

In accordance with Article 39 the Convention will enter into force between Australia and

the *United States of America .... 22 August 1993*

France .... 27 March 1993

Denmark .... 12 April 1993

the *United Kingdom of Great Britain and .... 20 April 1993*

Northern Ireland (also for the *Bailiwick*
of Guernsey, the *Bailiwick of Jersey,*
the *Isle of Man, Anguilla, Cayman Islands,*
*Falkland Islands, Gibraltar, Hong Kong** and
South Georgia and the *South Sandwich Islands)*

Cyprus .... 19 June 1993

the *Federal Republic of Germany .... 3 July 1993*

Luxembourg .... 9 February 1993

the *Kingdom of the Netherlands .... 14 February 1993*

(for the Kingdom in Europe)

Aruba .... 19 July 1993

Finland .... 23 July 1993

Sweden .... 1 March 1994

Norway .... 18 June 1994

Spain .... 28 August 1994

Italy .... 16 January 1996

Slovak Republic .... 20 May 1996

Czech Republic .... 31 May 1997

Argentina .... 21 July 1997

Singapore .... 25 July 1997

Mexico .... 26 July 1997

Barbados .... 21 October 1997

South Africa .... 17 January 1998

Bulgaria .... 7 May 2001

Portugal .... 8 June 2001

Lithuania .... 11 September 2001

Slovenia .... 11 September 2001

Sri Lanka .... 11 September 2001

Ukraine .... 11 March 2002

Russian Federation .... 11 March 2002

Belarus .... 21 July 2002

* See *infra,* under ``CHINA, Hong Kong Special Administrative Region''.

1b *Notification in conformity with Article 42, sub e, of the Convention.*—By a Letter of 2 September 1982, received at The Ministry of Foreign Affairs of the Kingdom of the Netherlands on 29 September 1982, Barbados informed the Depositary in accordance with Article 35 of the abovementioned Convention of the following: ``… . for the purpose of the said Convention, the Central Authority is the Registrar of the Supreme Court of Barbados.''

In accordance with Article 39 the Convention will enter into force between Barbados and

Spain .... 28 August 1994

Switzerland .... 13 January 1995

the *Kingdom of the Netherlands (for the Kingdom in Europe) .... 20 June 1981*

(for Aruba) .... 27 July 1986

the *United States of America .... 20 June 1981*

Luxembourg .... 4 August 1981

Israel .... 19 September 1981

the *United Kingdom of Great Britain and .... 21 September 1981*

Northern Ireland (also for the
Cayman Islands, the Falkland Islands and
Dependencies, Gibraltar, Hong Kong, the*
Isle of Man and the Sovereign Base Areas of
Akrotiri and Dhekelia in the Island of Cyprus)

Czechoslovakia .... 6 October 1981

Finland .... 9 October 1981

Sweden .... 29 November 1981

France .... *27 December 1981*

Denmark .... *8 February 1982*

the *Federal Republic of Germany* .... *5 April 1982*

Italy .... *24 April 1983*

Portugal .... *17 February 1984*

Norway .... *15 December 1986*

Spain .... *28 August 1994*

Switzerland .... *13 January 1995*

Australia .... *21 October 1997*

Singapore .... *6 February 1999*

*See *supra,* under ``CHINA, Hong Kong Special Administrative Region''.

1c

BELARUS (accession) 6 October 2001
7 August
2001

The Republic of Belarus made the following reservation and declarations:

``…

The Republic of Belarus excludes, in whole, the application of the provisions of the paragraph 2 of the Article 4 of the Convention.''

and declarations:

``1. In accordance with the Article 8 of the Convention the Republic of Belarus declares that the members of the judicial personnel of another Contracting State may be present at the execution of a letter of Request in civil or commercial matters with prior authorisation by the competent authorities of the Republic of Belarus.

The Republic of Belarus designates the Supreme Court of the Republic of Belarus and the Supreme Economic Court of the Republic of Belarus in accordance with their competence as the authorities for the purposes of this Article of the Convention.

2. In accordance with Articles 16 and 17 of the Convention of the Republic of Belarus declares that a diplomatic officer or consular agent and a person duly appointed as a commissioner may take the evidence in the territory of the Republic of Belarus in civil and commercial matters without compulsion with prior permission by the competent authorities and on the conditions which competent authorities have specified.

The Republic of Belarus designates the Supreme Court of the Republic of Belarus and the Supreme Economic Court of the Republic of Belarus in accordance with their competence as the authorities for the purposes of this Article of the Convention.

3. In accordance with Article 18 of the Convention the Republic of Belarus declares that a diplomatic officer or consular agent and commissioner authorized to take evidence under Articles 15, 16 or 17 may apply to the competent authority of the Republic of Belarus for appropriate assistance to obtain the evidence in civil and commercial matters by compulsion.

The Republic of Belarus designates the Supreme Court of the Republic of Belarus and the Supreme Economic Court of the Republic of Belarus in accordance with their competence as the authorities for the purposes of this Article of the Convention."

In accordance with Article 39 the Convention will enter into force between Belarus and

Switzerland .... 12 March 2002

Germany .... 7 April 2002

United States of America .... 26 April 2002

United Kingdom of Great Britain and .... 21 May 2002

Northern Ireland (also for the Dependent

Territories of Anguilla, the Cayman Islands,
the Falkland Islands, Gibraltar, the Sovereign
Base Areas of Cyprus, the Isle of Man, and
the Bailiwicks of Guernsey and Jersey)

Sweden .... 15 July 2002

Australia .... 21 July 2002

Israel .... 28 July 2002

Norway .... 29 July 2002

Portugal .... 2 August 2002

Argentina .... 28 October 2002

Finland .... 4 February 2003

Spain .... 15 February 2003

Poland .... 18 February 2003

Denmark .... 12 April 2003.

1d **_Bosnia and Herzegovina_**

Acceptances of accessions

Convention of 18 March 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters

Accession accepted by	**Date of acceptance**	**Entry into force**
Poland	22-VIII-2008	21-X-2008
Luxembourg	10-IX-2008	9-XI-2008
Israel	23-X-2008	22-XII-2008
Bulgaria	27-X-2008	26-XII-2008
Greece	12-XII-2008	10-II-2009
Monaco	5-I-2009	6-III-2009
Latvia	16-I-2009	17-III-2009
Sweden	21-I-2009	22-III-2009
Slovakia	22-I-2009	23-III-2009
China, People's Republic of	26-I-2009	27-III-2009
Norway	20-II-2009	21-IV-2009
Denmark	20-V-2009	19-VII-2009

Entry into force between Bosnia and Herzegovina and	**Entry into force**
Poland	21-X-2008
Luxembourg	9-XI-2008
Israel	22-XII-2008
Bulgaria	26-XII-2008
Greece	10-II-2009
Monaco	6-III-2009
Latvia	17-III-2009
Sweden	22-III-2009
Slovakia	23-III-2009
China, People's Republic of	27-III-2009
Norway	21-IV-2009
Denmark	19-VII-2009

China, People's Republic of—Entry into force

(including Hong Kong SAR & Macao SAR)

Bosnia and Herzegovina—Central Authority (Art. 2)

The Ministry of Justice of Bosnia and Herzegovina.

1e The Republic of Bulgaria made the following reservation and declarations:

``Reservation on Article 33

The Republic of Bulgaria excludes the application within its territory of the provisions of:

—Article 4, paragraph 2;

—Articles 16, 17, 18 and 19 of Chapter II of the Convention.

Declaration on Articles 2 and 8

The Republic of Bulgaria designates as Central Authority the Ministry of Justice and European Legal Integration, which is also the competent authority under Article 8.

Declaration on Article 8

Representatives of the judicial authority of the requesting State may be present at the execution of Letters of Request after prior consent of the competent Bulgarian authority.

Declaration on Article 11, paragraph 2

The judge who executes a Letter of Request is competent to recognise the privileges and duties to refuse to give evidence existing under the law of a third State provided that the Letter of Request contains information about the privileges and duties to refuse to give evidence under the law of that third State necessary to the application of Article 11, paragraph 2.

Declaration on Article 23

The Republic of Bulgaria declares that it will not execute Letters of Request issued for the purpose of obtaining pre-trial discovery of documents as known in common law countries."

In accordance with Article 39 the Convention will enter into force between Bulgaria and

Slovakia .... 29 September 2000

Germany .... 30 April 2001

United Kingdom of Great Britain and .... 6 May 2001

Northern Ireland

Australia .... 7 May 2001

Spain .... 13 August 2001

Argentina .... 21 September 2001

Lithuania .... 3 November 2001

Estonia .... 12 February 2002

Switzerland .... 12 March 2002

United States of America .... 26 April 2002

Sweden .... 15 July 2002

Israel .... 28 July 2002

Norway .... 29 July 2002

Finland .... 4 February 2003

Poland .... 18 February 2003

Denmark .... 25 April 2003.

1f The Permanent Bureau of the Hague Conference on private international law presents its compliments to the Diplomatic Missions of the Member States and to the National Organs and has the honour to inform them that, by instrument deposited on 8 December 1997 with the Ministry of Foreign Affairs of the Kingdom of the Netherlands,

the People's Republic of China

acceded to the above-mentioned Convention.

The instrument of accession contains the following declarations and reservation:

Translation

``1. in accordance with Article 2 of the Convention, the Ministry of Justice of the People's Republic of China has been designated as the Central Authority which will undertake to receive Letters of Request coming from a judicial authority of another Contracting State and to transmit them to the authority competent to execute them;

2. in accordance with Article 23 of the Convention concerning the Letters of Request issued for the purpose of obtaining pre-trial discovery of documents as known in Common Law countries, only the request for obtaining discovery of the documents clearly enumerated in the Letters of Request and of direct and close connection with the subject matter of the litigation will be executed;

3. in accordance with Article 33 of the Convention, the provisions of Chapter II of the Convention except for Article 15 will not be applicable"

The Central Authority designated by the People's Republic of China in accordance with Article 2 is as follows:

``*Bureau of International Judicial Assistance*

Ministry of Justice of the People's Republic of China
10, Chaoyangmen Nandajie, Chaoyang District
Beijing, 100020
China".

The accession will have no effect on the notification and the accompanied declarations contained in the Note of the Embassy of the People's Republic of China No He Wai Fa (97)-53 dated on 10 June, 1997 concerning the application of the Convention in the Hong Kong Special Administrative Region of the People's Republic of China (see circular letter A No 35 / ON No 39 dated 25 July 1997).

In accordance with Article 39, paragraph 3, the Convention will enter into force for the *People's Republic of China* on *6 February 1998*.

According to Article 39, paragraph 4, of the Convention the accession will have effect only as regards the relations between the People's Republic of China and such Contracting States as will have declared their acceptance of the accession. Such declaration shall be deposited with the Ministry of Foreign Affairs of the Kingdom of the Netherlands.

In accordance with its Article 39 the Convention will enter into force between China and

the *Kingdom of the Netherlands (for the .... 7 April 1998*

Kingdom in Europe and Aruba)

Luxembourg .... 11 April 1998

the *Czech Republic .... 28 April 1998*

Israel .... 12 May 1998

Poland .... 5 June 1998

Finland .... 23 June 1998

Germany .... 6 July 1998

Italy .... 16 August 1998

the *United States of America .... 23 August 1998*

the *Slovak Republic .... 4 September 1998*

France .... 7 March 1999

Denmark .... 5 September 1999

Spain .... 18 September 1999

Australia .... 18 September 1999

Norway .... 22 October 1999

Argentina .... 6 March 2000

Estonia ....12 February 2002

Switzerland .... 12 March 2002

Sweden .... 15 July 2002

CHINA, Hong Kong Special Administrative Region Only

By notification dated June 10, 1997, to the Ministry of Foreign Affairs of The Kingdom of The Netherlands, the People's Republic of China communicated the following information concerning Hong Kong:

THE EMBASSY OF THE PEOPLE'S REPUBLIC OF CHINA
IN THE KINGDOM OF THE NETHERLANDS

No. He Wai Fa (97)-53

(Translation)

The Hague, June 10, 1997

Your Excellency,

In accordance with the Joint Declaration of the Government of the People's Republic of China and the Government of the United Kingdom of Great Britain and Northern Ireland on the Question of Hong Kong signed on 19 December 1984 (hereinafter referred to as the ``Joint Declaration''), the People's Republic of China will resume the exercise of sovereignty over Hong Kong with effect from 1 July 1997. Hong Kong will, with effect from that date, become a Special Administrative Region of the People's Republic of China and will enjoy a high degree of autonomy, except in foreign and defence affairs which are the responsibilities of the Central People's Government of the People's Republic of China.

It is provided both in Section XI of Annex I to the Joint Declaration, ``Elaboration by the Government of the People's Republic of China of its Basic Policies Regarding Hong Kong'', and Article 153 of the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China, which was adopted on 4 April 1990 by the National People's Congress of the People's Republic of China, that international agreements to which the People's Republic of China is not a party but which are implemented in Hong Kong may continue to be implemented in the Hong Kong Special Administrative Region.

In accordance with the above provisions, I am instructed by the Minister of Foreign Affairs of the People's Republic of China to make the following notification:

The Convention on Taking of Evidence Abroad in Civil or Commercial Matters done at the Hague on 18 March 1970 (hereinafter referred to as the ``Convention''), by which the Government of the Kingdom of the Netherlands is designated as the depository, which applies to Hong Kong at present, will continue to apply to the Hong Kong Special Administrative Region with effect from 1 July 1997. The Government of the People's Republic of China also makes the following declarations:

1. With reference to the provisions of Article 16 of the Convention, the diplomatic officer or consular agent of the other Contracting State will not be permitted to take the evidence of nationals of the People's Republic of China or of a third State in the Hong Kong Special Administrative Region.

2. It declares, in accordance with Article 23 of the Convention, the Hong Kong Special Administrative Region will not execute the ``Letters of Request issued for the purpose of obtaining pre-trial discovery of documents''. The ``Letters of Request issued for the purpose of obtaining pre-trial discovery of documents'' for the purposes of the foregoing Declaration include *any Letter of Request which requires a person:*

1) to state what documents relevant to the proceedings to which the Letter of Request relates are, or have been, in his possession, custody or power; or

2) to produce any documents other than particular documents specified in the Letter of Request as being documents appearing to the requested Court to be, or to be likely to be, in his possession, custody or power.

3. In accordance with Article 24 of the Convention, it designates the Registrar of the High Court of the Hong Kong Special Administrative Region as an Other Authority competent to receive Letters of Request for execution in the Hong Kong Special Administrative Region; in accordance with Article 17 of the Convention, it designates the Administrative Secretary of the Government of the Hong Kong Special Administrative Region as the competent authority for the Hong Kong Special Administrative Region.

4. In accordance with Article 4 and 33 of the Convention, the Hong Kong Special Administrative Region will not accept a Letter of Request in the French Language.

Within the above ambit, responsibility for the international rights and obligations of a party to the Convention will be assumed by the Government of the People's Republic of China.

It would be appreciated if the contents of this Note could be placed formally on record and brought to the attention of the other Parties to the Convention.

I avail myself of this opportunity to renew to Your Excellency the assurances of my highest consideration.

CHINA, Macau Special Administrative Region Only

The Ambassador of Portugal at The Hague informed the Minister for Foreign Affairs of the Kingdom of the Netherlands by letter of 16 December 1999 of the following:

``Upon instructions from my Government and referring to the Convention on the Taking of Evidence Abroad in Civil or Commercial Matters concluded at The Hague on 18 March 1970 (hereinafter referred to as the Convention) which currently applies to Macau, I have the honour to inform Your Excellency of the following:

In accordance with the Joint Declaration of the Government of the Portuguese Republic and of the Government of the People's Republic of China on the question of Macau, signed in Beijing on 13 April 1987, the Government of the Portuguese Republic will remain internationally responsible for Macau until 19 December 1999, the People's Republic of China resuming from that date the exercise of sovereignty over Macau, with effect from 20 December 1999. From 20 December 1999 the Portuguese Republic will cease to be responsible for the international rights and obligations arising from the application of the Convention in Macau.

(…)''

The Ambassador of the People's Republic of China at The Hague informed the Minister for Foreign Affairs by letter of 16 December 1999 of the following:

<u>Translation</u>

``In accordance with the Joint Declaration of the Government of the People's Republic of China and the Government of the Republic of Portugal on the Question of Macau signed on 13 April

1987, the Government of the People's Republic of China will resume the exercise of sovereignty over Macau with effect from 20 December 1999. Macau will from that date become a Special Administrative Region of the People's Republic of China and will enjoy a high degree of autonomy, except in foreign and defence affairs which are the responsibilities of the Central People's Government of the People's Republic of China.

In this connection, I am instructed by the Minister of Foreign Affairs of the People's Republic of China to inform Your Excellency of the following:

The Convention on the Taking of Evidence Abroad in Civil or Commercial Matters, concluded at The Hague on 18 March 1970 (hereinafter referred to as the Convention), to which the Government of the People's Republic of China deposited the instrument of accession on 8 December 1997, shall apply to the Macau Special Administrative Region with effect from 20 December 1999. The Government of the People's Republic of China also wishes to make the following declaration:

1. In accordance with Article 2 of the Convention, it designates the Procurate of the Macau Special Administrative Region as the Central Authorities in the Macau Special Administrative Region.

2. In accordance with Article 23 of the Convention, it declares that the Macau Special Administrative Region will not execute Letters of Request issued for the purpose of obtaining pre-trial discovery of documents known in common law countries.

3. In accordance with Article 33 of the Convention, it declares that the provisions of Chapter II of the Convention except for Article 15 will not be applicable in the Macau Special Administrative Region; paragraph 2 of Article 4 of the Convention will not be applicable in the Macau Special Administrative Region.

The Government of the People's Republic of China shall assume the responsibility for the international rights and obligations arising from the application of the Convention to the Macau Special Administrative Region.

(…)".

The Embassy of the People's Republic of China at The Hague informed the Minister for Foreign Affairs of the Netherlands by letter of 1 November 2000 of the following amendments with respect to the contents of the above Note of 16 December 1999:

<u>Translation</u>

``1. The reference in the above-mentioned Note that ``in accordance with Article 2 of the Convention, it designates the Procurate of the Macau Special Administrative Region as the Central Authority in the Macau Special Administrative Region'' shall be amended as follows: ``In accordance with Article 24 of the Convention, it designates the Procuratorate of the Macau Special Administrative Region as the Other Authority in the Macau Special Administrative Region, which will undertake to receive Letters of Request coming from a judicial authority of another Contracting State and to transmit them to the authority competent to execute them.

The address of the Procuratorate of the Macau Special Administrative Region is:

Alameda Dr. Carlos d'Assumpcao

Macau SAR of the People's Republic of China 7th Floor, Dynasty Plaza Building
NAPE

Macau"

2. The Government of the People's Republic of China also wishes to make the following supplementary declaration:

``In accordance with paragraph 3 of Article 4 of the Convention, it declares that the Macau Special Administrative Region will only accept Letters of Request in either Chinese or Portuguese, or those accompanied by a translation in either Chinese or Portuguese".

(…)".

By Note dated 5 July 2002, the Embassy of the People's Republic of China at The Hague informed the Minister for Foreign Affairs of the Netherlands of the following amendments with respect to the application of the Convention in the Macau Special Administrative Region:

``(…)

With regard to the Procuratorate of the Macau Special Administrative Region referred to in (…) the Taking of Evidence Convention, the address of which has amended as **7th Floor, Dynasty Plaza Building, Alameda Dr. Carlos D'Assumpcao, NAPE, Macau."**

1g Notification in conformity with Article 42, sub e, of the Convention.—After having designated the Central Authority on 3 May 1984 (see Notification No. 2/1984) the Government of Cyprus informed the Ministry of Foreign Affairs of the Kingdom of the Netherlands of the following on 15 May 1984:

``The Republic of Cyprus makes the following declarations:

1. Under Article 2 the Ministry of Justice is designated as the Competent Authority.

2. Under Article 16 the Ministry of Justice is designated as the Competent Authority.

3. Under Article 17 the Ministry of Justice is designated as the Competent Authority.

4. In accordance with Article 18 the Republic of Cyprus declares that a diplomatic officer, consular agent or commissioner authorised to take evidence under Articles 15, 16 or 17 may apply to the Competent Authority for appropriate assistance to obtain such evidence by compulsion as prescribed by the law for internal proceedings, provided that the requesting Contracting State has made a declaration affording reciprocal facilities under Article 18.

Under Article 18 the Supreme Court is designated as the Competent Authority.

5. In accordance with Article 23, the Government of the Republic of Cyprus declares that the Republic of Cyprus will not execute Letters of Request issued for the purpose of obtaining pre-trial discovery of documents. The Government of the Republic of Cyprus further declares that the Republic of Cyprus understands `Letters of Request issued for the purpose of obtaining pre-trial discovery of documents' for the purposes of the foregoing declaration as including any Letter of Request which requires a person:

a. to state what documents relevant to the proceedings to which the Letter of Request relates are, or have been, in his possession, custody or power; or

b. to produce any documents other than particular documents specified in the Letter of Request as being documents appearing to the requested court to be, or likely to be, in his possession, custody or power.

The Republic of Cyprus makes the following reservations:

1. In accordance with Article 8 the Republic of Cyprus declares that members of the judicial personnel of the requesting authority may be present at the execution of a Letter of Request.

2. In accordance with the provisions of article 33 the Republic of Cyprus will not accept a Letter of Request in French."

According to the depositary the declaration under 5 and the reservation under 2 should have been made at the time of accession. The States which have declared to accept Cyprus' accession to the Convention, namely: the Federal Republic of Germany, Finland, France, Israel, Italy, the Kingdom of the Netherlands, Luxembourg, Portugal, the United Kingdom of Great Britain and Northern Ireland, Sweden and Czechoslovakia, are requested to inform the Ministry of Foreign Affairs of the Kingdom of the Netherlands whether they accept the declaration and the reservation concerned.

In accordance with Article 39 the Convention entered into force between Cyprus and

the Kingdom of the Netherlands (for the .... 29 April 1983

Kingdom in Europe)

(for Aruba) .... 27 July 1986

Finland .... 13 May 1983

France .... 13 May 1983

Israel .... 21 May 1983

Sweden ....13 June 1983

the *Federal Republic of Germany .... 27 June 1983*

Czechoslovakia .... 6 August 1983

Luxembourg .... 9 August 1983

Italy .... 13 August 1983

the *United Kingdom of Great Britain and .... 18 October 1983*

Northern Ireland (also for the Cayman Islands, the Falkland Islands and Dependencies, Gibraltar, Hong Kong, the Isle of Man and the Sovereign Base Areas of Akrotiri and Dhekelia in the Island of Cyprus*

Portugal .... 17 February 1984

Denmark .... 11 February 1986

Norway .... 15 December 1986 the *United States of America .... 30 January 1988*

Argentina .... 18 January 1993

Mexico .... 18 January 1993

Monaco .... 18 January 1993

Australia .... 19 June 1993

Venezuela .... 29 April 1994

Spain .... 10 July 1994

Switzerland .... 13 January 1995

Latvia .... 16 March 1997

Poland .... 16 March 1997

Estonia .... 16 March 1997

Singapore .... 6 February 1999

*See *supra,* under ``CHINA, Hong Kong Special Administrative Region''.

1h By notification dated January 28, 1993 the Czech Republic communicated the following: ``In accordance with the valid principles of international law and to the extent defined by it, the Czech Republic, as a successor state created as a result of the division of the Czech and Slovak Federal Republic, considers itself bound, as of January 1, 1993, i.e. the date of the division of the Czechoslovak federation, by multilateral international treaties to which the Czech and Slovak Federal Republic was a party on that date, including reservations and declarations to their provisions made earlier by Czechoslovakia'', which are as follow:

(Translation)

``The Socialist Republic of Czechoslovakia declares, with reference to Article 16 of the Convention on the taking of evidence abroad in civil or commercial matters, concluded at The Hague on 18 March 1970, that evidence may be taken in accordance with Chapter II without its prior permission provided the principal of reciprocity is applied.

The Socialist Republic of Czechoslovakia also declares, in connection with Article 18 of the said Convention, that a diplomatic officer, consular agent or commissioner authorized to take evidence under Articles 15, 16 and 17, may request the competent Czechoslovak court or the Czechoslovak state notary to carry out procedural action and that such a diplomatic officer, consular agent or commissioner will transmit the dossier to that court or notary through the intermediary of the Minister of Justice of the Czech Socialist Republic in Prague or the Minister of Justice of the Slovak Socialist Republic in Bratislava, provided the principal of reciprocity is applied.

The Socialist Republic of Czechoslovakia wishes to state, in connection with Article 40 of the Convention according to all states the right to declare that the convention shall be applicable to all territories for the international relations of which it is responsible, that keeping certain countries in a state of dependence is in its opinion contrary to the spirit and objectives of the United Nations

Declaration of 14 December 1960 on the granting of independence to colonial countries and peoples, which declares the necessity for a speedy and unconditional end to colonialism in all its forms.".

By notification contained in Note dated May 28, 1978, the Minister of Justice of the Czech Socialist Republic and the Minister of Justice of the Slovak Socialist Republic have been designated as central authorities in accordance with Articles 2 and 24 of the Convention.

1i With the following reservations:

``1) Availing itself of the provisions laid down in Article 33, the Danish Government hereby declares, in accordance with Article 4, that Denmark will not accept Letters of Request which are sent in French.

2) Availing itself of the provisions laid down in Article 33, the Danish Government hereby declares, in accordance with Article 17, that Denmark will not accept the taking of evidence by commissioners."

And with the following declarations in accordance with Article 35:

``Article 2

The Ministry of Justice is hereby designated as Central Authority.

Article 4

Letters of Request may be sent in Norwegian and Swedish, and Denmark accepts no obligation to return evidence taken in other languages than Danish.

Article 8

Members of the judicial personnel of the requesting authority of another contracting State may be present at the execution of a Letter of Request if they have obtained prior authorization from the competent Danish authority.

Article 15

A diplomatic officer or consular agent may take evidence if he has been authorized to do so by the Ministry of Justice.

Article 16

The Ministry of Justice will issue authorizations to take evidence.

Article 23

Letters of Requests issued for the purpose of obtaining pre-trial discovery of documents may not be executed in Denmark.

Article 27 a

As has been the case hitherto, Letters of Request may be transmitted directly to the competent Danish court by the consular agents of foreign States."

Additional declaration of July 23, 1980:

``The declaration made by the Kingdom of Denmark in accordance with article 23 concerning `Letters of Request issued for the purpose of obtaining pre-trial discovery of documents' shall apply to any Letter of Request which requires a person:

a) to state what documents relevant to the proceedings to which the Letter of Request relates are, or have been, in his possession, other than particular documents specified in the Letter of Request;

or

b) to produce any documents other than particular documents which are specified in the Letter of Request, and which are likely to be in his possession.''

1j The Permanent Bureau of the Hague Conference on private international law presents its compliments to the Diplomatic Missions of the Member States and to the National Organs and has the honour to inform them that, by instrument deposited on

2 February 1996 with the Ministry of Foreign Affairs of the Kingdom of the Netherlands.

the Republic of Estonia

acceded to the above-mentioned Convention.

The instrument of accession contains the following declarations:

``1) on the basis of Article 8 the judges of the pursuing state have the right to participate in the process operation subject to the preceding consent of the Ministry of Justice of the Republic of Estonia;

2) on the basis of Article 11, a person may refuse to participate in the taking of evidence or process operation, in case he has the right or commitment to it in accordance with the laws of his home-state;

3) on the basis of Article 23 the Republic of Estonia fulfills a requisition where the producing of the documents or its copy is requested if it corresponds to the following requirements:

a) process has been launched;

b) documents have been reasonably identified according to the dates, the contents or other information;

c) circumstances have been indicated giving ground to presume that the documents are in the property, possession of the person or known to him.''

According to Articles 16 and 17 of the Convention the competent authority designated to give its permission is the *Ministry of Justice of the Republic of Estonia.*

In accordance with Article 39 the Convention entered into force between Estonia and

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Luxembourg ..................                            18 June 1996
Denmark ..................                               22 June 1996
Slovak Republic ..................                       25 June 1996
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Israel	30 June 1996
Germany	2 July 1996
Italy	6 July 1996
Finland	5 August 1996
Netherlands (for the Kingdom in Europe and Aruba)	16 August 1996
Poland	14 September 1996
United Kingdom (Dependent Territories Anguilla, Cayman Islands, Channel Islands, Sovereign Base Areas of Cyprus, Falkland Islands, Gibraltar, Hong Kong*, Isle of Man)	21 February 1997
Cyprus	16 March 1997
Sweden	13 April 1997
Singapore	4 May 1997
Spain	25 May 1997
United States	11 November 1997
Argentina	21 September 1997
the Czech Republic	13 January 1998
Switzerland	11 July 1998
Portugal	8 June 2001
Bulgaria	12 February 2002
People's Republic of China	12 February 2002
Poland	12 February 2002
Slovenia	12 February 2002
Sri Lanka	12 February 2002
Lithuania	12 February 2002
South Africa	12 February 2002
Ukraine	12 February 2002
Russian Federation	12 February 2002

*See *supra,* under ``CHINA, Hong Kong Special Administrative Region''.

1k With the following reservation and declaration:

Reservation:

``In conformity with Article 33, Finland enters a reservation to paragraph 2 of Article 4 to the effect that Letters of Request in the English or French languages will not be accepted.''

Declaration:

``1. In Finland the Ministry of Justice (as of 6/1/82) shall be the Central Authority referred to in Article 2.

2. Swedish is the second official language of Finland. Finland will therefore in accordance with paragraph 1 of Article 4 accept Letters of Request in the Swedish language. The answer shall be given in the Swedish language if in connection with the Letter of Request this has been specifically requested.

3. A member of the judicial personnel of the requesting authority may in accordance with Article 8 be present at the execution of a Letter of Request, provided that the Finnish Ministry of Justice has given its consent.

4. The evidence referred to in Articles 16 and 17 of the Convention may be taken without the prior permission of the Finnish authorities.

5. Finland is not going to execute Letters of Request referred to in Article 23 issued for the purpose of obtaining pre-trial discovery of documents as known in Common Law countries.''

Notification in conformity with Article 42, paragraph e, of the Convention

By note dated 11 December 1980 and received at the Ministry of Foreign Affairs of the Kingdom of the Netherlands on 12 December 1980 the Government of Finland informed the Ministry of the withdrawal in part of the reservation to Article 4, paragraph 2, of the above-mentioned Convention made at the time of ratification and declared that it hereafter accepts the Letters of Request done in or translated into the English language. In accordance with Article 35, sub c, the Government of Finland made the following declaration:

``By accepting Letters of Request in English, the Republic of Finland does not undertake to execute the request, or transmit the evidence thus obtained in the English language; nor to have translated the documents which establish the execution of the Letter of Request.''.

Furthermore the Government of Finland modified the declaration concerning Article 23 of the above-mentioned Convention made at the time of ratification. The modified declaration is worded as follows:

``The declaration made by the Republic of Finland in accordance with Article 23 concerning ``Letters of Request issued for the purpose of obtaining pre-trial discovery of documents'' shall apply only to Letters of Request which require a person:

a) to state what documents relevant to the proceedings to which the Letter of Request relates are, or have been, in his possession, custody or power;

b) to produce any documents other than particular documents specified in the Letter of Request, which are likely to be in his possession, custody or power.''

1l With the following declarations:

With respect to the first paragraph of Article 40 of the Convention, France declares that the Convention shall apply to all the Territory of the French Republic.

In conformity with the provisions of Article 33, the French Government declares:

That, in application of the second paragraph of Article 4, it will execute only Letters in French or accompanied by a translation in French.

That, in application of Article 23, it will not execute Letters of Request issued for the purpose of obtaining pre-trial discovery of documents as known in Common Law countries;

In conformity with the provisions of Article 2, the Ministry of Justice, Civil Division of International Judicial Assistance, 13 Place Vendôme, Paris (1er), is designated as the Central Authority to the exclusion of any other authority.

In conformity with the provisions of Article 16, the Ministry of Justice, Civil Division of International Judicial Assistance, 13 Place Vendôme, Paris (1er), is designated as the competent authority to give permission to diplomatic officers or consular agents of a Contracting State to take the evidence, without compulsion, of persons other than nationals of that State in aid of proceedings commenced in the courts of a State which they represent.

That permission, which shall be given for each specific case and shall be accompanied by special conditions when appropriate, shall be granted under the following general conditions:

1. Evidence shall be taken only within the confines of the Embassies or Consulates;

2. The date and time of taking the evidence shall be notified in due time to the Civil Division of International Judicial Assistance so that it may have the opportunity to be represented at the

proceedings;

3. Evidence shall be taken in premises accessible to the public:

4. Persons requested to give evidence shall be served with an official instrument in French or accompanied by a translation into French, and that instrument shall mention:

a. That evidence is being taken in conformity with the provisions of The Hague Convention of March 18, 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters and relates to legal proceedings pending before a jurisdiction specifically designated by a Contracting State;

b. That appearance is voluntary and failure to appear will not give rise to criminal proceedings in the State of origin;

c. That the parties to the trial are consenting or, if not, the grounds of their objections;

d. That in the taking of evidence the person concerned may be legally represented;

e. That a person requested to give evidence may invoke a privilege or duty to refuse to give evidence.

A copy of these requests shall be transmitted to the Ministry of Justice.

5. The Civil Division of International Judicial Assistance shall be kept informed of any difficulty.

In conformity with the provisions of Article 17, the Ministry of Justice, Civil Division of International Judicial Assistance, 13 Place Vendôme, Paris (1er), is appointed as the competent authority to give permission to persons duly appointed as commissioners to proceed, without compulsion, to take any evidence in aid of proceedings commenced in the courts of a Contracting State.

This permission, which shall be given for each specific case and shall be accompanied by special conditions when appropriate, shall be granted under the following general conditions:

1. Evidence shall be taken only within the Embassy confines;

2. The date and time of taking the evidence shall be notified in due time to the Civil Division of International Judicial Assistance so that it may have the opportunity to be represented at the proceedings;

3. Evidence shall be taken in premises accessible to the public;

4. Persons requested to give evidence shall be served with an official instrument in French or accompanied by a translation in French, and that instrument shall mention:

a. That evidence is being taken in conformity with the provisions of The Hague Convention of March 18, 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters and relates to legal proceedings pending before a jurisdiction specifically designated by a Contracting State;

b. That appearance is voluntary and failure to appear will not give rise to criminal proceedings in the State of origin;

c. That the parties to the trial are consenting and, if not, the grounds of their objections;

d. That in the taking of evidence the person concerned may be legally represented;

e. That a person requested to give evidence may invoke the privilege and duty to refuse to give evidence.

A copy of these requests shall be transmitted to the Ministry of Justice.

5. The Civil Division of International Judicial Assistance shall be kept informed of any difficulty.

The request for permission transmitted by the requesting authority to the Ministry of Justice shall specify:

1. The motives that led to choosing this method of taking evidence of preference to that of a Letter of Request, considering the judiciary costs incurred;

2. The criteria for appointing commissioners when the person appointed does not reside in France.

The French Government declares that, in application of the provisions of Article 8, members of the judicial personnel of the requesting authority of a Contracting State may be present at the execution of a Letter of Request.

The Permanent Bureau of the Hague Conference on private international law presents its compliments to the Diplomatic Missions of the Member States and to the National Organs and has the honour to inform them that, by a letter received at the Ministry of Foreign Affairs of the Kingdom of the Netherlands on 19 January 1987, in accordance with Article 34 of the Convention, *France* has modified its declaration regarding Article 23 as follows:

The declaration made by the French Republic in accordance with Article 23 relating to Letters of Request issued for the purpose of obtaining pre-trial discovery of documents does not apply when the requested documents are enumerated limitatively in the Letter of Request and have a direct and precise link with the object of the procedure. (Translation)

The Permanent Bureau avails itself of this opportunity to renew to the Diplomatic Missions of the Member States and to the National Organs an assurance of its highest consideration and esteem.

2 ``A. The Government of the Federal Republic of Germany makes the following declarations in accordance with paragraph 1 of Article 33 of the Convention of 18th March 1970:

The Federal Republic of Germany makes the reservation provided for in the first sentence of paragraph 1 of Article 33 of the Convention excluding the application of the provisions of paragraph 2 of Article 4 of the Convention. Letters of Request to be executed under Chapter 1 of the Convention must, in accordance with paragraphs 1 and 5 of Article 4 of the Convention, be in the German language or be accompanied by a translation into that language.

The Federal Republic of Germany declares in accordance with the option provided for in the first sentence of paragraph 1 of Article 33 of the Convention to make a reservation excluding the application of the provisions of Chapter II of the Convention that the taking of evidence by diplomatic officers or consular agents is not permissible in its territory if German nationals are involved.

B. The Government of the Federal Republic of Germany makes the following declarations pursuant to Article 35 of the Convention of 18th of March 1970:

(1) The authority competent to execute a Letter of Request shall be the local court (Amtsgericht)

in whose district the official act is to be performed.

Letters of Request shall be addressed to the Central Authority of the Land in which the respective request is to be executed. The Central Authority* pursuant to Article 2 and paragraph 2 of Article 24 of the Convention shall be for:

**List revised, April 2001*

Baden-Württemberg	Präsident des Amtsgerichts Freiburg Holzmarkt 2 79098 FREIBURG tel.: +49 (761) 205-0 fax: +49 (761) 205-1800
Bavaria	Präsidentin des Oberlandesgerichts München Prielmayerstrasse 5 80097 München tel.: +49 (89) 5597-1 fax: +49 (89) 5597-3575
Berlin	Senatsverwaltung für Justiz von Berlin Salzburger Strasse 21-25 10825 Berlin tel.: +49 (30) 9013-0 fax: +49 (30) 9013-2000
Brandenburg	Ministerium der Justiz und für Bundes-und Europaangelegenheiten des Landes Brandenburg Heinrich-Mann-Allee 107 14460 Potsdam tel.: +49 (331) 866-0 fax: +49 (331) 866-3080 / 3081
Bremen	Der Präsident des Landsgerichts Domsheide 16 28195 Bremen tel.: +49 (421) 361-4253 fax: +49 (421) 361-6713
Hamburg	Präsident des Amtsgerichts Hamburg Sievekingplatz 1 20335 Hamburg tel.: +49 (40) 42843-0 fax: +49 (40) 42843-4318 / 4319
Hessen	Hessisches Ministerium der Justiz und für Europaangelegenheiten Luisenstrasse 13 65185 Wiesbaden tel.: +49 (611) 32-0 fax: +49 (611) 32-2763
Lower Saxony	Niedersächisches Ministerium der Justiz und für Europaangelegenheiten Am Waterlooplatz 1 30169 Hannover tel.: +49 (511) 120-0 fax: +49 (511) 120-5170 / 5181
Mecklenburg-Western Pomerania	Justizministerium des Landes Mecklenburg-Vorpommern Demmlerplatz 14 19053 Schwerin tel.: +49 (385) 588-0 fax: +49 (385) 588-3453
Northrhine-Westphalia	Präsident des Oberlandesgerichts Düsseldorf Cecilienallee 3 40474 Düsseldorf tel.: +49 (211) 4971-0 fax: +49 (211) 4971-548
Rhineland-Palatinate	Ministerium der Justiz des Landes Rheinland-Pfalz Ernst-Ludwig-Strasse 3 55116 Mainz tel.: +49 (6131) 16-0

	fax: +49 (6131) 16-4887
Saarland	Ministerium der Justiz des Saarlandes Zähringerstrasse 12 66119 Saarbrücken tel.: +49 (681) 501-00 fax: +49 (681) 501-5855
Saxony	Präsident des Oberlandesgerichts Dresden (as per 1 January 2000) Postfach 12 07 32 01008 Dresden
Saxony-Anhalt	Ministerium für Justiz des Landes Sachsen-Anhalt Wilhelm-Höpfner-Ring 6 39116 Magdeburg tel.: +49 (391) 567-01 fax: +49 (391) 567-4226
Schleswig-Holstein	Ministerium für Justiz, Bundes-und Europaangelegenheiten des Landes Schleswig-Holstein Lorentzendamm 35 24103 Kiel tel.: +49 (431) 988-0 fax: +49 (431) 988-3870
Thuringia	Thüringer Ministerium für Justiz und Europaangelegenheiten Alfred-Hess-Strasse 8 99094 Erfurt tel.: +49 (361) 37-95200 fax: +49 (361) 37-95155

(2) Pursuant to Article 8 of the Convention, the Government of the Federal Republic of Germany declares that members of the requesting court of another Contracting State may be present at the execution of a Letter of Request by the local court if prior authorization has been given by the Central Authority of the Land where the request is to be executed.

(3) The taking of evidence by diplomatic officers or consular agents pursuant to paragraph 1 of Article 16 of the Convention which involves nationals of a third State or stateless persons shall be subject to permission from the Central Authority of the Land where the evidence is to be taken. Pursuant to paragraph 2 of Article 16 of the Convention, permission shall not be required if the national of the third State is also a national of the State of the requesting court.

(4) A commissioner of the requesting court may not take evidence pursuant to Article 17 of the Convention unless the Central Authority of the Land where the evidence is to be taken has given its permission. Such permission may be made subject to conditions. The local court in whose district official acts would have to be performed by virtue of a Letter of Request in the same matter shall be entitled to control the preparation and the actual taking of the evidence. Under the second sentence of Article 19 of the Convention, a member of the court may be present at the taking of the evidence.

(5) The Federal Republic of Germany declares in pursuance of Article 23 of the Convention that it will not, in its territory, execute Letters of Request issued for the purpose of obtaining pre-trial discovery of documents as known in Common Law countries."

2a **Greece—Central Authority**

Address—the Ministry of Justice

Department of International Judicial Cooperation in Civil Cases

Mesogeion 96

TK 11527, ATHENS

tel.: +30.210.776-7312 / 776-7322 / 776-7321

fax: +30.210.776-7499

Head of Department: Mrs. A. Eleftheriadou

Languages of communication: English and Greek

(The effective date of the above information is *19 July 2005*)

Reservations Declarations

Articles: 4,8,15,16,17,23,35

1. (…)

2. Without prejudice to article 33 Greece declares that, in terms of the provision of article 4, para. 2 of the Convention, letters of request must be submitted in Greek or accompanied by a translation into Greek.

3. In terms of articles 8 and 35, para. 2c of the Convention, judicial personnel of the requesting authority of another Contracting State may be present at the execution of a request for judicial assistance, provided such attendance has been authorized in advance by the Central Authority of Greece.

4. In terms of article 18, Greece declares that it shall provide the necessary assistance for the execution of evidentiary proceedings as referred to in articles 15, 16, and 17 provided such execution shall be carried out in accordance with the Greek law.

5. Greece declares that, in terms of the provision of article 23 of the Convention, it shall not execute judicial assistance requests for pretrial discovery of documents.

2b **Hungary—Central Authority (Art. 2)**

Address—the Ministry of Justice

Reservations Declarations

Articles: 2,4,8,15,16,17,18,23

(Declarations)

``To Article 2

In the Republic of Hungary the Ministry of Justice is designated as the Central Authority in accordance with Article 2 of the Convention.

To Article 8

Members of the judicial personnel of the requesting authority may be present at the execution of a Letter of Request executed by the requested court, subject to prior permission by the Hungarian Central Authority.

To Article 15

In accordance with Article 15 of the Convention the diplomatic officer or consular agent of a Contracting State may in the territory of the Republic of Hungary take the evidence in aid of proceedings commenced in the courts of a state which he represents without prior permission of the Hungarian authorities provided that the person affected is exclusively national of the sending state of the diplomatic officer or consular agent. Taking of evidence shall not involve applying or holding out of the prospect of compulsion or disadvantageous legal consequences.

To Article 17

In the Republic of Hungary the Central Authority is entitled to give the permission set out in Paragraph 2 of Article 17 of the Convention.

To Article 23

The Hungarian authorities will not execute Letters of Request issued for the purpose of obtaining pre-trial discovery of documents."

(Reservations)

``To Paragraph 2 of Article 4

The Republic of Hungary excludes the application of Paragraph 2 of Article 4 of the Convention.

To Article 16

The Republic of Hungary excludes the application of Article 16 of the Convention.

To Article 18

The Hungarian authorities do not give assistance to the taking of evidence of the diplomatic officer or consular agent in accordance with Article 15 of the Convention or the commissioner in accordance with Article 17 of the Convention by applying measures of compulsion."

Convention of 18 March 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters

Accession accepted by	**Date of acceptance**	**Entry into force**
Israel	10-IX-2004	9-XI-2004
Netherlands	6-X-2004	5-XII-2004

Entry into force between Hungary and	**Entry into force**
Israel	9-XI-2004
Netherlands	5-XII-2004

2c Iceland

Acceptances of accessions

Convention of 18 March 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters

Accession accepted by	**Date of acceptance**	**Entry into force**
Bulgaria	29-I-2009	30-III-2009
Luxembourg	11-II-2009	12-IV-2009
Latvia	18-II-2009	19-IV-2009
Israel	24-II-2009	25-IV-2009
Sweden	10-III-2009	9-V-2009
Slovakia	22-IV-2009	21-VI-2009
Monaco	6-V-2009	5-VII-2009
Denmark	20-V-2009	19-VII-2009
Finland	9-VI-2009	8-VIII-2009

Entry into force between Iceland and	**Entry into force**
Bulgaria	30-III-2009
Luxembourg	12-IV-2009
Latvia	19-IV-2009
Israel	25-IV-2009
Sweden	9-V-2009
Slovakia	21-VI-2009
Monaco	5-VII-2009
Denmark	19-VII-2009
Finland	8-VIII-2009

Iceland—Central Authority (Art. 2)

In accordance with Article 2, paragraph 1, of the Convention, Iceland designates the Ministry of Justice and Ecclesiastical Affairs as the Central Authority which will undertake to receive Letters of Request coming from a judicial authority of another Contracting State and to transmit them to the authority competent to execute them.

Declarations Reservations

Articles: 4,8,15,23

In accordance with Article 33, paragraph 1, of the Convention, Iceland excludes the application of paragraph 2 of Article 4 of the Convention to the effect that Letters of Request in the French language or translations into that language will not be accepted.

Iceland declares, in accordance with Article 8 of the Convention, that members of the judicial personnel of the requesting authority of another Contracting State may be present at the execution of a Letter of Request if prior permission has been granted by the Ministry of Justice and Ecclesiastical Affairs.

In accordance with Article 15, paragraph 2, of the Convention, Iceland declares that evidence may be taken by a diplomatic officer or consular agent only if permission to that effect has been given by the Ministry of Justice and Ecclesiastical Affairs upon application made by him or on his behalf.

In accordance with Article 23, Iceland declares that it will not execute Letters of Request issued for the purpose of obtaining pre-trial discovery of documents as known in Common Law countries.

2d ***India***

Acceptances of accessions

Convention of 18 March 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters

Accession accepted by	**Date of acceptance**	**Entry into force**
Argentina	23-V-2007	22-VII-2007
Finland	24-V-2007	23-VII-2007
Latvia	3-VII-2007	1-IX-2007
United States of America	18-VII-2007	16-IX-2007
Germany	21-VIII-2007	20-X-2007
Czech Republic	11-X-2007	10-XII-2007
Spain	31-I-2008	31-III-2008
Slovakia	19-VI-2008	18-VIII-2008
Australia	12-VIII-2008	11-X-2008
Poland	8-IX-2008	7-XI-2008
Netherlands	30-IX-2008	29-XI-2008
Bulgaria	27-X-2008	26-XII-2008
Monaco	5-I-2009	6-III-2009
Sweden	21-I-2009	22-III-2009
Norway	20-II-2009	21-IV-2009
Denmark	20-V-2009	19-VII-2009

Entry into force between India and	**Entry into force**
Argentina	22-VII-2007
Finland	23-VII-2007
Latvia	1-IX-2007
United States of America	16-IX-2007
Germany	20-X-2007
Czech Republic	10-XII-2007
Spain	31-III-2008
Slovakia	18-VIII-2008
Australia	11-X-2008
Poland	7-XI-2008
Netherlands	29-XI-2008
Bulgaria	26-XII-2008
Monaco	6-III-2009

Sweden	22-III-2009
Norway	21-IV-2009
Denmark	19-VII-2009

India—Central Authority (Art. 2, 16, 17)

The Ministry of Law and Justice
and the High Courts in all States and Union Territories within India

India—competent authority (Art. 18)

The District Court within whose territory the evidence is to be taken.

India—competent authority (Art. 8)
the Central Authority and the concerned court

Declarations

Articles: 4,8,16,17,18,23

All requests under the Convention shall be in the English language, or accompanied with an English translation.

Subject to prior authorization of the Central Authority and the concerned court, members of the judicial personnel of the requesting Contracting Party may be present at the execution of a letter of request.

Evidence by diplomatic officers or consular agents of Indian nationals or nationals of a third State under Article 16 of the Convention can be taken with the prior permission of the Central Authority.

In accordance with Article 18, a diplomatic or consular officer or a commissioner authorized under Article 15, 16 and 17 may apply for appropriate assistance to obtain the evidence by compulsion to the District Court within whose territory the evidence is to be taken.

The Republic of India will not execute Letters of Request issued in pursuance of Article 23 of the Convention for the purpose of obtaining pre-trial discovery of documents, which requires a person to produce any documents other than particular documents specified in the Letter of Request, which are likely to be in his possession, custody or power.

2e *Notification in conformity with Article 42, paragraph e, of the Convention*

In accordance with Article 35 of the Convention Israel notified by a Note dated April 17, 1980 and received at the Ministry of Foreign Affairs of the Kingdom of the Netherlands on April 25, 1980, that the Central Authority designated by the State of Israel in accordance with Article 2 of the above-mentioned Convention, is the Director of Courts, 19 Jaffa Road, Jerusalem.

The Director of the Courts is also the authority designated pursuant to Articles 16 and 17 to give the permission specified in those Articles.

In accordance with Article 8, Israel declares that the members of the judicial personnel of the requesting authority may be present at the execution of a Letter of Request without prior authorization.

2f *Notification in conformity with Article 42, sub a and e, of the Convention*

The Italian Republic deposited its instrument of ratification of the above-mentioned Convention with the Ministry of Foreign Affairs of the Kingdom of the Netherlands on 22 June 1982, in accordance with Article 37, paragraph 2, of the Convention.

In accordance with Article 38, paragraph 2, the Convention will enter into force for Italy on 21 August 1982.

At the time of the deposit of the instrument of ratification the Italian Government notified the Ministry of Foreign Affairs of the following:

Translation

(1) The Italian Government declares, in accordance with Article 8, that members of the judicial personnel of the requesting authority of another Contracting State may be present at the execution of a Letter of Request, subject to prior authorization by the competent authority designated by the Italian State under (4) paragraph 2 below.

(2) The Italian Government declares, in accordance with Article 18, that a diplomatic officer, consular agent or commissioner who is taking evidence under Article 15, 16 or 17, may apply to Authority designated by the Italian State under (4) paragraph 2 below, for appropriate assistance to obtain the evidence by compulsion.

(3) The Italian Government declares, in accordance with Article 23, that it will not execute Letters of Request issued for the purpose of obtaining pre-trial discovery of documents as known in Common Law countries.

(4) In accordance with Article 35 the Italian Government designates the Ministry of Foreign Affairs pursuant to Article 2 as the Central Authority which will undertake to receive Letters of Request coming from a judicial authority of another Contracting State and to transmit them to the authority competent to execute them.

In accordance with the abovementioned Article the Italian Government designates the Court of Appeal within whose jurisdiction proceedings are to take place as the authority competent to:

—authorize foreign judicial personnel to be present at the execution of a Letter of Request, pursuant to Article 8;

—authorize foreign diplomatic officers, consular agents or commissioners to take evidence under

Article 16 or 17;

—grant the judicial assistance provided for in Article 18.

2g The ``Department of International Relations at the Ministry of Justice of the State of Kuwait'' has been designated as Central Authority.

Entry into force between Kuwait and

the Czech Republic	25 October 2002
Norway	29 November 2002
Poland	18 February 2003
Denmark	12 April 2003

2h In accordance with Article 2 the following Central Authority has been designated by Latvia:

Ministry of Justice

Brivibas Boulevard 34

LV-1536, Riga

Tel: 282607

Fax: 285575

In accordance with Article 39, paragraph 5, the Convention will enter into force between Latvia and

Luxembourg	15 July 1995
Finland	21 August 1995
United Kingdom of Great Britain and Northern Ireland	12 September 1995
Germany	11 November 1995
Italy	16 January 1996
Australia	20 January 1996
Norway	27 January 1996
Israel	27 February 1996
Slovak Republic	20 May 1996
Denmark	22 June 1996
Netherlands (for the Kingdom in Europe and Aruba)	16 August 1996
United States	11 November 1996
Singapore	4 May 1997
Spain	25 May 1997
Argentina	21 September 1997
South Africa	19 October 1997
the Czech Republic	13 January 1998
Switzerland	11 July 1998
France	7 March 1999
Portugal	8 June 2001

2i ***Liechtenstein***

Acceptances of accessions

Convention of 18 March 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters

Accession accepted by	**Date of acceptance**	**Entry into force**
Monaco	5-I-2009	6-III-2009
Bulgaria	29-I-2009	30-III-2009
Luxembourg	11-II-2009	12-IV-2009
Latvia	18-II-2009	19-IV-2009
Israel	20-II-2009	21-IV-2009
United States of America	26-II-2009	27-IV-2009
Sweden	10-III-2009	9-V-2009
Denmark	20-V-2009	19-VII-2009
Finland	9-VI-2009	8-VIII-2009

Entry into force between Liechtenstein and	**Entry into force**
Monaco	6-III-2009
Bulgaria	30-III-2009
Luxembourg	12-IV-2009
Latvia	19-IV-2009
Israel	21-IV-2009
United States of America	27-IV-2009
Sweden	9-V-2009
Denmark	19-VII-2009
Finland	8-VIII-2009

Liechtenstein—Central Authority (Art. 2)

Pursuant to Article 35 (1) of the Convention, the Principality of Liechtenstein notifies as Central Authority referred to in Article 2 of the Convention:

Fürstliches Landgericht (Court of Justice)

Spaniagass 1

9490 Vaduz

Principality of Liechtenstein

Declarations

Articles: 4,8,11,15–18,23

Declaration concerning Article 4 of the Convention:

Pursuant to Articles 33 and 35 of the Convention, the Principality of Liechtenstein declares that, with reference to Article 4 (2) and (3) of the Convention, Letters of Request and their annexes must be in German or accompanied by a translation into German. The confirmation of the execution of the request will be in German.

Declaration concerning Article 8 of the Convention:

Pursuant to Article 35 (2) of the Convention, the Principality of Liechtenstein declares that members of the judicial personnel of the requesting authorities who are part of the proceedings of a Contracting State may be present at the execution of a Letter of Request, if they have received prior authorization by the authorities that are competent for the execution.

Declaration concerning Article 11 of the Convention:

Pursuant to Article 11 of the Convention, the Principality of Liechtenstein recognizes the privileges and duties of the person concerned to refuse to give evidence in so far as the person has these privileges and duties under the law of his State of origin.

Declaration concerning Articles 15, 16 and 17 of the Convention:

Pursuant to Article 35 of the Convention, the Principality of Liechtenstein declares that the taking of evidence as referred to in Articles 15, 16 and 17 of the Convention is subject to prior permission by the Government of the Principality of Liechtenstein.

Declaration concerning Article 18 of the Convention:

The Principality of Liechtenstein does not grant any assistance by measures of compulsion to diplomatic officers or consular agents acting under Articles 15, 16 and 17 of the Convention.

Declaration concerning Article 23 of the Convention:

Pursuant to Article 23 of the Convention, the Principality of Liechtenstein declares that Letters of Request issued for the purpose of obtaining pre-trial discovery of documents will not be executed.

2j Under the following declarations:

``…And whereas it is provided in paragraph 1 of Article 2 of the Convention, the Republic of Lithuania designates the Ministry of Justice of the Republic of Lithuania as a Central Authority to receive a Letter of Request coming from a judicial authority of another Contracting State;

And whereas it is provided in paragraph 4 of Article 4 of the Convention, the Republic of Lithuania declares that it will accept a Letter of Request submitted only in the Lithuanian, English, French or Russian languages, or, where a Letter of Request is made in none of those languages, a Letter of Request and supporting documents shall be accompanied by a translation into Lithuanian, English, French or Russian languages;

And whereas it is provided in Article 8 of the Convention, the Republic of Lithuania declares that members of the judicial personnel of the requesting authority of another Contracting State may be present at the execution of a Letter of Request only under the prior permission of the Ministry of Justice of the Republic of Lithuania;

And whereas it is provided in Article 16 of the Convention, the Republic of Lithuania declares that a diplomatic officer or consular agent of a Contracting State may take evidence, without compulsion, of citizens of the Republic of Lithuania under the Law on Citizenship of the Republic of Lithuania, only under the prior permission of the Ministry of Justice of the Republic of Lithuania. The permission to take evidence issued by the Ministry of Justice of the Republic of Lithuania shall indicate that:

(a) evidence shall be taken by a diplomatic officer or consular agent only within the premises of the embassy or consular institution of the State which he/she represents;

(b) the Ministry of Justice of the Republic of Lithuania shall be informed about the time and place of the taking of evidence;

(c) evidence shall be taken in the Lithuanian or another language understandable to the person giving evidence or taking of evidence and shall be accompanied by a translation into the Lithuanian or another language understandable for such person;

(d) the document concerning the taking of evidence written in the language understandable to the person giving evidence shall be signed by this person. The copy of such document shall be forwarded to the Ministry of Justice of the Republic of Lithuania;

And whereas it is provided in Article 17 of the Convention, the Republic of Lithuania declares that a person duly appointed as a commissioner for this purpose, may, without compulsion, take evidence in the territory of the Republic of Lithuania from the person which is a citizen of the Republic of Lithuania under the Law on Citizenship of the Republic of Lithuania, if the Ministry of Justice of the Republic of Lithuania has given its prior written permission. The permission issued by the Ministry of Justice of the Republic of Lithuania shall indicate that:

(a) the Ministry of Justice of the Republic of Lithuania shall be informed about the time and place of the taking of evidence;

(b) the evidence shall be taken in the Lithuanian or another language understandable to the person giving evidence or taking of evidence shall be accompanied by a translation into the Lithuanian or another language understandable for such person;

(c) the document concerning the taking of evidence written in the language understandable to the person giving evidence shall be signed by this person. The copy of such document shall be

forwarded to the Ministry of Justice of the Republic of Lithuania;

And whereas it is provided in Article 23 of the Convention, the Republic of Lithuania declares that it will not execute a Letter of Request issued for the purpose of obtaining pre-trial discovery of documents ..."

In accordance with Article 39 the Convention entered into force between Lithuania and

Luxembourg	21 April 2001
Slovakia	8 May 2001
Denmark	21 July 2001
Australia	11 September 2001
Germany	11 September 2001
Argentina	21 September 2001
Bulgaria	3 November 2001
Estonia	12 February 2002
Switzerland	12 March 2002
United States of America	26 April 2002
Spain	25 May 2002
Sweden	15 July 2002
Israel	28 July 2002
Norway	29 July 2002
Poland	18 February 2003

2k *Notification in accordance with Article 42, sub a and e, of the Convention*

In accordance with Article 37, paragraph 2, Luxemburg deposited on 26 July 1977 its instrument of ratification of the Convention with the Ministry of Foreign Affairs of the Kingdom of the Netherlands.

In conformity with Article 38, paragraph 2, the Convention shall enter into force for Luxemburg on 24 September 1977.

On the occasion of the deposit of the said instrument of ratification the Government of Luxemburg made the following declarations and reservations (translation):

``—In accordance with Article 2 the Parquet Général is designated as the Central Authority.

—In pursuance of Article 4, paragraph 4, Letters of Request in German shall also be accepted.

—In pursuance of Article 23, Letters of Request issued for the purpose of obtaining pre-trial discovery of documents as know in Common Law countries shall not be executed.

—In accordance with the provisions of Article 16, the Parquet Général is designated as the authority competent to authorise the diplomatic officers or consular agents of a Contracting State to take, without compulsion, the evidence of persons other than the nationals of the State in aid of proceedings commenced in the courts of the State which they represent.

This authorisation, which is given in each specific case and to which specific conditions, where appropriate, are attached, is granted under the following general conditions:

1—The evidence shall be taken only within the precincts of an Embassy or Consultate.

2—The Parquet Général shall be given reasonable advance notice of the time, date and place of the taking of evidence so that it can, if it wishes, be represented.

3—A request to a person to appear shall, in accordance with the regulations, be in the form of an official document in French or German or accompanied by an (sic) translation into one of these languages stating:

a) that the evidence is to be taken in accordance with the provisions of the Convention on the taking of evidence abroad in civil or commercial matters concluded at The Hague on 18 March 1970, and in the framework of a judicial procedure followed in a jurisdiction designated by a Contracting State;

b) that the appearance is voluntary and that no prosecution in the requesting State will result from failure to appear;

c) that the parties to the action, where appropriate, consent to the taking of the evidence or are opposed to it for reasons to be given;

d) that the person requested to appear may be legally represented;

e) that the person requested to appear may invoke a privilege or a duty to refuse to give evidence.

—In accordance with the provisions of Article 17, the Parquet Général is designated as the authority competent to authorise persons designated in accordance with the regulations as commissioners to take evidence, without compulsion, in aid of proceedings commenced in the courts of another Contracting State.

This authorisation, which is given in the particular case and to which specific conditions, where appropriate, are attached, is granted under the following general conditions:

1—The Parquet Général shall be given reasonable advance notice of the time, date and place of the taking of evidence so that it can, if it wishes, be represented.

2—A request to a person to appear shall, in accordance with the regulations, be in the form of an official document in French or German or accompanied by a translation into one of these languages stating;

a) that the evidence is to be taken in accordance with the provisions of the Convention on the taking of evidence abroad in civil or commercial matters concluded at The Hague on 18 March 1970, and in the framework of a judicial procedure followed in a jurisdiction designated by a

Contracting State;

b) that the appearance is voluntary and that no prosecution in the requesting State will result from failure to appear;

c) that the parties to the action, where appropriate, consent to the taking of the evidence or are opposed to it for reasons to be given;

d) that the person requested to appear may be legally represented;

e) that the person requested to appear may invoke a privilege or a duty to refuse to give evidence.

—In pursuance of Article 8, members of the judicial personnel of the requesting authority of a Contracting State may be present at the execution of a Letter of Request."

2I In conformity with Article 39, paragraph 2, the instrument of accession by the United Mexican States to the above-mentioned Convention was deposited with the Ministry of Foreign Affairs of the Kingdom of the Netherlands on 27 July 1989.

The instrument of accession of the United Mexican States contains the declarations and reservations the text of which together with a translation in English is annexed to this notification.

In accordance with paragraph 3 of Article 39, the Convention will enter into force for the United Mexican States on 25 September 1989.

According to Article 39, paragraph 4, of the Convention the accession will have effect only as regards the relations between the United Mexican States and such Contracting States as will have declared their acceptance of the accession. Such declarations shall be deposited at the Ministry of Foreign Affairs of the Kingdom of the Netherlands.

Unofficial translation

A) TRANSMISSION AND EXECUTION OF LETTERS OF REQUEST

Entry into force between Hungary and	**Entry into force**
1.	*Central Authority (Article 2)*
Name:	Secretaría de Relaciones Exteriores, Dirección General de Asuntos Jurídicos.
Address:	Ricardo Flores Magón No. 1
Telephone:	782-34-40
Telex:	01762090

2. *Language requirements (Article 4)*

2.1 The United Mexican States does hereby make a special reservation related to the provisions of paragraph 2 of Article 4, and declares in accordance with paragraph 4 of the same Article, that letters of request sent to its Central Authority or judicial authorities shall be written in the spanish language or shall otherwise be accompanied by a translation into said language.

B) TAKING OF EVIDENCE ABROAD BY DIPLOMATIC OFFICERS, CONSULAR AGENTS AND COMMISSIONS (CHAPTER II)

3. The United Mexican States makes a special and complete reservation concerning the provisions contained in Articles 17 and 18 of this Chapter in relation to the ``commissioners'' and the use of measures to compulsion by diplomatic officers and consular agents.

C) FORMULATION OF PRE-TRIAL DISCOVERY OF DOCUMENTS

4. With reference to Article 23 of the Convention, the United Mexican States declares that according to Mexican law, it shall only be able to comply with letters of request issued for the purpose of obtaining the production and transcription of documents when the following requirements are met:

a) that the judicial proceeding has been commenced;

b) that the documents are reasonably identifiable as to date, subject and other relevant information and that the request specifies those facts and circumstances that lead the requesting party to reasonable believe that the requested documents are known to the person from whom they are requested or that they are in his possession or under his control or custody;

c) that the direct relationship between the evidence or information sought and the pending proceeding be identified.

D) OTHER TRANSMISSION CHANNEL TO THE JUDICIAL AUTHORITIES DIFFERENT FROM THOSE PROVIDED FOR IN ARTICLE 2

5. In regard to Article 27, paragraph a) of the Convention, the United Mexican States does hereby declare that the letters of request may be transmitted to its judicial authorities not only through the Central Authority but also through diplomatic or consular channels or through judicial channels (directly sent from the foreign court to the Mexican Court), providing that in the latter case all requirements relating to legalization of signatures are fulfilled.

6. In regard to Article 32 of the Convention, the United Mexican States informs that it is a State Party to the Interamerican Convention on the Taking of Evidence Abroad, signed in Panama on January the thirtieth, nineteen hundred and seventy-five, as well as to its Additional Protocol signed in La Paz, Bolivia, on May the twenty-fourth, nineteen hundred and eighty-four.

In accordance with Article 39 the Convention will enter into force between the United Mexican States and

Norway	20 November 1989
Israel	17 December 1989
the United States of America	24 December 1989
Argentina	25 December 1989
Finland	16 January 1990
Denmark	22 January 1990
the United Kingdom of Great Britain and Northern Ireland .... (also for Anguilla, the Cayman Islands, the Falkland Islands, Gibraltar, Guernsey, Hong Kong*, the Isle of Man, Jersey, South Georgia and the South Sandwich Islands and the Sovereign Base Areas of Akrotiri and Dhekelia in the Island of Cyprus)	16 March 1990
the Federal Republic of Germany	23 March 1990
Czechoslovakia	2 April 1990
the Kingdom of the Netherlands .... (for the Kingdom in Europe)	16 April 1990

Sweden	17 April 1990
Aruba	18 May 1991
Portugal	14 October 1991
Spain	29 June 1994
Switzerland	13 January 1995
Italy	25 May 1996
France	29 June 1998
Singapore	6 February 1999
Luxembourg	30 June 2003

*See *supra,* under ``CHINA, Hong Kong Special Administrative Region''.

2m *Notification in conformity with Article 42, sub c and e, of the Convention*

In accordance with Article 39, paragraph 2, the Principality of Monaco deposited its instrument of accession to the above-mentioned Convention with the Ministry of Foreign Affairs of the Kingdom of the Netherlands on 17 January 1986, with the following declarations and reservations:

Translation

1. In accordance with article 2, the Directorate of Judicial Services, MC 98025 MONACO CEDEX, is designated as the Central Authority.

2. Under article 4, paragraph 2, only Letters of Request drawn up in French or accompanied by a translation in that language shall be accepted.

3. Under article 23, Letters of Request issued for the purpose of obtaining pre-trial discovery of documents shall not be executed.

4. In accordance with articles 16 and 17, the Directorate of Judicial Services is designated as a competent authority for the purpose of authorising, as appropriate:

—the consular authorities of a Contracting State to take the evidence without compulsion of persons other than nationals of that State and in aid of proceedings commenced in a court of the State which they represent, or

—persons duly designated as commissioners to take evidence without compulsion in aid of proceedings commenced in a court of the Contracting State.

Such authorisation, which shall be granted for each particular case and may contain specific conditions, shall be subject to the following general conditions:

a) evidence shall be taken solely on the premises of consulates when the latter are situated within the Principality, and in other cases in the Palais de Justice of Monaco;

b) the Directorate of Judicial Services shall be informed of the date and time of the taking of the evidence in time to permit the Directorate to be represented, and, if necessary, to provide courtroom accommodation at the Palais de Justice of Monaco;

c) the persons concerned in the taking of evidence shall be duly summoned by an official document drawn up in French or accompanied by a translation in that language; this document shall indicate:

—that the taking of the evidence in question is being conducted in accordance with the provisions of the Hague Convention of 18 March 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters, and that the procedure constitutes part of legal proceedings pursued under the specially designated jurisdiction of a Contracting State;

—that appearance is voluntary and non-appearance would not entail legal proceedings in the requesting State;

—that the person concerned in the taking of evidence may be represented by a lawyer of defense counsel;

—that the parties in the proceedings, should they be instituted, give their consent, and if not the document shall state the reason for their opposition;

—that the person concerned in the taking of evidence may apply to be exempted or barred from testifying.

A copy of the summonses shall be sent to the Directorate of Judicial Services, which is also to be kept informed of any difficulties.

Pursuant to Article 39, paragraph 3, the Convention will enter into force for the Principality of Monaco on 18 March 1986.

The accession will have effect only as regards the relations between Monaco and such Contracting States as will have declared their acceptance of the accession.

Notification pursuant to Article 42 of the Convention

In accordance with Article 39 the Convention will enter into force between Monaco and

the *Kingdom of the Netherlands (for the .... 14 July 1986*

Kingdom in Europe)

(for Aruba) .... 27 July 1986

the *Federal Republic of Germany .... 12 August 1986*

the *United Kingdom of Great Britain and .... 18 August 1986*

Northern Ireland (also for the Cayman
Islands, the Falklands, Gibraltar, Guernsey
Hong Kong, the Isle of Man, South*
Georgia, the South Sandwich Islands and
the Sovereign Base Areas of Akrotiri and
Dhekelia in the Island of Cyprus)

Finland .... 22 September 1986

Italy .... 22 September 1986

Norway .... 15 December 1986

Czechoslovakia .... 30 December 1986

Sweden .... 18 January 1987

Denmark .... *23 January 1987*

Israel .... *31 March 1987*

France .... *3 January 1988*

the *United States of America* .... *30 January 1988*

Portugal .... *14 October 1991*

Cyprus .... *18 January 1993*

Spain .... *28 August 1994*

Switzerland .... *13 January 1995*

Singapore .... *6 February 1999*

Luxembourg .... *30 June 2003*

*See *supra,* under ``CHINA, Hong Kong Special Administrative Region''.

2n *Notification in conformity with Article 42, sub a and e, of the Convention.*

``The Kingdom of the Netherlands deposited on 8 April 1981, in accordance with Article 37, paragraph 2, of the Convention its instrument of ratification for the Kingdom in Europe of the above-mentioned Convention.

Upon the deposit of the instrument of ratification the Government of the Kingdom of the Netherlands has made the following declaration:

Translation

In the Netherlands the Convention shall be applied as follows:

Article 2

The Public Prosecutor at The Hague district Court is designated as the Central Authority.

Article 4

Letters of Request will be accepted in Dutch, German, English or French, or if they are accompanied by a translation into one of these languages.

The Netherlands does not undertake to translate documents for the execution of a Letter of Request.

Article 8

Members of the judicial personnel of another Contracting State may be present at the execution of a Letter of Request provided that the court which is responsible for execution authorises this and provided that any conditions which the court may impose are respected.

Article 11

Only the court which is responsible for executing the Letter of Request shall be competent to decide whether any person concerned by the execution has a privilege or duty to refuse to give evidence under the law of a State other than the State or origin; no such privilege or duty exists under Dutch law.

Article 14

Fees paid to experts and interpreters and costs occasioned by the use of a special procedure requested by the State of origin under Article 9, paragraph 2 of the Convention shall be borne by the State or origin.

Article 16

In the Netherlands, no prior permission is required for the taking of evidence as provided for in Article 16.

Article 17

The permission referred to in Article 17 must be requested from the President of the District Court in the area in which evidence is to be taken. If evidence is to be taken from witnesses or experts, the area in question will be that in which the witnesses or experts, or the majority of them reside. If the President gives permission, he may impose any conditions which he considers necessary to ensure that the evidence is taken in proper manner. He may decide that the evidence should be taken at the court, under the supervision of a judge designated by him. Permission will only be granted if the following conditions are met:

a) the witness or expert concerned must have been duly summoned; the summons must be in Dutch or must be accompanied by a Dutch translation and must contain;

—the facts of the case and a summary of the proceedings in connection with which the evidence is to be taken, and details of the court which has requested the evidence;

—a statement to the effect that there is no obligation for the witness or expert to appear, and that if he refuses to appear, to take an oath, to give his word of honour or to give evidence, he will not incur any penalty or measure of any kind, either in the Netherlands or in the State where the proceedings have been instituted;

—a statement to the effect that the person concerned may be legally represented;

—a statement to the effect that in so far as the person concerned has a privilege or duty to refuse to give evidence, he may do so;

—a statement to the effect that the commissioner will reimburse expenses incurred by the witness or expert in connection with his appearance to give evidence.

b) A copy of the summons must be forwarded to the President.

c) The request for permission must state the reasons why the taking of evidence has been entrusted to a commissioner and it must state the commissioner's official status unless he is a lawyer competent to practise in the Netherlands.

d) The costs of taking the evidence, i.e. the expenses of the witnesses, experts or interpreters, must be reimbursed in full.

Article 23

The Netherlands will not execute Letters of Request issued for the purpose of obtaining pre-trial discovery of documents as known in Common Law countries.

For the purposes of Article 23 of the Convention, ``Letters of Request issued for the purpose of obtaining pre-trial discovery of documents as known in Common Law countries'', which the Netherlands will not execute, are defined by the Government of the Kingdom of the Netherlands as being any Letters of Request which require a person:

a. to state which of the documents which are of relevance to the proceedings to which the Letter of Request relates have been in his possession, custody or power; or

b. to produce any document other than particular documents specified in the Letter of Request as being documents which the court which is conducting the proceedings believes to be in his possession, custody or power.

Article 26

The Netherlands will request that any State of origin which has made a request pursuant to paragraph 1 of Article 26 should reimburse the fees and costs to which this paragraph refers.

* By letter dated 13 November 2002, the Permanent Bureau of the Hague Conference was informed of the new contact details of the Central Authority:

De Officier van Justitie
Postbus 20302
2500 EH THE HAGUE

In accordance with Article 38, paragraph 2, the Convention will enter into force for the Kingdom of the Netherlands (the Kingdom in Europe) on 7 June 1981."

In accordance with Article 40, paragraph 2, the Kingdom of the Netherlands declared on 28 May 1986 that the Convention shall extend to Aruba.

In conformity with Article 40, paragraph 3, the Convention will enter into force for Aruba on 27 July 1986.

The Permanent Bureau of the Hague Conference on private international law presents its compliments to the Diplomatic Missions of the Member States and to the National Organs and has the honour to inform them that, in accordance with Article 2 of the above-mentioned Convention, the has designated the ``*Procureur-Generaal in Aruba van het Gemeenschappelijk Hof van Justitie van de Nederlandse Antillen en Aruba*'' (the Attorney-General in Aruba of the joint Court of Justice of the Netherlands Antilles and of Aruba) as Central Authority for *Aruba.*

The Convention is being applied in Aruba subject to the same declarations as made upon ratification of the Convention on 8 April 1981 by the Kingdom of the Netherlands for the Kingdom in Europe. In addition, in conformity with Article 4, paragraphs 3 and 4, Aruba will not accept Letters of Request in French, unless accompanied by a translation into Dutch, English or Spanish.

The Permanent Bureau avails itself of this opportunity to renew to the Diplomatic Missions of the Members States and to the National Organs an assurance of its highest consideration and esteem.

2o With the following reservation:

``In conformity with article 33, Norway enters a reservation to paragraph 2 of article 4 to the effect that Letters of Request in the French language will not be accepted.''

And with the following declarations:

``I. The Royal Ministry of Justice and Police is designated as the Central Authority with reference to article 2 and as the Competent Authority with reference to articles 15, 16 and 17.

II. With reference to article 4, paragraph 3, the Kingdom of Norway declares that letters in the Danish or Swedish languages can be sent to the Central Authority.

III. By accepting Letters of Request in another language than the Norwegian, the Kingdom of Norway does not undertake to execute the request, or transmit the evidence thus obtained in this other language; nor to have translated the documents which establish the execution of the Letter of Request.

IV. By virtue of article 15, evidence can be taken by diplomatic officers or consular agents only if, upon application, prior permission to that effect has been granted.

V. By virtue of article 23, the Kingdom of Norway declares that it will not execute Letters of Request issued for the purpose of obtaining pre-trial discovery of documents as known in Common Law countries.''

The declaration made by the Kingdom of Norway in accordance with article 23 concerning ``Letters of Request issued for the purpose of obtaining pre-trial discovery of documents'' shall apply only to Letters of Request which require a person

a) to state what documents relevant to the proceedings to which the Letter of Request relates, are, or have been, in his possession, other than particular documents specified in the Letter of Request; or

b) to produce any documents other than particular documents which are specified in the Letter of Request, and which are likely to be in his possession.

3 The Permanent Bureau of the Hague Conference on private international law presents its compliments to the Diplomatic Missions of the Member States and to the National Organs and has the honour to inform them that, by instrument deposited on 13 February 1996 with the

Ministry of Foreign Affairs of the Kingdom of the Netherlands,

the Republic of Poland

acceded to the above-mentioned Convention.

The instrument of accession contains a reservation, the text of which is attached.

Translation

Articles 23 et 33 will not be applicable within the territory of the Republic of Poland.

The instrument of accession was accompanied by the following declarations and reservations, the text of which is also attached.

Translation

Declarations

Article 2, Paragraph 1—the Central Authority designated to receive requests for service coming from another Contracting State shall be the Ministry of Justice.

Article 8—the Authority designated to complete a certificate of service in the republic of Poland shall be the Ministry of Justice.

Article 24 and Article 27, sub-paragraph a—other authorities (in addition to the Central Authority) designated to receive requests for service shall be the voivodship courts.

Reservations

Article 23—the Republic of Poland declares, that it will not execute Letters of Request issued for the purpose of obtaining ``pre-trial discovery of documents'' as known in common law countries.

Article 33—the Republic of Poland excludes the application on its territory:

—the provisions of Article 4, paragraph 2,

—the provisions of Chapter II, excluding provisions of Article 15.

In accordance with paragraph 3 of Article 39, the Convention will enter into force for the *Republic of Poland* on *13 April 1996*.

According to Article 39, paragraph 4, of the Convention the accession will have effect only as regards the relations between the Republic of Poland and such Contracting States as will have declared their acceptance of the accession. Such declarations shall be deposited with the Ministry of Foreign Affairs of the Kingdom of the Netherlands.

In accordance with Article 39, paragraph 5, the Convention will enter into force between Poland and

Luxembourg .... 2 June 1996

Denmark .... *22 June 1996*

Slovak Republic .... *25 June 1996*

Israel .... *30 June 1996*

Finland .... *5 August 1996*

Netherlands (for the Kingdom in Europe and Aruba) .... *16 August 1996*

Germany .... *14 September 1996*

United States .... *11 November 1996*

Norway .... *20 December 1996*

Australia .... *10 January 1997*

the *United Kingdom of Great Britain* and .... *21 February 1997*

Northern Ireland (also for the *Dependent*
Territories of Anguilla, the *Cayman Islands,*
the *Channel Islands,* the *Sovereign Base*
Areas of Cyprus, the *Falkland Islands,*
*Gibraltar, Hong Kong** and the *Isle of Man)*

Cyprus ....*16 March 1997*

Sweden .... *13 April 1997*

Singapore .... *4 May 1997*

Spain .... *25 May 1997*

Mexico .... *26 July 1997*

the *Czech Republic* .... *13 January 1998*

South Africa .... *10 February 1998*

the *People's Republic of China* .... *5 June 1998*

Switzerland .... *11 July 1998*

Portugal .... *8 June 2001*

Estonia .... *12 February 2002*

Belarus .... *18 February 2003*

Bulgaria .... *18 February 2003*

Kuwait .... *18 February 2003*

Lithuania .... 18 February 2003

Russian Federation ....18 February 2003

Slovenia .... 18 February 2003

Sri Lanka .... 18 February 2003

Ukraine .... 18 February 2003

France .... 5 April 2003

*See *supra,* under ``CHINA, Hong Kong Special Administrative Region''.

3a With the following reservations and declarations:

(Translation)

``a) In accordance with Article 33 of the Convention, the Portuguese State makes the following reservations:

1. exclusion of the application of paragraph 2 of Article 4;

2. exclusion of the application of Chapter II, with the exception of Article 15.

b) In accordance with Articles 15 and 23 of the Convention, the Portuguese State makes the following declarations:

1. The Portuguese State declares that the evidence as referred to in Article 15, can only be taken if permission to that effect is given by the appropriate authority designated by it upon application made by the diplomatic or consular agent;

2. The Portuguese State declares that it will not execute Letters of Request issued for the purpose of obtaining pre-trial discovery of documents as known in Common Law Countries.

c) With regard to Articles 2 and 15 of the Convention, the competent Portuguese authority will be the Director-General of the Judiciary Department (``Direccào-Geral dos Serviços Judiciários'') of the Ministry of Justice.''.

Extension*

In accordance with Article 40, second paragraph, Portugal extended the Convention to *Macau* on 15 October 1999, with the following declarations:

``a) In conformity with the provisions of Article 4 of the Convention, only Letters of Request in Portuguese, Chinese and English shall be accepted in Macau;

b) With the exception of Article 15, Chapter II of the Convention shall not be applicable in the territory of Macau;

c) In conformity with the provisions of Article 15 of the Convention, the Republic of Portugal declares that evidence referred to in that same article may not be taken in Macau if permission to that effect has not been given by an appropriate authority, to be designated by the appropriate bodies of the territory, upon application made by a diplomatic officer or consular agent;

d) In conformity with the provisions of Article 23 of the Convention, the Republic of Portugal declares that the Letters of Request issued for the purpose of obtaining pre-trial discovery of documents as known in common law countries will not be executed in Macau."

Entry into force for *Macau** on *14 December 1999.*

***See *supra,* under CHINA, Macau Special Administrative Region.**

3b Romania—Central Authority (Art. 2)

Address—Ministry of Justice

With the following Reservations and Declarations

Articles: 8,16,17,18,19,21,23

``A. Declarations

1. (…)

2. In accordance with Article 8 of the Convention, the members of the judicial personnel of the requesting authority may be present at the execution of a Letter of Request, after prior information of the competent central authority.

3. In accordance with Article 23 of the Convention, Romania declares that it will execute Letters of Request issued for the purpose of obtaining pre-trial discovery of documents as known in Common Law countries, to the extent that this expression refers to providing evidence (inquest in futurum).

B. Reservation

In accordance with Article 33, paragraph 1, of the Convention, Romania will not apply the provisions of Articles 16, 17 and 18 of Chapter II of the Convention. Romania declares that Articles 19 and 21 will not be applicable, in as far as that they refer to Articles 16, 17 and 18, to which the reservation was made."

Convention of 18 March 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters

Accession accepted by	**Date of acceptance**	**Entry into force**
Czech Republic	11-III-2004	10-V-2004
Netherlands	31-X-2003	30-XII-2003
Denmark	31-X-2003	30-XII-2003
United States of America	17-II-2004	17-IV-2004
Bulgaria	2-III-2004	1-V-2004
Slovak Republic	9-III-2004	8-V-2004
Norway	16-VI-2004	15-VIII-2004
Germany	14-VI-2004	13-VIII-2004
Latvia	28-VII-2004	26-IX-2004

Entry into force between Romania and	**Entry into force**
Czech Republic	10-V-2004
Netherlands	30-XII-2003
Denmark	30-XII-2003
United States of America	17-IV-2004
Bulgaria	1-V-2004
Slovak Republic	8-V-2004
Norway	15-VIII-2004
Germany	13-VIII-2004
Latvia	26-IX-2004

3c In accordance with Article 39, paragraph 5, the Convention will enter into force between the Russian Federation and

Luxembourg .... 20 October 2001

the *Czech Republic .... 3 November 2001*

Denmark .... 21 December 2001

the *United Kingdom of Great Britain and .... 19 January 2002*

Northern Ireland (accepted also for Anguilla, the Cayman Islands, the Falkland Islands, Gibraltar, the Sovereign Base Areas in Cyprus, the Isle of Man, and the Bailiwicks of Guernsey and Jersey)

Estonia .... 12 February 2002

Australia .... 11 March 2002

Switzerland .... 12 March 2002

Sweden .... 15 July 2002

Israel .... 28 July 2002

Portugal ....2 August 2002

Spain .... 4 August 2002

Argentina .... 28 October 2002

Norway .... 29 November 2002

Poland .... 18 February 2003.

3d Declarations

Articles: 23

``(…) that it wishes to declare, in accordance with article 35 clause c) and pursuant to article 23, first paragraph of the Convention, that the Republic of Seychelles will not execute Letters of Request issued for the purpose of obtaining pre-trial discovery of documents as known in

Common Law countries."

Accession accepted by	Date of acceptance	Entry into force
Slovak Republic	19-III-2004	18-V-2004
Denmark	10-III-2004	9-V-2004
United States of America	11-III-2004	10-V-2004
Israel	22-IV-2004	21-VI-2004
Netherlands	25-III-2004	24-V-2004
Norway	16-VI-2004	15-VIII-2004
Czech Republic	21-VII-2004	19-IX-2004
Latvia	28-VII-2004	26-IX-2004

Entry into force between Seychelles and	Entry into force
Slovak Republic	18-V-2004
Denmark	9-V-2004
United States of America	10-V-2004
Israel	21-VI-2004
Netherlands	24-V-2004
Norway	15-VIII-2004
Czech Republic	19-IX-2004
Latvia	26-IX-2004

3e In accordance with Article 39, paragraph 3, the Convention shall enter into force for the Republic of Singapore on December 26, 1978.

Notification in accordance with Convention Article 42(c) and (e):

On October 27, 1978, the Ministry of Foreign Affairs of the Kingdom of the Netherlands received the instrument of accession of the Republic of Singapore to the Convention on the Taking of Evidence Abroad in Civil and Commercial Matters in accordance with Article 39, Paragraph 2, of the aforesaid Convention.

At the time of its accession the Government of the Republic of Singapore made the following reservations:

``(i) The entire Chapter II of the Convention is not applicable to the Republic of Singapore; and

``(ii) With regard to Article 4, paragraph 2, the Republic of Singapore will not accept a Letter of Request in a language other than English, since this language is the one used by the judicial personnel in Singapore."

In accordance with Article 23 the Government of the Republic of Singapore has declared that the Republic of Singapore will not execute Letters of Request issued for the purpose of obtaining pre-trial discovery of documents as known in Common Law countries.

The Government of the Republic of Singapore has further declared that it understands ``Letters of Request issued for the purpose of obtaining pre-trial discovery of documents" for the purposes of the foregoing declaration as including any Letter of Request which requires a person:

(a) to state what documents relevant to the proceedings to which the Letter of Request relates are, or have been, in his possession, custody or power; or

(b) to produce any documents other than particular documents specified in the Letter of Request as being documents appearing to the requested court to be, or likely to be, in his possession, custody or power. It is also understood that the reference to civil or commercial actions in the Convention does not include tax matters for the Republic of Singapore.

In accordance with Article 39, paragraph 3, the Convention shall enter into force for the Republic of Singapore on December 26, 1978.

The accession shall be effective only for relations between the Republic of Singapore and contracting States that declare that they accept this accession.

Notification in conformity with Article 42, paragraph e, of the Convention:

In accordance with Article 35 of the Convention Singapore notified the Ministry of Foreign Affairs of the Kingdom of the Netherlands by a Note dated August 4, 1979, that the Central Authority which will undertake to receive Letters of Request referred to in Article 2 of the Convention, is the Registrar of the Supreme Court.

In accordance with Article 39, paragraph 5, the Convention will enter into force between Singapore and

Spain .... 28 August 1994

Switzerland .... 13 January 1995

United States .... 24 October 1995

Sweden .... 10 April 1979

the *United Kingdom of Great Britain and .... 13 May 1979*

Northern Ireland (also for Gibraltar and Hong Kong)*

Norway .... 20 May 1979

Czechoslovakia .... 3 June 1979

Denmark .... 6 August 1979

Luxembourg .... 3 December 1979

France .... 27 December 1979

Finland .... 12 January 1980

the *Kingdom of the Netherlands (for the .... 20 June 1981*
Kingdom in Europe)

(for Aruba) .... 27 July 1986

the *Federal Republic of Germany .... 13 September 1981*

Israel .... 19 September 1981

Italy .... 24 April 1993

Portugal .... 17 February 1984

Spain .... 28 August 1994

Switzerland .... 13 January 1995

Latvia .... 4 May 1997

Poland .... 4 May 1997

Estonia .... 4 May 1997

Australia .... 25 July 1997

Barbados .... 6 February 1999

Cyprus .... 6 February 1999

Monaco .... 6 February 1999

Argentina .... 6 February 1999

Mexico .... 6 February 1999

Venezuela .... 6 February 1999

*See *supra,* under ``CHINA, Hong Kong Special Administrative Region''.

3f By notification dated March 15, 1993 the Slovak Republic communicated the following: ``In accordance with relevant principles and norms of international law and to extent defined by it, the Slovak Republic, as a successor State, born from the division of the Czech and Slovak Federal Republic, considers itself bound, as of January 1, 1993, i.e. the date of the division of the Czechoslovak Federation, by multilateral international treaties to which the Czech and Slovak Federal Republic was a party at that date, including reservations and declarations in respect of provisions made earlier by Czechoslovakia, as well as objections by Czechoslovakia in respect of reservations made by other treaty parties'', which are as follows: [Same declarations and reservations, *mutatis mutandis*, under Czech Republic, see footnote [1d]].

The Slovak Republic has designated in accordance with Articles 2 and 8 [of the Convention] the following Central Authority:

Ministerstvo spravodlivosti Slovenskej republiky
Zupne namestie 13, 813 11 Bratislava
Slovak Republic
fax: +421 (2) 5935 3604

3g Designation of the Central Authority in accordance with Article 2, paragraph 1:

Ministry of Justice of the Republic of Slovenia
Zupanciceva 3
1000 LJUBLJANA
tel.: +386 (1) 478.5244
fax: +386 (1) 426.1050
e-mail: ana.bucar@gov.si

In accordance with Article 39 the Convention entered into force between Slovenia and

Luxembourg .... 21 April 2001

Slovakia .... 8 May 2001

Denmark ....21 July 2001

Australia .... 11 September 2001

Germany .... 11 September 2001

Argentina .... 21 September 2001

Estonia .... 12 February 2002

Switzerland .... 12 March 2002

United States of America .... 26 April 2002

Spain .... 25 May 2002

Sweden .... 15 July 2002

Israel .... 28 July 2002

Norway .... 29 July 2002

Poland .... 18 February 2003.

3h The Permanent Bureau of the Hague Conference on private international law presents its compliments to the Diplomatic Missions of the Member States and to the National Organs and has the honour to inform them that, by instrument deposited on 8 July 1997 with the Ministry of Foreign Affairs of the Kingdom of the Netherlands,

the Republic of South Africa

acceded to the above-mentioned Convention.

The instrument of accession contains the following reservations, designation of authorities and declarations:

``*1. Reservations*

That the Republic of South Africa excludes the following in terms of Article 33 of the Convention, namely—

(a) the application of the provision of paragraph 2 of Article 4 of the Convention, which provides that a Letter of Request shall be accepted in French; and

(b) the application of the provisions of Articles 15 and 16 of Chapter II of the Convention.

2. Designation of authorities

That the Republic of South Africa designates—

(a) the Director General of the Department of Justice as Central Authority in terms of Article 2 of the Convention and as the competent authority referred to in Article 8 of the Convention; and

(b) the division of the High Court of South Africa that has jurisdiction as the competent authority referred to in Articles 17 and 18 of the Convention.

3. Declarations

That the Republic of South Africa makes the following declarations under the Convention:

(a) For the purposes of paragraph 4 of Article 4 of the Convention, a Letter of Request, if not in English, may also be sent to the Central Authority in any of the following languages: Sepedi, Sesotho, Setswana, siSwati, Tshivenda, Xitsonga, Afrikaans, isiNdebele, isiXhosa and isiZulu.

(b) Members of the judicial personnel of the requesting authority of another Contracting State may, after authorisation by the competent authority referred to in Article 8 of the Convention, be present at the execution of a Letter of Request as contemplated in that article.

(c) Evidence may not be taken in terms of Article 17 of the Convention without the prior permission of the competent authority referred to in that Article.

(d) A commissioner authorised to take evidence under Article 17 of the Convention may, in terms of Article 18 of the Convention, apply to the competent authority referred to in that Article to obtain the evidence by compulsion, subject to the measures of compulsion which are appropriate and prescribed by South African law for use in internal proceedings.

(e) Letters of Request issued for the purpose of obtaining pre-trial discovery of documents as known in Common Law countries, will not be executed as provided for in Article 23."

In accordance with the terms of Article 39, paragraph 3, the Convention will enter into force for the *Republic of South Africa* on *6 September 1997.*

According to Article 39, paragraph 4, of the Convention the accession will have effect only as regards the relations between the Republic of South Africa and such Contracting States as will have declared their acceptance of the accession. Such declaration shall be deposited with the Ministry of Foreign Affairs of the Kingdom of the Netherlands.

In accordance with Article 39, paragraph 5, the Convention entered into force between South Africa and:

the *United States of America .... November 1, 1997*

the *Kingdom of the Netherlands*

(for the Kingdom in Europe and Aruba) .... October 24, 1997

Latvia .... 19 October 1997

the *Kingdom of the Netherlands (for the .... 24 October 1997*

Kingdom in Europe and Aruba)

Israel .... 9 November 1997

Finland .... 28 November 1997

the *Slovak Republic .... 13 December 1997*

Germany .... 12 January 1998

the *Czech Republic .... 13 January 1998*

Australia .... 17 January 1998

Sweden .... 24 January 1998

Poland .... 10 February 1998

the *United Kingdom of Great Britain and .... 8 March 1998*

Northern Ireland (also for the *Dependent*
Territories of Anguilla, the *Cayman Islands,*
the *Channel Islands,* the *Sovereign Base*
Areas of Cyprus, the *Falkland Islands,*
Gibraltar and the *Isle of Man)*

Portugal .... 7 July 1998

Switzerland .... 11 July 1998

China, Hong Kong Special Administrative .... 24 November 1998

Region only

France .... 7 March 1999

Denmark .... 5 September 1999

Norway .... 22 October 1999

Spain .... 17 January 2000

Argentina .... 6 March 2000

Estonia .... 12 February 2002

United States of America .... 26 April 2002.

3i Spain has informed the Ministry of Foreign Affairs of the Kingdom of the Netherlands of a change in the designation of the Central Authority designated in accordance with Article 2, paragraph 1, of the Convention. The Central Authority shall be:

``*el Ministerio de Relaciones Exteriores".*

Notification pursuant to Article 42 of the Convention

In accordance with Article 37, paragraph 2, of the above-mentioned Convention Spain deposited its instrument of ratification with the Ministry of Foreign Affairs of the Kingdom of the Netherlands on 22 May 1987.

The instrument of ratification contains the following reservation:

``De conformidad con el artículo 33 en relacíon con el artículo 4.º, párrafo 2, Espana no aceptará comisiones rogatorias que no estén redactadas en espa[Delta equal to]nol o acompa[Delta equal to]nadas de una traducción.

<u>Translation</u>

In accordance with Article 33 in relation with Article 4, paragraph 2, Spain will not accept Letters of Request which are not drawn up in Spanish or accompanied by a translation.

``a) La Autoridad Central espa[Delta equal to]nola a que se refiere el artículo 2 será:

Secretaría General Técnica del Ministerio de Justicia
Calle San Bernardo 62
28071 MADRID*

b) Previa autorización del Ministerio de Justicia espaonol, un Juez del Estado requirente podrá intervenir en el cumplimiento de una comisíon rogatoria, de conformidad con el artículo 8.

c) De conformidad con los artículos 16 y 17, la prueba podrá ser practicada, sin necesidad de autorización previa de la Autoridad espa[Delta equal to]nola, en los locales de la Representacíon diplomática o consular del Estado requirente.

d) A tenor del artículo 23, Espa[Delta equal to]na no acepta las comisiones rogatorias derivadas del procedimiento ``pre-trial discovery of documents'' conocido en los países del ``Common Law''.''.

<u>Translation</u>

(a) The Spanish Central Authority referred to in Article 2 will be:

Secretaría General Técnica del Ministerio de Justicia
Calle San Bernardo 62
28071 MADRID

* Modification communicated by the Embassy of Spain to the Depositary by Note dated 8 March 1999.

b) With prior authorization of the Spanish Ministry of Justice, a Judge of the requesting State may intervene in the execution of a Letter of Request, in accordance with Article 8.

c) In accordance with Articles 16 and 17, the evidence may be taken, without prior permission of the Spanish Authority, in the premises of the diplomatic or consular representation of the requesting State.

d) Pursuant to Article 23 Spain does not accept Letters of Request derived from the ``pre-trial discovery of documents'' procedure known in Common Law countries.

The Convention will enter into force for Spain on 21 July 1987.

3j Under the following declaration and reservations:

``(i) In terms of Article 2, Secretary/Ministry of Justice and Constitutional Affairs is designated the Central Authority.

(ii) For purposes of Article 4 of the Convention, the letter of request should be in the English language or if in French, accompanied by an English translation.

(iii) For purposes of Article 8 of the Convention, the prior authorisation of the Competent Authority designated under Article 2 would be required.

(iv) The Government of Sri Lanka further declares in terms of Article 23 of the Convention, that it will not execute Letters of Request issued for the purpose of obtaining pre-trial discovery of documents.

(v) The Government of Sri Lanka, in terms of Article 33, excludes in whole, the application of the provisions of Chapter II of the Convention.''

In accordance with Article 39 the Convention entered into force between Sri Lanka and

Luxembourg .... 21 April 2001

Slovakia .... 8 May 2001

Denmark .... 21 July 2001

Australia .... 11 September 2001

Germany .... 11 September 2001

Argentina .... 21 September 2001

Estonia .... 12 February 2002

Switzerland .... 12 March 2002

United States of America .... 26 April 2002

Spain ....25 May 2002

Sweden .... 15 July 2002

Israel .... 28 July 2002

Norway .... 29 July 2002

Poland .... 18 February 2003.

3k With the following declarations:

(Translation)

—That, in pursuance of Article 4, para. 4, Letters of Request in the Danish and Norwegian languages will be accepted;

—That, in pursuance of Article 8, members of the judicial personnel of the requesting authority of another Contracting State may be present at the execution of a Letter of Request without prior authorisation;

—That, in pursuance of Article 15, para. 2, a diplomatic officer or consular agent may only take evidence if permission to do so has been granted by the competent Swedish authority;

—That, in pursuance of Article 23, Letters of Request issued for the purpose of obtaining pre-trial discovery of documents as known in Common Law countries will not be executed;

—That documents provided by Sweden which establish that a Letter of Request has been executed will be in the Swedish language only.

Additional declaration of July 11, 1980:

``The Swedish Government understands `Letters of Request issued for the purpose of pre-trial discovery of documents' for the purposes of the foregoing Declaration as including any Letter of Request which requires a person:

a) to state what documents relevant to the proceedings to which the Letter of Request relates are, or have been, in his possession, custody or power; or

b) to produce any documents other than particular documents specified in the Letter of Request, which are likely to be in his possession, custody or power.''

By Note dated 6 November 2000 the Minister for Foreign Affairs of Sweden informed the Depositary as follows:

``As from 1 October 2000 the Central Authority, meaning the receiving authority, competent authority and transmitting authority, concerning [this Convention] has been changed from the Ministry for Foreign Affairs to the Ministry of Justice.''

The address of the Ministry of Justice is as follows:

Ministry of Justice
Division for Criminal Cases and International Judicial Co-operation
Central Authority
S-103 33 Stockholm
Sweden
tel.: +46 (8) 405 4500 (secretariat)
fax: +46 (8) 405 4676.

3l *Notification pursuant to Article 42 of the Convention*

In accordance with Article 37, paragraph 2, of the above-mentioned Convention *Switzerland* deposited its instrument of ratification with the Ministry of Foreign Affairs of the Kingdom of the Netherlands on 2 November 1994.

The instrument of ratification contains the following reservation and declarations:

Translation

``Re Article 1

1. With regard to Article 1, Switzerland takes the view that the Convention applies exclusively to the Contracting States. Moreover, regarding the conclusions of the Special Commission which met in The Hague in April 1989, Switzerland believes that, whatever the opinion of the Contracting States on the exclusive application of the Convention, priority should in any event be given to the procedures provided for in the Convention regarding requests for the taking of evidence abroad.

Re Articles 2 and 24

2. In accordance with Article 35, first paragraph, Switzerland designates the cantonal authorities listed in the annex as Central Authorities as referred to in Articles 2 and 24 of the Convention. Requests for the taking of evidence or the execution of any other judicial act may also be addressed to the Federal Justice and Police Department in Bern, which will forward them to the appropriate Central Authority.

Re Article 4, second and third paragraphs

3. In accordance with Articles 33 and 35, Switzerland declares, with regard to Article 4, second and third paragraphs, that Letters of Request and any accompanying documents must be in the language of the authority requested to execute them, *i.e.* in German, French or Italian, or accompanied by a translation into one of these languages, depending on the part of Switzerland in which the documents are to be executed. The documents confirming execution will be drawn up in the official language of the requested authority (*cf.* annex).

Re Article 8

4. In accordance with Article 35, second paragraph, Switzerland declares, with regard to Article 8, that members of the judicial personnel of the requesting authority of another Contracting State may be present at the execution of a Letter of Request provided they have obtained prior authorization from the executing authority.

Re Articles 15, 16 and 17

5. In accordance with Article 35, Switzerland declares that evidence may be taken according to Articles 15, 16 and 17 subject to prior authorization by the Federal Justice and Police Department. A request for authorization must be addressed to the Central Authority in the canton where the evidence is to be taken.

Re Article 23

6. In accordance with Article 23, Switzerland declares that Letters of Request issued for the purpose of obtaining pre-trial discovery of documents will not be executed if:

a. the request has no direct and necessary link with the proceedings in question; or

b. a person is required to indicate what documents relating to the case are or were in his/her possession or keeping or at his/her disposal; or

c. a person is required to produce documents other than those mentioned in the request for legal assistance, which are probably in his/her possession or keeping or at his/her disposal; or

d. interests worthy of protection of the concerned persons are endangered".

The list of Central Authorities for the Cantons is attached.

Cantonal Central Authorities (list up to date as per 13 February 2003)

A list of the Central Cantonal Authorities, including their address and phone/fax numbers, can be consulted online at the following address: http://www.ofj.admin.ch/rhf/d/service/recht/Kantonale-Zentralbehoerden.pdf

To determine the Central Authority competent by reason of its location, the database of the Swiss localities and Courts can be consulted online at the following address:
http://www.elorge.admin.ch.

3m The former Yugoslavic Republic of Macedonia

Declarations

Articles: 4,8,23

With regard to Article 4, paragraph 3, of the Convention, the Republic of Macedonia declares that Letters of Request and their annexes which are to be executed under this Convention must be written in the Macedonian language or be accompanied by a translation into the Macedonian language in accordance with the Article 7 of the Constitution of the Republic of Macedonia dated 17 November 1991.

The Government of the Republic of Macedonia declares, in accordance with Article 8, that members of the judicial personnel of the requesting authority of another Contracting State may be present at the execution of a Letter of Request, provided they have obtained prior authorization from courts of first instance of the Republic of Macedonia.

In accordance with Article 23 of the Convention, the Republic of Macedonia declares that it will not execute Letters of Request issued for the purpose of obtaining pre-trial discovery of documents as known in Common Law countries.

4 Turkey made the following reservations and declaration:

1. Reservations

In accordance with Article 33 of the Convention, the Republic of Turkey excludes the application on its territory of the provisions of Article 4, paragraph 2, and of the provisions of Chapter II.

2. Declaration

In terms of Article 35 of the Convention, the Republic of Turkey declares that it will not execute letters of request issued for the purpose of obtaining pre-trial discovery of documents as known in common law countries, as provided for in Article 23.

By Note dated 1 May 2002, the Embassy of Turkey at The Hague informed the depositary of the following:

``(…) has the honour to inform the Ministry of the following reservation and declarations which are to replace the previous reservations and declaration made by Turkey with regard to the Convention on the Taking of Evidence Abroad in Civil or Commercial Matters.

Reservation and Declarations:

In accordance with Article 33 of the Convention on the Taking of Evidence Abroad in Civil or Commercial Matters, the Republic of Turkey reserves its rights not to implement the provisions of Article 4, paragraph 2, on its territory. Letters of request which are to be executed under Chapter I of the Convention, shall be in Turkish or be accompanied by a Turkish translation in compliance with Article 4, paragraphs 1 and 5.

In accordance with Article 35 of the Convention, the Republic of Turkey declares that:

—the Ministry of Justice has been designated as the competent authority empowered to grant permission envisaged in Articles 16 and 17, and

—It will not execute letters of request issued for the purpose of obtaining pre-trial discovery of documents as known in common law countries, as provided for in Article 23.

(…)".

4a Ukraine made the following reservations and declarations:

—in accordance with Article 2 of the Convention, the Ministry of Justice of Ukraine is the Central Authority of Ukraine;

—in accordance with Article 4 of the Convention, letters of request to be executed under Chapter 1 of the Convention must be in the Ukrainian language or be accompanied by a translation into the Ukrainian language;

—in accordance with Article 8 of the Convention, members of the judicial personnel of the requesting authority of another Contracting Party may be present at the execution of a letter of request, if the possibility of such presence is confirmed by the consent of the Ministry of Justice of Ukraine;

—in accordance with Article 23 of the Convention, Ukraine will not execute letters of request issued for the purpose of obtaining pre-trial discovery of documents as known in common law countries.

In accordance with Article 33 of the Convention, Ukraine makes the following reservations:

—Ukraine excludes, in whole, the application of the provisions of paragraph 2 of Article 4 of the Convention;

—Ukraine excludes the application within its territory of the provisions of Chapter II of the Convention, except for Articles 15, 20, 21 and 22.

In accordance with Article 39 the Convention entered into force between Ukraine and

Denmark .... 21 July 2001

Mexico ....22 July 2001

Luxembourg .... 29 July 2001

Bulgaria .... 12 August 2001

Israel .... 14 August 2001

Italy .... 18 August 2001

Slovenia .... 3 September 2001

the *United Kingdom of Great Britain and ....19 October 2001*

Northern Ireland (also for the *Dependent Territories of Anguilla,* the *Cayman Islands,* the *Falkland Islands, Gibraltar,* the *Sovereign Base Areas of Cyprus,* the *Isle of Man,* and the *Bailiwicks of Guernsey and Jersey)*

Germany ....13 November 2001

Australia ....11 March 2002

Switzerland ....12 March 2002

United States of America ....26 April 2002

Spain ....25 May 2002

Sweden ....15 July 2002

Norway ....29 July 2002

Argentina ....2 October 2002

Poland ....18 February 2003.

4b *Notification in conformity with Article 42, under a and e, of the Convention:*

In accordance with Article 37, paragraph 2, the United Kingdom of Great Britain and Northern Ireland deposited on July 16, 1976 its instrument of ratification with the Ministry of Foreign Affairs of the Netherlands.

In conformity with Article 38, paragraph 2, the Convention shall enter into force for the United Kingdom on September 14, 1976.

The instrument of ratification mentioned above, contains the following reservation:

``… . in accordance with the provisions of Article 33 the United Kingdom will not accept a Letter of Request in French."

On the occasion of the deposit of the said instrument of ratification the Government of the United Kingdom of Great Britain and Northern Ireland made the following declarations:

``1. In accordance with Article 8 Her Majesty's Government declare that members of the judicial personnel of the requesting authority may be present at the execution of a Letter of Request.

2. In accordance with Article 18 Her Majesty's Government declare that a diplomatic officer, consular agent or commissioner authorised to take evidence under Articles 15, 16 and 17 may apply to the competent authority designated hereinbefore for appropriate assistance to obtain

such evidence by compulsion provided that the Contracting State whose diplomatic officer, consular agent or commissioner makes the application has made a declaration affording reciprocal facilities under Article 18.

3. In accordance with Article 23 Her Majesty's Government declare that the United Kingdom will not execute Letters of Request issued for the purpose of obtaining pre-trial discovery of documents. Her Majesty's Government further declare that Her Majesty's Government understand ``Letters of Request issued for the purpose of obtaining pre-trial discovery of documents'' for the purposes of the foregoing Declaration as including any Letter of Request which requires a person:—

a. to state what documents relevant to the proceedings to which the Letter of Request relates are, or have been, in his possession, custody, or power; or

b. to produce any documents other than particular documents specified in the Letter of Request as being documents appearing to the requested court to be, or to be likely to be, in his possession, custody or powers.

4. In accordance with Article 27 Her Majesty's Government declare that by the law and practice of the United Kingdom the prior permission referred to in Articles 16 and 17 is not required in respect of diplomatic officers, consular agents or commissioners of a Contracting State which does not require permission to be obtained for the purposes of taking evidence under Articles 16 and 17.''

In accordance with Article 35 of the Convention, the Government of the United Kingdom made the following designations:

1. Under Article 2: the Foreign and Commonwealth Office.

2. Under Article 16: the Foreign and Commonwealth Office.

3. Under Article 17: the Foreign and Commonwealth Office.

4. Under Article 18: the Senior Master of the Supreme Court (Queen's Bench Division) for England and Wales; the Crown Agent for Scotland, for Scotland; the Master (Queen's Bench and Appeals). The address of the Master (Queen's Bench and Appeals) is Royal Courts of Justice, Belfast 1.

5. Under Article 24: the Senior Master of the Supreme Court (Queen's Bench Division) in England and Wales; * By a Note of 21 March 2000, the British Government notified that, with effect from 1 April 2000, the designated authority for Scotland will be: ``The Scottish Executive Justice Department, Civil Justice & International Division, Second Floor West, Saint Andrews House, Regent Road, Edinburgh EH1 3DG, tel.: +44.131.244.4826/9, fax: +44.131.244.4848''. The address of the Master (Queen's Bench and Appeals) is Royal Courts of Justice, Belfast 1.

Extension to Gibraltar.—

In accordance with Article 40, Paragraph 3, the Convention shall enter into force for Gibraltar on January 20, 1979.

The extension declaration contains the following reservation: ``In accordance with the provisions of Article 4 and Article 33 of the Convention, Gibraltar will not accept a Letter of Request in French.''

In accordance with Article 35 of the Convention the following designations have been made;

``(a) Under Articles 16 and 17 of the Convention, the Deputy Governor is designated as the competent authority for Gibraltar;

``(b) Under Article 18 of the Convention, the Registrar of the Supreme Court of Gibraltar is designated as the competent authority;

``(c) Under Article 24 of the Convention, the Deputy Governor is designated as an additional authority competent to receive Letters of Request for execution in Gibraltar.''

[For declarations see the original note.]

Notification in conformity with article 42, sub d and e, of the Convention

By a letter dated November 20, 1978, and received at the Ministry of Foreign Affairs of the Kingdom of the Netherlands on November 21, 1978, the Ambassador of the United Kingdom of Great Britain and Northern Ireland at The Hague, referring to the deposit on July 16, 1976 of the instrument of ratification of the above-mentioned Convention by the United Kingdom of Great Britain and Northern Ireland, declared in accordance with article 40 that the Convention shall extend to Gibraltar. The Convention shall enter into force for Gibraltar on January 20, 1979.

The declaration of extension contains the following reservation:

``… . in accordance with the provisions of Article 4 and Article 33 of the Convention, Gibraltar will not accept a Letter of Request in French.''

In accordance with Article 35 of the Convention the following designations have been made:

a) under Articles 16 and 17 of the Convention the Deputy governor is designated as the competent authority for Gibraltar;

b) under Article 18 of the Convention, the Registrar of the Supreme Court of Gibraltar is designated as the competent authority;

c) under Article 24 of the Convention, the Deputy Governor is designated as an additional authority competent to receive Letters of Request for execution in Gibraltar, and the following declarations:

1. In accordance with Article 8, members of the judicial personnel of the requesting authority may be present at the execution of a Letter of Request in Gibraltar.

2. In accordance with Article 18, a diplomatic officer, consular agent or commissioner authorised to take evidence under Articles 15, 16 and 17 of the Convention may apply to the competent authority in Gibraltar designated hereinbefore for appropriate assistance to obtain such evidence by compulsion provided that the Contracting State whose diplomatic officer, consular agent or commissioner makes the application has made a declaration affording reciprocal facilities under Article 18.

3. In accordance with Article 23, Gibraltar will not execute Letters of Request issued for the purpose of obtaining pre-trial discovery of documents. The Government of Gibraltar understands ``Letters of Request issued for the purpose of obtaining pre-trial discovery of documents'' for the purposes of the foregoing Declaration as including any Letter of Request which requires a person:

a) to state what documents relevant to the proceedings to which the Letter of Request relates are, or have been, in his possession, custody or power; or

b) to produce any documents other than particular documents specified in the Letter of Request as being documents appearing to the requested court to be, or likely to be, in his possession, custody or power.

4. In accordance with Article 27, by the law and practice of Gibraltar the prior permission referred to in Articles 16 and 17 of the Convention is not required in respect of diplomatic officers, consular agents or commissioners of a Contracting State which does not require permission to be obtained for the purposes of taking evidence under Articles 16 or 17.

Extension to Sovereign Base Areas of Akrotiri and Dhekalia in the Island of Cyprus.—

``The Convention shall enter into force for the Sovereign Base Areas of Akrotiri and Dhekelia in the Island of Cyprus on August 24, 1979.

The declaration of extension contains the following reservation:

``… in accordance with the provisions of Article 4 and Article 33 of the Convention, the Sovereign Base Areas will not accept a Letter of Request in French.''.

In accordance with Article 35 of the Convention the following designations have been made:

a) under Articles 16 and 17 of the Convention the Chief Officer, Sovereign Base Areas, is designated as the competent authority for the Sovereign Base Areas;

b) under Article 18 of the Convention, the Senior Registrar of the Judge's Court of the Sovereign Base Areas of Akrotiri and Dhekelia is designated as the competent authority;

c) under Article 24 of the Convention, the Senior Registrar of the Judge's Court of the Sovereign Base Areas of Akrotiri and Dhekelia is designated as an additional authority competent to receive Letters of Request for execution in the Sovereign Base Areas.

and the following declarations:

1. In accordance with Article 8, members of the judicial personnel of the requesting authority may be present at the execution of a Letter of Request in the Sovereign Base Areas.

2. In accordance with Article 18, a diplomatic officer, consular agent or commissioner authorised to take evidence under Article 15, 16 and 17 of the Convention may apply to the competent authority in the Sovereign Base Areas designated hereinbefore for appropriate assistance to obtain such evidence by compulsion provided that the Contracting State whose diplomatic officer, consular agent or commissioner makes the application has made a declaration affording reciprocal facilities under Article 18.

3. In accordance with Article 23, the Sovereign Base Areas will not execute Letters of Request issued for the purpose of obtaining pre-trial discovery of documents. The Administration of the Sovereign Base Areas understands ``Letters of Request issued for the purpose of obtaining pre-trial discovery of documents'' for the purposes of the foregoing Declaration as including any Letter of Request which requires a person:

a) to state what documents relevant to the proceedings to which the Letter of Request relates are, or have been, in his possession, custody or power; or

b) to produce any documents other than particular documents specified in the Letter of Request as being documents appearing to the requested court to be, or likely to be, in his possession, custody or power.

4. In accordance with Article 27, by the law and practice of the Sovereign Base Areas the prior permission referred to in Articles 16 and 17 of the Convention is not required in respect of diplomatic officers, consular agents or commissioners of a Contracting State which does not require permission to be obtained for the purposes of taking evidence under Articles 16 or 17.''

Extension to Falkland Islands and Dependencies.—

Notification in conformity with Article 42, sub d and e, of the Convention

By a letter dated November 23, 1979, and received at the Ministry of Foreign Affairs of the Kingdom of the Netherlands on November 26, 1979, the Ambassador of the United Kingdom of Great Britain and Northern Ireland at The Hague, referring to the deposit on July 16, 1976 of the instrument of ratification of the above-mentioned Convention by the United Kingdom of Great Britain and Northern Ireland, declared in accordance with Article 40 that the Convention shall extend to the Falkland Islands and Dependencies.

The Convention shall enter into force for the Falkland Islands and Dependencies on January 25, 1980.

The declaration of extension contains the following reservation:

``… . in accordance with the provisions of Article 4 and Article 33 of the Convention, the Falkland Islands and Dependencies will not accept a Letter of Request in French.'' In accordance with Article 35 of the Convention the following designations have been made:

a) under Articles 16, 17 and 18 of the Convention the Judge of the Supreme Court of the Falkland Islands, is designated as the competent authority for the Falkland Islands and Dependencies;

b) under Article 24 of the Convention, the Governor of the Falkland Islands and its dependencies is designated as an additional authority competent to receive Letters of Request for execution in the Falkland Islands and Dependencies.

and the following declarations:

1. In accordance with Article 8, members of the judicial personnel of the requesting authority may be present at the execution of a Letter of Request in the Falkland Islands and Dependencies.

2. In accordance with Article 18, a diplomatic officer, consular agent or commissioner authorised to take evidence under Article 15, 16, and 17 of the Convention may apply to the competent authority in the Falkland Islands and Dependencies designated hereinbefore for appropriate assistance to obtain such evidence by compulsion provided that the Contracting State whose diplomatic officer, consular agent or commissioner makes the application has made a declaration affording reciprocal facilities under Article 18.

3. In accordance with Article 23, the Falkland Islands and Dependencies will not execute Letters of Request issued for the purpose of obtaining pre-trial discovery of documents.

The Governor of the Falkland Islands and its dependencies understands ``Letters of Request issued for the purposes of obtaining pre-trial discovery of documents'' for the purposes of the foregoing declaration as including any Letter of Request which requires a person:

a) to state what documents relevant to the proceedings to which the Letter of Request relates are, or have been, in his possession, custody or power; or

b) to produce any documents other than particular documents specified in the Letter of Request as being documents appearing to the requested court to be, or likely to be, in his possession, custody or power.

4. In accordance with Article 27, by the law and practice of the Falkland Islands and Dependencies the prior permission referred to in Articles 16 and 17 of the Convention is not required in respect of diplomatic officers, consular agents or commissioners of a Contracting State which does not require permission to be obtained for the purposes of taking evidence under Articles 16 or 17.

Extension to Isle of Man.—

Notification is conformity with article 42, sub d and e, of the Convention

By a letter dated April 16, 1980, and received at the Ministry of Foreign Affairs of the Kingdom of the Netherlands on April 16, 1980, the Ambassador of the United Kingdom of Great Britain and Northern Ireland at The Hague, referring to the deposit on July 16, 1976 of the instrument of ratification of the above-mentioned Convention by the United Kingdom of Great Britain and Northern Ireland, declared in accordance with article 40 that the Convention shall extend to the Isle of Man.

The Convention shall enter into force for the Isle of Man on June 15, 1980.

The declaration of extension contains the following reservation:

``… . in accordance with the provisions of Article 4 and Article 33 of the Convention, the Isle of Man will not accept a Letter of Request in French.''

In accordance with Article 35 of the Convention the following designations have been made:

a) under Articles 16, 17 and 18 of the Convention Her Majesty's First Deemster and Clerk of the Rolls is designated as the competent authority for the Isle of Man;

b) under Article 24 of the Convention, Her Majesty's First Deemster and Clerk of the Rolls is designated as an additional authority competent to receive Letters of Request for execution in the Isle of Man.

and the following declarations:

1. In accordance with Article 8, members of the judicial personnel of the requesting authority may be present at the execution of a Letter of Request in the Isle of Man.

2. In accordance with Article 18, a diplomatic officer, consular agent or commissioner authorised to take evidence under Article 15, 16 and 17 of the Convention may apply to the competent authority in the Isle of Man designated hereinbefore for appropriate assistance to obtain such evidence by compulsion provided that the Contracting State whose diplomatic officer, consul-ar agent or commissioner makes the application has made a declaration affording reciprocal facilities under Article 18.

3. In accordance with Article 23, the Isle of Man will not execute Letters of Request issued for the purpose of obtaining pre-trial discovery of documents.

The Government of the Isle of Man understands ``Letters of Request issued for the purpose of obtaining pre-trial discovery of documents'' for the purposes of the foregoing declaration as including any Letter of Request which requires a person:

a) to state what documents relevant to the proceedings to which the Letter of Request relates are, or have been, in his possession, custody or power; or

b) to produce any documents other than particular documents specified in the Letter of Request as being documents appearing to the requested court to be, or likely to be, in his possession, custody or power.

4. In accordance with Article 27, by the law and practice of the Isle of Man the prior permission referred to in Articles 16 and 17 of the Convention is not required in respect of diplomatic officers, consular agents or commissioners of a Contracting State which does not require permission to be obtained for the purposes of taking evidence under Articles 16 or 17.

Extension to Cayman Islands.—

Notification in conformity with Article 42, sub d and e, of the Convention

By letter dated 16 September 1980 and received at the Ministry of Foreign Affairs of the Kingdom of the Netherlands on that same date, the Ambassador of the United Kingdom of Great Britain and Northern Ireland at The Hague referring to the deposit on 16 July 1976 of the instrument of ratification of the above-mentioned Convention by the United Kingdom of Great Britain and Northern Ireland declared in accordance with Article 40 that the Convention shall extend to the Cayman Islands.

The Convention will enter into force for the Cayman Islands on 15 November 1980.

The declaration of extension contains the following reservation:

``… in accordance with the provisions of Article 4 and Article 33 of the Convention, … the Cayman Islands will not accept a Letter of Request in French''.

In accordance with Article 35 of the Convention the following designations have been made:

a) Under Articles 16 and 17 of the Convention, the Attorney General is designated as the competent authority for the Cayman Islands;

b) Under Article 18 of the Convention, the Clerk of the Grand Court is designated as the competent authority;

c) Under Article 24 of the Convention, His Excellency the Governor is designated as an additional authority competent to receive Letters of Request for execution in the Cayman Islands.

and the following declarations:

1. In accordance with Article 8, members of the judicial personnel of the requesting authority may be present at the execution of a Letter of Request in the Cayman Islands.

2. In accordance with Article 18, a diplomatic officer, consular agent or commissioner authorised to take evidence under Article 15, 16 and 17 of the Convention may apply to the competent authority in the Cayman Islands designated hereinbefore for appropriate assistance to obtain such evidence by compulsion provided that the Contracting State whose diplomatic officer,

consular agent or commissioner makes the application has made a declaration affording reciprocal facilities under Article 18.

3. In accordance with Article 23, the Cayman Islands will not execute Letters of Request issued for the purpose of obtaining pre-trial discovery of documents. The Government of the Cayman Islands understand ``Letters of Request issued for the purpose of obtaining pre-trial discovery of documents'' for the purposes of the foregoing declaration as including any Letter of Request which requires a person:

a) to state what documents relevant to the proceedings to which the Letter of Request relates are, or have been, in his possession, custody or power; or

b) to produce any documents other than particular documents specified in the Letter of Request as being documents appearing to the requested court to be, or likely to be, in his possession, custody or power.

4. In accordance with Article 27, by the law and practice of the Cayman Islands the prior permission referred to in Article 16 and 17 of the Convention is not required in respect of diplomatic officers, consular agents or commissioners of a Contracting State which does not require permission to be obtained for the purposes of taking evidence under Articles 16 or 17.

Extension to Guernsey.—

Notification in accordance with Article 42, sub d and e, of the Convention

With reference to the deposit of its instrument of ratification of the above-mentioned Convention on 16 July 1985 the Government of the United Kingdom of Great Britain and Northern Ireland declared by letter of 13 November 1985 which was received by the Ministry of Foreign Affairs of the Kingdom of the Netherlands on 19 November 1985, in accordance with Article 40, second paragraph, that the Convention shall extend to Guernsey.

In accordance with Article 35 the Government of the United Kingdom furthermore declared that:

``(a) under Articles 8 and 25 of the Convention, the Bailiff, Deputy Bailiff, any Jurat of the Royal Court of Guernsey, the Chairman or a Jurat of the Court of Alderney and the Seneschal (or Deputy) of the Court of the Seneschal of Sark are designated as the competent authorities for Guernsey;

(b) under Article 23 of the Convention, Guernsey will not execute Letters of Request issued for the purpose of obtaining pre-trial discovery of documents.''.

In accordance with Article 40, third paragraph, the Convention will enter into force for Guernsey on 18 January 1986.

Extension to Anguilla.—

Notification pursuant to Article 42, paragraph c, d and e, of the Convention

In accordance with Article 40, paragraph 2, the Kingdom of Great Britain and Northern Ireland declared, by a Letter dated 1 July 1986, received at the Ministry of Foreign Affairs on 3 July 1986, that the present Convention shall extend to Anguilla.

In accordance with Article 35, of the Convention, the following designations have been made:

``a. Under Articles 16, 17 and 18 of the Convention the Registrar of the East Caribbean Supreme

Court is designated as the competent authority for Anguilla.

b. Under Article 24 of the Convention, the Governor of Anguilla is designated as an additional authority competent to receive Letters of Request for execution in Anguilla."

and the following declarations:

``.................. in accordance with the provisions of Articles 4 and 33 of the Convention, Anguilla will not accept a Letter of Request in French.

In accordance with Article 8, members of the juridical personnel of the requesting authority may be present at the execution of a Letter of Request in Anguilla.

In accordance with Article 18, a diplomatic officer, consular agent or commissioner authorized to take evidence under Articles 15, 16 and 17 of the Convention may apply to the competent authority in Anguilla designated above for appropriate assistance to obtain such evidence by compulsion provided that the contracting State whose diplomatic officer, consular agent or commissioner makes (sic) the application has made a declaration affording reciprocal facilities under Article 18.

In accordance with Article 23, Anguilla will not execute Letters of Request issued for the purpose of obtaining pre-trial discovery of documents. Anguilla understands ``Letters of Request issued for the purpose of obtaining pre-trial discovery of documents" for the purposes of the foregoing declaration as including any Letter of Request which requires a person:

i. to state what documents relevant to the proceedings to which the Letter of Request relates are, or have been, in his possession, custody or power; or

ii. to produce any documents other than particular documents specified in the Letter of Request as being documents appearing to the requested court to be, or likely to be, in his possession, custody or power.

In accordance with Article 27, by the law and practice of Anguilla the prior permission referred to in Articles 16 and 17 of the Convention is not required in respect of diplomatic officers, consular agents or commissioners of a Contracting State which does not require permission to be obtained for the purposes of taking evidence under Articles 16 or 17."

In accordance with Article 40, the Convention entered into force for Anguilla on 1 September 1986.

By a letter dated 29 December 1986, and received at the Ministry of Foreign Affairs of the Kingdom of the Netherlands on 6 January 1987, the United Kingdom of Great Britain and Northern Ireland declared in accordance with Article 40 that the Convention shall extend to Jersey.

Entry into force for *Jersey* on *7 March 1987.*

The declaration of extension contains the following designations:

``*(a)* under Articles 16, 17 and 18 of the Convention the Royal Court is designated as the competent authority for Jersey;

(b) under Articles 24 and 25 of the Convention, the Royal Court is designated as an additional authority competent to receive Letters of Request for execution in Jersey.";

and the following declarations:

``1. In accordance with Article 8, members of the judicial personnel of the requesting authority may be present at the execution of a Letter of Request in Jersey only with the prior authorisation of the Royal Court.

2. In accordance with Article 18, a diplomatic officer, consular agent or commissioner authorized to take evidence under Articles 15, 16 and 17 of the Convention may apply to the competent authority in Jersey designated hereinbefore for appropriate assistance to obtain such evidence by compulsion provided that the Contracting State whose diplomatic officer, consular agent or commissioner makes the application has made a declaration affording reciprocal facilities under Article 18.

3. In accordance with Article 23, Jersey will not execute Letters of Request issued for the purpose of obtaining pre-trial discovery of documents.

The Government of Jersey understands ``Letters of Request issued for the purpose of obtaining pre-trial discovery of documents'' for the purposes of the foregoing declaration as including any Letter of Request which requires a person:

(i) to state what documents relevant to the proceedings to which the Letter of Request relates are, or have been, in his possession, custody or power; or

(ii) to produce any documents other than particular documents specified in the Letter of Request as being documents appearing to the requested court to be or likely to be, in his possession, custody or power.''

N.B. By a Note dated 9 February 1995 and received on 21 February 1995, the Embassy of the United Kingdom of Great Britain and Northern Ireland informed the Ministry of Foreign Affairs of the Kingdom of the Netherlands that, unless otherwise stated, in future the acceptance by the United Kingdom of the accession of any State to the Convention shall also be acceptance in respect of all the territories for the international relations of which the United Kingdom is responsible and to which the application of the Convention has been extended.

4c With the following designations and declarations:

The United States Department of Justice, Washington, D.C., 20530, is designated as the Central Authority referred to in Article 2 of the Convention.

Under paragraph 2 of Article 4 of the United States has agreed to accept a Letter of Request in or translated into French. The United States wishes to point out that owing to the necessity of translating such documents into English it will take the Central Authority longer to comply with a Letter of Request in or translated into French than with a similar request received in English.

In accordance with paragraph 3 of Article 4 the United States declares that it will also accept Letters of Request in Spanish for execution in the Commonwealth of Puerto Rico.

In accordance with Article 8 the United States declares that subject to prior authorization members of the judicial personnel of the requesting authority of another Contracting State may be present at the execution of a Letter of Request. The Department of Justice is the competent authority for the purposes of this Article.

The United States declares that evidence may be taken in the United States under Articles 16 and 17 without its prior permission.

In accordance with Article 18 the United States declares that a diplomatic or consular officer or a commissioner authorized to take evidence under Articles 15, 16 or 17 may apply for appropriate assistance to obtain the evidence by compulsion. The competent authority for the purposes of Article 18 is the United States district court of the district in which a person resides or is found. Such court may order him to give his testimony or statement or to produce a document or thing for use in a proceeding in a foreign tribunal. The order may direct that the testimony or statement be given, or the document or other thing be produced, before a person appointed by the court.

In accordance with Article 40 the United States declares that the Convention shall extend to Guam, Puerto Rico and the Virgin Islands.

In accordance with the provisions of Article 39 of the Convention, the United States declared its acceptance of the accessions by Argentina, Australia, Barbados, China, Cyprus, Estonia, Latvia, Mexico, Monaco, Poland, Singapore, and Venezuela.

5 In accordance with Article 2 [of the Convention] Venezuela designated the following Central Authority: el ministerio de Relaciones Exteriores.

In accordance with Article 39, paragraph 5, the Convention will enter into force between Venezuela and

Cyprus ....29 April 1994

*United Kingdom of Great Britain and Northern Ireland ....15 August 1994**

Sweden ....3 September 1994

Germany ....21 October 1994

Denmark ....27 November 1994

Spain ....6 February 1995

Finland ....11 March 1995

the *United States of America ....24 October 1995*

Italy ....16 January 1996

Australia ....20 January 1996

Israel ....19 March 1996

Slovakia ....20 May 1996

Mexico ....26 July 1997

Argentina ....21 September 1997

the *Czech Republic ....13 January 1998*

Switzerland ....11 July 1998

Singapore ....6 February 1999

Portugal ....8 June 2001

* The Permanent Bureau of the Hague Conference on private international law presents its compliments to the Diplomatic Missions of the Member States and to the National Organs and has the honour to inform them that, by a Note dated 9 February 1995 and received on 21 February 1995, the Embassy of the United Kingdom of Great Britain and Northern Ireland informed the Ministry of Foreign Affairs of the Kingdom of the Netherlands that the acceptance of Venezuela's accession to the Convention, set out in the Embassy's Note of 14 June 1994 (see L.c. A No 51/L.c. ON No 47 dated 26 July 1994) was also in respect of the territories for the international relations of which the United Kingdom is responsible and to which the application of the Convention has been extended.

The Embassy also informed that, unless otherwise stated, in future the acceptance by the United Kingdom of the accession of any State to the Convention shall also be acceptance in respect of all the territories for the international relations of which the United Kingdom is responsible and to which the application of the Convention has been extended.

[5] The Permanent Bureau of the Hague Conference on private international law presents its compliments to the Diplomatic Missions of the Member States and to the National Organs and has the honour to inform them that, by instrument deposited on 1 November 1993 with the Ministry of Foreign Affairs of the Kingdom of the Netherlands,

Venezuela

acceded to the above-mentioned Convention.

The instrument of accession contains the following reservations and declaration:

Translation

1.—With regard to Article 4, paragraph 2:

``The Republic of Venezuela will accept Letters of Request and documents and other items annexed thereto only when these are properly translated into the Spanish language''.

2.—With regard to Chapter II:

``The Republic of Venezuela will not allow commissioners as provided for in Chapter II of this Convention to act in obtaining evidence''.

3.—With regard to Article 23:

``The Republic of Venezuela declares that it will only execute Letters of Request dealing with the procedure known in *Common Law* countries as *pre-trial discovery of documents* when the following conditions apply:

a) that proceedings have been instituted;

b) that the documents requested to be exhibited or transcribed shall be reasonably identified as regards their date, contents or other relevant information;

c) that any facts or circumstances giving the plaintiff reasonable cause to believe that the documents asked for are known to the person requested to produce them so that they are or were in the possession or under the control or in the custody of that person, shall be specified;

d) that the connection between the evidence or information sought and the pending litigation be made quite clear".

In accordance with Article 39, paragraph 3, the Convention will enter into force for *Venezuela* on *31 December 1993*.

According to Article 39, paragraph 4, of the Convention the accession will have effect only as regards the relations between *Venezuela* and such *Contracting States* as will have declared their acceptance of the accession. Such declarations shall be deposited at the Ministry of Foreign Affairs of the Kingdom of the Netherlands.

MODEL FOR LETTERS OR REQUEST RECOMMENDED FOR USE IN APPLYING THE HAGUE CONVENTION OF 18 MARCH 1970 ON THE TAKING OF EVIDENCE ABROAD IN CIVIL OR COMMERCIAL MATTERS

REQUEST FOR INTERNATIONAL JUDICIAL ASSISTANCE PURSUANT TO THE HAGUE CONVENTION OF 18 MARCH 1970 ON THE TAKING OF EVIDENCE IN CIVIL OR COMMERCIAL MATTERS

N.B. Under the first paragraph of article 4, the Letter of Request shall be in the language of the authority requested to execute it or be accompanied by a translation into that language. However, the provisions of the second and third paragraphs may permit use of other languages.

In order to avoid confusion, please spell out the name of the month in each date.

I *(Items to be included in all Letters of Request.)*

1 Sender

—(identity and address)—
____
____

2 Central Authority of the Requested State

—(identity and address)—
____
____

3 Person to whom the executed request is to be returned

—(identity and address)—

____

____

II *(Items to be included in all Letters of Request.)*

4 In conformity with article 3 of the Convention, the undersigned applicant has the honour to submit the following request:

5 *a* Requesting judicial authority (article 3, *a*)

—(identity and address)—

____

____

b To the competent authority of (article 3, *a*)

—(the requested State)—

____

____

6 Names and addresses of the parties and their representatives (article 3, *b*)

a Plaintiff

____

____

____

b Defendant

____

____

____

c Other parties

____

____

____

7 Nature and purpose of the proceedings and summary of the facts (article 3, *c*)

____

____

____

8 Evidence to be obtained or other judicial act to be performed (article 3, *d*)

____

____

____

III *(Items to be completed where applicable.)*

9 Identity and address of any person to be examined (article 3, *e*)

____

____

____

10 Questions to be put to the persons to be examined or statement of the subject-matter about which they are to be examined (article 3, *f*)

____

—(or see attached list)—

____

____

11 Documents or other property to be inspected (article 3, *g*)

____

—(specify whether it is to be produced, copied, valued, etc.)—

____
____

12 Any requirement that the evidence be given on oath or affirmation and any special form to be used (article 3, *h*)

____
—(In the event that the evidence cannot be taken in the manner requested, specify whether it is to be taken in such manner as provided by local law for the formal taking of evidence.)—
____

13 Special methods or procedure to be followed (articles 3, *i*) and 9)

____
____

14 Request for notification of the time and place for the execution of the Request and identity and address of any person to be notified (article 7)

____
____
____
____

15 Request for attendance of participation of judicial personnel of the requesting authority at the execution of the Letter of Request

____
____
____

16 Specification of privilege or duty to refuse to give evidence under the law of the State of origin (article 11, *b*)

____
____
____
____

17 The fees and costs incurred which are reimbursable under the second paragraph of article 14 or under article 26 of the Convention will be borne by

—(identity and address)—
____
____
____

IV *(Items to be included in all Letters of Request.)*

18 Date of request

____

19 Signature and seal of the requesting authority

____
____

1 Notifications

Articles: 12

Belgium, Germany, Greece, Italy and Spain raised an objection to the accession of Albania within the period of six months specified in Article 12, paragraph 2, and expiring on 10 March 2004. The Convention will not enter into force between Albania and these five countries.

Albania—competent authority (Art. 6)

the Consular Department of the Ministry of Foreign Affairs.

1a *Notification in conformity with Article 15 of the Convention*

On 15 April 1996 the Ministry of Foreign Affairs of the Kingdom of the Netherlands received the instrument of accession of the Principality of Andorra to the above-mentioned Convention in accordance with Article 12, first paragraph, of the Convention.

In accordance with the terms of Article 12, paragraph 1, of the Convention any State not mentioned in Article 10 may accede to this Convention. In accordance with Article 12, paragraph 2, such accession shall have effect only as regards the relations between the Principality of Andorra and those contracting States (at present: Antigua and Barbuda, Argentina, Armenia, Australia, Austria, Bahamas, Barbados, Belgium, Belize, Byelorus, Bosnia and Herzegovina, Botswana, Brunei, Darussalam, Croatia, Cyprus, El Salvador, Fiji, Finland, France, Germany, Greece, Hungary, Israel, Italy, Japan, the Kingdom of the Netherlands, Lesotho, Liechtenstein, Luxembourg, The former Yugoslav Republic of Macedonia, Malawi, Malta, Marshall Islands, Mauritius, Mexico, Norway, Panama, Portugal, Russia, Saint Kitts and Nevis, San Marino, Seychelles, Slovenia, South Africa, Spain, Surinam, Swaziland, Switzerland, Tonga, Turkey, the United Kingdom of Great Britain and Northern Ireland and the United States of America) which have not raised an objection to its accession in the six months after receipt of this notification. For practical reasons this six months' period will run from 1 May 1996 till 1 November 1996. The Principality of Andorra informed the depositary that as per 16 September 2002 the following authorities are competent to issue the certificate referred to in Article 3:

1. Ministre/a d'Afers Exteriors (Minister of Foreign Affairs)

2. Ministre/a de Presidència i Turisme (Minister of the Presidency and Tourism)

3. Ministre/a de Justícia i Interior (Minister of Justice and Interior)

4. Secretari/ària d'Estat de Justícia i Interior (Secretary of State of Justice and Interior)

5. Director/a de política exterior, afers bilaterals i Unió Europea (Director of Foreign Policy, Bilateral Affairs and European Union)

6. Director/a d'Afers multilaterals i cooperació al desenvolupament (Director of Multilateral Affairs and Co-operation for Development).

1b Designation of the competent authorities to issue the certificate in accordance with Article 6, paragraph 1: ``the Registrar of the High Court of Antigua and Barbuda, St. Johns, Antigua''.

1c In accordance with Article 12, paragraph 1, the instrument of accession by the Argentine Republic to the above-mentioned Convention was deposited with the Ministry of Foreign Affairs of the Kingdom of the Netherlands on 8 May 1987.

The instrument of accession contains the declaration annexed to this notification.

``In accordance with the terms of Article 12, paragraph 1, of the Convention any State not mentioned in Article 10 may accede to this Convention. In accordance with Article 12, paragraph 2, such accession shall have effect only as regards the relations between the Argentine Republic and those contracting States (at present: Antigua and Barbuda, Austria, Bahamas, Belgium, Botswana, Brunei Darussalam, Cyprus, Fiji, Finland, France, the Federal Republic of Germany, Greece, Hungary, Israel, Italy, Japan, Lesotho, Liechtenstein, Luxembourg, Malawi, Malta, Mauritius, the Kingdom of the Netherlands, Norway, Portugal, Seychelles, Spain, Surinam, Swaziland, Switzerland, Tonga, Turkey, the United Kingdom of Great Britain and Northern Ireland, the United States of America and Yugoslavia) which have not raised an objection to its accession in the six months after the receipt of this notification. For practical reasons this six months' period will extend from 20 June 1987 till 20 December 1987."

``The Argentine Republic rejects the extension of the application of the Convention Abolishing the Requirement of Legalization for Foreign Public Documents, concluded at The Hague on October 5, 1961, to the Malvinas, South Georgia, and South Sandwich Islands, as notified by the United Kingdom of Great Britain and Northern Ireland to the Ministry of Foreign Affairs of the Kingdom of the Netherlands on February 24, 1965, and reaffirms its sovereign rights over the Malvinas, South Georgia, and South Sandwich Islands, which form an integral part of its national territory.

``The United Nations General Assembly has adopted resolutions 2065(XX), 3160(XXVIII), 31/49, 37/9, 38/12, 39/6, 40/21, and 41/40, acknowledging the existence of a sovereignty dispute with respect to the question of the Malvinas Islands, and urging the Argentine Republic and the United Kingdom of Great Britain and Northern Ireland to continue negotiating in order to reach a peaceful and definitive solution to the dispute as soon as possible, through the good offices of the United Nations Secretary General, who is to inform the General Assembly of the progress achieved.

``The Argentine Republic also rejects the extension of the Convention, notified on the same date as above, to the so-called ``British Antarctic Territory," and thereby reaffirms the rights of the Republic to the Argentine Antarctic Sector, including those relating to its corresponding maritime sovereignty or jurisdiction. It further recalls the safeguards on claims of territorial sovereignty in Antarctica set forth in Article IV of the Antartic Treaty, done at Washington on December 1, 1959, to which the Argentine Republic and the United Kingdom of Great Britain and Northern Ireland are parties." (Translation provided by the Division of Language Services, Department of State)

Designation of the competent authorities to issue the certificate in accordance with Article 6, paragraph 1:

``Ministerio de Relaciones Exteriores y Culto, Reconquista 1088, 1003 Buenos Aires".

1d The Permanent Bureau of the Hague Conference on private international law presents its compliments to the Diplomatic Missions of the Member States and to the National Organs and has the honour to inform them that, in accordance with Article 6, paragraph 1, of the Convention, the Government of *the Republic of Armenia* has designated *the Ministry of Foreign Affairs* and *the Ministry of Justice of the Republic of Armenia* to issue the certificate referred to in the first paragraph of Article 3.

2 *Notification in conformity with Article 15 of the Convention*

On 11 July 1994 Australia deposited its instrument of accession at the Ministry of Foreign Affairs of the Kingdom of the Netherlands to the above-mentioned Convention in accordance with Article 12, first paragraph, of the Convention.

Australia made the following declarations:

``—pursuant to the second paragraph of Article 6, the Secretary to the Department of Foreign Affairs and Trade of the Commonwealth will be its competent authority for the purpose of that Article; and

—pursuant to Article 13, the Convention shall extend to all the territories for the international relations of which it is responsible."

In accordance with the terms of Article 12, paragraph 1, of the Convention any State not mentioned in Article 10 may accede to this Convention. In accordance with Article 12, paragraph 2, such accession shall have effect only as regards the relations between Australia and those contracting States (at present: Antigua and Barbuda, Argentina, Armenia, Austria, Bahamas, Belgium, Belize, Byelorus, Bosnia and Herzegovina, Botswana, Brunei Darussalam, Croatia, Cyprus, Fiji, Finland, France, Germany, Greece, Hungary, Israel, Italy, Japan, the Kingdom of the Netherlands, Lesotho, Liechtenstein, Luxemburg, The former Yugoslav Republic of Macedonia, Malawi, Malta, Marshall Islands, Mauritius, Norway, Panama, Portugal, Russia, Seychelles, Slovenia, Spain, Surinam, Swaziland, Switzerland, Tonga, Turkey, the United Kingdom of Great Britain and Northern Ireland and the United States of America) which have not raised an objection to its accession in the six months after receipt of this notification. For practical reasons this six months' period will run from 15 July 1994 till 15 January 1995.

2a Designation of the competent authorities to issue the certificates in accordance with Article 6, paragraph 1:

``1. das Bundesministerium für Auswärtige Angelegenheiten hinsichtlich aller Urkunden, die

a) vom Bundespräsidenten oder von der Präsidentschatskanzlei,

b) vom Präsidenten des Nationalrates, vom Vorsitzenden des Bundesrates oder von der Parlamentdirektion,

c) von der Bundesregierung,

d) von einem Bundesministerium,

e) vom Verfassungsgerichtshof oder vom Verwaltungsgerichtshof,

f) vom Obersten Gerichtshof, vom Kartellobergericht beim Obersten Gerichtshof, von der Obersten Rückstellungskommission beim Obersten Gerichtshof oder von der Obersten Rückgabekommission beim Obersten Gerichtshof oder

g) vom Rechnungshof

ausgestellt worden sind;

2. Die Präsidenten der mit Zivilrechtassachen befassten Gerichtshäfe erster Instanz oder ihre zur Ausstellung der Unterzeichnungsbestätigung (Apostille) bestimmten Stellvertreter, mit Ausnahme des Handelsgerichtes Wien und des Jugendgerichtshofes Wien, hinsichtlich aller Urkunden, die von einem anderen Gericht als den in Zifter 1 lit. *e* und *f* genannten, von einer staatsanwaltschaftlichen Behärde, von einem Notar, von einer Notariatskammer oder von einer Rechtsanwaltskammer—insoweit diese Kammern dabei in Vollziehung behärdlicher Aufgaben des Bundes tätig weden—im Sprengel des betreffenden Gerichtshofes ausgestellt worden sind;

3. hinsichtlich aller anderen Urkunden

a) die Landeshauptmänner, soweit es sich um Urkunden handelt, die in ihrem Bundesland in Vollziehung behärdlicher Aufgaben des Bundes und

b) die Landesregierungen, soweit es sich um Urkunden handelt, die in ihrem Bundesland in Vollziehung behärdlicher Aufgaben des Landes ausgestellt worden sind.''

2b Notifications

Articles: 12

In accordance with Article 12, second paragraph, of the Convention, the accession will have effect only as regards the relations between Azerbaijan and those Contracting States which have not raised an objection to the accession in the six months after the receipt of the notification referred to in sub-paragraph (d) of Article 15 of the Convention. In the case of Azerbaijan, this six months' period will run from 1 July 2004 until 1 January 2005.

Azerbaijan—Competent Authority (Art. 6)

Designated Competent Authority(ies):

1. Ministry of Justice—for documents emanating from courts, public prosecutors and justice authorities, including documents certified in notarial order and state civil acts registration documents;

2. Ministry of Foreign Affairs—for other documents.

	Contact details:
	Ministry of Foreign Affairs
Address:	4, Sh. Gurbanov str Baku city, AZ1009 Azerbaijan
Telephone:	+994 (12) 492 9692
Fax:	+994 (12) 498 8480
E-mail:	secretariat@mfa.gov.az
General website:	http://www.mfa.gov.az/eng/
	Ministry of Justice
Address:	1, Inshaatchilar avn Baku city, AZ1073 Azerbaijan
Telephone:	+994 (12) 430 0977
Fax:	+994 (12) 430 0981
E-mail:	minjus@azdata.net
General website:	http://www.justice.gov.az/eng_index.html

2c In accordance with Article 6, second paragraph, of the Convention, the Ministry of Foreign Affairs of the Commonwealth of the Bahamas has notified a change in the designated authorities. The designated authorities are:

(a) Permanent Secretary, Ministry of Foreign Affairs

(b) Director General, Ministry of Foreign Affairs

(c) Under Secretary, Ministry of Foreign Affairs

(d) Senior Assistant Secretary, Ministry of Foreign Affairs

(e) Deputy Permanent Secretary, Ministry of Foreign Affairs

(f) First Assistant Secretary, Ministry of Foreign Affairs

3 The Ministry of Foreign Affairs of the Kingdom of the Netherlands, depositary of the Convention Abolishing the Requirement of Legalisation for Foreign Public Documents concluded at the Hague on 5 October 1961, has the honour to inform the Member States of the Hague Conference on Private International Law and the States having acceded to the above-mentioned Convention that Barbados has amended the list of competent authorities to issue certificate as follows:

``Solicitor-General

Deputy Solicitor-General

Registrar of the Supreme Court

Registrar of Corporate Affairs

Permanent Secretary in the Ministry responsible for Foreign Affairs

Chief of Protocol''.

4 The Ministry of Foreign Affairs of the Byelorussian Republic communicated the following by Note of 8 February 1993:

Translation

… .the Ministry would advise that in accordance with Article 6 of the Convention and in accordance with the Decree issued by the Government of the Byelorussian Republic on 1 January 1993, official documents issued by government agencies of the Byelorussian Republic for use in the territories of contracting States of the Hague Convention, repealing the necessity of legalisation of foreign official documents, are now authorised only by an apostille written on these documents. An apostille may be given by the Ministry of Justice on documents issued by judicial authorities and courts; by the Ministry of National Education on documents issued by relevant educational authorities; by the committee for Archives and Administration on documents issued by relevant state archives; and by the Ministry of Foreign Affairs on all other documents.

4a Designation of the competent authorities to issue the certificate in accordance with Article 6, paragraph 1: ``Ministère des Affaires étrangères, du Commerce extérieur et de la Coopération au Développement''.

5 *Notification in conformity with Article 15 of the Convention*

On 17 July 1992 the Ministry of Foreign Affairs of the Kingdom of the Netherlands received the instrument of accession by Belize to the above-mentioned Convention in accordance with Article 12, first paragraph, of the Convention.

In accordance with the terms of Article 12, paragraph 1, of the Convention any State not mentioned in Article 10 may accede to this Convention. In accordance with Article 12, paragraph 2, such accession shall have effect only as regards the relations between Belize and those contracting States (at present Antigua and Barbuda, Argentina, Austria, Bahamas, Belgium, Botswana, Brunei Darussalam, Cyprus, Fiji, Finland, France, the Federal Republic of Germany, Greece, Hungary, Israel, Italy, Japan, Lesotho, Liechtenstein, Luxembourg, Malawi, Malta, Marshall Islands, Mauritius, the Kingdom of the Netherlands, Norway, Panama, Portugal, Russia, Seychelles, Spain, Surinam, Swaziland, Switzerland, Tonga, Turkey, the United Kingdom of Great Britain and Northern Ireland, the United States of America and Yugoslavia) which have not raised an objection to its accession in the six months after the receipt of this notification. For practical reasons this six months' period will extend from 10 August 1992 till 10 February 1993.

The Contracting States were notified by the depositary of the accession on 10 August 1992. None of these States raised an objection to the accession within the period of six months specified in Article 12, paragraph 2, which period expired on 10 February 1993.

The provisions of the Convention will enter into force between Belize and the Contracting States on 11 April 1993.

Designation of the competent authorities to issue the certificate in accordance with Article 6, paragraph 1: ``the Registrar General''.

5a One of the successor States to the former Socialist Federal Republic of Yugoslavia which became a Party to the Convention on 24 January 1965. On 23 August 1993 the Republic of Bosnia and Herzegovina declared itself to be bound by the Convention.

No objection has been received from the Contracting States.

Designation of the competent authorities to issue the certificate in accordance with Article 6, paragraph 1: ``the Ministry of Justice and Administration of the Republic of Bosnia and Herzegovina''.

By Note dated 17 August 2000, the Ministry of Foreign Affairs of Bosnia and Herzegovina informed the depositary of the following:

``(…) the authorities designated by Bosnia and Herzegovina who are competent to issue the certificate referred to in the first paragraph of Article 3 of the Convention Abolishing the Requirement of Legalisation for Foreign Public Documents concluded at The Hague on 5th October 1961, are Municipal Courts in the Federation of Bosnia and Herzegovina and in the Republic of Srpska. These certificates shall be subject to certification by the Ministry of Civil Affairs and Communications of Bosnia and Herzegovina and the Ministry of Foreign Affairs of Bosnia and Herzegovina.''

5b Botswana declared on 16 September 1968 that it considers itself bound by the Convention.

Designation of the competent authorities to issue the certificate in accordance with Article 6, paragraph 1:

``*(a)* The persons for the time being exercising the functions of

(i) Permanent Secretary,

(ii) Registrar of High Court,

(iii) District Commissioner,

(b) Any person appointed or empowered to hold a subordinate court of the first class; and

(c) Such other persons as the President may appoint by notice in the Gazette.''

5c Designation of the competent authorities to issue the certificate in accordance with Article 6, paragraph 1:

``Chief Registrar, Deputy Chief Registrar and Registrars of the Supreme Court of Brunei Darussalam; Chief Magistrate, Magistrates and Registrars of subordinate Courts of Brunei Darussalam.''

5d The instrument of accession contains the following declaration:

``The Republic of Bulgaria declares that the following authorities are designated to issue the certificate referred to in paragraph 1 of Article 3 of the Convention: the Ministry of Justice—in respect of the documents of the courts and notaries—and the Ministry of Foreign Affairs—in respect of all other documents.''

5e Accession

According to Article 12, second paragraph, the accession will have effect only as regards the relations between Cape Verde and those Contracting States which will not have raised an objection to its accession in the six months after receipt of the notification from the depositary.

For practical reasons this six months' period will in this case run from 15 June 2009 to 15 December 2009.

Cape Verde—Competent Authority (Art. 6)

Translation)

…in accordance with Article 6 of this Convention, the authorities of the Republic of Cape Verde which are competent to issue the certificate referred to in Article 3, (…), are the *Direcçao-Geral dos Registos e Notariado* of the Ministry of Justice and the *Direcçao-Geral dos Assuntos Consulares e Comunidades* of the Ministry of Foreign Affairs.

CHINA, Hong Kong Special Administrative Region Only.

5f By notification dated June 10, 1997, to the Ministry of Foreign Affairs of The Kingdom of The Netherlands, the People's Republic of China communicated the following information concerning Hong Kong:

THE EMBASSY OF THE PEOPLE'S REPUBLIC OF CHINA
IN THE KINGDOM OF THE NETHERLANDS

No. He Wai Fa (97)-54

(Translation)

The Hague, June 3, 1997

Your Excellency,

In accordance with the Joint Declaration of the Government of the People's Republic of China and the Government of the United Kingdom of Great Britain and Northern Ireland on the Question of Hong Kong signed on 19 December 1984 (hereinafter referred to as the ``Joint Declaration''), the People's Republic of China will resume the exercise of sovereignty over Hong Kong with effect from 1 July 1997. Hong Kong will, with effect from that date, become a Special Administrative Region of the People's Republic of China and will enjoy a high degree of autonomy, except in foreign and defence affairs which are the responsibilities of the Central People's Government of the People's Republic of China.

It is provided both in Section XI of Annex I to the Joint Declaration, ``Elaboration by the Government of the People's Republic of China of its Basic Policies Regarding Hong Kong'', and Article 153 of the Basic Law of the Hong Kong Special Administration Region of the People's

Republic of China, which was adopted on 4 April 1990 by the National People's Congress of the People's Republic of China, that international agreements to which the People's Republic of China is not a party but which are implemented in Hong Kong may continue to be implemented in the Hong Kong Special Administrative Region.

In accordance with the above provisions, I am instructed by the Minister of Foreign Affairs of the People's Republic of China to make the following notification:

The Convention Abolishing the Requirement of Legalization for Foreign Public Documents done at the Hague on 5 October 1961 (hereinafter referred to as the ``Convention''), by which the Government of the Kingdom of the Netherlands is designated as the depository, which applies to Hong Kong at present, will continue to apply to the Hong Kong Special Administrative Region with effect from 1 July 1997. The Government of the People's Republic of China also makes the following declaration:

In accordance with Article 6 of the Convention, it designates each of the following as the competent authorities in the Hong Kong Special Administrative Region to issue the certificates referred to in Paragraph 1 of Article 3 of the Convention for the Hong Kong Special Administrative Region: the Administrative Secretary, the Registrar of the High Court, the Deputy Registrar of the High Court and the Assistant Registrar of the High Court.

Within the above ambit, responsibility for the international rights and obligations of a party to the Convention will be assumed by the Government of the People's Republic of China.

It would be appreciated if the contents of this Note could be placed formally on record and brought to the attention of the other Parties to the Convention.

I avail myself of this opportunity to renew to Your Excellency the assurances of my highest consideration.

CHINA, Macau Special Administrative Region Only

By letter dated 26 November 1999, the Ambassador of Portugal to the Netherlands informed the Minister of Foreign Affairs of the Netherlands of the following:

``Upon instructions from my Government and referring to the Convention abolishing the requirement of legalisation for foreign public documents concluded at The Hague on 5 October 1961 (hereinafter referred to as the Convention) which currently applies to Macau, I have the honour to inform Your Excellency of the following:

In accordance with the Joint Declaration of the Government of the Portuguese Republic and of the Government of the People's Republic of China on the question of Macau, signed in Beijing on 13 April 1987, the Government of the Portuguese Republic will remain internationally responsible for Macau until 19 December 1999, the People's Republic of China resuming from that date the exercise of sovereignty over Macau, with effect from 20 December 1999. From 20 December 1999 the Portuguese Republic will cease to be responsible for the international rights and obligations arising from the application of the Convention in Macau. (… .).''

By letter of 10 December 1999, the Ambassador of the People's Republic to the Netherlands informed the Minister of Foreign Affairs of the Netherlands of the following:

<u>Courtesy translation</u>

``In accordance with the Joint Declaration of the Government of the People's Republic of China and the Government of the Republic of Portugal on the Question of Macau (hereinafter referred to as the Joint Declaration) signed on 13 April 1987, the Government of the People's Republic of China will resume the exercise of sovereignty over Macau with effect from 20 December 1999. Macau will from that date become a Special Administrative Region of the People's Republic of China and will enjoy a high degree of autonomy, except in foreign and defence affairs which are the responsibilities of the Central People's Government of the People's Republic of China.

It is provided both in Section VIII of Elaboration by the Government of the People's Republic of China of its Basic Policies Regarding Macau, which is annex I to the Joint Declaration, and Article 138 of the Basic Law of Macau Special Administrative Region of the People's Republic of China, which was adopted on 31 March 1993 by the National People's Congress of the People's Republic of China, that international agreements to which the Government of the People's Republic of China is not yet a Party but which are implemented in Macau may continue to be implemented in the Macau Special Administrative Region.

In accordance with the provisions mentioned above, I am instructed by the Minister of Foreign Affairs of the People's Republic of China to inform Your Excellency of the following:

The Convention abolishing the requirement of legalisation for foreign public documents, done at The Hague on 5 October 1961 (hereinafter referred to as the Convention), which applies to Macau at present, shall continue to apply to the Macau Special Administrative Region with effect from 20 December 1999. The Government of the People's Republic of China also wishes to make the following declaration:

In accordance with Article 6 of the Convention, it designates the Chief Executive, the Secretary for Administration and Justice, and the Director of Justice Affairs Department of the Macau Special Administrative Region as the authorities competent to issue the certificate referred to in the first paragraph of Article 3 of the Convention in the Macau Special Administrative Region. Within the above ambit, the Government of the People's Republic of China will assume the responsibility for the international rights and obligations that place on a Party to the Convention.

(…)".

6 Instrument of Accession deposited 27 April 2000; enters into force for Colombia 1 December 2000.

Designation of the competent authorities to issue the certificate referred to in Article 3, paragraph 1:

Ministerio de Relaciones Exteriores
Area de Legalizaciones
Dirección: Transversal 17 A No. 98-55
BOGOTA, D.C.
tel.: +57 (1) 525 1860 / 62
fax: +57 (1) 522 3538
e-mail: lgcoord@minrelext.gov.co.

6a Cook Islands—competent authority (Art. 6)

the Ministry of Foreign Affairs and Immigration.

6b One of the successor States to the former Socialist Federal Republic of Yugoslavia which became a Party to the Convention on 24 January 1965. On 5 April 1993 the Republic of Croatia declared itself to be bound by the Convention.

No objection has been received from the Contracting States.

Designation of the competent authorities to issue the certificate in accordance with Article 6, paragraph 1: ``Municipal courts or the Ministry of Justice and Administration of the Republic of Croatia".

6c Designation of the competent authorities to issue the certificate in accordance with Article 6, paragraph 1: ``The Ministry of Justice of the Republic of Cyprus".

6d The Czech Republic deposited with the Ministry of Foreign Affairs of the Kingdom of the Netherlands its instrument of accession to the Convention on 23 June 1998.

In accordance with Article 12, paragraph 3, the Convention entered into force between the Czech Republic and the Contracting States on 16 March 1999.

In accordance with Article 6, first paragraph of the Convention, the Czech Republic designated the following competent authorities:

1. the Ministry of Justice, International Department (certificates issued by authorities of justice, including certificates issued or certified by notaries);

2. the Ministry of Foreign Affairs, Consular Department (when documents are issued by authorities of State Administration or by the other ones).

6e Denmark—Competent Authority (Art. 6)

Designated Competent Authority(ies):

Ministry of Foreign Affairs

Contact details:

Address:	Ministry of Foreign Affairs Legalisation Office Asiatisk Plads 2 B 1448 Copenhagen K Denmark
Telephone:	+45 33 92 12 33
Fax:	+45 33 92 01 38
E-mail:	legalisering@um.dk
Languages of communication:	Danish, English, German
General website *(see also ``Practical Information'')*:	www.um.dk
Price:	165 DKK (approx. [Euro] 22)
Useful Links:	Apostille Endorsements (Ministry of Foreign Affairs)

Declarations

Articles:

(…) that the Convention as yet does not apply for Greenland and the Faro Islands.

6f The Commonwealth of Dominica declared on 22 October 2002 that it considers itself bound by the Convention.

N.B.: The Convention will remain in force between the Commonwealth of Dominica and those Contracting States which have not raised an objection to its accession before **11 May 2003** (Article 12, paragraph 2, of the Convention).

Designation of the competent authorities to issue the certificate referred to in Article 3, paragraph 1:

``The Attorney General, the Solicitor General, the Registrar and the Deputy Registrar ROSEAU

Commonwealth of Dominica''.

7 Dominican Republic—Competent Authority (Art. 6)

``…pursuant to the terms of Article 6 of the Convention (…), the Dominican authority competent to issue the certificates referred to in paragraph 1 of Article 3 of the aforementioned Convention will be the Secretariat of State of Foreign Relations of the Dominican Republic, Legalisations Section of the Consular Department.''

7a Notifications

Articles:

According to Article 12, second paragraph, the Convention will have effect only as regards the relations between Ecuador and those Contracting States which will not have raised an objection to the accession in the six months after receipt of the depositary's notification.

For practical reasons this six months' period will in this case run from 1 August 2004 to 1 February 2005.

Ecuador—competent authority (Art. 6)

Ministry of Foreign Affairs
General Division of Consular Affairs
Legalization Department
QUITO
Ecuador
Contact person: Mrs Alexandra Haro Mancheno, Director.

7b The Ministry of Foreign Affairs of the Republic of El Salvador informed the depositary that the Ministry of Foreign Affairs is the only competent authority to issue the certificate referred to in Article 3 of the Convention.

7c Designation of the competent authorities to issue the certificate in accordance with Article 6, paragraph 1:

``1. The Ministry of Foreign Affairs, Legal Division, Consular Department, Islandi väljak 1, 15049 Tallinn, phone +372 6317 440, fax +372 631 7454;

2. Estonian Ministry of Education, Administrative Department, Tänismägi 11, EE0100 Tallinn, phone +372 6 281 243, fax +372 6 281 390;

3. Administrative Department, Munga 18, EE 2400 Tartu, phone +372 7 350 252, fax +372 7 350 250;

4. Monitoring Department, Munga 18, Tartu, phone +372 7 350 231, fax +372 7 350 250;

5. Ministry of Justice, Courts' Department, Tartu mnt 85, EE0100 Tallinn, phone +372 612 7810, fax +372 612 7811;

6. Ministry of International Affairs, General Administrative Department, Legal Services office, Lai 40, EE0100 Tallinn, phone +372 612 5199, fax +372 612 5198;

7. Ministry of Social Affairs, Public Relations and Training Department, Gonsiori 29, EE0100 Tallinn, phone +372 626 9875, fax +372 699 2209''.

7d Fiji declared on 29 March 1971 that it considers itself bound by the Convention.

Designation of the competent authorities to issue the certificate in accordance with Article 6, paragraph 1: ``The Chief Registrar of the Supreme Court of Fiji''.

8 The Ministry of Foreign Affairs of the Kingdom of the Netherlands, depositary of the above-mentioned Convention, has the honour to inform the Member States of the Hague Conference on Private International Law and the States having acceded to the above-mentioned Convention that in accordance with Article 6, second paragraph, of the Convention Finland has notified changes in the designated authorities. An updated list of the competent authorities in Finland is attached.

<u>Finlande/Finland</u>

Designation of the competent authorities to issue the certificate in accordance with Article 6, paragraph 1:*

* List as per 20 February 2001.

Espoon maistraatti
Magistraten i Esbo
Itätuùlentie 2 A
P.B. 49
02101 ESPOO
tel.: +358 (9) 5024-2760
fax: +358 (9) 5024-2721

Helsingin maistraatti
Magistraten i Helsingfors
Albertinkatu 25
P.B. 309
00181 HELSINKI
tel.: +358 (9) 695-441
fax: +358 (9) 6954-4255

Hyvinkään maistraatti
Urakankatu 1
P.B. 70
05901 HYVINKää
tel.: +358 (205) 161-22
fax: +358 (205) 162-922

Lohjan maistraatti
Magistraten i Lojo
Postikatu 3—P.B. 37
08101 LOHJA
tel.: +358 (19) 360-4509

Porvoon maistraatti
Magistraten i BorgÅa
Piispankatu 34
06100 PORVOO
tel.: +358 (19)

Raseborgs magistrat
Raaseporin maistraatti
Formansallén 4—P.B. 49
10601 EKENäS

fax: +358 (19) 322-153

548-611
fax: +358 (19) 548-6575

tel.: +358 (19) 221-261
fax: +358 (19) 221-2620

Vantaan maistraatti
Magistraten i Vanda
Neilikkatie 8
P.B. 112
01301 VANTAA
tel.: +358 (9) 836-2480
fax: +358 (9) 8362-4850

Porin maistraatti
Isolinnankatu 28
PL 191
28101 PORI
tel.: +358 (2) 622-7300
fax: +358 (2) 622-7307

Rauman maistraatti
Aittakarinkatu 21
P.B. 30
26101 RAUMA
tel.: +358 (2) 831-921
fax: +358 (2) 8319-5270

Salon maistraatti
Magistraten i Salo
Rummunlyäjänkatu 7 B
P.B. 40
24101 SALO
tel.: +358 (2) 775-151
fax: +358 (2) 775-1597

Turun maistraatti
Magistraten i ÅAbo
Aurakatu 8
P.B. 372
20101 TURKU
tel.: +358 (2) 5110-100
fax: +358 (2) 5110-173

Magistraten i ÅAboland
Turunmaan maistraatti
Strandvägen 30
P.B. 16
21601 PARGAS
tel.: +358 (2) 458-1800
fax: +358 (2) 458-1803

Vakka-Suomen maistraatti
Välskärintie 2
P.B. 6
23501 UUSIKAUPUNKI
tel.: +358 (2) 842-2330
fax: +358 (2) 842-2336

Läansstyrelsen pÅa Aland, Magistratsavdelningen
Torggatan 16
P.B. 29
22101 MARIEHAMN
tel.: +358 (18) 6350
fax: +358 (18) 23-750

Hämeenlinnan maistraatti
Birger Jaarlin katu 13
P.B. 64
13101 HäMEENLINNA
tel.: +358 (205) 16-121
fax: +358 (205) 162-183

Lahden maistraatti
Salininkatu 3
15100 LAHTI
tel.: +358 (3) 875-000
fax: +358 (3) 875-0060/0061

Tampereen maistraatti
Verkatehtaankatu 14 A
P.B. 682
33101 TAMPERE
tel.: +358 (3) 253-9000
fax: +358 (3) 253-9015

Kotkan maistraatti
Magistraten i Kotka
Vuorikatu 5 C 3. krs
48100 KOTKA
tel.: +358 (5) 219-9599
fax: +358 (5) 219-9593

Kouvolan maistraatti
Kauppalankatu 14
P.B. 99
45101 KOUVOLA
tel.: +358 (20) 516-121
fax: +358 (5) 375-1144

Lappeenrannan maistraatti
Pormestarinkatu 1 A
P.B. 149
53101 LAPPEENRANTA
tel.: +358 (5) 626-5500
fax: +358 (5) 626-

Mikkelin maistraatti
Raatihuoneenkatu 5 B
P.B. 293
50101 MIKKELI
tel.: +358 (15) 204-0778
fax: +358 (15)

Savonlinnan maistraatti
Olavinkatu 24
57130 SAVONLINNA
tel.: +358 (15) 578-0280
fax: +358 (15) 578-0281

Joensuun maistraatti
Kauppakatu 40 B
P.B. 82
80101 JOENSUU
tel.: +358 (13) 1411
fax: +358 (13) 141-2605

Seinäjoen maistraatti
Kalevankatu 17
P.B. 168
60101 SEINäJOKI
tel.: +358 (6) 420-1300
fax: +358 (6) 420-1326

Jämsän maistraatti
Keskuskatu 17
42100 JäMSä
tel.: +358 (14) 749-1261
fax: +358 (14) 749-1269

Oulun maistraatti
Isokatu 4
P.B. 78
90101 OULU
tel.: +358 (20) 517-8444
fax: +358 (20) 517-8466

Rovanienmen maistraatti
Rovakatu 8
P.B. 8183
96101 ROVANIEMI
tel.: +358 (16) 329-4111
fax: +358 (16) 329-4999

5570

Kuopion seudun maistraatti
Käsityäkatu 43
PL 1348
70101 KUOPIO
tel.: +358 (17) 265-4300
fax: +358 (17) 265-4349

Pielisen-Karjalan maistraatti
Onninpolku 1
P.B. 10
83901 JUUKA
tel.: +358 (13) 474-7240
fax: +358 (13) 474-7213

Magistraten i Vasa
Vaasan maistraatti
Wolffskavägen 35
P.B. 208
65101 VASA
tel.: +358 (205) 17-161
fax: +358 (6) 317-3603

Saarijärven maistraatti
Sivulantie 11
P.B. 47
43101 SAARIJäRVI
tel.: +358 (14) 417-230
fax: +358 (14) 417-236

Kemin maistraatti
Valtakatu 28
94100 KEMI
tel.: +358 (16) 294-330
fax: +358 (16) 294-332

Lapin Maistraatti
Valtion virastotalo
99100 KITTILä
tel.: +358 (16) 651-2275
fax: +358 (16) 651-2270

204-0771

Ylä-Savon maistraatti
Pohjolankatu 10 (2. krs)
PL 115
74101 IISALMI
tel.: +358 (17) 839-1393
fax: +358 (17) 839-1395

Kokkolan maistraatti
Magistraten i Karleby
Torikatu 40
67100 KOKKOLA
tel.: +358 (6) 827-9111
fax: +358 (6) 827-9711

Jyväskylä maistraatti
Väinänkatu 10
P.B. 253
40101 JYVäSKYLä
tel.: +358 (14) 313-6511
fax: +358 (14) 313-6512

Kajaanin maistraatti
Kalliokatu 4
P.B. 221
87101 KAJAANI
tel.: +358 (8) 61-631
fax: +358 (8) 616-3795

Raahen maistraatti
Rantakatu 58 A
PL 16
92101 RAAHE
tel.: +358 (8) 29-931
fax: +358 (8) 299-3280

8a On depositing their instrument of ratification the French Government declared that the Convention mentioned above applies to the entire territory of the French Republic.

Designation of the competent authorities to issue the certificate in accordance with Article 6, paragraph 1:

—Departments in Europe and Overseas Departments (Guadeloupe, Guyana, Martinique and Reunion): ``les Procureurs généraux près les cours d' appèl'';

Overseas Territories:

Comore Islands:	le Procureur de la République près le Tribunal supérieur d'appel de Moroni
French territory of the Affairs and the Issas:	le Procureur de la République près le Tribunal supérieur d'appel de Djibouti
New Caledonia:	le Procureur général près la Cour d'appel de Nouméa
Wallis and Futuna:	le juge de la section du Tribunal de première instance de Nouméa, siégeant à Mata Utu
French Polynesia:	le Procureur de la Réublique près le Tribunal supérieur d'appel de Papeete
St.Pierre and Miquelon:	le Président du Tribunal supérieur d'appel de St.Pierre

8b

Georgia—Competent Authority (Art. 6)

Address	• Ministry of Justice of Georgia • Ministry of Education and Science of Georgia • Supreme Court of Georgia • Ministry of Labor, Health and Social Affairs of Georgia
Conventions	• Convention of 5 October 1961 Abolishing the Requirement of Legalisation for Foreign Public Documents [12]

Accession

According to Article 12, second paragraph, the Convention will have effect only as regards the relations between Georgia and those Contracting States which will not have raised an objection to the accession in the six months after receipt of the notification from the depositary.

For practical reasons this six months' period will in this case run from 15 September 2006 to 15 March 2007.

Declarations

Articles:

This Convention does not apply to the documents issued by the *de facto* illegitimate authorities and officials of the regions of Georgia: Autonomous Republic of Abkhazia and the former

Autonomous District of South Ossetia.

9 With the reunification of Germany on 3 October 1990 the Hague Convention of 5 October 1961 applies to the entire territory of the Federal Republic of Germany.

In accordance with Article 3, first paragraph, of the Convention the issue of certificates in respect of public documents from the new federal Länder listed below:

- Brandenburg
- Mecklenburg-West Pomerania
- Saxony
- Saxony-Anhalt
- Thuringia

is the responsibility of the following Land authorities:

a) für Urkunden der Justizverwaltungsbehärden, der ordentlichen Gerichte (Zivil-und Strafgerichte) und der Notare	*die Ministerien für Justiz sowie die Präsidenten der Landgerichte (Bezirksgerichte)*
b) für Urkunden aller Verwaltungsbehärden (ausser Justizverwaltungsbehärden)	*die Ministerien für Inneres sowie die Regierungspräsidenten (Bezirksregierungen) und das Landesverwaltungsamt (Thüringen)*
c) für Urkunden anderer Gerichte als der ordentlichen Gerichte (vgl. Buchstabe a)	

die Ministerien für Inneres, die
Regierungspräsidenten (Bezirksregierungen), die Ministerien für Justiz
sowie die Präsidenten der Landgerichte
(Bezirksgerichte)

Designation of the competent authorities to issue the certificate in accordance with Article 6, paragraph 1:

<<1 Bund	
a) Urkunden aller Bundesbehärden und gerichte (ausser den unter Buchstabe *b* erwähnten Urkunden)	Bundesverwaltungsamt in Käln
b) Urkunden des Bundespatentsgerichts und des Deutschen Patentamtes	Präsident des Deutschen Patentamtes
2 Länder	
a) Urkunden der Justizverwaltungsbehärden, der ordentlichen Gerichte (Zivil-und Strafgerichte und der Notare	Ministerium (Senator) für Justiz Land-, (Amts-)gerichtspräsident
b) Urkunden aller Verwaltungsbehärden	Ministerium (Senator) für Inneres
(ausser Justizverwaltungsbehärden)	Regierungspräsident (Präsident des Verwaltungsbezirks)
c) Urkunden der anderen als der ordentlichen	Ministerium (Senator) für Inneres Regierungspräsident (Präsident des Verwaltungsbezirks)
Gerichte (vgl. Buchstabe *a*)	Ministerium (Senator) für Justiz
	Land-(amts-)gerichtspräsident.>>

9a Designation of the competent authorities to issue the certificate in accordance with Article 6, paragraph 1:

``1) la Préfecture où siège l'autorité qui délivre le document dans le cas de documents de nature administrative;

2) le Tribunal de Première Instance de l'arrondissement où siège l'autorité qui délivre le document dans le cas de documents de nature judiciaire.''

Translation

(1) the department (nómos) which is the seat of the authority issuing the document in the case of administrative documents;

(2) the court of the first instance in the district which is the seat of the authority issuing the document in the case of judicial documents.

9b Grenada declared on 17 July 2001 that it considers itself bound by the Convention. In accordance with Article 12, last paragraph, the Convention will enter into force between Grenada and those Contracting States which have not raised an objection to its accession on the sixtieth day after the expiry of the six months' period referred to in the second paragraph of Article 12 (which, in this case, will run from 6 August 2001 until 6 February 2002), *i.e.* on 7 April 2002.

Designation of the competent authorities to issue the certificate in accordance with Article 6, paragraph 1:

The Ministry of Foreign Affairs and International Trade
The Permanent Secretary and the Senior Administrative Officer
Ministerial Complex
Botanical Gardens
St. Georges
Grenada W.I.
tel.: 440-2640/2712/2255
fax: 440-4184
e-mail: faffgnd@caribsurf.com.

9c Honduras—Competent Authority (Art. 6)

Designated Competent Authority(ies):

Minister of Foreign Affairs, Secretaría de Estado en el Despacho de Relaciones Exteriores

Contact details:

Address:	Centro Cívico Gubernamental Casa Presidencial Blvd. Kuwait contiguo a la Corte Suprema de Justicia TEGUCIGALPA Honduras
Telephone:	+504 234 49 71 +504 234 4921 +504 234 1962 +504 234 1898
Fax:	+504 234 1897 +504 234 1484
E-mail:	consultas@sre.hn
General website:	http://www.sre.hn/ (*in Spanish only*)
Price:	*[no information available]*
Useful Links:	http://www.sre.hn/tramitessj.html

9d Under the following declaration:

``The Hungarian People's Republic declares that the provisions of Article 13 of the Convention Abolishing the Requirement of Legalisation for Foreign Public Documents, done at The Hague on October 5, 1961, are contrary to resolution 1514/XV on the granting of independence to colonial countries and peoples, adopted by the General Assembly of the United Nations on December 14, 1960."

Designation of the competent authorities to issue the certificate in accordance with Article 6, paragraph 1: ``The Minister of Justice of the Hungarian People's Republic in respect of public documents and legalizations executed by judicial authorities and the Minister for Foreign Affairs of the Hungarian People's Republic in respect of public documents and legalizations executed by other authorities."

9e Iceland—Competent Authority (Art. 6)

Designated Competent Authority(ies):

Ministry for Foreign Affairs (Utanríkisráduneytid)

	Contact details:
Address:	*Street address:* Raudararstigur 25 Reykjavík *Postal address:* Ministry for Foreign Affairs IS-150 Reykjavík Iceland
Telephone:	+354 545 9900
Fax:	+354 562 2373
E-mail:	external@utn.stjr.is postur@utn.stjr.is
General website:	http://www.mfa.is/

9f India—competent authority (Art. 6)

E-mail:	dcpf@mea.gov.in
General website:	http://meaindia.nic.in/

Under the following objections to the accession of India to the Convention:

Belgium, Finland, Germany, the Netherlands and Spain raised an objection to the accession within the period of six months specified in Article 12, paragraph 2, and expiring on 15 May 2005. Therefore, the Convention will not enter into force between India and the above-mentioned Contracting States.

Belgium, 20-04-2005

(Translation)

The Embassy hereby notifies that Belgium believes it is necessary to make a reservation in connection with India's accession to the Convention Abolishing the Requirement of Legalisation for Foreign Public Documents.

Germany, 21-04-2005

(Translation)

India has declared its accession to the Hague Convention abolishing the requirement of legalisation for foreign public documents of 5 October 1961.

The Embassy hereby raises an objection to India's accession with reference to article 12, paragraph 2, of the Convention.

Finland, 02-05-2005

Pursuant to Article 15, second paragraph, of that Convention Finland hereby objects to the accession of India. Consequently, pursuant to Article 15, third paragraph, the Convention shall not enter into force between India and Finland.

Spain, 13-05-2005

(Translation)

In accordance with Article 12, paragraph 2, of the Convention, Spain hereby declares that the Convention shall not enter into force between the Republic of India and the Kingdom of Spain.

Netherlands, 13-05-2005

(Translation)

… the Kingdom of the Netherlands (the Kingdom in Europe, the Netherlands Antilles and Aruba) raises an objection to the accession of India to the Convention abolishing the requirement of legalisation for foreign public documents.

NOTICE FROM THE DEPOSITARY

On 25 May 2005 the depositary received an objection from Portugal concerning India's accession. Since the objection was received after the time limit for filing objections had expired, it will have no legal consequences.

None.

9g By instrument deposited with the Ministry of Foreign Affairs of the Kingdom of the Netherlands, Ireland ratified the Convention.

In accordance with Article 6, first paragraph, of the Convention, the Government of Ireland designated the Department of Foreign Affairs in Dublin as the authority competent to issue the certificate referred to in the first paragraph of Article 3.

In accordance with Article 11, second paragraph, the Convention will enter into force for Ireland on 9 March 1999.

10 The Permanent Bureau of the Hague Conference on private international law presents its compliments to the Diplomatic Missions of the Member States and to the National Organs and has the honour to inform them that, in accordance with Article 6, second paragraph, of the Convention, the following States informed the Ministry of Foreign Affairs of the Kingdom of the Netherlands of a change in the designation of the authorities competent to issue the certificate referred to in the first paragraph of Article 3:

Israel

1. The Ministry of Foreign Affairs of the State of Israel

2. Registrars of Magistrates Courts and Civil Servants appointed by the Minister of Justice under Notaries Law, 1976.

10a Designation of the competent authorities to issue the certificate in accordance with Article 6, paragraph 1:

``1) pour les actes judiciaires, de l'état civil et notariés: le Procureur de la République auprès des Tribunaux dans la juridiction desquels les actes sont émanés;

2) pour tous les autres actes administratifs prévus par la Convention: les Préfets territorialement compétents, pour la Vallée d'Aoste le Président de la Région et pour les provinces de Trente et Bolzano le Commissaire du Gouvernement.''

10b Designation of the competent authorities to issue the certificate in accordance with Article 6, paragraph 1: ``The Ministry of Foreign Affairs in Tokyo''.

10c Korea, Republic of—Competent Authorities (Art. 6)

``(…) in accordance with Article 6 of the Convention, the Republic of Korea has decided to designate the Ministry of Foreign Affairs and Trade, the Ministry of Justice, and the National Court Administration as the authorities who are competent to issue the certificate referred to in the first paragraph of Article 3 of this Convention."

Ministry of Foreign Affairs and Trade
Consular Service division
Government Complex 1303
Sejong-Ro 37
Jongno-gu
SEOUL
Republic of Korea
Telephone: 82-2-2100-8166
Fax: 82-2-2100-7972
E-mail:—
Website: www.0404.go.kr
Language(s) of communication: English, Korean
Name of contact person:—

Categories of public documents for which Apostilles can be issued: Public documents made by government organizations and private documents tested by a notary public.

10c Kazakhstan—Competent Authority (Art. 6)

Designated Competent Authority(ies):

1. The Ministry of Justice of the Republic of Kazakhstan—for official documents issued by the bodies for justice and other state bodies, including the notary offices;

2. The Ministry of Education and Science of the Republic of Kazakhstan—for official documents issued by the bodies for education, science and the educational institutions of the Republic;

3. The Ministry of Internal Affairs of the Republic of Kazakhstan—for official documents issued by the structural subdivisions of the Migration Police;

4. The Committee on administration of the archives and documentation to the Ministry of Culture, Information and Public Consent of the Republic of Kazakhstan—for archive certificates and copies of archive documents issued by the state archives of the Republic of Kazakhstan;

5. The Committee for forensic (legal) administration to the Supreme Court (to be co-ordinated) for official documents issued by the law-enforcement bodies and the bodies for execution of law;

6. The Ministry on State Income of the Republic of Kazakhstan—for official documents issued by the structural and territorial subdivisions of the Ministry on State Income of the

Republic of Kazakhstan;

7. The General Office of Public Prosecutors of the Republic of Kazakhstan (to be co-ordinated)—for official documents issued by the bodies of Public Prosecutors, investigation agencies and inquest;

8. The Ministry of Defence of the Republic of Kazakhstan—for archive certificates and copies of archive documents issued by the special state archives of the Ministry of Defence of the Republic of Kazakhstan;

9. The Committee for National Security of the Republic of Kazakhstan (to be co-ordinated)—for archive certificates and copies of archive documents issued by the special archives of the Committee for National Security of the Republic of Kazakhstan;

10. The designated bodies are entitled to delegate the authority to their territorial bodies to issue the apostille.

Attachment: The Hague Convention of 05.10.1961 abolishing the legalisation for foreign public documents stipulates the apostille of 9 × 9 cm in size.It is expedient to have a stamp of the apostille, which size is 13 × 13 cm.A script of the text can be enlarged for the comfort of its representation and reading. It is not allowed to change (translate) a language document, text and its order of placing on the stamp.The stamp can be fulfilled in the language of the Republic of Kazakhstan only.

Contact details:

Ministry of Justice
Address: 45 Pobedy Avenue
473000 ASTANA
Kazakhstan
Telephone: +7 (3172) 391213
General website: http://www.minjust.kz

Ministry of Education and Science
Address: Republic avenue, 60
473000 Astana
Kazakhstan
Telephone: +7 (3172) 33-33-25
Fax: +7 (3172) 33-34-12
E-mail: pressa@edu.gov.kz
General website: http://www.edu.gov.kz/

Ministry of Internal Affairs
Address: 4 Manasa Street
473000 ASTANA
Kazakhstan
Telephone: +7 (3172) 343600

Committee on Administration of the Archives and Documention to the Ministry of Culture, Information and Public Consent
Address: 22 Beibitshilik Street
473000 ASTANA
Kazakhstan
Telephone: +7 (3172) 322495

Address: The Committee for Forensic (legal) Administration to the Supreme Court

General website: http://www.supcourt.kz

Ministry of Defense
Address: 51a Beibitshilik Street
473000 ASTANA
Kazakhstan
Telephone: +7 (3172) 721020
General website: http://www.mod.kz/

Address: *The Committee for National Security*
Telephone: +7 (317-2) 32-50-50
General website: http://www.knb.kz/ (in Kazakh only)

Declarations

Articles:

``(...)

Attachment: The Hague Convention dd 05.10.1961 abolishing the legalisation for foreign public documents stipulates the apostille of 9 × 9 cm in size.

It is expedient to have a stamp of the apostille, which size is 13 × 13 cm.

A script of the text can be enlarged for the comfort of its representation and reading. It is not allowed to change (translate) a language document, text and its order of placing on the stamp.

The stamp can be fulfilled in the language of the Republic of Kazakhstan only."

11 In accordance with Article 6, first paragraph, of the Convention the Government of Latvia has designated the following authority competent to issue certificates referred to in Article 3, first paragraph:

The Ministry of Foreign Affairs
Brivibas bvld 36
Riga LV-1395
tel. 280425, 286815
fax 371 2227755, 371 88228121

11a Lesotho declared on 24 April 1972 that it considers itself bound by the Convention.

Designation of the competent authorities to issue the certificate in accordance with Article 6, paragraph 1:

``*a.* the Attorney-General;

b. the Permanent Secretary of a Ministry or Department;

c. the Registrar of the High Court;

d. a Resident Magistrate;

e. a Magistrate of the First Class;

f. such other person as the Minister may appoint and whose appointment notice has been published in the Gazette."

12 *Ed. Note*—The Government of the United States of America does not accept the accession of the Government of Liberia to the Convention. The Convention is not in force between the Government of the United States of America and the Government of Liberia.

12a Designation of the competent authorities to issue the certificate in accordance with Article 6, paragraph 1: ``Der Regierungskanslei der fürstlichen Regierung'' at Vaduz.

12b In accordance with Article 6, paragraph 1, of the Convention, Lithuania has designated as competent authority to issue the certificate referred to in the first paragraph of Article 3: the Consular Department of the Ministry of Foreign Affairs.

12c Designation of the competent authorities to issue the certificate in accordance with Article 6, paragraph 1: ``The Ministry of Foreign Affairs''.

13 The Former Yugoslav Republic of Macedonia informed the Depositary that in addition to the Ministry of Justice, all 27 First Instance Courts in the Republic of Macedonia are competent to issue the certificate referred to in the first paragraph of Article 3.

13a Designation of the competent authorities to issue the certificate in accordance with Article 6, paragraph 1:

``*(a)* the Attorney General or the Solicitor General;

(b) the Permanent Secretary of a Government Ministry;

(c) the Registrar of the High Court;

(d) the Registrar General;

(e) a Government Agent;

(f) a notary public;

(g) a Resident Magistrate''.

13b Designation of the competent authorities to issue the certificate in accordance with Article 6, paragraph 1: ``The Ministry of Commonwealth and Foreign Affairs''.

14 *Notification in conformity with Article 15 of the Convention*

The Government of the Marshall Islands deposited its instrument of accession to the Convention with the Ministry of Foreign Affairs of the Kingdom of the Netherlands on 18 November 1991 in accordance with Article 12, first paragraph, of the Convention.

The Contracting States were notified by the depositary of the accession on 25 November 1991. None of these States raised an objection to the accession within the period of six months specified in Article 12, paragraph 2, which period expired on 15 June 1992.

The provisions of the Convention entered into force between the Marshall Islands and the Contracting States on 14 August 1992.

Designation of the competent authorities to issue the certificate in accordance with Article 6, paragraph 1:

``1. Minister of Foreign Affairs of the Marshall Islands,

2. Attorney General and Acting Attorney General,

3. Clerk and Deputy Clerk of the High Court,

4. Registrars and Deputy Registrars of Corporations,

5. Maritime Administrator and Special Agents thereof, and

6. Commissioner and Deputy Commissioners of Maritime Affairs or Special Agents thereof.''

14a Mauritius declared on 20 December 1968 that it considers itself bound by the Convention.

Designation of the competent authorities to issue the certificate in accordance with Article 6, paragraph 1: ``Master and Registrar of the Supreme Court of Mauritius''.

In a Note of 17 September 1973, the Government of Mauritius has informed the Ministry of Foreign Affairs of the Netherlands that the authority competent to issue the certificates referred to in Article 3, paragraph 1, is now: ``The Permanent Secretary, or in his absence, a Principal Assistant Secretary, of the Prime Minister's Office''.

14b Designation of the competent authorities to issue the certificate in accordance with Article 6, paragraph 1 (list updated by the Mexican Embassy by Note of 14 August 1995 addressed to the Ministry of Foreign Affairs of the Kingdom of the Netherlands):

DIRECCIÓN GENERAL DE GOBIERNO

bucareli no 99—planta baja—06600 mexico, d.f.—tel. 535.31.12; 535.43.92—fax 535.26.88

dirección de coordinación política con los poderes de la union

abraham gonzalez no 48—planta baja—06600 mexico, d.f.—tel. 535.51.31—fax 566.12.25

subdirección de formalización y control

abraham gonzalez no 48—planta baja—06600 mexico, d.f.—tel. 535.53.84; 546.57.32—fax 566.12.25

SECRETARIA DE GOBERNACION

DIRECTORIO

REPRESENTACIONES DE LA SUBSECRETARIA DE GOBIERNO

ENTIDAD / DIRECCIÓN OFICIAL

estado de baja california—servicios migratorios

línea internacional—agustín melgar no 1—col. centro,—21100 mexicali, b.c.,—mexico—tel. 91(65) 556665—fax 529050

estado de baja california sur

bravo no 406—entre aquiles serdán—y guillermo preito—23000 la paz, baja california sur—mexico—tel.: 91(112) 32083—fax 32280

estado de campeche

av. de las palmas s/n—junto al centro—bizantino bartimeo—24020 campeche, camp.,—mexico—tel.: 91(981) 53150; 53186—fax 53149

chiapas

libramineto norte n/s—a un costado de esq. pablo—guardado chávez—tuxtla gutiérrez, chis.—tel.: 91(961) 43288—fax: 899091

chihuahua

doblado y 3a no 117—despacho 2 y 3—col. centro—31000 chihuahua, chih.—tel.: 91(14) 167499—fax 370149

estado de coahuila

victoria no 406-1,—zona centro—25000 saltillo, coah.—tel.; 91(18) 175506—fax 175334; 178951

estado de colima

gabino barrera no 159-a—zona centro—28000 colima, col.—tel.: 91(331) 45912—fax 45912

estado de durango

constitución no 210-1—norte altos—zona centro—34000 durango, dgo.,—mexico—tel.: 91(18) 17506—fax 175334;178951

estado de guanajuato

agora del baratillo—despacho—8, zona centro—36000 guanajuato, gto.,—tel.: 91(473) 29446—fax 29110;29111

estado de guerrero

av. ignacio ramírez no 22-a—col. centro—39000 chilpancingo, gro.,—mexico—tel.: 91(74) 711772—fax 721144

calle mina no 120

esq. morelos—col. centro—39300 acapulco, gro.—tel.: 91(74) 828751—fax 800341

estado de hidalgo

torre coby—art. 3 no 97-7 piso—fracc, constitución—42080 pachuca, hgo.,—mexico—tel.: 91(771) 34026—fax 34026

estado de jalisco

chesterton 184—jardines vallarta—45030 guadalajara, jal.—tel.: 91(3) 673 2394—fax 673 2138

mexico

chalco no 703-8—col. sánchez—50140 touca, méx.—tel.: 91(72) 134679—fax 134768; 158325

estado de michoacan

av. siervo de la nación s/n—col. del valle—58260 morelia, mich.—tel.: 91(43) 267 905/06—fax 267 905/06

estado de morelos

galeana no 2-8 piso—edificio ocampo—col. centro—62000 cuernavaca, mor.,—mexico—tel.: 91(73) 188594—fax 188708

estado de nayarit

zacatecas no 16 sur 1 y 2 piso—entre allende y abasolo—63000 tepic, nayarit—tel.: 91(321) 46269—fax 46271

estado de nuevo leon

zaragoza no 1000 sur—condominio acero ph—64000 monterrey, n.l.,—mexico—tel.: 91(8) 3403000—fax 3403000

estado de oaxaca

calzada de la república—no 402-b—jalatlaco—33606 oaxaca, oax.,—mexico—tel.: 91(951) 42145—fax 42145

estado de puebla

calla italia no 2224—fracc las hadas—entre 15 de mayo y 26 pte.—72070 puebla, pue.,—mexico—tel.: 91(22) 494082—fax 494072

estado de queretaro

boulevard hernando quintana—no 168 desp. 203 y 204—76050 querétaro, qro.,—mexico—tel.: 91(42) 234960; 234660—fax 234960

estado de quintana roo

av. primo de verdad no 181—int. 1 esq. av. héroes—67000 chetumal, q.roo.,—mexico—tel.: 91(983) 27347—fax 22744

estado de san luis potosi

av. venustiano—carranza 707-402—col. centro—78250 san luis potosí, s.l.p.—mexico—tel.:

91(48) 144092—fax 173988

estado de sinaloa

lázardo cárdenas—no 913 sur—primer piso—zona centro—80129 culiacán, sin.,—mexico—tel.: 91(67) 173988—fax 173988

estado de sonora

bvd. navarrete no 125—despacho 2—edif. sonmol.—col. valle verde—83200 hermosillo, son.,—mexico—tel.: 91(62) 165044—fax 165044

tabasco

centro admvo. del estado—tabasco 2000—86035 villahermosa, tab.—tel.: 91(93) 165152—fax 165152

estado de tamaulipas

matamoros 11 y 12 no 613—cd. victoria, tamps.—mexico—tel.: 91(131) 20462—fax 20462

estado de tlaxcala

kilómetro 1 1/2 carretera—federal tlaxcala—puebla s/n—90000 tlaxcala, tlax.—mexico—tel.: 91(246) 27147—fax 27264

estado de veracruz

zaragoza no 2 esq.—miguel barragán—91000 xalapa, ver.—mexico—tel.: 91(28) 189303—fax 189395

estado de yucatan

calle 51 no 459 × 50—zona centro—90000 mérida, yuc.,—mexico—tel.: 91(99) 239142; 239636; 239671; 240815—fax 235535

estado de zacatecas

calle sabino no 114 fracc.—la pe[Delta equal to]nuela—98060 zacatecas, zac.,—mexico—tel.: 91(492) 42318—fax 43218

APOSTILLAS DE DOCUMENTOS ESTATALES

estado de aguascalientes

secretaria general de gobierno—palacio de gobierno, plaza da la—patria, zona centro,—c.p. 20000 aguascalientes, ags.—mexico—tel.: 91(49) 15 8188; 15 8175; 15 8643—fax 16 9728

estado de baja california

secretaria general de gobierno—edificio poder ejecutivo, 3° piso—calz. independencias y heroes—c.p. 21000 mexicali, b.c.,—mexico—tel.: 91(65) 58 1114; 58 1053; 58 1042—fax 58 1169

estado de baja california sur

secretaria general de gobierno—palacio de gobierno—isabel la catolica entre bravo y rosales, 1° piso,—c.p. 24000 la paz, b.c.—mexico—tel.: 91(112) 2 0866; 2 9477—fax 5 2422

estado de campeche

secretaria general de gobierno—palacio de los poderes, 4° piso,—calle n° 8, s/n, col. centro,—c.p. 24000 campeche, camp.,—mexico—tel.: 91(981) 6 5070; 6 2341—fax 6 5885

estado de coahuila

palacio de gobierno, 2° piso,—plaza de las armas entre calle—allende y calle juarez, centro,—c.p. 25008 coahuila, saltillo,—mexico—tel.: 91(84) 14 8375; 14 0031; 14 3700—fax 14 1672

estado de colima

secretaria general de gobierno—palacio de gobierno,—calle reforma e hidalgo, col. centro,—c.p. 28000 colima, col.—mexico—tel.: 91(331) 4 4046; 2 2729; 2 1153—fax 4 3508

estado de chiapas

secretaria general de gobierno—palacio de gobierno, 2° piso,—av. central y 1° de oriente—col. centro,—c.p. 29000 tuxtla gtz., chis.,—mexico—tel.: 91(962) 2 2133; 2 9047—fax 3 2458

estado de chihuahua

secretaria general de gobierno—palacio de gobierno 1° piso—aldama y venustiano carranza, col. centro,—c.p. 31000 chihuahua, chih.,—mexico—tel.: 91(14) 10 6324; 10 4643

estado de durango

secretaria general de gobierno—palacio de gobierno s/n—calle 5 de febrero, col. centro—c.p. 34000 durango, dgo.,—mexico—tel.: 91(181) 15600; 15702; 12092—fax 32013

estado de guanajuato

secretaria general de gobierno—palacio de gobierno—paseo de la presa n° 103, 1°piso—c.p. 36000 guanajuato, gto., mexico—tel.: 91(473) 22611; 20534; 24995—fax 28204

estado de guerrero

secretaria general de gobierno—palacio de gobierno—av. miguel aleman n° 1, col. centro—c.p. 39009 chilpancingo, gro.,—mexico—tel.: 91(747) 23006; 25512—fax 27712

estado de hidalgo

secretaria de gobierno—palacio de gobierno,—plaza juarez s/n, 2° piso, col. centro—c.p. 42000 pachuca, hgo.,—mexico—tel.: 91(771) 30200; 30418; 30711—fax 31470

estado de jalisco

secretaria general de gobierno—palacio de gobierno, corona y pedro moreno, sec. centro,—c.p. 44100 guadalajara, jal.,—mexico—tel.: 91(36) 14 5375; 14 3258; 13 1605—fax 13 1846

estado de mexico

secretaria general de gobierno—palacio de gobierno, primer piso—puerta ``a".n° 22, col. centro, —c.p. 50000 toluca, edo de mexico,—mexico—tel.: 91(72) 14 1233; 14 1451; 14 1017—fax 13 4925

estado de michoacan

secretaria general de gobierno—palacio de gobierno, primer patio—planta alta, col. centro,—c.p. 58000 morelia, mich.—mexico—tel.: 91(43) 12 0322; 12 3536; 12 3134—fax 13 4925

estado de morelos

secretaria general de gobierno—palacio de gobierno,—jardines juarez s/n, col. centro,—c.p. 62009 cuernavaca, mor.,—mexico—tel.: 91(73) 12 0056; 12 5131 (ext. 1110)—fax 18 3378

estado de nayarit

secretaria general de gobierno—palacio de gobierno,—av. mexico y abasolo, col. centro,—c.p. 63000 tepic, nayarit,—mexico—tel.: 91(321) 2 5414; 2 4144; 2 7147—fax 2 5364

estado de nuevo leon

secretaria general de gobierno—palacio de gobierno, 2° piso,—zaragoza y 5 de mayo, centro,—c.p. 64000 monterrey, n.l.,—mexico—tel.: 91(83) 42 8022; 40 1845—fax 45 0331

estado de oaxaca

secretaria general de gobierno—palacio de gobierno,—bustamante s/n, planta alta—col. centro, —c.p. 68000 oaxaca, oax.,—mexico—tel.: 91(951) 6 2281; 6 2221—fax 6 7962

estado de puebla

secretaria de gobernacion—palacio de gobierno—av. reforma 711, col. centro,—c.p. 72000 puebla, pue.,—mexico—tel.: 91(22) 32 3123; 32 6119; 46 9964—fax 46 6566

estado de queretaro

secretaria general de gobierno—palacio de gobierno—pasteur y corregidora, col. centro,—c.p. 76000 queretaro, qro.,—mexico—tel.: 91(42) 24 1250; 12 9100; 12 9626—fax 12 9626

estado de quintana roo

secretaria general de gobierno—palacio de gobierno—av. 22 de enero s/n, col. centro—c.p. 77000 chetumal, q.roo.,—mexico—tel.: 91(983) 2 1177; 2 2685; 2 0266 (ext. 112)—fax 2 2366

estado de san luis potosi

secretaria general de gobierno—palacio de gobierno—jardin hidalgo s/n, col. centro—c.p. 78000 san luis potosi, s.l.p.—mexico—tel.: 91(48) 14 4681; 12 5892; 14 9597—fax 12 1433

estado de sinaloa

secretaria general de gobierno—palacio de gobierno—insurgentes y lazaro cardenas—c.p. 80000 culiacan, sin., mexico—tel.: 91(67) 14 2297; 14 1523—fax 14 5722

estado de sonora

secretaria general de gobierno—palacio de gobierno—dr. paliza y comonfort, centro—c.p. 83260 hermosillo, son.,—mexico—tel.: 91(62) 17 2055; 17 2049; 13 4540—fax 12 7424

estado de tabasco

secretaria general de gobierno—anexo palacio de gobierno, 2° piso,—col. centro—c.p. 86000 villahermosa, tab.,—mexico—tel.: 91(93) 12 1065; 12 7858; 12 2610—fax 12 2841

estado de tamaulipas

secretaria general de gobierno—palacio de gobierno, 3° piso—15 y 16, hidalgo y juarez, zona centro,—c.p. 87000 cd. victoria, tamps.,—mexico—tel.: 91(131) 2 5872; 2 1964; 2 5921—fax 2 5017

estado de tlaxcala

secretaria general de gobierno—palacio de gobierno,—plaza da la constitucion n° 3,—col. centro, —c.p. 90000 tlaxcala, tlax., mexico—tel.: 91(246) 2 0006; 2 0366 (ext. 103)—fax 2 5326

estado de veracruz

secretaria general de gobierno—palacio de gobierno—calle henriquez s/n—col. centro,—c.p. 91000 japala, ver.—tel.: 91(28) 17 8670; 17 5648; 17 4516—fax 18 9776

estado de yucatan

secretaria general de gobierno—palacio de gobierno—calle 61 y 60 s/n—col. centro—c.p. 97000 merida, yuc., mexico—tel.: 91(99) 23 0336; 23 8921; 23 7045—fax 24 6374

estado de zacatecas

secretaria general de gobierno—palacio de gobierno—av. miguel hidalgo n° 602—col. centro,—c.p. 98000 zacatecas, zac., mexico—tel.: 91(492) 2 1211; 2 5288—fax 2 8327

distrito federal

direccion general juridica y de estudios legislativos del departamento del distrito federal,—izazaga 89, 8° piso, col. centro—c.p. 06080 mexico, d.f.—tel.: (525) 709 0884—fax 709 7846.

14c

Moldova—Competent Authority (Art. 6)

Address ***Designated Competent Authority(ies):***
For administrative documents:
Contact details:
Address: The Ministry of Foreign Affairs
and European Integration
31 August 1989, 80 Street / 80,
Mateevici Street
MD—2012
Chisinau
Telephone: +373 (22) 201 040
+373 (22) 201 041
Fax: +373 (22) 232 225
E-mail: consdep@mfa.md
dac@mfa.md
General website: http://www.mfa.md
For all other public documents:

	Contact details:	
	Address:	The Ministry of Justice 31 August 1989, 82 Street MD—2012 Chisinau
	Telephone:	+373 (22) 201 457 +373 (22) 234 795
	Fax:	+373 (22) 234 797 +373 (22) 201 457
	E-mail:	secretariat@justice.gov.md
	General website:	http://www.justice.gov.md
	Practical Information:	
	Price:	[no information available]
	Useful Links:	-
Conventions	• Convention of 5 October 1961 Abolishing the Requirement of Legalisation for Foreign Public Documents [12]	

Accession

According to Article 12, second paragraph, the Convention will have effect only as regards the relations between Moldova and those Contracting States which will not have raised an objection to the accession in the six months after receipt of the present notification.

For practical reasons this six months' period will in this case run from 15 July 2006 to 15 January 2007.

None

Articles:

14d

MONACO	**(accession)** **24 April 2002**	**1 November 2002**

Designation of the competent authorities in accordance with Article 6:

Direction des Services Judiciaires

Palais de Justice

BP 513

MC 98015 Monaco Cedex

14e Mongolia Accession

According to Article 12, second paragraph, the accession will have effect only as regards the relations between Mongolia and those Contracting States which will not have raised an objection to its accession in the six months after receipt of the notification from the depositary.

For practical reasons this six months' period will in this case run from 1 May 2009 to 1 November 2009.

Mongolia—Competent Authority (Art. 6)

the Ministry of Foreign Affairs and Trade of Mongolia.

14f Montenegro Succession

One of the successor States to the former Socialist Federal Republic of Yugoslavia which became a Party to the Convention on 24 January 1965.

By letter received by the depositary on 26 April 2001, the Federal Republic of Yugoslavia (since 4 February 2003 called ``Serbia and Montenegro'') declared itself to be bound by the Convention. No objection has been received from the Contracting States.

The Ministry of Foreign Affairs of the Netherlands, depositary of the Hague Conventions, has notified the Member States of the Hague Conference on 5 July 2006 that

``Following the declaration of the state independence of Montenegro, and under the Article 60 of the Constitutional Charter of the state union of Serbia and Montenegro, the Republic of Serbia is continuing international personality of the state union of Serbia and Montenegro, which was confirmed also by the National Assembly of the Republic of Serbia at its session held on 5 June 2006.''

On 30 January 2007 the Republic of Montenegro declared itself to be bound by the Convention:

``… the Government of the Republic of Montenegro succeeds to the Convention abolishing the requirement of legalisation for foreign public documents, adopted at The Hague on October, 5th, 1961, and takes faithfully to perform and carry out the stipulations therein contained as from June 3rd 2006, the date upon which the Republic of Montenegro assumed responsibility for its international relations.''

Montenegro—Competent Authorities (Art. 6)

The courts of first instance of Montenegro:

Basic Court of Bar

Basic Court of Berane

Basic Court of Bijelo Polje

Basic Court of Danilovgrad

Basic Court of Zabljak

Basic Court of Kolasin

Basic Court of Kotor

Basic Court of Niksic

Basic Court of Plav

Basic Court of Pljevlja

Basic Court of Podgorica

Basic Court of Rozaje

Basic Court of Ulcinj

Basic Court of Herceg Novi

Basic Court of Cetinje

President of the Court is authorized to certify the authenticity of the documents or the person who is authorized by the President of the Court with the seal ``Apostille''.

The Ministry of Justice may also issue Apostilles for the public documents issued by the authorities in the district of every Court of First Instance in Montenegro if the necessary conditions are fulfilled, i.e. when the Ministry's database has a sample of the signature and stamp which the public document bears.

14g Namibia—Competent Authority (Art. 6)

Designation of the competent authorities in accordance with Article 6:

(a) Any magistrate, including a regional magistrate and an additional magistrate;

(b) the Registrar of the High Court;

(c) the Permanent Secretary and the Deputy Permanent Secretary: Ministry of Justice and Office of the Attorney General.

15 The Ministry of Foreign Affairs of the Kingdom of the Netherlands, depositary of the above-mentioned Convention, has the honour to inform the Member States of the Hague Conference on Private International Law and the States having acceded to the above-mentioned Convention that in accordance with Article 6, second paragraph of the Convention the Government of Aruba informed the Ministry that since 1 January 1986 the competent authority designated to issue the certificate has been the ``Directeur van het Centraal Bureau Juridische en Algemene Zaken''.

Designation of the competent authorities to issue the certificate in accordance with Article 6, paragraph 1:

the Kingdom in Europe	the Registrar of the Courts of first instance
the Netherlands Antilles	The Lieutenant Governor of an island or a group of islands. The authority designated for the island of Curaçao—the Lieutenant Governor of the island of Curaçao—has delegated his competence to issue the certificate referred to in Article 3, first paragraph, of the Convention to: 1. the Head of the Births, Deaths and Marriages, Population and Electoral Registers of the island of Curaçao, and 2. the acting Head of the Births, Deaths and Marriages, Population and Electoral Registers of the island of Curaçao.
Aruba	de Directeur van het Centraal Bureau Juridische en Algemene Zaken* (the Director of the Central Bureau for Legal and General Affairs).''

*Since 1 January 1986, as communicated by the Government of Aruba to the depositary.

15 The Ministry of Foreign Affairs of the Kingdom of the Netherlands, depositary of the above-mentioned Convention, has the honour to inform the Member States of the Hague Conference on Private International Law and the States having acceded to the above-mentioned Convention that in accordance with Article 6, second paragraph of the Convention the Government of Aruba informed the Ministry that since 1 January 1986 the competent authority designated to issue the certificate has been the ``Directeur van het Centraal Bureau Juridische en Algemene Zaken''.

Designation of the competent authorities to issue the certificate in accordance with Article 6, paragraph 1:

the Kingdom in Europe	the Registrar of the Courts of first instance
the Netherlands	The Lieutenant Governor of an island or a group of islands.

Antilles	The authority designated for the island of Curaçao—the Lieutenant Governor of the island of Curaçao—has delegated his competence to issue the certificate referred to in Article 3, first paragraph, of the Convention to: 1. the Head of the Births, Deaths and Marriages, Population and Electoral Registers of the island of Curaçao, and 2. the acting Head of the Births, Deaths and Marriages, Population and Electoral Registers of the island of Curaçao.
Aruba	de Directeur van het Centraal Bureau Juridische en Algemene Zaken* (the Director of the Central Bureau for Legal and General Affairs).''

*Since 1 January 1986, as communicated by the Government of Aruba to the depositary.

15a With the following declaration:

(…) this accession shall not extend to Tokelau unless and until a declaration to that effect is lodged by the Government of New Zealand with the depositary, in accordance with Article 13 of the Convention;

and designates the New Zealand Department of Internal Affairs as its competent authority for the purposes of Article 6 of the Convention.

15b The Government of Niue deposited with the Ministry of Foreign Affairs of the Kingdom of the Netherlands its instrument of accession to the Convention on June 10, 1998.

In accordance with Article 12, paragraph 3, the Convention entered into force between Niue and the Contracting States on 2 March 1999.

By Note dated 22 June 1999 the Government of Niue informed the depositary that in accordance with Article 6, paragraph 1, of the Convention the designated authorities are:

``(a) The Attorney General

(b) The Financial Secretary

(c) Crown Counsel

(d) The Registrar International Business Companies

(e) Deputy Registrar International Business Companies

(f) The Registrar, High Court of Niue

(g) Secretary to Government.''

15c Designation of the competent authorities to issue the certificate in accordance with Article 6, paragraph 1:

``Royal Norwegian Ministry of Foreign Affairs;

the ``County Governors'' namely:

1. Fylkesmannen i Aust-Agder
Serviceboks 606

4809 Arendal
tel.: +47.37017500
fax: +47.37017610
e-mail: postmottak@fm-aa.stat.no

2. Fylkesmannen i Buskerud
Postboks 1604
3007 Drammen
tel.: +47.32 26 66 00
fax: +47.32 89 32 36
e-mail: postmottak@fm-bu.stat.no

3. Fylkesmannen i Finnmark
Damsv. 1
9815 Vadsø
tel.: +47.78 95 03 00
fax: +47.78 95 03 07
e-mail: postmottak@fm-fi.stat.no

4. Fylkesmannen i Hedmark
Postboks 4034
2306 Hamar
tel.: +47.62 55 10 00
fax: +47.62 55 10 01
e-mail: postmottak@fm-he.stat.no

5. Fylkesmannen i Hordaland
Postboks 7310
5020 Bergen
tel.: +47.55 57 20 00
fax: +47.55 57 20 09
e-mail: postmottak@fm-ho.stat.no

6. Fylkesmannen i Møre og Romsdal
Julsundv. 9
6404 Molde
tel.: +47.71 25 84 43
fax: +47.71 25 85 10
e-mail: postmottak@fm-mr.stat.no

7. Fylkesmannen i Nordland
Molov. 10
8002 Bodø
tel.: +47.75 53 15 00
fax: +47.75 52 09 77
e-mail: postmottak@fm-no.stat.no

8. Fylkesmannen i Nord-Trøndelag
Strandv. 38
7734 Steinkjer
tel.: +47.74 16 80 00

fax: +47.74 16 80 53
e-mail: postmottak@fm-nt.stat.no

9. Fylkesmannen i Oppland
Storg. 170
2626 Lillehammer
tel.: +47.61 26 60 00
fax: +47.61 26 61 67
e-mail: postmottak@fm-op.stat.no

10. Fylkesmannen i Oslo og Akershus
Postboks 8111 Dep
0032 Oslo
tel.: +47.22 00 35 00
fax: +47.22 00 35 35
e-mail: postmottak@fm-oa.stat.no

11. Fylkesmannen i Rogaland
Postboks 59
4001 Stavanger
tel.: +47.51 56 87 00
fax: +47.51 56 88 11
e-mail: postmottak@fm-ro.stat.no

12. Fylkesmannen i Sogn og Fjordane
Postboks 43
6861 Leikanger
tel.: +47.57 65 50 00
fax: +47.57 65 50 55
e-mail: postmottak@fm-sf.stat.no

13. Fylkesmannen i Sør-Trøndelag
Prinsens g. 1 A
7468 Trondheim
tel.: +47.73 19 91 00
fax: +47.73 19 91 01
e-mail: postmottak@fm-st.stat.no

14. Fylkesmannen i Telemark
Gjerpens g. 14
3708 Skien
tel.: +47.35 58 61 10
fax: +47.35 52 85 90
e-mail: postmottak@fm-te.stat.no

15. Fylkesmannen i Troms
Strandv. 13
9291 Tromsø
tel.: +47.77 64 20 00
fax: +47.77 64 21 39
e-mail: postmottak@fm-tr.stat.no

16. Fylkesmannen i Vest-Agder
Serviceboks 513
4605 Kristiansand S
tel.: +47.38 17 60 00
fax: +47.38 17 60 13
e-mail: postmottak@fm-va.stat.no

17. Fylkesmannen i Vestfold
Postboks 2076
3103 Tønsberg
tel.: +47.33 37 10 00
fax: +47.33 37 12 60
e-mail: postfmve@fm-ve.stat.no

18. Fylkesmannen i Østfold
Postboks 325
1502 Moss
tel.: +47.69 24 70 00
fax: +47.69 24 70 31
e-mail: postmottak@fm-os.stat.no.

15d Designation of the competent authorities to issue the certificate in accordance with Article 6, paragraph 1:

``1. Respecto de los documentos autorizados por las autoridades o funcionarios judiciales competentes, el Secretario de la Corte Suprema de justicia o quienes lo systituyan legalmente.

2. Respecto de los documentos autorizados notarialmente y los documentos privados, cuyas firmas hayan sido autenticadas por Notario, los funcionariòs de la Dirección Servicios Administrativos del Ministerio de Gobierno y Justicia.

3. Respecto de los damás documentos emanados de cualquiera institución del Gobierno Central, instituciones autónomas o semiautónomas, municipales, policiales o del Ministerio Público, los funcionarios del Departamento Consular y Legalizaciones del Ministerio de Relaciones Exteriores.

4. Respecto de los demás documentos públicos se podrá utilizar indistintamente cualquiera do los tres procedimientos anteriores''.

Translation

1. Concerning the documents authorized by competent court authorities or officials, the Secretary of the Supreme Court or his legal substitutes.

2. Concerning deeds drawn up by a notary or private documents authenticated by a notary, the officials of the department of administrative service of the Ministry of Justice.

3. Regarding other documents issued by any central government bodies, any autonomous or semi-autonomous bodies, municipal or police authorities or a Public Ministry, the officials of the consular and legalisation department of the Ministry of Foreign Affairs.

4. Regarding all other public documents, any of the three preceding procedures are allowed.

15e Poland—competent authority (Art. 6)

Designated competent authority(ies):

the Ministry of Foreign Affairs

Contact details:	
Address:	Al. J. Ch. Szucha 23 00-580 Warsaw Poland
Telephone:	+48 22 523 9000
Fax:	—
E-mail:	dsi@msz.gov.pl
General website:	http://www.msz.gov.pl/

15f Designation of the competent authorities to issue the certificate in accordance with Article 6, paragraph 1:

Portugal	Le Procureur Général de la République et les Procureurs de la République auprès des Cours d'Appel
Angola and Mozambique	Les Gouverneurs généraux (``Governadores Gerais'')
Territory of Macau*	The Governor of Macau Palàcio do Governo Av. da Praia Grande Macau The Assistant Secretary for Justice of Macau R. de S. Lourenço Edifício dos Secretários Adjuntos, 1° andar Macau The Head of the Justice Department of Macau Av. da Praia Grande, 594 Edifício BCM, 8°andar Macau
the other overseas departments	Les gouverneurs (``Governadores'')

*Until December 19, 1999. See supra, under CHINA, Macau Special Administrative Region Only.

15g . The instrument of accession contains the following declaration:

``In accordance with Article 6 of the Convention, the Romanian authorities who are competent to issue the certificate referred to in the first paragraph of Article 3, are the Ministry of Justice for the certificates referred to in Article 1 *a, c, d* and the Ministry of Foreign Affairs for the official certificates referred to in Article 1 *b."*

16 … the Convention entered into force between the Russian Federation and the Contracting States on 31 May 1992. The status of the Republics with respect to this Convention is under review by the Depositary.

On 4 September 1991 the Union of Soviet Socialist Republics deposited its instrument of accession to the Convention.

The Contracting States were notified by the depositary of the accession on 20 September 1991. None of the Contracting States raised an objection to the accession within the period of six months specified in Article 12, paragraph 2, which period expired on 1 April 1992. As the Union of Soviet Socialist Republics does not exist any more and since the Russian Federation according to its declaration contained in its Note of 13 January 1992 to the Heads of the Diplomatic Representations at Moscow (see below) continues to perform the rights and fulfil the obligations following from the international agreements signed by the Union of Soviet Socialist Republics, the depositary has asked the Russian Federation to let him know whether this declaration applies also to the present Convention and, in the affirmative, to inform him of the adaptations to be made in the notification made by the Soviet Union on 4 September 1991.

Declaration made by the Russian Federation:

``The Ministry of Foreign Affairs of the Russian Federation presents its compliments to the Heads of Diplomatic Representations in Moscow and has the honour to request them to inform their Governments about the following.

The Russian Federation continues to perform the rights and fulfil the obligations following from the international agreements signed by the Union of the Soviet Socialist Republics.

Accordingly the Government of the Russian Federation shall perform the functions of a depository in conformity with the corresponding multilateral agreements instead of the Government of the USSR.

Therefore, the Ministry kindly requests to consider the Russian Federation as a Party to all international agreements in force instead of the USSR.

The Ministry avails itself of this opportunity to renew to the Heads of Diplomatic Representations the assurances of its highest consideration.

Moscow, January 13, 1992."

By Note of 14 April 1992, received at the Ministry of Foreign Affairs at The Hague on 11 May 1992, the Russian Federation confirmed that the declaration of 13 January 1992 applies also to this Convention and reworded the statement made on the accession by the Government of the USSR:

Unofficial English Translation

The statement made on the accession of the Government of the USSR to the Convention Abolishing the Requirements of Legalisation for Foreign Public Documents, dated October 6, 1961, reads as follows:

``In compliance with Article 6 of the Convention the Government of the Russian Federation declares that the following bodies have the authority competent to issue the certificate referred to in Article 3 of the Convention:

1. The Ministry of Justice of the Russian Federation shall certify originals of documents of organizations and institutions directly subordinate to the Ministry of Justice;

2. Ministries of Justice of the republics within the Russian Federation and judicial bodies of the administration of krais, regions and autonomous formations as well as of the towns of Moscow and St.-Petersburg shall certify documents of judicial bodies subordinate to them and institutions and corresponding bodies of law of the republic, krai, region, district or town;

3. Republican registry offices of the republics within the Russian Federation, central registry offices of krais, regions and districts as well as of the towns of Moscow and St.-Petersburg shall certify certificates of civil status of the above-mentioned bodies or registry offices subordinate to them;

4. The Department of documentary and reference work of the Archives Committee of the Russian Federation shall certify documents issued by the central state archives of Russia;

5. Archives bodies of autonomous formations and archives departments of krais and regions shall certify documents issued by archives subordinate to them;

6. The Department of Procurator General's Office of the Russian Federation shall certify documents made through the channels of the bodies of prosecution".

16a *Notification in accordance with Article 15 of the Convention*

The Independent State of Samoa deposited its instrument of accession to the above-mentioned Convention with the Ministry of Foreign Affairs of the Kingdom of the Netherlands on 18 January 1999 in accordance with Article 12, first paragraph of the Convention.

The Contracting States were notified by the depositary of the accession by notification of 19 January 1999. None of these States raised an objection to the accession within the period of six months specified in Article 12, paragraph 2, which period expired on 15 July 1999.

The provisions of the Convention will enter into force, in accordance with Article 12, third paragraph, between the Independent State of Samoa and the Contracting States on 13 September 1999.

In accordance with Article 6, paragraph 2, of the Convention the Government of Samoa has designated as the competent authority: ``the Secretary for Foreign Affairs, Ministry of Foreign Affairs, P.O. Box L1861, Apia, Samoa, Tel: (685) 63333, Fax: (685) 21504."

16b Designation of the competent authorities to issue the certificate in accordance with Article 6, paragraph 1: ``The Minister of Foreign Affairs (il Segretario di Stato per gli Affari Esteri della Repubblica di San Marino) or a person delegated and officially authorized by him/her to sign and authenticate legal instruments and documents issued by the Department of Foreign Affairs and other of the Republic's public bodies".

16c Sao Tome and Principe—Competent Authorities

(*Translation)*

The Minister's Office and the Consular Affairs Department of the Ministry of Foreign Affairs, Cooperation and Communities are the competent authorities for the purposes of the Convention.

The contact details of the Ministry of Foreign Affairs, Cooperation and Communities are as follows:

Avenida Amilcar Cabral
CP 201
Sao Tomé
Sao Tomé e Principe
Telephone: +239 222309/224841
Fax: +239 223237

16d One of the successor States to the former Socialist Federal Republic of Yugoslavia which became a Party to the Convention on 24 January 1965. By letter received by the depositary on 26 April 2001, the Federal Republic of Yugoslavia declared itself to be bound by the Convention.

No objection has been received from the Contracting States.

The Ministry of Foreign Affairs of the Netherlands, depositary of the Hague Conventions, has notified the Member States of the Hague Conference on 5 July 2006 that ``Following the declaration of the state independence of Montenegro, and under the Article 60 of the Constitutional Charter of the state union of Serbia and Montenegro, the Republic of Serbia is continuing international personality of the state union of Serbia and Montenegro, which was confirmed also by the National Assembly of the Republic of Serbia at its session held on 5 June 2006."

Declarations

Articles:

By Note dated 24 January 2003, the Embassy of the Federal Republic of Yugoslavia informed the depositary of the following:

``The Embassy of the Federal Republic of Yugoslavia presents it compliments to the Ministry of Foreign Affairs of the Kingdom of The Netherlands and with the reference to the misunderstandings concerning the application of the Convention Abolishing the Requirement of Legalization for Foreign Public Documents, signed at The Hague on 5 October 1961 and ratified by the Federative People's Republic of Yugoslavia on 21 May 1961, and the Convention On the Issue of Multilingual Extracts from Civil Status Records, signed in Vienna on 8 September 1976 and ratified by the Socialist Federal Republic of Yugoslavia, to the succession of which the Federal Republic of Yugoslavia signed the declarations on 19 April 2001 and 16 October 2001 respectively, and, in that connection, the competencies of Yugoslav institutions to legalize public documents, has the honour to inform of the following:

1) Yugoslavia has legalized public documents in the sense of the Hague Convention under the Law on the Legalization of Public Documents in International Traffic (``Official Gazette of the SFRY", No. 6, 8 February, 1973) since its adoption.

Under the article 8 of the said Law, the courts of the first instance and the Ministries of Justice of the constituent Yugoslav Republics provide apostilles, i.e. authorize Yugoslav documents, for use in the States Parties to the Hague Convention. Under the Law, municipal courts have primary competence to certify documents issued by institutions resident in the areas under the jurisdiction of the courts. Republican and Provincial justice administration authorities are competent to authorize, as an alternative, documents issued by institutions resident in the areas under their jurisdiction if not authorized by competent courts of the first instance.

Bearing that in mind, only one authorization, i.e. apostille, by the competent court of the first instance or, exceptionally, by a Republican or Provincial justice administration authority will suffice for the authorization/acceptance of Yugoslav documents in international legal traffic. The insistence therefore on a cumulative authorization of documents by one or more Yugoslav institutions is in contravention of the provisions of the Hague Convention and the goals for the promotion of which it was signed and acceded to by a large number of countries, Yugoslavia included, as a source of international law.

2) Furthermore, and with reference to the said Note, the Embassy has noticed that the competent authorities of the Kingdom of the Netherlands frequently request that multilingual extracts from Yugoslav civil status records be legalized by alternative Yugoslav authorities (Ministries of Justice

of the Republic of Serbia and the Republic of Montenegro).

That practice is contrary to the provisions of Article 8, para 2, of the Vienna Convention and Article 6, para 1, of the Hague Convention. They also request that extracts from Yugoslav civil status records in Serbia undergo the entire gamut of possible legalizations by various Yugoslav and Dutch authorities, which runs counter to the letter and spirit of Article 1 of The Hague Convention which provides for the obligation of the States Parties to accept extracts from civil status records of all States Parties, defined as public documents, if they are supplied by an apostille alone.

In advising the Ministry of the above, the Embassy of the Federal Republic of Yugoslavia would appreciate if it interceded with the competent authorities of the Kingdom of the Netherlands, as the depository of the Hague Convention, to change the existing practice and align it with the provisions of the Hague Conventions and to advise thereof the other States Parties to the Convention. (…)''

Designated Competent Authority(ies):

By Note dated 24 January 2003, the Embassy of the Federal Republic of Yugoslavia informed the depositary of the following:

``The Embassy of the Federal Republic of Yugoslavia presents it compliments to the Ministry of Foreign Affairs of the Kingdom of The Netherlands and with the reference to the misunderstandings concerning the application of the Convention Abolishing the Requirement of Legalization for Foreign Public Documents, signed at The Hague on 5 October 1961 and ratified by the Federative People's Republic of Yugoslavia on 21 May 1961, and the Convention On the Issue of Multilingual Extracts from Civil Status Records, signed in Vienna on 8 September 1976 and ratified by the Socialist Federal Republic of Yugoslavia, to the succession of which the Federal Republic of Yugoslavia signed the declarations on 19 April 2001 and 16 October 2001 respectively, and, in that connection, the competencies of Yugoslav institutions to legalize public documents, has the honour to inform of the following:

1) Yugoslavia has legalized public documents in the sense of the Hague Convention under the Law on the Legalization of Public Documents in International Traffic (``Official Gazette of the SFRY'', No. 6, 8 February, 1973) since its adoption.

Under the article 8 of the said Law, the courts of the first instance and the Ministries of Justice of the constituent Yugoslav Republics provide apostilles, i.e. authorize Yugoslav documents, for use in the States Parties to the Hague Convention. Under the Law, municipal courts have primary competence to certify documents issued by institutions resident in the areas under the jurisdiction of the courts. Republican and Provincial justice administration authorities are competent to authorize, as an alternative, documents issued by institutions resident in the areas under their jurisdiction if not authorized by competent courts of the first instance.

Bearing that in mind, only one authorization, i.e. apostille, by the competent court of the first instance or, exceptionally, by a Republican or Provincial justice administration authority will suffice for the authorization/acceptance of Yugoslav documents in international legal traffic. The insistence therefore on a cumulative authorization of documents by one or more Yugoslav institutions is in contravention of the provisions of the Hague Convention and the goals for the promotion of which it was signed and acceded to by a large number of countries, Yugoslavia included, as a source of international law.

2) Furthermore, and with reference to the said Note, the Embassy has noticed that the competent authorities of the Kingdom of the Netherlands frequently request that multilingual extracts from

Yugoslav civil status records be legalized by alternative Yugoslav authorities (Ministries of Justice of the Republic of Serbia and the Republic of Montenegro).

That practice is contrary to the provisions of Article 8, para 2, of the Vienna Convention and Article 6, para 1, of the Hague Convention. They also request that extracts from Yugoslav civil status records in Serbia undergo the entire gamut of possible legalizations by various Yugoslav and Dutch authorities, which runs counter to the letter and spirit of Article 1 of The Hague Convention which provides for the obligation of the States Parties to accept extracts from civil status records of all States Parties, defined as public documents, if they are supplied by an apostille alone. In advising the Ministry of the above, the Embassy of the Federal Republic of Yugoslavia would appreciate if it interceded with the competent authorities of the Kingdom of the Netherlands, as the depository of the Hague Convention, to change the existing practice and align it with the provisions of the Hague Conventions and to advise thereof the other States Parties to the Convention. (…)"

Contact details:;

Address:	*Ministry of Justice of Serbia* Nemanjina 22-26 11000 BELGRADE Serbia
Telephone:	+381 3616-548 +381 3616-549
Fax:	+381 3616-419 +381 685-672
E-mail:	kabinet@mpravde.sr.gov.yu
General website:	http://www.mpravde.sr.gov.yu/ http://www.srbija.sr.gov.yu/

16e Designation of the competent authorities to issue the certificate referred to in the first paragraph of Article 3:

1 the Minister responsible for Foreign Affairs, or any person designated and officially authorized by him/her;

2 the Attorney General, or any person designated and officially authorized by him/her;

3 the Secretary to the Cabinet;

4 the Registrar of the Supreme Court.

16f With the following declaration:

``The Slovak Republic, under Article 6 of the Convention, designates for purposes of Article 3 of the Convention as authorities competent to issue the certificate the following:

1) The Ministry of Justice of the Slovak Republic *(Ministerstvo spravodlivosti Slovenskej republiky)* for:

a) public documents issued or certified by courts, notaries, hussiers de justice or other judicial officers;

b) translations executed by official (court appointed) translators;

2) The Ministry of Interior of the Slovak Republic *(Ministerstvo vnutra Slovenskej republiky)* for public documents emanating from authorities within its jurisdiction with the exception of documents specified in point 6 lit. a/ below;

3) The Ministry of Education of the Slovak Republic *(Ministerstvo skolstva Slovenskej republiky)* for public documents emanating from authorities within its jurisdiction;

4) The Ministry of Health of the Slovak Republic *(Ministerstvo zdravotnictva Slovenskej republiky)* for public documents emanating from authorities within its jurisdiction with the exception of documents specified in point 6 lit. b/ below;

5) The General Headquarters of the Army of the Slovak Republic *(Generalny stab Armady Slovenskej republiky)* for public documents emanating from authorities within the jurisdiction of the Ministry of Defence of the Slovak Republic;

6) Office of the Regional Administration *(krajsky urad)* for:

a) documents from the Register of Births, Deaths and Marriages *(matrika)* with the exception of decisions on civil status;

b) documents issued by health facilities established by the Office of Regional Administration;

7) The Ministry of Foreign Affairs of the Slovak Republic *(Ministerstvo zahranicnych veci Slovenskej republiky)* for any other public document issued in the Slovak Republic not specified above."

16g One of the successor States to the former Socialist Federal Republic of Yugoslavia which became a Party to the Convention on 24 January 1965. On 8 June 1992 the Republic of Slovenia declared itself to be bound by the Convention.

No objection has been received from the Contracting States.

Designation of the competent authorities to issue the certificate in accordance with Article 6, paragraph 1: ``the Ministry of Justice and Administration of the Republic of Slovenia".

16h Designation of the competent authorities to issue the certificate in accordance with Article 6, paragraph 1:

``1. Any magistrate or additional magistrate.

2. Any registrar or assistant registrar of the Supreme Court of South Africa.

3. Any person designate by the Director-General: Justice.

4. Any person designated by the Director-General: Foreign Affairs".

16i Designation of the competent authorities to issue the certificate in accordance with Article 6, paragraph 1:

``1. Quant aux documents judiciaires, le Secrétaire (Secretario de Gobierno) de la Cour Territoriale correspondante.

2. Quant aux documents notariaux, le Doyen du Collège Notarial respectif ou un membre du Conseil de Direction.

3. Quant aux autres documents, les fonctionnaires auxquels se réfère le précédent alinéa ou le Chef de la Section Centrale du Ministère de la Justice."

By a Note dated 10 November 1978 Spain notified a modification in the designated authorities, who are competent to issue the certificate referred to in the first paragraph of Article 3 of the Convention.

The text of this modification is as follows:

``Les autorités compétentes pour délivrer l'apostille prévue à l'article 3, alinéa 1, seront:

1 Quant aux documents établis par des autorités ou par des fonctionnaires judiciaires compétents, les Secrétaires des Cours Territoriales (Secretarios de Gobierno de las Audiencias) ou leurs suppléants.

2 Quant aux documents autorisés par un Notaire ou quant aux documents privés dont la signature ait été légitimée par un Notaire, le Doyen du Collège Notarial respectif, ou celui qui légalement en soit en charge.

3 Quant aux autres documents publics, sauf ceux procédant des Organes de l'Administration Centrale, les fonctionnaires susmentionnés sous les paragraphes 1 et 2, indistinctement.

4 Quant aux documents des autorités de l'Administration Centrale, le Chef de la Section Centrale (Jefe de la Sección Central de la Subsecretaría) du Ministère de la Justice.''

Translation

The authorities competent to issue the certificate referred to in Article 3, paragraph 1, will be as follows:

1 For documents drawn up be competent judicial authorities or officials: the Secretaries of the ``Territorial Courts'' (Secretarios de Gobierno de las Audiencias) or their deputies.

2 For documents authenticated by a notary public, or private documents where the signatures have been authenticated by a notary public: the President of the relevant Association of Notaries public or the person legally responsible for its affairs.

3 For other public documents, excepting those issued by central administrative bodies: any of the officials referred to in paragraphs 1 and 2, above.

4 For documents issued by authorities of the central administration: the Head of the Central Section (Jefe de la Sección Central de la Subsecretaría) of the Ministry of Justice.

On 4 August 1997, the Embassy of Spain at The Hague made a declaration concerning Gibraltar (see *infra,* under UNITED KINGDOM OF GREAT BRITAIN AND NORTHERN IRELAND, Extensions).

16j Designation of the competent authorities to issue the certificate in accordance with Article 6, paragraph 1:

``For Saint Kitts and Nevis or the Island of Saint Kitts the competent authority shall be the Attorney General, the Solicitor General, the Chief Secretary in the Office of the Prime Minister, the Permanent Secretary in the Ministry of Foreign Affairs, or the Registrar of the Supreme Court, and for the Island of Nevis the competent authority shall be the Chief Secretary in the Office of the Premier, the Legal Adviser in the Legal Department or the Deputy Registrar of the Supreme Court.''

16k

SAINT LUCIA	**(accession) 5 December 2001**	**1 June 200231 July 2002**

Designation of the competent authorities to issue the certificate in accordance with Article 6, paragraph 1:

The Permanent Secretary, Ministry of Foreign Affairs and International Trade

The Deputy Permanent Secretary, Ministry of Foreign Affairs and International Trade

The Permanent Secretary, Ministry of Commerce, International Financial Services and Consumer Affairs

The Deputy Permanent Secretary, Ministry of Commerce, International Financial Services and Consumer Affairs

The Registrar of Companies and Intellectual Property

The Registrar of the Supreme Court

The Solicitor General

16l

SAINT VINCENT AND THE GRENADINES	**(accession) 2 May 2002**	**19 January 2003**

Designation of the competent authorities to issue the certificate in accordance with Article 6, paragraph 1:

The Permanent Secretary, Ministry of Foreign Affairs

The Registrar, High Court

16m Suriname declared on 29 October 1976 that it considers itself bound by the Convention, which had been extended to its territory by the Kingdom of the Netherlands on 16 May 1967 (see above under Netherlands: *extensions*).

Designation of the competent authorities to issue the certificate in accordance with Article 6, paragraph 1: ``The Registrar of the Court of Justice of Suriname.''

16n Swaziland declared on 3 July 1978 that it considers itself bound by the Convention.

Designation of the competent authorities to issue the certificate in accordance with Article 6, paragraph 1:

``*(a)* the Deputy Prime Minister

(b) the Attorney-General

(c) the Registrar of the High Court

(d) the Head of Department not specified in paragraphs (b) and (c)

(e) a District Commissioner

(f) a Magistrate, and

(g) such other officer as the Deputy Prime Minister may, by notice published in the Gazette, specify''.

By Noted dated 3 February 1998, the Ministry of Foreign Affairs and Trade of the Kingdom of Swaziland has informed the depositary that, in accordance with Article 6, paragraph 2, of the Convention, the Principal Secretary's Office in the Ministry of Foreign Affairs and Trade is the only appropriate entity to issue apostilles in Swaziland.

16o On 2 March 1999 the Convention was signed and ratified by Sweden.

The instrument of ratification contains the following declaration:

``The Government of Sweden declares, in accordance with Article 6, that the competent authorities to issue the certificate are all Notaries Public and the Ministry of Foreign Affairs''.

In accordance with Article 11, second paragraph, the Convention entered into force for Sweden on 1 May 1999.

16p Designation of the competent authorities to issue the certificate in accordance with Article 6, paragraph 1:

``A. Autorité de la Confédération: la Chancellerie fédérale

B. Autorités cantonales:

Canton de Zurich:	Die Staatskanzlei
Canton de Berne:	Die Staatskanzlei (La Chancellerie d'Etat)
Canton de Lucerne:	Die Staatskanzlei
Canton d'Uri:	Die Standeskanzlei
Canton de Schwyz:	Die Staatskanzlei
Canton d'Unterwald-le-Haut:	Die Staatskanzlei
Canton d'Unterwald-le-Bas:	Die Standeskanzlei
Canton de Glaris:	Die Regierungskanzlei
Canton de Zoug:	Die Staatskanzlei
Canton de Fribourg:	La Chancellerie d'Etat (Die Staatskanzlei)
Canton de Soleure:	Die Staatskanzlei
Canton de Bâle-Ville:	Die Staatskanzlei
Canton de Bâle-Campagne:	Die Landeskanzlei
Canton de Schaffhouse:	Die Staatskanzlei
Canton d'Appenzell Rh.-Ext.:	Die Kantonskanzlei
Canton d'Appenzell Rh.-Int.:	Die Ratskanzlei
Canton de Saint-Gall:	Die Staatskanzlei
Canton des Grisons:	Die Standeskanzlei (La Cancelleria dello Stato)
Canton d'Argovie:	Die Staatskanzlei
Canton de Thurgovie:	Die Staatskanzlei
Canton du Tessin:	La Cancelleria dello Stato
Canton de Vaud:	La Chancellerie d'Etat
Canton de Valais:	La Chancellerie d'Etat (Die Staatskanzlei)
Canton de Nauchâtel:	La Chancellerie d'Etat
Canton de Genève	La Chancellerie d'Etat
Canton du Jura:	La Chancellerie d'Etat''.

16q Tonga declared on 28 October 1971 that it considers itself bound by the Convention.

Designation of the competent authorities to issue the certificate in accordance with Article 6, paragraph 1: ``The Secretary to Government, Prime Minister's Office, Nuku'alofa''.

16r By Note dated 27 July 2000, the Republic of Trinidad and Tobago informed the depositary of the following:

``(…) the Registrar General (in Port of Spain) has been designated the competent authority to affix the Convention Apostille (…)''.

16s Designation of the competent authorities to issue the certificate in accordance with Article 6, paragraph 1:

``1. Administrative documents

a. in provinces: Governor, Deputy-Governor, Director of Juridical Matters.

b. in towns: Vice-Governor.

2. Judicial documents

Presidencies of the Judicial Commissions where the high criminal courts exist''.

16t With the following declaration:

``In accordance with Article 6 of the Convention and the Decree of the Government of Ukraine No 61 dated 18 January 2003, an apostille may be granted by the Ministry of Justice of Ukraine on documents issued by judicial authorities and courts, including documents certified by Ukraine's notaries; the Ministry of Education and Science of Ukraine on official documents issued by the bodies for education, state authorities, establishments and organisations, related to education and science; and the Ministry of Foreign Affairs of Ukraine on all other documents.''

N.B. In accordance with Article 12, paragraph 2, of the Convention, the accession will have effect only as regards the relations between Ukraine and those Contracting States which have not raised an objection to its accession in the six months after the receipt of the notification referred to in Article 15, sub-paragraph (d), of the Convention. In the case of Ukraine, this six months' period will run from 23 April 2003 until 23 October 2003.

Belgium and **Germany** raised an objection to the accession of Ukraine within the period of six months specified in Article 12, paragraph 2, and expiring on 23 October 2003.

Belgium withdrew its objections on 5 July 2004; the Convention entered into force between Ukraine and Belgium on 5 July 2004.

17 Designation of the competent authorities to issue the certificate in accordance with Article 6, paragraph 1:

``For the United Kingdom as from 17 October 1968: Her Majesty's Principal Secretary of State for Foreign and Commonwealth Affairs, Foreign and Commonwealth Office, London SW1, and for:

Anguilla	The Governor of Anguilla
Bermuda	The Governor and Commander-in-Chief of the Bermudas or Somers Islands
British Antarctic Territory	The High Commissioner for the British Antarctic Territory
British Virgin	The Governor of the British Virgin Islands

Islands	
Cayman Islands	The Governor of the Cayman Islands
Falkland Islands	The Governor of the Falkland Islands
Gibraltar	The Governor and Commander-in-Chief of the City and Garrison of Gibraltar
the Bailiwick of Guernsey	The Lieutenant Governor of the Bailiwick of Guernsey
Hong Kong***	Registrar, Supreme Court; Assistant Registrar, Supreme Court; Deputy Chief Secretary, Supreme Court; Deputy Registrar, Supreme Court
Isle of Man	The Lieutenant Governor of the Isle of Man
the Bailiwick of Jersey	His Excellency the Lieutenant Governor of the Bailiwick of Jersey (modified on 1 March 1990)
Montserrat	The Governor of Montserrat
St. Helena	The Governor and Commander-in-Chief of the Island of St. Helena and its Dependencies
South Georgia and South Sandwich Islands	The Commissioner for South Georgia and the South Sandwich Islands
Turks and Caicos Islands	The Governor of the Turks and Caicos Islands.''

17a *Authorities in the United States of America Competent to Issue the Certificate Referred to in Article 3 of the Convention*

I. Authentication Officer and Acting Authentication Officer, United States Department of State

II. Clerks and deputy clerks of the following: The Supreme Court of the United States, the Courts of Appeals for the First through the Eleventh Circuits, the District of Columbia Circuit and the Federal Circuit; the United States District Courts; the United States Court of International Trade; the United States Claims Court; the District Court of Guam, the District Court of the Virgin Islands, and the District Court for the Northern Mariana Islands.

The District Court for the District of the Canal Zone ceased to exist on Mar. 31, 1982. Its records have been transferred to the National Archives which will certify those records.

III. Officers of the individual States and other subdivisions as indicated:

States:

Alabama: Secretary of State

Alaska: Lieutenant Governor; Attorney General; Clerk of the Appellate Court.

Arizona: Secretary of State; Assistant Secretary of State

Arkansas: Secretary of State; Chief Deputy Secretary of State

California: Secretary of State; any Assistant Secretary of State; any Deputy Secretary of State

Colorado: Secretary of State; Deputy Secretary of State

Connecticut: Secretary of the State; Deputy Secretary of the State

Delaware: Secretary of State; Acting Secretary of State

Florida: Secretary of State

Georgia: Georgia Superior Court Clerks' Cooperative Authority

Hawaii: Lieutenant Governor of the State of Hawaii

Idaho: Secretary of State; Chief Deputy Secretary of State; Deputy Secretary of State; Notary Public Clerk

Illinois: Secretary of State; Assistant Secretary of State; Deputy Secretary of State

Indiana: Secretary of State; Deputy Secretary of State

Iowa: Secretary of State; Deputy Secretary of State

Kansas: Secretary of State; Assistant Secretary of State; any Deputy Assistant Secretary of State

Kentucky: Secretary of State; Assistant Secretary of State

Louisiana: Secretary of State

Maine: Secretary of State; Deputy Secretary of State

Maryland: Secretary of State

Massachusetts: Deputy Secretary of the Commonwealth of Massachusetts for Public Records (beginning in 1981 through January 13, 1995); Deputy Secretary of State of the Commonwealth of Massachusetts (beginning January 16, 1995, through November 16, 1995); Secretary of the Commonwealth of Massachusetts (from November 17, 1995)

Michigan: Secretary of State; Deputy Secretary of State

Minnesota: Secretary of State; Deputy Secretary of State

Mississippi: Secretary of State; any Assistant Secretary of State

Missouri: Secretary of State; Deputy Secretary of State

Montana: Secretary of State; Chief Deputy Secretary of State; Government Affairs Bureau Chief

Nebraska: Secretary of State; Deputy Secretary of State

Nevada: Secretary of State; Chief Deputy Secretary of State; Deputy Secretary of State

New Hampshire: Secretary of State; Deputy Secretary of State

New Jersey: Secretary of State; Assistant Secretary of State

New Mexico: Secretary of State

New York: Secretary of State; Executive Deputy Secretary of State; any Deputy Secretary of State; any Special Deputy Secretary of State

North Carolina: Secretary of State; Deputy Secretary of State

North Dakota: Secretary of State; Deputy Secretary of State

Ohio: Secretary of State; Assistant Secretary of State

Oklahoma: Secretary of State; Assistant Secretary of State; Budget Officer of the Secretary of State

Oregon: Secretary of State; Deputy Secretary of State; Acting Secretary of State; Assistant to the Secretary of State

Pennsylvania: Secretary of the Commonwealth; any Deputy Secretary of the Commonwealth; Commissioner of the Bureau of Commissions, Elections and Legislation

Rhode Island: Secretary of State; First Deputy Secretary of State; Second Deputy Secretary of State

South Carolina: Secretary of State

South Dakota: Secretary of State; Deputy Secretary of State

Tennessee: Secretary of State

Texas: Secretary of State; Assistant Secretary of State; division Director

Utah: Lieutenant Governor; Deputy Lieutenant Governor; Administrative Assistant

Vermont: Secretary of State; Deputy Secretary of State

Virginia: Secretary of the Commonwealth; Chief Clerk, Office of the Secretary of the Commonwealth

Washington (State): Secretary of State; Assistant Secretary of State; Director, Department of Licensing

West Virginia: Secretary of State; Under Secretary of State; any Deputy Secretary of State

Wisconsin: Secretary of State; Assistant Secretary of State

Wyoming: Secretary of State; Deputy Secretary of State

Other Subdivisions:

American Samoa: Secretary of American Samoa; Attorney General of American Samoa

District of Columbia (Washington, D.C.): Executive Secretary; Assistant Executive Secretary; Mayor's Special Assistant and Assistant to the Executive Secretary; Secretary of the District of Columbia

Guam (Territory of): Director, Department of Administration; Acting Director, Department of Administration; Deputy Director, Department of Administration; Acting Deputy Director, Department of Administration

Northern Mariana Islands (Commonwealth of the): Attorney General; Acting Attorney General; Clerk of the Court, Commonwealth Trial Court; Deputy Clerk, Commonwealth Trial Court

Puerto Rico (Commonwealth of): Under Secretary of State; Assistant Secretary of State for External Affairs; Assistant Secretary of State; Chief, Certifications Office; Director, Office of Protocol; Assistant Secretary of State for International Affairs; Chief, Certification Office

Virgin Islands of the United States: no authority designated

The instrument of accession was accompanied by the following statement:

``On the occasion of the deposit by the United States of America of its instrument of accession to the Convention Abolishing the Requirement of Legalisation for Foreign Public Documents, concluded October 5, 1961 (1961 Convention), the Department of State wishes to draw the attention of States currently Parties to the Convention, and eventually of those becoming so in the future, to the provisions of Title 18, United States Code, Section 3190 relating to documents submitted to the United States Government in support of extradition requests. It does so for the purpose of preventing possible misunderstandings by stipulating that the 1961 Convention does not supersede or override the provisions of Section 3190.

Section 3190 provides:

Section 3190 Evidence on (Extradition) hearing

Depositions, warrants, or other papers or copies thereof offered in evidence upon the hearing of any extradition case shall be received and admitted as evidence on such hearing for all the purposes of such hearing if they shall be properly and legally authenticated so as to entitle them to be received for similar purposes by the tribunals of the foreign country from which the accused party shall have escaped, and the certificate of the principal diplomatic or consular officer of the United States resident in such foreign country shall be proof that the same, so offered, are authenticated in the manner required.

The requirement of Section 3190 is satisfied by the certification of the principal United States diplomatic or consular officer resident in the state requesting extradition that the documents are in such form as to be admissible in the tribunals of that State. The certification by apostille under the 1961 Convention does not satisfy this requirement, as it only certifies the signature, the capacity of the signer, and the seal on the documents. It does not certify the admissibility of the documents. Thus, the requirement of section 3190 is not deemed by the United States to be overridden by operation of Article 8 of the 1961 Convention.

It should be noted, however, that a certification by the principal diplomatic or consular officer of the United States as set out in section 3190 has also served to legalize such documents, and will continue to do so without the need for any other legalization by United States officials or certification by the apostille under the 1961 Convention.

In light of the above, it is recommended that States Party to the 1961 Convention continue as before to cover documents supporting extradition requests directed to the United States with the special certification provided for by section 3190. Failure to cover extradition documents in this recommended manner could regrettably result in a finding by the United States judge or magistrate hearing the extradition request that the documents do not meet the requirements of section 3190 and thus are not entitled to be received and admitted as evidence. Such a finding could, in turn, result in the irrevocable rejection of the extradition request."

17b Vanuatu

Succession

On 24 February 1965, the Convention had been extended to the New Hebrides (now the Republic of Vanuatu) by the United Kingdom of Great Britain and Northern Ireland. Vanuatu declared on 1 August 2008 that it considers itself bound by the Convention.

None of the other Contracting States have objected to its succession.

The date of entry into force for Vanuatu is the date of its independence (30 July 1980).

Vanuatu—Competent Authorities (Art. 6)

Designated Competent Authority(ies):

1. The Department of Foreign Affairs;

2. The Vanuatu Financial Services Commission for public documents falling under its jurisdiction

Contact details:

Address:	Vanuatu Financial Services Commission Financial Services Centre Bouganville Street PMB No. 9023 Port Vila Republic of Vanuatu
Telephone:	+678 22247
Fax:	+678 22242
Contact person:	Mr George Andrews Commissioner
Main language of communication:	English (others: French)
E-mail:	gandrews@vfsc.com.vu
General website:	http://www.vfsc.vu/
Price:	Single sided page document US$50; Double sided page document US$100; and per copy certificate US$25 (Apostille of identical document/same issuing authority)

17c By notification deposited with the Ministry of Foreign Affairs of the Kingdom of the Netherlands, Venezuela deposited its instrument of accession to the Convention on 1 July 1998.

In accordance with Article 12, paragraph 3, the Convention entered into force between Venezuela and the Contracting States on 16 March 1999.

In accordance with Article 6, first paragraph of the Convention, the Government of Venezuela has designated the following competent authority:

the Ministry of Foreign Affairs of Venezuela, Directorate General of Consular Affairs.

Endnotes

1 Albania acceded to the Convention on deposite of its instrument of accession on 13 May 2009 and will enter into force 1 June 2010.

1a The instrument of accession by the Government of Argentina contains the following declaration:

(Translation) (Original: Spanish)

In accordance with articles 96 and 12 of the United Nations Convention on Contracts for the International Sale of Goods, any provision of article 11, article 29 or Part II of the Convention that allows a contract of sale or its modification or termination by agreement or any offer, acceptance or other indication of intention to be made in any form other than in writing does not apply where any party has his place of business in the Argentine Republic.

1b Armenia acceded to the Convention on deposite of its instrument of accession on 2 December 2008 and will enter into force 1 January 2010.

2 The instrument of accession by the Government of Australia contains the following declaration:

(Original: English)

``The Convention shall apply to all Australian States and mainland territories and to all external territories except the territories of Christmas Island, the Cocos (Keeling) Islands and the Ashmore and Cartier Islands.''

3 The instrument of accession by the Government of [Belarus] contains the following declaration:

(Translation) (Original: Russian)

``[Belarus], in accordance with articles 12 and 96 of the Convention declares that any provision of article 11, article 29 or Part II of this Convention that allows a contract of sale or its modification or termination by agreement or any offer, acceptance or other indication of intention to be made in any form other than in writing does not apply where any party has his place of business in [Belarus].''

3a The instrument of accession by the Government of Canada contains the following declaration:

``The Government of Canada declares, in accordance with Article 93 of the Convention, that the Convention will extend to Alberta, British Columbia, Manitoba, New Brunswick, Newfoundland, Nova Scotia, Ontario, Prince Edward Island and the Northwest Territories.''

Subsequently the Government of Canada declared that ``the Convention shall also extend to Quebec and Saskatchewan'' (9 April 1992), ``applies also to the Territory of the Yukon'' (29 June 1992), and ``shall extend to the Territory of Nunavut'' (18 June 2003).

4 The instrument of ratification by the Government of Chile contains the following declaration:

(Translation) (Original: Spanish)

``The State of Chile declares, in accordance with articles 12 and 96 of the Convention, that any provision of article 11, article 29 or Part II of the Convention that allows a contract of sale or its modification or termination by mutual agreement or any offer, acceptance or other indication of intention to be made in any other form than in writing, does not apply where any party has its place of business in Chile.''

5 The instrument of approval by the Government of China contains the following declaration:

(Courtesy translation) (Original: Chinese)

The People's Republic of China does not consider itself to be bound by subparagraph (b) of paragraph 1 of Article 1 and Article 11 as well as the provisions in the Convention relating to the content of Article 11.

6 Subject to the following declaration:

(Courtesy Translation) (Original: Czechoslovak)

``Pursuant to Article 95, the [Czech Republic] declares that it shall not consider itself bound by the provision of Article 1, paragraph 1, item b), of the Convention.''

7 The instrument of ratification by the Government of Denmark was accompanied by the following declarations:

(Original: English)

``Upon ratifying the Convention, the Kingdom of Denmark declares:

1) under paragraph 1 of Article 92 that Denmark will not be bound by Part II of the Convention,

2) under paragraph 1 of Article 93 that the Convention shall not apply to the Faroe Islands and Greenland,

3) under paragraph 1 cf. paragraph 3 of Article 94 that the Convention shall not apply to contracts of sale where one of the parties has his place of business in Denmark, Finland, Norway or Sweden and the other party has his place of business in another of the said states,

4) under paragraph 2 of Article 94 that the Convention is not to apply to contracts of sale where one of the parties has his place of business in Denmark, Finland, Norway or Sweden and the other party has his place of business in Iceland".

7a The instrument of accession by the Government of Estonia contains the following declaration:

``In accordance with Articles 12 and 96 of the United Nations Convention on Contracts for the International Sale of Goods any provision of Article 11, Article 29 or Part II of the Convention that allows a contract of sale or its modification or termination by agreement or any offer, acceptance or other indication of intention to be made in any form other than in writing does not apply where any party has his place of business in the Republic of Estonia."

8 The instrument of ratification by the Government of Finland contains the following declarations:

(Original: English)

``1. With reference to Article 92, Finland will not be bound by Part II of this Convention (Formation of the Contract).

2. With reference to Article 94, in respect of Sweden in accordance with paragraph (1) and otherwise in accordance with paragraph (2) the Convention will not apply to contracts of sale where the parties have their places of business in Finland, Sweden, Denmark, Iceland or Norway."

9 On October 3, 1990 the German Democratic Republic acceded to the Federal Republic of Germany.

The instrument of ratification by the Government of the Federal Republic of Germany contains the following declaration:

(Courtesy Translation) (Original: German)

``The Government of the Federal Republic of Germany holds the view that Parties to the Convention that have made a declaration under article 95 of the Convention are not considered Contracting States within the meaning of subparagraph (1) (b) of article 1 of the Convention. Accordingly, there is no obligation to apply—and the Federal Republic of Germany assumes no obligation to apply—this provision when the rules of private international law lead to the application of the law of a Party that has made a declaration to the effect that it will not be bound by subparagraph (1) (b) of article 1 of the Convention. Subject to this observation the Government of the Federal Republic of Germany makes no declaration under article 95 of the Convention."

In a note accompanying the instrument of ratification the Government of the Federal Republic of Germany stated that the said Convention shall also apply to Berlin (West) with effect from the date on which it enters into force for the Federal Republic of Germany.

9a In a note accompanying its instrument of ratification, the Government of Hungary made the following declarations:

—``It [Hungary] considers the General Conditions of Delivery of Goods between Organizations of the Member Countries of the Council for Mutual Economic Assistance/GCD CMEA, 1968/1975, version of 1979/ to be subject to the provisions of article 90 of the Convention;

—It states, in accordance with articles 12 and 96 of the Convention, that any provision of article 11, article 29 or part II of the Convention that allows a contract of sale or its modification or termination by agreement or any offer, acceptance or other indication of intention to be made in any form other than in writing, does not apply where any party has his place of business in the Hungarian People's Republic."

9b 12 March 2003

Declaration:

``Pursuant to article 94, paragraph 1, the Convention will not apply to contracts of sale or to their formation where the parties have their places of business in Denmark, Finland, Iceland, Norway or Sweden."

10 The instrument of accession by the Government of Latvia contains the following declaration:

``In accordance with article 96 of the [said Convention], the Republic of Latvia declares that any provision of article 11, article 29, or Part II of this Convention, that allows a contract of sale or its modification or termination by agreement or any offer, acceptance, or other indication of intention to be made in any form other than in writing, does not apply where any party has his place of business in the Republic of Latvia."

10a Lebanon acceded to the Convention on deposites of its instrument of accession on 21 November 2008 and will enter into force 1 December 2009.

10b The instrument of accession by the Government of Lithuania contains the following declaration:

``In accordance with articles 96 and 12 of the said Convention, the Republic of Lithuania declares that any provisions of article 11, article 29 or Part II of the Convention that allows a contract of sale or its modification or termination by agreement or any offer, acceptance or other indication of intention to be made in any form other than in written does not apply where any party has his place of business in the Republic of Lithuania."

10c Declarations:

Pursuant to article 39 of the Convention, the Grand Duchy of Luxembourg declares that it does not wish to be bound by chapter V, which contains autonomous conflict-of-laws rules that allow too wide an application to laws other than those of the assignor and that moreover are difficult to reconcile with the Rome Convention.

The Grand Duchy of Luxembourg, pursuant to article 42, paragraph 1(c), of the Convention, will be bound by the priority rules set forth in section III of the annex, namely those based on the time of the contract of assignment.

10d For the Kingdom in Europe and Aruba.

10e With a declaration of non-application to the Cook Islands, Niue, and Tokelau.

10f The instrument of ratification by the Government of Norway contains the following declarations:

(Original: English)

``1. In accordance with Article 92, paragraph (1), the Government of the Kingdom of Norway declares that Norway will not be bound by Part II of this Convention. (Formation of the Contract).

2. With reference to Article 94, in respect of Finland and Sweden in accordance with paragraph (1) and otherwise in accordance with paragraph (2), the Government of the Kingdom of Norway declares that the Convention will not apply to contracts of sale where the parties have their places of business in Norway, Denmark, Finland, Iceland or Sweden.''

11 The instrument of accession by the Government of the [Russian Federation] contains the following declaration:

(Translation) (Original: Russian)

``In accordance with articles 12 and 96 of the Convention, the [Russian Federation] declares that any provision of article 11, article 29 or Part II of the Convention that allows a contract of sale or its modification or termination by agreement or any offer, acceptance or other indication of intention to be made in any form other than in writing does not apply where any party has his place of business in the [Russian Federation].''

11a The instrument of accession by the Government of Saint Vincent and the Grenadines contains the following declaration:

``The Government of Saint Vincent and the Grenadines declares that Saint Vincent and the Grenadines will not be bound by subparagraph 1(b) of article 1 of the Convention.''

11b Formerly Serbia and Montenegro. Montenegro declared its independence on June 3, 2006 and acceded to the Convention on 23 October 2006.

11c The instrument of ratification by the Government of Singapore contains the following declaration:

In accordance with article 95 of the said Convention, the Government of the Republic of Singapore will not be bound by sub-paragraph (1)(b) of article 1 of the Convention and will apply the Convention to the Contracts of Sale of Goods only between those parties whose places of business are in different States when the States are Contracting States.

11d Subject to the following declaration:

(Courtesy Translation) (Original: Czechoslovak)

``Pursuant to Article 95, [Slovakia] declares that it shall not consider itself bound by the provision of Article 1, paragraph 1, item b), of the Convention.''

12 The instrument of ratification by the Government of Sweden contains the following declarations:

(Original: English)

``1. With reference to Article 92, Sweden will not be bound by Part II of this Convention

(Formation of the Contract).

2. With reference to Article 94, in respect of Finland in accordance with paragraph (1) and otherwise in accordance with paragraph (2) the Convention will not apply to contracts of sale where the parties have their places of business in Sweden, Finland, Denmark, Iceland or Norway.''

13 The instrument of accession by the Government of [Ukraine] contains the following declaration:

(Translation) (Original: Russian)

``In accordance with articles 12 and 96 of the Convention, [Ukraine] declares that any provision of article 11, article 29 or Part II of the Convention that allows a contract of sale or its modification or termination by agreement or any offer, acceptance or other indication of intention to be made in any form other than in writing does not apply where any party has his place of business in [Ukraine].''

14 The instrument of ratification by the Government of the United States contains the following declaration:

``Pursuant to article 95 the United States will not be bound by subparagraph (1)(b) of Article 1.''

Endnotes

1 Albania acceded to the Convention on deposite of its instrument of accession on 13 May 2009 and will enter into force 1 June 2010.

1a The instrument of accession by the Government of Argentina contains the following declaration:

(Translation) (Original: Spanish)

In accordance with articles 96 and 12 of the United Nations Convention on Contracts for the International Sale of Goods, any provision of article 11, article 29 or Part II of the Convention that allows a contract of sale or its modification or termination by agreement or any offer, acceptance or other indication of intention to be made in any form other than in writing does not apply where any party has his place of business in the Argentine Republic.

1b Armenia acceded to the Convention on deposite of its instrument of accession on 2 December 2008 and will enter into force 1 January 2010.

2 The instrument of accession by the Government of Australia contains the following declaration:

(Original: English)

``The Convention shall apply to all Australian States and mainland territories and to all external territories except the territories of Christmas Island, the Cocos (Keeling) Islands and the Ashmore and Cartier Islands.''

3 The instrument of accession by the Government of [Belarus] contains the following declaration:

(Translation) (Original: Russian)

``[Belarus], in accordance with articles 12 and 96 of the Convention declares that any provision of article 11, article 29 or Part II of this Convention that allows a contract of sale or its modification or termination by agreement or any offer, acceptance or other indication of intention to be made in any form other than in writing does not apply where any party has his place of business in [Belarus]."

3a The instrument of accession by the Government of Canada contains the following declaration:

``The Government of Canada declares, in accordance with Article 93 of the Convention, that the Convention will extend to Alberta, British Columbia, Manitoba, New Brunswick, Newfoundland, Nova Scotia, Ontario, Prince Edward Island and the Northwest Territories."

Subsequently the Government of Canada declared that ``the Convention shall also extend to Quebec and Saskatchewan" (9 April 1992), ``applies also to the Territory of the Yukon" (29 June 1992), and ``shall extend to the Territory of Nunavut" (18 June 2003).

4 The instrument of ratification by the Government of Chile contains the following declaration:

(Translation) (Original: Spanish)

``The State of Chile declares, in accordance with articles 12 and 96 of the Convention, that any provision of article 11, article 29 or Part II of the Convention that allows a contract of sale or its modification or termination by mutual agreement or any offer, acceptance or other indication of intention to be made in any other form than in writing, does not apply where any party has its place of business in Chile."

5 The instrument of approval by the Government of China contains the following declaration:

(Courtesy translation) (Original: Chinese)

The People's Republic of China does not consider itself to be bound by subparagraph (b) of paragraph 1 of Article 1 and Article 11 as well as the provisions in the Convention relating to the content of Article 11.

6 Subject to the following declaration:

(Courtesy Translation) (Original: Czechoslovak)

``Pursuant to Article 95, the [Czech Republic] declares that it shall not consider itself bound by the provision of Article 1, paragraph 1, item b), of the Convention."

7 The instrument of ratification by the Government of Denmark was accompanied by the following declarations:

(Original: English)

``Upon ratifying the Convention, the Kingdom of Denmark declares:

1) under paragraph 1 of Article 92 that Denmark will not be bound by Part II of the Convention,

2) under paragraph 1 of Article 93 that the Convention shall not apply to the Faroe Islands and Greenland,

3) under paragraph 1 cf. paragraph 3 of Article 94 that the Convention shall not apply to contracts of sale where one of the parties has his place of business in Denmark, Finland, Norway or

Sweden and the other party has his place of business in another of the said states,

4) under paragraph 2 of Article 94 that the Convention is not to apply to contracts of sale where one of the parties has his place of business in Denmark, Finland, Norway or Sweden and the other party has his place of business in Iceland".

7a The instrument of accession by the Government of Estonia contains the following declaration:

``In accordance with Articles 12 and 96 of the United Nations Convention on Contracts for the International Sale of Goods any provision of Article 11, Article 29 or Part II of the Convention that allows a contract of sale or its modification or termination by agreement or any offer, acceptance or other indication of intention to be made in any form other than in writing does not apply where any party has his place of business in the Republic of Estonia."

8 The instrument of ratification by the Government of Finland contains the following declarations:

(Original: English)

``1. With reference to Article 92, Finland will not be bound by Part II of this Convention (Formation of the Contract).

2. With reference to Article 94, in respect of Sweden in accordance with paragraph (1) and otherwise in accordance with paragraph (2) the Convention will not apply to contracts of sale where the parties have their places of business in Finland, Sweden, Denmark, Iceland or Norway."

9 On October 3, 1990 the German Democratic Republic acceded to the Federal Republic of Germany.

The instrument of ratification by the Government of the Federal Republic of Germany contains the following declaration:

(Courtesy Translation) (Original: German)

``The Government of the Federal Republic of Germany holds the view that Parties to the Convention that have made a declaration under article 95 of the Convention are not considered Contracting States within the meaning of subparagraph (1) (b) of article 1 of the Convention. Accordingly, there is no obligation to apply—and the Federal Republic of Germany assumes no obligation to apply—this provision when the rules of private international law lead to the application of the law of a Party that has made a declaration to the effect that it will not be bound by subparagraph (1) (b) of article 1 of the Convention. Subject to this observation the Government of the Federal Republic of Germany makes no declaration under article 95 of the Convention."

In a note accompanying the instrument of ratification the Government of the Federal Republic of Germany stated that the said Convention shall also apply to Berlin (West) with effect from the date on which it enters into force for the Federal Republic of Germany.

9a In a note accompanying its instrument of ratification, the Government of Hungary made the following declarations:

—``It [Hungary] considers the General Conditions of Delivery of Goods between Organizations of the Member Countries of the Council for Mutual Economic Assistance/GCD CMEA, 1968/1975, version of 1979/ to be subject to the provisions of article 90 of the Convention;

—It states, in accordance with articles 12 and 96 of the Convention, that any provision of article 11, article 29 or part II of the Convention that allows a contract of sale or its modification or termination by agreement or any offer, acceptance or other indication of intention to be made in any form other than in writing, does not apply where any party has his place of business in the Hungarian People's Republic."

9b 12 March 2003

Declaration:

``Pursuant to article 94, paragraph 1, the Convention will not apply to contracts of sale or to their formation where the parties have their places of business in Denmark, Finland, Iceland, Norway or Sweden."

10 The instrument of accession by the Government of Latvia contains the following declaration:

``In accordance with article 96 of the [said Convention], the Republic of Latvia declares that any provision of article 11, article 29, or Part II of this Convention, that allows a contract of sale or its modification or termination by agreement or any offer, acceptance, or other indication of intention to be made in any form other than in writing, does not apply where any party has his place of business in the Republic of Latvia."

10a Lebanon acceded to the Convention on deposites of its instrument of accession on 21 November 2008 and will enter into force 1 December 2009.

10b The instrument of accession by the Government of Lithuania contains the following declaration:

``In accordance with articles 96 and 12 of the said Convention, the Republic of Lithuania declares that any provisions of article 11, article 29 or Part II of the Convention that allows a contract of sale or its modification or termination by agreement or any offer, acceptance or other indication of intention to be made in any form other than in written does not apply where any party has his place of business in the Republic of Lithuania."

10c Declarations:

Pursuant to article 39 of the Convention, the Grand Duchy of Luxembourg declares that it does not wish to be bound by chapter V, which contains autonomous conflict-of-laws rules that allow too wide an application to laws other than those of the assignor and that moreover are difficult to reconcile with the Rome Convention.

The Grand Duchy of Luxembourg, pursuant to article 42, paragraph 1(c), of the Convention, will be bound by the priority rules set forth in section III of the annex, namely those based on the time of the contract of assignment.

10d For the Kingdom in Europe and Aruba.

10e With a declaration of non-application to the Cook Islands, Niue, and Tokelau.

10f The instrument of ratification by the Government of Norway contains the following declarations:

(Original: English)

``1. In accordance with Article 92, paragraph (1), the Government of the Kingdom of Norway declares that Norway will not be bound by Part II of this Convention. (Formation of the Contract).

2. With reference to Article 94, in respect of Finland and Sweden in accordance with paragraph (1) and otherwise in accordance with paragraph (2), the Government of the Kingdom of Norway declares that the Convention will not apply to contracts of sale where the parties have their places of business in Norway, Denmark, Finland, Iceland or Sweden."

11 The instrument of accession by the Government of the [Russian Federation] contains the following declaration:

(Translation) (Original: Russian)

``In accordance with articles 12 and 96 of the Convention, the [Russian Federation] declares that any provision of article 11, article 29 or Part II of the Convention that allows a contract of sale or its modification or termination by agreement or any offer, acceptance or other indication of intention to be made in any form other than in writing does not apply where any party has his place of business in the [Russian Federation]."

11a The instrument of accession by the Government of Saint Vincent and the Grenadines contains the following declaration:

``The Government of Saint Vincent and the Grenadines declares that Saint Vincent and the Grenadines will not be bound by subparagraph 1(b) of article 1 of the Convention."

11b Formerly Serbia and Montenegro. Montenegro declared its independence on June 3, 2006 and acceded to the Convention on 23 October 2006.

11c The instrument of ratification by the Government of Singapore contains the following declaration:

In accordance with article 95 of the said Convention, the Government of the Republic of Singapore will not be bound by sub-paragraph (1)(b) of article 1 of the Convention and will apply the Convention to the Contracts of Sale of Goods only between those parties whose places of business are in different States when the States are Contracting States.

11d Subject to the following declaration:

(Courtesy Translation) (Original: Czechoslovak)

``Pursuant to Article 95, [Slovakia] declares that it shall not consider itself bound by the provision of Article 1, paragraph 1, item b), of the Convention."

12 The instrument of ratification by the Government of Sweden contains the following declarations:

(Original: English)

``1. With reference to Article 92, Sweden will not be bound by Part II of this Convention (Formation of the Contract).

2. With reference to Article 94, in respect of Finland in accordance with paragraph (1) and otherwise in accordance with paragraph (2) the Convention will not apply to contracts of sale where the parties have their places of business in Sweden, Finland, Denmark, Iceland or Norway."

13 The instrument of accession by the Government of [Ukraine] contains the following declaration:

(Translation) (Original: Russian)

``In accordance with articles 12 and 96 of the Convention, [Ukraine] declares that any provision of article 11, article 29 or Part II of the Convention that allows a contract of sale or its modification or termination by agreement or any offer, acceptance or other indication of intention to be made in any form other than in writing does not apply where any party has his place of business in [Ukraine].''

14 The instrument of ratification by the Government of the United States contains the following declaration:

``Pursuant to article 95 the United States will not be bound by subparagraph (1)(b) of Article 1.''

Endnotes

1 Albania acceded to the Convention on deposite of its instrument of accession on 13 May 2009 and will enter into force 1 June 2010.

1a The instrument of accession by the Government of Argentina contains the following declaration:

(Translation) (Original: Spanish)

In accordance with articles 96 and 12 of the United Nations Convention on Contracts for the International Sale of Goods, any provision of article 11, article 29 or Part II of the Convention that allows a contract of sale or its modification or termination by agreement or any offer, acceptance or other indication of intention to be made in any form other than in writing does not apply where any party has his place of business in the Argentine Republic.

1b Armenia acceded to the Convention on deposite of its instrument of accession on 2 December 2008 and will enter into force 1 January 2010.

2 The instrument of accession by the Government of Australia contains the following declaration:

(Original: English)

``The Convention shall apply to all Australian States and mainland territories and to all external territories except the territories of Christmas Island, the Cocos (Keeling) Islands and the Ashmore and Cartier Islands.''

3 The instrument of accession by the Government of [Belarus] contains the following declaration:

(Translation) (Original: Russian)

``[Belarus], in accordance with articles 12 and 96 of the Convention declares that any provision of article 11, article 29 or Part II of this Convention that allows a contract of sale or its modification or termination by agreement or any offer, acceptance or other indication of intention to be made in any form other than in writing does not apply where any party has his place of business in [Belarus].''

3a The instrument of accession by the Government of Canada contains the following declaration:

``The Government of Canada declares, in accordance with Article 93 of the Convention, that the Convention will extend to Alberta, British Columbia, Manitoba, New Brunswick, Newfoundland, Nova Scotia, Ontario, Prince Edward Island and the Northwest Territories.''

Subsequently the Government of Canada declared that ``the Convention shall also extend to Quebec and Saskatchewan'' (9 April 1992), ``applies also to the Territory of the Yukon'' (29 June 1992), and ``shall extend to the Territory of Nunavut'' (18 June 2003).

4 The instrument of ratification by the Government of Chile contains the following declaration:

(Translation) (Original: Spanish)

``The State of Chile declares, in accordance with articles 12 and 96 of the Convention, that any provision of article 11, article 29 or Part II of the Convention that allows a contract of sale or its modification or termination by mutual agreement or any offer, acceptance or other indication of intention to be made in any other form than in writing, does not apply where any party has its place of business in Chile.''

5 The instrument of approval by the Government of China contains the following declaration:

(Courtesy translation) (Original: Chinese)

The People's Republic of China does not consider itself to be bound by subparagraph (b) of paragraph 1 of Article 1 and Article 11 as well as the provisions in the Convention relating to the content of Article 11.

6 Subject to the following declaration:

(Courtesy Translation) (Original: Czechoslovak)

``Pursuant to Article 95, the [Czech Republic] declares that it shall not consider itself bound by the provision of Article 1, paragraph 1, item b), of the Convention.''

7 The instrument of ratification by the Government of Denmark was accompanied by the following declarations:

(Original: English)

``Upon ratifying the Convention, the Kingdom of Denmark declares:

1) under paragraph 1 of Article 92 that Denmark will not be bound by Part II of the Convention,

2) under paragraph 1 of Article 93 that the Convention shall not apply to the Faroe Islands and Greenland,

3) under paragraph 1 cf. paragraph 3 of Article 94 that the Convention shall not apply to contracts of sale where one of the parties has his place of business in Denmark, Finland, Norway or Sweden and the other party has his place of business in another of the said states,

4) under paragraph 2 of Article 94 that the Convention is not to apply to contracts of sale where one of the parties has his place of business in Denmark, Finland, Norway or Sweden and the other party has his place of business in Iceland''.

7a The instrument of accession by the Government of Estonia contains the following declaration:

``In accordance with Articles 12 and 96 of the United Nations Convention on Contracts for the International Sale of Goods any provision of Article 11, Article 29 or Part II of the Convention that allows a contract of sale or its modification or termination by agreement or any offer, acceptance or other indication of intention to be made in any form other than in writing does not apply where any party has his place of business in the Republic of Estonia.''

8 The instrument of ratification by the Government of Finland contains the following declarations:

(Original: English)

``1. With reference to Article 92, Finland will not be bound by Part II of this Convention (Formation of the Contract).

2. With reference to Article 94, in respect of Sweden in accordance with paragraph (1) and otherwise in accordance with paragraph (2) the Convention will not apply to contracts of sale where the parties have their places of business in Finland, Sweden, Denmark, Iceland or Norway.''

9 On October 3, 1990 the German Democratic Republic acceded to the Federal Republic of Germany.

The instrument of ratification by the Government of the Federal Republic of Germany contains the following declaration:

(Courtesy Translation) (Original: German)

``The Government of the Federal Republic of Germany holds the view that Parties to the Convention that have made a declaration under article 95 of the Convention are not considered Contracting States within the meaning of subparagraph (1) (b) of article 1 of the Convention. Accordingly, there is no obligation to apply—and the Federal Republic of Germany assumes no obligation to apply—this provision when the rules of private international law lead to the application of the law of a Party that has made a declaration to the effect that it will not be bound by subparagraph (1) (b) of article 1 of the Convention. Subject to this observation the Government of the Federal Republic of Germany makes no declaration under article 95 of the Convention.''

In a note accompanying the instrument of ratification the Government of the Federal Republic of Germany stated that the said Convention shall also apply to Berlin (West) with effect from the date on which it enters into force for the Federal Republic of Germany.

9a In a note accompanying its instrument of ratification, the Government of Hungary made the following declarations:

—``It [Hungary] considers the General Conditions of Delivery of Goods between Organizations of the Member Countries of the Council for Mutual Economic Assistance/GCD CMEA, 1968/1975, version of 1979/ to be subject to the provisions of article 90 of the Convention;

—It states, in accordance with articles 12 and 96 of the Convention, that any provision of article 11, article 29 or part II of the Convention that allows a contract of sale or its modification or termination by agreement or any offer, acceptance or other indication of intention to be made in any form other than in writing, does not apply where any party has his place of business in the Hungarian People's Republic.''

9b 12 March 2003

Declaration:

``Pursuant to article 94, paragraph 1, the Convention will not apply to contracts of sale or to their formation where the parties have their places of business in Denmark, Finland, Iceland, Norway or Sweden.''

10 The instrument of accession by the Government of Latvia contains the following declaration:

``In accordance with article 96 of the [said Convention], the Republic of Latvia declares that any provision of article 11, article 29, or Part II of this Convention, that allows a contract of sale or its modification or termination by agreement or any offer, acceptance, or other indication of intention to be made in any form other than in writing, does not apply where any party has his place of business in the Republic of Latvia.''

10a Lebanon acceded to the Convention on deposites of its instrument of accession on 21 November 2008 and will enter into force 1 December 2009.

10b The instrument of accession by the Government of Lithuania contains the following declaration:

``In accordance with articles 96 and 12 of the said Convention, the Republic of Lithuania declares that any provisions of article 11, article 29 or Part II of the Convention that allows a contract of sale or its modification or termination by agreement or any offer, acceptance or other indication of intention to be made in any form other than in written does not apply where any party has his place of business in the Republic of Lithuania.''

10c Declarations:

Pursuant to article 39 of the Convention, the Grand Duchy of Luxembourg declares that it does not wish to be bound by chapter V, which contains autonomous conflict-of-laws rules that allow too wide an application to laws other than those of the assignor and that moreover are difficult to reconcile with the Rome Convention.

The Grand Duchy of Luxembourg, pursuant to article 42, paragraph 1(c), of the Convention, will be bound by the priority rules set forth in section III of the annex, namely those based on the time of the contract of assignment.

10d For the Kingdom in Europe and Aruba.

10e With a declaration of non-application to the Cook Islands, Niue, and Tokelau.

10f The instrument of ratification by the Government of Norway contains the following declarations:

(Original: English)

``1. In accordance with Article 92, paragraph (1), the Government of the Kingdom of Norway declares that Norway will not be bound by Part II of this Convention. (Formation of the Contract).

2. With reference to Article 94, in respect of Finland and Sweden in accordance with paragraph (1) and otherwise in accordance with paragraph (2), the Government of the Kingdom of Norway declares that the Convention will not apply to contracts of sale where the parties have their places of business in Norway, Denmark, Finland, Iceland or Sweden.''

11 The instrument of accession by the Government of the [Russian Federation] contains the following declaration:

(Translation) (Original: Russian)

``In accordance with articles 12 and 96 of the Convention, the [Russian Federation] declares that any provision of article 11, article 29 or Part II of the Convention that allows a contract of sale or its modification or termination by agreement or any offer, acceptance or other indication of intention to be made in any form other than in writing does not apply where any party has his place of business in the [Russian Federation]."

11a The instrument of accession by the Government of Saint Vincent and the Grenadines contains the following declaration:

``The Government of Saint Vincent and the Grenadines declares that Saint Vincent and the Grenadines will not be bound by subparagraph 1(b) of article 1 of the Convention."

11b Formerly Serbia and Montenegro. Montenegro declared its independence on June 3, 2006 and acceded to the Convention on 23 October 2006.

11c The instrument of ratification by the Government of Singapore contains the following declaration:

In accordance with article 95 of the said Convention, the Government of the Republic of Singapore will not be bound by sub-paragraph (1)(b) of article 1 of the Convention and will apply the Convention to the Contracts of Sale of Goods only between those parties whose places of business are in different States when the States are Contracting States.

11d Subject to the following declaration:

(Courtesy Translation) (Original: Czechoslovak)

``Pursuant to Article 95, [Slovakia] declares that it shall not consider itself bound by the provision of Article 1, paragraph 1, item b), of the Convention."

12 The instrument of ratification by the Government of Sweden contains the following declarations:

(Original: English)

``1. With reference to Article 92, Sweden will not be bound by Part II of this Convention (Formation of the Contract).

2. With reference to Article 94, in respect of Finland in accordance with paragraph (1) and otherwise in accordance with paragraph (2) the Convention will not apply to contracts of sale where the parties have their places of business in Sweden, Finland, Denmark, Iceland or Norway."

13 The instrument of accession by the Government of [Ukraine] contains the following declaration:

(Translation) (Original: Russian)

``In accordance with articles 12 and 96 of the Convention, [Ukraine] declares that any provision of article 11, article 29 or Part II of the Convention that allows a contract of sale or its modification or termination by agreement or any offer, acceptance or other indication of intention to be made in any form other than in writing does not apply where any party has his place of business in [Ukraine].''

14 The instrument of ratification by the Government of the United States contains the following declaration:

``Pursuant to article 95 the United States will not be bound by subparagraph (1)(b) of Article 1.''

Endnotes

* Text as amended in accordance with article I of the 1980 Protocol. States that make a declaration under article 36 bis (article XII of the 1980 Protocol) will be bound by article 3 as originally adopted in the Limitation Convention, 1974. Article 3 as originally adopted reads as follows:

``Article 3

1. This Convention shall apply only if, at the time of the conclusion of the contract, the places of business of the parties to a contract of international sale of goods are in Contracting States.

2. Unless this Convention provides otherwise, it shall apply irrespective of the law which would otherwise be applicable by virtue of the rules of private international law.

3. This Convention shall not apply when the parties have expressly excluded its application.''

* Text of paragraphs (a) and (e) as amended in accordance with article II of the 1980 Protocol. Paragraphs (a) and (e) of article 4 as originally adopted in the Limitation Convention, 1974, prior to its amendment under the 1980 Protocol, read as follows:

``(a) of goods bought for personal, family or household use;

(e) of ships, vessels, or aircraft;''.

* Text as amended in accordance with article I of the 1980 Protocol. States that make a declaration under article 36 bis (article XII of the 1980 Protocol) will be bound by article 3 as originally adopted in the Limitation Convention, 1974. Article 3 as originally adopted reads as follows:

``Article 3

1. This Convention shall apply only if, at the time of the conclusion of the contract, the places of business of the parties to a contract of international sale of goods are in Contracting States.

2. Unless this Convention provides otherwise, it shall apply irrespective of the law which would otherwise be applicable by virtue of the rules of private international law.

3. This Convention shall not apply when the parties have expressly excluded its application.''

* Text of paragraphs (a) and (e) as amended in accordance with article II of the 1980 Protocol. Paragraphs (a) and (e) of article 4 as originally adopted in the Limitation Convention, 1974, prior

to its amendment under the 1980 Protocol, read as follows:

``(a) of goods bought for personal, family or household use;

(e) of ships, vessels, or aircraft;''.

Endnotes

* Text as amended in accordance with article I of the 1980 Protocol. States that make a declaration under article 36 bis (article XII of the 1980 Protocol) will be bound by article 3 as originally adopted in the Limitation Convention, 1974. Article 3 as originally adopted reads as follows:

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1. This Convention shall apply only if, at the time of the conclusion of the contract, the places of business of the parties to a contract of international sale of goods are in Contracting States.

2. Unless this Convention provides otherwise, it shall apply irrespective of the law which would otherwise be applicable by virtue of the rules of private international law.

3. This Convention shall not apply when the parties have expressly excluded its application.''

* Text of paragraphs (a) and (e) as amended in accordance with article II of the 1980 Protocol. Paragraphs (a) and (e) of article 4 as originally adopted in the Limitation Convention, 1974, prior to its amendment under the 1980 Protocol, read as follows:

``(a) of goods bought for personal, family or household use;

(e) of ships, vessels, or aircraft;''.

Footnotes

* New paragraph 4, added in accordance with article III of the 1980 Protocol.

Endnotes

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Endnotes

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Endnotes

* Text as amended in accordance with article IV of the 1980 Protocol. Article 34 as originally adopted in the Limitation Convention, 1974, prior to its amendment under the 1980 Protocol, read as follows:

``Article 34

Two or more Contracting States may at any time declare that contracts of sale between a seller having a place of business in one of these States and a buyer having a place of business in another of these States shall not be governed by this Convention, because they apply to the matters governed by this Convention the same or closely related legal rules.''

2. A Contracting State which has the same or closely related legal rules on matters governed by this Convention as one or more non-Contracting States may at any time declare that the Convention shall not apply to contracts of international sale of goods where the parties have their places of business in those States.

3. If a State which is the object of a declaration under paragraph 2 of this article subsequently becomes a Contracting State, the declaration made shall, as from the date on which this Convention enters into force in respect of the new Contracting State, have the effect of a declaration made under paragraph 1, provided that the new Contracting State joins in such declaration or makes a reciprocal unilateral declaration.

* Such a State will then be bound by article 3 of the unamended Convention. For its text, see footnote under article 3.

* Text as amended in accordance with article V of the Protocol. Article 37 as originally adopted in the Limitation Convention, 1974, prior to its amendment under the 1980 Protocol, read as follows:

``Article 37

This Convention shall not prevail over conventions already entered into or which may be entered into, and which contain provisions concerning the matters covered by this Convention, provided that the seller and buyer have their places of business in States parties to such a convention.''

Endnotes

* Last sentence of paragraph 1 of article 40 (between asterisks) added in accordance with article VI of the 1980 Protocol.

Endnotes

* Last sentence of paragraph 1 of article 40 (between asterisks) added in accordance with article VI of the 1980 Protocol.

Endnotes

* Text as amended in accordance with article IV of the 1980 Protocol. Article 34 as originally adopted in the Limitation Convention, 1974, prior to its amendment under the 1980 Protocol, read as follows:

``Article 34

Two or more Contracting States may at any time declare that contracts of sale between a seller having a place of business in one of these States and a buyer having a place of business in another of these States shall not be governed by this Convention, because they apply to the matters governed by this Convention the same or closely related legal rules.''

2. A Contracting State which has the same or closely related legal rules on matters governed by this Convention as one or more non-Contracting States may at any time declare that the Convention shall not apply to contracts of international sale of goods where the parties have their places of business in those States.

3. If a State which is the object of a declaration under paragraph 2 of this article subsequently becomes a Contracting State, the declaration made shall, as from the date on which this Convention enters into force in respect of the new Contracting State, have the effect of a declaration made under paragraph 1, provided that the new Contracting State joins in such declaration or makes a reciprocal unilateral declaration.

* Such a State will then be bound by article 3 of the unamended Convention. For its text, see footnote under article 3.

* Text as amended in accordance with article V of the Protocol. Article 37 as originally adopted in the Limitation Convention, 1974, prior to its amendment under the 1980 Protocol, read as follows:

``Article 37

This Convention shall not prevail over conventions already entered into or which may be entered into, and which contain provisions concerning the matters covered by this Convention, provided that the seller and buyer have their places of business in States parties to such a convention."

* Last sentence of paragraph 1 of article 40 (between asterisks) added in accordance with article VI of the 1980 Protocol.

Endnotes

* Refers to the 1974 Limitation Convention.

* Refers to the 1974 Limitation Convention.

* Refers to the 1974 Limitation Convention.

* Paragraphs (1) and (2) of article XIII of the Protocol read as follows:

``(1) A Contracting State may denounce this Protocol by notifying the depositary to that effect.

(2) The denunciation shall take effect on the first day of the month following the expiration of twelve months after receipt of the notification by the depositary."

1 Declaration made upon signature and confirmed upon ratification:

In accordance with article 34 the Government of the Kingdom of Norway declares that the Convention shall not govern contracts of sale where the seller and the buyer both have their relevant places of business within the territories of the Nordic States (i.e. Norway, Denmark, Finland, Iceland and Sweden).

2 Formerly Serbia and Montenegro.

Endnotes

* Refers to the 1974 Limitation Convention.

* Refers to the 1974 Limitation Convention.

* Refers to the 1974 Limitation Convention.

* Paragraphs (1) and (2) of article XIII of the Protocol read as follows:

``(1) A Contracting State may denounce this Protocol by notifying the depositary to that effect.

(2) The denunciation shall take effect on the first day of the month following the expiration of twelve months after receipt of the notification by the depositary."

1 Declaration made upon signature and confirmed upon ratification:

In accordance with article 34 the Government of the Kingdom of Norway declares that the Convention shall not govern contracts of sale where the seller and the buyer both have their relevant places of business within the territories of the Nordic States (i.e. Norway, Denmark, Finland, Iceland and Sweden).

2 Formerly Serbia and Montenegro.

Endnotes

1 ***Albania Accession***

Accession accepted by	Date of acceptance	Entry into force
Monaco	15-VI-2007	1-IX-2007
Latvia	3-VII-2007	1-X-2007
Netherlands	13-VII-2007	1-X-2007
Germany	18-VII-2007	1-X-2007
Poland	1-VIII-2007	1-XI-2007
Greece	13-VIII-2007	1-XI-2007
Israel	23-VIII-2007	1-XI-2007
Slovakia	8-X-2007	1-I-2008
Czech Republic	11-X-2007	1-I-2008
San Marino	29-X-2007	1-I-2008
Ireland	31-X-2007	1-I-2008
Sweden	14-I-2008	1-IV-2008
New Zealand	1-II-2008	1-V-2008
China, People's Republic of	18-VI-2008	1-IX-2008
Venezuela	15-X-2008	1-I-2009
Lithuania	29-XII-2008	1-III-2009
Finland	18-II-2009	1-V-2009
Spain	2-VI-2009	1-IX-2009

Entry into force between Albania and	Entry into force
Monaco	1-IX-2007
Latvia	1-X-2007
Netherlands	1-X-2007
Germany	1-X-2007
Poland	1-XI-2007
Greece	1-XI-2007
Israel	1-XI-2007
Slovakia	1-I-2008
Czech Republic	1-I-2008

San Marino	1-I-2008
Ireland	1-I-2008
Sweden	1-IV-2008
New Zealand	1-V-2008
China, People's Republic of	1-IX-2008
Venezuela	1-I-2009
Lithuania	1-III-2009
Finland	1-V-2009
Spain	1-IX-2009

China, People's Republic of—Entry into force
(acceptance on behalf of the SAR of Macao only)

Central Authority

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Reservations

Articles: 26

In accordance with Article 42 of the Convention, the Republic of Albania reserves the right that it shall not be bound to assume any costs referred to in the second paragraph of Article 26 of the Convention resulting from the participation of legal counsel or advisers or from court proceedings, except insofar as those costs may be covered by its system of legal aid and advice.

1a *Notification pursuant to Article 45, first paragraph, of the Convention*

In conformity with Article 37, first paragraph, the Chargé d'Affaires a.i. of the Argentine Republic signed the above-mentioned Convention for the Argentine Republic as follows on 28 January 1991:

GASIO

28 JAN 91

In accordance with Article 37, paragraph 2, Argentina deposited its instrument of ratification of the abovementioned Convention with the Ministry of Foreign Affairs on 19 March 1991.

In accordance with Article 6, paragraph 1, of the Convention Argentina has designated as the Central Authority:

``The Ministry of Foreign Relations—Legal Affairs Department (Ministerio de Relaciones Exteriores y Culto—Dirección de Asuntos Jurídicos)''.

N.B. See also *infra,* 10 UNITED KINGDOM OF GREAT BRITAIN AND NORTHERN IRELAND, Extensions, note**.

In accordance with Article 43 the Convention will enter into force for Argentina on 1 June 1991.

Central Authority designated under the *Hague Convention of 25 October 1980 on the civil aspects of international child abduction.*

adresse/address:

Ministerio de Relaciones Exteriores

Ministry of Foreign Affairs

Comercio Internacional y Culto

International Trade and Culture

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Directora de Asistencia Judicial Internacional

M./Mr Ignacio GOICOECHEA

(languages of communication: espagnol Spanish/anglais/English)

tél./tel.: (54)-1-311-0071 ext. 166

Notification pursuant to Article 45 of the Convention

The Ministry of Foreign Affairs of the Kingdom of the Netherlands, depositary of the Convention on the Civil Aspects of International Child Abduction of 25 October 1980, has the honour, with reference to the depositary's notification No. 7/1998 of 22 April 1998, to inform the Member States of The Hague Conference on Private International Law and States having acceded to the above-mentioned Convention of the following. By Note A.E. N° 33/98 dated 31 May 1998 the Embassy of the Argentine Republic transmitted to the Depositary a declaration concerning the extension of the application of the Convention by the United Kingdom of Great Britain and Northern-Ireland to the Falkland Islands.

A copy of the Note and its enclosure are attached.

The Embassy of the Argentine Republic presents its compliments to the Ministry of Foreign Affairs of the Kingdom of the Netherlands -Treaties Division- and has the honour to address the Government of the Netherlands in its capacity of Depositary of the Convention on the Civil Aspects of International Child Abduction, done at The Hague on 25, October 1980.

In that respect, the Argentine Republic rejects the extension of the application of the Convention on the Civil Aspects of International Child Abduction, done at The Hague on 25th, October 1980, to the Malvinas, South Georgia and South Sandwich Islands, notified by the United Kingdom of Great Britain and Northern Ireland to the Government of the Netherlands as Depositary of the Convention.

The General Assembly of the United Nations has adopted resolutions 2065 (XX), 3160 (XXVIII), 31/49, 37/9, 38/12, 39/6, 40/21 and 41/40 which recognize the existence of a dispute over sovereignty relating to archipelago, urging the Argentine Republic and the United Kingdom of Great Britain and Northern Ireland to resume negotiations in order to find as soon as possible a peaceful and definitive solution to the dispute through the good offices of the Secretary-General of the United Nations, who is to report to the General Assembly on the progress made.

The Argentine Republic reaffirms its sovereign rights over the Malvinas, South Georgia and South Sandwich Islands and its surrounding maritime areas, which form an integral part of its National territory.

The Argentine Government requests the Government of the Netherlands to notify the preceding communication to the Members of the Hague Conference on Private International Law and Signatories and Parties to the above mentioned Convention.

The Embassy of the Argentine Republic kindly requests the Ministry of Foreign Affairs -Treaties Division- to circulate the preceding communication at the earliest possible convenience.

The Embassy of the Argentine Republic avails itself of this opportunity to renew to the Ministry of Foreign Affairs -Treaties Division- the assurances of its highest consideration.

1b ***Armenia Accession***

Convention of 25 October 1980 on the Civil Aspects of International Child Abduction

Accession accepted by	Date of acceptance	Entry into force
Slovakia	8-X-2007	1-I-2008
Latvia	16-X-2007	1-I-2008
Ireland	31-X-2007	1-I-2008
Czech Republic	13-XI-2007	1-II-2008
Poland	21-XI-2007	1-II-2008
Sweden	14-I-2008	1-IV-2008
New Zealand	17-III-2008	1-VI-2008
San Marino	25-III-2008	1-VI-2008
Monaco	31-III-2008	1-VI-2008
China, People's Republic of	18-VI-2008	1-IX-2008
France	14-X-2008	1-I-2009
Venezuela	15-X-2008	1-I-2009
Lithuania	29-XII-2008	1-III-2009
Finland	1-III-2009	1-VI-2009
Spain	2-VI-2009	1-IX-2009

Entry into force between Armenia and	Entry into force
Slovakia	1-I-2008
Latvia	1-I-2008
Ireland	1-I-2008
Czech Republic	1-II-2008
Poland	1-II-2008
Sweden	1-IV-2008
New Zealand	1-VI-2008
San Marino	1-VI-2008
Monaco	1-VI-2008
China, People's Republic of	1-IX-2008
France	1-I-2009
Venezuela	1-I-2009
Lithuania	1-III-2009
Finland	1-VI-2009
Spain	1-IX-2009

China, People's Republic of—Entry into force
(acceptance on behalf of the SAR of Macao only)

Armenia—Central Authority

Ministry of Justice of the Republic of Armenia
Department for Control
Halabyan 41/a
YEREVAN 0078
Republic of Armenia
Tel.: +374 (10)34 46 77
Fax: +374 (10) 38 03 82
E-mail: justice@justice.am

Reservations

Articles: 24,26

Pursuant to Article 42 of the Convention (…), the Republic of Armenia makes the following reservations:

1. With regard to Article 24, applications, communications or other documents sent to the Central Authority of the Republic of Armenia shall be in original languages and shall be accompanied by a translation into Armenian or, where that is not feasible, a translation into English.

2. With regard to Article 26, the Republic of Armenia shall not be bound to assume any costs referred to in Article 26, second paragraph, resulting from the participation of legal counsel or advisers or from court proceedings, except insofar as those costs may be covered by its system of legal aid and advice.

1c *Notification pursuant to Article 45 of the Convention*

In conformity with Article 37, first paragraph, the above-mentioned Convention was signed for Australia on 29 October 1986 as follows:

``GEOFFREY PRICE
29 October 1986."

In conformity with Article 37, paragraph 2, Australia deposited on the same date its instrument of ratification of the Convention with the Ministry of Foreign Affairs of the Kingdom of the Netherlands.

The Government of Australia declared in accordance with Article 40 that the Convention extends to the legal system applicable only in the Australian States and mainland Territories.

In accordance with Article 43, paragraph 1, the Convention will enter into force for Australia on 1 January 1987.

The Australian Embassy informed the Ministry of Foreign Affairs of the Kingdom of the Netherlands by Note of 23 December 1986 of the designation of the following Central Authorities by Australia in accordance with Article 6 of the above-mentioned Convention:

A. Pour le *Commonwealth Central Authority/*For the Commonwealth Central Authority

``A. Commonwealth Central Authority
Secretary
Attorney-General's Department
Canberra

Note: La Convention ne s'applique qu'au système juridique applicable aux Etats australiens et aux territories continentaux.

Certains organes des états et territoires australiens sont autorisés à remplir certaines fonctions conformément à la Convention, mais ne sont pas autorisés à recevoir ou à transmettre des demandes. Toute communication doit être soumise d'abord à l' *Attorney General's Department (Commonwealth Central Authority).*

The Convention extends to the legal system applicable only in the Australian States and mainland Territories.

Some Australian State and Territory agencies have been appointed to carry out some functions under the Convention but are not authorised to receive or transmit applications. Communications should be sent in the first instance to the Attorney-General's Department.

(Les renseignements mentionnés ci-dessus sont valables à partir du *3 avril 1997*)

(The effective date of the above information is *3 April 1997*)

B. State Central Authorities

(i) Director,
Department of Children's Services,
Queensland

(ii) Secretary,
Department of Community Development,
Northern Territory.

(iii) Director-General,
Department of Community Services,
Victoria.

(iv) Director-General
Department of Youth and Community Services,
New South Wales.

(v) Director for Community Welfare,
Department for Community Welfare,
Tasmania.

(vi) Commissioner,
Western Australian Police Department,
Western Australia.

(vii) Commissioner,
South Australian Police Department,
South Australia.

(viii) Director of Welfare,
Department of Territories,
Australian Capital Territory.

Applications should be forwarded to the Commonwealth Central Authority for initial processing, addressed as follows: The Secretary, Attorney-General's Department, National Circuit, Barton A.C.T. 2600."

1d *Notification pursuant to Article 45 of the Convention*

In accordance with Article 37, paragraph 2, Austria deposited on 14 July 1988 its instrument of ratification of the above-mentioned Convention with the Ministry of Foreign Affairs of the Kingdom of the Netherlands.

The Convention will enter into force for Austria in accordance with Article 43 on 1 October 1988.

Austria designated as the Central Authority mentioned in Article 6 of the Convention:

adresse/address:

Bundesministerium für Justiz

Abteilung I 10

Postfach 63

A-1016 Vienna

Austria

numéro de téléphone/telephone number:

Secrétariat/Secretariat:

+43 (1) 52152 2147

numéro de télex/telex number:

13/1264

numéro de télécopie/telefax number:

+43 (1) 52152 2829 ou/or +43 (1) 52152 2727

personnes à contacter/persons to

contact:

M/Mr Werner SCHüTZ (langues de communication/languages of communication: anglais et
allemand/English and German) tél./tel.: +43 (1) 52152 2134
ou/or (en cas d'absence/in his absence)

M/Mr Ihor TARKO (langues de communication/languages of communication: anglais et
allemand/English and German)
tél./tel.: (222) 52152 2292
Mlle/Ms Ruth STRAGANZ (langues de communication/languages of communication: anglais,
français, allemand/English, French, German)

tél./tel.: +43 (1) 52152 2115

1e In accordance with Article 38, paragraph 5, the Convention is in force between the Bahamas and the following States:

the Kingdom of the Netherlands (for the Kingdom in Europe)	1 February 1994
the United States of America	1 January 1994
Luxembourg	1 March 1994
the United Kingdom of Great Britain and Northern Ireland*	1 March 1994
the Federal Republic of Germany	1 May 1994
Finland	1 August 1994
Australia	1 September 1994
Switzerland	1 October 1994
Ireland	1 December 1994
Sweden	1 January 1995
Spain	1 March 1995
Argentina	1 May 1995
Canada	1 August 1995
New Zealand	1 November 1995
Mexico	1 December 1995
Israel	1 January 1996
Italy	1 April 1997
France	1 September 1997
Venezuela	1 September 1997
Greece	1 October 1997
Poland	1 March 1998
the Czech Republic	1 August 1998
Norway	1 October 1998
the Slovak Republic	1 February 2001
Portugal	1 January 2002
Hungary	1 June 2002

* The United Kingdom made the following declaration with regard to the accession of the Bahamas to the Convention:

``Notwithstanding the provisions of the said Article 38 regarding entry into force of the Convention as between the acceding State and the State declaring its acceptance of the accession, amendments will have been made to the United Kingdom municipal law in order to give effect to the Convention between it and the Bahamas as of 1 January 1994 when the Convention enters into force for the Bahamas." The Ministry of Foreign Affairs of the Kingdom of the Netherlands has not yet received any communication from the Government of the Bahamas concerning the date of entry into force proposed by the United Kingdom.

Central Authority designated under the *Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction.*

adresse/address:

The Honourable Minister of Foreign Affairs of the Commonwealth of the Bahamas

Ministry of Foreign Affairs

PO Box No 3746

NASSAU

Bahamas

numéro de téléphone/telephone number:

+1 (242) 322 7624

numéro de télex/telex number:

—

numéro de télécopie/telefax number:

+1 (242) 328 8212 ou/or +1 (242) 326 2123

personnes à contacter/persons to

contact:

—

1f Under Article 38, the Convention is not in force between the United States and Belarus.

Notification pursuant to Article 45 of the Convention

The Ministry of Foreign Affairs of the Kingdom of the Netherlands, depositary of the Convention on the Civil Aspects of International Child Abduction of 25 October 1980, has the honour to inform the Member States of The Hague Conference on Private International Law and the States having acceded to the above-mentioned Convention that in accordance with Article 38, paragraph 2, the Republic of Belarus deposited its instrument of accession with the Ministry of Foreign Affairs of the Kingdom of the Netherlands on 12 January 1998.

The instrument of accession contains the following reservation:

``The Republic of Belarus declares that it shall not be bound to assume any costs referred to in Paragraph 2 of Article 26 of this Convention resulting from the participation of legal counsel or advisers or from our court proceedings, except insofar as those costs may be covered by its system of legal aid and advice."

The Convention will enter into force for the Republic of Belarus on 1 April 1998 in accordance with Article 38, paragraph 3.

The accession will have effect only as regards the relations between the Republic of Belarus and such Contracting States as will have declared their acceptance of the accession.

In accordance with Article 38, paragraph 5, the Convention is in force between Belarus and the following States:

the Kingdom of the Netherlands (for the Kingdom in Europe and Aruba)	1 May 1998
Israel	1 June 1998
Finland	1 July 1998
the Czech Republic	1 August 1998
Australia	1 November 1998
Argentina	1 November 1998
Germany	1 February 1999
Moldova	1 February 1999
Paraguay	1 February 1999
Chile	1 June 1999
China, Hong Kong Special Administrative Region	1 June 1999
Spain	1 October 1999
Georgia	1 January 2000
Greece	1 March 2000
Fiji	1 September 2000
Costa Rica	1 September 2000
Uzbekistan	1 September 2000
Bosnia and Herzegovina	1 December 2000
Canada	1 January 2001

Ireland	1 January 2001
the Slovak Republic	1 February 2001
Poland	1 February 2001
Switzerland	1 February 2001
Colombia	1 April 2001
Brazil	1 May 2001
Malta	1 May 2001
Uruguay	1 May 2001
Trinidad and Tobago	1 May 2001
Italy	1 August 2001
Portugal	1 January 2002
Hungary	1 June 2002

In accordance with Article 6, first paragraph, the Republic of Belarus has designated the Ministry of Justice of the Republic of Belarus (220084 Minsk, ul.Kollektornaya, 10; tel. 375 172 208 687/208829; fax 209 684) as the Central Authority.

1g In accordance with Article 6, paragraph 1, Belgium has designated as Central Authority:

Ministére de la Justice

Direction générale de la Législation civile et des Cultes

Service Entraide judiciaire internationale.

1h *Notification pursuant to Article 45 of the Convention*

In accordance with Article 38, paragraph 2, of the above-mentioned Convention Belize deposited its instrument of accession to the Convention with the Ministry of Foreign Affairs of the Kingdom of the Netherlands on 22 June 1989.

The instrument of accession contains the following reservations:

``1) any application or other documents transmitted to the Central Authority under the Convention must be accompanied by a translation in English and not in French and

``2) Belize will not be bound to assume any costs relating to applications under the Convention resulting from the participation of legal counsel or advisers, or from court proceedings, except insofar as these costs may be covered by its system of legal aid and advice.".

The Convention will enter into force for Belize in accordance with Article 38, paragraph 3, on 1 September 1989.

The accession will have effect only as regards the relations between the acceding State and such Contracting States as will have declared their acceptance of the accession.

In accordance with Article 6, paragraph 1, of the Convention, on July 13, 1990 Belize has designated the following as Central Authority:

adresse/address:

Ministry of Human Resources, Women's Affairs and Youth Development

West Block

Independence Hill

BELMOPAN

Belize

numéro de téléphone/telephone number:

+501 (08) 22161 ou/or +501 (08) 22684

numéro de télécopie/telefax number:

+501 (08) 23175

personnes à contacter/persons to contact:

M./Hon. Phillip S.W. GOLDSON

In accordance with Article 38, paragraph 5, the Convention is in force between Belize and the following States:

the United Kingdom of Great Britain and Northern Ireland	1 October 1989
the United States of America	1 November 1989
Australia	1 March 1990
Portugal	1 May 1990
the Kingdom of the Netherlands (for the Kingdom in Europe)	1 September 1990
the Federal Republic of Germany	1 December 1990
Luxembourg	1 January 1991
Sweden	1 April 1991
Canada	1 September 1991
Ireland	1 October 1991
France	1 January 1992
Israel	1 February 1992
Spain	1 July 1992
Switzerland	1 September 1992

Norway	1 October 1992
Finland	1 August 1994
Mexico	1 December 1995
Argentina	1 December 1996
Italy	1 April 1997
Venezuela	1 September 1997
Greece	1 October 1997
the Czech Republic	1 August 1998
the Slovak Republic	1 February 2001
Hungary	1 June 2002

1i One of the successor States to the former Socialist Federal Republic of Yugoslavia which became a Party to the Convention on 1 December 1991. On 23 August 1993, the Republic of Bosnia and Herzegovina declared itself to be bound by the Convention.

No objection has been received from the Contracting States.

In accordance with Article 6, first paragraph, Bosnia and Herzegovina has designated as Central Authority: ``the Ministry for Civil Affairs and Communications of Bosnia and Herzegovina''.

1j The instrument of accession contains the following reservation:*

``(…) avec une réserve quant à l'article 24 de ladite Convention, permise par son article 42, pour établir que les documents étrangers annexés aux actes judiciaires soient accompagnés de leur traduction en portugais par un traducteur assermenté officiel.''

Translation

(…) with a reservation as provided for in Article 24 of the said Convention (permitted under Article 42), to the effect that foreign documents appended to legal instruments must be accompanied by a translation into Portuguese done by a sworn translator.*

* The Ministry of Foreign Affairs of the Kingdom of the Netherlands received a Note dated 21 June 2000 from the Embassy of Finland concerning the reservation made by Brazil. The Note reads as follows:

``(…)The Government of Finland is unable to accept the reservation in so far as it is incompatible with Article 24(2) and 42(1) of the Convention.

According to Article 24(1), any application, communication or other document sent to the Central Authority shall be in the original language, and shall be accompanied by a translation into the official language or one of the official languages of the requested State, or *where that is not feasible, a translation into French or English.* Under Article 24(2) a Contracting State may, by making a reservation, *object the use of either French or English, but not both,* in any application, communication or other document sent to its Central Authority.

Having regard to the wording and purpose of this provision the Finnish Government considers that the reservation made by Brazil, which excludes the use of both French and English languages in cases where it is not feasible to obtain a translation of the document into Portuguese, is not allowed under Article 24(2) and 42(1). In conclusion, the Finnish Government declares that in relation to Finland this reservation may not be invoked by the authorities of Brazil in so far as this would be incompatible with the aforementioned provisions of the Convention. This declaration is not to be interpreted as preventing the entry into force of the Convention between Finland and Brazil. (…)''

In accordance with Article 38, paragraph 5, the Convention is in force between Brazil and the following States:

Argentina	1 April 2000
Luxembourg	1 April 2000
Israel	1 April 2000
Chile	1 April 2000
Poland	1 May 2000
Panama	1 July 2000
Finland	1 September 2000
Colombia	1 September 2000
Ireland	1 January 2001
the Slovak Republic	1 February 2001
Spain	1 May 2001
Australia	1 May 2001
Belarus	1 May 2001
Mexico	1 June 2001
Italy	1 August 2001
Moldova	1 September 2001
Portugal	1 January 2002
Austria	1 March 2002
the Netherlands (for the Kingdom in Europe)	1 April 2002
Norway	1 April 2002
Germany	1 May 2002
Hungary	1 June 2002
Uzbekistan	1 June 2002
El Salvador	1 June 2002
Estonia	1 June 2002
Guatemala	1 June 2002
Latvia	1 June 2002
Nicaragua	1 June 2002
Peru	1 June 2002
Sri Lanka	1 June 2002
Trinidad and Tobago	1 June 2002
Sweden	1 September 2002

1k *Bulgaria Accession*

Convention of 25 October 1980 on the Civil Aspects of International Child Abduction

Accession accepted by	**Date of acceptance**	**Entry into force**
Guatemala	26-IX-2003	1-XII-2003
Israel	3-X-2003	1-I-2004
Luxembourg	20-X-2003	1-I-2004
Ireland	27-X-2003	1-I-2004
Netherlands	13-XI-2003	1-II-2004
Hungary	17-XI-2003	1-II-2004
Brazil	4-II-2004	1-V-2004
Argentina	6-II-2004	1-V-2004
Chile	26-II-2004	1-V-2004
Slovakia	9-III-2004	1-VI-2004
Turkey	26-III-2004	1-VI-2004
Greece	13-IV-2004	1-VII-2004

Italy	7-V-2004	1-VIII-2004
Czech Republic	1-VI-2004	1-IX-2004
Estonia	15-VI-2004	1-IX-2004
Lithuania	7-VII-2004	1-X-2004
Australia	28-VII-2004	1-X-2004
Germany	15-IX-2004	1-XII-2004
United States of America	7-X-2004	1-I-2005
New Zealand	11-X-2004	1-I-2005
Finland	12-X-2004	1-I-2005
Venezuela	16-XI-2004	1-II-2005
Croatia	24-XI-2004	1-II-2005
Switzerland	10-XII-2004	1-III-2005
France	16-XII-2004	1-III-2005
Latvia	29-XII-2004	1-III-2005
Spain	17-I-2005	1-IV-2005
Norway	1-IV-2005	1-VII-2005
Cyprus	6-IV-2005	1-VII-2005
Bahamas	25-V-2005	1-VIII-2005
China, People's Republic of	30-V-2005	1-VIII-2005
Austria	14-VII-2005	1-X-2005
China, People's Republic of	21-VII-2005	1-X-2005
Belize	30-VIII-2005	1-XI-2005
Peru	29-XI-2005	1-II-2006
Uruguay	12-I-2006	1-IV-2006
Belgium	31-I-2006	1-IV-2006
Panama	2-XI-2006	1-II-2007
Honduras	16-XI-2006	1-II-2007
Poland	10-I-2007	1-IV-2007
Mexico	8-II-2007	1-V-2007
Colombia	2-IV-2007	1-VII-2007
Monaco	10-IV-2007	1-VII-2007
Sweden	26-VI-2007	1-IX-2007
Georgia	22-IX-2008	1-XII-2008
The former Yugoslav Republic of Macedonia	29-XII-2008	1-III-2009
United Kingdom of Great Britain and Northern Ireland	12-II-2009	1-V-2009

Entry into force between Bulgaria and	**Entry into force**
Dominican Republic	1-XII-2005
Ukraine	1-XII-2006
San Marino	1-VI-2007
Guatemala	1-XII-2003
Israel	1-I-2004
Luxembourg	1-I-2004
Ireland	1-I-2004
Netherlands	1-II-2004
Hungary	1-II-2004
Brazil	1-V-2004
Argentina	1-V-2004
Chile	1-V-2004
Slovakia	1-VI-2004
Turkey	1-VI-2004
Greece	1-VII-2004
Italy	1-VIII-2004
Czech Republic	1-IX-2004

Estonia	1-IX-2004
Lithuania	1-X-2004
Australia	1-X-2004
Germany	1-XII-2004
United States of America	1-I-2005
New Zealand	1-I-2005
Finland	1-I-2005
Venezuela	1-II-2005
Croatia	1-II-2005
Switzerland	1-III-2005
France	1-III-2005
Latvia	1-III-2005
Spain	1-IV-2005
Norway	1-VII-2005
Cyprus	1-VII-2005
Bahamas	1-VIII-2005
China, People's Republic of	1-VIII-2005
Austria	1-X-2005
China, People's Republic of	1-X-2005
Belize	1-XI-2005
Peru	1-II-2006
Uruguay	1-IV-2006
Belgium	1-IV-2006
Panama	1-II-2007
Honduras	1-II-2007
Poland	1-IV-2007
Mexico	1-V-2007
Colombia	1-VII-2007
Monaco	1-VII-2007
Sweden	1-IX-2007
Georgia	1-XII-2008
The former Yugoslav Republic of Macedonia	1-III-2009
United Kingdom of Great Britain and Northern Ireland	1-V-2009

Dominican Republic—Entry into force

China, People's Republic of—Entry into force

(30-V-2005: acceptance for the Special Administrative Region of Macao only)

China, People's Republic of—Entry into force

(21-VII-2005: acceptance for the Special Administrative Region of Hong Kong only)

United Kingdom of Great Britain and Northern Ireland—Entry into force

(acceptance also on behalf of Montserrat, the Cayman Islands, Bermuda, the Falkland Islands, the Isle of Man and Anguilla)

Bulgaria—Central Authority

The Ministry of Justice
Central Authority of the Republic of Bulgaria
1, Slavyanska Street
1040 SOFIA
numéros de téléphone/telephone numbers:
+359 (2) 923 7302 (experts)
numéro de télécopie/telefax number: +359 (2) 987 1557

Personne à contacter / person to contact:

Mrs Maria HRISTOVA
Chief expert, International Legal Child Support and Intercountry Adoptions Directorate
(langue de communication / language of communication: français / French)
e-mail: m.hristova@justice.government.bg

Reservations

Articles: 26,42

In accordance with Article 42, paragraph 1, of the Convention, the Republic of Bulgaria declares it shall not be bound to assume any costs and expenses resulting from proceedings or, where applicable, those arising from the participation of legal counsel and those of returning the child."

1I The Permanent Bureau of the Hague Conference on private international law presents its compliments to the Diplomatic Missions of the Member States and to the National Organs and has the honour to inform them that, by instrument deposited on 25 May 1992 with the Ministry of Foreign Affairs of the Kingdom of the Netherlands,

Burkina Faso

acceded to the above-mentioned Convention.

In conformity with Article 38, paragraph 3, the Convention will enter into force for *Burkina Faso* on 1 August 1992.

According to Article 38, paragraph 4, the accession will have effect only as regards Burkina Faso and such Contracting States as will have declared their acceptance of the accession.

In accordance with Article 38, paragraph 5, the Convention is in force between Burkina Faso and the following States:

the Kingdom of the Netherlands (for the Kingdom in Europe)	1 September 1992
the United Kingdom of Great Britain and Northern Ireland	1 November 1992

Luxembourg	1 November 1992
the United States of America	1 November 1992
France	1 January 1993
the Federal Republic of Germany	1 January 1993
Ireland	1 April 1993
Australia	1 April 1993
Argentina	1 August 1993
Canada	1 October 1993
Israel	1 November 1993
Sweden	1 December 1993
Finland	1 August 1994
Switzerland	1 October 1994
Spain	1 December 1994
New Zealand	1 November 1995
Mexico	1 December 1995
Italy	1 April 1997
Venezuela	1 September 1997
Greece	1 October 1997
Norway	1 March 1998
the Czech Republic	1 August 1998
the Slovak Republic	1 February 2001
Portugal	1 January 2002
Hungary	1 June 2002

The Permanent Bureau of the Hague Conference on private international law presents its compliments to the Diplomatic Missions of the Member States and to the National Organs and has the honour to inform them that, in accordance with Article 6, paragraph 1, of the above-mentioned Convention, *Burkina Faso* has designated as Central Authority:

``*Le Ministère délégué chargé de l'Action Sociale et de la Famille du Burkina Faso.''*

Central Authority designated under the *Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction.*

adresse/address:

Le Ministère de l'Action Sociale et de la Famille

01 BP 515

OUAGADOUGOU 01

Burkina Faso

numéro de téléphone/telephone number:

(226) 30 68 75

numéro de télex/telex number:

Segegou 5555

numéro de télécopie/telefax number:

(226) 31 67 37

personnes à contacter/persons to contact:

Mme/Ms Bana OUANDAOGO

Ministre de l'Action Sociale et de la Famille

(langue de communication/language of communication: français/French)

tél./tel.: (226) 30 68 75

Mme/Ms Patricia ZAIDA

Directrice de l'Enfance

(langue de communication/language of communication: français/French)

tél./tel.: (226) 30 68 80

Mme/Ms Haoua TAPSOBA

Chef de service de la sauvegarde de l'enfance en danger

(langue de communication/language of communication: français/French)

tél./tel.: (226) 30 68 80

2 *Notification in accordance with Article 45, paragraphs 1, 5 and 6 of the Convention*

In conformity with Article 37, paragraph 2, Canada deposited its instrument of ratification of the above-mentioned Convention with the Ministry of Foreign Affairs of the Kingdom of the Netherlands on 2 June 1983. Canada made the following declarations and reservations.

``*Extension of the Convention*

1. In accordance with the provisions of Article 40, the Government of Canada declares that the Convention shall extend to the Provinces of Ontario, New Brunswick, British Columbia and Manitoba.

Central Authorities

2. In accordance with the provisions of Article 6, paragraph 2, the Minister of Justice and Attorney General of Canada, as represented by the Domestic Legal Services in the Department of External Affairs, is designated as the Central Authority to which applications may be addressed for transmission to the appropriate Central Authority within Canada.

3. In accordance with the provisions of Article 6, paragraph 2, the Ministry of the Attorney General of Ontario is designated as the Central Authority for the Province of Ontario.

4. In accordance with the provisions of Article 6, paragraph 2, the Attorney General of New Brunswick is designated as the Central Authority for the Province of New Brunswick.

5. In accordance with the provisions of Article 6, paragraph 2, the Attorney General of British Columbia is designated as the Central Authority for the Province of British Columbia.

6. In accordance with the provisions of Article 6, paragraph 2, the Attorney General of Manitoba is designated as the Central Authority for the Province of Manitoba.

Reservations

7. In accordance with the provisions of Article 42 and pursuant to Article 26, paragraph 3, the Government of Canada declares that, with respect to applications submitted under the Convention concerning the Provinces of Ontario, New Brunswick and British Columbia, Canada will assume the costs referred to in paragraph 2 of Article 26 only insofar as these costs are covered by the system of legal aid of the Province concerned.

Other declarations and reservations

8. The Government of Canada further declares that it may at any time submit other declarations or reservations, pursuant to Articles 6, 40 and 42 of the Convention, with respect to other territorial units.''.

Notification in accordance with Article 45, paragraphs 3 and 5, of the Convention

In conformity with Article 40 the Government of Canada extended the above-mentioned Convention to the Province of Nova Scotia by Note dated 24 February 1984 and received at the Ministry of Foreign Affairs of the Kingdom of the Netherlands on 27 February 1984.

The Canadian declaration extending the Convention to the Province of Nova Scotia contains the following declarations and reservations:

``*Central Authority*

In accordance with the provisions of Article 6, paragraph 2, the Attorney General of Nova Scotia is designated as the Central Authority for the Province of Nova Scotia.

Reservation

In accordance with the provisions of Article 42 and pursuant to Article 26, paragraph 3, the Government of Canada declares that, with respect to applications submitted under the Convention concerning the Province of Nova Scotia, Canada will assume the costs referred to in paragraph 2 of Article 26 only insofar as these costs are covered by the system of legal aid of the Province of Nova Scotia.

Other declarations and reservations

The Government of Canada further declares that it may at any time submit other declarations or reservations, pursuant to Articles 6, 40 and 42 of the Convention, with respect to other territorial units.".

In conformity with Article 43, paragraph 2, the Convention will enter into force for the Province of Nova Scotia on 1 May 1984.

Federal Government:

Ministre de la Justice et Procureur général du Canada représenté par:

Minister of Justice and Attorney General of Canada as represented by:

Le Service de droit interne
Ministère des Affaires
extérieures (JDS)
Tour C, 7e étage
Imm. Lester B. Pearson
125 Promenade Sussex
OTTAWA, Ontario K1A OG2
Canada

Domestic Legal Services
Department of External Affairs (JDS)
Tower C, 7th Floor
Lester B. Pearson Building
125 Sussex Drive
OTTAWA, Ontario K1A OG2 Canada

numéro de téléphone/telephone number:

(613) 992 6299

numéro de télex/telex number:

053 3745

numéro de télécopie/telefax number:

(613) 992 2467

personnes à contacter/persons to contact:

Me/Mr Richard FIUTOWSKI

tél./tel.: (613) 992 8608

ou/or

Me/Ms Nora O'BRIEN

tél./tel.: (613) 992 6299

British Columbia:

Attorney General of British Columbia,

Parliament Buildings,

VICTORIA, British Columbia,

V8V 1X4

Contact: Bob Adamson,

Assistant Deputy Attorney

General,

Policy Planning,

telephone: (604) 384-4435

Pour la Province de l'Ontario/For the Province of Ontario

adresse/address:

Ministry of the Attorney General

PO Box 640

DOWNSVIEW, Ontario

Canada

M3M 3A3

numéro de téléphone/telephone number:

(1)-416-240-2411

numéro de télex/telex number:

—

numéro de télécopie/telefax number:

(1)-416-240-2405

personnes à contacter/persons to contact:

Mlle/Ms Michelle DOUGLAS-CUMMINGS

(langue de communication/language of

communication: anglais/English)

Mlle/Ms Nathalie RIOUX

Reciprocity Officer

(langues de communication/languages of

communication: anglais et français/English and French)

Manitoba:

adresse/address:

Department of Justice

Family Law Branch

4th Floor, 405 Broadway

WINNIPEG, Manitoba R3C 3L6 Canada

numéro de téléphone/telephone number:

(204) 945 2841

numéro de télex/telex number:

075 7346

numéro de télécopie/telefax number:

(204) 945 0053

personnes à contacter/persons to contact:

Me/Ms Joan MacPHAIL

New Brunswick:

Attorney General of New Brunswick,

P.O. Box 6000,

Room 551,

Centennial Building,

FREDERICTON, New Brunswick, E3B 5H1

Contact: Director of Public Prosecutions Branch

telephone: (173) 453-2583

Nova Scotia:

Attorney General of Nova Scotia,

1723, Hollis Street,

HALIFAX, Nova Scotia, B3J 2L6

Contact: Mr R. Gerald Conrad, Q.C.

Director (Civil) Department

of the Attorney General

telephone: (902) 424-4041

Pour la Province du Québec/For the Province of Quebec

adresse/address:

Direction générale des affaires juridiques

Ministère de la Justice du Québec

1200 route de l'Eglise

2e étage

SAINTE-FOY, Québec, Canada

numéro de téléphone/telephone number:

+1 (418) 644 7152

numéro de télex/telex number:

0513 1650

numéro de télécopie/telefax number:

+1 (418) 646 1696

personnes à contacter/persons to contact:

Me Jean-Marc NEAULT, avocat

(langues de communication/languages of communication: français, anglais/French, English)

Mme/Ms France REMILLARD

(langues de communication/languages

of communication: français, anglais/

French, English)

Notification in accordance with Article 45, paragraphs 3 and 5, of the Convention

In conformity with Article 40 the Government of Canada extended the above-mentioned Convention to the Province of Newfoundland by Note dated 5 July 1984 and received at the Ministry of Foreign Affairs of the Kingdom of the Netherlands on 6 July 1984. The Canadian declaration extending the Convention to the Province of Newfoundland contains the following declarations and reservations:

``*Central Authority*

In accordance with the provisions of Article 6, paragraph 2, the Attorney General of Newfoundland is designated as the Central Authority for the Province of Newfoundland.

Pour la Province de Terre-Neuve/For the Province of Newfoundland

adresse/address:

Attorney General of Newfoundland

4th Floor, East Block

Confederation Building

Prince Philip Drive

P.O. Box 8700

ST JOHN'S, Newfoundland

Canada

A1B 4J6

numéro de téléphone/telephone number:

(1)-709-729-2887

numéro de técopie/telefax number:

(1)-709-729-2129

personnes à contacter/persons to contact:

M./Mr Brian F. Furey

Manager—Social Unit

Reservation

In accordance with the provisions of Article 42 and pursuant to Article 26, paragraph 3, the Government of Canada declares that, with respect to applications submitted under the Convention concerning the Province of Newfoundland, Canada will assume the costs referred to in paragraph 2 of Article 26 only insofar as these costs are covered by the system of legal aid of the Province of Newfoundland.

Other declarations and reservations

The Government of Canada further declares that it may at any time submit other declarations or reservations, pursuant to Articles 6, 40 and 42 of the Convention, with respect to other territorial units.".

In conformity with Article 43, paragraph 2, the Convention will enter into force for the Province of Newfoundland on 1 October 1984.

The Permanent Bureau of the Hague Conference on private international law presents its compliments to the Diplomatic Missions of the Member States and to the National Organs and has the honour to inform them that, by a letter received at the Ministry of Foreign Affairs of the Kingdom of the Netherlands on 11 October 1984, the Government of *Canada* declared, in accordance with Article 40, that the above-mentioned Convention shall extend to the Province of *Quebec.*

The Convention shall enter into force for the Province of Quebec on *1 January 1985.*

The declaration of extension contains the following declarations and reservations:

``*Central Authority*

In accordance with the provisions of Article 6, paragraph 2, the Department of Justice of Quebec is designated as the Central Authority for the Province of Quebec.

Reservations

In accordance with the provisions of Article 42 and pursuant to Article 24, paragraph 2, translation in the French language will be required for any application, communication or other document concerning the Province of Quebec when the original language is neither French nor English.

In accordance with the provisions of Article 42 and pursuant to Article 26, paragraph 3, the Government of Canada declares that, with respect to applications submitted under the Convention concerning the Province of Quebec, Canada will assume the costs referred to in paragraph 2 of Article 26 only insofar as these costs are covered by the system of legal aid of the Province of Quebec.

Other declarations and reservations

The Government of Canada further declares that it may at any time submit other declarations or reservations, pursuant to Articles 6, 40 and 42 of the Convention, with respect to other territorial units.".

Notification in accordance with Article 45, paragraphs 3 and 5, of the Convention

In conformity with Article 40 the Government of Canada extended the above-mentioned Convention to the Yukon Territory by Note dated 15 November 1984 and received at the Ministry of Foreign Affairs of the Kingdom of the Netherlands on 16 November 1984.

The Canadian declaration extending the Convention to the Yukon Territory contains the following declarations and reservation:

``*CENTRAL AUTHORITY*

In accordance with the provisions of Article 6, paragraph 2, the Deputy Minister of Justice of the Yukon Territory is designated as the Central Authority for the Yukon Territory.

Pour le Territoire du Yukon/For the Yukon Territory

adresse/address:

Deputy Minister of Justice

P.O. Box 2703

WHITEHORSE, Yukon

Canada

Y1A 2C6

numéro de téléphone/telephone number:

(1)-403-667-5412

numéro de télex/telex number:

036-8260

numéro de télécopie/telefax number:

(1)-403-667-3979

personnes à contacter/persons to contact:

M./Mr Thomas E. ULLYETT

RESERVATION

In accordance with the provisions of Article 42, and pursuant to Article 26, paragraph 3, the Government of Canada declares that, with respect to applications submitted under the Convention concerning the Yukon Territory, Canada will assume the costs referred to in paragraph 2 of Article 26 only insofar as these costs are covered by the system of legal aid of the Yukon Territory.

OTHER DECLARATIONS AND RESERVATIONS

The Government of Canada further declares that it may at any time submit other declarations or reservations, pursuant to Articles 6, 40 and 42 of the Convention, with respect to other territorial units.".

In conformity with Article 43, paragraph 2, the Convention will enter into force for the Yukon Territory on 1 February 1985.

Notification in accordance with Article 45, paragraphs 3 and 5, of the Convention

In conformity with Article 40 the Government of Canada extended the above-mentioned Convention to the Province of Prince Edward Island by Note dated 11 February 1986 and received at the Ministry of Foreign Affairs on 12 February 1986.

Central Authority designated under the *Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction.*

Pour la Province de l'Ile du Prince-Edouard/For the Province of Prince Edward Island

adresse/address:

Departmental Solicitor

Department of Provincial Affairs

& Attorney General

Legal Services Section

P.O. Box 2000

CHARLOTTETOWN, P.E.I.

Canada

C1A 7N8

numéro de téléphone/telephone number:

(1)-902-368-5064

numéro de télex/telex number:

—

numéro de télécopie/telefax number:

(1)-902-368-4563

personnes à contacter/persons to contact:

Mme/Ms Judy HALDEMANN

tél./tel. (1)-902-368-4553

RESERVATION

In accordance with the provisions of Article 42, and pursuant to Article 26, paragraph 3, the Government of Canada declares that, with respect to applications submitted under the Convention concerning the Province of Prince Edward Island, Canada will assume the costs referred to in paragraph 2 of Article 26 only insofar as these costs are covered by the system of legal aid of the Province of Prince Edward Island.

The Government of Canada further declares that it may at any time submit other declarations or reservations, pursuant to Articles 6, 40 and 42 of the Convention, with respect to other territorial units.".

In conformity with Article 43, paragraph 2, the Convention will enter into force for the Province of Prince Edward Island on 1st May 1986.

In accordance with Article 40, paragraph 2, Canada has declared, by a Note dated 7 August 1986, received at the Ministry of Foreign Affairs on 11 August 1986, that this Convention shall extend to the Province of Saskatchewan, under the following reservation:

``In accordance with the provisions of Article 42, and pursuant to Article 26, paragraph 3, the Government of Canada declares that, with respect to applications submitted under the Convention concerning the Province of Saskatchewan, Canada will assume the costs referred to in paragraph 2 of Article 26 only insofar as these costs are covered by the system of legal aid of the Province of Saskatchewan.", and the following declaration:

``The Government of Canada further declares that it may at any time submit other declarations or reservations, pursuant to Articles 6, 40 and 42 of the Convention, with respect to other territorial units.''.

In conformity with Article 43, paragraph 2, the Convention shall enter into force for the Province of Saskatchewan on 1 November 1986.

In conformity with Article 6, paragraph 2, of the Convention Canada has designated the Minister of Justice of Saskatchewan as Central Authority for the Province of Saskatchewan:

Pour la Province de la Saskatchewan/For the Province of Saskatchewan

adresse/address:

Department of Justice, Policy, Planning and Evaluation Branch

Public Law and Policy Division

1874 Scarth Street

REGINA, Saskatchewan

Canada

S4P 3V7

numéro de téléphone/telephone number:

(1)-306-787-8954

numéro de télex/telex number:

071-2586

numéro de télécopie/telefax number:

(1)-306-787-9111

personnes à contacter/persons to contact:

Mme/Ms B.A. POTTRUFF

ou/or

Mme/Ms Carol SNELL

Notification pursuant to Article 45 of the Convention

In conformity with Article 40 of the above-mentioned Convention Canada declared, by a Note dated 4 November 1986, received at the Ministry of Foreign Affairs on the same date, that the Convention shall extend to the Province of Alberta, under the following reservation:

``In accordance with the provisions of Article 42, and pursuant to Article 26, paragraph 3, the Government of Canada declares that, with respect to applications submitted under the Convention concerning the Province of Alberta, Canada will assume the costs referred to in paragraph 2 of Article 26 only insofar as these costs are covered by the system of legal aid of the Province of Alberta.";

and the following declarations:

``In accordance with the provisions of Article 6, paragraph 2, the Attorney General of Alberta is designated as the Central Authority for the Province of Alberta.

The Government of Canada further declares that it may at any time submit other declarations or reservations, pursuant to Articles 6, 40 and 42 of the Convention, with respect to other territorial units.".

In accordance with Article 43, paragraph 2, the Convention will enter into force for the Province of Alberta on 1 February 1987.

The Permanent Bureau of the Hague Conference on private international law presents its compliments to the Diplomatic Missions of the Member States and to the National Organs and has the honour to inform them that, by a letter received at the Ministry of Foreign Affairs of the Kingdom of the Netherlands on 26 January 1988, the Government of *Canada* declared, in accordance with Article 40, that the above-mentioned Convention shall extend to the *Northwest Territories.*

The Convention now extends to all the territorial units of Canada.

In conformity with Article 43, paragraph 2, the Convention shall enter into force for the *Northwest Territories* on *1 April 1988.*

The declaration of extension contains the following declaration and reservation:

``Central Authority

In accordance with the provisions of Article 6, paragraph 2, the Minister of Justice of the Northwest Territories is designated as the Central Authority for the Northwest Territories.

Pour les Territories du Nord-Ouest/For the Northwest Territories

adresse/address:

Legal Division

Department of Justice

Government of the Northwest Territories

4903—49th Street

PO Box 1320

YELLOWKNIFE, Northwest Territories

Canada

X1A 2L9

numéro de téléphone/telephone number:

(1)-403-920-6143

numéro de télex/telex number:

034-45531 ou/or 034-45528

numéro de télécopie/telefax number:

(1)-403-873-0234

personnes à contacter/persons to contact:

Mme/Ms Debra BULMER

Reservation

In accordance with the provisions of Article 42, and pursuant to Article 26, paragraph 3, the Government of Canada declares that, with respect to applications submitted under the Convention concerning the Northwest Territories, Canada will assume the costs referred to in paragraph 2 of Article 26 only insofar as these costs are covered by the system of legal aid of the Northwest Territories."

In accordance with the provisions of Article 40 of the Convention, the Government of Canada declares that, in addition to the provinces of Ontario, New Brunswick, British Columbia, Manitoba, Nova Scotia, Newfoundland, Quebec, Prince Edward Island, Saskatchewan, Alberta, the Yukon Territory and the Northwest Territories, the Convention shall extend to *Nunavut.* The Government of Canada further declares that the Convention now extends to all the territorial units of Canada."

Entry into force for *Nunavut: 1 January 2001.*

The declaration of extension of the Convention to Nunavut contains the following declaration and reservation:

``Central Authority

In accordance with the provisions of Article 6, paragraph 2, the Minister of Justice and Attorney General for Nunavut is designated as the Central Authority for Nunavut.

Reservation

In accordance with the provisions of Article 42, and pursuant to Article 26, paragraph 3, the Government of Canada declares that, with respect to applications submitted under the Convention concerning Nunavut, Canada will assume the costs referred to in paragraph 2 of Article 26 only insofar as these costs are covered by the system of legal aid of Nunavut."

2a The instrument of accession from Chile contained the following declaration (in Spanish): ``Chile understands Article 3 of the Convention on the Civil Aspects of International Child Abduction in the sense that it is not inconsistent with the national legislation which provides that the right to guardianship and custody is exercised until the age of 18." (Translation)

Central Authority designated under the *Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction.*

adresse/address:

La Corporación de Asistencia Judicial de la Región Metropolitana

Agustunas 1419

SANTIAGO DE CHILE

Chile

numéro de téléphone/telephone number:

+56 2 698 2829 ou/or

+56 2 698 2750 ou/or

+56 2 698 1601

numéro de télex/telex number:

—

numéro de télécopie/telefax number:

+56 2 672 8700

personnes á contacter/persons to contact:

M./Mr Jaime Arellano QUINTANA

(Director General)

In accordance with Article 38, paragraph 5, the Convention entered into force

—between *Chile* and the following States:

the United States of America	1 July 1994
the Kingdom of the Netherlands (for the Kingdom in Europe)	1 July 1994
the United Kingdom of Great Britain and Northern Ireland	1 July 1994
Luxembourg	1 August 1994
Finland	1 August 1994
Switzerland	1 October 1994
Australia	1 November 1994
Ireland	1 December 1994
Sweden	1 January 1995
Panama	1 March 1995
Argentina	1 May 1995
Germany	1 June 1995
Canada	1 August 1995
Spain	1 September 1995
New Zealand	1 November 1995
Mexico	1 December 1995
Israel	1 January 1996
France	1 February 1996
Cyprus	1 May 1996
Slovenia	1 May 1996
St. Kitts and Nevis	1 May 1996
Zimbabwe	1 May 1996
Italy	1 August 1996
Hungary	1 April 1997
Colombia	1 June 1997
Iceland	1 June 1997
Venezuela	1 September 1997
Greece	1 October 1997
Poland	1 March 1998
the Czech Republic	1 August 1998
Norway	1 October 1998
South Africa	1 June 1999
Georgia	1 June 1999
Turkmenistan	1 June 1999
Belarus	1 June 1999
Moldova	1 June 1999
Paraguay	1 June 1999
Costa Rica	1 June 1999
Brazil	1 April 2000
Malta	1 April 2000
Uzbekistan	1 October 2000
the Slovak Republic	1 February 2001
El Salvador	1 November 2001
Portugal	1 January 2002
Austria	1 March 2002
Estonia	1 December 2002
Peru	1 December 2002
Trinidad and Tobago	1 December 2002

* The United Kingdom made the following declaration with regard to the accession of Chile to the Convention: ``Notwithstanding the provisions of the said Article 38 regarding entry into force of the Convention as between the acceding State and the State declaring its acceptance of the accession, amendments will have been made to the United Kingdom municipal law in order to give effect to the Convention between it and Chile as of 1 May 1994 when the Convention enters into force for Chile.'' The Ministry of Foreign Affairs of the Kingdom of the Netherlands has not yet received any communication from the Government of Chile concerning the date of entry into force proposed by the United Kingdom.

2b By notification dated June 10, 1997, to the Ministry of Foreign Affairs of The Kingdom of The Netherlands, the People's Republic of China communicated the following information concerning Hong Kong:

THE EMBASSY OF THE PEOPLE'S REPUBLIC OF CHINA

IN THE KINGDOM OF THE NETHERLANDS

No. He Wai Fa (97)-58

(Translation)

The Hague, June 13, 1997

Your Excellency,

In accordance with the Joint Declaration of the Government of the People's Republic of China and the Government of the United Kingdom of Great Britain and Northern Ireland on the Question of Hong Kong signed on 19 December 1984 (hereinafter referred to as the ``Joint Declaration''), the People's Republic of China will resume the exercise of sovereignty over Hong Kong with effect from 1 July 1997. Hong Kong will, with effect from that date, become a Special Administrative Region of the People's Republic of China and will enjoy a high degree of autonomy, except in foreign and defence affairs which are the responsibilities of the Central People's Government of the People's Republic of China.

It is provided both in Section XI of Annex I to the Joint Declaration, ``Elaboration by the Government of the People's Republic of China of its Basic Policies Regarding Hong Kong'', and Article 153 of the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China, which was adopted on 4 April 1990 by the National People's Congress of the People's Republic of China, that international agreements to which the People's Republic of China is not a party but which are implemented in the Hong Kong Special Administrative Region.

In accordance with the above provisions, I am instructed by the Minister of Foreign Affairs of the People's Republic of China to make the following notification:

The Convention on the Civil Aspects of International Child Abduction done at the Hague on 25

October 1980 (hereinafter referred to as the ``Convention"), by which the Government of the Kingdom of the Netherlands is designated as the depository, which applies to Hong Kong at present, will continue to apply to the Hong Kong Special Administrative Region with effect from 1 July 1997. The Government of the People's Republic of China also makes the following declarations:

1. In accordance with the provisions of Article 42 of the Convention, the Hong Kong Special Administrative Region will not be bound to bear any costs referred to in Paragraph 2 of Article 26 of the Convention resulting from the participation of legal counsel or advisors or from court proceedings, except insofar as those costs may be covered by its system of legal aid and advice;

2. In accordance with Article 6 of the Convention, it designates the Secretary of Justice of the Government of the Hong Kong Special Administrative Region as the Central Authority for the Hong Kong Special Administrative Region.

Within the above ambit, responsibility for the international rights and obligations of a party to the Convention will be assumed by the Government of the People's Republic of China.

It would be appreciated if the contents of this Note could be placed formally on record and brought to the attention of the other Parties to the Convention.

I avail myself of this opportunity to renew to Your Excellency the assurances of my highest consideration.

CHINA, Macau Special Administrative Region Only

The Ministry of Foreign Affairs of the Kingdom of the Netherlands, depositary of the Convention, gave notice that the Minister for Foreign Affairs of the Kingdom of the Netherlands received a letter dated 26 November 1999 from the Ambassador of Portugal at The Hague and a letter dated 10 December 1999 from the Ambassador of the People's Republic of China at The Hague. The letter from the Ambassador of Portugal reads as follows:

``Upon instructions from my Government and referring to the Convention on the Civil Aspects of International Child Abduction concluded at The Hague on 25 October 1980 (hereinafter referred to as the Convention) which currently applies to Macau, I have the honour to inform Your Excellency of the following:

In accordance with the Joint Declaration of the Government of the Portuguese Republic and of the Government of the People's Republic of China on the question of Macau, signed in Beijing on 13 April 1987, the Government of the Portuguese Republic will remain internationally responsible for Macau until 19 December 1999, the People's Republic of China resuming from that date the exercise of sovereignty over Macau, with effect from 20 December 1999. From 20 December 1999 the Portuguese Republic will cease to be responsible for the international rights and obligations arising from the application of the Convention in Macau. (…)"

The letter from the Ambassador of the People's Republic of China reads as follows:

<u>Translation</u>

``In accordance with the Joint Declaration of the Government of the People's Republic of China and the Government of the Republic of Portugal on the Question of Macao (hereinafter referred to as the Joint Declaration), the Government of the People's Republic of China will resume the exercise of sovereignty over Macao with effect from 20 December 1999. Macao will from that date, become a Special Administrative Region of the People's Republic of China and will enjoy a high degree of autonomy, except in foreign and defence affairs which are the responsibilities of the Central People's Government of the People's Republic of China. It is provided both in Section VIII of Elaboration by the Government of the People's Republic of China of its Basic Policies Regarding Macao, which is annex I to the Joint Declaration, and Article 138 of the Basic Law of Macao Special Administrative Region of the People's Republic of China, which was adopted on 31 March 1993 by the National People's Congress of the People's Republic of China, that international agreements to which the Government of the People's Republic of China is not yet a party but which are implemented in Macao, may continue to be implemented in the Macao Special Administrative Region.

In accordance with the provisions mentioned above, I am instructed by the Minister of Foreign Affairs of the People's Republic of China, to inform Your Excellency of the following:

The Convention on the Civil Aspects of International Child Abduction, done at The Hague on 25 October 1980 (hereinafter referred to as the ``Convention''), which applies to Macao at present, will continue to apply to the Macao Special Administrative Region with effect from 20 December 1999. The Government of the People's Republic of China also wishes to make the following declaration:

In accordance with Article 6 of the Convention, it designates the Welfare Department of the Macao Special Administrative Region as Central Authority in the Macao Special Administrative Region.

Within the above ambit, the Government of the People's Republic of China will assume the responsibility for the international rights and obligations that place on a party to the Convention. (…)".

2c Central Authority designated under the *Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction.*

adresse/address:

Instituto Colombiano de Bienestar

Familiar

Sede Nacional Avenida 68 No 64-01

Santafé de Bogotá, DC

Colombia

numéro de téléphone/telephone number:

—

numéro de télex/telex number:

—

numéro de télécopie/telefax number:

(57)-1-231-4558

personnes à contacter/persons to contact:

Mme/Ms Carmen Elena TAMARA

Subdirectora de Protección

In accordance with Article 38, paragraph 5, the Convention entered into force between Colombia and the following States:

Luxembourg	1 April 1996
Panama	1 May 1996
Israel	1 June 1996
the United States of America	1 June 1996
Cyprus	1 August 1996
the Kingdom of the Netherlands (for the Kingdom in Europe)	1 September 1996
Germany	1 November 1996
the United Kingdom of Great Britain and Northern Ireland*	1 December 1996
Argentina	1 December 1996
Ireland	1 January 1997
Hungary	1 April 1997
Switzerland	1 May 1997
Finland	1 May 1997
Chile	1 June 1997
Norway	1 June 1997
Spain	1 June 1997
Venezuela	1 September 1997
Greece	1 October 1997
Australia	1 December 1997
Canada	1 December 1997
New Zealand	1 March 1998
Poland	1 March 1998
the Czech Republic	1 August 1998

Brazil	1 September 2000
Malta	1 September 2000
Uruguay	1 September 2000
Italy	1 September 2000
Costa Rica	1 January 2001
the Slovak Republic	1 February 2001
Trinidad and Tobago	1 March 2001
Iceland	1 April 2001
Belarus	1 April 2001
Fiji	1 April 2001
Moldova	1 April 2001
Paraguay	1 April 2001
South Africa	1 April 2001
Turkmenistan	1 April 2001
Uzbekistan	1 April 2001
Mexico	1 June 2001
Portugal	1 January 2002
Latvia	1 May 2002
Sri Lanka	1 May 2002
Sweden	1 September 2002
Peru	1 March 2003
Estonia	1 May 2003
Guatemala	1 May 2003
Nicaragua	1 May 2003
Thailand	1 May 2003

*With the following declaration:

``Notwithstanding the provisions of the said Article 38 regarding entry into force of the Convention as between the acceding State and the State that has declared its acceptance of the accession, the municipal law of the United Kingdom was amended with effect from 1 March 1996 to give effect to the provisions of the Convention between it and Colombia from the date when the Convention enters into force for Colombia. I should be grateful for confirmation of the date of 1 March 1996 as the date on which the Convention entered into force between the United Kingdom and Colombia."

2d

Israel	1 April 1999
Ireland	1 June 1999
Chile	1 June 1999
Finland	1 July 1999
Luxembourg	1 September 1999
Greece	1 March 2000
Argentina	1 April 2000
Australia	1 May 2000
Belarus	1 September 2000
Bosnia and Herzegovina	1 December 2000
Colombia	1 January 2001
Canada	1 January 2001
the Slovak Republic	1 February 2001
Poland	1 February 2001
Switzerland	1 February 2001

Panama	1 March 2001
Spain	1 May 2001
Mexico	1 June 2001
Italy	1 August 2001
Moldova	1 September 2001
El Salvador	1 October 2001
Estonia	1 October 2001
Nicaragua	1 October 2001
Peru	1 November 2001
Portugal	1 January 2002
the Netherlands (for the Kingdom in Europe)	1 April 2002
Latvia	1 April 2002
Sri Lanka	1 April 2002
Hungary	1 June 2002
Sweden	1 September 2002
Thailand	1 July 2003

2e In conformity with Article 6 Para. 1 of the Convention, the Executive Authority is the Ministry of Labour and Welfare and Executive Authority to which applications may be submitted to be forwarded to the Central Executive Authority from Article 6 Para. 1 of the Convention is the Ministry of Justice and Administration.

adresse/address:

Ministry of Labour and Welfare

Prisavlje 14

10000 ZAGREB

Republic of Croatia

numéro de téléphone/telephone number:

(385)-1-517000

numéro de télex/telex number:

—

numéro de télécopie/telefax number:

(385)-1-530195

personnes à contacter/persons to contact:

Mme/Ms Hela UJEVIC-BULJETA

Head of Department

(langue de communication/language of communication: croate/Croatian)

tél./tel. (385)-1-6169-111

Mme/Ms Mila SIMIC

Counsellor

(langues de communication/languages of communication: croate et anglais/Croatian and English)

Mme/Ms Jasna SPOLJARIC

Counsellor

(langues de communication/languages of communication: croate et anglais/Croatian and English)

Le Bureau Permanent a été informé que le Ministére de la Justice de Croatie sera désigné comme Autorité centrale selon la Convention. L'adresse, les numéros de téléphone et de télécopie sont les suivants:

the Permanent Bureau is informed that the Croatioan Ministry of Justice will be designated to serve as Central Authority under the convention and that its address, telephone number and telefax number are as follows:

Ministére de la Justice

Ministry of Justice

Savska Cesta 41

Savska Cesta 41

10000 ZAGREB

10000 ZAGREB

Republique de Croatie

Republic of Croatia

tél.: (385)-1-537622

tel.: (385)-1-537622

télécopie: (385)-1-536321

telefax: (385)-1-536321

2f In accordance with Article 38, paragraph 5, the Convention entered into force between Cyprus and the following States:

the United Kingdom of Great Britain and Northern Ireland	1 February 1995
the Kingdom of the Netherlands (for the Kingdom in Europe)	1 March 1995
the United States of America	1 March 1995
Luxembourg	1 April 1995
Germany	1 May 1995
Panama	1 June 1995
Sweden	1 October 1995

France	1 October 1995
Australia	1 November 1995
New Zealand	1 November 1995
Mexico	1 December 1995
Israel	1 January 1996
Chile	1 May 1996
Greece	1 August 1996
Colombia	1 August 1996
Zimbabwe	1 August 1996
Argentina	1 December 1996
Ireland	1 January 1997
Norway	1 January 1997
Poland	1 January 1997
Hungary	1 April 1997
Italy	1 April 1997
Switzerland	1 May 1997
Finland	1 May 1997
Spain	1 June 1997
Venezuela	1 September 1997
Denmark	1 October 1997
Canada	1 January 1998
the Czech Republic	1 August 1998
the Slovak Republic	1 February 2001
Portugal	1 January 2002
Austria	1 March 2002
Belgium	1 May 2003

Central authority designated under the *Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction.*

adresse/address:

Minister of Justice and Public Order

12 Helioupoleos Street

NICOSIA

Cyprus

numéro de téléphone/telephone number:

(357)-2-302127

numéro de télécopie/telefax number:

(357)-2-461427

personnes à contacter/persons to contact:

Mrs. Anny SHAKALLI

(langues de communication/languages of communication: grecque, anglais/Greek, English)

tél./tel. (357)-2-303558

2g The Permanent Bureau of the Hague conference on private international law presents its compliments to the Diplomatic Missions of the Member States and to the National Organs and has the honour to inform them that, by instrument deposited on 15 December 1997 with the Ministry of Foreign Affairs of the Kingdom of the Netherlands,

the Czech Republic

ratified the above-mentioned Convention.

In accordance with Article 43, paragraph 2, the Convention will enter into force for the *Czech Republic* on *1 March 1998.*

The instrument of ratification contains the following reservation:

Translation

``Having examined this convention and knowing that the Parliament of the Czech Republic has given its consent thereto, we hereby ratify and confirm it with the reservation according to Article 42 of the Convention, that the Czech Republic shall not be bound to assume any costs referred to in Article 26, paragraph 2 of the Convention, resulting from the participation of legal counsel or advisers or from our court proceedings, except insofar as those costs may be covered by its legal system of legal aid and advice".

In accordance with Article 6, paragraph 1, the Czech Republic has designated as Central

Authority under the *Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction.*

adresse/address:

Ustredí pro mezinárodne právní ochranu mládeze (Central Agency for International Legal Protection of Youth)

Benesova 22

60200 BRNO

Czech Republic

numéro de téléphone/telephone number et/and numéro de télécopie/telefax number:

+420 (5) 42 21 28 36

numéro de télex/telex number:

—

adresse e-mail/e-mail address:

—

personnes à contacter/persons to contact:

M./Mr Rostislav ZALESKY

Director

(langues de communication/languages of communication: allemand, anglais/German, English)

Mme/Mrs Markéta NOVAKOVA

Deputy Director

(langues de communication/languages of communication: allemand, anglais/German, English)

2h *Notification pursuant to Article 45 of the Convention*

In accordance with Article 37, paragraph 1, the Ambassador of the Kingdom of Denmark at The Hague signed the above-mentioned Convention for Denmark on 17 April 1991 as follows:

PER GROOT

17th April, 1991

In accordance with Article 37, paragraph 2, the Ambassador deposited the instrument of ratification of Denmark of the above-mentioned Convention with the Ministry of Foreign Affairs of the Kingdom of the Netherlands on 17 April 1991.

Upon the ratification Denmark declared that:

``1) pursuant to the provisions of Article 39, paragraph 1, the Convention shall not be applicable to the territories of the Faroe islands and Greenland;

2) pursuant to the provisions of Article 42, paragraph 1,

a) the Kingdom of Denmark objects to the use of French in any application, communication or other document sent to its Central Authority (cf. Article 24, paragraph 2); and

b) it shall not be bound to assume any costs resulting from the participation of legal counsel or advisers or from court proceedings, except insofar as those costs may be covered by its system of legal aid and advice (cf. Article 26, paragraph 3);

3) Central Authority designated under the *Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction.*

adresse/address:

Ministry of Justice (Justitsministeriet)

Department of Private Law

(Civilretsdirektoratet)

Æbeløgade 1

2100 COPENHAGEN Ø

Denmark

numéro de téléphone/telephone number:

(45)-33 92 33 02 (from 10.00 till 14.30)

numéro de télex/telex number:

—

numéro de télécopie/telefax number:

(45)-39 27 18 89

personnes à contacter/persons to contact:

Mme/Ms Anne THALBITZER, Head of Secretariat

(langues de communication/languages of communication: danois, anglais/Danish, English)

tél./tel.: (45)-33 92 28 69 or (45)-39 27 56 05 (direct lines)

Mme/Ms Rie THOUSTRUP

SØRENSEN, Head of Section

(langues de communication/languages of communication: danois, anglais/Danish, English)

tél./tel.: (45)-33 92 28 59 (direct line)

M./Mr Niels CARSTENSEN,

Head of Section (langues de communication/languages of communication: danois, anglais/Danish, English)

tél./tel.: (45)-33 92 29 04 (direct line)

Mme/Ms Hanne KRISTIANSEN, Head of Section

(langues de communication/languages of communication: danois, anglais/Danish, English)

tél./tel.: (45)-33 92 28 27 (direct line)

Note: La Convention ne s'applique pas aux territoires de Iles Féroé et du Groenland. The Convention does not apply to the territories of the Faroe Islands and Greenland.

In accordance with Article 43 the Convention will enter into force for Denmark on 1 July 1991.

The Operation of the Central Authority for Denmark.

1. *Rules.*

A. The International Child Abduction Act, no 793 of November 27th, 1990.

The International Child Abduction Act incorporates the Conventions into the Danish legal system and thus enables the courts to enforce decisions about rights of custody etc. of the other contracting states.

The Act also outlines the duties of the Central Authority and authorizes the Minister of Justice to appoint the Central Authority. (Section 3 of the Act)

B. Government Order no. 453 of June 18th, 1990, on International Child Abduction.

By this Government Order the Minister of Justice has appointed the Department of Private Law as Central Authority.

2. *Accommodation.*

The Central Authority for Denmark is the Department of Private Law. This Department is part of the Ministry of Justice. All correspondence should be directed to ``Ministry of Justice, Department of Private Law, (Civilretsdirektoratet), AEbeleogade 1, DK-2100 København Ø. The Fax no. of the Department is -45- 3927 1889''. The cases will be dealt with by a younger member of the legal staff of the Division of Family Law (a head of section) under the supervision of the head of the Division or one of his 2 deputies, whose names and telephone nos have been communicated to the other parties to the conventions.

3. *Case management.*

In its file each case has a sheet recording all relevant information such as the facts of the case (including letters, telefonecalls, action taken etc.) and the considerations of the officers who have dealt with the case. The file will be marked in a way which indicates its urgent nature. Until the case is closed, the file will be kept on the desk of the officer who deals with the case.

4. *Applications forwarded to Denmark.*

A. Procedures when the application reaches the Central Authority.

When an application reaches the Central Authority, it will immediately be examined in order to establish whether it meets the requirements of the convention under which it has been made. If further information or documents are necessary they will be requested.

If it is manifest that the requirements are not fulfilled or that the application is otherwise not well founded, the Central Authority will immediately inform the applicant or the Central Authority through which the application has been submitted that the application cannot be accepted and of the reasons for this. (See art. 27 of the Hague Convention and Article 4, paragraph 4 of the European Convention) All other applications will be translated into Danish and sent by facsimile and letter to the bailiff's court of the town where the abductor resides.

If it is thought to be expedient the Central Authority will ask the local administrative authority (statsamt) to summon the abductor and, if possible, the applicant to an interview in order to seek a solution on a voluntary basis. (See article 10 of the Hague Convention)

If the whereabouts of the child are unknown the Central Authority will request the police (Politiets Eftersøgningstjeneste) to find the child (see Article 7 litra a of the Hague Convention and Article 5, la, of the European Convention). All available information that may help the police to find the child will immediately be forwarded to the police.

B. The procedure in the court.

When the court has received the application it will automatically assign a lawyer for the applicant. (See Section 18, 2nd paragraph of the International Child Abduction Act) (If the applicant has already hired a Danish lawyer, this lawyer may be assigned to the case, if he is willing to accept the rules of legal aid.) The lawyer will act on behalf of the applicant and will see to it that all relevant information is put before the court. The Department of Private Law will offer to supply the court and the lawyer with information concerning the application of the convention.

According to Section 15 in the International Child Abduction Act the courts shall act expeditiously in these cases. To meet this requirement the application should contain all relevant information and be accompanied by all relevant documents. The defendant parent will then be ordered to appear before the court according to Sections 493 and 494 of the Danish Administration of Justice Act.

If it is found to be necessary the court can decide that the child should stay with one of the parents or in a place chosen by the local social security authority until the court has reached a final decision (See Section 17 of the International Child Abduction Act).

C. Costs of the application.

The costs of the application are covered by Denmark only insofar as those costs may be covered by the Danish system of legal aid and advice.

However the Central Authority does not have to apply for legal aid, because the Danish Child Abduction Act establishes a right for the applicant to get legal aid when the bailiff has assigned a lawyer to the case, cf. 5 B.

5. *Cases where a Danish decision on custody or visitation is necessary.*

A. Where recognition or enforcement is refused and the applicant requests that the Central Authority brings proceedings concerning the substance of the case, the Central Authority will consider whether it should comply with the request. (This only applies where the European Convention is applicable) (See Article 5, paragraph 4 in the European Convention)

If the Central Authority complies with the request it will apply for legal aid on behalf of the applicant. Further information about the financial circumstances of the applicant may be necessary to decide whether legal aid can be granted. However the Department of Private Law can decide that legal aid may be provided regardless of this, for instance due to the general interest of the matter or to the special significance of the case for the applicant. (See the Danish Administration of Justice Act, sections 330–331 a). Foreign citizens have the same right to legal aid as Danish citizens. The local court will assign lawyer to the case cf. 5 B.

B. If the Central Authority receives an application to make arrangements for organizing or securing the effective exercise of rights of access, it will forward the application to the local administrative authority (statsamt). (See Article 21 in the Hague Convention) The local administrative authority will try to settle any disputes between the two parties. If this is not possible a decision will be made on the matter according to the Danish rules on access rights. In such cases the way that access has been exercised earlier—whether on the basis of an agreement or on a foreign decision—will be taken into account.

Either party may appeal the decision of the local administrative authority to the Department of Private Law.

2i *Dominican Republic Accession*

Convention of 25 October 1980 on the Civil Aspects of International Child Abduction

Accession accepted by	**Date of acceptance**	**Entry into force**
Netherlands	27-X-2004	1-I-2005
Latvia	29-XII-2004	1-III-2005
Chile	15-III-2005	1-VI-2005
Slovakia	5-IV-2005	1-VII-2005
Panama	25-IV-2005	1-VII-2005
Bahamas	25-V-2005	1-VIII-2005
Spain	11-VII-2005	1-X-2005
Argentina	20-VII-2005	1-X-2005
Belize	30-VIII-2005	1-XI-2005
Bulgaria	5-IX-2005	1-XII-2005
Greece	22-XI-2005	1-II-2006
Peru	29-XI-2005	1-II-2006
Israel	30-XI-2005	1-II-2006
Uruguay	12-I-2006	1-IV-2006
Brazil	17-I-2006	1-IV-2006
Honduras	16-XI-2006	1-II-2007
Italy	20-XII-2006	1-III-2007
Poland	10-I-2007	1-IV-2007
Estonia	11-I-2007	1-IV-2007
Mexico	8-II-2007	1-V-2007
United States of America	5-III-2007	1-VI-2007
Colombia	2-IV-2007	1-VII-2007
Belgium	23-IV-2007	1-VII-2007
New Zealand	27-IV-2007	1-VII-2007
Sweden	26-VI-2007	1-IX-2007
Ireland	31-X-2007	1-I-2008
Germany	8-I-2008	1-IV-2008
Switzerland	16-I-2008	1-IV-2008
Monaco	31-III-2008	1-VI-2008
Venezuela	15-X-2008	1-I-2009
Lithuania	29-XII-2008	1-III-2009
Slovenia	9-VII-2009	1-X-2009

Entry into force between Dominican Republic and	**Entry into force**
Netherlands	1-I-2005
Latvia	1-III-2005
Chile	1-VI-2005
Slovakia	1-VII-2005
Panama	1-VII-2005
Bahamas	1-VIII-2005
Spain	1-X-2005
Argentina	1-X-2005
Belize	1-XI-2005
Bulgaria	1-XII-2005
Greece	1-II-2006
Peru	1-II-2006
Israel	1-II-2006
Uruguay	1-IV-2006

Brazil	1-IV-2006
Honduras	1-II-2007
Italy	1-III-2007
Poland	1-IV-2007
Estonia	1-IV-2007
Mexico	1-V-2007
United States of America	1-VI-2007
Colombia	1-VII-2007
Belgium	1-VII-2007
New Zealand	1-VII-2007
Sweden	1-IX-2007
Ireland	1-I-2008
Germany	1-IV-2008
Switzerland	1-IV-2008
Monaco	1-VI-2008
Venezuela	1-I-2009
Lithuania	1-III-2009
Slovenia	1-X-2009

Dominican Republic—Central Authority

Address—The National Council for the Childhood and Adolescence (CONANI)

Avenida México esq. 30 de Marzo
Oficinas Gubernamentales, Edificio ``D'' Primer Nivel
Apartado Postal 2081
SANTO DOMINGO
Dominican Republic Tel.: +1 (809) 567 2233
Fax: +1 (809) 472 8343
E-mail: conani@conani.gov.do

personnes à contacter / persons to contact:

- Lic. Aly Q. PE[Delta equal to]NA
  Consultora Jurídica
  e-mail: aly.pena@conani.gov.do

* Lic. Cristian MALDONADO
Sub-Consultor Jurídico
e-mail: cristian.maldonado@conani.gov.do.

2j By instrument deposited on 22 January 1992 with the Ministry of Foreign Affairs of the Kingdom of the Netherlands, Ecuador acceded to the Convention. In conformity with Article 38, paragraph 3, the Convention will enter into force for Ecuador on 1 April 1992. According to Article 38, paragraph 4, the accession will have effect only as regards Ecuador and such Contracting States as will have declared their acceptance of the accession.

In accordance with Article 38, paragraph 5, the Convention entered into force between Ecuador and the following States:

the United States of America 1 April 1992

the Kingdom of the Netherlands (for the Kingdom in Europe)	1 May 1992
Israel	1 June 1992
Luxembourg	1 June 1992
the United Kingdom of Great Britain and Northern Ireland	1 June 1992
Spain	1 July 1992
the Federal Republic of Germany	1 September 1992
Argentina	1 September 1992
Switzerland	1 September 1992
Ireland	1 April 1993
Australia	1 April 1993
Canada	1 December 1993
Sweden	1 December 1993
Finland	1 August 1994
New Zealand	1 November 1995
Mexico	1 December 1995
Hungary	1 April 1997
Italy	1 April 1997
Panama	1 May 1997
Venezuela	1 September 1997
the Czech Republic	1 August 1998
Norway	1 October 1998
the Slovak Republic	1 February 2001
Portugal	1 January 2002

In accordance with Article 6, paragraph 1, Ecuador has designated as Central Authority:

``The Ministry of Welfare

Robles No. 850 and Amazonas Avenue

Quito

Ecuador''.

2k With the following reservation and declaration:

``1. Le Gouvernement de la République du Salvador ne sera pas tenu à assumer les frais mentionnés au 3ième alinéa de l'article 26, sauf quand ces frais seront supportés par son propre système d'assistance judiciaire et juridique;

2. Le Gouvernement de la République du Salvador interprète l'article 3 dans le sens qu'il ne constitue pas une contradiction avec la législation interne qui établit que la majorité est atteinte à l'âge de dixhuit ans;

3. Le Gouvernement de la République du Salvador, conformément au 1 er alinéa de l'article 6, désigne comme Autorité centrale l'ISPM: Instituto de Protección al Menor (Institut de Protection de l'Enfant), ainsi que le PGR: Procuraduría General de la República (Bureau du Procureur de la République);

4. Le Gouvernement de la République du Salvador déclare que toute documentation envoyée au Salvador en application de ladite Convention devra être accompagnée d'une traduction officielle vers l'espagnol.''

Translation

1. The Government of the Republic of El Salvador shall not be bound to assume the costs referred to in Article 26, paragraph 3, except insofar as those costs may be covered by its system of legal aid and advice;

2. The Government of the Republic of El Salvador interprets Article 3 with the domestic legislation of the Republic whereby the age of majority is eighteen years;

3. The Government of the Republic of El Salvador, in accordance with Article 6, paragraph 1, designates as its Central Authority the ISPM: Instituto de Protección al Menor (Institute for the Protection of the Child), and the PGR: Procuraduría General de la República (Office of the Procurator of the Republic).

4. The Government of the Republic of El Salvador declares that all documentation sent to El Salvador in application of the said Convention must be accompanied by an official translation into Spanish.

In accordance with Article 38, paragraph 5, the Convention entered into force between El Salvador and the following States:

Italy	1 August 2001
Panama	1 September 2001
Uruguay	1 October 2001
Argentina	1 October 2001
Costa Rica	1 October 2001
Chile	1 November 2001
Czech Republic	1 November 2001
Ireland	1 November 2002
Portugal	1 January 2002
Israel	1 April 2002
the Netherlands (for the Kingdom in Europe)	1 April 2002
Norway	1 April 2002
Hungary	1 June 2002
Spain	1 June 2002
Uzbekistan	1 June 2002
Brazil	1 June 2002
Slovak Republic	1 September 2002
Germany	1 November 2002
Australia	1 January 2003
Trinidad and Tobago	1 March 2003
Poland	1 March 2003

2l Under the following declaration and reservations:

``1) pursuant to Article 6, paragraph 1, of the Convention the Republic of Estonia designates the Ministry of Justice of the Republic of Estonia as the Central Authority;

2) pursuant to Article 42 and Article 24, paragraph 2, of the Convention the Republic of Estonia only accepts English language with regard to applications, communications or other documents;

3) pursuant to Article 42 and Article 26, paragraph 3, of the Convention the Republic of Estonia will not accept obligations with regard to expenses referred to in Article 26, paragraph 2, which result from the participation of a legal counsel or advisers or from court proceedings, except

insofar as those costs may be covered by its system of legal aid and advice."

In accordance with Article 38, paragraph 5, the Convention entered into force between Estonia and the following States:

Moldova	1 October 2001
Luxembourg	1 October 2001
Argentina	1 October 2001
Costa Rica	1 October 2001
Czech Republic	1 November 2001
Finland	1 December 2001
Germany	1 December 2001
Israel	1 April 2002
the Netherlands (for the Kingdom in Europe)	1 April 2002
Norway	1 April 2002
Hungary	1 June 2002
Uzbekistan	1 June 2002
Brazil	1 June 2002
Portugal	1 August 2002
Spain	1 August 2002
Sweden	1 September 2002
Slovak Republic	1 September 2002
Chile	1 December 2002
Greece	1 January 2003
Australia	1 January 2003
Panama	1 February 2003
Poland	1 March 2003
Colombia	1 May 2003
Belgium	1 May 2003
Uruguay	1 May 2003

2m In accordance with Article 38, paragraph 5, the Convention entered into force between Fiji and the following States:

Finland	1 September 1999
Luxembourg	1 September 1999
Israel	1 October 1999
Italy	1 November 1999
New Zealand	1 February 2000
Argentina	1 April 2000
Australia	1 May 2000
Belarus	1 September 2000
Canada	1 January 2001
Ireland	1 January 2001
the Slovak Republic	1 February 2001
Poland	1 February 2001
Colombia	1 April 2001
Spain	1 May 2001
Portugal	1 January 2002
Norway	1 April 2002
Hungary	1 June 2002
Netherlands (for the Kingdom in Europe)	1 April 2003

2n In accordance with Article 43, paragraph 2, the Convention will enter into force for *Finland* on *1 August 1994.*

The instrument of acceptance contains the following declarations:

``1. Finland declares, according to Article 42 and Article 24, paragraph 2, of the Convention, that it accepts only the use of English in applications, communications and other documents sent to its Central Authority.

2. Finland declares, according to Article 42 and Article 26, paragraph 3, of the Convention, that it shall not be bound to assume any costs referred to in Article 26, paragraph 2, resulting from the participation of legal counsel or advisers or from court proceedings, except insofar as those costs may be covered by its system of legal aid and advice."

In accordance with Article 6, first paragraph, of the Convention Finland has designated as the Central Authority:

Ministry of Justice

Eteläesplanadi 10

P.O. Box 1

FIN-00131 HELSINKI

Tel:+358-0-18251

FINLAND

Telefax:+358-0-1825224

Liaison Officers: Senior Ministerial Secretary

Mr. Hannu Taimisto Tel. +358-0-1825327
Senior Ministerial Secretary
Ms. Mirja Kurkinen Tel. +358-0-1825321

3 *Notification in accordance with Article 45, paragraphs 4 and 6, of the Convention*

On the occasion of the approval by France of the above-mentioned Convention the French Government made the following reservations and declarations:

Translation

1) In accordance with the provisions of Article 42 and pursuant to Article 24, paragraph 2, the Government will consider only those applications which are drawn up in French, or are accompanied by a translation into French, and will require a translation into French of any communication or document sent to its Central Authority.

2) In accordance with the provisions of Article 42 and pursuant to Article 26, paragraph 3, the

Government declares that it will assume the costs referred to in paragraph 2 of Article 26 only insofar as these costs are covered by the French system of legal aid.

3) In accordance with the provisions of Article 39, the Government declares that the Convention shall extend to the whole of the territory of the French Republic.

Autorité centrale française:

1Le Ministère de la Justice

Bureau de l'Entaide Judiciaire Internationale

adresse/address

Le Ministère de la Justice

Bureau de l'Entraide Judiciaire

Internationale

13, Place Vendôme

75001 PARIS France

numéro de téléphone/telephone number:

(1) 42.61.80.22

numéro de télex/telex number:

211802

télécopieur (*nouveau*)/telecopier (*new*):

(1) 44 77 60 70

personnes à contacter/persons to contact:

M/Mr B. STURLESE, magistrat
(Chef du Bureau de l'Entraide
Judiciaire Internationale)
langues de communication/
languages of communication:
français, anglais/French, English
tél./tel.: (1) 44 77 65 80
Mme/Mrs D. LAVAU, magistrat
(Chef adjoint du Bureau de
l'Entraide Judiciaire
Internationale) langues de
communication/languages of
communication: français, anglais/
French, English
tél./tel.: (1) 44 77 63 84
Mme/Mrs PRIVE
tél./tel.: (1) 44 77 63 89

(The effective date of this information is *3 July 1990*)

The instrument of approval by France was deposited on 16 September 1982.

3a Under Article 38, the Convention is not in force between the United States and Georgia.

Notification pursuant to Article 45 of the Convention

The Ministry of Foreign Affairs of the Kingdom of the Netherlands, depositary of the Convention on the Civil Aspects of International Child Abduction of 25 October 1980, has the honour to inform the Member States of The Hague Conference on Private International Law and the States having acceded to the above-mentioned Convention that in accordance with Article 38, paragraph 2, Georgia deposited its instrument of accession with the Ministry of Foreign Affairs of the Kingdom of the Netherlands on 24 July 1997.

The Convention will enter into force for Georgia on 1 October 1997 in accordance with Article 38, paragraph 3.

The accession will have effect only as regards the relations between Georgia and such Contracting States as will have declared their acceptance of the accession.

In accordance with Article 6, first paragraph, Georgia has designated as the Central Authority discharging the duties imposed by the Convention:

the Ministry of Justice of Georgia

Contact Person:

Ms. Maia Mtsariashvili

The Chief of the Department of International Legal Relations

30, Rustaveli ave.
Tbilisi, 380046
Georgia
Tel: office (995 32) 995878
(995 32) 931498
home (995 32) 222670
Fax: (995 32) 990225

Working hours of the Ministry of Justice: 9 am—6 pm. (lunch hour 1–2 pm).

In accordance with Article 38, paragraph 5, the Convention entered into force between Georgia and the following States:

the Kingdom of the Netherlands (for the Kingdom in Europe)	1 November 1997
Israel	1 December 1997
the United Kingdom of Great Britain and Northern Ireland*	1 December 1997
Finland	1 December 1997
Ireland	1 December 1997
Australia	1 January 1998
Germany	1 March 1998
New Zealand	1 March 1998
the Czech Republic	1 August 1998
Argentina	1 November 1998
China, Hong Kong Special Administrative Region only	1 December 1998
Spain	1 March 1999
Chile	1 June 1999
Canada	1 November 1999
Turkmenistan	1 January 2000
Belarus	1 January 2000
Greece	1 March 2000
Bosnia and Herzegovina	1 December 2000
the Slovak Republic	1 February 2001
Poland	1 February 2001
Italy	1 August 2001
Portugal	1 January 2002
Austria	1 March 2002
Hungary	1 June 2002
Norway	1 June 2002
China, Macau Special	1 September 2003

Administrative Region

*With the following declaration:

``(…) notwithstanding the provisions of the said article, the United Kingdom accepts the accession of (…) Georgia with effect from *1 October 1997."*

3b On October 3, 1990 the German Democratic Republic acceded to the Federal Republic of Germany.

Notification pursuant to Article 45 of the Convention

In accordance with Article 37, paragraph 2, the Federal Republic of Germany deposited its instrument of ratification of the above-mentioned Convention on 27 September 1990

with the declaration that the Convention shall also apply to Berlin (West) with effect from the date on which it enters into force for the Federal Republic of Germany,

with the following reservation:

[Die Bundesrepublik Deutschland]"erklärt in übereinstimmung mit Artikel 26 Abs. 3, daB sie nur insoweit gebunden ist, die sich aus der Beiordnung eines Rechtsanwalts oder aus einem Gerichtsverfahren ergebenden Kosten im Sinn des Artikels 26 Abs. 2 zu übernehmen, als diese Kosten durch ihre Vorschriften über die ProzeBkosten und Beratungshilfe gedeckt sind."

courtesy translation

[The Federal Republic of Germany] declares in accordance with the third paragraph of Article 26 that it is not bound to assume any costs referred to in the second paragraph of Article 26 resulting from the participation of legal counsel or advisers or from court proceedings, except insofar as those costs may be covered by its regulations concerning legal aid and advice.

and stating the following:

``Die Bundesrepublik Deutschland geht davon aus, daB Ersuchen aus anderen Vertragsstaaten gemäB Artikel 24 Abs. 1 regelmäBig von einer deutschen übersetzung begleitet sein werden."

courtesy translation

The Federal Republic of Germany assumes that, in accordance with the first paragraph of Article 24, applications from other Contracting States shall regularly be accompanied by a translation into German.

In accordance with Article 6, paragraph 1, of the Convention the Federal Republic of Germany has designated as Central Authority:

Der Generalbundesanwalt beim Bundesgerichtshof

Central Authority designated under the *Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction.*

adresse/address:

Der Generalbundesanwalt beim
Bundesgerichtshof-Zentrale
Behärde nach dem Sorgerechts-
übereinkommens-Ausführungsgesetz
Heinemannstrae 6
53175 Bonn
Germany

numéro de téléphone/telephone number:

+49 (30) 2538 80

numéro de télex/telex number:

185505

numéro de télécopie/telefax number:

+49 (30) 2538 8397

personnes à contacter/persons to contact:

Mme/Ms Gabriele LIMBROCK (langues de communication/languages of

communication: allemand, anglais/

German, English)

tél./tel.: +49 (30) 2538 8344

Mme/Ms Birgit GILDENAST

(langues de communication/languages of

communication: allemand, anglais/

German, English)

tél./tel.: +49 (30) 2538 8283

Mme/Ms Barbara SCHUCK

(langues de communication/languages of

communication: allemand, anglais/

German, English)

tél./tel.: +49 (30) 2538 8282

Mme/Ms Iris KEIM

(langues de communication/languages of

communication: allemand, anglais/

German, English)

tél./tel.: +49 (30) 2538 8282

Mme/Ms Elke PAHN

(langues de communication/languages of

communication: allemand, anglais/

German, English)

tél./tel.: +49 (30) 2538 8309

M./Mr Bernd PFEIFFER

(langues de communication/languages of

communication: allemand, anglais/

German, English)

tél./tel.: +49 (30) 2538 8309

The Convention will enter into force for the Republic of Germany on 1 December 1990.

3c *Notification pursuant to Article 45 of the Convention.*

In accordance with Article 37, paragraph 2, Greece deposited its instrument of ratification of the above-mentioned Convention with the Ministry of Foreign Affairs of the Kingdom of the Netherlands on 19 March 1993.

Upon ratification Greece made the following reservations and declaration:

Translation

1. In accordance with Article 42 of the Convention on the Civil Aspects of International Child Abduction Greece declares that is shall not be bound to assume any costs referred to in the second paragraph of Article 26 resulting from the participation of legal counsel or advisers or from court proceedings, except insofar as those costs concern cases of free legal aid.

2. In accordance with Article 42 of the above-mentioned Convention Greece declares that it objects to the use of the French language in any application, communication or other document sent to its Central Authority.

3. In accordance with Article 6, first paragraph, of the Convention the Ministry of Justice (Direction de l'élaboration des lois, 4ème section) is designated as the Central Authority of Greece.

adresse/address:

Ministère de la Justice

Direction de l'élaboration des lois

4ème section

ATHENES

Grèce

numéro de téléphone/telephone number:

(30)-1-771-4186

numéro de télex/telex number:

216352

numéro de télécopie/telefax number:

(30)-1-770-7025

personnes à contacter/persons to contact:

Mme/Mrs A. ELEFTHERIADOU

Head of Section

(langues de communication/languages of

communication: grecque, anglais/Greek, English)

In accordance with Article 43 the Convention will enter into force for Greece on 1 June 1993.

3d **GUATEMALA (accession) 6 February 2002 1 May 2002**

In accordance with Article 6, paragraph 1, Guatemala has designated as Central Authority: the ``Procuraduría de la Nación''.

The instrument of accession contains the following reservations:

``1. The Republic of Guatemala opposes itself to the use of French in all requests, communication and other documents to be sent to the Central Authority, based in the second paragraph of Article 24 of the Convention (if applicable).

2. The Republic of Guatemala is not obligated to assume any kind of expenses mentioned in the second paragraph of Article 26 of the Convention, derived from the participation of a lawyer, legal advisors or the judiciary procedure, except insofar as those costs may be covered by its system of legal aid and advice.

The Convention is in force between Guatemala and the following States:

the Netherlands (for the Kingdom in Europe)	1 May 2002
Hungary	1 June 2002
Uzbekistan	1 June 2002
Brazil	1 June 2002
Luxembourg	1 July 2002
Portugal	1 August 2002
Israel	1 August 2002
Czech Republic	1 September 2002
Norway	1 October 2002
Argentina	1 November 2002
Germany	1 January 2003
Panama	1 February 2003
Trinidad and Tobago	1 March 2003
Poland	1 March 2003
Colombia	1 May 2003
Uruguay	1 May 2003

3e In accordance with Article 38, paragraph 2, of the above-mentioned Convention the Republic of Honduras deposited its instrument of accession with the Ministry of Foreign Affairs of the Kingdom of the Netherlands on 20 December 1993. The Republic of Honduras acceded to the Convention subject to the reservation provided for in its Article 26, third paragraph.

The Convention will enter into force for the Republic of Honduras on 1 March 1994 in accordance with Article 38, paragraph 3.

The accession will have effect only as regards the relations between the Republic of Honduras and such Contracting States as will have declared their acceptance of the accession.

Central Authority designated under the *Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction.*

adresse/address:

Junta Nacional de Bienestar Social

Frente Emisoras Unidas

Contiguo a Leche 2 Pinos

Boulevard Suyapa

Tegucigalpa, M.D.C.

Honduras

numéro de téléphone/telephone number:

(504)-39-1020 ou/or 39-1004 ou/or 37-9302

numéro de télécopie/telefax number:

(504)-39-1011

personnes à contacter/persons to contact:

Yamileth MEJIA

(General Secretary)

The Convention is in force between *Honduras* and the following States:

the United Kingdom of Great Britain and Northern Ireland	1 May 1994
Luxembourg	1 May 1994
the United States of America	1 June 1994
the Kingdom of the Netherlands (for the Kingdom in Europe)	1 June 1994
the Federal Republic of Germany	1 August 1994
Finland	1 August 1994
Australia	1 September 1994
Switzerland	1 October 1994

Ireland	1 December 1994
Sweden	1 January 1995
Canada	1 August 1995
New Zealand	1 November 1995
Mexico	1 December 1995
Israel	1 January 1996
Argentina	1 December 1996
Norway	1 January 1997
Hungary	1 April 1997
Italy	1 April 1997
Spain	1 June 1997
Venezuela	1 September 1997
Greece	1 October 1997
Poland	1 March 1998
the Czech Republic	1 August 1998
the Slovak Republic	1 February 2001
Portugal	1 January 2002

4 Notification in accordance with Article 45, paragraphs 2 and 3, of the Convention

In conformity with Article 38, paragraphs 1 and 2, the Hungarian People's Republic deposited its instrument of accession to the above-mentioned Convention with the Ministry of Foreign Affairs of the Kingdom of the Netherlands on 7 April 1986.

In conformity with Article 43, paragraph 2, the Convention will enter into force for the Hungarian People's Republic on 1 July 1986.

According to Article 38, paragraph 4, the accession will have effect only as regards the Hungarian People's Republic and such Contracting States as will have declared their acceptance of the accession.

In conformity with Article 6, paragraph 1, of the Convention, the Hungarian Peoples Republic designated as Central Authority to discharge the duties which are imposed by the Convention:

Bureau compétent auprès du Ministère de la Justice: Bureau du droit international et des relations internationales./Competent unit within the Ministry of Justice: Department of International Law and International Relations.

Directeur/Director:

Dr Tamas BAN (langues de communication/languages of communication: anglais et français/English and French)

Directeur adjoint/Deputy Director:

Mme/Mrs Dr Klara NéMETH (langues de communication/languages of

communication: allemand et

français/German and French)

adresse/address:

``The Ministry of Justice

Szalay utca 16

PO Box 54

1363 BUDAPEST

Hongrie/Hungary

numéro de téléphone/telephone number:

36 1 1 318 188 ou/or 36 1 1 114 015

numéro de télex/telex number:

224998

numéro de télécopie/telefax number:

36 1 1 114 015

personnes à contacter/persons to contact:

Mme/Mrs Dr Katalin BENEDEK (langue de communication/language of

communication: anglais/English)

(heures de bureau:
lundi à vendredi 8 à 16 h.)

Mme/Mrs Dr éva HORVATH (langues de communication/languages of

communication: français, russe/

French, Russian)

(working hours:

Monday to Friday 8–16 hours)

Mlle/Miss Dr Marianna SZéKELY (langue de communication/language of

communication: anglais/English)

M./Mr Dr Jozsef GEHéR (langues de

communication/languages of

communication: allemand, français,

anglais/German, French, English)

M./Mr Dr Gabor HIDASI (langues de

communication/languages of

communication: allemand, anglais,

italien/German, English, Italian)

In accordance with Article 43, paragraph 2, the Convention is in force between Hungary and the following States:

the United Kingdom of Great Britain and Northern Ireland	1 September 1986
Luxembourg	1 January 1987
France	1 February 1987
Australia	1 March 1988
Canada	1 April 1988
the United States of America	1 July 1988
Sweden	1 July 1990
the Kingdom of the Netherlands (for the Kingdom in Europe)	1 September 1990
Austria	1 November 1990
the Federal Republic of Germany	1 December 1990
Norway	1 February 1991
Ireland	1 October 1991
Israel	1 February 1992
Denmark	1 March 1992
Spain	1 July 1992
Portugal	1 August 1992
Switzerland	1 September 1992
Finland	1 August 1994
Argentina	1 December 1996
Italy	1 April 1997
Chile	1 April 1997
Cyprus	1 April 1997
Mexico	1 April 1997
Monaco	1 April 1997
Poland	1 April 1997
Romania	1 April 1997
Slovenia	1 April 1997
Colombia	1 April 1997
Ecuador	1 April 1997
Honduras	1 April 1997
New Zealand	1 April 1997
Panama	1 April 1997
Venezuela	1 September 1997
Greece	1 October 1997
the Czech Republic	1 August 1998
the Slovak Republic	1 February 2001

the Bahamas	1 June 2002
Belarus	1 June 2002
Belize	1 June 2002
Brazil	1 June 2002
Burkina Faso	1 June 2002
Costa Rica	1 June 2002
El Salvador	1 June 2002
Estonia	1 June 2002
Fiji	1 June 2002
Georgia	1 June 2002
Guatemala	1 June 2002
Iceland	1 June 2002
Latvia	1 June 2002
Malta	1 June 2002
Mauritius	1 June 2002
Moldova	1 June 2002
Nicaragua	1 June 2002
Paraguay	1 June 2002
Peru	1 June 2002
Saint Kitts and Nevis	1 June 2002
South Africa	1 June 2002
Sri Lanka	1 June 2002
Trinidad and Tobago	1 June 2002
Turkmenistan	1 June 2002
Uruguay	1 June 2002
Uzbekistan	1 June 2002
Zimbabwe	1 June 2002
Belgium	1 May 2003

4a Notification pursuant to Article 45 of the Convention

The Ministry of Foreign Affairs of the Kingdom of the Netherlands, depositary of the above-mentioned Convention, has the honour to inform the Member States of the Hague Conference on Private International Law and States having acceded to the Convention that in accordance with Article 38, paragraph 2, Iceland deposited its Instrument of accession with the Ministry of Foreign Affairs of the Kingdom of the Netherlands on 14 August 1996.

The instrument of accession contains the following reservations:

``1. In accordance with Article 42, paragraph 1, and Article 24, paragraph 2, of the Convention, Iceland makes a reservation with regard to Article 24, paragraph 1, and objects to the use of French in any application, communication or other document sent to its Central Authority.

2. In accordance with Article 42, paragraph 1, and Article 26, paragraph 3, of the Convention, Iceland makes a reservation that it shall not be bound to assume any costs referred to in Article 26, paragraph 2, resulting from the participation of legal counsel or advisers or from court proceedings, except insofar as those costs may be covered by its system of legal aid and advice.

The other provisions of the Convention shall be inviolably observed."

The Convention will enter into force for Iceland on 1 November 1996 in accordance with Article 38, paragraph 3.

The accession will have effect only as regards the relations between Iceland and such Contracting States as will have declared their acceptance of the accession.

The Convention is in force between *Iceland* and the following States:

the United States of America	1 December 1996
the Kingdom of the Netherlands (for the Kingdom in Europe)	1 December 1996
Argentina	1 December 1996
Ireland	1 January 1997
Luxembourg	1 January 1997
Norway	1 January 1997
Poland	1 January 1997
the United Kingdom of Great Britain and Northern Ireland*	1 January 1997
Israel	1 February 1997
Denmark	1 March 1997
Germany	1 April 1997
Italy	1 April 1997
Switzerland	1 May 1997
Sweden	1 May 1997
Finland	1 May 1997
Chile	1 June 1997
Bosnia and Herzegovina	1 August 1997
Venezuela	1 September 1997
Greece	1 October 1997
Australia	1 December 1997
Canada	1 December 1997
New Zealand	1 March 1998
Spain	1 April 1998
the Czech Republic	1 August 1998
the Slovak Republic	1 February 2001
Colombia	1 April 2001
Mexico	1 June 2001
Portugal	1 January 2002
Austria	1 March 2002
Hungary	1 June 2002
France	1 September 2002
Belgium	1 May 2003

*The letter of the Ambassador of the United Kingdom of Great Britain and Northern Ireland contains the following declaration:

``Notwithstanding the provisions of the said Article 38 regarding entry into force of the Convention as between the acceding State and the State that has declared its acceptance of the accession, the municipal law of the United Kingdom was amended with effect from 1 November 1996 to give effect to the provisions of the Convention between it and Iceland from the date when the Convention enters into force for Iceland. I should be grateful for confirmation of the date of 1 November 1996 as the date on which the Convention entered into force between the United Kingdom and Iceland."

In accordance with Article 6, paragraph 1, of the Convention, Iceland has designated as Central Authority the Ministry of Justice and Ecclesiastical Affairs.

Central Authority designated under the *Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction.*

adresse/address:

Ministry of Justice and Ecclesiastical Affairs

Arnarhvoll

150 Reykjavik

numéro de téléphone/telephone number:

+(354) 560 9010

numéro de télex/telex number:

—

numéro de télécopie/telefax number:

+(354) 552 7340

personnes à contacter/persons to contact:

M./Mr Benedikt Bogason

Director of Law Affairs

tél./tel. +(354) 560 9042

4b The Permanent Bureau of the Hague Conference on private international law presents its compliments to the Diplomatic Missions of the Member States and to the National Organs and has the honour to inform them that, by instrument deposited on 16 July 1991 with the Ministry of Foreign Affairs of the Kingdom of the Netherlands, Ireland ratified the above-mentioned Convention.

In accordance with Article 6, paragraph 1, Ireland has designated as Central Authority: ``The Minister for Justice''.

In accordance with Article 43, paragraph 2, the Convention will enter into force for Ireland on 1 October 1991.

4c *Notification pursuant to Article 45 of the Convention*

The Ambassador Extraordinary and Plenipotentiary of Israel at The Hague signed on 4 September 1991, in accordance with Article 37, paragraph 1, the above mentioned Convention for the State of Israel as follows:

M.N. Bawly

4 septembre 1991

In accordance with Article 37, paragraph 2, Israel deposited its instrument of ratification of the above mentioned Convention with the Ministry of Foreign Affairs on 4 September 1991. The instrument of ratification contains the following reservation:

``In accordance with Articles 26 and 42 of the Convention, the State of Israel hereby declares that, in proceedings under the Convention, it shall not be bound to assume any costs resulting from the participation of legal counsel or advisers or from court proceedings, except insofar as those costs may be covered by its system of legal aid and advice.''

In accordance with Article 43 the Convention will enter into force for the State of Israel on 1 December 1991.

Central Authority designated under the *Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction.*

adresse/address:

International Department of the State Attorney's Office

Ministry of Justice

PO Box 1087

JERUSALEM 91010

Israel

numéro de téléphone/telephone number:

+972 (2) 670 8797

numéro de télex/telex number:

—

numéro de télécopie/telefax number:

+972 (2) 628 7668

adresse e-mail/e-mail address:

jleum@trendline.co.il

(dans la case ``sujet'' veuillez indiquer ``Enlèvement d'enfants'')

under ``Subject'' please indicate ``Child Abduction'')

personnes à contacter/persons to contact:

M./Mr Marvin HANKIN

(langues de communication/languages of communication: hébreu, anglais/Hebrew, English)

tél./tel.: +972 (2) 670 8617

Mme/Ms Leslie KAUFMAN

(langues de communication/languages of communication: hébreu, anglais/Hebrew, English)

tél./tel.: +972 (2) 670 0401

4d Central authority designated under the *Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction.*

adresse/address:

Ministero di Grazia e Giustizia

Ufficio Centrale per la Giustizia Minorile

Via Giulia, 131

00186 ROME

Italy

Director: M./Mr Giuseppe Magno (Magistrate)

numéro de téléphone/telephone number:

+39 (6) 6880 7139

numéro de télécopie/telefax number:

+39 (6) 6880 7087 ***ou/or*** *+39 (6) 6880 8085*

adresse e-mail/e-mail address:

—

personnes à contacter/persons to contact:

Mme/Mrs Anna Maria Teresa GREGORI

(Magistrate in charge of the Central Authority)

tél./tel.: +39 (6) 6880 7139

M./Mr Pietro LO RE (Senior Executive)

tél./tel.: +39 (6) 6818 8234 ***ou/or*** *+39 (6) 6880 8085*

Mme/Mrs Ludovica JOVENE

(langue de communication/language of communication: français/French)

tél./tel.: +39 (6) 6880 7139 ***ou/or*** *+39 (6) 6818 8229*

Mme/Mrs Vera COZZOLINO

(langue de communication/language of communication: anglais/English)

tél./tel.: +39 (6) 6818 8227

Mme/Mrs Pieranna ANNESE

(langue de communication/language of communication: francais/French)

tél./tel.: +39 (6) 6818 8259

Mme/Mrs Clara Laura BENELLI

(langue de communication/language of communication: anglais/English)

tél./tel.: +39 (6) 6818 8259

Mme/Mrs Anna SANCHEZ

(langue de communication/language of communication: espagnol/Spanish)

tél./tel.: +39 (6) 6818 8227

4e **LATVIA (accession) 15 November 2001 1 February 2002**

Under the following reservation:

``In accordance with Article 42 and Article 24, paragraph 2, of the Convention on the Civil Aspects of International Child Abduction the Republic of Latvia declares that it accepts only the use of English in any application, communication or other document sent to its Central Authority."

In accordance with Article 6, paragraph 1, Latvia has designated as Central Authority: ``National Center for the Rights of the Child".

The Convention entered into force between Latvia and the following States:

the Netherlands (for the Kingdom in Europe)	1 April 2002
Costa Rica	1 April 2002
Norway	1 April 2002
Czech Republic	1 May 2002
Colombia	1 May 2002
Luxembourg	1 May 2002
Republic of Moldova	1 May 2002
Hungary	1 June 2002
Uzbekistan	1 June 2002
Brazil	1 June 2002
Israel	1 August 2002
Sweden	1 September 2002
Slovak Republic	1 September 2002
Germany	1 November 2002
Argentina	1 November 2002
Australia	1 January 2003
Trinidad and Tobago	1 March 2003
Spain	1 March 2003

Poland	1 March 2003
Belgium	1 May 2003
Uruguay	1 May 2003

4f **LITHUANIA (accession) 5 June 2002 1 September 2002**

Under the following reservations:

``1. Pursuant to Article 42 and paragraph 2 of Article 24 of the Convention, the Republic of Lithuania consents to using only the English language for any application, communication or other document sent to its Central Authority;

2. Pursuant to Article 42 and paragraph 3 of Article 26 of the Convention, the Republic of Lithuania shall not be bound to assume any costs referred to in paragraph 2 of Article 26 of the Convention resulting from court proceedings or from the participation of legal counsel or advisers, except insofar as those costs may be covered by the system of legal aid and advice of the Republic of Lithuania."

Entry into force between Lithuania and

Poland	1 March 2003
Norway	1 April 2003
Belgium	1 May 2003
Uruguay	1 May 2003

5 Notification pursuant to Article 45 of the Convention

In conformity with Article 37, paragraph 2, the Grand-Duchy of Luxemburg deposited its instrument of ratification of the above-mentioned Convention with the Ministry of Foreign Affairs of the Kingdom of the Netherlands on 8 October 1986.

At the time of ratification the following declarations were made:

Translation

The Grand-Duchy of Luxemburg declares that it shall not be bound to assume any costs referred to in Article 26, paragraph 2, of the Convention, namely the costs resulting from the participation of legal counsel or advisers or from court proceedings, except insofar as those costs are covered by the Luxemburg system of legal aid and advice.

The ``procureur général d'Etat'' is designated as the Central Authority referred to in Article 6 of the Convention.

adresse/address:

Le Procureur Général d'Etat

Palais de Justice

Boîte postale 15

L-2010 LUXEMBOURG Luxembourg

numéro de téléphone/telephone number:

Secrétariat/Secretariat: +352 475981-336

numéro de télex/telex number:

numéro de télécopie/telefax number:

+352 470550

personnes à contacter/persons to contact:

M./Mr Nico EDON

(langues de communication/languages of communication: français, anglais, allemand/French, English, German)

tél./tel.: +352 475981 332

en son absence/in his absence:

M./Mr Pierre SCHMIT

(langues de communication/languages of communication: français, anglais, allemand/French, English, German)

tél./tel.: +352 475981 390

In accordance with Article 43, paragraph 1, the Convention will enter into force for Luxemburg on

1 January 1987.

5a Central Authority designated under the *Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction.*

adresse/address:

Ministère du Travail et de la Politique

Sociale/Ministry of Labour and Social Policy

Rue Dame Gruev No 14

91000 SKOPJE

République de Macédoine

numéro de téléphone/telephone number:

(389) 91 238 224

numéro de télex/telex number:

—

numéro de télécopie/telefax number:

(389)-91-220-408

personnes à contacter/persons to contact:

Mme/Ms Elena LAZOVSKA (Conseiller)

tél./tel.: (389)-91-117-752 ou/or

(389)-91-117-228

One of the successor States to the former Socialist Federal Republic of Yugoslavia which became a Party to the Convention on 1 December 1991. On 20 September 1993, The former Yugoslav Republic of Macedonia declared itself to be bound by the Convention.

By letter dated 30 November 1993, the Ambassador of Greece to the Netherlands informed the Ministry of Foreign Affairs of the Kingdom of the Netherlands that His Government does not recognize The former Yugoslav Republic of Macedonia and consequently does not consider itself to be bound by the Conventions to which the latter is a Party.

No objection has been received from the other Contracting States.

5b In accordance with Article 38, paragraph 5, the Convention entered into force between Malta and the following States:

Argentina	1 April 2000
Luxembourg	1 April 2000
Israel	1 April 2000
Chile	1 April 2000
Poland	1 June 2000
Finland	1 September 2000
Colombia	1 September 2000
Ireland	1 January 2001
the Slovak Republic	1 February 2001
Switzerland	1 February 2001
Spain	1 May 2001
Australia	1 May 2001
Belarus	1 May 2001
Moldova	1 September 2001
Portugal	1 January 2002
Austria	1 March 2002
the United Kingdom of Great Britain and Northern Ireland (including Bermuda, the Cayman Islands, the Falkland Islands, the Isle of Man and Montserrat)	1 March 2002
the Netherlands (for the Kingdom in Europe)	1 April 2002
Norway	1 April 2002
Hungary	1 June 2002
Uzbekistan	1 June 2002
Germany	1 November 2002
United States of America	1 February 2003
Belgium	1 May 2003

5c Notification pursuant to Article 45 of the Convention.—

In accordance with Article 38, paragraph 2, of the above-mentioned Convention the Republic of Mauritius deposited its instrument of accession with the Ministry of Foreign Affairs of the Kingdom of the Netherlands on 23 March 1993.

The Convention will enter into force for the Republic of Mauritius on 1 June 1993 in accordance with Article 38, paragraph 3.

The accession will have effect only as regards the relations between the Republic of Mauritius and such Contracting States as will have declared their acceptance of the accession.

The Ministry of Foreign Affairs of the Kingdom of the Netherlands, in its notification No. 3/1993 of 19 April 1993 concerning the accession by the Republic of Mauritius to the abovementioned Convention, omitted to state that the Republic of Mauritius made the following reservation:

``The Republic of Mauritius declares that is shall not be bound to assume any costs referred to in paragraph 2 of article 26 resulting from the participation of legal counsel or advisers or from court proceedings, except insofar as those costs may be covered by its system of legal aid and advice."

Notification pursuant to Article 45 of the Convention

The Ministry of Foreign Affairs of the Kingdom of the Netherlands, depositary of the Convention on the Civil Aspects of International Child Abduction of 25 October 1980, has the honour, to inform the Member States of the Hague Conference on Private International Law and the States having acceded to the abovementioned Convention that in accordance with Article 6, first paragraph, of the Convention the Attorney General's Office is designated as the Central Authority of Mauritius.

In accordance with Article 38, paragraph 5, the Convention entered into force between Mauritius and the following States:

the Kingdom of the Netherlands (for the Kingdom in Europe)	1 August 1993
the United Kingdom of Great Britain and Northern Ireland	1 September 1993
Luxembourg	1 September 1993
the United States of America	1 October 1993
the Federal Republic of Germany	1 December 1993
Israel	1 December 1993
Sweden	1 December 1993
Australia	1 January 1994
Argentina	1 February 1994
Finland	1 August 1994
Switzerland	1 October 1994
Ireland	1 December 1994
Spain	1 December 1994
France	1 July 1995
Canada	1 August 1995
New Zealand	1 November 1995
Norway	1 January 1997
Italy	1 April 1997
Venezuela	1 September 1997
Greece	1 October 1997
Poland	1 March 1998
the Czech Republic	1 August 1998
the Slovak Republic	1 February 2001
Portugal	1 January 2002
Hungary	1 June 2002

Central authority designated under the *Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction.*

adresse/address:

The Attorney-General

Attorney-General's Chambers

NPF Building

PORT LOUIS

Mauritius

numéro de téléphone/telephone number:

(230)-212-2067

numéro de télex/telex number:

—

numéro de télécopie/telefax number:

(230)-212-6742

personnes à contacter/persons to contact:

—

5d The Permanent Bureau of the Hague Conference on private international law presents its compliments to the Diplomatic Missions of the Member States and to the National Organs and has the honour to inform them that, by instrument deposited on 20 June 1991 with the Ministry of Foreign Affairs of the Kingdom of the Netherlands,

Mexico

acceded to the above-mentioned Convention.

In conformity with Article 38, paragraph 3, the Convention will enter into force for *Mexico* on *1 September 1991*.

According to Article 38, paragraph 4, the accession will have effect only as regards Mexico and such Contracting States as will have declared their acceptance of the accession.

In accordance with Article 38, paragraph 5, the Convention is in force between Mexico and the following States:

Ireland	1 October 1991
the United Kingdom of Great Britain and Northern Ireland	1 October 1991
the Kingdom of the Netherlands (for the Kingdom in Europe)	1 October 1991
Argentina	1 October 1991
the United States of America	1 October 1991
Luxembourg	1 November 1991
New Zealand	1 December 1991
France	1 January 1992
the Federal Republic of Germany	1 February 1992
Israel	1 February 1992
Norway	1 March 1992
Australia	1 June 1992
Canada	1 July 1992
Spain	1 July 1992
Portugal	1 August 1992
Sweden	1 August 1992
Switzerland	1 September 1992
Denmark	1 December 1992
Finland	1 August 1994
Austria	1 November 1994
the Bahamas	1 December 1995
Belize	1 December 1995
Burkina Faso	1 December 1995
Chile	1 December 1995
Cyprus	1 December 1995
Ecuador	1 December 1995
Honduras	1 December 1995
Monaco	1 December 1995
Panama	1 December 1995
Poland	1 December 1995
Romania	1 December 1995
Saint Kitts and Nevis	1 December 1995
Slovenia	1 December 1995
Zimbabwe	1 December 1995

Hungary	1 April 1997
Italy	1 April 1997
Venezuela	1 September 1997
Greece	1 October 1997
the Czech Republic	1 August 1998
the Slovak Republic	1 February 2001
Brazil	1 June 2001
Colombia	1 June 2001
Costa Rica	1 June 2001
Iceland	1 June 2001
Nicaragua	1 June 2001
Paraguay	1 June 2001
South Africa	1 June 2001
Uruguay	1 June 2001
China, Macau Special Administrative Region	1 September 2003

Notification pursuant to Article 45 of the Convention

Mexico has designated as the Central Authority referred to in Article 6 of the Convention:

adresse/address:

Consultoria Juridica

Secretaría de Relaciones Exteriores

Homero No 213, Piso 17

Colonia Chapultepec Morales

11570 MEXICO, Distrito Federal

numéro de téléphone/telephone number:

(52)-5-327-3218

numéro de télex/telex number:

176 3479 (SREME)

numéro de télécopie/telefax number:

(52)-5-327-3201

personnes à contacter/persons to contact:

M./Mr Ricardo CAMARA SANCHEZ

Coordinador de la Autoridad Central Mexicana

(langues de communication/languages of communication: espagnol, anglais, français/Spanish, English, French)

Mme/Mrs Concepción GALVEZ COETO

Coordinadora del Programa Internacional de Menores

(langues de communication/languages of communication: espagnol, anglais/Spanish, English)

Mme/Mrs Rosa Isela GUERRERO ALBA

Asesor Legal del Programa Internacional de Menores

(langues de communication/languages of communication: espagnol, anglais/Spanish, English)

The following officials can be contacted:

``Dr. Carlos Pujalte Pineiro, Adjunct Juridical Consultant; Dr. Eduardo Pena Haller, Coärdinator of the Adviser's and Defense Office for Mexicans Abroad.''

According to Article 6, paragraph 2, Mexico has designated the following State Central Authorities:

AUTORIDADES CENTRALES ESTATALES EN LOS ESTADOS UNIDOS MEXICANOS

distrito federal

direccion de asistencia juridica—sistema nacional para el desarrollo integral de la familia—prolongacion xochilcalco 947—col. santa cruz atoyac—delegacion benito juarez—03310 mexico, d.f.—tel.: 601 2222 (ext. 1600, 1601, 6012), 629 2367, 629 2368—fax: 688 6710

aguascalientes

direccion general del dif aguascalientes—av. de la convencion sur exq. av. de los maestros—col. espa[Delta equal to]na—20210 aguascalientes, ags.—tel.: 133376

procuraduria de la defensa del menor y la familia—dif aguascalientes—av. de la convencion sur y av. de los maestros—col. espa[Delta equal to]na—20210 aguascalientes, ags.—tel.: 133363

baja california

direccion general dif baja california—av. obregon calle ``e'' 1290—col. nueva—21100 mexicali, b.c.—tel.: 525680

direccion general de asuntos juridicos y procuraduria de la defensa del menor y la familia dif baja california—locales 12 y 13 centro comercial plaza fiesta—calz. independencia y ni[Delta equal to]nos heroes—21280 mexicali, b.c.—tel.: 524802

baja california sur

direccion general dif baja california sur—aquiles serdan y rosales—23000 la paz, b.c.s.—tel.: 26790

procuraduria de la defensa del menor y la familia—dif baja california sur—aquiles serdan y rosales—23000 la paz, b.c.s.—tel.: 23887

campeche

direccion general dif campeche—calle diez n° 584 mansion carbajal—col. san roman centro—24000 campeche, camp.—tel.: 167520

procuraduria de la defensa del menor y la familia—dif campeche—calle diez n° 584 mansion carbajal—col. san roman centro—24000 campeche, camp.—tel.: 167644

coahuila

direccion general dif coahuila—paseo de las arboledas y torres bodet—col. chapultepec—25050 saltillo, coah.—tel.: 173700

colima

direccion general dif colima—calz. galvan norte y emilio carranza—28030 colima, col.—tel.: 125937

procuraduria de la defensa del menor y la familia—dif colima—calz. galvan norte y emilio carranza—28030 colima, col.—tel.: 121705

chiapas

direccion general dif chiapas—libramiento nte. ote. salomon gonzalez blanco—esq. paso limon—col. patria nueva—29000 tuxtla gutierrez, chis.—tel.: 141584

procuraduria de la defensa del menor y la familia—dif chiapas—libramiento nte. ote. salomon gonzalez blanco—esq. paso limon—col. patria nueva—29000 tuxtla gutierrez, chis.—tel.: 141557

chihuahua

direccion general dif chihuahua—av. tecnologico 2903—31310 chihuahua, chih.—tel.: 137689

procuraduria de la defensa del menor y la familia—dif chihuahua—av. tecnologico 2903—31310 chihuahua, chih.—tel.: 135644

durango

direccion general dif durango—h. colegio militar y cap francisco ibarra s/n—34000 durango, dgo.—tel.: 83904

procuraduria de la defensa del menor y la familia—dif durango—h. colegio militar y cap francisco ibarra s/n—34000 durango, dgo.—tel.: 178417

estado de mexico

direccion general dif estado de mexico—paseo colon y tollecan—col. isidro favela—50170 toluca, mex.—tel.: 173786

procuraduria de la defensa del menor y la familia—del dif estado de mexico—jose v. villada 451, esq. francisco murguia—col. el ranchito—50130 toluca, mex.—tel.: 124868

guanajuato

direccion general dif guanajuato—paseo de la presa 89-a—36000 guanajuato, gto.—tel.: 320499

procuraduria de la defensa del menor y la familia—dif guanajuato—paseo de la presa 89-a—36000 guanajuato, gto.—tel.: 321083

guerrero

direccion general dif guerrero—orquidea s/n av. lazaro cardenas esq. ruffo figueroa—apartado 131—col. burocratas—39090 chilpancingo, gro.—tel.: 722772

procuraduria de la defensa del menor y la familia—dif guerrero—av. lazaro cardenas esq. ruffo figueroa s/n—apartado 131—col. burocratas—39090 chilpancingo, gro.—tel.: 727992

hidalgo

direccion general dif hidalgo—salazar 100—col. centro—42000 pachuca, hgo.—tel.: 55395

procuraduria de la defensa del menor y la familia—dif hidalgo—salazar 100—col. centro—42000 pachuca, hgo.—tel.: 55283

jalisco

direccion general dif jalisco—av. alcalde 1220 piso 1—44280 guadalajara, jal.—tel.: 824 0097 procuraduria de la defensa del menor y la familia—av. alcalde 1220—44280 guadalajara, jal.—tel.: 624 4154

michoacan

direccion general dif michoacan—av. acueducto 447, esq. ventura—puente bosque cuauhtemoc—58000 morelia, mich.—tel.: 120 7815

procuraduria de la defensa del menor y la familia—dif michoacan—av. acueducto y ventura puente—58000 morelia, mich.—tel.: 133541

morelos

direccion general dif morelos—av. chapultepec s/n—col. chapultepec—62450 cuernavaca, mor.—tel.: 156920

procuraduria de la defensa del menor y la familia—dif morelos—bajada de chapultepec 24—col. chapultepec—62450 cuernavaca, mor.—tel.: 155168

nayarit

direccion general dif nayarit—calle sauce y cedro—col. san juan—63130 tepic, nay.—tel.: 140252

procuraduria de la defensa del menor y la familia—dif nayarit—amado nervo y puebla—63130 tepic, nay.—tel.: 125271

nuevo leon

direccion general dif nuevo leon—av. morones prieto 600 ote.—col. independencia—64720 monterrey, n.l.—tel.: 403297

procuraduria de la defensa del menor y la familia—dif nuevo leon—luis g. urgina s/n—col. fabriles—64550 monterrey, n.l.—tel.: 481862

oaxaca

direccion general dif oaxaca—la. gral. vicente guerrero 114—col. miguel aleman—68120 oaxaca, oax.—tel.: 66928

procuraduria de la defensa del menor, la mujer y la familia dif oaxaca—matamoros 305—col. centro—68000 oaxaca, oax.—tel.: 62385

puebla

direccion general dif puebla—priv. 5-b sur n° 4302—col. gabriel pastor—72420 puebla. pue.—tel.: 409912

procuraduria de la defensa del menor y la familia—dif puebla—25 poniente n° 2302—col. los angeles—72440 puebla, pue.—tel.: 430240

queretaro

direccion general dif queretaro—pasteur sur n° 5 altos—76000 queretaro, qro.—tel.: 141254 procuraduria de la defensa del menor y la familia—dif queretaro—pasteur sur n° 6 altos casa de escala—76000 queretaro, qro.—tel.: 141115

quintana roo

direccion general dif quintana roo—av. adolfo lopez mateos 441—col. campestre—77030 chetumal, q.r.—tel.: 324177

procuraduria de la defensa del menor y la familia—dif quintana roo—av. adolfo lopez mateos 441—col. campestre—77030 chetumal, q.r.—tel.: 322224 (ext. 66 y 64)

san luis potosi

direccion general dif san luis potosi—nicolas fernandez torres 500—col. jardin—78270 san luis potosi, s.l.p.—tel.: 176211

procuraduria de la defensa del menor y la familia—dif san luis potosi—mariano otero 804—col. barrio de tequisquiapan—78230 san luis potosi, s.l.p.—tel.: 135281

sinaloa

direccion general dif sinaloa—ignacio ramirez y rivapalacio centro—80200 culiacan, sin.—tel.: 131109

procuraduria de la defensa del menor y la familia—dif sinaloa—av. constitucion y juan m. banderas centro—80200 culiacan, sin.—tel.: 164486

sonora

direccion general dif sonora—blvd. luis encinas esq. francisco monteverde—col. san benito a.p. 500—83260 hermosillo, son.—tel.: 150351

procuraduria de la defensa del menor y la familia—dif sonora—blvd. luis encinas esq. francisco monteverde—col. san benito a.p. 500—83260 hermosillo, son.—tel.: 146283

tabasco

direccion general dif tabasco—lic. manuel antonio romero 203—col. pensiones—86170 villahermosa, tab.—tel.: 510942

direccion de la procuraduria de la defensa del menor y la familia y asuntos juridicos dif tabasco—lic. manuel antonio romero 203—col. pensiones—86170 villahermosa, tab.—tel.: 510986

tamaulipas

direccion general dif tamaulipas—calz. gral. luis caballero 297 ote.—86000 cd. victoria, tams.—tel.: 124146

procuraduria de la defensa del menor y la familia—dif tamaulipas—calz. gral. luis caballero 297 ote.—86000 cd. victoria, tams.—tel.: 128080 (ext. 114)

tlaxcala

direccion general dif tlaxcala—av. morelos 4 centro—90000 tlaxcala, tlax.—tel.: 627825

procuraduria de la defensa del menor y la familia—dif tlaxcala—av. morelos 4 centro—90000 tlaxcala, tlax.—tel.: 620210 (ext. 105)

veracruz

direccion general dif veracruz—av. miguel aleman 109—col. federal—91140 jalapa, ver.—tel.: 400044

procuraduria de la defensa del menor, la familia y el indigena dif veracruz—av. miguel aleman 109—col. federal—91140 jalapa, ver.—tel.: 400044 (ext. 40)

yucatan

direccion general dif yucatan—av. miguel aleman 355—col. itzimna—97100 merida, yuc.—tel.: 265085

procuraduria de la defensa del menor y la familia—dif yucatan—av. miguel aleman 355—col. itzimna—97100 merida, yuc.—tel.: 271798

zacatecas

direccion general dif zacatecas—instalaciones la encantada s/n—98000 zacatecas, zac.—tel.: 222073

procuraduria de la defensa del menor y la familia—dif zacatecas—instalaciones lago la encantada s/n—98000 zacatecas, zac.—tel.: 221377

5e *Notification pursuant to Article 45 of the Convention*

The Ministry of Foreign Affairs of the Kingdom of the Netherlands, depositary of the Convention on the Civil Aspects of International Child Abduction of 25 October 1980, has the honour to inform the Member States of The Hague Conference on Private International Law and the States having acceded to the above-mentioned Convention that in accordance with Article 38, paragraph 2, the Republic of Moldova deposited its instrument of accession with the Ministry of Foreign Affairs of the Kingdom of the Netherlands on 10 April 1998.

The instrument of accession contains the following reservation:

Translation

``In accordance with the provisions of Article 42 of the Convention, pursuant to Article 26, paragraph 3, the Republic of Moldova declares that the Republic of Moldova will assume the costs referred to in paragraph 2 of Article 26 only insofar as these costs are covered by the national system of legal and judicial aid."

In accordance with Article 6, paragraph 1, the Republic of Moldova has designated as Central Authority:

The Ministry of Education and Science of the Republic of Moldova

1, Piata Marii Adunari Nationale

CHISINAU

Republic of Moldova, MD—2033

The Convention will enter into force for the Republic of Moldova on 1 July 1998 in accordance with Article 38, paragraph 3.

The accession will have effect only as regards the relations between the Republic of Moldova and such Contracting States as will have declared their acceptance of the accession.

Under Article 38, the Convention is not in force between the United States and Moldova.

In accordance with Article 38, paragraph 5, the Convention entered into force between Moldova and the following States:

Luxembourg	1 September 1998
Israel	1 September 1998
Poland	1 September 1998
Finland	1 October 1998
Italy	1 November 1998
Australia	1 November 1998
Argentina	1 November 1998
the Czech Republic	1 December 1998
Belarus	1 February 1999
Ireland	1 February 1999
Chile	1 June 1999
China, Hong Kong Special Administrative Region	1 June 1999
Spain	1 February 2000
Greece	1 March 2000
Germany	1 May 2000
Bosnia and Herzegovina	1 December 2000
Canada	1 January 2001
the Slovak Republic	1 February 2001
Colombia	1 April 2001
Brazil	1 September 2001
Costa Rica	1 September 2001
Malta	1 September 2001
Nicaragua	1 September 2001
Uruguay	1 September 2001
Uzbekistan	1 September 2001
Estonia	1 October 2001
Portugal	1 January 2002
Austria	1 March 2002
the Netherlands (for the Kingdom in Europe)	1 April 2002
Latvia	1 May 2002
Peru	1 May 2002
Hungary	1 June 2002
Belgium	1 May 2003

5f In accordance with Article 38, paragraph 5, the Convention entered into force between Monaco and the following States:

the Kingdom of the Netherlands (for the Kingdom in Europe)	1 March 1993
France	1 March 1993
Luxembourg	1 April 1993

Ireland	1 April 1993
the United Kingdom of Great Britain and Northern Ireland	1 April 1993
the United States of America	1 June 1993
the Federal Republic of Germany	1 July 1993
Argentina	1 August 1993
Israel	1 November 1993
Sweden	1 December 1993
Australia	1 January 1994
Finland	1 August 1994
Switzerland	1 October 1994
Austria	1 November 1994
Spain	1 December 1994
Denmark	1 May 1995
Canada	1 June 1995
New Zealand	1 November 1995
Mexico	1 December 1995
Norway	1 January 1997
Hungary	1 April 1997
Italy	1 April 1997
Venezuela	1 September 1997
Greece	1 October 1997
Poland	1 March 1998
the Czech Republic	1 August 1998
the Slovak Republic	1 February 2001
Portugal	1 January 2002
Belgium	1 May 2003

With the following reservation:

``Conformément à l'article 26, alinéa 3, de la Convention, la Principauté de Monaco déclare n'être tenue au paiement des frais visés à l'article 26, alinéa 2, liés à la participation d'un avocat ou d'un conseiller juridique, ou aux frais de justice, que dans la mesure où ces coûts peuvent être couverts par son système d'assistance judiciaire et juridique.''

Translation

In conformity with Article 26, paragraph 3, of the Convention, the Principality of Monaco declares that it shall not be bound to assume any costs referred to in Article 26, paragraph 2, resulting from the participation of legal counsel or advisers or from court proceedings, except insofar as those costs may be covered by its system of legal aid and advice.

In accordance with Article 6, paragraph 1, Monaco has designated as Central Authority: ``Direction des Services Judiciaires, Palais de Justice''.

6 The Permanent Bureau of the Hague Conference on private international law presents its compliments to the Diplomatic Missions of the Member States and to the National Organs and has the honour to inform them that, in accordance with Article 37, paragraph 2,

the Kingdom of the Netherlands

deposited on *12 June 1990 for the Kingdom in Europe* the instrument of acceptance of the above-mentioned Convention. The instrument of acceptance contains the following reservation:

The Kingdom of the Netherlands shall not be bound to assume any costs referred to in the second paragraph of Article 26 of the Convention on the Civil Aspects of International Child Abduction, done at The Hague on 25 October 1980, resulting from the participation of legal counsel or advisers or from court proceedings, except insofar as those costs may be covered by its system of legal aid and advice.

In accordance with Article 43, paragraph 2, the Convention will enter into force for the *Kingdom of the Netherlands (the Kingdom in Europe)* on *1 September 1990.*

In accordance with the provisions of Article 6 of the Convention, the Central Authority designated is:

for the *Kingdom in Europe*: the *Ministry of Justice at The Hague.*

In accordance with the provisions of Article 6 of the Convention, the Central Authority designated is, for the Kingdom in Europe:

``Ministry of Justice
Prevention, Youth Protection and Probation Service
Legal Affairs Support Unit
The Hague".

6a *Notification pursuant to Article 45 of the Convention*

In accordance with Article 38, paragraph 2, New Zealand deposited its instrument of accession to the above-mentioned Convention with the Ministry of Foreign Affairs of the Kingdom of the Netherlands on 31 May 1991.

The instrument of accession contains the following declarations:

``the Government of New Zealand hereby declares in accordance with Article 24 and Article 42 of the Convention that any application, communication or other document sent to its Central Authority should either be in the English language or accompanied by a translation thereof in the English language;

And the Government of New Zealand hereby further declares in accordance with Article 26 and Article 42 of the Convention that it reserves the right not to be bound to assume the costs referred to in Article 26 resulting from the participation of legal counsel or advisers or from Court proceedings, except insofar as those costs may be covered by its system of legal aid and advice."

In accordance with Article 38, paragraph 3, the Convention will enter into force for New Zealand on 1 August 1991. The accession will have effect only as regards the relations between New Zealand and such Contracting States as will have declared their acceptance of the accession. Such declaration shall be deposited at the Ministry of Foreign Affairs of the Kingdom of the Netherlands.

New Zealand designated as the Central Authority under Article 6, paragraph 2:

adresse/address:

The Secretary

Department of Justice

Private Box 180

Wellington

New Zealand

numéro de téléphone/telephone number:

(04) 725-980

numéro de télex/telex number:

numéro de télécopie/telefax number:

(04) 732-362

personnes à contacter/persons to contact:

Mme/Ms Heather TAVASSOLI

(langues de communication/

language of communication:

allemand/German)

Mme/Mrs Virginia LYNCH

In accordance with Article 38, paragraph 5, the Convention is in force between New Zealand and the following States:

the Kingdom of the Netherlands (for the Kingdom in Europe)	1 September 1991
the United Kingdom of Great Britain and Northern Ireland	1 October 1991
Luxembourg	1 October 1991
Ireland	1 October 1991
Denmark	1 October 1991
the United States of America	1 October 1991
Argentina	1 October 1991
Mexico	1 December 1991
France	1 January 1992
the Federal Republic of Germany	1 February 1992
Israel	1 February 1992
Australia	1 June 1992
Canada	1 July 1992
Spain	1 July 1992
Portugal	1 August 1992
Sweden	1 August 1992
Switzerland	1 September 1992
Norway	1 October 1992
Finland	1 August 1994
Austria	1 November 1994
the Bahamas	1 November 1995
Burkina Faso	1 November 1995
Chile	1 November 1995
Cyprus	1 November 1995
Ecuador	1 November 1995
Honduras	1 November 1995
Mauritius	1 November 1995
Monaco	1 November 1995
Panama	1 November 1995
Poland	1 November 1995
Romania	1 November 1995
Slovenia	1 November 1995
Zimbabwe	1 November 1995
Hungary	1 April 1997
Italy	1 April 1997
Venezuela	1 September 1997
Greece	1 October 1997
Georgia	1 March 1998
Colombia	1 March 1998
Iceland	1 March 1998
St. Kitts and Nevis	1 March 1998
South Africa	1 March 1998
the Czech Republic	1 August 1998
the Republic of Fiji	1 February 2000
the Slovak Republic	1 February 2001
Belgium	1 May 2003

6b In accordance with Article 38, paragraph 5, the Convention is in force between Nicaragua and the following States:

Mexico	1 June 2001
Moldova	1 September 2001
Panama	1 September 2001
Uruguay	1 October 2001
Argentina	1 October 2001
Costa Rica	1 October 2001
Ireland	1 November 2001
Portugal	1 January 2002
Israel	1 April 2002
Norway	1 April 2002
Hungary	1 June 2002
Spain	1 June 2002
Uzbekistan	1 June 2002
Brazil	1 June 2002
Sweden	1 September 2002
Slovak Republic	1 September 2002
Greece	1 January 2003
Trinidad and Tobago	1 March 2003
Poland	1 March 2003
Colombia	1 May 2003

6c Notification pursuant to Article 45 of the Convention

In accordance with its Article 37, paragraph 1, the above-mentioned Convention was signed for Norway on 9 January 1989 as follows:

(sd.) BJØRN BLAKSTAD

9th January 1989

subject to ratification and to the reservations

set out in the full powers to sign.

The text of those reservations is worded as follows:

``1. In accordance with Articles 24 and 42, the Norwegian Government reserves the right not to accept applications, communications or other documents sent to the General Authority in French.

2. In accordance with Articles 26 and 42, Norway makes the reservation that it shall not be bound to assume any costs resulting from the participation of legal counsel or advisers or from court proceedings, except insofar as those costs may be covered by Act of 13 June 1980 relating to free legal aid."

In accordance with Article 37, paragraph 2, Norway deposited on 9 January 1989 also its instrument of ratification of the said Convention with the Ministry of Foreign Affairs of the Kingdom of the Netherlands. The instrument of ratification contains the same reservations as the full powers to sign the Convention.

The Convention will enter into force for Norway in accordance with Article 43 of 1 April 1989.

Central Authority designated under the *Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction.*

adresse/address:

Justisdepartementet

(Ministry of Justice)

Rettshjelpskontor

Postboks 8005 dep

0030 OSLO 1"

Norway

numéro de téléphone/telephone number:

(47)-2-234-5481

numéro de télex/telex number:

21403 JDEP N

numéro de télécopie/telefax number:

(47)-2-234-2722

personnes à contacter/persons to contact:

M./Mr Jan GOTAAS

Deputy Director General

(langue de communication/language of communication: anglais/English)

tél./tel.: (47) 22 24 52 28

Mlle/Ms Helene S. BJONNESS-

JACOBSEN

Senior Executive Officer

(langue de communication/language of communication: anglais/English)

tél./tel.: (47) 22 24 54 71

Mlle/Ms Elisabeth HALVORSEN

Senior Executive Officer

(langue de communication/language of communication: anglais/English)

tél./tel.: (47) 22 24 54 83

6d Central Authority designated under the *Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction.*

adresse/address:

Direccion General de Asuntos Juridicos y Tratados

Ministerio de Relaciones Exteriores

Panama

numéro de téléphone/telephone number:

(507)-25-1544

numére de télex/telex number:

—

numéro de télécopie/telefax number:

(507)-27-1680

personnes à contacter/persons to contact:

—

The Convention is in force between *Panama* and the following States:

the United States of America	1 June 1994
the Kingdom of the Netherlands (for the Kingdom in Europe)	1 June 1994
Luxembourg	1 June 1994
the United Kingdom of Great Britain and Northern Ireland	1 July 1994
Finland	1 August 1994
Australia	1 September 1994
Switzerland	1 October 1994
Ireland	1 December 1994
Sweden	1 January 1995
Chile	1 March 1995
Argentina	1 May 1995
Germany	1 June 1995
Cyprus	1 June 1995
Saint Kitts and Nevis	1 June 1995
Slovenia	1 June 1995

Canada	1 August 1995
Spain	1 September 1995
New Zealand	1 November 1995
Mexico	1 December 1995
Israel	1 January 1996
Colombia	1 May 1996
Hungary	1 April 1997
Italy	1 April 1997
Ecuador	1 May 1997
Venezuela	1 September 1997
Greece	1 October 1997
Poland	1 March 1998
the Czech Republic	1 August 1998
Norway	1 November 1999
Brazil	1 July 2000
the Slovak Republic	1 February 2001
Uruguay	1 March 2001
Costa Rica	1 March 2001
Trinidad and Tobago	1 March 2001
Paraguay	1 March 2001
El Salvador	1 September 2001
Nicaragua	1 September 2001
Portugal	1 January 2002
Estonia	1 February 2003
Guatemala	1 February 2003
Peru	1 February 2003

6e In accordance with Article 38, paragraph 5, the Convention is in force between Paraguay and the following States:

Israel	1 October 1998
the Czech Republic	1 October 1998
Argentina	1 November 1998
Poland	1 December 1998
Belarus	1 February 1999
Ireland	1 February 1999
Finland	1 March 1999
Australia	1 April 1999
Chile	1 June 1999
Spain	1 February 2000
Greece	1 March 2000
Canada	1 January 2001
the Slovak Republic	1 February 2001
Panama	1 March 2001
Colombia	1 April 2001
Mexico	1 June 2001
Italy	1 August 2001
Germany	1 December 2001
Portugal	1 January 2002
the Netherlands (for the Kingdom in Europe)	1 April 2002
Hungary	1 June 2002
Sweden	1 September 2002

In accordance with Article 6, Paraguay has designated as Central Authority: the Direction of the Protection of the Child at the Ministry of Justice and Labour.

6f In accordance with Article 38, paragraph 5, the Convention is in force between Peru and the following States:

Argentina	1 October 2001
Luxembourg	1 August 2001
Argentina	1 October 2001
Costa Rica	1 November 2001
Norway	1 April 2002
the Republic of Moldova	1 May 2002
the Netherlands (for the Kingdom in Europe)	1 May 2002
Hungary	1 June 2002
Uzbekistan	1 June 2002
Brazil	1 June 2002
Portugal	1 August 2002
Israel	1 August 2002
Slovak Republic	1 September 2002
Spain	1 December 2002
Chile	1 December 2002
Greece	1 January 2003
Australia	1 January 2003
Panama	1 February 2003
Trinidad and Tobago	1 March 2003
Colombia	1 March 2003
Poland	1 March 2003
Uruguay	1 May 2003

6g In accordance with Article 38, paragraph 2, of the above-mentioned Convention the Republic of Poland deposited its instrument of accession to the Convention with the Ministry of Foreign Affairs of the Kingdom of the Netherlands on 10 August 1992. The instrument of accession contains the following reservation:

Translation

In accordance with Article 42 the Republic of Poland makes the reservation pursuant to Article 26, paragraph 3, of the Convention and declares that it shall not be bound to assume any costs referred to in the preceding paragraph, resulting from court proceedings, except insofar as those costs may be covered by its system of legal aid and advice.

The Convention will enter into force for the Republic of Poland in accordance with Article 38, paragraph 3, on 1 November 1992.

The accession will have effect only as regards the relations between the Republic of Poland and such Contracting States as will have declared their acceptance of the accession.

In accordance with Article 38, paragraph 5, the Convention will enter into force between Poland and the following States:

the United States of America	1 November 1992
the Kingdom of the Netherlands (for the Kingdom in Europe)	1 November 1992
Luxembourg	1 January 1993

the United Kingdom of Great Britain and Northern Ireland	1 February 1993
France	1 February 1993
the Federal Republic of Germany	1 February 1993
Ireland	1 April 1993
Norway	1 July 1993
Israel	1 November 1993
Sweden	1 December 1993
Australia	1 January 1994
Argentina	1 February 1994
Canada	1 February 1994
Finland	1 August 1994
Switzerland	1 October 1994
Austria	1 November 1994
Spain	1 December 1994
Denmark	1 May 1995
New Zealand	1 November 1995
Mexico	1 December 1995
Italy	1 February 1996
Cyprus	1 January 1997
Iceland	1 January 1997
Hungary	1 April 1997
Venezuela	1 September 1997
Greece	1 October 1997
the Bahamas	1 March 1998
Chile	1 March 1998
Colombia	1 March 1998
Honduras	1 March 1998
Mauritius	1 March 1998
Monaco	1 March 1998
Panama	1 March 1998
Romania	1 March 1998
St. Kitts and Nevis	1 March 1998
Slovenia	1 March 1998
South Africa	1 March 1998
Zimbabwe	1 March 1998
the Czech Republic	1 August 1998
Moldova	1 September 1998
Paraguay	1 December 1998
Uzbekistan	1 January 2000
Brazil	1 May 2000
Uruguay	1 May 2000
Malta	1 June 2000
the Slovak Republic	1 February 2001
Belarus	1 February 2001
Georgia	1 February 2001
Fiji	1 February 2001
Turkmenistan	1 February 2001
Costa Rica	1 February 2001
Portugal	1 January 2002
El Salvador	1 March 2003
Estonia	1 March 2003
Guatemala	1 March 2003
Latvia	1 March 2003
Lithuania	1 March 2003
Nicaragua	1 March 2003

Peru	1 March 2003
Sri Lanka	1 March 2003
Trinidad and Tobago	1 March 2003
Belgium	1 May 2003

Central Authority designated under the *Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction.*

addresse/address:

Ministère de la Justice

Département juridique

Al. Ujazdowskie 11

00-950 VARSOVIE

Pologne

numéro de téléphone/telephone number:

(48)-22-628-4431 (Central no. for Ministry)

(48)-22-628-9173 (Department of International Co-operation and European Law)

numéro de télex/telex number:

—

numéro de télécopie/telefax number:

(48)-22-628-0949 (Dept. of International

Co-operation and European Law)

personnes à contacter/persons to contact:

Mme/Ms Katarzyna BIERNACKA

(langue de communication/language of communication: français/French)

Mme/Ms Jolanta BORKOWSKA

(langue de communication/language of communication: anglais/English)

6h *Notification in accordance with Article 45, paragraphs 1 and 3 of the Convention*

In conformity with Article 37, paragraph 2, Portugal deposited its instrument of ratification of the above-mentioned Convention with the Ministry of Foreign Affairs of the Kingdom of the Netherlands on 29 September 1983.

The Portugese Government notified that the Portugese Central Authority as provided for in Article 6 of the Convention is:

adresse/address:

Instituto de Reinserçao Social

Avenida Almirante Reis, 101, 7°

1197 LISBOA Codex

Portugal

numéro de téléphone/telephone number:

+351 (1) 317 6100

numéro de télex/telex number:

—

numéro de télécopie/telefax number:

+351 (1) 317 6171

personnes à contacter/persons to contact:

Mme/Mrs TRIGO DE SOUSA

(langues de communication/languages of

communication: portugais, français, anglais/Portuguese, French, English)

M./Mr PEDRO MIGUEL DUARTE

(langues de communication/languages of

communication: portugais, anglais,

français/Portuguese, English, French)

tel./tel.it +351 (1) 317 6175

In accordance with Article 43 the Convention shall enter into force the first December 1983 for Canada, France and Portugal.

By note dated 2 December 1998, received at the Ministry of Foreign Affairs of the Kingdom of the Netherlands on 9 December 1998, Portugal extended the Convention in accordance with Article 39 to Macau.

In accordance with Article 43, paragraph 2, sub 2, the Convention will enter into force for Macau on 1 March 1999.

7 Central Authority designated under the *Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction.*

adresse/address:

Ministère de la Justice

Bd. M. Kogalniceanu 33

Sector 5

BUCAREST

Roumanie

numéro de téléphone/telephone number:

+40 (1) 614 4400

+40 (1) 311 0784

numéro de télex/telex number:

11964 MJ

numéro de télécopie/telefax number:

+40 (1) 323 6179

personnes à contacter/persons to contact:

Mme/Ms A. IACOVESCU

(Directeur adjount des relations juridiques internationales du Ministère de la Justice)

(langue de communication/language of communication: français/French)

Mme/Ms Cristina FILISANU

(Conseillère à la Direction des relations juridiques internationales)

(langue de communication/language of communication: français/French)

In accordance with Article 38, paragraph 5, the Convention entered into force between Romania and the following States:

the Kingdom of the Netherlands (for the Kingdom in Europe)	1 March 1993
France	1 March 1993
the United Kingdom of Great Britain and Northern Ireland*	1 April 1993
Ireland	1 April 1993
Luxembourg	1 April 1993
the United States of America	1 June 1993
the Federal Republic of Germany	1 July 1993
Argentina	1 August 1993
Israel	1 November 1993
Sweden	1 December 1993
Australia	1 January 1994
Finland	1 August 1994
Switzerland	1 October 1994
Austria	1 November 1994
Spain	1 December 1994
Denmark	1 May 1995
Canada	1 June 1995
New Zealand	1 November 1995
Mexico	1 December 1995
Hungary	1 April 1997
Venezuela	1 September 1997
Greece	1 October 1997
Poland	1 March 1998
the Czech Republic	1 August 1998
Norway	1 October 1998
Italy	1 September 2000
the Slovak Republic	1 February 2001
Portugal	1 January 2002
Belgium	1 May 2003

*With the following declaration:

``Notwithstanding the provisions of the said Article 38 regarding entry into force of the Convention as between the acceding State and the State declaring its acceptance of the accession, amendments will have been made to the United Kingdom municipal law in order to give effect to the Convention between it and Romania as of 1 February 1993 when the Convention enters into force for Romania."

7a The instrument of accession contains the following declaration:

``Saint Kitts and Nevis is not bound to assume any costs resulting under the Convention from the participation of legal counsel or advisers [or] from court proceedings in terms of paragraph 3 of Article 26 of the Convention."

In accordance with Article 38, paragraph 3, the Convention will enter into force for *Saint Kitts and Nevis* on *1 August 1994.*

According to Article 38, paragraph 4, the accession will have effect only as regards Saint Kitts and Nevis and such Contracting States as will have declared their acceptance of the accession.

The Convention is in force between *Saint Kitts and Nevis* and the following States:

the Kingdom of the Netherlands (for the Kingdom in Europe)	1 October 1994
the United Kingdom of Great Britain and Northern Ireland*	1 August 1994
Luxembourg	1 November 1994
Ireland	1 December 1994
Sweden	1 January 1995
Germany**	1 May 1995
the United States of America	1 June 1995
Panama	1 June 1995
Canada	1 August 1995
Australia	1 November 1995
Mexico	1 December 1995
Israel	1 January 1996
Chile	1 May 1996
Argentina	1 December 1996
Italy	1 April 1997
Switzerland	1 May 1997
Finland	1 May 1997
Spain	1 June 1997
Venezuela	1 September 1997
New Zealand	1 March 1998
Poland	1 March 1998
Norway	1 March 1998
the Czech Republic	1 August 1998
the Slovak Republic	1 February 2001
Portugal	1 January 2002
Hungary	1 June 2002

*With the following declaration:

``Notwithstanding the provisions of the said Article 38 regarding entry into force of the Convention as between the acceding State and the State declaring its acceptance of the accession, amendments will have been made to the United Kingdom municipal law in order to give effect to the Convention between it and Saint Christopher and Nevis as of 1 August 1994 when the Convention enters into force for Saint Christopher and Nevis. I would be grateful for confirmation of the date of 1 August 1994 as the date on which the Convention will enter into force between the United Kingdom and Saint Christopher and Nevis.''

The Government of Saint Kitts and Nevis (formerly Saint Christopher and Nevis) has confirmed the date of *1 August 1994* as the date on which the Convention entered into force between *Saint Kitts and Nevis* and the *United Kingdom of Great Britain and Northern Ireland.*

** The Note of the Embassy of Germany contains the following declaration: ``The reservation under Article 26, paragraph 3, of the Convention made by Saint Kitts and Nevis on its accession is believed by the competent German judicial authorities to be connected with the fact that Saint Kitts and Nevis does not have a system of legal aid. Introduction of such a system would, however, render the reservation in its present form inadmissible. A possible solution would be for Saint Kitts and Nevis to supplement its reservation under Article 26, paragraph 3, accordingly.'' (Translation)

Central Authority designated under the *Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction*.

adresse/address:

Attorney General or his designate

Government Headquarters

PO Box 164

BASSETERRE

Saint Kitts and Nevis

West Indies

numéro de téléphone/telephone number:

+1 (809) 465 2521

numéro de télécopie/telefax number:

+1 (809) 465 5040

personnes à contacter/persons to contact:

Mr Delano BART

(Attorney General)

7b ***San Marino Accession***

Convention of 25 October 1980 on the Civil Aspects of International Child Abduction

Accession accepted by	**Date of acceptance**	**Entry into force**
Mexico	8-II-2007	1-V-2007
Luxembourg	12-II-2007	1-V-2007
Greece	16-II-2007	1-V-2007
Bulgaria	1-III-2007	1-VI-2007
Poland	13-III-2007	1-VI-2007
Latvia	15-III-2007	1-VI-2007
Belgium	23-IV-2007	1-VII-2007
Brazil	24-IV-2007	1-VII-2007
New Zealand	27-IV-2007	1-VII-2007
Finland	1-V-2007	1-VIII-2007
Slovakia	4-V-2007	1-VIII-2007
Bahamas	16-V-2007	1-VIII-2007
Czech Republic	6-VI-2007	1-IX-2007
Germany	11-VI-2007	1-IX-2007
Israel	20-VIII-2007	1-XI-2007
Cyprus	17-IX-2007	1-XII-2007
United States of America	26-X-2007	1-I-2008
Ireland	31-X-2007	1-I-2008
Spain	13-XII-2007	1-III-2008
Sweden	14-I-2008	1-IV-2008
Switzerland	16-I-2008	1-IV-2008
Monaco	31-III-2008	1-VI-2008
Italy	6-V-2008	1-VIII-2008
China, People's Republic of	18-VI-2008	1-IX-2008
Georgia	22-IX-2008	1-XII-2008
Venezuela	15-X-2008	1-I-2009

Lithuania	29-XII-2008	1-III-2009
Austria	11-VI-2009	1-IX-2009
Argentina	9-VII-2009	1-X-2009

Entry into force between San Marino and	**Entry into force**
Albania	1-I-2008
Armenia	1-VI-2008
Mexico	1-V-2007
Luxembourg	1-V-2007
Greece	1-V-2007
Bulgaria	1-VI-2007
Poland	1-VI-2007
Latvia	1-VI-2007
Belgium	1-VII-2007
Brazil	1-VII-2007
New Zealand	1-VII-2007
Finland	1-VIII-2007
Slovakia	1-VIII-2007
Bahamas	1-VIII-2007
Czech Republic	1-IX-2007
Germany	1-IX-2007
Israel	1-XI-2007
Cyprus	1-XII-2007
United States of America	1-I-2008
Ireland	1-I-2008
Spain	1-III-2008
Sweden	1-IV-2008
Switzerland	1-IV-2008
Monaco	1-VI-2008
Italy	1-VIII-2008
China, People's Republic of	1-IX-2008
Georgia	1-XII-2008
Venezuela	1-I-2009
Lithuania	1-III-2009
Austria	1-IX-2009
Argentina	1-X-2009

China, People's Republic of—Entry into force

San Marino—Central Authority

Tribunale Unico (Single Court)
via 28 Luglio, 38
47893 BORGO MAGGIORE
San Marino

numéro de téléphone/telephone number: +378 (0549) 888 888
numéro de télécopie/telefax number:—

personnes à contacter / persons to contact:

Mr Gilberto FELICI
Law Commissioner

e-mail: gilberto.felici.tribunaleunico@pa.sm

Mrs Valeria PIERFELICI
Law Commissioner
e-mail: tribunale.pierfelici@pa.sm

Declarations

Articles: 26

``In conformity with Article 26, paragraph 3, of the Convention, the Republic of San Marino declares that it shall not be bound to assume any costs referred to in Article 26, paragraph 2, resulting from the participation of legal counsel or advisers or from court proceedings, except insofar as those costs may be covered by its system of legal aid and advice."

7c Serbia

Succession

One of the successor States to the former Socialist Federal Republic of Yugoslavia which became a Party to the Convention on 1 December 1991. By letter received by the depositary on 26 April 2001, the Federal Republic of Yugoslavia declared itself to be bound by the Convention.

No objection has been received from the Contracting States.

The Ministry of Foreign Affairs of the Netherlands, depositary of the Hague Conventions, has notified the Member States of the Hague Conference on 5 July 2006 that ``Following the declaration of the state independence of Montenegro, and under the Article 60 of the Constitutional Charter of the state union of Serbia and Montenegro, the Republic of Serbia is continuing international personality of the state union of Serbia and Montenegro, which was confirmed also by the National Assembly of the Republic of Serbia at its session held on 5 June 2006."

Serbia—Central Authority

Ministry for Human and Minority Rights of Serbia

Bulevar Mihajla Pupina 2

NEW BELGRADE
Tel.: +381 (11) 311 1145
Fax: +381 (11) 311 7074

person to contact:

Mrs Danijela CETKOVIC, assistant

e-mail: daniela@humanrights.gov.yu

Ministry for Justice of the Republic of Serbia

Bulevar Mihajla Pupina 2

NEW BELGRADE

Tel.: +381 (11) 362 0698 / 0540

Fax: +381 (11) 361 6287

person to contact:

Mr Milisav COGURIC

Head of the Department for International Legal Assistance

(The effective date of the above information is *13 July 2006*).

7d *Seychelles Accession*

Convention of 25 October 1980 on the Civil Aspects of International Child Abduction

Accession accepted by	**Date of acceptance**	**Entry into force**
Poland	22-VIII-2008	1-XI-2008
Luxembourg	10-IX-2008	1-XII-2008

Bahamas	13-X-2008	1-I-2009
Venezuela	15-X-2008	1-I-2009
Israel	5-XI-2008	1-II-2009
Monaco	10-XI-2008	1-II-2009
Greece	12-XII-2008	1-III-2009
New Zealand	18-XII-2008	1-III-2009
Germany	15-I-2009	1-IV-2009
Latvia	16-I-2009	1-IV-2009
Slovakia	22-I-2009	1-IV-2009
Spain	2-VI-2009	1-IX-2009
Argentina	9-VII-2009	1-X-2009

Entry into force between Seychelles and	**Entry into force**
Poland	1-XI-2008
Luxembourg	1-XII-2008
Bahamas	1-I-2009
Venezuela	1-I-2009
Israel	1-II-2009
Monaco	1-II-2009
Greece	1-III-2009
New Zealand	1-III-2009
Germany	1-IV-2009
Latvia	1-IV-2009
Slovakia	1-IV-2009
Spain	1-IX-2009
Argentina	1-X-2009

Seychelles—Central Authority

Ms Linda William

Director of Social Services

Ministry of Health and Social Development
P.O. Box 190, Victoria House
Tel: (00 248) 72 33 09 (00 248) 28 18 33
Fax: (00 248) 22 56 56
dgsa@seychelles.net.

7e With the following reservation:

``The Slovak Republic avails itself of the possibility to make a reservation under Article 42 of the Convention of 25 October 1980 on Civil Aspects of International Child Abduction and, in accordance with its Article 26, paragraph 3, declares that it shall not be bound to assume any costs referred to in Article 26, paragraph 2, resulting from the participation of legal counsel or advisers or from court proceedings, except insofar as those costs may be covered by its system of legal aid and advice."

In accordance with Article 6, paragraph 1, the Slovak Republic has designated as Central Authority:

``Centre for International Legal Protection of Children and Youth BRATISLAVA''.

7f In accordance with Article 6, paragraph 1, of the above-mentioned Convention, the *Republic of Slovenia* has designated as Central Authority:

adresse/address:

The Ministry of the Interior

Stefanova 2

15000 LJUBLJANA

Republic of Slovenia

numéro de téléphone/telephone number:

(386)-61-172-4521

(386)-61-172-4126

numéro de télex/telex number:

—

numéro de télécopie/telefax number:

(386)-61-172-4206

personnes à contacter/persons to contact:

Mme/Mrs Katja BASIC

Mme/Mrs Stanka GORINSEK

EMERGENCY NUMBERS

The following numbers can be contacted at any time:

Telephone: +386 (61) 132 5125

Telefax: +386 (61) 172 4206

The Convention is in force between *Slovenia* and the following States:

the Kingdom of the Netherlands (for the Kingdom in Europe)	1 July 1994
Luxembourg	1 August 1994
the United Kingdom of Great Britain and Northern Ireland*	1 June 1994
Switzerland	1 October 1994
Australia	1 November 1994
Austria	1 November 1994
Ireland	1 December 1994
Sweden	1 January 1995
the United States of America	1 April 1995
Argentina	1 May 1995
Panama	1 June 1995
Germany	1 June 1995
Canada	1 August 1995
Spain	1 September 1995
New Zealand	1 November 1995
Mexico	1 December 1995
Israel	1 January 1996
Chile	1 May 1996
Hungary	1 April 1997
Italy	1 April 1997
Finland	1 May 1997
Norway	1 June 1997
Venezuela	1 September 1997
Greece	1 October 1997
Poland	1 March 1998
the Czech Republic	1 August 1998
Uzbekistan	1 March 2000
the Slovak Republic	1 February 2001
Portugal	1 January 2002
Belgium	1 May 2003

*With the following declaration:

``Notwithstanding the provisions of the said Article 38 regarding entry into force of the Convention as between the acceding State and the State declaring its acceptance of the accession, amendments will have been made to the United Kingdom municipal law in order to give effect to the Convention between it and Slovenia as of 1 June 1994 when the Convention enters into force for Slovenia. I would be grateful for confirmation of the date of 1 June 1994 as the date on which the Convention will enter into force between the United Kingdom and Slovenia.''

The Government of Slovenia has confirmed the date of *1 June 1994* as the date on which the Convention entered into force between the *Republic of Slovenia* and the *United Kingdom of Great Britain and Northern Ireland.*

7g *Notification pursuant to Article 45 of the Convention*

The Ministry of Foreign Affairs of the Kingdom of the Netherlands, depositary of the Convention on the Civil Aspects of International Child Abduction of 25 October 1980, has the honour to inform the Member States of The Hague Conference on Private International Law and the States having acceded to the above-mentioned Convention that in accordance with Article 38, paragraph 2, the Republic of South Africa deposited its instrument of accession with the Ministry of Foreign Affairs of the Kingdom of the Netherlands on 8 July 1997.

The Republic of South Africa made the following reservations:

``(a) That the use of French in any application, communication or other document sent to the Central Authority of the Republic of South Africa, as provided for in Article 24 of the Convention, is objected to, and that such documents shall not be accepted in French.

(b) That the Republic of South Africa shall not be bound to assume any costs referred to in paragraph 2 of Article 26 of the Convention resulting from the participation of legal counsel or advisers or from court proceedings, except those costs which may be covered by the system of legal aid in terms of the Legal Aid Act, 1969 (Act. No. 22 of 1969).''

The Convention will enter into force for the Republic of South Africa on 1 October 1997 in accordance with Article 38, paragraph 3.

The accession will have effect only as regards the relations between the Republic of South Africa and such Contracting States as will have declared their acceptance of the accession.

***

The Convention is in force between *South Africa* and the following States:

the United States of America	1 November 1997
the Kingdom of the Netherlands (for the Kingdom in Europe)	1 November 1997
Israel	1 December 1997
the United Kingdom of Great Britain and Northern Ireland*	1 December 1997
Finland	1 December 1997
Ireland	1 December 1997
Sweden	1 January 1998
Australia	1 January 1998
Germany	1 February 1998
New Zealand	1 March 1998
Poland	1 March 1998
Norway	1 March 1998
Switzerland	1 August 1998
the Czech Republic	1 August 1998
Argentina	1 November 1998
China, Hong Kong Special Administrative Region only	*1 December 1998*
Canada	1 May 1999
Chile	1 June 1999
Spain	1 February 2000
Greece	1 March 2000
the Slovak Republic	1 February 2001
Colombia	1 April 2001
Uruguay	1 June 2001
Mexico	1 June 2001
Italy	1 August 2001
Portugal	1 January 2002
Austria	1 March 2002
Hungary	1 June 2002
Belgium	1 May 2003

*With the following declaration:

``(…) notwithstanding the provisions of the said article, the United Kingdom accepts the accession of South Africa (…) with effect from *1 October 1997."*

7h *Notification pursuant to Article 45 of the Convention*

In accordance with Article 37, paragraph 2, Spain deposited on 16 June 1987 its instrument of ratification of the above-mentioned Convention with the Ministry of Foreign Affairs of the Kingdom of the Netherlands.

Spain designated as the Central Authority mentioned in Article 6 of the Convention: ``La Secretaría General Técnica del Ministerio de Justicia, San Bernardo, 45.-28015 Madrid".

address:

Secretaria General Técnica del

Ministerio de Justicia

Calle San Bernardo, 62

28071 MADRID

Espagne

telephone number:

For telephone calls made within Spain, the access code for Madrid is (091)

telefax number:

(1) 522 1539

telex number:

22545

person to contact:

M./Mr A. LAGUIA ARRAZOLA

tél./tel. (1) 521 7046

(langues de communication/languages of communication: espagnol, français anglais/Spanish, French, English)

The Convention will enter into force for Spain in accordance with its Article 43 on 1 September 1987.

8 **SRI LANKA (accession) 28 September 2001 1 December 2001**

The instrument of accession contains the following declarations and reservations:

``Reservations as provided for in Article 42 of the Convention as regards Articles 24 and 26

Article 24

For purposes of Article 24, the documents should be in the English language.

Article 26(3)

For purposes of Article 26(3) Sri Lanka should not be bound to assume any costs referred to in the preceding paragraph resulting from the participation of Legal Counsel or advisers or from Court proceedings except insofar as those costs may be covered by the legal aid and advice system of Sri Lanka.

Declarations made under Article 6 and 8

Article 6

In terms of Article 6, the Secretary/Ministry of Justice is designated the Central Authority.

Article 8

The authority competent to act upon a Letter of Request pursuant to Article 8 would be the Secretary, Ministry of Justice."

The Convention is in force between Sri Lanka and the following States:

Luxembourg	1 December 2001*
the Netherlands (for the Kingdom in Europe)	1 April 2002
Costa Rica	1 April 2002

Norway	1 April 2002
Colombia	1 May 2002
Hungary	1 June 2002
Uzbekistan	1 June 2002
Brazil	1 June 2002
Israel	1 August 2002
Slovak Republic	1 September 2002
Argentina	1 November 2002
Germany	1 January 2003
Australia	1 January 2003
Spain	1 March 2003
Poland	1 March 2003
Uruguay	1 May 2003

*Pursuant to Article 38, paragraph 5 of the Convention, the date of entry into force should normally be 1 March 2002. However, following a request from Luxembourg, the date of entry into force has been changed to 1 December 2001.

8a The Permanent Bureau of the Hague Conference on private international law presents its compliments to the Diplomatic Missions of the Member States and to the National Organs and has the honour to inform them that on 22 March 1989 the above-mentioned Convention was signed and ratified by

Sweden.

In accordance with article 43, paragraph 2, the Convention will enter into force for *Sweden* on *1 June 1989*.

The instrument of ratification contains the following reservation:

In accordance with the provisions of article 42 and pursuant to article 42 and pursuant to article 26, Sweden declares that it shall not be bound to assume any costs referred to in article 26, paragraph 2, resulting from the participation of legal counsel or advisers or from court proceedings, except insofar as those costs may be covered by the Swedish system of legal aid.

Central Authority designated under the *Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction.*

adresse/address:

Ministry for Foreign Affairs

103 39 STOCKHOLM

Sweden

numéro de téléphone/telephone number:

Voir ci-dessous/See below

numéro de télex/telex number:

105 90 MINFOR S

numéro de télécopie/telefax number:

+46 (8) 723 1176

adresse e-mail/e-mail address:

ud@foreign.ministry.se

personnes à contacter/persons to contact:

Mme/Ms Agneta LUNDVALL

(Head of Section)

(langues de communication/languages of

communication: anglais, français,

allemand/English, French, German)

tél./tel.: +46 (8) 405 5038

Mme/Ms Madelaine BERONIUS

tél./tel.: +46 (8) 405 5041

8b *Notification in accordance with Article 45, paragraphs 1 and 3 of the Convention*

In conformity with Article 37, paragraph 2, Switzerland deposited its instrument of ratification of the above-mentioned Convention with the Ministry of Foreign Affairs of the Kingdom of the Netherlands on 11 October 1983.

The Swiss Government notified that the Central Authority as provided for in Article 6 of the Convention is:

adresse/address:

L'Office fédéral de Justice du Département fédéral de Justice et Police

3003 BERNE

Suisse

numéro de téléphone/telephone number:

Secrétariat/Secretariat:

(41)-31-322-4122

numéro de télex/telex number:

911268

numéro de télécopie/telefax number:

(41)-31-322-7864

personnes à contacter/persons to contact:

Mme/Ms Nicolette RUSCA

(langues de communication/languages of

communication: français, allemand, italien, anglais/French, German, Italian, English)

tél./tel.: (41)-31-322-4108

M./Mr Hans KUHN

(langues de communication/languages of

communication: français, allemand, italien, anglais, espagnol/French, German, Italian, English, Spanish)

tél./tel.: (41)-31-322-5356

Mme/Mrs Franziska ABT

(langues de communication/languages of

communication: français, allemand, italien, anglais/French, German, Italian, English)

tél./tel.: (41)-31-322-4222

M./Mr Alexander R. MARKUS

(langues de communication/languages of

communication: français, allemand, anglais/French, German, English)

In accordance with Article 43 the Convention shall enter into force for Switzerland on 1 January 1984.

8c Entry into force between Thailand and

the Netherlands	1 December 2002
Luxembourg	1 December 2002
Finland	1 March 2003
Colombia	1 May 2003
Uruguay	1 May 2003
Czech Republic	1 May 2003
Costa Rica	1 July 2003

8d In accordance with Article 38, paragraph 5, the Convention entered into force between Trinidad and Tobago and the following States:

the Slovak Republic	1 February 2001
Ireland	1 February 2001
Finland	1 February 2001
Panama	1 March 2001
Colombia	1 March 2001
Australia	1 May 2001
Belarus	1 May 2001
Argentina	1 October 2001
Spain	1 January 2002
Portugal	1 January 2002
Norway	1 April 2002
Hungary	1 June 2002
Uzbekistan	1 June 2002
the Netherlands (for the Kingdom in Europe)	1 June 2002
Brazil	1 June 2002
Israel	1 August 2002
Chile	1 December 2002
Poland	1 March 2003
El Salvador	1 March 2003
Guatemala	1 March 2003
Latvia	1 March 2003
Nicaragua	1 March 2003
Peru	1 March 2003
Uruguay	1 May 2003

9 With the following reservation:

``(…) that in accordance with paragraph 3 of Article 26, the Republic of Turkey shall not be bound to assume any costs and expenses of the proceedings or, where applicable, those arising from the participation of legal counsel or advisers and those of returning the child."

In accordance with Article 6, the following Central Authority has been designated:

Ministry of Justice

General Directorate of International Law and Foreign Relations

The Ministry of Foreign Affairs of the Kingdom of the Netherlands received a Note dated 18 October 2000 from the Embassy of Finland concerning the reservation made by Turkey. The Note reads as follows:

``The Government of Finland is unable to accept the reservation in so far as it is incompatible with Article 26(3) and 42(1) of the Convention.

According to the Article 26(3), a Contracting State may, be making a reservation in accordance with Article 42, declare that it shall not be bound to assume any costs referred to in the preceding paragraph resulting from the participation of legal counsel or advisers or from court proceedings, *except insofar as those costs may be covered by its system of legal aid and advice.*

Having regard to the wording and the purpose of this provision the Finnish Government considers that the reservation made by Turkey, which excludes also the costs covered by Turkey's system of legal aid and advice, is not allowed under Article 26(3) and 42(1). In conclusion, the Finnish Government declares that in relation to Finland this reservation may not be invoked by Turkey in so far as this would be incompatible with the aforementioned provisions of the Convention…".

9a *Under Article 38, the Convention is not in force between the United States and Turkmenistan.*

In accordance with Article 38, paragraph 5, the Convention entered into force between Turkmenistan and the following States:

the Kingdom of the Netherlands (for the Kingdom in Europe)	1 May 1998
the United Kingdom of Great Britain and Northern Ireland	1 May 1998
Israel	1 June 1998
Finland	1 July 1998
Germany	1 August 1998
the Czech Republic	1 August 1998
Australia	1 November 1998
Argentina	1 November 1998
China, Hong Kong Special Administrative Region only	1 December 1998
Chile	1 June 1999
Spain	1 October 1999
Georgia	1 January 2000
Bosnia and Herzegovina	1 December 2000
Canada	1 January 2001
Ireland	1 January 2001
the Slovak Republic	1 February 2001
Poland	1 February 2001
Switzerland	1 February 2001
Colombia	1 April 2001
Italy	1 August 2001
Portugal	1 January 2002
Hungary	1 June 2002
Norway	1 June 2002

In accordance with Article 6, paragraph 1, Turkmenistan has designated as Central Authority:

Turkmen National Institute of Democracy and Human Rights under the President of Turkmenistan
Karl Libkneht St., 47

ASHGABAT 744000

9b Ukraine Accession

Convention of 25 October 1980 on the Civil Aspects of International Child Abduction

Accession accepted by	**Date of acceptance**	**Entry into force**
Latvia	15-VIII-2005	1-XI-2006
Czech Republic	4-IX-2006	1-XII-2006
Romania	6-IX-2006	1-XII-2006
Bulgaria	14-IX-2006	1-XII-2006
Luxembourg	27-IX-2006	1-XII-2006
Slovakia	10-X-2006	1-I-2007
Greece	1-XI-2006	1-II-2007
Panama	2-XI-2006	1-II-2007
Cyprus	8-XI-2006	1-II-2007
Netherlands	13-XI-2006	1-II-2007
Honduras	16-XI-2006	1-II-2007
Israel	28-XI-2006	1-II-2007
Uruguay	7-XII-2006	1-III-2007
Hungary	7-XII-2006	1-III-2007
Ecuador	12-XII-2006	1-III-2007
Italy	20-XII-2006	1-III-2007
Peru	27-XII-2006	1-III-2007
Poland	10-I-2007	1-IV-2007
Estonia	11-I-2007	1-IV-2007
Chile	30-I-2007	1-IV-2007
Serbia	1-II-2007	1-V-2007
Mexico	8-II-2007	1-V-2007
France	16-II-2007	1-V-2007
Argentina	19-II-2007	1-V-2007
Finland	20-II-2007	1-V-2007
Portugal	8-III-2007	1-VI-2007
Colombia	2-IV-2007	1-VII-2007
Monaco	10-IV-2007	1-VII-2007
Belgium	23-IV-2007	1-VII-2007
Brazil	24-IV-2007	1-VII-2007
New Zealand	27-IV-2007	1-VII-2007
Bahamas	16-V-2007	1-VIII-2007
United States of America	1-VI-2007	1-IX-2007
Sweden	26-VI-2007	1-IX-2007
Croatia	12-VII-2007	1-X-2007
Germany	15-X-2007	1-I-2008
Ireland	31-X-2007	1-I-2008
Spain	13-XII-2007	1-III-2008
Bosnia and Herzegovina	18-XII-2007	1-III-2008
Turkey	3-I-2008	1-IV-2008
Montenegro	25-II-2008	1-V-2008
China, People's Republic of	14-III-2008	1-VI-2008
Slovenia	7-VII-2008	1-X-2008
Venezuela	7-VIII-2008	1-XI-2008
Georgia	22-IX-2008	1-XII-2008
The former Yugoslav	29-X-2008	1-I-2009

Republic of Macedonia		
Lithuania	29-XII-2008	1-III-2009

Entry into force between Ukraine and	**Entry into force**
Latvia	1-XI-2006
Czech Republic	1-XII-2006
Romania	1-XII-2006
Bulgaria	1-XII-2006
Luxembourg	1-XII-2006
Slovakia	1-I-2007
Greece	1-II-2007
Panama	1-II-2007
Cyprus	1-II-2007
Netherlands	1-II-2007
Honduras	1-II-2007
Israel	1-II-2007
Uruguay	1-III-2007
Hungary	1-III-2007
Ecuador	1-III-2007
Italy	1-III-2007
Peru	1-III-2007
Poland	1-IV-2007
Estonia	1-IV-2007
Chile	1-IV-2007
Serbia	1-V-2007
Mexico	1-V-2007
France	1-V-2007
Argentina	1-V-2007
Finland	1-V-2007
Portugal	1-VI-2007
Colombia	1-VII-2007
Monaco	1-VII-2007
Belgium	1-VII-2007
Brazil	1-VII-2007
New Zealand	1-VII-2007
Bahamas	1-VIII-2007
United States of America	1-IX-2007
Sweden	1-IX-2007
Croatia	1-X-2007
Germany	1-I-2008
Ireland	1-I-2008
Spain	1-III-2008
Bosnia and Herzegovina	1-III-2008
Turkey	1-IV-2008
Montenegro	1-V-2008
China, People's Republic of	1-VI-2008
Slovenia	1-X-2008
Venezuela	1-XI-2008
Georgia	1-XII-2008
The former Yugoslav Republic of Macedonia	1-I-2009
Lithuania	1-III-2009

10 *Notification in pursuance of Article 45, paragraphs 1 and 3, of the Convention*

In conformity with Article 37, paragraph 2, the United Kingdom of Great Britain and Northern Ireland deposited its instrument of ratification of the above-mentioned Convention with the Ministry of Foreign Affairs of the Kingdom of the Netherlands on 20 May 1986.

The instrument of ratification contains the following reservation:

``… ., in accordance with the provisions of Article 42 of the Convention, the United Kingdom declares that it shall not be bound to assume any costs referred to in the second paragraph of Article 26 of the Convention resulting from the participation of legal counsel or advisers or from court proceedings, except insofar as those costs may be covered by its system of legal aid and advice."

The Government of the United Kingdom declared, that, in accordance with Article 6 of the Convention, it has designated the following Central Authorities:

``(i) for England and Wales,

(Central Authority for England and Wales and the Central Authority to which applications may be addressed for transmission to the appropriate Central Authority within the United Kingdom.)

adresse/address:

The Lord Chancellor

The Lord Chancellor's Department,

Trevelyan House,

30 Great Peter Street

LONDON SW1P 2 BY

United Kingdom

(ii) for Northern Ireland,

Northern Ireland Court Service
Windsor House,
9/15 Bedford Street,
Belfast BT 7LT.;
Northern Ireland
+ 44 (1232) 328 594
persons to contact: Mme/Mrs LAURA MCPOLIN
(remplace Mme Bowers/replaced Mrs Bowers)
telefax number: + 44 (1232) 439 110

(iii) Office of the Secretary of State for Scotland

The Scottish Courts Administration
26/27 Royal Terrace
EDINBURGH EH7 5AH
Scotland U.K.
numéro de téléphone/telephone number: (031) 556 0755
personnes à contacter/persons to contact: M./Mr ROBERTSON
In conformity with Article 6, paragraph 2, of the Convention, the United Kingdom of Great Britain and Northern Ireland designated as Central Authority to which applications may be addressed for transmission to the appropriate Central Authority:

``the Lord Chancellor
the Lord Chancellor's Department,
Trevelyan House,
30 Great Peter Street
London SW1P 2BY."

The Convention is ratified in respect of the United Kingdom of Great Britain and Northern Ireland only. The Government of the United Kingdom declared, that, in accordance with Article 39 of the Convention, it will notify the depositary in due course of the territories for the international relations of which it is responsible, to which the Convention is to be extended.

In accordance with Article 43, paragraph 1, the Convention will enter into force for the United Kingdom of Great Britain and Northern Ireland on 1 August 1986.

Notification pursuant to Article 45 of the Convention

On 28 June 1991 the United Kingdom of Great Britain and Northern Ireland declared in accordance with Article 39 that the Convention shall extend to the Isle of Man.

The Convention will enter into force for the Isle of Man on 1 September 1991 in accordance with Article 43, paragraph 2.

On 8 May 1998 the United Kingdom of Great Britain and Northern Ireland extended the Convention to the Cayman Islands. The Convention entered into force for the Cayman Islands on 1 August 1998.

The Central Authority designated for the Cayman Islands: The Attorney General, Government Administration Building, GRAND CAYMAN, Cayman Islands.

On 26 March 1998 the United Kingdom of Great Britain and Northern Ireland extended the

Convention to the Falkland Islands. The Convention entered into force for the Falkland Islands on 1 June 1998.

The Central Authority designated for the Falkland Islands: The Governor, Government House, STANLEY, Falkland Islands.

By Note dated 8 December 1998, received at the Ministry of Foreign Affairs of the Kingdom of the Netherlands on 10 December 1998, the United Kingdom of Great Britain and Northern Ireland has extended the Convention in accordance with Article 39 to Montserrat.

In accordance with Article 43, paragraph 2, sub 2, the Convention will enter into force for Montserrat on 1 March 1999.

In accordance with Article 6, paragraph 2, of the Convention, the United Kingdom designated the following Central Authority for Montserrat:

The Attorney General
Attorney General's Chambers
Montserrat
West Indies

By Note dated 21 December 1998, the United Kingdom of Great Britain and Northern Ireland has extended the Convention in accordance with Article 39 to Bermuda.

In accordance with Article 43, paragraph 2, sub 2, the Convention will enter into force for Bermuda on 1 March 1999.

In accordance with Article 6, paragraph 2, of the Convention, the United Kingdom designated the following Central Authority for Bermuda:

The Attorney General
Attorney General's Chambers
Hamilton
Bermuda

10a *Notification pursuant to Article 45 of the Convention*

In accordance with Article 37, paragraph 2, the United States of America deposited on 29 April 1988 its instrument of ratification of the above-mentioned Convention with the Ministry of Foreign Affairs of the Kingdom of the Netherlands.

The instrument of ratification contains the following reservations:

``(1) Pursuant to the second paragraph of Article 24, and Article 42, the United States makes the following reservation: All applications, communications and other documents sent to the U.S. Central Authority should be accompanied by their translation into English.

(2) Pursuant to the third paragraph of Article 26, the United States declares that it will not be bound to assume any costs or expenses resulting from the participation of legal counsel or advisers or from court and legal proceedings in connection with efforts to return children from the United States pursuant to the Convention except insofar as those costs or expenses are covered by a legal aid program.''

The United States of America designated as the Central Authority mentioned in Article 6 of the Convention:

Central Authority designated under the *Hague Convention of 25 October 1980 on the civil aspects of international child abduction.*

adresse/address:

Office of Children's Issues (CA/OCS/CI)

US Department of State

2201 C Street, N.W.

WASHINGTON, DC 20520-4818

United States of America

numéro de téléphone/telephone number:

(1)-202-312-9743

personnes à contacter/persons to contact:

Mme/Ms. Michelle Bernier-Toth, Director

M./Mr. Jonathan Fishbein, Chief,

P.L. 100-300 (42 U.S.C. 11601) (International Child Abduction Remedies Act) was enacted to facilitate implementation of the Convention. Pertinent regulations may be found at 22 CFR 94; pertinent forms may be obtained from the Office of Children's Issues (CA/OCS/CI), Room 4811, Department of State, Washington, D.C. 20520-4811; phone number (202) 736-7000.

In accordance with Article 43, the Convention entered into force for the United States of America on July 1, 1988.

10b In accordance with Article 6, Uruguay designated the following Central Authority:

``Dirección de Cooperación Jurídica Internacional y de Justicia del Ministerio de Educación y Cultura

Dirección: Avda. 18 de Julio 1377, 1 ^{0} piso

Montevideo''

In accordance with Article 38, paragraph 5, the Convention entered into force between Uruguay and the following States:

Argentina	1 April 2000
Luxembourg	1 April 2000
Israel	1 April 2000
Chile	1 May 2000
Poland	1 May 2000
Finland	1 September 2000
Colombia	1 September 2000
Ireland	1 January 2001
the Slovak Republic	1 February 2001
Switzerland	1 February 2001
Panama	1 March 2001
Belarus	1 May 2001
Spain	1 May 2001
Australia	1 May 2001
South Africa	1 June 2001
Mexico	1 June 2001
Italy	1 July 2001
Moldova	1 September 2001
Germany	1 October 2001
the Czech Republic	1 October 2001
El Salvador	1 October 2001
Nicaragua	1 October 2001
Portugal	1 January 2002
the Kingdom of the Netherlands (for the Kingdom in Europe)	1 January 2002
Norway	1 April 2002
Hungary	1 June 2002
Uzbekistan	1 June 2002
Sweden	1 September 2002
Greece	1 January 2003
Estonia	1 May 2003
Guatemala	1 May 2003

Latvia	1 May 2003
Lithuania	1 May 2003
Peru	1 May 2003
Sri Lanka	1 May 2003
Thailand	1 May 2003
Trinidad and Tobago	1 May 2003

11 In accordance with Article 38, paragraph 2, the Republic of Uzbekistan deposited its instrument of accession to the Convention with the Ministry of Foreign Affairs of the Kingdom of the Netherlands on 31 May 1999.

The instrument of accession contains the following reservation:

``The Republic of Uzbekistan shall not be bound to assume any costs referred to in the paragraph 2 of the Article 26 and resulting from the participation of legal counsel or from court proceedings.''

The Republic of Uzbekistan designated as Central Authority: Ministry of Justice of the Republic of Uzbekistan, International Law Department, 5, Saylgoh Street, TASHKENT CITY 700047, Uzbekistan.

In accordance with Article 38, paragraph 5, the Convention entered into force between Uzbekistan and the following States:

Israel	1 October 1999
Poland	1 January 2000
Slovenia	1 March 2000
Argentina	1 April 2000
Belarus	1 September 2000
Chile	1 October 2000
Bosnia and Herzegovina	1 December 2000
Ireland	1 January 2001
the Slovak Republic	1 February 2001
Switzerland	1 February 2001
Colombia	1 April 2001
Spain	1 May 2001
Australia	1 May 2001
Italy	1 August 2001
Moldova	1 September 2001
Portugal	1 January 2002
the Czech Republic	1 January 2002
the Netherlands (for the Kingdom in Europe)	1 April 2002
Norway	1 April 2002
Hungary	1 June 2002
Brazil	1 June 2002
Guatemala	1 June 2002
Latvia	1 June 2002
Malta	1 June 2002
Nicaragua	1 June 2002
Peru	1 June 2002
Trinidad and Tobago	1 June 2002
Uruguay	1 June 2002
Sri Lanka	1 June 2002
El Salvador	1 June 2002
Estonia	1 June 2002

11a Central Authority designated under the *Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction.*

adresse/address:

Ministerio de Relaciones Exteriores

Torre Ministerio de Relaciones Exteriores

Conde a Carmelitas

Piso 6

CARACAS 1010

Venezuela

numéro de téléphone/telephone number:

+58 (2) 862 1145 ou/or +58 (2) 819 691

numéro de télex/telex number:

—

numéro de télécopie/telefax number:

+58 (2) 862 2420

adresse e-mail/e-mail address:

personnes à contacter/persons to contact:

Ambassador Carmen MARTINEZ DE GRIJALBA

División de Asuntos Especiales

Dirección General Sectorial de Relaciones

Consulares

(langue de communication/language of

communication: espagnol/Spanish)

The Embassy of Finland presents its compliments to the Ministry of Foreign Affairs of the Netherlands and, with reference to the ratification by the Republic of Venezuela of the Hague Convention on the Civil Aspects of International Child Abduction (1980), has the honour to inform the Ministry on the following.

The Government of Finland has noted that when ratifying the above-mentioned Convention on 16 October 1996 the Republic of Venezuela has made the following reservations:

``All communications to the Central Authority should be drawn up in the Spanish language. The Republic of Venezuela is not bound to assume any costs referred to in Article 26, paragraph 3.''

The Government of Finland is unable to accept these reservations in so far as they are incompatible with Article 24, paragraph 2, Article 26, paragraph 3 and Article 42, paragraph 1 of the Convention.

According to Article 24, paragraph 1, any application, communication or other document sent to the Central Authority shall be in the original language, and shall be accompanied by a translation into the official language or one of the official languages of the requested State or, where that is not feasible, a translation into French or English.

Under Article 24, paragraph 2, a Contracting State may, by making a reservation, object to the use of either French or English, but not both, in any application, communication or other document sent to its Central Authority. Having regard to the wording and the purpose of this provision the Finnish Government considers that the reservation made by the Republic of Venezuela, which excludes the use of both French and English languages in cases where it is not feasible to obtain a translation of the document into Spanish, is not allowed under Article 24, paragraph 2 and Article 42, paragraph 1.

In addition, the reservation seems to require that all communications, even the original documents transmitted to the Venezuelan Central Authority shall be in the Spanish language whereas under Article 24, paragraph 1 the documents shall be in the original language and, in addition, accompanied by a translation into the official language or official languages of the State addressed (or, where that, i.e. translation, is not feasible, into French or English). Such a requirement, implicit in the reservation, is not only incompatible with Article 24 but also in most cases impossible to comply with in cases where the original documents which under paragraph 1 shall be sent to the State addressed have not been drawn up in Spanish.

According to Article 26, paragraph 3, a Contracting State may make a reservation not to be bound to assume any costs referred to in paragraph 2 resulting from the participation of legal counsel or advisers or from court proceedings, except insofar as those costs may be covered by its system of legal aid and advice. However, the reservation by the Republic of Venezuela seems to indicate that in the application of the Convention Venezuela would not assume any costs referred to above, under any circumstances and not even in cases where those costs might be covered by the Venezuelan system of legal aid and advice, if available. The Finnish Government considers that such a reservation is incompatible with Article 26, paragraph 3 and Article 42, paragraph 1 of the Convention.

In conclusion, the Finnish Government declares that in relation to Finland these reservations may not be invoked by the authorities of the Republic of Venezuela in so far as this would be incompatible with the aforementioned provisions of the Convention.

This declaration is not to be interpreted as preventing the entry into force of the Convention between Finland and the Republic of Venezuela.

The Ministry of Foreign Affairs of the Kingdom of the Netherlands, depositary of the above-mentioned Convention, has the honour to inform the Member States of the Hague Conference on Private International Law and States having acceded to the Convention that the Government of Germany on 15 April 1997 has deposited the following declaration concerning a reservation with regard to Article 26 of the Convention, made by Venezuela on the occasion of the ratification on 16 October 1996:

<u>Translation</u>

``The reservation made by Venezuela is taken by the Federal Government to mean that persons eligible for legal aid who enter an application pursuant to the above-mentioned Convention may invoke the provisions laid down in the Venezuelan code of civil procedure as generally applicable to such persons, namely that free access to the courts and to legal counsel is also guaranteed in respect of proceedings pursuant to the Convention."

12 Under the following reservation:

``… subject to the reservation that the costs mentioned in the second paragraph of Article 26 of the aforesaid Convention shall not be borne by the State".

In accordance with Article 6, paragraph 1, Zimbabwe has designated as Central Authority: ``the Secretary for the Ministry of Justice, Legal and Parliamentary Affairs".

adresse/address:

Permanent Secretary of the Ministry of Justice

Legal and Parliamentary Affairs

Corner House

Samora Machel Avenue/Leopold Takawira Street

PO Box 7704

HARARE

Zimbabwe

numéro de téléphone/telephone number:

(263)-4-737-9319 or (263)-4-790-9027

numéro de télex/telex number:

—

numéro de télécopie/telefax number:

personnes à contacter/persons to contact:

In accordance with article 38, paragraph 5, the Convention entered into force between Zimbabwe and the following States:

the United States of America	1 August 1995
the United Kingdom of Great Britain and Northern Ireland*	1 October 1995
Luxembourg	1 October 1995
the Kingdom of the Netherlands (for the Kingdom in Europe)	1 November 1995
New Zealand	1 November 1995
Mexico	1 December 1995
Australia	1 April 1996
Chile	1 May 1996
Cyprus	1 August 1996
Argentina	1 December 1996
Ireland	1 January 1997
Norway	1 January 1997
Germany	1 February 1997
Italy	1 April 1997
Switzerland	1 May 1997
Finland	1 May 1997
Spain	1 June 1997
Venezuela	1 September 1997
Greece	1 October 1997
Israel	1 October 1997
Sweden	1 January 1998
Canada	1 January 1998
Poland	1 March 1998
the Czech Republic	1 August 1998
the Slovak Republic	1 February 2001
Portugal	1 January 2002
Hungary	1 June 2002

* The Note of the Embassy of the United Kingdom contains the following declaration with regard to the accession of Zimbabwe to the Convention: ``Notwithstanding the provisions of the said Article 38 regarding entry into force of the Convention as between the acceding State and the State that has declared its acceptance of the accession, the municipal law of the United Kingdom will be amended with effect from 1 July 1995 to give effect to the provisions of the Convention between it and Zimbabwe from the date when the Convention enters into force for Zimbabwe. I should be grateful for confirmation of the date of 1 July 1995 as the date on which the Convention will enter into force between the United Kingdom and Zimbabwe.'' The Ministry of Foreign Affairs of the Kingdom of the Netherlands has not yet received any communication from the Government of Zimbabwe concerning the date of entry into force proposed by the United Kingdom.

Endnotes

1 ***Albania Accession***

Accession accepted by	Date of acceptance	Entry into force
Monaco	15-VI-2007	1-IX-2007
Latvia	3-VII-2007	1-X-2007
Netherlands	13-VII-2007	1-X-2007

Germany	18-VII-2007	1-X-2007
Poland	1-VIII-2007	1-XI-2007
Greece	13-VIII-2007	1-XI-2007
Israel	23-VIII-2007	1-XI-2007
Slovakia	8-X-2007	1-I-2008
Czech Republic	11-X-2007	1-I-2008
San Marino	29-X-2007	1-I-2008
Ireland	31-X-2007	1-I-2008
Sweden	14-I-2008	1-IV-2008
New Zealand	1-II-2008	1-V-2008
China, People's Republic of	18-VI-2008	1-IX-2008
Venezuela	15-X-2008	1-I-2009
Lithuania	29-XII-2008	1-III-2009
Finland	18-II-2009	1-V-2009
Spain	2-VI-2009	1-IX-2009

Entry into force between Albania and	**Entry into force**
Monaco	1-IX-2007
Latvia	1-X-2007
Netherlands	1-X-2007
Germany	1-X-2007
Poland	1-XI-2007
Greece	1-XI-2007
Israel	1-XI-2007
Slovakia	1-I-2008
Czech Republic	1-I-2008
San Marino	1-I-2008
Ireland	1-I-2008
Sweden	1-IV-2008
New Zealand	1-V-2008
China, People's Republic of	1-IX-2008
Venezuela	1-I-2009
Lithuania	1-III-2009
Finland	1-V-2009
Spain	1-IX-2009

China, People's Republic of—Entry into force
(acceptance on behalf of the SAR of Macao only)

Central Authority

Ministry of Justice
Bulevardi ``Zogu I''
TIRANA
Albania
Tel.: +355 (4) 22 59 388 ext. 2208
Fax: +355 (4) 22 34 560

Contact person: Eriketa Korini, Expert, Juvenile and Family Law Bureau, General Directorate of Codification

E-mail: ekorini@justice.gov.al

Internet: http://www.justice.gov.al

Reservations

Articles: 26

In accordance with Article 42 of the Convention, the Republic of Albania reserves the right that it shall not be bound to assume any costs referred to in the second paragraph of Article 26 of the Convention resulting from the participation of legal counsel or advisers or from court proceedings, except insofar as those costs may be covered by its system of legal aid and advice.

1a *Notification pursuant to Article 45, first paragraph, of the Convention*

In conformity with Article 37, first paragraph, the Chargé d'Affaires a.i. of the Argentine Republic signed the above-mentioned Convention for the Argentine Republic as follows on 28 January 1991:

GASIO

28 JAN 91

In accordance with Article 37, paragraph 2, Argentina deposited its instrument of ratification of the abovementioned Convention with the Ministry of Foreign Affairs on 19 March 1991.

In accordance with Article 6, paragraph 1, of the Convention Argentina has designated as the Central Authority:

``The Ministry of Foreign Relations—Legal Affairs Department (Ministerio de Relaciones Exteriores y Culto—Dirección de Asuntos Jurídicos)''.

N.B. See also *infra,* 10 UNITED KINGDOM OF GREAT BRITAIN AND NORTHERN IRELAND, Extensions, note**.

In accordance with Article 43 the Convention will enter into force for Argentina on 1 June 1991.

Central Authority designated under the *Hague Convention of 25 October 1980 on the civil aspects of international child abduction.*

adresse/address:

Ministerio de Relaciones Exteriores

Ministry of Foreign Affairs

Comercio Internacional y Culto

International Trade and Culture

Arenales 819—4th floor

1007 BUENOS AIRES

Argentina

numéro de téléphone/telephone number:

+54 (1) 819 7170 (Direct tel/fax)

+54 (1) 819 7000 (Ext. 7171/7187)

numéro de télex/telex number:

—

numéro de télécopie/telefax number:

+54 (1) 819 7170

+54 (1) 310 8210

+54 (1) 310 8227

personnes à contacter/persons to contact:

M./Mr Mariano MACIEL

Director General de Asuntos Jurídicos

tél./tel.: (54)-1-311-6815

Mme/Mrs Maria SEONAE DE CHIODI

Directora de Asistencia Judicial Internacional

M./Mr Ignacio GOICOECHEA

(languages of communication: espagnol Spanish/anglais/English)

tél./tel.: (54)-1-311-0071 ext. 166

Notification pursuant to Article 45 of the Convention

The Ministry of Foreign Affairs of the Kingdom of the Netherlands, depositary of the Convention on the Civil Aspects of International Child Abduction of 25 October 1980, has the honour, with reference to the depositary's notification No. 7/1998 of 22 April 1998, to inform the Member States of The Hague Conference on Private International Law and States having acceded to the above-mentioned Convention of the following. By Note A.E. N° 33/98 dated 31 May 1998 the Embassy of the Argentine Republic transmitted to the Depositary a declaration concerning the extension of the application of the Convention by the United Kingdom of Great Britain and Northern-Ireland to the Falkland Islands.

A copy of the Note and its enclosure are attached.

The Embassy of the Argentine Republic presents its compliments to the Ministry of Foreign Affairs of the Kingdom of the Netherlands -Treaties Division- and has the honour to address the Government of the Netherlands in its capacity of Depositary of the Convention on the Civil Aspects of International Child Abduction, done at The Hague on 25, October 1980.

In that respect, the Argentine Republic rejects the extension of the application of the Convention on the Civil Aspects of International Child Abduction, done at The Hague on 25th, October 1980, to the Malvinas, South Georgia and South Sandwich Islands, notified by the United Kingdom of Great Britain and Northern Ireland to the Government of the Netherlands as Depositary of the

Convention.

The General Assembly of the United Nations has adopted resolutions 2065 (XX), 3160 (XXVIII), 31/49, 37/9, 38/12, 39/6, 40/21 and 41/40 which recognize the existence of a dispute over sovereignty relating to archipelago, urging the Argentine Republic and the United Kingdom of Great Britain and Northern Ireland to resume negotiations in order to find as soon as possible a peaceful and definitive solution to the dispute through the good offices of the Secretary-General of the United Nations, who is to report to the General Assembly on the progress made.

The Argentine Republic reaffirms its sovereign rights over the Malvinas, South Georgia and South Sandwich Islands and its surrounding maritime areas, which form an integral part of its National territory.

The Argentine Government requests the Government of the Netherlands to notify the preceding communication to the Members of the Hague Conference on Private International Law and Signatories and Parties to the above mentioned Convention.

The Embassy of the Argentine Republic kindly requests the Ministry of Foreign Affairs -Treaties Division- to circulate the preceding communication at the earliest possible convenience.

The Embassy of the Argentine Republic avails itself of this opportunity to renew to the Ministry of Foreign Affairs -Treaties Division- the assurances of its highest consideration.

1b ***Armenia Accession***

Convention of 25 October 1980 on the Civil Aspects of International Child Abduction

Accession accepted by	**Date of acceptance**	**Entry into force**
Slovakia	8-X-2007	1-I-2008
Latvia	16-X-2007	1-I-2008
Ireland	31-X-2007	1-I-2008
Czech Republic	13-XI-2007	1-II-2008
Poland	21-XI-2007	1-II-2008
Sweden	14-I-2008	1-IV-2008
New Zealand	17-III-2008	1-VI-2008
San Marino	25-III-2008	1-VI-2008
Monaco	31-III-2008	1-VI-2008
China, People's Republic of	18-VI-2008	1-IX-2008
France	14-X-2008	1-I-2009
Venezuela	15-X-2008	1-I-2009
Lithuania	29-XII-2008	1-III-2009
Finland	1-III-2009	1-VI-2009
Spain	2-VI-2009	1-IX-2009

Entry into force between Armenia and	**Entry into force**
Slovakia	1-I-2008
Latvia	1-I-2008
Ireland	1-I-2008
Czech Republic	1-II-2008
Poland	1-II-2008
Sweden	1-IV-2008
New Zealand	1-VI-2008
San Marino	1-VI-2008
Monaco	1-VI-2008
China, People's Republic of	1-IX-2008

France	1-I-2009
Venezuela	1-I-2009
Lithuania	1-III-2009
Finland	1-VI-2009
Spain	1-IX-2009

China, People's Republic of—Entry into force
(acceptance on behalf of the SAR of Macao only)

Armenia—Central Authority

Ministry of Justice of the Republic of Armenia
Department for Control
Halabyan 41/a
YEREVAN 0078
Republic of Armenia
Tel.: +374 (10)34 46 77
Fax: +374 (10) 38 03 82
E-mail: justice@justice.am

Reservations

Articles: 24,26

Pursuant to Article 42 of the Convention (…), the Republic of Armenia makes the following reservations:

1. With regard to Article 24, applications, communications or other documents sent to the Central Authority of the Republic of Armenia shall be in original languages and shall be accompanied by a translation into Armenian or, where that is not feasible, a translation into English.

2. With regard to Article 26, the Republic of Armenia shall not be bound to assume any costs referred to in Article 26, second paragraph, resulting from the participation of legal counsel or advisers or from court proceedings, except insofar as those costs may be covered by its system of legal aid and advice.

1c *Notification pursuant to Article 45 of the Convention*

In conformity with Article 37, first paragraph, the above-mentioned Convention was signed for Australia on 29 October 1986 as follows:

``GEOFFREY PRICE
29 October 1986."

In conformity with Article 37, paragraph 2, Australia deposited on the same date its instrument of ratification of the Convention with the Ministry of Foreign Affairs of the Kingdom of the Netherlands.

The Government of Australia declared in accordance with Article 40 that the Convention extends to the legal system applicable only in the Australian States and mainland Territories.

In accordance with Article 43, paragraph 1, the Convention will enter into force for Australia on 1 January 1987.

The Australian Embassy informed the Ministry of Foreign Affairs of the Kingdom of the Netherlands by Note of 23 December 1986 of the designation of the following Central Authorities by Australia in accordance with Article 6 of the above-mentioned Convention:

A. Pour le *Commonwealth Central Authority/*For the Commonwealth Central Authority

``A. Commonwealth Central Authority
Secretary
Attorney-General's Department
Canberra

Note: La Convention ne s'applique qu'au système juridique applicable aux Etats australiens et aux territories continentaux.

Certains organes des états et territoires australiens sont autorisés à remplir certaines fonctions conformément à la Convention, mais ne sont pas autorisés à recevoir ou à transmettre des demandes. Toute communication doit être soumise d'abord à l' *Attorney General's Department (Commonwealth Central Authority).*

The Convention extends to the legal system applicable only in the Australian States and mainland Territories.

Some Australian State and Territory agencies have been appointed to carry out some functions under the Convention but are not authorised to receive or transmit applications. Communications should be sent in the first instance to the Attorney-General's Department.

(Les renseignements mentionnés ci-dessus sont valables à partir du *3 avril 1997*)

(The effective date of the above information is *3 April 1997*)

B. State Central Authorities

```
        Director,
(i)     Department of Children's Services,
        Queensland
        Secretary,
(ii)    Department of Community Development,
        Northern Territory.
(iii)   Director-General,
        Department of Community Services,
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Victoria.

(iv) Director-General
Department of Youth and Community Services,
New South Wales.

(v) Director for Community Welfare,
Department for Community Welfare,
Tasmania.

(vi) Commissioner,
Western Australian Police Department,
Western Australia.

(vii) Commissioner,
South Australian Police Department,
South Australia.

(viii) Director of Welfare,
Department of Territories,
Australian Capital Territory.

Applications should be forwarded to the Commonwealth Central Authority for initial processing, addressed as follows: The Secretary, Attorney-General's Department, National Circuit, Barton A.C.T. 2600."

1d *Notification pursuant to Article 45 of the Convention*

In accordance with Article 37, paragraph 2, Austria deposited on 14 July 1988 its instrument of ratification of the above-mentioned Convention with the Ministry of Foreign Affairs of the Kingdom of the Netherlands.

The Convention will enter into force for Austria in accordance with Article 43 on 1 October 1988.

Austria designated as the Central Authority mentioned in Article 6 of the Convention:

adresse/address:

Bundesministerium für Justiz

Abteilung I 10

Postfach 63

A-1016 Vienna

Austria

numéro de téléphone/telephone number:

Secrétariat/Secretariat:

+43 (1) 52152 2147

numéro de télex/telex number:

13/1264

numéro de télécopie/telefax number:

+43 (1) 52152 2829 ou/or +43 (1) 52152 2727

personnes à contacter/persons to

contact:

M/Mr Werner SCHüTZ (langues de communication/languages of communication: anglais et allemand/English and German) tél./tel.: +43 (1) 52152 2134
ou/or (en cas d'absence/in his absence)

M/Mr Ihor TARKO (langues de communication/languages of communication: anglais et allemand/English and German)
tél./tel.: (222) 52152 2292
Mlle/Ms Ruth STRAGANZ (langues de communication/languages of communication: anglais, français, allemand/English, French, German)

tél./tel.: +43 (1) 52152 2115

1e In accordance with Article 38, paragraph 5, the Convention is in force between the Bahamas and the following States:

the Kingdom of the Netherlands (for the Kingdom in Europe)	1 February 1994
the United States of America	1 January 1994
Luxembourg	1 March 1994
the United Kingdom of Great Britain and Northern Ireland*	1 March 1994

the Federal Republic of Germany	1 May 1994
Finland	1 August 1994
Australia	1 September 1994
Switzerland	1 October 1994
Ireland	1 December 1994
Sweden	1 January 1995
Spain	1 March 1995
Argentina	1 May 1995
Canada	1 August 1995
New Zealand	1 November 1995
Mexico	1 December 1995
Israel	1 January 1996
Italy	1 April 1997
France	1 September 1997
Venezuela	1 September 1997
Greece	1 October 1997
Poland	1 March 1998
the Czech Republic	1 August 1998
Norway	1 October 1998
the Slovak Republic	1 February 2001
Portugal	1 January 2002
Hungary	1 June 2002

* The United Kingdom made the following declaration with regard to the accession of the Bahamas to the Convention:

``Notwithstanding the provisions of the said Article 38 regarding entry into force of the Convention as between the acceding State and the State declaring its acceptance of the accession, amendments will have been made to the United Kingdom municipal law in order to give effect to the Convention between it and the Bahamas as of 1 January 1994 when the Convention enters into force for the Bahamas." The Ministry of Foreign Affairs of the Kingdom of the Netherlands has not yet received any communication from the Government of the Bahamas concerning the date of entry into force proposed by the United Kingdom.

Central Authority designated under the *Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction.*

adresse/address:

The Honourable Minister of Foreign Affairs of the Commonwealth of the Bahamas

Ministry of Foreign Affairs

PO Box No 3746

NASSAU

Bahamas

numéro de téléphone/telephone number:

+1 (242) 322 7624

numéro de télex/telex number:

—

numéro de télécopie/telefax number:

+1 (242) 328 8212 ou/or +1 (242) 326 2123

personnes à contacter/persons to contact:

—

1f Under Article 38, the Convention is not in force between the United States and Belarus.

Notification pursuant to Article 45 of the Convention

The Ministry of Foreign Affairs of the Kingdom of the Netherlands, depositary of the Convention on the Civil Aspects of International Child Abduction of 25 October 1980, has the honour to inform the Member States of The Hague Conference on Private International Law and the States having acceded to the above-mentioned Convention that in accordance with Article 38, paragraph 2, the Republic of Belarus deposited its instrument of accession with the Ministry of Foreign Affairs of the Kingdom of the Netherlands on 12 January 1998.

The instrument of accession contains the following reservation:

``The Republic of Belarus declares that it shall not be bound to assume any costs referred to in Paragraph 2 of Article 26 of this Convention resulting from the participation of legal counsel or advisers or from our court proceedings, except insofar as those costs may be covered by its system of legal aid and advice."

The Convention will enter into force for the Republic of Belarus on 1 April 1998 in accordance with Article 38, paragraph 3.

The accession will have effect only as regards the relations between the Republic of Belarus and such Contracting States as will have declared their acceptance of the accession.

In accordance with Article 38, paragraph 5, the Convention is in force between Belarus and the following States:

the Kingdom of the Netherlands (for the Kingdom in Europe and Aruba)	1 May 1998
Israel	1 June 1998
Finland	1 July 1998
the Czech Republic	1 August 1998
Australia	1 November 1998
Argentina	1 November 1998
Germany	1 February 1999
Moldova	1 February 1999
Paraguay	1 February 1999
Chile	1 June 1999
China, Hong Kong Special Administrative Region	1 June 1999
Spain	1 October 1999
Georgia	1 January 2000
Greece	1 March 2000
Fiji	1 September 2000
Costa Rica	1 September 2000
Uzbekistan	1 September 2000
Bosnia and Herzegovina	1 December 2000
Canada	1 January 2001
Ireland	1 January 2001
the Slovak Republic	1 February 2001
Poland	1 February 2001
Switzerland	1 February 2001
Colombia	1 April 2001
Brazil	1 May 2001
Malta	1 May 2001
Uruguay	1 May 2001
Trinidad and Tobago	1 May 2001
Italy	1 August 2001
Portugal	1 January 2002
Hungary	1 June 2002

In accordance with Article 6, first paragraph, the Republic of Belarus has designated the Ministry of Justice of the Republic of Belarus (220084 Minsk, ul.Kollektornaya, 10; tel. 375 172 208 687/208829; fax 209 684) as the Central Authority.

1g In accordance with Article 6, paragraph 1, Belgium has designated as Central Authority:

Ministére de la Justice

Direction générale de la Législation civile et des Cultes

Service Entraide judiciaire internationale.

1h *Notification pursuant to Article 45 of the Convention*

In accordance with Article 38, paragraph 2, of the above-mentioned Convention Belize deposited its instrument of accession to the Convention with the Ministry of Foreign Affairs of the Kingdom of the Netherlands on 22 June 1989.

The instrument of accession contains the following reservations:

``1) any application or other documents transmitted to the Central Authority under the Convention must be accompanied by a translation in English and not in French and

``2) Belize will not be bound to assume any costs relating to applications under the Convention resulting from the participation of legal counsel or advisers, or from court proceedings, except insofar as these costs may be covered by its system of legal aid and advice.''.

The Convention will enter into force for Belize in accordance with Article 38, paragraph 3, on 1 September 1989.

The accession will have effect only as regards the relations between the acceding State and such Contracting States as will have declared their acceptance of the accession.

In accordance with Article 6, paragraph 1, of the Convention, on July 13, 1990 Belize has designated the following as Central Authority:

adresse/address:

Ministry of Human Resources, Women's Affairs and Youth Development

West Block

Independence Hill

BELMOPAN

Belize

numéro de téléphone/telephone number:

+501 (08) 22161 ou/or +501 (08) 22684

numéro de télécopie/telefax number:

+501 (08) 23175

personnes à contacter/persons to contact:

M./Hon. Phillip S.W. GOLDSON

In accordance with Article 38, paragraph 5, the Convention is in force between Belize and the following States:

the United Kingdom of Great Britain and Northern Ireland	1 October 1989
the United States of America	1 November 1989
Australia	1 March 1990
Portugal	1 May 1990
the Kingdom of the Netherlands (for the Kingdom in Europe)	1 September 1990
the Federal Republic of Germany	1 December 1990
Luxembourg	1 January 1991
Sweden	1 April 1991
Canada	1 September 1991
Ireland	1 October 1991
France	1 January 1992
Israel	1 February 1992
Spain	1 July 1992
Switzerland	1 September 1992
Norway	1 October 1992
Finland	1 August 1994
Mexico	1 December 1995
Argentina	1 December 1996
Italy	1 April 1997
Venezuela	1 September 1997
Greece	1 October 1997
the Czech Republic	1 August 1998
the Slovak Republic	1 February 2001
Hungary	1 June 2002

1i One of the successor States to the former Socialist Federal Republic of Yugoslavia which became a Party to the Convention on 1 December 1991. On 23 August 1993, the Republic of Bosnia and Herzegovina declared itself to be bound by the Convention.

No objection has been received from the Contracting States.

In accordance with Article 6, first paragraph, Bosnia and Herzegovina has designated as Central Authority: ``the Ministry for Civil Affairs and Communications of Bosnia and Herzegovina''.

1j The instrument of accession contains the following reservation:*

``(…) avec une réserve quant à l'article 24 de ladite Convention, permise par son article 42, pour établir que les documents étrangers annexés aux actes judiciaires soient accompagnés de leur traduction en portugais par un traducteur assermenté officiel.''

Translation

(…) with a reservation as provided for in Article 24 of the said Convention (permitted under Article 42), to the effect that foreign documents appended to legal instruments must be accompanied by a translation into Portuguese done by a sworn translator.*

* The Ministry of Foreign Affairs of the Kingdom of the Netherlands received a Note dated 21 June 2000 from the Embassy of Finland concerning the reservation made by Brazil. The Note reads as follows:

``(…)The Government of Finland is unable to accept the reservation in so far as it is incompatible with Article 24(2) and 42(1) of the Convention.

According to Article 24(1), any application, communication or other document sent to the Central Authority shall be in the original language, and shall be accompanied by a translation into the official language or one of the official languages of the requested State, or *where that is not feasible, a translation into French or English.* Under Article 24(2) a Contracting State may, by making a reservation, *object the use of either French or English, but not both,* in any application, communication or other document sent to its Central Authority.

Having regard to the wording and purpose of this provision the Finnish Government considers that the reservation made by Brazil, which excludes the use of both French and English languages in cases where it is not feasible to obtain a translation of the document into Portuguese, is not allowed under Article 24(2) and 42(1). In conclusion, the Finnish Government declares that in relation to Finland this reservation may not be invoked by the authorities of Brazil in so far as this would be incompatible with the aforementioned provisions of the Convention. This declaration is not to be interpreted as preventing the entry into force of the Convention between Finland and Brazil. (…)''

In accordance with Article 38, paragraph 5, the Convention is in force between Brazil and the following States:

Argentina	1 April 2000
Luxembourg	1 April 2000
Israel	1 April 2000
Chile	1 April 2000
Poland	1 May 2000
Panama	1 July 2000
Finland	1 September 2000
Colombia	1 September 2000
Ireland	1 January 2001
the Slovak Republic	1 February 2001
Spain	1 May 2001
Australia	1 May 2001
Belarus	1 May 2001
Mexico	1 June 2001
Italy	1 August 2001
Moldova	1 September 2001
Portugal	1 January 2002
Austria	1 March 2002
the Netherlands (for the Kingdom in Europe)	1 April 2002
Norway	1 April 2002
Germany	1 May 2002
Hungary	1 June 2002
Uzbekistan	1 June 2002
El Salvador	1 June 2002
Estonia	1 June 2002

Guatemala	1 June 2002
Latvia	1 June 2002
Nicaragua	1 June 2002
Peru	1 June 2002
Sri Lanka	1 June 2002
Trinidad and Tobago	1 June 2002
Sweden	1 September 2002

1k *Bulgaria Accession*

Convention of 25 October 1980 on the Civil Aspects of International Child Abduction

Accession accepted by	**Date of acceptance**	**Entry into force**
Guatemala	26-IX-2003	1-XII-2003
Israel	3-X-2003	1-I-2004
Luxembourg	20-X-2003	1-I-2004
Ireland	27-X-2003	1-I-2004
Netherlands	13-XI-2003	1-II-2004
Hungary	17-XI-2003	1-II-2004
Brazil	4-II-2004	1-V-2004
Argentina	6-II-2004	1-V-2004
Chile	26-II-2004	1-V-2004
Slovakia	9-III-2004	1-VI-2004
Turkey	26-III-2004	1-VI-2004
Greece	13-IV-2004	1-VII-2004
Italy	7-V-2004	1-VIII-2004
Czech Republic	1-VI-2004	1-IX-2004
Estonia	15-VI-2004	1-IX-2004
Lithuania	7-VII-2004	1-X-2004
Australia	28-VII-2004	1-X-2004
Germany	15-IX-2004	1-XII-2004
United States of America	7-X-2004	1-I-2005
New Zealand	11-X-2004	1-I-2005
Finland	12-X-2004	1-I-2005
Venezuela	16-XI-2004	1-II-2005
Croatia	24-XI-2004	1-II-2005
Switzerland	10-XII-2004	1-III-2005
France	16-XII-2004	1-III-2005
Latvia	29-XII-2004	1-III-2005
Spain	17-I-2005	1-IV-2005
Norway	1-IV-2005	1-VII-2005
Cyprus	6-IV-2005	1-VII-2005
Bahamas	25-V-2005	1-VIII-2005
China, People's Republic of	30-V-2005	1-VIII-2005
Austria	14-VII-2005	1-X-2005
China, People's Republic of	21-VII-2005	1-X-2005
Belize	30-VIII-2005	1-XI-2005
Peru	29-XI-2005	1-II-2006
Uruguay	12-I-2006	1-IV-2006
Belgium	31-I-2006	1-IV-2006
Panama	2-XI-2006	1-II-2007
Honduras	16-XI-2006	1-II-2007

Poland	10-I-2007	1-IV-2007
Mexico	8-II-2007	1-V-2007
Colombia	2-IV-2007	1-VII-2007
Monaco	10-IV-2007	1-VII-2007
Sweden	26-VI-2007	1-IX-2007
Georgia	22-IX-2008	1-XII-2008
The former Yugoslav Republic of Macedonia	29-XII-2008	1-III-2009
United Kingdom of Great Britain and Northern Ireland	12-II-2009	1-V-2009

Entry into force between Bulgaria and	**Entry into force**
Dominican Republic	1-XII-2005
Ukraine	1-XII-2006
San Marino	1-VI-2007
Guatemala	1-XII-2003
Israel	1-I-2004
Luxembourg	1-I-2004
Ireland	1-I-2004
Netherlands	1-II-2004
Hungary	1-II-2004
Brazil	1-V-2004
Argentina	1-V-2004
Chile	1-V-2004
Slovakia	1-VI-2004
Turkey	1-VI-2004
Greece	1-VII-2004
Italy	1-VIII-2004
Czech Republic	1-IX-2004
Estonia	1-IX-2004
Lithuania	1-X-2004
Australia	1-X-2004
Germany	1-XII-2004
United States of America	1-I-2005
New Zealand	1-I-2005
Finland	1-I-2005
Venezuela	1-II-2005
Croatia	1-II-2005
Switzerland	1-III-2005
France	1-III-2005
Latvia	1-III-2005
Spain	1-IV-2005
Norway	1-VII-2005
Cyprus	1-VII-2005
Bahamas	1-VIII-2005
China, People's Republic of	1-VIII-2005
Austria	1-X-2005
China, People's Republic of	1-X-2005
Belize	1-XI-2005
Peru	1-II-2006
Uruguay	1-IV-2006
Belgium	1-IV-2006
Panama	1-II-2007
Honduras	1-II-2007
Poland	1-IV-2007
Mexico	1-V-2007
Colombia	1-VII-2007
Monaco	1-VII-2007
Sweden	1-IX-2007
Georgia	1-XII-2008
The former Yugoslav Republic of Macedonia	1-III-2009
United Kingdom of Great Britain and Northern Ireland	1-V-2009

Dominican Republic—Entry into force

China, People's Republic of—Entry into force

(30-V-2005: acceptance for the Special Administrative Region of Macao only)

China, People's Republic of—Entry into force

(21-VII-2005: acceptance for the Special Administrative Region of Hong Kong only)

United Kingdom of Great Britain and Northern Ireland—Entry into force

(acceptance also on behalf of Montserrat, the Cayman Islands, Bermuda, the Falkland Islands, the Isle of Man and Anguilla)

Bulgaria—Central Authority

The Ministry of Justice
Central Authority of the Republic of Bulgaria
1, Slavyanska Street
1040 SOFIA
numéros de téléphone/telephone numbers:
+359 (2) 923 7302 (experts)
numéro de télécopie/telefax number: +359 (2) 987 1557

Personne à contacter / person to contact:

Mrs Maria HRISTOVA
Chief expert, International Legal Child Support and Intercountry Adoptions Directorate
(langue de communication / language of communication: français / French)
e-mail: m.hristova@justice.government.bg

Reservations

Articles: 26,42

In accordance with Article 42, paragraph 1, of the Convention, the Republic of Bulgaria declares it shall not be bound to assume any costs and expenses resulting from proceedings or, where applicable, those arising from the participation of legal counsel and those of returning the child."

1I The Permanent Bureau of the Hague Conference on private international law presents its compliments to the Diplomatic Missions of the Member States and to the National Organs and has the honour to inform them that, by instrument deposited on 25 May 1992 with the Ministry of Foreign Affairs of the Kingdom of the Netherlands,

Burkina Faso

acceded to the above-mentioned Convention.

In conformity with Article 38, paragraph 3, the Convention will enter into force for *Burkina Faso* on 1 August 1992.

According to Article 38, paragraph 4, the accession will have effect only as regards Burkina Faso and such Contracting States as will have declared their acceptance of the accession.

In accordance with Article 38, paragraph 5, the Convention is in force between Burkina Faso and the following States:

the Kingdom of the Netherlands (for the Kingdom in Europe)	1 September 1992
the United Kingdom of Great Britain and Northern Ireland	1 November 1992
Luxembourg	1 November 1992
the United States of America	1 November 1992
France	1 January 1993
the Federal Republic of Germany	1 January 1993
Ireland	1 April 1993
Australia	1 April 1993
Argentina	1 August 1993
Canada	1 October 1993
Israel	1 November 1993
Sweden	1 December 1993
Finland	1 August 1994
Switzerland	1 October 1994
Spain	1 December 1994
New Zealand	1 November 1995
Mexico	1 December 1995
Italy	1 April 1997
Venezuela	1 September 1997
Greece	1 October 1997
Norway	1 March 1998
the Czech Republic	1 August 1998
the Slovak Republic	1 February 2001
Portugal	1 January 2002
Hungary	1 June 2002

The Permanent Bureau of the Hague Conference on private international law presents its compliments to the Diplomatic Missions of the Member States and to the National Organs and has the honour to inform them that, in accordance with Article 6, paragraph 1, of the above-mentioned Convention, *Burkina Faso* has designated as Central Authority:

``*Le Ministère délégué chargé de l'Action Sociale et de la Famille du Burkina Faso.''*

Central Authority designated under the *Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction.*

adresse/address:

Le Ministère de l'Action Sociale et de la Famille

01 BP 515

OUAGADOUGOU 01

Burkina Faso

numéro de téléphone/telephone number:

(226) 30 68 75

numéro de télex/telex number:

Segegou 5555

numéro de télécopie/telefax number:

(226) 31 67 37

personnes à contacter/persons to contact:

Mme/Ms Bana OUANDAOGO

Ministre de l'Action Sociale et de la Famille

(langue de communication/language of communication: français/French)

tél./tel.: (226) 30 68 75

Mme/Ms Patricia ZAIDA

Directrice de l'Enfance

(langue de communication/language of communication: français/French)

tél./tel.: (226) 30 68 80

Mme/Ms Haoua TAPSOBA

Chef de service de la sauvegarde de l'enfance en danger

(langue de communication/language of communication: français/French)

tél./tel.: (226) 30 68 80

2 *Notification in accordance with Article 45, paragraphs 1, 5 and 6 of the Convention*

In conformity with Article 37, paragraph 2, Canada deposited its instrument of ratification of the above-mentioned Convention with the Ministry of Foreign Affairs of the Kingdom of the Netherlands on 2 June 1983. Canada made the following declarations and reservations.

``*Extension of the Convention*

1. In accordance with the provisions of Article 40, the Government of Canada declares that the Convention shall extend to the Provinces of Ontario, New Brunswick, British Columbia and Manitoba.

Central Authorities

2. In accordance with the provisions of Article 6, paragraph 2, the Minister of Justice and Attorney General of Canada, as represented by the Domestic Legal Services in the Department of External Affairs, is designated as the Central Authority to which applications may be addressed for transmission to the appropriate Central Authority within Canada.

3. In accordance with the provisions of Article 6, paragraph 2, the Ministry of the Attorney General of Ontario is designated as the Central Authority for the Province of Ontario.

4. In accordance with the provisions of Article 6, paragraph 2, the Attorney General of New Brunswick is designated as the Central Authority for the Province of New Brunswick.

5. In accordance with the provisions of Article 6, paragraph 2, the Attorney General of British Columbia is designated as the Central Authority for the Province of British Columbia.

6. In accordance with the provisions of Article 6, paragraph 2, the Attorney General of Manitoba is designated as the Central Authority for the Province of Manitoba.

Reservations

7. In accordance with the provisions of Article 42 and pursuant to Article 26, paragraph 3, the Government of Canada declares that, with respect to applications submitted under the Convention concerning the Provinces of Ontario, New Brunswick and British Columbia, Canada will assume the costs referred to in paragraph 2 of Article 26 only insofar as these costs are covered by the system of legal aid of the Province concerned.

Other declarations and reservations

8. The Government of Canada further declares that it may at any time submit other declarations or reservations, pursuant to Articles 6, 40 and 42 of the Convention, with respect to other territorial units.".

Notification in accordance with Article 45, paragraphs 3 and 5, of the Convention

In conformity with Article 40 the Government of Canada extended the above-mentioned Convention to the Province of Nova Scotia by Note dated 24 February 1984 and received at the Ministry of Foreign Affairs of the Kingdom of the Netherlands on 27 February 1984.

The Canadian declaration extending the Convention to the Province of Nova Scotia contains the following declarations and reservations:

``*Central Authority*

In accordance with the provisions of Article 6, paragraph 2, the Attorney General of Nova Scotia is designated as the Central Authority for the Province of Nova Scotia.

Reservation

In accordance with the provisions of Article 42 and pursuant to Article 26, paragraph 3, the Government of Canada declares that, with respect to applications submitted under the Convention concerning the Province of Nova Scotia, Canada will assume the costs referred to in paragraph 2 of Article 26 only insofar as these costs are covered by the system of legal aid of the Province of Nova Scotia.

Other declarations and reservations

The Government of Canada further declares that it may at any time submit other declarations or reservations, pursuant to Articles 6, 40 and 42 of the Convention, with respect to other territorial units.".

In conformity with Article 43, paragraph 2, the Convention will enter into force for the Province of

Nova Scotia on 1 May 1984.

Federal Government:

Ministre de la Justice et Procureur général du Canada représenté par:

Minister of Justice and Attorney General of Canada as represented by:

Le Service de droit interne
Ministère des Affaires
extérieures (JDS)
Tour C, 7e étage
Imm. Lester B. Pearson
125 Promenade Sussex
OTTAWA, Ontario K1A OG2
Canada

Domestic Legal Services
Department of External Affairs (JDS)
Tower C, 7th Floor
Lester B. Pearson Building
125 Sussex Drive
OTTAWA, Ontario K1A OG2 Canada

numéro de téléphone/telephone number:

(613) 992 6299

numéro de télex/telex number:

053 3745

numéro de télécopie/telefax number:

(613) 992 2467

personnes à contacter/persons to contact:

Me/Mr Richard FIUTOWSKI

tél./tel.: (613) 992 8608

ou/or

Me/Ms Nora O'BRIEN

tél./tel.: (613) 992 6299

British Columbia:

Attorney General of British Columbia,

Parliament Buildings,

VICTORIA, British Columbia,

V8V 1X4

Contact: Bob Adamson,

Assistant Deputy Attorney

General,

Policy Planning,

telephone: (604) 384-4435

Pour la Province de l'Ontario/For the Province of Ontario

adresse/address:

Ministry of the Attorney General

PO Box 640

DOWNSVIEW, Ontario

Canada

M3M 3A3

numéro de téléphone/telephone number:

(1)-416-240-2411

numéro de télex/telex number:

—

numéro de télécopie/telefax number:

(1)-416-240-2405

personnes à contacter/persons to contact:

Mlle/Ms Michelle DOUGLAS-CUMMINGS

(langue de communication/language of

communication: anglais/English)

Mlle/Ms Nathalie RIOUX

Reciprocity Officer

(langues de communication/languages of

communication: anglais et français/English and French)

Manitoba:

adresse/address:

Department of Justice

Family Law Branch

4th Floor, 405 Broadway

WINNIPEG, Manitoba R3C 3L6 Canada

numéro de téléphone/telephone number:

(204) 945 2841

numéro de télex/telex number:

075 7346

numéro de télécopie/telefax number:

(204) 945 0053

personnes à contacter/persons to contact:

Me/Ms Joan MacPHAIL

New Brunswick:

Attorney General of New Brunswick,

P.O. Box 6000,

Room 551,

Centennial Building,

FREDERICTON, New Brunswick, E3B 5H1

Contact: Director of Public Prosecutions Branch

telephone: (173) 453-2583

Nova Scotia:

Attorney General of Nova Scotia,

1723, Hollis Street,

HALIFAX, Nova Scotia, B3J 2L6

Contact: Mr R. Gerald Conrad, Q.C.

Director (Civil) Department

of the Attorney General

telephone: (902) 424-4041

Pour la Province du Québec/For the Province of Quebec

adresse/address:

Direction générale des affaires juridiques

Ministère de la Justice du Québec

1200 route de l'Eglise

2e étage

SAINTE-FOY, Québec, Canada

numéro de téléphone/telephone number:

+1 (418) 644 7152

numéro de télex/telex number:

0513 1650

numéro de télécopie/telefax number:

+1 (418) 646 1696

personnes à contacter/persons to contact:

Me Jean-Marc NEAULT, avocat

(langues de communication/languages of communication: français, anglais/French, English)

Mme/Ms France REMILLARD

(langues de communication/languages

of communication: français, anglais/

French, English)

Notification in accordance with Article 45, paragraphs 3 and 5, of the Convention

In conformity with Article 40 the Government of Canada extended the above-mentioned Convention to the Province of Newfoundland by Note dated 5 July 1984 and received at the Ministry of Foreign Affairs of the Kingdom of the Netherlands on 6 July 1984. The Canadian declaration extending the Convention to the Province of Newfoundland contains the following declarations and reservations:

``*Central Authority*

In accordance with the provisions of Article 6, paragraph 2, the Attorney General of Newfoundland is designated as the Central Authority for the Province of Newfoundland.

Pour la Province de Terre-Neuve/For the Province of Newfoundland

adresse/address:

Attorney General of Newfoundland

4th Floor, East Block

Confederation Building

Prince Philip Drive

P.O. Box 8700

ST JOHN'S, Newfoundland

Canada

A1B 4J6

numéro de téléphone/telephone number:

(1)-709-729-2887

numéro de técopie/telefax number:

(1)-709-729-2129

personnes à contacter/persons to contact:

M./Mr Brian F. Furey

Manager—Social Unit

Reservation

In accordance with the provisions of Article 42 and pursuant to Article 26, paragraph 3, the Government of Canada declares that, with respect to applications submitted under the Convention concerning the Province of Newfoundland, Canada will assume the costs referred to in paragraph 2 of Article 26 only insofar as these costs are covered by the system of legal aid of the Province of Newfoundland.

Other declarations and reservations

The Government of Canada further declares that it may at any time submit other declarations or reservations, pursuant to Articles 6, 40 and 42 of the Convention, with respect to other territorial units.".

In conformity with Article 43, paragraph 2, the Convention will enter into force for the Province of Newfoundland on 1 October 1984.

The Permanent Bureau of the Hague Conference on private international law presents its compliments to the Diplomatic Missions of the Member States and to the National Organs and has the honour to inform them that, by a letter received at the Ministry of Foreign Affairs of the Kingdom of the Netherlands on 11 October 1984, the Government of *Canada* declared, in accordance with Article 40, that the above-mentioned Convention shall extend to the Province of *Quebec.*

The Convention shall enter into force for the Province of Quebec on *1 January 1985.*

The declaration of extension contains the following declarations and reservations:

``*Central Authority*

In accordance with the provisions of Article 6, paragraph 2, the Department of Justice of Quebec is designated as the Central Authority for the Province of Quebec.

Reservations

In accordance with the provisions of Article 42 and pursuant to Article 24, paragraph 2, translation in the French language will be required for any application, communication or other document concerning the Province of Quebec when the original language is neither French nor English.

In accordance with the provisions of Article 42 and pursuant to Article 26, paragraph 3, the Government of Canada declares that, with respect to applications submitted under the Convention concerning the Province of Quebec, Canada will assume the costs referred to in paragraph 2 of Article 26 only insofar as these costs are covered by the system of legal aid of the Province of Quebec.

Other declarations and reservations

The Government of Canada further declares that it may at any time submit other declarations or reservations, pursuant to Articles 6, 40 and 42 of the Convention, with respect to other territorial units.".

Notification in accordance with Article 45, paragraphs 3 and 5, of the Convention

In conformity with Article 40 the Government of Canada extended the above-mentioned Convention to the Yukon Territory by Note dated 15 November 1984 and received at the Ministry of Foreign Affairs of the Kingdom of the Netherlands on 16 November 1984.

The Canadian declaration extending the Convention to the Yukon Territory contains the following declarations and reservation:

``*CENTRAL AUTHORITY*

In accordance with the provisions of Article 6, paragraph 2, the Deputy Minister of Justice of the Yukon Territory is designated as the Central Authority for the Yukon Territory.

Pour le Territoire du Yukon/For the Yukon Territory

adresse/address:

Deputy Minister of Justice

P.O. Box 2703

WHITEHORSE, Yukon

Canada

Y1A 2C6

numéro de téléphone/telephone number:

(1)-403-667-5412

numéro de télex/telex number:

036-8260

numéro de télécopie/telefax number:

(1)-403-667-3979

personnes à contacter/persons to contact:

M./Mr Thomas E. ULLYETT

RESERVATION

In accordance with the provisions of Article 42, and pursuant to Article 26, paragraph 3, the Government of Canada declares that, with respect to applications submitted under the Convention concerning the Yukon Territory, Canada will assume the costs referred to in paragraph 2 of Article 26 only insofar as these costs are covered by the system of legal aid of the Yukon Territory.

OTHER DECLARATIONS AND RESERVATIONS

The Government of Canada further declares that it may at any time submit other declarations or reservations, pursuant to Articles 6, 40 and 42 of the Convention, with respect to other territorial units.".

In conformity with Article 43, paragraph 2, the Convention will enter into force for the Yukon Territory on 1 February 1985.

Notification in accordance with Article 45, paragraphs 3 and 5, of the Convention

In conformity with Article 40 the Government of Canada extended the above-mentioned Convention to the Province of Prince Edward Island by Note dated 11 February 1986 and received at the Ministry of Foreign Affairs on 12 February 1986.

Central Authority designated under the *Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction.*

Pour la Province de l'Ile du Prince-Edouard/For the Province of Prince Edward Island

adresse/address:

Departmental Solicitor

Department of Provincial Affairs

& Attorney General

Legal Services Section

P.O. Box 2000

CHARLOTTETOWN, P.E.I.

Canada

C1A 7N8

numéro de téléphone/telephone number:

(1)-902-368-5064

numéro de télex/telex number:

—

numéro de télécopie/telefax number:

(1)-902-368-4563

personnes à contacter/persons to contact:

Mme/Ms Judy HALDEMANN

tél./tel. (1)-902-368-4553

RESERVATION

In accordance with the provisions of Article 42, and pursuant to Article 26, paragraph 3, the Government of Canada declares that, with respect to applications submitted under the Convention concerning the Province of Prince Edward Island, Canada will assume the costs referred to in paragraph 2 of Article 26 only insofar as these costs are covered by the system of legal aid of the Province of Prince Edward Island.

The Government of Canada further declares that it may at any time submit other declarations or reservations, pursuant to Articles 6, 40 and 42 of the Convention, with respect to other territorial units.".

In conformity with Article 43, paragraph 2, the Convention will enter into force for the Province of Prince Edward Island on 1st May 1986.

In accordance with Article 40, paragraph 2, Canada has declared, by a Note dated 7 August 1986, received at the Ministry of Foreign Affairs on 11 August 1986, that this Convention shall extend to the Province of Saskatchewan, under the following reservation:

``In accordance with the provisions of Article 42, and pursuant to Article 26, paragraph 3, the Government of Canada declares that, with respect to applications submitted under the Convention concerning the Province of Saskatchewan, Canada will assume the costs referred to in paragraph 2 of Article 26 only insofar as these costs are covered by the system of legal aid of the Province of Saskatchewan.",

and the following declaration:

``The Government of Canada further declares that it may at any time submit other declarations or reservations, pursuant to Articles 6, 40 and 42 of the Convention, with respect to other territorial units.".

In conformity with Article 43, paragraph 2, the Convention shall enter into force for the Province of Saskatchewan on 1 November 1986.

In conformity with Article 6, paragraph 2, of the Convention Canada has designated the Minister of Justice of Saskatchewan as Central Authority for the Province of Saskatchewan:

Pour la Province de la Saskatchewan/For the Province of Saskatchewan

adresse/address:

Department of Justice, Policy, Planning and Evaluation Branch

Public Law and Policy Division

1874 Scarth Street

REGINA, Saskatchewan

Canada

S4P 3V7

numéro de téléphone/telephone number:

(1)-306-787-8954

numéro de télex/telex number:

071-2586

numéro de télécopie/telefax number:

(1)-306-787-9111

personnes à contacter/persons to contact:

Mme/Ms B.A. POTTRUFF

ou/or

Mme/Ms Carol SNELL

Notification pursuant to Article 45 of the Convention

In conformity with Article 40 of the above-mentioned Convention Canada declared, by a Note dated 4 November 1986, received at the Ministry of Foreign Affairs on the same date, that the Convention shall extend to the Province of Alberta, under the following reservation:

``In accordance with the provisions of Article 42, and pursuant to Article 26, paragraph 3, the Government of Canada declares that, with respect to applications submitted under the

Convention concerning the Province of Alberta, Canada will assume the costs referred to in paragraph 2 of Article 26 only insofar as these costs are covered by the system of legal aid of the Province of Alberta.";

and the following declarations:

``In accordance with the provisions of Article 6, paragraph 2, the Attorney General of Alberta is designated as the Central Authority for the Province of Alberta.

The Government of Canada further declares that it may at any time submit other declarations or reservations, pursuant to Articles 6, 40 and 42 of the Convention, with respect to other territorial units.".

In accordance with Article 43, paragraph 2, the Convention will enter into force for the Province of Alberta on 1 February 1987.

The Permanent Bureau of the Hague Conference on private international law presents its compliments to the Diplomatic Missions of the Member States and to the National Organs and has the honour to inform them that, by a letter received at the Ministry of Foreign Affairs of the Kingdom of the Netherlands on 26 January 1988, the Government of *Canada* declared, in accordance with Article 40, that the above-mentioned Convention shall extend to the *Northwest Territories.*

The Convention now extends to all the territorial units of Canada.

In conformity with Article 43, paragraph 2, the Convention shall enter into force for the *Northwest Territories* on *1 April 1988.*

The declaration of extension contains the following declaration and reservation:

``*Central Authority*

In accordance with the provisions of Article 6, paragraph 2, the Minister of Justice of the Northwest Territories is designated as the Central Authority for the Northwest Territories.

Pour les Territories du Nord-Ouest/For the Northwest Territories

adresse/address:

Legal Division

Department of Justice

Government of the Northwest Territories

4903—49th Street

PO Box 1320

YELLOWKNIFE, Northwest Territories

Canada

X1A 2L9

numéro de téléphone/telephone number:

(1)-403-920-6143

numéro de télex/telex number:

034-45531 ou/or 034-45528

numéro de télécopie/telefax number:

(1)-403-873-0234

personnes à contacter/persons to contact:

Mme/Ms Debra BULMER

Reservation

In accordance with the provisions of Article 42, and pursuant to Article 26, paragraph 3, the Government of Canada declares that, with respect to applications submitted under the Convention concerning the Northwest Territories, Canada will assume the costs referred to in paragraph 2 of Article 26 only insofar as these costs are covered by the system of legal aid of the Northwest Territories."

In accordance with the provisions of Article 40 of the Convention, the Government of Canada declares that, in addition to the provinces of Ontario, New Brunswick, British Columbia, Manitoba, Nova Scotia, Newfoundland, Quebec, Prince Edward Island, Saskatchewan, Alberta, the Yukon Territory and the Northwest Territories, the Convention shall extend to *Nunavut.* The Government of Canada further declares that the Convention now extends to all the territorial units of Canada.''

Entry into force for *Nunavut: 1 January 2001.*

The declaration of extension of the Convention to Nunavut contains the following declaration and reservation:

``Central Authority

In accordance with the provisions of Article 6, paragraph 2, the Minister of Justice and Attorney General for Nunavut is designated as the Central Authority for Nunavut.

Reservation

In accordance with the provisions of Article 42, and pursuant to Article 26, paragraph 3, the Government of Canada declares that, with respect to applications submitted under the Convention concerning Nunavut, Canada will assume the costs referred to in paragraph 2 of Article 26 only insofar as these costs are covered by the system of legal aid of Nunavut.''

2a The instrument of accession from Chile contained the following declaration (in Spanish): ``Chile understands Article 3 of the Convention on the Civil Aspects of International Child Abduction in the sense that it is not inconsistent with the national legislation which provides that the right to guardianship and custody is exercised until the age of 18.'' (Translation)

Central Authority designated under the *Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction.*

adresse/address:

La Corporación de Asistencia Judicial de la Región Metropolitana

Agustunas 1419

SANTIAGO DE CHILE

Chile

numéro de téléphone/telephone number:

+56 2 698 2829 ou/or

+56 2 698 2750 ou/or

+56 2 698 1601

numéro de télex/telex number:

—

numéro de télécopie/telefax number:

+56 2 672 8700

personnes á contacter/persons to contact:

M./Mr Jaime Arellano QUINTANA

(Director General)

In accordance with Article 38, paragraph 5, the Convention entered into force

—between *Chile* and the following States:

the United States of America	1 July 1994
the Kingdom of the Netherlands (for the Kingdom in Europe)	1 July 1994
the United Kingdom of Great Britain and Northern Ireland	1 July 1994
Luxembourg	1 August 1994
Finland	1 August 1994
Switzerland	1 October 1994
Australia	1 November 1994
Ireland	1 December 1994
Sweden	1 January 1995
Panama	1 March 1995
Argentina	1 May 1995
Germany	1 June 1995
Canada	1 August 1995
Spain	1 September 1995
New Zealand	1 November 1995
Mexico	1 December 1995
Israel	1 January 1996
France	1 February 1996
Cyprus	1 May 1996
Slovenia	1 May 1996
St. Kitts and Nevis	1 May 1996
Zimbabwe	1 May 1996

Italy	1 August 1996
Hungary	1 April 1997
Colombia	1 June 1997
Iceland	1 June 1997
Venezuela	1 September 1997
Greece	1 October 1997
Poland	1 March 1998
the Czech Republic	1 August 1998
Norway	1 October 1998
South Africa	1 June 1999
Georgia	1 June 1999
Turkmenistan	1 June 1999
Belarus	1 June 1999
Moldova	1 June 1999
Paraguay	1 June 1999
Costa Rica	1 June 1999
Brazil	1 April 2000
Malta	1 April 2000
Uzbekistan	1 October 2000
the Slovak Republic	1 February 2001
El Salvador	1 November 2001
Portugal	1 January 2002
Austria	1 March 2002
Estonia	1 December 2002
Peru	1 December 2002
Trinidad and Tobago	1 December 2002

* The United Kingdom made the following declaration with regard to the accession of Chile to the Convention: ``Notwithstanding the provisions of the said Article 38 regarding entry into force of the Convention as between the acceding State and the State declaring its acceptance of the accession, amendments will have been made to the United Kingdom municipal law in order to give effect to the Convention between it and Chile as of 1 May 1994 when the Convention enters into force for Chile.'' The Ministry of Foreign Affairs of the Kingdom of the Netherlands has not yet received any communication from the Government of Chile concerning the date of entry into force proposed by the United Kingdom.

2b By notification dated June 10, 1997, to the Ministry of Foreign Affairs of The Kingdom of The Netherlands, the People's Republic of China communicated the following information concerning Hong Kong:

THE EMBASSY OF THE PEOPLE'S REPUBLIC OF CHINA

IN THE KINGDOM OF THE NETHERLANDS

No. He Wai Fa (97)-58

(Translation)

The Hague, June 13, 1997

Your Excellency,

In accordance with the Joint Declaration of the Government of the People's Republic of China and the Government of the United Kingdom of Great Britain and Northern Ireland on the Question of Hong Kong signed on 19 December 1984 (hereinafter referred to as the ``Joint Declaration''), the People's Republic of China will resume the exercise of sovereignty over Hong Kong with effect from 1 July 1997. Hong Kong will, with effect from that date, become a Special Administrative Region of the People's Republic of China and will enjoy a high degree of autonomy, except in foreign and defence affairs which are the responsibilities of the Central People's Government of the People's Republic of China.

It is provided both in Section XI of Annex I to the Joint Declaration, ``Elaboration by the Government of the People's Republic of China of its Basic Policies Regarding Hong Kong'', and Article 153 of the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China, which was adopted on 4 April 1990 by the National People's Congress of the People's Republic of China, that international agreements to which the People's Republic of China is not a party but which are implemented in the Hong Kong Special Administrative Region.

In accordance with the above provisions, I am instructed by the Minister of Foreign Affairs of the People's Republic of China to make the following notification:

The Convention on the Civil Aspects of International Child Abduction done at the Hague on 25 October 1980 (hereinafter referred to as the ``Convention''), by which the Government of the Kingdom of the Netherlands is designated as the depository, which applies to Hong Kong at present, will continue to apply to the Hong Kong Special Administrative Region with effect from 1 July 1997. The Government of the People's Republic of China also makes the following declarations:

1. In accordance with the provisions of Article 42 of the Convention, the Hong Kong Special Administrative Region will not be bound to bear any costs referred to in Paragraph 2 of Article 26 of the Convention resulting from the participation of legal counsel or advisors or from court proceedings, except insofar as those costs may be covered by its system of legal aid and advice;

2. In accordance with Article 6 of the Convention, it designates the Secretary of Justice of the Government of the Hong Kong Special Administrative Region as the Central Authority for the Hong Kong Special Administrative Region.

Within the above ambit, responsibility for the international rights and obligations of a party to the Convention will be assumed by the Government of the People's Republic of China.

It would be appreciated if the contents of this Note could be placed formally on record and brought to the attention of the other Parties to the Convention.

I avail myself of this opportunity to renew to Your Excellency the assurances of my highest consideration.

CHINA, Macau Special Administrative Region Only

The Ministry of Foreign Affairs of the Kingdom of the Netherlands, depositary of the Convention, gave notice that the Minister for Foreign Affairs of the Kingdom of the Netherlands received a letter dated 26 November 1999 from the Ambassador of Portugal at The Hague and a letter dated 10 December 1999 from the Ambassador of the People's Republic of China at The Hague. The letter from the Ambassador of Portugal reads as follows:

``Upon instructions from my Government and referring to the Convention on the Civil Aspects of International Child Abduction concluded at The Hague on 25 October 1980 (hereinafter referred to as the Convention) which currently applies to Macau, I have the honour to inform Your Excellency of the following:

In accordance with the Joint Declaration of the Government of the Portuguese Republic and of the Government of the People's Republic of China on the question of Macau, signed in Beijing on 13 April 1987, the Government of the Portuguese Republic will remain internationally responsible for Macau until 19 December 1999, the People's Republic of China resuming from that date the exercise of sovereignty over Macau, with effect from 20 December 1999. From 20 December 1999 the Portuguese Republic will cease to be responsible for the international rights and obligations arising from the application of the Convention in Macau. (…)''

The letter from the Ambassador of the People's Republic of China reads as follows:

<u>Translation</u>

``In accordance with the Joint Declaration of the Government of the People's Republic of China and the Government of the Republic of Portugal on the Question of Macao (hereinafter referred to as the Joint Declaration), the Government of the People's Republic of China will resume the exercise of sovereignty over Macao with effect from 20 December 1999. Macao will from that date, become a Special Administrative Region of the People's Republic of China and will enjoy a high degree of autonomy, except in foreign and defence affairs which are the responsibilities of the Central People's Government of the People's Republic of China. It is provided both in Section VIII of Elaboration by the Government of the People's Republic of China of its Basic Policies Regarding Macao, which is annex I to the Joint Declaration, and Article 138 of the Basic Law of Macao Special Administrative Region of the People's Republic of China, which was adopted on 31 March 1993 by the National People's Congress of the People's Republic of China, that international agreements to which the Government of the People's Republic of China is not yet a party but which are implemented in Macao, may continue to be implemented in the Macao Special Administrative Region.

In accordance with the provisions mentioned above, I am instructed by the Minister of Foreign Affairs of the People's Republic of China, to inform Your Excellency of the following:

The Convention on the Civil Aspects of International Child Abduction, done at The Hague on 25 October 1980 (hereinafter referred to as the ``Convention''), which applies to Macao at present, will continue to apply to the Macao Special Administrative Region with effect from 20 December 1999. The Government of the People's Republic of China also wishes to make the following declaration:

In accordance with Article 6 of the Convention, it designates the Welfare Department of the Macao Special Administrative Region as <u>Central Authority</u> in the Macao Special Administrative Region.

Within the above ambit, the Government of the People's Republic of China will assume the responsibility for the international rights and obligations that place on a party to the Convention. (…)''.

2c Central Authority designated under the *Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction.*

adresse/address:

Instituto Colombiano de Bienestar

Familiar

Sede Nacional Avenida 68 No 64-01

Santafé de Bogotá, DC

Colombia

numéro de téléphone/telephone number:

—

numéro de télex/telex number:

—

numéro de télécopie/telefax number:

(57)-1-231-4558

personnes à contacter/persons to contact:

Mme/Ms Carmen Elena TAMARA

Subdirectora de Protección

In accordance with Article 38, paragraph 5, the Convention entered into force between Colombia and the following States:

Luxembourg	1 April 1996
Panama	1 May 1996
Israel	1 June 1996
the United States of America	1 June 1996
Cyprus	1 August 1996
the Kingdom of the Netherlands (for the Kingdom in Europe)	1 September 1996
Germany	1 November 1996
the United Kingdom of Great Britain and Northern Ireland*	1 December 1996
Argentina	1 December 1996
Ireland	1 January 1997
Hungary	1 April 1997
Switzerland	1 May 1997
Finland	1 May 1997
Chile	1 June 1997
Norway	1 June 1997
Spain	1 June 1997
Venezuela	1 September 1997
Greece	1 October 1997
Australia	1 December 1997
Canada	1 December 1997
New Zealand	1 March 1998
Poland	1 March 1998
the Czech Republic	1 August 1998
Brazil	1 September 2000
Malta	1 September 2000
Uruguay	1 September 2000
Italy	1 September 2000
Costa Rica	1 January 2001
the Slovak Republic	1 February 2001
Trinidad and Tobago	1 March 2001
Iceland	1 April 2001
Belarus	1 April 2001
Fiji	1 April 2001
Moldova	1 April 2001
Paraguay	1 April 2001
South Africa	1 April 2001
Turkmenistan	1 April 2001
Uzbekistan	1 April 2001
Mexico	1 June 2001
Portugal	1 January 2002
Latvia	1 May 2002
Sri Lanka	1 May 2002
Sweden	1 September 2002
Peru	1 March 2003
Estonia	1 May 2003
Guatemala	1 May 2003
Nicaragua	1 May 2003
Thailand	1 May 2003

*With the following declaration:

``Notwithstanding the provisions of the said Article 38 regarding entry into force of the Convention as between the acceding State and the State that has declared its acceptance of the accession, the municipal law of the United Kingdom was amended with effect from 1 March 1996 to give effect to the provisions of the Convention between it and Colombia from the date when the Convention enters into force for Colombia. I should be grateful for confirmation of the date of 1 March 1996 as the date on which the Convention entered into force between the United Kingdom and Colombia."

2d

Israel	1 April 1999
Ireland	1 June 1999
Chile	1 June 1999
Finland	1 July 1999
Luxembourg	1 September 1999
Greece	1 March 2000
Argentina	1 April 2000
Australia	1 May 2000
Belarus	1 September 2000
Bosnia and Herzegovina	1 December 2000
Colombia	1 January 2001
Canada	1 January 2001
the Slovak Republic	1 February 2001
Poland	1 February 2001
Switzerland	1 February 2001
Panama	1 March 2001
Spain	1 May 2001
Mexico	1 June 2001
Italy	1 August 2001
Moldova	1 September 2001
El Salvador	1 October 2001
Estonia	1 October 2001
Nicaragua	1 October 2001
Peru	1 November 2001
Portugal	1 January 2002
the Netherlands (for the Kingdom in Europe)	1 April 2002
Latvia	1 April 2002
Sri Lanka	1 April 2002
Hungary	1 June 2002
Sweden	1 September 2002
Thailand	1 July 2003

2e In conformity with Article 6 Para. 1 of the Convention, the Executive Authority is the Ministry of Labour and Welfare and Executive Authority to which applications may be submitted to be forwarded to the Central Executive Authority from Article 6 Para. 1 of the Convention is the Ministry of Justice and Administration.

adresse/address:

Ministry of Labour and Welfare

Prisavlje 14

10000 ZAGREB

Republic of Croatia

numéro de téléphone/telephone number:

(385)-1-517000

numéro de télex/telex number:

—

numéro de télécopie/telefax number:

(385)-1-530195

personnes à contacter/persons to contact:

Mme/Ms Hela UJEVIC-BULJETA

Head of Department

(langue de communication/language of communication: croate/Croatian)

tél./tel. (385)-1-6169-111

Mme/Ms Mila SIMIC

Counsellor

(langues de communication/languages of communication: croate et anglais/Croatian and English)

Mme/Ms Jasna SPOLJARIC

Counsellor

(langues de communication/languages of communication: croate et anglais/Croatian and English)

Le Bureau Permanent a été informé que le Ministére de la Justice de Croatie sera désigné comme Autorité centrale selon la Convention. L'adresse, les numéros de téléphone et de télécopie sont les suivants:

the Permanent Bureau is informed that the Croatioan Ministry of Justice will be designated to serve as Central Authority under the convention and that its address, telephone number and telefax number are as follows:

Ministére de la Justice

Ministry of Justice

Savska Cesta 41

Savska Cesta 41

10000 ZAGREB

10000 ZAGREB

Republique de Croatie

Republic of Croatia

tél.: (385)-1-537622

tel.: (385)-1-537622

télécopie: (385)-1-536321

telefax: (385)-1-536321

2f In accordance with Article 38, paragraph 5, the Convention entered into force between Cyprus and the following States:

the United Kingdom of Great Britain and Northern Ireland	1 February 1995
the Kingdom of the Netherlands (for the Kingdom in Europe)	1 March 1995
the United States of America	1 March 1995
Luxembourg	1 April 1995
Germany	1 May 1995
Panama	1 June 1995
Sweden	1 October 1995
France	1 October 1995
Australia	1 November 1995
New Zealand	1 November 1995
Mexico	1 December 1995
Israel	1 January 1996
Chile	1 May 1996
Greece	1 August 1996
Colombia	1 August 1996
Zimbabwe	1 August 1996
Argentina	1 December 1996
Ireland	1 January 1997
Norway	1 January 1997
Poland	1 January 1997
Hungary	1 April 1997
Italy	1 April 1997
Switzerland	1 May 1997
Finland	1 May 1997
Spain	1 June 1997
Venezuela	1 September 1997
Denmark	1 October 1997
Canada	1 January 1998
the Czech Republic	1 August 1998
the Slovak Republic	1 February 2001
Portugal	1 January 2002
Austria	1 March 2002
Belgium	1 May 2003

Central authority designated under the *Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction.*

adresse/address:

Minister of Justice and Public Order

12 Helioupoleos Street

NICOSIA

Cyprus

numéro de téléphone/telephone number:

(357)-2-302127

numéro de télécopie/telefax number:

(357)-2-461427

personnes à contacter/persons to contact:

Mrs. Anny SHAKALLI

(langues de communication/languages of communication: grecque, anglais/Greek, English)

tél./tel. (357)-2-303558

2g The Permanent Bureau of the Hague conference on private international law presents its compliments to the Diplomatic Missions of the Member States and to the National Organs and has the honour to inform them that, by instrument deposited on 15 December 1997 with the Ministry of Foreign Affairs of the Kingdom of the Netherlands, *the Czech Republic*

ratified the above-mentioned Convention.

In accordance with Article 43, paragraph 2, the Convention will enter into force for the *Czech Republic* on *1 March 1998.*

The instrument of ratification contains the following reservation:

Translation

``Having examined this convention and knowing that the Parliament of the Czech Republic has given its consent thereto, we hereby ratify and confirm it with the reservation according to Article 42 of the Convention, that the Czech Republic shall not be bound to assume any costs referred to in Article 26, paragraph 2 of the Convention, resulting from the participation of legal counsel or advisers or from our court proceedings, except insofar as those costs may be covered by its legal system of legal aid and advice''.

In accordance with Article 6, paragraph 1, the Czech Republic has designated as Central Authority under the *Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction.*

adresse/address:

Ustredí pro mezinárodne právní ochranu mládeze (Central Agency for International Legal Protection of Youth)

Benesova 22

60200 BRNO

Czech Republic

numéro de téléphone/telephone number et/and numéro de télécopie/telefax number:

+420 (5) 42 21 28 36

numéro de télex/telex number:

—

adresse e-mail/e-mail address:

—

personnes à contacter/persons to contact:

M./Mr Rostislav ZALESKY

Director

(langues de communication/languages of communication: allemand, anglais/German, English)

Mme/Mrs Markéta NOVAKOVA

Deputy Director

(langues de communication/languages of communication: allemand, anglais/German, English)

2h *Notification pursuant to Article 45 of the Convention*

In accordance with Article 37, paragraph 1, the Ambassador of the Kingdom of Denmark at The Hague signed the above-mentioned Convention for Denmark on 17 April 1991 as follows:

PER GROOT

17th April, 1991

In accordance with Article 37, paragraph 2, the Ambassador deposited the instrument of ratification of Denmark of the above-mentioned Convention with the Ministry of Foreign Affairs of the Kingdom of the Netherlands on 17 April 1991.

Upon the ratification Denmark declared that:

``1) pursuant to the provisions of Article 39, paragraph 1, the Convention shall not be applicable to the territories of the Faroe islands and Greenland;

2) pursuant to the provisions of Article 42, paragraph 1,

a) the Kingdom of Denmark objects to the use of French in any application, communication or other document sent to its Central Authority (cf. Article 24, paragraph 2); and

b) it shall not be bound to assume any costs resulting from the participation of legal counsel or advisers or from court proceedings, except insofar as those costs may be covered by its system of legal aid and advice (cf. Article 26, paragraph 3);

3) Central Authority designated under the *Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction.*

adresse/address:

Ministry of Justice (Justitsministeriet)

Department of Private Law

(Civilretsdirektoratet)

Æbeløgade 1

2100 COPENHAGEN Ø

Denmark

numéro de téléphone/telephone number:

(45)-33 92 33 02 (from 10.00 till 14.30)

numéro de télex/telex number:

—

numéro de télécopie/telefax number:

(45)-39 27 18 89

personnes à contacter/persons to contact:

Mme/Ms Anne THALBITZER, Head of Secretariat

(langues de communication/languages of communication: danois, anglais/Danish, English)

tél./tel.: (45)-33 92 28 69 or (45)-39 27 56 05 (direct lines)

Mme/Ms Rie THOUSTRUP

SØRENSEN, Head of Section

(langues de communication/languages of communication: danois, anglais/Danish, English)

tél./tel.: (45)-33 92 28 59 (direct line)

M./Mr Niels CARSTENSEN,

Head of Section (langues de communication/languages of communication: danois, anglais/Danish, English)

tél./tel.: (45)-33 92 29 04 (direct line)

Mme/Ms Hanne KRISTIANSEN, Head of Section

(langues de communication/languages of communication: danois, anglais/Danish, English)

tél./tel.: (45)-33 92 28 27 (direct line)

Note: La Convention ne s'applique pas aux territoires de Iles Féroé et du Groenland. The Convention does not apply to the territories of the Faroe Islands and Greenland.

In accordance with Article 43 the Convention will enter into force for Denmark on 1 July 1991.

The Operation of the Central Authority for Denmark.

1. *Rules.*

A. The International Child Abduction Act, no 793 of November 27th, 1990.

The International Child Abduction Act incorporates the Conventions into the Danish legal system and thus enables the courts to enforce decisions about rights of custody etc. of the other contracting states.

The Act also outlines the duties of the Central Authority and authorizes the Minister of Justice to appoint the Central Authority. (Section 3 of the Act)

B. Government Order no. 453 of June 18th, 1990, on International Child Abduction.

By this Government Order the Minister of Justice has appointed the Department of Private Law as Central Authority.

2. *Accommodation.*

The Central Authority for Denmark is the Department of Private Law. This Department is part of the Ministry of Justice. All correspondence should be directed to ``Ministry of Justice, Department of Private Law, (Civilretsdirektoratet), AEbeleogade 1, DK-2100 København Ø. The Fax no. of the Department is -45- 3927 1889''. The cases will be dealt with by a younger member of the legal staff of the Division of Family Law (a head of section) under the supervision of the head of the Division or one of his 2 deputies, whose names and telephone nos have been communicated to the other parties to the conventions.

3. *Case management.*

In its file each case has a sheet recording all relevant information such as the facts of the case (including letters, telefonecalls, action taken etc.) and the considerations of the officers who have dealt with the case. The file will be marked in a way which indicates its urgent nature. Until the case is closed, the file will be kept on the desk of the officer who deals with the case.

4. *Applications forwarded to Denmark.*

A. Procedures when the application reaches the Central Authority.

When an application reaches the Central Authority, it will immediately be examined in order to establish whether it meets the requirements of the convention under which it has been made. If further information or documents are necessary they will be requested.

If it is manifest that the requirements are not fulfilled or that the application is otherwise not well founded, the Central Authority will immediately inform the applicant or the Central Authority through which the application has been submitted that the application cannot be accepted and of the reasons for this. (See art. 27 of the Hague Convention and Article 4, paragraph 4 of the European Convention) All other applications will be translated into Danish and sent by facsimile and letter to the bailiff's court of the town where the abductor resides.

If it is thought to be expedient the Central Authority will ask the local administrative authority (statsamt) to summon the abductor and, if possible, the applicant to an interview in order to seek a solution on a voluntary basis. (See article 10 of the Hague Convention)

If the whereabouts of the child are unknown the Central Authority will request the police (Politiets Eftersøgningstjeneste) to find the child (see Article 7 litra a of the Hague Convention and Article 5, la, of the European Convention). All available information that may help the police to find the child will immediately be forwarded to the police.

B. The procedure in the court.

When the court has received the application it will automatically assign a lawyer for the applicant. (See Section 18, 2nd paragraph of the International Child Abduction Act) (If the applicant has already hired a Danish lawyer, this lawyer may be assigned to the case, if he is willing to accept the rules of legal aid.) The lawyer will act on behalf of the applicant and will see to it that all relevant information is put before the court. The Department of Private Law will offer to supply the court and the lawyer with information concerning the application of the convention.

According to Section 15 in the International Child Abduction Act the courts shall act expeditiously in these cases. To meet this requirement the application should contain all relevant information and be accompanied by all relevant documents. The defendant parent will then be ordered to appear before the court according to Sections 493 and 494 of the Danish Administration of Justice Act.

If it is found to be necessary the court can decide that the child should stay with one of the parents or in a place chosen by the local social security authority until the court has reached a final decision (See Section 17 of the International Child Abduction Act).

C. Costs of the application.

The costs of the application are covered by Denmark only insofar as those costs may be covered by the Danish system of legal aid and advice.

However the Central Authority does not have to apply for legal aid, because the Danish Child Abduction Act establishes a right for the applicant to get legal aid when the bailiff has assigned a lawyer to the case, cf. 5 B.

5. *Cases where a Danish decision on custody or visitation is necessary.*

A. Where recognition or enforcement is refused and the applicant requests that the Central Authority brings proceedings concerning the substance of the case, the Central Authority will consider whether it should comply with the request. (This only applies where the European Convention is applicable) (See Article 5, paragraph 4 in the European Convention)

If the Central Authority complies with the request it will apply for legal aid on behalf of the applicant. Further information about the financial circumstances of the applicant may be necessary to decide whether legal aid can be granted. However the Department of Private Law can decide that legal aid may be provided regardless of this, for instance due to the general interest of the matter or to the special significance of the case for the applicant. (See the Danish Administration of Justice Act, sections 330–331 a). Foreign citizens have the same right to legal aid as Danish citizens. The local court will assign lawyer to the case cf. 5 B.

B. If the Central Authority receives an application to make arrangements for organizing or securing the effective exercise of rights of access, it will forward the application to the local administrative authority (statsamt). (See Article 21 in the Hague Convention) The local administrative authority will try to settle any disputes between the two parties. If this is not possible a decision will be made on the matter according to the Danish rules on access rights. In such cases the way that access has been exercised earlier—whether on the basis of an agreement or on a foreign decision—will be taken into account.

Either party may appeal the decision of the local administrative authority to the Department of Private Law.

2i *Dominican Republic Accession*

Convention of 25 October 1980 on the Civil Aspects of International Child Abduction

Accession accepted by	**Date of acceptance**	**Entry into force**
Netherlands	27-X-2004	1-I-2005
Latvia	29-XII-2004	1-III-2005
Chile	15-III-2005	1-VI-2005
Slovakia	5-IV-2005	1-VII-2005
Panama	25-IV-2005	1-VII-2005
Bahamas	25-V-2005	1-VIII-2005
Spain	11-VII-2005	1-X-2005
Argentina	20-VII-2005	1-X-2005
Belize	30-VIII-2005	1-XI-2005
Bulgaria	5-IX-2005	1-XII-2005
Greece	22-XI-2005	1-II-2006
Peru	29-XI-2005	1-II-2006
Israel	30-XI-2005	1-II-2006
Uruguay	12-I-2006	1-IV-2006
Brazil	17-I-2006	1-IV-2006
Honduras	16-XI-2006	1-II-2007
Italy	20-XII-2006	1-III-2007
Poland	10-I-2007	1-IV-2007
Estonia	11-I-2007	1-IV-2007
Mexico	8-II-2007	1-V-2007
United States of America	5-III-2007	1-VI-2007

Colombia	2-IV-2007	1-VII-2007
Belgium	23-IV-2007	1-VII-2007
New Zealand	27-IV-2007	1-VII-2007
Sweden	26-VI-2007	1-IX-2007
Ireland	31-X-2007	1-I-2008
Germany	8-I-2008	1-IV-2008
Switzerland	16-I-2008	1-IV-2008
Monaco	31-III-2008	1-VI-2008
Venezuela	15-X-2008	1-I-2009
Lithuania	29-XII-2008	1-III-2009
Slovenia	9-VII-2009	1-X-2009

Entry into force between Dominican Republic and	**Entry into force**
Netherlands	1-I-2005
Latvia	1-III-2005
Chile	1-VI-2005
Slovakia	1-VII-2005
Panama	1-VII-2005
Bahamas	1-VIII-2005
Spain	1-X-2005
Argentina	1-X-2005
Belize	1-XI-2005
Bulgaria	1-XII-2005
Greece	1-II-2006
Peru	1-II-2006
Israel	1-II-2006
Uruguay	1-IV-2006
Brazil	1-IV-2006
Honduras	1-II-2007
Italy	1-III-2007
Poland	1-IV-2007
Estonia	1-IV-2007
Mexico	1-V-2007
United States of America	1-VI-2007
Colombia	1-VII-2007
Belgium	1-VII-2007
New Zealand	1-VII-2007
Sweden	1-IX-2007
Ireland	1-I-2008
Germany	1-IV-2008
Switzerland	1-IV-2008
Monaco	1-VI-2008
Venezuela	1-I-2009
Lithuania	1-III-2009
Slovenia	1-X-2009

Dominican Republic—Central Authority

Address—The National Council for the Childhood and Adolescence (CONANI)

Avenida México esq. 30 de Marzo
Oficinas Gubernamentales, Edificio ``D'' Primer Nivel
Apartado Postal 2081
SANTO DOMINGO
Dominican Republic Tel.: +1 (809) 567 2233
Fax: +1 (809) 472 8343
E-mail: conani@conani.gov.do

personnes à contacter / persons to contact:

- Lic. Aly Q. PE[Delta equal to]NA
  Consultora Jurídica
  e-mail: aly.pena@conani.gov.do

* Lic. Cristian MALDONADO
Sub-Consultor Jurídico
e-mail: cristian.maldonado@conani.gov.do.

2j By instrument deposited on 22 January 1992 with the Ministry of Foreign Affairs of the Kingdom of the Netherlands, Ecuador acceded to the Convention. In conformity with Article 38, paragraph 3, the Convention will enter into force for Ecuador on 1 April 1992. According to Article 38, paragraph 4, the accession will have effect only as regards Ecuador and such Contracting States as will have declared their acceptance of the accession.

In accordance with Article 38, paragraph 5, the Convention entered into force between Ecuador and the following States:

the United States of America	1 April 1992
the Kingdom of the Netherlands (for the Kingdom in Europe)	1 May 1992
Israel	1 June 1992
Luxembourg	1 June 1992
the United Kingdom of Great Britain and Northern Ireland	1 June 1992
Spain	1 July 1992
the Federal Republic of Germany	1 September 1992
Argentina	1 September 1992
Switzerland	1 September 1992
Ireland	1 April 1993
Australia	1 April 1993
Canada	1 December 1993
Sweden	1 December 1993
Finland	1 August 1994
New Zealand	1 November 1995
Mexico	1 December 1995
Hungary	1 April 1997
Italy	1 April 1997
Panama	1 May 1997
Venezuela	1 September 1997
the Czech Republic	1 August 1998
Norway	1 October 1998
the Slovak Republic	1 February 2001
Portugal	1 January 2002

In accordance with Article 6, paragraph 1, Ecuador has designated as Central Authority:

``The Ministry of Welfare

Robles No. 850 and Amazonas Avenue

Quito

Ecuador".

2k With the following reservation and declaration:

``1. Le Gouvernement de la République du Salvador ne sera pas tenu à assumer les frais mentionnés au 3ième alinéa de l'article 26, sauf quand ces frais seront supportés par son propre système d'assistance judiciaire et juridique;

2. Le Gouvernement de la République du Salvador interprète l'article 3 dans le sens qu'il ne constitue pas une contradiction avec la législation interne qui établit que la majorité est atteinte à l'âge de dixhuit ans;

3. Le Gouvernement de la République du Salvador, conformément au 1 er alinéa de l'article 6, désigne comme Autorité centrale l'ISPM: Instituto de Protección al Menor (Institut de Protection de l'Enfant), ainsi que le PGR: Procuraduría General de la República (Bureau du Procureur de la République);

4. Le Gouvernement de la République du Salvador déclare que toute documentation envoyée au Salvador en application de ladite Convention devra être accompagnée d'une traduction officielle vers l'espagnol."

Translation

1. The Government of the Republic of El Salvador shall not be bound to assume the costs referred to in Article 26, paragraph 3, except insofar as those costs may be covered by its system of legal aid and advice;

2. The Government of the Republic of El Salvador interprets Article 3 with the domestic legislation of the Republic whereby the age of majority is eighteen years;

3. The Government of the Republic of El Salvador, in accordance with Article 6, paragraph 1, designates as its Central Authority the ISPM: Instituto de Protección al Menor (Institute for the Protection of the Child), and the PGR: Procuraduría General de la República (Office of the Procurator of the Republic).

4. The Government of the Republic of El Salvador declares that all documentation sent to El Salvador in application of the said Convention must be accompanied by an official translation into Spanish.

In accordance with Article 38, paragraph 5, the Convention entered into force between El Salvador and the following States:

Italy	1 August 2001
Panama	1 September 2001
Uruguay	1 October 2001
Argentina	1 October 2001
Costa Rica	1 October 2001
Chile	1 November 2001
Czech Republic	1 November 2001
Ireland	1 November 2002
Portugal	1 January 2002
Israel	1 April 2002

the Netherlands (for the Kingdom in Europe)	1 April 2002
Norway	1 April 2002
Hungary	1 June 2002
Spain	1 June 2002
Uzbekistan	1 June 2002
Brazil	1 June 2002
Slovak Republic	1 September 2002
Germany	1 November 2002
Australia	1 January 2003
Trinidad and Tobago	1 March 2003
Poland	1 March 2003

2l Under the following declaration and reservations:

``1) pursuant to Article 6, paragraph 1, of the Convention the Republic of Estonia designates the Ministry of Justice of the Republic of Estonia as the Central Authority;

2) pursuant to Article 42 and Article 24, paragraph 2, of the Convention the Republic of Estonia only accepts English language with regard to applications, communications or other documents;

3) pursuant to Article 42 and Article 26, paragraph 3, of the Convention the Republic of Estonia will not accept obligations with regard to expenses referred to in Article 26, paragraph 2, which result from the participation of a legal counsel or advisers or from court proceedings, except insofar as those costs may be covered by its system of legal aid and advice.''

In accordance with Article 38, paragraph 5, the Convention entered into force between Estonia and the following States:

Moldova	1 October 2001
Luxembourg	1 October 2001
Argentina	1 October 2001
Costa Rica	1 October 2001
Czech Republic	1 November 2001
Finland	1 December 2001
Germany	1 December 2001
Israel	1 April 2002
the Netherlands (for the Kingdom in Europe)	1 April 2002
Norway	1 April 2002
Hungary	1 June 2002
Uzbekistan	1 June 2002
Brazil	1 June 2002
Portugal	1 August 2002
Spain	1 August 2002
Sweden	1 September 2002
Slovak Republic	1 September 2002
Chile	1 December 2002
Greece	1 January 2003
Australia	1 January 2003
Panama	1 February 2003
Poland	1 March 2003
Colombia	1 May 2003
Belgium	1 May 2003
Uruguay	1 May 2003

2m In accordance with Article 38, paragraph 5, the Convention entered into force between Fiji and the following States:

Finland	1 September 1999
Luxembourg	1 September 1999
Israel	1 October 1999
Italy	1 November 1999
New Zealand	1 February 2000
Argentina	1 April 2000
Australia	1 May 2000
Belarus	1 September 2000
Canada	1 January 2001
Ireland	1 January 2001
the Slovak Republic	1 February 2001
Poland	1 February 2001
Colombia	1 April 2001
Spain	1 May 2001
Portugal	1 January 2002
Norway	1 April 2002
Hungary	1 June 2002
Netherlands (for the Kingdom in Europe)	1 April 2003

2n In accordance with Article 43, paragraph 2, the Convention will enter into force for *Finland* on *1 August 1994.*

The instrument of acceptance contains the following declarations:

``1. Finland declares, according to Article 42 and Article 24, paragraph 2, of the Convention, that it accepts only the use of English in applications, communications and other documents sent to its Central Authority.

2. Finland declares, according to Article 42 and Article 26, paragraph 3, of the Convention, that it shall not be bound to assume any costs referred to in Article 26, paragraph 2, resulting from the participation of legal counsel or advisers or from court proceedings, except insofar as those costs may be covered by its system of legal aid and advice."

In accordance with Article 6, first paragraph, of the Convention Finland has designated as the Central Authority:

Ministry of Justice

Eteläesplanadi 10

P.O. Box 1

FIN-00131 HELSINKI

Tel:+358-0-18251

FINLAND

Telefax:+358-0-1825224

Liaison Officers: Senior Ministerial Secretary

Mr. Hannu Taimisto Tel. +358-0-1825327
Senior Ministerial Secretary
Ms. Mirja Kurkinen Tel. +358-0-1825321

3 *Notification in accordance with Article 45, paragraphs 4 and 6, of the Convention*

On the occasion of the approval by France of the above-mentioned Convention the French Government made the following reservations and declarations:

Translation

1) In accordance with the provisions of Article 42 and pursuant to Article 24, paragraph 2, the Government will consider only those applications which are drawn up in French, or are accompanied by a translation into French, and will require a translation into French of any communication or document sent to its Central Authority.

2) In accordance with the provisions of Article 42 and pursuant to Article 26, paragraph 3, the Government declares that it will assume the costs referred to in paragraph 2 of Article 26 only insofar as these costs are covered by the French system of legal aid.

3) In accordance with the provisions of Article 39, the Government declares that the Convention shall extend to the whole of the territory of the French Republic.

Autorité centrale française:

1Le Ministère de la Justice

Bureau de l'Entaide Judiciaire Internationale

adresse/address

Le Ministère de la Justice

Bureau de l'Entraide Judiciaire

Internationale

13, Place Vendôme

75001 PARIS France

numéro de téléphone/telephone number:

(1) 42.61.80.22

numéro de télex/telex number:

211802

télécopieur (*nouveau*)/telecopier (*new*):

(1) 44 77 60 70

personnes à contacter/persons to contact:

M/Mr B. STURLESE, magistrat
(Chef du Bureau de l'Entraide
Judiciaire Internationale)
langues de communication/
languages of communication:
français, anglais/French, English
tél./tel.: (1) 44 77 65 80
Mme/Mrs D. LAVAU, magistrat
(Chef adjoint du Bureau de
l'Entraide Judiciaire
Internationale) langues de
communication/languages of
communication: français, anglais/
French, English
tél./tel.: (1) 44 77 63 84
Mme/Mrs PRIVE
tél./tel.: (1) 44 77 63 89

(The effective date of this information is *3 July 1990*)

The instrument of approval by France was deposited on 16 September 1982.

3a Under Article 38, the Convention is not in force between the United States and Georgia.

Notification pursuant to Article 45 of the Convention

The Ministry of Foreign Affairs of the Kingdom of the Netherlands, depositary of the Convention on the Civil Aspects of International Child Abduction of 25 October 1980, has the honour to inform the Member States of The Hague Conference on Private International Law and the States having acceded to the above-mentioned Convention that in accordance with Article 38, paragraph 2, Georgia deposited its instrument of accession with the Ministry of Foreign Affairs of the Kingdom of the Netherlands on 24 July 1997.

The Convention will enter into force for Georgia on 1 October 1997 in accordance with Article 38, paragraph 3.

The accession will have effect only as regards the relations between Georgia and such Contracting States as will have declared their acceptance of the accession.

In accordance with Article 6, first paragraph, Georgia has designated as the Central Authority discharging the duties imposed by the Convention:

the Ministry of Justice of Georgia

Contact Person:

Ms. Maia Mtsariashvili

The Chief of the Department of International Legal Relations

30, Rustaveli ave.
Tbilisi, 380046
Georgia
Tel: office (995 32) 995878
(995 32) 931498
home (995 32) 222670
Fax: (995 32) 990225

Working hours of the Ministry of Justice: 9 am—6 pm. (lunch hour 1–2 pm).

In accordance with Article 38, paragraph 5, the Convention entered into force between Georgia and the following States:

the Kingdom of the Netherlands (for the Kingdom in Europe)	1 November 1997
Israel	1 December 1997
the United Kingdom of Great Britain and Northern Ireland*	1 December 1997

Finland	1 December 1997
Ireland	1 December 1997
Australia	1 January 1998
Germany	1 March 1998
New Zealand	1 March 1998
the Czech Republic	1 August 1998
Argentina	1 November 1998
China, Hong Kong Special Administrative Region only	1 December 1998
Spain	1 March 1999
Chile	1 June 1999
Canada	1 November 1999
Turkmenistan	1 January 2000
Belarus	1 January 2000
Greece	1 March 2000
Bosnia and Herzegovina	1 December 2000
the Slovak Republic	1 February 2001
Poland	1 February 2001
Italy	1 August 2001
Portugal	1 January 2002
Austria	1 March 2002
Hungary	1 June 2002
Norway	1 June 2002
China, Macau Special Administrative Region	1 September 2003

*With the following declaration:

``(…) notwithstanding the provisions of the said article, the United Kingdom accepts the accession of (…) Georgia with effect from *1 October 1997."*

3b On October 3, 1990 the German Democratic Republic acceded to the Federal Republic of Germany.

Notification pursuant to Article 45 of the Convention

In accordance with Article 37, paragraph 2, the Federal Republic of Germany deposited its instrument of ratification of the above-mentioned Convention on 27 September 1990

with the declaration that the Convention shall also apply to Berlin (West) with effect from the date on which it enters into force for the Federal Republic of Germany,

with the following reservation:

[Die Bundesrepublik Deutschland]"erklärt in übereinstimmung mit Artikel 26 Abs. 3, daB sie nur insoweit gebunden ist, die sich aus der Beiordnung eines Rechtsanwalts oder aus einem Gerichtsverfahren ergebenden Kosten im Sinn des Artikels 26 Abs. 2 zu übernehmen, als diese Kosten durch ihre Vorschriften über die ProzeBkosten und Beratungshilfe gedeckt sind."

courtesy translation

[The Federal Republic of Germany] declares in accordance with the third paragraph of Article 26 that it is not bound to assume any costs referred to in the second paragraph of Article 26 resulting from the participation of legal counsel or advisers or from court proceedings, except insofar as those costs may be covered by its regulations concerning legal aid and advice.

and stating the following:

``Die Bundesrepublik Deutschland geht davon aus, daB Ersuchen aus anderen Vertragsstaaten gemäB Artikel 24 Abs. 1 regelmäBig von einer deutschen übersetzung begleitet sein werden."

courtesy translation

The Federal Republic of Germany assumes that, in accordance with the first paragraph of Article 24, applications from other Contracting States shall regularly be accompanied by a translation into German.

In accordance with Article 6, paragraph 1, of the Convention the Federal Republic of Germany has designated as Central Authority:

Der Generalbundesanwalt beim Bundesgerichtshof

Central Authority designated under the *Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction.*

adresse/address:

Der Generalbundesanwalt beim
Bundesgerichtshof-Zentrale
Behärde nach dem Sorgerechts-
übereinkommens-Ausführungsgesetz
Heinemannstrae 6
53175 Bonn
Germany

numéro de téléphone/telephone number:

+49 (30) 2538 80

numéro de télex/telex number:

185505

numéro de télécopie/telefax number:

+49 (30) 2538 8397

personnes à contacter/persons to contact:

Mme/Ms Gabriele LIMBROCK (langues de communication/languages of

communication: allemand, anglais/

German, English)

tél./tel.: +49 (30) 2538 8344

Mme/Ms Birgit GILDENAST

(langues de communication/languages of

communication: allemand, anglais/

German, English)

tél./tel.: +49 (30) 2538 8283

Mme/Ms Barbara SCHUCK

(langues de communication/languages of

communication: allemand, anglais/

German, English)

tél./tel.: +49 (30) 2538 8282

Mme/Ms Iris KEIM

(langues de communication/languages of

communication: allemand, anglais/

German, English)

tél./tel.: +49 (30) 2538 8282

Mme/Ms Elke PAHN

(langues de communication/languages of

communication: allemand, anglais/

German, English)

tél./tel.: +49 (30) 2538 8309

M./Mr Bernd PFEIFFER

(langues de communication/languages of

communication: allemand, anglais/

German, English)

tél./tel.: +49 (30) 2538 8309

The Convention will enter into force for the Republic of Germany on 1 December 1990.

3c *Notification pursuant to Article 45 of the Convention.*

In accordance with Article 37, paragraph 2, Greece deposited its instrument of ratification of the above-mentioned Convention with the Ministry of Foreign Affairs of the Kingdom of the

Netherlands on 19 March 1993.

Upon ratification Greece made the following reservations and declaration:

Translation

1. In accordance with Article 42 of the Convention on the Civil Aspects of International Child Abduction Greece declares that is shall not be bound to assume any costs referred to in the second paragraph of Article 26 resulting from the participation of legal counsel or advisers or from court proceedings, except insofar as those costs concern cases of free legal aid.

2. In accordance with Article 42 of the above-mentioned Convention Greece declares that it objects to the use of the French language in any application, communication or other document sent to its Central Authority.

3. In accordance with Article 6, first paragraph, of the Convention the Ministry of Justice (Direction de l'élaboration des lois, 4ème section) is designated as the Central Authority of Greece.

adresse/address:

Ministère de la Justice

Direction de l'élaboration des lois

4ème section

ATHENES

Grèce

numéro de téléphone/telephone number:

(30)-1-771-4186

numéro de télex/telex number:

216352

numéro de télécopie/telefax number:

(30)-1-770-7025

personnes à contacter/persons to contact:

Mme/Mrs A. ELEFTHERIADOU

Head of Section

(langues de communication/languages of

communication: grecque, anglais/Greek, English)

In accordance with Article 43 the Convention will enter into force for Greece on 1 June 1993.

3d **GUATEMALA (accession) 6 February 2002 1 May 2002**

In accordance with Article 6, paragraph 1, Guatemala has designated as Central Authority: the ``Procuraduría de la Nación".

The instrument of accession contains the following reservations:

``1. The Republic of Guatemala opposes itself to the use of French in all requests, communication and other documents to be sent to the Central Authority, based in the second paragraph of Article 24 of the Convention (if applicable).

2. The Republic of Guatemala is not obligated to assume any kind of expenses mentioned in the second paragraph of Article 26 of the Convention, derived from the participation of a lawyer, legal advisors or the judiciary procedure, except insofar as those costs may be covered by its system of legal aid and advice.

The Convention is in force between Guatemala and the following States:

the Netherlands (for the Kingdom in Europe)	1 May 2002
Hungary	1 June 2002
Uzbekistan	1 June 2002
Brazil	1 June 2002
Luxembourg	1 July 2002
Portugal	1 August 2002
Israel	1 August 2002
Czech Republic	1 September 2002
Norway	1 October 2002
Argentina	1 November 2002
Germany	1 January 2003
Panama	1 February 2003

Trinidad and Tobago	1 March 2003
Poland	1 March 2003
Colombia	1 May 2003
Uruguay	1 May 2003

3e In accordance with Article 38, paragraph 2, of the above-mentioned Convention the Republic of Honduras deposited its instrument of accession with the Ministry of Foreign Affairs of the Kingdom of the Netherlands on 20 December 1993. The Republic of Honduras acceded to the Convention subject to the reservation provided for in its Article 26, third paragraph.

The Convention will enter into force for the Republic of Honduras on 1 March 1994 in accordance with Article 38, paragraph 3.

The accession will have effect only as regards the relations between the Republic of Honduras and such Contracting States as will have declared their acceptance of the accession.

Central Authority designated under the *Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction.*

adresse/address:

Junta Nacional de Bienestar Social

Frente Emisoras Unidas

Contiguo a Leche 2 Pinos

Boulevard Suyapa

Tegucigalpa, M.D.C.

Honduras

numéro de téléphone/telephone number:

(504)-39-1020 ou/or 39-1004 ou/or 37-9302

numéro de télécopie/telefax number:

(504)-39-1011

personnes à contacter/persons to contact:

Yamileth MEJIA

(General Secretary)

The Convention is in force between *Honduras* and the following States:

the United Kingdom of Great Britain and Northern Ireland	1 May 1994
Luxembourg	1 May 1994
the United States of America	1 June 1994
the Kingdom of the Netherlands (for the Kingdom in Europe)	1 June 1994
the Federal Republic of Germany	1 August 1994
Finland	1 August 1994
Australia	1 September 1994
Switzerland	1 October 1994
Ireland	1 December 1994
Sweden	1 January 1995
Canada	1 August 1995
New Zealand	1 November 1995
Mexico	1 December 1995
Israel	1 January 1996
Argentina	1 December 1996
Norway	1 January 1997
Hungary	1 April 1997
Italy	1 April 1997
Spain	1 June 1997
Venezuela	1 September 1997
Greece	1 October 1997
Poland	1 March 1998
the Czech Republic	1 August 1998
the Slovak Republic	1 February 2001
Portugal	1 January 2002

4 Notification in accordance with Article 45, paragraphs 2 and 3, of the Convention

In conformity with Article 38, paragraphs 1 and 2, the Hungarian People's Republic deposited its instrument of accession to the above-mentioned Convention with the Ministry of Foreign Affairs of the Kingdom of the Netherlands on 7 April 1986.

In conformity with Article 43, paragraph 2, the Convention will enter into force for the Hungarian People's Republic on 1 July 1986.

According to Article 38, paragraph 4, the accession will have effect only as regards the Hungarian People's Republic and such Contracting States as will have declared their acceptance of the accession.

In conformity with Article 6, paragraph 1, of the Convention, the Hungarian Peoples Republic designated as Central Authority to discharge the duties which are imposed by the Convention:

Bureau compétent auprès du Ministère de la Justice: Bureau du droit international et des relations internationales./Competent unit within the Ministry of Justice: Department of International Law and International Relations.

Directeur/Director:

Dr Tamas BAN (langues de communication/languages of communication: anglais et français/English and French)

Directeur adjoint/Deputy Director:

Mme/Mrs Dr Klara NéMETH (langues de communication/languages of communication: allemand et français/German and French)

adresse/address:

``The Ministry of Justice

Szalay utca 16

PO Box 54

1363 BUDAPEST

Hongrie/Hungary

numéro de téléphone/telephone number:

36 1 1 318 188 ou/or 36 1 1 114 015

numéro de télex/telex number:

224998

numéro de télécopie/telefax number:

36 1 1 114 015

personnes à contacter/persons to contact:

Mme/Mrs Dr Katalin BENEDEK (langue de communication/language of

communication: anglais/English)

(heures de bureau:
lundi à vendredi 8 à 16 h.)

Mme/Mrs Dr éva HORVATH (langues de communication/languages of

communication: français, russe/

French, Russian)

(working hours:

Monday to Friday 8–16 hours)

Mlle/Miss Dr Marianna SZéKELY (langue de communication/language of communication: anglais/English)

M./Mr Dr Jozsef GEHéR (langues de communication/languages of communication: allemand, français, anglais/German, French, English)

M./Mr Dr Gabor HIDASI (langues de communication/languages of communication: allemand, anglais, italien/German, English, Italian)

In accordance with Article 43, paragraph 2, the Convention is in force between Hungary and the following States:

the United Kingdom of Great Britain and Northern Ireland	1 September 1986
Luxembourg	1 January 1987
France	1 February 1987
Australia	1 March 1988
Canada	1 April 1988
the United States of America	1 July 1988
Sweden	1 July 1990
the Kingdom of the Netherlands (for the Kingdom in Europe)	1 September 1990
Austria	1 November 1990
the Federal Republic of Germany	1 December 1990

Norway	1 February 1991
Ireland	1 October 1991
Israel	1 February 1992
Denmark	1 March 1992
Spain	1 July 1992
Portugal	1 August 1992
Switzerland	1 September 1992
Finland	1 August 1994
Argentina	1 December 1996
Italy	1 April 1997
Chile	1 April 1997
Cyprus	1 April 1997
Mexico	1 April 1997
Monaco	1 April 1997
Poland	1 April 1997
Romania	1 April 1997
Slovenia	1 April 1997
Colombia	1 April 1997
Ecuador	1 April 1997
Honduras	1 April 1997
New Zealand	1 April 1997
Panama	1 April 1997
Venezuela	1 September 1997
Greece	1 October 1997
the Czech Republic	1 August 1998
the Slovak Republic	1 February 2001
the Bahamas	1 June 2002
Belarus	1 June 2002
Belize	1 June 2002
Brazil	1 June 2002
Burkina Faso	1 June 2002
Costa Rica	1 June 2002
El Salvador	1 June 2002
Estonia	1 June 2002
Fiji	1 June 2002
Georgia	1 June 2002
Guatemala	1 June 2002
Iceland	1 June 2002
Latvia	1 June 2002
Malta	1 June 2002
Mauritius	1 June 2002
Moldova	1 June 2002
Nicaragua	1 June 2002
Paraguay	1 June 2002
Peru	1 June 2002
Saint Kitts and Nevis	1 June 2002
South Africa	1 June 2002
Sri Lanka	1 June 2002
Trinidad and Tobago	1 June 2002
Turkmenistan	1 June 2002
Uruguay	1 June 2002
Uzbekistan	1 June 2002
Zimbabwe	1 June 2002
Belgium	1 May 2003

4a Notification pursuant to Article 45 of the Convention

The Ministry of Foreign Affairs of the Kingdom of the Netherlands, depositary of the above-mentioned Convention, has the honour to inform the Member States of the Hague Conference on Private International Law and States having acceded to the Convention that in accordance with Article 38, paragraph 2, Iceland deposited its Instrument of accession with the Ministry of Foreign Affairs of the Kingdom of the Netherlands on 14 August 1996.

The instrument of accession contains the following reservations:

``1. In accordance with Article 42, paragraph 1, and Article 24, paragraph 2, of the Convention, Iceland makes a reservation with regard to Article 24, paragraph 1, and objects to the use of French in any application, communication or other document sent to its Central Authority.

2. In accordance with Article 42, paragraph 1, and Article 26, paragraph 3, of the Convention, Iceland makes a reservation that it shall not be bound to assume any costs referred to in Article 26, paragraph 2, resulting from the participation of legal counsel or advisers or from court proceedings, except insofar as those costs may be covered by its system of legal aid and advice.

The other provisions of the Convention shall be inviolably observed."

The Convention will enter into force for Iceland on 1 November 1996 in accordance with Article 38, paragraph 3.

The accession will have effect only as regards the relations between Iceland and such Contracting States as will have declared their acceptance of the accession.

The Convention is in force between *Iceland* and the following States:

the United States of America	1 December 1996
the Kingdom of the Netherlands (for the Kingdom in Europe)	1 December 1996
Argentina	1 December 1996
Ireland	1 January 1997
Luxembourg	1 January 1997
Norway	1 January 1997
Poland	1 January 1997
the United Kingdom of Great Britain and Northern Ireland*	1 January 1997
Israel	1 February 1997
Denmark	1 March 1997
Germany	1 April 1997
Italy	1 April 1997
Switzerland	1 May 1997
Sweden	1 May 1997
Finland	1 May 1997
Chile	1 June 1997
Bosnia and Herzegovina	1 August 1997
Venezuela	1 September 1997
Greece	1 October 1997
Australia	1 December 1997
Canada	1 December 1997
New Zealand	1 March 1998
Spain	1 April 1998
the Czech Republic	1 August 1998
the Slovak Republic	1 February 2001

Colombia	1 April 2001
Mexico	1 June 2001
Portugal	1 January 2002
Austria	1 March 2002
Hungary	1 June 2002
France	1 September 2002
Belgium	1 May 2003

*The letter of the Ambassador of the United Kingdom of Great Britain and Northern Ireland contains the following declaration:

``Notwithstanding the provisions of the said Article 38 regarding entry into force of the Convention as between the acceding State and the State that has declared its acceptance of the accession, the municipal law of the United Kingdom was amended with effect from 1 November 1996 to give effect to the provisions of the Convention between it and Iceland from the date when the Convention enters into force for Iceland. I should be grateful for confirmation of the date of 1 November 1996 as the date on which the Convention entered into force between the United Kingdom and Iceland."

In accordance with Article 6, paragraph 1, of the Convention, Iceland has designated as Central Authority the Ministry of Justice and Ecclesiastical Affairs.

Central Authority designated under the *Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction.*

adresse/address:

Ministry of Justice and Ecclesiastical Affairs

Arnarhvoll

150 Reykjavik

numéro de téléphone/telephone number:

+(354) 560 9010

numéro de télex/telex number:

—

numéro de télécopie/telefax number:

+(354) 552 7340

personnes à contacter/persons to contact:

M./Mr Benedikt Bogason

Director of Law Affairs

tél./tel. +(354) 560 9042

4b The Permanent Bureau of the Hague Conference on private international law presents its compliments to the Diplomatic Missions of the Member States and to the National Organs and has the honour to inform them that, by instrument deposited on 16 July 1991 with the Ministry of Foreign Affairs of the Kingdom of the Netherlands, Ireland ratified the above-mentioned Convention.

In accordance with Article 6, paragraph 1, Ireland has designated as Central Authority: ``The Minister for Justice''.

In accordance with Article 43, paragraph 2, the Convention will enter into force for Ireland on 1 October 1991.

4c *Notification pursuant to Article 45 of the Convention*

The Ambassador Extraordinary and Plenipotentiary of Israel at The Hague signed on 4 September 1991, in accordance with Article 37, paragraph 1, the above mentioned Convention for the State of Israel as follows:

M.N. Bawly

4 septembre 1991

In accordance with Article 37, paragraph 2, Israel deposited its instrument of ratification of the above mentioned Convention with the Ministry of Foreign Affairs on 4 September 1991. The instrument of ratification contains the following reservation:

``In accordance with Articles 26 and 42 of the Convention, the State of Israel hereby declares that, in proceedings under the Convention, it shall not be bound to assume any costs resulting from the participation of legal counsel or advisers or from court proceedings, except insofar as those costs may be covered by its system of legal aid and advice.''

In accordance with Article 43 the Convention will enter into force for the State of Israel on 1 December 1991.

Central Authority designated under the *Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction.*

adresse/address:

International Department of the State Attorney's Office

Ministry of Justice

PO Box 1087

JERUSALEM 91010

Israel

numéro de téléphone/telephone number:

+972 (2) 670 8797

numéro de télex/telex number:

—

numéro de télécopie/telefax number:

+972 (2) 628 7668

adresse e-mail/e-mail address:

jleum@trendline.co.il

(dans la case ``sujet'' veuillez indiquer ``Enlèvement d'enfants'')

under ``Subject'' please indicate ``Child Abduction'')

personnes à contacter/persons to contact:

M./Mr Marvin HANKIN

(langues de communication/languages of communication: hébreu, anglais/Hebrew, English)

tél./tel.: +972 (2) 670 8617

Mme/Ms Leslie KAUFMAN

(langues de communication/languages of communication: hébreu, anglais/Hebrew, English)

tél./tel.: +972 (2) 670 0401

4d Central authority designated under the *Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction.*

adresse/address:

Ministero di Grazia e Giustizia

Ufficio Centrale per la Giustizia Minorile

Via Giulia, 131

00186 ROME

Italy

Director: M./Mr Giuseppe Magno (Magistrate)

numéro de téléphone/telephone number:

+39 (6) 6880 7139

numéro de télécopie/telefax number:

+39 (6) 6880 7087 ***ou/or*** *+39 (6) 6880 8085*

adresse e-mail/e-mail address:

—

personnes à contacter/persons to contact:

Mme/Mrs Anna Maria Teresa GREGORI

(Magistrate in charge of the Central Authority)

tél./tel.: +39 (6) 6880 7139

M./Mr Pietro LO RE (Senior Executive)

tél./tel.: +39 (6) 6818 8234 ***ou/or*** *+39 (6) 6880 8085*

Mme/Mrs Ludovica JOVENE

(langue de communication/language of communication: français/French)

tél./tel.: +39 (6) 6880 7139 ***ou/or*** *+39 (6) 6818 8229*

Mme/Mrs Vera COZZOLINO

(langue de communication/language of communication: anglais/English)

tél./tel.: +39 (6) 6818 8227

Mme/Mrs Pieranna ANNESE

(langue de communication/language of communication: francais/French)

tél./tel.: +39 (6) 6818 8259

Mme/Mrs Clara Laura BENELLI

(langue de communication/language of communication: anglais/English)

tél./tel.: +39 (6) 6818 8259

Mme/Mrs Anna SANCHEZ

(langue de communication/language of communication: espagnol/Spanish)

tél./tel.: +39 (6) 6818 8227

4e **LATVIA (accession) 15 November 2001 1 February 2002**

Under the following reservation:

``In accordance with Article 42 and Article 24, paragraph 2, of the Convention on the Civil

Aspects of International Child Abduction the Republic of Latvia declares that it accepts only the use of English in any application, communication or other document sent to its Central Authority."

In accordance with Article 6, paragraph 1, Latvia has designated as Central Authority: ``National Center for the Rights of the Child".

The Convention entered into force between Latvia and the following States:

the Netherlands (for the Kingdom in Europe)	1 April 2002
Costa Rica	1 April 2002
Norway	1 April 2002
Czech Republic	1 May 2002
Colombia	1 May 2002
Luxembourg	1 May 2002
Republic of Moldova	1 May 2002
Hungary	1 June 2002
Uzbekistan	1 June 2002
Brazil	1 June 2002
Israel	1 August 2002
Sweden	1 September 2002
Slovak Republic	1 September 2002
Germany	1 November 2002
Argentina	1 November 2002
Australia	1 January 2003
Trinidad and Tobago	1 March 2003
Spain	1 March 2003
Poland	1 March 2003
Belgium	1 May 2003
Uruguay	1 May 2003

4f **LITHUANIA (accession) 5 June 2002 1 September 2002**

Under the following reservations:

``1. Pursuant to Article 42 and paragraph 2 of Article 24 of the Convention, the Republic of Lithuania consents to using only the English language for any application, communication or other document sent to its Central Authority;

2. Pursuant to Article 42 and paragraph 3 of Article 26 of the Convention, the Republic of Lithuania shall not be bound to assume any costs referred to in paragraph 2 of Article 26 of the Convention resulting from court proceedings or from the participation of legal counsel or advisers, except insofar as those costs may be covered by the system of legal aid and advice of the Republic of Lithuania."

Entry into force between Lithuania and

Poland	1 March 2003
Norway	1 April 2003
Belgium	1 May 2003
Uruguay	1 May 2003

5 Notification pursuant to Article 45 of the Convention

In conformity with Article 37, paragraph 2, the Grand-Duchy of Luxemburg deposited its instrument of ratification of the above-mentioned Convention with the Ministry of Foreign Affairs of the Kingdom of the Netherlands on 8 October 1986.

At the time of ratification the following declarations were made:

Translation

The Grand-Duchy of Luxemburg declares that it shall not be bound to assume any costs referred to in Article 26, paragraph 2, of the Convention, namely the costs resulting from the participation of legal counsel or advisers or from court proceedings, except insofar as those costs are covered by the Luxemburg system of legal aid and advice.

The ``procureur général d'Etat'' is designated as the Central Authority referred to in Article 6 of the Convention.

adresse/address:

Le Procureur Général d'Etat

Palais de Justice

Boîte postale 15

L-2010 LUXEMBOURG Luxembourg

numéro de téléphone/telephone number:

Secrétariat/Secretariat: +352 475981-336

numéro de télex/telex number:

numéro de télécopie/telefax number:

+352 470550

personnes à contacter/persons to contact:

M./Mr Nico EDON

(langues de communication/languages of communication: français, anglais, allemand/French, English, German)

tél./tel.: +352 475981 332

en son absence/in his absence:

M./Mr Pierre SCHMIT

(langues de communication/languages of communication: français, anglais, allemand/French, English, German)

tél./tel.: +352 475981 390

In accordance with Article 43, paragraph 1, the Convention will enter into force for Luxemburg on 1 January 1987.

5a Central Authority designated under the *Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction.*

adresse/address:

Ministère du Travail et de la Politique

Sociale/Ministry of Labour and Social Policy

Rue Dame Gruev No 14

91000 SKOPJE

République de Macédoine

numéro de téléphone/telephone number:

(389) 91 238 224

numéro de télex/telex number:

—

numéro de télécopie/telefax number:

(389)-91-220-408

personnes à contacter/persons to contact:

Mme/Ms Elena LAZOVSKA (Conseiller)

tél./tel.: (389)-91-117-752 ou/or

(389)-91-117-228

One of the successor States to the former Socialist Federal Republic of Yugoslavia which became a Party to the Convention on 1 December 1991. On 20 September 1993, The former Yugoslav Republic of Macedonia declared itself to be bound by the Convention.

By letter dated 30 November 1993, the Ambassador of Greece to the Netherlands informed the Ministry of Foreign Affairs of the Kingdom of the Netherlands that His Government does not recognize The former Yugoslav Republic of Macedonia and consequently does not consider itself to be bound by the Conventions to which the latter is a Party.

No objection has been received from the other Contracting States.

5b In accordance with Article 38, paragraph 5, the Convention entered into force between Malta and the following States:

Argentina	1 April 2000
Luxembourg	1 April 2000
Israel	1 April 2000
Chile	1 April 2000
Poland	1 June 2000
Finland	1 September 2000
Colombia	1 September 2000
Ireland	1 January 2001

the Slovak Republic	1 February 2001
Switzerland	1 February 2001
Spain	1 May 2001
Australia	1 May 2001
Belarus	1 May 2001
Moldova	1 September 2001
Portugal	1 January 2002
Austria	1 March 2002
the United Kingdom of Great Britain and Northern Ireland (including Bermuda, the Cayman Islands, the Falkland Islands, the Isle of Man and Montserrat)	1 March 2002
the Netherlands (for the Kingdom in Europe)	1 April 2002
Norway	1 April 2002
Hungary	1 June 2002
Uzbekistan	1 June 2002
Germany	1 November 2002
United States of America	1 February 2003
Belgium	1 May 2003

5c Notification pursuant to Article 45 of the Convention.—

In accordance with Article 38, paragraph 2, of the above-mentioned Convention the Republic of Mauritius deposited its instrument of accession with the Ministry of Foreign Affairs of the Kingdom of the Netherlands on 23 March 1993.

The Convention will enter into force for the Republic of Mauritius on 1 June 1993 in accordance with Article 38, paragraph 3.

The accession will have effect only as regards the relations between the Republic of Mauritius and such Contracting States as will have declared their acceptance of the accession.

The Ministry of Foreign Affairs of the Kingdom of the Netherlands, in its notification No. 3/1993 of 19 April 1993 concerning the accession by the Republic of Mauritius to the abovementioned Convention, omitted to state that the Republic of Mauritius made the following reservation:

``The Republic of Mauritius declares that is shall not be bound to assume any costs referred to in paragraph 2 of article 26 resulting from the participation of legal counsel or advisers or from court proceedings, except insofar as those costs may be covered by its system of legal aid and advice."

Notification pursuant to Article 45 of the Convention

The Ministry of Foreign Affairs of the Kingdom of the Netherlands, depositary of the Convention on the Civil Aspects of International Child Abduction of 25 October 1980, has the honour, to inform the Member States of the Hague Conference on Private International Law and the States having acceded to the abovementioned Convention that in accordance with Article 6, first paragraph, of the Convention the Attorney General's Office is designated as the Central Authority of Mauritius.

In accordance with Article 38, paragraph 5, the Convention entered into force between Mauritius and the following States:

the Kingdom of the Netherlands (for the Kingdom in Europe)	1 August 1993
the United Kingdom of Great Britain and Northern Ireland	1 September 1993
Luxembourg	1 September 1993
the United States of America	1 October 1993
the Federal Republic of Germany	1 December 1993
Israel	1 December 1993
Sweden	1 December 1993
Australia	1 January 1994
Argentina	1 February 1994
Finland	1 August 1994
Switzerland	1 October 1994
Ireland	1 December 1994
Spain	1 December 1994
France	1 July 1995
Canada	1 August 1995
New Zealand	1 November 1995
Norway	1 January 1997
Italy	1 April 1997
Venezuela	1 September 1997
Greece	1 October 1997
Poland	1 March 1998
the Czech Republic	1 August 1998
the Slovak Republic	1 February 2001
Portugal	1 January 2002
Hungary	1 June 2002

Central authority designated under the *Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction.*

adresse/address:

The Attorney-General

Attorney-General's Chambers

NPF Building

PORT LOUIS

Mauritius

numéro de téléphone/telephone number:

(230)-212-2067

numéro de télex/telex number:

—

numéro de télécopie/telefax number:

(230)-212-6742

personnes à contacter/persons to contact:

—

5d The Permanent Bureau of the Hague Conference on private international law presents its compliments to the Diplomatic Missions of the Member States and to the National Organs and has the honour to inform them that, by instrument deposited on 20 June 1991 with the Ministry of Foreign Affairs of the Kingdom of the Netherlands,

Mexico

acceded to the above-mentioned Convention.

In conformity with Article 38, paragraph 3, the Convention will enter into force for *Mexico* on *1 September 1991*.

According to Article 38, paragraph 4, the accession will have effect only as regards Mexico and such Contracting States as will have declared their acceptance of the accession.

In accordance with Article 38, paragraph 5, the Convention is in force between Mexico and the following States:

Ireland	1 October 1991
the United Kingdom of Great Britain and Northern Ireland	1 October 1991
the Kingdom of the Netherlands (for the Kingdom in Europe)	1 October 1991
Argentina	1 October 1991
the United States of America	1 October 1991
Luxembourg	1 November 1991

New Zealand	1 December 1991
France	1 January 1992
the Federal Republic of Germany	1 February 1992
Israel	1 February 1992
Norway	1 March 1992
Australia	1 June 1992
Canada	1 July 1992
Spain	1 July 1992
Portugal	1 August 1992
Sweden	1 August 1992
Switzerland	1 September 1992
Denmark	1 December 1992
Finland	1 August 1994
Austria	1 November 1994
the Bahamas	1 December 1995
Belize	1 December 1995
Burkina Faso	1 December 1995
Chile	1 December 1995
Cyprus	1 December 1995
Ecuador	1 December 1995
Honduras	1 December 1995
Monaco	1 December 1995
Panama	1 December 1995
Poland	1 December 1995
Romania	1 December 1995
Saint Kitts and Nevis	1 December 1995
Slovenia	1 December 1995
Zimbabwe	1 December 1995
Hungary	1 April 1997
Italy	1 April 1997
Venezuela	1 September 1997
Greece	1 October 1997
the Czech Republic	1 August 1998
the Slovak Republic	1 February 2001
Brazil	1 June 2001
Colombia	1 June 2001
Costa Rica	1 June 2001
Iceland	1 June 2001
Nicaragua	1 June 2001
Paraguay	1 June 2001
South Africa	1 June 2001
Uruguay	1 June 2001
China, Macau Special Administrative Region	1 September 2003

Notification pursuant to Article 45 of the Convention

Mexico has designated as the Central Authority referred to in Article 6 of the Convention:

adresse/address:

Consultoria Juridica

Secretaría de Relaciones Exteriores

Homero No 213, Piso 17

Colonia Chapultepec Morales

11570 MEXICO, Distrito Federal

numéro de téléphone/telephone number:

(52)-5-327-3218

numéro de télex/telex number:

176 3479 (SREME)

numéro de télécopie/telefax number:

(52)-5-327-3201

personnes à contacter/persons to contact:

M./Mr Ricardo CAMARA SANCHEZ

Coordinador de la Autoridad Central Mexicana

(langues de communication/languages of communication: espagnol, anglais, français/Spanish, English, French)

Mme/Mrs Concepción GALVEZ COETO

Coordinadora del Programa Internacional de Menores

(langues de communication/languages of communication: espagnol, anglais/Spanish, English)

Mme/Mrs Rosa Isela GUERRERO ALBA

Asesor Legal del Programa Internacional de Menores

(langues de communication/languages of communication: espagnol, anglais/Spanish, English)

The following officials can be contacted:

``Dr. Carlos Pujalte Pineiro, Adjunct Juridical Consultant; Dr. Eduardo Pena Haller, Coärdinator of the Adviser's and Defense Office for Mexicans Abroad.''

According to Article 6, paragraph 2, Mexico has designated the following State Central Authorities:

AUTORIDADES CENTRALES ESTATALES EN LOS ESTADOS UNIDOS MEXICANOS

distrito federal

direccion de asistencia juridica—sistema nacional para el desarrollo integral de la familia—prolongacion xochilcalco 947—col. santa cruz atoyac—delegacion benito juarez—03310 mexico, d.f.—tel.: 601 2222 (ext. 1600, 1601, 6012), 629 2367, 629 2368—fax: 688 6710

aguascalientes

direccion general del dif aguascalientes—av. de la convencion sur exq. av. de los maestros—col. espa[Delta equal to]na—20210 aguascalientes, ags.—tel.: 133376

procuraduria de la defensa del menor y la familia—dif aguascalientes—av. de la convencion sur y av. de los maestros—col. espa[Delta equal to]na—20210 aguascalientes, ags.—tel.: 133363

baja california

direccion general dif baja california—av. obregon calle ``e'' 1290—col. nueva—21100 mexicali, b.c.—tel.: 525680

direccion general de asuntos juridicos y procuraduria de la defensa del menor y la familia dif baja california—locales 12 y 13 centro comercial plaza fiesta—calz. independencia y ni[Delta equal to]nos heroes—21280 mexicali, b.c.—tel.: 524802

baja california sur

direccion general dif baja california sur—aquiles serdan y rosales—23000 la paz, b.c.s.—tel.: 26790

procuraduria de la defensa del menor y la familia—dif baja california sur—aquiles serdan y rosales—23000 la paz, b.c.s.—tel.: 23887

campeche

direccion general dif campeche—calle diez n° 584 mansion carbajal—col. san roman centro—24000 campeche, camp.—tel.: 167520

procuraduria de la defensa del menor y la familia—dif campeche—calle diez n° 584 mansion carbajal—col. san roman centro—24000 campeche, camp.—tel.: 167644

coahuila

direccion general dif coahuila—paseo de las arboledas y torres bodet—col. chapultepec—25050 saltillo, coah.—tel.: 173700

colima

direccion general dif colima—calz. galvan norte y emilio carranza—28030 colima, col.—tel.: 125937

procuraduria de la defensa del menor y la familia—dif colima—calz. galvan norte y emilio carranza—28030 colima, col.—tel.: 121705

chiapas

direccion general dif chiapas—libramiento nte. ote. salomon gonzalez blanco—esq. paso limon—col. patria nueva—29000 tuxtla gutierrez, chis.—tel.: 141584

procuraduria de la defensa del menor y la familia—dif chiapas—libramiento nte. ote. salomon gonzalez blanco—esq. paso limon—col. patria nueva—29000 tuxtla gutierrez, chis.—tel.: 141557

chihuahua

direccion general dif chihuahua—av. tecnologico 2903—31310 chihuahua, chih.—tel.: 137689

procuraduria de la defensa del menor y la familia—dif chihuahua—av. tecnologico 2903—31310 chihuahua, chih.—tel.: 135644

durango

direccion general dif durango—h. colegio militar y cap francisco ibarra s/n—34000 durango, dgo.—tel.: 83904

procuraduria de la defensa del menor y la familia—dif durango—h. colegio militar y cap francisco ibarra s/n—34000 durango, dgo.—tel.: 178417

estado de mexico

direccion general dif estado de mexico—paseo colon y tollecan—col. isidro favela—50170 toluca, mex.—tel.: 173786

procuraduria de la defensa del menor y la familia—del dif estado de mexico—jose v. villada 451, esq. francisco murguia—col. el ranchito—50130 toluca, mex.—tel.: 124868

guanajuato

direccion general dif guanajuato—paseo de la presa 89-a—36000 guanajuato, gto.—tel.: 320499

procuraduria de la defensa del menor y la familia—dif guanajuato—paseo de la presa 89-a—36000 guanajuato, gto.—tel.: 321083

guerrero

direccion general dif guerrero—orquidea s/n av. lazaro cardenas esq. ruffo figueroa—apartado 131—col. burocratas—39090 chilpancingo, gro.—tel.: 722772

procuraduria de la defensa del menor y la familia—dif guerrero—av. lazaro cardenas esq. ruffo figueroa s/n—apartado 131—col. burocratas—39090 chilpancingo, gro.—tel.: 727992

hidalgo

direccion general dif hidalgo—salazar 100—col. centro—42000 pachuca, hgo.—tel.: 55395

procuraduria de la defensa del menor y la familia—dif hidalgo—salazar 100—col. centro—42000 pachuca, hgo.—tel.: 55283

jalisco

direccion general dif jalisco—av. alcalde 1220 piso 1—44280 guadalajara, jal.—tel.: 824 0097

procuraduria de la defensa del menor y la familia—av. alcalde 1220—44280 guadalajara, jal.—tel.: 624 4154

michoacan

direccion general dif michoacan—av. acueducto 447, esq. ventura—puente bosque cuauhtemoc—58000 morelia, mich.—tel.: 120 7815

procuraduria de la defensa del menor y la familia—dif michoacan—av. acueducto y ventura puente—58000 morelia, mich.—tel.: 133541

morelos

direccion general dif morelos—av. chapultepec s/n—col. chapultepec—62450 cuernavaca, mor.—tel.: 156920

procuraduria de la defensa del menor y la familia—dif morelos—bajada de chapultepec 24—col. chapultepec—62450 cuernavaca, mor.—tel.: 155168

nayarit

direccion general dif nayarit—calle sauce y cedro—col. san juan—63130 tepic, nay.—tel.: 140252

procuraduria de la defensa del menor y la familia—dif nayarit—amado nervo y puebla—63130 tepic, nay.—tel.: 125271

nuevo leon

direccion general dif nuevo leon—av. morones prieto 600 ote.—col. independencia—64720 monterrey, n.l.—tel.: 403297

procuraduria de la defensa del menor y la familia—dif nuevo leon—luis g. urgina s/n—col. fabriles—64550 monterrey, n.l.—tel.: 481862

oaxaca

direccion general dif oaxaca—la. gral. vicente guerrero 114—col. miguel aleman—68120 oaxaca, oax.—tel.: 66928

procuraduria de la defensa del menor, la mujer y la familia dif oaxaca—matamoros 305—col. centro—68000 oaxaca, oax.—tel.: 62385

puebla

direccion general dif puebla—priv. 5-b sur n° 4302—col. gabriel pastor—72420 puebla. pue.—tel.: 409912

procuraduria de la defensa del menor y la familia—dif puebla—25 poniente n° 2302—col. los angeles—72440 puebla, pue.—tel.: 430240

queretaro

direccion general dif queretaro—pasteur sur n° 5 altos—76000 queretaro, qro.—tel.: 141254

procuraduria de la defensa del menor y la familia—dif queretaro—pasteur sur n° 6 altos casa de escala—76000 queretaro, qro.—tel.: 141115

quintana roo

direccion general dif quintana roo—av. adolfo lopez mateos 441—col. campestre—77030 chetumal, q.r.—tel.: 324177

procuraduria de la defensa del menor y la familia—dif quintana roo—av. adolfo lopez mateos 441—col. campestre—77030 chetumal, q.r.—tel.: 322224 (ext. 66 y 64)

san luis potosi

direccion general dif san luis potosi—nicolas fernandez torres 500—col. jardin—78270 san luis potosi, s.l.p.—tel.: 176211

procuraduria de la defensa del menor y la familia—dif san luis potosi—mariano otero 804—col. barrio de tequisquiapan—78230 san luis potosi, s.l.p.—tel.: 135281

sinaloa

direccion general dif sinaloa—ignacio ramirez y rivapalacio centro—80200 culiacan, sin.—tel.: 131109

procuraduria de la defensa del menor y la familia—dif sinaloa—av. constitucion y juan m. banderas centro—80200 culiacan, sin.—tel.: 164486

sonora

direccion general dif sonora—blvd. luis encinas esq. francisco monteverde—col. san benito a.p. 500—83260 hermosillo, son.—tel.: 150351

procuraduria de la defensa del menor y la familia—dif sonora—blvd. luis encinas esq. francisco monteverde—col. san benito a.p. 500—83260 hermosillo, son.—tel.: 146283

tabasco

direccion general dif tabasco—lic. manuel antonio romero 203—col. pensiones—86170 villahermosa, tab.—tel.: 510942

direccion de la procuraduria de la defensa del menor y la familia y asuntos juridicos dif tabasco—lic. manuel antonio romero 203—col. pensiones—86170 villahermosa, tab.—tel.: 510986

tamaulipas

direccion general dif tamaulipas—calz. gral. luis caballero 297 ote.—86000 cd. victoria, tams.—tel.: 124146

procuraduria de la defensa del menor y la familia—dif tamaulipas—calz. gral. luis caballero 297 ote.—86000 cd. victoria, tams.—tel.: 128080 (ext. 114)

tlaxcala

direccion general dif tlaxcala—av. morelos 4 centro—90000 tlaxcala, tlax.—tel.: 627825

procuraduria de la defensa del menor y la familia—dif tlaxcala—av. morelos 4 centro—90000 tlaxcala, tlax.—tel.: 620210 (ext. 105)

veracruz

direccion general dif veracruz—av. miguel aleman 109—col. federal—91140 jalapa, ver.—tel.: 400044

procuraduria de la defensa del menor, la familia y el indigena dif veracruz—av. miguel aleman 109—col. federal—91140 jalapa, ver.—tel.: 400044 (ext. 40)

yucatan

direccion general dif yucatan—av. miguel aleman 355—col. itzimna—97100 merida, yuc.—tel.: 265085

procuraduria de la defensa del menor y la familia—dif yucatan—av. miguel aleman 355—col. itzimna—97100 merida, yuc.—tel.: 271798

zacatecas

direccion general dif zacatecas—instalaciones la encantada s/n—98000 zacatecas, zac.—tel.: 222073

procuraduria de la defensa del menor y la familia—dif zacatecas—instalaciones lago la encantada s/n—98000 zacatecas, zac.—tel.: 221377

5e *Notification pursuant to Article 45 of the Convention*

The Ministry of Foreign Affairs of the Kingdom of the Netherlands, depositary of the Convention on the Civil Aspects of International Child Abduction of 25 October 1980, has the honour to inform the Member States of The Hague Conference on Private International Law and the States having acceded to the above-mentioned Convention that in accordance with Article 38, paragraph 2, the Republic of Moldova deposited its instrument of accession with the Ministry of Foreign Affairs of the Kingdom of the Netherlands on 10 April 1998.

The instrument of accession contains the following reservation:

Translation

``In accordance with the provisions of Article 42 of the Convention, pursuant to Article 26, paragraph 3, the Republic of Moldova declares that the Republic of Moldova will assume the costs referred to in paragraph 2 of Article 26 only insofar as these costs are covered by the national system of legal and judicial aid."

In accordance with Article 6, paragraph 1, the Republic of Moldova has designated as Central Authority:

The Ministry of Education and Science of the Republic of Moldova

1, Piata Marii Adunari Nationale

CHISINAU

Republic of Moldova, MD—2033

The Convention will enter into force for the Republic of Moldova on 1 July 1998 in accordance with Article 38, paragraph 3.

The accession will have effect only as regards the relations between the Republic of Moldova and such Contracting States as will have declared their acceptance of the accession.

Under Article 38, the Convention is not in force between the United States and Moldova.

In accordance with Article 38, paragraph 5, the Convention entered into force between Moldova and the following States:

Luxembourg	1 September 1998
Israel	1 September 1998
Poland	1 September 1998
Finland	1 October 1998
Italy	1 November 1998
Australia	1 November 1998
Argentina	1 November 1998
the Czech Republic	1 December 1998
Belarus	1 February 1999
Ireland	1 February 1999
Chile	1 June 1999
China, Hong Kong Special Administrative Region	1 June 1999
Spain	1 February 2000
Greece	1 March 2000
Germany	1 May 2000
Bosnia and Herzegovina	1 December 2000

Canada	1 January 2001
the Slovak Republic	1 February 2001
Colombia	1 April 2001
Brazil	1 September 2001
Costa Rica	1 September 2001
Malta	1 September 2001
Nicaragua	1 September 2001
Uruguay	1 September 2001
Uzbekistan	1 September 2001
Estonia	1 October 2001
Portugal	1 January 2002
Austria	1 March 2002
the Netherlands (for the Kingdom in Europe)	1 April 2002
Latvia	1 May 2002
Peru	1 May 2002
Hungary	1 June 2002
Belgium	1 May 2003

5f In accordance with Article 38, paragraph 5, the Convention entered into force between Monaco and the following States:

the Kingdom of the Netherlands (for the Kingdom in Europe)	1 March 1993
France	1 March 1993
Luxembourg	1 April 1993
Ireland	1 April 1993
the United Kingdom of Great Britain and Northern Ireland	1 April 1993
the United States of America	1 June 1993
the Federal Republic of Germany	1 July 1993
Argentina	1 August 1993
Israel	1 November 1993
Sweden	1 December 1993
Australia	1 January 1994
Finland	1 August 1994
Switzerland	1 October 1994
Austria	1 November 1994
Spain	1 December 1994
Denmark	1 May 1995
Canada	1 June 1995
New Zealand	1 November 1995
Mexico	1 December 1995
Norway	1 January 1997
Hungary	1 April 1997
Italy	1 April 1997
Venezuela	1 September 1997
Greece	1 October 1997
Poland	1 March 1998
the Czech Republic	1 August 1998
the Slovak Republic	1 February 2001
Portugal	1 January 2002
Belgium	1 May 2003

With the following reservation:

``Conformément à l'article 26, alinéa 3, de la Convention, la Principauté de Monaco déclare n'être tenue au paiement des frais visés à l'article 26, alinéa 2, liés à la participation d'un avocat ou d'un conseiller juridique, ou aux frais de justice, que dans la mesure où ces coûts peuvent être couverts par son système d'assistance judiciaire et juridique."

Translation

In conformity with Article 26, paragraph 3, of the Convention, the Principality of Monaco declares that it shall not be bound to assume any costs referred to in Article 26, paragraph 2, resulting from the participation of legal counsel or advisers or from court proceedings, except insofar as those costs may be covered by its system of legal aid and advice.

In accordance with Article 6, paragraph 1, Monaco has designated as Central Authority: ``Direction des Services Judiciaires, Palais de Justice".

6 The Permanent Bureau of the Hague Conference on private international law presents its compliments to the Diplomatic Missions of the Member States and to the National Organs and has the honour to inform them that, in accordance with Article 37, paragraph 2,

the Kingdom of the Netherlands

deposited on *12 June 1990 for the Kingdom in Europe* the instrument of acceptance of the above-mentioned Convention. The instrument of acceptance contains the following reservation:

The Kingdom of the Netherlands shall not be bound to assume any costs referred to in the second paragraph of Article 26 of the Convention on the Civil Aspects of International Child Abduction, done at The Hague on 25 October 1980, resulting from the participation of legal counsel or advisers or from court proceedings, except insofar as those costs may be covered by its system of legal aid and advice.

In accordance with Article 43, paragraph 2, the Convention will enter into force for the *Kingdom of the Netherlands (the Kingdom in Europe)* on *1 September 1990.*

In accordance with the provisions of Article 6 of the Convention, the Central Authority designated is:

for the *Kingdom in Europe*: the *Ministry of Justice at The Hague.*

In accordance with the provisions of Article 6 of the Convention, the Central Authority designated is, for the Kingdom in Europe:

``Ministry of Justice
Prevention, Youth Protection and Probation Service
Legal Affairs Support Unit
The Hague".

6a *Notification pursuant to Article 45 of the Convention*

In accordance with Article 38, paragraph 2, New Zealand deposited its instrument of accession to the above-mentioned Convention with the Ministry of Foreign Affairs of the Kingdom of the Netherlands on 31 May 1991.

The instrument of accession contains the following declarations:

``the Government of New Zealand hereby declares in accordance with Article 24 and Article 42 of the Convention that any application, communication or other document sent to its Central Authority should either be in the English language or accompanied by a translation thereof in the English language;

And the Government of New Zealand hereby further declares in accordance with Article 26 and Article 42 of the Convention that it reserves the right not to be bound to assume the costs referred to in Article 26 resulting from the participation of legal counsel or advisers or from Court proceedings, except insofar as those costs may be covered by its system of legal aid and advice."

In accordance with Article 38, paragraph 3, the Convention will enter into force for New Zealand on 1 August 1991. The accession will have effect only as regards the relations between New Zealand and such Contracting States as will have declared their acceptance of the accession. Such declaration shall be deposited at the Ministry of Foreign Affairs of the Kingdom of the Netherlands.

New Zealand designated as the Central Authority under Article 6, paragraph 2:

adresse/address:

The Secretary

Department of Justice

Private Box 180

Wellington

New Zealand

numéro de téléphone/telephone number:

(04) 725-980

numéro de télex/telex number:

numéro de télécopie/telefax number:

(04) 732-362

personnes à contacter/persons to contact:

Mme/Ms Heather TAVASSOLI

(langues de communication/

language of communication:

allemand/German)

Mme/Mrs Virginia LYNCH

Mme/Mrs Ellen FRANCE

In accordance with Article 38, paragraph 5, the Convention is in force between New Zealand and the following States:

the Kingdom of the Netherlands (for the Kingdom in Europe)	1 September 1991
the United Kingdom of Great Britain and Northern Ireland	1 October 1991
Luxembourg	1 October 1991
Ireland	1 October 1991
Denmark	1 October 1991
the United States of America	1 October 1991
Argentina	1 October 1991
Mexico	1 December 1991
France	1 January 1992
the Federal Republic of Germany	1 February 1992
Israel	1 February 1992
Australia	1 June 1992
Canada	1 July 1992
Spain	1 July 1992
Portugal	1 August 1992
Sweden	1 August 1992
Switzerland	1 September 1992
Norway	1 October 1992
Finland	1 August 1994
Austria	1 November 1994
the Bahamas	1 November 1995

Burkina Faso	1 November 1995
Chile	1 November 1995
Cyprus	1 November 1995
Ecuador	1 November 1995
Honduras	1 November 1995
Mauritius	1 November 1995
Monaco	1 November 1995
Panama	1 November 1995
Poland	1 November 1995
Romania	1 November 1995
Slovenia	1 November 1995
Zimbabwe	1 November 1995
Hungary	1 April 1997
Italy	1 April 1997
Venezuela	1 September 1997
Greece	1 October 1997
Georgia	1 March 1998
Colombia	1 March 1998
Iceland	1 March 1998
St. Kitts and Nevis	1 March 1998
South Africa	1 March 1998
the Czech Republic	1 August 1998
the Republic of Fiji	1 February 2000
the Slovak Republic	1 February 2001
Belgium	1 May 2003

6b In accordance with Article 38, paragraph 5, the Convention is in force between Nicaragua and the following States:

Mexico	1 June 2001
Moldova	1 September 2001
Panama	1 September 2001
Uruguay	1 October 2001
Argentina	1 October 2001
Costa Rica	1 October 2001
Ireland	1 November 2001
Portugal	1 January 2002
Israel	1 April 2002
Norway	1 April 2002
Hungary	1 June 2002
Spain	1 June 2002
Uzbekistan	1 June 2002
Brazil	1 June 2002
Sweden	1 September 2002
Slovak Republic	1 September 2002
Greece	1 January 2003
Trinidad and Tobago	1 March 2003
Poland	1 March 2003
Colombia	1 May 2003

6c Notification pursuant to Article 45 of the Convention

In accordance with its Article 37, paragraph 1, the above-mentioned Convention was signed for Norway on 9 January 1989 as follows:

(sd.) BJØRN BLAKSTAD

9th January 1989

subject to ratification and to the reservations

set out in the full powers to sign.

The text of those reservations is worded as follows:

``1. In accordance with Articles 24 and 42, the Norwegian Government reserves the right not to accept applications, communications or other documents sent to the General Authority in French.

2. In accordance with Articles 26 and 42, Norway makes the reservation that it shall not be bound to assume any costs resulting from the participation of legal counsel or advisers or from court proceedings, except insofar as those costs may be covered by Act of 13 June 1980 relating to free legal aid."

In accordance with Article 37, paragraph 2, Norway deposited on 9 January 1989 also its instrument of ratification of the said Convention with the Ministry of Foreign Affairs of the Kingdom of the Netherlands. The instrument of ratification contains the same reservations as the full powers to sign the Convention.

The Convention will enter into force for Norway in accordance with Article 43 of 1 April 1989.

Central Authority designated under the *Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction.*

adresse/address:

Justisdepartementet

(Ministry of Justice)

Rettshjelpskontor

Postboks 8005 dep

0030 OSLO 1"

Norway

numéro de téléphone/telephone number:

(47)-2-234-5481

numéro de télex/telex number:

21403 JDEP N

numéro de télécopie/telefax number:

(47)-2-234-2722

personnes à contacter/persons to contact:

M./Mr Jan GOTAAS

Deputy Director General

(langue de communication/language of communication: anglais/English)

tél./tel.: (47) 22 24 52 28

Mlle/Ms Helene S. BJONNESS-

JACOBSEN

Senior Executive Officer

(langue de communication/language of communication: anglais/English)

tél./tel.: (47) 22 24 54 71

Mlle/Ms Elisabeth HALVORSEN

Senior Executive Officer

(langue de communication/language of communication: anglais/English)

tél./tel.: (47) 22 24 54 83

6d Central Authority designated under the *Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction.*

adresse/address:

Direccion General de Asuntos Juridicos y Tratados

Ministerio de Relaciones Exteriores

Panama 4

Panama

numéro de téléphone/telephone number:

(507)-25-1544

numére de télex/telex number:

—

numéro de télécopie/telefax number:

(507)-27-1680

personnes à contacter/persons to contact:

—

The Convention is in force between *Panama* and the following States:

the United States of America	1 June 1994
the Kingdom of the Netherlands (for the Kingdom in Europe)	1 June 1994
Luxembourg	1 June 1994
the United Kingdom of Great Britain and Northern Ireland	1 July 1994
Finland	1 August 1994
Australia	1 September 1994
Switzerland	1 October 1994
Ireland	1 December 1994
Sweden	1 January 1995
Chile	1 March 1995
Argentina	1 May 1995
Germany	1 June 1995
Cyprus	1 June 1995
Saint Kitts and Nevis	1 June 1995
Slovenia	1 June 1995
Canada	1 August 1995
Spain	1 September 1995
New Zealand	1 November 1995
Mexico	1 December 1995
Israel	1 January 1996
Colombia	1 May 1996
Hungary	1 April 1997
Italy	1 April 1997
Ecuador	1 May 1997
Venezuela	1 September 1997
Greece	1 October 1997
Poland	1 March 1998
the Czech Republic	1 August 1998
Norway	1 November 1999
Brazil	1 July 2000
the Slovak Republic	1 February 2001
Uruguay	1 March 2001
Costa Rica	1 March 2001
Trinidad and Tobago	1 March 2001
Paraguay	1 March 2001
El Salvador	1 September 2001
Nicaragua	1 September 2001
Portugal	1 January 2002
Estonia	1 February 2003
Guatemala	1 February 2003
Peru	1 February 2003

6e In accordance with Article 38, paragraph 5, the Convention is in force between Paraguay and the following States:

Israel	1 October 1998
the Czech Republic	1 October 1998
Argentina	1 November 1998
Poland	1 December 1998
Belarus	1 February 1999
Ireland	1 February 1999
Finland	1 March 1999
Australia	1 April 1999
Chile	1 June 1999
Spain	1 February 2000
Greece	1 March 2000
Canada	1 January 2001
the Slovak Republic	1 February 2001
Panama	1 March 2001
Colombia	1 April 2001
Mexico	1 June 2001
Italy	1 August 2001
Germany	1 December 2001
Portugal	1 January 2002
the Netherlands (for the Kingdom in Europe)	1 April 2002
Hungary	1 June 2002
Sweden	1 September 2002

In accordance with Article 6, Paraguay has designated as Central Authority: the Direction of the Protection of the Child at the Ministry of Justice and Labour.

6f In accordance with Article 38, paragraph 5, the Convention is in force between Peru and the following States:

Argentina	1 October 2001
Luxembourg	1 August 2001
Argentina	1 October 2001
Costa Rica	1 November 2001
Norway	1 April 2002
the Republic of Moldova	1 May 2002
the Netherlands (for the Kingdom in Europe)	1 May 2002
Hungary	1 June 2002
Uzbekistan	1 June 2002
Brazil	1 June 2002
Portugal	1 August 2002
Israel	1 August 2002
Slovak Republic	1 September 2002
Spain	1 December 2002
Chile	1 December 2002
Greece	1 January 2003
Australia	1 January 2003
Panama	1 February 2003
Trinidad and Tobago	1 March 2003
Colombia	1 March 2003
Poland	1 March 2003
Uruguay	1 May 2003

6g In accordance with Article 38, paragraph 2, of the above-mentioned Convention the Republic of Poland deposited its instrument of accession to the Convention with the Ministry of Foreign Affairs of the Kingdom of the Netherlands on 10 August 1992. The instrument of accession contains the following reservation:

Translation

In accordance with Article 42 the Republic of Poland makes the reservation pursuant to Article 26, paragraph 3, of the Convention and declares that it shall not be bound to assume any costs referred to in the preceding paragraph, resulting from court proceedings, except insofar as those costs may be covered by its system of legal aid and advice.

The Convention will enter into force for the Republic of Poland in accordance with Article 38, paragraph 3, on 1 November 1992.

The accession will have effect only as regards the relations between the Republic of Poland and such Contracting States as will have declared their acceptance of the accession.

In accordance with Article 38, paragraph 5, the Convention will enter into force between Poland and the following States:

the United States of America	1 November 1992
the Kingdom of the Netherlands (for the Kingdom in Europe)	1 November 1992
Luxembourg	1 January 1993
the United Kingdom of Great Britain and Northern Ireland	1 February 1993
France	1 February 1993
the Federal Republic of Germany	1 February 1993
Ireland	1 April 1993
Norway	1 July 1993
Israel	1 November 1993
Sweden	1 December 1993
Australia	1 January 1994
Argentina	1 February 1994
Canada	1 February 1994
Finland	1 August 1994
Switzerland	1 October 1994
Austria	1 November 1994
Spain	1 December 1994
Denmark	1 May 1995
New Zealand	1 November 1995
Mexico	1 December 1995
Italy	1 February 1996
Cyprus	1 January 1997
Iceland	1 January 1997
Hungary	1 April 1997
Venezuela	1 September 1997
Greece	1 October 1997
the Bahamas	1 March 1998
Chile	1 March 1998
Colombia	1 March 1998
Honduras	1 March 1998
Mauritius	1 March 1998
Monaco	1 March 1998
Panama	1 March 1998

Romania	1 March 1998
St. Kitts and Nevis	1 March 1998
Slovenia	1 March 1998
South Africa	1 March 1998
Zimbabwe	1 March 1998
the Czech Republic	1 August 1998
Moldova	1 September 1998
Paraguay	1 December 1998
Uzbekistan	1 January 2000
Brazil	1 May 2000
Uruguay	1 May 2000
Malta	1 June 2000
the Slovak Republic	1 February 2001
Belarus	1 February 2001
Georgia	1 February 2001
Fiji	1 February 2001
Turkmenistan	1 February 2001
Costa Rica	1 February 2001
Portugal	1 January 2002
El Salvador	1 March 2003
Estonia	1 March 2003
Guatemala	1 March 2003
Latvia	1 March 2003
Lithuania	1 March 2003
Nicaragua	1 March 2003
Peru	1 March 2003
Sri Lanka	1 March 2003
Trinidad and Tobago	1 March 2003
Belgium	1 May 2003

Central Authority designated under the *Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction.*

addresse/address:

Ministère de la Justice

Département juridique

Al. Ujazdowskie 11

00-950 VARSOVIE

Pologne

numéro de téléphone/telephone number:

(48)-22-628-4431 (Central no. for Ministry)

(48)-22-628-9173 (Department of International Co-operation and European Law)

numéro de télex/telex number:

—

numéro de télécopie/telefax number:

(48)-22-628-0949 (Dept. of International

Co-operation and European Law)

personnes à contacter/persons to contact:

Mme/Ms Katarzyna BIERNACKA

(langue de communication/language of communication: français/French)

Mme/Ms Jolanta BORKOWSKA

(langue de communication/language of communication: anglais/English)

6h *Notification in accordance with Article 45, paragraphs 1 and 3 of the Convention*

In conformity with Article 37, paragraph 2, Portugal deposited its instrument of ratification of the above-mentioned Convention with the Ministry of Foreign Affairs of the Kingdom of the Netherlands on 29 September 1983.

The Portugese Government notified that the Portugese Central Authority as provided for in Article 6 of the Convention is:

adresse/address:

Instituto de Reinserçao Social

Avenida Almirante Reis, 101, 7°

1197 LISBOA Codex

Portugal

numéro de téléphone/telephone number:

+351 (1) 317 6100

numéro de télex/telex number:

—

numéro de télécopie/telefax number:

+351 (1) 317 6171

personnes à contacter/persons to contact:

Mme/Mrs TRIGO DE SOUSA

(langues de communication/languages of

communication: portugais, français, anglais/Portuguese, French, English)

M./Mr PEDRO MIGUEL DUARTE

(langues de communication/languages of

communication: portugais, anglais,

français/Portuguese, English, French)

tel./tel.it +351 (1) 317 6175

In accordance with Article 43 the Convention shall enter into force the first December 1983 for Canada, France and Portugal.

By note dated 2 December 1998, received at the Ministry of Foreign Affairs of the Kingdom of the Netherlands on 9 December 1998, Portugal extended the Convention in accordance with Article 39 to Macau.

In accordance with Article 43, paragraph 2, sub 2, the Convention will enter into force for Macau on 1 March 1999.

7 Central Authority designated under the *Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction.*

adresse/address:

Ministère de la Justice

Bd. M. Kogalniceanu 33

Sector 5

BUCAREST

Roumanie

numéro de téléphone/telephone number:

+40 (1) 614 4400

+40 (1) 311 0784

numéro de télex/telex number:

11964 MJ

numéro de télécopie/telefax number:

+40 (1) 323 6179

personnes à contacter/persons to contact:

Mme/Ms A. IACOVESCU

(Directeur adjount des relations juridiques internationales du Ministère de la Justice)

(langue de communication/language of communication: français/French)

Mme/Ms Cristina FILISANU

(Conseillère à la Direction des relations juridiques internationales)

(langue de communication/language of communication: français/French)

In accordance with Article 38, paragraph 5, the Convention entered into force between Romania and the following States:

the Kingdom of the Netherlands (for the Kingdom in Europe)	1 March 1993
France	1 March 1993
the United Kingdom of Great Britain and Northern Ireland*	1 April 1993
Ireland	1 April 1993
Luxembourg	1 April 1993
the United States of America	1 June 1993
the Federal Republic of Germany	1 July 1993

Argentina	1 August 1993
Israel	1 November 1993
Sweden	1 December 1993
Australia	1 January 1994
Finland	1 August 1994
Switzerland	1 October 1994
Austria	1 November 1994
Spain	1 December 1994
Denmark	1 May 1995
Canada	1 June 1995
New Zealand	1 November 1995
Mexico	1 December 1995
Hungary	1 April 1997
Venezuela	1 September 1997
Greece	1 October 1997
Poland	1 March 1998
the Czech Republic	1 August 1998
Norway	1 October 1998
Italy	1 September 2000
the Slovak Republic	1 February 2001
Portugal	1 January 2002
Belgium	1 May 2003

*With the following declaration:

``Notwithstanding the provisions of the said Article 38 regarding entry into force of the Convention as between the acceding State and the State declaring its acceptance of the accession, amendments will have been made to the United Kingdom municipal law in order to give effect to the Convention between it and Romania as of 1 February 1993 when the Convention enters into force for Romania."

7a The instrument of accession contains the following declaration:

``Saint Kitts and Nevis is not bound to assume any costs resulting under the Convention from the participation of legal counsel or advisers [or] from court proceedings in terms of paragraph 3 of Article 26 of the Convention."

In accordance with Article 38, paragraph 3, the Convention will enter into force for *Saint Kitts and Nevis* on *1 August 1994.*

According to Article 38, paragraph 4, the accession will have effect only as regards Saint Kitts and Nevis and such Contracting States as will have declared their acceptance of the accession.

The Convention is in force between *Saint Kitts and Nevis* and the following States:

the Kingdom of the Netherlands (for the Kingdom in Europe)	1 October 1994
the United Kingdom of Great Britain and Northern Ireland*	1 August 1994
Luxembourg	1 November 1994
Ireland	1 December 1994
Sweden	1 January 1995

Germany**	1 May 1995
the United States of America	1 June 1995
Panama	1 June 1995
Canada	1 August 1995
Australia	1 November 1995
Mexico	1 December 1995
Israel	1 January 1996
Chile	1 May 1996
Argentina	1 December 1996
Italy	1 April 1997
Switzerland	1 May 1997
Finland	1 May 1997
Spain	1 June 1997
Venezuela	1 September 1997
New Zealand	1 March 1998
Poland	1 March 1998
Norway	1 March 1998
the Czech Republic	1 August 1998
the Slovak Republic	1 February 2001
Portugal	1 January 2002
Hungary	1 June 2002

*With the following declaration:

``Notwithstanding the provisions of the said Article 38 regarding entry into force of the Convention as between the acceding State and the State declaring its acceptance of the accession, amendments will have been made to the United Kingdom municipal law in order to give effect to the Convention between it and Saint Christopher and Nevis as of 1 August 1994 when the Convention enters into force for Saint Christopher and Nevis. I would be grateful for confirmation of the date of 1 August 1994 as the date on which the Convention will enter into force between the United Kingdom and Saint Christopher and Nevis."

The Government of Saint Kitts and Nevis (formerly Saint Christopher and Nevis) has confirmed the date of *1 August 1994* as the date on which the Convention entered into force between *Saint Kitts and Nevis* and the *United Kingdom of Great Britain and Northern Ireland.*

** The Note of the Embassy of Germany contains the following declaration: ``The reservation under Article 26, paragraph 3, of the Convention made by Saint Kitts and Nevis on its accession is believed by the competent German judicial authorities to be connected with the fact that Saint Kitts and Nevis does not have a system of legal aid. Introduction of such a system would, however, render the reservation in its present form inadmissible. A possible solution would be for Saint Kitts and Nevis to supplement its reservation under Article 26, paragraph 3, accordingly." (Translation)

Central Authority designated under the *Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction*.

adresse/address:

Attorney General or his designate

Government Headquarters

PO Box 164

BASSETERRE

Saint Kitts and Nevis

West Indies

numéro de téléphone/telephone number:

+1 (809) 465 2521

numéro de télécopie/telefax number:

+1 (809) 465 5040

personnes à contacter/persons to contact:

Mr Delano BART

(Attorney General)

7b **San Marino Accession**

Convention of 25 October 1980 on the Civil Aspects of International Child Abduction

Accession accepted by	Date of acceptance	Entry into force
Mexico	8-II-2007	1-V-2007
Luxembourg	12-II-2007	1-V-2007

Greece	16-II-2007	1-V-2007
Bulgaria	1-III-2007	1-VI-2007
Poland	13-III-2007	1-VI-2007
Latvia	15-III-2007	1-VI-2007
Belgium	23-IV-2007	1-VII-2007
Brazil	24-IV-2007	1-VII-2007
New Zealand	27-IV-2007	1-VII-2007
Finland	1-V-2007	1-VIII-2007
Slovakia	4-V-2007	1-VIII-2007
Bahamas	16-V-2007	1-VIII-2007
Czech Republic	6-VI-2007	1-IX-2007
Germany	11-VI-2007	1-IX-2007
Israel	20-VIII-2007	1-XI-2007
Cyprus	17-IX-2007	1-XII-2007
United States of America	26-X-2007	1-I-2008
Ireland	31-X-2007	1-I-2008
Spain	13-XII-2007	1-III-2008
Sweden	14-I-2008	1-IV-2008
Switzerland	16-I-2008	1-IV-2008
Monaco	31-III-2008	1-VI-2008
Italy	6-V-2008	1-VIII-2008
China, People's Republic of	18-VI-2008	1-IX-2008
Georgia	22-IX-2008	1-XII-2008
Venezuela	15-X-2008	1-I-2009
Lithuania	29-XII-2008	1-III-2009
Austria	11-VI-2009	1-IX-2009
Argentina	9-VII-2009	1-X-2009

Entry into force between San Marino and	**Entry into force**
Albania	1-I-2008
Armenia	1-VI-2008
Mexico	1-V-2007
Luxembourg	1-V-2007
Greece	1-V-2007
Bulgaria	1-VI-2007
Poland	1-VI-2007
Latvia	1-VI-2007
Belgium	1-VII-2007
Brazil	1-VII-2007
New Zealand	1-VII-2007
Finland	1-VIII-2007
Slovakia	1-VIII-2007
Bahamas	1-VIII-2007
Czech Republic	1-IX-2007
Germany	1-IX-2007
Israel	1-XI-2007
Cyprus	1-XII-2007
United States of America	1-I-2008
Ireland	1-I-2008
Spain	1-III-2008
Sweden	1-IV-2008
Switzerland	1-IV-2008
Monaco	1-VI-2008
Italy	1-VIII-2008
China, People's Republic of	1-IX-2008
Georgia	1-XII-2008
Venezuela	1-I-2009
Lithuania	1-III-2009
Austria	1-IX-2009
Argentina	1-X-2009

China, People's Republic of—Entry into force

San Marino—Central Authority

Tribunale Unico (Single Court)
via 28 Luglio, 38
47893 BORGO MAGGIORE
San Marino

numéro de téléphone/telephone number: +378 (0549) 888 888
numéro de télécopie/telefax number:—

personnes à contacter / persons to contact:

Mr Gilberto FELICI
Law Commissioner
e-mail: gilberto.felici.tribunaleunico@pa.sm

Mrs Valeria PIERFELICI
Law Commissioner
e-mail: tribunale.pierfelici@pa.sm

Declarations

Articles: 26

``In conformity with Article 26, paragraph 3, of the Convention, the Republic of San Marino declares that it shall not be bound to assume any costs referred to in Article 26, paragraph 2, resulting from the participation of legal counsel or advisers or from court proceedings, except insofar as those costs may be covered by its system of legal aid and advice.''

7c Serbia

Succession

One of the successor States to the former Socialist Federal Republic of Yugoslavia which became a Party to the Convention on 1 December 1991. By letter received by the depositary on 26 April 2001, the Federal Republic of Yugoslavia declared itself to be bound by the Convention.

No objection has been received from the Contracting States.

The Ministry of Foreign Affairs of the Netherlands, depositary of the Hague Conventions, has notified the Member States of the Hague Conference on 5 July 2006 that ``Following the declaration of the state independence of Montenegro, and under the Article 60 of the Constitutional Charter of the state union of Serbia and Montenegro, the Republic of Serbia is continuing international personality of the state union of Serbia and Montenegro, which was confirmed also by the National Assembly of the Republic of Serbia at its session held on 5 June 2006."

Serbia—Central Authority

Ministry for Human and Minority Rights of Serbia

Bulevar Mihajla Pupina 2

NEW BELGRADE
Tel.: +381 (11) 311 1145
Fax: +381 (11) 311 7074

person to contact:

Mrs Danijela CETKOVIC, assistant

e-mail: daniela@humanrights.gov.yu

Ministry for Justice of the Republic of Serbia

Bulevar Mihajla Pupina 2

NEW BELGRADE

Tel.: +381 (11) 362 0698 / 0540

Fax: +381 (11) 361 6287

person to contact:

Mr Milisav COGURIC

Head of the Department for International Legal Assistance

(The effective date of the above information is *13 July 2006*).

7d *Seychelles Accession*

Convention of 25 October 1980 on the Civil Aspects of International Child Abduction

Accession accepted by	**Date of acceptance**	**Entry into force**
Poland	22-VIII-2008	1-XI-2008
Luxembourg	10-IX-2008	1-XII-2008
Bahamas	13-X-2008	1-I-2009
Venezuela	15-X-2008	1-I-2009
Israel	5-XI-2008	1-II-2009
Monaco	10-XI-2008	1-II-2009
Greece	12-XII-2008	1-III-2009
New Zealand	18-XII-2008	1-III-2009
Germany	15-I-2009	1-IV-2009
Latvia	16-I-2009	1-IV-2009
Slovakia	22-I-2009	1-IV-2009
Spain	2-VI-2009	1-IX-2009
Argentina	9-VII-2009	1-X-2009

Entry into force between Seychelles and	**Entry into force**
Poland	1-XI-2008
Luxembourg	1-XII-2008
Bahamas	1-I-2009
Venezuela	1-I-2009
Israel	1-II-2009
Monaco	1-II-2009
Greece	1-III-2009
New Zealand	1-III-2009
Germany	1-IV-2009
Latvia	1-IV-2009
Slovakia	1-IV-2009
Spain	1-IX-2009
Argentina	1-X-2009

Seychelles—Central Authority

Ms Linda William

Director of Social Services

Ministry of Health and Social Development
P.O. Box 190, Victoria House
Tel: (00 248) 72 33 09 (00 248) 28 18 33
Fax: (00 248) 22 56 56
dgsa@seychelles.net.

7e With the following reservation:

``The Slovak Republic avails itself of the possibility to make a reservation under Article 42 of the Convention of 25 October 1980 on Civil Aspects of International Child Abduction and, in accordance with its Article 26, paragraph 3, declares that it shall not be bound to assume any costs referred to in Article 26, paragraph 2, resulting from the participation of legal counsel or advisers or from court proceedings, except insofar as those costs may be covered by its system of legal aid and advice."

In accordance with Article 6, paragraph 1, the Slovak Republic has designated as Central Authority:

``Centre for International Legal Protection of Children and Youth BRATISLAVA".

7f In accordance with Article 6, paragraph 1, of the above-mentioned Convention, the *Republic of Slovenia* has designated as Central Authority:

adresse/address:

The Ministry of the Interior

Stefanova 2

15000 LJUBLJANA

Republic of Slovenia

numéro de téléphone/telephone number:

(386)-61-172-4521

(386)-61-172-4126

numéro de télex/telex number:

—

numéro de télécopie/telefax number:

(386)-61-172-4206

personnes à contacter/persons to contact:

Mme/Mrs Katja BASIC

Mme/Mrs Stanka GORINSEK

EMERGENCY NUMBERS

The following numbers can be contacted at any time:

Telephone: +386 (61) 132 5125

Telefax: +386 (61) 172 4206

The Convention is in force between *Slovenia* and the following States:

the Kingdom of the Netherlands (for the Kingdom in Europe)	1 July 1994
Luxembourg	1 August 1994
the United Kingdom of Great Britain and Northern Ireland*	1 June 1994
Switzerland	1 October 1994
Australia	1 November 1994
Austria	1 November 1994

Ireland	1 December 1994
Sweden	1 January 1995
the United States of America	1 April 1995
Argentina	1 May 1995
Panama	1 June 1995
Germany	1 June 1995
Canada	1 August 1995
Spain	1 September 1995
New Zealand	1 November 1995
Mexico	1 December 1995
Israel	1 January 1996
Chile	1 May 1996
Hungary	1 April 1997
Italy	1 April 1997
Finland	1 May 1997
Norway	1 June 1997
Venezuela	1 September 1997
Greece	1 October 1997
Poland	1 March 1998
the Czech Republic	1 August 1998
Uzbekistan	1 March 2000
the Slovak Republic	1 February 2001
Portugal	1 January 2002
Belgium	1 May 2003

*With the following declaration:

``Notwithstanding the provisions of the said Article 38 regarding entry into force of the Convention as between the acceding State and the State declaring its acceptance of the accession, amendments will have been made to the United Kingdom municipal law in order to give effect to the Convention between it and Slovenia as of 1 June 1994 when the Convention enters into force for Slovenia. I would be grateful for confirmation of the date of 1 June 1994 as the date on which the Convention will enter into force between the United Kingdom and Slovenia."

The Government of Slovenia has confirmed the date of *1 June 1994* as the date on which the Convention entered into force between the *Republic of Slovenia* and the *United Kingdom of Great Britain and Northern Ireland.*

7g *Notification pursuant to Article 45 of the Convention*

The Ministry of Foreign Affairs of the Kingdom of the Netherlands, depositary of the Convention on the Civil Aspects of International Child Abduction of 25 October 1980, has the honour to inform the Member States of The Hague Conference on Private International Law and the States having acceded to the above-mentioned Convention that in accordance with Article 38, paragraph 2, the Republic of South Africa deposited its instrument of accession with the Ministry of Foreign Affairs of the Kingdom of the Netherlands on 8 July 1997.

The Republic of South Africa made the following reservations:

``(a) That the use of French in any application, communication or other document sent to the Central Authority of the Republic of South Africa, as provided for in Article 24 of the Convention, is objected to, and that such documents shall not be accepted in French.

(b) That the Republic of South Africa shall not be bound to assume any costs referred to in paragraph 2 of Article 26 of the Convention resulting from the participation of legal counsel or advisers or from court proceedings, except those costs which may be covered by the system of legal aid in terms of the Legal Aid Act, 1969 (Act. No. 22 of 1969)."

The Convention will enter into force for the Republic of South Africa on 1 October 1997 in accordance with Article 38, paragraph 3.

The accession will have effect only as regards the relations between the Republic of South Africa and such Contracting States as will have declared their acceptance of the accession.

***

The Convention is in force between *South Africa* and the following States:

the United States of America	1 November 1997
the Kingdom of the Netherlands (for the Kingdom in Europe)	1 November 1997
Israel	1 December 1997
the United Kingdom of Great Britain and Northern Ireland*	1 December 1997
Finland	1 December 1997
Ireland	1 December 1997
Sweden	1 January 1998
Australia	1 January 1998
Germany	1 February 1998
New Zealand	1 March 1998
Poland	1 March 1998
Norway	1 March 1998
Switzerland	1 August 1998
the Czech Republic	1 August 1998
Argentina	1 November 1998
China, Hong Kong Special Administrative Region only	*1 December 1998*
Canada	1 May 1999
Chile	1 June 1999
Spain	1 February 2000
Greece	1 March 2000
the Slovak Republic	1 February 2001
Colombia	1 April 2001
Uruguay	1 June 2001
Mexico	1 June 2001
Italy	1 August 2001
Portugal	1 January 2002

Austria	1 March 2002
Hungary	1 June 2002
Belgium	1 May 2003

*With the following declaration:

``(…) notwithstanding the provisions of the said article, the United Kingdom accepts the accession of South Africa (…) with effect from *1 October 1997."*

7h *Notification pursuant to Article 45 of the Convention*

In accordance with Article 37, paragraph 2, Spain deposited on 16 June 1987 its instrument of ratification of the above-mentioned Convention with the Ministry of Foreign Affairs of the Kingdom of the Netherlands.

Spain designated as the Central Authority mentioned in Article 6 of the Convention: ``La Secretaría General Técnica del Ministerio de Justicia, San Bernardo, 45.-28015 Madrid''.

address:

Secretaria General Técnica del

Ministerio de Justicia

Calle San Bernardo, 62

28071 MADRID

Espagne

telephone number:

For telephone calls made within Spain, the access code for Madrid is (091)

telefax number:

(1) 522 1539

telex number:

22545

person to contact:

M./Mr A. LAGUIA ARRAZOLA

tél./tel. (1) 521 7046

(langues de communication/languages of communication: espagnol, français anglais/Spanish, French, English)

The Convention will enter into force for Spain in accordance with its Article 43 on 1 September 1987.

8 **SRI LANKA (accession) 28 September 2001 1 December 2001**

The instrument of accession contains the following declarations and reservations:

``**Reservations as provided for in Article 42 of the Convention as regards Articles 24 and 26**

Article 24

For purposes of Article 24, the documents should be in the English language.

Article 26(3)

For purposes of Article 26(3) Sri Lanka should not be bound to assume any costs referred to in the preceding paragraph resulting from the participation of Legal Counsel or advisers or from Court proceedings except insofar as those costs may be covered by the legal aid and advice system of Sri Lanka.

Declarations made under Article 6 and 8

Article 6

In terms of Article 6, the Secretary/Ministry of Justice is designated the Central Authority.

Article 8

The authority competent to act upon a Letter of Request pursuant to Article 8 would be the Secretary, Ministry of Justice."

The Convention is in force between Sri Lanka and the following States:

Luxembourg	1 December 2001*
the Netherlands (for the Kingdom in Europe)	1 April 2002
Costa Rica	1 April 2002
Norway	1 April 2002
Colombia	1 May 2002
Hungary	1 June 2002
Uzbekistan	1 June 2002
Brazil	1 June 2002
Israel	1 August 2002
Slovak Republic	1 September 2002
Argentina	1 November 2002
Germany	1 January 2003
Australia	1 January 2003
Spain	1 March 2003
Poland	1 March 2003
Uruguay	1 May 2003

*Pursuant to Article 38, paragraph 5 of the Convention, the date of entry into force should normally be 1 March 2002. However, following a request from Luxembourg, the date of entry into force has been changed to 1 December 2001.

8a The Permanent Bureau of the Hague Conference on private international law presents its compliments to the Diplomatic Missions of the Member States and to the National Organs and has the honour to inform them that on 22 March 1989 the above-mentioned Convention was signed and ratified by

Sweden.

In accordance with article 43, paragraph 2, the Convention will enter into force for *Sweden* on *1*

June 1989.

The instrument of ratification contains the following reservation:

In accordance with the provisions of article 42 and pursuant to article 42 and pursuant to article 26, Sweden declares that it shall not be bound to assume any costs referred to in article 26, paragraph 2, resulting from the participation of legal counsel or advisers or from court proceedings, except insofar as those costs may be covered by the Swedish system of legal aid.

Central Authority designated under the *Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction.*

adresse/address:

Ministry for Foreign Affairs

103 39 STOCKHOLM

Sweden

numéro de téléphone/telephone number:

Voir ci-dessous/See below

numéro de télex/telex number:

105 90 MINFOR S

numéro de télécopie/telefax number:

+46 (8) 723 1176

adresse e-mail/e-mail address:

ud@foreign.ministry.se

personnes à contacter/persons to contact:

Mme/Ms Agneta LUNDVALL

(Head of Section)

(langues de communication/languages of

communication: anglais, français,

allemand/English, French, German)

tél./tel.: +46 (8) 405 5038

Mme/Ms Madelaine BERONIUS

tél./tel.: +46 (8) 405 5041

8b *Notification in accordance with Article 45, paragraphs 1 and 3 of the Convention*

In conformity with Article 37, paragraph 2, Switzerland deposited its instrument of ratification of the above-mentioned Convention with the Ministry of Foreign Affairs of the Kingdom of the Netherlands on 11 October 1983.

The Swiss Government notified that the Central Authority as provided for in Article 6 of the Convention is:

adresse/address:

L'Office fédéral de Justice du Département fédéral de Justice et Police

3003 BERNE

Suisse

numéro de téléphone/telephone number:

Secrétariat/Secretariat:

(41)-31-322-4122

numéro de télex/telex number:

911268

numéro de télécopie/telefax number:

(41)-31-322-7864

personnes à contacter/persons to contact:

Mme/Ms Nicolette RUSCA

(langues de communication/languages of

communication: français, allemand, italien, anglais/French, German, Italian, English)

tél./tel.: (41)-31-322-4108

M./Mr Hans KUHN

(langues de communication/languages of

communication: français, allemand, italien, anglais, espagnol/French, German, Italian, English, Spanish)

tél./tel.: (41)-31-322-5356

Mme/Mrs Franziska ABT

(langues de communication/languages of

communication: français, allemand, italien, anglais/French, German, Italian, English)

tél./tel.: (41)-31-322-4222

M./Mr Alexander R. MARKUS

(langues de communication/languages of

communication: français, allemand, anglais/French, German, English)

In accordance with Article 43 the Convention shall enter into force for Switzerland on 1 January 1984.

8c Entry into force between Thailand and

the Netherlands	1 December 2002
Luxembourg	1 December 2002
Finland	1 March 2003
Colombia	1 May 2003
Uruguay	1 May 2003
Czech Republic	1 May 2003
Costa Rica	1 July 2003

8d In accordance with Article 38, paragraph 5, the Convention entered into force between Trinidad and Tobago and the following States:

the Slovak Republic	1 February 2001
Ireland	1 February 2001
Finland	1 February 2001
Panama	1 March 2001
Colombia	1 March 2001
Australia	1 May 2001
Belarus	1 May 2001
Argentina	1 October 2001
Spain	1 January 2002
Portugal	1 January 2002
Norway	1 April 2002

Hungary	1 June 2002
Uzbekistan	1 June 2002
the Netherlands (for the Kingdom in Europe)	1 June 2002
Brazil	1 June 2002
Israel	1 August 2002
Chile	1 December 2002
Poland	1 March 2003
El Salvador	1 March 2003
Guatemala	1 March 2003
Latvia	1 March 2003
Nicaragua	1 March 2003
Peru	1 March 2003
Uruguay	1 May 2003

9 With the following reservation:

``(…) that in accordance with paragraph 3 of Article 26, the Republic of Turkey shall not be bound to assume any costs and expenses of the proceedings or, where applicable, those arising from the participation of legal counsel or advisers and those of returning the child."

In accordance with Article 6, the following Central Authority has been designated:

Ministry of Justice

General Directorate of International Law and Foreign Relations

The Ministry of Foreign Affairs of the Kingdom of the Netherlands received a Note dated 18 October 2000 from the Embassy of Finland concerning the reservation made by Turkey. The Note reads as follows:

``The Government of Finland is unable to accept the reservation in so far as it is incompatible with Article 26(3) and 42(1) of the Convention.

According to the Article 26(3), a Contracting State may, be making a reservation in accordance with Article 42, declare that it shall not be bound to assume any costs referred to in the preceding paragraph resulting from the participation of legal counsel or advisers or from court proceedings, *except insofar as those costs may be covered by its system of legal aid and advice.*

Having regard to the wording and the purpose of this provision the Finnish Government considers that the reservation made by Turkey, which excludes also the costs covered by Turkey's system of legal aid and advice, is not allowed under Article 26(3) and 42(1). In conclusion, the Finnish Government declares that in relation to Finland this reservation may not be invoked by Turkey in so far as this would be incompatible with the aforementioned provisions of the Convention…".

9a *Under Article 38, the Convention is not in force between the United States and Turkmenistan.*

In accordance with Article 38, paragraph 5, the Convention entered into force between Turkmenistan and the following States:

the Kingdom of the Netherlands (for the Kingdom in Europe)	1 May 1998
the United Kingdom of Great Britain and Northern Ireland	1 May 1998
Israel	1 June 1998

Finland	1 July 1998
Germany	1 August 1998
the Czech Republic	1 August 1998
Australia	1 November 1998
Argentina	1 November 1998
China, Hong Kong Special Administrative Region only	1 December 1998
Chile	1 June 1999
Spain	1 October 1999
Georgia	1 January 2000
Bosnia and Herzegovina	1 December 2000
Canada	1 January 2001
Ireland	1 January 2001
the Slovak Republic	1 February 2001
Poland	1 February 2001
Switzerland	1 February 2001
Colombia	1 April 2001
Italy	1 August 2001
Portugal	1 January 2002
Hungary	1 June 2002
Norway	1 June 2002

In accordance with Article 6, paragraph 1, Turkmenistan has designated as Central Authority:

Turkmen National Institute of Democracy and Human Rights under the President of Turkmenistan
Karl Libkneht St., 47

ASHGABAT 744000

9b Ukraine Accession

Convention of 25 October 1980 on the Civil Aspects of International Child Abduction

Accession accepted by	**Date of acceptance**	**Entry into force**
Latvia	15-VIII-2005	1-XI-2006
Czech Republic	4-IX-2006	1-XII-2006
Romania	6-IX-2006	1-XII-2006
Bulgaria	14-IX-2006	1-XII-2006
Luxembourg	27-IX-2006	1-XII-2006
Slovakia	10-X-2006	1-I-2007
Greece	1-XI-2006	1-II-2007
Panama	2-XI-2006	1-II-2007
Cyprus	8-XI-2006	1-II-2007
Netherlands	13-XI-2006	1-II-2007
Honduras	16-XI-2006	1-II-2007
Israel	28-XI-2006	1-II-2007
Uruguay	7-XII-2006	1-III-2007
Hungary	7-XII-2006	1-III-2007
Ecuador	12-XII-2006	1-III-2007
Italy	20-XII-2006	1-III-2007
Peru	27-XII-2006	1-III-2007
Poland	10-I-2007	1-IV-2007
Estonia	11-I-2007	1-IV-2007
Chile	30-I-2007	1-IV-2007

Serbia	1-II-2007	1-V-2007
Mexico	8-II-2007	1-V-2007
France	16-II-2007	1-V-2007
Argentina	19-II-2007	1-V-2007
Finland	20-II-2007	1-V-2007
Portugal	8-III-2007	1-VI-2007
Colombia	2-IV-2007	1-VII-2007
Monaco	10-IV-2007	1-VII-2007
Belgium	23-IV-2007	1-VII-2007
Brazil	24-IV-2007	1-VII-2007
New Zealand	27-IV-2007	1-VII-2007
Bahamas	16-V-2007	1-VIII-2007
United States of America	1-VI-2007	1-IX-2007
Sweden	26-VI-2007	1-IX-2007
Croatia	12-VII-2007	1-X-2007
Germany	15-X-2007	1-I-2008
Ireland	31-X-2007	1-I-2008
Spain	13-XII-2007	1-III-2008
Bosnia and Herzegovina	18-XII-2007	1-III-2008
Turkey	3-I-2008	1-IV-2008
Montenegro	25-II-2008	1-V-2008
China, People's Republic of	14-III-2008	1-VI-2008
Slovenia	7-VII-2008	1-X-2008
Venezuela	7-VIII-2008	1-XI-2008
Georgia	22-IX-2008	1-XII-2008
The former Yugoslav Republic of Macedonia	29-X-2008	1-I-2009
Lithuania	29-XII-2008	1-III-2009

Entry into force between Ukraine and	**Entry into force**
Latvia	1-XI-2006
Czech Republic	1-XII-2006
Romania	1-XII-2006
Bulgaria	1-XII-2006
Luxembourg	1-XII-2006
Slovakia	1-I-2007
Greece	1-II-2007
Panama	1-II-2007
Cyprus	1-II-2007
Netherlands	1-II-2007
Honduras	1-II-2007
Israel	1-II-2007
Uruguay	1-III-2007
Hungary	1-III-2007
Ecuador	1-III-2007
Italy	1-III-2007
Peru	1-III-2007
Poland	1-IV-2007
Estonia	1-IV-2007
Chile	1-IV-2007
Serbia	1-V-2007
Mexico	1-V-2007
France	1-V-2007
Argentina	1-V-2007
Finland	1-V-2007
Portugal	1-VI-2007
Colombia	1-VII-2007
Monaco	1-VII-2007
Belgium	1-VII-2007
Brazil	1-VII-2007
New Zealand	1-VII-2007

Bahamas	1-VIII-2007
United States of America	1-IX-2007
Sweden	1-IX-2007
Croatia	1-X-2007
Germany	1-I-2008
Ireland	1-I-2008
Spain	1-III-2008
Bosnia and Herzegovina	1-III-2008
Turkey	1-IV-2008
Montenegro	1-V-2008
China, People's Republic of	1-VI-2008
Slovenia	1-X-2008
Venezuela	1-XI-2008
Georgia	1-XII-2008
The former Yugoslav Republic of Macedonia	1-I-2009
Lithuania	1-III-2009

10 *Notification in pursuance of Article 45, paragraphs 1 and 3, of the Convention*

In conformity with Article 37, paragraph 2, the United Kingdom of Great Britain and Northern Ireland deposited its instrument of ratification of the above-mentioned Convention with the Ministry of Foreign Affairs of the Kingdom of the Netherlands on 20 May 1986.

The instrument of ratification contains the following reservation:

``… ., in accordance with the provisions of Article 42 of the Convention, the United Kingdom declares that it shall not be bound to assume any costs referred to in the second paragraph of Article 26 of the Convention resulting from the participation of legal counsel or advisers or from court proceedings, except insofar as those costs may be covered by its system of legal aid and advice."

The Government of the United Kingdom declared, that, in accordance with Article 6 of the Convention, it has designated the following Central Authorities:

``(i) for England and Wales,

(Central Authority for England and Wales and the Central Authority to which applications may be addressed for transmission to the appropriate Central Authority within the United Kingdom.)

adresse/address:

The Lord Chancellor

The Lord Chancellor's Department,

Trevelyan House,

30 Great Peter Street

LONDON SW1P 2 BY

United Kingdom

(ii) for Northern Ireland,

Northern Ireland Court Service
Windsor House,
9/15 Bedford Street,
Belfast BT 7LT.;
Northern Ireland
+ 44 (1232) 328 594
persons to contact: Mme/Mrs LAURA MCPOLIN
(remplace Mme Bowers/replaced Mrs Bowers)
telefax number: + 44 (1232) 439 110

(iii) Office of the Secretary of State for Scotland

The Scottish Courts Administration
26/27 Royal Terrace
EDINBURGH EH7 5AH
Scotland U.K.
numéro de téléphone/telephone number: (031) 556 0755
personnes à contacter/persons to contact: M./Mr ROBERTSON
In conformity with Article 6, paragraph 2, of the Convention, the United Kingdom of Great Britain and Northern Ireland designated as Central Authority to which applications may be addressed for transmission to the appropriate Central Authority:

``the Lord Chancellor
the Lord Chancellor's Department,
Trevelyan House,
30 Great Peter Street
London SW1P 2BY."

The Convention is ratified in respect of the United Kingdom of Great Britain and Northern Ireland only. The Government of the United Kingdom declared, that, in accordance with Article 39 of the Convention, it will notify the depositary in due course of the territories for the international relations of which it is responsible, to which the Convention is to be extended.

In accordance with Article 43, paragraph 1, the Convention will enter into force for the United

Kingdom of Great Britain and Northern Ireland on 1 August 1986.

Notification pursuant to Article 45 of the Convention

On 28 June 1991 the United Kingdom of Great Britain and Northern Ireland declared in accordance with Article 39 that the Convention shall extend to the Isle of Man.

The Convention will enter into force for the Isle of Man on 1 September 1991 in accordance with Article 43, paragraph 2.

On 8 May 1998 the United Kingdom of Great Britain and Northern Ireland extended the Convention to the Cayman Islands. The Convention entered into force for the Cayman Islands on 1 August 1998.

The Central Authority designated for the Cayman Islands: The Attorney General, Government Administration Building, GRAND CAYMAN, Cayman Islands.

On 26 March 1998 the United Kingdom of Great Britain and Northern Ireland extended the Convention to the Falkland Islands. The Convention entered into force for the Falkland Islands on 1 June 1998.

The Central Authority designated for the Falkland Islands: The Governor, Government House, STANLEY, Falkland Islands.

By Note dated 8 December 1998, received at the Ministry of Foreign Affairs of the Kingdom of the Netherlands on 10 December 1998, the United Kingdom of Great Britain and Northern Ireland has extended the Convention in accordance with Article 39 to Montserrat.

In accordance with Article 43, paragraph 2, sub 2, the Convention will enter into force for Montserrat on 1 March 1999.

In accordance with Article 6, paragraph 2, of the Convention, the United Kingdom designated the following Central Authority for Montserrat:

The Attorney General
Attorney General's Chambers
Montserrat
West Indies

By Note dated 21 December 1998, the United Kingdom of Great Britain and Northern Ireland has extended the Convention in accordance with Article 39 to Bermuda.

In accordance with Article 43, paragraph 2, sub 2, the Convention will enter into force for Bermuda on 1 March 1999.

In accordance with Article 6, paragraph 2, of the Convention, the United Kingdom designated the following Central Authority for Bermuda:

The Attorney General
Attorney General's Chambers
Hamilton
Bermuda

10a *Notification pursuant to Article 45 of the Convention*

In accordance with Article 37, paragraph 2, the United States of America deposited on 29 April 1988 its instrument of ratification of the above-mentioned Convention with the Ministry of Foreign Affairs of the Kingdom of the Netherlands.

The instrument of ratification contains the following reservations:

``(1) Pursuant to the second paragraph of Article 24, and Article 42, the United States makes the following reservation: All applications, communications and other documents sent to the U.S. Central Authority should be accompanied by their translation into English.

(2) Pursuant to the third paragraph of Article 26, the United States declares that it will not be bound to assume any costs or expenses resulting from the participation of legal counsel or advisers or from court and legal proceedings in connection with efforts to return children from the United States pursuant to the Convention except insofar as those costs or expenses are covered by a legal aid program."

The United States of America designated as the Central Authority mentioned in Article 6 of the Convention:

Central Authority designated under the *Hague Convention of 25 October 1980 on the civil aspects of international child abduction.*

adresse/address:

Office of Children's Issues (CA/OCS/CI)

US Department of State

2201 C Street, N.W.

WASHINGTON, DC 20520-4818

United States of America

numéro de téléphone/telephone number:

(1)-202-312-9743

personnes à contacter/persons to contact:

Mme/Ms. Michelle Bernier-Toth, Director

M./Mr. Jonathan Fishbein, Chief,

Abductions Unit

P.L. 100-300 (42 U.S.C. 11601) (International Child Abduction Remedies Act) was enacted to facilitate implementation of the Convention. Pertinent regulations may be found at 22 CFR 94; pertinent forms may be obtained from the Office of Children's Issues (CA/OCS/CI), Room 4811, Department of State, Washington, D.C. 20520-4811; phone number (202) 736-7000.

In accordance with Article 43, the Convention entered into force for the United States of America on July 1, 1988.

10b In accordance with Article 6, Uruguay designated the following <u>Central Authority:</u>

``Dirección de Cooperación Jurídica Internacional y de Justicia del Ministerio de Educación y Cultura

Dirección: Avda. 18 de Julio 1377, 1 ^{0} piso

Montevideo''

In accordance with Article 38, paragraph 5, the Convention entered into force between Uruguay and the following States:

Argentina	1 April 2000
Luxembourg	1 April 2000
Israel	1 April 2000
Chile	1 May 2000
Poland	1 May 2000

Finland	1 September 2000
Colombia	1 September 2000
Ireland	1 January 2001
the Slovak Republic	1 February 2001
Switzerland	1 February 2001
Panama	1 March 2001
Belarus	1 May 2001
Spain	1 May 2001
Australia	1 May 2001
South Africa	1 June 2001
Mexico	1 June 2001
Italy	1 July 2001
Moldova	1 September 2001
Germany	1 October 2001
the Czech Republic	1 October 2001
El Salvador	1 October 2001
Nicaragua	1 October 2001
Portugal	1 January 2002
the Kingdom of the Netherlands (for the Kingdom in Europe)	1 January 2002
Norway	1 April 2002
Hungary	1 June 2002
Uzbekistan	1 June 2002
Sweden	1 September 2002
Greece	1 January 2003
Estonia	1 May 2003
Guatemala	1 May 2003
Latvia	1 May 2003
Lithuania	1 May 2003
Peru	1 May 2003
Sri Lanka	1 May 2003
Thailand	1 May 2003
Trinidad and Tobago	1 May 2003

11 In accordance with Article 38, paragraph 2, the Republic of Uzbekistan deposited its instrument of accession to the Convention with the Ministry of Foreign Affairs of the Kingdom of the Netherlands on 31 May 1999.

The instrument of accession contains the following reservation:

``The Republic of Uzbekistan shall not be bound to assume any costs referred to in the paragraph 2 of the Article 26 and resulting from the participation of legal counsel or from court proceedings.''

The Republic of Uzbekistan designated as Central Authority: Ministry of Justice of the Republic of Uzbekistan, International Law Department, 5, Saylgoh Street, TASHKENT CITY 700047, Uzbekistan.

In accordance with Article 38, paragraph 5, the Convention entered into force between Uzbekistan and the following States:

Israel	1 October 1999
Poland	1 January 2000
Slovenia	1 March 2000
Argentina	1 April 2000
Belarus	1 September 2000

Chile	1 October 2000
Bosnia and Herzegovina	1 December 2000
Ireland	1 January 2001
the Slovak Republic	1 February 2001
Switzerland	1 February 2001
Colombia	1 April 2001
Spain	1 May 2001
Australia	1 May 2001
Italy	1 August 2001
Moldova	1 September 2001
Portugal	1 January 2002
the Czech Republic	1 January 2002
the Netherlands (for the Kingdom in Europe)	1 April 2002
Norway	1 April 2002
Hungary	1 June 2002
Brazil	1 June 2002
Guatemala	1 June 2002
Latvia	1 June 2002
Malta	1 June 2002
Nicaragua	1 June 2002
Peru	1 June 2002
Trinidad and Tobago	1 June 2002
Uruguay	1 June 2002
Sri Lanka	1 June 2002
El Salvador	1 June 2002
Estonia	1 June 2002

11a Central Authority designated under the *Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction.*

adresse/address:

Ministerio de Relaciones Exteriores

Torre Ministerio de Relaciones Exteriores

Conde a Carmelitas

Piso 6

CARACAS 1010

Venezuela

numéro de téléphone/telephone number:

+58 (2) 862 1145 ou/or +58 (2) 819 691

numéro de télex/telex number:

—

numéro de télécopie/telefax number:

+58 (2) 862 2420

adresse e-mail/e-mail address:

—

personnes à contacter/persons to contact:

Ambassador Carmen MARTINEZ DE GRIJALBA

División de Asuntos Especiales

Dirección General Sectorial de Relaciones

Consulares

(langue de communication/language of

communication: espagnol/Spanish)

The Embassy of Finland presents its compliments to the Ministry of Foreign Affairs of the Netherlands and, with reference to the ratification by the Republic of Venezuela of the Hague Convention on the Civil Aspects of International Child Abduction (1980), has the honour to inform the Ministry on the following.

The Government of Finland has noted that when ratifying the above-mentioned Convention on 16 October 1996 the Republic of Venezuela has made the following reservations:

``All communications to the Central Authority should be drawn up in the Spanish language. The Republic of Venezuela is not bound to assume any costs referred to in Article 26, paragraph 3.''

The Government of Finland is unable to accept these reservations in so far as they are incompatible with Article 24, paragraph 2, Article 26, paragraph 3 and Article 42, paragraph 1 of the Convention.

According to Article 24, paragraph 1, any application, communication or other document sent to the Central Authority shall be in the original language, and shall be accompanied by a translation into the official language or one of the official languages of the requested State or, where that is not feasible, a translation into French or English.

Under Article 24, paragraph 2, a Contracting State may, by making a reservation, object to the use of either French or English, but not both, in any application, communication or other document sent to its Central Authority. Having regard to the wording and the purpose of this provision the Finnish Government considers that the reservation made by the Republic of Venezuela, which excludes the use of both French and English languages in cases where it is not feasible to obtain a translation of the document into Spanish, is not allowed under Article 24, paragraph 2 and Article 42, paragraph 1.

In addition, the reservation seems to require that all communications, even the original documents transmitted to the Venezuelan Central Authority shall be in the Spanish language whereas under Article 24, paragraph 1 the documents shall be in the original language and, in addition, accompanied by a translation into the official language or official languages of the State addressed (or, where that, i.e. translation, is not feasible, into French or English). Such a requirement, implicit in the reservation, is not only incompatible with Article 24 but also in most cases impossible to comply with in cases where the original documents which under paragraph 1 shall be sent to the State addressed have not been drawn up in Spanish.

According to Article 26, paragraph 3, a Contracting State may make a reservation not to be bound to assume any costs referred to in paragraph 2 resulting from the participation of legal counsel or advisers or from court proceedings, except insofar as those costs may be covered by its system of legal aid and advice. However, the reservation by the Republic of Venezuela seems to indicate that in the application of the Convention Venezuela would not assume any costs referred to above, under any circumstances and not even in cases where those costs might be covered by the Venezuelan system of legal aid and advice, if available. The Finnish Government considers that such a reservation is incompatible with Article 26, paragraph 3 and Article 42, paragraph 1 of the Convention.

In conclusion, the Finnish Government declares that in relation to Finland these reservations may not be invoked by the authorities of the Republic of Venezuela in so far as this would be incompatible with the aforementioned provisions of the Convention.

This declaration is not to be interpreted as preventing the entry into force of the Convention between Finland and the Republic of Venezuela.

The Ministry of Foreign Affairs of the Kingdom of the Netherlands, depositary of the above-mentioned Convention, has the honour to inform the Member States of the Hague Conference on Private International Law and States having acceded to the Convention that the Government of Germany on 15 April 1997 has deposited the following declaration concerning a reservation with regard to Article 26 of the Convention, made by Venezuela on the occasion of the ratification on 16 October 1996:

Translation

``The reservation made by Venezuela is taken by the Federal Government to mean that persons eligible for legal aid who enter an application pursuant to the above-mentioned Convention may invoke the provisions laid down in the Venezuelan code of civil procedure as generally applicable to such persons, namely that free access to the courts and to legal counsel is also guaranteed in respect of proceedings pursuant to the Convention."

12 Under the following reservation:

``… subject to the reservation that the costs mentioned in the second paragraph of Article 26 of the aforesaid Convention shall not be borne by the State".

In accordance with Article 6, paragraph 1, Zimbabwe has designated as Central Authority: ``the Secretary for the Ministry of Justice, Legal and Parliamentary Affairs".

adresse/address:

Permanent Secretary of the Ministry of Justice

Legal and Parliamentary Affairs

Corner House

Samora Machel Avenue/Leopold Takawira Street

PO Box 7704

HARARE

Zimbabwe

numéro de téléphone/telephone number:

(263)-4-737-9319 or (263)-4-790-9027

numéro de télex/telex number:

—

numéro de télécopie/telefax number:

personnes à contacter/persons to contact:

In accordance with article 38, paragraph 5, the Convention entered into force between Zimbabwe and the following States:

the United States of America	1 August 1995
the United Kingdom of Great Britain and Northern Ireland*	1 October 1995
Luxembourg	1 October 1995
the Kingdom of the Netherlands (for the Kingdom in Europe)	1 November 1995
New Zealand	1 November 1995
Mexico	1 December 1995
Australia	1 April 1996
Chile	1 May 1996
Cyprus	1 August 1996
Argentina	1 December 1996
Ireland	1 January 1997
Norway	1 January 1997
Germany	1 February 1997
Italy	1 April 1997
Switzerland	1 May 1997
Finland	1 May 1997
Spain	1 June 1997
Venezuela	1 September 1997
Greece	1 October 1997
Israel	1 October 1997
Sweden	1 January 1998
Canada	1 January 1998
Poland	1 March 1998

the Czech Republic	1 August 1998
the Slovak Republic	1 February 2001
Portugal	1 January 2002
Hungary	1 June 2002

* The Note of the Embassy of the United Kingdom contains the following declaration with regard to the accession of Zimbabwe to the Convention: ``Notwithstanding the provisions of the said Article 38 regarding entry into force of the Convention as between the acceding State and the State that has declared its acceptance of the accession, the municipal law of the United Kingdom will be amended with effect from 1 July 1995 to give effect to the provisions of the Convention between it and Zimbabwe from the date when the Convention enters into force for Zimbabwe. I should be grateful for confirmation of the date of 1 July 1995 as the date on which the Convention will enter into force between the United Kingdom and Zimbabwe.'' The Ministry of Foreign Affairs of the Kingdom of the Netherlands has not yet received any communication from the Government of Zimbabwe concerning the date of entry into force proposed by the United Kingdom.

Endnotes

1a (Declaration made at the time of ratification, according to Article 16 of the Convention)

The instrument of ratification corresponding to this Convention contains the declaration ``that its provisions cover the execution of letters rogatory in criminal, labor, and contentious-administrative cases, as well as in arbitrations and other matters within the jurisdiction of special courts''.

(Provided information in accordance with Article 4)

The Central Authority to receive and distribute letters rogatory is the Ministry of Foreign Affairs of the Republic of Chile (May 7, 1987).

2 On 23 April 1984 sent information (Note No. 89-OEA/84), appointing the Asesoría Técnico-Jurídica of the Ministry of Foreign Affairs of Ecuador as the ``Central Authority, to carry out the functions entrusted to it in the Inter-American Convention on Letters Rogatory.''

The Government of Ecuador has designated the Ministry of Foreign Affairs, Technical and Legal Advisory Office, General Directorate of Legal Affairs as the central authority to receive and distribute letters rogatory, for the purposes set forth in the Protocol.

3 Reservation to application of Article 7.

(Provided information in accordance with Articles 4 and 18)

In El Salvador the Supreme Court of Justice is the competent central authority for receiving and distributing Letters Rogatory. The requirements exacted for legalization and translation of Letters Rogatory are those prescribed in Article 261 of the Code of Civil Procedures and Articles 388, 389, 391 and 392 of the Bustamente Code … (The text of the articles is omitted).

4 (Provided information in accordance with Article 4)

The Central Authority competent to transmit, receive and distribute letters rogatory is the Supreme Court of Justice (October 21, 1987).

5 With the interpretative declaration made at the time of signature.

``It is the interpretation of the Government of Mexico that Article 9 of this Convention refers to the international validity of foreign judgments.''

(Provided information in accordance with Article 4)

The Central Authority competent to receive and distribute letters rogatory is the Secretariat of Foreign Affairs of Mexico.

5a (Provided information in accordance with Article 2 of the Protocol)

On October 4, 1991, Panama designated the Ministry of Foreign Affairs as the Central Authority competent pursuant to the functions of article 2 of the Protocol.

6 (Provided information in accordance with Article 4)

The Central Authority competent to receive and distribute letters rogatory is the General Technical Secretariat of the Ministry of Justice (Secretaría General Técnica), whose address is: San Bernardo 47, Madrid 28015, Spain (April 14, 1988).

7 (Reservations made at the time of ratification)

``1. Pursuant to Article 2(b) of the Inter-American Convention on Letters Rogatory, letters rogatory that have as their purpose the taking of evidence shall be excluded from the rights, obligations and operation of this Convention between the United States and another State Party.

2. In ratifying the Inter-American Convention on Letters Rogatory, the United States accepts entry into force and undertakes treaty relations only with respect to States which have ratified or acceded to the Additional Protocol as well as the Inter-American Convention, and not with respect to States which have ratified or acceded to the Inter-American Convention alone.''

(Provided information in accordance with Articles 4 and 18)

Pursuant to Article 4 of the Convention and Article 2 of the Additional Protocol, the Government of the United States wishes to inform the Secretary General that the Department of Justice is the Central Authority competent to receive and distribute letters rogatory. The mailing address for these purposes is:

Office of International Judicial Assistance
Civil Division
Department of Justice
Todd Building Room 1234
550 11th Street, N.W.
Washington, D.C. 20530 (*)

Pursuant to Article 18 of the Convention, the Government of the United States wishes to inform the Secretary General that letters rogatory to be executed in the United States must be translated into the English language.

Pursuant to Article 6 of the Additional Protocol, the Government of the United States declares that the United States reserves the right to charge a total of twenty-five dollars for performance of the services referred to therein.

Pursuant to Article 7 of the Additional Protocol, the Government of the United States declares that the aforementioned charge shall be waived on a reciprocal basis for the execution of a letter rogatory emanating from any State Party to both the Convention and Additional Protocol and may be otherwise waived as appropriate.

(*) Phone: (202) 724-7455.

8 (Provided information in accordance with Article 4)

On 30 August 1985 sent information (Note No. 961/85) appointing the Ministry of Education and Culture ``Asesoría Autoridad Central de Cooperación Jurídica Internacional'' as the ``Central Authority'' provided for in Article 4 of the Convention.

9 (Reservation made at the time of ratification)

With reservation to letter b) of Article 2 of the Convention.

(Provided information in accordance with Article 4)

The Central Authority competent to receive and distribute letters rogatory is the Ministry of Foreign Affairs of the Republic of Venezuela (11 December 1984).

Endnotes

1a (Declaration made at the time of ratification, according to Article 16 of the Convention)

The instrument of ratification corresponding to this Convention contains the declaration ``that its provisions cover the execution of letters rogatory in criminal, labor, and contentious-administrative cases, as well as in arbitrations and other matters within the jurisdiction of special courts''.

(Provided information in accordance with Article 4)

The Central Authority to receive and distribute letters rogatory is the Ministry of Foreign Affairs of the Republic of Chile (May 7, 1987).

2 On 23 April 1984 sent information (Note No. 89-OEA/84), appointing the Asesoría Técnico-Jurídica of the Ministry of Foreign Affairs of Ecuador as the ``Central Authority, to carry out the functions entrusted to it in the Inter-American Convention on Letters Rogatory.''

The Government of Ecuador has designated the Ministry of Foreign Affairs, Technical and Legal Advisory Office, General Directorate of Legal Affairs as the central authority to receive and distribute letters rogatory, for the purposes set forth in the Protocol.

3 Reservation to application of Article 7.

(Provided information in accordance with Articles 4 and 18)

In El Salvador the Supreme Court of Justice is the competent central authority for receiving and distributing Letters Rogatory. The requirements exacted for legalization and translation of Letters Rogatory are those prescribed in Article 261 of the Code of Civil Procedures and Articles 388, 389, 391 and 392 of the Bustamente Code … (The text of the articles is omitted).

4 (Provided information in accordance with Article 4)

The Central Authority competent to transmit, receive and distribute letters rogatory is the Supreme Court of Justice (October 21, 1987).

5 With the interpretative declaration made at the time of signature.

``It is the interpretation of the Government of Mexico that Article 9 of this Convention refers to the international validity of foreign judgments.''

(Provided information in accordance with Article 4)

The Central Authority competent to receive and distribute letters rogatory is the Secretariat of Foreign Affairs of Mexico.

5a (Provided information in accordance with Article 2 of the Protocol)

On October 4, 1991, Panama designated the Ministry of Foreign Affairs as the Central Authority competent pursuant to the functions of article 2 of the Protocol.

6 (Provided information in accordance with Article 4)

The Central Authority competent to receive and distribute letters rogatory is the General Technical Secretariat of the Ministry of Justice (Secretaría General Técnica), whose address is: San Bernardo 47, Madrid 28015, Spain (April 14, 1988).

7 (Reservations made at the time of ratification)

``1. Pursuant to Article 2(b) of the Inter-American Convention on Letters Rogatory, letters rogatory that have as their purpose the taking of evidence shall be excluded from the rights, obligations and operation of this Convention between the United States and another State Party.

2. In ratifying the Inter-American Convention on Letters Rogatory, the United States accepts entry into force and undertakes treaty relations only with respect to States which have ratified or acceded to the Additional Protocol as well as the Inter-American Convention, and not with respect to States which have ratified or acceded to the Inter-American Convention alone.''

(Provided information in accordance with Articles 4 and 18)

Pursuant to Article 4 of the Convention and Article 2 of the Additional Protocol, the Government of the United States wishes to inform the Secretary General that the Department of Justice is the Central Authority competent to receive and distribute letters rogatory. The mailing address for these purposes is:

Office of International Judicial Assistance
Civil Division
Department of Justice
Todd Building Room 1234
550 11th Street, N.W.
Washington, D.C. 20530 (*)

Pursuant to Article 18 of the Convention, the Government of the United States wishes to inform the Secretary General that letters rogatory to be executed in the United States must be translated into the English language.

Pursuant to Article 6 of the Additional Protocol, the Government of the United States declares that the United States reserves the right to charge a total of twenty-five dollars for performance of the services referred to therein.

Pursuant to Article 7 of the Additional Protocol, the Government of the United States declares that the aforementioned charge shall be waived on a reciprocal basis for the execution of a letter rogatory emanating from any State Party to both the Convention and Additional Protocol and may be otherwise waived as appropriate.

(*) Phone: (202) 724-7455.

8 (Provided information in accordance with Article 4)

On 30 August 1985 sent information (Note No. 961/85) appointing the Ministry of Education and Culture ``Asesoría Autoridad Central de Cooperación Jurídica Internacional'' as the ``Central Authority'' provided for in Article 4 of the Convention.

9 (Reservation made at the time of ratification)

With reservation to letter b) of Article 2 of the Convention.

(Provided information in accordance with Article 4)

The Central Authority competent to receive and distribute letters rogatory is the Ministry of Foreign Affairs of the Republic of Venezuela (11 December 1984).

Endnotes

1 Complete the original and two copies of this form; if A(1) is applicable, attach the original and two copies of the translation of this item in the language of the State of destination.

1 Complete the original and two copies of this form in the language of the State of origin and two copies in the language of the State of destination.

1 Complete the original and one copy in the language of the State of destination.

1 On 23 April 1984 sent information (Note No. 89-OEA/84), appointing the Asesoría Técnico-Jurídica of the Ministry of Foreign Affairs of Ecuador as the ``Central Authority'', to carry out the functions entrusted to it in the Additional Protocol to the Inter-American Convention on Letters Rogatory.

1a Appointed the Supreme Court of Justice as the Central Authority on January 24, 2002.

Declaration made at the time of ratification:

``According to domestic law, pursuant to Article 181 of the Constitution of the Republic, no charge shall be made for the execution of letters requisitorial or rogatory in this country (January 24, 2002).''

2 In accordance with the provisions stipulated in Article 2 of the Additional Protocol to the Inter-American Convention on Letters Rogatory relative to the designation of a central authority, I notify Your Excellency that this shall be the Secretariat of Foreign Affairs of Mexico (9 March 1983).

2a (Provided information in accordance with Article 2 of the Protocol)

On October 4, 1991, Panama designated the Ministry of Foreign Affairs as the Central Authority competent pursuant to the functions of article 2 of the Protocol.

3 (Reservations made at the time of ratification)

``1. Pursuant to Article 2(b) of the Inter-American Convention on Letters Rogatory, letters rogatory that have as their purpose the taking of evidence shall be excluded from the rights, obligations and operation of this Convention between the United States and another State Party.

2. In ratifying the Inter-American Convention on Letters Rogatory, the United States accepts entry into force and undertakes treaty relations only with respect to States which have ratified or acceded to the Additional Protocol as well as the Inter-American Convention, and not with respect to States which have ratified or acceded to the Inter-American Convention alone."

(Provided information in accordance with Article 2)

Pursuant to Article 4 of the Convention and Article 2 of the Additional Protocol, the Government of the United States wishes to inform the Secretary General that the Department of Justice is the Central Authority competent to receive and distribute letters rogatory. The mailing address for these purpose is:

Office of International Judicial Assistance
Civil Division
Department of Justice
Todd Building Room 1234
550 11th Street, N.W.
Washington, D.C. 20530
Phone: (202) 724-7455

(Declarations made at the time of ratification)

Pursuant to Article 6 of the Additional Protocol, the Government of the United States declares that the United States reserves the right to charge a total of twenty-five dollars for performance of the services referred to therein.

Pursuant to Article 7 of the Additional Protocol, the Government of the United States declares that the aforementioned charge shall be waived on a reciprocal basis for the execution of a letter rogatory emanating from any State Party to both the Convention and Additional Protocol and may be otherwise waived as appropriate.

4 (Declaration made at the time of ratification)

With the declaration made at the time of signature.

The scope of public order:

Uruguay wishes to state that it expressly ratifies the line of thought enunciated in Panama at CIDIP-I, reaffirming its genuine Pan American spirit and its clear and positive decision to contribute with its ideas and endorsement to the successful development of the legal community.

This line of thinking and conduct has been evidenced in undoubtable form by the unreserved ratification by Uruguay of all the Conventions of Panama, approved by law number 14,534 in 1976.

In line with the foregoing, Uruguay gives its affirmative vote to the formula regarding public order. Nevertheless, Uruguay wishes to state expressly and clearly that, in accordance with the position it maintained in Panama, its interpretation of the aforementioned exception refers to international public order as an individual juridical institution, not necessarily identifiable with the internal public order of each state.

Therefore, in the opinion of Uruguay, the approved formula conveys an exceptional authorization to the various States Parties to declare in a nondiscretionary and well-founded manner that the precepts of foreign law are inapplicable whenever these concretely and in a serious and open manner offend the standards and principles essential to the international public order on which each individual state bases its legal individuality.

(Provided information in accordance with Articles 2, 6 and 7)

For the purposes indicated in articles six and seven of the above-cited Protocol, I wish to state that the single fixed amount of the cost of the services necessary for execution of the letter rogatory will be twenty readjustable units or its equivalent in currency. Also the schedule of the services that must be paid directly by the interested party will be limited to the possibility of resorting to the need for the services of appraisers, experts and other assistants in the case affected.

On 30 August 1985 sent information (Note No. 961/85) appointing the Ministry of Education and Culture ``Asesoría Autoridad Central de Cooperación Jurídica Internacional'' as the ``Central Authority'' provided for in Article 2 of the Protocol.

Endnotes

1 Complete the original and two copies of this form; if A(1) is applicable, attach the original and two copies of the translation of this item in the language of the State of destination.

1 Complete the original and two copies of this form in the language of the State of origin and two copies in the language of the State of destination.

1 Complete the original and one copy in the language of the State of destination.

1 On 23 April 1984 sent information (Note No. 89-OEA/84), appointing the Asesoría Técnico-Jurídica of the Ministry of Foreign Affairs of Ecuador as the ``Central Authority'', to carry out the functions entrusted to it in the Additional Protocol to the Inter-American Convention on Letters Rogatory.

1a Appointed the Supreme Court of Justice as the Central Authority on January 24, 2002.

Declaration made at the time of ratification:

``According to domestic law, pursuant to Article 181 of the Constitution of the Republic, no charge shall be made for the execution of letters requisitorial or rogatory in this country (January 24, 2002).''

2 In accordance with the provisions stipulated in Article 2 of the Additional Protocol to the Inter-American Convention on Letters Rogatory relative to the designation of a central authority, I notify Your Excellency that this shall be the Secretariat of Foreign Affairs of Mexico (9 March 1983).

2a (Provided information in accordance with Article 2 of the Protocol)

On October 4, 1991, Panama designated the Ministry of Foreign Affairs as the Central Authority competent pursuant to the functions of article 2 of the Protocol.

3 (Reservations made at the time of ratification)

``1. Pursuant to Article 2(b) of the Inter-American Convention on Letters Rogatory, letters rogatory that have as their purpose the taking of evidence shall be excluded from the rights, obligations and operation of this Convention between the United States and another State Party.

2. In ratifying the Inter-American Convention on Letters Rogatory, the United States accepts entry into force and undertakes treaty relations only with respect to States which have ratified or acceded to the Additional Protocol as well as the Inter-American Convention, and not with respect to States which have ratified or acceded to the Inter-American Convention alone."

(Provided information in accordance with Article 2)

Pursuant to Article 4 of the Convention and Article 2 of the Additional Protocol, the Government of the United States wishes to inform the Secretary General that the Department of Justice is the Central Authority competent to receive and distribute letters rogatory. The mailing address for these purpose is:

Office of International Judicial Assistance
Civil Division
Department of Justice
Todd Building Room 1234
550 11th Street, N.W.
Washington, D.C. 20530
Phone: (202) 724-7455

(Declarations made at the time of ratification)

Pursuant to Article 6 of the Additional Protocol, the Government of the United States declares that the United States reserves the right to charge a total of twenty-five dollars for performance of the services referred to therein.

Pursuant to Article 7 of the Additional Protocol, the Government of the United States declares that the aforementioned charge shall be waived on a reciprocal basis for the execution of a letter rogatory emanating from any State Party to both the Convention and Additional Protocol and may be otherwise waived as appropriate.

4 (Declaration made at the time of ratification)

With the declaration made at the time of signature.

The scope of public order:

Uruguay wishes to state that it expressly ratifies the line of thought enunciated in Panama at CIDIP-I, reaffirming its genuine Pan American spirit and its clear and positive decision to contribute with its ideas and endorsement to the successful development of the legal community.

This line of thinking and conduct has been evidenced in undoubtable form by the unreserved ratification by Uruguay of all the Conventions of Panama, approved by law number 14,534 in 1976.

In line with the foregoing, Uruguay gives its affirmative vote to the formula regarding public order. Nevertheless, Uruguay wishes to state expressly and clearly that, in accordance with the position it maintained in Panama, its interpretation of the aforementioned exception refers to international public order as an individual juridical institution, not necessarily identifiable with the internal public order of each state.

Therefore, in the opinion of Uruguay, the approved formula conveys an exceptional authorization to the various States Parties to declare in a nondiscretionary and well-founded manner that the precepts of foreign law are inapplicable whenever these concretely and in a serious and open manner offend the standards and principles essential to the international public order on which each individual state bases its legal individuality.

(Provided information in accordance with Articles 2, 6 and 7)

For the purposes indicated in articles six and seven of the above-cited Protocol, I wish to state that the single fixed amount of the cost of the services necessary for execution of the letter rogatory will be twenty readjustable units or its equivalent in currency. Also the schedule of the services that must be paid directly by the interested party will be limited to the possibility of resorting to the need for the services of appraisers, experts and other assistants in the case affected.

On 30 August 1985 sent information (Note No. 961/85) appointing the Ministry of Education and Culture ``Asesoría Autoridad Central de Cooperación Jurídica Internacional'' as the ``Central Authority'' provided for in Article 2 of the Protocol.

1 In accordance with Article 8 of the Convention, the Instrument of Ratification of the Government of the United States of America was deposited with the Secretary General of the Organization of American States on September 27, 1990.

In ratifying the aforesaid Convention, the Government of the United States of America made the following reservations:

``1. Unless there is an express agreement among the parties to an arbitration agreement to the contrary, where the requirements for application of both the Inter-American Convention on International Commercial Arbitration and the Convention on the Recognition and Enforcement of Foreign Arbitral Awards are met, if a majority of such parties are citizens of a state or states that have ratified or acceded to the Inter-American Convention and are member states of the Organization of American States, the Inter-American Convention shall apply. In all other cases, the Convention on the Recognition and Enforcement of Foreign Arbitral Awards shall apply.

2. The United States of America will apply the rules of procedure of the Inter-American Commercial Arbitration Commission which are in effect on the date that the United States of America deposits its instrument of ratification, unless the United States of America makes a later official determination to adopt and apply subsequent amendments to such rules.

3. The United States of America will apply the Convention, on the basis of reciprocity, to the recognition and enforcement of only those awards made in the territory of another Contracting State''.